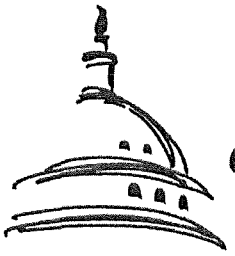

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SUMMARY

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December 12, 2018

Laura Gatz
Analyst in Environmental Policy

# "Waters of the United States" (WOTUS): Current Status of the 2015 Clean Water Rule

The Clean Water Act (CWA) is the principal federal law governing pollution of the nation's surface waters. The statute protects "navigable waters," which it defines as "the waters of the United States, including the territorial seas." The scope of the term *waters of the United States*, or WOTUS, is not defined in the CWA. Thus, the Army Corps of Engineers and U.S. Environmental Protection Agency (EPA) have defined the term in regulations several times as part of their implementation of the act.

Two Supreme Court rulings (*Solid Waste Agency of Northern Cook County v. U S Army Corps of Engineers* and *Rapanos v. United States*), issued in 2001 and 2006 (respectively), interpreted the scope of the CWA more narrowly than EPA and the Corps had done previously in regulations and guidance. However, the rulings also created uncertainty about the intended scope of waters that are protected by the CWA. In 2014, the Corps and EPA proposed revisions to the existing 1980s regulations in light of these rulings. After reviewing over 1 million public comments and holding over 400 meetings with diverse stakeholders, the Corps and EPA issued a final rule in June 2015. The final rule—the Clean Water Rule—focused on clarifying the regulatory status of waters with ambiguous jurisdictional status following the Supreme Court rulings, including isolated waters and streams that flow only part of the year and nearby wetlands.

Since the Clean Water Rule was finalized in 2015, its implementation has been influenced both by the courts and administrative actions. Following issuance of the 2015 Clean Water Rule, industry groups, more than half the states, and several environmental groups filed lawsuits challenging the rule in multiple federal district and appeals courts. A federal appeals court ordered a nationwide stay of the 2015 Clean Water Rule in October 2015 and later ruled that it had jurisdiction to hear consolidated challenges to the rule. In January 2018, the Supreme Court unanimously held that federal district courts, rather than appellate courts, are the proper forum for filing challenges to the 2015 Clean Water Rule. As a result, the appeals court vacated its nationwide stay. Three district courts have issued preliminary injunctions on the 2015 Clean Water Rule effective in the states challenging the rule in those courts. Accordingly, the 2015 Clean Water Rule is currently enjoined in 28 states and in effect in 22 states. In states where the 2015 Clean Water Rule is enjoined, regulations promulgated by the Corps and EPA in 1986 and 1988, respectively, are in effect.

The Trump Administration has taken actions to delay implementation of the 2015 Clean Water Rule and rescind and replace it:

- In February 2018, the Corps and EPA published a rule that added an "applicability date" to the 2015 Clean Water Rule delaying implementation until February 2020. However, environmental groups and states filed lawsuits challenging the 2018 Applicability Date Rule, and in August 2018, a district court issued a nationwide injunction.
- The Trump Administration has also taken steps to rescind and replace the 2015 Clean Water Rule. In February 2017, President Trump issued Executive Order 13778 directing the Corps and EPA to review and rescind or revise the rule and to consider interpreting the term *navigable waters* in a manner consistent with Justice Scalia's opinion in *Rapanos*, which proposed a narrower test for determining WOTUS. In July 2017, the Corps and EPA published a proposed rule that would "initiate the first step in a comprehensive, two-step process intended to review and revise the definition of 'waters of the United States' consistent with the Executive Order." The proposed step-one rule would rescind the 2015 Clean Water Rule and re-codify the regulatory definition of WOTUS as it existed prior to the rule. In July 2018, the agencies published a supplemental notice of proposed rulemaking to solicit comment on additional considerations supporting the agencies' proposed repeal. A final step-one rule has not been issued. On December 11, 2018, the Corps and EPA announced a proposed step-two rule that would revise the definition of WOTUS.

In the 115th Congress, some Members have introduced free-standing legislation and provisions within appropriations bills that would either repeal the 2015 Clean Water Rule, allow the Corps and EPA to withdraw the rule without regard to the Administrative Procedures Act, or amend the definition of *navigable waters* in the CWA. Two bills—H.R. 2 and H.R. 6147—have each passed the House and Senate in different forms. The House-passed versions of both bills would repeal the 2015 Clean Water Rule, while the Senate-passed versions of both bills do not include such provisions. The conference report for H.R. 2, released on December 11, 2018, did not include a provision to repeal the 2015 Clean Water Rule.

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# Brief History of the 2015 Clean Water Rule

The Clean Water Act (CWA) is the principal federal law governing pollution of the nation's surface waters.[1] The CWA protects "navigable waters," defined in the statute as "waters of the United States, including the territorial seas."[2] The scope of this term—*waters of the United States*, or WOTUS—determines which waters are federally regulated and has been the subject of debate for decades.[3] The CWA does not define the term. Thus, in implementing the CWA, the Army Corps of Engineers and U.S. Environmental Protection Agency (EPA) have defined the term in regulations. For much of the past three decades, regulations promulgated by the Corps and EPA in 1986 and 1988, respectively, have been in effect.[4]

In 2001 and 2006, the Supreme Court issued rulings pivotal to the definition of WOTUS—*Solid Waste Agency of Northern Cook County v. U S Army Corps of Engineers* and *Rapanos v. United States*, respectively.[5] Both rulings interpreted the scope of the CWA more narrowly than the Corps and EPA had done previously in regulations and guidance, but they created uncertainty about the intended scope of waters that are protected by the CWA. The Court's decision in *Rapanos*, split 4-1-4, yielded three different opinions. The four-Justice plurality decision, written by Justice Scalia, states that the dredge and fill provisions in the CWA apply only to wetlands connected to relatively permanent bodies of water (streams, rivers, lakes) by a continuous surface connection. Justice Kennedy, writing alone, demanded a "significant nexus" between a wetland and a traditional navigable water, using a case-by-case test that considers ecological connection. Justice Stevens, for the four dissenters, would have upheld the existing reach of Corps/EPA regulations.

In response to the rulings, the agencies developed guidance in 2003[6] and 2008[7] to help clarify how EPA regions and Corps districts should implement the Court's decisions. This guidance identified categories of waters that remained jurisdictional or not jurisdictional and required a case-specific analysis to determine whether jurisdiction applies. The guidance did not resolve all interpretive questions, and diverse stakeholders requested a formal rulemaking to revise the existing rules.[8]

Accordingly, the Corps and EPA proposed a rule in April 2014 defining the scope of waters protected under the CWA.[9] On June 29, 2015, the Corps and EPA finalized the rule—known as

[1] 33 U.S.C. §1251 *et seq.*

[2] CWA §502(7); 33 U.S.C §1362(7).

[3] For a more in-depth discussion of the federal regulations, legislation, agency guidance, and case law that have shaped the meaning of *waters of the United States* over time, see CRS Report R44585, *Evolution of the Meaning of "Waters of the United States" in the Clean Water Act*, by Stephen P. Mulligan.

[4] U S. Army Corps of Engineers, "Final Rule for Regulatory Programs of the Corps of Engineers," 51 *Federal Register* 41206, November 13, 1986; EPA, "Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations," 53 *Federal Register* 20764, June 6, 1988

[5] 531 U.S. 159 (2001) and 547 U S. 715 (2006).

[6] Army Corps of Engineers and EPA, "Appendix A, Joint Memorandum," 68 *Federal Register* 1995, January 15, 2003.

[7] Benjamin H. Grumbles, Assistant Administrator for Water, EPA, and John Paul Woodley Jr , Assistant Secretary of the Army (Civil Works), Department of the Army, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v United States*, memorandum, December 2, 2008.

[8] See EPA Web Archive at https://archive epa gov/epa/cleanwater rule/what-clean-water-rule-does.html, which includes a list of stakeholders requesting a rulemaking (https.//archive epa gov/epa/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf).

[9] Army Corps of Engineers and EPA, "Definition of 'Waters of the United States' Under the Clean Water Act," 79 *Federal Register* 22188, April 21, 2014.

the Clean Water Rule or WOTUS rule.[10] It reflects over 1 million public comments on the 2014 proposed rule as well as input provided through public outreach efforts that included over 400 meetings with diverse stakeholders.[11]

# Brief Overview of the 2015 Clean Water Rule

The 2015 Clean Water Rule retained much of the structure of the agencies' prior definition of WOTUS. It focused on clarifying the regulatory status of waters with ambiguous jurisdictional status following the Supreme Court's rulings, including isolated waters and streams that flow only part of the year and nearby wetlands. As explained in the 2015 Clean Water Rule's preamble, the Corps and EPA used Justice Kennedy's "significant nexus" standard in developing the rule as well as the plurality opinion (written by Justice Scalia) in establishing boundaries on the scope of jurisdiction.

The 2015 Clean Water Rule identified categories of waters that are and are not jurisdictional as well as waters that require a case-specific evaluation (see **Figure 1**). Broad categories under the final rule include the following:

- **Jurisdictional by rule in all cases.** Traditional navigable waters, interstate waters, the territorial seas, and impoundments of these waters are jurisdictional by rule. All of these waters were also jurisdictional under pre-2015 rules.
- **Jurisdictional by rule, as defined.** Two additional categories—tributaries and adjacent waters—are jurisdictional by rule if they meet definitions established in the 2015 Clean Water Rule. According to the rule's preamble, the definitions ensure that the rule covers waters that meet the significant nexus standard.[12] Tributaries, under pre-2015 rules, were jurisdictional by rule without qualification but lacked a regulatory definition. The 2015 Clean Water Rule newly defined *tributaries*. Tributaries that meet the new definition are jurisdictional by rule.[13]

  Similarly, "adjacent waters"—including wetlands, ponds, lakes, oxbows, impoundments, and similar waters that are adjacent to traditional navigable waters, interstate waters, the territorial seas, jurisdictional tributaries, or impoundments of these waters—are jurisdictional by the 2015 Clean Water Rule if they meet the rule's established definition. Under the 2015 Clean Water Rule, *adjacent* means "bordering, contiguous, or neighboring" one of the aforementioned waters. The rule established a definition of *neighboring* that set new limits for the purposes of determining adjacency. *Neighboring* is defined to include waters (1) located within 100 feet of the ordinary high water mark (OHWM)[14] of a traditional navigable water, interstate water, the territorial seas,

[10] Army Corps of Engineers and EPA, "Clean Water Rule. Definition of 'Waters of the United States', Final Rule," 80 *Federal Register* 37054, June 29, 2015 (hereinafter "2015 Clean Water Rule")

[11] 2015 Clean Water Rule (80 *Federal Register* 37057).

[12] 2015 Clean Water Rule (80 *Federal Register* 37058)

[13] Under the 2015 Clean Water Rule, tributaries (including ephemeral and intermittent streams) are jurisdictional by rule if they have certain features that are indicators of flow (e.g., a bed and bank and an ordinary high water mark)—and contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas.

[14] OHWM is defined in Corps and EPA regulations as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas."

jurisdictional tributary, or impoundment of these waters; (2) located in the 100-year floodplain and within 1,500 feet of the OHWM of a traditional navigable water, interstate water, the territorial seas, jurisdictional tributary, or impoundment of these waters; or (3) located within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas and waters located within 1,500 feet of the OHWM of the Great Lakes. Under pre-2015 rules, wetlands adjacent to jurisdictional waters were jurisdictional by rule, but *adjacent* was not defined in regulations.

- **Waters requiring a case-specific evaluation.** Some types of waters—but fewer than under practices used prior to the 2015 Clean Water Rule—would remain subject to a case-specific evaluation of whether or not they meet the standards for federal jurisdiction. This case-specific evaluation examines whether the water has a significant nexus to traditional navigable waters, interstate waters or wetlands, or the territorial seas. Similarly situated waters (i.e., prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands) are combined for the purposes of a significant nexus analysis.[15] In addition, the 2015 Clean Water Rule provides that two other categories of waters are subject to case-specific significant nexus analysis: (1) waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas; and (2) waters within 4,000 feet of the high tide line or the OHWM of a traditional navigable water, interstate water, the territorial seas, impoundments, or jurisdictional tributary.
- **Exclusions.** Certain waters would be excluded from CWA jurisdiction. Some were restated exclusions under pre-2015 rules (e.g., prior converted cropland). Some have been excluded by practice and would be expressly excluded by rule for the first time (e.g., groundwater and some ditches). Some were new in the final rule (e.g., stormwater management systems). The 2015 Clean Water Rule did not affect existing statutory exclusions—that is, exemptions for existing "normal farming, silviculture, and ranching activities" and for maintenance of drainage ditches (CWA §404(f))[16] as well as for agricultural stormwater discharges and irrigation return flows (CWA §402(l) and CWA §502(14)).[17]

[15] In the 2015 Clean Water Rule (80 *Federal Register* 37056), EPA and the Corps note

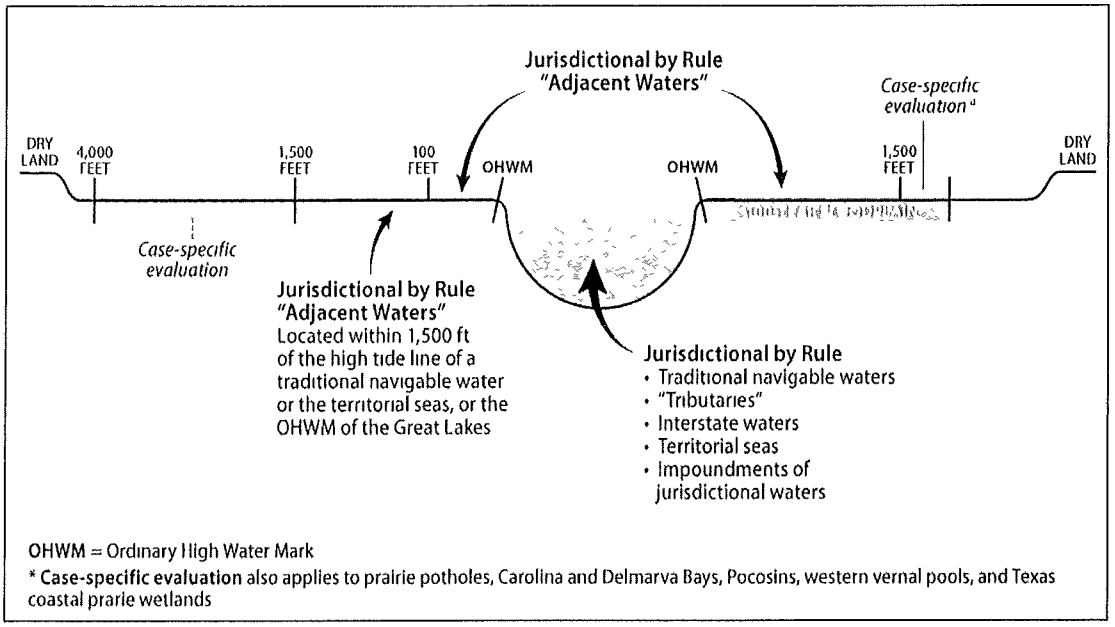
> Justice Kennedy concluded that wetlands possess the requisite significant nexus if the wetlands "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable '" 547 U.S. at 780.

[16] 33 U.S.C. §1344(f).

[17] 33 U.S.C. §1342(l) and 33 U S C. §1362(14).

**Figure 1. Jurisdictional Waters Under the 2015 Clean Water Rule**

(Not drawn to scale)




OHWM = Ordinary High Water Mark

* **Case-specific evaluation** also applies to prairie potholes, Carolina and Delmarva Bays, Pocosins, western vernal pools, and Texas coastal prarie wetlands

**Source:** Prepared by CRS, from Army Corps of Engineers and EPA, "Clean Water Rule: Definition of 'Waters of the United States'; Final Rule," 80 *Federal Register* 37054, June 29, 2015.

**Notes:** "Jurisdictional by Rule" waters are jurisdictional *per se* without case-specific evaluation. "Tributaries" and "adjacent waters" are jurisdictional by rule if they meet the definitions established in the 2015 Clean Water Rule. Waters requiring case-specific evaluation may be jurisdictional if there is a significant nexus to traditional navigable waters, interstate waters, or the territorial seas.

An OHWM is defined in Corps and EPA regulations as the line on the shore established by the fluctuations of water and indicated by specific physical characteristics listed in those regulations (e.g., the natural line impressed on the bank, the presence of litter and debris).

a. Case-specific evaluation for this subset of waters (waters within the 100-year floodplain, but beyond 1,500 feet from the OHWM) is limited to those waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas.

# Issues and Controversy

Much of the controversy since the Supreme Court's rulings has centered on instances that have required CWA permit applicants to seek a case-specific analysis to determine if CWA jurisdiction applies to their activity. The Corps and EPA's stated intention in promulgating the Clean Water Rule was to clarify questions of CWA jurisdiction in view of the rulings while also reflecting their scientific and technical expertise.[18] Specifically, they sought to articulate categories of waters that are and are not protected by the CWA, thus limiting the water types that require case-specific analysis.

Industries that are the primary applicants for CWA permits and agriculture groups raised concerns over how broadly the 2014 proposed rule would be interpreted. They contended that the proposed definitions were ambiguous and would enable agencies to assert broader CWA jurisdiction than is consistent with law and science. The final 2015 Clean Water Rule added and defined key terms,

[18] 2015 Clean Water Rule (80 *Federal Register* 37054).

such as *tributary* and *significant nexus*, and modified the proposal in an effort to improve clarity, but the concerns remained.

Some local governments that own and maintain public infrastructure also criticized the 2014 proposed rule. They argued that it could increase the number of locally owned ditches under federal jurisdiction because it would define some ditches as WOTUS under certain conditions. Corps and EPA officials asserted that the proposed exclusion of most ditches would decrease federal jurisdiction, but the issue remained controversial. The final 2015 Clean Water Rule excluded most ditches and expressly excluded stormwater management systems and structures from jurisdiction.

Some states supported a rule to clarify the scope of CWA jurisdiction,[19] but there was no consensus on the 2014 proposed rule or the final 2015 Clean Water Rule. Many states asserted that the changes would too broadly expand federal jurisdiction, some believed that the agencies did not adequately consult with states, and some were largely supportive.[20]

Environmental groups generally supported the agencies' efforts to protect waters and reduce uncertainty. Still, some argued that the scope of the 2014 proposed rule should be further expanded—for example, by designating additional categories of waters and wetlands (e.g., prairie potholes) as categorically jurisdictional. The final 2015 Clean Water Rule did not do so. Instead, such waters would require case-specific analysis to determine if jurisdiction applies.

Corps and EPA officials under the Obama Administration defended the 2014 proposed rule but acknowledged that it raised questions they believed the final 2015 Clean Water Rule clarified. In their view, the 2015 Clean Water Rule did not protect any new types of waters that were not protected historically, did not exceed the CWA's authority, and would not enlarge jurisdiction beyond what is consistent with the Supreme Court's rulings as well as scientific understanding of significant connections between small and ephemeral streams and downstream waters.[21] The agencies asserted that they had addressed criticisms of the 2014 proposed rule by, for example, defining *tributaries* more clearly, setting maximum distances from jurisdictional waters for the purposes of defining *neighboring waters*, and modifying the definition of WOTUS to make it clear that the rule preserves agricultural exclusions and exemptions.[22]

Issuance of the final 2015 Clean Water Rule did not diminish concerns amongst stakeholders. Many groups contended that the rule did not provide needed clarity, that its expansive definitions made it difficult to identify any waters that would fall outside the boundary distances established in the rule, and that the threshold for determining "significant nexus" was set so low that virtually any water could be found to be jurisdictional.[23] The 2015 Clean Water Rule would impose costs,

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[19] See EPA Web Archive at https://archive.epa.gov/epa/cleanwaterrule/what-clean-water-rule-does.html, which includes a list of stakeholders requesting a rulemaking (https://archive.epa.gov/epa/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf).

[20] EPA, *Clean Water Rule Response to Comments—Topic 1. General Comments*, pp. 90-133, https://www.epa.gov/cwa-404/response-comments-clean-water-rule-definition-waters-united-states.

[21] EPA published the following report, which according to the Clean Water Rule preamble (80 *Federal Register* 37057) provides much of the technical basis for the rule: EPA, *Connectivity of Streams and Wetlands to Downstream Waters A Review and Synthesis of the Scientific Evidence*, EPA/600/R-14/475F, 2015

[22] 2015 Clean Water Rule (80 *Federal Register* 37055, 37079, 37082)

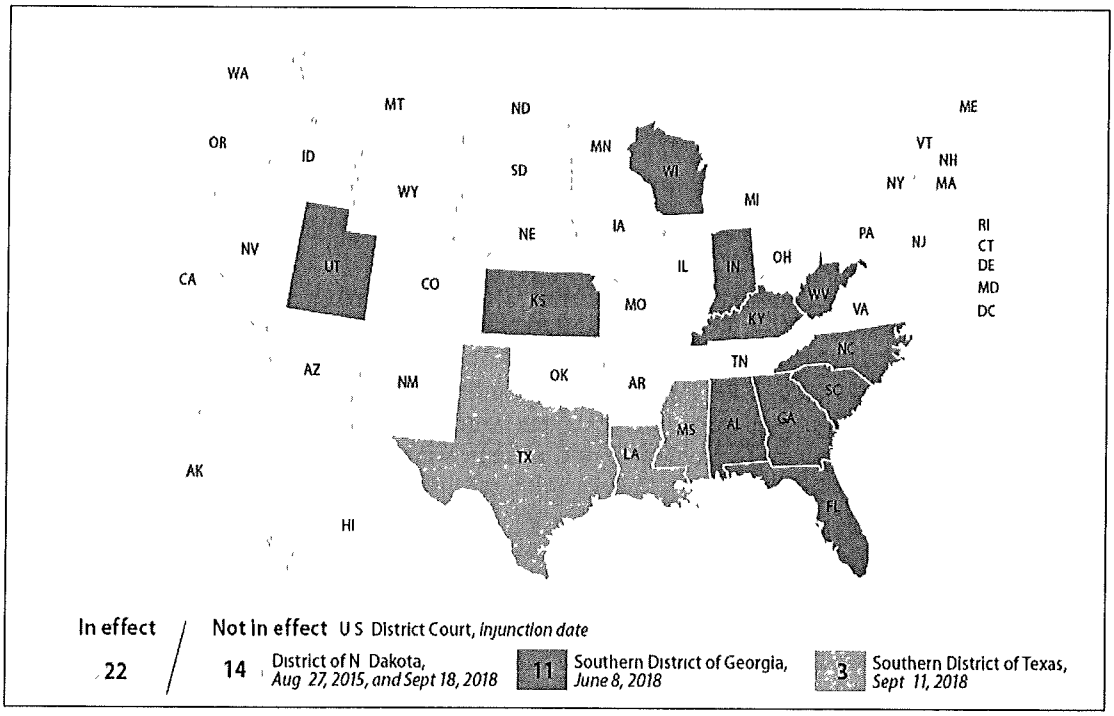
[23] See testimony of Tom Buchanan, American Farm Bureau Federation, in U.S. Congress, Senate Committee on Environment and Public Works, Subcommittee on Superfund, Waste Management, and Regulatory Oversight, *American Small Businesses' Perspectives on Environmental Protection Agency Regulatory Actions*, 114th Cong., 2nd sess., April 12, 2016, S.Hrg.114-352. See U.S. Chamber of Commerce, "U.S. Chamber Statement on EPA's Final Clean Water Rule," press release, May 27, 2015, https://www.uschamber.com/press-release/us-chamber-statement-epa-

critics said, but have little or no environmental benefit. Environmental groups were supportive but also faulted parts of the final rule. Some environmental groups believed the rule reduced the jurisdictional reach of the CWA and rolled back protections for certain waters, including minor tributaries and some ephemeral aquatic habitats.[24]

# Current Status of the 2015 Clean Water Rule

Currently, the 2015 Clean Water Rule is in effect in 22 states and enjoined in 28 states (see **Figure 2**). In states where the 2015 Clean Water Rule is enjoined, regulations promulgated by the Corps and EPA in 1986 and 1988, respectively, are in effect. Since the 2015 Clean Water Rule was finalized, its implementation has been influenced both by the courts and administrative actions.

**Figure 2. Status of the 2015 Clean Water Rule as of December 12, 2018**




**Source:** CRS.

s-final-clean-water-rule Also see Opening Brief of State Petitioners and Opening Brief for the Business and Municipal Petitioners, *Murray Energy Corp v United States DOD*, No 15-3751, 2016 U.S. App. LEXIS 9987 (6th Cir. Apr. 21, 2016).

[24] See Waterkeeper Alliance and Center for Biological Diversity, "EPA and Army Corps Issue Weak Clean Water Rule," press release, May 27, 2015, https://www.biologicaldiversity.org/news/press_releases/2015/clean-water-rule_05-27-2015.html. Also see Opening Brief of Petitioners Waterkeeper Alliance et al., *Murray Energy Corp v United States DOD*, No 15-3751, 2016 U.S. App. LEXIS 9987 (6th Cir. Apr 21, 2016)

## Court Actions

Following issuance of the 2015 Clean Water Rule, industry groups, more than half the states, and several environmental groups filed lawsuits challenging the rule in multiple federal district and appeals courts. By the time the 2015 Clean Water Rule entered into effect (August 28, 2015), a district court had already prevented its enforcement in 13 states. Specifically, on August 27, 2015, the U.S. District Court for the District of North Dakota issued a preliminary injunction on the 2015 Clean Water Rule in the 13 states challenging the rule in that court.[25] In October 2015, the U.S. Court of Appeals for the Sixth Circuit ordered a nationwide stay of the 2015 Clean Water Rule and later ruled (in February 2016) that it had jurisdiction to hear consolidated challenges to the rule.[26] However, in January 2018, the Supreme Court unanimously held that federal district courts, rather than appellate courts, are the proper forum for filing challenges to the 2015 Clean Water Rule.[27] Accordingly, on February 28, 2018, the appeals court vacated its nationwide stay.[28]

On November 22, 2017, the Corps and EPA proposed to add an "applicability date" to the 2015 Clean Water Rule.[29] The agencies finalized this rule on February 6, 2018, effectively delaying the implementation of the 2015 Clean Water Rule until February 6, 2020.[30] According to the preamble of the 2018 Applicability Date Rule, the agencies' intention in adding an applicability date to the 2015 Clean Water Rule was to maintain the legal status quo and provide clarity and certainty for regulated entities, states, tribes, agency staff, and the public regarding the definition of *waters of the United States* while the agencies work on revising the 2015 Clean Water Rule.

Environmental groups and states immediately filed lawsuits challenging the 2018 Applicability Date Rule, asserting that it violated the Administrative Procedures Act. On August 16, 2018, the U.S. District Court for the District of South Carolina issued a nationwide injunction of the rule.[31] As a result, the 2015 Clean Water Rule went into effect in the states where injunctions had not been issued. During the period between when the 2018 Applicability Date Rule was finalized and the district court issued a nationwide injunction of that rule, the U.S. District Court for the Southern District of Georgia enjoined the 2015 Clean Water Rule in 11 states.[32] Since that time, two additional court actions have enjoined the 2015 Clean Water Rule in four additional states. The U.S. District Court for the Southern District of Texas enjoined the 2015 Clean Water Rule in three states on September 11, 2018. On September 18, 2018, the U.S. District Court for the District of North Dakota granted a request from the Governor of Iowa to clarify that the preliminary injunction applied to Iowa.[33] Accordingly, the 2015 Clean Water Rule is currently in effect in 22 states and enjoined in 28 states. (See **Figure 3** for a timeline of actions.)

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[25] *North Dakota v. United States EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015)

[26] *Ohio v United States Army Corps of Eng'rs (In re EPA & DOD Final Rule)*, 803 F.3d 804 (6th Cir. 2015); *Murray Energy Corp v United States DOD (In re United States DOD)*, 817 F.3d 261 (6th Cir. 2016).

[27] *Nat'l Ass'n of Mfrs v. DOD*, 138 S. Ct. 617 (2018).

[28] *Murray Energy Corp v United States DOD (In re United States DOD)*, 713 F. App'x 489 (6th Cir. 2018).

[29] Army Corps of Engineers and EPA, "Definition of 'Waters of the United States'—Addition of an Applicability Date to 2015 Clean Water Rule," 82 *Federal Register* 55542, November 22, 2017

[30] Army Corps of Engineers and EPA, "Definition of 'Waters of the United States'—Addition of an Applicability Date to 2015 Clean Water Rule," 83 *Federal Register* 5200, February 6, 2018

[31] *S C. Coastal Conservation League v Pruitt*, 318 F Supp. 3d 959 (D.S C 2018).

[32] *Georgia v. Pruitt*, No. 2:15-cv-79, 2018 U.S. Dist. LEXIS 97223 (S D. Ga. June 8, 2018).

[33] *North Dakota v United States EPA*, No. 3:15-cv-59, 2018 U S. Dist LEXIS 180503 (D N.D Sep 18, 2018).

**Figure 3. Timeline of Selected Administrative and Court Actions Related to the Status of the 2015 Clean Water Rule (CWR)**

| | ADMINISTRATION ACTIONS | | COURT ACTIONS | | | | | |
|---|---|---|---|---|---|---|---|---|
| | President | Agencies | Supreme Court | Sixth Circuit | District of North Dakota | Southern District of Georgia | District of South Carolina | Southern District of Texas |
| 2015 | | **JUNE 29.** Corps and EPA published final CWR | | **OCTOBER 9.** Court issued a nationwide stay on CWR | **AUGUST 27.** Court enjoined CWR in 13 states | | | |
| 2016 | | | | **FEBRUARY 22.** Court ruled it had jurisdiction to hear consolidated challenges to CWR | | | | |
| 2017 | **FEBRUARY 28.** President issues Executive Order 13778 directing Corps and EPA to review and rescind or revise CWR | **JULY 27.** Corps and EPA publish proposed "Step One" rule to rescind CWR and re-codify prior definition of WOTUS | | | | | | |
| 2018 | | **FEBRUARY 6.** Corps and EPA published a final rule that added an "applicability date" to CWR<br>**JULY 12.** Corps and EPA published a supplemental notice of proposed rulemaking for "Step One" rule<br>**DECEMBER 11.** Corps and EPA announced a proposed "Step Two" rule to revise the definition of WOTUS | **JANUARY 22.** Court held that federal district courts are the proper forum for filing challenges to CWR | **FEBRUARY 28.** Court vacated its nationwide stay on CWR | **SEPTEMBER 18.** Court grants a request for Iowa to join court's preliminary injunction on CWR | **JUNE 8.** Court enjoined CWR in 11 states | **AUGUST 16.** Court issued a nationwide injunction of the "applicability date" rule | **SEPTEMBER 11.** Court enjoined CWR in 3 states |

**Source:** CRS.

## Administrative Actions

The Administration has also taken steps to rescind and revise the 2015 Clean Water Rule. On February 28, 2017, President Trump issued an executive order directing the Corps and EPA to review and rescind or revise the rule and to consider interpreting the term *navigable waters* as defined in the CWA in a manner consistent with Justice Scalia's opinion in *Rapanos*.[34] On July 27, 2017, the agencies proposed a rule that would "initiate the first step in a comprehensive, two-step process intended to review and revise the definition of 'waters of the United States' consistent with the Executive Order."[35] The first step proposes to rescind the 2015 Clean Water Rule and re-codify the regulatory definition of WOTUS as it existed prior to the rule. On July 12, 2018, the Corps and EPA published a supplemental notice of proposed rulemaking to clarify, supplement, and seek additional comment on the agencies' proposed repeal.[36] The public comment period closed on August 13, 2018. The agencies have not yet issued a final step-one rule.

On December 11, 2018, the Corps and EPA announced a proposed step-two rule that would revise the definition of WOTUS.[37] The EPA press release states that the proposal is intended to clarify federal authority under the CWA and more clearly define "the difference between federally protected waterways and state protected waterways."

# Actions in the 115th Congress

Considering the numerous court rulings, ongoing legal challenges, and issues that Administrations have faced in defining the scope of WOTUS, some stakeholders have urged Congress to define WOTUS through amendments to the CWA. In the 115th Congress, Members of Congress have shown continued interest in the 2015 Clean Water Rule and the scope of WOTUS. Some Members have introduced the following free-standing legislation and provisions within appropriations bills that would repeal the 2015 Clean Water Rule, allow the Corps and EPA to withdraw the rule without regard to the Administrative Procedures Act, or amend the CWA to add a narrower definition of *navigable waters*.

- H.R. 1105 would repeal the 2015 Clean Water Rule.
- H.R. 1261 would nullify the 2015 Clean Water Rule and amend the CWA by changing the definition of *navigable waters*. The language, as proposed, would narrow the scope of waters subject to CWA jurisdiction.
- H.R. 7194 would repeal the 2015 Clean Water Rule and amend the CWA by changing the definition of *navigable waters*. The language, as proposed, would narrow the scope of waters subject to CWA jurisdiction.
- H.Res. 152 and S.Res. 12 would express the sense of the House and Senate, respectively, that the 2015 Clean Water Rule should be withdrawn or vacated.

[34] Executive Order 13778, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule," 82 *Federal Register* 12497, March 3, 2017. Note the *Federal Register* notice indicates that the executive order was issued on February 28, 2017

[35] Army Corps of Engineers and EPA, "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules," 82 *Federal Register* 34899, July 27, 2017.

[36] Army Corps of Engineers and EPA, "Definition of 'Waters of the United States'—Recodification of Preexisting Rule," 83 *Federal Register* 32227, July 12, 2018.

[37] EPA, "EPA and Army Propose New 'Waters of the United States' Definition," press release, December 11, 2018, https://www.epa.gov/newsreleases/epa-and-army-propose-new-waters-united-states-definition.

- H.R. 2 (the farm bill) included an amendment (H.Amdt. 633) in the House-passed version that would repeal the 2015 Clean Water Rule. However, the Senate-passed version did not include that provision. The conference report—as released on December 11, 2018, and agreed to in the Senate—did not contain a provision to repeal the 2015 Clean Water Rule.
- H.R. 6147—the Interior, Environment, Financial Services and General Government, Agriculture, Rural Development, Food and Drug Administration, and Transportation, Housing and Urban Development Appropriations Act of 2019—includes a provision in the House-passed version that would repeal the 2015 Clean Water Rule. However, the Senate-passed version does not include that provision. On September 6, 2018, the Senate agreed to the House's request for a conference to reconcile differences on H.R. 6147.
- The House-passed version of H.R. 5895—the Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019—included a provision that would have repealed the 2015 Clean Water Rule. However the Senate-passed version and enacted public law (P.L. 115-244) did not include that provision.
- Two House-passed appropriations bills (H.R. 3219, Make America Secure Appropriations Act, 2018, and H.R. 3354, Interior and Environment, Agriculture and Rural Development, Commerce, Justice, Science, Financial Services and General Government, Homeland Security, Labor, Health and Human Services, Education, State and Foreign Operations, Transportation, Housing and Urban Development, Defense, Military Construction and Veterans Affairs, Legislative Branch, and Energy and Water Development Appropriations Act, 2018) contain provisions that would have authorized withdrawal of the 2015 Clean Water Rule "without regard to any provision of statute or regulation that established a requirement for such withdrawal" (e.g., the Administrative Procedures Act).

# Conclusion

For several decades, Administrations have struggled to interpret the term *navigable waters* for the purpose of implementing various requirements of the CWA, and courts have been asked repeatedly to weigh in on those interpretations as manifest in regulations and policy. Stakeholders have asked the various Administrations and the courts to resolve issues involving scope, clarity, consistency, and predictability. Some stakeholders assert that the scope of waters under federal jurisdiction is overly broad, infringing on the rights of property owners, farmers, and others. Other stakeholders argue that the scope of federally protected waters is too narrow, leaving some hydrologically connected waters and aquatic habitats unprotected.

The regulations the Corps, EPA, and states are currently using to determine which waters are protected under the CWA vary across the United States. The jurisdictional scope as laid out in the 2015 Clean Water Rule is in effect in 22 states, while the jurisdictional scope laid out in regulations from the late 1980s is in effect in 28 states. Actions from the courts, the Administration, and Congress all have the potential to continue to alter the scope of federal jurisdiction under the CWA. Some observers argue that the term *navigable waters*, defined under the act as WOTUS, is too vague and should be addressed by Congress or the courts. Others argue that the Corps and EPA, with their specific knowledge and expertise, are in the best position to determine the scope of the term.

## Author Information

Laura Gatz
Analyst in Environmental Policy

## Disclaimer

**DEPARTMENT OF DEFENSE**

**Department of the Army, Corps of Engineers**

**33 CFR Part 328**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401**

**[EPA–HQ–OW–2018–0149; FRL–9988–15–OW]**

**RIN 2040–AF75**

## Revised Definition of "Waters of the United States"

**AGENCY:** Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

**ACTION:** Proposed rule

**SUMMARY:** The Environmental Protection Agency and the Department of the Army ("the agencies") are publishing for public comment a proposed rule defining the scope of waters federally regulated under the Clean Water Act (CWA). This proposal is the second step in a comprehensive, two-step process intended to review and revise the definition of "waters of the United States" consistent with the Executive Order signed on February 28, 2017, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." This proposed rule is intended to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" federally regulated under the Act. This proposed definition revision is also intended to clearly implement the overall objective of the CWA to restore and maintain the quality of the nation's waters while respecting State and tribal authority over their own land and water resources.

**DATES:** Comments must be received on or before April 15, 2019.

**ADDRESSES:** You may submit comments, identified by Docket ID No. EPA–HQ–OW–2018–0149, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: OW-Docket@epa.gov.* Include Docket ID No. EPA–HQ–OW–2018–0149 in the subject line of the message.
- *Mail:* U S. Environmental Protection Agency, EPA Docket Center, Office of Water Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery/Courier.* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a m.–4:30 p.m., Monday–Friday (except Federal Holidays).

*Instructions:* All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the "How should I submit comments?" heading of the GENERAL INFORMATION section of this document.

**FOR FURTHER INFORMATION CONTACT:** Michael McDavit, Oceans, Wetlands, and Communities Division, Office of Water (4504–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 566–2428; email address: *CWAwotus@epa gov;* or Jennifer A. Moyer, Regulatory Community of Practice (CECW–CO–R), U.S. Army Corps of Engineers, 441 G Street NW, Washington, DC 20314; telephone number: (202) 761–5903; email address: *USACE_CWA_Rule@usace.army.mil.*

**SUPPLEMENTARY INFORMATION:**

### Table of Contents



## I. General Information

### *A. How can I get copies of this document and related information?*

1. *Docket.* An official public docket for this action has been established under Docket ID No. EPA–HQ–OW–2018–0149. The official public docket consists of the documents specifically referenced in this action, and other information related to this action. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202–566–2426. A reasonable fee will be charged for copies.

2. *Electronic Access* You may access this **Federal Register** document electronically under the **Federal Register** listings at *http://www.regulations.gov.* An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You

may access EPA Dockets at *http://www.regulations.gov* to view public comments as they are submitted and posted, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.* Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility.

*B Under what legal authority is this proposed rule issued?*

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.,* including sections 301, 304, 311, 401, 402, 404, and 501.

*C. How should I submit comments?*

Throughout this notice, the agencies solicit comment on a number of issues related to the proposed rulemaking. Submit your comments, identified by Docket ID No. EPA–HQ–OW–2018–0149, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

This rule is the outgrowth of other rulemakings and extensive outreach efforts, including requests for recommendations and comments, and the agencies have taken recommendations and comments received into account in developing this proposal. In developing a final rule, the agencies will be considering comments submitted on this proposal Persons who wish to provide views or recommendations on this proposal must provide comments to the agencies as part of this comment process. To facilitate the processing of comments, commenters are encouraged to organize their comments in a manner that corresponds to the outline of this proposal.

## II. Background

*A. Executive Summary*

The U.S. Environmental Protection Agency (EPA) and the U S. Department of the Army (Army) (together, the agencies) are publishing for public comment a proposed rule defining the scope of waters subject to federal regulation under the Clean Water Act (CWA), in light of the U.S. Supreme Court cases in *United States* v. *Riverside Bayview Homes* (*Riverside Bayview*), *Solid Waste Agency of Northern Cook County* v. *United States* (*SWANCC*), and *Rapanos* v. *United States* (*Rapanos*), and consistent with Executive Order 13778, signed on February 28, 2017, entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."

The agencies propose to interpret the term "waters of the United States" to encompass: Traditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other jurisdictional waters.

The agencies propose as a baseline concept that "waters of the United States" are waters within the ordinary meaning of the term, such as oceans, rivers, streams, lakes, ponds, and wetlands, and that not all waters are "waters of the United States." Under this proposed rule, a tributary is defined as a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year either directly or indirectly through other tributaries, jurisdictional ditches, jurisdictional lakes and ponds, jurisdictional impoundments, and adjacent wetlands or through water features identified in paragraph (b) of this proposal so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. Ditches are generally proposed not to be "waters of the United States" unless they meet certain criteria, such as functioning as traditional navigable waters, if they are constructed in a tributary and also satisfy the conditions of the proposed "tributary" definition, or if they are constructed in an adjacent wetland and also satisfy the conditions of the proposed "tributary" definition.

The proposal defines "adjacent wetlands" as wetlands that abut or have a direct hydrological surface connection to other "waters of the United States" in a typical year. "Abut" is proposed to mean when a wetland touches an otherwise jurisdictional water at either a point or side. A "direct hydrologic surface connection" as proposed occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and jurisdictional water. Wetlands physically separated from other waters of the United States by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent under this proposal.

The proposal would exclude from the definition of "waters of the United States" waters or water features not mentioned above. The proposed definition specifically clarifies that "waters of the United States" do not include features that flow only in response to precipitation; groundwater, including groundwater drained through subsurface drainage systems; certain ditches; prior converted cropland; artificially irrigated areas that would revert to upland if artificial irrigation ceases; certain artificial lakes and ponds constructed in upland; water-filled depressions created in upland incidental to mining or construction activity; stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off; wastewater recycling structures constructed in upland; and waste treatment systems. In addition, the agencies are proposing to clarify and define the terms "prior converted cropland" and "waste treatment system" to improve regulatory predictability and clarity.

In response to the interest expressed by some States in participating in the federal jurisdictional determination process, the agencies are soliciting comment as to how they could establish an approach to authorize States, Tribes, and Federal agencies to establish

geospatial datasets of "waters of the United States," as well as waters that the agencies propose to exclude, within their respective borders for approval by the agencies. Under a separate action, the agencies may propose creating a framework under which States, Tribes, and Federal agencies could choose to develop datasets for approval for all, some, or none of the "waters of the United States" within their boundaries. If the agencies were to pursue such an action, they would do so in coordination with other Federal agencies, State, tribal, and interested stakeholders. This approach would not require State and tribal governments to establish these datasets, it would simply make this process available to those government agencies that would find it useful.

The fundamental basis used by the agencies for the revised definition proposed today is the text and structure of the CWA, as informed by its legislative history and Supreme Court precedent, taking into account agency policy choices and other relevant factors. This proposed definition revision is intended to strike a balance between Federal and State waters and would carry out Congress' overall objective to restore and maintain the integrity of the nation's waters in a manner that preserves the traditional sovereignty of States over their own land and water resources. The agencies believe the proposed definition would also ensure clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public. This proposed rule is intended to ensure that the agencies are operating within the scope of the Federal government's authority over navigable waters under the CWA and the Commerce Clause of the U S. Constitution.

*B. The Clean Water Act and Regulatory Definition of "Waters of the United States"*

1. The Clean Water Act

Congress amended the Federal Water Pollution Control Act (FWPCA), or Clean Water Act (CWA) as it is commonly called,[1] in 1972 to address longstanding concerns regarding the quality of the nation's waters and the federal government's ability to address those concerns under existing law. Prior to 1972, the ability to control and redress water pollution in the nation's waters largely fell to the U.S. Army Corps of Engineers (Corps) under the Rivers and Harbors Act of 1899 (RHA). While much of that statute focused on restricting obstructions to navigation on the nation's major waterways, section 13 of the RHA made it unlawful to discharge refuse "into any navigable water of the United States,[2] or into any tributary of any navigable water from which the same shall float or be washed into such navigable water." 33 U.S.C. 407. Congress had also enacted the Water Pollution Control Act of 1948, Public Law 80–845, 62 Stat. 1155 (June 30, 1948), to address interstate water pollution, and subsequently amended that statute in 1956 (giving the statute its current formal name), 1961, and 1965. The early versions of the CWA promoted the development of pollution abatement programs, required States to develop water quality standards, and authorized the Federal government to bring enforcement actions to abate water pollution.

These early statutory efforts, however, proved inadequate to address the decline in the quality of the nation's waters, *see City of Milwaukee* v. *Illinois*, 451 U.S. 304, 310 (1981), so Congress performed a "total restructuring" and "complete rewriting" of the existing statutory framework in 1972, *id.* at 317 (quoting legislative history of 1972 amendments). That restructuring resulted in the enactment of a comprehensive scheme (including voluntary as well as regulatory programs) designed to prevent, reduce, and eliminate pollution in the nation's waters generally, and to regulate the discharge of pollutants into navigable waters specifically. *See, e.g., S.D. Warren Co.* v. *Maine Bd. of Environmental Protection*, 547 U.S. 370, 385 (2006) (noting that "the Act does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally").

The objective of the new statutory scheme was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C 1251(a). In order to meet that objective, Congress declared two national goals: (1) "that the discharge of pollutants into the navigable waters be eliminated by 1985;" and (2) "that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 . . . " *Id.* at 1251(a)(1)–(2).

Congress also established several key policies that direct the work of the agencies to effectuate those goals. For example, Congress declared as a national policy "that the discharge of toxic pollutants in toxic amounts be prohibited; . . . . that Federal financial assistance be provided to construct publicly owned waste treatment works; . . . . that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; . . . [and] that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution." *Id.* at 1251(a)(3)–(7).

Congress provided a major role for the States in implementing the CWA, balancing the traditional power of States to regulate land and water resources within their borders with the need for a national water quality regulation. For example, the statute highlighted "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution" and "to plan the development and use . . . . of land and water resources . . . . ." *Id.* at 1251(b). Congress also declared as a national policy that States manage the major construction grant program and implement the core permitting programs authorized by the statute, among other responsibilities. *Id.* Congress added that "[e]xcept as expressly provided in this Act, nothing in this Act shall . . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id.* at 1370.[3] Congress pledged to provide technical support and financial aid to the States "in connection with the prevention, reduction, and elimination of pollution." *Id.* at 1251(b).

To carry out these policies, Congress broadly defined "pollution" to mean "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of

[1] The FWCPA is commonly referred to as the CWA following the 1977 amendments to the FWPCA Public Law 95–217, 91 Stat. 1566 (1977) For ease of reference, the agencies will generally refer to the FWPCA in this notice as the CWA or the Act

[2] The term "navigable water of the United States" is a term of art used to refer to waters subject to federal jurisdiction under the RHA *See, e g*, 33 CFR 329.1. The term is not synonymous with the phrase "waters of the United States" under the CWA, *see id*, and the general term "navigable waters" has different meanings depending on the context of the statute in which it is used *See, e g*, *PPL Montana, LLC* v *Montana*, 132 S Ct 1215, 1228 (2012)

[3] 33 U S C 1370 also prohibits authorized States from adopting any limitations, prohibitions, or standards that are less stringent than required by the CWA

**DEPARTMENT OF DEFENSE**

**Department of the Army, Corps of Engineers**

**33 CFR Part 328**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401**

**[EPA–HQ–OW–2017–0203; FRL–10000–10–OW]**

**RIN 2040–AF74**

# Definition of "Waters of the United States"—Recodification of Pre-Existing Rules

**AGENCY:** Department of Defense, Department of the Army, Corps of Engineers; Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") are publishing a final rule to repeal the 2015 Clean Water Rule: Definition of "Waters of the United States" ("2015 Rule"), which amended portions of the Code of Federal Regulations (CFR), and to restore the regulatory text that existed prior to the 2015 Rule. The agencies will implement the pre-2015 Rule regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.

The agencies are repealing the 2015 Rule for four primary reasons. First, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the Clean Water Act (CWA) as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*. Second, the agencies conclude that in promulgating the 2015 Rule the agencies failed to adequately consider and accord due weight to the policy of the Congress in CWA section 101(b) to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." 33 U.S.C. 1251(b). Third, the agencies repeal the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority. Lastly, the agencies conclude that the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies find that these reasons, collectively and individually, warrant repealing the 2015 Rule.

With this final rule, the regulations defining the scope of federal CWA jurisdiction will be those portions of the CFR as they existed before the amendments promulgated in the 2015 Rule.

**DATES:** This rule is effective on December 23, 2019.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2017–0203. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Michael McDavit, Office of Water (4504–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 566–2428; email address: *CWAwotus@epa.gov;* or Jennifer Moyer, Regulatory Community of Practice (CECW–CO–R), U.S. Army Corps of Engineers, 441 G Street NW, Washington, DC 20314; telephone number: (202) 761–6903; email address: *USACE_CWA_Rule@usace.army.mil.*

**SUPPLEMENTARY INFORMATION:** The agencies are taking this final action to repeal the Clean Water Rule: Definition of "Waters of the United States," 80 FR 37054 (June 29, 2015), and to recodify the regulatory definitions of "waters of the United States" that existed prior to the August 28, 2015 effective date of the 2015 Rule. Those pre-existing regulatory definitions are the ones that the agencies are currently implementing in more than half the States in light of various judicial decisions currently enjoining the 2015 Rule. As of the effective date of this final rule, the agencies will administer the regulations promulgated in 1986 and 1988 in portions of 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401,[1] and will continue to interpret the statutory term "waters of the United States" to mean the waters covered by those regulations consistent with Supreme Court decisions and longstanding practice, as informed by applicable agency guidance documents, training, and experience.

State, tribal, and local governments have well-defined and established relationships with the Federal government in implementing CWA programs. This final rule returns the relationship between the Federal government, States, and Tribes to the longstanding and familiar distribution of power and responsibilities that existed under the CWA for many years prior to the 2015 Rule.

In issuing the July 27, 2017 notice of proposed rulemaking (NPRM) and the July 12, 2018 supplemental notice of proposed rulemaking (SNPRM), the agencies gave interested parties an opportunity to comment on important considerations and reasons for the agencies' proposal, including whether it is desirable and appropriate to recodify the pre-2015 regulations as an interim step pending a substantive rulemaking to reconsider the definition of "waters of the United States." *See* 82 FR 34899, 34903 (July 27, 2017); 83 FR 32227 (July 12, 2018). The agencies received approximately 770,000 public comments on this rulemaking and carefully reviewed those comments in deciding whether to finalize this rule.

For the reasons discussed in Section III of this notice, the agencies conclude that the 2015 Rule exceeded the agencies' authority under the CWA by adopting an interpretation of Justice Kennedy's "significant nexus" standard articulated in *Rapanos* v. *United States and Carabell* v. *United States,* 547 U.S. 715 (2006) ("*Rapanos*") that was inconsistent with important aspects of that opinion (as well as the opinion of the Court in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) ("*SWANCC*")) and which enabled federal regulation of waters outside the scope of the Act, even though Justice Kennedy's concurring opinion was identified as the basis for the significant nexus standard established in the 2015 Rule. The agencies also conclude that, contrary to reasons articulated in support of the 2015 Rule, the rule

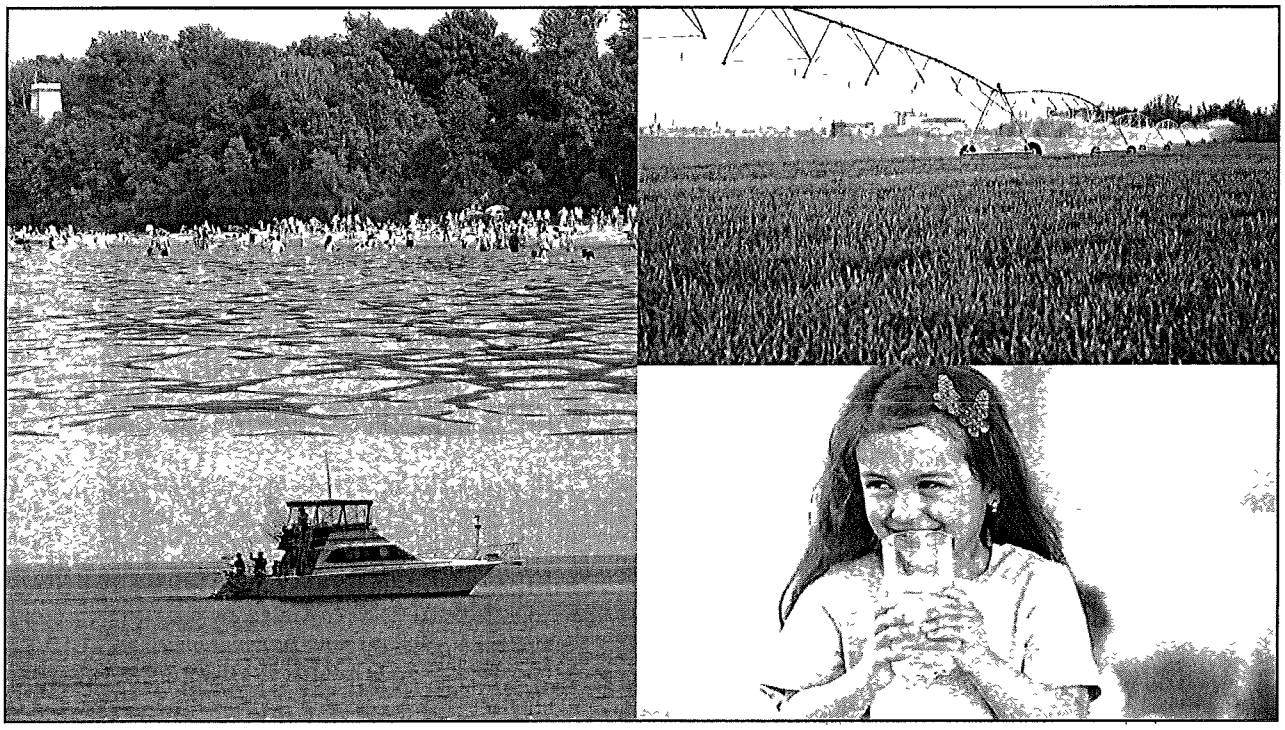
[1] While the EPA administers most provisions in the CWA, the Department of the Army, Corps of Engineers administers the permitting program under section 404. During the 1980s, both agencies adopted substantially similar definitions of "waters of the United States." *See* 51 FR 41206 (Nov. 13, 1986) (amending 33 CFR 328.3), 53 FR 20764 (June 6, 1988) (amending 40 CFR 232.2)

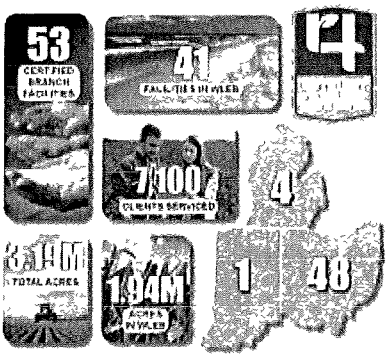
H2Ohio

PROTECTING OHIO'S WATER

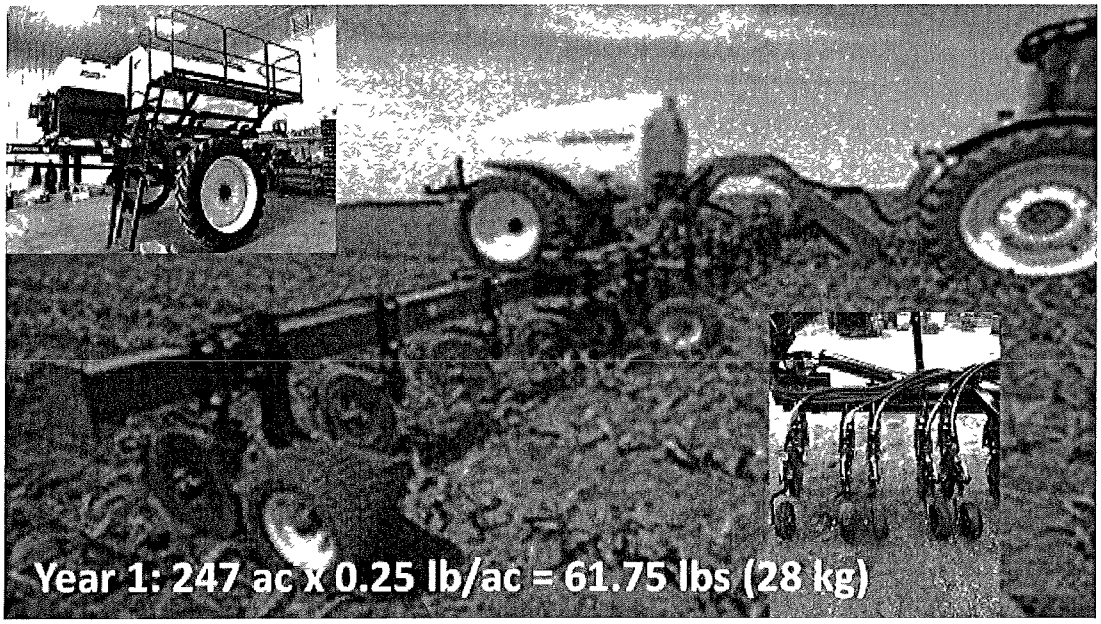
# WELCOME

**Mike DeWine**, Governor
**Jon Husted**, Lt Governor






Also: Senate Bill 299, $34M to Ohio Dept. of Ag for nutrient management incentive programs.
Example: Small Grains Program, to encourage proper use and incorporation of manure.



# H2Ohio

H2Ohio Fund will be invested in targeted solutions to ensure safe and clean water across Ohio.

- Statewide initiative to address water challenges
- Roughly half of the funding would be used for the Western Basin of Lake Erie
- Designed to last 10 years

MIKE DEWINE
GOVERNOR OF OHIO

# H2Ohio

H2Ohio Fund will be invested in targeted solutions to ensure safe and clean water across Ohio.

- $172 million appropriated for FY2020-2021

Ohio Environmental Protection Agency – Director Laurie Stevenson
- $8 million in FY2020 to support infrastructure improvements, lead, water quality monitoring and technology R&D

Ohio Department of Agriculture – Director Dorothy Pelanda
- $30 million in FY2020 to support best management practices for water quality

Ohio Department of Natural Resources – Director Mary Mertz
- $46 million in FY2020 to restore and construct wetlands to capture and filter nutrients from runoff

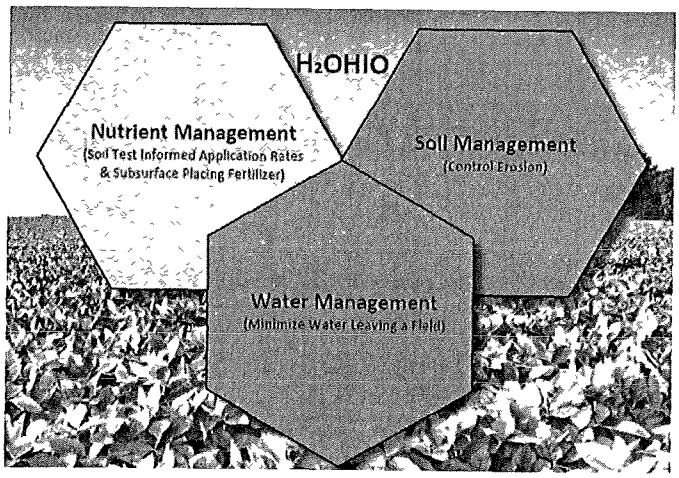
Lake Erie Commission – Director Joy Mulinex

MIKE DEWINE
GOVERNOR OF OHIO

Ohio | Department of Agriculture

**ODA H2Ohio 2019**
$30.3 million to support best management practices for water quality

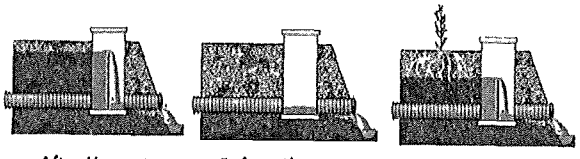
***Soil and Water Phosphorus Program (SB299)***
$20 million for Programs in the Western Lake Erie Basin




MIKE DEWINE
GOVERNOR OF OHIO

## Water Management

- Drainage Water Management
- Wetlands & Water Retention Reservoirs
- Conservation Buffers




**Water Retention Reservoir**

Ohio | Department of Agriculture

**Best Management Practices**

- Nutrient Management Plans
- Subsurface Placement
- In-Season Application


**Soil Management**

- Conservation Tillage
- Cover Crops
- Small Grain Crop Rotation


Funds will be distributed through local Soil and Water Conservation Districts.

Ohio | Department of Agriculture

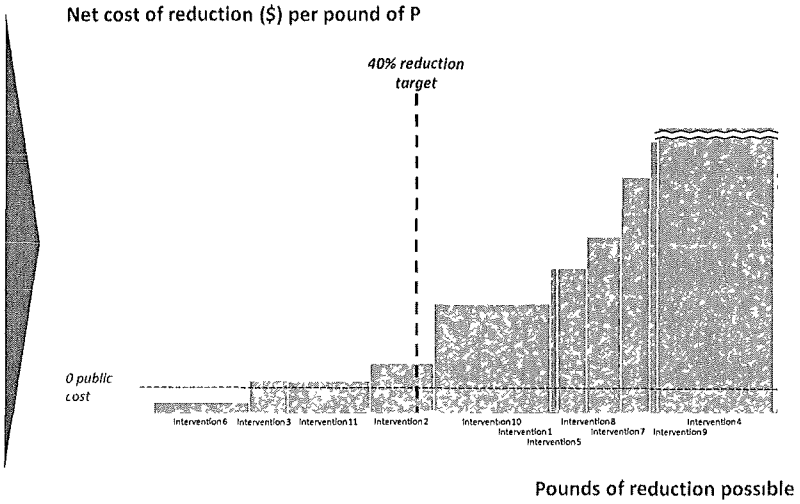
| | | |
|---|---|---|
| Edge-of-field buffers | Riparian forest buffers | ▪ Tree / shrub planting besides waterways used to filter P from runoff |
| | Filter strips | ▪ Herbaceous vegetation areas removing P from overland flow |
| | Filter areas | ▪ Expansion of targeted P-filtration areas at targeted drainage point |
| Erosion mitigation | Conservation tillage | ▪ Reduce inversion tillage, leaving 30%+ cover on the soil surface |
| | Grassed waterways | ▪ In-field graded channels seeded to grass or other vegetation |
| | Cascading waterways | ▪ Repaired grassed waterways retrofitted with pond-like areas within |
| | Cover crops | ▪ Planting grasses / legumes in rotation with cash crops for soil cover |
| Hydraulic retention / detention | Conservation crop rotation | ▪ Use of 1+ resource-conserving crop in rotation (i e , alfalfa / hay) |
| | Drainage water management | ▪ Allow adjustment of subsurface outlet elevation via control structure |
| | Blind inlet | ▪ Tile riser replacement at farm depression low point to reduce flow |
| | Water sediment and control basin | ▪ Earth embankment across slope to trap sediment and detain water |
| Nutrient management | Soil testing & nutrient mgmt. plan | ▪ Reduced P application according to test-driven mgmt plan approval |
| | Variable rate fertilization ('right rate') | ▪ In-field variability of P application via precision agriculture tools |
| | Sub-surface fertilizer placement | ▪ P application below soil surface (>1 cm), i e , via injection |
| | Manure incorporation | ▪ Incorporation of manure within 3 days, <40% soil disturbance |
| | Phosphorus filters | ▪ P removal structure using industrial by-products |
| Wetlands | Wetlands creation | ▪ Establishment of wetlands on a site historically not wetlands |
| | Wetlands restoration | ▪ Return of wetland and its function to (near) original condition |
| | Wetlands enhancement | ▪ Augmentation of specific wetland functions |
| [illegible] | Streambank stabilization | ▪ Structural protection of streambanks and constructed channels |
| | Bio-retention / rain gardens | ▪ Shallow planted depression to retain stormwater pre-discharge |
| [illegible] | Municipal filtering of P from wastewater | ▪ Enhanced biological removal – culture microbes for intracellular P |
| | Addressing failing septic systems | ▪ *Replace sludge-leaking tanks with modern units* |

# We will build upon previous work to develop a fact-based and actionable approach to meeting the 2025 target

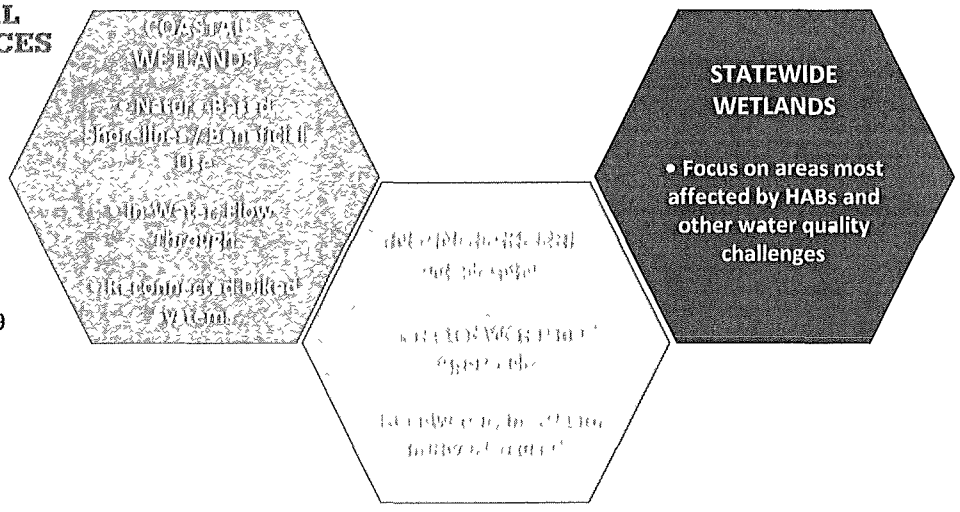
**How we will build on past work**

- Account for **cost** in prioritizing interventions
- Develop reasonable, time-constrained **bounds for incremental application** of respective interventions
- Create a **single baseline** for reduction target (single source of truth)
- Create a **"living tool"** that is regularly updated and used to refine existing plans
- Combine this economic data with feasibility assessments to form **on-the-ground action plans**

**Illustrative. P reduction cost curve**




Ohio Department of NATURAL RESOURCES



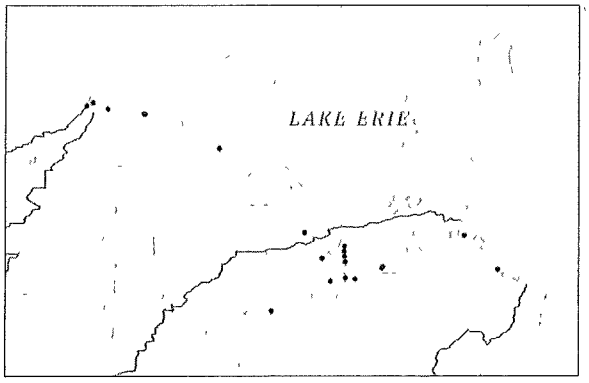

**ODNR H2Ohio 2019**
$46 million to restore and construct wetlands that will assist in filtering nutrients from water

MIKE DEWINE
GOVERNOR OF OHIO

## COASTAL WETLAND PROJECTS

Nineteen coastal wetland projects will maximize nutrient reduction flowing into Lake Erie.

- The creation of multiple "in-water, flow through wetlands" in the mouth of the Maumee and Sandusky Rivers and other critical areas.
- The reconnection of diked wetlands and adjacent tributaries including agricultural drainage channels that flow directly into Lake Erie



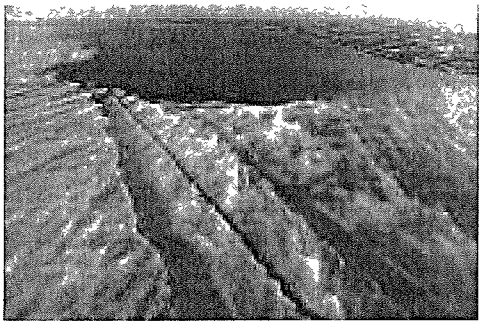

Ohio Department of NATURAL RESOURCES

## INLAND WESTERN LAKE ERIE BASIN WETLAND PROJECTS

- Fifteen targeted inland wetland projects will reduce nutrient runoff
- Focused on nutrient reduction, but anticipate positive impact on streams, wildlife habitat, flood and channel protection

## STATEWIDE WETLAND PROJECTS

Focused on other regions in the state experiencing harmful algae blooms and other water quality challenges



Ohio Department of NATURAL RESOURCES

Ohio Environmental Protection Agency

Disadvantaged Community Drinking Water and Wastewater Infrastructure

Failing Home Sewage Treatment Systems

Reduce Risk of Drinking Water-Related Lead Exposure in Daycares and Schools

Enhance State Water Quality Monitoring Capabilities

Support R&D for Wastewater Treatment Technologies

**OEPA H2Ohio 2019**
$8.675 million to support infrastructure improvements, lead, water quality monitoring and technology R&D

MIKE DEWINE
GOVERNOR OF OHIO

Ohio Environmental Protection Agency

## Disadvantaged Community Drinking Water and Wastewater Infrastructure

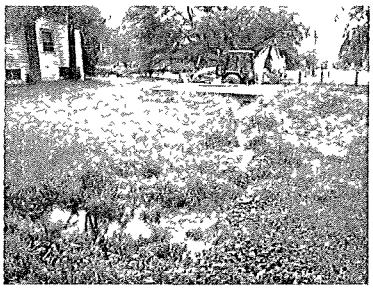
Fund infrastructure projects in small, disadvantaged communities to increase accessibility to safe drinking water and sewer services.

To be disbursed through Ohio EPA's Division of Environmental and Financial Assistance. Have identified small community projects in areas of the state, including southeast Ohio.

Will conduct community outreach and solicit nominations for future projects, using DEFA's existing funding program/process.

Ohio Environmental Protection Agency

## Addressing Failing Home Septic Systems

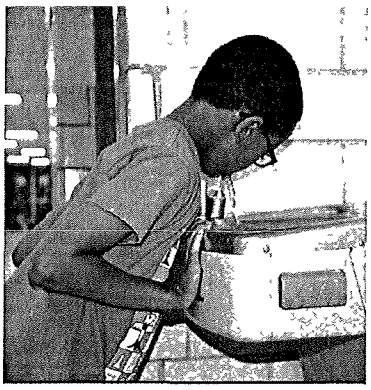


Over 1 million existing home sewage treatment systems and an estimated 6,000 new systems installed each year.

Estimated 31% of existing systems are failing, resulting in public health and water quality concerns.

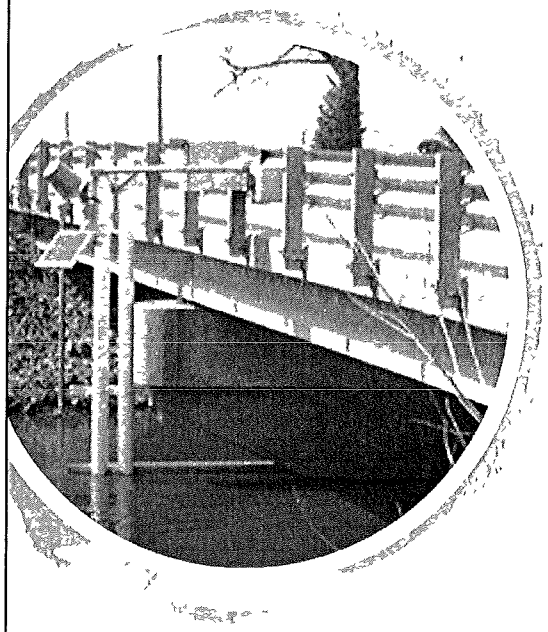
Funding expected for replacement of 250-300 failing home sewage treatment systems, *focusing on low MHI households*. Builds upon existing Ohio EPA program that has already provided $21 million to replace 1,500 systems and repair 400 systems statewide.

## Addressing Lead-Related Drinking Water Hazards in Daycares and Schools



- $1.3 million in federal grant dollars to assist schools/daycares in testing drinking water
- Matching H2Ohio will fund replacement of lead service lines and fixtures
- Partners include ODH and ODJFS
- Initially targeting urban areas

Ohio Environmental Protection Agency



## Enhance Water Quality Monitoring and Support R&D for Treatment Technologies

More in-stream monitoring and rainfall gages in Lake Erie basin and Ohio River areas to fill gaps in nutrient load monitoring.

Establish process to evaluate project proposals for treatment efficacy, scalability and speed at which technology could be implemented.

Ohio Environmental Protection Agency

H2Ohio

## Next Steps and Questions?

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GOVERNOR OF OHIO

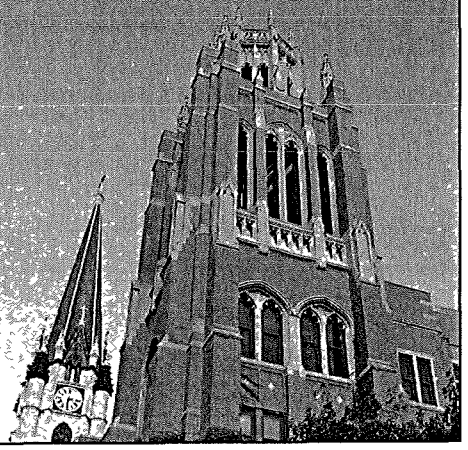
MARQUETTE UNIVERSITY LAW SCHOOL

# Great Lakes Compact – the Racine Diversion

## University of Toledo College of Law

## Great Lakes Water Conference (Nov. 8, 2019)

Prof. David A. Strifling, Director, MULS Water Law & Policy Initiative



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## The Chicago Megacity – A Hotspot for Diversion Controversies

- More diversion hotspots than all other states/provinces combined
- Chicago is the largest and most litigated diversion, by far
- New Berlin – first approved diversion under Compact
- Waukesha – first approved diversion to community in a straddling county
- Racine/Foxconn – first administrative challenge of a diversion

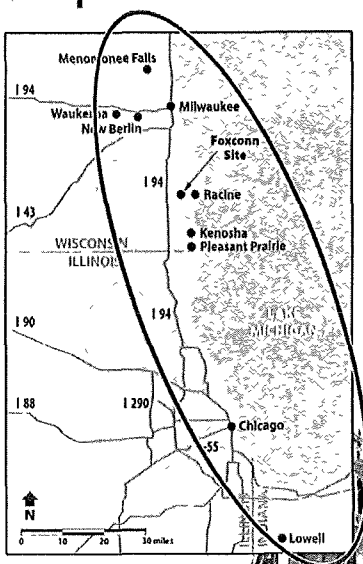
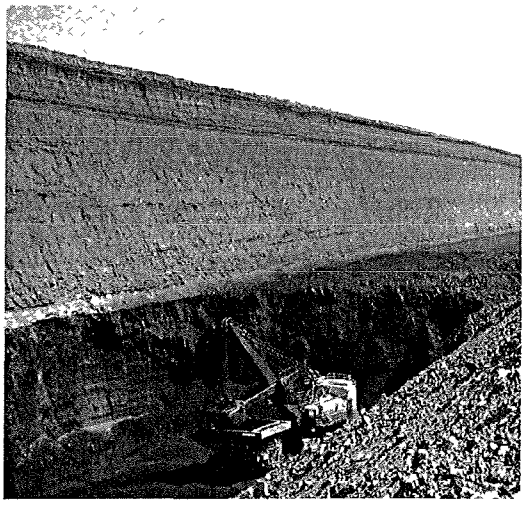
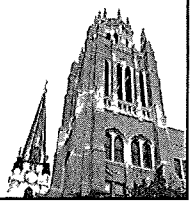



Image source: Peter Annin

## Great Lakes Compact – How Did We Get Here?



Late 1970s – proposal to construct coal slurry *pipeline from Wyoming's* Powder River Basin to Duluth using Lake Superior water to suspend the coal



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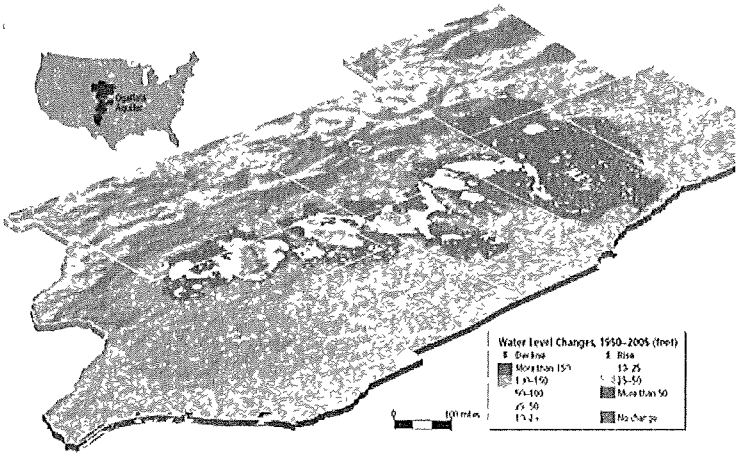
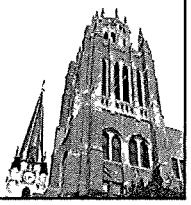
## Great Lakes Compact – How Did We Get Here?




Early 1980s – U.S. Army Corps of Engineers studies the feasibility of using Great Lakes Water to replenish the Ogalalla Aquifer



## Great Lakes Compact – How Did We Get Here?


1998 – "Nova Group" proposal to ship Lake Superior water to private customers in Asia approved by Ontario



## Great Lakes Compact – How Did We Get Here?

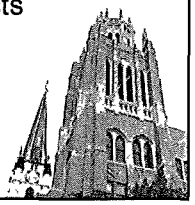

Great Lakes Diversions

- More than a dozen diversions since 1825
- Raise/lower Great Lakes water levels by centimeters

Source: IJC, USACOE

## Great Lakes Compact (2008)

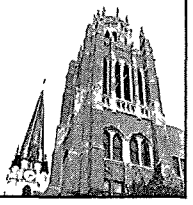
- Adopted by all member state legislatures; approved by Congress; signed by President Bush
- Generally bans new water diversions from Great Lakes
- Exceptions for "straddling communities" and "communities in straddling counties"
- Communities outside straddling counties can't even ask for a diversion
- Diverted water must be returned after use, less an allowance for consumption, with no adverse impacts





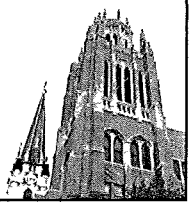
## Great Lakes Compact - significance

- Remarkable degree of political cooperation
- Recognition that the Great Lakes are a shared resource held "in trust" (Section 1.3)
  - –Far from the typical experience in management of transboundary waters
- Carefully thought out to withstand scrutiny
- Relies on sound science
  - –Ignores political boundaries
  - –Recognizes importance of hydrogeology



## Great Lakes Compact – "straddling community" exception (Wis. Stat. 281.346(4)(c))

- Must be "solely for public water supply purposes"
- Must return treated water after use, less allowance for consumption
- Must adopt water conservation program
- Must meet exception standard, if new or increased withdrawal
- No regional review unless consumptive use over 5 MGD; approval decision falls to local governor and agency



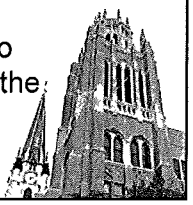


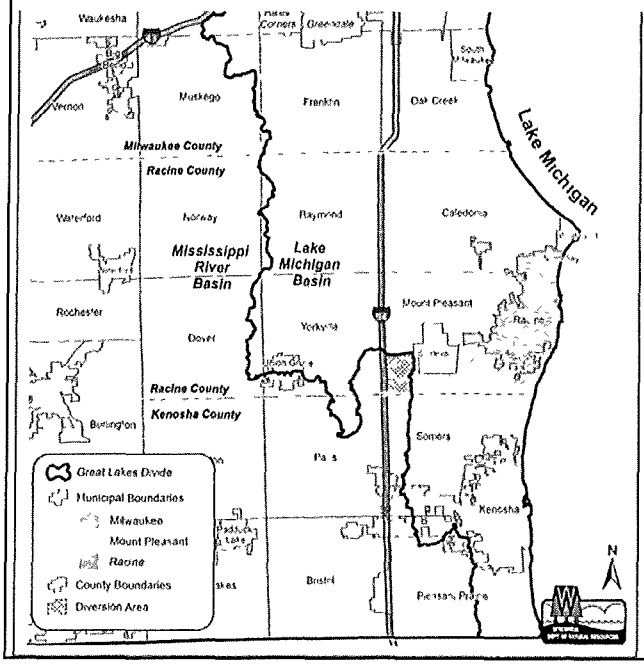
## The Foxconn project (2017)

Economic Policy

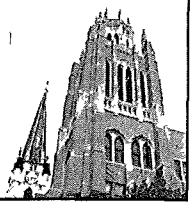
### Scott Walker just approved $3 billion deal for a new Foxconn factory in Wisconsin

- Global electronics manufacturing giant to build facility in Mount Pleasant, Wisconsin
- Refundable state tax credits originally believed to provide most of incentive amount
- 13,000 jobs originally promised, campus the size of multiple Pentagons
- Water is a major issue, significant supply needed to produce flat screen panels, and campus straddles the Great Lakes basin line (some water to be used outside Basin)






- The "Racine" or "Foxconn" diversion
- Racine is a Lake Michigan community that supplies water to Mount Pleasant (Foxconn site); therefore Racine must apply for Foxconn diversion (Wis. Stat. 281.346(4)(b)(2))





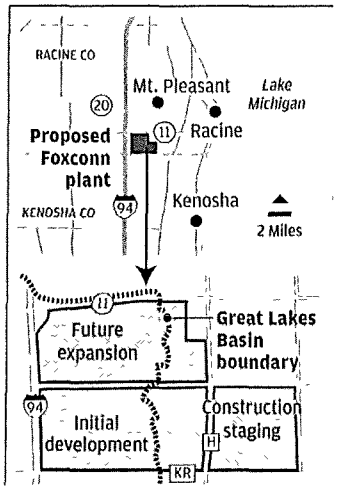
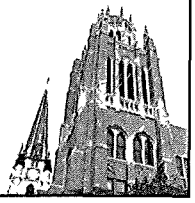


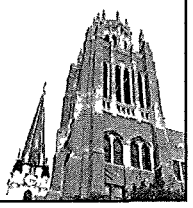

Image source: Wisconsin State Journal

- Foxconn campus straddles the Great Lakes basin line
- Original application: 7 MGD/4.3 MGD returned
- Consumptive use mostly in cooling towers (evaporation)
- Later projections show less demand, but application never amended
- Requested amount fits well within Racine baseline (60 MGD, using 17 MGD)



## Racine diversion – the application

| Straddling county requirements | Racine application |
|---|---|
| Solely for "public water supply purposes" | Disputed |
| Return treated water after use, less allowance for consumption | Satisfied |
| Adopt water conservation program | Satisfied |
| Meet exception standard, if new or increased withdrawal | DNR concludes not new or increased withdrawal |
| Consumptive use less than 5 MGD | Consumptive use est 2 7 MGD (no regional review) |



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## Racine diversion – the application

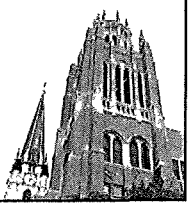
Nov. 2017: Project agreement signed

Jan. 2018: Racine applies for diversion

April 2018: DNR approves diversion

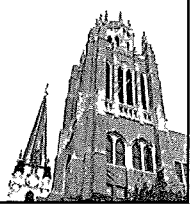
May 2018: Envtl. Petitioners challenge approval

June 2019: Wis. ALJ upholds DNR approval



## Great Lakes Compact – dispute resolution

- Dispute Resolution and Enforcement (Section 7)
  - –Any person aggrieved by a Council action is entitled to a hearing before the Council
  - –Any person aggrieved by a Party's action is entitled to a hearing pursuant to the Party's administrative procedures and laws
- Appeal rights
  - –From Council hearing. right to judicial review in federal court
  - –From Party administrative review: right to judicial review in Party's court of competent jurisdiction





## Racine diversion – the legal challenge

### A crack in the Great Lakes Compact? Approved water diversion prompts pushback

By Andrew Blok | July 15 2019

Wisconsin law implementing the Compact requires an approved diversion to be used only for "public water supply purposes"

(pm) "Public water supply purposes" means water distributed to the public through a physically connected system of treatment, storage, and distribution facilities serving a group of largely residential customers that may also serve industrial, commercial, and other institutional operators. Water withdrawn directly from the basin and not through such a system shall not be considered to be used for public water supply purposes.

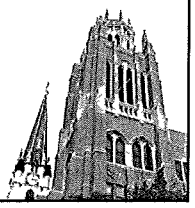
# Foxconn diversion – the legal challenge

- Racine/DNR/Foxconn argument: "solely for public water supply purposes" refers to the *system* as a whole:

Table One Customer Accounts in Mount Pleasant by Class

| Customer Class | Number of Customers Accounts in Mount Pleasant |
|---|---|
| Residential Single Family | 5,579 |
| Residential Multi Family | 349 |
| Commercial | 353 |
| Industrial | 33 |
| Public Authority | 7 |

- Environmental Petitioners' argument: "solely for public water supply purposes" means the *diversion volume* itself must serve "largely residential customers"





# Foxconn diversion – the legal resolution

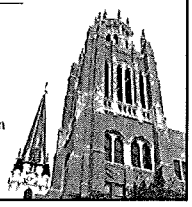
**Before the**
**State of Wisconsin**
DIVISION OF HEARINGS AND APPEALS

In the Matter of Department of Natural Resources, Environmental Management Division, Findings of Fact, Conclusions of Law, and Diversion Approval

Case No. DNR 18 0006

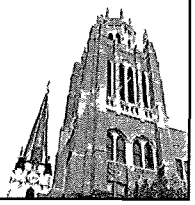
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 26, 2018, the City of Racine, through the Racine Water Utility, (Applicant) applied to the Department of Natural Resources (Department) under Wis. Stat. § 281.346(4)(b) requesting approval to begin a diversion of 7 million gallons of water a day from Lake Michigan



## Foxconn diversion – the legal resolution

- Primary takeaway: ALJ adopts DNR's view on "public water supply purposes" under Wis. Stat. 281.343(1)(pm)
  - Focus (#1) on the system, not on the nature of use of the water at issue
  - Per definition, system must be "largely residential" but may also serve industrial and commercial customers
  - Focus (#2) on the word "customers" – places primacy on number of customers, not volume of water transferred
- Here, Mount Pleasant is 93 percent residential customers
- ALJ won't impute a "private purpose" to this action because public water utility serves all customers to further community interests, including economic development



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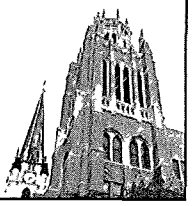
## Foxconn diversion – the legal resolution

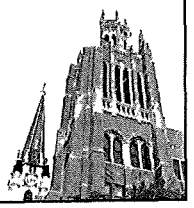
- Secondary takeaways
  - ALJ gave no deference to DNR interpretation of "public water supply purposes" – de novo standard of review for statutory interpretation
  - ALJ decided case based on Wisconsin statutes, not the Compact; may result in minor differences based on individual state legislation implementing the Compact
  - ALJ examined empirical evidence of policy consequences, including a 2006 analysis that only 7% of Wisconsin jurisdictions are straddling communities, most well outside feasibility of connecting to a public utility.



## The Foxconn project (2019)

**Bloomberg Businessweek**

# Inside Wisconsin's Disastrous $4.5 Billion Deal With Foxconn



Before the
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Department of Natural Resources, Environmental Management Division, Findings of Fact, Conclusions of Law, and Diversion Approval

Case No. DNR-18-0006

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 26, 2018, the City of Racine, through the Racine Water Utility, (Applicant) applied to the Department of Natural Resources (Department) under Wis. Stat. § 281.346(4)(b) requesting approval to begin a diversion of 7 million gallons of water a day from Lake Michigan. On April 25, 2018, the Department issued a Diversion Approval (Approval) of the application to begin a diversion of Lake Michigan water to an area outside the Great Lakes Basin, pursuant to Wis. Stat. §§ 281.343(4n)(a) and 281.346(4)(c). On May 25, 2018, the League of Women Voters of Wisconsin, Milwaukee Riverkeeper, Minnesota Center for Environmental Advocacy, and River Alliance of Wisconsin submitted a petition for a contested case hearing to review the Approval, and on June 13, 2018, the Department granted the request for a hearing. On July 13, 2018, the Department requested that the Division of Hearings and Appeals (Division) conduct a contested case hearing based on Petitioners' request for a hearing under Wis. Admin. Code § NR 2.055.

Pursuant to due notice required in Wis. Admin. Code §§ NR 2.06, NR 2.08(5) and NR 2.12, a prehearing conference was held on September 12, 2018, and a status conference was held by telephone on November 8, 2018, at 4822 Madison Yards Way, Madison, Wisconsin, Brian Hayes, Administrative Law Judge, presided. Parties were recognized and the issue to be decided was determined. The parties agreed that this action should proceed through summary judgment briefing according to Wis. Admin. Code § HA 1.10(2); a scheduling order was issued that noticed the briefing schedule, the introduction of exhibits, and a list of stipulated findings of facts Additional facts from the exhibits were highlighted through the briefing process.

In accordance with Wis. Stat. § 227.44(4)(b), Wis. Stat. § 227.46(1), Wis. Admin. Code § NR 2.08(5), and Wis. Admin. Code § NR 2.12, the PARTIES to this proceeding are:

River Alliance of Wisconsin, Minnesota Center for Environmental Advocacy, Milwaukee Riverkeeper, League of Women Voters of Wisconsin, League of Women Voters Lake Michigan Region, and Natural Resources Defense Council (collectively "Petitioners"), by

Attorney Tressie Kamp
Attorney Robert D. Lee
Midwest Environmental Advocates, Inc.
612 West Main Street, Suite 302
Madison, WI 53703

Wisconsin Department of Natural Resources ("Department"), by

Attorney Cheryl Heilman
Attorney Judith Mills
Department of Natural Resources - Bureau of Legal Services
P.O. Box 7921
Madison, WI 53707-7921

City of Racine/Racine Water Utility ("Applicant") by

Attorney Lawrie Kobza
Boardman & Clark, LLP
1 South Pinckney Street, Fourth Floor
Madison, WI 53701

Wisconsin Manufacturers & Commerce ("WMC"), by

Attorney Corydon Fish
Wisconsin Manufacturers & Commerce, Inc.
501 East Washington Avenue
Madison, WI 53703

Village of Mount Pleasant ("Village"), by

Attorney Smitha Chintamaneni
Attorney Alan Marcuvitz
Attorney Andrea Roschke
von Briesen & Roper, s.c.
411 East Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202

Racine County ("County"), by

Attorney Sara Stellpflug Rapkin
Attorney Deborah C Tomczyk
Reinhart Boerner van Deuren, s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202

## Issue to be Decided

Whether the Department's Diversion Approval violates Wis. Stat. §§ 281.343(4n)(a) and 281.346(4)(c) and Sections 4.3.3, 4.8, and 4.9.1 of the Compact with respect to the Department's interpretation of "public water supply purposes."

## Stipulated Findings of Fact

1. The Racine Water Utility is a department of the City of Racine (Applicant).

2. The Racine Water Utility operates a system of collection, treatment, storage and distribution facilities that withdraws water from Lake Michigan, stores the water in water towers, treats the water at a treatment plant located on the shores of Lake Michigan, and distributes the treated water through pipes and booster stations to customers.

3. The Racine Water Utility provides Lake Michigan water directly to residential, industrial, commercial, and other institutional customers in the City of Racine, the Village of Elmwood Park, the Village of North Bay, the Village of Sturtevant, and portions of the Villages of Mount Pleasant (Village) and Somers on a retail basis. The Racine Water Utility also provides Lake Michigan water to the Village of Caledonia on a wholesale basis.

4. All of the customers that are currently served by the Racine Water Utility are located within the Great Lakes Basin. To date, the Racine Water Utility has not transferred any amount of Great Lakes water west of the subcontinental divide.

5. The Village lies partly within and partly outside the Great Lakes Basin and is wholly within a county (Racine County) that lies partly within the Great Lakes Basin.

6. As of February 8, 2018, the Racine Water Utility served water to 6,321 customer accounts in the portion of the Village that is inside the Great Lakes Basin, including 5,579 residential single-family customer accounts, 349 residential multi-family customer accounts, 353 commercial customer accounts, 33 industrial customer accounts and 7 public authority customer accounts.

7. The Racine Water Utility does not currently serve water to any customers in the portion of the Village that is outside of the Great Lakes Basin. The portion of the Village that is outside the Great Lakes Basin is currently served by private wells.

8. Prior to receiving the Applicant's application for a diversion to the Village, the Wisconsin Department of Natural Resources (Department) provided the Applicant with Joint Exs. 3 and 4, documents created by the Department regarding straddling community diversion application requirements.

9. On January 26, 2018, the Applicant applied to the Department for approval to begin a diversion of Great Lakes water to the portion of the Village that lies outside the Great Lakes Basin (diversion area). The application is Joint Ex. 5.

10. The diversion area is part of an Electronics and Information Technology Manufacturing (EITM) Zone that, in September 2017, the State Legislature authorized the state to create.

11. In the application, the Applicant requested approval to divert up to 7,000,000 gallons of water per day (7 mgd) to meet forecasted demands for water resulting from expected development in the Village along the Interstate-94 (I-94) corridor.

12. The projected customers of the Racine Water Utility within the diversion area are industrial and commercial customers. The Applicant's application contains a table projecting the water demand forecast for the diversion area at full build out in 2050. The table projects a volume of 5.8 mgd for use by the Foxconn Technology Group (Foxconn) in the diversion area. The table projects 1.2 mgd for use by other industrial and commercial customers in the diversion area.

13. The Applicant's application does not identify any residential customers in the diversion area that will be served by the Racine Water Utility.

14. On January 31, 2018, the Department issued a public notice describing the application from the Applicant. The notice provided information on the public comment period and the hearing that the Department planned to hold on the proposed diversion. The notice is Joint Ex. 6.

15. The Department prepared a document entitled "DNR's Racine Diversion Application Fact Sheet," dated February 2018, which was posted on the Department's Racine Diversion web page, https://dnr.wi.gov/topic/WaterUse/Racine/. The fact sheet is Joint Ex. 7.

16. The Department held a public hearing on March 7, 2018, at the SC Johnson iMET Center, 2320 Renaissance Boulevard, Sturtevant, Wisconsin, to give interested persons an opportunity to comment on the diversion application. Prior to the public comment portion of the hearing, the Department held an informational meeting and question and answer session.

17. The Department received approximately 780 written comments (email/mailed postcards, letters, written comments at hearing) from individuals and groups during the public comment period. (The comments are available on the Racine Diversion web page https://dnr.wi.gov/topic/WaterUse/Racine/.)

18. Oral comments were received at the public hearing on March 7, 2018, in Sturtevant. Of the 243 people who registered at the hearings, 54 provided oral testimony. (A tape of the oral comments is available on the Racine Diversion web page https://dnr.wi.gov/topic/WaterUse/documents/Racine/RacineDivPublicHearing.WMA.)

19. The Applicant provided the Department with supplemental information during the Department's review process. Information on the Applicant's reported water utility volumes

from 1995 through 2016, dated January 30, 2018, is Joint Ex. 8 Information regarding the Racine Water Utility customer accounts by class in the Village, dated February 15, 2018, is Joint Ex. 9. Reports on the Applicant's water withdrawals in 2017 are in Joint Ex. 10. Information on the Applicant's consumptive use forecast for diversion area customers other than Foxconn is Joint Ex. 11.

20. Foxconn provided supplemental information to the Department in response to questions regarding Foxconn's conservation and efficiency plans and consumptive use projections. Foxconn's response to the Department's questions, dated April 24, 2018, is Joint Ex. 12.

21. As part of the Department's evaluation of the diversion application and response to comments, the Department reviewed data from the Public Service Commission for 2016, calculated the percentage of metered connections by customer class for Wisconsin municipal water suppliers that withdraw water from Lake Michigan, and created Table 1 in Joint Ex. 24.

22. As part of the Department's evaluation of the diversion application, the Department evaluated the Applicant's approved and actual water withdrawal amounts. The Applicant has a water use permit dated December 8, 2011, with an approved water withdrawal amount of 60,010,000 gallons per day. The Racine Water Utility withdrew an average of 17,144,688 gallons per day in 2017.

23. During the comment period, Petitioners submitted written comments. The comments received from Petitioners during the comment period are Joint Exs. 13, 14, 15, 16, 17, and 18.

24. The Department prepared a summary of comments during the public comment period and the Department's response to comments. The Department's summary of comments and response to comments is Joint Ex. 24.

25. The Department's Findings of Fact, Conclusions of Law, and Diversion Approval (Approval) was issued April 25, 2018. The Approval is Joint Ex. 1.

26. The Department informed the Compact Council and the Regional Body of the Applicant's application on January 29, 2018.

27. The written comments provided to the Department from the states of New York, Michigan, and Pennsylvania are Joint Exs. 19, 20, 21, and 22.

28. The Department responded to comments in a letter to the New York Department of Environmental Conservation, dated April 25, 2018. The letter is Joint Ex. 23.

29. The Department responded to comments and questions in a letter to the Regional Body dated May 16, 2018. The letter is Joint Ex. 2.

## Applicable Law and Standard of Review

The Department has approved a water diversion from the Applicant to provide water from Lake Michigan of the Great Lakes Basin (Basin) to the Village. This permission is challenged by Petitioners, asserting that Wis. Stat. §§ 281.343(4n)(a) and 281.346(4)(c) and Sections 4.3 3, 4.8, and 4.9.1 of the Great Lakes – St. Lawrence River Basin Water Resources Compact (Compact) prohibit the approval. Specifically, Petitioners argue that the Department incorrectly interpreted the meaning of "public water supply purposes" in Wisconsin Statutes and the Compact and that the application should be denied.

As is evident by the nature of the issue, this case is one of statutory interpretation[1]. The standard of review was determined when the parties agreed that the matter was to be decided by summary judgment under Wis. Admin. Code § HA 1.01(2). Section HA 1.10(2) provides that the summary judgment procedure as provided in Wis Stats. § 802.08 shall be available to the parties upon approval by the division or the administrative law judge. Wisconsin Stats. § 802.08(2) provides, in relevant part, the following:

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Further, Wis. Stat. § 802.08(6) provides that if it appears "that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor."

Generally, when both parties file cross-motions for summary judgment, it is the equivalent of a stipulation of facts permitting the case to be decided solely on the legal issues presented. *See BMO Harris Bank, N A v European Motor Works*, 2016 WI App 91, ¶15, 372 Wis. 2d 656, 889 N.W.2d 165.

As to the applicable law, the focus here is on the meaning of the Wisconsin Statutes that govern the approval of the application, not the Compact that led to the promulgation of the statutes. The Wisconsin Legislature codified the Compact in Wis. Stat. § 281.343 and then implemented it in Wis. Stat. § 281.346. The utility of the Compact and its language here is to inform what lawmakers intended when they codified "public water supply purposes" in Wisconsin Statutes. There are three reasons to focus on the statute and not the Compact.

First, the Department used its statutory authority to approve the application in Wis. Stat. § 281.346(4)(b) and granted a hearing to Petitioners with its authority found in Wis. Stat. § 281.93(2) These are the triggers that the Department used to approve the application and refer the matter to the Division for a contested case hearing. The application must be analyzed on

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[1] As the Wisconsin Supreme Court recently reminded, "statutory interpretation is a question of law which courts decide *de novo*," citing Harnischfeger v. LIRC, 196 Wis. 2d 650, 659, 539 N.W 2d 98 (1995) in *Tetra Tec EC, Inc., and Lower Fox River Remediation LLC v. Wisconsin Department of Revenue*, 2018 WI 75, ¶ 12, 382 Wis 2d 496, 914 N.W.2d 21.

those terms. The Compact's provisions are useful to understand what led to the promulgation of the statutes, but the Compact itself was not used to grant the application or the hearing. Petitioners primarily use the Compact language to add force to its arguments as the language is largely identical.

Secondly, this is not a case interpreting the Compact. It is a challenge to the interpretation of the statutes that were drafted to implement the Compact and not a challenge to the Compact as a contract. The Petitioners are third parties - they are not signatories to the Compact. They are authorized to request a hearing under Wis. Stat. § 281.93(2) which are the provisions allowing "other persons" to seek review. There is a process for signatories to challenge an application for a diversion and there are statutory considerations that were followed. Wis. Stat. § 281.343(4h)(a)(6). There is a process to address questions of Compact signatories and that was followed in this matter. The Department followed the process for noticing the other states and provinces of the request for diversion. None of the Petitioners are signatories to the Compact

Thirdly, there is a constitutional consideration when interpreting a statute. Statutes enacted by the legislature carry a heavy presumption of constitutionality. *LeClair v Nat. Res. Bd* , 168 Wis. 2d 227, 236, 483 N.W.2d 278, 282 (Wis. Ct. App. 1992). The statutes enacted to codify the Compact declare that they do not change the application of the Public Trust Doctrine found in Wisconsin's Constitution. *See* Wis. Stat. § 281.343(1). ("Nothing in this section may be interpreted to change the application of the public trust doctrine.") Wisconsin's Public Trust Doctrine, found in Article IX, Section 1 of Wisconsin's Constitution, declares that the State maintains concurrent jurisdiction over its waters, from the St. Lawrence to the Mississippi. Interpreting statutes that implement the Compact cannot conflict with the State's Public Trust Doctrine so as not to trigger concerns over federal preemption. There is nothing here to indicate that Wisconsin's legislative muscle was pulled from its constitutional bone but limiting or redefining the word "public" in the application of the Compact on Wisconsin's jurisdiction over its water could provoke a constitutional analysis [2]

**Discussion**

The Applicant has requested a diversion of water from Lake Michigan. Specifically, it requests approval of an increased 7 million gallon per day diversion to meet the Village's expected need to supply a legislatively created Electronics and Information Technology Manufacturing (EITM) Zone along the I-94 corridor in Southeast Wisconsin. *See* Wis. Stat. § 238.396(1m). The EITM Zone is wholly within the Village and wholly outside the Basin. It will include industrial and commercial users; there will be no residential customers in the EITM Zone (Stipulated Facts 11, 12 and 13.)

The intent of the Compact is to prohibit diversions unless the application falls into specific exceptions and conditions. The prohibition is found in Wis. Stat. § 281.346(4)(a). All

[2] That analysis is beyond the scope and authority of this administrative review granted under Wis Admin Code § NR 2 055

diversions require an application to the Department. Wis. Stat. § 281.346(4)(b)(1). Both the authorizing and implementing statutes provide additional regulatory requirements.

The first regulatory requirement that the statute places on a diversion is the nature of the Applicant. Only public water utilities are qualified applicants. By statute, an applicant must operate a public water supply system that would receive water from the diversion. Wis. Stat. § 281.346(4)(b)(2). This renders the statutory terms by which a diversion may be approved to that of a public water utility statute. Any private water system does not qualify and is precluded from applying for a diversion.

The Applicant is a public water system or utility as defined under Wis. Stat. § 196.01(5), Wis. Admin Code § NR 809.04(67) and Wis. Admin Code § NR 811.02(56). It operates a system of collection, treatment, storage and distribution facilities that stores the water in water towers, treats the water at a treatment plant and distributes the treated water through pipes and booster stations to customers. (Stipulated Fact 2.) As a public water system, the Applicant must submit to a regulatory overlay to impose standards and practices to ensure public health and safe drinking water. The Compact and statute prohibit a private diversion from the Basin to the EITM Zone; every diversion must be operated by the public water utility and included in the utility's public water system. In this way, any diversion is through the regulated system to better monitor and improve water quality for the systems' customers.

Secondly, the diversion must be for a straddling community as political jurisdictions within the Basin are not coterminous. A straddling community is defined as "any incorporated city, town or the equivalent thereof, wholly within any county that lies partly or completely within the basin, whose corporate boundary existing as of the effective date of this compact is partly within the basin." Wis. Stat. § 281.343(1e)(t). The Village is both a straddling community and an incorporated village wholly within Racine County. (Stipulated Fact 5.) Moreover, the Village has been a straddling community since the inception of the Compact and is the only jurisdiction that will consume the diverted water.

The requested diversion seeks to provide a source of water for the area of the Village that is not in the Basin; 92 percent of the Village is in the Basin and around 8 percent is outside the Basin. The Applicant currently services over 6,321 customer accounts within the Village of which 5,928 are residential – around 93 percent of the customer base. (Stipulated Fact 6.) The Applicant services 33,969 customer accounts in total and 30,375 of these customers are residential, which is approximately 89 percent of the customer base. (Ex. 200, at 036) In other words, the Village is a bit more residential than the Applicant's current customer base that includes the customers in the Village that are in the Basin.

The area to be served is outside the Basin in the southwest portion of Racine County and is currently serviced by private wells. (Stipulated Fact 7.) The diversion will only serve the area of the Village within Racine County and outside the Basin.

The Compact authorizes the diversion exception for straddling communities, and that requirement is codified in the implementing statute. Specifically, Wis. Stat. § 281.346(4)(c) mandates the following:

> The department may approve a proposal . . . to begin a diversion . . . to an area within a straddling community but outside the Great Lakes basin or outside the source watershed if the water diverted will be used solely for public water supply purposes in the straddling community.

The authorizing statute, Wis. Stat. § 281.343(4n)(a), amplifies further:

> A proposal to transfer water to an area within a straddling community but outside the basin or outside the source Great Lake watershed shall be excepted from the prohibition against diversions and be managed and regulated by the originating party provided that regardless of the volume of water transferred, all of the water so transferred shall be used solely for public water supply purposes within the straddling community.

Based on the language in both the authorizing and implementing statutes, diverted water can be transferred to an area in a straddling community outside the Basin if the water is used within the entire straddling community. These statutes require the use of the water within the straddling community; it cannot be exported out.

In addition, a diversion request must be folded under the amount that the Applicant is permitted to withdraw from the Basin as a public water system. On December 8, 2011, the Applicant received its Basin withdrawal permit and baseline withdrawal amount under Wis. Stat. §§ 281.346(5)(c), (4)(e), and (4)(g). The Applicant received a withdrawal permit of more than 60 million gallons of water per day. In 2017, the Applicant reported withdrawing a little over 17 million gallons a day and is seeking a 7 million gallons a day diversion for the portion of the Village outside the Basin (Stipulated Fact 22.) The Applicant has sufficient room under its permitted withdrawal amount; the Applicant's excess capacity is due in part to decreased water needs for industrial customers. The Applicant's industrial water use decreased by 47 percent between 1995 and 2016 due to the decline in manufacturing. (Exhibit 5, pg. 8,¶1.)

Finally, the public water utility must also certify that an amount of water equal to the amount diverted for the straddling community will be returned to the Basin, minus an allowance for consumptive use. Additional qualifications on returning water to the Basin from outside the Basin are also implemented to reduce the introduction of invasive species into the Basin. Wis. Stat. §§ 281.346(4)(c)(1) and (2). By requiring that water from the Basin be returned to the Basin, a limit is placed on the effect to the Basin of the diversion.

At this point, the Department approved the application from the Racine Water Utility as it was a qualified applicant, seeking a diversion under its withdrawal limit for a straddling community it wished to service.

Petitioners objected and sought the contested case hearing wanting the Department to deny the diversion request by the Applicant prompting this appeal. Petitioners believe the application for a diversion to provide water to an industrial customer violates the statutory intent of the Compact that allows diversions to be "used solely for public water supply purposes in the

straddling community." Wis. Stat. § 281.346(4)(c). Wis Stat. § 281.343(4n)(a) has similar wording.

The Petitioners assert that because the Applicant seeks to service primarily an economic development project with industrial customers outside the Basin but in a straddling community with its requested diversion, it violates the directive in the statutory exemption for straddling communities requiring the diversion be for "public water supply purposes."

Wisconsin Stat. § 281.343(1)(pm) defines "public water supply purposes" as "water distributed to the public through a physically connected system of treatment, storage, and distribution facilities serving a group of largely residential customers that may also serve industrial, commercial, and other institutional operators."

After reviewing both the actual language and context of the statute, the provenance of Petitioners' interpretation is unmarked.[3] As to the actual language in Wis. Stat. § 281.346(4)(c), the diverted water is to be used **within the straddling community**. The statute does not direct that the diverted water go specifically to the area outside the Basin. The statute envisions the diverted water going through a "system . . . of largely residential customers" to the whole straddling community. The definition does not conceive that the water transferred outside the Basin, or on the nature of the use of the water, is material to the application. The focus is on the water transferred to within the whole straddling community through a system serving multiple types of customers.

The Applicant operates a physically connected system of treatment, storage, and distribution facilities. (Stipulated Fact 2.) The Village, a straddling community, is a portion of the system operated by the Applicant. The portion of the Village not in the Basin seeks to benefit from the Applicant's system. As noted, the Village is currently 93 percent residential based on its customer base. The Applicant's customer base is 89 percent residential. In both instances, the customer base of the public water utility prior to the proposed diversion and after will be largely residential. It will also serve industrial, commercial and institutional customers in the system. The proposed diversion does not change the largely residential character of either Applicant's service area or, more prescriptively, the Village's service area.

Petitioners repeatedly cite the definition of public water supply purposes as serving largely residential customers. (Pet. Brief, pgs. 20 and 21 and Pet. Reply Brief, pg.7.) The actual words of the definition note that the intent is to serve a group of largely residential customers **that may also serve industrial, commercial, and other institutional operators**. By truncating and failing to address the last ten words in the definition, Petitioners fail to see that the statute's intent is to allow a system serving many kinds of customers as a public water supply purpose. As a matter of word choice in the statute, the words "largely residential" do not transform to "solely residential" by truncating the clause that allows for the Applicant to serve its industrial, commercial and institutional customers.

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[3] See *State ex. rel Kalal v Circuit Court*, 2004 WI 58, 271 Wis. 2d 633 681 N.W 2d 110, where the Wisconsin Supreme Court explains the use of extrinsic (context) or intrinsic (word usage) factors to interpret a statute.

Tellingly, the use of the term "customers" as a metric used in the definition is important in a couple of ways. First, the definition places primacy on customers and not the volume of water. The statutory language notes that "regardless of the volume of water transferred, all of the water so transferred shall be used solely for public water supply purposes." Wis. Stat. § 281.343(4n)(a). Based on this, the volume of water diverted is immaterial to the approval of a diversion. The important criterion for a diversion is that it be done for public supply purposes through a physically connected system serving largely residential customers. The volume of water diverted is accounted for more holistically in the baseline withdrawal amount under which the Applicant must adhere.

Further, by calling the users "customers," the public water purpose definition signals that service is provided for a fee and the product is a system of regulated water to help provide for safe drinking water and the public health. The Applicant provides service to the Village on a "retail basis." (Stipulated Fact 3.) Petitioners propose several dictionary meanings of "public" (Pet. Brief pgs. 20 and 21) but ignore the amplification that is in the definition. Based on the definition, the public is a group of different kinds of customers that pay for and receive a benefit of the regulated, physically connected system.

The Petitioners' interpretation also requires a leap from the context of the statutes that regulate the water utility. The context of the statutes, knitted together, is to regulate public water utilities to promote the system of water delivery and waste removal to straddling communities.

As noted above in Wis. Stat. § 196 01(5), Wis. Admin Code § NR 809.04(67) and Wis. Admin Code § NR 811.02(56), the Applicant is a public water system; it services residential, industrial, commercial and other institutional customers in the City of Racine and other communities within the Basin in Racine County. It is a public water utility in both definition and character as it services multiple types of customers.

The Petitioners assert that the public utility has requested to do something "un-public." It reads a private purpose into the public water utility's request to seek additional customers in the straddling community that it serves and extend its system accordingly. The utility is created to service various types of customers, including industrial and commercial customers. The regulatory structure is to provide an exception for a diversion for public water utilities seeking to serve their communities. The public water utility's behavior here is consistent with its character

The value of the public water utility is in who it serves (any residential, commercial or industrial customers), and in what it provides (a connected system of clean water delivery and wastewater processing to further community interests, including economic development). The universality of its service and the benefits it offers are furthered by a reading that allows the public utility to serve the whole village It benefits the public This statutory construction protects the Basin by allowing a diversion (and return) of water that is processed through a regulated utility. Under the regulatory limit that requires a return of any diverted water to use in the straddling community, the diverted water cannot be "exported" further outside the Basin; this limit promotes the ability of the public water utility to further its public character, its universality, and provide a water system to the whole straddling community.

To read an "un-public" purpose into the Applicant's intent is to read an absurdity into the law. The Applicant services many kinds of customers, most of whom are private and many of whom are nonresidential. If the Compact and its enabling statutes had intended to have a public water utility serve its residential, commercial, industrial and institutional customers within the Basin and only residential customers with diverted water outside the Basin, it would have said something very different. It would have directed the diverted water go to the area outside the Basin and restrict its customers to solely residential users. This would signal that the Applicant would have to change its customer service character. There is nothing in the words or context of the statute that would indicate that.

To deny the application would have deleterious consequences. Under the Petitioners' reading of the statute, the Applicant has three options. First, it can do nothing and have residents of the Village outside the Basin remain off the Applicant's public water system on well water. Secondly, the Applicant can accept the denial of its application and contort the area's land use plan to allow for only residential development outside the Basin along the I-94 highway. Thirdly, the Village or the Applicant can create a separate water system for the area outside the Basin without diverted Basin water to provide the benefits of a system serving a variety of customers.

The first two options undermine the land use planning and development of the area in the Village outside the Basin. There have been development plans for the area that precede the creation of the EITM Zone. Assigning the area of the Village outside the Basin to well water was not the long-term goal. The third option requires the Village to lose the benefits of a consolidated utility service. These benefits include the Applicant's scale, expertise, and financing. The third option envisions the Village being serviced by two separate systems of pipes, wastewater treatment, holding ponds and rate setting with different water supplies. This will influence land use and property value in the Village differently. To divide the Village on its public water system is to divide the Village. Notably, the Applicant had plans to consolidate and unite the Village's water supply prior to the creation of the EITM Zone. There is nothing in the record to indicate that two systems, one from the Basin and one from outside, were contemplated as the Village sought development.

Petitioners fear an open floodgate of diversion requests. It should be noted that there are relatively few straddling communities, around 7 percent of the total jurisdictions, in Wisconsin.[4] Fewer systems still that can withdraw an amount under its baseline and also meet the statutory requirements to return the water to the Basin minus consumption. This type of diversion is a limited occurrence in Wisconsin and is brought about by the unique nature of the Applicant with room under its baseline withdrawal with a straddling community close enough warrant the extension of service.

The Compact created and Wisconsin enacted an exception to the prohibition on diversions so that straddling communities could enjoy the community benefit of a common water system under certain regulatory restrictions. Those conditions were met here on the facts in this

[4] Exhibit 209 is a 2006 Legislative Council memo written listing the communities The maps indicate that most of the straddling communities lie well outside the feasibility of connecting to a public utility that currently diverts water from the Basin

record. Taken together, the words and the context of the statutes allow the Applicant to build its system consistent with its character to serve its customers to provide a public benefit for the whole of the straddling community.

The Department has justified its approval of the application offered by the Applicant. Based on the language of Wis. Stat. § 281.343(4n)(a) on qualified diversions for straddling communities, the Applicant, the Racine Water Utility, has proven that it will use the 7 million gallons a day diversion for public water supply purposes as defined in Wis. Stat. § 281.343(1)(pm). It will provide the physically connected system of treatment, storage and distribution facilities and will continue to be a largely residential utility after aggregating the portion of the Village outside the Basin. Further, the Applicant will confine the diverted water solely to the straddling community.

## ORDER

WHEREFORE, IT IS HEREBY ORDERED THAT the decision of the Wisconsin Department of Natural Resources to approve a diversion from the Great Lakes Basin is AFFIRMED.

Dated at Madison, Wisconsin, on June 7, 2019.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, Fifth Floor
Madison, WI 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____
Brian K. Hayes
Administrative Law Judge

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party aggrieved by a decision of the hearing examiner may commence an action in circuit court to review that decision. Wis. Stat. § 281.36(3q)(h)2.

2. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

3. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

4. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.