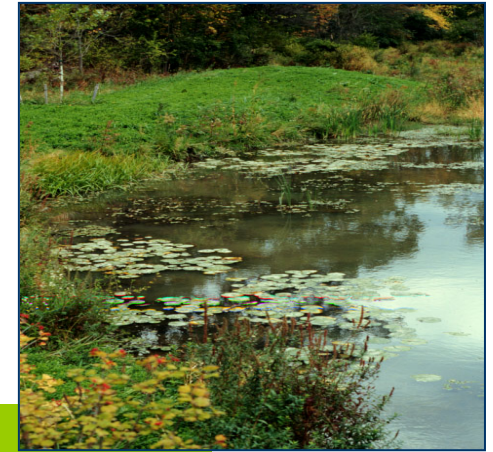


Unit 7 - Wetlands

Section 404 of the
Clean Water Act



Value of Wetlands



- Maintaining and enhancing water quality;
- Preventing and minimizing damage from floods and storms;
- Protecting shorelines against erosion;
- Providing habitat to a variety of species of fish and wildlife (many of which are endangered or threatened); and
- Enhancing aesthetic and recreational experiences.

Clean Water Act § 404 Program

- Centerpiece of federal wetlands regulatory programs administered by the Corps
- “The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified sites.”

Federal Agency Roles

- Army Corps of Engineers
 - Responsible for issuing permits for the discharge of dredged and fill material.
- Environmental Protection Agency
 - CWA requires the Corps to apply guidelines promulgated by EPA in conjunction with the Corps.
 - EPA may also “veto” any Corps decision to issue a § 404 permit.

Covered Activities

- CWA § 301 contains a general prohibition against the “discharge of any pollutant by any person.”
- Pollutant includes a variety of fill material, such as rock and sand, and “dredged spoils.”

Jurisdictional Scope

- For § 404 to apply, two questions must be answered in the affirmative:
 - Can the area be delineated as wetland?
 - Are these wetlands “navigable waters” (otherwise know as waters of the U.S.)?

Regulatory Definition of Wetland

“Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils.”

“Waters of U.S.”

Once a site is properly characterized as a wetland, the Corps’ regulations regard it as within the “waters of the U.S.” in three circumstances:

- Wetland is an interstate wetland;
- Wetland is adjacent to other waters of the U.S, or
- The use, degradation or destruction of the wetland could affect interstate commerce.

Adjacent Wetlands

- Corps has construed § 404 to encompass wetlands adjacent to waters of the U.S.
 - “Adjacent” means “bordering, contiguous, or neighboring.”
- Supreme Court upheld the Corps regulation of “adjacent wetlands” in *U.S. v. Riverside Bayview Homes* in 1985.

Isolated Wetlands

- Corps regulations provide for jurisdiction over “other waters” of the U.S., including wetlands the “use, degradation, or destruction of which could affect interstate or foreign commerce.”
- Intrastate waters without a hydrological or other ecological connection.

Migratory Bird Rule

- Corps had attempted to regulate isolated wetlands through Migratory Bird Rule which extended §404 jurisdiction to waters that
 - Are used as habitat by birds protected by Migratory Bird treaties;
 - Are used as habitat by migratory birds that cross state lines; or
 - Used by endangered species

Prairie Potholes - South Dakota



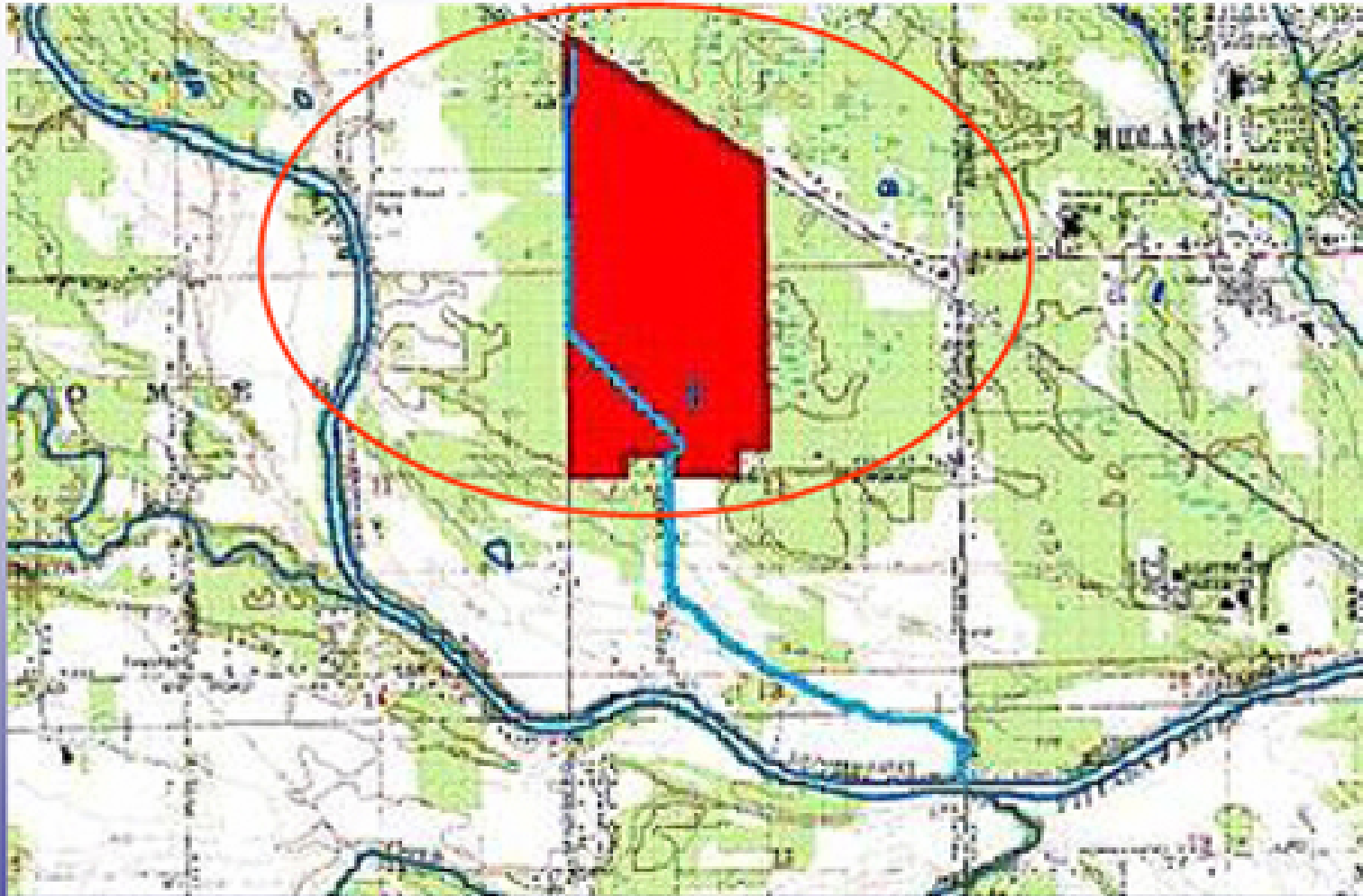
SWANCC

- In 2001, Supreme Court in *Solid Waste Agency of Northern Cook County v. Corps* struck down the “Migratory Bird Rule.”
 - Seemed to narrow ruling in *Riverside Bayview Homes*.
- Need a “significant nexus” between wetlands and “navigable waters.”

U.S. v. Rapanos

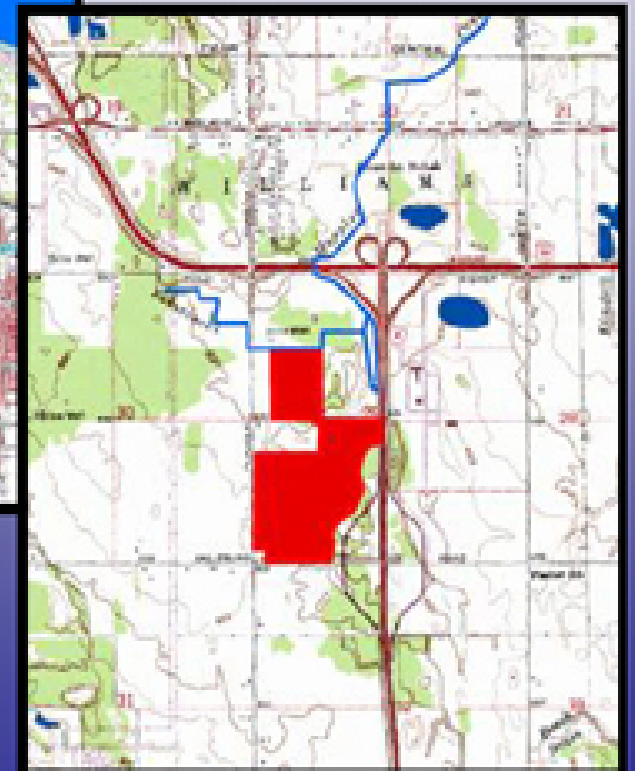
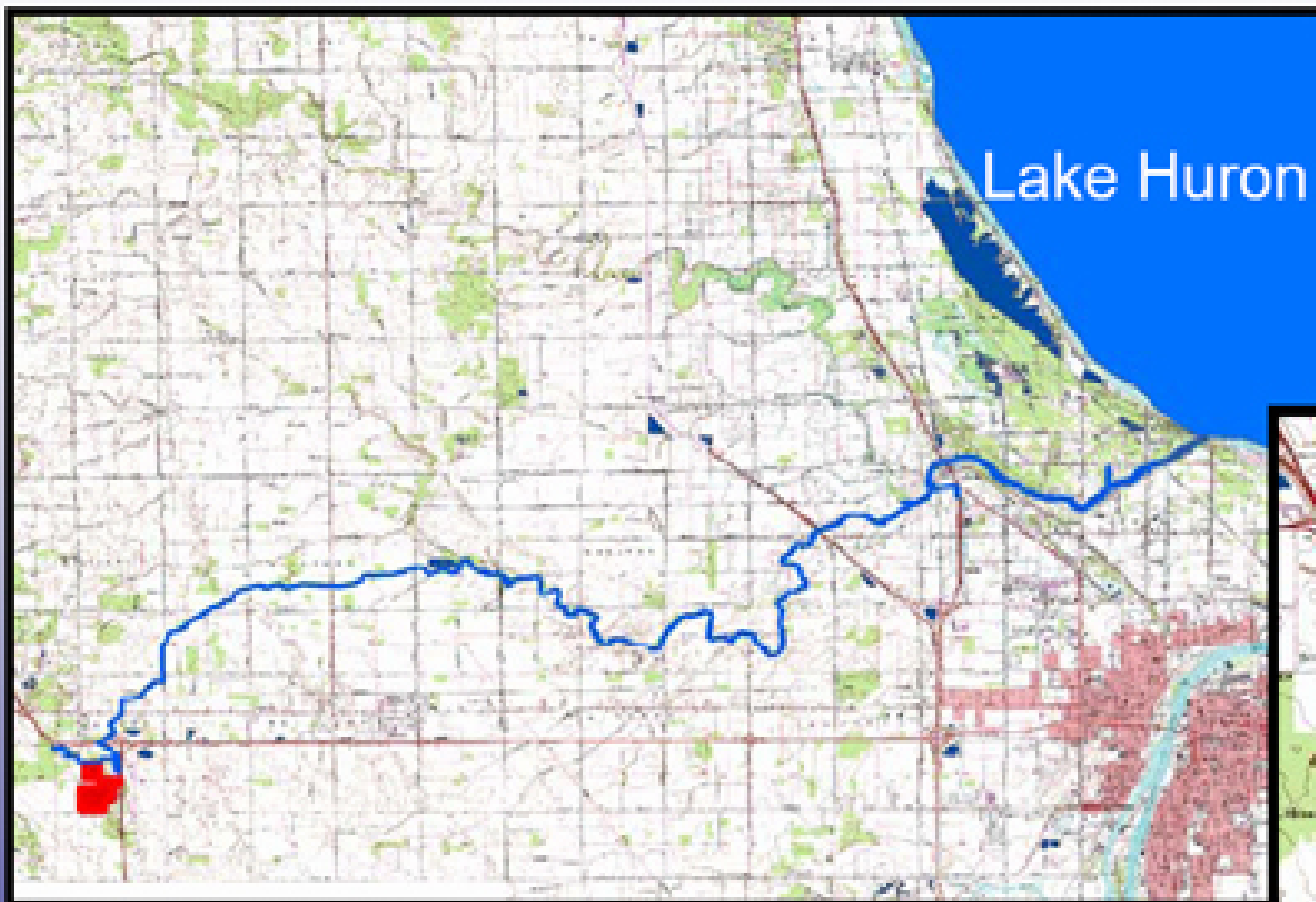


Hines Road Site



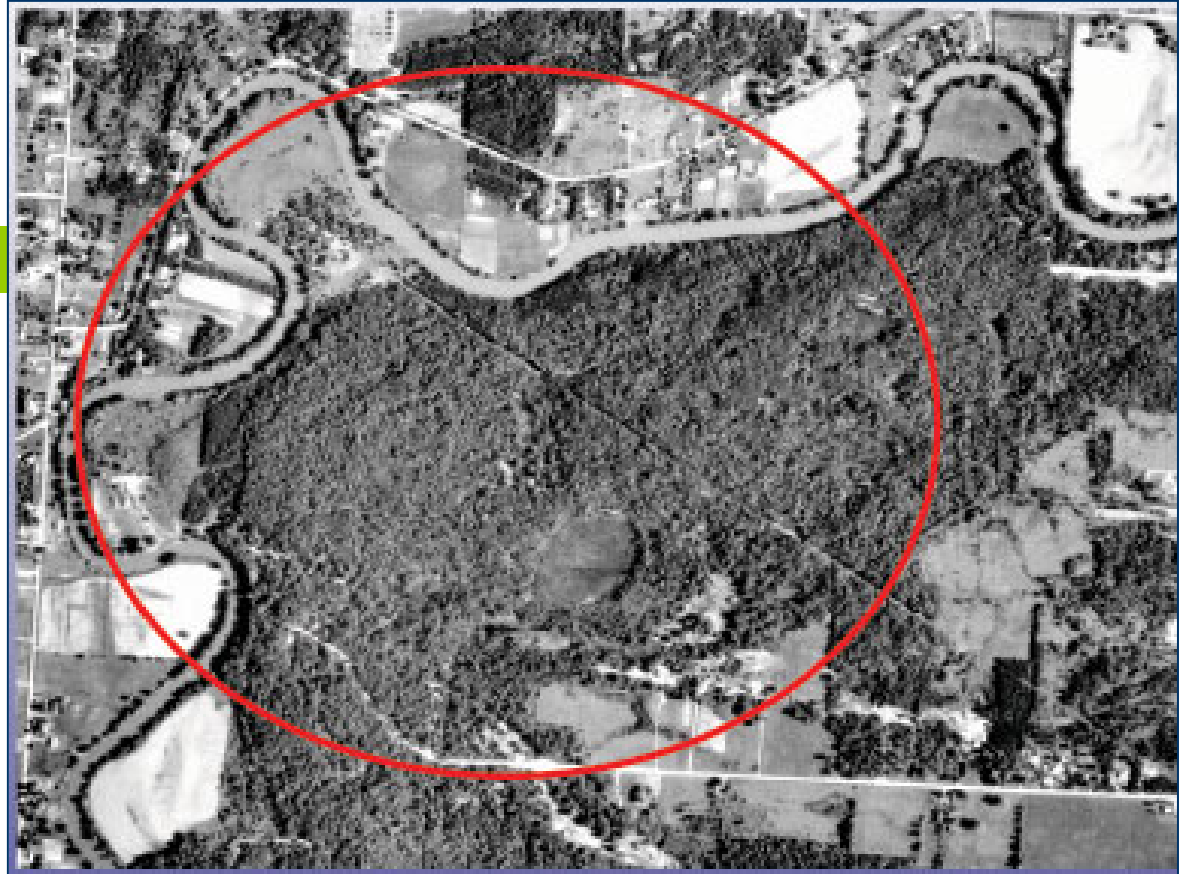
This slide shows the location of the Hines Road Site. The Rose drain is a designated County Drainage which is 15-20 feet wide and is the blue line running through the property and connecting with the Tittabawasee River approximately 1.3 miles downstream south of the property. The Tittabawasee River is approximately 200 feet wide where Rose drain connects with the river.

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.

Pine River Site



This is an aerial photo, taken in 1982, before any development took place at the 200-acre Pine River Site. Site clearly borders the Pine River, a 50-foot wide body of water.

Rapanos' Property

Undisturbed spot, with characteristic wetlands vegetation.



Drainage Ditch

One of the large drains dug on the property to drain the wetlands and prepare the site for development. Some were 7-foot deep and 15-foot wide.



Transformation of Property



Pine River Site in 1998



The pattern of roads suggests intended use was a housing development. 15 of the 49 acres of wetlands were destroyed.

Carabell Site Location



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.

Plurality Opinion

- Scalia, Roberts, Thomas, and Alito
- Two-part test for establishing jurisdiction:
 - Adjacent channel contains a relatively permanent body of water connected to traditional interstate navigable waters; and
 - Wetland has a continuous surface connection with that water making it difficult to determine where the “water” ends and the “wetland” begins.

Justice Kennedy's Opinion

- “Significant Nexus” required
- Present “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.”

What test do you apply?

- So far most courts have applied Kennedy's "significant nexus" test.
- **Why?**
 - Any wetlands that meet Kennedy's test would be considered jurisdictional by the 4 dissenting judges.
 - Have a majority of the court.
- **Problem?** Not all wetlands meeting plurality's test would meet Kennedy's test.

Implications?

- Important to note that the Rapanos decision is not limited to wetlands issues.
- Definition of “waters of the U.S.” is central to all jurisdictional questions under the CWA.
 - If small creeks and ditches are not covered by the Act, factories and other traditional point source dischargers arguably could discharge to them without an NPDES permit.
 - Ripple Effect - RCRA