NACWA 2008 LAW SEMINAR
Developments in Clean Water Law


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Top 10 CWACs

by

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The Cutting Room Floor


» *Northwest Envt’l Advocates v. USEPA*, 537 F.3d 1006 (9th Cir. 2008) (vessel discharges).

» *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) (en banc) (USFS Mission Brush Project), overruling *Ecology Center Inc. v. Austin*, 430
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CRF

» *Sierra Club v. Flowers*, 526 F.3d 1353 (11th Cir. 2008) (NEPA review of 404 permits).

» *Florida Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008) (FEMA’s FIP subject to ESA).

» *NRDC v. Winter*, 518 F.3d 658 (9th Cir. 2008) (Navy sonar).
Varied Bathymetry off the Coast of Southern California
Winter v. NRDC, No. 07–1239.

» NEPA challenge to Navy’s MFA sonar training exercises
  › Navy: EA and operational precautions
  › District Court: EIS and 6 more conditions
  › Ninth Circuit affirmed

» Reversed: 9th Circuit’s standard of “possibility” of irreparable harm is too lenient
  › Balance of equities and public interest test make injunction inappropriate
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» The Basics: CWA Jurisdiction
» Regulatory Repose (or Not)
» Permits & Certifications
» Citizen Suit Enforcement
N. California River Watch v. City of Healdsburg, CA, 496 F.3d 993 (9th Cir. 2007), cert. denied, 128 S. Ct. 1225, 76 U.S.L.W. 3438 (Feb. 19, 2008).

» Must EPA consider effects on endangered species to approve Arizona NPDES program?
  › Ninth Circuit said, “Yes!”
  › D.C. and Fifth Circuits had previously said, “No.”

» Supreme Court: No. Reversed and remanded.
  › FWS regulation says ESA § 7 applies only to discretionary actions.
  › CWA § 402(b): Nine factors; no EPA discretion.
2. United States v. Robison, 505 F.3d 1208 (11th Cir. 2007).

» Appeal of a conviction for unpermitted discharges to an Alabama creek.

» Held: Reversed due to faulty jury instruction on “navigable water,” and absence of proof of nexus.

» Justice Kennedy’s “significant nexus” test requires evidence and proof.
3. United States v. Lucas, 516 F.3d 316 (5th Cir. 2008).

- Appeal of convictions for CWA & other crimes.
  - Developer hired an engineer to certify septic systems for Jackson County, MS trailer park.
  - Cease & desist orders → 41-count indictment.

- Held: Affirmed. Trailer park was jurisdictional wetlands & septic systems are “point sources.”
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  » Appeal of dismissal of a challenge to the 1986 definition of “waters of the United States.”

    › District Court: Challenge untimely under 28 U.S.C. § 2401(a):
      - 6-year statute of limitations
      - “every civil action commenced against the United States”

  » Held: Dismissal affirmed. Neither the Corps’ ANPRM nor its Guidance was a “reopening.”

  › P & V might challenge rule’s application
5. Our Children’s Earth Fndn. v. EPA, 527 F.3d 842 (9th Cir. 2008), petition for cert. filed Aug. 21, 2008.

> Appeal from dismissal of citizen suit seeking

» Technology-based review of effluent limitations and guidelines

» Listing of new source categories for regulation; and

» Timely plans for future reviews.

> Held: Affirmed.

» District court had jurisdiction.

» But EPA has discretion in review of guidelines.
6. **Northwest Env'tl. Advocates v. EPA**, 537 F.3d 1006 (9th Cir. 2008).

» Appeal from 2005 district court holding 40 C.F.R. § 122.3(a) *ultra vives*.

  › EPA had exempted vessel discharges in 1973.

  › NWA sued in 2003.

» Held: Affirmed as to jurisdiction, merits, and remedy.
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7. **Friends of Pinto Creek v. EPA**, 504 F.3d 1007 (9th Cir. 2007).

» Review of an NPDES permit for new copper discharges to impaired river.

» Held: Permit is vacated.

» 40 C.F.R. § 122.4 allows new discharges into impaired waters only if:

  › Sufficient pollutant load allocations remain; and
8.A. Islander East Pipeline Co., LLC v. McCarthy, 525 F.3d. 141 (2nd Cir. 2008).

» Review of CT DEP denial of a 401 Certification for a new gas pipeline between CT and NY.

» Held: Petition dismissed.


» Review of states’ inaction on 401 Certification.

» Held: Dismissed for lack of standing.

› WCE could not demonstrate any injury.

› If injury from 404 delay, not redressable.
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- Appeal from dismissal of citizen suit over MS4 Permit violations.
- City agreed to a Consent Decree with EPA.
- Court entered Consent Decree and dismissed ECO suit on *res judicata*.
- Held: Vacated and remanded to dismiss as moot.
  - The decree resolved all violations alleged.

» Appeal from dismissal of citizen suit for violations of thermal limits in NPDES permit.

› County had applied for less stringent thermal limits.

› MDE & County had resolved MDE enforcement action by a 2006 Consent Judgment.

» Held: Affirmed. Suit was barred by CWA § 505(b)(1)(B).

› MDE was diligently prosecuting.

› “Section [505(b)(1)(B)] does not require government prosecution to be far-reaching or zealous. It requires only diligence.” 523 F.3d at 459, quoting Karr v. Hefner, 475 F.3d 1192, 1197 (10th Cir. 2007).
Coming Attractions

» *City of Los Angeles v. Kern County*, 509 F.Supp.2d 865 (C.D. Cal. 2007), *appeal pending*, No. 07–56564 (9th Cir.).
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