

THE INCREASING NECESSITY
TO MONITOR WETLANDS LOSSES
DUE TO CHANGING REGULATORY
PROGRAMS AND RECENT SUPREME
COURT DECISIONS

FEDERAL LAWS AND REGULATIONS

1899 - Rivers and Harbors Act (Refuse Act).
Interferences with Navigation until two Supreme Court Decisions in the 1960s expanded the Act's jurisdiction to apply to the discharge of industrial wastes.

1948 – Federal Water Pollution Control Act (FWPCA).
Placed primary responsibility for pollution control with the states. Underlying assumption - waste disposal was a fundamental use of water. Very little federal presence in the process. Applied only to interstate waters.

1971 - the Corps of Engineers and newly created EPA were directed by President Nixon to establish a discharge permit program (NPDES) for all industries discharging into navigable waters. Relied on effluent limitations. A Federal District Court invalidated the permitting system in late 1971 for violating the National Environmental Policy Act.)

1972 – FWPCA – The Clean Water Act. Considers control-at-the source as the most effective means for controlling water pollution. Goal to end all discharges entirely (1986) and to restore, maintain, and preserve the integrity of the nation's waters. (Established deadlines delayed.)

1981 – Clean Water Act – Established Construction Grants Program for sewage treatment plants.

1987 – Water Quality Act – Replaced Construction Grants Program with State Water Pollution Revolving Fund, Compliance Dates, Penalty Authority, Toxics, NPDES Program delegation to states, sewage sludge, storm water.

Other Federal Environmental Statutes

Endangered Species Act

National Historic Preservation Act

Wild and Scenic Rivers Act

Fish and Wildlife Coordination Act

Coastal Management Act

Coastal Barriers Resources Act

Farmland Protection Policy Act – Swampbuster – USDA,
NRCA

Executive Order 1190 – Protection of Wetlands - 1977

Essential Fish Habitat

Section 404 – the Clean Water Act – Permits for the Discharge of Dredged or Fill Material – 1972 CWA. Initially required a permit for the discharge of dredged or fill material into navigable waters – “waters of the United States including the territorial seas.” No mention of “wetlands”!

April 3, 1974 – First Regulations published by the Corps of Engineers. Regulated only historically ‘navigable waters’.

July 25, 1975 – Waters of the U.S. – interim final regulations

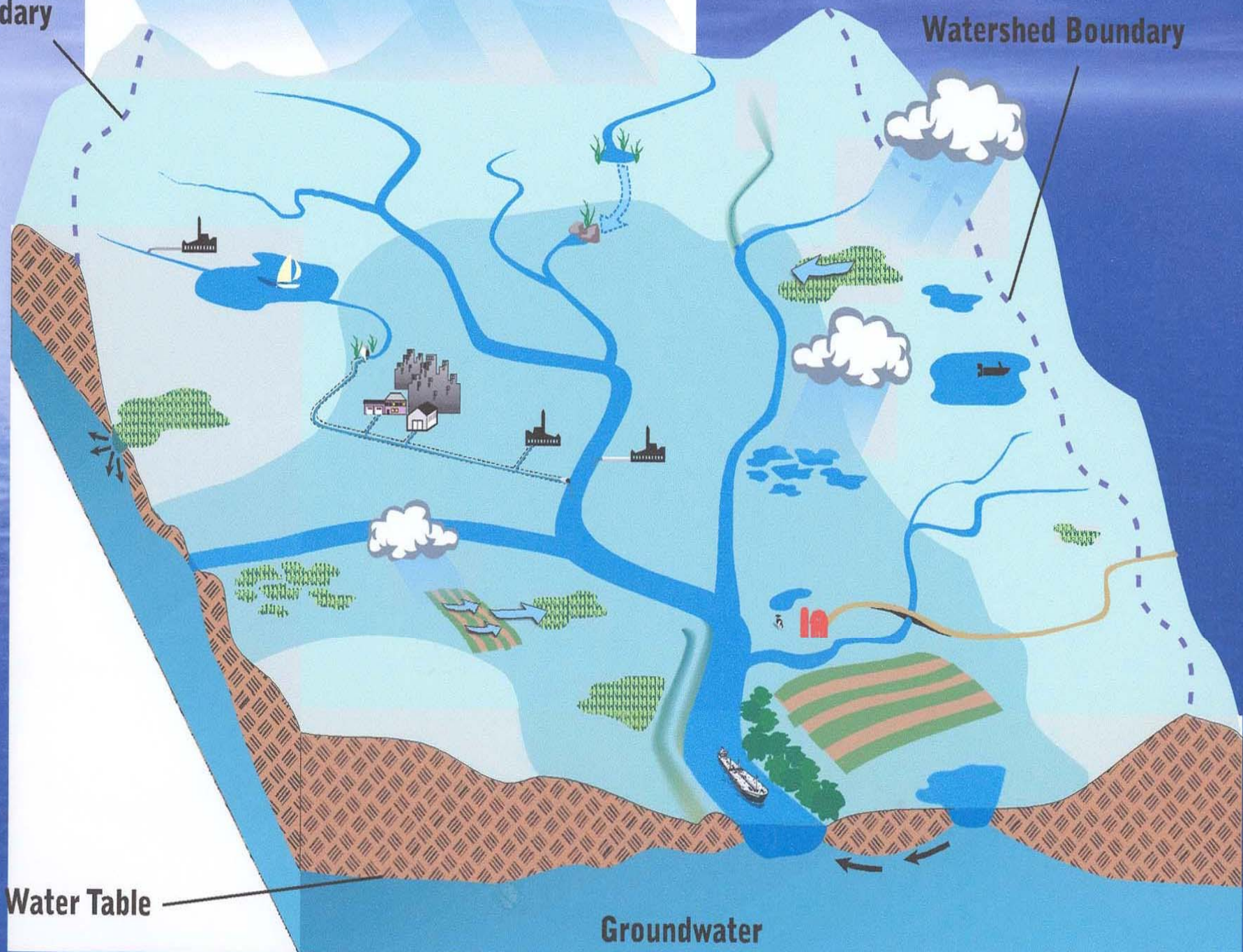
1. all waters currently used or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
2. all interstate waters including interstate wetlands.
3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.
4. all impoundments of waters
5. Tributaries of waters identified in paragraphs (a) (1) –(4) of this section
6. The territorial seas
7. wetlands adjacent to waters. (bordering, contiguous, or neighboring)

November 13, 1986 – Current Regulations. Department of Defense, Department of the Army, Corps of Engineers, Regulatory Program. 33 CFR Parts 320 – 330.

Federal definition of wetlands: areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstance do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

Watershed boundary

Watershed Boundary



Water Table

Groundwater

Significant Court Cases Addressing Federal Jurisdiction

- 1975 – Natural Resources Defense Council v. Callaway. District Court for Washington D.C. Revoked 1974 Corps Regulation which, “limits the permit (Section 404) jurisdiction of the Corps by definition or otherwise to waters of the United States”. July 26, 1975 – new Corps Regulations with new definition of “Waters”. Phased in waters – 1975(Phase I), 1976(Phase 2), 1977(Phase 3). Required permits for tributaries of traditionally navigable waters.
- 1987 – United States v. Riverside Bayview Homes – wetlands adjacent to ‘Waters’ are jurisdictional. The extent of the Clean Water Act, “ reaches to the fullest extent permitted under the Commerce Clause” of the Constitution. ‘Adjacent’ defined by the Corps as, “bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes , natural river berms, beach dunes, and the like are ‘adjacent wetlands’ ”.
- 2001 – Solid Waste Authority of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers. Corps exceeded its authority in asserting jurisdiction over isolated, intrastate, non-navigable waters. Invalidated Corps ‘Migratory Bird Rule’ found in preamble to regulations. January 15, 2003 – Proposed Corps/EPA Rule with Guidance. Are wetlands ‘connected’ to ‘waters’ or is there a ‘nexus’? Left many states without protection of freshwater wetlands and intermittent/ephemeral streams. 35-40 lower court cases across the U.S.
- 2006 – United States v. Rapanos & Carabell. Both Michigan cases. Corps denied permits. Rapanos – filled wetlands connected to Lake Huron 15 miles away by first drainage ditches and then small streams to the Tattabawassee River, Saginaw Bay and Lake Huron..
- Carabell – wetlands separated from Lake St. Clair by a man-made earthen berm. Remanded back to lower courts to clarify what constitutes a ‘nexus’

Rapanos Decision

5-4 or more specifically 4-1-4 (5 separate opinions)

Justices Scalia, Thomas, Roberts & Alito:

- only property adjacent to and contiguous to streams should be considered wetlands. Only relatively permanent, standing or continually flowing water.
- restrictive reading of the CWA.

Justices Stevens, Souter, Ginsberg & Brewer:

- broad interpretation of waters subject to CWA jurisdiction.

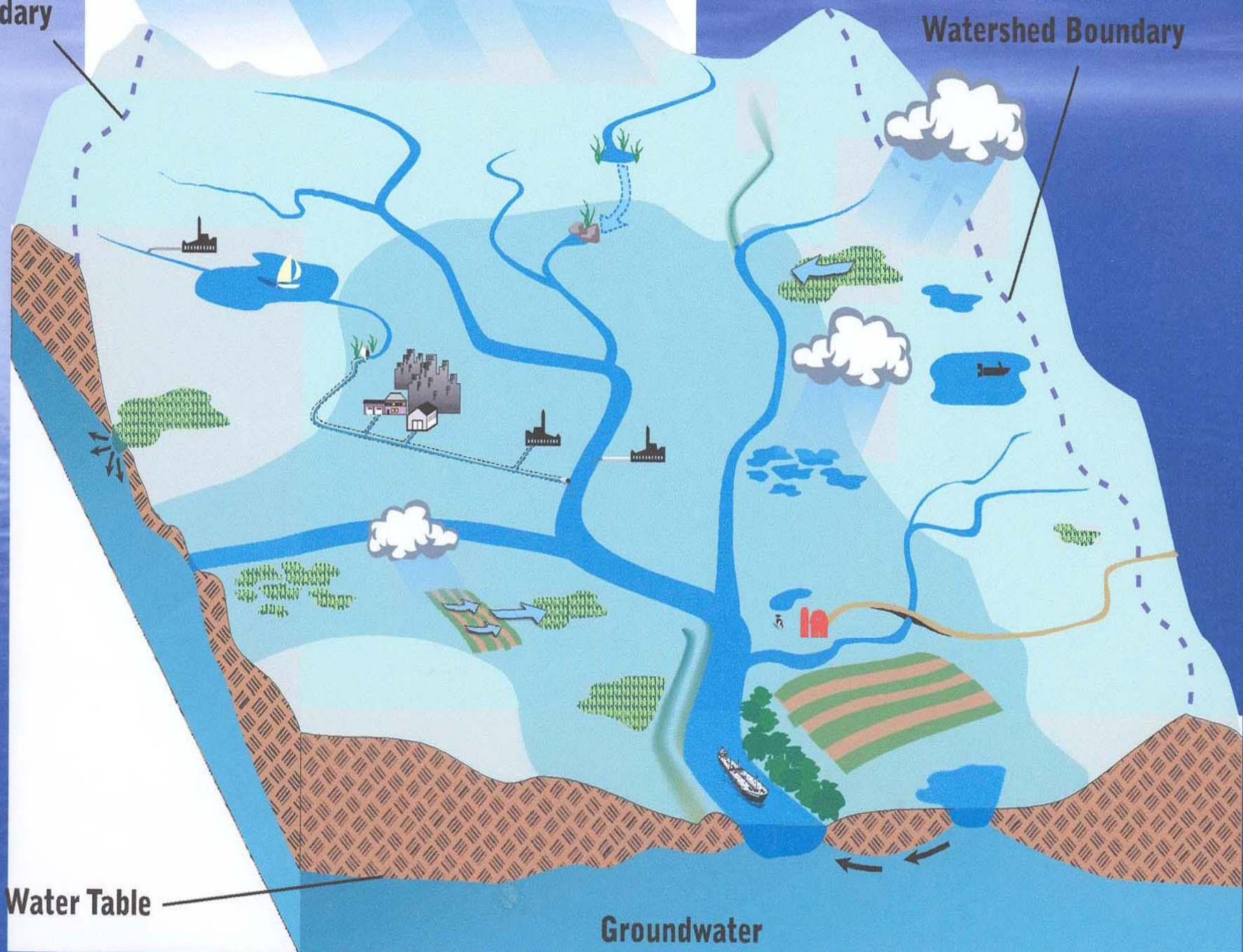
Justice Kennedy – dissenting in a separate opinion:

- wetlands could come under the CWA if they “significantly affect the chemical, physical and biological integrity” of navigable waters – ie: connected.

Sent 2 cases back to lower courts to determine whether a significant connection (nexus) between the wetlands at issue and navigable waters. Kennedy controlling opinion decisive.

Watershed boundary

Watershed Boundary



Water Table

Groundwater

Senate Subcommittee Meeting – “The Waters of the United States - Interpreting the Rapanos/Carabell Decision.”

August 1, 2006 – legislation, rulemaking, or guidance ??

Senate Subcommittee on Fisheries, Wildlife, and Water
of the Senate Committee on Environment and Public
Works.

Senator Lincoln Chafee - RI – Chair

Senator Hilary Clinton - NY

Senator Lisa Murkowski - AK

Senator Jim Jeffords – VT

Senator Frank Lautenberg - NJ

Senator James Inhofe - OK

Sacramento Bee

JUSTICE SCALIA'S NEXT DUCK HUNTING TRIP...

