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FLORIDA'S LAW FIRM FOR BUSINESS

Private Sector Perspective on Federal Wetlands Jurisdiction

Debbie Madden
2015 Environmental Permitting
Chamber Summer School

Predictability and Certainty

Per Se Jurisdictional Categories

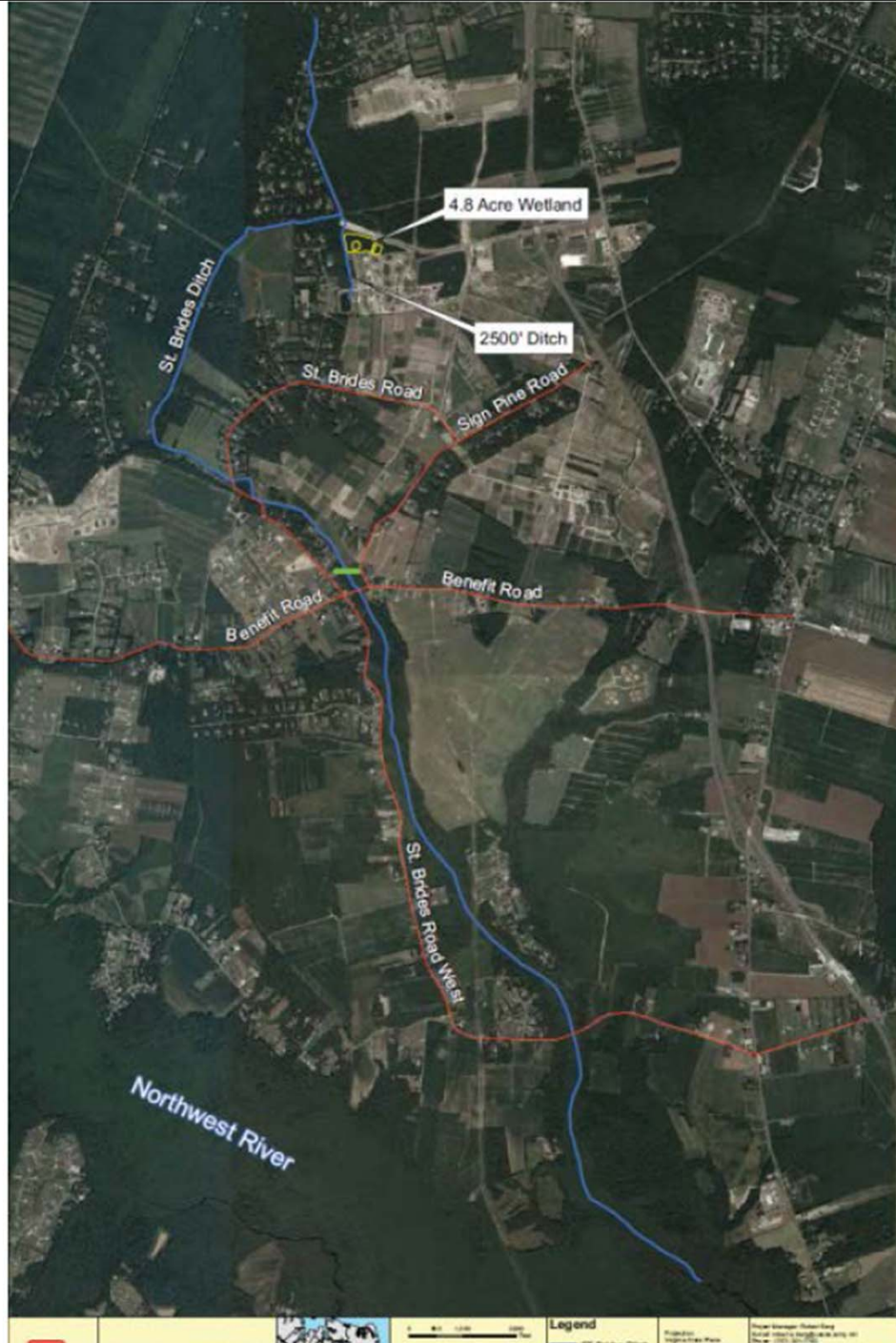
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- (1) All waters used in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands;
- (3) The territorial seas;
- (4) All impoundments of waters;
- (5) Tributaries of 1-3;
- (6) Waters, including wetlands, adjacent to/bordering, contiguous, “neighboring” (1)-(5)

Precon Development Example

- 13 year legal battle
- Edinburgh development in Chesapeake, VA
 - Precon Dev. Corp. Inc. v. U.S. Army Corps of Engineers, 633 F. 3d 278 (4th Cir. 2011) – Precon I
 - Precon Dev. Corp. Inc. v. U.S. Army Corps of Engineers, Fourt Circuit affirmed by unpublished opinion, March 10, 2015

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Jurisdictional through Significant Nexus Determination

- (7) Prairie Potholes, Carolina and Delmarva Bays, Pocosins, Western Vernal Pools, Texas Coastal Prairie Wetlands with a significant nexus to a (1)-(3) water; and
- (8) All waters within the 100-year floodplain of a (1)-(3) water and all waters located within 4,000 of the high tide line or OHWM of a (1)-(5) water.

Reliance on Desktop Tools

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- LIDAR
- Historic aerials
- Maps
- USGS maps
- Studies

Ditches

- Regulated ditches:
 - Ditches with perennial flow,
 - Ditches with intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands,
 - Ditches, regardless of flow, that are excavated in or relocate a tributary.

Almost all ditches are regulated with narrow exclusions

Dry Land

- Several of the exclusions in (b) use the phrase “dry land”
- Phrase is undefined

Erosional feature or tributary?

Constructed lake or pond or TNW or adjacent?

Dry Land (b)(4)

- Artificially irrigated areas that would revert to dry land should application of irrigation water to that area cease
- Artificial, constructed lakes or ponds created by excavating and/or diking dry land such as farm and stock watering ponds, irrigation ponds, settling basins, log cleaning ponds, cooling ponds, or fields flooded for rice growing
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons
- Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand or gravel that fill with water
- Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways
- Puddles

Dry Land

- “[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs — **in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of ‘waters’ is far from obvious.**” *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985)

Significant Nexus Definition

- First time this term is defined outside case law
- Relies heavily on Justice Kennedy's opinion
 - Water that alone or in combination with out similarly situated waters in the region significantly affects the chemical, physical, or biological integrity of a (1)-(3) water that is not speculative or insubstantial.
 - Similarly Situated Waters are those that are sufficiently alike and are sufficiently close.

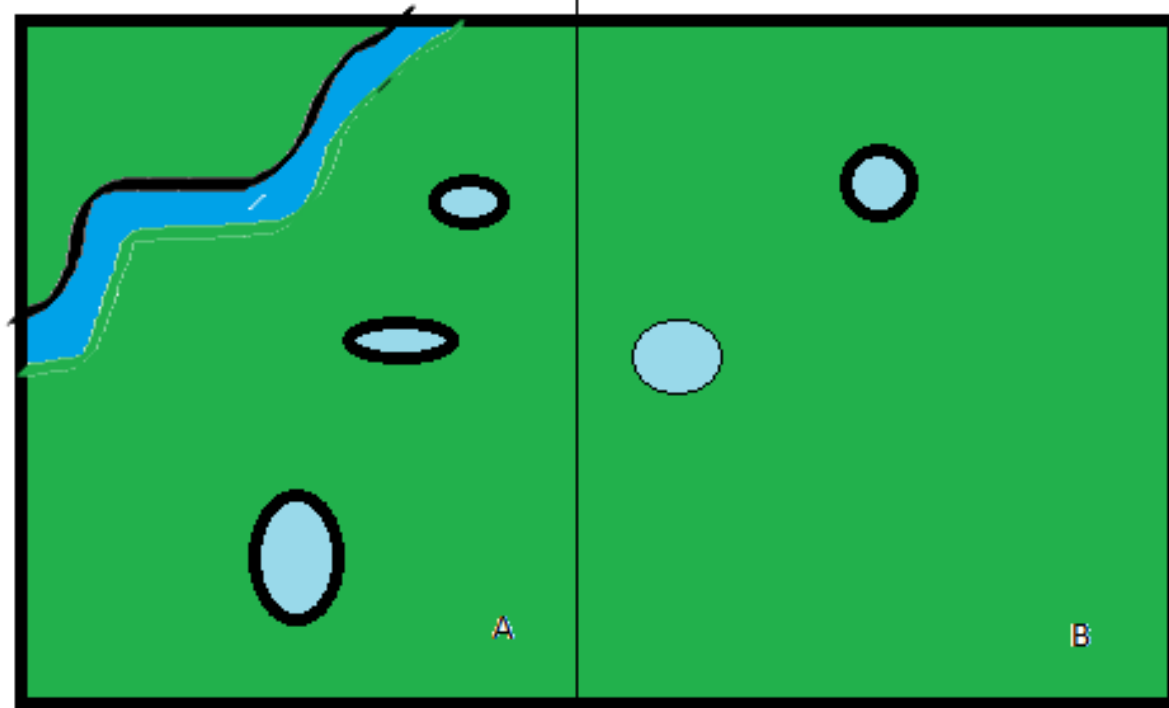
Significant Nexus

Functions relevant for evaluating significant nexus:

- Sediment trapping
- Nutrient recycling
- Pollutant trapping, transformation, filtering, and transport
- Retention and attenuation of flood waters
- Runoff Storage
- Contribution of flow
- Export of organic matter
- Provision of life cycle dependent aquatic habitat

Off-site Effects of Jurisdictional Determination

- Aggregating waters – when neighbor gets a JD, you do too



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