What's in a Name? A Rule Called a Permit is Still a Rule

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I. INTRODUCTION

Procedural rules are of great significance in American jurisprudence, as exemplified by the U.S. Constitution's emphasis on due process. Procedural rules level the playing field for all participants because they provide a detailed roadmap to everyone on how to live equitably and

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successfully within society. Arguably, the most well-known procedural laws passed by Congress in the environmental law sphere include the Administrative Procedure Act (APA)[1] and the National Environment Policy Act (NEPA),[2] each of which sets out a detailed pathway for what actions federal agencies must take when making certain regulatory or adjudicatory decisions. When end-goal wishes are ignored, or at least given secondary or tertiary importance in the decision-making process, not only has the playing field been leveled for all participants, but the integrity of the decision-making process and the final decision itself are reinforced.

While statutes such as the Clean Water Act are inundated with substantive requirements, there is still a rigorous procedural process to inform both the government and the public what permitted pollutants are being discharged, while also setting strict conditions for any such discharge to ensure that the chemical, physical, or biological integrity of the waters of the United States are not impacted. As federal agencies decide who may discharge a pollutant and who may not, procedural rules provide a transparent roadmap where biases and preferences are eliminated as much as possible, providing reinforcement of the integrity of the federal agency permitting process as well as general societal acceptance of any final federal agency decision.

In line with this thinking, Congress passed the Regulatory Flexibility Act of 1980 (RFA), another statute like the APA and NEPA that focuses exclusively on procedural requirements and rights. Comparable to the APA and NEPA, the RFA demands no final substantive outcome or decision by any federal agency other than the basic procedural requirement to adhere to a certain procedure and methodology. Congress aimed to ensure that federal agencies follow certain equitable procedures when promulgating a regulation that might have an adverse impact on small entities.[3]

Small entities—whether they be small businesses, non-profits, or small governmental jurisdictions—have an inherent disadvantage compared to non-small entities because of two primary circumstances: economies of scale, where the cost of anything cannot be spread over a large basis, and personnel limitations, where small entities often rely on one person to perform multiple job functions and hold multiple job roles. Because of these inherent and unavoidable circumstances, the RFA has provided a legislative avenue to eliminate other unintended and

1. 5 U.S.C. § 551 *et seq.*
2. 42 U.S.C. § 4321 *et seq.*
3. 5 U.S.C. § 601 *et seq.*

unnecessary circumstances adverse to small entities so long as the elimination was not contrary to the substantive statutory goals of the applicable statute.

As long as federal agencies adequately analyze the regulatory impact of any regulation on small entities, the federal agencies satisfy their legal obligation under the RFA. It would not matter if the regulation would cause a significant impact on a substantial number of small entities; and it would not matter if the regulation caused a substantial number of small entities to go out of business. What matters is whether the federal agency properly followed the rules by analyzing what impacts, if any, a regulation would have on small entities.

But what happens in any context when someone ignores the rules? Not only is it unlawful in many circumstances, but it is also inequitable and disadvantages those with fewer resources to the benefit of the more powerful. Illicit victories should not be recognized, and the illicit victors should be stripped of their false victories, admonished, and ordered to comply with the rules in the future. Of all types of organizations, governments endowed with certain unique enforcement rights should be held strictly accountable to follow the rules—especially the rules it created.

This Article focuses on one narrow question that many small entities have struggled with: is a "general permit" issued under the Clean Water Act (CWA) a "rule" as defined by the RFA, thus requiring a regulatory flexibility analysis? Based on statutory interpretation and existing caselaw, a general permit issued under the CWA is a rule as defined by the RFA, thus requiring RFA compliance by the U.S. Environmental Protection Agency (EPA) in issuing general permits.

II. REGULATORY FLEXIBILITY ACT

Congress passed the Regulatory Flexibility Act of 1980 after determining that "[f]ederal regulatory and reporting requirements ha[d] in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting, and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources."[4] Attempting to redress and remove the undue and disproportionate burden placed upon these small entities,[5]

4. *Id.*

5. "Small entities" under the RFA include small businesses, small organizations, and small governmental jurisdictions. *See* 5 U.S.C. § 601(6).

Congress established that federal agencies "should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public"[6] by requiring federal agencies "to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities"[7] and by requiring agencies "to explain the rationale for their actions to assure that such proposals are given serious consideration."[8]

The main tool provided by the RFA is the requirement that federal agencies conduct regulatory flexibility analyses of proposed rules whenever the federal agency is required to publish a general notice of proposed rulemaking.[9] The regulatory flexibility analysis should "describe the impact of the proposed rule on small entities."[10] The federal agency is not required to conduct a regulatory flexibility analysis "if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[11]

The RFA strengthened the Office of Advocacy, an independent federal government office created in 1976 and housed within the Small Business Administration, to act as the watchdog of the RFA by authorizing the Office of Advocacy to "present [its] views with respect to compliance [with the RFA], the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities"[12] as well as to generally "advance[] the views and concerns of small businesses before Congress, the White House, federal agencies, federal courts, and state policymakers."[13]

A. Amendment to the RFA—The Small Business Regulatory Enforcement Fairness Act

The RFA was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act (SBREFA) to address certain frustrations with the original RFA. Although Congress hoped the RFA would eliminate

6. Pub. L. No. 96-354, § 2(a)(1), 94 Stat. 1164 (1980).
7. *Id.* at § 2(a)(8).
8. *Id.* at § 2(b).
9. *See* 5 U.S.C. § 603(a).
10. *Id.*
11. *Id.* at § 605(b).
12. *Id.* at § 612(b).
13. 15 U.S.C. § 634(b); *see also About*, OFFICE OF ADVOCACY, https://advocacy.sba.gov/about/ (last visited May 13, 2021).

unnecessary burdens placed upon small entities,[14] "small businesses [still bore] a disproportionate share of regulatory costs and burdens."[15] SBREFA maintains the basic requirements of the RFA to require agencies to conduct a regulatory flexibility analysis unless it can certify that a proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. SBREFA also created two important statutory tools for small entities to participate in the federal rulemaking process.

First, SBREFA created Small Business Advocacy Review (SBAR) panels,[16] which must be convened by certain agencies, including the EPA,[17] the Consumer Financial Protection Bureau (CFPB),[18] and the Occupational Safety and Health Administration (OSHA),[19] during any federal rulemaking process that would have a significant impact on a substantial number of small entities.[20] The SBAR panels are composed of one representative from the applicable federal agency, the chief counsel of the Office of Advocacy, and the administrator of the Office of Information and Regulatory Affairs (OIRA).[21] The panel meets with representatives of regulated small entities to solicit advice on regulatory alternatives to minimize the burden on small entities while meeting all statutory requirements imposed on the applicable agency.[22] Since SBREFA was passed and signed into law, CFPB has convened eight SBAR panels, OSHA has convened fourteen SBAR panels, and EPA has convened fifty-seven SBAR panels.[23]

Second, SBREFA expressly criticized federal agencies by stating that "the requirements of [conducting a regulatory flexibility analysis under the original RFA] have too often been ignored by government agencies, resulting in greater regulatory burdens on small entities than necessitated by statute[.]"[24] To correct such behavior by federal agencies, SBREFA granted small entities the opportunity to seek judicial review of an

14. *See* Pub. L. No. 96-354, § 2(a)(8), 94 Stat. 1164 (1980).
15. Pub. L. No. 104-121, § 202(2), 110 Stat. 857-862 (1996) (amended 2007).
16. 5 U.S.C. § 609(b)(3); *see also SBEFRA Panels*, OFFICE OF ADVOCACY, https://advocacy.sba.gov/resources/reference-library/sbrefa/ (last visited Feb. 22, 2022).
17. *Id.* at § 609(d)(1).
18. *Id.* at § 609(d)(2).
19. *Id.* at § 609(d)(3).
20. *Id.* at § 609(a).
21. *Id.* at § 609(b)(3).
22. *See id.* at § 609(b).
23. *See SBREFA Panels*, OFFICE OF ADVOCACY, https://advocacy.sba.gov/resources/reference-library/sbrefa/ (last visited Feb. 21, 2022).
24. Pub. L. No. 104-121, § 202(5), 110 Stat. 857-862 (1996) (amended 2007).

agency's regulatory flexibility analysis, or lack thereof.[25] Previously, from 1980 until 1996, when SBREFA was passed and signed into law, there was no recourse for any entity, governmental or non-governmental, to force an applicable agency to conduct its statutorily required initial regulatory flexibility analysis through the courts.[26] SBREFA corrected this legal deficiency by allowing courts for the first time to review final regulations under a RFA cause of action, creating the risk to federal agencies that regulations that failed to comply with the RFA could be vacated or enjoined.

B. Is a Multi-Sector General Permit a Rule Under the RFA?

It is now well-accepted that a proposed rule issued by a federal agency is subject to the RFA, and the federal agency must either conduct a regulatory flexibility analysis or certify that the proposed rule, if promulgated, would not have a significant impact on a substantial number of small entities.[27] Specifically, a regulatory flexibility analysis under the RFA is required "[w]henever an agency is required by Section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule[.]"[28] Because RFA compliance is only required for regulations and rules, federal agencies have turned their attention to the threshold question of whether the federal agency action being contemplated would fall into the "rulemaking" category as a way to efficiently differentiate those federal agency actions that require RFA compliance and those that do not. Disputes between federal agencies and small entities now exist about what constitutes a "rule" under the RFA. One such dispute concerns the CWA's general permitting scheme, and specifically, whether a "general permit" issued under the CWA is a "rule" as defined by the RFA.

III. STATUTORY AUTHORITY TO REGULATE DISCHARGES INTO WATERS OF THE UNITED STATES—THE CLEAN WATER ACT AND THE RIVERS AND HARBORS ACT OF 1899

Under the CWA,[29] the EPA is authorized to issue a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of any

25. *Id.* at § 202(6).
26. *See* Thompson v. Clark, 741 F.2d 401 (D.C. Cir. 1984).
27. *See* Nat'l Tel. Coop. Ass'n v. FCC, 563 F.3d 536 (D.C. Cir. 2009); Alfa Int'l Seafood v. Ross, 264 F. Supp. 3d 23 (D.C. Cir. 2017).
28. 5 U.S.C. § 603(a).
29. 33 U.S.C. § 1251 *et seq.*

pollutant from a point source.[30] EPA is further required to develop an approach to regulate municipal and industrial stormwater discharges under the NPDES program.[31] In response, EPA created the Multi-Sector General Permit (MSGP) program to regulate discharges of pollutants from industrial point sources.[32] Since 1995, EPA has been required to issue a revised MSGP at least every five years.[33] EPA's most recent MSGP was finalized in January 2021.[34] The MSGP "is actually 50 separate general NPDES permits covering areas within an individual state, tribal land, or U.S. territory, or federal facilities."[35] "These fifty general permits contain provisions that require industrial facilities in twenty-nine different industrial sectors to, among other things, implement control measures and develop site-specific stormwater pollution prevention plans (SWPPPs) to comply with NPDES requirements."[36]

Like EPA, the U.S. Army Corps of Engineers (the Corps) is also authorized under the CWA "after notice and opportunity for public hearing, to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States for a period of no more than five years after the date of issuance."[37] Like EPA's MSGP, "[n]ationwide permits [NWPs] are a type of general permit issued by [the Corps] and are designed to regulate with little, if any, delay or paperwork certain activities in federally jurisdictional waters and wetlands, where those activities would have no more than minimal adverse environmental impacts[.]"[38] The Corps issued its first NWP in 1977.[39] The Corps recently reissued twelve NWPs in 2021 and issued four new NWPs in 2021.[40] There are currently a total of fifty-six NWPs.[41]

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30. 33 U.S.C. § 1342(a).
31. 33 U.S.C. § 1342(p).
32. *See* 40 C.F.R. § 122.26 (2020).
33. 33 U.S.C. § 1342(b)(1)(B).
34. 86 Fed. Reg. 10,269 (Feb. 19, 2021).
35. *See National Pollutant Discharge Elimination System Fact Sheet (NPDES)*, EPA, https://www.epa.gov/system/files/documents/2021-07/final-2021-msgp-fact-sheet.pdf (last visited May 17, 2021).
36. *See id.* at 2.
37. 86 Fed. Reg. 2744, 2745 (Jan. 13, 2021); *see also* 33 U.S.C. § 1344(e).
38. 86 Fed. Reg. at 2745.
39. *See* 42 Fed. Reg. 37,122 (July 19, 1977).
40. 86 Fed. Reg. at 2744.
41. *See id.*

A. The Corps Concedes NWPs are Rules Under the RFA

In 1996, the Corps proposed to reissue several existing NWPs that were set to expire on January 21, 1997.[42] Between 1996 and 2000, the Corps promulgated significant revisions to NWP 26 and 29 that were more restrictive to the regulated community than prior versions of the NWPs. As a result of the Corps' actions, three lawsuits were filed by the National Association of Home Builders (NAHB), the National Stone, Sand & Gravel Association (NSSGA), and the National Federation of Independent Business (NFIB).[43] The cases were consolidated and presented four main issues for judicial review, including whether the Corps "violated the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601 *et seq.*, by failing to evaluate the potential impact of the permits on small businesses and other small entities as well as alternatives to the permits[.]"[44]

The Corps asserted that a NWP is not a rule under the RFA, and therefore no regulatory flexibility analysis was required. To support its position, the Corps argued that a NWP is an "adjudication" as defined by the APA because the NWP was the "agency process for the formulation of an order[.]"[45] The Corps reached such a conclusion after it, as the court described, conducted an "elaborate statutory construction" contrary to "the more straightforward [construction that a NWP is a rule]."[46] Specifically, the Corps pointed to the definitions listed in the APA.[47] Under the APA, a "permit" is included in the definition of "license."[48] An "order" under the APA includes a licensing disposition.[49] Using the Corps' logic, because a permit is a license and because a licensing disposition is an order, a permit must always be an order.[50] Because a licensing disposition necessarily involves a license, the Corps' argument utilized language that presupposes all actions involving licenses are licensing dispositions. However, the court summarily rejected this logical fallacy that incorrectly assumed that all *licenses* are *licensing disposition(s)* and failed to acknowledge that a "general permit" fits within the definition of "rule" under the RFA.[51]

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42. 61 Fed. Reg. 30,780 (June 17, 1996).
43. *See* Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1274 (D.C. Cir. 2005).
44. *Id.* at 1277.
45. *Id.* at 1284.
46. *Id.*
47. *Id.*
48. 5 U.S.C. § 551(8).
49. *Id.* at § 551(6).
50. Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1284-85 (D.C. Cir. 2005).
51. *See id.*

The court correctly identified the proper method to determine whether a certain phrase or word—i.e., general permit—is intended to be included in another phrase or word—i.e., rule.[52] This inquiry involved deciding whether the term "general permit" "fit[] within" the term "rule." The court concluded that a NWP, a general permit, "fits within the APA's definition of 'rule.'"[53] The court relied upon the definition of rule provided by the APA, which states that a "rule" is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]"[54] Relying upon the APA definition of rule, the court reasoned that a NWP, which "authorizes a permittee to discharge dredged and fill material (and therefore does not allow others without an individual permit), is a legal prescription of general and prospective applicability which the Corps has issued to implement the permitting authority the Congress entrusted to it in section 404 of the CWA."[55]

Since the ruling in *National Ass'n of Home Builders v. U.S. Army Corps of Engineers* that a NWP is a rule under the RFA, the Corps has effectively conceded that all present and future NWPs are rules subject to the RFA. Indeed, for each NWP issued after 2005, the Corps has conducted a regulatory flexibility analysis or certified that there will not be a "significant impact on a substantial number of small entities" in compliance with the RFA.[56]

B. EPA Refuses to Acknowledge that Multi-Sector General Permits are "Rules" Under the RFA

Unlike the Corps, EPA has refused to fully comply with the RFA when promulgating its MSGPs. In previous MSGP promulgations, including the 2015 and 2008 MSGPs, EPA has refused to reference the RFA in any Federal Register notice, but it has consistently utilized a bastardized form of the RFA's required language, stating that the MSGP "will not have a significant economic impact on a substantial number of small entities."[57] For the 2008 MSGP, EPA stated that it "[would] not result

52. *Id.*
53. *Id.* at 1284.
54. 5 U.S.C. § 551(4).
55. *Nat'l Ass'n of Home Builders*, 417 F.3d at 1284.
56. *See* Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744, 2857 (Jan. 13, 2021); Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1981 (Jan. 6, 2017); Nationwide Permit Plan, 78 Fed. Reg. 5726, 5732 (Jan. 28, 2013).
57. NPDES General Permit for Stormwater Discharges From Industrial Activities, 80 Fed. Reg. 34403, 34407 (June 16, 2015).

in a significant economic impact on a substantial number of small businesses."[58] In the 2021 MSGP, EPA stated that "these costs [of the MSGP] will not have a significant economic impact on a substantial number of small entities."[59] In each of the 2008, 2015, and 2021 MSGPs, EPA attempted to straddle the fence of complying with the RFA while not admitting or wanting to concede that the issuance of the MSGP is subject to the RFA. In 2008, EPA utilized the incorrect phrase of "small businesses" but corrected their verbiage in the 2015 and 2021 MSGPs to incorporate the correct phrase of "small entities."[60] In the 2015 MSGP and the 2021 MSGP, EPA only referenced the "costs" related to the MSGP when certifying the rule.[61]

In each of these three examples, EPA failed to properly certify under the RFA. First, any certification must be based upon the effects not just to small businesses, but must be based upon the effects to *all small entities*. Second, any certification must be based upon the entire impact of the rule—not only the costs of any rule. While such a distinction may seem trivial, the implications for small entities may be enormous. If any rule has a significant economic impact—whether net positive or net negative—the agency must conduct a regulatory flexibility analysis if a substantial number of small entities are impacted. The scale of the impact of any rule presents an opportunity to federal agencies—as directed by Congress—to identify regulatory alternatives that could eliminate the net negative impact to small entities or could even assist federal agencies in identifying and selecting a more "net positive" regulatory alternative that would further reduce or eliminate the inequities that small entities already face.

However, in each of these examples, EPA failed to certify that MSGPs will not have a significant economic impact on a substantial number of small entities. Certification of such statements is required by the RFA if no initial regulatory flexibility analysis is conducted.[62] Still straddling this procedural fence of noncompliance, EPA, for the first time, responded to public comments in the 2021 MSGP regarding the RFA. In its response, EPA stated that "[i]t is EPA's longstanding position that CWA Section 402 general permits are adjudications, rather than rules, under the

58. NPDES General Permit for Stormwater Discharges From Industrial Activities, 73 Fed. Reg. 56572, 56578 (Sept. 29, 2008).

59. NPDES 2021 Issuance of the Multi-Sector General Permit for Stormwater Discharges Associated With Industrial Activity, 86 Fed. Reg. 10269, 10276 (Feb. 19, 2021).

60. NPDES General Permit for Stormwater Discharges From Industrial Activities, 80 Fed. Reg. 34403, 34407 (June 16, 2015).

61. *See, e.g.*, *id.*

62. *See* 5 U.S.C. § 605(b).

APA and the CWA."[63] EPA points to a few arguments why they believe MSGPs are "adjudications . . . rather than rules."[64]

First, EPA points to 33 U.S.C. § 1322, which pertains to "[m]arine sanitization devices; discharges incidental to the normal operation of vessels[,]"[65] as well as 33 U.S.C. § 1342(p), which pertains to "[n]ational pollutant discharge elimination system; [m]unicipal and [i]ndustrial Stormwater Discharges."[66] I suspect EPA's reference to § 1322 is a typographical error, and EPA meant to reference § 1342. Regardless of whether there was a typographical error or not, EPA's argument fails in that neither § 1322 nor § 1342(p) requires EPA to utilize rulemaking to issue general permits. It is accurate that neither section expressly requires EPA to utilize rulemaking to issue general permits. However, EPA has fallen into the same erroneous argument the Corps did over fifteen years ago. Neither § 1322 nor § 1342(p) mandates EPA to utilize any specific administrative law procedure to meet its statutory goals under the CWA. As the D.C. Circuit alluded to in *National Ass'n of Home Builders*, when an agency can choose to go down the path of rulemaking or adjudication, the agency cannot claim statutory, and specifically RFA exemptions when conducting a rulemaking, because it would not have had to comply if it had chosen the pathway of adjudication.[67] In this context, EPA could have decided to issue an individual NPDES permit versus a general NPDES permit. If EPA had chosen to issue an individual NDPES permit, EPA likely would have been safe to conclude that the *individual* NPDES permit was not a rule under the RFA—thus negating any requirement to comply with the RFA when issuing the individual NPDES permit. But, because EPA chose instead to issue a *general* NPDES permit, the definitional difference that categorized the general NPDES permit as a rule triggered the RFA compliance requirement.

Second, EPA cites to the *Attorney General's Manual on the Administrative Procedure Act* (the *Manual*) published in 1947 to support its argument that a MSGP is not a rule.[68] EPA correctly states the *Manual* attempts to create two main buckets of agency action under the APA, the

63. *See, e.g.*, *Response to Comments on EPA NPDES 2021 Multi Sector General Permit (MSGP)*, EPA (Jan. 15, 2021), https://www.regulations.gov/document/EPA-HQ-OW-2019-0372-0349.

64. *See id.*

65. 33 U.S.C. § 1322.

66. 33 U.S.C. § 1342(p).

67. 417 F.3d 1272, 1284-85 (D.C. Cir. 2005).

68. EPA, *supra* note 63, at 1.

first being "rulemaking" and the second being "adjudication."[69] Like the Corps, EPA then attempts to veer into an elaborate statutory construction activity by asserting that an adjudication is "the process for formulation of an order" as defined by the APA, and that an order includes "licensing," and that a "license" is "an agency permit."[70] However, even if there was any possibility that a MSGP could superficially be considered a license, EPA fails to acknowledge that the *Manual* expressly states "there is [an] apparent overlapping between the definition of 'rule' . . . and of 'license.'"[71] The *Manual* clarifies that "[r]ule making is agency action which regulates the future conduct of either groups of person or a single person[.]"[72] The *Manual* then goes on to state that a rulemaking "operates in the future" and "is primarily concerned with policy considerations."[73] A rulemaking, unlike an adjudication, is not concerned with the "evaluation of a respondent's past conduct."[74]

Unlike rulemaking, adjudication is "concerned with the determination of past and present rights and liabilities."[75] The two main examples to address a "past" versus a "present" right are first, for past rights and liabilities, a determination of "whether past conduct was unlawful . . . characterized by an accusatory flavor[,]"[76] and second, for present rights, a "determination of a person's right to benefits under existing law[.]"[77]

The *Manual* goes on further to point to the use of staff and experts versus resting all authority in a hearing officer as indicia that the agency is conducting rulemaking.[78] Rulemaking allows "the hearing officer [to be] entirely free to consult with any other member of the agency's staff . . . [and] the intermediate decision may be made by the agency itself or by a responsible officer other than the hearing officer."[79] The use of the agency's staff is reflective "that the purpose of the rule making proceeding

69. *See* U.S. Dep't of Justice, *Manual on the Administrative Proc. Act*, § (I)(c) (1947).

70. *See, e.g.*, *Response to Comments on EPA NPDES 2021 Multi Sector General Permit (MSGP)*, EPA (Jan. 15, 2021), https://www.regulations.gov/document/EPA-HQ-OW-2019-0372-0349.

71. U.S. Dep't of Justice, *Manual on the Admin. Proc. Act*, §(I)(c)(e) (1947).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.*

79. *Id.*

is to determine policy,"[80] which "is not made . . . by individual hearing examiners."[81]

As the MSGP issuance involves no hearing officer, witness, evaluation of past conduct, evaluation of present entitlement to legal benefits, or decision recommendation by a hearing officer, the *Manual* does not support EPA's argument that the MSGP involves adjudication. Rather, the *Manual* supports the conclusion that the MSGP is a rule, as the MSGP regulates future conduct and is formulated by utilizing policy advisors to determine policy.

C. Textualism Supports the Conclusion that MSGPs are Rules

This Article now turns to the question of whether the MSGP falls under the RFA and APA definition of a "rule" requiring certification or a flexibility analysis. Under the RFA, an agency is required to conduct a regulatory flexibility analysis "[w]henever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule."[82] Looking exclusively at the text of the RFA, a "general permit," and specifically a Multi-Sector General Permit, falls within the RFA's definition of a rule.

The RFA's definition of "rule" tracks the APA's language nearly verbatim.[83] Taking express instruction from the inclusions and exclusions of the APA definition of "rule" into the RFA definition, the final, concise definition of rule under the RFA is that a "rule" is:

> the whole or part of an agency statement of general applicability and future effects designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law.[84]

Thus, under this definition, an MSGP is a rule if (1) it is a statement of general applicability that (2) has future effects designed to implement,

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80. *Id.*
81. *Id.*
82. 5 U.S.C. § 603(a).
83. *Compare* 5 U.S.C. § 601(2) (defining a rule as "any rule for which the agency publishes a general notice of proposed rulemaking . . . including any rule of general applicability governing Federal grants to States and local governments for which the agency provides an opportunity for notice and public comment") *with* 5 U.S.C. § 551(4) (defining a rule as "the whole or part of an agency statement of general or particular applicability and future effects designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency").
84. *See id.*

interpret, or prescribe law or policy, and (3) is published as a general notice of proposed rulemaking.

First, the MSGP is a statement of general applicability because it has widespread applicability to municipal and industrial polluters. The MSGP covers thirty sectors, ranging from Timber Products to Mineral Mining to Food and Kindred Products.[85] It is a "general" permit because the intended user of the MSGP is not any one specific party.[86] Rather, it is intended to be used by multiple parties across a multitude of sectors.[87] The 2015 MSGP was utilized by 2,270 operators, and EPA estimated the 2021 MSGP would be utilized by 2,270 operators as well.[88] The 2,270 operators under the 2015 MSGP had initial uniform requirements and obligations.[89] Similarly, the expected 2,270 operators under the 2021 MSGP have initial uniform requirements and obligations regardless of the individual identity of the operator.[90]

Second, the MSGP imposes a multitude of future obligations upon operators.[91] A few examples include: (1) quarterly, bi-annual, or annual data collection at specified future times;[92] (2) corrective action implementation upon pollutant benchmark exceedances;[93] and (3) facility signage posting and maintenance.[94] These are all future obligations of operators under MSGP with which operators must comply.[95] Further, the MSGP program was created in response to EPA's legal requirement under the CWA to create a phased approach to general permitting for industrial activity.[96] Thus, the MSGP implements EPA's obligation under the CWA by creating rules and requirements for how and when industry, at large,

85. 86 Fed. Reg. 10,269 (Feb. 19, 2021).

86. *See id.*

87. *See id.*

88. *2021 MSGP—Final Fact Sheet*, EPA (Feb. 18, 2021), https://www.regulations.gov/document/EPA-HQ-OW-2019-0372-0331; *2021 MSGP Cost Analysis—Cost Impact Analysis for the Final 2021 Multi-Sector General Permit (MSGP)*, EPA (Feb. 18, 2021), https://www.regulations.gov/document/EPA-HQ-OW-2019-0372-0325.

89. *See National Pollutant Discharge Elimination System (NPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP)*, EPA (June 4, 2015), https://www.epa.gov/npdes/final-2015-msgp-documents.

90. *See 2021 MSGP—Final Permit Parts*, EPA 1-7 (Feb. 18, 2021), https://www.regulations.gov/document/EPA-HQ-OW-2019-0372-0328.

91. *See generally id.*

92. *See 2021 MSGP—Final Fact Sheet*, EPA 8 (Feb. 18, 2021), https://www.regulations.gov/document/EPA-HQ-OW-2019-0372-0331.

93. *See id.* at 14.

94. *See id.* at 27.

95. *See 2021 MSGP—Final Fact Sheet*, EPA (Feb. 18, 2021), https://www.regulations.gov/document/EPA-HQ-OW-2019-0372-0331.

96. *See* 33 U.S.C. § 1342(p).

can discharge pollutants from point sources into waters of the United States.

Finally, the MSGP is published as a general notice of proposed rulemaking. Not only does the EPA publish the proposed and final MSGP on its website,[97] it also publishes the proposed and final MSGP in the Federal Register.[98] EPA has conceded that regardless of status of MSGP as a "rule" or an "adjudication," EPA is required to publish all proposed general permits in the Federal Register.[99] Furthermore, not only is EPA obligated to publish the proposed general permit in the Federal Register, but EPA is also required to allow the proposed general permit to be "publicly noticed and made available for public comment."[100] Since it is established that general permits must be "publicly noticed,"[101] the question arises whether such "notice" should be "general" or "specific" in nature. "General Notice" is not required if (1) the "person[s] subject [to the rule] are named" and (2) either (i) the person is "personally served [a copy of the rule]" or (ii) "ha[s] actual notice [of the rule]."[102] In the history of MSGP, the EPA has never named any specific person subject to the MSGP, and no such person(s) has ever been personally served or been shown to have actual notice.

IV. A MULTI-SECTOR GENERAL PERMIT IS A RULE

The MSGP fits squarely within the constraints of the definition of a "rule" specified in the RFA and the APA, and the MSGP specifically satisfies each element of that definition. The MSGP, created in direct response to implementing requirements under the CWA,[103] is an agency statement that applies to the general industrial population and requires specific future actions by such industrial operators. Furthermore, the proposed MSGP is published in the Federal Register to provide general notice to the public for the opportunity to meaningfully engage with EPA through public hearings and public comments.

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97. *See National Pollutant Discharge Elimination System (NPDES)*, EPA, https://www.epa.gov/npdes/final-2015-msgp-documents (last visited May 18, 2021).

98. *See* 85 Fed. Reg. 12288 (Mar. 2, 2020); 86 Fed. Reg. 10269 (Feb. 19, 2021).

99. 40 C.F.R. § 124.10(c)(2)(i) (2019).

100. 40 C.F.R. § 124.6(e) (2019); *see also* 33 U.S.C. § 1342(a)(1) ("[T]he Administrator [of EPA] may, *after opportunity for public hearing*, issue a permit for the discharge of any pollutant, or combination of pollutants . . .") (emphasis added).

101. *See* 40 C.F.R. § 124 (2019).

102. 5 U.S.C. § 553(b).

103. *See* 33 U.S.C. § 1342(p); *see also* 40 C.F.R. § 122.26 (2020).

A. Caselaw Supports the Conclusion that the MSGP is a Rule

As previously discussed, the D.C. Circuit has expressly opined that a NWP, a type of general permit, issued under the CWA by the Corps is a "rule" under the RFA.[104] In addition, despite EPA's current position, EPA previously conceded that its Vehicle General Permit (VGP) issued under the CWA is a rule subject to the RFA in *Lake Carriers Ass'n v. EPA*.[105] In *Lake Carriers*, the court opined that as long as EPA certified the VGP did not have a "significant impact on a substantial number of small entities" under the RFA based upon the impact considerations identified in the record including impacts identified during public comment, then EPA had complied with its obligations under the RFA.[106] As the D.C. Circuit has already directly opined once that general permits in the form of NWPs are "rules" and presupposed once that VGPs are "rules" under the RFA, EPA will have a difficult time arguing a position that is contrary to relevant caselaw.[107] Any argument EPA chooses to make why the MSGP is not a "rule" under the RFA will need to explain away why NWPs are different than MSGPs and why EPA has treated VGPs differently than MSGPs. Such differentiations are unlikely to persuade a court as each of the NWPs, the VGPs, and the MSGPs are comparable general permits whose significant differences are that they target and regulate different industries.

The D.C. Circuit has also held that "[a]n Agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule."[108] Because MSGP requires recipients to take certain actions such as data collection and implementing corrective actions for benchmark exceedances and because failure to comply with either could result in an enforcement action, the MSGP is a "legislative rule" as defined by the D.C. Circuit.[109]

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104. Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1284-85 (D.C. Cir. 2005).

105. *See* Lake Carriers Ass'n v. EPA, 652 F.3d 1, 6 n.3 (D.C. Cir. 2011).

106. *Id.*

107. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (holding that "a court's prior construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference . . . if the prior court decision holds that its construction follows from the unambiguous terms of the statue and thus leaves no room for agency discretion.").

108. Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014).

109. *See also* PWB Stock Exchange, Inc. v. SEC, 485 F.2d 718, 732 (3d Cir. 1973) (explaining that "[r]ulemaking . . . involves . . . declaring generally applicable policies binding upon the affected public generally, but not adjudicating the rights and obligations of the parties before it."). This analysis mirrors the analysis conducted by the Attorney General in the *Manual*

B. EPA's Statutory Construction of MSGP is Not a Reasonable One

Even if the D.C. Circuit had not opined already that general permits are rules, it is well established that an agency's statutory construction must be "reasonable."[110] In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, the United States Supreme Court has explained that when a court reviews "an agency's construction of the statute which it administers," the court must ask two questions.[111] First, has Congress "directly spoken to the precise question at issue?"[112] If Congress has, "the [C]ourt, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[113] If Congress has not, then the question becomes "whether the agency's answer is based on a permissible construction of the statute."[114]

In determining whether a construction is "permissible," the Court is not required to "conclude that the agency construction was the only one it permissibly could have adopted."[115] But, the Supreme Court has consistently analyzed whether a term is applicable to a definition by a "fit within" standard.[116] The "fit within" standard has not been articulated as a standard or a doctrine that the Supreme Court has directly referenced. Rather, the idea of the standard has been used as a tool to analyze statutes to determine if *Chevron* deference has been satisfied. It can often be incorporated into the principles of textualism, *Chevron*, clear statement, and major questions as the first step of any legal analysis. If a concept fits comfortably within a definition as determined by looking at the specific definitional components, then the "fit within" standard will conclude that the concept is a type of the defining term. If a concept fails to satisfy each of the definitional components, then the "fit within" standard precludes the concept from being included as a type of the defining term.

As discussed previously, MSGP "fits within" the definition of a "rule" as defined by the RFA. It satisfies and comports to each word or phrase used within the "rule" definition. As a result, MSGP must be considered a type of "rule" based upon this "fit within" standard unless

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discussed previously. As MSGP applies generally and not to any one particular party and as MSGP obligations apply in the future, the Third Circuit's analysis would also carve the way for MSGP to be clearly identified as a rule.

110. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

111. *Id.* at 842

112. *Id.*

113. *Id.* at 842-83.

114. *Id.* at 843.

115. *Id.* at 843 n.11.

116. *See* Burlington Northern Santa Fe Ry. v. Loos, 139 S. Ct. 893, 896 (2019) (concluding "[d]amages awarded under FELA for lost wages fit comfortably within this definition [of compensation].").

some unique circumstance exists to deviate away from the "fit within" standard. EPA has not provided any justification why the "fit within" standard—or some form that utilizes the principle of the standard—should not apply when analyzing whether MSGP is a rule under the RFA. For EPA's statutory construction to be accepted by the Court, EPA's construction must be "sufficient[ly] rational . . . to preclude a court from substituting its judgment for that of [the Agency]."[117] Ignoring the "fit within" standard and attempting to equate a general permit with a licensing order is not "sufficiently rational" for the Supreme Court to overturn precedent.

V. CONCLUSION

Let me end this Article by expressly stating its goal: accountability to foster confidence in federal agencies. Federal agencies, like others, must comply with their legal obligations. As federal agencies continue to comply with all facets of the law, confidence in their decisions will increase as is necessary to rebuild confidence in how we are governed and how the natural resources of the United States are protected. EPA's failure to treat the MSGP as a rule despite caselaw supporting its status as a rule creates a procedural deficiency in any final MSGP. Recognizing MSGP as a "rule" and, in turn, complying with the RFA presents the opportunity hoped for by Congress to strengthen the efficiency of any final MSGP by fully engaging with small entities and understanding how small entities participate in the MSGP regulatory program.

117. Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, 470 U.S. 116, 125 (1985).