



WATER LAW HOT TOPICS 2023 - 24

SDEP

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JANUARY 31, 2024

ENVIRONMENTAL
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AGENDA

- WATERS OF THE UNITED STATES
- NEW STORMWATER PERMIT INITIATIVES
- PFAS



SACKETT V. EPA

- ON MAY 25, 2023, BY A NARROW 5-4 MAJORITY, THE US SUPREME COURT RULED IN SACKETT V. EPA THAT THE CLEAN WATER ACT (CWA) ONLY EXTENDS TO WETLANDS THAT HAVE A “CONTINUOUS SURFACE CONNECTION” WITH “WATERS OF THE UNITED STATES” (WOTUS)
 - 143 S. CT. 1322 (2023); 33 U.S.C. §§ 1362(7), 1342, 1344.
- WOTUS IS THE CWA’S DEFINITION OF “NAVIGABLE WATERS” THAT DETERMINES THE JURISDICTION OF THE ACOE AND EPA OVER PROJECTS AND OTHER ACTIVITIES REQUIRING PERMITS TO DREDGE, FILL, OR **DISCHARGE** INTO FEDERALLY PROTECTED WATERS.



HOW DID WE GET HERE?

- **FOR THE PAST 50 YEARS OR SO, ENVIRONMENTALISTS, PERMIT APPLICANTS, LEGISLATORS, AGENCIES, AND COURTS HAVE TRIED AND FAILED TO BRING CONSISTENCY AND CLARITY TO THE MEANING OF WOTUS IN THE ABSENCE OF A CLEAR DEFINITION IN THE CWA ITSELF.**
 - **1985**
 - **RIVERSIDE BAY VIEW -- WETLANDS ADJACENT TO A NAVIGABLE WATERWAY ARE WITHIN THE DEFINITION OF WOTUS**
 - **SWANCC -- ISOLATED PONDS AND WATERS NEEDED A "SIGNIFICANT NEXUS" TO TRADITIONALLY NAVIGABLE WATERS TO BE SUBJECT TO CWA JURISDICTION.**
 - **2006**
 - **RAPANOS -- 4-1-4 SUPREME COURT SPLIT.**
 - **JUSTICE SCALIA WROTE AN OPINION FOR A PLURALITY OF THE COURT "WATERS OF THE UNITED STATES" INCLUDED WETLANDS WITH A "CONTINUOUS SURFACE CONNECTION TO BODIES OF WATER THAT ARE 'WATERS OF THE UNITED STATES' IN THEIR OWN RIGHT, SO THAT THERE IS NO CLEAR DEMARCATION BETWEEN 'WATERS' AND WETLANDS."**
 - **JUSTICE KENNEDY AUTHORED A SEPARATE CONCURRING OPINION AFFIRMING THE RESULT BUT PROPOSING A DIFFERENT TEST. THE ARMY CORPS SHOULD DETERMINE ON A CASE-BY-CASE BASIS WHETHER A WATER AT ISSUE HAD A "SIGNIFICANT NEXUS" TO WATERS THAT ARE NAVIGABLE IN FACT.**
 - **RESULTS IN SPLITS BETWEEN THE FEDERAL CIRCUITS**
 - **2023**
 - **SACKETT -- THE CWA "EXTENDS TO ONLY THOSE 'WETLANDS WITH A CONTINUOUS SURFACE CONNECTION TO BODIES THAT ARE 'WATERS OF THE UNITED STATES' IN THEIR OWN RIGHT,' SO THAT THEY ARE 'INDISTINGUISHABLE' FROM THOSE WATERS."**

WHAT DOES IT MEAN GENERALLY?

- SACKETT RULING CONTINUES A TREND WITH THE SUPREME COURT DRAMATICALLY CURTAILING AN AGENCY'S AUTHORITY TO REGULATE IN ITS AREA OF EXPERTISE.
 - FOLLOWING WHAT BECAME KNOWN AS CHEVRON DEFERENCE (FROM CHEVRON U.S.A., INC. V. NATURAL RESOURCES DEFENSE COUNCIL, INC., 468 U.S. 837 (1984)), COURTS WOULD DEFER TO AN AGENCY'S INTERPRETATION OF A STATUTE IF THE STATUTE WAS SILENT ON THE ISSUE OR THE LANGUAGE WAS AMBIGUOUS, THE INTERPRETATION WAS NOT UNREASONABLE, AND CONGRESS HAD NOT DIRECTLY ANSWERED THE QUESTION.
 - CHEVRON HAS COME UNDER ATTACK FROM STATE COURTS AND THE SUPREME COURT
 - ON JANUARY 17, 2024 THE SUPREME COURT HEARD ORAL ARGUMENTS IN A CASE RECONSIDERING THE CHEVRON DOCTRINE ON APPEAL FROM THE D.C. CIRCUIT (LOPER BRIGHT ENTERPRISES V. RAIMONDO AKA THE "FISH CASE").
 - THE FISH CASE RAISES THE FOLLOWING QUESTION: CONGRESSIONAL INTENT IS AMBIGUOUS, WHO SHOULD SORT THE ISSUE OUT? THE AGENCY OR THE COURTS?



WHAT DOES IT MEAN FOR THE CWA

- TOGETHER, SACKETT AND LOPER COULD SIGNIFICANTLY IMPACT THE SCOPE OF SECTIONS 401, 404 AND 402 OF THE CWA
 - CWA JURISDICTION UNDER SECTIONS 404 (DREDGE AND FILL) AND 401 RELATED STATE CERTIFICATIONS WOULD BE SIGNIFICANTLY LIMITED UNDER A STRICT READING OF SACKETT WHILE THE FISH CASE COULD IMPAIR ACOE AND EPA'S AUTHORITY TO INTERPRET THE STATUTE.
 - SACKETT REQUIRES NPDES JURISDICTION UNDER SECTION 402 NPDES PERMITS COULD REQUIRE A SHOWING OF "CONTINUOUS SURFACE CONNECTION TO BODIES OF WATER THAT ARE 'WATERS OF THE UNITED STATES' IN THEIR OWN RIGHT," WHILE THE FISH CASE COULD SEVERELY LIMITED EPA AND AUTHORIZED STATES FROM PUTTING THEIR OWN SPIN ON THE SCOPE OF REGULATORY JURISDICTION.
 - MORE NONAS?
- STATE ENFORCEMENT TO THE RESCUE?
 - CALIFORNIA – PORTER COLOGNE
 - "...ANY WATER, SURFACE OR UNDERGROUND, INCLUDING SALINE WATERS, WITHIN THE BOUNDARIES OF THE STATE..."
 - INCLUDES ESTUARIES, DELTAS, RIVERS, CREEKS (INCLUDING SEASONAL OR INTERMITTENT), WETLANDS, PONDS, GRASSY SWALES
 - HOW TO INTERPRET JOINT NPDES AND WDR GENERAL PERMITS?
 - CITIZEN SUIT ENFORCEMENT?



CWA SECTION 402 (NPDES PERMITS)

- REGULATES POINT SOURCE DISCHARGES OF POLLUTANTS INTO WATERS OF THE UNITED STATES VIA A NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT
- WHOSE DISCHARGES ARE SUBJECT TO NPDES PERMITS?
 - INDUSTRY
 - CONSTRUCTION
 - CITIES
 - NON-TRADITIONAL MS4S (SCHOOLS, PUBLIC FACILITIES, PUBLIC COLLEGES)
 - COMING SOON (COMMERCIAL AND INSTITUTIONAL FACILITIES SUCH AS CHURCHES, HOSPITALS AND SHOPPING CENTERS)
 - MORE ON THIS LATER





WHO ENFORCES THESE PERMITS?

- USEPA
- US DOJ
- STATE AND REGIONAL WATER QUALITY CONTROL BOARDS
- DISTRICT ATTORNEYS AND STATE ATTORNEY GENERAL
- LOCAL LAND USE AGENCIES
- CITIZEN ENFORCERS



NEW REGULATION – THE CII PERMIT

- EPA AND AUTHORIZED STATES SUCH AS CALIFORNIA REGULATE STORMWATER DISCHARGES FROM MUNICIPAL SEWER SYSTEMS (MS4S), INDUSTRIAL ACTIVITIES, AND CONSTRUCTION SITES.
 - PER SECTION 402(P) OF THE CLEAN WATER ACT, THESE STORMWATER DISCHARGES THAT DRAIN TO WATERS OF THE U.S. MUST BE REGULATED BY A NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT.
- EPA HAS "RESIDUAL DESIGNATION" AUTHORITY ("RDA") UNDER 40 CFR 122.26(A)(9)(I)(C) AND (D) TO REQUIRE NPDES PERMITS FOR OTHER STORMWATER DISCHARGES OR CATEGORY OF DISCHARGES ON A CASE-BY-CASE BASIS.
 - IN RESPONSE TO PETITIONS BY SEVERAL ENVIRONMENTAL GROUPS AND A 2018 DISTRICT COURT ORDER, EPA REGION 9 AGREED TO EXERCISE ITS RDA TO ADD REQUIREMENTS FOR CERTAIN STORMWATER SOURCES (BASED ON LAND USE CATEGORIES) THAT DISCHARGE TO LOS CERRITOS CHANNEL, ALAMITOS BAY, THE DOMINQUEZ CHANNEL, AND LOS ANGELES AND LONG BEACH HARBOR.
 - THE PROPOSED DESIGNATION IS SPECIFICALLY INTENDED FOR PRIVATELY-OWNED COMMERCIAL, INDUSTRIAL AND INSTITUTIONAL (CII) FACILITIES FOR STORMWATER RUNOFF ONLY IN THESE TWO WATERSHEDS.
- IN ANTICIPATION OF EPA EXERCISING ITS RDA AND IN ORDER TO PROVIDE PERMIT COVERAGE FOR THESE FACILITIES, THE LOS ANGELES REGIONAL WATER BOARD (LARWQCB) IS CURRENTLY PROMULGATING A GENERAL NPDES PERMIT FOR ALL APPLICABLE CII SITES IN THESE WATERSHEDS.

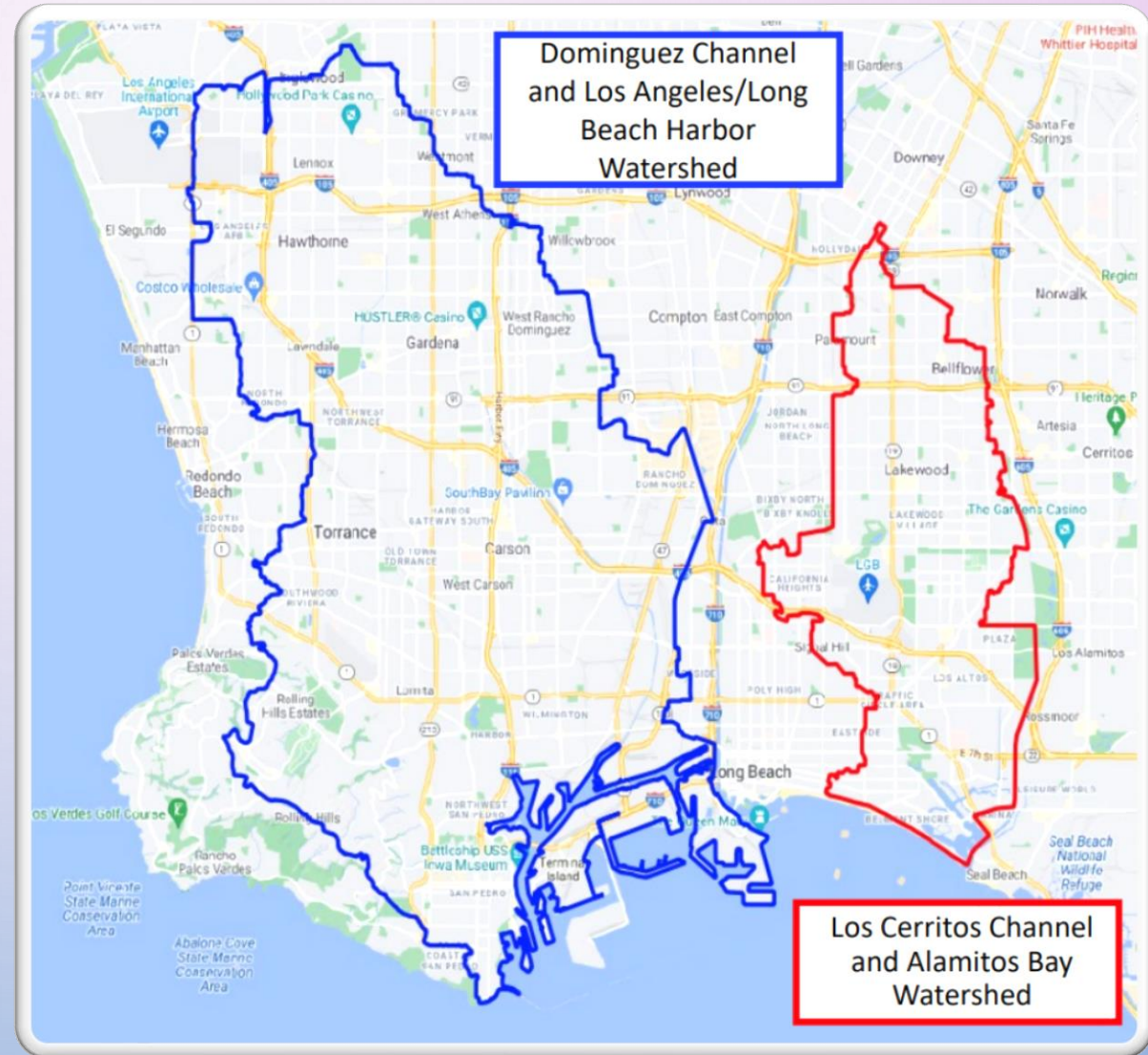


CURRENT STATUS OF RDA

- EPA SOLICITED PUBLIC COMMENT ON A PRELIMINARY DESIGNATION FROM JULY 26, 2022 THROUGH OCTOBER 24, 2022.
- OCTOBER 2023 EPA PUBLISHES REVISIONS TO THE PRELIMINARY DESIGNATION
- IN ORDER TO EXERCISE ITS RDA, EPA MUST COMPLY WITH THE FEDERAL ADMINISTRATIVE PROCEDURES ACT.
- TO COMPLY WITH THE ACT, ON NOVEMBER 2, 2023 EPA PUBLISHES IN FEDERAL REGISTER NOTICE OF AVAILABILITY OF PRELIMINARY DESIGNATION OF CERTAIN STORMWATER DISCHARGES WITHIN TWO WATERSHEDS IN LOS ANGELES COUNTY, CALIFORNIA UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM OF THE CLEAN WATER ACT.
- EPA WILL RESPOND TO COMMENTS ON THE 2022 PRELIMINARY DESIGNATION, ALONG WITH COMMENTS ON THE REVISIONS TO THE PRELIMINARY DESIGNATION, IF AND WHEN IT FINALIZES ANY DESIGNATION THROUGH A RECORD OF DECISION (ROD) PURSUANT TO THE APA.
- LARWQCB CAN NOT PROMULGATE AN NPDES PERMIT UNTIL THE ROD IS FINALLY ISSUED AND ANY STAY AS A RESULT OF APPEALS ARE RESOLVED.

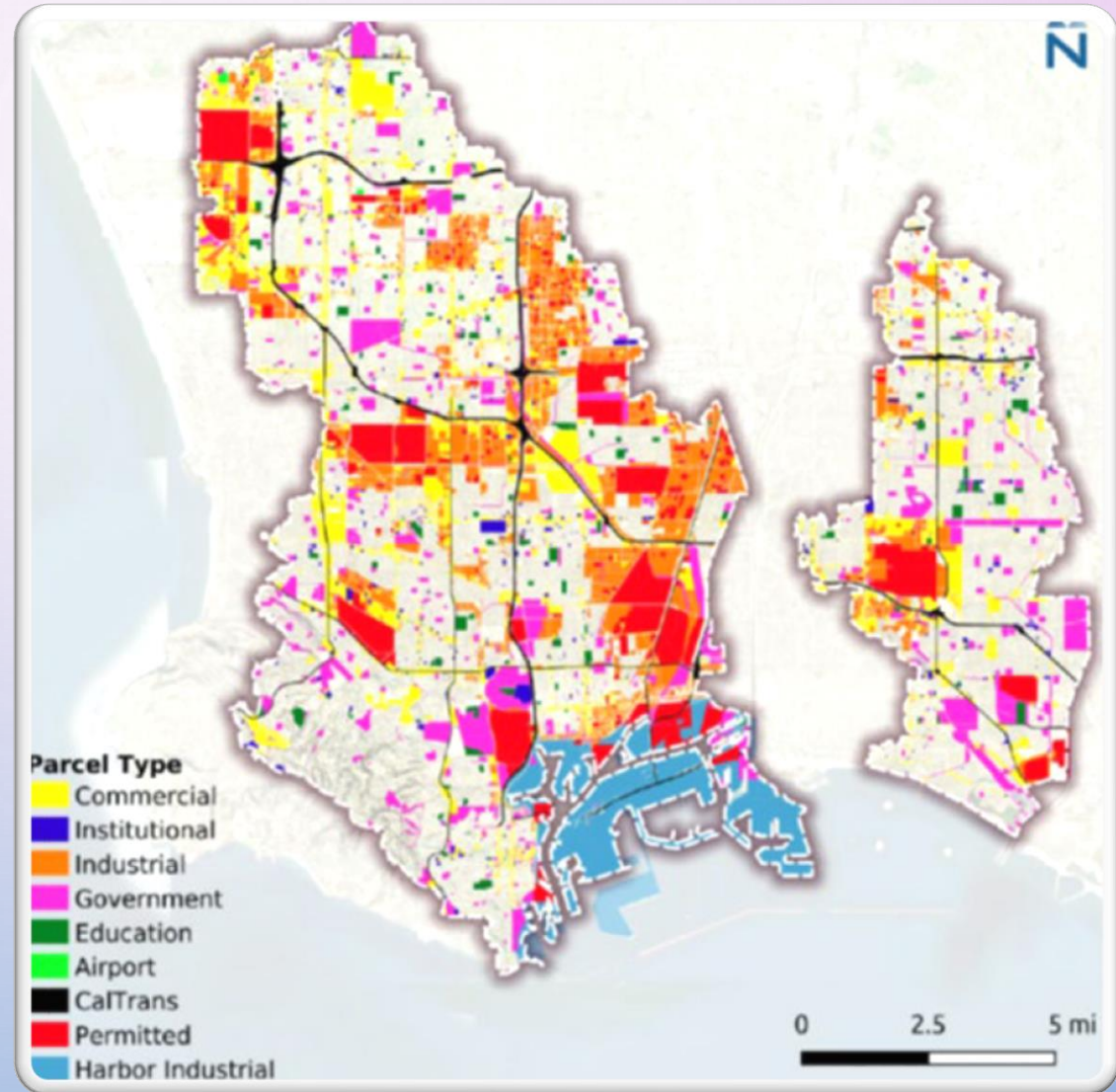
CURRENT STATUS OF PERMIT

- LARWQCB ISSUES TENTATIVE DRAFT PERMIT.
- COMMENTS ON TENTATIVE DRAFT PERMIT RECEIVED JULY 22, 2022.
- RESPONSE TO COMMENTS ON TENTATIVE DRAFT PERMIT PUBLISHED NOVEMBER 3, 2023
 - REVISED DRAFT PERMIT PUBLISHED
- PUBLIC HEARING CURRENTLY SCHEDULED FOR FEBRUARY 22, 2024.
- LIKELY TO BE CANCELLED DUE TO INCOMPLETE STATUS OF RDA.



WHAT DO WE KNOW ABOUT THE DRAFT CII

- REGULATES “COMMERCIAL, INDUSTRIAL, MIXED USE HOUSING, AND INSTITUTIONAL” FACILITIES WITH FOOTPRINTS GREATER THAN FIVE ACRES INCLUDING ROOFS AND PARKING LOTS.
- APPLICABLE ONLY TO “PRIVATE” FACILITIES –INCLUDING SHOPPING CENTERS BIG BOX STORES, HOSPITALS, CHURCHES INDUSTRIAL FACILITIES ALREADY COVERED BY IGP, PRIVATE SCHOOLS AND UNIVERSITIES, MIXED USE HOUSING , AND MORE.
 - THREE OPTIONS TO COMPLY
 - OPTION 1 -- PAY INTO AN ALTERNATIVE COMPLIANCE PROJECT SPONSORED BY A PUBLIC AGENCY.
 - OPTION 2 -- CAPTURE AND INFILTRATE, USE, OR DISCHARGE TO THE SANITARY SEWER THE 85TH PERCENTILE STORM EVENT.
 - OPTION 3 -- COMPLY WITH A SET OF REQUIREMENTS LIKE THE IGP FENCE LINE TO FENCE LINE.

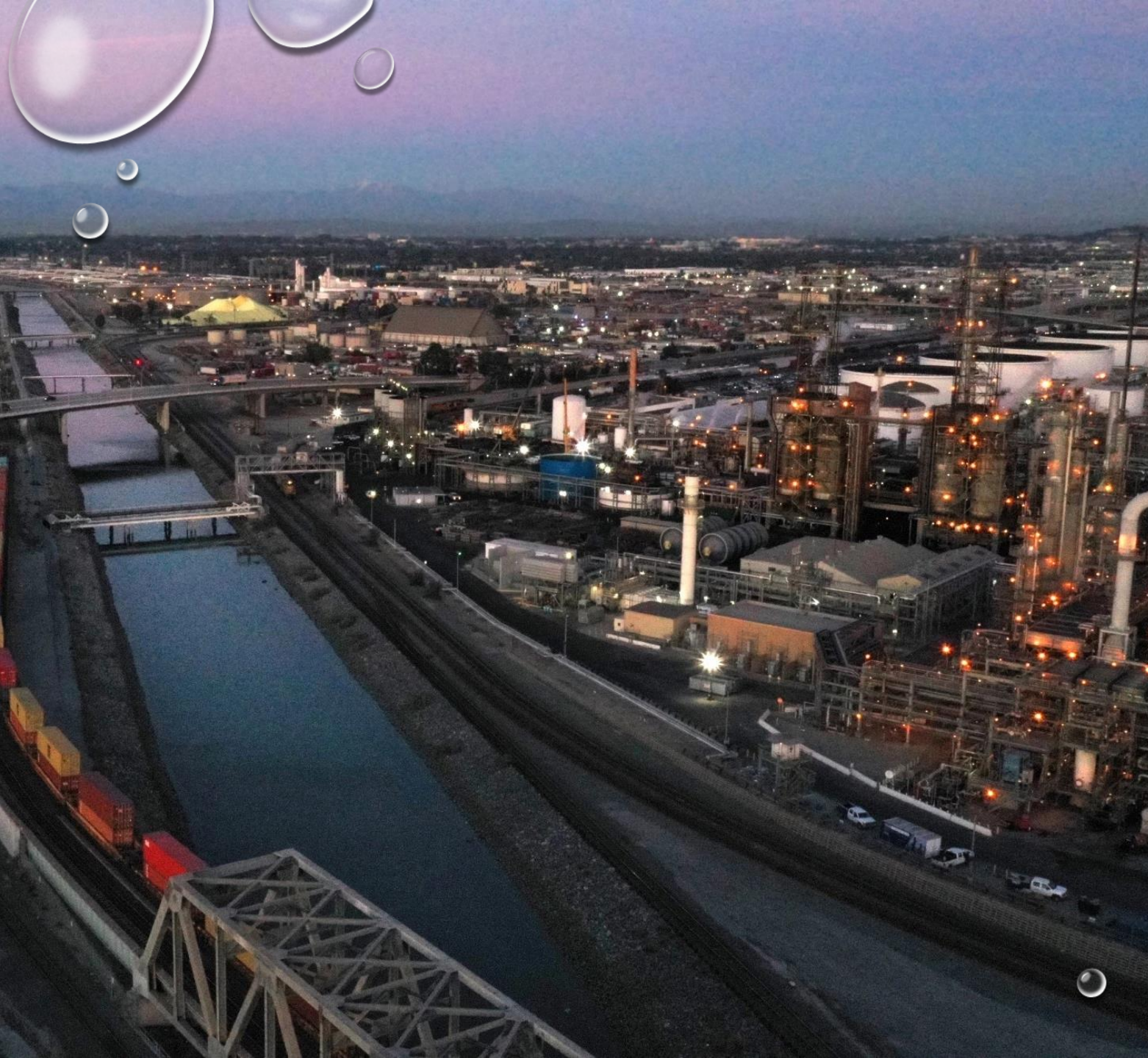


OPTION 1 AGREEMENT WITH LOCAL WATERSHED MANAGEMENT GROUP TO FUND REGIONAL PROJECT

- DISCHARGERS ENTER INTO A LEGALLY BINDING AGREEMENT WITH THE LOCAL WATERSHED MANAGEMENT GROUP TO FUND, OR PARTIALLY FUND, A DOWNSTREAM REGIONAL PROJECT INCLUDED IN A WATERSHED MANAGEMENT PROGRAM DEVELOPED TO IMPLEMENT REQUIREMENTS OF THE REGIONAL MS4 PERMIT AND APPROVED BY THE LOS ANGELES WATER BOARD.
- IF A DOWNSTREAM REGIONAL PROJECT IS NOT TECHNICALLY FEASIBLE IN THE WATERSHED MANAGEMENT PROGRAM, THE APPLICABLE WATERSHED MANAGEMENT GROUP SHALL IDENTIFY AN UPSTREAM PROJECT WITHIN THE WATERSHED MANAGEMENT GROUP'S AREA.
- SPECIFIC DETAILS RELATED TO THE FUNDED PROJECT SHALL BE DOCUMENTED IN THE AGREEMENT BETWEEN DISCHARGERS AND WATERSHED MANAGEMENT GROUP AND APPROVED BY THE RWQCB.
- THE REGIONAL PROJECT SHALL BE ADEQUATELY SIZED TO ADDRESS THE NSWV AND STORMWATER VOLUME THAT WOULD OTHERWISE NEED TO BE ADDRESSED ONSITE UNDER COMPLIANCE OPTIONS 2 OR 3.
- THE FUNDING LEVEL MUST BE PROPORTIONAL TO THE NSWV AND ONSITE STORMWATER VOLUME TO BE ADDRESSED/TOTAL REGIONAL PROJECT STORMWATER CAPACITY.
- DISCHARGERS SELECTING AND IN COMPLIANCE WITH COMPLIANCE OPTION 1 SHALL BE DEEMED IN COMPLIANCE WITH THE DISCHARGE PROHIBITIONS AND EFFLUENT LIMITATIONS
- STILL REQUIRES ALL OF THE REQUIREMENTS IN THE IGP
 - SWPPP
 - MONITORING PLAN
 - RECORD KEEPING
 - ETC.

OPTION 2 FACILITY-SPECIFIC DESIGN STANDARD TO REDUCE STORMWATER RUNOFF

- THE DISCHARGER SHALL DESIGN, IMPLEMENT, AND PROPERLY OPERATE AND MAINTAIN STORMWATER CONTROLS (STRUCTURAL AND/OR NON-STRUCTURAL BMPs) WITH THE EFFECTIVE CAPACITY TO CAPTURE AND USE, INFILTRATE, AND/OR EVAPOTRANSPIRATION ALL NSWDS AND THE VOLUME OF RUNOFF PRODUCED UP TO AND DURING AN 85TH PERCENTILE 24-HOUR STORM EVENT.
 - INFILTRATE
 - EVAPORATE
 - SANITARY SEWER
- THE DISCHARGER WHO INFILTRATE SHALL COMPLY WITH THE REQUIREMENTS SPECIFIED IN ATTACHMENT I. (SIMILAR TO IGP ATTACHMENT I)
 - INFILTRATED WATER MUST MEET ALL DRINKING WATER STANDARDS.
- DISCHARGERS SELECTING AND IN COMPLIANCE WITH COMPLIANCE OPTION 2 SHALL BE DEEMED IN COMPLIANCE WITH THE DISCHARGE PROHIBITIONS AND EFFLUENT LIMITATIONS
 - ALL OTHER IGP REQUIREMENTS STILL APPLY.

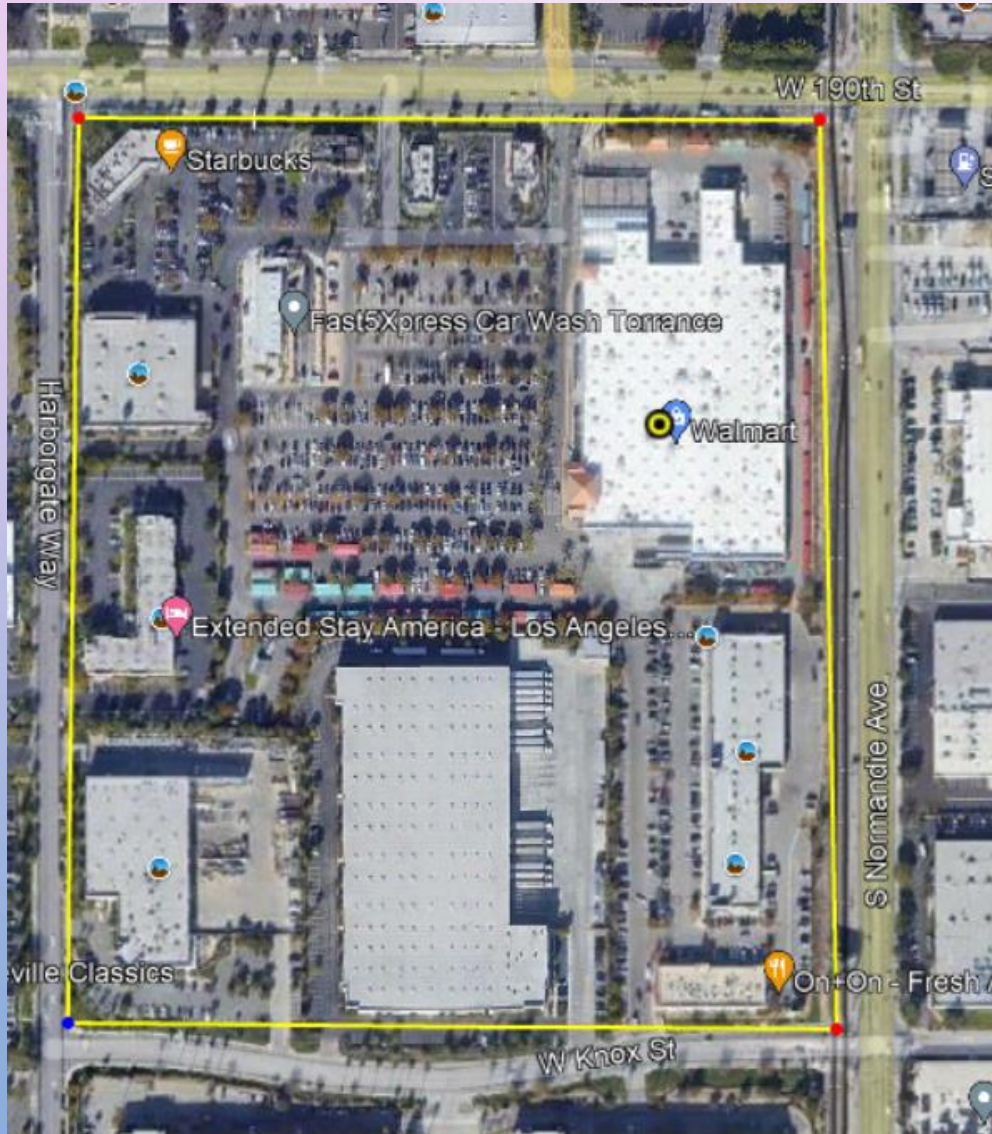


OPTION 3 - DIRECT DEMONSTRATION OF COMPLIANCE WITH WATER QUALITY BASED EFFLUENT LIMITATIONS

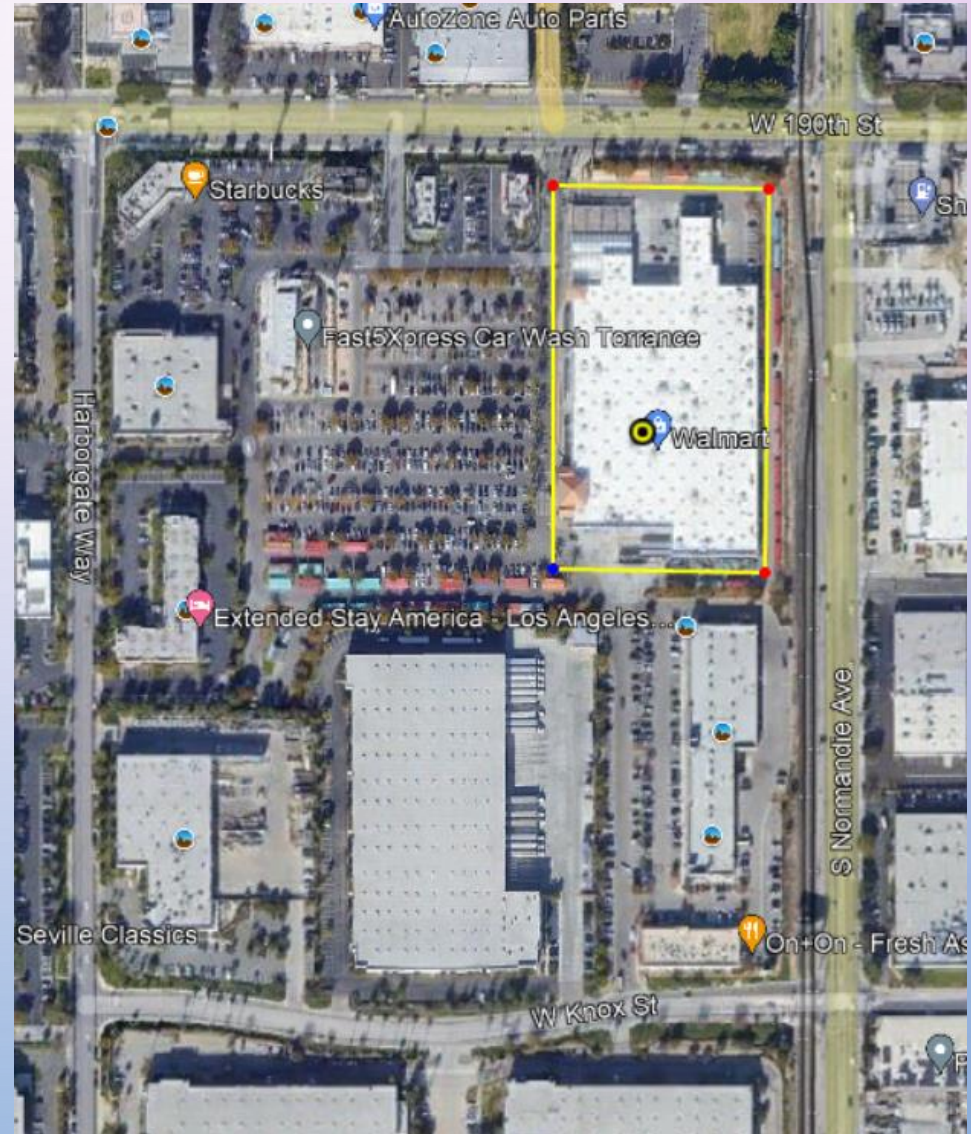
EACH CII PERMITTEE WILL NEED TO:

- COMPLETE THE NOI
- DEVELOP A SWPPP WITH SITE MAP
- CONDUCT A POLLUTANT SOURCE ASSESSMENT
- INSTALL BMPS
- CONDUCT EMPLOYEE TRAINING
- COLLECT STORMWATER DISCHARGE SAMPLES
- CONTRACT FOR LABORATORY ANALYSIS
- PREPARE AND SUBMIT ANNUAL REPORTS
- **MEET THE VERY LOW NUMERIC EFFLUENT LIMITS (NELS) FOR COPPER, LEAD, AND ZINC, AS WELL AS BACTERIA, AMMONIA AND OTHER CONTAMINATES.**

38.4 ACRES



5.3 Acres





WHAT WE DON'T KNOW ABOUT THE CII

- **WHO IS REGULATED?**
 - **OWNER VS. OPERATOR**
 - **PUBLIC VS. PRIVATE**
- **WHAT IS REGULATED?**
 - **ENTIRE ACREAGE VS IMPERVIOUS AREA**
- **OPTION 1**
 - **CREDIT OWNERSHIP AND TIMING**
 - **RUN WITH THE LAND OR ARE THEY THE PROPERTY OF THE OPERATOR?**
 - **WHEN DO CREDITS BECOME EFFECTIVE?**
 - **CREDIT CALCULATIONS**
 - **ACRE FOR ACRE OR GALLON FOR GALLON?**
- **RATIONAL FOR EXEMPTIONS**
 - **NEC VS. NONA**



WHO IS REGULATED – OWNER OR OPERATOR?

- THE DRAFT CII DOES NOT CLARIFY
 - CGP – IT'S THE OWNER
 - IGP – IT'S THE OPERATOR
 - CII -- ?
- EXAMPLE
 - 25-ACRE SHOPPING CENTER WITH MULTIPLE STORES.
 - THE OWNER OF THE PROPERTY WHO LEASES THE STORES AND CERTAIN RIGHTS TO USE THE COMMON AREAS IS ENGAGED IN COMMERCIAL ACTIVITIES (NAISC CODE 531120) LIKELY HAS CONTROL OVER THE ENTIRE PARCEL.
 - THE SHOP OWNERS WHO LEASE THE STORES AND HAVE RIGHTS TO THE USE OF THE COMMON AREAS ALSO ENGAGE IN COMMERCIAL ACTIVITIES (NAISC CODES 45XXXX).
 - IT IS LIKELY THAT EACH OF THE RETAIL STORES ARE THEMSELVES LESS THAN FIVE ACRES. HOWEVER, THE DRAFT PERMIT FAILS TO ADDRESS HOW TO CALCULATE COMMON AREA ACREAGE SUCH AS PARKING LOTS SIDEWALKS AND OTHER AMENITIES.

WHO IS REGULATED – PUBLIC VS PRIVATE?

- PUBLIC LANDS THAT ARE THEN LEASED TO PRIVATE OPERATORS.
- CII EXEMPTS PRIVATE LESSEES ON PUBLIC AIRPORTS.
 - “MOST IMPERVIOUS SURFACES AT THE AIRPORTS ARE NOT CONTROLLED BY PRIVATE ENTITIES, BUT RATHER BY MUNICIPAL DEPARTMENTS AND AS SUCH, ARE ALREADY REGULATED UNDER REGIONAL MUNICIPAL SEWER SYSTEM NPDES PERMIT ORDER NO R4-2021-0105” (“MS4 PERMIT”).”
 - UNCLEAR AS TO WHETHER THIS INCLUDED OTHER COMMERCIAL AND INSTITUTIONAL ACTIVITIES AT PUBLIC AIRPORTS
 - HOTELS
 - RENTAL CARS
 - LONG TERM PARKING
 - FLIGHT SCHOOLS
 - FBOS
 - SAME LOGIC APPEARS TO APPLY TO MANY OTHER PUBLICLY OWNED PROPERTIES SUCH AS
 - PORT FACILITIES.
 - SCHOOLS AND HOSPITALS ON PUBLIC LANDS
 - PRIVATE RECREATIONAL FACILITIES ON PUBLIC LANDS.
- PUBLIC FACILITIES THAT ARE NOT SUBJECT TO AN MS4 PERMIT
 - PUBLIC SCHOOLS



WHAT IS REGULATED – ACREAGE VS. IMPERVIOUS AREAS?



Industrial facilities are regulated based on their entire footprint including roofs.



Commercial and institutional facilities are regulated based on “impervious area”

What constitutes “impervious area”

- Green roofs?
- Pervious pavers?

OPTION 1 CREDITS

Who owns the credit?

- Property owner or operator?
- Are the credits transferable
 - Between sites?
 - Between operators?

When does the credit become effective?

- When purchased or when the project is completed?

RATIONALE FOR EXEMPTIONS

NONA – In

NEC -- Out

CII COMING TO A WATERSHED NEAR YOU AB 2106

- STATUS
 - PASSED BY THE LEGISLATURE
 - VETOED BY GOVERNOR
 - LIKELY TO RETURN AFTER LA PERMIT IS FINALIZED
- THE STATE BOARD SHALL ESTABLISH A STATEWIDE COMMERCIAL, INDUSTRIAL, AND INSTITUTIONAL NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)
- THE STATE BOARD SHALL PUBLISH A DRAFT ORDER OF THE STATEWIDE ORDER FOR PUBLIC COMMENT ON OR BEFORE DECEMBER 31, 2026, OR 18 MONTHS AFTER THE REISSUANCE OF THE STATEWIDE IGP, WHICHEVER IS LATER.
- THE STATE BOARD SHALL CONTEMPORANEOUSLY DEVELOP A MODEL MEMORANDUM THAT DETAILS THE NECESSARY COMPONENTS OF AN AGREEMENT BETWEEN COMMERCIAL, INDUSTRIAL, AND INSTITUTIONAL PERMITTEES AND LOCAL MUNICIPALITIES FOR ACHIEVING OFFSITE STORMWATER CAPTURE AND USE
- THE NPDES ORDER SHALL INCLUDE MULTIPLE OPTIONS TO ACHIEVE COMPLIANCE WITH WATER QUALITY STANDARDS, INCLUDING, BUT NOT LIMITED TO, COMPLIANCE OPTIONS INCENTIVIZING ONSITE OR OFFSITE STORMWATER CAPTURE AND USE.
- REGULATED STORMWATER PERMITTEES SHALL NOT BE SUBJECT TO MORE THAN ONE STORMWATER NPDES ORDER FOR THE SAME FACILITY
- ALL EFFLUENT LIMITATIONS APPLICABLE TO STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITIES SHALL BE INCORPORATED INTO THE STATEWIDE CII
- THE OPERATION OF THIS SECTION IS CONTINGENT UPON AN APPROPRIATION FOR ITS PURPOSES BY THE LEGISLATURE IN THE ANNUAL BUDGET ACT OR ANOTHER STATUTE.



The background features a light purple-to-blue gradient. Scattered throughout are several realistic water droplets of various sizes, some with highlights and shadows. A large, faint, light-colored circle is centered in the upper half of the image.

PFAS LEGAL ISSUES

LITIGATION EXPOSURES

REPORTING REQUIREMENTS AND PRODUCT PROHIBITIONS

WATER

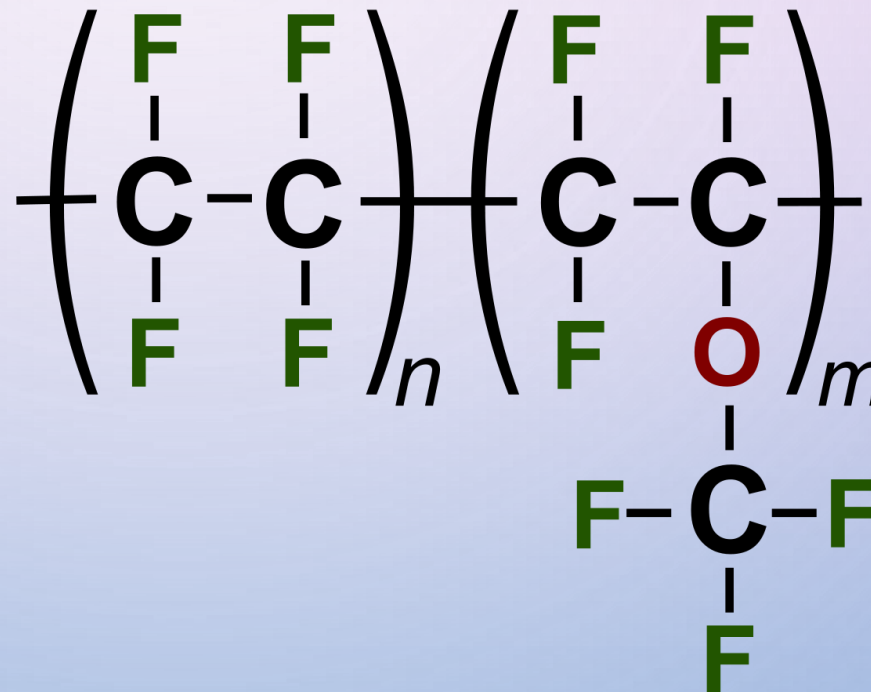
PFAS – THE FOREVER CHEMICALS

- FLUORINATED POLYMERS

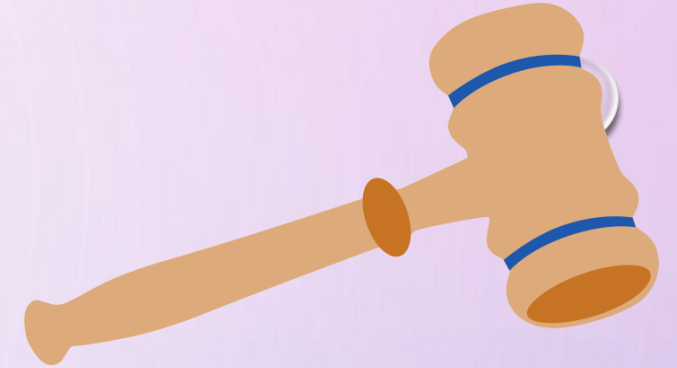
- DIFFERENT DEFINITIONS FROM EPA AND VARIOUS STATES

- THEY ARE EVERYWHERE

- CLOTHING
- PIZZA BOXES
- CHROME PLATING
- HYDROPHILIC APPLICATIONS
- RELEASE APPLCIATIONS
- STORM WATER
- WASTE WATER
- TRASH



LITIGATION EXPOSURES



- POLLUTION OR PRODUCT-LIABILITY CLAIMS.
 - PRODUCTS THAT INCORPORATE PFAS COMPOUNDS THAT ALSO INCLUDE “GREEN” MARKETING CLAIMS SUCH AS “GREEN”, “NATURAL” AND “CLEAN”
 - FALSE AND MISLEADING ADVERTISING CLAIMS.
 - OPEN THE DOOR FOR RESTITUTION, DISGORGEMENT, FINES AND COMPENSATORY DAMAGES.
 - CALIFORNIA HAS ADDED PFAS TO THE LIST OF CHEMICALS REQUIRING CONSUMER WARNINGS UNDER PROPOSITION 65 AND LIABILITY FOR CONTAMINATION OF DRINKING WATER.
 - THREE OTHER PFAS (PFDA, PFHXS, AND PFUNDA) ARE CURRENTLY UNDER REVIEW BY THE OFFICE OF ENVIRONMENTAL HAZARD ASSESSMENT (“OEHHA”) FOR POSSIBLE REPRODUCTIVE TOXICITY.



REPORTING REQUIREMENTS

- THE INTENTIONAL USE OF PFAS COMPOUNDS TRIGGERS BOTH FEDERAL AND STATE REPORTING OBLIGATIONS.
 - FEDERAL REPORTING REQUIREMENTS ARISE OUT OF THE TOXIC SUBSTANCES CONTROL ACT (TSCA)
 - THE STATES OF MAINE, MINNESOTA, NEW YORK, WASHINGTON, AND CALIFORNIA HAVE INDEPENDENTLY ADOPTED ADDITIONAL REPORTING OBLIGATIONS

TSCA

- FY 2020 NATIONAL DEFENSE AUTHORIZATION ACT (NDAA) AMENDED THE TOXIC SUBSTANCES CONTROL ACT (TSCA) TO ADD SECTION 8(A)(7).
 - MANDATES A ONE-TIME REPORTING EVENT ON PFAS. ON OCTOBER 11, 2023
 - PERSONS WHO HAVE MANUFACTURED (INCLUDING IMPORTED) PFAS FOR COMMERCIAL PURPOSES IN ANY YEAR SINCE JANUARY 1, 2011, THROUGH DECEMBER 31, 2022,
 - RULE DOES NOT EXEMPT SMALL MANUFACTURERS OR ARTICLE IMPORTERS FROM REPORTING AND RECORDKEEPING REQUIREMENTS.
- EPA'S REGULATION IS EFFECTIVE ON NOVEMBER 13, 2023.
 - MOST ENTITIES, INCLUDING SMALL ENTITIES, HAVE 18 MONTHS FROM THE EFFECTIVE DATE OF THIS RULE TO SUBMIT THE REQUESTED INFORMATION.
 - EPA IS GRANTING SMALL MANUFACTURERS (AS DEFINED AT 40 CFR 704.3) WHO WOULD REPORT EXCLUSIVELY AS ARTICLE IMPORTERS AN ADDITIONAL SIX MONTHS TO REPORT DATA. THEREFORE, THOSE SMALL ARTICLE IMPORTERS WOULD HAVE 24 MONTHS FROM THE EFFECTIVE DATE OF THIS RULE TO SUBMIT THE REQUESTED INFORMATION ON THEIR IMPORTED ARTICLES

MAINE REPORTING REQUIREMENTS



- THE PFAS IN PRODUCTS PROGRAM WAS INITIALLY ENACTED IN PUBLIC LAW 2021, C. 477
 - AN ACT TO STOP PERFLUOROALKYL AND POLYFLUOROALKYL SUBSTANCES POLLUTION.
 - THE LAW REQUIRES MANUFACTURERS OF PRODUCTS WITH INTENTIONALLY ADDED PFAS TO REPORT THE INTENTIONALLY ADDED PRESENCE OF PFAS IN THOSE PRODUCTS JANUARY 1, 2025.
 - THE LAW ALSO PROHIBITS THE SALE OF CARPETS OR RUGS, AS WELL AS THE SALE OF FABRIC TREATMENTS, THAT CONTAIN INTENTIONALLY ADDED PFAS BEGINNING ON JANUARY 1, 2023.
 - EFFECTIVE JANUARY 1, 2030, ANY PRODUCT CONTAINING INTENTIONALLY ADDED PFAS MAY NOT BE SOLD IN MAINE UNLESS THE USE OF PFAS IN THE PRODUCT IS SPECIFICALLY DESIGNATED AS A CURRENTLY UNAVOIDABLE USE BY THE DEPARTMENT.
 - DEP IS NOW ACCEPTING PROPOSALS FROM THOSE SEEKING SUCH CUU DETERMINATIONS,

MAINE PROHIBITIONS

- PROHIBITS THE SALE OF CARPETS OR RUGS, AS WELL AS THE SALE OF FABRIC TREATMENTS, THAT CONTAIN INTENTIONALLY ADDED PFAS BEGINNING ON JANUARY 1, 2023.



MINNESOTA REPORTING REQUIREMENTS AND PROHIBITIONS



- NO PERSON SHALL MANUFACTURE OR KNOWINGLY SELL, OFFER FOR SALE, DISTRIBUTE FOR SALE, DISTRIBUTE OR OFFER FOR USE IN MINNESOTA A FOOD PACKAGE THAT CONTAINS INTENTIONALLY ADDED PFAS.
- AMARA’S LAW, (MINNESOTA SESSION LAW – 2023, CHAPTER 60)
 - ESTABLISHES PFAS NON-ESSENTIAL USE RESTRICTIONS.
 - BANS PFAS IN 11 PRODUCT CATEGORIES BY 2025 (CARPETS/RUGS, CLEANING PRODUCTS, COOKWARE, COSMETICS, DENTAL FLOSS, FABRIC TREATMENTS, JUVENILE PRODUCTS, MENSTRUATION PRODUCTS, TEXTILE FURNISHINGS, SKI WAX, AND UPHOLSTERED FURNITURE),
 - REQUIRES REPORTING ON PFAS IN PRODUCTS BY 2026,
 - BANS NON-ESSENTIAL USES OF PFAS IN ALL PRODUCTS BY 2032,
 - AUTHORIZES THE MINNESOTA POLLUTION CONTROL AGENCY (“MPCA”) TO DETERMINE WHICH PFAS USES ARE ESSENTIAL.

CALIFORNIA PROHIBITIONS



- NO PERSON SHALL DISTRIBUTE, SELL, OR OFFER FOR SALE IN THIS STATE FOOD PACKAGING CONTAINING PFAS SUBSTANCES AS INTENTIONALLY ADDED CHEMICALS ON OR AFTER DECEMBER 31, 2022.
- NO PERSON IN THE COURSE OF DOING BUSINESS SHALL KNOWINGLY DISCHARGE OR RELEASE A CHEMICAL KNOWN TO THE STATE TO CAUSE CANCER OR REPRODUCTIVE TOXICITY INTO WATER OR ONTO OR INTO LAND WHERE SUCH CHEMICAL PASSES OR PROBABLY WILL PASS INTO ANY SOURCE OF DRINKING WATER, NOTWITHSTANDING ANY OTHER PROVISION OR AUTHORIZATION OF LAW . . ." HSC § 25249.5
- DISCHARGERS SHALL ENSURE THAT INDUSTRIAL STORM WATER DISCHARGES AND AUTHORIZED NSWDS DO NOT CAUSE OR CONTRIBUTE TO AN EXCEEDANCE OF ANY APPLICABLE WATER QUALITY STANDARDS IN ANY AFFECTED RECEIVING WATER. CALIFORNIA INDUSTRIAL GENERAL STORM WATER PERMIT § VI.A
- JANUARY 1, 2025 PROHIBITS PFAS IN APPAREL, TEXTILES, AND COSMETICS.
 - APPLIES TO THE SALE, MANUFACTURE AND DISTRIBUTION OF NEW COSMETICS AND TEXTILE ARTICLES (DEFINED TO INCLUDE APPAREL, ACCESSORIES, HANDBAGS, BACKPACKS, DRAPERIES, SHOWER CURTAINS, FURNISHINGS, UPHOLSTERY, BEDDINGS, TOWELS, NAPKINS, AND TABLECLOTHS) THAT CONTAIN "INTENTIONALLY ADDED" PFAS.
 - FOR TEXTILES, THE LAW REQUIRES MANUFACTURERS TO PROVIDE RETAILERS AND DISTRIBUTORS WITH A CERTIFICATE OF COMPLIANCE STATING THAT THE PRODUCT DOES NOT CONTAIN ANY "REGULATED PFAS,"
 - PFAS "THAT HAVE A FUNCTIONAL OR TECHNICAL EFFECT IN THE PRODUCT."
 - APPLIES TO PFAS PRESENT IN TEXTILE ARTICLES PRESENT ABOVE CERTAIN MINIMUM THRESHOLDS, AS MEASURED BY TOTAL ORGANIC FLUORINE CONTENT
 - EXEMPTIONS FROM THE BAN ARE PROVIDED FOR "PERSONAL PROTECTIVE EQUIPMENT" (PPE) AND "CLOTHING ITEMS FOR EXCLUSIVE USE BY THE UNITED STATES MILITARY."

NEW YORK PROHIBITIONS



- NO PERSON SHALL DISTRIBUTE, SELL, OR OFFER FOR SALE IN THIS STATE FOOD PACKAGING CONTAINING PFAS SUBSTANCES AS INTENTIONALLY ADDED CHEMICALS ON OR AFTER DECEMBER 31, 2022
- LARGELY BANS PER- AND POLYFLUOROALKYL SUBSTANCES (“PFAS”) IN CLOTHING AND APPAREL BY 2025
 - INCLUDING CLOTHING ITEMS INTENDED FOR “REGULAR WEAR OR FORMAL OCCASIONS INCLUDING, BUT NOT LIMITED TO,
 - UNDERGARMENTS, SHIRTS, PANTS, SKIRTS, DRESSES, OVERALLS, BODYSUITS, VESTS, DANCEWEAR, SUITS, SARIS, SCARVES, TOPS, LEGGINGS, LEISUREWEAR, FORMAL WEAR,” OUTDOOR APPAREL AND CHILDREN’S CLOTHES, INCLUDING ONESIES, BIBS AND DIAPERS
 - DOES NOT INCLUDE PROFESSIONAL UNIFORMS WORN TO PROTECT THE WEARER FROM HEALTH OR ENVIRONMENTAL HAZARDS

WASHINGTON PROHIBITIONS



- BEGINNING JANUARY 1, 2022, NO PERSON MAY MANUFACTURE, KNOWINGLY SELL, OFFER FOR SALE, DISTRIBUTE FOR SALE, OR DISTRIBUTE FOR USE IN THIS STATE FOOD PACKAGING TO WHICH PFAS HAVE BEEN INTENTIONALLY ADDED IN ANY AMOUNT
- ALSO BANS AFTERMARKET STAIN- AND WATER-RESISTANCE TREATMENTS, CARPETS AND RUGS, AND LEATHER AND TEXTILE FURNISHINGS

OTHER STATES WITH PROHIBITIONS

- COLORADO – FOOD CONTAINERS AND FIRE RETARDANTS
- VERMONT –AFFF FOAM
- RHODE ISLAND -- FOOD CONTAINERS
- MARYLAND – FOOD CONTAINERS

CWA AND CITIZEN SUIT LIABILITIES

- CITIZEN SUIT LIABILITY
 - PFAS AND RECEIVING WATER LIMITATIONS
 - IGP PROHIBITS DISCHARGES OF AN INDUSTRIAL POLLUTANT THAT CAUSES OR CONTRIBUTES TO THE EXCEEDANCE OF A WATER QUALITY OBJECTIVE.
 - MCLS ARE WATER QUALITY OBJECTIVES APPLICABLE WHERE THE RECEIVING WATER HAS A BENEFICIAL USE OF “MUNICIPAL”
 - WHERE AN IGP PERMITTEE DETERMINES THAT PFAS ARE ASSOCIATED WITH AN INDUSTRIAL ACTIVITY IN ANY WAY AND THE RECEIVING WATER TO WHICH THE FACILITY DISCHARGES HAS A MUNICIPAL BENEFICIAL USE THE PERMITTEE WILL BE REQUIRED TO SAMPLE FOR PFAS AND ANY EXCEEDANCE CARRIES STRICT LIABILITY PENALTIES.
 - TENNESSEE RIVERKEEPER V. CITY OF LEBANON
 - RECENT CITIZEN SUIT 12/26/23
 - ALLEGES VIOLATION OF A STORM WATER PERMIT BECAUSE THE PERMIT DID NOT SPECIFICALLY AUTHORIZE DISCHARGE OF PFAS
 - THEREFORE, THE LIMIT IS ZERO



CALIFORNIA PROPOSITION 65

- PFOA AND PFOS LISTED AS A CARCINOGEN IN NOVEMBER 2017
 - WARNING PROVISIONS EFFECTIVE NOVEMBER 2018
 - CONSUMER PRODUCT WARNINGS
 - ENVIRONMENTAL EXPOSURE WARNINGS
 - OCCUPATIONAL EXPOSURE WARNINGS
 - TENNANT WARNINGS
 - AS OF JULY 2019, CALIFORNIA BUSINESSES WERE ALSO TO BE PROHIBITED FROM RELEASING PFOA OR PFOS INTO SOURCES OF DRINKING WATER.
 - PROPOSITION 65 IS ENFORCEABLE BY CITIZEN SUIT



TREATMENT AND DISPOSAL TECHNOLOGIES

- TREATMENT POSSIBLE BUT COSTLY
 - CARBON
 - IOX
 - OTHER
- DISPOSAL
 - THESE ARE “FOREVER COMPOUNDS”
 - INCINERATION?
 - LANDFILL?
 - EPA RECOMMENDATIONS – HOLD ON TO IT FOR THE NEXT FIVE TO TEN YEARS WHILE WE FIGURE IT OUT.



QUESTIONS

