



US Army Corps of Engineers/EPA Waters of the US Guidance Update

Joint Committee on Energy and Environmental Policy

October 18, 2011

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What Are Navigable/Waters of the US?

- Question has arisen in numerous court cases and Congress
 - Several narrow answers provided
- The issue in Congress/courts has been wetlands & 404 permits
 - Could potentially have much broader impact on CWA programs
- Congress took up a bills to define *Waters of the US (WoUS)* in the 110th and 111th Congress
[*S. 1870/H.R. 2421/S. 787*]
 - Hearings were held, some committee action, but no passage

Key Court Decisions

- US v. Riverside Bayview Home, Inc. – 1985
 - RBHI filled property in MI for home construction
 - ACOE determined the area was a wetland adjacent to a navigable water, thus permit required to fill
 - District Ct upheld ACOE decision
 - Appeals Ct overturned District Ct
 - Stated land was not an adjacent wetland since it was not routinely flooded by navigable water, ie groundwater issue
 - Supreme Ct overturned Appeals Ct
 - Wetlands adjacent to navigable waters fall under the CWA regardless of surface inundation or groundwater

Key Court Decisions

- Solid Waste Agency of Northern Cook County (SWANCC) v. ACOE – 2001
 - SWANCC bought sand & gravel pit to convert to a landfill
 - Pit accumulated water & plants used by migratory birds
 - ACOE called the pit regulated wetland under CWA
 - Supreme Ct ruled Migratory Bird Rule did not apply
 - Pit was isolated, intrastate, non-navigable water

Key Court Decisions

- Rapanos/Carabell v. ACOE - 2006
 - Jurisdictional wetlands issue – consolidated 2 cases
 - COE denied fill permits for wetlands to construct mall/condos
 - Rapanos/Carabell appealed based on “isolation” of wetlands
 - District and appellate courts found in favor of ACOE
 - Supreme Court split 4-1-4
 - Plurality said to send back to lower courts
 - » 4 – ACOE too broadly extended the CWA
 - » 4 – ACOE acted properly
 - » 1 – None of the parties or the lower courts applied a “significant nexus” test for isolation

EPA/ACOE WoUS Guidance

- To interpret Supreme Ct decisions for field assessment staff, ACOE/EPA developed guidance
 - Initial guidance came in December 2008
 - ACOE/EPA memo for field staff interpreting Rapanos case
 - The memo created more confusion than clarity
 - Instances cited where ACOE & EPA had different interpretations
 - Deadlocked some projects seeking fill permits
 - After Congress was unable to address the issue
 - ACOE/EPA worked cooperatively to produce refined guidance
 - Draft guidance published for comment April 27, 2011

EPA/ACOE WoUS Guidance

- Feedback on draft guidance
 - Governor's comments were submitted July 14, 2011
 - Signed by Governor and Agency heads
 - Kansas Water Authority submitted comments June 24, 2011
 - KWO/KDHE briefed Kansas Congressional delegation on concerns
 - Nearly 300,000 comments received
 - Many were "mass mail" comments from both pro and con groups
 - EPA discussing guidance issues with States in Oct & Nov
 - Tributaries & Headwaters
 - Stormwater and NPDES Permit Issues
 - Impacts to TMDLs and WQS

EPA/ACOE WoUS Guidance

- Once guidance is final, ACOE/EPA uses to determine Clean Water Act jurisdiction
 - Primarily under Section 404 of the CWA (dredge and fill)
- Draft guidance is an **interim** step
 - EPA/ACOE say they will ultimately propose a rule
 - No timeline has been provided
 - Note 170 Members of Congress asked EPA/ACOE to forego the guidance
 - » Prefer a statutory change
 - » At a minimum, want EPA/ACOE to undertake a rule making
 - Most areas of concern to KS to be addressed by rule – defining criteria for “significant nexus”

EPA/ACOE WoUS Guidance

- Guidance has 8 sections

1. Traditional navigable waters

- Kansas River, Arkansas River, Missouri River

2. Interstate waters – e.g., Republican or Blue Rivers

3. Significant nexus analysis

4. Tributaries

- Shunga Cr, Soldier Cr, Cowskin Cr, etc.

5. Adjacent wetlands

6. Other waters

- Physically proximate
- Not physically proximate



Keys for
KS

EPA/ACOE WoUS Guidance

- Guidance sections – contd.

- 7. Waters not generally jurisdictional

- Prior converted cropland, stock watering ponds, irrigation ponds, swimming pools, reflecting pools, ornamental pools, standing water related to construction activity, erosional features that are not tributaries or wetlands, and groundwater drainage systems

- 8. Documentation

- Information leading to a conclusion a water is jurisdictional
 - Information leading to a conclusion a water is not jurisdictional
 - Information demonstrating significant nexus
 - Information demonstrating lack of significant nexus

EPA/ACOE WoUS Guidance

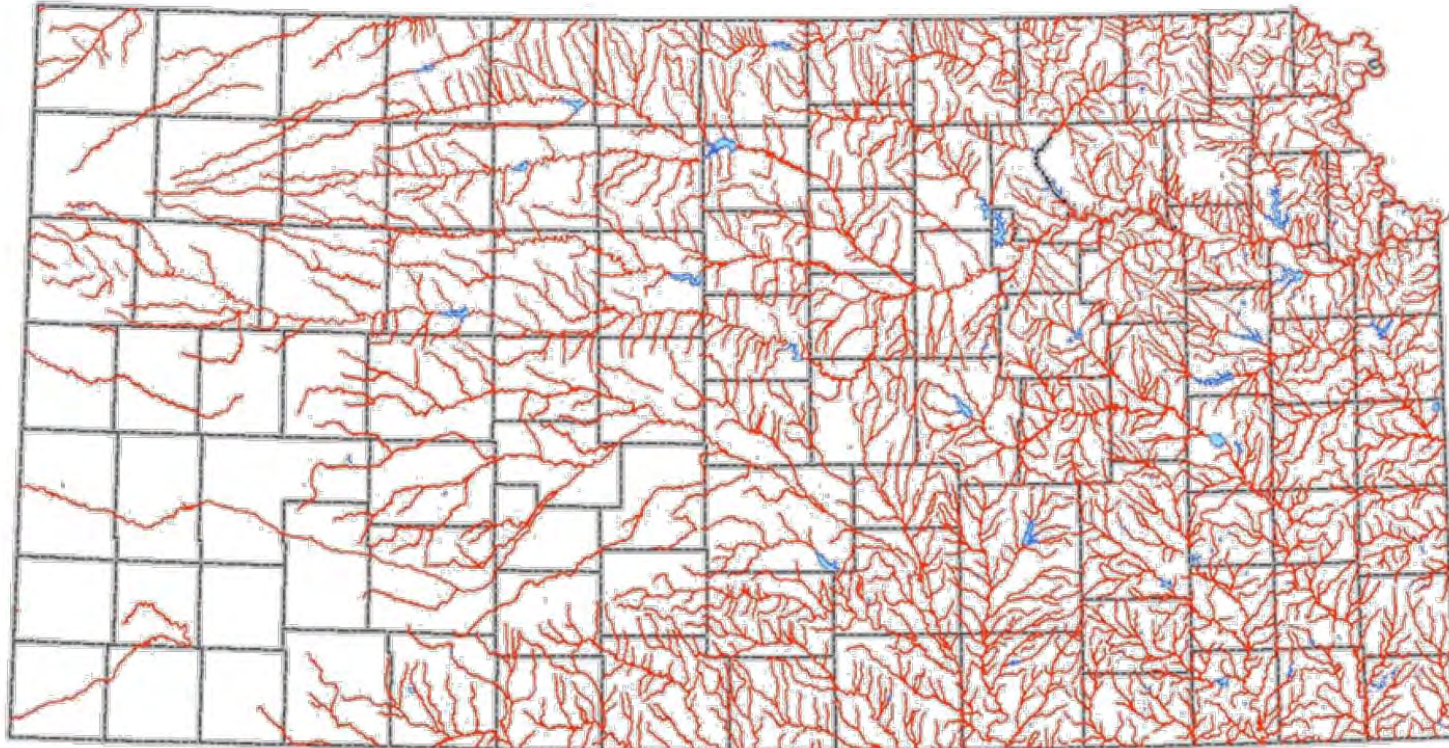
- KDHE could support much of the guidance
 - However, concerns exist
 - Still seems to be aimed at wetlands
 - Identification of ephemeral waters as potential WoUS
 - Ephemeral streams are deemed jurisdictional if they have a bed, bank and ordinary high water mark – many Kansas ephemerals do
 - Definitions of *significant nexus*, *tributary*, and *other waters* could prove troubling
- Old ACOE/EPA reg defn did not include ephemeral

“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”

Kansas has addressed thru K.S.A. 82a-2001, *et seq*

- Current “Classified” Waters in Kansas
 - Waters with assigned designated uses & numeric criteria = Waters of the US
 - Classified streams have -
 - Adequate hydrology, and/or;
 - Threatened or endangered species present, and/or;
 - Refuge for aquatic life during low flow periods, allowing recolonization upon resumption of normal conditions, and/or;
 - A permitted (NPDES) discharge from facilities, other than a confined animal feeding operation
 - Classified streams are not -
 - Ephemeral streams
 - Grass waterways
 - Culverts
 - Ditches
 - All other waters = Waters of the State, subject to general (“free from”) criteria
- EPA/USGS National Hydrographic Dataset (NHD)
 - National database of surface water features
 - Many believe NHD constitutes Waters of the US
 - Includes streams deemed not classified by Kansas

Kansas Classified Streams



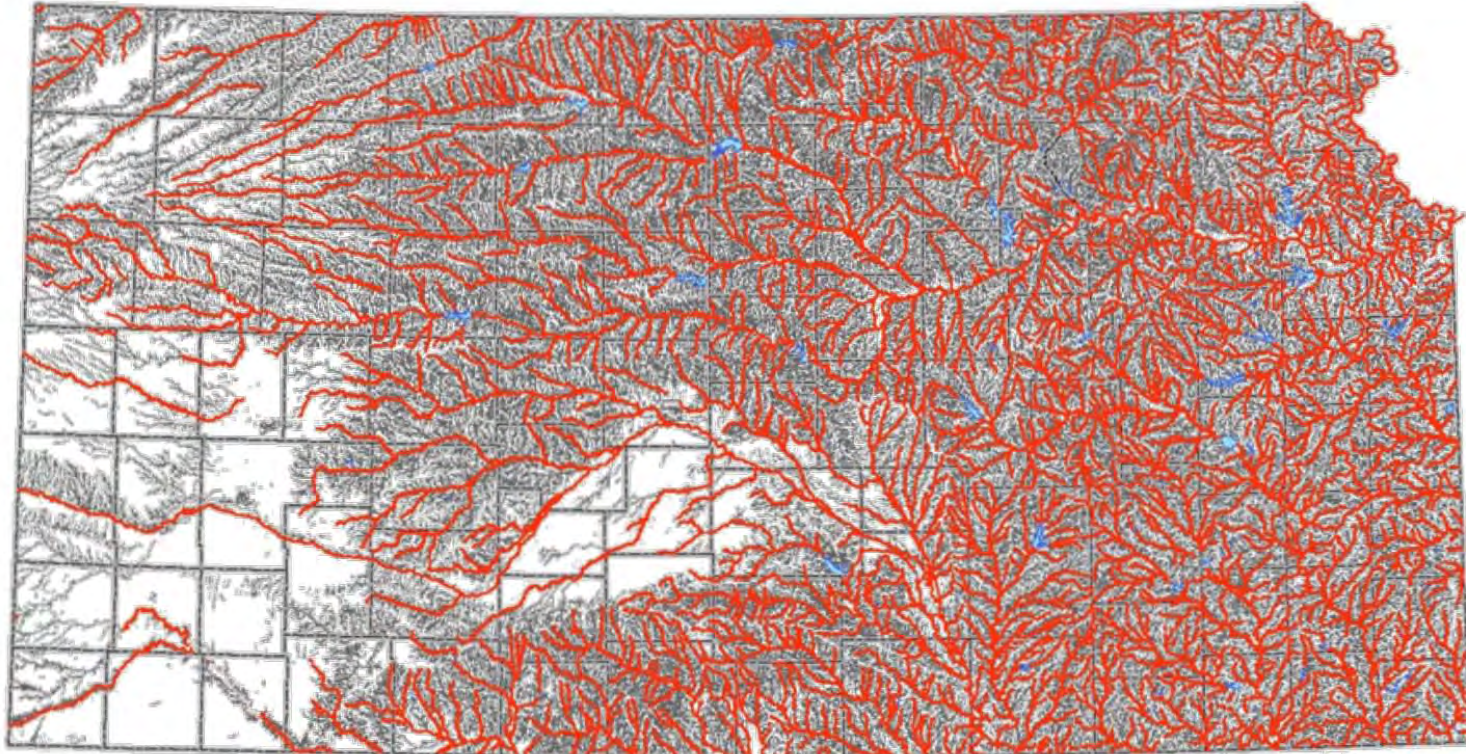
Legend

-  County
-  Registered Stream
-  Lake



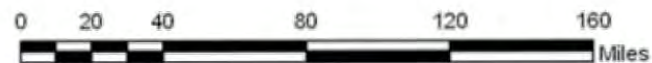
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Kansas – NHD and Classified Streams



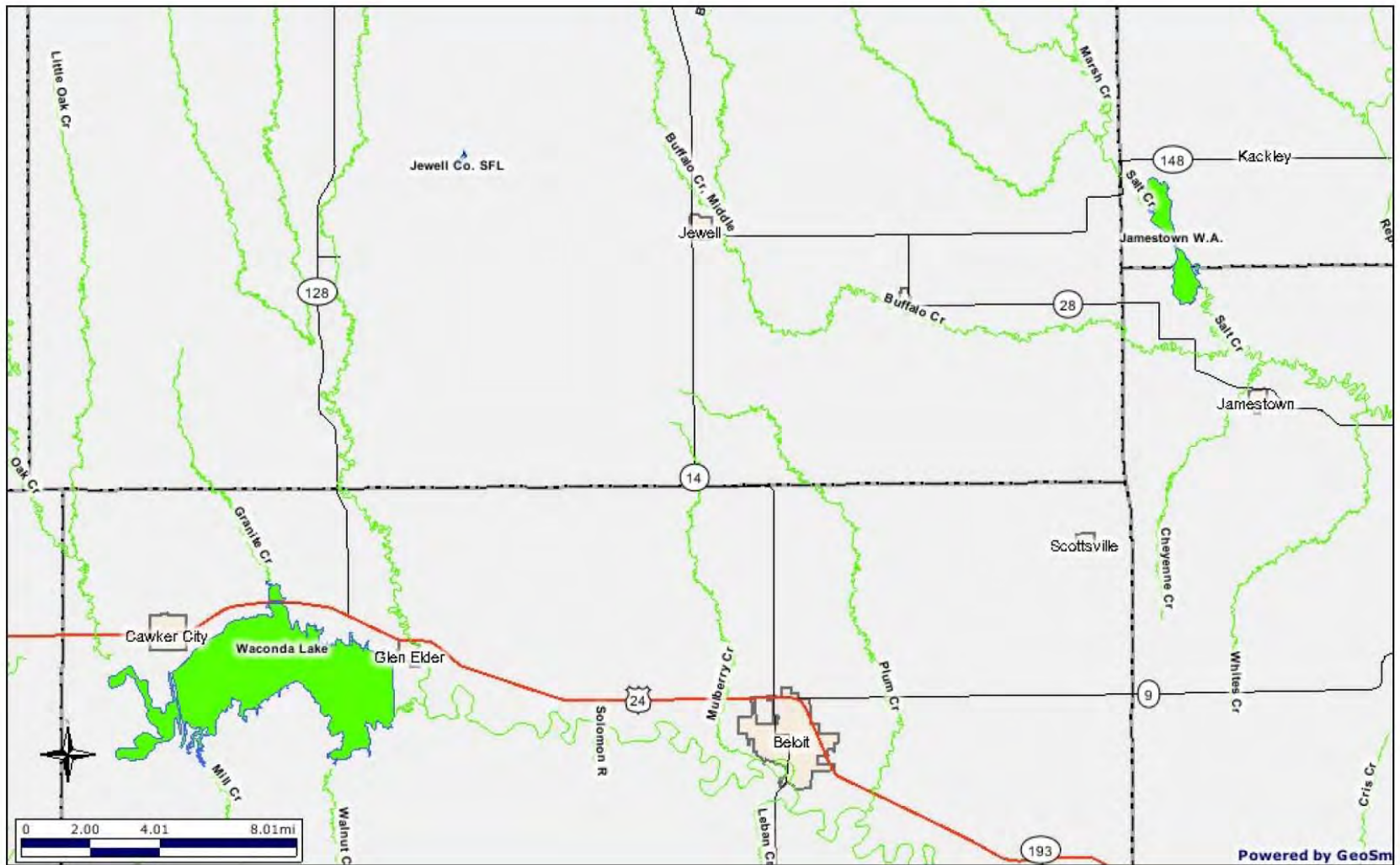
Legend

-  County
-  Registered Stream
-  Lake
-  NHD Streams

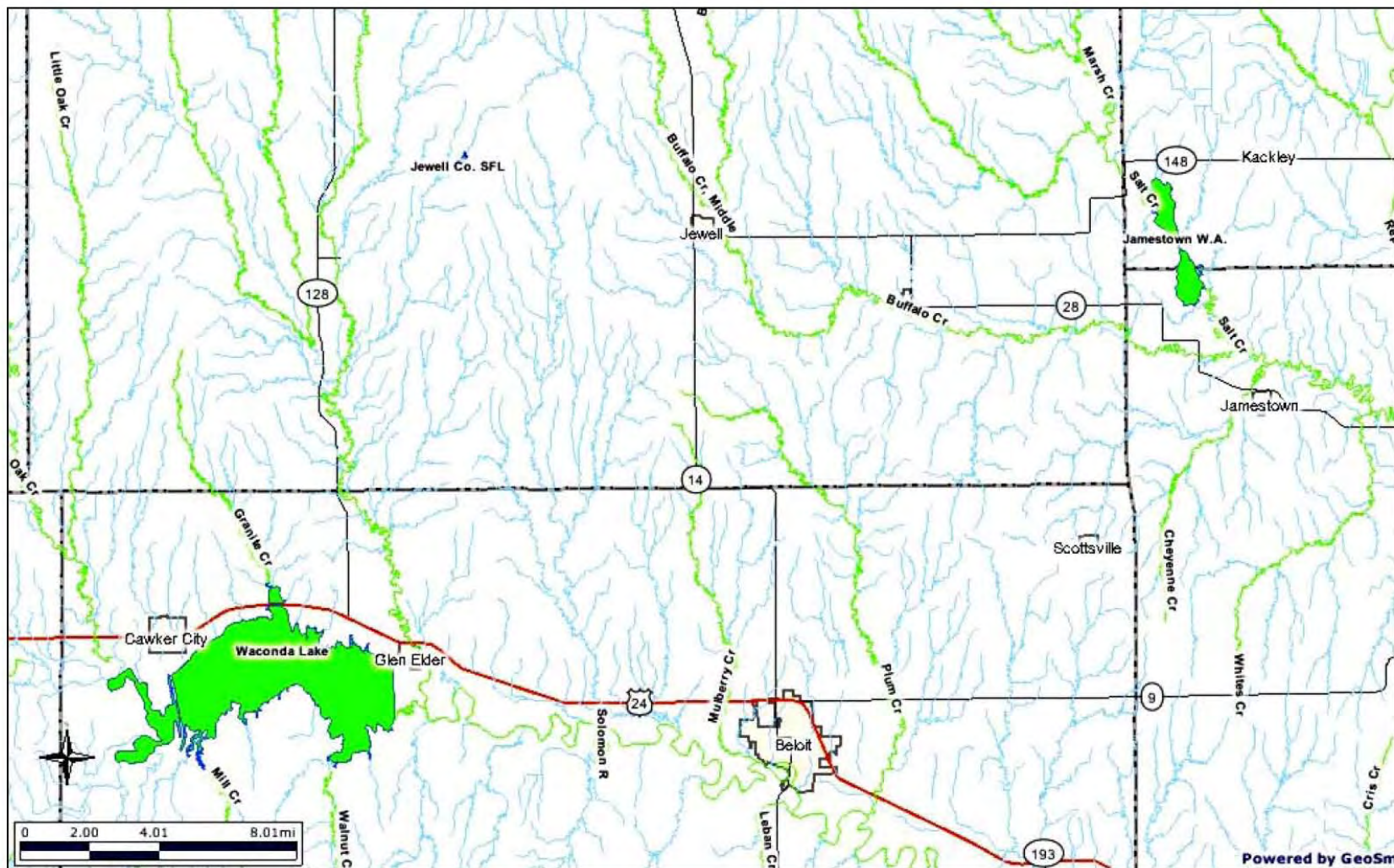


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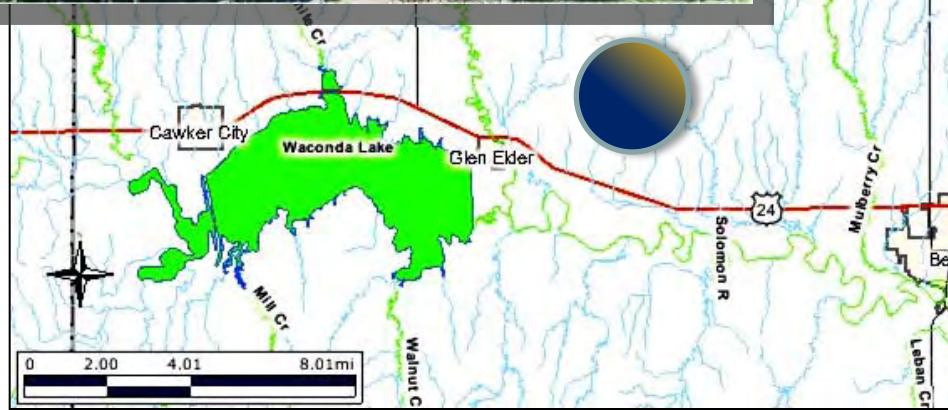
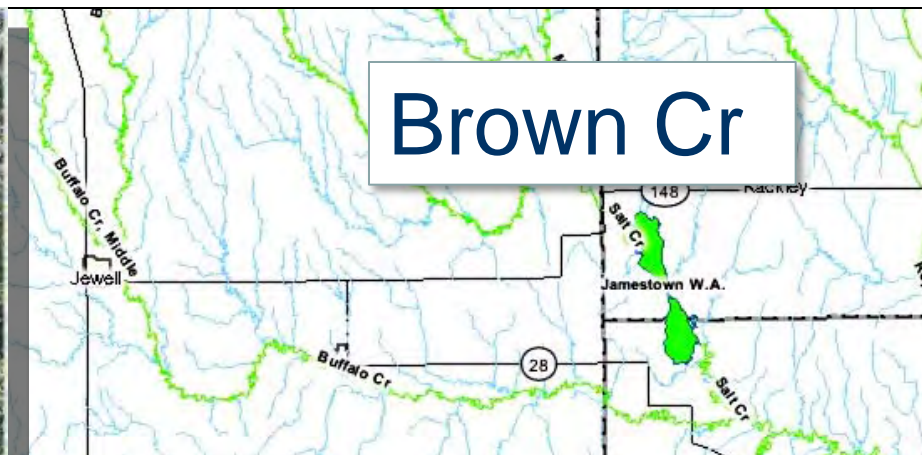
Classified vs NHD – Example



Classified vs NHD – Example



Classified vs NHD – Example



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Summary

- Question of CWA Jurisdiction has not been a major issue in Kansas
- Proposed fix for other jurisdictional problems elsewhere in nation may create administration problems for Kansas
- Continued push back on inclusion of ephemeral streams and sweeping application of CWA over all Kansas waters
- Existing State Authority adequate to protect most State waters

