



What is a Federally Protected Waterway?

Six Supreme Court Decisions and we finally have an answer...or do we?

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Contributor via Getty Images

Time Magazine Cover from 1969



Cleveland Press Collection, Cleveland State University
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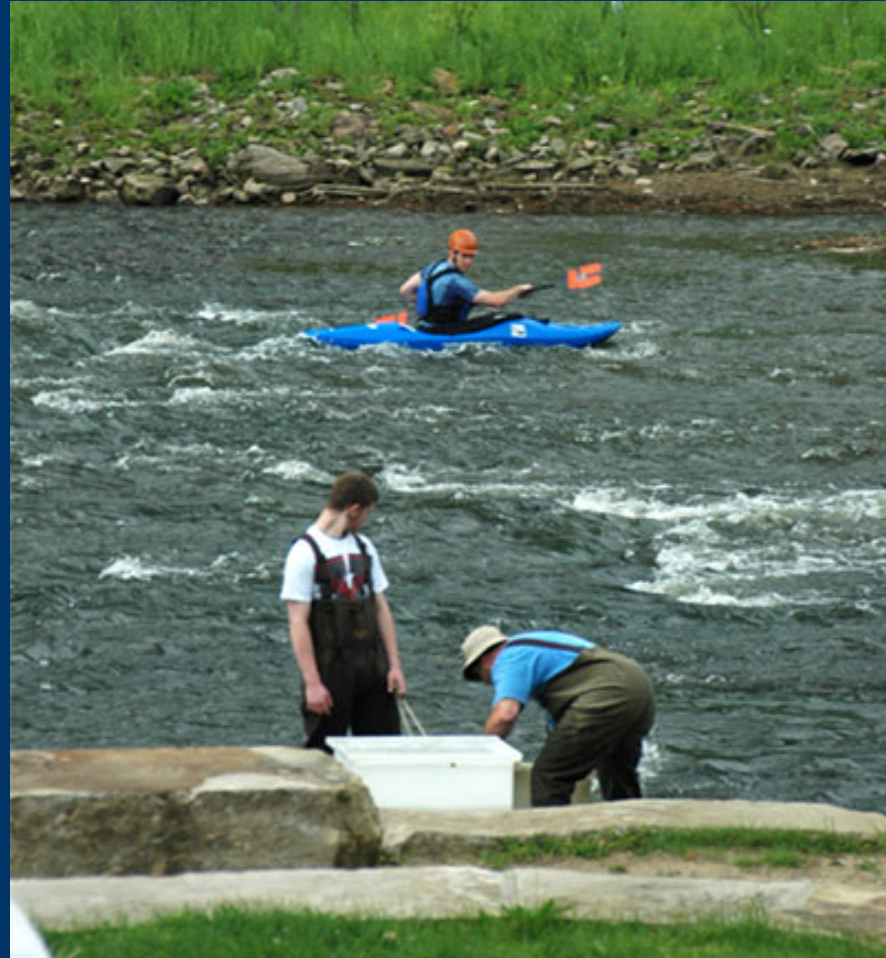
50th Anniversary of Cuyahoga River Fire

2019 was the 50th
Anniversary since the
1969 Fire

\$3.5 billion in
infrastructure

60 fish species

River cleaner than it
has been in 150 years



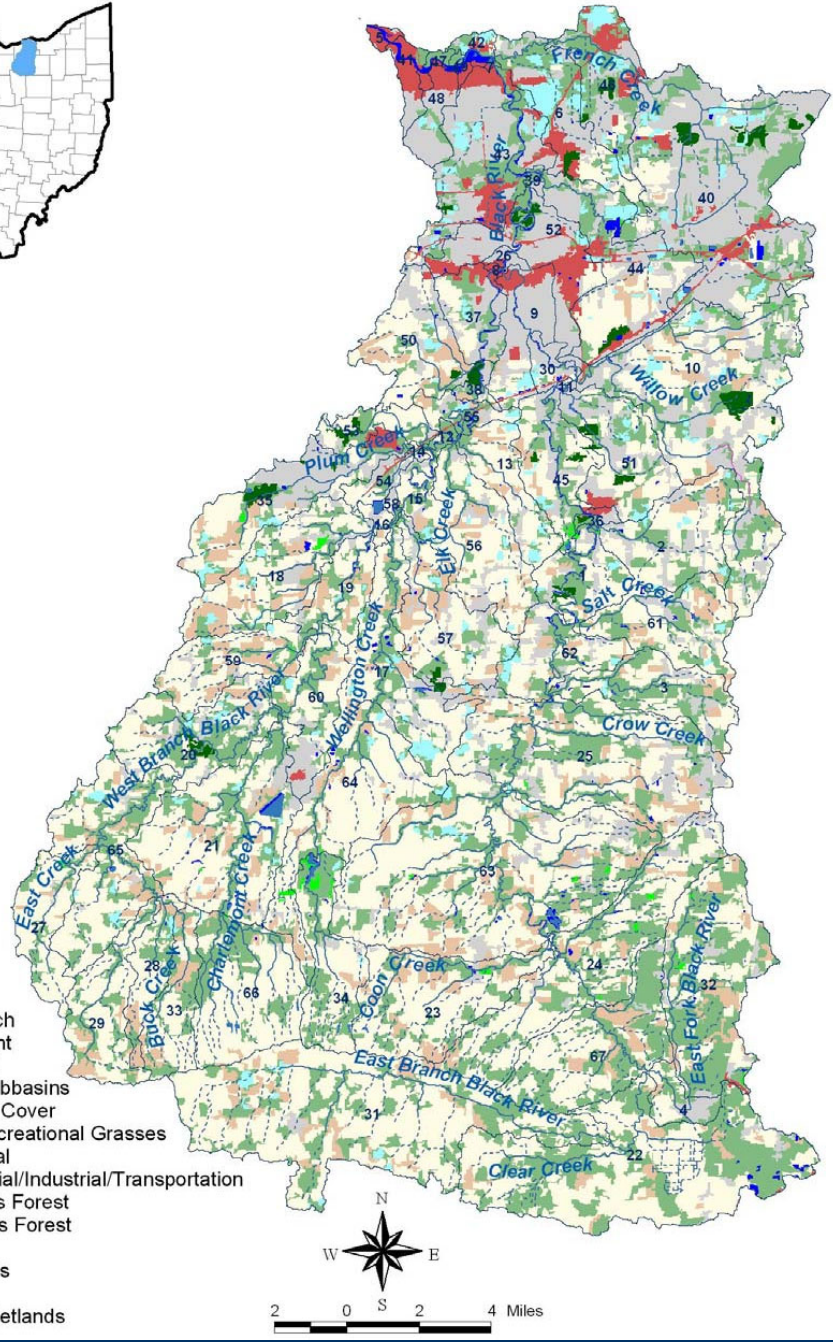
Quote Regarding Impact of the Clean Water Act

- “By all accounts, the Act (Clean Water Act) has been a great success. Before its enactment in 1972, many of the Nation’s rivers, lakes, and streams were severely polluted, and existing federal legislation had proved inadequate. Today, many formerly fetid bodies of water are safe for use and enjoyment of the people of this country.”

Impacts to Wetlands/Streams



Which streams and wetlands are federally regulated?



IMPORTANT NOTE

Technical definitions of ecological resources and their boundaries **HAVE NOT CHANGED.**

A wetland is still a wetland

A stream is still a stream

A pond is still a pond

A lake is still a lake

What is in question is **which regulatory agencies** have authority over **which resources.**

What is a stream?

Riverine systems with linear flowing waters bound by a channel with defined bed and bank.

Perennial stream:

- Flowing water year-round during a typical year
- Water table is located above the stream bed
- Groundwater is the primary source of water



Intermittent stream:

- Flowing water during certain times of the year
- Groundwater provides water for stream flow



Ephemeral stream:

- Flowing water only during and just after a precipitation events
- Stream beds are located above the water table
- Groundwater is not usually a source of water
- Runoff from rainfall or snowmelt is the primary source of water



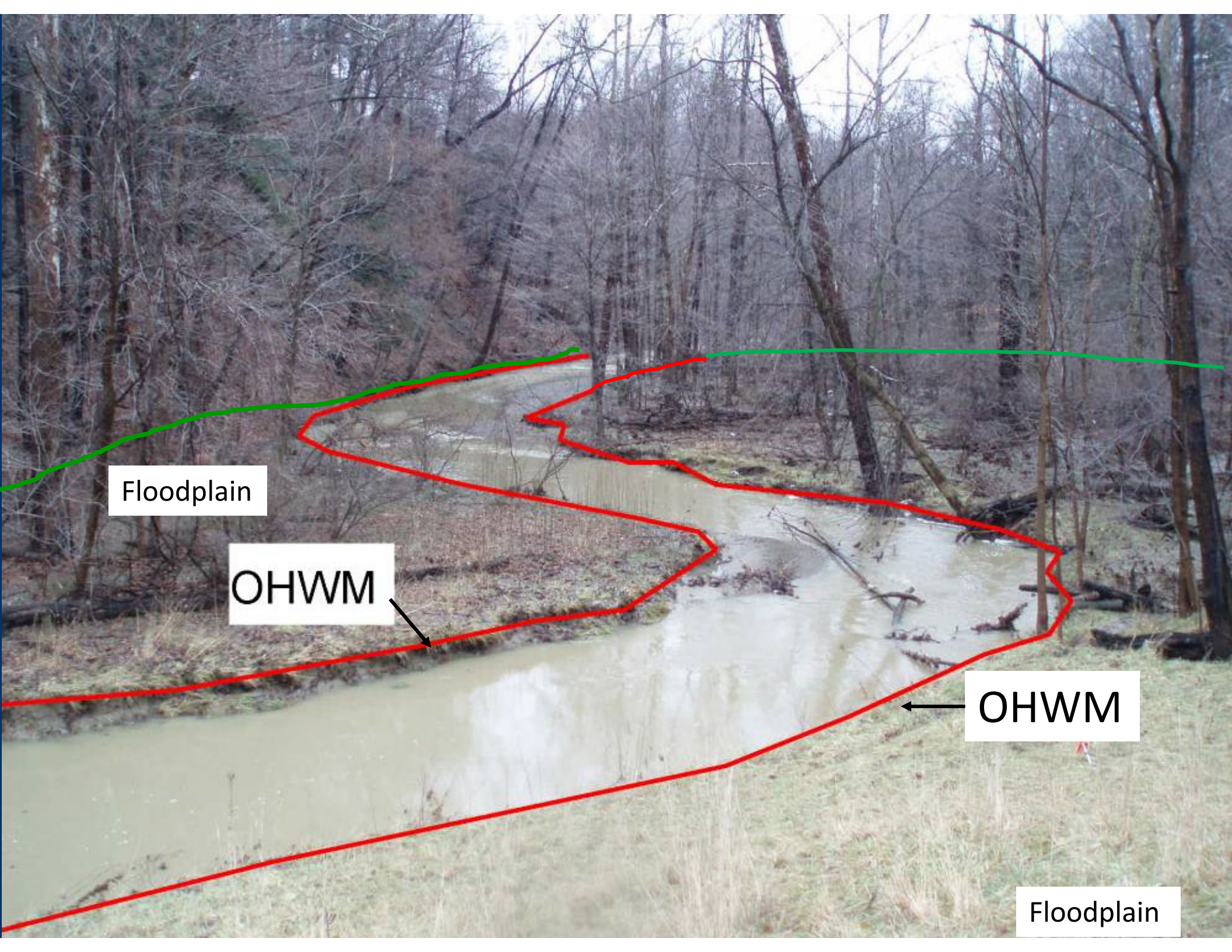
Streams

Width boundary is determined by the stream's Ordinary High Water Mark (OHWM)

OHWM is the line on the shore of a channel, established by fluctuations of water.

- Clear natural line impressed on the bank
- Shelving
- Changes in the character of soil
- Destruction of terrestrial vegetation





Floodplain

OHWM

OHWM

Floodplain

Wetlands

Official Section 404 Clean Water Act Definition:

“Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

So what does this mean?

What is a Wetland?

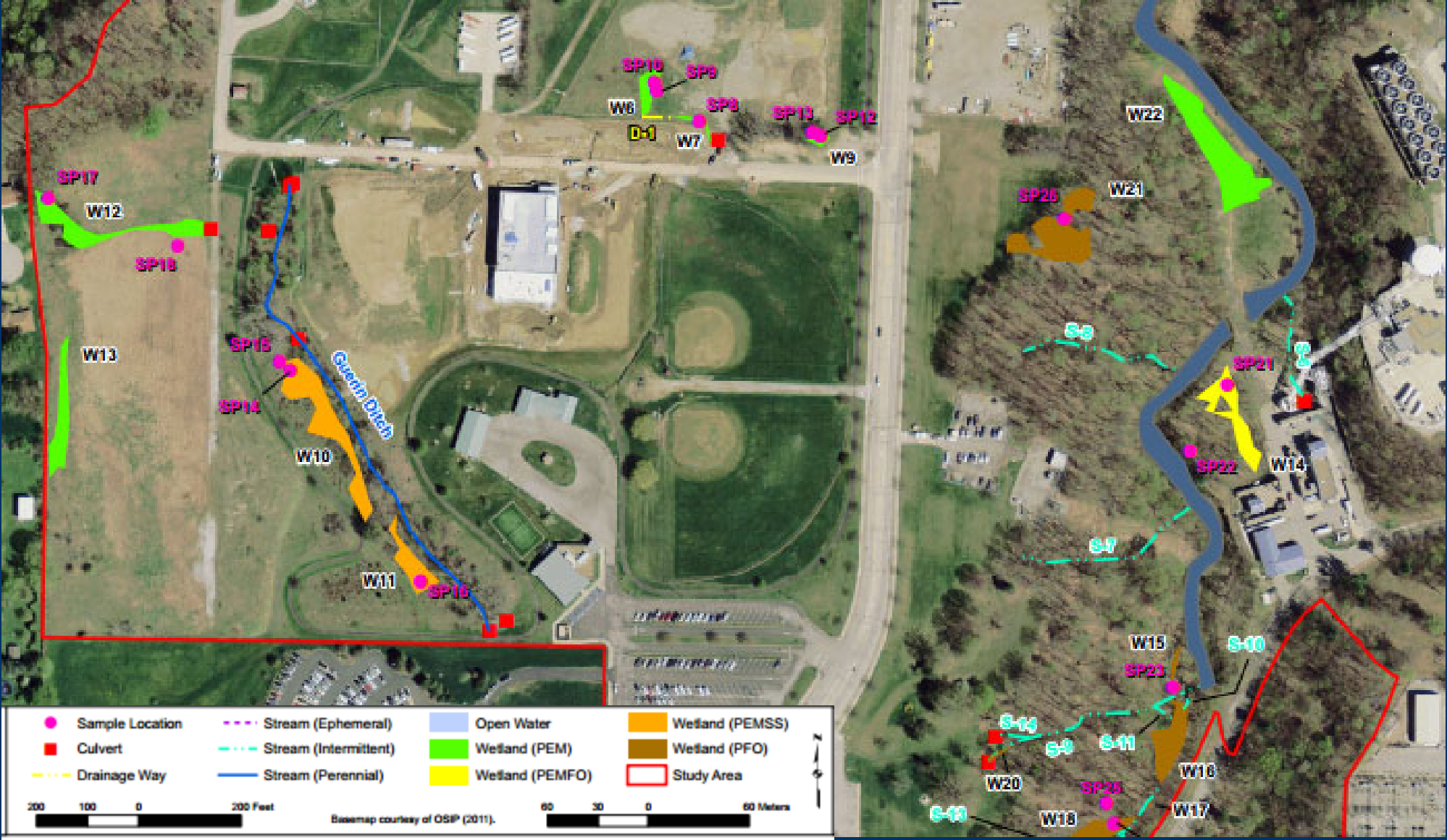
To be a wetland an area has to possess three characteristics*

* Under normal circumstances, unless an atypical situation applies

- **Hydrophytic Vegetation**
- **Hydric Soils**
- **Wetland Hydrology**



Wetland Delineation Map



Who Decides Where the Wetland Ends?

The regulated public and their consultants can complete wetland delineations and stream hydrology determinations, but USACE is the ultimate arbiter of:

- What is a wetland and what is not
- Where are the outer boundaries of wetlands
- What is a stream and what is not (ditch, swale, gully, drainage pattern, etc.)
- Where is the stream's OHWM
- Is a stream or wetland jurisdictional (under federal authority) or isolated (outside of federal authority)

This information is summarized in a written document called a jurisdictional determination (commonly abbreviated as JD).

Jurisdictional Determinations

Approved Jurisdictional Determination (JD):

- Official USACE Determination Letter that states what Jurisdictional resources are present
- Valid for 5 years
- Can be appealed to Division Engineer
- May involve a site visit for verification
- Will involve significant nexus determination for all questionable resources
- May take up to 6 months to receive letter

Preliminary Jurisdictional Determination (Pre-JD):

- Non-binding written indication that there are waters of the US on the site
- All Resources are considered Jurisdictional
- Cannot be appealed to Division Engineer
- May involve a site visit
- No expiration date
- May be submitted in conjunction with permitting
- Less impacts on project schedule

Definitions of ecological resources (streams, wetlands, ponds) and their boundaries have not changed.

What is in question is which regulatory agencies have authority over those resources under applicable federal and state laws

Waters of the U.S. vs. Waters of the State



Legal History of Federal Jurisdiction under the Clean Water Act

SIX SUPREME COURT CASES AND COUNTING

Defining Waters of the U.S.

What Does the Statute Actually Say?

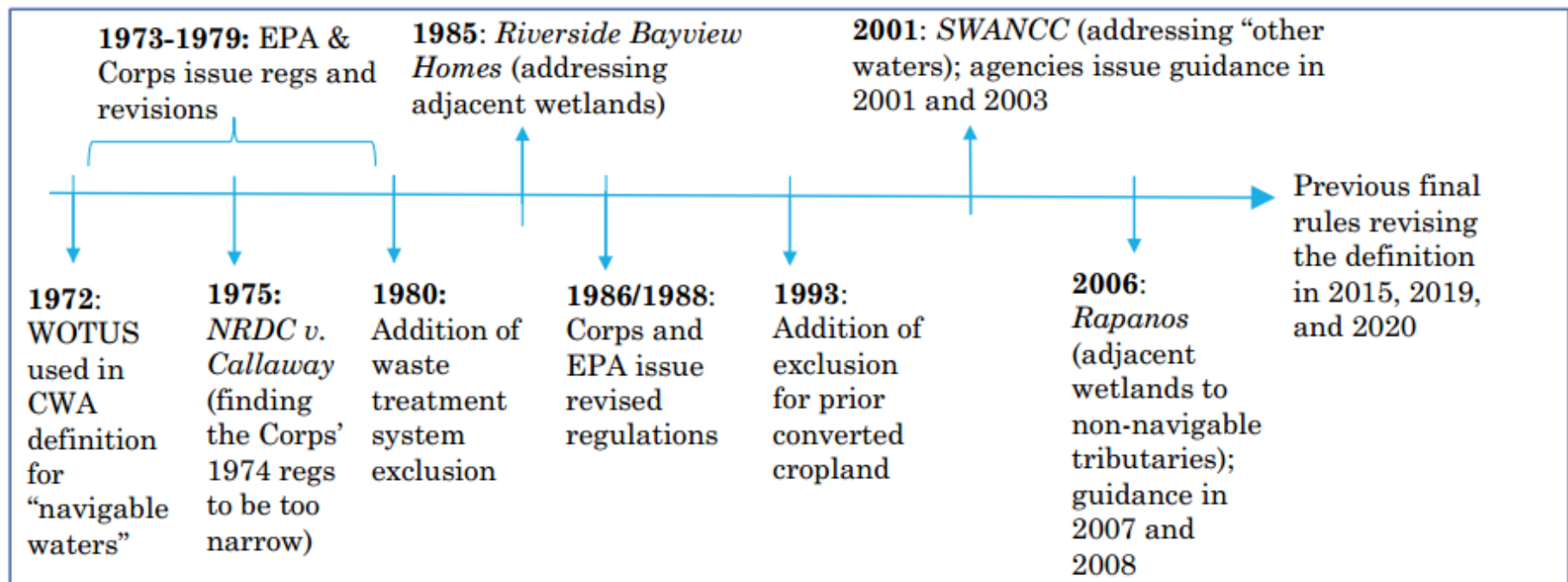
- Section 301(a) prohibits discharges of pollutants to “navigable waters” without a permit, 33 U.S.C. §§ 1311(a), 1362(12)
- “Navigable Waters,” means: “the waters of the United States, including the territorial seas,” 33 U.S.C. § 1362(7)
- The definition of “navigable waters” also applies in CWA §§ 401, 402, 404
- “Waters of the United States” includes “wetlands adjacent thereto...” See, U.S.C §1344(g)(1)
- Interpretation of "waters of the United States" controversial since the CWA was enacted in 1972
 - The United States Supreme Court has addressed this definition three times
Defines federal jurisdiction based on “Waters of the U.S.”

Defining Waters of the U.S.

Executive Branch

- 2015 WOTUS- Obama Administration
- 2020 Navigable Water Protection Rule- Trump Administration
- 2023 Waters of the United States- Biden Administration

- The definition of “waters of the United States” has been a subject of dispute and addressed in several major Supreme Court cases.



1st Supreme Court Wetland Decision

United States v. Riverside Bayview Homes (1985)

- 1976 - Riverside Bayview Homes, Inc. placed fill in 80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan.
- USACE files suit
- District Court sides with USACE- 1977 and 1981
- Sixth Circuit Court overrules in 1984



1st Supreme Court Wetland Decision

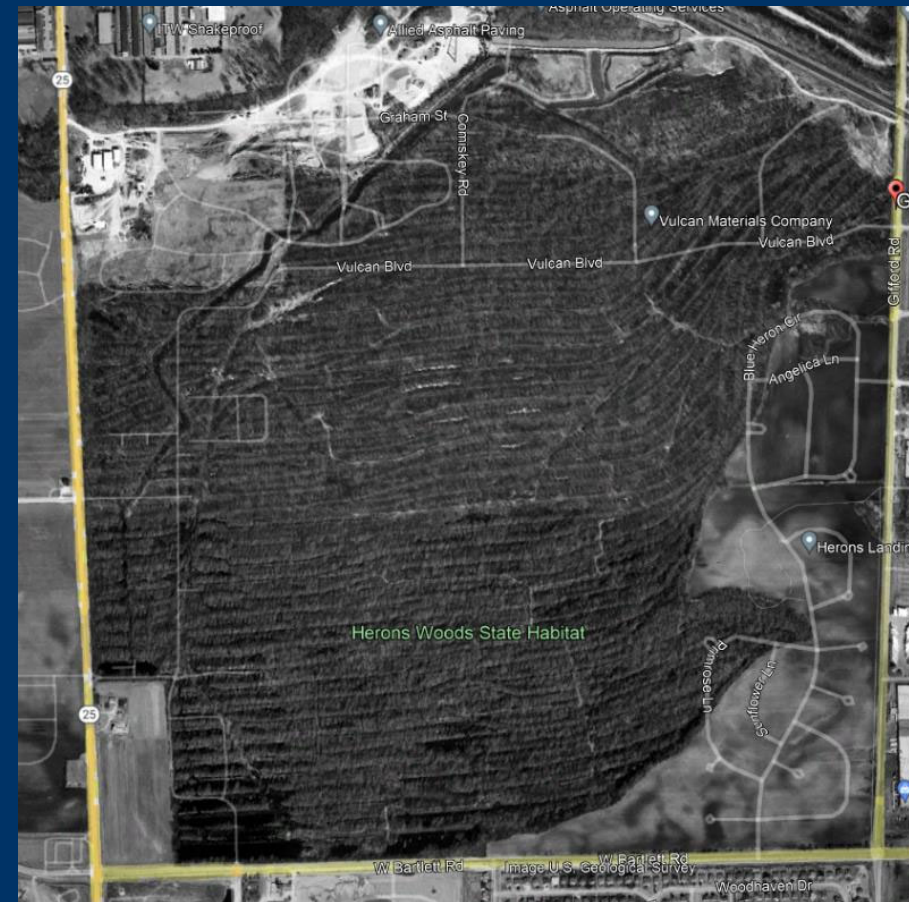
United States v. Riverside Bayview Homes (1985)

- In a unanimous decision, Supreme Court held CWA authorizes regulation of wetlands adjacent to navigable waters
 - the term “navigable” is of “limited import”
 - Permits required for the discharge of material into **wetlands adjacent** to other “waters of the United States”

2nd Supreme Court Wetland Decision

Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)

- Corps claimed jurisdiction over ponds in former sand and gravel mining pit
- 1986 Migratory Bird Rule
 - §404(a) extends to intrastate waters that, inter alia, provide habitat for migratory birds. 51 Fed. Reg. 41217



2nd Supreme Court Wetland Decision

Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)

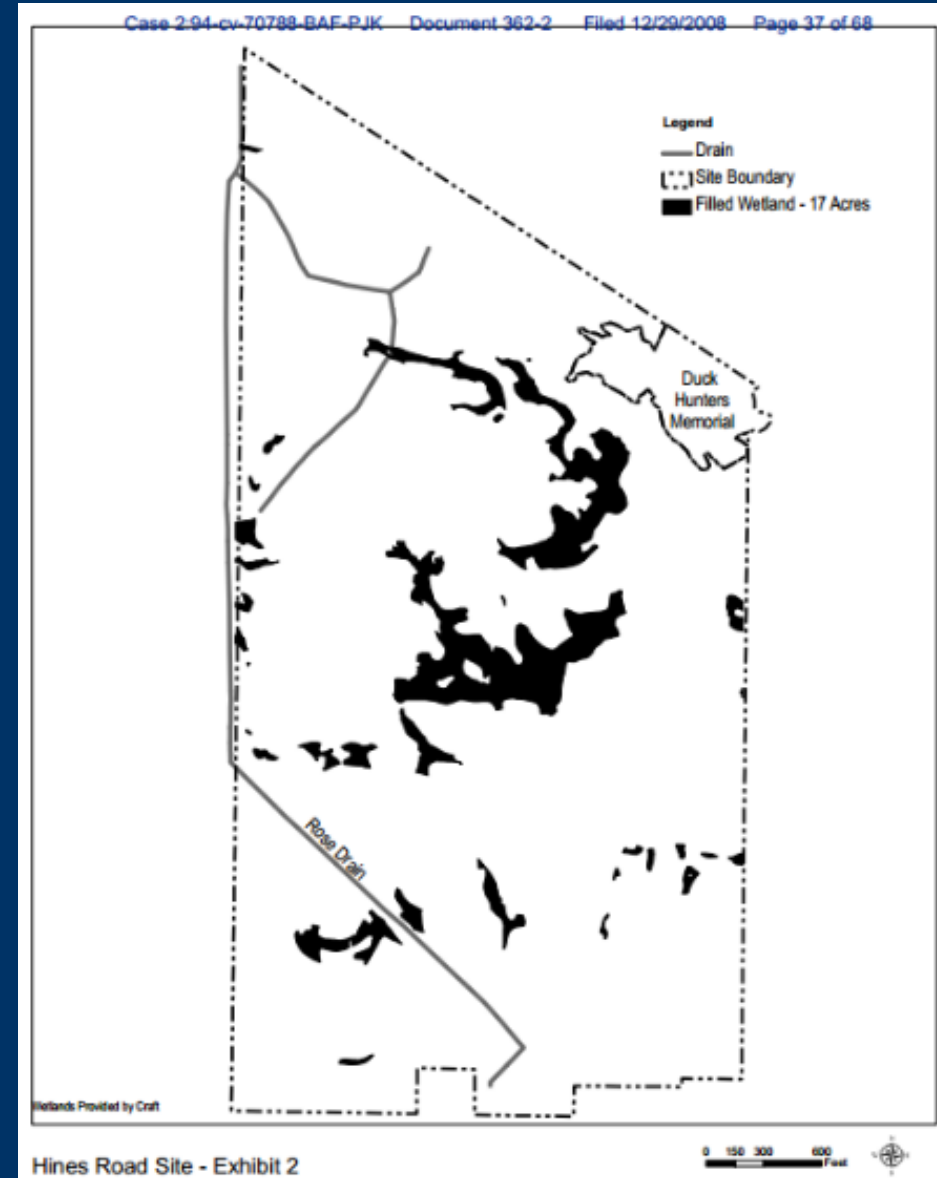
- Supreme Court Held:
 - There was no clear indication that Congress intended to regulate isolated waters
 - Corps cannot regulate isolated, non-navigable, intrastate waters solely based on their use as habitat for migratory birds
 - “navigable” does not mean jurisdiction limited to only navigable waterways...but doesn’t extend to waters on basis of bird habitat
 - First written use of the term “significant nexus” for waters
 - “It was the significant nexus between the wetlands and “navigable waters” that informed our reading of the CWA in Riverside Bayview Homes.”

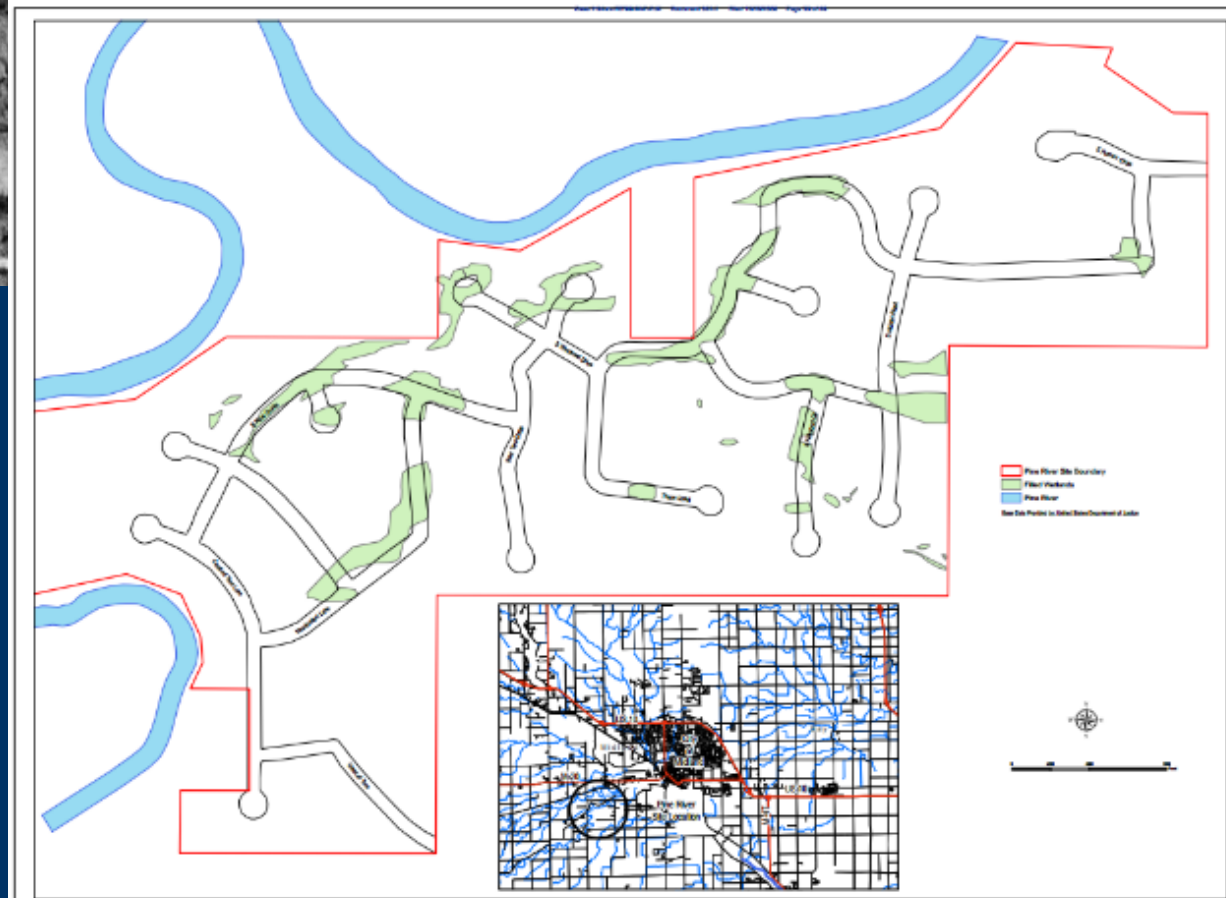
3rd Supreme Court Wetland Decision

Rapanos v. United States, 547 U.S. 715 (2006)

John Rapanos filled wetlands on three sites without a permit in the 1980s

- Wetlands were adjacent to ditches that flowed to traditional navigable waters
- Disagreed with agency findings; required search warrant for agency access
- Told his consultant to destroy the consultant's delineation when it agreed with USACE
- Said that the wetlands should not be jurisdictional under CWA
 - Mistrial
 - Conviction
- Eventually appealed to SCOTUS





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Project Name: _____
 Prepared by: _____
 Checked by: _____
 Date: _____

US vs. Tappan
 Pine River Site
 November 2008

Drawing No. _____
 Revision _____
 Date: _____
 Scale: _____
 Project Number: _____

3rd Supreme Court Wetland Decision

Rapanos v. United States, 547 U.S. 715 (2006)



Filling of wetlands adjacent to ditches that flowed to traditional navigable waters

“Regulatory Uncertainty” - wetland and stream regulation under CWA

5 justices can't agree when you have “jurisdictional waters” that require a federal permit

- Split decision (4-1-4)- five opinions were issued
 1. Scalia
 2. Roberts - concurring
 3. Kennedy – concurring
 4. Breyer – dissent
 5. Stevens- dissent

- Introduced two “new” terms
 - Relatively permanent water
 - Significant nexus

Rapanos Test #1: Plurality Test (Scalia)



- 1) Navigable water or adjacent wetland
- 2) non-navigable tributary or adjacent wetland, if tributary is “permanent”
 - flow year round, or*
 - continuous at least seasonally*

Rapanos Test #2

Justice Kennedy Test

“Significant Nexus” Test-

Tributaries that are deemed not “permanent”, (i.e. ephemeral or intermittent) still need permit if

-affects *the chemical, physical and biological integrity* of downstream navigable waters

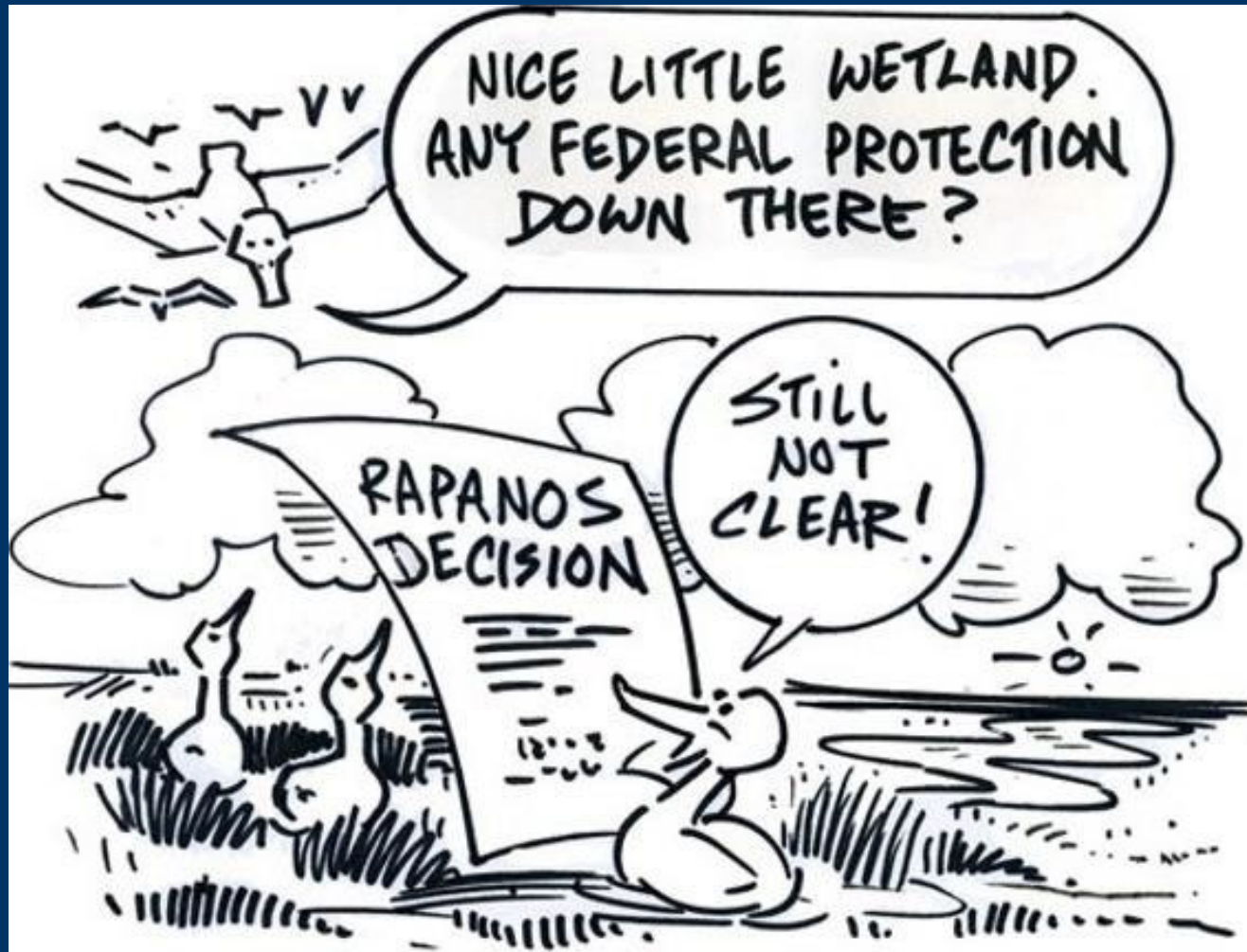


Which Test Applies?

Kennedy v. Scalia

- Significant litigation post-*Rapanos*
- Appellate Courts held that almost universally applied the Justice Kennedy Test
 - Broaden CWA jurisdiction
 - 7th and 9th Circuits held Kennedy test only valid test
 - Other circuits held CWA jurisdiction extends to waters meeting either test

Problem solved?



Corps Issues 2008 Rapanos Guidance

Guidance “Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*”

- To EPA and Army Corps of Engineers Personnel

Jurisdiction, in all cases, over the following classes of waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable, but relatively permanent, tributaries of traditional navigable waters
- Wetlands that directly abut such tributaries

Case-by-case basis- streams and wetlands

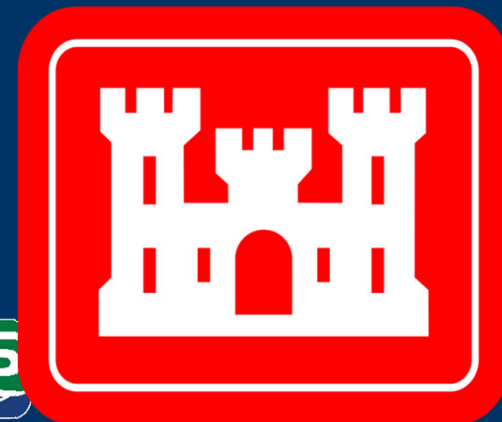
- With a “significant nexus” with traditional navigable waters based on
 - flow and functions of the water in question in addition to all other “similarly situated” waters, meaning a tributary and all of its adjacent wetlands, as a single collective unit.
 - not assert jurisdiction over certain categories of ditches, swales, and erosional features, but did not foreclose the possibility of doing so on a case-by-case basis

4th Supreme Court Decision

U.S. v. Hawkes (May 31, 2016)

Jurisdictional Determination (JD)-

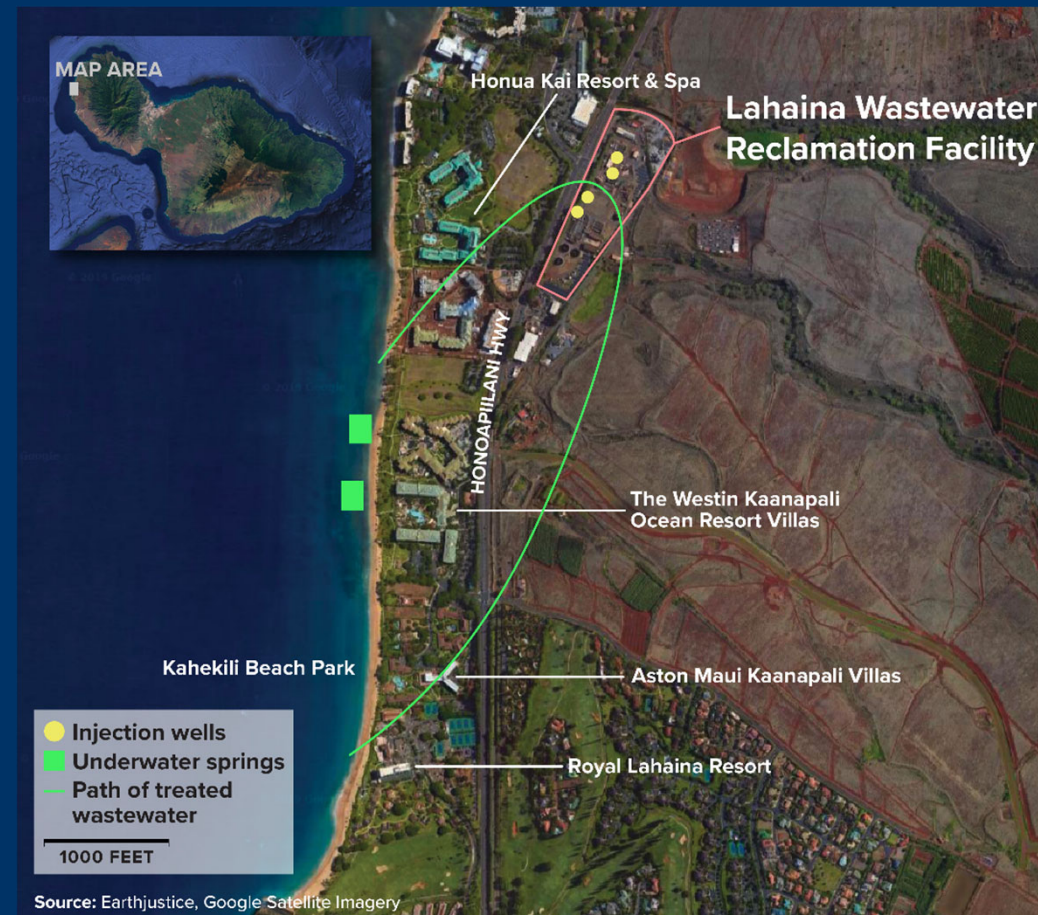
- Formal determination by Army Corps as to whether a property contains federally protected wetlands or streams
- JD's are the Corps determination on the "Significant Nexus" Test
- Historically JDs were not appealable into Court
 - Either administratively appeal to Army Corps
 - Proceed with permitting and challenge later
 - Proceed with project and risk enforcement
- Supreme Court decides JDs "determine rights to which consequences flow' ...therefore, JDs can be challenged in Court



County of Maui v. Hawaii Wildlife Fund

(April 23, 2020) Fifth Supreme Court Case

- Wastewater treatment plant on Maui, Hawaii
- Pumped 4M gallons of treated sewage each day through injection wells into aquifer about a half-mile from the Pacific Ocean.
- Some of the waste reached the ocean near Kahekili Beach and harming coral reefs



County of Maui v. Hawaii Wildlife Fund

(April 23, 2020) Fifth Supreme Court Case

- In a 6-3 ruling, SCOTUS rejected both the government and environmental group's positions in the case as too extreme.
 - County and the Trump administration- discharges into groundwater are never covered
 - vs.
 - Environmental groups – CWA applies to discharges that “actually and foreseeably reach navigable surface waters.”

Held: The statutory provisions at issue require a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.

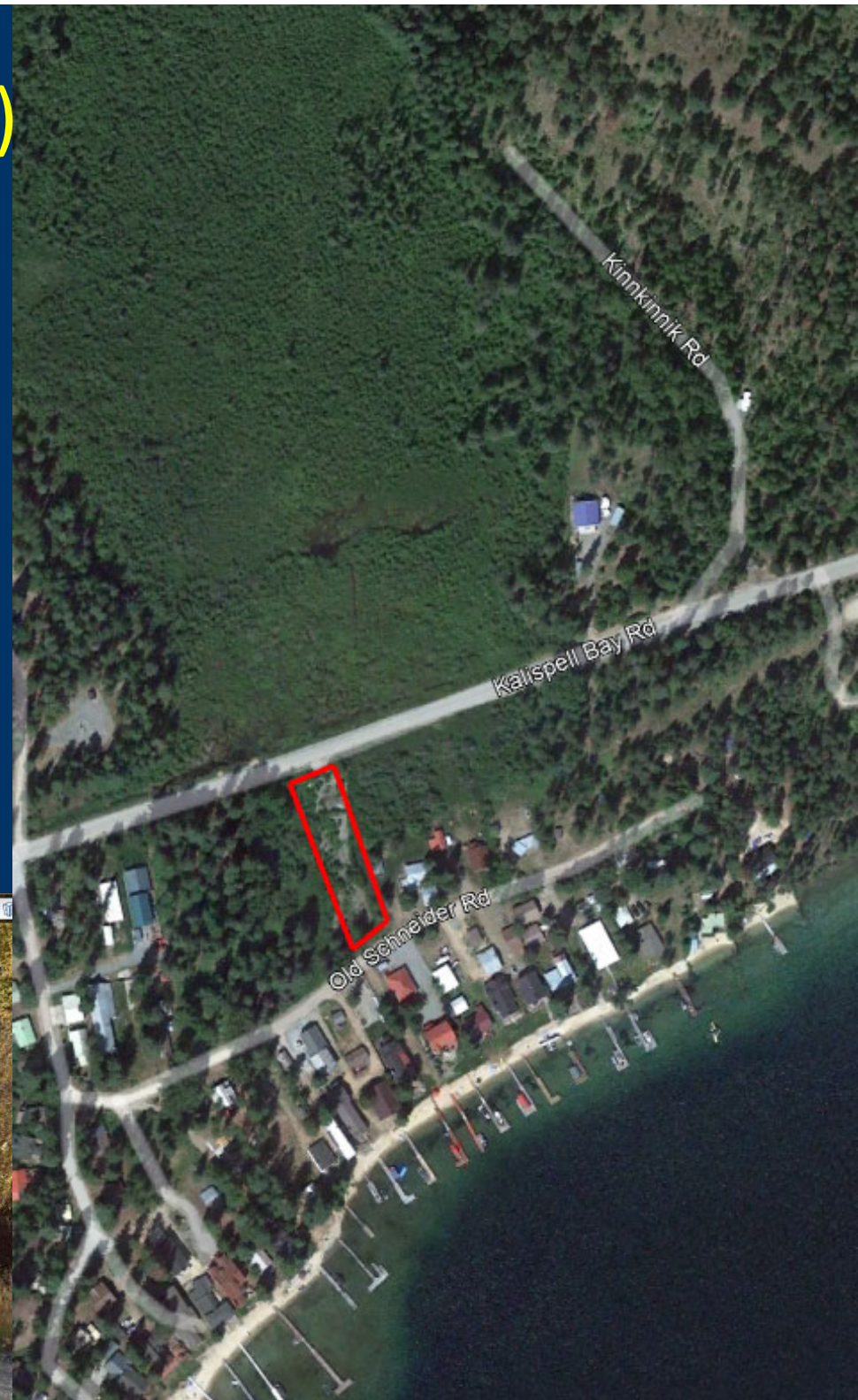
Sackett v. EPA (May 25, 2023)

Sixth Supreme Court Case

Michael and Chantell Sackett

- 0.63-ac vacant lot in a residential subdivision near Priest Lake, Idaho.
- 300 ft from Priest Lake
- No surface water connection
- No surface water connection to any body of water.
- EPA sent an administrative compliance order determining that their home construction violated the Clean Water Act because their lot contains regulated wetlands using
- Ninth Circuit employed Justice Kennedy's "significant nexus" test to uphold EPA's authority over the Sacketts' homesite.

The question presented is: Should *Rapanos* be revisited to adopt the plurality's test for wetlands jurisdiction under the Clean Water Act?



Key Questions

What is the definition of “adjacent”?

What type of connection is sufficient to establish federal jurisdiction?

Sackett's Proposed Test for Jurisdiction

- 1. First, there must be a water, that is, a hydro-geographic feature that in ordinary parlance would be referred to as a type of stream, creek, river, lake, or the like. A wetland, however, is none of those things, and so it can be regulated as a water only to the extent that it blends into and thus becomes indistinguishable from an abutting water.
- 2. Second, the water has to be of the United States, that is, for all practical purposes, a navigable in fact water.
- “visual indistinguishability”
- **Adjacent means “touching”. Any physical separation means that resources are not adjacent.**

USEPA Argument

USEPA argument

“...everyone agrees that the waters protected by the Clean Water Act include some adjacent wetlands.

The narrow but important question presented in this case is whether wetlands lose protection if they're separated from other waters by a barrier like a berm or a road.”

- **Significant nexus test is a suitable test and wetlands that are not determined to be adjacent to navigable waters.**
- **Adjacent does not require resources to be physically touching each other.**

A useful online paper on Sackett: <https://crsreports.congress.gov/product/pdf/LSB/LSB10707>

Sackett v. EPA (May 25, 2023)

Sixth Supreme Court Case

9 Justices spend 76 pages debating the word “adjacent”

New Test

Continuous Surface Connection Test

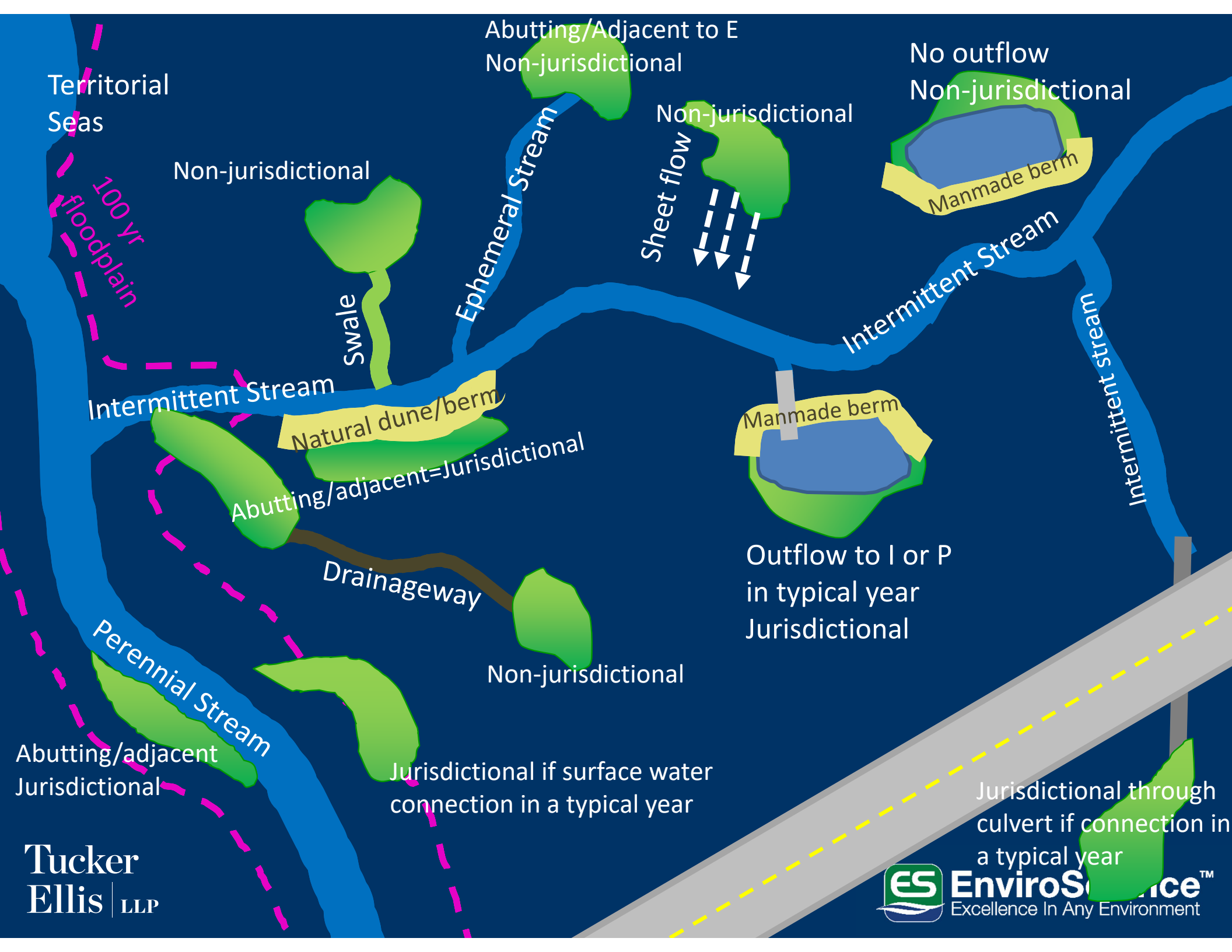
- 1) adjacent to a relatively permanent body of water connected to traditional interstate navigable waters
- 2) the wetland has a continuous surface connection with the water, making it difficult to determine where the “water” ends and the “wetland” begins

Sackett v. EPA (May 25, 2023)

Sixth Supreme Court Case

Basis for Majority Decision

1. **State's Rights/Property Rights**- “Exceedingly clear language “ is required if Congress wishes to alter the federal/state balance or the Government’s rights over private property
2. **Due Process**- Criminal penalties mean law must have “sufficient definiteness that ordinary people can understand what conduct is prohibited.”



Territorial
Seas

Abutting/Adjacent to E
Non-jurisdictional

No outflow
Non-jurisdictional

Non-jurisdictional

Non-jurisdictional

100 yr
floodplain

Sheet flow

Manmade berm

Swale

Ephemeral Stream

Intermittent Stream

Intermittent stream

Intermittent Stream

Natural dune/berm

Manmade berm

Abutting/adjacent=Jurisdictional

Outflow to I or P
in typical year
Jurisdictional

Drainageway

Non-jurisdictional

Perennial Stream

Abutting/adjacent
Jurisdictional

Jurisdictional if surface water
connection in a typical year

Jurisdictional through
culvert if connection in
a typical year

Territorial
Seas

100 yr
floodplain

Ephemeral Stream

Intermittent Stream

Intermittent stream

Intermittent Stream

Natural dune/berm

Abutting/adjacent=Jurisdictional

Manmade berm

Outflow to I or P
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Perennial Stream

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culvert if connection in
a typical year

Territorial
Seas

100 yr
floodplain

Swale

Intermittent Stream

Intermittent stream

Intermittent Stream

Natural dune/berm

Justice Kavanaugh- Eight presidential administrations,
Including the Trump Administration, did not have as narrow
an interpretation of the scope of the CWA

Perennial Stream

Abutting/adjacent
Jurisdictional

What about Intermittent Streams?

Sackett only directly addresses wetlands. However, language in the decision raises questions regarding protection of any Intermittent streams, and clearly ephemeral streams are likely not protected.

“*relatively permanent body of water* connected to traditional Interstate navigable waters...” *Sackett*

Territorial
Seas

100-yr
floodplain

Perennial Stream

Abutting/adjacent
Jurisdictional

Quote Regarding Impact of the Clean Water Act

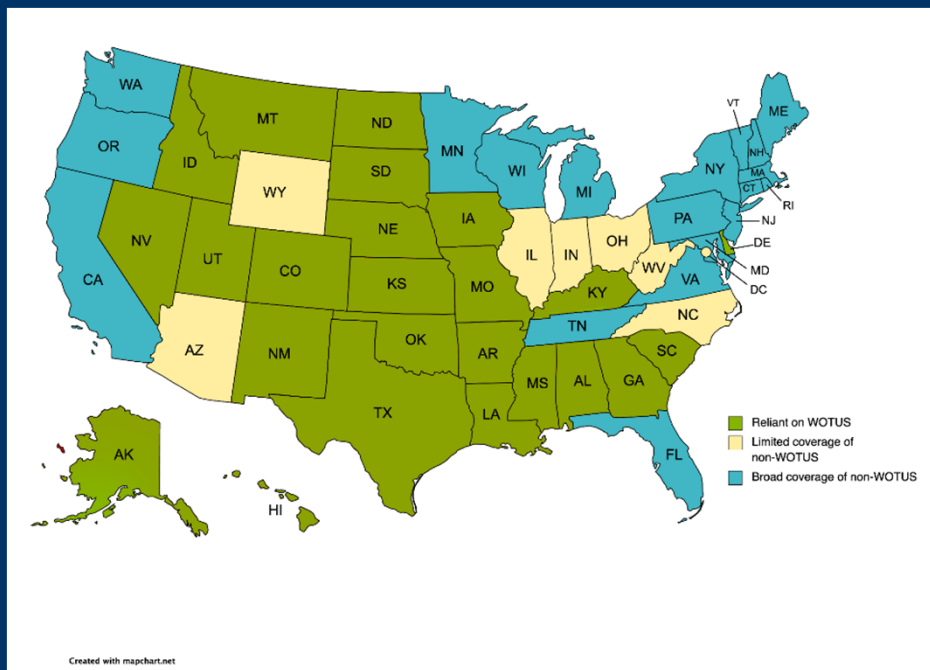
- “By all accounts, the Act (Clean Water Act) has been a great success. Before its enactment in 1972, many of the Nation’s rivers, lakes, and streams were severely polluted, and existing federal legislation had proved inadequate. Today, many formerly fetid bodies of water are safe for use and enjoyment of the people of this country.” **Justice Alito- *Sackett v. EPA***



Now that the Law is Clear...Or is it?

Patchwork of Regulations in the States

- **Green**- No state law protections (24 states)
- **Yellow**- State law protects some of the waters losing protection (19 states)
- **Blue**- State law with broad protection (7 states)



Again, the definitions of ecological resources
(streams, wetlands, ponds) and their boundaries
HAVE NOT CHANGED.

What has changed is which regulatory agencies have
authority over those resources.

Ohio

Ohio Isolated Wetlands and Streams

- Ohio passed isolated wetlands legislation in 2001 after *SWANCC v. U.S. Army Corps of Engineers*
 - Ohio Revised Code 6111.021 to 6111.028
- Definition of “Waters of the State” includes all streams, including ephemeral streams
 - Ohio Revised Code 6111.01(H)
 - Question- Regulation of 36,000 miles of ephemeral streams throughout Ohio?
- **House Bill 175 (2022)**- Revised Code §6111.01(H) amended to “Waters of the state” to exclude ephemeral feature for which the United States Army Corps of Engineers lacks the authority to issue a permit under 33 U.S.C. 1344.
- Tied stream regulation to *Sackett*...does this remove protection of intermittent streams in addition to ephemeral streams?

Ohio Isolated Wetlands

- Ohio's isolated wetlands regulation requires mitigation for ANY impact to wetlands, no matter how small
- Permit application form rounds to nearest 0.01 acre
 - 0.01 ac = 436 sq. ft.
 - Minimum mitigation credit amount = 0.1 ac (10:1 ratio)
- USACE Nationwide Permits typically allow up to 0.1 ac of impacts to wetlands and other waters without requiring mitigation

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Conclusion

Biographical Information

**Joseph P. Koncelik, Partner and Chair, Environmental and Renewable Energy Group
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Joseph Koncelik, chair of the Tucker Ellis Environmental and Renewable Energy Group, has more than two decades of experience practicing in the areas of environmental law, property development and remediation, and oil and gas.

Joe has 12 years of government regulatory experience gained as Ohio EPA director and chief legal counsel under Governor Taft's administration and as an assistant attorney general in the Environmental Enforcement Section. Joe uses this unique background to help clients efficiently navigate complex issues and governmental agency administrative processes to cost-effectively reach their goals.

Joe has significant experience in resolving a range of challenging and complex state and federal environmental issues. He has been involved in environmental due diligence associated with significant business transactions and more than 200 different properties. Joe is passionate about brownfield redevelopment and property remediation. He has advised clients on complex projects and helped to secure more than \$15 million in brownfield grants and other financial assistance.

Joe provides counsel, advice, and guidance to clients in all facets of Ohio and federal environmental law and related compliance issues. His areas of expertise include: air emissions, wastewater discharges, hazardous and solid waste management, construction and demolition debris, and wetlands. Joe has assisted clients in defending against U.S. EPA, Ohio EPA, and Ohio Department of Natural Resources enforcement actions, including defense of criminal investigations/actions. He has assisted clients in complex permitting issues and disputes, such as wetlands/stream impacts, air emissions, and NPDES discharge permits. Joe's clients include manufacturers, construction companies, municipalities, real estate developers, and waste management companies.

A board member of the Greater Ohio Policy Center (GOPC), Joe proposed the concept of sponsoring a bill through which the State of Ohio would adopt the federal Bona Fide Purchaser Defense (BFPD). After GOPC found a sponsor for the bill, Joe worked with the Legislative Service Commission to draft the language and worked with numerous stakeholders to resolve questions related to the bill. The passage of Ohio H.B. 168 in 2020 represents more than two years of work by Joe, GOPC, and the State legislature to fill the gap in Ohio law, resulting in a significant reduction in cost and time to clean up environmental contamination on commercial/industrial property.

A native of Columbus, Ohio, Joe has been a resident of Northeast Ohio for the past 10 years. He lives in Westlake with his wife and three sons.

**Michael Liptak, Ph.D., Senior Ecologist
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Dr. Liptak is a member of the ecological survey team at EnviroScience where he specializes in wetlands ecology, wetland restoration, and mitigation wetland design. He has over 25 years of experience in wetlands research and consulting. His main responsibilities at EnviroScience include wetland restoration, mitigation planning, wetland assessments and delineations, technical report preparation, and permitting. Dr. Liptak has experience preparing mitigation plans for many different projects, including wetland creation, restoration and enhancement, as well as preparing upland restoration and prairie planting plans.

Dr. Liptak has extensive experience with terrestrial, aquatic and wetland surveys for projects of all sizes. He is a pre-qualified consultant certified to complete aquatic and terrestrial ecological surveys, wetland delineations, waterways permitting, and wetland mitigation design for Ohio Department of Transportation (ODOT) projects. He is a member of the Society of Wetlands Scientists and the Ecological Society of America, and regularly gives seminars on wetland issues and regulations within the state of Ohio.