

Water Quality and Wetlands Committee Newsletter

Vol. 7, No. 1

September 2007

NEWS FROM THE CHAIR

John Milner

We are beginning a new committee leadership year with a renewed commitment to provide useful and timely information to the Section members concerning water quality and wetlands issues. Chair Lee DeHihns has announced the focus of his tenure to be the “Year of the Committee” and we will be a full participant in this program. We are focusing on providing newsletters, quick conferences, and programs during the year as outlined in our Action Plan. This will be a “living document” so that we can continue to be immediately responsive to new developments of interest to the members.

The committee’s activities this year will be managed by an excellent leadership team of vice chairs. They are:

Program Co-Vice Chair: Phillip Mancusi-Ungaro, Office of Water Legal Support-R4, United States Environmental Protection Agency, mancusi-ungaro.philip@epa.gov

Program Co-Vice Chair: Kim Diana Connolly, South Carolina School of Law, Connolly@law.law.sc.edu

Program Co-Vice Chair: Carol Lear, Chevron U.S.A. Inc., clear@chevron.com

Public Service Co-Vice Chair: Royal C. Gardner, Institute for Biodiversity Law and Policy, Stetson University College of Law, gardner@law.stetson.edu

Public Service Co-Vice Chair: Francine M. Ffolkes, Florida Department of Environmental Protection, francine.fffolkes@dep.state.fl.us

Newsletter Co-Vice Chair: Jeff Kray, Marten Law Group, PLLC, jkgray@martenlaw.com

Newsletter Co-Vice Chair: W. Blaine Early, III, Stites & Harbison, PLLC, bearly@stites.com

Newsletter Co-Vice Chair: Tara W. Duhy, Lewis, Longman & Walker, P.A., tduhy@llw-law.com

Year in Review Vice Chair and Membership Co-Vice Chair: Wilson S. Buntin, Tennessee Department of Environment and Conservation, wilson.buntin@state.tn.us

Membership Co-Vice Chair: Dick Brownell, Malcolm Pirnie, Inc., rbrownell@pirnie.com

Co-Vice Chair: Lawrence R. Liebesman, Holland & Knight LLP, lawrence.liebesman@hklaw.com

We are updating our committee list serve in order to keep our current committee members informed of our Action Plan activities, to solicit ideas and authors for articles, and to provide an opportunity for comments

**Water Quality and Wetlands
Committee Newsletter
Vol. 7, No. 1, September 2007
Tara W. Duhy, W. Blaine Early, III, and
Jeff Kray, Editors**

In this issue:

News from the Chair
John Milner 1

2007 Ushers in New Nationwide
Permits
Kim Diana Connolly 2

Washington State Delays Issuing New
Stormwater Permit
Dustin Till 5

Minnesota Supreme Court Issues Major
Clean Water Act Decision
David J. Zoll and Charles N. Nauen .. 6

Rapanos Update
Philip G. Mancusi-Ungaro 6

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and discussion regarding additions or revisions to the Action Plan components. We are formulating our public service projects and have mapped out the timeline for producing the committee's *Year in Review* participation. We are seeking opportunities to co-sponsor activities with other water-related committees in the Section where that is feasible and advantageous.

In addition to increasing communications with current Committee members, we are continuing to seek new members, particularly through outreach to state bar water quality committee members through the Section's State and Regional Cooperation Committee. Please contact me or any other members of the committee leadership team with any requests, suggestions, or offers to participate.

**2007 USHERS IN NEW
NATIONWIDE PERMITS**

Kim Diana Connolly

The United States Army Corps of Engineers (Corps) has jurisdiction over many proposed actions involving discharges into waters of the United States. 33 U.S.C. § 1344 (2000). This permitting requirement can be met through a streamlined permitting process in most cases. *Id.* § 1344(e); *see also* 33 C.F.R. Part 330 (2006), 40 C.F.R. § 230.7 (2006). In fact, the vast majority of Corps regulatory permit actions involve streamlined "general" permits under CWA Section 404(e). According to Corps records, in FY2005, of the 89,516 federal permit decisions made by the Corps, 78,336 were authorized by the general permitting program. Of those general permits, 34,114, or 38 percent, were nationwide permits (NWP).

All general permits involve a programmatic review when they are issued, designed to result in significantly reduced (though sometimes still lengthy) processing time for such permits. In 1997, it was reported that the average time to evaluate projects under general permits was fifteen days as compared to 104 days for individual permits. *Wetlands Protection and Mitigation Banking: Hearing Before the H. Comm.*

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| <ol style="list-style-type: none"> 1. Aids to Navigation; 2. Structures in Artificial Canals; 3. Maintenance; 4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities; 5. Scientific Measurement Devices; 6. Survey Activities; 7. Outfall Structures and Associated Intake Structures; 8. Oil and Gas Structures on the Outer Continental Shelf; 9. Structures in Fleeting and Anchorage Areas; 10. Mooring Buoys; 11. Temporary Recreational Structures; 12. Utility Line Activities; 13. Bank Stabilization; 14. Linear Transportation Projects; 15. U.S. Coast Guard Approved Bridges; 16. Return Water From Upland Contained Disposal Areas; 17. Hydropower Projects; 18. Minor Discharges; 19. Minor Dredging; 20. Oil Spill Cleanup; 21. Surface Coal Mining Operations; 22. Removal of Vessels; 23. Approved Categorical Exclusions; 24. Indian Tribe or State Administered Section 404 Programs; 25. Structural Discharges; 26. [Reserved]; 27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities; | <ol style="list-style-type: none"> 28. Modifications of Existing Marinas; 29. Residential Developments; 30. Moist Soil Management for Wildlife; 31. Maintenance of Existing Flood Control Facilities; 32. Completed Enforcement Actions; 33. Temporary Construction, Access, and Dewatering; 34. Cranberry Production Activities; 35. Maintenance Dredging of Existing Basins; 36. Boat Ramps; 37. Emergency Watershed Protection and Rehabilitation; 38. Cleanup of Hazardous and Toxic Waste; 39. Commercial and Institutional Developments; 40. Agricultural Activities; 41. Reshaping Existing Drainage Ditches; 42. Recreational Facilities; 43. Stormwater Management Facilities; 44. Mining Activities; 45. Repair of Uplands Damaged by Discrete Events; 46. Discharges in Ditches; 47. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs; 48. Existing Commercial Shellfish Aquaculture Activities; 49. Coal Remining Activities; 50. Underground Coal Mining Activities. |
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Figure 1: Current Nationwide Permits

on Transportation and Infrastructure Subcomm. on Water Resources and Environment, 105th Cong. (1997) (statement of Michael L. Davis, Deputy Assistant Secretary of the Army for Civil Works and Robert H. Wayland, III, Director, Office of Wetlands, Oceans and Watersheds, Environmental Protection Agency). By statute, the Corps' general permits are limited to categories of activities involving discharges of dredged or fill material into waters of the United States that are similar in nature and cause only minimal

adverse environmental effects when performed separately and considered cumulatively. Like other aspects of the wetlands permitting process, the nationwide permit program has been the subject of much discord over the years. Most recently, in September 2006, the U.S. District Court for the District of Columbia issued a long-awaited ruling in *National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, Civ. No. 00-379 (D. D.C., Sept. 29, 2006) regarding the 2000/2002 nationwide

permit issuance. A coalition made up of various members of the permitted community had sued the Corps asserting that those NWP's as issued exceeded the Corps authority. The court rejected the suit, holding that the Corps "adequately explained its reasoning behind its issuance of the NWP's and [general conditions] and clearly acted within its authority." Slip op. at 32.

The Corps recently issued revised NWP's (which it must do every five years). *Reissuance of Nationwide Permits: Notice*, 72 Fed. Reg. 11,092 (Mar. 12, 2007), available at http://www.usace.army.mil/cw/cecwo/reg/nwp/nwp_2007_final.pdf. The 2007 issuance includes forty-nine total available NWP's, which comprise forty-three reissued and six new NWP's. The types of activities governed by nationwide permits vary, but include a variety of minor development, maintenance, and other activities. The current nationwide permits are listed in Figure 1. These new nationwide permits impose acreage and linear feet limitations on many activities, and thus should be carefully reviewed before proceeding under them (note that some may even require pre-construction notification). General conditions that apply to all nationwide permits include: 1. Navigation; 2. Aquatic Life Movements; 3. Spawning Areas; 4. Migratory Bird Breeding Areas; 5. Shellfish Beds; 6. Suitable Material; 7. Water Supply Intakes; 8. Adverse Effects from Impoundments; 9. Management of Water Flows; 10. Fills Within 100-Year Floodplains; 11. Equipment; 12. Soil Erosion and Sediment Controls; 13. Removal of Temporary Fills; 14. Proper Maintenance; 15. Wild and Scenic Rivers; 16. Tribal Rights; 17. Endangered Species; 18. Historic Properties; 19. Designated Critical Resource Waters; 20. Mitigation; 21. Water Quality; 22. Coastal Zone Management; 23. Regional and Case-by-Case Conditions; 24. Use of Multiple Nationwide Permits; 25. Transfer of Nationwide Permit Verifications; 26. Compliance Certification; 27. Pre-Construction Notification; and 28. Single and Complete Project. *Id.* at 1191-1196.

The new 2007 NWP's cover Emergency Repair Activities, Discharges into Ditches and Canals, Pipeline Safety Program Designated Time Sensitive Inspections

and Repairs, Commercial Shellfish Aquaculture Activities, Coal Remining Activities, and Underground Coal Mining Activities. *Id.* at 56,273-56,276. New definitions and general conditions were issued as well. The final issuance of the 2007 NWP's did not allow time for the states to do water quality certification under Clean Water Act Section 401, or where applicable, Coastal Zone Management certifications. Accordingly, such approvals or restrictions will be coming on line later.

Given the contentious nature of the Corps regulatory program and the history of discord associated with the nationwide permit program, it is entirely likely that the 2007 permits will be challenged. In the meantime, the Corps maintains a helpful Web page (containing all the permits, various related lists and other documents, and relevant links) entitled *Nationwide Permit Program* at http://www.usace.army.mil/cw/cecwo/reg/nationwide_permits.htm.

LIKE TO WRITE?

The Water Quality and Wetlands Committee welcomes the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact one of the editors: Tara W. Duhay (tduhy@llw-law.com), W. Blaine Early (bearly@stites.com), and Jeff Kray (jkray@martenlaw.com).

VISIT US ON THE WEB!

To learn more about the Water Quality and Wetlands Committee, please visit: www.abanet.org/environ/committees/waterquality

WASHINGTON STATE DELAYS ISSUING NEW INDUSTRIAL STORMWATER PERMIT

Dustin Till

The Washington Department of Ecology (Ecology) will delay issuing a revised Industrial Stormwater General Permit (Revised Permit) until spring 2008, following intense opposition to the inclusion of new testing requirements for copper. Small amounts of copper attributable to brake pads and other sources are generated at many industrial facilities. Ecology added copper as a core sampling parameter because it is commonly present in stormwater runoff and can be toxic to aquatic organisms, notably endangered salmon species.

Ecology administers its stormwater management program consistent with the Federal Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and the Washington Water Pollution Control Law, WASH. REV. CODE § 90.48.010, *et seq.* Ecology's stormwater program includes permitting requirements under the National Pollution Discharge Elimination System (NPDES) for stormwater discharges from industrial facilities. Ecology's current industrial stormwater permit (Current Permit) covers stormwater discharges from over 1,100 industrial facilities in Washington, and was set to expire in September 2007.

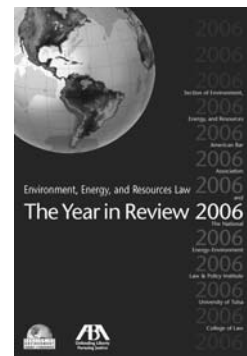
The Current Permit establishes "benchmarks" and "action levels" for four core effluents (known as "parameters"): turbidity, pH, zinc, and petroleum (oil and grease). Facilities are required to analyze quarterly stormwater samples for the four parameters and submit the results to Ecology. Facilities must perform certain adaptive management actions in response to exceeding Permit benchmarks or action levels. Such actions include inspecting the facility and implementing additional source, operational, or treatment controls. The Current Permit also requires facilities to develop and implement a site-specific stormwater pollution prevention plan (SWPPP), which identifies potential contaminant sources and describes best management practices (BMPs) designed to limit stormwater impacts.

In February 2007, Ecology published the Revised Permit for public review and comment. The Revised Permit contains the two core components of the Current Permit (quarterly sampling and SWPPP implementation). Significantly, the Revised Permit would require all subject facilities to analyze stormwater samples for copper in addition to the four parameters identified in the Current Permit. Under the Current Permit, facilities are only required to sample for copper if stormwater samples exceed the zinc parameter for two consecutive quarters.

Ecology decided to rework the Revised Permit based on the high volume of comments, particularly those expressing concern over the proposed copper benchmarks. Ecology anticipates having an updated draft for public comment by the end of October 2007. The agency plans to issue the final Revised Permit in spring 2008. In the meantime, the Current Permit remains in effect. The Revised Permit and public comments may be viewed on Ecology's Web site: <http://www.ecy.wa.gov/programs/wq/stormwater/industrial/index.html>.

***The Year in Review* AVAILABLE ONLINE AT www.abanet.org/environ!**

ABA Section of Environment, Energy, and Resources members are able to view *The Year in Review* in the Section Members Only area of the Section Web site after logging onto the site with your ABA Member ID number and password. Years 2003 to 2006 are available.



MINNESOTA SUPREME COURT ISSUES MAJOR CLEAN WATER ACT DECISION

**David J. Zoll
Charles N. Nauen**

The Minnesota Supreme Court recently reversed a decision by the Minnesota Court of Appeals which halted plans for more than sixty new or expanded wastewater facilities and threatened future residential developments across the half of the state within the Lake Pepin watershed, including the Twin Cities. *In re Cities of Annandale and Maple Lake*, 731 N.W.2d 502 (Minn. 2007). The Court of Appeals decision prohibited the permitting of any new or expanded discharges which would contribute to Lake Pepin's impaired status until plans were created to bring the Lake into compliance with the requirements of the Clean Water Act.

The controversy centers on a discharge permit issued for a joint wastewater treatment facility proposed by the cities of Annandale and Maple Lake to replace the cities' existing facilities which were constructed in the 1940s. The Minnesota Pollution Control Agency (MPCA) issued the permit even though the proposed facility would discharge an additional 2,200 pounds of phosphorus into the North Fork of the Crow River, eventually reaching Lake Pepin. The agency reasoned that the increased phosphorus discharge would be offset by a 50,000 pound reduction in the annual phosphorus discharge from an upgraded wastewater treatment facility in Litchfield and, therefore, would not contribute to the continued impairment of Lake Pepin. The Minnesota Court of Appeals held the relevant Clean Water Act regulations do not allow MPCA to consider such off-setting reductions and reversed the agency's decision to issue the permit.

The Minnesota Supreme Court disagreed and concluded that the federal regulations allow MPCA "to make a range of policy judgments based on [its] scientific and technical knowledge" and that it was appropriate for the agency to consider the off-setting reductions from the Litchfield facility when it issued the permit to Annandale and Maple Lake. The Supreme Court's decision relaxes the de facto moratorium

imposed by the Court of Appeals and makes room for continued development by granting MPCA broad latitude to implement its permitting authority under the Clean Water Act.

RAPANOS UPDATE

Philip G. Mancusi-Ungaro

Since the United States Supreme Court issued its decision on *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*, 126 S. Ct. 2208 (2006), there have been approximately six appellate decisions, twelve district court decisions, three petitions for Writ of Certiorari to the Supreme Court that have been denied and two pending, and twenty cases presently in some form of litigation addressing issues related to *Rapanos*. In addition, on June 5, 2007, the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency issued joint guidance to the agencies on implementing the *Rapanos* decision. Two recent appellate decisions involving the scope of jurisdiction of waters of the United States are worth noting.

In *United States v. Moses*, No. 06-30379, 2007 WL 2215954 (9th Cir. Aug. 3, 2007), *petition for rehearing en banc* (Aug. 17, 2007), the court affirmed a criminal conviction under the Clean Water Act (CWA) concluding that an intermittent stream that flows approximately two months of the year where the discharge of dredged and redeposited material occurred was a jurisdictional water of the United States. Mr. Moses had dredged and redeposited material within Teton Creek diverting the water from the original water course for all but two months of the year. The court further held that man-made diversions which cause the creek to be dry much of the year cannot eliminate jurisdiction if the water was a water of the United States before the diversion.

On Aug. 6, 2007 the 9th Circuit Court of Appeals issued a second *Rapanos*-related decision. In *Northern California River Watch v. City of Healdsburg*, No. 04-15442, 2007 WL 223010186

(9th Cir. Aug. 6, 2007), the court withdrew a previous opinion and, in the new decision, concluded that an National Pollutant Discharge Elimination System (NPDES) permit was required for a discharge of pollutants into a pond that was separated by a levee from a navigable-in-fact river. In the previous, Aug. 10, 2006, decision, the 9th Circuit had also concluded that an NPDES permit was needed for the discharge into the pond, but perhaps more interesting is that the earlier decision had referred to Justice Kennedy's concurring opinion in *Rapanos* as the "controlling rule of law," seemingly limiting the applicable approach to determining jurisdiction to the Kennedy test. In the 2007 decision, the court appeared to change that stance by noting that Kennedy's concurrence "is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases." The court then concluded that this approach was "the controlling rule of law in our case." In sum, the opinion now leaves the door open for application of the plurality (Scalia) approach to determining jurisdiction in other factual circumstances.

A second issue that was addressed in the 2007 opinion concerned whether adjacency to navigable waters alone could establish jurisdiction. In the 2006 decision the court had stated that "[a]djacency of wetlands to navigable waters alone is not sufficient" to establish jurisdiction. The United States filed an amicus brief and, in addition to asking the court to reconsider its limitation to using only the Kennedy test, also asked the court to alter its position concerning adjacency. In the 2007 decision the court expressly stated that "a significant nexus may be inferred when wetlands are adjacent to navigable waters." The court then held that the wetlands at issue here—part of a pond system that is separated from the Russian River by other wetlands and a levee—are subject to CWA jurisdiction both because they are adjacent to navigable waters and, as district court found in the prior opinion, the findings otherwise demonstrate the existence of a significance nexus.

The opinions expressed in this article are solely those of the author and do not necessarily reflect the position of the U.S. Environmental Protection Agency.

**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

Calendar of Section Events

15th Section Fall Meeting

Sept. 26-29, 2007
Pittsburgh, Pennsylvania

The Basic Practice Series

Sept. 28-29, 2007
Pittsburgh, Pennsylvania

**22nd Annual Petroleum Marketing
Roundtable (PMPA)**

Oct. 10, 2007
Phoenix, Arizona

ABA Midyear Meeting

Feb. 6-12, 2008
Los Angeles, California

26th Annual Water Law Conference

Feb. 21-22, 2008
San Diego, California

**37th Annual Conference on
Environmental Law**

March 13-16, 2008
Keystone, Colorado

Eastern Water Resources

May 1-2, 2008
Charlotte, North Carolina

***For more information, see the
Section Web site at
www.abanet.org/enviro
or contact the Section at 312/988-5724.***

The Clean Water Act Handbook, Second Edition **Mark A. Ryan, editor**

This updated guide is the definitive resource to the provisions and complexities of the federal Clean Water Act and how it continues to evolve. Recent court rulings and the change of administration have resulted in significant changes that dramatically affect practitioners working in the area. This new edition provides detailed explanations of these changes and considers the impact of recent court decisions, including the Supreme Court's decision in *SWANCC* and the Court of Appeals decisions in *American Mining Assoc.*, *Talent Irrigation*, and *Forsgren*, among others.

Beginning with an overview of the law's provisions and pertinent regulation and enforcement issues, the subsequent chapters address specific issues, such as:

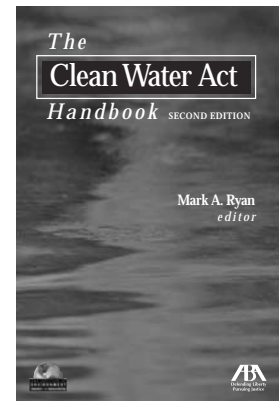
- NPDES permits
- Control of publicly owned treatment works
- Requirements applicable to indirect discharges
- The regulation of wetlands and the impact of recent judicial decisions
- Oil and hazardous substance spills
- Enforcement options under Section 309
- Judicial review

Chapters begin with a section on applicability and scope. Within each fully annotated chapter, clear explanations of specific statutory and regulatory provisions and court decisions applicable to the issue are presented in the order needed for full and accurate analysis – a virtual checklist of requirements and considerations. Making this new edition more useful than ever, the authors reference URL addresses for quick, up-to-the-minute information on government documents that are often difficult to locate.

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