



Water Environment  
Association of Texas

# There's a WOTUS Among Us: What's the Deal with WOTUS and Groundwater

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## 2022 Texas Groundwater Summit

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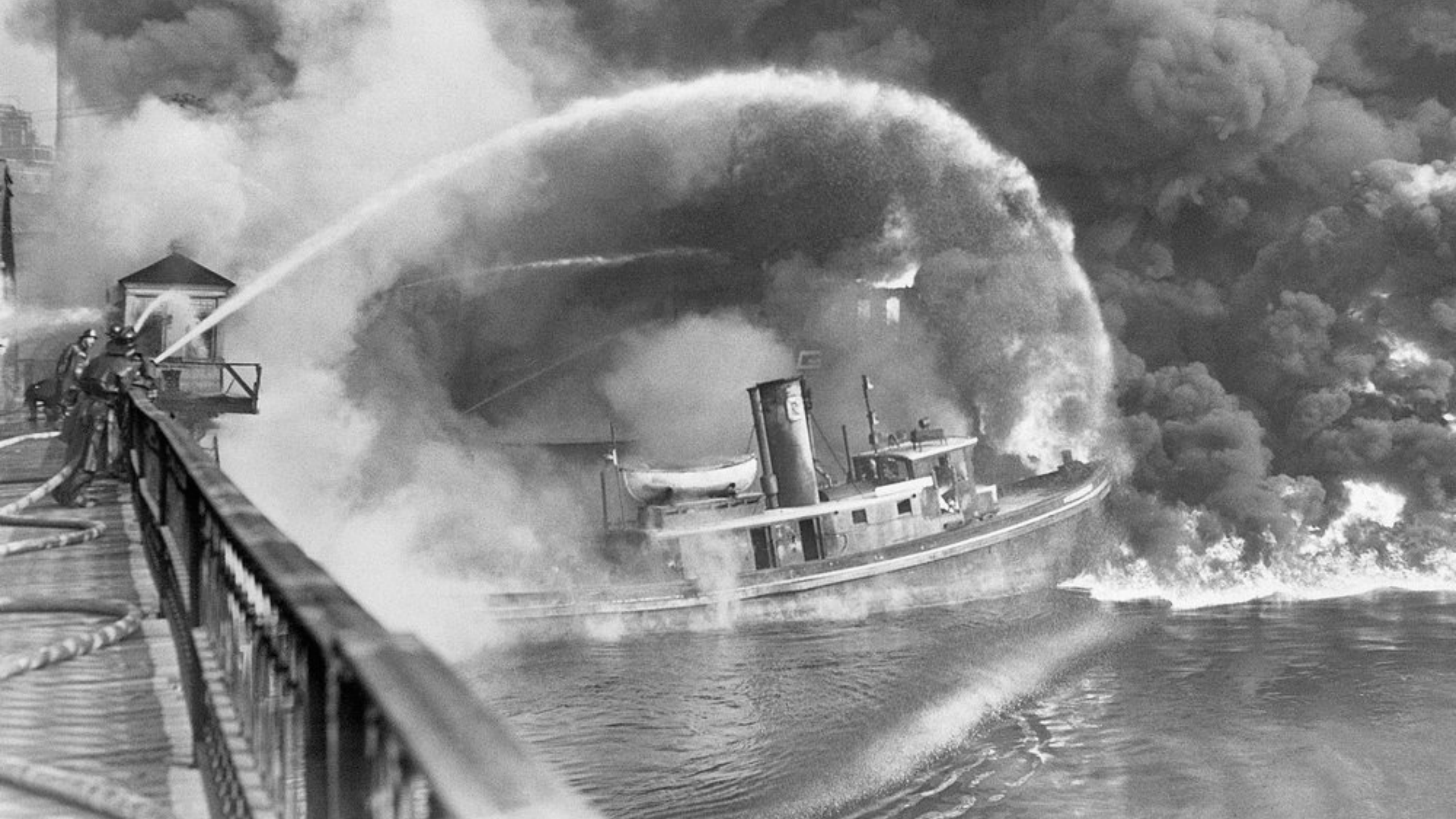
August 31, 2022



# WOTUS Whiplash

- WOTUS Origin Story and Purpose
- WOTUS History and Court Cases: WOTUS SCOTUS
- WOTUS Redux: Obama, Trump, Biden and Beyond
- WOTUS and Texas Water Code, Chapter 26
- Tomorrow's WOTUS





# Guidance and Court Cases

- Rejected Navigable-in-fact waters and **added adjacent wetlands**, 1977
- Food Security Act, (FSA)  
December 23, 1985: **Prior Converted Cropland (PCC)** PCC exemption codified, 1993
- The Corps Migratory Bird Rule, 1986\* (Riverside)



# WOTUS and SCOTUS

- Riverside Bayview, SCOTUS 1985
- Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers, SCOTUS 2001
- Rapanos v. United States, “Rapanos” SCOTUS 2006 - **Significant Nexus**







# Obama-era WOTUS (Clean Water Rule)

- Issued by EPA and Army Corps of Engineers May 27, 2015
- Established 3 categories:
  - Jurisdictional by Rule;
  - Significant Nexus Test, (adjacent and “neighboring”)
  - Excluded by Rule
- Exclusions: PCC, Groundwater, stormwater control features, wastewater treatment plants, etc.
- Lawsuits commence





# Trump-era WOTUS (Navigable Waters Protection Rule)

- Finalized and Published in Federal Register April 21, 2020
- **Restored** surface water connection and **removed** significant nexus test
- Exclusions: PCC, Isolated wetlands, Stormwater control features, Groundwater, Wastewater treatment plants, **NON** perennial or intermittent tributaries
- Lawsuits commence





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**WERE SENDING YOU  
BACK TO THE FUTURE!**



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# Biden-era WOTUS

- Attempt to bring clarity and create
- Defined by 1986 regulations Inform SCOTUS precedent – only two exc
- Meets statutory objective to **“restore chemical, physical, and biological waters’ as based on best available functions provided by upstream wetlands, and “other waters” to water quality of downstream fou**



# WOTUS and Groundwater\*

**“The agencies note that they have never interpreted groundwater be a “water of the United States” under the Clean Water Act... The agencies have never interpreted ‘Waters of the United States’ to including groundwater.”**

**“...The proposed rule makes no change to that longstanding interpretation... most recently confirmed by Maui... ‘Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate.’ ”**



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**LIONS AND TIGERS AND  
BEARS! OH, MY!**

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# Groundwater and Waters of the State

"Water" or "**water in the state**" means **groundwater** otherwise, lakes, bays, ponds, impoundments, streams, creeks, estuaries, wetlands, Mexico, inside the territorial limits of the state, surface waters, or nonnavigable watercourses and bodies of surface water, that are wholly or partially inside or bordering the jurisdiction of the state.

WATER CODE  
TITLE 2. WATER ADMINISTRATION  
SUBTITLE D. WATER QUALITY CONTROL  
CHAPTER 26. WATER QUALITY CONTROL  
SUBCHAPTER A. ADMINISTRATIVE PROVISIONS

Sec. 26.001. DEFINITIONS. As used in this chapter:

- (1) "Board" means the Texas Water Development Board.
- (2) "Commission" means the Texas Natural Resource Conservation Commission.
- (3) "Executive administrator" means the executive administrator of the Texas Water Development Board.
- (4) "Executive director" means the executive director of the Texas Natural Resource Conservation Commission.
- (5) "Water" or "water in the state" means **groundwater**, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, wetlands, marshes, inlets, canals, the Gulf of Mexico, inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the jurisdiction of the state.

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# SCOTUS Timeline

- Oct 3, 2022 – Hear Oral arguments in Sackett
- Summer 2022 – Rule on Sackett

## EPA Rulewriting Timeline:

- Feb 7, 2022 – Comment deadline
- Summer 2022 –Stakeholder Engagement, Roundtable
- November 2023, WOTUS rule published incorporating input from SCOTUS decision





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