

OVERVIEW OF AUTHORITIES AND JURISDICTION

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RIVERS AND HARBORS ACT OF 1899

Navigable waters of the United States:

- “...waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.”
- Jurisdiction applies laterally over the entire surface of the waterbody.
- Jurisdiction is not extinguished by later actions or events which impede or destroy navigable capacity.



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CLEAN WATER ACT JURISDICTION

33 CFR 328.3 (A)

1. Waters currently used, used in past, or susceptible for use in interstate or foreign commerce, including waters subject to ebb and flow of the tide
2. Interstate waters and **wetlands**
3. Intrastate waters where destruction or degradation could affecting interstate or foreign commerce (HQ approval required)
 - Waters used for recreation or other purposes
 - Waters with fish or shellfish sold in interstate or foreign commerce
 - Waters used for industrial purposes
4. Impoundments of waters of the U.S.
5. Tributaries to waters in categories 1 – 4
6. Territorial seas (3 miles from shore)
7. **Wetlands** adjacent to waters of the U.S.



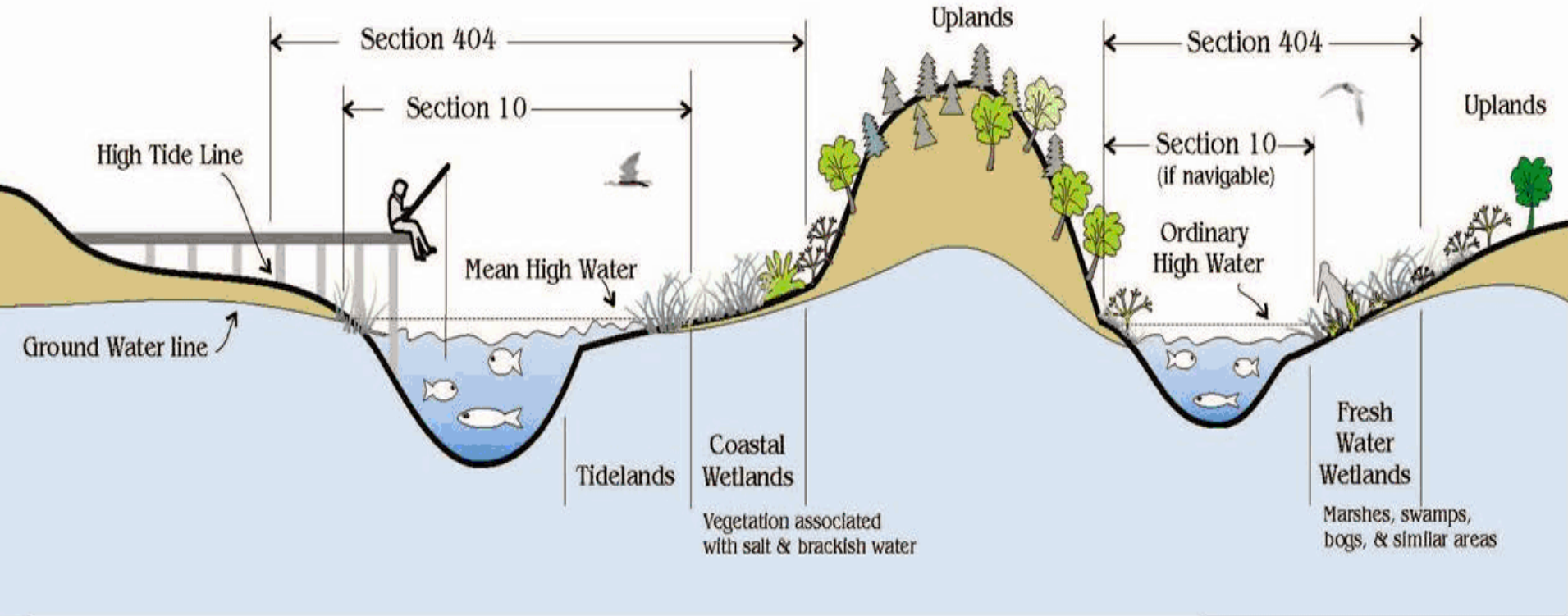
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CORPS OF ENGINEERS REGULATORY JURISDICTION

Tidal Waters

Fresh Waters



Section 103

Ocean Disposal of Dredged Material

Ocean discharges of dredged material

Section 404

Discharge of Dredged or Fill Material (all waters of the U.S.)

All filling activities, utility lines, outfall structures, road crossings, beach nourishment, riprap, jetties, some excavation activities, etc.

Section 10

All Structures and Work (navigable waters)

Dredging, marinas, piers, wharves, floats, intake / outtake pipes, pilings, bulkheads, ramps, fills, overhead transmission lines, etc.

Typical examples of regulated activities

WHO DOES JURISDICTIONAL DETERMINATIONS?

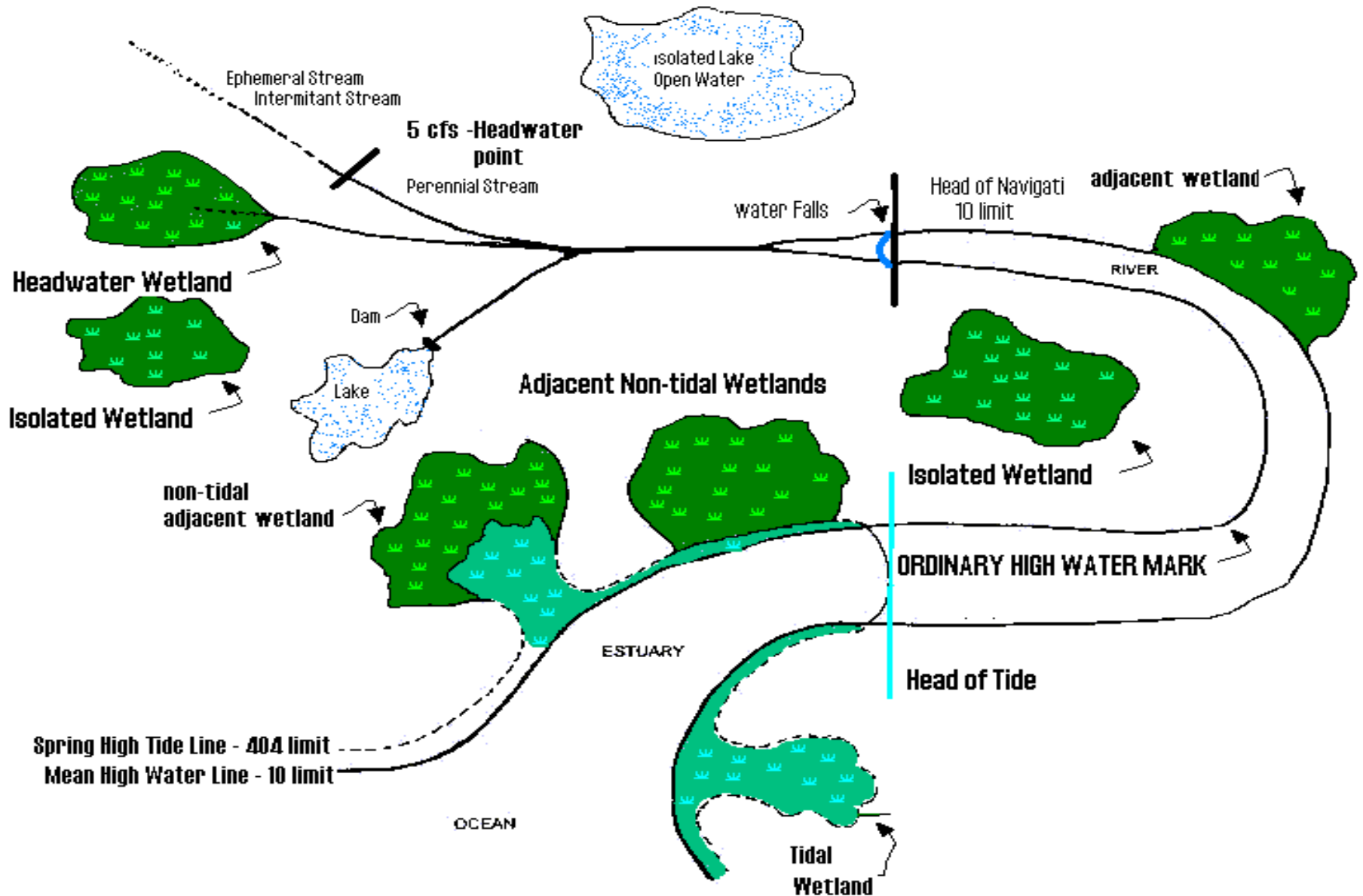
- District engineers determine:
 - ▶ Navigable waters of the U.S. (§10)
 - ▶ Waters of the U.S. (§404)
- Exceptions:
 - ▶ Division engineer makes navigability determinations
 - ▶ EPA makes a §404 jurisdictional determination
- 1989 Army-EPA Jurisdiction MOA
 - ▶ Based on 1979 Attorney General opinion
 - ▶ EPA has ultimate authority to determine geographic jurisdiction under §404 of the Clean Water Act



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Landward Limits of Waters of the United States



1986 MIGRATORY BIRD RULE

- Habitat for birds protected under the Migratory Bird Treaties.
- Habitat supporting migratory birds crossing state boundaries
- Habitat for Endangered Species
- Irrigate crops sold in Interstate Commerce



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U.S. SUPREME COURT CASES SHAPING CLEAN WATER ACT JURISDICTION

- U.S. v. Riverside Bayview (1985)
 - ▶ Michigan
 - ▶ Wetlands adjacent to a navigable waterbody are subject to CWA jurisdiction
- Solid Waste Agency of Northern Cook County (SWANCC) v. USACE (2001)
 - ▶ Illinois
 - ▶ No CWA jurisdiction over isolated, intrastate, non-navigable waters based on use by migratory birds alone
- Rapanos v. U.S. and Carabell v. U.S. (2006)
 - ▶ Michigan
 - ▶ CWA jurisdiction applies to relatively permanent waters connected to traditional navigable waters, plus wetlands with a continuous surface connection to those relatively permanent waters (Plurality opinion)
 - ▶ CWA jurisdiction requires finding of significant nexus to traditional navigable waters (Kennedy opinion)



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SWANCC GUIDANCE

- Issued on January 15, 2003
- Do not assert CWA jurisdiction over isolated, intrastate, non-navigable waters when sole basis is use by migratory birds
- Field staff need to seek formal, project-specific Headquarters approval before asserting jurisdiction over waters based on (a)(3) factors
 - Other waters (usually intrastate), where their degradation or destruction could affect interstate or foreign commerce
 - Recreation
 - Fish and shellfish
 - Industrial use
- Continue to assert jurisdiction over traditional navigable waters and adjacent wetlands, and generally their tributaries (and adjacent wetlands)
- New data forms



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RAPANOS-CARABELL GUIDANCE

- Issued June 5, 2007
- Revised December 2, 2008
- Joint guidance issued by Army and EPA
- Retains key principles provided in 2003 SWANCC guidance
- HQ approval needed to assert (a)(3) jurisdiction
 - Intrastate waters where destruction or degradation could affecting interstate or foreign commerce

RAPANOS-CARABELL GUIDANCE

- Jurisdictional waters (categorical findings of CWA jurisdiction):
 - Traditional navigable waters
 - Wetlands adjacent to traditional navigable waters
 - bordering, contiguous, neighboring
 - Non-navigable tributaries of traditional navigable waters that have relatively permanent flow
 - Flow year round
 - Flow seasonally (e.g., 3 months)
 - Wetlands that directly abut these non-navigable tributaries with relatively permanent flow



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CWA TNW DESIGNATIONS

- September 24, 2008, directive from ASA(CW)
- Additional guidance issued on October 16, 2008
- Stand-alone CWA TNW designations under § 328.3(a)(1) must be elevated to Division Commanders
- ASA(CW) directive only addresses procedures
- Substantive criteria for what constitutes a CWA TNW provided by:
 - Appendix D of the Rapanos-Carabell guidance
 - December 2, 2008, Rapanos-Carabell guidance (footnote 20)



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REVISED RAPANOS-CARABELL GUIDANCE

- December 2, 2008, revision
- Focused on three issues:
 - Clean Water Act Traditional Navigable Waters (§328.3(a)(1))
 - Definition of “adjacent”
 - Identifying the “relevant reach”



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CLEAN WATER ACT TRADITIONAL NAVIGABLE WATERS

Broader than RHA § 10 waters

They include:

- Waters determined to be navigable-in-fact by a federal court
- Waters historically or currently used for commercial navigation
 - e.g., boat rentals, guided fishing trips, water ski tournaments
- Evidence of susceptibility for use in future commercial navigation
 - Must be more than speculative or insubstantial
 - Clear documentation required (e.g., development plans)
 - Use caution when assessing average annual flows in “flashy waters” – daily gage data provides better representation



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REGULATORY GUIDANCE LETTER (RGL) 16-01

- October 2016
- RGL 16-01 explains differences between an approved JD and preliminary JD.
- Provides guidance on which JD, if any, is appropriate to issue.
- Encourages discussions between Corps districts and interested parties obtaining the Corps views on jurisdiction.



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RELEVANT FEDERAL STATUTES

- **Clean Water Act of 1972 and Amendments**
 - Authorized EPA and the Corps to regulate certain activities in wetlands and other waters
- **Food Security Act of 1985 and Amendments**
 - Authorized NRCS to make wetland determinations under the Act's "Swampbuster" provisions

WHY DELINEATE WETLANDS AND OTHER WATERS OF THE U.S.

- Help to define the limits of CWA jurisdiction, in accordance with current laws, regulations, and policy.
- Determine the boundary of the wetland, ditch, stream, river, lake, reservoir, playa, mudflat that may be affected by a project, as a first step in impact assessment, alternatives analysis, and mitigation.



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Questions ?

