A Practitioner's View of WOTUS

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APEX

REGULATORY BACKGROUND

- Rivers & Harbors Appropriation Act of 1899
  - Permit required to place refuse in navigable Waters, or tributaries of navigable waters
  - US Army, Corps of Engineers (USACE) administers the permit process
- Federal Water Pollution Control Act of 1948
  - Public Health Service to prepare comprehensive programs for eliminating or reducing the pollution of interstate waters and tributaries
  - To be Accomplished by the Surgeon General in cooperation with other Federal, state and local entities
- Federal Water Pollution Control Act of 1972 (CWA)
  - Established national objectives to restore and maintain the chemical, physical, and biological integrity of the nation's waters

REGULATORY BACKGROUND – Cont.

- Section 404 of the amendments
  - Authorized the USACE to issue permits for the discharge of dredged or fill material into navigable waters
  - The federal Environmental Protection Agency (USEPA) was authorized to prohibit the use of a site as a disposal site based on a determination that discharges would have an unacceptable adverse effect on municipal water supplies, fishery areas, wildlife, or recreational uses.
  - Waters need not be truly navigable to be subject to CWA jurisdiction.
  - Waters that are jurisdictional (Waters of the United States-WOTUS) are subject to the multiple regulatory requirements of the CWA: standards, discharge limitations, permits, and enforcement.

REGULATORY BACKGROUND – Cont.

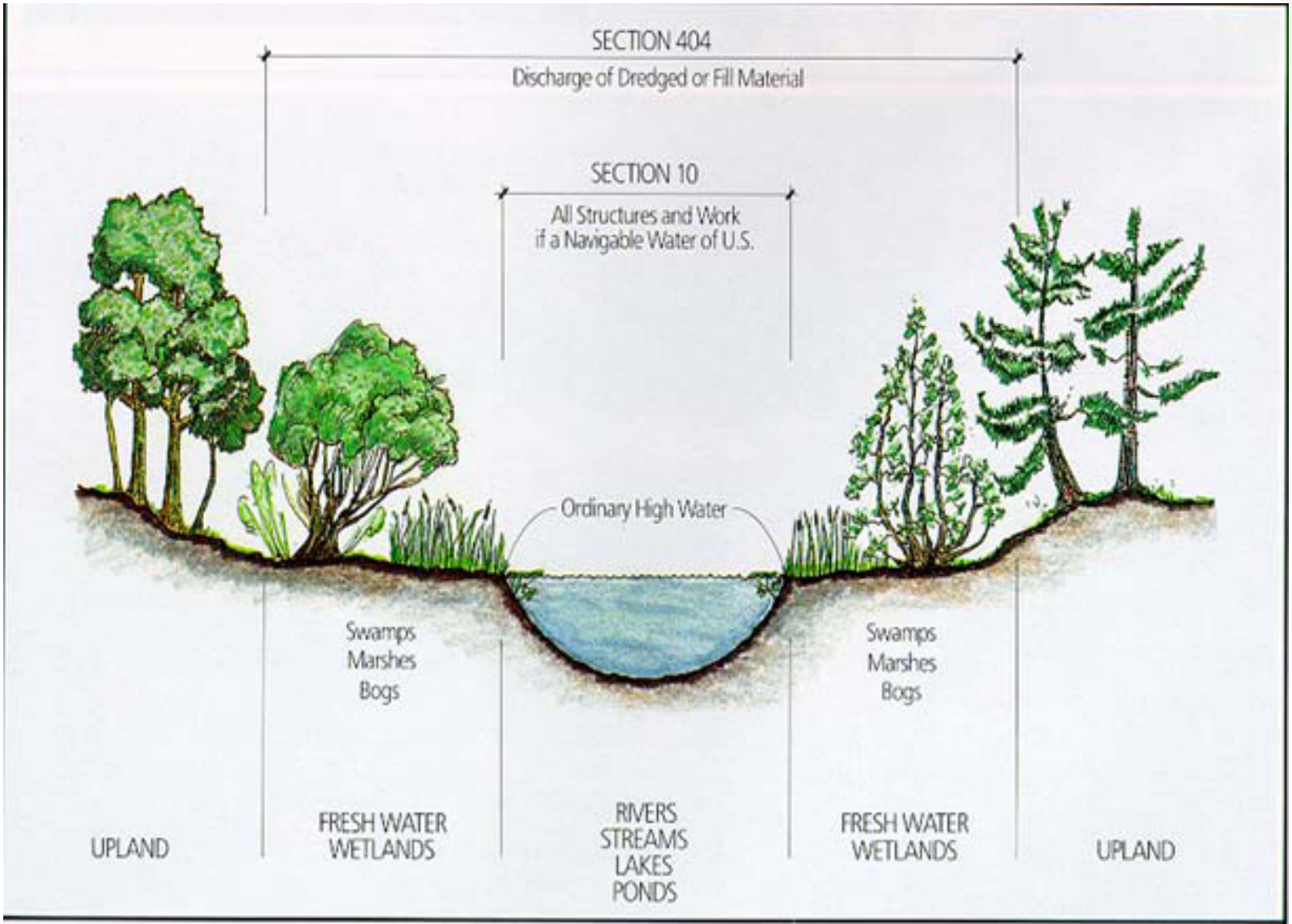
- The CWA leaves it to the federal agencies to define the WOTUS in regulations, which USEPA and USACE have done several times, most recently in 2015.
- Supreme Court rulings (without a majority) in 2001 and 2006 interpreted the regulatory scope of the CWA more narrowly than the agencies and lower courts were then doing, and created uncertainty about the appropriate scope of waters protected under the CWA.
- Throughout CWA enforcement history, the USACE has used the "Jurisdictional Determination" process to guide scope of federal authority at specific locations.

Jurisdictional Determinations - JD

- An approved JD is the official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site.
- The JD precisely identifies the limits of those waters on a specific project site which are determined to be jurisdictional under the CWA. (33 C.F.R. 331.2.)
- Historically, the USACE has relied on the identification of the Ordinary High Water Mark (OHWM) to provide a "bright line" for federal jurisdiction.

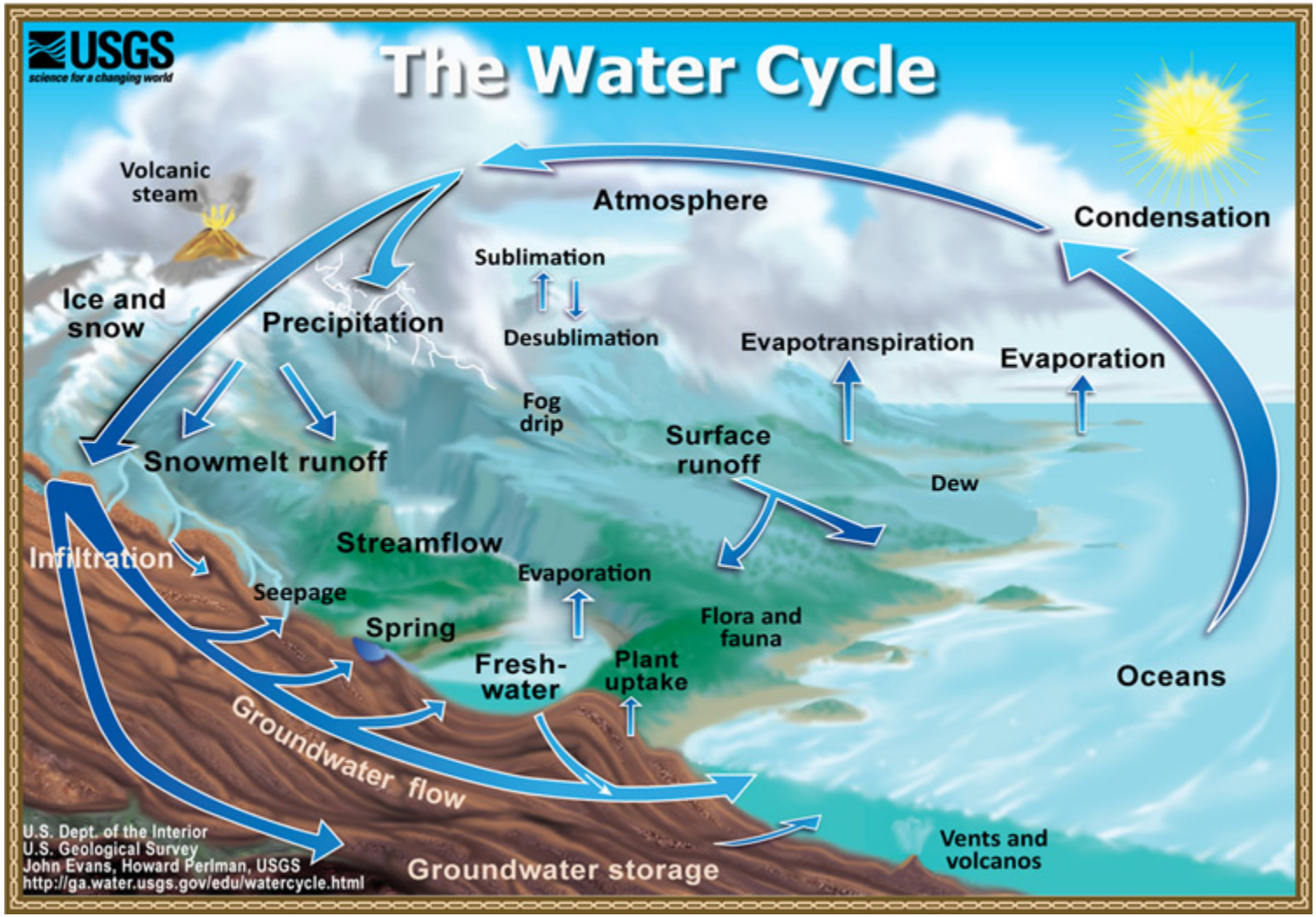
- Federal regulations (33 CFR 328.3(e)) define the OHWM as:
  - . *"…that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas."*

OHWM - USCOE Perspective



Corps of Engineers Regulatory Jurisdiction in **FRESH WATERS**

WATER IN NATURE



WATER IN NATURE, Cont.

- Water is one of our most important natural resources. Without it, there would be no life on earth. – USGS
- The world's total water supply has remained nearly constant throughout history and is estimated at about 333 million cubic miles of water, over 96 percent of which is saline
- "Water runs downhill and pools in low places" – Professor Joseph Harp, University of Oklahoma
- Runoff is flow from a drainage basin or watershed that appears in surface streams.
- Where does it become "jurisdictional"?

Old Rule-Field Determinations of WOTUS

- USGS Quadrangle Maps
  - Solid Blue Line
  - Dashed Blue Line
- Aerial Photograph Assessment
  - Riparian Vegetation Patterns
  - Extension of Flow Paths
  - Bridges, Farm Ponds, Man-made Structures
- On-site Inspections for OHWM/Wetlands

Clean Water Rule - 2015

- Purpose: EPA and USACE wanted to reduce the confusion about what is/is not a waters of the U.S. following multiple Supreme Count decisions
- Redefines "waters of the U.S."
- Codified many long-standing interpretations
- Establishes categories of jurisdictional waters *by rule*
- Rule became effective on August 28, 2015
- Nationwide "stay" issued by 6th US Circuit Court of App
  October 9, 2015

EPA/COE Perspective "In most cases, the Clean Water Rule does not affect the current jurisdictional status of waters and wetlands."

New Rule Defines "Tributary" for the First Time

- Ordinary High Water Mark (OHWM): Line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.
- Bed and bank
- Downstream flow

Adjacent Wetlands and Waters

- Previous rule only considered adjacent wetlands
  - Must Meet USACE criteria for soils, plants, and hydrology
- New rule changes the word "wetland" to "**waters**"
  - Wetlands AND ponds, lakes, offline impoundments, manmade waters, etc.
- Adjacent: bordering, contiguous, or neighboring
  - Bordering and contiguous are obvious. But what is neighboring?

Adjacent Wetlands and Waters

- The new rule gives distances for determining what is neighboring
- "Neighboring" features are:
  - Within 100 feet of the OHWM of a covered feature
  - Within the 100yr floodplain AND within 1,500 feet of the OHWM of a covered feature ("floodplain waters")
  - Within 1,500 feet of a traditional navigable water, interstate water, or territorial seas
- These features are <u>jurisdictional by rule</u>
  - No more significant nexus analysis of these features
- Does not apply to waters subject to "established agriculture"

Features that Require a Significant Nexus Analysis

- These features require a significant nexus analysis
  - Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands
- Considered similarly situated <u>by rule</u>
  - i.e. must be analyzed in combination / as a group
- In SWANCC vs. USACOE, the US Supreme court ruled out the jurisdictional status of these features, when isolated

- A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest navigable water, interstate water or territorial seas
- The significant nexus definition used in the final rule diverges from Justice Kennedy's decision. Justice Kennedy's opinion included "chemical, physical and biological" to determine jurisdiction

Case-specific Significant Nexus

- In the event that water or wetland did not meet any of the previously mentioned criteria, there is a catch all in the new rule:
  - Waters within the 100-yr floodplain of a traditional navigable water, interstate water, or seas (so, > 1,500 feet)
  - Waters **within 4,000 feet** of the OHWM of a covered feature (so, beyond the floodplain)
- Why so encompassing? EPA Science Committee determined that a watershed is the "reasonable and appropriate" region for a significant nexus analysis

Exclusions

- Features <u>excluded by rule</u>
  - Prior converted cropland and waste treatment systems (same)
  - Groundwater and erosional features
  - Stormwater control features that convey, treat, or store stormwater
  - Ditches that have ephemeral or intermittent flow and are not a relocated tributary or excavated in a tributary or drain wetlands
    - What's missing? Perennial ditches

Examples of Difficult Waters for JD

Examples of Difficult Waters for JD, Cont.

Examples of Difficult Waters for JD, Cont.

Examples of Difficult Waters for JD, Cont.

Examples of Difficult Waters for JD, Cont.

Examples of Difficult Waters for JD, Cont.

Examples of Difficult Waters for JD, Cont.

Examples of Difficult Waters for JD, Cont.

Easy JD Stream

Easy JD Stream