

~~WOTUS~~  
WTF

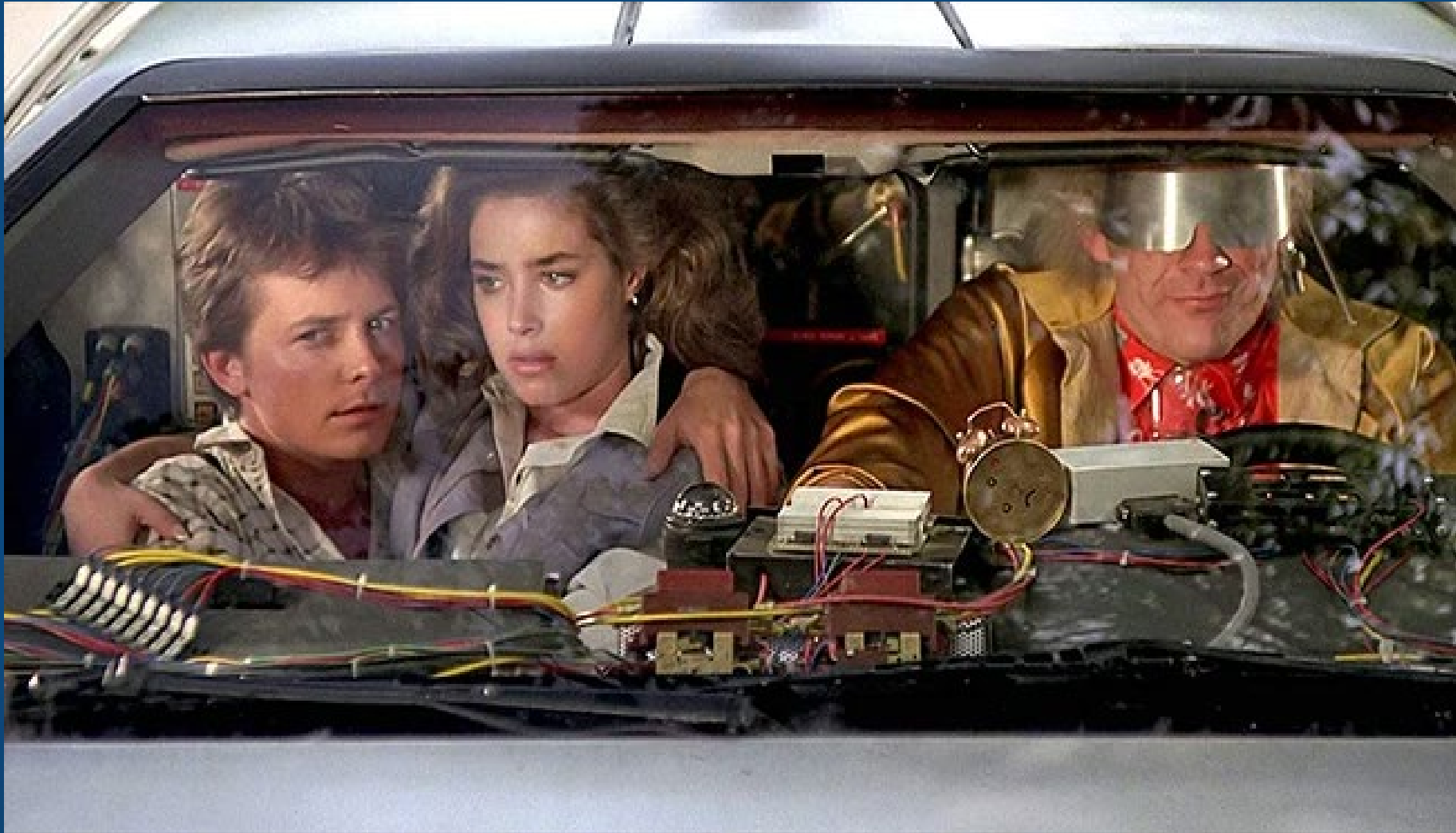
Arkansas Environmental Federation  
2022 Water Seminar

June 16, 2022

MITCHELL | WILLIAMS

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

# Roads? Where We're Going, We Don't Need Roads



# WOTUS: *The long arc of history ...*

1980s

WOTUS Defined

40 CFR 230.3(s)

33 CFR 328.3(a)

2001-2006

Judicial Review

- SWANCC
- *Rapanos*
- Post-*Rapanos*

2008

Corps' Guidance



2015

Obama Rule



2020

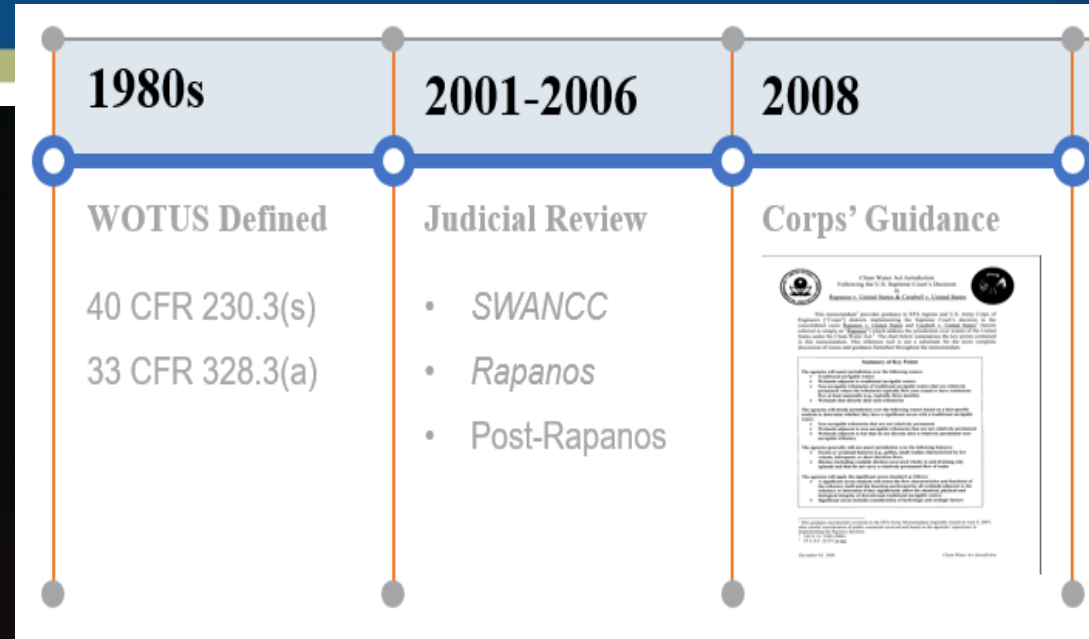
Trump Rule: The 2 Step



# WOTUS: *The more recent past ...*

- *Pascua Yaqui Tribe v. U.S. Env't'l Protection Agency*, No. CV-020-00266-TUC-RM, Doc. 99, Order (Aug. 30, 2021)
  - Granted EPA/USACE voluntary remand of NWPR (Trump Step 2)
  - Vacated NWPR (Trump Step 2)
  - Considering remand and vacatur of Trump Step 1
  
- EPA/Corps: “In light of this order, the agencies have halted implementation of the [NWPR] and are interpreting ‘waters of the United States’ consistent with the pre-2015 regulatory regime until further notice.” (September 3, 2021).

# WOTUS: *The here and now ...*



## Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will apply the significant nexus standard as follows:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors

# WOTUS: *Getting Back to the Future ...*



## The Biden Rule

- Executive Order 13390 (Jan. 20, 2021)
  - Must replace NWPR
- Intent to Revise WOTUS (Jun. 9, 2021)
- Proposed Rule, 68 Fed. Reg. 69372 (Dec. 7, 2021)
  - Reinstates the 1986 Rule
  - Builds into rule the relevant Supreme Court precedent, *i.e.* – apply either test from *Rapanos*
- Scheduled Roundtables
  - Began in early May, with the last scheduled for June 24th

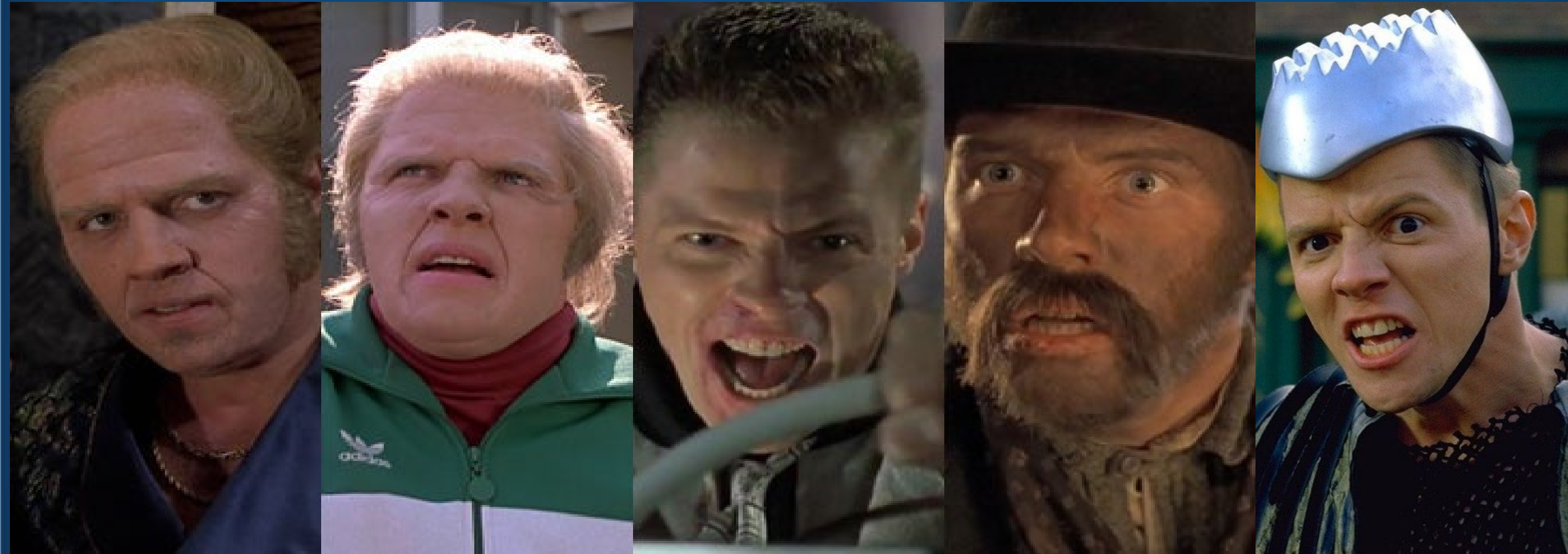
# Stated Differently



“Traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands; most impoundments of ‘waters of the United States’; tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the relatively permanent standard or the significant nexus standard; wetlands adjacent to impoundments and tributaries, that meet either relatively permanent standard or the significant nexus standard; and ‘other waters’ that meet either the relatively permanent standard or the significant nexus standard.”



# And, the Supreme Court may Strike First!



# SCOTUS Wetlands Refresher

***U.S. V. RIVERSIDE BAYVIEW HOMES***, 474 U.S. 121 (1985)

(CWA jurisdiction reaches wetlands adjacent to Traditional Navigable Waters)

***SWANCC v USACE***, 531 US 159 (2001)

(CWA does not reach isolated wetlands, Bird Rule rejected)

***RAPANOS v. EPA***, 547 US 715 (2006)

(4-1-4 split on jurisdiction over wetlands separated from Traditional Navigable Waters)

***SACKETT v. EPA***, 566 U.S. 120 (2012)

(EPA Administrative Consent Order re wetlands compliance reviewable under the APA)

***USACE v. HAWKES CO.***, 578 U.S. \_\_\_\_ (2016)

(USACE Approved Jurisdictional Determinations reviewable under the APA)

# Mike and Chantell Sackett



# The Perfect Fact Pattern for Revisiting the *Rapanos* Plurality

- Definite Wetland
- “Adjacent” to Jurisdictional Wetland
- “Adjacent” to Traditional Navigable Water
- Clear Surface Separation in all directions
- Clear Hydrologic Connection to Jurisdictional Waters
- Clear Historic Connection



# The Question

## Petition for Certiorari:

Should *Rapanos* be revisited to adopt the plurality's test for wetlands jurisdiction under the Clean Water Act?

## EPA's Brief in Opposition:

Whether the court of appeals correctly upheld the Environmental Protection Agency's determination that the wetlands on petitioners' property constitute "waters of the United States" under the Clean Water Act, 33 U.S.C. 1362(7), because the wetlands are adjacent to a tributary of a traditional navigable water.

## SCOTUS Order Granting Certiorari:

Petition GRANTED limited to the following question: Whether the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U. S. C. §1362(7).

# Counting the Votes in *Sackett II*

## Rapanos Court



Stevens



Ginsberg



Souter



Breyer



Kennedy



Roberts



Scalia



Alito



Thomas

Defer to Corps' definition of "adjacent"

Significant Nexus

Continuous Surface Connection required

## Sackett II Court



Sotomayor



Kagan



Jackson



Roberts



Kavanaugh



Barrett



Gorsuch



Alito



Thomas

# The End

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# Get Your Thinking Caps On

