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# Hot Topics in Wetlands and Water

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40<sup>th</sup> Annual Local Government Law in Florida Conference

# Wetlands - Where are we with WOTUS?

## Status of Federal Waters of the United States (WOTUS) Rule

- Became effective on August 28, 2015
- Stayed by Sixth Circuit Court of Appeals pending a jurisdictional challenge
- ACOE and EPA are currently using the previous Rapanos rule, court opinions, and guidance documents to make wetland jurisdictional determinations.



# Original Army Corps Jurisdiction: Navigability

- Sections 9 and 10 of the Rivers and Harbors Act of 1890, as amended 1899 - Federal jurisdiction originally limited to the concept of navigability
- Definition of “navigable-in-fact” originated with U.S. Supreme Court case The Daniel Ball, 77 U.S. 557 (1870)
  - Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water



# Regulatory Evolution- Protection of Water Quality

- The Federal Water Pollution Control Act of 1948 - created modern CWA program but limited direct government regulation to interstate waters
- Water Quality Act in 1965 - first act focused on water quality and not human health
- Clean Water Act of 1972
  - Push to fill regulatory gap between state tort law and admiralty law in combatting pollution (particularly oil)
  - Utilized term “navigable waters” but also included undefined term of waters with a “significant nexus” to navigable waters



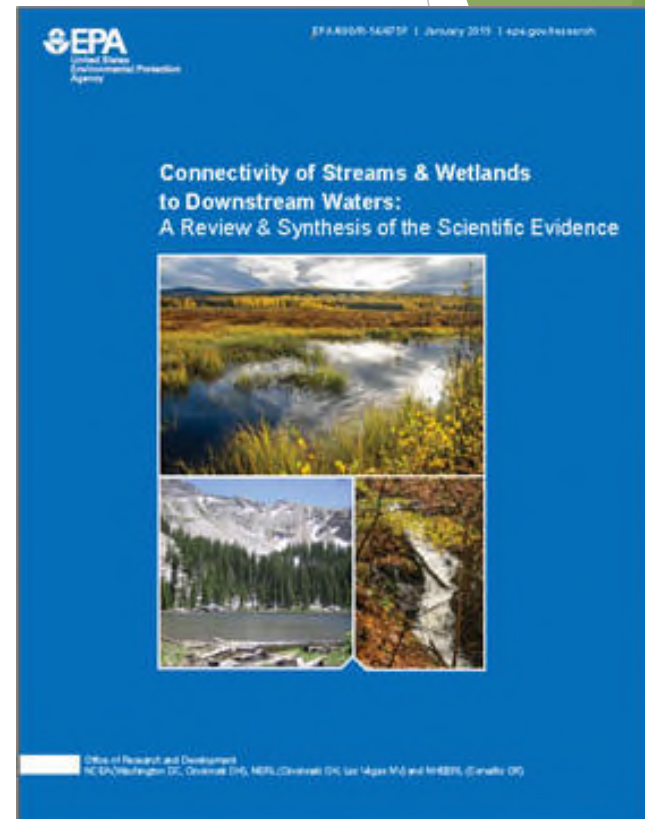
# Key Court Opinions on Scope of WOTUS

- The *Avoyelles Sportsmen's League* cases
- *U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985)
- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineer's*, 53 U.S. 159 (2001) (SWANCC)
- *Rapanos v. U.S.*, 547 U.S. 715 (2006)



# EPA & Corps Response- The Science

- September 2013 draft report released
- January 2015 EPA publishes in Federal Register report on the current state-of-the-science
- Conclusions:
  - Streams- regardless of size or frequency of flow- are connected to downstream waters
  - Wetlands, transitional areas and floodplains are physically, chemically and biologically integrated “buffers” for downstream rivers
  - Incremental contributions of streams and wetlands are cumulative across watersheds and impacts should be evaluated in a “watershed” context



# Waters of the United States

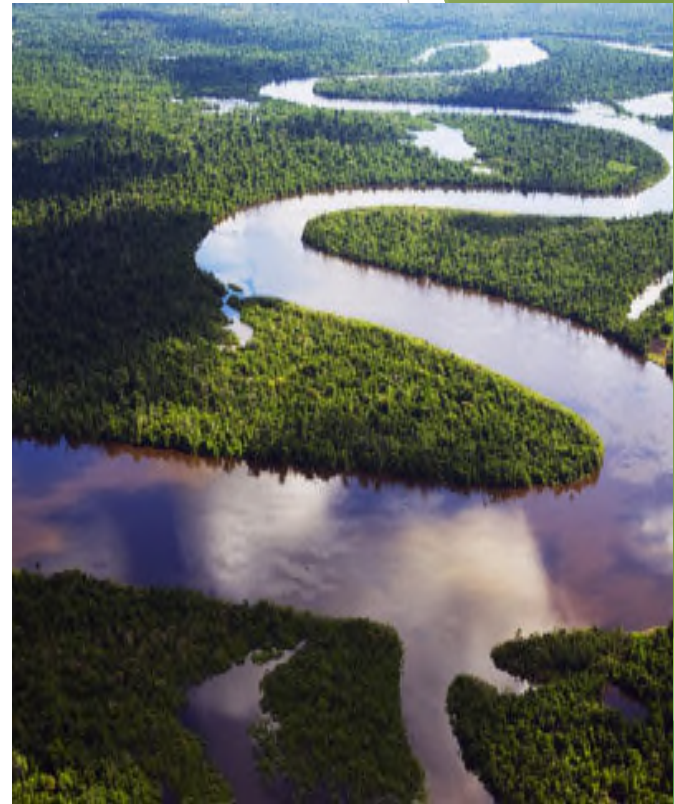
1. Traditionally Navigable Waters \*
2. Interstate Waters \*
3. Territorial Seas \*
4. Impoundments of Jurisdictional Waters \*
5. Tributaries
6. Adjacent Waters
7. Similarly Situated Regional Water
8. Case Specific Significant Nexus Waters

\* Remains Unchanged From Prior Definition



# Tributaries- always there, now defined

- **Tributaries:** waters with physical characteristics of “bed and banks” *AND* an “ordinary high water mark” that contribute flow to traditional navigable waters, interstate waters or the territorial seas
- EPA determined that tributaries categorically have a significant nexus and are therefore **jurisdictional**





# Adjacent Waters

- **Adjacent waters:** Any waters that border, neighbor, or are contiguous to a traditionally navigable water, interstate water, territorial sea, impoundment or tributaries.
  - Previously limited to adjacent wetlands, now any adjacent water
  - Includes waters separated from jurisdictional waters by constructed dikes or barriers, natural river berms, beach dunes and other similar features



## Outer Limits of “Neighboring”

- Neighboring waters under the adjacency test for jurisdiction:
  - Waters within:
    - a *minimum* of 100 feet of a traditional navigable water, an interstate water, a territorial sea, an impoundment, or tributary *OR*
    - *Within* the FEMA 100-year floodplain *AND* up to a *maximum* of 1,500 feet of the ordinary high water mark
  - The entire water is neighboring if a portion is located within these criteria



# The Significant Nexus Test

- Focus of the Kennedy concurring opinion in *Rapanos*
- Significant Nexus is determined on a case by case basis
- A water will be considered to have a significant nexus to a traditional navigable water, an interstate water or a territorial sea if:
  - Alone or together with similarly situated waters in a watershed which “significantly affects the chemical, physical or biological integrity”
  - Found through evaluation of factors



- 9 Factor Test:

- Sediment trapping;
- Nutrient recycling;
- Pollutant trapping, transformation, filtering and transport;
- Retention and attenuation of flood waters;
- Runoff storage;
- Contribution flow;
- Export of organic matter;
- Export of food resourced; or
- Provision of life cycle dependent aquatic habitat for species located in a traditional navigable water.

## Other Changes of Note

### ▫ Similarly Situated Regional Waters:

- Prairie potholes, Carolina and Delmarva Bays, Pocosins, Western vernal pools and Texas coastal prairie wetlands that have a significant nexus to a Traditional Navigable Waters, Interstate Waters or Territorial Sea.
- Categorically “similarly situated”



### • “Other Waters” aka Case Specific Significant Nexus Waters:

- Waters in the 100 year floodplain of Traditional Navigable Waters, Interstate waters or Territorial Sea *AND*
- Within 4,000 feet of a Traditional Navigable Waters, Interstate Waters or Territorial Sea, Impoundment or Tributary

# Categorical Exclusions

- Irrigated areas that would revert to dry land if application ceased.
  - Artificial lakes or ponds created on dry land (farm ponds, stock watering ponds, settling basins, cooling ponds, log cleaning ponds, flooded fields for rice growing)
  - Artificial reflecting or swimming pools created on dry land
  - Small ornamental waters created in dry land
- Water-filled depressions created in dry land incidental to mining or construction activity.
  - Erosional features (gullies, rills, and other ephemeral features)
  - Puddles
  - Groundwater
  - Ditches
  - Constructed components for MS4s and water delivery/reuse and erosional features



# Potential Changes to WOTUS

## **Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule**

- Instructs EPA and ACOE to revise or rescind the WOTUS Rule
- Instructs them to consider interpreting “navigable waters” in “a manner consistent with” Justice Scalia’s opinion in *Rapanos*
- Instructs EPA and ACOE to inform the Attorney General of this pending review
- Instructs heads of all “executive departments and agencies” to review all “orders, rules, regulations, guidelines, or policies” enforcing the WOTUS Rule for consistency with the EO and rescind or revise them “as appropriate and consistent with law”

## **Notice of intent to review and rescind or revise the Clean Water Rule**

- Federal Register Number: 2017-04312. Posted March 6, 2017.



# Florida Pollution Reporting

## Background Events

- Sinkhole under Mosaic Fertilizer facility in Polk County.
- City of St. Petersburg release of domestic wastewater into Tampa Bay.
- Public outcry → Governor required DEP issue a 90 day Emergency Rule on Public Notification of Pollution, required rule making and also legislative authority
- Impacted trade associations challenged the Proposed Rule - Judge Canter agreed finding that DEP's authority not specific enough to impose this obligation and due to the additional regulatory costs
- 90 day Emergency Rule expired, proposed rule struck down, Governor's bill filed in legislative session



# Florida Pollution Reporting

## **Emergency and Proposed Rule Issues:**

- Definition of “pollution” vague
- 48-hour reporting window was not enough time to assess problem and provide information required
- Redundant reporting
- Notification of local media
- Reporting requirements for air and large water bodies was not practicable.





# Florida Public Notice of Pollution Act

## 2017 legislative action:

- 3 bills introduced: SB 532, SB 1018, and HB 1065
- SB 532 passed the Senate on 4/18, went to the House
- Pollution reporting requirement language inserted into SB 1018, a bill relating to contaminated site cleanup, in late April.
- On May 3, Public Notice of Pollution Act - CS/CS/SB 1018 passed, awaits Governor's signature.



# Florida Public Notice of Pollution Act

## **CS/CS/SB 1018:** requirements for regulated entities

- “Reportable pollution release” is a release/discharge from an installation into air/land/water which is:
  1. Discovered by the owner or operator of the installation;
  2. Not authorized by law; and
  3. Reportable to State Watch Office under any DEP rule, permit, order, or variance.
- Reporting requirements:
  - Within 24 hours of discovery of release, must notify DEP with the same information provided to the State Watch Office.
  - If pollution migrates off property, must notify DEP again within 24 hours.



## Florida Public Notice of Pollution Act - Miscellaneous

- If multiple parties must report same release, single report will suffice, but if report defective, DEP may enforce against all parties
- Failure to report: civil penalties under § 403.121, Fla. Stat.
- No criminal penalties
- Notice not an admission of liability/harm
- Effective date July 1, 2017



# Florida Public Notice of Pollution Act

## **CS/CS/SB 1018:** DEP responsibilities

- Must maintain a website where it will post all notices of reportable pollution releases it receives within 24 hours of receipt
- Will create regional email lists to allow subscribers to receive notices
- Create an email address and online form to allow owners or operators to submit notices required under the law



# Lake Okeechobee Updates

## **Existing/ongoing water storage programs**

- Lake Okeechobee Watershed Project (LOWP)
- SFWMD Dispersed Water Management Program and Payments for Environmental Services Program
- DEP's Basin Management Action Plans (BMAP)



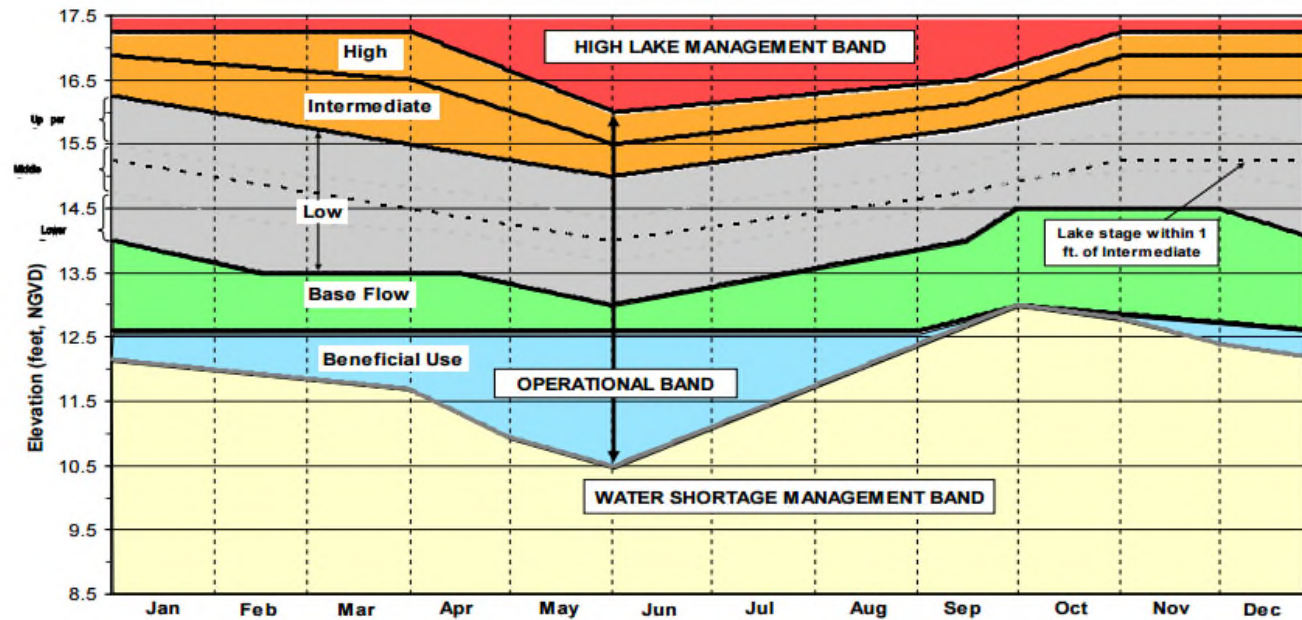
# Lake Okeechobee Background

- LORS schedule (forward pumps)
- Herbert Hoover Dam rehabilitation
- BMAP and other water storage projects
- Lake Okeechobee Watershed Project
- 2017 Florida Legislature Action



# Lake Okeechobee: Lake Okeechobee Regulation Schedules

## Features of the 2008 Lake Okeechobee Interim Regulation Schedule (aka LORS-2008)



**NOTES:**

**High Lake Management Band:** Outlet canals may be maintained above their optimum water management elevations.  
**Operational Band:** Outlet canals should be maintained within their optimum water management elevations.  
**Water Shortage Management Band:** Outlet canals may be maintained below optimum water management elevations.

CENTRAL AND SOUTHERN FLORIDA PROJECT  
 2008 LAKE OKEECHOBEE  
 INTERIM REGULATION SCHEDULE  
 PART B  
 DATED: March 2008  
 DEPARTMENT OF THE ARMY, JACKSONVILLE DISTRICT  
 CORPS OF ENGINEERS, JACKSONVILLE, FLORIDA

Figure 7-2

# Lake Okeechobee: Herbert Hoover Dike rehabilitation



<http://www.saj.usace.army.mil/Missions/Civil-Works/Lake-Okeechobee/Herbert-Hoover-Dike/>



# Lake Okeechobee Programs: BMAP & Dispersed Water Management

- ❑ Water quality based storage program
- ❑ Landowners paid by state to hold water that would otherwise go to Lake Okeechobee or down the tributaries
- ❑ BMAP implemented by DEP, establishes requirements on landowners regarding phosphorus loading into Lake Okeechobee

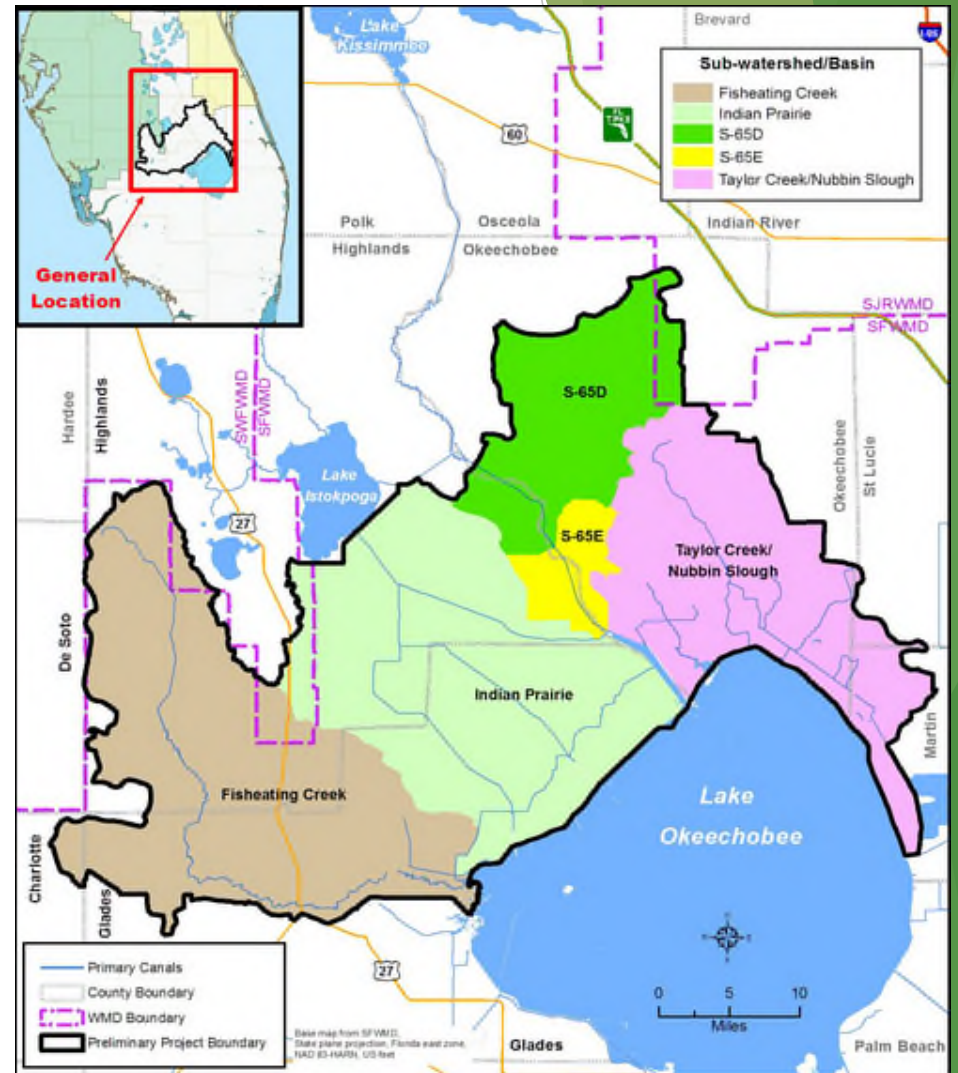


**Map of Dispersed Water Management Projects**



# Lake Okeechobee Planning: Lake Okeechobee Watershed Project

- Reduce discharges to estuaries
- Re-establish wetland areas in northern Everglades
- meet minimum targets for discharges down the estuaries for restoration
- potential to add water supply as an objective to the project



# Lake Okeechobee Legislation - Chapter 2017-10

## Land Acquisition

- Authorizes the SFWMD to pursue the goal of creating at least 240,000 acre-feet of storage south of Lake Okeechobee.
- SFWMD to acquire all lands east of the Miami Canal and west of the “A-2 parcel” needed to construct reservoir
  - ~3,200 acres are state-owned, but under lease; ~500 acres are privately owned.
  - Cannot use eminent domain to acquire property.
  - Coordinate termination of leases and transfer of title of lands to SFWMD
- Total acreage necessary for additional water treatment cannot exceed the amount required to meet state and federal water quality standards



# Lake Okeechobee Legislation - Chapter 2017-10

## Post Authorization Change Report

- SFWMD/ACOE to submit a post-authorization change report to CEPP to revise A-2 parcel component to increase water storage to a minimum of 240,000 acre-feet. If an alternate configuration could result in at least 360,000 acre-feet of storage by using A-1 parcel, given authority to recommend.
- SFWMD must terminate the option agreement with U.S. Sugar and other parties at the seller's request if:
  - The post-authorization change report receives congressional approval; or
  - The acquisition of land necessary to construct the reservoir project has been completed



# Lake Okeechobee Legislation - Chapter 2017-10

## Other Requirements

- If post-authorization change report is not submitted or rejected by Congress, SFWMD must initiate a project implementation report for the reservoir project and proceed with implementation of CEPP project components in line with the project implementation report
- SFWMD is to give preference to hiring former agricultural workers for construction of reservoir project
- Authorizes SFWMD to acquire land to implement Phase 2 of the C-51 reservoir project
- SFWMD must request reevaluation of the Lake Okeechobee Regulation Schedule to incorporate increases in storage capacity
- Ends inmate work programs in the EAA or “in any area experiencing high unemployment rates in the agricultural sector . . . .”



# Lake Okeechobee Legislation - Chapter 2017-10

## Water Storage Facility Revolving Loan Fund

- Provides funding assistance to local governments for the development and construction of water storage facilities
- DEP may award loans up to 75% of the “costs of planning, designing, constructing, upgrading, or replacing water resource infrastructure or facilities, whether natural or man-made, including acquisition of real property for water storage facilities.”
- DEP will develop rules that give priority to:
  - Alternative water supply projects in areas limited/threatened by saltwater intrusion, excessive drawdowns, contamination, or other problems;
  - Projects contributing to regional water sustainability
  - Projects that produce additional water for consumptive uses or natural systems
  - Projects that diversify water supply to meet needs during wet/dry times
  - Projects that provide “flexibility in addressing the unpredictability of water conditions” from year to year.



# Lake Okeechobee Legislation - Chapter 2017-10

## Water Protection and Sustainability Program

- Repurposed funds deposited in the Water Protection and Sustainability Program Trust Fund to now be used for:
  - The alternative water supply program as provided in § 373.707, FS; or
  - The new water storage facility revolving loan fund as provided in § 373.475, FS



# Lake Okeechobee Legislation - Chapter 2017-10

## **Everglades Restoration and Agricultural Community Employment Training Program**

- Program to be created within DEO to help training and employment programs in areas of high agricultural unemployment
- It will also provide other services to stimulate the creation of jobs in areas of high agricultural unemployment.
- Funds may be used for technical or vocational programs





# Fracking in Florida

- Chapter 377, Florida Statutes (2016) governs energy resources; regulations governing oil and gas resources are located in Fla. Admin. Code Ch. 62C-25-30 (2016)
- Many Counties and Cities in Florida have banned fracking
- Last year and this year legislation was introduced to the Florida Legislature in an attempt to preempt local fracking regulations; legislation has failed both years
- Fracking regulation by local governments is not preempted by the state





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**Thank you!**  
**Any questions?**

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