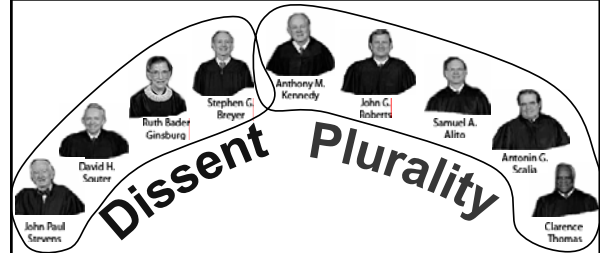


John Rapanos



Rapanos Decision – A Divided Court



Rapanos v. United States, 547 U.S. ___, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006).

Goals For Today

1. Review Background
2. Introduce Case Studies/Examples
 - a. Cundiff
 - b. Adam Brothers Farming
 - c. PNW Local
3. Summarize Current Guidance
4. Predict the Future.....

Summary of Key Points

(First Section Of Cover Summary - June 5, 2007 Guidance)

The agencies will assert jurisdiction over the following waters:

1. Traditional navigable waters
2. Wetlands adjacent to traditional navigable waters
3. Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
4. Wetlands that directly abut such tributaries

"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carrabel v. United States*," June 5, 2007, p. 1. Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

1. Traditional Navigable Waters (i.e., "(a)(1) Waters") and Their Adjacent Wetlands

Key Points

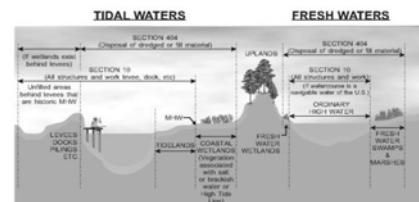
1. The agencies will assert jurisdiction over traditional navigable waters, which includes all the waters described in 33 C.F.R. § 328.3(a)(1), and 40 C.F.R. § 230.3 (s)(1).
2. The agencies will assert jurisdiction over wetlands adjacent to traditional navigable waters, including over adjacent wetlands that do not have a continuous surface connection to traditional navigable waters.

"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carrabel v. United States*," June 5, 2007, p. 4. Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

1. Traditional Navigable Waters (i.e., "(a)(1) Waters") and Their Adjacent Wetlands -

The agencies will assert jurisdiction over traditional navigable waters, which includes all the waters described in 33 C.F.R. § 328.3(a)(1), and 40 C.F.R. § 230.3 (s)(1).

Waters of the US Regulated by the Corps Regulatory Program



Traditional Navigable Waters (i.e., "(a)(1) Waters") and Their Adjacent Wetlands - The agencies will assert jurisdiction over traditional navigable waters, which includes all the waters described in 33 C.F.R. § 328.3(a)(1), and 40 C.F.R. § 230.3(s)(1).



1. Traditional Navigable Waters (i.e., "(a)(1) Waters") and Their Adjacent Wetlands

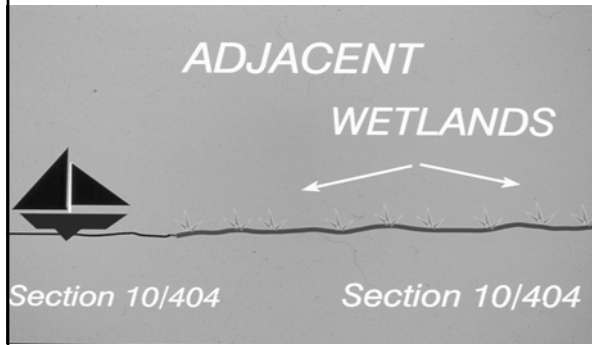
Key Points:

2. The agencies will assert jurisdiction over wetlands adjacent to traditional navigable waters, including over adjacent wetlands that do not have a continuous surface connection to traditional navigable waters.

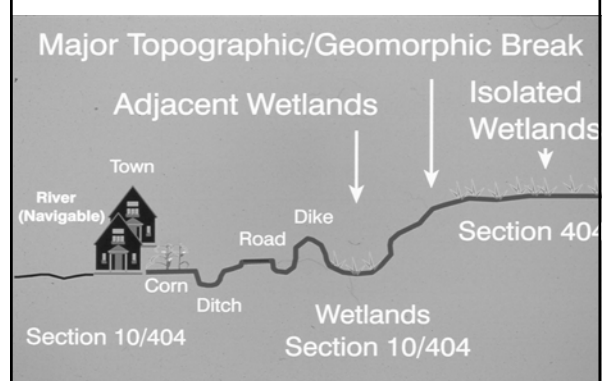


"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*," June 5, 2007, p 4. Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

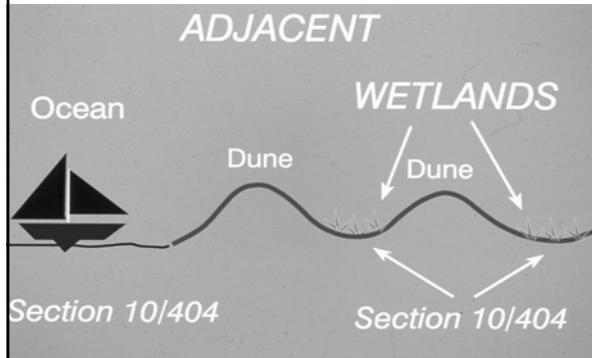
Definition: The term "Adjacent" means "bordering, contiguous or neighboring." Wetlands separated from other waters of the US by man made dikes or barriers, natural river berm, beach dunes, and the like are "adjacent wetlands."
[33 CFR 328.3 (c)]



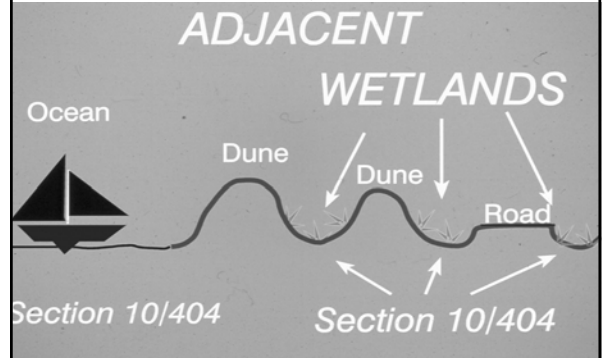
The Changing Regulatory Landscape – (EPA Headquarters Training Slide – circa 1989).



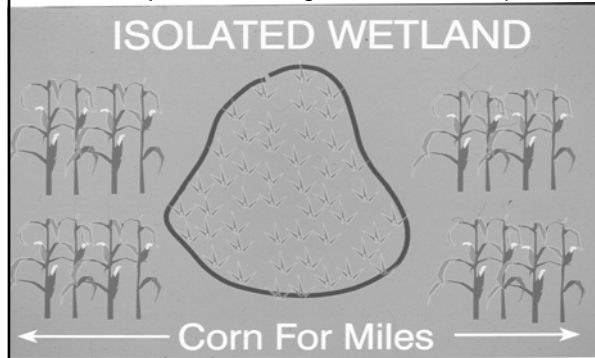
The Changing Regulatory Landscape – (EPA Headquarters Training Slide – circa 1989).



The Changing Regulatory Landscape – (EPA Headquarters Training Slide – circa 1989).



The Changing Regulatory Landscape – (EPA Headquarters Training Slide – circa 1989).



2. Relatively Permanent Non-Navigable Tributaries of Traditional Navigable Waters/Wetlands with a Continuous Surface Connection with Such Tributaries

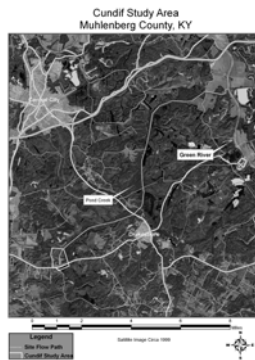
Key Points

1. The agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).

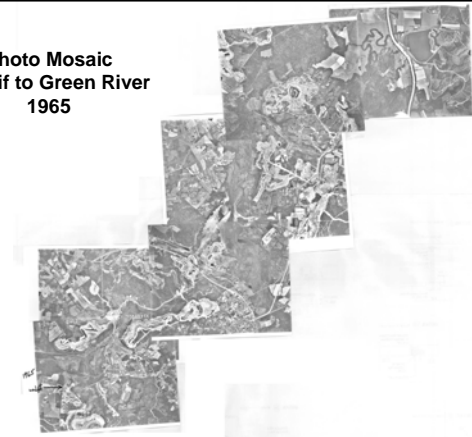


"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," June 5, 2007, p 5. Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

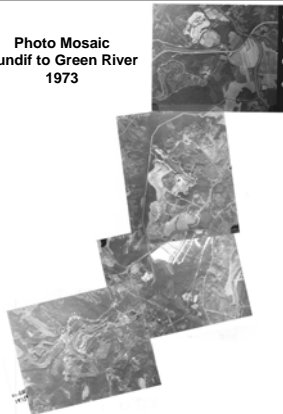
The Agencies Will Assert Jurisdiction Over....(3) Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)



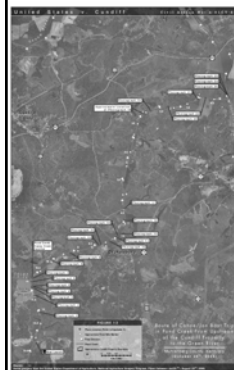
**Photo Mosaic
Cundiff to Green River
1965**



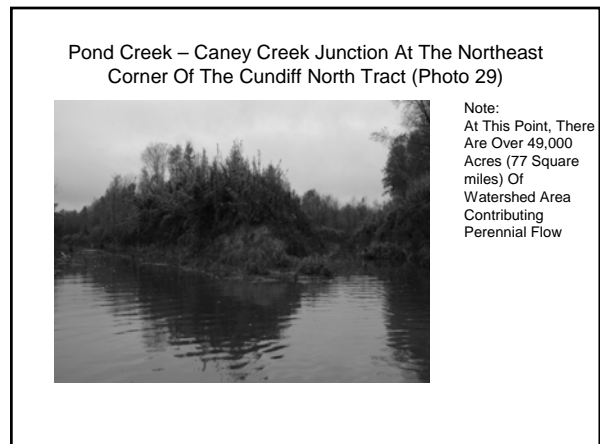
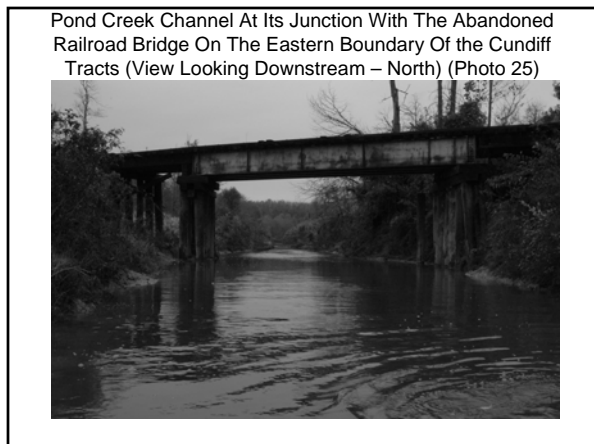
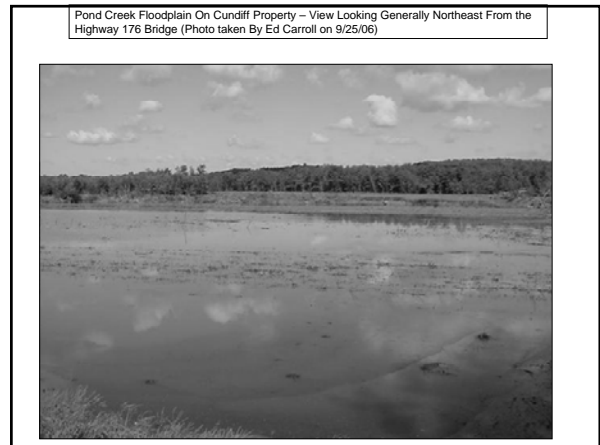
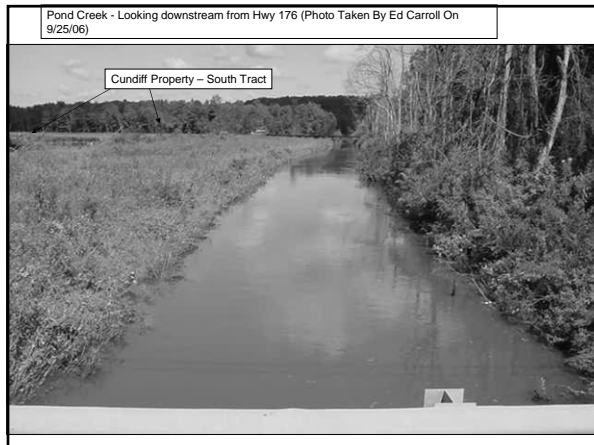
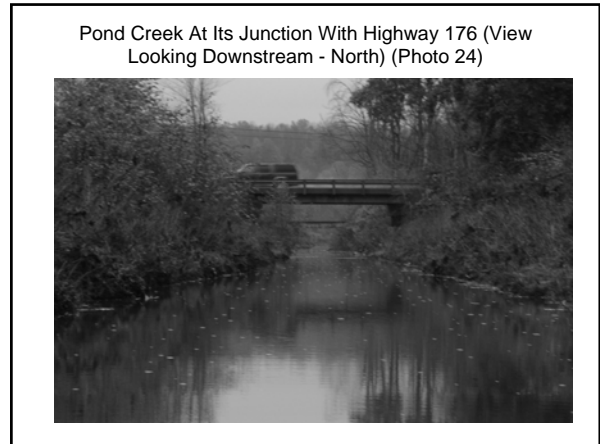
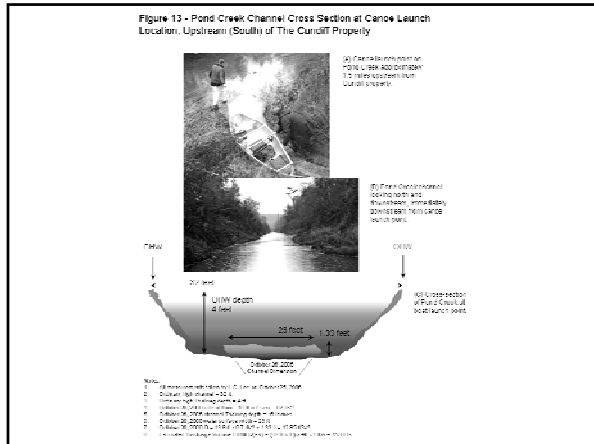
**Photo Mosaic
Cundiff to Green River
1973**



The Agencies Will Assert Jurisdiction Over....(3) Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)



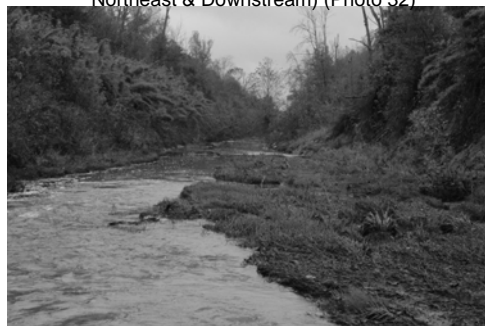
- Canoe Trip Slide Sequence – Cundiff Site To the Green River



Pond Creek Channel Between Confluence With Caney Creek And the Highway 431 Bridge (Photo 30)



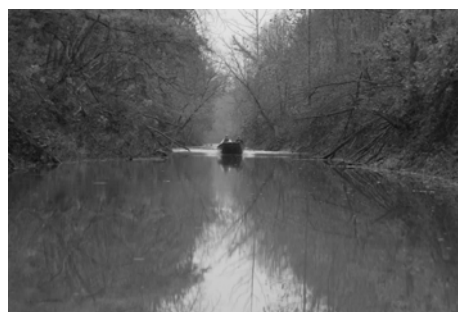
Pond Creek Between Its Confluence With Caney Creek And the Highway 431 Bridge –(View Looking East By Northeast & Downstream) (Photo 32)



Active Railroad Bridge Over Pond Creek, Downstream From Highway 431 Bridge (View Looking Northeast – Downstream) (Photo 36)



Point In Pond Creek At Which Canoe Meets With Jon Boat Entering From Green River (View Looking Northeast – Downstream) (Photo 41)



View Looking Southwest & Upstream Into The Pond Creek Channel Near Its Confluence With The Green River (Photo 43)



View Looking East & Into The Green River From Pond Creek At Its Confluence With The Green River (Photo 46)



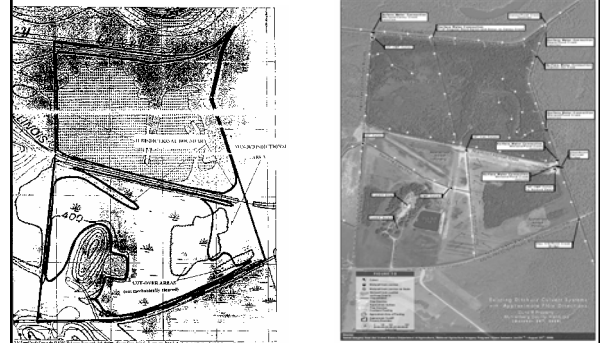
View (Looking West & Upstream) Into Pond Creek From the Main Channel Of The Green river (Photo 47)



The Agencies Will Assert Jurisdiction Over....

(3) Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)

(4) Wetlands that abut such tributaries

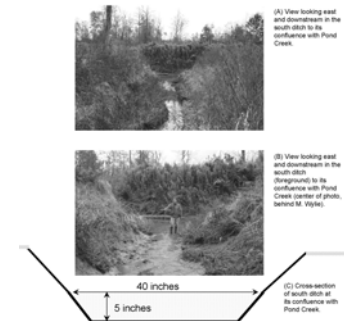


North Tract – South Channel Near Its Continuous Surface Connection With Pond Creek (View Looking Upstream – West)



*Note:
Scour In Banks
From Erosion
During High
Water Events*

Figure 11 - Cross Section Views of North Tract, South Ditch at its confluence with Pond Creek on the Cundiff Property



Notes:

1. All measurements taken by L.C. Lee on October 29, 2004.

2. Measured width of existing active channel = 40 inches = 3.33 ft.

3. Measured depth of existing active channel = 5 inches = 0.417 ft.

4. Rate of flow = 10.0 ft³ / 5 seconds = 2.00 cfs.

5. Estimated discharge (discharge) = 1.0 cfs.

6. 10.00 ft³ / 5.00 sec = 2.00 cfs.

Debris (Wrack) Deposited by Pond Creek Overbank Flooding/Surface Connection (Immediately Upstream From Pond – Caney Creek Junction)



Large And Small Debris (Wrack) Deposited by Pond Creek Overbank Flooding (Immediately Upstream From Pond – Caney Creek Junction)



Eroded/Water-Scoured Surface Connection From Abutting Forested Wetlands To Pond Creek (View Looking East, Into Pond Creek)



Continuous Surface Connection From Wetlands In Cundiff South Tract (Northeast Corner) To Pond Creek (View Looking West)



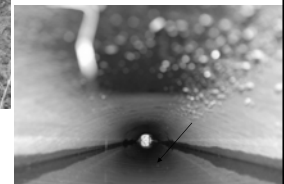
South Tract – New Center Ditch (View Looking South)



36 Inch Diameter Iron Culvert - Forming A Surface Connection Of South Tract Wetlands To North Tract – South Channel



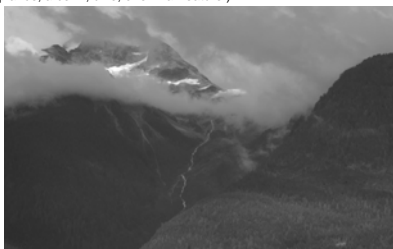
View Inside Culvert – Arrow Shows Water Surface In Culvert



2. Relatively Permanent Non-Navigable Tributaries of Traditional Navigable Waters with a Continuous Surface Connection with Such Tributaries

Key Points

2. The agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection to such tributaries (e.g., they are not separated by uplands, a berm, dike, or similar feature.)



"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," June 5, 2007, p 5. Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

Summary of Key Points (Second Section Of Cover Summary - June 5, 2007 Guidance):

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:

1. Non-navigable tributaries that are not relatively permanent
2. Wetlands adjacent to non-navigable tributaries that are not relatively permanent
3. Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," June 5, 2007, p 1. Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

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:

(1) Non-navigable tributaries that are not relatively permanent



"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," June 5, 2007, p 1. Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

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:

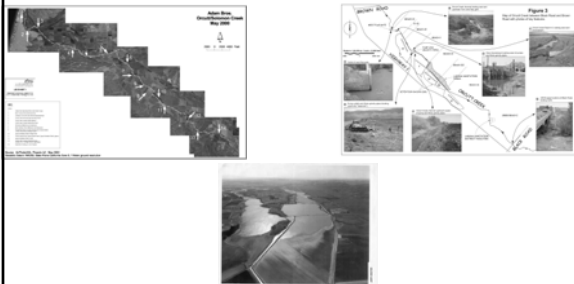
(2) Wetlands adjacent to non-navigable tributaries that are not relatively permanent



"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," June 5, 2007, p 1. Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

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:

Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary



"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," June 5, 2007, p 1. Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

**Summary of Key Points
(Third Section Of Cover Summary - June 5, 2007
Guidance)**

The agencies generally will not assert jurisdiction over the following features:

1. Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
2. Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," June 5, 2007, p 1. Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

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"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," June 5, 2007, p 1. Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

The agencies generally will not assert jurisdiction over the following features:

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"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," June 5, 2007, p 1. Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

Summary of Key Points
(Fourth Section of Cover summary – June 5, 2007
Guidance)

The agencies will apply the significant nexus standard as follows:

1. A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they *significantly* affect the chemical, physical and biological integrity of downstream traditional navigable waters
2. Significant nexus includes consideration of hydrologic and ecologic factors

"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," June 5, 2007, p. 1.
Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

3. Certain Adjacent Wetlands and Non-navigable Tributaries That Are Not Relatively Permanent
Key Points

1. The agencies will assert jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to a traditional navigable water.
2. A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.
3. "Similarly situated" wetlands include all wetlands adjacent to the same tributary.

"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," June 5, 2007, p. 7.
Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

4. Significant nexus includes consideration of hydrologic factors including the following:
 - a) volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary
 - b) proximity to the traditional navigable water
 - c) size of the watershed
 - d) average annual rainfall
 - e) average annual winter snow pack
5. Significant nexus also includes consideration of ecologic factors including the following:
 - a) potential of tributaries to carry pollutants and flood waters to traditional navigable waters
 - b) provision of aquatic habitat that supports a traditional navigable water
 - c) potential of wetlands to trap and filter pollutants or store flood waters
 - d) maintenance of water quality in traditional navigable waters

"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," June 5, 2007, p. 7.
Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.

6. The following geographic features generally are not jurisdictional waters:
 - a) swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow)
 - b) ditches (including roadside ditches) excavated wholly in and draining only
 - c) uplands and that do not carry a relatively permanent flow of water

"Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," June 5, 2007, p. 7.
Available at the following address: www.epa.gov/owow/wetlands/guidance/cwawaters.html.



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:

Non-navigable tributaries that are not relatively permanent
Wetlands adjacent to non-navigable tributaries that are not relatively permanent
Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

Adam Brothers Ranch #6 – Orcutt/Solomon Creek, Post Disturbance Conditions (1/15/99)



Contradiction within the June 5, 2007 Rapanos Guidance (pages 5-6)

Both the plurality opinion and the dissent would uphold CWA jurisdiction over non-navigable tributaries that are "relatively permanent" – waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months).²² Justice Scalia emphasizes that relatively permanent waters do not include tributaries "whose flow is 'coming and going at intervals ... broken, fitful.'"²³ Therefore, "relatively permanent" waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally.

²² See 126 S. Ct. at 2221 n. 5 (Justice Scalia, plurality opinion) (explaining that "relatively permanent" does not necessarily exclude waters "that might dry up in extraordinary circumstances such as drought" or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months").

*Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Cabell v. United States*, June 5, 2007, p 5-6. Available at the following address: www.epa.gov/owow/wetlands/guidance/cwa_waters.html.

Ephemeral Stream

An ephemeral stream has flowing water only during, and for short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

From: *E. Definitions* (p. 11196). Federal Register Vol. 72, No. 47: Department of Defense, Department of the Army, Corps of Engineers [ZIN 0710-ZA02], 11092-11198.

Intermittent Stream

An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

From: *E. Definitions* (p. 11196). Federal Register Vol. 72, No. 47: Department of Defense, Department of the Army, Corps of Engineers [ZIN 0710-ZA02], 11092-11198.

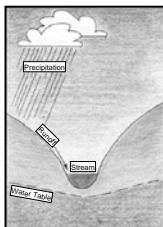
Perennial Stream

A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

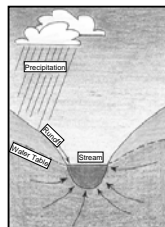
From: *E. Definitions* (p. 11197). Federal Register Vol. 72, No. 47: Department of Defense, Department of the Army, Corps of Engineers [ZIN 0710-ZA02], 11092-11198.

Comparisons Among Stream Type Definitions

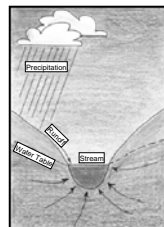
Source: "Reissuance of Nationwide Permits; Notice," *Federal Register* 72:47 (12 March, 2007) pp. 11196-11197



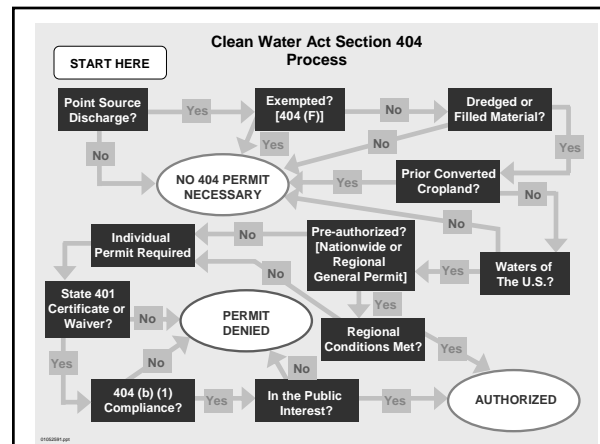
Ephemeral
•Flowing water only during and shortly after precipitation events.
•Precipitation primary source for stream flow.
•No supplemental source for stream flow.

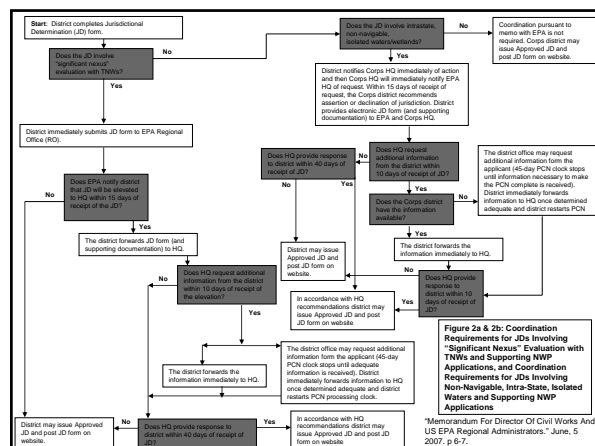
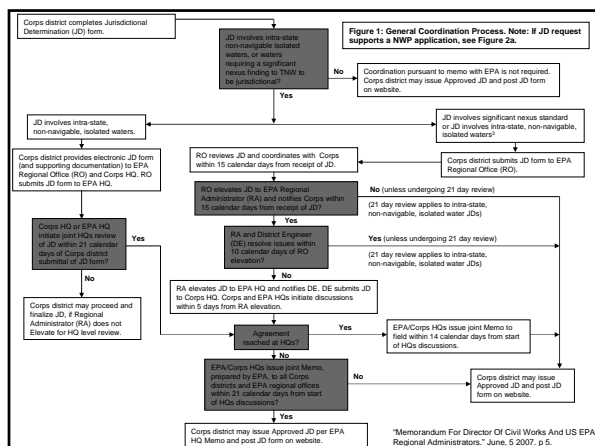


Intermittent
•Groundwater primary source for stream flow.
•Runoff from rainfall supplemental source for stream flow.
•Flowing water during certain times of the year.



Perennial
•Groundwater primary source for stream flow.
•Runoff from rainfall supplemental source for stream flow.
•Flowing water year-round.





Wetlands Checklist	
A "yes" response to any question indicates CWA coverage for the wetland.	
Question	Legal Rule or Test
1. Does the wetland cross state lines?	Interstate Waters
2. Is the wetland a traditional navigable water? (A body of water that is currently used, or was used in the past, or is susceptible to use in the future, in interstate or foreign commerce. This includes all waters that are subject to the ebb and flow of the tide.)	Traditional Navigable Waters
3. Is the wetland adjacent to traditional navigable waters?	Adjacency Rule
4. Does the wetland, either alone or in combination with similarly situated lands in the region, significantly affect the (A) chemical integrity, (B) physical integrity, or (C) biological integrity of any traditional navigable waters?	Significant Nexus Test
5. Is the wetland adjacent to - and does it have a continuous surface connection with - a relatively permanent, standing or continuously flowing body of water that is connected to traditional interstate navigable waters?	Adjacency + Continuous Surface Connection Test
6. Could the degradation or destruction of the wetland affect interstate or foreign commerce? This includes any wetland (A) that is or could be used by interstate or foreign travelers for recreational or other purposes; (B) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (C) that is or could be used for industrial purpose by industries in interstate commerce?	Affecting Interstate or Foreign Commerce Test

Source: Myers, Bruce and Roxanne Thomas. "Happy Anniversary, Rapanos...Now What?" National Wetlands Newsletter. Volume 29, Number 4: July-August 2007.

Streams Checklist	
A "yes" response to any question indicates CWA coverage for the stream.	
Question	Legal Rule or Test
1. Does the stream cross state lines?	Interstate Waters
2. Is the stream a traditional navigable water? (A body of water that is currently used, or was used in the past, or is susceptible to use in the future, in interstate or foreign commerce. This includes all waters that are subject to the ebb and flow of the tide.)	Traditional Navigable Waters
3. Is the stream a continuously flowing or relatively permanent body of water that flows into traditional interstate navigable waters?	Continuously Flowing/Relatively Permanent Test
4. Does the stream (whether continuously flowing or not) significantly affect the (A) chemical integrity, (B) physical integrity, or (C) biological integrity of any traditional navigable waters?	Significant Nexus Test
5. Could the degradation or destruction of the stream affect interstate or foreign commerce? This includes any stream (A) that is or could be used by interstate or foreign travelers for recreational or other purposes; (B) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (C) that is or could be used for industrial purpose by industries in interstate commerce?	Affecting Interstate or Foreign Commerce Test

Source: Myers, Bruce and Roxanne Thomas. "Happy Anniversary, Rapanos...Now What?" National Wetlands Newsletter. Volume 29, Number 4: July-August 2007.