



2015 Clean Water Rule in Illinois: A Never Ending Saga



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A BRIEF REGULATORY HISTORY

- 1986/1988 Waters of the US (WOTUS) Regulations
- U.S. Supreme Court Decisions
 - SWANCC, 2002 (Migratory Birds & Isolated Wetlands)
 - Rapanos, 2006
- USEPA/USACE Rapanos Guidance, December 2008
 - Significant Nexus basis for jurisdiction over tributaries and wetlands adjacent to tributaries
- Obama Clean Water Rule
 - Proposed April 2014
 - Comment Period until November 2014
 - Final Rule issued, June 2015



2015 OBAMA CLEAN WATER RULE

- Became Effective August 28, 2015
- Purpose was to redefine the scope of “waters of the United States” (WOTUS) including wetlands regulated by the USACE
- Is a Definitional Rule
- Does not change activities regulated in WOTUS, including wetlands, only where the activities are regulated
- Defined 8 categories of WOTUS
- More specifically defined non-jurisdictional waters/wetlands



LEGAL CHALLENGES

- On August 27, 2015, the US District Court for the District of North Dakota, granted a preliminary injunction that stopped the rule from becoming effective in the in the 13 states, excluding Illinois.
- On October 9, 2015, the US Court of Appeals for the Sixth District (KY, MI, OH, TN) blocked the new rule from going into effect nationwide, to “temporarily silence the whirlwind of confusion that springs from uncertainty.”
- In effect in Illinois for 49 days.



ONGOING LEGAL CHALLENGES

- U. S. District Courts: 18 cases filed
- U. S. Circuit Courts of Appeals: 22 petitions for review filed
- Legal Claims:
 - Procedural rulemaking violations
 - Clean Water Act statutory violations
 - Constitutional violations
 - National Environmental Policy Act violation
- January 2018 Supreme Court decision
 - All WOTUS challenges must be held in District Courts
 - October 2015 national stay lifted.



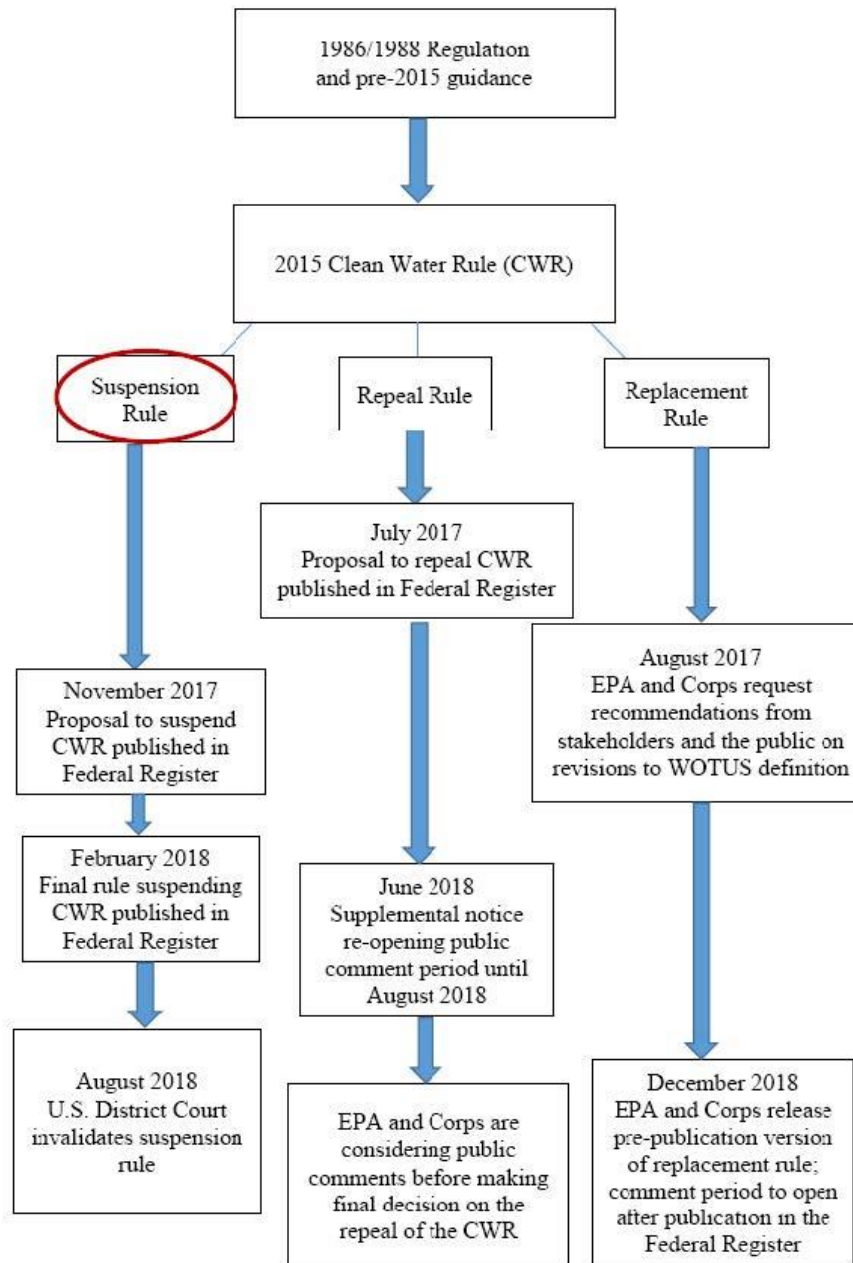
MEANWHILE...



TRUMP EXECUTIVE ORDER

- Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, February 2017
- Three administrative actions:
 - Repeal Rule, pending
 - Suspension Rule, February 2018
 - Replacement Rule, Published February 14, 2019

Status of Trump administrative actions affecting the Clean Water Rule



EPA and the Army Finalize Rule Adding an Applicability Date to the 2015 Rule

The Environmental Protection Agency and U.S. Department of the Army finalized a rule adding an applicability date to the 2015 Rule defining “waters of the United States.” The 2015 Rule will not be applicable until February 6, 2020. [Read the Final Rule.](#)

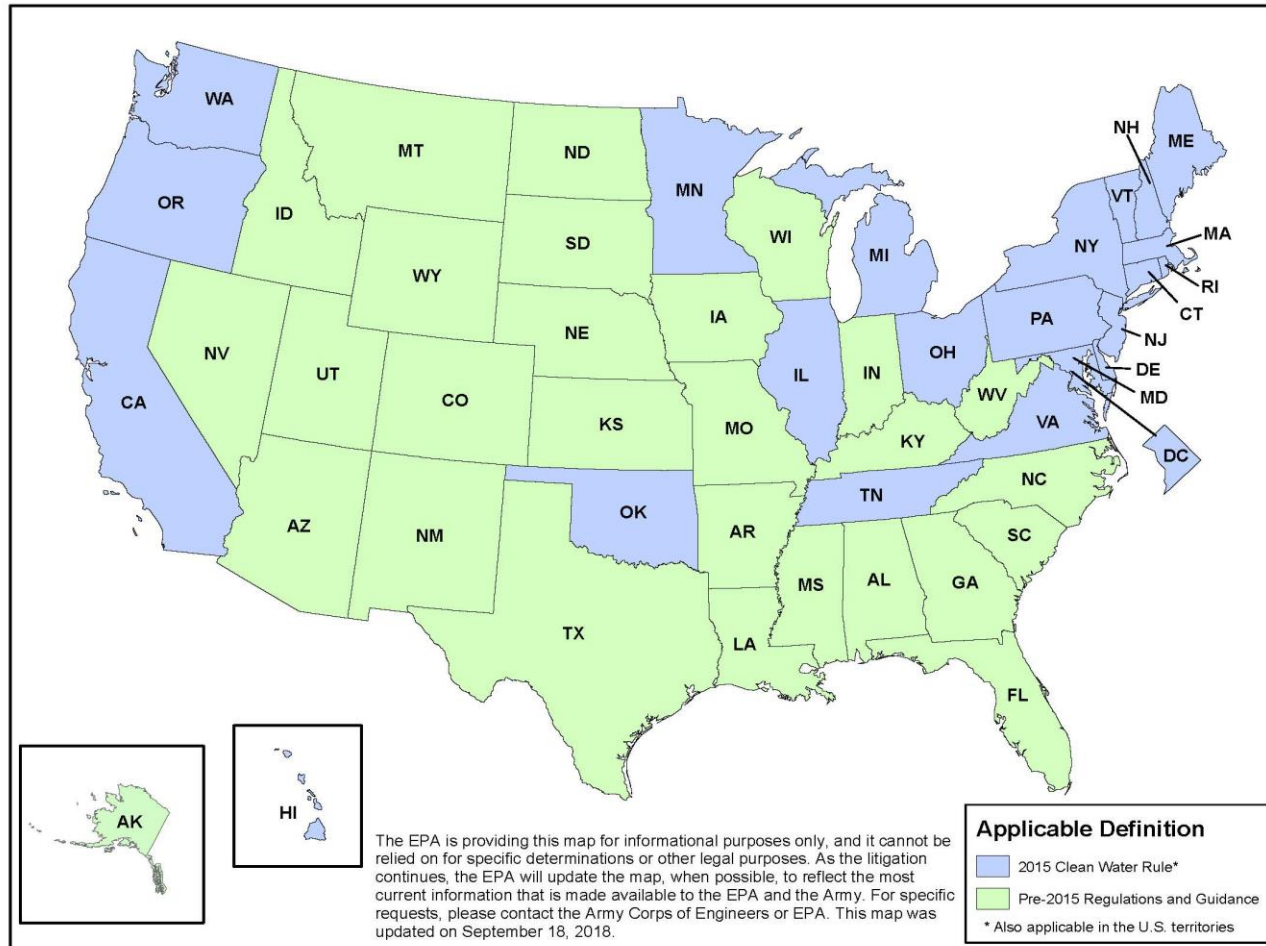
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TRUMP ADMINISTRATION
SUSPENSION RULE

August 16, 2018: Suspension Rule Enjoined By U.S. District Court of South Carolina, Lawsuit filed by Southern Environmental Law Center





SUMMARY OF 2015 OBAMA CLEAN
WATER RULE:
EIGHT WOTUS CATEGORIES



1. TRADITIONAL NAVIGABLE WATERS (TNW)

- Lake Michigan
- Fox River
- Des Plaines River
- Calumet River
- Chicago River (including most tributaries)
- Kankakee River
- Little Calumet River
- Trail Creek (Michigan City, IN)



2. ALL INTERSTATE WATERS & INTERSTATE WETLANDS

- Waters and Wetlands which cross state lines

3. THE TERRITORIAL SEAS

- (Not Applicable to Midwest)

4. IMPOUNDMENTS OF WATERS OF THE US



5. ALL TRIBUTARIES (MORE PRECISELY DEFINED)

- Physical indicators of flow
- Bed & Bank
- Ordinary High Water Mark (OHWM)
- Contributes flow to TNW, Interstate Waters
- Can be Natural, Modified or Constructed
- Ditches are jurisdictional if they meet the definition of a tributary:
 - Ditches with perennial flow
 - If intermittent flow, need to be a relocated tributary, excavated in a tributary, or drain a wetland
 - If excavated in or relocated a tributary, flow doesn't matter



6. ADJACENT WATERS/WETLANDS

- Bordering, contiguous or neighboring to a Waters of the US
- **No longer requires a “significant nexus” basis for jurisdiction**
- New Definition of “neighboring”
- Three circumstances under which waters would be “neighboring”
 1. Waters/wetlands located in whole or in part within 100 of OHWM of TNW, interstate waters or a tributary
 2. Waters/wetlands located in whole or in part of the 100-year floodplain AND that are not more than 1500 feet of TNW, interstate water or a tributary (“floodplain waters”)
 3. Waters/wetlands located in whole or in part within 1500 feet of TNW, interstate water or within 1500 feet of the OHWM of the Great Lakes



7. CASE-SPECIFIC WATERS DETERMINED TO HAVE A SIGNIFICANT NEXUS TO JURISDICTIONAL WATERS

- Prairie Potholes, upper Midwest
- Carolina & Delmarva Bays, Atlantic coastal plain
- Pocosins, Central Atlantic coastal plain
- Western Vernal Pools, California
- Texas coastal plain wetlands

Significant nexus = waters or wetlands, either alone or in combination with others in the region, which **significantly** affect the chemical, physical or biological integrity of TNWs, interstate waters or the territorial seas.



8. FLOODPLAIN WATERS/WETLANDS

- a) Waters/wetlands **not considered adjacent**, within the **100-year floodplain of TNW or interstate water**, where on a case-by-case basis have a significant nexus to TNW or interstate water. **Does not include 100-year floodplain of tributaries.**
- b) Waters/wetlands not considered adjacent, within 4,000 feet of high tide line or OHWM of TNW, interstate water, impoundment of waters, or a jurisdictional tributary, where on a case-by case basis have a significant nexus.



NON-JURISDICTIONAL WATERS

1. Waste treatment systems, including treatment ponds or lagoons, designed to meet Clean Water Act requirements
2. Prior converted cropland (drained wetlands now cropped)
3. **Ditches (new qualifiers)**
 - a) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary
 - b) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands
 - c) Ditches that do not flow, either directly or through another jurisdictional water into a TNW or interstate water



NON-JURISDICTIONAL WATERS

4. Geographic Features

- a) Artificially irrigated area that would revert to dry land should the application of water cease
- b) Artificial, constructed lakes or 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
- c) Artificial reflecting pools or swimming pools created in dry land
- d) Small ornamental waters created in dry land



NON-JURISDICTIONAL WATERS

- e. Water-filled depressions created in dry land incidental to mining and construction activity, including pits excavated for obtaining fill, sand or gravel that fill with water
- f. **Erosional features**, including gullies, rills, and other ephemeral features (Are ravines erosional features or tributaries?)
- g. **Puddles**. (Not defined. Preamble discussion: Is an inexact term. Commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rain storm or similar precipitation event.)



NON-JURISDICTIONAL WATERS

5. Groundwater, including groundwater drained through subsurface drainage systems.
6. Stormwater control features constructed to convey, treat or store stormwater created in dry land.
7. Wastewater recycling systems constructed in dry land.



MISCELLANEOUS COMMENTS

- The rule clarifies the definition of “dry land” which was not previously defined
- Dry Land refers to areas of the geographic landscape that are not water features such as streams, rivers, wetlands, ponds and the like.
- The Corps and DuPage County consider “dry land” to include areas of hydric soils which may have once been wetland. (Ditches excavated in hydric soils were jurisdictional.)



WHAT'S NEXT?

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- March 8, 2019: Appeal of August 16, 2018 Suspension Rule Injunction dropped by US Justice Department
 - Obama Rule to remain in effect in 21 states.
 - Proposed Replacement Rule published on February 14, 2019 for 60 day comment period
 - When will Replacement Rule go into effect?
 - Repeal Rule end of March?
 - More legal challenges?
 - **MORE REGULATORY UNCERTAINTY!!**



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QUESTIONS?