

Wetland & Stream Permitting in North Carolina

with an update based on the Rapanos Decision

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Questions to Be Answered

- What is the result of the Rapanos decision?
- When do I need a permit?
- How much stream/wetland area can I impact?
- What type of permit do I need?
- Who approves my permit?
- How long does it take to get my permit?
- How much will it cost?



Rapanos Et ux., et al. v. United States

- U.S. Supreme Court consolidated two cases: Rapanos Et ux. v. United States and Carabell et al. v. United States Army Corps of Engineers (ACOE)
- Both cases involved parcels of land in Michigan
- Argued on February 21, 2006
- Decided June 19, 2006



Key Facts in Rapanos site

Involved three sites; conducted fill activities without a permit:

- Salzburg Parcel 230 ac. with 28 ac. of wetland; filled 22 ac.
- Hines Road Parcel 275 ac. with 64 ac. of wetland; filled 17 ac.
- Pine River Parcel 200 ac. with 49 ac. of wetland; filled 15 ac.
- Nearest body of navigable-infact water was 11 to 20 mi. away via man-made drains, which flow into creeks, rivers and ultimately into Lake Huron in Michigan.





Key Facts in Carabell site

Carabell was denied a permit to fill about 16 ac. of wetlands on 20 ac. parcel

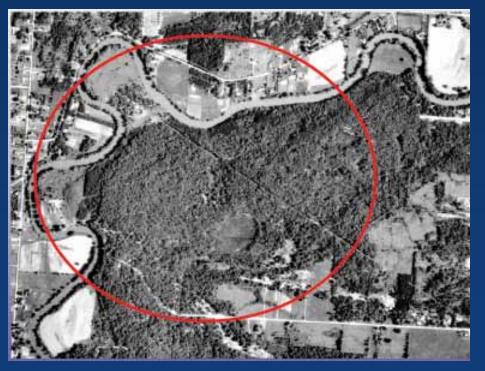
- Wetland separated from a tributary to Lake St. Clair by a 4 ft. wide manmade berm.
- Berm blocked drainage of surface water from the parcel.



Rapanos Salzburg site before and after

Pre Disturbance

Post Disturbance







Questions posed to Supreme Court in *Rapanos* and *Carabell*

- 1) Are wetlands that are adjacent to, and have a surface hydrologic connection with non-navigable waters a part of "the waters of the United States within the meaning of the Clean Water Act?
- 2) Are wetlands that are hydrologically isolated from any "waters of the United States" subject to the Clean Water Act?
- 3) Did the Clean Water Act jurisdiction exceed Congress' power under the Commerce Clause?



Rapanos Decision

- Four justices (Scalia writing decision) concluded that regulatory authority extends only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters and to "wetlands with a continuous surface connection to" such relatively permanent waters.
- Terms Relatively Permanent Waters (RPW) and Traditional Navigable Waters (TNW) included in EPA/ACOE Memorandum



Rapanos Decision

Kennedy concluded that wetlands are "waters of the United States" ... "if the 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.' "

The term Significant Nexus (SN) included in EPA/ACOE memorandum



Results from Rapanos and Carabell

- EPA and ACOE issued Memorandum "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States, June 5, 2007
- ACOE issued Jurisdictional Form and Instructional Guidebook



Wetland-Stream Permitting Decision Flow Chart

Identify Proposed Development Site

Perform Preliminary Site Evaluation for Wetlands, Streams and Buffers

Wetlands, Streams or Buffers Present?

Perform Stream/Wetland Delineation

Yes

Continue Project

No



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Wetland Delineation Requirements

- Hydrology
- Hydrophytic Vegetation
- Hydric Soils





ACOE Wetland Delineation Form

DATA FORM ROUTINE WETLAND DETERMINATION			DATA FORM ROUTINE WETLAND DETERMINATION (1987 COE Wellands Determination Mani Project / Star: Application:	
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NC DWQ Stream Identification Form

Evaluator: Total Points: Stream a least intermitient 72:18 or personal 72:30 A. Geomorphology (Subtotal =) 1.' Contruous bed and bank	Site: County:			Latitude:			
Stream is at least intermittent f2: 19 or perennial f2: 30 A. Geomorphology (Subtotal = 1°. Continuous bed and bank	County:		Longitude:				
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4. Soil texture or stream substrate sort	ing	0	01	02	0.3		
5. Active/relic floodplain	-	00	01	02	0.3		
6. Depositional bars or benches		0	01	C2	0.3		
7. Braided channel		C 0	C1	C2	C 3		
8. Recent alluvial deposits		CO	01	C 2	0.3		
9 " Natural levees		CO	01	C 2	0.3		
10. Headcuts		C 0	01	C 2	0.3		
11. Grade controls		C 0	C0.5	01	C15		
12. Natural valley or drainageway		C 0	C0.5	C1	C15		
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21 ¹ . Rooted plants in channel		C3.	C 2	C1	- C 0		
22. Crayfish		C0	C0.5	C1	C15		
23. Bivalves		C0	C1	C2	0.3		
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- Geomorphology (Stream Relief Features)
- Hydrology
- Biology
- Stream is scored in each area
 - < 19 = Ephemeral</p>
 - $\ge 19 = Intermittent$
 - $\ge 30 =$ Perennial



ACOE Stream Assessment Worksheet

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ACOE Jurisdictional Determination Form

APPROVED JURISDICTIONAL DETERMINATION FORM U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook

SECTION I: BACKGROUND INFORMATION

- A REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD):
- R DISTRICT OFFICE, FILE NAME, AND NUMBER-

C. PROJECT LOCATION AND BACKGROUND INFORMATION: State: Scoth Carolina County/panish b cough: Center coordinates of site (latilong in degree decimal format): Let. N Long Universal Transverse Moreator Name of nearest waterbody: Four Hole Swarap Name of nearest Traditional Navigable Water (TNW) into which the squatic resource flows: Name of watershed or Hydrologic Unit Code (HUC): Check if map/diagram of review area and/or potential jurisdictional areas in her available spon request. Check if supplings in of rotest and and in presential justificational areas to have some terms request.
 Check if other size (e.g., office mitigation size, dopond size, etc...) are same inset with this action and are recorded on a

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY): Office (Desk) Determination. Date: 8-6-07 Office (Deak) Determination. :
 Field Determination. Data(a):

SECTION IL: SUMMARY OF FINDINGS A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There Bick List "novigable Water of the U.S." within Rivers and Harbers Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the twise and [Augusted]

8 Waters subject to the obb and flow of the tide. Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign constances. Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION

There Fick List "water of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 128) in the review sees. [Sequered]

1. Waters of the U.S.

- inters of the US. Indicate presence of waters of U.S. is review area (theck all that apply): ¹ DTWA, including unitarial sease Welched adjacents ITWA Balawoly permanant waters¹ (RPWa) that flow directly or indirectly into TNWa Non-RPW that the w decay or indirectly into TNWa

- Wethards denety abuting RPWs that flow directly or indirectly into TNWs Wethards adjacent to but not directly abuting RPWs that flow directly or indirectly into TNWs Wethards adjacent to not RPWs that flow directly or indirectly into TNWs
- Impoundments of jurisdictional waters
- Isolated (interstate or intrastate) waters, including isolated wefards
- b. Identify (estimate) size of waters of the U.S. in the review area: Non-wetland waters: linear feet: width (ft) and/or Wetlands: acres. 1000

c. Limits (bos staries) of jurisdictios based eec Pick List Elevation of established OHWM (if known);

- Non-regulated waters/wetlands (check if applicable):²
- Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional. Explaine

"Bones checked below shall be supported by completing the appropriate sections in Section 31 below. "For purposes of this form, an RPW is defined as a reburry the is not a TSW and that typically flows your-round or has continuous flow at least "seasonally (e.g., typically I months). Supporting documentation is presented in Section III P.

APPROVED JURISDICTIONAL DETERMINATION FORM U.S. Army Corps of Engineers

New 7-page form for documenting Section 404 jurisdiction by the **Corps resulting from the Rapanos Court Decision.**

Contains Sections:

- **Background Info**
- Π. **Summary of Findings**
- III. CWA Analysis
- **IV.** Data Sources



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ACOE Jurisdictional Determination Forms

APPROVED JURISDICTIONAL DETERMINATION FORM U.S. Army Corps of Engineers

New Terms that supercede the terms of Ephemeral, Perennial, and Intermittent

Traditional Navigable Waters (TNW's)

Include all "navigable waters of the U.S." that now, or in the past, have been used for interstate commerce.

Relatively Permanent Waters (RPW's)

Flows directly or indirectly into TNW's. Exhibits at least seasonal flow.

Significant Nexus (SN)

Require use of SN section of JD form to tie a wetland to a TNW. Used when wetlands are adjacent (not abutting) to waters other than TNW SEC GROUP

ACOE New Jurisdictional Features

- 1) TNW's including territorial seas
- 2) Wetlands adjacent to TNW's
- 3) **RPW's** Flowing directly or indirectly into TNW's
- 4) Wetlands directly abutting RPW's Flowing directly or indirectly into TNW's
- 5) Wetlands adjacent to but not directly abutting RPW's Flowing directly or indirectly into TNW's.

- 6) Non-RPW's Flowing directly or indirectly into TNW's.
- 7) Wetlands adjacent to non-RPW's Flowing directly or indirectly into TNW's.
- 8) Impoundments of Jurisdictional Waters
- Isolated (interstate or intrastate) waters, including isolated wetlands



