Defining Waters of the U.S.: EPA's Proposed Rulemaking

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Overview

- The Importance of the Proposed Rule and its Context
- The Proposed Rule
- Implications for Public Agencies



Importance of the Proposed Rule

- The Clean Water Act protects “navigable waters” defined as “the waters of the United States, including the territorial seas.” (33 U.S.C. § 1362(7))
- Applies to all aspects of the Clean Water Act.



Importance of the Proposed Rule

- Falling within this definition triggers
  - Discharge Prohibition (§ 301)
  - Standards/TMDL (§303)
  - NPDES Permits (§402)
  - Dredge and Fill Permits §404)
  - Certifications (§401)
  - Other Laws (ESA)
- Jurisdictional determination = fundamental legal “change” to waters



Context for Proposed Rule

- Prior and Current EPA and Corps Definitions of "waters of the United States"
- Supreme Court cases
  - Riverside Bayview Homes (1985)
  - SWANCC (2001)
  - Rapanos (2006)
- EPA and Corps Guidance



Why Proposed Rule?

- Reasons Provided by EPA and Corps
  - Requested by stakeholders
  - Greater water quality protection (federal and state)
  - Reduce confusion
  - Save time and money
- Expansion or Confirmation of Authority?
  - EPA and Corps
  - Congressional Research Service
  - Other Perspectives



The Proposed Rule (3 Key Points)

- Waters that are “per se” jurisdictional
- Waters that are “per se” non-jurisdictional
- Waters whose jurisdictional status will depend on whether significant nexus to jurisdictional water exists



Jurisdictional Waters by Definition

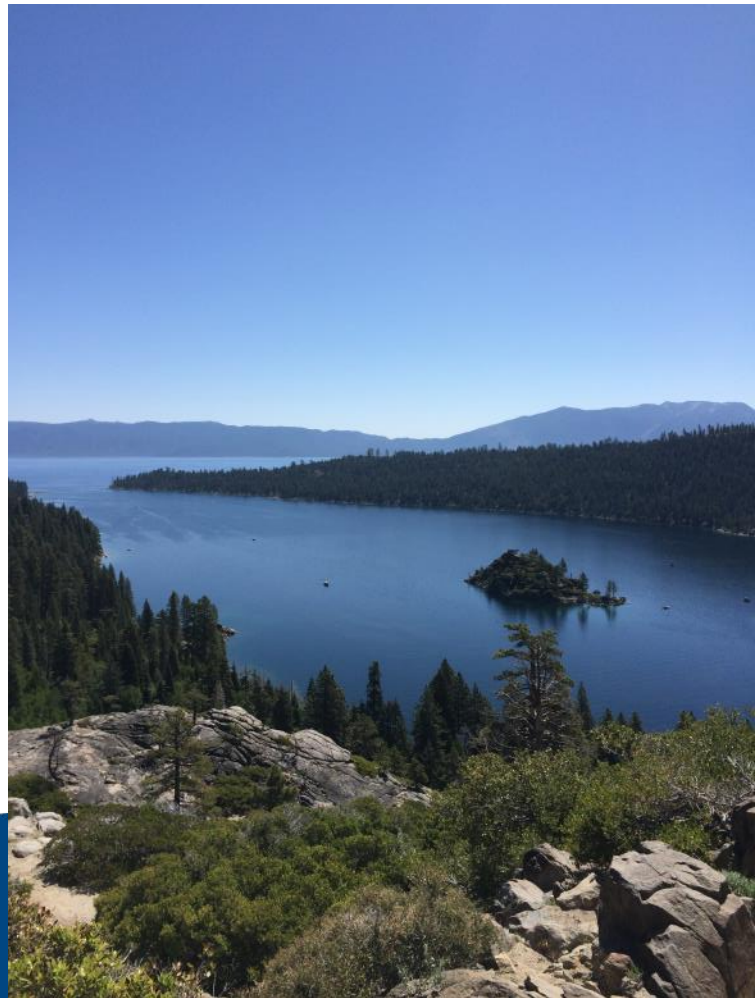
- "Per se" Waters:
  - Traditional navigable waters
  - Interstate waters (including wetlands)
  - Territorial seas
  - Impoundments of jurisdictional waters
  - Tributaries
  - Adjacent waters
- Key New Provisions
  - Tributaries
  - Adjacent waters



“Per se” Waters

- Traditional navigable waters

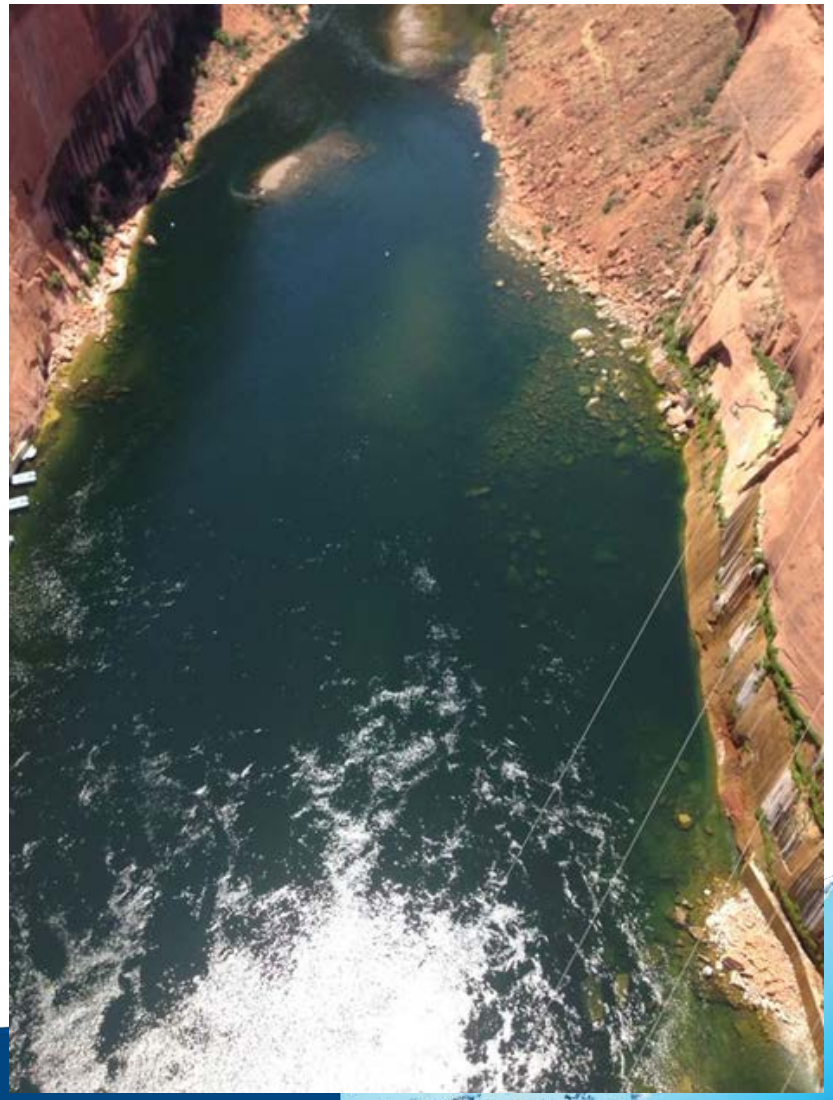




“Per se” Waters

- Interstate waters (including wetlands)

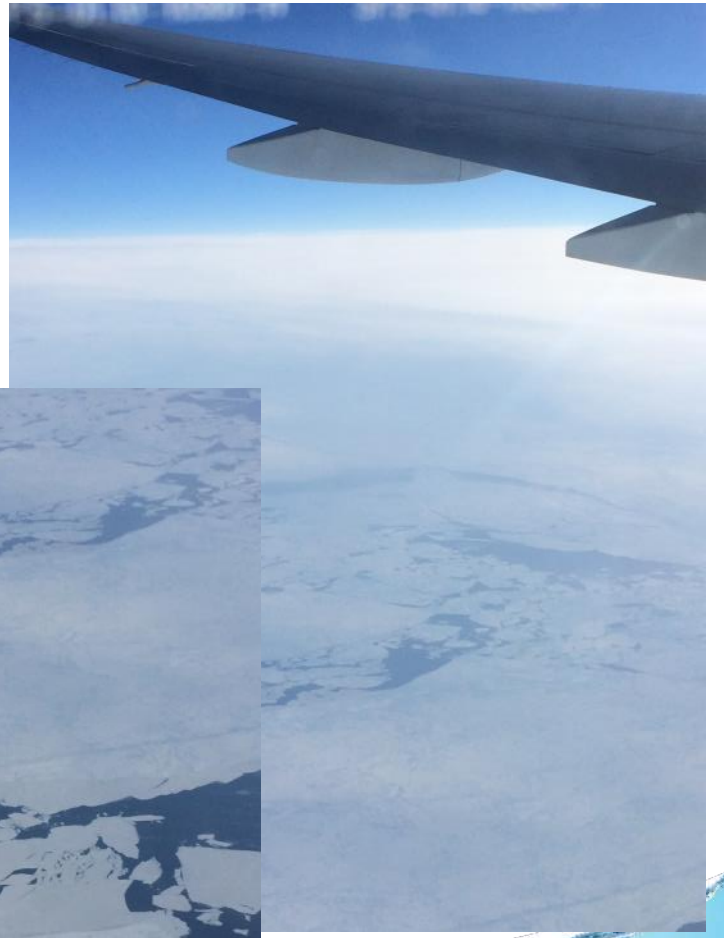




“Per se” Waters

- Territorial seas



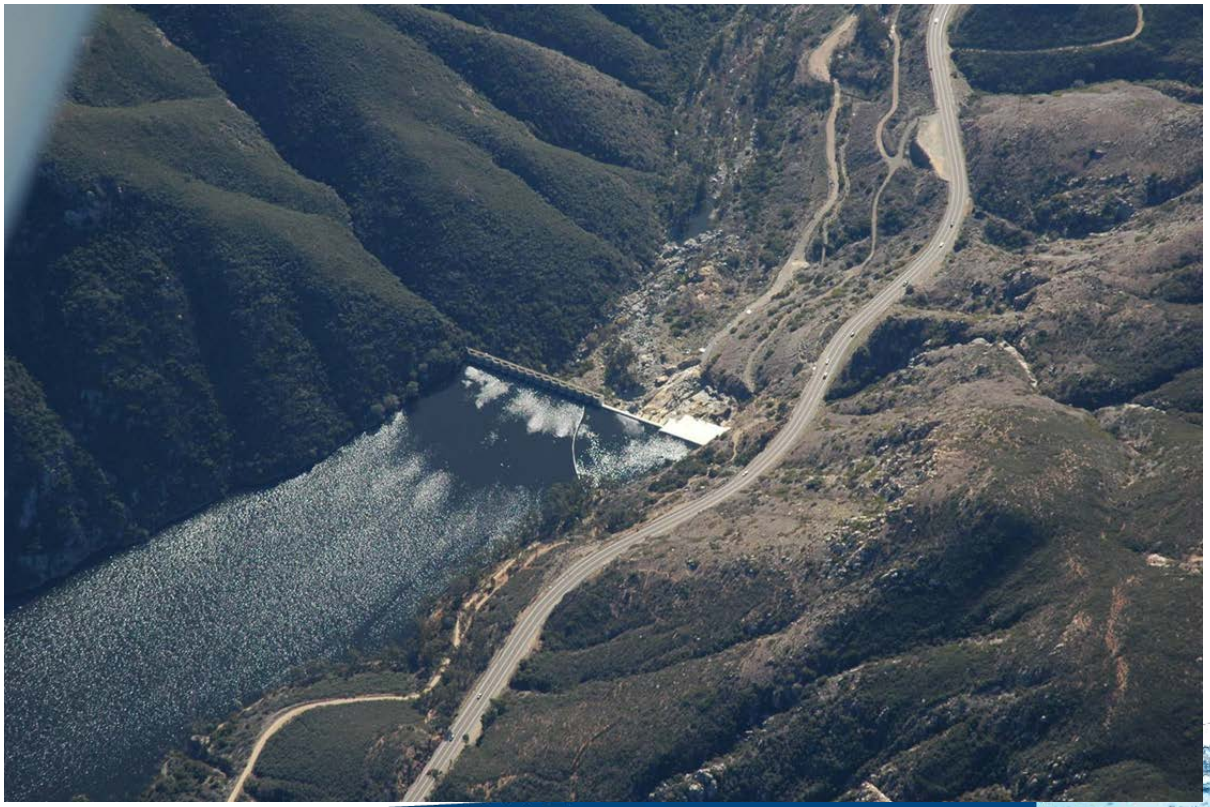






“Per se” Waters

- Impoundments of jurisdictional waters



Tributaries

- Waters with bed, banks, and ordinary high water mark that contribute flow (direct or indirectly) to jurisdictional waters



Tributaries

- Wetlands without bed, banks and ordinary high water mark that contribute flow to a jurisdictional water



Tributaries

- Man-made breaks (bridges, culverts, pipes or dams)





Tributaries

- Man-made, waters including channels and ditches





Adjacent Waters (Not just Wetlands)

- New Definitions
  - Adjacent ⇨ Neighboring ⇨ Riparian Area or Floodplain

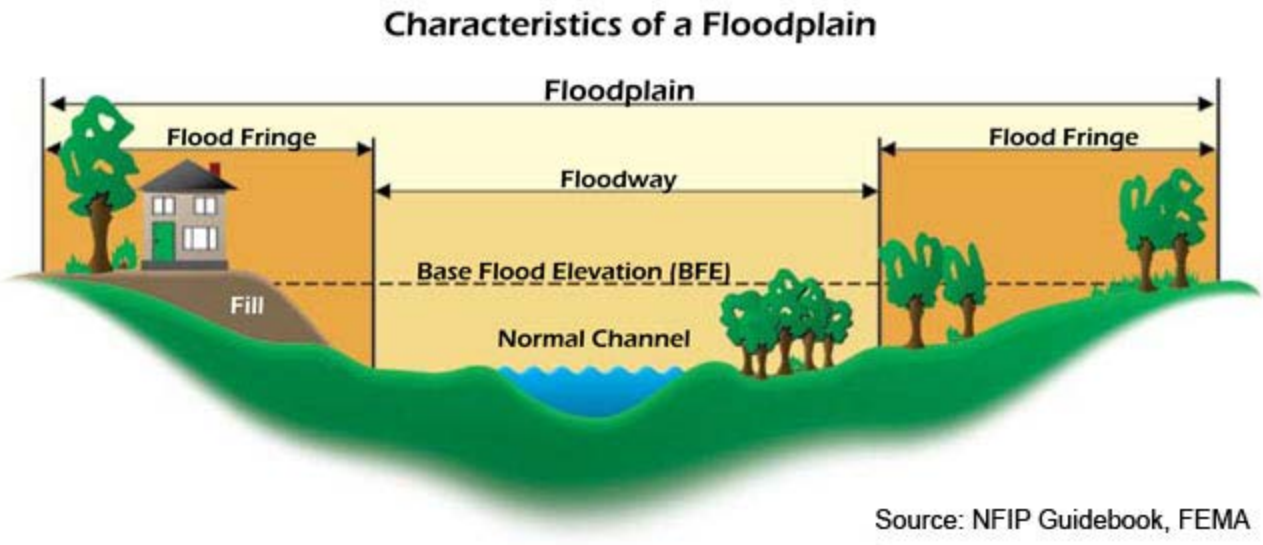
Adjacent Waters (Not just Wetlands)

- Adjacent/Neighboring



Adjacent Waters (Not just Wetlands)

- Riparian or Floodplain



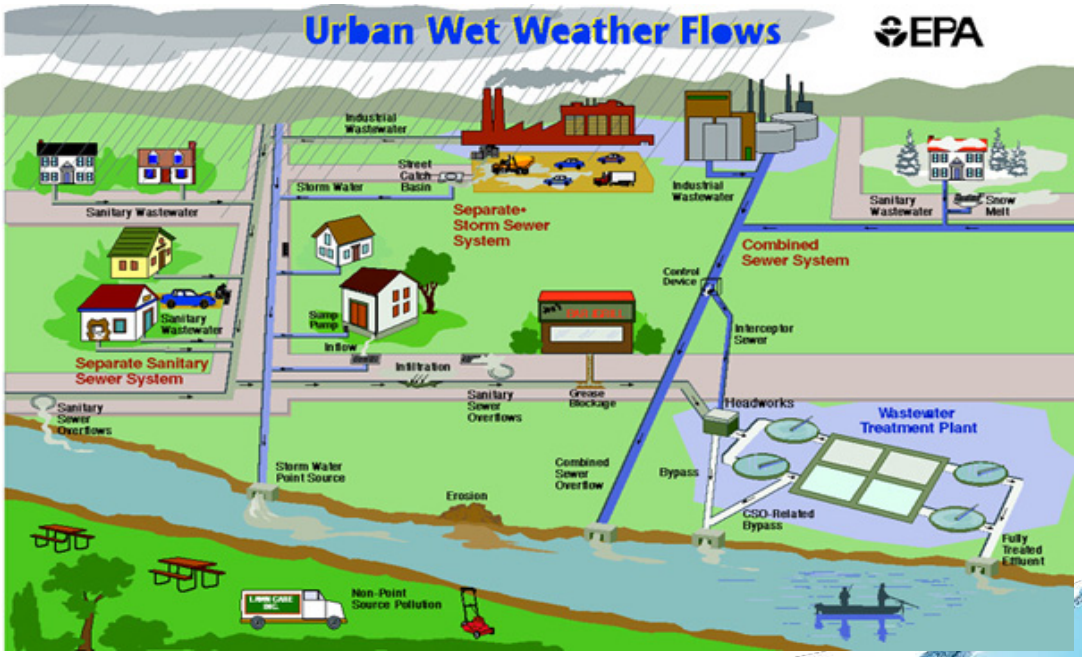
Other Waters

- Definition of Significant Nexus
- Case-specific Basis
- Alone or in Combination



Important Implications

- For MS4s:
  - What is MS4 and what is WOTUS?
  - Water Quality Standards within the MS4
  - What about MEP?



Important Implications

- For Water Suppliers:
  - Key issue is definition of tributaries
  - Water conveyance systems meet technical definition
  - Water transfers exempt from NPDES
  - Other obligations would apply – see methylmercury





Important Implications

- For Wastewater Agencies:
  - Defining what is internal to the waste treatment system (existing Exemption)
  - Retention ponds
  - Percolation ponds
  - Water Reuse



Conclusion and Questions



Thank you for attending.

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