

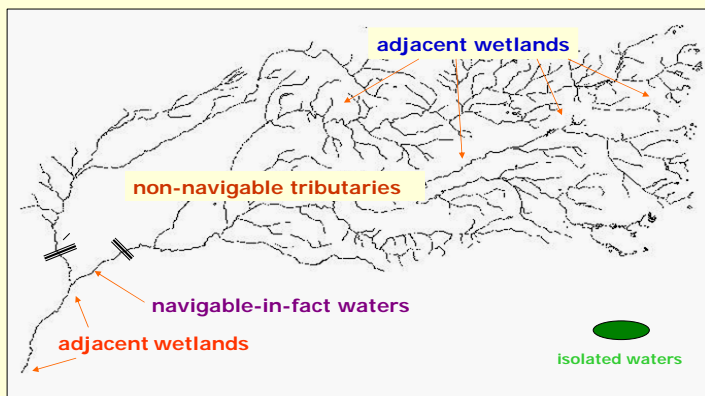
Wading into the December 2008 Rapanos Guidance



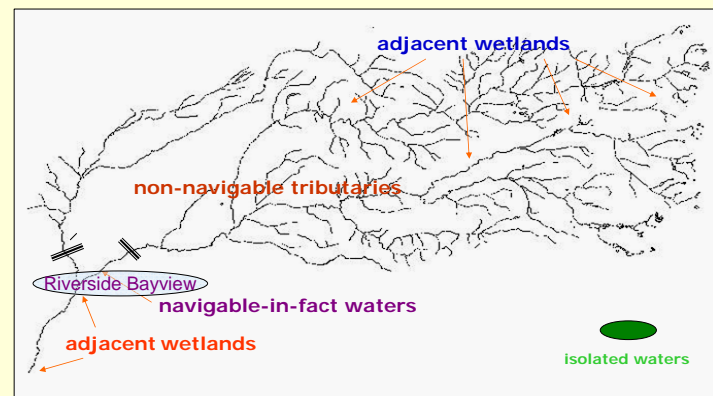
WATERS OF THE UNITED STATES

- Traditional navigable waters
- Interstate waters including interstate wetlands
- Other waters including intrastate, non-navigable waters with interstate/foreign commerce connections
- Impoundments of waters otherwise defined as waters of the U.S.
- Tributaries of the above
- Territorial seas
- Adjacent wetlands

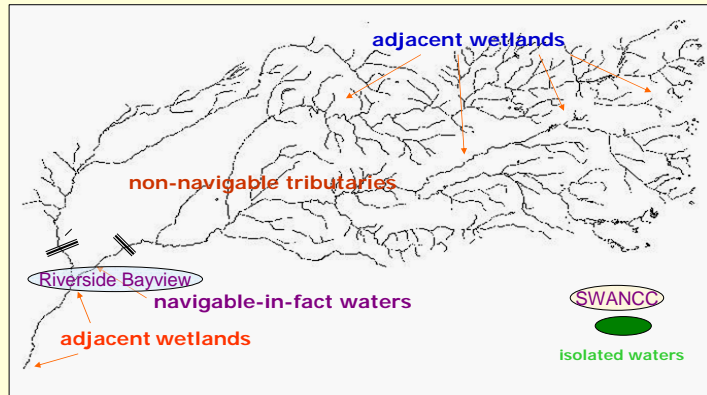
CWA Geographic Jurisdiction: The Regulations in Graphic Form



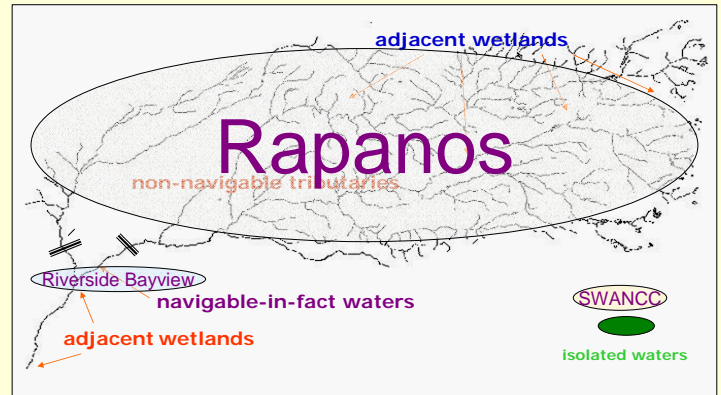
CWA Geographic Jurisdiction: The Regulations Addressed by the Supremes



CWA Geographic Jurisdiction: The Regulations Addressed by the Supremes



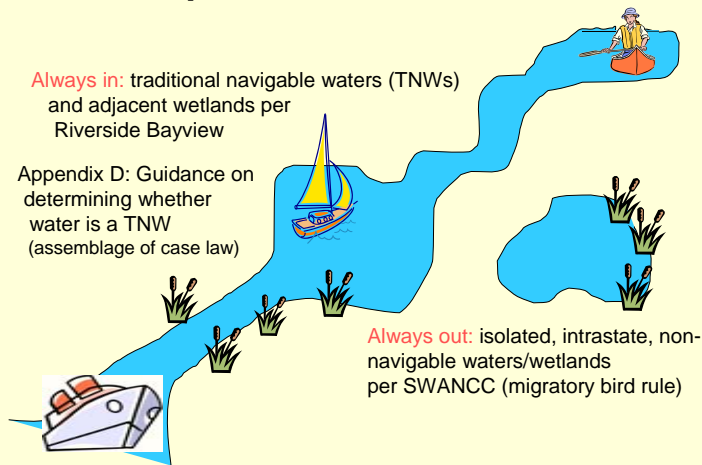
CWA Geographic Jurisdiction: The Regulations Addressed by the Supremes



Post-Rapanos Guidance: June 2007

Always in: traditional navigable waters (TNWs) and adjacent wetlands per Riverside Bayview

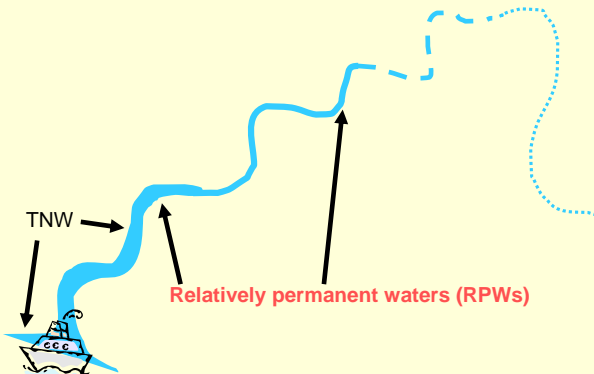
Appendix D: Guidance on determining whether water is a TNW (assemblage of case law)



Always out: isolated, intrastate, non-navigable waters/wetlands per SWANCC (migratory bird rule)

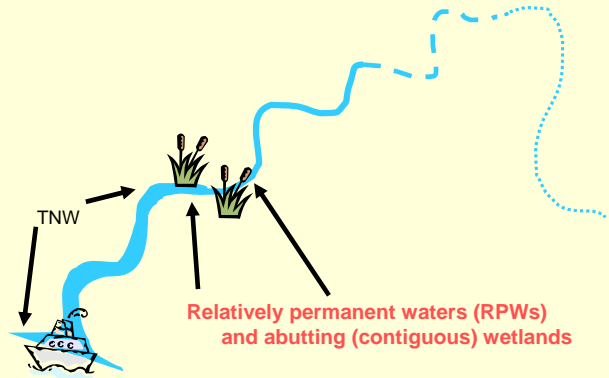
Post-Rapanos Guidance: June 2007

Significant Nexus Determination Not Required For



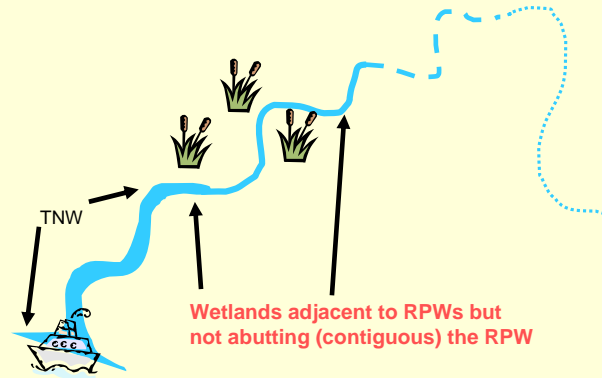
Post-Rapanos Guidance: June 2007

Significant Nexus Determination *Not* Required For



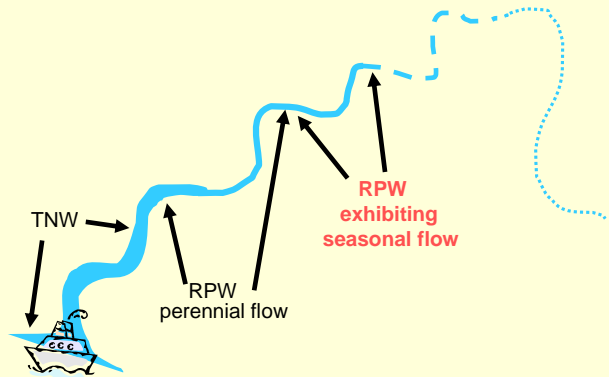
Post-Rapanos Guidance: June 2007

Significant Nexus Determination *is* Required For



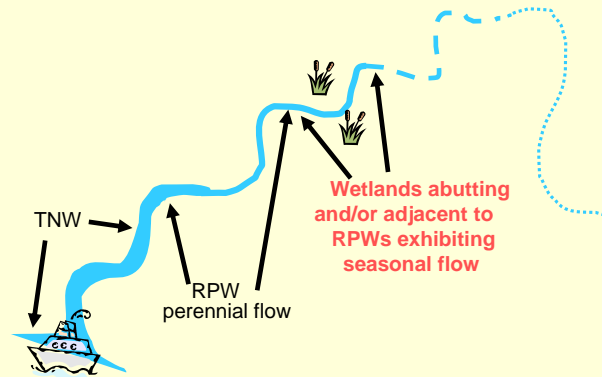
Post-Rapanos Guidance: June 2007

Significant Nexus Determination *is* Required For



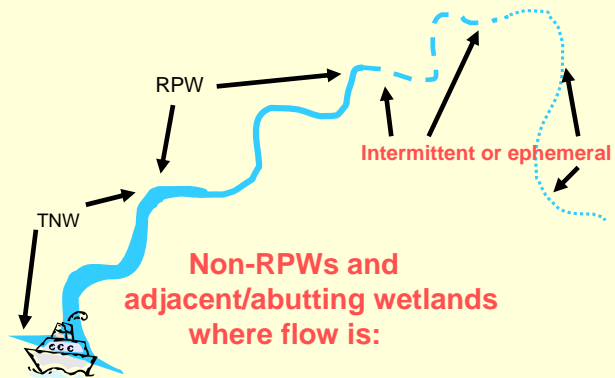
Post-Rapanos Guidance: June 2007

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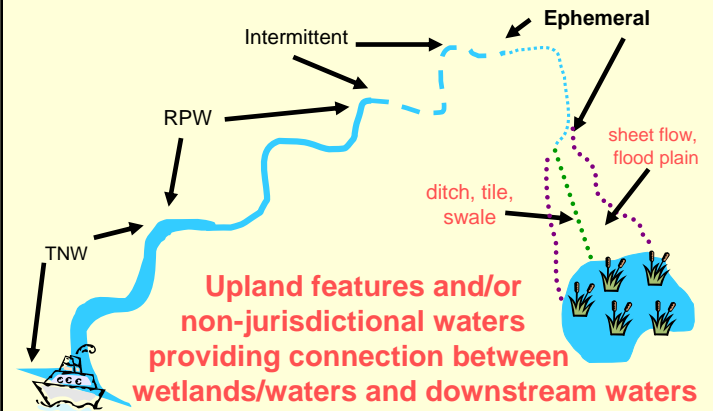
Post-Rapanos Guidance: June 2007

Significant Nexus Determination *is* Required For



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Significant Nexus Determination *is* Required For



Post-Rapanos Guidance: June 2007

Significant Nexus Determinations

Assess the **flow characteristics and functions of the tributary** itself and the **functions performed by any wetlands adjacent to the tributary** to determine if they significantly affect the chemical, physical, and biological integrity of a TNW

A significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has **more than a speculative or insubstantial effect** on the chemical, physical and/or biological integrity of a TNW.

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Significant Nexus Determinations

Involves analysis of the flow characteristics of a particular tributary and the functions of the wetlands adjacent to the tributary



Post-Rapanos Guidance: June 2007

Significant Nexus Determinations

Assess Tributary/Adjacent Wetlands' Capacity To:

Carry and/or reduce the amount of pollutants or flood waters to TNWs (big one for public interest concerns)

Provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW

Transfer nutrients and organic carbon that support downstream foodwebs

Also Assess:

Other relationships to the physical, chemical, or biological integrity of the TNW

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Relevant Reach / Similarly Situated Wetlands

Significant Nexus determinations must look at the "relevant reach" of a tributary in combination with all of the tributary's adjacent, "similarly situated" wetlands

Provides some standardization for establishing a geographic "context" for significant nexus determinations

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Relevant Reach / Similarly Situated Wetlands

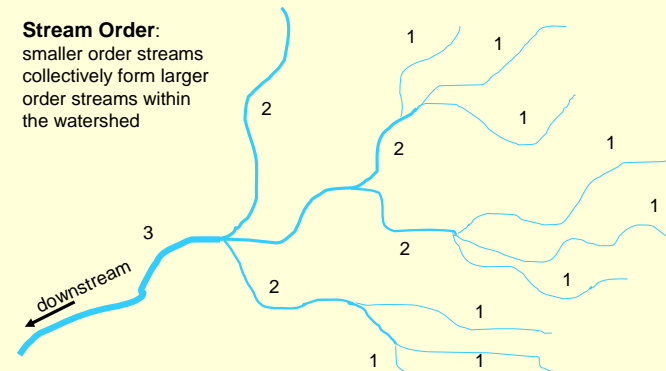
Relevant reach is the entire reach of the tributary that is of the same order (the point where two/more smaller streams form the tributary downstream to where the tributary enters a higher order stream)

"The flow characteristics of a particular tributary will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream)."

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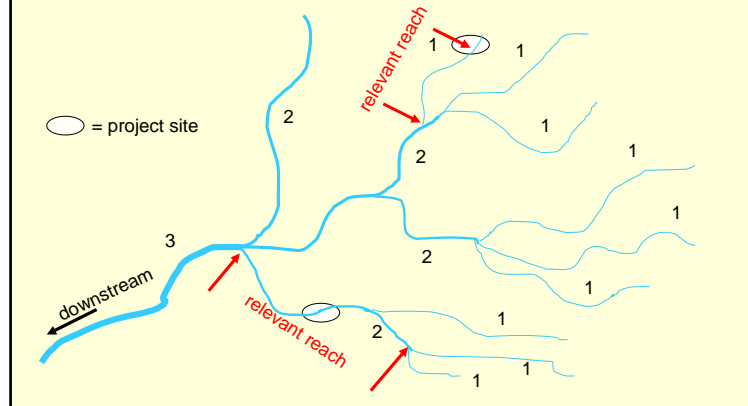
Relevant Reach / Similarly Situated Wetlands

Stream Order:
smaller order streams collectively form larger order streams within the watershed



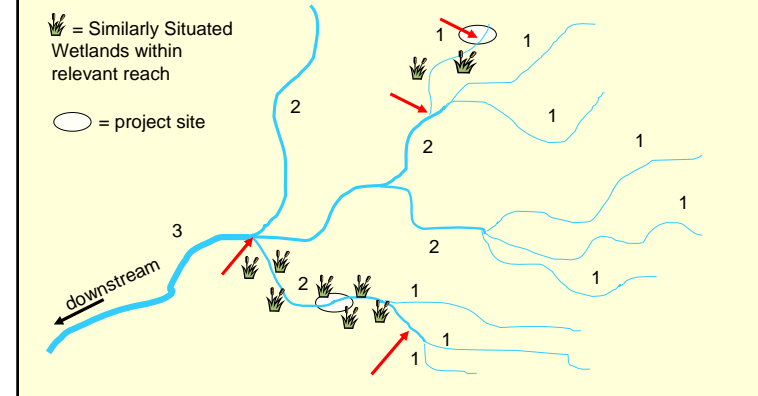
Post-Rapanos Guidance: June 2007

Relevant Reach / Similarly Situated Wetlands



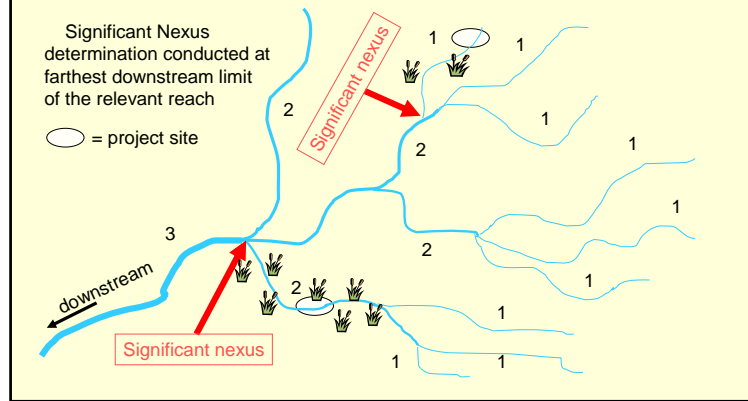
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Relevant Reach / Similarly Situated Wetlands



Post-Rapanos Guidance: June 2007

Relevant Reach / Similarly Situated Wetlands



Post-Rapanos Guidance: December 2008

Clarifies how to determine the reach of TNWs

Clarifies the term “adjacent wetlands”

Refines concept of “relevant reach”

Post-Rapanos Guidance: December 2008

TNWs:

Not just Section 10 waters

Waters determined navigable-in-fact by a court

Historically or currently used for commercial navigation, including commercial waterborne recreation (e.g., boat rentals, guided fishing trips, water ski tournaments)

Evidence of susceptibility to future commercial navigation that is more than speculative or insubstantial

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Adjacent Wetlands

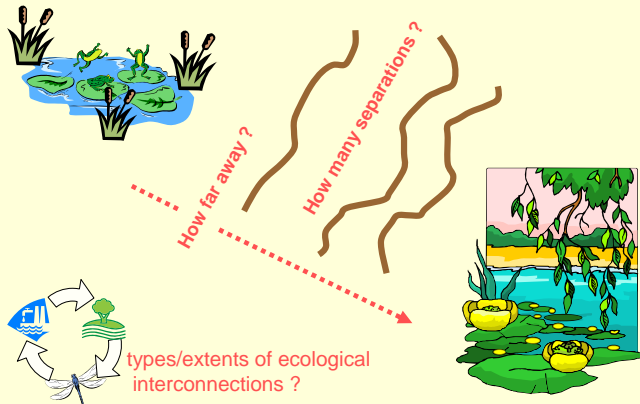
The presence of an unbroken hydrologic connection to jurisdictional waters (contiguous)

The presence of physical barriers between wetlands and jurisdictional waters (e.g., man-made dikes or barriers; natural river berms)

and also

Reasonably close physical proximity to jurisdictional waters that provides an ecological interconnection

Post-Rapanos Guidance: December 2008



Post-Rapanos Guidance: December 2008

Relevant Reach

The flow characteristics of a particular tributary **generally** will be evaluated at the farthest downstream limit of such tributary

However, for purposes of determining whether the tributary is relatively permanent, where data indicates the flow regime at the downstream limit is not representative of the entire tributary (e.g., where data indicates the tributary is relatively permanent at its downstream limit but not for the majority of its length, or vice versa), the **flow regime that best characterizes the entire tributary should be used.**

A primary factor in making this determination is the relative lengths of segments with differing flow regimes.