



# Stormwater: The Good, the Bad, and the Polluted

*Presented by:*  
*David Ubaldi*

# History of Stormwater Regulation

---



Stormwater:

“stormwater runoff, snow melt runoff, and surface runoff and drainage.”

40 C.F.R. §122.26(b)(13).



# History of Stormwater Regulation



## What's the Big Deal?

Stormwater considered to be one of the leading causes of pollution to our nation's waters. Linked to impacts to:

- Human Health
- Drinking Water
- Water Quality
- Habitat



"Jack, we could stop falling down this stupid hill if you'd stop worrying about contaminants in our tap water."

# Stormwater Regulation

---



Federal Water Pollution Control Act, or Clean Water Act



# Stormwater Regulation

---



Congress enacted the Clean Water Act to:

“Restore and maintain the chemical, physical,  
and biological integrity of the Nation’s waters .  
. . . .”

33 U.S.C. § 1251(a).





# Stormwater Regulation

---



## Clean Water Act:

The Act prohibits the release of pollutants to navigable waters from point sources except in compliance with National Pollution Discharge Elimination System ("NPDES") permit.

33 U.S.C. § 1311(a)

33 U.S.C. § 1342

# Point Source

---



*"[A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, 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."*

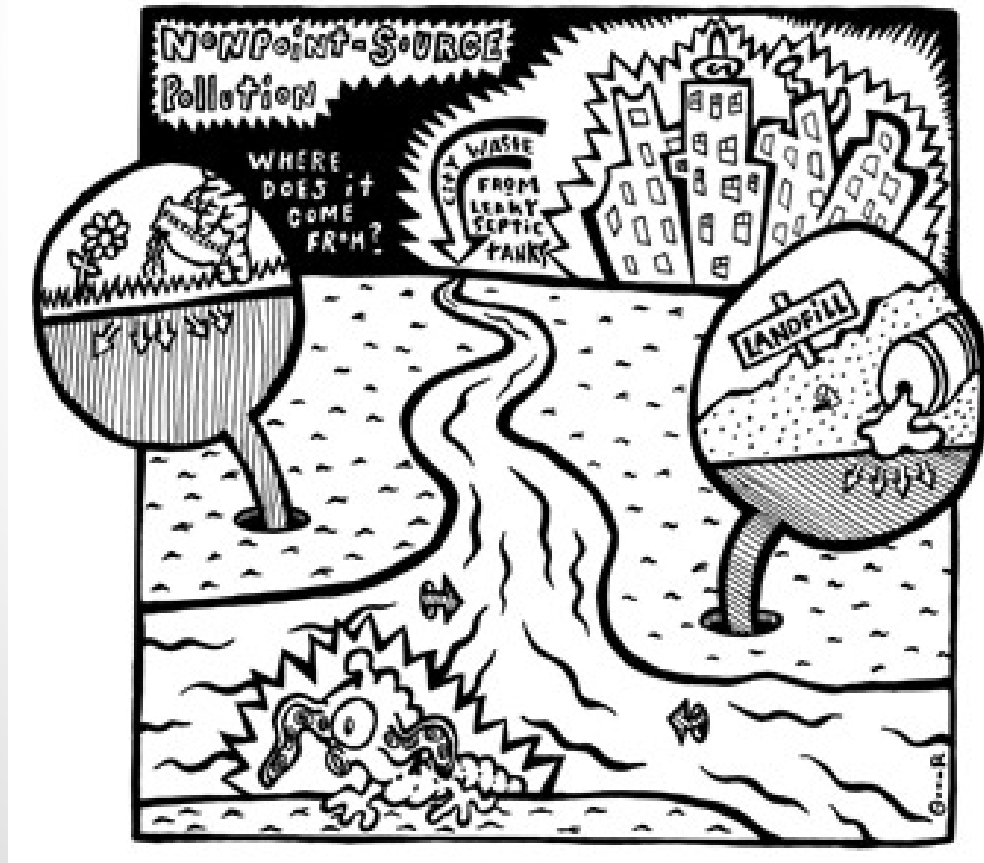
Section 502(14) of the Act



# Nonpoint Source Pollution



- Not defined under the Act.





# Stormwater Regulation

---



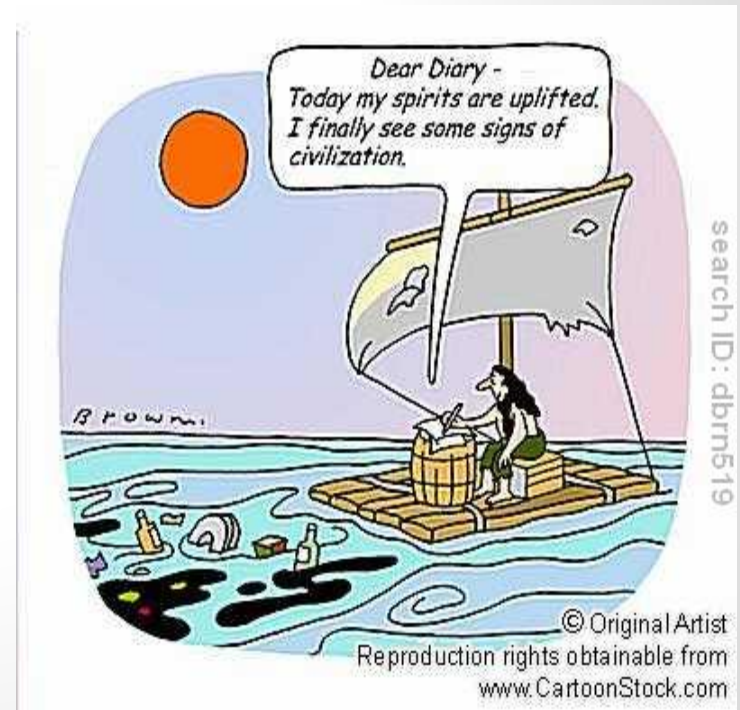
- Nonpoint Source Pollution:
  - Pollution that arises from dispersed activities over large areas
  - Not traceable to a single source
  - Difficult to regulate
  - Examples:
    - Roadways
    - Fertilizers applied to lawns
    - Pet waste



# What is a Pollutant?



“Dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into the water.”



Section 502(6).

# Navigable Waters

---



It's anyone's guess.

- Traditional navigable waters;
- Interstate waters;
- Adjacent wetlands;
- Non-navigable tributaries;
- Wetlands that directly abut;  
and
- Waters that have a 'significant nexus.'

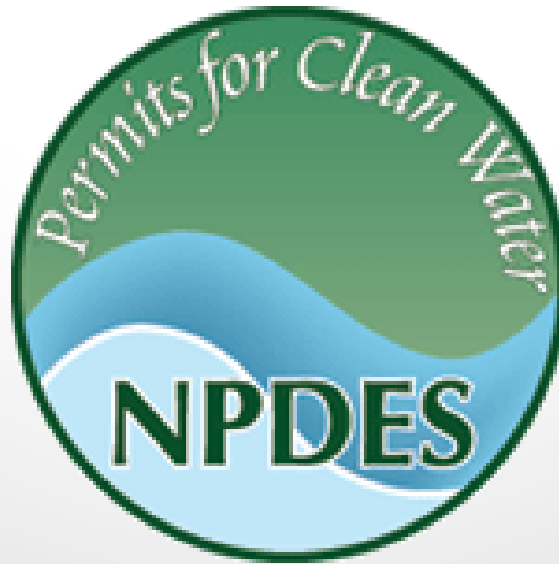


# NPDES Program

---



- One of the mechanisms of achieving the goals of the Clean Water Act.
- Administered by EPA.
- Delegated responsibility to State of Washington.



# Stormwater Regulation

---



Ecology uses two types of permits to to administer its NPDES Program:

- Individual
- General
- Effluent Limits or Benchmarks/Corrective Actions





# Stormwater Regulation

---



Stormwater is regulated in Washington State by several types of permits.

- Construction;
- Municipal (Phase I and Phase II);
- Industrial; and
- Sand and Gravel.



# Stormwater Permits

---



## Municipal Permits: Phase I & Phase II

What Are They?

Who Has Them?





## Municipal Stormwater Permits

Summary of major permit features:

- Public Education, Outreach, & Involvement
- Illicit Discharge Detection & Elimination
- Construction Site Stormwater Runoff Control
- Pollution Prevention & Good Housekeeping
- Post Construction Stormwater Management & LID
- Monitoring
- Structural Stormwater Controls (Phase I)
- Source Control (Phase I)



## Municipal Permits – Proposed Changes

- PCHB Hearings Board decisions & settlements
  - Additional monitoring.
  - New data management requirements.
  - Additional structural stormwater controls (Phase I).
  - Removed requirements for 1 acre or greater (Phase II).
  - Requirements for LID stormwater techniques in new development and redevelopment.

# Stormwater Permits

---



## Industrial Stormwater General Permit

- Current permit expires in January 1, 2015; but will be modified soon.
- Who needs coverage?
- Who doesn't need coverage?





# Stormwater Permits

---



## Central Requirements of the ISWGP

- Stormwater Pollution Prevention Plan or SWPPP;
- Quarterly Sampling;
- Inspections
- Benchmarks
- Corrective Actions
- Annual Reports



# Proposed Changes to the Industrial Stormwater Permit:



- Consistent Attainment – 8 consecutive quarters of meeting benchmarks;
- Level 1 – a new deadline for completing an inspection;
- Level 2 – Shorter deadline for completing source control;
- Additional corrective actions may be required for serial Level 3's; and
- Fecal Coliform.



# Runoff from Forest Roads

---



- Challenging the Definition of Point Source
  - *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9<sup>th</sup> Cir. 2011)
  - Two separate cert petitions filed in September 2011 seeking Supreme Court's review of this controversial decision.



# Runoff from Forest Roads

---



## *Northwest Environmental Defense Center v. Brown*

- NEDC filed citizen suit against Oregon officials.
- Claimed discharging stormwater without a permit.
  - Logging roads with ditches, culverts, and channels.
- Oregon officials argued that the Silvicultural Rule exempts such discharges.

# Runoff from Forest Roads

---



## *Northwest Environmental Defense Center v. Brown*

- **Silvicultural Rule:**

“(1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.”

40 C.F.R. §122.27



# Runoff from Forest Roads

---



## *Northwest Environmental Defense Center v. Brown*

- District Court dismissed.
- Ninth Circuit reversed holding that runoff from logging roads is discharge associated with industrial activity and requires a permit when collected in ditches and culverts.
  - Focused on the mechanism of discharge and not the source of the pollution.



## *Northwest Environmental Defense Center v. Brown*

- Challengers argue that the ruling:
  - Creates a split in the courts; and
  - Runs counter to the mandatory deference that must be given to EPA's interpretations.

# Clean Water Act Citizen Suits



Citizen Enforcement – 33 U.S.C. § 1365(a)

- \$37,500 per day per violation for violations after January 12, 2009. 40 C.F.R. §19.4.
- Injunctive relief.
- Reimbursement for the citizen's attorney fees.



# Clean Water Act Citizen Suits

---



Who Brings These Suits?

Why Do They Bring These Suits?

How Do They Find Defendants?



# Clean Water Act Citizen Suits



## Ecology's PARIS Database:

Water Quality Permitting and Reporting Information System (PARIS)

ations ▾ Inspections and Enforcements ▾ Help ▾ More Water Quality Info

**Discharge Monitoring Reports (DMR) Data**

*Fill in one or more fields and click **Search***

**Permit Number** Example: WAR0011379 or 11379

**Facility Name**

**City**

**County**

**Permit Type**  [Lookup Permit Types](#)

**Start Date**  **End Date**

[Cancel](#)



# Clean Water Act Citizen Suits

---



## Typical Settlement Scenario

- Payment in lieu of penalties
- Attorneys' fees
- Changes in facility operations
- Production of documents
- Open ended consent decrees



# Clean Water Act Citizen Suits

---



These Are Small Ticket Cases, Right?

- Nope: Sometimes they can be significant.
- *Case in point:*  
*Puget Soundkeeper Alliance v. BNSF Railway Company, C09-1087-JCC.*
- BNSF represented K&L Gates LLP, Seattle, WA.

# Case Gone Bad

---



## *Puget Soundkeeper Alliance v. BNSF Railway Company*

Interesting defense strategy:

- BNSF hires stormwater consultant to evaluate offsite discharge of stormwater.
- BNSF terminates permit coverage
- BNSF files summary judgment seeking dismissal of the lawsuit.

# Case Gone Bad

---



## *Puget Soundkeeper Alliance v. BNSF Railway Company*


- Soundkeeper places dye.
- Court denies BNSF's motion for summary judgment.
- Soundkeeper amends complaint.

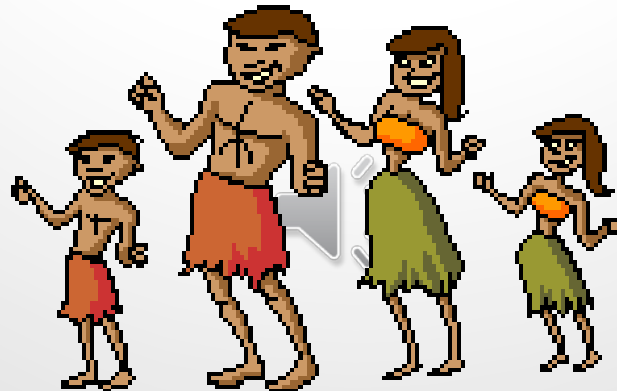
# Case Gone Bad

---



## *Puget Soundkeeper Alliance v. BNSF Railway Company*

- How did it all work out?
- Not well if you are BNSF 
- But it was a happy dance for Soundkeeper



# Case Gone Bad

---



## *Puget Soundkeeper Alliance v. BNSF Railway Company*

- Settlement:
  - Payment in lieu of penalty:
    - \$1.5M to the Rose Foundation for Communities and the Environment
    - \$1M in fees and costs.





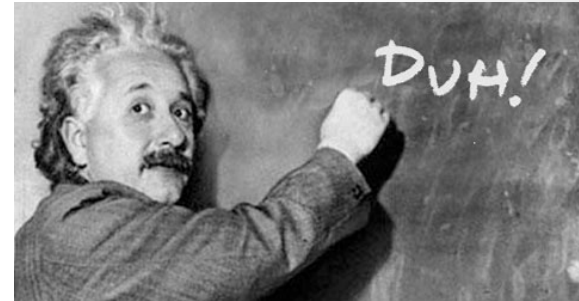
# Clean Water Act Citizen Suits

---



What can my client do to avoid getting sued?

- Depends on your permit.
  - Effluent limits.
  - Benchmarks.
- File your DMRs and Annual Reports on a timely basis
- Maintain a SWPPP that includes all elements in the permit & implement
- Implement timely and effective corrective actions



# Clean Water Act Citizen Suit

---



What if my client does everything right and still gets a Notice of Intent to Sue letter?

- Act quickly within the 60-day notice period!
  - Identify your compliance gaps and remedy
- Barring full compliance, consider defenses
  - Standing
  - Rule 68 Offer of Judgment
  - Wholly past violations

# Clean Water Act Citizen Suit

---



If Defenses are not a slam-dunk



Settle Quickly!

# Clean Water Act

---



Where are we headed?

- Every Permit is Litigated
- Third Parties are driving the process
- Cost of compliance continuing to increase
- Ecology Enforcement rather than Citizen Suits
- Area wide treatment?
- Should we address the biggest issues first:  
municipal stormwater?

# Stormwater and Remediation

---



- What stormwater requirements apply when conducting a remediation?
  - Disturb more than 1 acre: Construction Stormwater General Permit and Local Rules/Regulations.
  - Disturb less than 1 acre: Local Rules/Regulations.
- Seattle:
  - Grading Code (triggered if grading more than 4 feet and 50 cy or > 500 cy);
  - Stormwater Code; and
  - Director's Rules on Source Control, Technical Requirements, Flow Control, and Water Quality Treatment.

# Stormwater Infiltration

---



- No Permit Needed for Industrial facilities that *discharge stormwater* only to groundwater.
- UIC Well – Need to comply with Underground Injection Control Regulations
- On-site infiltration: Need to comply with local regulations, like King County's Surface Water Design Manual, available at <http://www.kingcounty.gov/environment/waterandland/stormwater/documents/surface-water-design-manual.aspx>