

ELI Summer School

CLEAN WATER ACT

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CLEAN WATER ACT

The Act: An Overview of Central Provisions

Recent Developments: Cases

Requirements Applicable to POTWs

OVERVIEW

- History
- Substantive Provisions
- Procedural Features

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- **History**
- Substantive Provisions
- Procedural Features

Federal Water **P**ollution Control Act
Amendments of 1972, P.L. 92-500
(Oct. 18, 1972): Major Features

1. Federal Permit Programs
("NPDES" & "404" or "Wetlands")
2. Federal-State Partnership
3. Technology-based standards
4. Water quality standards
5. Massive grants program for POTWs

History - Major Amendments Since 1972:

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

Clean Water Act of 1977, P.L. 95-217 (Dec. 27, 1977).

1. Extensive Amendments
2. Toxics: NRDC v. Train Settlement Codified
3. Rewrote deadlines
4. Gave statute its popular name

Municipal Wastewater Treatment Construction Grant Amendments of 1981, P.L. 97-117 (Dec. 29, 1981).

1. Extensive Amendments
2. Municipal grants program overhaul
3. More money, more uses

Water Quality Act of 1987, P.L. 100-4 (Feb. 4, 1987).

1. Extensive Amendments
2. Strengthened Enforcement and Penalties
3. Toxic Control Strategies
4. Non-Point source programs

History: 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

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P.L. 98-67 (1983): The Virgin Islands Rum Act

History: Trends

- Less EPA Discretion
- Missed Deadlines, Court Orders & Consent Decrees
- Increasing Focus on Toxics
- Revision of Municipal Standards
- Increasing Penalties

OVERVIEW

- History
- **Substantive Provisions**
- Procedural Features

Core Provisions: The 3 P's

Prohibition - § 301

Permits - §§ 402, 404

Penalties - § 309

3 P's: Prohibition: § 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 a vessel of the Armed Forces

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

Navigable waters:

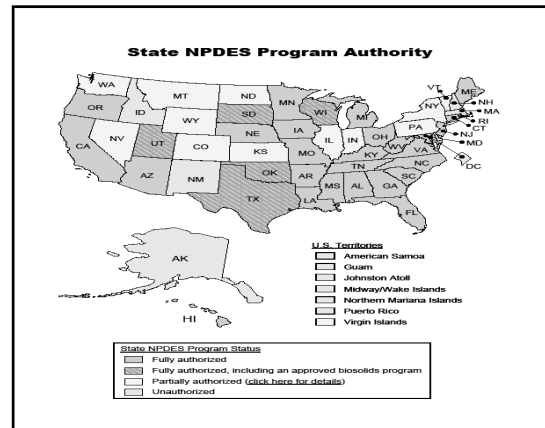
waters of the United States, including the territorial seas

Congress sought broadest possible definition under the Commerce Clause, beyond "traditionally navigable" waters.

3 P's: Permits

National Pollutant Discharge Elimination System (NPDES) - § 402

- Federal-State “Partnership”
- Federally designed
- State administered, Federally supervised
- 5-year Permits
- All but a few “States” have NPDES Programs



4 R's of NPDES Permits

- **Restrictions on discharges**
- **Reporting requirements**
- **Reopeners**
- **Revocability**

4 R's: Restrictions on Discharges

Technology-based Effluent Limitations

Effluent Limitation Guidelines (ELG's), § 304(b)

New Source Performance Standards, § 306

Secondary Treatment Standards

Pretreatment Standards for Indirect Discharges,
§ 307(b)

Water Quality-based limitations

4 R's: Restrictions on Discharges

Technology-based Effluent Limitations

Best Practicable Technology (BPT)

Best Available Technology (BAT)

Best Conventional Technology (BCT)

Best Available Control Technology
("BACT")

Secondary Treatment for Municipals

4 R's: Restrictions on Discharges

Water Quality-based Restrictions

Any more stringent limitation, § 301(b)(1)(C)

Water quality standards, § 303

- Designated uses
- Criteria
- Nondegradation

Total maximum Daily Loads (TMDLs), § 303(d)

- Waste Load Allocations – point sources
- Load Allocations – nonpoint sources

4 R's: Reporting Requirements

Noncompliance – DMR's

Changes in discharges

Upsets, By-Passes

4 R's: Reopeners

Change in circumstances

Change in discharge

Change in applicable toxic standards

4 R's: Revocability

Submission of false or misleading information

Violation of permit

3 P's: Penalties

Administrative Penalties, § 309(g)

- Class I: \$11,000/\$32,500
- Class II: \$11,000/\$157,500

Civil Penalties, § 309(d)

- Federal district courts
- \$32,500 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.

69 Fed. Reg. 7121 (Feb. 13, 2004).

3 P's: Criminal Penalties

Negligent violations

\$2,500 to \$25,000 fine
1-year imprisonment

Knowing violations

\$5,000 to \$50,000 fine
3 years

Knowing endangerment

\$250,000/\$1,000,000 fine
15 years

Other Programs

State Block Grant Program

Areawide Planning and Continuing
Planning Process, §§ 208, 303(e)

Oil and hazardous substance spills, § 311

State certifications, §401

Ocean discharge criteria, §403

Dredge & Fill Permit Program, § 404

OVERVIEW

- History
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- **Procedural Features**

Procedural Features

- Preclusive judicial review, § 509(b)
- Federal-state relationship
- Savings Clause, § 510
- Citizen Suits, § 505

Clean Water Act Additional Information

Statute: 33 U.S.C. § 1251 *et. seq.*

EPA Regulations: 40 C.F.R. Parts 104-140
401-503

EPA: Introduction to the Clean Water Act
<http://www.epa.gov/owow/watershed/wacademy/webcasts/register.html>

Recent CWA Cases: Themes

- **What is a Navigable Water?**
- The Saga of 316(b)
- CWA vs. ESA
- Section 402 vs. Section 404

United States v. Rapanos, 126 S.Ct. 2208 (2006)

- **Background** – case involved two parcels of land containing wetlands that are “adjacent” to tributary of navigable water.
 - Corps’ statutory jurisdiction extends to “navigable waters,” defined as “waters of the United States”.

United States v. Rapanos (cont’d)

- **Background (cont’d)**
 - Corps interprets its jurisdiction to include:
 - Navigable water bodies;
 - Tributaries to navigable water bodies;
and
 - Wetlands adjacent to both.

United States v. Rapanos (cont'd)

▪ Background (cont'd)

- *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985)
 - Corps has jurisdiction over wetlands adjacent to navigable water bodies because of difficulty in determining where water ends and land begins.
 - Court reserved issue of Corps' jurisdiction over wetlands adjacent to tributaries of navigable waters.

United States v. Rapanos (cont'd)

▪ Background (cont'd)

- *Solid Waste Agency of Northern Cook County v. U. S. Army Corps of Engineers*, 531 U.S. 159 (2001).
 - Isolated, abandoned gravel pit occasionally providing shelter to migratory birds is not "water of the United States".
 - Pit had no "significant nexus" to navigable waters.

United States v. Rapanos (cont'd)

▪ The Decision: 4-1-4

- 5-4 vote to remand case.
- Plurality Opinion (Scalia) – four votes
 - Remand to apply proper understanding of "waters of the United States".
- Concurring Opinion (Kennedy)
 - Remand to apply significant nexus test from SWANCC.
- Dissenting Opinion (Stevens) – four votes
 - Defer to Corps on Chevron grounds.

United States v. Rapanos (cont'd)

▪ The Plurality Opinion

- Scalia, Roberts, Thomas, Alito.
- Notes *Riverside Bayview* left open status of wetlands in tributaries to navigable waters.
- Evaluates whether "waters of the United States" includes intermittently flowing tributaries.
 - Uses Webster's Dictionary to define "waters".

United States v. Rapanos (cont'd)

▪ The Plurality Opinion (cont'd)

- Corps' jurisdiction over tributary and adjacent wetlands depends on regular water flow.
- Establishing that tributary empties into navigable water (when flow is present) is not enough.

United States v. Rapanos (cont'd)

▪ Justice Kennedy's Concurrence

- Focuses on whether there is "substantial nexus" between wetland and navigable water.
- Approach comes from court's decision in SWANCC.
- J. Kennedy would have Corps evaluate effect of wetland on water quality in navigable water and base jurisdictional decision on existence of such an effect.

The Aftermath of *Rapanos*

- As expected, the courts have struggled with how to apply the result of the decision.
- Several Courts of Appeal have already addressed the issue, including:
 - The First Circuit;
 - The Seventh Circuit;
 - The Ninth Circuit; and
 - The Eleventh Circuit.

Themes for CWA Cases

- What is a Navigable Water?
- **The Saga of 316(b)**
- CWA vs. ESA
- Section 402 vs. Section 404

The Saga of 316(b)

- Statute requires EPA to ensure that cooling water intake structures reflect “the best technology available” for minimizing adverse environmental impacts (“BTA”).
- EPA Rules and Practice
 - EPA’s first set of regulations was invalidated in 1970s due to procedural deficiencies.
 - Agency administered the program on a case by case basis for many years.

The Saga of 316(b) (cont’d)

- A consent decree with Hudson Riverkeeper required EPA to issue rules in three phases.
- Phase I: 2001- new source intake structures
- Most of this rule survived judicial review.
 - But the Second Circuit rejected the option to do restoration work in lieu of fully complying with the technical standards.

The Saga of 316(b) (cont’d)

- Then Phase II: 2004- large, existing power plants
 - EPA quantified the reductions in mortality BTA achieves.
 - Rules then set ranges of mortality reductions that facilities must achieve, based on BTA.
 - Rules again included the restoration option.
 - EPA used and included a cost-benefit test.

The Saga of 316(b) (cont’d)

- *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007).
 - Court rejected EPA’s definition of BTA.
 - EPA may consider costs in only two ways when determining BTA:
 - Whether the industry can be “reasonably” bear it; and
 - In comparison of the costs of equivalent technologies that achieve BTA performance.
 - EPA cannot compare the cost of BTA to the benefits achieved.

The Saga of 316(b): Supreme Court

- *Entergy Corp. v. Riverkeeper, Inc.*, No. 07-558 (Apr. 1, 2009).
- Held (6-3): EPA permissibly relied upon cost-benefit analysis.
- Applied *Chevron* deference.
- EPA's interpretation is reasonable.
- Reversed and remanded to Second Circuit.

Themes for CWA Cases

- What is a Navigable Water?
- The Saga of 316(b)

- **CWA vs. ESA**

- Section 402 vs. Section 404

- Clean Water Act v. Endangered Species Act
- *National Ass'n of Home Bldrs. v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007).

- **Issue:** In approving Arizona's NPDES program, must EPA consider effects on endangered species.
- Ninth Circuit ruled that EPA must do so and remanded the approval to EPA.
- D.C. and Fifth Circuits had both ruled to the contrary.

- *National Ass'n of Home Bldrs. v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007).

- Supreme Court reversed the Ninth Circuit.
- Court deferred to FWS regulation: ESA § 7 applies to only discretionary federal actions.
- EPA **MUST** approve state programs that meet the nine factors listed in CWA § 402(b).

Themes for CWA Cases

- What is a Navigable Water?
- The Saga of 316(b)
- CWA vs. ESA

- **Section 402 vs. Section 404**

Section 402 vs. Section 404

- *Coeur Alaska, Inc. v. S.E. Alaska Cons. Council, Inc.*, No. 07-984 (June 22, 2009).
 - Corps of Engineers issued § 404 permit for a gold mine to discharge slurry into a lake.
 - Reasoned that slurry was "fill material."
 - Env't'l groups sued: requires a 402 permit, EPA standards.
 - Ninth Circuit agreed and directed the district court to invalidate the permit.

*Coeur Alaska, Inc. v. S.E. Alaska
Cons. Council, Inc.*

- Supreme Court reversed (6-3).
- Held: Slurry fits within rules' definition of "fill material" – changes bottom elevation.
- EPA memo resolving § 402/§ 404 overlap is entitled to deference.
- EPA standards for new sources do not apply; § 404 permit is lawful.

Conclusion

- Consensus emerging regarding effect of *Rapanos* decision.
 - Recent guidance from EPA and USACE essentially adopts the First Circuit's approach in *United States v. Johnson*.
 - Clean Water Act Restoration Act.
- EPA still has a lot of work to do on 316(b).
- After more than 30 years since passage of the Clean Water Act, EPA and the courts are still struggling to understand its requirements.

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