

REGULATORY UPDATES



Regulatory Highlights

- **PROPOSED CWA GUIDANCE**
- **AVATAR & WHAT IS RIGHT?**
 - ▶ Jurisdiction
 - ▶ Permits
 - ▶ Mitigation/Mitigation Banking
- **PROPOSED NWP PROCESS**
- **MITIGATION UPDATES**
- **OTHER OUTREACH INITIATIVES**



Mission

- **Is to implement the delegated Department of the Army regulatory authorities provided under Section 10 of the Rivers and Harbors Act, Section 404 of the Clean Water Act and Section 103 of the Ocean Dumping Act.**
- **Is to protect the nation's aquatic resources, while allowing reasonable development through fair and balanced permit decisions in accordance with federal laws and regulations.**

CWA Goal:

- **Protect the biological, chemical and physical functions of our nation's waters of the U.S.**

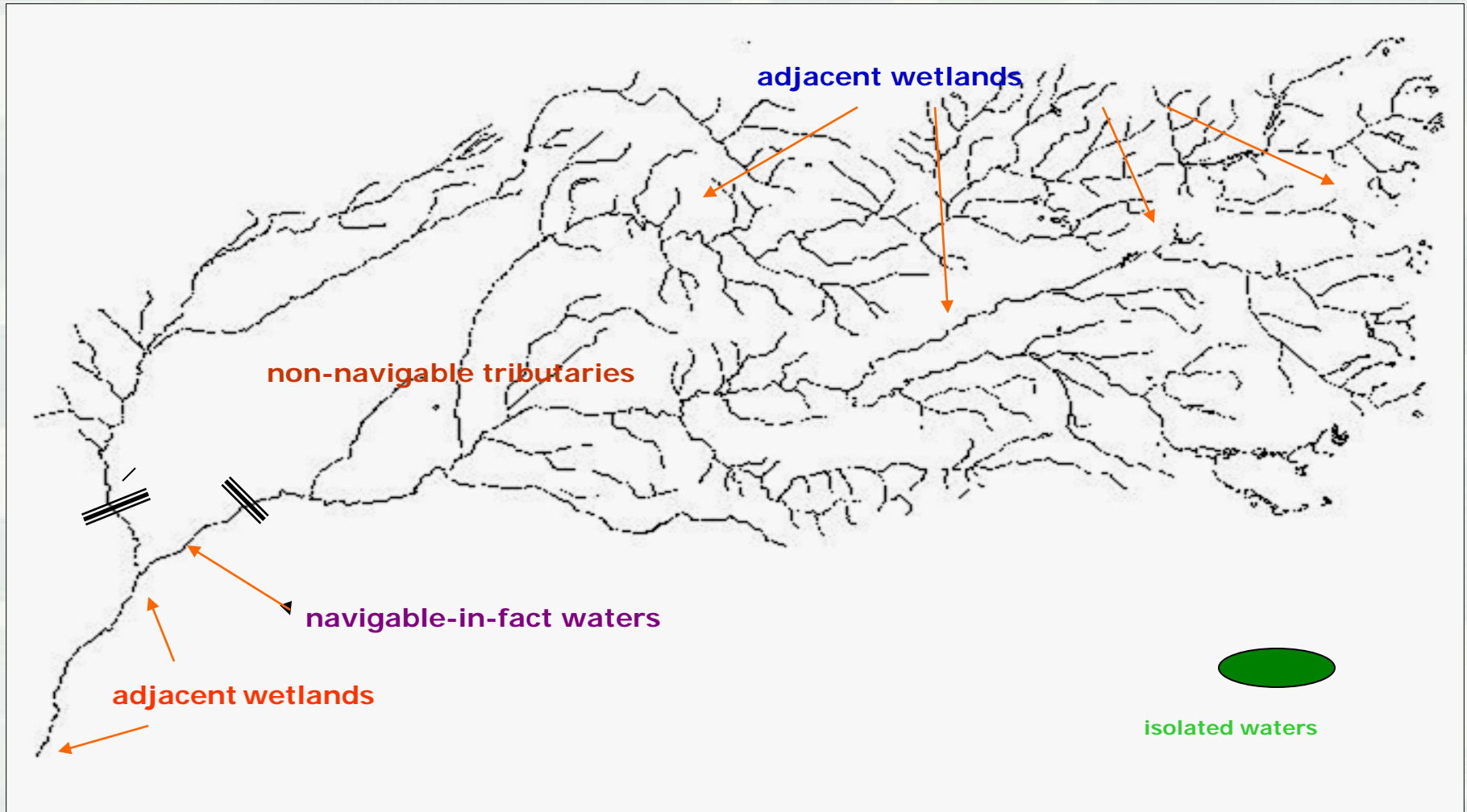


CWA Section 404: A Short History

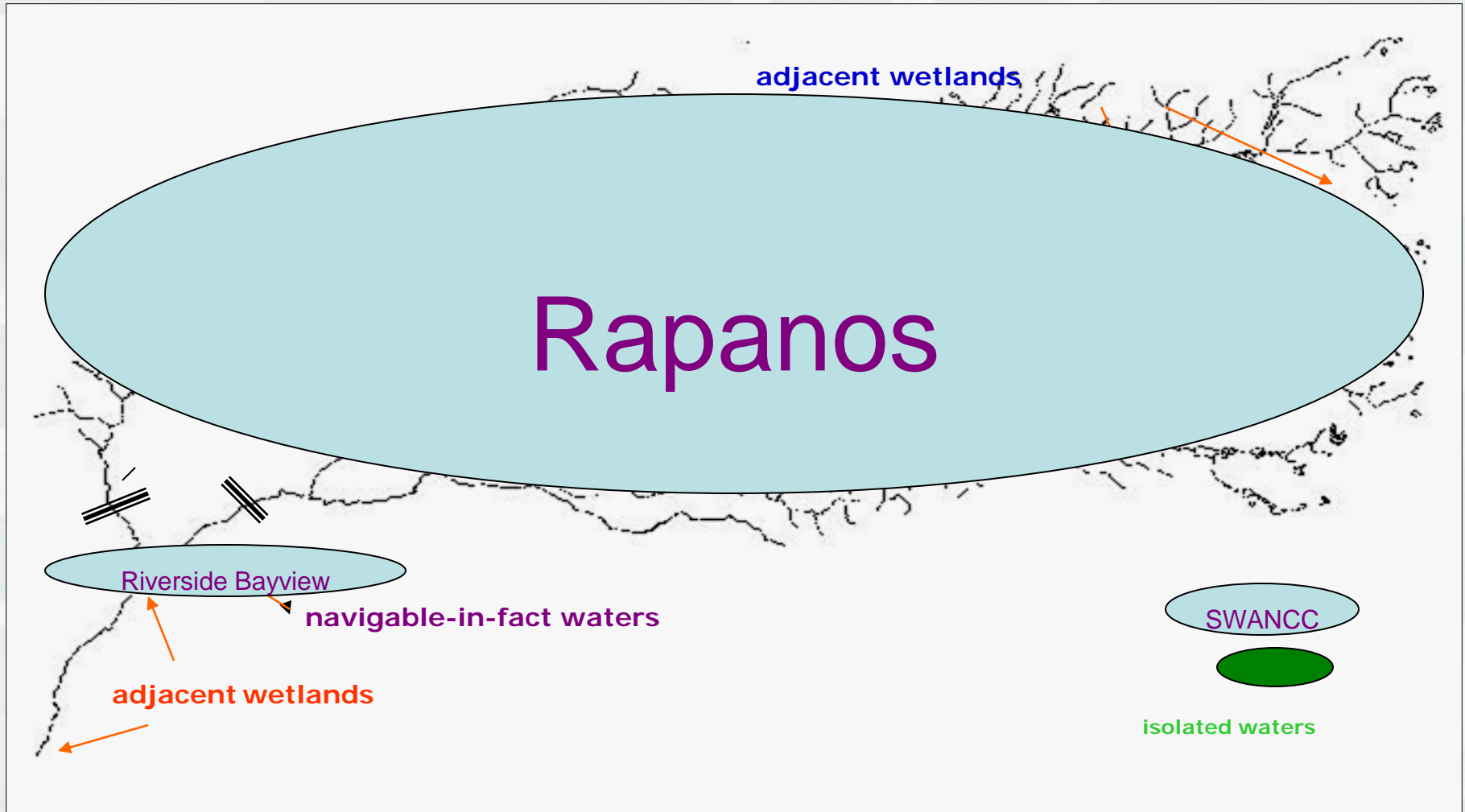
- **1972 Enacted**
- **1974 Regulation**
- **1975 NRDC vs. Calloway. Interim regulation**
- **1977 Regulation & Congressional Amendments**
- **1979 GS Civiletti decision**
- **1985 Riverside Bayview Homes**
EPA's Migratory Bird Memo
- **1986 Preamble on "Migratory Bird Rule"**
- **2001 Supreme Court decision in *SWANCC v. USACE***
- **2006 S Ct decision in *Rapanos & Carabell***
- **2008 11th Circuit: *McWane***



CWA Geographic Jurisdiction



CWA Geographic Jurisdiction



Waters of the U.S.

- **Traditional navigable waters**
- **Interstate waters including interstate wetlands**
- **Other waters including intrastate, non-navigable waters with interstate/foreign commerce connections**
- **Impoundments of waters otherwise defined as waters of the U.S.**
- **Tributaries of the above**
- **Territorial seas**
- **Adjacent wetlands**



Traditional Navigable Waters

Lake Sidney Lanier, GA



Etowah River, GA



**TNWs are jurisdictional
under the CWA.**



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Riverside Bayview Homes

Wetlands adjacent to Traditional Navigable Waters are Jurisdictional



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85-86 Migratory Bird Rule (MBR)

- **Habitat for birds protected under the Migratory Bird Treaties.**
- **Habitat supporting migratory birds crossing state boundaries**
- **Habitat for Endangered Species**
- **Irrigate crops sold in interstate commerce**



Solid Waste Agency in Northern Cook County (SWANCC)

2001 Supreme Court Decision in SWANCC

- **Corps determined CWA jurisdiction over abandoned gravel pits by use of MBR**
- **MBR based on blue heron use of ponds.**
- **Holding:**
 - ▶ **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**



Isolated Waters & Wetlands



Isolated wetland, IA



For each specific request, staff will need to make a case-by-case determination on jurisdiction. HQ concurrence required.



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U.S. Supreme Court Decisions

Rapanos. Determine if wetlands having a surface hydrologic connection to a man-made ditch that drains into traditional navigable waters are waters of the U.S.

Carabell. Determine if a wetland is “adjacent” if separated by a man-made berm from a tributary to navigable waters.



Rapanos & Carabell

- **A split Supreme Court vacated and remanded judgments back down to Sixth Circuit Court of Appeals.**
- **Justices issued five opinions in Rapanos (one plurality opinion, two concurring opinions, and two dissenting opinions), with no single opinion commanding a majority of Court.**



Interagency Guidance on CWA Jurisdiction

Jurisdictional Guidance:

- **Use of Plurality method**
- **Use of Kennedy method: fact-specific analysis to determine whether there is a significant nexus with a traditional navigable water?**
- **TNWs**
- **Adjacent**

**Which features generally are not
jurisdictional**



RPWs & Non-RPWs

Wolf Trap Creek, Vienna, VA



Ephemeral channel, ID



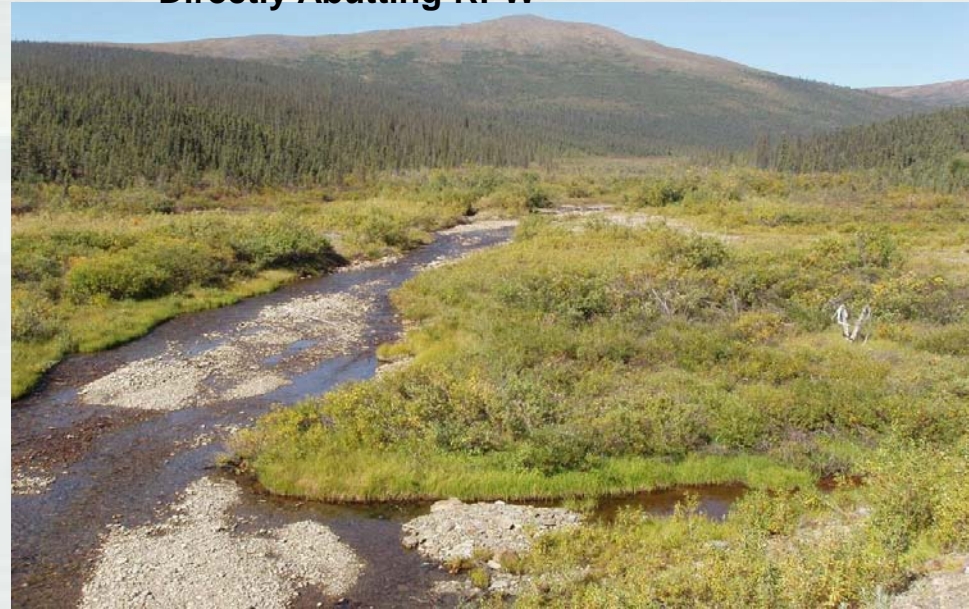
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Wetlands

Not-Directly Abutting RPW



Directly Abutting RPW



Adjacent to Non-RPW

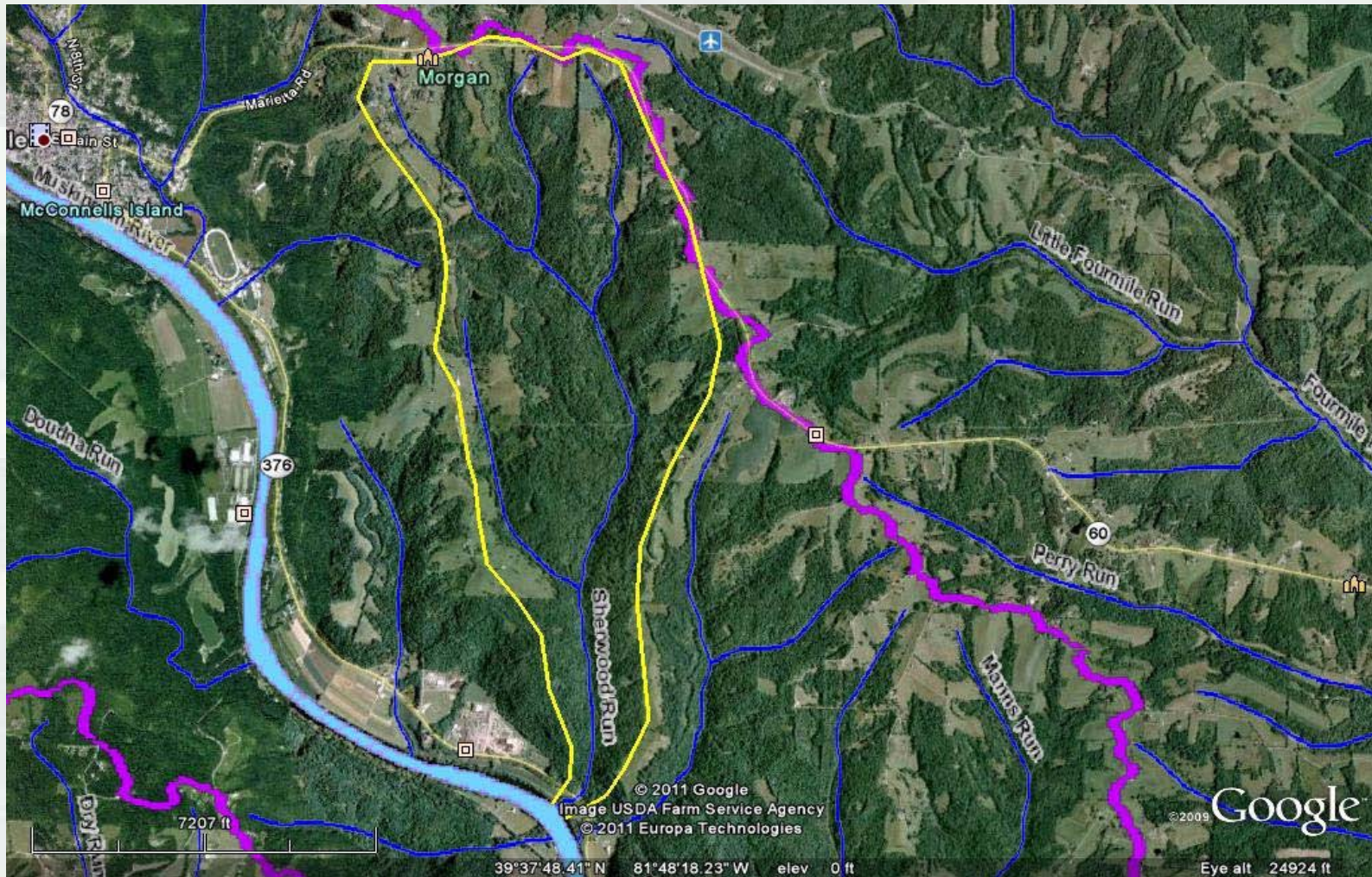


CWA Guidance: What's Proposed?

- **Traditional Navigable Waters: Broader Definition**
- **Interstate Waters: No Change**
- **Tributaries: Bed, Bank & OHWM with SN – Single Point Entry**
- **Adjacency: Ecological Connectivity & Use of Residence Species**
- **Other waters:**
 - ▶ **Isolated**
 - ▶ **Physical Proximate**



Single Point of Entry Watershed



Hmmm...

What have I
forgotten?



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