

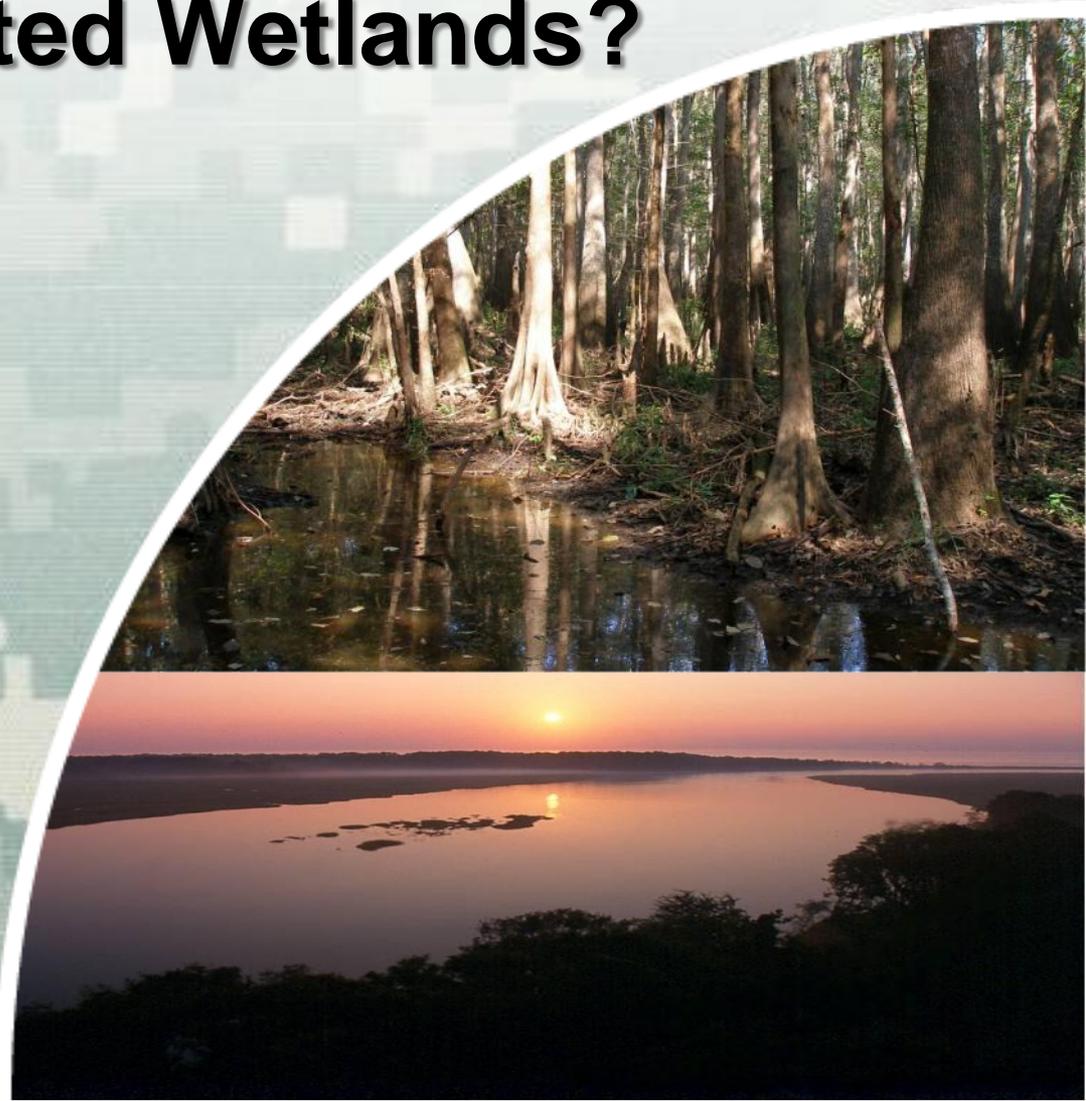
Clean Water Act Jurisdiction: What About Isolated Wetlands?

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PRESENTATION OUTLINE

Clean Water Act Jurisdiction Framework

Definition of Adjacency

Supreme Court SWANCC Decision

Isolated versus Adjacent



Waters of the United States

(33 CFR 328.3(a))

1. Waters which are, were, or could be susceptible to use in interstate or foreign commerce (including all waters subject to the ebb and flow of the tide)
2. Interstate waters---waters that cross state or tribal boundaries
3. Intrastate waters whose use or degradation could affect interstate or foreign commerce
4. Impoundments of other categories of waters
5. Tributaries of category 1 – 4 waters
6. Territorial seas
7. Wetlands adjacent to category 1 – 6 waters



Wetlands Definition

From 33 CFR 328 Definitions (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.



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What Does Adjacent Mean?

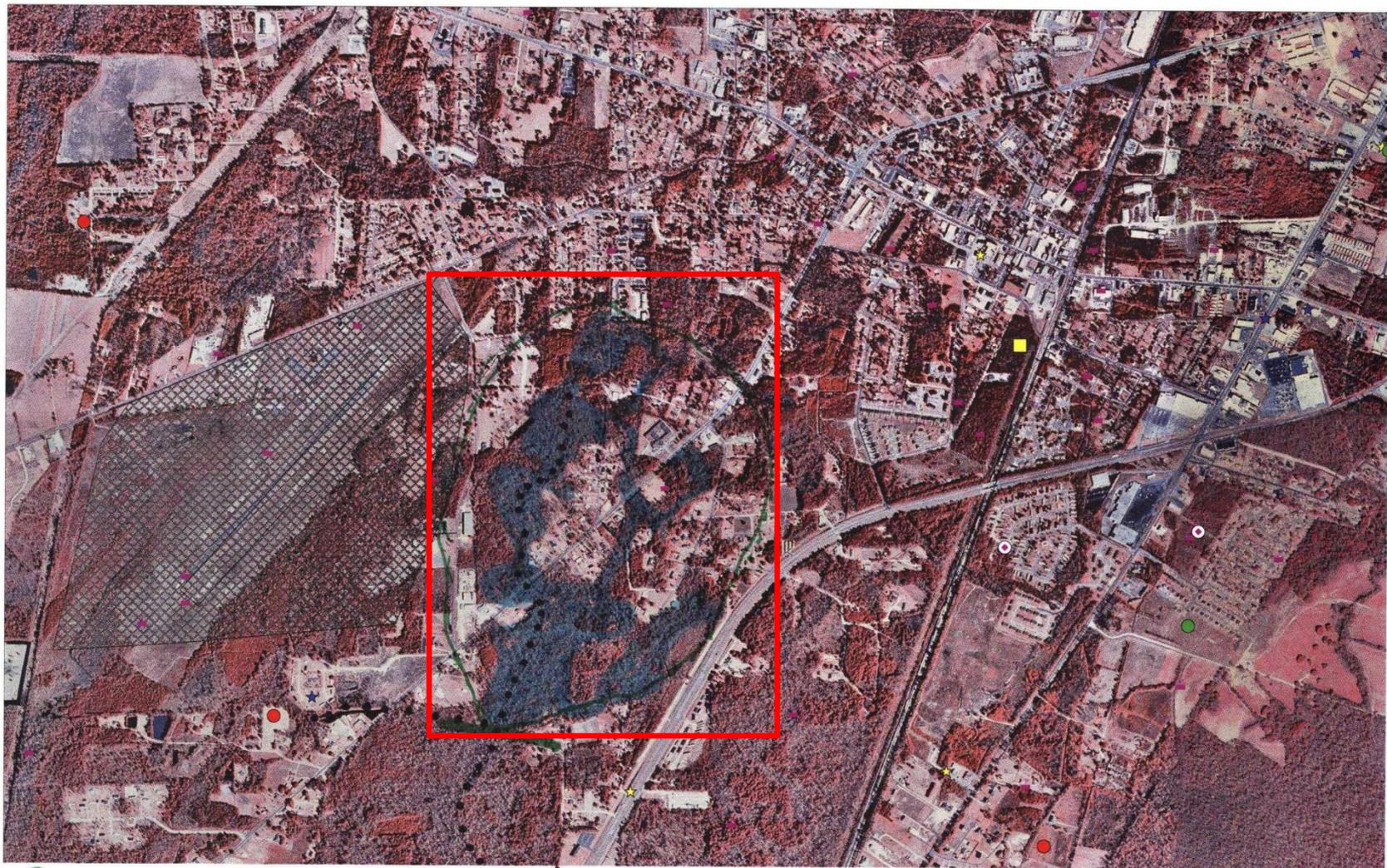
From 33 CFR 328.3 Definitions (c)

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.”



Wetlands adjacent to a tributary



□ review area ... Non RPW

● Potential wetlands in review area approx 120 ac

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ISOLATED – Essentially the Opposite of Adjacent

Wetlands that are not contiguous, bordering or neighboring with respect to other Waters of the US are jurisdictionally “isolated”

Isolated wetlands have NO chemical, physical, or biological connection (nexus) to Waters of the US

and

have no connection to interstate or foreign commerce



“Classic” depressional wetland



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SWANCC Case (2001 Supreme Court)

Solid Waste Agency of Northern Cook County

The Corps attempted to regulate a non-navigable, intrastate, inland water because it represented a water:

- (a) That would be used as habitat by birds protected by migratory bird treaties; or
- (b) That would be used as habitat by other migratory birds that cross state lines; or
- (c) That would be used as habitat for endangered species; or
- (d) That would be used to irrigate crops sold in interstate commerce.

This has been dubbed “The Migratory Bird Rule.”



Supreme Court Holdings in SWANCC

The Supreme Court reversed, and invalidated the Migratory Bird Rule.

...held that the rule is not a fairly supported interpretation of the term “waters of the United States,”

and

...the COE exceeded its jurisdiction by interpreting the CWA’s reach to include isolated, inland, non-navigable waters.



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Jurisdiction is NOT About What EPA and the Corps of Engineers Think is Important...

...Jurisdiction IS about what the Clean Water Act and agency (Corps and EPA) regulations protect.



A desert oasis is incredibly important in its ecosystem. However, from the Clean Water Act regulatory perspective, there is no connection to navigable waters or interstate or foreign commerce.



CWA SECTION 404 JURISDICTION

Based on Supreme Court plurality in Rapanos

Waters of the U.S. include:

- TNWs, including territorial seas
- Wetlands adjacent to TNWs
- RPWs that flow directly or indirectly into TNWs
- Wetlands directly abutting RPWs that flow directly or indirectly into TNWs

- Non-RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs

Jurisdictional
by definition

Significant
Nexus
Determination
required

Isolated wetlands – no federal jurisdiction



ADJACENT – Post-Rapanos

- Adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are also adjacent. (33 CFR 328.3(c))

ABUTTING - A wetland abuts a tributary if it is not separated from the tributary by uplands, a berm, dike, or similar feature.

NON-ABUTTING - Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are adjacent.



Revised Rapanos Guidance

ADJACENT

The Corps and EPA will consider a wetland adjacent based on:

- 1) Unbroken surface or shallow sub-surface connection to jurisdictional waters. (This hydrologic connection may be intermittent)
- 2) Wetland is physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like
- 3) Proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters. Because of the scientific basis for this inference, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case-specific demonstration of an ecologic interconnection. (Revised Rapanos Guidance)





WETLANDS C, D, & E
ORIGINALLY CALLED
ISOLATED





Questions or Discussion ?



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Clean Water Act Jurisdiction: Corps Regulations at 33 CFR 328.3

- 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;



Clean Water Act Jurisdiction: Corps Regulations at 33 CFR 328.3

- 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) of this section;
- 6) The territorial seas;
- 7) Wetlands **adjacent** to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

- 8) 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.



SIGNIFICANT NEXUS DETERMINATION (SND)

A significant nexus analysis will assess the **flow characteristics** and functions of the **relevant reach** of the tributary, in combination with functions collectively performed by all wetlands adjacent to the tributary, to determine if they have more than an insubstantial or speculative effect on the chemical, physical, or biological integrity of TNWs.



How Might This Appeal Affect Charleston District?

The Corps will continue to review tributary and wetland adjacency the same. We feel strongly supported by this Court opinion.

For Significant Nexus Determinations: the Corps will include any available information on the existing conditions of the TNW and will relate/compare tributary and wetland functions accordingly...**the assumption is no longer sufficient.**

