

Presentation Outline

- Overview of Section 404 of the Clean Water Act
- Section 404's Special Treatment of Linear Projects
- Legal Challenges to U.S. Army Corps of Engineers' Authorization of Linear Projects
- Implications for Energy and Transportation Projects

Clean Water Act of 1972

- Amended Federal Water Pollution Control Act of 1948
- Passed by congress to protect Waters of the U.S.
- Includes several sections:
 - Section 301: requires permits for discharges
 - Section 319: non-point source management
 - Section 402: national pollution discharges elimination system
 - **Section 404: regulates discharge of material into waters of the U.S.**

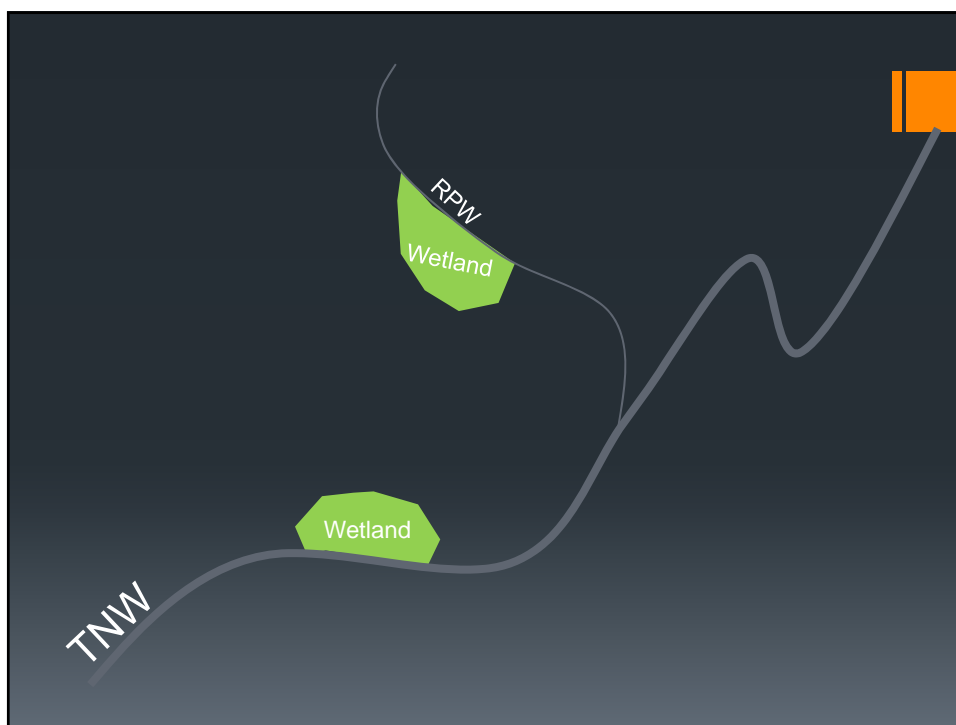
Geographic Jurisdictional Extent of Section 404—Certain “Waters”

- Waters include:
 - Rivers, streams, creeks, canals, ditches, washes
 - Harbors, lakes, ponds, reservoirs
 - Wetlands are areas with:
 - Hydric soils
 - Hydrophytic vegetation
 - Wetland hydrology



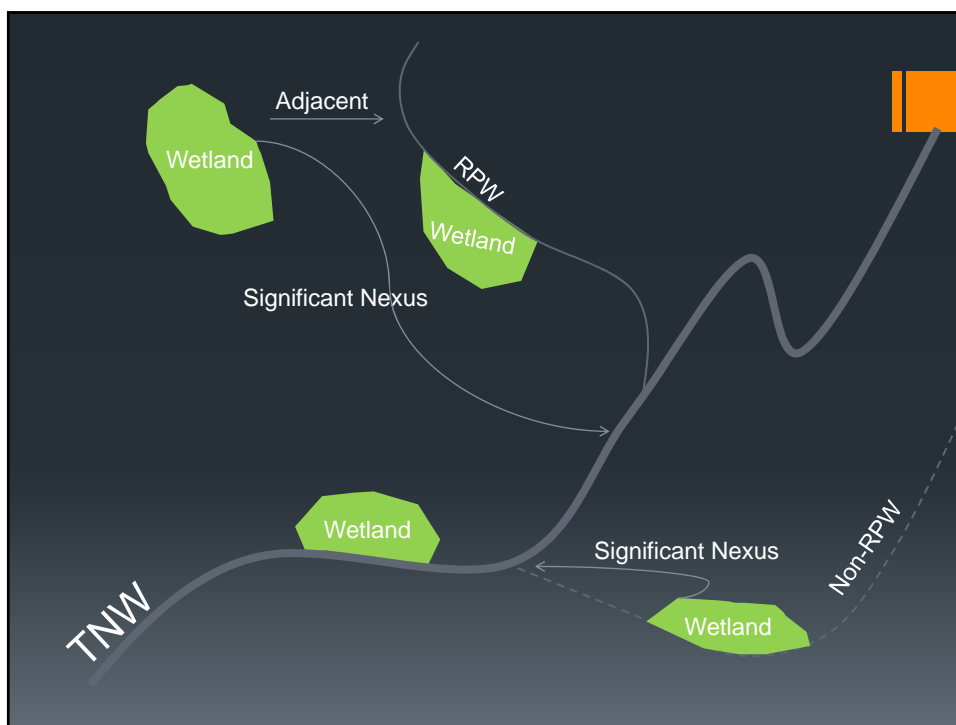
Jurisdictional Extent of Section 404

- The agencies will assert jurisdiction over:
 - Traditional Navigable Waters (TNW)
 - And adjacent wetlands
 - Non-navigable tributaries to TNW that are relatively permanent waters (RPW)
 - And adjacent wetlands



Current Definition of Waters of the U.S.—Agency Guidance

- The agencies will decide jurisdiction over the following using “fact-specific analysis” of significant nexus:
 - Non-navigable tributaries that are not RPWs
 - And adjacent wetlands
 - Wetlands that are adjacent to, but not abutting RPW tributaries to TNWs



Discharges Triggering Section 404 Regulation

33 CFR Part 323

Discharges Include:

- Any addition of dredged or fill material into, including redeposit of dredged material



Permitting for Regulated Projects

- Individual Permits
- Nationwide Permit Program



Nationwide General Permits

- Provide rapid authorization for variety of projects
- Pre-construction notification may be required
- Some projects may require restoration and/or mitigation
- Typically authorize impacts up to a specified amount for “Single and Complete” projects.



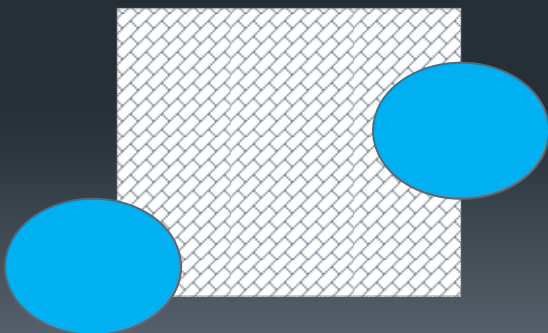
Nationwide General Permits (cont.)

- NWP 3: Maintenance
- NWP 12: Utility Line Activities
- NWP 14: Linear Transportation Projects
- NWP 18: Minor Discharges
- NWP 41: Reshaping Existing Drainage Ditches
- NWP 46: Discharges in Ditches



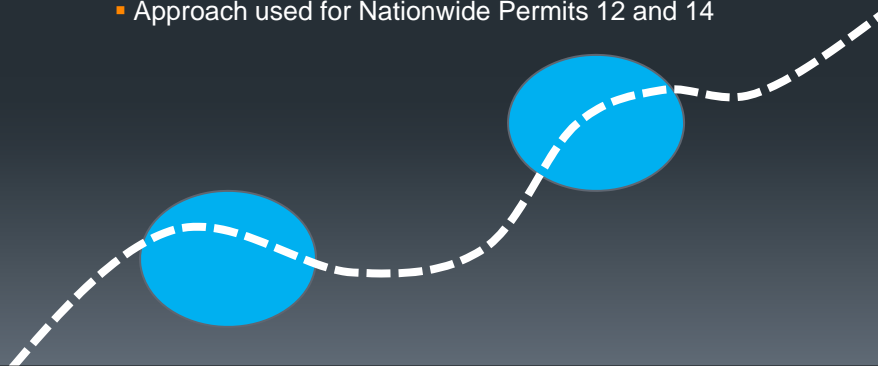
Single and Complete Project

- Impact limits apply for a Single and Complete project definition
- Non-Linear Projects
 - Entire project with independent utility



Single and Complete Project

- Impact limits apply for a Single and Complete project definition
- Linear projects (utility lines, roads, railways, etc.)
 - All impacts at a single crossing of a waterbody at a specific location
 - Approach used for Nationwide Permits 12 and 14



TransCanada Keystone Pipeline

- A pipeline system to transport crude oil from Alberta, Canada, to the Gulf Coast
- Consists of four phases
 - Phase 1: Hardisty to Steel City, Wood River and Patoka
 - Phase 2: Steele City to Cushing
 - Phase 3: Cushing to Houston and Port Arthur
 - Phase 4: Hardisty to Steel City
- Phases 3 and 4 are referred to as the Keystone XL Pipeline
- Permitting Requirements
 - Presidential Permit
 - Clean Water Act Section 404 Permit



TransCanada Keystone Pipeline: Phase 3 Clean Water Act Section 404 Permitting

- 485 miles of 36-inch pipe in a 110-foot-wide right-of-way
- Phase 3 includes 1,500 crossings of Waters of the U.S.
 - 158 acres of temporary impacts to forested wetland
 - 137 acres of permanent conversion of forested wetland to scrub-shrub wetland
- TransCanada submitted Preconstruction Notification to the Galveston U.S. Army Corps of Engineers District for Nationwide Permit 12 authorization
- U.S. Army Corps of Engineers confirmed that Phase 3 conforms to Nationwide Permit 3

TransCanada Keystone Pipeline: Legal Challenges

- Sierra Club files Complaint for Declaratory and Injunctive Relief and Petition For Review of Agency Action
 - Named U.S. Army Corps of Engineers at the Defendant
 - Claims (abbreviated):
 - 1) NWP 12 violates the Clean Water Act by authorizing projects with more than Minimal Effects on the Environment
 - 2) NWP 12 violates the Clean Water Act by deferring its Minimal Effects Determination until after the opportunity for Public Participation has ended
 - 3) NWP 12 is an abuse of discretion because it allows linear projects unlimited use of NWP 12 while not allowing the same for non-linear projects
 - 4) NWP 12 is an abuse of discretion because it determines that conversion of forested wetland to non-forested wetland is not a loss of Waters of the U.S.
 - 5) The U.S. Army Corps of Engineers authorization of Phase 3 violates the Clean Water Act

TransCanada Keystone Pipeline: Legal Challenges

- The U.S. District Court for the Western District of Oklahoma rejected the Sierra Club's claims for injunction:
 - 1) Injunction was not warranted because plaintiffs failed to establish substantial likelihood of success
 - 2) The U.S. Army Corps of Engineers made the required minimal impact determinations during the issuance of NWP 12
 - 3) The U.S. Army Corps of Engineers' interpretation of "Single and Complete project" for linear projects is permissible
 - 4) The U.S. Army Corps of Engineers' treatment of forested wetland conversion is permissible

El Dorado Arkansas Wastewater Pipeline: More Legal Challenges

- Ouachita Riverkeeper v. U.S. Army Corps of Engineers

Claims:

- 1) Conversion of forested wetland to non-forested wetland constitutes a loss of Waters of the U.S.
- 2) Installation of a buried pipeline results in permanent loss

Court found in favor of defendants

Enbridge Energy's Flanagan South Pipeline: Potential Legal Challenges on Horizon



Looking to the Future

- Expected increase in linear projects
 - Aging roads and utilities infrastructure
 - Growing demand for water and energy
- The value of Nationwide Permits
- Expect heightened focus on the reissuance of Nationwide Permits in 2017
- Clean Water Act Section 404 Permitting without Nationwide Permits

Questions?

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