

WATER UPDATE

2017 Environmental Law Forum

April 5, 2017

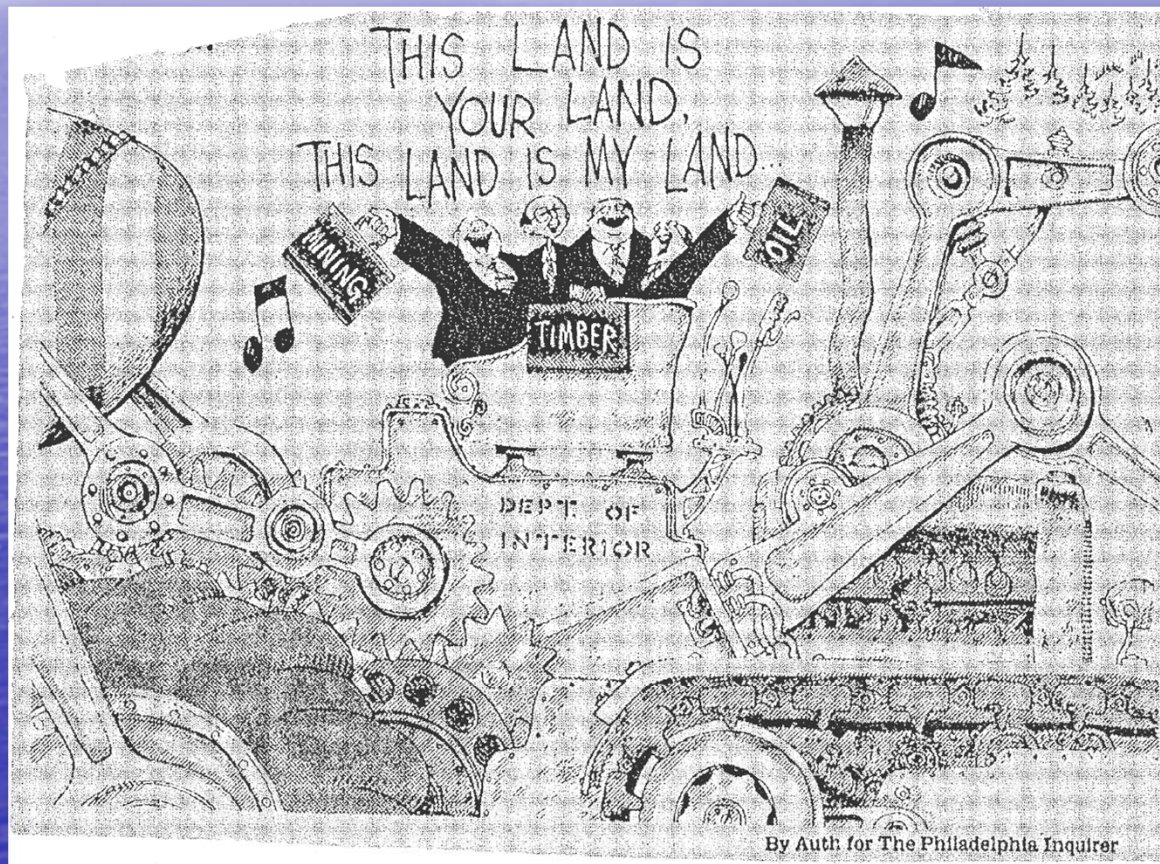
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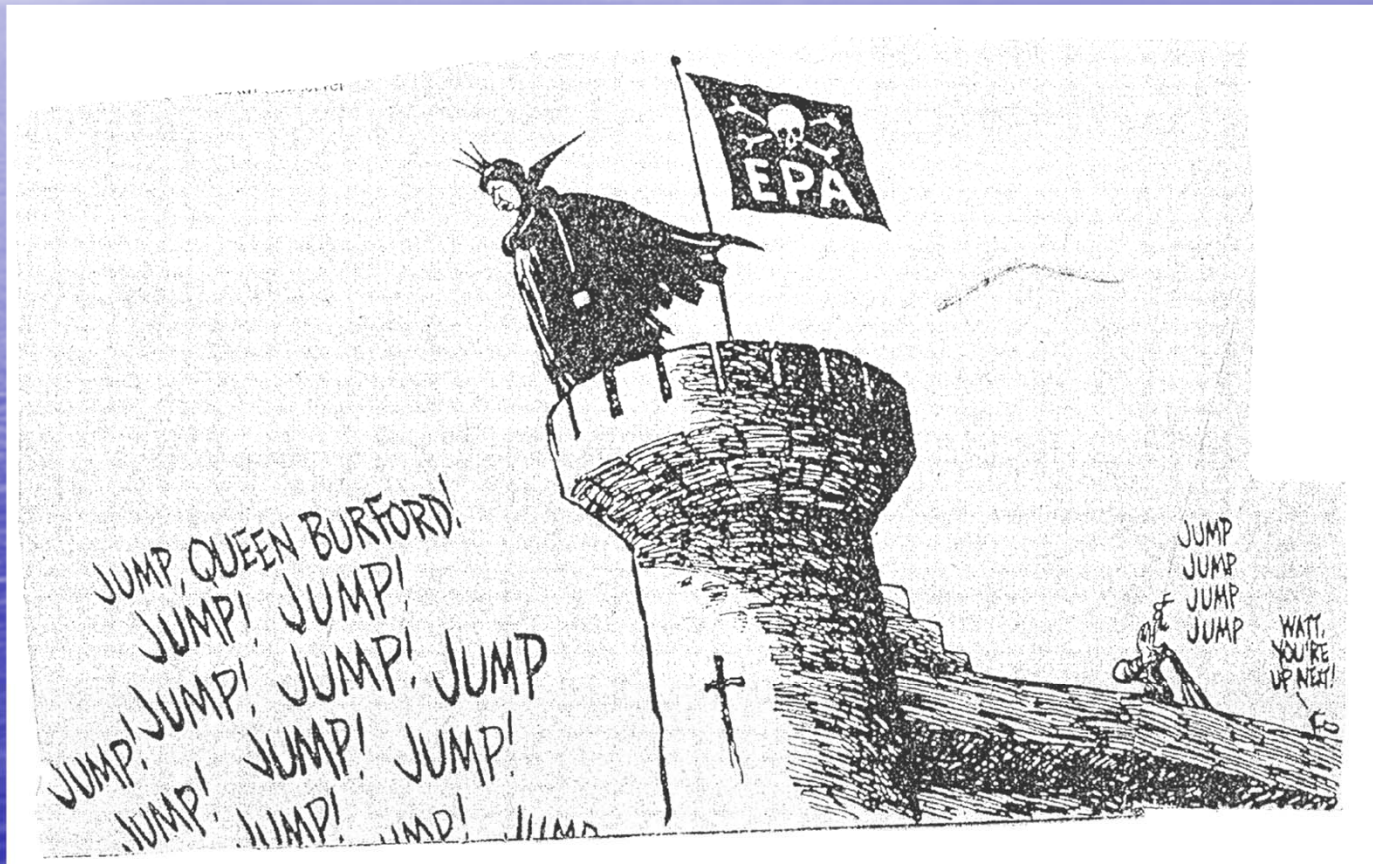
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DISCLAIMERS

- 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. Gelles 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.







INTRODUCTORY REMARKS

- The CWA continues to be a major focus of both regulation and litigation.
- Many issues discussed last year remain:
 - CWA jurisdiction & WOTUS Rule
 - Bay issues and stormwater issues
 - ESA/water
 - Energy/water
 - Enforcement
 - PA Update
 - Takings
 - Emerging contaminants

A blue-tinted photograph of a vast ocean under a cloudy sky. The word "STORMWATER" is centered in white, bold, sans-serif capital letters.

STORMWATER

Stormwater

- EPA Rulemaking for Small MS4s (“Remand Rule”)
 - NRDC and EDC filed petition in 9th Circuit to enforce a 2003 judgment that found regulations inadequate.
 - January 2016, EPA published a proposed rule offering three possible “options” for changes governing how states implement Small MS4 permitting.
 - Traditional General Permit Approach
 - Procedural Approach
 - State Choice Approach
 - In late 2016, EPA issued its final rule providing two alternative approaches to administer Small MS4 permits:
 - Comprehensive General Permit
 - Two-Step General Permit

Stormwater

- In 2015, EPA issued new multi-sector general permit under CWA for industrial stormwater discharges
 - Applies to 29 sectors in jurisdictions (DC, ID, MA, NH, NM, PR) where EPA has permitting authority
 - Makes changes to effluent limitation requirements, inspections, corrective actions, etc.
- Legal challenge from environmental groups settled in 2016 requiring:
 - EPA to sponsor and fund a study by the National Research Council (3 issues)
 - A tiered approach to corrective action
 - Ban on coal tar sealants

Stormwater

- EPA issued a Construction General Permit that became effective Feb. 16, 2017
 - Considers all builders on a site “jointly and severely liable” for compliance with permit terms
 - No authorization of non-stormwater discharges which contain hazardous substances
 - Information at sites on how to contact EPA to obtain a copy of the SWPPP or if stormwater pollution is observed in the discharge.
- Challenged by National Association of Homebuilders
 - Claiming liability framework is illegal, because operators often work on a site at different times, and cannot legally or physically control the activities of others.

Stormwater

- Residual Designation Authority
 - In 2015, NRDC and others submitted petitions to regulate stormwater from privately-owned commercial, industrial, and institutional sites (Dominguez Channel and Los Cerritos Channel in Los Angeles and the Back River in Baltimore)
 - EPA denied the petitions in late 2016
 - NRDC filed challenges to both denials (court of appeals for 4th and 9th circuits)

Stormwater

- PA DEP issued final PAG-03 (industrial stormwater discharges)
 - Tries to make more consistent with EPA's MSGP
 - Adds new appendices to distinguish among industrial groups that had previously been consolidated
 - New eligibility criteria
 - "Benchmark concentrations" for certain pollutants (Not effluent limitations, but two consecutive exceedances would trigger need for corrective action plan)

Stormwater

- PA DEP issued final PAG-13 (for municipal separate stormwater ("MS4"))
 - Excludes MS4s with wasteload allocations in TMDLs
 - Creates standardized "appendices" to address acid mine drainage, pathogens, and priority organic pollutants
 - Requires municipality-specific pollutant reduction plan for:
 - discharges to waters impaired by sediment or nutrients (with no WLA)

Stormwater

- 2016 legislative session three proposals that would allow municipalities to impose stormwater fees. Only the one related to 2nd class townships passed.
 - HB 1325 (2nd Class Twps.), PASSED
 - HB 1394 (Boroughs)
 - HB 1661 (1st Class Twps.)
 - All would allows municipalities to assess fees based “in whole or in part on characteristics of the property”



JURISDICTIONAL ISSUES

Jurisdictional Issues - WOTUS

- For all things WOTUS see:
 - http://www.americanbar.org/groups/environment_energy_resources/resources/wotus.html
- 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" from *Rapanos*.
 - *Based on a scientific study from SAB.*
- Key Issues:
 - Ditches
 - Ponds
 - Non-navigable intrastate waters

Jurisdictional Issues - WOTUS

- Firestorm of litigation ensued
- Current status:
 - 6th Cir. Found it has jurisdiction (split dec.)
 - Some other courts deferred to 6th Cir.
 - 6th Cir. stayed WOTUS nationwide (10/15)
 - SCOTUS Ct. grants Cert on 6th Cir. Jurisdiction
 - Does Rule relate to issuing/denying permit?
 - Is the Rule an “effluent or other limitation”?
 - SCOTUS delayed oral argument (October?)
 - Enviro, some states, Pacific Legal Fnd, and Farm Bureau against SCOTUS delay

Jurisdictional Issues - WOTUS

- Trump Administration position:
 - 2/28/27 - Executive Order directs ACOE/EPA to rescind Rule
 - “Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule”)
 - Order - 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
 - Pruitt signed notice of intent to review/rescind/revise
 - A long slog ahead on revising Rule

Other Jurisdictional Issues

- *USACOE v. Hawkes* (5/16) SCOTUS – final JDs are final agency action entitled to judicial review
 - On remand D. Minn rejected ACOE's JD
 - *Kent Recycling v. ACOE* – SCOTUS vacated/ remanded 5th Cir. Decision holding otherwise
- *Gulf Restoration Network v. ACOE* (E.D. LA 9/19/16)
 - rejected APA claim based on ACOE refusal to reopen comment period – holding that insufficient notice is not final agency action

Other Jurisdictional Issues

- *Catskill Mtn TU v. EPA* – (2nd Cir. 1/18/17)
applied Chevron to uphold Water Transfer Rule
 - Permits not required for transfers w/o subjecting water to industrial, commercial or municipal use
- *Mingo Logan Coal v. EPA* (DC Cir. 7/19/16)
 - Case has been in litigation since 2012
 - Upheld EPA's revocation of permit 4 yrs after ACOE issuance based on EPA findings of adverse effects

Other Jurisdictional Issues

- Stream Protection Rule was w/drawn by Administration pursuant to Cong. Review Act
 - Limited placement of mining waste in streams
 - Rule was the subject of ct. challenges by 14 states and energy companies
 - Trump on CRA action:
 - “We haven’t treated [coal] with the respect it deserves.”
 - Back to 1983 rule: Surface mining cannot disturb land w/in 100’ of a perennial or intermittent stream

Other Jurisdictional Issues

- 1/6/17 ACOE issued final package of nationwide permits (“NWP”)
 - NWPs do not refer to or apply WOTUS Rule
 - 50 reissued NWPs and 2 new NWPs
 - Removal of low-head dams posing boater threat (NWP 53)
 - Construction/maintenance of living shorelines in estuarine/marine waters and the Great Lakes (NWP 54)
 - Package granted a waiver Trump’s 60-day regulatory freeze (took effect on 3/19/17)



ENFORCEMENT ISSUES

Enforcement

- **Joint Federal-State**

- *United States and PADEP v. Consol Energy Inc., et al.*, No. 16-1178 (W.D. Pa. 2016)(Implementation of water management and monitoring activities to prevent contaminated discharges of mining wastewater and payment of a civil penalty of \$3 million.)
- Guidelines for Joint State/Federal Civil Environmental Enforcement Litigation (USDOJ ENRD and NAAG, January 2017)

Enforcement

- **Federal**

- *United States v. D.G. Yuengling and Son Inc*, No. 15-290 (M.D. Pa. 2016) (Resolving failures to comply with Industrial User (IU) Permits providing pretreatment requirements for discharges to POTW via payment of a civil penalty of \$2.8 million.)

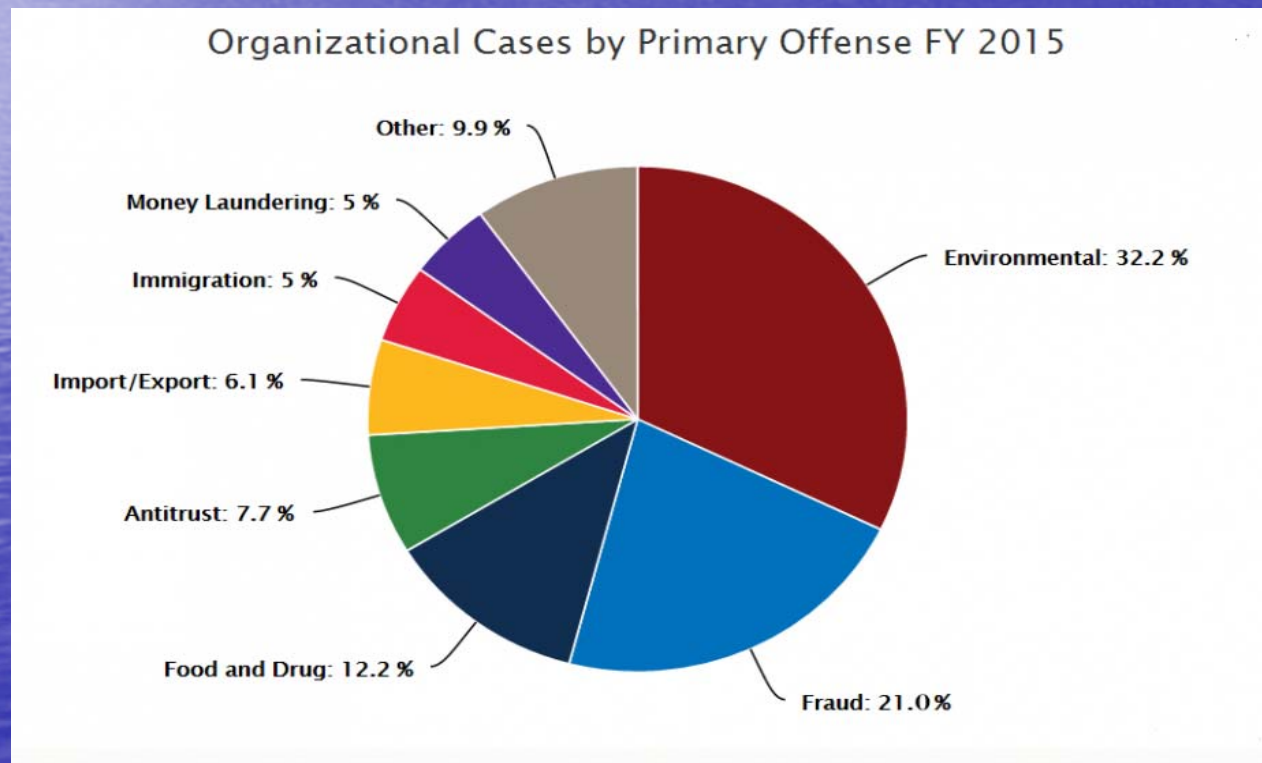
Enforcement

- **Environmental Groups**

- *Citizens for Pennsylvania's Future and PADEP v. Confluence Borough Municipal Authority*, No. 14-00100 (W.D.Pa. 2016) (Design and construction of a new pressurized collection and conveyance system throughout borough and elimination of unpermitted sewage outfalls.)

Enforcement

- Criminal



Enforcement

- **Criminal**

- Environmental offenses made up nearly a third (33.2 percent) of all crimes committed by organizations.
- 70 percent of the environmental crimes were water-related (16.7 percent affected wildlife, 8.3 percent involved hazardous materials, and 5 percent were air-related)

Source: United States Courts (Dec. 22, 2016)

Enforcement

- **Criminal**

United States v. International Petroleum Corporation of Delaware (D. Del. 2017) (Sentence for environmental crimes, including a conspiracy to violate the Clean Water Act, involving tampering with sampling required under pretreatment permit; \$1,300,000 fine and \$2,200,000 restitution to City of Wilmington.)

Enforcement

- **Criminal**

- *Commonwealth of Pennsylvania v. XTO Energy*, (2016) (Settlement agreement resolving discharge of fracking wastewater via payment of a \$300,000 fine to DEP, and an additional \$100,000 to environmental group.)



CHESAPEAKE BAY

Chesapeake Bay



Chesapeake Bay

Final Chesapeake Bay TMDL

- Established by EPA on Dec. 29, 2010
- Identifies the necessary pollution reductions of nitrogen, phosphorus and sediment for Chesapeake Bay States
- Establishes framework to meet applicable water quality standards in the Bay by 2025
- Framework includes Watershed Implementation Plans (WIPs), annual progress reviews, and two-year milestones

Chesapeake Bay

- 3rd Circuit Upholds Bay TMDL (Cert. Denied)
 - *American Farm Bureau Federation v. United States EPA*, 792 F.3d 281 (3d Cir. 2015)
 - “Establishing a comprehensive, watershed-wide TMDL – complete with allocations among different kinds of sources, a timetable, and reasonable assurance that it will actually be implemented – is reasonable and reflects a legitimate policy choice by the agency in administering a less-than-clear statute states and EPA could, working together, best allocate the benefits and burdens of lowering pollution”

Chesapeake Bay

- June 2016, EPA issued an evaluation 2014-2015 milestones and 2016-2017 commitments.
 - PA achieved its state-wide targets for phosphorus, but not for nitrogen
 - PA met targets for wastewater facilities, but not for agriculture or urban/suburban stormwater

Chesapeake Bay

- Pennsylvania Reboot Strategy
 - Compliance and enforcement efforts in the agriculture and stormwater sectors
 - Quantifying previously undocumented BMPs
 - Increasing high-impact, low-cost BMPs in watersheds impaired by agriculture and stormwater
 - Improving reporting and record keeping data systems for the agriculture sector

Chesapeake Bay

Watershed Implementation Plans (WIP)

– Phase 2 WIP Nutrient Trading Supplement

- EPA's concerns with nonpoint source agricultural baseline requirements in the nutrient trading regulations
- Establishes additional eligibility and credit calculation requirements for agricultural sources

– Phase 3 WIP

- Plan to for 2018-2025 to meet Bay restoration goals
- PADEP assembling steering committee and work groups on specific priority issues

Chesapeake Bay

- 2018 proposed federal budget

“Eliminates funding for specific regional efforts such as the Great Lakes Restoration Initiative, the Chesapeake Bay, and other geographic programs. These geographic program eliminations are \$427 million lower than the 2017 annualized CR levels. The Budget returns the responsibility for funding local environmental efforts and programs to State and local entities, allowing EPA to focus on its highest national priorities.”

Chesapeake Bay

- *Food & Water Watch v. PADEP and Papettis Hygrade: Egg Products, Inc.*, Dock. No. EHB 2017-008
 - challenging a permit allowing nutrient trading in the Chesapeake Bay Watershed



ENERGY AND WATER

Energy and Water

- *EQT Production v. DEP* (PA Comm. Ct, 1/11/17)
 - CSL penalties must be based on when spill ceases - not how long water remains polluted.
- *Ohio Valley Env. Coalition v. Fola Coal* (4th Cir. 1/4/17)
 - Discharge of water with high conductivity adversely affects stream chemistry and is a violation of state narrative WQS
 - Permit shield did not apply

Energy and Water

- *Wayne Land and Mineral Gp v. DRBC* – (MD PA)
 - Challenge by landowner to DRBC fracking moratorium
 - DRBC correctly defines well pads as projects
- *Del. Riverkeeper Ntwk v. DEP* (3rd. Cir. 8/8/16)
 - PA/NJ complied with CWA in issuing permits for pipeline expansion
 - Ct. affirmed Cir. Cts jurisdiction over state agencies when agency acting pursuant to federal law

Energy and Water

- *DRN v. FERC*, No. 16-416 (D.C. Cir. 3/22/17)
 - Dismissed DRN's suit claiming FERC pipeline approval process unconstitutionally favors the energy industry.
 - No evidence FERC is biased
- EPA final rule published (6/28/16) prohibiting wastewater discharges from fracking going to municipal WWTPs



ENDANGERED SPECIES AND WATER

ESA and Water

- Federal
 - Resource Agencies
 - Department of Commerce, NMFS
 - Department of Interior, USFWS
 - Endangered Species Act, 16 U.S.C. §§ 1531-1543
 - ESA § 4
 - Listing of Endangered or Threatened Species
 - Critical Habitat
 - ESA § 7 -- Agency Consultation

ESA and Water

- Pennsylvania
 - Fish and Boat Commission
 - Fish Restoration and Management Act, 30 Pa. C.S.A. § 2305
 - Fish and Boat Code, 58 Pa. Code §§ 75.1-75.4
 - Game Commission
 - Game or Wildlife Protection Act, 34 Pa. C.S.A. § 2167
 - Game and Wildlife Code, 58 Pa. Code §§ 133.1-133.41

ESA and Water

- Department of Conservation and Natural Resources (DCNR)
 - Wild Resource Conservation Act, 32 P.S. § 5307
 - 17 Pa. Code Chapter 45 (Native Wild Plants)
 - Pennsylvania Natural Diversity Inventory (PNDI)

ESA and Water

- 25 Pa. Code Chapter 102
 - Earth Disturbance Activities
 - § 102.5(2): PNDI consultation requirement
- 25 Pa. Code Chapter 105
 - Dams and Waterways
 - § 105.16(c)(3); § 105.401(3): references federal and state authorities
 - § 105.17(1): special protection for EV wetlands

ESA and Water

- 25 Pa. Code Chapter 92a
 - NPDES Permits
 - § 92a.12(c): references federal and state authorities
- 25 Pa. Code Chapter 93
 - Water Quality Standards
 - § 93.4c(a)(2): Maintain and protect existing instream water uses, including protection of endangered and threatened species

ESA and Water

- PNDI process
 - Notification
 - Screening
 - Coordination and Mitigation
 - Documentation
 - Proposed or final action

ESA and Water

- *Hoopla Valley Tribe, et al. v. National Marine Fisheries Service, et al.*, No. 16-cv-04294 (N.D. Cal. Feb. 8, 2017) (manage river flows to protect juvenile salmon).
- *National Wildlife Federation, et al. v. National Marine Fisheries Service, et al.*, No. 3:01-cv-00640 (D. Oregon May 4, 2016) (Rejecting use of “trending toward recovery” standard in biological opinion.)
- *United States, et al. v. State of Washington*, 827 F.3d 836 (9th Cir. 2016) (State must correct culverts that allow streams to flow under roads, thereby interfering with salmon migration.)

TMDLS

TMDLs

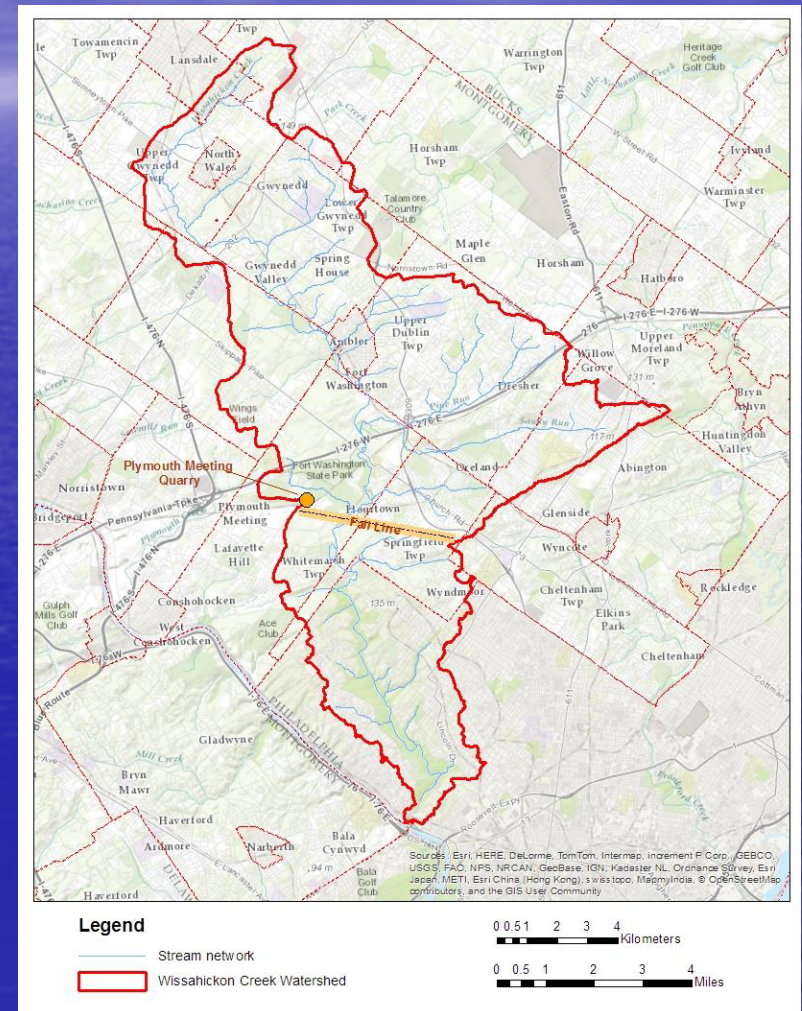
- EPA issued rule to treat Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act (81 Fed. Reg. 65901) September 26, 2016.
- *D.C. Water & Sewer Auth. v. EPA, D.D.C.*, Case 1:15-cv-02044 (Filed 11/23/15)
 - Challenge to EPA's TMDL for e. coli for the Potomac River. EPA argues DC Water waived right to challenge e. coli listing since not raised in comments.
 - Environmental groups intervened.
 - Stipulation of dismissal entered March 2017.

TMDLs

- EPA established a TMDL for trash in the Anacostia
 - unlike most TMDLs, which are expressed in terms of the loads of a pollutant that may be added to a waterbody, the trash TMDL was expressed in the negative, i.e., in terms of quantities of trash that must be removed or prevented from entering the waterbody
 - NRDC challenged the TMDL as failing to establish an upper limit on trash pollution in the Anacostia River. *NRDC v. EPA*, D.D.C. case 16-1861 (filed 9/19/2016).

TMDLs

- Wissahickon Creek phosphorus TMDL,
 - EPA proposed draft in May 2015
 - 2016 an intergovernmental agreement was signed by 16 municipalities and 4 WWTP to collaborate on an alternative TMDL plan





MISCELLANEOUS ISSUES

Miscellaneous Issues - Takings

- *Res. Invs. v. US, US*, No. 15-802 (6/27/16)
 - Cert Denied in case to determine if 6 yr delay by ACOE to deny 404 Permit constitutes a taking
 - Fed. Cir. Denied claim
- *Murr v. State (SCOTUS)*
 - Ct heard arguments on whether 2 commonly owned parcels should be considered 1 for takings claim
 - Wisc. SCT held it was 1 parcel –denying takings claim

Miscellaneous Issues – PA Update

- Chapter 93 Water Quality Standards
Triennial Update
- Chapter 91/92a WQM/NPDES Permit Fees

Miscellaneous Issues: Emerging Pollutant (PFOA):

- EPA issued a health advisory identifying 0.07 parts per billion (70 parts per trillion) PFOA and PFOS in drinking water above which adverse health effects are anticipated to occur over a lifetime of exposure
- Hoosick Falls, NY class action law suit
 - *Baker et al. v. Saint-Gobain Performance Plastics Corp et al.*, 1:16-cv-00917 (N.D.N.Y.).
- Montgomery and Bucks County, PA at least 7 law suits filed.



?????QUESTIONS?????