



# Rion Bowers SWCA Environmental and Cultural Resource Services

Presented to The Arizona Hydrological Society

May 15, 2008

**SWCA**  
ENVIRONMENTAL CONSULTANTS

Sound Science. Creative Solutions.

## About Us

- More than 350 cultural and natural resource scientists and planners company-wide
- Founded in Flagstaff in 1981, with corporate offices now based in Phoenix
- We specialize in environmental science and compliance; and cultural and natural resource analysis, planning, and management
- Employee-owned
- Engineering News-Record Top 200 Environmental Firm

# Clean Water Act Section 404 Permitting

## Overview and Recent Developments



Sound Science. Creative Solutions.

# Regulatory Update on Section 404

- **Jurisdictional Delineations – Joint EPA/Corps Guidance**
- **1987 Wetland Delineation Manual Regional Updates**
- **Nationwide Permit Program Reauthorization**
- **Proposed Legislation – H.R. 2421**

# U.S. Army Corps Authority

## Clean Water Act of 1972

### Goal:

Protect the biological, chemical, and physical functions of the waters of the U.S.

**Section 404 of the CWA regulates discharge of dredged or fill material into waters of the U.S.  
(33 USC 1362 [7])**

**“Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.”**

Typical Section  
404 Process

Jurisdictional Determination

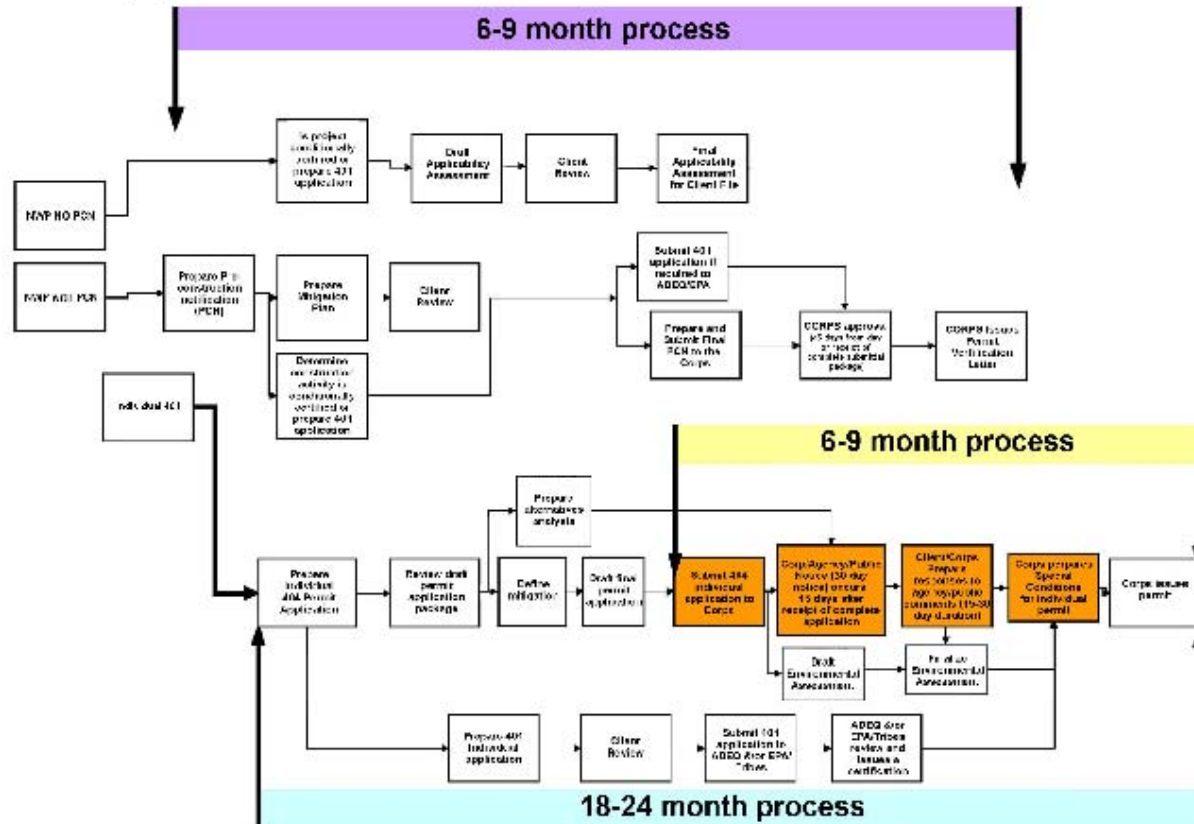
Impact Analysis

Pre-Application

Individual Permit

Nationwide Permit

# Section 404 Permit Application and Approval Process



# CWA Definition of Waters of the U.S.

1. All waters currently used, or that were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide.
2. All interstate waters, including interstate wetlands .....

# CWA Definition of Waters of the U.S. (cont.)

3. All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sand flats, wetland sloughs, prairie potholes, wet meadows, playas, or natural ponds, *the use, degradation, or destruction of which could affect interstate or foreign commerce*, including such waters:
  - That are or could be used by interstate or foreign travelers for recreation or other purposes.
  - From which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
  - That are or could be used for industrial purposes by industries in interstate commerce.

# CWA Definition of Waters of the U.S. (cont.)

4. All impoundments of waters otherwise defined as waters of the U.S. under the definition.
5. Tributaries of waters identified in paragraphs 1 through 4.
6. Territorial seas.
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs 1 through 6 of this section.

# CWA Section 404: A Short History

- 1972 Enacted
- 1974 Regulation
- 1975 NRDC vs. Calloway: Interim regulation
- 1977 Regulation & Congressional Amendments
- 1979 Civiletti decision
- 1985 Riverside v. Bayview Homes  
EPA's Migratory Bird Memo
- 1986 Preamble on "Migratory Bird Rule"
- 2001 Supreme Court decision in SWANCC v. USACE
- 2003 ANPRM & Rulemaking
- 2004/5 GAO reports
- 2006 Rapanos & Carabell U.S. Supreme Court cases

# Solid Waste Agency in Northern Cook County (SWANCC) vs. USACE

## 2001 Supreme Court Decision in SWANCC

- Corps determined CWA jurisdiction over abandoned gravel pits by use of Migratory Bird Rule (MBR)
- MBR based on blue heron use of ponds.
- Holding:
  - Reasoning could be extended further: CWA intended intended some connection to navigability
  - Did not invalidate existing regulations
  - Has implications for all CWA programs, not just §404

## U.S. Supreme Court decisions (21 Feb 2006)

**Rapanos.** Determine whether 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 whether 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

- A split Supreme Court vacated and remanded the judgments back down to the Sixth Circuit Court of Appeals.
- The justices issued five opinions in Rapanos (one plurality opinion, two concurring opinions, and two dissenting opinions), with no single opinion commanding the majority of the Court.

## Rapanos & Carabell

The plurality concluded that the agencies' regulatory authority should extend only to “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to” such relatively permanent waters.

## Rapanos & Carabell

Justice Kennedy agreed with plurality that the statutory term “waters of the United States” extends beyond water bodies that are traditionally considered navigable.

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.’”

# Rapanos & Carabell

## Dissenting opinions

**Corps regulations are reasonable interpretation of CWA TNWs and Wetlands adjacent to TNWs**

**Decision/guidance does not address SWANCC nor does it affect the Joint Memorandum issued by the General Counsels of EPA and the Army dated January 10, 2003.**

# U.S. Environmental Protection Agency/Corps JD Guidance

- **Approved Jurisdictional Delineation Form (U.S. Army Corps of Engineers)**
- **60-page JD Guidebook**
- **Regulatory Guidance Letters**
- **Supporting Documentation**

# **Interagency Guidance on CWA Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. U.S. & Carabell v. U.S.**

## **Summary of Key Points:**

- **The agencies will assert jurisdiction over the following waters?**
- **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?**
- **The agencies generally will not assert jurisdiction over the following features?**
- **The agencies will apply the significant nexus test as follows?**

# CWA Jurisdiction

The Agencies will assert jurisdiction over the following waters:

- TNWs and Wetlands adjacent to TNWs
- Non-navigable tributaries of TNWs that are relatively permanent (i.e., the tributaries typically flow year-round or that have continuous flow at least seasonally) and wetlands that directly abut such tributaries

# CWA Jurisdiction

In addition, the following waters will also be found jurisdictional based on a fact-specific analysis that they have a significant nexus with a TNW:

- 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.

# **U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK**

**This document contains instructions to aid field staff in completing the Approved Jurisdictional Determination Form (“JD form”). This document is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination (JD) and documenting practices to support an approved JD until this document is further revised and reissued.**

# CWA Jurisdiction

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 whether they have more than an insubstantial or speculative effect on the chemical, physical, and/or biological integrity of TNWs.

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 floodwaters 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 floodwaters
- the ability to maintain water quality

# CWA Jurisdiction

Certain ephemeral waters in the arid west are distinguishable from the geographic features described below where such ephemeral waters are tributaries and may have a significant nexus to TNWs.

Certain geographical features (e.g., ditches, canals) that transport relatively permanent (continuous at least seasonally) flow directly or indirectly into TNWs or between two (or more) waters of the U.S., including wetlands, are jurisdictional waters regulated under the CWA.

Certain geographic features (e.g., swales, ditches, pipes) may contribute to a surface hydrologic connection where the features:

- replace or relocate a water of the U.S., or
- connect a water of the U.S. to another water of the U.S., or
- provide relatively permanent flow to a water of the U.S.

# 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 overland flow generated from precipitation (i.e., rain events and snowmelt)



**Swale**



**Erosional Features**



**Ditch**

# Coordination/Elevation Process

## Significant Nexus Evaluation

15 days – Corps District/EPA Regional Office

15 days – Corps DE/Regional Administrator

14 or 21 days – HQ EPA/Corps/DA

## Isolated Waters

Process above with copy sent directly  
to HQ (HQ review – 21 days)

# Wetland Delineation Manual Updates

10 regional supplements to the 1987 Wetland Delineation Manual are being developed to address “regional differences in climate, geology, soils, hydrology, plant and animal communities, and other factors that are important to the identification and functioning of wetlands. These differences cannot be considered adequately in a single national manual.”

# Schedule of Regional Supplements

	<u>Target Date For Publication</u>
Alaska	2006
Arid West	2006
Western Mountains, Valleys & Coast	2007
Great Plains	2007
Midwest	2008
Atlantic and Gulf Coastal Plain	2008
Northcentral and Northeast	2009
Caribbean Islands	2009
Mid-Atlantic and Southeast	2010
Hawaii / Pacific Islands	2010

# Arid West Regional Supplement

- Geographically covers all or portions of 11 states, including Arizona, Colorado, Idaho, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming
- The following geographic areas are excluded from the Arid West Supplement because environmental conditions are more appropriate for application of the Mountain West, Valleys and Coastal Regional Supplement (currently in preparation):
  - Sierra Nevada Mountains
  - Southern Cascade Mountains
  - Arizona and New Mexico Mountains
  - Other mountain ranges scattered throughout the West that support mainly coniferous forest on the lower slopes, alpine tundra, and open coniferous woodlands.

# Arid West Regional Supplement

- **The supplement provides regional indicators and procedures for:**
  - Hydrophytic vegetation
  - Hydric soil indicators
  - Wetland hydrology indicators
  - Growing season definition
  - Hydrology standard for highly disturbed problematic wetland situations
- **The Arid West Regional Supplement data forms and indicators must be used for any data collection for wetland delineations.**

# Nationwide Permit Program Reauthorized March 2007

On March 12, 2007, the Corps published in the Federal Register its new Nationwide Permits (NWP). Conditions for several of the permits have changed, several permits have been replaced, and five additional permits have been added, so there are now 50 NWP categories available in Arizona. The new NWPs became effective on March 19, 2007, and are active for a period of five years, expiring on March 18, 2012.

# The Most Significant Changes to the NWP Program Include:

1. The application of the 300-linear-foot limit to all waters of the U.S., including ephemeral and intermittent drainages. Prior to reauthorization of the NWPs, the Corps imposed a 300-linear-foot limit on perennial and intermittent waters only, and did not apply the limit to ephemeral waters (i.e., those drainages that flow only during, and for short duration after, precipitation events in a typical year). Now the Corps will limit the use of some NWPs where more than 300 linear feet of ephemeral waters are lost due to the actions that would take place under the NWP. Applicants may apply for a waiver from the 300-linear-foot limit, but no guidance has been issued as to how or when the Corps will issue such waivers. If waivers are not obtained for projects impacting more than 300 linear feet of jurisdictional drainage, then an individual permit will be required.
2. Creation of separate NWPs for residential (NWP 29) and commercial (NWP 39) developments.
3. The 1/10 of an acre notification threshold has been eliminated, and now a Preconstruction Notification (PCN) must be submitted for all residential and commercial projects that impact waters of the U.S.

# Proposed Legislation – H.R. 2421

- *“A bill presented to the 110th Congress in May 2007 to amend the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States.”*
- Due to the uncertainty of the Corps jurisdiction based on the Recent Supreme Court decision, The Clean Water Restoration Act of 2007 was introduced by Rep. James Oberstar, D-Minn., John Dingell, D-Mich., and Vernon Ehlers, R-Mich., along with a bipartisan group of more than 165 co-sponsors.
- The bill would remove the term “navigable waters” from the 1972 Clean Water Act, expanding the scope of areas and activities covered by federal regulation. H.R. 2421 replaces the term “navigable” with a new legislative definition of “waters of the United States” that includes all “intrastate waters” and all “activities affecting these waters.”
- This bill would be the most far-reaching expansion of the original Clean Water Act, extending federal jurisdictional reach to everything from ditches and gutters to groundwater.

# Experience from the Field

- For more than 1 year, the Corps Project Managers in Arizona have asked applicants to refrain from submitting new JDs until the national JD guidance was issued; until they determine how to conduct the significant nexus test and fill out the new 7-page JD form; and until the LA District determines what drainages qualify as Traditional Navigable Waters.
- Some of the AZ Corps Project Managers conducted library research and submitted a “white paper” in an effort to support designation of certain drainages, such as the Santa Cruz River, as TNWs.
- Very few jurisdictional delineations in the LA District conducted after June 5, 2007, have been reviewed in accordance with the Rapanos Guidance. Only a few JDs in California are known to be under the full review process, and a few JDs that are adjacent to the Colorado River that do not require the significant nexus evaluation have been processed.
- The Corps will process JDs submitted to the Corps prior to issuance of the Rapanos Guidance on June 5, 2007. These JDs will be processed according to methodology applied prior to Rapanos.

# Section 404 Permitting Time-Frame

You have to remember that you are dealing with a federal regulatory agency. As with all federal regulatory agencies, they spend a lot of time measuring and counting time so they are very good at it. You should also take a moment to remember that the Corps can: turn a desert wash into a navigable waterway; turn a water resource program into a federal land use program; turn structures into fill; turn excavation into fill; and turn land into water. Clearly, an agency that can accomplish all of that can easily make time stand still. And further, it's their clock!!!!