50TH ANNIVERSARY OF THE CLEAN WATER ACT (CWA)—MAJOR RULINGS CONCERNING CLEAN WATER IN THE UNITED STATES

- U.S. Supreme Court (USSC)
  - W. Virginia v. Env't Prot. Agency, No. 20-1530, 2022 WL 2347278, at *1-40 (2022)
    - Major Holding Summary (MHS): Pursuant to the "major questions doctrine," in certain extraordinary cases involving statutes that confer authority upon an administrative agency, the agency must point to clear congressional authorization for the authority it claims
  - Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund, 140 S. Ct. 1462 (2020)
    - MHS: The CWA requires a permit when there is a direct discharge of pollutants from a point source into navigable waters or when there is the functional equivalent of a direct discharge
  - Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018)
    - MHS: Challenges to rules promulgated by the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (USACE), separating waters into three jurisdictional groups in order to clarify definition of "waters of the United States" (WOTUS) as used in the CWA, were required to be brought in federal district courts since the rules fell outside the ambit of the CWA section enumerating seven categories of EPA actions for which review lay directly and exclusively in the federal courts of appeals
  - U.S. Army Corps of Eng'rs v. Hawkes, Co., Inc., 578 U.S. 590 (2016)
    - MHS: USACE' revised jurisdictional determination that property on which the company sought to mine eat contained WOTUS subject to the CWA's permitting requirements marked consummation of USACE' decision-making process, as required to constitute final agency action under the Administrative Procedure Act (APA). A determination was issued after extensive fact-finding regarding physical and hydrological characteristics of the property, a ruling in which USACE definitively found that the property contained WOTUS by issuing an approved jurisdictional determination. A revision of USACE' approved determination based on new information did not make its otherwise definitive decision non-final
  - Decker v. Nw. Env't. Def. Ctr., 658 U.S. 597 (2013)
    - MHS: The CWA and its implementing regulations do not require National Pollutant Discharge Elimination System (NPDES) permits before channeled stormwater runoff from logging roads can be discharged into the navigable waters of the United States

- Los Angeles Cnty. Flood Control Dist. V. Nat. Res. Def. Council, Inc., 568 U.S. 78 (2013)
    - MHS: The flow of water out of a concrete channel within a river did not rank as a "discharge of a pollutant" under the CWA
- Sackett v. Env't Prot. Agency, 566 U.S. 120 (2012)
    - MHS: The EPA's compliance order stating that an Idaho residential lot contained navigable waters and that the landowners' construction project violated the CWA was a "final agency action" for which there was no adequate remedy other than the APA. The CWA did not preclude a review under the APA
- Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009)
    - MHS: The CWA gave authority to USACE, rather than the EPA, to issue permits for discharge of mining waste
- Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009)
    - MHS: The EPA permissibly relied on cost-benefit analysis in promulgating regulations pursuant to the CWA
- Nat'l Ass'n of Home Builders v. Def. of Wildlife, 551 U.S. 644 (2007)
    - MHS: The mere fact that, in ruling on a state's application for transfer of permitting power under the NPDES, the EPA may have changed its views from those expressed during preliminary review of the state's application and in the Federal Register did not render the decision-making process arbitrary and capricious; the regulation purporting to apply the consultation and no-jeopardy mandates of the Endangered Species Act (ESA), which require federal agencies to consult with other agencies to ensure that proposed agency action is not likely to jeopardize any endangered or threatened species, only in situations in which there is discretionary federal involvement or control, was reasonable interpretation entitled to deference; and the decision to transfer its permitting power to state officials, once the EPA determined that nine statutory requirements for the transfer were satisfied, was not one committed to the discretion of the EPA, so the transfer application did not trigger the consultation and no-jeopardy requirements
- Rapanos v. U.S., 547 U.S. 715 (2006)
    - MHS: The term "navigable waters," under the CWA, includes only relatively permanent, standing or flowing bodies of water, not intermittent or ephemeral flows of water; and only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right are adjacent to such waters and covered by the CWA

- S.D. Warren Co. v. Maine Bd. of Env't. Prot., 547 U.S. 370 (2006)
  - MHS: Because a hydroelectric dam raised the potential for discharge, § 401 of the CWA was triggered and state certification was required
- S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004)
  - MHS: "[D]ischarge of a pollutant," for which a NPDES permit is required under the CWA, includes point sources that do not themselves generate pollutants
- Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001)
  - MHS: The USACE's rule extending the definition of "navigable waters" under the CWA to include intrastate waters used as habitat by migratory birds exceeded authority granted to the USACE under the CWA
- Friends of the Earth, Inc. v. Laidlaw Env't. Serv. (TOC), Inc., 528 U.S. 167 (2000)
  - MHS: Compliance with a NPDES permit or the shutting down of a facility does not automatically render CWA action moot, absent showing that violations could not reasonably be expected to recur

- U.S. Court of Appeals for the Eleventh Circuit (11th Cir.)
  - Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC, 26 F. 4th 1235 (11th Cir. 2022)
    - MHS: An environmentalist who regularly visited wetlands to recreate and enjoy their natural beauty, and derived less pleasure during the visits from unnatural grasses and lawn that was placed on the wetlands, had standing under Article III of the United States Constitution
  - U.S. v. Coleman, 833 F.Appx. 810 (11th Cir. 2020)
    - MHS: The federal government proffer of evidence at plea colloquy was not sufficient to satisfy the "navigable waters" element of the crime of discharge of oil into the waters of the United States; and the defendant was substantially prejudiced by the federal district court's acceptance of his guilty plea without a sufficient factual basis to satisfy the "navigable waters" element
  - Ctr. For Biological Diversity v. U.S. Army Corps of Eng'rs, 941 F. 3d 1288 (11th Cir. 2019)
    - MHS: Environmental effects of the production and storage of phosphogypsum were too attenuated from the phosphate mining company's discharge for the USACE to be required to consider phosphogypsum-related effects in its National Environmental Protection Act (NEPA) analysis of issuing a CWA permit; the USACE complied with NEPA by issuing an area-wide environmental impact statement (EIS) and

by supplementing an area-wide EIS with an environmental assessment of one specific mine extension rather than issuing a new EIS; and the EIS did not constitute an agency action that required consultation with the U.S. Fish and Wildlife Service under the ESA

- Cahaba Riverkeeper v. U.S. Env't Prot. Agency, 938 F. 3d 1157 (11th Cir. 2019)
  - MHS: The EPA did not abuse its discretion in its denial of a petition filed by environmental organizations under the CWA to commence proceedings to withdraw the state of Alabama's authority to administer the NPDES permit program
- Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 833 F. 3d 1274 (11th Cir. 2016)
  - MHS: The USACE was not arbitrary and capricious in finding minimal individual and cumulative adverse effects related to the discharge of dredged or fill materials into navigable waters by surface coal mining operations that were issued a general permit (which was alleged to have violated both the CWA and the NEPA); and the USACE was not arbitrary and capricious in treating old and new activities differently
- Black Warrior Riverkeeper, Inc. v. Black Warrior Min., Inc., 734 F. 3d 1297 (11th Cir. 2013)
  - MHS: Environmental groups could not evade the CWA's 60-day waiting period for filing citizen suits by suing a coal mine operator for alleged CWA violations related to new source performance standards
- Friends of Everglades v. S. Florida Water Mgmt. Dist., 570 F. 3d 1210 (11th Cir. 2009)
  - MHS: The operation of pumps without NPDES permits that would pump polluted canal water into Lake Okeechobee did not violate the CWA; the language in the CWA, regarding the "any addition of any pollutant to navigable waters from any point source," was ambiguous; and the regulation promulgated by the EPA, which accepted the unitary waters theory that transferring pollutants between navigable waters was not an "addition to navigable waters," was a reasonable, and therefore permissible, construction of that ambiguous language in the CWA regarding the NPDES program and was thus entitled to *Chevron* deference
- U.S. v. Robison, 505 F. 3d 1208 (11th Cir. 2007)
  - MHS: Water can only be "navigable" under the CWA if it possesses a significant nexus to waters that are or were navigable in fact; the federal district court's erroneous instruction that a continuous or intermittent flow into a navigable-in-fact body of water would be sufficient to bring a

creek within the reach of the CWA was not a harmless error; and remand for a new criminal trial (as opposed to judgments of acquittal) was the appropriate remedy for the federal district court's error

- Sierra Club, Inc. v. Leavitt, 488 F. 3d 904 (11th Cir. 2007)
  - MHS: The Florida Department of Environmental Protection's failure to consider data more than 7.5 years old in developing its impaired waters list for the state of Florida was a violation of EPA regulations; the EPA acted reasonably in approving the state of Florida's decision to delist waterbody/pollutant combinations that exceeded applicable water quality standards at least once in the previous 7.5 years as it related to its impaired waters list that was created pursuant to the CWA; and the EPA did not violate the CWA by allowing the state of Florida to delist seven waters with naturally occurring low dissolved oxygen levels
- Florida Pub. Int. Rsch. Grp. Citizen Lobby, Inc. v. Env't Prot. Agency, 386 F. 3d 1070 (11th Cir. 2004)
  - MHS: Remand was required to determine whether the state of Florida's impaired waters rule under the CWA as a new or revised state water quality standard had the actual effect of changing existing surface water quality standards
- Sierra Club v. Hankinson, 351 F. 3d 1358 (11th Cir. 2003)
  - MHS: The attorney fee award by the federal district court was not an abuse of discretion in a citizen suit; and the environmental organizations could recover fees for a non-testifying expert witness who helped monitor the consent decree
- Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc., 300 F. 3d 1294 (11th Cir. 2002)
  - MHS: In a citizen suit filed by an environmental organization that alleged CWA violations by a farm by discharging pollutants into a lake without a NPDES permit, the discharge of rainwater was "agricultural stormwater discharge" within the meaning of a CWA exemption; the discharge of groundwater withdrawn into irrigation canals and seepage from the lake constituted a "return flow from irrigation agriculture" within the meaning of a CWA exemption; and there was insufficient evidence of non-exempt pollutants originating from adjacent properties for which the farm provided drainage
- Sierra Club v. Meiburg, 296 F. 3d 1021 (11th Cir. 2002)
  - MHS: The federal district court's order that allegedly interpreted the consent decree previously entered in a lawsuit under the CWA was, in reality, a modification of consent decree, which the federal court of

appeals had jurisdiction to review; and the order modifying the consent decree in the lawsuit, which required the EPA to not only formulate total maximum daily load (TMDL) standards for the presence of particular pollutants in water bodies in the state of Georgia, but also to develop implementation plans, constituted an abuse of the federal district court's discretion

- U.S. District Court for the Northern District of Alabama (N.D. Ala.)
  - Black Warrior Riverkeeper, Inc. v. Drummond Co., Inc., No.2:16-CV-01443-AKK, 2022 WL 129495 (N.D. Ala. Jan. 12, 2022)
    - MHS: Groundwater contaminated with acid mine drainage constituted a functional equivalent of direct discharge of pollutants from a point source into a tributary of a river, and, thus, the operator violated the CWA by discharging said pollutant into the tributary from a point source without an NPDES permit
- Supreme Court of Alabama (Ala.)
  - Ex parte Legal Env't Assistance Found., Inc., 832 So. 2d 61 (Ala. 2002)
    - MHS: The implementation procedures for a water antidegradation policy adopted by the Alabama Department of Environmental Management (ADEM) were "rules" as defined by the Alabama Administrative Procedure Act (AAPA), such that ADEM could not legally adopt them without complying with the rulemaking provisions of both the AAPA and the Alabama Environmental Management Act (AEMA)
- Court of Civil Appeals of Alabama (Ala. Civ. App.)
  - Alabama Dep't of Env't Mgmt. v. Wynlake Dev., LLC, No. 2190999, 2021 WL 1324013 (Ala. Civ. App. Apr. 9, 2021)
    - MHS: ADEM's assessment of a $50, 300 civil penalty against a property owner for alleged violations of clean-water regulations was not arbitrary and capricious
  - Alabama Dep't of Env't Mgmt. v. Alabama Rivers All., Inc., 14 So. 3d 853 (Ala. Civ. App. 2007)
    - MHS: The Alabama Environmental Management Commission's (AEMC) finding that biota in the Hurricane Creek watershed was impaired but that there was "no evidence" that such impairments were due to iron, aluminum, or turbidity was clearly erroneous; discharge from proposed coal-mining operations would "cause or contribute to a violation of water quality standards" such that a NPDES permit could not be issued; and reversal, rather than remand for clarification or reconsideration, was appropriate

- Alabama Dep't of Env't Mgmt. v. Legal Env't Assistance Found., Inc., 922 So. 2d 101 (Ala. Civ. App. 2005)
  - MHS: ADEM provided a sufficient pre-promulgation statement of reasons for adoption of proposed water quality antidegradation regulations by the AEMC; reference in regulations to a list of water bodies did not adopt matter by reference in contravention of the AAPA; the subsection of a regulation which contained a 110% rule for alternative projects bore some relationship to the public health, welfare, or prosperity such that the subsection did not violate the due-process clause of the Constitution of the State of Alabama; and portions of a regulation which provided a standard for applicants seeking permits for discharges to tier two quality waters were not void for vagueness under the Constitution of the State of Alabama