“Waters of the United States” Under the Clean Water Act

Water Quality Standards Academy

December 2011

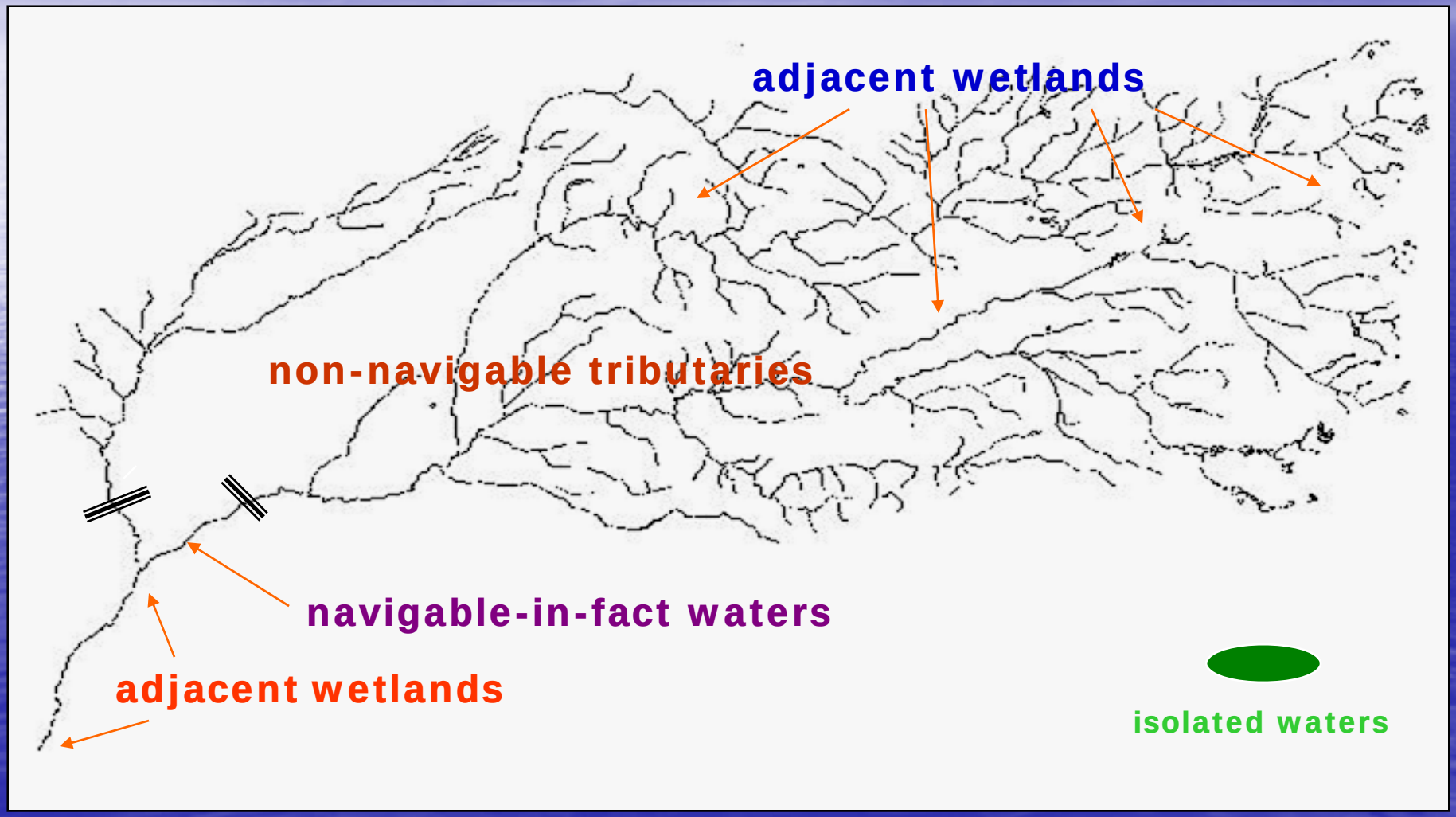
Overview of Presentation

- "Waters of the US" and the *Rapanos* and *SWANCC* opinions
  - Legal and regulatory background
- EPA/Corps Joint Guidance and current agency practice
- Implementation Challenges Posed by *Rapanos* and *SWANCC*

Clean Water Act Jurisdiction

- CWA covers “navigable waters,” defined in the statute as “waters of the US and territorial seas”
- “waters of the US” further defined by agencies at 40 CFR 230.3 etc.
  - Further discussed in preambles, including “migratory bird rule”

CWA Geographic Jurisdiction: The Regulations in Graphic Form



Jurisdictional Regulations

- Waters used/historically used/susceptible to use in interstate commerce
- Interstate waters and wetlands
- All other waters such as intrastate lakes, rivers, streams, wetlands, etc., the use, degradation, or destruction of which could affect interstate commerce (so called "(a)(3)" regulation)
  - Presence of interstate travelers
  - Extraction of fish or shellfish
  - Use for industrial purposes
- Impoundments of waters of the US
- Tributaries of above waters
- Territorial seas
- Wetlands adjacent to above waters

The Supremes Weigh In

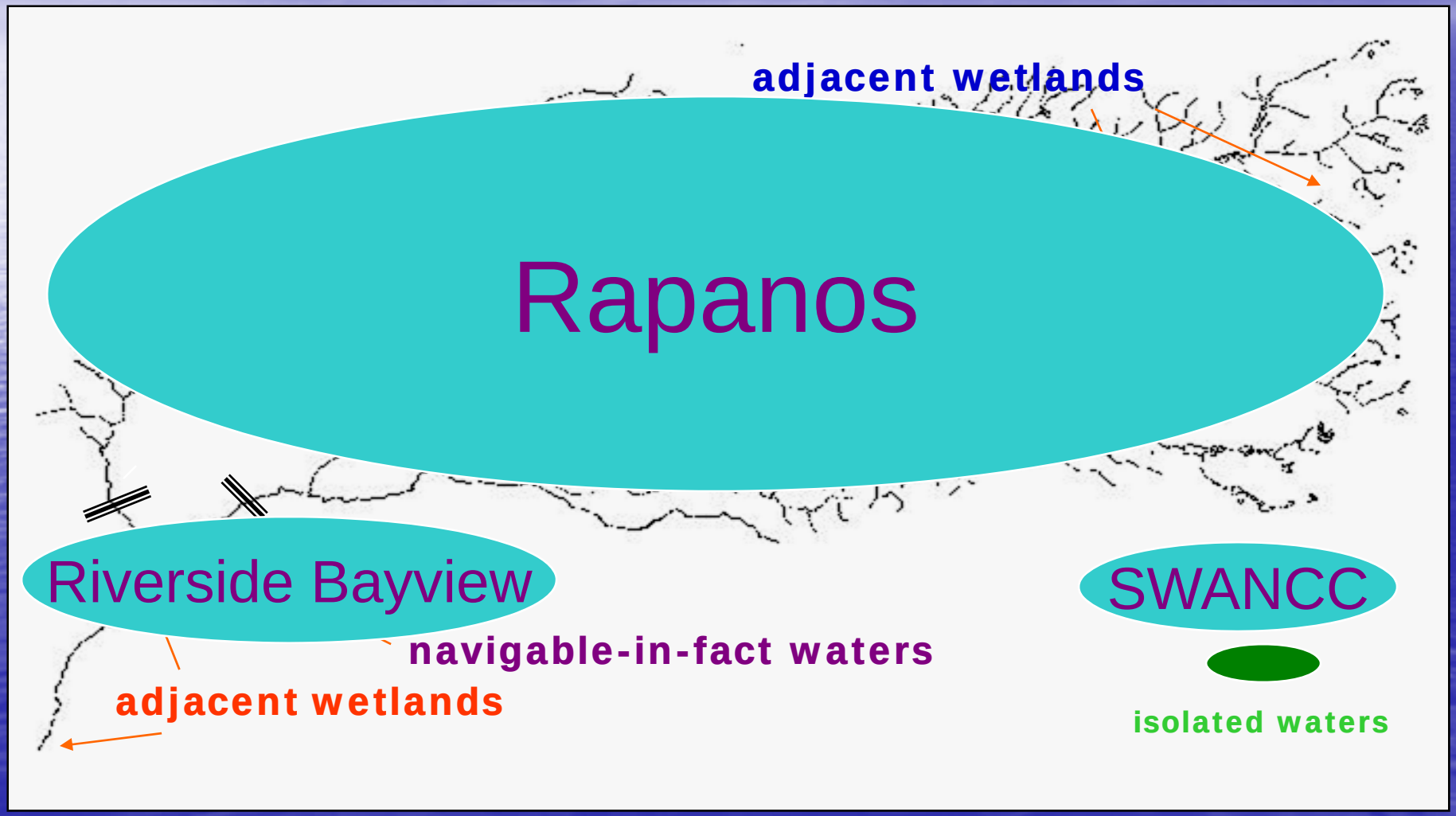
- ***Riverside Bayview*** (1985): Reasonable for agencies to construe "navigable waters" as including wetlands adjacent to other jurisdictional waters

- ***SWANCC*** (2001): "migratory bird rule" is not a valid sole basis for CWA jurisdiction
  - Reasoning could be extended further: CWA intended some connection to navigability
  - Did not invalidate existing regulations
  - Has implications for all CWA programs, not just §404

More Supremes: *Rapanos* and *Carabell*

- **Issues**: does CWA cover non-navigable tributaries and their adjacent wetlands?
- **Result**: nine justices and five opinions, with none having a majority of votes. Remanded.
  - **Plurality/Scalia**: JD if relatively permanent or seasonal rivers, or wetlands with continuous surface connection to such waters.
  - **Kennedy**: wetlands and waters are JD if "significant nexus" to navigable waters (individually or cumulatively), affecting phys/chem/bio of navigable waters.

CWA Geographic Jurisdiction: The Regulations Addressed by the Supremes



Interagency *Rapanos* Guidance

- In June 2007, EPA and the Corps issued **guidance** interpreting WUS after *Rapanos.*
  - Reissued with slight revisions December 2008
- **Addresses 3 categories of waters**
  - Traditional navigable waters (TNWs) and their adjacent wetlands
  - Waters that satisfy the plurality standard (i.e., relatively permanent)
  - Waters that satisfy the Kennedy standard (i.e., significant nexus)

Isolated Waters Unaddressed by *Rapanos* Guidance

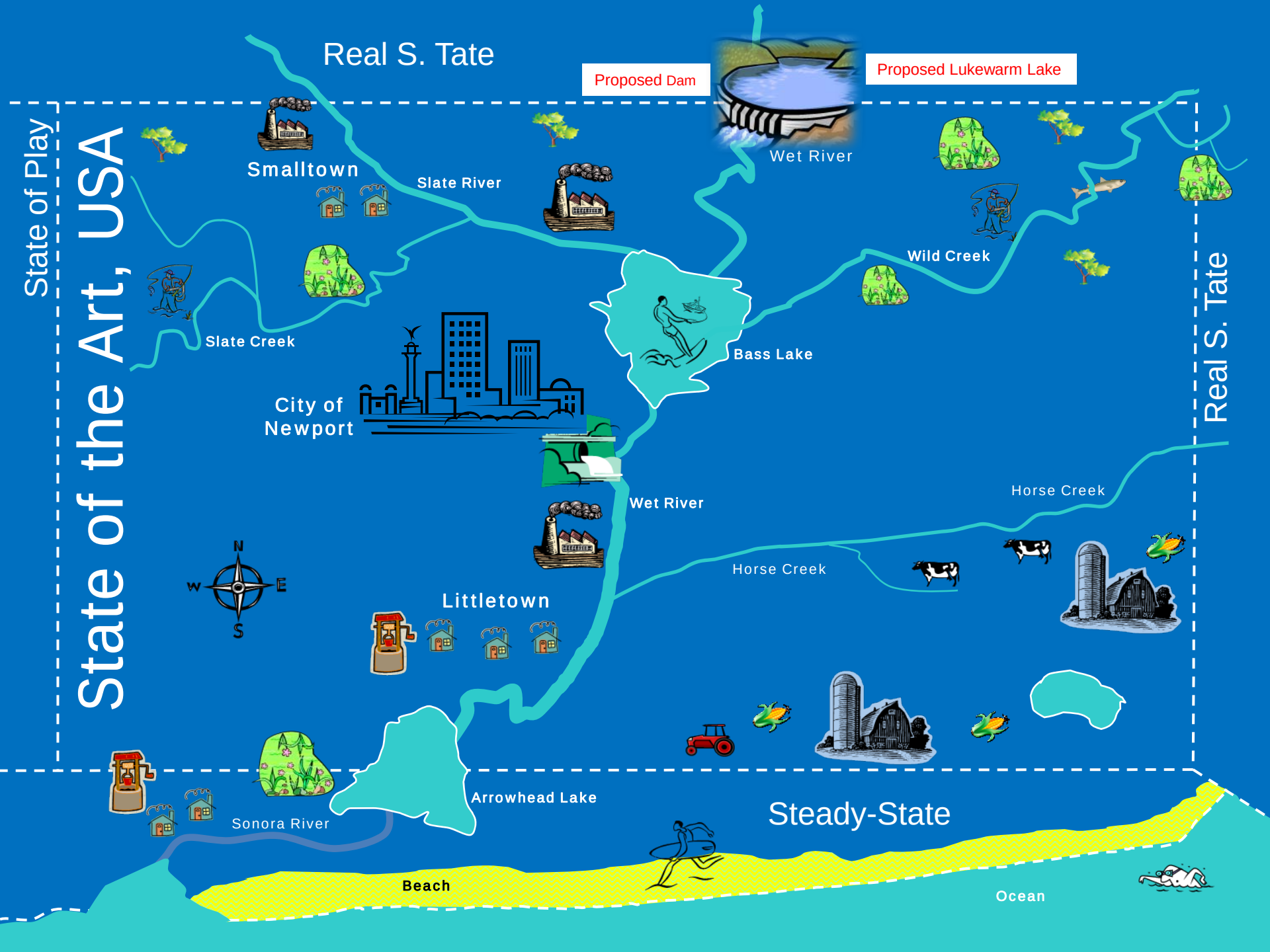
- Guidance focused on waters at issue in *Rapanos*, which were not isolated
- January 03 interagency guidance addressed isolated (a)(3) waters
  - Jurisdictional where case-by-case evaluation shows interstate commerce links
  - Currently, interagency coordination required for <u>all</u> isolated JD determinations (positive or negative)

Draft Interagency Guidance for *SWANCC* and *Rapanos*

- Proposed for public comment May 2011
  - 230,000 comments received, including mass mailings
  - Draft guidance not in effect until finalized
- Would:
  - Treat TNWs and interstate waters similarly
  - Consider tributaries as likely to have a significant nexus
  - Call for "other" waters to be jurisdictional if they have a significant nexus to a TNW or interstate water
    - Physically proximate "other" waters in combination; more remote waters individually unless "compelling science" indicates should be evaluated together

Ouch! What Should I Remember?

- Guidance currently in effect: Jan 03, Dec 08
- For a water to be covered by the CWA under current policies, consider if its characteristics suggest:
  - The water is “relatively permanent” OR
  - The water has a “significant nexus” to a traditional navigable water
- This area is complex, but that will get you most of the way


State of Play
State of the Art, USA
Real S. Tate
Proposed Dam
Proposed Lukewarm Lake
Wet River
Smalltown
Slate River
Wild Creek
Slate Creek
Bass Lake
City of Newport
Wet River
Horse Creek
Horse Creek
N
W
E
S
Littletown
Arrowhead Lake
Sonora River
Steady-State
Beach
Ocean
Real S. Tate

Implementation Challenges Posed by *Rapanos*

- **Impact of *Rapanos* on the scope of WUS will depend on case-by-case application of Scalia and Kennedy analyses.**
- **Field staff must undertake additional data collection and analyses as part of many JDs.**
  - Raises scientific, program resource, legal, and other challenges.

Scientific Challenges of *Rapanos*

- **Scalia and Kennedy standards use jurisdictional terms different from those typically used by aquatic scientists.**
  - "Relatively permanent"
  - "Continuous surface connection"
  - "Significant nexus"
  - "Similarly situated"
- **Challenge: does a particular water have the characteristics called for by the legal terms, as defined by the agencies and the courts?**

Legal Challenges of *Rapanos*

- **Many post-*Rapanos* legal challenges**
  - 12 U.S. Courts of Appeal decisions
  - 26 district court decisions (3 on appeal)
  - 8 of 8 petitions for review rejected by Supreme Court
  - More than 30 cases currently in litigation
- **U.S. position**: water jurisdictional if meets <u>either</u> the Kennedy or Scalia standards

Looking Forward: WUS and the Obama Administration

- EPA, CEQ, USDA, Corps, Dept of Interior heads signed letter to Congress, indicating legislation needed
  - Can't address all problems created by *Rapanos* and *SWANCC* administratively
- EPA and the Corps have indicated will do rulemaking on scope of "waters of the US"
  - Reflects comments on May 2011 guidance that called for rulemaking

Looking Forward: Congress

- Last Congress: bills in House and Senate intended to restore CWA historical scope (S.787, H.R. 5088)
  - Would have replaced “navigable waters” with “waters of the US” and defined that term similar to current regulatory definition
- Current Congress: no substantive legislation but focus on appropriations
  - House has passed appropriation riders that would prevent new guidance or rulemaking
  - Hearings appear likely

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True. The CWA defines "navigable waters" as meaning 'waters of the US." The terms are used interchangeably.

Question #2

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"Navigable waters" protected by the CWA only include those waters that can float a boat.

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False. "Navigable waters" is a legal term of art that includes waters not thought of as "navigable" in the plain English sense of the word.

Question #3

"Waters of the US" does <u>not</u> include which of the following:

1. Perennial waters (that flow throughout the year)
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3. Wetlands adjacent to a jurisdictional stream or lake
4. Territorial seas

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A “significant nexus” analysis considers such factors as:

1. Flow and other hydrologic relationships with a TNW
2. Ecological relationships to a TNW, such as ability to trap pollutants or provide habitat supporting biota in a TNW
3. Contribution of all wetlands on a stream reach

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For Additional Information

EPA website

http://www.epa.gov/owow/wetlands

Corps website

http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/cwa_guide.htm

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