



**2020 – Waters of the United States:
Where are we now?**

**January 2020 OCAPA
Environmental & Health Safety Cmte.**

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The Big Picture

- **In 2019 the Administration (EPA & Corps) repealed the 2015 CWA Waters of the United States definition and proposed a new definition**
- **Some see this as a major rollback, others as appropriate adjustments**
- **This morning (Jan 23, 2020), the Corps and EPA signed the new definition**



Some Key Terms to Keep in Mind

Key Terminology

Navigable-in-fact waters: A term of art developed by courts to describe waters that are navigable in the traditional sense, meaning they are capable of being used by vessels in interstate commerce or are subject to the ebb and flow of tide.²³

Interstate waters: Waters that form a part of a state's boundary.²⁴

Navigable waters: An anomalous term as used in the Clean Water Act. The Clean Water Act governs "navigable waters,"²⁵ but this phrase is defined within the statute such that it is not limited to waters that are navigable-in-fact.

Waters of the United States: The jurisdiction-defining phrase in the Clean Water Act. That statute generally regulates "navigable waters," but it defines that term to mean "the Waters of the United States, including the territorial seas."²⁶

Jurisdictional waters: A term of art used by courts to describe those waters subject to federal regulatory jurisdiction under the Clean Water Act.²⁷



Where we came from

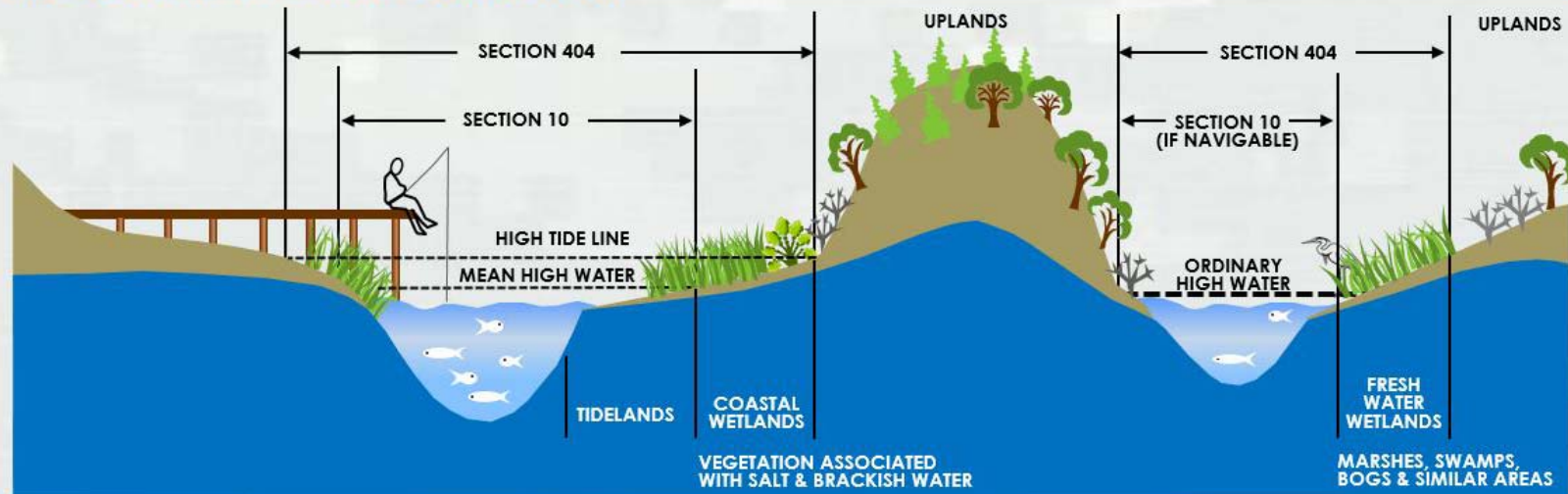
- **Rivers and Harbors Act & Waters**
- **1972 Clean Water Act and “Navigable Waters”**
 - Congress equates with “waters of the United States” but doesn’t define further
- **40+ years of varying uncertainty leads to present situation**
 - Agencies
 - Courts



Basic Jurisdiction

AUTHORITIES: CLEAN WATER ACT SECTION 404 RIVERS & HARBOR ACT OF 1899 SECTION 10 JURISDICTIONAL AREAS

REGULATORY PROGRAM JURISDICTION

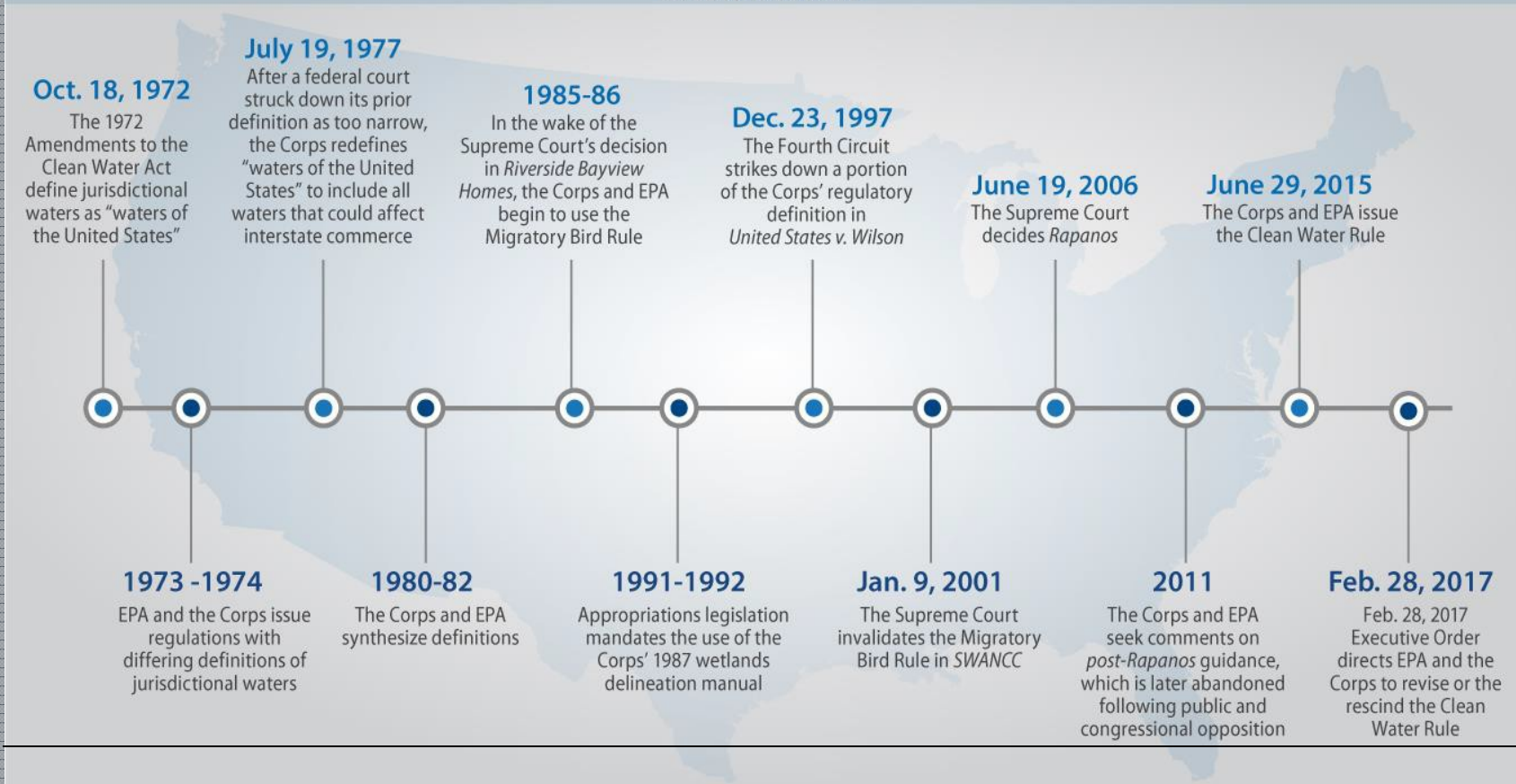




Timeline of “Waters” Definition

EVOLUTION OF THE DEFINITION OF “WATERS OF THE UNITED STATES”

Critical Events Timeline





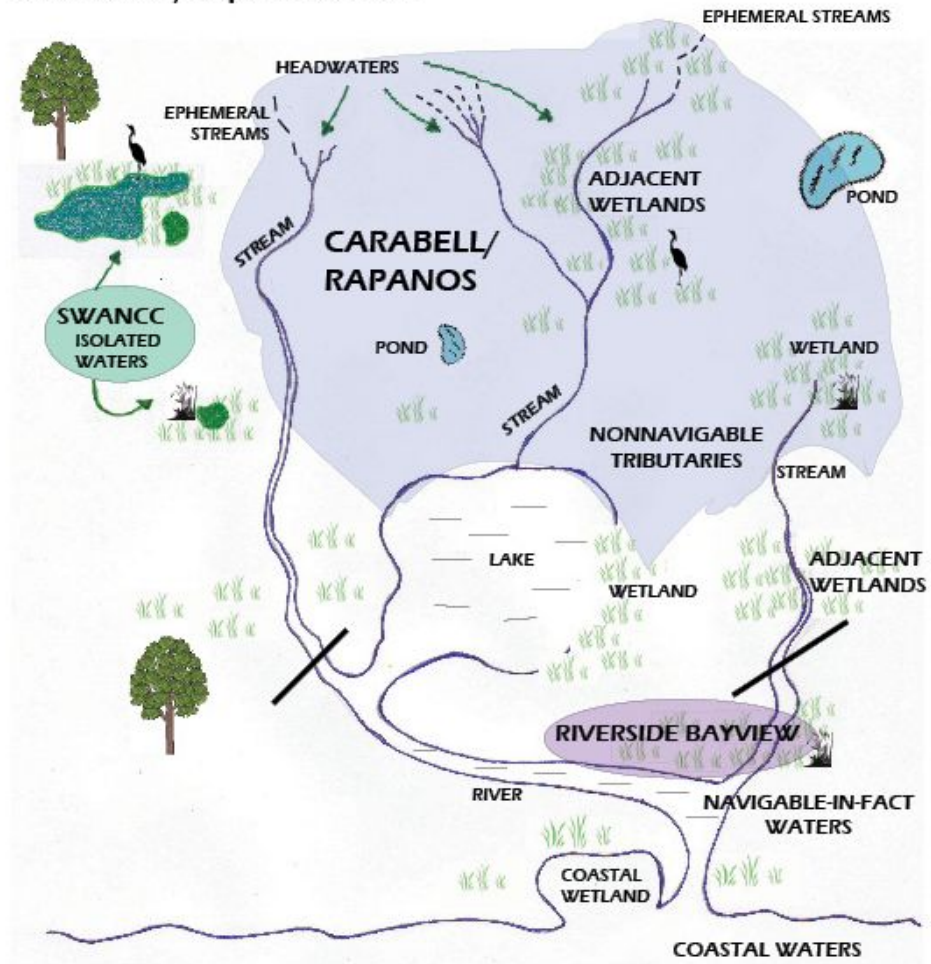
Cases give Agencies Course Corrections

- **Calloway (DC Cir) overturns initial definitions**
- **Bayview Homes (SCt. 1985)**
 - adjacent wetlands within jurisdiction
 - “waters” and Commerce Clause power
- **Leslie Salt (II-IV) (9th Cir) – Migratory Birds and Manmade Wetlands**
- **SWANCC (2001) – Migratory Bird Rule Out**
- **Rapanos (SCt 2006) – plurality decisions makes life hard**



Post-Rapanos

CWA Jurisdictional Areas Subject to Carabell/Rapanos, et. al.



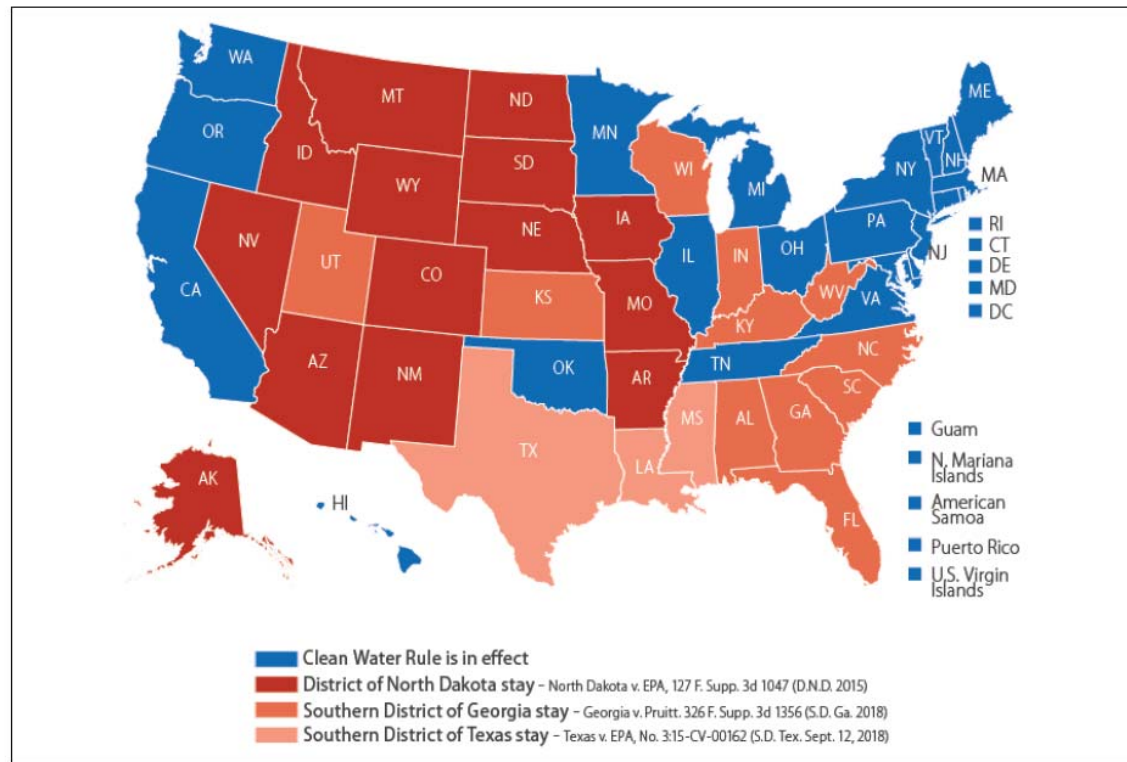
Areas potentially affected by Carabell/Rapanos decision

Watershed graphic prepared by Assoc. of State Wetland Managers



The 2016 Rule – by 2018 chaos ensues

Figure 2. Status of the Clean Water Rule



Source: North Dakota v. EPA, 127 F. Supp. 3d 1047 (D.N.D. 2015); Order, North Dakota v. EPA, No. 3:14-cv-59, (D.N.D. Sep. 9, 2018), ECF No. 250; Georgia v. Pruitt, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); Texas v. EPA, No. 3:15-CV-00162 (S.D. Tex. Sept. 12, 2018)



2020 Rule (pre-publication) – What's In 120.2(1)

- (i) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide;
- (ii) Tributaries;
- (iii) Lakes and ponds, and impoundments of jurisdictional waters; and
- (iv) Adjacent wetlands.

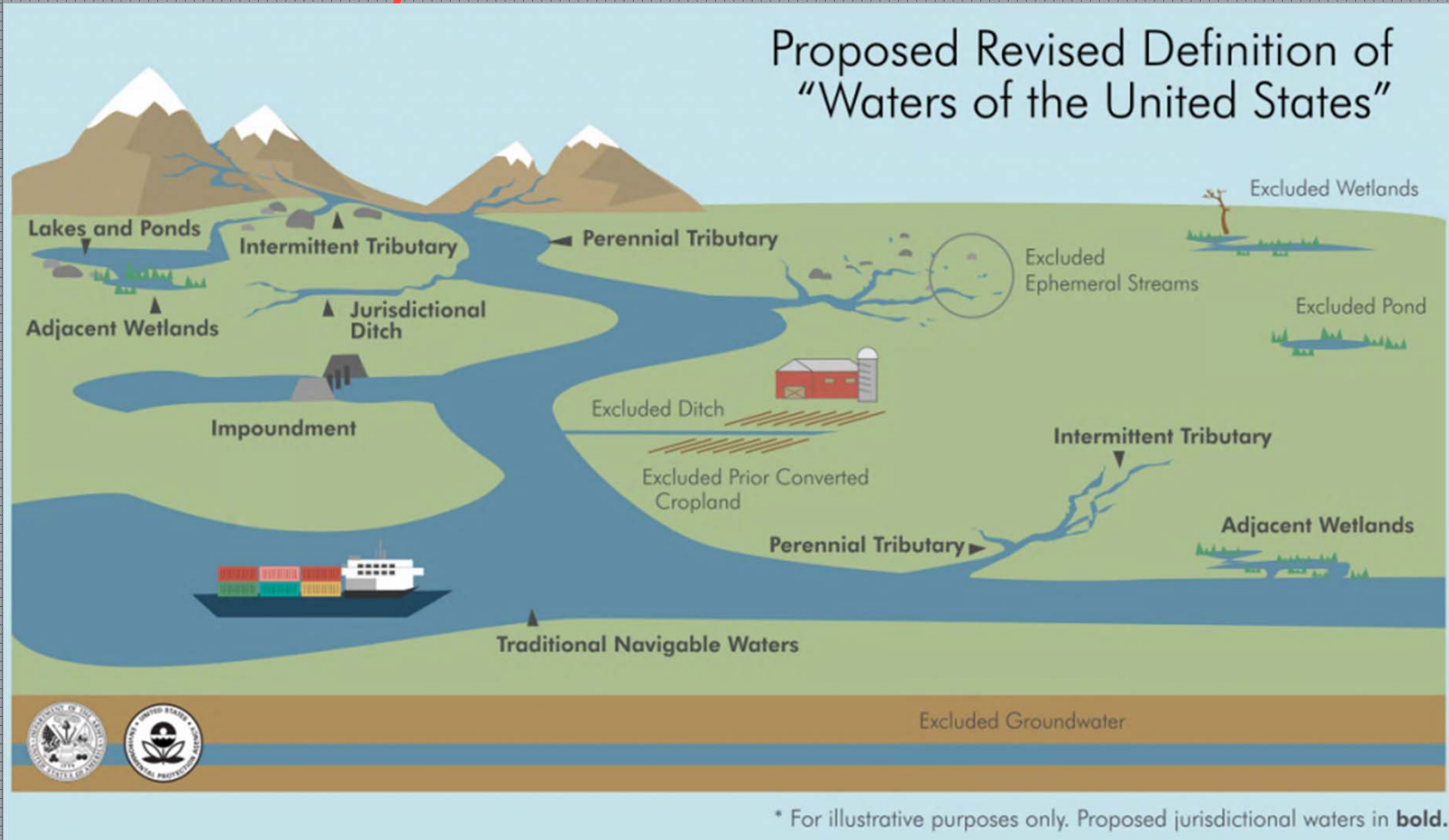


2020 Rule (pre-publication) – What's Out 120.2(2)

- (i) Waters or water features that are not identified in paragraphs (1)(i) through (iv) of this section;
- (ii) Groundwater, including groundwater drained through subsurface drainage systems;
- (iii) Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools;
- (iv) Diffuse stormwater run-off and directional sheet flow over upland;
- (v) Ditches that are not paragraph (1)(i) or (ii) waters, and those portions of ditches constructed in paragraph (1)(iv) waters that do not satisfy the conditions of paragraph (3)(i);
- (vi) Prior converted cropland;
- (vii) Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease;
- (viii) Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (3)(vi);
- (ix) Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;
- (x) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off;
- (xi) Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters; and
- (xii) Waste treatment systems.



The 2019 Proposed Rule



* For illustrative purposes only. Proposed jurisdictional waters in **bold**.



Muddy waters

“The Trump EPA is actively pushing its new interpretation of the Clean Water Act to replace existing regulations. When it comes to this administration, new does not mean better. Under President Trump, it means a weaker version that also strips out protections for 60 percent of streams and more than 100 million acres of wetlands, which is why President Trump’s version of Clean Water rules has been dubbed the ‘Dirty Water Rule.’” – Rep. DeFazio – 9/12/19

“While we commend the goal of the regulatory agencies to strive for a clear and practical definition for Waters of the United States (WOTUS) as it applies to the Clean Water Act, we are deeply concerned that the 2019 Proposed Revised Definition of WOTUS and the accompanying analysis are not consistent with existing science.” – Ducks Unlimited, Statement on 2019 WOTUS Rule

“NSSGA applauds the Trump administration’s effort to rescind and reconsider the Waters of the U.S. rule. NSSGA supports more workable and pragmatic regulations including regulating waters with relatively permanent flow.” – NSSGA Position Statement

The Clean Water Act Chronicles A Tale Of Growing Federal Regulations

The Beginning

1972

Forty-two years ago, the **Clean Water Act** was put into place to monitor one-third of the country’s waters for fishing and swimming.



The Growing Problem



Over the years, the EPA has claimed more authority through the rule, nearly doubling its jurisdiction.



The Consequences of Compliance

\$37,500



> Nearly a decade ago, the average cost of a Clean Water Act permit was more than **\$270,000**.
> Altering land without a permit can lead to fines of up to **\$37,500 per day**.

\$270,000



The Trigger



In April 2014, the EPA proposed a large expansion to the rule – to include inland watersheds, farm ponds, and ditches – that would further expand the CWA jurisdiction to more than 41% of the continental United States.

41%



The Complication



The EPA failed to conduct analysis legally required by the Regulatory Flexibility Act to consider the impacts of the proposed rule on small businesses.



The Repercussion



With such uncertainty, small businesses and land owners hesitate to engage in development projects, resulting in less economic development across the country.





County of Maui v. Hawaii Wildlife Fund

- **US Supreme Court heard argument November 6, 2019.**
- **Questions Presented:**
 - Whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source such as groundwater
 - Whether County had fair notice for UIC wells that operated 40 years w/o permit



Parting Thoughts

- **Does it matter in Oregon?**
- **Almost Certain to see 2016-2018 play out again with new rule**
- **Only Congress can provide a level of certainty as to jurisdictional scope**
 - Will they ever provide it?



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QUESTIONS/DISCUSSION

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