

**North Central Texas Council of Governments**

# How the U.S. Supreme Court Shaped the Definition of WOTUS and What It Means Going Forward

**NCTCOG Webinar  
August 22, 2023**

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

Elena Berg, NCTCOG  
[eberg@nctcog.org](mailto:eberg@nctcog.org)



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

# Procedures for Webinar

- ▶ The webinar is being recorded and will be posted to NCTCOG's website under the green banner called "Webinars" here:

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

- ▶ 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

- ▶ **Presentation**

- ▶ Analysis and Implications of the U.S. Supreme Court Ruling, *Sackett v. EPA*

- ▶ **Questions for Speakers**

- ▶ **Wrap-Up**

# Introduction of Speakers

## Andre Monette

- ▶ Partner
- ▶ Best Best & Krieger, LLP
- ▶ Washington, D.C.

## Rebecca Andrews

- ▶ Partner
- ▶ Best Best & Krieger, LLP
- ▶ Houston/San Diego

## Lowry Crook

- ▶ Partner
- ▶ Best Best & Krieger, LLP
- ▶ Washington, D.C./Houston

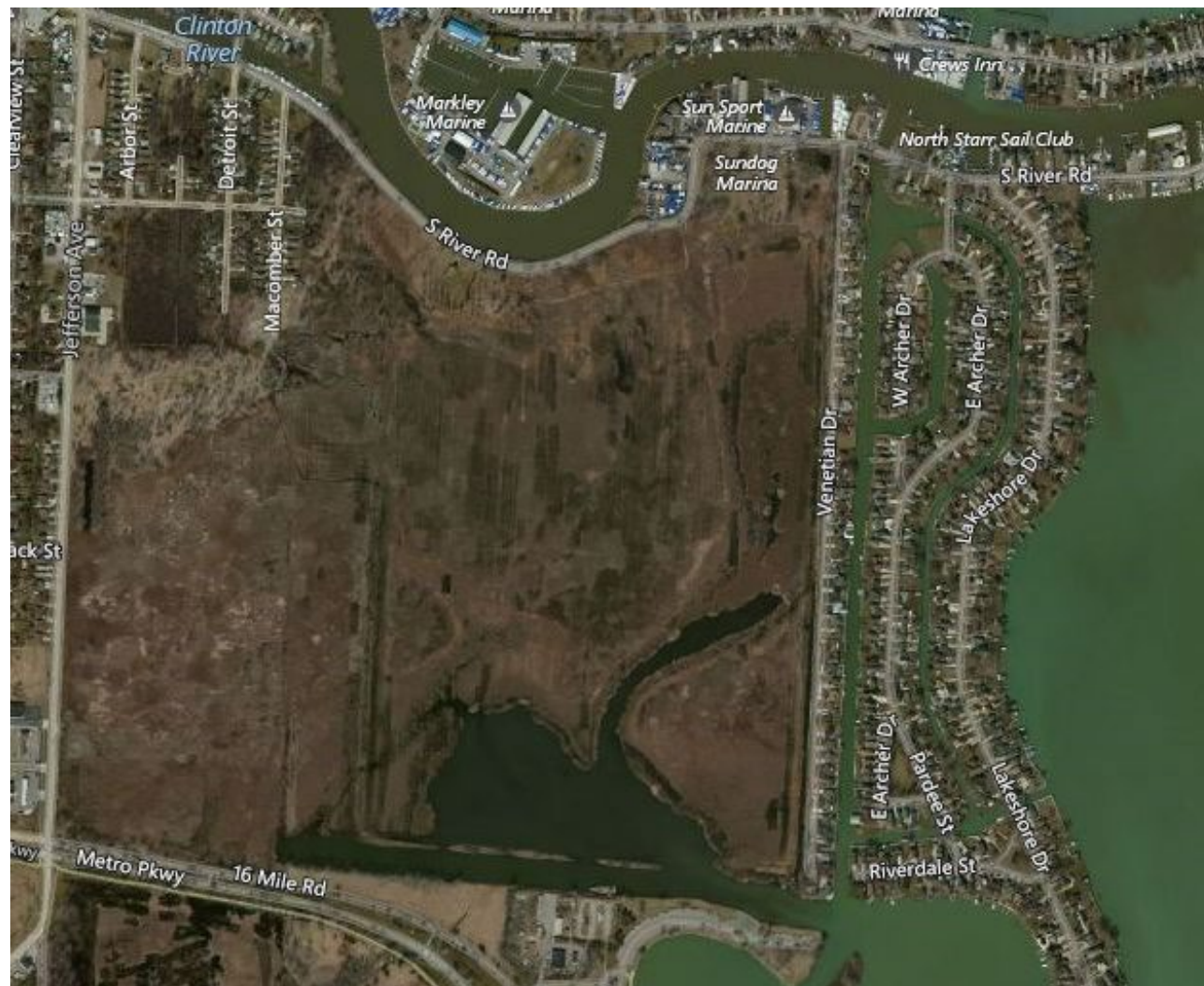
# How the U.S. Supreme Court Shaped the Definition of WOTUS and What It Means Going Forward

(Navigating Navigable Waters in the Wake of *Sackett v. EPA*)

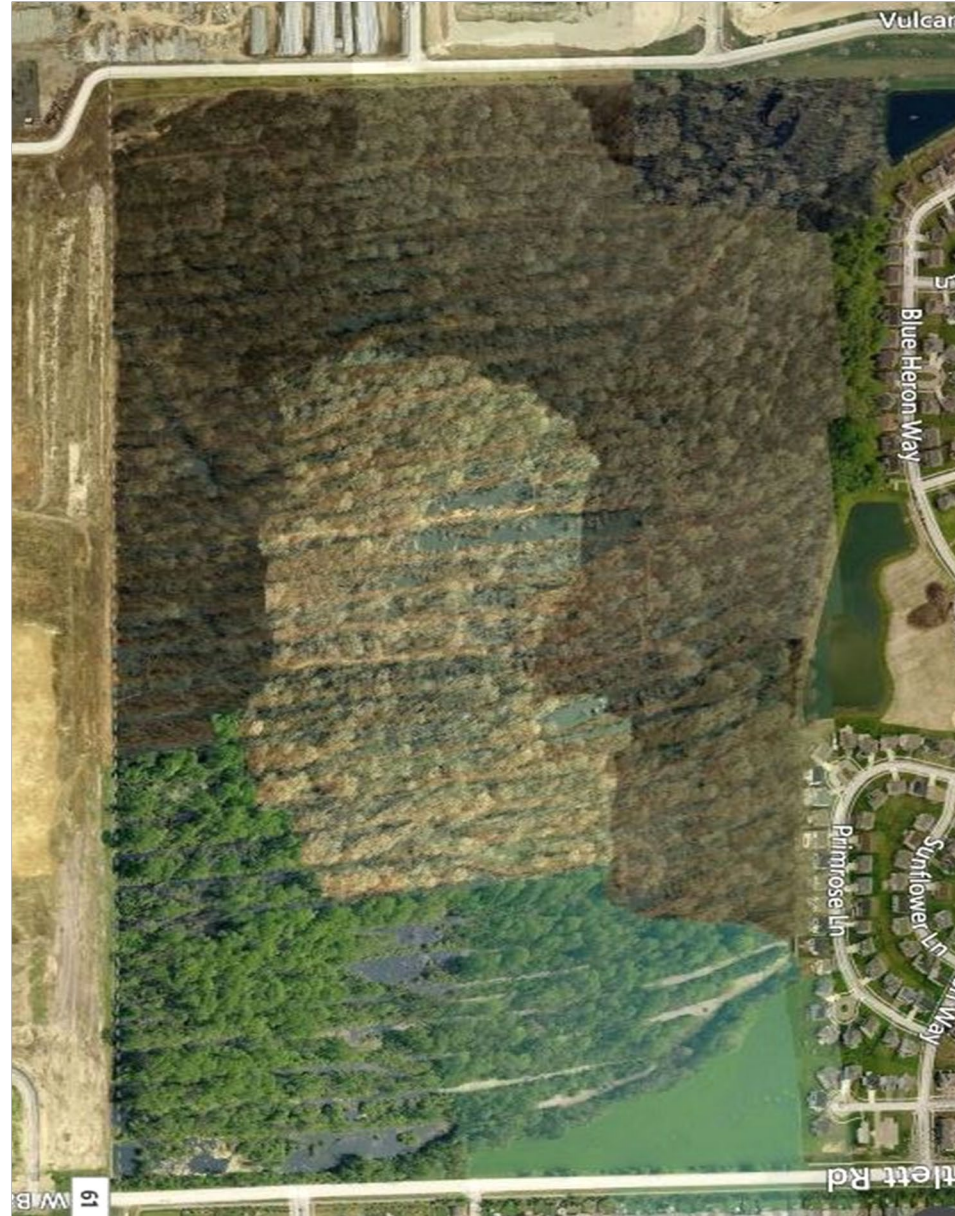
# How we got to today

- Modern Clean Water Act adopted 1972
- Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975)
- 1977 Regulations (42 FR 37122, 37144)
- 1986 Migratory Bird Rule (51 FR 41217)

# United States v. Riverside Bayview Homes, 474 U.S. 121 (1985)

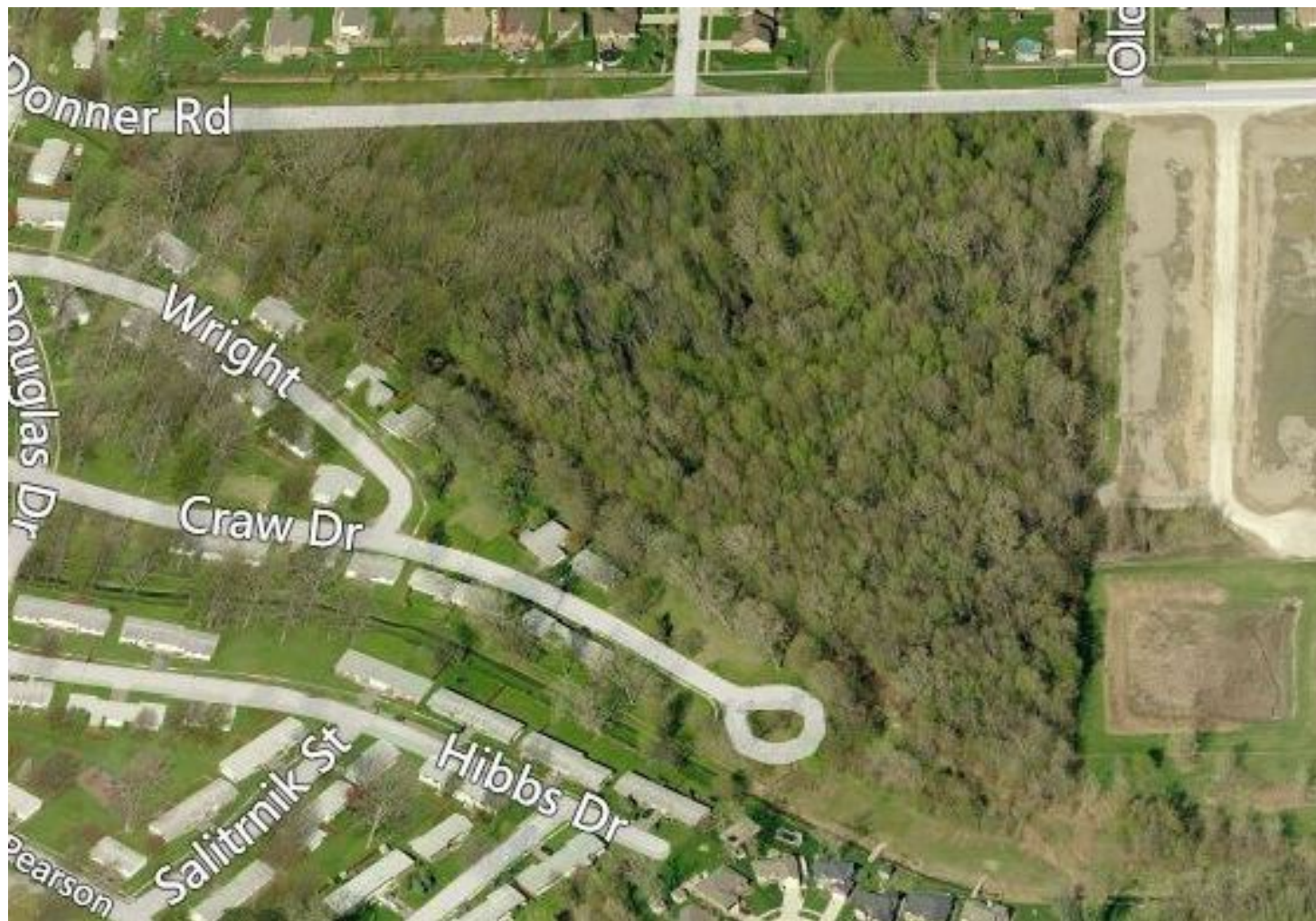


# SWANCC v. Army Corps, 531 U.S. 159 (2001)

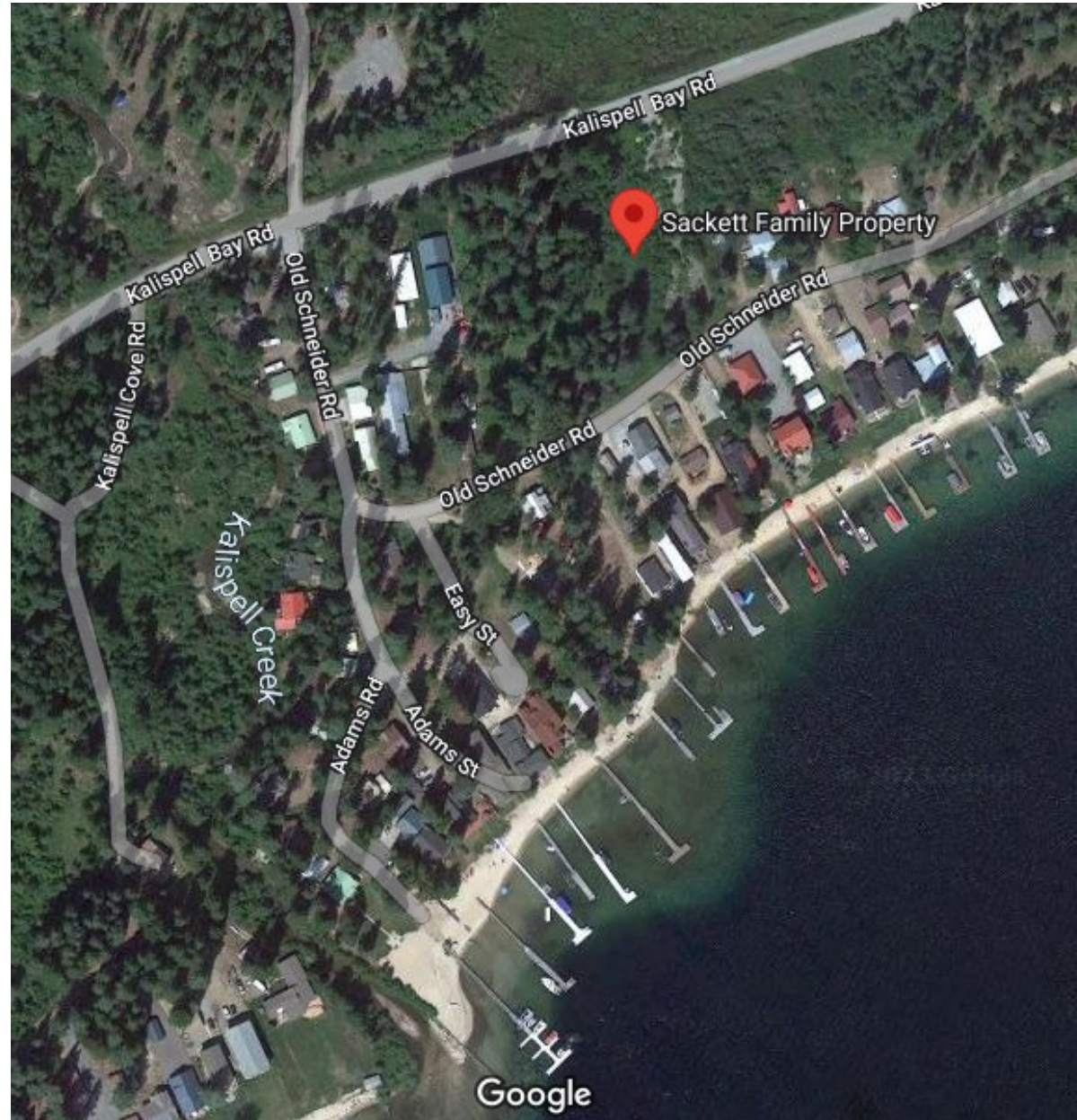




Rapanos v.  
United States,  
547 U.S. 715  
(2006)



# Sackett v. EPA, 598 U.S. \_\_\_\_ (2023)



# Sackett v. EPA: Black Letter Law

A water is WOTUS if:

1. **TRADITIONAL NAVIGABLE WATERS:** A stream, river, ocean or lake that is used for navigation and interstate commerce, or flows across or forms a part of State boundaries
2. A relatively permanent, standing or continuously flowing stream, river, or lake that maintains a continuous surface connection to traditional navigable waters
3. A wetland with a continuous surface connection to Traditional Navigable Waters

## Questions Remain:

1. What does it mean to have a “continuous surface connection”?
2. What does it mean to be “relatively permanent”?
3. What does it mean to be a “Traditional Navigable Water”?
4. What does this case mean for infrastructure development, operations and management?

# Traditional Navigable Waters



# Traditional Navigable Water

- “Traditional Navigable Waters”—that is, interstate waters that were either navigable in fact and used in commerce or readily susceptible of being used in this way

# Traditional Navigable Waters



# Continuous Surface Connection and Relatively Permanent Waters

- What is at issue:
  - Ephemeral streams and connected wetlands
  - Streams with intermittent flow
  - Infrastructure built in or adjacent to these features





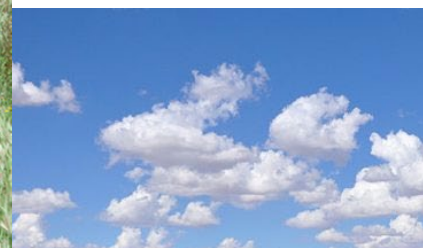
# Continuous Surface Connection

- “waters” may fairly be read to include only those wetlands that are “as a practical matter indistinguishable from waters of the United States,” such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”
- That occurs when wetlands have “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.”
- **We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.**

# Relatively Permanent Waters

- Justice Scalia in Rapanos:
  - We also do not necessarily exclude **seasonal rivers**, which contain continuous flow during some months of the year but no flow during dry months—such as the **290-day**, continuously flowing stream.
  - The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

# Continuous Surface Connection and Relatively Permanent Waters



# Implications for Infrastructure

- New project construction – analysis will focus on two questions:
  - Is there a relatively permanent stream, river, or lake; or a wetland?
  - Does the water or wetland have a continuous surface connection to a Traditional Navigable Water?

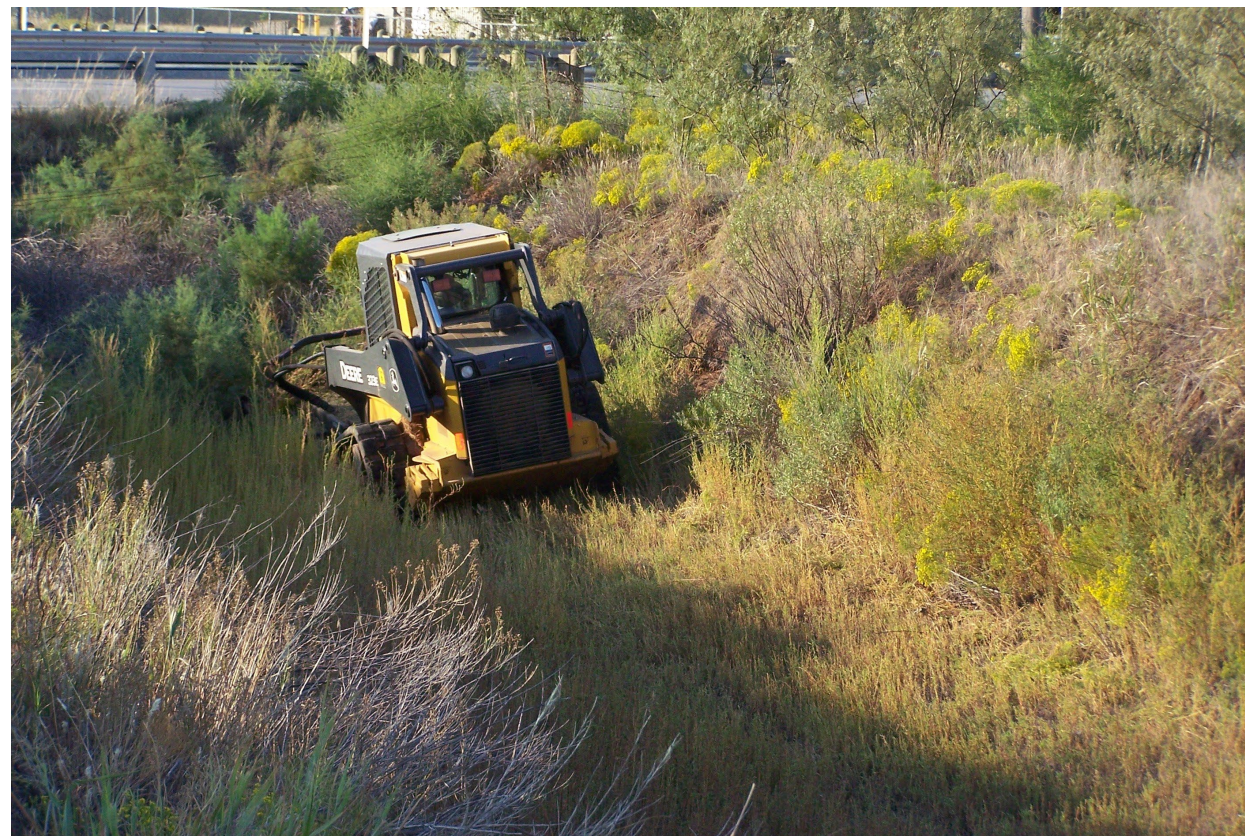
# Implications for Infrastructure

- Classification of existing and completed projects – analysis will focus on:
  - Nature of infrastructure – can it be called, in ordinary terms a stream, river, lake or wetland?
  - Relatively Permanent – is there continuous flow in the project/facility/infrastructure?
  - Continuous surface connection – is there continuous flow connecting the project/facility/infrastructure to traditional navigable waters?

# Implications for Infrastructure – Storm Drains and Flood Control Channels



# Implications for Infrastructure – Aqueducts, Irrigation Canals and Ditches



# Implications for Infrastructure – Mixed Use Projects





# Other Implications

- *Maui County v. Hawaii Wildlife Fund*
- 402 (NPDES) Permitting
- Local regulatory authority over water bodies and wetlands
- Chevron Deference and new regulations defining WOTUS

# Key Take Aways

A water is WOTUS if:

1. It is a stream, river, ocean or lake that is used for navigation and interstate commerce, or flows across or forms a part of State boundaries
2. It is a relatively permanent, standing or continuously flowing stream, river, or lake that maintains a continuous surface connection to Traditional Navigable Waters
3. It is a wetland with a continuous surface connection to Traditional Navigable Waters

# Key Take Aways

- Classification of existing and completed projects – analysis will focus on:
  - Nature of infrastructure – can it be called, in ordinary terms, a stream, river, lake or wetland?
  - Relatively permanent – is there continuous flow in the project/facility/infrastructure?
  - Continuous surface connection – is there continuous flow connecting the project/facility/infrastructure to traditional navigable waters?

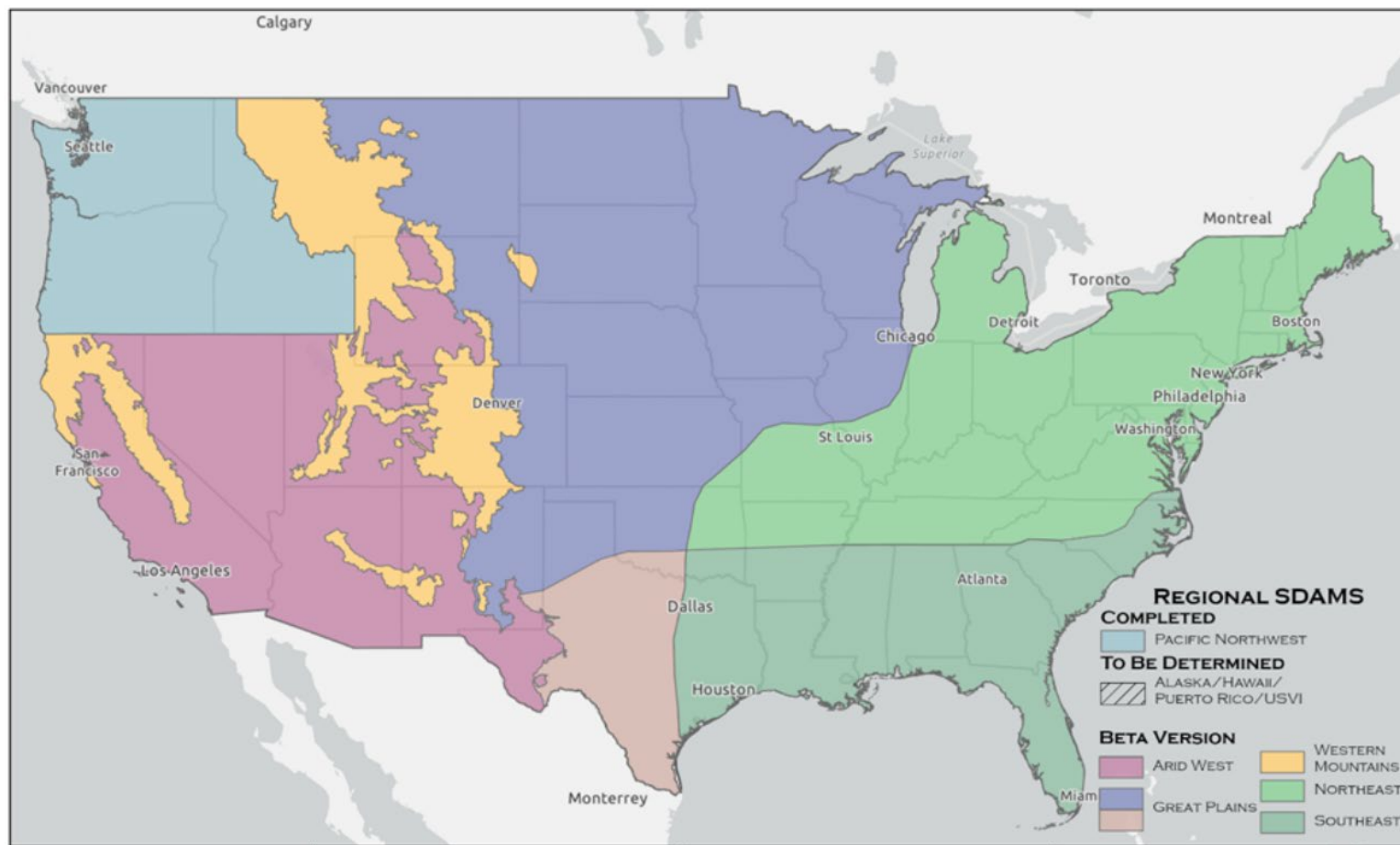
# Next Steps

- EPA and Army Corps to issue new regulation defining the term WOTUS
- Agencies are proposing to issue the regulation as a final rule by September 1, 2023
- Processing most approved Jurisdictional Determinations is on pause while the Agencies decide how to interpret the *Sackett* decision

# Next Steps

- Potential Criteria for Relatively Permanent:
  - Scalia plurality in *Rapanos* (2006): flowing for **290 days** is Relatively Permanent; flowing for **1 day is not**. Ephemeral and Intermittent streams are not Relatively Permanent.
  - 2008 EPA/Army Guidance on Rapanos: Relatively Permanent = “typically have continuous flow at least seasonally (e.g., typically **three months**).”
  - January 2023 WOTUS Definition Final Rule: Relatively Permanent = “flows for more than a short duration in direct response to precipitation.” Streams that dry within days following a storm are not Relatively Permanent.
  - January 2023 WOTUS Definition Final Rule: use Regional **Streamflow Duration Assessment Methods (SDAMs)** – which are under development.

# Next Steps: Regional Streamflow Duration Assessment Methods (SDAMs)



# Next Steps

- APA standard for issuing a final rule without notice or comment:
  - Agencies find for “good cause” that prior notice and comment are “impracticable, unnecessary, or contrary to the public interest.” 5 USC § 553(b)(3)(B)
  - This exception “should be narrowly construed and only reluctantly countenanced.” --DC Circuit
  - The exception is generally limited to “emergency situations, or where delay could result in serious harm.” --DC Circuit
  - A court will only agree “in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest.” --DC Circuit

# Next Steps

- Jurisdictional Determinations:
  - The Army Corps is pausing certain decisions while new regulation is pending
  - *Sackett* decision will shrink the scope of federal regulation in many areas
  - In some cases, it may make sense to presume jurisdiction because of project timelines



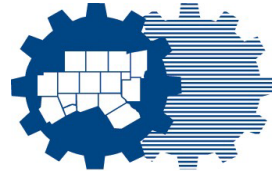
# Questions?

# Questions for Speakers



# 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).
- ▶ Feedback Survey: <https://form.jotform.com/232335780699165>



**North Central Texas Council of Governments**

**Thank you for attending!**

**NCTCOG Webinar  
August 22, 2023**

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

Elena Berg, NCTCOG  
eberg@nctcog.org



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