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So Much Drama, So Little Time: Update on the WOTUS Rule

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Member

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History of WOTUS – It's been a battle

- Since 1972, debate has raged over proper meaning of “waters of the United States”
- Goal of Clean Water Act
 - Prevent pollution into navigable waters
 - EPA has authority to prepare and development programs for preventing, reducing or eliminating the pollution of navigable waters
 - “Navigable waters” defined as “the waters of the United States, including the territorial seas.”



History of WOTUS – “Significant Nexus”

- 2006 – *Rapanos v. United States*
 - No Majority Opinion
 - Concurrence (1 justice) governed for last 10 years
- Justice Kennedy – “waters of the United States” extends beyond what is traditionally considered navigable.
 - Navigable-in-fact → can regulated based on “adjacency”
 - Nonnavigable → “... must establish a significant nexus on a case-by-case basis . . . to regulate wetlands based on adjacency to nonnavigable tributaries.”



2015 Clean Water Rule

- Obama Administration sought to reduce uncertainty about scope of CWA by increasing categorical jurisdictional determinations and reduce number of case-specific significant nexus test
- **Litigation Ensued**
 - Never reach substantive merits
 - Litigation over which court was proper jurisdiction – federal district or appellate courts
 - Supreme Court held federal district courts are proper forum for challenges (unanimous)



2017 Trump Executive Order

- E.O. 13,778
 - Restoring the Rule of Law, Federalism and Economic Growth by Reviewing “Waters of the United States” Rule
 - Ensure waters are protected but promote economic growth and minimize uncertainty
 - Consider interpreting jurisdictional reach as outlined by Scalia in *Rapanos*
 - ‘continuous surface connection’
- **Two Step Repeal and Replace**
 - STEP ONE: Repeal 2015 Rule
 - Final Rule signed September 12, 2019
 - STEP TWO: Revise definition of WOTUS
 - Proposed Rule published February 14, 2019
 - Comment period closed April 15, 2019



STEP ONE Final Rule (9/12/19)

- Concluded Obama Admin's 2015 Rule:
 - Outside scope of CWA and Kennedy's decision in *Rapanos*
 - Improperly balanced federal and state regulatory authority
 - Distance-based limitations for jurisdiction were deficient and lacked support
 - Had procedural and substantive deficiencies (as identified in 2019 court opinions)



Final Rule (9/12/19)– STEP ONE

- Restore regulatory text that existed prior to 2015 Clean Water Rule.
 - Nationwide applicability
 - Rely on applicable agency guidance documents and Supreme Court decisions interpreting that regulatory text
 - Effective 60 days from publication in Federal Register.
- Await STEP TWO and outcome of expected litigation





**Clean Water Act
at the U.S.
Supreme Court**

October 2019 Term

County of Maui, Hawaii v. Hawaii Wildlife Fund

- Question for the Court
 - Whether the Clean Water Act requires a permit when pollutants originate from a point source but are transported to navigable waters by a nonpoint source, such as groundwater.
- This case is litigating the issues presented in the 2015 Clean Water Rule about scope of CWA to groundwater



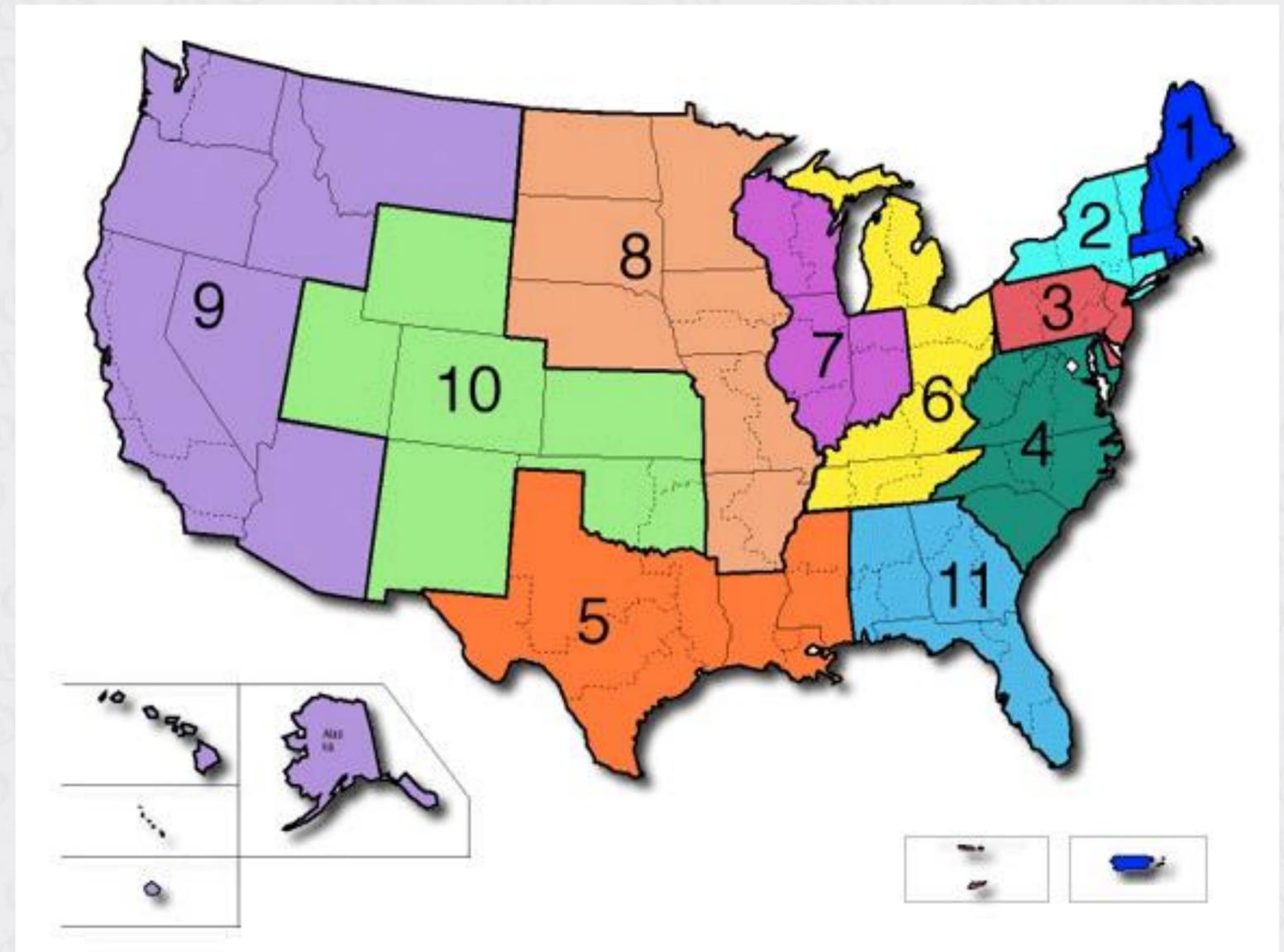
County of Maui, Hawaii v. Hawaii Wildlife Fund

- County of Maui Wastewater Treatment
 - Since 1980s, discharges treated wastewater into four injection wells
 - Groundwater shown to enter the Pacific Ocean
 - Is that a point source discharge under the CWA?
- Ninth Circuit Court of Appeals said, Yes, this is under the jurisdiction of the CWA, subject to NPDES.



County of Maui, Hawaii v. Hawaii Wildlife Fund

- Circuit Split
 - Sixth Circuit: similar question
 - Discharge to groundwater not subject to CWA
 - Fourth and Ninth Circuit
 - Discharges to groundwater are subject to CWA
 - Circuit Split necessitated Supreme Court take up the case



County of Maui, Hawaii v. Hawaii Wildlife Fund

- STATUS

- September 20, 2019
 - Maui County Council voted 5-4 to settle the litigation
- Mayor now decides
 - Reviewing options
- Supreme Court Oral argument set for November 6, 2019





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