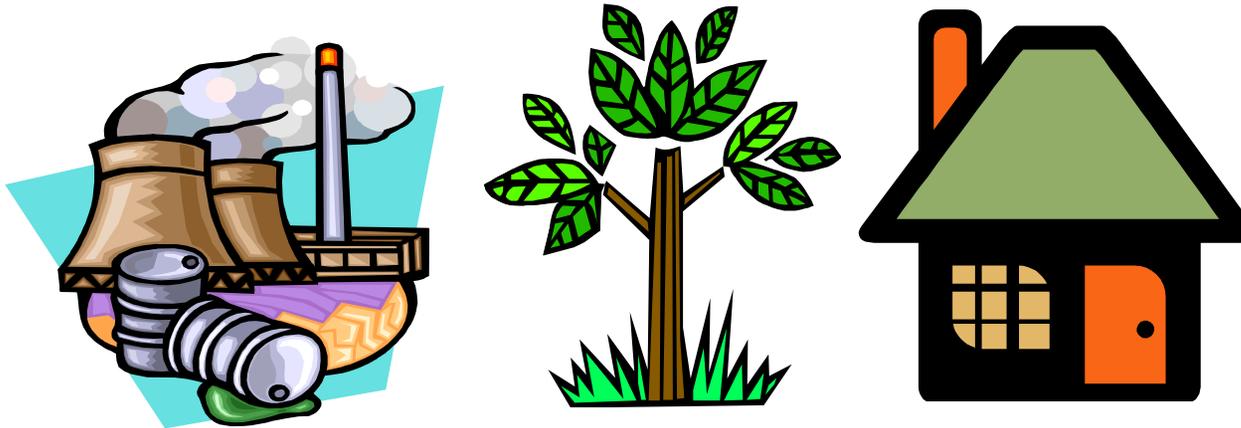


ENVIRONMENTAL ISSUES IN BANKRUPTCY AFFECTING REAL ESTATE AND BUSINESS VALUATION, TRANSACTIONS AND PERMITTING

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WHO IN BANKRUPTCY NEEDS TO KNOW OF ENVIRONMENTAL ISSUES?

- Debtors, petitioners, trustees, receivers, creditors and counsel
- Vendees, vendors, accountants, appraisers and brokers
- Landowners, easement holders, landlords and tenants
- Lenders, borrowers, mortgagees, and guarantors
- Auctioneers and real estate, business and asset bidders
- Bankruptcy Court judges

WHAT CAN ENVIRONMENTAL ISSUES AFFECT IN BANKRUPTCY?

- Valuation of real estate, personal property, businesses and other assets
- Nature and amounts of legal liabilities and governmental regulatory responsibilities
- Transaction structures and selections of business entities
- Site cleanup options, relative costs, construction activities, and business disruption or displacement
- Regulatory compliance strategy, costs, tactics and timetable
- Property development potential; business permit prospects
- Prospects for future land uses and business expansions

WHY DO ENVIRONMENTAL ISSUES HAVE THESE EFFECTS?

A bankruptcy petition does not relieve the debtor of obligations to comply with environmental standards.

US v. Hansen, 262 F.3d, 1217 (11th Cir.2001)

Anyone in possession of the site whether debtor, receiver, vendee, or bankruptcy trustee must comply with environmental laws of the state.

Midlantic v. NJ DEP, 474 US 494 (1986)

Government suits, actions and proceedings for fraud, safety, environmental protection, consumer protection, or similar police or regulatory laws, or to fix damages for such violations of law, are not automatically stayed.



WHAT DO BANKRUPTCY COUNSEL NEED TO KNOW?

Environmental Laws from A to Z
Due Diligence in Real Estate/Business

The Four Ws

Waste Wetlands

Water Wildlife

What's Next in Climate Change,
Energy Efficiency, and Green Building

ENVIRONMENTAL LAWS from A to Z

- Agriculture/Animal Feedlots
- Air Pollution
- Archeological Resources
- Brownfields
- Climate Change
- Coastal Zone
- Common Law
 - Nuisance
 - Negligence
 - Trespass
- Conservation Restrictions/Easements
- Dams/Reservoirs
- Drinking Water
- Earth Removal
- Emergency Management
- Eminent Domain/Condemnation
- Endangered Species
- Energy Efficiency/Conservation
- Energy Facility Siting
- Energy Transmission
- Environmental Impact Studies
- Erosion/Sedimentation Control
- Farms, Farming and Farmland
- Fish and Game
- Fisheries and Shellfish
- Floodplains
- Forests and Trees
- Ground water

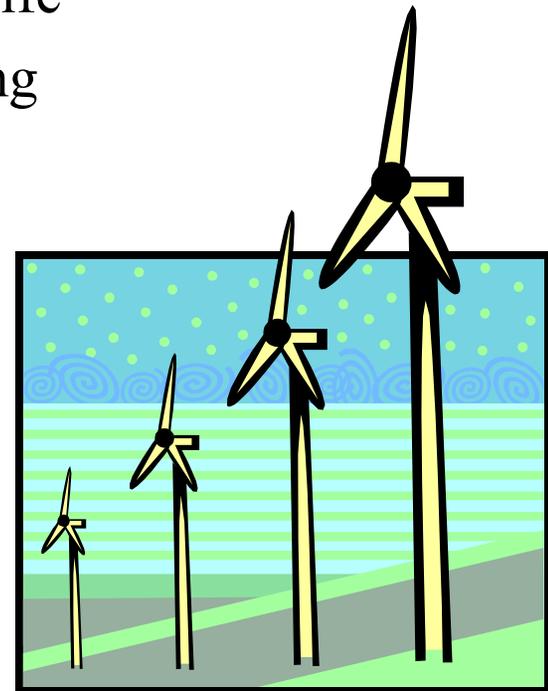
ENVIRONMENTAL LAWS from A to Z

(Cont'd)

- Hazardous and Toxic Materials/Costs
- Hazardous Waste Cleanups/Costs
- Hazardous Waste Management
- Historic and Cultural Sites/Structures
- Housing Policy/Projects
- Indoor Pollution
 - Lead Paint
 - Radon
 - Urea Formaldehyde Insulation
 - No Smoking
 - Asbestos
 - Mold
 - Sick Buildings
- Mining and Minerals
- Outdoor Pollution
 - Noise
 - Lighting
 - Blasting
 - Odors
 - Vibration
- Open Space
- Parklands and Reservations
- Pesticides
- Petroleum Products
- Public Lands and Water Areas
- Radioactive Materials
- Regulatory Takings
- Scenic Resources

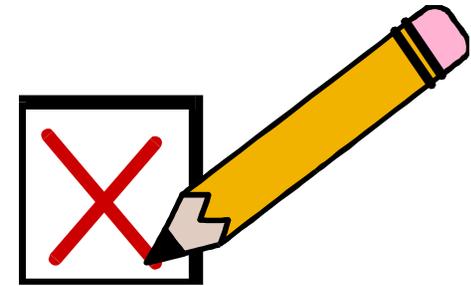
ENVIRONMENTAL LAWS from A to Z (Cont'd)

- Sewage and Septic Systems
- Smart Growth
- Solid Waste Facilities/Siting
- Solid Waste/Cleanup
- Storage Tanks
- Stormwater
- Streets, Roads and Highways
- Subdivision Control
- Taxation
- Telecommunications
- Tidelands and Waterways
- Toxic Substances
- Water Bodies
- Water Supply
- Water Pollution
- Water Rights
- Wetlands
- Wilderness
- Wildlife
- Zoning



DUE DILIGENCE FOR REAL ESTATE AND BUSINESS

1. Property Assessment
2. Title Review
3. Uses/Operations/Utilities/Zoning
4. Waste Handling/Disposal/Releases/Contamination
5. Wetlands/Floodplains/Water Bodies/Stormwater
6. Wildlife/Endangered Species
7. Documentation/Deeds/Easements/Permits/Plans
8. Neighborhood and Community Relations/Impacts
9. Federal, State and Local Regulatory Compliance
10. Litigation History/Pending Claims/Enforcement



PROPERTY ASSESSMENT

- ✓ Property Designation, Parcels and Location
- ✓ Legal Description and Recorded Plans/Tax Records
- ✓ Past, Present and Proposed Uses
- ✓ Recent History (including proposals to develop or use)
- ✓ Water, Sewer and Electric Utilities Available
- ✓ Wetlands and Surface Waters on and near the Property
- ✓ Stormwater Discharges to or from the Property
- ✓ Tidelands, Waterways and Floodplains on or near Site
- ✓ Wildlife and Designated Habitats on or near Site

PROPERTY ASSESSMENT

(Cont'd)



- ✓ Special Flora or Fauna on Property (with special attention to Rare, Threatened, or Endangered)
- ✓ All Topography, Soils, Bedrock, Crops, Forests, Minerals
- ✓ Steep Slopes, Flood Prone Areas, Dams on or near Site
- ✓ All Landmarks, Historic Structures, or Archeological Sites
- ✓ Survey of Property to Show Current Conditions

INFRASTRUCTURE AND UTILITIES

- ✓ Examine structural integrity and capacity of roads, bridges, water supply, sewage disposal, stormwater, gas, electric and telecommunications
- ✓ Determine if necessary new services or transmission facilities are available
- ✓ Examine sewage or septic system, and operational permits and reports
- ✓ Examine public or private water supply and any needed new well, surface supply or connection



ZONING AND GENERAL BYLAWS



✓ Obtain certified copy of current, complete zoning as well as general bylaws or ordinances and related maps, forms and guidelines

✓ Height limits, density limitations, building bulk, minimum lot size, lot coverage, building footprint, floor area, setbacks, parking and loading requirements, landscape standards, street and sidewalk improvement standards, design review standards, signage rules, open space, demolition delay, moratoria, grandfathered uses and buildings, and historic districts

✓ Ensure there is sufficient time allowed to obtain necessary zoning and non-zoning opinions, variances, special permits, findings, subdivision approvals, ANRs, or other rulings, and resolve any claims or appeals

REGULATORY COMPLIANCE

- ✓ Identify applicable federal, state and local laws, rules and regulations as well as guidelines and other requirements
- ✓ Copies of all current and pending permits, plans, certificates, registrations and approvals regarding environmental matters
- ✓ Copies of all correspondence and inquiries to and from any governmental agencies during the past three years
- ✓ Material reports filed with government agencies pursuant to environmental laws
- ✓ Any legal opinions or recommendations concerning compliance with environmental laws or potential liabilities





FOUR Ws

✚ There are four areas of environmental, law where cleanup obligations, regulatory compliance, legal liabilities, permit requirements, agency standards, land use constraints, or site conditions can be fatal to asset values, building timetables, getting permits, finding capital, development expectations, property transfers, or projected profits.

✚ **Waste**

✚ **Wetlands**

✚ **Water**

✚ **Wildlife**

WASTE



PROPERTY CONTAMINATION



- These words can spook buyers, sellers, lenders, investors, donors, heirs, landlords, tenants, brokers, trustees, and other fiduciaries.
- Potential real estate buyers and developers disappear with signs of hazardous waste, other contamination, or extensive violations.
- Industry executives and managers think of retiring early faced with daunting governmental enforcement or extensive litigation.
- Business expansions, mergers or acquisitions are cancelled for fear of discovering or disturbing waste on site or buying bad sites.
- Government agencies acquiring property by purchase, eminent domain, condemnation, tax title, or gift get cold feet and back off.

FEAR OF CONTAMINATION IS REASONABLE AND LOGICAL

- Federal and state Superfund laws impose a new type of strict, joint and several, retroactive, and future liability.
- Upon past, present and future owners or operators of real property where hazardous substances were or are released.
- Upon those who arranged for transportation, storage, treatment or disposal of hazardous substances
- Innocent landowners can be liable for contaminated land even if unaware of contamination at the time of acquisition (even if past contamination was legal at the time).
- Some qualified liability exemptions for lenders, trustees, fiduciaries, good faith purchasers, and government involuntary acquisitions (eminent domain, condemnation)

FORTUNATELY MOST CONTAMINATION IS MANAGEABLE

The presence of contamination need not render property unusable or unsellable

- Someone needs to take charge and manage the problems
- Contaminated real estate can be bought and sold without unreasonable fear of liability
- Parties to a transaction can find many ways to “hold the deal together”
- It is very possible to make money buying and selling dirty property



THE GOAL IS TO FIND THE CONTAMINATION

- It is naïve to buy a cheap assessment in the hope that it will be “clean”
- ASTM standards set a framework for conducting Phase I and Phase II environmental site assessments



DO CAREFUL SITE ASSESSMENTS

A properly done site assessment should include:

Permit and enforcement history

Prior waste disposal

Topography

Conditions of all
buildings and
structures

Geologic setting

Surface and
groundwater flows

Building and
utility layouts

Presence of tanks
and piping

Prior uses, industrial,
commercial or agriculture

STRUCTURE TRANSACTIONS TO REDUCE RISK

Decisions to purchase or develop land should be based on the nature and scope of contamination, anticipated cleanup costs, activity and use limitations, and potential future liability

- Control liability by timing and structuring the transaction
 - Delay the closing or acquisition until cleanup is complete
 - Deposit purchase money in escrow until the property or operation is clean
 - Personally do the cleanup, deducting costs from the purchase price
 - Contract cleanup duties between buyer and seller, using a formula
 - Agree that clauses survive the closing
- Postpone, limit or avoid liability by carving off the contaminated areas
 - Do not own or operate the dirty site, buy only the clean portion
 - Purchase or lease less than fee interest in property, such as an easement, the air rights, or the upper floors
 - Lease the clean parts of the site or building
 - Loan operating funds, taking back principal and interest

CONTRACT ESSENTIALS

Condition of property	Liability releases	Warranties and representations	Escrow deposits
Purchase money holdbacks	Government liaison	Purchase price adjustments	Contingencies about future claims
Management of the cleanup	Reimbursement formulas	Circulation of progress reports	Covenants not to sue
Government cleanup orders	Cooperation in defense	Cooperation on insurance claims	Arrangements against third party claims
			Cost-sharing arrangement



FEDERAL WASTE LAWS



- **Resources Conservation & Recovery Act (RCRA):**
 - Disposal of Solid/Hazardous Waste
- **Comprehensive Environmental Response Compensation & Liability Act (CERCLA):**
 - Clean-up Hazardous Waste Sites
- **Toxic Substance Control Act (TSCA):**
 - Introduction of New or Existing Chemicals

RCRA

- **Cradle to Grave:** regulates anyone who generates, transports, treats, stores, or disposes of hazardous waste
- **Landowner Liability**
 - **Hazardous Substances:** some courts have imposed liability on landowners for hazardous waste dumped on the property before their ownership.
 - Affirmative duty on purchasers either to investigate the property before purchase or to accept property as is, complete with cleanup responsibilities. See *U.S. v. Price*, 523 F.Supp. 1055 (D.N.J. 1981) and *U.S. v. Waste Industries*, 734 F.2d 159 (4th Cir. 1984)
 - **Underground Storage Tanks (USTs):** Requirements designed to prevent USTs from leaking hazardous wastes and petroleum products into the surrounding environment
 - 8 categories of standards to owners and operators of USTs:
 - Notification of Tank Existence
 - Leak Detection
 - Records Maintenance
 - Release Reporting
 - Corrective Action
 - Tank Closure
 - Financial Responsibility
 - Performance Standards for New Tanks



CERCLA



- Superfund
- Gives broad authority for the federal government to initiate “response actions” to address or remedy releases or threatened releases of hazardous substances into the environment.
- Potentially Responsible Parties (PRPs)
 1. **The current “owner or operator” of property** on which hazardous substances have been released (or threat)
 2. **A previous “owner or operator” of a contaminated property**, when such ownership or operation existed or occurred at the time the hazardous substances were disposed of, released or stored on the property.
 3. **The “person” who generates, owns or possesses the hazardous substances**, or the person who arranged for the transport of such substances to a property where contamination occurred (referred to as “generator” or “arranger” liability).
 4. **A person who accepted hazardous substances for transport** to a disposal or treatment facility from which there has been a release or contamination (“transporter” liability).

CERCLA (Cont'd)

Brownfields Revitalization Act



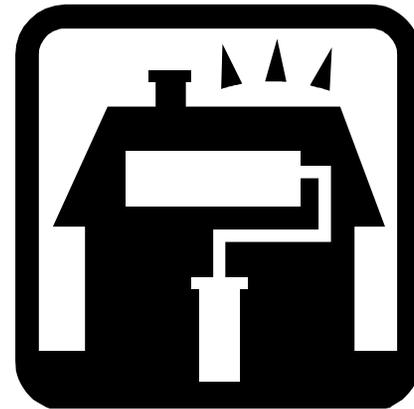
- **Brownfields Definition:** abandoned, idled, or underused industrial and commercial sites where expansion or redevelopment is complicated by real or perceived environmental contamination
- Brownfield Act amends CERCLA
- **Two main goals of Act:**
 - Encourages brownfield redevelopment by providing federal liability relief to prospective purchasers of brownfield properties and to persons who undertake cleanup of these properties under state law
 - Provides funding to both state brownfield programs and to local governments who seek to return brownfields to productive use
- **Bona Fide Prospective Purchaser**
 - To qualify for exemption purchaser must show:
 - Disposal of hazardous substance occurred prior to acquisition
 - Prior to acquiring property made inquiry about ownership and use of property
 - Provided all legally required notices with respect to discovery or release of hazardous substance
 - Exercised appropriate care with respect to hazardous substances found at facility
 - Provided full cooperation, assistance, and access to governmental or private parties performing response action
 - Complied with land use restrictions
 - Complied with government request for information
 - Has no corporate affiliation or family relationship with another person who is liable

TSCA

Controls substances that are determined to cause unreasonable risk to public health or the environment

- **Lead Based Paints**

- Disclosure Requirements: requires disclosure of information on lead-based paint and lead-based paint hazards before the sale or lease of most housing built before 1978.



- **PCB** – Regulates storage and disposal
 - “In or Near Commercial Buildings,” phase out or outright prohibition
 - Transformer Registration Requirement
 - Regulations on Servicing
 - Also regulates disposal and storage

STATE WASTE LAWS



- **Alabama**
 - Solid Waste Disposal Act – Ala. Code , § 22-27-7
 - Alabama Hazardous Wastes Management and Minimization Act of 1978 – Ala. Code, §§ 22-30-1
- **Alaska:**
 - Solid Waste Regulations - 18 AAC 60
- **Arizona:**
 - Solid Waste Management Act – Ariz. Rev. Stat. § 49-701 to 49-881
 - Hazardous Waste Disposal - Ariz. Rev. Stat. § 49-901 to 49-905
- **Arkansas:**
 - Arkansas Solid Waste Management Act – Ark. Code Ann. § 8-6-201 to 222
 - Arkansas Hazardous Waste Management Act of 1979 - Ark. Code Ann. § 8-7-201 to 277
- **California:**
 - Hazardous Waste Control - Cal. Health & Safety Code § 25100 to 25257.1
- **Colorado:**
 - Hazardous Waste Laws - Colo. Rev. Stat. Ann. § 25-15-101 to 104
 - State Hazardous Waste Citing Act – Colo. Rev. Stat. Ann. § 25-15-200 to 219
 - State Hazardous Waste Incinerator or Processor Siting Act – Colo. Rev. Stat. Ann. § 25-15-501 to 525
 - Pollution Prevention Act of 1992 - Colo. Rev. Stat. Ann. § 25-16.5-101 to 110
- **Connecticut:**
 - Solid Waste Management - Conn. Gen. Stat. Ann. § 22a-207 to 256ee
 - Solid Waste Management Services Act - Conn. Gen. Stat. Ann. § 22a-257 to 292
 - Hazardous Waste Management - Conn. Gen. Stat. Ann. § 22a-114 to 134
- **Delaware:**
 - Hazardous Substance Clean-up Act - & Del. Code. Ann. § 9101 to 9120

STATE WASTE LAWS



- **Florida:**

- Solid Waste Management Act – Fla. Stat. Ann. § 403.702
- Hazardous Waste - Fla. Stat. Ann. § 403.72

- **Georgia:**

- Georgia Hazardous Waste Management Act - Ga. Code Ann. § 12-8-60 to 12-8-83.
- Georgia Comprehensive Solid Waste Management Act - Ga. Code Ann. §§ 12-8-20 et seq.
- Regional Solid Waste Management Authorities Act - Ga. Code Ann. §§ 12-8-50 et seq.

- **Hawaii:**

- Solid Waste – Haw. Rev. Stat. § 342G, 342H
- Hazardous Waste – Haw. Rev. Stat. § 342J

- **Idaho:**

- Hazardous Waste Management Act - I.C. § 39-4401 to 4432
- Idaho Hazardous Substance Response Act - I.C. § 39-7101 to 7115
- Idaho Solid Waste Facilities Act - I.C. § 39-7401 to 7421

- **Illinois:**

- Hazardous and Solid Waste Recycling and Treatment Act - 30 Ill. Comp. Stat. 750/3-2

- **Indiana:**

- Solid Waste Management - Ind. Code §§ 13-20-1-1 to 13-20-24-4, 13-21-1-1 to 13-21-14-9
- Hazardous Waste Management- Ind. Code § 13-22-1-1 to 13-22-14-3

- **Kansas:**

- Solid and Hazardous Waste Act - Kan. Stat. Ann. § 65-3401

- **Kentucky:**

- Solid Waste - Ky. Rev. Stat. Ann. § 224.43-010 to 815
- Hazardous Waste - Ky. Rev. Stat. Ann. § 224.46-012 to 870

- **Louisiana:**

- Louisiana Hazardous Waste Control Law – La. Rev. Stat. Ann. § 30:2171
- Louisiana Waste Reduction Law - La. Rev. Stat. Ann. § 30:2291

STATE WASTE LAWS



- **Louisiana:**

- Solid Waste Recycling and Reduction Law - La. Rev. Stat. Ann. § 30:2411
- Louisiana Solid Waste Management and Resource Recovery Law - La. Rev. Stat. Ann. § 30:2151

- **Maine:**

- Maine Hazardous Waste, Septage and Solid Waste Management Act -Me. Rev. Stat. Ann. Tit. 38 § 1301.

- **Maryland:**

- Hazardous Materials and Hazardous Substances - Md. Code Ann., Envir. § 7-101 to 709

- **Massachusetts:**

- Hazardous Waste Management Act - M.G.L. c. 21C § 4
- Hazardous Waste Facility Siting Act - M.G.L. c. 21D § 1
- Oil & Hazardous Material Release Prevention Act - M.G.L. c. 21E § 1
- Solid Waste Facilities - M.G.L. c. 21H § 1

- **Michigan:**

- Hazardous Waste Management Act -Mich. Comp. Laws Ann. § 324.11101 to 324.11153
- Solid Waste Management Act - Mich. Comp. Laws Ann. § 324.11501 to 324.11550

- **Minnesota:**

- Waste Management Act - Minn. Stat. Ann. § 115A.01

- **Mississippi:**

- Solid Waste Disposal Law - Miss. Code Ann. § 17-17-27
- Nonhazardous Solid Waste Planning Act of 1991 - Miss. Code Ann. § 17-17-201
- Mississippi Regional Solid Waste Management Authority Act - Miss. Code Ann. § 17-17-301
- Mississippi Hazardous Waste Facility Siting Act of 1990 - Miss. Code Ann. § 17-18-1

STATE WASTE LAWS



- **Missouri:**

- Missouri Hazardous Waste Management Law - Mo. Ann. Stat. §§ 260.350 to 260.430
- Solid Waste Management Law - Mo. Ann. Stat. §§ 260.200 to 260.255

- **Montana:**

- Montana Hazardous Waste Act - Mont. Code Ann. § 75-10-401
- Montana Solid Waste Management Act – Mont. Code Ann. § 75-10-201

- **Nebraska:**

- Integrated Solid Waste Management - Neb. Rev. Stat. § 13-2002
- Hazardous Waste - Neb. Rev. Stat. §§ 81-1521.08 to 81-1521.23

- **Nevada:**

- Collection and Disposal of Solid Waste - Nev. Rev. Stat. Ann. §§ 444.440 to 444.620
- Hazardous Materials - Nev. Rev. Stat. Ann. §§ 459.380 to 459.930

- **New Hampshire:**

- Hazardous Waste Management Program - N.H. Rev. Stat. Ann. § 147-A:1 to 147-A:20
- Solid Waste Disposal and Management - N.H. Rev. Stat. Ann. § 147:43 to 147:45, §149-M:1 to 149-M:31

- **New Jersey:**

- Solid Waste Management Act – N.J. Stat. Ann. § 13:1E-1
- Hazardous Waste - N.J. Stat. Ann. § 13:1E-40

- **New Mexico:**

- Hazardous Waste Act - N.M. Stat. § 74-4-2
- Solid Waste Act – N.M. Stat. § 74-9-1

- **New York:**

- Industrial Hazardous Waste Management - N.Y. Env'tl. Conserv. Law §§ 27-0900 to 27-0926
- Litter and Solid Waste Control - N.Y. Env'tl. Conserv. Law §§ 27-1001 to 27-1019

STATE WASTE LAWS



- **North Carolina:**

- Solid and Hazardous Waste Management - N.C. Gen. Stat. Ann. § 130A-291
- Solid Waste Management Act of 1989 - N.C. Gen. Stat. Ann. § 130A-309.01
- Brownfields Property Reuse Act of 1997 - N.C. Gen. Stat. Ann. § 130A-310.30

- **North Dakota:**

- Hazardous Waste Management - N.D. Cent. Code § 23-20.3-01
- Solid Waste Management and Land Protection - N.D. Cent. Code § 23-29-01

- **Ohio:**

- Solid and Hazardous Wastes - Ohio Rev. Code Ann. §§ 3734.01 to 3734.99

- **Oklahoma:**

- Oklahoma Hazardous Waste Management Act - Okla. Stat. Ann. Tit. 27A § 2-7-102
- Oklahoma Solid Waste Management Act - Okla. Stat. Ann. Tit. 27A § 2-10-101

- **Oregon:**

- Toxic Use Reduction and Hazardous Waste Reduction Act - Or. Rev. Stat. §§ 465.003 to 465.034
- Solid Waste Management - Or. Rev. Stat. §§ 459.005 to 459.995

- **Pennsylvania:**

- Solid Waste Management Act - 35 Pa. Stat. Ann. § 6018.101
- Hazardous Sites Cleanup Act - 35 Pa. Stat. Ann. § 6020.101

- **Rhode Island:**

- Hazardous Waste Management Act - R.I. Gen. Laws § 23-19.1-1 § 23-19.8-1
- Hazardous Waste Cleanup Good Samaritan Act - RI Gen. Laws
- Resource Recovery Corporation Act - R.I. Gen. Laws § 23-19-1
- Industrial Property Remediation and Reuse Act - R.I. Gen. Laws § 23-19.14-1

STATE WASTE LAWS



- **South Carolina:**

- Hazardous Waste Management Act - S.C. Code Ann. § 44-56-20
- Solid Waste Policy and Management Act - S.C. Code Ann. § 44-96-10

- **South Dakota:**

- Hazardous Waste Management - S.D. Codified Laws § 34A-11-1
- Solid Waste Management - S.D. Codified Laws § 34A-6-1.1

- **Tennessee:**

- Solid Waste Disposal Act - Tenn. Code Ann. § 68-211-101
- Hazardous Waste Management Act - Tenn. Code Ann. §§ 68-212-101, 68-212-201

- **Texas:**

- Solid Waste Disposal Act - Tex. Health & Safety Code Ann. § 361.001
- Hazardous Substances - Tex. Health & Safety Code Ann. § 501.001

- **Utah:**

- Solid and Hazardous Waste Act - Utah Code Ann. § 19-6-101
- Hazardous Waste Facility Siting Act - Utah Code Ann. § 19-6-201
- Hazardous Substance Mitigation Act - Utah Code Ann. § 19-6-301
- Solid Waste Management Act - Utah Code Ann. § 19-6-501
- Voluntary Cleanup Program – Utah Code Ann. § 19-8-101

- **Vermont:**

- Waste Management - Vt. Stat. Ann. Tit. 10, § 6601
- Toxic Use Reduction and Hazardous Waste Reduction - Vt. Stat. Ann. Tit. 10, § 6623
- Brownfields Reuse and Environmental Liability Limitations - Vt. Stat. Ann. Tit. 10, § 6641

STATE WASTE LAWS

- **Virginia:**

- Virginia Waste Management Act - Va. Code Ann. § 10.1-1400

- **Washington:**

- Solid Waste Management-Reduction and Recycling - Wash. Rev. Code Ann. § 70.95.010
- Hazardous Waste Management - Wash. Rev. Code Ann. § 70.105.005
- Hazardous Waste Cleanup-Model Toxics Control Act - Wash. Rev. Code Ann. § 70.105D.010

- **West Virginia:**

- Solid Waste Management Act - W. Va. Code R. § 22-15-1
- Hazardous Waste Management Act - W. Va. Code R. § 22-18-1
- Voluntary Remediation and Redevelopment Act - W. Va. Code R. § 22-22-1

- **Wisconsin:**

- Solid Waste Reduction, Recovery and Recycling - Wis. Stat. § 287.01
- Hazardous Waste Management - Wis. Stat. § 291.001

- **Wyoming:**

- Solid Waste Management - Wyo. Stat. Ann. § 35-11-501
- Integrated Solid Waste Planning - Wyo. Stat. Ann. § 35-11-1901



WETLANDS AND FLOODPLAIN LAW



WILL THE WORK AFFECT A PROTECTED RESOURCE?

Protected Resources Include:

WETLANDS = areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support (and normally does support) prevalent vegetation typical of saturated soil conditions (33 CFR § 328 (b))

- Vegetated Wetlands (marshes, swamps, bogs)
- Coastal Wetlands (salt marshes, tidal flats, estuaries, dunes, beaches)

FLOODPLAINS

- Areas Prone to Flooding
- Areas Affected by the Tide or Coastal Flowage



CAUTION: Working definitions of wetlands and floodplains are merely rules of thumb and may vary between different statutes and bylaws.

OTHER WATER RESOURCES

- Rivers, Streams, Lakes, Ponds, Ocean

DOES THE PROJECT AFFECT PUBLIC INTERESTS IN THE RESOURCES?

- Flood Control
- Recreation
- Storm damage prevention
- Agriculture
- Shellfish
- Public or private water supply
- Preventing pollution
- Navigation
- Fisheries
- Ground water supply
- Aquaculture
- Wildlife and its habitat
- Other

Example: In English, wetlands are natural sponges.

Wetlands store surface water and release it during times of low flow. They absorb flood waters and reduce damage elsewhere.

They are also natural food factories and produce nutrients.

They are also natural housing.



FEDERAL WETLANDS AND FLOODPLAIN PROTECTION



- 1. Army Corps of Engineers Section 404 Permits**
- 2. Rivers and Harbors Act 1899**
 - ✚ Regulates dredging, structures and water course changes (§ § 9, 10, 13)
- 3. Executive Orders on Wetlands and Floodplains**
- 4. FEMA Flood Insurance Program**
- 5. Clean Water Act Stormwater Regulations**
- 6. Superfund/ Brownfields**
- 7. Endangered Species Act**

JURISDICTIONAL WETLANDS

“WATERS OF THE UNITED STATES”

EPA Post *Rapanos* Guidance

- **Jurisdictional Waters:**
 - Traditional navigable waters
 - Wetlands adjacent to traditional navigable waters
 - Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries flow year-round or have continuous flow at least seasonally (e.g., typically three months)
 - Wetlands that directly abut such tributaries



JURISDICTIONAL WETLANDS

“WATERS OF THE UNITED STATES” (Cont’d)

- **Jurisdiction based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:**
 - Non-navigable tributaries that are not relatively permanent
 - Wetlands adjacent to non-navigable tributaries that are not relatively permanent
 - Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary
- **Significant Nexus Analysis:**
 - Assesses the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters - includes consideration of hydrologic and ecologic factors



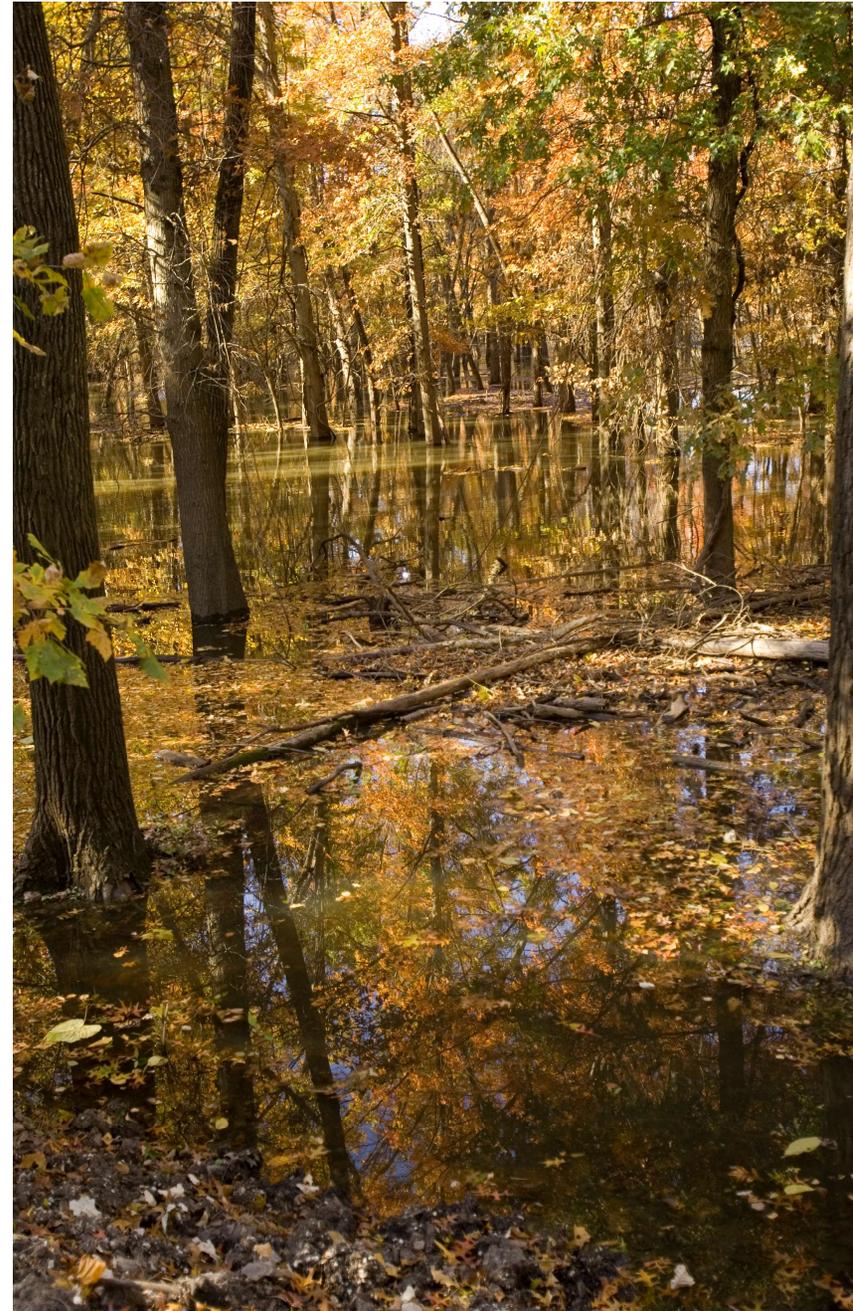
§ 404 PERMITS



- **No discharge of dredged or fill material may be permitted if:**
 - A practicable alternative exists that is less damaging to the aquatic environment; or
 - The nation’s waters would be significantly degraded.
- **Must show that you have:**
 - Taken steps to avoid wetland impacts;
 - Minimized potential impacts on wetlands; and
 - Provided compensation for any remaining unavoidable impacts.
- **Permit Exemptions §404(f):**
 - Routine, ongoing farming, ranching, forestry activities
 - Plowing, seeding, cultivating, harvesting food, fiber, and forest products
 - Upland soil and water conservation practices
 - Construction and maintenance of irrigation ditches, farm, stock ponds, farm and forest roads (best management practices)
 - Maintenance of structures, such as dams, dikes, and levees, drainage ditches

§ 404 PERMITS (Cont'd)

- **Two Permits:**
 - Individual - potentially significant impacts
 - Process: Standard permit application form, notice and comment, interagency consultation, “Public Interest” review
 - General - minimal adverse effects
 - issued on a nationwide regional, or State basis for particular categories of activities
 - Valid for 5 years
- **State Water Quality Certification:**
 - §401: permit applicant must have water quality certification from state indicating that proposed activity will comply with state water quality criteria
- **EPA Veto:**
 - §404(c): “unacceptable adverse effect on municipal water supplies, shellfish beds and fishery area...wildlife, or recreational areas.”



RECENT CHANGES TO WETLAND POLICY



- In 2009 the Obama administration called on Congress to clarify the Clean Water Act’s scope. The Environment and Public Works Committee responded with a bill that replaces the phrase “navigable waters” with “waters of the United States” and “reaffirms Federal Jurisdiction over all waters of the United States, as the Clean Water Act was applied and interpreted” prior to *SWANCC* and *Rapanos*.

STATE WETLAND/FLOODPLAIN LAW



❖ Alabama:

- Coastal Area Management Act – Ala. Code §§ 9-7-10 to 9-7-22

❖ Alaska:

- Coastal Management Act - Alaska Stat. §§ 46.39 & 46.40
- Alaska Land Act - Alaska Stat. §§ 38.05.070 to 075

❖ California:

- Coastal Act - Cal. Pub. Res. Code §§ 30000 to 30900.

❖ Connecticut:

- Inland Wetlands and Watercourses Act - Conn. Gen. Stat. Ann. §§ 22a-36 to 22a-45
- Tidal Wetlands Act - Conn. Gen. Stat. Ann. §§ 22a-28 to 22a-35
- Connecticut Coastal Management Act – Conn, Gen, Stat. Ann. §§ 22a-90 to 22a-112
- Coastal Structure and Dredging Act – Conn. Gen. Stat. Ann. §§ 22a-359 to 22a-363f

❖ Delaware:

- Wetlands Act -Del. Code Ann. tit. 7, §§ 6601 to 6620
- Beach Preservation Act - Del. Code Ann. tit. 7, §§ 6801 to 6812
- Coastal Zone Act - Del. Code Ann. tit. 7, §§ 7001 to 7013

❖ Florida:

- Beaches and Shores Preservation Act – Fla. Stat. §§ 161.001 to 161.45
- Coastal Zone Protection Act – Fla. Stat. §§ 161.52 to 161.58
- Florida Environmental Reorganization Act of 1993 - Part IV of Ch. 373, Fla. Stat.
- Florida Air and Water Pollution Control Act - Ch. 403, Fla. Stat.

STATE WETLAND/FLOODPLAIN LAW



❖ Georgia:

- Coastal Marshlands Protection Act - Ga. Code Ann. §§ 12-5-280 to 12-5-297
- Shore Protection Act - Ga. Code Ann. §§ 12-5-230 to 12-5-248

❖ Hawaii:

- Coastal Zone Management Act - Haw. Rev. Stat. §§ 205A-1 to 205A-49

❖ Indiana:

- Wetland Regulations – 13 Ind. Admin. Code 18-22-1

❖ Iowa:

- Wetlands Act of 1990 – Iowa Code Ann. § 456B.1

❖ Louisiana:

- State and Local Coastal Resources Management Act - La. Rev. Stat. Ann. § 49:214.21 et seq
- Mitigation of Coastal Wetlands Losses - La. Rev. Stat. Ann. § 49:214.41

❖ Maine:

- Natural Resources Protection Act - Me. Rev. Stat. Ann tit. 38, §§ 480-A to 480-Z
- Mandatory Shoreline Zoning and Subdivision Control Act - Me. Rev. Stat. Ann tit. 38, §§ 435 to 447
- Natural Resources Protection Act - Me. Rev. Stat. Ann tit. 38, §§ 481 to 490
- Coastal Management Policies Act - Me. Rev. Stat. Ann tit. 38, §§ 1801 to 1803
- Coastal Barrier Resources System Act - Me. Rev. Stat. Ann tit. 38, §§ 1901 to 1905

❖ Maryland:

- Nontidal Wetlands Protection Act - Md. Nat. Res. Code Ann. secs. 16-1201
- Tidal Wetlands Act - Md. Envir. Code Ann. §§ 1-101 to 1-503
- Chesapeake Bay Critical Area Act - Md. Nat. Res. Code Ann. secs. 8-1801-1816
- Coastal Facilities Review Act - Md. Envir. Code §§ 14-501 to 14-511

STATE WETLAND/FLOODPLAIN LAW



❖ Massachusetts:

- Wetlands Protection Act – G.L. c. 131, §§ 40, 40A
- Coastal Wetlands Restriction Act – G.L. c. 130, § 105
- Inland Wetlands Restriction Act – G.L. c. 131, § 40A
- Public Waterfront Act - MGL c. 91
- Coastal Zone Management Laws – G.L. c. 6A, § 2-7; c. 21A, § 4A

❖ Michigan:

- Wetland Protection Act – Mich. Comp. Laws Ann. § 324.30301 et seq
- Shorelands Protection and Management – Mich. Comp. Laws Ann. § 324.32301 et seq

❖ Minnesota:

- Wetland Conservation Act - Minn. Stat. Ann. § 103G.221 to 103G.2372

❖ Mississippi:

- Coastal Wetlands Protection Act - Miss. Code Ann. §§ 49-27-1 to 49-27-71
- Marine Resources Law - Miss. Code Ann. §§ 57-15-1 to 57-15-17

❖ New Hampshire:

- Fill and Dredge in Wetlands - N.H. Rev. Stat. Ann. §§ 482-A:1
- Surface Water Permit Program - N.H. Rev. Stat. Ann. §§ 485-A:2

❖ New Jersey:

- Freshwater Wetlands Protection Act - N.J. Stat. Ann. 13:9B-1 et seq
- Coastal Wetlands Protection Act - N.J. Stat. Ann. § 13:9A1-10

STATE WETLAND/FLOODPLAIN LAW



❖ New York:

- Freshwater Wetlands Act - N.Y. Env'tl. Conserv. Law §§ 24-0101 to 1305
- Tidal Wetlands Act - N.Y. Env'tl. Conserv. Law §§ 25-0101 to 0601
- Waterfront Revitalization of Coastal Areas & Inland Waterways Act - N.Y. Exec. Law §§ 910 to 923

❖ North Carolina:

- Coastal Area Management Act - N.C.Gen Stat. Ann. § 113A-100-129
- Dredge and Fill Act – N.C. Gen. Stat. Ann. §113-229, 230

❖ North Dakota

- Wetlands Law - N.D. Cent. Code §§§ 61-32-03, 07, 08

❖ Ohio:

- Water Pollution Control Act/Isolated Wetlands - Ohio Rev. Code Ann. § 6111.01

❖ Oregon:

- Fill and Removal Act - Or. Rev. Stat. Ann. §196.800 to 196.990
- Mitigation Banking Act of 1987 – Or. Rev. Stat. Ann. §196.600 to 196.665
- Oregon Ocean Resources Management -Or. Rev. Stat. Ann. §§ 196.405 to 196.580
- Comprehensive Land Use Planning Coordination Act - Or. Rev. Stat. Ann. §§ 197.005 to 197.860

❖ Pennsylvania:

- The Clean Streams Law - 35 Pa. Cons. Stat. Ann. §§ 691.1 et seq.
- The Dams Safety and Encroachments Act - 32 Pa. Cons. Stat. Ann. §§ 693.1 et seq.

❖ Rhode Island:

- Freshwater Wetlands Act - R.I. Gen .Laws §§ 2-1-18 to 2-1-24
- Coastal Resources Management Act - R.I. Gen. Laws §§ 46-23-1 to 46-23-2.

STATE WETLAND/FLOODPLAIN LAW

❖ South Carolina:

- Coastal Tidelands and Wetlands Act - S.C. Code Ann. §§ 48-39-10 to 48-39-360

❖ Texas:

- Coastal Coordination Act of 1991 - Tex. Nat. Res. Code §§ 33.201 et seq.

❖ Virginia:

- Wetlands Act - Va. Code Ann. §§ 62.1-13.1 to 13.20.
- Water Resources Management Act - 10 V.S.A. Ch. 37, § 905(7) to (9)
- Land Use and Development Act - 10 V.S.A. Ch. 10, §§ 6001 to 6092
- Coastal Primary Sand Dune Protection Act - Va. Code Ann. §§ 62.1-13.21 to 62.1-13.28
- Chesapeake Bay Preservation Act - Va. Code Ann. §§ 10.1-2100 et seq.

❖ Washington:

- Shoreline Management Act –Wash. Rev. Code. Ann. § 90.58
- Growth Management Act - Wash. Rev. Code. Ann. § 36.70A

❖ Wisconsin:

- Wetland Mapping Act - Wisc. Stat. Ann. § 23.32.
- Shoreland-Wetland Zoning - Wisc. Stat. Ann. §§ 59.971, 61.351, 62.23, 62.231 and 61.351
- Water Resources Development Act - Wisc. Stat. Ann. § 59.692

❖ Wyoming:

- Wyoming Wetland Act - Wyo .Stat. An..§ § 35-11-308 to 311



WATER



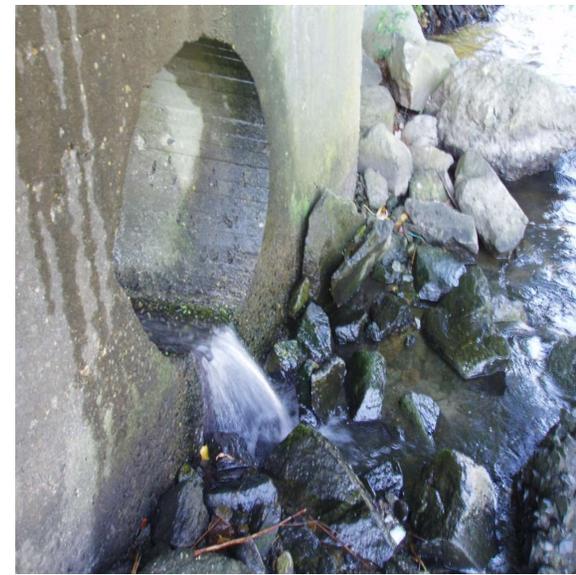
CLEAN WATER ACT

- Goal: “restore and maintain the chemical, physical, and biological integrity of the Nation’s water” by eliminating the discharge of pollutants or, in the alternative, by making (and keeping) the waters clean enough for the protection of wildlife and human recreation
- States adopt water quality standards that establish maximum permissible concentrations of pollutants in surface waters
- Nationwide permit program (NPDES) limits concentrations and quantities of pollutants that may be discharged from point sources into surface waters (known as effluent limitations)
- Effluent limitations are written into NPDES permits to assure that water quality standards are met and maintained

Source: Water Pollution Control, Massachusetts Environmental Law, 3d Ed., MCLE



CLEAN WATER ACT (Cont'd)



- Pretreatment standards are a version of effluent limits that are applicable to industrial facilities discharging into publicly owned treatment works (POTW)
 - This prevents POTW from violating its NPDES permit
- Failure to comply with permit requirements can result in civil or criminal sanctions through EPA enforcement proceedings or citizen suits
- Effluent limitations may be water quality-based or technology-based
- Uniform technology-based limits are written into many NPDES permits, but there is a trend toward state-level development of basinwide management plans that provide water quality-based limits for the addition of similar pollutants whether through a point source or nonpoint source

SAFE DRINKING WATER ACT

- Safe Drinking Water Act (SDWA) applies to all public water systems
 - Public water system: at least 15 service connections or serves at least 25 people per day for 60 days of the year
- Standards apply according to type and size of public water system
 - Community water system: serves same people year-round
 - Non-community water system: serves the public but not the same people year-round
 - Non-transient non-community water system: serves same people for more than six months per year, but not year-round
 - Transient non-community water system: serves public but not the same people for more than six months



SAFE DRINKING WATER ACT (Cont'd)

- Protects against naturally-occurring and manmade contaminants from sources such as improperly disposed chemicals, animal waste, pesticides, and waste injected underground
- EPA sets national standards for maximum permissible contaminant levels for particular contaminants and prescribes methods for removal of contaminants
- National standards also include testing requirements
- States and territories (except Wyoming and D.C.) have primacy and implement the SDWA within their jurisdiction: ensure testing is conducted, review plans for improvements, conduct inspections and take action against non-compliant systems
- SDWA's barriers against pollution: source water protection, treatment, distribution system integrity, and public information
- EPA and states can enforce the SDWA through administrative orders, legal actions and fines

STORMWATER PROGRAM

- **“Point Sources” under NPDES**
 - Construction activities
 - Industrial activities
 - Municipal separate storm sewer systems (MS4s)



- **EPA definition of “stormwater”**
 - “storm water runoff, snow melt runoff, and surface runoff and drainage” 40 CFR §122.26(b)(13)
 - Focus on runoff from precipitation events
 - EPA program represents the minimum federal standards
 - Recently state standards have been getting stricter

CONSTRUCTION ACTIVITIES

Goal of Program: To minimize erosion from construction sites and minimize discharge of sediment and other construction site pollutants in stormwater



• Construction Site Pollutants

- Fertilizers
- Pesticides
- Petroleum Products
- Construction Chemicals
- Solid Waste and Debris
- Sediment
- Turbidity

• Potential Dangers

- Large quantities of dissolved soil carried away as sediment
- Aquatic ecosystem degradation
- Increased drinking water treatment costs
- Impaired recreational use and aesthetic values
- Sediment accumulation can require dredging or other mitigation to prevent choking of streams, filling of wetlands and reduced water storage or navigation capacity
- High erosion rates at construction sites



CONSTRUCTION PERMITTING

Permitting Requirements Extend To:

1. Construction activities that disturb more than one acre of land
 2. Construction activities that disturb less than one acre of land but are part of a larger common plan of development or sale that disturbs more than one acre of land
 3. Any site identified as contributing to a violation of water quality standards or as being a significant contributor of pollutants to US waters, regardless of size
- A “larger plan of development or sale” refers to a contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one plan
 - Disturbed land is exposed soil resulting from activities such as clearing, grading & excavating
 - The total quantity of disturbed land is key, a large project that only disturbs half an acre of land would not require a stormwater permit



APPLYING FOR A PERMIT

1. Review the EPA's Construction General Permit (CGP) for:

- ✓ Notice of Intent (NOI) requirements
- ✓ Requirements to develop and implement a Storm Water Pollution Prevention Plan (SWPPP) as well as performance objectives
- ✓ Region- and state-specific conditions
- ✓ Site inspection obligations
- ✓ Conditions to protect endangered and threatened species and critical habitat
- ✓ Requirement to submit notice of permit termination when construction completed
- ✓ National Historic Preservation Act certification requirement

2. Develop a Storm Water Pollution Prevention Plan (SWPPP)

- ✓ Must be developed before filing for permits
- ✓ Must incorporate erosion and sediment controls
- ✓ Must include measures to manage stormwater flows over construction sites

APPLYING FOR A PERMIT (Cont'd)

3. Complete an endangered species determination

- ✓ Details in the CGP

4. File a Notice of Intent (NOI)

- ✓ Can be done electronically (eNOI) from EPA's website

5. Implement Best Management Practices (BMPs)

- ✓ Outlined in SWPPP



SMALL CONSTRUCTION EXEMPTIONS

Small construction activity:

- Disturbs between one and five acres of land
- Disturbs less than one acre of land but is part of a larger common plan of development or sale that disturbs between one and five acres
- NOIs may not be required for small construction activities but EPA strongly recommends their use

Small construction activity can be exempted from permitting if

1. Construction activity at issue will occur during a period of low predicted rainfall potential; or
2. Stormwater controls are unnecessary either because TMDLs address the pollutants of concern or because an equivalent analysis determines that allocations are not needed to protect water quality



WHO MUST APPLY & PENALTIES

- **Operators of regulated facilities or activities must obtain permits**
 - Entities responsible for designing, modifying and implementing specifications for a particular site
 - Entities exercising day-to-day control over site operations, especially earth moving functions
 - Includes developers, general contractors and subcontractors
- **If multiple parties are responsible for these activities they must become co-permittees**
 - Co-permittees must each submit an NOI but should work in concert to develop and implement a single pollution prevention plan
 - Co-permittees bear individual responsibility for the portions of the project they operate



- **Penalties for nonpermitted discharges can include**
 - Administrative penalties
 - Civil enforcement
 - Criminal Prosecution
 - Enjoinment of construction operations until permit obtained

RECENT CHANGES TO STORMWATER POLICY

- In December 2009 EPA published effluent limitations guidelines and new source performance standards to control pollution from Construction and Development point sources (the C&D rule)
 - All sites covered must implement a range of erosion and sediment controls and pollution prevention measures
 - The regulation took effect on February 1, 2010 and is to be phased in over the course of 4 years
 - States which issue their own permits must incorporate the new requirements into any permits issued after the effective date
 - Effective January 4, 2011 EPA stayed the numeric limitation for turbidity with plans to revise it in a future rulemaking
- In April 2011 EPA published a proposed draft of its new CGP (76 FR 22882) with public comments due July 11, 2011. This would replace the 2008 CGP (now set to expire February 15, 2012) and contains a number of modifications, most importantly those to implement the new guidelines and standards from the C&D rule

INDUSTRIAL ACTIVITIES

- **Ten categories of industrial activity that require NPDES permit**

1. Facilities subject to federal stormwater effluent discharge standards
2. Heavy manufacturing
3. Coal and mineral mining and oil and gas exploration and processing
4. Hazardous waste treatment, storage, or disposal facilities
5. Landfills, land application sites, and open dumps with industrial wastes
6. Metal scrapyards, salvage yards, automobile junkyards, and battery reclaimers
7. Steam electric power generating plants
8. Transportation facilities that have vehicle maintenance, equipment cleaning, or airport deicing operations
9. Treatment works treating domestic sewage with a design flow of 1 million gallons a day or more
10. Light manufacturing



MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s)

- A conveyance or system of conveyances that is
 - Owned by a state, city, town, village, or other public entity that discharges to waters of the U.S.;
 - Designed or used to collect or convey stormwater (including storm drains, pipes, ditches, etc.);
 - Not a combined sewer; and
 - Not part of a Publicly Owned Treatment Works (sewage treatment plant).
- Need NPDES permit and required to develop/implement a stormwater management program to reduce the contamination of stormwater runoff and prohibit illicit discharge



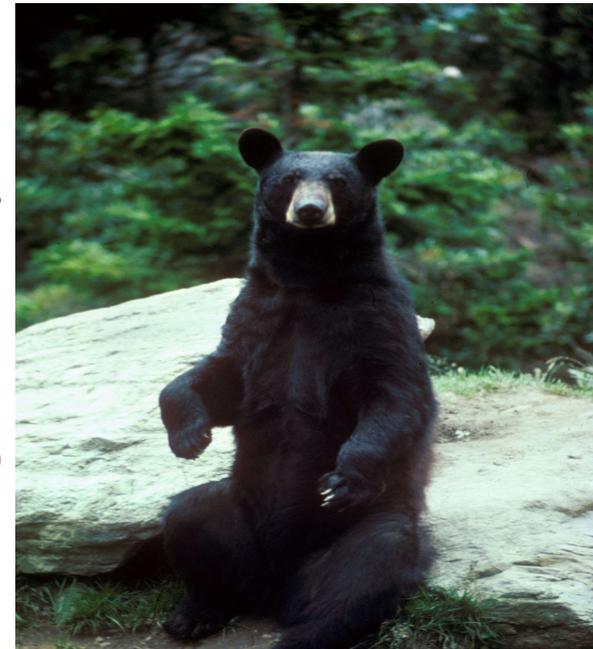
WILDLIFE and ENDANGERED SPECIES



FEDERAL ENDANGERED SPECIES ACT

16 U.S.C. § 1531

- **Purpose:** *“Provide a means by whereby ecosystems upon which endangered species and threatened species depend may be conserved and to provide a program for the conservation of such endangered species and threatened species.”* 16 U.S.C. §1531(b)
- **Definitions:**
 - **Endangered species** – *“species which is in danger of extinction throughout all or a significant portion of its range.”* 16 U.S.C. § 1532(6)
 - **Threatened species** – *“species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”* 16 U.S.C. § 1532(20)
- **Steps to achieve statutory goal:**
 - Listing of species, designating critical habitat, planning for recovery
 - Prohibitions against “killing, hunting, injuring, harming, or other take” of listed species
 - Permitting otherwise prohibited takes, if incidental to lawful purpose
 - Enforcement



SPECIES LISTINGS AND CRITICAL HABITAT



- **Step 1: Listing**

- Based on:
 - The present or threatened destruction, modification, or curtailment of its habitat or range;
 - Overutilization for commercial, recreational, scientific, or education purposes;
 - Disease or predation;
 - Inadequacy of existing regulatory mechanisms; or
 - Other natural or manmade factors affecting its continued existence

- **Step 2: Designate Critical Habitat**

- Areas “essential to the conservation of the species”
- Areas “may require special management considerations”

- **Step 3: Recovery Plan**

- Develop/implement plan for conservation and survival
- Priority to species that are, or may be, in conflict with construction or other development projects or other forms of economic activity

SPECIES “TAKE” PROHIBITION



- **Section (9)(a)(1) – unlawful for any person to “take” listed species**
 - Applies to fish and wildlife listed as endangered
 - Interpreted as applying to threatened species as well
 - See *Sweet Home Chapter of Communities for Great Oregon v. Babbitt*, 1 F.3d (D.C. Circ. 1993)
- **Take - “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”** 16 U.S.C.A. § 1532
 - **Harm** - “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral functions, including breeding, feeding, or sheltering.”
50 C.F.R. §17.3

INCIDENTAL SPECIES “TAKE”

- Exception to Take Prohibition
 - Allowed if take incidental to lawful activity such as real estate development
- Section 7 applies to actions that federal agency:
 - Funds
 - Authorizes (permitting)
 - Carries out
- Cannot jeopardize existence or adversely affect critical habitat



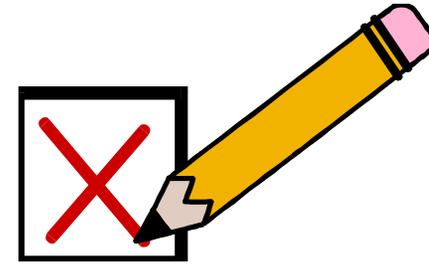
- Consultation:
 - Determine presence of species
 - Biological Assessment- “likely to be affected”
 - Formal Consultation FWS – Biological opinion
 - Will it jeopardize existence or adversely affect critical habitat
 - Action cannot go forward unless there is a prudent alternative

AUTHORIZATION TO “TAKE”

- **Section 10(a) - Authorizes issuance of permit allowing a taking that is incidental to, and not the purpose of, the carrying out of an otherwise lawful act**
- **Applicant Must Submit Conservation Plan:**
 - Specifying impact of take
 - Efforts to minimize and mitigate impacts
 - Why alternatives not being used
- **Consultation Process not Required**
 - Public notice and comment required
- **Use of permitting authorization has been limited**
 - 540 issued to date
 - Limited case law



SPECIES SURVEY AND PROJECT CHANGES



- **Before/During Project:**
 - Before acquisition, survey property for species listed, proposed to be listed, petitioned to be listed, or otherwise on the radar screen of concern
 - Consider impacts of project in terms of where development might intrude on species' habitat
 - Self permit the project by adjusting development areas to avoid the habitat and to reduce secondary impact on habitat
- **During Permitting Phase:**
 - If a take is likely, determine desirability of proceeding under §7 versus §10(a)
 - Prepare scientific documentation for review – “avoid, minimize, mitigate”
 - Consider which species should be covered in permit – provisions for future listings
 - Approach agency and discuss timeframe for permitting
 - Proceed under §7 or §10(a) process

RECENT CHANGES TO WILDLIFE POLICY



- President Obama issued a memorandum March 2009 which rescinded a Bush-era rule that weakened the Endangered Species Act. The Bush rule allowed federal agencies whose activities might harm threatened and endangered species to avoid the longstanding requirement that they consult first with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.

STATE ENDANGERED SPECIES LAW



- **Alabama:**

- Bear Protection Laws - Ala. Code §§ 9-11-480 - 9-11-481

- **Alaska:**

- Endangered Species Act - Alaska Stat. §§ 16.20.180 - 16.20.210

- **Arkansas:**

- Endangered, Threatened, and Nongame Species Preservation - Ark. Code Ann. §§ 15-45-301 - 15-45-306

- **California:**

- California Endangered Species Act - Cal. Fish & Game § 2050 - 2115.5
- Marine Life Protection Act - Cal. Fish & Game §§ 2850 - 2863
- Protected Reptiles & Amphibians - Cal. Fish & Game §§ 5000 - 5062

- **Colorado:**

- Nongame, Endangered, or Threatened Species Conservation Act - Col. Rev. Stat. Ann. §§ 33-2-101 - 33-2-108

- **Connecticut:**

- Endangered Species Act - Con. Gen. Stat. Ann. §§ 26-303 - 26-316

- **Delaware:**

- Endangered Species Act - Del. Code Ann. Tit. 7, §§ 601 - 605

- **Florida**

- Endangered and Threatened Species Act - Fla. Stat. Ann. §§ 379.2291 - 379.231

- **Georgia:**

- Endangered Wildlife Act of 1973 – Ga. Code Ann. ST §§ 27-3-130 – 27-3-133

- **Hawaii:**

- Endangered Species Act – Haw. Rev. Stat. Ann §§ 195D-1 – 195D-32

- **Idaho:**

- Species Conservation – Idaho Code Ann. §§ 36-2401 – 36-2405

STATE ENDANGERED SPECIES LAW



- **Illinois:**
 - Illinois Endangered Species Protection Act - 10 Ill. Comp. Stat. Ann. §§ 10/1 -11
- **Indiana:**
 - Nongame and Endangered Species Conservation - Ind. Code Ann. §§ 14-22-34-1 - 14-22-34-21
- **Iowa:**
 - Endangered Plants and Wildlife - Iowa Code §§ 481B.1 - 10
- **Kansas:**
 - Nongame and Endangered Species Conservation Act - Kan Stat. Ann. §§ 32-957 – 32-963
- **Kentucky:**
 - Endangered Species - Ky. Rev. Stat. Ann. § § 150.180, 183, 990
- **Louisiana:**
 - Threatened and Endangered Species Conservation - La. Rev. Stat. Ann. § 56:1901
- **Maine:**
 - Endangered Species - Me. Rev. Stat. Ann. tit. 12, § § 12801 - 12808
- **Maryland:**
 - Nongame and Endangered Species Conservation Act -Md. Code Ann. Nat. Res §§ 10-2A-01 - 09
- **Massachusetts:**
 - Massachusetts Endangered Species Act - G.L. c. 131A § § 1 - 7
- **Michigan**
 - Endangered and Threatened Species Act of Michigan - Mich. Comp. Laws Ann. § 324.36501
- **Minnesota:**
 - Endangered Species Act - Minn. Stat. Ann. §§ 84.0895, 84.944, 97A.245, 97A.501
- **Mississippi:**
 - Nongame and Endangered Species Conservation Act - Miss. Code Ann. §§ 49-5-101 - 119
- **Missouri:**
 - Endangered Species Law – Mo. Rev. Stat. § 252.240
- **Montana:**
 - Nongame and Endangered Species Conservation Act - Mont. Code Ann. §§ 87-5-101 - 132

STATE ENDANGERED SPECIES LAW



- **Nebraska:**
 - Nongame and Endangered Species Conservation Act - Neb. Rev. Stat. Ann. § 37-801
- **Nevada:**
 - Protection and Propagation of Native Fauna - Nev. Rev. Stat. Ann. § 503.584
- **New Hampshire:**
 - Endangered Species Conservation Act - N.H. Rev. Stat. Ann. §§ 212-A:1 - A:15
- **New Jersey:**
 - Endangered and Nongame Species Conservation Act - N.J. Stat. Ann. §§ 23:2A-1 - 15
- **New Mexico:**
 - Wildlife Conservation Act - N.M. Stat. Ann. §§ 17-2-37 - 46
- **New York:**
 - Endangered Species - N.Y. Env'tl. Conserv. Law § 11-0535
- **North Dakota:**
 - Definition of Endangered Species - N.D. Cent. Code § 20.1-01-02
 - Golden and bald eagle protected - N.D. Cent. Code § 20.1-04-05
- **Ohio:**
 - Endangered Species General Provisions - Ohio Rev. Code Ann. §§ 1518.01, 1531.25, 1531.99
- **Oklahoma:**
 - Endangered or Threatened Species or Subspecies - Okla. Stat. Ann. tit. 29, § 5-412
- **Oregon:**
 - Threatened or Endangered Wildlife Species - Or. Rev. Stat. Ann. §§ 496.171 – 996, 498.026
- **Pennsylvania:**
 - Wild Resource Conservation Act - 32 Pa. Cons. Stat. Ann. § 5301 - 14
 - Protection of Game or Wildlife - 34 Pa. Cons. Stat. Ann. § 2924

STATE ENDANGERED SPECIES LAW

- **Rhode Island:**
 - Endangered Species of Animals and Plants - R.I. Gen. Laws §§ 20-37-1 - 5
- **South Carolina:**
 - Nongame and Endangered Species Conservation Act - S.C. Code Ann. §§ 50-15-10 - 90
- **South Dakota:**
 - Endangered and Threatened Species - S.D. Codified Laws §§ 34A-8-1 - 13
- **Tennessee:**
 - Nongame and Endangered or Threatened Wildlife Species Conservation Act of 1974 – Tenn. Code Ann. §§ 70-8-101 - 112
- **Texas:**
 - Endangered Species – Tex. Parks & Wild. Code Ann. §§ 68.001 - 021
- **Utah:**
 - Wildlife Resources Code – Utah Code Ann. §§ 23-20-3 - 4.5
- **Vermont:**
 - Protection of Endangered Species – Vt. Stat. Ann. tit. 10, § 5401
- **Virginia:**
 - Endangered Species – Va. Code Ann. §§ 29.1-563 - 570
- **Washington:**
 - Endangered Fish or Wildlife – Wash. Rev. Code Ann. §§ 77.15.120, 130, 410, 420
- **Wisconsin:**
 - Wild Animals and Plants – Wis. Stat. Ann. §§ 29.604, 29.977, 29.983



WHAT'S NEXT: CLIMATE CHANGE

- National Law

- **EPA Endangerment Finding**

- Endangerment Finding: Mix of six GHG's in the air threaten public health and welfare

- Cause/Contribute Finding: combined emissions of GHGs from motor vehicles contribute to atmospheric concentrations of GHGs and hence to threat of climate change

- **EPA Reporting Rule**

- Suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines, and facilities that emit 25,000 metric tons or more per year of GHG emissions are required to submit annual reports to EPA

- **EPA Tailoring Rule**

- Requires sources covered by the reporting rule to get permits and meet GHG control and energy efficiency requirements when significantly modifying existing or building new sources.

- International Law

WHAT'S NEXT: ENERGY EFFICIENCY

- **American Clean Energy & Security Act**
 - Cap-and-trade program
 - Electric utilities must meet 20% of their electricity demand through renewable energy sources/energy efficiency
 - Invests in new clean energy technologies and energy efficiency
 - Requires a 17% emissions reduction from 2005 levels by 2020
- **American Recovery and Reinvestment Act 2009**
 - \$16.8 billion to Office Energy Efficiency & Renewable Energy to fund various programs such as biomass, solar technology, vehicle technology, wind energy, geothermal technology, hydropower infrastructure, weatherization assistance, and energy efficient building technologies



WHAT'S NEXT: GREEN BUILDING

- Siting
- Design
- Materials
- Energy
- Construction
- Landscaping
- Transportation
- Utilities
- Operations
- Sustainability



GREEN BUILDING (cont'd)



- U.S. Green Building Council

- **LEED Green Building Certification Program**

- Measures sustainable sites, water efficiency, energy & atmosphere, materials & resources, indoor environmental quality, locations & linkages, awareness & education, innovation in design, and regional priority
- Over 35,000 projects are currently participating in the LEED system, comprising over 6.9 billion square feet of construction space in all 50 states and 114 countries

- **Cool Cities Program**

- Step-by-step green building policy for communities. Policies include leadership standards for government buildings that serve as models for the community; financial and no-cost incentives to build green for the commercial and residential sectors; and improved minimum efficiency standards through energy code adoption and enforcement.

- National Green Building Program

- Developed green building standard

- **Certified Green Professional Designation**

- Recognizes builders, remodelers and other industry professionals who incorporate green building principles into homes without driving up the cost of construction.

**Environmental issues in bankruptcy
affecting real estate and business
valuations, transactions and
permitting can be anticipated,
managed and resolved.**

