

# WETLANDS REGULATION IN ALASKA GNI v. USACE

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# GNI v. USACE

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# Origins – Physical Setting



# Origins – History

- 04/04 – Original Jurisdictional Determination
- 2004 to 2008 – Regulator Rodeo
- 3/07 - Permit Issued by USACE
- 5/07 – Request for new JD by GNI
- 11/07 – new final/approved JD from USACE
- 12/07 – Appeal of JD based on permit condition
- 6/08 – Appeal remanded back to Alaska District
- 2009-2011 – Legal Challenge
- 06/09 – Case filed by PLF on behalf of GNI
- 06/10 – District Court Decision
- 07/10 – Reconsideration Decision
- 09/10 – USACE files appeal motion w/9<sup>th</sup> Circuit
- 02/11 – USACE abandons appeal w/9<sup>th</sup> Circuit

# Origins - Regulation

## Title 33: Navigation and Navigable Waters § 328.3

### Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term *waters of the United States* means:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
  - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;
- (6) The territorial seas;
- (7) **Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.**

# Origins - Regulation

## Title 33: Navigation and Navigable Waters § 328.8

### Definitions.

- (8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
- Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.
- (b) The term *wetlands* means 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 soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- (c) The term *adjacent* means 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.”

# Origins – Dispute

## Conflict in Regulation

33 CFR 328.3 a(7)

**(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.**

**AND**

33 CFR 328.3 (c)

**(c) The term *adjacent* means 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.”**

Muddying the waters is “Significant Nexus” from Supreme Court

### **Question for the District Court in GNI v. USACE:**

**“Can the USACE use one part of regulation, guidance, and/or case law to nullify another part of regulation?”**

# Decision – Conclusions of Law

“Where a jurisdictional wetland is separated from another wetland by a man-made barrier, jurisdiction will only extend beyond the man-made barrier if the wetlands are continuous such that they should be considered the same wetland.”

“33 CFR 329.4 which provides that a “determination of navigability, once made applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity” does not apply to non-navigable wetlands.”

# Decision – Conclusions of Law

“wetlands bisected by barriers are, as a matter of law, separate waters”

1. No continuum/wetland complex/historic conditions
2. No boundary drawing issues (Holly Ridge v. US)
3. Groundwater connection not applicable (Banks v. US)
4. The presence of ecological interconnection or significant nexus between “wetlands adjacent to adjacent wetlands” cannot be used by the USACE to defeat 33 CFR 328 3 (a) (7).
5. Geography is important...how can a wetland be adjacent to a more distant water body (Tanana River) and not adjacent to a closer water body (A-channel)

# Fun Stuff from the Court

- Errors in the Application of Law by the USACE at GNI
  1. Wetlands separated by barriers are separate waters as a matter of law;
  2. 33 CFR 329.4 is not applicable to non-navigable wetlands;
  3. 33 CFR 328.3 (a)(7) places an independent regulatory limit on CWA jurisdiction;
  4. Significant nexus/ecological connectivity cannot be used to circumvent 33 CFR 328.3 (a)(7);
  5. Adjacency by proximity cannot be used to circumvent 33 CFR 328.3(a)(7); and most importantly:
  6. **“When the Corps adopts regulations, it is bound by them.”**

# Regulatory Implications

The Alaska District of the USACE strongly disagrees with the GNI decision. The Dept. of Justice failed to sustain the appeal of the GNI decision in the 9<sup>th</sup> Circuit Court. GNI is now settled law.

GNI v. USACE is the only case law to deal specifically with 33 CFR 328.3 (a)(7) in the nation.

Perhaps most troubling to the USACE is that for the first time in CWA jurisprudence, a Federal Court refused to remand the JD back to the USACE for further consideration to allow the USACE to “find” jurisdiction under the Clean Water Act.

The Court could not allow the USACE to contravene its own regulations by remanding the JD back to the Alaska District

“It is well settled that an agency is legally bound to respect its own regulations, and commits procedural error if it fails to abide them.”

To answer the question put forth by GNI –

**The USACE cannot use one part of regulation to nullify another part of regulation**