Local Government Advisory Committee
to the Chesapeake Executive Council

The Clean Water Act & the Regulatory Landscape of Water Quality

Local Government Advisory Committee

September 25, 2024

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- Professor of Teaching, Penn State Law
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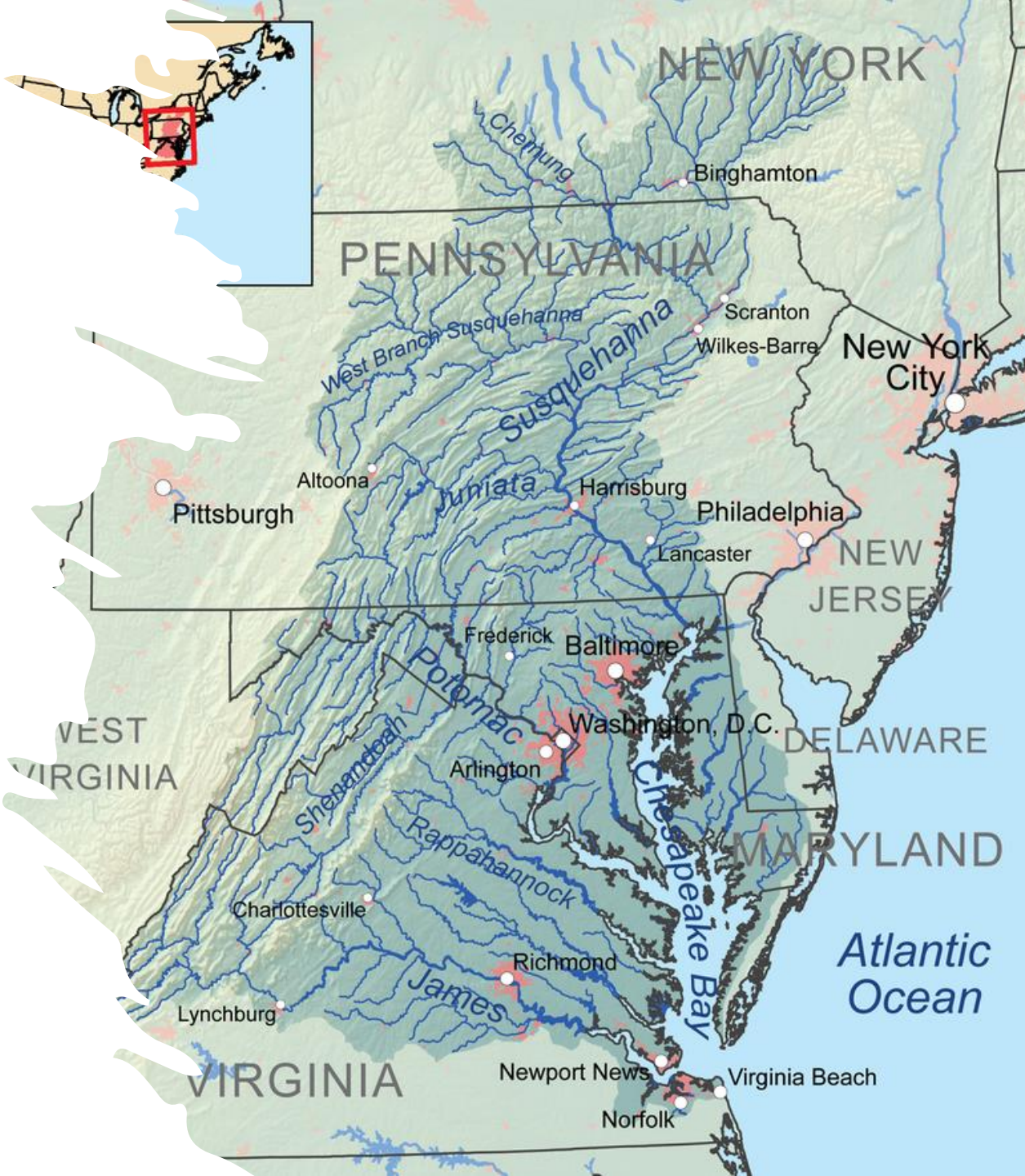
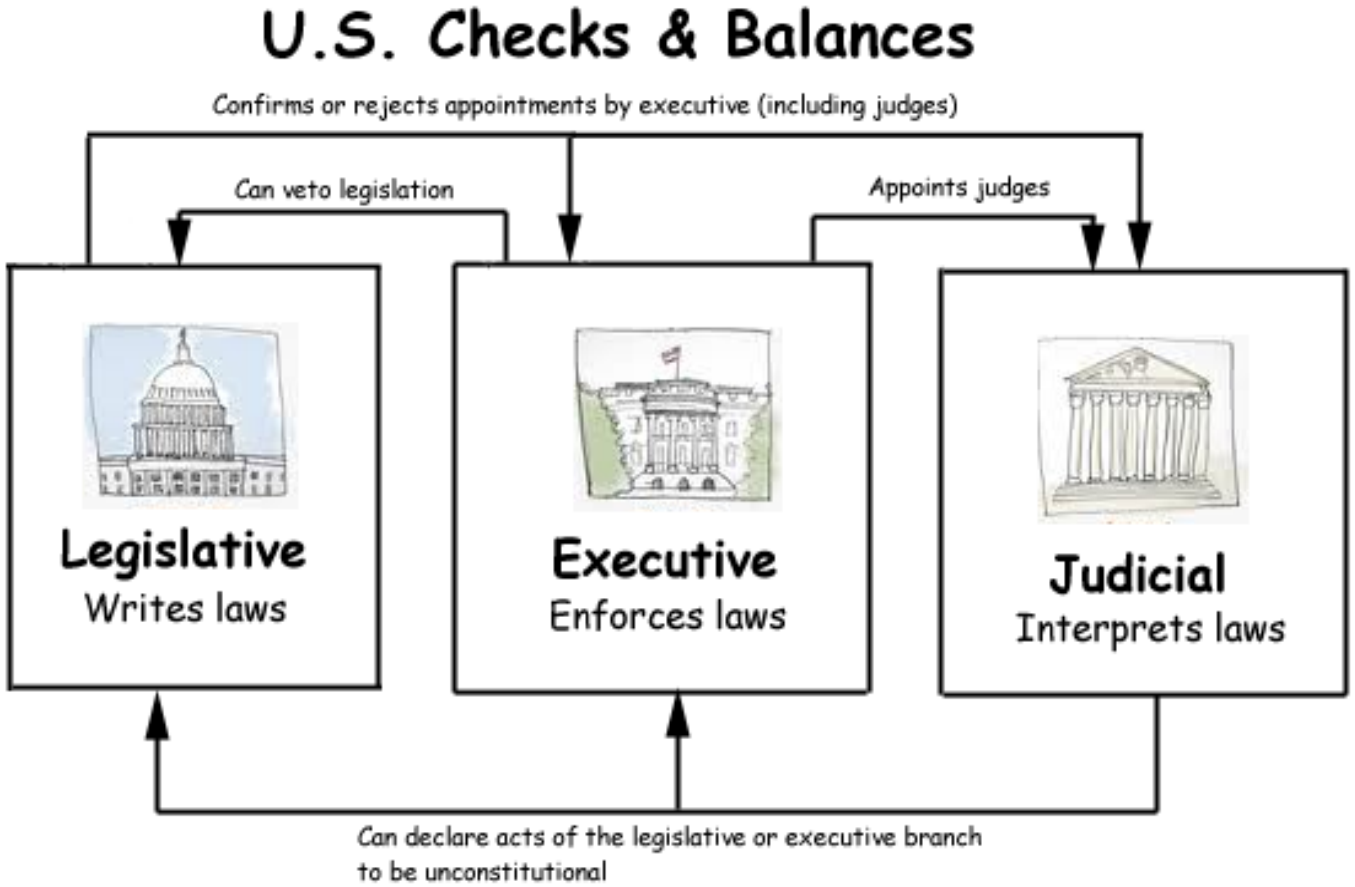
Overview

- Quick reminder of where “law” comes from
- A very fast history leading up to 1972
- The Clean Water Act + interpretation of WOTUS
- Recent SCOTUS decisions re: Chevron
- Regulations & the Chesapeake Bay
- Pennsylvania as a case study
- What now + some ideas



The basic legal structure in the U.S. remains critical to clean water

Constitution



Statutes

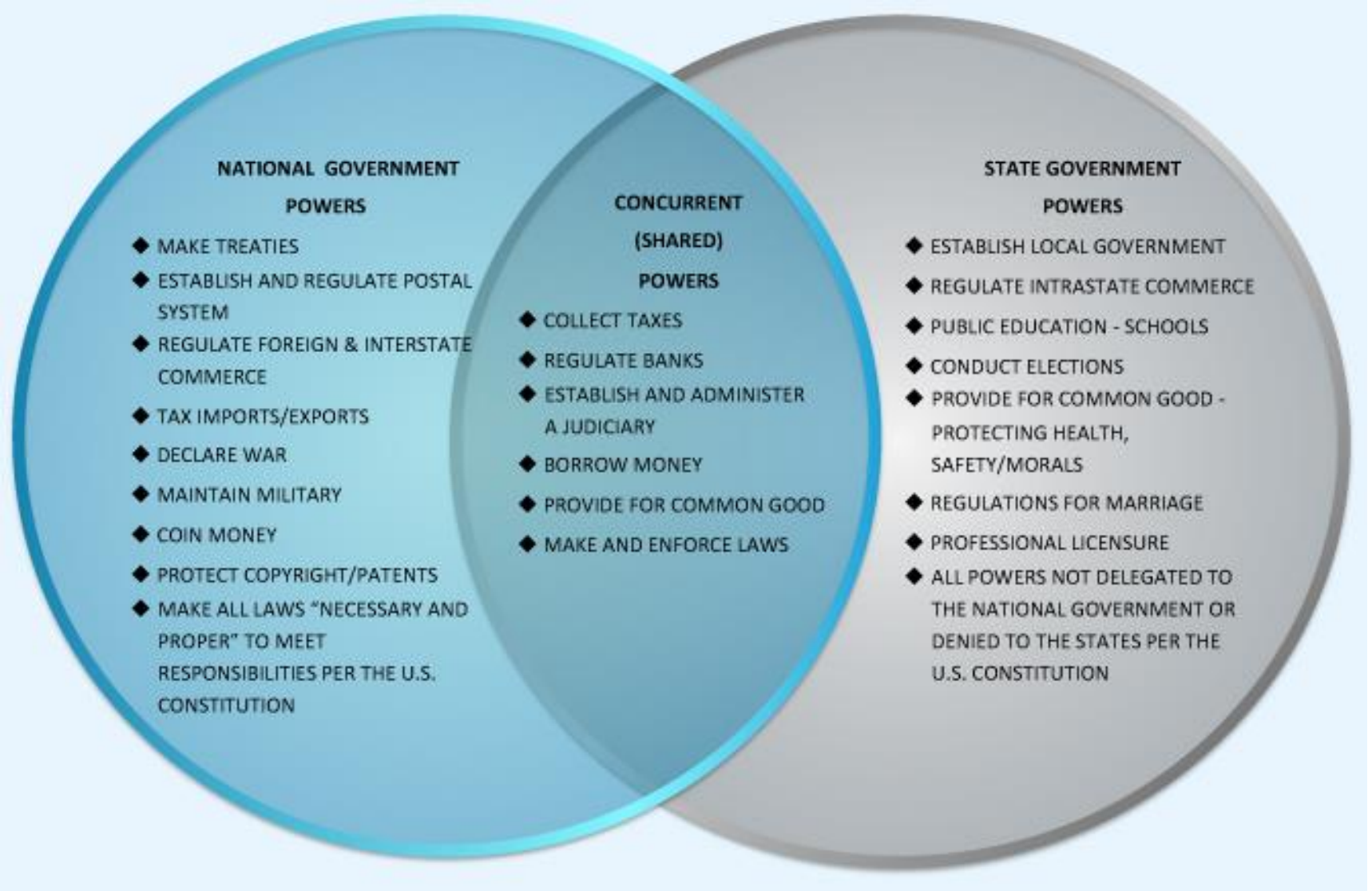
Court cases (common law, interpretation of statutes)

Executive orders

Administrative codes

geopolicraticus.wordpress.com

The interplay between the federal and state governments = federalism



Long history of common law, federalism, and managing for clean water

Common law riparian rights & nuisance (dating to the Roman Empire's Justinian Code, imported with the English)

Photograph: Pittsburgh Salt Works, https://explorepahistory.com/displayimage.php?imgId=1-2-1D73

1899 Rivers and Harbors Act

https://www.historycentral.com/IndustrialAge/RiverHarborAct.html

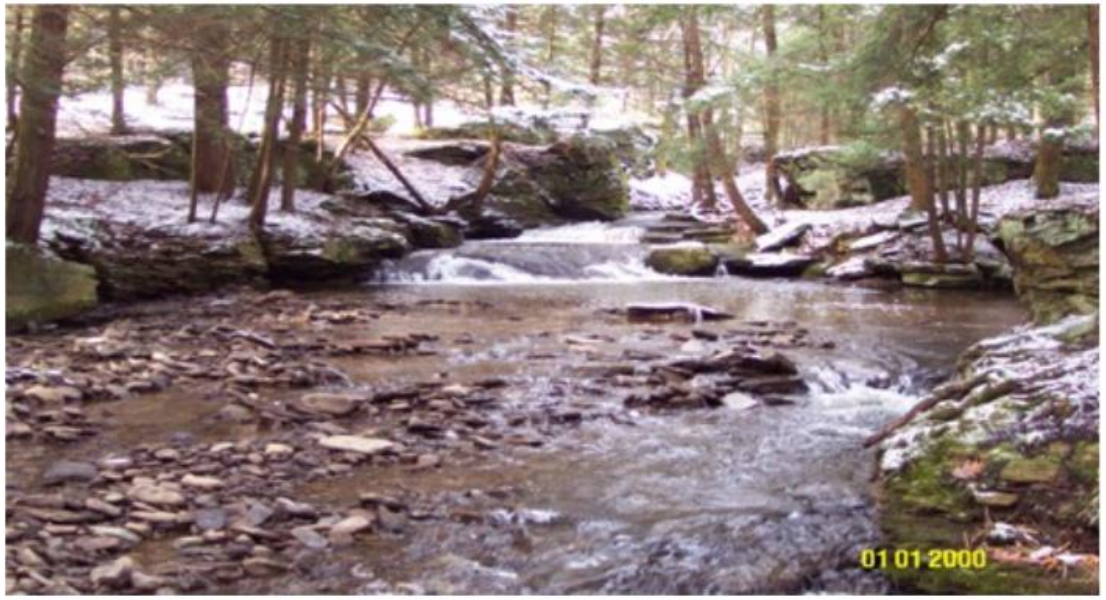
- Criminal misdemeanor for discharge of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and flowing therefrom in a liquid state" into navigable waters

- Prohibition to excavate, fill or alter the course, condition, or capacity of any port, harbor, channel, or other areas without permit

Example state law: Pennsylvania's Clean Streams Law (1937)

PENNSYLVANIA CODE
Title 25.Environmental Protection
Chapter 102 Erosion and Sediment Control

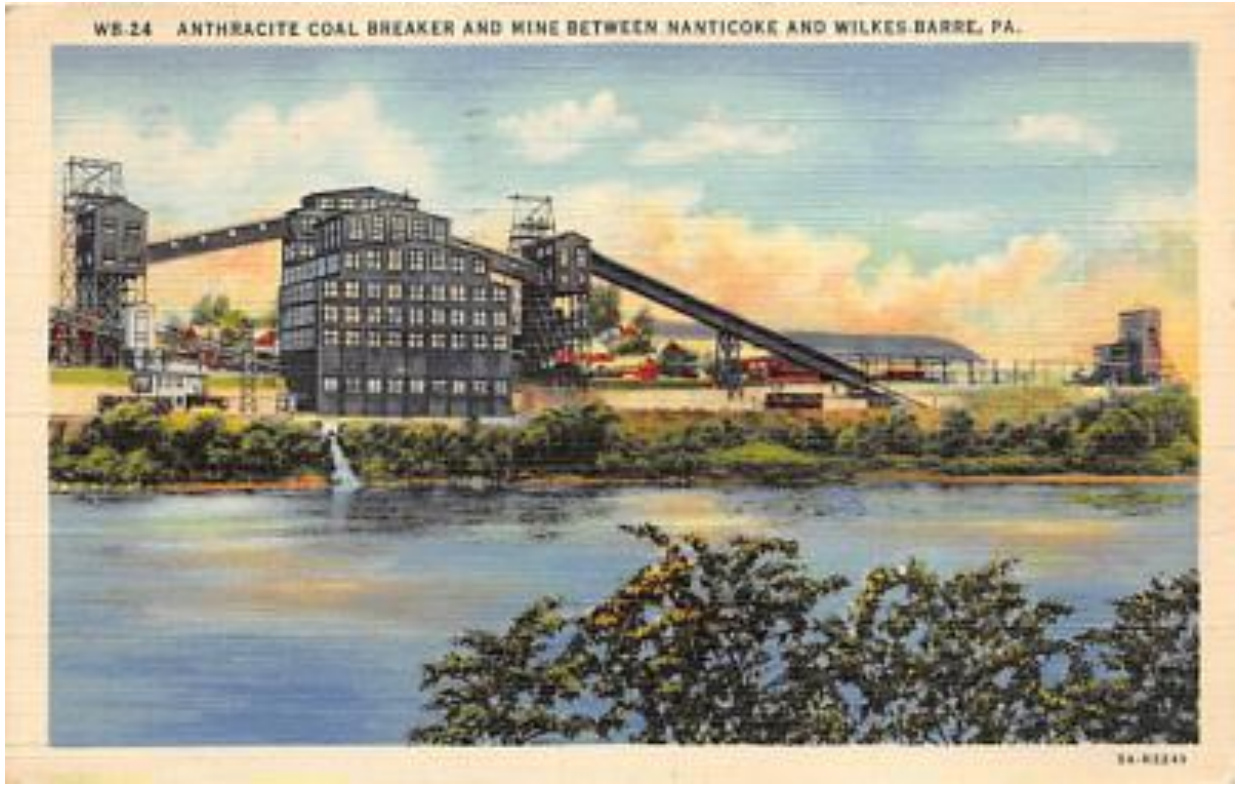
Clean Streams Law-Act 394 of 1937- To preserve and improve the purity of the waters of the Commonwealth for the protection of public health, animal and aquatic life, and for industrial consumption, and recreation…



https://slideplayer.com/slide/3607641/

Continued evolution: the 1948 Federal Water Pollution Control Act

- Federal $→ communities for sewage treatment
  - Loans to build wastewater treatment plants
  - Grants for state /local agencies to investigate pollutant sources



https://www.oldpostcards.com/uspostcards/pennsylvania/nanticoke-pa_xx_56913-anthracite-coal-breaker-and-mine.html

"We would strenuously object to any bill that would make it unlawful to allow water from the anthracite mines or breakers to enter the streams adjacent thereto because, as stated herein, they do not adversely affect the streams and there is no other place where these waters can go…..The anthracite industry would be put out of business overnight if such laws were passed and enforced and it would still leave the problem unsolved. If no new source of pollution (especially acid mine water) is permitted, as proposed in H. R. 123, except with final approval of the Surgeon General, it may eventually prevent the opening of new mines, whose mineral products might be sorely needed in our economy, especially in being ready to secure our Nation in its problems of defense."

Henry H. Otto, Assistant General Manager, The Hudson Coal Co., Scranton, PA on behalf of the Anthracite Institute of Wilkes-Barre, PA., Testimony, House Committee on Public Works (06/11/1947) Quote from http://crywolfproject.org/taxonomy/term/416

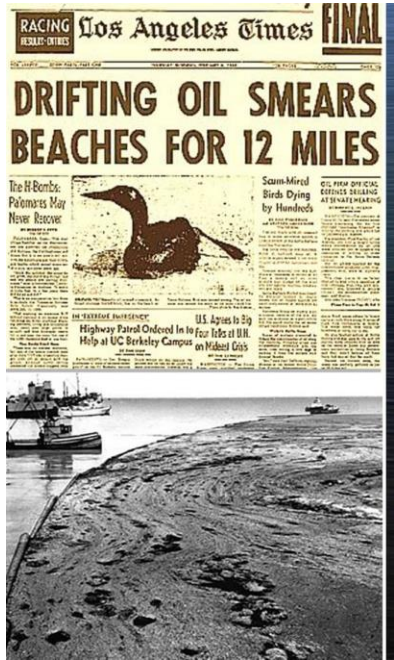
Catalysts for change

1948- Donora, PA

1962

1969- Cuyahoga River, Ohio

1969- Santa Barbara



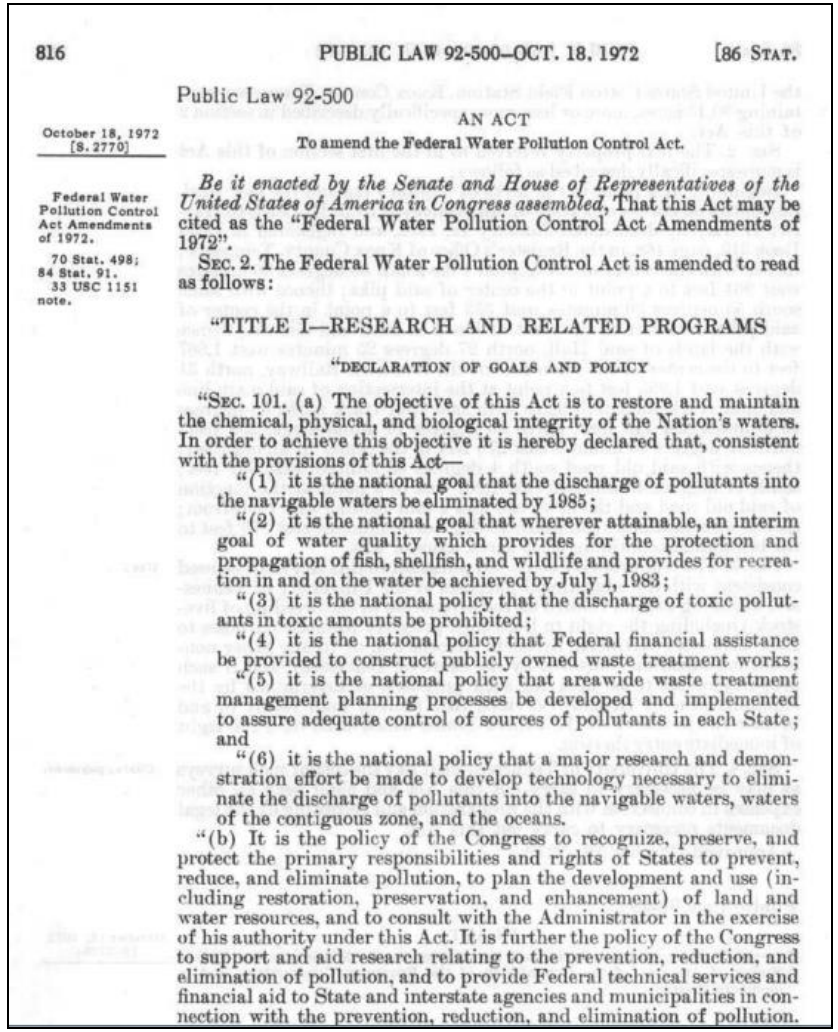
Major US Environmental Legislation

Major Environmental Legislation

Year	Law	Year	Law
1899	Refuse Act	1975	Hazardous Materials Transportation Act
1918	Migratory Bird Treaty Act of 1918	1976	Resource Conservation and Recovery Act
1948	Federal Water Pollution Control Act	1976	Solid Waste Disposal Act
1955	Air Pollution Control Act	1976	Toxic Substances Control Act
1963	Clean Air Act (1963)	1977	Clean Air Act Amendments
1965	Solid Waste Disposal Act	1977	Clean Water Act Amendments
1965	Water Quality Act	1980	CERCLA (Superfund)
1967	Air Quality Act	1984	Resource Conservation and Recovery Act Amendments
1969	National Environmental Policy Act	1986	Safe Drinking Water Act Amendments
1970	Clean Air Act (1970)	1986	Superfund Amendments and Reauthorization Act
1970	Occupational Safety and Health Act	1986	Emergency Wetlands Resources Act
1972	Consumer Product Safety Act	1987	Clean Water Act Reauthorization
1972	Federal Insecticide, Fungicide, and Rodenticide Act	1990	Oil Pollution Act
1972	Clean Water Act	1990	Clean Air Act (1990)
1972	Noise Control Act	1993	North American Free Trade Agreement
1973	Endangered Species Act	2003	Healthy Forests Initiative
1974	Safe Drinking Water Act		

http://en.wikipedia.org/wiki/Environmental_policy_of_the_United_States

Critical to the Chesapeake Bay: the Federal Water Pollution Control Act Amendments of 1972 (aka the Clean Water Act)



816 PUBLIC LAW 92-500—OCT. 18, 1972 [86 STAT.

Public Law 92-500

AN ACT

October 18, 1972
[S. 2770]

To amend the Federal Water Pollution Control Act.

Federal Water Pollution Control Act Amendments of 1972.
70 Stat. 498; 84 Stat. 91. 33 USC 1151 note.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Water Pollution Control Act Amendments of 1972".

SEC. 2. The Federal Water Pollution Control Act is amended to read as follows:

"TITLE I—RESEARCH AND RELATED PROGRAMS

"DECLARATION OF GOALS AND POLICY

"SEC. 101. (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

"(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

"(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

"(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

"(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

"(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

"(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

"(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

Presumption under the common law:
activities that might cause water pollution are presumptively lawful unless a plaintiff sues and proves harm to protected legal interest

The Clean Water Act flipped this presumption

President Nixon is given credit for the Clean Water Act.

However, he vetoed it.

Congress passed it over his veto

- 247 to 23 in the House
- 52 to 12 in the Senate

Clean Water Act: Objective & Goals

Objective:

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

Goals:

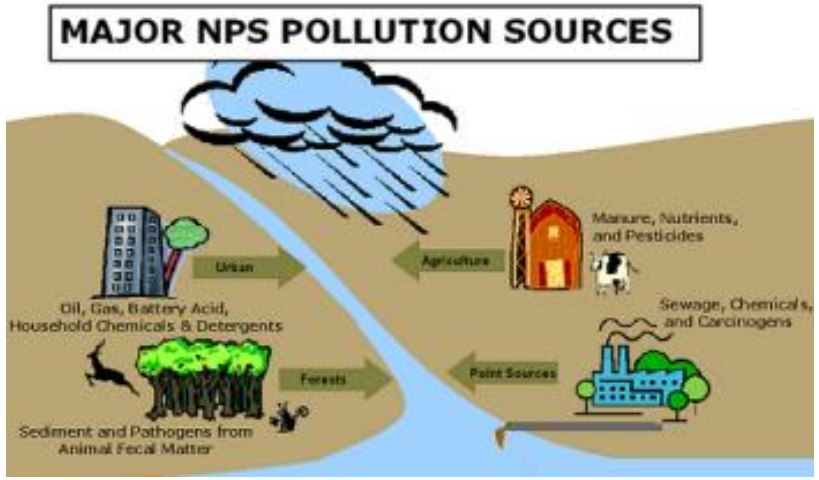
- Eliminate pollution into navigable waters by 1985
- Wherever attainable, interim goal of water quality which provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 (fishable & swimmable goal)
- National policy that discharge of toxic pollutants in toxic amounts be prohibited

Definitions

- Pollutants, § 502(6), 33 U.S.C. § 1362(6):
  - wide range of substances that might be discharged into water, including "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."
  -
- Pollution, § 502(19), 33 U.S.C. § 1362(19).
  - "man made or man-induced alternation of the chemical, physical, biological and radiological integrity of water."
- Discharge of pollutant, § 502(16), 33 U.S.C. § 1362(16).
  - Any addition of any pollutant to navigable waters from any point source.
- Point source, § 502(14), 33 U.S.C. § 1362(14).
  - "Any 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."
  - Excludes "ag stormwater discharges and return flows from irrigated agriculture"

Definitions

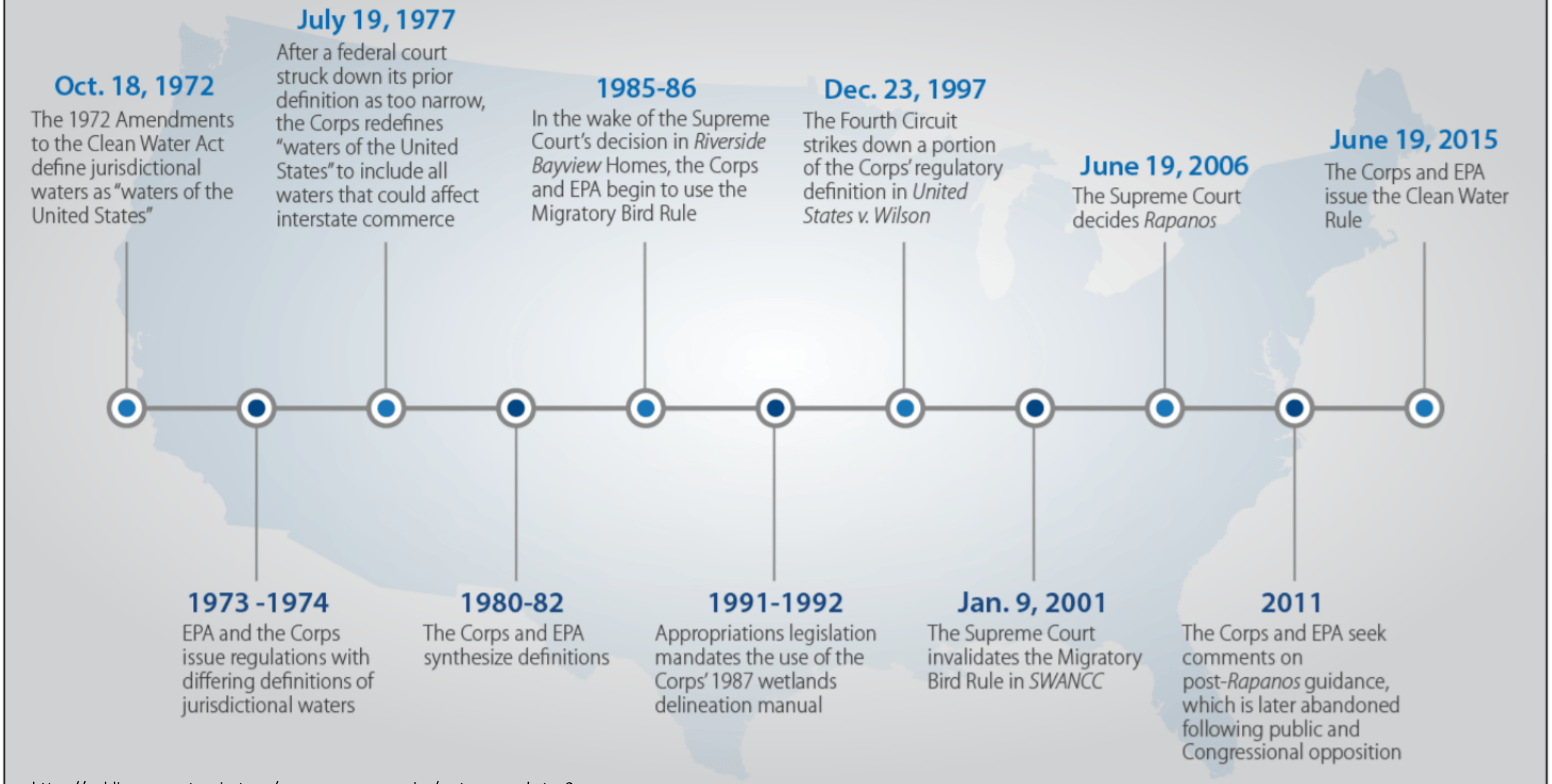
- Point source, § 502(14), 33 U.S.C. § 1362(14).
  - May be allowed upon issuance of
    - National Pollutant Discharge Elimination System (NPDES) permits
      - Issued by US Environmental Protection Agency, state (if allowed), or tribes as state
      - Must meet technology-based requirements (301(b)), or
      - Must meet water quality-based standards (303)
    - Dredge & fill material permit
      - US Army Corps or state (if allowed)
- Exceptions:
  - Dispersed runoff of pollutants (stormwater/agricultural)
  - Airborne pollutants



https://www.roanokecountyva.gov/353/Non-Point-Source-NPS-Pollution

EVOLUTION OF THE DEFINITION OF "WATERS OF THE UNITED STATES"

Critical Events Timeline



https://publiccommentproject.org/aq-conservsummaries/wotus-repeal-step2

Multiple US Supreme Court cases, conflicting views

- *United States v. Riverside Bayview Homes, Inc.* (1985)
  - Deference to the Corps' assertion of jurisdiction over wetlands actually abutting a traditional navigable water, stating that adjacent wetlands may be regulated as waters of the United States because they are ''inseparably bound up'' with navigable waters and ''in the majority of cases'' have ''significant effects on water quality and the aquatic ecosystem'' in those waters.

- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*) (2001)
  - Rejected a claim of federal jurisdiction over nonnavigable, isolated, intrastate ponds that lack a sufficient connection to traditional navigable waters, noting that the term ''navigable'' must be given meaning within the context and application of the statute.

- *Rapanos vs. U.S.*, 547 U.S. 715 (2006)
  - Split outcome:
    - Scalia for 4 person plurality: dictionary definition "only relatively permanent, standing or flowing bodies of water" (no deference to US Army Corps)
    - Kennedy concurrence: fact specific test depending on "significant nexus between the wetlands in question and navigable waters in the specific sense"
    - Stevens dissent with 4: *Chevron* deference to Corps' regulations

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

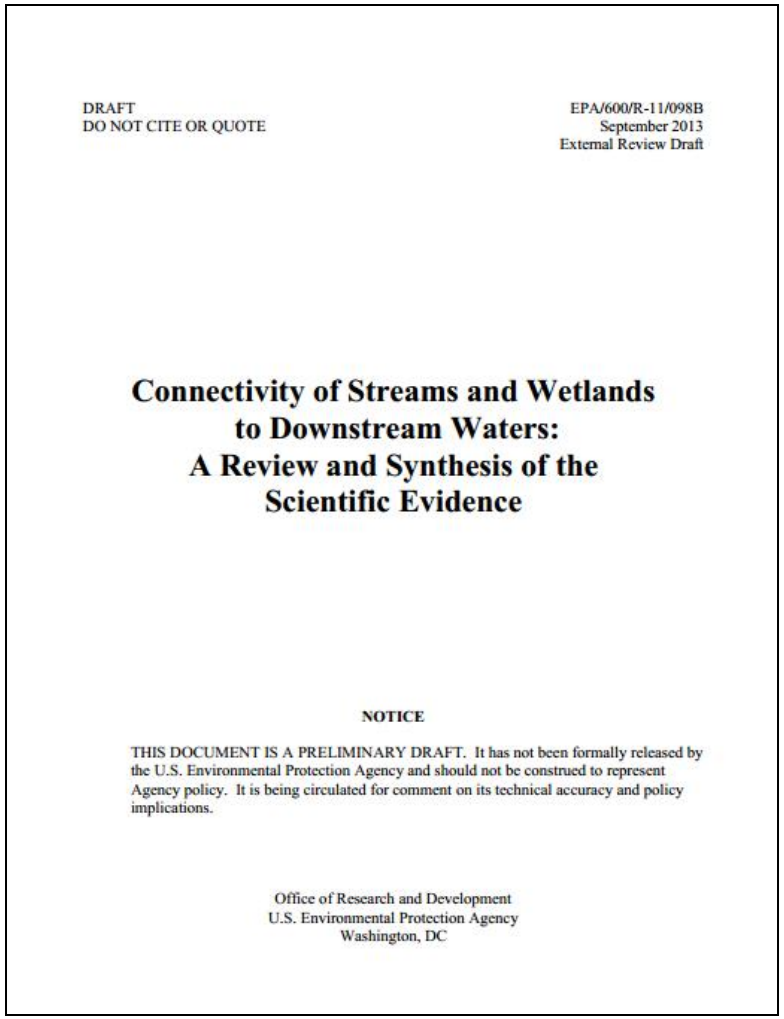
Agreed with the plurality to return the two cases to lower courts for further deliberation but disagreed that only "permanent bodies of waters" are subject to regulation. Also said that remote tributaries that have a "significant nexus" to a navigable waterway can be protected.

The New York Times

Clean Water Act: Post *Rapanos/Obama Admin*

- In the courts…
  - At least 14 courts declined to extend *Rapanos*
- Administratively…
  - Scientific peer review in 2013
  - Draft rules from EPA & Corps →
    - Released in March 2014
    - Comment period closed Nov. 2014
    - Million + comments
  - Rule finalized in 2015
- Back in the courts, stayed by the 6th Circuit on Oct. 9, 2015
- Rulemaking to repeal, 2017
- Unstayed for 26 states in 2018

http://www2.epa.gov/cleanwaterrule/documents-related-proposed-definition-waters-united-states-under-clean-water-act



DRAFT
DO NOT CITE OR QUOTE

EPA/600/R-11/098B
September 2013
External Review Draft

Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence

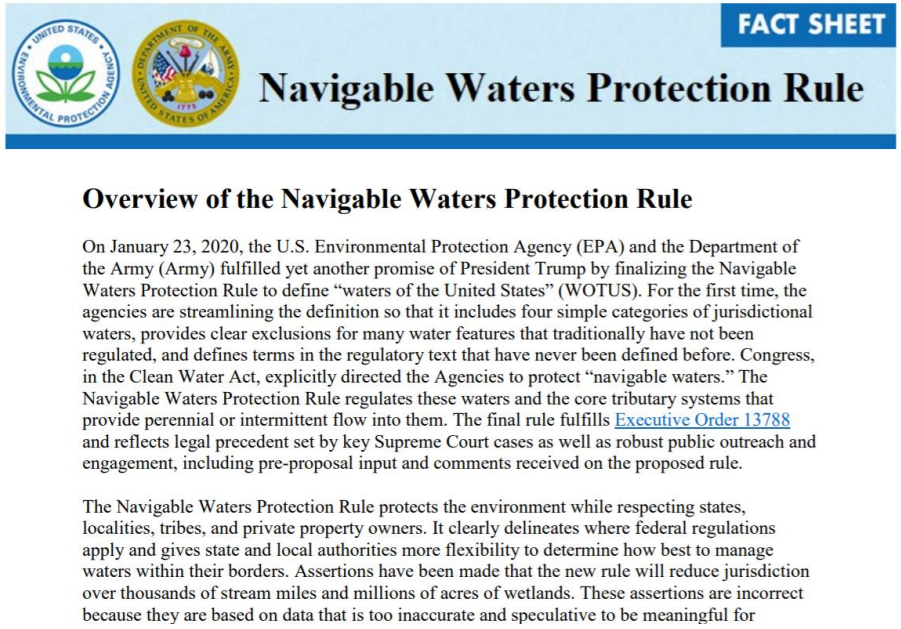
NOTICE

THIS DOCUMENT IS A PRELIMINARY DRAFT. It has not been formally released by the U.S. Environmental Protection Agency and should not be construed to represent Agency policy. It is being circulated for comment on its technical accuracy and policy implications.

Office of Research and Development
U.S. Environmental Protection Agency
Washington, DC

Clean Water Act- Trump Administration

- 2019 Final Rulemaking to undo 2015 Rule
- Jan. 2020 Draft “Navigable Waters Protection Rule” listed for public comment
- April 2020 Navigable Waters Protection Rule became final
- More lawsuits (lots)



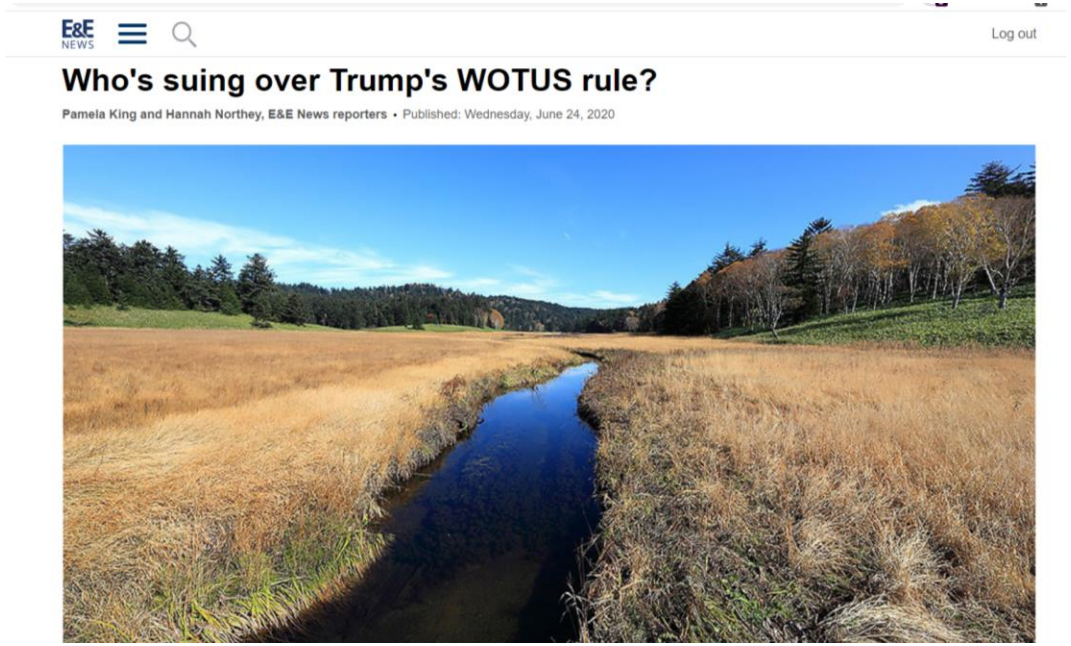
FACT SHEET

Navigable Waters Protection Rule

Overview of the Navigable Waters Protection Rule

On January 23, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) fulfilled yet another promise of President Trump by finalizing the Navigable Waters Protection Rule to define “waters of the United States” (WOTUS). For the first time, the agencies are streamlining the definition so that it includes four simple categories of jurisdictional waters, provides clear exclusions for many water features that traditionally have not been regulated, and defines terms in the regulatory text that have never been defined before. Congress, in the Clean Water Act, explicitly directed the Agencies to protect “navigable waters.” The Navigable Waters Protection Rule regulates these waters and the core tributary systems that provide perennial or intermittent flow into them. The final rule fulfills Executive Order 13788 and reflects legal precedent set by key Supreme Court cases as well as robust public outreach and engagement, including pre-proposal input and comments received on the proposed rule.

The Navigable Waters Protection Rule protects the environment while respecting states, localities, tribes, and private property owners. It clearly delineates where federal regulations apply and gives state and local authorities more flexibility to determine how best to manage waters within their borders. Assertions have been made that the new rule will reduce jurisdiction over thousands of stream miles and millions of acres of wetlands. These assertions are incorrect because they are based on data that is too inaccurate and speculative to be meaningful for



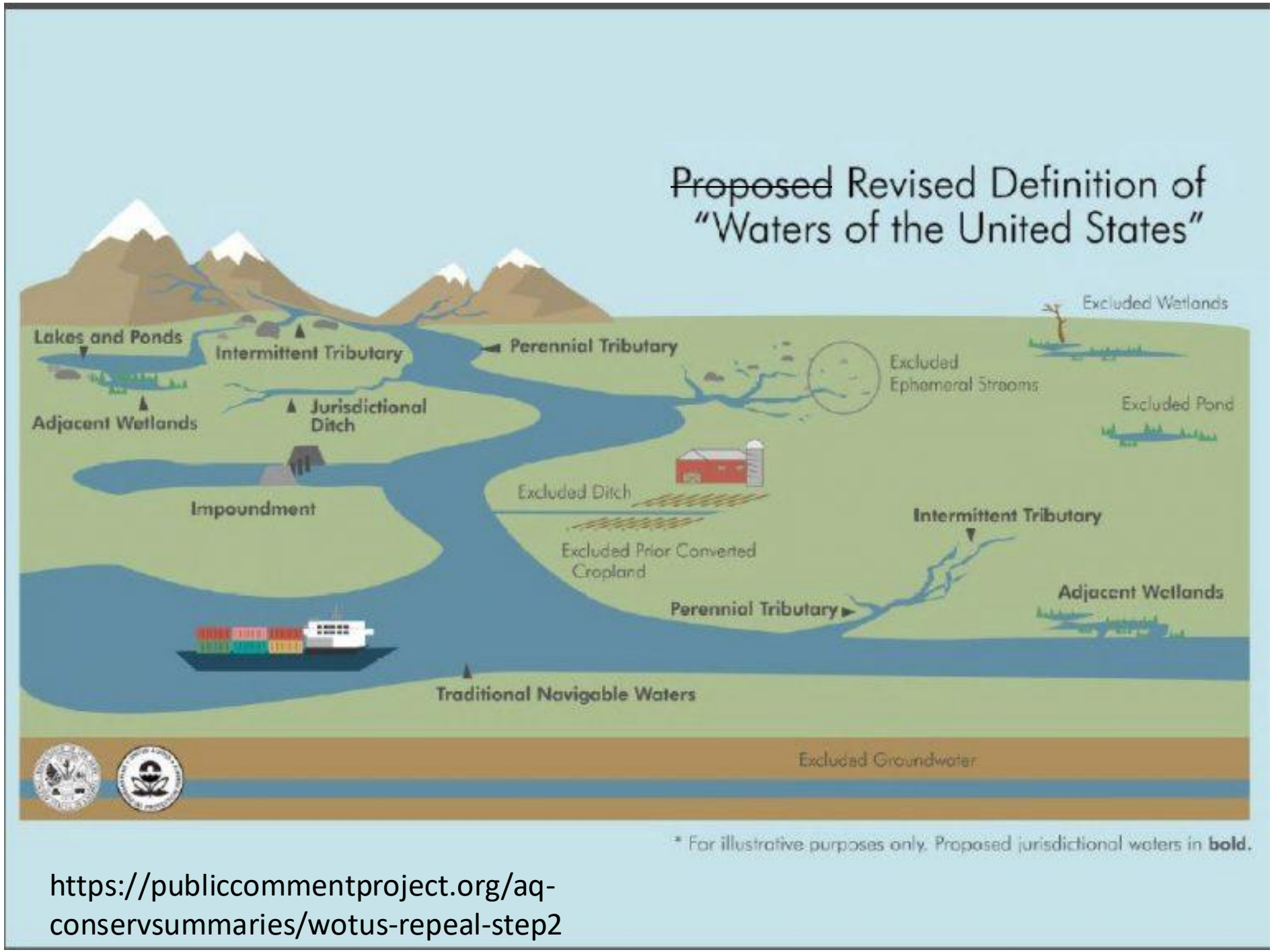
E&E NEWS

Log out

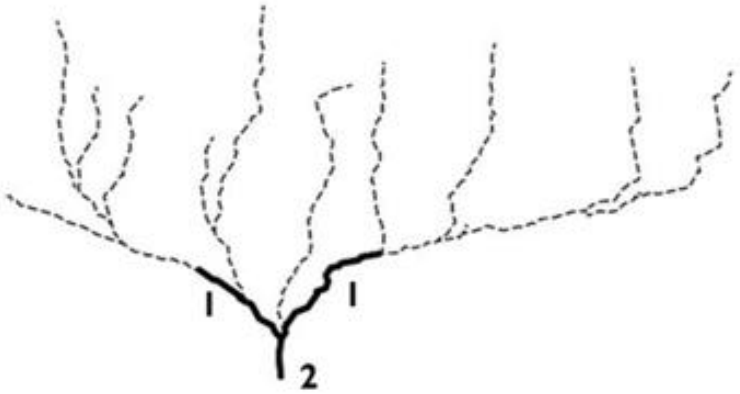
Who's suing over Trump's WOTUS rule?

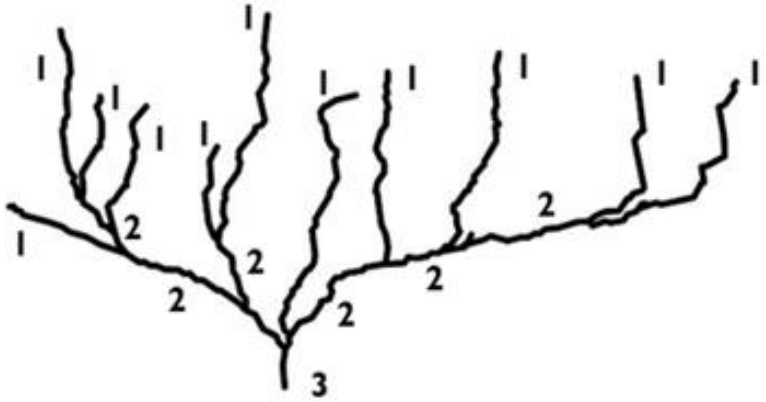
Pamela King and Hannah Northey, E&E News reporters • Published: Wednesday, June 24, 2020

Water Resource	Obama Rule	Trump Rule
Traditionally Navigable Waters	✓	✓
Perennial and intermittent tributaries	✓	?
Ephemeral Streams	✓	✗
Wetlands with physical surface connections to waterways	✓	Some
Wetlands lacking a surface connection to waterways	✓	✗
Ditches	Some	Very Few
Lakes and Ponds	Most	Most
Impoundments	✓	✓



https://publiccommentproject.org/aq-conservsummaries/wotus-repeal-step2





Difference between a dry and wet year?

The above figure shows the expansion and contraction of streamflow in the Leading Ridge watershed in Huntingdon County, Pennsylvania.

Research by Jon Duncan, Penn State

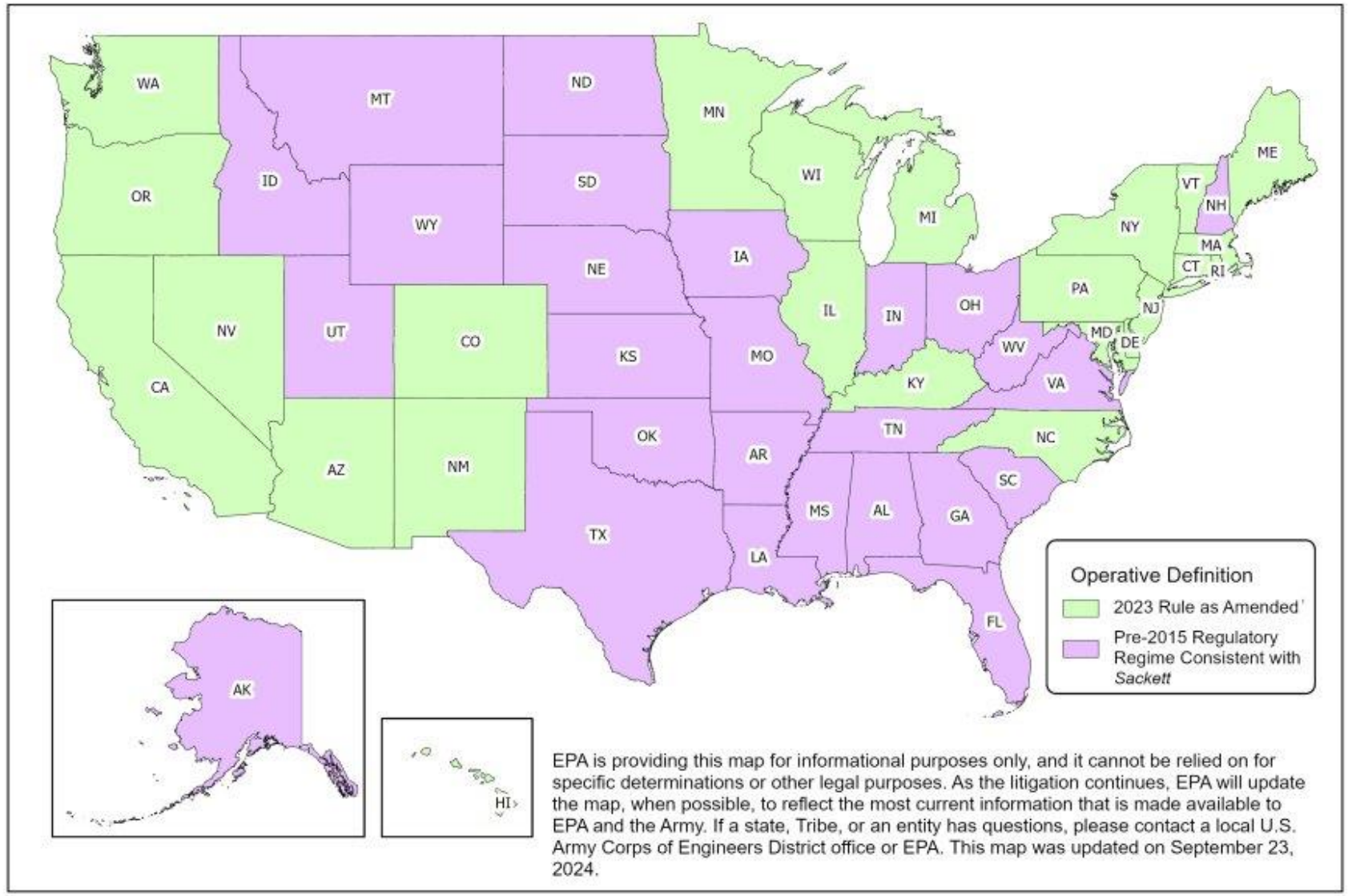
Clean Water Act- continued

- Aug. 30, 2021- US District Court for Arizona vacated, remanded Trump's "Navigable Waters Protection Rule"
  - EPA & US Army Corps halted implementation
  - Interpreting WOTUS as consistent w/ pre-2015 regulatory regime framework
- Nov. 18, 2021- new proposed rulemaking to reinstate 2015 rulemaking
- Oct. 3, 2022- Sackett Case argued
- January 18, 2023- EPA/COE publish definition of waters of the United States
- May 25, 2023- US Supreme Court decides Sackett (9-0 decision)

  Sackett Holding: The Clean Water Act extends only to wetlands that have a continuous surface connection with "waters" of the United States — i.e., with a relatively permanent body of water connected to traditional interstate navigable waters, **33 U.S.C. § 1362(7)** — making it difficult to determine where the water ends and the wetland begins.

  https://www.scotusblog.com/case-files/cases/sackett-v-environmental-protection-agency/
- August 29, 2023- EPA & US Army Corps issue final rule to amend the final "Revised Definition of the Waters of the United States" rule; effective Sept. 2023
- Lots more litigation

Operative Definition of "Waters of the United States"



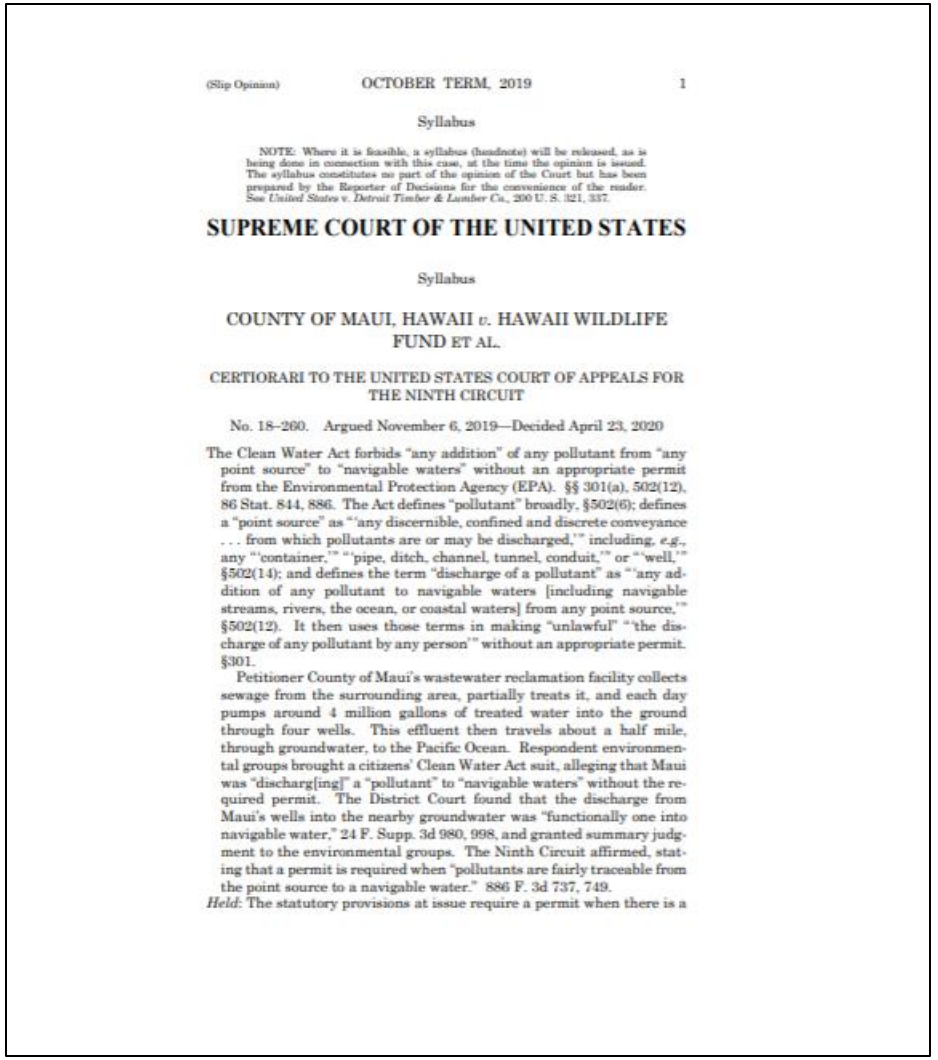
[1] Also operative in the U.S. Territories and the District of Columbia

https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update

One other critical case: Hawai‘i Wildlife Fund v. County of Maui (2020)

In June 2013, the University of Hawaii prepared the Lahaina Groundwater Tracer Study for the State of Hawai‘i Department of Health, U.S. Environmental Protection Agency, and U.S. Army Engineer Research and Development Center. The study showed that there was a hydraulic connection between the Lahaina Wastewater Reclamation Facility (LWRF) and the water off the coast of Kaanapali. The treated wastewater effluent that the County of Maui was injecting into its wells was making its way through the groundwater and into the ocean.

New test for functional equivalency through groundwater from Hawai‘i Wildlife Fund v. County of Maui (2020)



(Slip Opinion) OCTOBER TERM, 2019 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COUNTY OF MAUI, HAWAII *v.* HAWAII WILDLIFE FUND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18–260. Argued November 6, 2019—Decided April 23, 2020

The Clean Water Act forbids "any addition" of any pollutant from "any point source" to "navigable waters" without an appropriate permit from the Environmental Protection Agency (EPA). §§ 301(a), 502(12), 86 Stat. 844, 886. The Act defines "pollutant" broadly, §502(6); defines a "point source" as "'any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged,'" including, *e.g.*, any "'container,'" "'pipe, ditch, channel, tunnel, conduit,'" or "'well,'" §502(14); and defines the term "discharge of a pollutant" as "'any addition of any pollutant to navigable waters [including navigable streams, rivers, the ocean, or coastal waters] from any point source,'" §502(12). It then uses those terms in making "unlawful" "'the discharge of any pollutant by any person'" without an appropriate permit. §301.

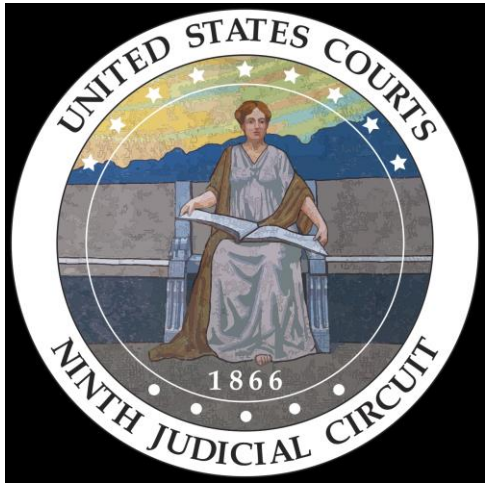
Petitioner County of Maui's wastewater reclamation facility collects sewage from the surrounding area, partially treats it, and each day pumps around 4 million gallons of treated water into the ground through four wells. This effluent then travels about a half mile, through groundwater, to the Pacific Ocean. Respondent environmental groups brought a citizens' Clean Water Act suit, alleging that Maui was "discharg[ing]" a "pollutant" to "navigable waters" without the required permit. The District Court found that the discharge from Maui's wells into the nearby groundwater was "functionally one into navigable water," 24 F. Supp. 3d 980, 998, and granted summary judgment to the environmental groups. The Ninth Circuit affirmed, stating that a permit is required when "pollutants are fairly traceable from the point source to a navigable water." 886 F. 3d 737, 749.

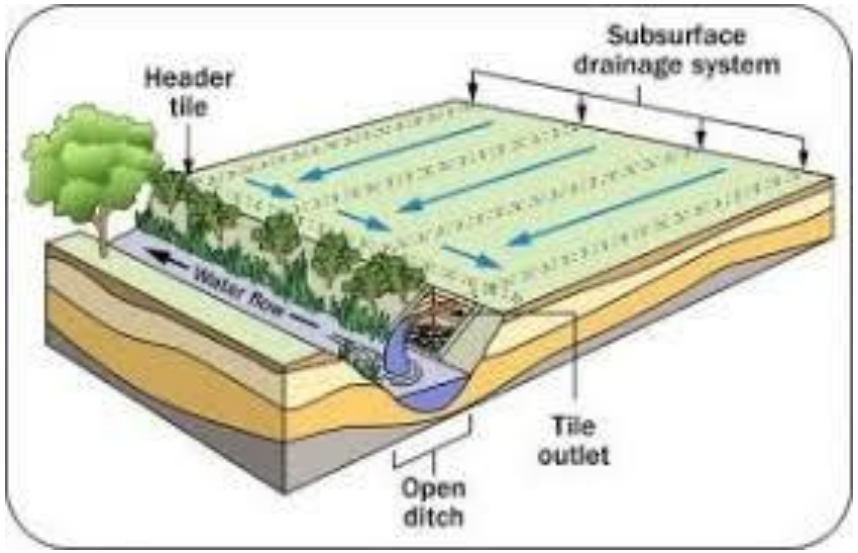
Held: The statutory provisions at issue require a permit when there is a

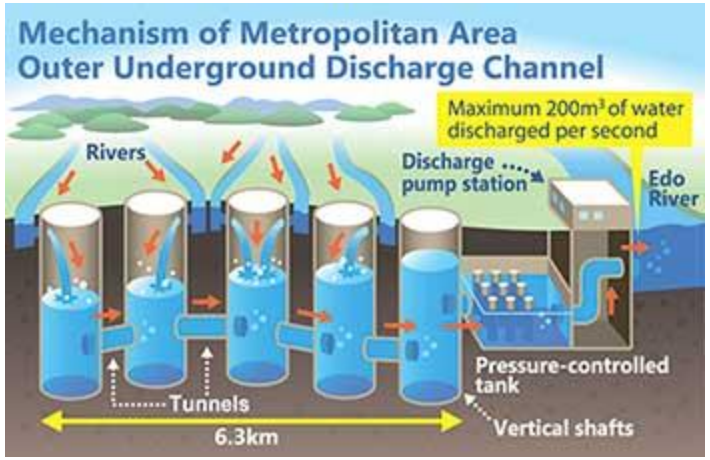
"the functional equivalent of a direct discharge"

- (1) transit time,
- (2) distance traveled,
- (3) the nature of the material through which the pollutant travels,
- (4) the extent to which the pollutant is diluted or chemically changed as it travels,
- (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source,
- (6) the manner by or area in which the pollutant enters the navigable waters,
- (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case.

How does the Maui case fit in today? (????)







More wrinkles from the Loper-Bright (2024) case

The Washington Post
Democracy Dies in Darkness

Supreme Court curbs federal agency power, overturning Chevron precedent

The Chevron precedent was targeted by conservatives who say the government gives too much power to federal bureaucrats.

9 min 4374

2024 US Supreme Court Decision

- Overturned “Chevron” case which provided deference to reasonable agency interpretations of ambiguous statutory provisions

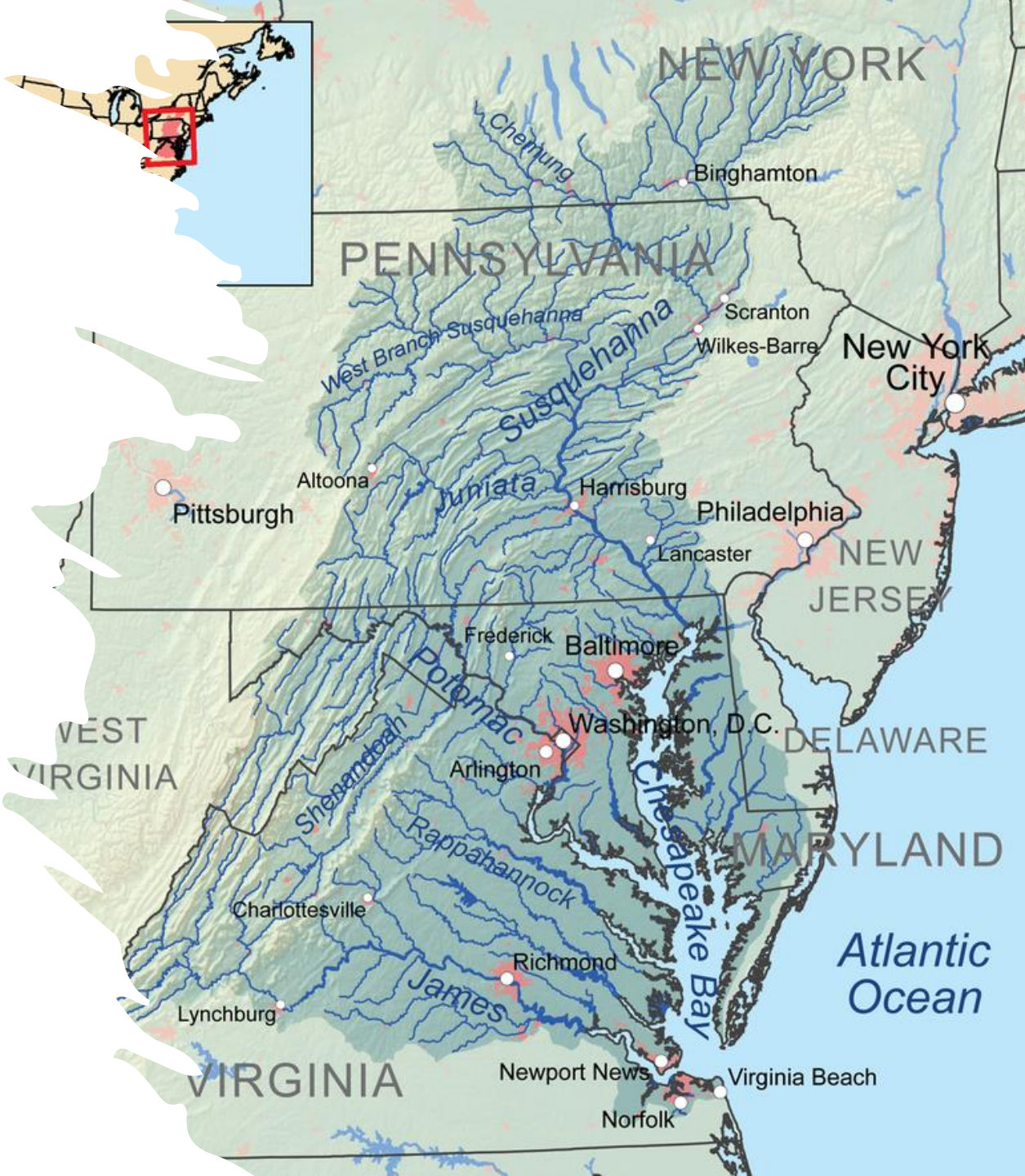
- Deference given to agencies given their specialized expertise in the subject area; Congress allowed agencies to fill the gaps, promote uniformity across the United States

- Now? Agency interpretations should be given “respect” but not binding deference

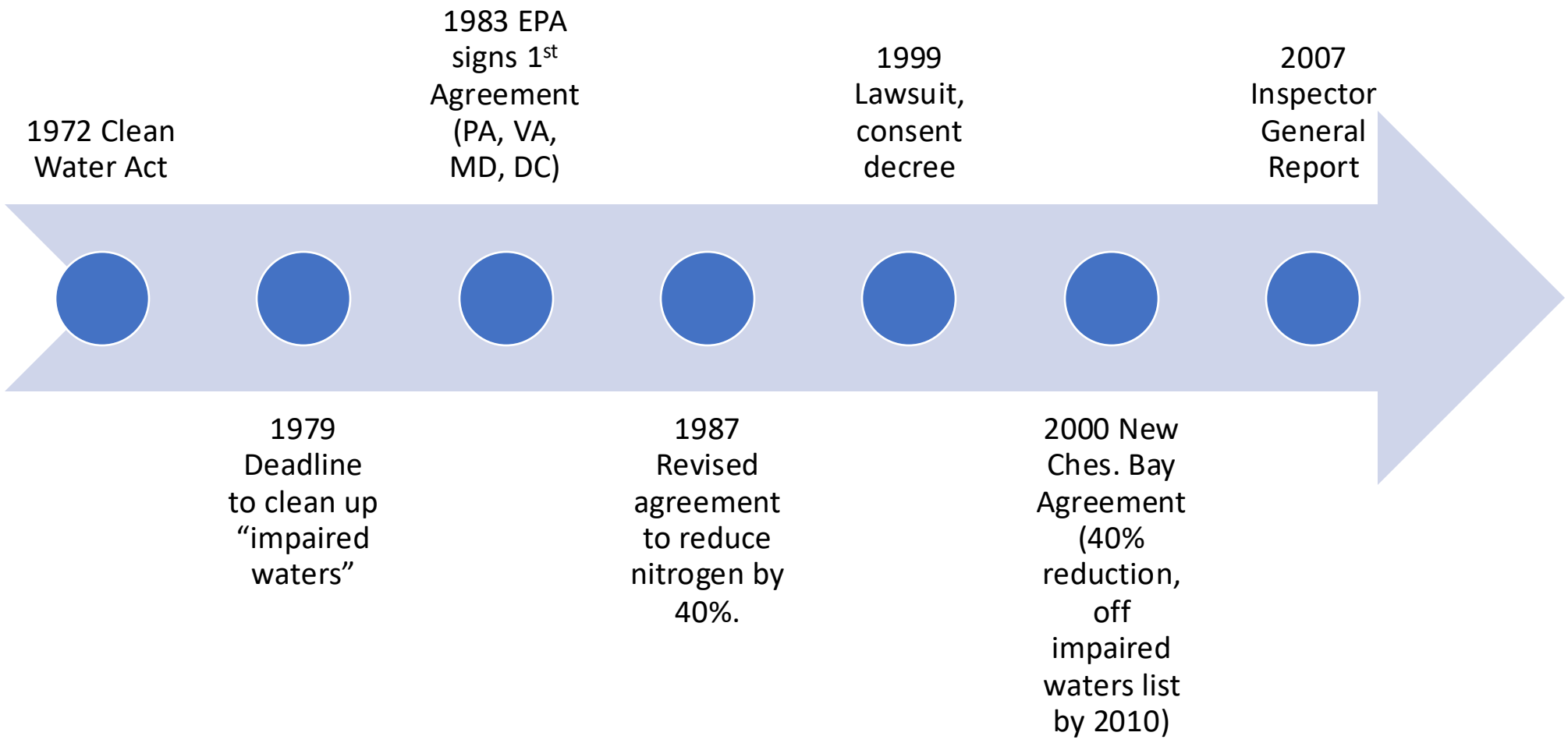
- Impact?
  - Past cases are unaffected
  - Future cases cannot apply deference
  - More litigation (federal and state)

Overview

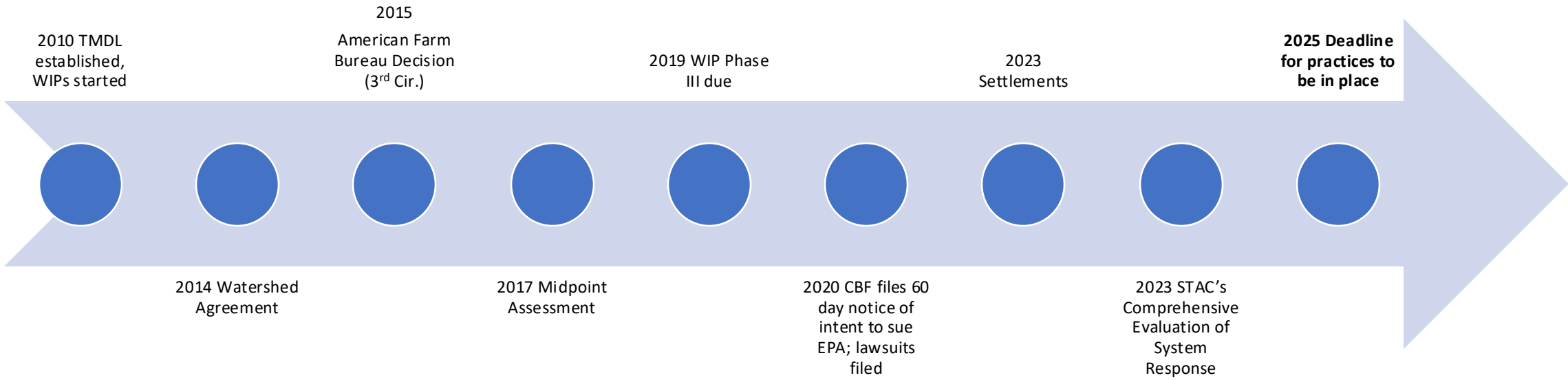
- Quick reminder of where “law” comes from
- A very fast history leading up to 1972
- The Clean Water Act + interpretation of WOTUS
- Recent SCOTUS decisions re: Chevron
- **Regulations & the Chesapeake Bay**
- Pennsylvania as a case study
- Now what + some ideas



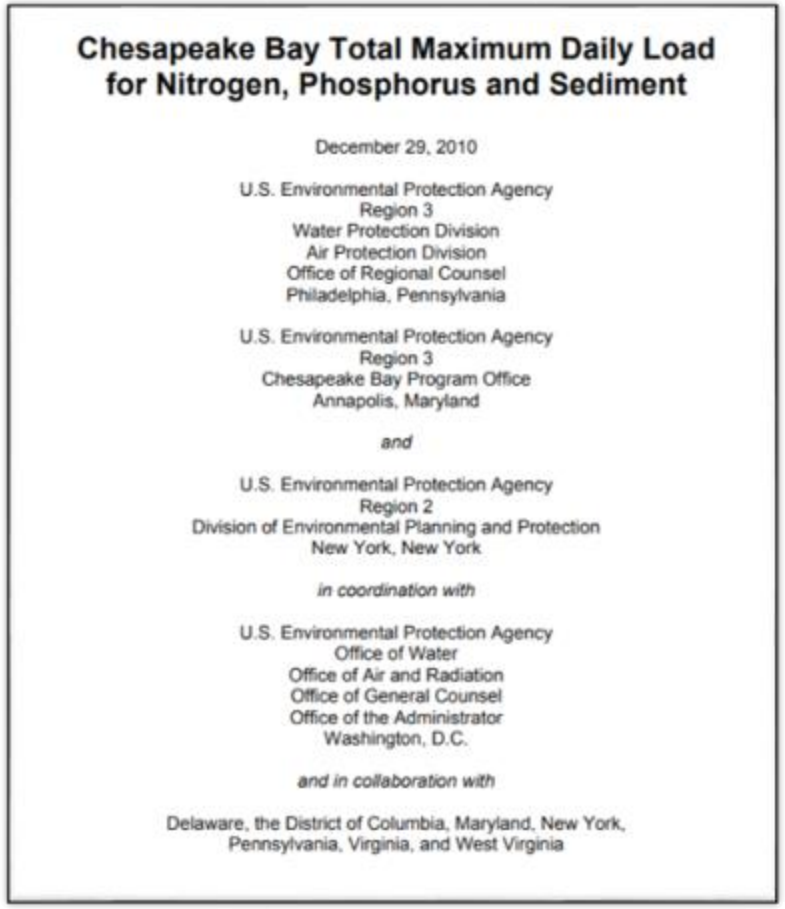
The law & policy on how to address the Chesapeake Bay has evolved over 40+ years



The legal framework has tightened over time, but what now?



In 2010,the Chesapeake Bay "Total Maximum Daily Load" created the first-in-the-nation regulatory requirements for an entire watershed



Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment

December 29, 2010

U.S. Environmental Protection Agency
Region 3
Water Protection Division
Air Protection Division
Office of Regional Counsel
Philadelphia, Pennsylvania

U.S. Environmental Protection Agency
Region 3
Chesapeake Bay Program Office
Annapolis, Maryland

and

U.S. Environmental Protection Agency
Region 2
Division of Environmental Planning and Protection
New York, New York

in coordination with

U.S. Environmental Protection Agency
Office of Water
Office of Air and Radiation
Office of General Counsel
Office of the Administrator
Washington, D.C.

and in collaboration with

Delaware, the District of Columbia, Maryland, New York, Pennsylvania, Virginia, and West Virginia

→ Legal requirement to reduce nutrients, achieve standards for dissolved oxygen, water clarity, and Chlorophyll A, and meet living resources goals

→ The 2010 TMDL set Bay watershed limits of 185.9 million pounds of nitrogen, 12.5 million pounds of phosphorus and 6.45 billion pounds of sediment per year.

- 25% reduction in nitrogen
- 24% reduction in phosphorus
- 20% reduction in sediment

→ "The TMDL is designed to ensure that all pollution control measures needed to fully restore the Bay and its tidal rivers are in place by 2025, with at least 60 percent of the actions completed by 2017"

Implementation responsibility: 6 states + Washington DC through "Watershed Implementation Plans" (WIPs)

	Expectation letter	Submission
Phase I	2009	2010
Phase II	2011	2012
Phase III	2018	2019

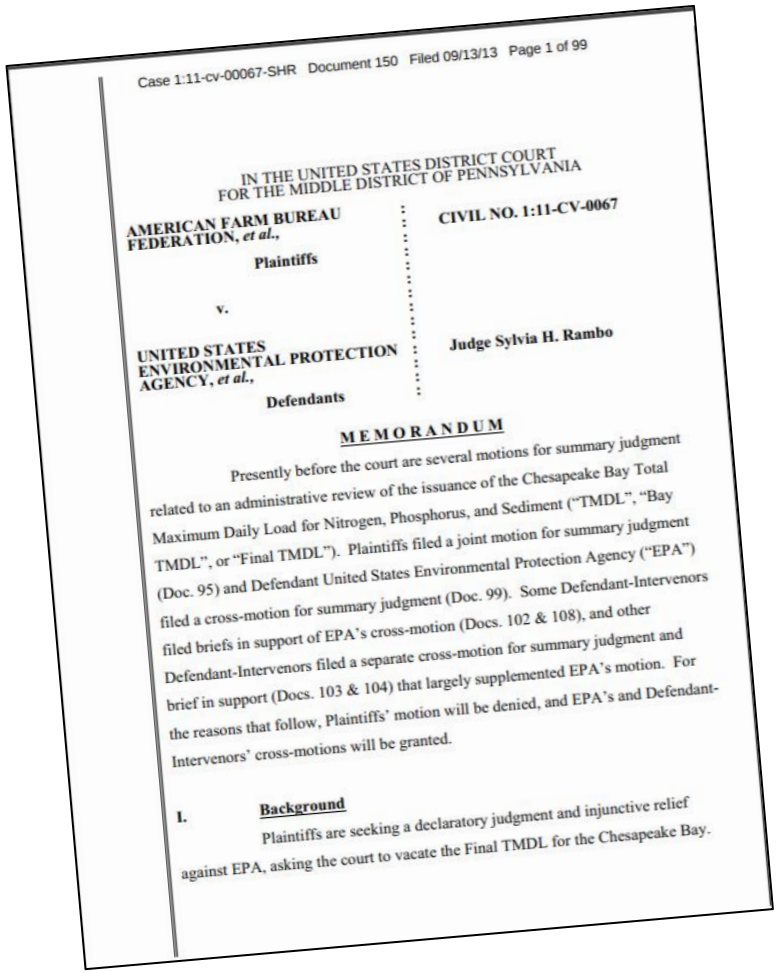
Key Phase III requirement:

"Specify the programmatic and numeric commitments in order to have all practices and controls in place by 2025 to achieve the final Phase III WIP nutrient and sediment planning targets"

Phase III Expectation Fact Sheet

https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-fact-sheet

In late 2010, the American Farm Bureau et al filed a lawsuit in federal court; however, courts upheld the TMDL after 5+ years of litigation



Case 1:11-cv-00067-SHR Document 150 Filed 09/13/13 Page 1 of 99

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FARM BUREAU FEDERATION, *et al.*,
Plaintiffs

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Defendants

CIVIL NO. 1:11-CV-0067

Judge Sylvia H. Rambo

MEMORANDUM

Presently before the court are several motions for summary judgment related to an administrative review of the issuance of the Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus, and Sediment ("TMDL", "Bay TMDL", or "Final TMDL"). Plaintiffs filed a joint motion for summary judgment (Doc. 95) and Defendant United States Environmental Protection Agency ("EPA") filed a cross-motion for summary judgment (Doc. 99). Some Defendant-Intervenors filed briefs in support of EPA's cross-motion (Docs. 102 & 108), and other Defendant-Intervenors filed a separate cross-motion for summary judgment and brief in support (Docs. 103 & 104) that largely supplemented EPA's motion. For the reasons that follow, Plaintiffs' motion will be denied, and EPA's and Defendant-Intervenors' cross-motions will be granted.

I. **Background**

Plaintiffs are seeking a declaratory judgment and injunctive relief against EPA, asking the court to vacate the Final TMDL for the Chesapeake Bay.

<u>Procedural history:</u>

- 2013: 99 page decision by Judge Rambo in U.S District Court for Central Pennsylvania upholding EPA's decision
- Appealed to 3rd Circuit Court of Appeals
- 2015: 3rd Circuit upheld case
- 2016: US Supreme Court denied certiorari

<u>Key findings:</u>

- 2010 TMDL represented lawful federalism under the Clean Water Act, particularly given consultation/engagement
- Public comment period was sufficient
- EPA's modeling & use of data was appropriate

In 2014, the Chesapeake Watershed Agreement provided principles, goals & outcomes to accomplish the TMDL and more

WATER QUALITY

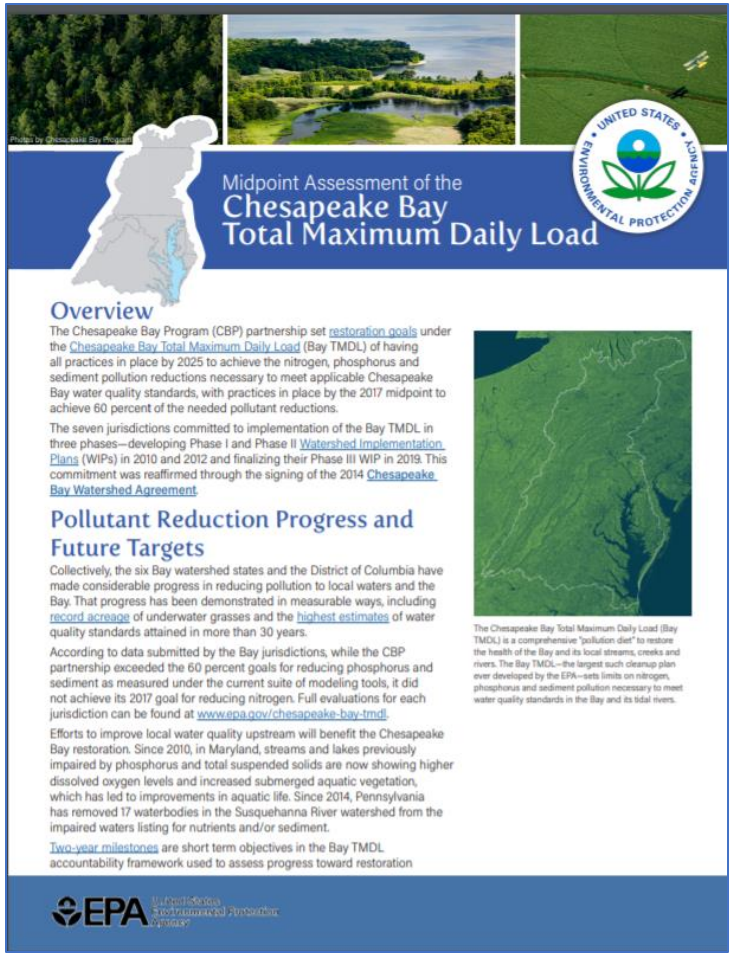
Restoring the Bay's waters is critical to overall watershed restoration because clean water is the foundation for healthy fisheries, habitats and communities across the region. However excess amounts of nitrogen, phosphorus and sediment in the Bay and its tributaries have caused many sections of the Bay to be listed as "impaired" under the Clean Water Act. The Chesapeake Bay Total Maximum Daily Load (TMDL) is driving nutrient and sediment reductions as described in the Watershed Implementation Plans (WIPs), adopted by the states and the District of Columbia, and establishes the foundation for water quality improvements embodied in this Agreement. These plans set nutrient and sediment reduction targets for various sources—stormwater, agriculture, air deposition, wastewater and septic systems.

GOAL: Reduce pollutants to achieve the water quality necessary to support the aquatic living resources of the Bay and its tributaries and protect human health.

7

2017 Watershed Implementation Plans (WIP) Outcome	By 2017, have practices and controls in place that are expected to achieve 60 percent of the nutrient and sediment pollution load reductions necessary to achieve applicable water quality standards compared to 2009 levels.
2025 WIP Outcome	By 2025, have all practices and controls installed to achieve the Bay's dissolved oxygen, water clarity/submerged aquatic vegetation and chlorophyll *a* standards as articulated in the Chesapeake Bay TMDL document.
Water Quality Standards Attainment and Monitoring Outcome	Continually improve the capacity to monitor and assess the effects of management actions being undertaken to implement the Bay TMDL and improve water quality. Use the monitoring results to report annually to the public on progress made in attaining established Bay water quality standards and trends in reducing nutrients and sediment in the watershed.

In 2017, the Mid-Point Assessment found progress and yet the need for more action



Midpoint Assessment of the
Chesapeake Bay
Total Maximum Daily Load

Overview

The Chesapeake Bay Program (CBP) partnership set restoration goals under the Chesapeake Bay Total Maximum Daily Load (Bay TMDL) of having all practices in place by 2025 to achieve the nitrogen, phosphorus and sediment pollution reductions necessary to meet applicable Chesapeake Bay water quality standards, with practices in place by the 2017 midpoint to achieve 60 percent of the needed pollutant reductions.

The seven jurisdictions committed to implementation of the Bay TMDL in three phases—developing Phase I and Phase II Watershed Implementation Plans (WIPs) in 2010 and 2012 and finalizing their Phase III WIP in 2019. This commitment was reaffirmed through the signing of the 2014 Chesapeake Bay Watershed Agreement.

Pollutant Reduction Progress and Future Targets

Collectively, the six Bay watershed states and the District of Columbia have made considerable progress in reducing pollution to local waters and the Bay. That progress has been demonstrated in measurable ways, including record acreage of underwater grasses and the highest estimates of water quality standards attained in more than 30 years.

According to data submitted by the Bay jurisdictions, while the CBP partnership exceeded the 60 percent goals for reducing phosphorus and sediment as measured under the current suite of modeling tools, it did not achieve its 2017 goal for reducing nitrogen. Full evaluations for each jurisdiction can be found at www.epa.gov/chesapeake-bay-tmdl.

Efforts to improve local water quality upstream will benefit the Chesapeake Bay restoration. Since 2010, in Maryland, streams and lakes previously impaired by phosphorus and total suspended solids are now showing higher dissolved oxygen levels and increased submerged aquatic vegetation, which has led to improvements in aquatic life. Since 2014, Pennsylvania has removed 17 waterbodies in the Susquehanna River watershed from the impaired waters listing for nutrients and/or sediment.

Two-year milestones are short term objectives in the Bay TMDL accountability framework used to assess progress toward restoration

The Chesapeake Bay Total Maximum Daily Load (Bay TMDL) is a comprehensive "pollution diet" to restore the health of the Bay and its local streams, creeks and rivers. The Bay TMDL—the largest such cleanup plan ever developed by the EPA—sets limits on nitrogen, phosphorus and sediment pollution necessary to meet water quality standards in the Bay and its tidal rivers.

EPA United States Environmental Protection Agency

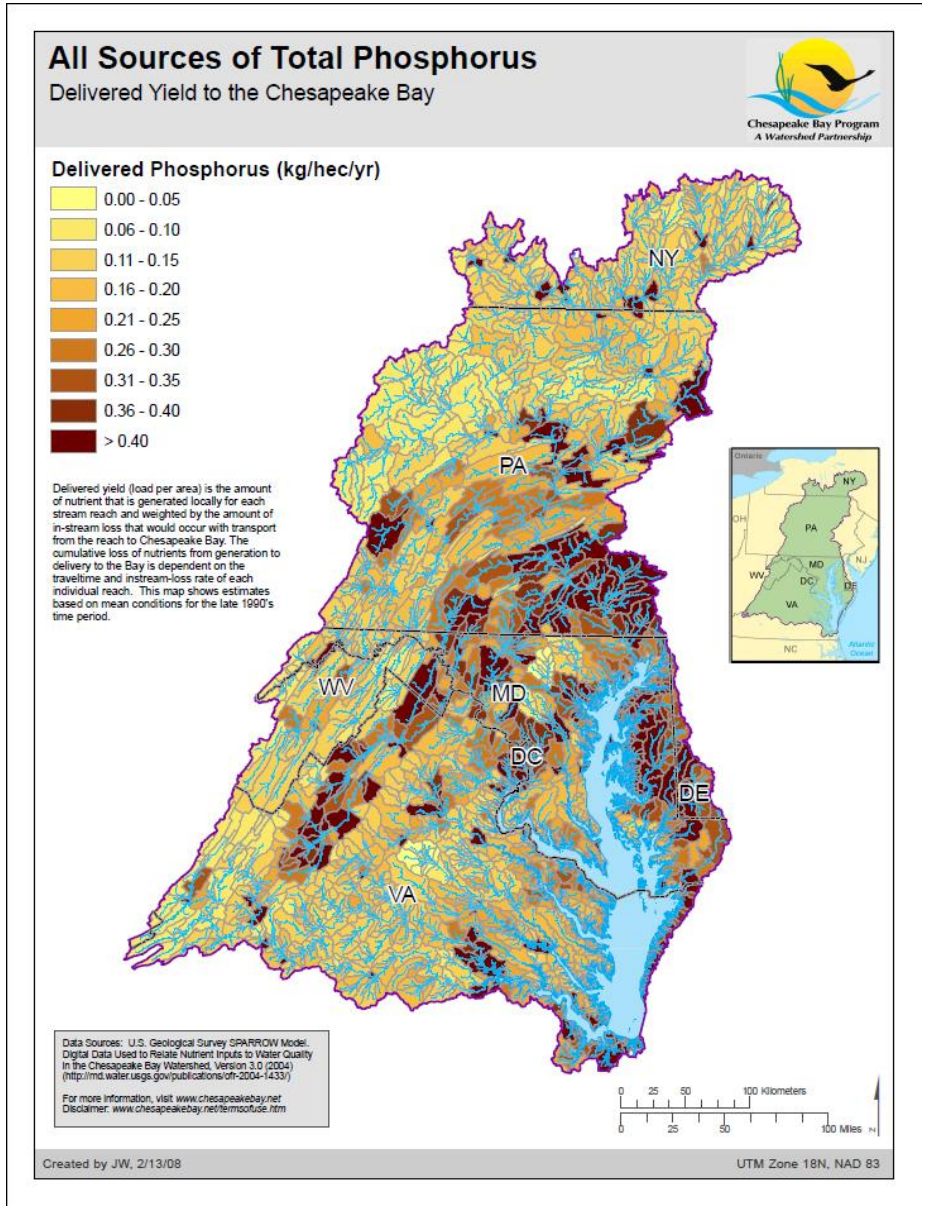
Considerable measurable progress:

- record acreage of underwater grasses
- highest estimates of water quality standards attained in 30 years+

While the 60 percent goals for reducing phosphorus and sediment as measured under the current suite of modeling tools were exceeded, the goal for reducing nitrogen was not met.

-EPA 2017 Mid Point Assessment

Monitoring showed that phosphorous runoff was improving in many areas



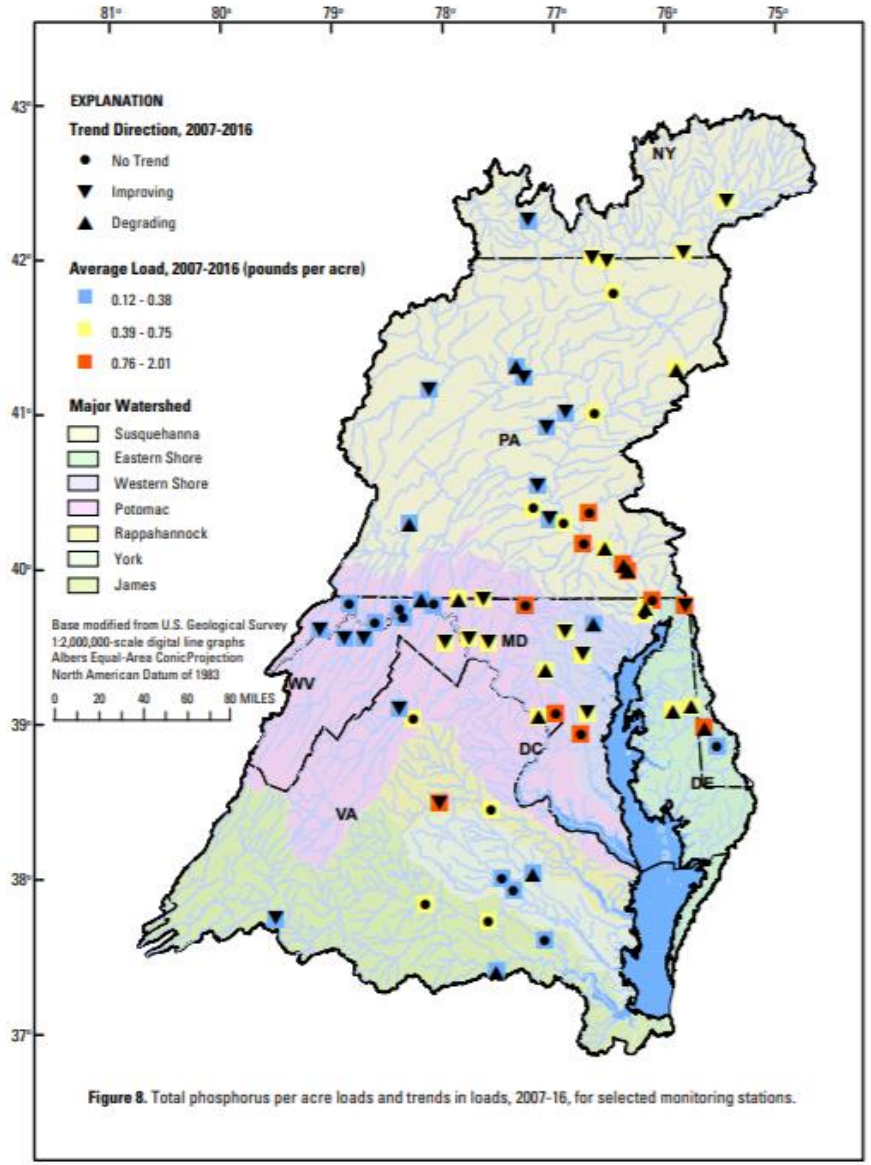
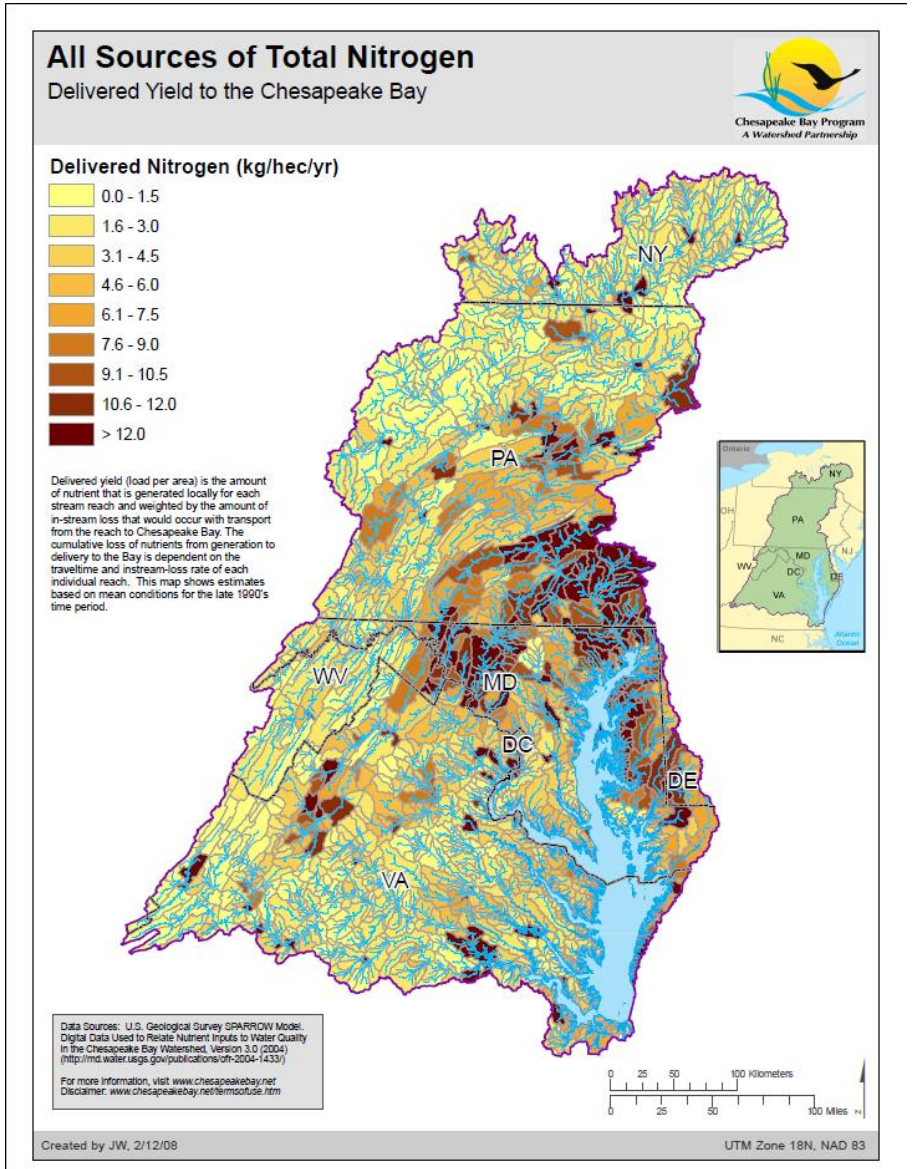


Figure 8. Total phosphorus per acre loads and trends in loads, 2007-16, for selected monitoring stations.

Moyer & Blomquist (2017)

However, monitoring also showed that nitrogen runoff goals not yet met



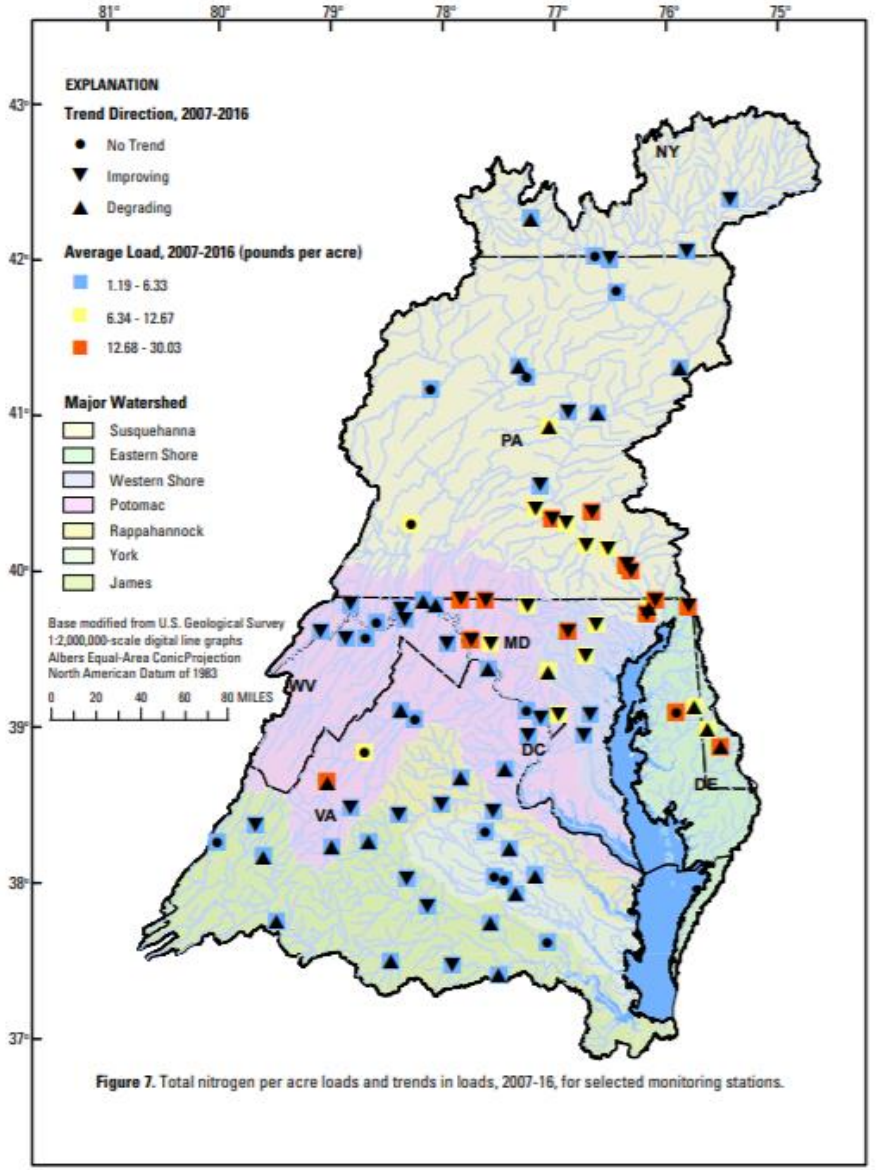


Figure 7. Total nitrogen per acre loads and trends in loads, 2007-16, for selected monitoring stations.

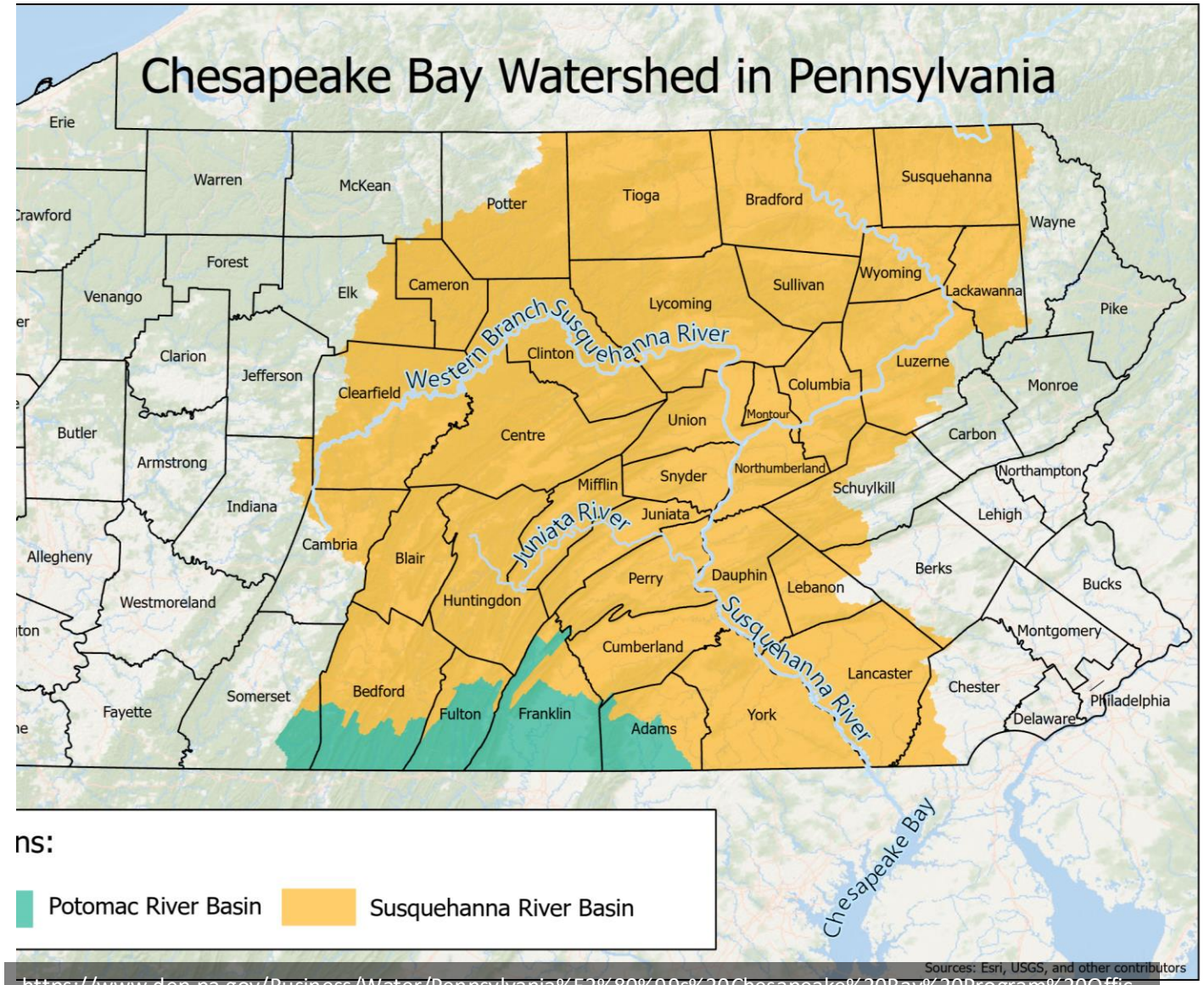
Moyer & Blomquist (2017)

A lot of questions remain re: sediment impacts, particularly related to the Susquehanna River & the Conowingo Dam

To the left: https://prd-wret.s3.us-west-2.amazonaws.com/assets/palladium/production/s3fs-public/styles/side_image/public/thumbnails/image/MODIS%20image%20of%20Chesapeake%20Bay%20area%20after%20Tropical%20Storm%20Lee_2011_09.PNG

Above: https://www.usgs.gov/news/conowingo-dam-above-90-percent-capacity-sediment-storage

The Susquehanna River provides more than 50% of the freshwater inflow into the Chesapeake Bay



https://www.dep.pa.gov/Business/Water/Pennsylvania%E2%80%99s%20Chesapeake%20Bay%20Program%20Office/WIP3/Pages/Phase-III-WIP-(Watershed-Implementation-Plans).aspx

Impact of upstream flows puts the focus on Pennsylvania

Pittsburgh Post-Gazette
post-gazette.com

EPA gives poor marks to Pa. on protecting Chesapeake Bay watershed

March 23, 2015 12:00 AM

Dennis Drenner/The New York Times

Pennsylvania discharges more nitrogen into tributaries of the Chesapeake Bay than any other state.

By Don Hopey / Pittsburgh Post-Gazette

More pollution flowing into Chesapeake Bay than expected

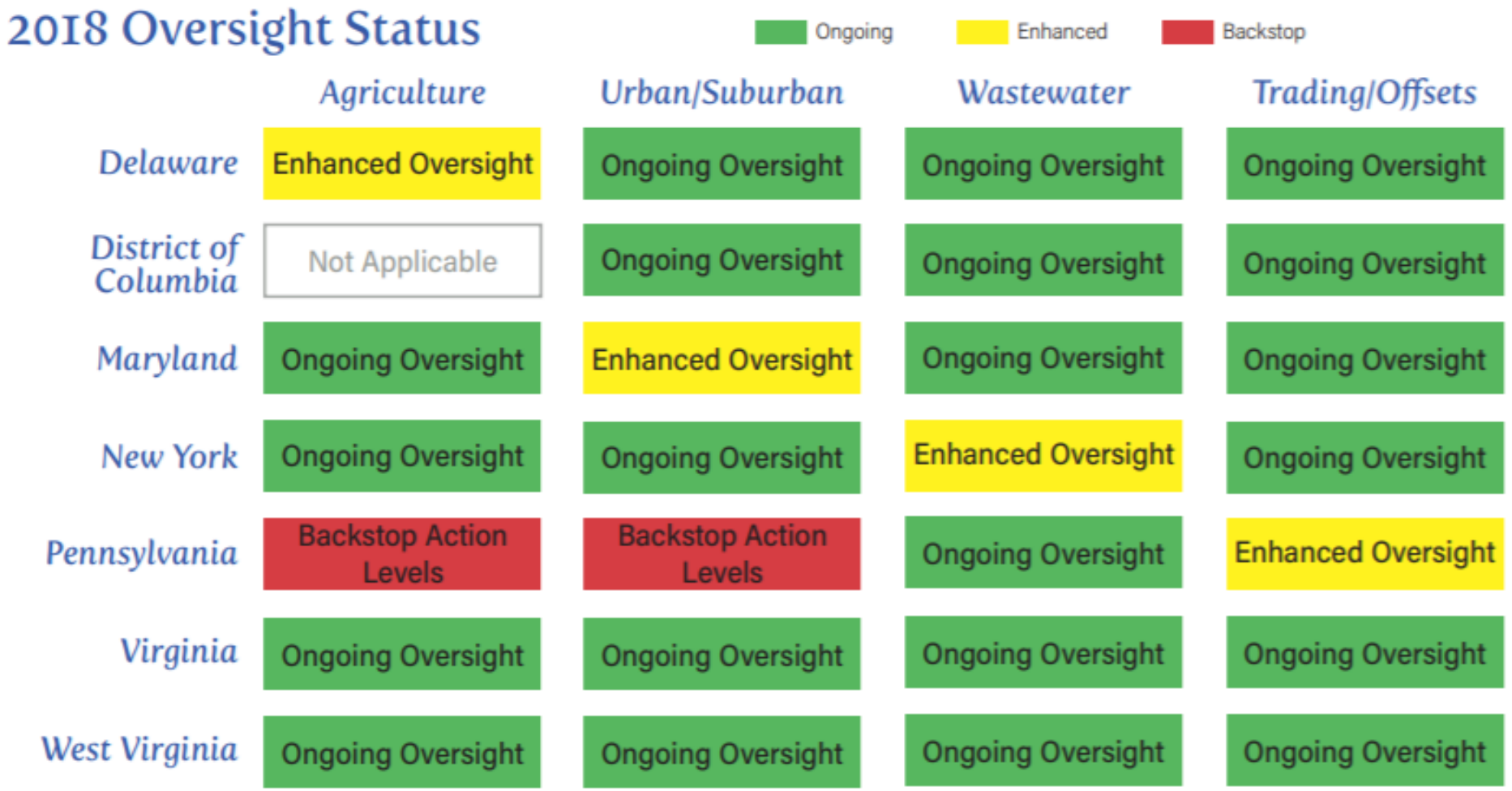
APRIL 21, 2015 | 12:01 AM

BY MARIE CUSICK

AP PHOTO/MORGAN HEIM/ILCP/CHESAPEAKE BAY FOUNDATION

Algae blooms (dark colors) in Yorktown, Virginia in 2010. Torrential rain combined with high temperatures and pollution made for ideal algae bloom conditions.

Concerns over PA sharpened by the Mid Point Assessment



https://www.epa.gov/sites/production/files/2018-07/documents/factsheet-epa-midpoint-assessment-chesapeake-bay-tmdl.pdf

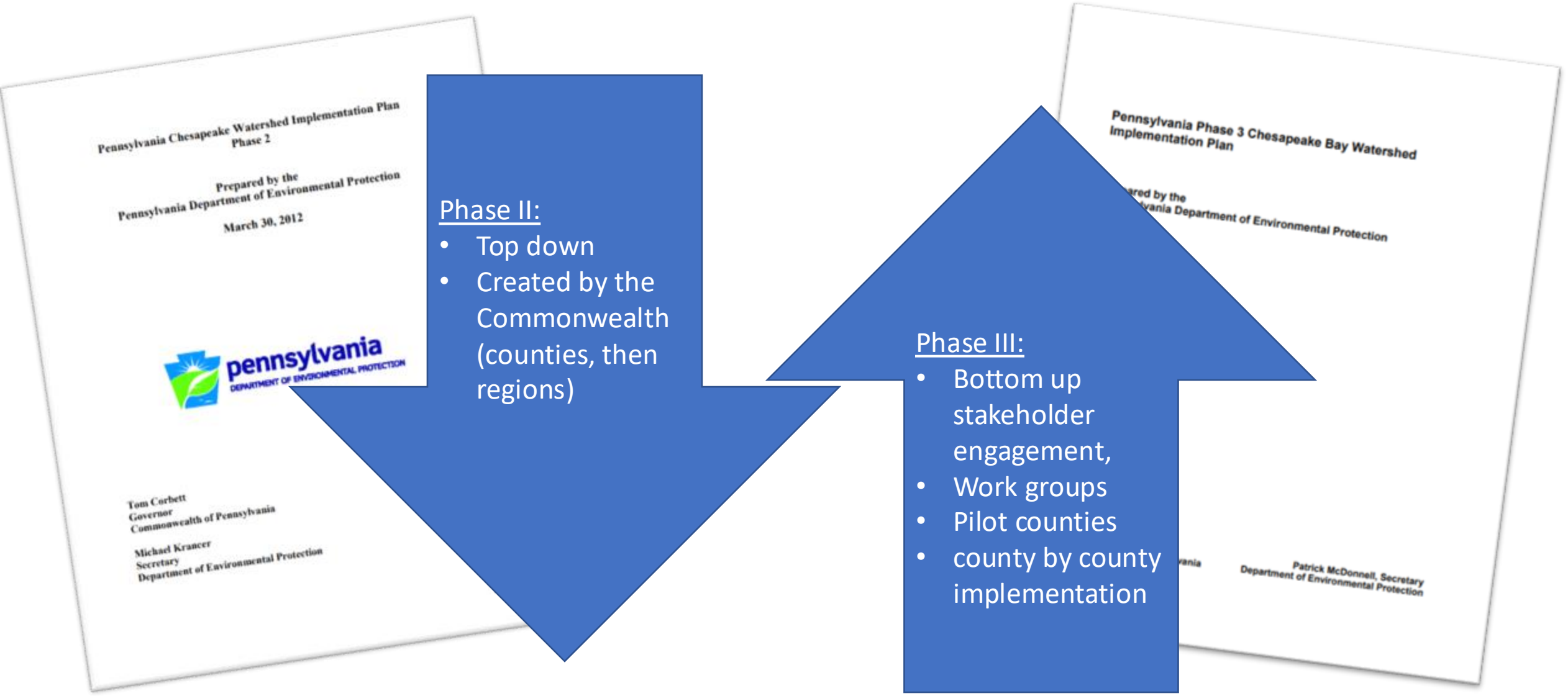
In August 2019, jurisdictions submitted Phase III Watershed Implementation Plans for EPA review; feedback in Dec. 2019

→ Virginia and Maryland plans, <u>if fully funded</u> and implemented, can meet their targets.

→ Pennsylvania's plan underfunded by $250-300 million and falls 25% short of meeting its nitrogen-reduction goal.

→ New York's plan did not meet nitrogen reduction goals at that time

Pennsylvania changed its approach between the Phase II and Phase III Watershed Implementation Plans (WIPs)



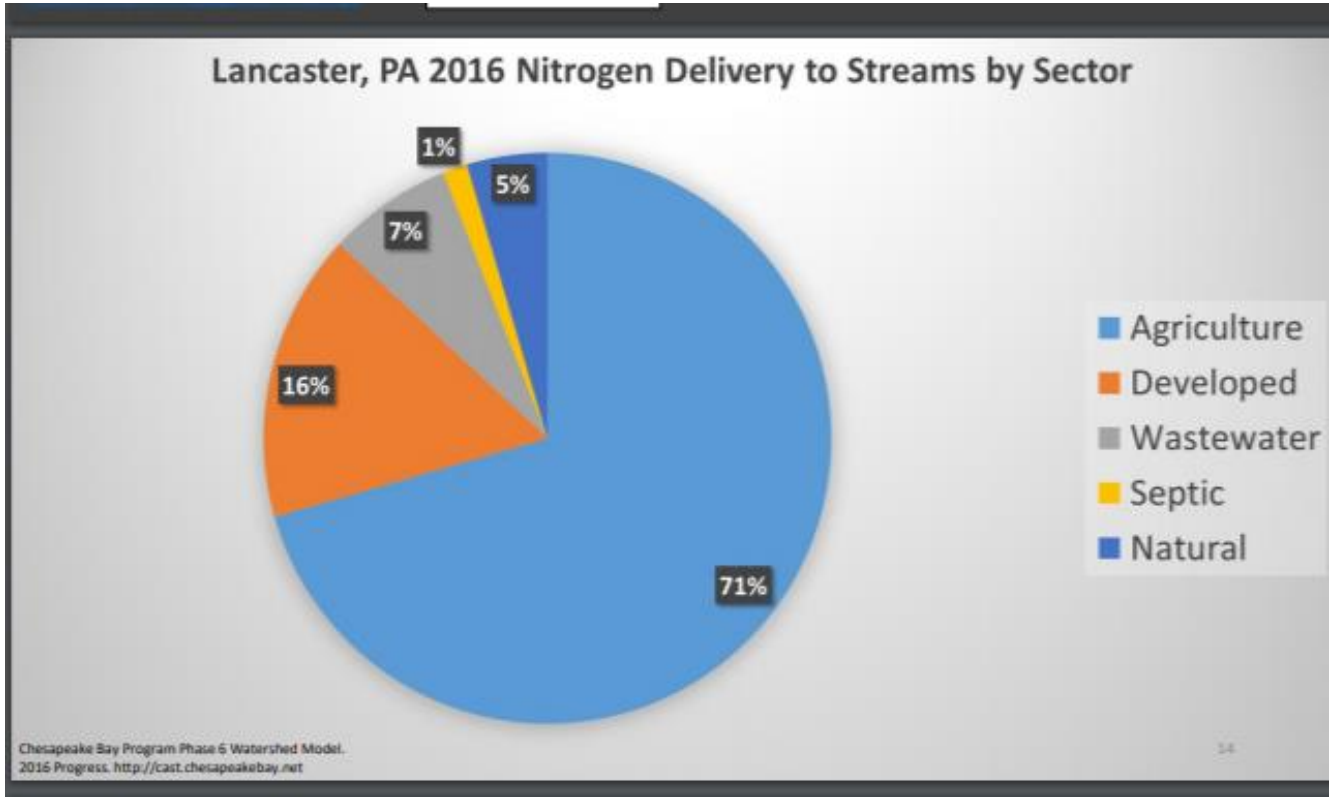
Phase II:

- Top down
- Created by the Commonwealth (counties, then regions)

Phase III:

- Bottom up stakeholder engagement,
- Work groups
- Pilot counties
- county by county implementation

EPA's Review of Pennsylvania:
Phase III WIP meets numeric targets for P; only 75% for N



https://www.chesapeakebay.net/channel_files/25878/ag_wg_trentacoste_6_19_18.pdf

"Pennsylvania's current planned efforts do not achieve the nitrogen Phase III WIP planning target, nor does the plan explain how or when additional reductions from the remaining County Action Plans will be incorporated into the broader plan to achieve the nitrogen planning target."

https://www.epa.gov/sites/production/files/2019-12/documents/pa.pdf

In January 2020, former Chesapeake Bay Program Director said the "TMDL is not enforceable"; huge backlash & questions

SECTIONS SEARCH Capital Gazette SUBSCRIBE 4 weeks for only 99¢ LOG IN

EPA Chesapeake Bay Program director says 2025 pollution targets are not 'enforceable'

By RACHAEL PACELLA
CAPITAL GAZETTE | JAN 03, 2020 | 6:23 PM

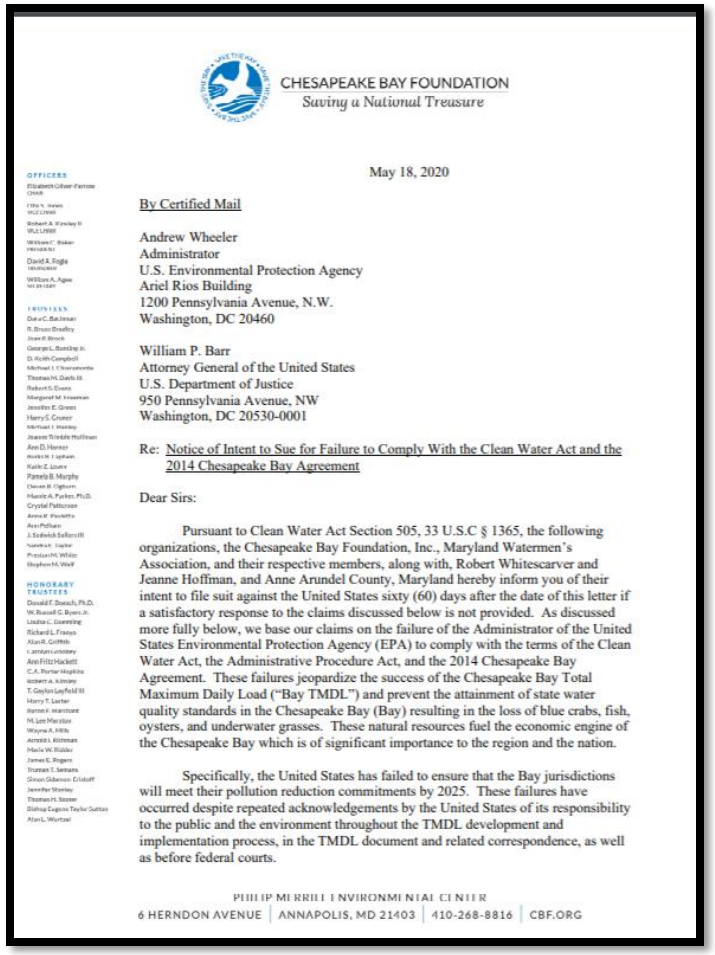
"The head of the EPA's Chesapeake Bay Program stepped back from strict enforcement of 2025 pollution goals for the Chesapeake Bay Friday, calling the technical targets "an aspiration" and not an enforceable deadline.

The comments by program Director Dana Aunkst near the end of a two-day conference in Annapolis sparked criticism from state officials and outrage from several environmental groups who said the comments represent the Trump administration's retreat from the Chesapeake Bay cleanup effort."

https://www.capitalgazette.com/environment/ac-cn-bay-comission-0104-20200103-o5nun6uojbapjecl5dak7p62wa-story.html

Dana Aunkst
Former Director, Chesapeake Bay Program
U.S. Environmental Protection Agency

In early 2020, other states, NGO sent 60-day notices of intent to sue EPA for failure to meet requirements



CHESAPEAKE BAY FOUNDATION
Saving a National Treasure

May 18, 2020

By Certified Mail

Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

William P. Barr
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Notice of Intent to Sue for Failure to Comply With the Clean Water Act and the 2014 Chesapeake Bay Agreement

Dear Sirs:

Pursuant to Clean Water Act Section 505, 33 U.S.C § 1365, the following organizations, the Chesapeake Bay Foundation, Inc., Maryland Watermen's Association, and their respective members, along with, Robert Whitescarver and Jeanne Hoffman, and Anne Arundel County, Maryland hereby inform you of their intent to file suit against the United States sixty (60) days after the date of this letter if a satisfactory response to the claims discussed below is not provided. As discussed more fully below, we base our claims on the failure of the Administrator of the United States Environmental Protection Agency (EPA) to comply with the terms of the Clean Water Act, the Administrative Procedure Act, and the 2014 Chesapeake Bay Agreement. These failures jeopardize the success of the Chesapeake Bay Total Maximum Daily Load ("Bay TMDL") and prevent the attainment of state water quality standards in the Chesapeake Bay (Bay) resulting in the loss of blue crabs, fish, oysters, and underwater grasses. These natural resources fuel the economic engine of the Chesapeake Bay which is of significant importance to the region and the nation.

Specifically, the United States has failed to ensure that the Bay jurisdictions will meet their pollution reduction commitments by 2025. These failures have occurred despite repeated acknowledgements by the United States of its responsibility to the public and the environment throughout the TMDL development and implementation process, in the TMDL document and related correspondence, as well as before federal courts.

PHILIP MERRILL ENVIRONMENTAL CENTER
6 HERNDON AVENUE | ANNAPOLIS, MD 21403 | 410-268-8816 | CBF.ORG

Two sets of notices:

- Chesapeake Bay Foundation, together with the MD Watermen's Association, Anne Arundel County, and Virginia cattle farmers
- Attorneys General of Maryland, Virginia, Delaware, and the District of Columbia

Issues:

- EPA has failed to ensure the Bay jurisdictions will meet their pollution reduction commitments by the 2025 deadline.
- The agency's failure is a violation of the federal Clean Water Act, the Administrative Procedure Act, and the 2014 Chesapeake Bay Agreement.

https://www.cbf.org/document-library/litigation/cbf-epa-noi-may-18-2020.pdf

Two sets of lawsuits filed in DC District Court, Sept. 2020. Settled in 2023 with a focus on ag & stormwater in PA.

EPA hit with lawsuits over Chesapeake Bay cleanup

Timothy B. Wheeler Sep 11, 2020 Updated Sep 11, 2020 0

Making good on threats issued months ago, three Chesapeake Bay watershed states, the District of Columbia and the Chesapeake Bay Foundation took the U.S. Environmental Protection Agency to court Thursday for its failure to push **Pennsylvania** and **New York** to do more to help clean up the Bay.

In their lawsuit, the attorneys general of Maryland, Virginia, Delaware and the District of Columbia accused the EPA of shirking its responsibility under the Clean Water Act by letting Pennsylvania and New York fall short in reducing their nutrient and sediment pollution fouling the Bay.

https://www.bayjournal.com/news/policy/epa-hit-with-lawsuits-over-chesapeake-bay-cleanup/article_db7ad7e0-f429-11ea-833a-87109c15a521.html

Potential mechanisms for enforcement?

(1) Targeting federal enforcement and compliance assurance in the watershed;
(2) Directing Chesapeake Bay funding to identified priorities;
(3) Establishing finer scale waste load and load allocations through a Pennsylvania state-specific proposed amendment to the Chesapeake Bay TMDL;
(4) Requiring additional reductions of loading from point sources through a Pennsylvania state-specific proposed amendment to the Chesapeake Bay TMDL; and
(5) Initiating a process to propose promulgating nitrogen and phosphorous numeric water quality standards for Pennsylvania applicable to streams and rivers in the Chesapeake Bay Watershed.

April 2017 Phase III WIP Expectations for PA: https://www.epa.gov/sites/production/files/2017-05/documents/final_pennsylvania_phase_iii_wip_expectations_4_27_17_508.pdf

Some of which have been tried previously…

U.S. ENVIRONMENTAL PROTECTION AGENCY

EPA leans on Amish farmers in Pennsylvania

By TIM WHEELER
JUN 09, 2010 AT 11:28 AM

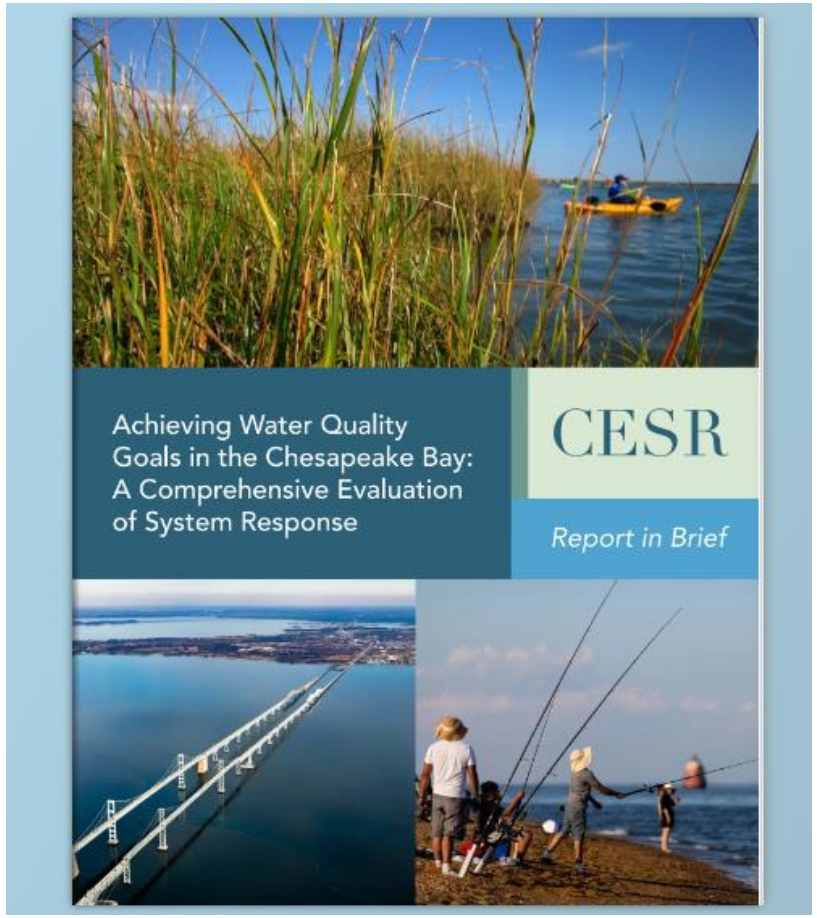
MONDAY, AUGUST 8, 2016

PA's Chesapeake Bay Reboot Strategy To Improve Water Quality May Need Kick-Start

By Timothy B. Wheeler,
Chesapeake Bay Journal

The Wolf administration's plan to "reboot" Pennsylvania's badly lagging Chesapeake Bay cleanup efforts could be in need of its own

2023 Comprehensive Evaluation of System Response: We're headed in the right direction, but not fast enough + challenges from non-point source pollution

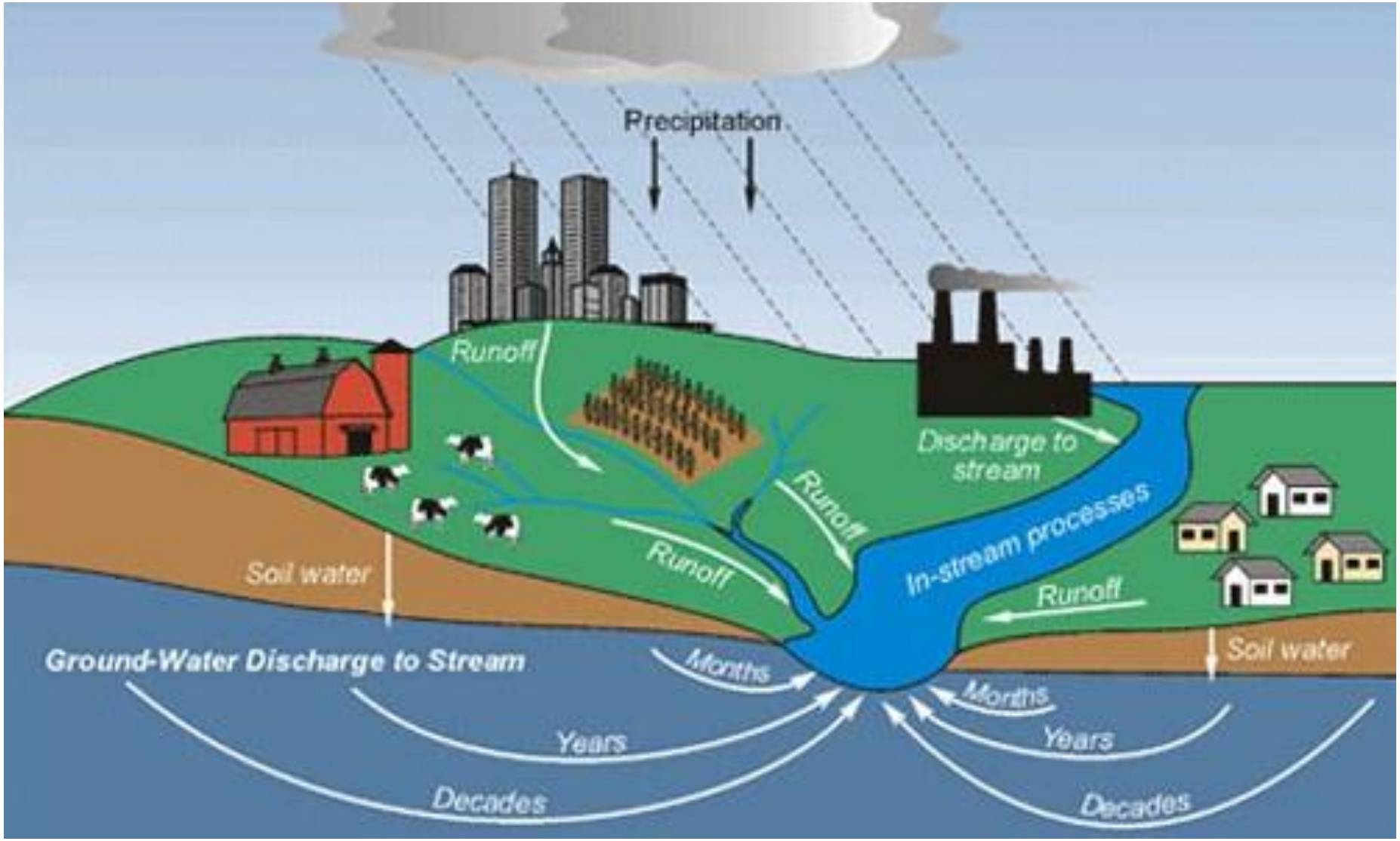


https://www.chesapeake.org/stac/cesr/

Beyond 2025?
Draft report out this summer

https://www.chesapeakebay.net/what/what-guides-us/planning-for-2025-and-beyond

While challenges facing the Chesapeake Bay and its watersheds are significant, the pathway from each state highlights opportunities



http://www.chesapeakebay.net/issues/issue/groundwater

PA as an example: a challenge, and an opportunity

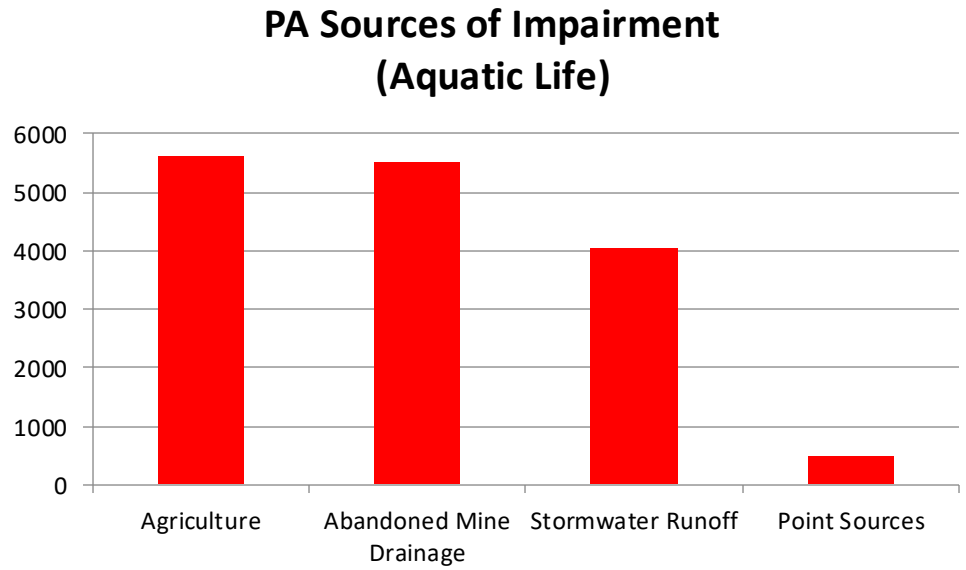
Impaired Waters Listed By State

Description of this table

State Name	Number of Waters on 303(d) List
Alabama	283
Alaska	35
American Samoa	45
Arizona	91
Arkansas	225
California	1,021
Colorado	244
Connecticut	461
Delaware	101
District Of Columbia	36
Florida	2,292
Georgia	242
Guam	47
Hawaii	298
Idaho	741
Illinois	1,057
Indiana	1,836
Iowa	480
Kansas	1,372
Kentucky	1,433
Louisiana	236
Maine	114
Maryland	184
Massachusetts	720
Michigan	2,352
Minnesota	1,144
Mississippi	229
Missouri	257
Montana	480
N. Mariana Islands	24
Nebraska	342
Nevada	215
New Hampshire	1,449
New Jersey	716
New Mexico	209
New York	1,543
North Carolina	1,130
North Dakota	201
Ohio	267
Oklahoma	657
Oregon	1,397
Pennsylvania	6,957
Puerto Rico	231
Rhode Island	120
South Carolina	961
South Dakota	166
Tennessee	1,012
Texas	719
Utah	156
Vermont	104
Virgin Islands	87
Virginia	1,523
Washington	2,420
West Virginia	1,097
Wisconsin	593
Wyoming	107

Total: 42,459 impaired waters

There are various sources of impairment; big ones include ag and urban stormwater runoff



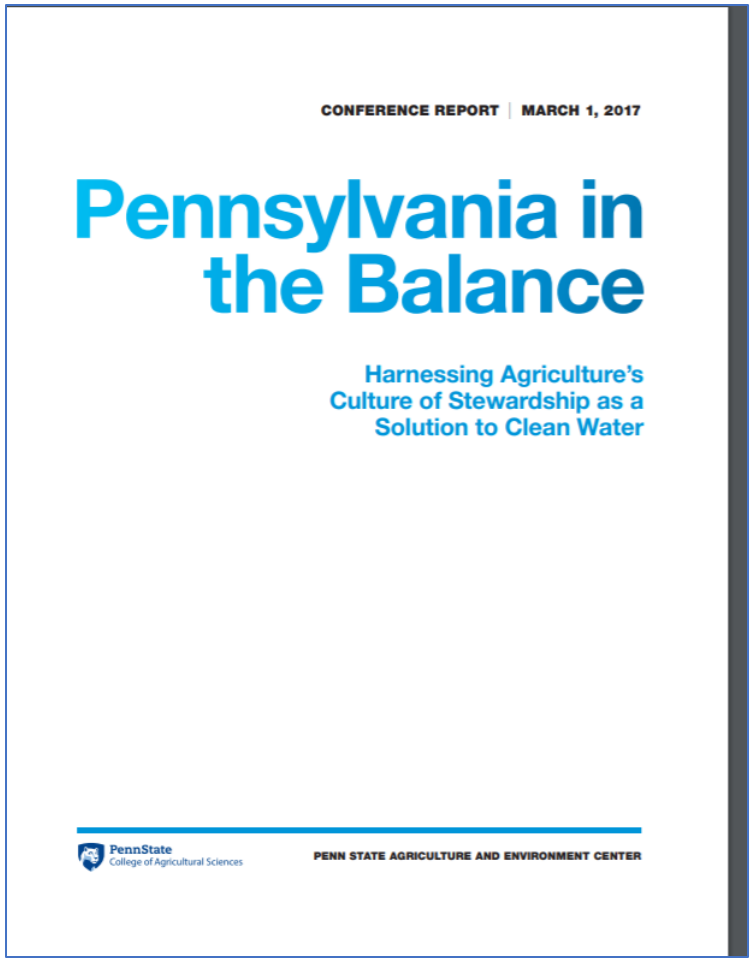
In March 2016, the “PA in the Balance” Conference brought 100+ stakeholders together to discuss water quality and agriculture: soil health a key focus

This conference feels like “we” can all try to pull together to make things better for the watershed and the Bay. It’s real lonely feeling that ag is in this alone, and to blame for what has happened.

- Conference Participant

The result? A lot of good thoughts on meeting both water quality and ensuring healthy & productive farms

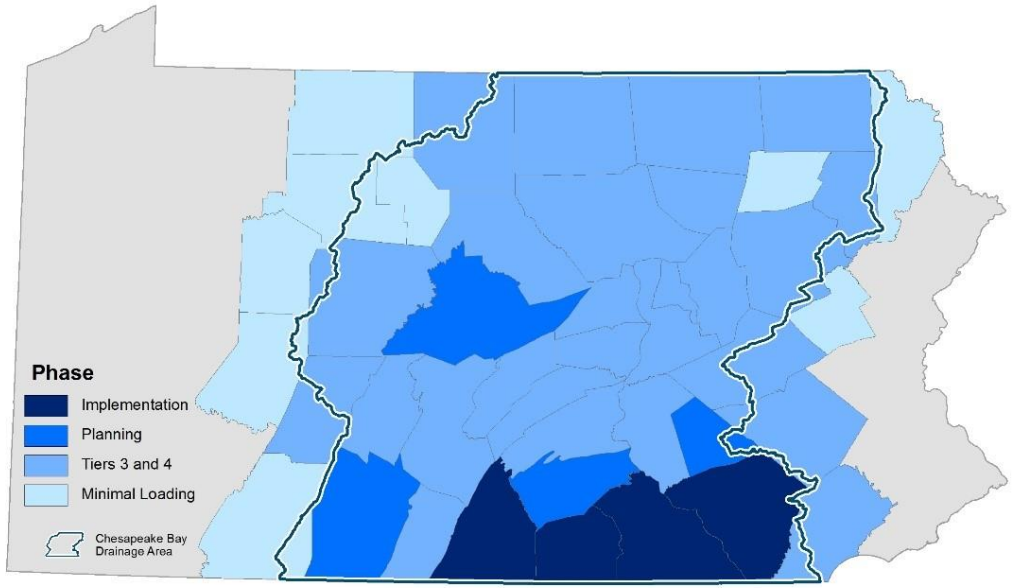
https://twitter.com/agsciences/status/705529878414761984



http://files.dep.state.pa.us/Water/ChesapeakeBayOffice/Ag%20page/(2)%20PA%20in%20the%20Balance%20Full%20Report.pdf

A focus on stakeholder engagement has been built into the PA Department of Environmental Protection's WIP III approach.
Will local action lead to effective implementation?

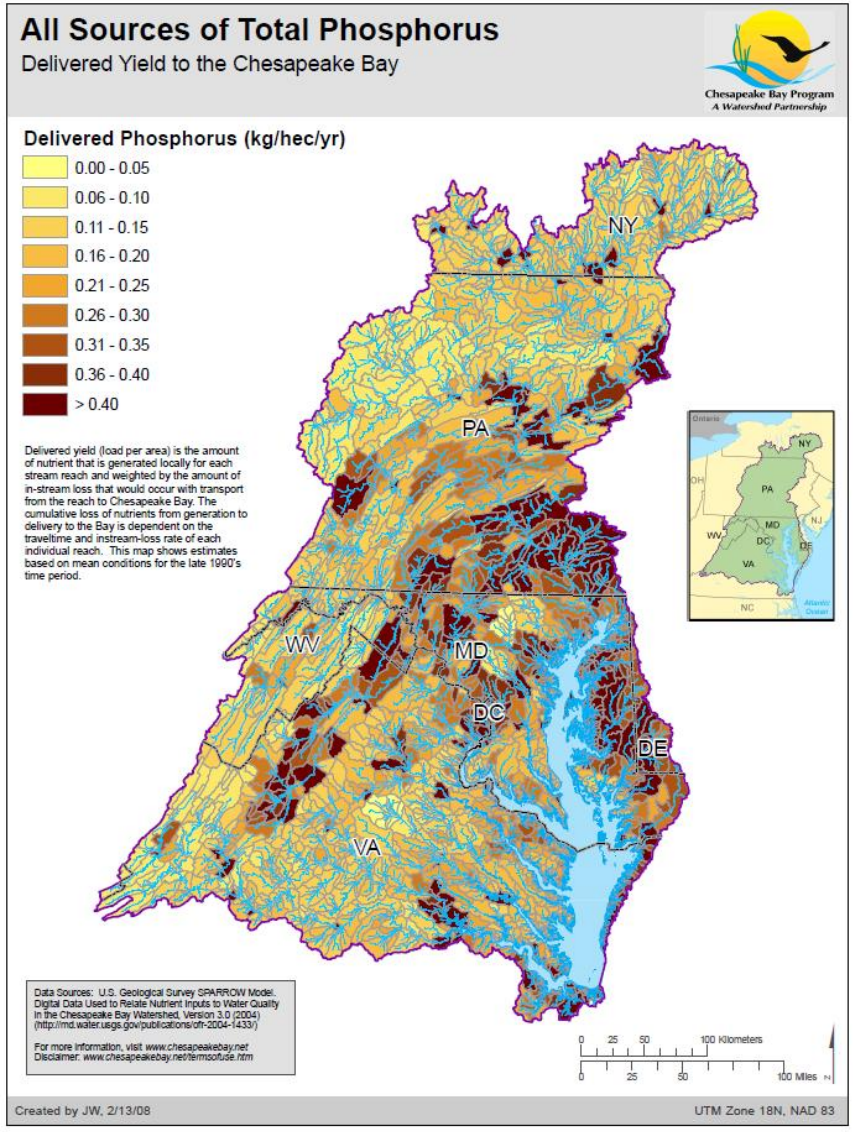
Clean water:
Great for PA
Good for the Bay

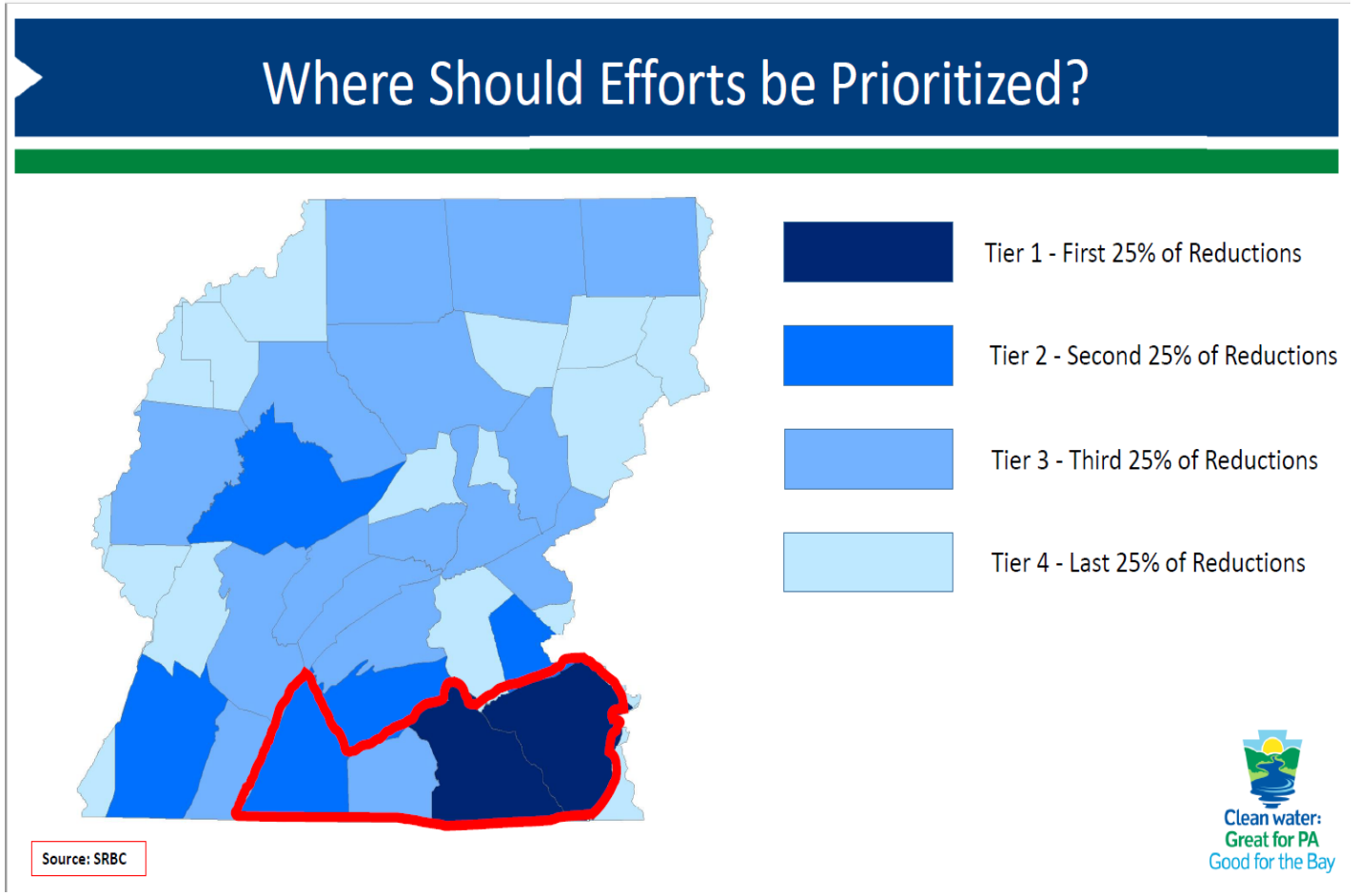


<u>Potential local priorities + co-benefits:</u>

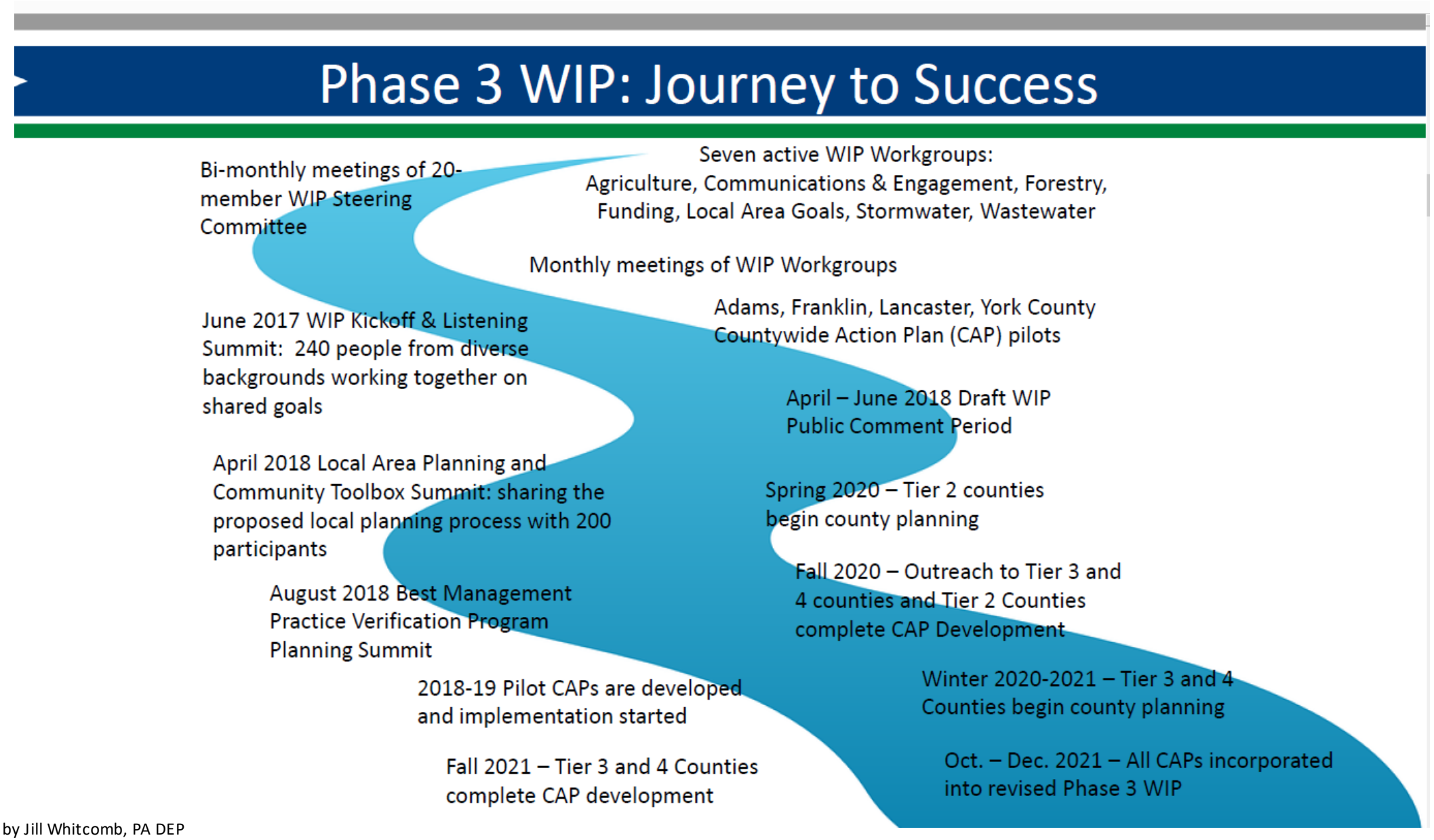
- Clean drinking water
- Food and beverage production by farmers
- Public health
- Less erosion and flooding, reducing the expense of related repairs
  Property value protection
- Outdoor experiences such as fishing, boating, and swimming
- Income from recreation and tourism businesses
- Habitat for fish, insects, birds, animals

PA is also using a tiered approach to prioritize its efforts and reinforce local action at a county level





PA focus on implementation



Slide provided by Jill Whitcomb, PA DEP
Update to Conservation Commission, Oct. 2020

Increased focus on training & scaling up

Federal, State Officials Launch New Training Center for Ag Professionals in Pennsylvania

TOPICS: PENNSYLVANIA

PUBLISH DATE: October 19, 2023

https://www.nrcs.usda.gov/conservation-basics/conservation-by-state/pennsylvania/news/federal-state-officia launch-new

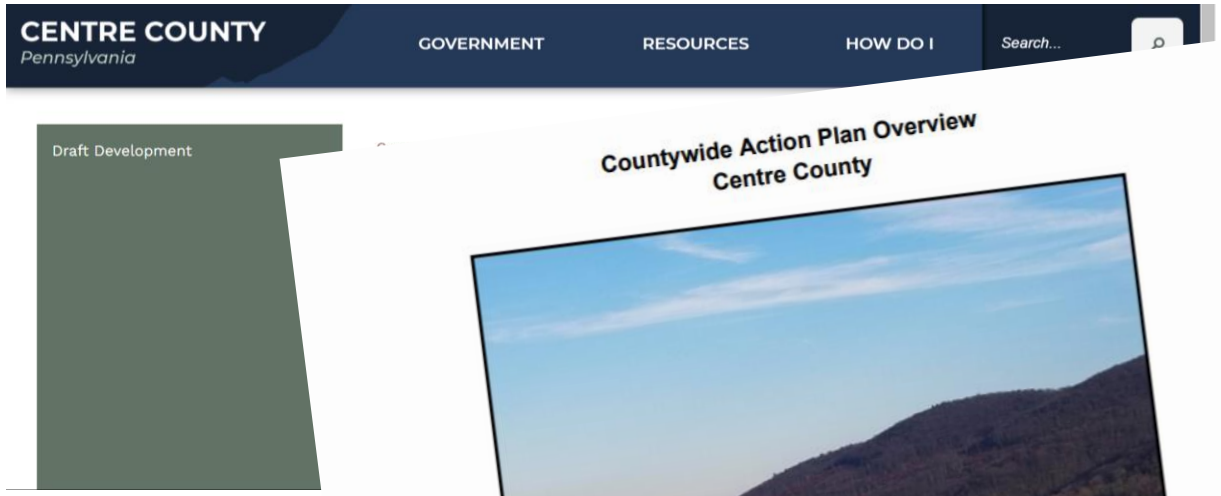
Pa. Launches $10 Million Agricultural Innovation Grant Program

Grant applications open September 30, run through November 26

PUBLISHED ON **SEPTEMBER 16, 2024**

https://www.morningagclips.com/pa-launches-10-million-agricultural-innovation-grant-program/

Continued focus on local implementation– what's possible HERE?



Countywide Action Plan Overview
Centre County

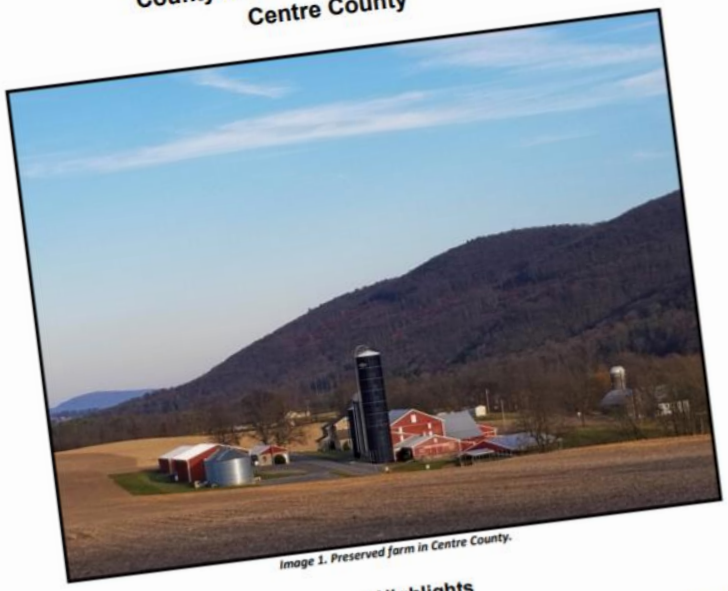
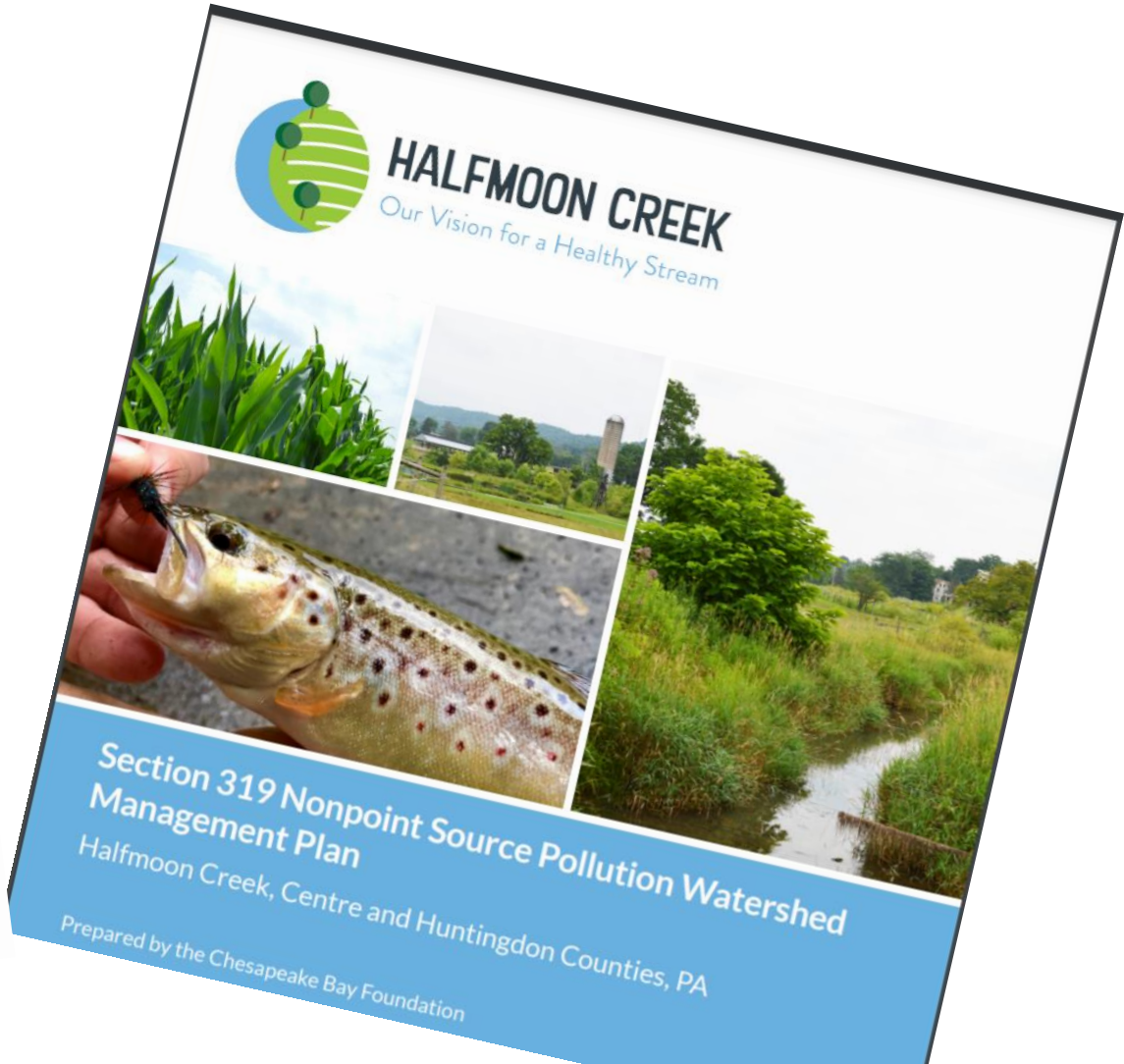


Image 1. Preserved farm in Centre County.

Plan Highlights

The Centre County Countywide Action Plan (CAP) provides a roadmap for the County and its partners to follow to reach the County's clean water goals. The initiatives outlined in the plan are intended to protect the future of Centre County's natural resources while reaching other community goals. Local improvements will benefit the community while also assisting Pennsylvania with meeting its Chesapeake Bay obligations.

The Centre County CAP identifies priority initiatives and actions that support the County's goal of meaningful local water quality improvements. The CAP includes four priority initiatives and several dozen goals. Each Priority Initiative is broken down into manageable and measurable goals. These goals may evolve over time based upon the early successes of plan implementation and changes in local priorities.






Opportunities to engage very locally and across all of our watersheds?

- Maintenance→ engagement!
- Integrated opportunities for restoration/habitat
- A chance to get outside (how do we continue to scale this up?)
- Financing

What now?

- Election uncertainty
- Litigation uncertainty + less deference to agencies
- Clean Water Act litigation- don't hold your breath for clarity

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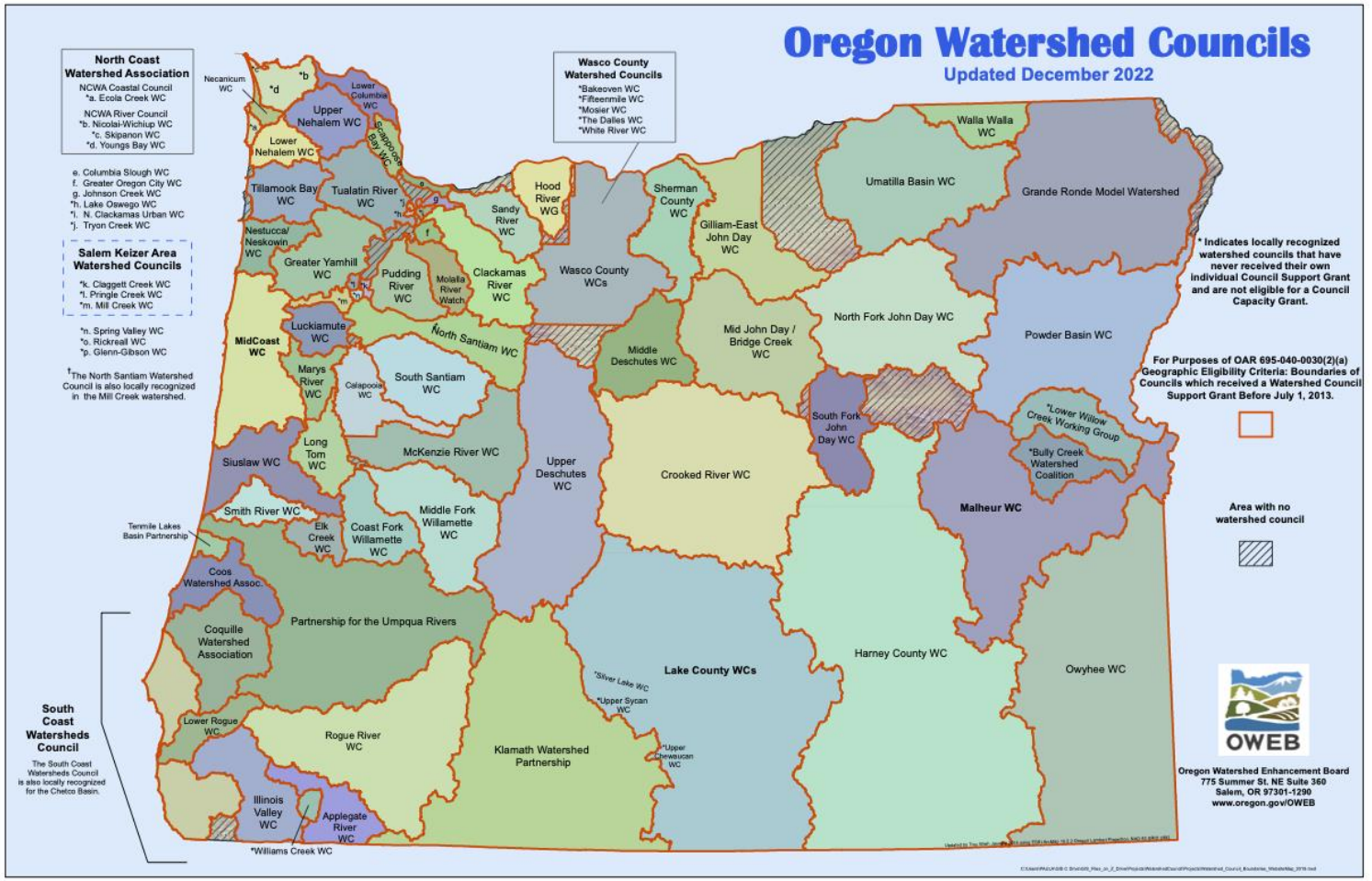
- Beyond 2025- now what?
- State action- shift toward pay for performance?
- Opportunity for regulatory "sandboxes"? Local foci?
- Funding for process (as much as for projects?)

Examples from elsewhere

Oregon: Watershed Focus

- Originated with Oregon Plan for Salmon and Watersheds
- Dedicated funding from the state lottery
- Decades of local watershed councils to help build coalitions
- Tremendous local success
- Not always easy, but great progress being made

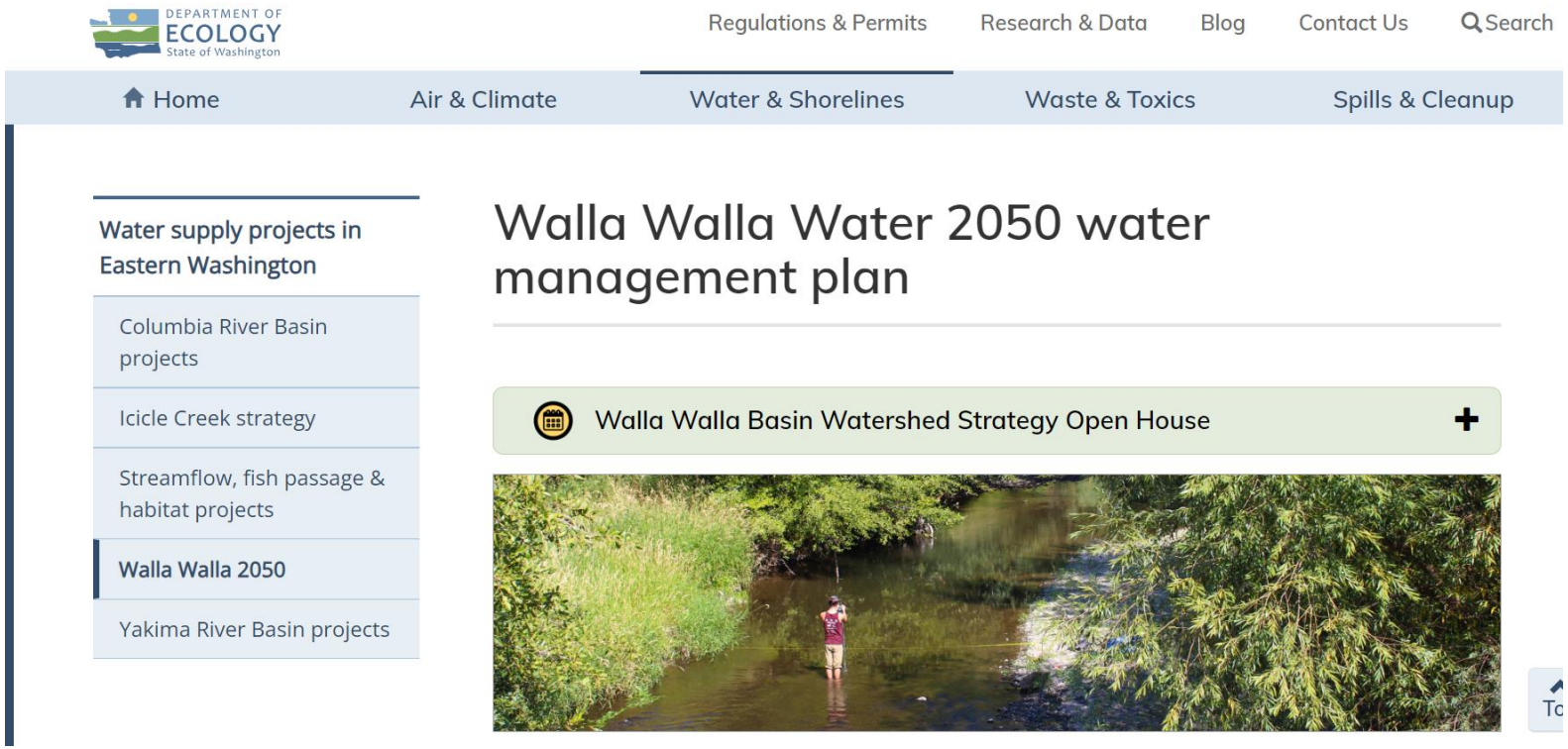


https://www.oregonwatersheds.org/who-we-are/oregon-watershed-councils/

Examples from elsewhere

Walla Walla River Basin (Washington side)

- Original pilot program to provide “flow from flexibility” in managing water allocation under prior appropriation
- Pilot extended through legislative means to water management plan
- Additional work across state lines to address instream flows and tribal rights



https://ecology.wa.gov/water-shorelines/water-supply/water-supply-projects-ew/walla-walla-2050

Questions/discussion?

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