Waters of the US
(a.k.a. WOTUS) . . .
“Notoriously Unclear”

Southern Legislative Conference
Energy and Environment Committee
July 10, 2016, 3:00 – 5:00 P.M.
Lexington, KY

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Which of these is not like the others?

A. POTUS  B. FLOTUS
C. SCOTUS  D. WOTUS
40 CFR 230.3 (o) (1) (vii)
Why does it matter?
Cuyahoga River, Ohio  1969
SEC. 301. (a) Except as in compliance with this section and sections . . . 402 and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

NPDES, including stormwater, CAFOs, lead shot

Discharge of dredged or fill material

Section 402

Section 404
Section 502 (12) The term “discharge of a pollutant” and the term “discharge of pollutants” each means (A) any addition of any pollutant to *navigable waters* from any point source . . .

Section 502 (7) The term “*navigable waters*” means the *waters of the United States*, including the territorial seas.
What “Waters” Are Covered by the CWA?
Where does the water end and the land begin?

Wetlands
I. Wetlands

- Transition areas between water and uplands
- Inundated or saturated lands
- Hydrophytic vegetation
- Hydric soils
What is a wetland?

“[t]hose areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.”
What Waters are **WOTUS Subject to the CWA?**
What “Waters” Are Covered by the CWA?

*Natural Resources Defense Council, Inc. v. Callaway*

1975 (D.C.)

By defining the term ‘navigable waters' to mean ‘the waters of the United States, including the territorial seas,’ Congress “asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution.”
The Governor . . . desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters . . . which [are] or are susceptible to use . . . as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto . . . may submit to [EPA] a . . . description of the program . . . .
Ebb and Flow of WOTUS

- Wetlands that “actually abut” on “traditional navigable waters” covered. U.S. v. Riverside Bayview Homes, Inc. (S. Ct. 1985)

- Regulation struck down asserting CWA jurisdiction of isolated wetlands if they could affect interstate commerce (migratory birds). Solid Waste Agency of Northern Cook County (SWANCC) (S. Ct. 2001)
“[W]e find nothing approaching a clear statement from Congress that it intended ... to reach an abandoned sand and gravel pit such as we have here.”

5–4

Commerce Clause
Justice Antonin Scalia + 3 – the Clean Water Act protects “only relatively permanent, standing or continuously flowing bodies of water” that are connected to traditional navigable waters and “wetlands with a continuous surface connection” to actual waterways “so that there is no clear demarcation between ‘waters’ and wetlands.”

Justice Anthony Kennedy agrees with result, but on different grounds. Wetlands need to have a “significant nexus” with navigable waters. Covered “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity” of jurisdictional waters...
What “Waters” Are Covered by the CWA?

- The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest (EPA 2008)

- Connectivity Report
What Waters are WOTUS Subject to the CWA?

Concrete lined conveyances? Intermittent? Ephemeral?
What “Waters” Are Regulated Under the CWA?

“The reach of the Clean Water Act is notoriously unclear.”

U.S. Supreme Court Justice Samuel Alito
March 21, 2012, concurring in
Sackett v. Environmental Protection Agency
“EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase.”

“Instead, the agency has relied on informal guidance . . .”

U.S. Supreme Court Justice Samuel Alito
March 21, 2012, concurring in
Sackett v. Environmental Protection Agency
In 2015, EPA and the Corps published the 88 page newly named “Clean Water Rule: Definitions of ‘Waters of the United States,’” after publishing a proposed rule and receiving 698,836 comments. 80 FED. REG. 37,054 (June 29, 2015).

Dozens of parties and 31 states filed challenges in 9 federal district courts and 8 federal courts of appeal.

July 28, 2015: The Judicial Panel on Multidistrict Litigation issues an order consolidating petitions challenging the WOTUS rule and transferring all petitions to the Sixth Circuit.
In 2015, EPA and the Corps published the newly named “Clean Water Rule: Definitions of ‘Waters of the United States,” after publishing a proposed rule and receiving 698,836 comments. 80 FED. REG. 37,054 (June 29, 2015).
Defines tributary for the first time as water features with bed, banks, an ordinary high water mark, and downstream flow, additional case by case evaluations for adjacency.

Includes waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100–year floodplain to a maximum of 1,500 feet of the ordinary high water mark.
Includes specific waters that are similarly situated: Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands when they have a significant nexus.

Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.
February 22, 2016: a three-judge panel in the Sixth Circuit holds that the Sixth Circuit has jurisdiction over the petition for review of the Clean Water Rule.

Briefing – September

Some other courts waiting, some not,
American Farm Bureau Federation

IT’S TIME TO DITCH THE RULE
Understanding the Jurisdiction of the CWA (WOTUS)

- CWA
- EPA Regulation
- Final Rule
- Court Interpretations
- EPA Guidance
- Proposed Rule
- Proposed Rule Withdrawn
What’s a State to Do?

- Participate in Litigation?
- Seek Assumption of Program? (404)
- Regulate the Unregulated?
- Influence Members of Congress?