Federal Jurisdiction Update: Definition of "Waters of the United States" Proposed Rule–Significant Nexus Defined and Implications for Application to Jurisdictional Determinations

Florida Chamber Environmental Permitting School 2015

Pamela J. Fetterman

Principal Scientist

ecoGENESIS, LLC

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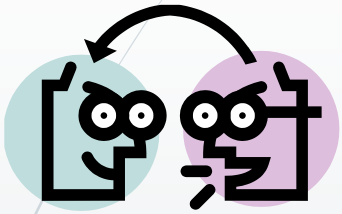
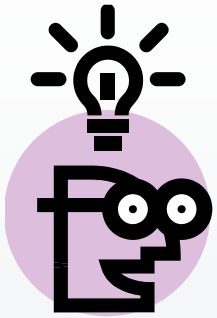




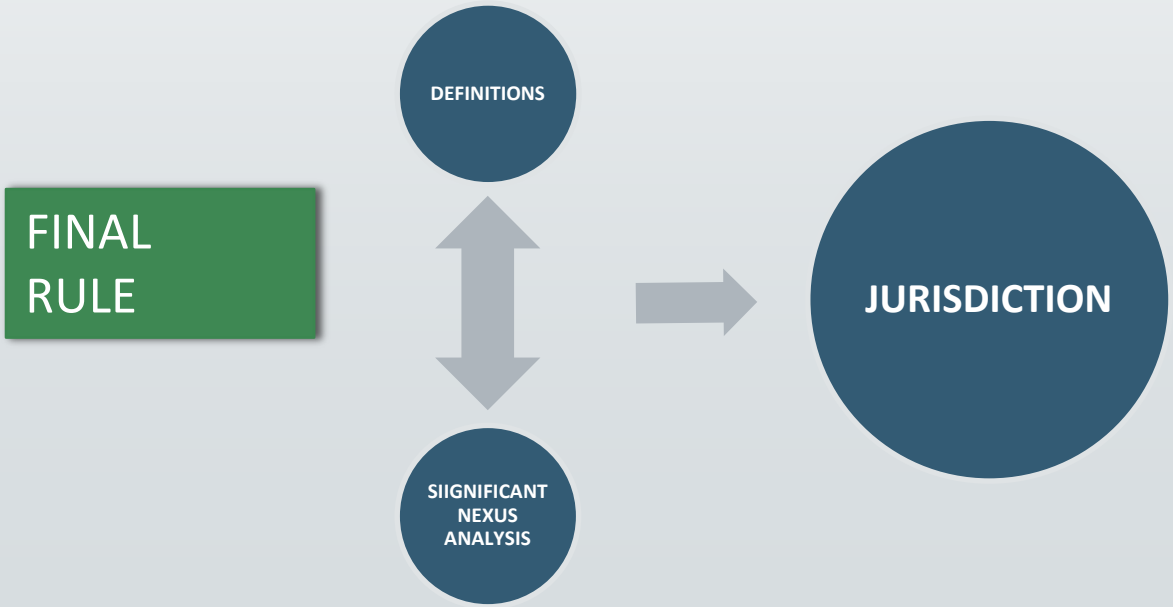
- The opinions expressed herein are not intended to represent the opinions of any other party, person or entity, other than the presenter.
- The opinions expressed herein are based, first and foremost, on a scientific, technical consideration of the Final USACE/EPA Definition of Waters of the United States Rule.
- The content presented herein is designed to stimulate thought, discussion and questioning, and explore how the definition of significant nexus and use of significant nexus in the rule rationale might look like in “real world” determination of jurisdiction
- FInal Rule published on June 29, 2015 in the Federal Register
- Definition amends several sections of Title 40, not just 33 CFR and Section 404

Presentation Summary

- Take a closer look at **Significant Nexus** in proposed rule
  - De facto significant nexus exists between tributaries and NW, IW, and/or Territorial Seas
  - De facto significant nexus exists between adjacent water bodies and NW, IW; and/or Territorial Seas; therefore,
  - ***ALL TRIBUTARIES & ADJACENT WATERS (including wetlands) are WATERS OF THE UNITED STATES (WOUS)***
  - ***CASE-SPECIFIC BASIS, INTRASTATE WATERS. INCLUDING WETLANDS THAT CAN BE SHOWN TO HAVE A SIGNIFICANT NEXUS TO TNW, IW or TERRITORIAL SEAS ARE WOUS—***
  - ***CATEGORICAL DETERMINATION OF "SIMILARLY SITUATED" FOR SEVERAL SPECIFIC SUBCATEGOREIS OF WETLANDS THAT FUNCTION AS "WETLAND COMPLEXES" WHEN MAKING A SIGNIFICANT NEXUS DETERMINATION***
- To understand the above, must understand definition of tributary, adjacent waters and "other waters" in the proposed rule
- Scientific Review and Significant Nexus—Basis for definition of Tributaries and Adjacent Waters as Jurisdictional
- Significant Nexus Definition vs Significant Nexus Analysis for "Other Waters"
- In application—Is it the same or different? Time permitting, step through application of significant nexus to existing approved JD determinations from the JAX Corps District to determine if jurisdiction would change with Final Rule

Emergence of Significant Nexus and Use in the Final Rule

- Justice Kennedy opinion arose from *SWANCC* and *Rapanos*--waters, alone or in combination ***with similarly situated waters in the region***, have a ***significant effect on the chemical, physical, or biological integrity of a TNW or interstate waters***
- Effect more than "speculative or insubstantial"
- Specifically defined and guidelines provided for case-specific analysis in two situations
- Encompass wetlands or all waters (if not exempted) that are <u>not adjacent</u>, if they possess the requisite significant nexus
- Final rule clarifies that if wetlands or waters meet definition of adjacency or are tributaries, are jurisdictional and do not require a significant nexus analysis



SIGNIFICANT NEXUS FOUNDATIONAL BASIS

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"Although these conclusions play a critical role in informing the agencies' interpretation of the CWA's scope, the agencies' interpretive task in this rule—determining which waters have a ''significant nexus''—requires scientific and policy judgment, as well as legal interpretation. The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in Implementing the CWA during a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, more consistent, and easily implementable standards to govern administration of the Act, including brighter line boundaries where feasible and appropriate."

"Waters are connected in myriad ways, including physical connections and the hydrologic cycle; however, connections occur on a continuum or gradient from highly connected to highly isolated. These variations in the degree of connectivity are a critical consideration to the ecological integrity and sustainability of downstream waters. The critical contribution of upstream waters to the chemical, physical, and biological integrity of downstream waters results from the accumulative contribution similar waters in the same watershed the context of their functions ed over time. "

Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence **[EPA Office of Research & Development]**

Additional Conclusions of the Science Report & SAB

The following are biologically, chemically and physically connected to downstream waters, and influence the ecological integrity of those waters:

1. **Tributary streams (perennial, intermittent and ephemeral)**
2. **Wetland & Open Waters in Floodplains & Riparian Areas**

Non-floodplain wetlands and open waters provide many functions that benefit downstream water quality and ecological integrity, but their effects on downstream waters are difficult to assess based solely on the available science.

Tributaries & Adjacent Waters and Wetlands

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Tributaries

- Bed, Bank and OHWL for Channel
- Contributes Flow Either Directly or Through Another Water* to a NW, IW, or Territorial Sea

*Another water need not be jurisdictional, could be an exempted water from CWA regulation

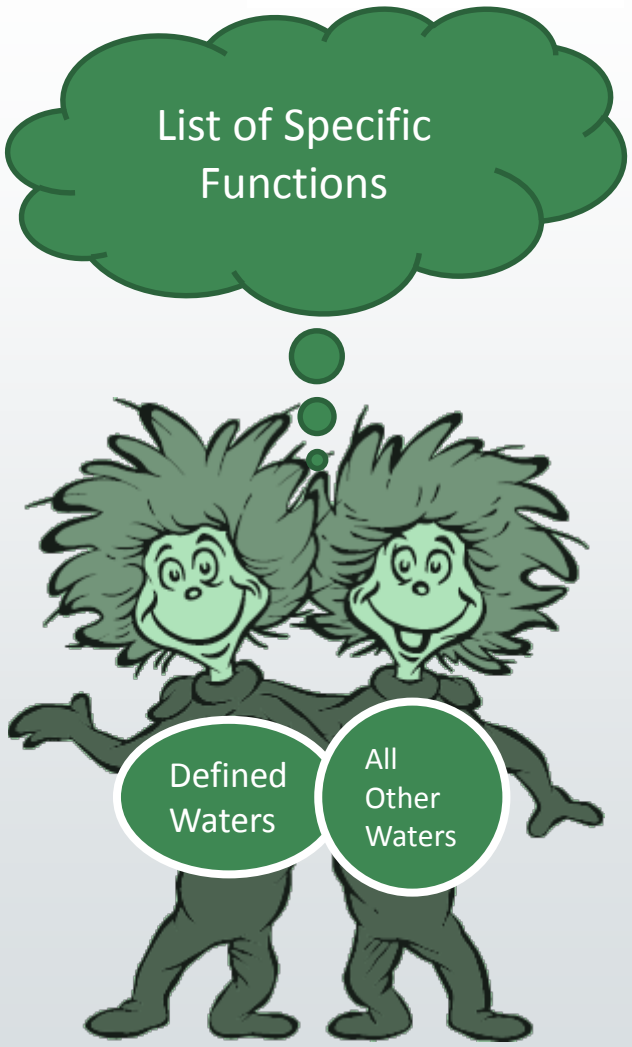
Adjacent

- Bordering, Contiguous or Neighboring a NW, IW or Territorial Sea, Impoundment or Tributary, & abutting it's OHW
- All Waters that Connect Segments of a Water, or located at a head of a water
- **Neighboring**-100ft of OHWL or within 100 YR Floodplain not more than 1500 feet from OHW or MHW of a NW, IW or Territorial Sea
- Separated by man-made or natural barriers still adjacent

SIGNIFICANT NEXUS DEFINITION

A Water, including wetlands—alone or in combination

- ***With other similarly situated waters in the region***
  - Means the watershed that drains to the nearest water identified as a NW, IW or territorial sea
- ***Significantly affects chemical, physical or biological integrity of NW, IW, or territorial seas***
- ***EffectS must be more than speculative or insubstantial***
- ***Waters (including wetlands) are similarly situated if they:***
  - ***Function alike***
  - ***Sufficiently close to function together in affecting downstream waters***



Circumstances Requiring Significant Nexus Determination

- The following waters and wetlands that do not meet criteria of defined waters and that are not excluded will require a case-specific significant nexus analysis to determine jurisdiction
  - **5 Subcategories of Waters: Prairie Potholes, Pocosins, Carolina & Delmarva Bays, Western Vernal Pools, Texas Coastal Prairie Wetlands**
    - Rule already determines these to be SIMILARLY SITUATED
  - **All waters within 100 YR Floodplain of a NW, IW or Territorial Sea that are not adjacent**
  - **All waters within 4000 feet of OHWL or MHW of the categorically defined waters (NW, IW, Territorial Sea, Impoundments, Tributaries) that are not adjacent**

- Will not "re-promulgate" the previous list
  - Intrastate lakes, rivers, streams (intermittent)
  - Mudflats, sandflats
  - Wetlands
  - Sloughs
  - Prairie potholes
  - Wet meadows
  - Playa lakes
  - Natural ponds

The use, degradation or destruction of which could affect interstate or foreign commerce

Physical, Chemical and Biological Functions

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Physical

- Sediment Trapping
- Runoff Storage
- Contribution of Flow
- Retention & Attenuation of Flood Waters
- Pollutant Trapping, Filtering & Transport

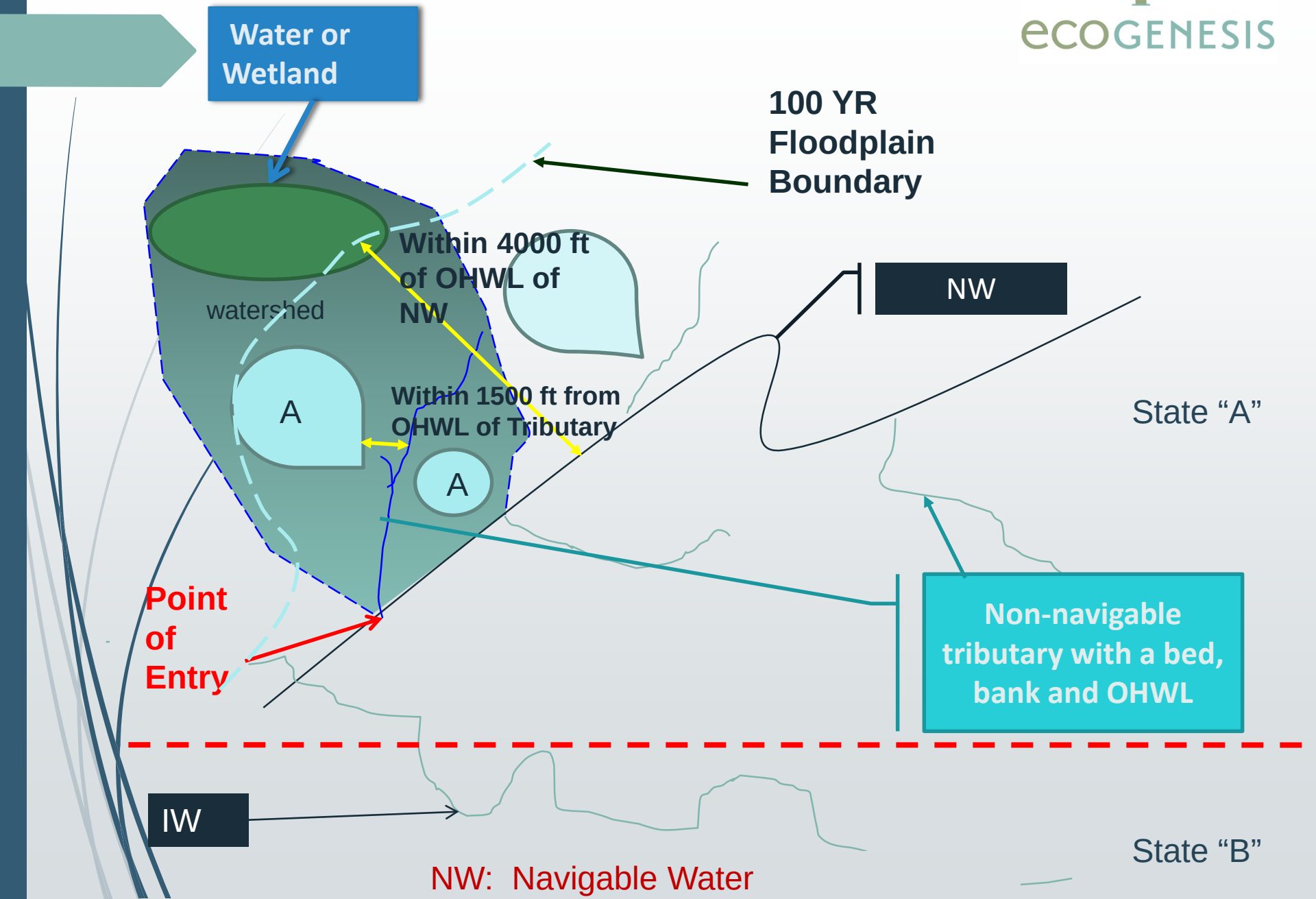
Chemical

- Pollutant Transformation
- Sediment Trapping
- Nutrient Recycling
- Export of Organic Matter

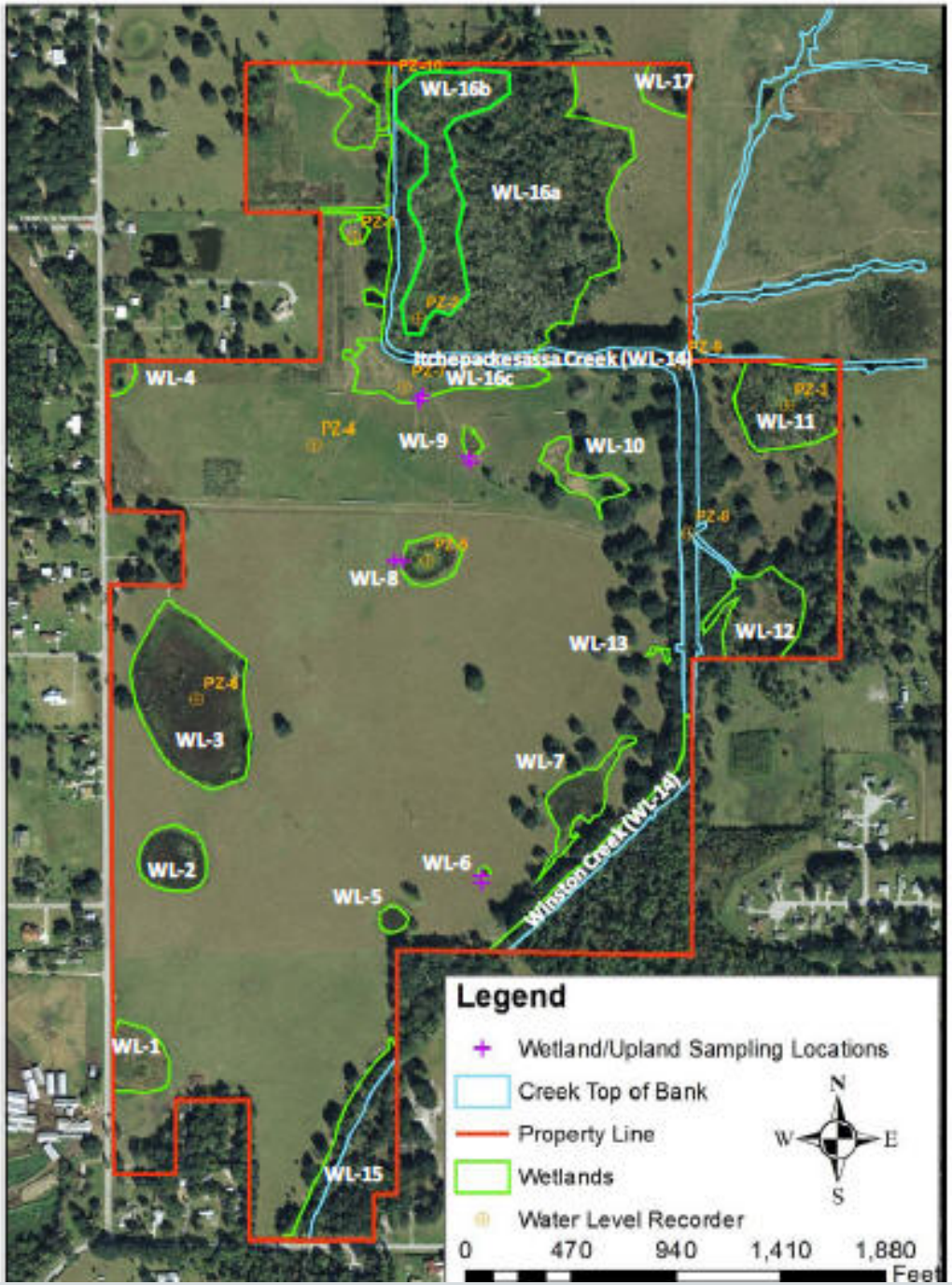
Biological

- Export of Organic Matter
- Export of Food Resources
- Life Cycle Dependent Habitat (Foraging, Feeding, Nesting, Breeding, Spawning or Nursery Area) for species located within a NW, IW or Territorial Sea

Similarly Situated & In the Region



Florida JD Significant Nexus Example: Itchepackesassa Creek RSWF



Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs. Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Florida JD Significant Nexus Example: Itchepackesassa Creek RSWF

Significant nexus determination for **Winston Creek** and **adjacent wetlands 1-3, 5-7, 12, and 13**:

Physical: The wetlands perform important flow maintenance functions including storage of flood waters [1, 2] and a release of these waters into the tributary in a more even and consistent manner[2]. Therefore, the wetlands directly affect the duration, frequency, and volume of flow in the tributary and the downstream navigable water[2]. The wetlands reduce local flooding[1]. Storage of surface waters provides groundwater recharge that contributes to base flow in the tributary that is vital to sustain aquatic life in downstream waters[1].

Chemical: The wetlands improve water quality by removing sediment and nutrients that would otherwise reach downstream waters and have a negative effect on aquatic resources [1, 2].

Biological: The wetlands are of utmost importance biologically since the majority of other non-wetland areas in the watershed have been altered for agriculture, residential, or other purposes[1]. These wetlands have a high abundance and diversity of species due to their transitional location between terrestrial and aquatic systems[1]. Productivity in downstream waters can depend on the exchange of nutrients within the floodplains[1]. Watersheds dominated by riparian wetlands export a large amount of carbon that is essential to downstream ecosystems[1]. Particulate carbon is important for shredders and filter-feeders while dissolved carbon is important for microorganisms within these systems[1].

[1]The Clean Water Act Jurisdictional Handbook. 2007. Environmental Law Institute, Washington, DC, 77 pp.
[2]Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States. 2007. US Department of the Army and US Environmental Protection Agency. 12 pp

Florida JD Significant Nexus Example: Itchepackesassa Creek RSWF

Significant nexus determination for **Itchepackesassa Creek** and **adjacent wetlands 4, 8, 9, 10, 11, 16, and 17:**

Physical: The wetlands perform important flow maintenance functions including storage of flood waters [1, 2] and a release of these waters into the tributary in a more even and consistent manner[2]. Therefore, the wetlands directly affect the duration, frequency, and volume of flow in the tributary and the downstream navigable water[2]. The wetlands reduce local flooding1. Storage of surface waters provides groundwater recharge that contributes to base flow in the tributary that is vital to sustain aquatic life in downstream waters[1].

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