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ASIWPCA

Alexandra Dapolito Dunn

Executive Director & General Counsel

&

Erin Flannery

U.S. Government Attorney

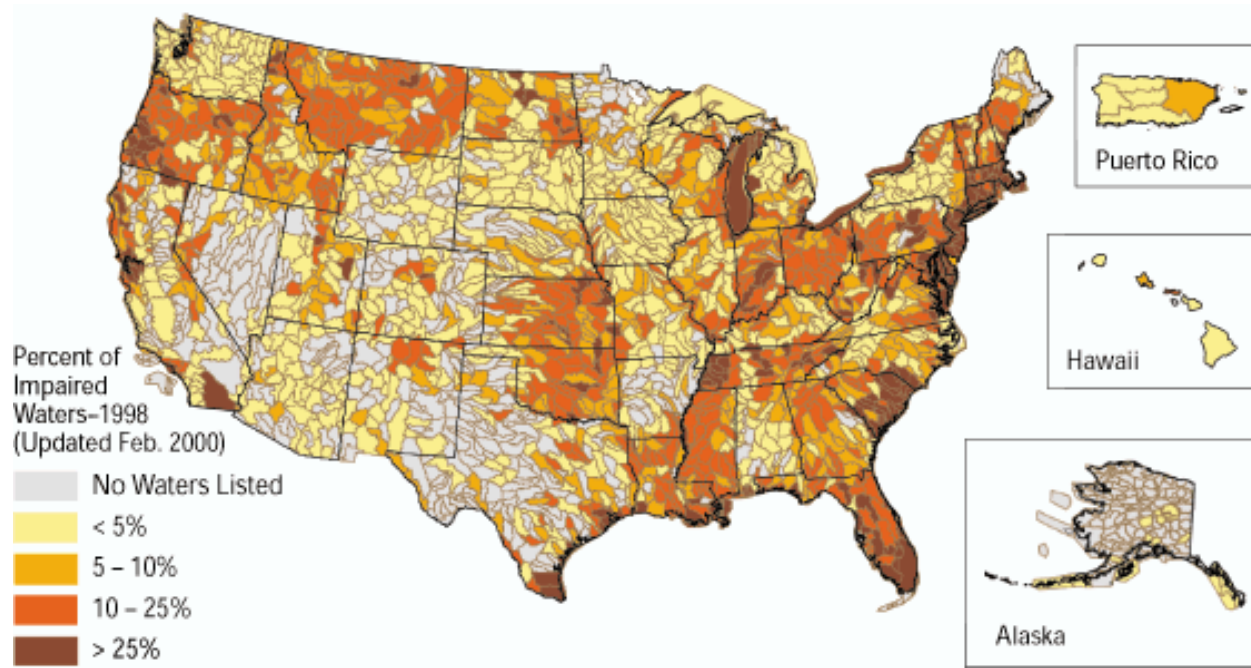
ELI Summer School

Clean Water Act (CWA)

33 U.S.C. §1251 et seq.

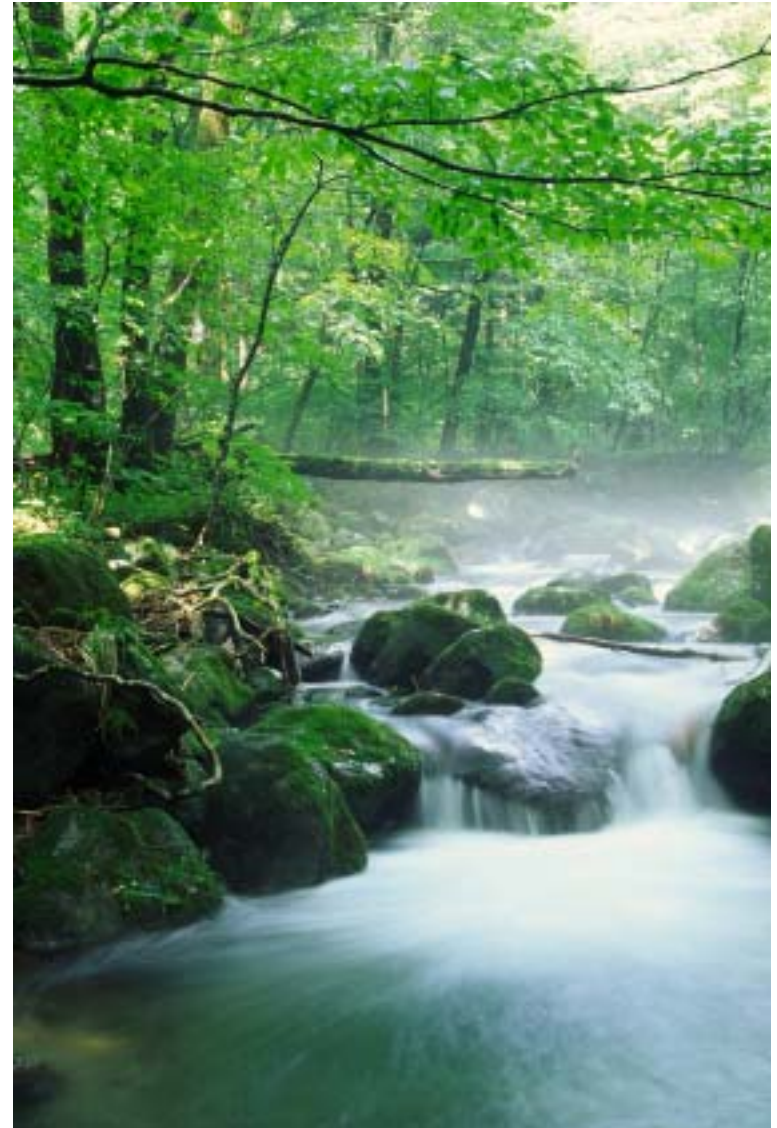
Over half of U.S. waters remain impaired...

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.

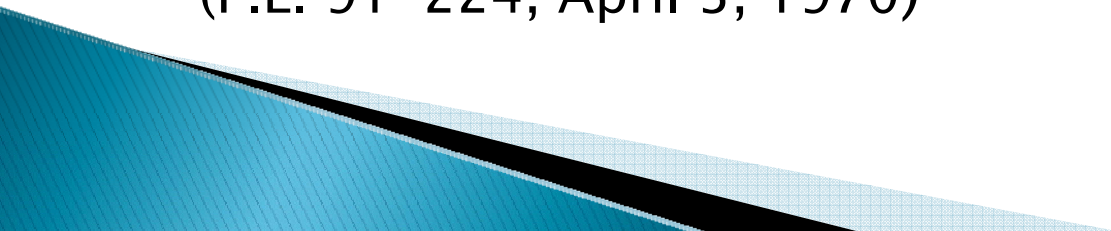


Overview

- ▶ History
- ▶ Substantive Provisions
- ▶ Procedural Features
- ▶ Current Issues



Early History

- 1948 Federal Pollution Control Act
(P.L. 80–845, June 30, 1948)
 - 1956 Water Pollution Control Act
(P.L. 84–660, July 09, 1956)
 - 1961 Federal Water Pollution Control Act Amendments
(P.L. 87–88, July 20 1961)
 - 1965 Water Quality Act
(P.L. 89–234, Oct. 2, 1965)
 - 1966 Clean Water Restoration Act
(P.L. 89–753, May 10, 1966)
 - 1970 Water Quality Improvement Act
(P.L. 91–224, April 3, 1970)
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♥♥ Heart of the 1972 CWA ♥♥

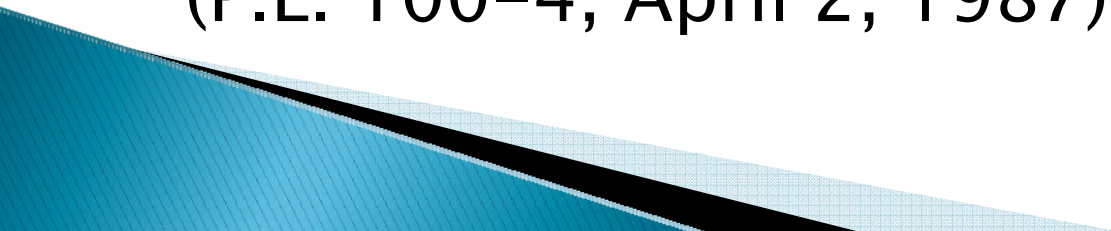
Goal:

--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?

- 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

Major Amendments Since 1972

- 1977 Clean Water Act
(P.L. 95-217, Dec. 27, 1977)
 - 1981 Municipal Wastewater Treatment
Construction Grants Amendments
(P.L. 97-117, Dec. 29, 1981)
 - 1987 Water Quality Act
(P.L. 100-4, April 2, 1987)
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1977 Clean Water Act

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



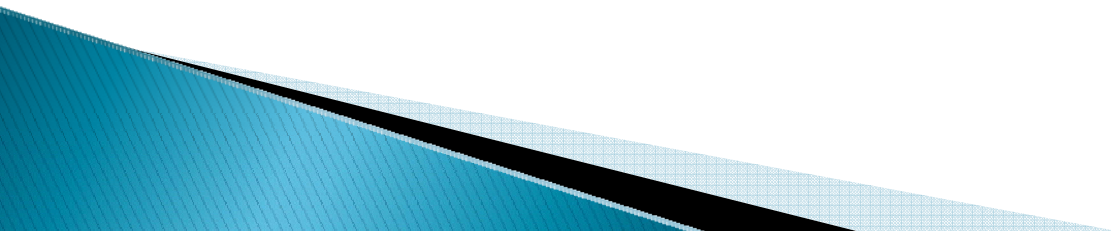
1981 Municipal Wastewater Treatment Construction Grants Amendments

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



Association of State and
Interstate Water Pollution
Control Administrators

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

Core Provisions – The “3 Ps”

Prohibition – CWA § 301

Permits – CWA § 402 & § 404

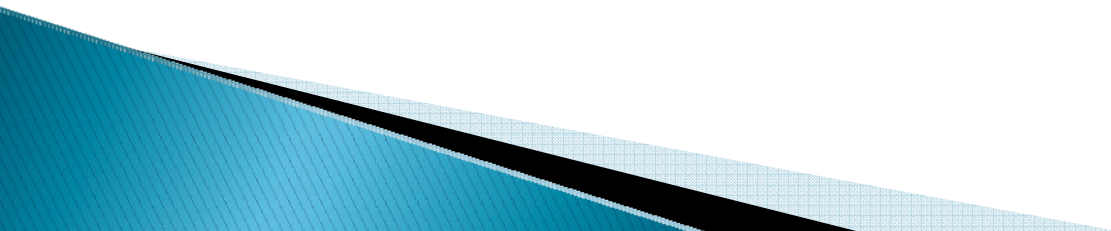
Penalties – CWA § 309

Prohibition:

CWA § 301(a) – “Any discharge of pollutants from a point source to navigable waters is prohibited, except as permitted.”



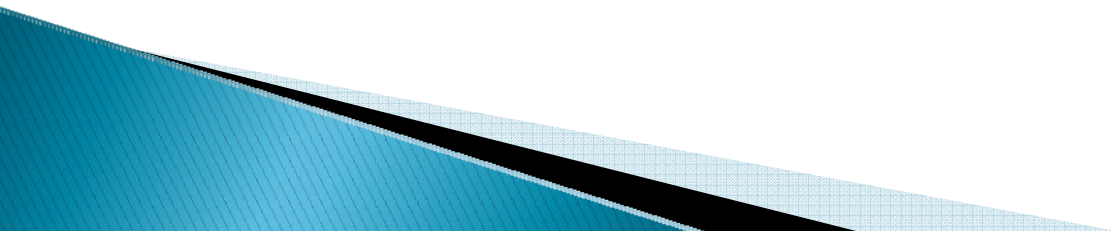
Discharge:

- any *addition* of any pollutant to navigable waters from any point source
 - any addition of any pollutant to the contiguous zone or ocean from any point source other than vessels
- 

Pollutant:

dredged spoil, solid waste, sewage, garbage, sludge, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water

Excluded: sewage from vessels or discharges incidental to operation of Armed Forces vessels



Point Source:

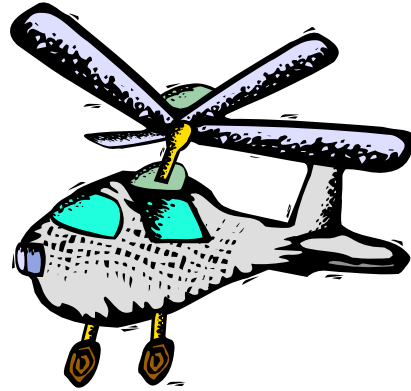
“any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged”

Includes: Vessels, concentrated animal feeding operations (CAFOs)

Excluded: agricultural stormwater discharges, irrigation return flows non-point sources

NONPOINT

Point Sources:



Navigable Waters:

waters of the United States, including the territorial seas

Congress sought broadest possible definition under the Commerce Clause, beyond “traditionally navigable” waters

Permits:

National Pollutant Discharge Elimination System (NPDES), CWA § 402

- Cooperative Federalism

- § Federal–State partnership

- § Federally designed

- § State administered

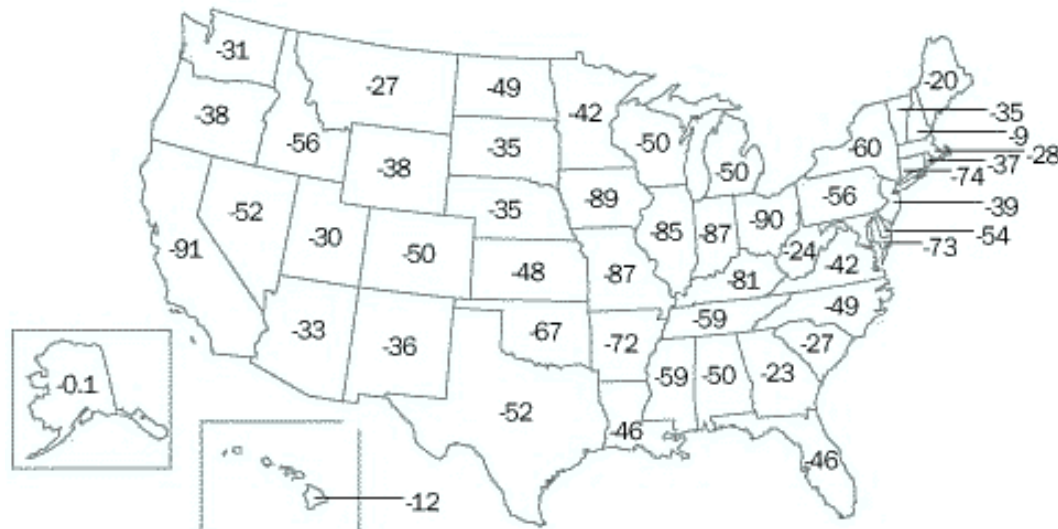
- § Federally supervised

- § 5–year Permits

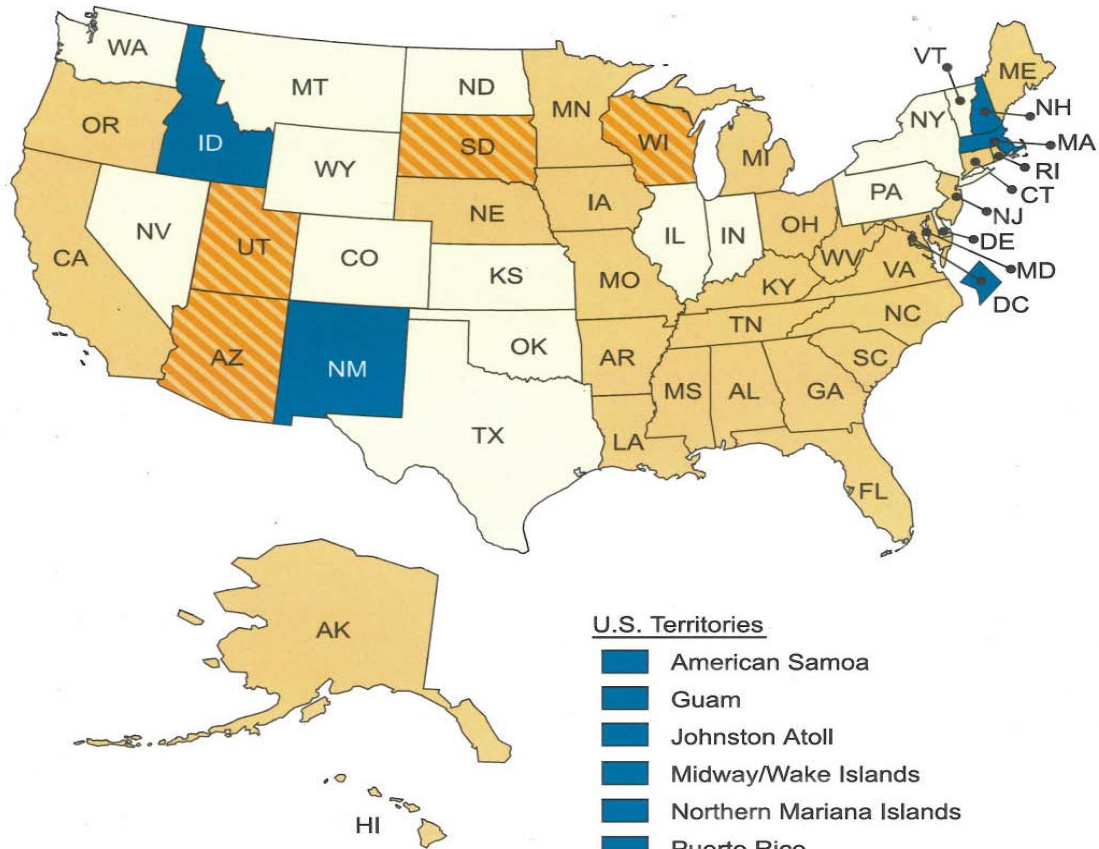
Wetlands Permitting:

CWA § 404 regulates “dredge and fill” activities in the **navigable waters** of the United States, and **waters with a “significant nexus” to navigable waters.**

Percentage of Wetlands Acreage Lost, 1780's-1980's



State NPDES Program Authority



U.S. Territories

- American Samoa
- Guam
- Johnston Atoll
- Midway/Wake Islands
- Northern Mariana Islands
- Puerto Rico
- Virgin Islands

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

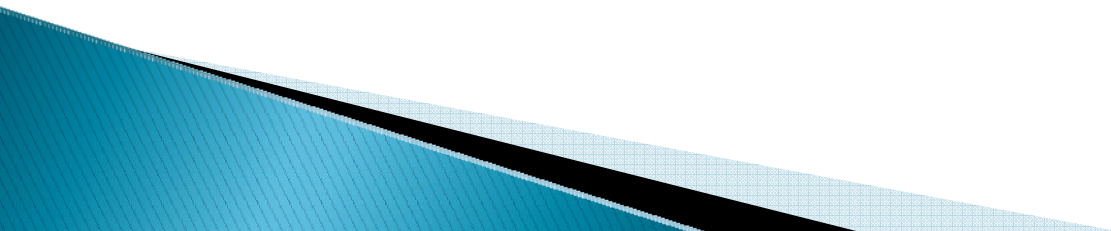
§ Antidegradation policy to maintain high quality waters (socioeconomic arguments can be made to allow degradation)

Restrictions on Discharges: Total Maximum Daily Load Derived Limitations

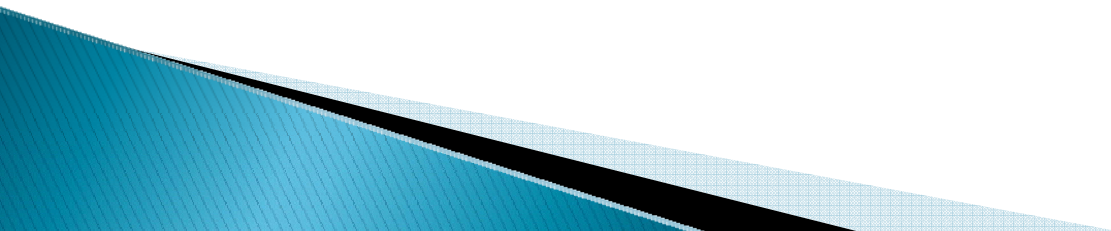
Total Maximum Daily Load (TMDLs)
Derived Limits
§ 303(d)

§ Waste Load Allocations – point sources

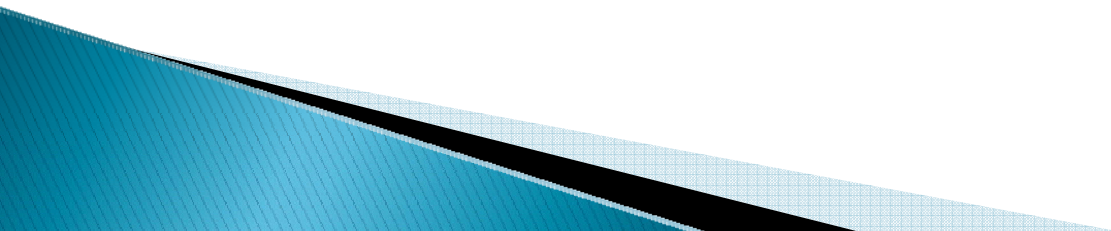
§ Load Allocations – nonpoint sources



Reporting Requirements:

- Noncompliance – Discharge Monitoring Reports (DMRs)
 - Changes in discharges
 - Upset, Bypass
- 

Reopeners:

- ▶ Change in circumstances
 - ▶ 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
- 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
- Mountaintop mining permitting
- Definition of "point source"

Others to watch:

- Stormwater – a new federal rulemaking
- Nonpoint source and nutrient pollution / healthy watersheds
- Funding
- Enforcement

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?

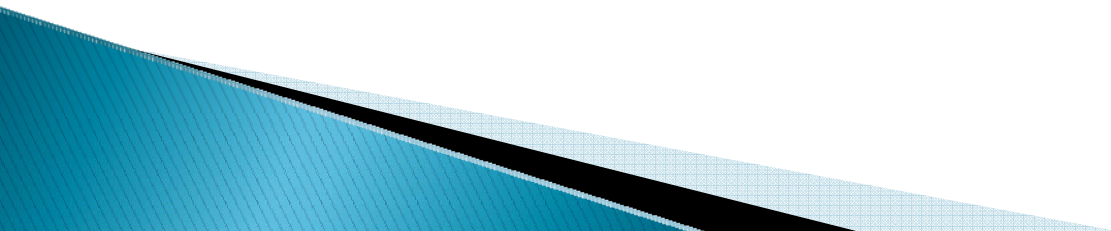
Scalia/Plurality: Water is jurisdictional if relatively permanent, or if seasonal river, or if wetlands have surface connections to such waters.

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.
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Recent and Key CWA Topics

2011 Proposed CWA Jurisdiction Guidance

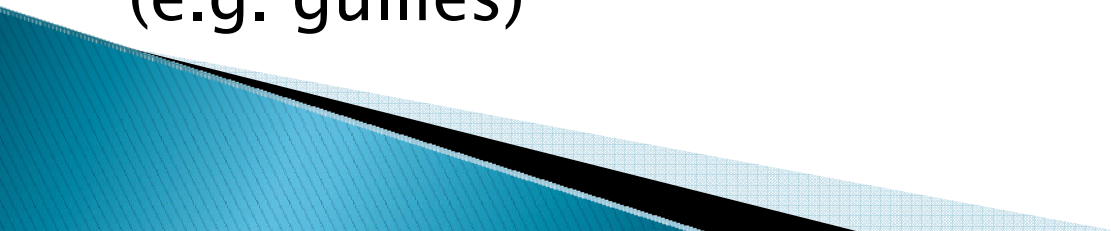
Subject to Significant Nexus Analysis:

- ▶ 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.



Recent and Key CWA Cases

- New interpretations of “point source” and 402 permit requirements
- *NEDC v. Brown*, 617 F.3d 1176 (9th Cir. 2010) – Forest Roads discharges subject to industrial stormwater Phase I NPDES permitting; EPA’s silvicultural rule overbroad.
- *NPCC v. U.S. EPA*, 635 F.3d 738 (5th Cir. 2011) – Vacates portions of CAFO rule that:
 - impose duty to apply for NPDES permit for potential discharges;
 - Establish liability for failure to apply for permit.