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# What is the latest with the Waters of the U.S. Battle?

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- WOTUS Rule(s) Timeline
- Where are we now?
- What's next?

# Rule(s) Timeline

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- 1986– WOTUS Definition
  - Waters used for interstate or foreign commerce
  - Interstate wetlands
  - All other waters; intrastate lakes, rivers, streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters:
    - Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
    - From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
    - Which are used or could be used for industrial purposes by industries in interstate commerce;
  - All impoundments of waters otherwise defined as waters of the United States under this definition;
  - Tributaries of waters identified in paragraphs (1) through (4) of this section;
  - The territorial sea;
  - Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section

# Rule(s) Timeline

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- 1986 Summary
  - All navigable waters, the territorial seas, plus...
  - Their tributaries, impoundments, and adjacent wetlands and isolated waters where the use, degradation or destruction of such waters could affect interstate or foreign commerce.
    - Adjacent wetlands?
    - Isolated waters?

# Rule(s) Timeline

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- Migratory Bird Rule (1986)
  - Based on 40 CFW 230.3(s) paragraph 3, EPA's Migratory Bird Rule (51 FR 41217) asserted that CWA jurisdiction could be extended to isolated, intrastate, non-navigable waters based on the following:
    - Use of the water as habitat by birds protected by the Migratory Bird Treaty Act;
    - Use of the water as habitat for Federally protected endangered or threatened species; or
    - Use of the water to irrigate crops sold in interstate commerce

# Rule(s) Timeline

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- SWANCC (2001)
  - Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159
  - Supreme Court dismissed the long controversial Migratory Bird Rule
  - Isolated waters no longer jurisdictional based solely on migratory bird use.

# Rule(s) Timeline

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- Rapanos (2006)
  - Rapanos v. United States, 547 U.S. 715
  - Plurality (4 Judges)
    - WOTUS limited to waters with:
      - Relatively permanent flow
      - Continuous surface connection

# Rule(s) Timeline

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- Rapanos (2006)
  - Rapanos v. United States, 547 U.S. 715
  - Concurrence (1 Judge)
    - Significant Nexus Test
      - Wetland or waterbody, either by itself or in combination with other similarly situated sites, that significantly affects the physical, biological, and chemical integrity of the downstream navigable waterway
  - Concurrence was to vacate case back to U.S. District Court



# Rule(s) Timeline

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- Rapanos (2006)
  - Rapanos v. United States, 547 U.S. 715
  - Dissent (4 Judges)
    - Agreed with USACE assertion of jurisdiction

# Rule(s) Timeline

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- April 2014 – Draft Waters of the U.S. rule released
  - Comment period over 200 days.
  - More than 1,000,000 comments were submitted
- August 28, 2015 – Rule effective
- Rule not effective – Federal Judge blocked the rule on August 27, 2015, 13 states had an injunction
- October 9, 2015 – U.S. Court of Appeals 6th Circuit issued a stay. Rule was not effective nationwide.

# Rule(s) Timeline

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- August 2018 – U.S. District Court reinstated 2015 rule. Stays issued for 28 (now 27) states; use pre-2015 definition.



# Eight Categories of Jurisdictional Waters

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## Mainstay Waters

1. All waters which are currently used, or were used in the past, or may be susceptible to use in the future in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
  - Traditional Navigable Waters (TNWs)
2. All interstate waters, interstate wetlands
3. Territorial seas

# Eight Categories of Jurisdictional Waters

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1. Impoundments of Waters of the U.S.
2. All tributaries of waters identified in items 1 through 3
3. All waters adjacent to waters identified in items 1 through 5

*Waters in items 1 through 6 are jurisdictional by rule, no additional studies required. Tributaries and adjacent waters have a nexus to the Mainstay waters.*

# Tributaries – Item 5

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- Rule provides a definition of tributaries.
  - A water must flow directly or through another water to a mainstay water ( item 1 through 3)
  - Flow must have sufficient volume, frequency, and duration to create physical characteristics.
    - Bed and bank, ordinary high water mark.

# Adjacent Waters – Item 6

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## *Bordering/Contiguous/Neighboring*

- Including waters separated from other Waters of the U.S. by constructed dikes or barriers, natural river berms, beach dunes, and the like
- Waters adjacent to items 1 through 5 are Waters of the U.S.
- Entire water is adjacent if any portion is



# Neighboring

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- All waters located in whole or in part within 100 feet of the ordinary high water mark of items 1 through 5.
- All waters within the 100-year floodplain of items 1 through 5 located in whole or in part within 1,500 feet of the ordinary high water mark.
- All waters in whole or in part within 1,500 feet of high tide line of TNW or territorial seas, and all waters located within 1,500 feet of the ordinary high water mark of the Great Lakes.

# Eight Categories of Jurisdictional Waters ctd.

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7. Five types of waters which have been determined to be “similarly situated” and should be considered in combination in a significant nexus analysis.

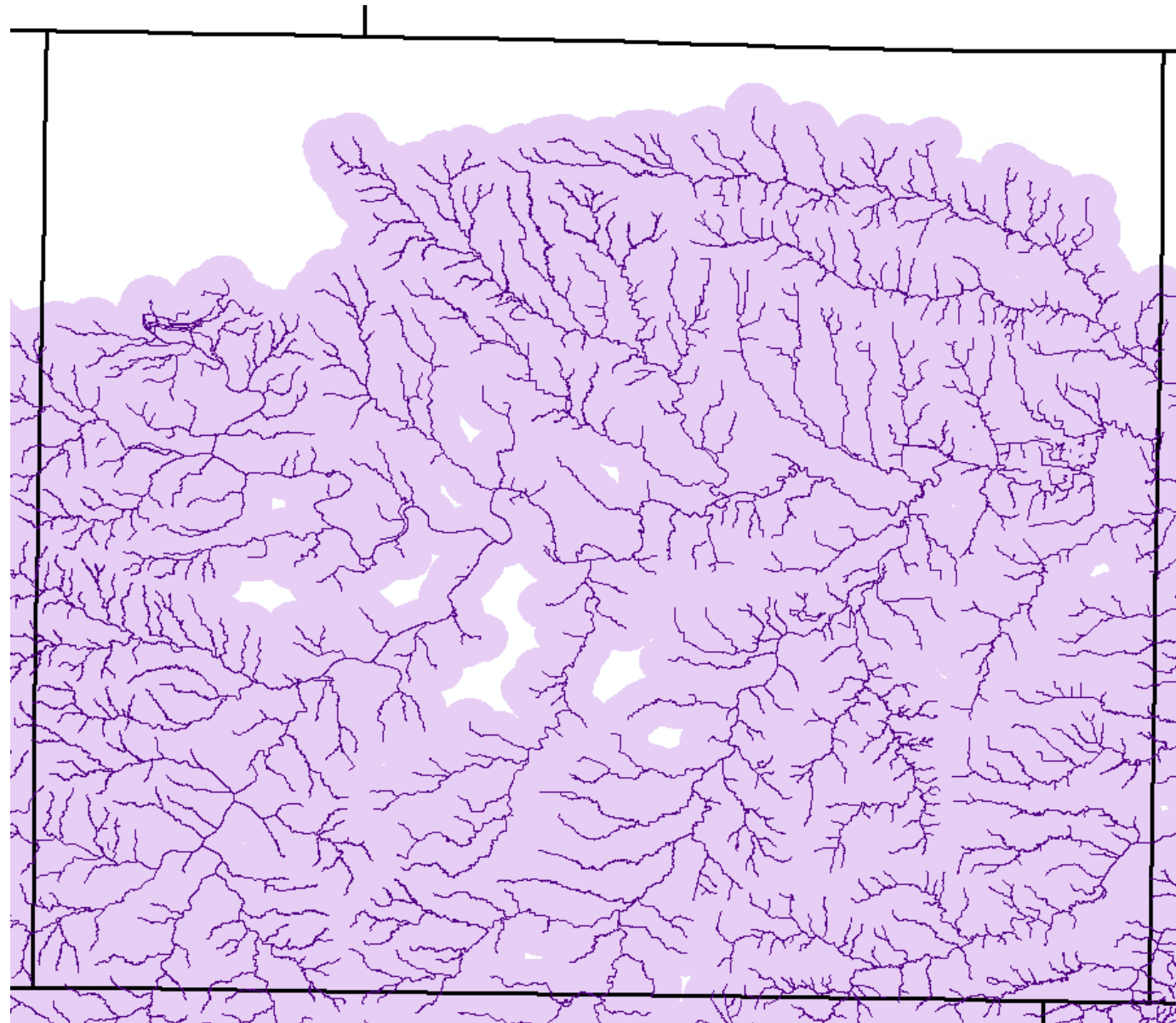
- Prairie Potholes
- Delmarva and Carolina bays
- Pocosins
- Western vernal pools
- Texas coastal prairie wetlands

# 100-year Floodplain & 4,000 Foot Distance – Item 8

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- Waters within the 100-year floodplain of Mainstay Waters (outside of the 1,500 foot ordinary high water mark)
- Waters within 4,000 feet of ordinary high water mark of items 1 through 5
- Case by case significant nexus determination needed
- Entire water will be evaluated if only a portion is in the buffers

# 4,000 Ft Buffer



# NOT Waters of the U.S.

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- Existing farming, ranching, silviculture exclusions
- Waste treatment systems: ponds/lagoons meeting the requirements of CWA
- Prior converted cropland
- Irrigated areas that would revert back to dry land if irrigation stopped
- Constructed lakes/ponds in dry land
- Water-filled depressions created in dry land without any mining/construction activity

# NOT Waters of the U.S. ctd.

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- Erosional features – gullies, rills, and other features not meeting tributary definition
- Stormwater control features created in dry land
- Non-wetland swales or constructed grassed waterways
- Ditches with ephemeral/intermittent flow that do not consist of a relocated stream channel (tributary)
- Ditches with no flow into a Mainstay Water – item 1 through 3)

# Rule(s) Timeline

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- April 19, 2017 – EO 13132 outlines two step process
- Rescind Clean Water Rule
- Replace WOTUS definition (per Scalia's interpretation)
- July 27, 2017 – Rescission of Clean Water Rule and Notice of Intent on replacement rule
- December 11, 2018 – proposed revised WOTUS rule released.
- 60-day comment period – closed April 15, 2019

# Proposed Rule

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- Six categories of WOTUS:
  - Traditional Navigable Waters
  - Tributaries
  - Certain ditches
  - Certain lakes/ponds
  - Impoundments
  - Adjacent Wetlands
- Clearly outlines what is not WOTUS
  - Ephemeral features
  - Groundwater
  - Ditches not covered in above category
  - Stormwater/wastewater features



# Rule(s) Timeline

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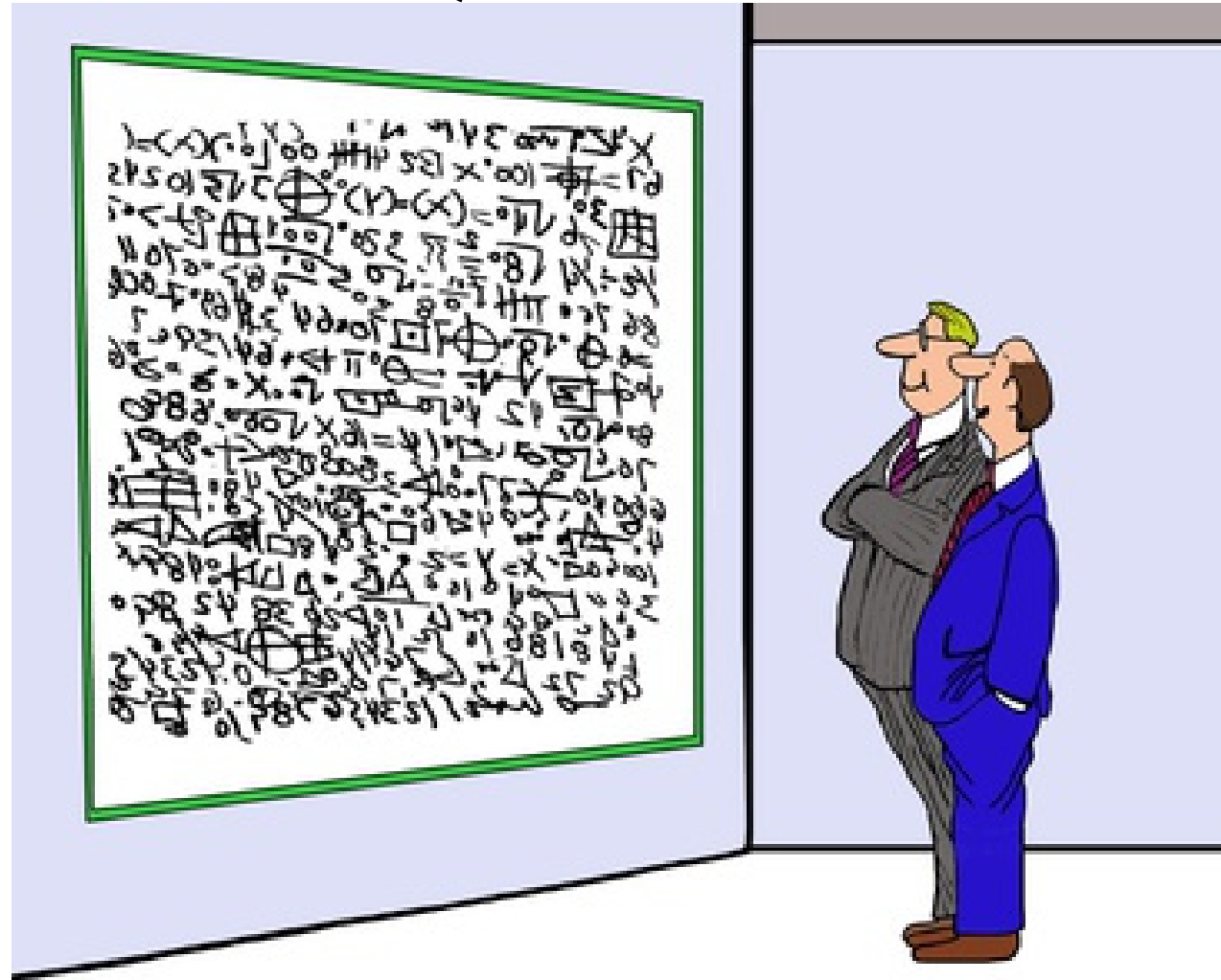
- September 2019 – rule finalized to repeal the 2015 Clean Water Rule
- Recodifies regulatory text from prior to 2015 rule
- Applicable to all 50 states
- Final rule effective 60 days after publication in Federal Register

# What Now?

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- Repeal effective December 23, 2019
- Working through comments to replacement rule (2018 Rule)
  - 600,000+ comments
- More litigation?
- Another supreme court case?

# Questions?



**“When you put it like that, it makes complete sense.”**

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