



# *UPDATE: Waters of the US Rulemaking*

**PBC Water Resources Task Force  
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# What is WOTUS?



- A rule to identify the boundaries of federal jurisdiction under the Clean Water Act and exemptions to federal regulation





# How did we get here?

- Existing Regulatory Definitions and Court Cases are not a Model of Clarity
- Supreme Court Cases
  - *SWANCC* (2001)
  - *Rapanos* (2006)
- Numerous District and Appellate Court Cases
- Multiple Guidance Documents
- 2003, 2008, 2011
- Additional Regulatory Guidance Letters and Inconsistency in Application
  
- \$Million ?'s – What test to use and what is a “significant nexus?”



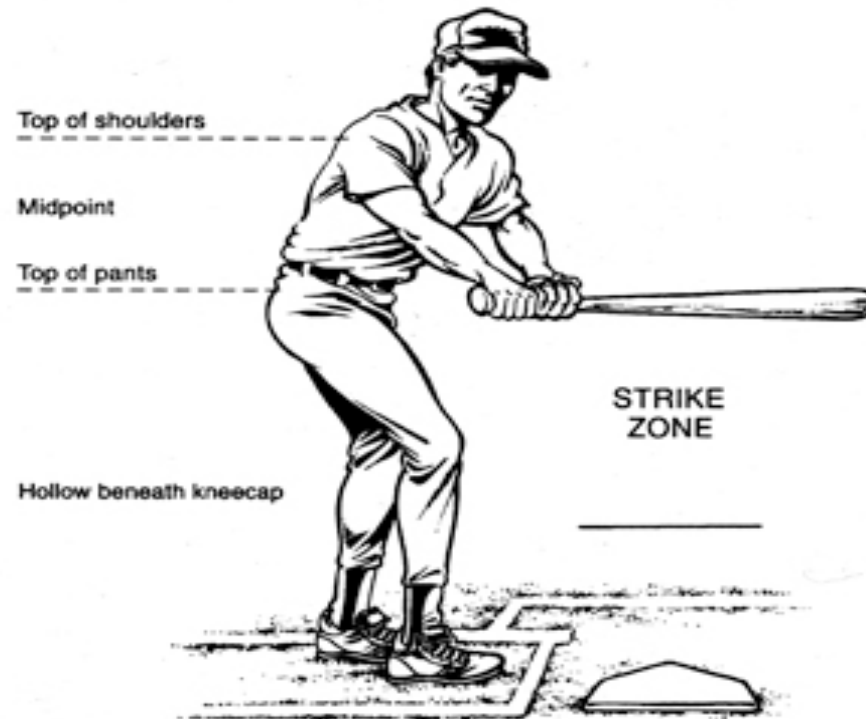


# What is the purpose of the WOTUS rulemaking?

\*\*Clarity (Per EPA Statements)

Possible Impediments:

- 1) National Rulemaking when permitting occurs on a state/local level based on local conditions
- 2) Possible conflict between proposed rule and existing state programs
- 3) Third Party Umpires interpreting EPA "intent"





# What do we seek to avoid?



**SOLUTION:**  
Maintain/clarify  
existing exemptions  
and reaffirm  
previously  
delegated and  
authorized state  
programs...

So...how did the Federal Agencies do?





# Old WOTUS Rule

Waters of the United States means:

- (1) All waters used in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands
- (3) All “other waters” the use, degradation or destruction of which could affect interstate or foreign commerce
- (4) All impoundments of waters otherwise defined as waters of the United States
- (5) Tributaries of (1) – (4)
- (6) The territorial seas
- (7) Wetlands adjacent to/neighboring (1) – (6)

**\*\* Much of the terminology undefined**





# Proposed WOTUS Rule

- (1) All waters used in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands;
- (3) The territorial seas;
- (4) All impoundments of waters;
- (5) “Tributaries” of (1)-(3)
- (6) Waters, including wetlands, adjacent to/“neighboring” (1)-(5)
- (7) Special waters with a “significant nexus”
- (8) Floodplain or Near High Tide Waters with a “significant nexus”

**New Definitions: Tributary, Neighboring, Significant Nexus, Adjacent, Floodplain, Other Waters**





# Narrowly Defined Exemptions – Proposed Rule

- Ditches excavated wholly in uplands and that drain only uplands that have less than perennial flow
- Groundwater, including groundwater drained through subsurface drainage systems
- Gullies, rills and non-wetland swales
- Waste Treatment Exemption (Original Language)
- Prior Converted Cropland







# Final WOTUS Rule – What Changed?



“

*I am under no obligation to make sense to you.*



- Neil DeGrasse Tyson -

”  
OkDay.com





# What's Definitely In...

- (1) All waters used in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands;
- (3) The territorial seas;
- (4) All impoundments of waters;
- (5) Tributaries of (1)-(3);
- (6) Waters, including wetlands, adjacent to/“neighboring” (1)-(5)





# What are “Tributaries?”

- Water with a bed, a bank, and a ordinary high water mark which contributes flow directly or indirectly to a water in (1)-(3), or even without a bed, bank, or OHWM if they contribute flow to water in (1)-(3).
- *BUT*, a water doesn't lose its tributary status if for any length there are one or more man-made breaks (such as culverts or dams) or natural breaks (such as wetlands) so long as a bed, bank and OHWM can be identified upstream of the break.
- *BUT*, a tributary can be natural, man-altered, or man-made and includes ditches not excluded elsewhere.
- **IF** a ditch meets a categorical exclusion it is **NOT** a WOTUS, no matter what.





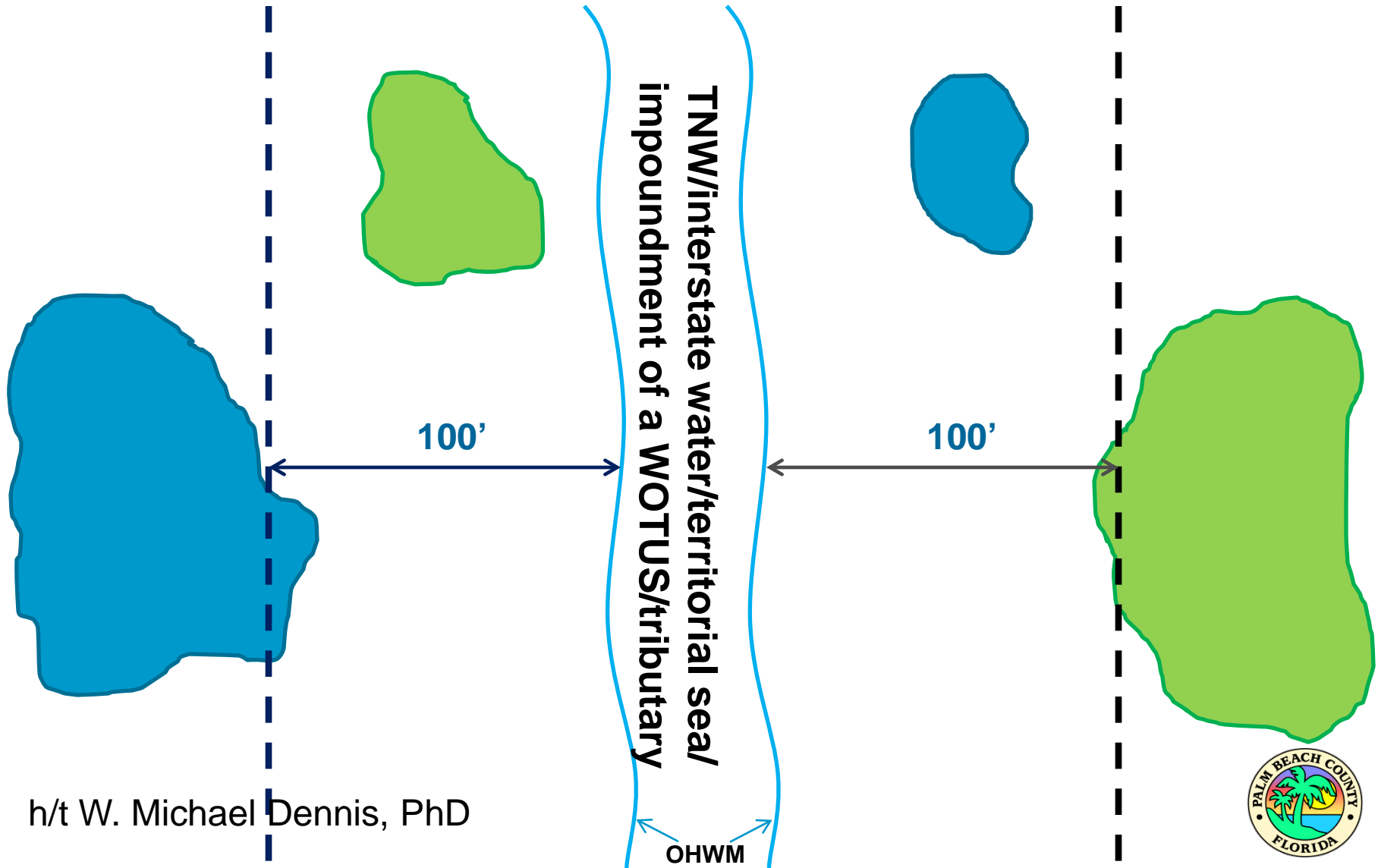
# What is “Adjacent?”

- Adjacent means bordering, contiguous or neighboring (existing definition);
- Neighboring means:
  - All waters located within 100’ of OHWM of waters in (1)-(5);
  - All waters located within 100-year floodplain of waters in (1)-(5) and not more than 1500’ from OHWM of such water;
  - All waters within 1500’ of the high tide line of a water in (1)-(3)





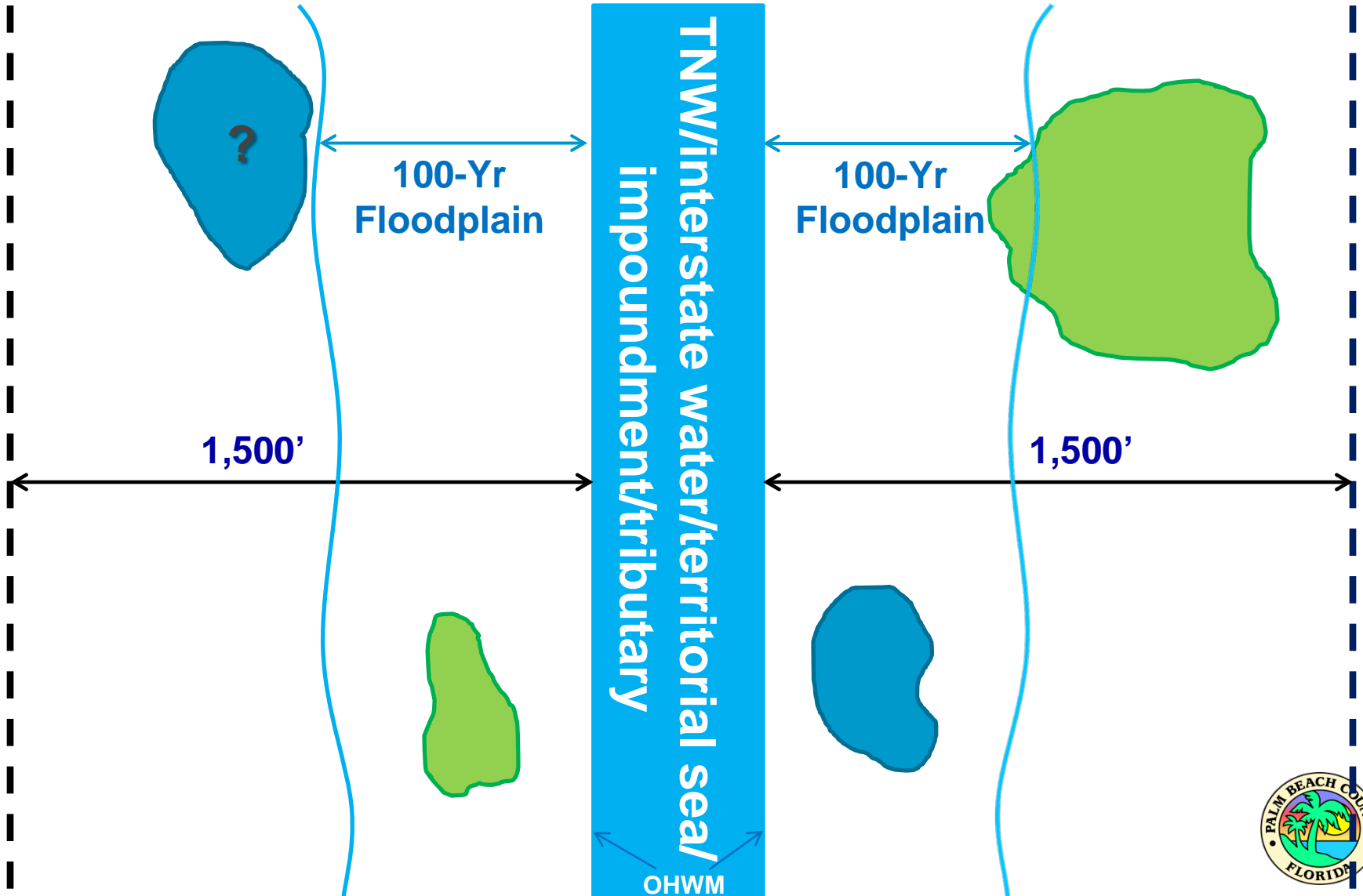
# Adjacent Waters (Neighboring)



h/t W. Michael Dennis, PhD



# Adjacent Waters (100-Year Floodplain)





# Categorical Exclusions

- Waste Treatment Systems, including treatment ponds and lagoons
- Prior converted cropland, as determined by EPA
- Ditches:
  - Ephemeral Flow ditches
  - Intermittent Flow ditches, unless it drains a wetland
  - Ditches that do not contribute flow, either direct or indirect, to surface water in (1)-(3)
- The following:
  - Artificially irrigated areas that would revert to natural conditions if irrigation stop;
  - Artificial lakes and ponds, including farm and ranch ponds, irrigation ponds, settling basins, and cooling ponds;
  - Groundwater;
  - Puddles;
  - Stormwater control features created in dry land;
  - Wastewater recycling structures constructed on dry land, including retention basins, recharge basins, percolation ponds, and water distributary structures.





# Waters that have a Significant Nexus

1. Prairie Potholes, Carolina and Delmarva Bays, Pocosins, Western Vernal Pools, Texas Coastal Prairie Wetlands with a significant nexus to a (1)-(3) water; and
2. All waters within the 100-year floodplain of a (1)-(3) water and all waters located within 4,000' of the high tide line or OHWM of a (1)-(5) water.







# What is a “Significant Nexus?”

- Water that alone or in combination with out similarly situated waters in the region significantly affects the chemical, physical, or biological integrity of a (1)-(3) water that is not speculative or insubstantial.
- Similarly Situated Waters are those that are sufficiently alike and are sufficiently close.
- Factors for evaluating significant nexus:
  - Sediment trapping
  - Nutrient recycling
  - Pollutant trapping, transformation, filtering, and transport
  - Retention and attenuation of flood waters
  - Runoff Storage
  - Contribution of flow
  - Export of organic matter
  - Provision of life cycle dependent habitat





# How New Definition of WOTUS will Affect Permitting Processes

- How to delineate??
  - Ditches
  - Ephemeral tributaries
  - Floodplains
  - Riparian areas
  - Adjacent wetlands
- Expanded considerations for alternative analysis
- Expanded considerations for avoidance and minimization
- Increased compensatory mitigation??

**Lots of Room for Discretion by Federal Agencies!**

**So...**

Florida = 100 year flood plain  
100 year flood plain = significant nexus  
Significant Nexus = WOTUS  
Florida = WOTUS?? (h/t Greg Munson)

**Exclusions CRITICAL**

**Substantial Changes to Final Rule  
From the Proposed Rule**

**How to handle Jurisdictional  
Determinations? Previously  
permitted systems?**

**Preamble Guidance?**





# Current Events / Next Steps

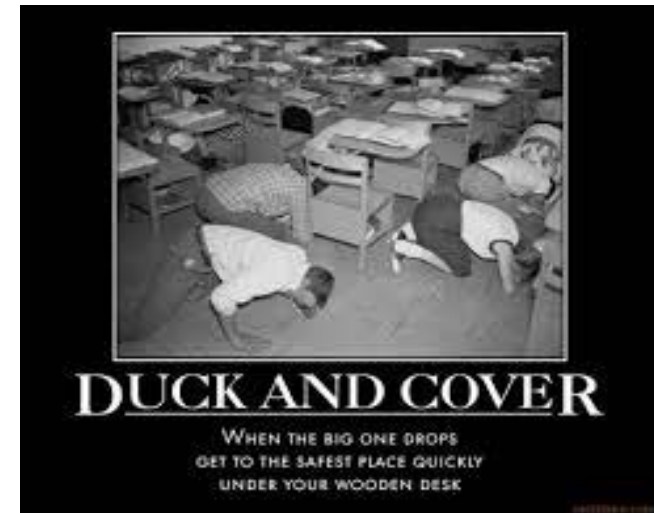
- Rule Published in Federal Register
  - 6/29/15 – Effective Date 8/28/15
- Rule Challenges! – 9 at present
  - 27 States have filed or joined lawsuits against the rule, including Florida (5)
  - Industry and Business Groups have also filed (4)
- Legislative Action
  - HR 5078, HR 1732, S. 1140 and similar legislation that will prohibit implementation of the rule or defund agency implementation
  - Resolution of Disapproval under Congressional Review Act (Only 1 of 43 has been successful)
  - Letter Demanding Legal Basis for Rule





# What can YOU do?

- Work with Industry/Interest Groups to Identify Ambiguities/Issues or Positive Impacts of the Rule
- Articulate Examples of Uncertainty / Possible Unintended Consequences of Rule Application
- Contact Congressional Offices and Region IV EPA / Jacksonville District USACE
- DUCK / HOLD ON...





# One Last Thought...

In the *Rapanos* case in 2006, Justice Roberts made a point of berating the government for failing to engage in rulemaking, while also emphasizing that the rule would receive strong judicial deference.

*Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer. Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority.*

*The proposed rulemaking went nowhere. Rather than refining its view of its authority in light of our decision in SWANCC, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.*

*It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. What is unusual in this instance, perhaps, is how readily the situation could have been avoided.*





# Questions?



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