The Shifting Boundaries of Clean Water Act Jurisdiction

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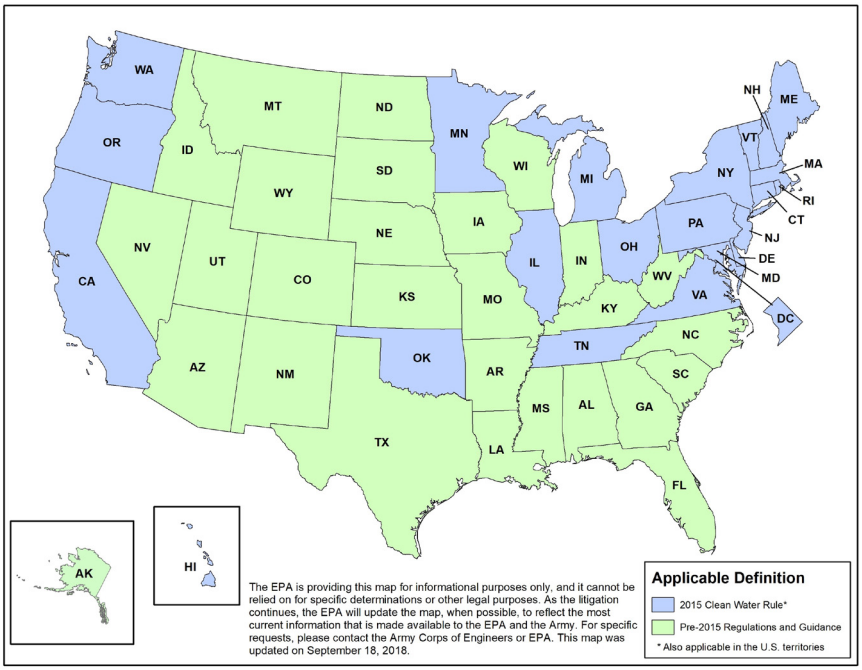
As a presidential candidate, Donald Trump promised to figuratively drain the ethical swamp of Washington. This has not come to pass. But as president, he has ordered regulatory changes that, if implemented, would result in the actual draining of swamps and other wetlands. These regulatory changes also may not come to pass—at least not right away.

The Clean Water Act (CWA) (33 U.S.C. §1251 et seq.) is the primary wetland protection law in the United States. If a wetland qualifies under the CWA as "waters of the United States"—often referred to as WOTUS—no one may discharge pollutants into that wetland without a federal permit. As of mid- September 2018, the precise authority of the federal government to regulate wetlands under the CWA exists in a muddled state.

In slightly less than half of the states, the 2015 Clean Water Rule, issued under the Obama administration, is in force. In the other half, the Clean Water Rule is enjoined by court orders, and pre-existing rules and guidance are used (see Figure 1). The Trump administration has tried to suspend the Clean Water Rule (unsuccessfully) and has formally proposed revoking it. The Trump administration has also stated that it intends to replace the Clean Water Rule with a new rule consistent with Justice Scalia's plurality opinion in *Rapanos v. United States*, a very restrictive view of the CWA's coverage. Meanwhile, litigation over the Clean Water Rule proceeds in various federal courts throughout the country. There is no clear path to definitively resolving the question of what constitutes a "water of the United States" under the CWA.

To understand how we got here, one must review the history of the federal government's protection of aquatic resources. As another president (Lincoln) noted: "Fellow citizens, we cannot escape history."

FIGURE 1. Current status of the Clean Water Rule across the country (as of September 18, 2018). Source: United States Environmental Protection Agency (2018).



THE RIVERS AND HARBORS ACT: A NINETEENTH CENTURY ANTECEDENT

Under the Rivers and Harbors Act of 1899, activities that impede "the navigable capacity of any of the waters of the United States" are prohibited unless authorized by the U.S. Army Corps of Engineers (Corps). In this context, "waters of the United States" are defined to be "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce" (33 C.F.R. § 329.4). Today, such waters are typically referred to as traditional navigable waters, or primary waters, or sometimes (a)(1) waters.[2]

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2 The term "(a)(1) waters" refers to the specific subsection of the definition of "waters of the United States" (see 33 C.F.R. § 328.3(a)(1)).

THE CLEAN WATER ACT: EXPANDING THE CONCEPT OF WATERS OF THE UNITED STATES

After it became clear that states were not sufficiently protecting water quality (with the Cuyahoga River fire as the starkest example), Congress enacted the CWA in its present form in 1972. The CWA generally prohibits the discharge of pollutants into "navigable waters" without a permit. Under the CWA, the term "navigable waters" is defined as "the waters of the United States, including the territorial seas" (33 U.S.C. § 1362).

While the U.S. Environmental Protection Agency (EPA) received most of the regulatory authority under the CWA, the Corps was assigned responsibilities under Section 404. The discharge of dredged or fill material into "waters of the United States" requires a permit from the Corps (33 U.S.C. §1344). Initially, the Corps interpreted the CWA's "waters of the United States" to be the same as the Rivers and Harbors Act's "waters of the United States," i.e., traditional navigable waters (see Mulligan 2016). Environmental groups challenged this interpretation, and a U.S. District Court concluded that Congress wanted the CWA to apply to the fullest extent permitted by the Commerce Clause. Accordingly, the court instructed the Corps to revise its regulations to cover additional waters (*Natural Resources Defense Council, Inc. v. Callaway*).

To complicate matters, the EPA also has its own regulations defining "waters of the United States" (see, e.g., 40 C.F.R. §122.2, 40 C.F.R. §230.3). Because the EPA has the bulk of CWA responsibilities, it has the final call (as between the agencies) on questions of the CWA's geographic scope (Civiletti Memorandum 1979). Ultimately, through a series of public notice-and-comment rulemakings, the Corps' and EPA's definitions were aligned in their 1986 and 1988 regulatory definitions of waters of the United States, respectively.

The aligned 1986/1988 regulatory definition covered traditional navigable waters, as well as their tributaries and adjacent wetlands. It also covered "other waters" if their "use, degradation or destruction" could affect commerce (Final Rule 1986; Final Rule 1988). This regulatory definition was then challenged by the regulated community, with three cases reaching the U.S. Supreme Court.

WOTUS IN THE SUPREME COURT

In the initial case of the trilogy, in 1985, the Supreme Court in *United States v. Riverside Bayview Homes* unanimously held that it was reasonable for the Corps to define waters of the United States to include wetlands adjacent to a traditional navigable water. In doing so, the Court recognized that such wetlands form part of an aquatic ecosystem and play an important role regarding the water quality of the traditional navigable water. The Court also specifically rejected the notion that an adjacent wetland needs to have a continuous surface connection to traditional navigable waters to be covered by the CWA. The Court deferred to the agencies' technical expertise in determining which waters should be protected to achieve the CWA's goals.

In 2001, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Supreme Court in a 5-4 decision ruled that the CWA did not cover certain so-called isolated waters. Here, the Corps attempted to demonstrate that seasonal ponds ("other waters" under the 1986/1988 regulations) had a connection to interstate commerce through the presence of migratory birds. The Court, concerned that the federal government might be straying into areas traditionally regulated by state governments, concluded that relying on migratory birds was an unreasonable interpretation of the CWA.

The 2006 case of *Rapanos v. United States*, a splintered 4-1-4 ruling, unleashed the chaos. In *Rapanos*, the Supreme Court considered whether the CWA covered wetlands adjacent to non-navigable tributaries of traditional navigable waters. There was no majority opinion. Four justices, led by Justice Scalia, argued that the only plausible interpretation of "waters of the United States" includes only those relatively permanent, standing, or continuously flowing bodies of water, such as oceans, rivers, and lakes. Accordingly, the CWA should cover only those wetlands with a continuous surface connection to bodies of water that are "waters of the United States" in their own right, making it difficult to determine where the "water" ends and the "wetland" begins. Four justices disagreed, contending that any hydrologic connection between a wetland and a traditional navigable water should suffice for CWA jurisdiction. Justice Kennedy, in the middle, advocated a third approach: a wetland is covered by the CWA if it has a "significant nexus" to a traditional navigable water.

Because the agencies had not made a specific finding with respect to the wetlands' "significant nexus," Justice Kennedy voted with Justice Scalia and his colleagues to remand the case for further consideration. There was, however, no majority or controlling opinion in *Rapanos* (see Mulligan 2016). Neither Justice Scalia's plurality opinion nor Justice Kennedy's concurrence in the judgment established a binding precedent.

In 2007, the EPA and the Corps responded with guidance, following Justice Kennedy's approach (Memorandum 2007). The agencies stated that they would assert CWA jurisdiction over certain waters such as traditional navigable waters, wetlands adjacent to these traditional navigable waters, non-navigable, relatively permanent tributaries of traditional navigable waters, and wetlands that directly abut

such tributaries. The agencies also identified a smaller class of waters that they would generally not assert jurisdiction over, including swales, gullies and small washes characterized by low volume, infrequent, or short duration flow, and certain ditches that do not carry a relatively permanent flow of water. For other waters (e.g., non-navigable tributaries that are not relatively permanent and adjacent wetlands thereto), the agencies indicated that a fact-specific analysis would be conducted to determine whether they have a significant nexus with a traditional navigable water. The guidance document then explained how to measure the extent to which a water contributes to the chemical, physical and biological integrity of downstream traditional navigable waters.

Although not required by the Administrative Procedure Act, the agencies sought public input on the significant nexus guidance. They received more than 66,000 comments and slightly revised the guidance document in December 2008 (see Memorandum 2008).

When deciding CWA jurisdictional cases post-*Rapanos*, lower courts typically applied Justice Kennedy's "significant nexus" standard, sometimes upholding CWA jurisdiction and sometimes not. Thus, up until 2015, the rules in place were the 1986/1988 regulations and the 2008 significant nexus guidance document.

THE 2015 CLEAN WATER RULE

In April 2014, the EPA and Corps issued for public input a proposed rule that sought to bring certainty to the scope of CWA jurisdiction. The comment period for the Clean Water Rule lasted nearly seven months, and the agencies received more than 1 million comments. In June 2015, the agencies formally promulgated the Clean Water Rule, which defined the term "waters of the United States" (Clean Water Rule 2015).

In conjunction with the rulemaking process, the EPA requested its Office of Research and Development to prepare a report to inform the rulemaking. The resulting document, sometimes referred to as the Connectivity Report, which reviewed and synthesized more than 1,200 peer-reviewed scientific publications, provides scientific support for the Clean Water Rule by establishing how streams and wetlands are connected to primary waters (United States Environmental Protection Agency 2015).

The Connectivity Report was one of the most thorough analyses, procedurally, ever conducted by the EPA. The Connectivity Report itself was subjected to multiple rounds of independent peer review, as well as public comment, and included only studies that were peer reviewed or otherwise verified for quality assurance.

Although the Clean Water Rule is a complex regulation, it has a straightforward organization. Certain waters are jurisdictional by rule, that is, they are categorically treated as waters of the United States and do not require any individual assessment. These categorical waters include traditional navigable waters, interstate waters, and the territorial seas, as well as tributaries of these waters and adjacent waters based on geographic proximity. Similarly, at the other end of the continuum, the Clean Water Rule excludes by rule certain waters from jurisdiction, based on their distance from traditional navigable waters. And, in between, other waters are subject to a significant nexus analysis (Clean Water Rule 2015).

Before we could see how the Clean Water Rule would play out on the ground, it was immediately challenged in numerous courts throughout the country on a multitude of procedural and substantive issues.

CLEAN WATER RULE LITIGATION: OPENING ROUND

Some challenges to EPA actions made pursuant to the CWA are initiated by filing a complaint in U.S. District Courts, while other challenges start with a petition to a U.S. Court of Appeals. One confounding aspect of the Clean Water Act litigation was that initially it was unclear which level of court had primary jurisdiction. Thus, complaints and petitions were both filed in District Courts and Courts of Appeals, respectively. While the District Court cases proceeded independent of each other, the litigation in the Courts of Appeals was consolidated before the Sixth Circuit (based in Cincinnati).

The Clean Water Rule litigation was moving on two tracks, and early results were not promising for the agencies. At the District Court level, in August 2015, the U.S. District Court for the District of North Dakota issued a preliminary injunction that covered 13 states (*North Dakota v. U.S. Environmental Protection Agency*). Meanwhile, in October 2015, the Sixth Circuit issued a nationwide stay of the Clean Water Rule (In re: *Environmental Protection Agency and Department of Defense Final Rule*).

The U.S. Supreme Court then stepped in to decide the (judicial) jurisdictional issue. That is when things became even more complicated.

CLEAN WATER RULE LITIGATION: THE META-JURISDICTIONAL QUESTION

On a positive note, in January 2018 in *National Association of Manufacturers v. Department of Defense*, the Supreme Court provided clarity about which court has jurisdiction to consider the challenges to agency rules on CWA jurisdiction. In a unanimous decision written by Justice Sotomayor, the Supreme Court held that a challenge to any WOTUS rule must begin in U.S. District Courts, not the Courts of Appeals. The Supreme Court based its ruling on the plain language of the CWA and rejected any policy-based arguments. Although vesting the Court of Appeals with primary

jurisdiction would promote national uniformity, the Court emphasized that Congress did not prioritize quick and orderly resolution of WOTUS rule challenges.

The immediate impact of the decision meant that since the Sixth Circuit lacked jurisdiction, it could not issue a stay. Thus, the nationwide stay preventing the implementation of the Clean Water Rule would be lifted—unless the Trump administration took some additional administrative action, which it did.

TRUMP ADMINISTRATION EFFORTS TO REPEAL AND REPLACE (AND SUSPEND) THE CLEAN WATER RULE

One month after taking office, President Trump issued an Executive Order calling on the EPA and Corps to rescind the Clean Water Rule and replace it with a rule consistent with Justice Scalia's plurality opinion in *Rapanos* (Presidential Executive Order 2017). Initially, the agencies contemplated a two-step process. First, they would formally rescind the Clean Water Rule and return to the *status quo ante* (the 1986/1988 regulations and previous guidance). Then they would propose a new, Scalia-based rule (see Proposed Rule 2017a).

A key point is that under the Administrative Procedure Act, repealing the Clean Water Rule is itself "rulemaking"—and thus requires the agencies to go through a notice-and-comment process before doing so. Accordingly, in July 2017, the EPA and the Corps announced their intention to rescind the Clean Water Rule (Proposed Rule 2017a). The agencies received more than 600,000 comments, including from the Society of Wetland Scientists, which strongly opposed the proposed repeal.

When issuing a final rule, agencies must explain how they considered the comments received during the notice-and-comment process. With so many substantive comments received, it was understandable that such the EPA and Corps' review would take time. Indeed, if the agencies engage in a cursory examination of and provide weak responses to the comments, any final rule could be vulnerable to a court challenge. But while the Sixth Circuit's national stay existed, there was no rush. The *status quo ante* that the repeal would effect was already in place.

Of course, the Supreme Court's decision—and the evaporation of the national stay—changed the calculus. Anticipating that decision, the Trump administration tried another administrative move. The EPA and Corps conducted a quick rulemaking with a three-week comment period to add an "applicability date" to the Clean Water Rule, essentially suspending implementation of the rule until February 2020 (see Proposed Rule 2017b). Again, SWS and Consortium of Aquatic Science Societies (CASS) commented, emphasizing that the agencies needed to consider the scientific basis of the Clean Water Rule before suspending it. The agencies contended they did not need to do so and quickly finalized this Suspension Rule, thereby preventing (briefly) the re-emergence of the Clean Water Rule (see Final Rule 2018).

CLEAN WATER RULE LITIGATION: CHALLENGING THE TRUMP ADMINISTRATION'S SUSPENSION RULE

Consistent with Newton's third law, the suspension of the Clean Water Rule brought a swift reaction from ten states and several environmental groups. Lawsuits were filed in U.S. District Courts in New York, South Carolina, and California, asserting that the Suspension Rule was procedurally invalid. The litigation in the Southern District of New York was brought by ten states and the District of Columbia, which asserted that the EPA and the Corps violated the Administrative Procedure Act by failing to consider and respond to comments raised during the truncated comment period (*New York v. Pruitt*).

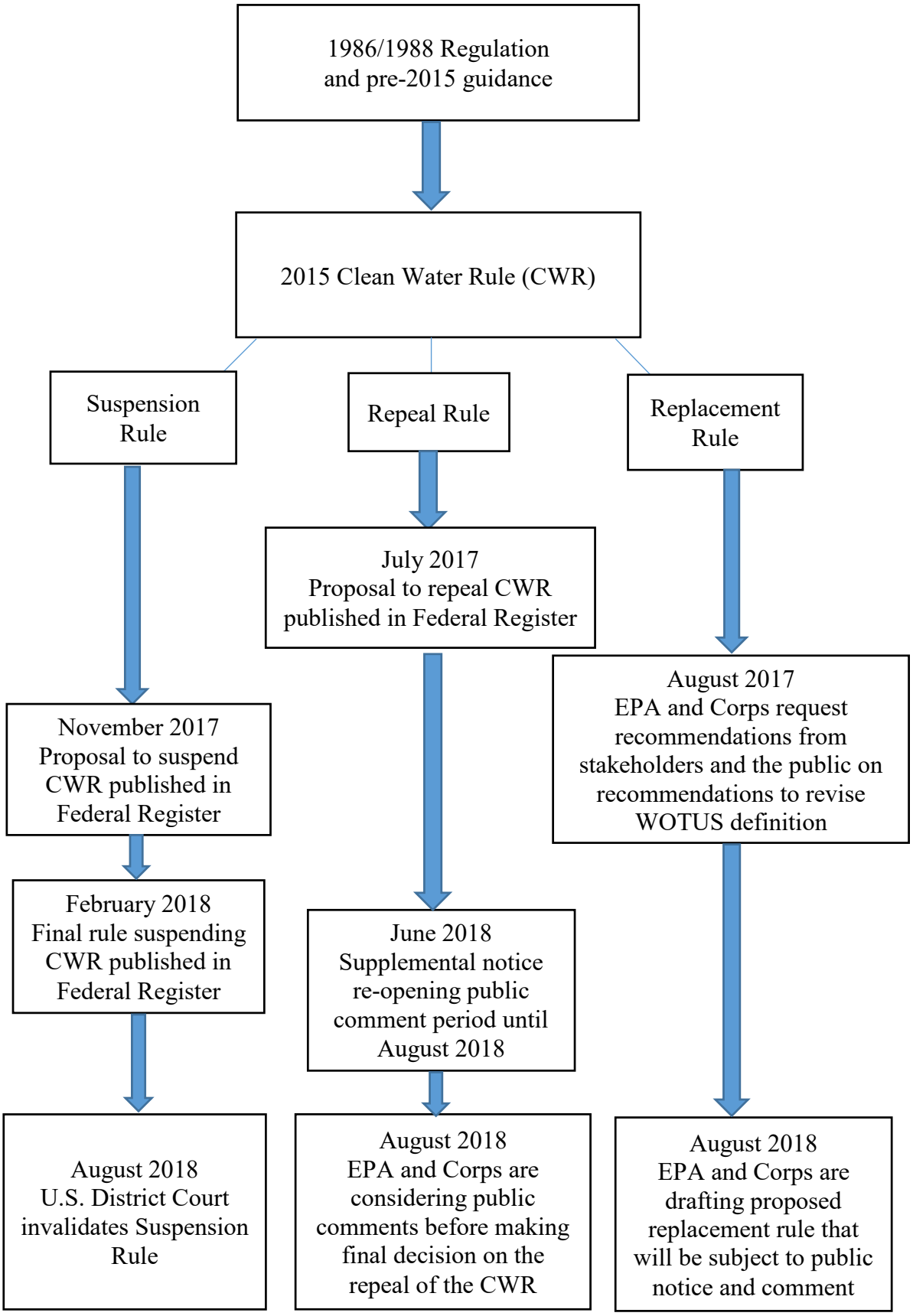
SWS filed an amicus brief in the Southern District of New York on behalf of the states to emphasize the importance of considering the scientific record. In summary, SWS stated:

> An agency must provide a reasoned explanation when promulgating or amending a rule. An agency's implausible explanation or its failure to consider relevant and significant aspects of a problem renders a rulemaking arbitrary and capricious. Because the EPA and Corps refused to consider the scientific basis of the Clean Water Rule, including the most current scientific understanding of how streams and wetlands contribute to the chemical, physical, and biological integrity of downstream waters, the Suspension Rule is arbitrary and capricious.
>
> More broadly, all major EPA policy decisions since the agency's inception have required the use of science. Science is critically important to furthering the goals of the CWA, and this Court should hold the EPA and Corps accountable for failing to consider science in their decisions. The agencies cannot so blithely disregard science related to the chemical, physical, and biological integrity of the Nation's aquatic resources.

(Brief of the Society of Wetland Scientists 2018a). The full amicus brief is available at http://stetso.nu/8J6ML.

While the Southern District of New York has yet to rule, the U.S. District Court for the District of South Carolina decided the matter quickly. On August 16, 2018, in *South Carolina Coastal Conservation League v. Pruitt*, the court invalidated the Suspension Rule. While the court acknowledged that agencies may change their views (and indeed it is expected when administrations change), agencies must nevertheless provide a reasoned analysis for the shift. The court stated:

Figure 2. Status of Trump administrative actions affecting the Clean Water Rule



> No such "reasoned analysis" was provided in the promulgation of the Suspension Rule. By refusing to allow public comment and consider the merits of the [Clean Water Rule] and the [1986/1988] regulation, the agencies did not allow a "meaningful opportunity" to comment. As such, the court finds that the agencies were arbitrary and capricious in promulgating the Suspension Rule. It vacates the Suspension Rule for this reason. To allow the type of administrative evasiveness that the agencies demonstrated in implementing the Suspension Rule would allow government to become a matter of the whim and caprice of the bureaucracy. Certainly, different administrations may implement different regulatory priorities, but the APA requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process. The agencies failed to promulgate the Suspension Rule with that required fidelity here. The court cannot countenance such a state of affairs.

(*South Carolina Coastal Conservation League v. Pruitt* [internal citations and quotations omitted]).

The U.S. District Court for the District of South Carolina's ruling applied nationwide. Thus, the effect of *South Carolina Coastal Conservation League v. Pruitt* is to resurrect the Clean Water Rule—except in those jurisdictions where a different U.S. District Court had enjoined it.

CLEAN WATER RULE LITIGATION: BACK TO THE MERITS

With the Suspension Rule no longer in force, and while we await more administrative moves, the legal battle shifts back to U.S. District Courts entertaining challenges to the Clean Water Rule. There are at least six such active cases at various stages. In *North Dakota v. U.S. Environmental Protection Agency*, for example, the U.S. District Court is considering making its preliminary injunction against the Clean Water Rule permanent. At this point, the Trump administration is not defending the substance of the Clean Water Rule in court. Instead, environmental groups such as the Sierra Club have intervened in support of the Obama-era rule.

In the North Dakota litigation (which involves 14 states), SWS has filed an amicus brief in support of the Clean Water Rule. The amicus brief explains why the Clean Water Rule is scientifically sound and how best available science supports the categorical treatment of tributaries and adjacent waters based on geographic proximity (Brief of the Society of Wetland Scientists 2018b). The amicus brief is available at http://stetso.nu/HbWZQ.

If a court strikes down the Clean Water Rule, the agencies will once again shift back to the 1986/1988 regulations and guidance, unless of course the EPA and Corps finalize any of their proposed or planned rulemakings. Even if the supporters of the Clean Water Rule prevail in court, the definition of "waters of the United States" can be modified administratively. But the agencies must follow the proper procedures, and any new rule will be subjected to legal attacks, both procedural (e.g., inconsistent with the Administrative Procedure Act) and substantive (e.g., inconsistent with the Clean Water Act).

RECAPPING THE ADMINISTRATIVE MORASS

Figure 2 illustrates the administrative state of play as of mid-September 2018. An attempt to suspend the Clean Water Rule for two years has been struck down. A proposal to permanently repeal or rescind the Clean Water Rule was issued for public comment. The comment period was reopened in July 2018 and extended until August 2018, and no final rule killing the Clean Water Rule has yet been published. The agencies are working on a proposed rule to replace the Clean Water Rule with a restrictive definition consistent with Justice Scalia's plurality opinion in *Rapanos*, but that proposed rule has yet to be published.

Meanwhile, as Figure 1 illustrates, the Clean Water Rule is being applied in 22 states, the District of Columbia, and U.S. territories, while the status quo ante (1986/1988 regulations and guidance) is being applied in the remainder.

CONCLUSION

In theory, Congress could step in at any time and amend the CWA's definition of "waters of the United States." Of course, such an intervention is not expected. Instead, it is more likely that the WOTUS battles will continue within the agencies and courts.

Whatever the next rulemaking steps the EPA and Corps might take—whether finalizing the Clean Water Rule's rescission or proposing and finalizing a Scalia-based rule—the agencies must provide a reasoned analysis for their decisions. Accordingly, the agencies must consider the scientific record, including the Connectivity Report, to justify their actions. Restricting the scope of waters protected under the CWA will be difficult to explain. ■

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Geographically isolated wetland in West Chicago, Illinois. (R. Tiner photo)