

US Army Corps of Engineers Regulatory Program Sacramento District: Section 10 and Section 404

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Bill Guthrie



US Army Corps of Engineers
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Overview

- Corps Authority under these two laws
- History of the Rivers and Harbors Act of 1899
- History of the Clean Water Act and Amendments 1972
- Section 10 and Section 404 Waters defined
- Permit and Exemptions
- Questions



Authorities

- Section 404 of the Clean Water Act

“Discharge of dredged or fill material into waters of the United States, including wetlands”

- Section 10 of the Rivers and Harbors Act of 1899

“Work or structures in or affecting navigable waters”

- Regulations: 33 CFR 320-332



Section 10 of the Rivers and Harbors Act

Section 10 of the Rivers and Harbors Appropriation Act of 1899

33 U.S.C. 403. Construction of bridges, causeways, dams or dikes generally;
exemptions

That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.



Definition of Navigable Waters of the United States

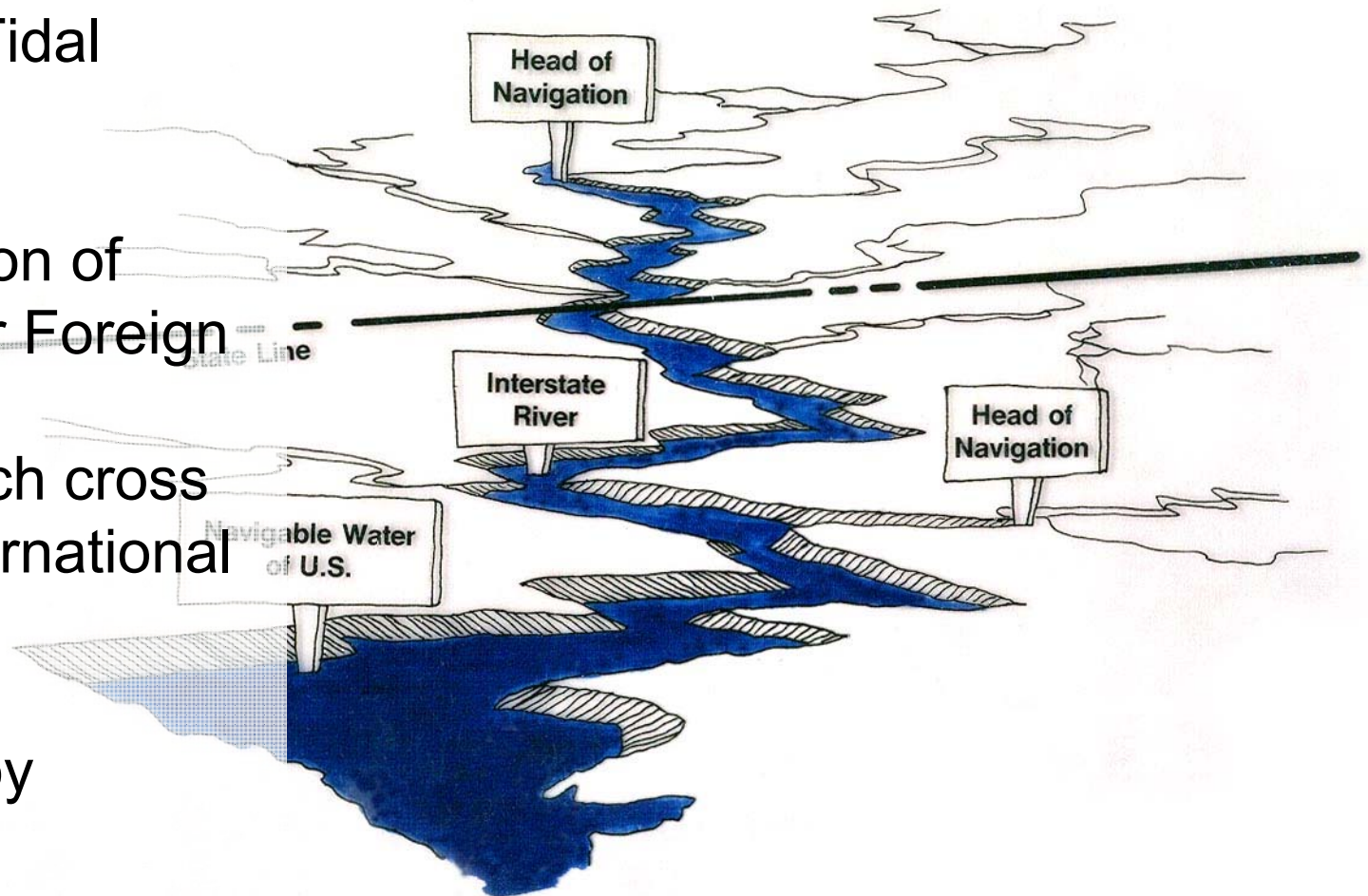
- Definition of navigable waters of the United States can be found at 33 CFR Part 329



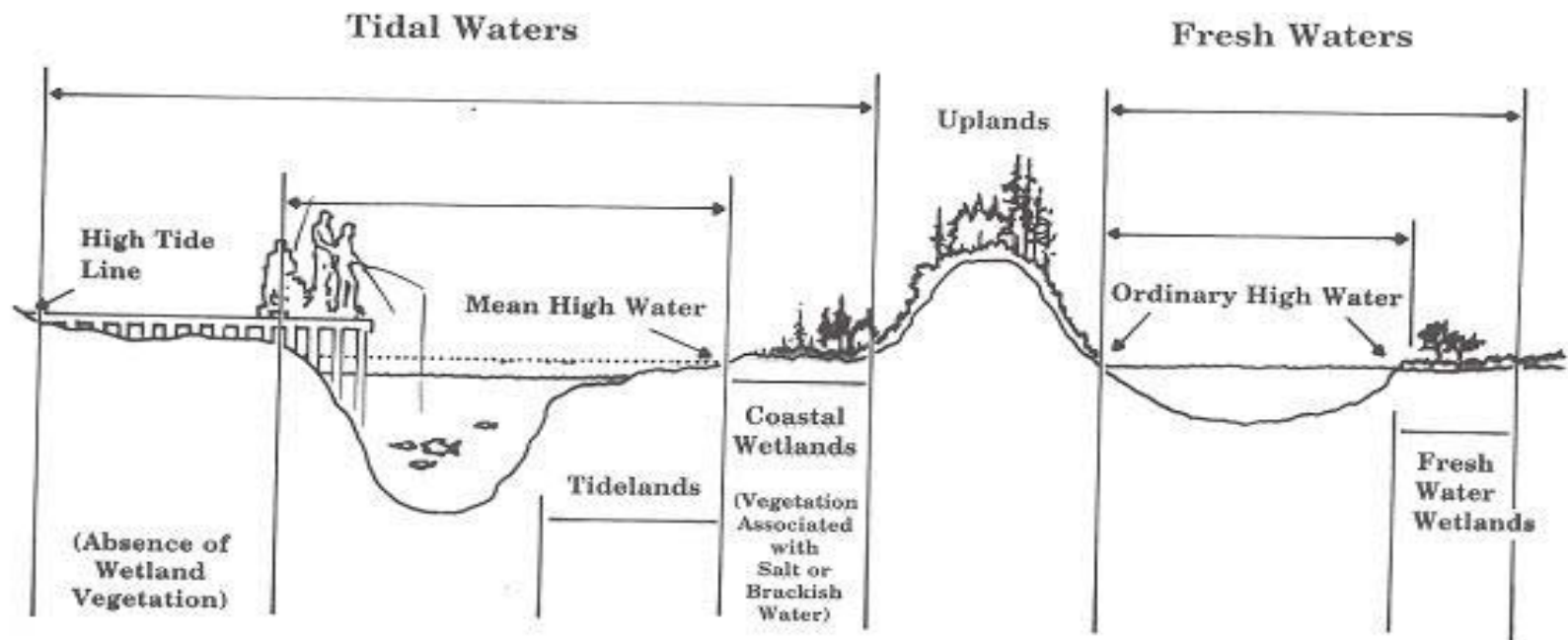
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Section 10 Jurisdiction – Navigable Waters 33 CFR Part 329

- 1) Subject to Tidal Action
- 2) Used for transportation of Interstate or Foreign Commerce
- 3) Waters which cross state or international borders
- 4) Designated Navigable by Congress



Waters of the United States



Rivers and Harbors Act

The Rivers and Harbors Act is the oldest environmental law in the United States

- Enacted March 3, 1899
- The act made it a misdemeanor to discharge refuse material into navigable waters
- Section 10 regulates work and structures in, over and under navigable waters and is administered by the Corps of Engineers



Section 10 authority

- Under Section 10 the Corps regulates structures and work in, over and under navigable waters of the United States.
- Structures such as:
 - ▶ Piers
 - ▶ Boat docks
 - ▶ Bridges (the Coast Guard takes jurisdiction over some structures under Section 9 of the Act and under the Bridge Act of 1946)



Section 10 authority

- Under Section 10 the Corps regulates work in navigable waters such as:
 - ▶ Dredging
 - ▶ Pile driving
 - ▶ Dewater and falsework construction



Structures in Section 10 waters



Activities such as pile driving

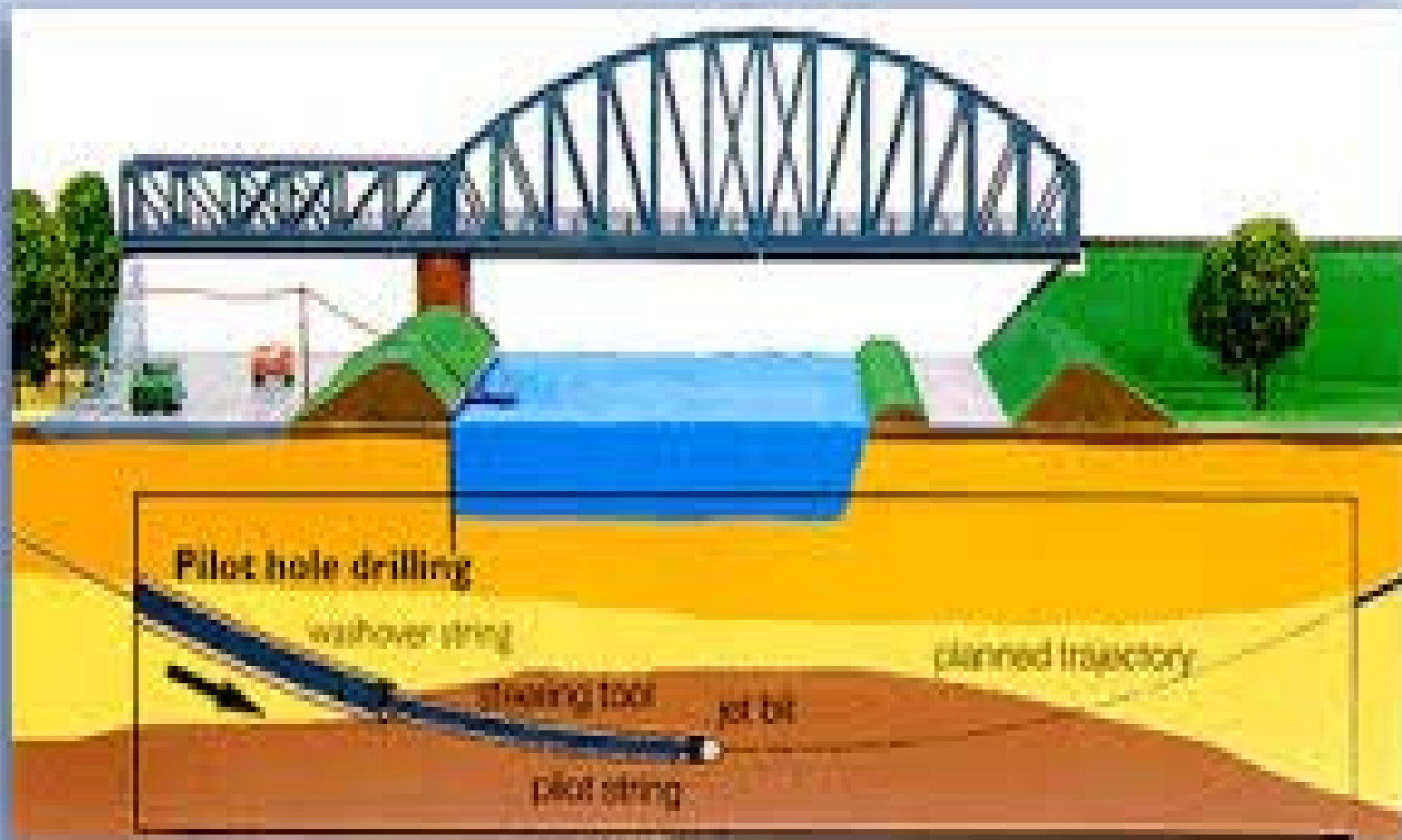


Section 10 authority

- Utility Crossings of Section 10 waterways also require permitting by the Corps.
- Examples:
 - ▶ Water and gas lines including those which are directional bored under streambeds
 - ▶ Overwater electrical power lines



Directional Boring



Section 10 summary

33 CFR Part 329

Section 10 authority is fairly straight forward.

A Section 10 water is a water that:

- Currently or historically used for interstate/international commerce
- Crosses state/national borders
- Tidally influenced
- Designated such by Congress



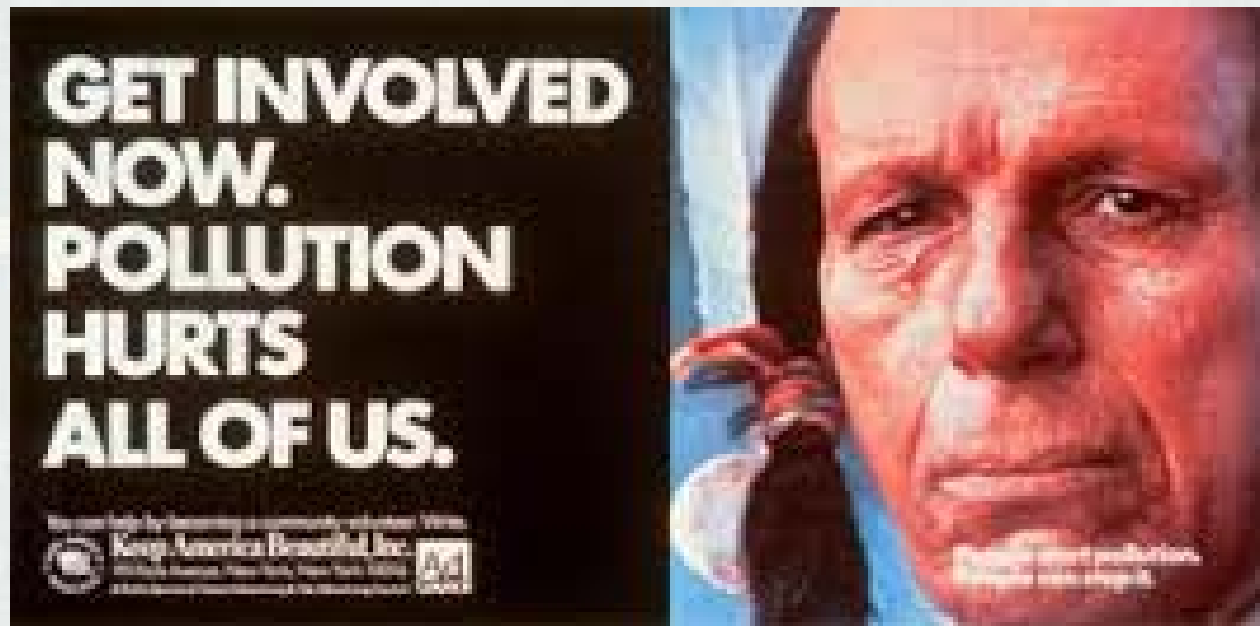
1933- U.S. ex rel. Greathouse et al v.Dern

- Corps denies Section 10 permit based on reason other than navigation
- Plaintiff applied to the Army Corps to construct a Wharf in the Potomac River. The site was situated in the path of the proposed George Washington Parkway.
- The Corps denied the permit on the grounds of addition cost to the government to construct the GW Parkway



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Environmental Activism of the 1960s and 70s resulted in new legislation



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Other Environmental/Preservation Laws/Lawsuits/Social Events

- 1955 Fish and Wildlife Coordination Act
- 1968 Zabel vs. Tabb-Public Interest Review is born
- 1969 National Environmental Policy Act
- 1970 Clean Air Act
- 1970 First Earth Day
- 1972 Clean Water Act
- 1973 Endangered Species Act



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Federal Water Pollution Control Act of 1972 (AKA Clean Water Act)

- Timeline (PBS *Troubled Waters A Brief History of the Clean Water Act*)
- 1968 Chesapeake Bay fisheries losing \$ 3 million annual
- DTT levels in some fish nine times FDA limit

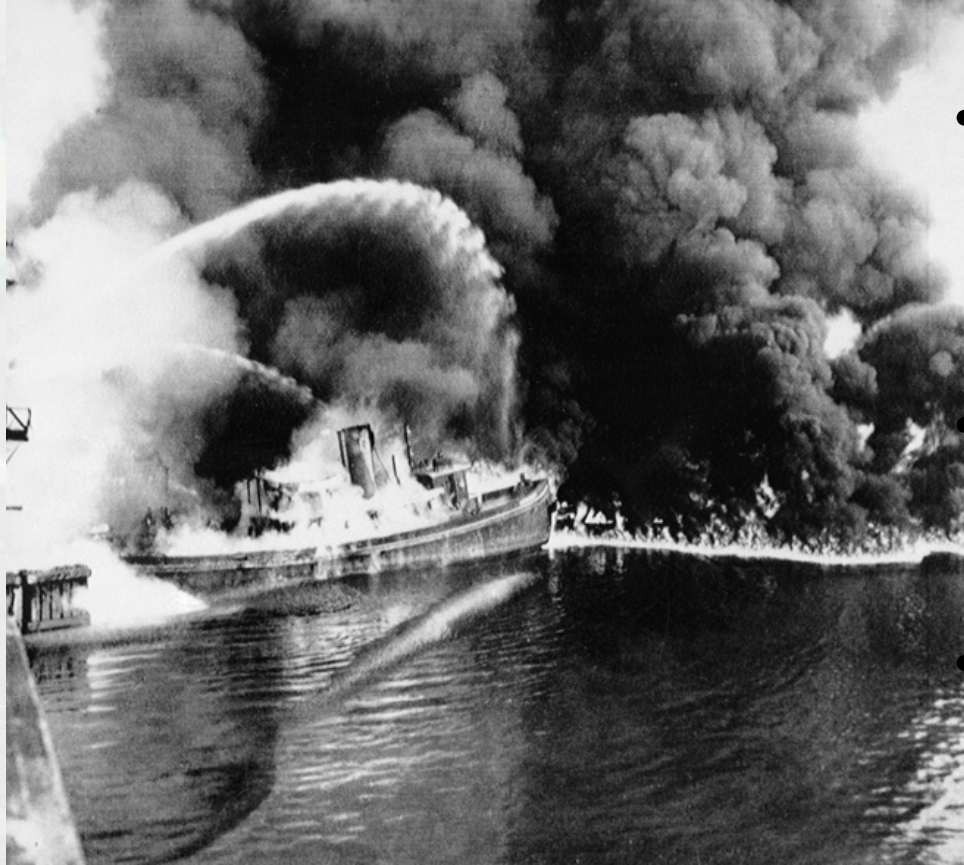


Timeline

- 1969 bacterial levels in Hudson River
- Record number of Fish Kills over 41 million fish
- Cuyahoga River catches fire (not for the first time)
- 1970 Bureau of Water Hygiene reports 30% of drinking water samples had chemicals levels exceeding Public Health Service limits



Example: Cuyahoga River Near Cleveland, Ohio (1969)



- Unrestricted dumping of oil & other industrial pollution
- “Oozes rather than flows” (Time Magazine)
- Helped spur passage of Clean Water Act (1972) & formation of USEPA



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Timeline

- 1971 FDA reported 87% of Swordfish sampled had mercury at levels that were unfit for human consumption
- 1972 Congress passes the Clean Water Act at the time nearly 2/3 of country's lakes, rivers and coastal waters were unfit for swimming or fishing



Clean Water Act signed by President Nixon



Well actually No

- The president veto the Act late in the night of October 17, 1972. This became know as the midnight veto



Congress worked across the aisle to override the Presidential Veto



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The bill passed into law on October 18, 1972

- The Corps authority is under Section 404 of the Clean water act
- Section 404 regulates the discharge of dredged or fill material into waters of the United States
- What is a water of the United States
- Good Question!



Definitions of Waters of the United States

- Definitions of waters of the United States can be found at 33 CFR Part 328



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Section 404

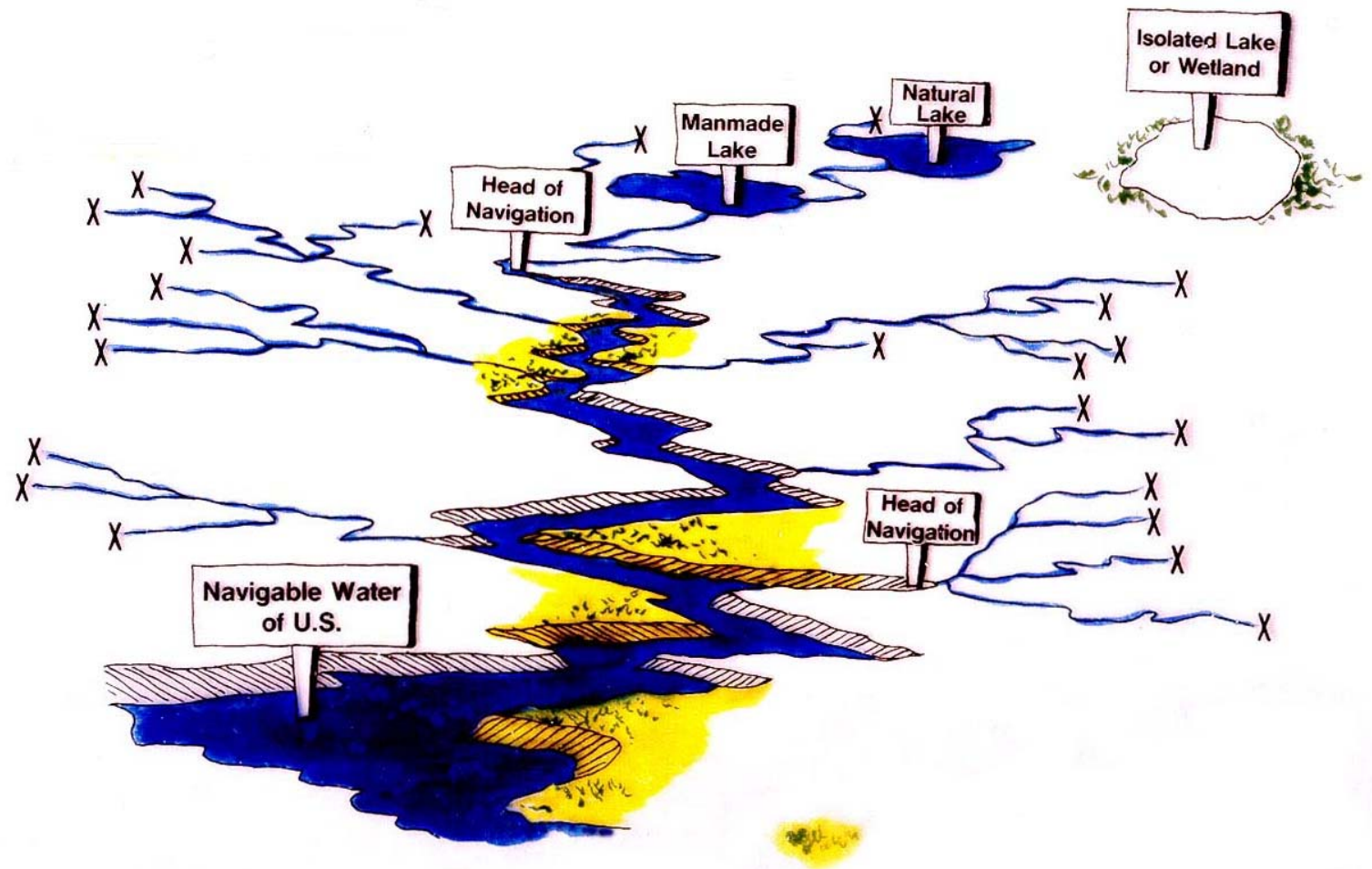
33 CFR Part 328

- Any Section 10 water is also jurisdictional under Section 404
- Streams that are tributary to Traditional Navigable (TNW) water (Section 10)
- Wetland which contiguous, adjacent to or abutting a TNW or tributary to a TNW are likely Section 404 waters



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Waters of the United States



Section 404 Jurisdiction

- Case by Case
- Wetland Delineation submitted to and verified by the Corps
- Several recent Supreme Court decisions have redefined the jurisdictional reach of Section 404
- New CWA rule published June 29, 2015, took effect August 28, 2015. Stayed by the 6th Circuit in October 2015.



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TNW and their Tributaries

- TNW and Tributaries to these waters are fairly straight forward
- Corps jurisdiction is determined by the Ordinary High Water Mark of High Tide Line



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Determining Jurisdiction

- **Must determine whether Corps has jurisdiction before taking an action**
- **Two step process:**
 1. What is extent of wetlands and other waters that may be subject to Corps jurisdiction (scientific)?
 - Delineation wetlands, ordinary high water mark
 2. Does the Corps regulate these areas (legal, administrative)?



Defining Wetlands

- **Definition**

- ▶ “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.” (33 *CFR* Section 328.3(b))

- **3-parameter test**

- ▶ Wetland vegetation
- ▶ Hydrology
- ▶ Wetland soils



Examples or Activities Regulated under Section 404: *33 CFR 323.3*

- Mechanized land clearing
- Deep ripping
- Mass grading
- In-water construction



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Regulated Activities (Continued)

- The previous activities would be regulated under Section 404 if the activity resulted in the discharge of dredged or fill material into waters of the United States
- Some activities are exempt under Section 404



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Exempt activities under Section 404: 33 *CFR* 323.4

- Examples
 - ▶ Normal farming practices
 - ▶ Maintenance
- The activities are exempt not the water which may be jurisdictional under other circumstance



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Cuyahoga River - Today



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Are there any



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Questions?

