

Waters of the United States (WOTUS)

Presented By: Aimee Davenport

Which Waters Matter?



WOTUS Primer

- EPA rule pre-SWANCC (1972-2001)
- *SWANCC* decision (U.S. 2001)
- *Rapanos* decision (U.S. 2006)
- Draft Guidance (2006-15)

WOTUS Primer

- Clean Water Rule (Aug. 2015)
- Trump Executive Order (Feb. 2017)
- EPA action to repeal, recodify, suspend
- 32+ Legal challenges (2015 – present)

The Foundation

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

Pre-2015 Rule

- 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

SWANCC

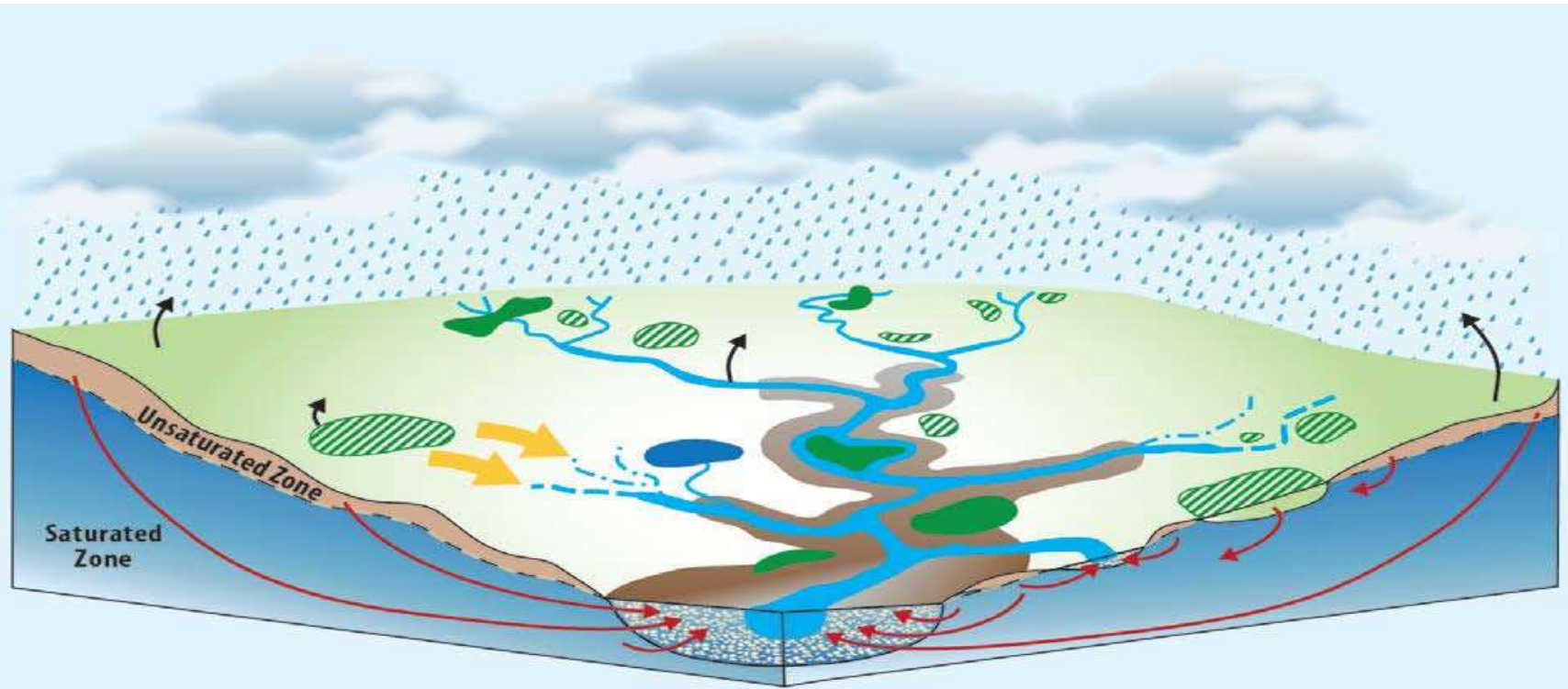
- *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (2001)*
 - Corps exceeded its authority by asserting CWA jurisdiction over isolated, inland, non-navigable waters (i.e. isolated sand and gravel pits with seasonal ponds, which provide migratory bird habitats.)

Rapanos 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.”

2015 Clean Water Rule

From EPA's Draft 2013 Report on "Connectivity"



- | | | | |
|---------------------|-----------------------------|---------------------------------|---------------------|
| Perennial stream | Wetland with surface outlet | Geographically isolated wetland | Evapo-transpiration |
| Intermittent stream | Floodplain | Overland flow (fill-and-spill) | Subsurface flows |
| Ephemeral stream | Riparian/floodplain wetland | Hyporheic zone | |





Clean Water Rule

- 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

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” goes too far
 - Costly repercussions on municipalities, industry and farming
 - Does not acknowledge state laws and regulatory schemes
 - Regulation of some agricultural ditches undercuts existing agricultural exemption

Clean Water Rule

- 32 lawsuits originally consolidated in Court of Appeals for 6th Circuit and Stayed Nationwide
- U.S. Supreme Court says Federal Districts Courts are proper venue (January 2018)
- Nationwide Stay is lifted (except in 13 states)
- South Carolina Federal District Court says “Suspension Rule” enjoined
- CWR restored in 26 states (not Missouri)

Zombie Clean Water Rule



Executive Order

- “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule”
 - **Step One**
 - Proposed Repeal of 2015 Rule
 - Recodification of pre-2015 rule
 - **Step Two**
 - Define Waters of the United States
 - **Applicability Date to the 2015 Clean Water Rule**
 - Clean Water Rule to take effect in 2020

Slow Progress Under Executive Order

- Step One
 - Repeal and recodification pending
- Step Two
 - Comments solicited
- Applicability Date to the 2015 Clean Water Rule
 - Declared Invalid

Cooperative Federalism

EPA solicits comments from states and tribes to help define Scalia Approach for Step Two.

June 19, 2017

“We offer the **perennial flow/permanent pool model** as...model for...relatively permanent water.”

- 10 CSR 20-7.031 – Classified Waters System

“...the term denotes a **hydrologic connection, not a biological or other functional connection.**”

“...by definition, a "continuous" connection is one that is **uninterrupted and constant...during normal conditions.**”



ERIC H. GREITENS
GOVERNOR



GOVERNOR OF MISSOURI
JEFFERSON CITY
65102

P.O. Box 720
(573) 751-3822

June 19, 2017

“Missouri's classification system for lakes and streams is a **GIS-based hydrographic map data set**, which is incorporated into regulation.”

“We believe our **current approach...is consistent with a Scalia approach...**”

“Missouri anticipates **very little programmatic impact** from this approach.”

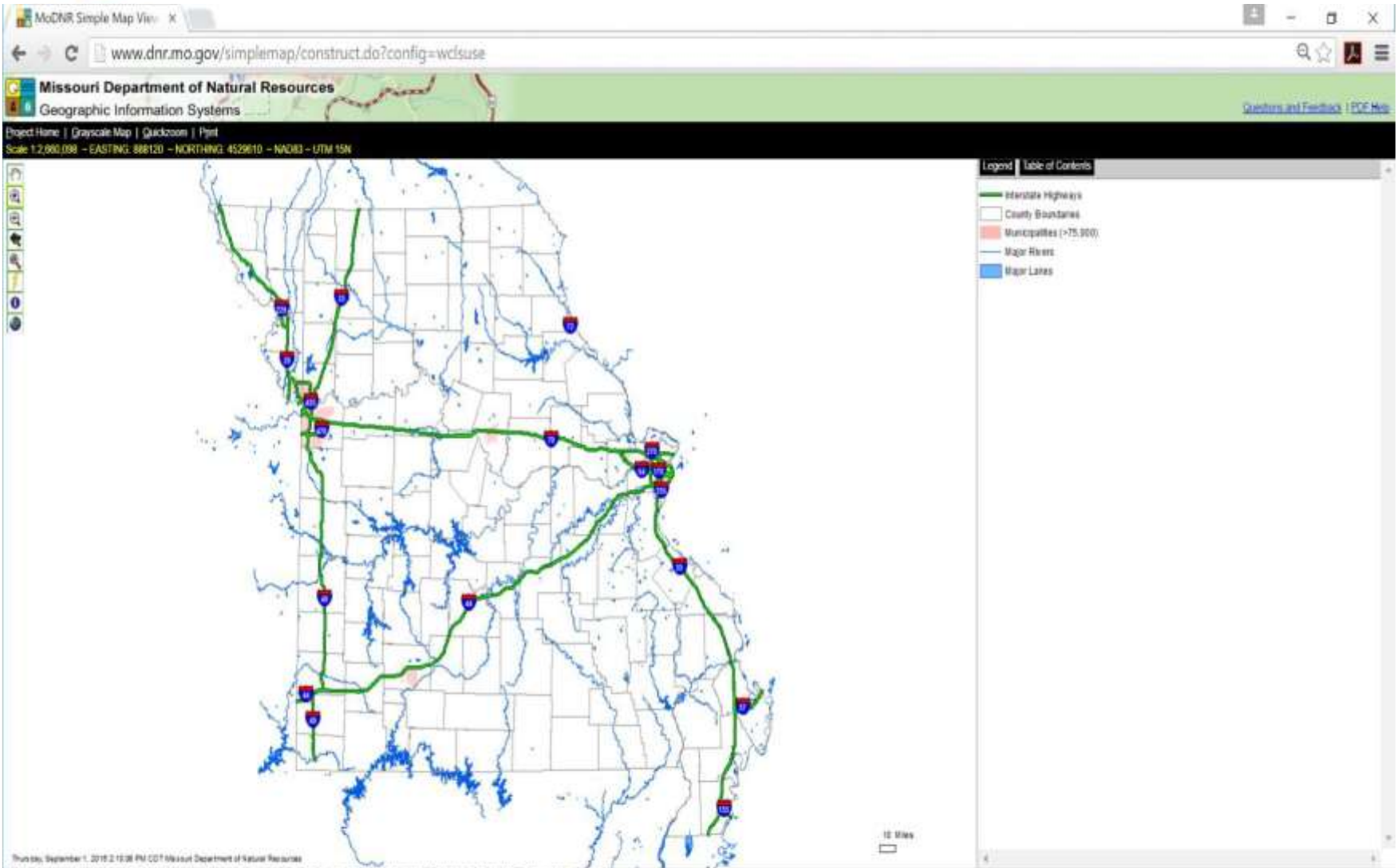
10 CSR 20-7.031

- **Class P:**
 - Streams that maintain permanent flow during drought conditions.
- **Class P1:**
 - Standing water reaches of class P streams.
- **Class C:**
 - Stream that may cease flow in dry periods but maintain permanent pools which support aquatic life.

10 CSR 20-7.031

- **Wetlands**
- **Class W:**
 - Wetlands that are waters of the state that meet the criteria in the *Corps of Engineers Wetlands Delineation Manual* (January 1987), and subsequent federal revisions. **Class W waters does not include wetlands that are artificially created on dry land and maintained for the treatment of mine drainage, stormwater control, drainage associated with road construction, or industrial, municipal or agricultural waste.**

MUDD

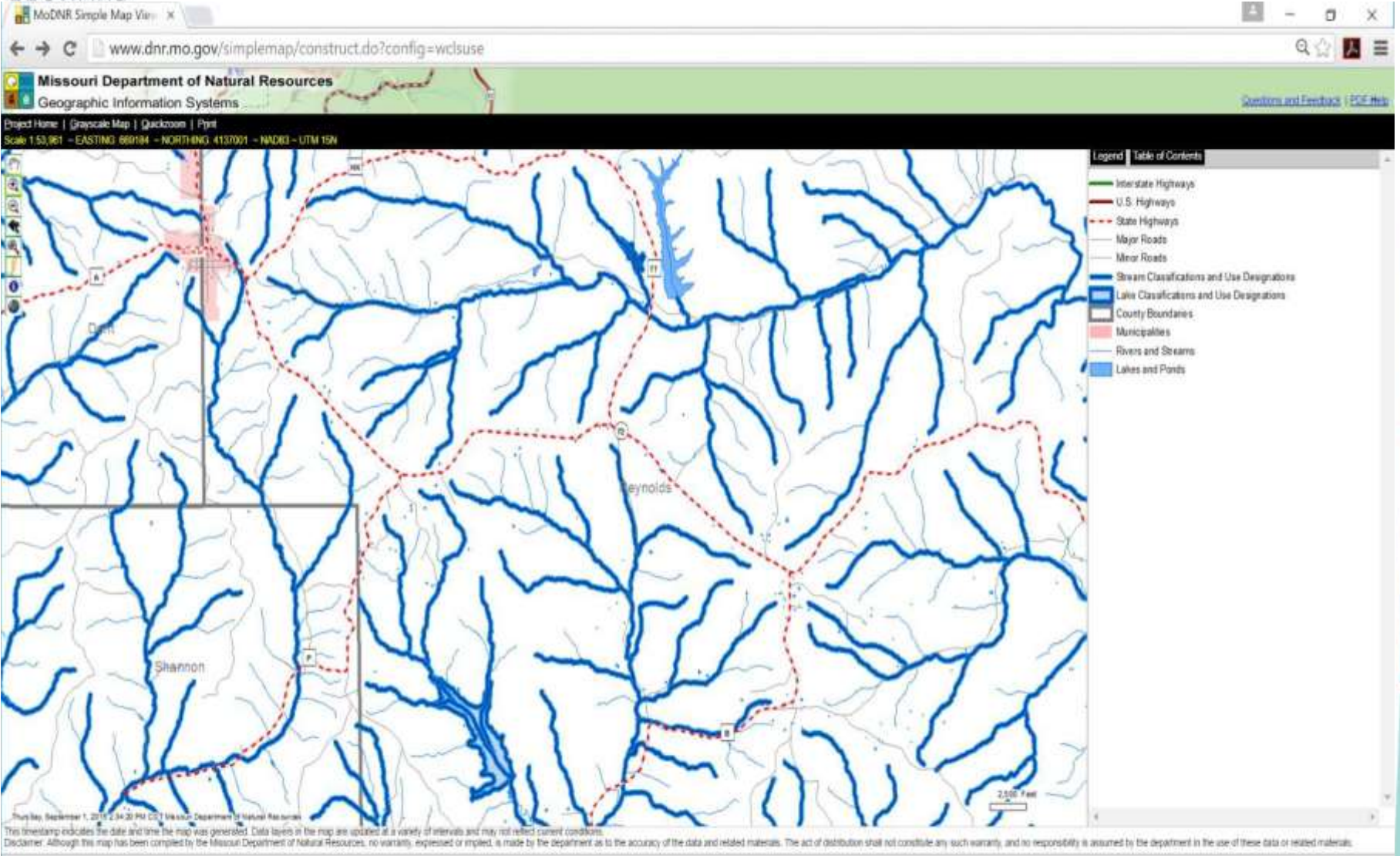


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“The reach of the Clean Water Act is notoriously unclear.”

- Justice Samuel Alito (*Sackett v. Environmental Protection Agency*, 2012)

Questions?



Aimee Davenport

Stinson Leonard Street LLP

(573) 556-3606

Aimee.Davenport@stinson.com



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