

# 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.

# Rapanos & Carabell



- The justices issued five opinions in Rapanos, with no single opinion commanding a majority of the Court.
- A 4-1-4 split Supreme Court vacated and remanded the judgments back down to the Sixth Circuit Court of Appeals.

# 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.’”

# Interagency Guidance For Rapanos Carabell

June 5<sup>th</sup> 2007 Guidance:

- Which waters are jurisdictional
  - ▶ Use of Plurality test
  - ▶ Use of Kennedy test: fact-specific analysis to determine whether there is a significant nexus with a traditional navigable water?

# Plurality Test

- Relatively Permanent Waters (RPWs)
  - ▶ Perennial Waters
  - ▶ Intermittent Waters where the flow is for example typically three months
    - Policy Decision to back analysis with “significant nexus evaluation”
- Wetlands Directly Abutting RPWs

# Kennedy Test

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 biological integrity of TNWs.

## RELATIVE REACH ANALYSIS.

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) to 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

# 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)

# Traditional Navigable Waters (TNWs)

**Pacific Ocean, OR**



**Yellowstone River, MT**



**TNWs are jurisdictional under the CWA**

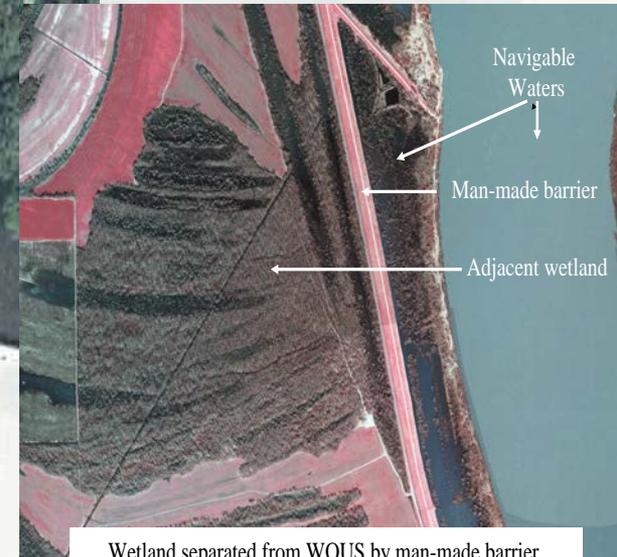
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# Wetlands Adjacent to TNWs

Mississippi River, MN



Mississippi River, LA



Wetland separated from WOUS by man-made barrier.

Pacific Ocean, HI



**Wetlands adjacent to TNWs are jurisdictional under the CWA.**

# Relatively Permanent Waters

## RPWs: Perennial & Seasonal



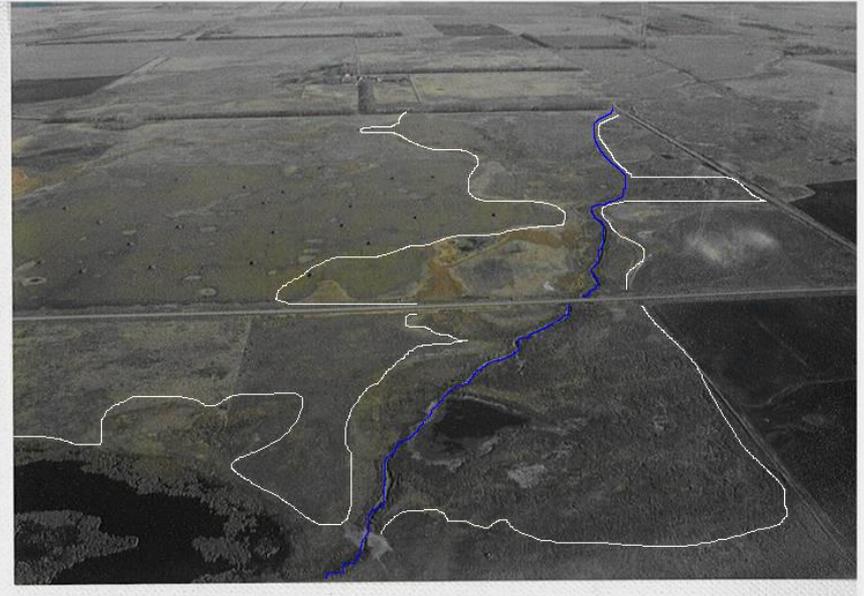
RPWs are jurisdictional under the CWA. As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a TNW and an RPW that is not perennial.

# 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.

# 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.

# 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.

# 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.

# 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 coordination is required.**

**So what has changed?**

**2008 Guidance Changes**

# Dec 2008 Revised Rapanos Guidance Summary

- Guidance remains largely the same with a few more specific points of clarification on the following
  - ▶ TNW designations
  - ▶ RPW designations
  - ▶ Adjacent wetland determinations
- RGL 08-02 – allowing the use of PJDs

# RPW designation

- If the flow at the downstream confluence is not representative of the entire reach (eg. “losing” stream), the flow regime that best characterizes the entire tributary should be used.

# Adjacent wetlands

- One of the following criteria must be present
  - ▶ Unbroken surface or shallow subsurface connection to jurisdictional waters
  - ▶ Physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like
  - ▶ Proximity to a jurisdictional water is “reasonably” close, supported by inference that such wetlands have an ecological interconnection with jurisdictional waters

# Proposed Rule

- The New proposed rule is now out on public notice in the Federal Register. The 90 day comment period began on 21 April 2014.

Direct any comments to Docket ID No. EPA-HQ-OW-2011-0880

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Show citation box *Email:* [ow-docket@epa.gov](mailto:ow-docket@epa.gov). Include EPA-HQ-OW-2011-0880 in the subject line of the message.