WATERS OF THE U.S. POLICY DEVELOPMENT

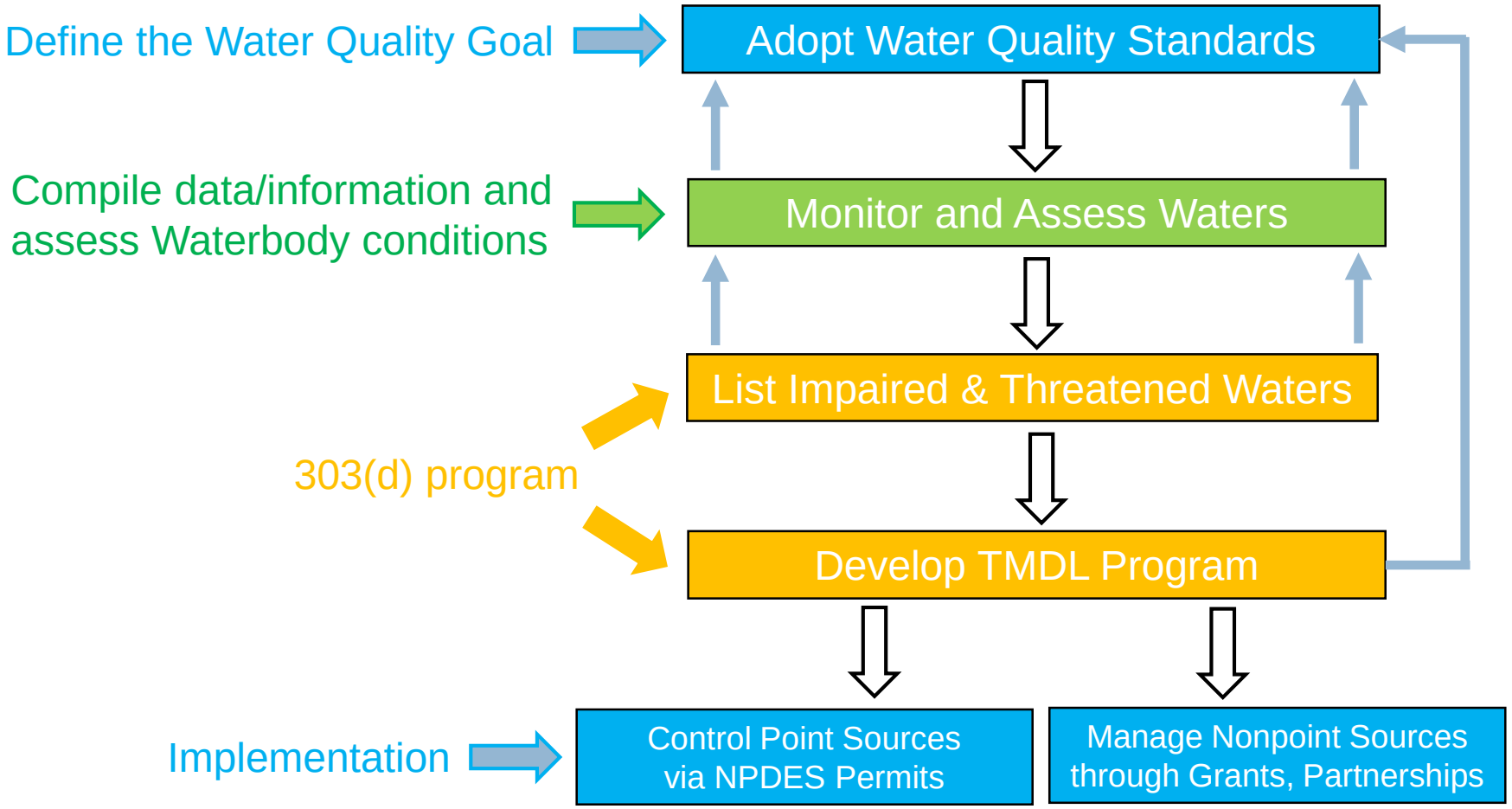
WESTCAS Fall Conference, October 26, 2017

Cuyahoga River, Cleveland, Ohio. 1969.

Congressional Intent

- The 1972 Federal Water Pollution Control Act (FWPCA) is based on a cooperative federalism approach for protecting the nation's waters.
- The FWPCA, also known as the Clean Water Act (CWA), is a comprehensive statute that partners federal, state, and local government and deploys a number of programs – both regulatory and non-regulatory – to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA §101(a).
- Responsibilities divided between federal and state governments: Protect navigable waters from pollution (federal); Protect non-navigable waters and groundwater (state).
- Congress chose not to regulate discharges into *all* waters generally, but only into "navigable waters." It carefully defined "navigable waters" as "*the* waters *of* the United States" meaning those waters in which the federal government has an interest, not as *all* waters *within* the United States.
- When Congress enacted the CWA, it limited federal jurisdiction under the Act. In doing so, Congress expressed its intent to "recognize, preserve, and protect" the States' primary authority and responsibility over local land and water resources. CWA §101(b).

State Responsibilities Under the CWA



U.S. Supreme Court Opinions

- In *Riverside Bayview Homes* (1985) the Court found that the Act's definition of "navigable waters" as "the waters of the United States" indicated an intent to regulate "at least some waters" that were not navigable in the traditional sense, and upheld Corps jurisdiction over wetlands that "actually abut a navigable waterway."
- In *Solid Waste Agency of Northern Cook County (2001)* the Court evaluated the Corps' determination of jurisdiction over small isolated ponds, which were created when rain filled abandoned sand and gravel pits, based on use of the ponds by migratory birds. Rejecting jurisdiction over these ponds – and the Migratory Bird Rule generally – the Court explained that the CWA's use of the term "navigable waters" demonstrates Congress' understanding that its "authority for enacting the CWA [was] its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."
- In *Rapanos (2006)* the plurality criticized the agencies for extending jurisdiction to "ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches and dry arroyos in the middle of the desert." Moreover, the court found that wetlands are waters of the United States if they bear the "significant nexus" of physical connection, which makes them *indistinguishable* from waters of the United States.

Ditches - Agency Interpretations and Policy Statements

- Congress included "ditch" in the definition of a "point source" subject to permitting under CWA §402.
- The Corps' 1975 regulations stated explicitly that "[d]rainage and irrigation ditches have been excluded" from the definition of jurisdictional waters.
- The Corps' 1977 regulations similarly disavowed jurisdiction over ditches. ("[M]anmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition")
- In a 1980 proposed rule, the Corps stated that "man-made, nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States."
- In 1983, in proposed jurisdictional rules, the Corps stated "waters of the United States do not include the following man-made waters: (1) Non-tidal drainage and irrigation ditches excavated on dry land, (2) Irrigated areas which would revert to upland if the irrigation ceased."
- The preamble to 1986 regulations, which adopted the broad Migratory Bird Rule, continued to maintain the exclusion for ditches ("We generally do not consider [drainage and irrigation ditches excavated on dry land] to be 'Waters of the United States.'"), albeit the preamble included a new reservation of "case-by-case" regulatory authority to claim jurisdiction after all.
- In the 1990 preamble to the Phase I storm water regulations, EPA made clear that storm water runoff into municipal sewers (roads, ditches, storm drains, etc.) is not a discharge of a pollutant to a water of the United States.
- The 2006 plurality and Kennedy opinions in Rapanos made clear that most ditches are not jurisdictional.

Additional Agency Interpretations

- In 1974, the Corps originally defined waters of the United States to include only TNWs. The U.S. District Court for the District of Columbia held that this definition was too narrow and that CWA jurisdiction is "not limited to the traditional tests of navigability," and ordered the Corps to develop new regulations
- In 1977, the Corps expanded its regulatory definition of waters of the United States, and included waters "the degradation or destruction of which could affect interstate commerce."
- In 1980, when EPA adopted the definition in its NPDES regulations, it stated that "small, isolated wet areas may not be waters of the United States . . . because . . . their destruction or degradation would not have any effect on interstate commerce."
- In 1988, the agencies again stated they "generally do not consider non-tidal drainage and irrigation ditches excavated on dry land to be 'waters of the United States.'"
- The agencies post-Rapanos 2008 guidance and draft 2011 guidance stated they would find jurisdiction if either the plurality's or Kennedy's standards were satisfied.

Conceptual WOTUS Policy Statement

- A definition of waters of the United States should meet both the plurality and Kennedy tests; specifically:
  - A water that is a standing water must be relatively permanent,
  - A water that is a stream must have a continuous flow,
  - A water that is a wetland must have a continuous surface connection to an otherwise jurisdictional water.
- The term "navigable waters" must be given consideration
- Recognition that traditional and primary authority over land and water resources resides with the states
- Clarity that empowers the states to identify and distinguish waters subject to Clean Water Act jurisdiction and waters subject to a states' water quality regulations
- Support for state adoption of § 404 permitting authority