US Army Corps of Engineers

CWA Summary

- CWA and Waters of the U.S.
- *SWANCC* decision
- GAO reports on post-*SWANCC* activities
  - Reports in 2004 & 2005
  - Corps surveys and other responses
- Rapanos & Carabell decision

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CWA & Waters of the U.S.

- CWA goal:
  - Protect the biological, chemical and physical functions of our nation's waters of the U.S.
- Waters of the U.S.
  - Traditional navigable waters
  - Interstate waters including interstate wetlands
  - Other waters including intrastate, non-navigable waters with interstate/foreign commerce connections
  - Impoundments of waters otherwise defined as waters of the U.S.
  - Tributaries of the above
  - Territorial seas
  - Adjacent wetlands

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CWA Section 404: A Short History

- 1972 Enacted
- 1974 Regulation
- 1975 NRDC vs. Calloway. Interim regulation
- 1977 Regulation & Congressional Amendments
- 1979 Civiletti decision
- 1985 Riverside v. Bayview Homes.
  EPA's Migratory Bird Memo
- 1986 Preamble on "Migratory Bird Rule"
- 2001 Supreme Court decision in *SWANCC v. USACE*
- 2003 ANPRM & Rulemaking
- 2004/5 GAO reports
- 2006 Rapanos & Carabell U.S. Supreme Court cases

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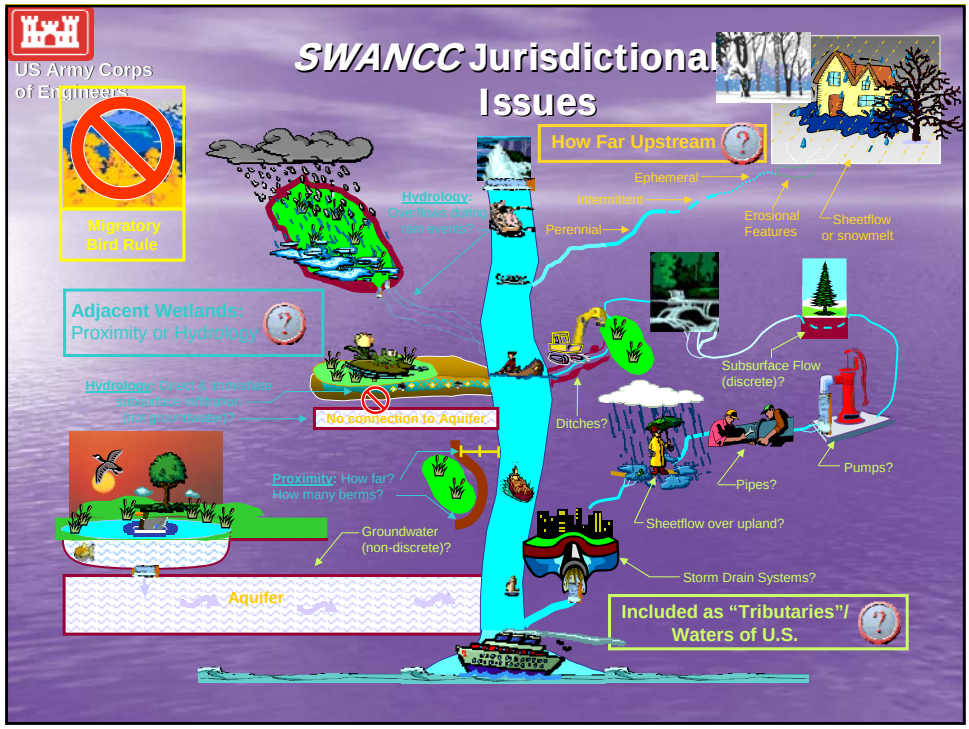
Solid Waste Agency in Northern Cook County (SWANCC) vs. USACE.

2001 Supreme Court Decision in *SWANCC*

- Corps determined CWA jurisdiction over abandoned gravel pits by use of Migratory Bird Rule (MBR)
- MBR based on blue heron use of ponds.
- Holding:
  - 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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SWANCC Jurisdictional Issues
How Far Upstream
Migratory Bird Rule
Hydrology:
Ephemeral
Intermittent
Perennial
Erosional Features
Sheetflow or snowmelt
Adjacent Wetlands:
Proximity or Hydrology
Subsurface Flow (discrete)?
No connection to Aquifer
Ditches?
Pumps?
Proximity: How far? How many berms?
Pipes?
Sheetflow over upland?
Groundwater (non-discrete)?
Storm Drain Systems?
Aquifer
Included as "Tributaries"/ Waters of U.S.


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SWANCC & Rulemaking
Jan 03: ANPRM solicited public comments on issues associated with CWA jurisdiction
– Appendix A
– 130,000 comments received on notice; majority opposed rulemaking
Dec 03: Announcement to discontinue rulemaking
corbis.com

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GAO Studies on CWA Post-*SWANCC* Implementation Procedures

2004 Study	2005 Study
JD Consistency?	N-JD Consistency?
Request by:	Request by:
Congressman Ose	Senator Lieberman

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GAO 2004 Study -- Findings

Report finalized in February 2004

- www.gao.gov/cgi-bin./getrpt?GAO-024-297

GAO conclusions:

- Corps jd practices are inconsistent
- Insufficient documentation practices

Report recommendations

- Require more documentation on district jd decisions
- Survey all district jd practices
- Evaluate whether and how differences resolved

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Army/Corps Response to 2004 GAO Report

- **Consistency: partially concurred with findings**
- **Agreed to:**
  - **Conduct a comprehensive survey to inventory district practices**
  - **Develop an adaptive management plan to provide clarity on JD practices**

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Corps Actions

- **Created standardized jd/njd reporting forms**
- **Required districts to post final actions on their web sites**
- **Collected and analyzed data on njd waters**
- **Revising jd/njd forms**

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Survey # 1

First Survey: All 38 Districts Queried Qualitatively [May 2004]

- **Identify district procedures for JDs**
- **Compare/contrast district level case studies**
- **Determine ruling litigation cases**

Results:

- **More questions than answers**
- **Another survey?**

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Survey # 2

Define nature and extent of regional variation for tributaries, connections, and adjacency

- **Define practices**
- **Identify practices**
- **Review legal applications**

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Survey #2, cont.

Survey: 100 pages

- **Districts provided 30 days to complete**

Survey is:

- **A data inventory tool**
- **Not guidance**
- **Not to expand/contract jurisdiction**

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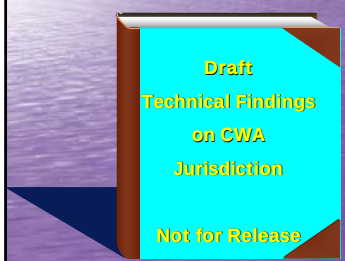
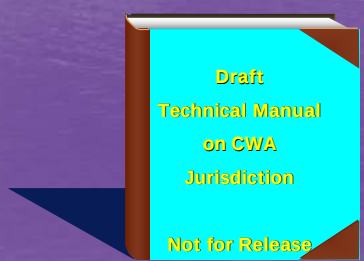
Survey #2, cont.

Data

- **3800+ pages of data**





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GAO 2005 Study

The 2005 study requested by Senator Lieberman:

- Mapped and identified data collection efforts to support JD process
- Summarized actions taken under 33 CFR 328.3(a)(3)
- Reviewed data collection efforts taken to comprehensively characterize the aquatic resource losses associated with SWANCC

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GAO 2005 Study -- Findings

GAO report publicly released October 2005

- Available at

  www.gao.gov/new.items/d05870.pdf

GAO recommendations

- Corps and EPA finalize guidance establishing process for HQ approval of JD calls based solely on (a)(3)
- Corps require detailed rationales for no-JD decisions

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2 U.S. Supreme Court decision (21 Feb 06)

Rapanos. Determine if wetlands having a surface hydrologic connection to a man-made ditch that drains into traditional navigable waters are waters of the U.S.

Carabell. Determine if a wetland is "adjacent" if separated by a man-made berm from a tributary (i.e., a man-made ditch) to navigable waters.

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Rapanos & Carabell

- **A split Supreme Court vacated and remanded the judgments back down to the Sixth Circuit Court of Appeals.**
- **The justices issued five opinions in Rapanos (one plurality opinion, two concurring opinions, and two dissenting opinions), with no single opinion commanding a majority of the Court.**

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Rapanos & Carabell

The plurality concluded that the agencies' regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters.

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Rapanos & Carabell

Justice Kennedy agreed with plurality that the statutory term "waters of the United States" extends beyond water bodies that are traditionally considered navigable.

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Rapanos & Carabell

Justice Kennedy concluded that "wetlands" are "waters of the United States" "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'

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Rapanos & Carabell

Dissenting opinion – Corps regulations are reasonable interpretation of CWA

TNWs and Wetlands adjacent to TNWs

Decision/guidance does not address SWANCC nor does it affect the Joint Memorandum issued by the General Counsels of EPA and the Army dated January 10, 2003.

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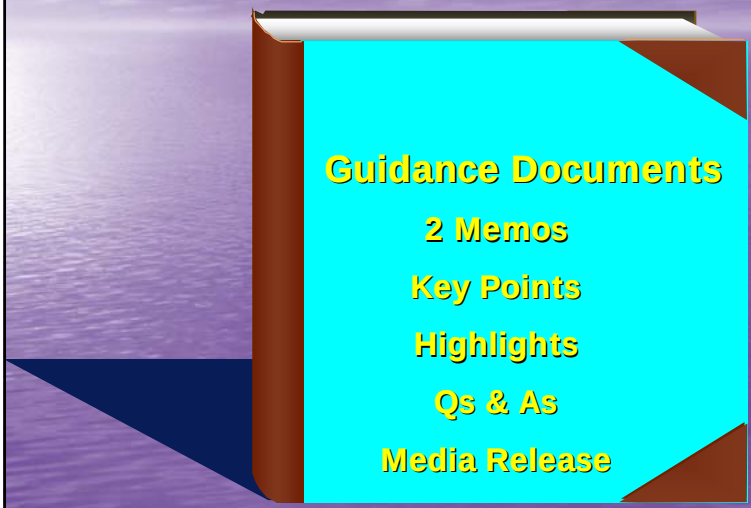
Survey #2: Proposed Strategy



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Interagency Guidance on CWA Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. U.S. & Carabell v. U.S.

Summary of Key Points:

- The agencies will assert jurisdiction over the following waters?
- The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water?
- The agencies generally will not assert jurisdiction over the following features?
- The agencies will apply the significant nexus test as follows?

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Coordination/Elevation Process

Significant Nexus Evaluation

- 15 days - District/Regional Office
- 15 days - DE/Regional Administrator
- 14 or 21 days – HQ EPA/Corps/DA

Isolated Waters

Process above with copy sent directly to HQ (HQ review – 21 days)

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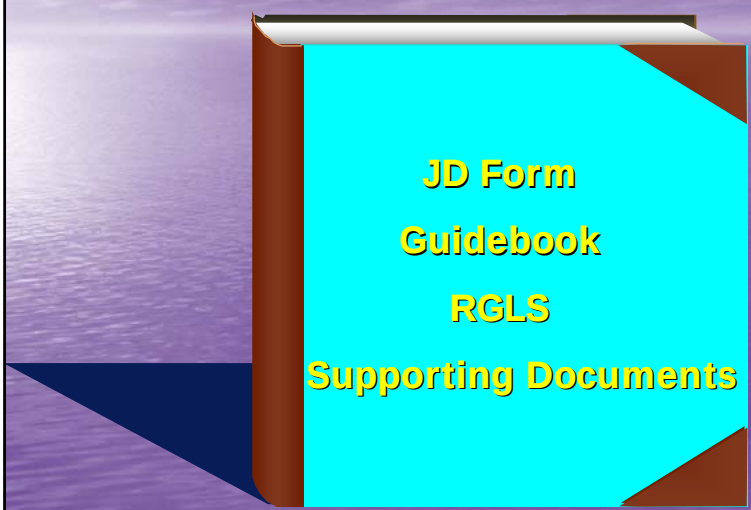
Survey #2: Proposed Strategy



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U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK

This document contains instructions to aid field staff in completing the Approved Jurisdictional Determination Form ("JD form"). This document is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination (JD) and documenting practices to support an approved JD until this document is further revised and reissued.

Caribbean Sea, St. Thomas, U.S. Virgin Islands.

This document was prepared by the Corps and the EPA.

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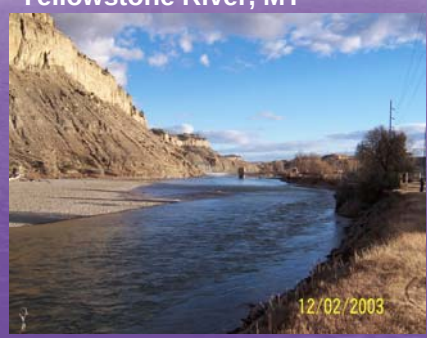
Traditional Navigable Waters (TNWs)

Yellowstone River, MT



Pacific Ocean, OR

TNWs are jurisdictional under the CWA.

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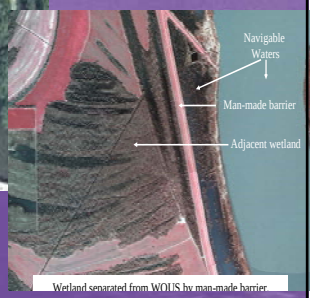
Wetlands Adjacent to TNWs

Mississippi River, MN

Pacific Ocean, HI

Mississippi River, LA



Wetlands adjacent to TNWs are jurisdictional under the CWA.

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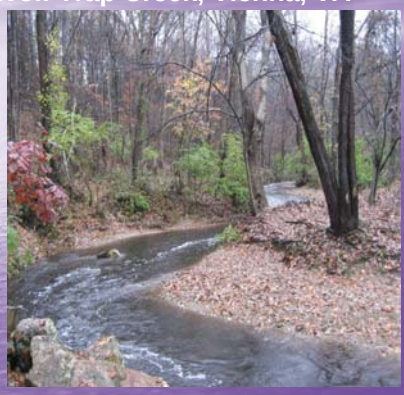
RPWs: Perennial & Seasonal

Wolf Trap Creek, Vienna, VA



Grindstone Creek, MO

RPWs are jurisdictional under the CWA. As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a TNW and an RPW that is not perennial.

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Wetlands Directly Abutting RPWs

Un-named water & wetlands, AK

Un-named water & wetlands, ND

Wetlands directly abutting RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA. As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus for a wetland directly abutting an RPW that is not perennial.

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Wetlands Not-Directly Abutting RPWs

Un-named water & wetlands, IL

Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW. For each specific request for wetlands adjacent but not directly abutting RPWs, field staff will need to perform significant nexus evaluation to determine if tributary is jurisdictional under the CWA.

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Non-RPWs

Desert ephemeral tributary, CA

Unnamed ephemeral tributary, ID

Non-RPWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW. For each specific request for non-RPWs, field staff will need to perform significant nexus evaluation to determine if tributary in combination with its adjacent wetlands (if any) is jurisdictional under the CWA.

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Wetlands Adjacent to Non-RPWs

Adjacent wetland, AR

Adjacent wetland, SAD

Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW. For each specific request, field staff will need to perform significant nexus evaluation to determine if tributary is jurisdictional under the CWA.

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Isolated Waters & Wetlands

Isolated wetland, IA

For each specific request for isolated waters (including isolated wetlands), field staff will need to make a case-by-case determination on jurisdictional status of resource. HQ concurrence required.

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CWA Jurisdiction

The significant nexus evaluation will include 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 and/or biological integrity of TNWs.

A consideration of hydrologic factors such as:

- volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary
- proximity to the traditional navigable water
- size of the watershed
- average annual rainfall
- average annual winter snow pack

A consideration of ecologic factors such as:

- the ability of the tributary and its adjacent wetlands (if any) to carry pollutants and flood waters to traditional navigable waters
- the ability of the tributary and its adjacent wetlands (if any) o provide aquatic habitat that supports biota of a traditional navigable water
- the ability for adjacent wetlands to trap and filter pollutants or store flood waters
- the ability to maintain water quality

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CWA Jurisdiction

Certain ephemeral waters in the arid west are distinguishable from the geographic features described below where such ephemeral waters are tributaries and may have a significant nexus to TNWs.

Certain geographical features (e.g., ditches, canals) that transport relatively permanent (continuous at least seasonally) flow directly or indirectly into TNWs or between two (or more) waters of the U.S., including wetlands, are jurisdictional waters regulated under the CWA.

Certain geographic features (e.g., swales, ditches, pipes) may contribute to a surface hydrologic connection where the features:

- replace or relocate a water of the U.S., or
- connect a water of the U.S. to another water of the U.S., or
- provide relatively permanent flow to a water of the U.S.

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Ditches, Swales, & Erosional Features

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CWA Jurisdiction

Certain geographic features generally are not jurisdictional waters:

- Swales, erosional features (e.g. gullies) and small washes characterized by low volume, infrequent, and short duration flow
- ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water
- uplands transporting over land flow generated from precipitation (i.e., rain events and snowmelt)

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RGLs

Documentation Practices

- Approved JDs
- Prioritization
- Field Visits
- Coordination for NWPs

- Ditches
  - Irrigation: Construction & Maintenance
  - Drainage: Maintenance


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USACE HQ Regulatory Web Page:
Link:www.usace.army.mil/inet/functions/cw/cecw/reg/