

Our wetlands and streams after Rapanos / Carabell...

*...does the Clean Water Act still
protect them?*



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Clean Water Act

- Passed 1972, significant amendments 1977
- Objective: "...to restore and maintain the chemical, physical and biological integrity of the Nation's waters."
- Large body of implementing regs, guidance, etc...
- Jointly administered by the Army Corps of Engineers and EPA



Clean Water Act

Section 301(a): Discharge of any pollutant is prohibited without a permit

Permit programs:

- National Pollution Discharge Elimination System (NPDES) permitting established pursuant to §402
- Permitting system for dredged or fill material established pursuant to §404
 - Traditional FWS involvement has been here
 - FWS comment authorities built into 404(m), 404(q)



Jurisdictional Waters under the Clean Water Act: The statute says...

“Navigable waters” =

*“the waters of the United States, including the territorial seas” **

This applies throughout CWA,

e.g., §§ 404, 402, 401

* at §502 (7)



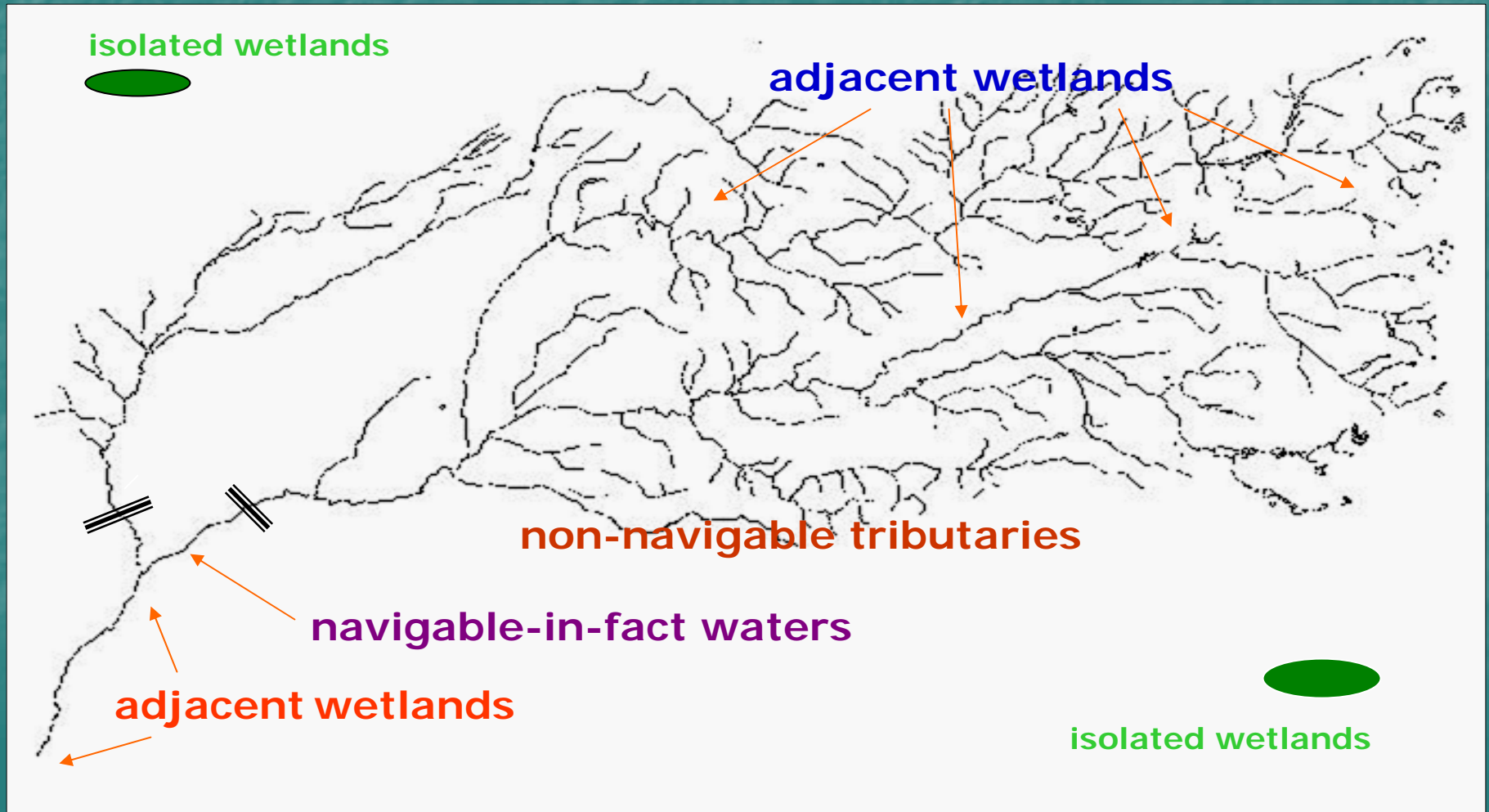
Jurisdictional Waters under the CWA: The Regs* Say...

“Waters of the United States” are:

- Traditional navigable waters
- Interstate waters
- Tributaries of above
- Adjacent wetlands
- Certain isolated waters

* 33 CFR §328.3

CWA Jurisdiction, Geographically



Jurisdiction Whittled, 1st by SWANCC

- Solid Waste Agency of Northern Cook County, IL.
→ Before Supreme Court in 2001.
- Previously, Corps asserted jurisdiction if mig birds flew between an isolated water and navigable waters
→ their "Migratory Bird Rule"
- Court said Corps cannot regulate non-navigable, isolated, intrastate waters based solely on use by migratory birds
- Migratory Bird Rule was invalidated. Reasons included violation of Constitution's Commerce Clause.

Rapanos / Carabell

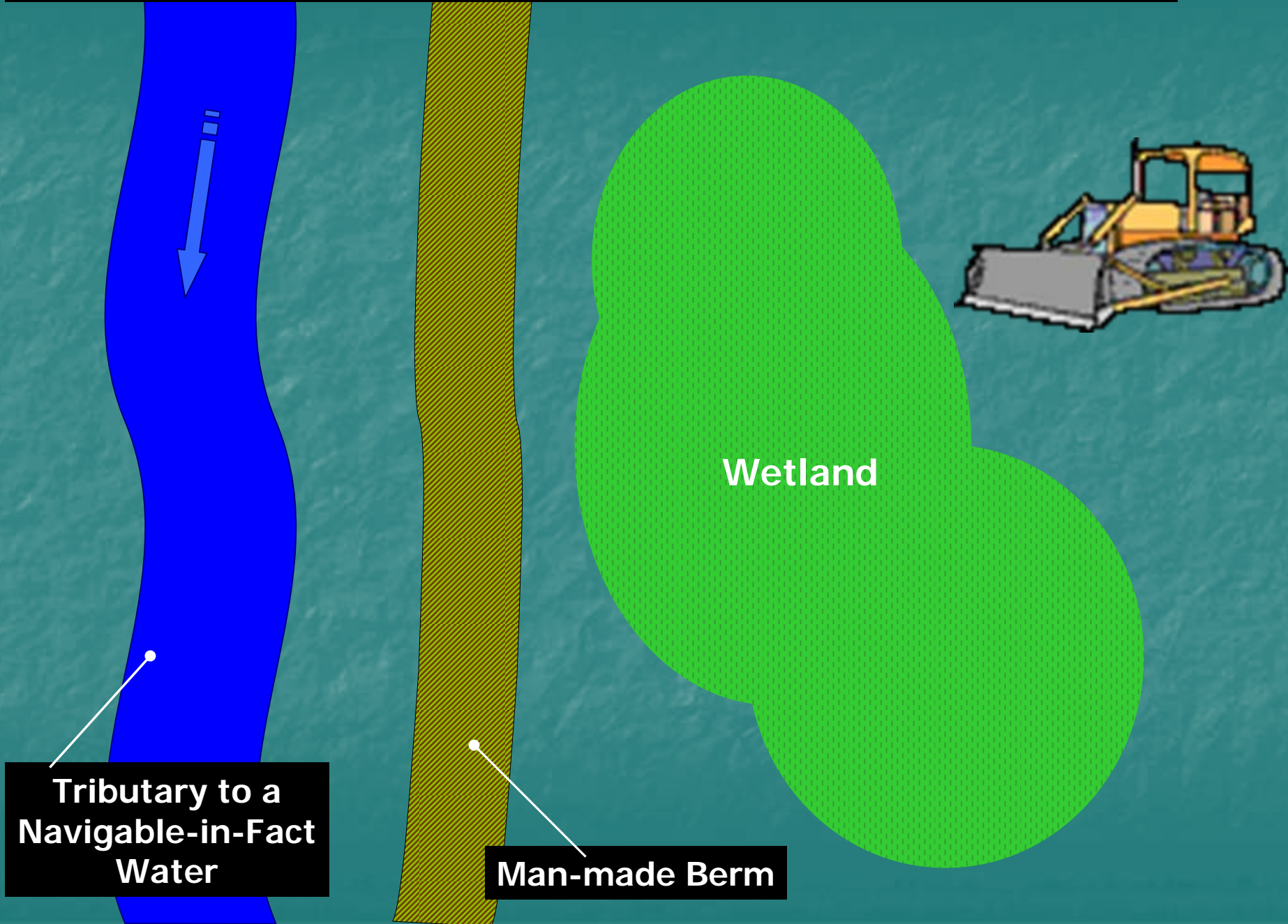
- A consolidation of 2 separate cases from Michigan
- Before Supreme Court Feb. 2006, decided June 2006

At issue in Rapanos: Are wetlands that do not physically abut navigable-in-fact waters jurisdictional under CWA?



At issue in Carabell: Does Federal jurisdiction apply to wetlands adjacent to, but hydrologically isolated from any tributary of a water of the United States?

A Carabell Wetland... Adjacent but *Separated*





What Was at Stake in these Cases?

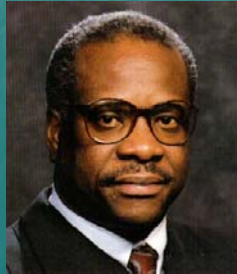
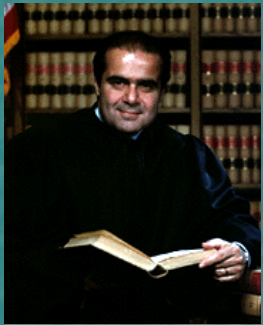
Rulings affect entire CWA, not just §404. According to a 2005 analysis by EPA:

- Up to 59% of stream miles outside of AK are headwater reaches potentially impacted by Rapanos/Carabell
- 40% of §402 NPDES (point-source) permitted operations discharge into headwater reaches.
- 90% of “Surface Water Protection Areas” include headwater reaches → serving 110 million Americans

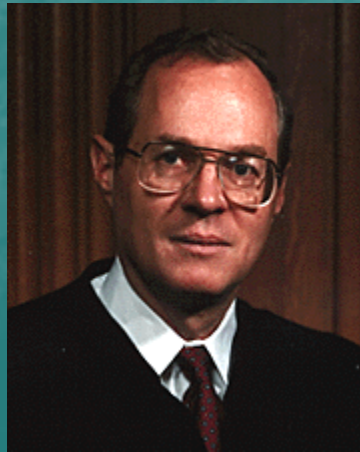
What did the Court decide?

- Cases remanded to lower court by 5-4 decision...
but really it was a "4-1-4" decision

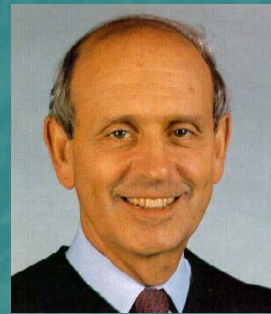
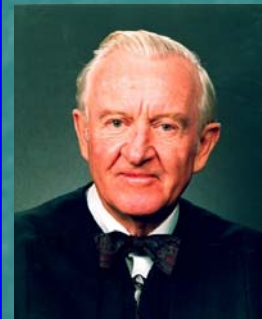
Scalia wrote
"plurality" opinion.
Joined by Alito,
Roberts and
Thomas.



Kennedy's
separate opinion
concurred in
judgment with
plurality, but with
very different
rationale



Stevens wrote the
dissent. Joined by
Breyer, Ginsburg
and Souter



What did the Court decide?

Scalia wrote... **Alito, Roberts, Thomas** joined...

Held that Corps misapplied the CWA, claiming jurisdiction over wetlands beyond original intent of Congress

The
Plurality

Kennedy wrote...

Concur that cases should be remanded, but because the lower court did not use the appropriate test to evaluate if wetlands were jurisdictional.

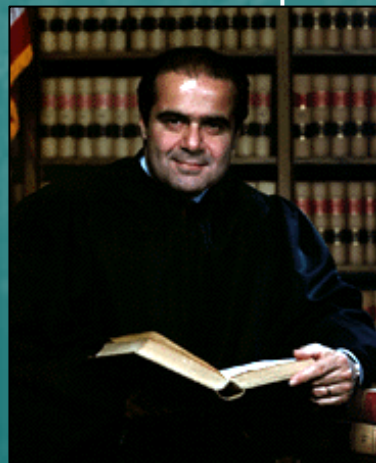
Kennedy
concur in
judgment

The correct test is whether or not a wetland has a "significant nexus" with a navigable water.

"Scalia Waters"

A prescription for reducing geographic extent of CWA jurisdiction?

- Federal jurisdiction extends only as far as wetlands adjacent to waters that are "relatively permanent*", standing or flowing."
- Adjacency should be defined as "having a continuous surface connection."



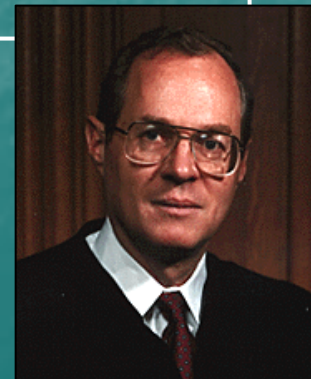
* Relatively Permanent Waters (RPW)

“Kennedy Waters”

Are jurisdictional and have “Significant Nexus” to a navigable water if:

“...the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’

When in contrast, wetlands’ effects are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”



Post-Rapanos Guidance

- Corps/EPA interim guidance July 2006: staff to avoid/defer close-call determinations if possible. Send the rest to HQ.
- The Justices' opinions urged Corps & EPA to write regs that better define Waters of the U.S., tributaries, adjacency, etc...
- In June 2007, Corps & EPA issued guidance package telling field staff how to implement the Supreme Court decision. Became effective immediately.
 - **Nutshell**: waters are jurisdictional if they serve one of 2 masters. If it meets the standard of a "Scalia Water" or a "Kennedy Water," it's jurisdictional.

Post-Rapanos Guidance

*Waters meeting the "Scalia Waters" standard are "Always IN"
(Corps/EPA will assert jurisdiction)*

- Traditional navigable waters (navigable-in-fact, or TNWs).
Ex. Potomac River
 - Wetlands adjacent to TNWs. Including those without a continuous surface connection.
Ex. Dyke Marsh
- Non-navigable tributaries of TNWs that are relatively permanent.
→ RPWs typically flow year-round or have continuous flow at least seasonally (typically 3 months)
 - Wetlands adjacent to such tributaries that have continuous surface connection to the tributary (not "separated")

Post-Rapanos Guidance

Waters that are categorically "OUT"

(Corps/EPA generally will not assert jurisdiction)

- **Swales or erosional features**
 - gullies, small washes
 - low volume, infrequent, short duration flow

- **Ditches, including roadside**
 - excavated wholly in and draining only uplands
 - those not carrying a relatively permanent flow of water





Post-Rapanos Guidance

Waters that now must have significant nexus to a traditional navigable water, i.e. "Kennedy Waters." ...the sticky wickets:

- Tributaries that are non-navigable and not "relatively permanent"
- Wetlands adjacent to tributaries that are non-navigable, not relatively permanent
- Wetlands adjacent to, but not directly abutting a relatively permanent non-navigable tributary

Los Angeles



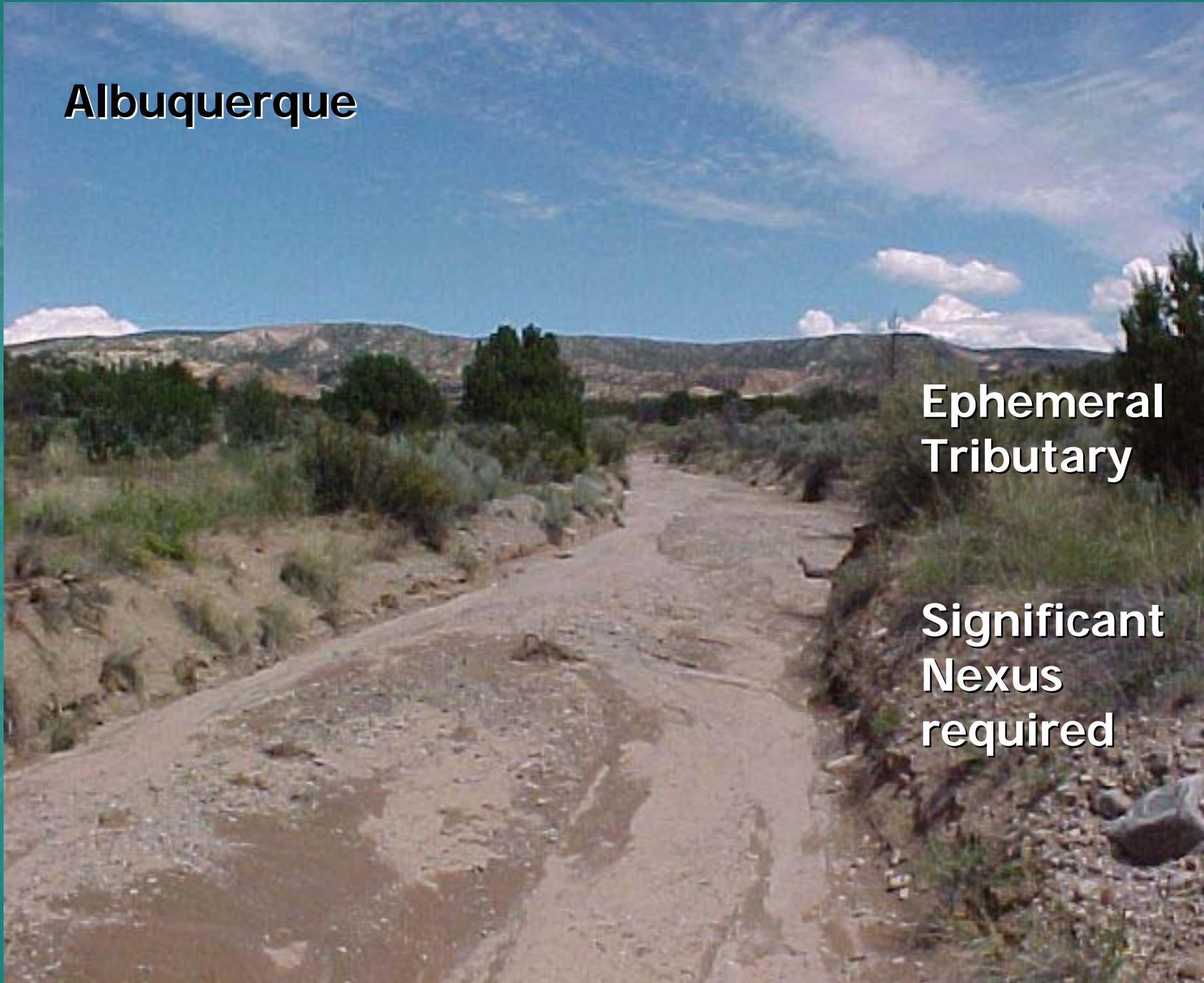
**Ephemeral
Tributary**

**Significant
Nexus
required**

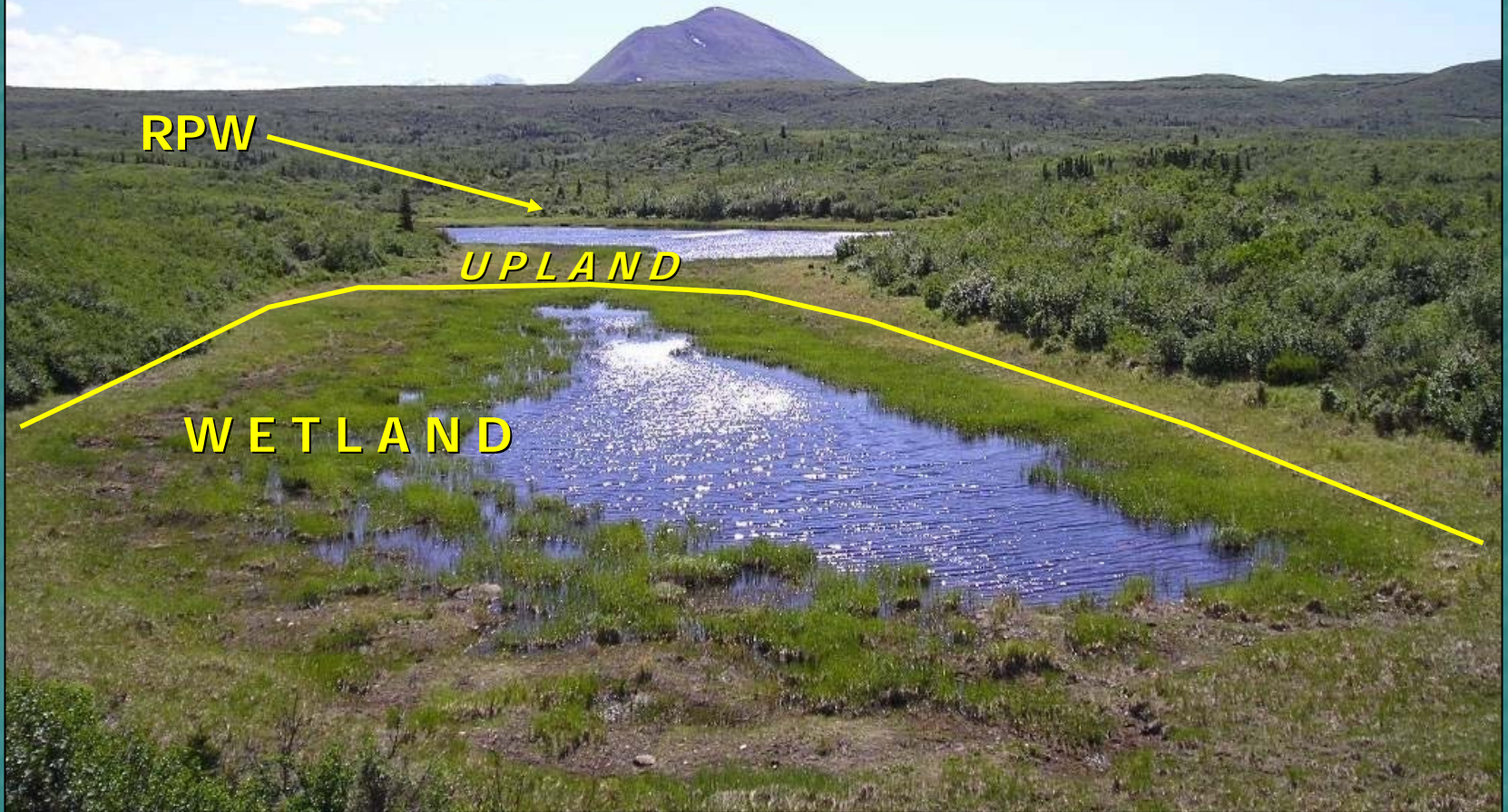
Albuquerque

**Ephemeral
Tributary**

**Significant
Nexus
required**



Alaska



**“Carabell Wetland.” Adjacent but separated.
Significant Nexus required.**



Significant Nexus

How are the agencies supposed to determine this?

From the 2007 guidance:

- Significant nexus analysis will assess:
 - flow characteristics and functions of the tributary itself
 - functions performed by any wetlands adjacent to the tributary
- ...to determine if they **significantly** affect the chemical, physical and biological integrity of downstream traditional navigable waters.

"Significantly" = *more than* speculative or insubstantial



Significant Nexus

Significant Nexus includes consideration of hydrologic factors including:

- Volume, duration, and frequency of flow
- Proximity to the traditional navigable water
- Size of the watershed
- Average annual rainfall
- Average annual winter snow pack



Significant Nexus

Ecological factors will be considered by asking if the tributary, in combination with adjacent wetlands (if any)...

- ...has the capacity to carry pollutants or flood waters to TNW's, or to trap/filter/store pollutants or flood waters that would reach a TNW?
- ...provides habitat and lifecycle support functions for fish and other spp. (feeding/nesting/spawning/rearing) present in the TNW?
- ...has the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- ...has other relationships to the physical, chemical or biological integrity of the TNW?



Significant Nexus

Broad implementation discretion...

- For certain categories of waters a Significant Nexus is now required before agencies will assert jurisdiction
- Which Nexuses are Significant?
 - Those that are MORE THAN speculative or insubstantial
- Who decides what is speculative or insubstantial?
 - Corps Districts. Have broad latitude to implement as each sees fit



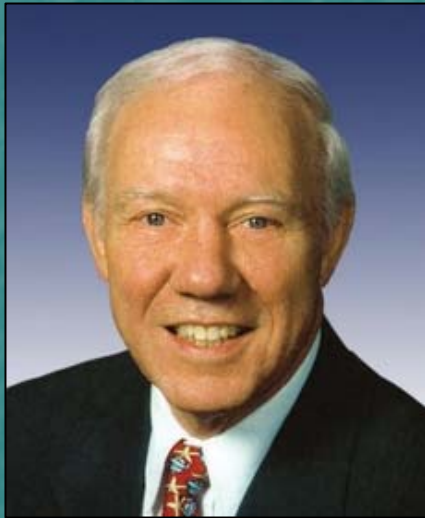
What's Next?

- Public comments on the June guidance:
 - Gather case studies and experiences applying the guidance
 - 2008 – will reissue, revise, or suspend guidance
- A rulemaking, further policy issuance?
 - Corps / EPA say they will broadly consider jurisdictional issues and definition of terms in additional products
- More lawsuits?
 - Already happening. Healdsburg, CA, for ex.

Is there a way to fix this?

Clean Water Restoration Act of 2007

- Currently introduced by Rep. Oberstar (HR 2421) and Sen. Feingold (S 1870)



- It's been around since SWANCC but finally has legs?
- It would return jurisdiction to pre-SWANCC status without extension of authority



Clean Water Restoration Act of 2007

- Purposes:
 - Reaffirm 1972 congressional intent
 - Clearly define the waters subject to CWA
 - Protect waters to fullest extent of congressional authority
- It **strikes** all instances of “navigable waters of the U.S.” and inserts “waters of the United States.”
- It **strikes** definition: “The term ‘navigable waters’ means the waters of the U.S. including the territorial seas.”

Clean Water Restoration Act of 2007

New Replacement Definition:

“The term ‘waters of the United States’ means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including...

lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing,...

to the the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.”



Clean Water Restoration Act of 2007

- Several hearings held by Environment & Public Works (Senate) and Transportation & Infrastructure (House) in '07 and '08
- “Won’t this hurt farmers?”
 - The “Savings Clause” in the bill explicitly preserves exemptions to regulation for ag activities, as per §404(f) and regs.
- Is this bill constitutional? What about the Commerce Clause?

