



CLEAN WATER ACT

404 Permits, WOTUS, & 401 State Certification
ELI SUMMER CAMP June 18, 2019

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Overview

1. 404 Permits Under the CWA

2. Jurisdictional Waters:

What does “waters of the United States”
mean? 2008, 2015, and 2019 WOTUS

3. CWA State Water Quality Certifications
Under Section 401



CWA SECTION 404 PERMITS

Individual Permits

Mitigation

Nationwide Permits

Clean Water Act Permits

- Section 402 National Pollutant Discharge Elimination System (NPDES)
 - Issued by EPA or authorized state government (46 states authorized)
- Section 404 Dredge and Fill
 - Issued by Army Corps of Engineers or authorized state government (NJ & MI authorized)

Clean Water Act Section 404 Permits

- Army Corps of Engineers issues permits for discharge of dredged or fill material into waters of the United States
- Corps makes jurisdictional determinations: Is it a WOTUS?
- Individual and Nationwide permits available
- EPA has authority to review and object to 404 permits (see § 404(c)).



Corps Regulatory Program

- Primary permitting authorities:
 - Section 404 of the Clean Water Act
 - Discharges of dredged or fill material into jurisdictional waters and wetlands
 - Example – fills to convert waters and wetlands to dry land
 - Section 10 of the Rivers and Harbors Act of 1899
 - Structures or work in navigable waters of the United States
 - Examples – piers, dredging, aids to navigation

Compensatory Mitigation

- Restoration, enhancement, establishment, and/or preservation of aquatic resources to offset permitted losses of jurisdictional waters and wetlands
 - Gains in aquatic resources to offset losses of aquatic resources caused by permitted activities
 - Gains – “credits”
 - Losses – “impacts” or “debits”
 - Supports national “**no overall net loss**” goal for wetlands

Compensatory Mitigation Sources

Mitigation banks

- Bank sponsor does compensatory mitigation project
- Sells compensatory mitigation credits to permittees
- Commercial bank or single client bank
- Responsibility transferred to bank sponsor

Mitigation Bank



Wetland Impacted by
Development

Mitigation credit required

Developer receives credit

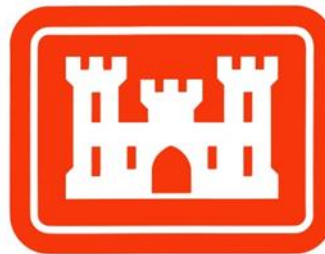


Developer pays for credit



Mitigation Bank
Constructed

Mitigation credit released



**U.S. Army Corps
of Engineers®**

Regulatory Agency

Compensatory Mitigation Sources

- In-lieu fee programs
 - Limited to government or non-profit natural resource management entities
 - Collects fees from permittees to do larger compensatory mitigation projects (in-lieu fee projects)
 - Responsibility transferred to in-lieu fee program sponsor

Compensatory Mitigation Sources

- Permittee-responsible mitigation
 - Permittee or contractor does compensatory mitigation project
 - Permittee retains responsibility

Mitigation Banking

- Process governs creation and release of credits
 - Approved instrument signed by Corps and sponsor
 - Public review process
 - Corps has authority to make decision and Corps approval required to release credits
 - Ledgers for credit transactions
 - Penalties for poor performance

Nationwide Permits (NWP)

- Nationwide Permits are issued for categories of work, and when issued, an individual permit is not required
- 54 NWPs
- Minimally impacting activities (generally less than 0.5 acres of fill)
- Pre-Construction Notification (PCN) requirements
- Good for 5 years from issuance—last issued 2017

JURISDICTIONAL WATERS: “WATERS OF THE UNITED STATES”

Pre-2015 Law

2015 Rule

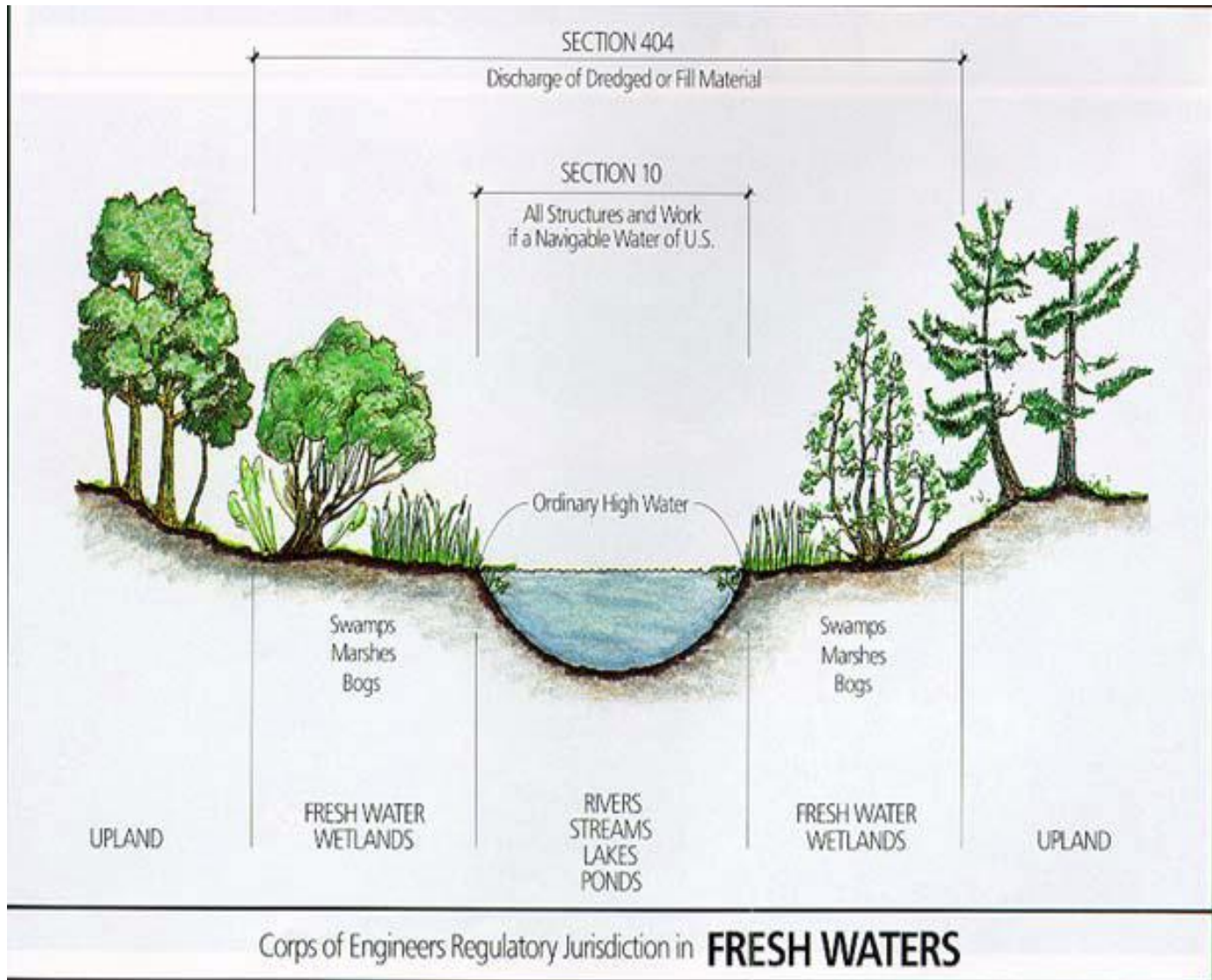
2019 Proposed Rule

2008 “Waters of the United States”

40 CFR 122.2

- All waters currently used, that were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters subject to ebb and flow of tide;
- All interstate waters;
- All other waters that could affect interstate or foreign commerce;
- All impoundments of waters of the US;
- Tributaries of the above four categories;
- The territorial sea; and
- Wetlands adjacent to waters identified above.

Waters of the US



Waters of the United States

40 CFR 122.2

- Regulatory definition has been interpreted to cover many types of surface waters including:
 - Rivers and streams
 - Lakes and ponds
 - Wetlands
 - Sloughs
 - Prairie potholes
 - Intermittent streams
 - Territorial sea



Clean Water Rule

- On May 27, 2015, EPA and Corps issued a final rule to clarify the “waters of the United States” (WOTUS) subject to regulation under the CWA
 - Discharges to WOTUS require CWA permits
 - WOTUS must meet Water Quality Standards
 - Citizens may sue to enforce the CWA when WOTUS are affected

1972 Clean Water Act – Cooperative Federalism

- “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 be achieved . . .” § 101(a)(2)

U.S. Supreme Court Cases on "Significant Nexus"

Riverside Bayview (1985)

Wetlands actually abutting navigable waters are jurisdictional

SWANCC (2001)

“Migratory Bird Rule” invalidated: CWA intended connection to navigability; so-called “isolated waters” rarely found jurisdictional. “Migratory bird” connection to interstate commerce insufficient.

Waters of the U.S.

Rapanos (2006) Wetlands adjacent to non-navigable tributaries of navigable waters:

Scalia/Plurality: Water is jurisdictional if relatively permanent, or if seasonal river, or if wetlands have surface connections to such waters

Kennedy: A “significant nexus” to navigable waters required for water/wetland to be jurisdictional.



2015 Clean Water Rule

- 5/27/15, EPA & Corps finalize rule to clarify definition of “waters of the United States” (WOTUS) subject to regulation under the Clean Water Act
 - *Discharges to WOTUS require CWA permits*
 - *WOTUS must meet Water Quality Standards*
 - *Citizens may sue to enforce the CWA*

37054

Federal Register/Vol. 80, No. 124/Monday, June 29, 2015

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

[EPA-HQ-OW-2011-0880; FRL-9927-20-OW]

RIN 2040-AF30

Clean Water Rule: Definition of “Waters of the United States”

AGENCY: U.S. Army Corps of Engineers, Department of the Army, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Final rule.

requirements. Instead, it is a definitional rule that clarifies the scope of “waters of the United States” consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. Programs established by the CWA, such as the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and response programs, all rely on the definition of “waters of the United States.” Entities currently are, and will continue to be, regulated under these programs that protect “waters of the United States” from pollution and destruction.

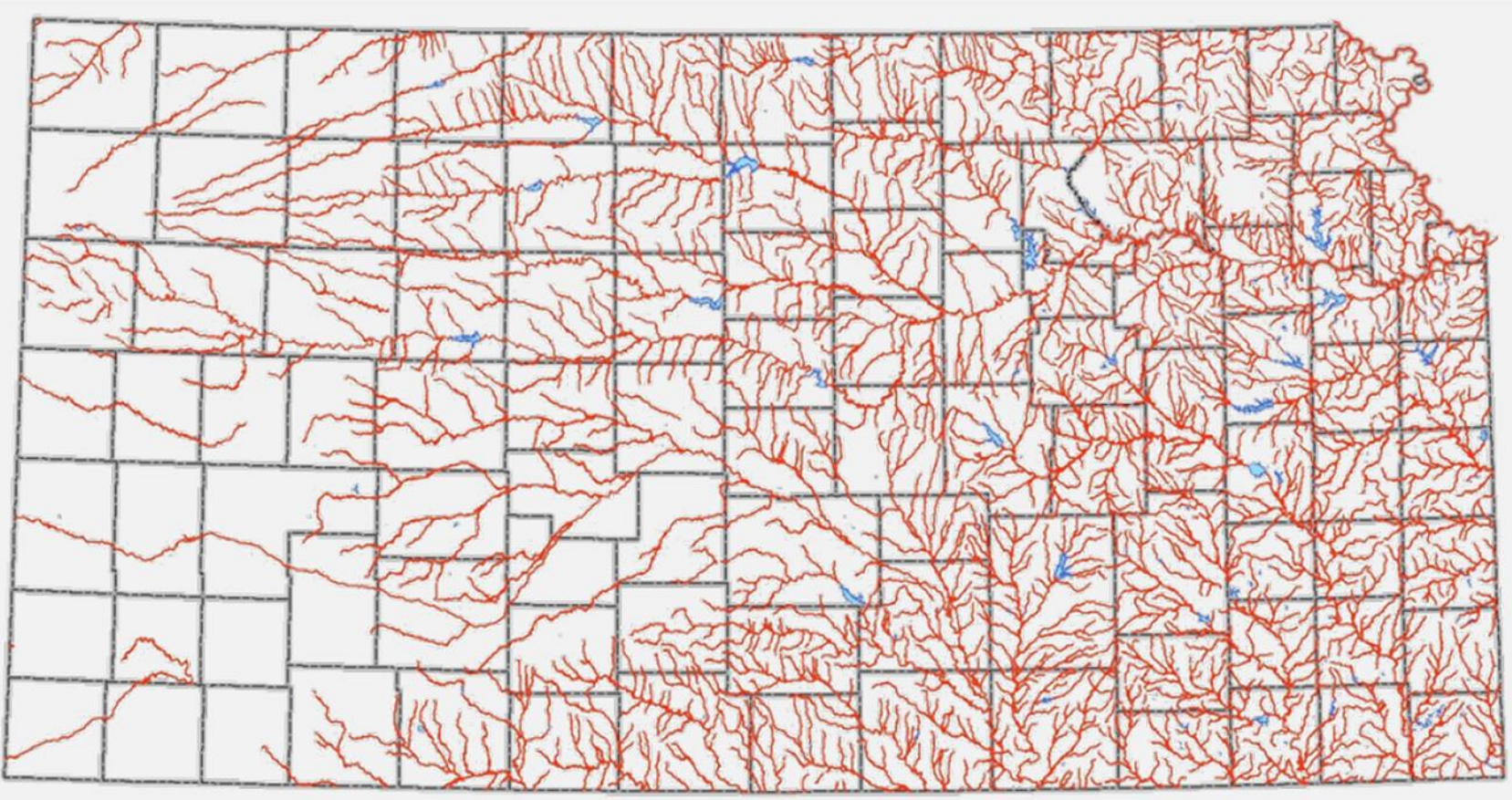
State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states

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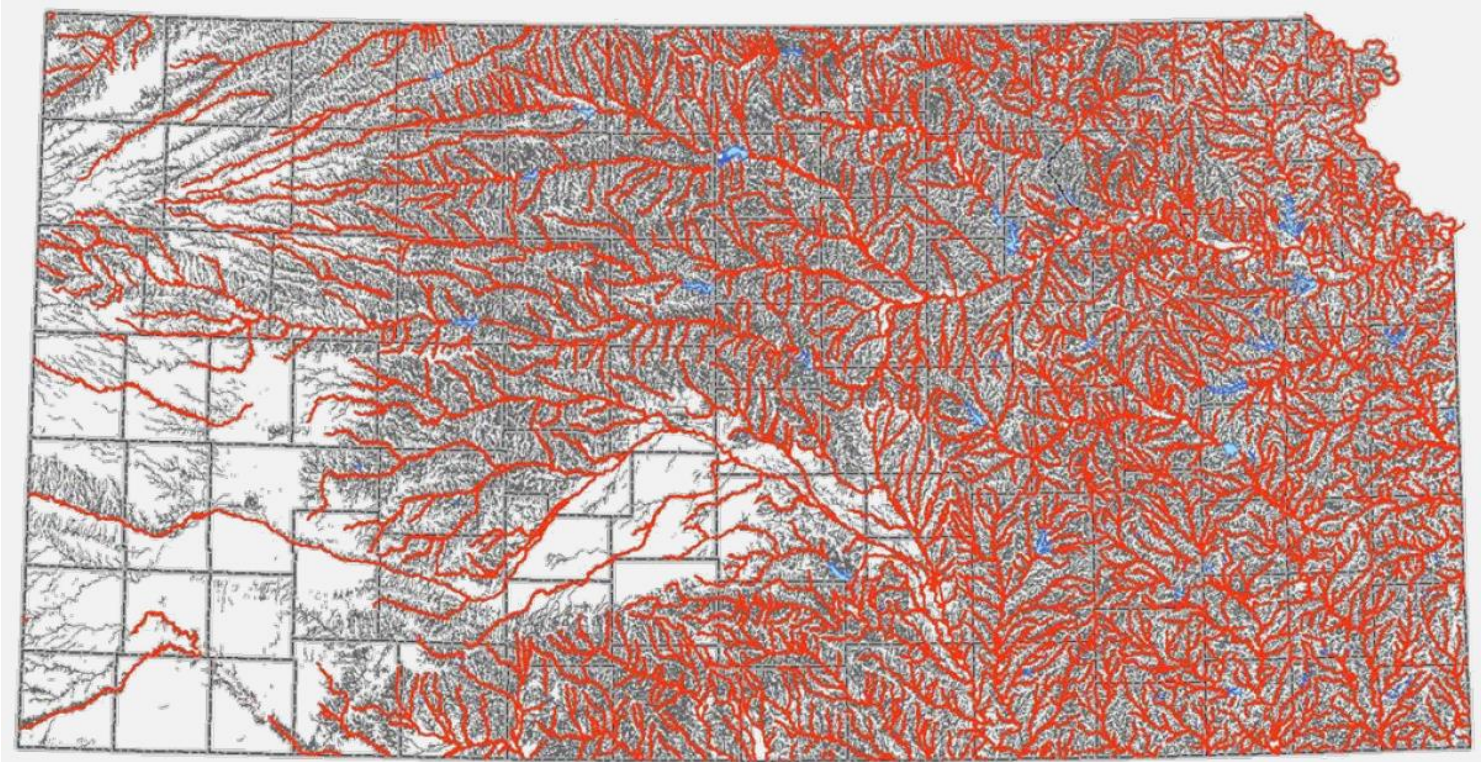
The 2015 Rule's Definition of WOTUS

1. Traditional navigable waters
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))?
- October 9, 2015: Sixth Circuit Court of Appeals issued a nationwide stay of the Clean Water Rule's implementation



Following the Stay

- 9/2/2016: National Assn. of Manufacturers petitions for writ of certiorari to the Supreme Court challenging Sixth Circuit jurisdiction
- 1/22/2018 U.S. Supreme Court rules jurisdiction resolved in federal district courts, not courts of appeals



“Presidential Executive Order (13788) 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*.
- Supreme Court denied a motion from the Administration to delay the case on court jurisdiction in light of the Executive Order.

2017 Proposed 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
- Challenged in ongoing litigation

Two-Step Process: July 27, 2017

Proposed “Suspension 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” (vacated nationwide; the Agencies ultimately dismissed their appeals)
- The second step: a rulemaking “in which the agencies will conduct a substantive re-evaluation of the definition of WOTUS” (this is the 2019 proposed rule)

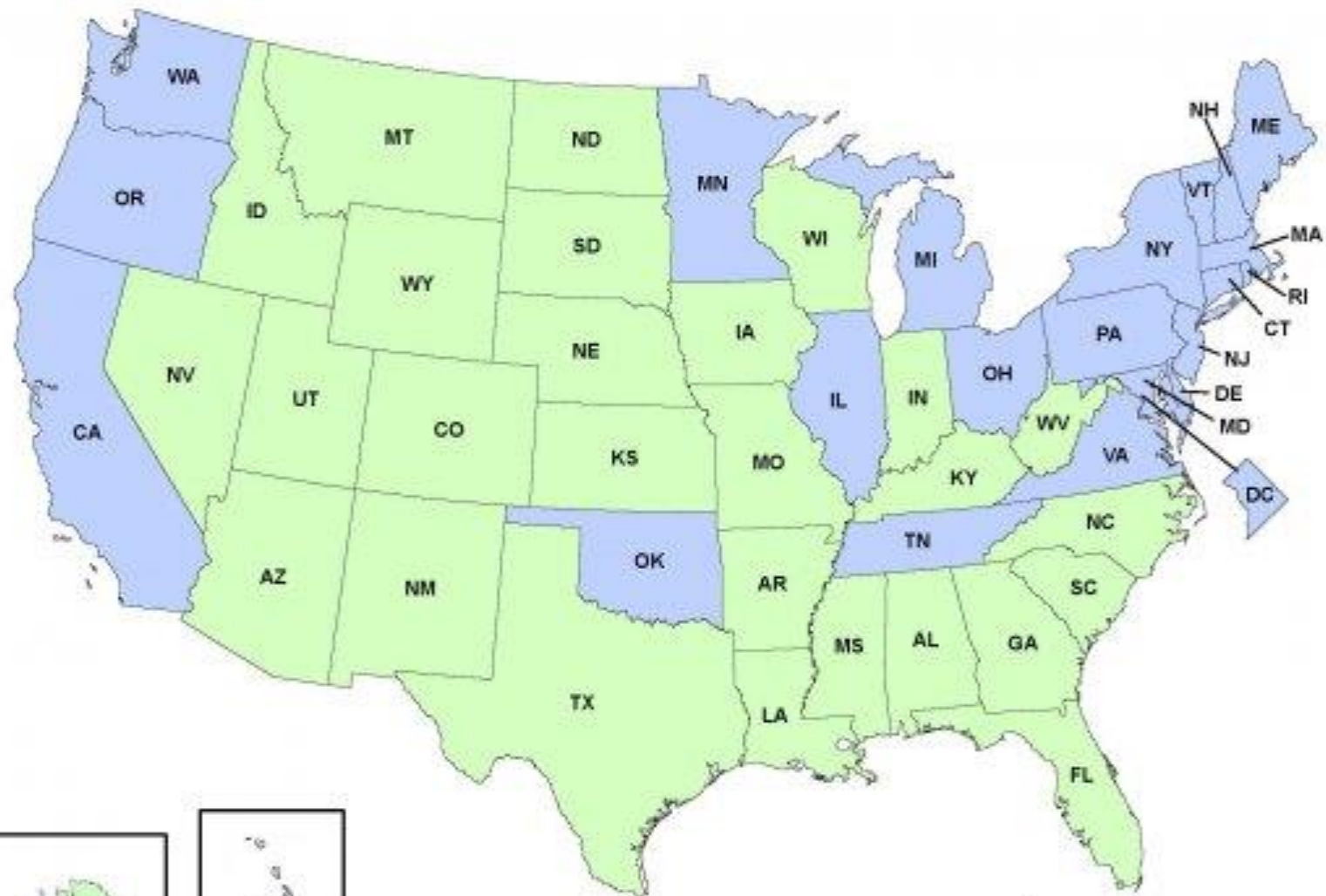
Current WOTUS Regulation

The pre-2015 law currently applies in 22 states:

CA, CT, DE, HI, IL, IA, LA, MD, ME, MI, MS, NH, NJ, NY, OH, OK, OR, PA, RI, TN, TX, VT, VA, WA

The 2015 Rule, still under litigation, currently applies in 28 states:

AL, AK, AZ, CO, FL, GA, ID, IN, KS, KY, MD, MA, MN, MO, MT, NV, NM, NC, ND, SC, SD, UT, WV, WI, WY



Applicable Definition

■ 2015 Clean Water Rule*

■ Pre-2015 Regulations and Guidance

* Also applicable in the U.S. territories

The EPA is providing this map for informational purposes only, and it cannot be relied on for specific determinations or other legal purposes. As the litigation continues, the EPA will update the map, when possible, to reflect the most current information that is made available to the EPA and the Army. For specific requests, please contact the Army Corps of Engineers or EPA. This map was updated on September 18, 2018.



2019 Proposed WOTUS Rule

- Feb. 14, 2019, EPA and the Corps issued a Proposed Rule redefining WOTUS
- Comment period closed on Apr. 15, 2019
- 500,000 comments received and now being reviewed by EPA

Definition of WOTUS 2019

Proposed Rule

1. Waters that are or were or may be susceptible to use in interstate or foreign commerce, including territorial seas and those subject to ebb and flow of the tides
2. Tributaries of #1 waters
3. Ditches that qualify under #1, or are constructed in a tributary, or relocate or alter a tributary, or are constructed in an adjacent wetland, so long as the ditches come within the definition of a tributary
4. Lakes and ponds that qualify under # 1, or contribute perennial or intermittent flow to a #1 water in a typical year, or that are flooded by a #1-5 water in a typical year
5. Impoundments of #1-4 and 6 waters
6. Adjacent wetlands to #1-5 waters

EXCLUDED FROM WOTUS 2019

1. Waters or water features not identified in #1-6 waters definition
2. Groundwater
3. Ephemeral features and diffuse stormwater runoff
4. Ditches not identified in # 3 waters definition
5. Prior converted cropland
6. Artificially irrigated areas that would revert to upland should irrigation water cease
7. Artificial lakes and ponds constructed in upland and not within #4 or 5 waters
8. Water-filled depressions in upland incidental to mining or construction, and pits excavated to obtain Fill, sand, or gravel
9. Stormwater control features constructed in upland to treat run-off
10. Wastewater recycling structures constructed in upland
11. Waste treatment systems

Provisions of the 2019 Rule

- Preamble emphasizes the importance of the states' autonomy to regulate their waters, and the need for regulatory clarity
- Emphasizes Justice Scalia's plurality opinion in *Rapanos and* "direct hydrological connection"
- Tributaries must convey perennial or intermittent flow downstream to a traditional navigable water, where "perennial" means surface water flowing continuously year-round during a typical year, and "intermittent" means surface water flowing continuously during certain times of a typical year -- not merely in direct response to precipitation.
- Wetlands must abut or have a direct hydrological surface connection to other WOTUS in a typical year to be jurisdictional

CWA 401 State Certification

New Guidance

Emphasis on Deadlines

CWA 401 State Certification

Under Section 401 of the CWA, a federal agency may not issue a permit or license to conduct any activity that may result in any discharge to WOTUS unless the state (or authorized tribe) issues a water quality certification verifying compliance with existing WQ requirements or waives it.

Applies to 402 and 404 permits in non-delegated states, FERC hydropower licenses, and navigable dredging permits

401: New Guidance

- June 7, 2019
- Response to EO 13868, “Promoting Energy Infrastructure and Economic Growth” 4/10/19
- Goal: “Modernize previous guidance and clarify existing requirements”
- Statutory and regulatory timelines for review
- Appropriate scope of certification conditions
- Implementing regs due out Aug. 8, 2019

Questions?

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