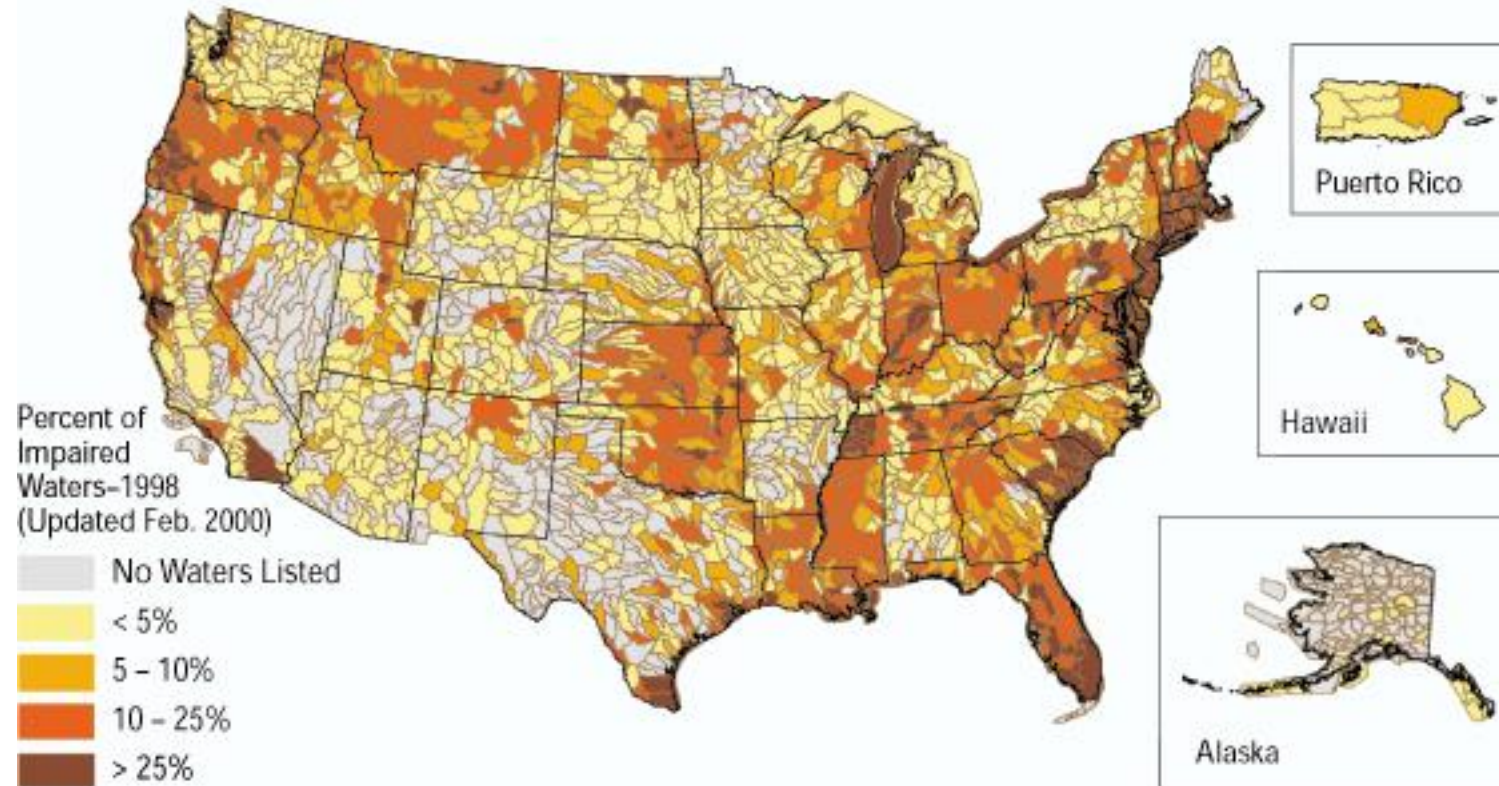


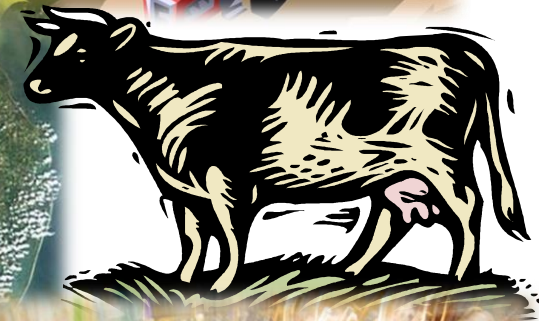
# **Basics of the CWA: Part 1**

**JOANNA CITRON DAY, US DEPARTMENT OF JUSTICE**

# The CWA is 44 Years Old....And yet, many waters do not meet water quality goals.



# Major Sources of Water Pollution



# We Connect with Water

## March 1-8, 2018

GALLUP POLL

Americans are more concerned about water pollution than they have been since 2001.

- 82% worry about pollution of drinking water
- 83% worry about pollution of rivers, lakes, and reservoirs
- *News.gallup.com—In depth topic Environment, 2018*



# What Will Be Covered

- Clean Water Act History, Goal and Framework
- Clean Water Act Substantive Provisions
  - Prohibition elements
  - Water Quality
  - Permitting and Restrictions on Discharges
  - Enforcement

# Brief History of the Clean Water Act

- **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: Administered by U.S. EPA's Office of Water in partnership with states
  - Cooperative federalism** approach



# Goal of the CWA

--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

# CWA Framework: 33 U.S.C. § 1251 et. seq.

- **Water Quality Standards**— Established for all contaminants in surface waters
- **NPDES Program**
  - Regulates pollutants discharges into waters of the United States from point sources
  - Makes it illegal to discharge without a NPDES permit
- **Pollution Control Program** – implements pollution control programs (e.g. setting wastewater standards for industry)
- **Construction Grants Program**—funded construction of sewage treatment plants
- **Non-point Sources Programs** – recognized need to address



# How Is the CWA Framework Implemented?

## EPA/Authorized 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 (NPDES program)
- Fund infrastructure
- Programs to manage non-point sources

# Examples of Key CWA Amendments

- **1977:** -- focus on toxics, rewrote deadlines
- **1981:** -- municipal grant program overhaul, treatment plants
- **1987:**
  - Municipal Grants – Municipal Loans (SRF)
  - Strengthened enforcement and penalty authorities
  - Toxic control strategies
  - Non-Point Source Program
  - Stormwater Program
- **1990 – 2014:** Additional Special Purpose Amendments

# CWA § 301 - 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)*

# CWA § 301 Prohibition Elements

- Discharge (act)
- Of a Pollutant (or combination of pollutants)
- 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).

*Additional detail in 40 CFR Part 122*

# Discharge

- Any addition of any pollutant or combination of pollutants to waters of the United States from any point source



# Of a Pollutant

- “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

- “An individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof. “

# From a Point Source

- “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





# Into a Water of the United States

- 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.

# Point Sources?



# CWA “Point Source”

- Any discernible 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, or vessel or other floating craft
- From which pollutants are or *may be* discharged

# CWA “Non-Point Source”

- Any source of water pollution that does not meet the legal definition of “point source in section 502(14) of the Clean Water Act

# CWA § 303: Water Quality Standards

## **Procedure:**

- States and Tribes must adopt WQS
- EPA approves or disapproves
- State/Tribal WQS take effect only after EPA approval
- EPA can issue WQS if State or Tribe fails to

# Water Quality Assessment and Reporting

- State Monitoring Network
- Biennial Report ( CWA 305(b)/303(d))
  - Assemble all available data
  - Assessment Methodology
  - 303(d) list of Impaired Waters
  - Prioritization--TMDLS

# Restrictions on Discharges: *Water Quality-Based Limitations*

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

Water Quality Standards, § 303

- **Designated/Existing uses** for a waterbody (fishable, swimmable, others)
- **Narrative and Numeric Criteria** to protect designated uses
- **Antidegradation** policy to maintain high quality waters ( Tiers 1, 2, 2.5, 3)



# Restrictions on Discharges: *Technology-Based Standards*

**CWA § 301 & 304:** criteria stating what the effluent limitation regulations "shall" contain, including mandatory technology-based requirements depending on industrial category

Achieve a specified outcome or pollutant removal OR

- POTWs have specified technology required
- CWA § 304(m) requires an ELG Plan by EPA biennially (updated 2018).



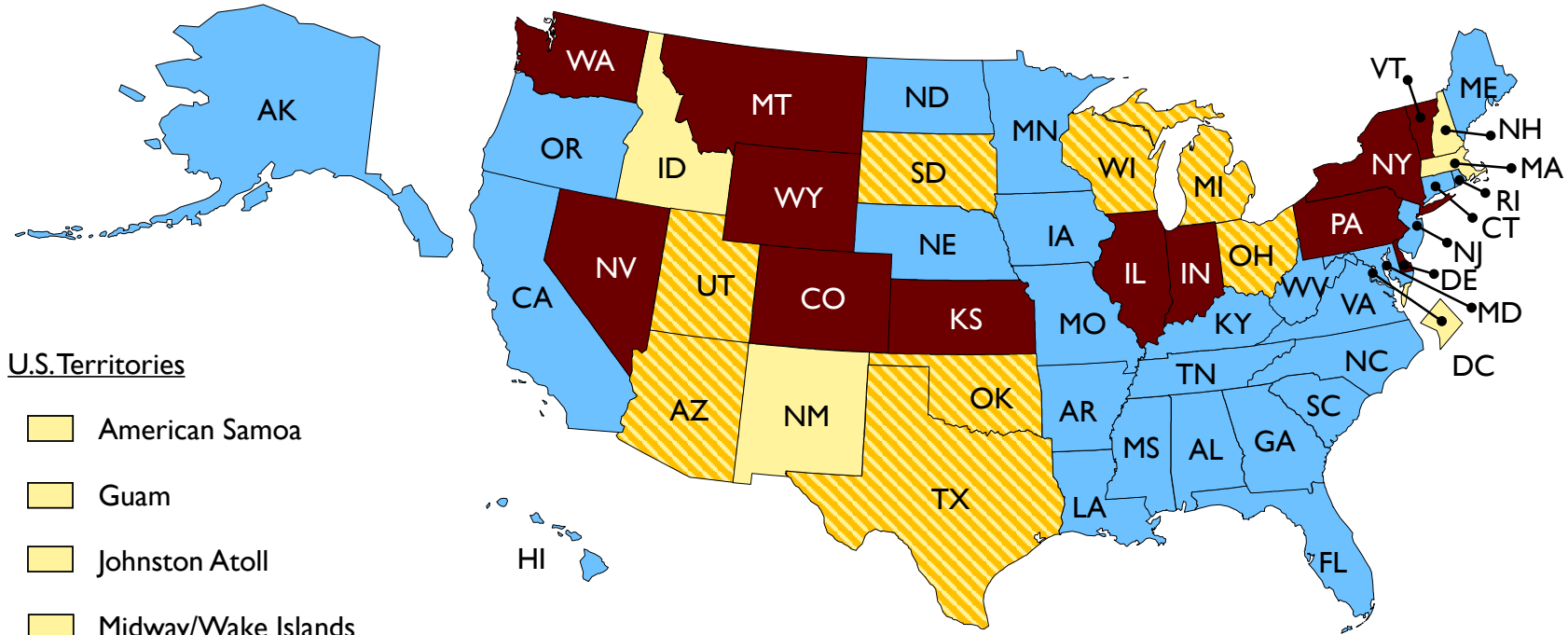
# CWA – Permitting

- **CWA § 402: NPDES Permitting**
  - “Point sources” (any discernable, confined and discrete conveyance) of “pollutants” to a water body must obtain 402 permit
  - 48 States have authorized NPDES permit programs

**CWA § 404: Permits for dredge and fill material**

# NPDES Program Authorizations





(as of July 2015)



## 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
-  Unauthorized

# Clean Water Act Section 402 Permits

*National Pollutant Discharge Elimination System (NPDES)*

- **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.
  - May revoke program approval for cause.
  - Potential for overfiling (more on that later).

# Narrative and Numeric Criteria

## Narrative:

- “Surface waters shall be virtually free from floating non-petroleum oils of vegetable or animal origin, as well as petroleum-derived oils”

## Numeric:

- “The ambient water quality criterion for cadmium is recommended to be identical to the existing drinking water standard, which is 10 µg/L (micrograms per liter)”

# 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

# CWA Enforcement – Federal and State

- **CWA § 308: Monitoring, Information Gathering**
- **CWA § 309: Enforcement**
  - Injunctive relief
  - Civil Penalties

# Permit Shield Defense – CWA 402(k)

- “Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of [state and federal enforcement and citizen suits]....,except any standard imposed...for a toxic pollutant injurious to human health.”

# Federal vs. State Enforcement

## **Overfiling - CWA § 309(a)**

- Federal enforcement not barred by state enforcement action
- Intended to promote consistent enforcement of federal regulations
- Only when an imminent hazard, states fails to take timely, appropriate action, or state has requested EPA take the lead

## **Underfiling**

- State has different remedy from EPA
- Seeking more stringent damages



# Civil Penalties

## **Civil penalties adjusted annually, beginning in 2015**

- Per day, per violation
- 2018 Under CWA 319 (d):
  - \$53,484 (increased from \$52,414 in 2017)
  - For violations occurring after 11/2/2015

**For Oil Spills, CWA § 311(b)(3) and § 311(j) for SPCC)**

**For Settlement -- EPA Penalty Policies**

# CWA Enforcement – Citizen Suits

## **CWA § 505 - Express Statutory Cause Of Action**

- Against any “person” in violation
- Against EPA for non-discretionary duty

## **Limits on CWA Citizen Suits:**

- Must provide 60 days notice of intent (Federal, State, violator)
- Diligent Prosecution Bar (Federal or State)
  - *But* can intervene
- Standing Requirement (person(s) adversely affected)
- Settlement/Penalties/Attorneys’ Fees