



ELI Summer School – June 26, 2014

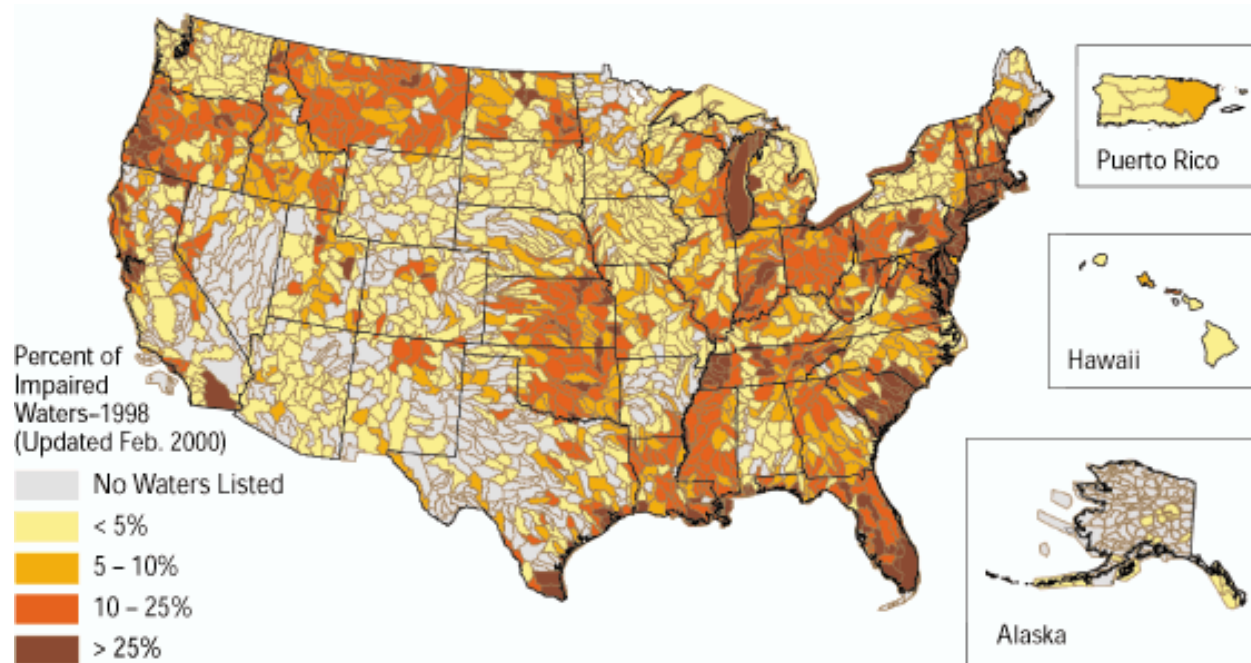
Clean Water Act

Erin Flannery Keith, Federal Government Water Attorney
Abigail M. Jones, Staff Attorney, Riverkeeper, Inc.

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Tumalo Creek, Bend, OR

Over half of U.S. waters remain impaired.



Major Sources of Water Pollution



Overview

- History
- Substantive Provisions
- Procedural Features
- Current Issues & Fact Pattern

Nantucket Harbor, 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
- Groundwater & Drinking Water
- 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

At the Core of the CWA: 3 P's

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

Plus a bonus P – a Plan: § 311

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
- Of a Pollutant
- By Any Person
- From a Point Source OR of Dredged or Fill Material
- Into Waters 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

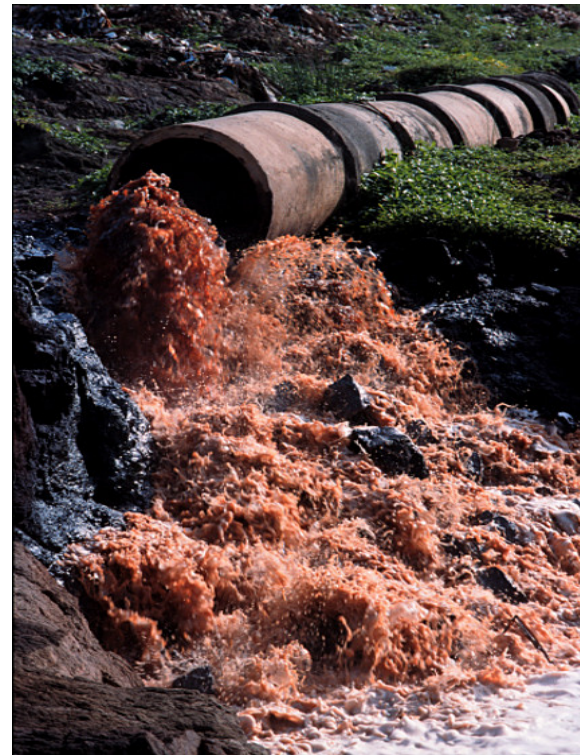
Criminal Liability

- 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

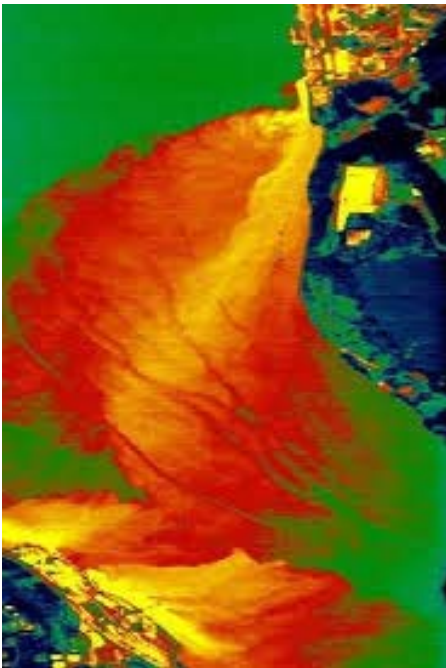


Of a Pollutant

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



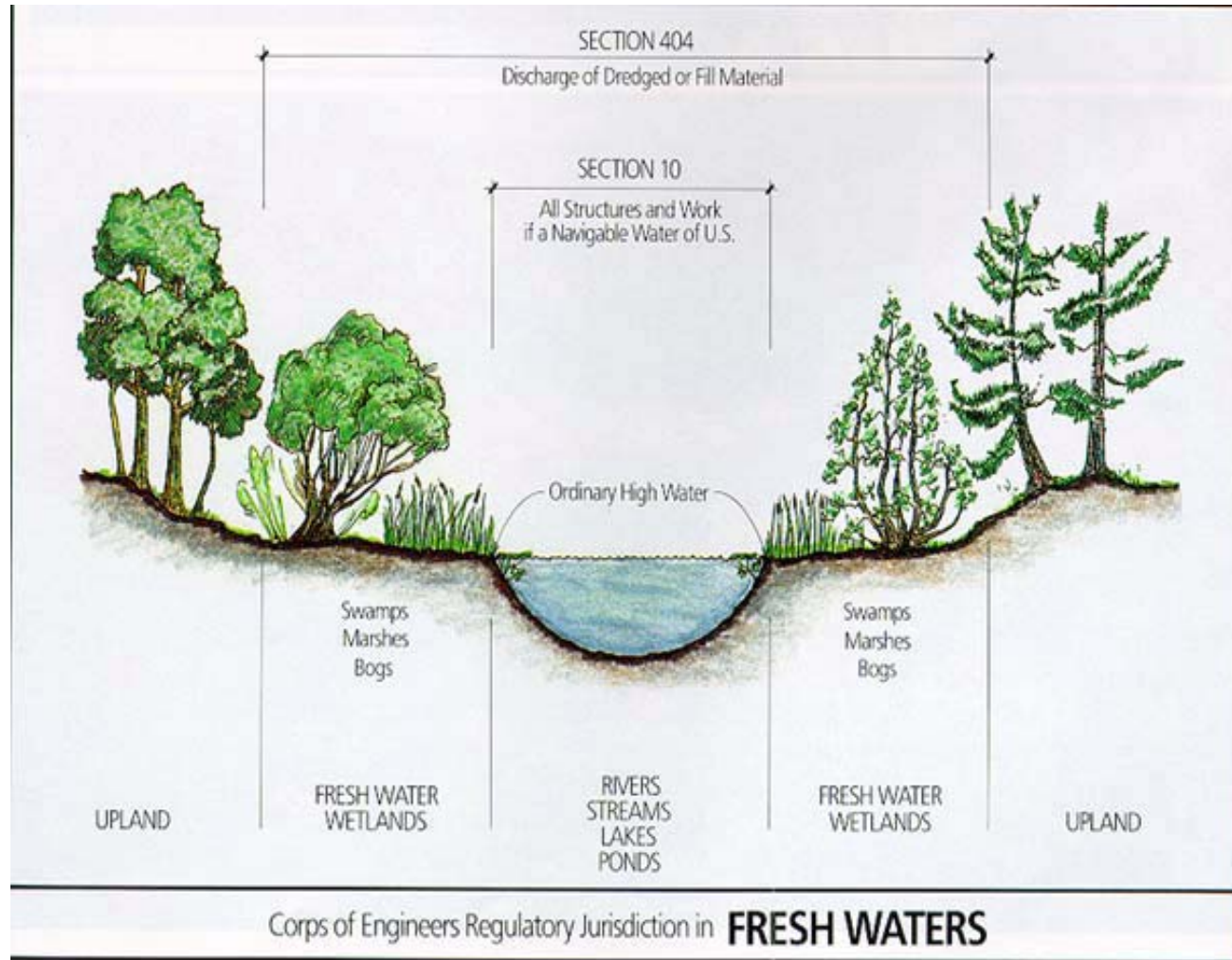
Into a Water of the United States

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.

* Surface Waters, Not Groundwater

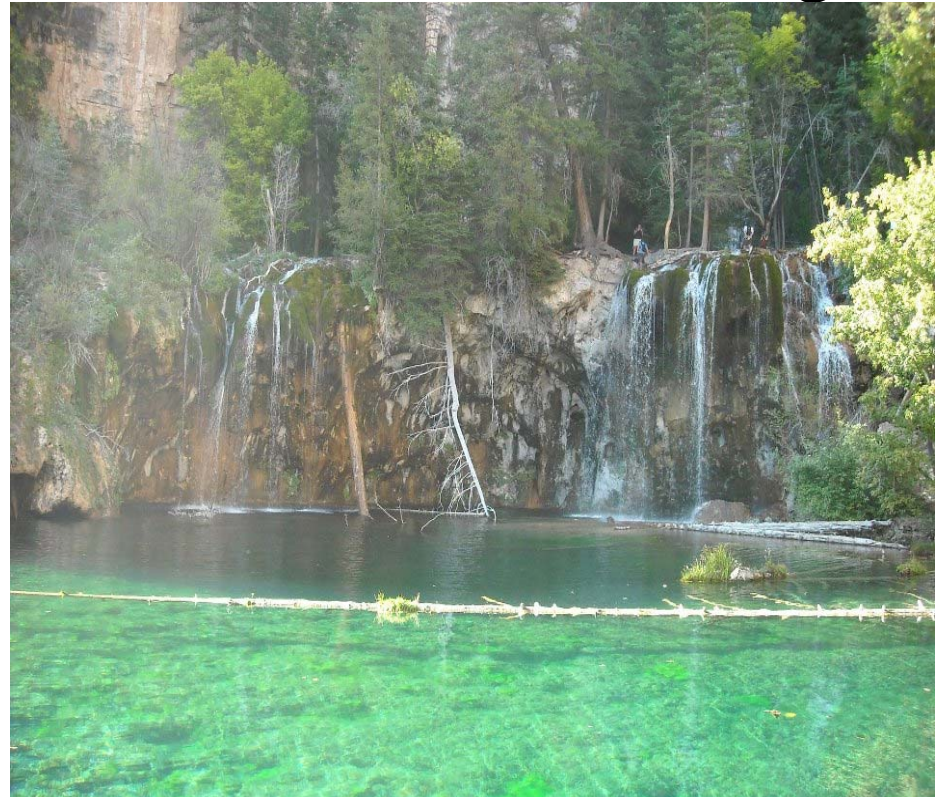
Waters of the US



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
 - Etc.



Hanging Lake near Glenwood Springs, CO

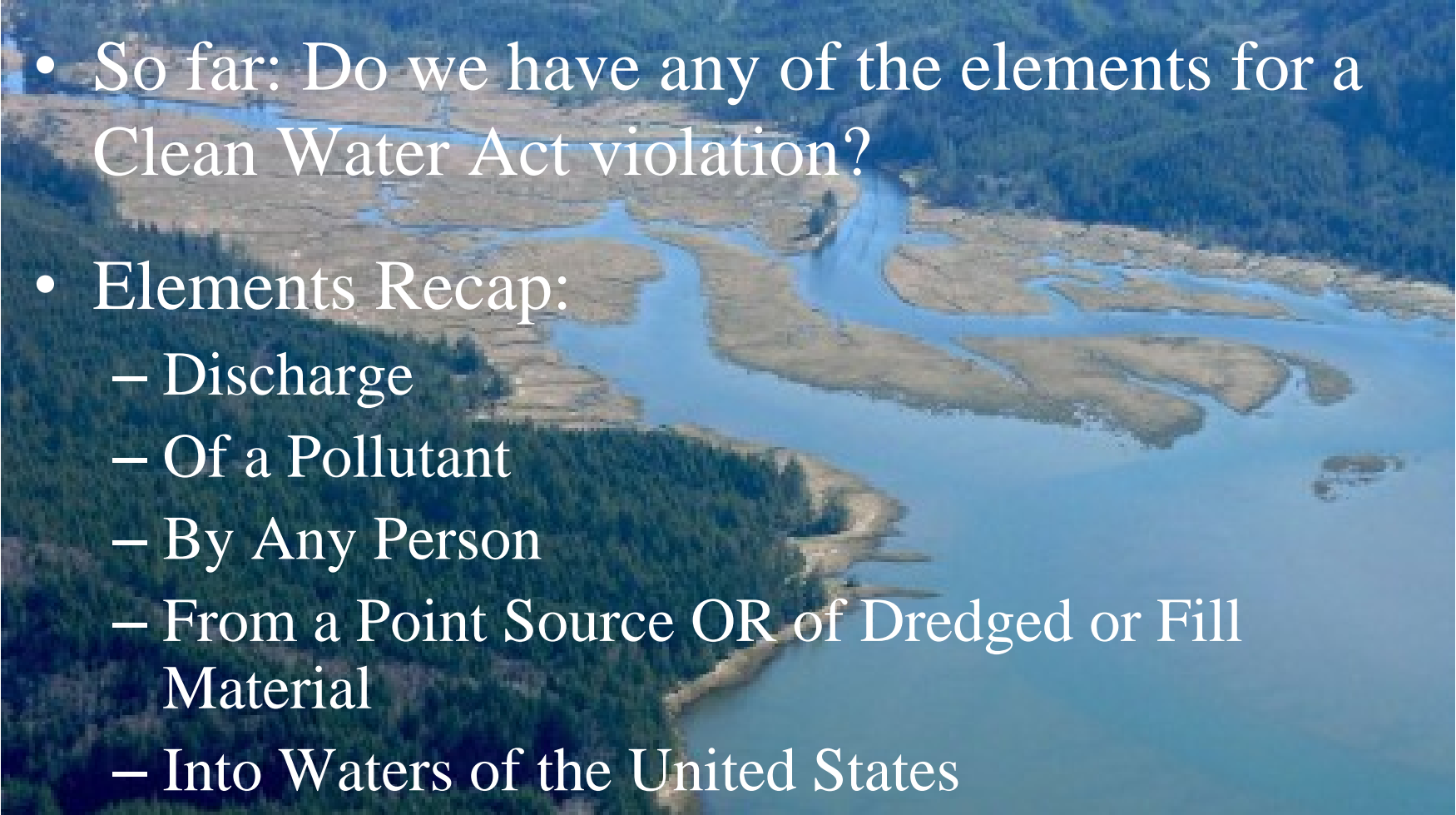
Waters of the United States

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 with a connection to traditionally navigable waters.



Fact Pattern Application: Elk River Chemical Spill

- 
- An aerial photograph of a wide, winding river with a distinct yellowish-brown plume of chemical spill moving downstream. The surrounding landscape is a mix of green forested areas and brownish, possibly dried or contaminated, banks. The text of the slide is overlaid on the left side of the image.
- So far: Do we have any of the elements for a Clean Water Act violation?
 - Elements Recap:
 - Discharge
 - Of a Pollutant
 - By Any Person
 - From a Point Source OR of Dredged or Fill Material
 - Into Waters of the United States

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



NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
State Pollutant Discharge Elimination System (SPDES)
DISCHARGE PERMIT

Industrial Code: 4911	SPDES Number: NY-0006262
Discharge Class (CL): 03	DEC Number: 3-2346-0001/000002
Toxic Class (CX): T	Effective Date (EDP): June 1, 2006
Major Drainage Basin: 13	Expiration Date (ExpD): May 31, 2011
Sub Drainage Basin: 01	Modification Date:
Water Index Number: H	
Contact Area:	

This SPDES permit is issued in compliance with Title 8 of Article 17 of the Environmental Conservation Law of New York State and in compliance with the Clean Water Act, as amended, (33 U.S.C. 1251 et seq.) (hereinafter referred to as "the Act").

PERMITTEE NAME AND ADDRESS

Name: **Dynegy Northeast Generation, Inc.** Attention: **John A. Carnright**
 Street: **992-994 River Road** State: **NY** Zip Code: **12550**
 City: **Newburgh**

is authorized to discharge from the facility described below:

FACILITY NAME AND ADDRESS

Name: **Dankammer Generating Station** County: **Orange**
 Location (C.T.V): **Newburgh (T)**
 Facility Address: **994 River Road** State: **NY** Zip Code: **12550**
 City: **Newburgh**

NYTM - E: _____ at Latitude: 41 ° 34 ' 23 " & Longitude: 73 ° 57 ' 52 "
 From Outfall No.: **001**
 into receiving waters known as: **Hudson River** Class: **A**
 and: (list other Outfalls, Receiving Waters & Water Classifications)

002, 003, 004	Hudson River	Class: A
005, 006, 06A	Hudson River	Class: A
007 - 009, 011 - 014	Hudson River	Class: A
016 - 019	Hudson River	Class: A

in accordance with: effluent limitations; monitoring and reporting requirements; other provisions and conditions set forth this permit; and 6 NYCRR Part 750-1.2(a) and 750-2.

DISCHARGE MONITORING REPORT (DMR) MAILING ADDRESS

Mailing Name: **Dankammer Generating Station, Dynegy Northeast Generation, Inc.**
 Street: **992-994 River Road** State: **NY** Zip Code: **12550**
 City: **Newburgh** Phone: **(845) 563-2791**
 Responsible Official or Agent: **Mr. Daniel P. Thompson, VP Operations**

This permit and the authorization to discharge shall expire on midnight of the expiration date shown above and the permittee shall not discharge after the expiration date unless this permit has been renewed, or extended pursuant to law. To be authorized to discharge

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 U.S.?
- General and individual permits available.
- EPA has authority to review and object to specifications for 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

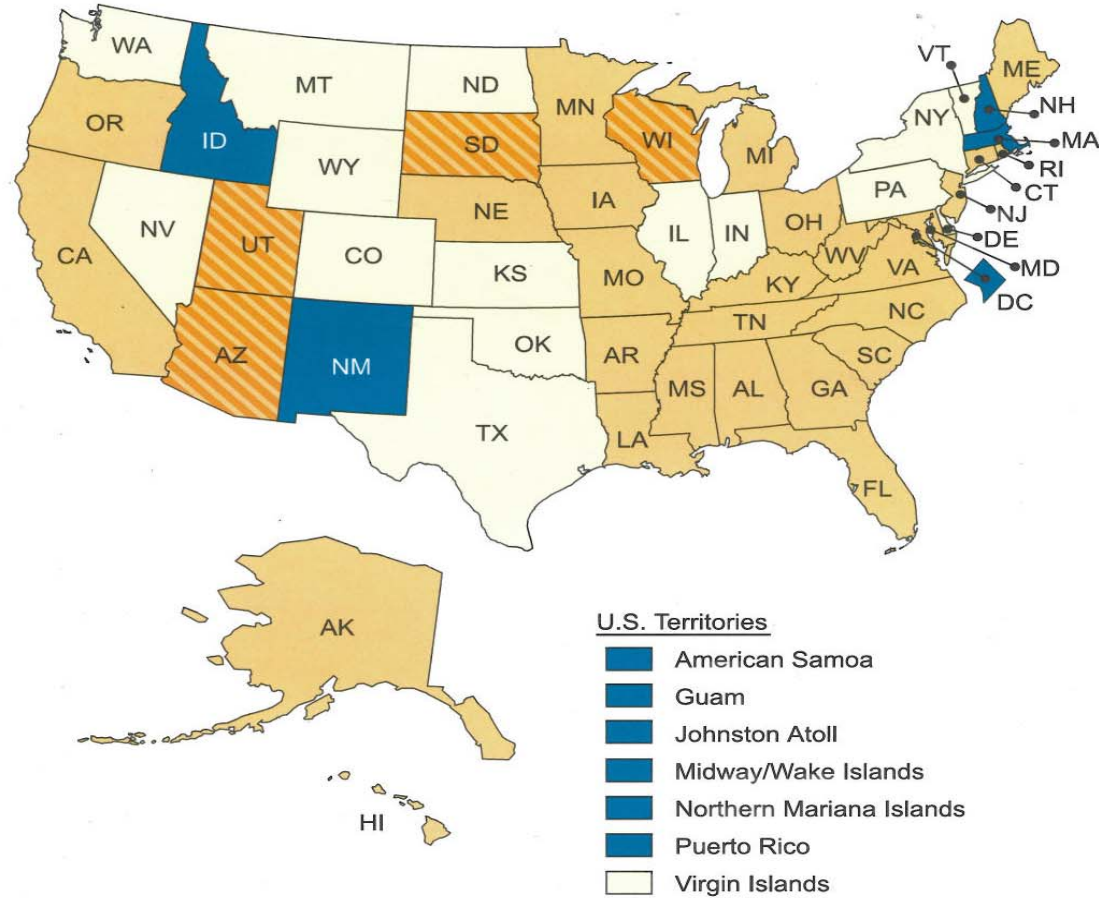


to a proposed state permit.

enforcement is not barred by a state enforcement action
(CWA § 309(a)(3))

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

Clean Water Act 402 Permits

Industrial Stormwater Permits

- EPA 1990 Stormwater NPDES Regulations
 - “stormwater discharges associated with industrial activity”
- “Industrial Activities” Covered:
 - Operators of MS4s located in “urbanized areas”
 - Industrial facilities in any of the 11 categories that discharge to an MS4 or to waters of the United States
 - Operators of construction activity that disturbs 1 or more acres of land
 - Oil and gas industry construction activities that disturb more than five acres of land are required to apply for permit coverage
- Implement SWPPPs or stormwater management programs (using BMPs)
- General vs. Individual Permits
 - Multi-Sector General Permit (MSGP)
- Conditional “No Exposure” Exclusion



Plan: Section 311 Spill Prevention, Control, and Countermeasure Plans

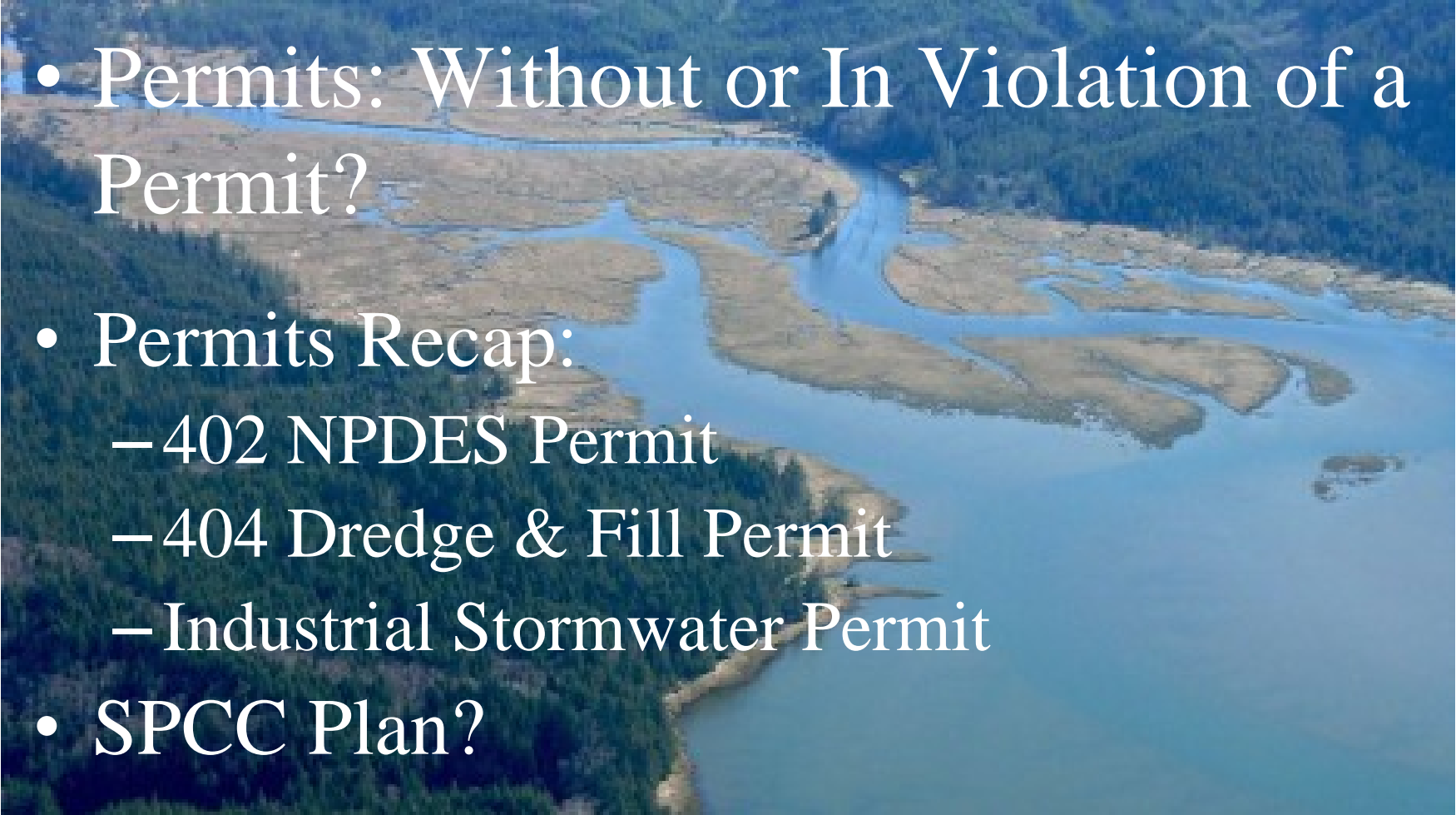
- Section 311(b)(3) prohibits the discharge of threshold amounts of oil or hazardous substances to navigable waters of the United States or adjoining shorelines.
- Facilities that store **oil** in significant amounts must prepare spill prevention, control, and countermeasure (SPCC) plans and to adopt measures to keep accidental releases from reaching navigable waters.

SPCC Plan

- Operating procedures that prevent oil spills;
- Control measures installed to prevent a spill from reaching the environment; and
- Countermeasures to contain, clean up, and mitigate the effects of an oil spill that reaches the environment.



Fact Pattern Application: Elk River Chemical Spill

- Permits: Without or In Violation of a Permit?
 - Permits Recap:
 - 402 NPDES Permit
 - 404 Dredge & Fill Permit
 - Industrial Stormwater Permit
 - SPCC Plan?
- 
- An aerial photograph of a river system, likely the Elk River, showing a main channel and several smaller tributaries. The river flows through a landscape with dense green forests and some cleared, brownish areas. The water is a clear blue color.

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

Citizen Suits

- CWA § 505
- 60 Day Notice of Intent to Sue
- Diligent Prosecution Bar
- Attorneys' Fees
(exception to the American Rule)



Storm King Mountain

“4 Rs” of NPDES Permits:

- Restrictions on discharges
- Reporting requirements
- Reopeners
- Revocability

Restrictions on Discharges: Technology-Based Limitations

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

Water Quality Standards, § 303

- Designated uses for a waterbody
 - “Fishable, Swimmable, Drinkable Waters”
- Criteria to protect designated uses
- Antidegradation policy to maintain high quality waters (socioeconomic arguments can be made to allow degradation)



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

Restrictions on Discharges:

Total Maximum Daily Load Derived Limitations

Total Maximum Daily Load (TMDLs) § 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

	A	B	C	D	E	F	G	H	I	J	K	L	M	
1	Name:	Danskammer Point Generating Station					Permit No NY0006262							
2		Newburgh, NY 12550												
3														
4		Outfall 002X												
5		Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	
6	2002	0 No DMR	28.9	56.56	0	55.7	45.28	52.6	30.4	33.32	29.7	29.1		
7		0 No DMR	60.48	90.72	0	121	120.96	121	60.5	60.48	30.2	51.8		
8	2003	0	30.2	26	33	0	35	0	49.78	No DMR	No DMR	No DMR	68	
9		0	30.2	61	61	0	91	0	120.96	No DMR	No DMR	No DMR	91	
10	2004	39	40	No DMR	No DMR	38	44	No DMR	28	45	30	No DMR	42	
11		60	60	No DMR	No DMR	60	60	No DMR	30	60	30	No DMR	60	
12	2005	65	61											
13		91	93											
14														
15														
16		Outfall 003X												
17		Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	
18	2002	62.02	62.95	114.07	75.31	93.78	116.4	115.06	118.1	118.1	102.3	103	56.2	
19		118.08	118.08	118.08	118.08	118.08	118	118.08	118.1	118.1	118.1	118.1	59	
20	2003	70.9	59	56	59	91	117	118	114	112	108	81	62	
21		118.1	59	59	59	118	118	118	118	118	118	118	118	
22	2004	68	59	59	59	81	118	118	114	114	MISSING	MISSING	59	
23		118	59	61	59	118	118	118	118	118	MISSING	MISSING	59	
24	2005	59	59											
25		59	59											
26														
27														
28		Outfall 004X												
29		Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	
30	2002	135.87	138.85	140.89	136.01	185.46	191.7	184.07	207.8	215.2	176.4	126.2	126.9	
31		144	157.2	151.2	144	216	216	216	216	216	216	144	144	
32	2003	144	144	128.6	0	144	133	186	209	192	195	139	144	
33		144	144	144	0	144	144	216	216	216	216	144	147	
34	2004	144	144	144	141	108	141	199	199	183	147	No DMR	72	

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

Current Issues:

- Recent Key CWA Decisions
- CWA and Climate Change

Recent and Key CWA Cases Water Transfers Rule



Esopus Creek, NY

Recent and Key CWA Cases

National Pollutant Water Transfers Rule

- *Catskill Mountains Chapter of Trout Unlimited Inc. v. EPA -and- States Of New York, Connecticut, Delaware v. EPA*
 - Whether a NPDES permit is required for the transfer of waters of the United States
 - *Chevron* Analysis:
 - Step I: Whether the CWA statutory language and/or legislative history unambiguously resolves the question?
 - Step II: Whether EPA's interpretation of the ambiguity was permissible?
 - **Held: Vacated and Remanded the Rule to EPA**

Recent and Key CWA Cases

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 industrial stormwater point sources subject to § 402 permitting.**

CWA and Climate Change

- Extreme weather events and managing large amounts of stormwater
- How will water quantity changes impact CWA permit requirements?
- How will temperature changes impact CWA permit requirements?



Fact Pattern Application: Elk River Chemical Spill



Is there anything else?

Thank you!

We are happy to answer your questions.



Barkhamsted Reservoir, CT