

**North Central Texas Council of Governments**

# Understanding WOTUS (Waters of the United States) and Anticipating What's Next

**NCTCOG Webinar  
August 29, 2022**

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

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[www.nctcog.org/WaterResources](http://www.nctcog.org/WaterResources)

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- ▶ If you submitted an RSVP for this webinar, you will receive an email with the presentation slides, and eventually, a link to the recording. If you did not RSVP and would like these webinar materials, please email [eberg@nctcog.org](mailto:eberg@nctcog.org).
- ▶ Please keep your microphone on mute until the Question-and-Answer period at the end of each presentation.
- ▶ Thank you!

# Webinar Agenda

- ▶ **Understanding WOTUS**
  - ▶ Randall Rush, U.S. EPA, Region 6, Dallas
  - ▶ Chandler Peter, U.S. Army Corps of Engineers, Fort Worth District
- ▶ **Anticipating What's Next for WOTUS at the U.S. Supreme Court**
  - ▶ Lisa Soronen, (Former) State and Local Legal Center
- ▶ **Overall Discussion and Questions for Speakers**
- ▶ **Wrap-Up**

# Speaker Introduction

## Randall Rush

- ▶ Senior Policy Advisor
- ▶ U.S. Environmental Protection Agency, Region 6

# Understanding WOTUS (Waters of the United States) and Anticipating What's Next

August 29, 2022

NCTCOG Roundtable Discussion

# “Waters of the United States” and the Clean Water Act

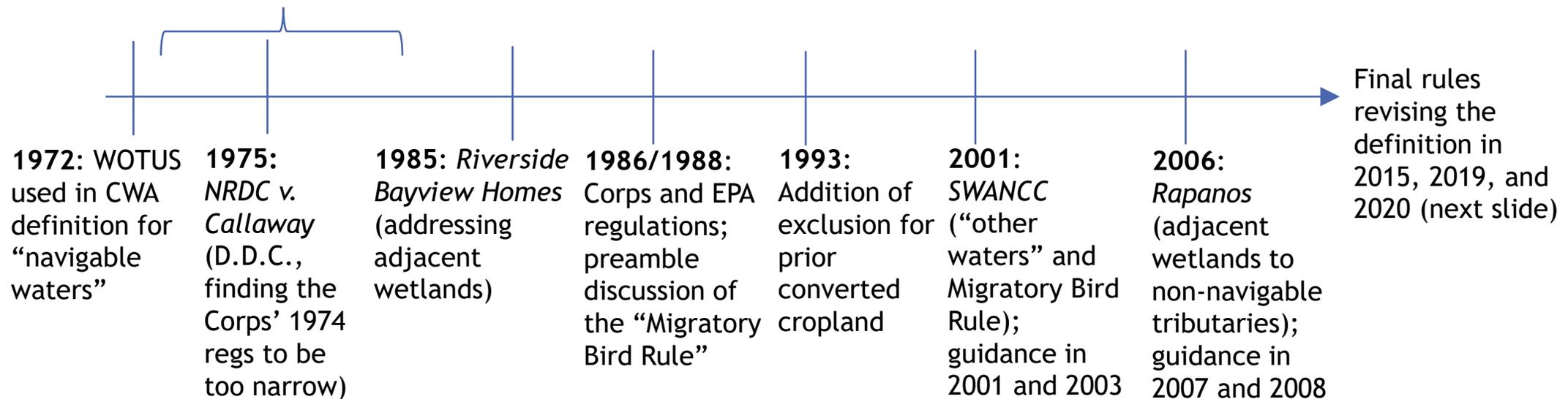
- ▶ “Waters of the United States” (WOTUS) is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- ▶ Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.”
- ▶ The Clean Water Act does not define “waters of the United States”; Congress left further clarification to the agencies.
- ▶ The EPA and the Department of the Army have defined “waters of the United States” by regulation since the 1970s.



# Background: Prior rulemakings and abbreviated legal history

The definition of “waters of the United States” has been a subject of dispute and addressed in major court cases

1973-1979: EPA and Corps regs and revisions



# Guidance and Regulations

- ▶ Agencies developed guidance following Supreme Court decisions addressing the definition of “waters of the United States”
- ▶ After a long period of regulatory stability, the definition of “waters of the United States” has been in flux since 2015
  - 2015 Clean Water Rule
  - 2019 Repeal Rule
  - 2020 Navigable Waters Protection Rule (NWPR)\*

\*The NWPR was vacated on August 30, 2021.

Agencies are currently implementing the pre-2015 approach nationwide.

# What Recently Happened

- **8/30/21** - U.S. District Court - Arizona issued order vacating & remanding 2020 Navigable Waters Protection Rule (NWPR) in *Pascua Yaqui Tribe v. U.S. EPA*.
- **9/1&2/21** - Corps paused all AJD reviews under NWPR. & directs Corps to resume conducting AJDs consistent with pre-2015 waters of the U.S. (WOTUS) regulatory regime (1986 + SWANCC + Rapanos Guidance).
- **11/18/21** - EPA/Corps issue rule to formally establish a “foundational rule” (pre-2015 regime w/ clarification) not to be confused w/ “durable rule” efforts announced 6/9/21
- **1/5/22** - EPA/Corps declare NWPR AJDs not usable for any new permit applications/decisions

# Proposed Rule and Future Actions

- ▶ The proposed rule to update the pre-2015 regulations to reflect consideration of relevant Supreme Court decisions was published in the *Federal Register* on December 7, 2021.
  - ▶ Comment period ended on February 7, 2022
- ▶ The agencies anticipate a second rulemaking to build upon that foundation

# Proposed Rule: Regulatory Text Overview

Structured like the agencies' pre-2015 regulations:

- ▶ (a)(1) - Traditional navigable waters (no change)
- ▶ (a)(2) - Interstate waters (no change)
- ▶ (a)(3) - All other waters...\*
- ▶ (a)(4) - Impoundments\*
- ▶ (a)(5) - Tributaries of waters identified in (1), (2), (4), and (6) \*
- ▶ (a)(6) - Territorial seas (no change)
- ▶ (a)(7) - Adjacent wetlands \*
- ▶ Waters of the United States do not include prior converted cropland or waste treatment systems

\* Categories of waters from the pre-2015 regulations, revised to reflect consideration of SWANCC and Rapanos Supreme Court decisions

# Proposed Rule: (a)(1) Traditional navigable waters, (a)(2) Interstate waters, & (a)(6) Territorial Seas

- ▶ The proposed rule would not change the pre-2015 approach to (a)(1) Traditional navigable waters, (a)(2) Interstate waters, & (a)(6) Territorial seas.
  - ▶ These waters are referred to in the preamble as “foundational waters.”
- ▶ The proposal restores interstate waters as a category of “waters of the United States” - they were eliminated as an independent source of jurisdiction under the Navigable Waters Protection Rule (NWPR).
  - ▶ Though there are no changes proposed in the regulatory text, the agencies are seeking comment on the scope of implementation for interstate waters (e.g., waters that flow across, or form a part of, boundaries of federally recognized tribes).

# Proposed Rule: (a)(4) Impoundments

- ▶ The proposed rule incorporates minor changes to the impoundments category compared to the pre-2015 rule
  - ▶ Impoundments of jurisdictional waters would remain jurisdictional under this category of the proposal except for impoundments of (a)(3) “other waters.”
  - ▶ However, impoundments of (a)(3) “other waters” could still be jurisdictional if they still meet the criteria for jurisdiction under (a)(3).
- ▶ The agencies are specifically seeking comment on the scope of implementation for impoundments.

# Proposed Rule: (a)(3) Other Waters

- ▶ The proposed rule would include the “other waters” category from the pre-2015 regulations but with changes informed by relevant Supreme Court precedent.
- ▶ “Other waters” include a variety of waters that do not otherwise meet the other categories of “waters of the United States” under the proposed rule, such as non-navigable, intrastate, non-tributary ponds and non-adjacent wetlands.
- ▶ The proposed rule would replace the interstate commerce test from the pre-2015 regulations with the relatively permanent and significant nexus standards, reflecting consideration of the *SWANCC* and *Rapanos* decisions.
- ▶ The agencies solicit comment on a variety of implementation options for “other waters” in the preamble.

# Proposed Rule: (a)(5) Tributaries

- ▶ The proposed rule would include the “tributaries” category from the pre-2015 regulations but with changes informed by relevant Supreme Court precedent.
- ▶ Tributaries under the proposed rule are typically streams and rivers, even lakes and ponds, that flow directly or indirectly into foundational waters or (a)(4) impoundments.
- ▶ The proposed rule would define “waters of the United States” to include tributaries of traditional navigable waters, interstate waters, impoundments, or the territorial seas if the tributary meets either the relatively permanent standard or the significant nexus standard.
- ▶ The agencies solicit comment on a variety of implementation approaches for tributaries in the preamble, including how to implement the relatively permanent standard.

# Proposed Rule: (a)(7) Adjacent wetlands

- ▶ The proposed rule would include the “adjacent wetlands” category from the pre-2015 regulations but with changes informed by relevant Supreme Court precedent.
- ▶ The proposed rule would not change the longstanding (pre-NWPR) definition of “adjacent,” but rather would add language to the provision establishing which adjacent wetlands can be considered “waters of the United States” to reflect the relatively permanent and significant nexus standards.

# Definition of “Significantly Affect”

- ▶ The term “Significantly affect” as proposed means more than speculative or insubstantial effects on the chemical, physical, or biological integrity of foundational waters.
- ▶ When assessing whether the effect that the functions waters have on foundational waters is more than speculative or insubstantial, the agencies propose factors to consider:
  1. The distance from a water of the United States;
  2. The distance from a foundational water;
  3. Hydrologic factors, including shallow subsurface flow;
  4. The size, density, and/or number of waters that have been determined to be similarly situated; and
  5. Climatological variables such as temperature, rainfall, and snowpack.

# Exclusions and Waters Generally Not Jurisdictional

## Exclusions (Regulatory Text)

- ▶ Waste Treatment Systems (1979)
- ▶ Prior Converted Cropland (1993)

## “Generally Not Jurisdictional” (Preamble\*):

- ▶ Certain ditches
- ▶ Artificially irrigated areas
- ▶ Certain artificial lakes or ponds
- ▶ Groundwater

\* Note: this list is not inclusive and additional features are included in the proposed preamble as “generally not jurisdictional.”

# Outreach and Engagement To Date

- ▶ Federalism and tribal consultations: initiated July 2021 and closed October 4, 2021
  - ▶ <https://www.epa.gov/wotus/federalism-consultation-pre-proposal-revised-definition-waters-us>
- ▶ Pre-proposal recommendations docket August 2021
  - ▶ 32,000+ recommendations
- ▶ Six public meetings August-September 2021
- ▶ State dialogues in September-October 2021
  - ▶ September 29, 2021, Eastern Meeting: Representatives from Rhode Island, Maryland, Indiana, Mississippi, and Kentucky
  - ▶ October 6, 2021, Central Meeting: Representatives from Minnesota, Missouri, Texas, Kansas, Wisconsin, Michigan, and South Dakota
  - ▶ October 20, 2021, Western Meeting: Representatives from Alaska, Colorado, Idaho, New Mexico, Nevada, Oregon, Washington, Wyoming, and Arizona
- ▶ Public hearing sessions in January 2022
- ▶ *State and tribal* roundtables in January 2022
- ▶ Public comment period ended on February 7, 2022
- ▶ Response to comments anticipated to be complete September, 2022
- ▶ For potential second rulemaking effort: Regional roundtables were held early summer 2022 to gather additional insight from varied parties.

# Outreach and Engagement- General Feedback

\*not inclusive of all comments

- ▶ Tools and resources to implement the new rule
- ▶ Greater clarity and duration for any revised definitions
- ▶ Incorporate a regional approach in new definitions
- ▶ Meaningful state engagement
- ▶ Support for at least some exclusions identified in the CWR and NWPR
- ▶ Divided opinions on many aspects of the NWPR
- ▶ Divergent views on wetlands, tributaries, ephemeral streams, and ditches

# Contacts

- ▶ EPA HQ: Damaris Christensen, [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov), (202) 566-0371
- ▶ Army HQ: Stacey Jensen, [usarmy.pentagon.hqda-asa-cw.mbx.asa-cwreporting@mail.mil](mailto:usarmy.pentagon.hqda-asa-cw.mbx.asa-cwreporting@mail.mil), (703) 459-6026
- ▶ EPA Region 6: Rush Randall, [rush.randall@epa.gov](mailto:rush.randall@epa.gov), (214) 665-7107

For more information, visit: <https://www.epa.gov/wotus>

# Questions?



# Speaker Introduction

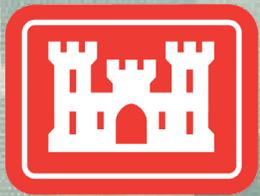
## Chandler Peter

- ▶ Regulatory Technical Specialist
- ▶ U.S. Army Corps of Engineers, Fort Worth District

# Understanding Waters of the US

North Central Texas Council of Governments  
Virtual Presentation  
August 29, 2022

Chandler Peter  
Technical Specialist  
Regulatory Division  
Fort Worth District



▪ US Army Corps of Engineers  
▪ **BUILDING STRONG**®



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# 2 Keys for Program Applicability

- Must involve:
  1. **Water features (Waters of the US)**
  2. Regulated activity
    - ▶ In 404 waters, placement of (discharge) of dredge or fill material in the waterbody
    - ▶ In 10 waters, any activity in/over/under the waterbody



# Waters of the United States

- Waters of the US is the term for the scope of waters subject to federal jurisdiction under the Clean Water Act.
- Determining whether a particular aquatic resource is jurisdictional has been the subject of many rulemaking efforts, guidance documents, Supreme Court cases, and other federal court decisions.
- Environmental Protection Agency has final say on what are/are not waters of the US (see AG Civiletti 1979 opinion)
  - ▶ Corps can make determination subject to EPA oversight (see 1989 EPA-Corps MOA: Determination of Geographic Jurisdiction of the Section 404 Program and Application of Exemptions Under CWA Section 404(f)).



# Major Milestones

- 1899 - Rivers and Harbors Act, Section 10
- 1972 - Federal Water Pollution Control Act amended to CWA
- 1975 - NRDC vs. Calloway – all WOTUS (not just navigable)
- 1977 - Regulations & Congressional Amendments; activity exemptions & state assumption
- 1979 - Civiletti opinion on CWA authority
- 1985 - Riverside v. Bayview Homes Supreme Court decision
- **1986 - Consolidated regulations, incl. Migratory Bird Rule**
- 1989 - MOAs with EPA on jurisdiction and enforcement
- **1993 – Prior converted cropland and pilings rule**
- 2000 – Administrative appeals program for approved JDs
- **2001 - *SWANCC v. USACE* Supreme Court decision**
- 2002 - Definition of “fill material” rule



# Major Milestones – Cont'd

- **2003 – 2003 Guidance post-SWANCC**
- **2005 – Joint Memorandum with NRCS**
- **2006 – *Rapanos & Carabell* Supreme Court decision**
- **2007 – 2008 - Rapanos guidance issued and revised**
- 2008 – Definition of “discharge of dredged material” rule
- 2015 – 2015 “Clean Water Rule” (CWR)
- 2016 – Hawkes Supreme Court decision
- **2016 – RGL 16-01 on Jurisdictional Determinations**
- 2017 – Executive Order – reconsider/potentially revise CWR
- 2018 – CWR implementation date extended 2 years
- 2019 – 2019 “Step 1” Rule
- 2020 – Rescission of the 2005 Joint Memorandum with NRCS
- 2020 – “Navigable Waters Protection Rule” (NWPR)
- **2021 – Vacatur of NWPR and return to pre-2015 WOTUS regime.**



# Waters of the United States (WOTUS)

Must meet both factors

1. Exhibits specific physical features

- **Ordinary high water mark** in open non-tidal waters
  - Limit of Corps jurisdiction under Section 404 in open waters
  - Line on shore or bank established by water fluctuations
  - Examples: shelving, soil changes, destruction of terrestrial vegetation, presence of litter and debris, other appropriate means considering surrounding area
- **Wetlands** - appropriate hydrology, soils, and vegetation

2. Meets definition in 33 CFR 328.3(a) (The Rule)

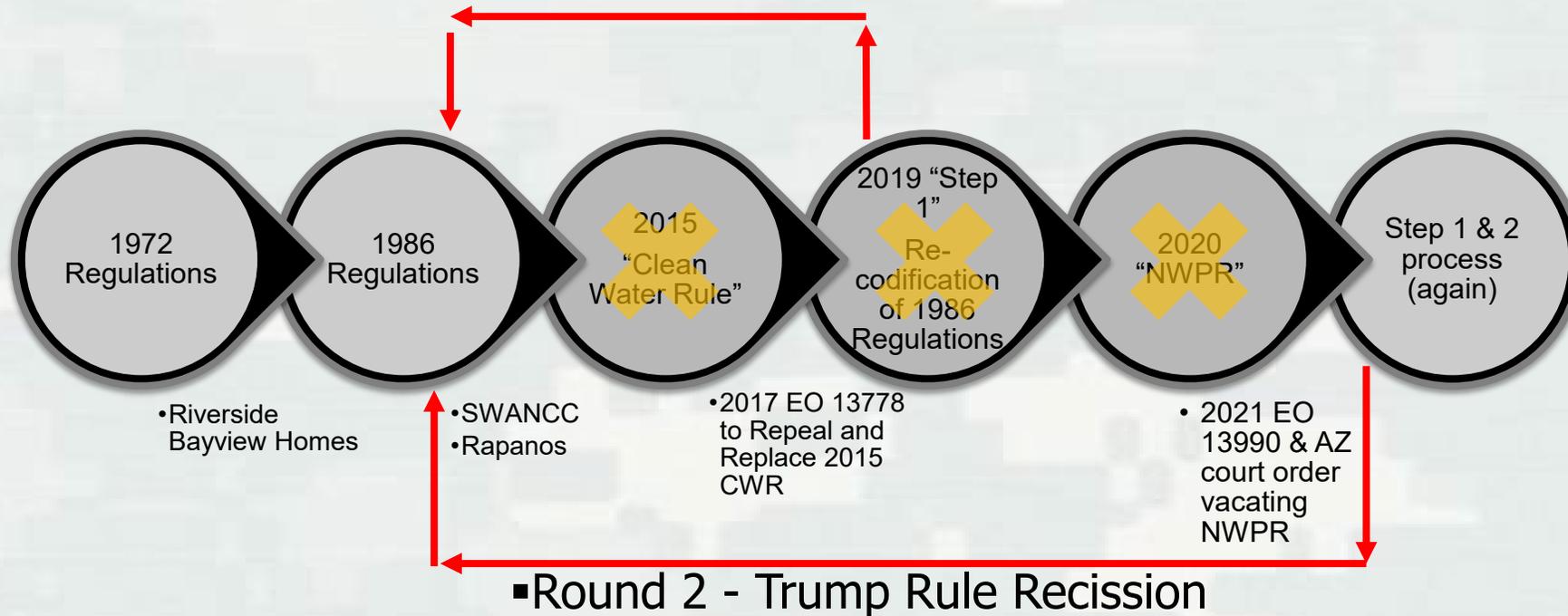
**This item has been subject of extensive litigation & change**



# Here We Go Again

- Basically, back to where we were in 2019 - which itself took us back to 1986 (w/ modifications).

## ▪Round 1 - Obama Rule Recission



# Obvious WOTUS



Perennial ↗



Ephemeral ↘



Intermittent →



# Not so obvious WOTUS



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# Non-JD Water Channel Features



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# Wetlands

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 (33 CFR 328.3 (b)) – may need consultant to ID.



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# Delineation of Waters/Wetlands

- Waters (streams/ponds/lakes) identified via OHWM
  - ▶ National Hydrologic Data features not accurate
  - ▶ Floodplain doesn't mean stream present or JD
  - ▶ Aerial photography helpful but site visit best
- Use of 1987 delineation manual & supplements required for wetlands
  - ▶ National Wetland Inventory inaccurate but useful
  - ▶ Aerial photography helpful
  - ▶ Site visit & data collection best method
- Consultants usually do work & prepare reports addressing waters/wetlands
- Not all features are jurisdictional



# Options for Confirming Delineations

- Approved Jurisdictional Determination
  - ▶ ID all water features (even non-JD)
  - ▶ Substantial additional paperwork
  - ▶ Agency coordination requirements
  - ▶ Appealable
- Preliminary Jurisdictional Determination
  - ▶ ID water features (JD and non-JD)
  - ▶ Corps assumes all waters JD
- Delineation Concurrence
  - ▶ No jurisdictional determination involved
  - ▶ Concludes delineation as “acceptable”
  - ▶ May include “errors”



# Program Information & Contact

- *National Regulatory Program Home Page:*  
<http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx>
- *Fort Worth District Regulatory Home Page:*  
<https://www.swf.usace.army.mil/Missions/Regulatory>
- Fort Worth District (817) 886-1731 – Regulator of the Day
- Chandler J. Peter [chandler.j.peter@usace.army.mil](mailto:chandler.j.peter@usace.army.mil); (817) 886-1736
- *If this program assisted you, please help us improve our services by completing the survey on the following website:* <http://per2.nwp.usace.army.mil/survey.html>



# Speaker Introduction

## **Lisa Soronen**

- ▶ Executive Director
- ▶ (Former) State and Local Legal Center, Washington, D.C.

# *Sackett v. EPA*

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Issue: What is the proper test for determining when “wetlands” are “waters of the United States?”

# Keys to Understanding this Case (if you Aren't a WOTUS Expert)

Designating water as WOTUS matters because local governments (and everyone else) can't "discharge" pollutants into WOTUS without a permit

Permits are expensive, difficult, and time-consuming to obtain (so I have been told)

Wetlands aren't bodies of water with clear and distinct parameters like rivers or lakes so figuring out if they are WOTUS is tricky

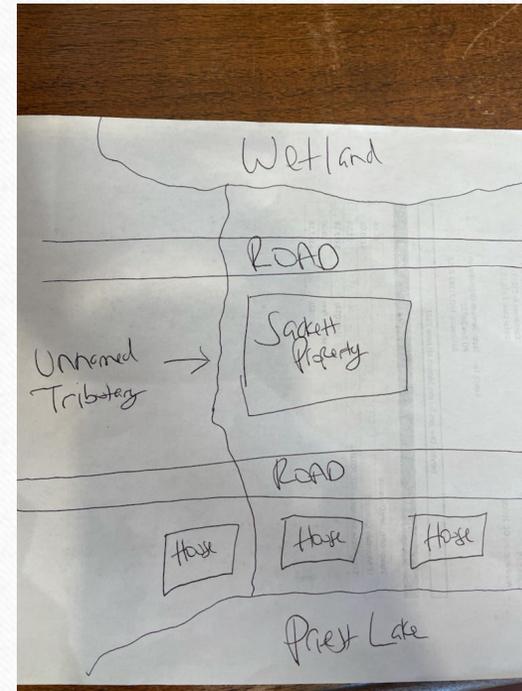
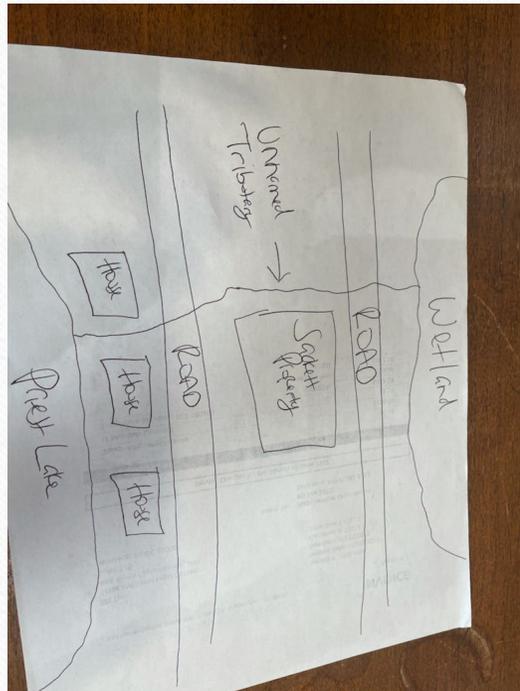
# Why Does This Case Matter to Local Governments?

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They are in the water business (wastewater, drinking water, etc.)!

If they plan to discharge pollutants (defined very broadly) into wetlands, they need to know if those wetlands are WOTUS (and act accordingly)

# I Am No Artist



# United States Version of the Facts

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Sacketts own .63 acres of property near Priest Lake

The parcel is bounded by roads to the north and south

Across the south road is a line of houses fronting Priest Lake, which is about 300 feet from the Sacketts' property

Across the north road "lies the Kalispell Bay Fen, a large wetlands complex that drains into an unnamed tributary" of Kalispell Creek, which in turn feeds into Priest Lake

# United States Version of the Facts

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The unnamed tributary is about 30 feet from Sacketts' property

Historically, the Sacketts' property was part of the larger Kalispell Bay Fen wetland, which drained directly into Priest Lake

Today, the Sacketts' property remains connected to the fen and the lake by "shallow subsurface flow"

## Sackett's Emphasize the Two Roads Between Wetlands and the Lake

- **The Sacketts' property contains no stream, river, lake, or similar waterbody**
- EPA contends that the Sacketts' proposed house requires a Clean Water Act [CWA] permit because: Priest Lake is a navigable water → A non-navigable creek connects to Priest Lake → The non-navigable creek is connected to a non-navigable, man-made ditch → The non-navigable, man-made ditch is connected to wetlands → These wetlands, though separated from the Sacketts' lot by a thirty-foot-wide paved road, are nevertheless "similarly situated" to wetlands alleged to exist on the Sacketts' lot → These alleged wetlands on the Sacketts' property, aggregated with the wetlands across the street, bear a "significant nexus" to Priest Lake.

# Ninth Circuit Adds



Sacketts wanted to build a house on their land, but it was “soggy”



After obtaining permits from the county the Sacketts began backfilling the property with sand and gravel to create a stable grade



The Environmental Protection Agency issued the Sacketts a “formal administrative compliance order” explaining they were violating the CWA and that failure to comply could result in penalties of over \$40,000 per day

Million Dollar  
Question: Is the  
Sacketts' Property  
a Wetland?

What is the definition of wetlands?



# Legal Background: More Details

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The Clean Water Act (CWA) prohibits any person who lacks a permit from discharging pollutants, including rocks and sand, into “navigable waters,” defined as “waters of the United States”

CWA regulations define “waters of the United States” to include “wetlands” that are “adjacent” to traditional navigable waters and their tributaries

# If You Are Feeling déjà vu

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- That is because SCOTUS allegedly already decided the test for determining when “wetlands” are “waters of the United States” in *Rapanos v. United States* (2016)...but the decision was 4-1-4
- 4 Justice plurality (Scalia writes)
- Justice Kennedy wrote alone
- 4 Justice dissent

# Scalia + Three Other Justices “Touch” Rule

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- [O]nly those wetlands with 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, are “adjacent to” such waters and covered by the Act
- Wetlands with only an intermittent, physically remote hydrologic connection to “waters of the United States” . . . lack the necessary connection to covered waters that we described as a “significant nexus”

# Kennedy “Significant Nexus” Rule

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- If wetlands have a “significant nexus” to navigable waters they are “waters of the United States”
- To have a significant nexus wetlands must significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable”

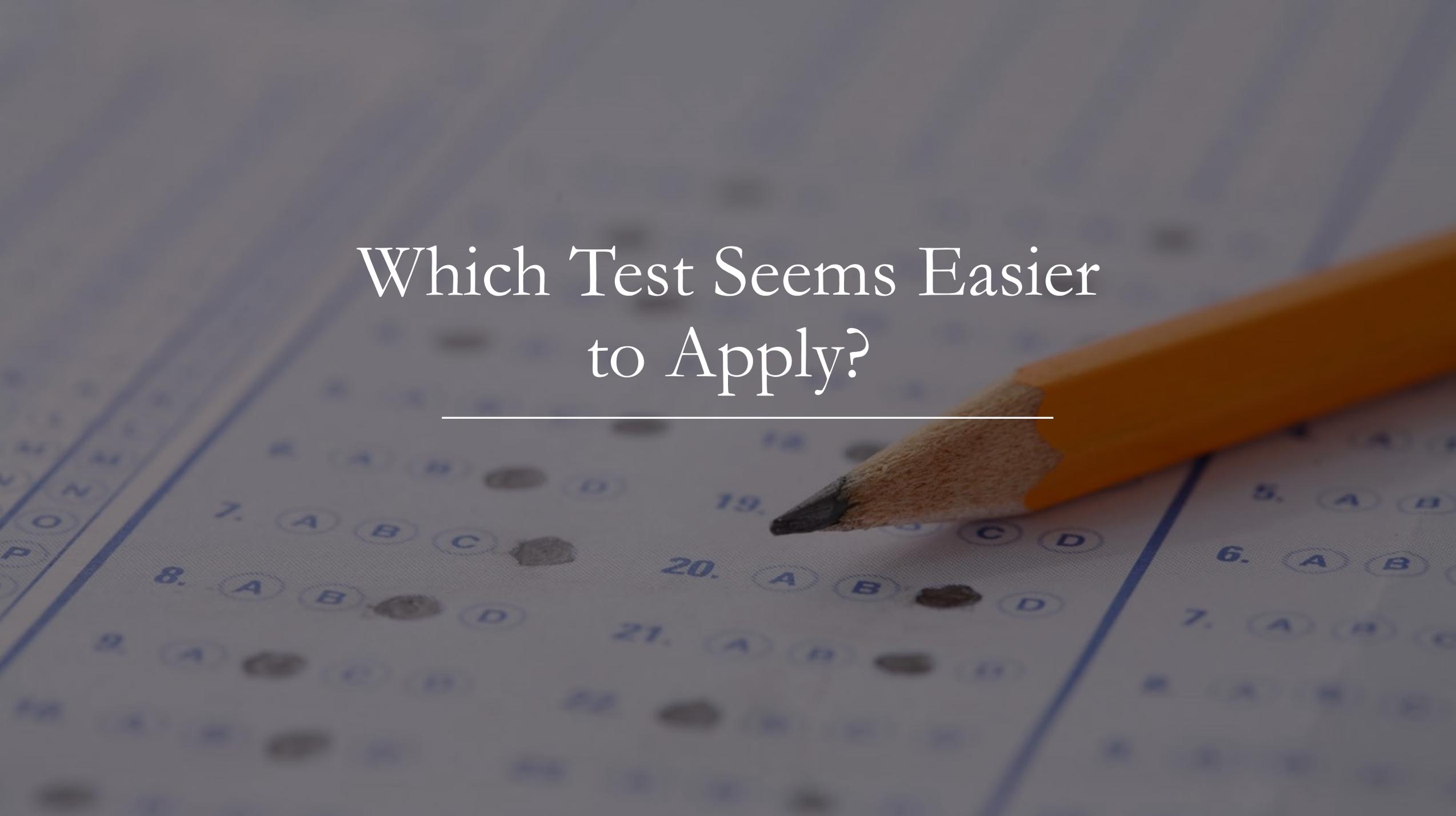
Which Test is More  
Environmentally Friendly?

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# Which Test Seems Easier to Apply?

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# Most Courts Applied the Kennedy Test

Per the Supreme Court in *Marks v. United States* (1977), if there aren't five votes to support one rationale of a Supreme Court case, the holding of the case is "the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases"

According to the Ninth Circuit the Kennedy concurrence supplied the controlling rule in *Rapanos* because if forced to the four dissenting Justices would have joined Kennedy's opinion rather than Scalia's

# Fifth Circuit Applies All Tests?

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- From the cert petition:
  - Meanwhile, the Fourth, Fifth, and Sixth Circuits have taken a somewhat different approach, declining to decide whether a controlling *Rapanos* opinion exists and thus effectively compelling landowners to disprove jurisdiction under the *Rapanos* plurality and significant nexus tests, **as well as (in the Fifth Circuit) the test advanced by the *Rapanos* dissent.** *United States v. Lucas*, 516 F.3d 316, 325–27 (5th Cir. 2008)
- Dissents test would make more wetlands WOTUS than the Kennedy test
- All wetlands in the 5<sup>th</sup> Circuit are WOTUS?!

# Ninth Circuit Applied the Kennedy Test

- “It is clear that the requirements of the Kennedy concurrence and the applicable regulations are satisfied here. The record plainly supports EPA's conclusion that the wetlands on the Sacketts’ property are adjacent to a jurisdictional tributary and that, together with the similarly situated Kalispell Bay Fen, they have a significant nexus to Priest Lake, a traditional navigable water.”
- Under the Scalia test the Sacketts would have won—no **continuous surface connection** between the wetland and the lake—they don’t touch and don’t forget the road

# Sacketts Propose a Two- Part Test

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In my humble opinion it reads like the Scalia's test said more  
articulately and with a longer explanation

# Sacketts Two-Part Test

Step one: is the wetland inseparably bound up with a “water”—i.e., a stream, ocean, river, lake, or similar hydrogeographic feature that in ordinary parlance would be called a “water”—by means of a **continuous surface-water connection**, such that it is difficult to tell where the wetland ends and the “water” begins?

Step two: is the “water” among “the waters of the United States,” i.e., those waterbodies subject to Congress’s authority over the channels of interstate commerce?

# Sacketts Reasons to Get Rid of Significant Nexus Test

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- It is divorced from the statutory text, which mentions no “nexus,” significant or otherwise
- Illogical: makes “whatever affects waters” to be “waters,” thereby inevitably erasing the distinction between water and land
- Improperly makes one statutory purpose—improving water quality—paramount, while ignoring other important Congressional aims, such as preserving traditional state authority over the use and development of land and aquatic resources

# Sacketts Reasons to Get Rid of Significant Nexus Test

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- The significant nexus test is “a **perfectly opaque**” standard, “not likely to constrain an agency whose disregard for the statutory language has been so long manifested”
- The opacity of the significant nexus test raises vagueness and due process concerns which are amplified by the “crushing” civil and criminal penalties that the Act imposes
- By hardly limiting the federal government’s power to regulate any and all waters and wetlands, the significant nexus test raises the same Tenth Amendment concerns

Sacketts  
Reasons  
to Get Rid  
of  
Significant  
Nexus  
Test

Justice Kennedy is gone!

Just kidding the Sacketts  
don't make this argument

But it might be the  
elephant in the room/road

# United States Arguments

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- Explicitly embraces the Kennedy significant nexus test
- Ignore the roads!
- Start of their summary of argument:
- When a wetland is adjacent to another water covered by the CWA, the wetland itself is among the “waters of the United States,” if it satisfies the significant-nexus test in Justice Kennedy’s concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). The mere presence of a berm, levee, or other similar barrier does not defeat CWA coverage.

# United States Arguments

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- Statutory text, structure, and history establish that adjacent wetlands are “waters of the United States” covered by the CWA
- **The continuous-surface-connection test was not briefed in *Rapanos*. And the plurality’s terse discussion of the issue did not elaborate on that test in any detail:** The plurality distinguished a “continuous surface connection” from “an intermittent, physically remote hydrological connection,” but gave little further guidance on the application of its test.
- The significant-nexus test, by contrast, ensures that the CWA covers those adjacent wetlands that significantly affect the chemical, physical, and biological integrity of the Nation’s traditional navigable waters

# United States Argument: Significant Nexus Isn't That Hard to Apply

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- “Petitioners’ amici assert that the continuous-surface connection test is easier to apply than the significant nexus test. But a continuous-surface-connection test would yield hard questions of its own. And any greater simplicity offered by the continuous-surface connection test would come at the expense of arbitrariness and a profound mismatch with the CWA’s design. The significant-nexus test is administrable, and the agencies now have ‘**over a decade of nationwide experience**’ with it. And individuals uncertain about the status of wetlands on their property may obtain, at no cost to them, a **jurisdictional determination** from the Corps.”

# United States Argument: Getting a Permit Doesn't Take That Long, Isn't That Expensive

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- Repeating certain cost estimates cited by the *Rapanos* plurality petitioners assert that the Section 404 permitting process is cumbersome or expensive. Those figures are **overstated**.
- The vast majority of Section 404 authorizations occur under the Corps' streamlined general permits, rather than site-specific permits. Many general permits allow project proponents to discharge pollutants without submitting any application to the Corps. Even for those general permits that require advance notice to the agency, the average processing time for applications is **less than two months**.
- The Corps estimates that the total Section 404 permitting cost for a typical project covered by a nationwide permit requiring advance notice varies from about **\$4,400 to \$14,700**. Those costs to individual dischargers are far outweighed by the public benefits that result from the CWA's protection of wetlands.

# Court Could Reject Both Tests

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And come up with a different test of its own

That is what happened in *Rapanos*?

# Smart Money: Scalia Test

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Our 6-3 conservative Court is more likely to adopt the Scalia test than something new (or the Kennedy test)

Parties don't advocate for different tests

Who likes reinventing the wheel?

# You Can't Lose in the Fifth Circuit!

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From the perspective of a local government that wants LESS (rather than MORE) water to be WOTUS you can't lose this case

SCOTUS isn't going to embrace *Rapanos's* dissent which defines wetlands more broadly than Kennedy's significant nexus test

Sometimes just clarity is best

# Helpful For Local Governments

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- If the Court offer explains in detail when/how the Scalia test (or whatever test it adopts) applies

# *Amicus* Briefs

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- About 30 supporting the Sacketts (touch)
- About 15 supporting the United States (significant nexus)
- SLLC filed a brief in support of neither party
- Why? We have members who like/dislike both tests

# SLLC Brief Argues: Local Government Water Infrastructure Isn't WOTUS

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- Drinking water, water supply, flood control and stormwater management infrastructure includes irrigation canals, aqueducts, reservoirs, flood control channels, infiltration basins and stormwater treatment facilities; isn't WOTUS . . . **even if a wetland might be nearby**

# Timelines

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Oral argument in opening day: October 3, 2022

Listen to the argument live on CSPAN around 11AM Eastern on Oct. 3

Opinion could be issued as late as June 2023

Expect an opinion anytime in March or after

# Questions?



# Overall Discussion and Questions for Speakers

What are your questions or thoughts on WOTUS?

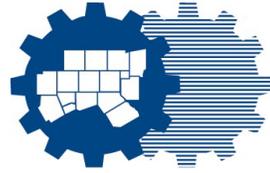


# Wrap-Up

- ▶ If you submitted an RSVP for this webinar, you will receive an email with the presentation slides and a subsequent email with a link to the recording.
- ▶ All webinar slides and recordings are posted on NCTCOG's website under the green banner, "Webinars" here:

<https://www.nctcog.org/envir/natural-resources/water-resources>

- ▶ If you did not RSVP and would like these webinar materials, please email [eberg@nctcog.org](mailto:eberg@nctcog.org).



**North Central Texas Council of Governments**

**Thank you for attending!**

**NCTCOG Webinar  
August 29, 2022**

*Prepared in cooperation with the  
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U.S. Environmental Protection Agency*

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[www.nctcog.org/WaterResources](http://www.nctcog.org/WaterResources)