

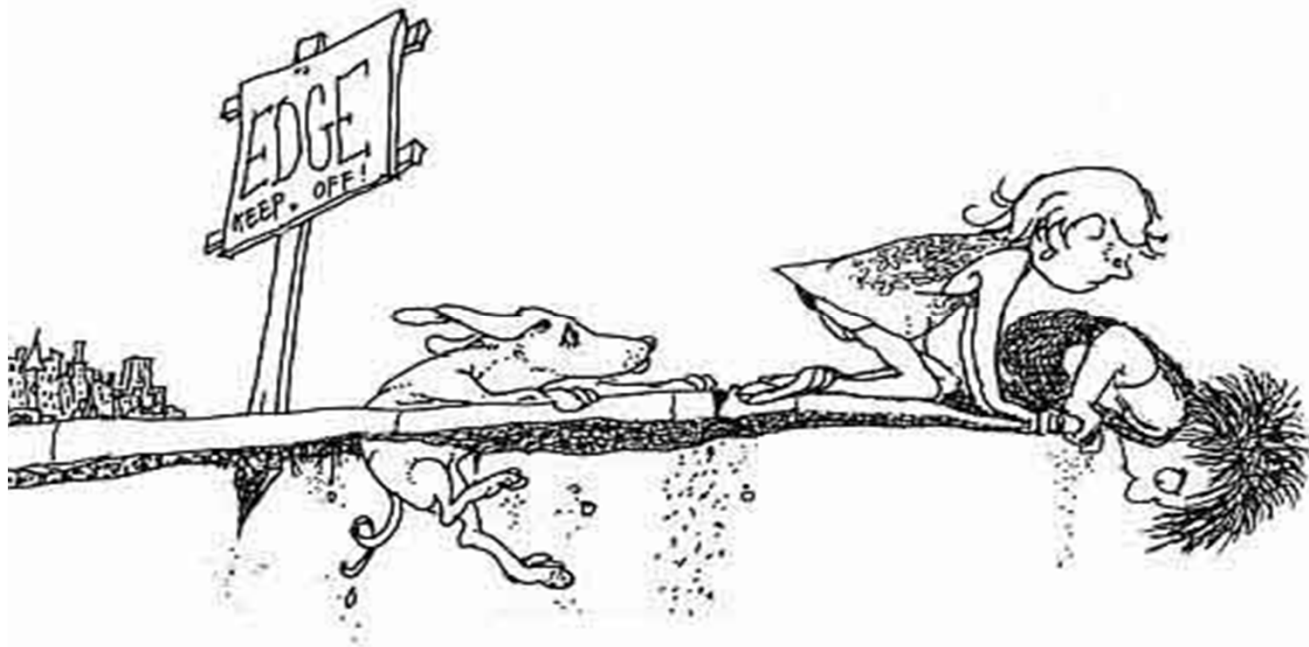
NACWA

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Seattle, Washington

Nutrients: The Next Clean Water Legal Frontier

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Hunton & Williams
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There is a place where the sidewalk ends. . .



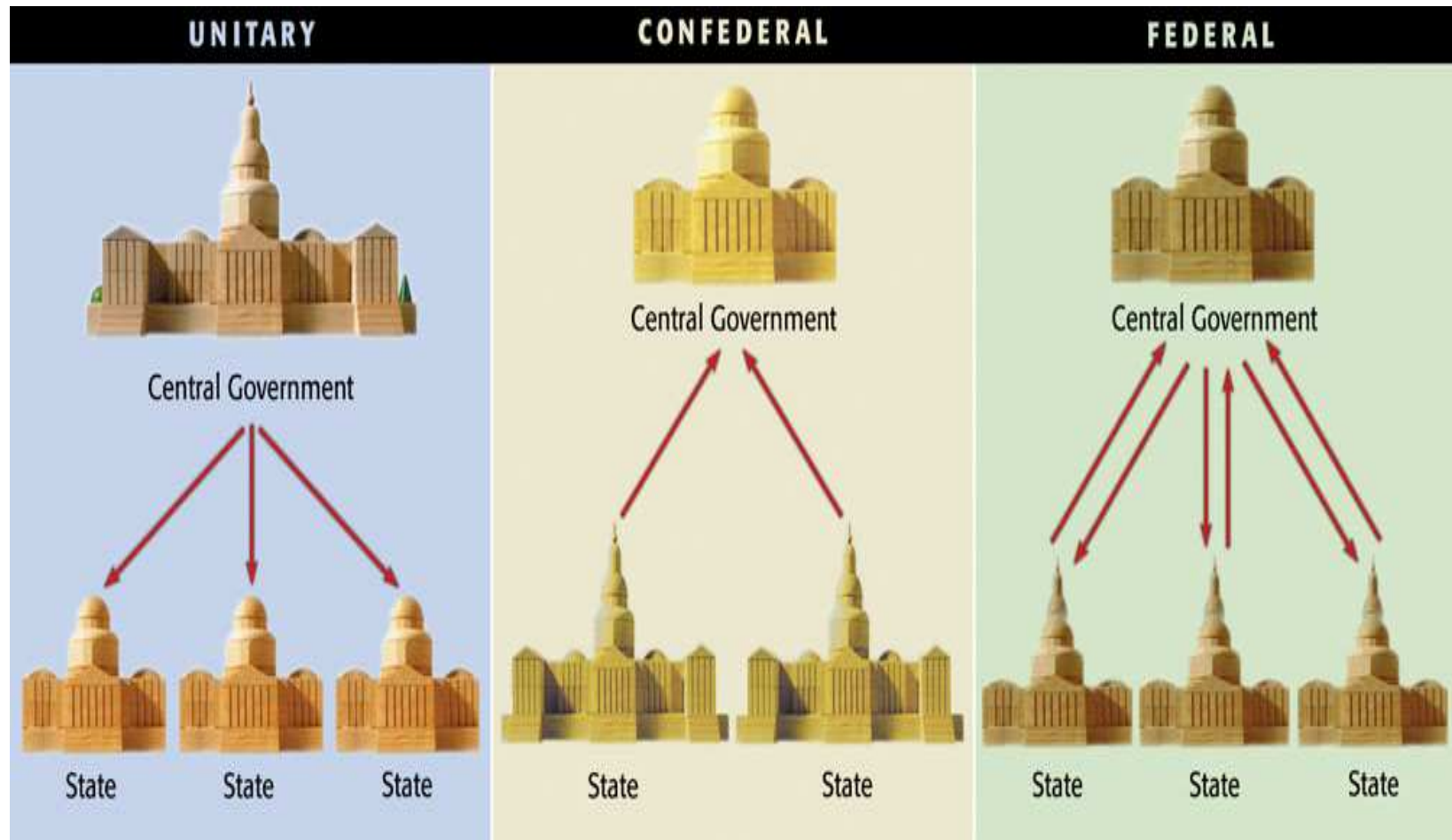
A Brief History of How We Got Here

Table I. Clean Water Act and Major Amendments

(codified generally as 33 U.S.C. §§1251-1387)

Year	Act	Public Law
1948	Federal Water Pollution Control Act	P.L. 80-845 (Act of June 30, 1948)
1956	Water Pollution Control Act of 1956	P.L. 84-660 (Act of July 9, 1956)
1961	Federal Water Pollution Control Act Amendments	P.L. 87-88
1965	Water Quality Act of 1965	P.L. 89-234
1966	Clean Water Restoration Act	P.L. 89-753
1970	Water Quality Improvement Act of 1970	P.L. 91-224, Part I
1972	Federal Water Pollution Control Act Amendments	P.L. 92-500
1977	Clean Water Act of 1977	P.L. 95-217
1981	Municipal Wastewater Treatment Construction Grants Amendments	P.L. 97-117
1987	Water Quality Act of 1987	P.L. 100-4

Cooperative Federalism





Cooperative Federalism in the Context of the Clean Water Act

- CWA 101: “It is the policy of the Congress to recognize, preserve, and protect the **primary responsibilities and rights of States** to prevent, reduce, and eliminate pollution...”
- CWA 510: “Except as expressly provided in this chapter, nothing in this chapter shall...be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.”



Cooperative Federalism in the Context of the WQS Program

CWA 303 provides that:

- States adopt / periodically review / revise WQS
- EPA reviews state WQS and either approves or disapproves of them
- If EPA disapproves, then it can develop its own WQS



Power to Inform, Guide, Inspire, Cajole . . .

CWA 304 gives EPA authority to:

- ***Develop and publish recommended criteria “accurately reflecting the latest scientific knowledge...”***
- ***Information on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters***
- ***But this information is not binding or enforceable; it merely serves “as guidance” to states for use in developing their own criteria.***



The Problem with Nutrients

- ***Among the leading causes of impairment;***
- ***But not inherently bad;***
- ***Many confounding variables;***
- ***Levels are dependent on uses;***
- ***No easy, one-size-fits-all solution.***

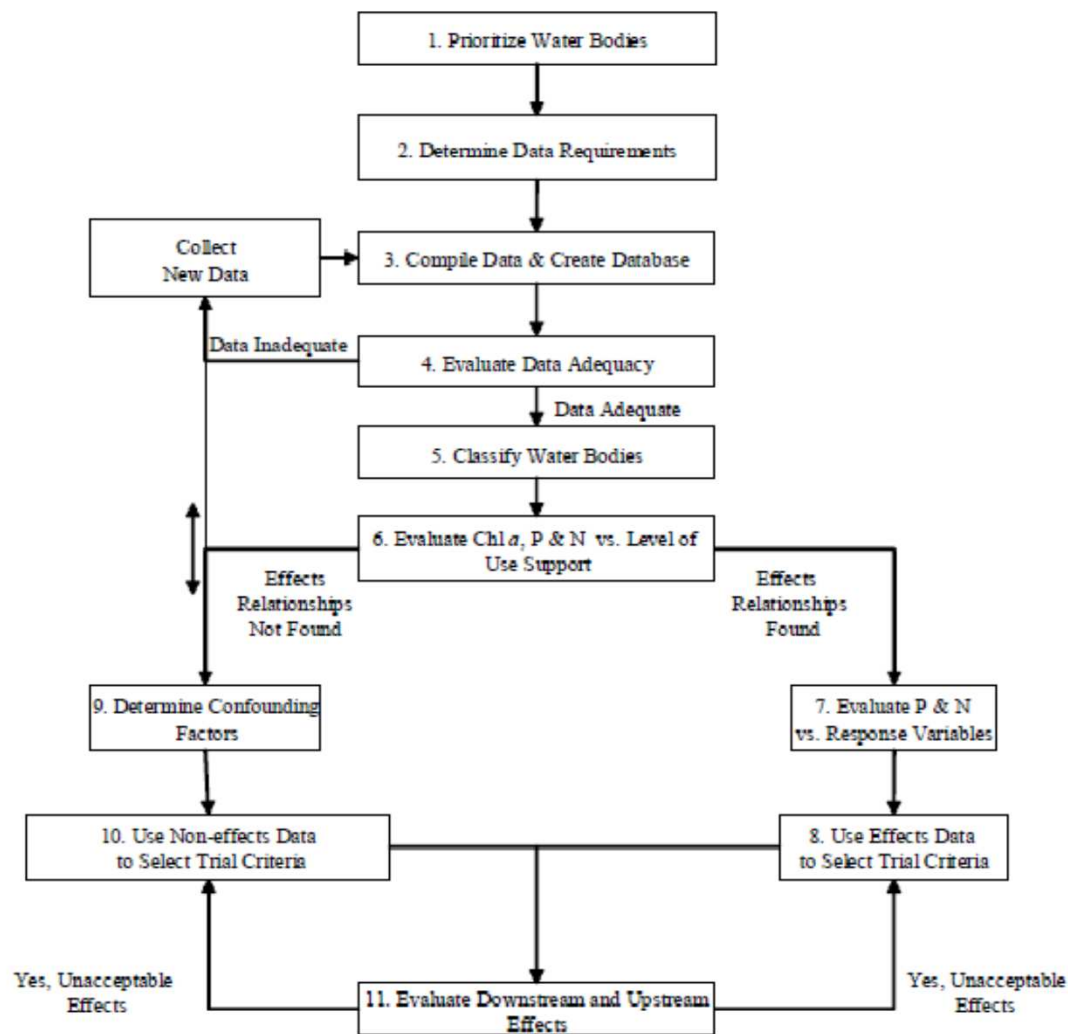


(Select) EPA Efforts to Guide and Cajole States

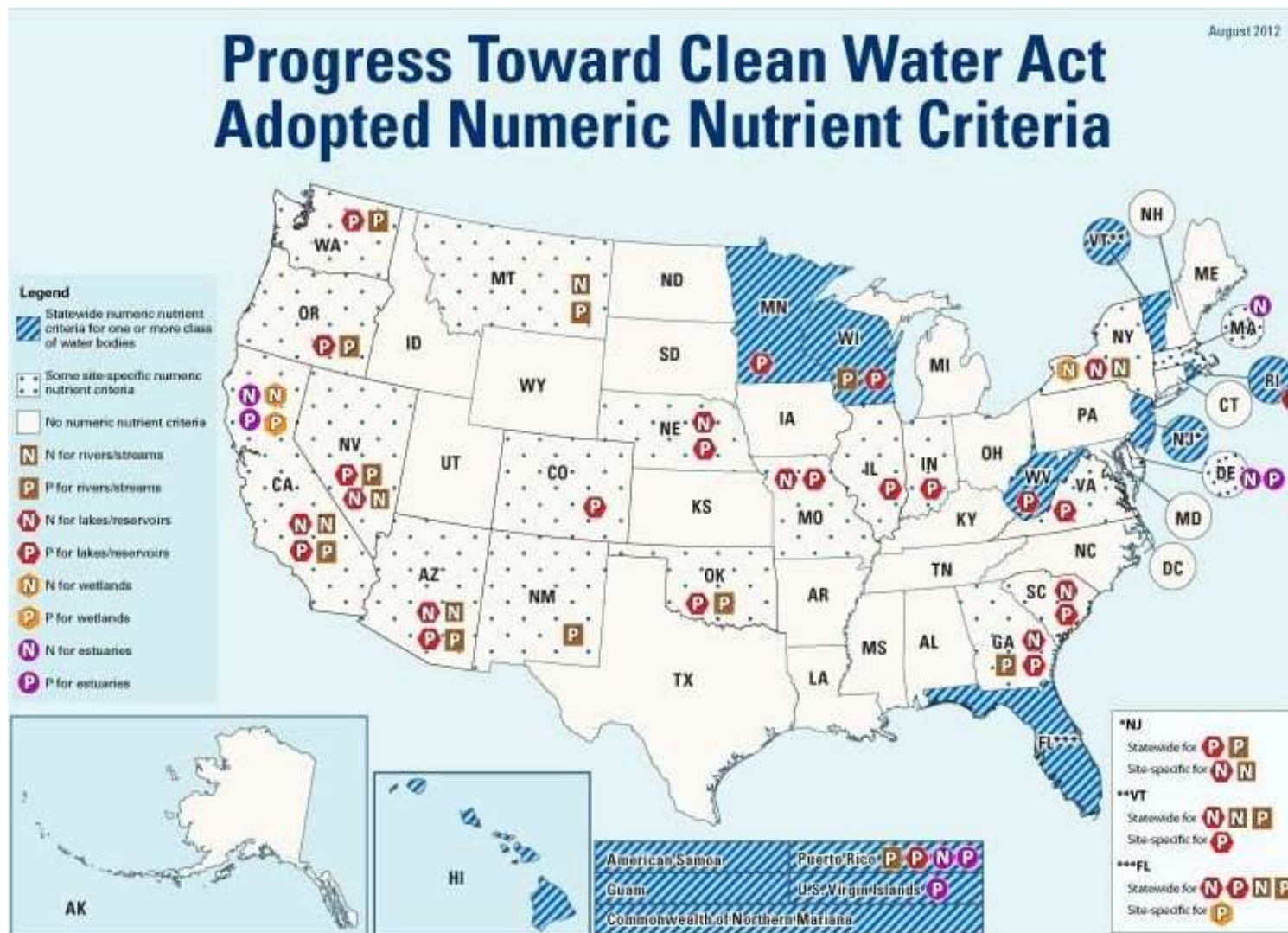
- ***Numeric Nutrient Criteria Strategy (1998)***
- ***Technical Guidance and Recommended Ecoregional Criteria (2000, 01, 02, 03, 08, 10)***
- ***Grubbs Memo on Developing Nutrient Criteria (2001)***
- ***Grumbles Memo on Nutrient Pollution and Numeric WQS (2007)***
- ***First National Report on Progress (2008)***
- ***Urgent Call to Action (2009)***
- ***EPA Intervention in Florida (2009-Present)***
- ***Stoner Memo Reaffirming EPA's Commitment to "Partnering" with States (2011)***

A Rationale Approach

Guidance on Developing Nutrient Standards for Protecting Designated Uses of Water Bodies



Where Are We Now?



Other Issues

- *Even in the face of “applicable” state-adopted and EPA-approved nutrient criteria, states and EPA regions continue to take short-cuts in the TMDL process and derive ad hoc unpromulgated nutrient targets (including “recommended” criteria published by EPA under CWA 304(a)).*
- *Only one federal circuit court has addressed the proper means of deriving numeric permit limits from narrative nutrient criteria, and unfortunately, that court afforded the permit writer “extreme deference.”*
- *Some courts have held, and many environmental groups continue to champion, that WQS are directly binding and enforceable.*



The End

*Yes we'll walk with a walk that is measured and
slow,
And we'll go where the chalk-white arrows go,
For the children, they mark, and the children,
they know
The place where the sidewalk ends.*

Shel Silverstein (1974)

Thank you!

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