

Laws Governing Water Quality, Wetlands and Species Preservation, and Water Use

Richard M. Glick
Ecosystem Services Workshop

Portland, Oregon
May 16, 2011

Anchorage
Bellevue
Los Angeles

New York
Portland
San Francisco

Seattle
Shanghai
Washington, D.C.

Introduction

- Federal *and* State laws govern water quality, wetlands and endangered species preservation
 - Clean Water Act
 - Endangered Species Act
 - Similar State laws
- Federal laws sometimes delegate administration to States, such as the Clean Water Act
- Federal laws sometimes give oversight of some federal agencies over others, such as Endangered Species Act

Introduction

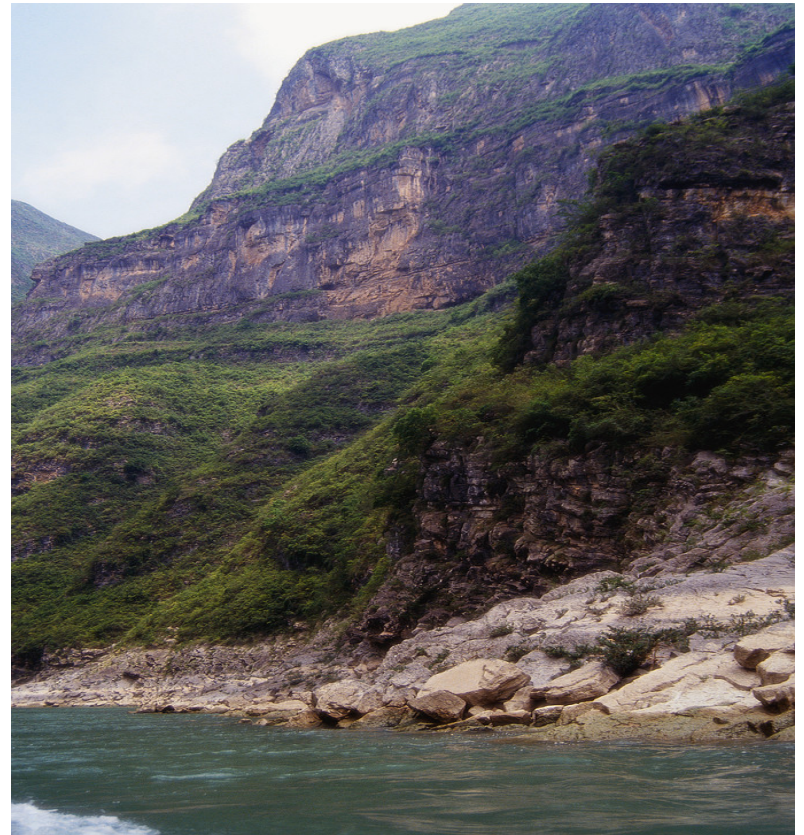
- Federal laws sometimes preempt part of State laws, but preserve other State authority, such as the Federal Power Act and Federal Reclamation Act
- Water use is governed by State law, *but*
 - Development may require Federal approvals, for example filling wetlands
 - Wetlands permit triggers other Federal requirements, such as Endangered Species Act consultation and mitigation
- Federal and State laws interplay in confusing and sometimes surprising ways!

Introduction

- Focus today on certain Federal and State laws that require preservation or mitigation as a condition of development:
 - Clean Water Act
 - Endangered Species Act
 - Oregon Water Rights Act

Clean Water Act

- CWA § 101(a): Purpose to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”



Clean Water Act

Main strategy:

- Control “point sources” through effluent limitations in permits to achieve standards
- Eliminate discharge of pollutants by 1985.
 - 33 U.S.C. § 1251(a)(1).
- By 1990, 87% of muni and 93% of industrial discharges under permits
 - *Yet standards are still unmet*

Clean Water Act

- § 301(a): Except under permit, “the *discharge* of any *pollutant* by any person into *navigable waters* shall be unlawful.”
 - 33 U.S.C. § 1311(a)
- National Pollutant Discharge Elimination System permits under CWA § 402
 - 33 U.S.C. § 1342
- § 303(d): Identify water where standards are unmet and establish “total maximum daily loads”
 - 33 U.S.C. § 1313(d)

Clean Water Act

- Why are standards unmet?
- Toxics and point sources largely under control
- Non-point sources not regulated
 - Water withdrawals, channel morphology and riparian devegetation lead to warmer temperatures
 - Most Pacific Northwest CWA 303(d) listings are based on temperature and nutrient loading
 - Agricultural runoff adds phosphorus, which depletes oxygen

Clean Water Act

- What if standards cannot be met?
 - *Site Specific Criteria* for situations where standards are stricter than necessary.
 - *Use Attainability Analysis* where criteria cannot be met and corrections are not feasible. 40 CFR 131.3(g).
 - EPA Region 10 incorporates both in 2003 Temperature Guidance. *EPA Region 10 Guidance for Pacific Northwest State and Tribal Temperature Water Quality Standards.*

[http://yosemite.epa.gov/R10/water.nsf/6cb1a1df2c49e4968825688200712cb7/b3f932e58e2f3b9488256d16007d3bca/\\$FILE/TempGuidanceEPAFinal.pdf](http://yosemite.epa.gov/R10/water.nsf/6cb1a1df2c49e4968825688200712cb7/b3f932e58e2f3b9488256d16007d3bca/$FILE/TempGuidanceEPAFinal.pdf)

Clean Water Act

- Mitigation for development focused on-site
 - Intuitive—address local impacts
 - Costly and ineffective
 - Sites too small, near developed areas
- Watershed approaches address overall ecosystem health

Clean Water Act

Scope and Definitions

- Discharge means addition of pollutant from point source
 - Point source means discrete conveyance, e.g. end of pipe
 - Dams not covered because they do not add pollutants.
National Wildlife Federation v. Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982)
 - Are you sure? *South Florida Water Management District v. Miccosukee Tribe of Indians, et al.*, 541 U.S. 95 (2004)

Clean Water Act

- Scope and Definitions
 - Pollutant means most anything. 33 U.S.C. § 1362(6).
 - Navigable waters means most anywhere. 33 U.S.C. § 1362(7).

Clean Water Act

Section 401: State certification for Federally licensed or funded projects

- Applicants for Federal approval for *any activity that may result in discharge* to navigable water must get certification State water quality standards will not be violated.
33 U.S.C. § 1341(a)(1).

Clean Water Act

- 33 USC § 1341(d)
- The certification shall contain effluent limitations and conditions to protect standards and “any other appropriate requirement of State law”
- State cert conditions become conditions of the federal license
 - Federal Energy Regulatory Commission may not alter
 - Who enforces, State or Federal agency?

Scope of State Authority

- Tension between states and FERC over chemical (e.g. dissolved oxygen) v. physical impacts (flow) in standards
- *California v. FERC*, 495 U.S. 490 (1990) (Rock Creek case)
 - Federal Power Act preempts state water use law
 - Includes allocation of water among competing users

Scope of State Authority

- *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994)
 - state may impose minimum flow requirement because can condition for effluent limitations and other appropriate state requirements
 - Court found does not conflict with FERC authority and therefore preemption not at issue

Scope of State Authority

- *S. D. Warren Co. v. Maine Board of Environmental Protection*, 126 S. Ct. 1843 (2006)
 - Plaintiff argued it added no pollutants to river, just passed them through from upstream, though acknowledged physical change
 - Hydro projects are subject to CWA 401 because they result in “discharge” even if not “discharge of pollutants”
 - Unanimous Court gave ringing endorsement to broad state power under 401
- Not much left of Federal Preemption!

Clean Water Act--Wetlands



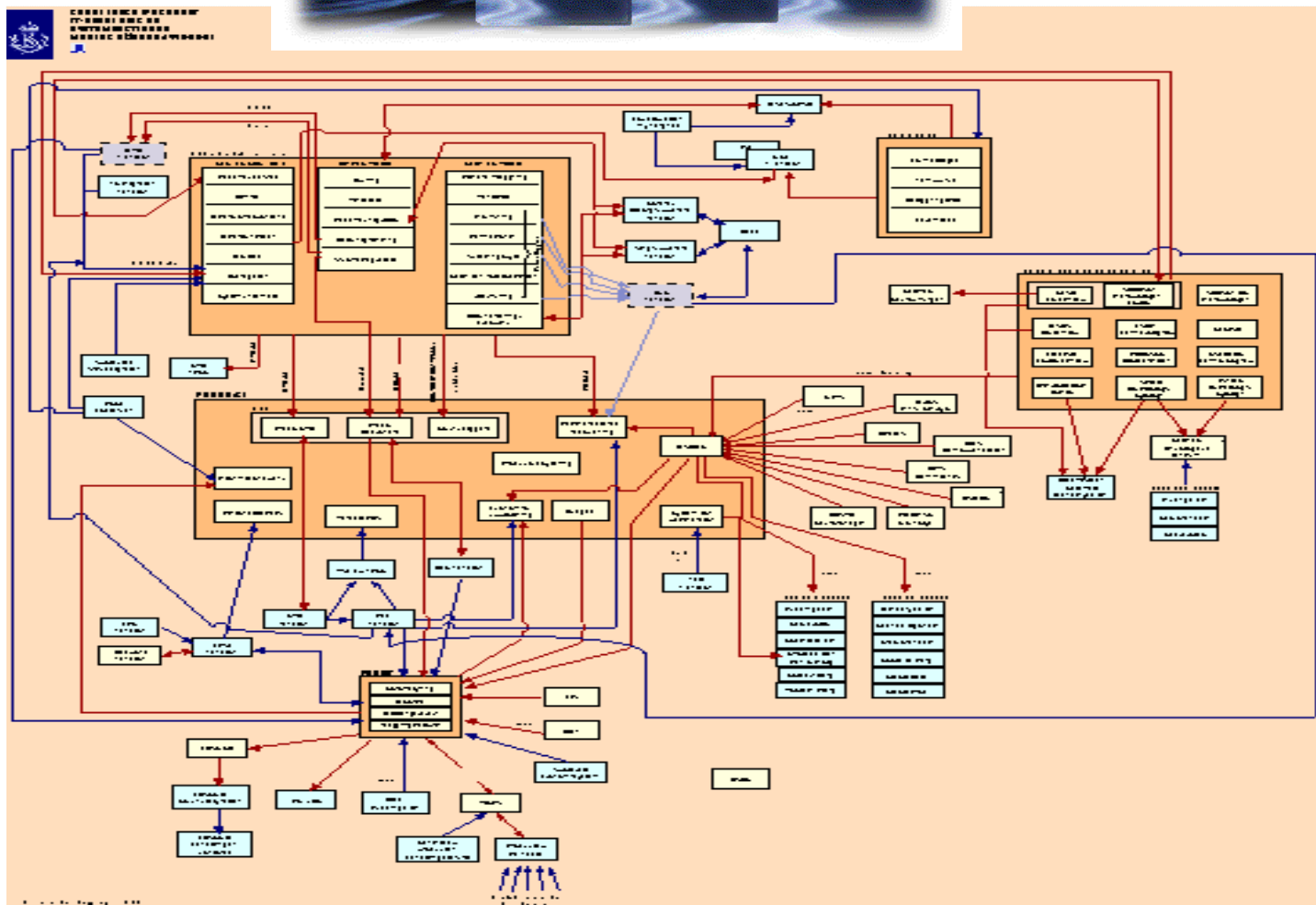
Clean Water Act--Wetlands

- Development in jurisdictional wetlands may not be permitted, or mitigation requirements may be imposed
- Clean Water Act §404 requires permit from Corps of Engineers before dredging “waters of U.S.” – wetlands
 - 33 U.S.C. § 1344.
 - Land need not squish beneath your feet to be a wetland.
 - 1987 Corps of Engineers Wetlands Delineation Manual defines:
"Those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

Clean Water Act--Wetlands

- Scope of jurisdiction uncertain
 - *United States v. Rapanos*, 547 U.S. 715 (2006)
 - *EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act*, 76 Fed. Reg. 24479 (May 2, 2011)
(<http://edocket.access.gpo.gov/2011/pdf/2011-10565.pdf>).
- Nationwide permits
 - For general, low impact activities
 - Government matrix

U.S. Army Corps of Engineers Nationwide Permit Program



Endangered Species Act



Endangered Species Act

- Purpose “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species . . .”
— 16 U.S.C. § 1531(b)
- “It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.”
— 16 U.S.C. § 1531(c)(1)

Endangered Species Act

- U. S. Supreme Court: ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”
 - *TVA v. Hill*, 437 U.S. 153, 180 (1978)
- Powerful command affecting wide range of public and private activity—ESA trumps everything else:
 - Snail Darter (Tellico Dam)
 - Spotted Owl (Logging in Pacific Northwest)
 - Columbia and Snake Rivers salmon (Federal hydroelectric power system)

Endangered Species Act

- Imposes procedural and substantive duties
- Administered by
 - National Marine Fisheries Service (anadromous fish and marine mammals)
 - U. S. Fish and Wildlife Service (resident fish and terrestrial animals)
- Action agencies have little discretion, *except*
 - Incidental “take” permits for scientific purposes
 - Cabinet-level committee can override—“God Squad”
 - Rarely used—failed in Tellico Dam
 - Courts reversed efforts to override in spotted owl cases

Endangered Species Act

- Agencies list sensitive, threatened and endangered species, with differing levels of protection
- Agencies designate “critical habitat”, which severely restricts land use
- Restrictions on activity:
 - No person may traffic in listed species
 - No person may “take” listed species
 - Agencies must ensure their actions do not jeopardize

Endangered Species Act

- **Section 9**—prohibits “take” of listed species
 - 16 U.S.C. § 1538
 - Can lead to civil and criminal liability
 - “the harming of even *one* individual protected by the Act is prohibited.” *Sierra Club v. U. S. Forest Service*, 535 F. Supp. 2d 1268, 1298 (N. D. Ga. 2008)
 - Destruction of habitat constitutes a taking. *Palila v. Hawaii Dept. of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff’d* 639 F.2d 495 (9th Cir. 1981)

Endangered Species Act

- **Section 7**—Federal action agencies must consult with Federal Services to ensure no jeopardy to listed species
 - 16 U.S.C. § 1536
 - Action agencies perform a biological assessment and consult with Services
 - Services develop a biological opinion
 - If Services find potential jeopardy, may impose “reasonable and prudent alternatives”
 - Action agencies *may not* proceed in face of jeopardy opinion

Endangered Species Act

- Incidental takings by federal agencies allowed if results from otherwise lawful activity
 - Services issue incidental take statements
 - Impose reasonable and prudent alternatives
- Incidental takings by individuals
 - Applies where no Federal lands or permits are involved, so no Section 7 consultation
 - Requires Habitat Conservation Plan

Water Rights

- Doctrine of Prior Appropriation: First in time is first in right

Doctrine developed in arid West to stimulate mining and irrigated agriculture

- Distinct from riparian rights
- Some states use correlative rights for groundwater

Water Rights

- Water rights different from other real property: “Usufruct” (right of use) vs. possessory
- No sharing in times of shortage
- Right continues so long as water put to beneficial use and not wasted

Water Rights

- Water rights are appurtenant to the land
 - They pass with land title by operation of law
 - They may not be separately conveyed, subject to certain exceptions
 - Changes in point of diversion or place of use are permitted if no harm to other vested right holders

Water Rights

- Permit creates inchoate water right
 - Permit contains conditions
 - Permit requires reasonable diligence in construction of water works and application to beneficial use
 - Cancellation of permit

Water Rights

- Once beneficial use established, the inchoate right ripens into a vested water right and a certificate is issued
 - Final proof survey a claim of beneficial use
 - WRD may issue a certificate only for the amount proved up

Water Rights

- Right continues in perpetuity
 - Failure to use all or part of the water right within five consecutive years establishes a rebuttable presumption of forfeiture
 - A Certificate is conclusive evidence

Water Rights

- The water right is appurtenant, but holder may apply to change the place of use, point of diversion or nature of use without losing priority
 - Administrative process to make sure other vested water rights holders would not be injured
 - Water rights may be assigned without administrative process



**Davis Wright
Tremain LLP**
DEFINING SUCCESS TOGETHER

rickglick@dwt.com
503.778.5210

Richard M. Glick
Davis Wright Tremain LLP

May 16, 2011

Anchorage
Bellevue
Los Angeles

New York
Portland
San Francisco

Seattle
Shanghai
Washington, D.C.

www.dwt.com