The legal status of WOTUS

Royal C. Gardner
Professor of Law and Director
Institute for Biodiversity Law and Policy
Stetson University College of Law
Outline

- An abbreviated WOTUS history
- Clean Water Rule litigation
- The Trump Administration’s rulemaking
- Action in Congress?
In the beginning (or shortly thereafter) …

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(2) All interstate waters including interstate wetlands;
(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
   (i.) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
   (ii.) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
   (iii.) Which are used or could be used for industrial purpose by industries in interstate commerce;
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
(6) The territorial seas;
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.
Riverside Bayview Homes
SWANCC

- Isolated waters: 33 CFR § 328.3(a)(3)
- Coastal wetland subject to the ebb and flow of the tide: 33 CFR § 328.3(a)(1)
- Wetland adjacent to non-navigable tributary: 33 CFR § 328.3(a)(7)
- Wetland adjacent to traditional navigable water: 33 CFR § 328.3(a)(7)
- Territorial sea: 33 CFR § 328.3(a)(6)
- River: 33 CFR § 328.3(a)(1)
- Non-navigable tributary: 33 CFR § 328.3(a)(5)
The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters

- Wetlands adjacent to traditional navigable waters

- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)

- Wetlands that directly abut such tributaries
The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)

- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water
The agencies **will decide jurisdiction over the following waters based on a fact-specific analysis** to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent

- Wetlands adjacent to non-navigable tributaries that are not relatively permanent

- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary
Clean Water Rule

- Proposed rule issued in April 2014
- Comment period until November 2014
- Final rule issued in June 2015
Previous Rule vs. 2015 Clean Water Rule

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(2) All interstate waters, including interstate wetlands;
(3) The territorial seas;
(4) All impoundments of waters otherwise identified as waters of the United States under this section;
(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;
(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

- All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters including interstate wetlands;
- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
  - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
- All impoundments of waters otherwise defined as waters of the United States under this definition;
- Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
- The territorial seas;
- Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.
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(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

(8) All waters in paragraphs (a)(7)(ii) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(3) through (6) of this section. Waters identified in each of paragraphs (a)(7)(ii) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis. In the watershed that drains to the nearest water identified in paragraphs (a)(5) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(10) Waters identified in paragraph (a)(1) through (8) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.
From the Congressional Research Service ...

**Figure 1. Jurisdictional Waters under the Final Clean Water Rule**

(Not drawn to scale)

- **Jurisdictional by Rule**:
  - If located within 1,500 ft of the high tide line, or the OHWM of the Great Lakes ("adjacent waters")
  - If not an "adjacent water," but there is a significant nexus to a jurisdictional water determined case-by-case

- **Jurisdictional by Rule if**
  - Rivers, streams, tributaries, interstate waters and wetlands, territorial seas

**Jurisdictional**
- If there is a significant nexus to a jurisdictional water determined case-by-case


**Notes**: "Jurisdictional by Rule" waters are jurisdictional per se without case-specific analysis. Other waters in this figure may be jurisdictional if there is a significant nexus to a jurisdictional downstream water. See text for discussion.
The litigation response ... 

- **United States District Courts**
  - At least 17 cases filed (1 of which was voluntarily dismissed)

- **United States Circuit Courts of Appeals**
  - At least 22 petitions for review filed
Plaintiffs/Petitioners

States/Industry/Associations

- American Farm Bureau Federation
  - American Forest & Paper Association
  - American Petroleum Institute
  - American Road and Transportation Builders Association
  - Greater Houston Builders Association
  - Leading Builders of America
  - Matagorda County Farm Bureau
  - National Alliance of Forest Owners
  - National Association of Home Builders
  - National Association of Manufacturers
  - National Association of Realtors
  - National Cattlemen’s Beef Association
  - National Corn Growers Association
  - National Mining Association
  - National Pork Producers Council
  - National Stone, Sand, and Gravel Association
  - Public Lands Council
  - Texas Farm Bureau
  - U.S. Poultry & Egg Association

- Georgia
  - West Virginia
  - Alabama
  - Florida
  - Indiana
  - Kansas
  - Kentucky
  - North Carolina Department of Environment and Natural Resources
  - South Carolina
  - Utah
  - Wisconsin

- Chamber of Commerce of the United States of America
  - National Federation of Independent Business
  - State Chamber of Oklahoma
  - Tulsa Regional Chamber
  - Portland Cement Association
States/Industry/Associations

States/Industry/Associations

- North Dakota
  - Alaska
  - Arizona
  - Arkansas
  - Colorado
  - Idaho
  - Missouri
  - Montana
  - Nebraska
  - Nevada
  - South Dakota
  - Wyoming
  - New Mexico Environment Department
  - New Mexico State Engineer

- Oklahoma

- Southeastern Legal Foundation, Inc.
  - Georgia Agribusiness Council, Inc.
  - Greater Atlanta Homebuilders Association, Inc.

- Texas
  - Louisiana
  - Mississippi

- Utility Water Act Group

- Washington Cattlemen’s Association
  - California Cattlemen’s Association
  - Oregon Cattlemen’s Association
  - New Mexico Cattle Growers Association
  - New Mexico Wool Growers, Inc.
  - New Mexico Federal Lands Council
  - Coalition of Arizona/New Mexico Counties for Stable Economic Growth
  - Duarte Nursery, Inc.
  - Pierce Investment Company
  - LPF Properties, LLC.
  - Hawkes Company, Inc.

- Murray Energy Corporation
Plaintiffs/Petitioners (continued)

States/Industry/Associations

- Ohio
  - Attorney General Bill Schuette on Behalf of the People of Michigan
  - Tennessee
- Arizona Mining Association
  - Arizona Farm Bureau
  - Association of Commerce and Industry
  - New Mexico Mining Association
  - Arizona Chamber of Commerce & Industry
  - Arizona Rock Products Association
  - New Mexico Farm & Livestock Bureau
- Association of American Railroads
  - Port Terminal Railroad Association
- Southeast Stormwater Association
  - Florida Stormwater Association
  - Florida Rural Water Association, Inc.
  - Florida League of Cities
- American Exploration and Mining Association
- Texas Alliance for Responsible Growth, Environment and Transportation
- Michigan Farm Bureau
Environmental Organizations

- National Wildlife Federation
- Natural Resources Defense Council, Inc.
- Puget Soundkeeper Alliance
  - Sierra Club
- Waterkeeper Alliance, Inc.
  - Center for Biological Diversity
  - Center for Food Safety
  - Humboldt Baykeeper
  - Russian Riverkeeper
  - Monterey Coastkeeper
  - Snake River Waterkeeper, Inc.
  - Upper Missouri Waterkeeper, Inc.
  - Turtle Island Restoration Network, Inc.

- One Hundred Miles
  - South Carolina Coastal Conservation League
# States Challenging or Supporting the Clean Water Rule

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<thead>
<tr>
<th>States Challenging the Rule</th>
<th>States Supporting the Rule</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>Connecticut</td>
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<td>Alaska</td>
<td>District of Columbia</td>
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A multitude of legal claims …

- **Procedural violations associated with the rulemaking process**
  - Substantial changes to proposed rule without additional public comment
  - Final rule is not a “logical outgrowth” of the proposed rule
  - Failed to make all information relied upon available to the public
  - Failed to respond appropriately to comments

- **Clean Water Act (statutory) violations**
  - Exceeds the agencies’ CWA authority
  - Inconsistent with CWA’s plain language

- **Constitutional violations**
  - Commerce Clause
  - Tenth Amendment
  - Due Process Clause

- **Other violations**
  - Regulatory Flexibility Act
  - Unfunded Mandates Reform Act
  - National Environmental Policy Act
  - Anti-Lobbying Act
  - Executive Orders
... in a multitude of courts

- **District Courts**
  - Northern District of Georgia
  - Southern District of Georgia
  - District of Minnesota
  - District of North Dakota
  - Southern District of Ohio
  - Northern District of Oklahoma
  - Southern District of Texas
  - Northern District of W. Virginia

- **Circuit Courts of Appeals**
  - Second Circuit
  - Fifth Circuit
  - Sixth Circuit
  - Eighth Circuit
  - Ninth Circuit
  - Tenth Circuit
  - Eleventh Circuit
  - District of Columbia Circuit

- In October 2015, the U.S. Judicial Panel on Multidistrict Litigation denied the motion to centralize the pretrial proceedings in the district court cases

- Most of the courts of appeals cases were consolidated in the Sixth Circuit
Question about (original) jurisdiction about (Clean Water Act) jurisdiction

M. Judicial Review

Section 509(b)(1) of the CWA provides for judicial review in the courts of appeals of specifically enumerated actions of the Administrator. The Supreme Court and lower courts have reached different conclusions on the types of actions that fall within section 509. Compare, E.I. du Pont de Nemours and Co. v. Train, 430 U.S. 112 (1977); NRDC v. EPA, 673 F.2d 400 (D.C. Cir. 1982); National Cotton Council of Amer. v. EPA, 553 F.3d 927 (6th Cir. 2009) cert denied 559 U.S. 936 (2010) with, Northwest Environmental Advocates v. EPA, 537 F.3d 1006 (9th Cir. 2008); Friends of the Everglades v. EPA, 699 F.3d 1280 (11th Cir. 2012) cert denied 559 U.S. 936 (2010).

80 Fed. Reg. 37104

Do the District Courts or the Courts of Appeals have jurisdiction?
Two-track litigation

**US District Court**
- August 2015: US District Court for the District of North Dakota issues preliminary injunction
- Injunction applies in 13 states

**US Court of Appeals**
- October 2015: Sixth Circuit issues national injunction (before deciding whether it has jurisdiction)
- February 2016: Sixth Circuit decides, 2-1, that it has jurisdiction
## Two-track litigation

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January 2017: US Supreme Court agrees to review the Sixth Circuit case
Meanwhile ...
Sec. 3. Definition of "Navigable Waters" in Future Rulemaking. In connection with the proposed rule described in section 2(a) of this order, the Administrator and the Assistant Secretary shall consider interpreting the term "Navigable waters," as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States, 547 U.S. 715 (2006).
The rulemaking process begins anew ...
A two-step process ...

Waters of the United States (WOTUS) Rulemaking

Pre-Publication Version of Proposed Rule: Definition of "Waters of the United States" - Recodification of Pre-existing Rules

The EPA Administrator, Scott Pruitt, along with Mr. Douglas Lamont, senior official performing the duties of the Assistant Secretary of the Army for Civil Works, signed the following proposed rule on 06/27/2017, and EPA is submitting it for publication in the Federal Register (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of public comment. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDsys website and on Regulations.gov in Docket No. EPA-HQ-OW-2017-0203. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.
“Opportunities” on three fronts

- **Courts**
  - US Supreme Court

- **Agency rulemaking**
  - Rescind Clean Water Rule
  - *Rapanos* plurality-based rule

- **Congress**
  - Energy and Water Appropriations rider
Thank you for your attention!