



Clean Water  
Act Violations  
– Legal  
Perspectives

PROTECT OUR WATER  
CONFERENCE

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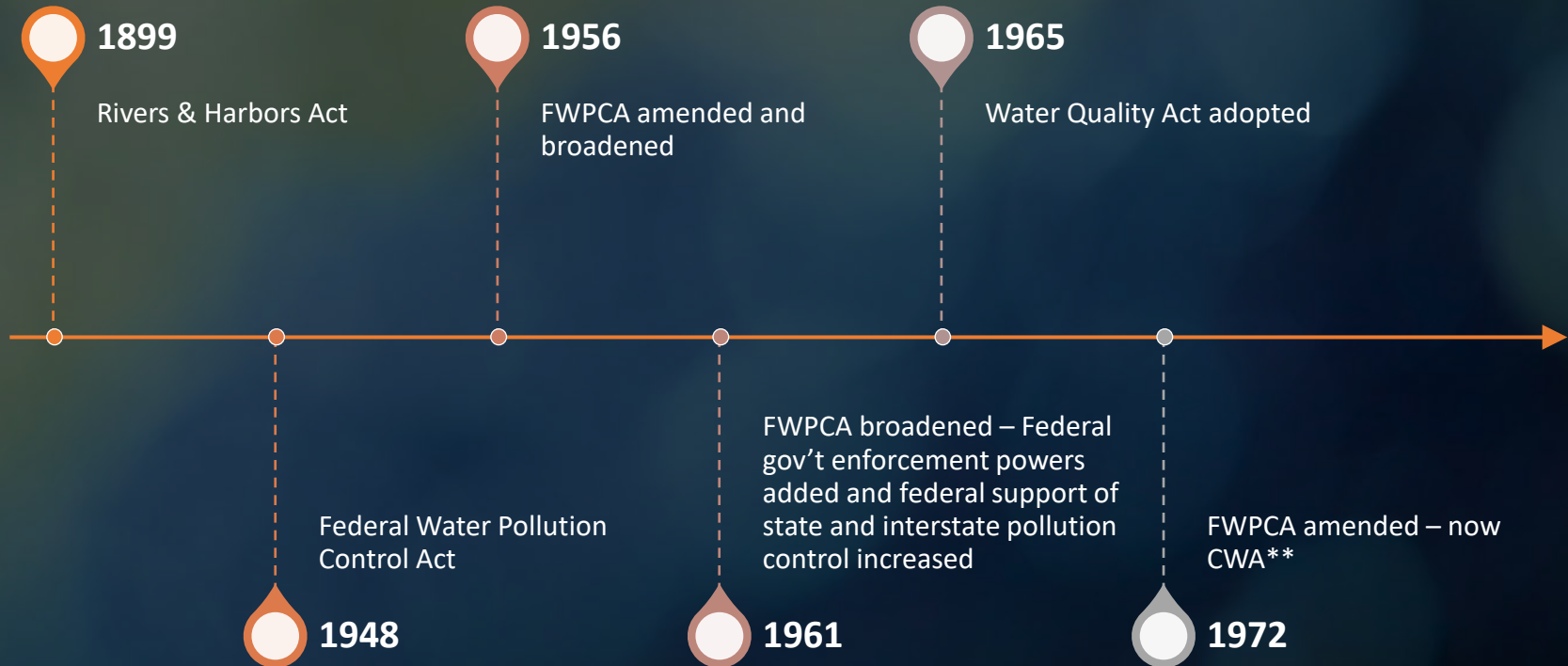
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# Historic Legislative Milestones



# Premise of the Clean Water Act

- **PROHIBITED DISCHARGE OF POLLUTANTS INTO THE WATERS OF THE UNITED STATES.**
- **THE 1972 AMENDMENTS**
  - Established the basic structure for regulating pollutant discharges.
  - Gave EPA the authority to implement pollutant control programs such as setting wastewater standards for industry.
  - Maintained existing requirements to set water quality standards for all contaminants in surface waters.
  - Made it unlawful for any person to discharge any pollutant from a point source into navigable waters, unless a permit was obtained under its provisions.
  - Funded the construction of sewage treatment plants under the construction grants program.
  - Recognized the need for planning to address the critical problems posed by nonpoint source pollution.
  - Created citizens suits (*Sierra Club v. Morton*, 405 U.S. 727 (1972) – recognized citizens standing to challenge the implementation of environmental protection laws

# The NPDES Program

- Permit is based on express statutory authority in Section 402 of the 1972 CWA but historical origins go back to the 1899 Refuse Act's prohibition against all industrial discharges to navigable waters.
- Legalizes otherwise the tens of thousands of industrial discharges that are prohibited in the CWA. Pub L. No. 95-500 sec. 301(a). In other words, mitigates the strict liability assumptions of the CWA.
- Without an NPDES permit, any "discharge of any pollutant" by any "person" from any "point source" into "navigable waters" is likely a violation of the Clean Water Act.

# Consequences of CWA Violations

- Strict liability for violations and a violator's intent and good faith are irrelevant to the liability issue. *See Hawaii Thousand Friends v. City and County of Honolulu*, 821 F. Supp. 1368, 1392 (D. Hawaii 1973).
- The fact that a violator is "without fault" in committing violations of the CWA may mitigate the amount of the penalties assessed, however, it will not absolve the violator from penalties. *Id.* At 1392; *Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208 (4<sup>th</sup> Cir. 1986) and *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11<sup>th</sup> Cir. 1990).

## Consequences (cont.)

- If the CWA or relevant state laws require a permit for discharge activities, one must obtain a permit and comply with the requirements. If one creates a conduit for pollutants for which a permit is required, but had not obtained one before the creation, the creator will be in violation of the CWA until a permit is obtained, regardless of whether its discharge activities conform to the technical permit requirements. *Molokai Chamber of Commerce*, 891 F. Supp. at 1400-1401.
- Once CWA violations are found, civil penalties are mandatory, although the amount is wholly within the discretion of the courts. *Hawaii Thousand Friends*, 821 F. Supp. at 1394.
- First time violators shall be punished by a fine of \$2,500 to \$25,000 per day for each violation and/or imprisonment up to one year.

## Relevant Cases

- When is an NPDES required? *Cnty. of Maui v. Hawaii Wildlife Fund*, 590 US \_\_\_\_; 140 S.Ct. 1462 (April 23, 2020).
- What constitutes “knowingly” discharge when it comes to an NPDES/CWA violation? *United States v. Weitzenhoff*, 35 F. 3d 1275 (9<sup>th</sup> Cir. 1993).
- What constitutes a person? *United States v. Curtis*, 988 F.2d 946 (9<sup>th</sup> Cir. 1993); *United States v. Brittain*, 931 F.2d 1413 (10<sup>th</sup> Cir. 1991).
- Limitations on NPDES permit shield. *Piney Run Ass’n v. Cnty. Comm’rs of Carrol Cnty.*, 268 F.3d 255 (4<sup>th</sup> Cir. 2001); *Natural Res. Def. Council Inc. v. Cnty. of Los Angeles*, 725 F.3d 1194, 1196-1197 (9<sup>th</sup> Cir. 2013) cert. denied, 134 S.Ct. 2135 (U.S. 2014).
- What are Waters of the United States? *Rapanos v. United States*, 547 U.S. 715, 739, 126 S.Ct. 2208, 2225, 165 L.Ed ed 159 (2006).



## Updates from the EPA & the DOJ

- In 2019, the EPA reported that they planned to return to their core program in collaboration with authorized state programs.
- EPA proposed to transition “Keeping Industrial Pollutants out of the Nation’s Waters” NCI to “National Pollutant Discharge Elimination System (NPDES) Significant Non-Compliance (SNC) Reduction”.
- In March 2020, the DOJ ended its longstanding practice of allowing the inclusion of environmentally beneficial projects in legal settlements with the EPA (aka Supplemental Environmental Projects) to offset the environmental harm caused by defendants.



# Case Developments

- City of Middletown, OH: In Feb. 2018, the EPA entered into a Consent Decree with the city concerning the discharge of sewage into local waterways in violation of the CWA. The settlement requires implementation of long-term control plan with control measures to reduce the discharge of pollutants by over 300,000 pounds per year.
- City of Quincy, MA: In March 2019, the EPA filed a civil judicial complaint against the city for discharge of sewage and untreated wastewater into Boston Harbor, Dorchester Bay, Quincy Bay and other waterways from the city's sanitary sewer and storm drain systems.



## Case Developments (continued)

- **Evangeline Enterprises, LLC:** In Oct. 2018, EPA entered into a Consent Decree with Evangeline for unauthorized discharges into the waters of the United States in violation of section 301 of the CWA from a horse training facility in Louisiana, which qualified as a concentrated animal feeding operation. Evangeline closed its operations and was required to pay a \$30,000 civil penalty.
- **Antero Resources Corporation:** In 2019, the EPA entered into a Consent Decree for violation of section 301 and 404 of the CWA for discharges of dredged fill material into wetlands and streams in connection with natural gas exploration and production activities at 32 sites. The Decree required restoration, enhancement, creation and preservation of over 11,500 linear feet of streams and more than 3 acres of wetlands – valued at \$8 million. Additionally, a \$3.15 million civil penalty was imposed.

# Lessons Learned

- Violations of CWA – strict liability.
- NPDES is a permit shield but ....
- You must operate within the confines of your permit.
- Failure to know what your permit allows or doesn't allow = VIOLATION (no discretion).
- Violations – fines can be expensive; restoration fines may no longer be part of the settlement package – may change under new administration; settlements generally require an acceptable plan to rectify the problem.