

# Hot Topics in Clean Water Law

September 16, 2015



# **“Waters of the United States” Rule**

Fred Andes, Barnes & Thornburg  
September 16, 2015

# WOTUS Legal Milestones

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- EPA rules pre-SWANCC
- SWANCC decision
- Rapanos decision
  - 5-4 decision, multiple views
  - Kennedy opinion
- Issuance of draft guidance
- Issuance of proposed rule
- Issuance of final rule
- Multiple legal challenges filed

# Key Aspects of Final Rule

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- New way of determining if covered
- Traditional navigable waters
- Interstate waters and territorial seas
- Impoundments
- Tributaries
- Adjacent waters
- “Significant nexus” waters
- Exclusions

# Exclusions in Final Rule

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- Prior converted cropland
- Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act
- 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

# More Exclusions

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- Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary
- Ditches within intermittent flow that are not a relocated tributary or excavated in a tributary or drain wetlands
- Ditches that do not flow, either directly or through another water, into a water used for commerce, an interstate water, or the territorial seas

# Still More Exclusions

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- Artificially irrigated areas that would revert to dry land should application of water to that area cease
- Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds
- Artificial reflecting pools or swimming pools created in dry land
- Small ornamental waters created in dry land

# Still More Exclusions

- Water filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water
- Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways
- Puddles
- Groundwater
- Stormwater control features constructed to convey, treat or store stormwater that are created in dry land



# Issues

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- Grandfathering
- “Waters” baseline
- Stormwater systems/MS4s
- Ditches/erosional features
- Dry land
- Significant nexus

# What Happens Next?

- Court of Appeals cases all in 6<sup>th</sup> Circuit
- District Court cases all over the place
- EPA wants all District Court cases in DC District
- North Dakota court issued stay for 13 States
- Legislation proposed to require EPA to go back and start over with new proposal, after making changes
- After venue fight to choose court, case will be briefed, on CWA, APA and constitutional issues
- Case will go all the way to Supreme Court
- For now, rule stayed in 13 States, in effect everywhere else

# Questions?

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# THE CLEAN WATER RULE: WHAT'S IN, WHAT'S OUT, AND WHAT'S ALL THE FUSS ABOUT?



JON DEVINE  
SENIOR ATTORNEY  
WATER PROGRAM, NATURAL RESOURCES DEFENSE COUNCIL

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# WHAT WATERS ARE PROTECTED BY THE CLEAN WATER ACT?

- Since 1972, the Act generally has prohibited “any addition of any pollutant to *navigable waters* from any point source....”
- “The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”
  - *Note: No limitation on the kinds of water bodies covered by the law*
- So, numerous Clean Water Act pollution control programs don’t apply unless there’s a “water of the United States”

# WHAT DID CONGRESS MEAN BY “NAVIGABLE WATERS”?

- 1972 Conference Report
  - “The conferees fully intend that the term ‘navigable waters’ be given ***the broadest possible constitutional interpretation*** unencumbered by agency determinations which have been made or may be made for administrative purposes.”
- 1972 Floor Statement of Rep. Dingell
  - “[T]he conference bill defines the term ‘navigable waters’ ***broadly for water quality purposes***. It means all ‘the waters of the United States’ in a geographical sense.”
- 1977 Failed attempt to restrict geographic scope of § 404
  - Senate Report: “[T]he committee amendment intends to assure continued protection of ***all the Nation’s waters***. . . .”
  - Sen. Bentsen: “The program would **still cover all waters of the United States**, including small streams, ponds, isolated marshes, and intermittently flowing gullies.”
- 1985 *U.S. v. Riverside Bayview Homes* (S.Ct.)
  - “[T]he language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the ‘waters of the United States.’”

# HOW DID THE SUPREME COURT SCREW UP CONGRESS'S INTENT?

- ***SWANCC v. U.S. Army Corps (2001)***: Court ruled that non-navigable, intrastate waters could not be classified as “waters of the United States” solely based on presence of migrating bird habitat.
- ***Rapanos v. U.S. (2006)***: No majority opinion; 5 justices remand case involving wetlands adjacent to non-navigable tributaries. Lower courts since have consistently ruled that the law at least protects those waters that collectively have a “significant nexus” to downstream navigable/interstate waters – a chemical, physical, or biological impact.





# HOW DID THE PRIOR ADMINISTRATION MAKE THINGS WORSE?

- Policy imposed after *SWANCC* required pre-approval from EPA/Corps HQ to protect “isolated” waters. Has operated as ban on protecting such waters – none have been found jurisdictional by federal agency since 2001.
- Policy imposed after *Rapanos* required case-by-case review for non-navigable streams and their adjacent wetlands, even though decision didn’t involve status of streams. Also constrained analysis to small stream “reach,” rather than watershed, which decision would’ve allowed.





# WHAT KINDS OF WATERS HAVE BEEN MOST AFFECTED?

## ***Headwater, Seasonal, and Rain-Dependent Streams***



*Rillito River, Arizona*

## ***Wetlands Near Non-Navigable Streams***



*Wetland near Four Mile Run, Arlington, VA*

# WHAT KINDS OF WATERS HAVE BEEN MOST AFFECTED?

## ***“Isolated” Waters***

*Playa Lake,  
Southern High  
Plains*



*Closed Basin  
Rio Tularosa, South Central NM*



*Prairie Pothole  
Wetland,  
Marshall  
County, SD*



# WHAT'S HAPPENED TO CLEAN WATER LAW ENFORCEMENT?



U.S. ENVIRONMENTAL PROTECTION AGENCY  
OFFICE OF INSPECTOR GENERAL

*Catalyst for Improving the Environment*

## Special Report

- “Processing enforcement cases where there is a jurisdictional issue has become very difficult.”
- In a relatively short period of time, “[a]n estimated total of 489 enforcement cases ... have been affected such that formal enforcement was not pursued as a result of jurisdictional uncertainty, case priority was lowered as a result of jurisdictional uncertainty, or lack of jurisdiction was asserted as an affirmative defense to an enforcement action.”

## Economic Analysis of Proposed Revised Definition of Waters of the United States

March 2014

“EPA enforcement managers have indicated that enforcement efforts have shifted away from small streams high in the watershed where jurisdiction is

a potential issue. In short, EPA is focusing efforts on larger streams and rivers, where there is more certainty of establishing jurisdiction.”



# WHAT DID WE NEED TO DO?

- With the continuing loss of the nation's water resources, many advocates urged EPA and the Corps to take science-backed administrative action, leading to regulations that protect as many waters as possible consistent with the Court's opinions.



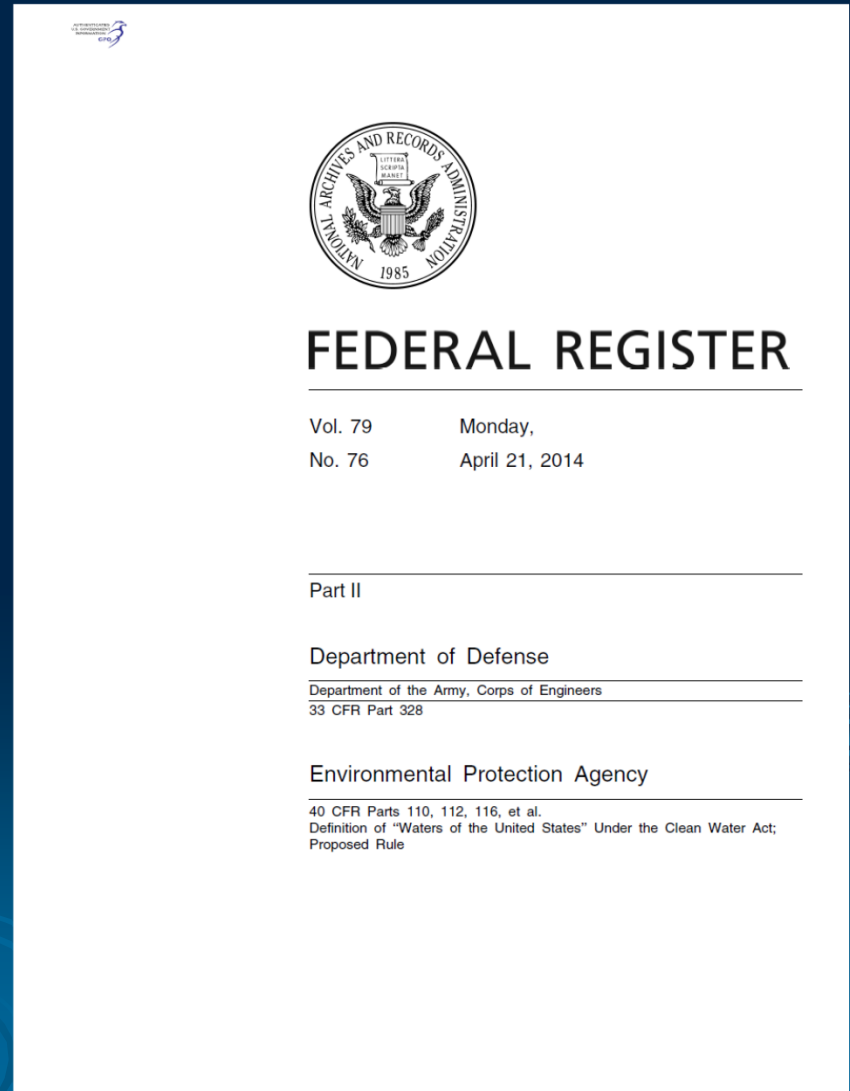
# HOW HAS THE OBAMA ADMINISTRATION RESPONDED?

- EPA scientists developed a report, *Connectivity of Streams and Wetlands to Downstream Waters*, that summarizes more than 1,200 pieces of peer-reviewed literature examining physical, chemical, or biological linkages between various waters.
- Report was already subject to peer review, and has had a final review by Science Advisory Board.
- Concludes that tributary streams and nearby waters have multiple important connections to downstream waters. Is equivocal about more distant waters.



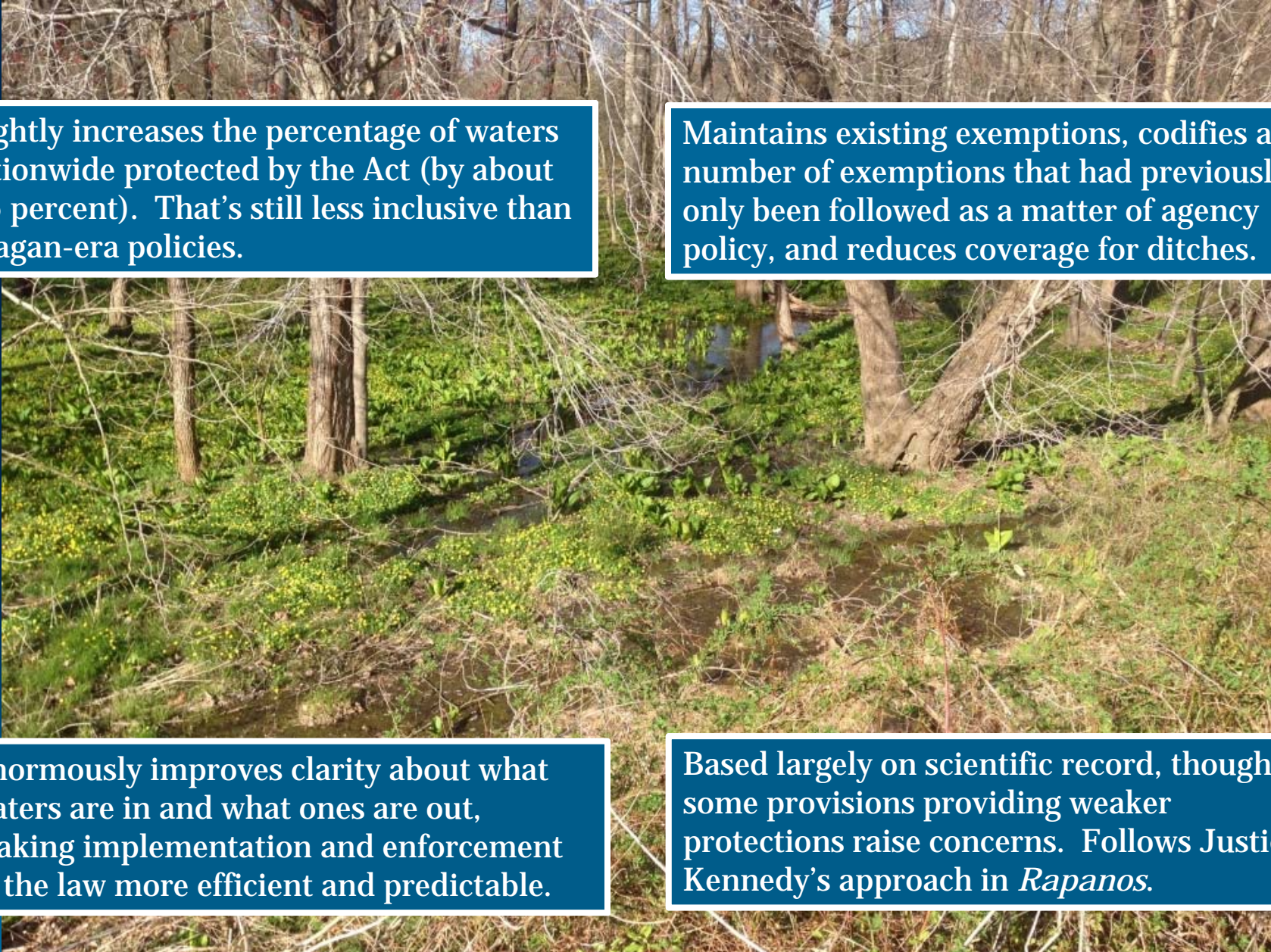
# HOW HAS THE OBAMA ADMINISTRATION RESPONDED?

- Clean Water Rule proposal published April 2014. Final rule published June 29, 2015.
- Based on science report's conclusions about waters' interconnection.
- Responds to 1+ million comments, 87% supportive of clean water. Also addresses many specific concerns, esp. with respect to constructed features.





# WHAT DOES THE RULE DO?



Slightly increases the percentage of waters nationwide protected by the Act (by about 3-5 percent). That's still less inclusive than Reagan-era policies.

Maintains existing exemptions, codifies a number of exemptions that had previously only been followed as a matter of agency policy, and reduces coverage for ditches.

Enormously improves clarity about what waters are in and what ones are out, making implementation and enforcement of the law more efficient and predictable.

Based largely on scientific record, though some provisions providing weaker protections raise concerns. Follows Justice Kennedy's approach in *Rapanos*.

# HOW WOULD THE RULE PROTECT WATERS?

## ➤ **Categorically Protected:**

- Traditional Navigable Waters
- Interstate Waters
- Impoundments of TNWs/Interstate
- Tributaries to above and impoundments of such tributaries
- Waters adjacent to above

## ➤ **Case-By-Case Review:**

- Other waters like “isolated” wetlands

## ➤ **Exempt:**

- Prior converted cropland
- Waste treatment systems
- Dry land ditches that don't function like traditional tributaries
- Artificially irrigated areas that would revert to upland if irrigation ceased
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for various purposes



# HOW WOULD THE RULE PROTECT WATERS?

## ➤ More Exempt Waters:

- Small ornamental waters created from dry land for primarily aesthetic reasons
- Water-filled depressions created incidental to construction activity
- Groundwater, including groundwater drained through subsurface drainage systems
- Erosional features that aren't tributaries, non-wetland swales & grassed waterways.



- Puddles
- Constructed water/wastewater management features on dry land.

# WHAT'S A "TRADITIONALLY NAVIGABLE WATER?"



- Waters used or susceptible to transport interstate/foreign commerce
- Waters that are navigable-in-fact, including by recreational craft.

- Waters previously found to be “navigable” under various federal legal requirements.
- Waters subject to ebb and flow of the tide.





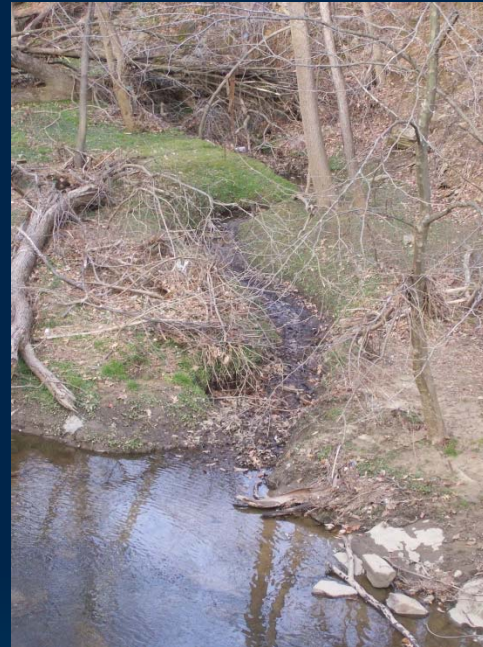
# WHAT'S AN INTERSTATE WATER?

- Exactly what you think.
- Things like (clockwise from right) Mississippi, Potomac & Columbia Rivers.
- Also interstate wetlands, lakes and ponds.



# WHAT'S A TRIBUTARY?

- Contributes flow directly or through another water to other covered water.
- Has ordinary high water mark (OHWM) and bed and bank. Breaks in these do not sever coverage, if these indicators of flow exist upstream and downstream.
- Includes man-made features too, unless otherwise exempt.
- Includes intermittent/ephemeral flows.
- OHWM & bed/bank can be determined using a variety of tools.





# WHAT'S AN "ADJACENT" WATER?



*Wetland near West Branch of Perkiomen Creek, PA*

## **"Adjacent" Means:**

- Physically bordering or contiguous, including if separated by berms or similar features.
- When it serves to connect two waters.
- In the 100-year floodplain of a covered water, but not beyond 1,500 feet out from OHWM.
- Within 1,500 feet of high tide line of traditional navigable water, interstate water, or territorial seas.
- Within 1,500 feet of OHWM of Great Lakes.

## **Noteworthy Aspects of Definition**

- Not just limited to adjacent wetlands – includes ponds, oxbow lakes, etc.
- Floodplain extent to be based on FEMA maps where available and up to date. Otherwise, various tools (NRCS soil surveys, state maps, modeling) to be used. Agencies promise further guidance on this.
- Waters "used for established normal farming, ranching and silviculture" not adjacent.



*Wetland near Piney Branch, Fairfax County, VA*

# WHAT ELSE IS COVERED?

- Five categories of “isolated” waters when – across a large watershed – they collectively have a significant effect on conditions downstream.



*Delmarva Bays*



*Prairie Potholes*



*Western Vernal Pools*



*Pocosins*



*Texas Coastal  
Prairie  
Wetlands*



# WHAT ELSE IS COVERED?

- Other kinds of “isolated” waters IF:
  - Located within the 100-year floodplain of a covered water body OR within 4,000 feet of the high tide line or OHWM of traditional navigable water, interstate water, or territorial seas; AND
  - Together with other waters of the same type and found to be “similarly situated,” have significant downstream impacts.



*Playa Lakes?*



*Rainwater  
Basin  
Wetlands?*



*Eastern Vernal  
Pools?*

# THANK YOU!





# QUESTIONS?

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# Great Lakes Sewage Overflow Legislation



114TH CONGRESS  
1ST SESSION

# S. 1645

[Report No. 114-70]

PROHIBITION OF SEWAGE DUMPING INTO THE GREAT  
LAKES

SEC. 428. (a) Section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342) is amended by adding at the end the following:

“(s) PROHIBITION ON SEWAGE DUMPING INTO THE  
GREAT LAKES.—

# Section 428 Facts:

- Applies to all direct and indirect dischargers to the Great Lakes
- Codifies EPA's bypass definition into CWA and requires all flows to be treated to secondary treatment standards, including flows from CSOs, and prohibits blending
- Increases penalties to \$100,000 per violation in 2035 and uses penalties for Great Lakes Restoration fund

# Who is Impacted?

- CSO Communities or utilities (184 in the Great Lakes watershed)
- Separate sewer communities that blend
- Those with both (Most CSO communities/utilities also have separate sewer service areas)
- Great Lakes watershed would be regulated differently than the rest of U.S.



# Key Implications

- Calls for complete elimination of all sewer overflows, including all CSOs
- Contradicts CSO Policy, 20 years of existing law and regulation; would eliminate blending
- Sets dangerous national precedent
- Establishes major policy change through appropriations process
- Unfunded federal mandate in appropriations bill that cuts CWSRF funding by nearly 30%

# NACWA Advocacy

- Working to educate Congress on major concerns with the legislation
- Collecting data on potential impacts – preliminary estimates suggest \$42+ billion cost
- Submitting letters and encouraging additional outreach from other impacted groups
- Politics on this are very tricky!



# We Need Your Help!!

- [NACWA Great Lakes Legislation Resources](#)
  - Background Information
  - Utility Survey
  - Sample Letter
  - Copies of Other Letters Submitted
- Entire municipal clean water utility community must rally behind this issue!
- Contact Nathan Gardner-Andrews at [ngardner-andrews@nacwa.org](mailto:ngardner-andrews@nacwa.org)



# The Clean Power Plan: Challenges & Opportunities

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## The path here...

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### ■ Background:

- For the first time, EPA is regulating carbon dioxide (CO<sub>2</sub>) from existing power plants (known as electric generating units (EGU)) under § 111(d) of the Clean Air Act.
  - EPA set minimum emission guidelines for source categories
  - Based on the Best System of Emission Reduction (BSER)
  - States establish equivalent performance standards through state plans
- EPA proposed the Clean Power Plan (CPP) on June 2, 2014.
  - Over 4 million comments were submitted on the proposed rule
- On August 3, 2015, EPA released the final CPP rule, proposed CPP federal plan, and final § 111(b) rule for new EGUs.
  - These rules are not yet published in the *Federal Register* but are expected shortly
  - Comments on three related elements are due 90 days after publication: (1) the draft federal plan for states that fail to submit a compliance plan by the September 2018 deadline, (2) the Clean Energy Incentive Program, and (3) the Draft EM&V Guidance for Demand-side Energy Efficiency

# Final Clean Power Plan (CPP)

- The Clean Power Plan establishes emission performance rates for two subcategories of existing EGUs:

CO <sub>2</sub> Emission Performance Rates (pounds of CO <sub>2</sub> per net MWh)		
Affected EGU	Interim Rate 2022-2029	Final Rate 2030
Fossil (Coal & Oil) Rate	1,534	1,305
Natural Gas	832	771


- Will require a 32% reduction of CO<sub>2</sub> emissions from 2005 levels by 2030
- EPA projects annual compliance costs ranging from \$2.5 to \$8.4 billion
- States are charged with determining how to best meet EPA's standards

# Final Clean Power Plan (CPP)

State Timing Requirements	
<b>Initial Submittal/Ext. Request</b>	September 6, 2016
<b>Final State Plan (w/Ext.)</b>	September 18, 2018
<b>Compliance Period Begins</b>	January 1, 2022
<b>Milestone #1</b>	Jan. 1, 2022 - Dec. 31, 2024
<b>Milestone #2</b>	Jan. 1, 2025 - Dec. 31, 2027
<b>Milestone #3</b>	Jan. 1, 2028 - Dec. 31, 2029
<b>Compliance Deadline</b>	January 1, 2030



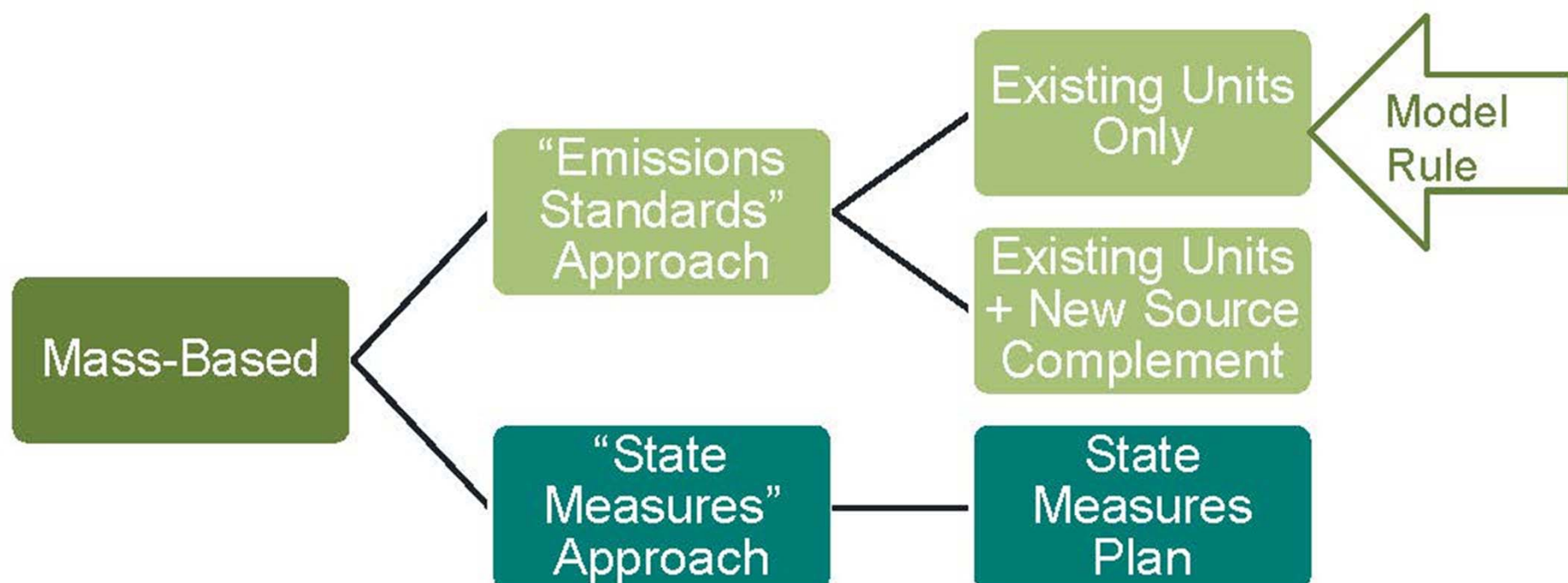
# Changes from Proposal to Final Rule

ITEM	PROPOSAL	FINAL
Compliance timeframe	2020	2022
Building Blocks	Four Building Blocks	Three Building Blocks (see next row) and refinements to Building Blocks
Demand-Side Energy Efficiency	Included as a Building Block	No longer a Building Block – though EPA anticipates that, due to its low costs and large potential in every state, demand-side energy efficiency will be a significant component of state compliance plans under the CPP
Timing of reductions	S-curve. Commenters disliked the “cliff” 	Steps down glide path more gradually: 2022-2024 2025-2027 2028-2029
Goal Setting	Formula included energy efficiency (EE), new nuclear, and existing renewable energy (RE) sources in the Best System of Emission Reduction (BSER)	BSER: Apply three building blocks to set two uniform CO <sub>2</sub> emissions rates: generally, 1. Fossil and 2. natural gas. EE, nuclear and existing RE not included in goal setting
Geographic focus	State/tribe/territory	Contiguous U.S.
Deadline for final state plan	September 2016 with opportunity for one or two year extension	September 2018: after initial submittal by September 2016
State plans options	Two Types: Direct emission limits and portfolio approach	Two types: emissions standards and state measures
Interstate trading mechanisms	Up-front agreements	Up-front agreements not required Trading-ready option

## A Few Definitions

- Eligible Renewable Energy (RE) and Demand-side Energy Efficiency (EE) measures that occur after 2012 can be included in state plans
- Demand-side Energy Efficiency (EE): “an equipment or system, a modification of existing equipment or system, or a strategy intended to affect consumer electricity use behavior, that results in a reduction in electricity use (in MWh) at an end-use facility ... connected to the electricity grid”
- Mass-based: a state goal developed on short tons of CO<sub>2</sub> emitted from the stacks of covered EGUs
- Rate-based: a state goal measured in pounds per megawatt hour (lb/MWh)
- Evaluation Measurement and Verification (EM&V) Plan: a plan that reports how all MWh saved and generated from eligible measures will be quantified and verified

# CPP: State Compliance Options





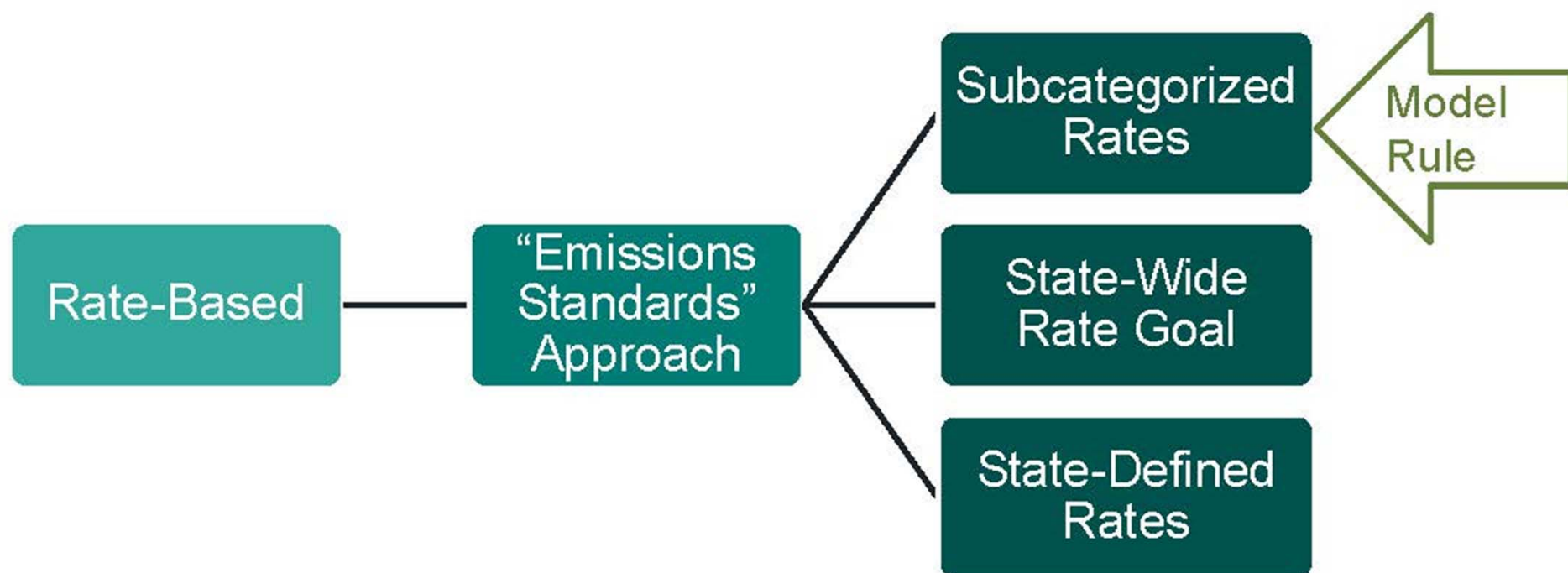
## CPP: Mass-Based Plan

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- Under the mass-based plan, EPA caps yearly emissions from the state's EGUs.
- States then issue the allotted number of "allowances" and determine how they are distributed.
- EGUs will be incentivized to reduce energy demand and thereby reduce the number of allowances they must purchase - for example by encouraging consumers to be more energy efficient.
- EE programs and projects do not need to be approved as part of a mass-based state plan. Evaluation Measurement and Verification (EM&V) will not be required, because compliance is demonstrated by measuring CO<sub>2</sub> emissions at the stack.
  - States can encourage EE through allocation provisions in a mass-based trading program. For example: (1) auction and reinvestment of proceeds to fund EE or (2) allocate set-asides for EE programs/ projects.



# CPP: State Compliance Options



## CPP: Rate-Based Plans

- Under rate-based plans, EPA sets a cap on how much carbon an EGU can emit per unit of energy produced (lb/MWh).
- EGU can invest in qualified measures such as zero or low carbon energy generation. The qualified measures are then evaluated by the state and granted credits.
- Because reductions do not occur at the stack, a EM&V plan is required for each EE program or project, specifying how MWh savings will be quantified and verified.
- The Clean Power Plan anticipates that states with pre-existing, effective oversight of EE programs, particularly through Public Utility Commissions, will be able to rely on them for compliance.
- Any type of EE that meets eligibility requirements, including EE programs and projects from energy service companies, industrial organizations and commercial buildings, are creditable if properly quantified and verified.

# Some Relevant Examples of Energy Reduction Opportunities

- EPA encourages broad and creative measures, including water and wastewater projects!
  - “Examples of demand-side EE measures include, but are not limited to, EE measures that reduce electricity use in residential and commercial buildings, industrial facilities, and other grid-connected equipment. ***Water efficiency programs that improve EE at water and wastewater treatment facilities also provide demand-side EE savings opportunities.***”
  - “The EPA received comments supporting the use of water sector EE programs and projects. Commenters identified water and wastewater utilities as particularly well-suited for participating in EE programs and providing a source of electricity savings. ***Investments such as replacing pumps and other aging equipment and repairing leaks can result in greater EE. The EPA agrees that these electricity savings should be eligible for adjustments to CO<sub>2</sub> emission rates at affected EGUs.***”



- Renewable Energy (RE) generating capacity installed after 2012 (and generating reductions in 2022-2030) that uses qualified biomass as fuel is eligible.
  - Qualified biomass means feedstock that is demonstrated as a method to control increases of CO<sub>2</sub> levels in the atmosphere.
- State plans must describe the types of biomass that are being proposed for use and why they should be considered “qualified biomass” (i.e., a feedstock that is demonstrated to control increases of CO<sub>2</sub> levels in the atmosphere).
- State plans must also specify how biogenic CO<sub>2</sub> emissions will be monitored and reported, and identify specific Evaluation Measurement and Verification (EM&V), tracking and auditing approaches.

# Cost of Power Projections

- **Proposed Rule - Power Cost Projections:**

- EPA: Projected that in 2030, electricity bills would be roughly 8% lower, saving Americans about \$8 on an average monthly residential electricity bill.
- Industry: Consumers would need to invest an additional \$53 billion (2013\$) in new gas and renewable generation capacity to replace lost coal generation capacity. Wholesale power prices would increase by \$274 billion over the initial compliance period (2020-2030) to capture higher production costs and new carbon penalties.

- **Final Rule - Power Cost Projections:**

- EPA: Due to increased energy efficiency, the final Clean Power Plan will reduce electric bills by about \$7 per month by 2030.
- Industry: TBD (presumably higher due to more stringent reductions).



# Legal Challenges

- After a flurry of pre-publication litigation, parties are gearing up to challenge almost every aspect of both the existing source and the new source rules.
  - Most will be filed after publication in the *Federal Register* (which is soon).
  - Challenges will be consolidated and heard first by the D.C. Circuit, but the matter will ultimately be resolved by the Supreme Court.
  - Further attempts to stay the rule are expected, but will be subject to elevated standards of review.
  - Given its complexity and the number of parties involved, these appeals will take years, not months, to be fully resolved.
  - Simultaneously, other aspects of the rule will likely be finalized by EPA and then challenged in court.
  - Absent a broad stay, many states will continue working to comply with the final rule as it currently exists.

## Key Takeaways

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- While the final state plan deadline is still far off, many states are already hard at work because (1) the endeavor is so complex and (2) legislation will be required in many states.
- Interested parties are engaging to help shape state plans – they are where the “rubber hits the road.”
- In nearly every state, there will be winners and losers. States must make significant policy decisions on who pays, where flexibility exists for Energy Efficiency projects and whether reductions will be via mandates or voluntary programs.
- Many (if not most) policy choices will be made before the courts have their final say.



# Questions and Answers

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A blue ribbon banner with a central rectangular box containing the text "Save the Date!".

Save the Date!

# Hot Topics in Clean Water Law

December 16, 2015  
2:00 – 3:30 pm

The NACWA logo, featuring the acronym "NACWA" in a large, blue, sans-serif font. Below it, the tagline "A Clear Commitment to America's Waters" is written in a smaller, blue, sans-serif font. The logo is positioned on the right side of the slide, above a decorative blue wave graphic.

**NACWA**  
A Clear Commitment to America's Waters