

“Waters of the United States” Under the Clean Water Act

Water Quality Standards Academy
May 2008

Overview of Presentation

- "Waters of the US" and the *Rapanos* opinions
 - Legal and regulatory background
- EPA/Corps Joint Guidance on *Rapanos*
 - Current agency practice
- Implementation Challenges Posed by *Rapanos*

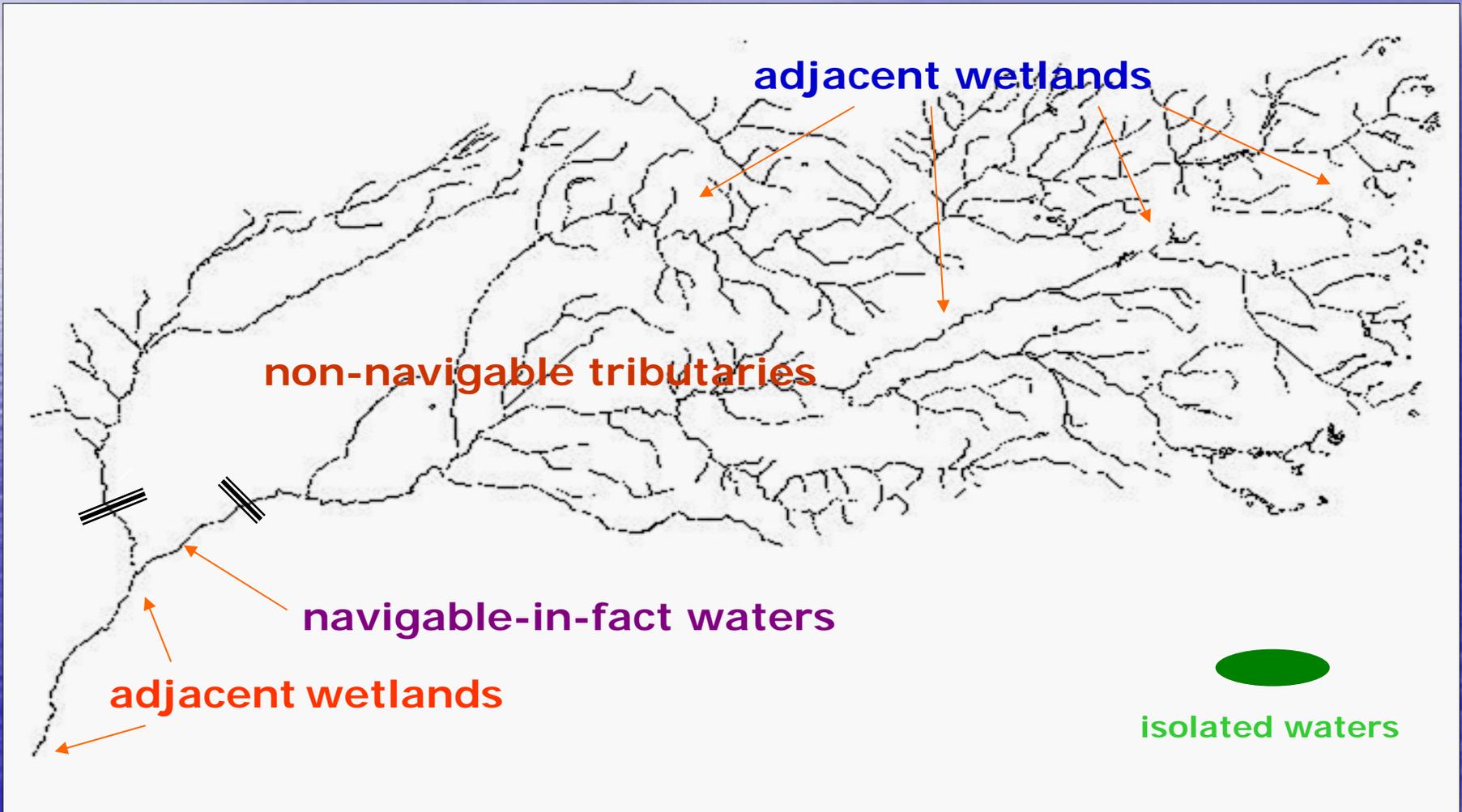
Clean Water Act Jurisdiction

- **CWA covers “navigable waters,” defined in the statute as “waters of the US and territorial seas”**
- **“waters of the US” further defined by agencies at 40 CFR 230.3 etc.**
 - **Further discussed in preambles, including “migratory bird rule”**

Jurisdictional Regulations

- **Waters used/historically used/susceptible to use in interstate commerce**
- **Interstate waters and wetlands**
- **All other waters such as intrastate lakes, rivers, streams, wetlands, etc., the use, degradation, or destruction of which could affect interstate commerce**
 - So called “(a)(3)” reg
- **Impoundments of waters of the US**
- **Tributaries of above waters**
- **Territorial seas**
- **Wetlands adjacent to above waters**

CWA Geographic Jurisdiction: The Regulations in Graphic Form





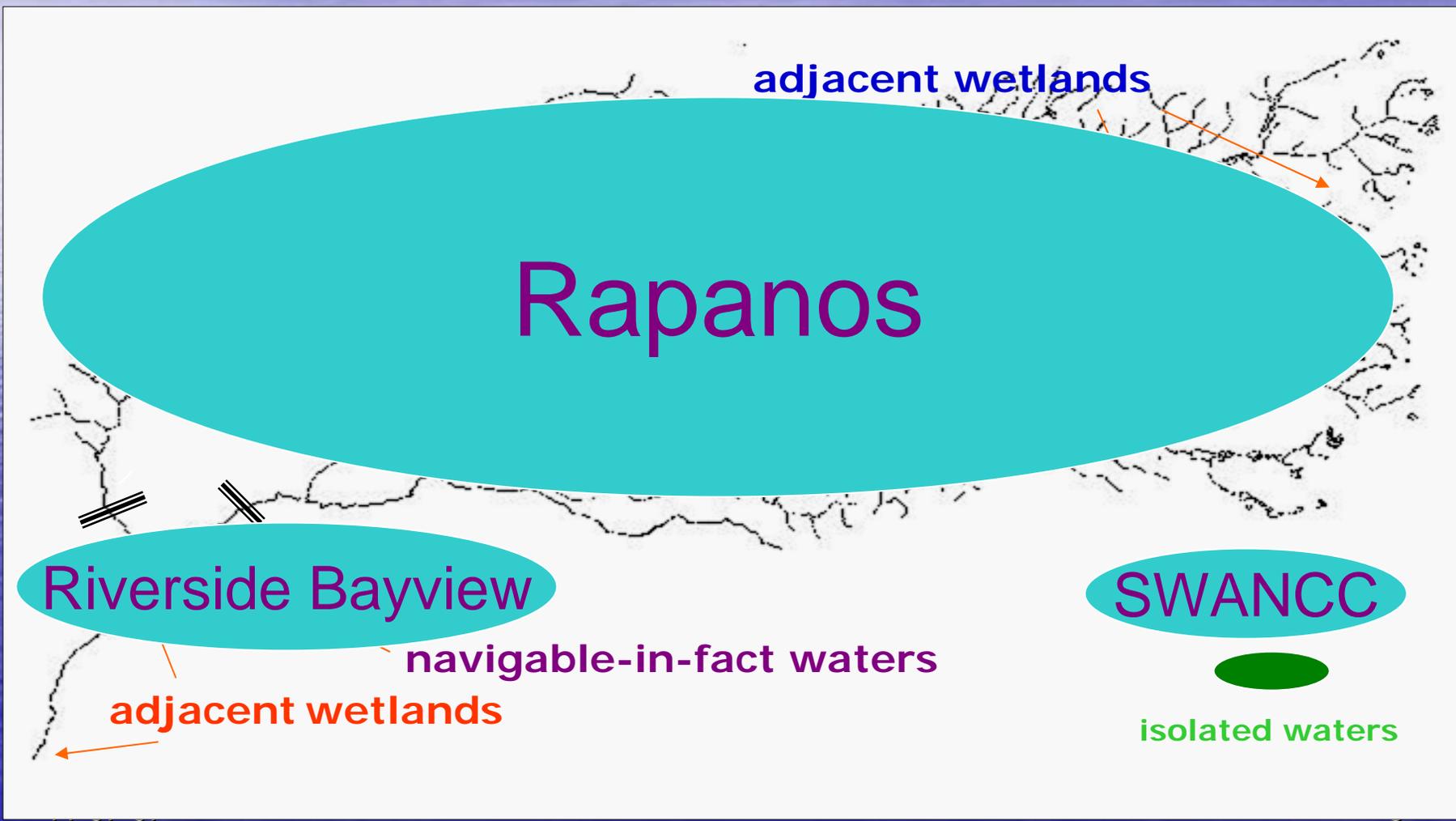
The Supremes Weigh In

- ***Riverside Bayview*** (1985): Reasonable for agencies to construe “navigable waters” as including wetlands adjacent to other jurisdictional waters
- ***SWANCC*** (2001): “migratory bird rule” is not a valid sole basis for CWA jurisdiction
 - Reasoning could be extended further: CWA intended some connection to navigability
 - Did not invalidate existing regulations
 - Has implications for all CWA programs, not just §404

More Supremes: *Rapanos and Carabell*

- **Issues:** does CWA cover non-navigable tributaries and their adjacent wetlands?
- **Result:** nine justices and five opinions, with none having a majority of votes. Remanded.
 - **Plurality/Scalia:** JD if relatively permanent or seasonal rivers, or wetlands with continuous surface connection to such waters.
 - **Kennedy:** wetlands and waters are JD if “significant nexus” to navigable waters (individually or cumulatively), affecting phys/chem/bio of navigable waters.

CWA Geographic Jurisdiction: The Regulations Addressed by the Supremes



Interagency *Rapanos* Guidance

- On June 5, 2007, EPA and the Corps issued **guidance** interpreting WUS after *Rapanos*.
- **Addresses 3 categories of waters**
 - Traditional navigable waters and their adjacent wetlands
 - Waters that satisfy the plurality standard (i.e., relatively permanent)
 - Waters that satisfy the Kennedy standard (i.e., significant nexus)

Interagency *Rapanos* Guidance: Traditional Navigable Waters

- The agencies will assert jurisdiction over:
 - traditional navigable waters (TNWs)
 - TNWs include all waters described as (a)(1) waters – navigable-in-fact, ebb/flow tide, etc.
 - Wetlands adjacent to TNWs, including those without a continuous surface connection to TNWs.

Interagency *Rapanos* Guidance: “Relatively Permanent” Waters

- The agencies will assert jurisdiction over:
 - Non-navigable tributaries of TNWs that are relatively permanent (RPWs)
 - Includes perennial streams as well as tributaries that have continuous flow at least seasonally
 - Adjacent wetlands that have a continuous surface connection to such tributaries (i.e., not separated by berm, etc.)

Interagency *Rapanos* Guidance: Other Tributaries and Wetlands

- The agencies will assert jurisdiction over:
 - Waters that are not a TNW or RPW, where they have a significant nexus to a TNW
 - Either individually or in combination with similarly situated waters
 - Wetlands adjacent to RPWs without continuous surface connection to such waters
- Significant nexus includes consideration of both hydrologic and ecologic factors

Interagency *Rapanos* Guidance: Features Generally Not Jurisdictional

- **Upland swales, erosional features (e.g. gullies), and small washes where:**
 - characterized by low volume, infrequent, and short duration flow
- **Ditches (including roadside ditches), where:**
 - excavated wholly in and draining only uplands, and
 - that do not carry a relatively permanent flow
- **Uplands transporting over land flow generated from precipitation**
 - E.g., sheetflow from rain events and snowmelt

Isolated Waters Unaddressed by *Rapanos* Guidance

- Guidance focused on waters at issue in *Rapanos*, which were not isolated
- January 03 interagency guidance addressed isolated (a)(3) waters
 - Jurisdictional where case-by-case evaluation shows interstate commerce links
 - Currently, interagency coordination required for all isolated JD determinations (positive or negative)

Interagency *Rapanos* Guidance: Next Steps

- Evaluating if Guidance needs revision
 - Agencies took public comment on experiences implementing guidance until 1/08 (www.regulations.gov)
 - We're reviewing comments and working to determine next steps.
- Continuing Interagency Coordination
 - Focus on coordination at field level, ideally referring to HQ only where raises national issues.

Implementation Challenges Posed by *Rapanos*

- Impact of *Rapanos* on the scope of WUS will depend on case-by-case application of Scalia and Kennedy analyses.
- Field staff must undertake additional data collection and analyses as part of many JDs.
 - Raises scientific, program resource, legal, and other challenges.

Scientific Challenges of *Rapanos*

- **Scalia and Kennedy standards use jurisdictional terms different from those typically used by aquatic scientists.**
 - “Relatively permanent”
 - “Continuous surface connection”
 - “Significant nexus”
 - “Similarly situated”
- **Challenge: does a particular water have the characteristics called for by the legal terms, as defined by the agencies and the courts?**

Program Resource Challenges

- **Annually, over 110,000 404-related JDs**
 - Many proposed project sites distant from agencies' field offices.
 - Implications for other CWA programs.
- **Coordination Memo** calls for EPA and Corps staff to work closely on all JDs involving significant nexus or isolated waters
 - Likely to be large percentage of total JDs.
 - Focus on decision making at field level for SN; disagreements referred to agencies' HQ.
 - Specific tight decision timeframes.

Legal Challenges of *Rapanos*

- **Many post-*Rapanos* legal challenges**
 - 6 appellate decisions, 12 district court (3 under appeal), 6 petitions for review rejected by Supreme Court with 1 pending.
 - Approximately 20 cases currently in litigation.
- **We'll likely be back before the Supreme Court on the issue of "waters of the US"**

Other Implementation Challenges

- **Continuing an open and predictable CWA section 404 program**
 - JDs should be posted on District public websites
 - Agencies' staff participating in many conferences and seminars to explain *Rapanos*, 404 program
- **Continuing to work closely with State/Tribal wetland protection programs**
 - EPA Wetland program development grants, technical assistance, other

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True. The CWA defines “navigable waters” as meaning “waters of the US.” The terms are used interchangeably.

Question #2

True or False:

“Navigable waters” protected by the CWA only include those waters that can float a boat.

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False. “Navigable waters” is a legal term of art that includes waters not thought of as “navigable” in the plain English sense of the word.

Question #3

“Waters of the US” does not include which of the following:

1. Perennial waters (that flow throughout the year)
2. Isolated lakes without links to interstate commerce, so long as they have viable native fish populations
3. Wetlands adjacent to a jurisdictional stream or lake
4. Territorial seas

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Question #4

A "significant nexus" analysis considers such factors as:

1. Flow and other hydrologic relationships with a TNW
2. Ecological relationships to a TNW, such as ability to trap pollutants or provide habitat supporting biota in a TNW
3. Contribution of all wetlands on a stream reach

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For Additional Information

EPA website

<http://www.epa.gov/owow/wetlands>

Corps website

[http://www.usace.army.mil/cw/cecwo/re
g/cwa_guide/cwa_guide.htm](http://www.usace.army.mil/cw/cecwo/re
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Donna Downing (202) 566-1367
Downing.donna@epa.gov

