

North Central Texas Council of Governments

How the U.S. Supreme Court Shaped the Definition of WOTUS and What It Means Going Forward

**NCTCOG Webinar
August 22, 2023**

*Prepared in cooperation with the
Texas Commission on Environmental Quality
and U.S. Environmental Protection Agency*

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www.nctcog.org/WaterResources

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- ▶ Please keep your microphone on mute until the Question-and-Answer period at the end of each presentation.
- ▶ Thank you!

Webinar Agenda

- ▶ **Presentation**

- ▶ Analysis and Implications of the U.S. Supreme Court Ruling, *Sackett v. EPA*

- ▶ **Questions for Speakers**

- ▶ **Wrap-Up**

Introduction of Speakers

Andre Monette

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- ▶ Best Best & Krieger, LLP
- ▶ Washington, D.C.

Rebecca Andrews

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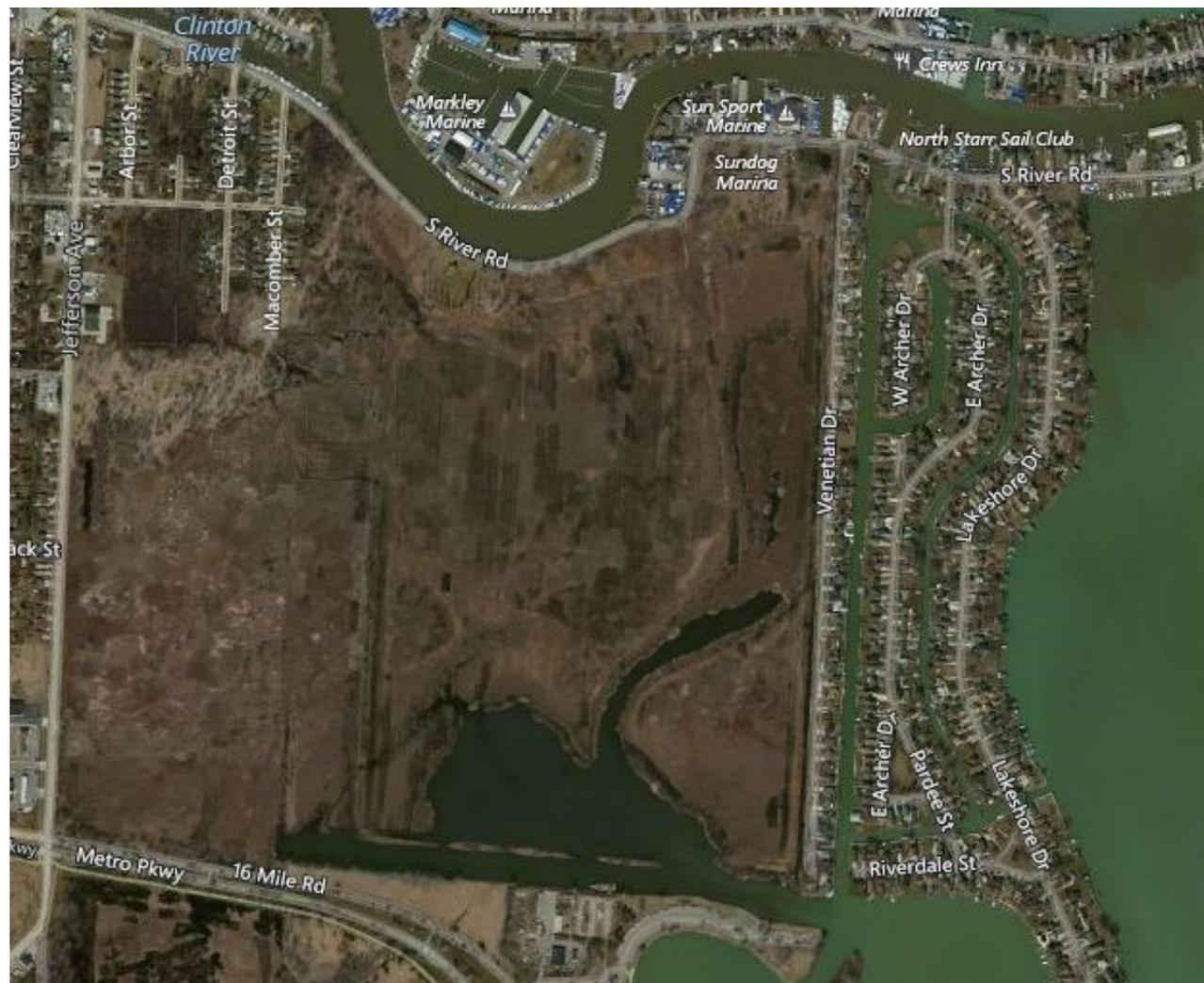
How the U.S. Supreme Court Shaped the Definition of WOTUS and What It Means Going Forward

(Navigating Navigable Waters in the Wake of *Sackett v. EPA*)

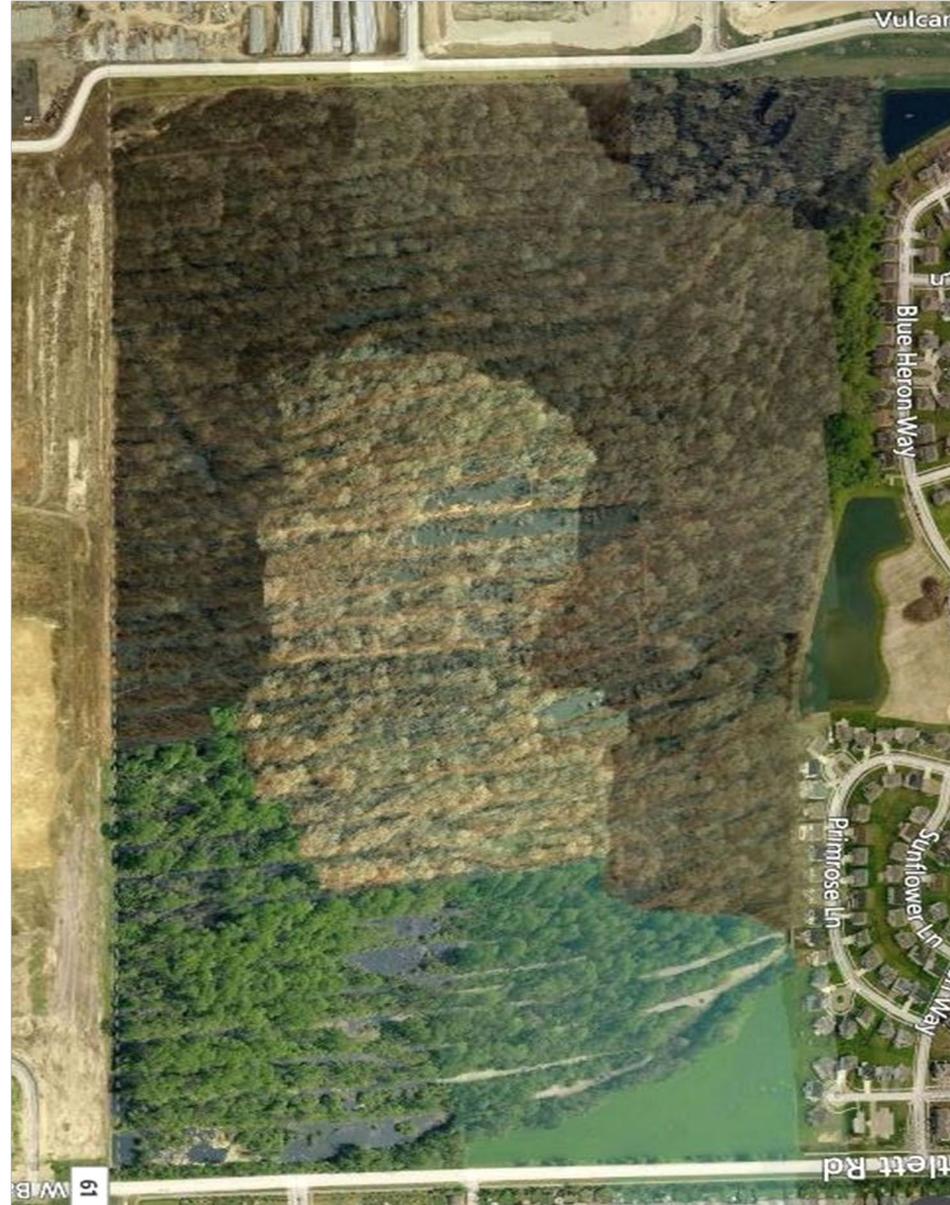
How we got to today

- Modern Clean Water Act adopted 1972
- Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975)
- 1977 Regulations (42 FR 37122, 37144)
- 1986 Migratory Bird Rule (51 FR 41217)

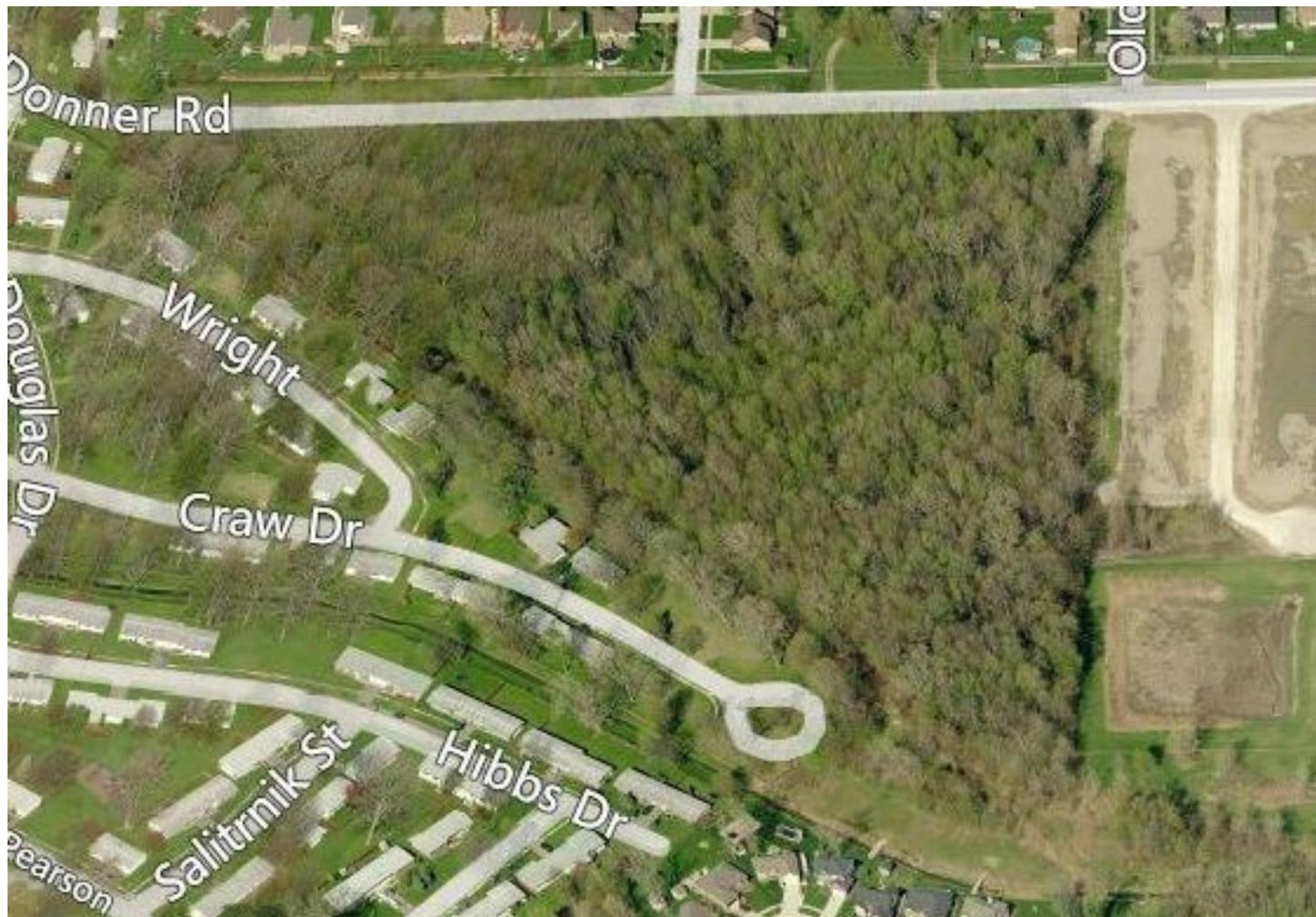
United States v. Riverside Bayview Homes, 474 U.S. 121 (1985)



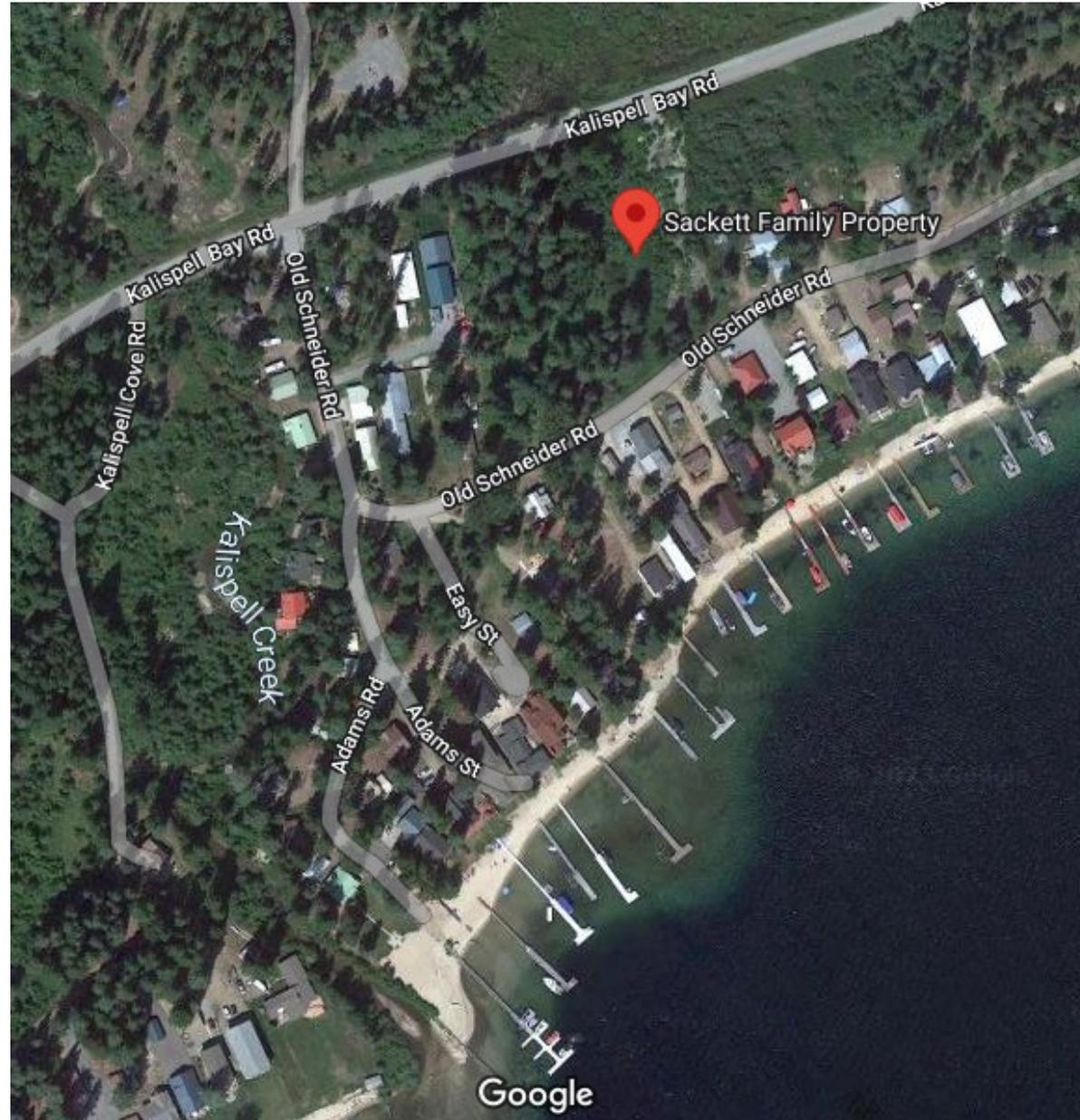
SWANCC v. Army Corps, 531 U.S. 159 (2001)



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



Sackett v. EPA, 598 U.S. ____ (2023)



Sackett v. EPA: Black Letter Law

A water is WOTUS if:

1. **TRADITIONAL NAVIGABLE WATERS:** A stream, river, ocean or lake that is used for navigation and interstate commerce, or flows across or forms a part of State boundaries
2. A relatively permanent, standing or continuously flowing stream, river, or lake that maintains a continuous surface connection to traditional navigable waters
3. A wetland with a continuous surface connection to Traditional Navigable Waters

Questions Remain:

1. What does it mean to have a “continuous surface connection”?
2. What does it mean to be “relatively permanent”?
3. What does it mean to be a “Traditional Navigable Water”?
4. What does this case mean for infrastructure development, operations and management?

Traditional Navigable Waters



Traditional Navigable Water

- “Traditional Navigable Waters”—that is, interstate waters that were either navigable in fact and used in commerce or readily susceptible of being used in this way

Traditional Navigable Waters



Continuous Surface Connection and Relatively Permanent Waters

- What is at issue:
 - Ephemeral streams and connected wetlands
 - Streams with intermittent flow
 - Infrastructure built in or adjacent to these features



Continuous Surface Connection

- “waters” may fairly be read to include only those wetlands that are “as a practical matter indistinguishable from waters of the United States,” such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”
- That occurs when wetlands have “a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands.”
- **We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.**

Relatively Permanent Waters

- Justice Scalia in Rapanos:
 - We also do not necessarily exclude **seasonal rivers**, which contain continuous flow during some months of the year but no flow during dry months—such as the **290-day**, continuously flowing stream.
 - The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

Continuous Surface Connection and Relatively Permanent Waters



Implications for Infrastructure

- New project construction – analysis will focus on two questions:
 - Is there a relatively permanent stream, river, or lake; or a wetland?
 - Does the water or wetland have a continuous surface connection to a Traditional Navigable Water?

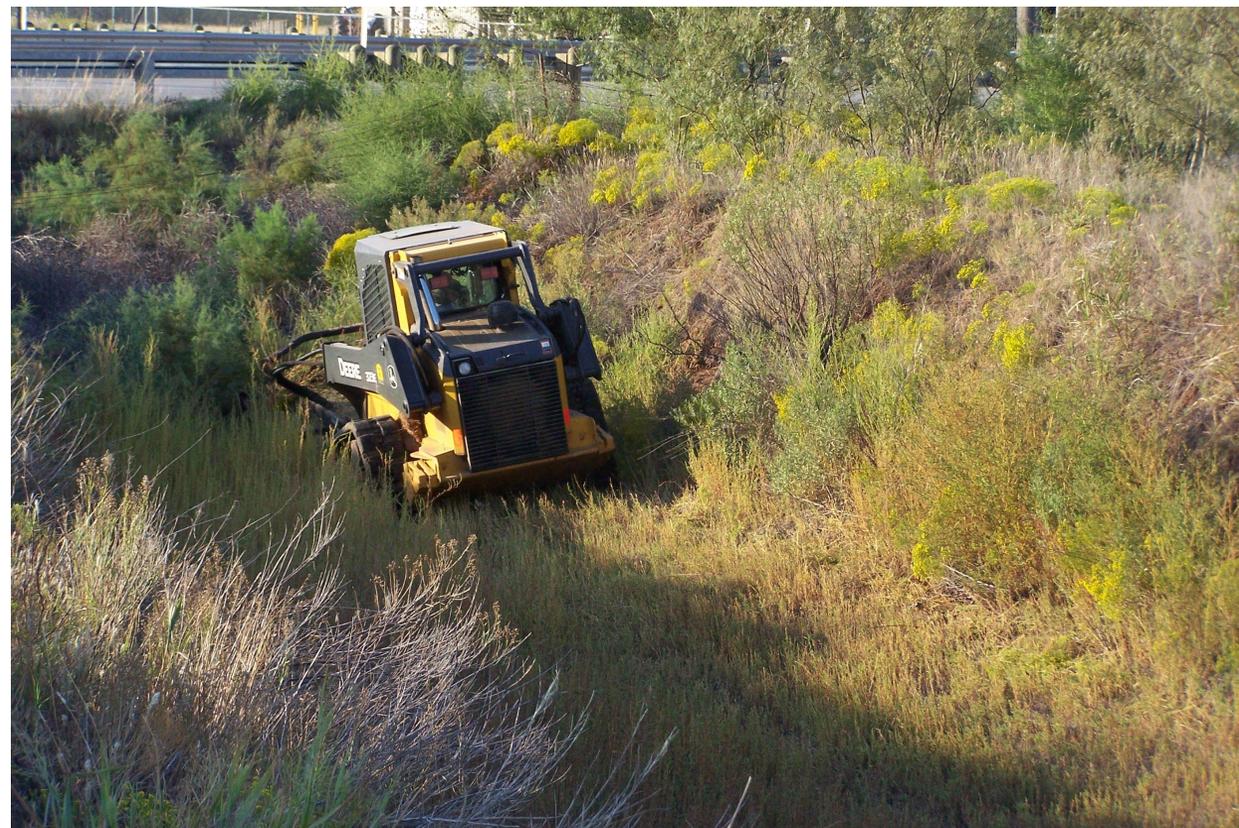
Implications for Infrastructure

- Classification of existing and completed projects – analysis will focus on:
 - Nature of infrastructure – can it be called, in ordinary terms a stream, river, lake or wetland?
 - Relatively Permanent – is there continuous flow in the project/facility/infrastructure?
 - Continuous surface connection – is there continuous flow connecting the project/facility/infrastructure to traditional navigable waters?

Implications for Infrastructure – Storm Drains and Flood Control Channels



Implications for Infrastructure – Aqueducts, Irrigation Canals and Ditches



Implications for Infrastructure – Mixed Use Projects



Other Implications

- *Maui County v. Hawaii Wildlife Fund*
- 402 (NPDES) Permitting
- Local regulatory authority over water bodies and wetlands
- Chevron Deference and new regulations defining WOTUS

Key Take Aways

A water is WOTUS if:

1. It is a stream, river, ocean or lake that is used for navigation and interstate commerce, or flows across or forms a part of State boundaries
2. It is a relatively permanent, standing or continuously flowing stream, river, or lake that maintains a continuous surface connection to Traditional Navigable Waters
3. It is a wetland with a continuous surface connection to Traditional Navigable Waters

Key Take Aways

- Classification of existing and completed projects – analysis will focus on:
 - Nature of infrastructure – can it be called, in ordinary terms, a stream, river, lake or wetland?
 - Relatively permanent – is there continuous flow in the project/facility/infrastructure?
 - Continuous surface connection – is there continuous flow connecting the project/facility/infrastructure to traditional navigable waters?

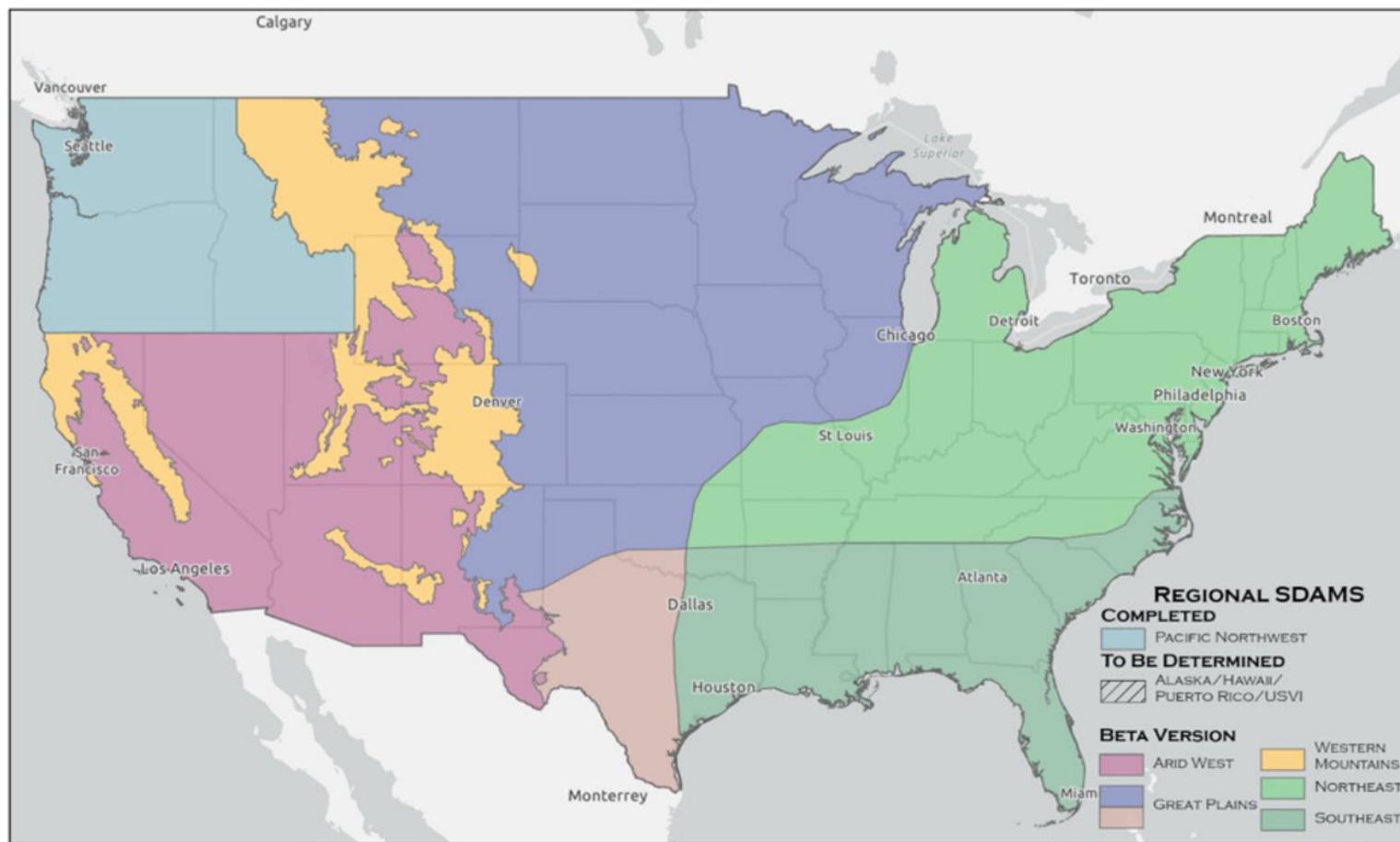
Next Steps

- EPA and Army Corps to issue new regulation defining the term WOTUS
- Agencies are proposing to issue the regulation as a final rule by September 1, 2023
- Processing most approved Jurisdictional Determinations is on pause while the Agencies decide how to interpret the *Sackett* decision

Next Steps

- Potential Criteria for Relatively Permanent:
 - Scalia plurality in *Rapanos* (2006): flowing for **290 days** is Relatively Permanent; flowing for **1 day is not**. Ephemeral and Intermittent streams are not Relatively Permanent.
 - 2008 EPA/Army Guidance on Rapanos: Relatively Permanent = “typically have continuous flow at least seasonally (e.g., typically **three months**).”
 - January 2023 WOTUS Definition Final Rule: Relatively Permanent = “flows for more than a short duration in direct response to precipitation.” Streams that dry within days following a storm are not Relatively Permanent.
 - January 2023 WOTUS Definition Final Rule: use Regional **Streamflow Duration Assessment Methods (SDAMs)** – which are under development.

Next Steps: Regional Streamflow Duration Assessment Methods (SDAMs)



Next Steps

- APA standard for issuing a final rule without notice or comment:
 - Agencies find for “good cause” that prior notice and comment are “impracticable, unnecessary, or contrary to the public interest.” 5 USC § 553(b)(3)(B)
 - This exception “should be narrowly construed and only reluctantly countenanced.” --DC Circuit
 - The exception is generally limited to “emergency situations, or where delay could result in serious harm.” --DC Circuit
 - A court will only agree “in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest.” –DC Circuit

Next Steps

- Jurisdictional Determinations:
 - The Army Corps is pausing certain decisions while new regulation is pending
 - *Sackett* decision will shrink the scope of federal regulation in many areas
 - In some cases, it may make sense to presume jurisdiction because of project timelines

Questions?

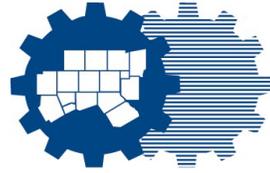


Questions for Speakers



Wrap-Up

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