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The 5th Annual Minnesota Environmental Institute

WATER UPDATE

April 23, 2009

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Voters Adopt Clean Water Funding Amendment

- Sales tax increase of three-eighths of one percent for 25 years
- Dedicates 33 percent of the funds to a clean water fund in the state treasury, which may be spent only to protect, enhance, and restore water quality in lakes, rivers, and streams and to protect groundwater from degradation
- At least 5 percent of the clean water fund must be spent only to protect drinking water sources
- Money must be appropriated by legislature and must supplement traditional sources of funding

Minn. Const., art. XI, § 15.

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Supreme Court Approves Cost-Benefit Analysis for Cooling Water Intakes

§ 316(b) of the CWA

- Authorizes EPA to compare costs with benefits in determining the "best technology available for minimizing adverse environmental impact"
- "Impingement and Entrainment"

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Supreme Court Hears Arguments on Regulation of Mining Waste

CWA §§ 301 and 306

"Fill Material"

CWA §§ 402 and 404

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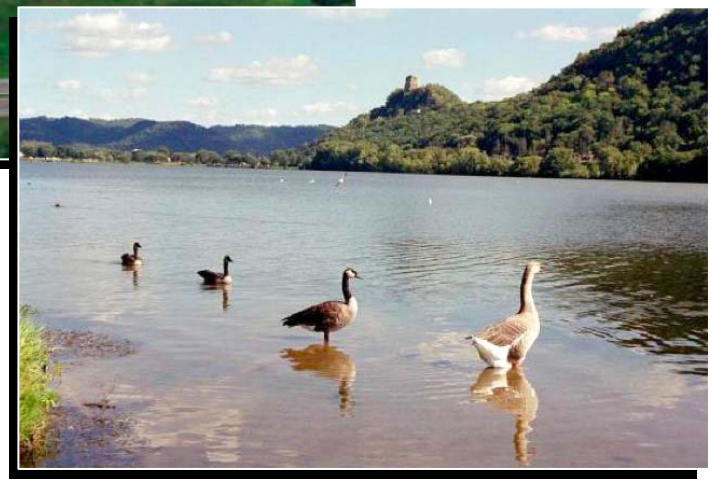
Minnesota Supreme Court Upholds MCPA Effluent Limitations in Absence of TMDL



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EPA and COE Issue Revised Guidance on CWA Jurisdiction

How to Define a Wetland

By a vote of 5 to 4, the Supreme Court found that regulators may have gone too far in in trying to thwart the plans of two Michigan property owners who have sought to develop tracts designated as wetlands. But the justices failed to form a majority on the broader issue of how the government defines a wetland.

PLURALITY

Alito Roberts Scalia Thomas Kennedy

Government can regulate land that is adjacent to a "relatively permanent body of water" and has a "continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins."

FROM THE OPINION BY JUSTICE ANTONIN SCALIA

DISSENTERS

Breyer Ginsburg Souter Stevens

Government's reach extends to wetlands adjacent to "all identifiable tributaries that ultimately drain into large bodies of water," even temporary ponds and manmade drains.

FROM THE OPINION BY JUSTICE JOHN PAUL STEVENS

Agreed with the plurality to return the two cases to lower courts for further deliberation but disagreed that only "permanent bodies of waters" are subject to regulation. Also said that remote tributaries that have a "significant nexus" to a navigable waterway can be protected.

The New York Times

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EPA and COE Issue Revised Guidance on CWA Jurisdiction

§ 404 of the CWA

Major differences between the revised guidance and 2007 guidance are that the revised guidance:

1. Clarifies how to determine the reach of the “Traditional Navigable Waters (TNWs)”
2. Clarifies the regulatory term “adjacent wetlands”
3. Refines the concept of “relevant reach”

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Federal Courts Address Jurisdiction Post-*Rapanos*

"In its short life, *Rapanos* has indeed satisfied any 'bafflement' requirement."

United States v. Robison, 505 F.3d 1208 (11th Cir. 2007)

United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009)

United States v. Bailey, 556 F. Supp. 2d 977 (D. Minn. 2008)

Bailey v. Minnesota Pollution Control Agency,
No. A07-2255 (Minn. Ct. App. Nov. 4, 2008)

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Ninth Circuit Rules Jurisdictional Finding Not Reviewable

Fairbanks N. Star Borough v. United States Army Corps of Engineers, 543 F.3d 586 (9th Cir. 2008), *petition for cert. filed*, (U.S. Feb. 13, 2009) (No. 08-1052)

Jurisdictional determination "is not an action . . . by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"

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Oberstar Authors Jurisdictional Legislation

Clean Water Restoration Act, H.R. 2421 (110th Congress)

Amending the CWA to change the term "*navigable waters of the United States*" to read "*waters of the United States*."

Further defined to include "all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, *to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.*"

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EPA and COE Issue Revised Definition of "Discharge of Dredged Material"

Revision to Tulloch II rule

The revision relieves the potentially regulated party from proving in every case that the activity results in only incidental fallback, but the lack of a definition also places more discretion in the hands of the COE.

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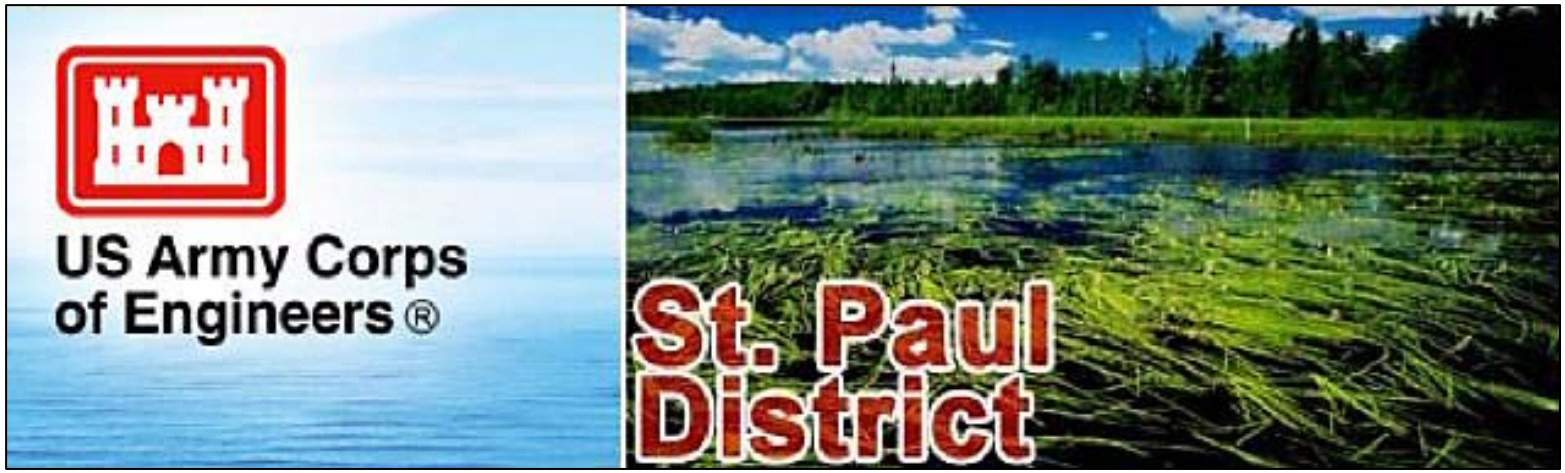
COE St. Paul District Issues Final Policy for Wetland Mitigation



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BWSR to Hold Hearings on Revised Wetland Conservation Act Rules

- Eliminate existing two wetland credit system and replace it with a single credit system in which all replacement actions are allocated one type of credit.
- Simplify determining wetland replacement ratios and establish an incentive-based wetland replacement system that establishes a preference for replacement through wetland banking.
- Require financial assurance for all wetland replacement that is not conducted before the proposed impact, unless local government waives the requirement if it determines it is not necessary to ensure successful replacement.
- Modify the actions eligible for credit to include: (1) establishing an upland buffer requirement for all replacement wetlands; (2) consolidating three different types of wetland creations into a single provision; and (3) allowing replacement credit for wetland preservation on state or local government land in greater than 80% areas of the state.

August 5, 2009 Deadline

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New EPA Rule, Bypassing Permit Requirement, Took Effect August 12, 2008

73 Fed. Reg. 33708 (June 13, 2008)
(to be codified at 40 C.F.R. pt. 122.3(i))

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Water Transfer Rule Immediately Challenged: Briefing Schedule Set

Friends of the Everglades v. United States Envtl. Prot. Agency, No. 08-13652-C (11th Cir. filed June 27, 2008)

Catskills Mountains Ch. of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77 (2d Cir. 2006), *cert. denied*, 549 U.S. 1252 (2007)

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Courts and Agencies

Strengthen Ballast

Water Regulation

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New EPA Rule Revises CAFO Permit Requirements

Certification of no discharge is available if:

1. Production area design, construction, operation, and maintenance are designed for no discharge;
2. A nutrient management plan is in place;
3. Supporting documentation is kept onsite.

73 Fed. Reg. 70418-86 (Nov. 20, 2008) (amending 40 C.F.R. pts. 9, 122, and 412)

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EPA Proposes New Rule for Runoff from Construction Sites

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Minnesota Revises General NPDES Stormwater Permits

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Sixth Circuit Vacates EPA Rule, Requires Permit for Pesticides

A permit is required in two particular situations even when pesticides are applied in compliance with FIFRA:

1. When pesticides are applied to land or air, and the overspray enters a water body;

2. When pesticides are applied to water, and some residue remains after application.

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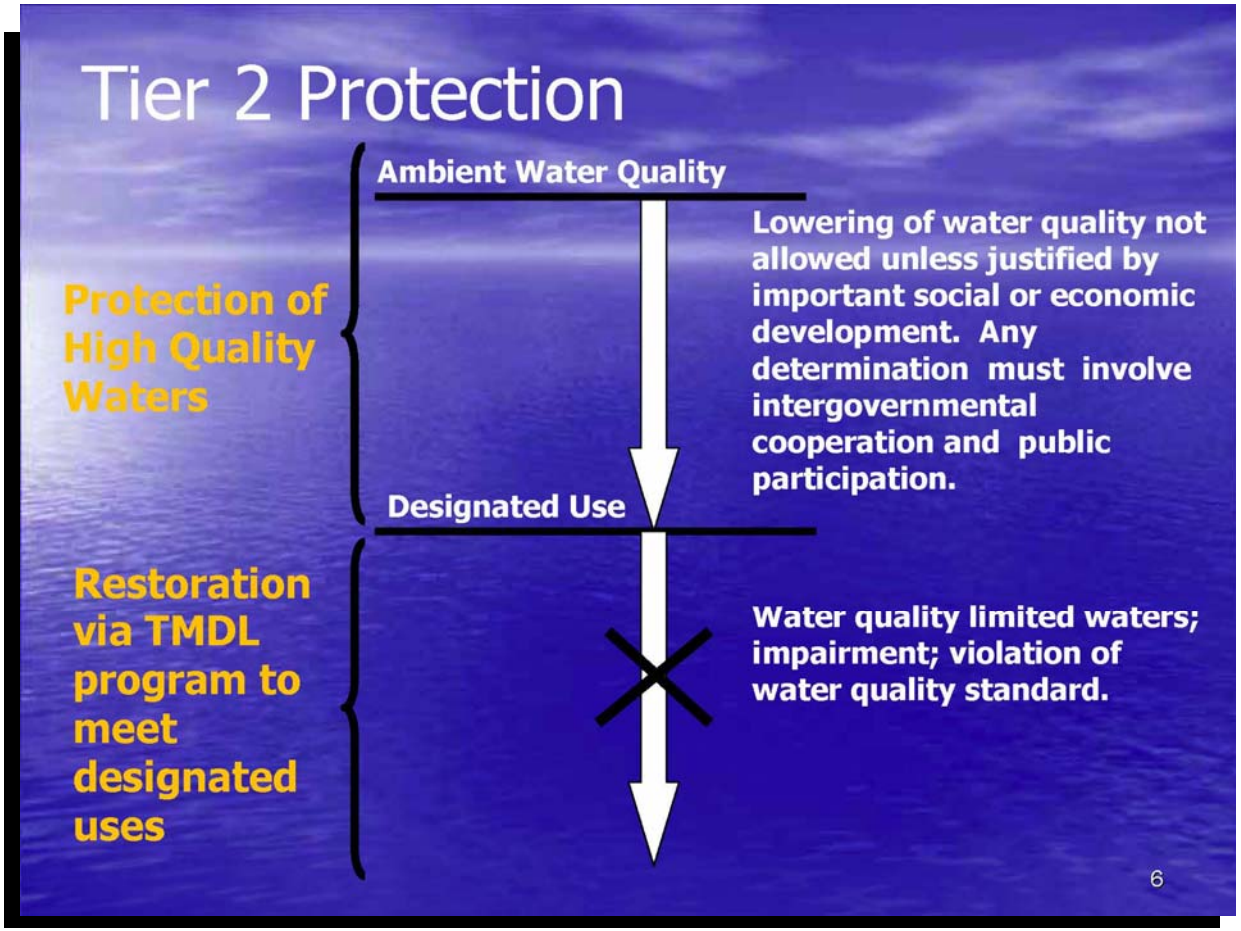
Coming:

Amended MPCA Rules on Nondegradation of Waters



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