

HUNTON ANDREWS KURTH

# THE LATEST ON WATERS OF THE U.S.

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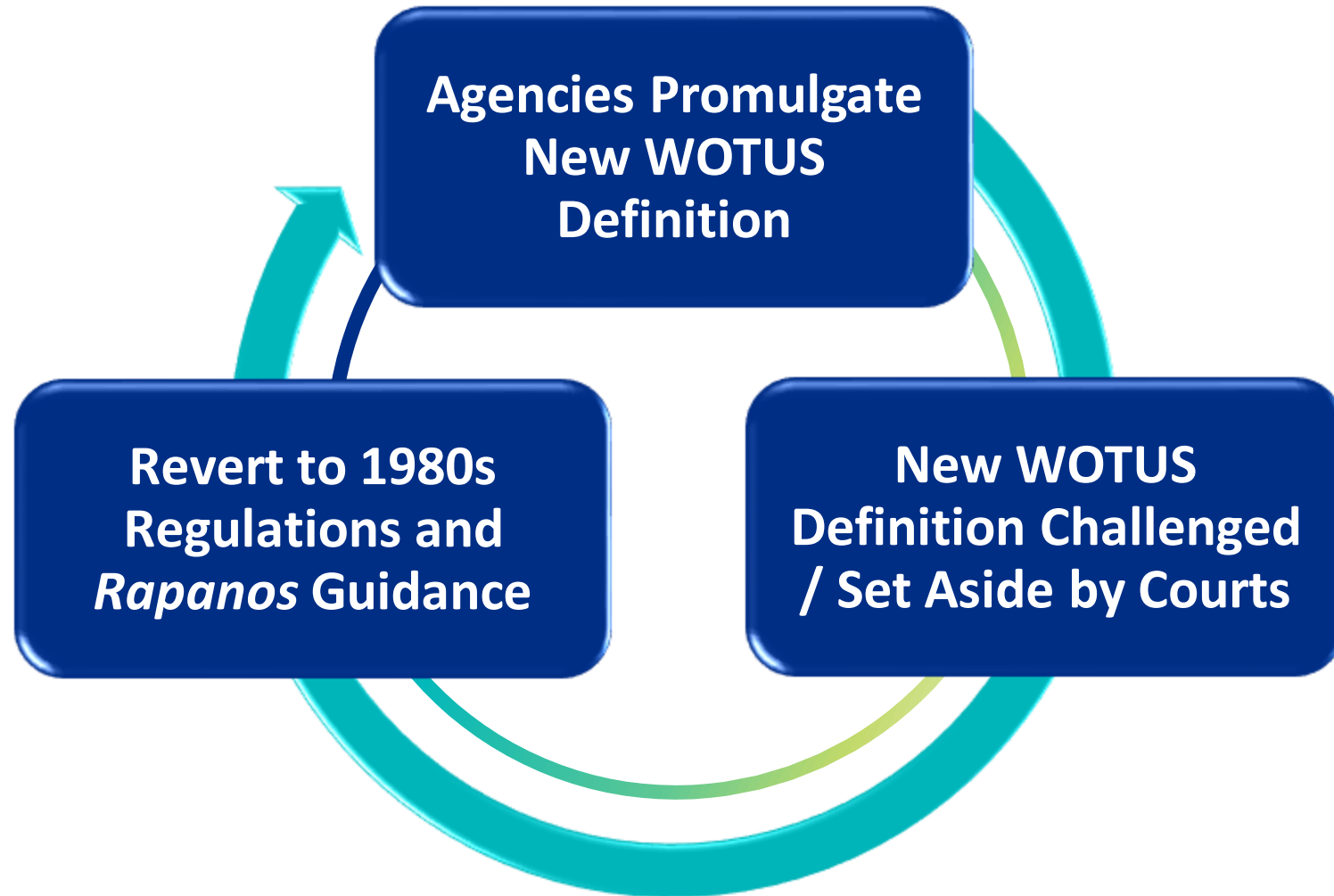
2021 National Waterways Conference Annual Meeting

September 24, 2021

# WATERS OF THE U.S.

- Clean Water Act requires permits for discharges to “waters of the U.S.” (WOTUS)
- WOTUS definition subject to regulatory uncertainty in the 15 years since *Rapanos* Supreme Court decision
  - 2008 *Rapanos* Guidance
  - 2011 Draft WOTUS Guidance (*withdrawn before finalized*)
  - 2015 Clean Water Rule
  - 2020 Navigable Waters Protection Rule

# ENDLESS CYCLE OF WOTUS REGULATION?



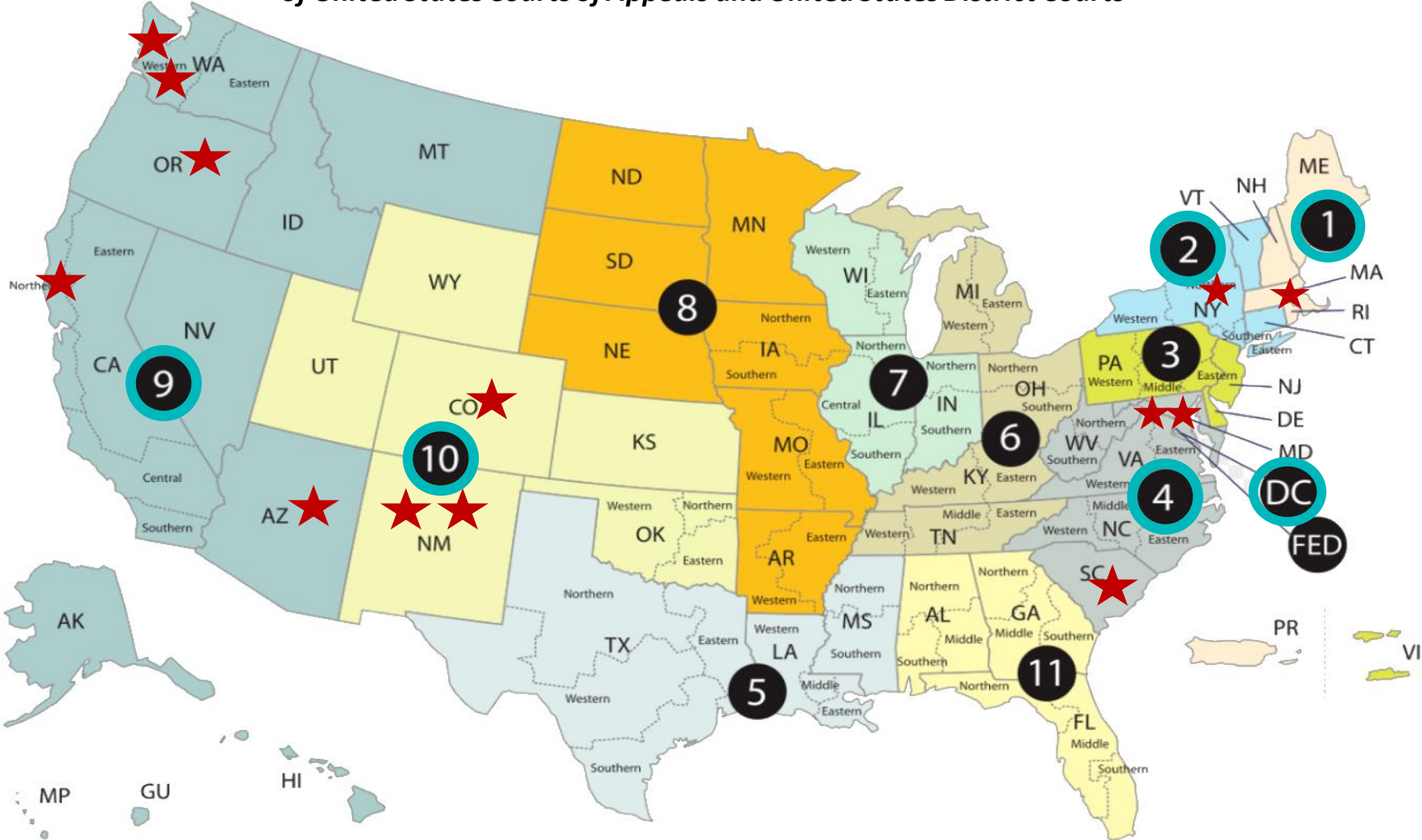
# 2020 NAVIGABLE WATERS PROTECTION RULE

- In effect June 2020 – August 2021
- Key components:
  - Four categories of jurisdictional waters
    1. Territorial seas and traditional navigable waters (TNWs)
    2. Tributaries
    3. Lakes and ponds, and impoundments of jurisdictional waters
    4. Adjacent wetlands
  - 12 categories of exclusions
    - E.g., ephemeral features, ditches not considered “tributaries”
  - Key clarifications for existing concepts
    - E.g., “adjacent wetland”

# CHALLENGES TO NWPR

## Geographic Boundaries

*of United States Courts of Appeals and United States District Courts*





# REMAND AND VACATUR OF NWPR

- DOJ sought remand without vacatur in pending cases
  - Some plaintiffs argued NWPR should be vacated while agencies reconsidered rulemaking
- On August 30, Arizona district court remanded and vacated NWPR
  - *Pasqua Yaqui Tribe v. EPA* (D. Ariz.)
  - Likely appeal to Ninth Circuit (and potential for motion to stay pending appeal)
- 4 courts have granted DOJ request for remand
  - N.D. Cal., D. Mass, N.D.N.Y., D.S.C.

# CURRENT WOTUS IMPLEMENTATION

“The agencies have **halted implementation of the Navigable Waters Protection Rule** and are **interpreting ‘waters of the United States’ consistent with the pre-2015 regulatory regime until further notice**. The agencies continue to review the [Arizona district court] order and consider next steps. This includes working expeditiously to move forward with the rulemakings announced on June 9, 2021 . . .”

<https://www.epa.gov/wotus/current-implementation-waters-united-states>

# PENDING JDs AND PERMITS

- Approved jurisdictional determinations (AJDs) generally valid for 5 years unless:
  - New information warrants revision prior to expiration
  - Corps identifies geographic areas with rapidly changing conditions meriting evaluation on more frequent basis
- Corps will stand by AJDs and permits previously issued under NWPR:
  - AJDs completed under NWPR prior to August 30 remain valid until expiration date unless criteria for revision met or AJD recipient requests new AJD
  - AJDs that were pending on, or received after August 30, will be completed consistent with *Rapanos* Guidance



# UPCOMING WOTUS RULEMAKINGS

- Agencies have announced two WOTUS rulemakings:
  - **Step 1 Rulemaking:** Reinstate 1980s regulations “updated to be consistent with relevant Supreme Court decisions”
  - **Step 2 Rulemaking:** New WOTUS definition that “builds upon that regulatory foundation”
- Biden Admin. rulemaking efforts so far:
  - In August 2021, Agencies held public meetings and took pre-proposal recommendations from stakeholders
  - No timing provided for Step 1 proposal, but Arizona decision may result in quicker Step 1 process

# ISSUES TO WATCH IN WOTUS RULEMAKINGS

Reliance on *Rapanos* – i.e., use of significant nexus

Bright lines v. case-by-case jurisdiction

Traditional navigable waters

Ephemeral/intermittent streams

Ditches

Isolated wetlands/waters

Exclusions – e.g., waste treatment, prior converted cropland

# TODAY'S PRESENTER



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