

What's Next for WOTUS?


Webinar Sponsored by the Association of State Wetland Managers
February 9, 2018

Presented by:

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

Stephen Samuels, Retired
Formerly: Assistant Section Chief
Environment & Natural Resources
Division
U.S. Department of Justice

Overview

- Historical Context
 - *National Association of Manufacturers v. DOD*
 - Wassup with the Stay?
 - New Rulemakings
 - Potential Litigation
- 

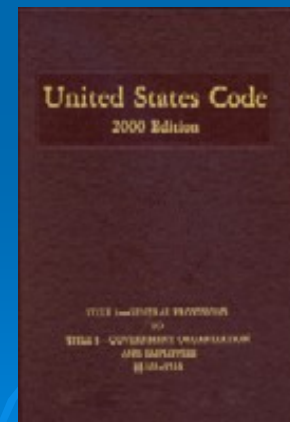
CWA Statutory Definition

“Navigable waters” =

“the waters of the
United States, including
the territorial seas”

The same definition applies
throughout CWA, e.g., §§ 404,
402, 401, 311

Definition has been addressed
3 times by the Supreme Court



Riverside Bayview (1985)

- 9-0: CWA confers federal authority to regulate adjacent wetlands
- Term “navigable” is of “limited import”

SWANCC (2001)

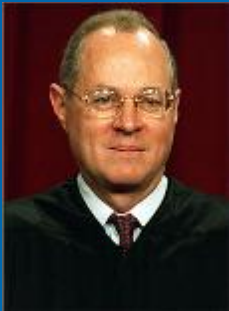
- 5-4: Corps cannot regulate isolated, non-navigable, intrastate waters based solely on their use as habitat by migratory birds
- “Navigable” may have limited effect, but not no effect



Rapanos (2006)



Plurality (4 Justices): Relatively permanent waters that connect to a TNW and wetlands with a continuous surface connection



Concurrence (1 Justice): Waters that, either alone or in combination with other similarly situated features in the region, have a significant nexus with a TNW



Dissent (4 Justices): Waters that satisfy either the Scalia or the Kennedy test

The Clean Water Rule (6/29/15)

Purpose: To provide a simpler, clearer, and more consistent approach to determining jurisdictional status of waters, based upon science, the agencies' expertise and experience, and Supreme Court decisions

Established 3 categories:

- Waters that are jurisdictional in all instances
- Waters that require case-by-case sig/nex analysis
- Exclusions

Supported by extensive record: connectivity report that reviewed 1200 peer-reviewed science publications; an extensive economic analysis; 400 public hearings; consideration of more than 1 million public comments

Clean Water Rule Litigation

18 District Court Complaints:

- 100 plaintiffs (businesses, states & environmental groups)
- U.S. motion to consolidate all complaints denied (10/13/15)
- Most complaints dismissed or stayed; one court issued PI

22 Petitions for Review:

- 100 petitioners
- Consolidated in 6th Circuit Court of Appeals
- CWR stayed (10/9/15)
- 6th Circuit ruled that it has exclusive jurisdiction (2/22/16)
- Rehearing en banc denied (4/21/16)
- Four sets of opening briefs (292 pages) (11/1/16)
- U.S. responsive brief (245 pages) (1/13/17)
- Litigation in 6th Circuit stayed (1/25/17)

States Challenging or Supporting the Clean Water Rule

States Challenging the Rule

Alabama	New Mexico (Environment
Alaska	Department and State
Arizona	Engineer)
Arkansas	North Carolina (Department
Colorado	of Environment and Natural
Florida	Resources)
Georgia	North Dakota
Idaho	Ohio
Indiana	Oklahoma
Kansas	South Carolina
Kentucky	South Dakota
Louisiana	Tennessee
Michigan	Texas
Mississippi	Utah
Missouri	West Virginia
Montana	Wisconsin
Nebraska	Wyoming
Nevada	

States Supporting the Rule

Connecticut
District of Columbia
Hawaii
Massachusetts
New York
Oregon
Vermont
Washington

National Association of Manufacturers v. Department of Defense

- Unanimous decision authored by Justice Sotomayor
- Inquiry begins and ends with the statutory text

(Slip Opinion) OCTOBER TERM, 2017 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL ASSOCIATION OF MANUFACTURERS *v.*
DEPARTMENT OF DEFENSE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

No. 16–299. Argued October 11, 2017—Decided January 22, 2018

The Clean Water Act (Act) generally prohibits “the discharge of any pollutant by any person,” except in express circumstances. 33 U. S. C. §1311(a). A “discharge of a pollutant” includes “any addition of any pollutant to navigable waters from any point source,” §1362(12), and the statutory term “navigable waters,” in turn, means “the waters of the United States,” §1362(7). Section §1311(a) contains important exceptions to the general prohibition on discharge of pollutants, including two permitting schemes that authorize certain entities to discharge pollutants into navigable waters: the National Pollutant Discharge Elimination System (NPDES) program administered by the Environmental Protection Agency (EPA) under §1342, and a program administered by the Army Corps of Engineers (Corps) under §1344.

The statutory term “waters of the United States” delineates the geographic reach of those permitting programs as well as other substantive provisions of the Act. In 2015, the EPA and the Corps proffered a definition of that term through an agency regulation dubbed the Waters of the United States Rule (WOTUS Rule or Rule). The WOTUS Rule “imposes no enforceable duty on any state, local, or tribal governments, or the private sector.” 80 Fed. Reg. 37102. As stated in its preamble, the Rule “does not establish any regulatory requirements” and is instead “a definitional rule that clarifies the scope of” the statutory term “waters of the United States.” *Id.*, at 37054.

There are two principal avenues of judicial review of an EPA action. Generally, parties may file challenges to final EPA actions in federal district courts, typically under the Administrative Procedure

National Association of Manufacturers v. Department of Defense

- CWA enumerates 7 categories of EPA actions for which review is exclusively in the U.S. Courts of Appeals
 - Clean Water Rule is not an effluent or other limitation
 - Clean Water Rule is not an action issuing or denying a section 402 permit

National Association of Manufacturers v. Department of Defense

- Supreme Court rejects policy arguments:
the text is clear
 - Bifurcation of review occurs elsewhere in CWA (e.g., review of section 402 and section 404 permits)
 - Congress did not prioritize quick and orderly resolution of WOTUS rule challenges
 - Congress's plain language trumps the goal of promoting national uniformity

National Association of Manufacturers v. Department of Defense

➤ The key take-away:

**A challenge to (any) WOTUS rule
must begin in U.S. District Courts**



Wassup with the Stay?

- Sixth Circuit lacked jurisdiction to stay Clean Water Rule
- Supreme Court judgment will issue no earlier than Feb. 16, 2018
- North Dakota preliminary injunction could go back into effect
- Other district courts could issue PIs
- Could be overtaken by intervening rulemakings

Meanwhile ...



The White House

Office of the Press Secretary

For Immediate Release

February 28, 2017

Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule

EXECUTIVE ORDER

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).

Initially, a two-step process to rescind and replace ...

EPA United States Environmental Protection Agency

Environmental Topics Laws & Regulations About EPA Search EPA.gov

Waters of the United States (WOTUS) Rulemaking

CONTACT US

SHARE    

Waters of the United States Rulemaking Home

About Waters of the United States

Rulemaking Process

Frequently Asked Questions

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.

... and then an applicability date sidestep

EPA and the Army Finalize Rule Adding an Applicability Date to the 2015 Rule

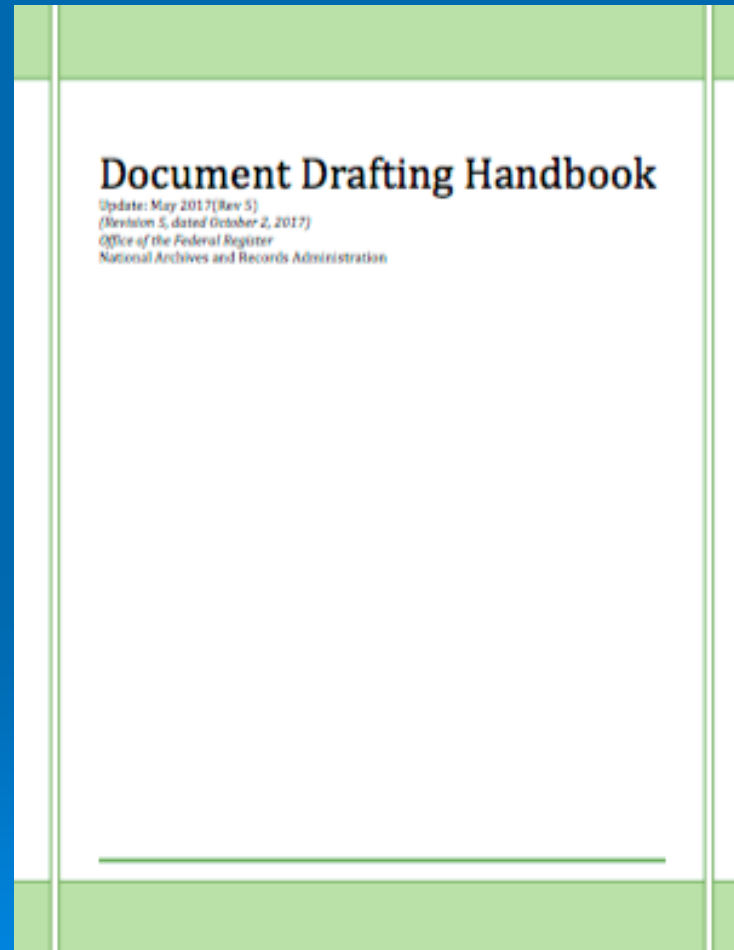
The Environmental Protection Agency and U.S. Department of the Army finalized a rule adding an applicability date to the 2015 Rule defining “waters of the United States.” The 2015 Rule will not be applicable until February 6, 2020. [Read the Final Rule.](#)

1

2



Wait, what's an applicability date?



OFR Document Drafting Handbook

Effective date

The effective date is the date that we amend the CFR by following your amendatory instructions. Therefore, effective dates cannot be retroactive and only rule documents that amend the CFR have effective dates.

Compliance dates and applicability dates

Some rules include a compliance or applicability date in addition to an effective date. The compliance or applicability date is the date that the affected classes must comply with the rule. Place the compliance or applicability date after the effective date (see **Example 3-9**).

Table 3-3: Differences between effective dates and compliance or applicability dates

Effective Date	Compliance/Applicability Date
Addresses the CFR placement.	Addresses the person who must comply.
Is the date the rule affects the current CFR.	Is the date the person must comply.
Is required by OFR.	Is not required by OFR.
Must not be retroactive.	May appear in DATES and CFR text.

Why did the agencies suspend the Clean Water Rule?

- Maintain the “legal” status quo (once Sixth Circuit lifts improper national stay) to provide:
 - clarity
 - certainty
 - consistency

Why did the agencies suspend the Clean Water Rule?

- Clarity? (That was the reason for the Clean Water Rule in the first place: to try to clarify CWA jurisdiction post-*Rapanos*.)
- Certainty? (The only certainty is the judicial challenge to the Suspension Rule.)
- Consistency? (The U.S. Supreme Court just told us that is not a primary concern.)

At least the legal issues are clear ...

- We know which courts will review the Suspension Rule (U.S. District Courts).
- We know the agencies are not relying on APA section 705 (because they said so).
- We know the agencies declined to examine the scientific basis of the Clean Water Rule and alternatives, costs, and benefits of its delay (because they said so).

And so the next round of litigation begins ...

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATES OF NEW YORK, CALIFORNIA,
CONNECTICUT, MARYLAND, NEW
JERSEY, OREGON, RHODE ISLAND,
VERMONT, and WASHINGTON;
COMMONWEALTH OF MASSACHUSETTS;
and the DISTRICT OF COLUMBIA,

Plaintiffs,

v.

COMPLAINT

Case No. 1:18-cv-1030

E. SCOTT PRUITT, as Administrator of the
United States Environmental Protection
Agency; UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY; RYAN A. FISHER, as Acting
Assistant Secretary of the Army for Civil
Works; and UNITED STATES ARMY
CORPS OF ENGINEERS,

Defendants.

Plaintiffs, the States of New York, California, Connecticut, Maryland, New Jersey, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, and the District of Columbia (the States), each represented by its Attorney General, allege as follows against defendants E. Scott Pruitt, as Administrator of the United States Environmental Protection Agency (EPA); EPA; Ryan A. Fisher, as Acting Assistant Secretary for the United States Army Corps of Engineers (Army Corps); and the Army Corps (collectively, the agencies):

Current and Potential Litigation


➤ Challenges to Suspension Rule

- Complaints already filed by 11 states in SDNY and by environmental groups in SDNY and DSC

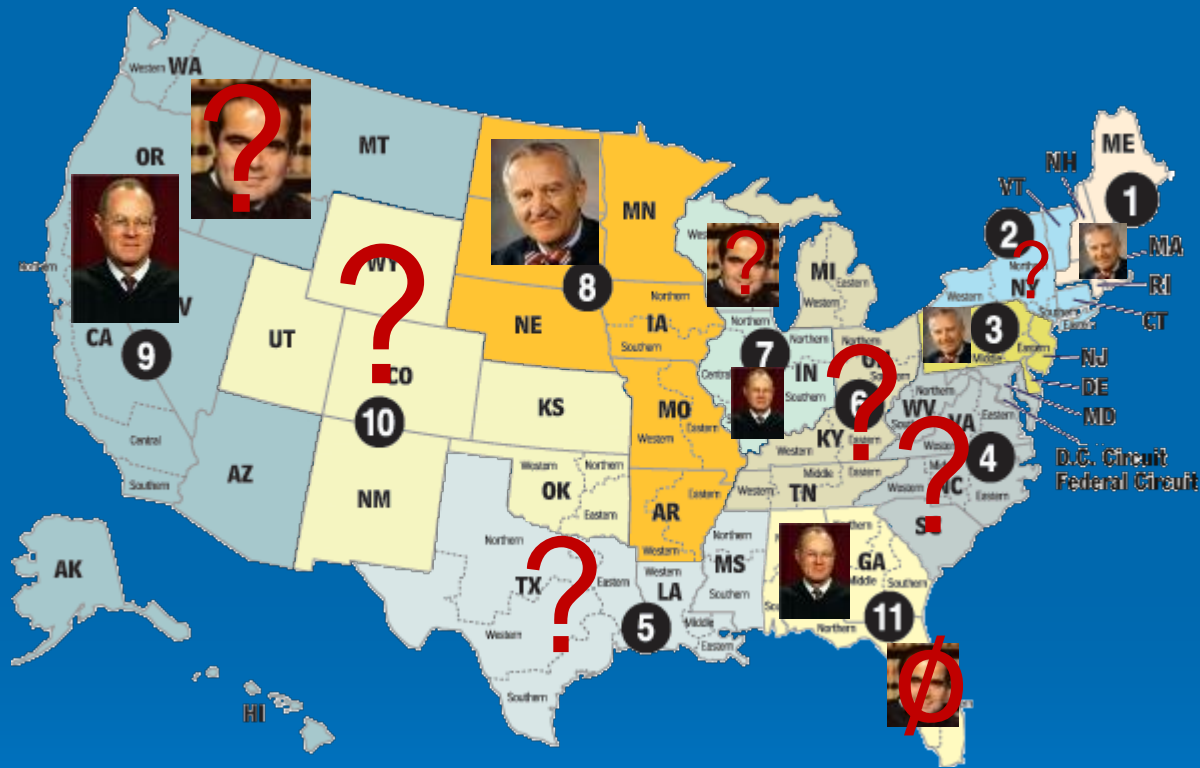
➤ Challenges to Rescission Rule

➤ Challenges to Replacement Rule

Issues Likely to be Litigated

- Can a district court issue a nationwide injunction?
 - Role of science vs. policy
 - Costs and benefits
 - Applicability of Scalia test
- 
- The background of the slide features several faint, concentric circular patterns in the bottom right corner, resembling ripples in water or a target design. These circles are light blue and vary in size and opacity, creating a subtle decorative effect.

What Test Applies?



Hughes v. United States

- How should lower courts construe fractured decisions of Supreme Court when one opinion concurring in judgment is not a subset of another?
- Possible outcomes:
 - Plurality opinion controls
 - Concurring opinion controls
 - Either opinion controls
 - Both opinions control
 - Reasoning vs. results
 - No controlling rule of law

