

ELI Summer School:
Basics of the Clean Water Act
“Waters of the United States”

June 22, 2021



**SOUTHERN
ENVIRONMENTAL
LAW CENTER**

Overview

- Why WOTUS Matters
- WOTUS Over Time
- Where We Are Today
- What's Next?



Why WOTUS Matters

- Clean Water Act programs apply to “*navigable waters*.”
- Congress defined “*navigable waters*” as “*waters of the United States*.” 33 U.S.C. § 1442(7).
- “*Waters of the United States*” establishes scope of federal jurisdiction under Clean Water Act.

Wetlands Matter

- Filter pollutants
- Absorb floodwaters
- Protect against erosion
- Prevent sedimentation
- Provide critical habitat
- Recharge groundwater
- Store carbon

<https://www.epa.gov/wetlands/why-are-wetlands-important>



Streams Matter

- Provide clean drinking water
- Protect against floods and erosion
- Filter pollutants
- Provide wildlife habitat
- Transport to downstream waters

<https://archive.epa.gov/water/archive/web/html/streams.html>



Jurisdictional Determinations Matter

- An “approved jurisdictional determination” (AJD) is the determination of whether WOTUS are present.
- AJDs identify the boundaries of WOTUS.
- AJDs are generally valid for five years.

Timeline

- 1972 - The Clean Water Act is enacted.
- 1974 to 1977 - Corps issues and revises early WOTUS rules.
- 1977 - Congress amends the Clean Water Act.
- 1982 - Corps and EPA refine WOTUS rule.
- 1985 - Supreme Court decides *Riverside Bayview Homes*.
- 1986 - Corps recodifies WOTUS rule and issues “migratory bird rule.”
- 2001 - Supreme Court decides *SWANCC*.
- 2003 - Corps and EPA issue joint guidance on *SWANCC*.
- 2006 - Supreme Court decides *Rapanos*.
- 2008 - Corps and EPA issue joint guidance on *Rapanos*.
- 2015 - Clean Water Rule
- 2019 - Repeal of Clean Water Rule
- 2020 - “Navigable Waters Protection Rule” (NWPR)
- 2021 - EPA and Corps announce intention to repeal and replace NWPR.

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Pre-Clean Water Act: Rivers and Harbors Act of 1899

- Navigable waters of the United States: “...waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport in interstate or foreign commerce.”
- Focus on navigation for trade and travel.
- “Traditional Navigable Waters”



Focus on Commerce Connections

- 1974 – Corps issues first WOTUS rule.
 - *Includes only traditional navigable waters. 33 C.F.R. § 209.120(d)(1) (1974).*
- 1975 – *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).
 - *“By defining ‘navigable waters’ . . . to mean “the waters of the United States . . . ,” [Congress] asserted federal jurisdiction over the nation's waters to **the maximum extent permissible under the Commerce Clause** of the Constitution. Accordingly, as used in the [Clean] Water Act, the **term is not limited to the traditional tests of navigability.**”*

Expanded Jurisdiction and Adjacent Wetlands

- 1975, 1977 – Corps revises rules, expanding jurisdiction.
 - *Includes non-navigable waters, including tributaries and wetlands adjacent to other jurisdictional waters. 33 C.F.R. § 209.120(d)(2) (1976); § 323.2(a) (1978).*
- 1977 – Congress amends the Clean Water Act.
- 1982 – Corps refined its regulations but did not significantly expand jurisdiction.

U.S. v. Riverside-Bayview Homes

474 U.S. 121 (1985)

- Deferred to Corps' assertion of jurisdiction over wetlands adjacent to other WOTUS.
- Decision was “compelled” by “the language, policies, and history of the Clean Water Act.” 474 U.S. at 139.
 - The term “navigable” as used in the Clean Water Act is of “limited import.” *Id.* at 133.
- Corps appropriately extended jurisdiction over waters and wetlands that “have **significant effects on water quality** and the aquatic ecosystem.” *Id.* at 135 n.9

“Isolated” Waters and Migratory Bird “Rule”

- 1986 – Corps recodifies WOTUS rule at 33 C.F.R. Part 328 (current location).
 - WOTUS includes geographically “isolated” intrastate waters that are not traditional navigable waters but that have ties to interstate commerce. 33 C.F.R. 328.3(a)(3).
 - WOTUS also includes any waters used:
 - as habitat by birds protected by Migratory Bird Treaties;
 - as habitat by migratory birds which cross state lines;
 - as habitat for endangered species; or
 - to irrigate crops sold in interstate commerce.

See 51 Fed. Reg. at 41,217 (Preamble).

Solid Waste Agency of Northern Cook County v. USACE

531 U.S. 159 (2001)

- Rejected jurisdiction over non-navigable, isolated, intrastate abandoned sand and gravel pit.
- The use of “isolated” pit by migratory birds was not by itself enough.
- “It was the **significant nexus** between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.” 531 U.S. at 167.



2003 SWANCC Guidance

*Joint Legal Memorandum,
68 Fed. Reg. 1991, 1995 (Jan. 15, 2003).*

- No jurisdiction over isolated, intrastate, non-navigable waters when sole basis is “migratory bird rule.”
- Case-by-case jurisdiction over “isolated waters” if ties to interstate commerce.
- Continue to assert jurisdiction over traditional navigable waters and adjacent wetlands, and generally their tributaries (and adjacent wetlands).

**Focus on Science:
More on “Significant Nexus”**

Rapanos v. United States

547 U.S. 715 (2006)

- Corps asserted jurisdiction over wetlands adjacent to non-navigable ditches/drains that flowed into traditional navigable waters.
- Vacated and remanded for reevaluation.
- Supreme Court split 4-4-1 in deciding the case.
- Two tests:
 - *Plurality (Scalia + 3): Jurisdiction extends only to:*
 - **Relatively permanent bodies of water connected to traditional navigable waters** (those commonly described as oceans, rivers, and lakes). 547 U.S. at 739.
 - **Wetlands with a continuous surface connection to these waters**, such that it is difficult to determine where the “water” ends and the “wetland” begins. *Id.* at 742.

Rapanos v. United States

547 U.S. 715 (2006)

- Two tests (cont.):

- *Justice Kennedy's concurrence:*

- “[J]urisdiction over wetlands depends upon the existence of a **significant nexus** between the wetlands in question and [traditional] navigable waters.” 547 U.S. at 779.
 - Wetlands adjacent to traditional navigable waters: may rely on adjacency alone.
 - Wetlands adjacent to tributaries: must establish significant nexus.
 - “Wetlands possess the requisite nexus . . . if the wetlands, **either alone or in combination with similarly situated lands in the region, significantly affect** the chemical, physical, and biological integrity of” traditional navigable waters. *Id.* at 779-80.

Rapanos v. United States

547 U.S. 715 (2006)

- Five Justices rejected the plurality's test:
 - Kennedy: It is “inconsistent with the Act’s text, structure, and purpose” and “makes little practical sense in a statute concerned with downstream water quality.” 547 U.S. at 769, 776.
 - Dissent: Its “limitations . . . are without support in the language and purposes of the Act or in our cases interpreting it.” *Id.* at 800.
- Every circuit court of appeals to consider the issue has held that waters that meet the “significant nexus” test are WOTUS.

2008 *Rapanos* Guidance

Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States" (Dec. 2, 2008)

WOTUS includes:

- Traditional navigable waters;
- Wetlands adjacent to traditional navigable waters;
- Waters that meet either *Rapanos* test:
 - Plurality:
 - Tributaries of traditional navigable waters that have relatively permanent flow.
 - Wetlands that directly abut such tributaries.
 - Kennedy:
 - Waters with a significant nexus with a traditional navigable water.

2015 Clean Water Rule

Clean Water Rule: Definition of “Waters of the U.S.,” 80 Fed. Reg. 37,054 (June 29, 2015)

- Based on the science of connectivity.
- WOTUS includes:
 - Traditional navigable waters, territorial seas, interstate waters, and impoundments of WOTUS.
 - Tributaries:
 - “Bed and banks” and an “ordinary high water mark”; and
 - Contribute flow to traditional navigable water (directly or indirectly).
 - Adjacent waters, including wetlands.
 - Bordering, contiguous, or neighboring.



2015 Clean Water Rule

- WOTUS includes (cont.):
 - Waters with “significant nexus.”
 - Including “similarly situated”:



- » Prairie potholes
- » Carolina Bays and Delmarva Bays
- » Western Vernal Pools in CA
- » Texas coastal prairie wetlands
- » Pocosins

**Where We Are Today:
“Navigable Water Protection Rule”**

Trump Administration

- 2017 Executive Order 13,778
- 2018 Applicability Date Rule
- 2019 Clean Water Rule Repeal (Step 1)
- 2020 “Navigable Waters Protection Rule” (Step 2)

“Navigable Waters Protection Rule”

“The Navigable Waters Protection Rule: Definition of ‘Waters of the U.S.’,” 85 Fed. Reg. 22,250 (Apr. 21, 2020)

- Excludes all otherwise jurisdictional waters, including traditional navigable waters, if they also fit within the Rule’s exclusions.
- Expanded “waste treatment system” exclusion.
- Important public lakes are out simply because they were created to provide cooling water for industrial facilities.



“Navigable Waters Protection Rule”

- Tributaries
 - Categorically excludes ephemeral streams.
 - All other tributaries must contribute relatively permanent flow to traditional navigable waters in a typical year.
- The Agencies estimated that up to 70% of the Nation’s streams lose protections.



“Navigable Waters Protection Rule”

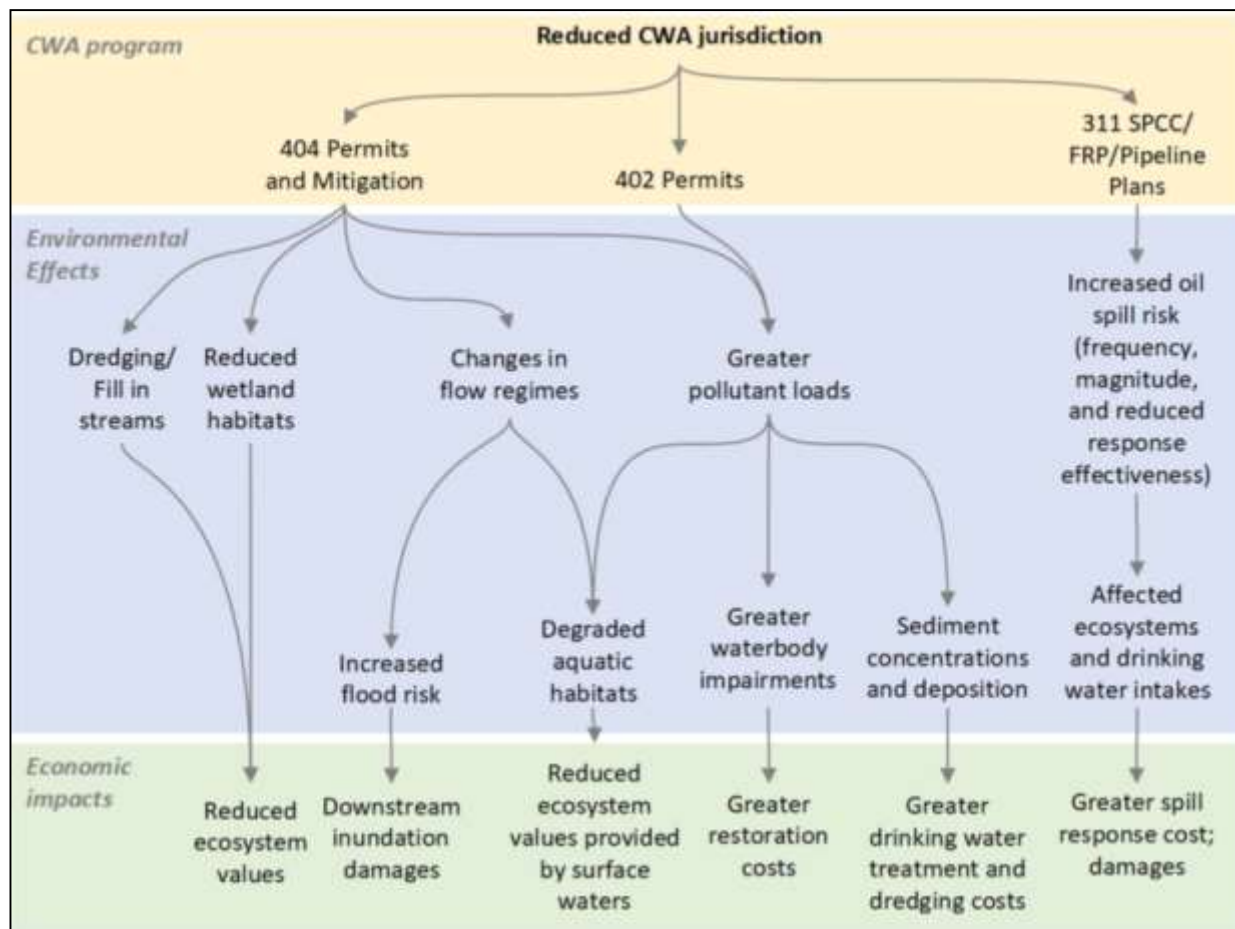
- Adjacent Wetlands

- Wetlands that physically touch another jurisdictional water.
- Wetlands with manmade structures that allow surface connection to WOTUS.
- Wetlands separated from WOTUS by a natural berm, bank, or dune.
- Wetlands that are inundated by flooding *from* WOTUS.

- Agencies estimated that over half the Nation’s wetlands lose protections.



“Navigable Waters Protection Rule”



Overview of potential environmental impacts to selected CWA programs from proposed changes in CWA jurisdiction for certain waters. EPA & Dep't of Army, Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States” (Jan. 22, 2020) at 105 (Figure III-9).

“Navigable Waters Protection Rule”

- Effective June 22, 2020.
- EPA Data: 92% of all waters and wetlands considered under the rule are not jurisdictional.
- Twin Pines Mine example:
 - Proposed titanium mine next to the Okefenokee Swamp NWR.
 - After NWPR, the mine sought a new JD.
 - Corps reversed course on nearly 400 acres of wetlands.
 - Mining equipment is on site.



Lawsuits Challenging the Rule

Lawsuits brought by States

- *California v. Regan* (N.D. Cal.) – coalition of 18 states, plus D.C. and NYC
- *Colorado v. EPA* (D. Colo.)*

Lawsuits brought by Tribes

- *Navajo Nation v. Regan* (D.N.M.)*
- *Pueblo of Laguna v. Regan* (D.N.M.)
- *Pascua Yaqui Tribe v. Regan* (D. Ariz.) – coalition of tribes and environmental groups*

Lawsuits brought by environmental groups

- *Chesapeake Bay Foundation v. Regan* (D. Md.)
- *Conservation Law Foundation v. EPA* (D. Mass.)*
- *Environmental Integrity Project v. Regan* (D.D.C.)
- *S.C. Coastal Conservation League v. Regan* (D.S.C.)*
- *Puget Soundkeeper Alliance v. EPA* (W.D. Wash.)
- *Waterkeeper Alliance v. Regan* (N.D. Cal.)*

Other lawsuits

- *Murray v. Regan* (N.D.N.Y.)
- *N.M. Cattle Growers' Association v. EPA* (D.N.M.)
- *Wash. Cattlemen's Association v. EPA* (W.D. Wash.)
- *Or. Cattlemen's Association v. EPA* (D. Or.)

* Case not stayed

What's Next: WOTUS – Biden Edition

<https://www.epa.gov/wotus/intention-revise-definition-waters-united-states>

- June 9, 2021 - Announced intent to initiate a new rulemaking process that:
 - Restores the protections in place prior to the 2015 Clean Water Rule; and
 - Develops a new definition of “waters of the United States.”
- Agencies have determined that “the [NWPR] is significantly reducing clean water protections” and is “leading to significant environmental degradation.”

A photograph of a pond with numerous lily pads and water lilies. The water is a deep blue, and the lily pads are green with some showing signs of aging or damage. The water lilies have long, thin, reddish-pink stems and white flowers with yellow centers. The scene is brightly lit, suggesting a sunny day.

Questions?

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