

# WATER LAW UPDATE

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Conference on the Environment  
November 7, 2019

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# 1. STATUS OF “WATERS OF THE UNITED STATES” RULEMAKING

# The “New” Rule

EPA, U.S. Corps

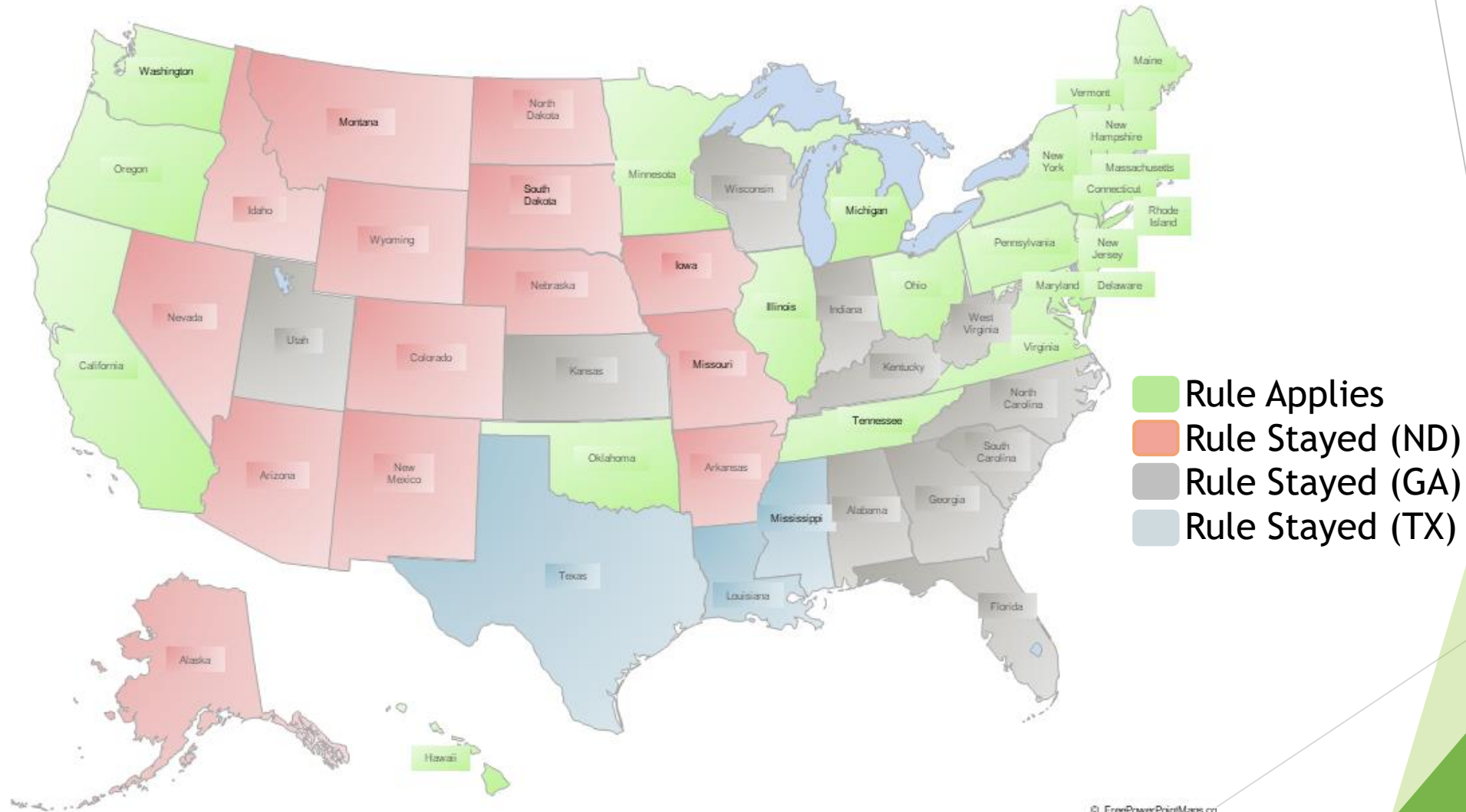
Definition of “Waters of the United States” Under the Clean Water Act

80 Fed. Reg. 37054 (June 29, 2015)

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# Current Status of 2015 “New Rule” Defining WOTUS



# The Repeal/Reinstatement Rule

EPA, U.S. Corps

Definition of “Waters of the United States,” Recodification  
of Pre-Existing Rules

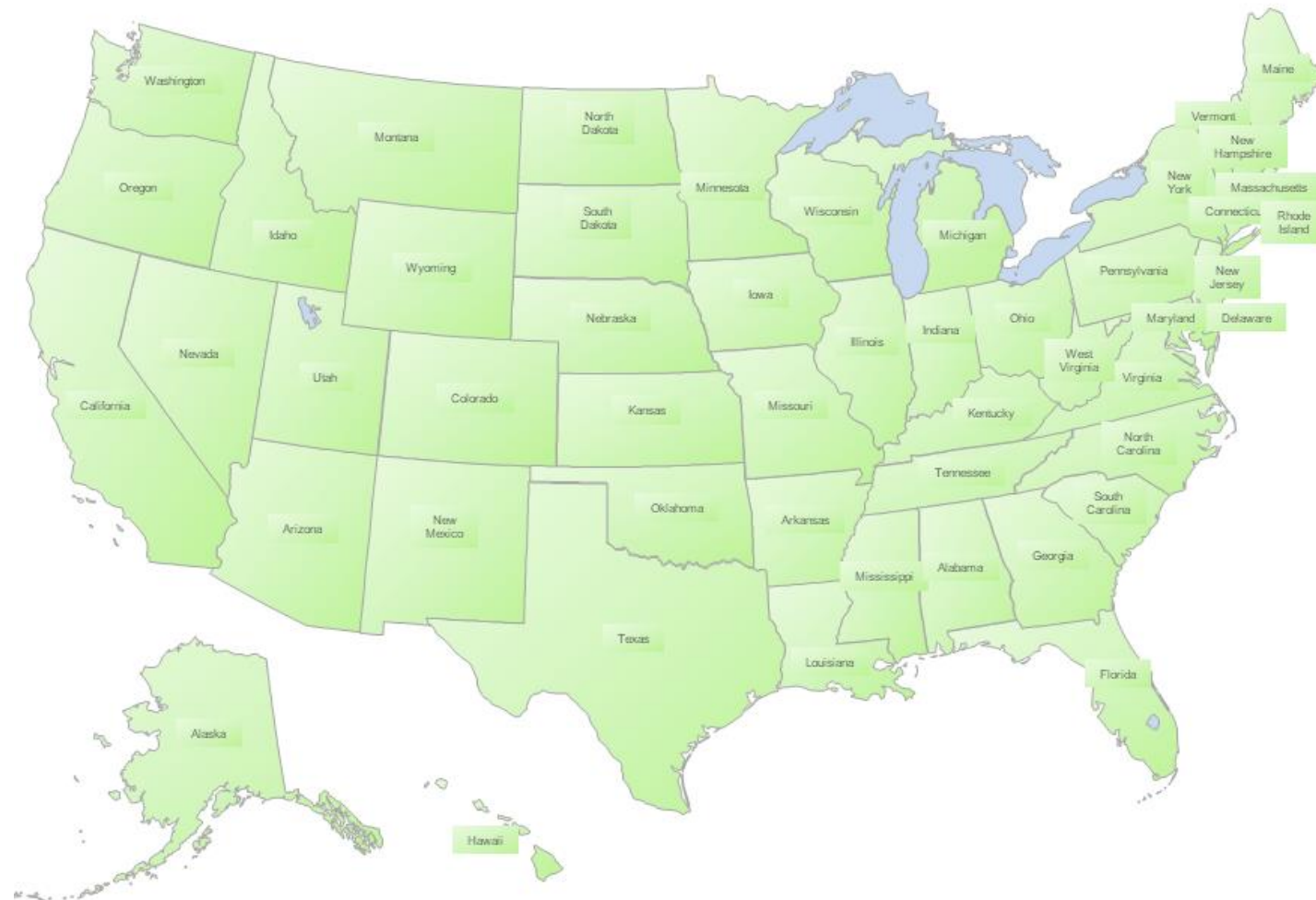
84 Fed. Reg. 56626 (Oct. 22, 2019)

Repealing the 2015 Rule avoids agency interpretations of the CWA that “push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority.”

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# Definition of WOTUS as of December 23, 2019



 OLD Rule Applies

# The Proposed Replacement Rule

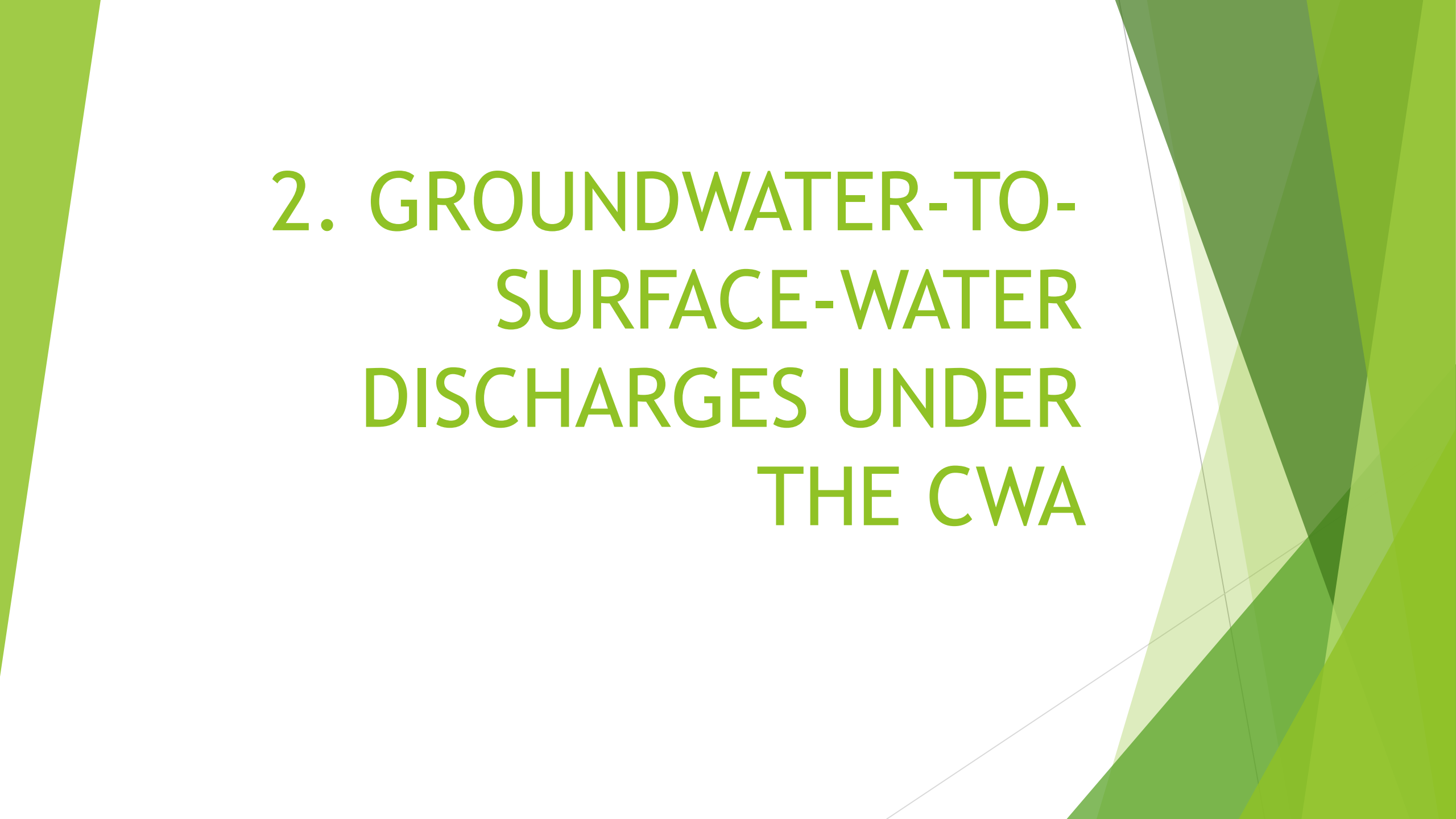
EPA, U.S. Corps

Proposed Rule, Revised Definition of  
“Waters of the United States”

84 Fed. Reg. 4154 (Feb. 14, 2019)

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The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. The shapes are primarily triangles and polygons, creating a dynamic, layered effect. The overall composition is clean and modern, with the text centered in a white space.

## 2. GROUNDWATER-TO- SURFACE-WATER DISCHARGES UNDER THE CWA



Does the Clean Water Act govern discharges into **groundwater** that is **hydrologically connected** to jurisdictional surface waters of the U.S.?

*Hawai'i Wildlife Fund v. County of Maui,*  
886 F.3d 737 (9th Cir. 2018)

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## Clean Water Act Jurisdiction

- The Act requires an NPDES permit when any pollutant is added to “**navigable waters**” from a point source.
- “**Navigable waters** is defined as “Waters of the United States” and excludes groundwater.

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## Ninth Circuit

--*Hawai'i Wildlife Fund v.  
County of Maui*,  
881 F.3d 754 (9th Cir. 2018)



Photo by Warren Gretz

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## Ninth Circuit

CWA only requires that:

“the pollutants are **fairly traceable** from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water.”

- NPDES Permit **required**

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# EPA Interpretive Statement

“[T]he CWA is best read as **excluding** all releases of pollutants from a point source to groundwater from NPDES program coverage, **regardless of a hydrologic connection** between the groundwater and jurisdictional surface water.”

--Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater. 84 Fed. Reg. 16810 (April 23, 2019)

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# Pending MN Case on Groundwater Discharges

*In the matter of the reissuance of an NPDES/SDS Permit to United States Steel Corporation (U. S. Steel) for its Minntac facility and response to Contested Case Hearing requests filed by U. S. Steel and the Minnesota Center for Environmental Advocacy (“MCEA”) And in the matter of the Application for Variance from Water Quality Standards in the proposed NPDES/SDS permit, MPCA’s preliminary Determination to Deny the Variance Request and U. S. Steel’s Contested Case Hearing request on the Variance Denial.*

Minnesota Court of Appeals Case Nos. A18-2094, A18-2095, A18-2159, and A18-2163.

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# 3. EPA Proposed Rules Governing Clean Water Act Section 401 Certifications

# Clean Water Act Section 401

“Any applicant for a Federal license or permit to conduct any activity... which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...that any such discharge will comply with [applicable state water quality standards].”

--33 U.S.C. § 1341(a)

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# Narrowing the Scope of 401 Certification

84 Fed. Reg. 44080 (August 22, 2019) (amending 40 C.F.R. § 121).

## Current EPA 401 Cert. Regulation

- ▶ There is a “reasonable assurance that *the proposed activity* will not result in a violation of applicable water quality standards....”

--40 CFR 121.24

## Proposed EPA 401 Cert. Regulation

- ▶ 401 Cert. scope “limited to assuring that *a discharge* from a Federally licensed or permitted activity will comply [with state water quality standards].”

--40 CFR 121.3 (proposed)

# U.S. Supreme Court on 401 Scope

“[Section 401(a)] is most reasonably read as authorizing additional conditions and limitations **on the activity as a whole** once the threshold condition, the existence of a discharge, is satisfied”

—*PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 511 U.S. 700 (1994)

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# Ramifications for Minnesota?

MPCA requires “oil spill response modeling to **assess the impacts of a spill** (and strategies, as appropriate, to avoid, minimize, and mitigate such impacts) in Lake Superior and the Lake Superior Watershed.”

—MPCA Section 401 Water Quality Certification Denial,  
Enbridge Energy’s Line 3 Replacement Project in Minnesota  
(Sept. 27, 2019)

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# 4. Water Transfer Rule Adopted by Statute in Minnesota

## Federal Water Transfer Rule

**Water transfer** means “an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.”

--40 CFR § 122.3(i)

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“Because the exemption is not incorporated by reference in state-administered NPDES programs...and because Minnesota’s NPDES program does not have its own water-transfer rule, the federal water-transfer rule does not apply in Minnesota.”

--*West McDonald Lake Ass’n v. Minn. Dep’t of Natural Res.*, 899 N.W.2d 832 (Minn. Ct. App. 2017).

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“An activity that conveys or connects waters of the state without subjecting the transferred water to intervening industrial, municipal, or commercial use does not require a national pollutant discharge elimination system permit.”

--S.F. 7, 91st Leg. Special Session, Art. 3, § 95 (Minn. 2019)  
(amending Minn. Stat. § 115.03, subd. 5).

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# 5. White Bear Lake Case Heads to Minnesota Supreme Court





Source: Chris Polydoroff (Pioneer Press)

*White Bear Lake Restoration Association v. Minn. Dept. Nat. Res.*,  
928 N.W.2d 351 (Minn. Ct. App., Apr. 22, 2019).

# MERA: Two Types of Lawsuits

## Under MERA 116B.03

- ▶ “Any person ...may maintain a **civil action** in the district court...against any person, for the **protection** of the air, water, land, or other **natural resources**...from **pollution, impairment, or destruction**...”

## Under MERA 116B.10

- ▶ “[Any] person ...may maintain a **civil action** in the district court...where the **nature of the action is a challenge to an environmental quality standard**, limitation, rule, order, license, stipulation agreement, **or permit** promulgated or issued by the state or any agency...”

# MERA: Two Types of Relief

## Under MERA 116B.03

- ▶ “The court may...**impose such conditions upon a party as are necessary** or appropriate to protect the air, water, land or other natural resources...from pollution, impairment, or destruction.”

--Minn. Stat. §116B.07

## Under MERA 116B.10

- ▶ “[T]he district court...shall **remit** the parties to the state agency ...to institute the **appropriate administrative proceedings** to consider and make findings and an order...”

--Minn. Stat. §116B.10

# Public Trust Doctrine

“The **state**, in its sovereign capacity, as trustee for the people, **holds all navigable waters and the lands under them for public use**. Public use comprehends not only navigation...but the use also for the ordinary purposes of life, such as boating, fowling, skating, bathing, taking water for domestic or agricultural purposes, and cutting ice.”

--Nelson v. De Long, 7 N.W.2d 342, 346 (Minn. 1942),

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“To be sure, the lake and the aquifer are hydrologically connected. **That is why MERA applies to the groundwater.** But that does not make groundwater ‘navigable.’”

--White Bear Lake Restoration Association v. Minn. Dept. Nat. Res., 928 N.W.2d 351 (Minn. Ct. App., Apr. 22, 2019).

**Klass, Alexandra**, *The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study*, 45 Environmental Law 431 (2015).

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# 6. “Flushable Wipes” Case Heads to Trial





*City of Mankato v. Kimberly-Clark Corp., No. 15-2101 (D. Minn.)*

## Status of “Flushable Wipes” Case

- Kimberly Clarke is the only remaining defendant.
- “Flushable” claims dismissed; “sewer safe” claims remain.
- All claims for financial damages have been dismissed.
  - Potential outcome for cities is injunctive relief.

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# QUESTIONS?

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