



“Waters of the United States (WOTUS)”
Policy and Litigation Background
Lee Decker – Oct. 29, 2014

Discussion Outline

- Statutory background
- Regulatory background
- Litigation background
- EPA/Corps response to *SWANCC* and *Rapanos*, including 2014 proposed rule
- Discussion of issues raised by proposed rule
 - Traditional navigable waters
 - Interstate waters
 - Tributaries and ephemeral drainages

Statutory Background

- Rivers and Harbors Act of 1899
 - Authorized Corps to issue permits for construction of structures or for dredge/fill activities in navigable waters
 - Used terms “navigable waters of the United States” and “waters of the United States” interchangeably; those terms have been interpreted to extend *only* to traditional navigable waters
- Federal Water Pollution Control Act (FWPCA) of 1948
 - Gave no regulatory authority to the federal government; primarily encouraged states to engage in water pollution control
 - Amended in 1965 to require states to develop water quality standards subject to federal review

Statutory Background (cont'd)

- FWPCA of 1972 or Clean Water Act (CWA) (amended in 1977 and 1987)
 - Established broad objective to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”
 - Required individual permits for discharges to “navigable waters”
 - Defined “navigable waters” as “the waters of the United States, including the territorial seas”
 - Conference report – “the conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation . . .”
 - Constitutional commerce power *versus* constitutional authority over traditional navigable waters

Regulatory Background

- EPA initial definition of “navigable waters” (1973 – 38 Fed. Reg. 13529)
 - Based on argument that federal jurisdiction under the 1972 FWPCA extended to waters capable of “affecting” interstate commerce
- Current version of definition of WOTUS was substantially adopted by EPA in 1980 (45 Fed. Reg. 33424)

Regulatory Background (cont'd)

- Corps initial definition of “navigable waters” (1974 – 39 Fed. Reg. 12119)
 - Rejected EPA’s broad definition and asserted jurisdiction only over the full scope of “traditional navigable waters”
 - Federal district court held in 1975 that the Corps’ definition was illegally narrow
- Corps issued interim final regulations in 1975 (40 Fed. Reg. 31324) that expanded its definition to regulate most linear water features below the headwaters and finalized the regulations in 1977 (42 Fed. Reg. 37144)

Regulatory Background (cont'd)

- Corps adopted interim final regulations in 1982 (47 Fed. Reg. 31810) that tracked EPA's 1980 regulations and definition of WOTUS
- Corps finalized its regulations and associated definition of WOTUS in 1986 (51 Fed. Reg. 41250)
 - Preamble identified “migratory bird rule” and noted several exemptions from the WOTUS definition including “non-tidal drainage and irrigation ditches excavated on dry land,” certain artificial lakes and ponds, certain artificial reflecting or swimming pools, and certain waterfilled depressions created incidental to construction or pits for obtaining fill, sand, or gravel

Regulatory Background (cont'd)

- Current WOTUS definition (40 C.F.R. 122.2 & 33 C.F.R. 328.3)
 - All waters which are currently used, 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 (traditional navigable waters)
 - All interstate waters, including interstate “wetlands”
 - 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 would affect or could affect interstate or foreign commerce including any such waters

Regulatory Background (cont'd)

- from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - which are used or could be used for industrial purposes by industries in interstate commerce
- All impoundments of waters otherwise defined as WOTUS
 - Tributaries of waters identified above
 - The territorial seas
 - “Wetlands” adjacent to waters identified above
 - Exemptions – “waste treatment systems” and “prior converted cropland”

Litigation Background

- Supreme Court Cases
 - *Riverside Bayview Homes* (1985) – extended CWA jurisdiction to wetlands adjacent to navigable waters
 - *Solid Waste Agency of North Cook County (SWANCC)* (2001) – dealt with “other waters” and “intrastate waters” portion of WOTUS definition; struck down migratory bird rule and held that CWA was not intended to regulate non-navigable, isolated, intrastate waters; noted that nothing in the CWA or its legislative history showed “that Congress intended to exert anything more than its commerce power over navigation.”

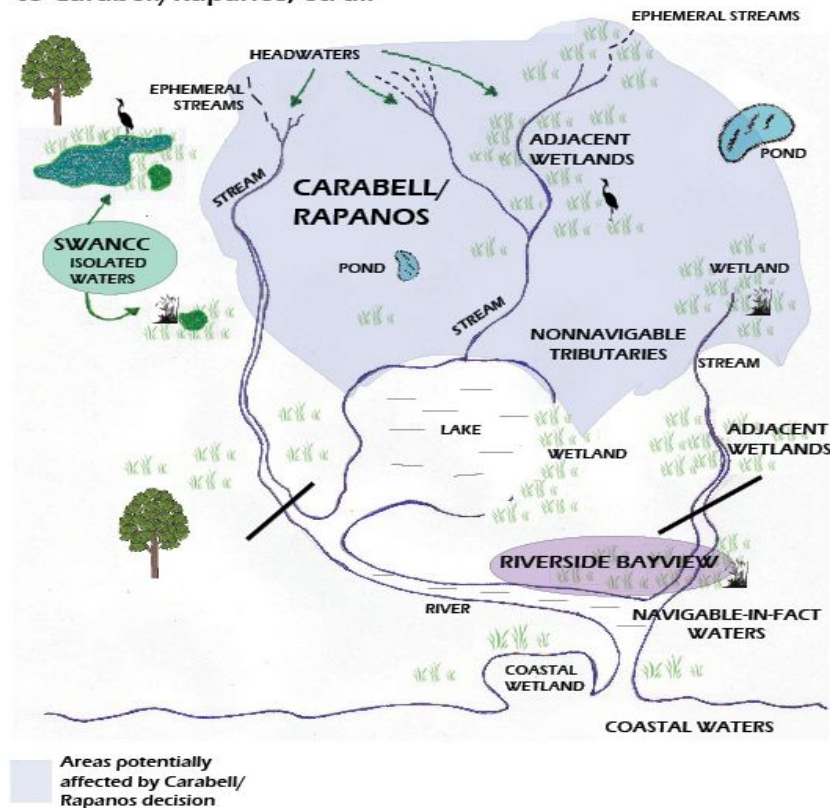
Litigation Background (cont'd)

– *Rapanos* (2006)

- Addressed tributary and adjacent wetlands portion of WOTUS definition.
- Plurality – jurisdiction extends only to tributaries to traditional navigable waters that are “relatively permanent, standing or continuously flowing bodies or water” and *not* to tributaries “through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall”
- Justice Kennedy – jurisdiction extends to wetlands adjacent to tributaries only if “if 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’”
- Myriad of lower federal court decisions on WOTUS definition

Litigation Background (cont'd)

CWA Jurisdictional Areas Subject to Carabell/Rapanos, et. al.



Watershed graphic prepared by Assoc. of State Wetland Managers

Agency Response to SWANCC & Rapanos

- January 2001 & January 2003 – joint EPA/Corps memoranda attempted to limit SWANCC to waters for which jurisdiction was based “solely on the presence of migratory birds”
- January 2003 Advanced Notice of Proposed Rulemaking
 - EPA and the Corps received over 130,000 comments
 - EPA and the Corps decided not to undertake a rulemaking but to preserve the federal government's authority to protect wetlands and other waters.

Agency Response to SWANCC & Rapanos (cont'd)

- 2007/2008 Rapanos Guidance
 - Three types of regulated waters
 - Traditional navigable waters and adjacent wetlands
 - Non-navigable tributaries to traditional navigable waters that are relatively permanent and directly abutting wetlands
 - Non-navigable tributaries that are not relatively permanent and adjacent wetlands – only jurisdictional if meet “significant nexus” test individually
 - Agencies will not assert jurisdiction over
 - Swales or erosional features (e.g., gullies, *small washes characterized by low volume, infrequent, or short duration flow*)
 - Ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

Agency Response to SWANCC & Rapanos (cont'd)

- 2011 draft “CWA Protection Guidance”
 - Regulated waters
 - Traditional navigable waters and adjacent wetlands
 - Interstate waters and adjacent wetlands
 - Non-navigable tributaries to traditional navigable waters or interstate waters that are relatively permanent and directly abutting wetlands
 - Non-navigable tributaries to traditional navigable waters or interstate waters that are not relatively permanent and adjacent wetlands – jurisdictional if meet “significant nexus” test based on “single point of entry” and “similarly situated” waters
 - Other waters if satisfy broad “significant nexus” test
 - Exempted erosional features but only gullies and rills

Agency Response to SWANCC & Rapanos (cont'd)

- 2014 Proposed Rule
 - Published April 21, 2014 (79 Fed. Reg. 22188)
 - Comment deadline extended until November 14, 2014
 - Preceded by draft connectivity report and initiation of Science Advisory Board (SAB) panel review of draft report
 - Proposes to use same definition for all CWA regulatory programs including NPDES (Section 402) permit program, Corps dredge and fill (Section 404) permit program, water quality standards and total maximum daily load (TMDL) program (Section 303), oil spill prevention and response program (Section 311), and state water quality certification process (Section 401)

Agency Response to SWANCC & Rapanos (cont'd)

– Proposed definition of WOTUS:

- Traditional navigable waters
- All interstate waters and wetlands
- The territorial seas
- All impoundments of waters otherwise listed
- All tributaries of waters listed above, whether ephemeral, intermittent, or perennial
- Adjacent waters, including wetlands
- On a case-specific basis, other waters, including wetlands, with a significant nexus to traditional navigable waters, interstate waters, or territorial seas alone or in combination with other similarly situated waters in the same region

Agency Response to SWANCC & Rapanos (cont'd)

- Exclusions from proposed WOTUS definition:
 - Waste treatment systems
 - Prior converted croplands
 - Certain ditches
 - Features deemed exempt under Corps' 1986 preamble language
 - Groundwater, including groundwater drained through subsurface drainage systems
 - Gullies and rills and non-wetland swales

Traditional Navigable Waters

- The determination of whether a water is a traditional navigable water is critical to determining the scope of the CWA jurisdiction
 - This concept has been “traditionally” defined as water susceptible to use as a highway for waterborne transportation of commercial goods in interstate or foreign commerce
 - Proposed rule attempts to redefine this concept by implying that a water will qualify as a traditional navigable water solely on the basis that it is susceptible to use for recreational purposes (such as having the potential to float a canoe or kayak – Santa Cruz River; Los Angeles River)

Interstate Waters

- Interstate waters (even small ephemeral tributaries that happen to cross state or national boundaries) are accorded the same status as traditional navigable waters under the proposed rule even though such waters are not even mentioned in *SWANCC* or *Rapanos*.
 - Proposed rule would impose jurisdiction over interstate waters and their tributaries regardless of any connection or nexus to traditional navigable waters
 - What will be considered “interstate waters?” What about waters that cross tribal boundaries?

Tributaries and Ephemeral Drainages

- Proposed rule defines tributary as a water physically characterized by the presence of a bed and banks and ordinary high water mark (OHWM), which contributes flow to traditional navigable waters, interstate waters, territorial seas, or impoundments of such waters.
 - Break in presence of bed and banks or OHWM does not defeat jurisdiction
 - Includes man-made or man-altered features
 - Includes ephemeral, intermittent, and perennial tributaries

Tributaries and Ephemeral Drainages (cont'd)

- Ephemeral drainages in the arid west
 - The highly-erodible soils in the arid west create dense, crisscrossing areas of dry arroyos, washes, and other similar drainages
 - These drainages carry water only in response to significant storm events and are dry the vast majority of the time
 - These drainages are more akin to land than a water feature
 - Due to infrequent flow, these drainages lack any chemical or biological processes and will have no such impact on downstream receiving waters
 - Often lack clearly distinguishable OHWM or bed and banks

Tributaries and Ephemeral Drainages (cont'd)



Tributaries and Ephemeral Drainages (cont'd)



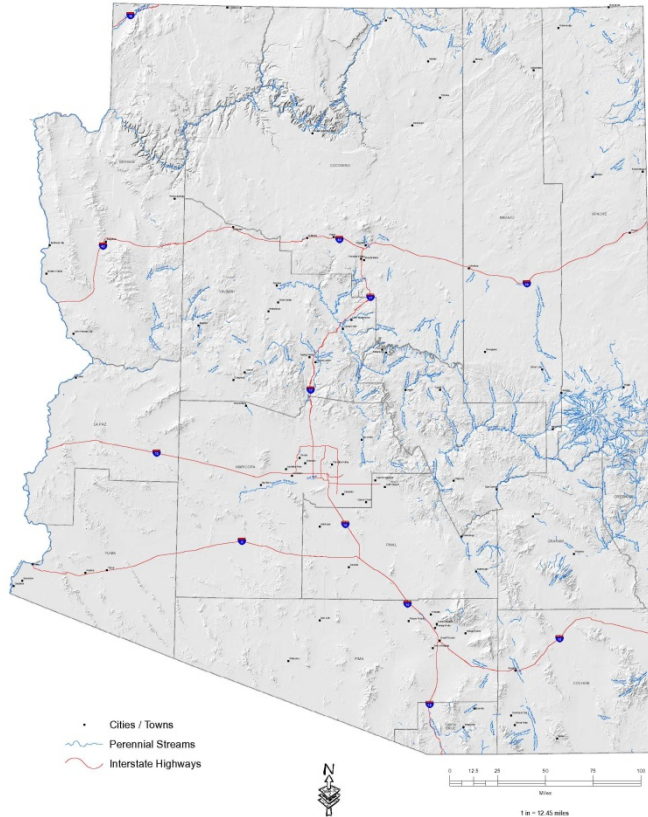
Tributaries and Ephemeral Drainages (cont'd)



Tributaries and Ephemeral Drainages (cont'd)



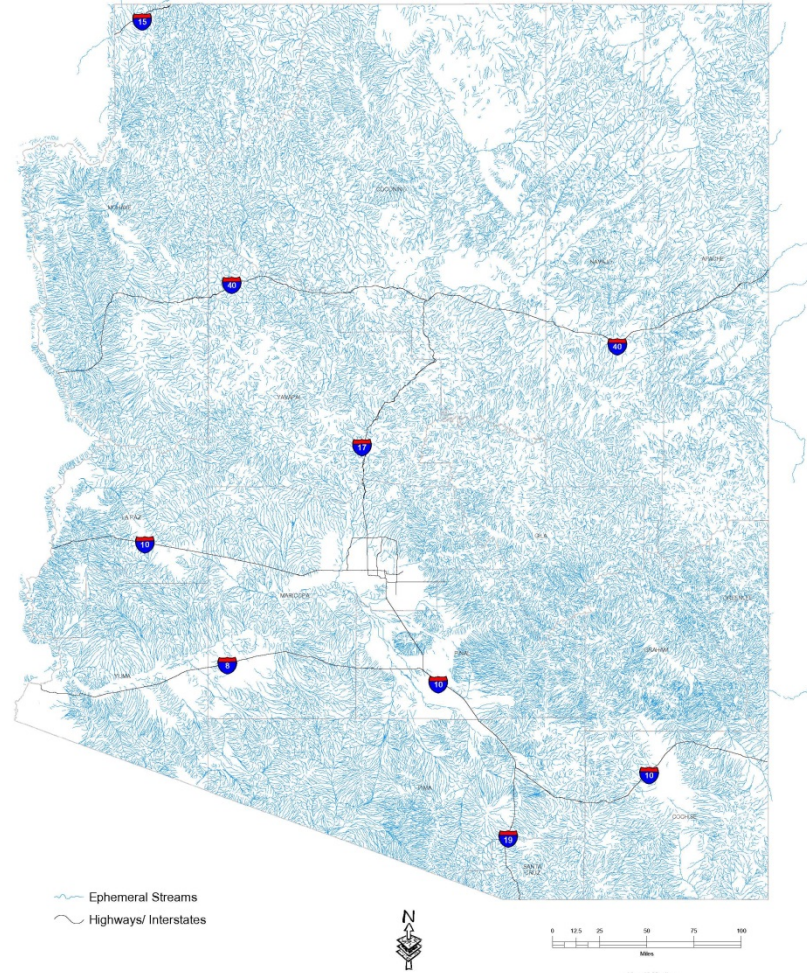
Arizona Perennial Streams



This map is for general reference only and may not be all inclusive. ADEQ does not guarantee the accuracy of the information. More detailed information and specific locations can be obtained by contacting the Arizona Department of Environmental Quality.

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Arizona Ephemeral Streams



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Tributaries and Ephemeral Drainages (cont'd)

- Proposed rule requests comment on how to distinguish between categorically jurisdictional ephemeral tributaries and exempt gullies, rills, and swales
 - “The agencies request comment on how they could provide greater clarity on how to distinguish between erosional features such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional”
 - “The agencies request comment on how they could provide greater clarity on how to distinguish swales, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional”

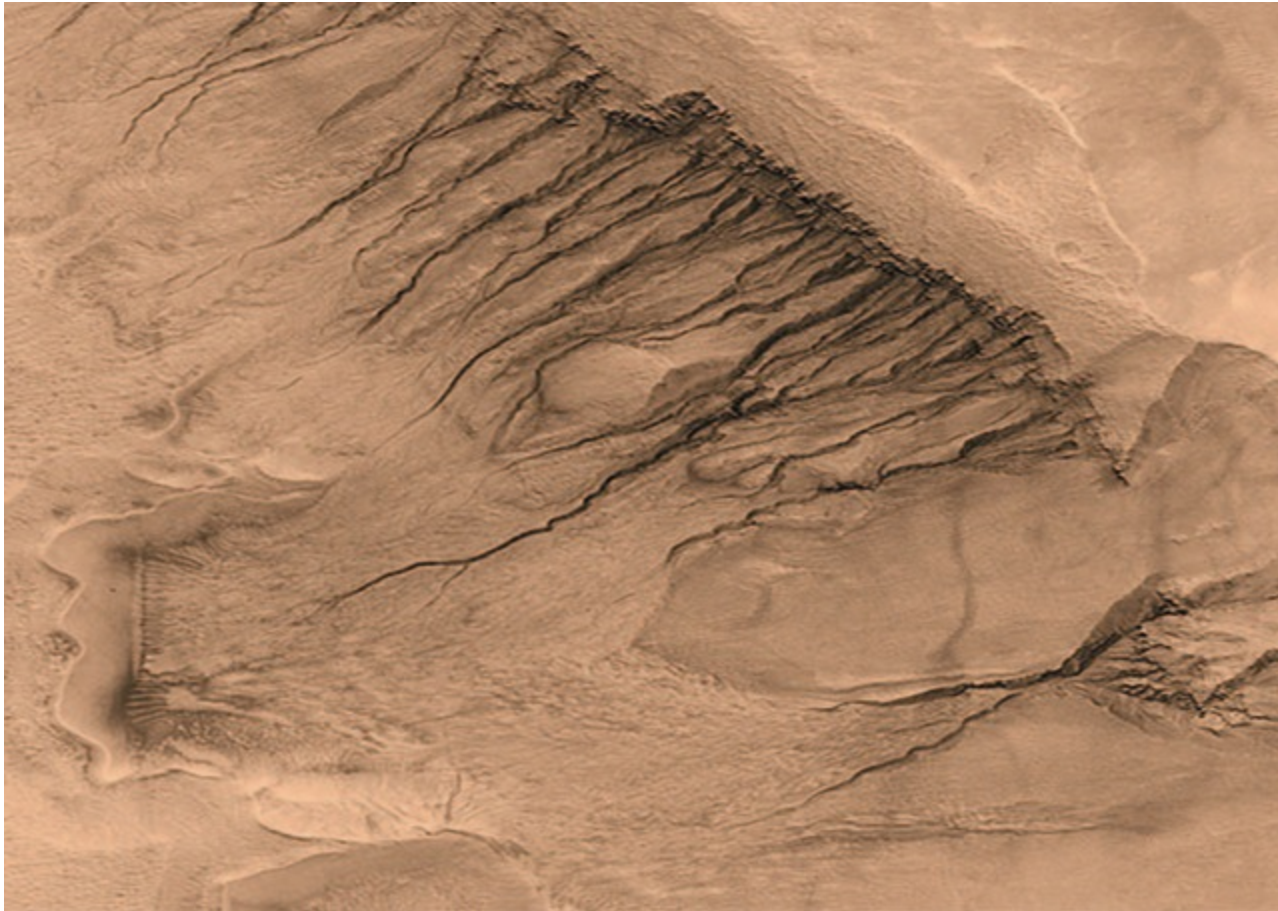
Tributaries and Ephemeral Drainages (cont'd)

- Gullies and rills are not defined in the proposed rule, but are discussed in the preamble
 - Both typically lack an OHWM
 - Rills are less permanent on the landscape whereas gullies are younger than streams in geologic age
 - Gullies often have steep banks with small beds and are deeper than wide
 - “Streams, except on steep slopes or where soils are highly erodible, are characterized by the presence of bed and banks and an OHWM as compared to typical erosional features that are more deeply incised”

Tributaries and Ephemeral Drainages (cont'd)



Tributaries and Ephemeral Drainages (cont'd)



Tributaries and Ephemeral Drainages (cont'd)

- Not all ephemeral drainages with bed, banks, and OHWM contribute flow
 - OHWM/channel feature are evidence that flow existed at one time
 - Channel features are known to persist even if there is no flow
 - HWMs are not “ordinary” in the arid west, but represent extreme conditions
 - Flow often lost to infiltration
- OHWMs may make sense to define tributaries in humid landscapes, but not in arid landscapes
- OHWMs do not convey any reliable information about where stormwater will flow in the next rain event

Tributaries and Ephemeral Drainages (cont'd)

- Corps OHWM guidance for arid landscapes
 - “Commonly observed physical features are potentially the result of uncommon processes and the effects of the most common condition do not persist on the landscape” (2004)
 - “The most problematic [OHW] delineations are associated with the commonly occurring ephemeral/intermittent channel forms that dominate the Arid West landscape” (2008)
 - “OHWM delineation in non-perennial (i.e., intermittent and ephemeral) streams can be especially challenging” (2014)

QUESTIONS?

