Top Clean Water Act Cases of Year

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Arkansas Game & Fish Commission v. United States, 87 Fed. Cl. 594 (2009), *rev'd*, 637 F.3d 1366 (Fed. Cir. 2011), *cert. granted*, 80 U.S.L.W. 3562 (U.S. Dock. No. 11-597) (April 2, 2012)

Issues and Holding:

The Corps of Engineers operates a dam on the Black River, which impounds Clearwater Lake approximately 45 miles northwest of Poplar Bluff, Missouri. In 1953, after five years of experimentation and consultation with affected stakeholders, the Corps formally adopted a water management plan for the dam, which was part of the Corps' Clearwater Lake Water Control Manual. The water management plan specified when water would be released from the dam, and in what quantity. During periods of high water, variations in the rate of release from the dam can result in shorter periods of more intense flooding or longer period of less severe flooding. The releases normally contemplated by the water management plan generally mimic the periodic flooding that would naturally occur in the river basin. The Manual allows for deviations from the water management plan in certain circumstances.

AG&FC owns a wildlife management area which consists of approximately 23,000 acres of wetlands and bottomland hardwood forest along the Black River near the Arkansas-Missouri border. The WMA is approximately 115 river miles downstream of the Corps dam on Clearwater Lake. Releases from the dam can and frequently do cause flooding in the WMA.

During the period 1993-2000 the Corps departed from the pattern of releases normally called for by the water management plan. The deviations from the plan resulted in longer periods of flooding in the WMA. AG&FC objected to the deviations without success until 2001. As a result of the prolonged periods of flooding, AG&FC experienced substantial timber losses in the WMA.

AG&FC filed suit in the Court of Federal Claims, seeking damages for the taking of a temporary flowage easement. After a two week trial that included a site visit, the Court of Federal Claims held that the United States owed AG&FC $5.6 million for the timber taken plus $176,428.34 for a regeneration program to address degraded habitat that will not recover on its own. On appeal, the Federal Circuit reversed by a divided vote. The majority held as a matter of law that there had been no taking. The dissent argued vigorously that there had been a taking. The Federal Circuit denied rehearing by a divided vote.

AG&FC petitioned for *certiorari*. *Amicus* briefs in support of AG&FC's petition for cert. were filed by the Association of Fish and Wildlife Agencies; the Pacific Legal Foundation and the Cato Institute; the National Association of Home Builders and the American Forest Resource Council; and the Attorneys General of Arkansas, Louisiana, Mississippi, and South Dakota.

On April 2, 2012 the Supreme Court granted *certiorari*, with Justice Kagan recusing. The question presented in the cert. petition is:

> Whether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the Takings Clause.

The case was argued on October 3, 2012, and now is awaiting decision. Prior to the oral argument, the federal government offered to settle for approximately $13 million, and AG&FC refused the offer.

Relevance to Public Utilities:
The decision of the Supreme Court could significantly affect the legal rules applicable to temporary takings, particularly if the decision of the Federal Circuit is reversed.

Next Steps:
The Supreme Court will decide the case by June.

Florida Wildlife Federation v. Jackson, 853 F.Supp.2d 1138 (N.D. Fl. 2012)

Issues and Holding:
This decision arises in the context of extensive litigation concerning the adequacy of Florida's water quality standards for nutrients. The District Court's order from February 2012 addresses numerous challenges to EPA's adoption of numeric nutrient criteria for Florida lakes, springs, and streams.

In 2009, EPA determined that the Florida Department of Environmental Protection's narrative nutrient criterion[1] was inadequate and that numeric criteria were necessary. This determination triggered EPA's duty to promulgate new standards under Section 303(c)(4) of the Clean Water Act. EPA negotiated a consent decree with plaintiffs in related litigation establishing a schedule for EPA rulemaking to establish numeric nutrient standards for lakes and flowing waters (Phase I) and for coastal and estuarine waters (Phase II).

The February 2012 Order relates to the Phase I criteria, which were issued on November 14, 2010. The District Court found that the criteria for lakes and springs were not arbitrary or capricious. The District Court found, however, that the stream criteria are arbitrary and capricious, concluding that there was "no basis in sound science" for EPA's criteria. Instead of developing criteria based on modeling and field studies, EPA chose a "representative sample of minimally-disturbed streams," calculated annual geometric means based on available nutrient data, and set the criteria at the 90th percentile. The Court rejected EPA's approach, finding no basis for setting criteria based on nutrient levels that would be expected to cause *any* change in flora and fauna; rather, EPA should have based criteria on nutrient levels that would cause a *harmful* change. The Court noted that EPA had cited no evidence that levels about the 90th percentile would cause harm.

The District Court reached a similar conclusion about EPA's downstream protection criteria for lakes – numeric criteria intended to protect lakes from nutrient pollution introduced through upstream waters. While the Court accepted EPA's decision to adopt downstream protection criteria, it rejected EPA's specific approach to protecting downstream lakes that are not impaired for reasons similar to its rejection of the stream criteria. As with the numeric criteria for streams, EPA based the downstream protection criteria on nutrient levels that would result in *any* increase from ambient conditions and thus presumably cause *some* change in flora and fauna, rather than on levels determined to cause a *harmful* change.

Finally, the District Court found that it was not arbitrary or capricious for EPA's rule to provide for site-specific alternative criteria – essentially variances – from the statewide numeric criteria.

Relevance to Public Utilities:
The courts' involvement in the establishment of Florida's nutrient criteria has been extensive, in this and related litigation concerning the relationship between EPA and the Florida Department of Environmental Protection in their efforts to protect the Everglades.[2] This may indicate a more

[1] "Nutrient concentrations of a body of water [must not] be altered so as to cause an imbalance in natural populations of aquatic flora or fauna." Fla. Admin. Code r. 62-302.530(47)(b).
[2] *Miccosukee Tribe of Indians of Fla. v. U.S.,* 2010 U.S. Dist. LEXIS 37531 (S.D. Fla. 2010).

active role for courts in light of nationwide frustration with the pace of remediation of certain prominent water bodies.

The roles of states, EPA, and courts in establishing nutrient criteria may become an even more pressing national issue in light of litigation filed by NRDC and other environmental advocacy organizations in *Gulf Restoration Network v. Jackson*, No. 12-677 (E.D. La.), seeking to require EPA to set national nutrient criteria or, in the alternative, to set nutrient criteria for nearly the entire Mississippi River basin and portions of the Gulf of Mexico. NACWA has intervened in that litigation.

Next Steps:
Under the consent order in related litigation (referenced by the District Court), the criteria that were not struck down will take effect on January 6, 2013. In the meanwhile, EPA must propose new rules consistent with this decision by November 30, 2012. EPA may also act on Florida DEP's proposed nutrient criteria by November 30. Florida DEP's criteria are similar to EPA's criteria, but include a site-specific biological confirmation as well as numeric limits. Florida DEP's proposed rule includes a "poison pill" – EPA can approve it in its entirety or reject it, but cannot modify it. Florida DEP submitted technical support for its proposed criteria to EPA in September 2012.

Plaintiffs have appealed to the Eleventh Circuit, and EPA has moved to dismiss plaintiffs' appeal on the grounds that there has not yet been a "final action" by the lower court.

Friends of the Everglades et al. v. EPA, No. 08-13652, 2012 U.S. App. LEXIS 22282 (11th Cir. Oct. 26, 2012)

Issues and Holding:
EPA's 2008 Water Transfers Rule (WTR)[1] provides that transfers of water do not require NPDES permits, so long as the transfers themselves do not subject the transferred water to intervening commercial, industrial, or municipal use. Many entities – including the environmental advocacy organizations that had previously challenged water transfers by New York City[2] and the South Florida Water Management District[3] – filed petitions to review the WTR in federal courts of appeals. Quite a few of those entities also filed suit under the Clean Water Act in federal district courts, given the lack of clarity about subject-matter jurisdiction. The petitions filed in the circuit courts were consolidated in the Eleventh Circuit by lottery under the multi-district rule. The district court cases were stayed pending resolution of the consolidated petitions for review.

In November 2008, the Eleventh Circuit stayed the petitions for review pending final decision in a Clean Water Act citizen suit concerning pumping stormwater into the Everglades. In the context of that individual water transfer, the Eleventh Circuit held in June 2009 that the South Florida Water Management District's "S-2" transfer did not need a NPDES permit based on the WTR, which the Court found (incidentally, in the context of the S-2 case) represented a valid exercise of EPA's discretion under the *Chevron* standard.[4] After the Supreme Court denied certiorari in the S-2 case in November 2010, the consolidated challenges to the Water Transfers Rule itself were briefed.

In October 2012, the Eleventh Circuit dismissed the consolidated petitions, holding that it lacked subject matter jurisdiction. It rejected EPA's arguments that the circuit courts had jurisdiction under: (1) 33 U.S.C § 1369(b)(1)(E), on the theory that the water-transfer rule is "related to" a limitation on movements of water and establishes limitations on permit issuers, and (2) 33 U.S.C. § 1369(b)(1)(F), because the effect of a permanent exemption from the requirements of a permit is "functionally similar" to the issuance of a permit. A challenge to the Water Transfers Rule thus must appropriately be brought in federal district court under the Administrative Procedure Act.[5]

NACWA joined New York City's amicus brief in support of EPA (on the merits – the brief did not address the jurisdiction issue), and has participated as an amicus curiae several times in related litigation over the past eight years.

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[1] 40 CFR § 122.3(i).
[2] *Catskill Mountains Ch. of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001), *aff'd following trial*, 451 F.3d 77 (2d Cir. 2006).
[3] *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist*., 280 F.3d 1364 (11th Cir. 2002), vacated and remanded by *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009), cert denied, 131 S. Ct. 643 (2010).
[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).
[5] *See also Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011).

Relevance to Public Utilities:
Numerous public utilities – particularly those involved in water supply and stormwater management – have been concerned about the decisions issued prior to EPA's adoption of the WTR that water management agencies needed NPDES permits to transfer untreated water from one water body to another "meaningfully distinct" body of water.

Next Steps:
EPA is apparently considering seeking rehearing *en banc*, or petitioning for a writ of certiorari. In the meanwhile, even though the Eleventh Circuit has not yet issued a mandate, plaintiffs in the Southern District of New York are urging that court to set a briefing schedule for summary judgment motions.

Leakey v. Corridor Materials, LLC, 839 F.Supp.2d 1340 (M.D. Ga. 2012)

Issues and Holding:
Corridor Materials ("Corridor") owns and operates the 493 acre Culverton Quarry in Hancock County, Georgia. The Plaintiffs, Jan and David Leakey (the "Leakeys"), own property located downstream of the Culverton Quarry site. The Leakeys contend that the Corridor's land disturbance and construction activities have caused and continue to cause discharges of eroded soils, sediment-laden stormwater, rock, sand, dirt, debris, and other pollutants into the Leakeys' pond and wetlands without the proper stormwater permits required by state and federal law.

In 2007, Corridor obtained a Surface Mining Permit, a Water Quality Permit, and an Air Quality Permit from the Georgia Environmental Protection Division (EPD) for the Culverton Quarry. After two Notices of Violation were issued in October 2008 and March 2009, EPD and Corridor negotiated a Consent Order on May 27, 2009.

Pursuant to the Consent Order, Corridor paid a $20,000 fine, and was also required to: (1) immediately implement and maintain erosion and sediment control measure; (2) implement a Wetland Restoration Plan to mitigate wetland disturbances; and (3) submit monitoring reports to the Georgia EPD for one year.

On January 11, 2010 the Leakeys filed a CWA citizen suit based on a July 2009 Notice Latter. The complaint also alleged various common law tort claims. After discovery, Corridor filed a Motion for Judgment on the Pleadings and to Dismiss Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction on August 16, 2011. Corridor argued that the Court is authorized to dismiss the Leakeys' complaint for lack of subject matter jurisdiction.

The District Court found that the Georgia law does not provide for the necessary meaningful opportunity for the general public to participate in the Georgia EPD penalty assessment process. Thus the Consent Order issued pursuant to Georgia's statutory scheme does not bar the Leakeys' CWA citizen suit and CWA claims against Corridor.

The Court looked at the jurisdictional challenge as a factual attack where "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits are considered." The plaintiff is not entitled to presumptions of truthfulness as to its allegations and disputed material facts will not preclude the court from evaluating the merits of the jurisdictional issue.[1]

This case turned on the limitations on actions found in 33 U.S.C. § 1319(g)(6)(A)(ii) and (iii). Subsection (ii) bars citizen suits when the "State has commenced and is diligently prosecuting a civil, criminal," or administrative enforcement proceeding against the polluter pursuant to comparable State law.[2]

Subsection (iii) bars citizen suits on all claims for which "the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under ...

[1] *Lawrence v. Dunbar*, 919 F.2d 1525, 1528–29 (11th Cir. 1990).
[2] *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1251 (11th Cir. 2003).

comparable State law...."[3] Both subsections require that the State's actions or final administrative order be undertaken pursuant to a comparable State law.

This decision turned on Eleventh Circuit precedent in *McAbee v. City of Fort Payne*, where the Court adopted a "rough comparability" test to apply when determining whether the CWA's enforcement scheme is comparable to a state's statutory scheme. Rejecting several other circuits' standards for determining comparability, the Eleventh Circuit held that courts should focus on three categories of provisions contained in 33 U.S.C. § 1319(g): penalty assessment, public participation, and judicial review.[4]

Each category of the applicable CWA provision must have a "roughly comparable" provision under state law in order for the bar against a CWA citizen suit to apply.[5] "Thus, the Court must engage in an independent analysis of each category of state law provisions, and if one state law provision is not roughly comparable to the applicable federal law provision, then a citizen suit is not precluded."[6]

The *Leakey* court found that Georgia's statutory scheme is not roughly comparable to the CWA's enforcement scheme, because of the different schemes for public notice of penalty actions. Under 33 U.S.C. § 1319(g)(4), the CWA provides "interested persons" with the right to public notice and an opportunity to comment, the right to present evidence if a hearing is held, and the right to petition for a hearing if one is not held.

The Georgia statutes do not contain analogous public participation provisions. First, the public participation provisions only apply to persons who are aggrieved or adversely affected by any action or any order, rather than to any interested party. Corridor cited no authority that would allow the Leakeys to challenge the Consent Order, nor any provision providing them with notice of the existence of the Consent Order. Georgia's one possibly applicable regulation merely highlights the fact that Georgia law essentially bars the public from participation in Georgia EPD penalty assessment proceedings unless the violation falls into one of four narrow categories.

Relevance to Public Utilities:
In the Eleventh Circuit it will be hard to get the comparability test passed as now both AL and GA have failed the comparability test. An odd outcome perhaps since an element of NPDES delegation under CWA Section 402(b)(7) is that a state be able "To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement."

Next Steps:
On October 4, 2012, counsel for the Leakeys and Corridor advised the Court that they had reached a settlement in principle in this case. The trial had been set for October 22, 2012. EPA will have a 45 day review period to review the settlement under the CWA once it becomes final.

[3] 33 U.S.C. § 1319(g)(6)(A)(iii).
[4] *McAbee v. Payne*, 318 F.3d 1248, 1250 (11th Cir. 2003).
[5] *Id*. at 1256.
[6] 839 F.Supp.2d at 1346.

Los Angeles County Flood Control District v. Natural Resources Defense Council, 673 F.3d 880 (9th Cir. 2011)*, cert. granted,* 2012 U.S. LEXIS 4832 (U.S., June 25, 2012) (U.S. Dock. No. 11-460)

Issues and Holding:
Plaintiffs brought this Clean Water Act citizen suit to enforce alleged violations of the Los Angeles County Municipal Separate Storm Sewer System Permit (L.A. County MS4 Permit), which covers stormwater discharges from the County of Los Angeles (County), the Los Angeles County Flood Control District (District) and 84 incorporated municipalities in the County of Los Angeles. The L.A. County MS4 Permit includes a requirement to monitor "Mass Emissions" at specific locations. Plaintiff Natural Resources Defense Council (NRDC) claimed that because the District's Mass Emissions stations had recorded exceedances of water quality standards, the County had therefore violated the L.A. County MS4 Permit and the Clean Water Act.

The litigation in the Central District of California and the Ninth Circuit raised a number of interesting and complex issues concerning, among other things, whether compliance with the "iterative process" provisions in the L.A. County MS4 Permit was sufficient for permit compliance, regardless of whether the District was in strict compliance with water quality standards. In its somewhat turgid decision, the Ninth Circuit held that the permit provisions in the L.A. County MS4 Permit do not provide a "safe harbor" for violations of the discharge prohibitions that are part of the Receiving Water Limitations in that Permit, finding instead that the requirement to implement control measures (i.e., compliance with the iterative process) is independent of the discharge prohibitions. The Court also held that implementation of the Stormwater Quality Management Plan (SQMP) is the minimum required of each Permittee, and that a permittee can be required to implement additional more restrictive programs and control measures.

At the heart of the issue, though, is a basic question about whether there had been a "discharge of a pollutant," i.e., any addition of any pollutant to navigable waters from any point source, when the alleged discharge (the MS4) and the receiving navigable water (the Los Angeles River) were one and the same. The Ninth Circuit reasoned that at the point the stormwater was discharged to the rivers, there was no doubt the District controlled the stormwater and that the District was adding stormwater to the river downstream from the monitoring stations that contained concentrations of bacteria and metals in excess of water quality standards.

The District filed a petition for a writ of certiorari seeking review of two questions: (1) whether manmade improvements to a river (such as the largely concrete-lined portion of the LA River that serves as a portion of the District's MS4) can render a water body no longer a "navigable water of the United States"; and (2) whether when water flows from one portion of a river to another, through an engineered improvement, can there be a "discharge" from a point source under the Clean Water Act. The Supreme Court granted certiorari only for the second question.

NACWA, among other organizations, joined an amicus brief submitted by New York City, which argues that mere water management activities that do not themselves add pollutants should not require NPDES permits. EPA opposed the cert. petition and, in its amicus brief on the merits, requested that the Supreme Court vacate the Ninth Circuit decision and remand the matter for further proceedings to determine whether the permit was actually violated, noting that

"no discharge occurs when polluted stormwater that has already been discharged into a river simply flows from a channelized portion … to a downstream portion of the same river."[1] Curiously, it isn't clear that even NRDC is arguing for a different result on the issue as it was presented to the Supreme Court. In one of its briefs, NRDC stated:

> The court of appeals therefore manifestly did not hold petitioner liable for the mere transfer of water within a single water body, and the decision could not be cited for that erroneous principle. Indeed, the decision has been cited to date by other courts only for the opposite and correct rule: that a finding of liability requires proof of a discharge of pollutants into navigable waters.[2]

Nonetheless, given the phrasing of the question the Supreme Court agreed to hear, NACWA and other organizations concerned with municipal water management felt compelled to weigh in about the burdens associated with calling into question the long-standing principle that intra-basin water transfers are not subject to the NPDES program.

Implications for Public Utilities:
Given the narrowness of the issue before the Supreme Court, and the likelihood that it will affirm its holding in *Miccosukee* that intra-basin transfers do not require NPDES permits, the Supreme Court decision seems unlikely to have much of an impact. The Circuit Court decision, however, will likely remain a source of concern about the iterative process and safe harbor for MS4 permitting. That decision, though, specifically notes that the MS4 Permit "provides no *textual support* for the proposition that compliance with certain provisions forgives compliance with the discharge prohibitions."[3] In other words, the decision does not foreclose the possibility that a permit could be drafted to make clear that compliance with the iterative process *does* constitute compliance with the discharge prohibitions.

Next Steps:
The case is being argued in the Supreme Court on December 4, 2012, and will be decided by June 2013.

[1] Brief for the United States as Amicus Curiae Supporting Neither Party at 18, Los Angeles County Flood Control District v. NRDC (No. 11-460).
[2] Respondents' Supplemental Brief at 2-3, Los Angeles County Flood Control District v. NRDC (No. 11-460).
[3] 2011 U.S. App. LEXIS 14443 at*43 (emphasis added).

Louisiana Environmental Action Network v. City of Baton Rouge, 677 F.3d 737 (5th Cir. 2012)

Issues and Holding:
The City of Baton Rouge and the Parish of East Baton Rouge (together, the City) have been the subject of EPA enforcement since 1988, which has resulted in a series of Consent Decrees. In 2010, Louisiana Environmental Action Network (LEAN) filed a citizen suit against the City of Baton Rouge and the Parish of East Baton Rouge (the City), alleging violations of the Clean Water Act. LEAN had previously sent a CWA citizen suit notice letter to the City, as well as to EPA and the Louisiana Department of Environmental Quality (LDEQ), alleging that the North, Central, and South Wastewater Treatment Plants were in violation of the CWA for failing to meet the effluent standards set out in the NPDES permits, and also the less stringent standards in the Consent Decree. In its complaint, LEAN alleged that "[n]either EPA nor LDEQ has commenced or is diligently prosecuting a civil or criminal action in court to redress the violations specified in the Notice and Revised Notice."

The City moved to dismiss, asserting that the citizen suit was barred under the "diligent prosecution" provision of the Act.[1] The United States District Court for the Middle District of Louisiana granted the motion, noting that the City was in full compliance with its Consent Decree, and was on schedule to complete massive updates and improvements to the three wastewater treatment plants by January 2015.[2] The District Court also held that the City's compliance with the Decree fully addressed LEAN's grievances, thereby rendering LEAN's claims moot. The District Court stated that "[p]rior to the January 2015 compliance deadline set by the 2002 consent decree, no remedy is available to [LEAN] absent a finding of non-compliance by the Court having proper jurisdiction to enforce the decree."

On appeal, the Fifth Circuit reversed the District Court's judgment. The Fifth Circuit found that the District Court's mootness analysis was based on a case where the Consent Decree came after the citizen suit was filed.[3] Neither EPA nor LDEQ argued mootness in the District Court. The Fifth Circuit instead examined the "diligent prosecution" issue not addressed in the District Court.

The Court undertook a thoughtful analysis of "whether the CWA's "diligent prosecution" bar is jurisdictional. If the provision is not jurisdictional, then LEAN is protected by the safeguards of FRCP Rule 12(b)(6), and the District Court is required to accept all well-pleaded facts in LEAN's complaint as true and view the facts in the light most favorable to LEAN. However, if the provision is jurisdictional, and thus goes to the District Court's subject matter jurisdiction, then the District Court is not obligated to accept the assertions in LEAN's complaint as true.

The Fifth Circuit concluded "that Congress has not clearly mandated that the CWA's 'diligent prosecution' provision is jurisdictional," reasoning that district courts have subject matter jurisdiction over CWA citizen suits pursuant to the general federal question jurisdiction statute, 28 U.S.C. § 1331 and the CWA's jurisdictional provision, 33 U.S.C. § 1365(a). However, since

[1] 33 U.S.C. § 1365(b)(1)(B).
[2] 2011 WL 1882439 M.D. La., May 17, 2011.
[3] *Environmental Conservation Organization v. City of Dallas*, 529 F.3d 519 (5th Cir.2008).

the issue of diligent prosecution is separately located in § 1365(b)(1)(B), Congress did not intend the provision to be jurisdictional:

> Our conclusion that the CWA's "diligent prosecution" provision is non-jurisdictional is buttressed by the Seventh Circuit's recent decision in *Adkins v. VIM Recycling, Inc., 644 F.3d 483 (7th Cir.2011)*. There, the court held that the "diligent prosecution" provision of the Resource Conservation and Recovery Act ("RCRA")—which is virtually identical to the "diligent prosecution" provision of the CWA is not jurisdictional.[4]

Even though the CWA's diligent prosecution bar is not jurisdictional, the question to be answered was whether the 2002 CD precluded LEAN's action. The City said that EPA's continued enforcement of the 2002 CD was diligent. The City's costs under the CD were projected to be over $1 billion. LEAN countered that EPA was not diligently prosecuting the 2002 CD due the City's ongoing, non-compliant discharges and EPA's failure to impose stipulated penalties for these violations. LEAN argued that the issue of "diligent prosecution" is a fact-intensive question that can only be answered after the proper development of a record. The Fifth Circuit concluded that those factual determinations were beyond its purview and remanded the matter for further proceedings.

Relevance to Public Utilities:
It may not always be the case, years into following a Consent Decree path, that a city will escape citizen suit review even when, as in Baton Rouge's situation, it will spend over $1 Billion.

Next Steps:
On May 31, 2012, the District Court issued a scheduling Order recognizing that the parties may find an amicable resolution of the plaintiff's claims. All fact discovery must be completed by September 9, 2013 and dispositive motions must be filed by September 30, 2013.

[4] 677 F.3d 749.

Mingo Logan Coal Co. v. EPA, 850 F.Supp. 2d 133 (D.D.C. 2012), *appeal pending*, Docket No. 12-5150 (D.C. Cir.)

Issues and Holding:
In 2007, after extensive administrative proceedings that included EPA involvement, the Corps of Engineers issued a 404 permit authorizing Plaintiff to create valley fills in six headwater streams for the disposal of coal mining spoils generated by a large mountaintop removal coal mine in West Virginia. The valley fills in question would permanently bury approximately 7½ miles of headwater streams beneath 110 yds^3 of excess spoils. In 2009 EPA asked the Corps to suspend, revoke, or modify the permit. The Corps declined this request. Six months later EPA published notice of its intent, acting under CWA § 404(c), to withdraw or restrict the specification of several of the streams as disposal sites. After receiving public comments, EPA issued a final determination in 2011 withdrawing the specification of two streams and their tributaries. EPA's decision effectively terminated the authority for approximately 80% of the disposal contemplated by the permit issued by the Corps.

Plaintiff filed suit in federal district court under the Administrative Procedures Act alleging that EPA's withdrawal of the specification exceeded the Agency's statutory authority and, in the alternative, that it was arbitrary, capricious and otherwise not in accordance with applicable law. On Plaintiff's motion for summary judgment, the District Court held that EPA did not have authority under § 404(c) to withdraw or restrict the specification of a disposal site after the Corps of Engineers has issued a permit under 404.

Section 404 of the CWA authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material "into navigable waters *at specified disposal sites*." Section 404(b) provides that the Secretary shall specify "each such disposal site" in a 404 permit, in accordance with specified procedures developed in conjunction with EPA. Section 404(c) provides in pertinent part that:

> The Administrator [of EPA] is authorized to prohibit the specification (including the withdrawal of specification) of . . . a disposal site, whenever he determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

Applying *Chevron* Tier I analysis, the District Court concluded that (i) the plain language of § 404(c) does not unambiguously give EPA authority to withdraw specification after a permit is granted; (ii) the structure of the CWA as a whole does not support such authority; and (iii) the legislative history does not support EPA's interpretation.

Under *Chevron* Tier II, the District Court concluded that EPA's view of the statute was entitled to little or no deference because the Corps, and not EPA, is the agency charged with administering § 404. Moreover, the District Court concluded that even if some deference was given to EPA, its interpretation of § 404(c) was unreasonable in light of the importance of finality in CWA permitting.

The language used by the District Court in rejecting EPA's position was extraordinarily dismissive:

> EPA claims that it is not revoking a permit – something it does not have the authority to do – because it is only withdrawing a specification. Yet EPA simultaneously insists that its withdrawal of the specification effectively nullifies the permit. ***To explain how this would be accomplished, . . . EPA resorts to magical thinking. It posits a scenario involving the automatic self-destruction of a written permit issued by an entirely separate federal agency after years of study and consideration. Poof!***

And:

> EPA's claim that the statute contemplates that a [404] permit is never really final is not easily squared with Congress's clear desire to limit duplication and delay so that commerce would not be disrupted more than necessary. ***What would be the point of insisting upon expedition in granting permits if a permit isn't worth the paper it's printed on and commerce could be interrupted at any time?***

EPA filed an appeal from the District Court's decision. Briefs have been filed, including a large number of *amicus* briefs. The appeal is now awaiting a date for oral argument.

Relevance to Public Utilities:
The direct effects of the District Court's decision are likely to be limited to the largely unique controversy that generated the case, namely mountaintop removal coal mining. EPA had never before attempted to withdraw a specification under § 404(c) after the Corps had issued a permit. The chances of frequent recurrence are extremely small. In a broader context, however, the case has relevance to EPA's capacity to pursue its agenda in a variety of spheres. EPA's belated action in this case is largely the product of the 2008 Presidential election. EPA agreed to, or at least acquiesced in, the original permitting decision of the Corps when President Bush was in office. Once the Obama administration entered office, EPA started to assert much stiffer opposition to mountaintop removal mining. While changes of EPA position in the wake of an election are not unprecedented, the facts in this case have become Exhibit A in a political argument that EPA has engaged in unjustifiable overreach. In the face of such criticism, many significant issues before EPA have been postponed to a point in time well after November 6th. Until the dust from the election settles, cases such as this will continue to leave EPA exposed as a political piñata.

Next Steps:
Briefs have been filed in EPA's appeal and the case is awaiting a date for oral argument.

National Mining Assn v. Jackson, ___ F.Supp. 2d ___, 42 ELR 20165, 2012 U.S. Dist. LEXIS 106057 (D.D.C. 2012), *appeal pending*, Docket No. 12-5310 (D.C. Cir.)

Issues and Holding:

In 2009 and 2010 EPA issued certain "guidance" guidance documents regarding review of water and mining permit applications for mountaintop removal coal mine projects. The National Mining Association and others filed a number of suits challenging EPA's guidance documents on grounds they exceeded the scope of the Agency's statutory authority under SMCRA and CWA. The cases were ultimately consolidated in the District Court for the District of Columbia. In January 2011, the District Court denied Plaintiffs' motion for preliminary injunctive relief.[1]

In October 2011 the Court granted the Plaintiffs' first motion for summary judgment, concluding that EPA did not have statutory authority to adopt part of the guidance documents at issue (the Multi-Criteria Integrated Resource Assessment and the Enhanced Coordination Process).[2] In July 2011 EPA issued its Final Guidance Memorandum which replaced the Interim Detailed Guidance that was challenged in the consolidated actions. The Plaintiffs amended their complaints to challenge the Final Guidance and moved for summary judgment. In July 2012 the District Court granted summary judgment on the remaining claims, holding that EPA's Final Guidance Memorandum was also in excess of the Agency's statutory authority under SMCRA and CWA.[3]

The Court's decision in *National Mining Assn II* was addressed in the November 2011 NACWA program on Top Clean Water Act Cases, and summarized in the written materials for that program. *National Mining Assn III* closely parallels the District Court's earlier decision in *National Mining Assn II*. Specifically, the Court concluded that EPA Final Guidance Memorandum constituted final agency action by which rights or obligations have been determined or from which legal consequences will flow. The Court summarily rejected EPA's reliance on the boilerplate language in the Final Guidance which stated that the document was not binding. Instead, the Court looked to the practical effect and concluded that the Guidance was being applied in a manner that effectively changed the obligations of the state permitting agencies. The Court also rejected EPA's arguments that the Plaintiffs' claims were barred by considerations of standing, ripeness, and exclusive jurisdiction under CWA § 509.

The Court's decision *National Mining Assn III* continues a line of decisions which rejects EPA's attempt to rely on guidance documents in lieu of conducting traditional notice and comment rulemaking.[4]

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[1] *National Mining Assn v. Jackson*, 768 F. Supp. 2d 34 (D.D.C. 2011) ("*National Mining Assn I*").
[2] *National Mining Assn v. Jackson*, 816 F. Supp. 2d 37 (D.D.C. 2011) ("*National Mining Assn II*").
[3] *National Mining Assn v. Jackson*, ___ F. Supp. 2d ___, 42 ELR 20165, 2012 U.S. Dist. LEXIS 106057 (D.D.C. 2011) ("*National Mining Assn III*").
[4] In addition to *National Mining Assn II*, *see, e.g.*, *Natural Resources Defense Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011).

Relevance to Public Utilities:
The District Court's decisions are significant not only because they reject EPA's reliance on guidance to achieve binding results. They are also significant because the Court stressed the impropriety of EPA usurping the primary authority of other agencies, i.e. the Corps of Engineers and state agencies with delegated status, to issue the permits in question. It is important to note, however, that the criticism of EPA's actions in these cases is addressed only to EPA's choice of procedure, and not to EPA's ultimate authority to take action if the appropriate procedure is followed.

Next Steps:
EPA's appeal has just been docketed. Any reliance on the District Court's opinions must be tempered by the fact that an appeal is pending.

Northwest Environmental Defense Center v. Brown, 640 F.3d 1063 (9th Cir. 2011), *cert. granted sub nom. Decker v. Northwest Envtl. Def. Ctr. and Georgia-Pacific West, Inc. v. Northwest Envtl. Def. Ctr.*, 132 Sup.Ct. 865 (U.S. Dock. No. 11-338) (2012)[1]

Issues and Holding:
The Northwest Environmental Defense Center (NEDC) brought suit against the Oregon State Forester, members of the Oregon Board of Forestry, and various timber companies alleging that Defendants violated the Clean Water Act by not obtaining permits for stormwater runoff from logging roads. NEDC claimed that rainwater runoff flows from logging roads into systems of ditches, culverts and channels before being discharged into forest streams and rivers, and that such discharges are from "point sources," as defined in the Clean Water Act.

The timber industry responded that (1) the Silvicultural Rule, 40 C.F.R. § 122.27, exempts logging road discharges from NPDES requirements and (2) the discharges are exempt under the 1987 amendments to Section 402(p) of the Clean Water Act. The District Court agreed that the discharges were exempt from NPDES permitting by the Silvicultural Rule and therefore did not reach the question of whether the discharges are also exempted by the 1987 amendments to the Clean Water Act. The Ninth Circuit reached both questions and determined that the discharges require NPDES permits.

The Ninth Circuit considered two possible readings of the Silvicultural Rule. The first, which reflects the intent of EPA in adopting the Rule, exempts all natural runoff from silvicultural activities irrespective of whether the runoff is collected and channeled before being discharged. The Ninth Circuit found this reading to be invalid because it is inconsistent with the statutory definition of "point source." The second reading does not reflect the intent of EPA but, the Court found, was consistent with the statute. Under this second reading, the Rule exempts natural runoff from silvicultural activities so long as the runoff stays "natural," but the exemption does not apply once the runoff is channeled or controlled. Under either reading, the Ninth Circuit held that the Silvicultural Rule does not exempt from the definition of point source stormwater runoff from logging roads that is collected and channeled before being discharged into streams and rivers, therefore stormwater runoff from logging operations requires a stormwater permit.

After reviewing the 1987 amendments to the Clean Water Act, the Ninth Circuit held that Congress' silence regarding EPA's interpretation of the Silvicultural Rule did not mean that Congress approved of or acquiesced to the Rule.

The Ninth Circuit also noted that the circuit courts do not have jurisdiction to review rules purporting to establish exemptions from the NPDES program but, rather, that challenges to such rules are properly brought in federal district courts.[2]

[1] The Court replaced the 2010 decision in 2011. The only difference is that the 2011 decision includes an analysis concluding that the court has subject matter jurisdiction.
[2] *See also Friends of the Everglades v. United States EPA*, No. 08-13652, 2012 U.S. App. LEXIS 22282 (11th Cir. Oct. 26, 2012).

In seeking certiorari, petitioners claimed that EPA's interpretation of the Silvicultural Rule is entitled to deference. They further argue that logging roads are not true "facilities" and therefore not covered by the Phase I stormwater regulations. While EPA characterized the Ninth Circuit's analysis of the Phase I regulations as "interpretation," petitioners argued that the Ninth Circuit effectively invalidated portions of the rules.

Meanwhile, on the same day it filed an amicus brief in support of petitioners, EPA published proposed amendments to the Phase I stormwater regulations that would clarify that stormwater from logging roads does not require a NPDES permit by distinguishing between the truly "industrial" aspects of logging – rock crushing, gravel washing, log sorting, and log storage, from logging roads. Comments on that proposed rule closed on October 4, 2012.

Also, Congress has considered bills (with bipartisan support in both houses) to codify the Silvicultural Rule as an amendment to the CWA.

Relevance to Public Utilities:
Management of stormwater is an issue of increasing importance to many NACWA members. Even though this decision focuses on a narrow interpretation of the CWA as applied to the timber industry, it may reflect a trend in how environmental groups and courts look at stormwater management.

Next Steps:
The case is being argued in the Supreme Court on December 3. EPA presumably will publish a final rule, and Congress may also address these issues.

Sackett v. EPA, __ U.S. __, 132 S. Ct. 1367, 182 L. Ed.2d 367, 2012 U.S. LEXIS 2320 (2012)

Issues and Holding:
In April 2007, Plaintiffs began excavating and backfilling a 0.63 acre parcel in a residential area of Priest Lake, Idaho to build a personal residence and shop. Three days later, apparently in response to a neighbor's complaint, representatives of EPA visited the site, indicated that the property was wetlands, and asked if the Plaintiffs had a permit to fill the wetlands. The Plaintiffs had no permit, and the representatives of EPA directed the Plaintiffs to cease the fill activity, which they did. After six months of ineffectual exchanges, EPA issued an Administrative Compliance Order which directed the Plaintiffs to cease all fill activity and to restore the area already filled. The Plaintiffs asked for a hearing on the ACO, which EPA denied. The Plaintiffs then filed an action in federal district court in Idaho seeking review of the ACO under the Administrative Procedures Act. EPA moved to dismiss the complaint for want of subject matter jurisdiction, arguing that there is no right to pre-enforcement review of administrative consent orders issued under the Clean Water Act. The District Court granted EPA's motion to dismiss and the Ninth Circuit affirmed, following a line of cases on this question in five other district courts and four other circuits.[1]

The Plaintiffs petitioned for a writ of certiorari, arguing that they were entitled to review of the ACO under the APA or, in the alternative, that EPA's issuance of an ACO without any right to pre-enforcement review violated due process. The Supreme Court granted certiorari and reversed.

Justice Scalia, writing for a unanimous Court, concluded that the ACO issued by EPA constituted "final agency action" within the meaning of the APA and therefore was reviewable under the APA. Justice Scalia rejected the argument that the Clean Water Act impliedly precluded pre-enforcement review. Scalia's opinion acknowledged that allowing district courts to engage in pre-enforcement review of ACOs issued by EPA might reduce efficiency of administrative enforcement under the CWA, but he said the same could be said of all judicial review of agency actions. Scalia's opinion alluded to the uncertainties regarding jurisdiction over non-adjacent Wetlands, implying that EPA's use of an ACO in this case might have been an attempt to gain unfair leverage over the Plaintiffs so that the Agency could avoid litigating whether the Plaintiffs' property was subject to CWA jurisdiction.

Justice Ginsburg filed a concurring opinion, stressing that pre-enforcement review was appropriate in this case because it went to EPA's jurisdiction to issue the ACO. She stressed that the Court's decision did not reach the question of whether pre-enforcement review would be available to assert non-jurisdictional challenges to a CWA ACO.

Justice Alito concurred separately to criticize what he perceived as the unfairness of EPA's position and to emphasize that confusion over the jurisdictional reach of CWA regulation of wetlands gave strong reason to be sympathetic to parties seeking pre-enforcement review.

[1] 622 F.3d 1139 (9th Cir. 2010).

Relevance to Public Utilities:

EPA issues approximately 1,500 ACOs per year, based on six different statutes. Of this total, approximately one-third typically involve NPDES violations.[2] The issuance of an ACO dramatically escalates the potential stakes in any CWA enforcement negotiations because EPA is authorized to seek penalties up to $37,500 per day for each day a respondent fails to comply with a CWA ACO. In practice, EPA has rarely filed suit to recover penalties for non-compliance with its ACOs. Nevertheless, the unanimous and harshly worded decision of the Supreme Court in Sackett is likely to reduce EPA's use of ACOs and increase the Agency's willingness to pursue informal negotiations of CWA enforcement matters, especially when they involve wetlands questions. The practical value of litigation seeking pre-enforcement review of an ACO may be very limited in most cases, however, because a successful challenge to an ACO might decide only that the order EPA issued was arbitrary or not supported by an adequate administrative record. The question whether the underlying conduct constituted a violation may not be resolved at all in such a challenge due to the limited scope of review available under the APA. Similarly, questions regarding the choice of proper remedies may not be amenable to review under the APA.

Next Steps:

The Plaintiffs' challenge to EPA's ACO is now pending on remand in the District Court. The District Court's request for a scheduling order has been stayed pending settlement negotiations between the Plaintiffs and EPA.

[2] The statutory breakdown of ACOs issued by EPA in the period FY 2001-FY2011 is as follows:

Clean Air Act	10%
Clean Water Act	
NPDES	32%
Wetlands	5%
Spills	1%
CERCLA	13%
FIFRA	5%
RCRA	2%
SDWA	32%

Unlike the CWA, some of the other statutes in question have provisions that expressly address the question of pre-enforcement review. *See, e.g.*, CERCLA § 113(h), 42 U.S.C. 9613(h).

U.S. v. Hampton Roads Sanitation Department, Civil No. 2:09cv481, 42 ELR 20076, 2012 WL 1109030, 2012 U.S. Dist. LEXIS 46984 (E.D. Va. April 2, 2012)

Issues and Holding:
EPA, the Commonwealth of Virginia and the Hampton Roads Sanitation District ("HRSD") entered into an Amended Consent Decree (ACD) on February 23, 2010. The ACD was drafted to be consistent with the requirements of a prior Special Order by Consent among the Virginia State Water Control Board, HRSD and the cities of Chesapeake, Hampton, Newport News, Poquoson, Portsmouth, Suffolk, Virginia Beach, and Williamsburg and the counties of Gloucester, Isle of Wight, James City and York and the town of Smithfield to address wet weather overflows.

After the ACD was entered, EPA demanded stipulated penalties for thirteen Sanitary Sewer Discharges (SSDs) that occurred from February to June 2010. Dispute resolution resolved three of the SSD events. Afterwards, HRSD asked the Court, pursuant to the dispute resolution provision of the ACD, to resolve the dispute between HRSD and EPA and Virginia to rule that the remaining ten sanitary sewer discharges ("SSDs") were *force majeure* events, not subject to stipulated penalties.

HRSD was not successful. The Court started the decision by saying:

> 'It's raining, it's pouring ...'
>
> This phrase, the start of an old nursery rhyme describing a rainstorm and the consequences of unfortunate injury, is an appropriate introduction to this work.

The Court initially considered plaintiffs' argument that the *force majeure* provision in the ACD was not intended to apply to SSDs at all, but rather should be interpreted as applying only to "construction schedules, and milestones and similar requirements for injunctive relief in the consent decree," on the theory that the CWA is a strict liability law and unpermitted overflows are prohibited. Plaintiffs also argued that the *force majeure* provision should not apply to stipulated penalties. The Court rejected both arguments and said that SSD events were subject to *force majeure* provision by the terms of the ACD.

In looking at the specific events giving rise to this litigation, the Court considered the primary standard for evaluating the *force majeure* provision to be "foreseeability." The Court found that the "despite HRSD's best efforts" phrase in the *force majeure* provision includes foreseeability. The Court held the requirement that HRSD exercise best efforts to fulfill its ACD obligations includes using best efforts to anticipate any potential *force majeure* event and best efforts to address the effects of any such event both (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay. The Court concluded that foreseeability was the bargained-for-language by the ACD's parties.

Then, based on foreseeability, the Court rejected HRSD's arguments that the storm event that caused the SSDs was beyond its control, based on EPA's expert's testimony that the storm that

caused six of the events was consistent with a bi-annual storm which the ACD required HRSD to plan for.

The remaining four separate SSDs occurred due to various equipment failures. The Court found EPA's experts more persuasive in each instance and rejected the four claims. The Court thus ordered EPA to proceed to resolve the stipulated penalty amounts via conference with HRSD.

Relevance to Public Utilities:
As a matter of law, the *force majeure* provision was upheld as a defense allowed by the ACD over EPA's objections. However, the experts for HRSD failed to convince the Court that EPA's experts were wrong in applying the foreseeability prong. If you rely on a *force majeure* clause for a defense against stipulated penalties, be prepared to fight EPA to win the battle. The battle here probably cost more that the $34,550 in penalties that EPA sought.

Next Steps:
The only aspect of the case remaining is for the parties to confer to ensure compliance with this Court's conclusion that HRSD must pay stipulated penalties for these discharges in a manner consistent with the terms of the Consent Decree. The docket does not indicate whether that has occurred.

Upper Blackstone Water Pollution Abatement District v. EPA, 690 F.3d 9 (1st Cir. 2012)

Issues and Holding:
Under a consent order executed in 2002, Upper Blackstone agreed to substantial upgrades to a POTW – which cost $180M and took eight years to implement. The upgrades were designed to meet the phosphorus limits in the plant's 2001 NPDES permit, and to remove nitrogen to a level based on anticipated nitrogen limits to be incorporated subsequently into the permit. While Upper Blackstone timely filed for an administrative renewal of the 2001 permit, and thus the permit remained in effect beyond the initial five-year term, in 2007, EPA issued a modified permit with significantly lower phosphorus and nitrogen limits than anticipated, which Upper Blackstone's upgrades could not meet.

Upper Blackstone filed a petition for review of the permit with the Environmental Appeals Board in 2008, challenging, among other things:

1. EPA's decision to lower the nutrient limits before the upgrades were complete, in the absence of more thorough information about nutrient impairment in the ultimate receiving waters; and

2. EPA's refusal to delay issuance of the modified permit until Upper Blackstone complete a new model of nutrients in the receiving waters.

The EAB denied the petition and upheld the permit in 2010. Upper Blackstone filed a petition for review in the First Circuit shortly after the permit became final in 2011, and got a stay pending this proceeding. The Conservation Law Foundation also filed a petition for review of the permit, which was consolidated with Upper Blackstone's proceeding. NACWA filed an amicus brief supporting Upper Blackstone. In August 2012, the First Circuit denied the petition and lifted the stay.

The Court gave considerable deference to EPA, under the standard from *Motor Vehicles Manufacturers Association*:

> We will not set aside [EPA's determination] unless the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribe to a difference in view or the product of agency expertise." [1]

The Court found that independent of the ongoing modeling work, EPA had reasonably determined that the upgraded plant's discharges would continue to "cause, or have a reasonable potential to cause, or contribute to"[2] violations of water quality standards. Thus, the Court determined, there was no basis to require EPA to wait for the results of Upper Blackstone's modeling. The Court seemed particularly unreceptive to the suggestion that final limits should

[1] 690 F.3d at 20, quoting *Motor Vehicles Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983) (other citations omitted)
[2] 40 CFR § 122.44(d)(1)(i); 690 F.3d at 22.

be delayed given that Upper Blackstone did not provide an estimate of when the modeling would be complete, but noted that Upper Blackstone would have "multiple opportunities" to submit new information during the establishment of a compliance schedule for the new permit (and that indeed Upper Blackstone had already submitted a permit modification request based on additional modeling and monitoring results).

The Court also found that the permit limits were not arbitrary and capricious, finding it reasonable for EPA to have relied on modeling done by the Rhode Island Department of Environmental Management, among other sources, even though EPA had acknowledged that the model might overstate (or understate) the impacts of nitrogen loadings.

The Court then suggested that notwithstanding the compliance schedule in the 2002 consent order, EPA had a duty to revisit the permit's terms upon its expiration:

> The five-year term limit *requires* the EPA or state permitting authority to re-ensure compliance with the Act whenever a permit expires and is renewed. Thus, in regular intervals, the Act *requires* reevaluation of the relevant factors, and allows for the tightening of discharge conditions.[3]

Relevance to Public Utilities:
This decision confirms just how difficult it is for a utility to demonstrate that permit limits established by a regulatory agency are unreasonable. The facts are especially sympathetic here, in that Upper Blackstone had so recently completed upgrades to meet the limits it expected would be in place for some time. On the other hand, the Court made a point of noting that "even with these upgrades, … relative to other Massachusetts residents, the District's ratepayers pay significantly less than the average sewage rate."

Perhaps the most troubling element of this decision to public utilities is the suggestion that EPA or state regulators must revisit all of the terms of NPDES permits every five years to "re-ensure compliance with the Act," even when the utility is bound by a compliance schedule in a consent order.

The First Circuit's deference to EPA in deriving numeric effluent limits from narrative water quality standards is also troubling: EPA relied on national guidance and did not consider data specific to the Blackstone River, contrary to EPA's own regulations.

Next Steps:
We understand that Upper Blackstone intends to file a petition for a writ of certiorari.

[3] 690 F.3d at 22 (emphasis added) (citations omitted).