



## Environmental Law & Policy Update

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Washington DC

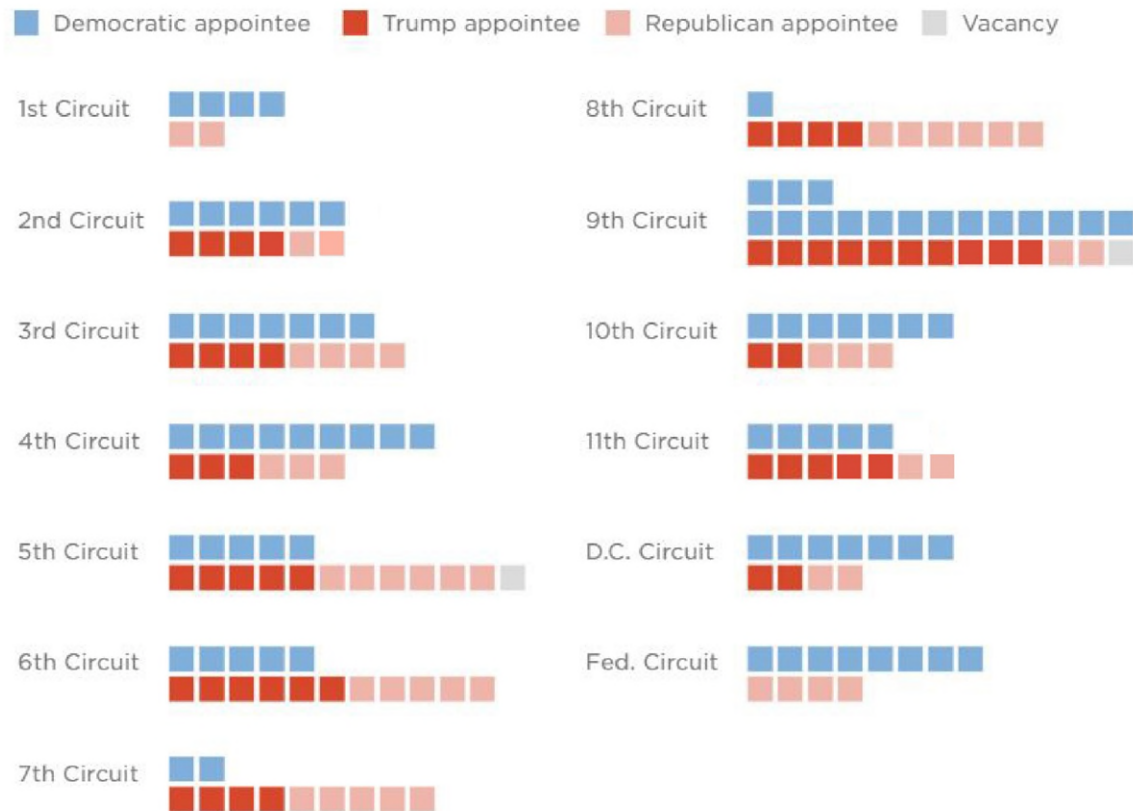
**National Waterways Conference**  
March 11, 2020

# Congressional Review Act

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- Enacted in 1996
- Allows Congress to review and disapprove federal regulations on expedited basis
- 60 day window (“session days” / “legislative days”)
- Pre-2017: one time
- 2017: 12+ times
- 2021: payback?
  - Maybe for some rules, but CRA not available for repeals of:
    - Clean Power Plan
    - Clean Water Rule

# Changing Composition Among the Circuits



Source: NPR analysis of data from Federal Judicial Center and the United States Courts. [Download the data here.](#)

Credit: Renee Klahr/NPR

# NEPA

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- CEQ regulations widely viewed as outdated
  - Adopted in 1978
  - Supplemented over 40+ years by guidance
- Exec. Order 13807
  - Infrastructure projects
- ANPRM (June 20, 2018)
- Proposed Rule (Jan. 10, 2020)
- Comment deadline - this week



# Key Proposed Changes: Procedures

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- Timelines and length
- Timely coordination
- Avoiding duplication
- Role of the applicant



# Key Proposed Changes: Substance of Analysis

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- Purpose and need
- Alternatives
  - “Technically and economically feasible”
  - No alternatives outside of agency’s jurisdiction
- Effects
  - Close causal relationship
  - No cumulative impacts

# Key Proposed Changes: Other

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- Agencies may not impose additional requirements
- Judicial review
- Does not (directly) address GHG emissions



# Comment Topics

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- Industry generally supports
- Procedures
  - Deadlines:
    - 6 months for EAs
    - Lack of teeth?
  - Length: 75 pgs. for EAs
  - Coordination with other agencies
  - Avoid duplication
    - Mandatory tiering/adoption
- Substance of analysis:
  - Purpose and need
  - Alternatives
    - Maximum number?
  - Effects
    - Cumulative impacts
- Restrictions on other agencies
- Mitigation: Nexus/effect requirements
- Role of the applicant



# Water Update

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1. WOTUS
2. State 404 Assumption
3. Section 401

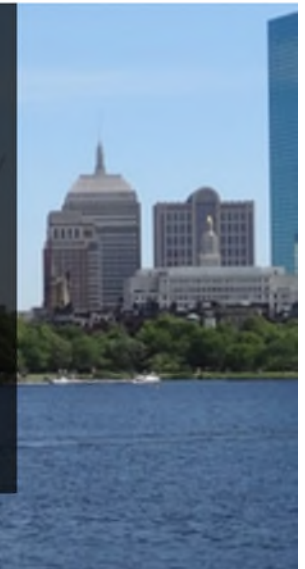
## EPA and Army Finalize Rule to Repeal 2015 “Waters of the U.S.” Definition

The Environmental Protection Agency and Department of the Army have finalized a rule to repeal the 2015 Clean Water Rule and re-codify the regulatory text defining “waters of the United States” that existed prior to 2015. [Read the final rule.](#)



## EPA and Army Sign the Navigable Waters Protection Rule

On January 23, the Environmental Protection Agency and the Department of the Army finalized this rule to define “waters of the United States.” [Learn more about the Navigable Waters Protection Rule.](#)



# Navigable Waters Protection Rule

- “Step Two” of repeal and replace
- Proposal issued Dec. 11, 2018/ published Feb. 14, 2019
- Prepublication final rule issued January 23, 2020
  - Not yet in *Federal Register*
- Purpose: “establish the boundary between [WOTUS] and the waters subject solely to State and tribal authority.”

**Navigable Waters Protection Rule**  
WOTUS: Territorial Seas and Traditional Navigable Waters




A tidally-influenced waterbody like the territorial waters of the Pacific Ocean off of California

A navigable water like the Mississippi River

A water used for interstate commerce like Lake Winnebago in Wisconsin

EPA  [epa.gov/nwpr](http://epa.gov/nwpr)


**Navigable Waters Protection Rule**  
WOTUS: Tributaries to Navigable Waters




A perennial tributary like a section of the Boise River in Idaho that contributes surface flow to the Snake River

A snowpack-fed intermittent tributary like Hayes Creek in Colorado that contributes surface flow to the Crystal River

A perennial tributary like the San Marcos River that contributes surface flow to the Guadalupe River

EPA  [epa.gov/nwpr](http://epa.gov/nwpr)

**Navigable Waters Protection Rule**  
WOTUS: Certain Lakes, Ponds, and Impoundments



A lake that contributes surface flow to a traditional navigable water like

A pond that contributes surface flow to a traditional navigable water like Christian Pond in Wyoming

An impoundment that contributes surface flow to a traditional navigable water like Hawks Nest Lake in West Virginia

# Proposed vs. Final Rule: Jurisdictional Waters

## Proposed Jurisdictional WOTUS Categories

1. Traditional navigable waters (including territorial seas);
2. Tributaries of traditional navigable waters;
3. Certain ditches;
4. Certain lakes and ponds;
5. Impoundments of otherwise jurisdictional waters; and
6. Wetlands adjacent to jurisdictional waters

## Final Jurisdictional WOTUS Categories

1. Traditional navigable waters and territorial seas;
2. Perennial and intermittent tributaries;
3. Lakes, ponds, and impoundments of jurisdictional waters; and
4. Wetlands adjacent to jurisdictional waters



# Big Picture Concepts

- Ephemeral streams essentially out
- Focus on Surface Connection
  - Subsurface connection  $\neq$  jurisdictional
- “Typical Year”
- “Adjacent” Wetlands
  - Revised from proposal w/r/t berms, banks, dunes, breaks
  - Inundation *from* jurisdictional water in “typical year”



Dry washes and ephemeral streams



Isolated wetlands



# Non-Jurisdictional Waters

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- Waters that don't meet requirements for jurisdictional waters – “catch-all” exclusion
- Waste treatment systems
- Groundwater
- Ephemeral features
- Ditches unless tributary or adjacent wetland



# Non-Jurisdictional Waters (cont'd)

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- If in “uplands” (now defined) or non-jurisdictional waters:
  - Artificial lakes and ponds
    - Like water storage reservoirs; farm, irrigation, stock watering, log cleaning ponds
  - Water-filled depressions incidental to mining or construction activity, pits for the purpose of obtaining fill, sand, or gravel
  - Stormwater control features
  - Groundwater recharge, water reuse, and wastewater recycling structures
- Artificially irrigated areas
- Prior Converted Cropland

# What's ahead?

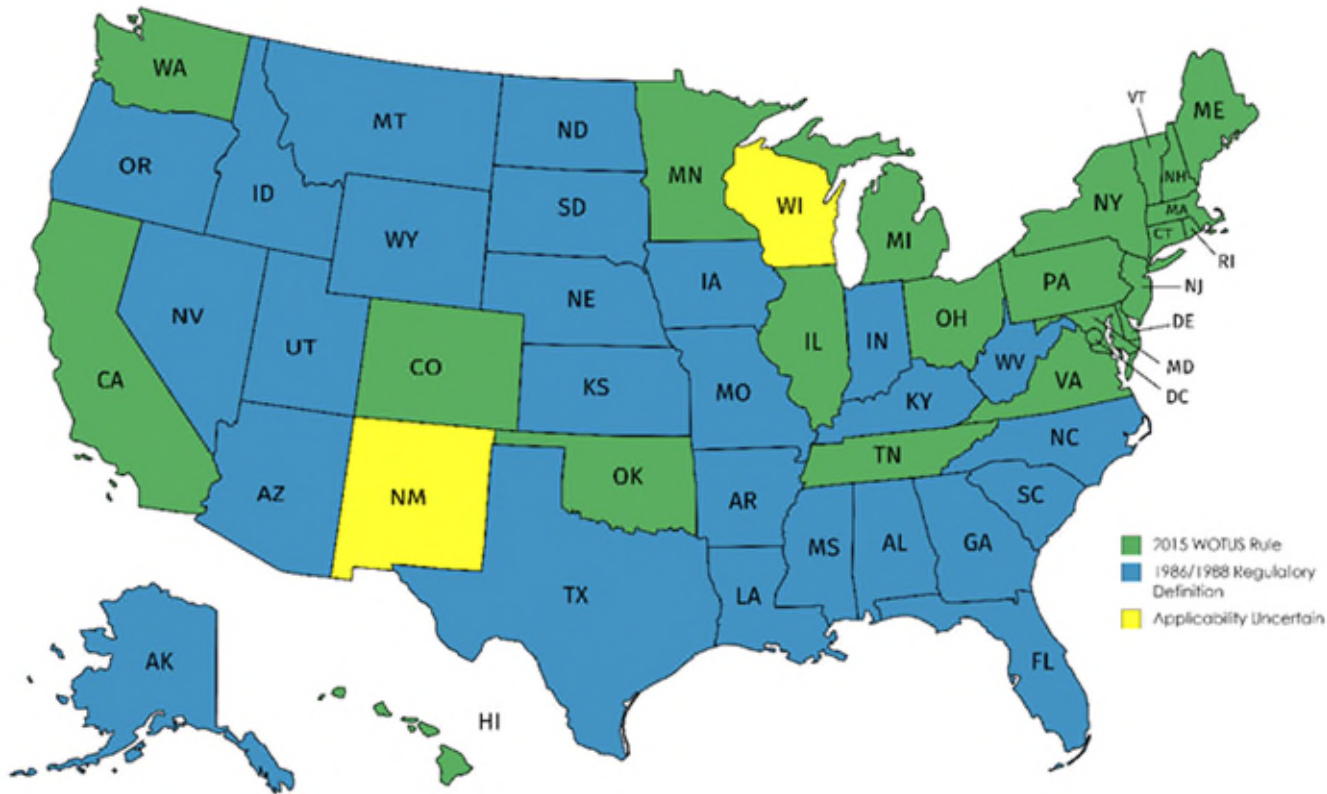
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- Final repeal rule scheduled to become effective 60 days after publication
- Litigation challenging repeal rule highly likely
  - Nationwide Injunctions?
  - 1986 Rules spring back?
  - SCOTUS?



# WOTUS Status (currently, without the new rule in effect)



# State Assumption of CWA 404 Permitting

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- CWA Section 404(g) and (h) provides a process for states to “assume” the federal 404 wetlands permit program.
- History of 404 Assumption (only two states with “assumption”)
  - Michigan
  - New Jersey
- Renewed Interest in 404 Assumption
  - Cooperative Federalism
  - Reduce costs and streamline permit process
  - States seriously exploring options
  - “Assumable waters”
  - ESA consultation?

# Proposed Update to Water Quality Certification Regs

- 1,081 comments filed
- Comments from states, state agencies span a broad range from strong support to strong concern



EPA is proposing a complete overhaul of its longstanding regulations, which serve as the “umbrella” regulatory framework to implement Section 401 of the Clean Water Act (“CWA” or “the Act”). EPA’s proposal drastically undermines the tenets of cooperative federalism in the CWA and inappropriately encroaches into authority expressly reserved to the states and authorized tribes (hereinafter referred to as “certifying authorities” or “states”) under Section 401, 33 U.S.C. § 1341. As recognized by Congress, states are in the best position to protect their waterways through their own individualized water quality certification processes



THE STATE  
of ALASKA  
GOVERNOR MICHAEL J. DUNLEAVY

Department of Environmental  
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federal and state authority, I believe state’s rights to protect our waters can be maintained while providing a predictable permitting scheme and schedule for project proponents.

I champion the efforts the Federal Government is taking in promoting efficient permitting processes and reducing regulatory uncertainties. As a state rich in energy and natural resources, Alaska presents the United States with tremendous economic opportunities. Alaska stands ready to enhance the President’s vision of the United States to



State of Utah

GARY R. HERBERT  
Governor

Department of  
Environmental Quality

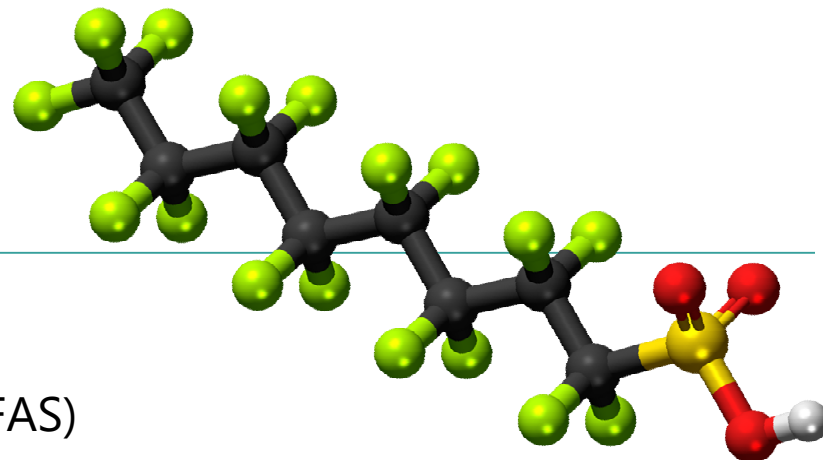
L. Scott Baird  
Executive Director

Kim Shelley  
Director of Operations

Infrastructure and Economic Growth. Utah supports robust and responsible energy development of all kinds and is grateful for the Administration’s emphasis on that issue. Although there are several aspects of the proposed EPA rule that Utah finds to be reasonable and clarifying, many aspects of the proposed rule are inconsistent with the goal of cooperative federalism. Specifically, Utah is concerned that the rulemaking:

# PFAS

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- Per- and polyfluoroalkyl substances (PFAS)
- Group of more than 5,000 man-made chemicals
  - Perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS)
  - Newer PFAS alternatives such as GenX and perfluorobutane sulfonic acid (PFBS)
- Unique physical and chemical properties
  - Oil-repelling, water-repelling
  - Stain-resistant
  - Friction reducing
- Extensively manufactured and used worldwide
- Numerous applications: non-stick coatings; stain-resistant textiles; paper products; firefighting foams; medical devices; paints; lubricants; surfactants; and many others

# Why are Concerns Arising?

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- Impacts to drinking water supplies (surface and groundwater)
- Ubiquity of contaminants in the overall environment
- Consumer awareness and biomonitoring
- Allegations of potential persistent, bio-accumulative and/or toxic effects
- Evolving science on hazards and risks
- Public anxiety and distrust of synthetic chemicals
- Perception of slow governmental responses



# Where are the Chemicals Coming From?

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Use of "aqueous film-forming foam" (AFFF) to fight fires

Manufacturing and processing wastes and by-products

Biosolids & discharges from water and wastewater treatment

Consumer use and exposure

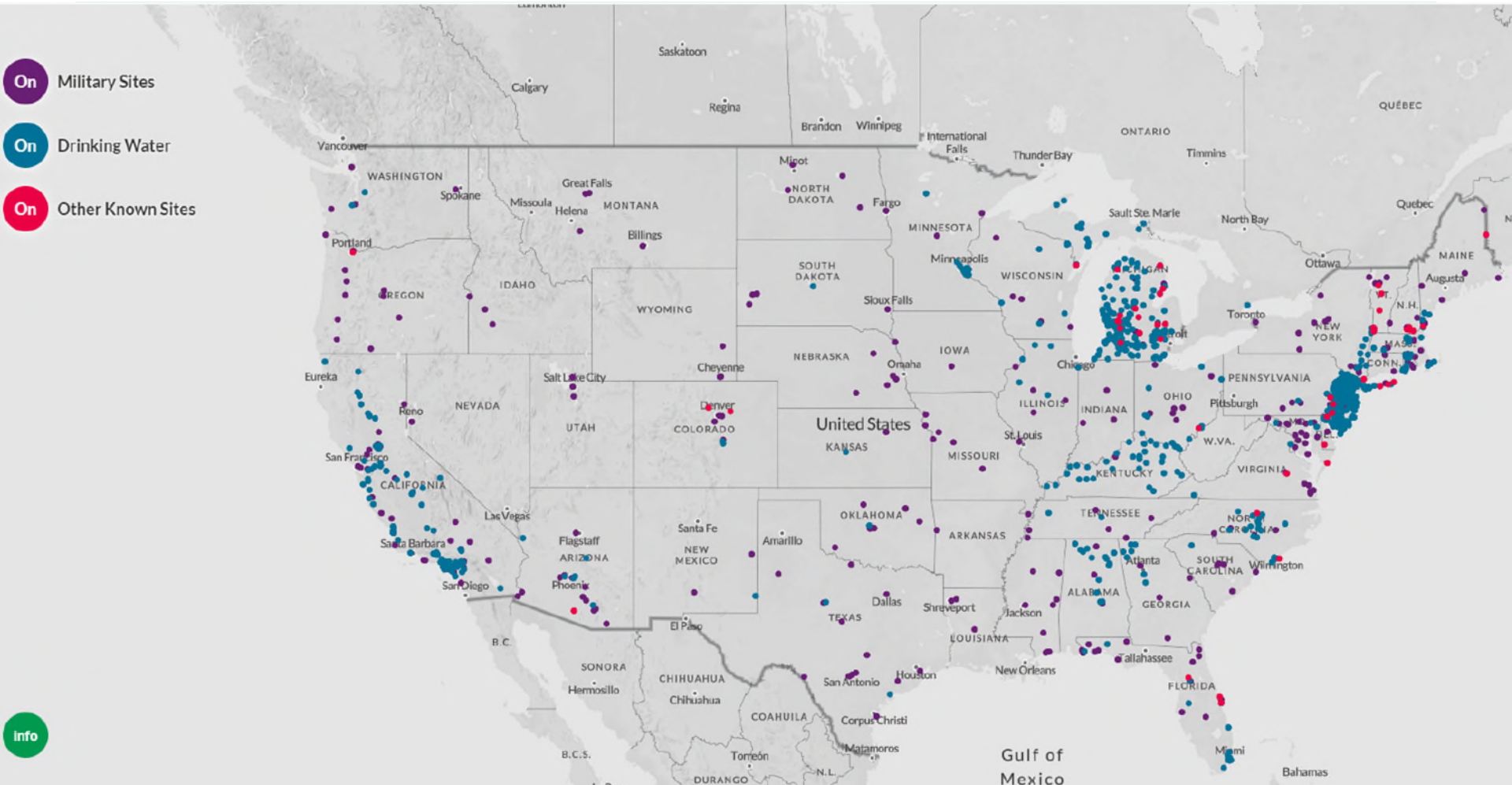
Airborne deposition

Fire-fighter training activities

Catastrophic incidents

Accidental spills and releases

# PFAS in Tap Water and at Industrial / Military Sites



# PFAS Regulatory History

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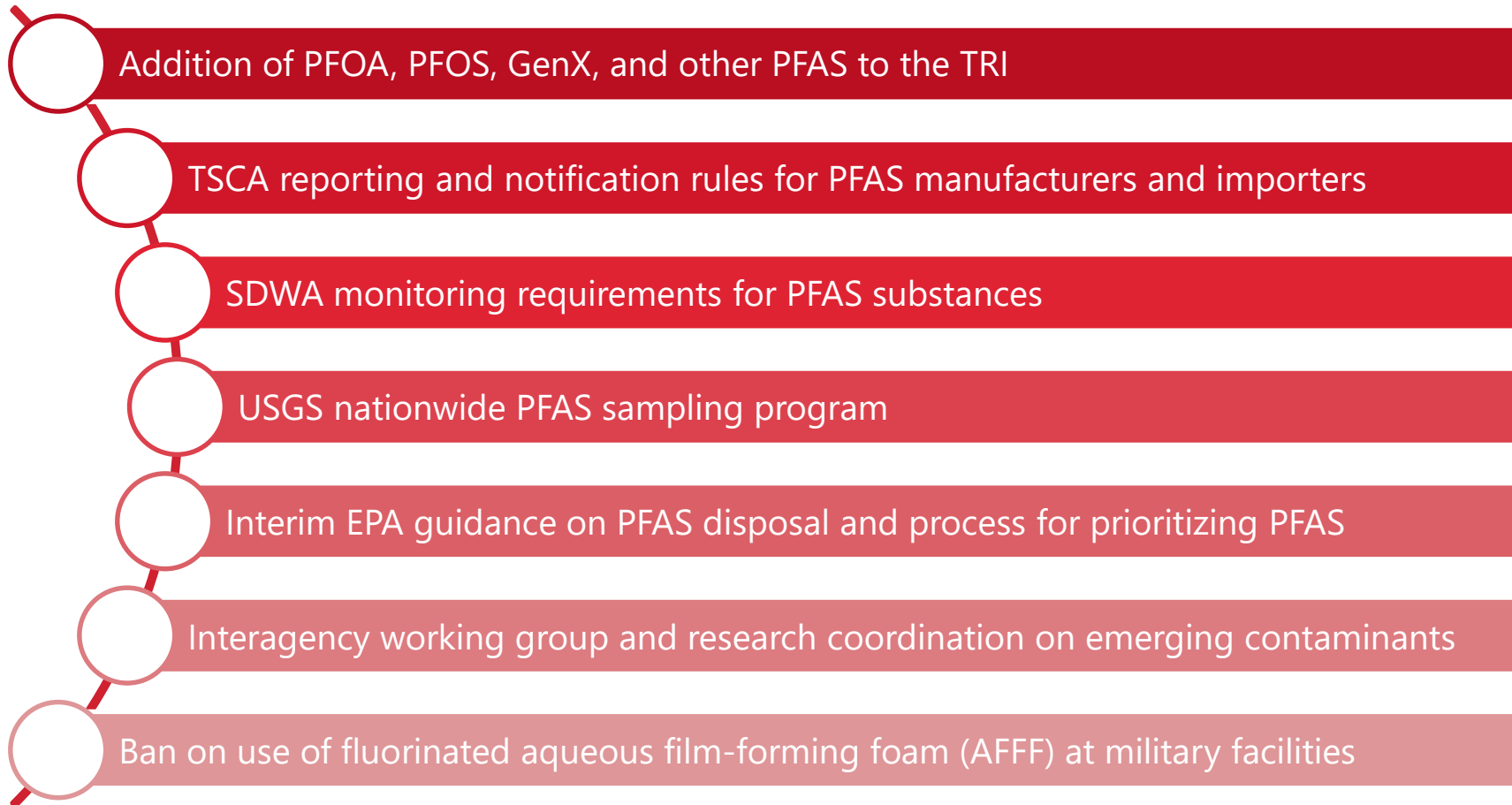
- 2000-2002: PFOS phaseout
- 2002-present: Series of TSCA orders and SNURs
- 2010/2015: EPA-led voluntary PFOA phaseout
- 2016: EPA established a **health advisory** for PFOS and PFOA, recommending a combined limit of 70 parts per trillion (ppt) in drinking water
- Currently:
  - No PFAS chemical is listed or designated as a hazardous substance under CERCLA
  - No federal Maximum Contaminant Level (MCL)
  - Not regulated as hazardous wastes, hazardous air pollutants, or toxic water pollutants
  - No federal cleanup standards
- Increasing patchwork of State requirements





# Key PFAS Provisions in FY2020 NDAA

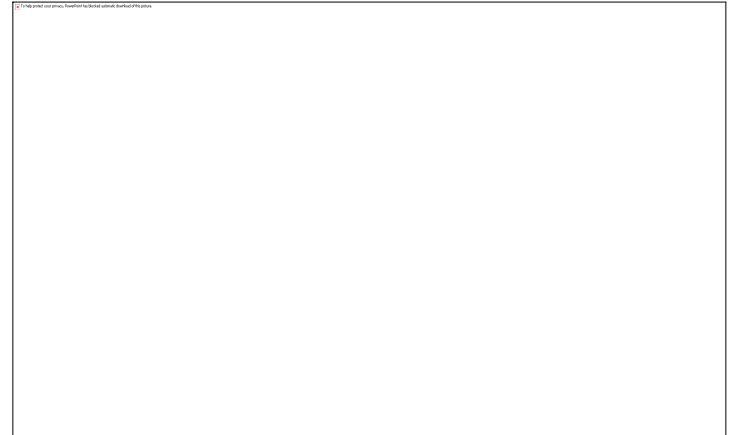
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# H.R. 535: PFAS Action Act of 2019

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- Passed House on January 10, 2020
- Within 1 year: EPA designates PFOA, PFOS as CERCLA hazardous substances
- Within 5 years: EPA decides whether to designate all PFAS under CERCLA
- Requires comprehensive toxicity testing on all PFAS under TSCA
- 5-year prohibition on manufacture, processing, distribution of certain PFAS
- Within 2 years: EPA issues SDWA national drinking water standard for PFAS
- Within 180 days: EPA adds PFOA and PFOS to CAA Sec. 112 list of HAPs
  - Within 1 year of HAPs listing, EPA must revise list of source categories
- Within 6 months: EPA issues SWDA regulations on PFAS disposal
- Within 2 years: EPA issues CWA human health water quality criteria for PFAS
- Within 4 years: EPA must issue ELGs and pretreatment standards for PFAS



# Senate Action on PFAS?

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- Senate EPW Chairman Barrasso does not plan to take up H.R. 535
- Nearly 20 PFAS-related bills currently pending in the Senate
- S. 3227, Prevent Future American Sickness (“PFAS”) Act of 2020:

Within 1 year: EPA designates all PFAS as CERCLA hazardous substances

All food in contact with PFAS deemed unsafe under FFDCA

Within 180 days: EPA adds all PFAS as a class to CAA Sec. 112 list of HAPs

Within 1 year of HAPs listing, EPA must revise list of source categories

Within 180 days: Prohibition on disposing AFFF by incineration

# Recent Regulatory Initiatives

## EPA and other Federal Agencies

- **EPA Feb. 2019 Action Plan & related**
  - Interim cleanup guidelines issued
  - EPCRA TRI expansion & proposed rule
  - Coordination with public water systems
  - Prioritized TSCA risk evaluations
  - Actions pending: Potential MCLs and CERCLA hazardous substance listings
  - Yesterday: EPA preliminary determination to regulate PFOS/PFOA under SDWA
- **CDC & ATSDR**
  - PFAS exposure assessments
  - Multi-site PFAS study
- **FDA**
  - Food and food packaging assessments/restrictions
- **DOD**
  - Military facility assessments and cleanups

## States

- Widespread groundwater and surface water monitoring
  - CA, MA, NY, NJ, NH
- State-specific surface and groundwater standards
- Directives to conduct sampling and testing
- Bans and restrictions on certain PFAS in fire-fighting foams, food contact paper
- Chemical content disclosures and warnings
- Consideration of PFAS monitoring for discharges to POTWs, storm sewers, NPDES permits

# Select PFAS Standards & Guidance for Water

Jurisdiction	Type of Value	PFOA	PFOS	PFBS	GenX
U.S. EPA	Lifetime Health Advisory for DW	70	70	—	—
U.S. EPA	Regional Screening Level for GW	400	400	400,000	—
U.S. EPA	Interim Recommendation for GW	40	40	—	—
California	Notification Level for DW	5.1	6.5	—	—
California	Response Level for DW	10	40	—	—
Michigan	Human Non-Cancer Value for Surface DW	420	11	—	—
Michigan	Generic Cleanup Criteria for DW and GW	70	70	—	—
Michigan	Screening Levels for DW	9	8	1,000	—
New Jersey	Interim Specific GW Quality Standard	10	10	—	—
N. Carolina	Health Goal for GW	—	—	—	140
Texas	Tier 1 Protective Concentration Level for GW	290	560	34,000	—
Canada	DW Screening Value	200	600	15,000	—
Canada	Maximum Acceptable Concentration for DW	200	600	—	—

- All values shown in parts per trillion (ppt)
- Source: Interstate Technology & Regulatory Council (ITRC); Cal. SWRCB
- Last updated: January 2020; February 2020

# Select PFAS Standards & Guidance for Soil

	Jurisdiction	Type of Value	PFOA	PFOS	PFBS
GW / Surface Water Protection	U.S. EPA	Regional Screening Level	0.000172	0.000378	0.13
	Michigan	GW Surface Water Protection Criteria: Drinking Surface Water	0.35	0.00022	—
	Michigan	GW Surface Water Protection Criteria: Non-Drinking Surface Water	10	0.00024	—
	N. Carolina	Preliminary Soil Remediation Goal	0.017	—	0.91
	Texas	Protective Concentration Level: 0.5-Acre	0.003	0.05	0.11
	Texas	Protective Concentration Level: 30-Acre	0.0015	0.025	0.053
Human Health	U.S. EPA	Regional Screening Level	1.26	1.26	1,300
	Michigan	Generic Cleanup Criteria	6	3.2	—
	N. Carolina	Preliminary Soil Remediation Goal	—	—	250
	Texas	Protective Concentration Level: 0.5-Acre	0.6	1.5	86
	Texas	Protective Concentration Level: 30-Acre	0.5	1.5	80
	Canada	Soil Screening Value: Agricultural/Residential Parkland Land Use	0.7	2.1	61

BAKER BOTTS

- All values shown in parts per million (ppm)
- Source: Interstate Technology & Regulatory Council (ITRC); last updated: January 2020

# MBTA - Proposed Rule on Incidental Taking

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- Published in early 2020
- Amends 50 C.F.R. Part 10 to add a new section:

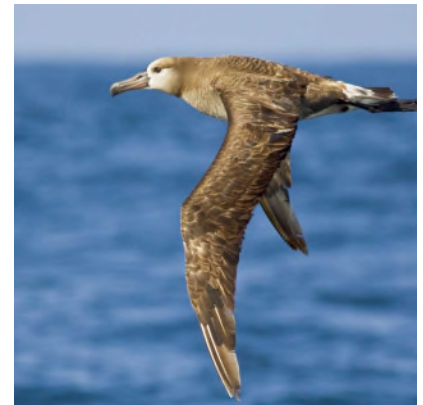


The prohibitions of the [MBTA] that make it unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, or kill migratory birds, or attempt to engage in any of those actions, apply only to actions ***directed at*** migratory birds, their nests or their eggs.

# Proposed Rule on Incidental Taking (*cont'd*)

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- Essentially adopts/codifies M-Opinion
- Preamble devoted to legal analysis supporting interpretation
  - Language of the Act
  - History
  - Constitutional concerns
  - Adoption as a matter of law and policy





# M-Opinion Litigation

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- NGOs and States filed summary judgment motions on Jan. 17, 2020
  - Plaintiffs have standing
  - M-Opinion is erroneous
  - Violation of NEPA
- Briefing scheduled to conclude on May 1, 2020

# ESA Rules Litigation

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- Challenges to 2019 revisions to regulations (Section 4, Section 7 and Blanket 4(d) rule)
- Motions to intervene filed by industry groups, 13 states and Pacific Legal Foundation
- Motion to dismiss filed by DOJ – Lack of standing and ripeness

# Rulemakings in the Works

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- Addition of a definition of “habitat” in the wake of the Supreme Court decision in the *Weyerhaeuser* (dusky gopher frog) case
  - Currently at OMB
- Clarification of consideration of benefits in designating critical habitat
- Revisions to Section 10 permit regs
- Revised definition of “significant portion of its range”

# Settlement of Challenge to Permit Program



Oct. 16,  
2019

Settlement agreement filed challenging certain portions of BGEPA permit program

Dec. 31,  
2020

FWS intends to publish updated bald eagle population figures based on actual survey data

Aug. 31,  
2021

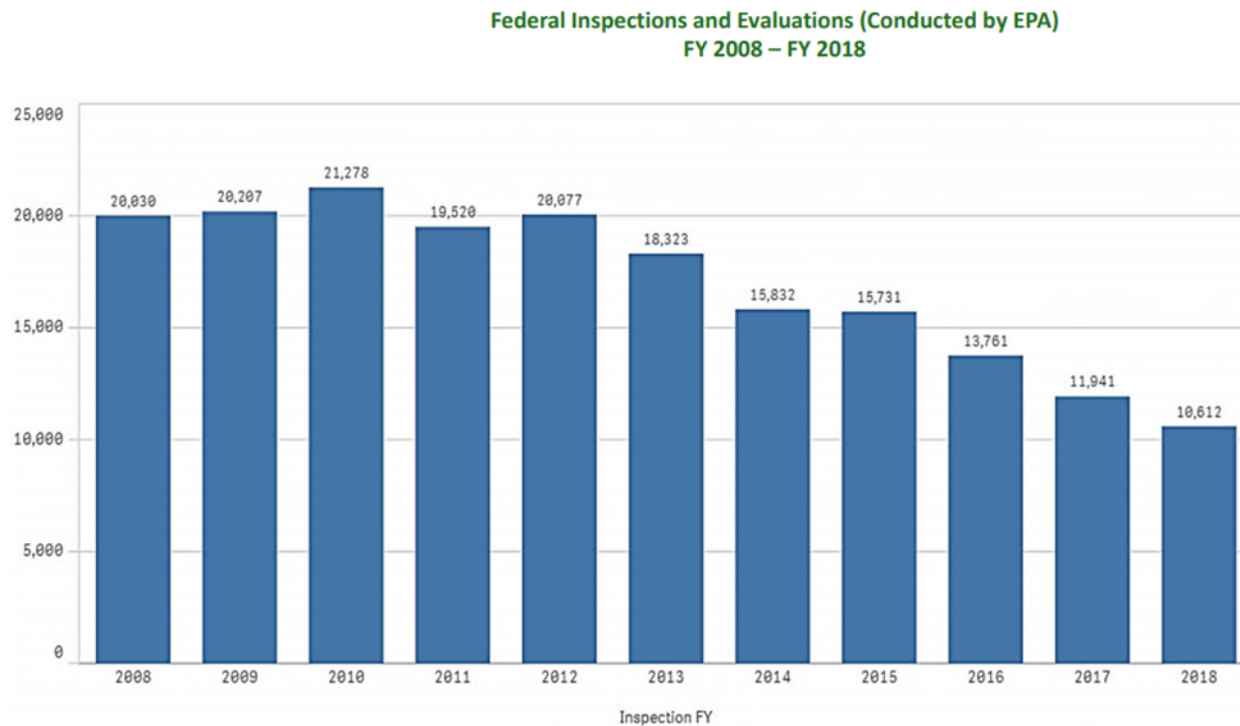
FWS to issue proposed rule

Aug. 31,  
2020

FWS to issue final rule

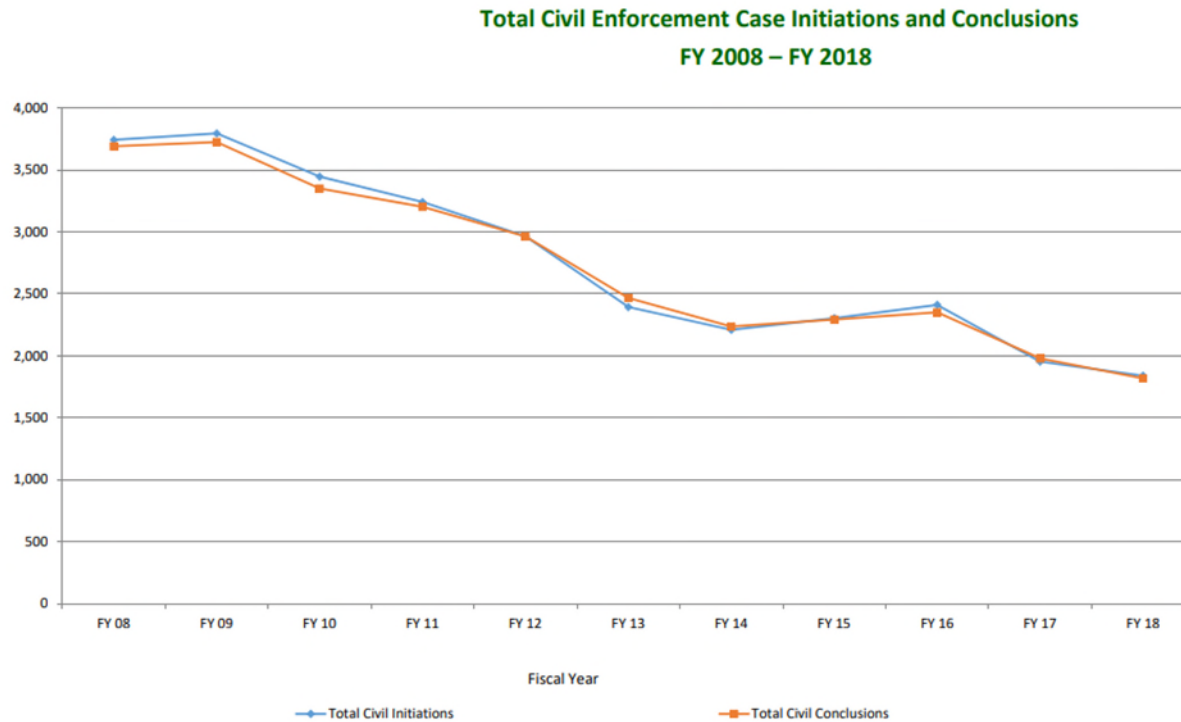
# Environmental Enforcement: Trends & Statistics

- Steady decline in number of EPA facility inspections



# Trends & Statistics

- Steady decline in civil enforcement cases

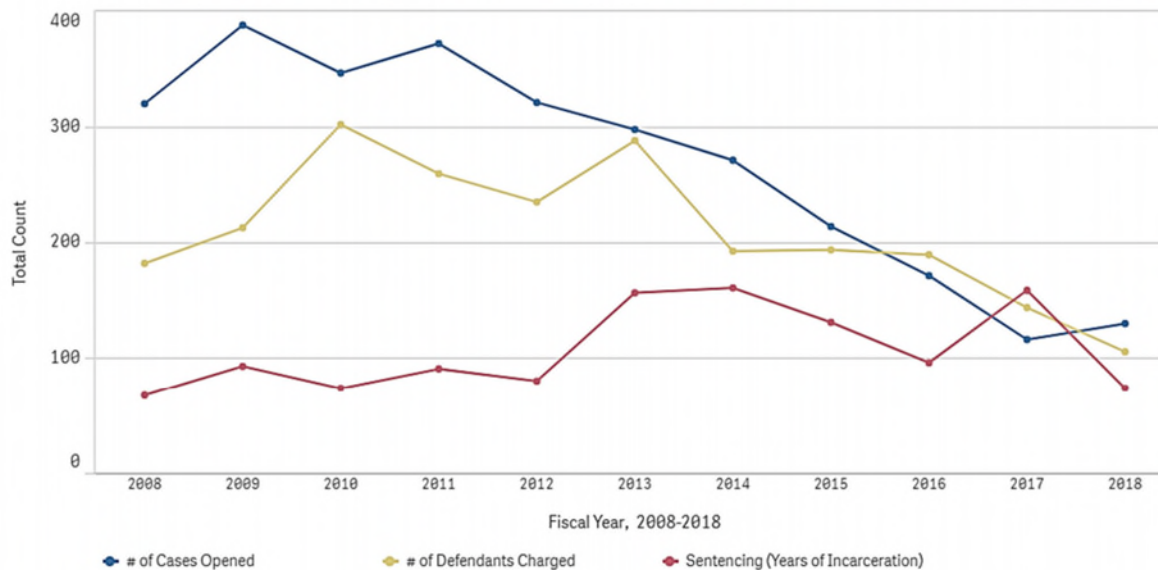


# Trends & Statistics

- Steady decline in the number of federal environmental criminal prosecutions, with a 10% decline in the last five years and a measured 60% decline over the last twenty years.




**Criminal Enforcement**  
**Environmental Crime Cases Opened, Defendants Charged, and Sentencing Results (Years of Incarceration)**  
**FY 2008 – FY 2018**



- In FY 2018, the criminal program continued to focus on complex cases that involve a serious threat to human health and the environment and/or undermine program integrity.
- For the first time since FY 2011, the number of environmental crime cases opened increased.

# Understanding Enforcement Trends

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- Stats tell just part of story due to limited data sets, lack of uniform coding of enforcement cases, and fact-specific nature of individual cases
- EPA data improving  targeting inspection resources more efficiently
- Industry investments in environmental compliance programs
- Self-reporting and cooperation policies
- Fewer yet more complex cases
- Tightening of some judicial standards applicable to enforcement



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