

Federal Wetland Jurisdiction

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July 24, 2014



US Army Corps of Engineers
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Bottom Line Up Front

The Clean Water Act 2008
Guidance is still the current
method for jurisdictional
determinations.



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Why “Waters of the US” Matter

“Navigable” Waters: Waters of the U.S.,
including Territorial Seas

303
Water
Quality
Standard
& TMDLs

States
Tribes
EPA
FWS

311
Oil
Spill
Prog-
rams

EPA

401
State
Certifi-
cation

States
Tribes
EPA

402
Pollutant
Discharge
Permits

States
EPA

404
Dredge
and
Fill
Permits

USACE
States
EPA



CWA Section 404: A Short History

- 1972: Enacted.
- 1975: NRDC vs. Calloway. WOUS broader than navigable.
- 1977: Regulation & Congressional Amendments.
- 1979: Civiletti decision on CWA authority. EPA lead.
- 1985: SCOTUS in *Riverside Bayview Homes*. Adjacent wetlands.
- 1986: “Migratory Bird Rule”; most recent version of consolidated regulations issued.
- 2001: SCOTUS in *SWANCC v. USACE*. Isolated waters.
- 2003: Advance Notice of Proposed Rulemaking.
- 2006: SCOTUS in *Rapanos & Carabell*. Adjacent wetlands and tributaries.
- 2007-8: Rapanos guidance issued and revised.
- 2011: Draft Guidance released for public comment.
- 2014: Draft Rule released for public comment



Waters Subject to CWA

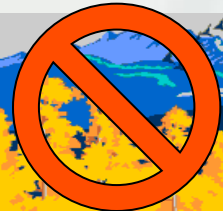
Programs 33 CFR part 328.3(a)

Current regulations define “waters of the U.S.” (WOUS) as including waters that are:

- Traditionally navigable (TNWs)
- Interstate
- Could affect interstate commerce if used, degraded, or destroyed
- Impoundments of jurisdictional waters
- Tributaries of jurisdictional waters
- Territorial seas
- Wetlands adjacent to jurisdictional waters
- Excludes waste treatment systems and prior converted cropland



SWANCC Jurisdictional Issues



Migratory Bird Rule

Adjacent Wetlands:
Proximity or Hydrology

Hydrology: Direct & immediate subsurface infiltration (not groundwater)?

No connection to Aquifer

Proximity: How far?
How many berms?

Groundwater (non-discrete)?

Aquifer

How Far Upstream

Ephemeral
Intermittent
Perennial

Erosional Features

Sheet flow or snowmelt

Subsurface Flow (discrete)?

Ditches?

Pipes?

Sheet flow over upland?

Storm Drain Systems?

**Included as "Tributaries"/
Waters of U.S.**

Rapanos Guidance: Kennedy Test

- Significant nexus evaluation:
 - ▶ An assessment of the flow characteristics and functions of the tributary, itself, in combination with the functions performed by any wetlands adjacent to the tributary.
- To determine if they have more than an insubstantial or speculative effect on the chemical, physical or biological integrity of TNWs.



Difficulties with Current Regulations

- Regulation does not include definitions for many terms such as, “tributary,” “significant nexus.”
- Regulations do not reflect all features that historically have been considered non-jurisdictional.



Previous Statements Made on Jurisdiction

Discover Magazine – September 2008
(Senator Obama)

“I am troubled by recent court rulings that have confused rather than clarified federal jurisdiction over “waters of the United States,” including environmentally sensitive wetlands critical to maintaining supplies of clean freshwater. I will support efforts to ensure that federal protection of the nation’s waters is strengthened, not weakened.”

Administration Views Letter – May 2009
(Sutley, Jackson, Salazar, Salt, Vilsack)

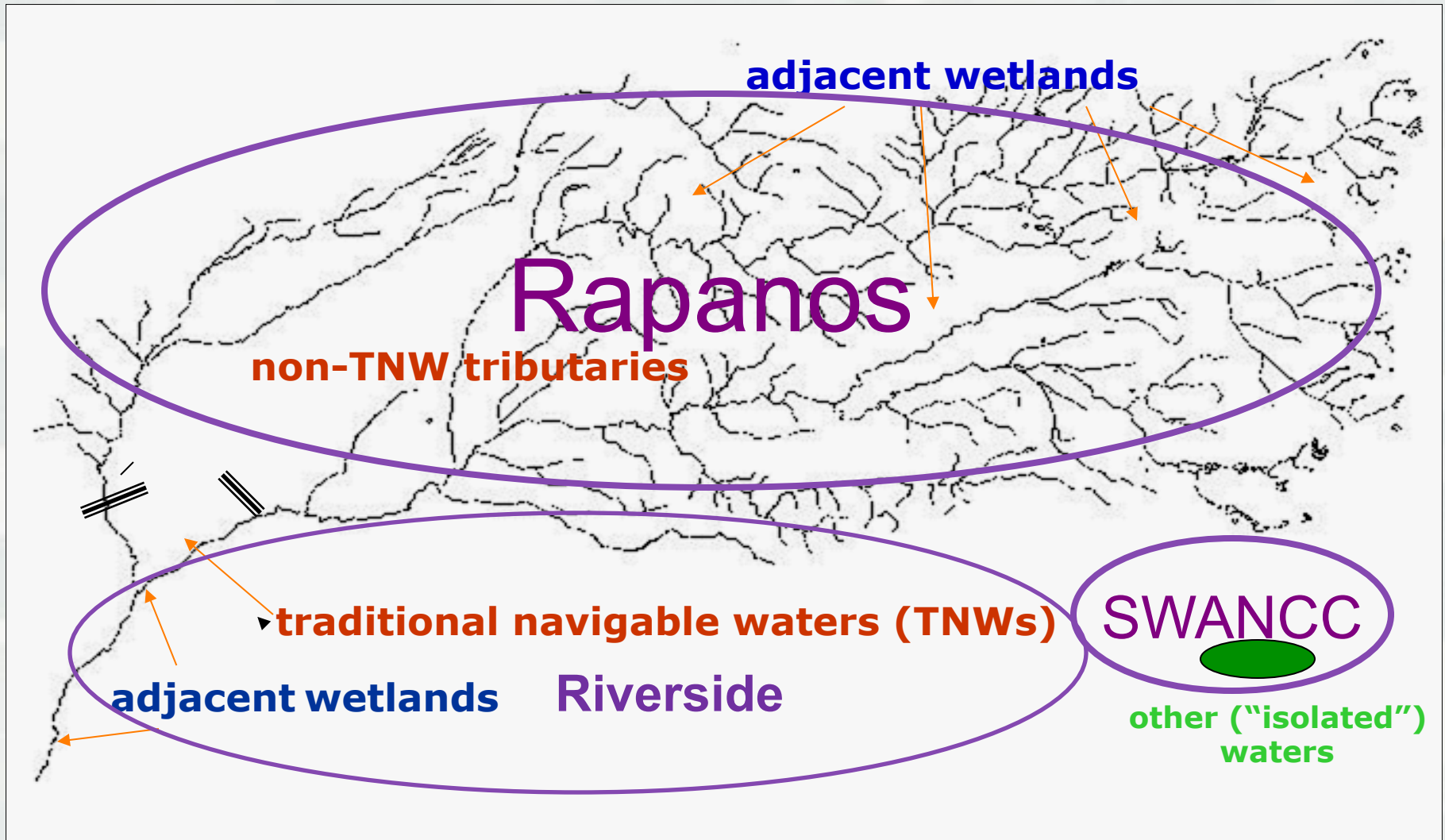
“It is essential that the Clean Water Act provide broad protection of the Nation’s waters, consistent with full Congressional authority under the Constitution. All of the environmental and economic benefits that these aquatic ecosystems provide are at risk if some elements are protected and others are not.”

Data Review

- Data from FY09 and FY10 were used to determine distribution and number of the different types of waters (e.g., TNW, tributary, wetland, isolated water).
 - ▶ Of approximately 184,000 waters in our database, **8.2%** were determined to be non-jurisdictional under the 2008 Rapanos or 2003 SWANCC guidance.
 - ▶ Of the non-jurisdictional waters:
 - 1,082 (0.6%) had no SN
 - 8,339 (4.5%) were isolated
 - 5,713 (3.1%) were undetermined/unknown



What Waters Are Involved?



Proposed CWA Rule

- Published in Federal Register April 21, 2014
- Public comment period open until October 20, 2014
- U.S. Environmental Protection Agency (USEPA) and Department of the Army believe that the draft rule is *consistent with the U.S. Supreme Court's SWANCC and Rapanos decisions*
- USEPA, Army and Office of Management and Budget have met with various agencies, groups and organizations to listen to their concerns about the proposed rule



Proposed CWA Rule

(cont'd)

- Provides *additional clarity* regarding geographic scope of Clean Water Act (CWA) jurisdiction
- *Improves national consistency and predictability* of jurisdictional decisions applicable to all CWA programs



(Clean Water Act, Sections 303, 311, 401, 402, and 404)



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Proposed CWA Rule

(cont'd)

■ Categories of waters addressed:

- Navigable waters
- Interstate waters/wetlands
- Territorial seas
- Impoundments of waters
- Tributaries
- Adjacent waters/wetlands
- Other waters

■ New definitions:

- Tributary
- Neighboring
- Riparian area
- Floodplain
- Significant nexus



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Proposed CWA Act Rule Implementation

- Expect slight increase (3%) over 2008 guidance in jurisdictional tributaries, adjacent and other waters
- New JD Form and documentation requirements
- New technical tools for the field to support determinations
- Policy for handling recent pending/near expiring JDs
- Public/stakeholder outreach



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Interpretive Rule Exemption*

- Issued April 3, 2014
- Clarifies the permitting exemption* to discharges of dredged or fill material
- Associated with certain agricultural *NRCS conservation practices* designed and implemented to protect and enhance water quality
- The interpretive rule will:
 - Improve the consistency and integration of programs as is fully consistent with the law
 - Promote the mutual objectives of regulations and statutes
 - Increase clarity and predictability for the agriculture community, who wants to protect the resources on their lands



**Clean Water Act Section 404 (f)(1)(a)*

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Interpretive Rule Exemption* (cont'd)

- Activities must be implemented in conformance with *NRCS technical conservation practice standard*
 - NRCS standards provide technical requirements, which are tailored to state and local conditions and provide specifications for installation of conservation measures
- Must be part of *established (i.e., ongoing) farming, ranching, or silviculture operation*
- Any farmer can utilize; *no need to be enrolled in NRCS program*



**Clean Water Act Section 404 (f)(1)(a)*

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Interpretive Rule Exemption* (cont'd)

- Landowners do *not need to determine whether the activities are in waters of the U.S. nor obtain site-specific pre-approval* from either USACE or the USEPA before implementation of a practice standard
- *CWA Section 404(f)(2) is not affected* by the interpretive rule and activities may still be recaptured if they meet the terms of 404(f)(2)
- The USEPA, USACE and the USDA have entered into a *Memorandum of Understanding (MOU)* to develop and implement a process for identifying, reviewing and updating NRCS agricultural conservation practices



**Clean Water Act Section 404 (f)(1)(a)*

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Questions?



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