

# Up A Creek: The Effects Of EPA's Proposed Navigable Waters Rule

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# Clean Water Act:

- In 1972, over a Nixon veto and two years after EPA was created, Congress passed the Federal Water Pollution Control Act 33 USC §§ 1251 – 1387 commonly referred to as the Clean Water Act (CWA)

# Clean Water Act Background:

- The CWA evolved from:
  - The Rivers and Harbors Act of 1889 (also known as “The Refuse Act”)
    - Tended to focus on the discharger – banned discharge of pollutants, but law was generally ignored
  - The Federal Water Pollution Control Act of 1948
    - Focus on waterbody itself – how clean it should be
    - States were required to adopt water quality standards

# The CWA: A Federal/State Partnership

- States and Federal Government share CWA authority
- States generally given the lead role in defining and protecting the quality of their waters
- EPA oversees what the States do and ensures that they meet minimum Federal requirements

# Definition of “Navigable Waters”

- “[W]aters of the United States, including the territorial seas.”
  - 33 U.S.C. § 1362(7)

## Definition of “Waters of the United States” - 33 C.F.R. Part 328 (1986)

1. Traditional navigable waters
2. Interstate waters
3. Other waters the use, degradation or destruction of which could affect interstate commerce
4. Impoundments of waters otherwise listed
5. Tributaries of waters otherwise listed
6. Territorial seas
7. Adjacent wetlands

# The Role of The Courts

- United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)
- Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)
- Rapanos v. United States, 547 U.S. 715 (2006)

# U.S. v. Riverside Bayview Homes (1985)

- Unanimous Court upholds CWA authority over wetlands adjacent to navigable-in-fact open waters (Lake St. Clair, Michigan)
- The Court provided three reasons
  1. Deference to the agency's interpretation was appropriate
  2. Congress intended the CWA to be interpreted broadly
  3. Wetlands adjacent to navigable water provide a key role in protecting water quality...therefore, Corps jurisdiction was appropriate



# Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers (2001)

- The Federal migratory bird rule extended the definition of “waters of the U.S.” to include isolated waters used as habitat by migratory birds
- The Court struck down the rule stating that the Corps exceeded its authority under Section 404 of the CWA
- Consequently, isolated bodies of water were no longer under Corps’ jurisdiction

## Rapanos v. U.S. (2006)

- Four vote plurality decision (4-1-4) holds that navigable waters are limited to only those relatively permanent, standing, or continuously flowing bodies of water forming geographic features such as streams, oceans, rivers, and lakes.
- Justice Kennedy concurred on different grounds – namely, that it was okay to regulate waters with a significant nexus to a traditional navigable water. Nexus determined case-by-case.

## Rapanos v. U.S. (2006)

- Contributed to greater uncertainty as to the test used to establish CWA jurisdiction -
  - Relatively permanent water;
  - Significant nexus; or
  - Both?
- Most courts use the significant nexus test

# EPA Interpretive Guidance

- “Joint Memorandum” dated January 15, 2003 – Provided EPA’s guidance following SWANCC
- EPA/Corps Joint Memorandum (June 5, 2009)
  - Regulatory jurisdiction under CWA exists over a water body if either the plurality’s or Justice Kennedy’s standard (concurring opinion) is satisfied
- “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*” dated December 2, 2008
- “Draft Guidance on Identifying Waters Protected by the Clean Water Act”, dated May 2, 2011 (withdrawn 9/13)

## Background for Proposed Rule

- In September 2013, EPA published a draft report entitled *Connectivity of Streams and Wetlands to Downstream Waters: a Review and Synthesis of the Scientific Evidence*
  - EPA stated that most waters (including tributaries) have a significant nexus with downstream traditional navigable waters **when considered in the aggregate**
  - Report is currently undergoing Science Advisory Board review

## CWA Jurisdiction – Proposed Rule

- EPA/Corps proposed a revised rule on jurisdiction on April 21, 2014.  
79 Fed. Reg. 22188
- Public comment now due October 20, 2014

## Proposed rule – Waters of the United States

1. Traditional navigable waters
2. Interstate waters
3. Territorial seas
4. Impoundments of (1) (2) (3) and (5)
5. Tributaries of (1) (2) (3) and (4)
6. Adjacent waters and wetlands
7. On a case specific basis, other waters, including wetlands, with a significant nexus to (1) (2) or (3) waters

# All Tributaries Are Jurisdictional

- Definition: Water physically characterized by bed and bank and Ordinary High Water Mark (OHWM) which contributes flow directly or indirectly to (1)-(4) waters
- No clear definition of upstream limit (how far?)
- Includes man-made features (e.g. ditches)
- Thus “ditch the rule” campaign



## Proposed Rule – Limited Exemptions

- Proposed rule includes exemptions: Ditches, Agriculture, Groundwater
  - Waste treatment systems designed to meet CWA requirements
  - Prior converted cropland
  - Ditches that are excavated in uplands, drain only uplands, and carry less than perennial flow
    - Exemption is lost if any portion of ditch crosses a non-upland area
  - Certain artificially irrigated areas created in uplands (e.g., stock ponds, settling basins, swimming pools, "water-filled depressions created incidental to construction activity")
  - Artificial lakes and ponds excavated in dry land used exclusively for irrigation, settling basins, rice growing
  - Ditches that do not contribute flow directly or indirectly to another water
  - Groundwater
  - Gullies, rills and non-wetland swales

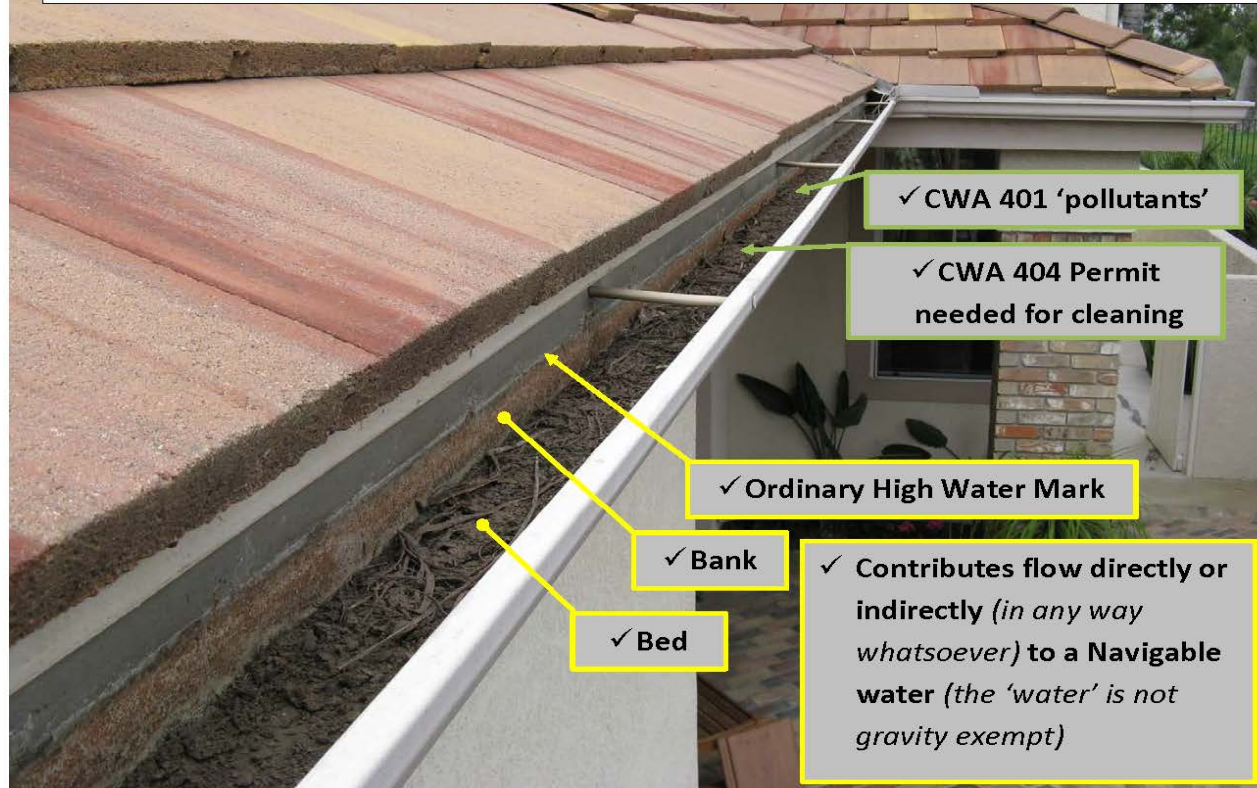
## Impact on Prior Delineations

- No discussion of how prior delineations or permits will be treated
- Delineations have 5-year terms (subject to changed conditions)
- Not extended once a permit is issued

# Arizona Impacts

- Home Builders and Commercial Developers
- If a 404 permit is required, it is often among the last permit obtained prior to construction
  - Timing and cost uncertainty
- Utilities
  - Canals could be treated as “tributaries”
- Mining
- Ranchers, Farmers, Cattlemen

**Tributaries** meeting the proposed USEPA / ACOE rule defining “Waters of the United States”



<http://youtu.be/9U00qJqNbbs>

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