Hot Topics in Clean Water Law

March 19, 2014

NACWA
A Clear Commitment to America's Waters

"Notoriously Unclear" . . . The Ebb and Flow of the Jurisdictional Reach of the CWA

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NACWA
A Clear Commitment to America's Waters

Notoriously Unclear

The Ebb and Flow of the Jurisdictional Reach of the CWA

WHAT WATERS ARE REGULATED UNDER THE FEDERAL WATER POLLUTION CONTROL ACT (THE CLEAN WATER ACT)?

What "Waters" Are Regulated Under the CWA?

"The reach of the Clean Water Act is notoriously unclear."

U.S. Supreme Court Justice Samuel Alito

March 21, 2012, concurring in

Sackett v. Environmental Protection Agency

Recent Draft Rule

Draft rule regarding the jurisdiction of the Clean Water Act sent to the Office of Management and Budget in September 2013.

- Rule 'leaked' in November 2013.

Draft Rule

- Putting the Cart Before the Horse?
  - Based on draft science report:

    Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence
    - Criticism of report and process.

Draft Science Report

- Conclusions include:
  - All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers.
  - Wetlands and open-waters in riparian areas and floodplains are physically, chemically, and biologically connected with rivers.
- Numerous references to ‘connectivity’ through groundwater.

What does the Draft Rule Propose?

- Revised regulatory definition of “waters of the United States.”

Draft Rule - Tributaries

Draft rule:

- Proposes that all tributaries (as broadly defined by the rule) are jurisdictional based on a significant nexus to a traditional navigable water, interstate water, or territorial sea.

Draft Rule – Adjacent Waters

Draft rule:

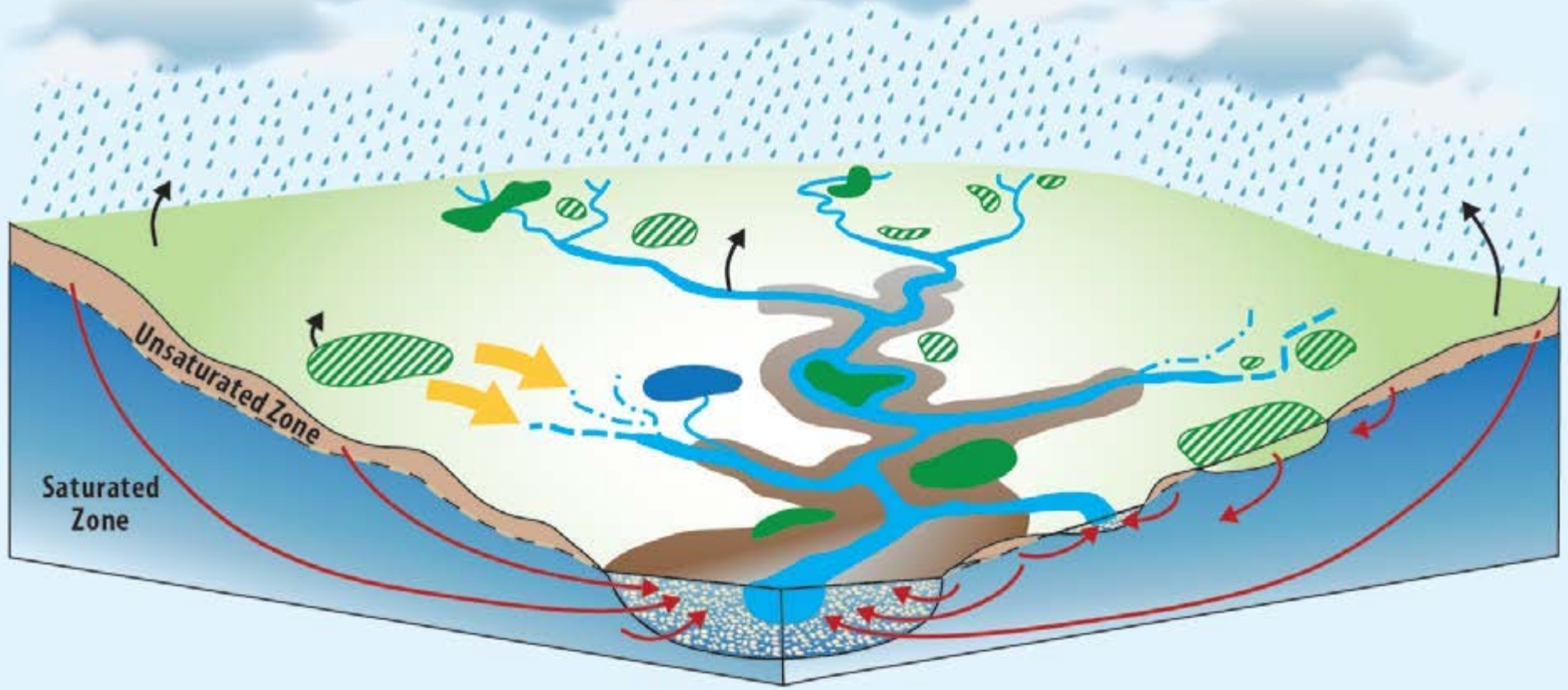
- Proposes to change "adjacent wetlands" to "adjacent waters" so that "waterbodies such as ponds and oxbow lakes, as well as wetlands, adjacent to jurisdictional waters are 'waters of the United States' by regulation."

Chaos Theory

The Single Flap of a Butterfly Wing ....

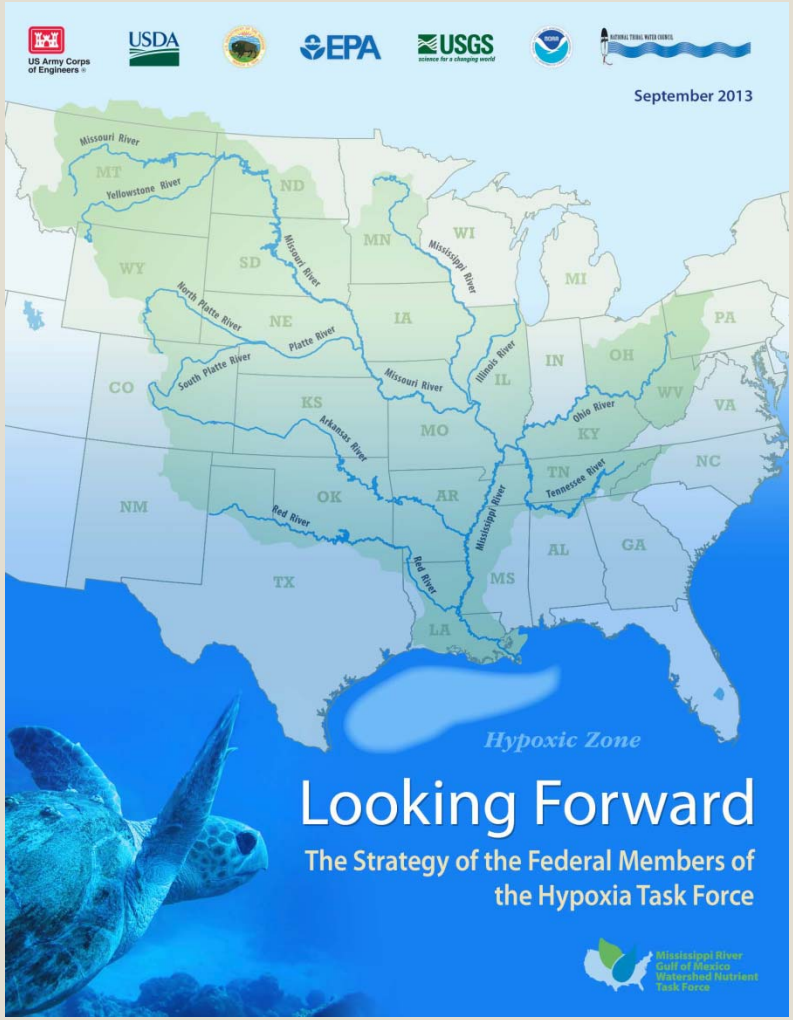
Results in a Tornado!

From EPA's Draft 2013 Report on "Connectivity"



Mississippi River Basin

Government Reports Link Water Quality Impacts Thousands of Miles from Sources



. . . nitrate trends in lower sections of the Mississippi River began increasing, likely reflecting the acceleration of already increasing nitrate trends in the upper Mississippi and Missouri Rivers, in addition to increases in inputs from other tributaries in the lower part of the Mississippi River Basin. USGS 2013

Arkansas v. Oklahoma (1992)

- EPA issued NPDES permit to Fayetteville, AR POTW
- EPA regs say that an NPDES permit shall not be issued "[w]hen the imposition of conditions cannot ensure compliance with the *applicable* water quality requirements of all affected States." 40 CFR 122.4(d)
- OK downstream water was designated “scenic”
- Impacts not expected to be “actually detectable or measurable.”
- “We find nothing in that history to indicate that Congress intended to preclude the EPA from establishing a general requirement that such permits be conditioned to ensure compliance with downstream water quality standards.”

What "Waters" Are Covered by the CWA?

What is or is not regulated has changed over time . . Even though the statute has not!

The Clean Water Act's Foundation

- CWA prohibits unpermitted discharges of pollutants into "navigable waters."
  - defined as "waters of the United States."

Waters of the U.S.

- Defined by regulation
  - Waters used in interstate or foreign commerce
  - Interstate waters including interstate wetlands
  - “Other waters” which could affect interstate or foreign commerce
  - Impoundments of waters that would otherwise be within definition of waters of the United States
  - Tributaries of the above-listed waters
  - Territorial seas
  - Wetlands adjacent to waters

Early District Court Case

Natural Resources Defense Council, Inc. v. Callaway 1975 (D.C.)

By defining the term ‘navigable waters' to mean ‘the waters of the United States, including the territorial seas,’ Congress “asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution.”

Riverside Bayview Homes

U.S. v. Riverside Bayview Homes (1985)

- Corps could define jurisdictional scope of CWA to encompass all wetlands adjacent to navigable waters.

SWANCC – A Game Changer

- *SWANCC v. Army Corps of Engineers* (2001)
  - Corps exceeded its authority by asserting CWA jurisdiction over isolated, inland, non-navigable waters

EPA/Corps Guidance 2003

- In the wake of SWANCC, EPA and the Corps issued guidance.
  - Abandoned 'Migratory Bird Rule' but jurisdictional reach remained broad.

Rapanos

- *Rapanos v. U. S.* (2006)
  - No majority opinion
    - Scalia plurality . . . the term "waters of the United States" includes "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers and lakes'"
    - Kennedy concurrence...waters with a "significant nexus to waters that are navigable in fact or that could reasonably be so made."

Chief Justice Comments

"In response to the *SWANCC* decision, the Corps and the Environmental Protection Agency (EPA) initiated a rulemaking...

The proposed rulemaking went nowhere. Rather than refining its view of its authority... the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."

Guidance and More Guidance

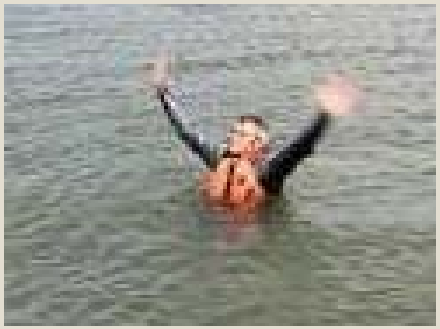
- June 2007 Memorandum of Agreement
- June 2007 Legal Memorandum
  - Public comments on Rapanos Guidance
  - Guidance revised
- December 2, 2008 Memorandum on Clean Water Act Jurisdiction Following Rapanos
- 2011 Draft Guidance
  - Extended comment period
  - Withdrawn

The Jurisdiction of the CWA

EPA Regulation

Court Interpretations

EPA Guidance



CWA

Proposed Rule

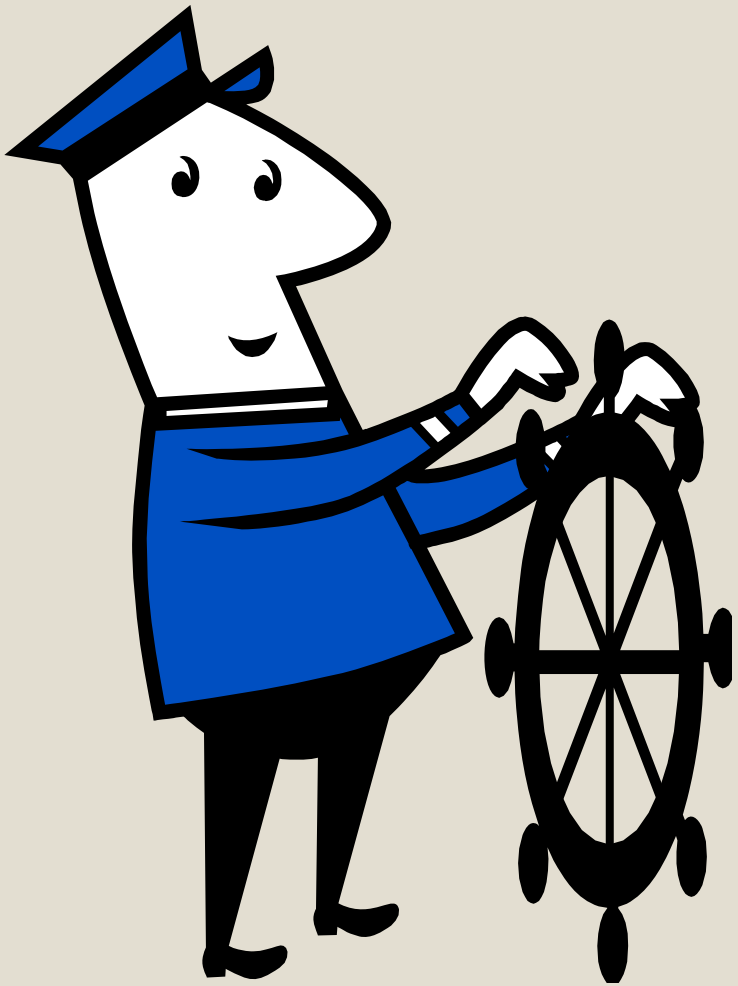
Proposed Guidance Withdrawn

Proposed Guidance

Guidance vs. Regulations . . .Does It Matter?

- Administrative Procedure Act
- Public Notice and Comment
- Final Agency Action and Opportunity to Challenge
- Views of the Courts

Who's in Charge?



? ? ?

What Waters Are Covered By the CWA?

"For 40 years, Congress has done nothing to resolve this critical ambiguity."

What Waters Are Covered By the CWA?

"EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase."

"Instead, the agency has relied on informal guidance . . ."

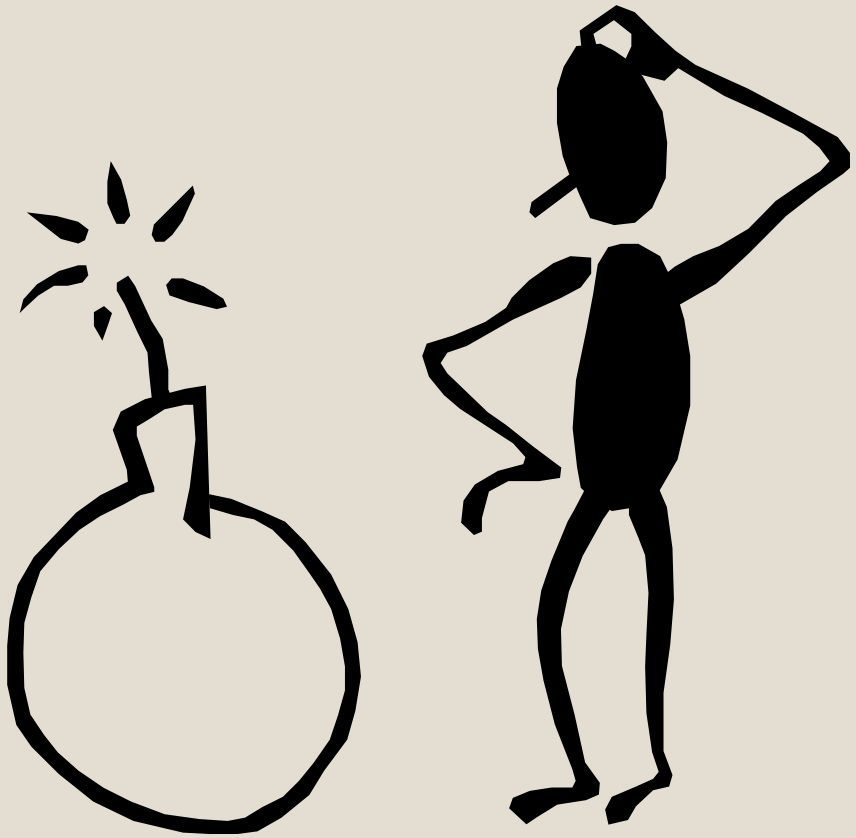
What Waters Are Covered By the CWA?

Not even a majority could explain . . . .

Resolving the Issue: What Waters Are Covered by the CWA?

What Can You Do?

- Educate
- Engage
- Encourage
- Express



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Gaining Ground – The Power, Potential and Occasional Perils of Water Quality Trading

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NACWA
A Clear Commitment to America's Waters

Water Quality Trading

Innovative market-based approach that "provides greater flexibility and has potential to achieve water quality and environmental benefits greater than would otherwise be achieved under more traditional regulatory approaches."

- EPA 2003 Policy

Key Dates

1980s	Handful of projects started as watershed strategies
1996	Draft Framework
2003	Final EPA Policy
2004	EPA WQT Assessment Handbook
2006	EPA's 2nd Annual WQT Conf. Pittsburgh
2007	WQT Toolkit for Permit Writers
2009	ORB Interstate Project
March 2014	"Linking Farmers and Factories"

THE WALL STREET JOURNAL

U.S. News: Trading System Tackles Waste -- New Plan Pays Farmers to Curb Agricultural Runoff That Pollutes the Gulf of Mexico

By **Mark Peters**

20 February 2014

The Wall Street Journal

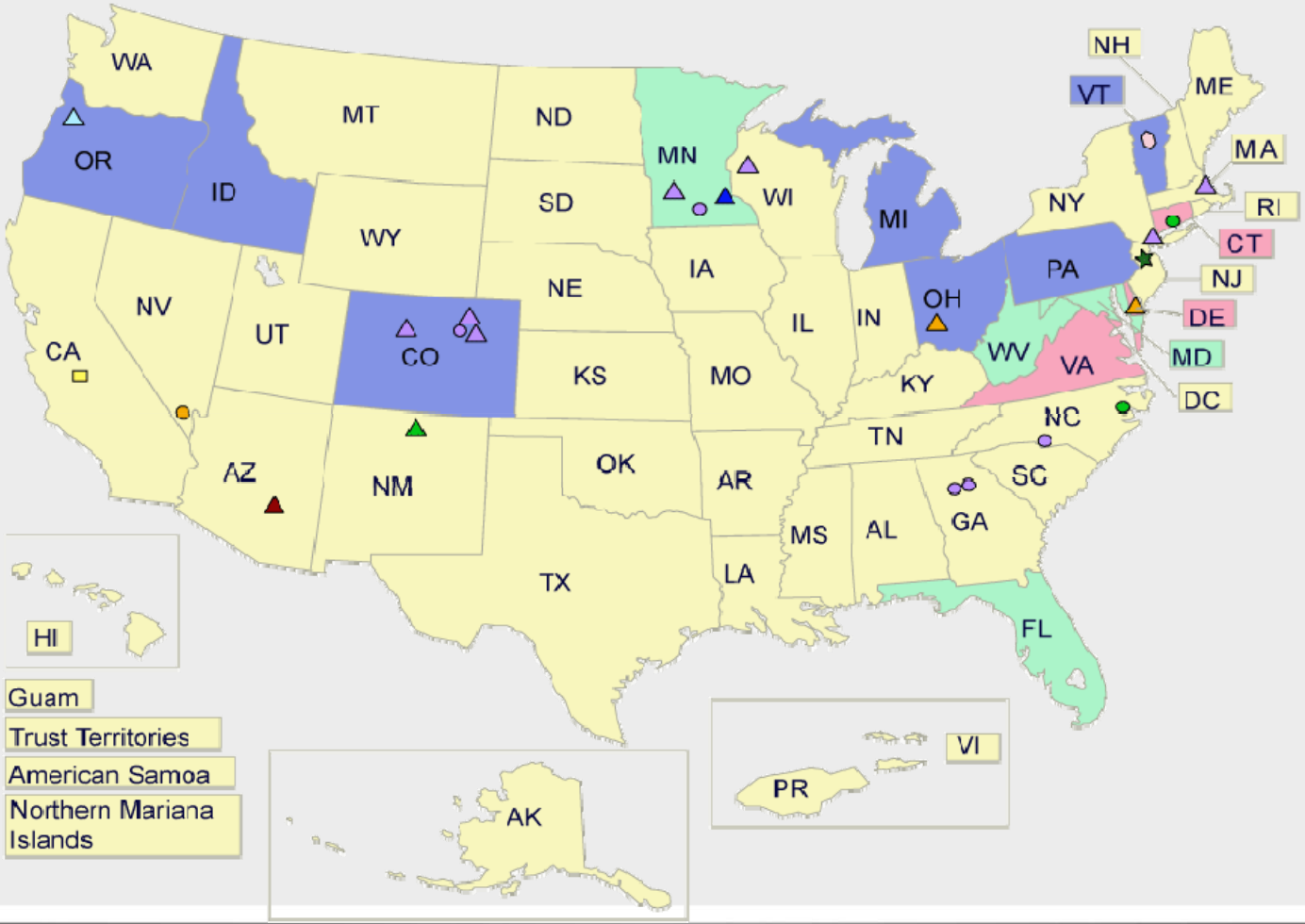
Why the Interest?

More cost-effective compliance - sources within the watershed have significantly different costs to control the pollutant of concern.

Uplift from ancillary environmental benefits.

Opportunity to accelerate and scale-up watershed restoration efforts.

State WQT Programs



Notable Programs

State	Description (Program, Permits, Rules, etc.)	PS/ PS	PS/ NPS	NPS/N PS	Trading Activity (Relative)
Minnesota	Permits, Draft Rules	✓	✓	✓	High
North Carolina	Bubble Permits, WQ banks	✓	✓	✓	High
Maryland	Guidelines (some draft)	✓	✓		None
Montana	Policy		✓		None
Colorado	Rules, watershed programs		✓		Low
Virginia	Rules	✓	✓	✓	High
Connecticut	Legislation	✓			High
Oregon	Guidance	✓	✓		Low
Pennsylvania	Rules	✓	✓	✓	High
California	Permit		✓	✓	Low
Idaho	Internal Guidance Doc.	✓	✓		None
Michigan	Rule	✓	✓	✓	None
Wisconsin	P rule/guidance		✓		Low
Ohio	Rule, watershed programs	✓	✓	✓	High

(Kieser & Associates, LLC; 2014)

Sources of Authority for WQT

- CWA 303 Continuum
- EPA National WQT Policy
- State Laws, Rules and Guidance

Case Law Affecting WQT

Arkansas v. Oklahoma

- 503 U.S. 91 (1992)

In re Cities of Annandale & Maple Lake

- 731 N.W.2d 502 (Minn. 2007)

Friends of Pinto Creek v. U.S. Envtl. Prot. Agency

- 504 F.3d 1007 (9th Cir. 2007)

Food & Water Watch v. U.S. Envtl. Prot. Agency

- 2013 U.S. Dist. LEXIS 174430 (D.D.C. Dec. 13, 2013)

Threats to WQT

The uncertainty that the GAO cites is especially true in proposed water trading systems. The Clean Water Act does not regulate polluted agricultural runoff as carefully as it does other sources, since it excludes most row crops.[42] Additionally, even the agricultural runoff that is regulated under the Clean Water Act has been subject only to weak and ineffective regulation.[43] This makes it an attractive market as an offset to regulated point sources of water pollution. However, since the runoff is unregulated, it is also unmeasured. Establishing a true market would require quantifying all runoff from a farm and the overall agriculture sector. But there are over 2.2 million farms in the United States.[44] Currently, because of weather effects and farm management practices, there is no way to trace pollution back to a specific farm.[45] Establishing a trading regime between point source polluters and non-point source polluters would require a massive infrastructure investment to ensure that the offsets are real.

Offsets are also setting up a new market for actual fraud. *The Christian Science Monitor* and the New England Center for Investigative Reporting did an investigation of the $700 million carbon offset market and found widespread abuse. From forests that were never planted to false claims of certification, the new market for carbon offsets and "greenwashing" was proving too lucrative for scams to ignore.[46] The temptation of selling something that is never physically delivered has proven strong.

Offsets are unwieldy and do not lead to sufficient pollution reductions. They are subject to abuse and do not represent a realistic approach to pollution abatement. Any program relying on them is suspect.

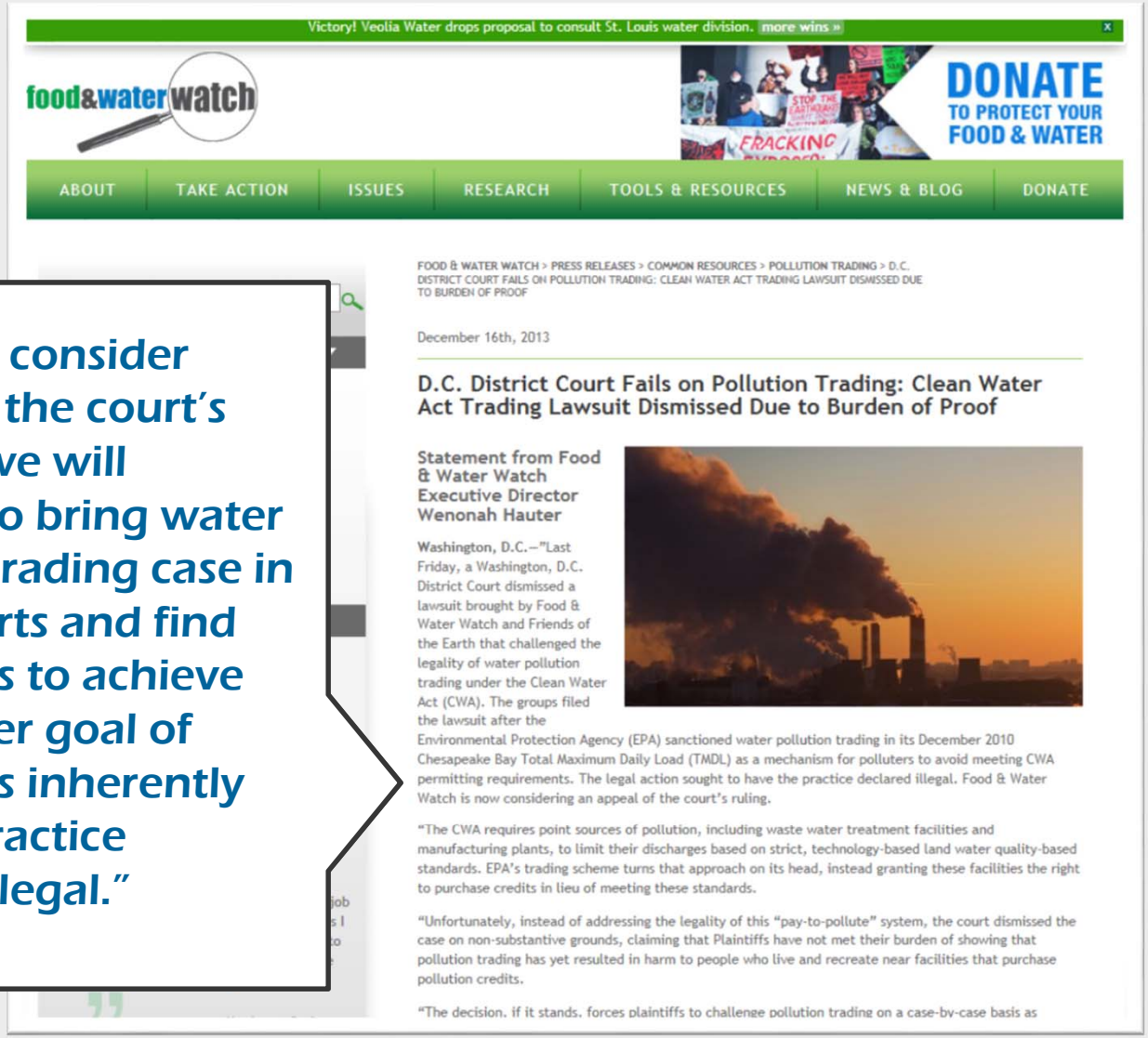
Credits and Distribution

In any cap-and-trade scheme, one of the most important parts of the system is determining who will receive credits and at what price. Because cap-and-trade credits are a very valuable part of the system, they are subject to stresses that make the system unfair.

When a cap-and-trade system is implemented, there are two main options for distributing permit allocations. The initial allocation can be either given to polluters or auctioned.[47] Both have inherent difficulties.

FWW Press release

"While we consider appealing the court's decision, we will continue to bring water pollution trading case in to the courts and find other ways to achieve our broader goal of having this inherently harmful practice declared illegal."



Victory! Veolia Water drops proposal to consult St. Louis water division. more wins »

food&waterwatch

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FOOD & WATER WATCH > PRESS RELEASES > COMMON RESOURCES > POLLUTION TRADING > D.C. DISTRICT COURT FAILS ON POLLUTION TRADING: CLEAN WATER ACT TRADING LAWSUIT DISMISSED DUE TO BURDEN OF PROOF

December 16th, 2013

D.C. District Court Fails on Pollution Trading: Clean Water Act Trading Lawsuit Dismissed Due to Burden of Proof

Statement from Food & Water Watch Executive Director Wenonah Hauter

Washington, D.C.—"Last Friday, a Washington, D.C. District Court dismissed a lawsuit brought by Food & Water Watch and Friends of the Earth that challenged the legality of water pollution trading under the Clean Water Act (CWA). The groups filed the lawsuit after the Environmental Protection Agency (EPA) sanctioned water pollution trading in its December 2010 Chesapeake Bay Total Maximum Daily Load (TMDL) as a mechanism for polluters to avoid meeting CWA permitting requirements. The legal action sought to have the practice declared illegal. Food & Water Watch is now considering an appeal of the court's ruling.

"The CWA requires point sources of pollution, including waste water treatment facilities and manufacturing plants, to limit their discharges based on strict, technology-based land water quality-based standards. EPA's trading scheme turns that approach on its head, instead granting these facilities the right to purchase credits in lieu of meeting these standards.

"Unfortunately, instead of addressing the legality of this "pay-to-pollute" system, the court dismissed the case on non-substantive grounds, claiming that Plaintiffs have not met their burden of showing that pollution trading has yet resulted in harm to people who live and recreate near facilities that purchase pollution credits.

"The decision, if it stands, forces plaintiffs to challenge pollution trading on a case-by-case basis as

More Threats

NWQTA Recommended Rule Language:

§131.13 General policies.
States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances. **In addition, States may implement water quality trading programs between and among point and non-point sources on a local, state or interstate basis to attain water quality standards. Trading is permitted for water quality-based effluent limitations (WQBELs) so long as data and ecological modeling confirm that the proposed trade would not result in adverse localized impacts or contribute to an exceedance of any applicable water quality standard.** Such policies are subject to EPA review and approval.

- **Absence of enabling and/or harmonizing national rules**
- **Absence of drivers in key watersheds, like Ohio and Mississippi River Basins**
- **Confusion over TMDLs as sources of authority and/or guideposts for WQT**
- **Inconsistencies among state approaches**

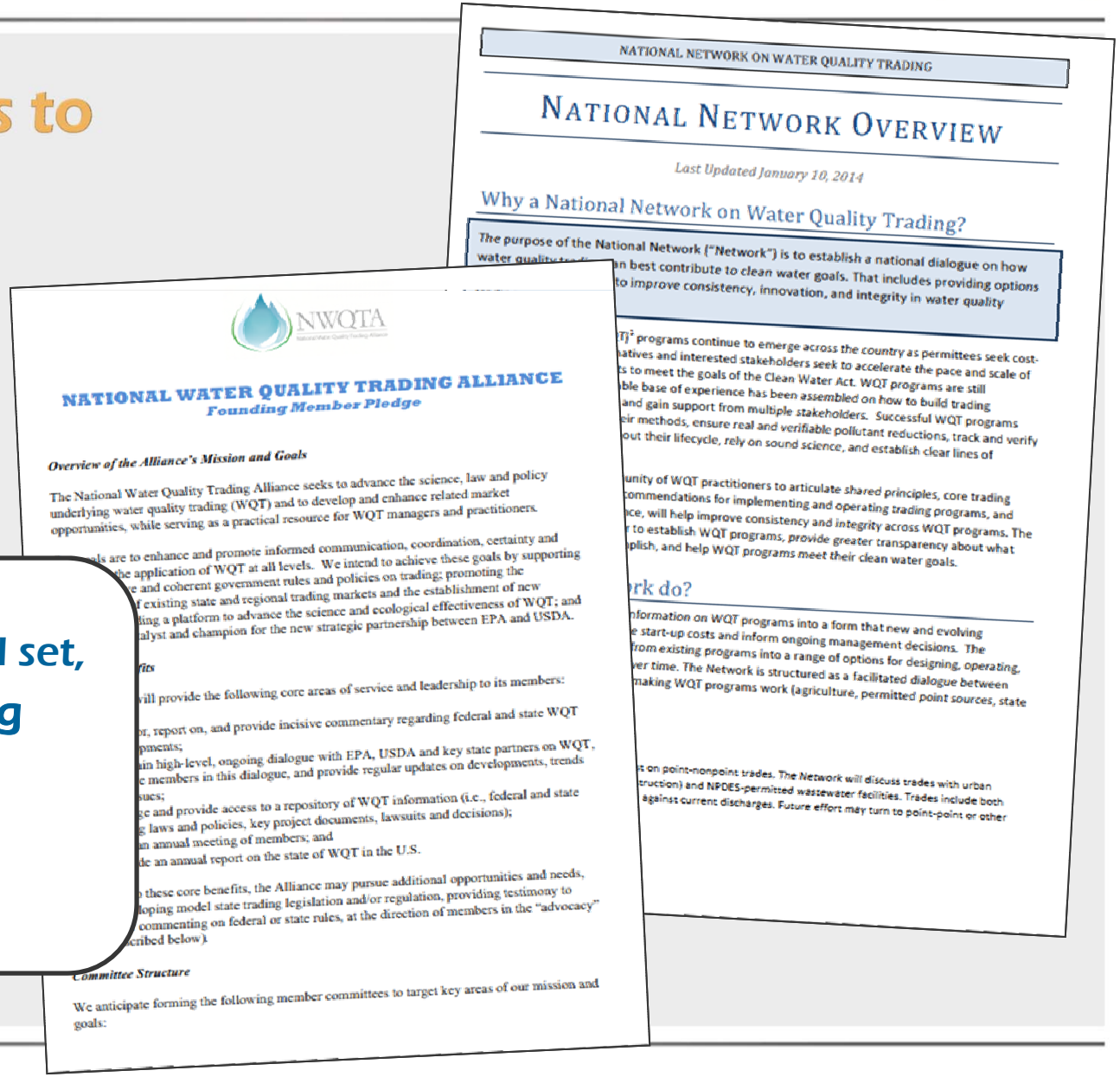
TROUTMAN SANDERS

Opportunities to Advance the Science, Law and Policy Underlying WQT

With first major deal set, water quality trading hits prime time

By **Annie Snider, E&E reporter**

10 March 2014



NATIONAL NETWORK ON WATER QUALITY TRADING

NATIONAL NETWORK OVERVIEW

Last Updated January 10, 2014

Why a National Network on Water Quality Trading?

The purpose of the National Network ("Network") is to establish a national dialogue on how

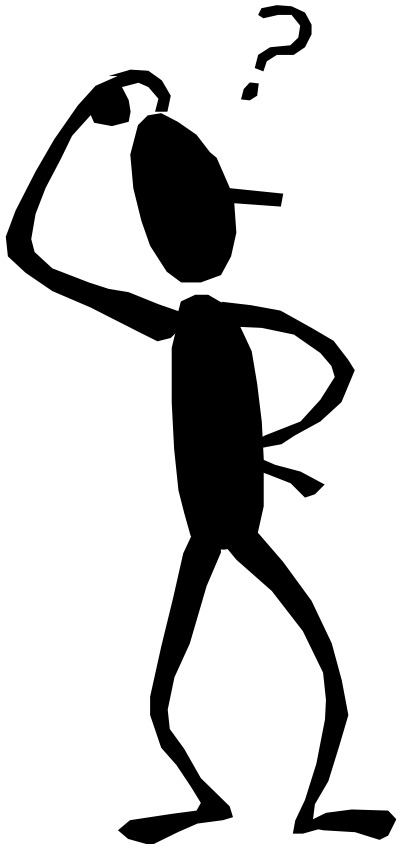
NWQTA

NATIONAL WATER QUALITY TRADING ALLIANCE

Founding Member Pledge

Overview of the Alliance's Mission and Goals

The National Water Quality Trading Alliance seeks to advance the science, law and policy underlying water quality trading (WQT) and to develop and enhance related market opportunities, while serving as a practical resource for WQT managers and practitioners.



Questions?

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