

# The Clean Water Act

“[N]obody can be in good health if he does not have all the time, fresh air, sunshine, and good water.”

--Flying Hawk, Oglala Sioux Chief

# Topics I Will Cover

- Federal and State regulation of water pollution before the Clean Water Act
  - Minimal Federal Intervention
  - State Control and the “Race to the Bottom”
- The Clean Water Act of 1972
  - Eliminate direct discharges into “waters of the United States”
  - Protect publicly owned sewer systems
  - Protect wetlands
  - Enforcement mechanisms for the above areas



**MINIMAL FEDERAL  
INVOLVEMENT AND STATE  
PRIMACY**

# Minimal Federal Involvement

- The Rivers and Harbors Act of 1899 (RHA)
  - Concerned mostly about navigation.
  - Section 13 prohibited the discharge of refuse into navigable waters or the deposit of such materials onto their banks unless the Secretary of the Army grants a permit to do so.
  - Regulates dredging, filling, and activities that might alter the course, condition, and location of navigable waters.

# State Primacy

- Most state water pollution statutes in early 1900s focused on controlling discharges of human waste, which was the cause of most waterborne illness
- States regulated mostly with narrative water quality standards



**INCREASED, BUT HESITANT,  
FEDERAL INVOLVEMENT POST  
WWII**

# More Federal Involvement

- Federal Water Pollution Control Act of 1948, amended in 1961, 1965 (FWPCA)
  - State primacy with federal assistance from US Surgeon General to set standards and find ways to treat wastes “that are not susceptible to known effective methods of treatment”
  - Surgeon General eventually replaced by Secretary of Health, Education, and Welfare
  - 1965 amendments created water quality criteria created between federal government and state; federal enforcement allowed but only after lengthy administrative proceedings for “abatement”

# More Federal Involvement

- Water Pollution Control Act of 1956
  - State primacy with federal assistance from Surgeon General, Public Health Service, and Secretary of Health, Education, and Welfare to promote interstate compacts between states to control water pollution. Also allowed SG to issue grants to states for sewer treatment facilities
- Clean Water Restoration Act of 1966
  - Provided federal assistance to states to promulgate rules for wetlands
- Water Quality Improvement Act of 1970
  - Sought to regulate oil pollution on ocean waters and made polluters liable to the US for up to \$8 million for clean-up costs





## **BUT THIS APPROACH DID NOT WORK**

Photo of Cuyahoga River (1969) after it caught on fire.

(<http://www.jcu.edu/chemistry/naosmm/2007/11031952Fire.jpg>)



# **MAJOR FEDERAL INVOLVEMENT AND STATE DELEGATION**

# Major Federal Involvement

- Why would the federal government take control over environmental law issues?
  - “Tragedy of the Commons”
  - “Race to the Bottom”
- Interstate nature of water and water pollution

# The Clean Water Act of 1972

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

33 U.S.C. § 1251(a).

# Purpose of the CWA

- “In order to achieve this objective it is hereby declared that, consistent with the provisions of [the CWA]--
  - it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
  - it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
  - it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
  - it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.”

# Major Parts of CWA

- Congress tried to achieve its lofty goals in three ways:
  - Try to eliminate/reduce discharges of pollutants into “waters of the United States” through use of permits and water quality standards
  - Protect publicly owned sewer systems
  - Regulate wetlands



**PART I: DEALING WITH  
DISCHARGES INTO WATERS  
OF THE U.S.**

# Discharges into waters of the United States

- The CWA made it illegal to:
  - Discharge
  - A pollutant
  - Into waters of the United States
  - From a point source
  - Without a permit
    - Permits are FEDERAL, but administration of program can be delegated to states with Federal veto power over permitting decisions



# Definitions

- The term "discharge" means "any addition"
- The term "Addition" is not defined in the statute but takes its "plain meaning" (i.e. "to combine").
- The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

# Definitions

- The term "navigable waters" means the waters of the United States, including the territorial seas.
  - We used to know what this meant before Rapanos

# Definitions

- The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

# Definitions

- “Nonpoint Source” is a source of water pollution without a single point of origin.
  - Agriculture runoff
  - Urban runoff

# Setting WQS

- States must designate a use for each water body or segment of the water body
  - Public water supplies
  - Propagation of fish and wildlife
  - Recreation
  - Agriculture
  - Industry
- The goal of the CWA is to make EVERY navigable body of water “fishable and swimmable”

# Setting WQS

- Once states establish the designated use, they must also determine the criteria to establish the maximum amount of pollutants to be discharged into a specific segment of water to attain the designated use
- These determinations may be in either narrative or numerical
- EPA may either accept or reject these criteria
  - If EPA rejects them, EPA will set them

# WQS

- States must test the water periodically
- States may decide to “downgrade” a body of water if certain EPA criteria are met,
  - The state may NOT downgrade water in national parks, state parks, or wildlife refuges.

# Federal Effluent Limitations

- To ensure that WQS are met, the EPA regulates discharges through technology based effluent limitations (TBEL)
- Effluent limitations set daily and monthly limits on how much of a pollutant may be discharged from a point source
- Effluent limitations are set by federal regulation



# TBELs

- TBELs are determined by the type and quantity of pollutants.
- EPA promulgates regulations that categorize each industry and set the effluent limitation for each pollutant commonly discharged by that industry.

# TBELs

- In addition to differing by industrial category, effluent limitations also differ depending on whether:
  - The source is “new” or “existing”
  - The discharges will be “conventional,” “toxic,” or “nonconventional”; or
  - The discharges will be directly into waters of the United States or through public treatment facilities

# WQS and Effluent Limitations

- EPA relies on WQS and effluent limitations to issue NPDES permits (a.k.a. National Pollutant Discharge Elimination System Permits)

# NPDES Permits

- It is unlawful to discharge any pollutant into the navigable waters of the United States without an NPDES permit (except for oil and gas operations) 33 U.S.C. § 1311)
- NPDES permit gives the permittee the right to discharge specific pollutants from certain point sources

# NPDES Permit

- Permit lasts 5 years
- Contain TBELs necessary to achieve compliance with WQS
- Monitoring required

# NPDES Permit

- States may take over NPDES permit issuance from EPA if state law is identical or more stringent than federal law
- EPA retains a veto power over NPDES permits

# Nonpoint Source Pollution

- Nonpoint source pollution into waters of the United States is estimated to cause
  - 65% of stream pollution,
  - 76% of lake pollution, and
  - 45% of estuary pollution

# Nonpoint Source Pollution

- Section 319 (33 U.S.C. § 1329) requires the Governor of each state to submit to EPA a report and a plan that identifies control strategies for navigable waters adversely affected by nonpoint source pollution
- Must be based on “best management practices”



# Nonpoint Source Pollution

- Total Maximum Daily Loads (TMDL): Even if every polluter is meeting the terms of his/her permit, the water may exceed WQS. For such areas, EPA in conjunction with the states establish TMDLs. Over time, EPA/state will ratchet down the permit allowances and the nonpoint sources to bring these bodies of water into compliance with WQS.



**PART II: PUBLICLY OWNED  
TREATMENT WORKS (“THE  
SEWER”)**

# Publicly Owned Treatment Works (POTWs)

- Congress recognized that a functioning sewer system is essential to maintaining health
- It also realized that many of the discharges into waters of the US came from POTWs

# POTWs

- In the CWA, Congress authorized the EPA to issue grants to build local sewer systems



**Congress also sought to protect POTWs  
from this.**

Kentucky POTW explosion

# POTWs

- To protect the sizeable public investment in POTWs, Congress
  - Allowed EPA to set NATIONAL standards as to what can go into a sewer system
    - E.g. no “pass through” allowed; no substances that may cause acute POTW worker health and safety problems
  - Allowed local POTWs to make their own rules as long as they are as strict as the national standards
    - Made local sewer ordinances federally enforceable both criminally and civilly
    - Thus, POTW rule are both federal and state law



# **PART III: WETLANDS**

# Dredge and Fill Permits

- In addition to regulating discharges from a point source into waters of the United States and into POTWs, the CWA regulates dredging and filling in order to comply with WQS
- Under section 404 (33 U.S.C. § 1344), a person may NOT discharge or place dredged or fill materials into navigable waters, including wetlands without a permit from the Army Corps of Engineers



# Dredge and Fill

- “Dredged material” is material that is excavated or dredged from the waters of the United States
- “Fill material” is any material used for the primary purpose of replacing an aquatic area with dry land or the elevating the bottom of a body of water (making a false island, building on a swamp, etc.)



# **ENFORCEMENT OF THE CWA**

# Enforcement

- Administrative
  - Compliance orders
  - Administrative penalties
    - Class I: \$10,000 per “violation,” but not more than \$25,000 per day in total penalties
    - Class II: \$10,000 for each day of violation, may not exceed \$125,000 total.
    - Public notice and comment required before assessing admin. penalties

# Enforcement

- Civil Remedies
  - EPA may commence a civil action to enforce the administrative penalties and may seek injunctive relief, clean-up costs, contempt penalties, etc.

# Enforcement

- Criminal

- Person who “knowingly” discharges a pollutant into the waters of the United States from a point source or into a wetland without a permit or in violation of a permit is guilty of a felony (up to 3 years in prison and a \$250,000 fine per day of violation)
- Person who “knowingly” violates an effluent or prohibition limitation for a POTW is guilty of a felony with the same penalty mentioned above
- Negligent violations get up to 1 year in prison and up to \$100,000 in fines (Class A misdemeanor)

# Enforcement

- Citizen Suits

- “Any citizen may commence a civil action on his own behalf” against any person (including the United States or state) “who is alleged to be in violation” of an effluent standard.
  - “To be in violation” does NOT include wholly past violations
- Civil action may NOT be commenced if the government is “diligently prosecuting” a civil or criminal action in a federal or state court
- Citizens must give EPA/state 60-days notice prior to filing suit