



2019 Water Update

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Disclaimers

- This session is an update – we'll assume some knowledge of the underlying water issues.
- This session is an overview – several other sessions will cover some of these topics in far more detail.
- This is a joint presentation, but the opinions expressed by each presenter are those of that presenter only.
- The views expressed in this presentation by Mr. Sullivan are those of the speaker and do not necessarily reflect the views of the Commonwealth, the Office of General Counsel or the Pennsylvania Department of Environmental Protection.

Subjects Covered

- Stormwater/Wastewater
- Wetlands
- WOTUS Rule
- Energy and Water
- Chesapeake Bay Update
- Groundwater Jurisdiction
- PFOA/PFOS Issues
- Enforcement
- TMDLs
- Pennsylvania Update

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STORMWATER/
WASTEWATER

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Stormwater/Wastewater

- *Los Angeles Waterkeeper v. Pruitt*, 320 F.Supp.3d 1115 (D. C.D. Cal., 2018)
 - Case involving administrative deference
 - Any person may petition the agency “to require a National Pollutant Discharge Elimination System (NPDES) permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard.” 40 C.F.R. § 122.26(f)(2)
 - Plaintiffs’ petitions requested that the EPA determine that currently unpermitted stormwater discharges from privately-owned commercial, industrial, and institutional sources are contributing to violations of water quality standards, and therefore require NPDES permit
 - EPA denied petitions
 - The court agreed that reliance on other federal, state, or local programs to regulate such discharges was improper because it was contrary to the specific language of the statute.

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Stormwater/Wastewater

- *Cooling Water Intake Structure Coalition v. United States Environmental Protection Agency*, 905 F.3d 49 (2d Cir. 2018)
 - Case challenging EPA final rule setting technological standards to prevent aquatic organism deaths in the cooling systems of power plants and manufacturing facilities
 - Environmental groups argued that EPA violated its statutory obligations by failing to establish one national standard; that EPA’s consideration of physical space restrictions at facilities was unreasonable; and that the Rule impermissibly granted too much discretion to states.
 - The court found that the text of the statute did not require EPA to establish one uniform standard; that EPA was reasonable in considering space constraints; and that the combination of mandatory and discretionary factors, coupled with the possibility of agency review, did not grant states too much discretion..

Stormwater/Wastewater

- *Delaware Riverkeeper Network, et al., v. Sunoco Pipeline L.P.*, Docket No. 18-02447 (E.D.P.A) (File June 12, 2018)
 - Plaintiffs allege that a stormwater discharge of sediment-laden water or other pollutants that violates/exceeds a state water quality standard triggers a requirement for an oil and gas facility to obtain or otherwise comply with a National Pollutant Discharge Elimination System permit.
 - Crux of the case is that the Ninth Circuit vacated a subsection of an EPA in *NRDC v. EPA*, 526 F.3d 591, 608 (9th Cir. 2008). As a result, storm water discharges composed entirely of sediment trigger the requirement to obtain a storm water permit for an oil and gas operation if sediment contributes to a violation (exceedance) of a water quality standard.
 - Court denied Sunoco Motion to Dismiss in February, MSJ will be filed in August.

Stormwater/Wastewater

- *ESCGP-3 Permit*
 - On October 6, 2018 the Department published notice of availability of the ESCGP-3
 - 102.5(m)The Department may issue general permits for activities not subject to NPDES requirements
 - Notable differences: Based on ESCGP-2 • No significant regulatory changes • Electronic permit • Expedited review eligibility and process • Changes to NOI Form and Instructions
 - Link to Department Training on ESCGP-3:
<https://www.dep.pa.gov/Business/Energy/OilandGasProgram/OilandGasMgmt/Public-Resources/Pages/default.aspx>

WETLANDS

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Wetlands

Marquette County Road Comm'n v. EPA,
2018 WL 1388541, No. 17-1154 (6th Cir.
March 20, 2018)

- Sixth Cir. affirms District Court decision that EPA comments objecting to MCRC's proposed permit before Mich. DEQ did not constitute an appealable final agency action
- MDEQ transferred permit review to the U.S. ACOE
- March 4, 2019, SCOTUS Denied Cert, Case Number 18-555

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Wetlands

Corsnitz v. DEP, EHB Docket No. 2016-030

- Feb. 23, 2018, EHB Adjudication and Order upholding DEP's order and wetland determination
- Appeal to Commonwealth Court dismissed as untimely
- Petition for Allowance of Appeal Pending in Pennsylvania Supreme Court

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Wetlands

US Army Corps of Engineers Regulatory Guidance Letters

- Letter 19-01, Feb. 22, 2019
 - Subject: "Mitigation Bank Credit Release Schedules and Equivalency in Mitigation Bank and In-Lieu Fee Program Service Areas"
- Letter 18-01, Sept. 25, 2018
 - Subject: "Determination of Compensatory Mitigation Credits for the Removal of Obsolete Dams and Other Structures from Rivers and Streams"

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Wetlands

US Department of Agriculture Updating Guidance for Wetland Determinations

- Public Comment Period Ended Feb. 5, 2019
- Applicable to Benefits for Farmers
- Not applicable to Environmental Permitting and Compliance

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WOTUS

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Waters of the United States Resources

- For all things WOTUS see:
 - http://www.americanbar.org/groups/environment_energy_resources/resources/wotus.html
- EPA Web Site:
 - <https://www.epa.gov/wotus-rule/about-waters-united-states>
- 2015 WOTUS Final Rule:
 - <https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states>
- 2018 Proposed Revised Rule:
 - https://www.epa.gov/sites/production/files/2018-12/documents/wotus_2040-af75_nprm_fm_2018-12-11_prepublication2_1.pdf

Waters of the US Rule – Some CWA Basics

- §301 prohibits “discharge of any pollutant” without a permit
- “Discharge of any pollutant” includes “addition of any pollutant to navigable waters...”
- “Navigable waters” = “waters of the United States, including the territorial seas.” §502(7)
- Hence the focus of attention on WOTUS

Rapanos v. US

- 2006 – no majority - 4 - 1 - 4
- Non adjacent parcel miles from nearest navigable water, interrupted by a man-made berm
- Kennedy: “a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” 547 U.S. at 759.
- Scalia: jurisdiction should be limited to waters that “include only relatively permanent, standing or flowing bodies of water.” *Id* at 732.

2015 WOTUS Rule

- FINAL Rule Published on 6/29/15 in Fed Reg.
- The Rule asserts jurisdiction over:
 - Natural/man-made tribs/lakes/ponds and/wetlands affecting chem., phys., & biol. integrity of downstream navigable waters.
 - Based on Kennedy’s “significant nexus test”.
- Based on a scientific study from SAB.

2015 Final WOTUS Rule Jurisdiction

1. Navigable in fact and water subject to ebb and flow of tides
2. Interstate waters and wetlands
3. The territorial sea
4. Some impoundments (as defined in Rule)
5. Tributaries (as defined in Rule)
6. All waters adjacent to the 5 categories
7. For 1-3, all waters w/in 100 year flood plain
8. For 1-5 & all waters w/in 4000 feet--if significant nexus

Key terms in 2015 Rule

- “Adjacent” (incl. connecting waters, water separated by berm)
- “Neighboring” (w/in 100 feet or w/in 100-year floodplain and not more than 1500 feet, or 1500 feet of OHWM)
- “Tributaries” (w/ bed, banks and ordinary high water mark that contribute flow directly or indirectly to a TNW)
- “Significant Nexus” – a water or wetland (or combination of them that function together) has a significant nexus when it “significantly affects the chemical, physical, or biological integrity” of waters in categories above.

Reactions to 2015 Rule

- Firestorm of litigation ensued
 - Over jurisdiction of courts to hear challenges
 - Substantive litigation over rule itself in district courts and courts of appeal
 - Nationwide and other stays of rule
 - SCOTUS finds jurisdiction in District Courts
 - Nationwide stay lifted/Other stays issued
 - Litigation over rule on delaying effective date

Status of WOTUS Rule

- 2015 WOTUS Rule: In effect in 22 states
- Active litigation of WOTUS Rule:
 - N.D. Florida
 - S.D. Ohio
 - N.D. Oklahoma
 - District of North Dakota
 - S.D. Texas
 - N.D. California
 - S.D. Georgia
 - NM recently w/drew from challenges

WOTUS Delay Rule Status

- 2017 Delay Rule: delayed effective date of WOTUS Rule until February 2020
- Challenged in several district courts
- Struck down nationwide by courts in Washington State and South Carolina
- Agencies appealed, but in March 2019, abandoned defense of Delay Rule by dismissing appeals (and litigation in SDNY)

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WOTUS Rule Replacement

- 2/28/17 - Executive Order directs ACOE/EPA to rescind Rule
 - Must “consider” defining the term “navigable waters” consistent with the opinion of Justice Scalia in *Rapanos*
 - Scalia required relatively permanent, standing, or continuously flowing bodies
- On February 24, 2019, EPA and ACOE published Replacement Rule for comment
- Comments due April 15th (extension requests recent denied)

2019 Draft Revised Rule – Basic “Principles”

- Respects the rule of law and primary role of states to be more stringent
- Will provide more certainty
- Based on Scalia opinion in Rapanos and NOT Kennedy significant nexus
- Creates 6 categories of covered waters
- Specifically excludes certain waters

2019 Draft Revised Rule – Covered Waters

- Traditional navigable waters (TNW)
- Tribs to TNW – both perennial and ephemeral that contribute flow to TNW in a typical year
 - Typical year = 30 year rolling average of precipitation and flow (watershed area)
 - Contribute flow yr-round or for extended period
 - 2015 rule: defined bed/banks & high water marks or tribs with significant hydrologic connection
- Ditches used for navigation or affected by tide

2019 Draft Revised Rule – Covered Waters (cont.)

- Lakes/ponds that are = to TNW or provide perennial or intermittent flow in a typical year
- Impoundments that form lakes or ponds behind them
- Wetlands that abut or have direct hydrological surface connection to waters of the US

2019 Draft Revised Rule – Excluded Waters

- Ephemeral - only flow in direct response to rain
- Groundwater
- Artificial depressions
- Roadside ditches
- Agricultural ditches
- Quarries filled with water
- Artificially irrigated fields

2019 Draft Revised Rule – Excluded Waters (cont.)

- Wetlands separated by land or dikes
- Prior converted cropland
- SW control systems
- WWTS
- Some wastewater recycling systems
- Mere hydrologic connection not enough

2019 Draft Revised Rules – Key Takeaways

- Significant nexus basis removed
- Tribs must contribute flow in “typical year”
- Adjacent wetlands must have physical connection
- Removes basis of GW jurisdiction in pending cases
- Prior converted cropland = pre 12/1985
- Interstate no longer independent basis for jurisdiction
- No truly ephemeral waters covered
- 2015 definition of “neighboring” removed

Critics' Reactions to Draft Revised Rule

- Estimated 60% reduction in covered waters
- Administration relied solely on legal analysis
 - Navigability plays central role
 - Adjacency from Riverside Bayview (adj/inseparably bound)
 - Plurality in Rapanos relied on for adjacency
- 2015 scientific basis for rule missing

2019 Draft Revised Rule – Next Steps

- Pre-publication hearing held 2/27 & 28
- 60 day comment period ends April 15, 2019
- Significant number of comments expected
- Time for review and response to comments
- Will states enact more stringent programs?
- Likely to be hearings and political maneuvering... and LITIGATION

ENERGY AND WATER

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Energy and Water

- *Briggs v. Southwestern Energy Prod. Co.*, No. 443 MAL 2018, 2018 Pa. LEXIS (Pa. Nov. 20, 2018) (per curiam order granting petition for allowance of appeal) (*Briggs v. Southwestern Energy Prod. Co.*, 184 A. 3d 153 (Pa. Super. Ct. 2018))
 - Subsurface trespass case - Question Presented: Does the rule of capture apply to oil and gas produced from wells that were completed using hydraulic fracturing and preclude trespass liability for allegedly draining oil or gas from under nearby property, where the well is drilled solely on and beneath the driller's own property and the hydraulic fracturing fluids are injected solely on or beneath the driller's own property?
 - Lower courts held that that hydraulic fracturing can give rise to viable trespass claims
 - Narrow or broad consideration? Will the Court address situations in which hydraulic fracturing fluids enter an adjacent property
 - Shameless Plug - THE KNOWN "UNKNOWNNS" OF HYDRAULIC FRACTURING: A CASE FOR A TRADITIONAL SUBSURFACE TRESPASS REGIME IN PENNSYLVANIA
 - <http://sites.law.duq.edu/blj/wp-content/uploads/2012/05/stemp.pdf>

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Energy and Water

- *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (D.C. Cir. 2019)
 - DC Circuit held that a state cannot enter into an agreement with an applicant to extend the deadline for making a decision on an application under Section 401 of the Clean Water Act.
 - The state and the applicant had shut a Tribe out of the process by signing an agreement to allow indefinite resubmittals that stretched over a decade.
 - Has implications for Constitution Pipeline (large interstate pipeline between PA and NY) and many other cases where a state fails to take action within a year of the application being submitted. See also *Ohio DEP v. Rover Pipeline, et al.*, Docket No. 2017-cv-2216 (Stark County Court of Common Pleas) (filed November 3, 2017).

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Energy and Water

- *Sierra Club v. United States Army Corps of Engineers*, 909 F.3d 635, 639 (4th Cir. 2018)
 - Petitioners requested that that construction of the Mountain Valley Pipeline cannot proceed under the terms and conditions of Clean Water Act Nationwide Permit 12 (“NWP 12”), and instead required an individual permit.
 - Corps exceeded its authority under CWA by substituting its own special condition in lieu of condition certified by state of West Virginia.
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Energy and Water

- *Delaware Riverkeeper Network, et al. v. Pennsylvania Department of Environmental Protection*, Docket No. 17-3299 (3d Circuit)
 - Is a Notice of Intent for a NPDES hydrostatic testing permit an application, or the functional equivalent of an application, thus triggering the public participation requirements of the Clean Water Act.
 - Briefing completed in February 2018, oral argument was scheduled for June 2018, but case was held in CAV.

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Energy and Water

- *Delaware Riverkeeper Network, et al. v. Pennsylvania Department of Environmental Protection*, Docket No. 18-1108 (U.S. Supreme Court) (Filed on January 9, 2019)
 - Case involves where appeals of state issued permits pursuant to FERC jurisdictional natural gas pipelines are heard
 - Question Presented: 1) May a federal court preempt a state's administrative review process by substituting a federal finality standard for a state finality standard, where the state finality standard is clearly defined by state law? 2) Whether the federal court's preemption of the Pennsylvania Environmental Hearing Board's state administrative review process violates the Tenth Amendment?

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Energy and Water

- *Wayne Land and Mineral Group LLC v. Delaware River Basin Commission*, 894 F.3d 509, 510–15 (3d Cir. 2018)
 - The Third Circuit found that the parties’ reasonable, but conflicting, interpretations of the term “project” demonstrated that the District Court erred in finding that the DRBC’s project review authority unambiguously extends to WLMG’s proposed fracking activities.
 - The Third Circuit vacated the District Court’s decision and remanded to the lower court for additional fact-finding regarding the intent of the original drafters.

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CHESAPEAKE BAY UPDATE

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Chesapeake Bay

PA Phase III WIP

- Phase II WIP March 30, 2012
- Phase III Local Engagement and Outreach
 - County Workgroups
 - » First Counties: Lancaster, York, Adams, Franklin
 - Statewide Sector Workgroups
- Commonwealth's Draft Phase III WIP Due to EPA April 12, 2019
- Public Comment Period to Follow

Chesapeake Bay

Conowingo Dam Litigation

- Maryland Dep't of the Environment (MDE) issued 401 Water Quality Certification (WQC) April 27, 2018
- MD WQC for Exelon FERC Relicensing of Conowingo Dam Hydroelectric power facility on lower Susquehanna River, just below PA/MD Border
- Three Appeals Filed

Chesapeake Bay

Conowingo Dam Litigation - Three Appeals

- MDE Administrative Appeal:
 - Request for Reconsideration
 - Oral Argument Scheduled for fall 2019
- State Appeal:
 - Circuit Court for Baltimore dismisses Exelon's Complaint against Maryland Department of the Environment for failing to exhaust administrative remedies on Oct. 9, 2018 at Docket No. 24-C-18-003410
- Federal Appeal:
 - *Exelon Generation Company, LLC v. Grumbles, et al*, Docket No. 1:18-cv-01224
 - Motion to Dismiss Pending, Oral Argument on Venue Feb. 2019

Chesapeake Bay

Conowingo Dam Litigation

- FERC Docket No. 405-121
 - February 28, 2019, Exelon filed Petition for Declaratory Order
 - Requests FERC to Find that MDE Waived 401 WQC Authority
 - Exelon Relies on Hoopa Valley Case

CWA JURISDICTION OVER GROUNDWATER

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County of Maui v. Hawai'i Wildlife Fund 886 F.3d 737 (9th Cir. Feb. 1, 2018)

February 2019, SCOTUS granted cert on the following question:

Whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

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Circuit Split

Groundwater discharges ARE subject to CWA jurisdiction:

- *County of Maui v. Hawai'i Wildlife Fund*
 - Plaintiffs-Appellees alleged Maui violated the CWA by discharging pollutants from wells at its WWTP into GW to Pacific Ocean.
 - The Ninth Circuit ruled CWA applied - wells were point sources discharging treated effluent into groundwater, entering navigable water. (Fairly traceable)
- *Upstate Forever v. Kinder Morgan*
 - Fourth Circuit held that CWA prohibits discharge of pollutants from a point source through groundwater that has a direct hydrological connection to navigable waters. (CWA not limited to direct discharge)

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Circuit Split

Groundwater discharges ARE NOT subject to CWA jurisdiction:

- *Virginia Electric Power*
 - Coal ash ponds are not PS so no CWA jurisdiction
- *Kentucky Waterways Alliance v. Kentucky Utilities Co. & Tennessee Clean Water Network v. TVA*
 - Sixth Circuit rejected the hydrologic connection and point source theories upon which the Ninth and Fourth Circuits relied, holding that groundwater discharges are not subject to CWA jurisdiction. (GW is not PS/not confined/discrete)
- *Prairie Rivers Network v. Dynegy*
 - C.D. Ill dismissed similar claims (appeal pending in 7th Cir.)

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GW Issues Before SCOTUS

- How does Chevron deference play out?
- Is significant nexus relevant? (Ties to WOTUS rule litigation?)
- Does it matter that the discharge originates from a PS? (Pipe/backhoe?)
- Does distance matter?
- If CWA applies – how do you write a permit?
- Application to septic systems, fracking, etc.?

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PFOA/PFOS ISSUES

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PFOA/PFOS

- Background:
 - perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA).
 - Fluorochemicals use became so widespread over the decades and their nature is so durable that PFOA has become ubiquitous in our environment. Blood studies that show the presence of PFOA chemicals in the blood of 96% of people in the U. S., approximately 4 ng/mL (nanogram/milliliter).
 - Contained in food containers, stain resistant and water resistant fabric and rug coatings, and other consumer products.
 - PFOA has been identified by preliminary government-risk assessment as being consistent with the category of a “likely carcinogen.”
 - The European Union has banned PFOS and is considering similar action with PFOA.

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PFOA/PFOS

- Background Continued:
 - Used in firefighting foam known as aqueous film-forming foam, or AFFF, it was originally created to put out jet fuel fires.
 - For decades, the military has been using AFFF to put out fires and to train military firefighters; that training involved spraying the foam onto blazes that were purposefully set in pits, many of which were unlined.
 - From there, PFOA and PFOS and other chemicals in their class seeped into groundwater in and around U.S. military bases
 - environmental concerns about the chemicals, which are associated with kidney cancer, testicular cancer, immune dysfunction, and many other health problems
 - In January 2017, a waste disposal company hired by the Defense Department began incinerating more than 1 million gallons of the foam
 - However, the primary two studies showing incineration are safe were funded by Dupont and 3M. There is research that suggests that incineration may not destroy the chemicals.

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PFOA/PFOS

- *Giovanni v. United States Department of the Navy*, 263 F.Supp.3d 532, 534 (E.D.Pa., 2017)
 - Pennsylvania Hazardous Sites Cleanup Act (HSCA) requesting that 1) a health assessment be conducted that would include blood testing for themselves and other community members impacted by the contamination, and that 2) the Navy be required to pay for medical monitoring for so that afflicted parties can address the harms that they may have suffered due to the Navy's improper disposal of those chemicals
 - The Navy argued for dismissal of the case because the case would constitute a challenge to ongoing response and remediation actions involving a Superfund site and therefore would be jurisdictionally barred by federal law under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).
 - The District Court agreed and dismissed the case finding that § 113(h) of CERCLA3 deprived it of jurisdiction.

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PFOA/PFOS

- *Giovanni v. United States Department of Navy*, 906 F.3d 94, 101-02 (3d Cir. 2018)
 - On Oct 2, 2018, the 3rd Circuit Court of Appeals overturned part of a district court decision that dismissed claims related to PFOA and PFOS contamination, finding that the lawsuit over medical monitoring could proceed because that relief does not interfere with or alter the ongoing cleanup
 - Specifically, although the requests for a government-led health assessment or health effects study are barred under § 113(h) as challenges to ongoing response actions, the requests for the costs associated with private party medical monitoring are not barred by that CERCLA provision because that relief does not interfere with or alter the ongoing cleanup efforts.

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PFOA/PFOS

- EPA Action Plan: https://www.epa.gov/sites/production/files/2019-02/documents/pfas_action_plan_021319_508compliant_1.pdf
 - On February 14, 2019, the EPA released an Action Plan on PFOA and PFOS
 - Action Plan did not adopt MCLs for PFOA and PFOS
 - The EPA is proposing to kick off a process to set a drinking water limit before the end of the year.
 - EPA has not set a new MCL for any contaminant since 1996
- PADEP Action Team: <https://stateimpact.npr.org/pennsylvania/2019/02/15/pa-to-begin-its-own-process-of-setting-health-limit-for-two-pfas-chemicals/>
 - DEP committed for the first time to laying the groundwork for a statewide standard for the chemicals

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ENFORCEMENT

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PA Enforcement

EQT Production Co. v. DEP, 193 A.3d 1137 (Pa. Cmwlth. 2018)

- Commonwealth Court affirms EHB adjudication imposing a civil penalty of \$1,137,295 for releasing wastewater through a damaged storage impoundment liner

PA Enforcement

- Pennsylvania Attorney General Files Criminal Charges Against Pittsburgh Water and Sewer Authority
- Pennsylvania Attorney General Investigating Mariner East II Pipeline
- PA PUC/PA DEP Pipeline Enforcement

Federal Enforcement

5th Circuit upholds \$81 million penalty against Citgo

- *United States ex rel. v. CITGO Petro. Corp.*, No. 16-30515
711 Fed.Appx. 237 (5th Cir. Feb. 14, 2018)
- June 2006, Citgo's Oil Refinery discharged 53,000 barrels of oil into the Indian Marais Waterway, Lake Charles, Louisiana
- *United States v. Citgo Petroleum Corp.*, No. 08-cv-893, 2015 WL 9692957 (W.D. La. Dec. 23, 2015).
 - U.S. District Court Considered Economic Benefit of \$91.7 million, reduced to \$81 million, considered clean up costs
 - 5th Circuit Previously found \$6 million penalty too low in 2013

EPA Enforcement

- March 15, 2018, EPA issued a unilateral administrative order to Sunnyside Gold Corporation
 - Order to conduct groundwater investigation activities at the Sunnyside Mine and surrounding area in the Bonita Peak Mining District Superfund Site in San Juan County, Colorado.

EPA Enforcement

- CSX Transportation Inc.
- July 24, 2018, U.S. DOJ, U.S. EPA, and State of West Virginia announced a settlement
 - CSX resolved its liability for state and federal water pollution violations related to a 2015 oil spill
 - Spill caused by a train derailment in Mount Carbon, West Virginia
 - Contributed \$500,000 to a state-administered fund to upgrade a water treatment facility in Fayette County, West Virginia

EPA Enforcement

- Evangeline Enterprises LLC.
- October 31, 2018, EPA settlement with racehorse training-center operator
 - Evangeline agreed to pay \$300,000 in civil penalties and make changes in its handling of polluted wastewater at its Louisiana facility.
 - This resolved Clean Water Act claims filed by the U.S. EPA and the Louisiana Department of Environmental Quality (LDEQ), the Department of Justice

EPA Enforcement

- Saratoga Springs Owners Association, Inc. and Cross Marine Projects, Inc.
- November 19, 2018, EPA settlement.
 - Defendants resolved alleged unpermitted dredge and fill activities and damages to wetlands at a Utah Lake marina facility in Utah County, Utah.
 - Defendants agreed to restore and enhance more than 7 acres of wetlands and pay a civil penalty of \$150,000

Enforcement

Citizen enforcement against indirect discharges

- Supreme Court of the United States Granted Writ of Cert on February 19, 2019
 - See *County Of Maui, HI v. Hawaii Wildlife Fund, Et Al.*, 2019 WL 659786
- *Hawaii Wildlife Fund v. County of Maui* (9th Cir. 2018) (discharge of pollutants from wells into groundwater, without NPDES permit, violated CWA)

ENDANGERED SPECIES

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ESA and Water

- *Friends of the Santa Clara River v. ACOE*

Ninth Circuit upheld issuance of dredge and fill permit despite environmental groups' claims that the permit would have a harmful impact on the endangered Southern California steelhead.

- *Black Warrior Riverkeeper v. ACOE*

Northern District of Alabama held that Army Corps properly considered potential harm to endangered species before issuing dredge and fill permit.

- Issue will undoubtedly be raised in the Pebble Mine matter in AK

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TMDLs

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Ohio Valley Environmental Coalition v. Pruitt, 893 F.3d 225 (4th Cir. 2018)

- District court found that WV's prolonged failure to submit TMDLs to EPA for hundreds of state waters impaired due to mining activities amounts to constructive submission of no TMDLs, and therefore that EPA erred by failing to consider the constructive submissions.
- Fourth Circuit reversed, ruling that the constructive submission doctrine was not satisfied because the State had submitted some TMDLs, and has a "credible plan" to submit more.

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PENNSYLVANIA UPDATE

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PA Update

Clean Streams Law Attorney Fees

- *Sierra Club v. DEP and Lackawanna Energy Center, LLC*, EHB Docket No. 2016-047-L (Consolidated with 2016-104-L)
- EHB Opinion and Order Issued March 28, 2018
 - EHB Denies Application for Costs and Fees, finding that permittee changed system for purely economic and business reasons
 - Pending appeal in Commonwealth Court, 563 CD 2018

PA Update

Clean Streams Law Attorney Fees

- *Friends of Lackawanna v. DEP and Keystone Sanitary Landfill, Inc.*, EHB Docket No. 2015-063-L
 - Appeal of landfill permit renewal
 - EHB added permit condition requiring a ground water assessment plan, but affirmed other aspects of permit
 - EHB Opinion and Order awarding \$18,000 in attorney fees under Clean Streams Law

PA Update

Clean Streams Law Attorney Fees

- *Clean Air Council et al. v. DEP and Sunoco Pipeline L.P.* EHB Docket No. 2017-009-L
 - Permittee and Appellants file applications for attorney fees against each other. DEP resolved any alleged attorney fee liability through settlement.
 - After *En Banc* Oral Argument, EHB issues Opinion and Order on February 19, 2019 Denying Fee Petitions
 - Board found no bad faith or vexatious conduct on the part of either side.
- Petitions for Review Filed in Commonwealth Court

PA Update

Stream Classification Case

- Monroe County Clean Streams Coalition v. PADEP et al. EHB Docket No. 2017-107
 - EHB grants motion to dismiss appeal of updated existing classification listing of a stream for lack of jurisdiction
 - Appropriate time to challenge is an appeal of Department permit action.

PA Update

Stream Redesignation Case

- Pocono Manors Investors LP, v. DEP
 - Declaratory Judgment action and Preliminary Objections currently pending in Commonwealth Court, 133 MD 2018 regarding a stream re-designation
 - Seeking Pre-Enforcement Review

QUESTIONS?

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