



**Understanding the
Final Clean Water Rule and
Changes to CWA Jurisdiction Included in
Senate Bill 1140**

Welcome!

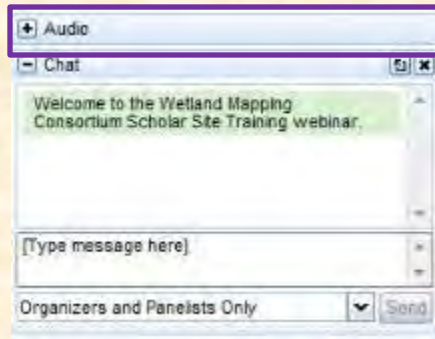


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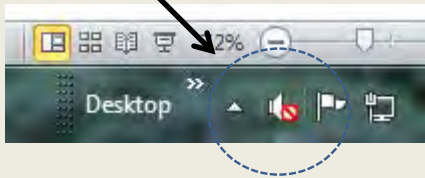


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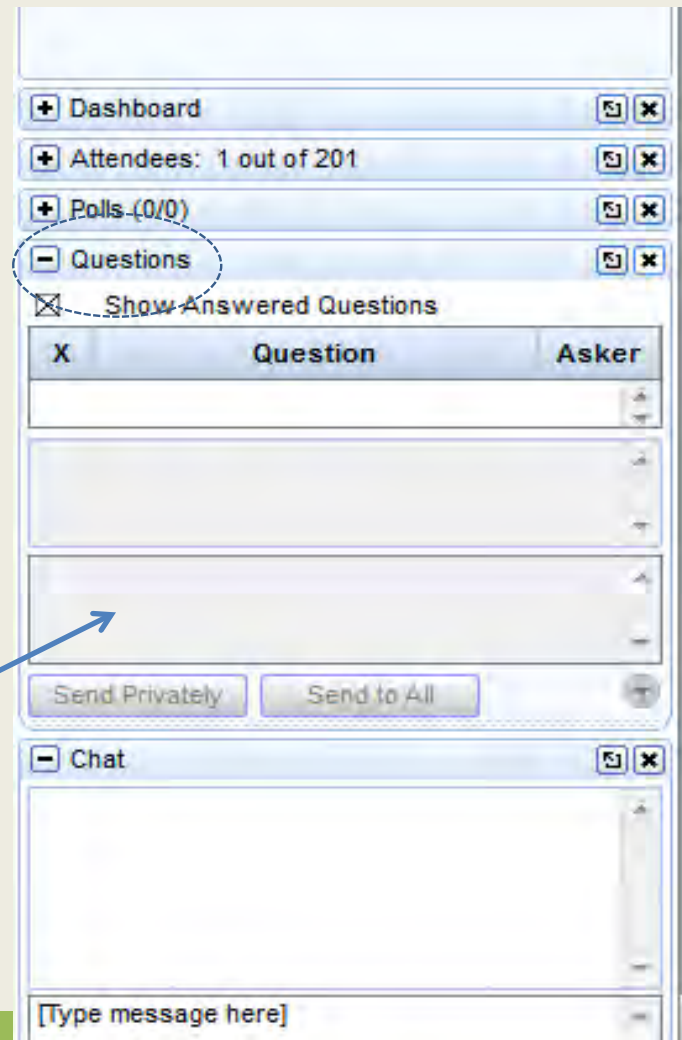


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Presenters



- **Roy Gardner, Professor of Law and Director, Institute for Biodiversity Law and Policy**
- **Kim Diana Connolly, Professor, Director of Clinical Legal Education, Vice Dean for Legal Skills, SUNY Buffalo Law School**

Moderator



- **Jeanne Christie, Executive Director, Association of State Wetland Managers**

Today's agenda ...

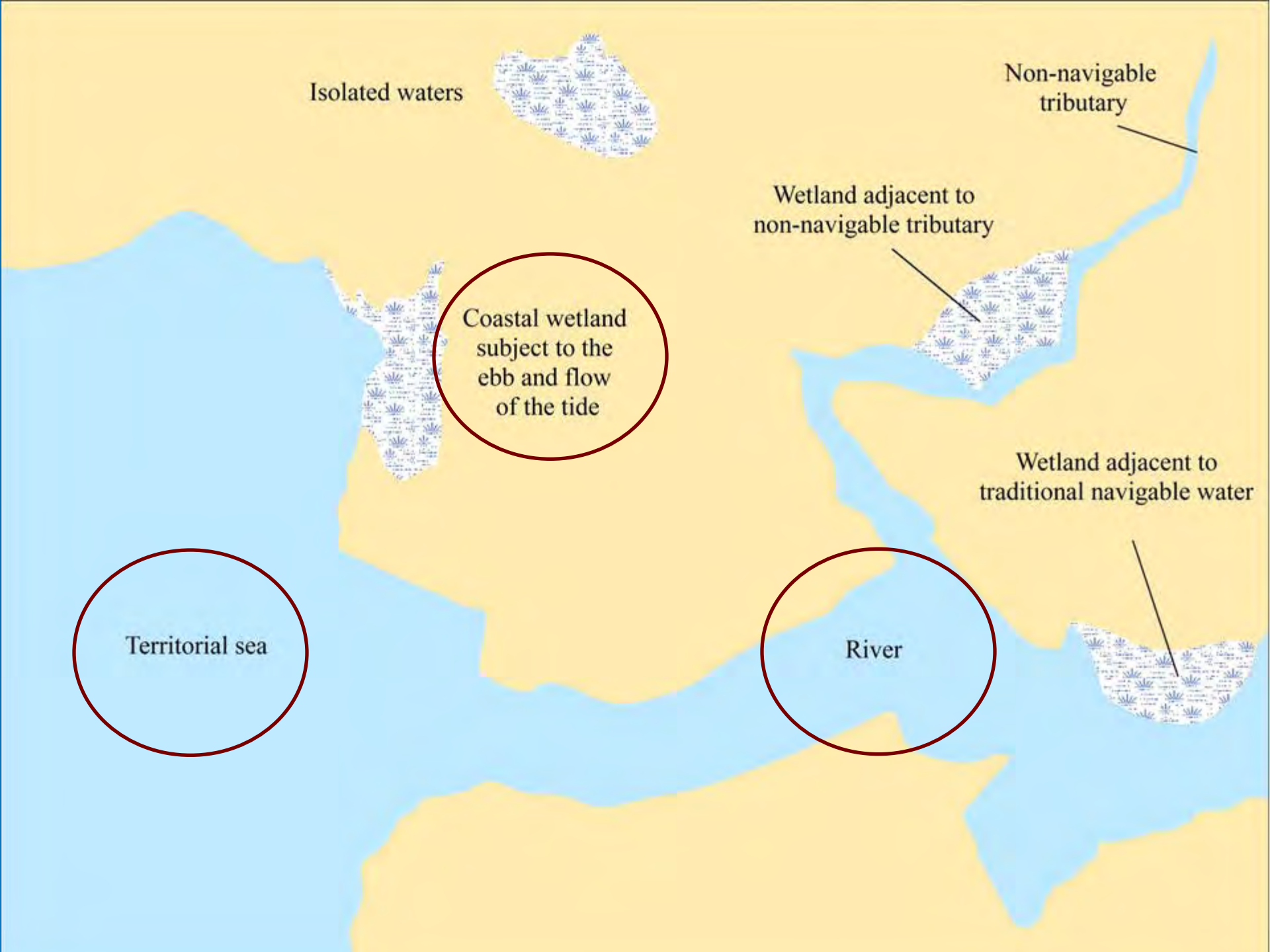
- Introductions (10 Minutes)
- Quick background history on the evolution of waters of the United States (10 Minutes)
- Overview of the final rule and changes in Clean Water Act jurisdiction (25 Minutes)
- Legal analysis of the final rule in light of RBH, SWANCC, and Rapanos (10 Minutes)
- Senate Bill 1140
(15 Minutes)
- Discussion
(20 Minutes)



Rivers and Harbors Act of 1899

- Traditional Notions of Navigability
 - Navigable in fact
 - Navigable in past
 - Navigable in future with reasonable improvements
 - Subject to the ebb and flow of the tide





Clean Water Act

Waters of the United States (currently)

- Traditional navigable waters
- Interstate waters
- All other waters, including wetlands, the use, degradation or destruction of which could affect commerce
- Impoundments of waters otherwise defined as WOTUS
- Tributaries of these waters
- Territorial sea
- Wetlands adjacent to these waters



Isolated waters
33 CFR § 328.3(a)(3)

Non-navigable
tributary
33 CFR § 328.3(a)(5)

Wetland adjacent to
non-navigable tributary
33 CFR § 328.3(a)(7)

Coastal wetland
subject to the
ebb and flow
of the tide
33 CFR § 328.3(a)(1)

Wetland adjacent to
traditional navigable water
33 CFR § 328.3(a)(7)

Territorial sea
33 CFR § 328.3(a)(6)

River
33 CFR § 328.3(a)(1)

Riverside Bayview Homes



SWANCC



Rapanos



Rapanos plurality opinion

Only plausible interpretation of “the waters of the United States” includes only those relatively permanent, standing, or continuously flowing bodies of water, such as oceans, rivers and lakes



Chief Justice Roberts' concurrence in Rapanos

Agencies should have completed rulemaking

Lower courts and regulated entities will now need to feel their way on a case-by-case basis



Justice Kennedy's concurrence in the judgment in Rapanos

Does the wetland
possess a “significant
nexus” to a traditional
navigable waters?



Isolated waters
5-4



Non-navigable
tributary
4-1-4

Wetland adjacent to
non-navigable tributary



9-0
Wetland adjacent to
traditional navigable water



May 2015

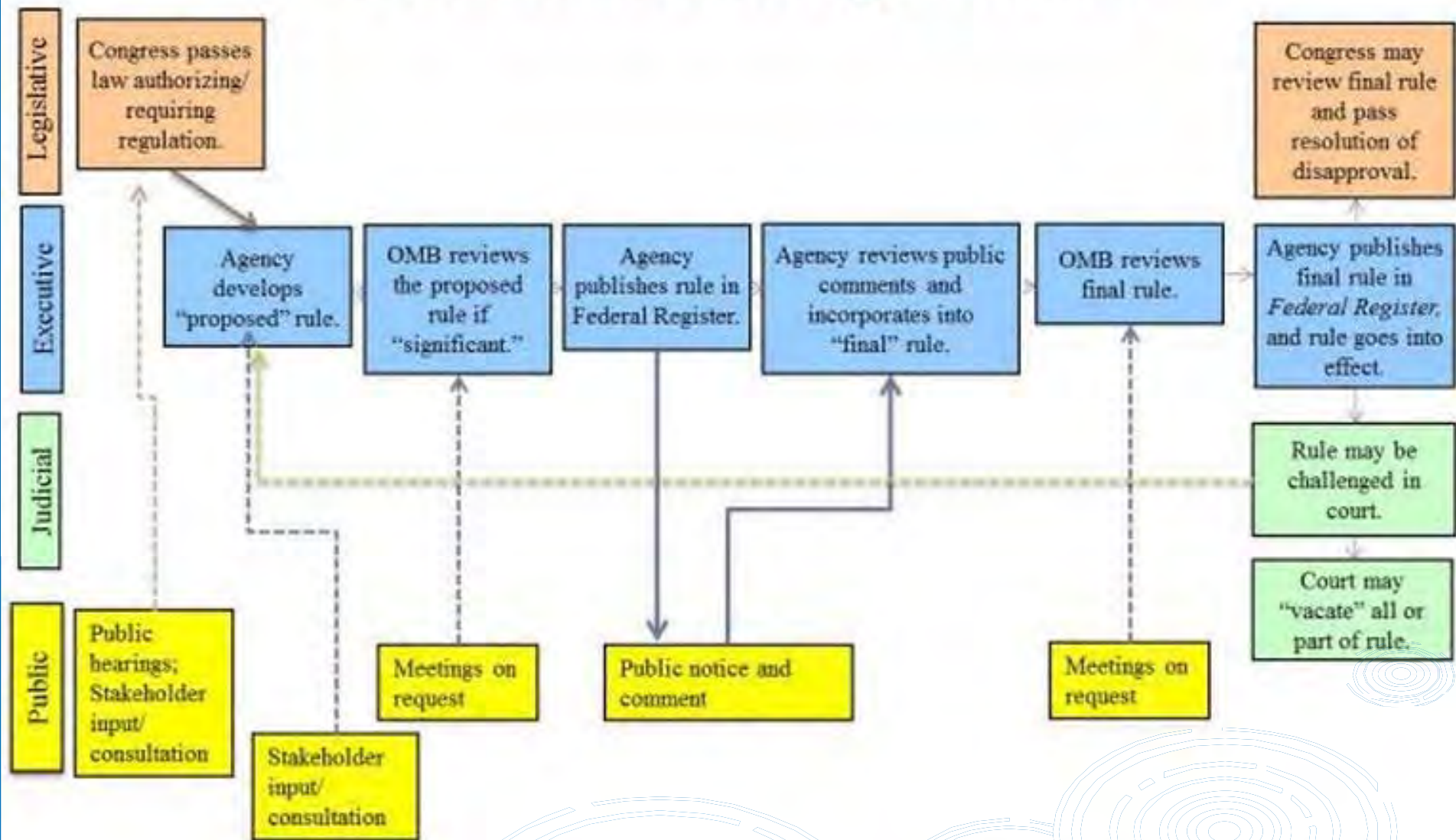
Clean Water Rule: Definition of “Waters of the United States”



EPA's News Release

- “For the water in the rivers and lakes in our communities that flow to our drinking water to be clean, the streams and wetlands that feed them need to be clean too,” said EPA Administrator Gina McCarthy. “Protecting our water sources is a critical component of adapting to climate change impacts like drought, sea level rise, stronger storms, and warmer temperatures – which is why EPA and the Army have finalized the Clean Water Rule to protect these important waters, so we can strengthen our economy and provide certainty to American businesses.”

U.S. Rulemaking Process



EPA Abused Rulemaking Process, American Farm Bureau General Counsel Steen Tells Senate



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OBAMA ADMINISTRATION ACTS TO PROTECT AMERICA'S CLEAN WATER



FOR IMMEDIATE RELEASE

May 27, 2015

Contact: Melanie Gade: mgade@defenders.org; (202) 772-0288

Obama Administration Acts to Protect America's Clean Water

WASHINGTON – Defenders of Wildlife today applauded the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers for resolving confusion created by previous court decisions about

NEWS

House-passed bill hangs proposed WOTUS rule out to dry

By [American Farm Bureau](#) May 18, 2015 | 2:51 pm EDT

 COMMENTS



 PRINT

CLIMATE

Senators Vote To Repeal Clean Water Rule That Protects Millions Of Miles Of Streams

BY NATASHA GEILING  POSTED ON JUNE 10, 2015 AT 4:26 PM UPDATED JUNE 10, 2015 AT 5:38 PM

What is in the 299 pages?

- The text of the rule (many times, at the end)
- The preamble
- Response to comments
- Other legal requirements

And, online...

- Supporting documents
 - Technical
 - Economic
 - Enviro Assessments
- Other materials, including blogs, etc.

WUS

- Traditional navigable waters
- Interstate waters
- Territorial seas
- Impoundments
- Tributaries
- Adjacent Waters

Tributaries

- **“Tributary”** or **“tributaries”** each mean a water that contributes flow, either directly or through another water (including impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this section that is characterized by the presence of a physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i1) through (iii) of this section. § 232.2(3)(iii).

Adjacent

- Adjacent to TNW, interstate, territorial, etc.
- For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this section and are bordering, contiguous, or **neighboring** such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent. § 232.2(3)(i).
- Neighboring...

Neighboring

- **“Neighboring”** means all waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark, all waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain. All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this section, and all waters within 1,500 feet of the ordinary. § 232.2(3)(ii).
- So...
 - Within 100 feet of ordinary high water mark of a TNW, interstate water, territorial sea, impoundment, or covered tributary.
 - 100-year FP out to 1,500 feet
 - Within 1,500 feet of TNW, terr. seas or Great Lakes

Significant Nexus

- Alone, or in combination, has a SN to similarly situated waters in the region
- More than speculative or insubstantial
- Case-specific analysis
 - 5 types of “similarly situated”
 - Within 100 year FP of TNW
 - Within 4,000 of categorical jurisdictional

Significant Nexus and Similarly Situated

- Similarly situated:
 - Prairie potholes
 - Carolina bays and Delmarva bays
 - Pocosins
 - Western vernal pools in CA
 - Texas coastal prairie wetlands
- Still requires SN

Significant Nexus Factors

Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

Not WUS

- New (expanded) definition
 - Waste treatment systems/ Prior converted cropland.
 - Certain ditches:
 - ephemeral flow that are not a relocated tributary or excavated in a tributary/intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands/ do not flow, either directly or through another water
 - Certain features:
 - Groundwater, including groundwater drained through subsurface drainage systems. (vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. (vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling
- If listed, can't become jurisdictional

The Clean Water Rule



Congress passed the Clean Water Act in 1972 to stop the pollution of America's waterways and protect drinking water.



Two Supreme Court decisions exposed a loophole in the Clean Water Act, allowing the pollution of certain waters, including currently unprotected wetlands.

80% of Americans favor the Clean Water Rule which will protect our streams and wetlands, safeguarding the waterways our children and grandchildren use to drink, swim and play in for generations to come.

What Can Be Done?



That means: **117 million** people have protections for their drinking water.



The Clean Water Rule will restore protections to small streams and wetlands, protecting the drinking water of **one in three** Americans.

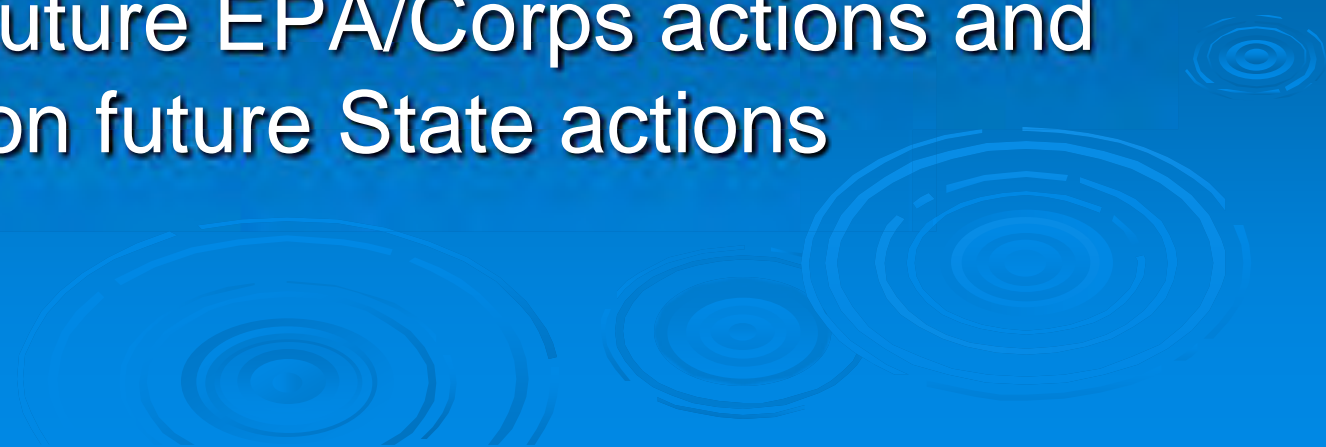
#DitchTheRule

MAKE YOUR VOICE HEARD DITCHTHERULE.FB.ORG




SAY NO TO THE CLEAN WATER ACT EXPANSION

S.1140 — Federal Water Quality Protection Act

- Overview of bill's provisions
 - Effect on final rule
 - Effect on future EPA/Corps actions and influence on future State actions
- 
- The background of the slide features several concentric, light blue circular ripples that resemble water droplets hitting a surface, positioned in the lower right and bottom center areas.

Overview of S.1140's provisions: Congressional findings

- Consultation with States, local governments, and affected entities
 - Limits on Federal authority
 - Role of the States
- 

Overview of S.1140's provisions: Core requirements

No change to definition of WOTUS unless:

- Adherence to principles (Section 4(b))
- EPA/Corps take specified procedural actions (Section 4(c))

Overview of S.1140's provisions: Principles

WOTUS may only include:

- TNWs and interstate waters
- Reach of a stream identified on USGS National Hydrology Dataset Plus at a 1:100,000 scale
- Reach of a stream that, through surface hydrologic connection, contributes flow to TNW sufficiently to degrade water quality of that TNW
- Wetlands next to a WOTUS that prevents movement of pollutants to a TNW

Overview of S.1140's provisions: Procedural actions


- EO 13132 on Federalism
- Consultation with States (180 days)
- Public comment period (120 days)
- Regulatory flexibility analysis and other EOs

Effect on final rule


“A revision to or guidance on a regulatory definition of the term ‘navigable waters’ or ‘waters of the United States’ promulgated or issued pursuant to the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) after February 4, 2015, shall have no force or effect ...”



Effect on future EPA/Corps actions

- Indefinite delay (despite call for final rule by December 31, 2016)
 - Additional grounds for judicial challenges
 - Status quo
- 

Influence on future State actions

- Recognizes States' role in water quality protection programs
 - Places no limits on scope of water subject to State jurisdiction under State law
 - But ...
- 
- The background of the slide features several concentric, light blue circular ripples that resemble water droplets or raindrops, scattered across the lower half of the frame.

What's Likely Next

- Rule will be published in Federal Register and 60 days later go into effect
- EPA/Corps will work with the states on training and clarifying rule implementation
- House Bill 1732 passed House
- Senate Bill 1140 will go to full Senate
- Veto likely, 67 votes in Senate uncertain
- Congress will also pursue appropriation language to prevent rule implementation

Discussion



Thank you for your attention
and contributions!

