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# Clean Water Act: Point Sources, Nonpoint Sources & TMDLs

Erin Grisby, Associate

**HUNTON**  
**ANDREWS KURTH**



- **“Point source”** means any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation (CAFO), or vessel or other floating craft from which pollutants are or may be discharged. CWA §1362(14).
- Discrete conveyance such as pipes of man-made ditches
  - Excludes agricultural stormwater discharges and return flows from irrigated agriculture
  - Includes **stormwater runoff** from:
    - Industrial and construction sites;
    - CAFOs; and
    - Certain municipal areas (MS4)

- Makes the **discharge of any pollutant** by any person **unlawful**, except as in compliance with a 402 or 404 permit, and certain other permits, limitations, and standards. 33 USC § 1311(a).
- “**discharge of a pollutant**” means any **addition** of any pollutant to navigable waters **from any point source**. CWA § 502(12), 33 USC § 1362(12).
- “**pollutant**” means dredged spoil, solid waste, incinerator residue, 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. CWA § 1362(6).

## **CWA § 402 – NPDES Permit**

- Obtain NPDES permit before discharging a pollutant to WOTUS
- 5-year permit term
- Individual or general permits
- Either EPA or a State Agency can administer the NPDES Program
- Municipal and Industrial Permit Program
- Pretreatment Program
- Federal Facilities Program
- General Permit Program
- Biosolids (Sludge) Program

## **CWA § 404 – Permits for Dredge/Fill**

- Required to discharge dredge or fill material to WOTUS
- U.S. Army Corps of Engineers issues permit
- EPA generally enforces violations and can veto permit
- General or individual permits
- Exclusions: normal farming activities; maintenance of currently serviceable structures; stock ponds, irrigation/drainage ditches; construction of farm or forest roads
  - Unless activity brings navigable waters into a use not previously subject, where flow or circulation may be impaired or reach reduced

- Established by EPA
- Particular to an industry
- Greatest pollutant reductions economically achievable
- Numerical limitations for specific pollutant reflecting a certain level of control
- No prescription of use of a specific control technology
  
- Set by states
- Designated beneficial use or uses (recreation, water supply, industrial, or other)
- Numerical/narrative statement of maximum concentrations of various pollutants that would not interfere with the designated use
  
- Additional monitoring, special studies, BMPs, or compliance schedules

**“A WQS defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses.”**

- States, territories, and tribes adopt WQSs for all WOTUS. 40 C.F.R. § 131.4.
- EPA has oversight authority
- **“Designated Uses”** - aquatic life protection and propagation; recreation (primary contact and secondary contact); public water supply; and navigation
- **“Water Quality Criteria”** – NPDES permitting authority sets numeric/narrative criteria to protect the Designated Uses
- **Antidegradation policy** – protect existing uses and water quality

- **Whether migration of pollutants through groundwater** is the “functional equivalent” of a direct discharge from a point source requiring a NPDES or 404 permit
- Non-exclusive list of seven factors:
  1. transit **time**,
  2. **distance** traveled,
  3. the **nature of the material** through which the pollutant travels,
  4. the extent to which the pollutant is **diluted** or chemically **changed** as it travels,
  5. the **amount** of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source,
  6. the **manner by or area in** which the pollutant enters the navigable waters, and
  7. the **degree** to which the pollution (at that point) has maintained its specific identity.

- **Defendants:** terminal point theory
  - not “from” their facility; rather, “from” the groundwater
- **Majority:** Rejected terminal point source theory and Ninth Circuit “fairly traceable”; in line with EPA’s prior practices, although the agency had changed its interpretation
- **Justice Kavanaugh, concurring:** Scalia’s plurality in *Rapanos* reaches same conclusion
- **Justices Thomas and Gorsuch, dissenting:** *Rapanos* addressed chain of point sources; favors direct discharge, majority opinion lacks proper guidance
- **Justice Alito, dissenting:** Lack of clear guidance; favored direct discharge; and supplemental state authority to regulate groundwater
- **EPA’s 2019 Interpretive Statement:** “[T]he CWA is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage, regardless of a hydrologic connection between the groundwater and jurisdictional surface water.” 84 Fed. Reg. 16,810.



## Aftermath of *Maui*

- Jan. 2021: EPA guidance - “Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program.
- Sept. 2021: EPA rescinded that document under President Biden’s directive, EO 13990. 86 Fed. Reg. 53,653.
- Courts and permitting authorities applying the factors

# Nonpoint Sources

- No “nonpoint source” definition
- **Causes** - runoff (rain and snowmelt), precipitation, atmospheric deposition, drainage, seepage, or hydrologic modification
- **Sources** are diffuse
  - Residential/agricultural - fertilizer, herbicides, insecticides, bacteria/nutrients from livestock, pet waste or faulty septic systems
  - Urban/energy - oil, grease
  - Natural/construction/forestry: sediment, erosion, channelization
  - Atmospheric deposition
- “Leading remaining cause of water quality problems” - according to EPA’s review of state reports

# Nonpoint Sources

- States makes assessment, develop programs, and phase in programs
- Federal funding under 319(h)
- Coastal Zone Act Reauthorization Amendments
- Effluent Trading Programs
- TMDLs

- States, territories and authorized tribes submit lists of waters that are too polluted or otherwise degraded to meet WQS
- NPDES Permitting Authority develops and implements Total Maximum Daily Load (TMDL)
  - TMDL limits included in NPDES permit
- Goal of a TMDL is attaining or maintaining water quality standards
- A TMDL is a pollution budget
- Permitting authority calculates the maximum amount of a pollutant that can occur in a waterbody and allocates the necessary reductions to one or more pollutant sources
- Where TMDL is for waters of more than one state, the most stringent WQS applies
- EPA EPA must develop a replacement TMDL if is disapprove a state TMDL

$$\text{TMDL} = \Sigma \text{WLA} + \Sigma \text{LA} + \text{MOS}$$

- = Total Maximum Daily Load
- = sum of wasteload allocations = point sources subject to NPDES regulation
- = load allocations = nonpoint sources and natural background
- = margin of safety