



WESTCAS 2019 Fall Conference

Legal Update & PFAS Legal Challenges

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ATTORNEYS AT LAW

Topics

- Clean Water Act jurisdiction: Waters of the United States
- Discharges through groundwater: Hawaii Wildlife v. County of Maui
- Agricultural return flows: Pacific Coast Federation of Fishermen's Associations v. Glaser
- Endangered Species Act Regulations and Water Operations
- Army Corps: Atmospheric River Forecasts and Reservoir Operations
- Tribal water reservations: Agua Caliente Tribe v. Coachella Valley Water District & Desert Water Agency
- PFAS



Clean Water Act Concepts at Issue:

- Navigable Waters/WOTUS
- Discharge of a pollutant
- Addition

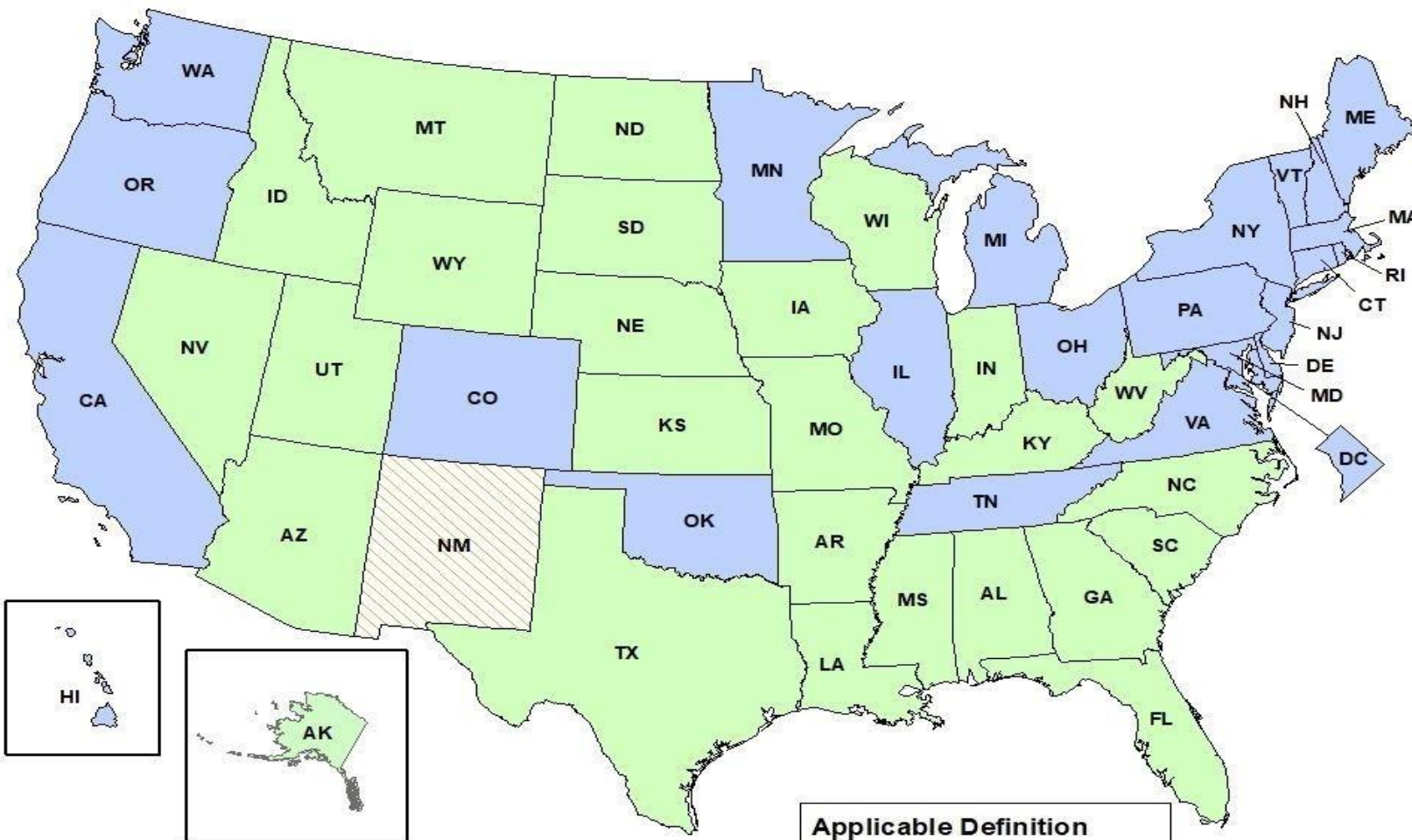


Waters of the United States

The term “navigable waters” means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(7)





Applicable Definition

- 2015 Clean Water Rule*
- Pre-2015 Regulations and Guidance
- Under Federal Court Consideration

* Also applicable in the U.S. territories

The EPA is providing this map for informational purposes only, and it cannot be relied on for specific determinations or other legal purposes. As the litigation continues, the EPA will update the map, when possible, to reflect the most current information that is made available to the EPA and the Army. For specific requests, please contact the Army Corps of Engineers or EPA. This map was updated on June 13, 2019.



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Rulemaking Status

- **Repeal** of 2015 WOTUS Definition:
 - October 22: Final Repeal Rule Published
 - December 23: Effective Date
 - Implications: return to pre-2015 status?
- **Replacement** Definition:
 - February 14: Proposed Replacement
 - April 15: Comment Period Closed
 - Next step: EPA & Army send final rule to OMB
 - Goal: final replacement rule in December



Key Features of Proposed Replacement Definition

- Wetlands: Only covered if abut or have a direct surface connection to jurisdictional water
- Ephemeral streams and features excluded
- Similar exclusions for artificial lakes and ponds, ditches, conveyances, stormwater control, wastewater recycling, water treatment systems
- Key question for water infrastructure: constructed in upland or a jurisdictional water?



Potential Changes in Final Rule:

- Should agencies use Kennedy standard in 2006 *Rapanos* (significant nexus), or Scalia standard (direct surface connection)?
- Exclude intermittent streams?
- Address effluent-dependent streams?
- Keep a new definition of “ditches”?
- Can a ditch be a point source and a WOTUS at the same time?
- Wetlands: alternative definitions of adjacent? Distance limit? Exclude separated wetlands even if they have direct hydrologic surface connection? Jurisdiction based on subsurface connections?
- Additional specific exclusions for clarity?
- Jurisdictional status of “features whose purpose is to move water”?



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The Discharge Prohibition

. . .the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a)



Discharge of a Pollutant

. . . any addition of any pollutant to navigable waters from any point source.

33 U.S.C. § 1362(12)



County of Maui v. Hawaii Wildlife Fund

886 F.3d 737 (9th Cir. 2018)

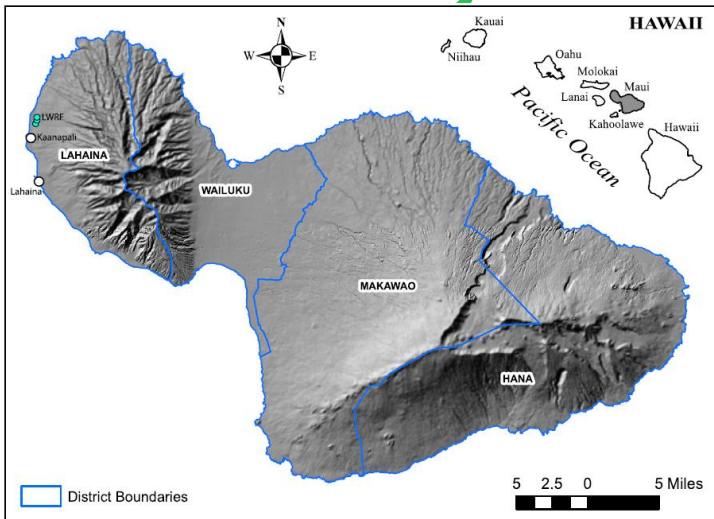
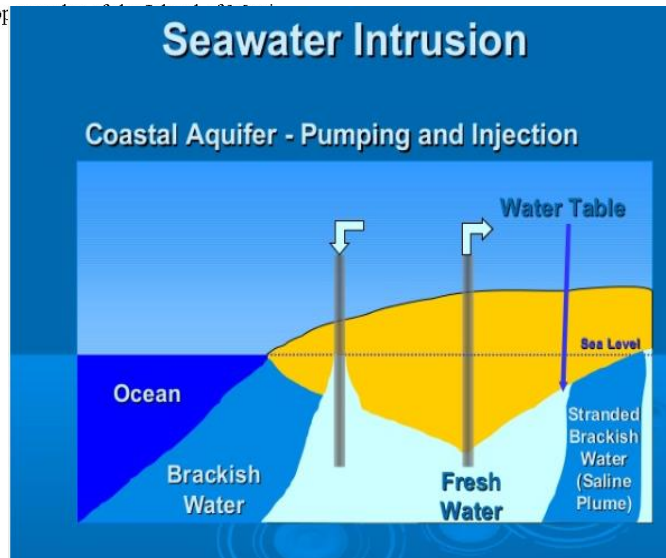


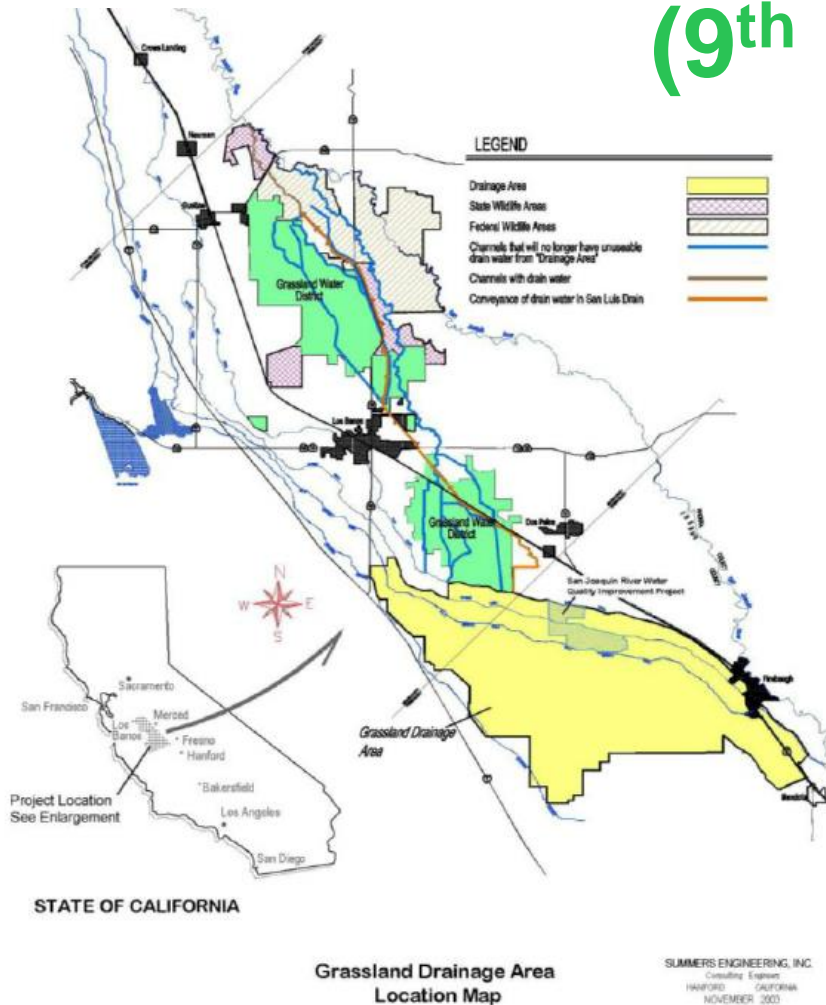
Figure 1-1: Location and top



- Supreme Court reviewing 9th Circuit “fairly traceable” standard for whether NPDES permit required for wastewater that travels through groundwater.
- April 15: EPA interpretive statement.
- Oral Argument November 6.
- Maui County Council voted 5-4 to settle case.
- Mayor wants to continue lawsuit.
- Dueling letters to Supreme Court.
- Court could still take up *Kinder Morgan Energy partners v. Upstate Forever* (4th Circuit)



Pacific Coast Federation of Fishermen's Associations v. Glaser (9th Circuit)



- Tile drain system for agriculture return flows
- Exception: “discharges composed entirely of return flows from irrigated agriculture.”
- At issue: flows from a solar project, “seepage and sediment” from highways, and residences
- Court: operator has burden to prove exception applies (prove no discharge from activities unrelated to crop production)
- “entirely” does not mean “majority”
- Remand to district court



Pacific Coast Federation of Fishermen's Associations v. Glaser (9th Circuit): Implications

- Narrows exemption for agricultural return flows and places burden on operator
- Potential impact for all agricultural drainage system operators
- What “entirely” means is unclear, but more than a “majority”
- Status: water authority has until November 12 to seek rehearing



New Endangered Species Act Regulations & Water Operations

- Challenged by 17 states on 9/25
- Consultation regulation changes effective October 28
- Dams: existence is in “environmental baseline” if agency lacks discretion to remove or modify them
- Clarifies and simplifies what are “effects of the action” that give rise to “reasonable and prudent measures”
- Can give credit for conservation plans before any binding plans or resource commitments



Army Corps: Atmospheric River Forecasts & Reservoir Operations

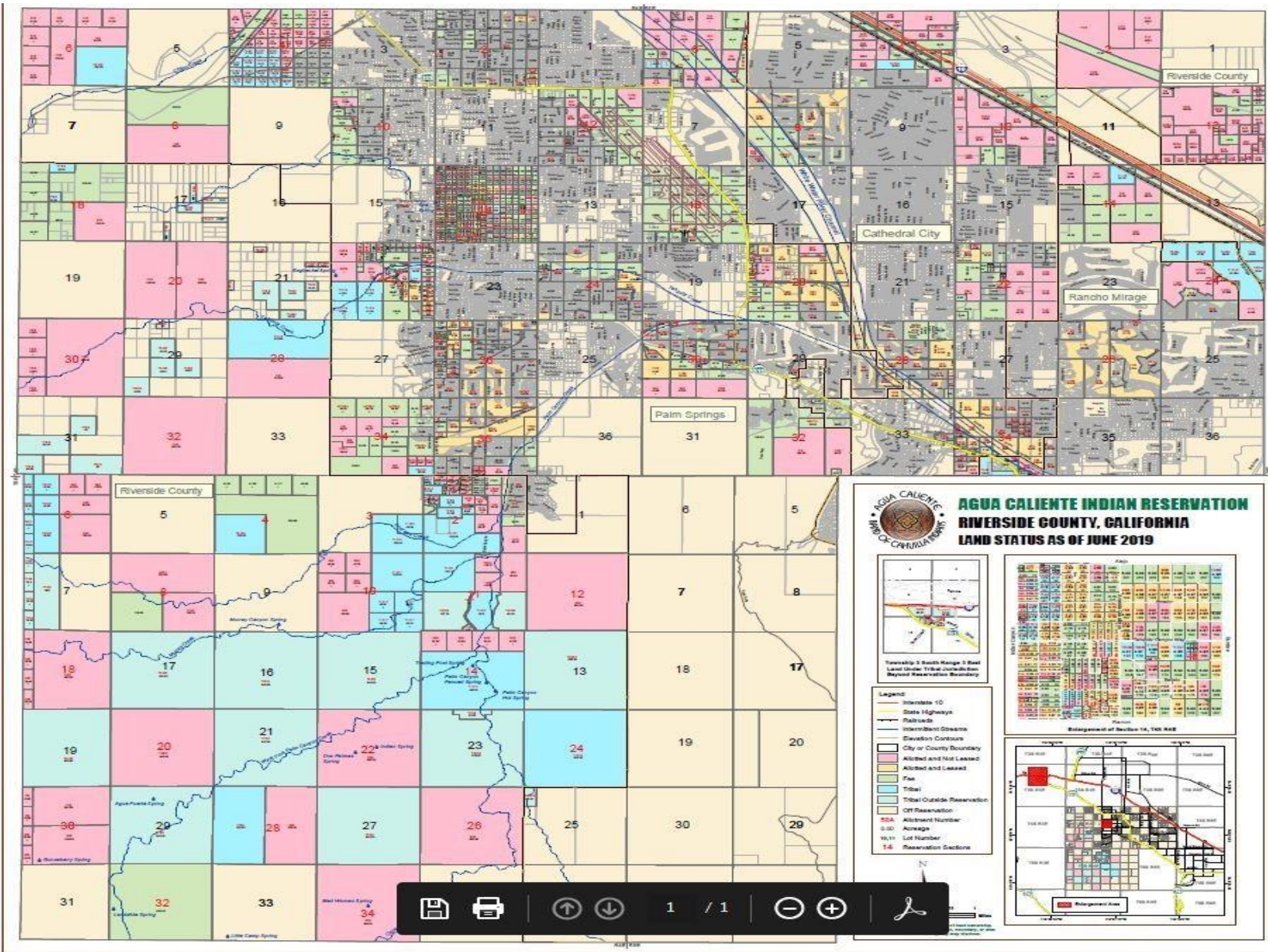
- Army Corps using improvements in “atmospheric river” forecasting to allow reservoirs to hold more water
- Pilot at Lake Mendocino: allowed 11,650 more acre feet last winter
- Expanding to Lake Oroville, New Bullards Bar Reservoir, and Prado Dam
- Significant change to Corps approach to flood control operations
- Potential for other reservoirs in California and Arizona



Agua Caliente Band of Cahuilla Indians

- Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District (9th Cir. 2017) 849 F.3d 1262 (Phase 1)
- District Court April 19, 2019 Order (Phase 2)
- August 14: District Court denied U.S. Government's Motion for Reconsideration
- Phase 3: sufficient pore space?





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PFAS: Congress

- Defense Authorization Act
 - Senate: Drinking Water Regulation
 - House: CWA & Superfund
- Stand-alone bills



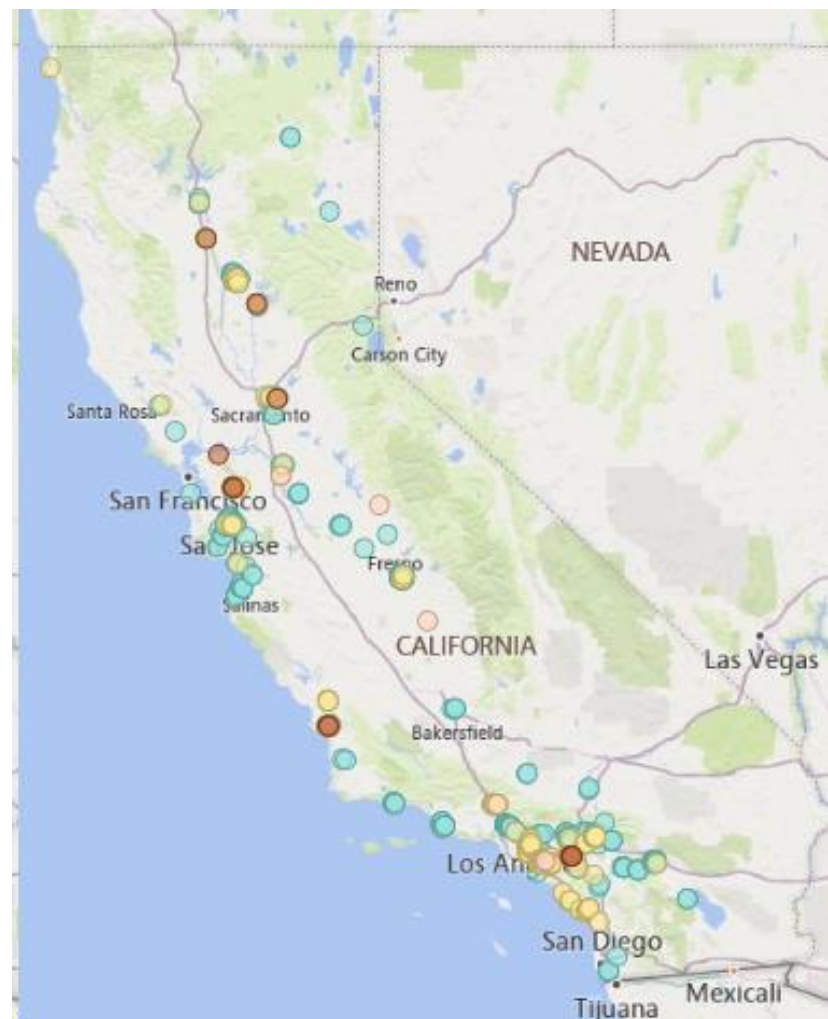
PFAS: EPA

- “Regulatory determination” for PFOA, PFOS by end of year
- 2020:
 - Developing Maximum Contaminant Level for PFOA, PFOS
 - Monitoring: UCMR 5
 - PFOA and PFOS under CWA, Superfund, RCRA
 - Other PFAS? PFBS, PFHxA, PFHxS, PFNA, PFDA, GenX



PFAS: California

- Notification levels = detection levels:
 - 5.1 ppt PFOA
 - 6.5 ppt PFOS
- Detection maps
- Response levels?
 - 10-20 ppt PFOA?
 - 40 ppt PFOS?
- Required public notices & water supplies?



PFAS: NH, NJ, NY

- **New Hampshire:** MCLs October 1
 - 12 ppt PFOA, 15 ppt PFOS, 18 ppt PFHxS, 11 ppt PFNA
 - Legal challenge by 3M, Plymouth Village Water & Sewer, farmer, biosolid company
- **New Jersey:**
 - 2018: 13 ppt MCL for PFNA (1st PFAS MCL)
 - April 2019: Proposed MCLs of 14 ppt PFOA, 13 ppt PFOS
- **New York:**
 - July 2019: Proposed MCLs of 10 ppt PFOA, 10 ppt PFOS
 - Comment period ended September 23



PFAS: Litigation

- *Minnesota v. 3M Corp.* (Minn. District Court)
 - Filed 2010
 - Settled in 2018 for \$850 million
- **Firefighting Foam Multi-District Litigation** (S.C. District Court)
 - Hundreds of states, local governments, other entities
- Nationwide class action: *Hardwick v. 3M Co.* (S.D. Ohio filed Oct. 4, 2018)
 - September 30: court denied challenges to jurisdiction
- Strategy for impacted agencies?
 - Join multidistrict litigation?
 - Individual claims?
 - State Attorneys General?



PFAS: The Movie

Premiers November 22



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Conclusions and Questions?



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