

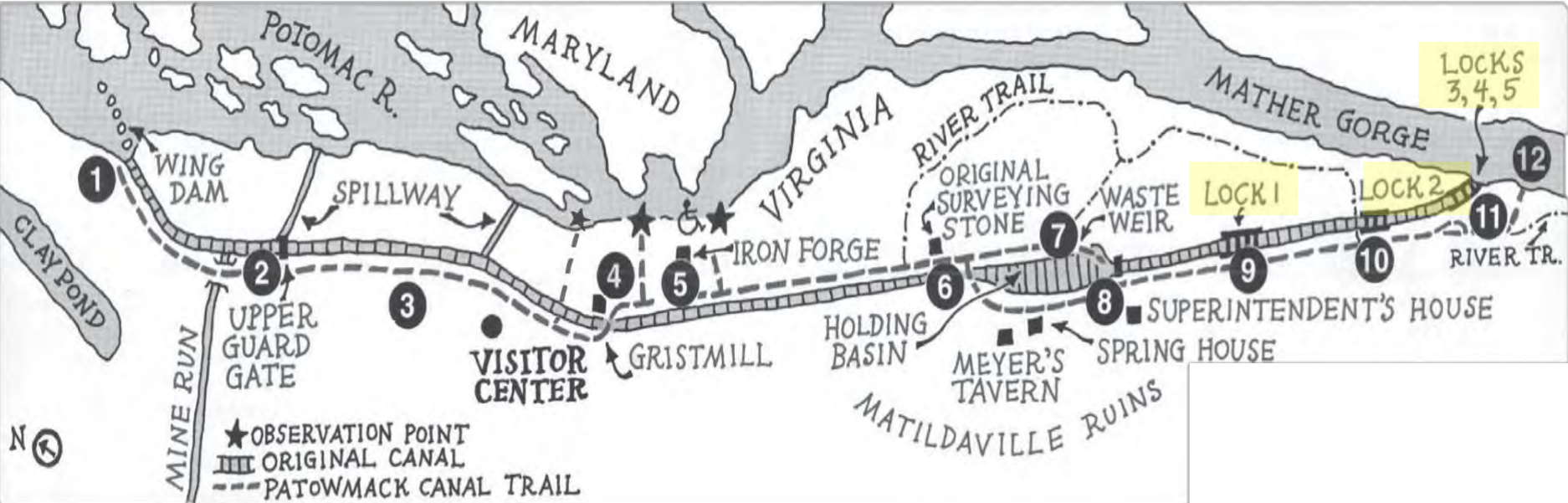
CIBO E&E MEETING

ENERGY & ENVIRONMENTAL POLICY OUTLOOK

LISA JAEGER

MARCH 5-6, 2019





WOTUS Rule

CWA Groundwater NPDES
Cnty of Maui HI v. HI Wildlife Fund
USSCT Oct 2019 Term


CSAPR Update
WI v. EPA
Oral Arg 10.3.18

EGU ELG

Southwestern Elec. Power v EPA
5th Cir - Oral Arg 10.3.18

CPP/NSPS Cases DC Cir
WV v. EPA – In Abeyance
ND v. EPA – In Abeyance

Revised Definition Solid Waste
CCAT v. EPA
Oral Arg 4.9.19

OIAI 
CCAT v. EPA
Oral arg 4.1.19

CERCLA 108 FA
Idaho Conservation League v. EPA
Oral Arg 3.13.19

BMACT / Area / CISWI III
Remanded Issues TBD 

ADMINISTRATION APPOINTEES

Principal	Position	Agency
Andrew Wheeler	Administrator	EPA
Alexandra Dunn	Assistant Administrator	EPA Office of Chemical Safety and Pollution Prevention
William Charles "Chad" McIntosh	Assistant Administrator	EPA Office of International and Tribal Affairs
Peter Wright (renominated)	Assistant Administrator	EPA Office of Land and Emergency Management
Mary Neumyar	Chairman	Council on Environmental Quality
Daniel Simmons	Assistant Secretary	DOE Office of Energy Efficiency and Renewable Energy
Kelvin Droegemeier	Director	White House Office of Science and Technology Policy

ADMINISTRATION ACTION UPDATE

NEPA Large Infrastructure Guidance

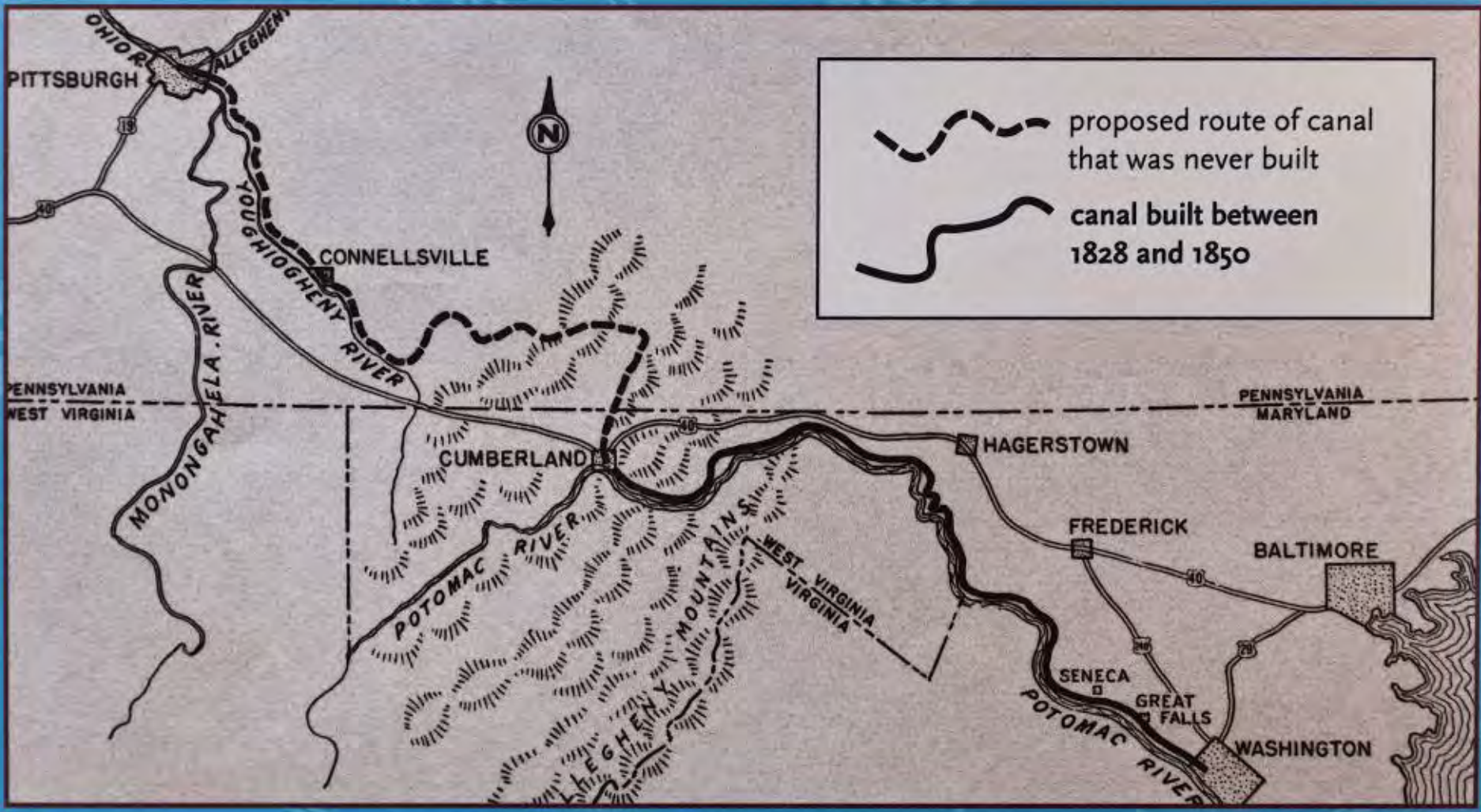
- OMB/CEQ: EO 13807 applies to States with NEPA Assignment Authority for Surface Transportation Infrastructure
- 2-year permitting timeframe, one lead agency, one EIS

Two for One EO / OMB Guidance

- *Public Citizen v. Trump* (DC Dist Ct, 17-253) Decision 2.19.19
- HELD: plaintiffs have standing but no summary dismissal; discovery launched

Implementation of EPA Litigation Transparency Principles

Enforcement Record



— — — — — proposed route of canal that was never built

————— canal built between 1828 and 1850





CAA - UTILITY MATS CASES

MATS Technical Corrections Rule *ARIPPA v. EPA* (DC Cir 16-1168)

MATS SU/SD Revisions Rule *Chesapeake Bay v. EPA* (15-1015)
briefing through June 2019

MATS Reconsideration Rule *ARIPPA v. EPA* (DC Cir 15-1180)

MATS Supplemental Finding *Murray Energy v. EPA* (DC Cir 16-1127)

MACT/RTR RULES

Issues Pending in DC Circuit Court / EPA Reconsideration

Pulp Mill RTR *Crossett Concerned Citizens v. EPA* (DC Cir. 17-1257)

- Must EPA set emission standard for each emitted HAP – dioxins, HCl, hydrogen fluoride, nondioxin organic HAP, Hg
- Where EPA considered but did not set MACT for a pollutant, may EPA set standard in RTR rule, on the basis that EPA would not be recalculating a floor?
- Can finding of acceptable risk support not setting MACT standard for a pollutant?
- Can PM be surrogate for gaseous Hg, where PM controls do not control Hg?
- Assessing health risk based on census block centroids v. “individual most exposed to emissions from source category” CAA § 112(f)(2)
- Court deadlines for standards as rationale for no new data gathering, analysis
- Briefing through Aug 2019

MARYLAND

Potomac River

C&O Canal

WEST
VIRGINIA

Tunnel North Entrance

Tunnel South Entrance

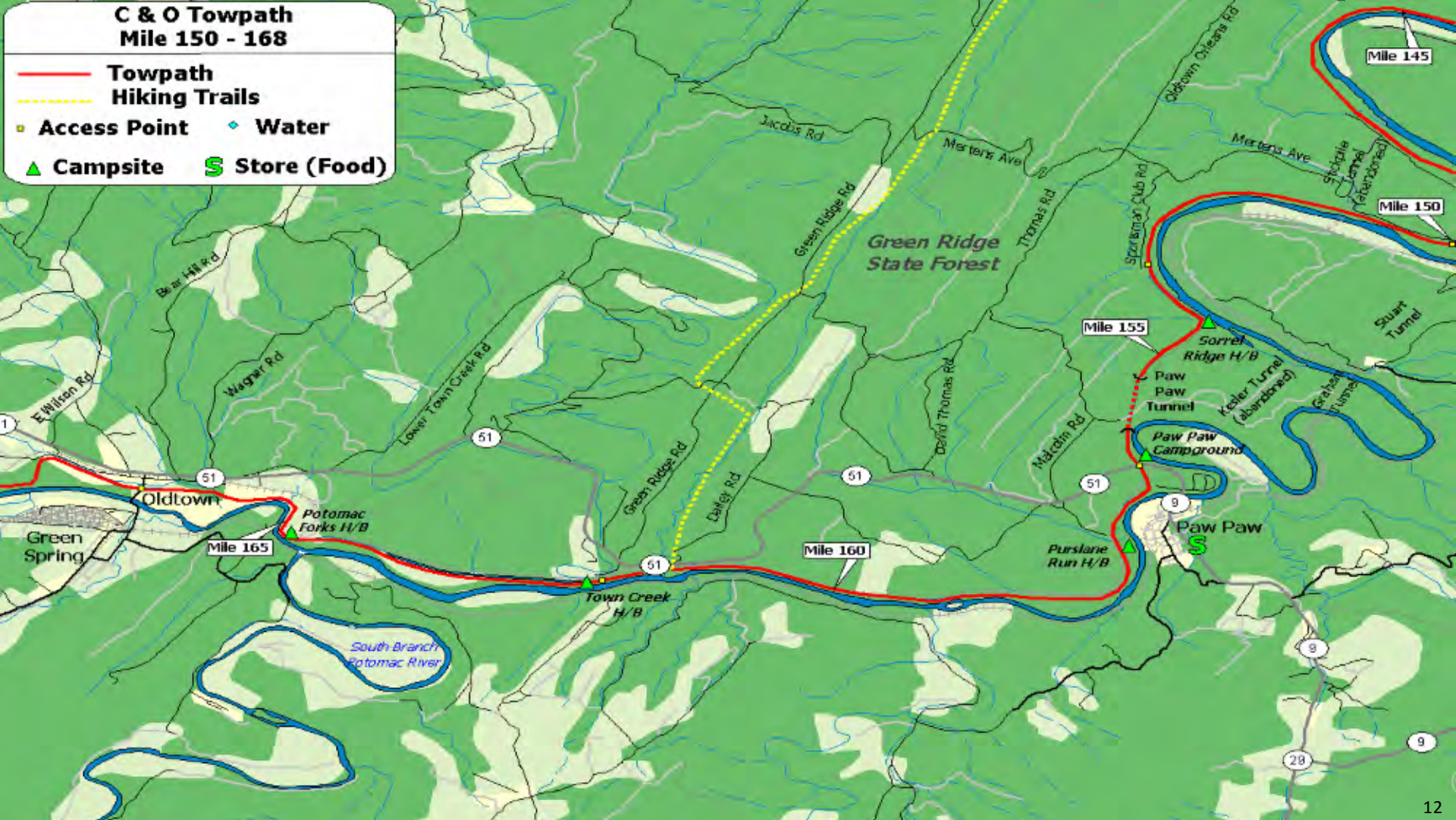
Paw Paw

1 km



**C & O Towpath
Mile 150 - 168**

-  Towpath
-  Hiking Trails
-  Access Point
-  Water
-  Campsite
-  Store (Food)





CAA CASES

CAA RMP Rule *ACC v. EPA* (DC Cir 17-1085)

- Adds duplicative disclosure and other requirements to CAA RMPs
- Admin recon pending – case in abeyance
- 90-day stay of effective date, CAA 307(d)(7)(B)
- Final delay of effective date to 2.19.19, CAA 307 and 112(r)

EPA working on replacement rule

Delay of effective date *Air Alliance Houston v. EPA* (DC Cir 17-1155)

- Challenging Rule delaying effective date to 2.19.19
- Decision 8.17.18 -- delay vacated

CAA ONCE IN ALWAYS IN

Bill Wehrum Memo (1.25.18) withdrew 1995 memo

- Sources previously subject to a major source MACT that are no longer major sources are not obligated to keep complying with the major source MACT
- Memo based on plain language reading of the CAA
- EPA to pursue rulemaking to codify the change

CA Communities against Toxics v. EPA (DC Cir 18-1085)

- Oral Arg 4.1.19
- Panel Judges Rogers, Wilkins, Silberman

CAA – ONCE IN ALWAYS IN

California Communities Against Toxics v. EPA
(DC Cir 18-1085)

Petitioners ENVs CA

IND Intervenors: Air Permitting Forum, NEDA/CAP
Auto Industry Forum, UARG

IND Amici: ACC API CIBO NAM Chamber
American Wood Council

NEW SOURCE REVIEW / PSD REFORM

Completed Administrative Actions

NSR / PSD Actions Already Complete	Type	Timing
Project Aggregation	Final Reconsideration Rule	November 2018
Ambient Air	Draft guidance	November 2018
Project Aggregation, Source Reactivation	Limetree Bay Terminals guidance memo	April 2018
Common Control/Source Aggregation	Meadowbrook guidance memo	April 2018
Project Emissions Accounting (aka Step 1 project netting)	Guidance memo	March 2018
Projected Actual Emissions	Guidance memo	Dec 2017

NEW SOURCE REVIEW / PSD REFORM

Pending Administrative Actions

NSR / PSD Actions Pending	Type	Timing (2019)
Source Aggregation (adjacency)	Final Guidance	April
Project Emissions Accounting	Proposed Rule	May
Ambient Air	Final Revised Policy	June
Activities Undertaken Before PSD Permit	Guidance	June
RMRR	Guidance	July
Excludable Emissions Due to Demand Growth	Guidance	Autumn
Renewing Pal Permits	Guidance	Autumn
Reactivation of a Source/Facility	Guidance	Winter

NEW SOURCE REVIEW / PSD REFORM

Project Aggregation

NRDC v. EPA (DC Cir 19-1007)

History

2009 Final Aggregation reforms (Jan 2009)

- ENVs sued, sought reconsideration
- EPA granted reconsideration, case in abeyance

2010 EPA proposed Recon Rule rescinding reforms, never finalized

2018 Final Aggregation Rule

Arguments





River

Dam

Inlet Lock Gates

Mule
Crossover
Bridge

Towpath

Canal



CWA § 316(B) RULE

Cooling Water Intake Structure (CWIS) Coalition v. EPA (2d Cir 14-4645)

- IND Petitioners CWIS Coalition UWAG, API, Entergy
 - USFWS and NMFS roles in NPDES permits illegal
 - Biological Opinion has wrong baseline for measuring species effects
- ENV Petitioners
 - “best available technology” = closed loop for existing sources
 - “new” units should include replacement units
- Decision 9.27.18 – Amended Opinion 11.26.18

DC Cir denied rehearing. No cert petition filed by deadline.

CWA – EGU EFFLUENT LIMITATIONS GUIDELINES

Final ELG Rule - 80 FR 67838 (Nov. 3, 2015)

Southwestern Electric v. EPA (5th Cir 15-60821)

- Utility & ENV Petitioners & Respondent-Intervenors
- Oral argument 10.3.18. **No decision yet.**

Severed Issues

- new, more stringent Best Achievable Control Technology (BAT)
- Pretreatment standards for existing sources (PSES) applicable to bottom ash transport water, FGD wastewater, gasification wastewater
- **rule at OMB**

CWA – EGU EFFLUENT LIMITATIONS GUIDELINES

Indefinite Stay Rule (9.18.17)

- stays compliance with some provisions of 2015 rule pending 5th Cir review of the substance of those provisions

Clean Water Action v. Wheeler (DC Cir 18-5149)

- Case in abeyance pending 5th Cir decision

Delay Rule (82 FR 43,494; 9.18.17)

- 2-year delay of BAT & PES deadlines, pending EPA reconsideration
- withdrew Indefinite Stay Rule

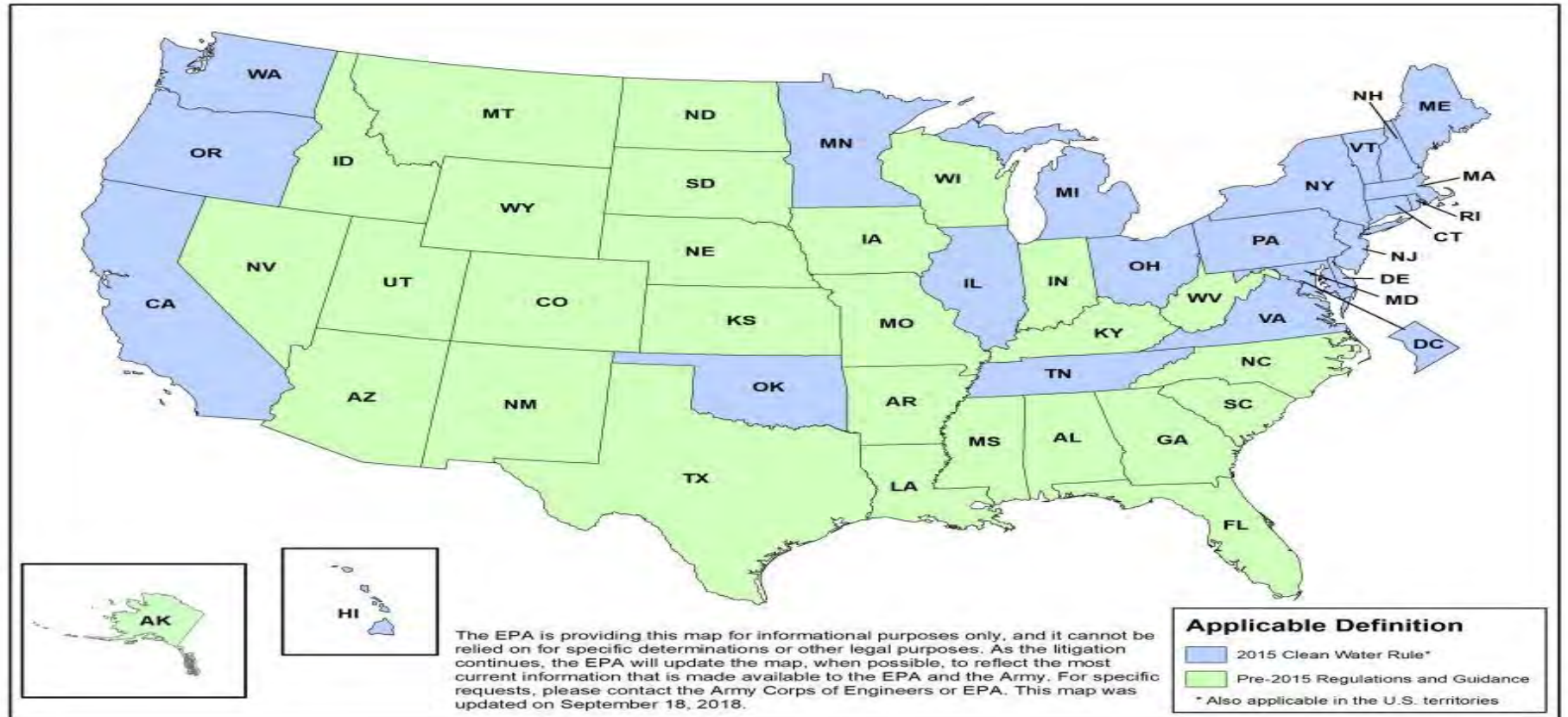
Clean Water Action v. EPA (5th Cir 18-60079)

- briefing through November 2018. Oral arg not yet scheduled.





CWA – WATERS OF THE US



CWA GROUNDWATER / POINT SOURCE

US Supreme Court

CWA text

- CWA regulates amount of pollutants “discharged from point sources into navigable waters”
- Point source = “discernible, confined and discrete conveyance”
- The definition includes, but not limited to “any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft.”

CWA GROUNDWATER / POINT SOURCE

US Supreme Court

- Citizen suit claims under CWA: pollutants traveling through groundwater to surface waters = point source discharge subject to NPDES permit
- ISSUE
Whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

CWA GROUNDWATER / POINT SOURCE

US Supreme Court

CERT GRANTED

County of Maui, Hawaii v. Hawaii Wildlife Fund (USSCT 18-260)

9th Cir Held: CWA liability triggered because pollutants are fairly traceable from point source to navigable water and are more than de minimis

CERT PETITION ON HOLD

Upstate Forever v. Kinder Morgan Energy Partners

4th Cir Held: CWA liability triggered because pollutants traveled through groundwater with “direct hydrologic connection” to surface water.

CWA GROUNDWATER / POINT SOURCE

County of Maui, HI v. Hawaii Wildlife Fund (USSCT 18-260)

PARTIES ON CERT

- HI Wildlife Fund, Sierra Club Maui, Surfrider Found, West Maui Preserv Assn
- County of Maui
- United States
- Assn CA Water Agencies, CA Assn Sanitation Agencies, Intl Municipal Lawyers Assn, ID Water Users Assns, ID Water Resources Bd, League of CA Cities, NACWA, Natl Assn Counties, Natl League of Cities, Natl Water Resources Ass, Watereuse Association and Western Coalition Arid States
- WV + AL AR CO ID IN GA KS KY LA MI NE NV OK TX UT + Govs KY and MS
- Pacific Legal Foundation

CWA GROUNDWATER / POINT SOURCE

EPA Request for Comment

- EPA request for comment (83 FR 7126; Feb 20, 2018)
 - on whether covering groundwater releases under NPDES is consistent with the CWA or is better covered by other regulatory authorities.
- Comments closed May 2018
- Next step what? when?
- Case in Oct Term 2019 (decision by June 2020)





RCRA – 2015 DEFINITION OF SOLID WASTE

API v. EPA (DC Cir. 09-1038)

2015 rule. ENVs and IND sued.

Decision 7.7.17, parts of rule IND challenged, vacated

- Judges Tatel (dissent), Kavanaugh, Williams

Panel rehearing granted, Decision 3.6.18

- Factor 4 fully vacated, Factor 4 v.2008 reinstated
- Revised definition of “contained” remains and applies to generators & third-party recyclers
- Revised containment standard ok for spent catalysts to qualify for transfer-based exclusion, Verified Recycler Exclusion vacated, not needed

RCRA - 2018 REVISED DEFINITION OF SOLID WASTE

CCAT v. EPA (DC Cir. 18-1163)

Rule revised in response to DC Circuit vacatur

- 83 FR 24664 (5.30.18)
- transfer-based exclusion reinstated

ENVs sued

- Under transfer-based exclusion, can pay recycler to take hazardous material, material not solid waste, not discarded
- Oral Arg 4.9.19

RCRA – HAZ WASTE GENERATOR IMPROVEMENTS RULE

ACC v. EPA (DC Cir. 17-1064)

- Final rule to make haz waste rules “user-friendly” 11.28.16
- Petitioners: ACC, AF&PA, AISI, API, American Wood Council, IPC-Assoc Connecting Electronics Industries, Motor & Equipment Mfters Assoc, NOPA, SOCMA
- Key IND issue: noncompliance with condition for exemption
 - = facility deemed to be operating as non-permitted TSDF
- In abeyance

CERCLA 108(b) FINANCIAL ASSURANCE

Idaho Conservation League v. EPA (DC Cir 18-1141)

Final Rule: EPA will not issue FA regs for hardrock mining
(2.21.18)

- NAM coalition
- Hardrock mining industry degree and duration of risk does not present a level of risk warranting imposing financial responsibility requirements
- Briefing through 1.18.19
- Oral Arg 3.13.19





ENVIRONMENTAL LIABILITY NEXTGEN

Noteworthy Cases

Sterigenics U.S. v. Kim (N.D. Ill. 1:19-cv-01219)

- IL EPA issued Seal Order to Sterigenics Willowbrook Facility (2.15.19)
- Court denied Sterigenics TRO Motion to block Seal Order (2.18.19)
- *IL AG v. Sterigenics U.S.* (DuPage County Cir Ct, 2018CH001329, 10.30.18)
- US Congress action

Grain Processing Corporation class action (IA District Court 2012)

- Corn milling facility, Muscatine IA
- State common law claims: nuisance, negligence, trespass
- 8 individuals, 2000 in class
- \$50M settlement: \$45M to class/lawyers, \$1.5M thermal oxidizer, \$5M new PCPs

ENVIRONMENTAL LIABILITY NEXTGEN

Juliana v. US (9th Circuit) – Kids' Climate Case



CCL Climate Communications & Law

Nonprofit dedicated to deepening public's understanding of climate change and how US law deals with its impacts

Climate Liability News

not-for-profit news site funded by CCL

Focus: govt & corporate responsibility & accountability for global warming & its consequences

“hard-nosed, uncompromising journalism”



NEPA

National Parks Conservation Assn v. Army Corps

(DC Cir 18-5179) Decision 3.1.19

- Electric power line project completed, across historic area of James River VA, based on Environmental Assessment / FONSI
- DC Circuit: arbitrary & capricious, vacating permit
- “direct” impacts to historic landmarks can include visual impacts
- “repeated criticism from many agencies. . . [and] consultants and organizations with on-point expertise, surely rises to more than mere passion”

