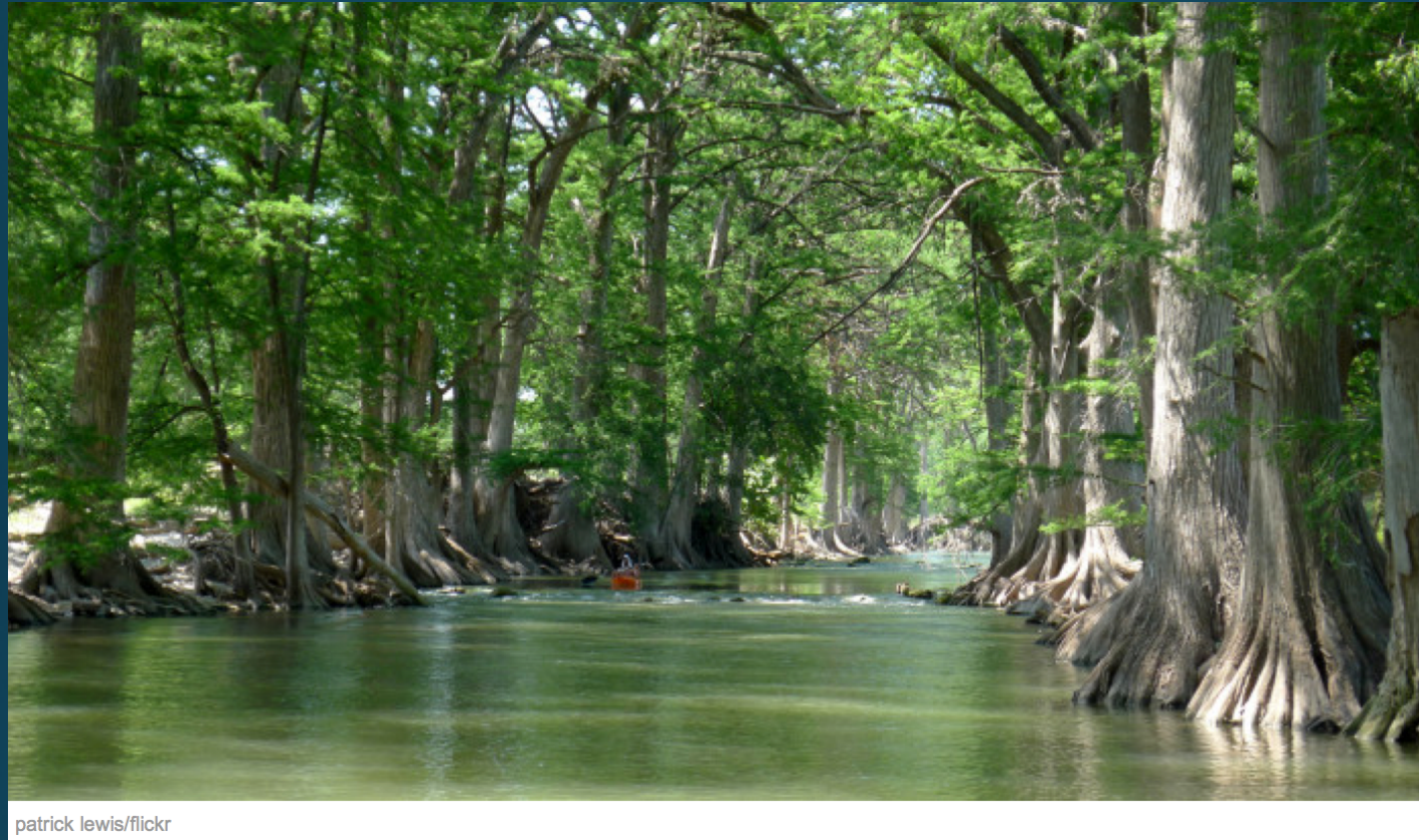


Implications for Agriculture

Waters of the United States and Clean Water Act

James D. Bradbury

Agricultural Law
State Bar of Texas
May 27, 2016
Lubbock, Texas



Historical WOTUS and *Rapanos*



© Paramount





Rapanos

- Resulted in multiple tests proffered to determine what constitutes “waters of the U.S.”
- The Plurality Opinion—Hydrologic Connection
 - Authored by Scalia
 - Most common sense test
 - CWA confers jurisdiction over non-navigable waters only if they exhibit a relatively permanent flow, such as a river, lake, or stream. Wetland is included if there exists a continuous surface water connection between it and a relatively permanent waterbody such that it is difficult to determine where the waterbody ends and the wetland begins.

Rapanos

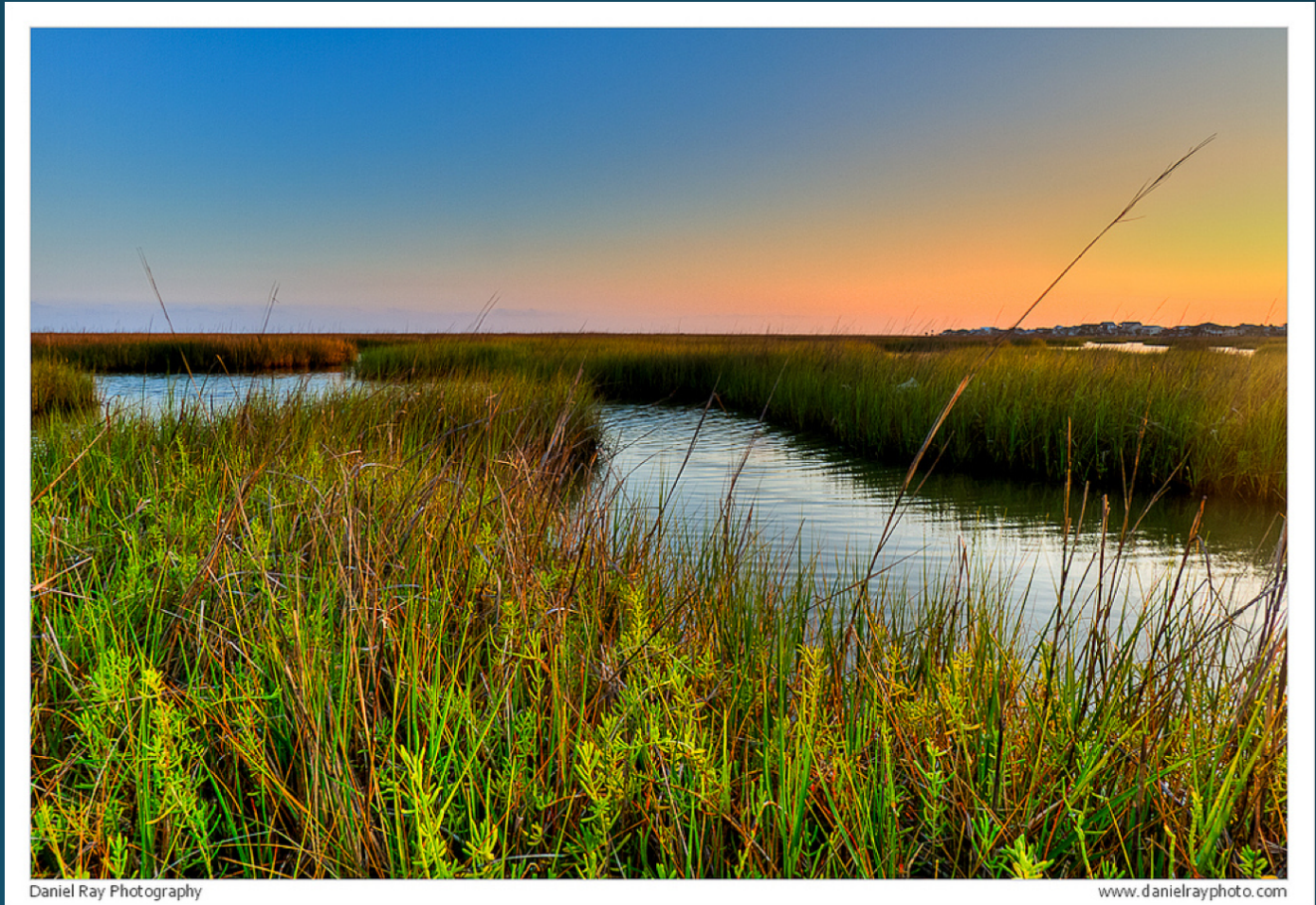
- Justice Kennedy's Concurrence—The Significant Nexus Test
 - Concluded that a wetland or non-navigable waterbody falls within the CWA's ambit if it bears a "significant nexus" to a traditional navigable waterway.
 - Where the wetland or water "either alone or in combination with similarly situated lands in the region, affects the chemical, physical and biological integrity of other covered waters more readily understood as navigable in a fashion that is not speculative or insignificant."
 - Continuous connection is irrelevant—environmental impact to other waters is key.

EPA's Interpretive Rule

- 56 defined Agriculture practices (NRCS) exempted from 404 permits
- No bearing on 402
- Does NRCS take on enforcement role?
- What about substantial but not precise compliance?
- Will this be a disincentive to engage in conservation practices?

Concerns regarding “Waters of the U.S.”

- ❧ EPA and Army Corps have been using an ad hoc method of determining jurisdiction many times in the field for enforcement
- ❧ Jurisdiction is irrelevant unless you know the definition of discharge
- ❧ When CWA was originally passed, land use was critical concern and was left to states. The new rule erodes this protection, making it a State vs. Federal issue.
- ❧ Biggest factor in water quality is adjacent land use



Daniel Ray Photography

www.danielrayphoto.com

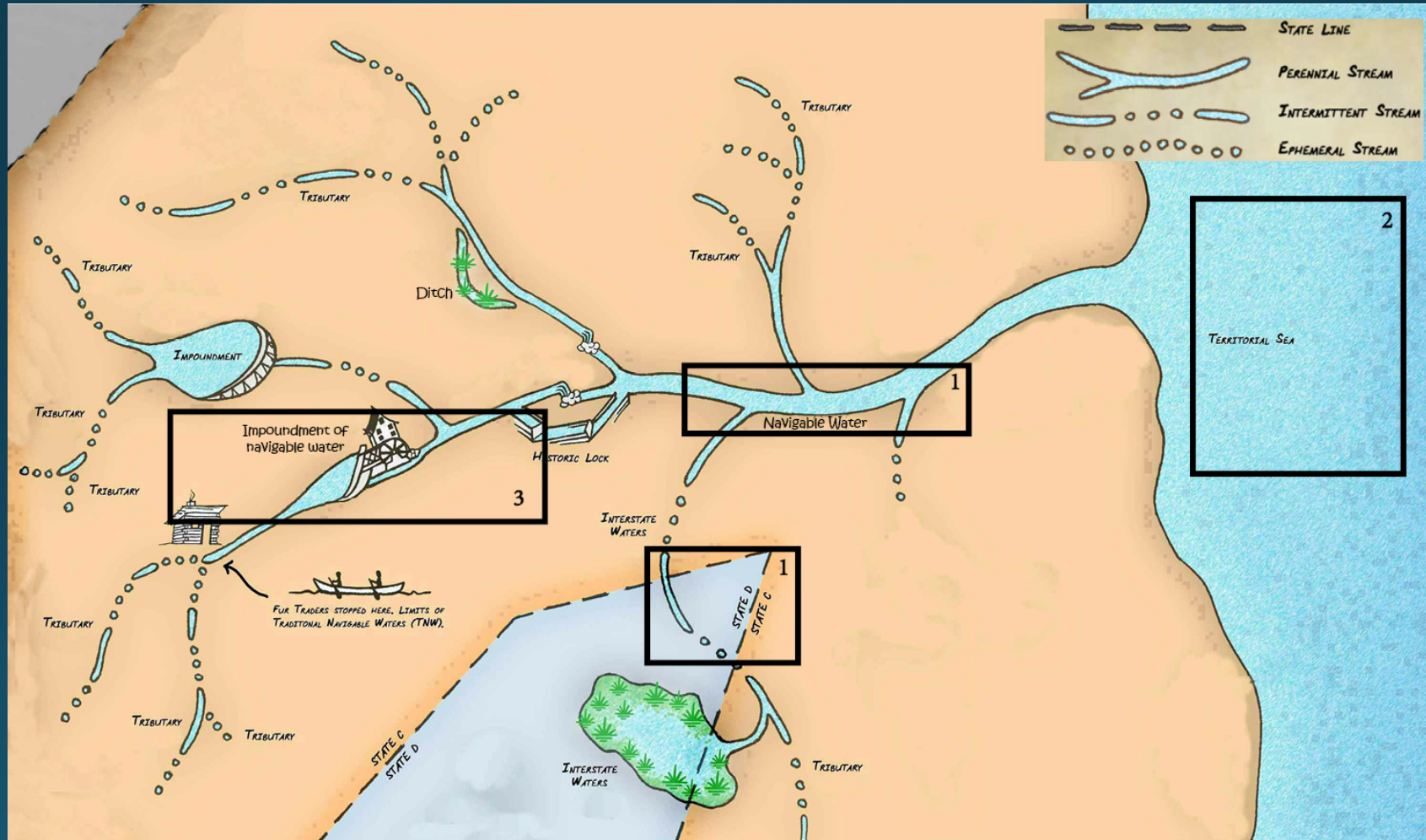
A Moving Target

The New Definition of WOTUS

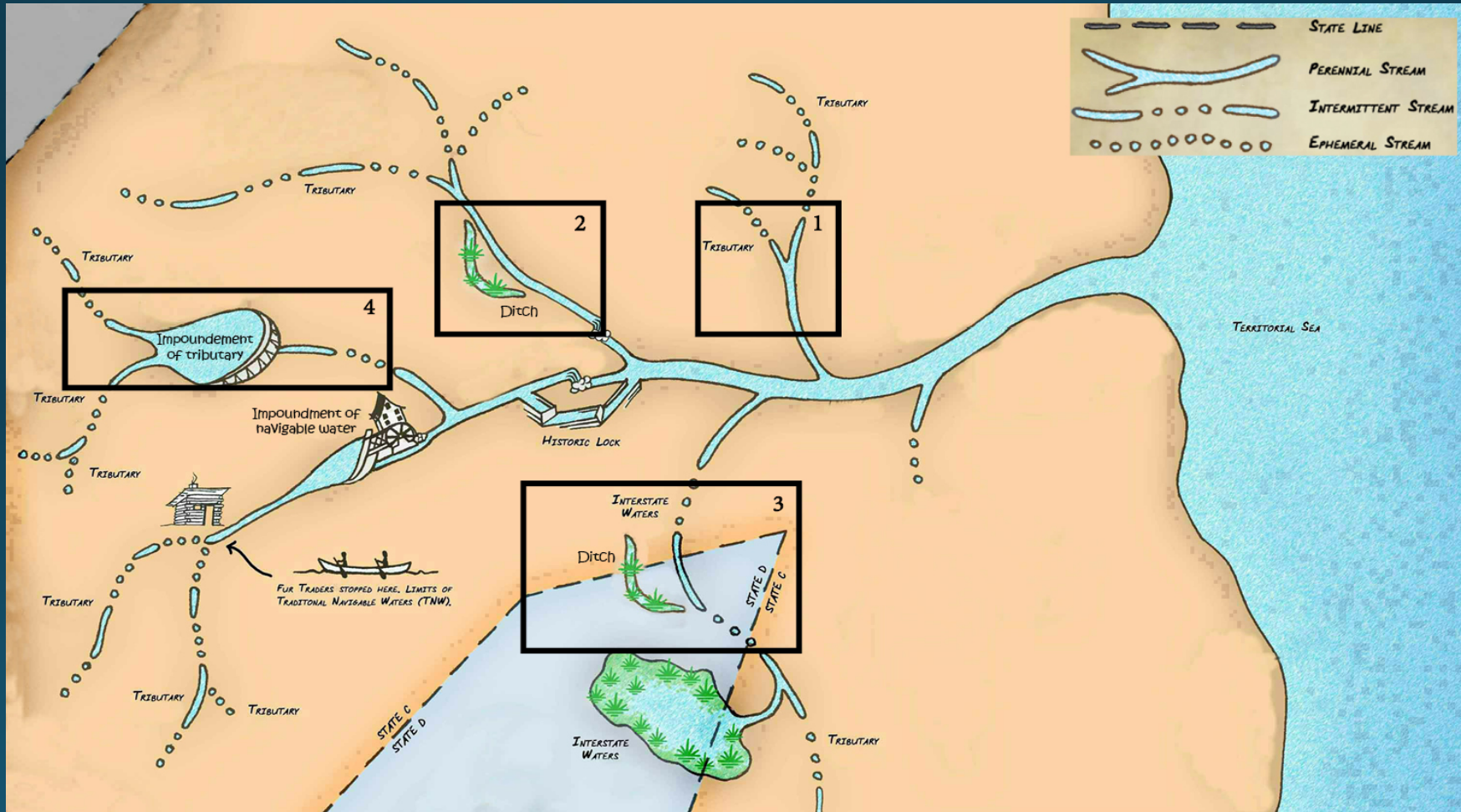
Proposed Clean Water Act Definition of “Waters of the U.S.”

- ❧ Clarification is needed in wake of *Rapanos*
- ❧ EPA and Army Corps of Engineers jointly released new rule to clarify protection under the CWA for streams and wetlands that form the foundation of the nation’s water resources.
- ❧ New Rule adopts “Significant Nexus” test in definition of Waters of the U.S.
- ❧ New Rule was issued on May 27, 2015 and became effective August 28, 2015.

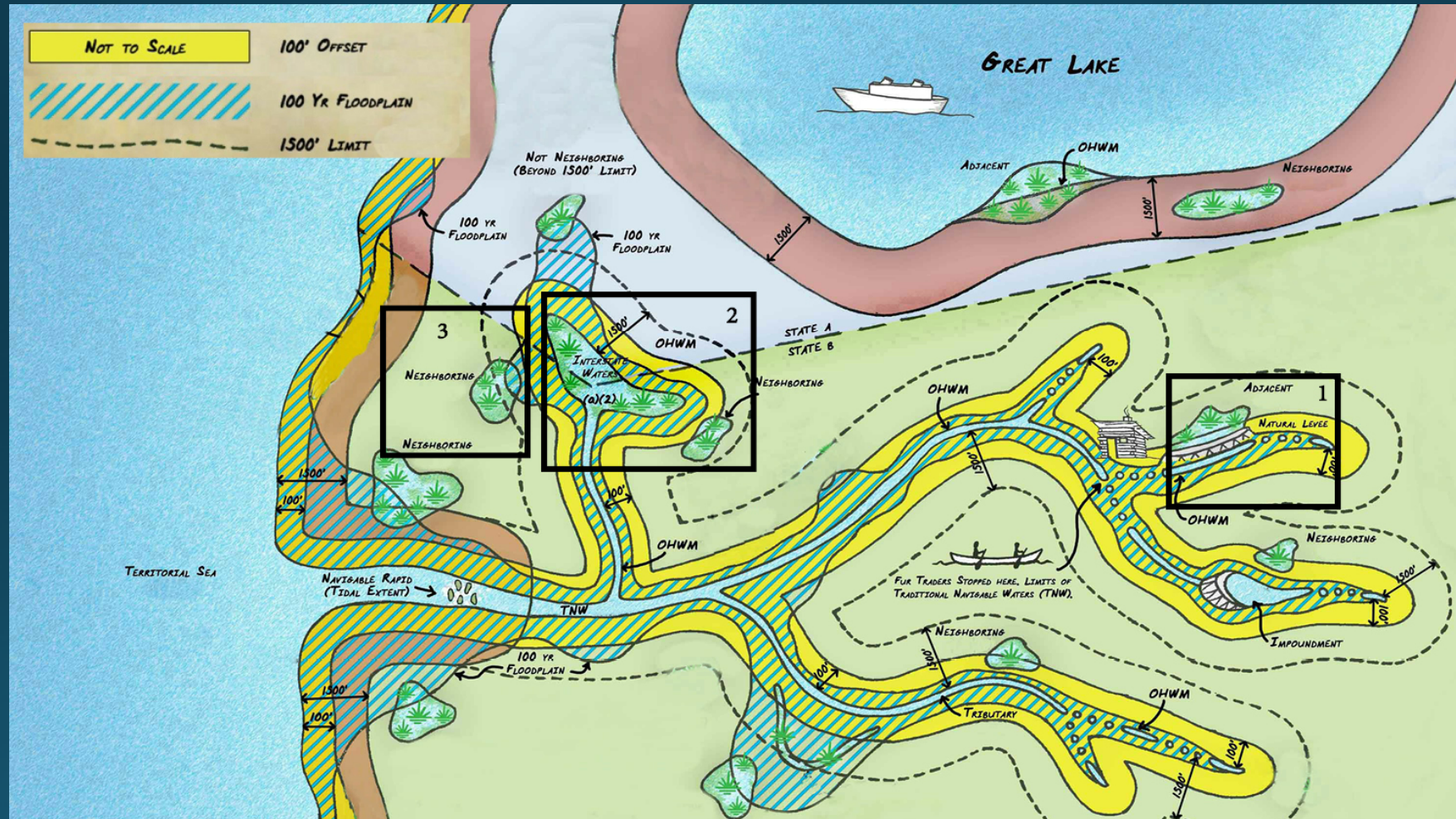
Historically WOTUS



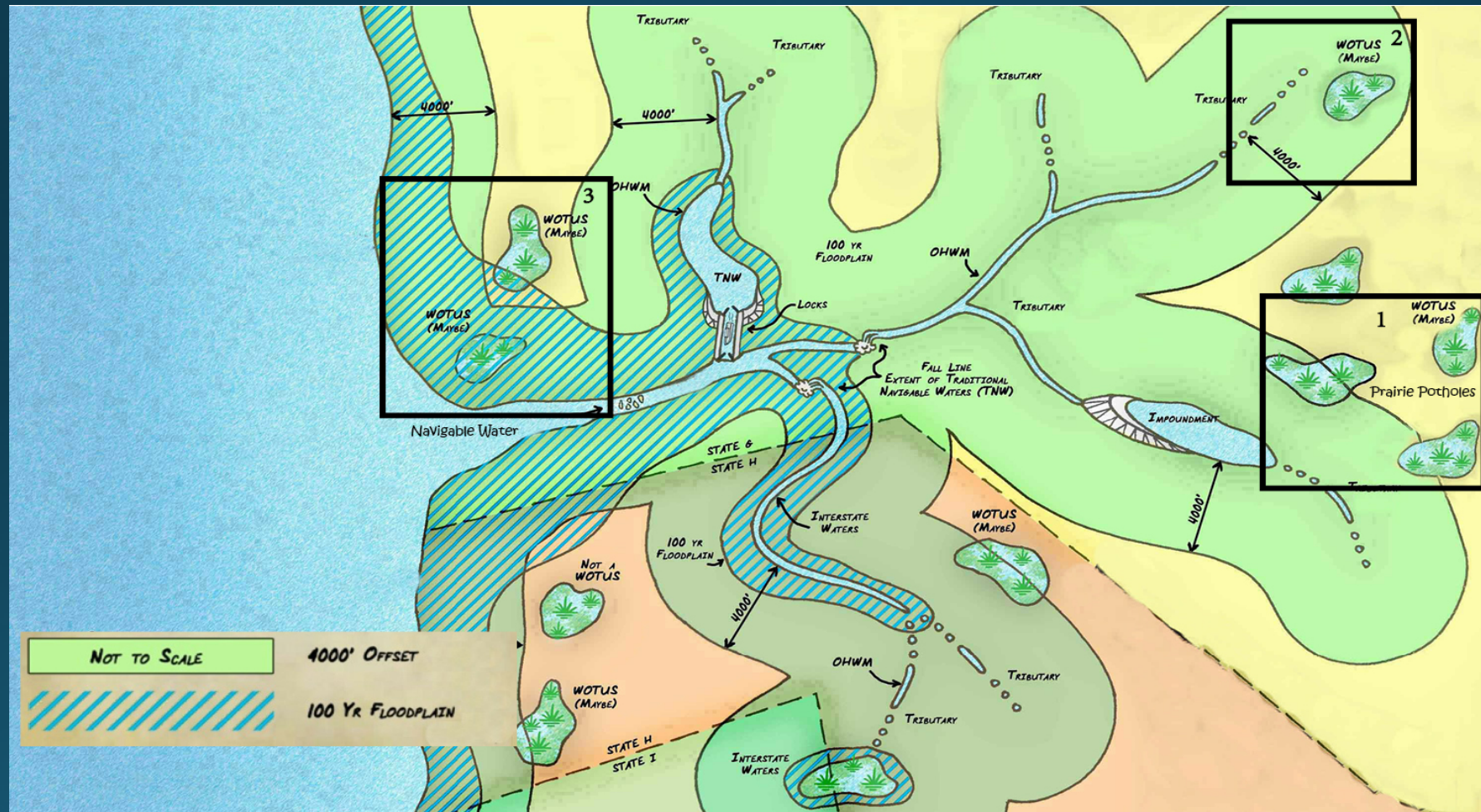
Categorically WOTUS Under New Rule



Adjacent Distances Under New Rule



Significant Nexus WOTUS



Tributaries Under the Proposed Rule

Where the CWA Meets the Pasture

- ❧ Definition of “Tributaries”—Extremely Broad
- ❧ Area of concern for agriculture and beef producers
- ❧ First definition of tributaries and does not clearly define what is covered
- ❧ Includes water that has ordinary high water mark and bed and banks that contributes flow directly or through another water (wetlands, lakes, and ponds)
 - ❧ Also includes ditches
- ❧ Much of dispute is over perennial, intermittent or ephemeral streams
- ❧ EPA has admitted it is impossible to map

Tributaries

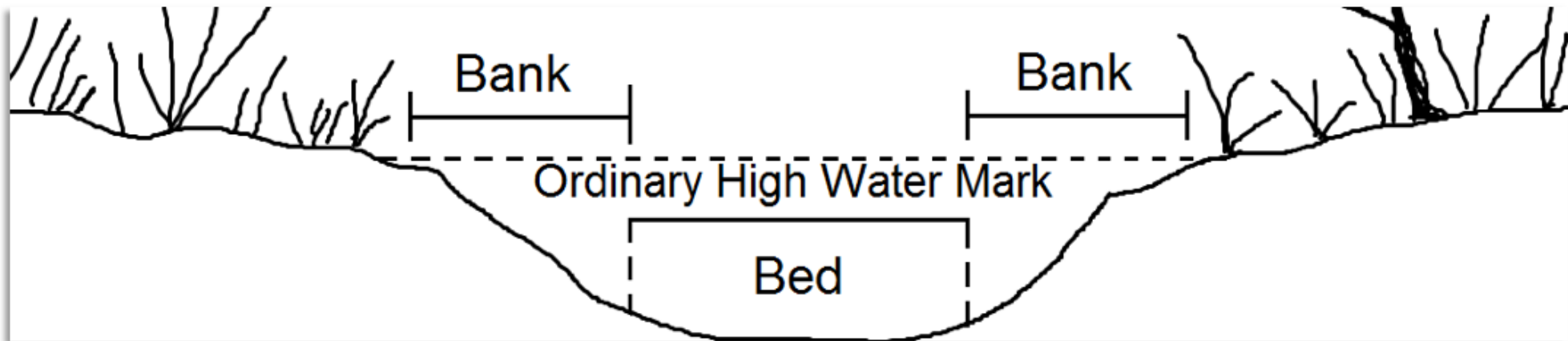
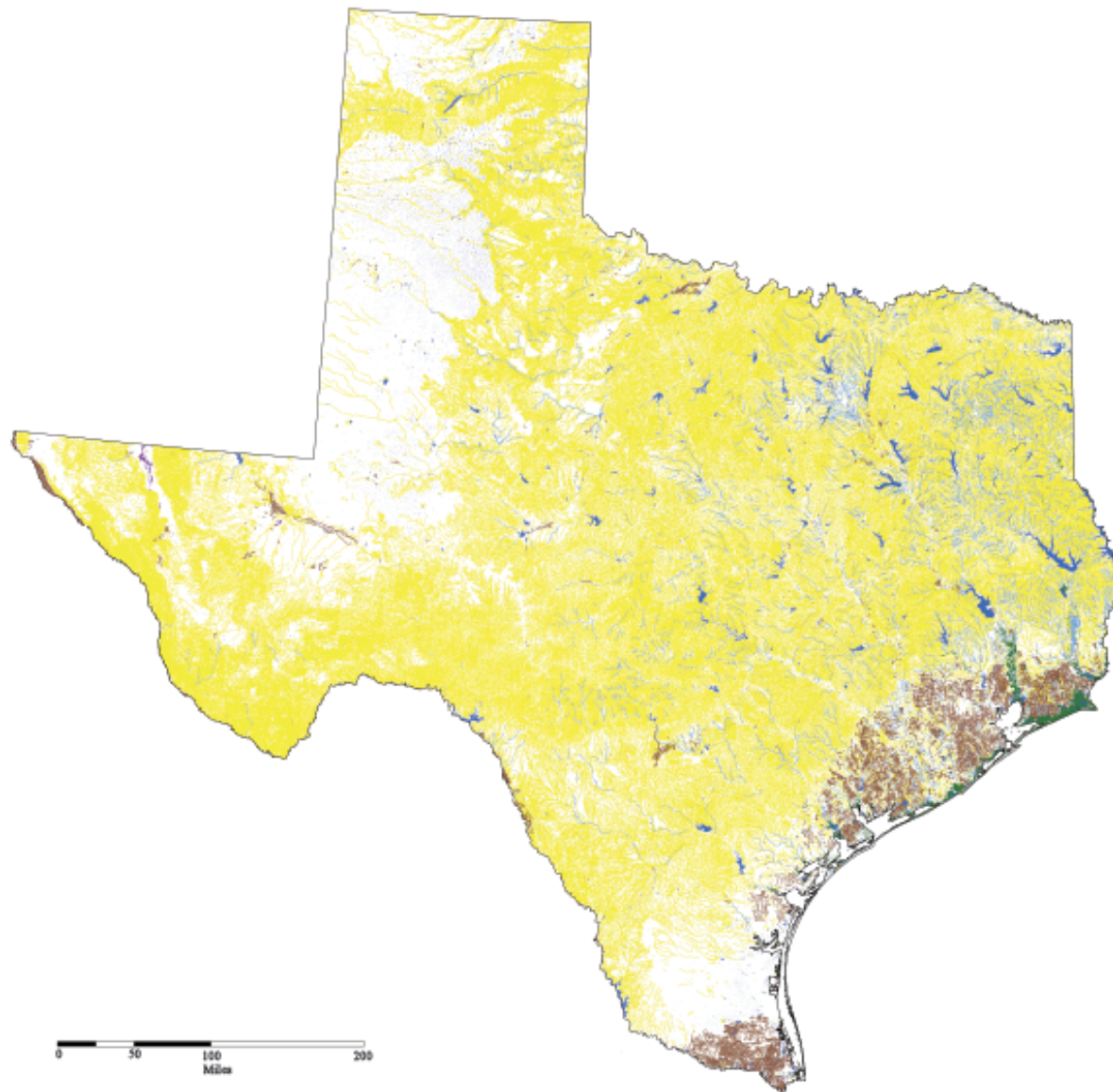


Figure 5. A bed, banks, and ordinary high water mark suggest the presence of a Tributary

EPA Map

STREAMS AND WATERBODIES IN TEXAS

The National Hydrography Dataset



This map displays the pattern of different surface water feature types across the state of Texas, including perennial, intermittent and ephemeral streams. Perennial streams generally contain water throughout the year, except for periods of extreme drought. Intermittent streams contain water for only part of the year, while ephemeral streams flow only in response to precipitation events. Although the intermittent and ephemeral stream classifications are distinguished from each other in the dataset, many ephemeral streams are included in the "intermittent" category. In addition, some ephemeral streams in the Southwest have been classified as washes. Only recently, and mainly on U.S. Forest Service land, have streams been added to the dataset under the "ephemeral" category, so very few streams are indicated as such. The map highlights the distribution of intermittent and ephemeral streams across the state. Of the 1,585,190 miles of linear streams in Texas, 29 percent (454,453 miles) are intermittent or ephemeral. One percent of streams are ditches (20,703 miles), which are not classified by their flow duration in the dataset.

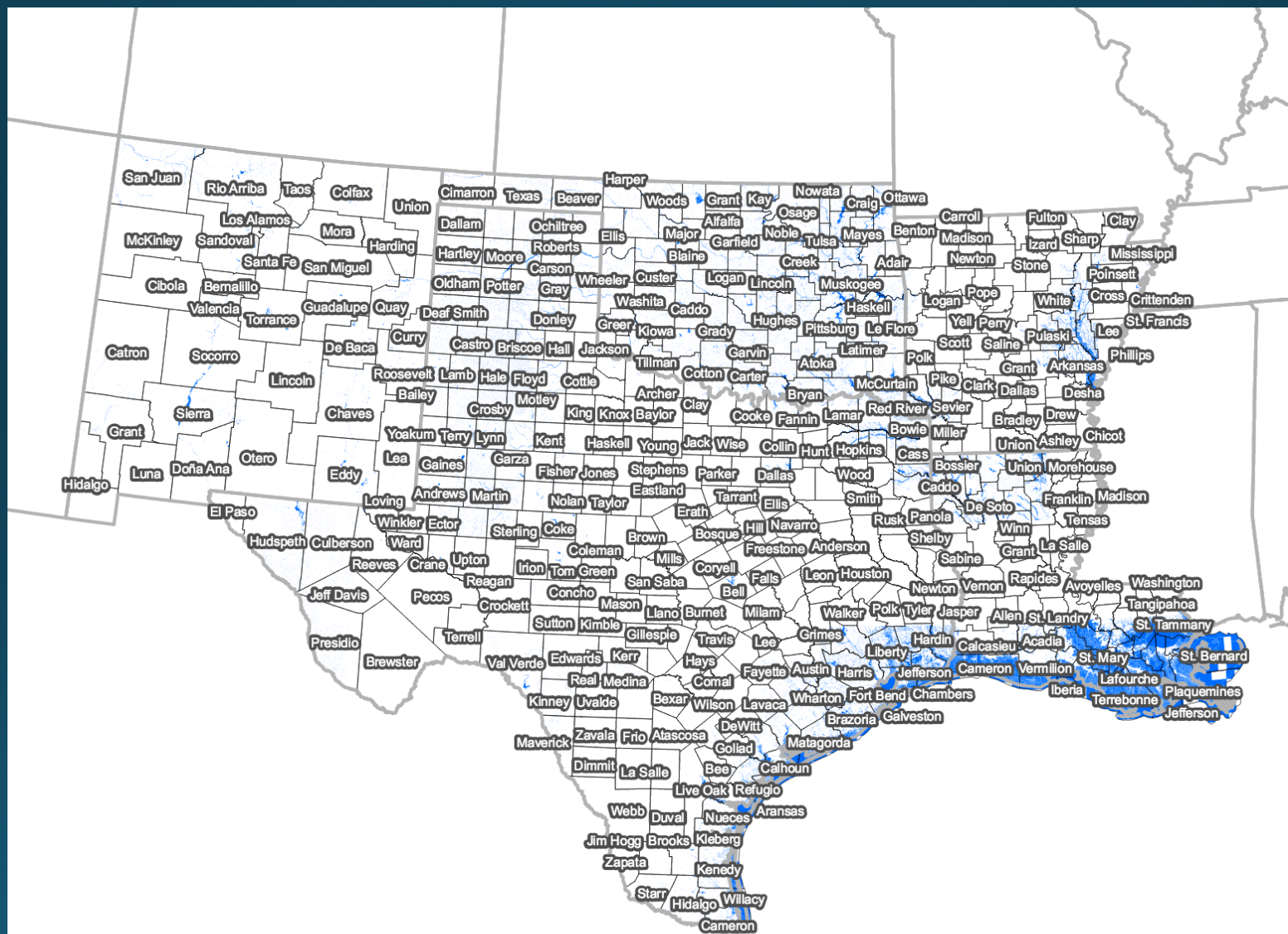
The water features on the map are from the National Hydrography Dataset (NHD) at high resolution (1:24,000 scale or higher) (data current as of October 2009). Many smaller waters are not included in the NHD because they could not be detected on the original aerial photos used to create the dataset or were excluded from the maps from which the dataset originates. The majority of perennial and most intermittent streams are captured at this resolution. However, most ephemeral streams are not captured unless they are in the arid west. Additional information on the NHD can be obtained from the NHD website at <http://nhd.usgs.gov>.

SURFACE WATER FEATURES

- STREAM/RIVER - PERENNIAL
- STREAM/RIVER - INTERMITTENT
- STREAM/RIVER - EPHEMERAL
- STREAM/RIVER - UNCLASSIFIED
- CANAL/DITCH
- LAKE/POND OR RESERVOIR
- SWAMP/MARSH
- PLAYA
- WASH

STATE BOUNDARY

Wetlands



Will CWA Agriculture Exemptions Continue under the Proposed Rule?

- ❧ Agriculture stormwater
 - ❧ Exemptions preserved but can go away depending on facts
- ❧ Fertilizer, manure, and pesticides



Jurisdictional Waters

- ☞ Under existing policy, EPA has jurisdiction over wetlands that are adjacent to jurisdictional waters.
- ☞ Under the proposed rule, EPA has jurisdiction over all waters adjacent to jurisdictional waters.
 - ☞ Much broader than wetlands and allows them to bring in almost any water that may be near jurisdictional water.
- ☞ Impact on Agriculture?
 - ☞ Adjacent and neighboring
 - ☞ Groundwater can be a connector—"shallow subsurface connection"
 - ☞ Riparian and flood plain areas
 - ☞ Playa lakes, prairie potholes
 - ☞ Perennial and occasional wet areas
 - ☞ Ability to build, farm, or move dirt, dig, or disturb
 - ☞ Loss of usable land
 - ☞ Nearly impossible to know for sure—even for field advisor or agency

Jurisdictional Waters

- ⌘ Rule was proposed to clarify “waters of the U.S.” but allows EPA to make case-by-case determinations of jurisdiction
- ⌘ EPA will not map properties—breeds further uncertainty and confusion

What is *NOT* a WOTUS?

- Waste treatment systems (including treatment ponds and lagoons)
- Prior-converted cropland
- Ditches excavated in dry land that do not flow to downstream water (and do not meet definition of tributary)
- Artificially irrigated areas that revert to dry land if not irrigated
- Farm ponds, stock ponds, irrigation ponds, and settling basins constructed on dry land (that do not meet definition of tributary)
- Erosional features that do not meet definition of tributary
- Waters adjacent to WOTUS if they are used for established normal farming or ranching activities (unless significant nexus)

Issues for WOTUS

- EPA Social Media Campaign During Run Up on Rulemaking
 - Government Accountability Office found EPA violated anti-lobbying restrictions by its use of social media in using hyperlinks on its website to connect visitors with third-party external websites run by environmental activists urging the public to contact Congress in support of the WOTUS rule.
 - Investigation is ongoing
- Legislative efforts to withdraw funding have not prevailed

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is putting
our waterways
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WHAT'S
UPSTREAM?

LAMAR

EPA Efforts to Boost Support

- Cooperative Agreement with Northwest Indian Fisheries Commission—"What's Upstream?" Campaign
 - Misuse of EPA funds
 - Lack of appropriate monitoring provisions to advise subaward recipients that use of funds for lobbying activities is prohibited
 - EPA's Office of Inspector General Issued Report in 2014 calling for greater oversight of Cooperative Agreements
- U.S. House Committee on Agriculture requested information and documentation regarding EPA activities on these matters (April 2016)

The Front Lines of Battle
Litigation Over WOTUS



State Lawsuits to Stop Rule Implementation

- On August 27, 2015, North Dakota Federal Court entered injunction stopping implementation of the rule in 13 states
 - Reasoned that EPA likely violated its congressional grant of authority
- Texas, Louisiana, Mississippi and various Texas state agencies sued in both federal district court in Galveston and before the Fifth Circuit Court of Appeals
 - Did not seek injunctive relief until after rule became effective Aug. 28, 2015
- Other similar state lawsuits followed before both district courts and circuit courts

“The Rule allows EPA regulation of waters that do not bear any effect on the “chemical, physical, and biological integrity” of any navigable-in-fact water. While the Technical Support Document states that pollutants dumped into a tributary will flow downstream to a navigable water, the breadth of the definition of a tributary set forth in the Rule allows for regulation of any area that has a trace amount of water so long as “the physical indicators of a bed and banks and an ordinary high water mark” exist. This is precisely the concern Justice Kennedy had in *Rapanos*, and indeed the general definition of tributary is strikingly similar. While the Agencies assert that the definitions exclusion of drains and ditches remedies the defect, the definition of a tributary here includes vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term.”

-Judge Ralph Erickson in Opinion granting Temporary Injunction
Staying Implementation of WOTUS Rule

Agriculture Organizations Join Galveston Lawsuit Against EPA

- American Farm Bureau Federation
- National Cattlemen's Beef Association
- National Corn Grower's Association
- National Pork Producer's Council

District Court vs. Circuit Court Litigation: A Question of Jurisdiction

- Which court is proper jurisdictional forum—Circuit Courts or District Courts?
- Circuit cases were consolidated under the Sixth Circuit Court of Appeals for a determination of jurisdiction
 - Oct. 9, 2015—Sixth Circuit issued a stay of the new rule pending an outcome of the question of jurisdiction
 - Feb. 2016—Sixth Circuit ruled in a split decision that it has exclusive jurisdiction to hear the cases on the Rule
 - Six petitions requesting En Banc consideration of jurisdiction
- Consolidation of District Court cases was considered by Judicial Panel for Multi-District Litigation
 - Ruled on October 13, 2015 that district court cases should not be consolidated in D.C. Circuit
 - District court cases remain in abeyance pending jurisdictional determination by Sixth Circuit

The Jurisdiction Issue

- CWA provides that certain actions of the EPA Administrator are directly reviewable by the U.S. Circuit Courts of Appeal.
- Uncertain whether the agency's action on the new rule is among these specified actions that are directly reviewable by the Circuit Courts.
- Question of whether promulgation of the new rule falls within either of two categories of agency action:
 - Approving or promulgating any effluent limitation or other limitation under sections 1311, 1312, 1316 or 1345 of CWA
 - In issuing or denying any permit under section 1345 of CWA.
- Movants maintain the new rule merely definitional and not within either of these categories of action

Sixth Circuit Claims Jurisdiction

- April 21, 2016—Sixth Circuit denied petitions for En Banc review
- Briefing Commenced
- Will likely go to U.S. Supreme Court

Sixth Circuit Opinion Taking Jurisdiction

Feb. 22, 2016

- By clarifying the definition of “waters of the United States,” the Rule undeniably has the indirect effect of altering permit issuers’ authority to restrict point-source operators’ discharges into covered waters. The alteration invariably results in expansion of regulatory authority in some instances and imposition of additional restrictions on the activities of some property owners. These restrictions, of course, are presumably the reason for petitioners’ challenges to the Rule. Hence, although the Rule is definitional in nature, it is undeniably, in the language of *E.I. du Pont*, a “basic regulation governing other individual actions issuing or denying permits .” – Circuit Judge McKeague
- *National Cotton’s* jurisdictional reach, in my view, has no end. Indeed, the lead opinion even acknowledges that *National Cotton* holds “a regulation that imposes no restriction or limitation is reviewable in circuit court, so long as it affects permitting requirements.” It is a broad authorization to the courts of appeals to review anything relating to permitting notwithstanding the statutory language to the contrary.... Here, the Clean Water Rule defines what waters necessarily require permits, and therefore is undoubtedly a “regulation[] governing the issuance of permits under section 402 [33 U.S.C. § 1342].” *National Cotton*, 553 F.3d at 933. Under this binding authority, the lead opinion properly concludes jurisdiction rests before us under subsection (F). – Circuit Judge Griffin, concurring
- In sum, *National Cotton’s* holding is not as elastic as the concurrence suggests. If this court construes that holding to be so broad as to cover the facts of this case, that construction brings subsection (F) to its breaking point: a foreseeable consequence of the concurrence’s reasoning is that this court would exercise original subject-matter jurisdiction over all things related to the Clean Water Act. Accordingly, I respectfully dissent. – Circuit Judge Keith, dissenting

U.S. Army Corps of Engineers v. Hawkes

The Corps “Jurisdictional Determination”

- Company wanted to mine peat on property
- Nearest jurisdictional water is 120 miles from the property
- Company applied for a permit from the Corps.
- Corps claimed wetlands have “significant nexus” to Red River (jurisdictional water) and issued “jurisdictional determination” to that effect
- Company sued Corps in federal court

U.S. Army Corps of Engineers v. Hawkes

- District Court dismissed the case because jurisdictional determination was not a “final agency action”
- Eighth Circuit reversed
- Corps appealed to U.S. Supreme Court
 - Oral Argument held March 31, 2016
 - Question: Whether the jurisdictional determination is final agency action
 - Two prong test:
 - Does it mark the consummation of the agency’s decision-making process?
 - Does it determine “rights and obligations” or is it an action “from which legal consequences will flow?”

\\ The Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice. //

-Justice Anthony Kennedy,
in Oral Argument for *U.S. Army Corps of Engineers v. Hawkes*

Johnson v. EPA



Johnson v. EPA

❧ Facts

- ❧ Farmer dams small creek across private property to create stock pond
 - ❧ Exemption from CWA
 - ❧ Plan approved by Wyoming
 - ❧ EPA Compliance Order
-
- ❧ Johnson seeks injunctive and declaratory relief that EPA's action is null and void because without jurisdiction
-
- ❧ Case settled in May 2016 with neither side admitting wrongdoing and Johnson agreeing to plant willows by the pond and fence off part of it from livestock.

U.S. v. Lipar

- ❧ EPA sued developer for alleged discharge of pollutants into WOTUS in Spring, Texas
 - ❧ Discharge of dredge or fill material into wetlands
- ❧ Lipar hired engineer to assess CWA application to tract of land before construction
 - ❧ Engineer concluded it was exempt from the CWA because well upstream of jurisdictional waters
- ❧ Court ruled on summary judgment
 - ❧ EPA would take nothing because it could not prove the wetlands were jurisdictional WOTUS
 - ❧ Sanctioned EPA for bringing the case in bad faith
 - ❧ Attorney's fees of Defendants incurred defending against the suit

“Mill Creek and Dry Creek, as the latter’s name suggests, are little more than drainage ditches that conduct water only after a rain—a country boy could easily jump them. The same is true for the three tributaries. They are not permanent waters.”

Judge Lynn Hughes, Opinion on Summary Judgment in *United States v. Lipar*

Duarte Nursery Case

- Duarte hired a man to plow 450 acres on land outside Sacramento, California
- Land consisted of rolling grassland over clay soil that held water when it rained called vernal pools
- Contractor was asked to plow around the pools—some were avoided, some were plowed over, but none were destroyed
- Corps saw plowing and issued cease-and-desist order to Duarte, saying CWA violation
- Lawsuits followed by both Duarte and Corps

Duarte Nursery



The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to \$75,000 per day (\$37,500 for violating the Act and another \$37,500 for violating the compliance order). And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable.

-Justice Samuel Alito, concurring in Sackett v. EPA

“ But the combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA’s tune.”

“Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act.”

“Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase (Waters of US) as an essentially limitless grant of authority.”

-Justice Samuel Alito, concurring in *Sackett v. EPA*

James D. Bradbury, PLLC

Fort Worth ❖ Austin

www.bradburycounsel.com