

EVANS & DIXON<sup>LLC.</sup>

ATTORNEYS AT LAW

Waters of the United States

(WOTUS)

Clean Water Rule



# Which Waters Are Covered?



# “Waters of the United States” Rule (WOTUS) History

- EPA rule pre-SWANCC
- SWANCC decision (U.S. 2001)
- Rapanos decision (U.S. 2006)
- Issuance of draft guidance
- Issuance of new rule
- Multiple legal challenges



What is or is not regulated has changed over time...but the statutes have not.



# CWA Foundation

CWA prohibits unpermitted discharges of pollutants into “navigable waters,” which are defined as “waters of the United States.”



# Defined by Regulation

- Waters used in interstate or foreign commerce
- Interstate waters including interstate wetlands
- “Other waters” which could affect interstate or foreign commerce
- Impoundments of waters that would otherwise be within definition of waters of the United States
- Tributaries of the above-listed waters
- Territorial seas
- Wetlands adjacent to waters of the US



# SWANCC

- *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (2001)
  - Corps exceeded its authority by asserting CWA jurisdiction over isolated, inland, non-navigable waters (i.e. isolated sand and gravel pits with seasonal ponds, which provide migratory bird habitats.)



# *Rapanos*

- *Rapanos v. U. S.* (2006)
  - No majority opinion (4-1-4)
  - Scalia plurality . . . the term “waters of the United States” includes “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers and lakes’”
  - Kennedy concurrence...waters with a “significant nexus to waters that are navigable in fact or that could reasonably be so made.”

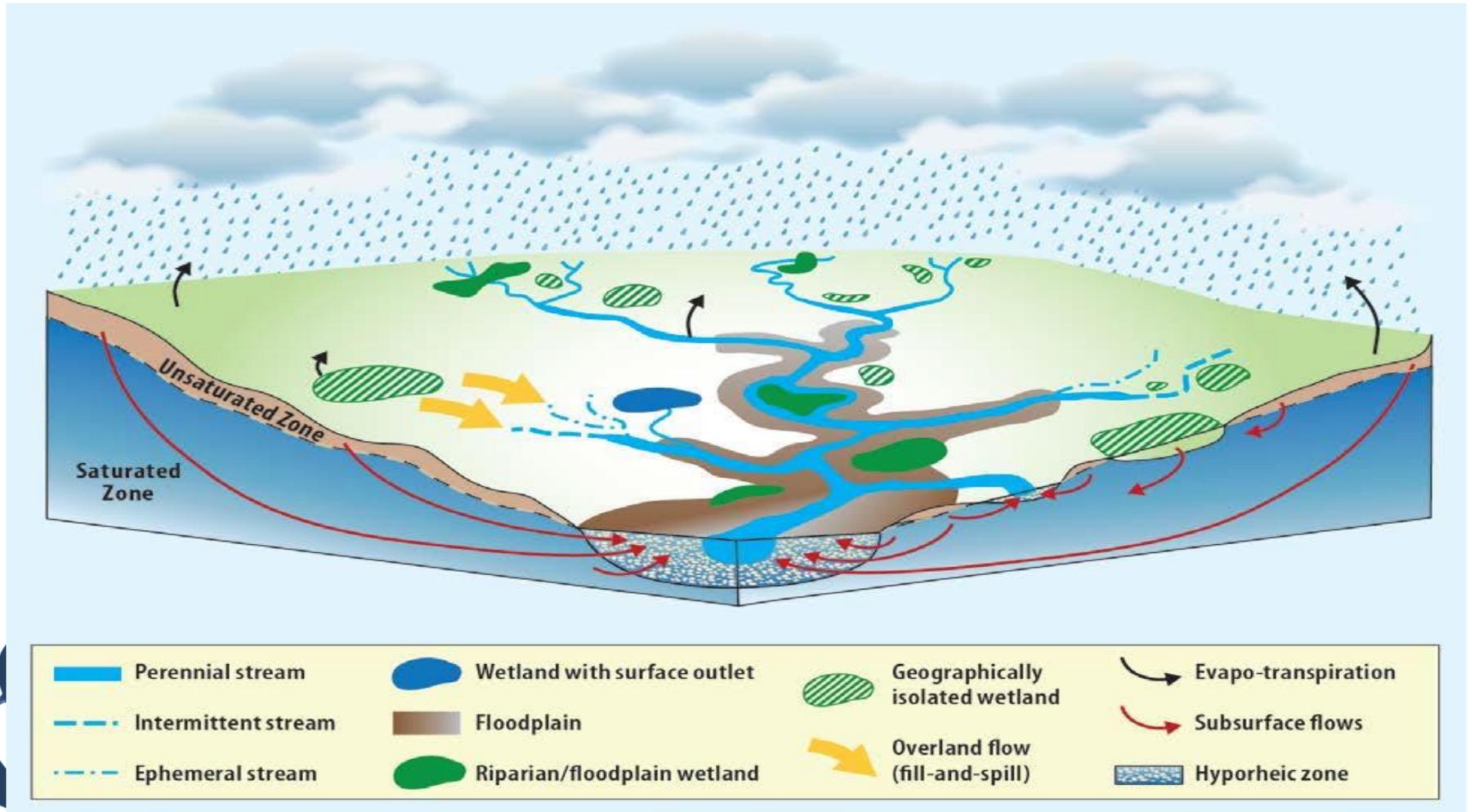


# Clean Water Rule

- April 21, 2014 – Rule public notice
- May 27, 2015 – Final rule is issued
- June 29, 2015 – Final rule is published in Federal Register and lawsuits immediately



# From EPA's Draft 2013 Report on "Connectivity"







# Key Aspects of Final Rule

- Attempts to use “bright-line boundaries” to make it clearer what was and was not a “Water of the United States”
  - New definition broadened definition of “tributary “ to include waters characterized by intermittent or ephemeral flows
  - Includes all waters that are “adjacent” or “neighboring” to jurisdictional waters
  - Also includes “other waters” that have a significant nexus to navigable waters, meaning they affect the chemical, physical, or biological integrity of a navigable water



# Exclusions

- Prior converted cropland
- Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act
- Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling



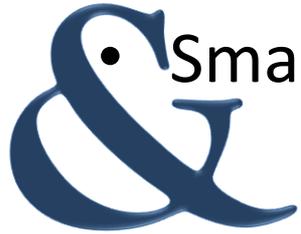
# Exclusions

- Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary
- Ditches within intermittent flow that are not a relocated tributary or excavated in a tributary or drain wetlands
- Ditches that do not flow, either directly or through another water, into a water used for commerce, an interstate water, or the territorial seas



# Exclusions

- Artificially irrigated areas that would revert to dry land should application of water to that area cease
- Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds
- Artificial reflecting pools or swimming pools created in dry land
- Small ornamental waters created in dry land



# Still more exclusions...

- Water filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water
- Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways
- Puddles
- Groundwater
- Stormwater control features constructed to convey, treat or store stormwater that are created in dry land



# Issues

- Grandfathering
- Stormwater systems/MS4s
- Ditches/erosional features
- Dry land
- Significant nexus



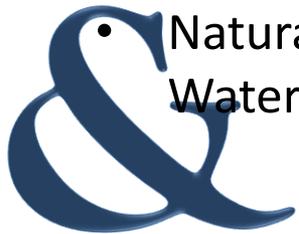
# 31 Lawsuits

- Almost immediately led to legal action from local governments, businesses, agricultural, and environmental groups
  - Multidistrict Panel combined lawsuits filed in Court of Appeals into a single 6th Cir. case (Murray Energy Corp. v. U.S. Dep't of Def. et al.)
  - Multidistrict Panel declined to combine lawsuits filed in District Courts into one case in the D.C. District
  - October 6, 2015 – 6th Circuit stayed application of the rule until further order



# Players

- Businesses, state and local governments, sued in District Court's across the country and in Courts of Appeal under provisions of the CWA that allow for certain types of rulemaking challenges to skip the District Court level
  - e.g., U.S. Chamber of Commerce, American Farm Bureau, Michigan Farm Bureau, Texas Alliance for Responsible Growth, American Exploration and Mining Association, Murray Energy Corporation, Southeastern Legal Foundation
  - Eighteen States, including Missouri



- Natural Resources Defense Counsel, Puget Soundkeeper Alliance, Waterkeeper Alliance, Inc.



# Pending Lawsuits

- The key questions: Does the Final Rule (1) expand the jurisdiction of EPA beyond the text of the Clean Water Act, or (2) exceed the limits of the U.S. Government under the Commerce Clause of the U.S. Constitution?
- Other Substantive Arguments:
  - The “nexus standard” is not consistent with SCOTUS decision in *Rapanos*
  - If implemented, Rule will have significant and costly repercussions on municipalities, industry and farming
  - Does not adequately acknowledge state laws and regulatory schemes
  - Regulation of some agricultural ditches undercuts existing agricultural exemption



# *Ohio v. U.S. ACOE*

- Issue: Does the Court have subject matter jurisdiction to hear the petitions under the Clean Water Act or whether it is properly heard in federal district court
- February 22, 2016: 6th Circuit determined it had jurisdiction to hear case on the merits
- Currently being briefed before the 6th Circuit, but will almost certainly end up before the Supreme Court (briefing set to conclude February 17, 2017)



# Which Waters Are Covered



# Which Waters Are Covered by 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*





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- Encourage Partners to do the same
- Express Practical Areas of Concern



# Questions?

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