THE CLEAN WATER ACT


Recent Developments: Cases

Requirements Applicable to POTWs

OVERVIEW

- History
- Substantive Provisions
- Procedural Features

Federal Water Pollution 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:


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


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


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

History: Special-purpose amendments
- 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

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

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<th>History: Trends</th>
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<td>- Less EPA Discretion</td>
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<td>- Missed Deadlines, Court Orders &amp; Consent Decreases</td>
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<td>- Increasing Focus on Toxics</td>
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<td>- Revision of Municipal Standards</td>
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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

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


### 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**
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Procedural Features

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

Clean Water Act
Additional Information


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.
    - 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

- 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)
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Clean Water Act v. Endangered Species Act

  - **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.

Themes for CWA Cases

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


- Corps of Engineers issued § 404 permit for a gold mine to discharge slurry into a lake.
- Reasoned that slurry was “fill material.”
- Env’tl groups sued: requires a 402 permit, EPA standards.
- Ninth Circuit agreed and directed the district court to invalidate the permit.

Section 402 vs. Section 404

- 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.
- 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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