



Hot Topics in Stormwater Law & Litigation

Andrea M. Salimbene
May 10, 2019
Ohio Stormwater Conference

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PRACTICE AREAS

[Environmental](#)

BAR MEMBERSHIPS

Ohio, 2006

COURTS

Ohio Supreme Court
United States District Court for the Northern District of Ohio
United States District Court for the Southern District of Ohio
United States Court of Appeals for the Sixth Circuit

Andrea counsels corporate and public sector clients on the environmental and regulatory implications of their business decisions and evaluates compliance options to meet their goals. She works in the areas of Clean Water Act (CWA) permitting and regulation for industrial dischargers, publicly-owned treatment works, and storm sewer systems, and with construction projects and sites involving wetlands. She works on drinking water issues and public water system licensing and regulation under the Safe Drinking Water Act. She also has experience with hazardous and solid waste regulation, permitting and recycling. In each of these areas, Andrea offers counseling, addresses civil and administrative enforcement matters, and negotiates consent orders and other settlement agreements. She has successfully litigated matters in the areas of wastewater and drinking water enforcement, and hazardous waste permitting.

Other Contact Info

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Hawai'i Wildlife Fund v. County of Maui

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAWAI'I WILDLIFE FUND, a Hawaii
non-profit corporation; SIERRA CLUB
- MAUI GROUP, a non-profit
corporation; SURFRIDER
FOUNDATION, a non-profit
corporation; WEST MAUI
PRESERVATION ASSOCIATION, a
Hawaii non-profit corporation,
Plaintiffs-Appellees,

v.

COUNTY OF MAUI,
Defendant-Appellant.

No. 15-17447

D.C. No.
1:12-cv-00198-
SOM-BMK

OPINION

Appeal from the United States District Court
for the District of Hawaii
Susan O. Mollway, Senior District Judge, Presiding

Argued and Submitted October 12, 2017
University of Hawaii Manoa

Filed February 1, 2018

Before: Mary M. Schroeder, Dorothy W. Nelson,
and M. Margaret McKeown, Circuit Judges.

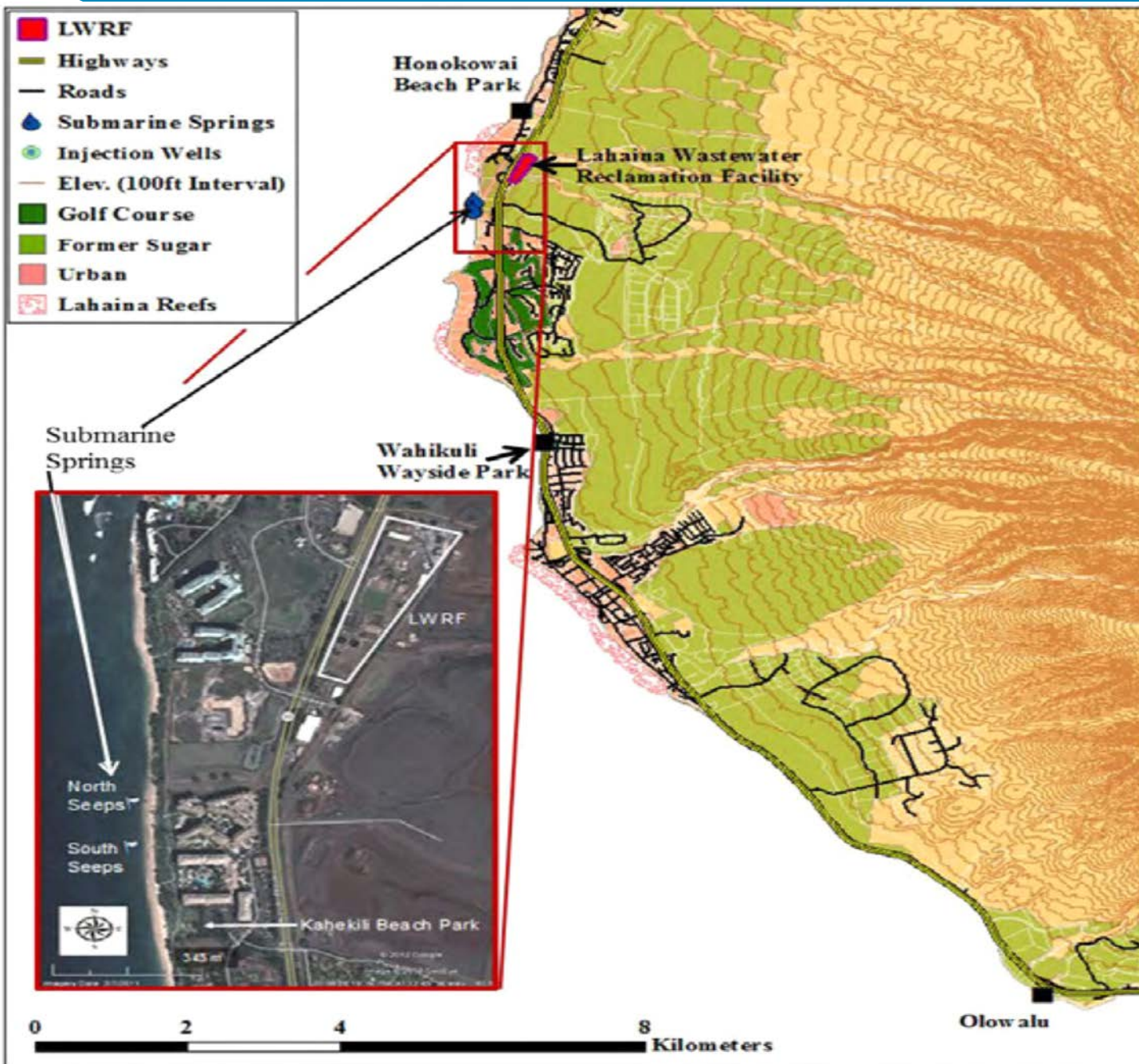
Opinion by Judge D.W. Nelson

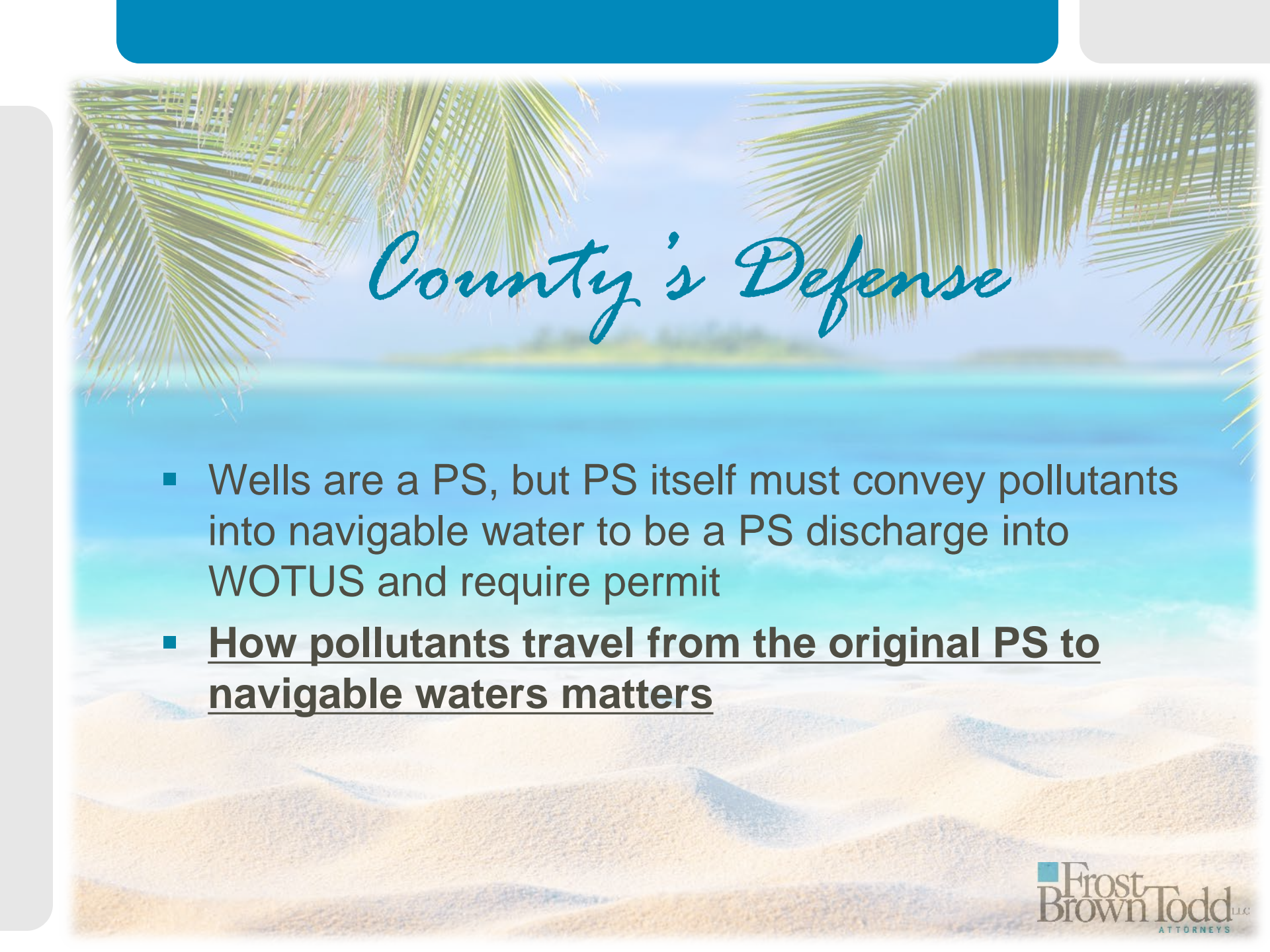
- U.S. Court of Appeals for the Ninth Circuit
- February 1, 2018



Key Facts

- County has 4 wells at Lahaina Wastewater Reclamation Facility
- County concedes that effluent from all 4 wells reaches ocean and has known since facility inception
- Tracer Dye Study showed 64% of treated wastewater injected into Wells 3 and 4 discharges to ocean





County's Defense

- Wells are a PS, but PS itself must convey pollutants into navigable water to be a PS discharge into WOTUS and require permit
- How pollutants travel from the original PS to navigable waters matters



District Court's Decision

Held County liable for discharging effluent to WOTUS without a permit

1. County indirectly discharged a pollutant into the ocean through a groundwater conduit
2. The groundwater is a PS
3. The groundwater is a navigable water

9th Circuit Affirms

- CWA doesn't require that PS itself convey pollutants directly into navigable water.
- If pollutants are fairly traceable from PS to a navigable water such that discharge was functional equivalent of discharge into navigable water and pollutant levels were more than *de minimis*, then you need NPDES



CIRCUIT COURTS OF APPEAL

4th Circuit Agrees - Kinder Morgan

- In 2014, underground pipeline ruptured spilling hundreds of thousands of gallons of gasoline in SC – 1,000 ft from waterway
- Citizen suit under CWA alleged gas was seeping into rivers and a plume was migrating to waterways through groundwater.
- District Court dismissed for lack of jurisdiction – no direct discharge to navigable waters

4th Circuit' Agrees - Kinder Morgan

4th Vacated and Remanded –

- Plaintiff claims that pollutants originating from a PS continue to be “added” to navigable waters – discharge of pollutant need not be a discharge directly to a navigable water from a PS.
- Movement through GW qualifies as an indirect discharge covered under CWA. Indirect discharges must be sufficiently connected to navigable waters to still be covered. Requires a “direct hydrological connection” between PS and navigable water.

5th Circuit Affirms

- Rejects “hydrological connection theory” propounded by 4th and 9th Circuits
- “For a point source to discharge *into* navigable waters, it must dump *directly* into those navigable waters”
- RCRA has adopted rules governing coal ash storage and treatment. Adopting Plaintiffs’ reading of the CWA would require an NPDES permit and remove coal ash pond from RCRA coverage

Policy Implications

CWA is 47
years old
and still
kicking up
dust

Parameters
for federal
CWA
jurisdiction

Mixing legal
and scientific
terms

CWA
regulation of
NPS
pollution

Expansion of
legal
argument
beyond GW

The role of
the states

Policy Implications



ORC 6111.01(H) broadly defines WOTS to include wells, springs, and accumulations of water underground, natural or artificial, regardless of depth, situated wholly or partly within the state or border upon this jurisdiction, ... except those private waters that do not combine or effect a junction with natural surface or ground waters.

The questions presented are:

1. 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.
2. Whether the County of Maui had fair notice that a CWA permit was required for its underground injection control wells that operated without such a permit for nearly 40 years.

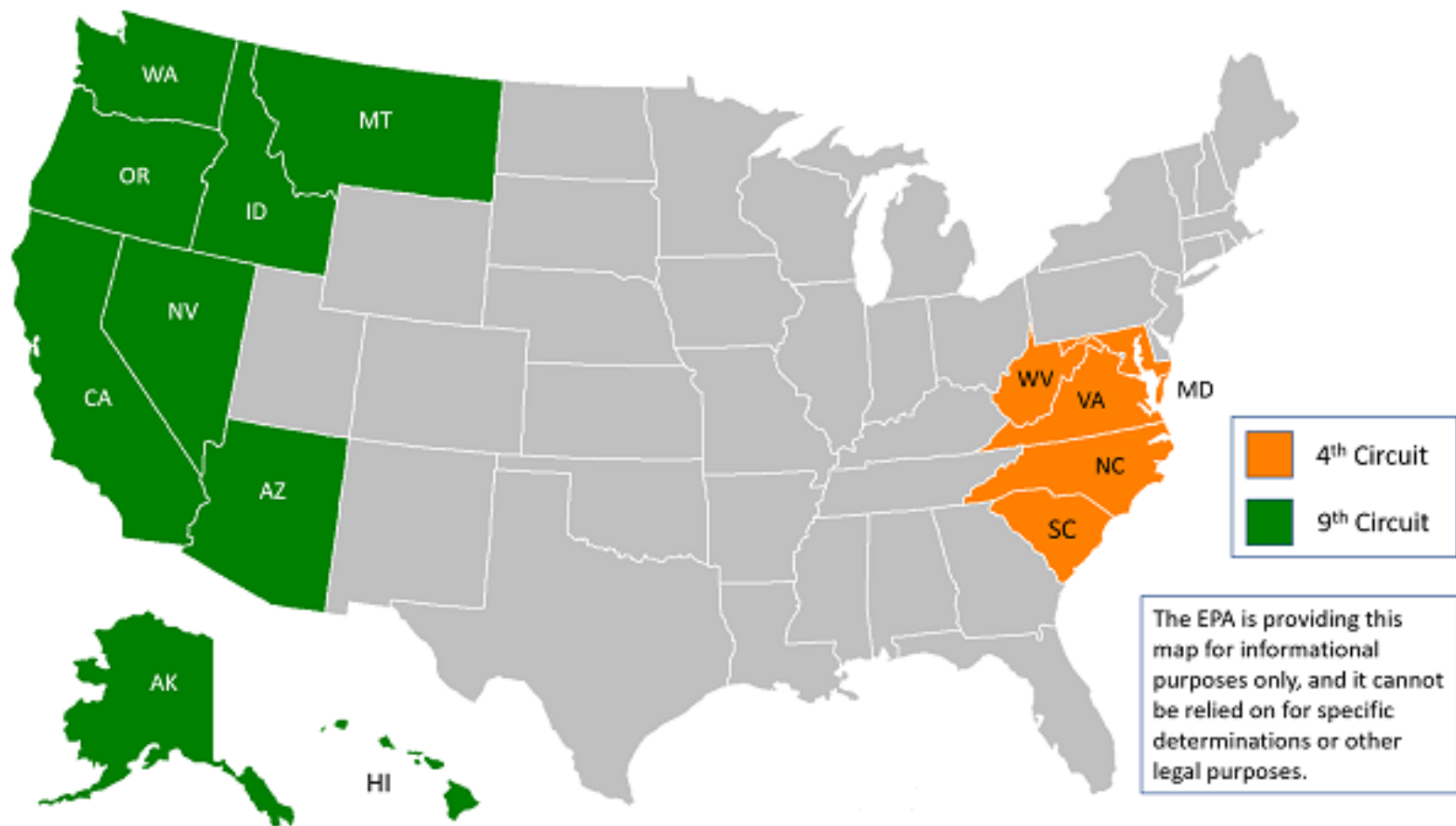
**Once upon
a time /
the end !**



Noel Francisco,
Solicitor General



Andrew Wheeler,
EPA Administrator



OHIO MS4 PERMIT RENEWAL

- Ohio EPA to require updates of local ordinances consistent with CGP. Ohio EPA to evaluate language regarding construction site plan review and inspection to ensure a thorough process and documentation of requirements, and require local enforcement protocol, i.e. NOV and enforcement escalation.
- Ohio EPA to require communities to address local TMDLs, i.e. if a community is dealing with a nitrogen TMDL, it would need to meet a programmatic condition or address through technologies Ohio EPA determines appropriate to achieve improvement. This could involve selection from BMPs to address a specific loading issue. Ohio EPA does not anticipate monitoring or sampling compliance measures.
- Ohio EPA to identify priority illicit discharges that require immediate notification to the Agency, i.e. cross-connections and sewage releases.



COX V. FRANKLIN COUNTY BOARD OF COMMISSIONERS



33 USC 1365, CWA Citizen Suits

Citizen may commence a civil action against any person who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a state with respect of such a standard of limitation.

60 day notice required

Has government commenced and is diligently prosecuting civil or criminal action in court to require compliance with the standard, limitation, or order?

In issuing final order, Court may award costs of litigation, **including reasonable attorney fees**, to any prevailing or substantially prevailing party

State's Count 1: Failure to submit a comprehensive storm sewer system map.

State's Count 2: Failure to identify and map on-site sewage disposal systems connected to MS4.

State's Count 3: Failure to evaluate home sewage treatment systems for discharges.

State's Count 4: Failure to determine if any new area should be connected to Columbus sanitary sewers.

State's Count 5: Failure to map, list and evaluate home sewage treatment systems.

Cox Count 1: Failure to trace, locate and eliminate sources of non-stormwater discharged from outfalls.

Cox Count 2: Violations of CWA and NPDES permit for failing to eliminate known illicit discharges to MS4.

Cox Count 3: Violations of CWA and NPDES permit for discharges mixed with sources of non-stormwater.

Cox Count 4: Failure to develop legally mandated map.

Cox Count 5: Failure to effectively prohibit illicit discharges into MS4 through ordinances or other regulatory mechanism.

Cox Count 6: Failure to create and submit a list of all on-site disposal systems connected to MS4.

Cox Count 7: Failure to reduce pollutants to the MEP

Cox Count 8: Programmatic violations related to SWMP.

Cox Count 9: Programmatic violations related to IDDE program.

Cox Count 10: Negligence

LAKE ERIE BILL OF RIGHTS

- Demands mandatory action to protect fundamental rights of Lake Erie
- Enforceable against private and public actors
- Unlawful for any corporation or government to violate LEBOR, and makes any permit to a corporation that would violate LEBOR invalid within City
- Requires maximum fines and criminal treatment
- City or Toledo resident may enforce by action in Lucas County in the name of the Lake Erie Ecosystem, with damages at cost of remediating injury
- Strict liability for any government or corporation
- Deems corporations not to be “persons” to extent they would interfere with LEBOR and they shall not have power to overturn or challenge LEBOR
- Rejects any state statute or rule that violates LEBOR
- Defines Lake Erie Ecosystem to mean “all natural water features, communities of organisms, soil as well as terrestrial and aquatic sub ecosystems that are part of Lake Erie and its watershed.”

Frangipani
(*Plumeria*
rubra),
'also known
as the
Hawaiian
Lei flower



ALOHA AND THANK YOU!

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