

Waters of the United States (WOTUS)

Presented By: Aimee Davenport

Which Waters Matter?



The Foundation

CWA prohibits unpermitted discharges of pollutants into “navigable waters,” which are defined as “waters of the United States.”

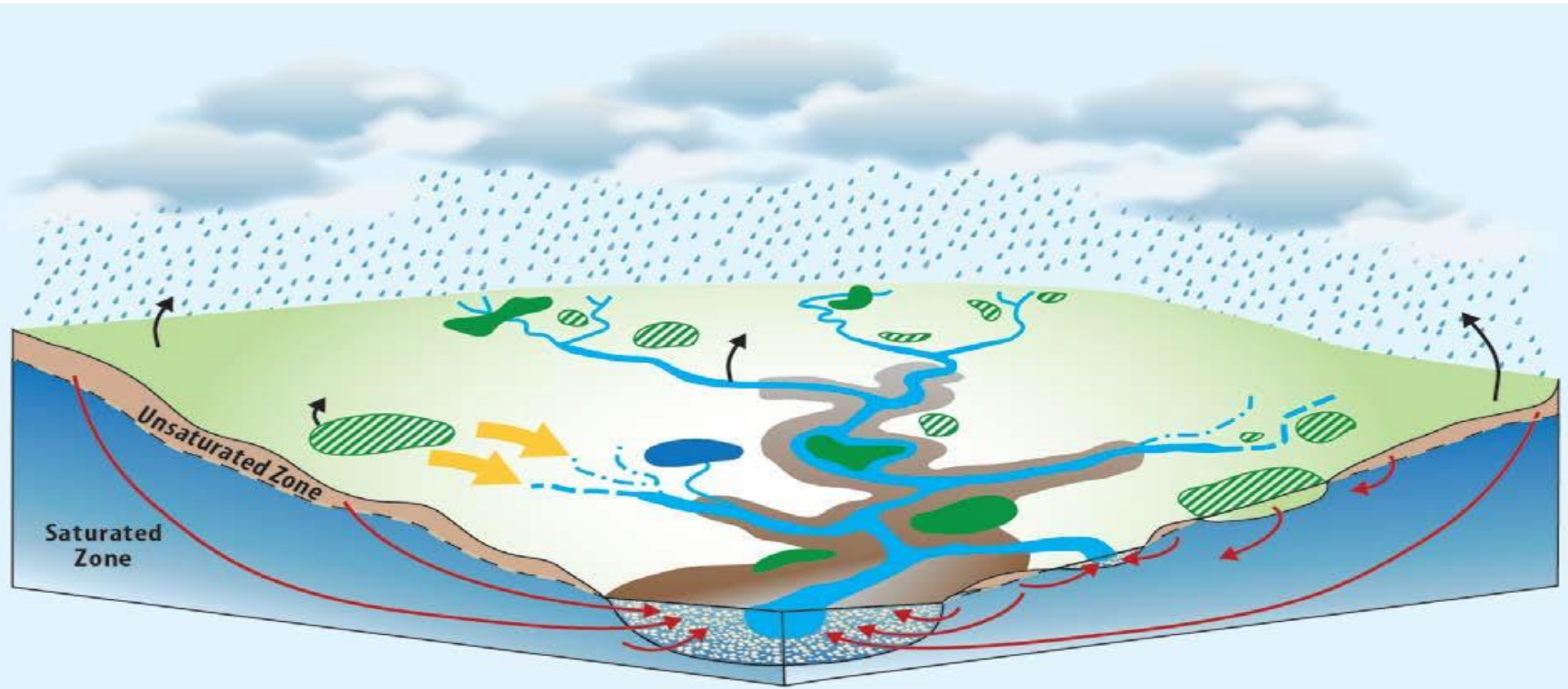
Pre-2015 Rule

- Waters used in interstate or foreign commerce
- Interstate waters including interstate wetlands
- “Other waters” which could affect interstate or foreign commerce
- Impoundments of waters that would otherwise be within definition of waters of the United States
- Tributaries of the above-listed waters
- Territorial seas
- Wetlands adjacent to waters

- Supreme Court Decisions
 - *SWANCC* (2001)
 - *Rapanos* (2006)

- 2015 Clean Water Rule

From EPA's Draft 2013 Report on "Connectivity"



- | | | | |
|---------------------|-----------------------------|---------------------------------|---------------------|
| Perennial stream | Wetland with surface outlet | Geographically isolated wetland | Evapo-transpiration |
| Intermittent stream | Floodplain | Overland flow (fill-and-spill) | Subsurface flows |
| Ephemeral stream | Riparian/floodplain wetland | Hyporheic zone | |



Clean Water Rule

- New definition broadened definition of “tributary “ to include waters characterized by intermittent or ephemeral flows
- Includes all waters that are “adjacent” or “neighboring” to jurisdictional waters
- Also includes “other waters” that have a significant nexus to navigable waters, meaning they affect the chemical, physical, or biological integrity of a navigable water

Clean Water Rule

- 33 lawsuits originally consolidated in Court of Appeals for 6th Circuit and Stayed Nationwide
- Nationwide stay granted, then lifted (except in some states)
- South Carolina and Washington Federal District Courts says “Suspension Rule” enjoined
- CWR restored in 23 states (not Missouri)

Executive Order

- “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule”
 - **Step One**
 - Proposed Repeal of 2015 Rule
 - Recodification of pre-2015 rule
 - **Step Two**
 - Define Waters of the United States
 - **Applicability Date to the 2015 Clean Water Rule**
 - Clean Water Rule to take effect in 2020

June 19, 2017

“We offer the **perennial flow/permanent pool model** as...model for...relatively permanent water.”

- 10 CSR 20-7.031 – Classified Waters System

“...the term denotes a **hydrologic connection, not a biological or other functional connection.**”

“...by definition, a "continuous" connection is one that is **uninterrupted and constant...during normal conditions.**”

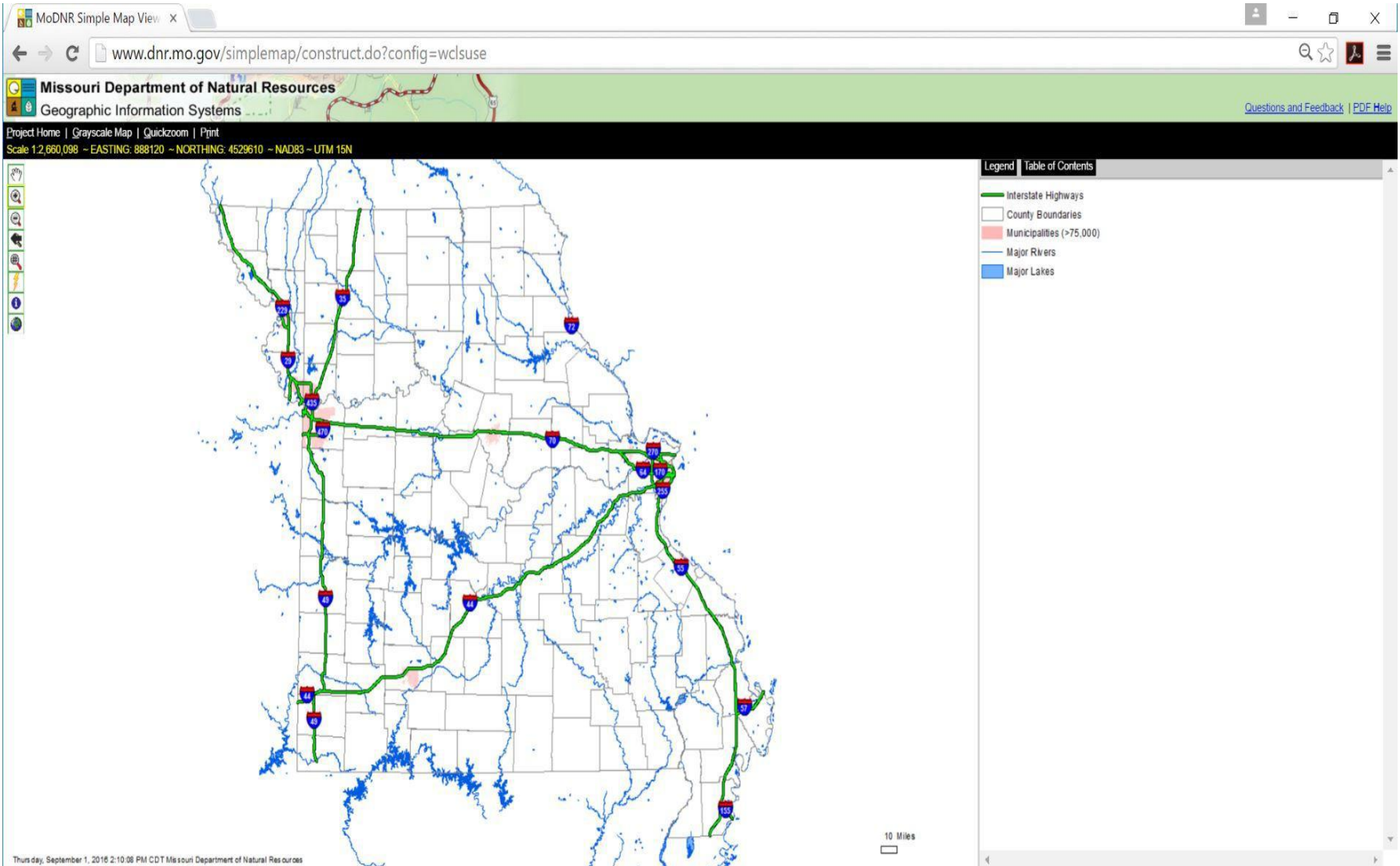
June 19, 2017

“Missouri's classification system for lakes and streams is a **GIS-based hydrographic map data set**, which is incorporated into regulation.”

“We believe our **current approach...is consistent with a Scalia approach...**”

“Missouri anticipates **very little programmatic impact** from this approach.”

MUDD



Thursday, September 1, 2016 2:10:08 PM CDT Missouri Department of Natural Resources

This timestamp indicates the date and time the map was generated. Data layers in the map are updated at a variety of intervals and may not reflect current conditions.

Disclaimer: Although this map has been compiled by the Missouri Department of Natural Resources, no warranty, expressed or implied, is made by the department as to the accuracy of the data and related materials. The act of distribution shall not constitute any such warranty, and no responsibility is assumed by the department in the use of these data or related materials.

2018 EPA Revision

- December 11, 2018, the EPA and Department of the Army proposed a “clear, understandable, and implementable” definition of “waters of the United States.”
- Scalia Approach
- Comment period ended April 15, 2019.

2018 EPA Revision

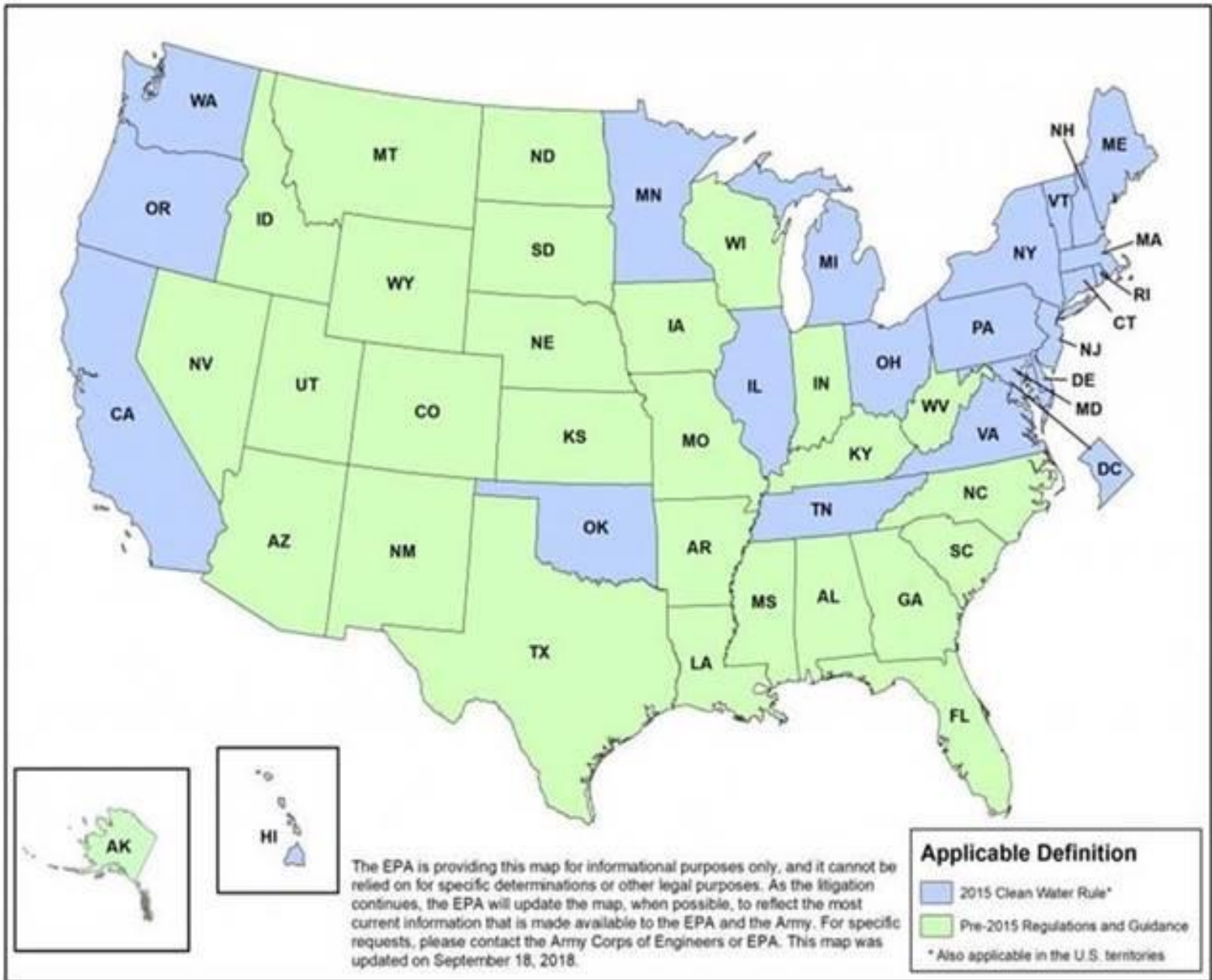
- Includes:
 - traditional navigable waters;
 - tributaries to those waters;
 - certain ditches;
 - certain lakes and ponds;
 - impoundments of jurisdictional waters; and
 - wetlands adjacent to jurisdictional waters..

2018 EPA Revision

- Excludes:
 - waters not meeting one of the preceding jurisdictional categories;
 - ephemeral features, including ephemeral streams;
 - groundwater;
 - many ditches;
 - prior converted cropland;
 - stormwater control systems and;
 - wastewater recycling structures; and waste treatment systems



STINSON
LEONARD
STREET



Questions?



Aimee Davenport

Stinson Leonard Street LLP

(573) 556-3606

Aimee.Davenport@stinson.com



**STINSON
LEONARD
STREET**