

# Permitting in Waters

## A Changing Environment

Nick Ricono – AMEC Environment & Infrastructure



# Overview



- Feds vs. States
- What gives the feds jurisdiction?
- Where should they have jurisdiction?
- History of the expansion and contraction of that jurisdiction
- Where are we now?
- Where are we going?
- The new proposed rule defining Waters of the U.S.



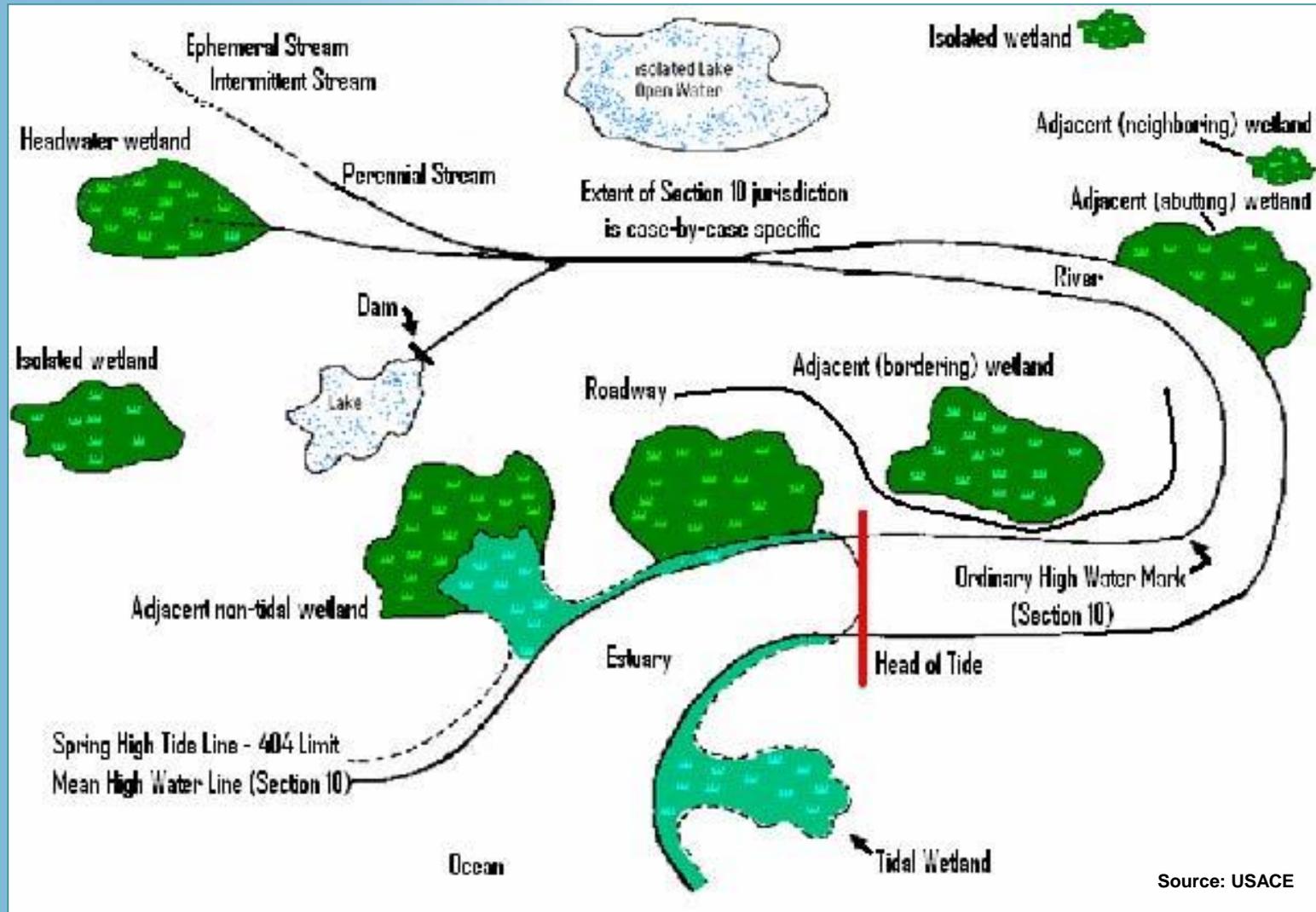
- Rivers and Harbors Act (1899)
  - Section 10 regulates all projects in **Navigable Waters**
    - Defined as waters subject to the ebb and flow of the tide and those with past, present, or future use to transport **interstate or foreign commerce**
    - Gives permitting authority to U.S. Army Corps of Engineers
  
- Clean Water Act (1972)
  - Section 404 regulates discharge of dredge or fill material in **Waters of the U.S.**
    - Corps has permitting authority with EPA oversight
    - Waters of the U.S. not well defined



# Federal Jurisdiction

Where should it start and where  
should it end?

# Federal Jurisdiction



# Navigable Waters?



# Seasonal Waters?



Source: USACE, 2007



Source: USACE, 2007

# Ephemeral Channels?



# VERY Ephemeral Channels?



Source: Vyverberg, 2010

# Wetlands?



# Broad Federal Authority under Clean Water Act Proposed in 1976, last codified in 1986



Waters of the U.S. (33 CFR 328.3(a)) defined as:

1. All waters which are currently used, were used in the past, or may be susceptible to use in **interstate or foreign commerce**, including all waters which are subject to the ebb and flow of the tide;
2. All **interstate** waters, including interstate wetlands;
3. **Other waters** such as intrastate lakes, rivers, streams, and wetlands, the degradation of which could affect interstate or foreign commerce: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (ii) From which fish or shellfish could be taken and sold; (iii) Which could be used for industrial purposes that affect interstate commerce;
4. All impoundments of Waters of the U.S.;
5. **Tributaries** of Waters of the U.S.;
6. The territorial seas;
7. Wetlands adjacent to Waters of the U.S.

*U.S. v. Riverside Bayview Homes*

474 U.S. 121 (1985)

Court upheld ruling that Corps can regulate wetlands adjacent to Navigable Waters

Court went further saying the objective of the CWA is to restore the integrity of the nation's waters and incorporated a broad, systemic view of the goal of maintaining and improving water quality

## The Migratory Bird Rule

Asserted that the CWA could be extended to isolated, intrastate, non-navigable waters based on the following factors being present:

1. Use of the water as habitat by birds protected by the Migratory Bird Treaty Act;
2. Use of the water as habitat for endangered threatened species; or
3. Use of the water to irrigate crops sold in interstate commerce.



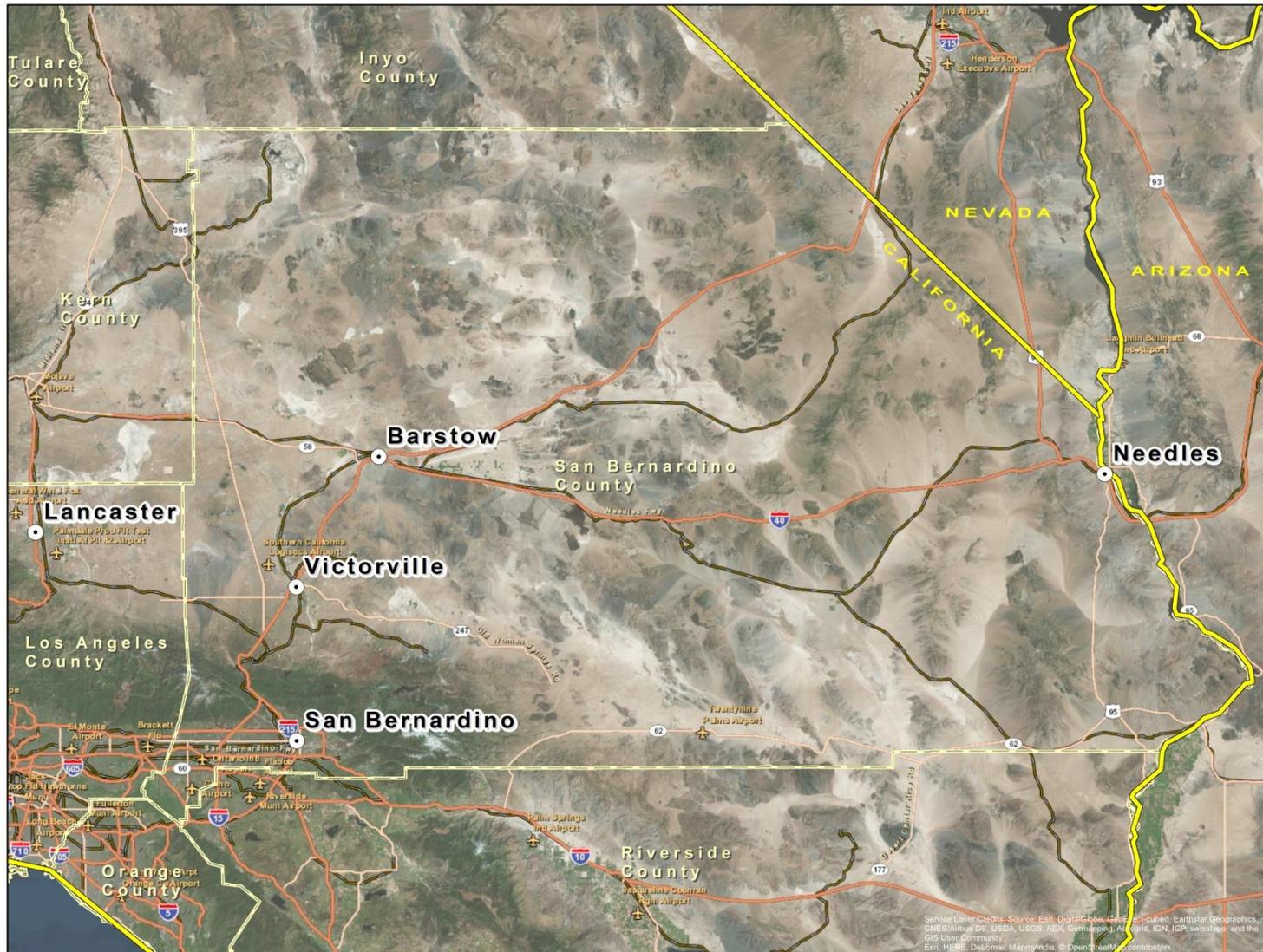
*SWANCC v. Corps*  
531 U.S. 159 (2001)

Invalidated the Migratory Bird Rule. The Court (in a 5-4 opinion) held that the use of “**isolated**” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA

Affect: Huge in California deserts. The Corps stopped regulating many isolated, non-navigable, intrastate waters



# Post SWANCC Jurisdiction Isolated Waters



# Post SWANCC Jurisdiction Isolated Wetlands



Source: USACE, 2007



*Rapanos v. U.S.*  
547 U.S. 715 (2006)

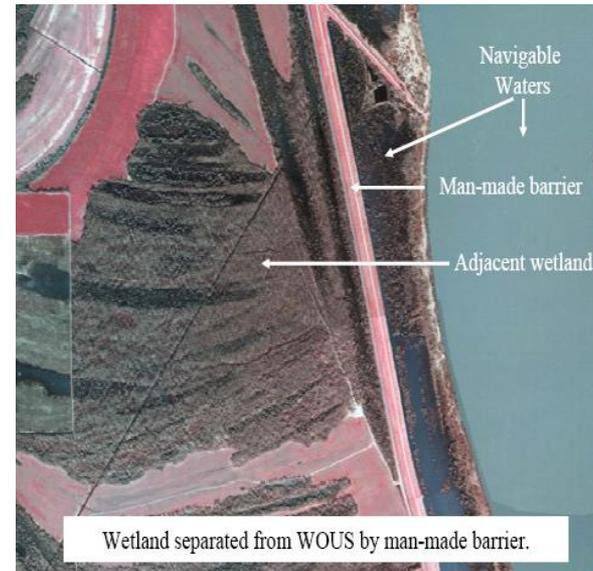
Case involving wetlands adjacent to a non-navigable tributary

Court ruled in a 4-1-4 plurality with Justice Kennedy taking the middle ground, stating that wetlands adjacent to non-navigable tributaries are covered by CWA only where there is a **significant nexus** with a navigable water

Results of *Rapanos* provided new standards for determining CWA jurisdiction:

- (1) “**Traditional navigable waters**” (TNWs)
- (2) Tributary to a TNW that is a “**relatively permanent water**” (RPW),
- (3) Non-RPWs that have a “**significant nexus**” with a TNW
  - meaning it can significantly affect the chemical, physical, and biological integrity of a TNW
  - affect must not be speculative or insubstantial

# Post Rapanos Jurisdiction TNWs and adjacent wetlands



Source: USACE, 2007

# Post Rapanos Jurisdiction RPWs



Source: USACE, 2007

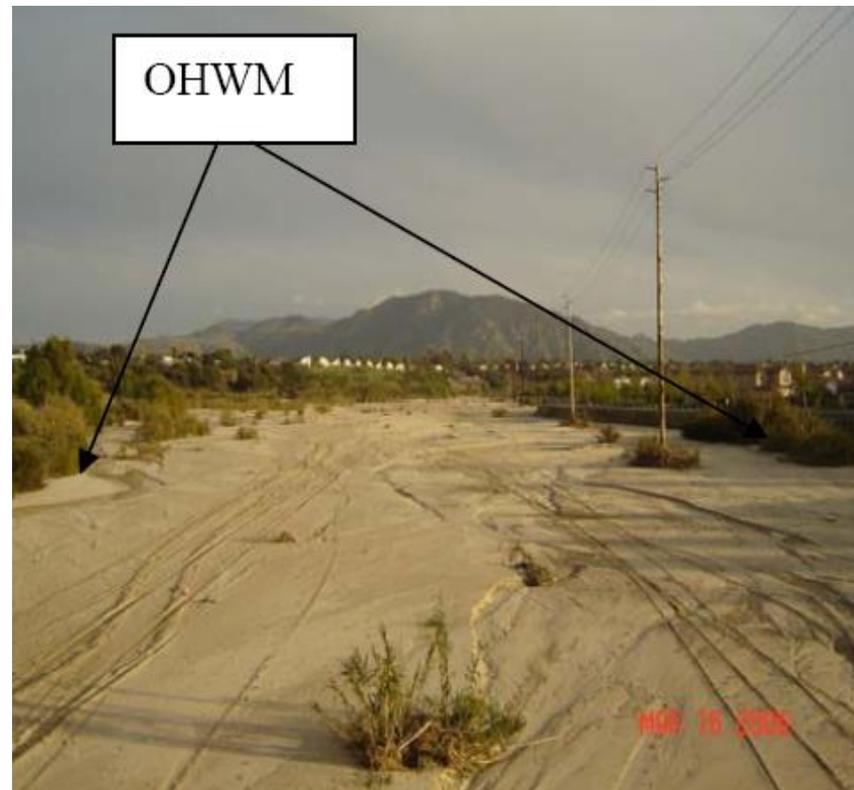


Source: USACE, 2007

# Post Rapanos Jurisdiction Non-RPWs with Significant Nexus to TNW



Source: USACE, 2007



Source: USACE, 2007

# Post Rapanos Jurisdiction Non-RPWs with Significant Nexus to TNW



Source: Vyverberg, 2010

# Post Rapanos Jurisdiction Non-RPWs only with Significant Nexus to TNW



## Corps and EPA Proposed Rule Defining Waters of the U.S.

- Published on April 21, 2014, 79 Fed. Reg. 22,188
- Deadline for Public Comments: **October 20, 2014**
- “The goal of the agencies is to ensure the regulatory definition is consistent with the CWA, as interpreted by the Supreme Court, and as supported by science, and to provide **maximum clarity** to the public...” and “...make the process of identifying waters of the U.S. **less complicated and more efficient.**”

The agencies propose to define the waters of the U.S. for all sections (including sections 301, 311, 401, 402, 404) of the CWA to mean:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters, including interstate wetlands;
3. The territorial seas;
4. All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;

continued...

continued...

5. **All tributaries** of a traditional navigable water, interstate water, the territorial seas or impoundment;
  - The term **tributary** means the presence of a bed and banks and ordinary high water mark which contributes flow to a water identified in paragraphs (a)(1) through (4)
  - **All tributary** streams, including perennial, intermittent, and ephemeral streams, are physically and chemically connected to downstream traditional navigable waters, interstate waters, and the territorial seas via channels and associated alluvial deposits.
  - **Headwater streams** (which can be ephemeral, intermittent or perennial) supply most of the water to downstream traditional navigable waters, interstate waters, and the territorial seas and are the most abundant stream-type in most river networks.

continued...

6. All **waters**, including wetlands, **adjacent** to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary;
  - The term **adjacent** means bordering, contiguous or neighboring
  - Proposes to change ‘adjacent wetlands’ to ‘adjacent waters’ to include water bodies such as ponds and oxbow lakes, as well as wetlands
  - The term **neighboring** includes waters located within the **riparian area or floodplain**, or waters with a **shallow subsurface hydrologic connection** or confined surface hydrologic connection
    - “When determining whether a water is located in a floodplain, the agencies will use best professional judgment to determine which flood interval to use (for example, **10 to 20 year flood interval zone**).”
    - How shallow is “shallow”?

Continued...

7. On a case-specific basis, **other waters**, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a **significant nexus** to a traditional navigable water, interstate water or the territorial seas.

Definitions below...

# Expanding Federal Jurisdiction

## Definition of “Other Waters”



- Not jurisdictional as a category, but require case-by-case analysis
- Analyzing waters alone, or in combination with other **similarly situated** waters, located in the **same region**
  - “Similarly situated: can be a **single landscape unit** with regard to their effect on the chemical, physical, or biological integrity of a water “
  - What is the “**same region**”?
- Must have a **significant nexus** to a traditional navigable water, interstate water, or territorial sea
  - Significant nexus means it significantly affects chemical, physical, or biological integrity of a traditional navigable water, interstate water, or territorial sea
  - Significant means more than speculative or insubstantial

- Proposed rule as written is an expansion of federal regulatory oversight from current conditions
  - Includes “all tributaries” to TNWs AND Interstate Waters
  - Extends jurisdiction to adjacent wetland and non-wetland waters
  - Extends jurisdiction to wetland and non-wetland waters within riparian areas and floodplains (potentially to the 20 year flood zone)
  - Extends jurisdiction to neighboring waters with a “shallow groundwater connection”
  - Could extend jurisdiction to “Other Waters”, which could be any wet area (or potentially wet area) similarly situated within the same region based on case by case analysis of significant nexus
- Proposed rule is taking public and scientific input so it will change
- The final rule will be challenged in court!

# Maximum Clarity? Questions?

Nick Ricono

Senior Regulatory Specialist

AMEC Environment & Infrastructure, Inc.

[nick.ricono@amec.com](mailto:nick.ricono@amec.com)

858-300-4332