

What's next for “Waters of the United States” and the Clean Water Act?

Presented by:



Welcome

- **Matthew Chase**
- CEO/Executive Director
- National Association of Counties



Webinar Agenda



RULES OF
ENGAGEMENT



ABOUT THE STATE
AND LOCAL LEGAL
CENTER



OVERVIEW OF THE
PROPOSED "WATERS
OF THE U.S." RULE



QUESTIONS &
ANSWERS



CLOSING REMARKS

Rules of Engagement



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About the State and Local Legal Center

- Since 1983, the SLLC has filed over 350 briefs in support of States and local governments
- This term, the SLLC will file 14 Supreme Court amicus briefs
- The SLLC is a resource for Big Seven members on legal issues – this webinar is an example!



About the Speaker

- **Samuel Brown**

Partner

Hunton Andrews Kurth

(415) 975-3714

slbrown@hunton.com



The Federal Clean Water Act

- Keystone provisions of the CWA:
 - §301(a) – “the discharge of any pollutant by any person shall be unlawful,” except via a permit
 - §502(12) – “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source”
 - §502(7) – “navigable waters” means the **waters of the United States**”

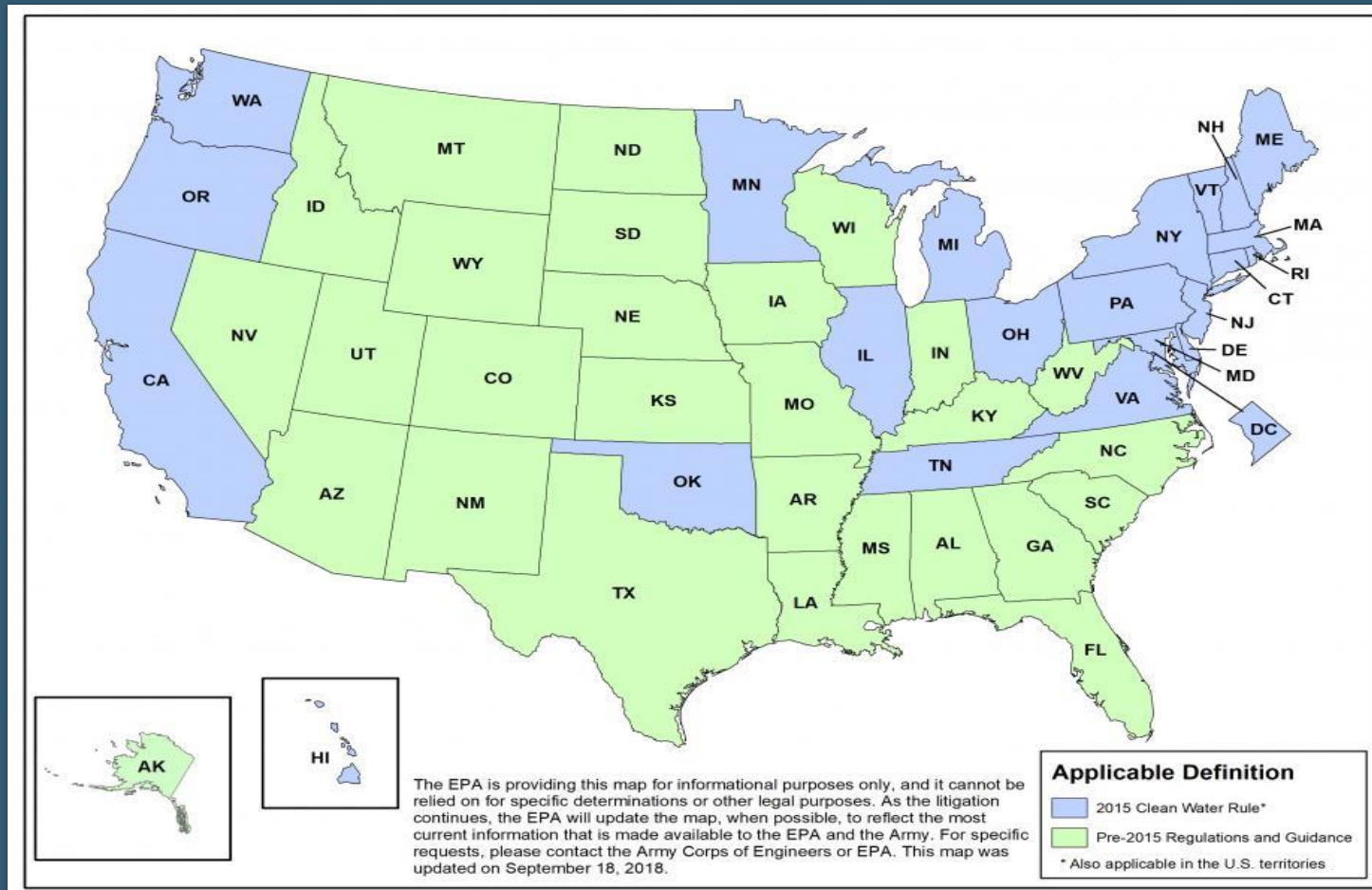
U.S. EPA and U.S. Army Corps Implementation- How Did We Get Here?

- 1980s Regulations Defining the Meaning of “WOTUS”
- U.S. Supreme Court Decisions:
 - *Riverside* (1985) (abutting wetlands)
 - *SWANNC* (2001) (isolated wetlands)
 - *Rapanos* (2006) (adjacent wetlands to tributary) – 4-1-4 decision
 - Plurality – relatively permanent flow & surface connection
 - J. Kennedy – significant nexus
- 2008 EPA and Corps Guidance re: *Rapanos*
- 2015 Rulemaking

Litigation on 2015 Regulation

- Multiple challenges in District Courts and Courts of Appeal
- What federal court should review the regulation (*i.e.*, District Courts or Court of Appeals)?
 - Sixth Circuit (nationwide stay of 2015 rule pending review) (+ D.Ct. state-specific stays)
 - Sixth Circuit (held proper venue is for substantive review is in Court of Appeals)
 - SCOTUS review, *Nat'l Ass'n of Manufacturers* (2018) (9-0)
- EPA and Corps anticipated a loss at SCOTUS on question of subject matter jurisdiction, which would mean Sixth Circuit has no jurisdiction to review 2015 rule, which means no nationwide stay.
 - Applicability Rule (*i.e.*, 2 year delay of effectiveness of 2015 rule)
 - District court litigation – eNGO successful challenges.

What Definition of WOTUS is Currently Applicable?



Trump Administration Rulemaking

- “Phase I” – Rescind the 2015 Rule
 - 2017 Proposal
 - Finalization TBD in 2019
- “Phase II” – Replace the 2015 Rule with New Definition
 - Dec. 2018 Proposal
 - Comment period not yet begun (federal government shutdown)
 - Goal: finalize in 2019

Phase II Proposal – A New Definition

Six Categories of WOTUS
Traditional Navigable Waters (TNWs) (a)(1)
Tributaries (a)(2)
Ditches (a)(3)
Lakes and ponds (a)(4)
Impoundments (a)(5)
Adjacent wetlands (a)(6)

Phase II Proposal – Comparison

2015 Rule	Phase II Proposal
Traditional Navigable Waters (TNWs)	Traditional Navigable Waters (TNWs)
Interstate waters	
Territorial seas	
Impoundments	Impoundments
Tributaries	Tributaries
	Ditches
Adjacent <u>waters</u>	Adjacent <u>wetlands</u>
Waters with significant nexus (case-by-case & specific)	
100-year floodplain or OHWM	
	Lakes and Ponds

Phase II Proposal – Exclusions

- Features not identified as WOTUS in (a)
- Groundwater
- Ephemeral features and diffuse stormwater runoff
- Ditches (not identified in (a)(3))
- Prior converted cropland
- Artificially irrigated areas
- Artificial lakes and ponds
- Water filled depressions created in upland incidental to mining or construction
- Stormwater control features excavated or constructed in uplands to convey, treat, infiltrate or store stormwater run-off
- Wastewater recycling structures constructed in uplands
- Waste treatment systems

WOTUS Under Proposed Phase II?



WOTUS Under Proposed Phase II?



QUESTIONS & ANSWERS



Thank You for
Attending!

Lisa Soronen

Executive Director
State and Local Legal Center
202.434.4845
lsoronen@sso.org

Julie Ufner

Associate Legislative Director
National Association of Counties
202.942.4269
jufner@naco.org

