

# Peering Through Muddy Waters

Update on  
“Waters of the United States”



**IPCB**

Illinois Pollution Control Board

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CLEVELAND — Partly cloudy today. Cloudy with a few showers this evening. High yesterday 70, low 46. See Page 15-C.

# CLEVELAND PLAIN DEALER

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# OIL SLICK FIRE RUINS FLATS SHIPYARD

## Surly Ohio Pen Rebels Fed at Gunpoint

### PRISON GETS FIRST QUIET AFTER RIOTS

Night of Destruction Cost State Close to Millions; Walls Still Hot

BY TODD SIMON AND NATE SILVERMAN Staff Correspondents

COLUMBUS, O., Nov. 1.—Feeding some 200 explosive roughnecks at gunpoint this afternoon was the first test of the Ohio Penitentiary's uneasy return to order. Surly but quiet, the inmates of Cell Blocks A and B got their first taste of food in 24 hours after they walked quietly under guard to the dinner tables from their wrecked, debris-strewn cells.

Investigation of the Friday riot and fire was being delayed today pending completion of a cleanup program in damaged cell blocks and a series of general shake-downs.

Cleaning and feeding were the order of the day, reported Warden Ralph W. Ajva, who said no attempt to determine the riot ring-leaders or discipline those involved would be made until normal security and prison routine have been restored.

Get Double Mail

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### R. O. K.'S PUSH UP KEY HILL, STALL

Withdrawn From Triangle Under Mail of Fire

BY STAY CARTER

### 1948 CASTS A VEIL OVER 'IKE TO WIN'

G. O. P. Victory Is Outlook, but Memories Discourage Flat Predictions

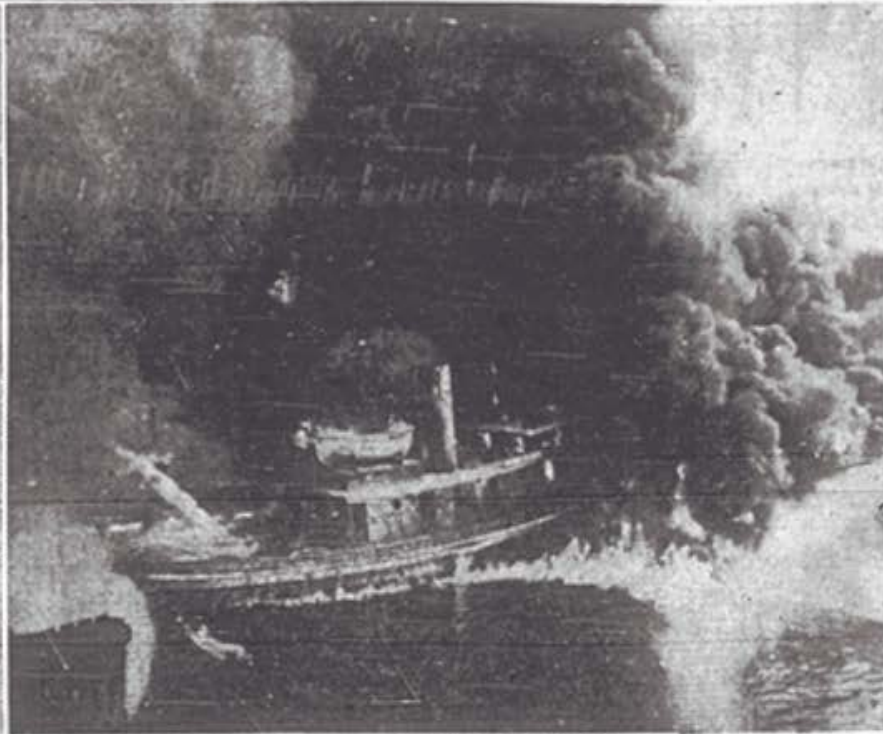
BY WALKER S. BUEL Chief of Plain Dealer Washington Bureau

It looks like Eisenhower—but pollsters and prognosticators are refraining from making any flat prediction, one way or the other, at the close of this unprecedented, confusing and vitriolic presidential campaign.

If it were not for the fact that polls and prophecies went wrong in 1948 in predicting the election of Gov. Thomas E. Dewey of New York, it is probable that the nation now would be ringing with forecasts that Gen. Dwight D. Eisenhower would be elected president of the United States Tuesday by a landslide.

Virtually all the polls in the Campaign stories on Pages 14-B, 15-B and 18-B

country give him an advantage over Gov. Adlai E. Stevenson, the Democratic nominee. Even in two southern states, Virginia and Florida, polls put the Republican candidate ahead.



Men in row boats struggle to save the tug *Adriana*, one of three damaged severely yesterday afternoon as fire swept through the shipyard of the Great Lakes Towing Co. on the Cuyahoga River at Jefferson Avenue S. W. Cooling damage estimated "in excess of \$1,500,000," the fire started when oil on the surface of the river was ignited from an undischarged cannon.

### FLAMES HIT DRY DOCKS, THREE TUGS

Buildings Also Damaged in \$1,500,000 Blaze; Bridge Put Out of Order

Fire that started on the oil-laden surface of the Cuyahoga River swept through the shipyard of the Great Lakes Towing Co. at 201 Jefferson Avenue S. W. yesterday afternoon, disabled the Jefferson Avenue Bridge and caused damage estimated variously at \$500,000 to \$1,500,000.

The first alarm sounded at 2:38 p. m. At 2:52 the fire, dangerously close to Standard Oil Co. of Ohio's McGuffey No. 7, was made a fire-alarm fire. Two battalions answered the call. Fire Chief Elmer Cain and Second Assistant Chief Ferdinand Buchner directed the firemen.

In the course of the blaze the electrical control tower at the Jefferson Avenue Bridge was damaged, and the wood flooring of the steel, double-jerkhoke bridge was charred. The bridge was down, to permit firemen to use it as a stage from which to direct their streams on the dry docks, and river traffic came to a halt.

Figure Vary Wide discrepancy in the damage figures was due to the difficulty of estimating damage done three tugs tied up at the company's dock. A company representative at the fire placed their value at \$150,000 each, but Chief McGuffey's official estimate of total damage was \$500,000. The company's punch and pebble ship, a temporary structure on just wide dock about 200 feet

HUGE VOTE IS ONLY SAFE NOV. 4 BET

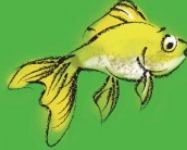
41927 at Stadium See

FINAL COUNTY POLL BOOSTS IKE'S EDGE


# Clean Water Act

- 1972
- Goals 33 USC 1251
  - Fishable and swimmable by July 1, 1983
  - Zero discharge of pollutants into navigable waters by 1985


Advice for Women of Childbearing Age and Young Children



**One Fish**




**Two Fish**



**Don't Fish**

Due to High Mercury Levels,  
Women of Childbearing Age and Children  
Should Not Eat:

Shark • Swordfish • King Mackerel • Tilefish




**Do Fish**

Eat 2 Meals per Week  
of a Variety of Seafood Lower in Mercury,  
such as:

Canned Light Tuna\* • Catfish • Pollock • Salmon • Shrimp

\* Eat Albacore ("white") Tuna only once per week

For more information, visit  
[www.epa.gov/waterscience/fish](http://www.epa.gov/waterscience/fish)



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EPA-823-H-06-004, December 2006

# Clean Water Act

- National Pollutant Discharge Elimination System (NPDES) 33 USC 1311, 1342  
Illegal to discharge a pollutant from a point source to a  navigable water  without a permit
- Wetlands 33 USC 1344  
Illegal to discharge dredged or fill material to  navigable water  without a permit
- Jurisdiction is over  navigable water

# Navigable Water



# Navigable Water



# Navigable Water



# Navigable Water

- River & Harbors Act of 1899
- 33 CFR 329.4
  - Waters subject to the ebb and flow of the tide
  - Used to transport interstate or foreign commerce
  - Applies to Corps civil works
  - Does not apply to Clean Water Act



# Waters of the US

- Clean Water Act 33 USC 1362(7)
  - “Navigable waters” are “the waters of the US”
- USEPA/Corps define “waters of the US”
  - Jurisdictional waters under Clean Water Act
  - Which waters need permit for discharge?
  - Which waters can federal government regulate?

# Waters of the US

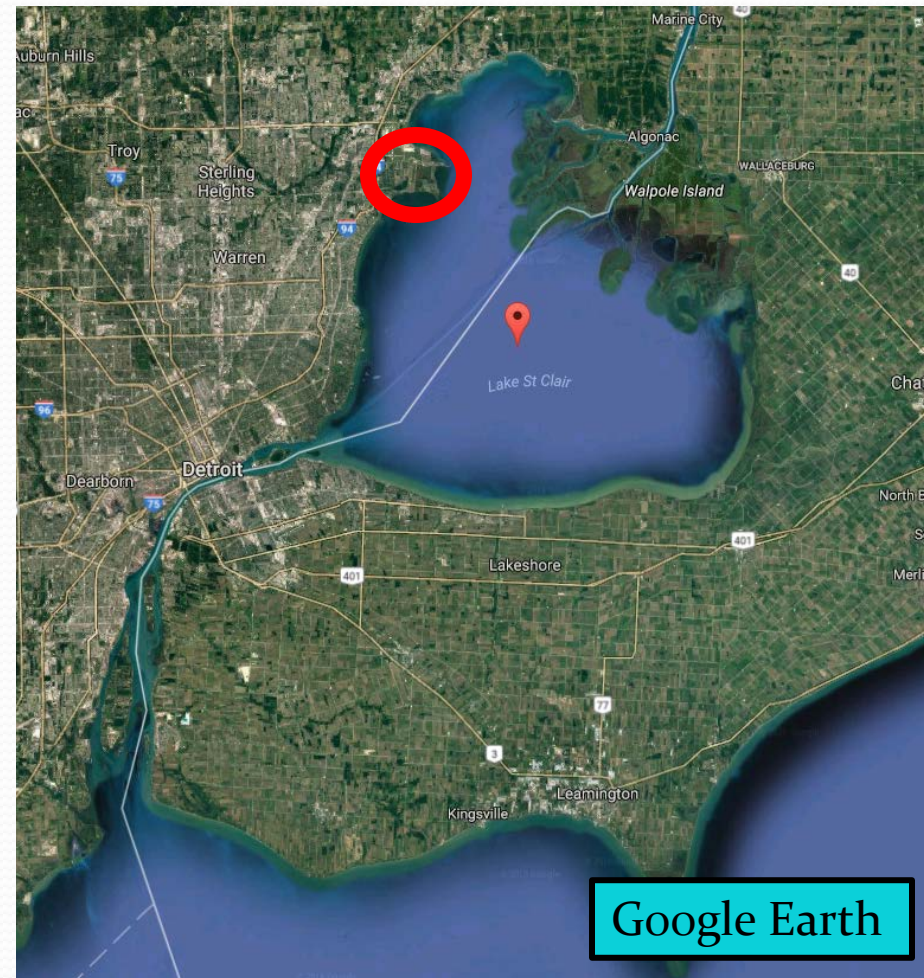
- NRDC v. Callaway, 392 F. Supp. 685 (D. D.C. 1975)
  - Struck down Corps definition limited to actual navigable waters
  - By defining “navigable waters” as “waters of the US,” Congress did not intend to limit WOTUS to traditional tests of navigability

# Waters of the US

- 1980s USEPA/Corps definitions
  - (1) traditional navigable waters, (2) interstate waters including wetlands, (3) other waters which could affect interstate commerce, (4) impoundments, (5) tributaries, (6) territorial seas, (7) adjacent wetlands
  - NOT waste treatment systems
  - 40 CFR 122.2; 33 CFR 328.3

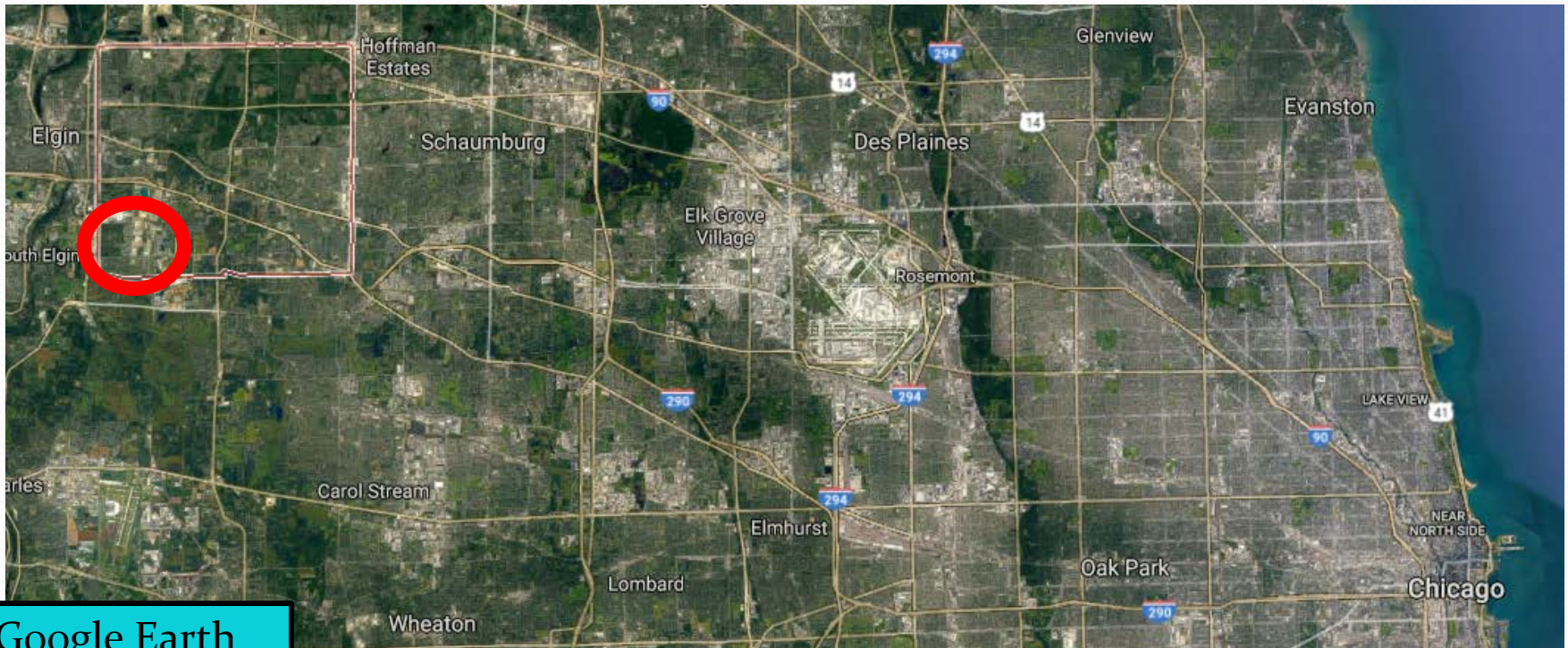
# Along Comes the Supreme Court

- US v Riverside Bayview Homes (1985)
  - Marshy land along Black Creek, near Clinton River, Lake St Clair, Michigan
  - Corps can regulate wetland adjacent to traditional navigable water
  - Unanimous



# Along Comes the Supreme Court

- Solid Waste Agency of Northern Cook County (SWANCC) v Army Corps of Engineers (2001)
  - Proposed landfill, former gravel strip mine, Bartlett, IL



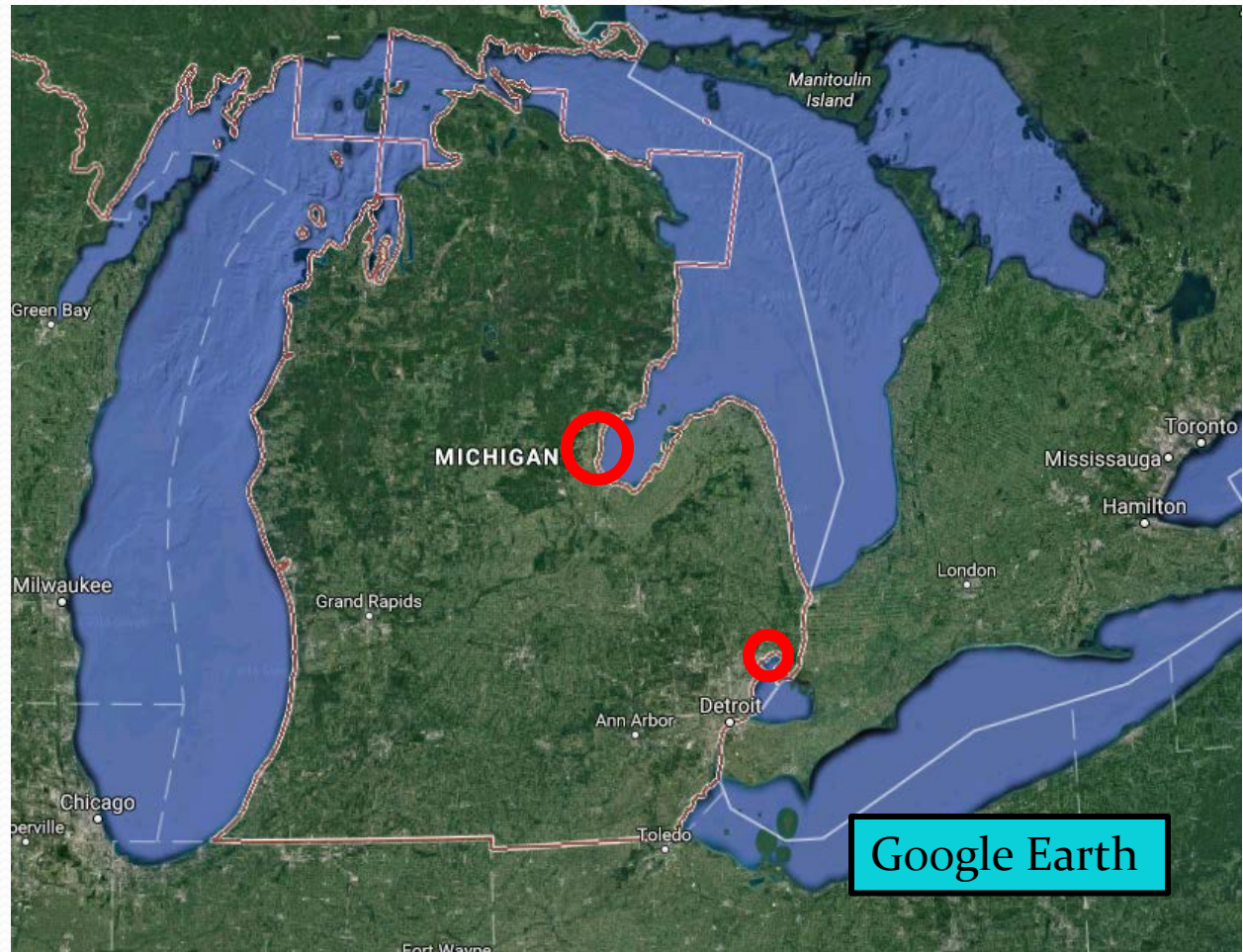
# Along Comes the Supreme Court

- SWANCC

- Corps: jurisdiction over abandoned gravel pits
  - Applied migratory bird rule - blue herons using pond in pit, interstate recreation
- Sup Ct: no federal jurisdiction
  - Needs to be traditional navigable water or have connection to navigable water
  - Here, isolated water used by birds
  - 5 (Rehnquist, Scalia, Kennedy, O'Connor, Thomas)
    - 4 (Stevens, Souter, Ginsburg, Breyer)

# Along Comes the Supreme Court

- Rapanos v US (2006)
  - Ditches leading to rivers
  - Unclear whether flow continuous or occasional



# Along Comes the Supreme Court

- Rapanos

- No federal jurisdiction
- Scalia, Roberts, Thomas, Alito
  - “Relatively permanent, standing or flowing”
  - Not “ordinarily dry channels . . . occasionally or intermittently flows”
  - Wetlands with a “continuous surface connection”
- Kennedy
  - “Significant nexus” between wetland and traditional water
  - “chemical, physical, and biological integrity” of traditional water
- Stevens, Souter, Ginsburg, Breyer
  - Wetlands adjacent to tributaries to navigable water



# Post-Rapanos Policy

- Traditional navigable waters & interstate waters & territorial seas
  - Adjacent wetlands
  - Non-navigable relatively permanent waters (year-round or seasonal flow at least 3 months)
- 
- Adjacent wetlands
  - Other waters and adjacent wetlands with significant nexus
- 
- Isolated wetlands

CWA  
JURISDICTION



NO CWA  
JURISDICTION

# Post-Rapanos Regulation

- Clean Water Rule
  - Proposed 79 Fed Reg 22188 (April 21, 2014)
  - Final 80 Fed Reg 37054 (June 29, 2015)
  - Effective August 28, 2015
- Identify CWA jurisdictional waters
  - Easier to understand
  - More predictable
  - Consistent with law and science

# Post-Rapanos Regulation

**#DitchTheRule**  
MAKE YOUR VOICE HEARD DITCHTHERULE.FB.ORG

The EPA wants to regulate all water, everywhere.

**SAY NO TO THE CLEAN WATER ACT EXPANSION**

2014 FARM BUREAU®

**EPA**

**KNOW THE FACTS:**  
*Proposed Rule to Protect Clean Water*  
Exclusions and exemptions for agriculture will not change.

**#ditchthemyth** [www.epa.gov/ditchthemyth](http://www.epa.gov/ditchthemyth)

# Clean Water Rule

## Jurisdictional by rule

1. Traditional navigable waters
2. Interstate waters
3. Territorial seas
4. Impoundments
5. *Tributaries (newly defined)*
6. *Adjacent waters (newly defined)*

## Other Waters

### Case specific significant nexus

7. *Five specified types: prairie potholes, Carolina bays, pocosins, vernal pools, Texas coastal wetlands*
8. *100 yr flood plain, 4000 ft ordinary high water mark*

## Exclusions

1. Waste treatment system
2. Prior converted cropland
3. *Ditches ephemeral/intermittent*
4. *Artificial ponds*
5. *Groundwater*
6. *Stormwater control*
7. *Wastewater recycling*

Exemptions for normal farming, silviculture, ranching, plowing, seeding, cultivating, farm or stock ponds 33 USC 1344(f)(1)

# Clean Water Rule

- Tributary
  - Water that contributes flow, directly or through another water
  - To navigable water, interstate water, territorial sea
  - “Physical indicators” of ordinary high water mark and bed and banks

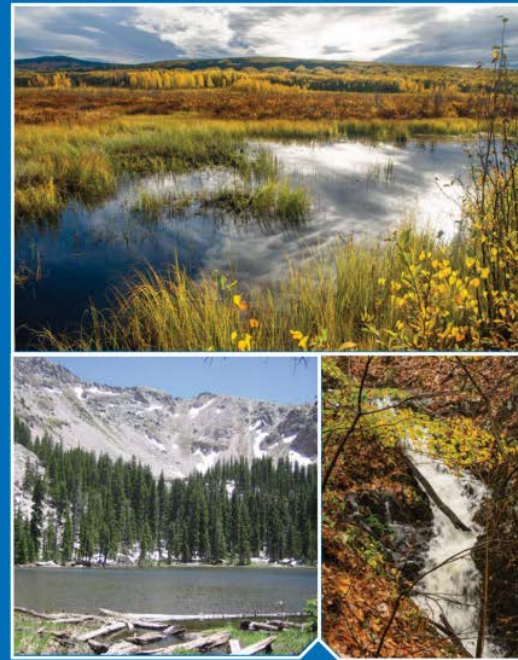
# Clean Water Rule

- Adjacent
  - Bordering, contiguous, or neighboring, even if separated by berm
- Neighboring
  - Within 100 feet of ordinary high water mark of navigable water, interstate water, territorial sea, impoundment, tributary
  - Within 1500 feet OHWM and 100 year flood plain

# Significant Nexus

- Adjacent/neighboring
- Tributaries
- Case-specific analysis

## Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence



# Congressional Challenges

113<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

## H. R. 5078

To preserve existing rights and responsibilities with respect to waters of the United States, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

SEPTEMBER 10, 2014

Received; read the first time

SEPTEMBER 11, 2014

Read the second time and placed on the calendar

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## AN ACT

To preserve existing rights and responsibilities with respect to waters of the United States, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*  
**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Waters of the United States Regulatory Overreach Protection Act of 2014”.

### The White House

Office of the Press Secretary

For Immediate Release

January 19, 2016

## Veto Message from the President -- S.J. 22

To the Senate of the United States:

I am returning herewith without my approval S.J. Res. 22, a resolution that would nullify a rule issued by the Environmental Protection Agency and the Department of the Army to clarify the jurisdictional boundaries of the Clean Water Act. The rule, which is a product of extensive public involvement and years of work, is critical to our efforts to protect the Nation’s waters and keep them clean; is responsive to calls for rulemaking from the Congress, industry, and community stakeholders; and is consistent with decisions of the United States Supreme Court.

We must protect the waters that are vital for the health of our communities and the success of our businesses, agriculture, and energy development. As I have noted before, too many of our waters have been left vulnerable. Pollution from upstream sources ends up in the rivers, lakes, reservoirs, and coastal waters near which most Americans live and on which they depend for their drinking water, recreation, and economic development. Clarifying the scope of the Clean Water Act helps to protect these resources and safeguard public health. Because this resolution seeks to block the progress represented by this rule and deny businesses and communities the regulatory certainty and clarity needed to invest in projects that rely on clean water, I cannot support it. I am therefore vetoing this resolution.

Barack Obama  
The White House  
January 19, 2016

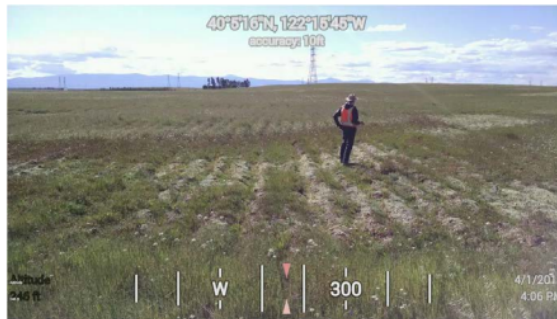


## UNITED STATES SENATE REPORT



### From Preventing Pollution of Navigable and Interstate Waters to Regulating Farm Fields, Puddles and Dry Land:

A Senate Report on the Expansion of Jurisdiction Claimed by the Army  
Corps of Engineers and the U.S. Environmental Protection Agency under the  
Clean Water Act



United States Senate Committee on Environment and Public Works

Majority Staff

Released:

September 20, 2016

# Nationwide Litigation

- Sixth Circuit (Murray Energy v EPA, No. 15-3751)
  - Oct. 9, 2015 stay
  - Briefing scheduled through February 2017
  - 2-1 opinion retaining jurisdiction
  - NAM filed SCOTUS appeal on jurisdiction



# Treading Water . . .

- Did USEPA follow SCOTUS directions?
- Overreach or not protective enough?
- Cuyahoga burning v. filling wetlands
- Far from consensus

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**IPCB**

Illinois Pollution Control Board

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