

Complying with Water Quality Laws & Regulations

Arkansas Water Laws & Regulations
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Topics to Discuss:

- Background refresher on Clean Water Act
- Developments at the federal level
 - WOTUS Step II
 - *Maui*
 - 401 Water Quality Certifications
 - Residual Designation
- Developments at the state level
 - APCEC Rule 6
 - Triennial Review
 - Antidegradation Implementation Methodology

Clean Water Act 101: A Return to Basics

Objective:

The objective of [the CWA] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

Clean Water Act 101: A Return to Basics

Water Quality Standards:

A water quality standard defines the water quality goals of a waterbody, or portion thereof, by **designating the use or uses** to be made of the water and by **setting criteria** that protect the designated use.

Clean Water Act 101: A Return to Basics

Designated Uses:

1. Protection and propagation of fish, shellfish, and wildlife
2. Recreation
3. Public drinking water supply
4. Agricultural, industrial, navigational, and other purposes.

Criteria:

Water quality criteria can be numeric (e.g., the maximum pollutant concentration levels permitted in a waterbody) or narrative (a criterion that describes the desired conditions of a waterbody being “free from” specific negative conditions).

Clean Water Act 101: A Return to Basics

The Prohibition:

“Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, **the discharge of any pollutant by any person shall be unlawful.**”

Clean Water Act 101: A Return to Basics

The Exception(s):

“Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing **issue a permit for the discharge of any pollutant, or combination of pollutants ...**”

Clean Water Act, 33 U.S.C. § 1342(a)(1) -- *Section 402*

Clean Water Act 101: A Return to Basics

The Exception(s):

The Secretary **may issue permits**, after notice and opportunity for public hearings **for the discharge of dredged or fill material into the navigable waters** at specified disposal sites.

Clean Water Act, 33 U.S.C. § 1344(a) -- *Section 404*

WOTUS

WOTUS: Now Just Four Categories

Territorial Seas and traditional navigable waters – (a)(1)

Tributaries – (a)(2)

Lakes and ponds, and impoundments of jurisdictional waters – (a)(3)

Adjacent wetlands – (a)(4)

(a)(1) Territorial seas and traditional navigable waters

The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide.

Key Changes

Combines the categories of traditional navigable waters and territorial seas

No substantive changes

(a)(2) Tributaries

“Tributary” means a naturally occurring surface water channel that contributes surface water flow to a paragraph (a)(1) water in a typical year either directly or through one or more paragraph (a)(2)-(4) waters. **A tributary must be perennial or intermittent in a typical year.**

Additional Explanations:

- A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature.
- The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of the definition.
- The term tributary includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of this definition.
- The Step II Rule does not change the existing regulations for establishing the lateral limits of federal jurisdiction for tributaries.

(a)(2) Tributaries

Key Changes:

Declined to implement any portion of the case-specific significant nexus test

Deleted all notion of jurisdictional status over ephemeral streams

(a)(2) Tributaries

Perennial:

- The term *perennial* means surface water flowing continuously year-round.

Intermittent:

- The term *intermittent* means surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

Ephemeral:

- The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow).

(a)(3) Lakes and ponds, and impoundments of jurisdictional waters

This category of waters means standing bodies of open water that contribute surface water flow to a paragraph (a)(1) water in a typical year either directly or through one or more paragraph (a)(2)-(4) waters.

Additional Explanations:

- A lake, pond, or impoundment does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature (e.g., an ephemeral stream, non-jurisdictional ditch), through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature.
- A lake, pond or impoundment is also jurisdictional if it is inundated by flooding from a paragraph (a)(1)-(3) water in a typical year.

(a)(3) Lakes and ponds, and impoundments of jurisdictional waters

Key Changes:

- Similar to the current rule, which regulates lakes and ponds as part of the tributary network, but the new rule clarifies that other kinds of surface hydrologic connections (e.g., inundation by flooding from an (a)(1)-(3) water) can also render lakes, ponds, and impoundments jurisdictional.
- Impoundments of jurisdictional waters are non-jurisdictional if they do not contribute surface flow to a downstream traditional navigable water or territorial sea in a typical year.

(a)(4) Adjacent wetlands:

This category includes wetlands that:

- abut, meaning to touch at least at one point or side of, a paragraph (a)(1)-(3) water;
- are inundated by flooding from a paragraph (a)(1)-(3) water in a typical year;
- are physically separated from a paragraph (a)(1)-(3) water only by a natural berm, bank, dune, or similar feature; or
- are physically separated from a paragraph (a)(1)-(3) water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection in a typical year through a culvert, flood or tide gate, pump, or similar artificial feature.

(a)(4) Adjacent wetlands:

Additional Explanations:

- An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic connection through or over that structure in a typical year.
- Does not change the agencies' longstanding definition of "wetlands."

Key Changes:

- Revised the longstanding definition of "adjacent."
- No wetlands are evaluated on the case-specific significant nexus test.

WOTUS: The Exclusions

Waters not listed as WOTUS

Groundwater

Ephemeral features

Diffuse stormwater run-off

Ditches not identified as WOTUS

Prior converted cropland

Artificially irrigated areas

Artificial lakes and ponds

Water-filled depressions incidental to mining or construction activity

Stormwater control features

Groundwater recharge, water reuse, and wastewater recycling structures

Waste treatment systems

The Litigation ...

Multiple lawsuits filed (many before the rule event went final).
Currently the new WOTUS Step II rule is effective in all states and territories **except the State of Colorado**

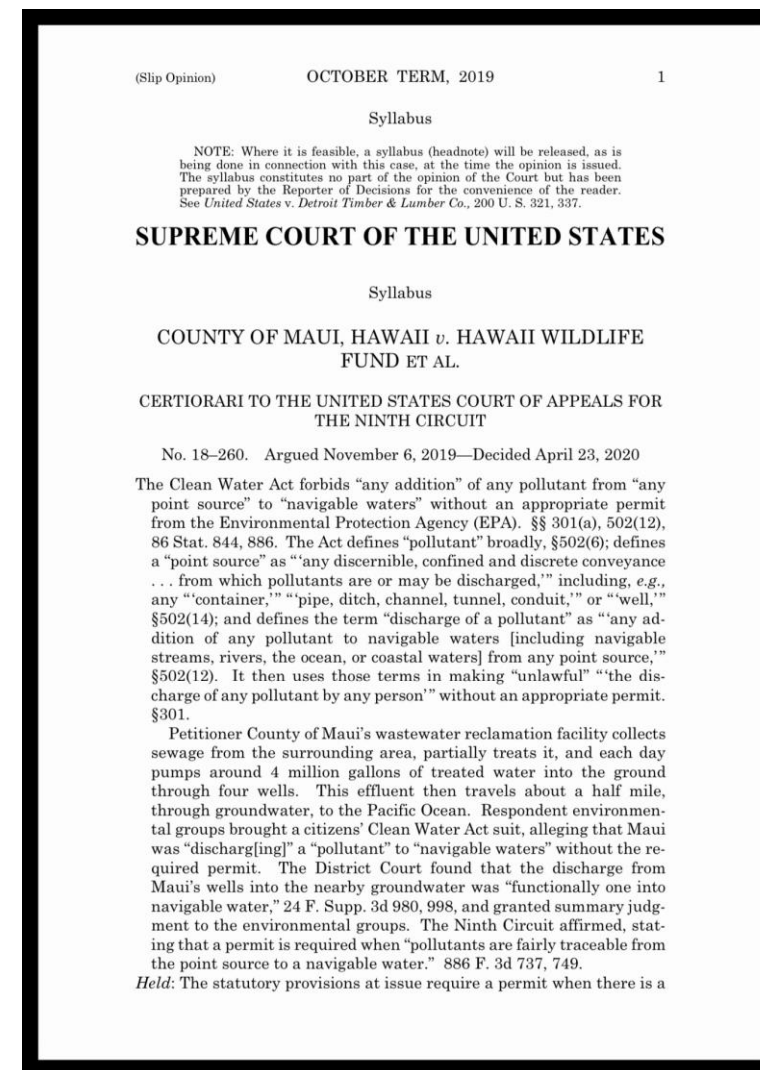
E.g. –

- State of California, et al. v. EPA, No. 3:20-CV-2005
- South Carolina Coastal Conservation League v. Wheeler, No. 2:19-CV-03006
- New Mexico Cattle Growers Ass'n. v. EPA, No. 1:19-CV-00988
- State of Colorado v. Wheeler, No. 20-CV-1461

Maui

County of Maui v. Hawaii Wildlife Fund

- Most important CWA case since *Rapanos* (2006)
- Question Presented: *Whether a point source discharge to groundwater requires an NPDES permit if the pollutants reach navigable waters*
- Two Surprises:
 - A totally new test for CWA jurisdiction
 - An unexpected line-up of votes



Lahaina Wastewater Reclamation Facility

Factual Background

- LWRF constructed in 1976
- Expanded in 1985
- Effluent used for irrigation
- 4 Class V injection wells used for backup
- Agricultural reuse ends 1999-2009
- Current injection rate \approx 4 MGD
- Population served \approx 40,000
- R-1 reuse of some water continues



Controversy Develops

- 2007: SCUBA researchers identify submarine seeps near shoreline
- 2007-2013: Multiple studies confirm LWRF effluent flows to the seeps
- EPA & Hawaii equivocate on NPDES requirement
- Public protest builds

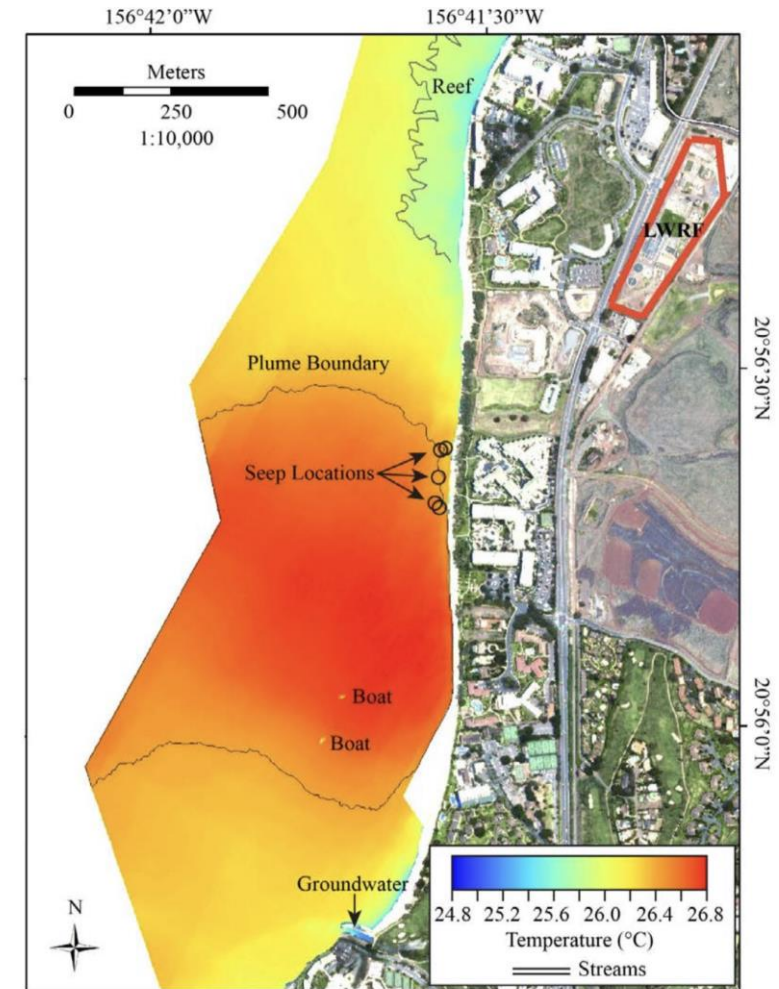
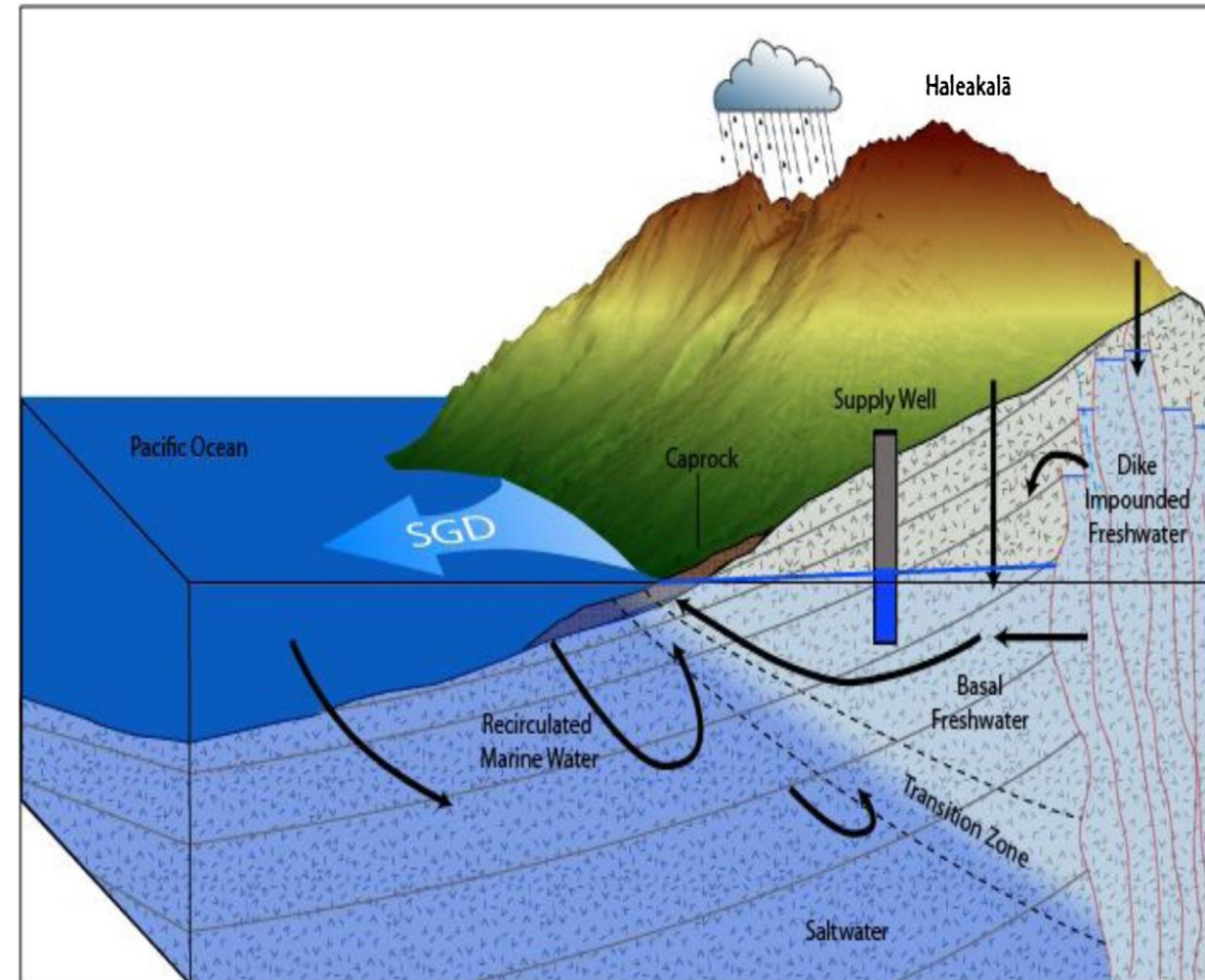


Figure ES-5: Aerial TIR sea surface temperature map thermal anomaly at North Kaanapali Beach.

Chronology of the Case

- 2012 Citizen suit filed
- 2014 USDC holds NPDES permit Is required
- 2018 9th Circuit affirms
- 2/19/19 Certiorari granted
- 11/6/19 SCOTUS hears oral argument
- 4/23/20 SCOTUS vacates & remands



The Textualist Quandary

CWA Definition of Discharge:

“Any addition of any pollutant to navigable waters from a point source”

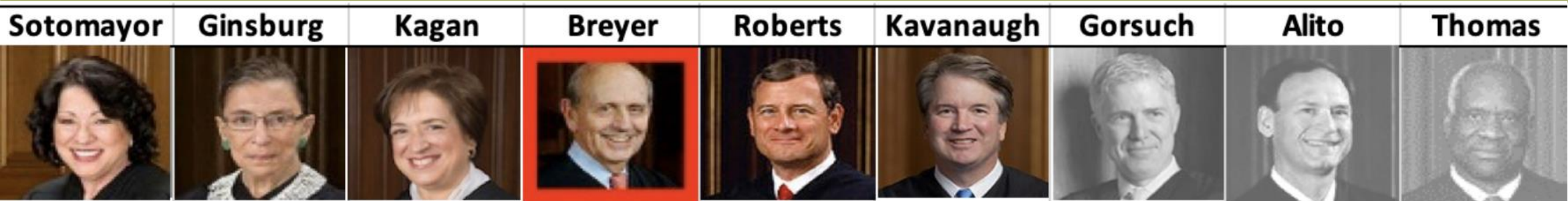
- Addition of a Pollutant
- To Navigable Waters
- A Point Source
- From?



Historical Evolution of Theories

- EPA₍₁₉₉₀₋₂₀₁₆₎ → Direct Hydrologic Connection (sometimes)
- *Rapanos*₍₂₀₀₆₎ → Significant Nexus (wetland context)
- USDC₍₂₀₁₄₎ → Direct Conduit
- DOJ₍₂₀₁₆₎ → Direct Hydrologic Connection
- 9th Cir.₍₂₀₁₈₎ → Fairly Traceable, Not De Minimis
- EPA/DOJ₍₂₀₂₀₎ → GW Discharges Categorically Excluded

Justice Breyer Writes Majority Opinion (6-3)



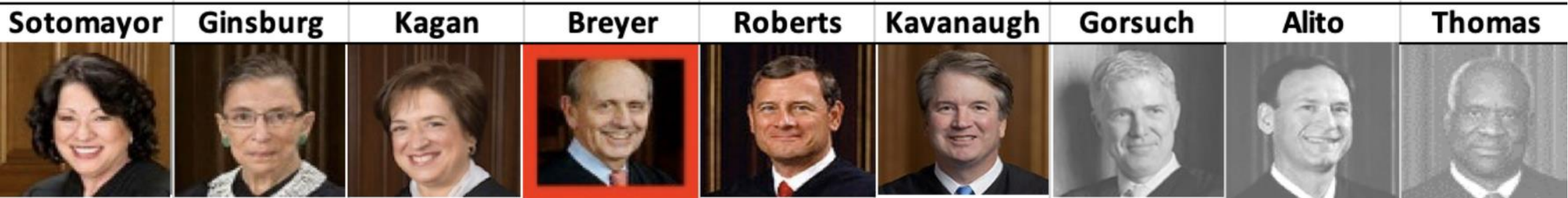
- Everyone agrees “From” is the key term in the statute
- 9th Cir. “Fairly Traceable” test too broad – Every drop of water winds up in the sea eventually
- EPA/DOJ categorical exclusion of GW too narrow -- Invites evasion
- Limiting principle needed → **Functional Equivalent Test**
- New test supported by CWA’s text, structure, context, **purpose & legislative history**
- No bright line test possible -- EPA & courts can handle ambiguity
- Seven factors offered for determining functional equivalence

Determining Functional Equivalence

Justice Breyer's Enumerated Factors

- (1) Transit time,
- (2) Distance traveled,
- (3) Nature of the material through which the pollutant travels,
- (4) Extent to which the pollutant is diluted or chemically changed as it travels,
- (5) Amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source,
- (6) The manner by or area in which the pollutant enters the navigable waters,
- (7) The degree to which the pollution (at that point) has maintained its specific identity

Concurring & Dissenting Opinions



- Justice Kavanaugh writes concurring opinion (joins majority opinion in full)
- Justice Thomas writes dissenting opinion, which Justice Gorsuch joins
- Justice Alito writes separate dissenting opinion

401 Certifications

What is taking so long?



Section 401 Water Quality Certifications

The Scope and Applicability of CWA Water Quality Certification

“Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that any such discharge will comply with the applicable provisions of [the Act].” CWA Section 401, 33 U.S.C. § 1341(a)(1).

The Waiver

Waiver of CWA Water Quality Certification

“If the State ... fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements ... shall be waived with respect to such Federal application.” CWA Section 401, 33 USC § 1341(a)(1).

Executive Orders, Guidance, and Rulemakings

Executive Order 13868, Promoting Energy Infrastructure and Economic Growth (April 10, 2019)

- Identified EPA's outdated federal guidance and regulations re: 401 as a source of uncertainty hindering the development of energy infrastructure
- Directed EPA to review and issue new guidance to states, tribes, and federal agencies within 60-days and to propose new 401 regulations within 120-days

Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (June 7, 2019)

- Reinforced that one-year is the maximum, and federal permitting agencies have authority and discretion to establish shorter timelines (*e.g.*, EPA is 6 months; USACE is 60-days)
- Reinforced that scope of Section 401 review is "limited to an evaluation of potential water quality impacts"
- Reinforced that to evaluate a certification request, "a state or tribe should only need the application materials submitted for the federal permit or license (*i.e.*, no need to wait on NEPA review)

Final Rule: Updating Regulations on Water Quality Certification, 85 Fed. Reg. 42210 (Jul. 13, 2020)

"This final rule is intended to increase the predictability and timeliness of CWA section 401 certification actions by clarifying the timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures."

Residual Designations



Residual Designation Authority (RDA)

40 CFR 122.26(a)

(9)(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

...

(C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or

(D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

RDA and an Emerging Body of Law

2015 Petitions

In September 2015, EPA Regions 3 and 9 received petitions requesting that they designate categories of stormwater discharges from privately-owned commercial, industrial, and institutional sites that contribute pollutants in four water bodies: Dominguez Channel and the Alamitos Bay/Los Cerritos Channel in the Los Angeles area, and Army Creek in New Castle County, Delaware and Back River, in Baltimore City and Baltimore County, Maryland.

EPA Regions' Responses to the 2015 Petitions

In October 2016, EPA Regions 3 and 9 denied the petitions for designation in each watershed, after evaluating the petitions and considering factors, including:

- The likelihood that the pollutants would be exposed to precipitation at sites in the source categories specified in the petition,
- Whether sufficient data were available to evaluate the contribution of stormwater discharges to water quality impairment from the specified sources,
- Whether the specified sources already were adequately addressed by other environmental programs.

Cont'd.

Los Angeles Waterkeeper, et al. v. Pruitt, 320 F.Supp.3d 1115 (C.D.Cal. 2018)

- Plaintiffs challenged EPA's rejection of petition for EPA to exercise its RDA to regulate stormwater discharges from privately-owned commercial, industrial, and institutional (CII) sites in the Dominguez Channel and the Los Cerritos Channel watersheds.
- The Court determined that EPA possesses discretion to exercise its RDA, but upon finding that the CII sites contributed to violations of WQS the EPA has only two options: (1) issuing NPDES permits for the discharges or (2) completely prohibiting the discharges.
- The Court also held that EPA cannot decide RDA petitions based on the availability of other federal, state, and local controls.

Blue Water Baltimore, Inc., et al. v. Wheeler, No. 1:17-cv-01253-GLR, 2019 WL 1317087 (D. Md. 2019)

- Plaintiffs challenged EPA's rejection of petition for EPA to exercise its RDA to regulate stormwater discharges from privately-owned CII sites in the Back River watershed.
- The Court determined that EPA's denial was arbitrary and capricious and violated the Administrative Procedure Act (APA) because it relied on a factor Congress did not authorize it to consider – *i.e.*, consideration of existing programs that address stormwater from CII sites

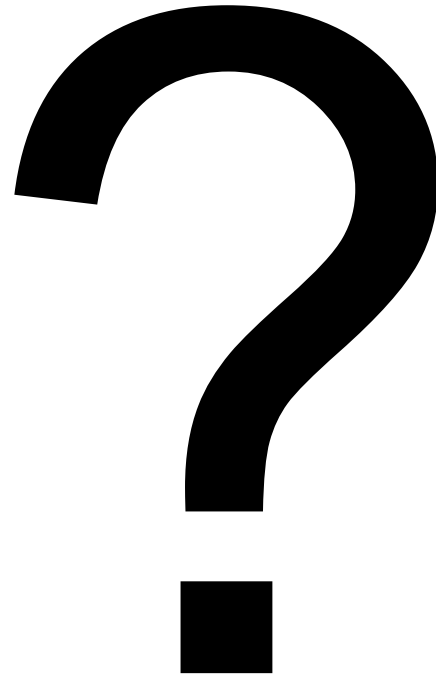
This Issue is NOT Going Away

For example –

On August 24, 2020 the Conservation Law Foundation petitioned EPA to exercise RDA over stormwater discharges from **“all existing non-permitted commercial, industrial, institutional, and certain large multi-family residential property dischargers”** within the Neponset and Mystic River watersheds (both in Massachusetts).

State Program Developments

APC&EC Rule 6



Triennial Review – APCEC Rule 2

- The CWA requires the State to review the State's water quality standards every three years (*i.e.* Triennial Review)
- DEQ recently completed the public review and comment period on APCEC Rule No. 2 (Arkansas Water Quality Standards)
- Snapshot:
 - The changes in the 2019 Triennial Review were designed to be minimal in the hopes of getting an EPA Record of Decision for a clean, fully-approved Rule 2
 - One notable change included revisions (finally) to Rule 2.309, which addresses temporary variances to water quality standards; now adopts by reference the Federal regulation

Antidegradation: What Has Happened?

2017-2018	DEQ Focus Groups discuss revision of CPP & Development of Antidegradation Implementation Document
June/July 2020	DEQ Stakeholder Sessions discuss Draft CPP & Antidegradation Implementation Methodology
July 26, 2020	Public Notice for Draft CPP & Antidegradation Implementation Methodology
October 2, 2020	Public Comment Period Closes

Introduction to Antidegradation

Antidegradation:

- Applies only to permits for New or Expanded Activities (i.e., NPDES permits, 404 permits, and 401 certifications)
- Is not a Prohibition of Degradation of Water Quality
- Is a Procedure for Deciding When, and How Much, a New or Expanded Activity may Degrade Water Quality
- Separates Receiving Waterbodies into 3 Tiers: Tier 3 = ORWs; Tier 2 = High Quality Waters; Tier 1 = Impaired Waters

Tier 1 Review

- Is the Receiving Stream Impaired for Any Parameter?
(AIM applies to Tier 1 Parameter by Parameter)
- If “Yes”, the New or Expanded Activity May Not Cause or Contribute to Impairment of a Use or violation of Water Quality Criteria
- Discharges to Tier 1 waters that are consistent with WQS do not require social development, economic, or alternatives analysis

Tier 2 Review

- Is the Receiving Stream Attaining Water Quality Standards?
(AIM applies to Tier 2 Parameter by Parameter)
- Will the impact be temporary or non-significant (<10% of Assimilative Capacity)? → No social, economic, or alternatives analysis required
- Will the impact be significant (>10% of Assimilative Capacity) and non-temporary? → Social development, economic, and alternatives analyses required

Tier 3 Review

- Is the Receiving Stream a Designated ORW?
(AIM Applies Tier 3 analysis Waterbody by Waterbody)
- If “Yes”, no net increase in parameter load is allowed. No social development, economic, or alternatives analysis required
- Exceptions may be allowed for temporary activities

Thank You

Thank You for Inviting Me to Speak

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