



CLEAN WATER ACT: WATERS OF THE UNITED STATES

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We Connect with Water

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GALLUP POLL

Americans are more concerned about water pollution than they have been since 2001.



- 85% worry about pollution of drinking water
- 85% worry about pollution of rivers, lakes, and reservoirs
- Low-income and nonwhite Americans are more concerned about water pollution

• [News.gallup.com/poll/207536/water-pollution-worries-highest-2001.aspx](http://news.gallup.com/poll/207536/water-pollution-worries-highest-2001.aspx)

WATERS OF THE U.S.

- The definition of ‘navigable waters’ under the CWA
- Cooperative Federalism and *Chevron* Deference
- Status of the WOTUS Rule and Future Rulemakings

The CWA Basic Prohibition

“Except as in compliance with this section and § § 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.”

33 USC § 1311(a)

Essentially, any unauthorized or non-permitted discharge of a pollutant by a person into navigable waters is unlawful.

Navigable Waters: Current Statute and Regulations

- Clean Water Act regulates "navigable waters," defined in the statute as "waters of the United States" (33 USC § § 1344(a), 1362,(7), 1362(12))
- Definition covers all sections of the Act (including NPDES § 402 and Dredge and Fill § 404 programs)
- EPA and the Corps also have promulgated from time to time regulations that define "waters of the United States" (33 CFR § 328.3(Corps); 40 CFR § 232(q) (EPA))

CWA Prohibition Elements

- Discharge (act)
- Of a Pollutant
- By any person
- From a point source OR of dredged or fill material
- Into a water of the United States
- Except as in compliance with listed permitting programs (402, 404, etc).

Discharge

40 CFR 122.2

- Any addition of any pollutant or combination of pollutants to waters of the United States from any point source



From a Point Source

40 CFR 122.2

- Any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit... concentrated animal feeding operation...vessel or other floating craft...
- **Excluded:** agricultural storm water discharges, irrigation return flows, **non-point sources**



Cooperative Federalism

1972 Clean Water Act

- “Except as expressly provided . . . nothing in this chapter shall (b) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” § 510(2)
- “[I]t is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife . . .” § 101(a)(2)

1977 Wallop Amendment

- “It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter. It is further the policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.” § 101(g)

EPA Clarification of Wallop Amendment

- Nov. 7, 1978 Interpretive Memo from Thomas Jorling, AA for Water and Water Management, and Joan Bernstein, GC.
- “It is also noteworthy that § 510(2), which Congress expressly declined to change, provides that States’ water rights are not to be impaired ‘except as expressly provided in this Act.’ Thus, as Senator Wallop noted, the requirements of water quality standards, § 402 and § 404 permits, and § 208 plans may incidentally affect water rights and usages without running afoul of § 101(g) and § 510(2).”

Navigable Waters on Corps Websites



Navigable Waters on Corps Websites



North Carolina



Northern Virginia



New Mexico



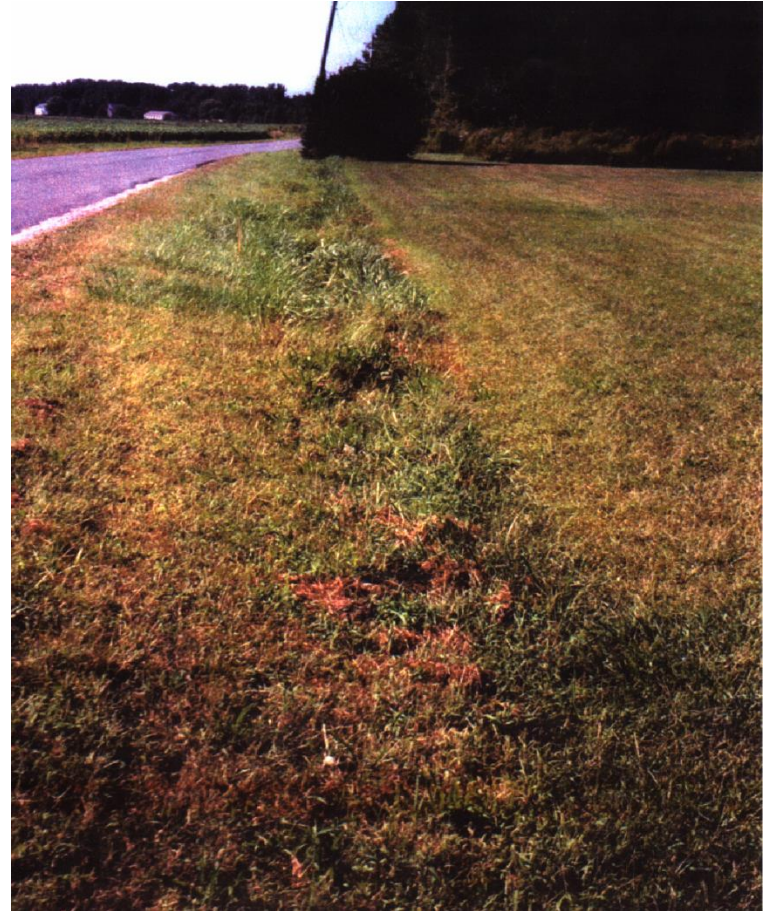
Former timber
operation in
Chesapeake,
Virginia



Filled Farm Ditch



- **Roadside ditch constructed and maintained by Wicomico County, Maryland roads department**
 - ***United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003)**



U.S. Supreme Court Cases on “Navigable Waters”

1. *Riverside Bayview* (1985)
 - Wetlands actually abutting navigable waters are jurisdictional
2. *SWANCC* (2001)
 - Invalidated the "Migratory Bird Rule" (isolated waters); there was a “significant nexus” in *Riverside Bayview* , but not here on isolated pond
3. *Rapanos/Carabel* (2006)
 - Wetlands adjacent to non-navigable tributaries of navigable waters are jurisdictional where there is a “significant nexus”—Kennedy concurrence

The Supreme Court and “Waters”

SWANCC (‘01) – CWA intended connection to navigability; “isolated waters” rarely found jurisdictional as there is no “significant nexus.”
Migratory bird connection to interstate commerce insufficient.

Rapanos (‘06) – **Scalia/Plurality**: Water is jurisdictional if relatively permanent, or if it is a seasonal river, or if wetlands have surface connections to such waters. **Kennedy/Concurrence**: “Significant nexus” to navigable waters required for water/wetland to be jurisdictional.



The “Clean Water Rule”

- On May 27, 2015, EPA and Corps issued Final Rule
- The Rule became effective August 28, 2015
- Numerous lawsuits challenging the rule immediately filed in district and circuit courts across the country
- The Sixth Circuit stayed effectiveness of the rule nationwide on October 9, 2015

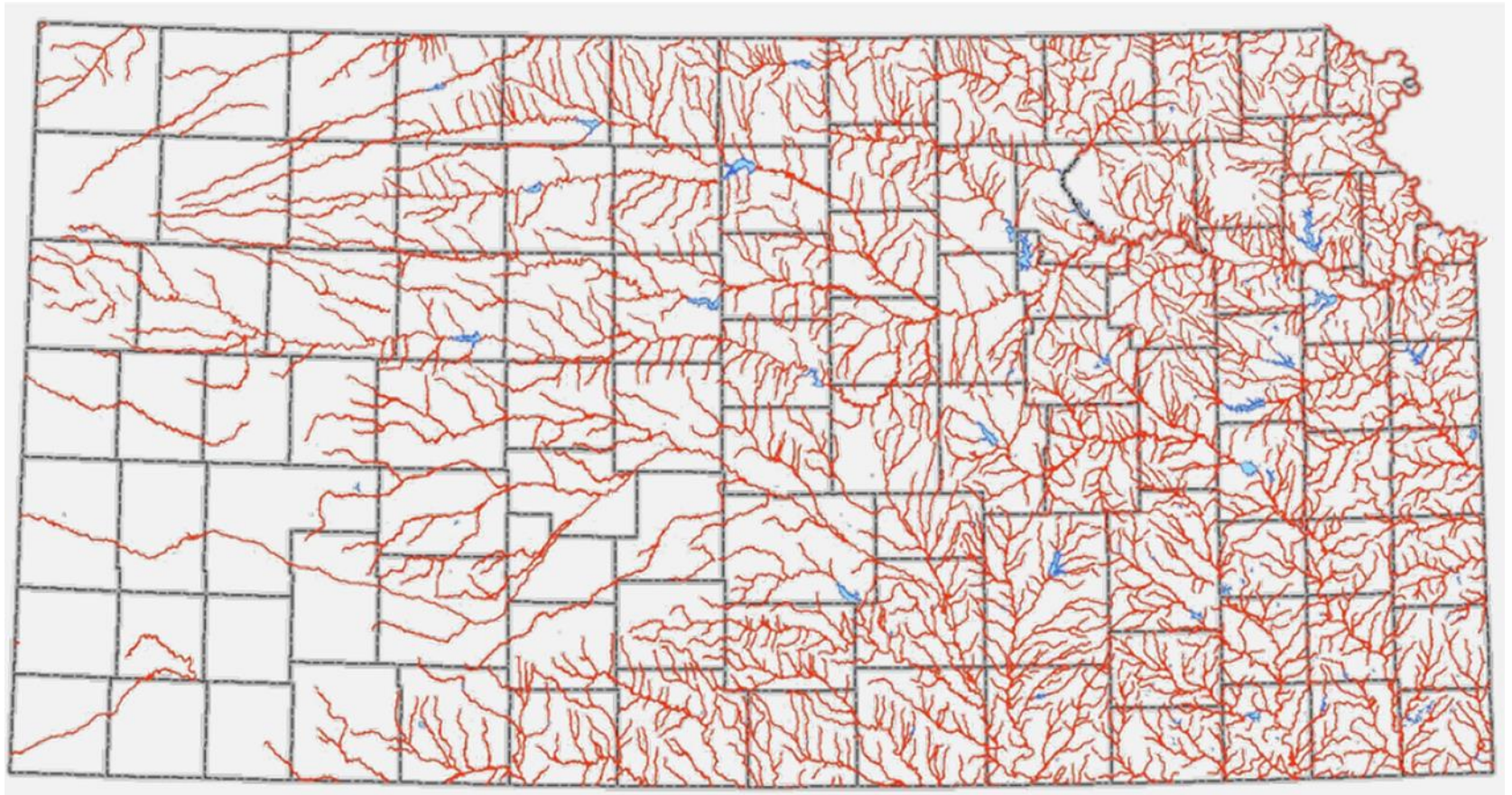
What does the Rule say?

- Redefines “Waters of the United States”
- Defines certain categories of water within jurisdiction of the Clean Water Act
- Excludes certain categories of water from jurisdiction
- For the first time, incorporates into regulation the concept of "significant nexus"

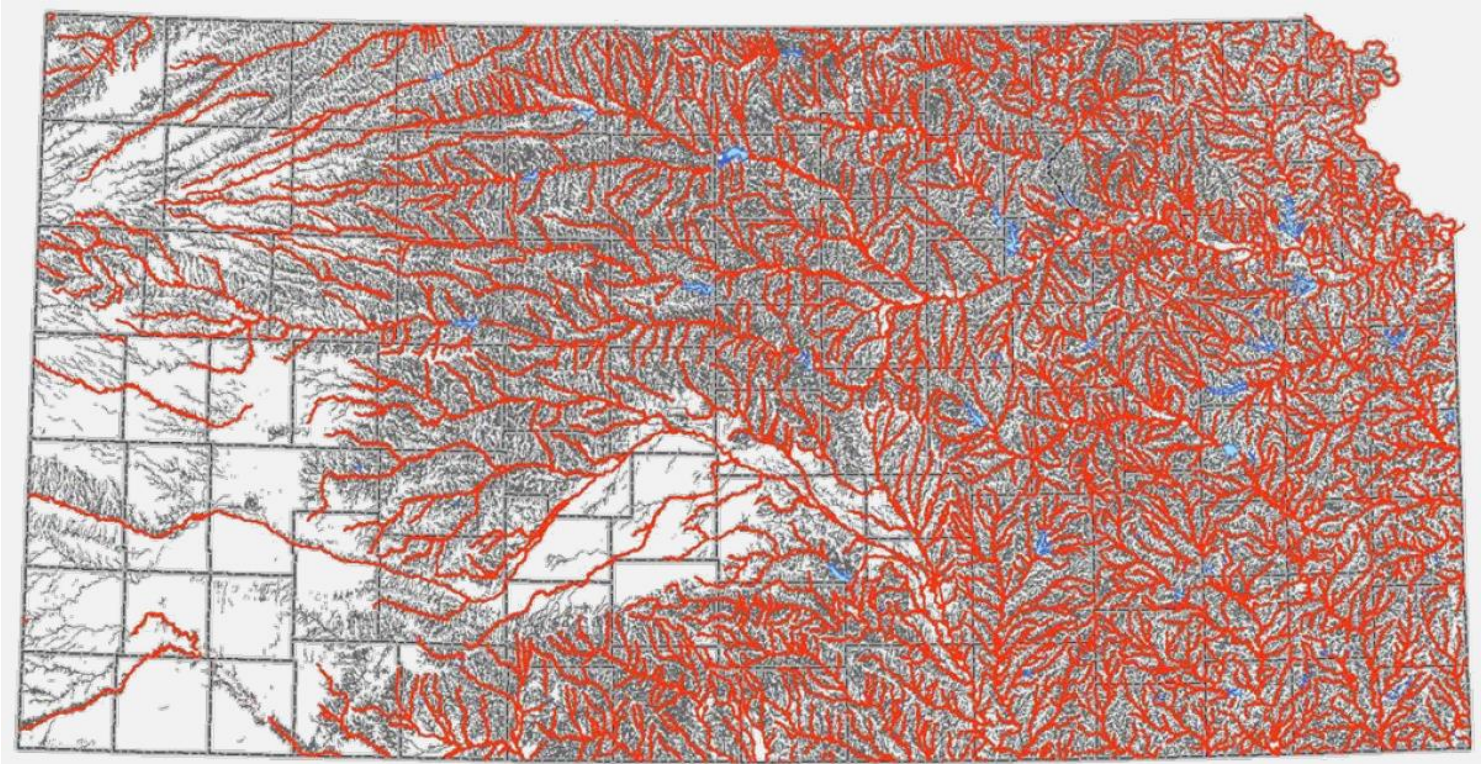
The 2015 Rule Definition of WOTUS

1. Traditional navigable waters (TNW)
2. Interstate waters
3. Territorial seas
4. Impoundments of otherwise jurisdictional waters
5. All tributaries of 1-3
6. “Waters” (including wetlands) adjacent to 1-5
7. Enumerated regional features with a “significant nexus”
8. Waters in the 100-year flood plain or within 4,000 feet of a water of the U.S. with a significant nexus to 1-3

Currently Designated WOTUS in Kansas



Additional WOTUS in Kansas



- If **ephemeral streams** are included as tributaries, Kansas Department of Health and Environment estimates an increase from 32,000 miles of streams to 134,000 miles of streams.

Judicial Review

- Threshold Question: Review of Final Rule in district courts under the APA (28 USC 1331) or jurisdiction on petition for review in courts of appeals (33 USC 1369(b)(1))?
- Sixth Circuit took jurisdiction and stayed the rule nationwide on Oct. 19, 2015
- U.S. Supreme Court held Jan. 22, 2018 that the challenge goes to the district courts not circuit courts



“Presidential Executive Order 13778 On Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the Waters of the United States Rule”

February 28, 2017

1. EPA and the Corps to review the Clean Water Rule and publish a proposed rule rescinding or revising.
2. Attorney General to inform the courts and take action he deems appropriate concerning pending litigation.
3. EPA and the Corps to consider in rulemaking interpreting “navigable waters” consistent with Justice Scalia in *Rapanos*.
4. Supreme Court denied a motion from the Administration to delay the case on court jurisdiction in light of the Executive Order

New 2017 Rule: “Definition of Waters of the United States – Recodification of Pre-Existing Rules”

- July 27, 2017
- 82 Fed. Reg. 143
- Comments closed August 28, 2017
- 500,000 comments filed

Two Step Process: July 27, 2017

Recodification Proposed Rule

- Corps and EPA issued Rule as “the first step in a two-step process intended to review and revise the definition of WOTUS consistent with the February 28, 2017 Executive Order”
- The second step will be a rulemaking “in which the agencies will conduct a substantive re-evaluation of the definition of WOTUS”

2017 Recodification Rule Key Provisions

- Recodifies regulations that existed before the 2015 Clean Water Rule which is now stayed and in litigation
- “The agencies will administer the regulations as they are currently being implemented consistent with Supreme Court decisions and longstanding practice as informed by applicable agency guidance documents”
- No new regulatory requirements – “codifies the current legal *status quo*” while a second rulemaking goes forward

The Second Step

- Separate, future notice and comment rulemaking
- Will develop a new definition of WOTUS, “taking into consideration the principles that Justice Scalia outlined in the *Rapanos* plurality opinion”
- Footnote 2: “Ultimately, developing ‘some notion of an outer bound [to the reach of their authority]’ from the full range of relevant information is the task facing the agencies [in step two]”

“Suspension Rule” Feb. 6, 2018

- “Definition of “ Waters of the United States” —Addition of an Applicability Date to 2015 Clean Water Rule” 83 FR 5200 (Feb. 6, 2018)
- Adds an applicability date of February 6, 2020 to the 2015 Clean Water Rule, still under challenge; was proposed on Nov. 22, 2017
- Separate from the two step process under Executive Order 13778 which will result in a new substantive rule
- Challenged in litigation: EPA and the Army Corps of Engineers lack authority under the CWA and Administrative Procedure Act to suspend WOTUS Rule



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