

On the Road to Recovery: The role of Clean Water Act regulation in development

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Preliminaries

- Disclaimer: [I am not HBACA or SAHBA]
- Perspective: Developers/Home Builders
- Focus: Clean Water Act regulatory programs
- Why: Regulatory costs are a major component in the cost of a new home

Clean Water Act Basics

- Permit needed for discharge of a pollutant from a "point source" to "navigable waters"
- Permit programs:
 - 402 (NPDES/AZPDES – EPA/ADEQ)
 - Stormwater program adopted under this provision
 - 404 (Dredge & Fill – Corps of Engineers)
- "Navigable waters" defined by statute as "waters of the United States"

Clean Water Act Basics – cont.

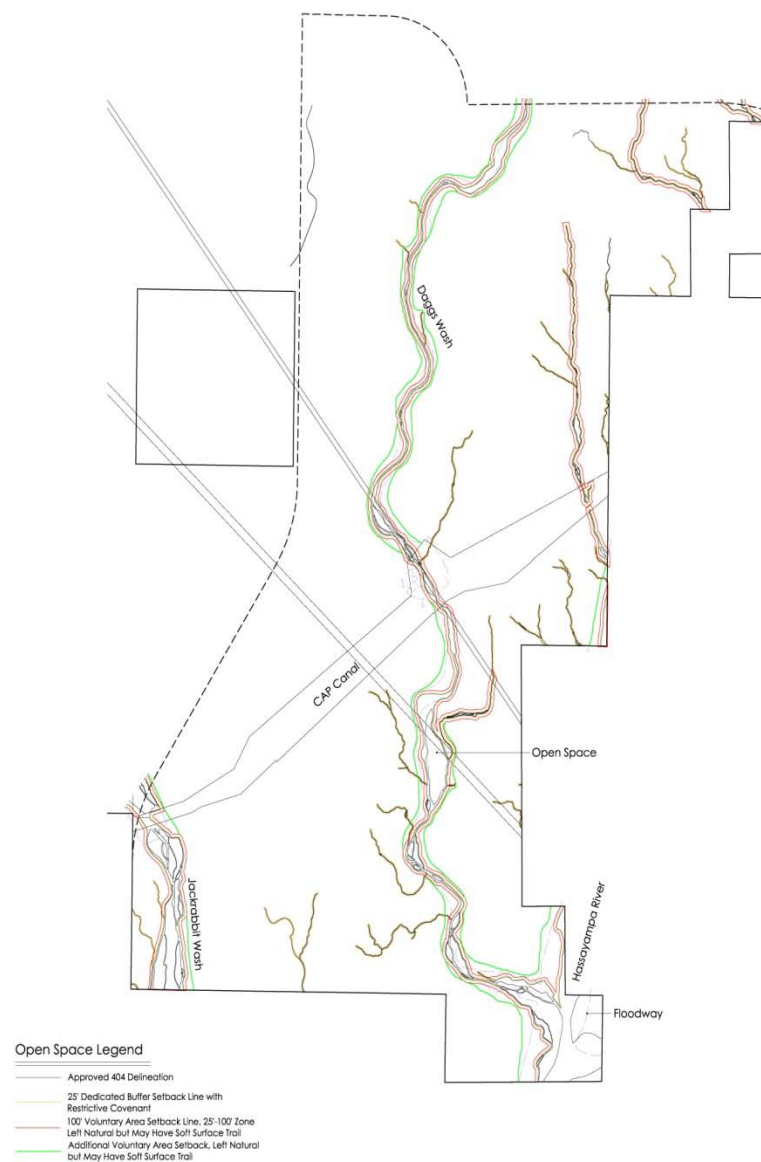
- Geographic jurisdiction (jurisdictional waters) under the two programs is exactly the same.
 - Approach is very different (404 delineates waters; 402 does not)
- Activity jurisdiction is different:
 - 402 – pollutants discharged IN water TO water
 - 404 – Construction in water
- Agency culture is markedly different
 - Corps vs. EPA vs. ADEQ

When do we need these permits?

- There is a de facto regulatory presumption that all but the smallest construction sites will get a NPDES stormwater permit (CGP); sometimes 2 permits (State + MS4).
 - This despite the fact that many sites do not discharge; many discharge to regional control structures; and many “waters” should not be considered not Federal.

When do we need these permits?

- 404 permits are only needed for development that impacts natural or man-made drainages.
 - Substantial question about the status of small and remote "waters" as jurisdictional.



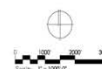
DOUGLAS RANCH

BUCKEYE, ARIZONA

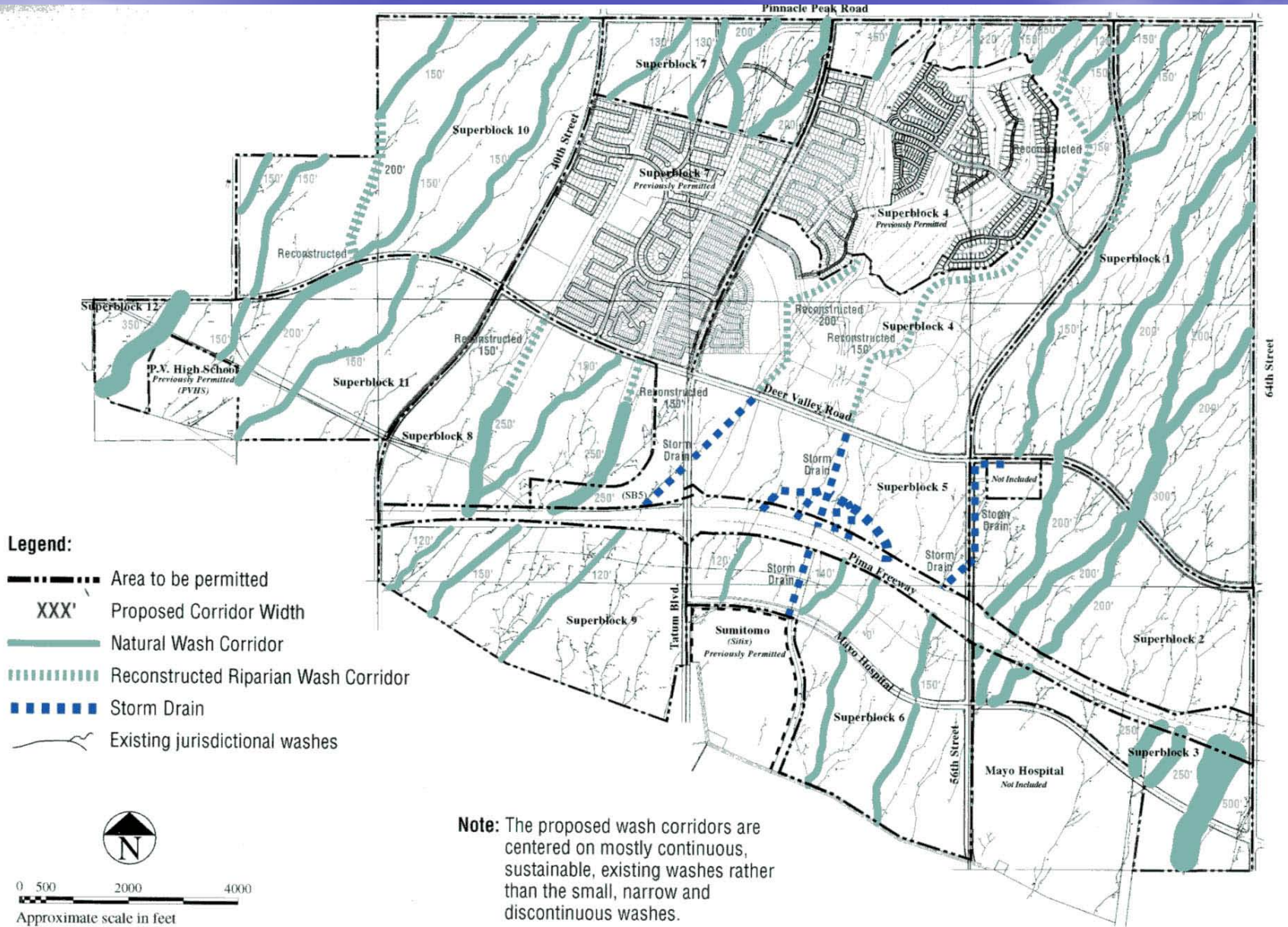
Southeast Planning Area Drainage Related Open Space Exhibit

Date: August 21, 2018

GREY PICKETT
landscape architecture urban planning design



Desert Ridge

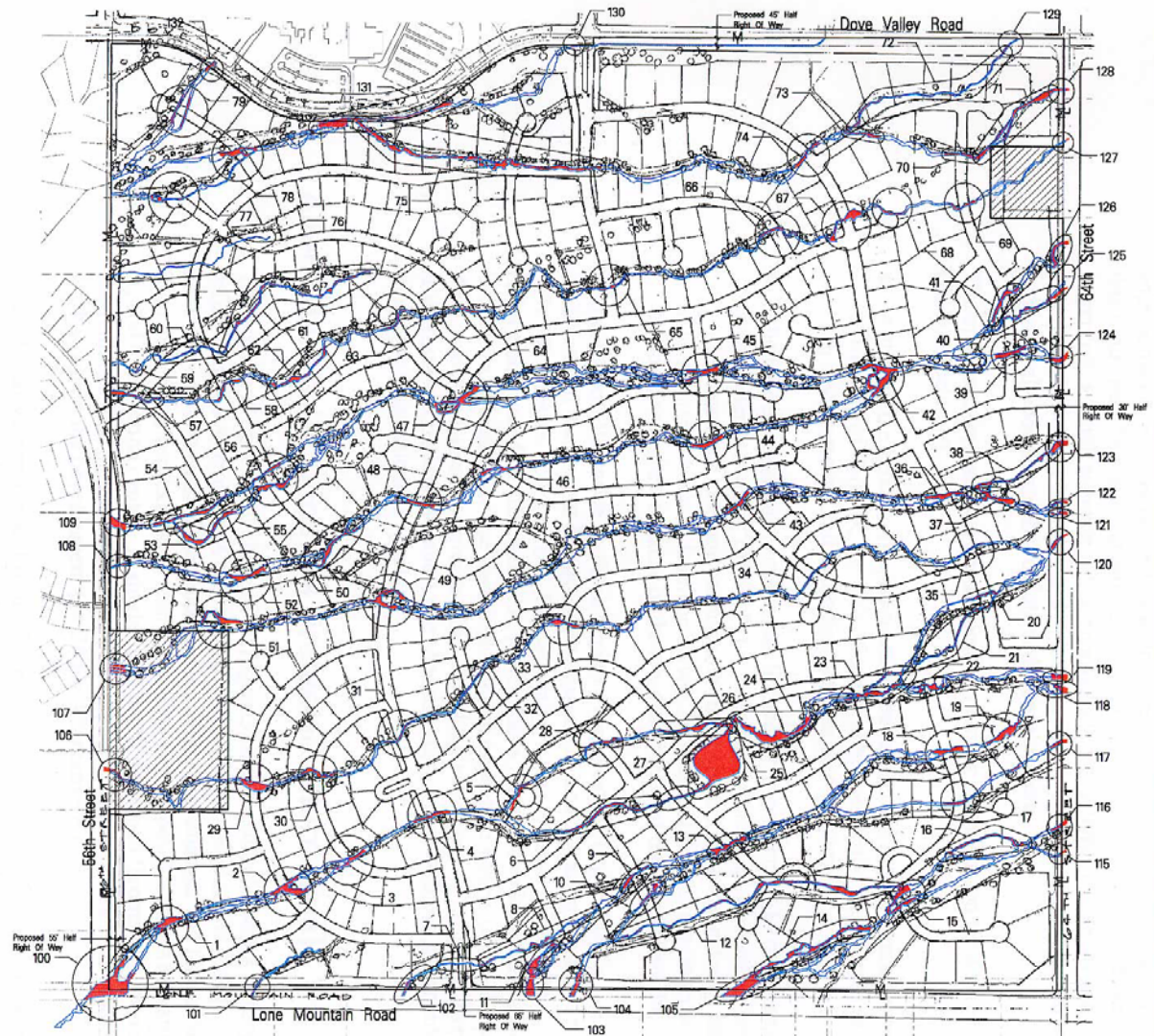




LEGEND

404 Impact Area (On Site)

TOTAL 404 IMPACT AREA = 557,358.0 SQ. FT



404 Impact Area Map

FIGURE 4
ALTERNATIVE B

Problems with CWA Regulation

- Jurisdiction
- Cost of permitting
- Delays in permitting
- Costs of compliance

Jurisdiction

- 39 years after the adoption of the CWA, we still don't know what waters are Federal.
- Agency approach to jurisdiction has been to push the bounds of what constitutes a "water" and to assert that "all waters are Federal".
- SCOTUS in SWANCC/Rapanos: No they are not
- Current rules do not to reflect this.
- Agencies have never defined the upstream limits of jurisdiction in rule.

Regulatory definition of Waters of the United States (1986)

1. Traditional navigable waters
2. Interstate waters
3. Other waters the use, degradation or destruction of which could affect interstate commerce
4. Impoundments of waters otherwise listed
5. Tributaries of waters otherwise listed
6. Territorial seas
7. Adjacent wetlands

Attempts to define limits of jurisdiction

- Corps: "ordinary high water mark" (OHWM) – lateral limit of perennial waters
- No real 404 regulation above headwaters before 1984; after that, Corps goes upstream until OHWM is not "perceptible"
- Corps Wetlands Manual (1987)
- EPA has never developed its own rules defining limits.





05/05/2005



08/04/2005



04/29/2005



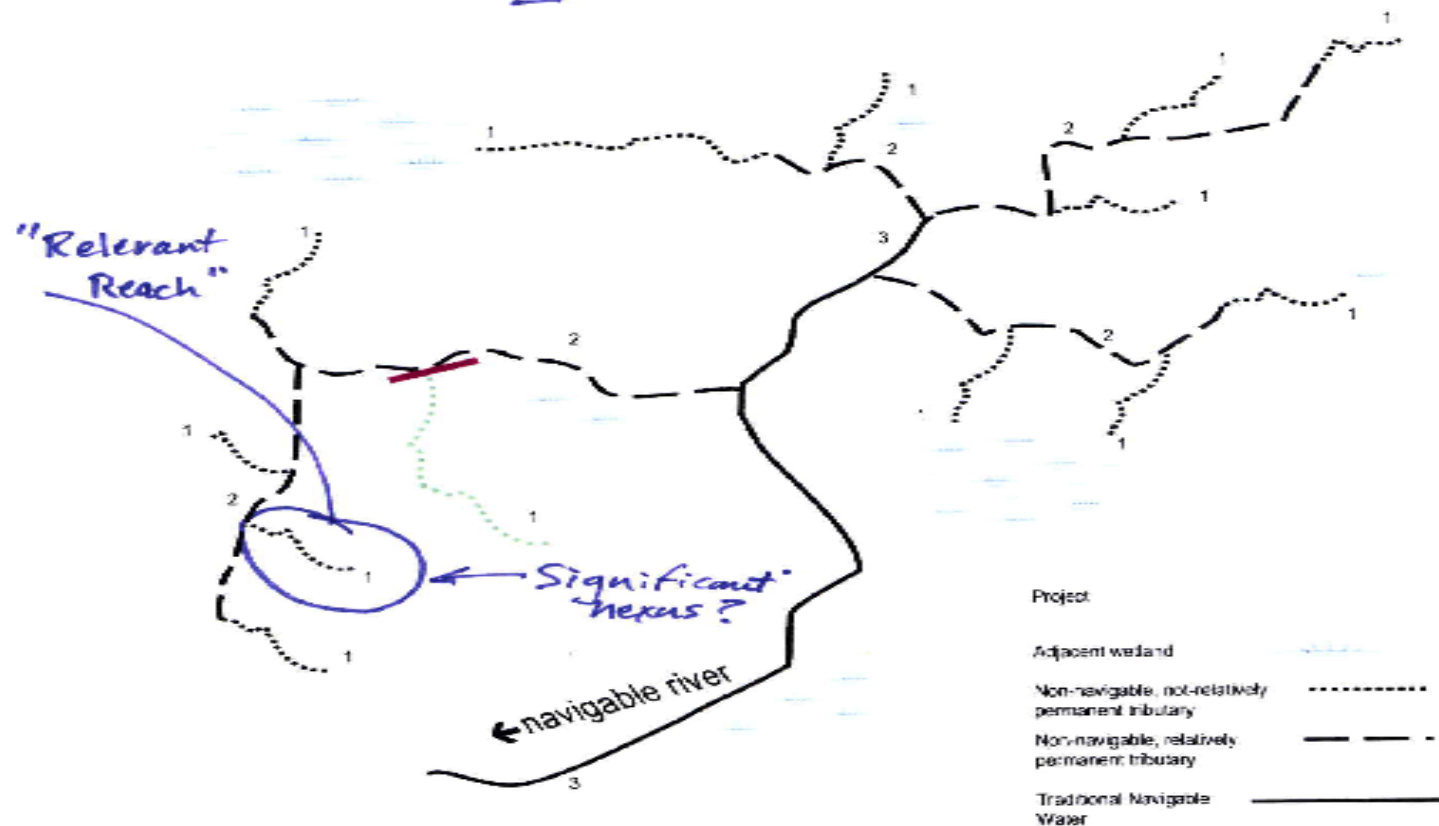
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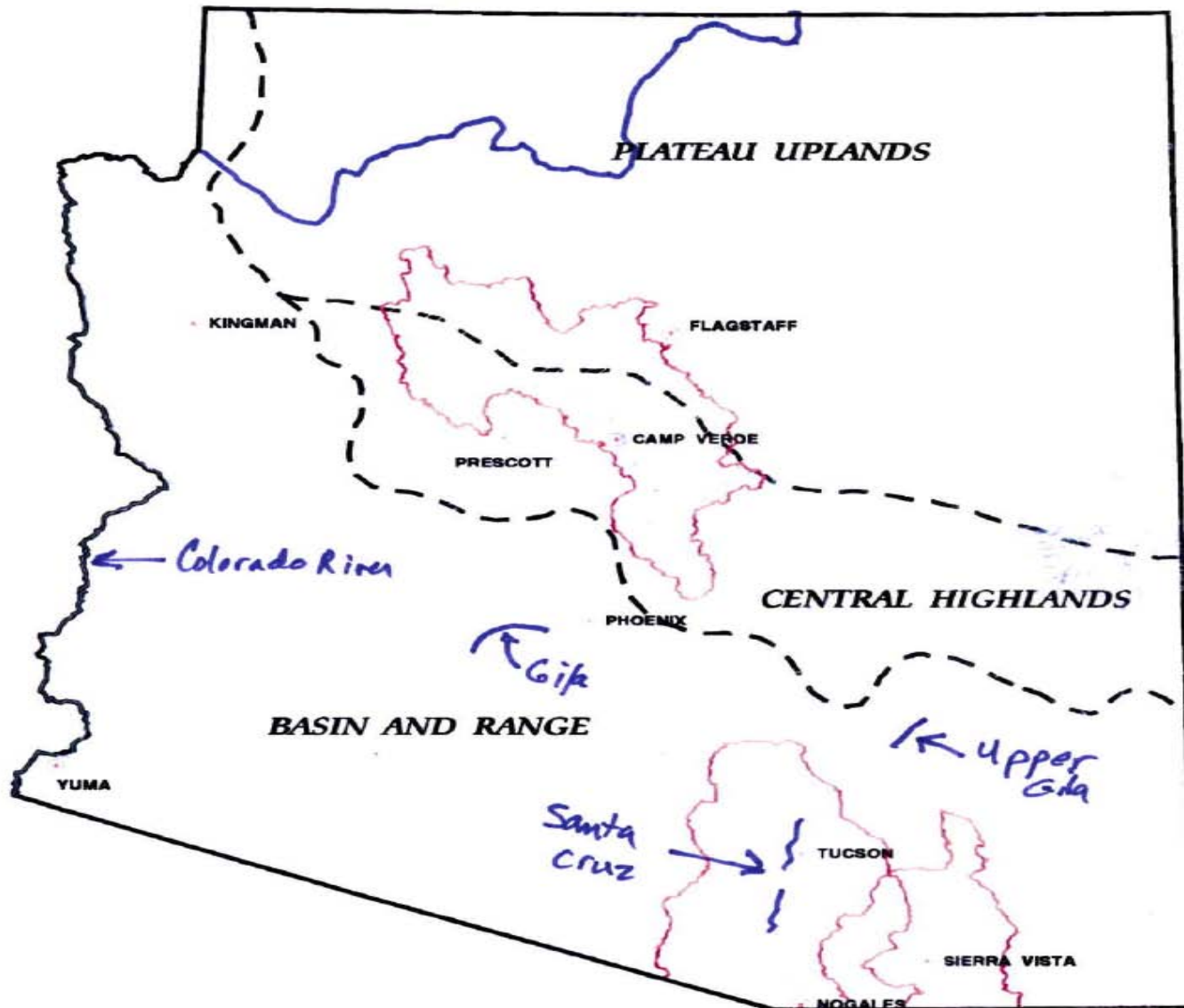
The Rapanos Guidance (2007/08)

- Sets forth structure for determining jurisdiction in the context of 404 permitting.
- Three type of regulated water bodies:
 - Traditional navigable waters
 - Relatively Permanent Waters
 - Non-RPWs
 - Only regulated if you meet the "significant nexus" test

2007-08 Guidance



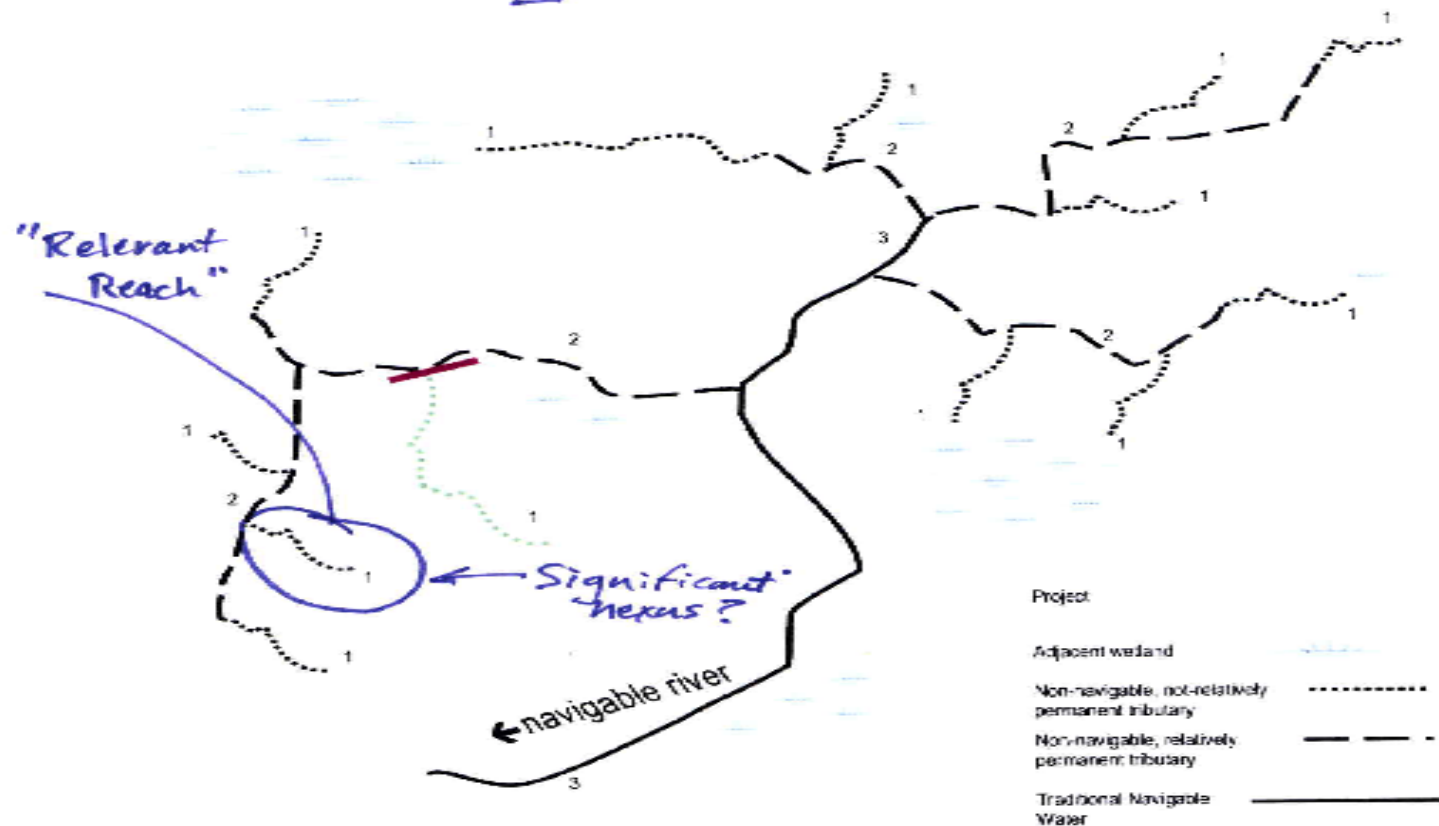
Traditional Navigable Waters



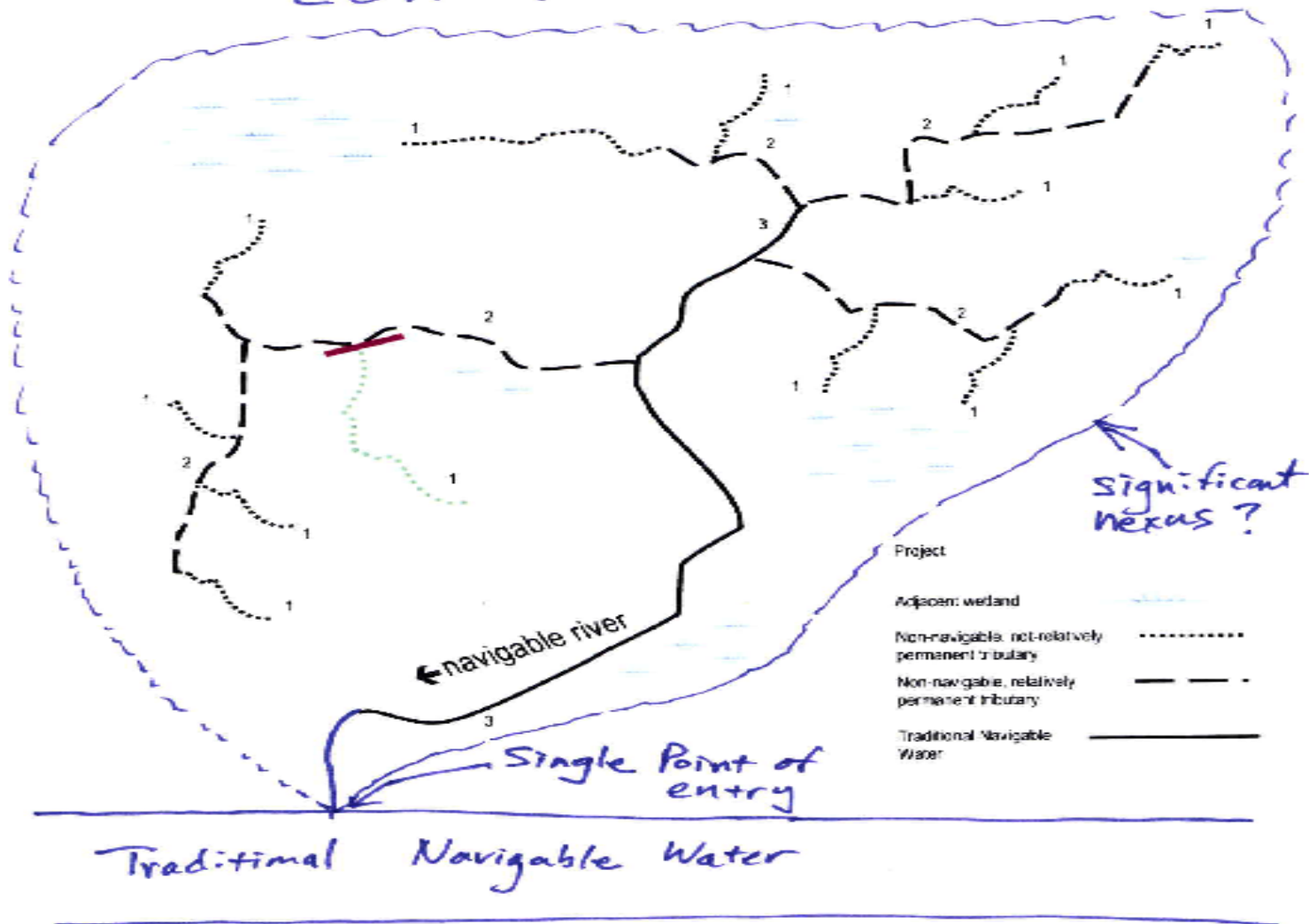
Clean Water Protection Guidance (draft) (April 2011)

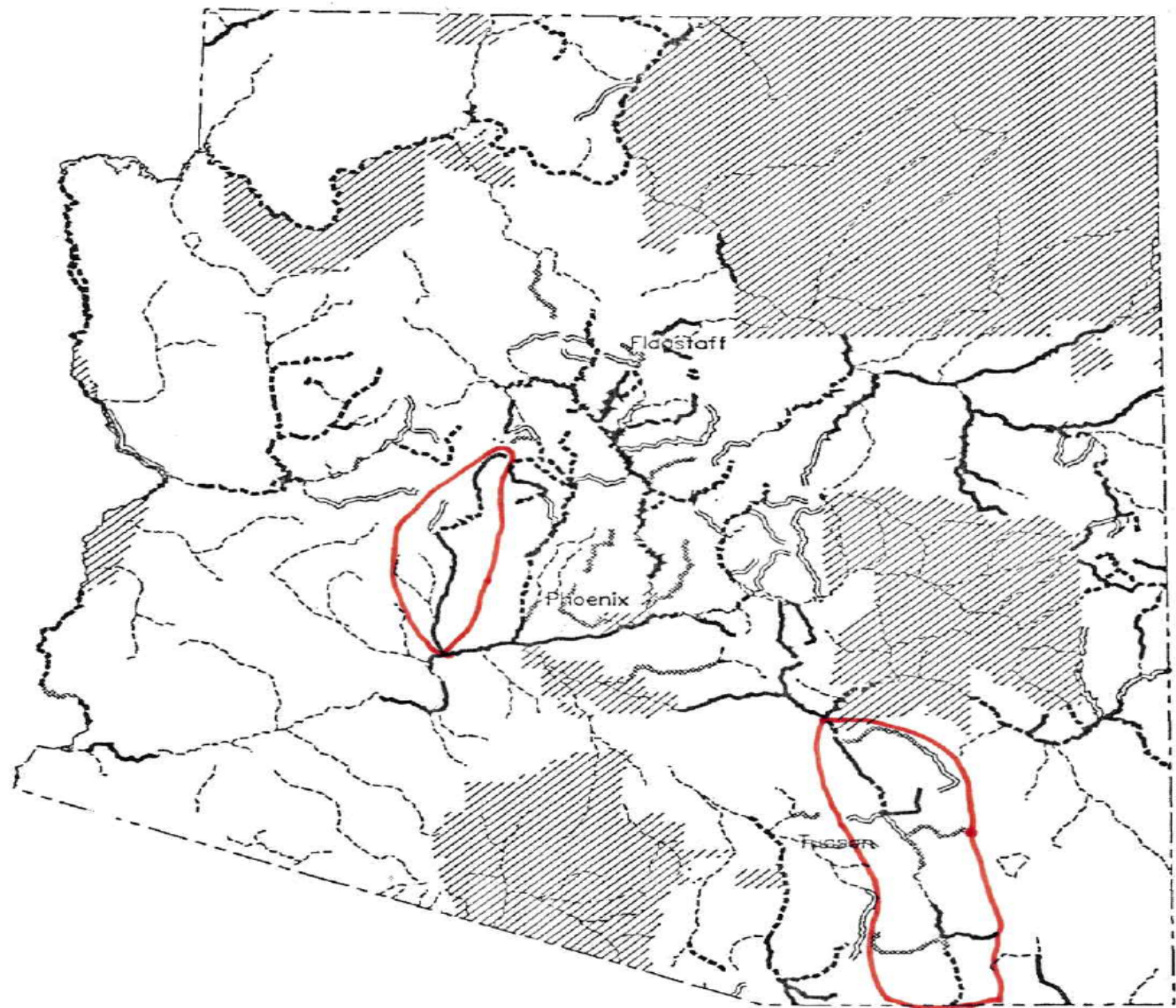
- Revises substantially the approach to jurisdiction.
- Biggest change: All waters that drain to a single point of entry to TNW are "similarly situated" and considered together for nexus purposes.

2007-08 Guidance



2011 Draft Guidance





Jurisdiction

- No real attempt to apply SCOTUS case law to NPDES program.
- Vastly different approaches depending on administration.
- No attempt to define upper limits or to clarify when ditches and other man made conveyances are regulated.
- This matters for both 404 and 402 because of delays under 404 and imposition of an expensive permit in stormwater context.

Cost of obtaining a permit

- AZPDES: Cost of SWPPP is manageable; but we are now paying fees to support the agency.
- Dual permitting is an issue both as to fees and consistency with AZPDES.
- 404: Substantial, including consultants, mitigation, cultural resources, endangered species.

Delays in permitting

- AZPDES: No significant issue due to NOI system.
- 404: single greatest cost; greatest source of uncertainty.

Costs of compliance - AZPDES

- Substantial, particularly for implementation of BMPs; employee time; stabilization requirements.
- Particularly troublesome because of the lack of benefits:
 - Most sites that discharge do so to ephemeral or manmade systems
 - Ephemeral systems are dominated by sediment and erosion increases if "clean" water is discharged.

Costs of compliance - 404

- Substantial and on going:
 - Mitigation – 2008 rule
 - Cultural resource/endangered species
 - Open space preservation

Solutions - Jurisdiction

- Let's define it and do so with common sense.
 - Not every feature that conveys or holds water is a "water"
 - Not every "water" is Federal.
- Agency line drawing by rule is subject to substantial judicial deference
- Benefits both the 404 and 402 worlds:
 - Delineations would be less time consuming; more routine
 - You would know if you need a permit or not

Solutions – delay in permitting

- Largely a 404 problem
- Jurisdiction clarity will help substantially
- Consider advisability of State primacy
 - Regulatory time frames
 - Fee structure means agency has resources to permit
 - Shorter and localized chain of command

Solutions – cost of AZPDES compliance

- Recognize the local approaches to retention/detention and credit them in the process with either "no permit" or reduced BMPs, depending on the level of protection.
- Consider the receiving waters when setting BMPs – if to a natural ephemeral wash, do we want to control sediment?

Solutions - cost of 404 compliance

- Clearer local standards on mitigation.
- Improve consistency of permit procedures and processing.
- Incentivize mitigation banks/in lieu fee.
- Revisit the Corps/EPA role in open space preservation.
- Primacy might help here too.

Closing – will this help in the recovery?

- 404 does delay projects and so better procedures, more certainty on jurisdiction would be a big help. The problem is if and when.
- 402 – Some issues require national action (like jurisdiction). But the CGP is up for reissuance so there is a unique opportunity now to streamline the process and eliminate permit requirements where not needed.