

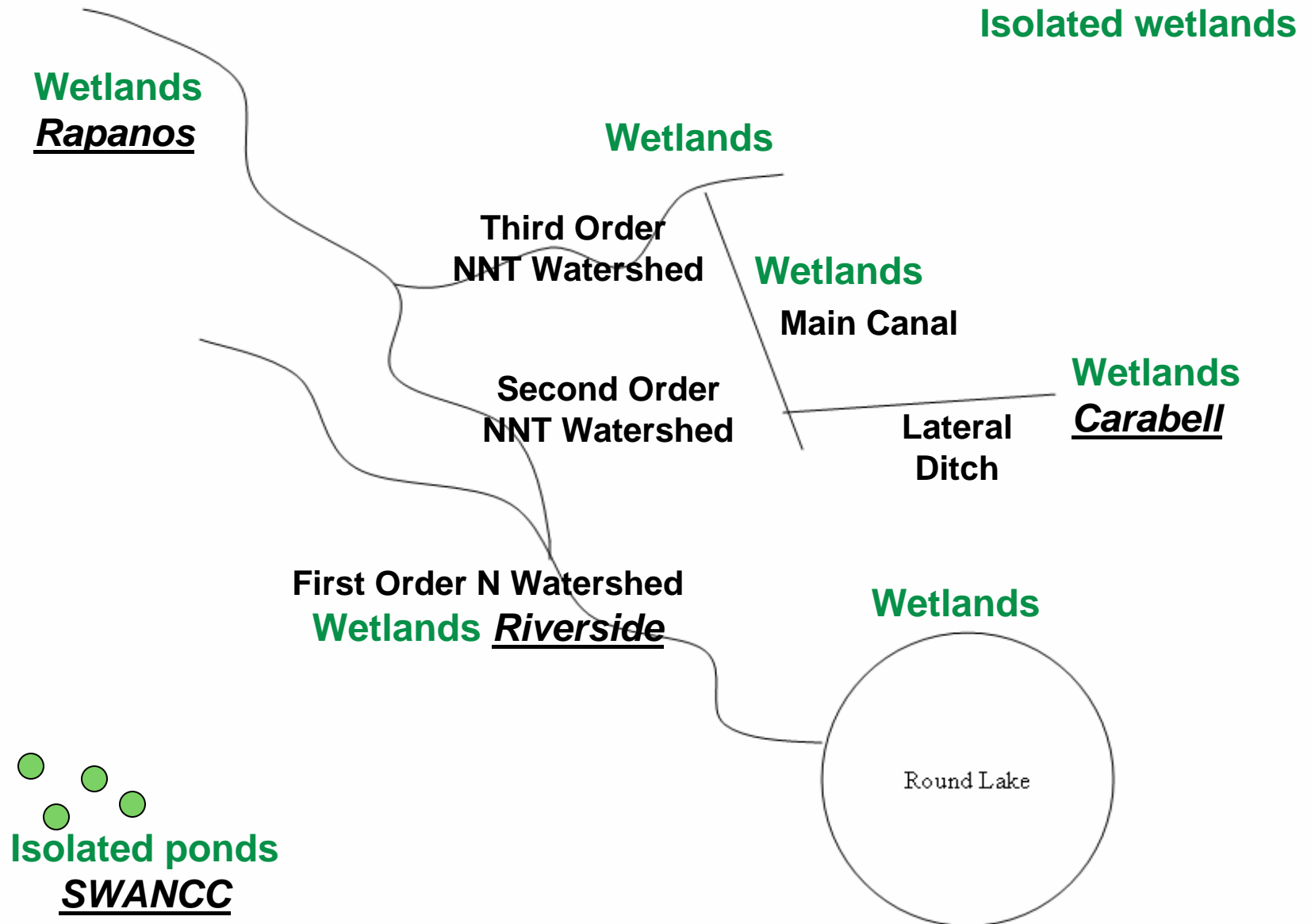


# Hot Topics!

## The Future of Federal Wetlands Regulation

**Professor Mark Squillace**  
**Director, Natural Resources Law Center**  
**University of Colorado School of Law**  
**10 May 2007**

# Federal Jurisdiction over Rivers, Streams, Ditches, Canals, Isolated Ponds, and Adjacent or Connected Wetlands



# Why Preserve Wetlands?

- Aesthetic value
- Ecosystem services
- Natural wastewater treatment facilities
- Absorb the impact of floods and stabilize runoff
- “Nurseries of life”
  - They cover <5% of the land surface, but host 31% of all plant species in the lower 48
  - They rival coral reefs and rainforests in terms of their biologically productivity
  - An essential link in the life cycle of 75 percent of the fish and shellfish commercially harvested in the U.S., and up to 90 percent of the recreational fish catch.



# Wetlands in the United States

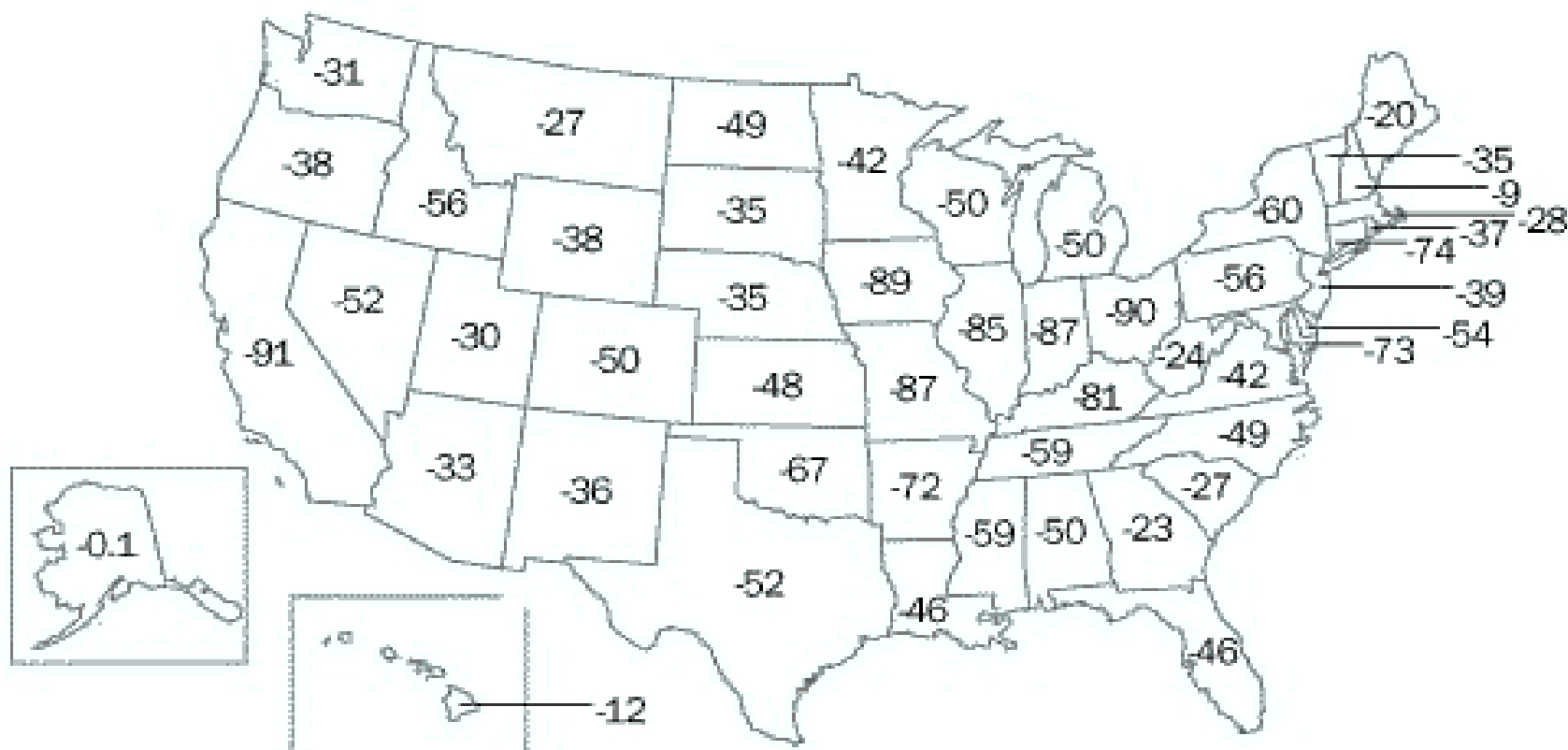
- Wetlands can be found in every county and climatic zone in the United States.
  - Nearly 75% of the nation's wetlands in the lower 48 states are privately owned
- A spectacular variety of wetland types exist throughout the United States, ranging from permafrost underlain wetlands in Alaska to tropical rain forests in Hawaii to riparian wetlands in the arid Southwest.
  - Wetlands include tidal and non-tidal marshes, swamps, bogs, and fens
  - They must generally be inundated or saturated by surface or ground water at a frequency and duration sufficient to support, a prevalence of vegetation suitable for life in saturated soil conditions

# Wetlands Loss

- Estimates of wetlands in Colonial times are about 221 million acres in the lower 48 states.
  - Current estimates of remaining wetlands are approximately 106 million acres
- Over the 200 year period between the 1780s and 1980s, the lower 48 states lost an estimated 53 percent of their original acreage of wetlands – *a startling average of 60 acres – about 48 football fields – of wetlands lost every hour over 200 years*
- Consider the cumulative impact of these losses

# Wetlands Loss Map

## Percentage of Wetlands Acreage Lost, 1780's-1980's



*Twenty-two states have lost at least 50 percent of their original wetlands. Seven states—Indiana, Illinois, Missouri, Kentucky, Iowa, California, and Ohio—have lost over 80 percent of their original wetlands. Since the 1970's, the most extensive losses of wetlands have been in Louisiana, Mississippi, Arkansas, Florida, South Carolina, and North Carolina.*

Source: Mitch and Gosselink. *Wetlands*. 2nd Edition, Van Nostrand Reinhold, 1993



# Federal Wetlands Policy

- **Swampbuster**

- This Food Security Act program withholds Federal farm program benefits to farmers who plant agricultural commodities on wetlands converted by drainage, dredging, leveling, or any other means after December 23, 1985

- **Section 404 of the Clean Water Act**

- Requires a permit from the U.S. Army Corps of Engineers before discharging dredged or fill material into “navigable waters”
- EPA has veto power over Corps permits



# Key issues under §404


***What are “navigable waters”?***

***When are wetlands “navigable waters”?***




## Background to CWA §404

- Rivers and Harbors Act (“RHA”) of 1899 requires permits for activities that might obstruct navigation
  - Section 13 of the RHA prohibits the discharge of refuse “*into any navigable water of the United States, or into any tributary of any navigable water ...* whereby navigation shall or may be impeded or obstructed,” without a permit from the Corps




# Federal Water Pollution Control Act of 1948

- Took modest steps toward establishing a regulatory program.
  - It authorized the Surgeon General of the Public Health Service to work with Federal, state, and local authorities to develop programs to reduce or eliminate pollution of “*interstate waters and their tributaries...*”



# Federal Water Pollution Control Act of 1972

- The primary purpose of the Act is *“to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”*
- FWPCA applies to *“navigable waters,”* which the statute ambiguously defines to mean *“waters of the United States,”*
- *But FWPCA has nothing to do with navigation!*



## The Meaning of “Navigable Waters” under FWPCA (Clean Water Act)

- Congress dropped the reference to tributaries in favor of “waters of the United States” but it plainly intended to expand jurisdiction beyond the language of early RHA and FWPCA provisions
- The FWPCA Conference Report describes Congress’ intent
  - “The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation...”

# So where do wetlands come in?

- Since 1975, the Corps' rules have included –
  - Wetlands adjacent to navigable waters and tributaries
  - “isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce....”
  - The Corps' 1986 “clarification of existing rules included the “migratory bird rule.”
- Wetlands Delineation Manual (1987) guides Corps and EPA decisions
  - Info on Corps' regulatory programs  
<http://www.usace.army.mil/cw/cecwo/reg/>

# Section 404 in the Supreme Court

- *United States v. Riverside Bayview Homes, Inc.* (1985)
- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* (2001)
- *Rapanos v. United States/Carabell v. U.S. Army Corps of Engineers* (2006)



*United States v. Riverside  
Bayview Homes, Inc.*


- Court uses broad language but facts of the case are compelling
  - Involved wetlands adjacent to navigable tributary of Lake St. Clair
- A unanimous Court finds that wetlands adjacent to navigable waters are navigable waters

*United States v. Riverside  
Bayview Homes, Inc.*

**Riverside Wetlands**

**Black Creek  
“navigable” tributary**

**Lake St.  
Clair**

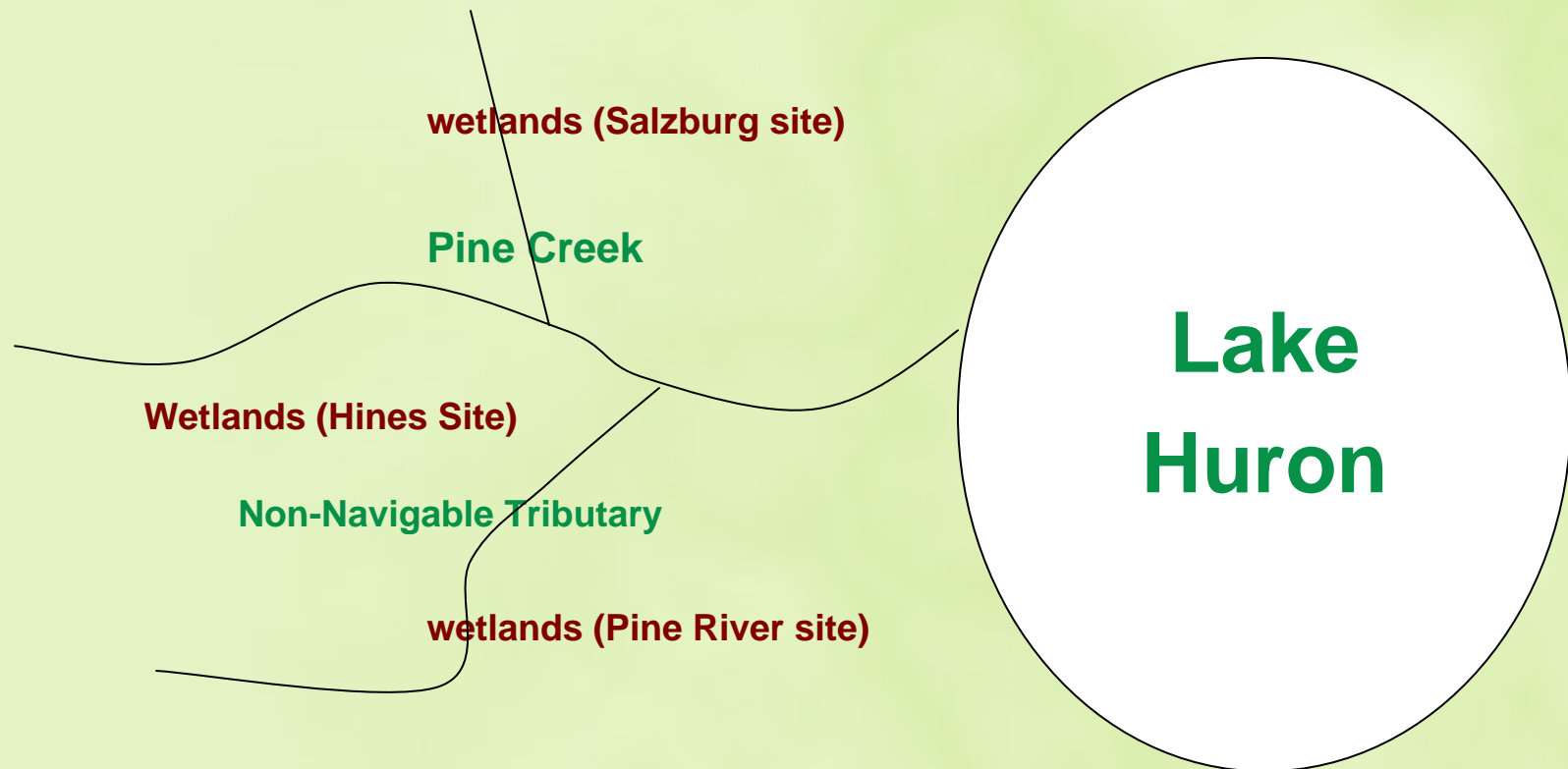


*Solid Waste Agency of No. Cook County v. U.S. Army Corps of Engineers (SWANCC)*

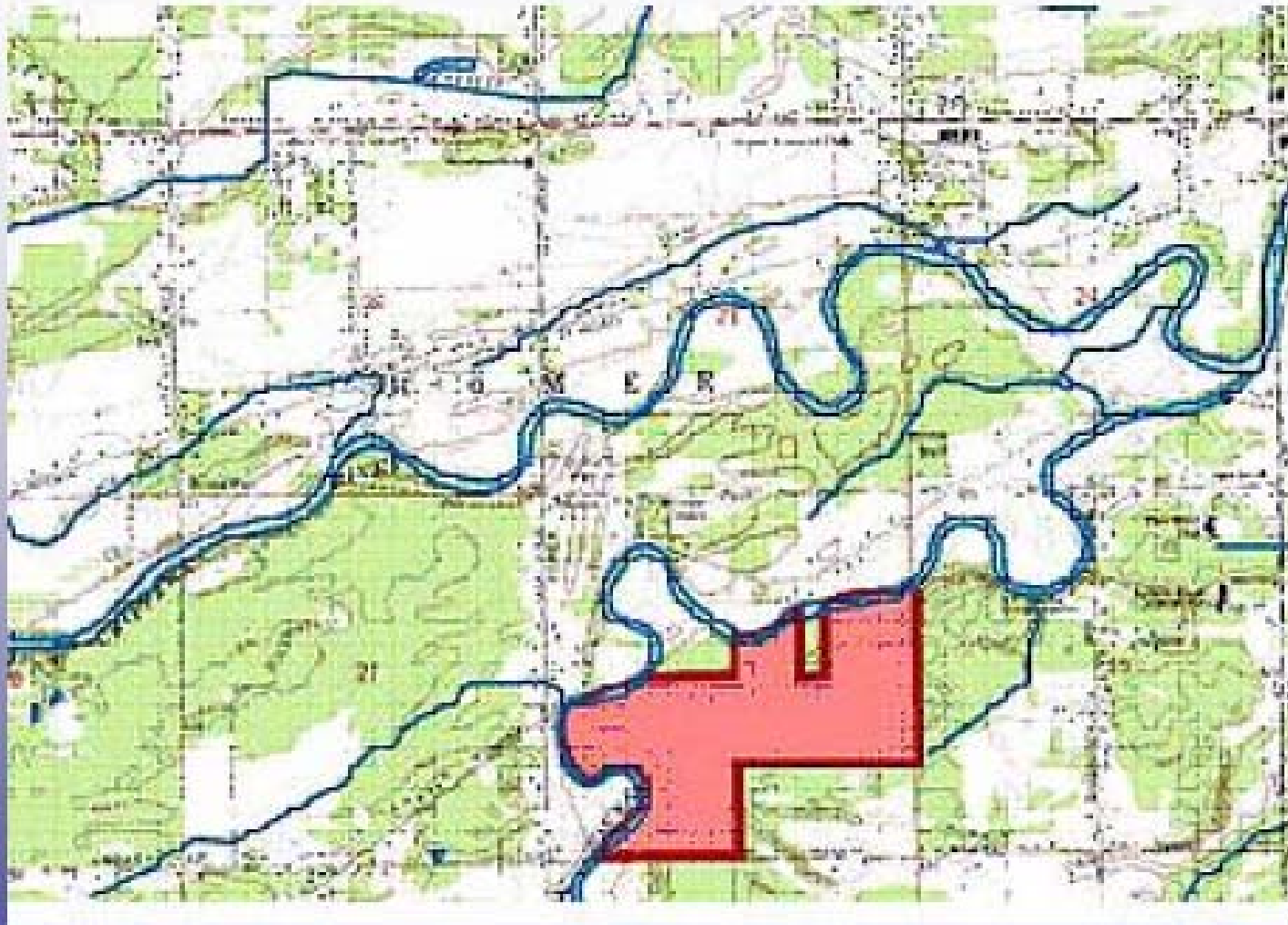
- SWANCC wanted to build a new landfill among isolated ponds used by migratory birds
  - Corps required a §404 permit
- In a 5-4 decision, the Court ruled against the Corps. Justice Rehnquist found that “it was the significant nexus between the wetlands and the ‘navigable waters’ that informed our reading of the CWA in *Riverside*....”
  - Migratory bird rule not supported by CWA

# *Rapanos v. United States*

- Three sites involving wetlands adjacent to both navigable and non-navigable tributaries of Lake Huron



# Rapanos' Pine River Site



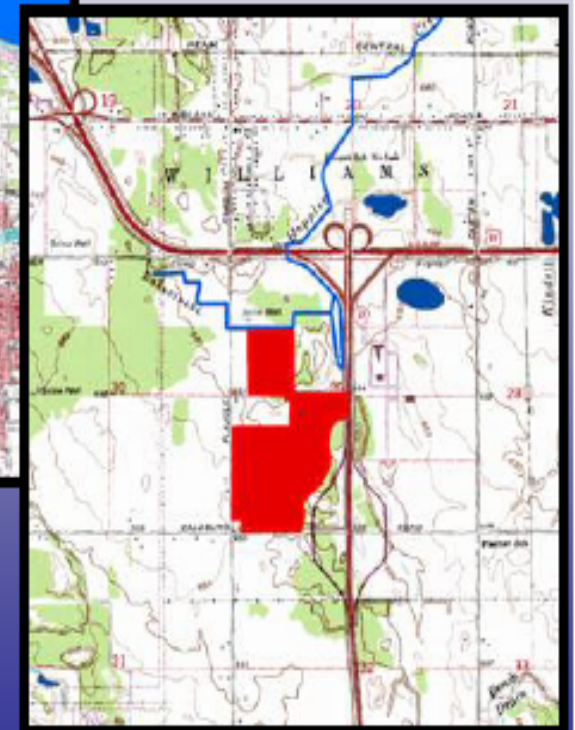
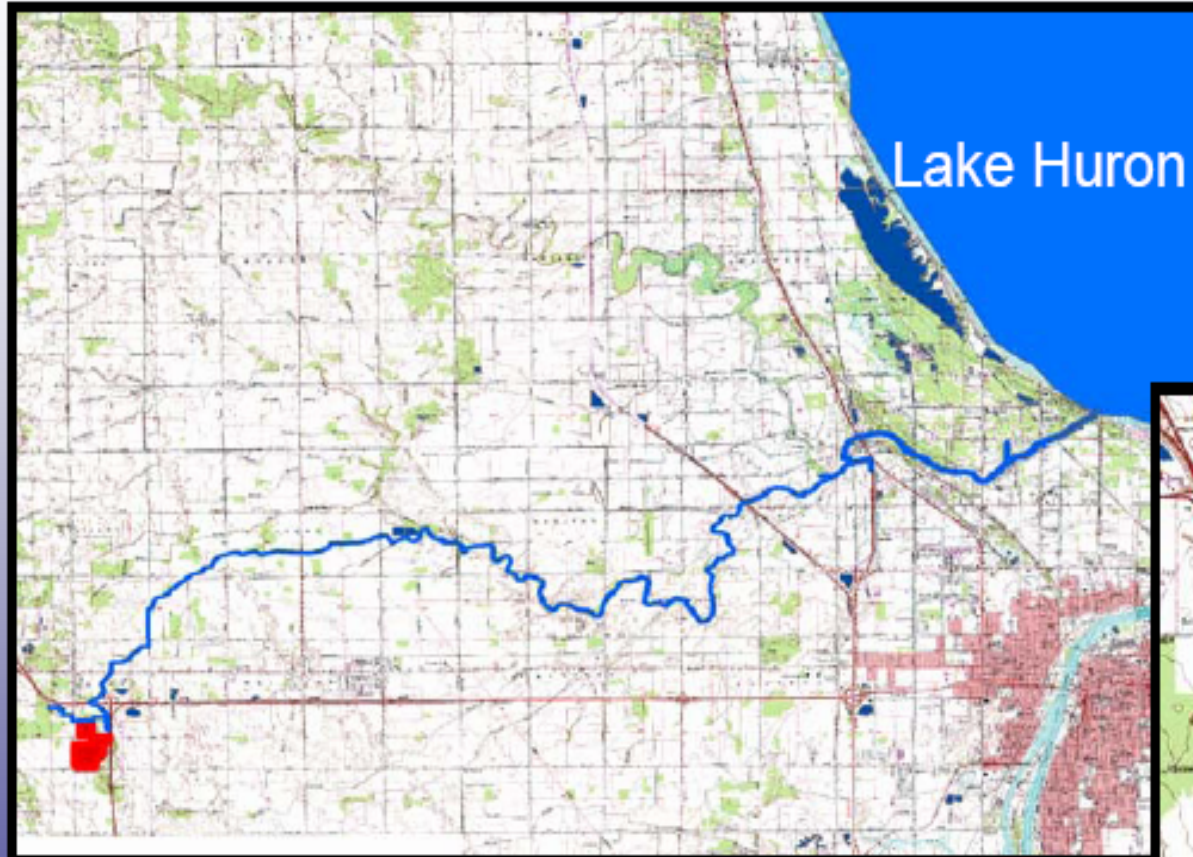
This slide shows the location of the Pine River site (circled in red). The Pine River is a major river approximately 100-120 feet wide where it flows adjacent to the north end of the property.

# Rapanos' Hines Road Site



This slide shows aerial photos of the Hines Road site before and after Rapanos impacted the wetlands on the site. The 1998 aerial photo shows the extensive road network Rapanos constructed on the property. The blue line on the aerial photograph on the right is the Rose drainage way.

# Rapanos' Salzburg Road Site



The slide above shows the location of the Salzburg Road site approximately 13-14 miles from Lake Huron and shows the 18 mile path water takes to reach Saginaw Bay. The slide on the right shows the streams on and adjacent to the property.

# John Rapanos



# *Carabell v. U.S. Army Corps of Engineers*



This slide depicts the vicinity of the Carabell site to Lake St. Clair and the Riverside Bayview site. The Riverside Bayview Homes Supreme Court case was argued on October 16, 1985 and decided on December 4, 1985. *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121, 133 (1985). The blue line is a designated county drainageway. The Carabell site is located approximately one mile from Lake St. Clair.

## Rapanos/Carabell Decision

- Scalia (plurality, with Thomas, Roberts, Alito)
  - “Waters” are what the 1954 edition of Webster’s New International dictionary says they are – relatively permanent, standing or flowing waters.
    - Under this definition can wetlands ever be “waters”?
    - Scalia concedes in deference to the Corps’ that wetlands adjacent to traditionally navigable waters are covered by CWA
- Kennedy (concurring in result (remand) only)
  - CWA encompasses only waters (and wetlands) with a significant nexus to traditional navigable waters
- Stevens (dissenting with Souter, Breyer & Ginsburg)
  - CWA should be construed consistent with Riverside and Congress’ plain intent
  - The Court should accord Chevron deference to the Corps

## Subtext: The Section 404 Burden

- In *Rapanos*, Justice Scalia opined that –  
“The burden of [Section 404] ... is not trivial. In deciding whether to grant or deny a permit, the [Corps] exercises the discretion of an enlightened despot... The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.”
- Scalia’s statement doesn’t seem to square with the facts

# Days to Evaluate Applications



US Army  
Corps of Engineers

## *U.S. Army Corps of Engineers Regulatory Program*

### FY 2003 Average Evaluation Days



Total number actions: Standard Permit (SP) 4,035 Letter Permit (LP) 3,040,  
General Permit (GP) 78,803, Denials 299, All Actions 86,177

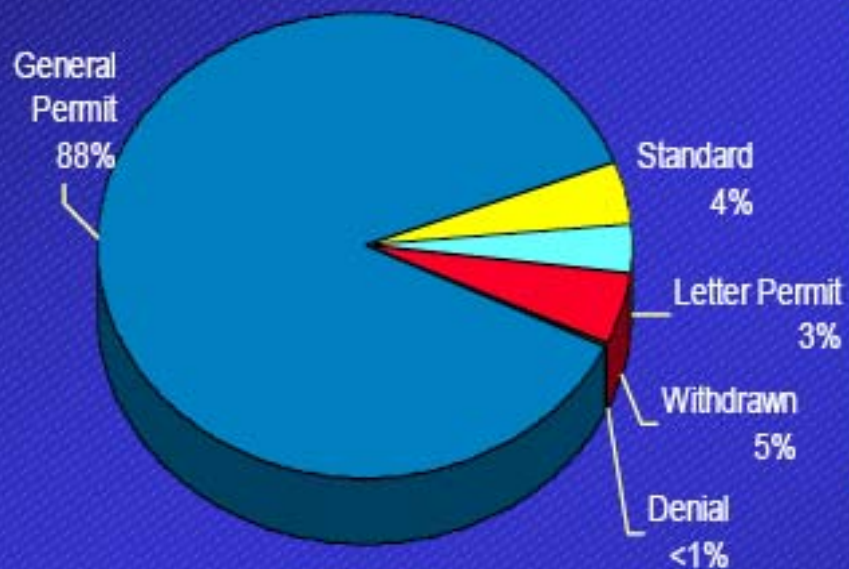
# Dispelling Myths about Section 404



US Army  
Corps of Engineers

## *U.S. Army Corps of Engineers Regulatory Program*

### ALL PERMIT DECISIONS FY 2003



#### TOTAL NUMBER EVALUATED

	FY02	FY03
Standard Permits	4,023	4,035
Nationwide	35,768	35,317
Regional	38,125	43,486
Letters of Permission	3,258	3,040
Denials	128	299
(Withdrawn)	4,143	4,494
<b>TOTAL</b>	<b>81,302</b>	<b>86,177</b>

# Rate of Permit Success



US Army  
Corps of Engineers

## *U.S. Army Corps of Engineers Regulatory Program*

### Wetland Acreage Impacts Includes Verified General Permits



# Corps' Consumer Surveys Are Positive

- Kim Diana Connolly, *Survey Says, Army Corps No Scalian Despot*, 37 ELR 10371
  - Corps surveys rank consumer satisfaction from 1-5 (5 indicates highest satisfaction)
  - **Alaska** – 76% of 984 rated service 4 or 5
    - (only 4% rated service 1 or 2)
  - **Albuquerque** – 84% of 151 rated service 5; 13% rated service 4
    - (0% rated service 1, 2, or 3)
  - **Omaha** – only two surveys; both rated 5
  - **Sacramento** – 82% of 447 rated service 4 or 5
    - (only 4% rated service 1 or 2)

# What can we learn from Rapanos?

- Congress should avoid using words (like navigable) that it doesn't mean
- The Court needs a primer on water law
  - As the Court itself has often noted, the phrase “navigable waters” is inherently ambiguous and means different things in different contexts
  - The word “navigability” is similarly ambiguous
- A bit of history might better inform the Court's decisions
  - Inconceivable that Congress would have intended a narrower scope for CWA than it intended for 1899 RHA, or 1948 FWPCA
- Webster's dictionary is a precarious source for legal authority



## The Fallout from Rapanos

- *U.S. v. Chevron Pipeline*, 437 F. Supp. 2d 605 (N.D. Tex. 2006)
  - Under Rapanos, the federal government lacks authority to regulate an oil spill in an ephemeral stream in Texas that drained into another ephemeral stream and then into a traditionally navigable water
- Lance Wood, an attorney for the Corps, has suggested that up to 99% of U.S. waterways and wetlands will be removed from federal authority if regulated waters have to meet the traditional "navigable waters" test
  - Not even Scalia goes this far, but his approach would certainly take us in that direction



# Gaining Policy Perspective

- View water more like air
  - Water exists in a hydrologic cycle
  - All water is interconnected
- Understand and appreciate the cumulative impacts of wetlands loss
- Recognize the limits of private property
  - “Takings” issues lurk in the background and must be considered but potential for significant public harm without aggressive regulation
  - It’s unlikely we would deny the government’s right to protect wetlands that provide a buffer from hurricanes



# Can We Fix the Problem?

- Both Roberts and Kennedy suggested that the Corps might promulgate rules to clarify the scope of their authority
  - The Corps (and EPA) should clarify their authority, but given the divisions on the Court and the ambiguity surrounding their decisions, it may be an impossible task
    - Corps Guidance document submitted to OMB in November 2006 has been pending ever since
  - And it should plainly address the conflict of interest problem that arises from allowing developers to hire the experts who decide which wetlands are jurisdictional
- But an amendment the Clean Water Act seems inevitable



# Legislative Proposals

- *The Clean Water Authority Restoration Act of 2005*
  - Would redefine the phrase “waters of the United States” in the definition of “navigable waters” essentially to encompass all waters subject to congress’ constitutional authority
- **Alternate and far better approach**
  - Abandon the phrase “navigable waters” in favor of a phrase the reflects what congress means – like “constitutional waters”

# The End

Professor Mark Squillace, Director  
Natural Resources Law Center  
[mark.squillace@colorado.edu](mailto:mark.squillace@colorado.edu)

*Mark Squillace, From Navigable Water to  
Constitutional Waters: The Future of Federal  
Wetlands Regulation,  
40 Mich. J. of L. Ref. \_\_\_\_ (2007)*

available at

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=944814](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=944814)