

WOTUS: The Legal Landscape



"Zombie WOTUS" Threatens Farmers and Ranchers

6/17/2018 6:47:00 AM / Categories: Popular Posts, General News, Today's Top 5, Livestock, Grains

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NEW DIRTY WATER RULE WOULD TRASH COMMUNITIES' DRINKING WATER

In threat to public health, Trump administration proposes to gut protections for close to two million miles of streams and wetlands

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“
We will make use of the full strength of our nation's bedrock environmental laws to protect families and communities from dangerous attacks like this. We will hold this administration accountable in court as we have from the start.
— Nigel Hill
President, Earthjustice

Royal C. Gardner
Professor of Law and Director
Institute for Biodiversity Law and Policy
Stetson University College of Law

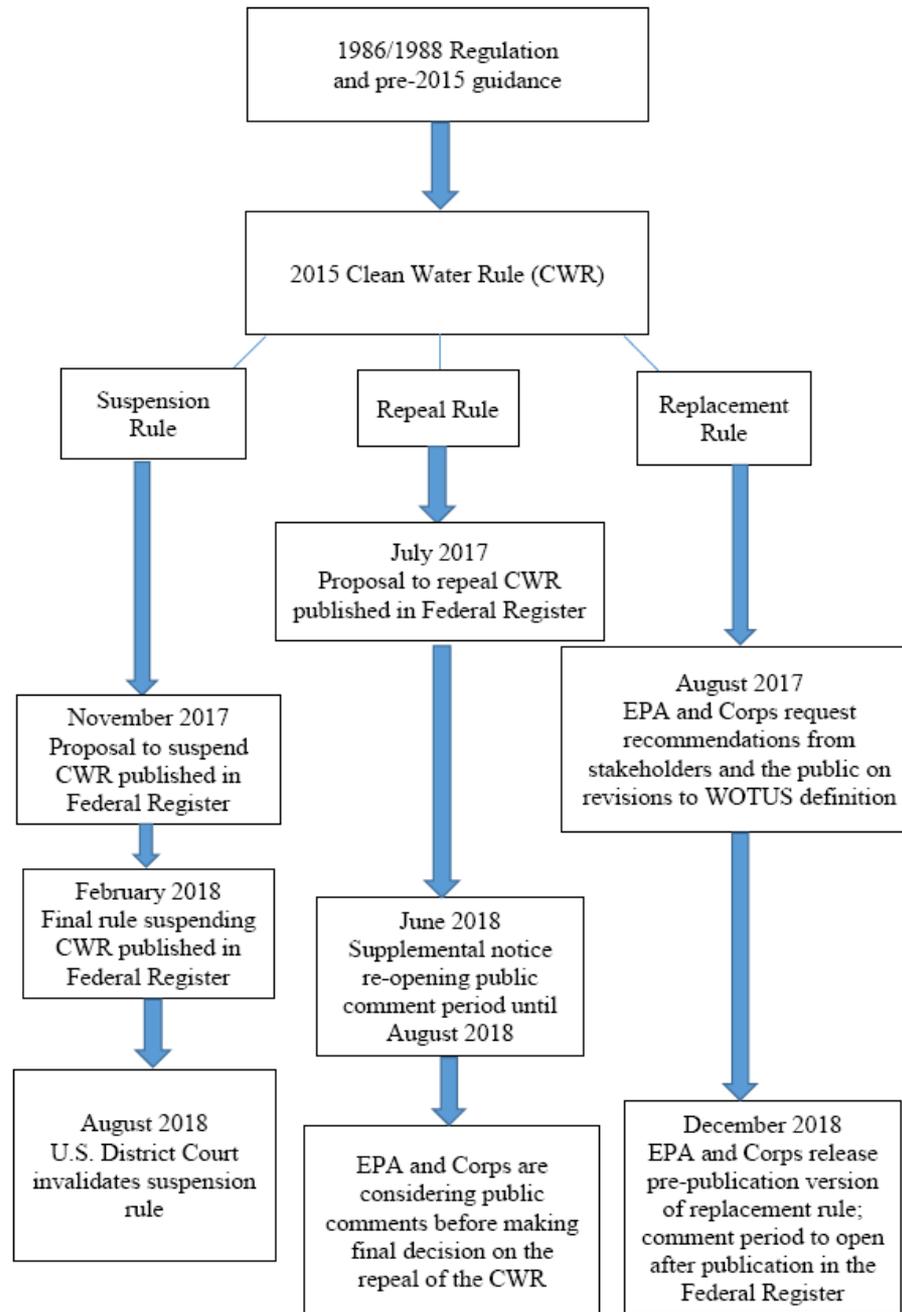


Outline

- WOTUS in SCOTUS
 - *Riverside Bayview, SWANCC, and Rapanos*
- Clean Water Rule
 - Litigation on the rule and the proper judicial forum
- Trump Administration actions
 - Rescind, suspend, and replace
- Next steps and future scenarios

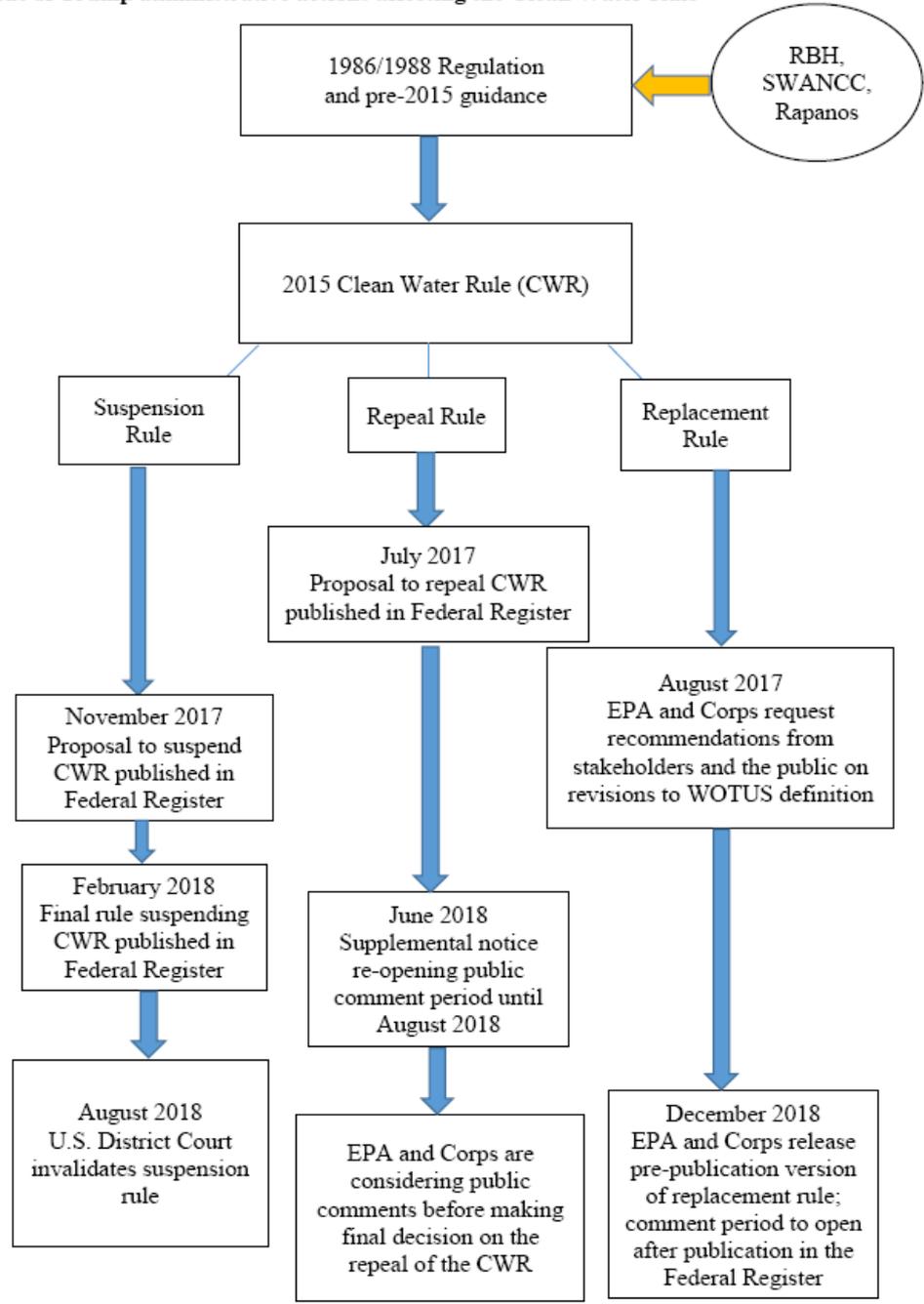


Status of Trump administrative actions affecting the Clean Water Rule



Adapted from Gardner & Okuno (2018)

Status of Trump administrative actions affecting the Clean Water Rule



Riverside Bayview Homes



SWANCC



Rapanos



Isolated waters
5-4



Non-navigable
tributary
4-1-4

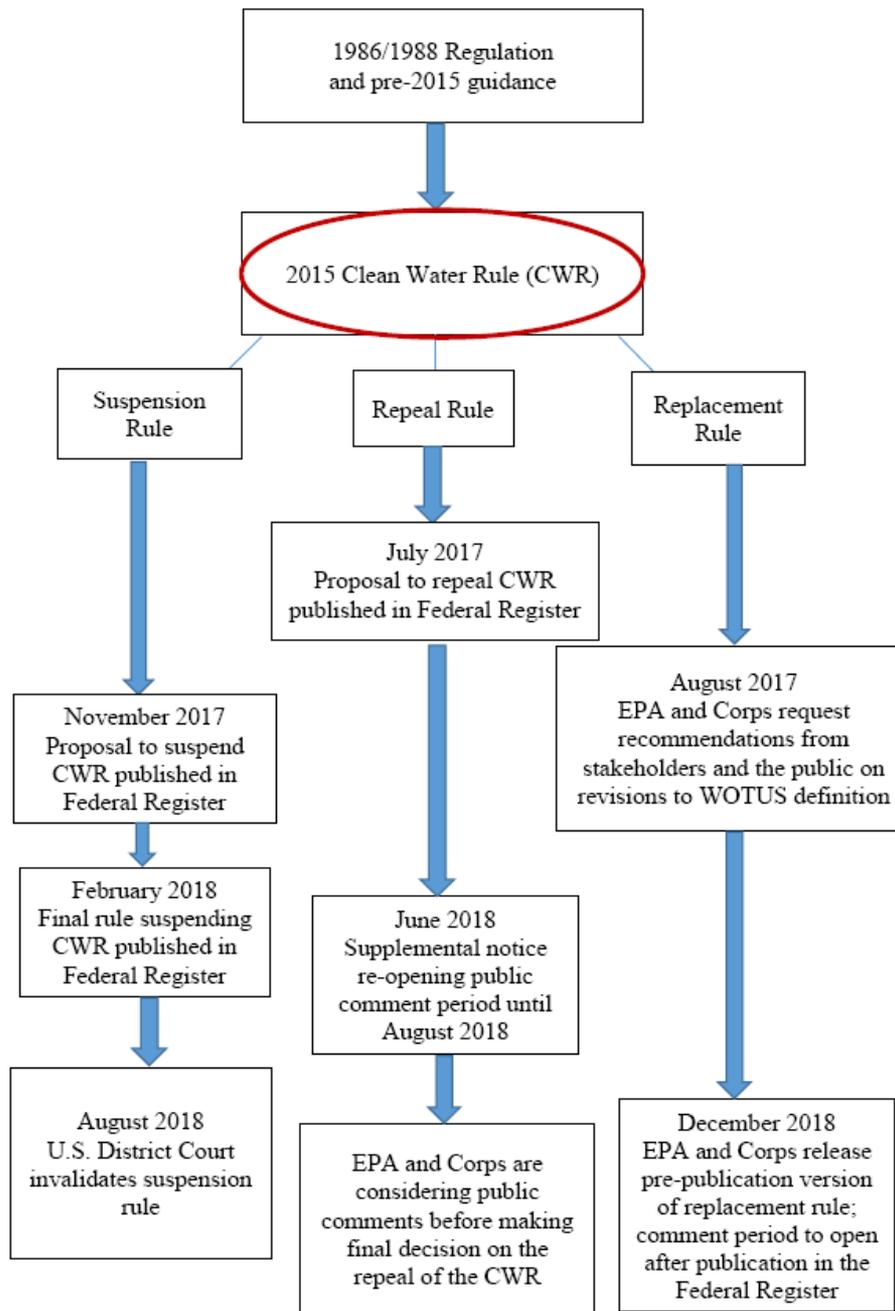
Wetland adjacent to
non-navigable tributary



9-0
Wetland adjacent to
traditional navigable water



Status of Trump administrative actions affecting the Clean Water Rule



Clean Water Rule

- Proposed rule issued in April 2014
- Comment period until November 2014
- Final rule issued in June 2015



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Waters of the United States

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Proposal to Protect Clean Water

Clarifying protection under the Clean Water Act for streams and wetlands that form the foundation of the nation's water resources.

- [Read an op-ed by Administrator McCarthy](#)
- [Learn about the proposal to protect clean water](#)
- [Submit a formal comment \(open until 11/14/14\)](#)
- [Access all documents related to this rulemaking](#)

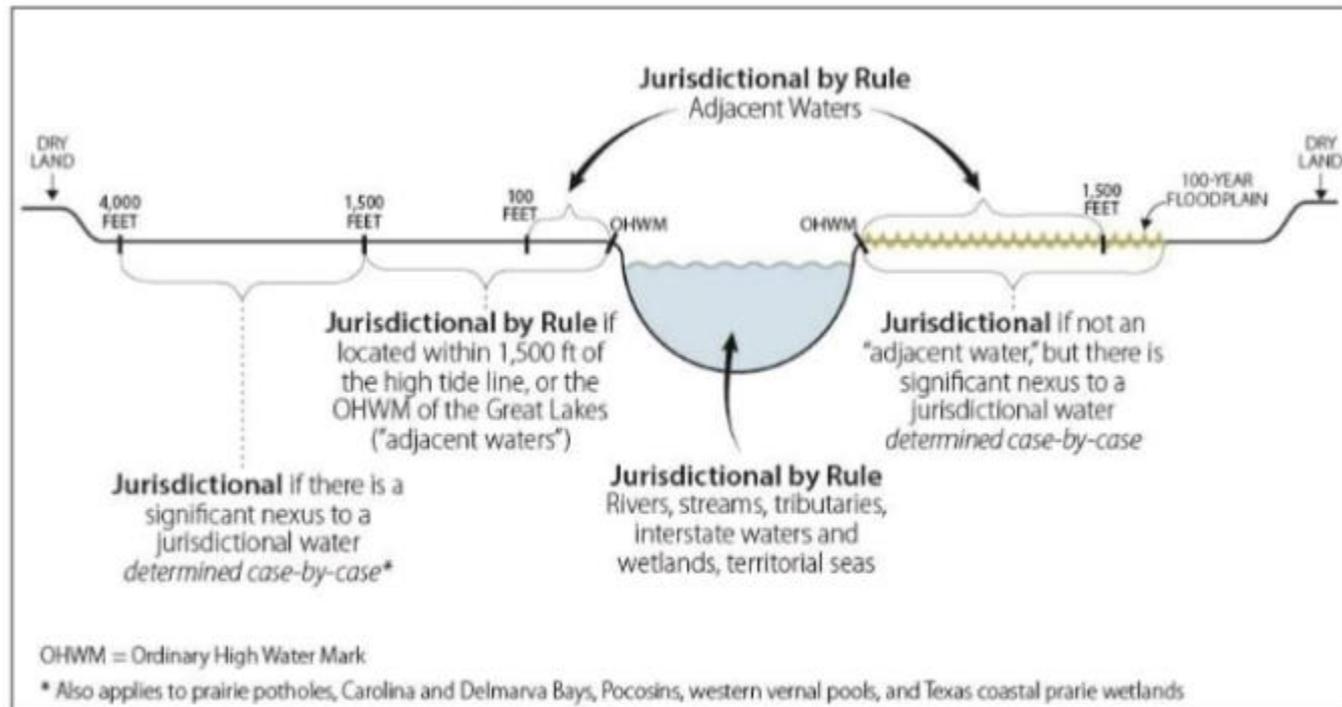
Do You Choose? YouTube



From the Congressional Research Service ...

Figure 1. Jurisdictional Waters under the Final Clean Water Rule

(Not drawn to scale)



Source: Prepared by CRS, from Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Clean Water Rule: Definition of "Waters of the United States," Final Rule," 80 *Federal Register* 37054-37127, June 29, 2015.

Notes: "Jurisdictional by Rule" waters are jurisdictional *per se* without case-specific analysis. Other waters in this figure may be jurisdictional if there is a significant nexus to a jurisdictional downstream water. See text for discussion.

The litigation response ...

- United States District Courts
 - 18 cases filed
- United States Circuit Courts of Appeals
 - 22 petitions for review filed



A multitude of legal claims ...

- Procedural violations associated with the rulemaking process
 - Substantial changes to proposed rule without additional public comment
 - Final rule is not a “logical outgrowth” of the proposed rule
 - Failed to make all information relied upon available to the public
 - Failed to respond appropriately to comments
- Clean Water Act (statutory) violations
 - Exceeds the agencies’ CWA authority
 - Inconsistent with CWA’s plain language
- Constitutional violations
 - Commerce Clause
 - Tenth Amendment
 - Due Process Clause
- Other violations
 - Regulatory Flexibility Act
 - Unfunded Mandates Reform Act
 - National Environmental Policy Act
 - Anti-Lobbying Act
 - Executive Orders

Two-track litigation

US District Court

- August 2015: US District Court for the District of North Dakota issues preliminary injunction
- Injunction applies in 13 states

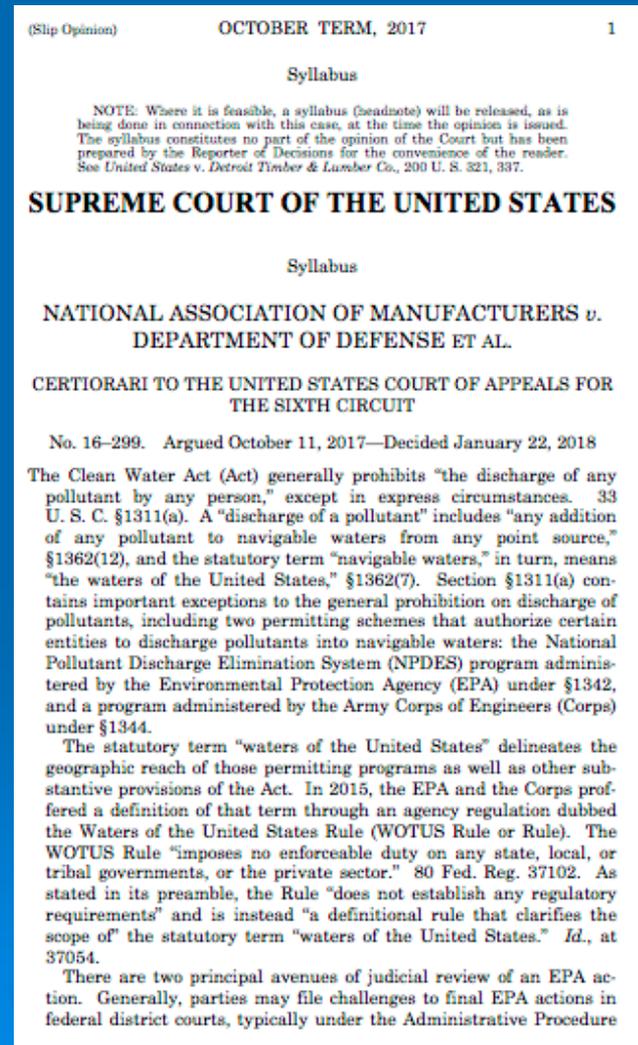
US Court of Appeals

- October 2015: Sixth Circuit issues national injunction (before deciding whether it has jurisdiction)
- February 2016: Sixth Circuit decides, 2-1, that it has jurisdiction

January 2017: US Supreme Court agrees to review the Sixth Circuit case

National Association of Manufacturers v. Department of Defense (Jan. 2018)

- Unanimous decision authored by Justice Sotomayor
- Inquiry begins and ends with the statutory text



National Association of Manufacturers v. Department of Defense

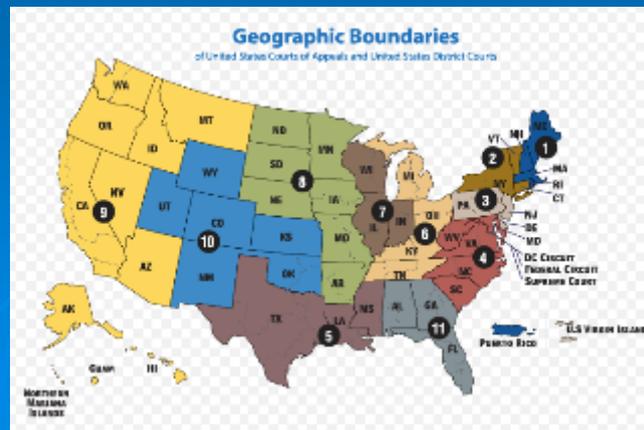
- Supreme Court rejects policy arguments: the text is clear
 - Bifurcation of review occurs elsewhere in CWA (e.g., review of section 402 and section 404 permits)
 - Congress did not prioritize quick and orderly resolution of WOTUS rule challenges
 - Congress's plain language trumps the goal of promoting national uniformity

National Association of Manufacturers v. Department of Defense

➤ The key take-aways:

**A challenge to (any) WOTUS rule must
begin in U.S. District Courts**

**And thus the Sixth Circuit's national
stay of Clean Water Rule is lifted**



Meanwhile ...



The White House

Office of the Press Secretary

For Immediate Release

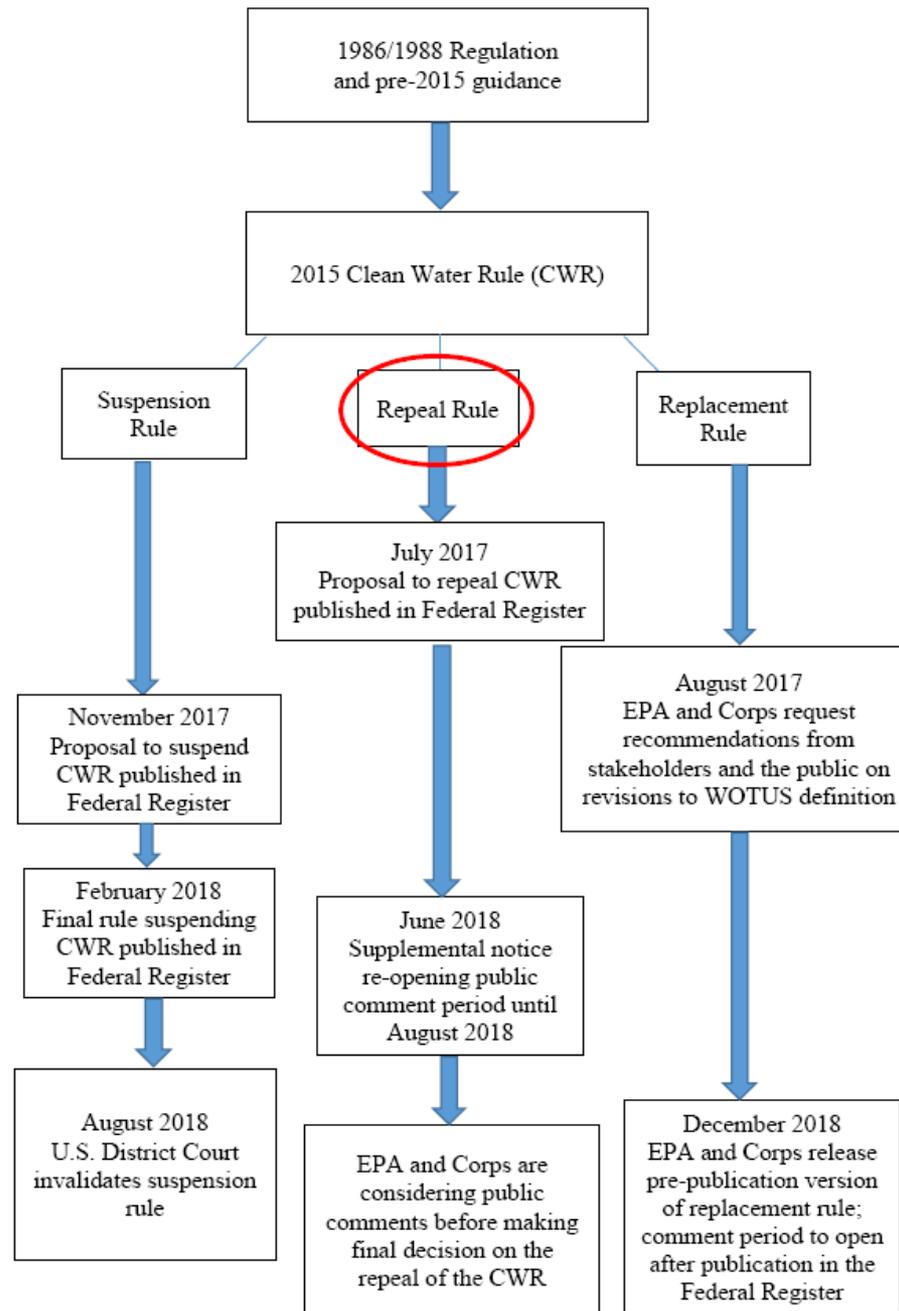
February 28, 2017

Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule

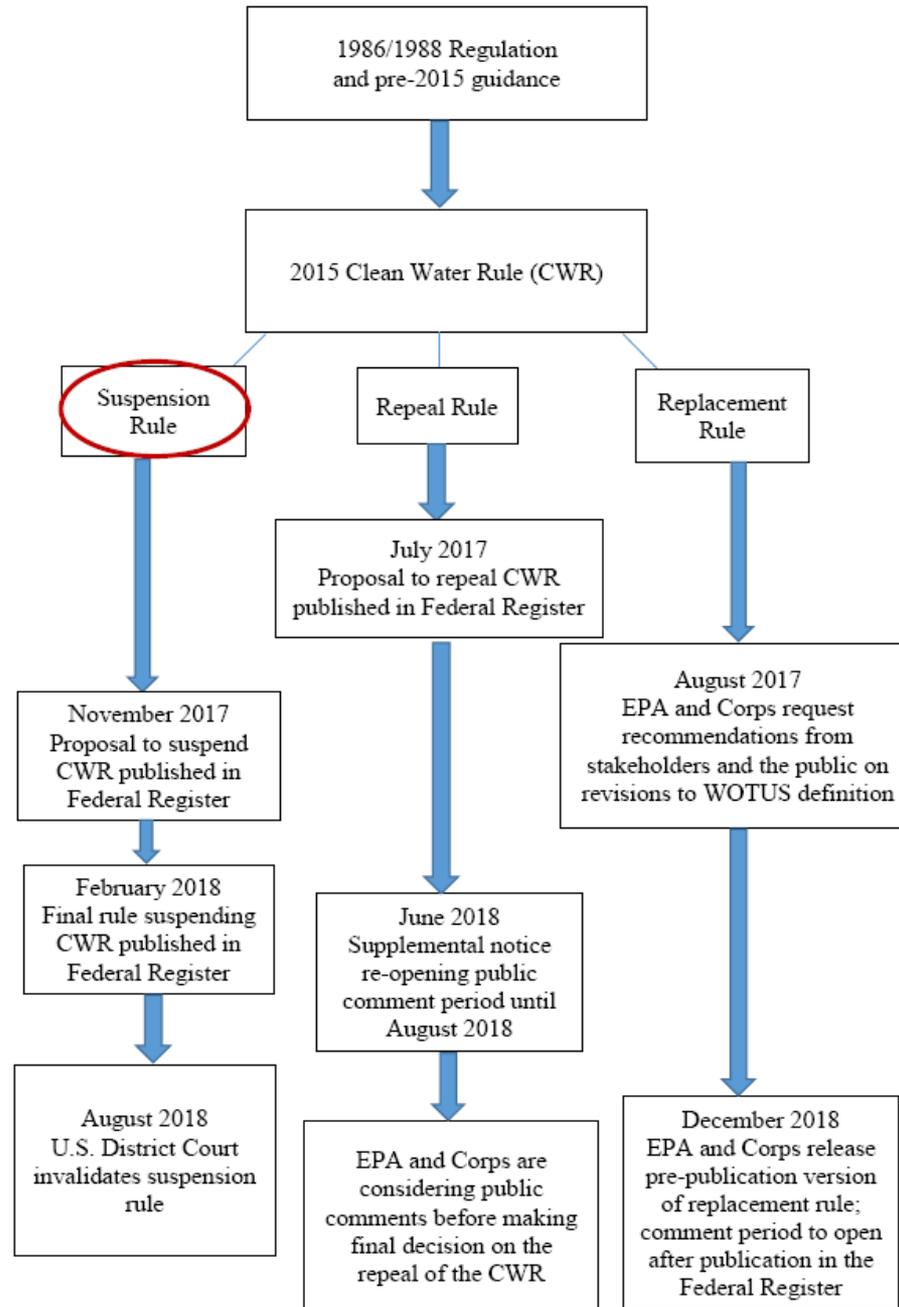
EXECUTIVE ORDER

Sec. 3. Definition of "Navigable Waters" in Future Rulemaking. In connection with the proposed rule described in section 2(a) of this order, the Administrator and the Assistant Secretary shall consider interpreting the term "navigable waters," as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

Status of Trump administrative actions affecting the Clean Water Rule



Status of Trump administrative actions affecting the Clean Water Rule



Suspension Rule

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

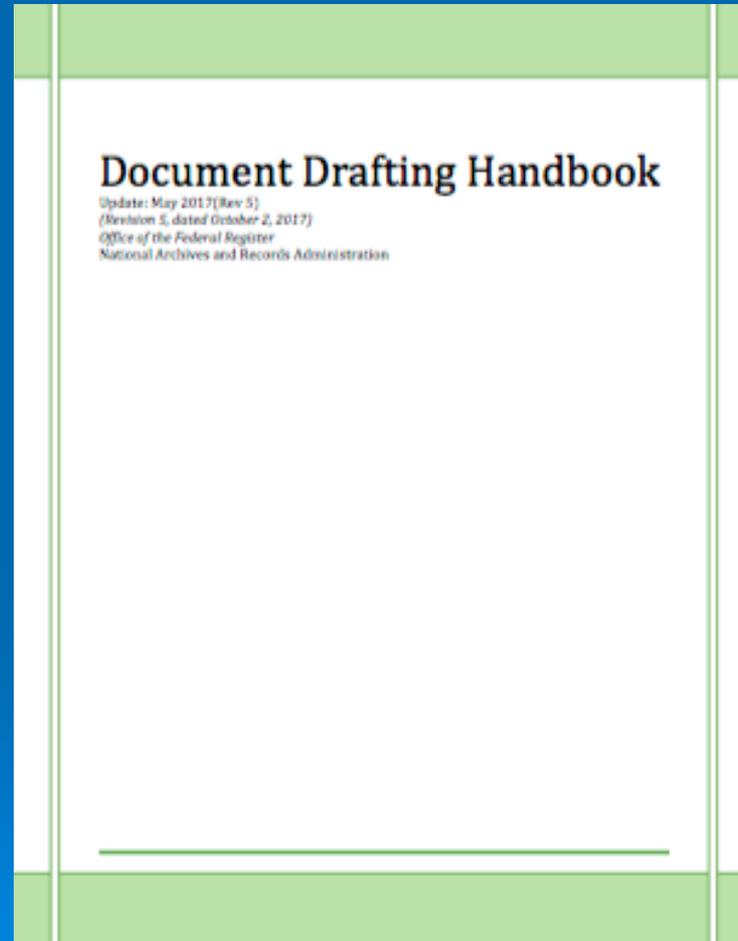
The Environmental Protection Agency and U.S. Department of the Army finalized a rule adding an applicability date to the 2015 Rule defining “waters of the United States.” The 2015 Rule will not be applicable until February 6, 2020. [Read the Final Rule.](#)

1

2



Wait, what's an applicability date?



OFR Document Drafting Handbook

Effective date

The effective date is the date that we amend the CFR by following your amendatory instructions. Therefore, effective dates cannot be retroactive and only rule documents that amend the CFR have effective dates.

Compliance dates and applicability dates

Some rules include a compliance or applicability date in addition to an effective date. The compliance or applicability date is the date that the affected classes must comply with the rule. Place the compliance or applicability date after the effective date (see **Example 3-9**).

Table 3-3: Differences between effective dates and compliance or applicability dates

Effective Date	Compliance/Applicability Date
Addresses the CFR placement.	Addresses the person who must comply.
Is the date the rule affects the current CFR.	Is the date the person must comply.
Is required by OFR.	Is not required by OFR.
Must not be retroactive.	May appear in DATES and CFR text.

Suspension Rule litigation

2:18-cv-00330-DCN Date Filed 08/16/18 Entry Number 66 Page 1 of 18

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SOUTH CAROLINA COASTAL)
CONSERVATION LEAGUE,)
CHARLESTON WATERKEEPER,)
AMERICAN RIVERS,)
CHATTAHOOCHEE RIVERKEEPER,)
CLEAN WATER ACTION, DEFENDERS)
OF WILDLIFE, FRIENDS OF THE)
RAPPAHANNOCK, NORTH CAROLINA)
COASTAL FEDERATION, and NORTH)
CAROLINA WILDLIFE FEDERATION,)

Plaintiffs,)

v.)

E. SCOTT PRUITT, as Administrator of the)
United States Environmental Protection)
Agency; UNITED STATES)
ENVIRONMENTAL PROTECTION)
AGENCY; R.D. JAMES, as Assistant)
Secretary of the Army for Civil Works; and)
UNITED STATES ARMY CORPS OF)
ENGINEERS,)

Defendants,)

AMERICAN FARM BUREAU)
FEDERATION, et al.,)

Intervenor-Defendants.)
_____)

No. 2-18-cv-330-DCN

ORDER

IV. CONCLUSION

As administrations change, so do regulatory priorities. But the requirements of the APA remain the same. The court finds that the government failed to comply with these requirements in implementing the Suspension Rule. Accordingly, the court **GRANTS** summary judgment for the environmental plaintiffs, **DENIES** the government's cross-motion for summary judgment, and **ENJOINS** the Suspension Rule nationwide.

AND IT IS SO ORDERED.

Suspension Rule litigation

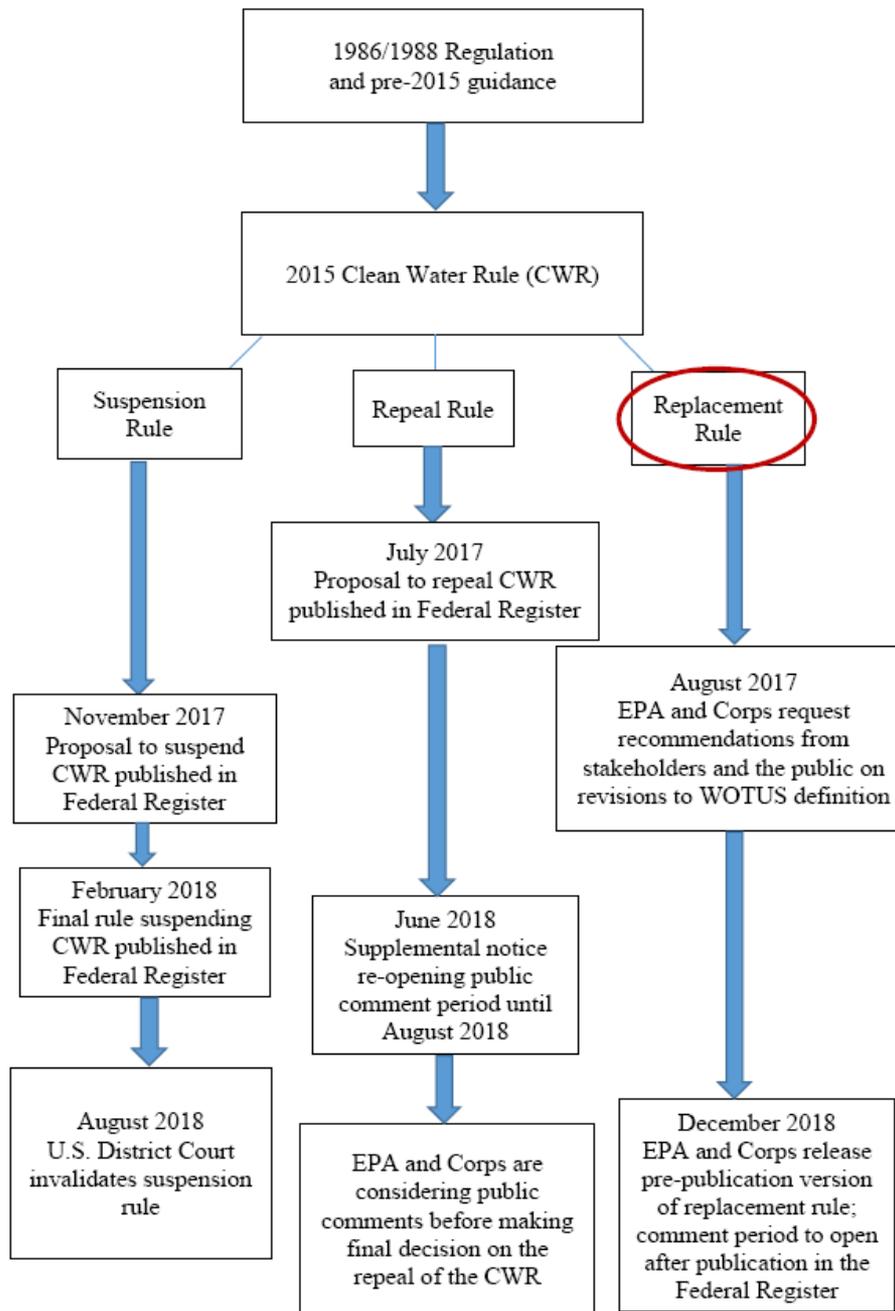
➤ Nationwide or universal injunction

⁴ Certainly, nationwide injunctions have the potential for abuse. As the Seventh Circuit recently observed in City of Chicago v. Sessions, 888 F.3d 272, 288 (7th Cir. 2018):

[U]nder the Obama administration, such injunctions stymied many of the President's policies, with five nationwide injunctions issued by Texas district courts in just over a year[.] At that time, then-Senator and now-Attorney General Sessions characterized the upholding of one such nationwide preliminary injunction as "a victory for the American people and for the rule of law." Press Release, Sen. Jeff Sessions III, June 23, 2016. Now, many who advocated for broad injunctions in those Obamaera cases are opposing them.

This court agrees that nationwide injunctions should be utilized "only in rare circumstances." *Id.* This is one such set of rare circumstances. Just because the political shoe is on the other foot does not mean that nationwide injunctions are no longer appropriate. What is good for the goose is good for the gander.

Status of Trump administrative actions affecting the Clean Water Rule



Replacement rule

- Emphasizes states' role in CWA implementation
- WOTUS includes:
 - Traditional navigable waters
 - Tributaries that contribute perennial or intermittent surface flow to a TNW*
 - Adjacent wetlands that abut or have a direct, perennial or intermittent,** hydrologic surface connection to other covered waters

*Or maybe only perennial tributaries

**Or maybe not

Replacement rule: next steps

- 60-day written comment period once published in the Federal Register
- EPA-Army informational webcast on February 14, 2019
- EPA-Army public meeting in Kansas City on February 27-28, 2019

- Agencies consider public input, and after OMB review, issue a final rule

Expect a multitude of (familiar) legal claims, including...

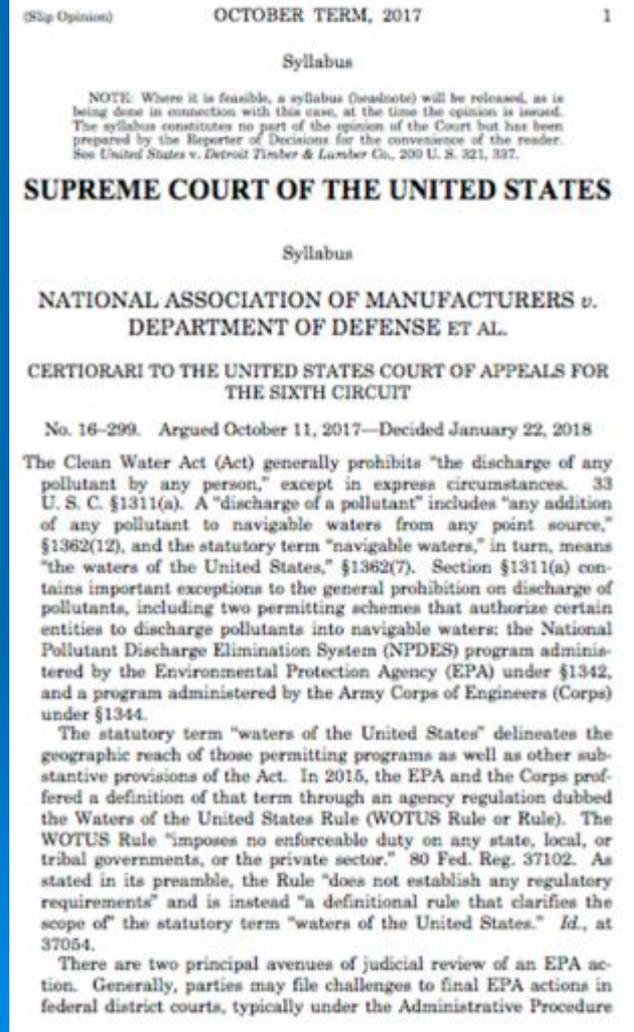
- Procedural violations associated with the rulemaking process
 - Substantial changes to proposed rule without additional public comment
 - Final rule is not a “logical outgrowth” of the proposed rule
 - Failure to respond appropriately to comments
 - Failure to provide a reasoned explanation for the change
 - Failure to consider the scientific record
 - Failure to consider the economic benefits of wetlands
- Clean Water Act (statutory) violations
 - Inconsistent with CWA’s plain language and its goals
- Other violations
 - National Environmental Policy Act



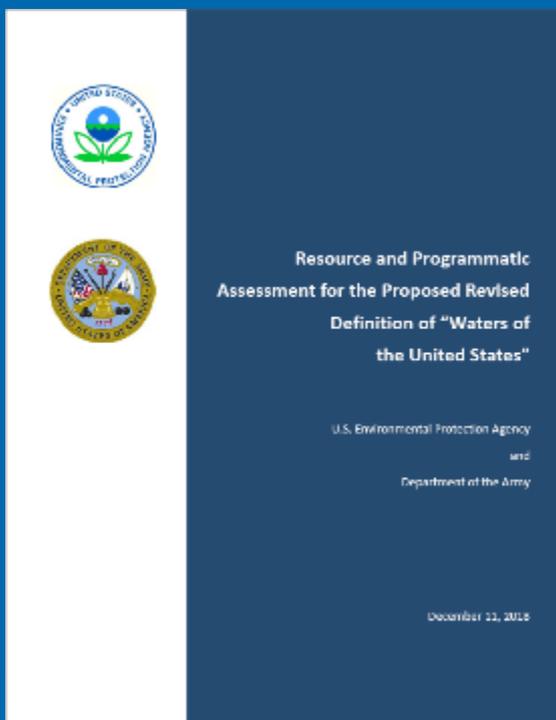
Expect the challenges to be brought in multiple U.S. District Courts ...

... in accordance with *National Association of Manufacturers v. Department of Defense*

And if a challenger prevails, expect it to request a nationwide or universal injunction



Will states fill the gaps?



Some states may adjust their current practices in light of a revised definition of “waters of the United States.” However, the agencies are not able to predict what changes might result from the proposed rule. Additionally, the agencies are aware that there are currently, and have been in the past, bills before state legislatures to either add or repeal laws that address the scope of state regulation compared to federal requirements. While this could have an effect on the regulation of waters that are not “waters of the United States” in the future, the agencies will not speculate on the outcomes of these efforts and instead are focused in this chapter on the information that is available to the agencies at this time.

Will states fill the gaps?

➤ No.

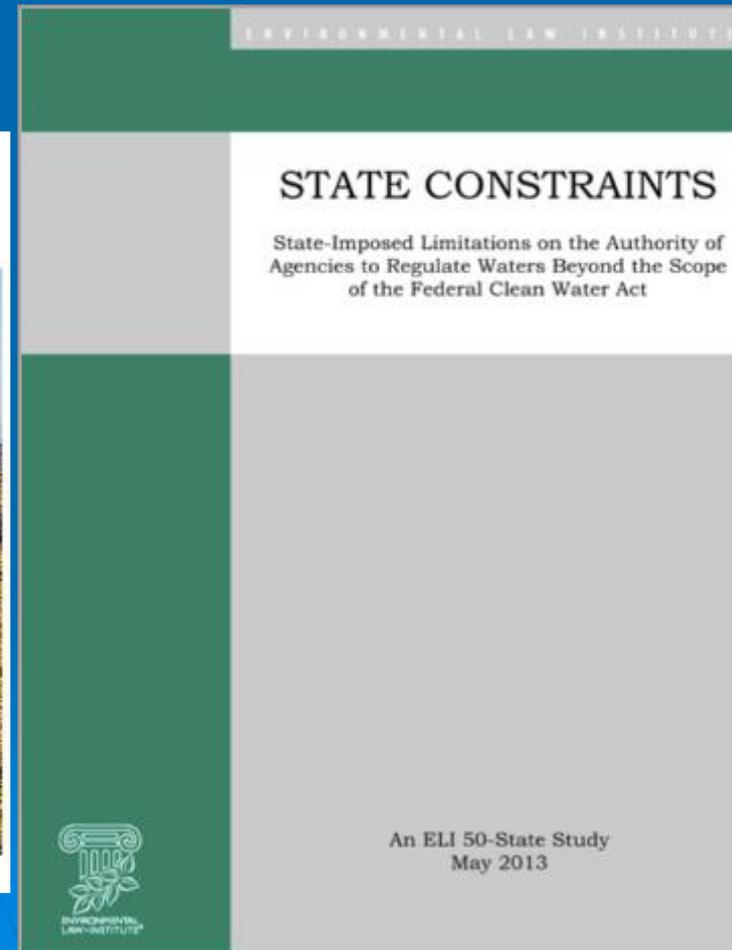
WETLANDS

Calif. clinches new regs just in time for federal rollback

Ariel Wittenberg, E&E News reporter • Greenwire: Monday, February 4, 2019



The Ballona Wetlands, seen here at Playa Vista in Los Angeles, are the last remaining wetlands in the Los Angeles Basin. Peter Bernier/Citizen of the Planet/Newscom



What would be likely effects if CWA jurisdiction is limited?

- No need for CWA permit to fill certain wetlands or streams, even if they were subject of previous denial



Rollback of federal water rule would have major impacts in Tucson area

By Tony Davis Arizona Daily Star Dec 11, 2018



The Alamo Wash in Tucson temporarily becomes a flowing stream after heavy monsoon rains.
Tony Davis/Arizona Daily Star 2007

ENVIRONMENTAL PROTECTION AGENCY

[EPA-R03-OW-2009-0985; FRL-9254-8]

Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, WV

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

What would be likely effects if CWA jurisdiction is limited?

- No need for CWA permit means no need for projects to provide offsets, and thus there would be no need to obtain mitigation credits



Trump's rule threatens booming \$4B 'restoration economy'

Ariel Wittenberg, E&E News reporter • Greenwire, Thursday, January 3, 2019



Restoration Systems' Katy Plains mitigation bank in Texas. Restoration Systems

Trump's move to redefine water rule threatens wetlands banks

by JASON DEAKIN June 16, 2019



Unintended consequences for developers

- No need for CWA permit means no need for ESA section 7 consultation and incidental take statement
- But the ESA still applies and the developer may then need to obtain an ESA section 10 incidental take permit



Thank you for your attention!

