

AGENDA

Subject Line: October 20, 2023: 2023 Environmental & Natural Resources Law: Year in Review

2023 Environmental & Natural Resources Law: Year in Review
October 20, 2023 from 8:30-4:30 PM PDT at McMenamins Edgefield and via Zoom
6.5 total MCLE credits (5.5 general, 1 ethics) (to be applied for)

Sponsored happy hour to follow.

The Environmental and Natural Resources Section is pleased to announce that we will be returning to McMenamins Edgefield in Troutdale for this year's 2023 Environmental and Natural Resources Law: Year in Review! We hope to see you in person, but this event will be hosted in a hybrid capacity and we will be live-streaming via Zoom.

We have a host of panels this year, with an incredible lineup of panelists. Here is the agenda for the day:

October 20, 2023	Sessions
8:30-8:35 AM	<i>Introductory Remarks</i> <ul style="list-style-type: none">· Ryan Shannon, Center for Biological Diversity, ENR Section Chair· Dominic Carollo, Carollo Law Group, ENR Section Chair-Elect, CLE Chair
8:35-8:40 AM	Transition (5 minutes)
8:40-9:40 AM	PANEL 1 — BLM Public Lands Rule <p>The panel will address U.S. Bureau of Land Management's expected adoption of the Public Lands Rule, which seeks to put conservation on equal footing with other multiple uses under the Federal Land Management and Policy Act (FLPMA) by increasing the designation of reserves and authorizing conservation leasing.</p> <p>Speakers:</p> <ul style="list-style-type: none">• Aaron Bruner, Attorney, Western Resources Legal Center• Susan Jane Brown, Principal and Chief Legal Counsel, Silvix Resources
9:40-9:45 AM	Transition (5 minutes)

9:45-10:45 AM	<p>PANEL 2 — Redevelopment of the Portland Harbor</p> <p>While the Superfund cleanup of Portland Harbor is still years from completion. What does this mean for the redevelopment of brownfield sites near or associated with the Portland Harbor Superfund Site? This panel will convene to discuss how these brownfield sites could be cleaned up, redeveloped and returned to use to benefit Portland.</p> <p>Speakers:</p> <ul style="list-style-type: none"> • David A. Rabbino, Partner, Jordan Ramis PC • Dana Domenighini, Project Environmental Scientist, Maul Foster Alongi • Tom Kruger, Vice President of Permitting, Eolian Energy
10:45-10:55 AM	<p>Break (10 minutes)</p>
10:55-11:55 AM	<p>PANEL 3 — Waters of the U.S. – <i>Sackett v. EPA</i></p> <p>The panel will discuss the U.S. Supreme Court’s recent ruling on regulatory jurisdiction over “waters of the United States” (WOTUS) in <i>Sackett v. EPA</i> and its application to existing and future matters.</p> <p>Speakers:</p> <ul style="list-style-type: none"> • James Saul, Associate Clinical Professor of Law and Staff Attorney, Earthrise Law Center • Brien Flanagan, Partner, Schwabe Williamson and Wyatt, PC • Lev Blumenstein, Assistant Division Counsel, U.S. Army Corps of Engineers
11:55-12:00 PM	<p>Transition (5 minutes)</p>
12:00-12:40	<p>KEYNOTE SPEAKER: Leah Feldon, Director, Oregon Department of Environmental Quality</p>
12:40-1:10 PM	<p>Lunch Break (30 minutes)</p>
1:10-2:10 PM	<p>PANEL 4 — Tribal Co-Stewardship of Forests and Wildlife</p>

	<p>Representatives from the Cow Creek Band of Umpqua Tribe of Indians will discuss their knowledge and experiences in establishing co-stewardship relationships with the U.S. Forest Service and Oregon Department of Fish and Wildlife.</p> <p>Speakers:</p> <ul style="list-style-type: none"> • Anthony Broadman, Partner, Galanda Broadman PLLC • Davia Palmeri, Conservation Policy Director, Oregon Department of Fish and Wildlife
2:10-2:15 PM	Transition (5 minutes)
2:15-3:15 PM	<p>PANEL 5 — <u>Updates on Oregon’s Approach to Groundwater Allocation</u></p> <p>Over the past year, OWRD has convened three different rulemaking advisory committees focused on changes to various rules that impact groundwater allocation. This focus on groundwater rules includes the Groundwater Allocation Rulemaking, which proposes notable changes to OWRD’s approach to allocating groundwater across Oregon. The panelists will discuss the rulemaking process and goals, the proposed changes to Oregon’s groundwater allocation scheme as part of the Groundwater Allocation RAC, and the implications of the proposed changes to different stakeholders across the state.</p> <p>Speakers:</p> <ul style="list-style-type: none"> • Steve Shropshire, Partner, Jordan Ramis PC • Zach Freed, Oregon Water Strategy Director, The Nature Conservancy • Ivan Gall, Oregon Water Resources Department
3:15-3:25 PM	Break (10 minutes)
3:25-4:25 PM	<p><u>Ethics and Practicalities in Retaining and Working with Scientific Experts</u></p> <p>Attorney Charlie Tebbutt will draw from decades of experience litigating citizen suits and toxic tort cases involving pollution, chemical injuries, and violations of environmental laws to discuss ethical and practical considerations in retaining and working with scientific experts.</p> <p>Speaker:</p> <ul style="list-style-type: none"> • Charlie Tebbutt, Law Offices of Charlie Tebbutt
4:25-4:30 PM	Closing Remarks
4:30-6:30 PM	Happy hour

PANEL 1



BLM's Conservation and Landscape Health Rule

2023 ENR Year In Review

Aaron Bruner, WRLC Staff Attorney



Western Resources
Legal Center

BLM Public Lands

- Agency manages 245 million acres of land, including 17.1 million acres in OR/WA
- Management guided by FLPMA, other use-specific statutes



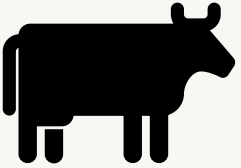
Federal Land Policy & Management Act

BLM's Organic Act directs the agency to:

- Inventory (and classify) lands
- Manage for “multiple use” and “sustained yield”

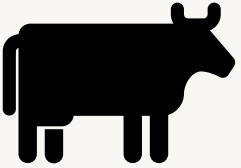
Two primary authorities:

- Land use planning and lease-permit authority



Federal Land Policy & Management Act

- “Multiple use” – balanced and diverse resource uses that take into account the long-term needs of future generations for renewable and nonrenewable resources, . . . without permanent impairment of the productivity of the land and the quality of the environment



Federal Land Policy & Management Act

- “Sustained yield” of principal or major resource uses, including livestock grazing, fish and wildlife, mineral exploration and production, rights-of-way, outdoor recreation, and timber production

Federal Land Policy & Management Act

- Policy to “protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values”



A background image of Earth from space, showing a curved horizon with blue oceans, white clouds, and green landmasses. The image is partially obscured by a semi-transparent grey rectangle containing text.

30x30 Initiative

- Worldwide initiative to designate 30% of Earth's land and water as protected
- Jan. 2021 - Biden EO 14008: Sets goal of 2030 to “conserve” at least 30% of nation's lands and waters
- Apr. 2023 - BLM Proposed Conservation and Landscape Health Rule: 88 Fed. Reg. 19,583

BLM's Proposed Rule

- Defines conservation as a “use” within FLPMA’s multiple-use framework
- Expands guidance for Areas of Critical Environmental Concern (ACECs)
- Conservation leases
- Focus on ecosystem resilience



“Conservation Use” Revisions

- Focus on protecting “intact landscapes”
- BLM to identify priority landscapes for restoration every 5 years, based on land health and watershed conditions assessments
- Restoration plan to be included in future resource management plans
- 10-year conservation leases for purposes of mitigation banking or restoration

ACEC Revisions

- Stronger language regarding protection of ACECs
- Requirement to seek public nominations for and to identify ACECs when developing new plans or revising existing plans
- Subtle changes to “relevance” and “importance” factors used to assess whether an area meets the definition of an ACEC

“Ecosystem Resilience” Revisions

- Land health to inform all decisionmaking
- Extend fundamentals of land health from BLM’s grazing regulations, 43 CFR 4180.1 (2005), to all BLM lands and program areas
- BLM to implement standards and guidelines to achieve land health standards
- Sets standards for land inventories

Related: Energy Act of 2020

- Directed BLM to permit 25GW of renewable electricity by 2025, allows reduced fee formula for wind and solar development
- BLM Proposed Rule, Renewable Energy Rights-of-Way, 88 FR 39,726 (June 2023)
- See also Western Solar Programmatic EIS

Legal Concerns with Proposed Rule



Valid existing rights,
permits, and leases?



Consistency with
FLPMA, other statutes



1995 Rule – PLC v.
Babbitt



Broad definition of
“conservation”

Prior BLM Conservation Use Rule

- 1995 BLM regs added “conservation” as an authorized use of public grazing permits
- Initiated at the request of a permittee, for up to 10-years

Public Lands Council v. Babbitt, 167 F.3d 1287 (10th Cir. 1999)

“[T]he Secretary’s conservation use . . . is an impermissible exercise of the Secretary’s authority under section three of the TGA because land that he has designated as “chiefly valuable for grazing livestock” will be completely excluded from grazing use even though range conditions could be good enough to support grazing. Congress intended that once the Secretary established a grazing district under the TGA, the primary use of that land should be grazing.”

BLM's Land Health Rule: A Conservation Perspective

Susan Jane M. Brown

Principal & Chief Legal Counsel

Silvix Resources



Perspectives on Proposed Rule

- Generally supportive
 - Tribal consultation
 - Recommendations re: additions
 - Recommendations re: clarification
 - Oregon-specific issues
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Politics and Political Reality

- Regulated industry opposition
 - Congressional push-back
 - CRA-bait
 - Litigation risk
 - Contra: Forest Service ANPR?
 - Oregon-specific issues
-

PANEL 2

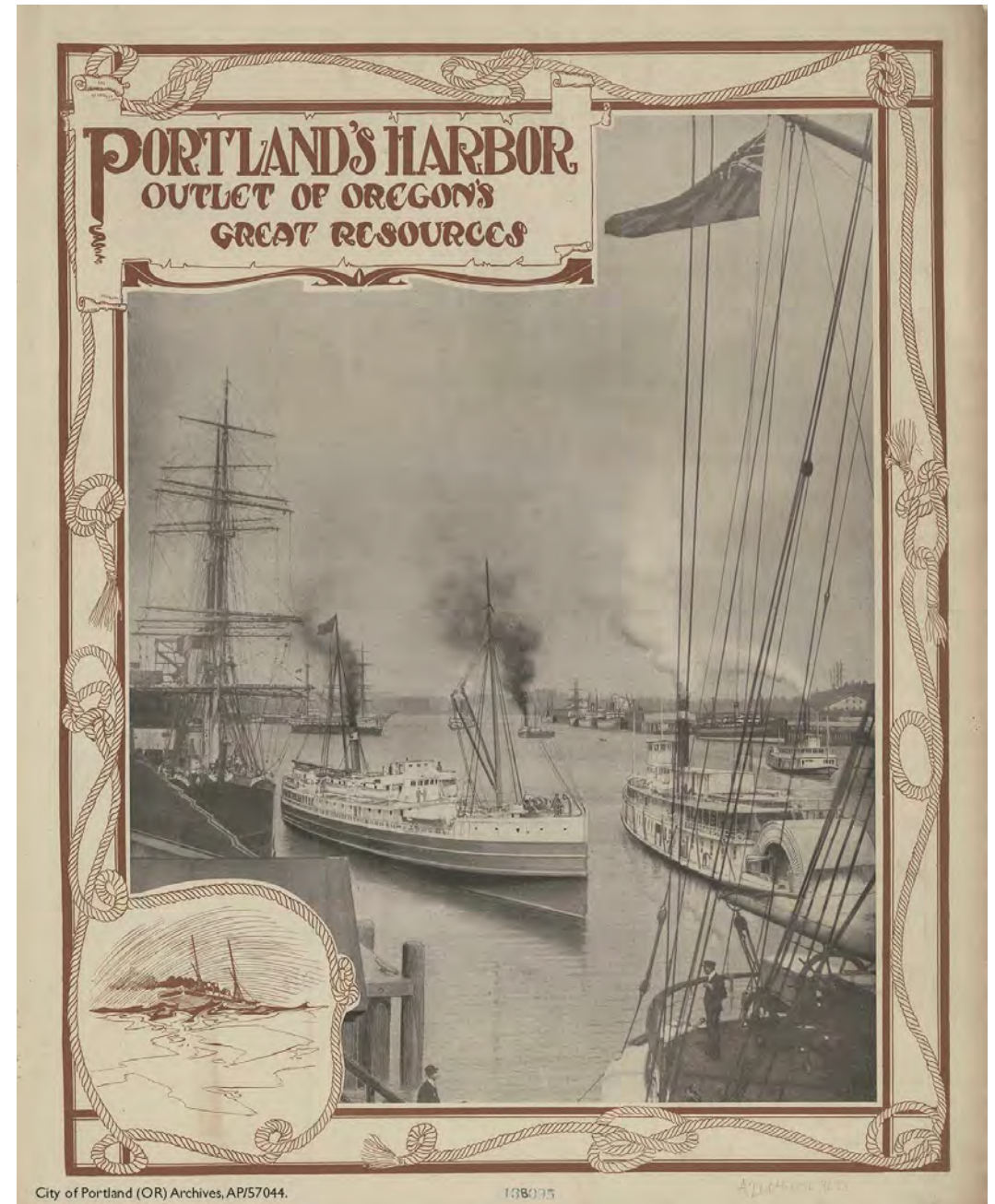
Portland Harbor: A Short History

Tom Kruger

VP of Permitting, Eolian



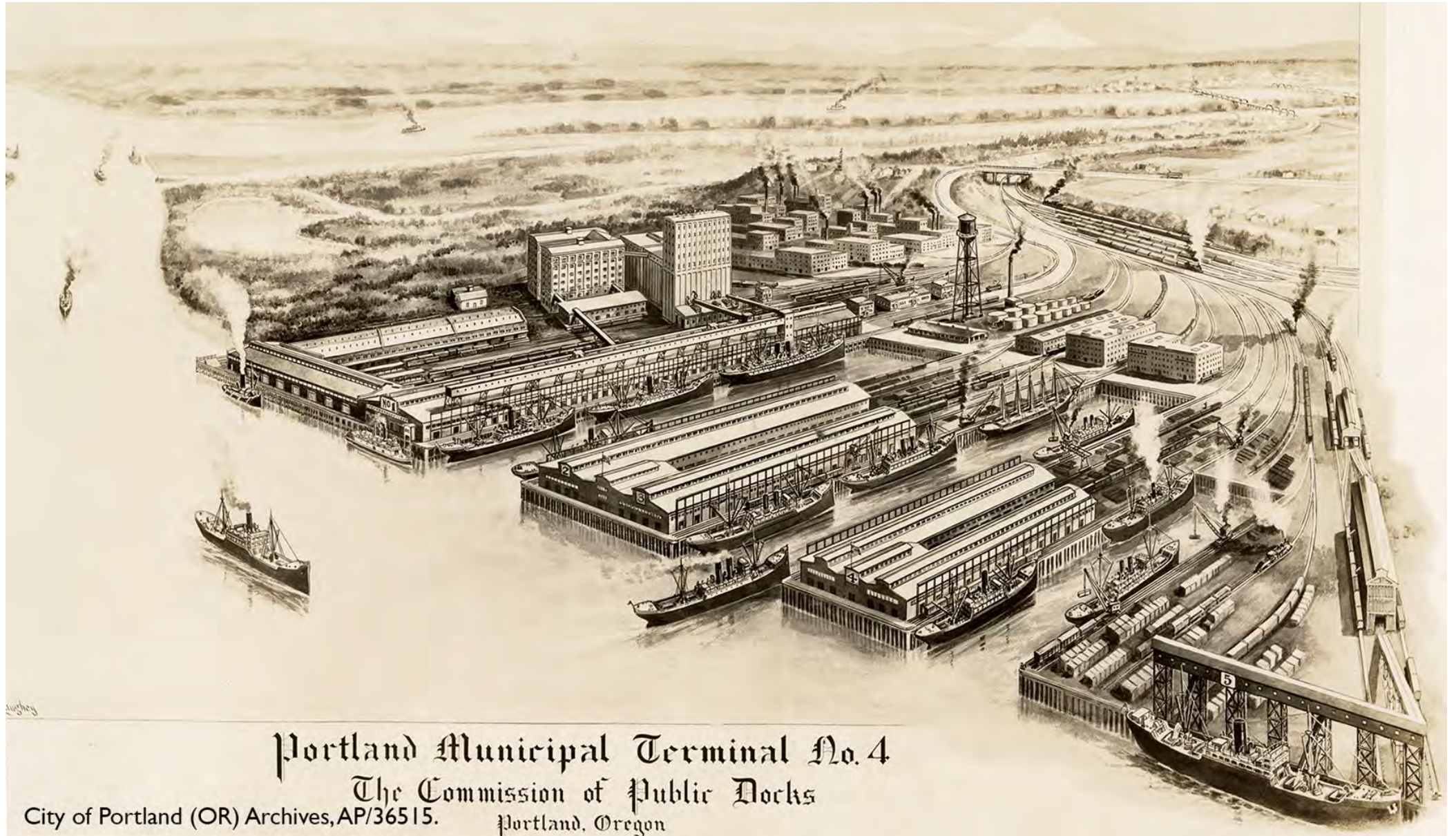
170+ Years of Water-Based Trade and Industry



Albers Bros Milling Co. and NW Industrial Area, c1915



1920



Portland Municipal Terminal No. 4

The Commission of Public Docks

City of Portland (OR) Archives, AP/36515.

Portland, Oregon



Terminal 4 1924

- Ship fueling
- Ship maintenance
- Interface with rail and road
- Creosote-treated wood piles and decking



Portland Gas Company, NW Flanders & Front Street, 1912



Gasco, 1938

- Creosote/Coal tar
- Coal ash
- Ammonia compounds
- Onsite disposal
- Direct Effluent
- Runoff



Northwest Tank Farms and Swan Island Airport, 1929



City of Portland (OR) Archives, A1999-004.55

30067
Brücker Aerial Surveys
Portland, Oregon

Swan Island Shipyards 1945



Kaiser Shipyards 1945

- Cutting and welding dust
- Cutting and machine oils, hydraulic fluids, fuels
- Solvents, paints
- Road oiling
- Underground storage tanks
- Uncontrolled Runoff



Port of Portland Drydocks, 1924



HAER No. OR-7-7

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**“One of
Oregon’s
Dirtiest Sites”**

1990



Arkema

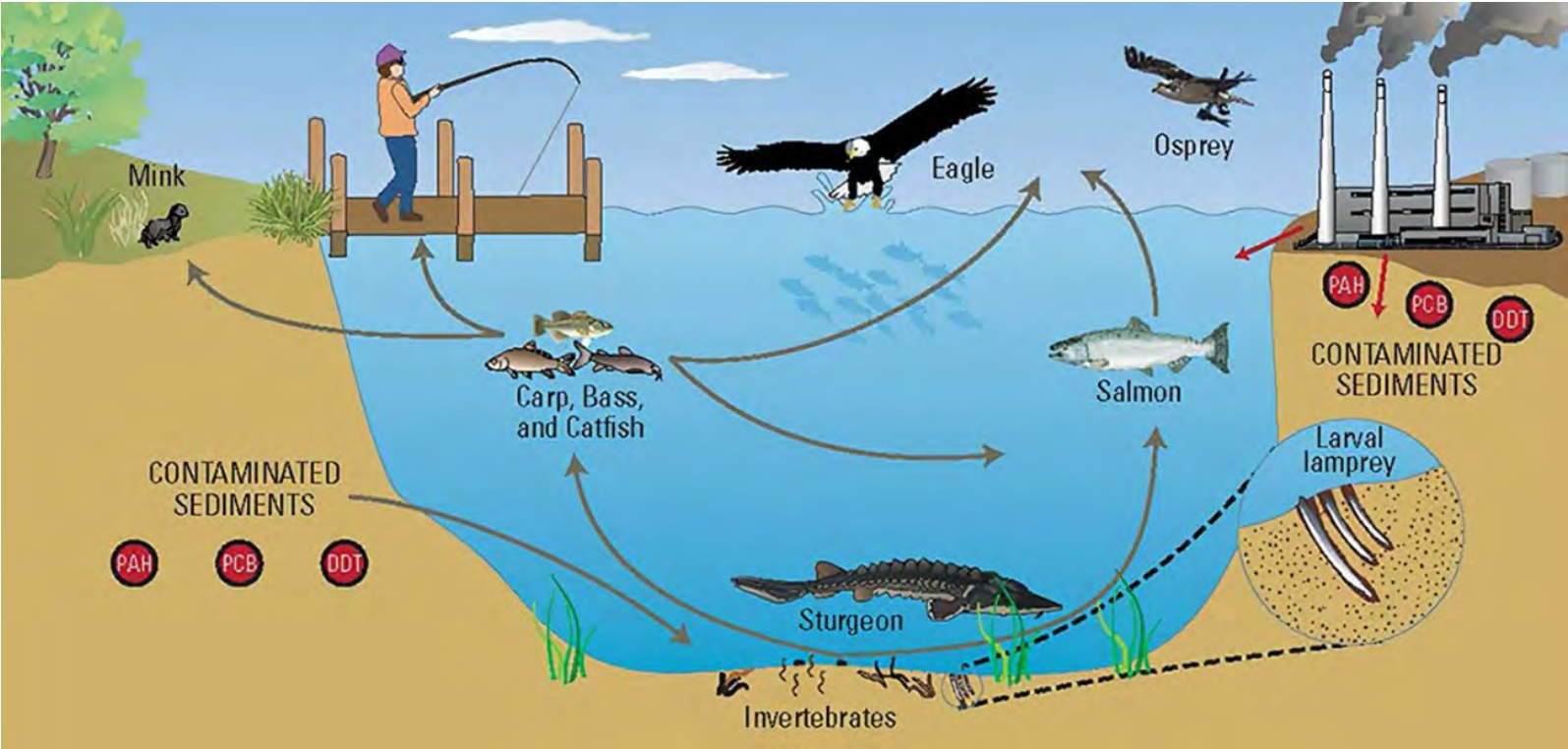
1941-2001

Heavy chemical
manufacturing plant,
multiple tenants and
operators

History of spills,
ineffective onsite
waste management,
and uncontrolled
stormwater runoff



Contaminants in the Food Web



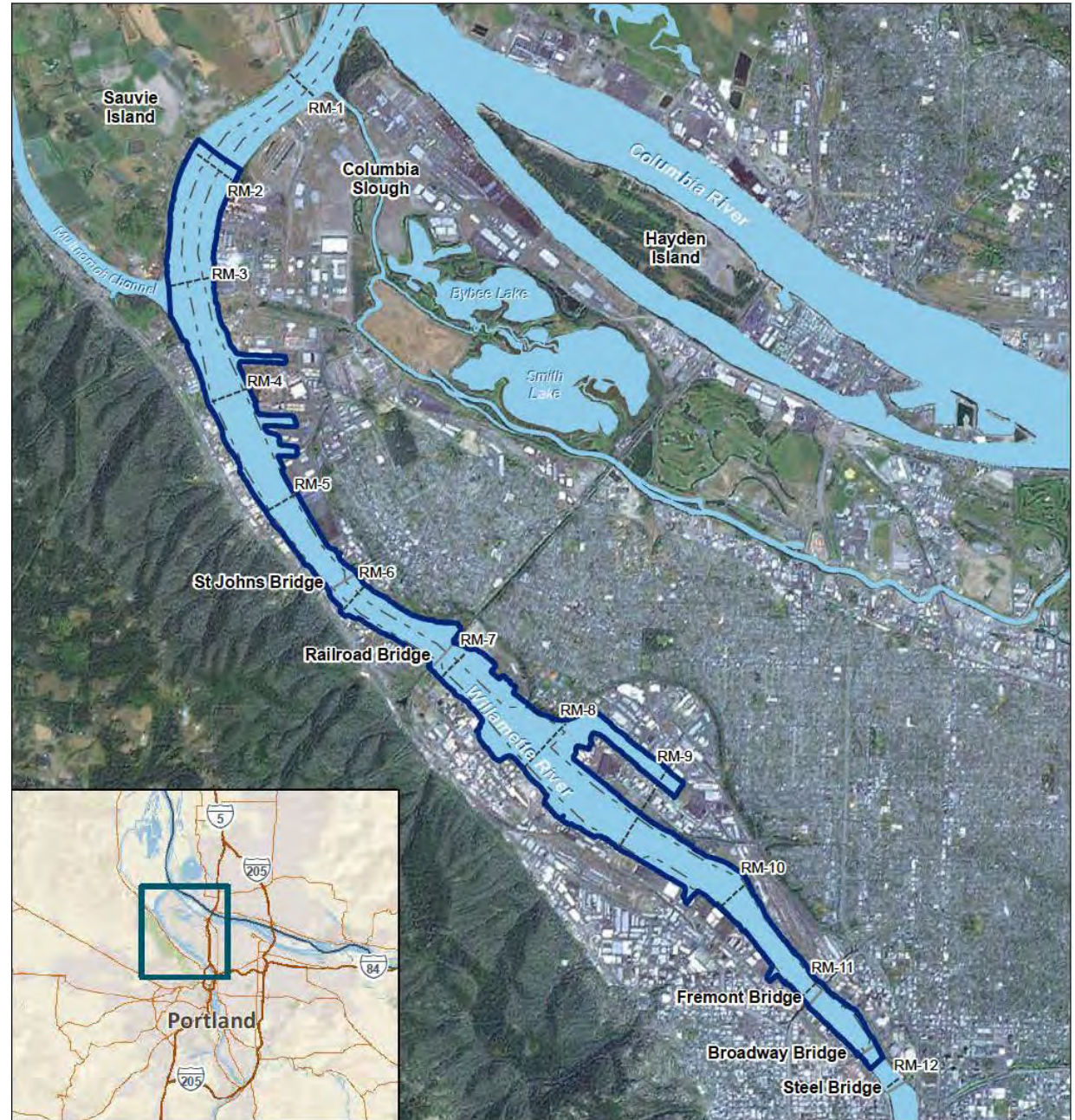
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Portland Harbor Superfund Site Designation

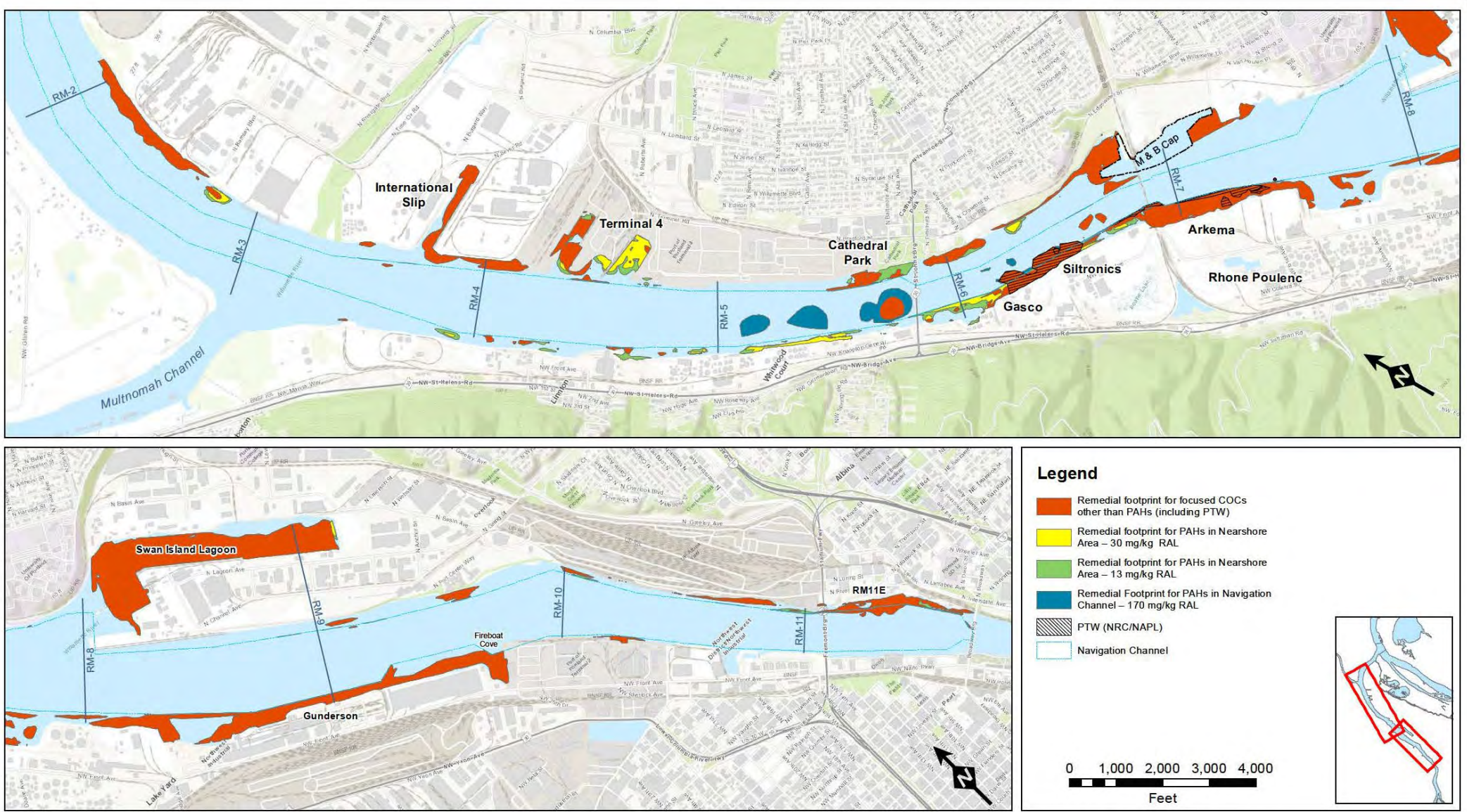
Added to National Priorities List in 2000

EPA is responsible for in-water cleanup

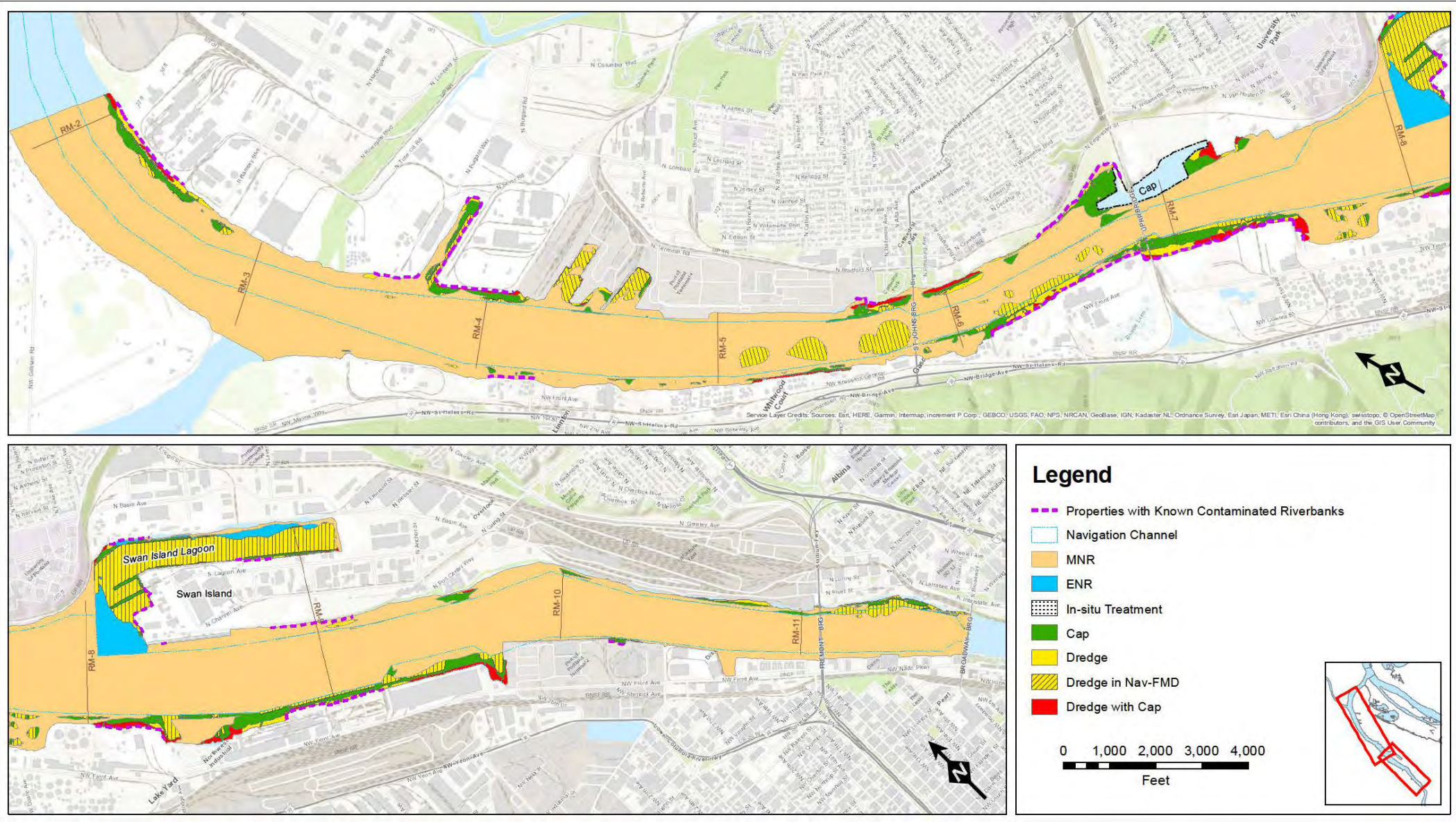
DEQ is responsible for source control
above waterline



Targeted Cleanup Efforts

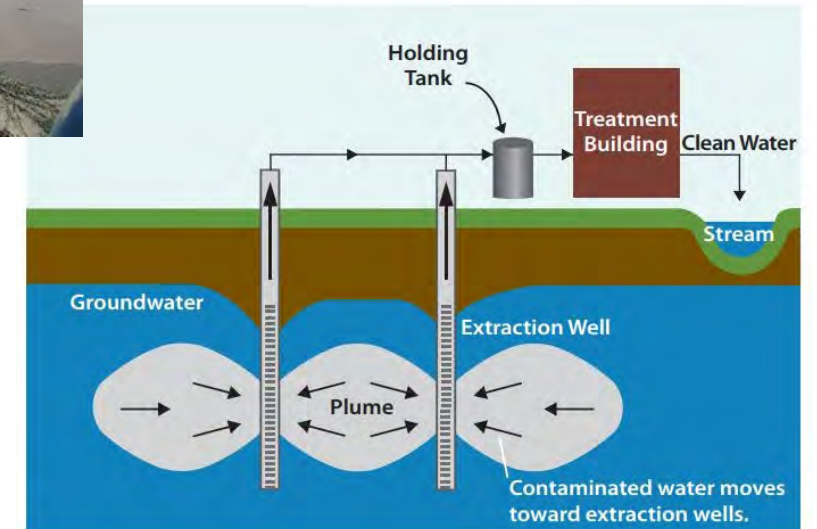


River Remediation Strategies



Source Control Strategies

Variable depending on nature and location of contaminants



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NEXT:

Laws and Liability Protection



Portland Harbor Redevelopment: Can It Be Done?

Yes – But . . .

2023 Environmental & Natural Resources Year In Review

McMenamins Edgefield

Presented by David A. Rabbino, Esq.

Jordan Ramis PC

October 20, 2023

Agenda

- Portland Harbor Superfund Site - “Brownfield” Redevelopment
- General Owner Liability Standards
- Phase I and Phase II Evaluations – Do Them
- How To Mitigate The Risk
- Use Experienced Professionals With The Regulators

What Is The Portland Harbor Superfund Site

- It Is An Approximately 12 Mile Stretch Of The Willamette River
- It Runs From Approximately RM 1.9 (Near The Confluence With The Columbia River) Up To RM 11.8
- It Is The Result Of Historic Industrial Activity Dating Back Over 150 Years
- It Was Listed On The Superfund List In 2000
- Record Of Decision Was Issued In 2017, And Modified In 2019
- It Involves Hundreds Of Current And Former Business Entities

What Is The Portland Harbor Superfund Site

- Contaminated With Many Hazardous Substances, including:
 - Polychlorinated Biphenyls (PCBs);
 - Polycyclic Aromatic Hydrocarbons (PAHs);
 - Dioxin/Furans;
 - Pesticides; and
 - Heavy Metals
- Remedy Will Include Dredging, Capping, Monitored Natural Attenuation and Long-Term Monitoring

What is a “Brownfield”?

- Generally – Any Property With Some Environmental Contamination That Impedes Development.
- Per ORS 285A.185: “Real Property Where Expansion Or Redevelopment Is Complicated By Actual Or Perceived Environmental Contamination.”
- Can Be Anything From A Former Dry Cleaner Site To A Large Scale Industrial Setting Such As The Former Blue Heron Site In Oregon City.

Are There Brownfield Properties in The Portland Harbor Superfund Site

- Essentially All Affected Properties Are “Brownfields”;
- There Are Approximately Several Hundred Throughout the Site;
- They Are Riparian and Uplands;
- Extent Of Cleanup Required Will Vary.

General Liability Standard Under CERCLA

- CERCLA (and Oregon Law) Is A “Strict Liability Statute” – Status As An Owner Of Real Property Imposes Liability.
- Buying Contaminated Property Generally Includes Buying The Cleanup Liability, Even Though The Result Of Prior Conduct.
- There Are Limited But Important Ways To Mitigate This Liability That Starts With Performing “All Appropriate Inquiry”

Phase I and Phase II Investigations

To Understand What You Are Buying/Redeveloping:

- You Have To Do Phase I and Phase II Investigations As Warranted;
- Standards Are Set Forth In ATSM E 1527-13 and 1527-21; and Codified At Section 101(35)(B) of CERCLA and The Regulations At 40 CFR Part 312;
- Failure To Do Phase I and Phase II Precludes Ability For Pre-Purchase Protection;

How To Mitigate The Risks – Pre-Purchase Protection

- Negotiate A Prospective Purchaser Agreement (PPA) and Scope Of Work (SOW) With The Regulators Ahead;
- Negotiate A No-Further Action Letter; or,
- Evaluate The Best Means To Facilitate Risk Transfer

Negotiate A PPA and SOW Ahead

- PPAs are unique in that you can negotiate the extent of cleanup in advance with DEQ or EPA;
- The SOW is the document that most likely has the greatest flexibility;
- Most PPAs are presented as “take it or leave it” deals by the DEQ and EPA;
- DEQ and EPA likely only willing to negotiate the terms of a PPA at highly complicated sites

What Tools Exist To Facilitate Risk Transfer?

- Define What The “Risk” Is, Then Evaluate Tools;
- Buyer To Seller Indemnity;
- Prospective Purchaser Agreements With DEQ/EPA;
- Purchase of Environmental Insurance

Use Appropriate Professionals When Doing Brownfield Work

- Brownfields Are Not “Typical” Real Estate Deals;
- They Are Complex And Have Unique Issues; Including: 1) Doing An Environmental Cleanup; 2) Working With Regulatory Agencies; and 3) Dealing With A Different Set Of Risks
- Qualified Technical and Legal Professionals Will Help Navigate These Issues, And Will Be Well Received By The Regulators;

Conclusion

- Portland Harbor Brownfields Do Not Have To Be Scary;
- They Come With Different Issues And Risk Than Typical Land Purchases
- There Are Several Way to Mitigate or Shift Liability Risk;
- Brownfields Can Be Great Development Opportunities

Any Questions



David A. Rabbino

david.Rabbino@jordanramis.com

(503) 598-5536

Case Study: Former Time Oil Site

Presented by:

Tom Kruger, Eolian

Dana Domenighini, Maul Foster & Alongi, Inc.

Willamette/Columbia Confluence 1935



Willamette/Columbia Confluence 2022



Kaiser Shipyards and Time Oil 1945



Time Oil 1955



Time Oil 1980



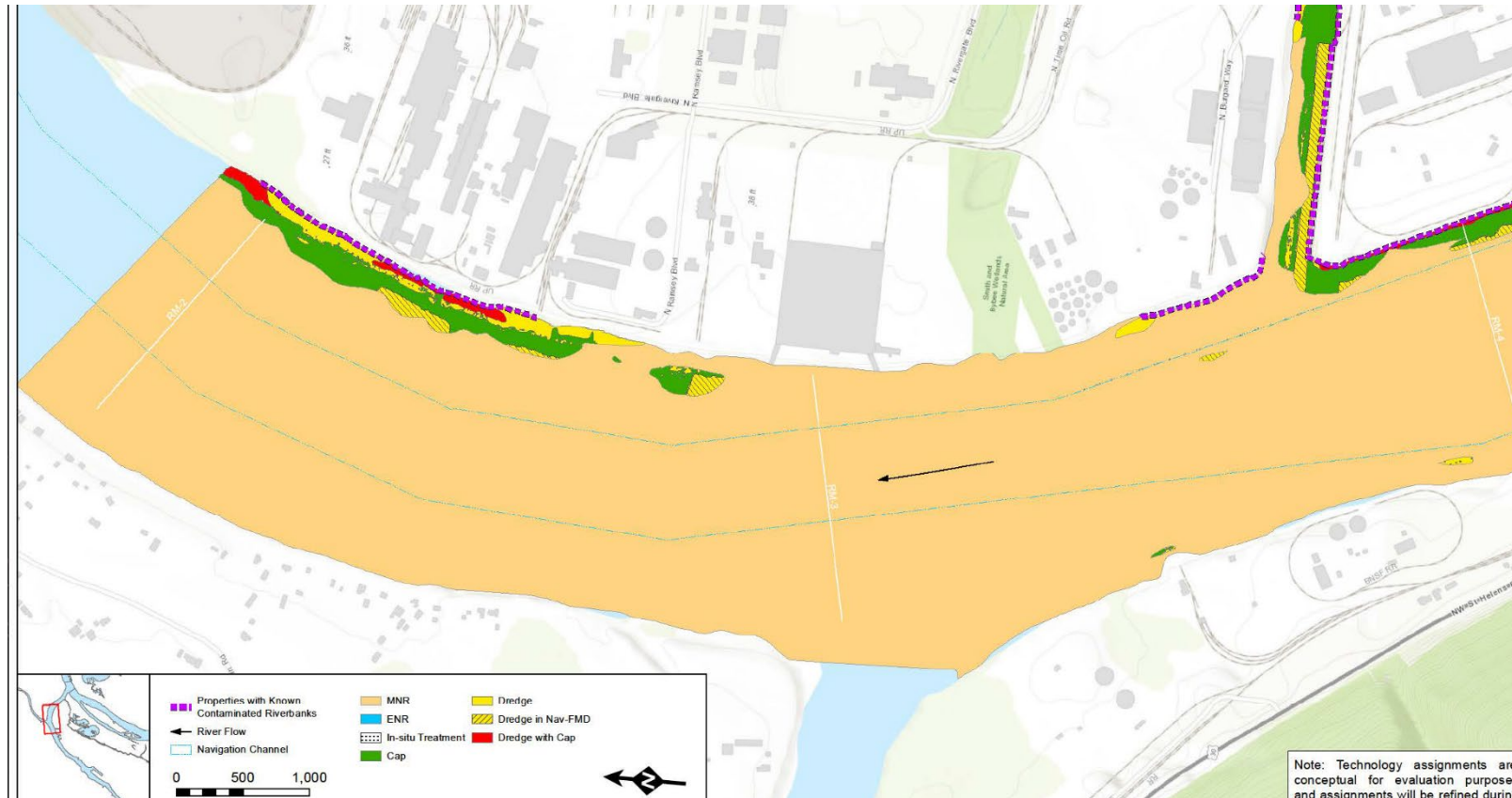
Contamination History

- Oiling of drive aisles in ship parts storage yard
- Spills of petroleum products in Main Tank Farm
- Spills in waste oil tank area
- Spills in pentachlorophenol (PCP) blending and storage area
- Spills of PCP and waste materials from drum storage yard

Remediation History

- Operations largely ceased by 1990; entered DEQ Voluntary Cleanup Program in 1991
- Multiple rounds of cleanup actions since 1996, partial NFAs
- Easement and Equitable Servitude (EES) Agreement in 2003 – established required actions and land use restrictions
- Time Oil bankruptcy in 2017
- Purchase by RestorCap/Rivergate Development in 2022
- New EES in 2022
- Completion of most necessary actions by Fall 2022
- Prospective Purchaser Agreement (PPA) in April 2023
- Purchased by Gothic Bridge Land Enterprises in July 2023, with Notice of Transfer and Assignment and Assumption of PPA

Relation to Superfund Site





eolian

PCP Mixing and Storage Area

Historical Actions

- 1982 – Facility closure and primary source removal
- 1984-2020 – Multiple rounds of soil characterization and ongoing groundwater monitoring
- 1984-2002 – Multiple source area removal actions
- 2004-2006 – Three rounds of injection points for in-situ oxidation
- 2000-2019 – Small-scale PCP pump-and-treat

Primary DEQ Concern

Ongoing source to groundwater with potential migration to the Willamette River or offsite

Main Terminal Tank Farm

Historical Actions

- 1994-2018 – Multiple rounds of soil characterization and ongoing groundwater monitoring
- 2001 – Facility closure and primary source removal
- 2009-2011 – Demolition of infrastructure and soil removal actions
- 2004-2012 – Passive LNAPL removal from wells

Primary DEQ Concern

Impacts to the Willamette River via preferential pathways (in or near storm drains)

PPA Remedial Actions

- Monitoring Well Decommissioning
- PCP Source Area Removal
- Containment Cell Construction
- Stormwater System Decommissioning

Monitoring Well Decommissioning



PCP Source Area Removal



Containment Cell Construction



Stormwater System Decommissioning



Ongoing Obligations

- Conduct four quarters of groundwater monitoring and preserve up to five additional wells
- Soil and groundwater management in accordance with Environmental Media Management Plan during future redevelopment activities
- Long-term monitoring and maintenance of site caps in accordance with a Monitoring and Maintenance Plan

Questions?

TOM KRUGER

VP of Permitting

tom.kruger@eolianenergy.com

503.758.4539

DANA DOMENIGHINI

Project Environmental Scientist

ddomenighini@maulfoster.com

971.254.8071



PANEL 3

Public Webinar: Updates on the Definition of “Waters of the United States”



September 12, 2023



Introductions

U.S. Environmental Protection Agency

- **Brian Frazer**, Director of the Office of Wetlands, Oceans, and Watersheds
- **Whitney Beck**, Clean Water Act Jurisdiction Team Lead

Department of the Army

- **Elliott Carman**, Water Resources Regulation and Policy Advisor

Presentation Outline

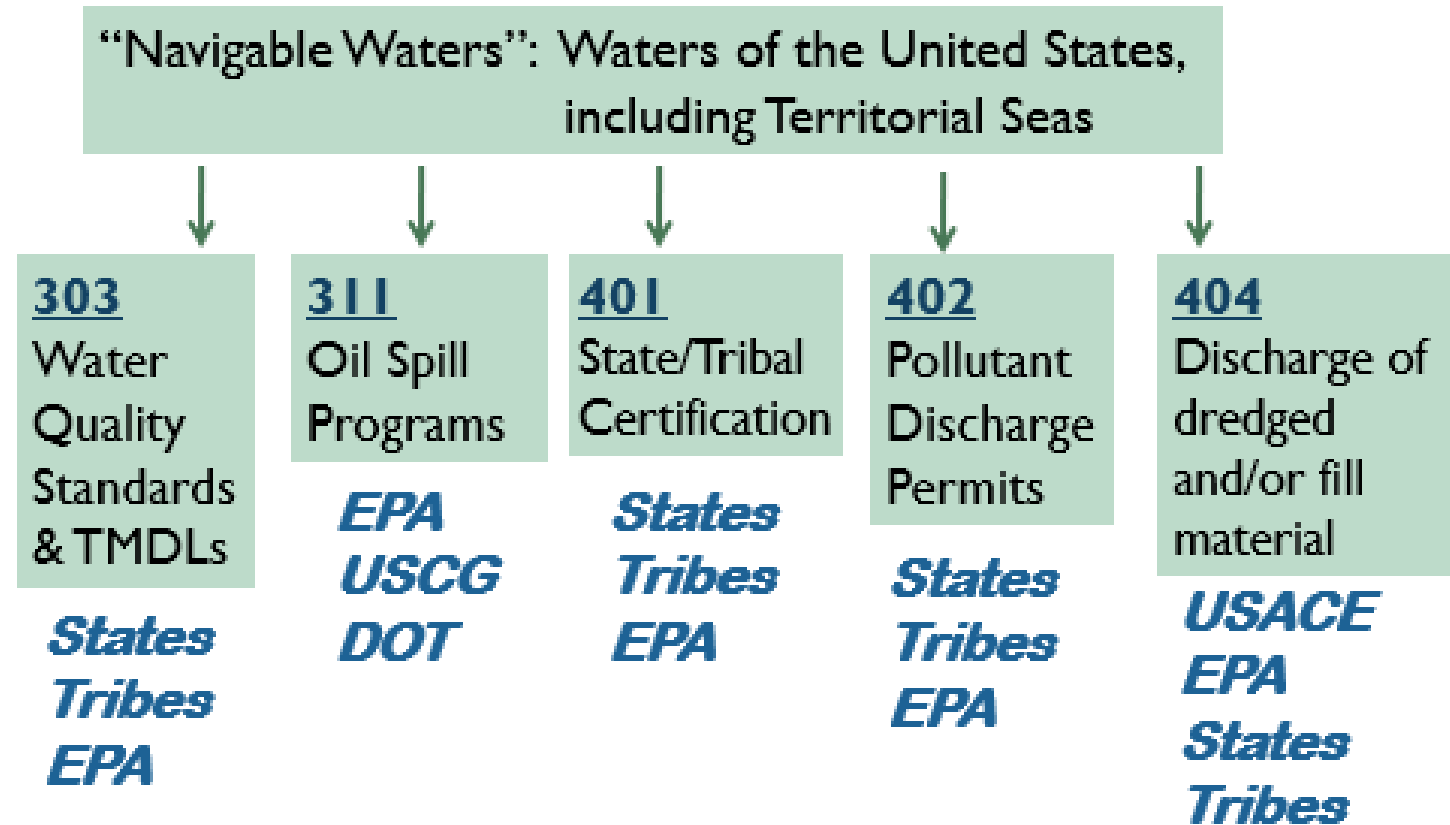
- Background
- Conforming Rule
- Additional Information



Background: “Waters of the United States” and the Clean Water Act

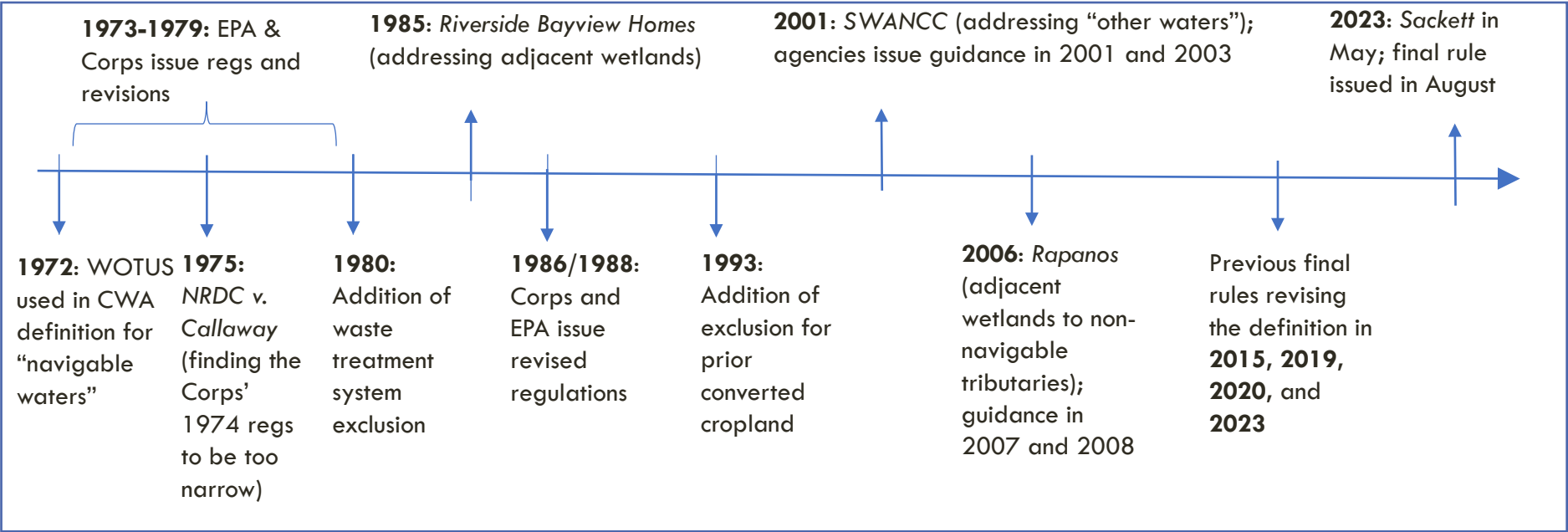
- “Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.”
- The Clean Water Act does not define “waters of the United States.”
- The EPA and the Department of the Army have defined “waters of the United States” by regulation since the 1970s.

Background: Why “Waters of the United States” Matters



Background: “Waters of the United States” Over Time

The definition of “waters of the United States” has been a subject of dispute and addressed in several major Supreme Court cases.



Background: Recent Events

January 2023	2023 Rule published – “Revised Definition of ‘Waters of the United States’”
March 2023	2023 Rule effective
May 2023	<i>Sackett</i> Supreme Court decision
June 2023	EPA and Army announce plans to issue a final rule amending the 2023 rule
August 2023	Final rule amending the 2023 rule: signature and announcement
September 2023	Final rule amending the 2023 rule: publication and effective date

Background: Ongoing Litigation

- As a result of ongoing litigation on the January 2023 Rule, the agencies will implement the January 2023 Rule, as amended by the conforming rule, in 23 states, the District of Columbia, and the U.S. Territories.
- In the other 27 states and for certain parties, the agencies are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime and the Supreme Court's decision in *Sackett* until further notice.

Background: *Sackett* Decision

- While the 2023 Rule was not directly before the Court, the Court considered the jurisdictional standards set forth in the rule.
- The Court concluded that the significant nexus standard was inconsistent with the Court's interpretation of the Clean Water Act (CWA).
- The Court concluded that the *Rapanos* plurality was correct: the CWA's use of "waters" encompasses only those **relatively permanent, standing or continuously flowing bodies of water** forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.
- The Court also agreed with the *Rapanos* plurality that wetlands are "waters of the United States" when the **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.

Background: Public Statement Issued After *Sackett* Decision

The Environmental Protection Agency and the U.S. Department of the Army (agencies) are in receipt of the U.S. Supreme Court's May 25, 2023, decision in the case of *Sackett v. Environmental Protection Agency*. In light of this decision, the agencies are interpreting the phrase “waters of the United States” consistent with the Supreme Court’s decision in *Sackett*. The agencies are developing a rule to amend the final "Revised Definition of 'Waters of the United States'" rule, published in the *Federal Register* on January 18, 2023, consistent with the U.S. Supreme Court’s May 25, 2023 decision in the case of *Sackett v. Environmental Protection Agency*. The agencies intend to issue a final rule by September 1, 2023.

<https://www.epa.gov/wotus>

Conforming Rule: Final Rule Amending the January 2023 Rule

- The agencies have determined that there is “good cause” under section 553(b)(B) of the Administrative Procedure Act to issue a final rule without prior proposal and opportunity for comment because such notice and opportunity for comment is unnecessary.
- Certain provisions of the 2023 Rule are invalid under the Supreme Court’s interpretation of the Clean Water Act in the *Sackett* decision.
- Providing advance public notice and seeking comment is unnecessary because the sole purpose of this rule is to amend these specific provisions of the 2023 Rule to conform with *Sackett*, and such conforming amendments do not involve the exercise of the agencies’ discretion.

Preamble to the Conforming Rule

- I. Why are the agencies issuing this final rule?**
- II. Which provisions are amended?**
- III. Severability**
- IV. Statutory and Executive Orders reviews**

Preamble to the Conforming Rule

- The agencies will continue to interpret the definition of “waters of the United States” consistent with the *Sackett* decision.
- It is both reasonable and appropriate for the agencies to promulgate this rule in response to a significant decision of the Supreme Court and to provide administrative guidance to address other issues that may arise outside of this limited rule. The agencies have a wide range of approaches to address such issues, including:
 - approved jurisdictional determinations and Clean Water Act permits;
 - guidance;
 - notice and comment rulemaking; and
 - agency forms and training materials.
- The agencies also intend to hold stakeholder meetings to ensure the public has an opportunity to provide the agencies with input on other issues to be addressed.

Targeted Changes to January 2023 Rule Jurisdictional Waters

Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters – revised

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries – revised

(a)(4) Adjacent Wetlands – revised

(a)(5) Additional Waters – revised

Targeted Changes to January 2023 Rule Jurisdictional Waters

**(a)(1)(iii) interstate waters
revised to remove interstate →
wetlands**

(1) Waters which are:

- (i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) The territorial seas; or
- (iii) Interstate waters, ~~including interstate wetlands~~;

Targeted Changes to January 2023 Rule Jurisdictional Waters

(a)(3) tributaries revised to
delete significant nexus
standard →

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section:
~~(i) That are relatively permanent, standing or continuously flowing bodies of water; or~~
~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;~~

Targeted Changes to January 2023 Rule Jurisdictional Waters

(a)(4) adjacent wetlands
revised to delete significant →
nexus standard

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(~~ii~~) of this section and with a continuous surface connection to those waters; ~~or~~

~~(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section~~

Targeted Changes to January 2023 Rule

Jurisdictional Waters

(a)(5) additional waters
revised to delete significant
nexus standard and delete
streams and wetlands →

(5) Intrastate lakes and ponds, ~~streams, or wetlands~~ not identified in paragraphs (a)(1) through (4) of this section:

~~(i) That~~ that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) ~~(i)~~ of this section; ~~or~~

~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section.~~

No Changes to January 2023 Rule Exclusions

Exclusions

- (b)(1) Waste treatment systems
- (b)(2) Prior converted cropland
- (b)(3) Certain ditches
- (b)(4) Artificially irrigated areas that would revert to dry land if irrigation ceased
- (b)(5) Certain artificial lakes and ponds
- (b)(6) Artificial reflecting or swimming pools or other small ornamental bodies of water
- (b)(7) Certain waterfilled depressions
- (b)(8) Swales and erosional features

Targeted Changes to January 2023 Rule Definitions

Definitions

(c)(1) Wetlands

(c)(2) Adjacent – **revised**

(c)(3) High tide line

(c)(4) Ordinary high water mark

(c)(5) Tidal waters

(c)(6) Significantly affect – **deleted**

Targeted Changes to January 2023 Rule Definitions

Revised definition of
“adjacent” →

(2) *Adjacent* means having a continuous surface connection. ~~bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are “adjacent wetlands.”~~

Targeted Changes to January 2023 Rule Definitions

Deleted definition of
“significantly affect”



~~(6) Significantly affect means a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section. To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section, the functions identified in paragraph (c)(6)(i) of this section will be assessed and the factors identified in paragraph (c)(6)(ii) of this section will be considered:~~

Status Update: Corps Approved Jurisdictional Determinations (AJDs)

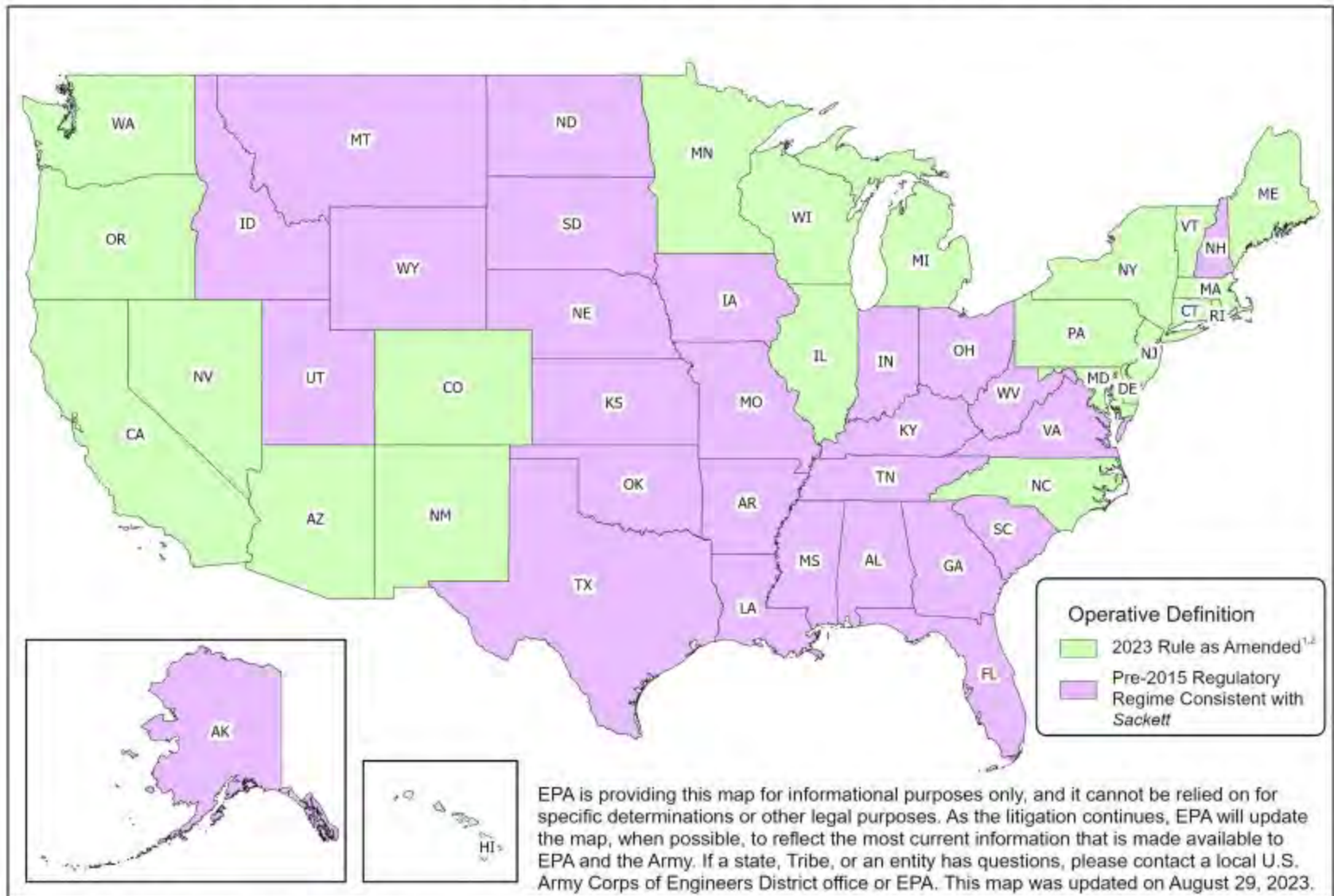
- After the *Sackett* decision was issued, the Corps paused issuance of all AJDs while the agencies determined next steps.
- After a short time, the Corps began issuing some types of AJDs:
 - Where no water resources are involved (dry land AJDs).
 - Where features meet the terms of the exclusions under the 2023 Rule or pre-2015 regulatory regime, where applicable.
- The Corps resumed issuing all types of AJDs on the effective date of the new rule.

Frequently Asked Questions

Additional Information

- See <https://www.epa.gov/wotus> for additional information.
- Please contact wotus-outreach@epa.gov with any questions.

Operative Definition of "Waters of the United States"



¹Also operative in the U.S. territories and the District of Columbia

²The pre-2015 regulatory regime implemented consistent with *Sackett* is operative for the Commonwealth of Kentucky and Plaintiff-Appellants in *Kentucky Chamber of Commerce, et al. v. EPA* (No. 23-5345) and their members (Kentucky Chamber of Commerce, U.S. Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce).

Sackett v. Environmental Protection Agency:

Implications for the future implementation of the Clean Water Act

Jamie Saul
Clinical Professor of Law
Earthrise Law Center
Lewis & Clark Law School

Significant impacts were foreshadowed by Justice Kavanaugh's concurrence in *Sackett*

- *Sackett* opinion will “leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States.” 598 U.S. at 716, 725–26.
- “The scientific evidence overwhelmingly demonstrates that wetlands separated from covered waters by those kinds of berms or barriers, for example, still play an important role in protecting neighboring and downstream waters, including by filtering pollutants, storing water, and providing flood control.” *Id.*

Will the federal wetlands permitting program survive *Sackett*?



Likely millions of acres of wetlands immediately lost federal CWA protection after *Sackett*: (a) those separated from a navigable water by a berm or dike, and (b) those plainly lacking a “continuous surface connection” to other jurisdictional waters.

But many more millions are at risk depending on:

- What is a “continuous surface connection” and how is it established?
- How complicated / expensive will jurisdictional determinations become?
- Will the Corps have the will and the budget to develop, and then implement, an effective post-*Sackett* policy on wetlands jurisdiction?

State wetland regulation post-*Sackett*

- CWA allows for state “assumption” of § 404 permitting; but currently only MI, NJ, and FL. Others (including Oregon) have considered but not pursued assumption.
- Wetland regulation under state law is spotty: 24 states have no wetland protections at all, and several others have very limited state programs
- Some states may follow the *Sackett* lead; others may step in to fill the void



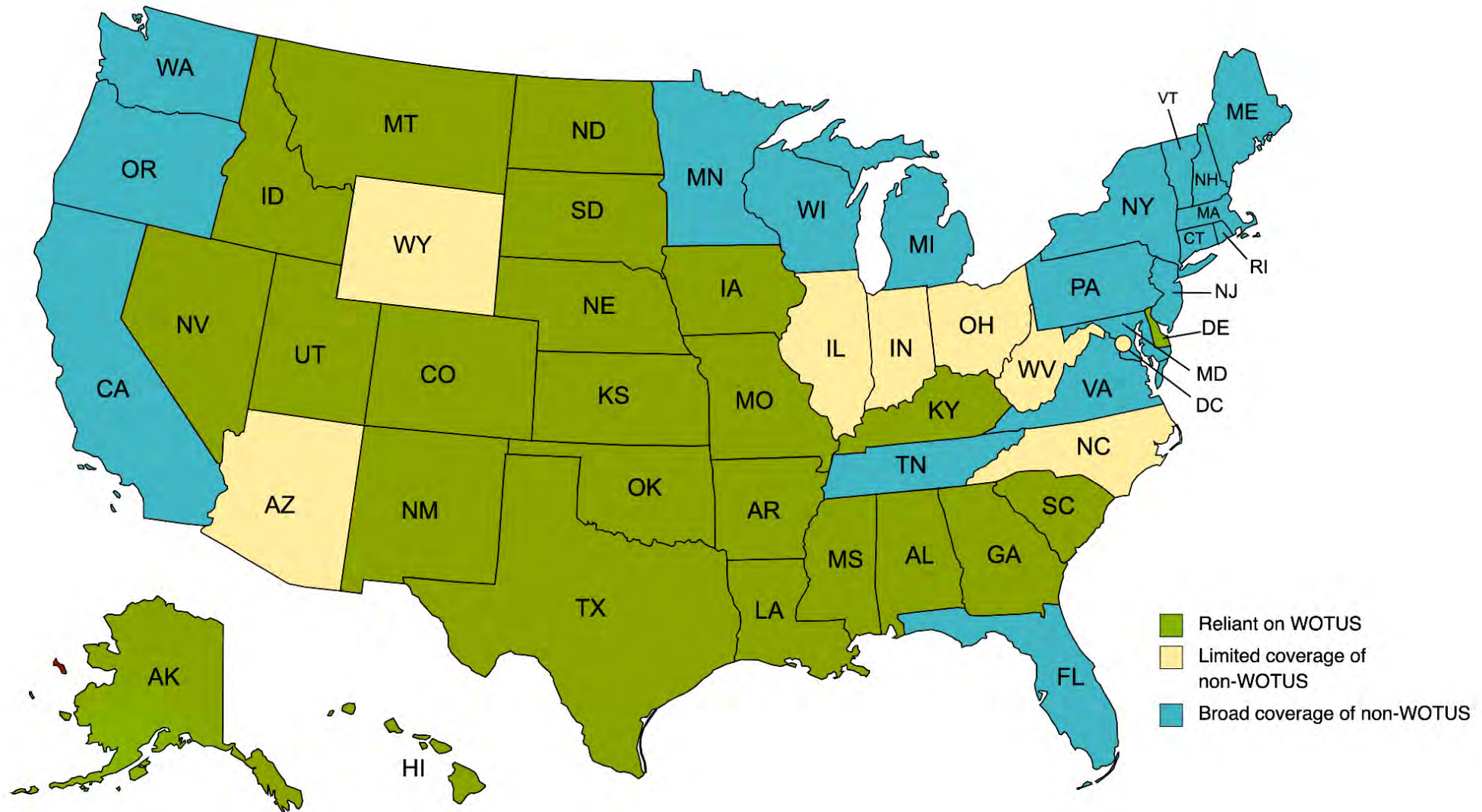


Figure courtesy of the Environmental Law Institute

What about non-navigable tributaries?

- *Rapanos* plurality: WOTUS includes “relatively permanent, standing or continuously flowing bodies of water” but not “channels through which water flows intermittently or ephemerally” 547 U.S. at 739.
- J. Kennedy’s concurrence in *Rapanos* would extend jurisdiction to wetlands and tributaries that have a “significant nexus” with navigable-in-fact waters
- EPA *Rapanos* Guidance (2007) and the Clean Water Rule (2015) relied on the “significant nexus” test to establish CWA jurisdiction over tributaries.
- But all 9 justices in *Sackett* rejected the significant nexus approach to CWA jurisdiction. E.g., 598 U.S. at 715-716. (Kavanaugh’s concurrence).



What about non-navigable tributaries?



The 2023 Conforming Rule revised the WOTUS definition to include only “tributaries of” (a) waters used in interstate commerce; (b) the territorial seas; (c) interstate waters; and (d) impoundments of other jurisdictional waters, but only if they are “relatively permanent, standing or continuously flowing bodies of water.” 40 C.F.R. § 120.2(a)(3) (2023).

2008 *Rapanos* Guidance: “relatively permanent” = “typically flow year-round or have continuous flow at least seasonally (i.e., 3 mos. per year).”

No more significant nexus test for tributaries

Other ripple effects of *Sackett*

- **NEPA review will shrink.** Issuance of § 404 permits is one of the most common “major federal actions” triggering review under NEPA and the preparation of Environmental Impact Statements.
- **ESA consultation will occur less frequently.** Issuance of § 404 permits is one of the most common federal actions triggering ESA consultation to ensure against jeopardy. And, by some estimates, 45% of all ESA-listed species are wetland-dependent.
- **401 certification will be required less frequently.** The requirement to obtain state water quality certification under CWA § 401 is triggered by issuance of a “Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters”

Effects of *Sackett* on projects of national interest

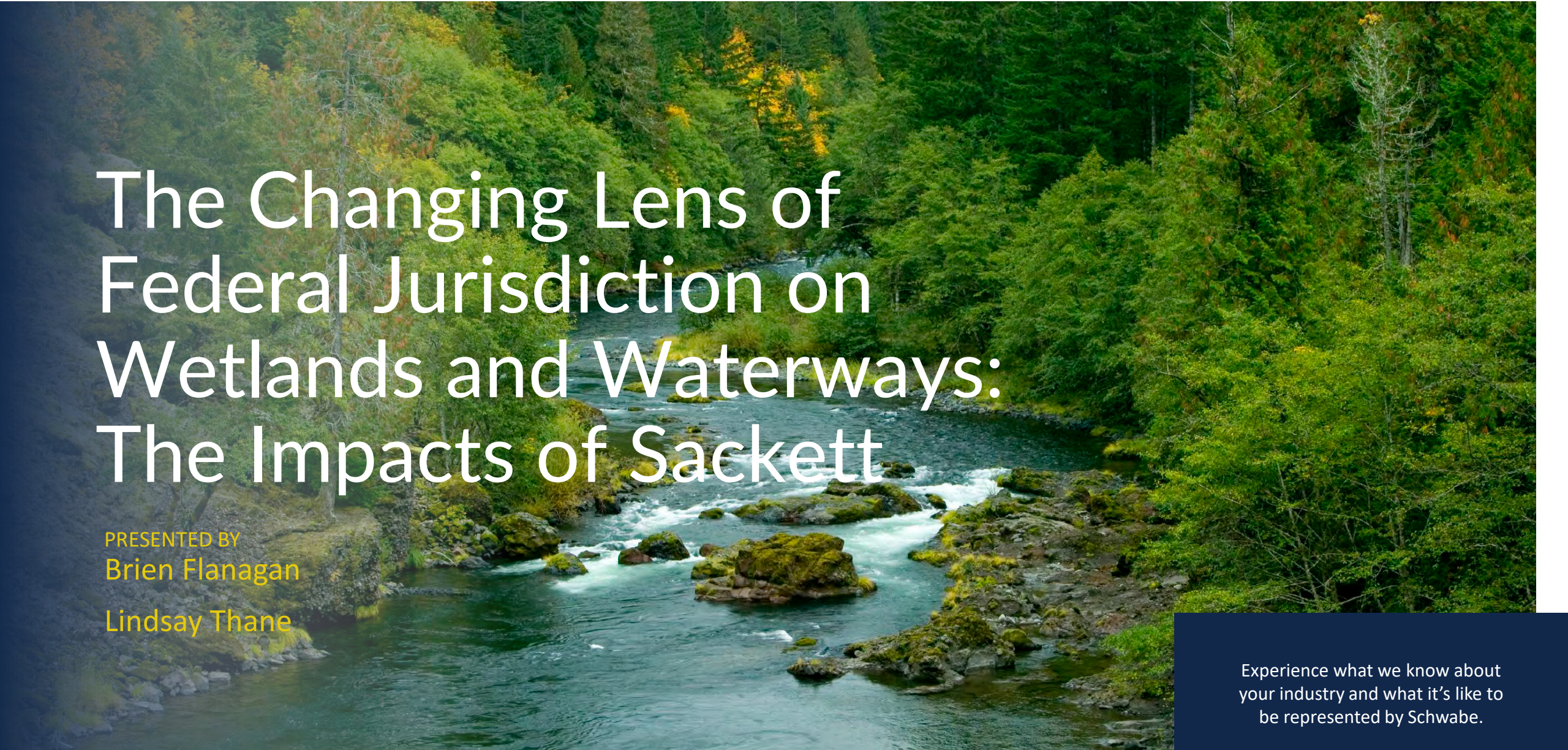


Pebble Mine

- Believed to be the world's largest copper deposit, located near Bristol Bay, Alaska
- The Corps found the mine would lead to the total loss of approx. 430 miles of streams and **more than 10,800 acres of wetlands**.
- The Corps denied the 404 permit application in 2020; EPA prohibited or restricted the use of approx. 309 sq. mi. of wetlands and other waters as disposal sites for the discharge of dredged or fill material under 404(c) in 2023.
- In July, relying in part on *Sackett*, AK sought Supreme Court review of the veto, arguing that EPA must determine whether the wetlands fit the new definition of WOTUS

Sackett and the ever-expanding Major Questions Doctrine

- *Sackett* majority: Congress must use “**exceedingly clear language** if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.” 598 U.S. at 630.
- But the majority glosses over CWA § 404(g) which – although not part of the definition section – was amended in 1977 to authorize states to implement their own permitting program over navigable waters and “**wetlands adjacent thereto[.]**” (incorporating language from the Corp’s regulatory definition).
- By ignoring this language, the Court’s decision “is explicable only as a reflexive response to Congress’s enactment of an ambitious scheme of environmental regulation.” 598 U.S. at 715. (Kagan, J., concurring).
- Even Justice Kavanaugh faulted the majority for ignoring EPA and the Corps’ “longstanding and consistent agency interpretation” that “reflects and reinforces the ordinary meaning of the statute.” *Id.* at 722.



The Changing Lens of Federal Jurisdiction on Wetlands and Waterways: The Impacts of Sackett

PRESENTED BY
Brien Flanagan
Lindsay Thane

Experience what we know about
your industry and what it's like to
be represented by Schwabe.

REPRESENTED BY
Schwabe

October 20, 2023

Natural Division:

the continuous surface connection requirement is a “physical-connection requirement.” 547 U.S. at 751 n.13

2023 Preamble: Under the relatively permanent standard for adjacent wetlands, wetlands meet the continuous surface connection requirement if they physically abut, or touch, a relatively permanent paragraph (a)(2) impoundment or a jurisdictional tributary when the jurisdictional tributary meets the relatively permanent standard, or if the wetlands are connected to these waters by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. A natural berm, bank, dune, or similar natural landform between an adjacent wetland and a relatively permanent water does not sever a continuous surface connection to the extent it provides evidence of a continuous surface connection. Again, the determination of whether a wetland is “adjacent” under the rule is distinct from whether an “adjacent” wetland has a continuous surface connection.



Dikes and Levees

“[Jurisdictional] 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.’”

Kavanaugh Concurrence: Distinction between “adjacent” and “adjoining” lost in majority opinion (i.e.—his entire concurrence stresses that majority opinion limited CWA 404 to adjoining wetlands, and clearly indicates that man-made interference breaks that connection). “The Court says that the wetland and the covered water must be ‘indistinguishable’ from one another—”

“[T]he Mississippi River features an extensive levee system to prevent flooding.” But, because these levees create a physical barrier, “the presence of those levees (the equivalent of a dike) would seemingly preclude Clean Water Act coverage of adjacent wetlands on the other side of the levees, even though the adjacent wetlands are often an important part of the flood-control project.”

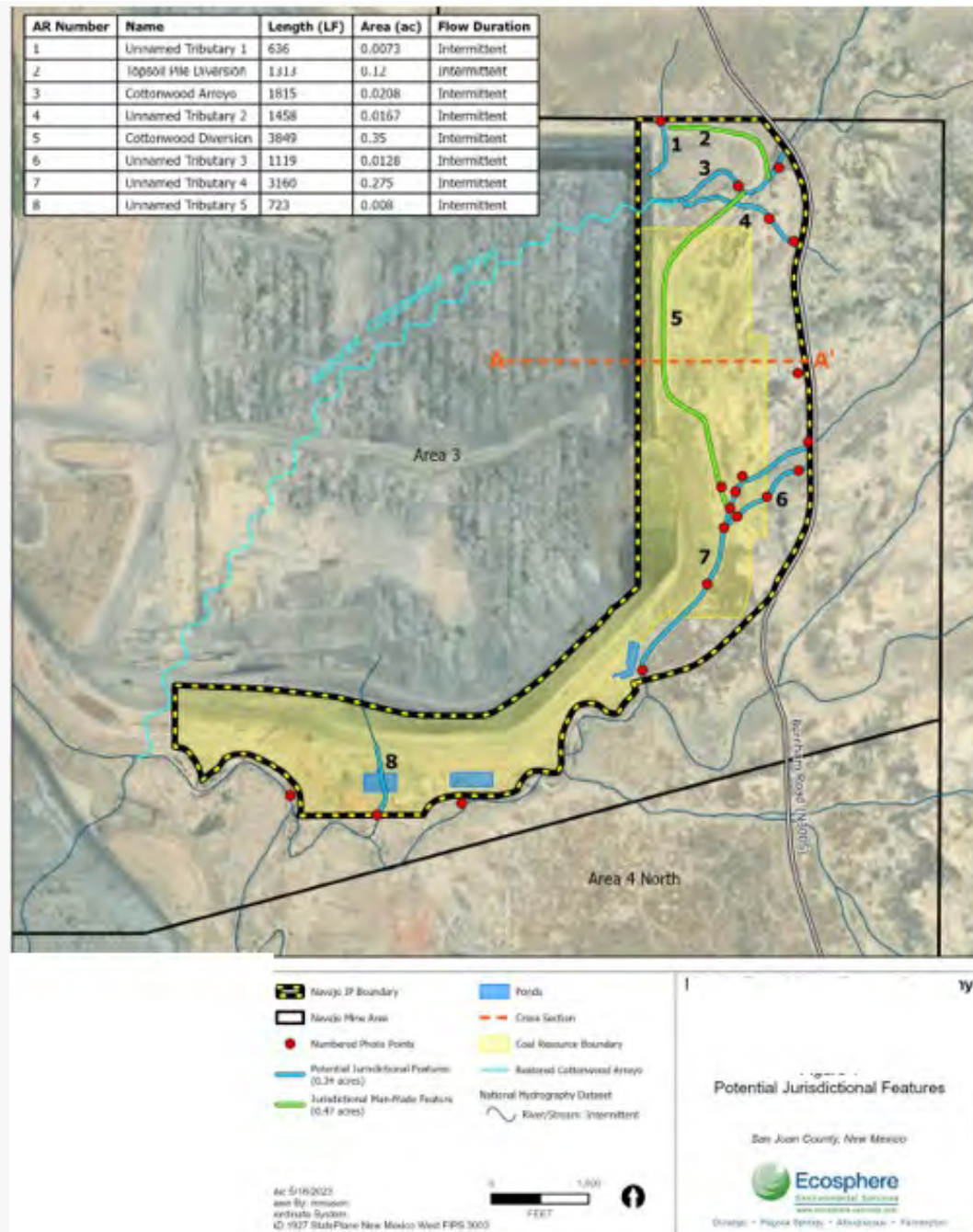


Intermittent and Ephemeral Streams

“The CWA’s use of ‘waters’ encompasses ‘only those relatively permanent, standing or continuously flowing bodies of water “forming geographic[al] features” that are described in ordinary parlance as “streams, oceans, rivers, and lakes.””

The Rapanos plurality distinguished a “continuous surface connection” from “an intermittent, physically remote hydrologic connection.” Id. at 742 (plurality opinion).

Corps requesting *Stream Duration Assessment Method (SDAM)* analysis.





Brien Flanagan

Shareholder

I help energy producers, manufacturers, and export terminals seek the permits, authorizations, and financing they need to develop state-of-the-art facilities vital to their success and our region's economic strength.

A naturally resourceful leader, I work along with my team on environmental, energy, and natural resource matters. We combine deep industry experience, business understanding, legal creativity, and the highest quality advocacy to help you seek your desired outcome.

503-796-2915

bflanagan@schwabe.com

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INDIAN COUNTRY
AND ALASKA NATIVE
CORPORATIONS

HEALTHCARE AND
LIFE SCIENCES

REAL ESTATE AND
CONSTRUCTION

COMMERCIAL
PRODUCTS,
MANUFACTURING,
AND RETAIL

NATURAL
RESOURCES

TECHNOLOGY

PORTS AND
MARITIME

PANEL 4

TRIBAL CO-STEWARDSHIP RELATIONSHIPS WITH OREGON AND THE U.S.

OCTOBER 20, 2023: ENVIRONMENTAL & NATURAL RESOURCES LAW CLE

Anthony Broadman
Galanda Broadman PLLC
Bend, Oregon

OVERVIEW – CO-STEWARDSHIP

- Oregon Tribal Governments – Sovereignty and Territory
- Co-Stewardship – What is it and why does it matter?
- Examples
- State and Federal Consultation and Cooperation and Treaty Requirements



CO-STEWARDSHIP

THANK YOU

Anthony Broadman

Galanda Broadman PLLC

Bend, OR

anthony@galandabroadman.com

(541) 588-4034

MOA Between Oregon Department of Fish and Wildlife and Cow Creek Band of Umpqua Tribe of Indians



2023 Oregon State Bar Environmental and Natural Resources Section

October 20, 2023

Davia Palmeri, davia.m.palmeri@odfw.Oregon.gov

Mission



To protect and enhance Oregon's fish and wildlife and their habitats for use and enjoyment by present and future generations.

State Policy (ORS 182.162 – 182.168)



“Tribe” means a federally recognized Indian tribe in Oregon

State Agencies shall develop policies that:

- Promote communication between the state agency and tribes
- Promotes positive government-to-government relations between the state and tribes

Agencies shall cooperate with tribes in the development and implementation of programs of the state agency that affect tribes, including by agreement

Agencies shall provide training to employees and create annual report

Does not create a right of action against an agency or a right of review of an agency action

Maintain Liaison Position

Meet Regularly with Tribes

Explore opportunities for state-tribal **partnership** and **collaboration**

Support and participate in cooperative efforts between tribal governments and federal, state, and/or local governments

Seek tribal **representation** on ODFW advisory committees

Support exchange of data between ODFW and tribes

Promote strong government-to-government relationship at all levels

Participate in the Natural resources Workgroup and Cultural Resources Cluster

Seek advice and guidance from the LCIS and staff on tribal government matters

Ensure ODFW employees are aware of the sovereign authority of tribes

Annual report: government-to-government activities



ODFW Policy (DO Policy 100_04)

Relevant Authority



ORS 496.138 Commission implements the state's policies and programs for wildlife management consistent with the state wildlife policy (ORS 496.012)

ORS 496.146 Commission may prescribe the time, place and manner; authority to prescribe the amounts of wildlife harvest, and to authorize the issuance of permits for the same

ORS 190.110 Agency may cooperate for any lawful purpose, by agreement, with an American Indian tribe in performing a duty imposed upon it



Negotiating MOA



PANEL 5



Groundwater Allocation Rules

Zach Freed

October 20, 2023

Groundwater: a hidden resource?

Groundwater is...

- the drinking water supply for 70% of Oregonians¹

[1] Oregon Dept. of Env. Quality 2023



Groundwater: a hidden resource?

Groundwater is...

- the drinking water supply for 70% of Oregonians¹
- the source of water for > 37,000 miles of rivers and streams²

[1] Oregon Dept. of Env. Quality 2023; [2] Freed et al. 2022



Groundwater: a hidden resource?

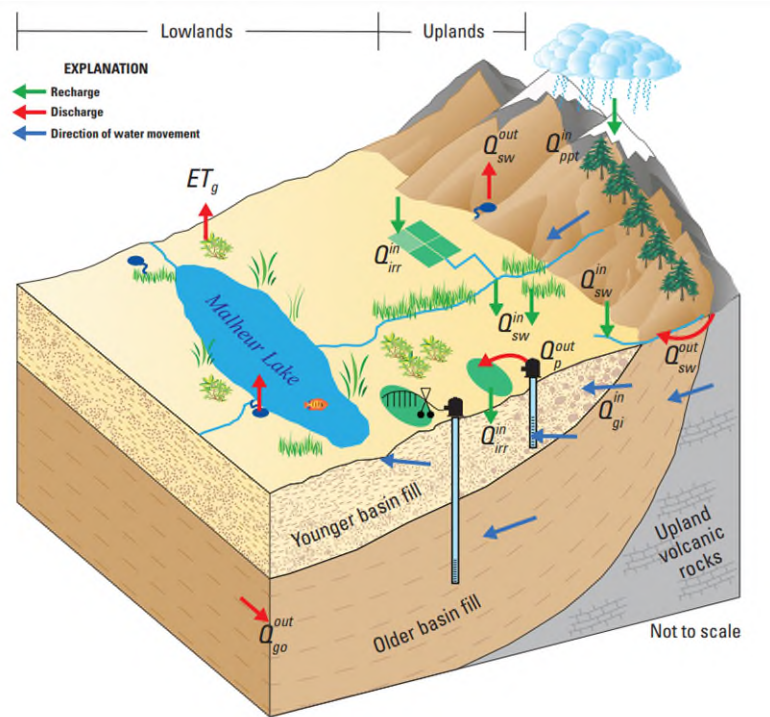
Groundwater is...

- the drinking water supply for 70% of Oregonians¹
- the source of water for > 37,000 miles of rivers and streams²
- Primary irrigation for agriculture worth ~ \$1.83 billion per year^{3,4}

[1] Oregon Dept. of Env. Quality 2023; [2] Freed et al. 2022; [3] Pilz et al. 2023 modified proportionately by data from [4] U.S. Geological Survey 2023



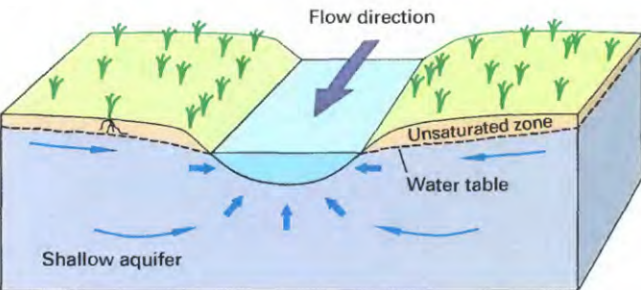
Harney County, OR © Zach Freed 2022



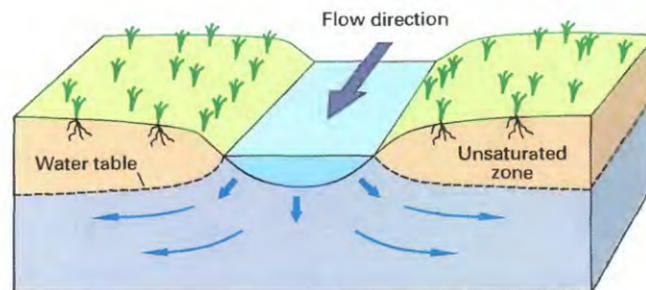
Flow Systems

- Recharged by rain and snow
- Discharged to wells, wetlands, and plants
- Speed and direction dependent upon hydrogeologic setting
- Inextricably connected to surface water

GAINING STREAM



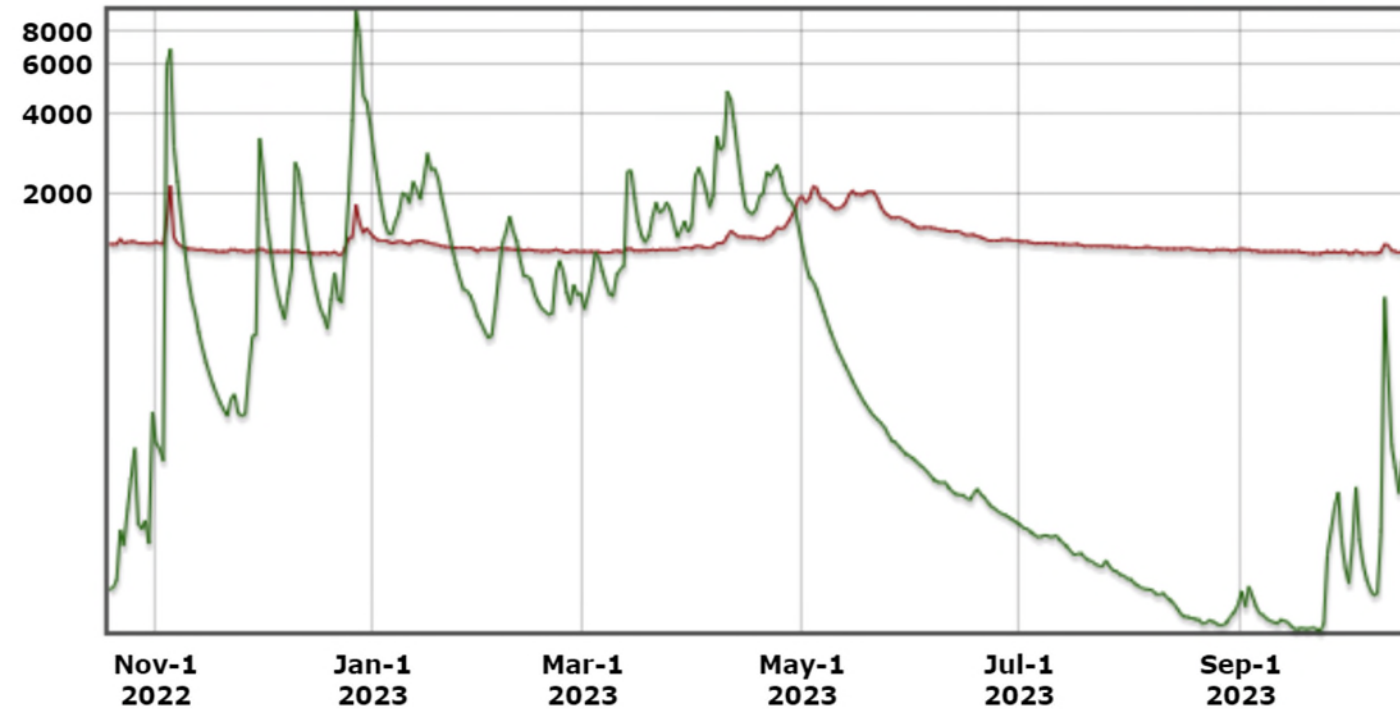
LOSING STREAM



Top: Gingerich et al. 2022; Bottom: Winter et al. 1999

USGS 14091500 Metolius (Brown) USGS 14302480 Trask River (Green)

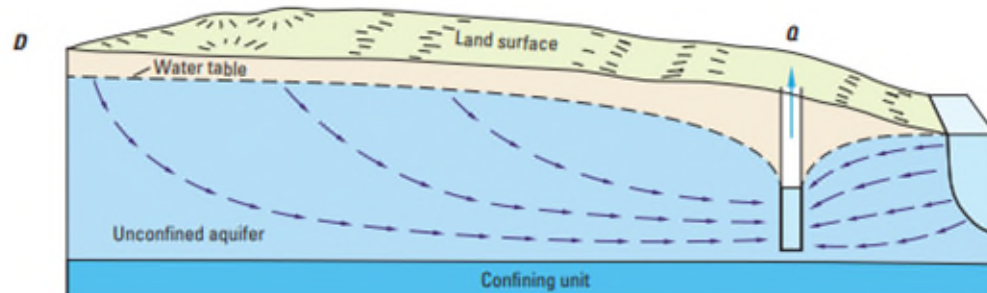
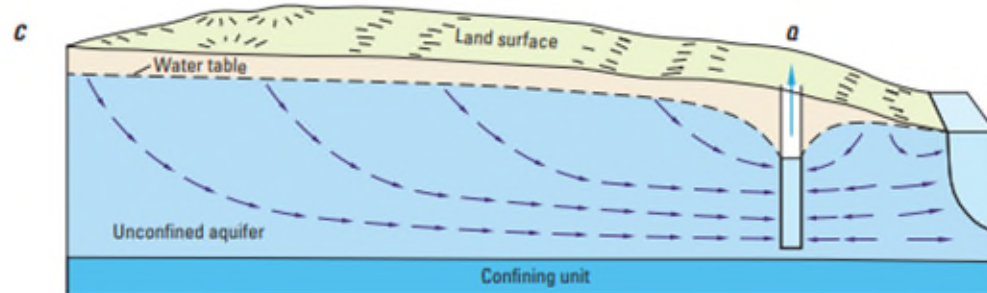
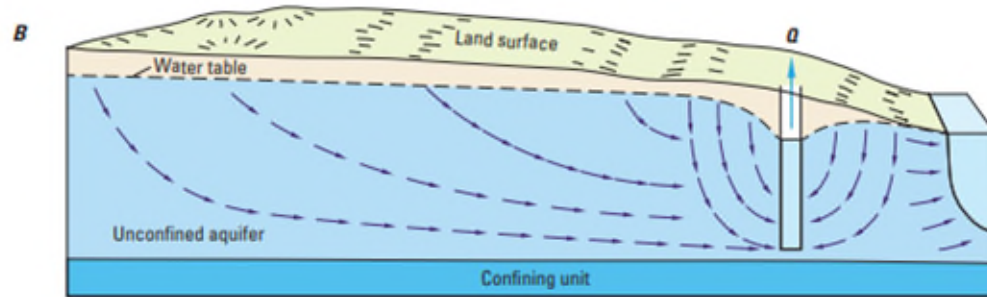
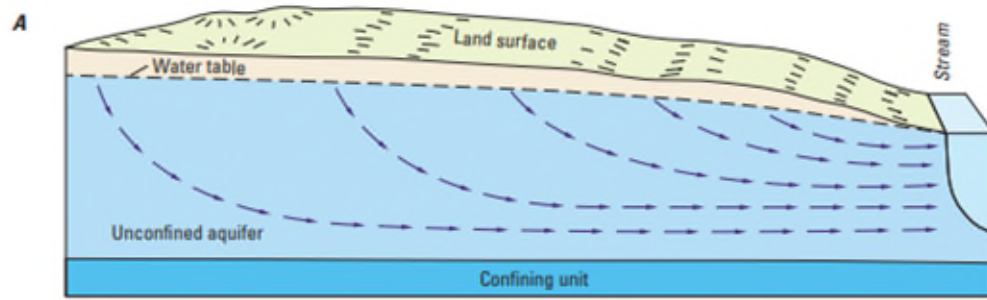
Zoom period plot



USGS National Water Information System, 2023

Groundwater or surface water?

- Groundwater supports *baseflow* in streams during summer and fall
- Increases drought resilience
- More consistent water availability



Groundwater or surface water?

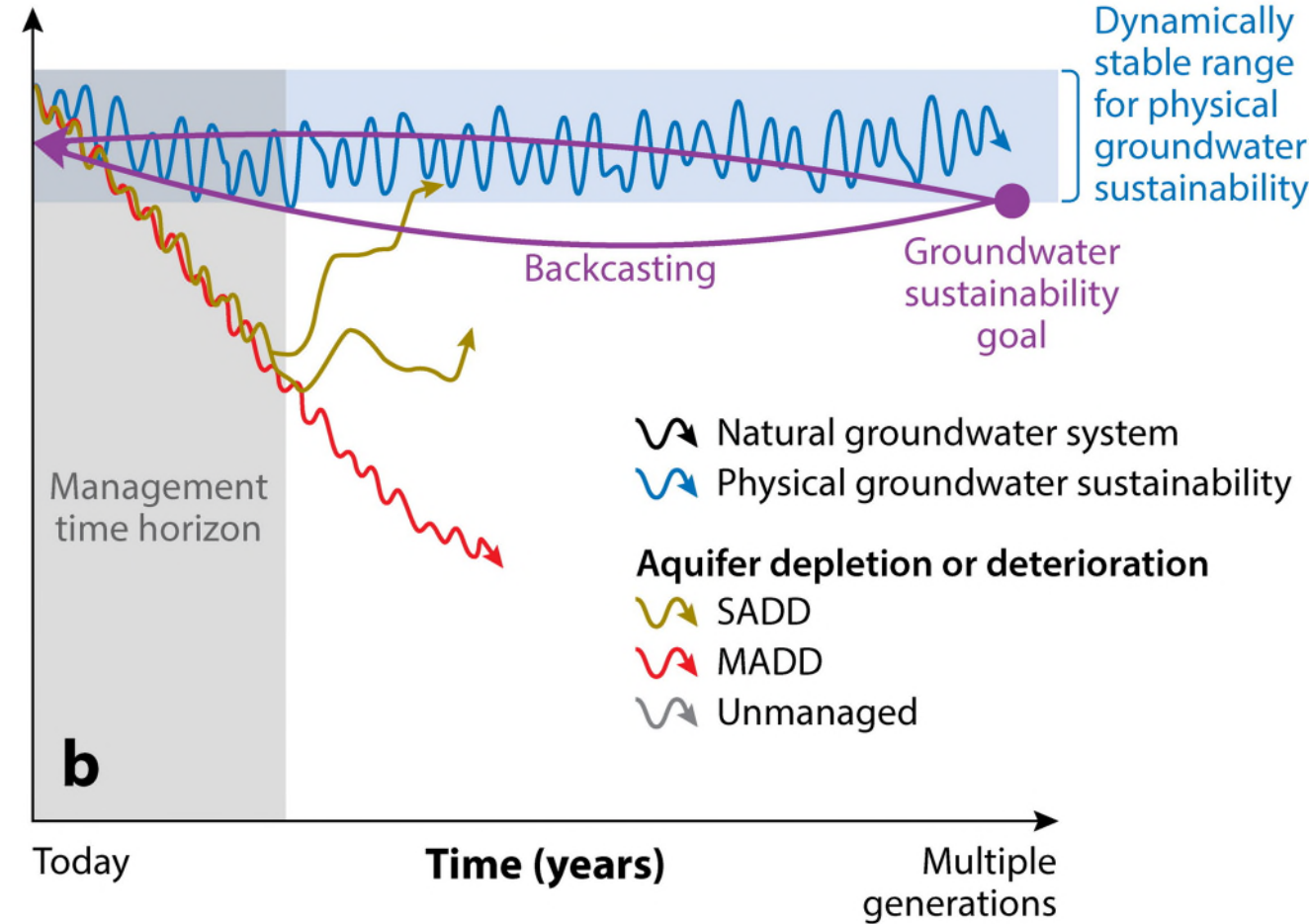
Adding wells to a system can affect surface water in two ways:

- Capture
- Induced recharge

Sustainability

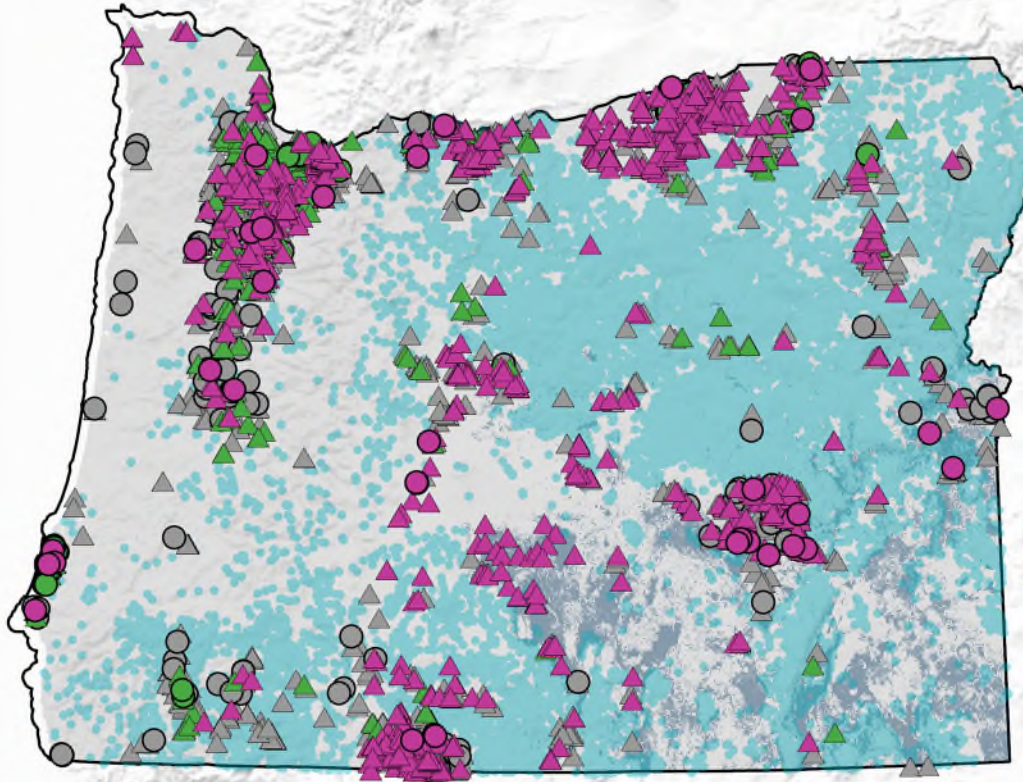
Dynamically stable groundwater levels:

- Represents balanced demand with supply
- Measured by groundwater levels and flows (e.g., streams, springs)
- Incorporates climate fluctuations (e.g., ENSO, PDO)
- Ensures long-term resilience



Gleeson et al. 2020

A



- Significantly declining groundwater trend
- Significantly increasing groundwater trend
- No significant trend
- Deep wells
- Shallow wells

Groundwater Level Trends

Systematic well declines in several areas over the past twenty years...

...but also several areas with stable or increasing well levels.

Biodiversity and Climate:

Groundwater-dependent ecosystems are:

- “Museums of biodiversity”¹
- “Keystone ecosystems”²
- “Oases of the future”³

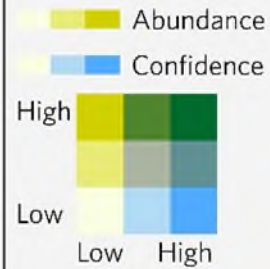
[1] Murphy et al. 2015; [2] Perla and Stevens 2008; [3] Cartwright et al. 2021



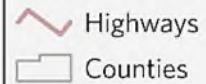
Unnamed spring on Broken Top Mtn. © Zach Freed 2018

Oregon GDE Atlas 2022

Distribution and Abundance of GDEs



Orienting Features



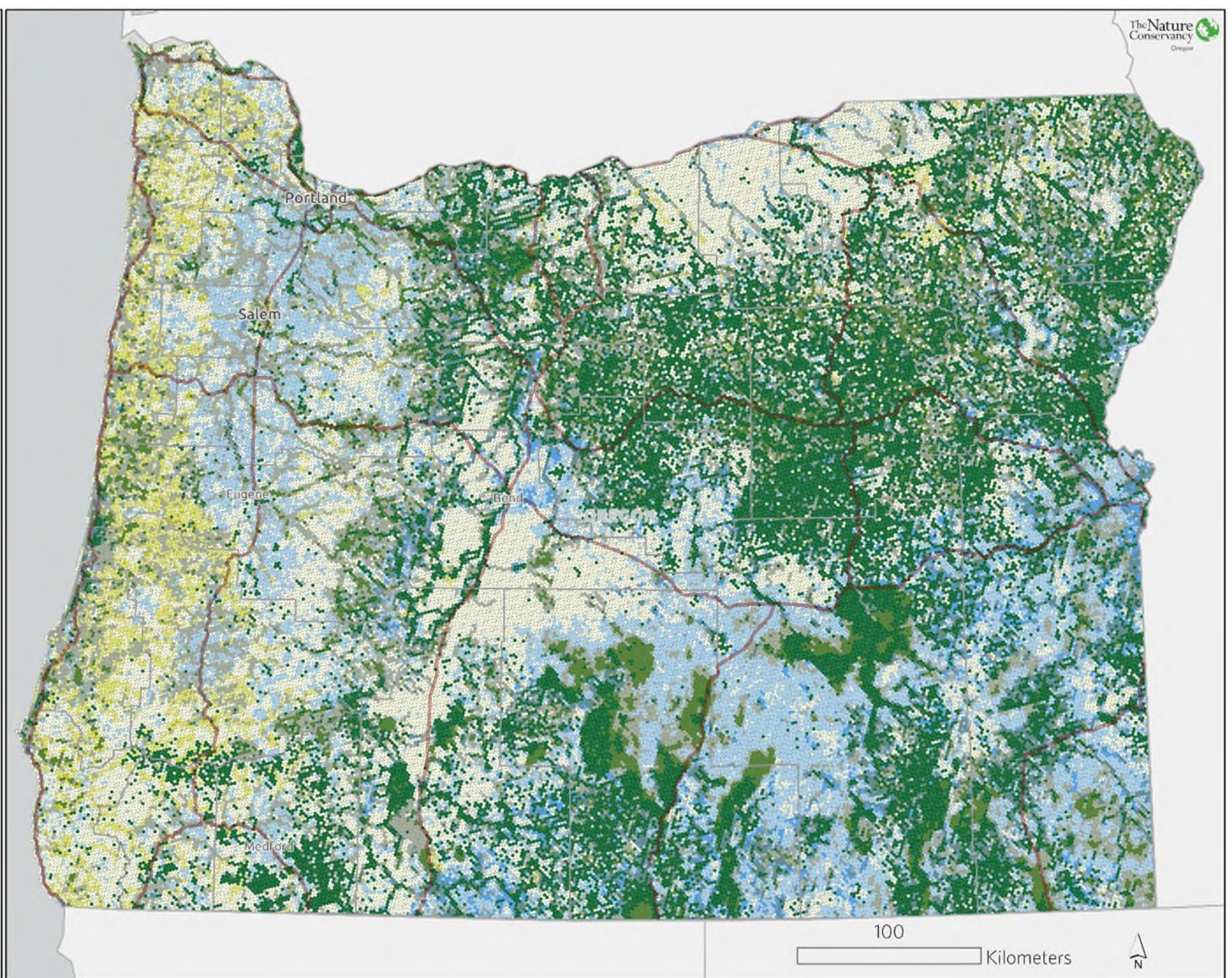
Groundwater-dependent ecosystems are unevenly distributed across Oregon. All five types of GDEs (springs, rivers, wetlands, lakes, and species) have been combined into a bivariate index of abundance and confidence. The abundance of different GDE types is standardized relative to their total distribution and summed. Confidence reflects the standardized sum of indicators across all GDE types.

Freed et al. 2022

Data Sources:

Hexagons: ODFW
Streams: National Hydrologic Dataset
Wetlands: National Wetlands Inventory
Springs: DOGAMI and TNC
GD Species: Oregon Biodiversity Information Center
Basemap: ESRI, State of Oregon GEO

Map produced by the The Nature Conservancy in Oregon, 2022



Frontline Communities:

those that experience the “first and worst” consequences of climate change;

those that have disproportionate exposure to long-term risks compared to short-term benefit.



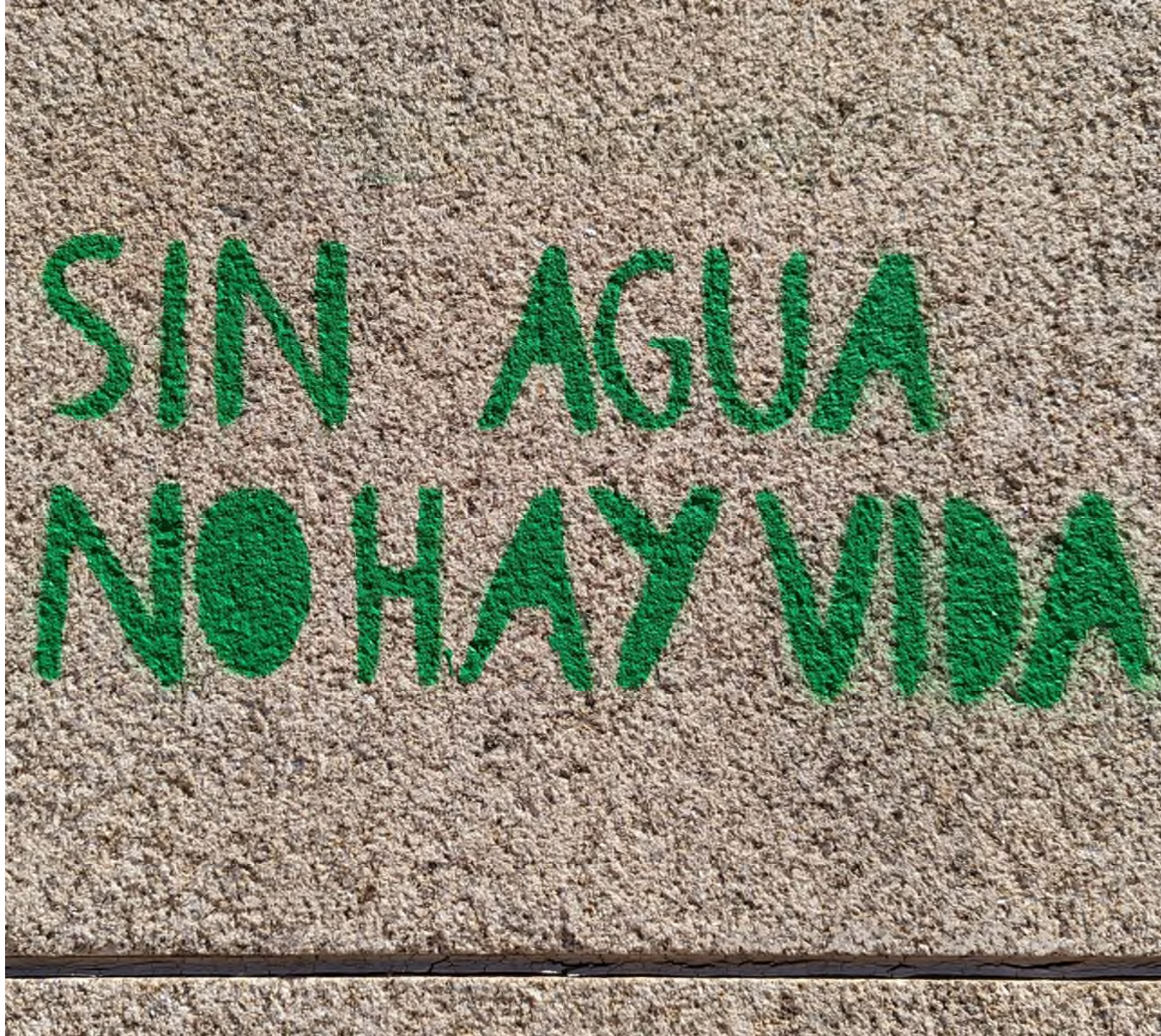
Harney Basin Community via OPB

Thank you

Get in touch:

zach.freed@tnc.org

503-802-8151



OREGON



WATER RESOURCES
DEPARTMENT

Oregon Bar Environmental & Natural Resources Annual CLE

Ivan Gall, Interim Deputy Director
Oregon Water Resources Department

October 20, 2023

The background of the slide is a stylized landscape. The top half features a blue sky with white, fluffy clouds. Below the sky are several mountain ranges in shades of brown and tan, with some peaks covered in white snow. The bottom half of the slide is a solid blue band containing the title text. Below this band are rolling green hills with white outlines, suggesting a grassy foreground.

Groundwater Allocation Rulemaking Background

Current GW Allocation Process

Groundwater allocation
has contributed to:

- groundwater level declines
- reduced surface water baseflow



Leadup to Rulemaking

June 2021 – Groundwater Concerns Assessment

- More than 70% of GW applications result in a permit
- Approx. 80% of applications in “Areas of Concern” receive permits
- The GW review cannot always determine whether an aquifer is over-appropriated given current definition, and policy around, that term

Dec 2021 & March 2022 – Commission Discussion

- Protect existing users
- Apply the precautionary principle
- Make a positive finding that water is available

Fall 2022 – Groundwater Allocation Project Outreach Meetings (5)

- Gather public input ahead of rulemaking

Rulemaking Objective

Update groundwater allocation rules to be more sustainable and protective of existing water right holders, both instream and out-of-stream.



Need for Updated Rules

“Reasonably Stable Groundwater Levels”

- are not defined, therefore
- declined excessively is the default standard for assessing over-appropriation

“Potential for Substantial Interference”

- provides limited protection to existing users and
- is not aligned with definition of over-appropriation



Rulemaking Process Included:

- Public outreach – 5 meetings, Fall 2022
- RAC meetings – 6 meetings since April 2023
- GWAC engagement - 8 meetings since March 2022
- Commission updates – since December 2021
- All information available on Department website

RAC representation includes:

- Agriculture and ranching interests
- Conservation groups
- Tribes
- Scientists, attorneys, engineers, economists
- Well drilling interests
- Municipal interests
- Domestic well owners
- County commissioners

Rulemaking Timeline

RAC Meetings #1-8

Input on Draft Rules; Input
on Draft Statement of
Need, Racial Equity
Impacts, Economic & Fiscal
Impacts

April 2023 - Early 2024

Public Hearings

Spring 2024

Review Public Comments

Revise Draft
Rules as
needed;
Develop WRC
Proposal

Spring 2024

**Effective
Date of
Final
Rule**

**Summer
2024**



**Notice of
Proposed
Rulemaking/
Start of 90-day
Public
Comment
Period
Early 2024**

**Last Day of
Public
Comment
Period
Spring
2024**

**WRC
Decision
on
Proposed
Rule
Adoption
Summer
2024**

General Rulewriting Approach

- Be clear
- Edit surgically
- Work towards simplicity in rule construct
- Remove redundancy where possible
- Awareness of impacts to other rules





Rulewriting Framework

- Based in law
- Based in science
- Focused on groundwater allocation (availability) without affecting other rules
- Clear and concise language

Basis in Law

ORS 537.621(2)

The four-part test

- Basin program rules
- Water is available
- Will not injure
- Other rules

Positive finding that water is available

ORS 537.780(2)

Determination that a groundwater use will

- Impair,
- Substantially Interfere, or
- Unduly Interfere

with a surface water source must be based on substantial evidence

Storage & Capture

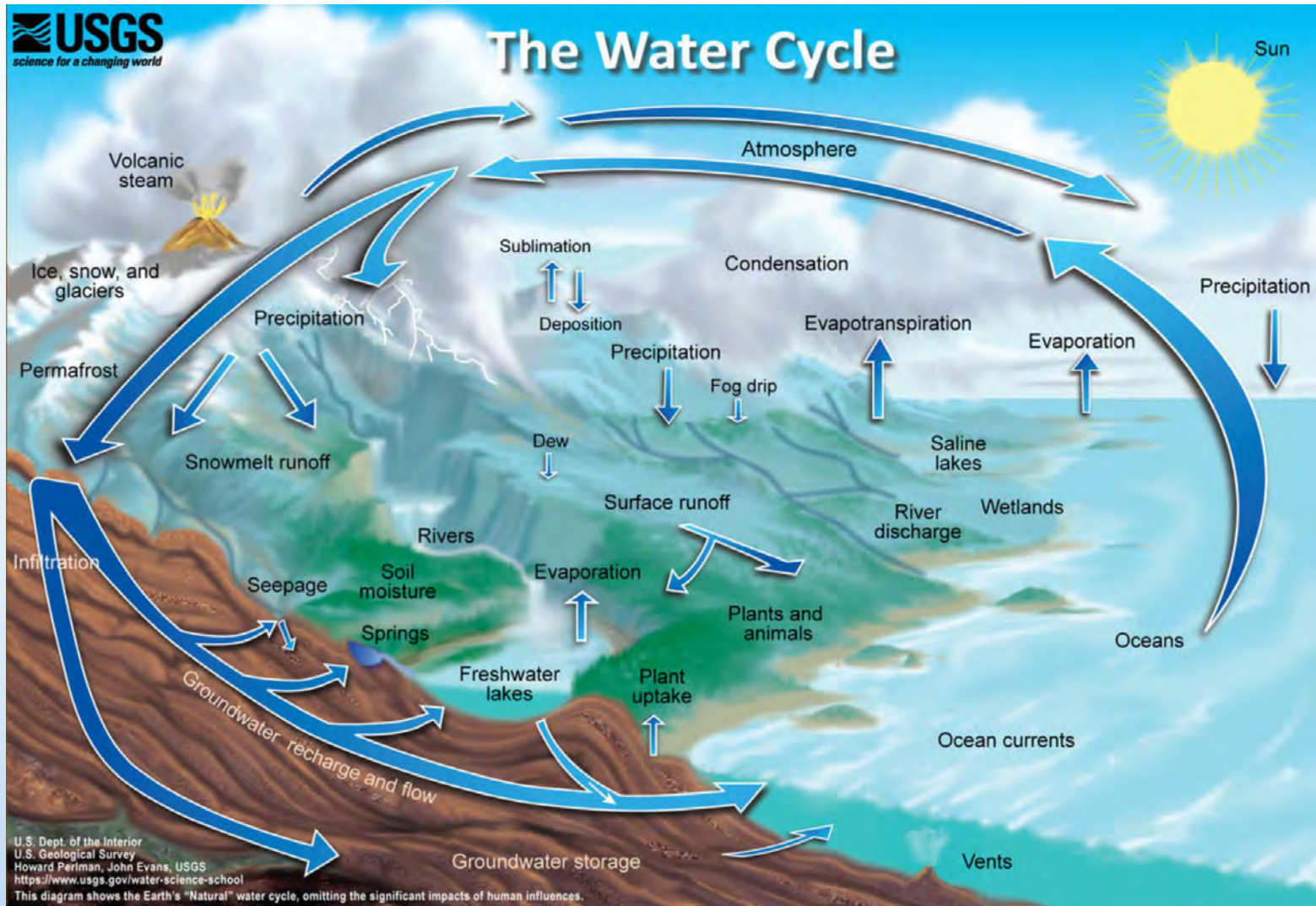
- “The Source of Water Derived from Wells” (Theis, 1940)

Timing of water from storage & streamflow depletion (capture)

- “Streamflow Depletion by Wells” (Barlow & Leake, 2012)



Groundwater within Water Cycle





OREGON
WATER
RESOURCES
DEPARTMENT

Baseflow is Groundwater



Define “Reasonably Stable Groundwater Levels”

- Address groundwater appropriation from storage

Re-define “Potential for Substantial Interference” (PSI)

- Address groundwater appropriation from capture (or streamflow depletion)



Water is Available if...

Existing:

Requested source is not over-appropriated:

- doesn't further deplete over-appropriated surface water
 - limited to < 1 mile and < 1 year
- allocation < average annual recharge
 - defer to definition of declined excessively

Proposed:

- Water levels are reasonably stable
- Substantial interference with surface water is avoided
- Target aquifer can produce requested rate

Reasonably Stable Water Levels

In short, Reasonably Stable Water Levels defined as:

- Less than 0.5 feet water level decline averaged over 5-20 years
- No more than 25 feet of total decline from highest known water level
- Need at least 5 years of recent data, otherwise “not available”
- Basin program rules can provide a local definition that is no less stringent than Declined Excessively

Impacts of GW Declines

- Wells go dry
- Reduced streamflow
- Water quality deteriorates
- Pumping costs increase
- Land subsidence



RAC Feedback

- Broad consensus that rulemaking is needed
 - Several RAC members believe draft rules meet Commission's objectives
- Failure to act may jeopardize existing water users
- Concerns about insufficient or outdated data
- Proposed rules may negatively impact:
 - Municipal growth
 - Agricultural expansion
- Solutions:
 - Conservation Incentives
 - Transfers
 - Market based approaches
 - Aquifer Storage/Recharge
 - Water Re-use



The Ground(water) Is Shifting Beneath Us -- Groundwater Allocation and Regulation

2023 Environmental & Natural Resources Law: Year in Review
October 20, 2023

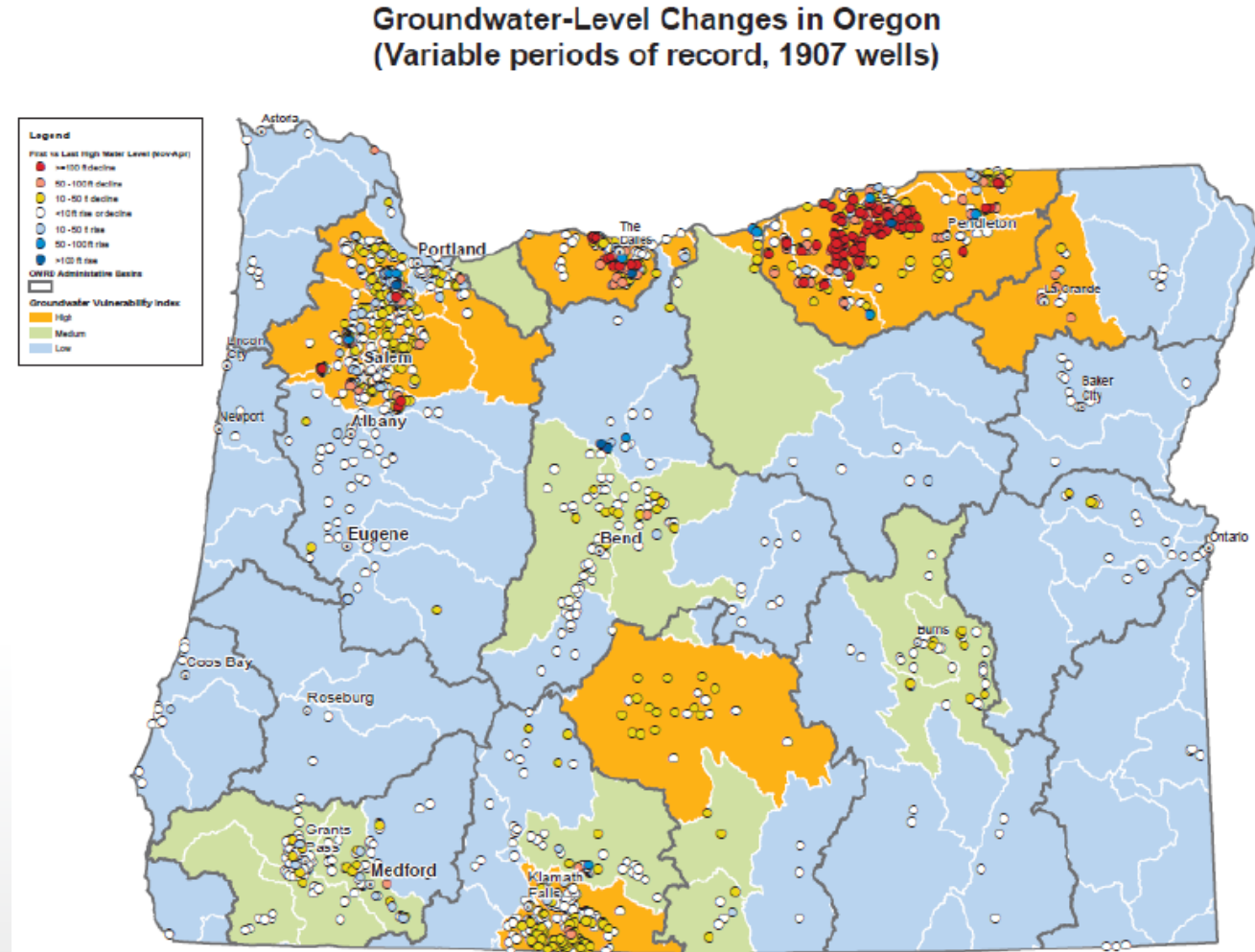
Presented by Steve Shropshire, Shareholder Jordan Ramis PC

Let's take a
short trip back
in time...



2015

- In 2015, the Water Resources Department generated a state-wide map of groundwater level changes and vulnerability



Increased Public Interest in Groundwater

August 2016
--Oregonian Draining Oregon
articles



MARK GRAVES/STAFF

Rolling irrigation pipe stands ready in a Dufur Valley field, farm country along Fifteenmile Creek south of The Dalles. In Oregon, the amount of water landowners are allowed to extract statewide totals nearly 1 trillion gallons annually – enough to fill 150 million tanker trucks. An analysis by The Oregonian/OregonLive has found farmers in a quarter of eastern Oregon, the driest part of the state, are allowed to pump more underground water each year than rains deposit.

DRAINING OREGON

By KELLY HOUSE and MARK GRAVES

2016 OWRD Audit by Secretary of State

Secretary of State Audit Report

Jeanne P. Atkins, Secretary of State

Mary Wenger, Interim Director, Audits Division



Oregon Water Resources Department: Enhancing Sustainability Efforts and Agency Planning Needed to Better Address Oregon's Water Supply Needs

Executive Summary

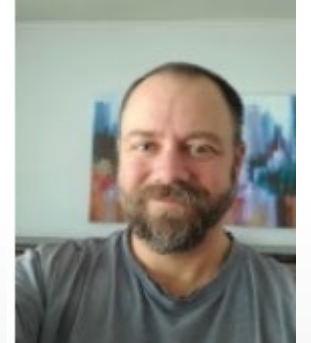
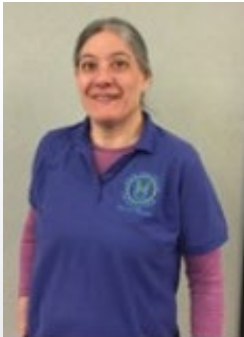


Oregon is facing growing pressures and concerns related to its water supply. The Water Resources Department (WRD), charged with managing the state's water resources, could better balance water rights issuance and management with actions to sustain current and future water needs. **The agency can also enhance its focus on groundwater protection, data collection and analysis, and workload and staffing.** A long-term agency plan would help WRD strategically focus and prioritize the agency's efforts and align them with available resources.

Water Resources Commission Groundwater Allocation Actions

Oregon Water Resources Commission Focus on Groundwater

- In October 2016, Department staff began a discussion with the Commission regarding groundwater management, reviewing the policy and legal framework for groundwater management, the importance of data to inform decision-making, the current status of the resource, and existing groundwater management tools.



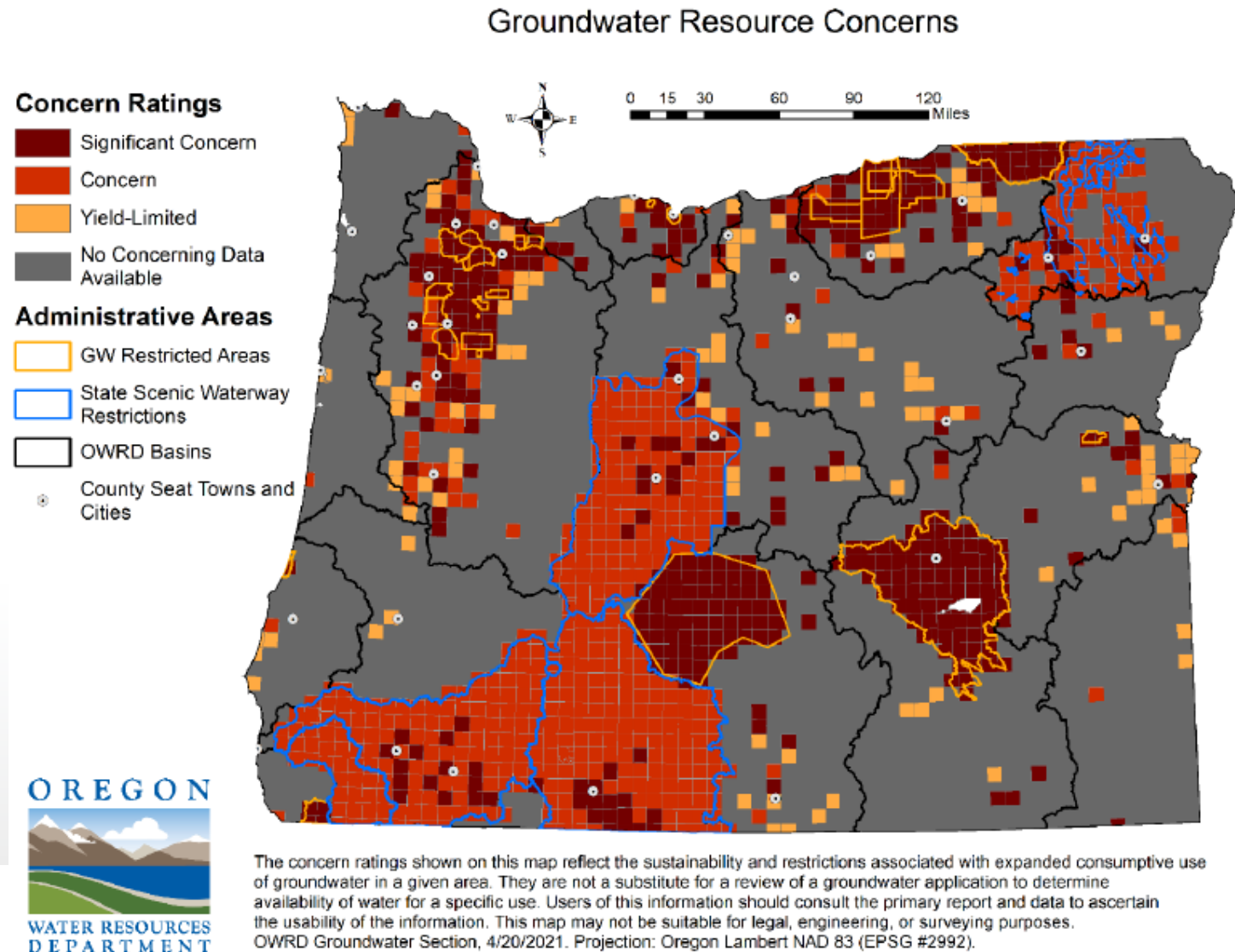
IWRS Updates Regarding Groundwater

- The Water Resources Commission adopted Oregon's first Integrated Water Resources Strategy (IWRS) in 2012 to understand and meet Oregon's water needs, and updated the IWRS in 2017.
- The IWRS identifies groundwater as one of four cross-cutting issues of vital importance to Oregon's water future.
 - IWRS contains recommended actions to advance the collection and processing of groundwater data, as well as the management and protection of groundwater resources

June 2021

--Statewide Assessment of Groundwater Vulnerability

- **Significant Concern (dark red):** groundwater pumping for new irrigation is prohibited by an area-specific rule, has been proposed for a use beyond the capacity of the resource, or has caused significant declines in groundwater levels.
- **Concern (red):** groundwater pumping for new irrigation is restricted by an area-specific rule, is likely to impact hydraulically-connected surface water with no August availability, or has caused moderate declines in groundwater levels.
- **Yield-limited Wells (orange):** groundwater pumping appears limited by aquifer characteristics that limit productivity, where typical well yield is insufficient to meet typical irrigation demand.
- **No Concerning Data Available (gray):** not enough reliable data have been collected within the Township to objectively assess a concern rating using this state-wide analysis, or available data indicates no concern related to the categories above (about 5% of all Townships in this category).



More Media Coverage of Groundwater

2022

-- New round of media coverage emerges regarding dry domestic wells and Morrow County nitrate contamination



As wells run dry, Klamath County residents depend on a state program that trucks in water

By ALEX BAUMHARDT Oregon Capital Chronicle Jun 30, 2022



Gov. Kate Brown, second from left, visited Rhonda Nyseth's home on a tour of Klamath County last month to learn about drought issues. Courtesy of the Governor's Office

KGW8

EASTERN OREGON

Oregon county declares emergency over water contamination

Groundwater is the primary drinking source but it's had high nitrate levels. The county is distributing bottled water and setting up water distribution trailers.

Water Resources Commission Groundwater Allocation Actions

December 3, 2021 Commission Meeting Outcome

- Direction from the Water Resources Commission that staff develop recommendations for a plan of action that will lead to a modernized groundwater allocation policy that is more sustainable and protective of senior water right holders, both surface and groundwater.

Water Resources Commission

Groundwater Allocation Actions

March 17, 2022 Commission Meeting Outcome

- Commission directed staff to be cautious and conservative in the new approach to groundwater permitting.
- Specifically, the Commission directed that groundwater application reviews indicating there are inadequate data available to determine whether the resource is over-appropriated should not be approved; thus, eliminating the option “Cannot be determined to be over-appropriated” from the review process.

OWRD Staff Response

June 16, 2022 Commission Meeting Report

- OWRD staff continuing to work internally to vet the concepts of what constitutes “water is available.”
- OWRD staff are working on proposals to implement the Commission direction to stop approving groundwater applications where inadequate over-appropriation data is available.

Groundwater Allocation Rulemaking Timeline

- **Spring 2023** – OWRD staff develops initial set of draft rules
- **April, May (2x), June, August and September 2023** – RAC meetings take place (first 4 meetings occurred during legislative session)
- **September 2023** – Commission hears status report on RAC process and takes public comment
- **October 2023** – OWRD staff announces intent to delay public release of rules (scheduled for November) in order to convene two additional RAC meetings

What is at stake?

- This is the most significant development in water law in many years
- As proposed, the implementation of the rules would result in an immediate defacto moratorium on most new groundwater development statewide



What is at stake?

- Interest groups are very polarized
- Groundwater development has fueled economic growth in municipalities, industry, and agriculture
- Groundwater shortages have impacted all the same groups and the environment

What are some of the big issues raised by the rulemaking?

- Does the Commission have the legislative authority to act?
- Should a policy decision of this magnitude be driven by a citizen commission?
- Should this process involve consideration of a broader set of issues?
- Insufficient or outdated groundwater data in support of statewide action
- Disagreements about policy decisions embedded in underlying scientific assumptions
- Should new rules of this impact be implemented immediately?
- OWRD non-regulation of exempt/domestic wells

Thank you!



Steve Shropshire

steve.shropshire@jordanramis.com

503.598.5583

PANEL 6

Draft OUTLINE FOR CLE ON PRACTICAL AND ETHICAL ISSUES WITH WORKING WITH SCIENTIFIC EXPERTS 10-6-23

Presented by Charlie Tebbutt, Law Offices of Charles M. Tebbutt, P.C.

- I. Determining Expert Need for Case
- II. Gatekeeper function of court under Daubert v Dow Chemicals
FRE 702- as of December 1, 2023
Rule 702. Testimony by Expert Witnesses
A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
 - (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - (b) the testimony is based on sufficient facts or data;
 - (c) the testimony is the product of reliable principles and methods;and
 - (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

OUTGOING RULE 702

Rule 702. Testimony by Expert Witnesses [Effective until December 1, 2023]

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

 - (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - (b) the testimony is based on sufficient facts or data;
 - (c) the testimony is the product of reliable principles and methods; and
 - (d) the expert has reliably applied the principles and methods to the facts of the case.
- III. Searching for Experts
 - a. Start with any networks of colleagues.
 - b. Expand search – ask experts who else they recommend.

- III. Difficulties in obtaining expert services for plaintiff- NGOs
 - a. Costs
 - b. Potential Conflicts- funding comes from industry
 - c. Willingness to work for Plaintiffs- Advocacy v Science- does the difference exist?
- IV. Practical Considerations
 - a. Developing rapport
 - b. Understanding roles
 - c. Gathering data
 - d. Presenting data -Cow Palace example of Defendants providing limited data sets
 - e. Attorney role in writing reports- *"Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed . . . this assistance may be needed."* Fed. R. Civ. P. 26, 1993 Advisory Committee Notes.
 - f. Discovery issues
 - g. Testifying Experts v Consulting Experts
- V. Can experts work on Contingency?
 - a. Fee shifting provisions provided by Congress- CWA 33 U.S.C. 1365(d), RCRA 42 U.S.C. 6972(e)
 - b. State/national professional association standards