

MITCHELL | WILLIAMS

EPA's Clean Water Rule:  
Defining "Waters of the United States"

A Presentation to the  
Arkansas Environmental Federation

By Allan Gates

October 1, 2015



# “Waters of the United States”

- CWA § 301 prohibits any **“Discharge of a Pollutant”** without a permit
- CWA § 502(12) defines “Discharge of a Pollutant” as any addition of a pollutant from a point source into **“Navigable Waters”**
- CWA § 502(7) defines “Navigable Waters as **“Waters of the United States**, including the territorial seas”
- **CWA has no definition of “Waters of the United States”**



# For Many Years “Waters of the United States” Was Broadly Construed

- Navigable Waters plus all tributaries and adjacent bodies of water
- Waters of the United States Reached the Full Extent Allowed by the Interstate Commerce Clause of the US Constitution
- Bird Rule: All isolated waters where there was an interstate connection (e.g., migratory birds)



## SCOTUS Decisions Have Narrowed “Waters of the United States”

- Commerce Clause narrowed by *Lopez v. US* (1995) and *Morrison v. US* (2002)
- *SWANCC v. US Army Corps* (2001)
  - Isolated wetlands frequented by migratory birds ≠ “Waters of the US”
- *Rapanos v. US* (2006) 4-1-4 vote
  - Wetlands adjacent to non-navigable tributaries of Navigable Waters ≠ “Water of the US” (unless there is a nexus? Or a surface connection? Or both)



## Post-*Rapanos* Confusion over “Waters of the United States”

- Cases split on nexus vs surface connection
- EPA/Corps Guidance issued and withdrawn
- Bills offered to “clarify” CWA jurisdiction
- *Sackett v. US* separate concurrence complained that EPA should adopt a rule clarifying the definition of “WOTUS”



## Alito's Concurring Opinion in *Sacket v. EPA* (2012)

“Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act. When Congress passed the Clean Water Act in 1972, it provided that the Act covers “the waters of the United States.” But Congress did not define what it meant by “the waters of the United States”; the phrase was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate. Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase as an essentially limitless grant of authority. We rejected that boundless view . . . [in *Rapanos* and *SWANCC*], but the precise reach of the Act remains unclear. For 40 years, Congress has done nothing to resolve this critical ambiguity, and the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase. Instead, the agency has relied on informal guidance. But far from providing clarity and predictability, the agency's latest informal guidance advises property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff.”



# Overview of Rulemaking Chronology

- 2012-13: EPA ORD Report on Scientific Literature regarding Connectivity of Streams and Wetlands to Downstream Waters
- 2013-14: Science Advisory Board Review
- 2014: Draft WOTUS Rule Published for Comment
- 2015: Final Rule Promulgated



Changes in EPA's Final Clean Water Rule\*

\*Source: EPA Fact Sheet)

| Subject  | Old Rule  | Proposed Rule  | Final Rule  |
|--|---|--|---|
| Navigable Waters                                     | Jurisdictional  | Same   | Same  |
| Interstate Waters                                    | Jurisdictional  | Same   | Same  |
| Territorial Seas                                     | Jurisdictional  | Same   | Same  |
| Impoundments   | Jurisdictional  | Same   | Same  |
| Tributaries to the Traditionally Navigable Waters    | Did not define tributary  | Defined tributary for the first time as water features with bed, banks and ordinary high water mark, and flow downstream.  | Same as proposal except wetlands and open waters without beds, banks and high water marks will be evaluated for adjacency.  |
| Adjacent Wetlands/Waters                             | Included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries. | Included all waters adjacent to jurisdictional waters, including waters in riparian area or floodplain, or with surface or shallow subsurface connection to jurisdictional waters. | Includes waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark.   |
| Isolated or "Other" Waters                           | Included all other waters the use, degradation or destruction of which could affect interstate or foreign commerce.               | Included "other waters" where there was a significant nexus to traditionally navigable water, interstate water or territorial sea.   | Includes specific waters that are similarly situated: Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands when they have a significant nexus.<br><br>Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters. |
| Exclusions to the definition of "Waters of the U.S." | Excluded waste treatment systems and prior converted cropland.  | Categorically excluded those in old rule and added two types of ditches, groundwater, gullies, rills and non-wetland swales.   | Includes proposed rule exclusions, expands exclusion for ditches, and also excludes constructed components for MS4s and water delivery/reuse and erosional features.  |



## District Court Challenges to EPA's Rule

- 71 Plaintiffs filed 10 cases in 8 Different District Courts
- Motions to Consolidate these cases Pending
- Decisions in 3 District Court cases
  - North Dakota, et al. v. EPA (D.N.D.) (13 States)  
Preliminary Injunction **GRANTED**
  - Georgia, et al. v. McCarthy (S.D. Ga.) (11 States)  
Preliminary Injunction **DENIED**
  - Murray Energy Corp. v. EPA (N.D.W.Va.)  
Preliminary Injunction **DENIED** and  
Case Dismissed Without Prejudice



# Court of Appeals Challenges to EPA's Rule

- 2d Circuit: *Natural Resources Defense Council v. EPA* , No. 15-2313
- 5th Circuit: *Texas, et al. v. EPA*, No. 15-60492
- 5th Circuit: *Utility Water Act Group v. EPA*, No. 15-60509
- 6th Circuit: *Murray Energy Corp. v. EPA*, No. 15-3751
- 8th Circuit: *North Dakota, et al. v. EPA*, No. 15-2552
- 9th Circuit: *Waterkeeper Alliance, Inc., et al v. EPA*, No. 15-72226
- 9th Circuit : *Puget Soundkeeper Alliance, et al v. EPA* , No. 15-72227
- 10th Circuit: *Oklahoma v. EPA*, No. 15-9551
- MCP No. 135
- 10th Circuit: *Chamber of Commerce, et al v. EPA*, No. 15-9552
- 11th Circuit: *Southeastern Legal Foundation, et al. v. EPA*, No. 15-13102
- 11th Circuit: *Georgia, et al. v. EPA*, No. 15-13252
- DC Circuit: *National Wildlife Federation v. EPA*, No. 15-1234



# Overview of Likely Arguments

- **Procedural Arguments:** E.g., Final Rule is not a logical outgrowth of original Proposed Rule
- **Arbitrary & Capricious:** Final Rule arbitrarily includes or excludes features and activities
- **Exceeds Statutory Authority:** CWA does not give EPA authority to regulate features or activities that the Final Rule would subject to regulation
- **Exceeds Constitutional Authority:** Commerce Clause does not give Congress



- WOTUS Rule only Involves Federal CWA jurisdiction
- Arkansas Water & Air Pollution Control Act Has Much Broader Jurisdiction
- But the State Prohibition is Different
  - *Do not Cause Pollution*
  - vs.
  - *Do not Discharge Without a Permit*



# Waters of the State

- The Basic Prohibition (ACA § 8-4-217)
  - “(a) It shall be unlawful for any person to:
    - (1) Cause pollution . . . of any of the waters of the state; or
    - (2) Place . . . any sewage or . . . other wastes in a location where it is likely to cause pollution of any waters of the state[.]”



## “Pollution” Defined

“Pollution” means such contamination or other alteration of the physical, chemical, or biological properties of any waters of the state, or such discharge of any liquid, gaseous, or solid substance in any waters of the state as will, or is likely to, render the waters harmful, detrimental, or injurious to public health, safety, or welfare; to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses; or to livestock, wild animals, birds, fish, or other aquatic life.

(ACA § 8-4-102(6)).



## “Waters of the State” Defined

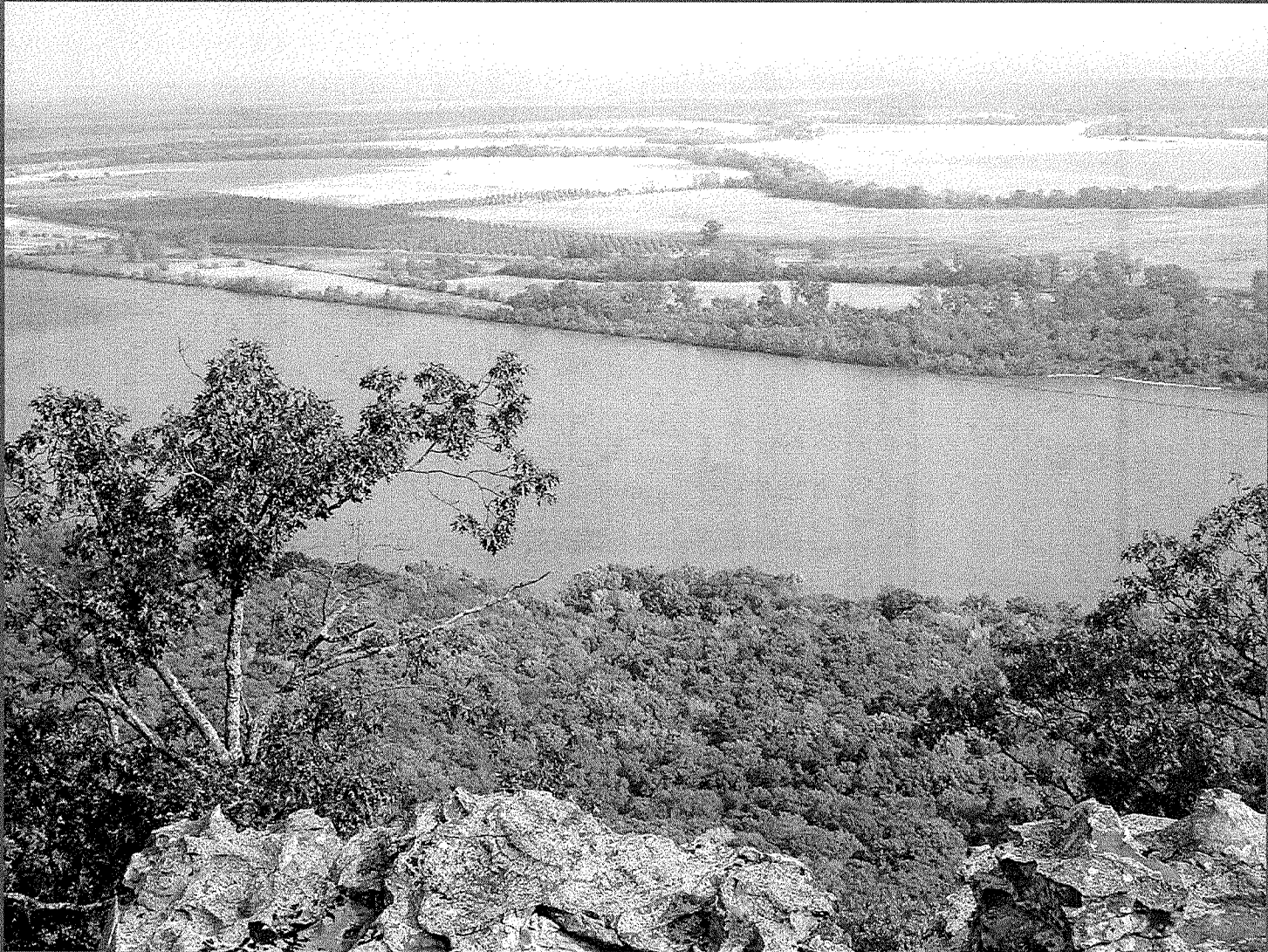
“Waters of the state” means all streams, lakes, marshes, ponds, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion of the state.

(ACA § 8-4-102(10)).



Waters of the State: YES  
Waters of the United States: YES

MITCHELL WILLIAMS





Waters of the State: YES

Waters of the United States: YES

WILLIAMS

MITCHELL





WILLIAMS

MITCHELL

# Waters of the State: YES Waters of the United States: ?





Waters of the State: YES

Waters of the United States: NO

MITCHELL | WILLIAMS





Waters of the State: YES  
Waters of the United States: ?

MITCHELL | WILLIAMS





Waters of the State: YES

Waters of the United States: NO

WILLIAMS

MITCHELL





Waters of the State: YES  
Waters of the United States: NO

WILLIAMS

MITCHELL

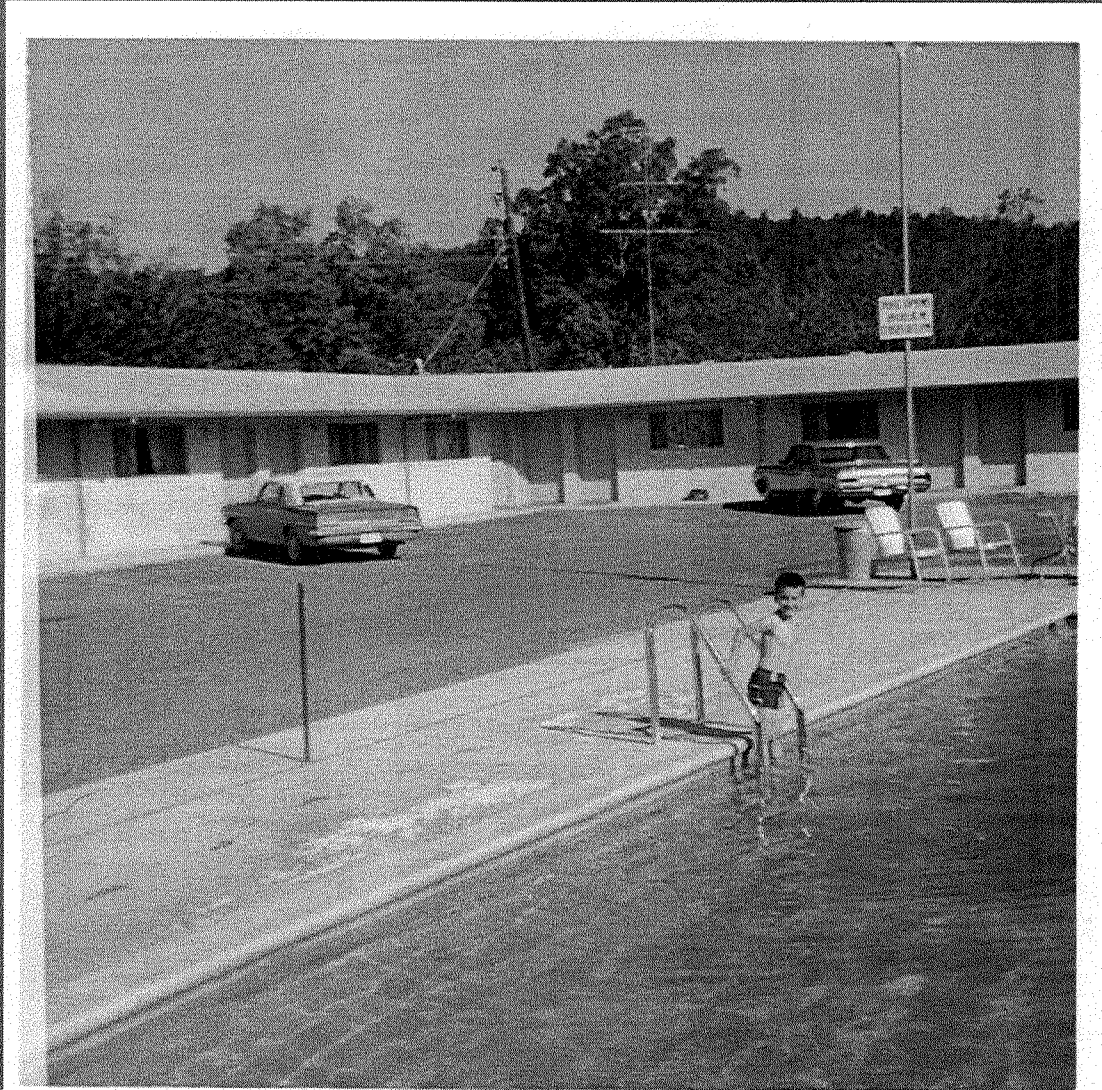




Waters of the State: YES  
Waters of the United States: NO

WILLIAMS

MITCHELL





Waters of the State: YES

Waters of the United States: NO

WILLIAMS

MITCHELL





Waters of the State: YES  
Waters of the United States: NO

WILLIAMS

MITCHELL





Waters of the State: YES  
Waters of the United States: NO

WILLIAMS

MITCHELL





Waters of the State: YES  
Waters of the United States: NO

WILLIAMS

MITCHELL





Waters of the State: YES  
Waters of the United States: NO

WILLIAMS

MITCHELL





“Waters of the state” means all . . . accumulations of water . . . natural or artificial, public or private, which are contained within . . . this state[.]”





# Important Differences “Waters of the State” vs. WOTUS

- Can you conduct treatment processes in Waters of the State?
- Must you meet Water Quality Standards in Waters of the State?
- Can you put toxics in toxic amounts in Waters of the State?
- **Others?**



MITCHELL | WILLIAMS

Thank You for Listening

For additional Information Contact:

Allan Gates

Mitchell Williams Selig Gates & Woodyard

425 W. Capitol Ave., Suite 1800

Little Rock, AR 72201

501-688-8816

[agates@mwlaw.com](mailto:agates@mwlaw.com)