

CLEAN WATER ACT

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CHESAPEAKE BAY FOUNDATION
Saving a National Treasure

Jon A. Mueller, jmueller@cbf.org
Vice President For Litigation
Chesapeake Bay Foundation

Outline

- Background and Purpose of the CWA
- Key Definitions
- Permitting Sections 402 and 404
- Meeting Water Quality Standards – Section 303
- Water Quality Certification – Section 401
- Enforcement – Sections 309 and 311



BACKGROUND OF THE CLEAN WATER ACT

Rivers and Harbors Act of 1899– Did not directly address pollutants

Act of 1948 – Pollution abatement if economically feasible

1969



**Act of 1972 – 33 USC § 1251 – 1388
Federal Water Pollution Control Act**



SECTION 101 - CONGRESSIONAL GOALS

Objective - restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

1. National goal - discharge of pollutants eliminated **by 1985**;
2. Interim goal - water quality which provides for the protection and propagation of fish, shellfish, and wildlife and recreation by **July 1, 1983**. Fishable and Swimmable

See 40 C.F.R. § 131.2 Purpose.

CONGRESSIONAL POLICIES CONTINUED

National policy –

Discharge of **toxic pollutants prohibited.**

Develop and implement programs for the control of **nonpoint sources of pollution** so goals can be met through the control of **both point and nonpoint sources of pollution.**

Policy of Congress to recognize, preserve, and protect the primary responsibilities and **rights of States** to prevent, reduce, and eliminate pollution.

...

Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

KEY PROVISIONS AND DEFINITIONS

33 USC §1311 – Section 301: Unless you comply with one of several other provisions of the Act, e.g., Section 402 (point source) and Section 404 (dredge and fill or wetland) permitting, the **discharge of a pollutant is unlawful**.

What is a pollutant?

Dredge spoil



“Pollutant” = Sewage



“Pollutant” = Industrial waste



“POLLUTANT” DEFINITION CONTINUED

Pollutant also means solid waste, incinerator residue, garbage, munitions, chemical wastes, biological materials, radioactive materials, heat, rock, sand, and cellar dirt.

33 USC §1362 – Section 502 – Definitions.

See also, 40 C.F.R. §131.3.

DEFINITIONS CONT'D

SECTION 502

“Discharge of a pollutant” means any addition of any pollutant to navigable waters or the ocean from any point source.

What are navigable waters? the waters of the United States including the territorial seas. Kelly Moser will cover in detail.

What is a point source? any discernible, confined and discrete conveyance, ... from which pollutants are or may be discharged.

“Point Source” = pipe



Industrial Point Source / Stormwater



“POINT SOURCE” = TUNNEL, PESTICIDE SPRAYING, ...

Catskill Mtn Trout Unlimited v.
City of New York



National Cotton Council v. EPA



“POINT SOURCE” = COAL LOADING CONVEYOR



Alaska Community Action on Toxics v. Aurora Energy Services, 9th Cir. 2014

Construction Stormwater



CONCENTRATED ANIMAL FEEDING OPERATIONS



Waterkeeper Alliance v. EPA, 2nd Cir.
40 C.F.R. § 122.23



STORMWATER

Urban Wet Weather Flows



“POINT SOURCE” CONT’D

“Point Source” also includes ditch, channel, conduit, well, discrete fissure, container, rolling stock, vessel or other floating craft.

“Point Source” does **not** include agricultural stormwater discharges or return flows from irrigated agriculture.



POINT SOURCE PERMITTING - SECTION 402

National Pollutant Discharge Elimination System (NPDES)

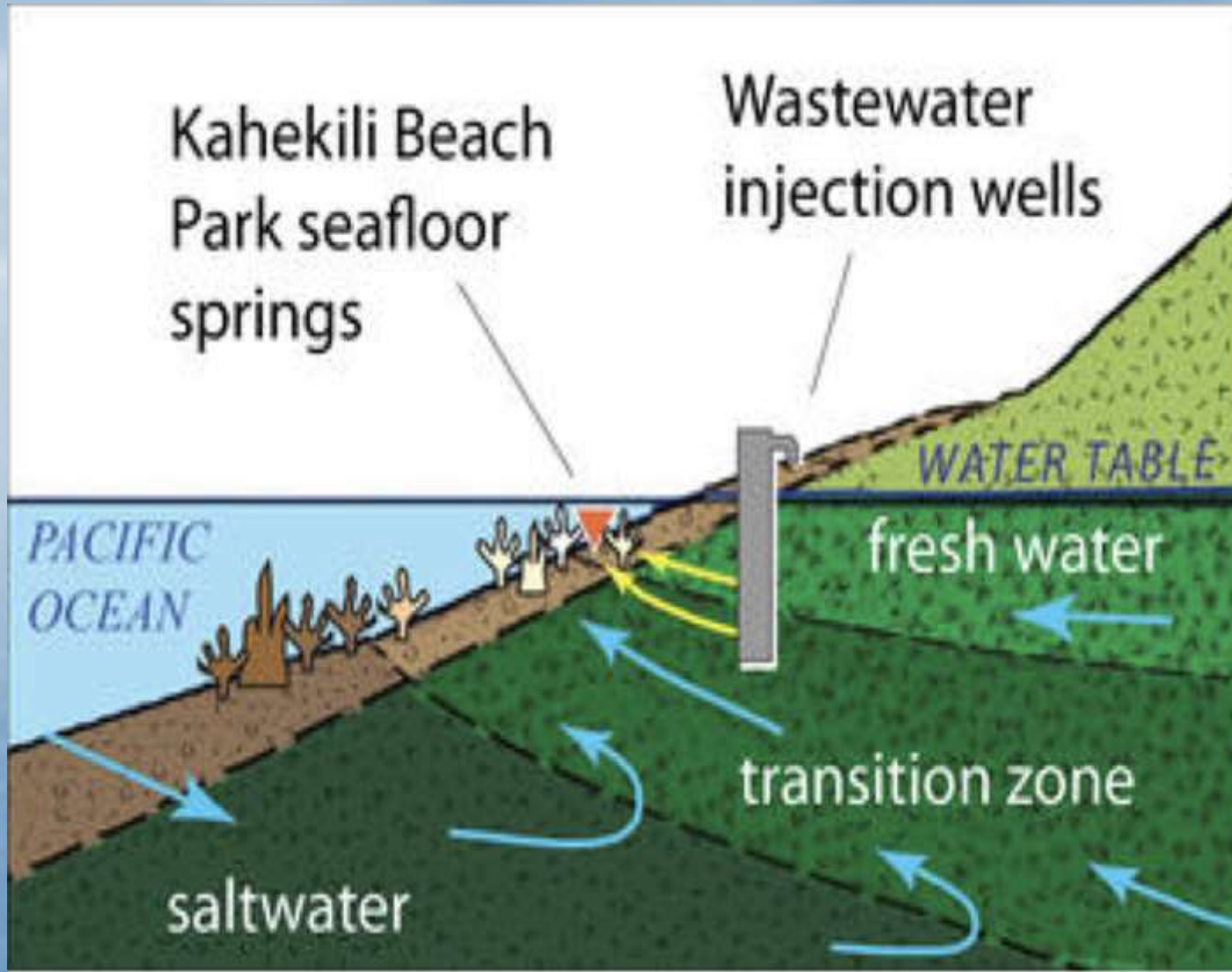
The EPA Administrator is authorized to issue pollution discharge permits after the public is given notice and opportunity to comment.

The discharge must meet either (A) all applicable requirements of other sections such the act like Water Quality Standards or (B) or permit has conditions necessary to comply with the Act.

The States are authorized to issue permits for discharge of pollutants into waters within the state.

Discharges to Groundwater
County of Maui v. Hawaii Wildlife Fund, SCT 2020





Functional Equivalent of a Point Source

Prairie Rivers Network v.
Dynergy Midwest Generation,
7th Cir.



Discharge to Surface Water Coal Ash Ponds

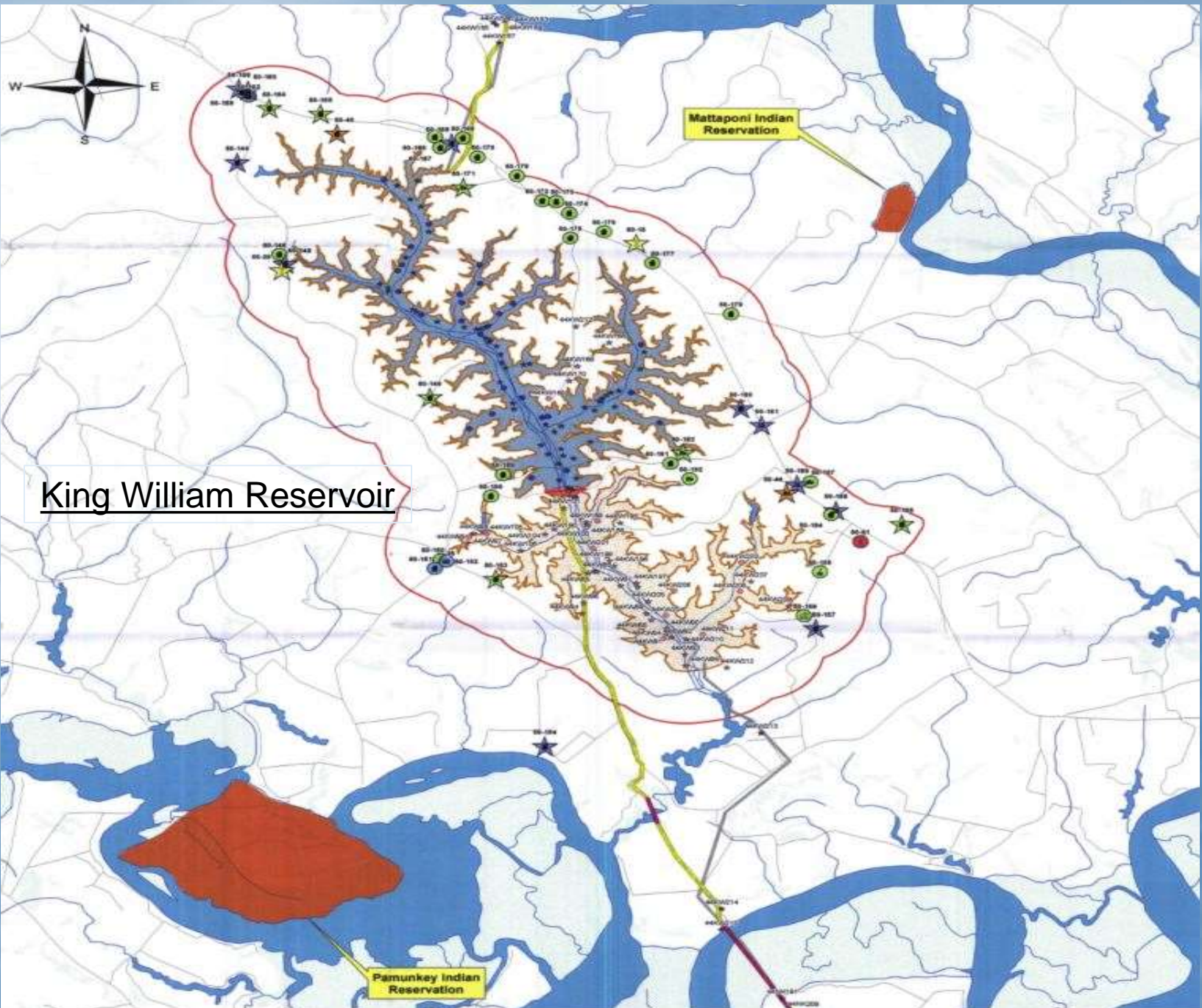
SECTION 404 – DREDGE AND FILL / WETLANDS PERMITTING

33 USC §1344 - The Secretary of the Army may issue permits for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

General Permits of National coverage and Individual permits.

404(b)(1) Guidelines. Each disposal site shall be specified for each permit by the Secretary through the application of guidelines developed by the EPA Administrator and the Secretary.





King William Reservoir

Mattaponi Indian Reservation

Pamunkey Indian Reservation

WATER QUALITY CERTIFICATION - SECTION 401

33 USC §1341 - Any applicant for a Federal license or permit to conduct any activity which may result in any discharge into the navigable waters, shall provide a certification from the State in which the discharge originates that any such discharge will not harm state water quality.

- State can deny certification and effectively terminate a project. Constitution Pipeline – New York.
- Certification must be provided within one year from date of application. No extensions. *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (DC Cir. 2019).
- Public can comment on certification and challenge decision.

Conowingo Dam Relicensing – CBF and Waterkeepers v FERC



**WATER QUALITY STANDARDS
TOTAL MAXIMUM DAILY LOAD, SECTION
303(D)
33 USC 1313(D)**

States must designate impaired waters and develop Total Maximum Daily Loads (TMDLs) **by 1979**.

TMDL =
Waste Load Allocations (point sources)
+ Load Allocations (non-point sources)
+ Natural Background
+ Margin of Safety

TMDL Litigation

Constructive Submission

Environmental organizations sued EPA because states failed to develop TMDLs. States effectively submitted a blank piece of paper.

- *Scott v. Hammond*, 7th Cir. (1984);
- *American Canoe v. EPA in Virginia* (1998);
- *Kingman Park Civic Ass'n v. EPA* in DC (1999);
- *American Littoral Society v. EPA* in DE, PA, and WVA.

EPA required to develop TMDLs if the states did not.

The Chesapeake Bay TMDL

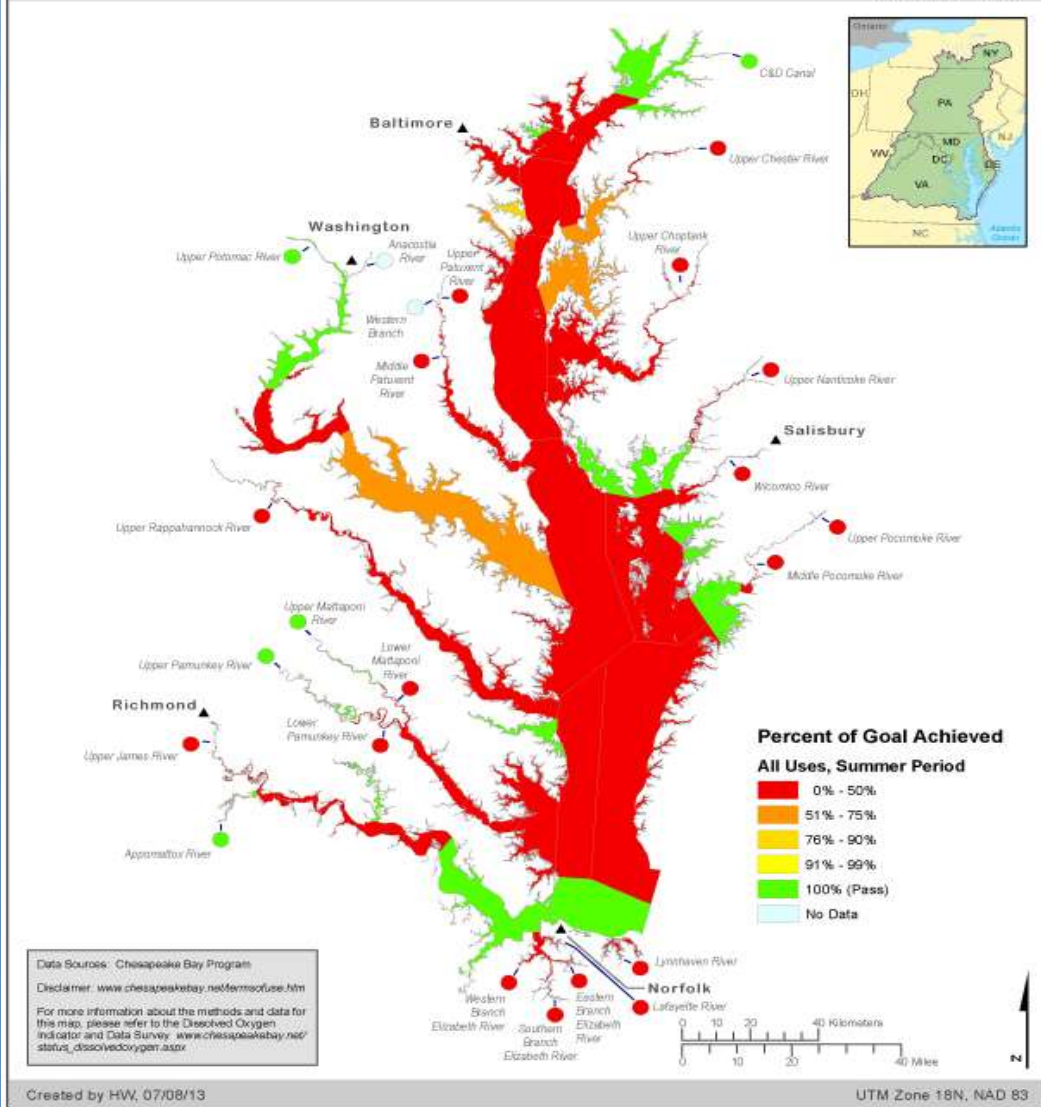
Bay Suffers from Too Much Nitrogen, Phosphorous and Sediment



Algae Blooms

Dead Zone

Dissolved Oxygen (June - September, 2010 - 2012) Percent of Goal Achieved (3 Year Analysis)







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Fowler v. EPA, E.D. PA
Jan. 5. 2009

Chesapeake Bay TMDL



December 29, 2010
76 Federal Register 549
(Jan. 5, 2011)



Enforcement - 33 USC 1319, Section 309

- Whenever the EPA Administrator finds someone is in violation of a point source (Section 402) or dredge and fill (Section 404) permit term he shall notify the violator and the State.

If after 30 days the State has not acted, the Administrator shall order the violator to comply or bring a civil action. EPA can also bring administrative actions.

- State and EPA can also bring criminal actions.

- Section sets range of penalty amounts and penalty factors to be considered. Check regulations for changes in amounts.

Knowing Endangerment – risk of bodily harm - penalty increases.

BP Deepwater Horizon – willful and wanton disregard for human life.*

- Specific reference to wrongful introduction of pollutants into treatment works.

US v. Distler, Louisville, Ky.

OIL AND HAZARDOUS SUBSTANCE LIABILITY

33 USC §1321, SECTION 311

Policy of the United States - **no discharges of oil or hazardous substances** into or upon waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, which may affect natural resources belonging to the United States.

- If you have knowledge of such a discharge, you must report it to the US.
- There are administrative classes of violations based on the quantity of oil (barrels) or hazardous substance.
- Gross negligence recognized – See *BP Deepwater Horizon*.
- US may recover removal costs like in Superfund.
- Natural resource trustees may recover costs associated with restoration of services lost by harm to or destruction of resources like, mammals, fish, birds, plants, shellfish, recreation (beaches).
- Section enacted due in large part to Exxon Valdez oil spill.

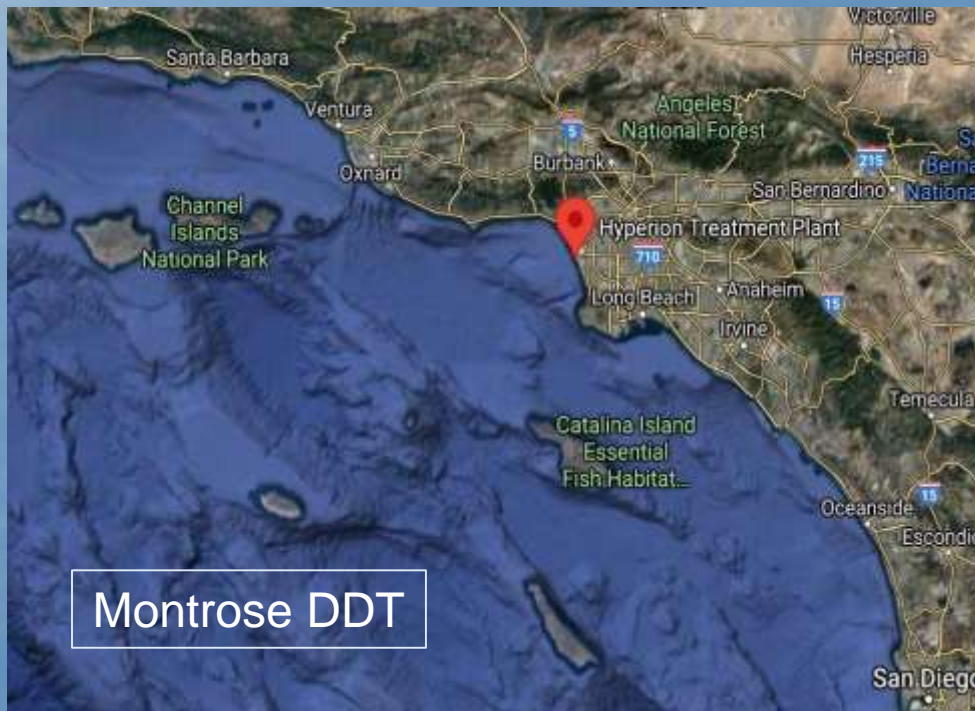
OIL AND HAZARDOUS SUBSTANCES -NATURAL RESOURCE DAMAGES



Exxon Valdez



Deepwater Horizon



Montrose DDT

CITIZENS SUITS - 33 USC §1365, SECTION 505

- With two exceptions, any citizen may bring a civil action against any person (including the United States, and a State or agency subject to the Eleventh Amendment to the Constitution) for:

Violation of an effluent standard or limitation – permit violation - or an order issued by the Administrator or a State with respect to such a standard or limitation, **or**

Against the Administrator for the failure to perform any non-discretionary duty. Bay TMDL matter in DC DCT.

60 Days Notice of the violation is required.

Violation must be “continuing.” *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, SCT 1987.



Jon Mueller, VP for Litigation, Chesapeake Bay Foundation

jmueller@cbf.org

443-482-2162

Annapolis, MD