

ELI Summer School – June 20, 2013

Clean Water Act

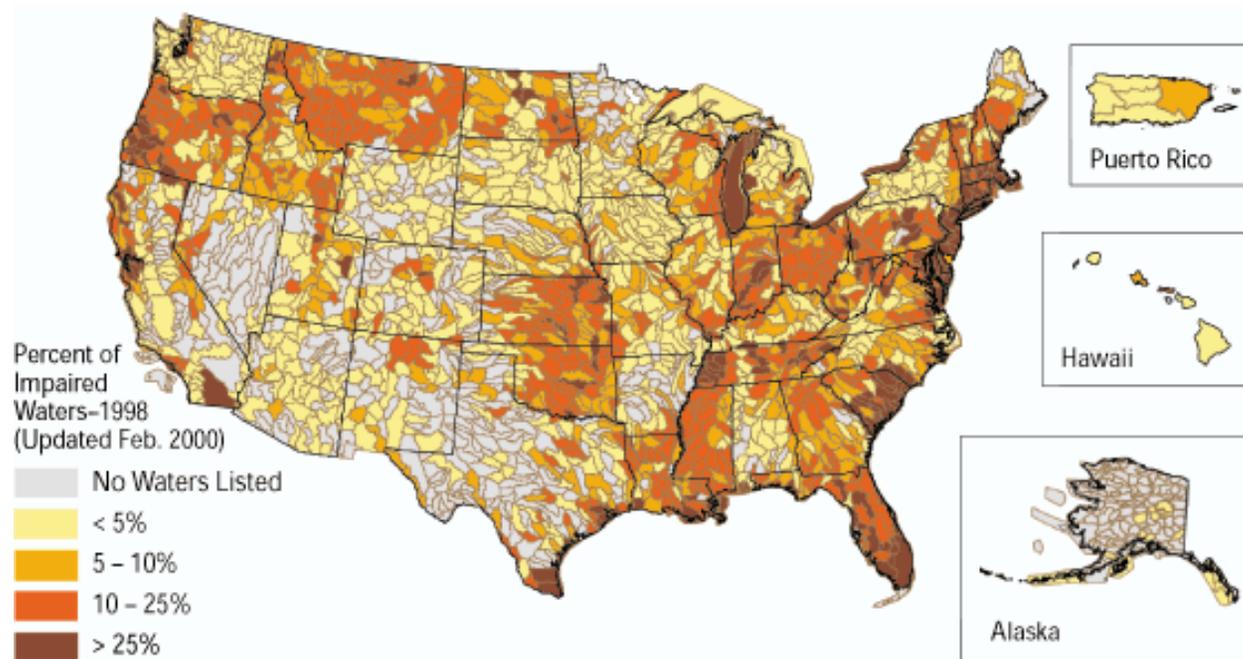
33 U.S.C. § 1251 et. seq.

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Long Island Sound, Niantic, CT

Over half of U.S. waters remain impaired.



Major Sources of Water Pollution



Overview

- History
- Substantive Provisions
- Procedural Features
- Current Issues

Nantucket Sound, MA

Where do we find Clean Water law today?

- Federal Statutes – Clean Water Act
 - Derive authority through Commerce Clause
- Regulations
 - Promulgated by each agency according to Congressional mandate
- Case Law
- State Law, Regulations

Clean Water Act

33 U.S.C. § 1251 et. seq.

- Where did CWA come from?
 - 1899 Rivers and Harbors Act/Refuse Act
 - 1948 Federal Water Pollution Control Act
- **Increasing public concern about water pollution** led to CWA in 1972 and amendments in 1977 and 1987: “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”
- Administered by U.S. EPA’s Office of Water in partnership with states
 - Cooperative federalism approach



What does the CWA Not Regulate?

- Water Quantity
- Non-point Source Pollution



Rocky Mountain National Park, CO

♥♥ Heart of the 1972 CWA ♥♥

Goal:

--to "restore and maintain the chemical, physical and biological integrity of the Nation's waters" by, among other things, eliminating the discharge of pollutants (without permits) into navigable waters of the United States

How? EPA and States:

- Establish Water Quality Standards
- List impaired and threatened waters
- Establish monitoring and management programs
- Develop TMDLs to protect water quality
- Issue permits to point sources to ensure WQS achievement
- Voluntary programs to manage non-point sources

1977 Clean Water Act Amendments

1. Toxics: NRDC v. Train Settlement Codified
2. Rewrote deadlines
3. Popular name



1981 Municipal Wastewater Treatment Construction Grants Amendments

1. Extensive Amendments
2. Municipal grants program overhaul
3. Increased dollars, more applications



Water Quality Act of 1987

1. Municipal Grants to Municipal Loans
2. Strengthened Enforcement and Penalties
3. Toxic Control Strategies
4. Non-Point Source Program including Stormwater Program

Special Purpose Amendments

- P.L. 106-457 (2000):

§ Alternative Water Sources Act of 2000

§ Lake Pontchartrain Basin Restoration Act of 2000

§ Long Island Sound Restoration Act

§ Chesapeake Bay Restoration Act of 2000

§ Beaches Environmental Assessment and Coastal Health Act of 2000

- P.L. 103-431 (1994): Ocean Pollution Reduction Act

- P.L. 101-596 (1990): Great Lakes Critical Programs Act of 1990

At the Core of the CWA: 3 P's

- Prohibition: § 301
- Permits: §§ 402 and 404
- Penalties: § 309

Clean Water Act: The Basic **Prohibition**

“Except as in compliance with this section and §§ 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.”

33 USC § 1311(a)

OR: Any unauthorized or non-permitted discharge of a pollutant by a person is unlawful.

Clean Water Act General **Prohibition:** *Elements*

- Discharge (act)
- Of a Pollutant
- By any person
- From a point source OR of dredged or fill material
- Into a water of the United States
- Except as in compliance with listed permitting programs (402, 404, etc).

- Is a mental state required?

Strict Liability

- No mental state required for a person to be liable for a CWA violation
- CWA administrative or civil sanctions apply

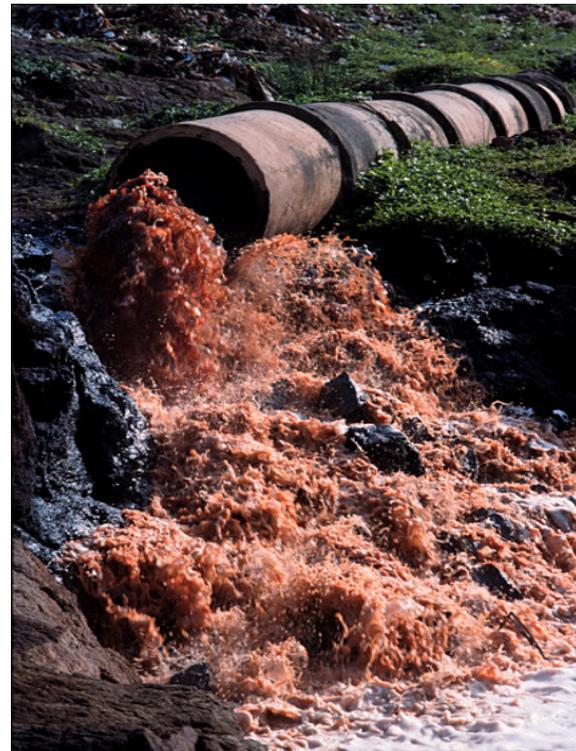
Criminal Liability

- Mens Rea required
- Negligently, knowingly, recklessly, purposely
- CWA criminal sanctions apply

Discharge

40 CFR 122.2

- Any addition of any pollutant or combination of pollutants to waters of the United States from any point source



Of a Pollutant

40 CFR 122.2

- Dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water

By a Person

40 CFR 122.2

- An individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

From a Point Source

40 CFR 122.2

- Any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit...concentrated animal feeding operation...vessel or other floating craft...
- **Excluded:** agricultural storm water discharges, irrigation return flows, non-point sources



Point Sources

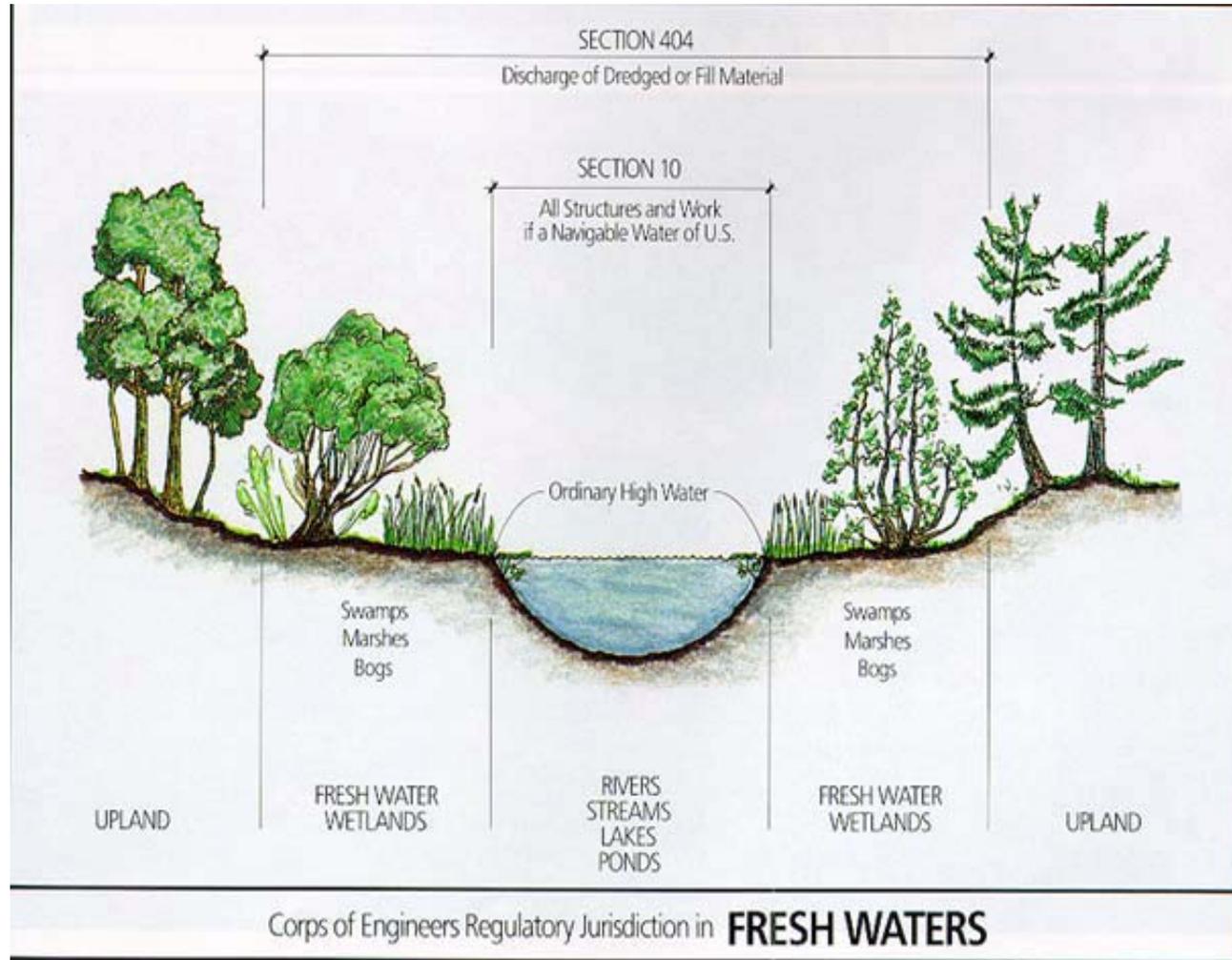


Into a Water of the United States

40 CFR 122.2

- All waters currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters subject to ebb and flow of tide;
- All interstate waters;
- All other waters that could affect interstate or foreign commerce;
- All impoundments of waters of the US;
- Tributaries of the above four categories;
- The territorial sea; and
- Wetlands adjacent to waters identified above.

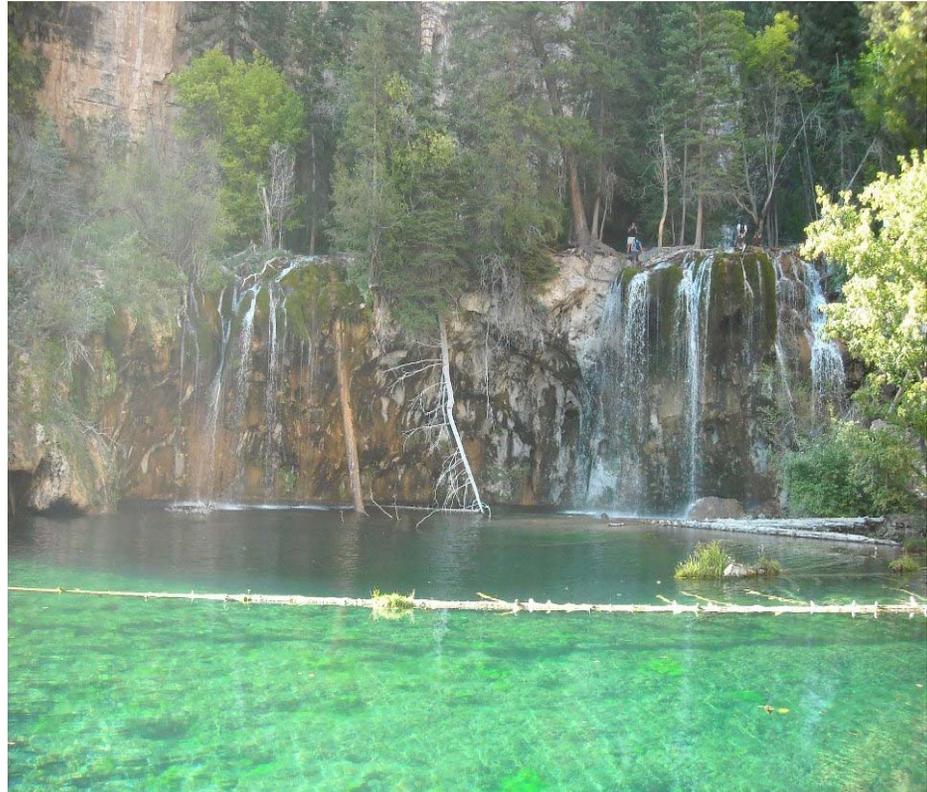
Waters of the US



Waters of the United States

40 CFR 122.2

- Regulatory definition has been interpreted to cover many types of surface waters including:
 - Rivers and streams
 - Lakes and ponds
 - Wetlands
 - Sloughs
 - Prairie potholes
 - Intermittent streams
 - Territorial sea
 - Etc.



Hanging Lake near Glenwood Springs, CO

Waters of the United States

40 CFR 122.2

- Two major Supreme Court decisions affect CWA jurisdictional determinations.
- *SWANCC v. U.S. Army Corps of Engineers* (2001)
 - No CWA jurisdiction over isolated, intrastate waters that could affect interstate commerce solely by virtue of their use as migratory bird habitat.
- *Rapanos v. United States* (2006)
 - Must be significant nexus between wetlands and the waters they feed for there to be CWA jurisdiction over the wetlands; or, water must be relatively permanent.

Waters of the United States

SWANCC, Rapanos, and CWA Jurisdiction Guidance

-*SWANCC* (2001) – CWA intended connection to navigability; so-called “isolated waters” rarely found jurisdictional. “Migratory bird” connection to interstate commerce insufficient.



Waters of the United States

SWANCC, Rapanos, and CWA Jurisdiction Guidance

-*Rapanos* (2006) – Are non-navigable tributaries and adjacent wetlands jurisdictional?

Scalia/Plurality: Water is jurisdictional if relatively permanent, or if seasonal river, or if wetlands have surface connections to such waters.

Kennedy: “Significant nexus” to navigable waters required for water/wetland to be jurisdictional.

Without or in Violation of a **Permit**

40 CFR 122.2

- Authorization, license
- Issued by government
- Granting permission to do something that would be illegal in absence of the permit
- Revocable



Clean Water Act **Permits**

- Section 402 - National Pollutant Discharge Elimination System (NPDES)
 - Issued by EPA or authorized state government (46 states authorized)
- Section 404 – Dredge and Fill
 - Issued by Army Corps of Engineers or authorized state government (2 states authorized)

Clean Water Act Section 404 **Permits**

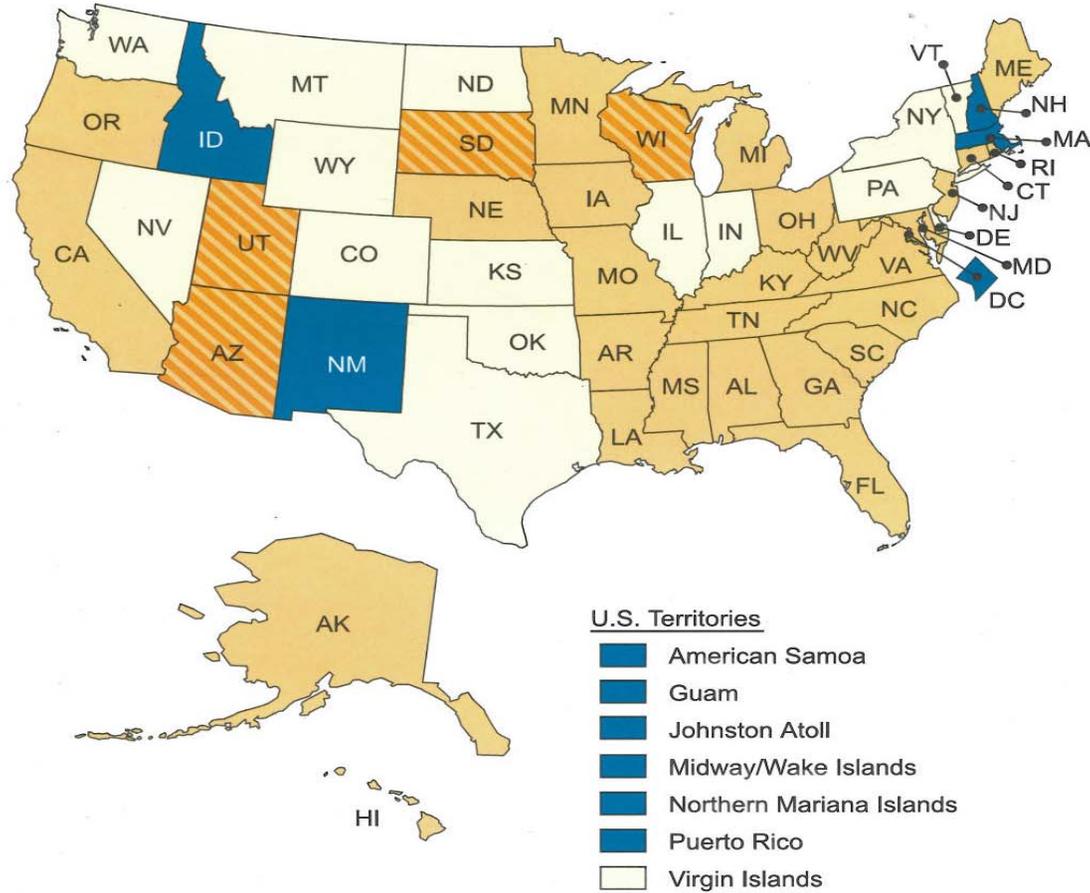
- Army Corps of Engineers issues permits for discharge of dredged or fill material into waters of the United States.
- Corps makes jurisdictional determinations: is it a water of the U.S.?
- Nationwide and individual permits available.
- EPA has authority to review and object to 404 permits (see § 404(c)).

Clean Water Act Section 402 Permits

National Pollutant Discharge Elimination System (NPDES)

- Cooperative Federalism
 - EPA may authorize states to administer NPDES program
 - State must provide opportunities for public to comment on permits.
 - EPA retains oversight.
 - Review draft permits and object if not as stringent as federal law requires.
 - May object to a proposed state permit.
 - Federal enforcement is not barred by a state enforcement action (overfiling; CWA § 309(a)(3))
 - May revoke program approval for cause (CWA §402(c)(3)). EPA has never withdrawn a state program.

State NPDES Program Authority



State NPDES Program Status	
	Fully authorized
	Fully authorized, including an approved biosolids program
	Partially authorized (click here for details)
	Unauthorized

Penalties:

Administrative Penalties, § 309(g)

§ Class I: \$16,000/\$37,500

§ Class II: \$16,000/\$177,500

Civil Penalties, § 309(d)

§ Federal district courts

§ \$37,500 per day per violation

**Federal Civil Penalties Inflation Adjustment Act of 1990, note at
28 U.S.C. § 2461, 40 C.F.R. § 19.4 (2000)**

73 Fed. Reg. 75340 (Dec. 11, 2008), eff. 1/12/09

“4 Rs” of NPDES Permits:

§ Restrictions on discharges

§ Reporting requirements

§ Reopeners

§ Revocability

Restrictions on Discharges:

Technology-Based Standards

CWA §§ 301 and 304 contain mandatory criteria stating what the effluent limitation regulations "shall" contain, including mandatory technology-based requirements depending on industrial category



Restrictions on Discharges: Water Quality-Based Limitations

“Any more stringent limitation”,
§ 301(b)(1)(C)

Water Quality Standards, § 303

§ Designated uses for a waterbody

§ Criteria to protect designated uses

§ Antidegradation policy to maintain high quality waters (socioeconomic arguments can be made to allow degradation)

Restrictions on Discharges: Total Maximum Daily Load Derived Limitations

Total Maximum Daily Load (TMDLs) Derived
Limits

§ 303(d)

§ Waste Load Allocations – point sources

§ Load Allocations – nonpoint sources

Reporting Requirements:

- Noncompliance – Discharge Monitoring Reports (DMRs)
- Changes in discharges
- Upset, Bypass
- Duty to provide information and right of entry
- May need additional monitoring or special studies

Reopeners:

- Change in circumstances or additional information
- Change in discharge
- Change in applicable toxic standards

Revocability:

- Submission of false or misleading information
- Violation of permit

Citizen Suits

- CWA § 505
- 60 Day Notice of Intent to Sue
- Diligent Prosecution Bar

Current Issues:

- Intersection of 402 v. 404 permitting
- Enforcement Compliance Orders – *Sackett v. EPA*
- Logging Roads
- Chesapeake Bay TMDL
- Nutrients – numeric v. narrative criteria
- Clean Water Act & Coal – Scope of 404(c) authority, coal rail cars & point sources, conductivity, selenium, and more

Recent and Key CWA Cases

Coeur Alaska v. Southeast Alaska Conservation Council, 129 S.Ct. 2459 (2009)

- EPA's promulgation of effluent limitation guidelines/new source performance standards does not trump Corps' 404 authority when discharge has effect of fill.
- Corps properly issued 404 permit for discharge of mining slurry into Lower Slate Lake, AK



Sackett v. EPA



- **Key points:** Involves debate over definition of “a water of the United States” and **pre-enforcement review**
- **Facts:** EPA issued compliance order against Sacketts alleging they violated CWA by failing to obtain permit before filling wetland. EPA denied request for hearing & Sacketts sued.

Sackett v. EPA cont.

- **9th Cir. Issue:** Whether Congress, in the CWA, intended to preclude pre-enforcement judicial review of administrative compliance orders issued by EPA pursuant to 33 USC 1319(a)(3).
- **Held:** CWA does preclude review. Does not violate due process rights.
- **Supreme Court heard case on January 9, 2012.**
- **HELD:** CWA administrative compliance order was final agency action subject to review under the APA.
 - CWA language and structure do not overcome the presumption of review of final agency action under the APA.
 - Did not reach merits of CWA Waters of the US jurisdiction.

2012-2013 Supreme Court Term

- *Decker v. Northwest Environmental Defense Center*
 - Whether the citizen suit provision can be used to challenge the validity of a NPDES rule, bypassing judicial review of that rule;
 - Whether Ninth Circuit erred in finding that stormwater from logging roads is industrial stormwater subject to CWA § 402 permitting, even when EPA has said that it is not industrial stormwater.
 - **Held: Logging roads are not subject to § 402 permitting under the industrial stormwater permitting program.**

Water Quality Regulation -- Numeric Criteria, TMDLs

- *American Farm Bureau Federation v. EPA*, No. 11-0067 (M.D. Pa.)
 - Challenge to Chesapeake Bay TMDL as federal overreach; awaiting district court decision
- *Fla. Wildlife Fed'n v. Jackson*, 853 F. Supp. 2d 1138, 1156-60 (N.D. Fla. 2012)
 - Rejecting Florida's challenge to EPA's determination that federal numeric nutrient criteria are necessary to meet the requirements of the Clean Water Act for Florida streams
- *Gulf Restoration Network v. Jackson*, No. 12-677 (E.D. La.)
 - Environmental plaintiffs seek EPA determination that federal numeric nutrient criteria are necessary to meet the requirements of the Clean Water Act in all fifty states or, at a minimum, the ten Mississippi River states
- *Virginia Dep't of Transportation v. EPA*, No. 12-775 (E.D. Va.) (Jan. 3, 2013)
 - Victory by State of Virginia in challenge to EPA-established TMDL based on "flow"

Clean Water Act & Coal

- Section 404: Spruce Mine Veto – *Mingo Logan Coal Co. v. United States* (850 F.Supp. 2d 133; 714 F.3d 608)
- CWA permitting for surface coal mining operation
- Following permit issuance, EPA invokes Section 404 authority to “veto” permit
- District court vacates EPA action:
 - The statute prohibits a post-permit veto
 - Even if statute were ambiguous, EPA’s action was not reasonable
- D.C. Circuit reversed based on plain language of Section 404(c) – petition for rehearing just filed

Clean Water Act & Coal

- EPA “guidance” on permitting eastern U.S. coal mining – *NMA v. Jackson/Perciasepe* – 768 F. Supp. 2d 34; 816 F. Supp. 2d 37; 880 F. Supp. 2d 119
- Starting in January 2009, a new approach to EPA reviews of Section 404 and 402 permits
- Issuance of “Enhanced Coordination Procedures” and “Detailed Guidance” to govern permit review
- Industry and States (WV, KY) challenge EPA actions in federal district court
- District court rejects EPA actions on all counts:
 - EPA’s actions violate both the CWA and SMCRA
 - EPA violated the APA by not following rulemaking procedures
- Currently on appeal to D.C. Circuit

Clean Water Act & Coal

- Citizen Suits:
 - *Sierra Club et al. v. BNSF Railway et al.* – Alleging that coal that falls off/blows off moving rail cars and into waterways violates the CWA.
 - Various suits in Appalachia seeking to impose numeric conductivity limits in NPDES permits
 - Various suits in Appalachia seeking to enforce selenium limits in NPDES permits and require NPDES permitting for alleged discharges at abandoned and reclaimed mining sites

We are happy to answer
your questions.

Columbia River, Astoria, OR

