



# Chapter 9

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## Water Quality Standards: Their Development and Application to Natural Resource Activities

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### § 9.01 Introduction.

The Federal Water Pollution Control Act, commonly referred to as the Clean Water Act<sup>1</sup> is the primary means of regulating surface water pollution in the United States. The Clean Water Act (CWA) requires with few exceptions that almost any person, business, or government entity obtain a permit before discharging pollutants into navigable waters from a point source. As set forth under the CWA, a point source is broadly defined as:

[a]ny discernable, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel,

<sup>1</sup> 33 U.S.C. §§ 1251-1376.

conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.<sup>2</sup>

“Navigable waters” also are broadly defined under the CWA as “waters of the United States, including the territorial seas.”<sup>3</sup>

The United States Environmental Protection Agency (EPA) has provided a regulatory definition of “waters of the United States” which helps define the scope of the point source discharge permitting program of the CWA. EPA has chosen not to regulate waste treatment systems under the CWA and excludes such systems from its regulatory definition of “waters of the United States.”<sup>4</sup>

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<sup>2</sup> 33 U.S.C. § 1362(14)(West 1986 & Supp. 1996).

<sup>3</sup> 33 U.S.C. § 1362(7).

<sup>4</sup> EPA has defined “waters of the United States” at 40 C.F.R. § 122.2 as follows:

- (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (b) All interstate waters, including interstate “wetlands”;
- (c) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
  - (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
  - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;
  - (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
- (f) The territorial sea; and
- (g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Section 402(b) of the CWA,<sup>5</sup> allows a state to manage the NPDES program within its borders if the program is approved by EPA. To receive this delegation of the program from the federal government, the state must meet the requirements set out in Sections 402(b) and 304(i)<sup>6</sup> of the CWA. Kentucky, Ohio, Virginia, Pennsylvania, Indiana, Illinois, West Virginia and many other eastern states involved in resource development have met these requirements and currently administer the NPDES program for dischargers within their jurisdictions.<sup>7</sup>

The CWA controls the discharge of effluent from point sources to waters of the United States by establishing an extensive permitting program based upon industry specific effluent guidelines and the development and implementation of state water quality standards

The CWA also controls non-point source discharges. Non-point discharges generally include “runoff” from activities such as agriculture, mining, and construction. Generally, the CWA controls non-point source pollution by requiring management plans designed to achieve and maintain applicable water quality standards, and by requiring the development and implementation of Best Management Practices (BMPs) for the activity generating the runoff.<sup>8</sup>

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Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. §423.11(m)(1995) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

EPA suspended, until further notice, the last sentence of the definition relating to impounded waters. 40 C.F.R. sec. 122.2 citing 45 *Fed. Reg.* 48620 (1980). The resulting prohibition against in-stream treatment facilities was unsuccessfully challenged in a West Virginia federal court by the West Virginia Coal Association and several other mining concerns. *West Virginia Coal Ass'n v. EPA*, 728 F. Supp. 1276 (S.D. W. Va. 1989). The court held that EPA was within its jurisdiction to adopt a policy that generally prohibits in-stream treatment ponds and fills, and could properly object to state-issued National Pollutant Discharge Elimination System (NPDES) permits that authorized such ponds and fills.

<sup>5</sup> 33 U.S.C. § 1342(b).

<sup>6</sup> 33 U.S.C. §§ 1314(i) 1342(b).

<sup>7</sup> See K.R.S. Chapter 224, WV Stat. 22 B-3, 4.

<sup>8</sup> 33 U.S.C. § 1288.