

2018 CWA Cases  
Mark Ryan

Sierra Club v. U.S. Fish & Wildlife Service, \_\_\_ F.3d \_\_\_, 2018 WL 6713260 (9<sup>th</sup> Cir. 2018) (finding most of the F&W documents withheld under FOIA deliberative process privilege in connection with consultation with EPA on the cooling water intake structure regulations were pre-decisional and properly withheld)

Menominee Indian Tribe of Wisc. v. EPA, 2018 WL 6681397 (E.D. Wis. 2018) (denying motion to amend complaint, held that EPA's decision to withdraw its objections to state-issued 404 permit was discretionary; granting motion to dismiss, held that Corps could not be sued under § 505 because Congress waived sovereign immunity only for "the Administrator [of the EPA]" and the EPA/Corps decision to not assert jurisdiction over the permit was not a final agency action)

Sierra Club v. Con-Strux, LLC, \_\_\_ F.3d \_\_\_, 2018 WL 6595577 (2<sup>nd</sup> Cir. 2018) (reversing district court, held that facility engaged in recycling of demolished concrete was engaged in an "industrial activity" for purposes of the MSGP; "We conclude that processing construction debris and waste for recycling fits within the definition of activities covered under SIC 5093.")

United States v. R.M. Packer Co., Inc., 2018 WL 6592659 (D. Ma. 2018) (granting motion for summary judgment, held that defendant failed comply with monitoring, inspection, evaluation and training requirements of MSGP at its bulk fuel facility)

Altamaha Riverkeeper v. USACOE, 2018 WL 6496791 (S.D. Ga. 2018) (denying motion for preliminary injunction in challenge to issuance of 404 permit at private resort; held that plaintiffs did not show a substantial likelihood of success on the merits of their multi-pronged attack on the permit)

Bade v. Black Hawk Security LLC, 2018 WL 6492594 (D. Hw. 2018) (granting motion to dismiss with leave to amend in pro se case; "Plaintiff identifies the CWA as a basis for federal jurisdiction, but he provides no facts or law to support his conclusory allegation . . .")

Lighthouse Resources Inc. v. Inslee, 2018 WL 6505372 (W.D. Wash. 2018) (granting state's motion for summary judgment, held that state's denial of 401 certification to coal transfer facility was not preempted by the Interstate Commerce Commission Termination Act or the Ports and Waterways Safety Act)

Surfrider Foundation v. Int'l Boundary and Water Comm., 2018 WL 6504154 (S.D. Cal. 2018) (§ 511(a) limits the partial sovereign immunity waiver of § 505(a)(1) where the CWA affects or impairs a treaty of the United States; denied motion to dismiss where defendant failed to provide sufficient evidence that requiring an NPDES permit for a stormwater discharge from Mexico would affect or impair the United States' transboundary treaty with Mexico)

City of Imperial Beach v. Int'l Boundary and Water Comm., 2018 WL 6504081 (S.D. Cal. 2018) (§ 511(a) limits the partial sovereign immunity waiver of § 505(a)(1) where the CWA affects or impairs a treaty of the United States; denied motion to dismiss where defendant failed to provide sufficient evidence that requiring an NPDES permit for a stormwater discharge from Mexico would affect or impair the United States' transboundary treaty with Mexico)



California v. Int'l Boundary and Water Comm., 2018 WL 6445929 (S.D. Cal. 2018) (granting motion by California Lands Commission to intervene by state under § 505(b)(1)(B), which allows any citizen to intervene as a matter of right)

Northwest Environmental Advocates v. EPA, 2018 WL 6524161 (D. Or. 2018) (ordering the parties to confer on schedule to re-promulgate temperature TMDLs in Oregon based on biological criteria; rejected state's request for 12 years to study problem; held that EPA's errors in approving TMDL's "are serious;" "The purpose of TMDLs . . . is not merely to set a cap on anthropogenic sources of pollution in a vacuum; the statutory purpose of TMDLs is to bring waters into compliance with the applicable criteria.")

United States v. U.S. Steel Corp., 2018 WL 6573164 (N.D. Ind. 2018) (granting Surfrider Foundation and City of Chicago motions to intervene in enforcement action brought by EPA and the State of Indiana, where EPA and the state had negotiated a consent decree)

Gulf Restoration Network v. Oscar Renda Contracting Inc., 2018 WL 6579171 (S.D. Miss. 2018) (denying motions by both parties in construction stormwater case to exclude expert testimony; parties attacks on the experts go to the weight of the evidence, not the admissibility)

Gulf Restoration Network v. Oscar Renda Contracting Inc., 2018 WL 6579172 (S.D. Miss. 2018) (denying motion for summary judgment in construction stormwater case, held that plaintiff need not show a discharge to WOTUS in order to prove certain NPDES permit violations)

Maine v. EPA, 2018 WL 6304402 (D. Me. 2018) (granting EPA's motion to remand approval of state's water quality standards, held that interim rule to protect Tribal fishing rights would remain in place until EPA re-issues new ruling on the state's standards; denied motion by state to remand with vacatur of the interim rule because court could not vacate without a finding on the merits)

Sierra Club v. USACOE, \_\_\_ F.3d \_\_\_, 2018 WL 6175671 (4<sup>th</sup> Cir. 2018) (in challenge to Corps NWP 12 issued for pipeline, held that Corps lacked authority to substitute its own special condition "in lieu of" a different special condition imposed by state in its 401 cert., even if the new condition is more protective; absent completion of the notice-and-comment procedures required by the CWA, a state cannot waive a special condition previously imposed as part of its 401 cert. of the NWP)

Puget Soundkeeper Alliance v. EPA, No. C15-1342-JCC (W.D. Wash. Nov. 26, 2018) (rejecting argument that CWA does not authorize an agency to suspend a rule, held that EPA did not act *ultra vires* when it promulgated rule suspending the effectiveness of WOTUS rule for two years; EPA was arbitrary and capricious in limiting comments on proposed suspension of rule, and in the process deprived the public of meaningful opportunity to comment on the "relevant and significant issues" in proposed rule; court issued a nationwide injunction vacating the rule)

Maryland v. Exxon Mobil Corp., 2018 WL 6111780 (D. Md. 2018) (denying motion to remand to state court in MTBE groundwater contamination case; defendants failed to carry their burden of showing there is a colorable CWA defense where they argued that groundwater met federal water quality standards; CWA typically governs surface water quality standards, not groundwater; states are free to set standards higher than federal standards)

United States v. Stabl Inc., 2018 WL 6068424 (D. Neb. 2018) (granting motion to quash prejudgment writ of garnishment, held that government did not meet burden of showing exigent circumstances in freezing millions of dollars of defendants' accounts to satisfy prior \$2.3 million dollar CWA penalty;



court ordered no further withdrawals from one account that contained sufficient assets to satisfy judgment without court approval)

Kathy Robb, “Groundwater & The Clean Water Act,” 177 The Water Report 15 (November 15, 2018)

Prairie Rivers Network v. Dynegy Midwest Generation, LLC, 2018 WL 6042805 (C.D. Ill. 2018) (granting motion to dismiss in case involving seepage from coal power plant ash pits into river via groundwater seeps, held that CWA jurisdiction does not extend to either discharges to groundwater or discharges to surface waters via groundwater)

Belfer v. Fidelity National Title Group, 2018 WL 6002905 (E.D.N.Y. 2018) (dismissing pro se plaintiff for failure to comply with 60-day notice requirement)

United States v. Magnolia Valley Plantation, LLC, 2018 WL 6042788 (S.D. Ga. 2018) (granting motion to enter consent decree for CGP violations; \$45,000 penalty plus injunctive relief including \$60,000 in wetland mitigation credits)

Audubon Society of Greater Denver v. USACOE, \_\_\_ F.3d \_\_\_, 2018 WL 5782609 (10<sup>th</sup> Cir. 2018) (in challenge to Corps permit to allow increased storage of water in reservoir, held that properly interpreted 33 C.F.R. § 230.10(a) to conclude that 404(b)(1) guidelines require that when fill is incidental to the overall project, the only alternative that need be considered is for the fill, and not the entire project; the Corps alternatives analysis was not arbitrary and capricious; district court did not abuse its discretion in denying plaintiff’s motion to supplement the record)

OVEC v. Elk Run Coal Co., Inc., 2018 WL 5815564 (S.D.W.V. 2018) (granting motion to amend consent decree to account for defendant’s bankruptcy where court found that the amendment adequately addressed the harms at issue in the original case; the court is empowered to modify consent decrees; the court must examine the decree to ensure that it is fair and not unlawful)

OVEC v. Elk Run Coal Co., Inc., 2018 WL 5833860 (S.D.W.V. 2018) (text of consent decree referenced in 2018 WL 5815564)

United States v. City of Colorado Springs, 2018 WL 5870530 (D. Co. 2018) (after trial on the merits, held that city violated its MS4 permit by granting a BMP waiver without making the necessary findings as required by its manual; city failed to provide adequate project oversight and failed to enforce compliance on new development; city improperly approved drainage basin that did not meet the requirements of its drainage manual)

Gulf Restoration Network v. EPA, 2018 WL 5297743 (E.D. La. 2018) (defendant’s answer to complaint in case challenging EPA approval of Louisiana state water quality standards did not comply with Fed. R. Civ. P. 8 where the answer stated “the document speaks for itself” or the allegations “are conclusions of law to which no response is required;” EPA was ordered to submit a new answer within 15 days that either admits or denies all of the allegations in the complaint)



Pennenvironment v. PPG Industries, Inc., 2018 WL 5312778 (W.D. Pa. 2018) (denying motion to dismiss, held that railroad was an indispensable party in case against contaminated site that lay within the RR's right of way, and which was discharging leachate via groundwater into the adjacent river)

Columbia Riverkeeper v. EPA, 2018 WL 5024027 (W.D. Wash. 2018) (on summary judgment, held that EPA had failed to act on temperature TMDL for the Columbia and lower Snake Rivers and therefore a constructive submission occurred; "A constructive submission occurs only when a state has clearly and unambiguously abandoned its obligation to produce a TMDL or TMDLs."; court rejected argument that states' authority to prioritize TMDLs required the court to look at the entire state TMDL program to find a constructive submission; EPA was ordered to either approve or disapprove a TMDL within 30 days)

Freshwater Accountability Project v. Patriot Water Treatment, LLC, 2018 WL 4899089 (N.D. Ohio 2018) (denying defendant's motions for summary judgment, held that plaintiffs established standing where the named plaintiff recreated in water in the vicinity of the discharge, and plaintiff was a member of the organization; plaintiff need not show actual harm to the environment; plaintiff's claims are redressable even where defendant had stopped discharging because defendant could not establish that cessation wasn't temporary; rejected argument that defendant lacked standing because monetary civil penalties would not address the injuries; civil penalties do not compensate private plaintiffs, but they deter defendants from persisting in unlawful injurious conduct)

Thibodeaux v. Port of Oakland, 2018 WL 4853299 (N.D. Cal. 2018) (plaintiff's 60-day notice need not describe where the facility is located, but must just describe what the facility is; plaintiff's failure to cite the general permit requires dismissal of counts related to alleged violations of the effluent limits in the permit; plaintiffs need not identify the date and time of every storm event that resulted in a discharge; plaintiff need not identify every individual pipe that was alleged to be discharging - - general allegations are sufficient; in order to prevail on mootness, defendant has the burden of demonstrating that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur; to show injury, plaintiff is not required to show that it performed activities immediately adjacent to the polluting site; presence of other polluters in the area does not absolve defendant from having caused or contributed to plaintiff's injury; the City of Oakland is an indispensable party)

Sierra Club v. BNSF Railway Co., 2018 WL 4931605 (W.D. Wash. 2018) (defendant violated terms of consent decree requiring it to come up with prototype coal train car cover to prevent coal dust from blowing into the water where defendant missed deadline for attempting to procure prototype; defendant ordered to actively solicit functional prototypes from manufacturers over six-month period; court retains jurisdiction to enforce its consent decree; courts interpret consent decrees as contracts, applying state contract law)

Environmental Law and Policy Center v. EPA, 2018 WL 4773553 (N.D. Ohio 2018) (denying plaintiffs motion to amend complaint, held that EPA no duty to promulgate TMDL in Ohio where EPA approval of state 303(d) list took no position on state's proposal to issue no TMDL; constructive submission does not



come into play where state just months earlier had put disputed waters on 303(d) list, despite long delays and state's intent to not issue a TMDL; summary judgment entered in favor of EPA where EPA withdrew its former approval of 303(d) list, and there is no longer a final agency action to assail)

Sanitary Bd. of Charleston v. EPA, \_\_\_ F. Supp. 3d \_\_\_, 2018 WL 4825260 (S.D.W.V. 2018) (denying motion for attorney fees, held that the catalyst theory is precluded by 4<sup>th</sup> Cir. precedent, and plaintiff was not a substantially prevailing party as that term is used in § 505(d) without receiving at least some relief on the merits and obtaining a judicially sanctioned change in the its relationship with defendant)

Sierra Club v. USACOE, \_\_\_ F. 3d \_\_\_, 2018 WL 4764328 (4<sup>th</sup> Cir. 2018) (per curium preliminary decision vacating Corps issuance of NWP 12 for pipeline construction project, held that Corps lacked authority to substitute "dry cut" method of constructing river crossings in lieu of special condition imposed by state; if any part of a project requires an individual permit, then the NWP does not apply and all portions of the project must be evaluated as part of the individual permit process)

Tennessee Clean Water Network v. TVA, \_\_\_ F.3d \_\_\_, 2018 WL 4559103 (6<sup>th</sup> Cir. 2018) (reversing district court, held that discharges from coal ash pond that are hydrologically connected to river are not covered by CWA; RCRA coal combustion residual rule, not the CWA, is the framework envisioned by Congress for coal ash ponds; NOTE dissent)

Kentucky Waterways Alliance v. Kentucky Utilities Co., \_\_\_ F.3d \_\_\_, 2018 WL 4559315 (6<sup>th</sup> Cir. 2018) (affirming district court, held that discharges from power plant ash pond that entered river via groundwater are not controlled by the CWA; groundwater is not a point source; while groundwater is a conveyance, it is not discernable, confined or discrete; the use of the term "into" in the definition of "effluent limitation" in § 502(11) requires directness; court distinguished language from plurality decision in Rapanos indicating discharges only need to be "to" WOTUS; stated purpose of CWA is both §§101(a) and 101(b); ash pond would be exempt from RCRA if CWA applied; NOTE dissent)

Toxics Action Center, Inc. v. Casella Waste Systems, Inc., 2018 WL 4696750 (D. Mass. 2018) (granting motion to dismiss, held that discharges of contaminated groundwater from landfill to wetlands do not violate the CWA because the landfill is not a point source; the groundwater discharge is not *from* a point source because it is not a discrete conveyance)

Hunton & Williams LLP v. EPA, 2018 WL 4637355 (D. D.C. 2018) (largely denying FOIA appeal seeking documents related to JD and special case determination by EPA on industrial site in California, held that EPA and the Corps assertions of deliberative process privilege and other FOIA exemptions were valid)

City of Highland Park v. EPA, 2018 WL 4699308 (E.D. Mich. 2018) (granting EPA's motion to dismiss, held there was no waiver of sovereign immunity in case alleging plaintiff failed to state a claim that Great Lakes Water Authority violated the CWA by overcharging plaintiff for sewer service; enforcement



decisions by the agency are discretionary; where plaintiff failed to raise issues in its 60-day notice letter, it may not raise them for the first time in federal court)

City of Highland Park v. EPA, 2018 WL 4619594 (E.D. Mich. 2018) (granting motion to dismiss for two defendants, held that plaintiff failed to state a claim that Great Lakes Water Authority violated the CWA by overcharging plaintiff for sewer service; plaintiff alleged no facts to support claim that defendants an EPA guidance document; plaintiff alleged a violation of 40 C.F.R. § 35.2140, which is not promulgated pursuant to a CWA provision cited in § 505)

The Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc., 2018 WL 4696749 (D. Mass. 2018) (dismissing case, held that state had commenced and diligently prosecuted case against contractor for violating the CGP; state had issued an administrative compliance order and entered into a settled with penalties prior to the filing of the citizen suit)

National Audubon Society v. USACOE, 2018 WL 4761024 (E.D.N.C. 2018) (denying in part, granting in part motion to supplement the record in 404 permit appeal, held that disputed documents that Corps did not rely on in making its decision were not relevant; “the key inquiry in determining the scope of the administrative record is what documents the agency considered in reaching the decision under review.”; emails constitute valid extra-record evidence because they pertain to whether the Corps violated CEQ regulations in treating an entity as an independent third-party contractor)

Sierra Club v. Virginia Electric & Power Co., \_\_\_ F.3d \_\_\_, 2018 WL 4343513 (4<sup>th</sup> Cir. 2018) (hydrologically-connected discharges via groundwater fall within the jurisdiction of the CWA; coal ash pond is not a point source because it does not act as a conveyance to WOTUS, but instead allows pollutants to slowly diffuse through groundwater into surface waters; because discharges via groundwater can’t be measured, they are not conveyances)

Bohmker v. Oregon, \_\_\_ F.3d \_\_\_, 2018 WL 4344338 (9<sup>th</sup> Cir. 2019) (state law prohibiting suction dredging for five years not preempted by federal law, including CWA; Mining Act of 1872’s “free and open” language does not prohibit state environmental regulations; NOTE dissent)

Tin Cup, LLC v. USACOE, \_\_\_ F.3d \_\_\_, 20189 WL 4516123 (9<sup>th</sup> Cir. 2018) (in cases where 404 permit holder objected to mitigation requirements, held that 1992 appropriations bill requiring use of 1987 wetland delineation manual did not prohibit the Corps from using the Alaska supplement to the 1987 manual to determine that permafrost is wetlands; without a clear statement of futurity, the bill is only in force for the fiscal year of the appropriation; NOTE concurring opinion)

Texas v. EPA, 2018 WL 4518230 (S.D. Tex. 2018) (enjoining 2015 WOTUS rule in Texas, Louisiana and Mississippi; “A stay provides much needed governmental, administrative and economic stability.; court declined request to issue nationwide injunction)



Verdier v. Bost, 2018 WL 4335626 (W.D. Wa. 2018) (on motion to dismiss, held that plaintiffs met standards for citizen suit where they alleged that defendants' discharges of fill material into river were unpermitted; plaintiffs may not bring 505 citizen suits for violations of 404 permits; plaintiffs' first cause of action based on fill material that was discharged five years ago dismissed for failure to show on-going discharge; plaintiffs' second cause of action appropriately pled an on-going discharge where it alleged continued crumbling and sluffing of fill material into river)

Waste Action Project v. Fruhling Sand & Topsoil, Inc., 2018 WL 4339988 (9<sup>th</sup> Cir. 2018) (unpublished) (district court improperly dismissed stormwater case on jurisdictional grounds based on assessment of evidence going to the merits of the claim; "The district court incorrectly concluded that [plaintiff] plan to conduct discovery to *prove* ongoing Clean Water Act violations meant that [plaintiff] lacked a good faith basis to *plead* those alleged violations."; § 505 provides federal subject matter jurisdiction where a person is "alleged to be in violation" of an NPDES permit)

Neal McAliley, "Waters of the United States": Practical advice on determining jurisdiction" ABA Trends, Vol. 50 No. 1 (2018)

Township of Bordentown v. FERC, \_\_\_ F.3d \_\_\_, 2018 WL 4212061 (3<sup>rd</sup> Cir. 2018) (in challenge to FERC approval of pipeline, held that conditional FERC permit was not arbitrary and capricious because it was conditioned on permittee obtaining 404 permit and 401 cert. from N.J. and construction could not start without the permit and cert.; remanded for further consideration under NGA)

City of Imperial Beach v. Int'l Boundary & Water Comm., 2018 WL 4104235 (S.C. Cal. 2018) (in case involving a complex trans-boundary scenario, held that plaintiffs had standing to sue POTW even though POTW did not have full control over pollution entering country from Mexico to be treated by defendants on the American side of the border; court denied defendant's motion to dismiss, held that factual record was not yet developed to allow the court to rule on whether the two waters at issue were meaningfully distinct to determine whether a discharge occurred to WOTUS or whether the water transfer rule applied; plaintiff's reading of the NPDES permit sufficed to deny motion to dismiss on grounds that no dry weather discharge occurred in violation of the terms of the permit)

Raritan Baykeeper, Inc. v. NL Industries, Inc., 2018 WL 4110946 (D.N.J. 2018) (denying motion for reconsideration on standing where plaintiffs failed to provide evidence to support CWA standing in case dominated by RCRA issues)

Deleware Riverkeeper Network v. Penn. Dept. of Env. Protection, \_\_\_ F.3d \_\_\_, 2018 WL 4201626 (3<sup>rd</sup> Cir. 2018) (in challenge to state 401 cert. for gas pipeline under the Natural Gas Act (NGA), held that NGA provides jurisdiction for challenges to final agency actions, and state's 401 cert. was final even though it is being appealed in state court; state was not arbitrary and capricious in issuing 401 cert. conditioned on future permits being obtained; petitioners' takings claims are brought in the wrong forum; petitioners cannot show they have been harmed by conditional cert. because required post-cert. permits have not yet been issued)

United States v. Acquest Transit LLC, 2018 WL 3861612 (W.D.N.Y. 2018) (on motions for summary judgment in wetlands case, held that trial issues of fact exist as to whether wetland at issue met the 1987 wetlands manual definition of a wetland, the downstream receiving water was a TNW and whether there is a significant nexus to the TNW; rejected defense argument that PCC cannot be abandoned; granted



summary judgment in favor of government on validity of 2007 § 402 permit on grounds that the earth-moving occurred beyond 2007 and involved more acres than set out in the permit application; denied governments and defendant's motions to strike expert witnesses on multiple ground)

Sierra Club v. St. Johns River Water Mgmt. Dist., \_\_\_ F. Supp. 3d \_\_\_, 2018 WL 3853997 (M.D. Fla. 2018) (on motion for summary judgment, held that manager of wetlands mitigation bank did not violate the Compensatory Mitigation Rule by permitting portions of bank to be converted to mix use development; Mitigation Rule allows for modifications of the mitigation bank instrument; bank was allowed to release portion of land from conservation easement where it was erroneously included in original document; plaintiff provided no evidence to support argument that state authorization to pump groundwater in area would affect the bank)

Black Warrior Riverkeeper v. USACOE, 2018 WL 3869983 (N.D. Ala. 2018) (denying motion for summary judgment, held that Corps was not arbitrary and capricious with FONSI for new surface coal mine where record established that Corps properly relied on compensatory mitigation from NPDES permit and it was not required to undertake an independent analysis; Corps' finding that surface water leaving the site would not impact downstream surface water quality was supported by the administrative record)

Puget Soundkeeper Alliance v. APM Terminals Tacoma LLC, 2018 WL 3917936 (W.D. Wash. 2018) (in stormwater case against operator of dock, court denied motion to enter consent decree, holding that decree could not settle all claims in case where third-party defendants were not involved in the settlement and had outstanding crossclaims against defendant; Port of Tacoma, which owned the dock, objected to the entry of the decree which purported to settle all claims in the case)

South Carolina Coastal Conserv. League v. EPA, No. 2-18-cv-330-DCN (D.S.C. August 16, 2018) (on motion for summary judgment, held that EPA violated the APA when it promulgated the applicability date rule for the 2015 WOTUS rule without taking public comment on the substantive elements of the rulemaking; court issued a nation-wide injunction against the suspension rule)

City of San Diego v. Monsanto Co., 2018 WL 3818015 (S.D. Cal. 2018) (in case by city alleging PCB contamination of bay, the court dismissed defendant's counterclaim alleging unauthorized stormwater discharges of PCBs into bay, holding that defendant's expected litigation costs in responding to PCB contamination do not give it Article III standing under section 505)

Wild Fish Conservancy v. EPA, 2018 WL 3742203 (W.D. Wash. 2018) (denying motions to dismiss, held that EPA had ESA Section 7 duty to consult with NMFS on state water quality standard approval for sediment management at salmon net pen operations; *res judicata* does not bar present action where prior litigation dealt with approval of 2008 agency action and current case looks at 2011 agency decision, which is separate and distinct; EPA retains "discretionary involvement and control" over its approval of a WQS if a triggering event occurs to create a duty by EPA to reinstate consultation)

United States v. Grimmel Industries, LLC, 2018 WL 3730856 (N.D.N.Y. 2018) (on motion to strike 25 of defendant's 44 affirmative defenses, held that laches is not available against the United States in an enforcement action; mootness is not a defense against the United States because the government can sue for wholly-past violations)

Deschutes River Alliance v. Portland General Electric Co., 2018 WL 3715706 (D. Ore. 2018) (on motion for summary judgment, held that dam operator did not violate the terms of the 401 cert. issued by the state



related to temperature, dissolved oxygen and others; decision turned on technical and specific language of the 401 cert.)

Sierra Club v. State Water Control Bd., \_\_\_ F.3d \_\_\_, 2018 WL 3635962 (4<sup>th</sup> Cir. 2018) (denying petition for review of state 401 cert. of 404 permits for pipeline, held that state was not arbitrary and capricious in issuing state cert. where it reasonably assured that sediment runoff would protect state waters; state was justified in relying on EPA’s judgment regarding the general effectiveness of the types of protections chosen for the project)

Puget Soundkeeper Alliance v. EPA, 2018 WL 3569862 (W.D. Wash. 2018) (in challenge to EPA’s 2017 proposed applicability date rulemaking on the WOTUS rule, Farm Bureau’s unopposed motion to intervene as defendant granted; proposed intervenors held to have significant economic and litigation interests at stake)

Cooling Water Intake Structure Coalition v. EPA, \_\_\_ F.3d \_\_\_, 2018 WL 3520398 (2<sup>d</sup> Cir. 2018) (in multi-pronged attack of new cooling water intake structure regulation by both environmental groups and industry under CWA and ESA, held that EPA acted reasonably and within its statutory authority in establishing BTA standards to minimize aquatic mortality resulting from both entrainment and impingement; EPA adequately explained why it defined “new units” at existing facilities as new stand-alone structures; EPA provided adequate notice of the Rule’s definition of “new unit”; EPA reasonably estimated the cost of complying with the Rule’s standards for “new units”; EPA reasonably interpreted the Rule as not imposing new permit application requirements on “below-threshold” facilities; EPA reasonably determined that section 316(b) of the CWA authorizes it to regulate all CWISs, including those that use only a small portion of the water withdrawn for cooling purposes)

Freshwater Accountability Project v. Patriot Water Treatment, LLC, 2018 WL 3417305 (N.D. Oh. 2018) (denying motion to dismiss, held that plaintiffs could enforce NPDES permit condition requiring municipality to develop pretreatment permits, among other things; rejected argument that section 505 does not allow citizens to force regulators to implement a regulation where the regulator is also a discharger; POTW’s general prohibition against interference and pass through does not relieve it of permit requirement to control inflow of TDS; POTW’s failure to limit inflow of radionuclides as required by local ordinance is actionable)

Orchard Hill Building Co. v. USACOE, \_\_\_ F.3d \_\_\_, 2018 WL 3132797 (in challenge to Corps’ JD, held that Corps failed to create a record on aggregation sufficient to support its significant nexus determination where the Corps referenced 165 wetlands in the watershed, but put nothing in the record to explain how any of those wetlands are adjacent to the same tributary)

OVEC v. EPA, \_\_\_ F.3d \_\_\_, 2018 WL 3039954 (4<sup>th</sup> Cir. 2018) (reversing district court, held that state had not constructively refused to submit TMDLs where state entered into an agreement with EPA setting out a schedule to develop and implement biological impairment TMDLs; plaintiffs had standing to sue where they established that they recreated on at least some of the rivers at issue in the case)

City of Taunton v. EPA, \_\_\_ F.3d \_\_\_, 2018 WL 3342108 (affirming EAB decision in multi-pronged challenge to nutrient limits in NPDES permit, held that city may not supplement the administrative record to counter arguments raised in an amicus brief; 509(c) does not apply because EPA’s review of the challenge to the permit is an informal adjudication; EPA’s fact sheet was not deficient and the new material EPA put in the record in response to a comment does not require re-opening the record for rebuttal; EPA is not required to respond to untimely supplemental comments; EPA made a showing of



reasonable potential to exceed DO water quality standards; “the ‘scientific and technical nature of EPA’s decision-making’ increases our level of deference”)

Atchafalaya BasinKeeper v. USACOE, \_\_\_ F.3d \_\_\_, 2018 WL 3339539 (5<sup>th</sup> Cir. 2018) (reversing district court, held that Corps properly evaluated out-of-kind compensatory mitigation and cumulative impacts; NOTE dissent)

City of West Palm Beach v. USACOE, \_\_\_ F. Supp. 2d \_\_\_, 2018 WL 3213300 (D.D.C. 2018) (in challenge to 404 permit for highway extension, and granting defendant’s motion to transfer case to S.D. Fla., held that substantial part of the case occurred outside the District of Columbia and considerations of convenience and fairness dictated a transfer of venue)

Daigle v. Cimarex Energy Co., 2018 WL 3203535 (W.D. La. 2018) (granting motion to dismiss, held that past spills on plaintiff’s property by oil producer were not currently discharging; claims of past discharges are barred by SOL, and state-court action over spill that did not involve the CWA did not toll the SOL)

3630 Investment Corp. v. Miami-Dade County, 2018 WL 3213489 (S.D. Fla. 2018) (in land dispute, plaintiff stated a cause of action where it alleged a discharge of sediment (a pollutant) from the County’s outfall pipe onto plaintiff’s property)

Northwest Environmental Advocates v. EPA, 2018 WL 317551 (W.D. Wash. 2018) (ordering EPA to complete review of TMDLs for 73 water bodies in Washington)

Kleinman v. City of Austin, 2018 WL 3132623 (W.D. Tex. 2018) (on motion for attorney fees, held that while plaintiff won the case, he did not get the injunctive relief he requested, and only a small penalty was assessed; because he vindicated a personal rather than a public interest, the court awarded 5% of the fees or \$5,451 and a portion of the costs)

Deschutes River Alliance v. Portland General Electric Co., 2018 WL 2917356 (D. Or. 2018) (in suit against utility alleging operation of dam project violates terms of 401 certification, held that Tribe, as co-owner of the project, is a necessary party and the CWA waives the tribe’s sovereign immunity)

Day, LLC v. Plantation Pipeline Co., 2018 WL 2572750 (N.D. Ala. 2018) (dismissing plaintiff’s suit, held that pipeline leak that stopped in 2014 was not an ongoing discharge; plaintiff’s expert was not qualified to testify that the pipeline was still leaking)

Puget Soundkeeper Alliance v. APM Terminals Tacoma, 2018 WL 2560995 (W.D. Wash. 2018) (denying motion to dismiss, held that port can be held liable for stormwater discharges by lessee if the port exercised control over the discharge; rejected arguments by port that port could not be held liable because it was not covered by the stormwater general permit; plaintiffs’ 60-day notice was sufficient where new permit was issued after the notice letter was sent, but the facts did not otherwise change; alleging discharge without a permit is not an impermissible collateral attack on state order modifying existing permit)

Northwest Environmental Advocates v. Dept. of Commerce, 2018 WL 3390587 (W.D. Wash. 2018) (on motion for summary judgment, in case where plaintiffs alleged that EPA and NOAA failed to withhold section 319 grant funds because the state had not submitted an approvable section 306 program, held that plaintiffs lacked standing where they failed to show that it was reasonably probable that the EPA and NOAA failure to withhold funds threatens plaintiffs’ interests)



Neil McAiley, *No clarity in sight for “waters of the United States,”* 40 ABA Trends, no. 6 (July/August 2018)

J.B. Ruhl, *Proving the Rapanos Significant Nexus*, 33 Natural Resources & Environment (Summer 2018) at 51

Georgia v. EPA, 2018 WL 2766877 (S.D. Ga. 2018) (on motion for preliminary injunction, held that plaintiffs had shown a likelihood of success on the merits in their challenge to the 2015 WOTUS rule; EPA was arbitrary and capricious in finding that intermittent and ephemeral streams have a significant nexus to downstream waters; EPA violated the logical outgrowth test by including for the first time in the final rule distance categories for determining jurisdiction over adjacent wetlands; plaintiffs showed substantial threat of imminent financial harm and harm to state sovereignty because 2015 rule will go into effect in 2020, and possibly sooner)

Crystal Conserv. Coalition v. Crystal Mountain, Inc., 2018 WL 2432936 (W.D. Wash. 2018) (on motion for summary judgment, held that defendant had violated several terms of the modified consent decree requiring treatment of stormwater runoff from its parking lots; court award costs and fees to plaintiffs and ordered defendant to meet all requirements of the decree within five months, and to submit progress reports to the court every 90 days)

New York v. EPA, 2018 WL 2411595 (S.D.N.Y. 2018) (denying motion to transfer challenge to WOTUS suspension rule to S.D. of Texas, held that defendants did not meet standards set out in 28 U.S.C. § 1404(a); EPA does not reside in Texas, and presence of field office does not suffice; a substantial part of the case did not occur in Texas; the state plaintiffs did not intervene in the Texas litigation, and therefore could not have asserted a counterclaim)

Clatsop Residents Against Walmart v. USACOE, 2018 WL 2377828 (9<sup>th</sup> Cir. 2018) (unpublished) (affirming summary judgment, held that Corps had no legal duty to independently evaluate an applicant’s submission when performing an EA; Corps was not arbitrary and capricious in evaluating cumulative impacts on a five-year baseline range; Corps properly evaluated public interest by looking to local zoning codes to determine whether a Walmart would impact other local businesses)

Witbeck v. U.S. Dept. of Labor, 2018 2308657 (9<sup>th</sup> Cir. 2018) (unpublished) (in very brief decision, held that plaintiff failed to present evidence in support of claim that his employer violated the whistle-blower provisions of the CWA regulations, 29 C.F.R. § 24.109(a))

Kinney v. Three Arch Bay Community Serv. Dist., 2018 WL 2327245 (9<sup>th</sup> Cir. 2018) (unpublished) (in pro se case, held that district court properly dismissed case where plaintiff had failed to comply with 60-day notice requirements, among other procedural issues)

United States v. HVI Cat Canyon, Inc., \_\_\_ F. Supp. 3d \_\_\_, 2018 WL 2325398 (C.D. Cal. 2018) (on motions for partial summary judgment regarding oil spills on five different creeks, held that government had met its burden of showing significant nexus on three of the five, and issues of material fact remained on two; rejected arguments that Kennedy test applies only to wetlands and does not allow the government to rely on OHWM to prove jurisdiction; distance from intermittent stream to navigable-in-fact waterbody alone does not exclude jurisdiction; ephemeral streams may have a significant nexus to downstream waters; significant nexus does not require laboratory analysis of soil samples, water samples or other tests; government is not required to pursue “cost-effective” recovery costs under OPA; the U.S. may recover its costs unless they are arbitrary and capricious; EPA’s recovery was consistent with the NCP; no third-party liability defense under OPA where defendant’s action contributed to the spill)



Hall & Associates v. EPA, 315 F. Supp. 3d 519 (D.D.C. 2018) (deliberative process privilege does not apply to a document that post-dates the time when EPA determined that it would nonacquiesce in the Iowa League of Cities decision regarding water quality rules outside of the 8<sup>th</sup> Cir.)

National Parks Conserv. Assoc. v. Semonite, 2018 WL 2363952 (D.D.C. 2018) (on motion for summary judgment in case challenging 404 permit for electrical infrastructure project, held that Corps properly considered comments before it regarding public interest review and independently weighted the costs and benefits of the project; Corps properly analyzed the least-damaging practical alternatives)

S. Carolina Coastal Conserv. League v. EPA, 2018 WL 2184395 (D.S.C. 2018) (denying motion to transfer venue to S.D. Tex in challenge to WOTUS suspension rule; held that challenge to rule suspension was distinct from S.D. Tex. litigation regarding the rule itself and plaintiffs have no connection with Texas; court focused on distinct S.C. wetlands that would be affected by repeal of the 2015 WOTUS rule; held that 18 industry groups could intervene as a matter of right in the litigation where they have different interests than the government)

Gulf Restoration Network v. Oscar Renda Contracting, Inc., 2018 WL 2147505 (in construction stormwater case, held that plaintiff's expert, who is not a geologist but an expert on coastal sciences may testify regarding a photo showing polluted runoff from the site; plaintiff's expert report is not admissible where it makes general conclusions regarding pollution and expert did not visit the site, take measurements, or perform any field analysis to tie the construction activities to harm to the receiving waters)

Folsom v. USACOE, 2018 WL 2049839 (D. Neb. 2018) (granting motion to dismiss, held that plaintiff cannot challenge EPA over dispute as to legality of bank stabilization work where EPA had sent him a "proposed compliance order," so there was no final agency action to challenge; rejected argument that EPA had made a jurisdictional determination that is subject to challenge under Hawkes)

Schneider v. Donaldson Funeral Home, P.A., 2018 WL 2095192 (4<sup>th</sup> Cir. 2018) (unpublished) (affirming dismissal by District court, held that there were no continuing violations of construction stormwater regulations where defendant applied for received coverage under the general permit before the filing of the complaint)

Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. USACOE, \_\_\_ F.3d \_\_\_, 2018 WL 1936356 (8<sup>th</sup> Cir. 2018) (affirming district court, held that Corps letter to tribe indicating challenged fill met the farm-road exemption was not a final agency action; claim that Corps' determination that roadway was not recaptured under 404(f)(2) was nonjusticiable challenge to an enforcement action; tribe was not entitled to equitable tolling of SOL; Corps did not unlawfully stack permit and exemption verifications where the project was phased and each phase was a distinct project)

Clean Water Action v. EPA, \_\_\_ F. Supp. 3d \_\_\_, 2018 WL 1865919 (D.D.C. 2018) (in case involving challenge to EPA's indefinite stay of effluent guidelines for coal fired powerplants, held that court had no jurisdiction under APA because review lies solely in court of appeals under 509(b)(1)(E); denied motion to amend to add new claims unrelated to original complaint; case is also moot where EPA had withdrawn the indefinite stay)

OVEC v. Fola Coal Co., LLC, 2018 WL 1833215 (S.D.W.V. 2018) (denying motion to dismiss, held that *res judicata* does not bar plaintiffs' claims for unauthorized discharges from coal mine where new claims post-dated similar violations in prior litigation; "the Court finds that the occurrence of additional



discharges in violation of permit conditions constitutes a new ‘new wrong.’ . . . To find otherwise would effectively insulate polluters from any liability after one successful round of litigation.”; no issue preclusion where substantial changes to site have occurred since prior litigation)

Environmental Law and Policy Center v. EPA, 2018 WL 1740146 (N.D. Ohio 2018) (denying motion for summary judgment, held that EPA’s withdrawal of approval of state’s defective 303(d) list during litigation deprived the court of jurisdiction because there was no final agency action; court remanded case to EPA to approve or disapprove 303(d) within 30 days; rejected argument that state was not obligated to put offshore waters in Lake Erie on 303(d) because algal blooms were caused in part by other states and Canada)

Friends of the Santa Clara River v. USACOE, \_\_\_ F.3d \_\_\_, 2018 WL 1702746 (9<sup>th</sup> Cir. 2018) (affirming district court, held that plaintiffs had standing to challenge 404 permit where they showed that the challenged agency action will threaten their concrete interests and they showed a reasonable probability that the Corps’ decision could be influenced by the environmental consideration NEPA requires the Corps to study; plaintiffs’ challenges to Corps’ determination of least environmental practical alternatives had no merit; Corps did not rely on unduly narrow range of available alternatives and Corps did not err in considering financial impacts of further avoidance of impacts to WOTUS)

City of Kennett v. EPA, \_\_\_ F.3d \_\_\_, 2018 WL 1702739 (8<sup>th</sup> Cir. 2018) (reversing and remanding, held that in challenge to EPA approval of TMDL, city whose NPDES permit was subject to the TMDL had established injury in fact and redressability for standing; EPA’s approval of TMDL was ripe for judicial review where state was working on new NPDES permit and TMDL requiring dramatically lower effluent limits was in place; remanded for determination whether City had properly preserved certain arguments in the administrative process below)

United States v. Blankenship, 2018 WL 1733987 (S.D.W.V. 2018) (in case involving alleged discharges of sewage wastes from a pump truck into a creek, held that photos and testimony of discharges that were not included in the indictment, are not evidence of a prior bad act, but show a pattern of conduct, and are admissible under FRE 404(b))

Env’tl Law and Policy Ctr. v. EPA, 2018 WL 1741046 (N.D. OH 2018) (denying both party’s motions for summary judgment, held that plaintiffs could not prove a final agency action to challenge where EPA withdrew its approval of Ohio’s water quality standards; court gave EPA 30 days to approve or disapprove the standards, and retained jurisdiction over the case)

Sanitary Bd. of Charleston v. EPA, 2018 WL 1582730 (S.D.W.V. 2018) (on summary judgment, held that plaintiff’s challenge to EPA disapproval of state WQS for copper did not present a case or controversy because plaintiff’s NPDES permit did not contain a copper limit; court rejected numerous arguments justifying standing based on hypothetical future events)

NRDC v. EPA, \_\_\_ F. Supp. 3d \_\_\_, 2018 WL 1568882 (D.C.D.C. 2018) (vacating and remanding trash TMDL for Anacostia River, held that TMDL was invalid because it set minimum standards for trash removal rather than maximum levels of trash discharges; statute and EPA regs are clear that TMDLs must be expressed as maximum loads)

Defenders of Wildlife v. USACOE, 2018 WL 1615962 (9<sup>th</sup> Cir. 2018) (unpublished) (vacating district court’s preliminary injunction on operation and maintenance of weir, held that court erred in its finding



on the alternatives analysis where record showed that Corps expressly found that there was no practicable alternative that would have less impact on the sturgeon population)

County of San Mateo v. Chevron, \_\_\_ F. Supp. 3d \_\_\_, 2018 WL 1414774 (N.D. Cal. 2018) (remanding case seeking recovery of injuries related to climate change to state court; held that removal was not warranted on grounds of federal preemption because the CWA contains a savings clause that preserves state causes of action)

S. Cal. Alliance of POTWs v. EPA, 2018 WL 1381887 (E.D. Ca. 2018) (granting motion to dismiss action challenging EPA's use of TST analytical analysis for WET testing, held that plaintiffs claim was time barred because EPA promulgated underlying regulation in 2010; court lacked jurisdiction to consider inclusion of TST in NPDES permit because such challenges must first be brought before the EAB; no final agency action is present where NPDES permit was issued by state, not EPA)

Marquette County Road Comm. v. EPA, 2018 WL 1388541 (6<sup>th</sup> Cir. 2018) (unpublished) (affirming district dismissal of action by Michigan county challenging EPA refusal to approve 404 permit; held that there was no final agency action subject to review where EPA had objected to permit, but had not vetoed it; transferring authority from EPA to Corps to review permit is not a final agency action by EPA where EPA and the Corps share responsibilities under 404; EPA's objections to permit cannot be characterized as patent violations of its authority)

Benham v. Ozark Material River Rock, LLC, \_\_\_ F.3d \_\_\_, 2018 WL 1414897 (10<sup>th</sup> Cir. 2018) (affirming district court in case involving discharge of dredge or fill material by a gravel miner without a permit, held that plaintiffs had Article III standing; notice letter sufficiently provided notice of violations; court did not err in finding discharge of fill materials into more than one-half acre of wetlands without a permit [court imposed \$35,000 fine and ordered restoration]; court acted within its discretion to not invoke primary jurisdiction doctrine to stay action)

City of Wilmington v. United States, \_\_\_ Fed. Cl. \_\_\_, 2018 WL 1321511 (Ct. Cl. 2018) (federal government, which owes money to city for stormwater fees associated with federal property, did not waive right to contest fees by failing to exhaust city administrative remedies because the city code does not require a property owner to pursue an administrative appeal; whether the city may charge interest on the unpaid fees is a question and it is not clear that § 1323 of the CWA waives sovereign immunity for collection of interest)

California Env't Protection Assoc. v. Sonoma Soil Builders, LLC, 2018 WL 1242252 (N.D. Cal. 2018) (denying motion to amend the complain to add third party, held that because violations at site had ceased, plaintiff could not show a continuing violation by the proposed third party; the lawsuit against the third party will not commence until the complaint is amended, which would be after the facility cease operations and all CWA violations have ended)

New York State Dept. of Env't Conserv. v. FERC, \_\_\_ F.3d \_\_\_, 2018 WL 1247016 (2<sup>nd</sup> Cir. 2018) (denying petition by state to vacate FERC ruling that state had waived its right to deny § 401 certification to gas pipeline, held that § 401 creates a bright-line one-year limit on the state's right to certify compliance with the CWA; rejected argument that forcing state to act within one year will force decisions on incomplete records; state can deny cert without prejudice when record is incomplete; rejected giving deference to state or FERC in the interpretation of § 401)

Olympic Forest Coalition v. Coast Seafoods Co., \_\_\_ F.3d \_\_\_, 2018 WL 1220506 (9<sup>th</sup> Cir. 2018) (affirming district court on interlocutory appeal, held that discharges from oyster hatchery via pipes,



ditches and channels were point source discharges requiring an NPDES permit; rejected argument that because oyster farm did not meet the 40 C.F.R. § 124.24 definition of a concentrated aquatic animal production facility (CAAPF), it was not a point source; the issue before the court was whether the discharges from pipes from a non CAAPF were point source discharges; court distinguished its prior holding in Assoc. to Protect Hammersley, Eld and Totten Inlets v. Taylor Resources, Inc., 299 F.3d 1007 (9<sup>th</sup> Cir. 2002) on grounds that no pipes were involved)

Northwest Environmental Advocates v. Dept. of Commerce, 2018 WL 1182245 (W.D. Was. 2018) (in lawsuit alleging EPA failed to consult under ESA when approving state's nonpoint source program, held that Washington Cattlemen's Assoc. and Washington Farm Bureau failed to establish grounds for intervention; intervenors' interests are protected by state, which had already intervened; intervenors' allegations that NWEA victory *could* adversely affect them fall short of the "direct, non-contingent, substantial and legally protectable" interest required for invention as a matter of right)

Stone v. High Mountain Mining Co., LLC, 2018 WL 1175039 (D. Co. 2018) (on motion to dismiss, held that plaintiff's 60-day notice letter did not adequately describe the sampling results allegedly showing discharges of pollutants from placer mine or where the culverts transporting pollutants to WOTUS are located; plaintiffs may not bring claims for discharges that ceased prior to the filing of the complaint; fine paid to state Division of Reclamation Mining does not preempt CWA claim)

Kleinman v. City of Austin, 2018 WL 1168859 (W.D. Tex. 2018) (after trial on merits, held that city was liable for discharges for silt from eroding channel on city property; rejected defense that discharge was covered by city's MS4 permit where city guidelines for addressing such discharges were not met; fined city \$25,000 and denied plaintiff's injunctive relief request where city had already budgeted \$12.5 million to install drop structures to prevent further head cutting in stream; court used bottom-up approach to calculating penalty and engaged in little analysis of economic benefit)

Atchafalaya Basinkeeper v. USACOE, 2018 WL 1089275 (M.D. La. 2018) (in case challenging 404 permit issued for construction of pipeline, court granted preliminary injunction, holding that the Corps failed to require proper compensatory mitigation for loss of forested wetlands and Corps did not consider pipeline owner's prior history of noncompliance or provide any analysis of permit conditions that would address cumulative loss of wetlands; rejected plaintiffs' arguments that Corps did not provide proper notice of proposed permit or that the Corps improperly relied on the RHA 408 EA to support 404 EA requirements)

United States v. Citgo Petroleum Corp., 2018 WL 895335 (5<sup>th</sup> Cir. 2018) (unpublished) (affirming district court penalty of \$81 million, held that court did not abuse its discretion in using the WACC rate of 10.04% or in choosing the least costly alternative to calculate economic benefit; rejected government's argument that court may not award a penalty below economic benefit or that court did not adequately explain its downward adjustments in the penalty)

Central Sierra Environmental Resource Center v. Stanislaus National Forest, 2018 WL 746381 (E.D. Ca. 2018) (in suit by environmental group against Forest Service alleging violations of water quality standards as a result of grazing leases, held that CWA § 313 waives sovereign immunity for federal facilities when the facility is authorizing third-party acts; plaintiffs failed to show that the F.S. was required to apply for any permits under California state law; availability of state enforcement actions do not divest the court of authority to review the case under the APA; there is a causal link between the alleged violations of water quality standards (increased fecal contamination before and after the lease) and the approval of the leases by the F.S.)



Blue Water Baltimore, Inc. v. EPA, 2018 WL 704847 (D. Md. 2018) (dismissing case, held that EPA has no non-discretionary duty under 40 C.F.R. § 122.26(f)(2) to determine whether certain stormwater discharges contribute to violations of state water quality standards, and therefore require NPDES permits; jurisdiction is in federal district court, not the court of appeals)

Conservation Law Foundation v. EPA, \_\_\_ F.3d \_\_\_, 2018 WL 524758 (1<sup>st</sup> Cir. 2018) (affirming lower court dismissal of two related cases, held that EPA's role in developing and approving TMDLs did not create a nondiscretionary duty for EPA to send section 124.52(b) notices requiring individual storm water permits for all dischargers within the watershed)

Chamber of Commerce v. EPA, 2018 WL 577011 (10<sup>th</sup> Cir. 2018) (remanding appeal of district court's dismissal of WOTUS rule challenge to district court in light of National Assoc. of Manuf's v. Dept. of Def., \_\_\_ U.S. \_\_\_, 2018 WL 491526 (2018))

Georgia v. EPA, \_\_\_ F.3d \_\_\_, 2018 WL 523333 (11<sup>th</sup> Cir. 2018) (remanding appeal of district court's denial of preliminary injunction WOTUS rule challenge to district court in light of National Assoc. of Manuf's v. Dept. of Def., \_\_\_ U.S. \_\_\_, 2018 WL 491526 (2018))

Suncoast Waterkeeper v. City of St. Petersburg, 2018 WL 502662 (M.D. Fla. 2018) (denying defendant's motion for summary judgment arguing that plaintiff was preempted by prior state enforcement action, held that Florida's public participation laws in administrative enforcement do not satisfy the requirements of the CWA, and therefore the state had not commenced and diligently prosecuted an action comparable to one under the CWA)

Suncoast Waterkeeper v. City of St. Petersburg, 2018 WL 549999 (M.D. Fla. 2018) (denying motion to strike, held that defendant's affirmative defenses raising failure to state a claim, preemption, act of God, laches and acts of third parties are valid)

Red River Coal Co., Inc. v. Sierra Club, 2018 WL 491698 (W.D. Va. 2018) (held that plaintiffs alleged sufficient facts to overcome motion dismiss, where plaintiffs claimed that underdrains in coal mine valley fills that discharged pollutants to nearby streams were point sources; claims related to prior litigation on same discharges are not res judicata where the prior NPDES permits have been closed, and the current claims are for unauthorized discharges while the prior claims were for permit violations; court declined to dismiss claims on the Burford abstention doctrine where defendant argued that Congress intended to leave groundwater regulation to the states)

United States v. Whitehill, 2018 WL 459300 (W.D.N.Y. 2018) (dismissing defendants' third party complaints against subcontractors in illegal wetlands fill case, held that New York contribution law does not allow defendants to seek contribution for relief sought by the United States; defendants may also not seek indemnification because it would not absolve defendants of their independent duty under the CWA to obtain and confirm the existence of a permit before allowing the third-party defendants to discharge fill material on defendants' property)

United States v. Lucero, 2018 WL 466503 (N.D. Ca. 2018) (government's proposed expert testimony regarding jurisdiction over illegal fill placed into wetlands does not invade the province of the jury, but aides the court and the jury in determining whether the waters at issue fall within the CWA; denied defendant's Daubert motion on grounds that the government's proffered testimony is both relevant and reliable, where the experts are experience and well-trained, and they relied on Corps Wetlands Delineation Manual, which has been peer reviewed)



Clean Water Action v. Searles Auto Recycling, Corp., \_\_\_ F. Supp. 3d \_\_\_, 2018 WL 457171 (D. Mass. 2018) (granting motion to dismiss counterclaim, held that fees and penalties are not a collateral advantage outside of the proceeding because there will be an award only if plaintiff has correctly employed the citizen suit provision in the CWA and prevails on the merits)

Hawai'i Wildlife Fund v. County of Maui, 881 F.3d 754 (9<sup>th</sup> Cir. 2018) (ground-injection wells used by POTW to dispose of treated wastewater are point sources where they are hydrologically connected to the ocean; the CWA does not require that the point source itself convey the pollutants directly into the navigable water; the wells are not nonpoint source pollution because they are discrete in number and capable of being regulated through individual permits)

National Assoc. of Manuf's v. Dept. of Def., \_\_\_ U.S. \_\_\_, 2018 WL 491526 (2018) (in a 9-0 ruling, the Court reversed the Sixth Circuit Court of Appeals in the WOTUS litigation, holding that the Sixth Circuit did not have authority under section 509 of the CWA to hear the challenges to the 2015 WOTUS rule; held that challenges should all be heard in the district courts)

