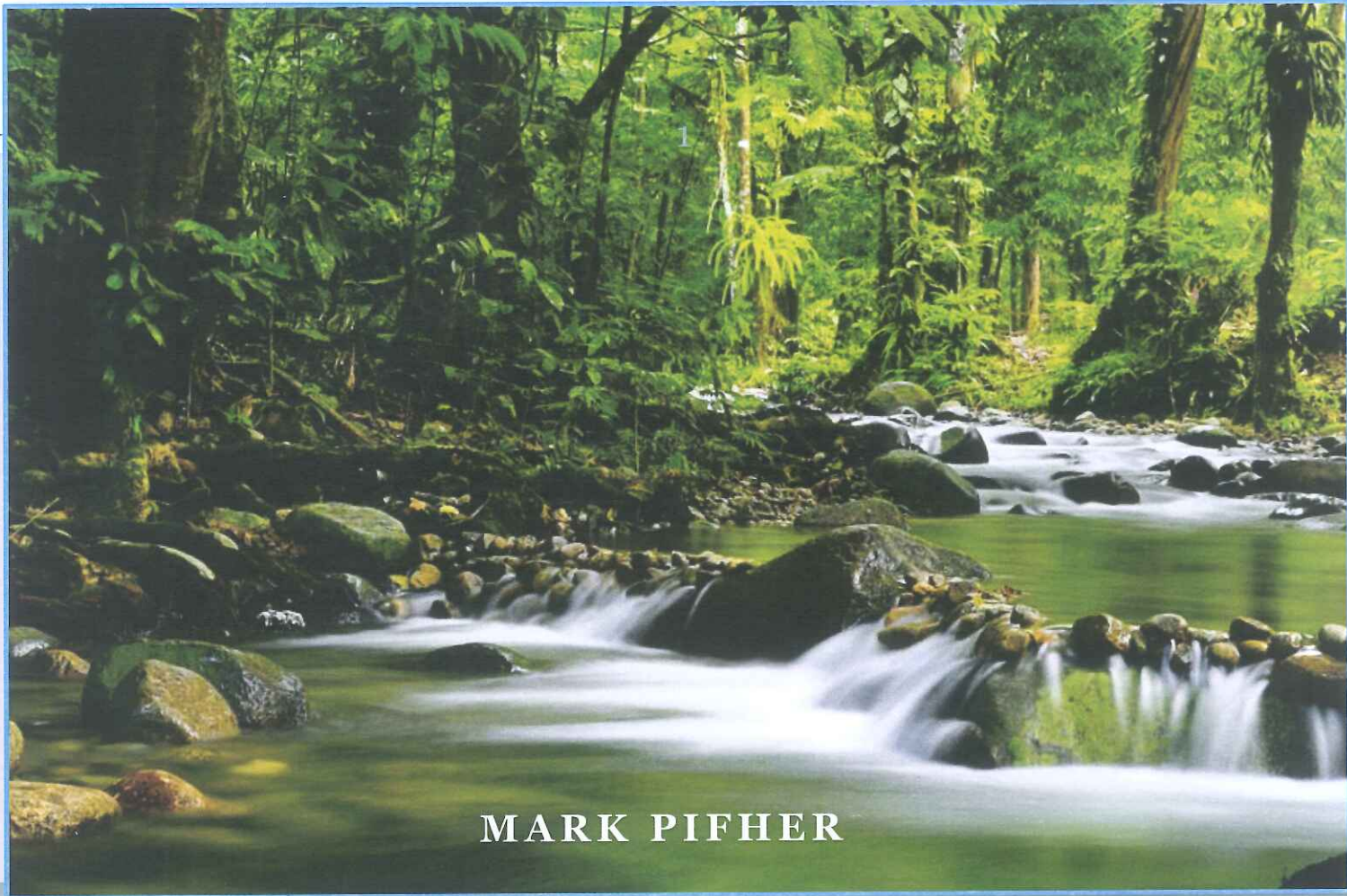


“Waters of the U.S.” Rule



MARK PIFHER

“What Drove Us Here?”



2

- Solid Waste Agency of Northern Cook County (SWANCC) V. Army corps of Engineers (2001); (migratory bird rule)
- Rapanos v. United States (2006); (wetlands that lay near drains or ditches) (4-4-1 opinion)
 - 4 (plurality) (relatively permanent, standing or flowing bodies of water)
 - 4 (dissent) (deference to the agencies and broad interpretation of WOUS)
 - 1 (Kennedy concurrence); (significant nexus must exist)
 - Earlier proposed guidance



“Jurisdictional by Rule” Waters

3

- Traditional navigable waters (TNWs with commerce clause connection)
- Interstate waters and wetlands
- Territorial Seas
- Impoundments of the above (and of tributaries)
- “All” tributaries
- All waters “adjacent” to the above



“Adjacent” Waters

4

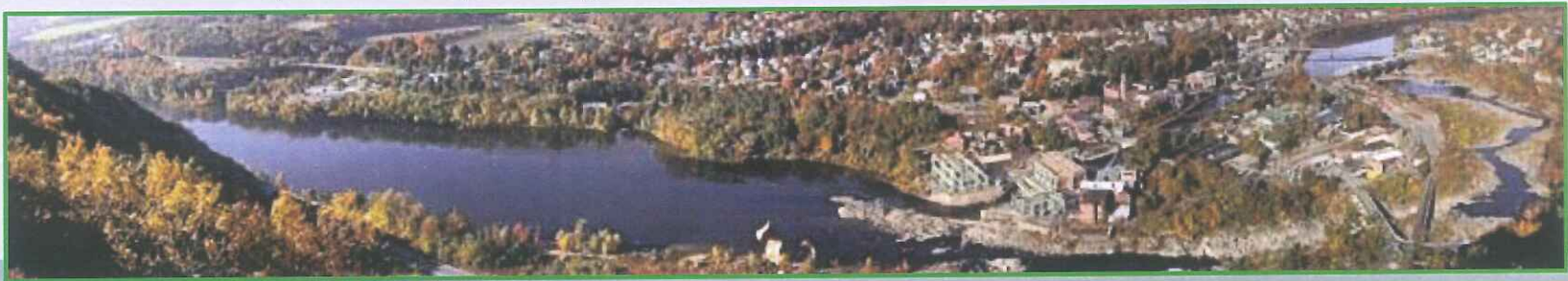
- All waters bordering, contiguous to or “neighboring” TNWs and tributaries
- Includes water separated by constructed dikes or barriers, river berms, beach dunes
- “Neighboring” means (a) within 100 feet of OHWM or (b) within 100 year floodplain out to maximum of 1500 feet from OHWM



“Other waters”

5

- Neither jurisdictional by rule nor categorically excluded
- Determined, on case-by-case basis, to have “significant nexus” to TNW, interstate water or territorial sea
- 2 types of “other waters”
 - 5 identified categories (potholes, bays, pocosins, vernal pools, Texas coastal prairie wetlands)
 - Waters within the 100 year floodplain of jurisdictional water and all waters within 4000 feet of high tide line or ordinary high water mark (OHWM) of a jurisdictional water



“Other waters”

6

- Water has a “significant nexus” when any single function or combination of functions, alone or with similarly situated waters in the region contribute significantly to the chemical, physical, or biological integrity of nearest TNW, interstate water or territorial sea.



“Other waters”

7

- “Functions” include sediment trapping, nutrient recycling, pollutant trapping, retention of flood waters, runoff storage, contribution of flow, export of organic material, export of food resources, provision of life cycle dependent habitat.



“Exemptions”

8

- Waste Water treatment systems
- Prior converted cropland
- Certain ditches
 - Those with ephemeral flow and not a relocated tributary or excavated in tributary
 - Those with intermittent flow and not a relocated tributary, excavated in a tributary, or drain wetlands
 - Those that do not flow, directly or indirectly, into a jurisdictional water



“Exemptions”

9

➤ Certain Features

- Artificially irrigated areas that would revert to dry land
- Artificially constructed lakes and ponds created in dry land
- Artificial reflecting or swimming ponds created in dry land
- Water filled depressions created in dry land incidental to mining or construction activities
- Erosional features, including gullies, rills and other ephemeral features that do not meet the definition of a tributary, non-wetland swales and lawfully constructed grassed waterways

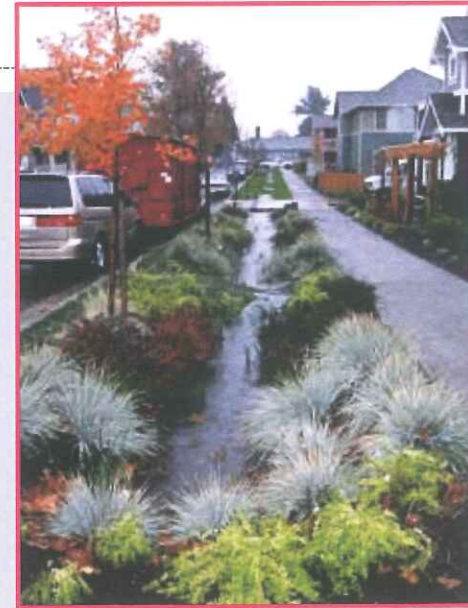
➤ Puddles



“Exemptions”

10

- Ground water
- Stormwater control features created in dry land
- Wastewater recycling structures constructed in dry land, detention and retention basin for recycling, groundwater recharge basins, percolation ponds for wastewater recycling, water distribution structures built for wastewater recycling



Significant Changes/Concerns



11

- Elimination of “isolation” of waters and wetlands based on breaks in jurisdiction (currently reaches upstream of a break in intermittent and ephemeral drainages are considered isolated or lacking a significant nexus)
- All “adjacent” waters are jurisdictional (not just wetlands)
- “Ephemeral” and “intermittent” are undefined with respect to ditches but for cross-reference to use of terms in context of streams; exemption is lost if one redirects a majority of stream’s flow and have ecological impacts.



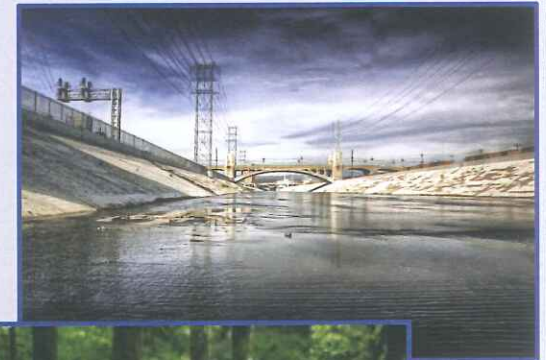
Significant Changes/Concerns

12



CHANGES
AHEAD

- All “tributaries” are WOUS, regardless of intermittent or ephemeral nature (is a “two part” test; bed, bank, OHWM and impact on TNW)
- “Subsurface flow” can establish necessary hydrologic connection, but little guidance on how to make the demonstration (costly)
- Can “aggregate” waters in a watershed for significant nexus purposes; Western water providers may not be on notice of “regional” determination; due to “functions” test, even “lack” of hydrologic connection can establish the nexus (attenuation of flooding)



Significant Changes/Concerns

13

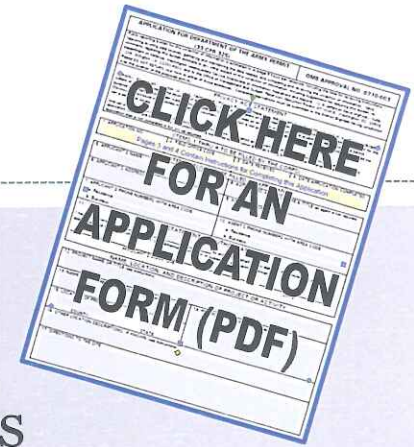


- No specific “Canal” exclusion, only mention in discussion of “tributaries”
- No specific exclusion for “water” systems, including recycling, reuse, recharge systems
- Limitation on stormwater control systems (“in dry land”); problem for post-fire remediation



“Implications”

14



- More section 404 dredge and fill permits
- More section 402 point source discharge permits
- More “individual” v. “nationwide” permits
- More state water quality standards applications, “TMDLs”, 401 certifications
- More NEPA reviews
- More time and cost

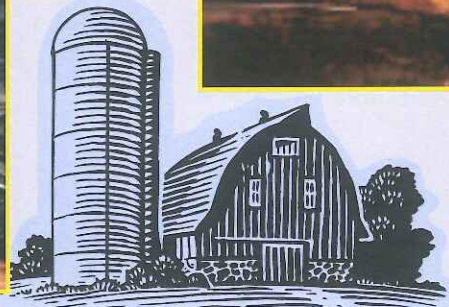


“Next Steps”



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- Implementation Guidance for Clarification
- Legislation (e.g. S.1140)
- Litigation (E.g. >25 states, Farm Bureau, Homebuilders, Manufacturers, Cattlemen’s, Corn Growers, Mining Assn)
 - Violation of APA
 - Violation of CWA
 - Violation of Constitution



Final Corps Comments

- “... the Corps’ recommendations related to our most serious concerns have gone unaddressed. Specifically, the current draft final rule contradicts long-standing and well-established legal principles underlying the Clean Water Act...”
- “That assertion of jurisdiction over every stream bed has the effect of asserting CWA jurisdiction over many thousands of miles of dry washes, and arroyos in the desert Southwest, even though [they] carry water infrequently and sometimes in small quantities”
- “... the Corps had no role in selecting or analyzing the data that EPA used in drafting either document. As a result, the documents [Economic Analysis and Technical Support Document] can only be characterized as having been developed by EPA, and should not identify the Corps as an author....”

Questions/Comments?

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