

***Excuse Me, Do You Speak
Lawyer? Communicating
Technical Clean Water
Concepts to Judges***

NACWA Developments in
Clean Water Law
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Acronym Soup



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Inscrutable and Imprecise Standards

- ❖ “best practicable control technology currently available”
- ❖ “best available technology economically achievable”
- ❖ “maximum extent practicable”



The TMDL Example – Settled Law

“Nothing is but what is not.”
William Shakespeare,
“Macbeth,” Act 1, Scene 3

- ❖ Thousands of pages of legislative history but no definition
- ❖ EPA defined pragmatically to allow non-daily TMDLs
- ❖ EPA’s definition applied without incident in thousands of TMDLs
- ❖ Then *NRDC v. Fox* (“excessively formalistic” not to follow EPA’s definition)
- ❖ Then *NRDC v. Muszynski* (a strict daily reading “strikes us as absurd”)



The TMDL Example – Unsettling Law

" 'Daily' means 'daily' and nothing else." *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140 (D.C. Cir. 2006).

Doctors making daily rounds would be of little use to their patients if they appeared seasonally or annually. And no one thinks of 'give us this day our daily bread' as a prayer for sustenance on a seasonal or annual basis.

Even Simple is Not Simple

Ecological Rights Foundation v. Pacific Gas & Electric Company, No 11-16042 (9th Circ.)

- ❖ Is a pole a “point source”?
- ❖ Is it “associated with industrial activity”?
- ❖ Is it a RCRA waste even while in service?



If Simple Is Hard, Forget About Complex

WET Methods Litigation, EEI v. EPA; WESTCAS v. EPA; AMSA v. EPA; WET Coalition v. EPA

- ❖ Tried using radar gun analogy to explain range of uncertainty around a WET result.
- ❖ Judge Edwards asked helpful questions but then joined unanimous opinion without a peep (same judge who, when he was a law professor, declined to read a CWA article because it had Venn diagrams in it).
- ❖ Lost on deference to agency.
- ❖ No reconsideration, despite post-decision motions with expert affidavits showing how the court got it wrong.
- ❖ Got uglier before the dust settled (motion for sanctions, "blatant misrepresentations by EPA without evidentiary support," etc.).

Inevitable Resort to Metaphor and Allusion

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
Through the Looking Glass, in The Complete Works of Lewis Carroll
196 (1939).

- Cited in over 1,000 legal opinions
- Including the seminal decision, *TVA v. Hill*, 437 U.S. 153 (1978)

Reductive or Deductive, Whatever Works

"When you have eliminated the impossible, whatever remains, however improbable, must be the truth." Sir Arthur Conan Doyle, "Sign of Four" (1890).

- Cited in EPA's Stressor Identification Guidance (EPA-822-B-00-025) (2001)

The Peril of Litotes

"A not unblack dog was chasing a not unsmall rabbit across a not ungreen field." George Orwell, "Shooting an Elephant and Other Essays" (1950)

- Cited in the Hearing Officer Deskbook, a Manual for Administrative Law Judges

$$E=mc^2$$

"It can scarcely be denied that the supreme goal of all theory is to make the irreducible basic elements as simple and as few as possible without having to surrender the adequate representation of a single datum of experience."

"Make things as simple as possible, but not simpler."

Understand the Power and Peril of Inferences

- ❖ In 1974, the skeleton of a 15,000 year old mastodon was unearthed in New York.
- ❖ It contained twice the level of mercury deemed safe for human consumption.

Inference #1: Mercury pollution has declined over the past 15,000 years.

Inference #2: Our concern over the environment may be misplaced.

Inference #3: Be careful about eating mastodon.

- ❖ The sobering truth: Every conclusion is fortuitous in the absence of adequate data.

Ten Things to Try

- ❖ Look outside *our* box of law.
- ❖ Write a homily and then delete it.
- ❖ Draw on lessons from everyday life.
- ❖ Avoid breathalyzer and radar speed trap cases.
- ❖ Balance elegant variation (boredom v. confusion).
- ❖ Appreciate that *our* acronyms are as clear as mud.
- ❖ Be clever for your client, not for the judge.
- ❖ Make things as simple as possible, but not simpler.
- ❖ Remember that even under a shield of discretion, EPA must act rationally.
- ❖ When all else fails, look for some literary allusion.

Thank you for listening!

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