

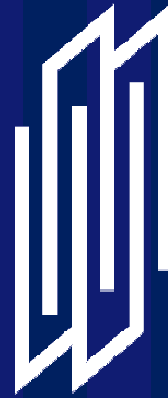
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# NACWA 2008 LAW SEMINAR Developments in Clean Water Law

## Top 10 CWACs – 2007–2008

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Top 10 CWACs

*by*

Bill Anderson

November 13, 2008

# The Cutting Room Floor

- » *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466 (6<sup>th</sup> Cir. 2008) (challenge to EPA approval of WQS antidegradation rules).
- » *Northwest Env'tl Advocates v. USEPA*, 537 F.3d 1006 (9<sup>th</sup> Cir. 2008) (vessel discharges).
- » *Lands Council v. McNair*, 537 F.3d 981 (9<sup>th</sup> Cir. 2008) (*en banc*) (USFS Mission Brush Project), *overruling Ecology Center Inc. v. Austin* 430



# Top 10 CWACs More CRF

- » *Sierra Club v. Flowers*, 526 F.3d 1353 (11<sup>th</sup> Cir. 2008) (NEPA review of 404 permits).
- » *Florida Key Deer v. Paulison*, 522 F.3d 1133 (11<sup>th</sup> Cir. 2008) (FEMA's FIP subject to ESA).
- » *NRDC v. Winter*, 518 F.3d 658 (9<sup>th</sup> Cir. 2008) (Navy sonar).

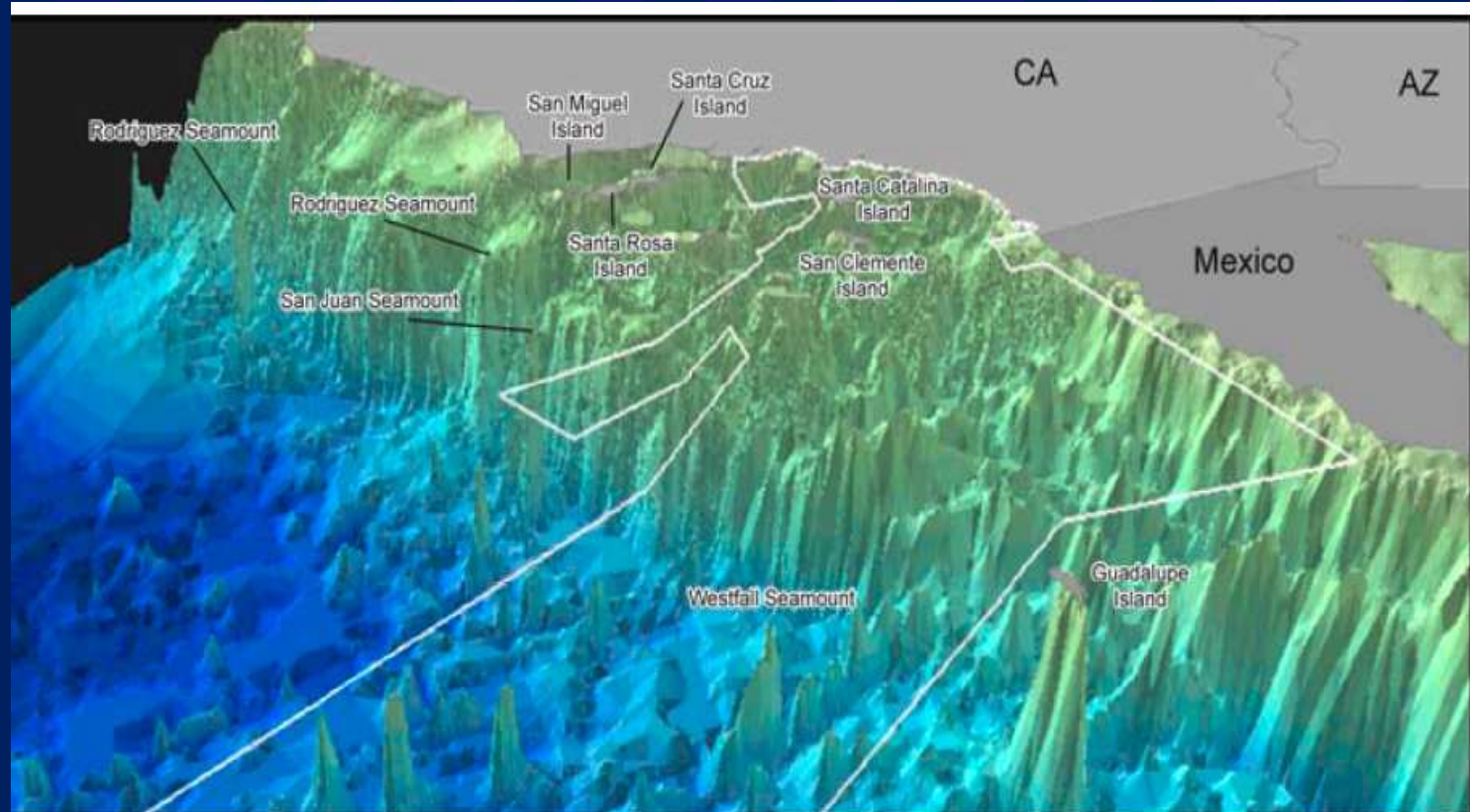


*Winter v. NRDC*, No. 07–1239 (S. Ct. Nov. 12, 2008), *rev'g* 518 F.3d 658 (9<sup>th</sup> Cir. 2008) (Roberts, C.J.).



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# Varied Bathymetry off the Coast of Southern California



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# *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: 9<sup>th</sup> Circuit’s standard of “possibility” of irreparable harm is too lenient
  - › Balance of equities and public interest test make injunction inappropriate



# Top 10 CWACs

- » 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  
(9<sup>th</sup> Cir. 2007), *cert. denied*, 128  
S. Ct. 1225, 76 U.S.L.W. 3438  
(Feb. 19, 2008).



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1. National Ass'n of Home Bldrs. v. Defenders of Wildlife, 127 S. Ct. 2518 (2007).

» 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 (11<sup>th</sup> 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 (5<sup>th</sup> 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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## 4. P & V Enterprises v. U.S. Army Corps of Eng'rs, 516 F.3d 1021 (D.C. Cir. 2008).

» 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



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5. Our Children's Earth Fndn. v. EPA, 527 F.3d 842 (9<sup>th</sup> Cir. 2008),  
*petition for cert. filed Aug. 21, 2008*

» Appeal from dismissal of citizen suit seeking 悩

- › *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



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6. Northwest Env'tl. Advocates v. EPA, 537 F.3d 1006 (9<sup>th</sup> Cir. 2008).

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

- › 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 (9<sup>th</sup> 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 (2<sup>nd</sup> Cir. 2008).

- » Review of CT DEP denial of a 401 Certification for a new gas pipeline between CT and NY.
- » Held: Petition dismissed.

8.B. Weaver's Cove Energy, LLC v. Rhode Island Dep't of Env'tl. Mgmt., 524 F.3d 1330 (D.C. Cir. 2008).

- » 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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## 9. Env'tl. Cons. Org. v. City of Dallas, 529 F.3d 519 (5<sup>th</sup> Cir. 2008).

- » 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.



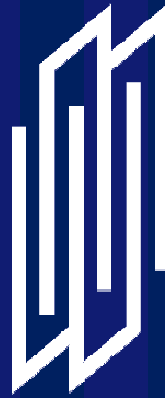
10. Piney Run Preserv. Ass'n v.  
Comm'rs of Carroll Cty., MD, 523 F.3d  
453 (4<sup>th</sup> Cir. 2008).

- » 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 (10<sup>th</sup> 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 (9<sup>th</sup> Cir.).





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