Jurisdictional Issues

Superior California Chapter of the Association of Environmental Professionals

April 22, 2009

Mike Finan, U.S. Army Corps of Engineers

Sacramento District, Regulatory Division

1325 J Street, Room 1480, Sacramento, CA 95814
PH: 916- 557-5324; FAX: -6877

michael.c.finan@usace.army.mil

Rivers and Harbors Act of 1899

- Navigable waters of the United States:
  - "…waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to <u>transport</u> interstate or foreign commerce."
  - Jurisdiction applies laterally over the entire surface of the waterbody.
  - Jurisdiction is not extinguished by later actions or events which impede or destroy navigable capacity.

Rivers and Harbors Act of 1899

- Ocean and coastal waters:
  - All ocean and coastal waters, to the limit of the territorial seas (3 nautical miles from baseline)
  - Shoreward limit is mean high water
  - Entire surface and bed of waterbody subject to tidal action
  - Includes shallow areas, even if obstructed by shoals, vegetation, and other barriers
- Rivers and Lakes:
  - Jurisdiction over entire water surface and bed of the navigable waterbody
  - Shoreward limit is ordinary high water mark (OHWM)
  - Includes shallow areas, even if obstructed by shoals, vegetation, and other barriers
  - Upper limit is head of navigation, where marked decrease in navigability occurs

Clean Water Act

Restore and maintain the physical, chemical and biological integrity of our nation's waters

- 1972 Federal Water Pollution Control Act
  - Under §404, the Corps regulates the "…discharge of dredged or fill material into the navigable waters at specified disposal sites."
  - §502(7) – The term ''navigable waters'' means the waters of the United States, including the territorial seas.
- 1977 amendments: Clean Water Act
  - Did not change definition at §502(7)

CWA Section 404: A Short History

- **1972 Enacted**
- **1974 Regulation**
- **1975 NRDC vs. Calloway. Interim regulation**
- **1977 Regulation & Congressional Amendments**
- **1979 SG (DOJ) Civiletti decision on CWA authority**
- **1985 Riverside Bayview Homes**
  EPA's Migratory Bird Memo
- **1986 Preamble on "Migratory Bird Rule"**
- *****
- **2001 Supreme Court decision in *SWANCC v. USACE***
- **2003 ANPRM & Rulemaking**
- **2006 Rapanos & Carabell U.S. Supreme Court cases**

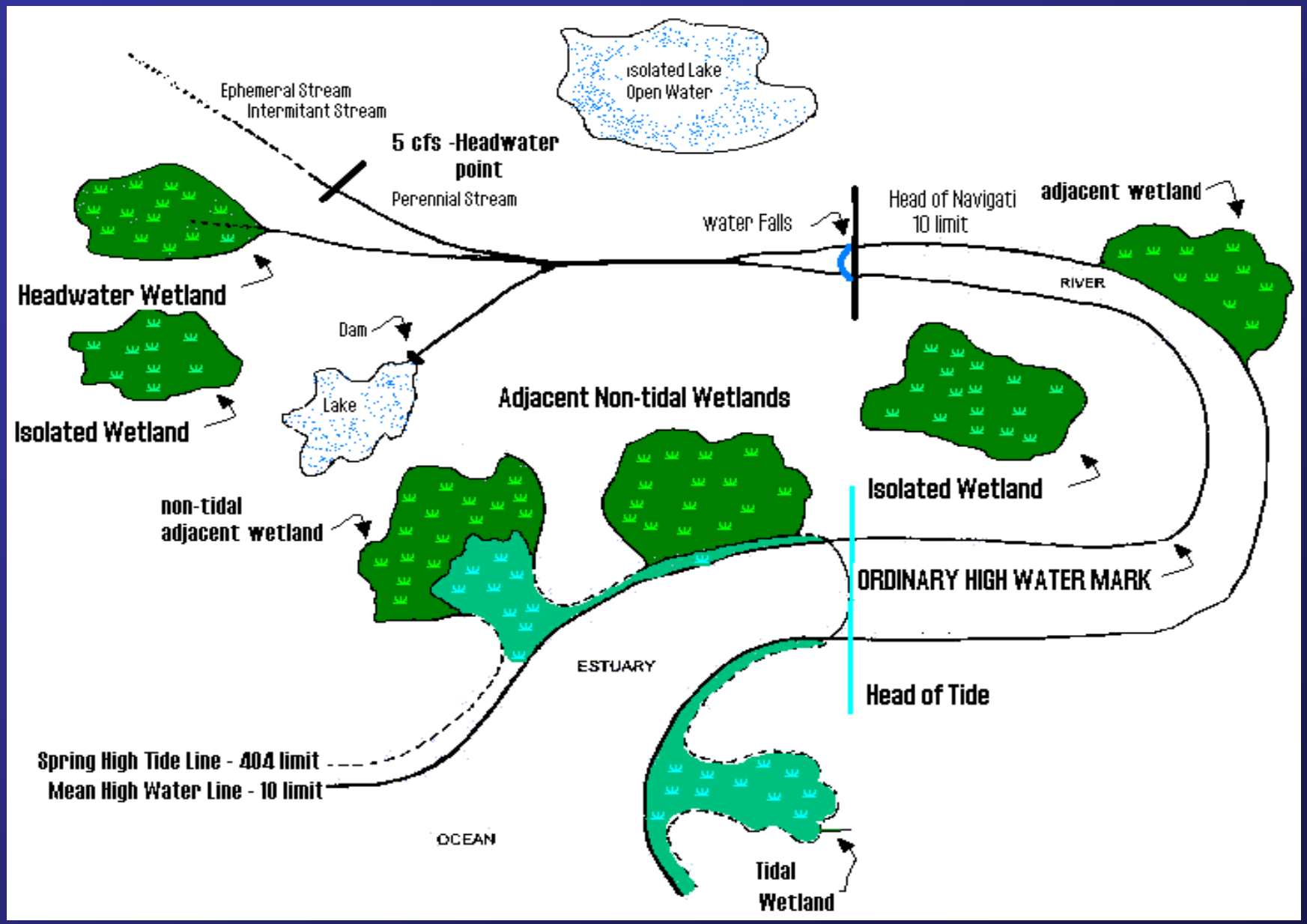
Clean Water Act Jurisdiction
33 CFR 328.3 (a)

1. Waters currently used, used in past, or susceptible for use in interstate or foreign commerce, including waters subject to ebb and flow of the tide
2. Interstate waters and wetlands
3. Intrastate waters where destruction or degradation could affecting interstate or foreign commerce (HQ approval required)
   - Waters used for recreation or other purposes
   - Waters with fish or shellfish sold in interstate or foreign commerce
   - Waters used for industrial purposes
4. Impoundments of waters of the U.S.
5. Tributaries to waters in categories 1 – 4
6. Territorial seas (3 miles from shore)
7. Wetlands adjacent to waters of the U.S.

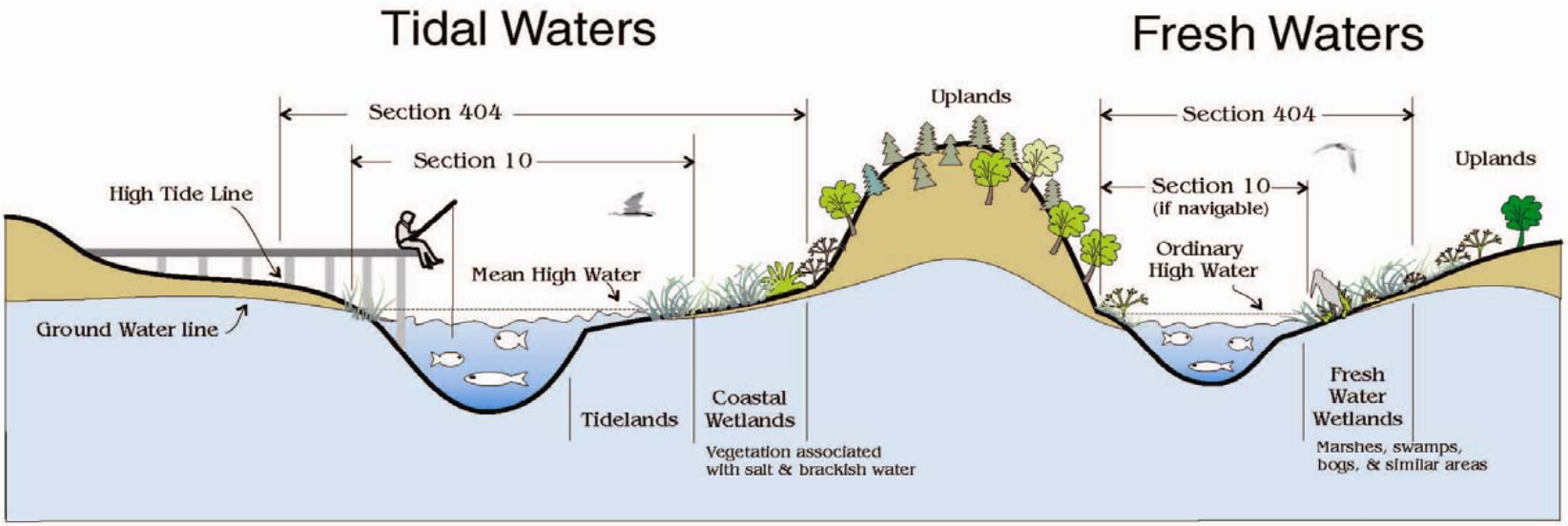
85-86 Migratory Bird Rule

- **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**

Landward Limits of Waters of the United States



CORPS OF ENGINEERS REGULATORY JURISDICTION



	Section 103	Section 404	Section 10
	Ocean Discharge of Dredged Material	Disposal of Dredged or Fill Material (all waters of the U.S.)	All Structures and Work (navigable waters)
Typical examples of regulated activities	Ocean discharges of dredged material	All filling activities, utility lines, outfall structures, road crossings, beach nourishment, riprap, jetties, some excavation activities, etc.	Dreding, marinas, piers, wharves, floats, intake / outtake pipes, pilings, bulkheads, ramps, fills, overhead transmission lines, etc.

Who Does Jurisdictional Determinations?

- District engineers determine waters that are:
  - Navigable waters of the U.S. (§10)
  - Waters of the U.S. (§404)
- Exceptions:
  - Division engineer makes a navigability determination
  - EPA makes a §404 jurisdictional determination
- 1989 Army-EPA Jurisdiction MOA
  - Based on 1979 Attorney General opinion
  - EPA has ultimate authority to determine geographic jurisdiction under §404 of the Clean Water Act

U.S. Supreme Court Cases Shaping Clean Water Act Jurisdiction

- U.S. v. Riverside Bayview (1985)
  - Michigan
  - Wetlands adjacent to a navigable waterbody are subject to CWA jurisdiction
- Solid Waste Agency of Northern Cook County (SWANCC) v. USACE (2001)
  - Illinois
  - No CWA jurisdiction over isolated, intrastate, non-navigable waters based on use by migratory birds
- Rapanos v. U.S. and Carabell v. U.S. (2006)
  - Michigan
  - CWA jurisdiction applies to relatively permanent waters connected to traditional navigable waters, plus wetlands with a continuous surface connection to those relatively permanent waters (Plurality opinion)
  - CWA jurisdiction requires finding of significant nexus to traditional navigable waters (Kennedy opinion)

SWANCC Guidance

- Issued on January 15, 2003
- Do not assert CWA jurisdiction over isolated, intrastate, non-navigable waters when sole basis is use by migratory birds
- Field staff need to seek formal, project-specific Headquarters approval before asserting jurisdiction over waters based on (a)(3) factors
  - Other waters (usually intrastate), where their degradation or destruction could affect interstate or foreign commerce
    - Recreation
    - Fish and shellfish
    - Industrial use
- Continue to assert jurisdiction over traditional navigable waters and adjacent wetlands, and generally their tributaries (and adjacent wetlands)

SWANCC & Rulemaking

Jan 03: ANPRM solicited public comments on issues associated with CWA jurisdiction

- **Water body reach**
- **Artificial features**
- **Adjacent wetlands**

130,000 comments received on notice; majority opposed rulemaking

Dec 03: Announcement to discontinue rulemaking

Rapanos & Carabell

- **A 4-1-4 split Supreme Court vacated and remanded the judgments back down to the Sixth Circuit Court of Appeals.**

- **The justices issued five opinions in <u>Rapanos,</u> with no single opinion commanding a majority of the Court.**

Rapanos & Carabell

The plurality concluded that the agencies' regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters.

Rapanos & Carabell

Dissenting opinion – Corps regulations are reasonable interpretation of CWA

TNWs and Wetlands adjacent to TNWs

Decision/guidance does not address SWANCC nor does it affect the Joint Memorandum issued by the General Counsels of EPA and the Army dated January 10, 2003.

Rapanos & Carabell

Justice Kennedy concluded that "wetlands" are "waters of the United States" "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.'

SWANCC Jurisdictional Issues

Rapanos-Carabell Guidance

- Issued June 5, 2007
- Revised December 2, 2008
- Joint guidance issued by Army and EPA
- Retains key principles provided in 2003 SWANCC guidance
  - HQ approval needed to assert (a)(3) jurisdiction
    - Intrastate waters where destruction or degradation could affecting interstate or foreign commerce

Rapanos-Carabell Guidance

- Jurisdictional waters (categorical findings of CWA jurisdiction):
  - Traditional navigable waters
  - Wetlands adjacent to traditional navigable waters
    - bordering, contiguous, neighboring
  - Non-navigable tributaries of traditional navigable waters that have relatively permanent flow
    - Flow year round
    - Flow seasonally (e.g., 3 months)
  - Wetlands that directly abut these non-navigable tributaries with relatively permanent flow

Rapanos-Carabell Guidance

- Jurisdictional waters (case-specific significant nexus analysis needed to determine if there is CWA jurisdiction):
  - Non-navigable tributaries that do not have relatively permanent flow
    - e.g., ephemeral streams
  - Wetlands adjacent to non-navigable tributaries that do not have relatively permanent flow
  - Wetlands adjacent to, but do not directly abut, a non-navigable tributary with relatively permanent flow

Significant Nexus Evaluation

- Assessment of:
  - Flow characteristics and functions of the tributary
  - Functions performed by all wetlands adjacent to the tributary
    - Tributary is defined as a stream reach of the same order
- Determine if the tributary and any adjacent wetlands significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Relates to the goal of the Clean Water Act
  - "Restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Significant Nexus Evaluation

- Hydrologic factors:
  - Volume, duration, and frequency of flow
  - Proximity to the traditional navigable water
  - Size of the watershed
  - Average annual rainfall
  - Average annual winter snow pack

Significant Nexus Evaluation

- Ecological factors:
  - Potential of tributaries to carry nutrients, pollutants, and flood waters to traditional navigable waters
  - Potential of adjacent wetlands to:
    - Trap and filter nutrients and pollutants
    - Trap sediments
    - Store flood waters
  - Maintain water quality in traditional navigable waters
  - Tributaries and their adjacent wetlands that provide habitat (e.g., places for feeding, nesting, spawning, or rearing young) for many aquatic species that also live in traditional navigable waters

Rapanos-Carabell Guidance

- These features are generally not jurisdictional
  - Upland swales or gullies
  - Ditches (including roadside ditches) excavated in and draining only uplands and that do not carry a relatively permanent flow of water
- This guidance does not provide authority to assert jurisdiction over waters deemed non-jurisdictional by SWANCC

JD Coordination Processes

- Applies only to approved jurisdictional determinations
- If significant nexus determination, draft JDs e-mailed to EPA Regional Office
  - EPA Region has 15 days to make special case recommendation to EPA HQ (1989 JD MOA)
  - EPA HQ has 10 working days to decide if it is a special case
- If isolated waters determination, coordination process continues with 21-day time frame

Revised Rapanos-Carabell Guidance

- December 2, 2008, revision
- Focused on three issues:
  - Clean Water Act Traditional Navigable Waters (§328.3(a)(1))
  - Definition of “adjacent”
  - Identifying the “relevant reach”

CWA TNW Designations

- Substantive criteria for what constitutes a CWA TNW provided by:
  - Appendix D of the Rapanos-Carabell guidance
  - December 2, 2008, Rapanos-Carabell guidance (footnote 20)

Clean Water Act Traditional Navigable Waters

- Broader than RHA §10 waters
- They include:
  - Waters determined to be navigable-in-fact by a federal court
  - Waters historically or currently used for commercial navigation
    - e.g., boat rentals, guided fishing trips, water ski tournaments
  - Evidence of susceptibility for use in future commercial navigation
    - Must be more than speculative or insubstantial
    - Clear documentation required (e.g., development plans)
    - Use caution when assessing average annual flows in “flashy waters” – daily gage data provides better representation

CWA TNW Designations

- Formal report in format provided by 33 CFR 329.14(c)
- If pending approved JDs are associated with proposed stand-alone CWA TNW designation, put them on hold until Division Commander makes his or her decision
- Navigability determinations made for the purposes of Sections 9 and 10 of the Rivers and Harbors Act of 1899 are not affected by this directive
  - Continue to follow procedures in 33 CFR Part 329

Adjacent Wetlands

- Regulatory definition (§328.3(c)) unchanged
  - …bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘‘adjacent wetlands.’’

Adjacent Wetlands

Three criteria clarifying "adjacent wetlands"

1. Wetlands with unbroken hydrologic connection; **or**
   - Connection may be surface or shallow subsurface
   - Connection may be intermittent
2. Wetlands separated by berm or similar feature(s) from a jurisdictional water; **or**
   - Man-made dikes or barriers, natural river berms, beach dune and the like
3. Wetlands in reasonably close physical proximity to a jurisdictional water
   - Science-based inference that wetlands have ecological interconnection with jurisdictional waters

Adjacent Wetlands

- Ecological interconnection with jurisdictional waters:
  - Generally does not require case-specific demonstration
  - Implied ecological interconnection is not speculative or insubstantial
    - General knowledge of such ecological interactions
    - Use by amphibians
    - Animals that use the floodplain during flood events (e.g., spawning, feeding)
  - Cannot use migratory species (esp. migratory birds)
    - But can use small distance animal movement between wetland and jurisdictional water
  - Wetlands divided by man-made activities are generally considered to be one wetland
  - Natural wetland-upland mosaics – evaluate individual wetlands

Relevant Reach

- Footnote 24
- Reach of a stream that is the same stream order
- Should no longer use the flow regime at the furthest downstream limit of the tributary (reach)
- Use most representative stream flow regime for the tributary (reach)
  - Consider relative lengths of stream segments within tributary that have different flow regimes
  - Rely on professional judgment
  - Don’t require substantial data collection and analysis

RGL 08-02

- Approved Jurisdictional Determinations
  - Official Corps determination that jurisdictional waters are present or absent on a site
  - Valid for 5 years (RGL 05-02), unless new information or changing environmental conditions warrant a revision
  - May also identify the limits of jurisdictional waters
  - Can be appealed
  - Districts continue to post on their web pages

RGL 08-02

- Preliminary Jurisdictional Determinations
  - Non-binding written indications that there *may be* waters of the United States on a site
  - Advisory in nature
  - May not be appealed
  - No expiration date (RGL 05-02)

RGL 08-02

- When to do a Preliminary JD
  - Landowner, permit applicant, or other affected party voluntarily wants to set aside questions of jurisdiction to expedite obtaining permit authorization
  - Enforcement situations where site access is impractical or unauthorized, or if approved JD cannot be completed in a timely manner

“No Permit Required” Letters

- Use under the following circumstances:
  - No activity jurisdiction
  - Activity is exempt under CWA §404(f)
- Jurisdictional status does not weigh into “no activity jurisdiction” or exemption decision
- Letter should clearly state that we are not making a finding regarding geographic jurisdiction

Preliminary JDs

- For permit decisions, include all waters and wetlands when determining impacts and compensatory mitigation
- Corps is not making a legally-binding determination whether CWA/RHA jurisdiction exists
- Affected party can later request an approved JD
  - Transmittal letter should advise affected party not to start work in waters if he or she intends to request an approved JD at a later time

RGL 08-02

- When to do an Approved JD
  - Landowner, permit applicant, or other affected party requests an approved JD
  - Landowner, permit applicant, or other affected party contests jurisdiction over a particular waterbody or wetland (and allows property access to provide an approved JD)
  - Corps determines that jurisdiction does not exist over a particular waterbody or wetland
  - Enforcement actions, where practicable
  - At district engineer's discretion, when it is warranted in a particular case

RGL 08-02

- When *not* to do an Approved or Preliminary JD
  - When the person is seeking a JD for another purpose, such as:
    - Section 402 of the Clean Water Act (NPDES)
    - Section 311 of the Clean Water Act (oil and hazardous substances spills)

Questions?

http://www.usace.army.mil/CECW/Pages/cecwo_reg.aspx

http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/index.html