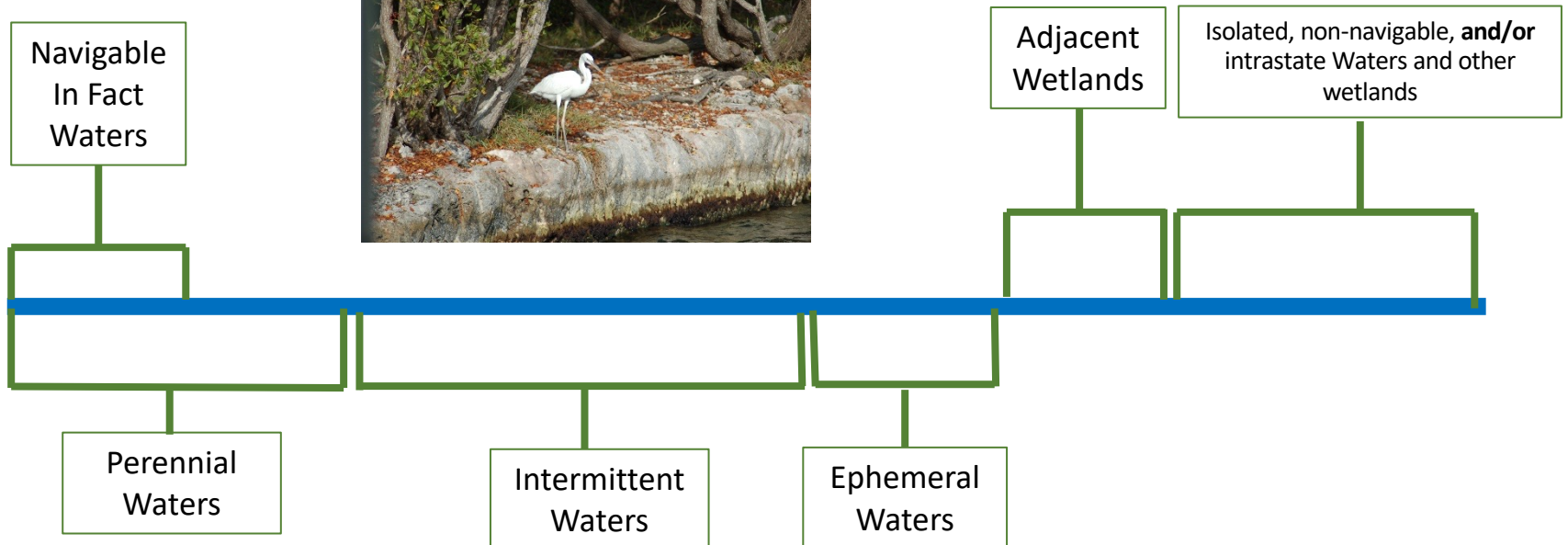


# Brief History of the CWA and Supreme Court

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# US vs Riverside Bayview Homes, 1985

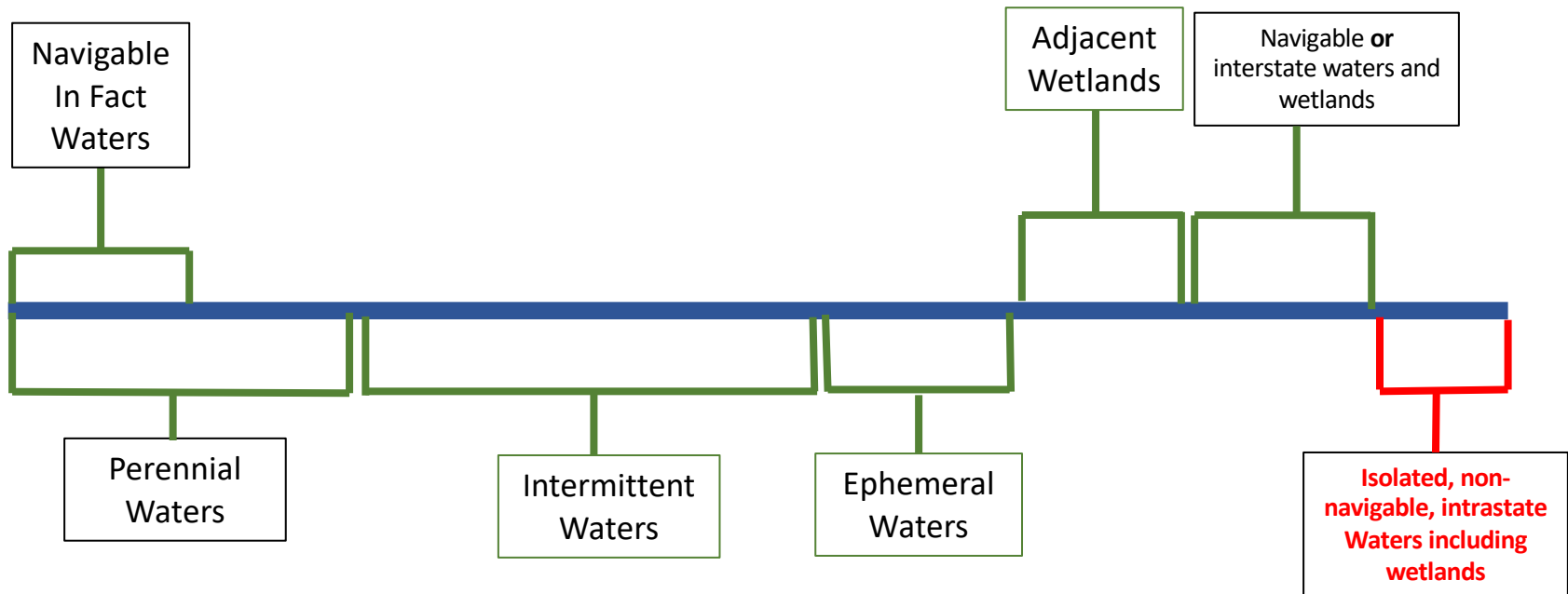
- Supported the Corps' regulatory authority
- Led to the publication of the 1986 regulations
- Migratory Bird rule 1986



# Solid Waste Agency of Northern Cook County (SWANCC), 2002

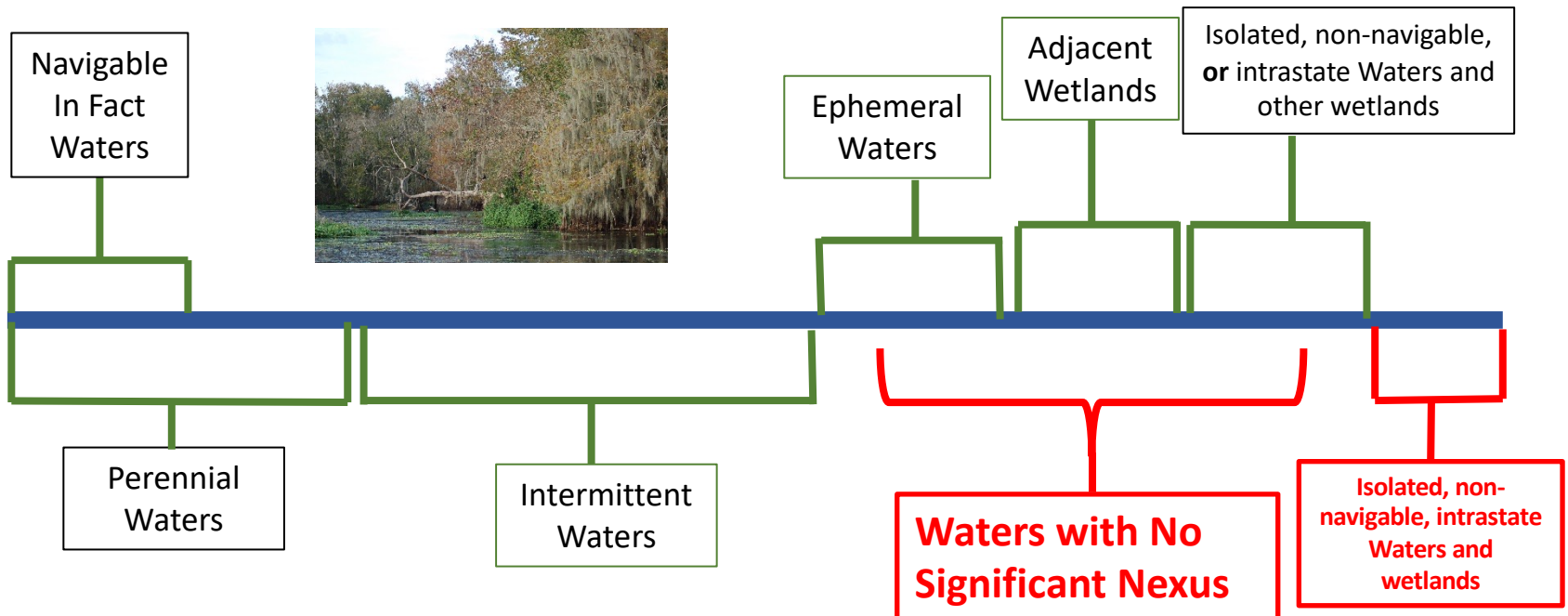


- Supreme Court struck the Migratory Bird rule
- Isolated, Intrastate, Non-navigable waters (including wetlands) were non-jurisdictional



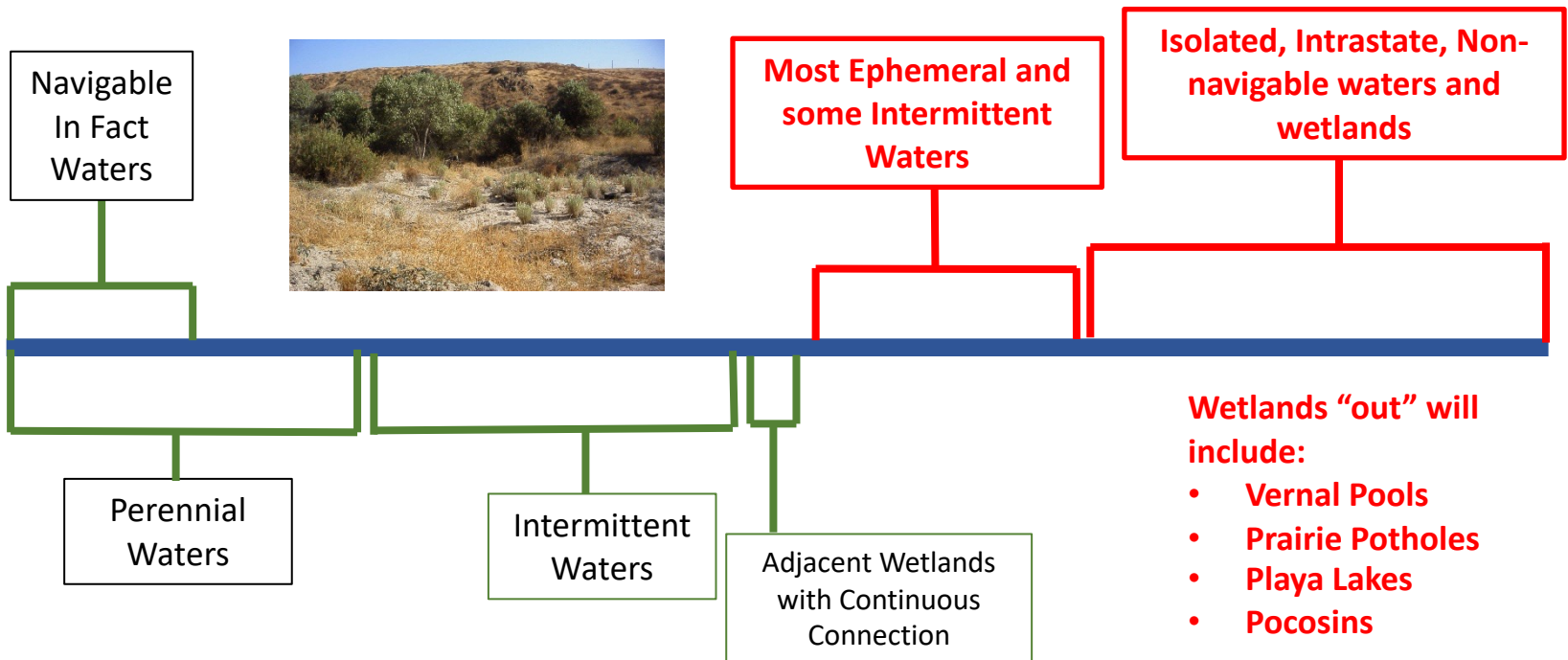
# Carabell-Rapanos Decision, 2006

- Two separate cases involving wetlands and associated tributaries.
- The decision was split 4-4-1, with Justice Kennedy introducing the “Significant Nexus” test
- The “Significant Nexus” test became the guiding principle for guidance and policy
- Justice Scalia’s view of “Waters of the United States” and adjacent wetlands used in Sackett decision



# Sackett Decision 2023

- Released May 25, 2023
- Court unanimously rejected Significant Nexus but that 5-4 majority adopted Scalia test on adjacency
- Followed by EPA and Corps revised rule in Sept 2023



# Sackett Rule

- On August 29, 2023, EPA and the Corps issued a final rule amending the January 2023 rule defining "Waters of the United States."
- The rule became effective September 8 when it was published in FR, this amended rule conforms to the Sackett decision.
  - Significant nexus out as a jurisdictional test
  - Continuous surface connection between a wetland and a traditional navigable water (TNW) or a relatively permanent (RP) tributary required.
  - Isolated wetlands (like vernal pools, playa lakes, prairie potholes) and ephemeral waters are out
  - Adjacent wetlands must have a continuous surface connection to a TNW or RP tributary so that you cannot tell where the water ends and the wetlands begin.
  - Wetlands separated by a barrier such as a man-made dike, barrier, natural river berm, beach dune and the like are no longer jurisdictional.
  - Perennial and many intermittent ditches will be in.

# Sackett Uncertainties

The following terms from the decision will need clarification:

- What are “**..relatively permanent, standing or continuously flowing bodies of water?**”
- What is a “**Continuous surface connection?**”

*“... the CWA’s use of “waters” encompasses “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”*



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