

The Federal Water Pollution Control Act (Clean Water Act) Basics

Environmental Law Institute Western Boot Camp

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Cuyahoga River Catches Fire 1969

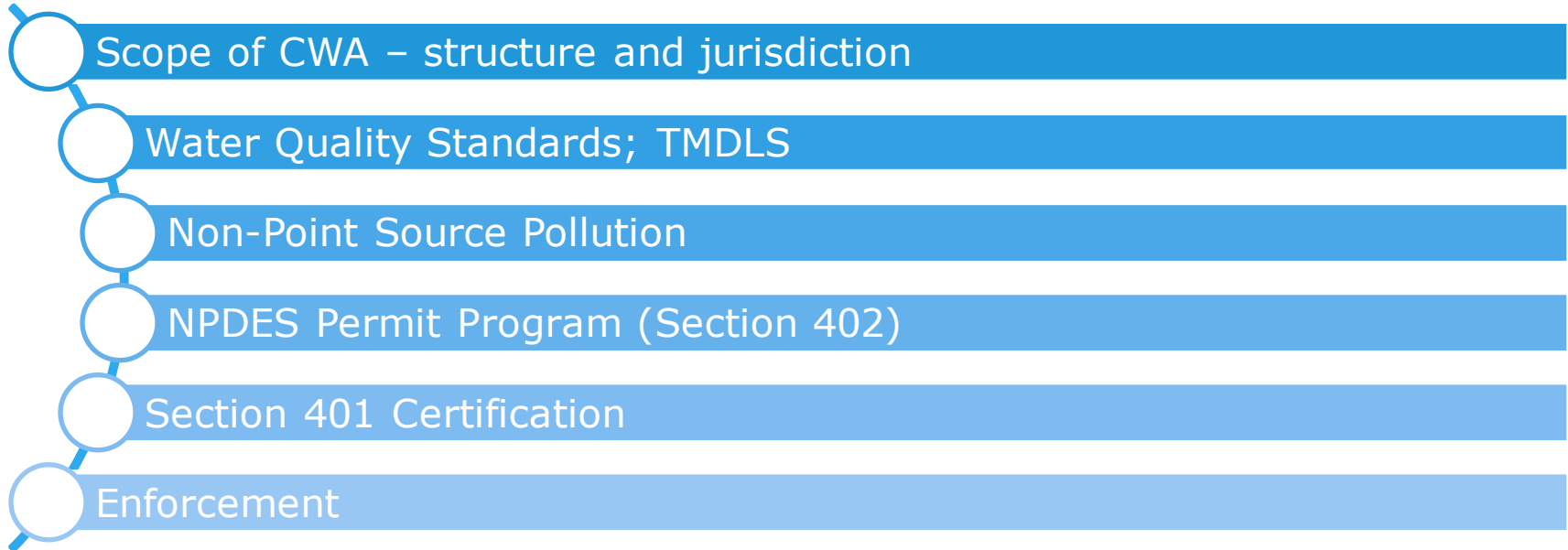


Goal of CWA (enacted 1972)

Ambitious goal to make the nation's waters fishable, swimmable, and to eliminate the of pollutants into water.

Supposed to be fishable/swimmable by 1983 and eliminate discharge of pollutants by 1985.

Roadmap for Today's Discussion



Central Prohibition of CWA

Except in compliance with a permit, the discharge of any pollutant by any person into navigable waters shall be unlawful



Jurisdictional Requirements

Person (incl. corp., state, muni but not Tribes)

Discharge of a

Pollutant from a

Point Source into

Navigable Waters/Waters of the U.S. (WOTUS)

“Discharge”

- Addition of any pollutant
- Case law focuses on whether the activity in question introduces a pollutant from outside the water body
 - (L.A. Flood Control District v. NRDC, 568 U.S. 78 (2013))

County of Maui v. Hawaii Wildlife Fund, 140 S. Ct. 1462 (2020)

Maui's wastewater treatment plant disposed into injection wells located ½ mile from the ocean. Tracer studies showed that some of the treated water traveled to the ocean.

Court remanded to determine whether discharge is the "functional equivalent" of a direct discharge.

- Seven factor test:
- "Time and distance will be the most important factors"
- Other factors to consider include: dilution with travel; amount of pollutant that enters water; nature of pollutant; manner by or area in which pollutant enters navigable waters; and degree to which pollution maintains its specific identity.

“Pollutant”

Conventional Pollutants

- Biochemical Oxygen Demand (BOD); suspended solids; PH; Thermal

Unconventional

- all other pollutants

Toxics

“Pollutants”



Sewage



Garbage



Heat



Invasive Species

What is a Point Source?

- Discernable, discreet conveyance that discharge pollutants
- Easiest to think about is a pipe - but not always



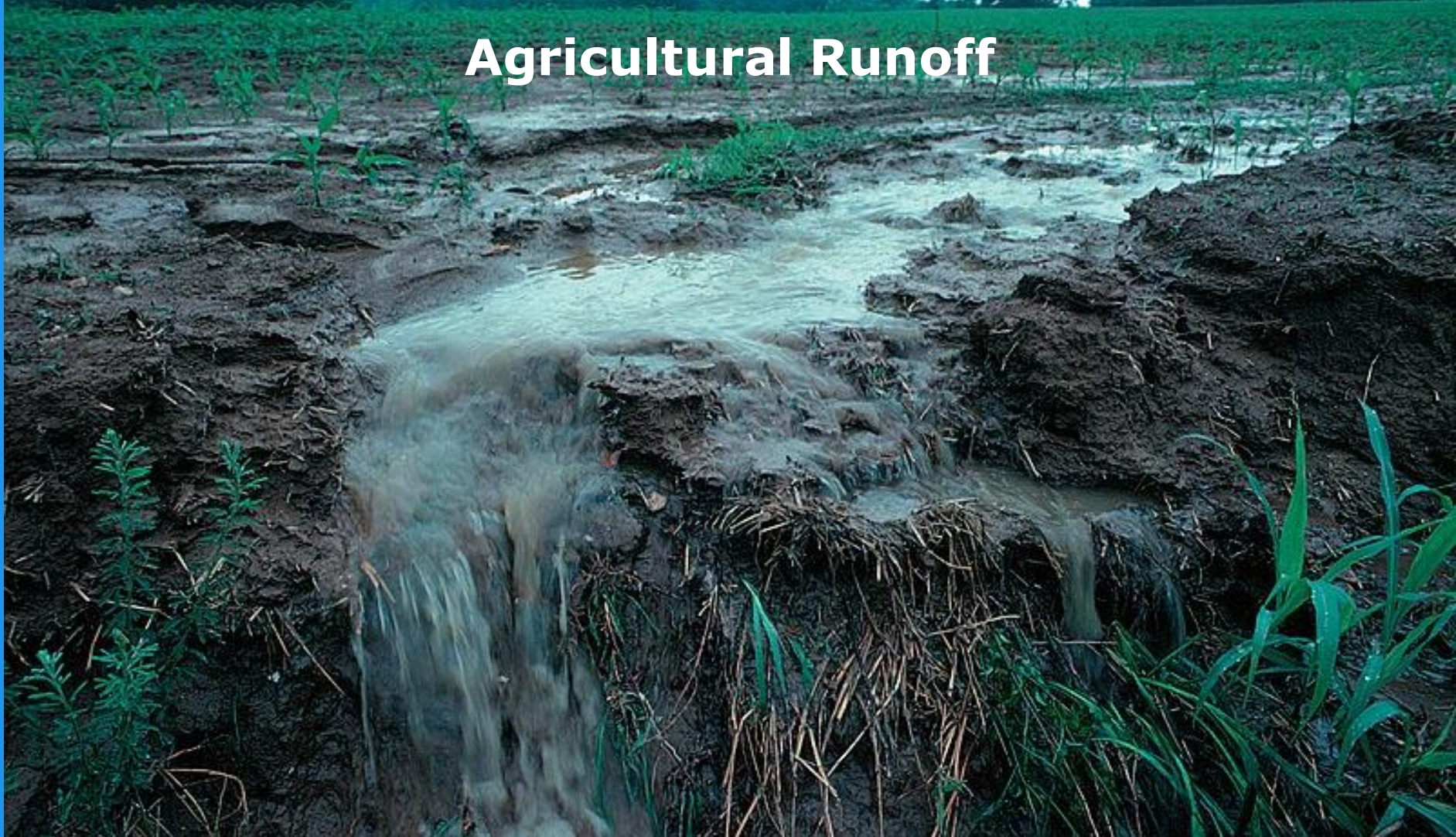
Point Sources



Stormwater



Agricultural Runoff



“Navigable Waters”

- Clean Water Act establishes federal jurisdiction over “navigable waters” which is defined as “waters of the U.S.” (WOTUS) [A lot more on this later]
- Does not include groundwater but groundwater can convey to a WOTUS

The NPDES Permit Program

CWA Section 402(a)



General Provisions

Maximum permit term -- five years (can be administratively extended)

Monitoring and reporting requirements

- Discharge monitoring requirements (DMRs)



Types of Permits

Individual permits

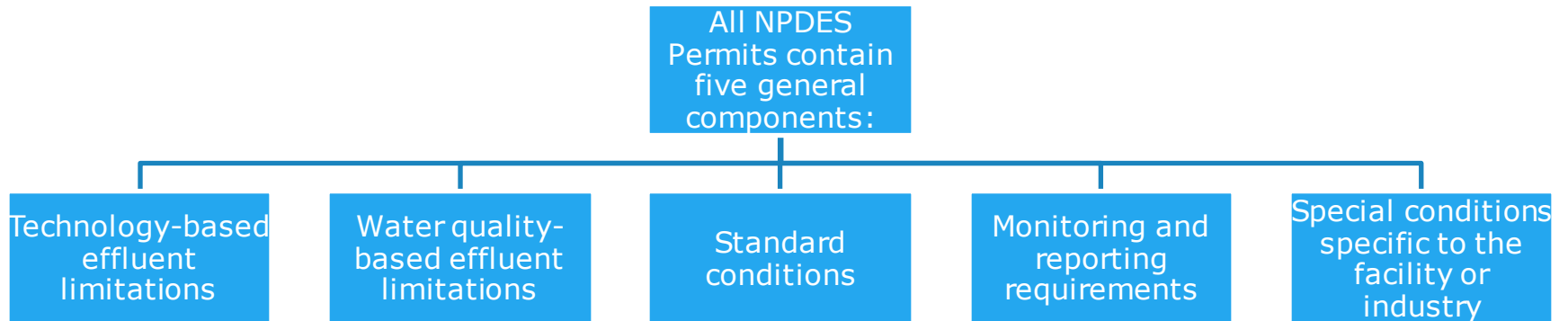
General Permits



Permit as a Shield (Section 402(k))

Protective against suit if permit terms are complied with

NPDES Permit Limitations and Conditions



Federal/State Checks & Balances

Federally Issued Permits

- State certifies compliance with applicable requirements of the CWA, including water quality standards

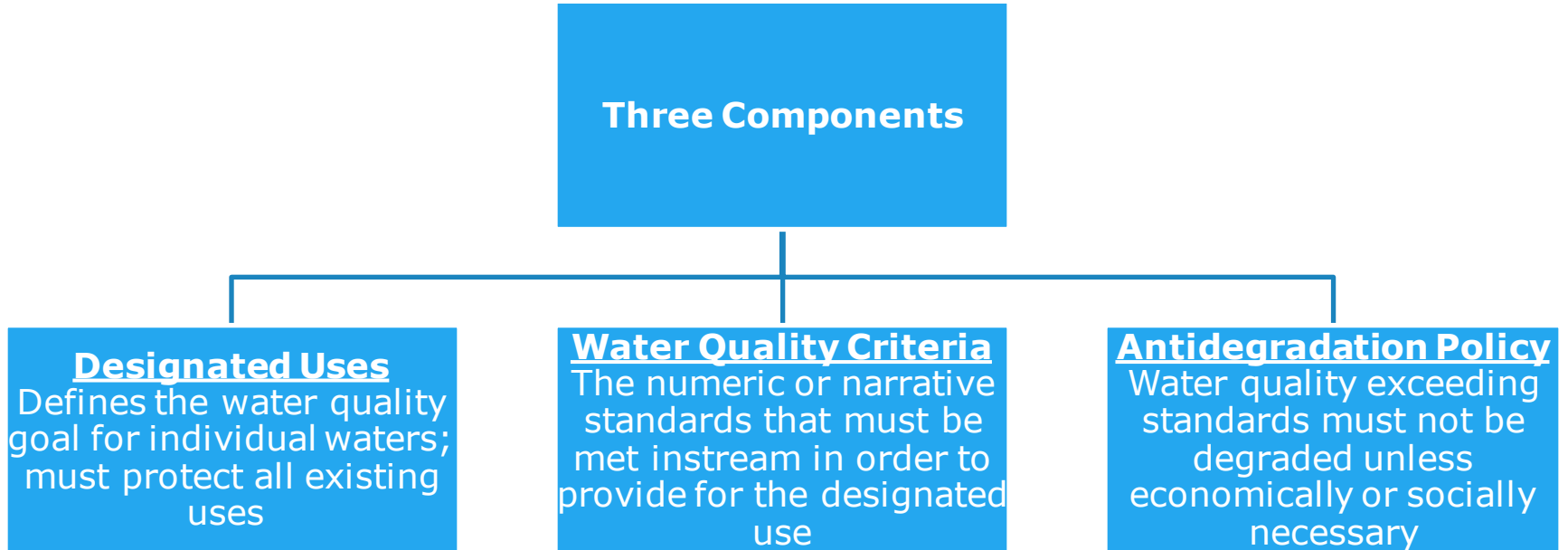
State Issued Permits

- EPA may veto state proposed permits if they fail to apply or ensure compliance with the requirements of the CWA

Water Quality Standards (Section 303)

- States set water quality standards, but they are only effective for CWA purposes once approved by EPA
- EPA sets standards only as last resort when states fail to do so

Water Quality Standards



Total Maximum Daily Loads (“TMDLs”)



States assess their waters every two years for compliance with WQS.



Waters not meeting standards must be listed under Section 303(d) as “impaired.”



States prepare TMDL = the maximum amount of pollutants the water body can receive without violating the state water quality standard.



TMDLs require a state to identify both point & nonpoint sources of pollution.



Objective: Develop a “pollution budget” - divide pollution among existing sources of pollution and reduce total loads.

TMDLs Require that All Sources of Pollution be Evaluated



Regulation of Non-Point Sources

- The most significant existing contributor to water quality problems is non-point source pollution
- States develop plans that include best management practices
- No enforcement by EPA, states, or citizens
- TMDLs are perhaps the most useful tool in encouraging the states to address non-point sources, but even these do not require non-point sources controls

Enforcement

State regulatory agencies

Federal regulatory agencies

Citizen suits

Regulatory enforcement can be administrative or judicial; civil or criminal

Enforcement Begins with Investigation

Information Gathering Authority (Section 308)

Enter premises for inspection

Obtain records and request information

Agency will create an inspection report



Criminal investigation can begin with a search warrant

Informal Enforcement

- Inspection reports/additional information requests
- Warning letter/Opportunity to confer
 - Not enforceable but provides notice of a violation
 - Provides opportunity to comply and potentially avoid formal enforcement

Statutory Penalty Factors (Section 309(g))

- In assessing a penalty, EPA or court must consider:
 - Nature, circumstances, extent, and gravity of the violations
 - Prior history of violations
 - Culpability
 - Economic benefit
 - Ability to pay
 - Other matters as justice may require

Supplemental Environmental Projects (SEPs)

- Environmentally beneficial project that is not otherwise legally required
- Must have a nexus to underlying violation
- [EPA SEP Policy](#) available on EPA's webpage

Criminal Enforcement (Section 309(c))

- May result in imprisonment or fines
- Potential suspension or debarment from federal contracts; mandatory if convicted or enter into a plea
- Misdemeanor: Negligent violations (simple negligence)
- Felony: Knowing violation
 - Knowing violation with imminent danger of death or serious bodily injury (up to 15 years in prison)
 - Knowingly making false statements

Citizen Suits (Section 505)

- Any person with standing may bring an action
- 60 day notice of intent to sue required
- Prohibited where:
 - Violation is wholly past
 - Diligent federal or state prosecution of civil or criminal action

Questions

Thank you!



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