



White River, Vermont

WATER QUALITY

Tentative Syllabus 10pring 2021

PROFESSOR PATRICK PARENTEAU

COURSE OBJECTIVE: This course takes an in depth look at the Clean Water Act with consideration of common law remedies and other related statutes such as the Safe Drinking Water Act, The Marine Protection, Research, and Sanctuaries Act (“Ocean Dumping Act”) and the Coastal Zone Management Act (Nonpoint Program). Guest speakers will provide additional perspectives

ASSIGNED TEXT: **Introduction to Environmental Law: Cases and Materials on Water Pollution Control, 2d ed.** Jeffrey Miller, Nancy Long, Ann Powers, Karl Coplan ELI Press (2017). Supplemental materials will be posted on TWEN

LEARNING OUTCOMES: After this course you should be able to:

- Describe the causes and effects of water quality problems
- Differentiate between point and nonpoint sources of pollution
- Describe the powers, functions and decision-making processes of the Environmental Protection Agency and US Army Corps of Engineers
- Interpret and analyze federal water quality statutes and regulations
- Analyze and apply key judicial precedents that address water quality problems
- Assess the role of public participation and citizen enforcement under the Clean Water Act
- Describe how water quality and technology-based standards are established, implemented, monitored, and enforced under the CWA
- Examine the relationship of state and federal governments under the “cooperative federalism” model of the CWA
- Evaluate common law remedies for water pollution
- Recognize environmental justice considerations in permitting and enforcement processes

COURSE WEBSITE: The course is on TWEN. The website contains the syllabus, course materials, calendar, bulletin board, job announcements, weblinks, email, blog, and a drop box for assignments. I will post announcements, news items, assignments and additional materials as we go. I will also use the email system to communicate scheduling information. Please be sure you are logged in and let me know of any technology glitches.

PARTICIPATION: In the virtual world it is important to make sure the technology is working. Please be on time and ready to go when class starts and let me know if you have are having any problems connecting. I will provide opportunities for students to take the lead in presenting some of the cases and materials as we go. There will also be a few breakout sessions to work on some problems. My home is in the country and I have had some connection problems and other glitches with apps and screen sharing. Flexibility and adaptation are the key words.

GRADING: The final take home exam will count for 80% of the final grade. The other 20% will be based on two Blog posts of 750 words each. The first is due **February 10**; the second is due **April 14**. They should be posted in the **Blog Forum** on TWEN by **5 PM** on each due date. The posts can be on any topic you choose so long as it relates to the subject matter of the course.

One of the best sources for topic ideas is [E&E News](#). VLS has a subscription so it's free. For examples of how to write a legal blog visit [Legal Planet](#).

OFFICE HOURS: I'll schedule a few of these on Teams but feel free to set up individual appointments at any time. Or just email me with questions.

TENTATIVE SCHEDULE OF CLASSES AND READINGS

Note: Readings not in assigned text are either hyperlinked on the Syllabus or posted on TWEN. Please let me know if there is a problem with links or anything else.

Jan 11 Introductions

We'll go around the room and give people a chance to say a few words about where you are from, your interests or background in water quality or environmental policy in general, and what you hope to get out of this course. Then I'll go over the syllabus and explain what we'll be doing.

Jan 13 How Healthy is Your Favorite Water Body?

Read Ch. I of Miller (pp 1-12)

Visit: <https://www.epa.gov/waterdata/how-my-waterway>

Exercise: Pick your favorite stream, river, lake, pond, wetland, estuary, or other water body and find out how it's doing. How is it classified? What are the designated uses? Is it meeting water quality standards? Has it been designated as impaired for certain uses? Has a TMDL been established? What are the major point and nonpoint source problems? What are some of its special values and major threats?

I will call on people to provide a brief report on what you find.

Jan 18 No Class MLK Holiday



Jan 20 **Common Law Remedies**

Miller, pp 13-57

Problem 1 *In Class Exercise*: We'll split the class into two breakout groups: one representing the Gilberts; the other Lakeview. Each group will have 20 minutes to discuss the following:

What claims do the Gilberts have?

What defenses does Lakeview have?

What remedies could the court order?

What are the pros and cons of common law remedies?

Then we'll reconvene for reports from the spokesperson(s) for each group and general discussion.

Jan 25: **CAFO's and PFAS**

[Court Upholds Hog Verdict; Smithfield Announces Settlement](#)

Plaintiffs in NC Cases: <https://thefern.org/2019/12/rural-north-carolinians-won-multimillion-dollar-judgments-against-the-worlds-largest-hog-producer-will-those-cases-now-be-overturned/>

[Dark Waters Trailer](#)

[State of Vermont v 3M](#)

[Judge grants class status in Bennington PFOA lawsuit](#)

Jan 27 **Intro to Clean Water Act**

Miller, pp. 59-99

Feb 1 **Judicial Review of Administrative Actions**

Miller pp. 130-173

Feb 3 ***Waters of the US***

Miller, pp 208-224

SWANCC v United States

Rapanos v United States

Feb 8 WOTUS WARS

Background

Navigable Waters Protection Rule

Parenteau *WOTUS in the West* PPT (TWEN)

Feb 10 Discharge Prohibition

Miller, pp. 175-208; 225-250

Problems 2 and 3 *In Class Exercise*

Feb 15 Discharges Through Groundwater

County of Maui v Hawaii Wildlife Fund

Parenteau [Return to Maui and Upstate Forever](#)

Feb 17 Water Quality Standards

Miller pp. 251-283

Anti-Degradation: <https://www.epa.gov/wqs-tech/key-concepts-module-4-antidegradation>

NWEA v EPA

Feb 22 TMDL's

Miller, pp. 283-320

Impaired Waters: http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T

Friends of Pinto Creek v EPA

American Farm Bureau v EPA

Feb 24 Technology Based Standards

Miller, pp. 321-372

Powerplant Effluent Standards

Mar 1-3 Spring Break No Class

Mar 8 NPDES Permit Program

Miller, pp. 407-440

Mar 10 State Permit Programs

Miller, pp. 485-524

Crane & Co. Permit: *Review for in class discussion*

Mar 15 Water Quality Certifications

Miller 440-58

[33 USC 1341](#)

[*Hoopa Valley Tribe v FERC*](#)

[Trump Rule](#)

Mar 17 Inspections and Information gathering

Miller, pp 585-655

Problem 7 In Class Discussion

Mar 22 Administrative and Civil Enforcement

Miller, pp.655-717

Sackett v EPA

Hawkes v Corps

Mar 24 Criminal Sanctions, Intergovernmental Conflicts and Enforcement Discretion

Miller, 717-90

Mar 31 Guest Speaker: Laura Murphy, Vermont Asst. Attorney General, Environmental Enforcement

[*In re Morrisville Hydroelectric Project Water Quality*](#)

[DECLARATORY ORDER ON WAIVER OF WATER QUALITY CERTIFICATION](#)

Apr 5 Citizen Suits

Miller, pp. 791-851

Apr 7 Environmental Justice

[Executive Order 12898](#)

Title VI: <http://www.epa.gov/ocr/epas-title-vi-policies-guidance-settlements-laws-and-regulations>

[Friends of Buckingham v State Air Pollution Control Board](#)

[Apr 12 Wetlands Protection](#)

Miller, pp. 859-870; 898-942

Couer Alaska v SEAC

[Apr 14 Nonpoint Source Pollution](#)

[Miller, 957-1004](#)

Farm Bill Conservation Programs: <http://www.landtrustalliance.org/topics/federal-programs/farm-bill-conservation-programs>

NOAA Program: <http://coastalmanagement.noaa.gov/nonpoint/welcome.html>

[Apr 19 Water Quality Trading](#)

EPA Program: <https://www.epa.gov/npdes/water-quality-trading>

[Nutrient Trading in Chesapeake](#)

http://www.wri.org/sites/default/files/comparison_tables_of_state_chesapeake_bay_nutrient_trading_programs.pdf

[Scanlan, Adaptive Trading: Experimenting with Unlikely Partners](#)

[Apr 21 Oil and Hazardous Waste Spills](#)

Miller, pp. 1005-1062

[Apr 26 Safe Drinking Water Act](#)

Miller 1079-87

[EPA Summary](#)

[Salzman, Past, Present and Future of the SDWA](#)

[Apr 28 Flint: A Case Study in Environmental Racism](#)

[Fighting for Safe Water](#)

[Chronology](#)

[Six Years Later](#)

[Lead and Copper Rule](#)

From: [Patrick Parenteau](#)
To: [Murphy, Laura](#)
Subject: Class Visit
Date: Wednesday, March 24, 2021 11:20:21 AM

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.

Just checking in to see if we are still good to go next Wednesday for your visit to my WQ class. I have your ppt from last time but maybe you want to update it? here's the link to join by Teams. Looking forward to "seeing" you.

Microsoft Teams meeting

Join on your computer or mobile app

[Click here to join the meeting](#)

Or call in (audio only)

[+1 213-293-2313,,169254612#](#) United States, Los Angeles

[\(833\) 827-2530,,169254612#](#) United States (Toll-free)

Phone Conference ID: 169 254 612#

[Find a local number](#) | [Reset PIN](#)

From: [Murphy, Laura](#)
To: [Patrick Parenteau](#)
Subject: RE: Class Visit
Date: Wednesday, March 24, 2021 11:34:00 AM

Yes, absolutely! Thanks for the link. I'll update my powerpoint. Looking forward to it, see you soon.
Laura

From: Patrick Parenteau <PPARENTEAU@vermontlaw.edu>
Sent: Wednesday, March 24, 2021 11:20 AM
To: Murphy, Laura <Laura.Murphy@vermont.gov>
Subject: Class Visit

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[\(833\) 827-2530,,169254612#](#) United States (Toll-free)

Phone Conference ID: 169 254 612#

[Find a local number](#) | [Reset PIN](#)

From: [Patrick Parenteau](#)
To: [Murphy, Laura](#)
Subject: Tomorrow
Date: Tuesday, March 30, 2021 6:43:11 PM

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.

I'll be on Teams at 9:45 if you want to join me and check signals.

Look forward to seeing you.

From: [Murphy, Laura](#)
To: [Patrick Parenteau](#)
Subject: RE: Tomorrow
Date: Tuesday, March 30, 2021 9:09:00 PM

Sounds good – see you at 9:45 or thereabouts.
Laura

From: Patrick Parenteau <PPARENTEAU@vermontlaw.edu>
Sent: Tuesday, March 30, 2021 6:43 PM
To: Murphy, Laura <Laura.Murphy@vermont.gov>
Subject: Tomorrow

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From: [Murphy, Laura](#)
To: [Patrick Parenteau](#)
Subject: RE: Tomorrow
Date: Wednesday, March 31, 2021 9:49:00 AM

Good morning! FYI I think I'm in the waiting room.

From: Murphy, Laura
Sent: Tuesday, March 30, 2021 9:10 PM
To: Patrick Parenteau <PPARENTEAU@vermontlaw.edu>
Subject: RE: Tomorrow

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To: Murphy, Laura <Laura.Murphy@vermont.gov>
Subject: Tomorrow

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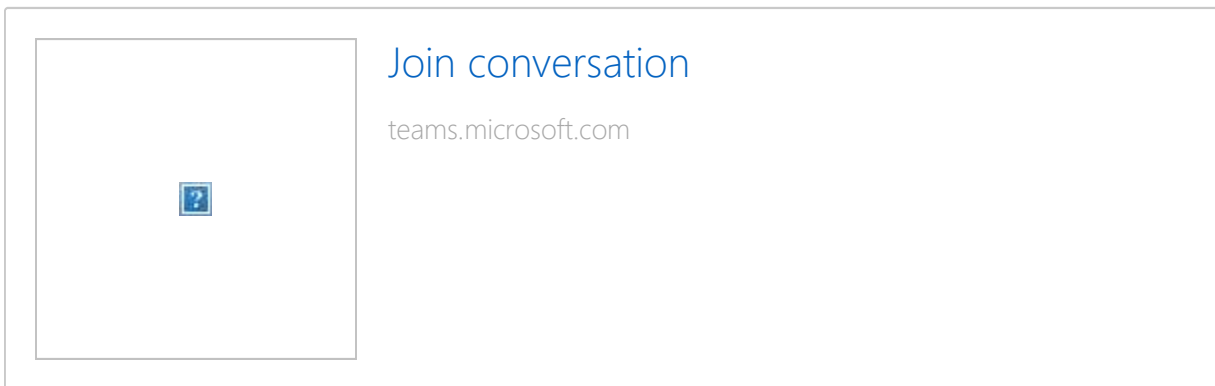
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From: [Patrick Parenteau](#)
To: [Murphy, Laura](#)
Subject: Re: Tomorrow
Date: Wednesday, March 31, 2021 9:52:04 AM

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I don't see you. Here's the link again

<https://teams.microsoft.com/l/meetup-join/19%3a4951e80267ce4f4fac0d91238c36466d%40thread.tacv2/1610309356406?context=%7b%22Tid%22%3a%228676127a-f6d4-4747-af4c-356f1b6c1610%22%2c%22Oid%22%3a%22d9fa5edb-b856-47b5-b70f-f3ba733d4128%22%7d>



From: Murphy, Laura <Laura.Murphy@vermont.gov>
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From: [Patrick Parenteau](#)
To: [Murphy, Laura](#)
Subject: Re: Tomorrow
Date: Wednesday, March 31, 2021 12:16:44 PM

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Laura, that was fabulous. A rich mix of substance, war stories, and practical and professional advice. Just what I was hoping for. I know you're extremely busy but I hope we can talk you into doing an online or summer course at some point.

Good luck with the PFAS cases and hope you get to argue the Morrisville case in DC. Could be a close one where your knowledge of the facts would be crucial.

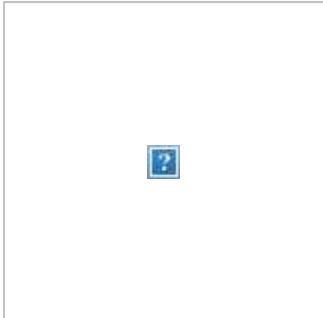
All the best,

Get [Outlook for iOS](#)

From: Patrick Parenteau <PPARENTEAU@vermontlaw.edu>
Sent: Wednesday, March 31, 2021 9:51:56 AM
To: Murphy, Laura <Laura.Murphy@vermont.gov>
Subject: Re: Tomorrow

I don't see you. Here's the link again

<https://teams.microsoft.com//meetup-join/19%3a4951e80267ce4f4fac0d91238c36466d%40thread.tacv2/1610309356406?context=%7b%22Tid%22%3a%228676127a-f6d4-4747-af4c-356f1b6c1610%22%2c%22Oid%22%3a%22d9fa5edb-b856-47b5-b70f-f3ba733d4128%22%7d>



Join conversation

teams.microsoft.com

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From: [Murphy, Laura](#)
To: [Patrick Parenteau](#)
Subject: RE: Tomorrow
Date: Wednesday, March 31, 2021 12:48:00 PM
Attachments: [~WRD0002.jpg](#)

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teams.microsoft.com



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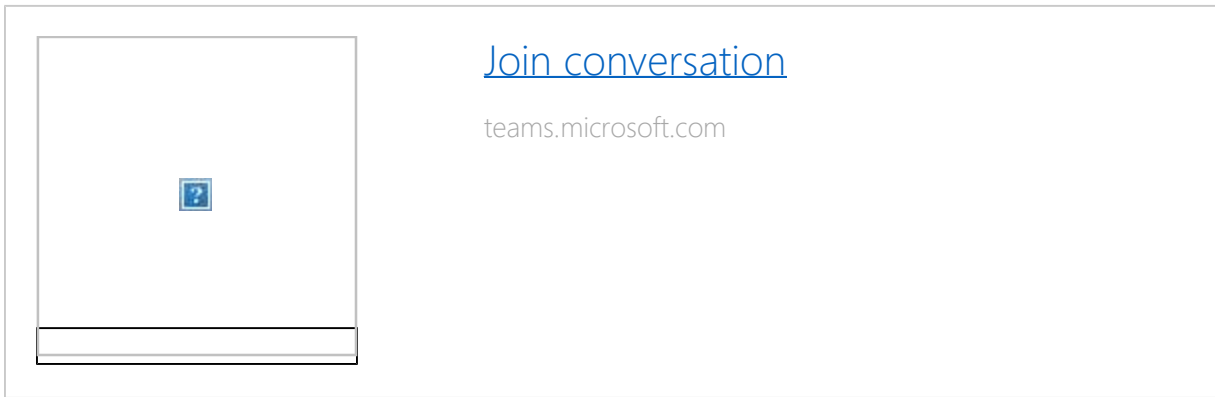
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From: [Murphy, Laura](#)
To: [Patrick Parenteau](#)
Subject: Powerpoint Again
Date: Wednesday, March 31, 2021 2:04:00 PM
Attachments: [20210331 Pat's WQ Class Compressed.pptx](#)

Hi – I compressed the file (I think) and am trying again. My message said thanks for having me, it was fun and good to see you. Also, seems like a good group of students. Laura

Water Quality

IN PRACTICE

Laura B. Murphy
March 31, 2021

Disclaimer!

Law School



1L Summer Internship National Wildlife Federation

(Syllabus Feb 3, Waters of the US)



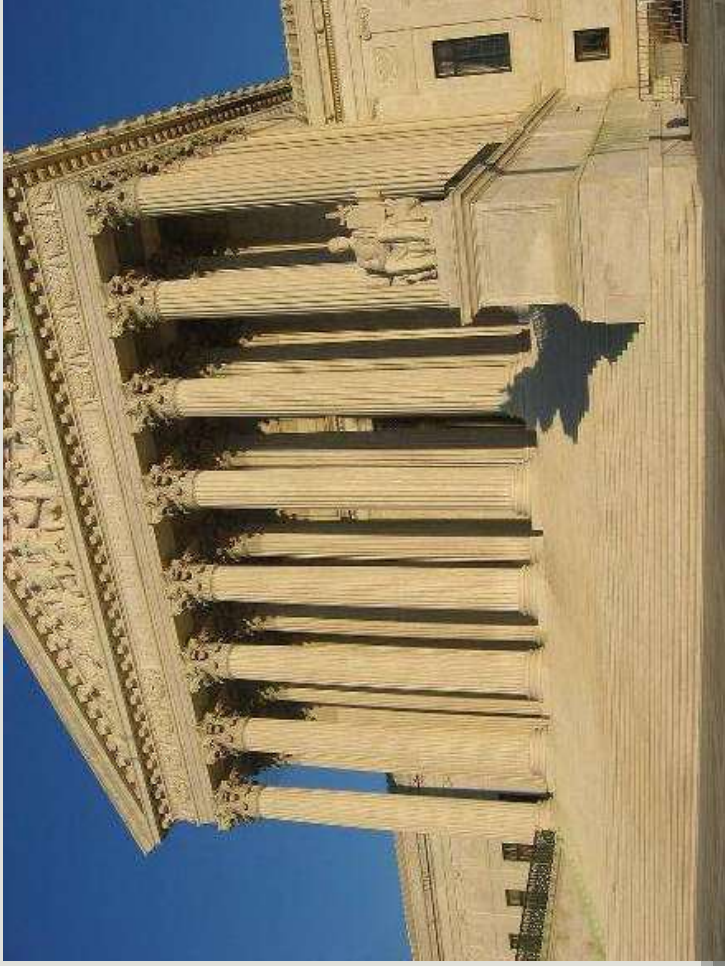
Amicus Brief 2004

Northern California River Watch v. City of Healdsburg



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US Supreme Court Feb 2006



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SD Warren
AND
Rapanos

Healdsburg Decision 2006

*Northern California River
Watch v. City of Healdsburg,*
496 F.3d 993 (9th Cir. 2006)

Post-Rapanos – followed
Kennedy

YES!!! Pond is a water of the US.

“In light of Rapanos, we conclude that Basalt Pond possesses such a ‘**significant nexus**’ to waters that are navigable in fact, not only because the Pond waters **seep into** the navigable Russian River, but also because they **significantly affect** the physical, biological, and chemical integrity of the River. We affirm the district court’s holding that Basalt Pond is subject to the CWA.”



It's important to really invest in learning the subject matter of your case and not take shortcuts. This is what gives you an informed (and more persuasive) analysis.

Potential for specialization.

Pace Environmental Litigation Clinic & ENRLC

(Syllabus Feb 10, Discharge Prohibition)

Esopus Creek

2d Cir 2005 - Pace

Supplemental appellate brief

Oral argument (observe!)

Catskill Mountains Chapter of Trout Unlimited v.

City of New York



[Flickr-Jeffs4653](#)

the work is not yet done



2001 2d Cir: **Yes, addition.** (Esopus case)
273 F.3d 481

2006 2d Cir: **Yes, addition.** (Esopus case)
451 F.3d 77

2008 EPA: No, not addition. (rule)

2014 Parenteau & Murphy (ENRLC):
Yes, addition.
(rule challenge amicus)

2017 2d Cr: **No, not addition.**
(rule challenge) 846 F.3d 492





Lessons
Learned

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Sometimes things don't make sense.

CAFO Tax Grieving 2007+ ENRLC

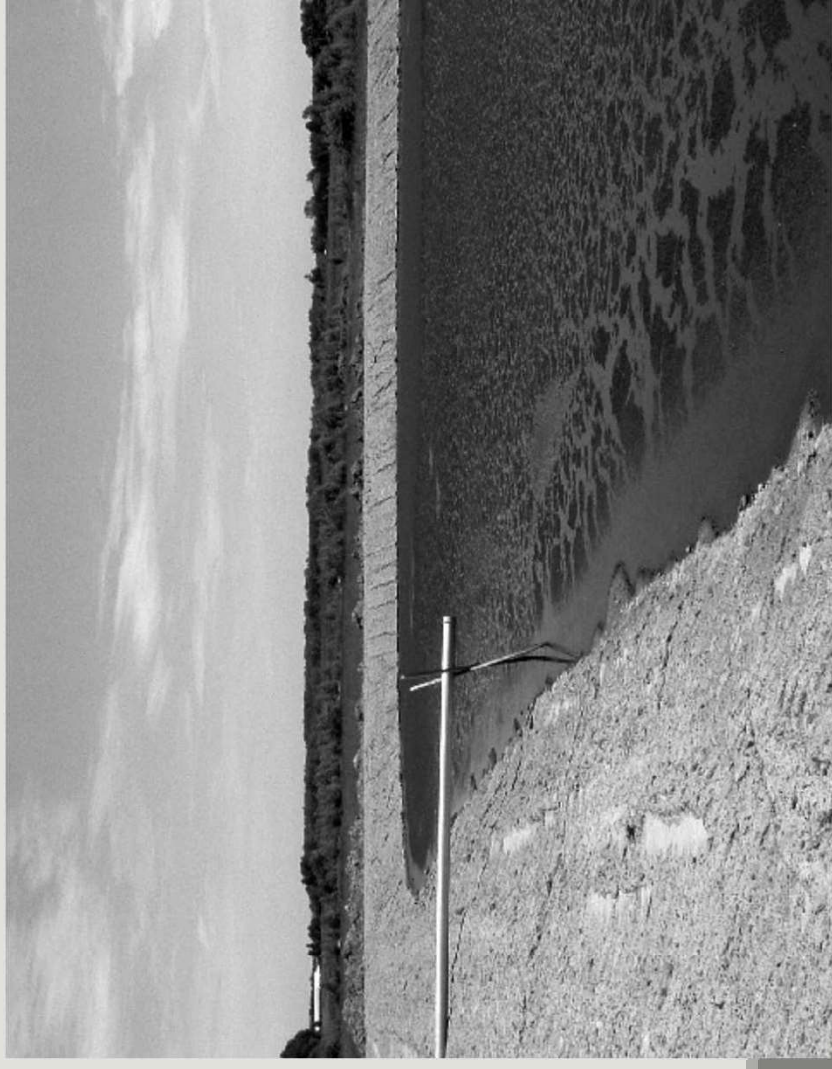
(Syllabus Jan 25 CAFOs... related)

Citizen resources/ manuals

Photo from

[*The Wasting of Rural New York State: Factory Farms and Public Health*](#) (Citizens Environmental Coalition & Sierra Club, 2005)

For more: 23 J. Env'tl. L. & Litig. 357 (2009)





Sometimes, there is no substitute for attorney boots-on-the-ground to address injustice.

De-Delegation ENRLC 2008+

(Syllabus Mar 10, State Permit Programs)



vpr



other photo credits clf

- 10 years' worth of:
 - Agency enforcement documents
 - Facility reports
 - Citizen complaints
 - Agency investigations

• 10 months, 61 single-spaced pages, 429 footnotes?!!

• See [Petition](#).



wikipedia

Region 1 came to Vermont.

We went to Boston.



We had more discussions and filed more stuff, and had more discussions and filed more stuff.

Region 1 came to VT again.



highpointchamber.org

And then finally

July 19, 2013 EPA Region 1 sends
[Corrective Action Plan](#) to State



createdebate



(this didn't really happen)



Lessons
Learned

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SOMETIMES MORE IS MORE.



OFFICE OF THE VERMONT ATTORNEY GENERAL

TJ Donovan, Vermont Attorney General

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- ABOUT
- FOR CONSUMERS
- IN THE COMMUNITY
- OPEN GOVERNMENT
- NEWS/MEDIA
- CONTACT PAGE

Protecting Vermont's Environment

Vermont's environment is one of our greatest resources. The Attorney General's Office is fighting to protect it every day.

READ MORE

NPDES Permits & TMDLs 2017-18 AGO

(Syllabus Feb 22, TMDLs)

TMDL

MUNI

CLF

ANR

WNTF

AGO

WLA

EPA



Lake Champlain

cleavingleaveland.com



2016 Lake Champlain TMDL: sets individual allocation for each WWTF (e.g., 1.097 mt/yr)



2017-18 NPDES permits set individual allocations as WQBELs (e.g., 1.097 mt/yr)



CLF challenges NPDES permits



Issue: whether the permit limits could be the same as the TMDL allocations

HELD: YES – Upholds Permits

In re Montpelier (Dog River Road) WWTF, 2019 WL 659388 (Vt. Sup. Ct. Env'tl. Div. Feb. 1, 2019)
(9 coordinated cases)

Summary Judgment

In essence:

Because TMDL allocations are designed to achieve water quality standards, a permit limit can be the same as a TMDL allocation as long as the assumptions upon which the TMDL allocation was based remain true, as here. The 2016 TMDL wastewater treatment facility allocations were based on the assumptions that phosphorus reductions in other sectors will occur in the future, and that the allocations are intended to be used in the present unless and until the other reductions do not occur.

“The permits presently on appeal are a part of a larger scheme meant to improve the water quality in the Lake, with the ultimate goal of a healthy Lake, as directed by the CWA.”



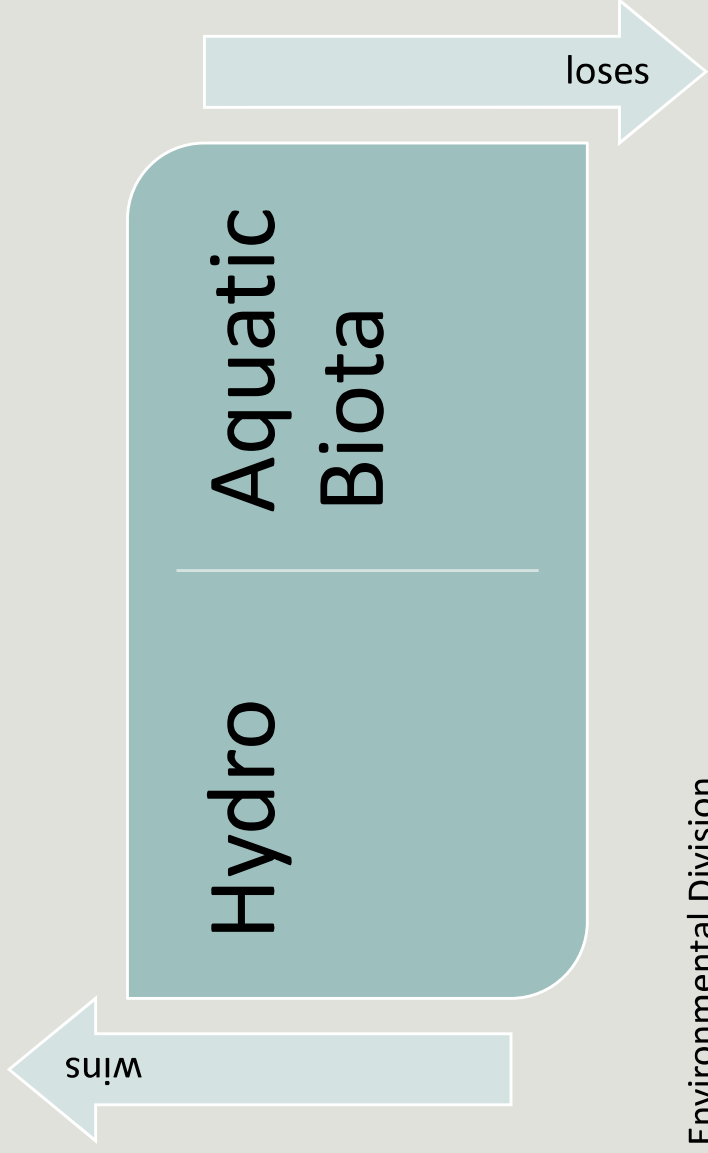
Lessons
Learned

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Even when the law is on your side,
THEMES and STORY are important.

Morrisville Hydroelectric AGO 2018-2019

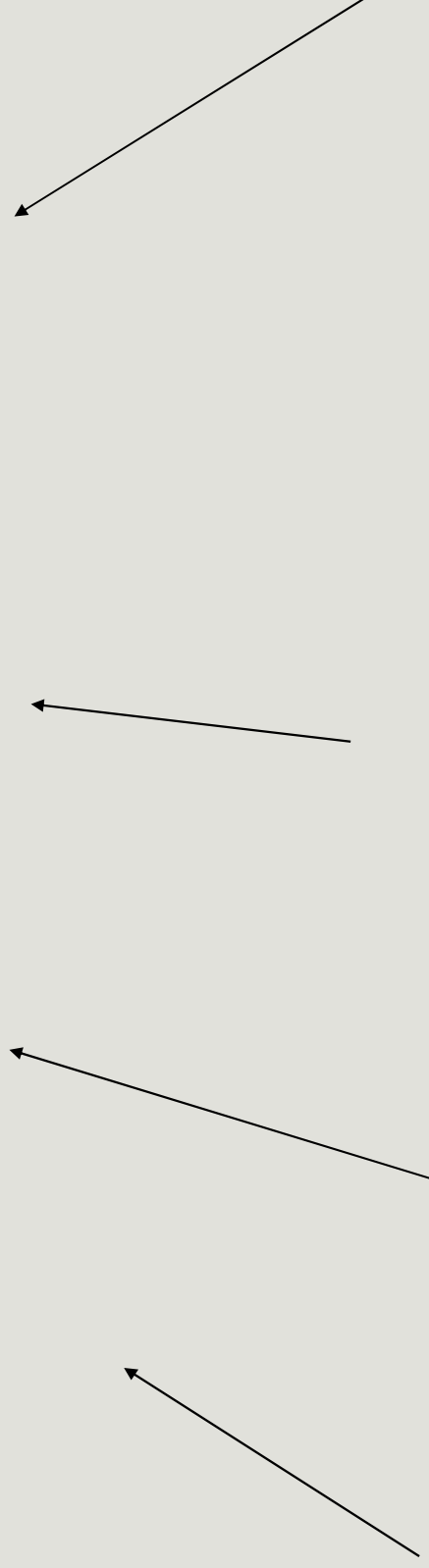
(Syllabus Feb 17 & Mar 15 & 31, Anti-Deg & 401) (VT Supreme Court Appeal)



Vermont Superior Court, Environmental Division
September 2018 Decision

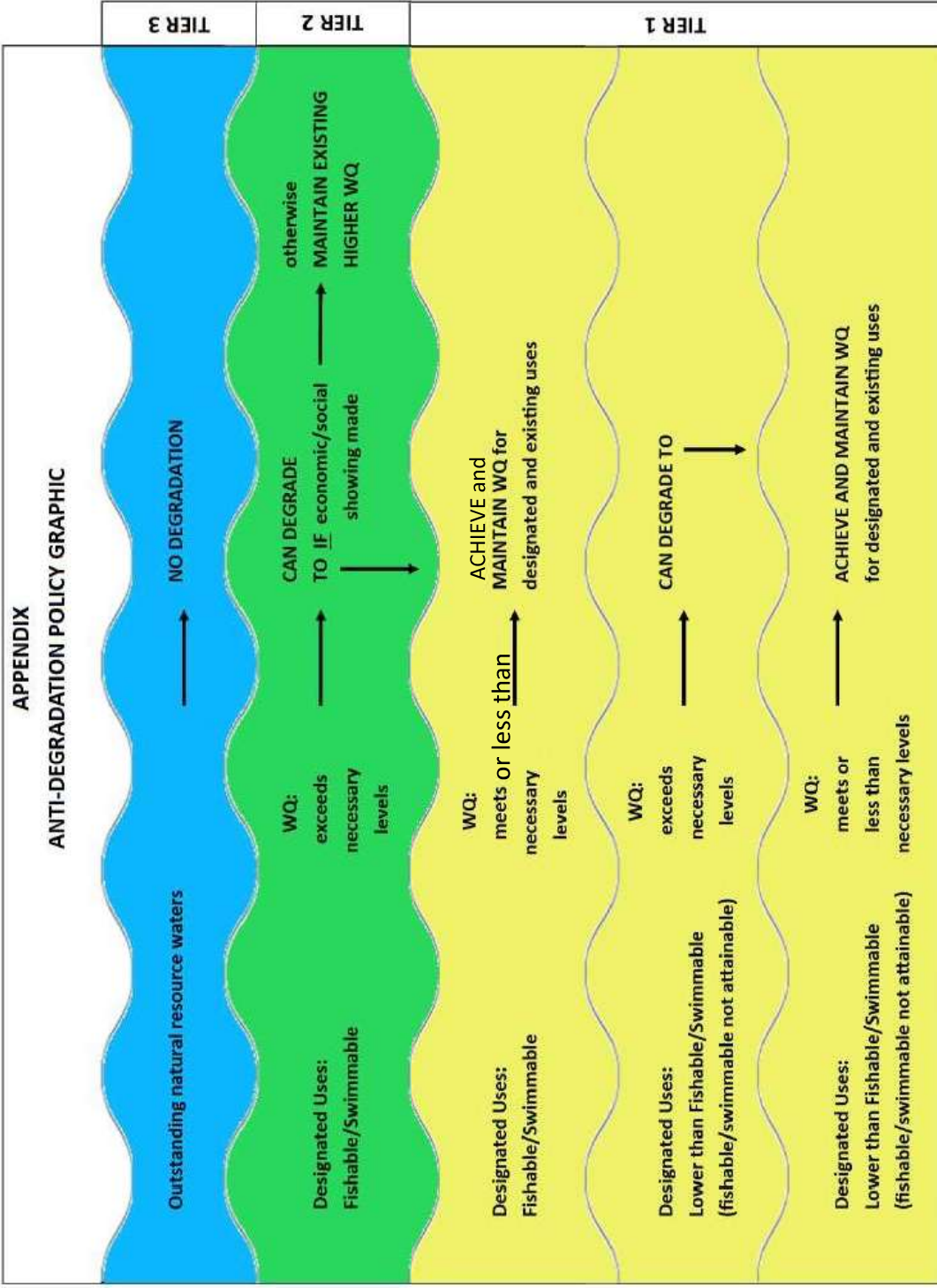
State/ANR Anti-Deg: Highest and Best Use

(closest to natural conditions, supports most sensitive use)





(corrected)



VT Supreme Court – Anti-Deg

In re Morrisville Hydroelectric Project Water Quality, 2019 VT 84

“ANR’s interpretation of the meaning of the antidegradation policy in the VWQS is consistent with the purposes of the VWQS, state water-quality law, and the CWA, and accords with the rationale of the U.S. Supreme Court. Its interpretation is rational and reasonable and entitled to deference.”

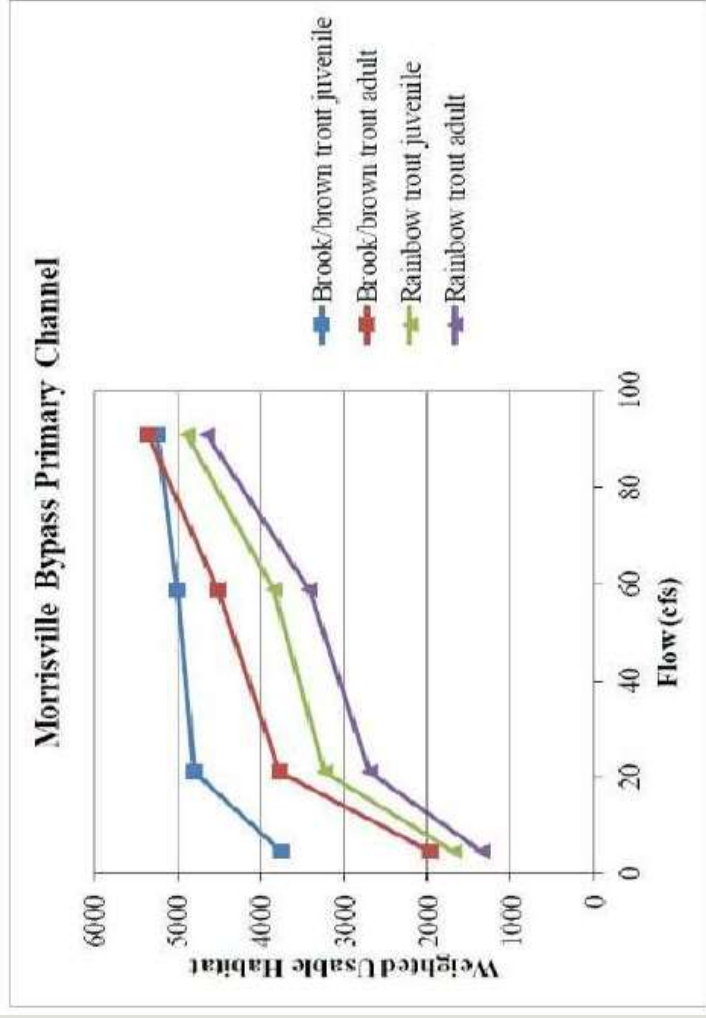
“The VWQS and the CWA support ANR’s interpretation and do not support the type of balancing engaged in by the Environmental Division.”

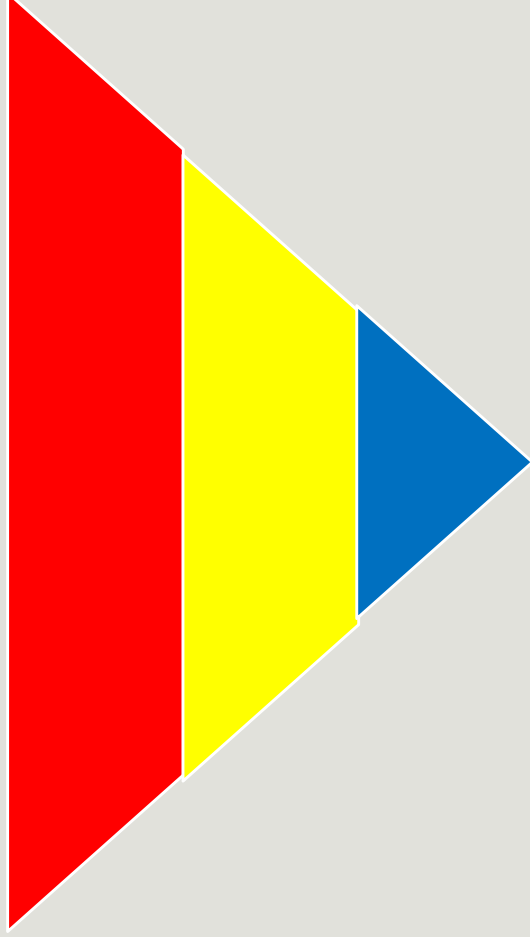
“We agree with ANR that the CWA and the VWQS do not allow promoting or protecting a use that degrades water quality.”

VT Supreme Court – Deference

In re Morrisville Hydroelectric Project Water Quality,
2019 VT 84

“Here, all factors indicate that deference is due. . . . Consequently, ANR is entitled to deference in both interpreting the VWQS and in determining how to measure compliance with those standards.”





Don't argue everything – choose wisely.

Then, prepare massively until you're able to distill your arguments to their essential points and explain them clearly.

BUT WAIT!!!

Morrisville v. FERC,
Docket No. 21-1042
(DC Circuit)

- WQC issued August 2016.
- Almost 4 years later (5/28/20):
Morrisville files waiver petition.
- FERC denies petition: ANR did not
waive its authority (11/19/20 and
2/24/21).
- Morrisville appeals to DC Circuit.
- ANR intervening in support of FERC
(intervention granted 3/29/21).

AGO MULTISTATE ([website](#))

Hoopa Valley amicus at DC Circuit & 401 comments & rule challenge litigation)

(Syllabus Mar 15, Water Quality Certifications)

County of Maui v. Hawaii Wildlife Fund amicus

(Syllabus Feb 15, Discharges through Groundwater)

Waters of the United States (comments & rule challenge litigation)

(Syllabus Feb 8, WOTUS Wars)



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