

# Legal Update

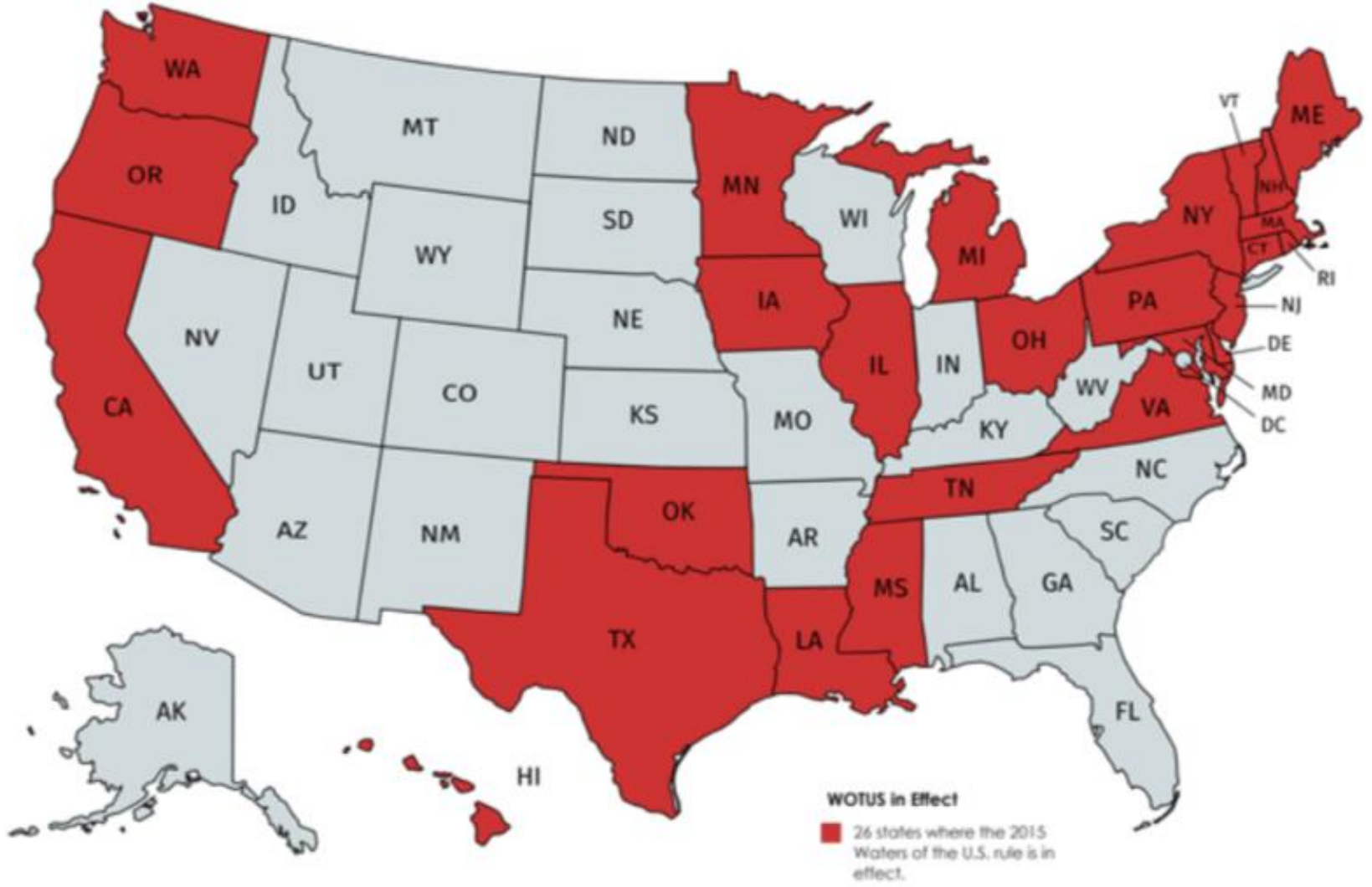
2018 Missouri Water Seminar

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# WOTUS

- ▶ Rulemaking in current administration:
  - ▶ Executive order
  - ▶ Proposed withdrawal of 2015 rule
  - ▶ “Replacement” rule
  - ▶ “Applicability” rule
- ▶ Litigation over 2015 rule



# Other Recent Developments

- ▶ “Final agency action” - *Folsom vs. EPA and Army Corps of Engineers*
- ▶ Cooling water intake rule (CWA 316(b))
- ▶ Steam Electric Effluent Limitations
- ▶ Groundwater with direct hydrologic connection to surface water
- ▶ City of Kennett vs. EPA (TMDL litigation)
- ▶ “Constructive submission” TMDL litigation

# EPA Review of State WQ Criteria

- ▶ EPA must determine:
  - ▶ whether the criteria protect the most sensitive designated use
  - ▶ whether the criteria are based on sound scientific rationale.

See 40 CFR Sections 131.5, 131.11

# EPA Review of State WQ Criteria

Eighth Circuit in *El Dorado v U.S.*:

- ▶ “EPA is permitted - and in fact statutorily required - to scrutinize a state’s water quality standards”
- ▶ “EPA has both the authority and obligation to ensure that revisions to a state’s water quality standards meets the requirements of the CWA.”

# Judicial Review of EPA WQS Decisions

- Deference to Agency: “Arbitrary and Capricious”
- An agency decision is arbitrary and capricious if the Agency:
  - ▶ entirely failed to consider an important aspect of the problem
  - ▶ relied on factors which Congress has not intended it to consider
  - ▶ offered an explanation for its decision that runs counter to the evidence before the Agency
  - ▶ makes a decision that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise

# Compliance and Enforcement

- ▶ Cooperative Federalism
- ▶ Agency Strategic Plan Goals:
  - ▶ **Drinking Water:** By September 30, 2022, reduce the number of community water systems out of compliance with health-based standards from 3,600 to 2,700.
  - ▶ **Wastewater:** By September 2022, increase the percentage of CWA NPDES permittees not in significant noncompliance with their permit limits to 88% from a baseline of 76%.