

A Look at EPA-Corps Draft CWA Guidance

Presented to
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EPA-Corps Draft Guidance on Identifying CWA "Waters of the U.S."

- Provide some background
- Describe the Guidance
- Identify some Myths
- Highlight implications of EPA's position
- Suggest how to hold EPA to the APA
- Identify steps you can take, if you are concerned

Background

- Statutory definition
- Regulatory Definition
- Three Supreme Court decisions on “navigable waters” definition

Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816

- Enacted October 18, 1972
- Renamed in Clean Water Act of 1977, P.L. 95-217, 91 Stat. 1566 ("CWA").
- Definition at § 502(7):
"The term *navigable waters* means the waters of the United States, including the territorial seas." 86 Stat. 886,
codified at 33 U.S.C. § 1362(7).

“Traditionally Navigable” Waters

- Waters subject to the ebb and flow of the tide; and
- Waters that are presently, have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.

Cf. 33 C.F.R. § 209.120(d) (1974) (Corp’s original definition of “navigable waters”)

Current Regulatory Definition: 33 C.F.R. § 328.3

The term *waters of the United States* means (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

- (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
- (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a) (1) through (4) [];
- (6) The territorial seas;
- (7) Wetlands adjacent to waters . . . identified [above].

Current Definitions: Adjacent Wetlands

(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

In other words . . .

- Rules say “Navigable waters” means
 - Traditionally navigable waters;
 - Interstate waters, navigable or not;
 - Purely *intrastate* waters, if their use, degradation or destruction *could* affect interstate or foreign commerce;
 - Impoundments and tributaries thereof;
 - And all wetlands adjacent thereto.
- Once “navigable,” always “navigable.”

Rules: "Wetlands" are "Waters"

- Inundated or Saturated Soils + Aquatic Vegetation = Wetlands
 - Rule includes surface or groundwater
- "Adjacent" need not be "adjoining" or "contiguous" or "abutting"
 - May be separated from "other waters" by dikes, barriers, berms, or dunes
 - Manmade or natural barriers

Illusory Regulatory Exclusions

- *Waters of the United States* do not include **prior converted cropland**. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
- **Waste treatment systems**, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Courts Held “Navigable Waters”:

- Storm sewers
- Dry arroyos
- Connected intermittent streams & ditches
- Roadside ditches
- Irrigation ditches & drains
- Washes & arroyos of an arid desert site
- Wetlands across a 70-foot wide berm from a flood control channel

Three Supreme Court Decisions

- *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).
- *Solid Waste Agency of Northern Cook County v. Corps of Engineers*, 531 U.S. 159 (2001).
- *Rapanos v. United States*, 547 U.S. 715 (2006).

United States v. Riverside Bayview Homes, Inc. ("RBH").

- Issue: Does § 404 reach "wetlands adjacent to navigable bodies of water and their tributaries"?
- RBH began filling 80 acres of marshlands near Lake St. Clair, MI, & Corps sued.
 - Lake St. Clair borders Canada
- Soils wet from ground, not navigable, water but extended to a navigable creek

United States v. Riverside Bayview Homes, Inc. (“RBH”) (Cont’d.)

- Unanimous Court (White, J.) held:
 - property contained “adjacent wetlands” within the Corps’ regulatory definition
 - with *Chevron* deference, Corps’ interpretation of the CWA to encompass “all wetlands adjacent to other bodies of water over which the Corps has jurisdiction” is permissible.
- Court expressed NO view on “wetlands not adjacent to bodies of open water.”

474 U.S. 131-32n.8.

Solid Waste Agency of Northern Cook County v. Corps of Engineers ("SWANCC").

- Issue: Does § 404 reach abandoned sand & gravel pits used by migratory birds?
- SWANCC bought 533 acres for solid waste disposal site.
- Premising jurisdiction on its "Migratory Bird Rule," the Corps denied a permit.
 - Lower courts sided with the Corps.
 - Seventh Circuit viewed "aggregate effects" to find an effect on interstate commerce.

SWANCC Decision

- Divided Court (5-4) (Rehnquist, C.J.) held:
 - CWA does not extend to nonnavigable, isolated, intrastate waters.
 - No *Chevron* deference where CWA is clear, Corps' construction pushes outer limits, and it would alter federal-state balance.
- "We hold that 33 CFR § 328.3(a)(3), as clarified and applied . . . by the Migratory Bird Rule, [] exceeds the authority granted to the [Corps] under § 404 of the CWA."

Rapanos v. United States, 547 U.S. 715 (2006) ("*Rapanos*").

- Issue: Does § 404 reach wetlands not "adjacent" to a navigable water?
- Involved appeals from –
 - An enforcement action for filling wetlands on 3 parcels in defiance of C&D orders
 - A permit denial
- Court split, with five opinions, including:
 - Plurality by Justice Scalia
 - Concurrence by Justice Kennedy
 - Dissent by Justice Stevens

Rapanos

- The Decision: A 3-way food fight: 5-4 vote to remand
 - Plurality (Scalia, J.) – four votes
 - Remand to apply proper understanding of “waters of the United States”
 - Concurring (Kennedy, J.)
 - Remand to apply his “significant nexus” test
 - Dissenting (Stevens, J.) – four votes
 - Defer to Corps on *Chevron* grounds

Rapanos Plurality

- Concluded “navigable waters” must be “relatively permanent, standing or continuously flowing bodies of water”
 - Does not include intermittent streams
 - It’s not enough that a tributary empties into navigable waters
- Noted *RBH* left open status of wetlands adjacent to tributaries
- Wetlands must have a “continuous surface connection” to jurisdictional waters to be “adjacent”

Rapanos Concurrence

- J. Kennedy articulated “significant nexus” test
- Plucked phrase from *SWANCC* majority’s explanation of *RBH*:
“It was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in [*RBH*].” *SWANCC*, 531 U.S. at 167.

Rapanos Concurrence

- “Significant nexus” if “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.”
- Both Plurality and Dissent rejected J. Kennedy’s approach as unauthorized by the CWA.

Rapanos Dissent

- Justice Stevens thought *RBH* controlled
 - Deferred to Corps' exercise of jurisdiction on *Chevron* grounds:
 - Corps determined wetlands adjacent to tributaries of navigable waters can affect water quality of navigable waters
 - This is reasonable basis for Corps to assume jurisdiction

Rapanos Thoughts

- Justice Roberts noted that the decision offered little guidance to courts or Corps on how to proceed.
- Justice Kennedy's significant nexus test is determinative.
- Case is great example of the ideological rift on the Court and its effects.

EPA-Corps Draft Guidance

- Notice: EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. 24479 (May 2, 2011).
- Draft Guidance:
http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf
- Comments due July 1, 2011

EPA-Corps Guidance: 8 Sections

- 1 & 2: Traditionally Navigable & Interstate
- 3: EPA's "Significant nexus" test
- Other types of waters
 - 4: Tributaries
 - 5: Adjacent Wetlands
 - 6: Other Waters
- 7: Examples not waters of the U.S.
- 8: Documentation needed for decisions

Proposed Jurisdictional Waters

- “Traditional navigable” waters
 - A single canoe trip has shown “navigability”
- Interstate waters
- Wetlands adjacent to either
- Non-navigable tributaries to above waters
 - Relatively permanent
 - Contain water at least seasonally
- Wetlands that abut such tributaries

But wait! There's more: "Nexus" waters too.

- Tributaries to traditional navigable or interstate waters
- Wetlands adjacent to such tributaries
- Other waters:
 - Those physically proximate to jurisdictional waters; and
 - Those not physically proximate.

EPA Pushes the Outer Limits

- Applies either the Plurality Standard or its version of Kennedy's "significant nexus"
- "Significant" = > "speculative or insubstantial"
- "Nexus": either flows into a jurisdictional water and therefore is connected or does not and therefore protects jurisdictional waters by holding water and sediments

EPA's "Nexus" vs. J. Kennedy's

- J. Kennedy: Wetlands are "navigable waters" if they "significantly affect the chemical, physical, *and* biological integrity of other covered waters more readily understood as navigable."
- EPA: Wetlands have sufficient nexus if they "significantly affect the chemical, physical, *or* biological integrity."

EPA's "Plurality" vs. J. Scalia's

- J. Scalia: Intermittent streams are not tributaries, unless they are relatively permanent, have at least seasonal flow.
- EPA: Tributaries may include intermittent and even ephemeral stream reaches "as dynamic zones within stream networks."

EPA's View vs. *SWANCC*

- *SWANCC*: "We hold that 33 CFR § 328.3(a)(3), as clarified and applied . . . by the Migratory Bird Rule, [] exceeds the authority granted to the [Corps] under § 404 of the CWA."
- EPA: "Neither *SWANCC* nor the opinions in *Rapanos* invalidated any of the regulatory provisions defining 'waters of the United States.'"

EPA Myths: Guidance . . .

- Is consistent with *SWANCC* and *Rapanos*
- Is to implement Court's decisions
- Adopts Kennedy's "significant nexus" test
- Doesn't address waste-treatment system or prior-converted-cropland exclusions
- Will be replaced by a rule (*see* 68 Fed. Reg. 1991 (2003), post-*SWANCC*).
- It's only non-binding "guidance"

EPA on Effect of Guidance

- Extent of waters over which the agencies assert jurisdiction will increase over present guidance
- Provide clearer directions to field staff
- Reduce uncertainty for the regulated community
- Will replace existing 2003 and 2008 guidance

Implications:

- § 404 Dredge & Fill Permits
- NEPA: EISs or EAs and FONSIIs
- § 401 State Water Quality Certifications
- § 402 NPDES Discharge Permits
- § 303 Water Quality Standards
- § 303(d) "Impaired Waters" Designations
- Total Maximum Daily Loads (TMDLs)
- § 311 Oil Spill Provisions and SPCCs*

Navigable water?



Los Angeles River, May 2008

Navigable water?

EPA said "Yes," July 8, 2008



Apache Lake, AZ

Seasonal tributaries or “gullies and rills”?

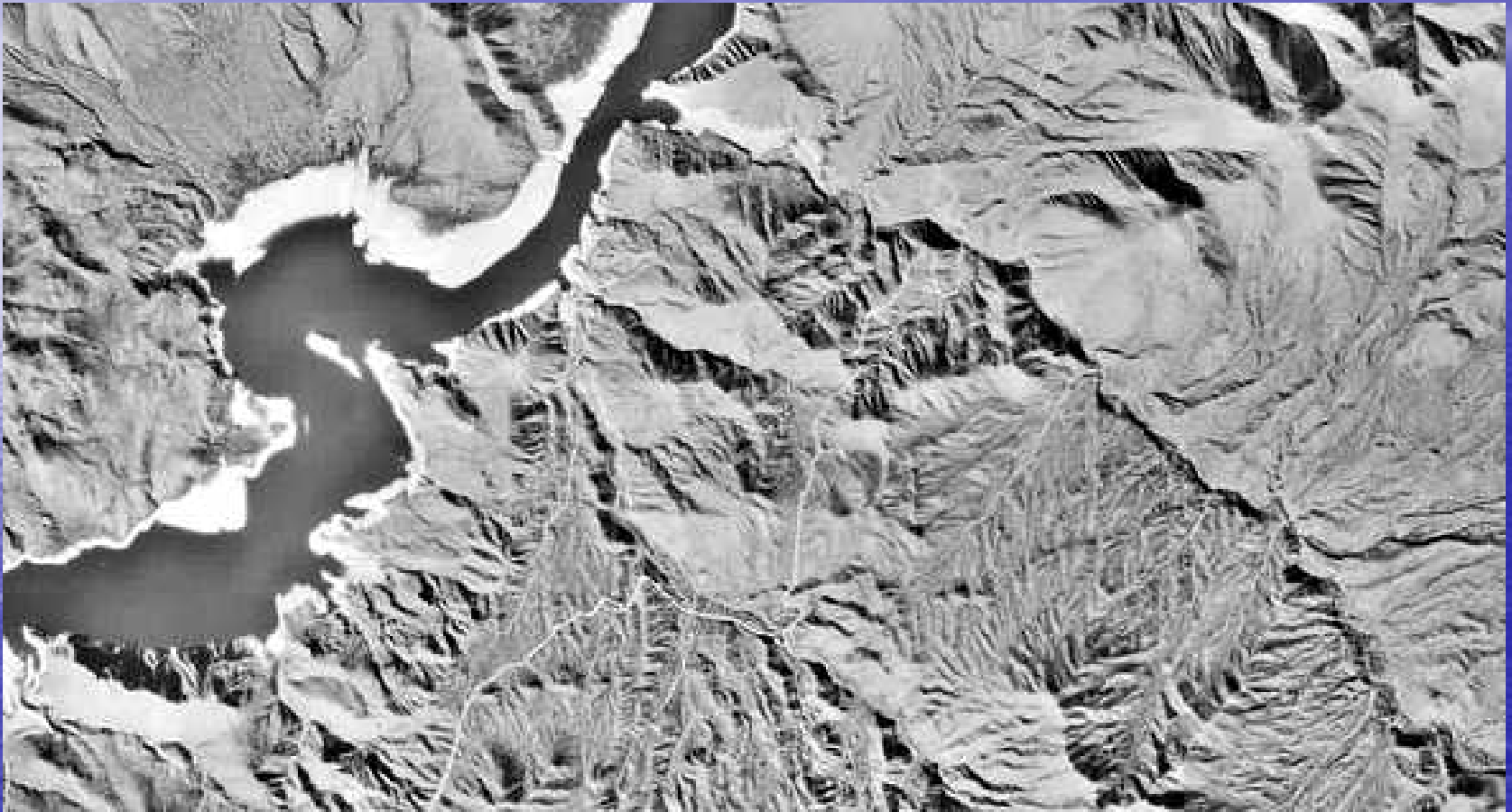


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Seasonal flow?



EPA tries to fortify the Guidance against judicial review

- It's only guidance (*i.e.*, not reviewable)
- Not binding, lacks the force of law
- "Expect" to issue proposed rule (not final)
- Cloaks its interpretation in expertise
 - Refers to agency's "scientific understanding"
 - "Reflects best available science"
 - Based on field implementation experience
- Appendix: Legal and Scientific Basis

How to Hold EPA to the CWA and APA

- Judicial Review
- *Chevron* deference is qualified, for example:
 - “The fair measure of deference to an agency administering its own statute has been understood to vary with the circumstances, and courts have looked to the agency’s care, its *consistency*, formality, and relative expertness, and to the persuasiveness of the agency’s position”
 - United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001) (footnotes and citations omitted; emphasis added).
- No *Chevron* deference in *SWANCC*

Holding EPA to the APA

- “Guidance” may be a rule in disguise
See Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).

Guidance that “reads like a ukase” held a rule and required notice and comment rulemaking.

Holding EPA to the APA

- A change in the agency's interpretation of a rule must be subject to notice and comment. *See Env'tl Integrity Project v. EPA*, 425 F.3d 992 (D.C. Cir. 2005):
"When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment."
quoting Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.2d 1030, 1034 (D.C. Cir. 1999).

What can you do?

- Stay informed
- Support NWC's and other industry efforts
- Treat the draft itself as a rulemaking
 - File comments, due **July 1, 2011**
 - Make a record for judicial review
 - Point to specifics, give concrete examples
- Keep your Hill contacts informed
- Consider judicial review

Further information?

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