

**Where Have All the Marshes Gone?
Wetland Regulations After *Rapanos***

**Rocky Mountain Land Use Institute
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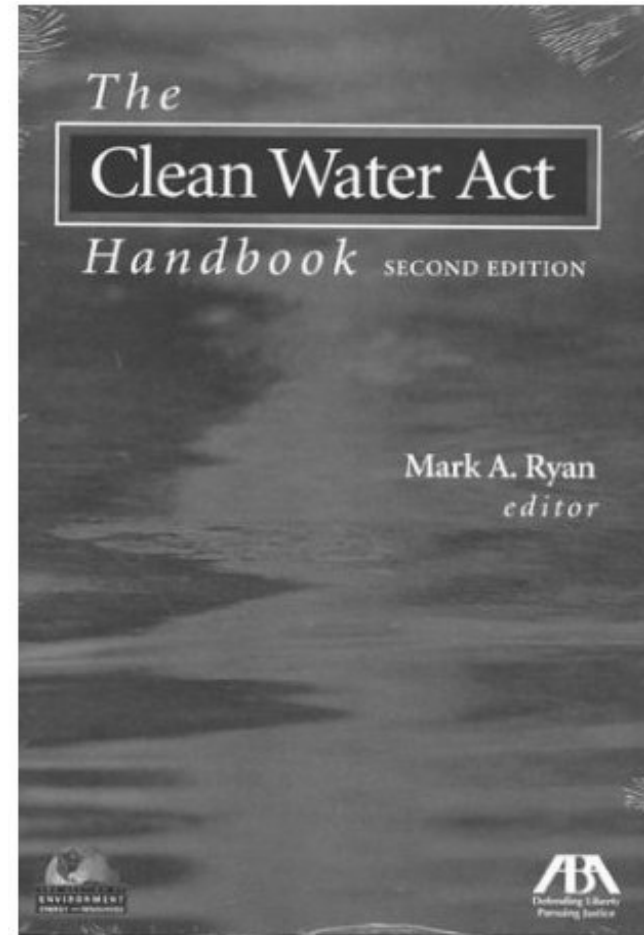
The State of Our Nation's Waters



- Our nation's waters have both improved and deteriorated since the Clean Water Act passed in 1972.
- The rate of wetlands loss in the lower 48 states was as much as 458,000 acres per year in the early 1970s; by 1997, we lost 58,500.
 - Since 1776, the continental US has lost > 50% of its wetlands.
- Rivers no longer burn, and factories discharge much safer effluent, but polluted runoff from roads, fields, cities and other activities expands continually with population growth.

Federal Clean Water Act

- The Clean Water Act (CWA) regulates “discharges” to “navigable waters.”
 - Section 402 directs EPA (and delegated states, of which there are ~ 40) to issue NPDES permits for point source discharge of pollutants.
 - Section 404 directs the Corps (and designated states, for this program only Florida & Wisconsin), with EPA approval to permit discharges of dredge and fill materials.



Navigable Waters



Alamosa National Wildlife Refuge

- CWA defines “navigable waters” as “waters of the US”.
- In *United States v. Riverside Bayview Homes Inc.* (1985), the Supreme Court ruled that the CWA required permits for discharges to wetlands adjacent to “navigable in fact” waters.
- Colorado’s only “navigable in fact” waters are the 15 miles of Colorado River between its confluence with the Gunnison River and the Utah border and Navaho Reservoir on the San Juan River.

Regulatory Definition of Navigable Waters

- Since the late 1970's, agency regulations have defined “waters of the US” as more than “navigable in fact” waters and their adjacent wetlands to include rivers and streams with a high water line and most riparian wetlands and fens.

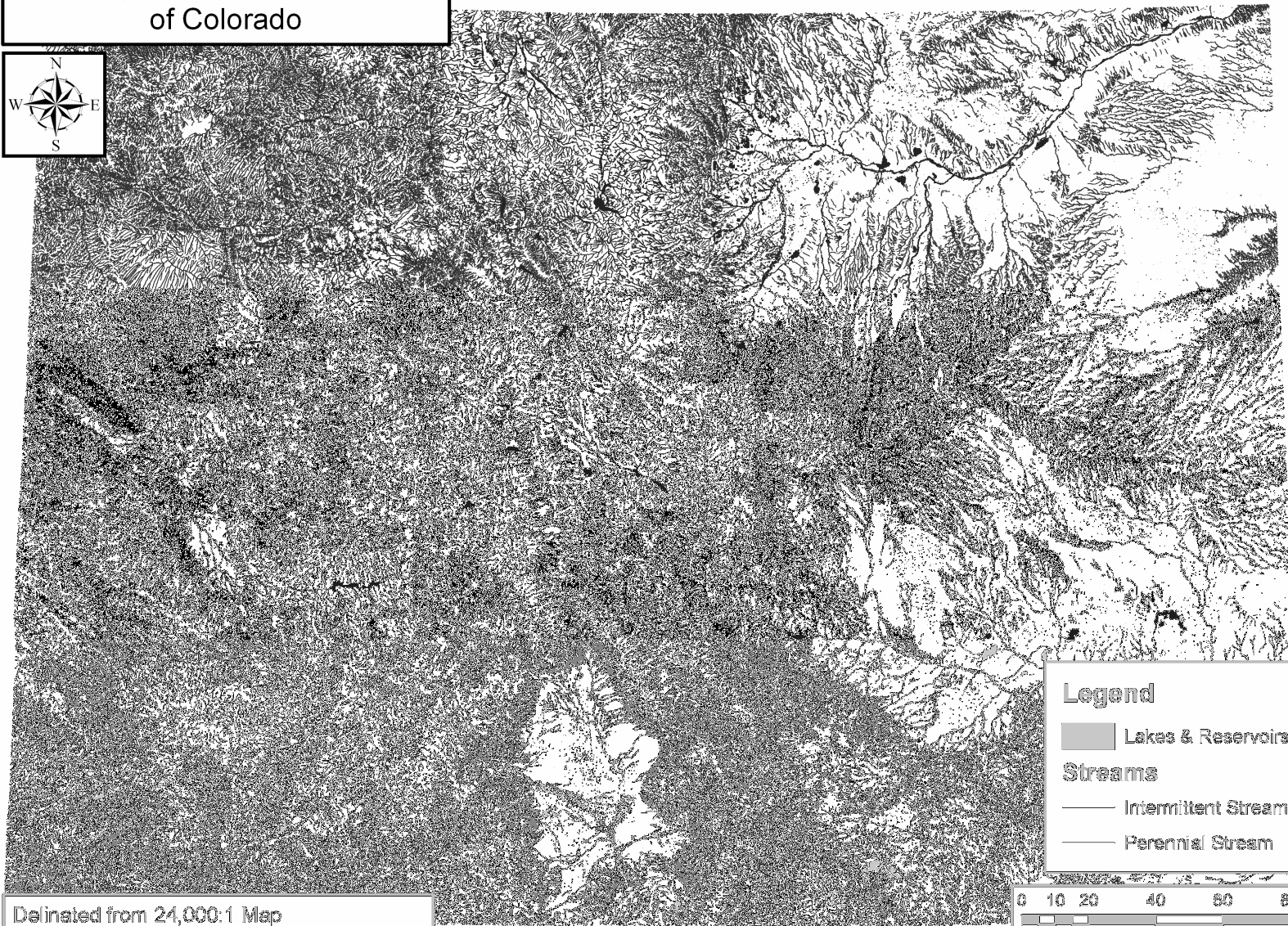


Upper left – slough, Upper right – sand flat
Lower left – wet meadow, Lower right – prairie pothole


Rapanos Decision

- **Supreme Court issued a highly fractured ruling:**
 - 4 Justices formed a plurality finding that the CWA should only reach discharges to relatively permanently standing or flowing bodies of water and wetlands with continuous surface connection to such waters.
 - Justice Kennedy contended that CWA permitting was appropriate for waters and wetlands, either alone or in combination with similarly situated streams or wetlands, with a **significant nexus** to a navigable water, i.e., such that the water or wetland in question significantly affects the chemical, physical and biological integrity of the navigable water.
 - 4 Justices dissented, arguing that the scope of the existing agency regulations was appropriate.

Streams, Lakes, and Reservoirs of Colorado



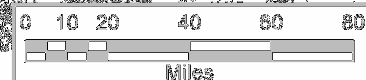
Legend

 Lakes & Reservoirs

Streams

 Intermittent Stream

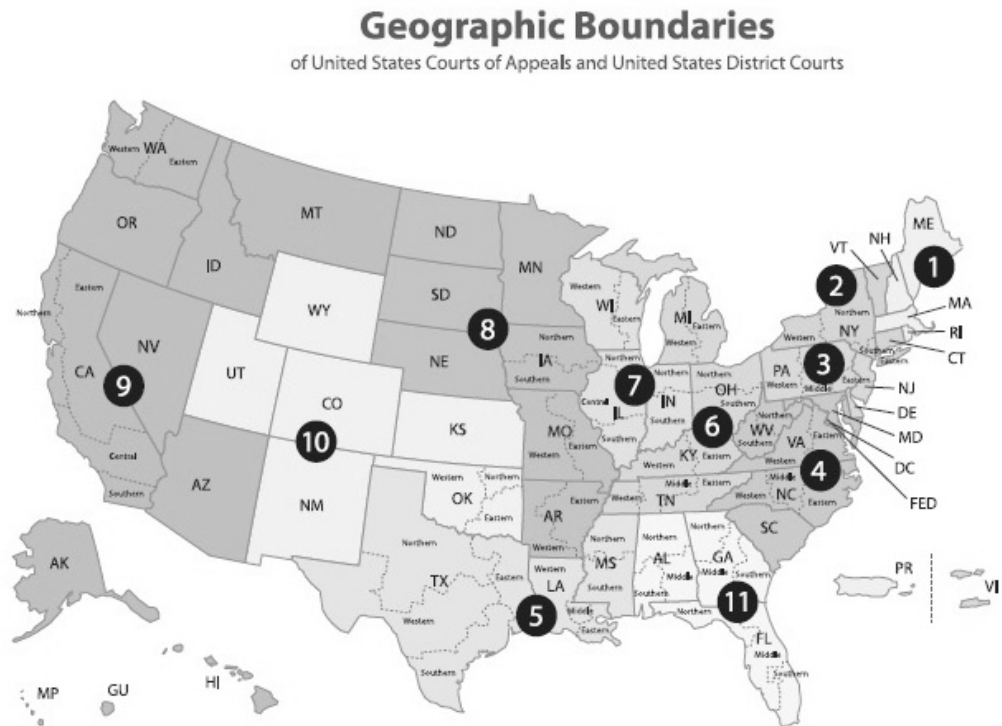
 Perennial Stream



Delinated from 24,000:1 Map
Data provided by Colorado Division of Wildlife

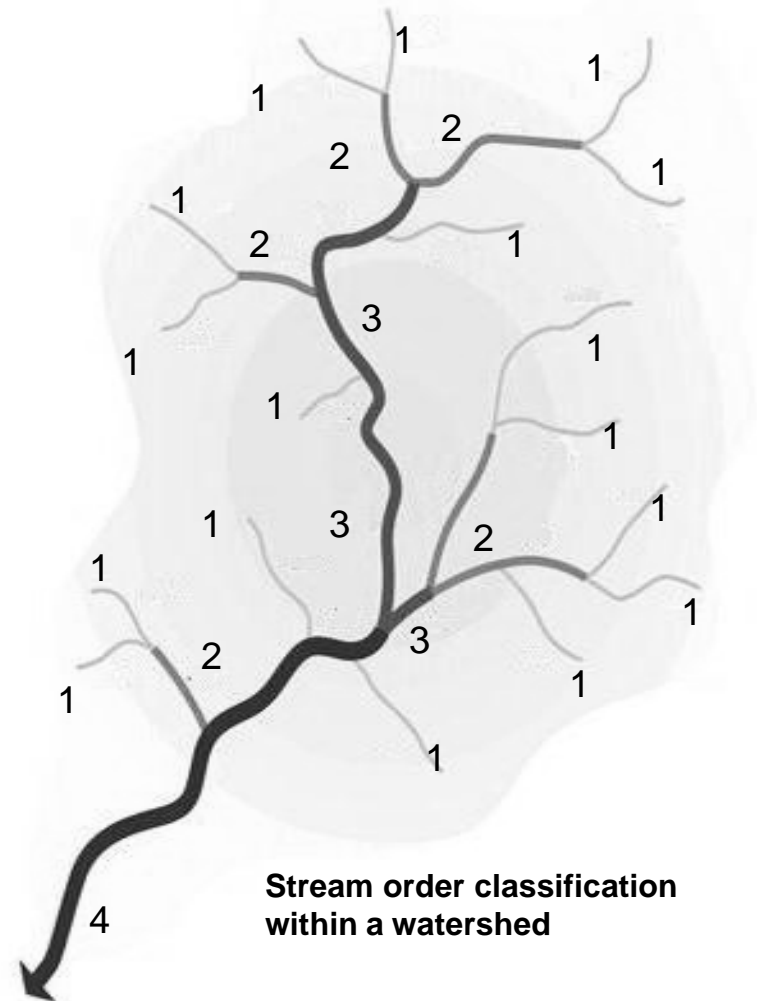
Lower Courts have followed different paths

- Three Circuit Courts of Appeal (7th, 9th & 11th) only consider Kennedy's test.
- The 1st Circuit will look either to the Kennedy or plurality test.
- The 5th Circuit analyzed all three standards in its one case to date.
- The 10th Circuit has yet to rule.



Agency Guidance

- The 2007 Joint EPA-USCOE Guidance adopts the 1st Circuit's position – that jurisdiction applies if either the plurality or Kennedy test is met.
- But the agency interprets Kennedy's language regarding “similarly situated” very narrowly – only wetlands adjacent to the affected waterbody while that waterbody is of the same stream order.



Pending Legislation



“Waters Of The United States. -- The term ‘waters of the United States’ means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.”

- Congress is considering a fix, the **Clean Water Restoration Act**.
- CWRA:
 - Removes phrase “navigable waters” from entire Act.
 - Defines “waters of the US” based on Corps regulation, 33 CFR 328.3
 - Retains all existing exemptions from permitting in Act.

Unregulated Impacts



- Federal regulation will not protect wetlands and streams from the impacts of discharges if the CWA doesn't reach the receiving waterbody.
- What does that mean for our aquatic environments?
- There would be a loss of the protection provided during permitting by EPA's "404(b)(1) guidelines" and the Corps' public interest test.

State Authority – What Colorado Law Covers



- State left to address impacts no longer federally regulated.
- Scope of Colorado Water Quality Control Act very broad: “waters of the state” even includes ground water.
- CDPS Point Source Discharge Program: Because Colorado permitting authority covers all waters of the state, *Rapanos* should not change coverage, although EPA would no longer review many permits.

State Authority – Gaps and Open Questions



Wetlands at Lathrop State Park

- Colorado has no 404 program to permit discharges of dredged and fill materials, so there is no current state regulation of those discharges.
- State authorities exist that could cover such discharges, but there are not yet regulations or staff to do so.
- Colorado Mined Land Reclamation Act and Oil and Gas Conservation Act may also provide authority to regulate impacts to aquatic ecosystems.