

ELI Summer School – June 28, 2012

Clean Water Act

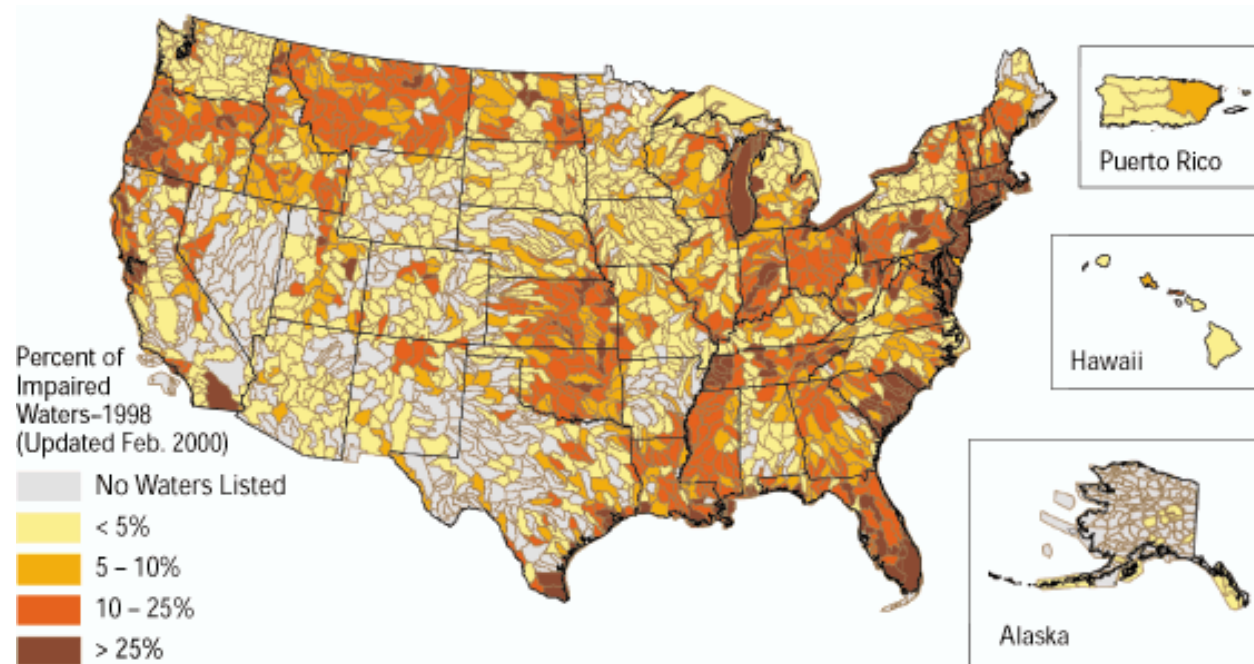
33 U.S.C. § 1251 et. seq.

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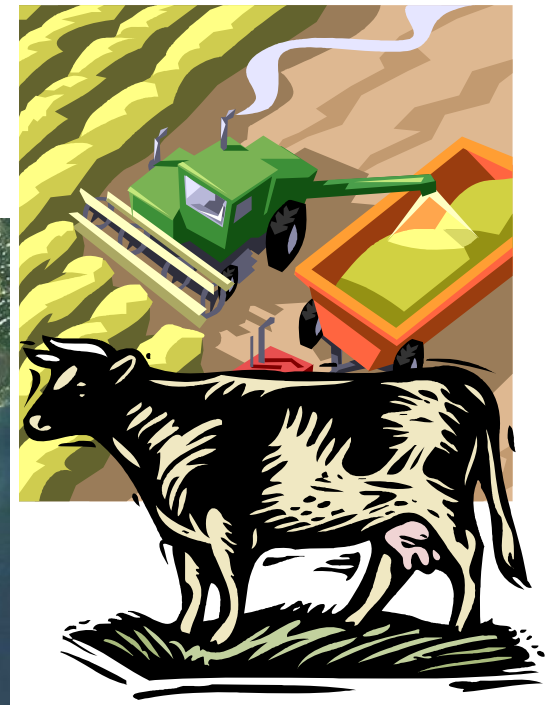
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Over half of U.S. waters remain impaired...

EPA Administrator Jackson: many waters do not meet public health goals, enforcement of water pollution laws is unacceptably low; strengthening water protection is a top priority.



Major Sources of Water Pollution



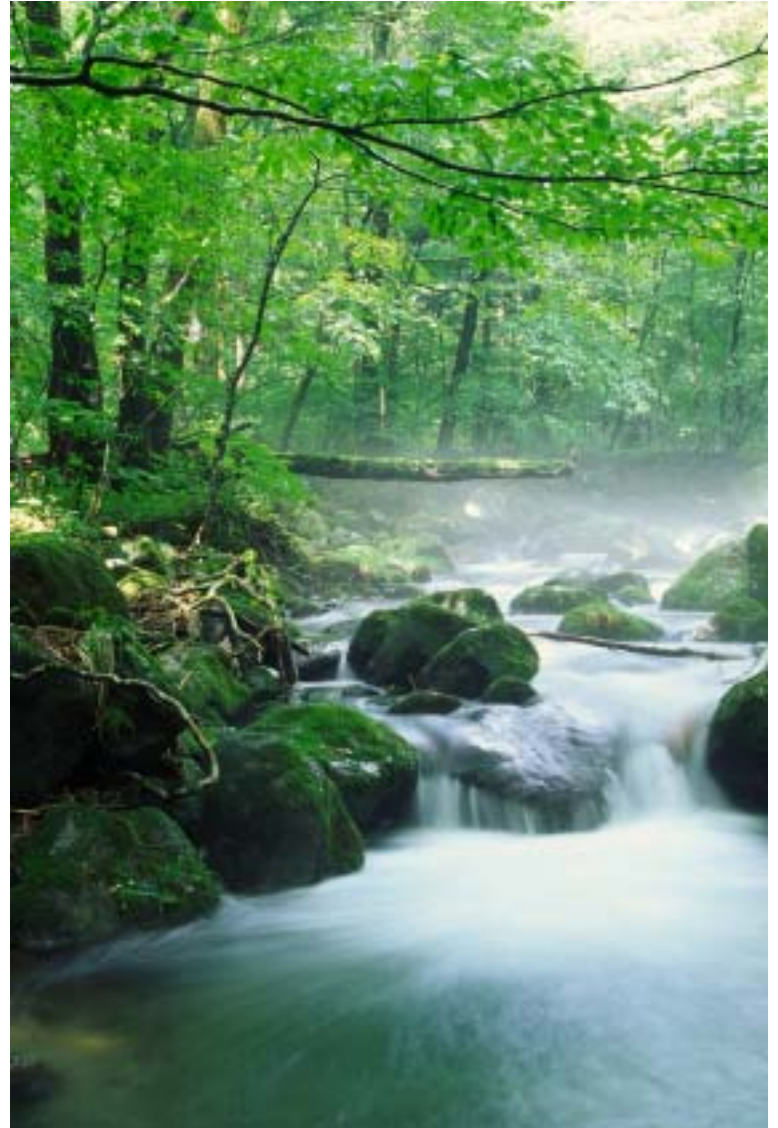
Water Ranks at Top in EPA '11 Gallup Poll

- People polled care most about those environmental issues related to water quality protection
- 77% of respondents concerned with pollution of drinking water
- 79% worried about pollution of rivers, lakes and reservoirs
- <http://www.gallup.com/poll/146810/water-issues-worry-americans-global-warming-least.aspx>

GALLUP POLL

Overview

- History
- Substantive Provisions
- Procedural Features
- Current Issues



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



♥♥ 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

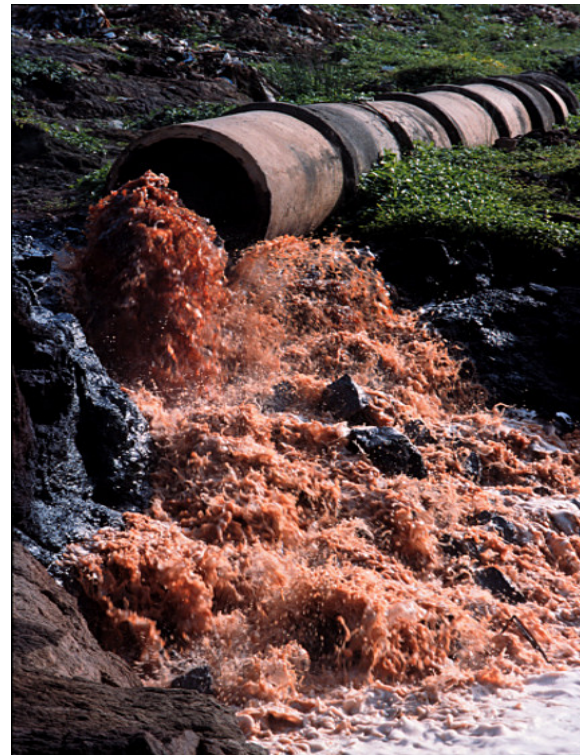
Criminal Liability

- 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

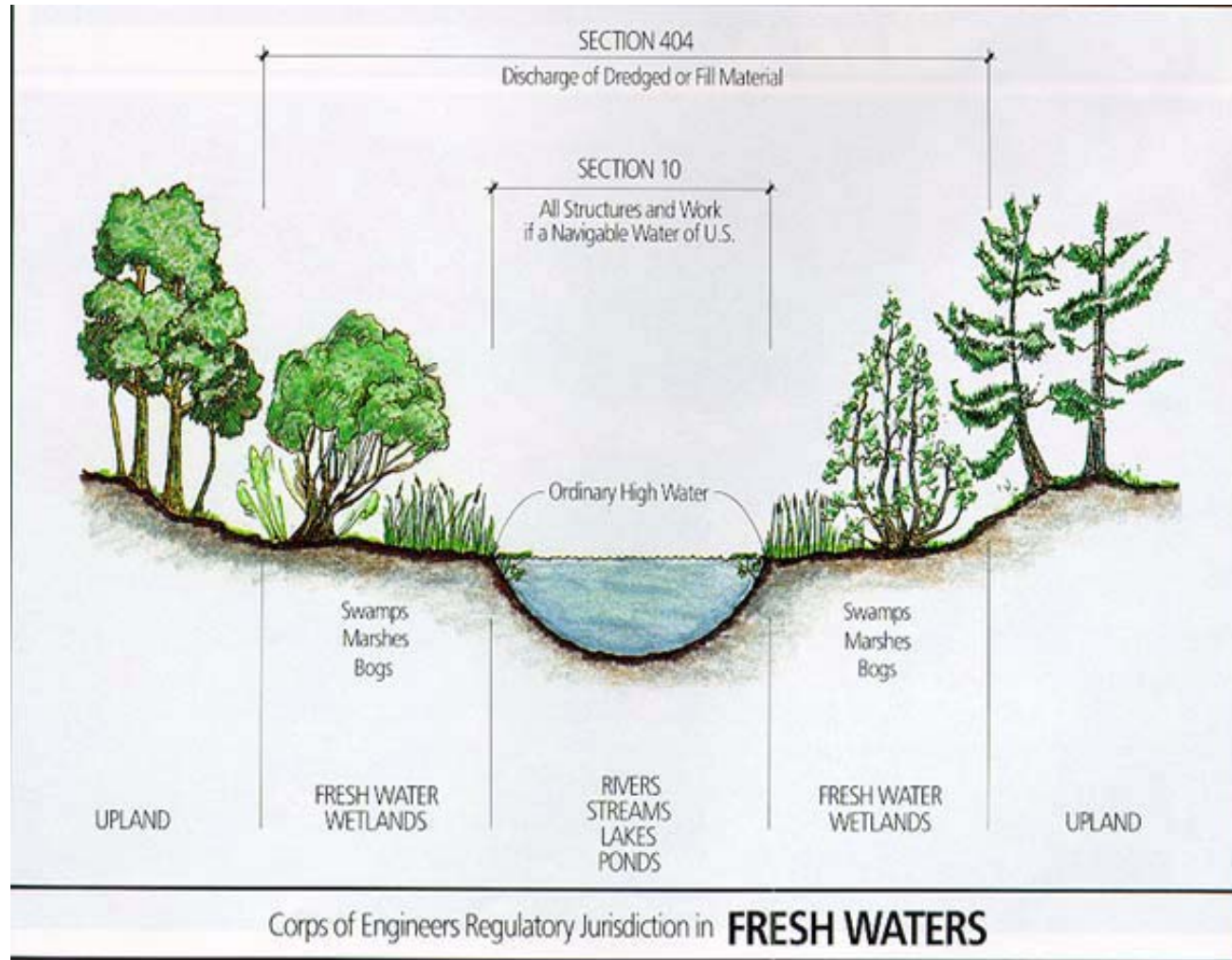


Into a Water of the United States

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.



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.

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**

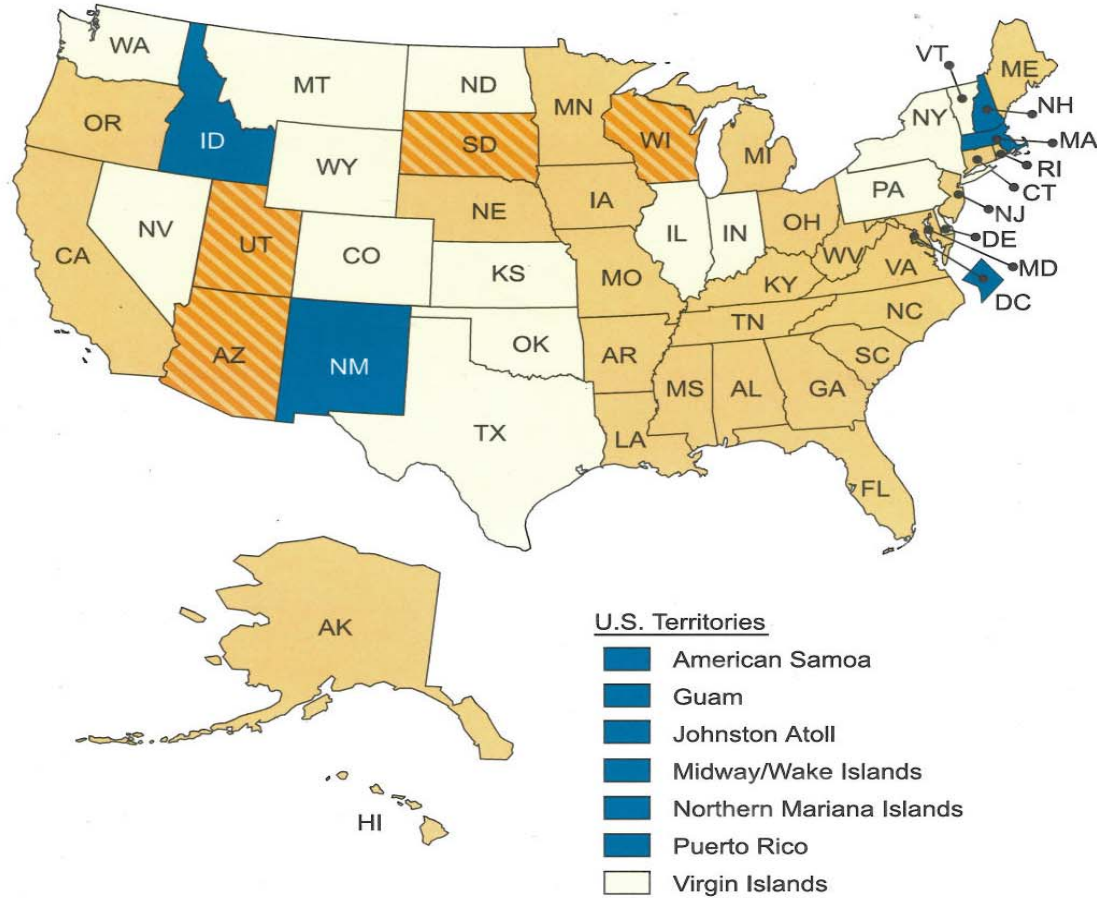
- Army Corps of Engineers issues permits for discharge of dredged or fill material into waters of the United States.
- Corps makes jurisdictional determinations: is it a water of the U.S.?
- Nationwide and individual permits available.
- EPA has authority to review and object to 404 permits (see § 404(c)).


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

Grant & Loan Programs:

CWA § 601 - Clean Water State Revolving Fund



CWA § 106 – State Program Grants

CWA § 319 – Nonpoint Source Grants

Current Issues:

- EPA's proposed guidance interpreting the scope of CWA jurisdiction, including "significant nexus" determinations.
- Intersection of 402 v. 404 permitting
- CWA 404(c) Veto Authority
- Enforcement Compliance Orders – *Sackett v. EPA*
- Chesapeake Bay Consent Decree

Others to watch:

- Nonpoint source and nutrient pollution / healthy watersheds
- Funding

Recent and Key CWA Topics

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.



Recent and Key CWA Topics

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.

Recent and Key CWA Topics

2011 Proposed CWA Jurisdiction Guidance

Jurisdictional:

- Traditional navigable waters;
- Interstate waters;
- Wetlands adjacent to either traditional navigable waters or interstate waters;
- Non-navigable tributaries to traditional navigable waters that are relatively permanent, meaning they contain water at least seasonally; and
- Wetlands that directly abut relatively permanent waters.

Recent and Key CWA Topics

2011 Proposed CWA Jurisdiction Guidance

Subject to Significant Nexus Analysis:

- Tributaries to TNWs or interstate waters;
- Wetlands adjacent to jurisdictional tributaries to TNWs or interstate waters; and
- Waters that fall under the “other waters” category of the regulations.
 - -Physically proximate other waters
 - -Non- physically proximate other waters

Recent and Key CWA Topics

2011 Proposed CWA Jurisdiction Guidance

Generally Not Jurisdictional:

- Wet areas that are not tributaries, open waters, or wetlands
- Waters excluded by regulation
- Waters without “significant nexus”
- Artificial lakes, ponds, pools, ornamental waters, and artificially irrigated areas
- Erosional features that are not wetlands or streams (e.g. gullies)

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



Recent and Key CWA Topics

Mountaintop Mining: Spruce Mine 404 Veto

- Corps authorized six “valley fills” which deposited mining waste into tributaries of the Coal River.
- Jan. 2011 - EPA vetoed Corps’ 404 permit for mine in West Virginia because of “unacceptable adverse effects” to fish and wildlife resources.
- Mining company sued: Did EPA exceed 404(c) authority when it attempted to invalidate the existing permit by withdrawing specification of certain areas as disposal sites?
- March 2012 – US District Court for the DC District granted summary judgment in favor of mining company.



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.

Chesapeake Bay Consent Decree

- Imposes several obligations on EPA with respect to Chesapeake Bay Watershed
 - Bay TMDL was to be set by 12/31/10
 - Review progress every 2 years
 - Review newly proposed/reissued NPDES permits
 - ALSO, EPA must propose reg. to expand universe of regulated stormwater discharges; revise CAFO regs
- Final Action to be taken by Nov. 19, 2012



**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ANACOSTIA RIVERKEEPER, INC., *et al.*,

Plaintiffs,

v.

LISA JACKSON, Administrator, United
States Environmental Protection Agency, *et al.*,

Defendants.

On July 25, 2011, the United States District Court for the District of Columbia issued a decision in *Anacostia Riverkeeper v. Jackson*, a case challenging the Anacostia River TMDL for sediment and TSS. This case comes after the D.C. Circuit's 2006 decision in *Friends of the Earth v. EPA*, which invalidated a previous TMDL for the Anacostia River because it was not expressed as a daily load. Several municipal associations

Anacostia Findings

- TMDLs must address all WQS applicable to the waterbody
- Wasteload allocations for MS4s (STORMWATER) may be allocated on a systemwide basis
- Implicit margin of safety okay



TMDL 10 Year Vision

- Initiative aimed at updating the TMDL program to improve state implementation of TMDLs and improve health of watersheds.
- EPA focused on developing several guidance documents to assist states with TMDL development & implementation
- EPA working with states to revise program to “maximize water quality protection”



Clean Water Funding

- Consolidated Appropriations Act, 2012 (HR 2055) – signed by President on 12/23/11
 - Infrastructure
 - CWSRF: \$1.47 billion
 - DWSRF: \$919.4 million
 - Categorical Grants
 - Section 106: \$238.79 million
 - Section 319 NPS: \$164.76 million



On the Horizon for the 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.
- *Los Angeles County Flood Control District v. NRDC*
 - When water flows from one portion of a Water of US, through a concrete channel, and into another portion of the same Water of the US, is there a “discharge” from an “outfall” subject to the CWA? (*Miccosukee* case notwithstanding)

We are happy to answer your questions.

