

WESTCAS 2014 Annual Conference
San Diego, California
June 18, 2014

Waters of the US (WOTUS)

Discussion from the Western Perspective

Looking at WOTUS:

several Western water perspectives

1. EPA Connectivity Report perspectives – Jim Kudlinski
2. Regional Agency perspectives – Jolene Walsh
3. ACWA perspective – Abby Schneider
4. Legal Perspective – Linda Christie
5. Congressional perspective – Hicks-Ray

Western Water – Legal Perspectives

Linda Christie

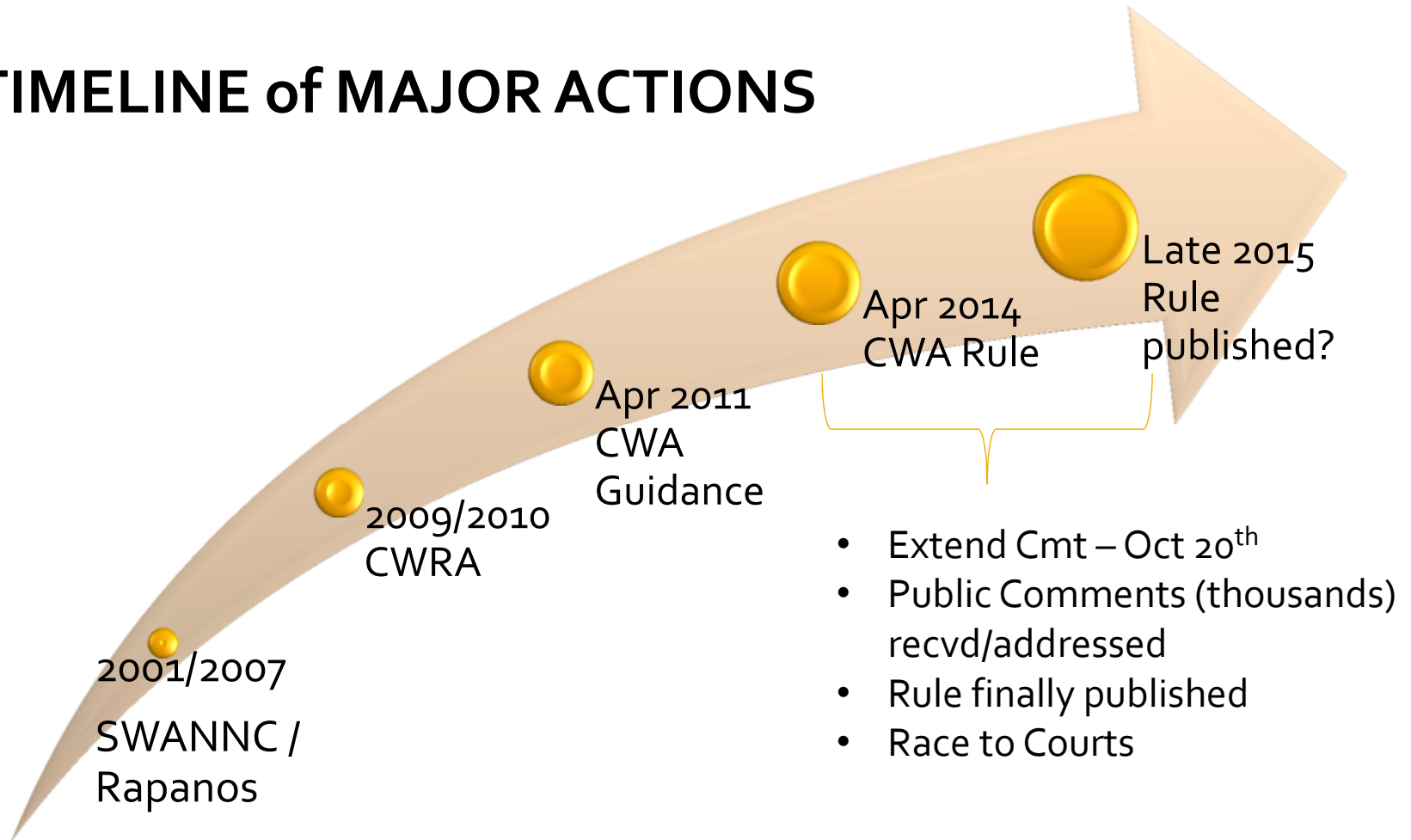
Chair, WESTCAS Legislative Committee
Attorney, Tarrant Regional Water District

“Waters of the US” Proposed Rule

Congressional Perspectives – Issues & Actions
Hicks-Ray Associates


WOTUS - Timeline

TIMELINE of MAJOR ACTIONS



WOTUS – Source of Conflict

Pre-2001,
CWA,
Guidance &
proposed Rule?



“Text Limits”
Statutory

Justice Kennedy, proposed a “significant nexus” test for determining federal Clean Water Act jurisdiction. Under this test, a water body would be subject to federal regulation only if that water body would significantly affect a **navigable-in-fact waterway**. Justice Kennedy would exclude from regulation remote drains, ditches, and streams with insubstantial flows and reject speculative evidence of a “significant nexus.”

majority
decision

MAJORITY: Justices (Scalia, Thomas, Alito, and Roberts) required limiting federal authority to

ent, standing or
g bodies of water”
ized as “streams, oceans,
at are connected to
e waters. *would also*
gulation of wetlands
r bodies if they contain a
water connection such that
ter body are

ices in the dissent took the
view that if the agencies could choose to
regulate essentially any waters (and much of
the land) to advance the statutory goal of
maintaining the “chemical, physical, and
biological integrity of the Nation’s waters.”

House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment.

Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule

"It is the responsibility of Congress, and not the Administration, to define the scope of

jurisdiction under the Clean Water Act.
Chairman Bill Lujan
on Transportation and Infrastructure

"Unfortunately, the rule currently proposed would impose additional regulatory burdens on rural communities and economies without any concomitant environmental benefits. The rule could "federalize" many of the local geologic and man-made water related features common to the arid West...." **Mark Pifher, Colorado Springs NWRA-WESTCAS-WUWC**

Our goal in revising the rule is straightforward: to respond to requests from stakeholders across the country for a more streamlined and more

of identifying
easier to
and more
reviewed
BY
ENVIRONMENTAL

WESTCAS POSITION?

For the first time we are in this rule excluding ditches," she said, laying out categories such as ditches carved entirely out of uplands and ditches that do not contribute perennial flow to larger downstream waters **Jo Ellen Darcy, ASA**

Attempt at Legislative “Fix”

How A Lack of Congressional Consensus Led to Today's Proposed Rule

Clean Water Restoration Act (2009) S. 787/HR 5088

introduced by Senator Feingold of Wisconsin and Representative Oberstar of Minnesota.

- ⇒ Took the definition of WOTUS far behind the post SWANCC/Rapanos Ruling
- ⇒ Passed out of the Senate Environment and Public Works Committee on April 21, 2009 on a 12-7 vote.
- ⇒ Although that session of Congress ran for an additional 19 months, no further action was ever taken on S. 787.

CWRA

LEGISLATION

☐ MAJOR EXPANSION

S. 787, the Clean Water Restoration Act, deletes “navigable” and includes its “waters of the US” provision.

☐ STATUS

As of right now, this legislation has passed the Senate Environment and Public Works Committee on a party line vote.

☐ HOLDS

But the bill has not advanced to the Senate floor, partly because several Senators have put holds on this legislation and Majority Leader Reid may not be willing to devote the time necessary to break a filibuster or line up 60 votes.

☐ HOUSE ACTION

Despite the existence of draft legislation in the House. Chairman Oberstar of the House Transportation and Infrastructure Committee has indicated that there won't be time to consider this bill in the current session of Congress.

Final Defeats & Reflections

- ⇒ HR 5088 was *never marked up* by the House Transportation and Infrastructure Committee.
- ⇒ Both Senator Feingold and Representative Oberstar were defeated for re-election in November, 2010



With Democrats holding a majority of the House and Senate and a Democrat in the White House, how the this legislation fail?

- For the simple reason that a number of Democrats joined with Republicans to initially stall and then kill S. 787/HR 5088.
- For the past three years, the WOTUS issue has been controlled by the Executive branch which has played its cards close to the vest.

Can Congress trump WOTUS?

Abandonment of a legislative strategy to secure an expansion of WOTUS, the Legislative Branch has limited cards to play this time around.



**Policy riders to
the FY15
Appropriations
bills for Energy
and Water
Appropriations
and Interior and
Environment.**

- ⇒ Control EPA/COE spending
- ⇒ A policy rider prohibits the of FY15 spending to finalize WOTUS Rule.
- ⇒ Hampers a final Rule on the schedule proposed by the Administration.
- ⇒ Likely enough votes in the House to pass FY15 Appropriations bills with WOTUS Riders.
- ⇒ In Senate, depends upon a 60 vote majority to bring a bill to the floor .
- ⇒ Not clear whether there would be 60 votes for WOTUS Appropriations riders or not.

Will there be the votes?

If such riders are agreed to in the Senate and are part of the final conference report for the relevant Appropriations bills, the President will have to decide whether to sign them.

Depends upon whether enough Democrats decide to unite with their Republican colleagues on support of Appropriations Riders.

If he chooses to veto the bill it would be very difficult to secure 67 votes in the Senate for an over-ride

In the near-term, the WOTUS issue will be shaped by the number of Democrats who share the concerns of Republicans that the proposed WOTUS Rule is an infringement both of Congressional prerogatives and also intrudes too deeply into local issues

WESTCAS Input

WESTCAS

Position & Comments

- WESTCAS WOTUS Task Force
- Extension letter submitted
- Additional 90 days allows more scrutiny
- Task Force – outline for preparing comments
 - Identify issues of concern to Texas/TWCA
 - Examples of potential negative impacts
 - More review of economic impacts
- Collaborate with other water assoc (ACWA, NWRA, NWC, TWCA, etc)

Questions & Discussion