Top Clean Water Act Cases of Year

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Anacostia Riverkeeper v. Jackson, No. 09-CV-97, 2011 U.S. Dist. LEXIS 80316 (D. D.C. Jul. 25, 2011)

Issues and holding:
In a long-standing battle among environmental groups, the U.S. Environmental Protection Agency ("EPA"), State environmental regulators and wastewater utilities in and around our nation's capital, Judge Royce Lambeth, Chief Judge of the U.S. District Court for the District of Columbia, summarily tossed out EPA's approval of the Anacostia River's Total Daily Maximum Load ("TMDL") for sediment and total suspended solids ("TSS"). In a strongly worded opinion, Judge Lambeth invalidated a TMDL that had been in development, in one way or another, for over a decade, and one which proposed removing 85 percent of the sediments and TSS being discharged to the river. The judge uses a painfully detailed literal and grammatical analysis of the Clean Water Act ("CWA") and EPA's TMDL regulations to reach a result that highlights the urgency of clarifying and improving the TMDL program to address the realities associated with meeting water quality standards in a meaningful way.

Introducing prior attempts to develop a TMDL for the Anacostia, Judge Lambeth succinctly provides his perspective by stating, "The development of a sediment/TSS TMDL is a story of excessive negligence and unnecessary delay." For many years, the District of Columbia ("the District") failed to submit 303(d) lists and develop TMDLs required by the Clean Water Act ("CWA"). Section 303 of the CWA requires EPA to approve or disapprove TMDL lists and TMDLs, and to develop lists and TMDLs when those submitted by States are deficient. In *Kingman Park Civil Ass'n v. EPA*, 84 F. Supp. 2d 1 (D.D.C. 1999), the court allowed a citizen suit to compel federal action under the theory of "constructive submission." That is, when a State fails over a long period of time to submit lists of impaired waters and proposed TMDLs, it will be treated as if it had submitted deficient ones, and EPA must move forward to develop them.

Following that decision, EPA, the District and the plaintiffs entered into a consent decree whereby the District would submit 303(d) lists and develop TMDLs for its waters. In 2002 the District submitted and EPA approved a TMDL to address excess sediment and TSS pollution in the Anacostia that relied upon annual, rather than daily, load limits. This TMDL was challenged and upheld in *Friends of the Earth v. EPA*, 346 F. Supp. 2d 182 (D.D.C. 2004), but was overturned on appeal by the D.C. Circuit, which focused solely on the question of whether a TMDL could be expressed in annual, rather than daily, limits. *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140 (D.C. Cir. 2006). After that decision, EPA coordinated a joint effort between the District and Maryland (the latter contributes significant pollutant loads to the Anacostia) to develop a single TMDL for both jurisdictions to address excessive sediment and TSS pollution in the river. The resulting sediment/TSS TMDL focused the protection of aquatic life, concluding that the relevant "endpoint of the TMDL (the most stringent reduction in sediment loads) is DC's tidal Anacostia clarity criterion." The TMDL did not, according to the court, evaluate whether that criterion was more stringent than criteria tied to recreational or aesthetic uses of the Anacostia that had been established by the District or Maryland. The TMDL, among other things, assigned waste load allocations ("WLAs") on a system-wide basis for the municipal separate storm sewers ("MS4s") throughout the watershed. The TMDL was submitted to EPA in June 2007 and approved one month later.

Anacostia Riverkeeper, Inc. and Friends of the Earth, Inc., two DC-based non-profit corporations, challenged the TMDL in the District Court. Interveners included the National Association of Clean Water Agencies, the Washington Area Sewer Authority, the Wet Weather Partnership, the Maryland Association of Municipal Wastewater Agencies, the Virginia Association of Municipal Wastewater Agencies, the Virginia Municipal Stormwater Association, the Storm Water Association of Maryland, and the West Virginia Municipal Water Quality Association.

The court rejected the majority of plaintiffs' challenges but held that EPA's finding that the TMDL would attain applicable water quality standards was insufficient under the law and unsupported by the evidence, and was therefore arbitrary and capricious, vacating the TMDL. The court stated, "The Clean Water Act requires a TMDL that sets load limits on a pollutant sufficient to reduce contamination to levels necessary to satisfy the narrative and numeric water quality criteria and protect all designated uses applicable to the water body." Moreover, the court held that when developing a TMDL for a particular pollutant, the CWA and the TMDL regulations require an evaluation of whether the load levels, once implemented, will protect ***all*** applicable water quality standards, including ***all*** designated uses and ***all*** water quality criteria.

The court did, however, distinguish between the requirement to set a total ***daily*** maximum load and the CWA's grant of discretion to States to determine whether their water quality standards should be expressed as daily, weekly, monthly, seasonal, or annual maximums or averages. The court deferred to EPA's interpretation that the CWA's requirement to develop TMDLs meant that daily pollutant loads could be set to meet water quality standards in "whatever time frame applies to those standards under state law." The court also upheld setting an aggregate daily load for MS4 wasteload allocations and the use of an implicit margin of safety. The court gave the jurisdictions one year to revise the TMDL in accordance with the opinion.

Of perhaps greater significance, the court rejected the Intervenors' arguments that the long established practice of setting partial TMDLs was appropriate. In essence, Judge Lambeth said that to the extent a State has developed and implemented a prior TMDL—whether it was a partial-TMDL designed only to protect certain designated uses or a full TMDL that is simply insufficient—that State's burden is the same: to continue to monitor compliance with all water quality standards, and, if they are not met, develop a new TMDL to address these shortcomings.

Relevance to public utilities:
This opinion could require much more extensive new TMDLs to be developed, and could require a reevaluation of those that already have been set for impaired waters. Instead of focusing on the contaminants and uses greatest concern, a broader analysis could be required, and more restrictive NPDES permits could be issued as a result. On the other hand, States could clearly set water quality standards, according to Judge Lambeth, that were expressed as monthly, seasonal or annual maximums or averages. Whether States are willing at this point to revise their water quality standards, and whether EPA will approve such standards, remains unclear.

Next steps:
Work with States and EPA to establish water quality standards that are expressed as monthly or annual averages, especially for those pollutants that are caused by wet weather events.

Florida Wildlife Federation v. S. Fla. Water Mgmt. Dist., 647 F.3d 1296 (11th Cir. 2011)

Issues and holding:
This decision arises in the context of extensive litigation concerning the adequacy of Florida's water quality standards for nutrients. In this lawsuit filed in 2008, several environmental advocacy organizations sued EPA, claiming that EPA had in effect, in its 1998 Clean Water Action Plan and/or its 1998 National Strategy Report, previously determined that Florida's nutrient standards were inadequate and therefore that EPA had a nondiscretionary duty to develop new standards. While EPA initially denied plaintiffs' claim that there had already been such a determination, in January 2009, EPA issued a letter to the Florida Department of Environmental Protection, explicitly finding that Florida's nutrient criteria were inadequate. At that point, EPA's duty to promulgate new standards was triggered, whether or not it had been earlier.

Plaintiffs and EPA negotiated and moved for entry of a consent decree establishing a schedule for EPA rulemaking to establish numeric nutrient standards for lakes and flowing waters by October 15, 2010 (Phase I) and for coastal and estuarine waters by October 15, 2011 (Phase II).

Following full briefing and oral argument, the District Court approved the decree in 2009. The South Florida Water Management District and the Florida Water Environment Association Utility Council, which had previously intervened in this litigation, opposed the decree and appealed the district court's order approving it.

In the meanwhile, consistent with the terms of the decree, EPA sought extensions for issuance of both sets of nutrient criteria. The Phase I criteria were issued (timely, based on the extension) on November 14, 2010 and the Phase II criteria are scheduled to be proposed by November 14, 2011, with the final rule by August 15, 2012.

On appeal of the order approving the consent decree, the intervenors argued that the decree led, or would lead, to the promulgation of substantively unfair requirements, and that the timeframes allowed for promulgation of the nutrient criteria were unreasonable. As the 11th Circuit explained, while in the proceedings below, there had been a live controversy between the plaintiffs and the defendant, once the district court had approved the consent decree, in order to pursue an appeal, the intervenors would have to establish a new "case or controversy" in order to maintain standing. To demonstrate constitutional standing, a plaintiff must show:

(1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;

(2) the injury is fairly traceable to the challenged action;

(3) it is likely that the injury will be redressed by a favorable decision.

With respect to the Phase I criteria, the 11th Circuit found that the appeal was moot. The rule had already been duly promulgated and is now valid, independent of the validity of the consent

decree. Thus, even had the Court been inclined to reverse the district court's approval of the decree, such a decision would not have redressed the alleged injuries.

With respect to the Phase II criteria, the 11th Circuit found that the alleged injuries were not traceable to the decree; rather, EPA's duty to promulgate revised nutrient criteria dated to the January 2009 determination that the existing standards were inadequate. And similar to its findings concerning the Phase I criteria, the Court noted that EPA's establishment of the Phase II criteria would be based on a valid rulemaking triggered by its January 2009 determination, rather than by the consent decree, which merely established a schedule. The Court thus concluded that a favorable decision would not redress the alleged injuries. Accordingly, the 11th Circuit dismissed the intervenors' appeal, finding that the intervenors lacked standing to challenge the decree.

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.[1] This may serve as a preview of a more active role courts may play in light of nationwide frustration with the pace of remediation of certain prominent water bodies.

Next steps:
This litigation appears to be over. EPA's Phase II nutrient criteria are expected to be published in draft on November 14, 2011.

On November 2, 2011, the Florida DEP published draft rules with nutrient criteria for inland waters which, if adopted and approved by EPA, would replace EPA's Phase I criteria. EPA indicated on the same day that its initial review of the proposal "leads us to the preliminary conclusion that EPA would be able to approve the draft rule under the CWA." This will undoubtedly lead to still more litigation, as EarthJustice has already pledged to challenge the State's standards.

[1] *Miccosukee Tribe of Indians of Fla. v. U.S.*, 2010 U.S. Dist. LEXIS 37531 (S.D. Fla. 2010).

***Friends of the Earth, Inc., et al v. Gaston Copper Recycling Corp.*, 629 F. 3d 387 (4th Cir. 2011)**

Issues and Holding:
Plaintiff nongovernmental organizations filed a Clean Water Act citizen suit against Gaston pursuant to 33 U.S.C. § 1365 seeking declaratory and injunctive relief, civil penalties and attorneys' fees for alleged violations of Gaston's NPDES permit. On appeal, the Fourth Circuit considered whether: (1) plaintiffs had standing to sue; (2) the District Court erred in imposing penalties for violations not detailed in plaintiff's 60 day notice letter; and (3) whether certain violations were "wholly past" and therefore not actionable.

Gaston owned a metals smelting facility in South Carolina, and held an NPDES permit for discharges of contaminated storm water to a lake on the plant site, which overflowed to a creek tributary to the Edisto River. The events at issue in the litigation occurred between July 1990 and September 1991 and involved alleged violations of Gaston's 1991 permit, which was subsequently amended in March 1993. Following a circuitous procedural history, including subsequent briefing by the parties *some two years after bench trial but before entry of judgment*, dismissal on standing grounds, reversal of that dismissal by the Fourth Circuit and remand, the District Court determined that Gaston had violated its effluent limitations on 91 days and committed 773 monitoring, reporting and compliance schedule violations. The District Court imposed a civil penalty of $2.3 million and ordered Gaston to pay the plaintiffs' attorneys' fees and costs.

On appeal, the Fourth Circuit held that plaintiffs maintained standing to sue despite the death prior to judgment of a key standing witness. This portion of the opinion is consistent with the generally low bar for citizen plaintiffs in Clean Water Act cases. The more interesting issues in the case were those involving the plaintiffs' ability to sue for violations not identified in the 60 day notice letter.

60 Day Notice: The Court considered several issues, including (1) the mandatory nature of the Clean Water Act's notice requirement, (2) the information that notices given under the Act must contain, and (3) the timing of Gaston's challenge to the plaintiffs' notice. With regard to the first point, the Court held that the filing of an adequate 60 day notice letter is a condition precedent to filing a Clean Water Act citizen suit, and that Gaston's challenge to the adequacy of the letter, if timely raised, would provide a legal defense to the plaintiffs' claims.

Gaston did not raise the issue of the sufficiency of the notice letter until the filing of supplemental findings of fact and conclusions of law two years following the close of evidence, but before judgment was entered. The Court deemed this to be timely: because the Court had yet to dispose of plaintiffs' claim on the merits, Gaston had successfully preserved its defense under the requirement that challenges to the legal sufficiency of a claim must be raised "at trial" if not before. With regard to the sufficiency of the notice itself, the Court had to consider a convoluted administrative permitting history that rivaled the odd procedural posture of the case. The permit contained two sets of phased effluent limitations, specific compliance timelines and various requests for extensions of time from Gaston. Among other things, the Court held that plaintiffs could not prosecute violations of effluent limitations for pollutants not specifically identified in the notice letter. In other words, plaintiffs could seek penalties for violations of mercury

limitations, PCBs and flow, which were called out in the letter, but not for cadmium, zinc, iron or oil and grease, which were not. With regard to the alleged monitoring violations, the Court found inadequate the statement in the letter that "there appear to be instances in which the facility has failed to comply with the monitoring and reporting requirements of the permit." According to the Court:

> Thus, in the absence of information indicating the nature or the dates of such reporting and monitoring violations, Gaston was not given adequate notice of those alleged violations. Our conclusion is not altered by the fact that when the plaintiffs sent their notice letter, they did not have access to information that they later acquired in discovery in this case. The plaintiffs' lack of information before their suit was filed cannot excuse the deficiencies in the notice letter, because those deficiencies prevented attainment of the legislative objectives of encouraging pre-suit governmental involvement and securing violator compliance.

Wholly Past Violations: The District Court had found Gaston liable for 54 days of violation related to failure to timely submit final improvement plans as required by the permit. Citing *Gwaltney*, the 4th Circuit found that with its late submittal of the final plans in December 1991, Gaston was no longer engaged in any ongoing violation related to this submission requirement, and when the plaintiffs filed suit in July 1992, the violation of the submission requirement was "wholly past."

Implications for Public Utilities:
The case may signal a trend toward strict enforcement of the regulations detailing what must be contained in a 60 day notice letter, including the specific provision alleged to be violated, the date and location of the violations. With regard to the issue of continuing violations, the case takes the view that each discrete category of violation must be ongoing, which could help defend against cases involving sporadic exceedances of discrete effluent limitations, or possibly even sewer spills occurring in different geographic segments of a collection system. However, other circuits take a much more lenient view of how strictly the detailed notice requirements must be adhered to. See, e.g. *San Francisco BayKeeper v. Tosco*, 309 F.3d 1153, 1159 (9th Cir. 2002) (holding sufficient allegation that defendant illegally discharged petroleum coke "on each day when the wind [was] sufficiently strong to blow coke" into a nearby waterway); *WaterKeepers' N. Ca. v. AG Indust. Mfg. Inc*., 375 F.3d 913,917 (9th Cir. 2004) (holding sufficient notice letter stating that defendant discharges contaminated storm water during "every rain event over 0.1 inches").

Next Steps:
The case is on remand to the District Court for further proceedings consistent with the opinion.

Friends of the Everglades et al. v. EPA, Petition No. 08-13653, consolidated with Petition Nos. 08-13652, 08-13657, 08-14247, 08-14471, 08-14921, 03-16270, 08-16283, 08-17189, and 09-10506 (currently being briefed in the 11th Circuit)

Issues and holding:
EPA's 2008 Water Transfers Rule (WTR)[2] 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[3] and the South Florida Water Management District[4] – 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 11th Circuit by lottery under the multi-district rule. The district court cases have been stayed pending resolution of the consolidated petitions for review.

In November 2008, the 11th 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 11th 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. Since the Supreme Court denied certiorari in the S-2 case in November 2010, the consolidated challenges to the Water Transfers Rule itself are now being briefed.

Many of the entities that initially sought review of the Rule have since withdrawn their petitions, apparently based on EPA's statement in opposing a motion for reconsideration en banc in the S-2 case that it intended to reconsider the WTR. The remaining parties are briefing both the merits and also the question of whether this challenge is appropriately heard by a court of appeals under the APA or by a district court under the CWA.

NACWA has joined New York City's amicus brief in support of EPA, and has participated as an *amicus curiae* several times in related litigation over the past eight years.

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.

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[2] 40 CFR § 122.3(i).
[3] *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).
[4] *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).

Next steps:
Reply briefs are due in mid-December and the matter will be likely be argued in spring 2012. Given the history and posture of this litigation, no matter what the 11th Circuit holds, a petition for a writ of certiorari seems inevitable, and there is also a likelihood of further litigation in the pending district court cases. Since EPA's statement in a brief in 2009, there has been no indication that EPA intends to reconsider the Rule, and the WTR is not included on EPA's August 2011 plan prioritizing periodic regulatory reviews.

National Mining Association v. Jackson, Nos. 10-1220, 11-0295, 11-0446, and 11-0447, 2011 U.S. Dist. LEXIS 115787 (D.D.C. Oct. 6, 2011)

Issues and holding:
This decision in several consolidated cases from Kentucky and West Virginia hits the U.S. Environmental Protection Agency ("EPA") where it really hurts . . . in the guidance documents. In an ever increasing effort to improve environmental quality as quickly as possible, and in the absence of meaningful updates to the almost forty year old Clean Water Act ("CWA"), EPA has seemingly increased its efforts to regulate by guidance. This case joins others that have challenged certain EPA's actions, claiming that they were issued and implemented in violation of the notice and comment requirements of the federal Administrative Procedure Act.

These cases challenge EPA's inserting itself in the permitting process beyond the role authorized by Section 404 of the CWA. Section 404 establishes shared responsibilities for EPA and the U.S. Army in implementing the program, with the issuance of permits being assigned exclusively to the Secretary of the Army, who has delegated that responsibility to the U.S. Army Corps of Engineers ("Corps"). EPA's roles include setting guidelines for permit issuance (which was accomplished by notice and comment rulemaking in the 1980s), consulting with the Corps, and vetoing permits that the Corps has issues.

Frustrated by the lack of protection being provided to areas of Eastern Kentucky and West Virginia by the Surface Mining Control and Reclamation Act and other environmental laws, (especially those areas subject to mountaintop removal to obtain coal beneath the mountains' surface), EPA announced certain actions in the last two years to change implementation of Section 404 that made obtaining permits more difficult. Those actions were challenged in these lawsuits.

In June 2009, the EPA, the Corps, and the Department of the Interior signed a Memorandum of Understanding on Implementing the Interagency Plan on Appalachian Surface Coal Mining ("2009 MOU"), describing a set of short-term and long-term actions, including enhanced coordinated environmental reviews of pending permit applications under the Clean Water Act. This review would involve EPA applying the 404(b) (1) guidelines and directing the Corps on which permit applications must go through the newly created Enhanced Coordination Process ("EC Process") and the Multi-Criteria Integrated Resource Assessment ("MCIR Assessment"). The Corps was not involved in developing the MCIR Assessment, despite its statutory role as the permitting authority. In a letter EPA stated that it intended to screen and evaluate the pending coal permit applications to determine which permit applications required further "coordination" between EPA and the Corps. If the EPA determined during the MCIR Assessment that further review was necessary, then the pending permit application was subjected to the EC Process.

In July 2010 the National Mining Association ("NMA") filed a complaint seeking declaratory and injunctive relief against multiple federal defendants, claiming, among other things, that EPA had exceeded its statutory authority by injecting itself into the permit review and decisionmaking process. In addition, they claimed that regardless what EPA called them, the documents represented final agency actions, subject to review, and that the added procedures constituted legislative rulemaking. As a result, NMA argued, notice and comment was required.

In January 2011, the Court denied the NMA's motion for a preliminary injunction and denied the federal defendants' motion to dismiss the NMA's complaint in *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34 (D.D.C. 2011). After that ruling, four cases pending in United States District Courts in West Virginia and Kentucky were transferred to the District Court for the District of Columbia, and consolidated with case number 10-cv-1220, the case in which the NMA had moved for a preliminary injunction in this Court.

EPA argued throughout the litigation that the MCIR Assessment and the EC Process were based on EPA's power to exercise its judgment as to how best to implement a general statutory mandate and that their actions fell within the agency's authority under the CWA.

The court disagreed with EPA, holding that the MCIR Assessment and the EC Process are not consistent with the legal duties and authority accorded the EPA by Section 404 of the CWA. Further, the court stated that it is apparent that the MCIR Assessment and the EC Process "effectively amend" the Section 404 permitting process by conferring additional reviewing authority on the EPA, and that such authority was beyond EPA's scope under the CWA.

Accordingly, the court stated, "because the EPA has exceeded the statutory authority conferred upon it by the Clean Water Act, and because the MCIR Assessment and the EC Process are legislative rules not exempt from the APA's notice and comment rulemaking requirements, the plaintiffs' motion for partial summary judgment is granted, and the federal defendants' motion for partial summary judgment is denied."

Relevance to public utilities:
EPA is being subjected to additional scrutiny following its decisions to move forward on several fronts by issuing "guidance documents" and to expand its role. This is the most recent of several cases to require EPA to engage the public and regulated community when changing the rules of the game. Consider current and upcoming actions by EPA to determine whether APA procedures were followed and whether the actions EPA is proposing are within its statutory authority.

Next steps:
Unknown whether EPA will appeal. The court has yet to decide on the status of the June 2009 MOU.

***National Pork Producers Council. v. EPA*, 635 F.3d 738 (5th Cir. 2011)**

Issues and Holding:
In 2003, EPA revised its regulations implementing its oversight of Concentrated Animal Feeding Operations (CAFOs). Several parties challenged the 2003 Rule, and the Second Circuit reviewed the challenges in *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005). In response, in 2008, EPA, revised its regulations (the 2008 Rule). In place of the 2003 Rule's duty to apply for a permit, the 2008 Rule required that a CAFO owner or operator apply for a permit only if the CAFO "discharges or proposes to discharge pollutants." The Rule also required that any NPDES permit issued to a CAFO include the requirement to develop and implement a Nutrient Management Plan (NMP), including land application requirements. The NMP had to be submitted, in its entirety, with the CAFO's permit application, reviewed by the agency and the public, and its terms must be incorporated into the permit as enforceable effluent limitations. A number of agricultural interests filed petitions for review of the 2008 Rule. The petitions for review were consolidated and the Fifth Circuit was randomly selected to review the parties' challenges.

On appeal, the Petitioners challenged EPA's authority to establish a "duty to apply" for an NPDES permit, imposition of liability for failing to apply for a permit, and the requirement for NMPs for land application. In rejecting the requirement that certain CAFOs must apply for a permit, the Fifth Circuit concluded EPA had attempted to supplement the CWA's comprehensive liability scheme in excess of its statutory authority. The Court declined to uphold EPA's requirement that CAFOs that *propose to discharge* apply for an NPDES permit. The Court held there must be an actual discharge into navigable waters to trigger the CWA's requirements. As the Court noted:

> At first blush it seems that the EPA, by regulating CAFOs that "propose" to discharge, is regulating CAFOs that want to discharge. However, as the Farm Petitioners' counsel explained at oral argument, the EPA's use of the term "propose" is not the same as the common understanding of the term – "to form or declare a plan or intention." … Instead, the EPA's definition of a CAFO that "proposes" to discharge is a CAFO designed, constructed, operated, and maintained in a manner such that the CAFO will discharge. Pursuant to this definition, CAFOs propose to discharge regardless of whether the operator wants to discharge or is presently discharging. This definition thus requires CAFO operators whose facilities are not discharging to apply for a permit and, as such, runs afoul of… well-established precedent.[5]

Similarly, the Court invalidated the provision of the 2008 Rule providing that a CAFO can be held liable for failing to *apply* for a permit. With regard to the NMP requirement, the Court found these challenges to be time-barred because the challenged requirement was promulgated in the 2003 Rule.

[5] 635 F.3d at 750.

Implications for Public Utilities:
The case is instructive on the issue of the limits of EPA's statutory authority. The specific issues in the case, dealing with EPA's ability to regulate an entity that proposes to or is likely to discharge, are not going to arise in the context of traditional POTWs or stormwater utilities. However, there may be a parallel in sanitary sewer collection systems. It can be argued that a handful of episodic and unintended sanitary sewer overflows (SSOs) cannot support requiring NPDES coverage, particularly when the SSOs occur in different parts of the system, or occur for different reasons, and the causes have been addressed or corrected. The occurrence of a single SSO event does not mean that the responsible entity is "actually discharging" as it had no intent that the accidental, unanticipated event would occur and has no intention of allowing another SSO event in the future. By regulating the "potential" discharge of pollutants from collection systems that have no intent to discharge in the future, EPA would arguably be exceeding its statutory authority.

Next Steps:
EPA plans to revise the CAFO regulations consistent with the Fifth Circuit's decision. In addition, EPA is proposing a rule that would require CAFOs to submit basic operational information to EPA so the Agency can "more effectively carry out its CAFO permitting programs on a national level and ensure that CAFOs are implementing practices to protect water quality and human health."

***Natural Resources Defense Council v. County of Los Angeles*, No. 10-56017, 2011 U.S. App. LEXIS 14443 (9th Cir. 2011)**

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 the District's Mass Emissions stations have recorded exceedances of water quality standards, and that the County of L.A. and other co-permittees had therefore violated the L.A. County MS4 Permit and the Clean Water Act.

In response, the co-permittees argued that compliance with the "iterative process" provisions in the L.A. County MS4 Permit were sufficient for permit compliance, regardless of whether the District was in strict compliance with water quality standards. The Ninth Circuit agreed with the plaintiffs, and 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. The receiving water limitation language states: "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." The Court found 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.

The co-permittees also contended that the Mass Emissions monitoring requirement in the L.A. County MS4 Permit "neither measures nor was designed to measure any individual's compliance with the permit." The Ninth Circuit disagreed and held that Congress has authorized the use of effluent limitations that prohibit discharges that "cause or contribute to exceedances of water quality standards." The Court reasoned that citizen suit enforcement is allowed when compliance mechanisms, including mass emissions monitoring, indicate that there is an exceedance of a water-quality standard, because an exceedance constitutes a violation of the MS4 Permit, and the CWA.

The L.A. County MS4 Permit monitoring program goals include "assessing compliance with the Order," and "[d]etermining if the MS4 is contributing to exceedances of water quality standards." Taken together, the Court held that the provisions support an enforcement action based on exceedances measured at Mass Emissions stations.

The Court recognized that NRDC needed to link the exceedances at Mass Emissions stations to discharges of pollutants (i.e., the addition of pollutants to navigable waters). Where the Mass Essions stations were in a section of the District's MS4 upstream from the outfalls to the receiving waters, the Court found pollutants were being added to navigable waters from point sources (i.e., District channels). The Court 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. With regard to two other Mass Emissions stations not located in the District's MS4 but, rather, in a downstream navigable water, NRDC failed to meet the evidentiary burden of demonstrating how the flow of water from the District's MS4 contributed to a water quality exceedance at the monitoring stations.

Implications for Public Utilities:
The case has generated significant discussion within the municipal stormwater community, with some attorneys viewing the decision as sounding the death knell for the iterative process and safe harbor for MS4 permitting. Others, however, believe the case can be read more narrowly, given the Court's finding that the MS4 Permit "provides no *textual support* for the proposition that compliance with certain provisions forgives compliance with the discharge prohibitions."[6] In other words, the Court was simply considering the four corners of the permit before it, and it is possible to draft a permit in such a way to make clear that compliance with the iterative process does constitute compliance with the discharge prohibitions.

Next Steps:
On October 11, 2011 the co-permittees filed a petition for a writ of certiorari seeking review not on the iterative process holding but rather on the question of whether the concrete lined channels at issue are waters of the United States such that the MS4 discharges into those waters are subject to the Clean Water Act. The questions presented are:

1. Do "navigable waters of the United States" include only "naturally occurring" bodies of water so that construction of engineered channels or other man-made improvements to a river as part of municipal flood and storm control renders the improved portion no longer a "navigable water" under the Clean Water Act?

2. When water flows from one portion of a river that is a navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

[6] 2011 U.S. App. LEXIS 14443 at*43 (emphasis added).

Northwest Environmental Defense Center v. Brown, 640 F.3d 1063 (9th Cir. 2011)

Issues and holding:
The 9th Circuit denied a motion for rehearing en banc in an August 2010 decision in this matter. The court replaced the decision reported at 617 F.3rd 1176 with the one cited above, which is different only in that the 2011 decision includes an analysis concluding that the court has subject matter jurisdiction.

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, which it argued means 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 as being inconsistent with the statutory definition of "point source." The second reading does not reflect the intent of EPA but would allow the court to construe the Rule to be consistent with the statute. Under this second reading, the Rule exempts natural runoff from silvicultural activities so long as the runoff stays natural – that is, the exemption does not apply once the runoff is channeled or controlled. Under either reading, however, 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 further stated that under the Phase I stormwater regulations, logging is covered under a SIC code included in the definition of "industrial activity."

The Ninth Circuit recognized that because EPA had not been requiring NPDES permits for controlled discharges from logging roads, EPA had not had occasion to establish a permitting process for such discharges. The Ninth Circuit, however, stated that it was "confident" that EPA

would be able to establish such a process "effectively and relatively expeditiously" given the closely analogous NPDES permitting process for stormwater runoff from other kinds of roads.

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 environmental groups and courts may look at stormwater management.

Next steps:
Defendants filed a petition for a writ of certiorari in September 2011. On October 17, 26 states filed an amicus brief in support of the petition.

In the meanwhile, based on the Ninth Circuit's decision in this case last year, EPA has apparently been considering a general permit, either tailored to logging roads or a multi-sector industrial NPDES general permit.

Precon Dev. Corp. v. United States Army Corps of Engineers, 633 F.3d 278 (4th Cir. 2011)

Issues and Holding:
In the never-ending twenty-first century saga to determine what "waters" are subject to the jurisdiction of the Clean Water Act ("CWA"), the 4th Circuit provides a little guidance concerning the proof required to satisfy the "significant nexus" test outlined by Justice Kennedy in the *Rapanos* case, 126 S. Ct. 2208 (2006).

The U.S. Army Corps of Engineers ("Corps) determined that it had CWA jurisdiction over 4.8 acres of wetlands located in Chesapeake, Virginia owned by Precon Development Corporation "(Precon"). The developer owns a 658-acre tract called the Edinburgh Planned Unit Development (PUD) in a region historically comprised of forested wetlands. A total of 166 acres of wetlands in the PUD ultimately drain into the Northwest River, the closest traditional navigable water, which flows south through the region, passing approximately seven miles from the 4.8 acres of wetlands (the Site Wetlands) that are the subject of this action.

The Site Wetlands are adjacent to but do not abut a manmade drainage ditch constructed in 1977. The Site Wetlands and this 2500 foot Ditch are separated by a berm created when material was side-cast when the ditch was constructed. The 2,500-foot Ditch flows seasonally—i.e., from late winter to early spring, and joins a larger, perennial drainage ditch, the Saint Brides Ditch, approximately 900 feet downstream of the Site Wetlands. The Corps considered the Saint Brides Ditch and the 2,500-foot Ditch as one "reach" because they were, according to the Corps, historically part of the same naturally defined wetland drainage feature. The Corps also considered these ditches (collectively) as the "relevant reach" for purposes of a Significant Nexus Determination. They were, together, labeled by the Corps as "a man-altered, first-order tributary to the Northwest River."

The Saint Brides Ditch runs along the western boundary of the PUD for approximately 3,000 feet before meeting a second perennial tributary, about two and one-half to three miles south of the Edinburgh PUD. These merged tributaries flow into the Northwest River approximately three to four miles downstream, meaning that the property was located approximately seven miles from the nearest traditional navigable water.

The Corps denied Precon's application for a CWA Section 404 permit to impact the wetlands through development. Precon appealed these determinations to the U.S. District Court (E.D. Virginia) under the Administrative Procedure Act ("APA"). The district court granted summary judgment to the Corps on September 4, 2009, upholding both its jurisdictional determination and its permit denial.

On appeal to the 4th Circuit, Precon challenged whether the Corps' administrative record, if accepted as accurate, suffices to meet Justice Kennedy's significant nexus test by adequately establishing the existence of a significant nexus between the Site Wetlands—along with similarly situated wetlands—and the Northwest River. The Court found that the record contained insufficient information to allow it to assess the Corps' conclusion that the wetlands (collectively) have a significant nexus with the Northwest River.

The significant nexus test does not require laboratory tests or any particular quantitative measurements. It is a flexible ecological inquiry into the relationship between the wetlands at issue and traditional navigable waters. There must, however, be some evidence of both a nexus and its significance. The Corps' administrative record did not contain *any* measurements of actual *flow*. It reflected measures of the water storage *capacity* and the resultant *potential* flow rates of the relevant reach, but no indication of how often this capacity was reached or how much flow was typically in the ditches.

The Court found that even if the record *had* sufficiently documented flow, that alone, absent any additional information regarding its significance, would not necessarily suffice to establish a significant nexus. The significant nexus inquiry emphasizes the comparative relationship between the wetlands at issue, their adjacent tributary, and traditional navigable waters. A wetland next to a tributary with minimal flow might be significant to a river one quarter mile away, whereas wetlands next to a tributary with much greater flow might have only insubstantial effects on a river located twenty miles away. Although the Court recognized that the wetlands and their adjacent tributaries trap sediment and nitrogen and perform flood control functions, there was not evidence that the Northwest River suffered from high levels of nitrogen or sedimentation, or if it was prone to flooding. There must be some evidence, either quantitative or qualitative, not only of the functions of the relevant wetlands and their adjacent tributaries, but of the condition of the relevant navigable waters.

Recent Ninth and Sixth Circuit cases provide examples of the types of evidence that could suffice to establish "significance." In one, the significant nexus test was satisfied in part because a showing of increased chloride levels in the relevant navigable water, from 5.9 parts per million to 18 parts per million (chlorine seepage from the wetlands into the navigable river). Another provided qualitative evidence that the wetlands' acid mine drainage storage capabilities and flood storage capabilities had "direct and significant" impacts on navigation in the traditional navigable water via sediment accumulation, and that the diversion of water from the wetlands had increased the flood peaks in the subject river.

Relevance to public utilities:
For those struggling with the jurisdictional reach of the waters of the U.S., this case offers some hope that the government must demonstrate some ***significance*** to the nearest traditional navigable water when using the Kennedy test to establish jurisdiction.

Next Steps:
EPA published yet another round of guidance to address this issue, but now seems to plan to conduct rulemaking on interpreting *Rapanos*.

Sackett v. EPA, No. 10-1062 *(Currently being briefed in the U.S. Supreme Court)*

Issues and holding:
On June 28, 2011, the U.S. Supreme Court granted *certiorari* for the 9th Circuit Court of Appeals' denial of pre-enforcement review of a Clean Water Act ("CWA") Section 309(a) compliance order in *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010). The CWA authorizes the U.S. Environmental Protection Agency ("EPA") to issue compliance orders for violations of the Act, § 309(a), to enforce the compliance orders and obtain injunctive and other relief against violators in federal court, §309(b), to seek criminal and civil penalties for violations of the statute, § 309(c)-(d), and to assess administrative penalties, § 309(g), among other things. The compliance order being challenged was issued by EPA to a married couple in Idaho, Mike and Chantell Sackett, in 2007.

The facts concern the Sacketts' efforts to build a home on their .63 acre lot near Priest Lake, Idaho. Their property is in a subdivision that already has been largely developed, and is zoned for residential use. After the Sackett's began site preparation activities in the spring of 2007, EPA issued a CWA Section 309(a) compliance order to them. The order claims the Sacketts discharged without a CWA permit into jurisdictional wetlands, forbids the Sacketts to build their home there, and requires, among other things, the Sacketts to remove all unauthorized fill material, restore to the site wetlands soils, allow EPA officials to move freely at the site and appropriate off-site areas, and provide access to all records and documentation related to the site's condition and restoration, with civil penalties of up to $32,500 per day for failure to comply. The Sacketts sought a hearing with EPA, but were denied one. The Sacketts, not your ordinary CWA permittees, sought instead to challenge the Section 309 order, as well as EPA's underlying jurisdictional determination.

The four Circuit Courts of Appeals that had previously addressed this issue directly have said that pre-enforcement review is not allowed (4th, 6th, 7th and 10th), as have a number of U.S. District Courts. Any entity that has received a Section 309 compliance order can understand the dilemma: Do you comply, and still be subject to potential civil or criminal penalties (but hope EPA is satisfied or pacified), or do you do nothing, and wait to challenge an Agency action as a defendant in an enforcement case, when the stakes are really, really high?

The U.S. District Court for Idaho and the Ninth Circuit lined up behind the other court decisions and dismissed the Sacketts' suit. The 9th Circuit inferred that "that Congress intended that all challenges to the compliance order be brought in one proceeding," and considered the goals of the Act and the legislative history of the Clean Air Act before ruling against the Sacketts in 2010.

The issues before the U.S. Supreme Court are:

1. Whether the Sacketts may seek pre-enforcement judicial review of the Administrative Compliance Order pursuant to the Administrative Procedure Act, 5 U.S.C. § 704 ("APA"), and

2. If not, whether the Sacketts' inability to seek pre-enforcement judicial review of the Administrative Compliance Order violates their rights under the Due Process Clause?

In their U.S. Supreme Court brief, the Sacketts note that unlike the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), which Congress specifically amended to preclude pre-enforcement review, 42 U.S.C. § 9613(h), there is no such express limitation in the CWA. This implies that Congress did not intend to foreclose judicial review of compliance orders under the APA. They argue that the compliance orders' powerful coercive effect, as well as the absence of any congressional intent that such orders be enforced quickly, supports judicial review under the APA.

Even if it such an interpretation is to be inferred from the Act, such intent is an unconstitutional deprivation of their due process rights, the Sacketts claim. Even the 9th Circuit stated, "[i]f the CWA is read in the literal manner the Sacketts suggest, it could indeed create a due process problem." In part, this view stems from the language of the Act that allows EPA to issue an order based upon "any information available," without any requirement that the information be credible to the extent, for example, of that required to establish probable cause for a search warrant.

Relevance to public utilities:
Although the case involves dismissal of a seemingly minor case, it will be the first time the U.S. Supreme Court has addressed a longstanding fairness issue that affects every entity that is potentially subject to Clean Water Act ("CWA") jurisdiction. After the decision, you may (or may not) have the opportunity to challenge EPA's issuance of a Section 309(a) compliance order before exposing one to additional civil or criminal sanctions.

Next steps:
On September 23, 2011, the Pacific Legal Foundation filed its merit brief in the U.S. Supreme Court. The government's deadline for filing its merit brief is November 23, 2011, and oral argument is scheduled for January 9, 2012. A number of entities, including NACWA, are filing *amicus* briefs.

U.S. v. City of Akron, No. 09-CV-272, 2011 U.S. Dist. LEXIS 35601 (N.D. Ohio 2011)

Issues and holding:
The District Court denied an unopposed motion to enter the CSO consent decree that EPA and Akron had negotiated. While the parties never completed discovery, since they were able to reach a settlement, the Court independently solicited documentation and held a two-day "fairness hearing" to assist in its review of the proposed consent decree.

The Court seems to have been fundamentally offended at the notion that the consent decree did not include a final construction schedule for remedial measures, but instead required Akron to update its Long Term Control Plan and implement it according to milestones to be developed through that planning process. The Court expressed skepticism about a decree providing for further negotiations, noting that "the parties have been engaged in precisely these same negotiations since 2002 without any meaningful progress."

The standard the Court applied, citing 6th Circuit precedent, was "whether the decree is fair, adequate, and reasonable, as well as consistent with the public interest." While the Court recognized both the presumption in favor of voluntary settlements and also that EPA is entitled to some degree of deference, it took a surprisingly close look at the evidence in applying the standard.

The Court focused on the content of the negotiations between Akron and EPA concerning the LTCP during the roughly ten months between the motion to enter the decree and the decision. In particular, the Court noted that EPA had proposed projects of significantly larger scope (more than double the storage capacity) than Akron, and that EPA had concluded that the facilities could be built six years sooner than Akron had proposed. The Court also questioned Akron's financial analysis, concluding that there was no basis for treating Akron as a high burden municipality, and therefore no basis for allowing 19 years for implementation of the LTCP.

Finding that the proposed decree was fair, adequate, or reasonable, nor protective of the public interest, the Court concluded that the parties and the public would be better served by a judicial order based on the evidence than by the agreement the parties had reached.

Relevance to public utilities:
The notion that courts will second-guess the parties once they have reached a settlement in an enforcement action is troubling. The Court in this case recognized that the parties expected that it would give deference to the proposed settlement as a whole, but instead chose to analyze each principal element – financial capability, the elements of the LTCP, and the implementation schedule – independently. While this case seems to be anomalous, and the decision may be reversed on appeal, it does seem to suggest that it may be wise to seek to reach agreement not only on the terms of a settlement itself but also on the basis for the parties' agreement that a settlement is appropriate.

Next steps:
The parties appealed to the Sixth Circuit, which is holding the matter in abeyance pending mediation with the District Court Judge, which is currently ongoing. If the matter is not resolved, NACWA will file an amicus brief supporting Akron.