OUTLINE OF CLEAN WATER ACT
33 U.S.C. §§ 1251 et seq.

I. GENERAL OVERVIEW

Goal of Act: To restore and maintain the chemical, physical and biological integrity of the Nation's waters. 33 U.S.C. section 1251(a); CWA section 101(a).

II. SCOPE OF CLEAN WATER ACT JURISDICTION

A. What Waters Are Covered by the Act?

1. Statutory and Regulatory Provisions:

   The Clean Water Act applies to "navigable waters," which are defined as "the waters of the United States, including the territorial seas." CWA § 502(7)

   EPA regulations: 40 C.F.R. § 122.2 define waters of the U.S. to include:

   - interstate waters, including interstate wetlands,
   - all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide,
   - territorial seas,
   - tributaries and impoundments of U.S. waters,
   - wetlands adjacent to U.S. waters, and
   - other "isolated" waters (such as intrastate lakes, wetlands, rivers, streams, mudflats, sandflats, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds), having a requisite connection with interstate commerce (see below).

   Waste treatment systems and certain areas that were converted for agricultural use prior to 1985 are not waters of the U.S. See 40 C.F.R. § 122.2.
2. When Does An Isolated Water Have the Requisite Interstate Commerce Nexus?

EPA's and the Corps' regulatory definition of waters: 40 CFR 122.2; 40 C.F.R. 232.2(q).

US v. Byrd, 609 F.2d 1204 (7th Cir. 1979)

Hoffman Homes v. EPA, 961 F.2d 1204, rehearing granted and opinion vacated, 975 F.2d 1554 (7th Cir. 1992); 999 F.2d 256 (7th Cir. 1993).

US v. Wilson, 133 F.3d 251 (4th Cir. 1998)

Solid Waste Agency of Northern Cook County (SWANCC) v. US Corps of Engineers, 998 F. Supp 946 (ND Ill. 1998), appeal pending.

B. What Activities Are Regulated by the Clean Water Act?

1. Statutory Provisions:

The Act regulates the “discharge of a pollutant” which is defined as an “addition” of a “pollutant” from a “point source.” CWA §§ 301(a), 502(6,12,14,16)

Point source discharges do not include

- unchanneled and uncollected surface water, also known as "non-point source discharges."

Addition of a pollutant:

NWF v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982);


Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897, 923 (5th Cir. 1983) (redeposit of dredged materials is discharge).

EPA and Corps regulations:
51 Fed. Reg. 41,206, 41,232 (Nov. 13, 1986) (EPA and the Corps defined the term “discharge of dredged material” to exclude de minimis incidental soil movement occurring during normal dredging operations)

58 Fed Reg. 45008 (August 25, 1993) (“Tulloch rule”) (removed the de minimis exception and expanded the definition of discharge to include any incidental redeposit of dredged material within the waters of the United States. The rule replaced the de minimis exclusion from the definition of “discharge” with a de minimis exception to the permit requirement for activities that do not degrade or destroy waters.) When the redeposit occurs at substantially the same spot as the initial removal, it is generally referred to as fallback.

NMA v. Corp of Engineers, No. 97-5099, (DC Cir. June 19, 1998). (“Tulloch” rule invalid; addition does not encompass activities that involve only incidental fallback)

US. v. Deaton, No. MJG-95-2140 (D. Md.), appeal pending (whether sidecasting – which involves placing removed soils alongside – is considered an addition).


A. Clean Water Act Section 402 Permits.

B. Clean Water Act Section 404 Permits.

IV. NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM PROGRAM (“NPDES”)

Under the NPDES permit system, any person responsible for the discharge of a pollutant into navigable waters from any point source must apply for and obtain a permit. This requirement covers new sources as well as existing sources with expiring permits. Absent a permit, the discharge of pollutants from any point source is unlawful.

There are three types of limitations on discharge:

1. Technology-based
2. Water quality standard-based
3. Toxic effluent standards (for 6 pollutants)

V. TECHNOLOGY BASED LIMITATIONS ON DISCHARGE

A. Effluent Guidelines or Best Professional Judgment


If limitations have not been established by national regulation, they are established on a case-by-case basis using best professional judgment. CWA section 402(a)(1).

B. Different levels of Technology-Based Limitations Apply to Different Dischargers

There are a number of different levels of technology-based requirements, depending on the type of pollutant being discharged, (conventional, toxic and nonconventional), and whether the discharger is an existing or new source. The national regulations are based on the appropriate level of technology, however, dischargers are not required to use any specific pollution control technologies to meet these limitations.

1. Existing Direct Dischargers

Best Practicable Technology ("BPT")

BPT is the first level of control for all pollutants. BPT was to be achieved by July 1, 1977. 33 U.S.C. § 1311(b)(1)(A). The word "practicable" is read in conjunction with 33 U.S.C. § 1314(b)(1)(B).

Best Available Technology Economically Achievable ("BAT")

By March 31, 1989, industrial dischargers were to have achieved effluent limitations based on the "best available technology economically achievable" (BAT). BAT applies to toxic and nonconventional pollutants. The Act states that BAT limitations be set at a level that "will result in reasonable further progress toward

**Best Conventional Pollutant Control Technology ("BCT")**
(33 U.S.C. § 1311(b)(2)(E))

BCT is the second level of control for conventional pollutants (oil and grease, biological oxygen demand, fecal coliform, pH, and total suspended solids). BCT limits of conventional pollutants exceed BPT limits only where they are "cost-reasonable."


2. **New Source Direct Dischargers**

New Source Performance Standards ("NSPS"), 33 U.S.C. § 1316

These standards reflect the greatest degree of effluent reduction achievable with the best available demonstrated control technology ("BADCT"). 33 U.S.C. 1316(a)(1). Congress expressed the belief that it is easier for new sources to reach a given level of pollution control than for existing sources.

3. **Stormwater Discharges**

a. **Industrial Activity.**

Stormwater discharges associated with industrial activity are subject to permits based on the technology based requirements identified above.

EPA’s final phase I stormwater regulations define this term and include construction activity which disturbs at least 5 acres, or construction activity which disturbs less than 5 acres which is part of a larger common plan of development or sale with the potential to disturb cumulatively five or more acres. See 40 CFR 122.26(b)(14). EPA has proposed, as part of its phase 2 stormwater program, to include construction activities which disturb between 1 and 5 acres, as well. 63 Fed. Reg. 1536 (January 9, 1998).

b. Municipal Discharges

Stormwater discharges from large and medium sized municipal systems with populations over 100,000 are also subject to the NPDES program now. They must effectively prohibit non-stormwater discharges into the storm sewers and must reduce discharges of pollutants “to the maximum extent practicable, as determined by EPA or the State.” CWA section 402(p)(3)(B).

Municipal stormwater discharges are not subject to the otherwise applicable technology-based requirements.

4. Secondary Treatment for Publicly-Owned Treatment Works

Publicly-Owned Treatment Works (POTWs) are required to meet "secondary treatment," consisting of limitations on several conventional pollutants (biochemical oxygen demand (BOD), total suspended solids (TSS), and pH). 33 U.S.C. § 1311(b)(1)(B)/§ 301(b)(1)(B).

5. Technology-Based Limits for Indirect Dischargers

For industrial discharges to POTWs, EPA promulgates Pretreatment Standards for Existing Sources (PSES) and Pretreatment Standards for New Sources (PSNS) based on technology analogous to BAT and BADT (for new sources). These standards apply to any pollutant that "interferes with", "passes-through," or "otherwise is incompatible with" POTWs. 33 U.S.C. § 1307(b)(1) (existing sources); § 1306(c) (new sources).

VI. WATER QUALITY BASED LIMITATIONS ON DISCHARGE

A. Water Quality Standards and Water Quality-Based Effluent Limitations

1. Water Quality Standards: Substantive Requirements

Water quality standards consist of:

Designated use for the waters in question (e.g., public water supply, recreation, aquatic life), 33 U.S.C. § 1313(c)(2);
Water quality criteria specifying the amount of various pollutants which may be present in those waters and still achieve the designated uses, 33 U.S.C. § 1313(c)(2); and

An antidegradation policy designed to protect existing uses and high quality waters, 40 C.F.R. § 131.12.

2. Procedures for establishing water quality standards consist of the following:

State establishes water quality standards for pollutants of concern in state waters, 33 U.S.C. § 1313(c)), including specifically toxic pollutants, see 33 U.S.C. § 1313(c)(2)(B); and

EPA approves State water quality standards or, in the event EPA disapproves a new or revised water quality standard or EPA determines that a state needs a new or revised standard, EPA promulgates such standard itself, 33 U.S.C. § 1313(c)(3) & (4).

3. Use of water quality standards:

Basis for water quality-based effluent limitations in NPDES permits, 33 U.S.C. § 1311(b)(1)(C);

Basis for calculating total maximum daily loads, 33 U.S.C. § 1313(d)(1)(C);

Assessing the quality of a state's lakes, rivers, and other waters; the results of these assessments are reported periodically by States in various assessments and reports required by the Clean Water Act, see, e.g., 33 U.S.C. § 1315(b) (biennial report of quality of all state waters); 33 U.S.C. § 1313(d)(1)(A) and 40 C.F.R. § 130.7(b)(1) (biennial report of waters not expected to meet water quality standards after application of required controls); 33 U.S.C. § 1329(a)(1) (waters affected by nonpoint sources); 33 U.S.C. § 1330 (estuaries); 33 U.S.C. §1324 (lakes)

4. Water Quality-Based Effluent Limitations

Permits must contain any more stringent limitations for particular pollutants that are necessary to attain and maintain water quality standards for those pollutants. Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).
Water quality-based effluent limitation for a pollutant must be consistent with any "total maximum daily load" developed for that pollutant and receiving water. 40 C.F.R. § 122.44(d)(1)(vii)(B).

B. Total Maximum Daily Loads (TMDLs)

1. CWA § 303(d) list: States to identify waters within their boundaries for which the technology-based and other controls are not stringent enough to implement the applicable water quality standards.

2. TMDLs: States to develop TMDLs for waters on their § 303(d) lists "from time to time."

TMDL represents the maximum amount of pollutant "loadings" which can be released to a receiving water without exceeding water quality standards.

3. EPA role: States submit their § 303(d) lists and TMDLs to EPA for review and approval or disapproval. If EPA disapproves a list or TMDL, EPA must issue its own list or establish the necessary TMDLs. EPA currently has litigation in over 26 states in which the environmental community is seeking to compel EPA to establish TMDLs where they allege that the states have failed to do so.


1. These are not technology-based standards; are established for individual toxic pollutants if EPA finds the technology-based requirement inadequate.

2. EPA has set effluent standards under this provision for 6 pollutants: aldrin, DDT, endrin, toxaphene, benzidine & PCB's.


VII. IMPLEMENTATION OF NPDES POINT SOURCE PROGRAMS

A. State/Tribal Program Authorization
1. Program authorization:
   CWA Section 402(b); 40 CFR Part 123.

2. Program oversight:
   CWA Section 402(c) (revoke authority to administer program) and (d) (veto individual permits).

B. Permit Program Procedures

CWA section 402; EPA Permit Regulations are codified in 40 C.F.R. Parts 122-124

Two types of NPDES permits, individual permits and general permits

Timely application for renewal of permit automatically extends existing permit. 5 U.S.C. § 558(c); 40 CFR § 122.6.

VIII. NON POINT SOURCE PROGRAM

A nonpoint source is any source of water pollution that does not meet the legal definition of "point source" in section 502(14) of the Clean Water Act.

Not subject to federal permit requirements; rather, they are regulated exclusively by the states.

Two related programs: section 319 of the Clean Water Act, and section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990, require states to develop nonpoint source management programs.

IX. IMPLEMENTATION OF WETLANDS SECTION 404 PROGRAM

A. Agency Roles under 404:

CWA § Section 404(a): Army Corps of Engineers/ EPA

B. Definition of Wetlands
Regulatory Definition: 40 C.F.R. § 122.2; 40 C.F.R. § 230.3(t).

Field Criteria for Delineating Wetlands:

C. Exempt Activities:

CWA Section 404(f).

40 C.F.R. § 232.3.

D. Standards for Issuance of 404 Permits

Corps Public Interest Review

EPA 404(b)(1) Guidelines

E. EPA Veto Authority

CWA section 404(c)

F. State Assumption

CWA section 404(h); See also 40 C.F.R. Part 233.

Only two states, Michigan and New Jersey, have assumed permitting authority under section 404.

X. 401 CERTIFICATION

A. Overview of Statutory Requirements

"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 obtain a certification from the State where the discharge originates "that any such discharges will comply with the applicable provisions of sections 301, 302, 303, 306, and 307" of the CWA. Section 401(a)(1).

A State certification under Section 401 "shall set forth any effluent limitations or other limitations necessary to assure" that the permit with comply with Sections 208(e),
301, 302, [303], 306, or 307 of the CWA "and with any other appropriate requirement of State law." Section 401(d); 40 CFR 124.53(e)(1). The conditions in the State certification must be included in the federal license or permit. This provision means that States may, at a minimum, impose any conditions necessary to protect its water quality standards. PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology, 114 S.Ct. 1900 (1994).

B. Applicability

1. What Types of Permits?

Applies to NPDES permits, CWA 404 permits, FERC hyrdoelectric licenses, NRC licenses, and many others.

2. Who Provides the Certification?

The State in which the discharge originates, not affected downstream States. NWF v. FERC, 912 F.2d 1471, 1483 (D.C. Cir. 1991). Downstream States may object to issuance of a 401 certification, and EPA can then decide to hold a hearing on what conditions are necessary to protect the downstream States' standards. Arkansas v. Oklahoma, 503 U.S. 91 (1992).

If the facility is in one State, but the discharge point is in the other, the 401 certification comes from the State where the discharge point is located.

An Indian Tribe which is treated in the same manner as a State for purposes of the water quality standards program is the certifying agency for discharges on Indian lands. 40 CFR § 131.4(c).

If the State or Tribe lacks authority to provide 401 certifications, EPA does so.

C. Relationship of 401 Certifications to NPDES Permits

All NPDES permits must contain any additional effluent limits more stringent than technology-based standards which are necessary to meet water quality standards. Section 301(b)(1)(C). Permits must also contain any limits contained within a State's 401 certification under 40 CFR 124.53(d)(1). See 40 CFR 122.44(d)(3).
D. Reviewability of State 401 Certifications

401 certifications are to be reviewed in State, not federal, courts. 40 CFR 124.55(e); Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982); Mobil Oil Corp. v. Kelley, 426 F.Supp. 230, 235 (S.D. Ala. 1976).

XII. INSPECTION & DATA GATHERING AUTHORITIES

Information gathering, inspections, monitoring and entry, etc. (Section 308, 33 U.S.C. § 1318).

EPA has broad powers to inspect & gather data for rulemaking and enforcement. Administrator shall require point source owner/operators to establish and maintain records, make reports, install, use and maintain monitoring equipment or methods, sample effluents, and provide other information as he may reasonably require.

XIII. ENFORCEMENT

A. Government Enforcement

Section 309, 33 U.S.C. § 1319

The Clean Water Act is a strict liability statute.

However, compliance with a permit is a "shield" against most enforcement actions, § 402(k); 40 CFR 122.5.

B. Citizen Enforcement

Section 505, 33 U.S.C. section 1365

Federal citizen suit authorized where EPA or state is not "diligently prosecuting" action in court or seeking administrative penalty, §309(g)(6).

No citizen suit jurisdiction for wholly past violations; must make a "good faith allegation of an ongoing violation." Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49 (1987). On remand, this requirement was satisfied by establishing violations occurring before filing of the suit unless it could be shown that there was "no real likelihood of repetition." Chesapeake Bay Found. v. Gwaltney, 688 F. Supp. 1078 (E.D. Va. 1988), modified, 890 F.2d 690 (4th Cir.)
1989), followed in *Sierra Club v. Union Oil*, 853 F.2d 667 (9th Cir. 1988).