

## David Stearns

### Shareholder

**I advise real estate developers, business owners, and individuals on complex environmental and natural resource issues throughout the Northwest, helping resolve disputes involving contaminated property, regulatory enforcement actions, and water rights.**

I began my legal career as an Assistant Attorney General for the Washington State Attorney General's Office in the Ecology Division, where I advised the State on complex water rights issues and litigated various environmental matters before the Pollution Control Hearings Board.

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# Clean Water Act

- Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et. seq.*
- Washington Water Pollution Control Act, chapter 90.48 RCW



# What Does the Clean Water Act Cover?

The CWA broadly prohibits:

- The discharge of any pollution into waters of the United States without a permit. 33 U.S.C. §§ 1311(a), 1362(7).
- In order to qualify as a “discharge,” there must be the addition of a pollutant from a “point source” (33 U.S.C. § 1362(12)), or the “functional equivalent” of a point source. *Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020).
- Think pipes, ditches, outfalls. Sheet flow or groundwater seepage does not count, unless it meets the “functional equivalent” test.

# ***Functional Equivalent “test” from County of Maui***

- Supreme Court identified seven factors that can influence whether something is the “functional equivalent” of a point source 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.”

*County of Maui v. Hawai’i Wildlife Fund (County of Maui)*, 590 U.S. \_\_\_; 140 S. Ct. 2778 (2020)

Ninth Circuit Recently reinstated a complaint alleging an “indirect discharge” theory where water from a holding pond potentially went into aquifer and then into surface water. *Cottonwood Env’tl. Law Ctr. v. Edwards*, Ninth Cir. (Nov. 1, 2023)

# Cooperative Federalism

- Although the Clean Water Act is federal law, it implements a cooperative federalism model for protecting water quality
  - States have primary responsibility for developing water quality standards in accordance with CWA. 33 U.S.C. § 1313
  - EPA can delegate administration of National Pollutant Discharge Elimination System (NPDES) Permit system to states. 33 U.S.C. § 1342(b)
  - Washington has been delegated that authority, so it issues permits that cover discharges under both the CWA and Washington's water quality laws.

# Types of Clean Water Act Permits

- Sec. 401. Certifications for Federal Permits related to activities that could result in discharges (33 U.S.C. § 1341)
- Sec. 402. NPDES Permits for the discharge of pollutants from point sources. (33 U.S.C. § 1342)
- Sec. 404. USACE Permits for Discharge of Dredge or Fill Material.

# *Section 401 Certifications*

- When a federal permit is for “any activity... which may result in any discharge into the navigable waters” the permittee must obtain a certification from the State that such permitted discharges will comply with provisions of the CSA, and any additional water quality standards the State has adopted.
- When acting on a petition for a § 401 Certification, State can:
  - Deny
  - Grant
  - Grant with conditions, which become part of the federal permit.
- Scope of State review has been subject of significant litigation; open questions remain

# *NPDES Permits*

- NPDES Permits are required whenever a facility discharges pollutants into waters of the United States from a point source.
- NPDES Permits impose monitoring requirements, and are designed to ensure that discharges do not harm the environment or human health.
- Most states, including Washington, implement the NPDES Stormwater Program and administer their own stormwater permitting programs.

# *Industrial Stormwater General Permit*

- A NPDES permit is required whenever industrial activities are exposed to stormwater that then discharges into navigable waters.
- “Pollutant” is very broadly defined, and can include things such as suspended sediments, chemical wastes, heat
- The Department of Ecology issues general permits that cover stormwater discharges from areas exposed to industrial activity.
- These are “general permits” because they are not specifically tailored to the site that is covered, though some permit conditions to take site characteristics into account.
- Predictability and speed are main advantages over getting individual permit for particular location.

# *Industrial Stormwater General Permit (cont'd)*

- Adaptive Management Approach:
  - Permittees are required to maintain Stormwater Pollution Prevention Plans (SWPPPs) that detail various Best Management Practices to keep discharges to a minimum
  - Permittees are required to regularly sample discharge points and submit reports to Ecology. Sampling obligations can be reduced if permittee can show consistent attainment.
  - The ISGP imposes “benchmarks” for effluent, not strict effluent limitations that typically occur in individual permits.
  - Benchmark exceedances, in and of themselves, are not permit violations. Rather, they trigger escalating response obligations.
  - If the facility discharges to impaired water bodies, there are stricter effluent limits

# CWA Enforcement

- Two Primary Enforcement Mechanisms:
  - State enforcement actions
  - Citizen Suits
- Violations of the CWA carry inflation-adjusted penalties of up to \$64,618 per violation per day. 33 U.S.C. § 1319; 40 CFR § 19.4
  - Because penalty maximum applies to each violation, the theoretical maximum can get very large very quickly
- State Actions
  - If the State becomes aware that a Permittee is violating the conditions of a permit, the State can issue orders and bring an enforcement action. 33 U.S.C. § 1319; RCW 90.48.120.
  - State can seek penalties of \$10,000/day under RCW 90.48.144

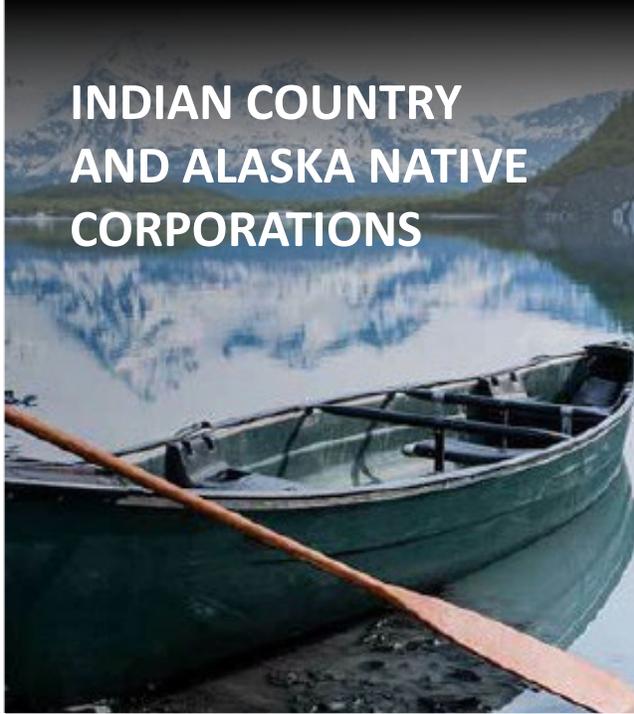
# *Citizen Suits*

- CWA authorizes citizen suits. Anyone can sue who has enough injury under Article III of the US Constitution.
- In order to initiate a citizen suit, citizen group must send a notice letter to the alleged violator, the EPA, and the State at least 60 days before initiating suit.
- If the State commences an enforcement action for the violations alleged in the notice letter, citizen suit is barred.
- Purpose of the notice letter is to provide alleged violator an opportunity to cure problems.
  - Citizen suit must be based on violations occurring at the time the suit is commenced. Cannot be based on wholly past violations.
- Remedies include:
  - Injunctions
  - Civil Penalties
  - Attorneys' fees (for the plaintiffs only)

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