The Clean Water Act: A Brief Primer

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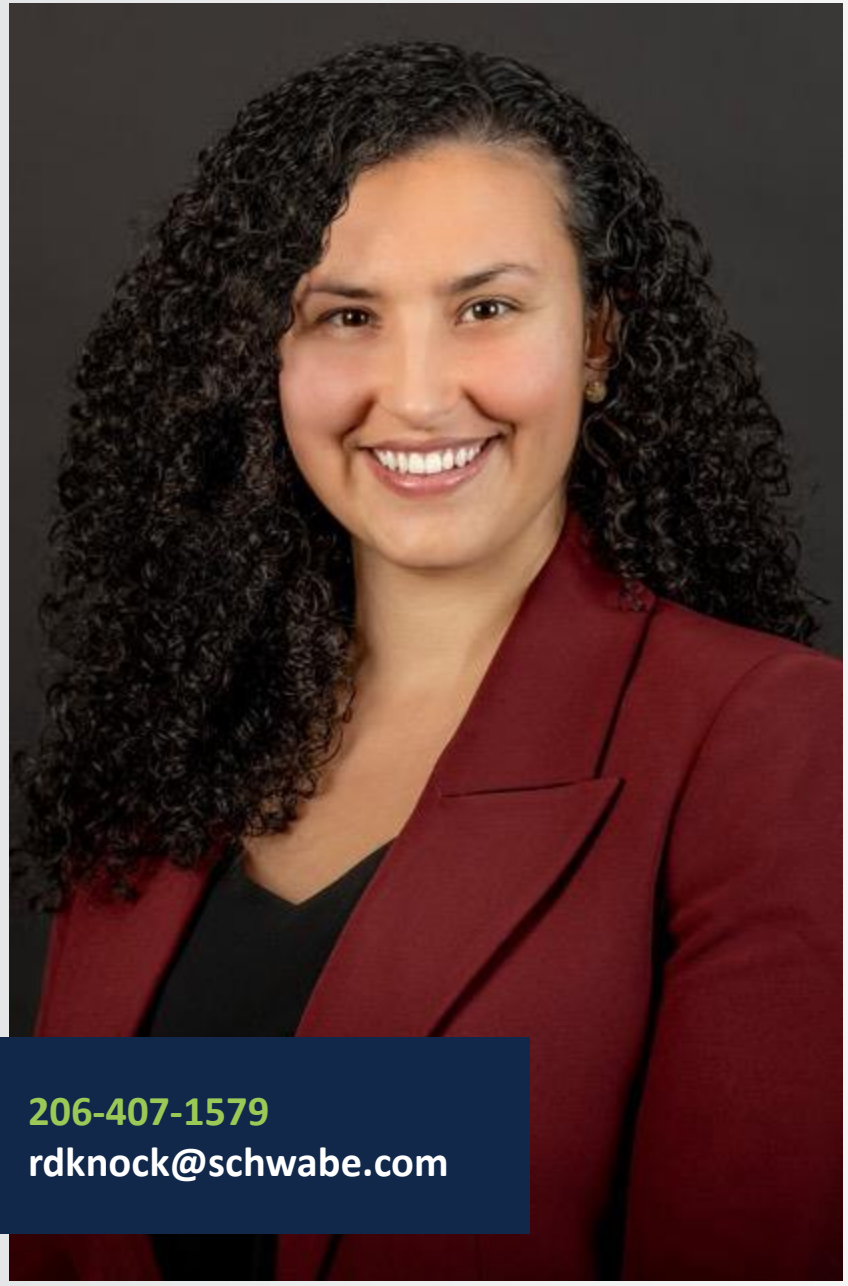
December 10, 2024



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I am a passionate and determined lawyer dedicated to helping clients navigate the intricate world of environmental and natural resource law.

My focus lies in providing strategic guidance on a variety of issues, including water rights, environmental compliance, and due diligence. In my practice, I help clients, big and small, understand and comply with a range of regulatory frameworks at the local and national levels.

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Clean Water Act Foundations

Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et. seq.*

The CWA broadly prohibits:

- The discharge of any pollution into waters of the United States without a permit.

  33 U.S.C. §§ 1311(a), 1362(7).

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Types of Clean Water Act Permits

- Sec. 401. Certifications for Federal Permits related to activities that could result in discharges (33 U.S.C. § 1341)
- Sec. 402. NPDES Permits for the discharge of pollutants from point sources. (33 U.S.C. § 1342)
- Sec. 404. USACE Permits for Discharge of Dredge or Fill Material.

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Discharge

- In order to qualify as a “discharge,” there must be the addition of a pollutant from a “point source” (33 U.S.C. § 1362(12)), or the “functional equivalent” of a point source. *Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020).
- A point source is “any discernible, confined and discrete conveyance.” 33 U.S.C. § 1362.
- Think pipes, ditches, outfalls. Sheet flow or groundwater seepage does not count.

County of Maui

Functional Equivalent test

- Environmental group sued County of Maui over unpermitted discharges from injection wells near the ocean.
- Supreme Court identified seven factors that can influence whether something is the “functional equivalent” of a point source discharge:
  - (1) transit time,
  - (2) distance traveled,
  - (3) the nature of the material through which the pollutant travels,
  - (4) the extent to which the pollutant is diluted or chemically changed as it travels,
  - (5) the 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.

  “Time and distance will be the most important factors in most cases, but not necessarily every case.”

Applying the "Functional Equivalent" test

- On remand, the *County of Maui* court concluded that injection wells were functionally equivalent to direct discharges, relying on the following factors:
  - Injection wells less than 0.5 miles from the sea
  - Transit time ranged from 84 days – 16 months
  - All water from injection wells made it to sea
- *Cottonwood Envtl. Law Ctr. v. Edwards*, (9th Cir. November 21, 2023) :
  - Big Sky Cnty. Water & Sewer District stored treated wastewater in holding ponds for later reuse
  - Water was leaking through pond liners into aquifer, which in turn eventually discharged to surface water body.
  - Under these facts, 9th Circuit affirmed ruling allowing trial on "indirect discharge" theory under *Maui.*
- *Black Warrior River-Keeper, Inc. v. Drummond Co., Inc.*, 579 F. Supp. 3d 1310, 1321 (N.D. Ala. 2022)
  - Acid Mine Drainage from mine that traveled through groundwater to river is "functional equivalent" of point source discharge.
  - Unclear AMD seeping in groundwater was ever conveyed through a "confined discrete conveyance"

Pollution

- 33 USC § 1362(19): pollution means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.
- Transferring water containing pollutants from one body to another counts as the addition of pollutants, even if concentration is higher in receiving water. Therefore a permit is required. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 484 (2d Cir. 2001)
  - Given that even heat is a pollutant, this means that virtually any transfer of water will require a permit

Waters of the United States

- The CWA prohibits the discharge of pollutants to “navigable waters,” which are defined as “the waters of the United States, including the territorial seas.”
- “Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- The Clean Water Act does not define “waters of the United States.”
- The EPA and the Department of the Army have defined “waters of the United States” by regulation since the 1970s.
- Comes up most often in Sec. 404 permits for fill in wetland.

Why does the definition of Waters of the United States (WOTUS) matter?

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Sackett Facts

- Purchased property in 2004. Began backfilling, and EPA sent a compliance order.
- The wetlands were on the other side of a 30-foot road from an unnamed tributary that feeds into a non-navigable creek, that feeds into Priest Lake, Idaho, which is a navigable water.

By Pacific Legal Foundation

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Sackett Test

- The CWA extends to cover only those wetlands where:
    1. The body of water adjacent to the wetland is a **WOTUS** (a relatively permanent body of water connected to traditional interstate navigable waters); and
    2. The wetland has a "**continuous surface connection**" with that water.

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Cooperative Federalism

- Although the Clean Water Act is federal law, it implements a cooperative federalism approach for protecting water quality
  - States have primary responsibility for developing water quality standards in accordance with CWA. 33 U.S.C. § 1313
  - EPA can delegate administration of NPDES Permit system to states. 33 U.S.C. § 1342(b)
  - All states except Massachusetts, New Hampshire, New Mexico, and some territories have been delegated that authority, so they issue permits that cover discharges under both the CWA and state-specific water quality laws.
  - States can have Sec. 404 fill permitting authority delegated to them, but this is rare.
- The Clean Water Act does not preempt state laws governing water quality. 33 U.S.C. § 1370

Section 401 Certifications

- When a federal permit is for “any activity… which may result in any discharge into the navigable waters” the permittee must obtain a certification from the State that such permitted discharges will comply with provisions of the CWA, and any additional water quality standards the State has adopted.
- When acting on a petition for a § 401 Certification, State can:
  - Deny
  - Grant
  - Grant with conditions, which become part of the federal permit.
- Scope of State review has been subject of significant litigation; open questions remain

Section 402 NPDES Permits

- NPDES Permits are required whenever a facility discharges pollutants into waters of the United States from a point source.
- NPDES Permits impose monitoring requirements, and are designed to ensure that discharges do not harm the environment or human health.
- Most states implement the NPDES Stormwater Program and administer their own stormwater permitting programs.
- There are two types of NPDES permits: individual permits and general permits.
- Predictability and speed are main advantages of the general over the individual permit for particular location.

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Industrial Stormwater General Permits (ISGP)

- Adaptive Management Approach:
  - Permittees are required to maintain Stormwater Pollution Prevention Plans (SWPPPs) that detail various Best Management Practices to keep discharges to a minimum
  - Permittees are required to regularly sample discharge points and submit reports to their governing state agency. Sampling obligations can be reduced if permittee can show consistent attainment.
  - The ISGP imposes “benchmarks” for effluent, not strict effluent limitations that typically occur in individual permits.
  - Benchmark exceedances, in and of themselves, are not permit violations. Rather, they trigger escalating response obligations.
  - If the facility discharges to impaired water bodies, there are stricter effluent limits

CWA Enforcement

- Two Primary Enforcement Mechanisms:
  - State enforcement actions
  - Citizen Suits
- Violations of the CWA carry inflation-adjusted penalties of up to $64,618 per violation per day. 33 U.S.C. § 1319; 40 CFR § 19.4
  - Because penalty maximum applies to each violation, the theoretical maximum can get very large very quickly
- State Actions
  - If the State becomes aware that a Permittee is violating the conditions of a permit, the State can issue orders and bring an enforcement action. *33 U.S.C. § 1319*
  - State can also seek penalties. Ex Washington RCW 90.48.144 can be $10,000/day

Citizen Suits

- CWA authorizes citizen suits. Anyone can sue who has enough injury under Article III of the US Constitution.
- In order to initiate a citizen suit, citizen group must send a notice letter to the alleged violator, the EPA, and the State at least 60 days before initiating suit.
- If the State commences an enforcement action for the violations alleged in the notice letter, citizen suit is barred.
- Purpose of the notice letter is to provide alleged violator an opportunity to cure problems.
  - Citizen suit must be based on violations occurring at the time the suit is commenced. Cannot be based on wholly past violations.
- Remedies include:
  - Injunctions
  - Civil Penalties
  - Attorneys' fees (for the plaintiffs only)

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