SOUTH CAROLINA BAR ANNUAL MEETING

Environment and Natural Resources Section/ Administrative & Regulatory Law Committee

HOT ETHICS ISSUES FOR ENVIROMENTAL/REGULATORY PRACTITIONERS

CLE Course Outline

Professor John P. Freeman

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I. ETHICS ISSUES FOR CORPORATE COUNSEL

A. Representation of the employee and the company, especially at the investigatory stage of an environmental enforcement case.

1. Prime area for conflicts.

2. Rule 1.7 is key.[1] **Caveat #1:** Never read 1.7 to be purely a conflict provision that allows waivers as an all-purpose solution.

[1] RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

Caveat #2: Always have signed, written waivers, and never, never, never write a waiver document that is perfunctory.

3. Likewise important: Rule 1.13. That rule says the "organization" is the client and that, "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Message: the entity's rights have primacy.

4. Can the lawyer jointly represent the entity and an employee or a director? Where do you look for guidance? Rule 1.7(g) is a starting point. It provides:

> (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

5. Likewise relevant are Comments [13] and [14]:

> [13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.
>
> [14] The question can arise whether counsel for the organization may defend such an action. **The proposition that the organization is the lawyer's client does not alone resolve the issue**. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, **if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board.** In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Message: Joint representation is OK in run-of-the-mill cases where there is a remote likelihood that the constituent's conduct poses a material risk to the entity. Those cases can be handled as 1.7 conflicts with full disclosure and written waivers. Where there are serious charges, i.e., charges that pose a material risk of loss to the business that may give rise to a right of indemnity by the entity, then there may be an unwaivable conflict. **For example:** the conflict between VW and the ring of employees to master-minded the defeat device that led to massive violations of the Clean Air Act represents an unwaivable conflict.

6. What if you're assigned to serve as separate counsel for the organization's "constituent," with your fee paid by the organization? Then Rule 1.8(f) applies.[2]

7. Watch out for "Who is the client?" problems.

   (a) For example, in Matter of Morgan, 288 S.C. 401, 343 S.E.2d 29 (1986), the court disciplined a lawyer who became involved in a real estate transaction with his client, observing that, "Respondent's misconduct derives in large measure from an unawareness of who his clients were." Id. at 403, 343 S.E.2d 30.

   (b) Matter of Pyatt, 280 S.C. 302, 312 S.E.2d 553 (1984), is another discipline case arising in the real estate setting. The lawyer in Pyatt had entered into a business transaction with a couple whom he regarded as "borrowers." They may have been borrowing, but, according to the court, they were clients because they were looking to the respondent to protect their interests." Id. at 303, 312 S.E.2d 554.

   (c) In Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985), defendant physicians in a malpractice case successfully moved for disqualification against plaintiff's counsel who represented in other litigation a partnership in which they were limited partners. The court found an "implied attorney-client relationship" or "fiduciary duty" arising from the firm's representation of the partnership in commercial litigation. Again, the relationship's existence will be

[2] (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6

a question of fact.

(d) Matter of Bell, 332 S.C. 6, 503 S.E.2d 731 (1998), is a typical case involving a lawyer who was unable correctly to understand all the clients' names.

(e) If you enter an appearance for someone, that someone is your client. E.F. Hutton & Co. v. Brown, 305 F. Supp. 371 (S.D. Tex. 1969).

(f) Relevant factors. Multiple factors are relevant in determining whether an attorney-client relationship exists. Arizona's Supreme Court enumerated some of the considerations in Matter of Petrie, 742 P.2d 796, 800-01 (Ariz. 1987):

> The [attorney-client] relationship is proved by showing that the parties sought and received advice and assistance from the attorney in matters pertinent to the legal profession. 7 Am. Jur. 2d Attorneys at Law § 118. The appropriate test is a subjective one, where "the court looks to the nature of the work performed and to the circumstances under which the confidences were divulged." Alexander v. Superior Court, 141 Ariz. 157, 162, 685 P.2d 1309, 1314 (1984) (citing developments in the law -- conflicts of interest in the legal profession, 94 Harv. L. Rev. 1244, 1321-22 (1981). An important factor in evaluating the relationship is whether the client thought an attorney-client relationship existed. Alexander, 141 Ariz. at 162, 685 P.2d at 1314. The relationship is on-going and gives rise to a continuing duty to the client unless and until the client clearly understands or reasonably should understand that the relationship is no longer depended on. In re Weiner, 120 Ariz. 349, 352, 586 P.2d 194, 197 (1978).

(g) Note the emphasis in both the Pyatt and Petrie cases cited above on the client's subjective impression that an attorney-client relationship existed. This fact-specific subjectivity makes it likely that most factual disputes over client status will need to be resolved by the trier of fact.

According to Judge Stanley Sporkin:

> Remember, if it's a person's reasonable perception that you represent him or her, I think the courts will say that you have an attorney-client relationship and that information the person gave you is confidential information you cannot use against him or her. . . [S]tate that "I do not represent you; I represent the company; if

you tell me that you have done something wrong, I must report it to my client and perhaps recommend to my client that it take action against you; and if you would feel more comfortable in talking to your lawyer before you talk to me, I would encourage you to do so."

Some lawyers have a brief written statement that they'll give a person so that the record is clear. If this care is not taken, the individual may later assert a successful malpractice claim against the lawyer on the grounds that an attorney-client relationship existed and the "client's" interests were not protected. So when you're in this one-on-one situation with the individual, it's extremely important to document your conversation. Conference, Internal Corporate Investigations, 45 Ohio St. L. Rev. 703, 708 (1984).

(h) Finally, as Judge Sporkin points out, if you do not represent someone, make it clear; and you best do it in writing. RPC 4.3.

B. Representation of two or more defendants.

1. For environmental lawyers, a particular area of interest is representing multiple Potentially Responsible Parties under Superfund. Liability under the statute is joint and several under the statute, but courts must decide whether the harm can be apportioned and, if so, how the cost of cleanup should be allocated.

2. See Michigan Ethics Opinion R-16, attached as Exhibit 1, holding:

   a. In general Rule 1.7 applies.

   b. Unwaivable conflicts:

      (1) Where the interests of the owner and generators are fundamentally antagonistic both may not be represented where the joint representation would include allocation issues.

      (2) Where a central issue will involve a dispute over the division of PRPs into classes of de minimis PRPs versus major PRPs, a lawyer may not represent both de minimis and major PRPs at the Superfund site where the representation would include allocation issues

3. **Vicarious conflicts.** A 1996 Illinois district court decision

considered a case where there was a joint remedial cost-sharing agreement by a group of corporations after being notified by the United States Environmental Protection Agency that they were Potentially Responsible Parties ("PRP") for the cleanup costs of a landfill Superfund site. GTE North, Inc., a member of the group, had entered into an information sharing arrangement and confidentiality agreement to investigate for additional PRPs. GTE brought an action against such entities, one of which was defended by a law firm that represented Chrysler, a party to the information-sharing agreement. In evaluating GTE's motion to disqualify the law firm, the court acknowledged that Model Rule 1.9 did not expressly apply, because there was no prior attorney-client relationship. The court however, found that prior authority under Canon 9 of the ABA Model Code still was viable. Although the presumption of the receipt of confidential information did not apply, confidential information under the agreement had actually been transferred to Chrysler's counsel, and so disqualification was required.

GTE North, Inc. v. Apache Products Co., 914 F. Supp. 1575, 1581 (N.D. Ill. 1996).

C. **Lawyer communications with regulatory agencies.** Agency investigations and enforcement are typically performed by non-lawyer personnel even though the agencies have in-house lawyers. When, if ever, must a respondent's lawyer stop talking about the matter to non-lawyer agency employees and communicate solely through an agency lawyer?

a. A case worth noting: Quirk v. Palms, 3:02-cv-01238-CMC, S.C. District Ct., Docket Entry 56, July 3, 2004.

b. Quirk had a legal fight with the University. The University was represented by counsel During the dispute, Quirk got a helpful affidavit ex parte from John Montgomery; this allegedly violated Rule 4.2. Did it? The Court first reviewed ABA Formal Op. 97-408, titled, "Communication with Government Agency Represented by Counsel":

Judge Currie's take on the ABA pronouncement:

After addressing the existing authority, the opinion concludes:

The Committee agrees with the weight of authority that Rule 4.2 is generally applicable to communications by lawyers with represented government entities. We see no basis for categorically exempting government entities from the protection afforded by the no-contact rule where such entities have chosen to deal with a particular controverted

issue through legal counsel. At the same time, we also agree that the no contact rule must not be applied so as to frustrate a citizen's right to petition, exercised by direct communication with government decision makers, through a lawyer . . . .

The Committee therefore concludes that Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate directly with government decision makers in certain limited circumstances within the ambit of the right to petition, even though it would in the same circumstances prohibit communication with a represented private person or organization without consent of counsel.

Recognizing the uncertain parameters of the constitutional right to petition and the limited scope of our own jurisdiction to opine on questions of law, the *Committee believes that the most responsible way of accommodating the tension between a citizen's right of access and the government's right to be protected from uncounseled communications by an opposing party's lawyer, is to make all unconsented contacts with government officials that would otherwise be prohibited by the no-contact rule subject to two important conditions.*

First, *the government official to be contacted must have authority to take or recommend action in the controversy, and the sole purpose of the communication must be to address a policy issue, including settling the controversy.*

Second, because of the predictable difficulty of confining the scope of the communication to policy issues where a contacted official is also a potential fact witness, and in recognition that the government has a right to the active participation of its lawyers even where the right to petition applies, the Committee believes it essential to ensure that government officials will have an opportunity to be advised by counsel in making the decision whether to grant an interview with the lawyer for a private party seeking redress. *Thus the lawyer for the private party must always give government counsel advance notice* that it intends to communicate with officials of the agency to afford such officials an opportunity to discuss with government counsel the advisability of entertaining the communication . . . .

In situations where the right to petition has no apparent applicability, either because it is not the sole purpose of the contact to address a policy issue or because the government officials with whom the lawyer wishes to communicate are not authorized to take or recommend action in the matter, Rule 4.2 should be considered fully applicable to a lawyer's communications with officials of a represented government entity just as it would apply to a lawyer's communications with officials of a private

organization. In such situations, no communication by the lawyer is permitted except with consent of counsel.

Judge Currie held:

This court finds the rationale of the ABA opinion as quoted above to be persuasive. It further concludes that the recommended limits adequately protect the First Amendment right to petition the government for redress while balancing the government's right to protect its legitimate interests as a litigant. This court, therefore, predicts that the South Carolina Supreme Court would adopt the above quoted narrow reading of the governmental exception.

Answer to the question posed: If the matter is in the hands of an agency lawyer, contact with a lay agency employee is proper only if: (1) counsel for the agency is notified in advance, and (2) the lay employee contacted has authority to take or recommend action in the matter.

II. LITIGATION ISSUES GENERALLY

A. A New Fun Indoor Environmental Law Sport: Seeking Sanctions

1. The Frivolous Civil Proceedings Sanctions Act provides in section 15-36-10:

(A)(4) An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for:

(a) filing a frivolous pleading, motion, or document if:

(i) the person has not read the frivolous pleading, motion, or document;

(ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;

(iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or

(iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing

proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based;

(b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or

(c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law. . . .

(C)(1) At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous. An attorney, party, or pro se litigant shall be sanctioned for a frivolous claim or defense if the court finds the attorney, party, or pro se litigant failed to comply with one of the following conditions:

(a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;

(b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party; or

(c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.

(2) Unless the court finds by a preponderance of the evidence that an attorney, party, or pro se litigant engaged in advancing a frivolous claim or defense, the attorney, party, or pro se litigant shall not be sanctioned. . . .

(H) If the court imposes a sanction on an attorney in violation of the provisions of this section, the court shall report its findings to the South Carolina Commission of Lawyer Conduct.

2. Other provisions:

a. Rule 11(a):

(a) Signature. Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is admitted to practice law in South Carolina, and whose address and telephone number shall be stated. . . . The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. . . .

If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

b. Administrative Law Court Rule 72:

72. Sanctions for Frivolous Cases. If the presiding administrative law judge determines that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

c. Ethics Rules 3.1 and 1.1(5). See In re Young, 371 S.C. 394, 402-03, 639 S.E.2d 674, 678 (2007):

Rule 3.1, RPC, provides that "A lawyer shall not bring ... a proceeding ... unless there is a basis in law and fact for doing so that is not frivolous...." The comments to this rule state, in part, that lawyers are required "to inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions." It is apparent from Respondent's testimony that he did no investigation . . . nor did he conduct any research into the . . .

> law as it may apply to these facts before proceeding to make these grave allegations against Askins and the doctors. Respondent testified he checked with two (unnamed) members of his firm before filing the RICO complaint, at least one of whom urged him not to file. Respondent presents himself as a RICO expert, and accordingly cannot rely upon his consultations with others to insulate him from a finding that he brought a frivolous RICO claim. . . .
>
> The Panel found, based implicitly on a determination that Respondent was the most credible witness, that Askins and at least one of the doctors had made the statements against Ruffin that Respondent alleged they had made. However, whether these "threats" were violative of the state criminal blackmail statute or the unlawful use of a telephone statute is highly doubtful. What is clear is that Respondent had no facts implicating one of the doctors he sued, nor did he conduct any legal research before filing this complaint. Further, Respondent was unable to explain the legal basis for at least part of his pleading at this disciplinary hearing . . . .
>
> We find clear and convincing evidence that Respondent violated the following ethical rules in filing this retaliatory RICO complaint against the doctors and Attorney Askins: Rule 3.1 (lawyer shall not bring a frivolous proceeding); and Rule 1.1(5) (competent representation includes thoroughness and preparation).

B. What can you do to avoid sanctions (besides win the case[3])?

1. Take a cue from South Carolina statutory law and get a "good cause" affidavit from someone able to serve as a qualified expert before filing your papers. I.e., have an independent review of the facts. Get a second opinion/reality check from a friend; maybe you're not seeing things 20:20.

[3] In one case, attorneys who failed to conduct a reasonable inquiry avoided Rule 11 sanctions for initiating a frivolous lawsuit because the complaint turned out to be well-founded. Holding that an attorney cannot be sanctioned for a complaint that is well-founded solely because the attorney failed to conduct a reasonable inquiry, a Ninth Circuit panel said the trial judge erred by imposing sanctions based on the attorneys' subjective knowledge at the time they filed the complaint. The had complaint charged that the franchisee of a weight loss program misrepresented that the program was safe when it knew, or was reckless in not knowing, that the program might lead to gall bladder problems. The appellate court referred to a scientific study suggesting a weight loss/gallstone link that was published several months before the franchisee's securities offering, but which was unknown to counsel when they filed the complaint, as well as subsequent expert testimony. A dissenting judge asserted that it should not be appropriate for a complaint, even though ultimately well-grounded in fact and law, "to be filed on the basis of a hunch. Moore v. Keegan Management Company (9th Cir 1996) No. 94-15713.

2. Document your facts. Be able to point to evidence you had in hand when you took the position that's under attack. Assume you will someday be required to justify your position and document that justification up front. Make sure your client realizes, from the outset, the need for complete, accurate disclosure.

3. Keep evaluating your case as it goes along. The law may change and the facts are likely to change some way or another. Carefully consider opposing counsel's positions. See Holmes v. E. Cooper Cmty. Hosp., Inc., 408 S.C. 138, 166-67, 758 S.E.2d 483, 498-99 (2014), reh'g denied (June 13, 2014):

> "Here, the circuit court sanctioned Appellant because she continued the lawsuit despite a prior ruling that the court lacked subject matter jurisdiction, despite previously receiving sanctions for arguing that the court lacked jurisdiction based on the exact same allegations, and despite Respondents' compliance with the plain language of the Hospital's by-laws. . . .
>
> In our view, Judge Harrington was warranted in ordering sanctions in this case, especially because Appellant, a licensed attorney, made identical legal arguments in the 2005 litigation and did not prevail on the merits. Appellant has continuously and repeatedly challenged the Hospital's credentialing decisions without any legal basis to do so, and in the process, has cost the Hospital untold amounts of time and resources in defending these claims."

4. If someone seeks sanctions against you, report it to your insurance carrier. You may have coverage.

5. A new and growing hotbed for sanctions motions: spoliation of electronic evidence. See Charles W. Adams, Spoliation of Electronic Evidence: Sanctions Versus Advocacy, 18 Mich. Telecomm. Tech. L. Rev. 1 (2011), available at http://www.mttlr.org/voleighteen/adams.pdf

EXHIBIT 1

MI Eth. Op. R-16 (Mich.Prof.Jud.Eth.), 1993 WL 566247
State Bar of Michigan
Standing Committee On Professional and Judicial Ethics
Opinion Number R-16
November 19, 1993

SYLLABUS

***1** A lawyer may represent multiple potentially responsible parties [PRPs] at a single Superfund site, provided that (a) a disinterested lawyer would reasonably conclude that the representation of each client will not be adversely affected by the multiple representation, and (b) each client consents after full disclosure and consultation.

Where the interests of an owner and a generator at a single Superfund site are fundamentally antagonistic, a lawyer may not undertake representation of both parties where the representation would include allocation issues.

Where it is likely that a central issue will involve a dispute over the division of PRPs into classes of de minimis PRPs versus major PRPs, a lawyer may not represent both de minimis and major PRPs at the Superfund site where the representation would include allocation issues.

1. References: MRPC 1.7; R-10; RI-66, RI-89, RI-98, RI-111, RI-108, RI- 134.

TEXT

A landfill has been identified as a Superfund site. Two successive owners, several transporters, and 196 generators have been identified as Potentially Responsible Parties (PRPs). The Environmental Protection Agency (EPA) has put all those parties on notice of their alleged liability and has produced a volumetric ranking of the wastes contributed by each of the PRPs. That ranking shows that there are 17 major PRPs (each over 1% by volume and 179 de minimis PRPs (each under 1% by volume).

The firm has been asked to represent one owner, two of the major PRPs, and 13 of the de minimis PRPs. The firm has described the relationship between the owners and generators as “antagonistic by definition.” The firm further has related that “there is a virtual certainty that battle lines will be drawn around the 1% de minimis benchmark.” The firm asks the following questions:

1. May the firm represent multiple parties within one of the two groups of generators at this site? If so, what steps are necessary to undertake the representation?

2. May the firm represent both major and de minimis generators at this site? If so, what steps are necessary to undertake the representation?

3. May the firm represent both owners and generators at this site? If so, what steps are necessary to undertake the representation?

Superfund proceedings present unique conflict of interest problems for clients and lawyers alike. To more fully understand these unique issues and respond to the above questions, it is necessary to make some general observations regarding Superfund proceedings. It should be emphasized, however, that each specific case presents a unique set of facts and circumstances, and that this opinion is limited to the facts provided by the inquirer.

Under CERCLA, 42 USC Section 9601, et seq., Superfund proceedings generally commence following an initial EPA search for PRPs. PRPs are those who may become liable to pay for "response costs", the cost of clean up, the cost of investigation to determine the nature and extent of contamination and to prepare a clean up plan, the EPA's administrative costs, and certain other potential expenses. PRPs generally fall into the categories of owners (current and former), transporters (dumpers), and generators of the hazardous substances hauled to the site.

*2 Once the EPA has identified a PRP and decided to include that company on the PRP list, it normally sends what is known as a "General/Special Notice Letter", which includes a demand for disclosure of information and production of documents concerning the PRP's involvement with the site. This demand is commonly referred to as a "104(e) request", based upon Section 104(e) of CERCLA. All listed PRPs must then make this disclosure.

A CERCLA case commonly consists of three major phases. In the initial phase, someone (either EPA, a state, or one or more PRPs) undertakes a Remedial Investigation and Feasibility Study to determine the nature and extent of contamination, evaluate the risk to the environment and to public health, identify potential methods of clean up, and do a comparative evaluation of those methods. Such study may take years to complete and cost millions of dollars.

The EPA then decides what method of clean up should be implemented, issues a Record of Decision, and the next phase begins. This includes Remedial Design (detailed engineering) and Remedial Action, to perform the required clean up. Lastly is the cost recovery phase, where the EPA (or state agency) seeks reimbursement of administrative and oversight costs. It is further at this juncture that determinations must be made as to who is going to perform the clean up work and, more importantly, who is going to shoulder the costs of this work.

The EPA has the option of undertaking the work itself and seeking recovery of the cost from the PRPs. Alternatively, the EPA may issue a Unilateral Administrative Order (UAO) under Section 106 of CERCLA, ordering one or more of the PRPs to do the work in the manner specified by EPA. A

party who receives a UAO or Section 106 Order and does not respond to the satisfaction of EPA is faced with a potential claim for treble damages and stiff daily penalties.

Prior to invoking either of the above alternatives, the EPA will commonly attempt to settle the matter with the PRPs. In 1986, CERCLA was amended to specifically authorize settlements with de minimis PRPs. EPA generally favors such settlements, since a settlement with de minimis parties generates some money for its case early on, and substantially reduces the number of PRPs with which it must deal. Any recovery from the de minimis PRPs also reduces the potential exposure of the major PRPs. Thus major PRPs are likewise generally in favor of an early settlement with the de minimis PRPs.
Although CERCLA, as amended in 1986, authorizes the EPA to prepare an advisory, non-binding allocation amongst the PRPs, it rarely chooses to do so. Since PRPs are potentially jointly and severally liable at a particular site, both the EPA and the PRPs generally prefer to leave the issue of allocation to the PRPs.

The generators and perhaps other participants at a particular site often organize and form a steering committee to deal with the EPA as a group. Such parties are often perceived as having a community of interest in dealing with the EPA which transcends disputes among individual parties. They generally work towards execution of a Participation Agreement, which among other issues, provides a mechanism for determining the respective shares of liability of the various generators or other participants.

*3 Because a typical Superfund site involves so many parties within a certain geographical area, many firms, especially the larger ones, may find a substantial number of their regular clients identified as PRPs. One current site in Michigan has over 800 PRPs.

Having so many parties identified as PRPs often presents those parties with problems in obtaining specialized representation at a reasonable cost. It would generally be impractical, if not impossible, for each party to have separate counsel. Transaction costs for a party can be minimized through common representation. Most clients further prefer, whenever possible, to stay with counsel familiar with their business and operations. If any given firm may represent only one PRP at any given site, most clients will be unable to obtain specialized representation at a reasonable cost, will be forced to utilize unfamiliar counsel, and there are serious questions raised regarding the sufficient availability of competent counsel experienced in Superfund matters.

There is unquestionably a potential for conflicts of interest to arise at various stages of Superfund proceedings. PRPs may initially challenge other PRP designations as de minimis vs. major. Owners and generators are almost always antagonistic on issues of allocation. Major and de minimis PRPs may argue over the appropriate levels of contribution by the de minimis PRPs. PRPs may challenge the accuracy and/or completeness of another PRP's Section 104(e) disclosure. Major PRPs may argue over allocation of clean up and other costs. All of these scenarios are possible in

any given case. In light of this potential for conflicting interests, the issue becomes how the legal profession can ethically, competently and efficiently service the needs of clients named in a Superfund proceeding.

The interpretation and application of conflict of interest rules involves a balancing of important, and sometimes competing values. First and foremost are the lawyer's duty of loyalty to the client and the need to preserve and protect client confidences. Secondly, clients and the public have countervailing concerns about reducing the costs of representation and achieving the benefits of a coordinated position in their cases. Of less import are the economic interests of the lawyer. See, generally, Annotated Model Rules of Professional Conduct, 2nd Ed., American Bar Association (1992), p 109; Restatement of the Law Governing Lawyers, Tentative Draft No. 3, The American Law Institute (1990), pp. 178-179.

The avoidance of potential conflicts can impose significant costs on lawyers and clients alike. As noted in the Restatement of the Law Governing Lawyers:

> "Any prohibition of conflicts of interest should guard against being broader than necessary. First, conflict avoidance can make representation more expensive. To the extent that conflict of interest law prevents multiple clients from being represented by a single lawyer, one or both clients are put to the necessity of finding additional lawyers. That may entail uncertainty concerning the successor lawyer's qualifications, usually additional cost, and the inconvenience of separate representation. Second, conflict avoidance tends to interfere with client expectations. At the very least, one of the clients may be deprived of the services of a lawyer whom the client had a particular reason to retain, perhaps based on a long time association with the lawyer. Indeed in some communities or fields of practice, there may be no lawyer who is perfectly conflict-free." Restatement of the Law Governing Lawyers, Tentative Draft No. 3, The American Law Institute (1990), p. 76.

*4 It is with these principles in mind that the questions addressed in this opinion are answered.

The questions posed in this case involve varying degrees of potential conflicts among multiple parties. The issues presented are principally governed by MRPC 1.7, which states:

"(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to any other client, unless:

> "(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> "(2) each client consents after consultation.

“(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

> “(1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> “(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.” [Note: Written waivers are now required.]

When dealing with potential conflicts, the controlling considerations are the likelihood that such conflicts will arise and the materiality of such conflicts. See Comment to Rule 1.7:

> ”. . . A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. . . .”

Under MRPC 1.7(b), it may be permissible for a lawyer to represent multiple de minimis PRPs at the subject site if a disinterested lawyer would reasonably conclude that the representation would not be adversely affected and each client consents after full disclosure. Given that de minimis PRPs in Superfund proceedings often settle according to a set multiplier (premium) of their volumetric contribution to the site, their interests are often aligned. In the case of multiple de minimis PRPs, there is little likelihood of material conflicts arising. The comment to Rule 1.7 states in part that: “. . . common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.” This evaluation by the lawyer must be made on a case by case basis.

It may also be permissible under MRPC 1.7(b) to represent multiple major PRPs at the subject site, if a disinterested lawyer would reasonably conclude that the representation would not be adversely affected, and each client consents after full disclosure. The lawyer must consider the likelihood of conflicts arising between the major PRPs which would materially limit the lawyer's representation. Where the interests of such PRPs are generally aligned and there are only slight differences of interest among them, a disinterested lawyer could reasonably conclude that the representation will not be adversely affected. On the other hand, where there is a likelihood that conflicts will later arise which will materially limit the lawyer's representation, a disinterested lawyer could not reasonably reach this conclusion.

*5 This evaluation must take into account the purpose of the joint representation. Where the purpose of representation is to deal with the EPA or other groups of PRPs on issues common to a particular group of PRPs, there is much less likelihood of conflicts later arising that will materially limit the lawyer's representation. On the other hand, where allocation issues are involved in the representation and there are no prior agreements regarding division of responsibility, there is a much greater likelihood that the conflicts will materially limit the lawyer's representation, and it would be unlikely that a disinterested lawyer could reasonably conclude that the representation will not be adversely affected. Again, this evaluation must be made on a case by case basis.

As noted, this common representation would only be permissible upon obtaining consent of all the clients after full and complete disclosure of the advantages and risks of such multiple representation. Full disclosure must be made of these advantages and risks such that a client may make an informed judgment concerning the advisability of the multiple representation. This disclosure should include the effect of multiple representation on the potential waiver of the client-attorney privilege.

Additionally, the fact that multiple representation may be initially undertaken, does not mean that circumstances will not later arise which require withdrawal from representation from some or all clients. See MRPC 1.16. For example, in RI-98 and RI-134, where representation of multiple plaintiffs was undertaken, the lawyer was later forced to withdraw when the parties were in disagreement concerning the subject of settlement. Part of the disclosure to multiple clients should include discussion of this possibility and the risks attendant thereto.

On the other hand, it might not be permissible for an individual lawyer to represent other multiple PRPs at this site. Representation of an owner and generator, absent a prior binding agreement on division of responsibility, would not be permissible if their interests are “antagonistic” as described. See MRPC 1.7(a), “directly adverse”. While generators may have some objective measurement of their contribution to a particular site, whether by volume, toxicity or otherwise, there is generally no available objective measurement for the relative responsibility of owners vs. other PRPs. There is thus often a significant dispute between the owners and other PRPs as to their respective shares of responsibility. Because these interests are so clearly antagonistic, a disinterested lawyer could not reasonably conclude that the representation of one client will not be materially limited by the lawyer's responsibilities to the other, at least as to common representation on allocation issues. See RI-66. Client consent does not vitiate the conflict in such a situation. See R-10; RI- 108, RI-111, RI-98, RI-89. Concurrent representation of owners and generators must be viewed on a case by case basis and with a view towards the scope of the issues to be include in the joint representation.

*6 Nor would it be permissible under the facts presented here for a lawyer to represent both de minimis and major PRPs at the subject site if any portion of the representation included allocation issues. The facts provided in this inquiry state that “there is a virtual certainty that battle lines will be drawn around the 1% de minimis benchmark . . . [the inquirer] believes that MRPC 1.7(b)(1)cannot be satisfied if we were to represent both major and de minimis PRPs.” Given that the requesting

lawyer recognizes this substantial likelihood of material conflicts, a disinterested lawyer could not reasonably conclude that the representation will not be adversely affected. Thus the lawyer may not represent both de minimis and major PRPs at the subject site, at least as to common representation on allocation issues.

The goal of the profession is to serve clients in a competent, ethical and efficient manner. Superfund proceedings present unique problems, where multiple firm clients are often notified as PRPs for a particular site. If such clients are to obtain competent representation at a reasonable cost, then access to regular counsel must be available. If any given firm can only represent a single PRP at a particular site, these client needs simply cannot be met.

Permitting some multiple representation of PRPs whose interests are only potentially adverse, or by limiting the scope of the representation to issues of common goals and interests, permits clients access to and representation by the firm of their choosing. This strikes an appropriate balance between the need to maintain high ethical standards in the profession, while being able to render competent legal representation at a reasonable cost.

MI Eth. Op. R-16 (Mich.Prof.Jud.Eth.), 1993 WL 566247

ETHICS ISSUES FOR CORPORATE COUNSEL

Prof. John P. Freeman

Jan. 22, 2016

jfreemanusc@gmail.com

A PLUG FOR A COUPLE GREAT RESEARCH SOURCES

- On WESTLAW, get “Legal & Judicial Ethics & Disciplinary Opinions” listed as one of your “favorites”
- Less exotic and free ➔
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407 Rules of Professional Conduct

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THE THREE MOST IMPORTANT THINGS . . . .

- In real estate they're what?
- _____
- _____
- _____
- In legal ethics they're what?

CONFLICTS, CONFLICTS, AND CONFLICTS

- Why so serious?
- The prohibition is ancient and easily understood.
- Have you read the Bible? What does it say about serving two masters?
- Are you sure you understand the basics?

WHO IS THE CLIENT?

- SEN. LEVIN: Who was your client?
- MR. SMITH: Well, we were rendering these opinions to the taxpayer. I don't think we -- and that was -- hopefully we had engagement letters with respect to this, which explain this and explain our role. But these opinions were being rendered -- I don't think we rendered more than one opinion to any taxpayer and that was the sole piece of legal work we did for those taxpayers, these concurring opinions. KPMG, the national tax group, were also rendering an opinion, to my understanding.

MORE PAIN….

- SEN. LEVIN: The taxpayer was supposed to be your client. You don't know whether there was any personal contact with those taxpayers in most cases or not, do you? For instance, in the BLIPS transactions, do you have any idea?
- MR. SMITH: It was my understanding that Mr. Ruble was available to consult primarily with the financial advisors that these taxpayers had. I couldn't -- I'd have no idea how –

BE IN THE PROBLEM ELIMINATION BUSINESS

- Use the retainer agreement to specify who is and who is not a client.
- Put the burden on the client to notify the firm in writing if there is a change in the status quo, such as by formation or acquisition of an affiliate.

WHERE THE CLIENT'S IDENTITY IS IN DOUBT…

- You've got a fact question to be resolved, which is never good for a lawyer to have when his or her neck is on the chopping block.

- Cases abound…. Such as *Morgan*, "A most disturbing aspect of this matter is Respondent's failure, or refusal, to recognize the very nature of the attorney-client relationship. It is patent from his actions and decisions throughout that he lacks a basic understanding of that relationship. In filing an action, as the party plaintiff, to evict his own clients, one a minor, he disserved the legal profession.

OTHER CASES….

- *Pyatt:* Loan transaction with people who convinced the court "they were looking to Respondent to protect their interests."
- *Margulies:* A great case. Don't get too hung up on Rule 1.13, holding that the lawyer's client is the "organization." Think practically….
- *Bell:* Any potential problems with ***selling babies***?
- *Brown:* If you enter an appearance . . . .

RULE 1.7

- See fn. first page of outline for text
- The first thing you need to do is spot the possible problem.
- The next thing to do is NOT to draft waiver forms . . . .
- You must first decide if the conflict is waivable at all.

EXAMPLE OF UNAWAIVABLE CONFLICT

- Bigco wants to buy out ABC, Co. owned by A, B, C as equal 1/3 shareholders
- A&B are insider/managers with particular, essential skills; C is more of a passive investor
- Bigco wants A&B to remain in mgm't; offers employment agreements and non-competes; no interest in C

ABC, CONT'D

- If C agrees to a disproportionate allocation of the purchase price in favor of A&B the conflict is waivable
- If C being of an entrepreneurial bent, believes that he is entitled to receive 1/3 of the total consideration to be paid by Bigco, the conflict is unwaivable
- If C wants equal $$ must the lawyer get out?

WITH PROPER WAIVERS . . .

- The lawyer may be able to represent the entity, ABC, Co., but if C wants to contest the price allocation you have an unwaivable conflict and A, B, & C each need their own counsel to handle the money split.
- Lawyer needs to advise each that there is an unwaivable conflict and each needs separate counsel

THE LESSON

- Conflict situations are inevitable in practice
- Smart lawyers see them coming and deal with them up front
- ➔Legal problems are always easier to handle early, at the front end, rather than later
- And this is especially so with conflicts

CONFLICT RULE #1: BEWARE OF THE UNWAIVABLE CONFLICT

- Conflict Rule #2: If you can waive, do it right
- Do it in writing, get it signed and put thought into it.
- Biggest waiver sins: Perfunctory verbiage and last minute sign-offs

DRAFTING WAIVERS – IT'S SERIOUS WORK . . . .

- Repeat: Put thought into it.
- Carefully explain the nature of the conflict; the pros and cons of proceeding with joint counsel, including the consequences of proceeding jointly
- Explain the value of independent counsel as well as any downside to separate counsel, such as delay and added cost

INTRA-ORGANIZATIONAL CONFLICTS

- We know what 1.13 says: "The 'organization' is the client."
- But how does the rule work?
- Can I represent the entity and its officials or agents? And, if so, who consents to waivers?

WHAT ABOUT WHEN EVERYBODY GETS SUED?

- Rule 1.7 may allow joint representation with appropriate waivers….
- But, “if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board.”

COMPETING PULLS AND PUSHES . . . .

- The entity may have a right to indemnity from a wayward agent/officer/director.
- On the other hand, indemnification statutes in ***favor*** of officers/directors are very broad
- When in doubt about the entity's rights vs. its agent's, get an ethics opinion to help get it right and establish your good faith.
- Suppose an executive has been indicted?

SEPARATE COUNSEL ALWAYS DESIRABLE IN CRIMINAL CASES

- Rosanne Roseannadana: "It's always something."
- What about the company paying the employee's legal fees?

CRIMINAL ISSUES….

- United States v. Stein, 541 F.3d 130, 157 (2d Cir. 2008). DOJ sought to bar KPMG from providing legal fees to former employees indicted for tax fraud.
- Held unconstitutional as a deprivation of Sixth Amendment rights.
- But how about the SC AG?

AG Op. May 13, 1997, 1997 WL 323769 (SCAG)

- "[O]ur courts would conclude that a school district may not expend public funds to pay a school board member's or an employee's expenses of representation in criminal proceedings."
- The AG contends that an indictment precludes the employer from making a finding of good faith by the employee

ON THE OTHER HAND . . . .

- Under our corporate law, S.C. Code § 33-31-851(c) holds that "[t]he termination of a proceeding by . . . conviction . . . is not, of itself, determinative that the director did not meet the standard of conduct described in this section."
- Corporate indemnity standard of conduct: good faith and a reasonable belief conduct was in the company's best interest.

WHAT ABOUT SUPERFUND LITIGATION ?

- Can you represent multiple Potentially Responsible Parties (“PRPs”)?
- See outline Ex. 1, Michigan Ethics Op.
- Yes, Rule 1.7 applies.
- However if there is a fundamental antagonism (such as due to allocation issues) between the owner and the generator, the conflict is unwaivable.

BIRDS OF A FEATHER . . .

- Should flock together. . . .
- Where it is likely that a central issue will involve a dispute over the division of PRPs into classes of de minimis PRPs versus major PRPs, a lawyer may not represent members of both classes if the representation will include allocation issues. Mich. Op. Exhibit 1.

EASY CASE – MULTIPLE DE MINIMUS PRPs

- Usually OK. Rule 1.7 allows common representation where interests “are generally aligned in interest even though there is some difference of interest among them.”
- Same outcome for multiple major PRPs.

BUT WATCH IT . . . .

- “[W]here allocation issues are involved in the representation and there are no prior agreements regarding division of responsibility, there is a much greater likelihood that the conflicts will materially limit the lawyer's representation”; i.e., you have an unwaivable conflict.
- I.e., watch it if there’s a pie-slicing issue.

BE SURE YOUR WAIVER COVERS . . . .

- Effect of joint representation on attorney client privilege
- What happens if a dispute erupts over settlement.
- And watch out for settlement pie-slicing issues

LIKELY CONFLICT AREA . . . .

- There is “often a significant dispute between the owners and other PRPs as to their respective shares of responsibility. Because these interests are so clearly antagonistic, a disinterested lawyer could not reasonably conclude that the representation of one client will not be materially limited by the lawyer's responsibilities to the other, at least as to common representation on allocation issues.”

OVERVIEW COMMENT . . .

- The more symmetry between clients, the better.
- “Permitting some multiple representation of PRPs whose interests are only potentially adverse, or by limiting the scope of the representation to issues of common goals and interests, permits clients access to and representation by the firm of their choosing.”

WHAT ABOUT CONTACTING AGENCY PERSONNEL?

- When does Rule 4.2 not apply?
- A case in point: *Quirk v. Palms*, p.6
- Judge Currie adopted ABA Formal Op. 97-408 (“Communication with Government Agency Represented by Counsel”)

OK TO DO IT IF . . . .

- Right to petition must be implicated
- Official contacted has **authority** to take or recommend action in the controversy
- Sole purpose of the communication must be to address a **policy issue** such as settlement
- Lawyer for private party must always give government lawyer **advance notice** of intent to contact the agency official.

NEW INDOOR SPORT: SEEKING SANCTIONS . . . .

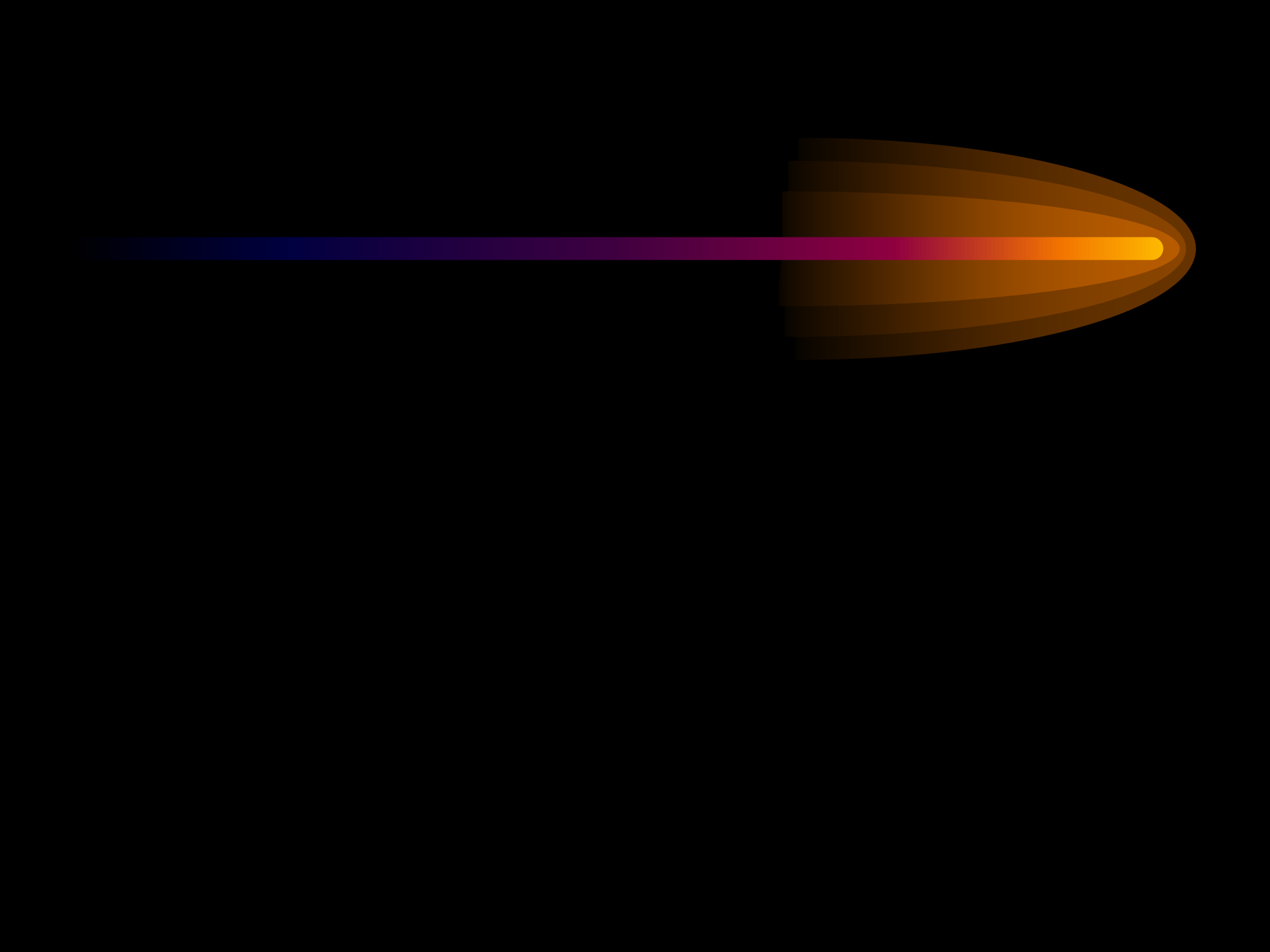
- FCPSA
- Rule 11
- Admin. Law Court Rule 72
- Rule 3.1 (lawyer shall not bring a frivolous proceeding); and Rule 1.1(5) (competent representation includes thoroughness and preparation).

HOW CAN YOU PROTECT YOURSELF?

- Run your facts by another lawyer, get an opinion/affidavit of merit and file it away
- Make a record of the key facts you relied upon in filing the claim
- Keep evaluating as you go along
- Report any sanctions claim to your carrier

AND FINALLY . . . .

Thanks for your attention!



Administrative Law Court Update

Ralph K. Anderson, III, Chief Judge
Jana E. Cox Shealy, Clerk of Court
January 22, 2016

I. OVERVIEW AND UPDATE AT ALC

- Organization (Attachment A)
- Caseload (Attachment B)
- Website search Engine (Attachment C)
- Upgraded case management system
- Electronic filing

II. AMENDMENTS TO ALC RULES OF PROCEDURE

- Amendments effective April 28, 2015. Special Appeals Rule 59 was amended to provide a new time frame for the agency (Department of Corrections and the Department of Probation, Parole and Pardon Services) to file the record with the Court.
    - The record must be filed within seventy days of the date of assignment to an Administrative Law Judge.
    - The amendments further provide that when the agency files a motion to dismiss prior to filing the record, the motion to dismiss stays the time for filing the record and for the submission of briefs.
    - Upon resolution of the motion to dismiss, the initial time frames for filing the record and briefs are in effect, and the time runs from the date of the order resolving the motion rather than the date of assignment.

- Proposed amendments for 2016 will be submitted to the General Assembly for promulgation by January 31, 2016 (effective 90 days from submission unless disapproved).

III. LEGISLATIVE UPDATE 2015-2016

- **Office of Freedom of Information Act Review, H.3161**

  The legislation creates the Office of Freedom of Information Act Review under the ALC in a similar capacity as the OMVH. The Chief Judge is Director and oversees the office. The Chief Judge is also responsible for hiring a hearing officer and staff, promulgating rules, and administration of the office.

  The bill has passed the House and is pending in a Senate Judiciary Subcommittee chaired by Senator Campsen.

- **Certificate of Need Program, H.3250**

  This legislation amends the Certificate of Need program, which in part eliminates DHEC Board review, allowing a party to file directly with the ALC after the staff decision; reduces the time frame for a decision to be issued at the ALC from 18 months to 12 months, requiring staff decision within 120 days of filing an application; and increases the NAD threshold from $600,000 to 5 million.

  The bill has passed the House and the Senate Medical Affairs Committee with a minority report.

IV. RECENT CASE LAW

Supreme Court

- *Nucor Corp. v. S.C. Dep't of Employment and Workforce*, 410 S.C. 507, 765 S.E.2d 558 (2014) was a direct appeal from the ALC to the Supreme Court that dealt with a threshold procedural challenge to appealability and substantively to the award of unemployment benefits. The case involved three issues, two of which had been decided by the ALC and the third was decided by the Appellate Panel upon remand from the Court of Appeals, which found that the case was not appealable at that time.
  - Neither party challenged the Appellate Panel's decision on the third issue, thus making it the final decision.
  - The Supreme Court held that the first two issues decided by the ALC became appealable after the Appellate Panel's decision on the third issue became the final agency decision.
  - The Court also found substantial evidence supported the ALC's decision on the two issues it decided. Nevertheless, even the Supreme Court called the procedural history in this case a "morass."

- *Kiawah Dev. Partners, II v. S.C. Dep't of Health and Envtl. Control, et al.*, 411 S.C. 16, 766 S.E.2d 707 (2014). Developer and conservation group appealed the permit for alteration of a critical area under the Coastal Zone Management Act via the construction of a 270-ft. revetment/bulkhead system along Captain Sam's Spit.
  - The Supreme Court held that
    - There was no finding of a benefit to the people;
    - The impact on the uplands within the larger coastal zone should be considered, and
    - The ALC erred in finding that there was no impact on the uplands;
    - The ALC erred in applying a substantiality requirement on any adverse effects to beach access;
    - There was no substantial evidence to support the ALC finding of no adverse effect on public access; and
    - The CZMA required the ALC to take the feasibility of the no-action alternative into consideration.

- *Carmax Auto Superstores West Coast, Inc. v. S.C. Dep't of Revenue*, 411 S.C. 79, 767 S.E.2d 195 (2014). A taxpayer challenged the Department of Revenue's application of an alternate method of assessing its corporate income taxes.
    - The Supreme Court held that the Department of Revenue has the burden of proving by a preponderance of the evidence that the statutory formula does not fairly represent a taxpayer's business activity in South Carolina in order to apply an alternate tax assessment method, and must also prove that the alternate method is reasonable.
    - The Court held that the Department failed to meet its burden of proving that the statutory formula did not fairly represent the taxpayer's business activity in South Carolina.

- *Allen v. S.C. Pub. Employee Benefit Auth.*, 411 S.C. 611, 769 S.E.2d 666 (2015). Public school district employee sought review after being denied benefits under the state employees' group health plan for a diabetes educational training session for his daughter, who had been diagnosed with diabetes and was an insured under the plan.
    - The Supreme Court held that because S.C. Code Ann. § 38-71-46 required coverage for the cost of diabetes education training in every group insurance policy issued or renewed in the State, this fell under the definition of "health insurance coverage" under the State Health Plan, and thus the plan was required to cover the cost of the diabetes education training session.
    - The Supreme Court also held that the class action relief sought by Appellant was not available in an appeal before the ALC.

- *Dreher v. S.C. Dep't of Health and Envtl. Control*, 412 S.C. 244, 772 S.E.2d 505 (2015) dealt with the Coastal Zone Management Act and a bridge to a parcel of property on an island.
    - The Supreme Court held that the parcel at issue was not a "coastal island" within the meaning of Regulation 30-1(D)(11), because it was part of Folly Beach, which is specifically exempted from the definition of "coastal island" in the regulation. Therefore, Regulation 30-12(N)(2)(c), which prohibits the construction of bridges to coastal islands under a minimum acreage, did not apply. DHEC thus erred in denying the property owner's application to construct a bridge to property she owned on the island.

- *Deerfield Plantation Phase II B Property Owners Ass'n v. S.C. Dep't of Health and Envtl. Control and Deertrack Golf, Inc. v. Bill Clark Homes of Myrtle Beach, LLC*, 2015 WL 5721506. This case dealt with stormwater management system on adjacent property in the Coastal Zone Management System. Specifically, the NPDES permitee sought to incorporate a drainage network of stormwater ponds from the old golf course that it purchased to develop into a new residential subdivision into the stormwater management plan and system for the proposed development.
    - The Supreme Court held that the stormwater ponds were "waters of the State" and thus subject to Regulation 61-68.
    - However, the Court also held that pretreatment of the stormwater running into these ponds was not the only way that the requirements under Regulation 61-68(E)(4) could be met. Rather, the Court found that Regulation 61-68(E)(4) could be also be met by implementing control measures, i.e. best management practices for control of stormwater, in the form of detention ponds.

- The Court also held that pursuant to Section 2.1(C) of the permit, the federal government's declaration of jurisdiction over a portion of the waters on the redevelopment site did not invalidate the entire permit issued by DHEC, only that falling under federal jurisdiction.

Court of Appeals

- *Maull v. S.C. Dep't of Envtl. Control*, 411 S.C. 349, 768 S.E.2d 402 (Ct. App. 2015) involved the issuance of an amendment to a critical area permit allowing a permittee to construct a dock about 20.4 feet from an adjacent property owner's property line. The Court of Appeals affirmed on all issues, except as to the issue of whether DHEC properly considered the impact that its permit amendment would have on adjoining property owner's value and enjoyment of his property pursuant to S.C. Code Ann. § 48-39-150(A)(10). The Court, therefore, remanded the case back for further findings of fact on that sole issue.

- *Trident Med. Ctr., LLC v. S.C. Dep't of Health and Envt. Control, et al.*, 412 S.C. 341, 772 S.E.2d 177 (Ct. App. 2015) involved cross-appeals from the ALC decision upholding DHEC's issuance of a CON for hospital construction to two hospitals within the same county.
  - The Court of Appeals, taking into consideration the agency deference given by the ALC to DHEC in CON matters, held that DHEC reasonably interpreted the plain language of the Bed Transfer Provision of the State Health Plan to permit the transfer of beds from an existing hospital to one that had not yet been constructed. The Court also held that the two permitees were not "competing applicants" under the CON Act.

- *Sierra Club v. S.C. Dep't of Health and Envtl. Control and Chem-Nuclear Sys., LLC*, 2015 WL 4746971. This case involved DHEC's renewal of a license to a waste disposal facility to allow disposal of low-level radioactive waste. The case was on appeal to the Court of Appeals from the ALC a second time after having been previously remanded to the ALC.
  - The Court held that there was substantial evidence to support the ALC's finding that the facility provided long-term stability of disposed waste.
  - However, the Court also held that there was insufficient evidence to support the finding that the facility complied with the technical requirements of the applicable regulations (subsections 7.11.11 and 7.23.6 of South Carolina Code Regulation 61-63), and that the facility's compliance with the "performance objectives" of subsection 7.10 was insufficient to satisfy the specific technical requirements of these regulations.

- *Boggero v. S.C. Dep't of Revenue*, 2015 WL 5714651.
  - As a matter of first impression, the Court of Appeals held that substantial evidence was the appropriate standard in determining whether a portable-toilet-business owner's transactions with her customers constituted a rental or a service for purposes imposing the South Carolina sales and use tax.
  - The Court held that substantial evidence supported the ALC's finding that the true object of the transactions at issue was the rental of portable toilets, and thus the transactions were subject to the sales and use tax.

- *Dorchester Cty. Assessor v. Middleton Place Equestrian Center, LLC*, 2015 WL 6735293. This case involved the agricultural use classification of 11 parcels of land for *ad valorem* tax purposes.
    - The Court of Appeals affirmed the finding that the taxpayer was entitled to retain the agricultural use classification for the 11 parcels of land, because though each of the tracts of land was less than the five-acre minimum required under S.C. Code Ann. § 12-43-232(1)(a) (2005), they were contiguous to and under the same management system as tracts of timberland consisting of acreage exceeding the minimum acreage.
    - The Court also held that the covenants creating a residential community that were also applicable to tracts did not restrict person who inherited property from conducting selective cutting and appropriate timber management.
    - The Court further held that pursuant to S.C. Code Ann. §§ 12-43-232(2) and (3)(e) (2005), the taxpayer was entitled to retain the agricultural use classification for the tracts of land at issue even if they were determined to be "nontimberland."

Attachment A

South Carolina Administrative Law Court
Office Directory

ALJs and Law Clerks/Judicial Assistant	
RALPH K. ANDERSON, III	
Harvin Fair	734-6409
JOHN D. McLEOD	
Anthony Goldman	734-6403
H.W. Funderburk, Jr.	
Julia Miller	734-6401
DEBORAH B. DURDEN	
Robin Coleman	734-6407
SHIRLEY C. ROBINSON	
Teckla Henderson	734-6402
S. PHILLIP LENSKI	
Edye Moran	734-6408

CLERK'S OFFICE	
Jana Shealy, Clerk	734-6411
Susan Dickerson, Asst. Clerk	734-1673
Janet Williams, Asst. Clerk	734-6413
Mary Jane Snelling, Receptionist	734-0550

GENERAL COUNSEL'S OFFICE	
Nancy Riley, GC	734-6412
Katie Buckner	734-0055
Sam Johnson	734-6410
Amy Rothschild	734-0059
Chris Whitehead	734-3225
Chelsea Clark	734-3227

OFFICE OF MOTOR VEHICLE HEARINGS	
Main Number	734-3201

Attachment B

ALC (No OMVH Cases) AGE OF DISPOSED CASES CHART	Total Cases Disposed	Avg. Age at Disposition	% Meeting Objective
Category I Case Types: Objective = 90 Days	**217**	**147**	**58**
Insurance rate cases [DOI]	0	--	--
Insurance agent application/disciplinary cases [DOI]	5	498	0
Wage disputes [LLR]	0	--	--
Alcoholic beverage license applications/renewals [DOR]	76	86	71
Alcoholic beverage license violations [DOR]	60	239	37
CWP, PI and Security licensing [SLED]	5	75	80
Setoff Debt Collection [SETOFF]	9	118	44
Consumer Affairs [CA]	5	108	40
Injunctive relief hearings	21	128	48
Public hearings for proposed regulations	23	70	96
Employee Grievance Appeals	4	415	0
Charter School Appeals	1	147	0
Criminal Justice Academy Appeals	1	124	0
Secretary of State	3	57	100
Subpoenas	2	8	100
Miscellaneous cases	2	57	100
Category II Case Types: Objective = 120 Days	**173**	**216**	**35**
Hunting/Fishing and Coastal Fisheries violations [DNR]	10	175	40
Boating under the influence	9	135	56
Health licensing cases [DHEC]	84	265	22
Outdoor advertising permits [DOT]	0	--	--
Disadvantaged Business Enterprises/Displacement[DOT]	1	371	0
PEBA Retirement Systems	12	119	67
OMVH Appeals [OMVH]	28	171	54
Professional Licensing Board Appeals [LLR]	10	317	10
OSHA [LLR]	19	137	47
Category III Case Types: Objective = 180 Days	**265**	**214**	**63**
Certificate of Need cases [DHEC]	5	804	0
Environmental permitting cases [DHEC]	7	337	29
OCRM cases [DHEC]	14	572	21
Medicaid Appeals [HHS]	4	276	25
Bingo violations [DOR]	10	225	80
State tax cases [DOR]	36	242	53
County property tax (real and personal) cases [DOR]	49	203	57
Daycare/Fostercare Appeals, SNAP (FI) [DSS]	13	30	100
Employment & Workforce Appeals [DEW]	109	151	77
PEBA Employee Insurance Program Appeals	18	191	50
Category IV Case Types: Objective = 120 days	**1116**	**114**	**55**
Inmate grievances [DOC & PPPS]	1116	114	55
ALL CASE TYPES	**1771**	**143**	**55**
ALL CASE TYPES excluding inmate grievances	**655**	**192**	**54**

COMBINED COURT AND OMVH WORKLOAD SINCE 2008

FISCAL YEAR	COURT	OMVH	TOTAL CASES FILED	COURT	OMVH	TOTAL FINAL DECISIONS
FY 08-09	1800	5340	**7,140**	1761	4655	**6,416**
FY 09-10	1955	6577	**8,532**	1591	5222	**6,813**
FY 10-11	1945	6786	**8,731**	1986	6760	**8746**
FY 11-12	1733	6939	**8,671**	1886	7501	**9387**
FY 12-13	1472	6776	**8,248**	1497	6678	**8,175**
FY 13-14	1698	6863	**8,561**	1776	6777	**8,553**
FY 14-15	1615	6796	**8,411**	1771	6627	**8,398**

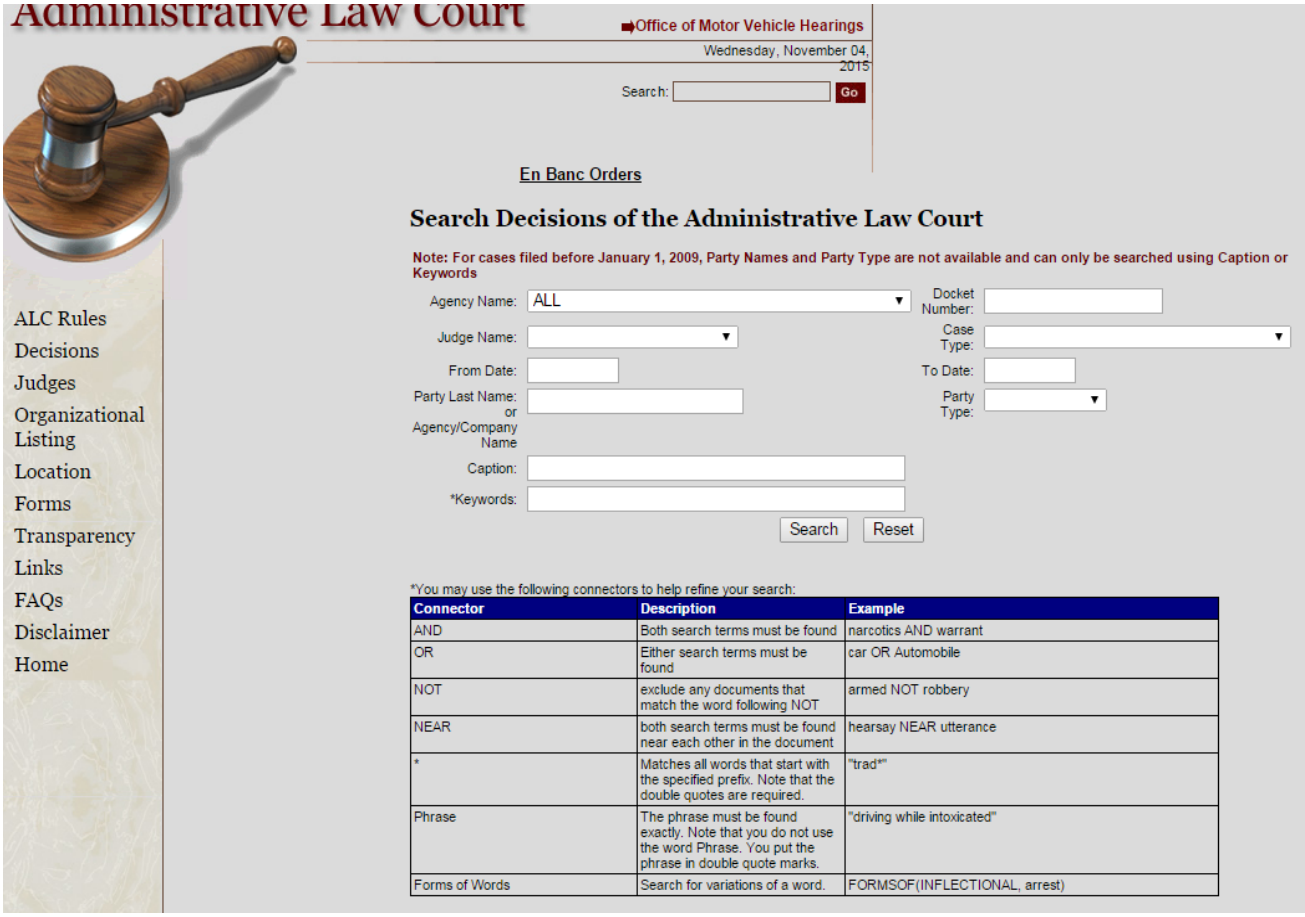
COURT'S WORKLOAD REPORT SINCE 2008

FISCAL YEAR	*CCs, RHs, IJs, and & other appeals	Al-Shabazz/ Furtick Appeals	TOTAL CASES FILED	*CCs, RHs, IJs, and & other appeals	Al-Shabazz/ Furtick Appeals	TOTAL FINAL DECISIONS
FY 08-09	534	1,266	**1,800**	544	1,342	**1,886**
FY 09-10	838	1,117	**1,955**	492	1,099	**1,591**
FY 10-11	750	1,195	**1,945**	924	1,062	**1,986**
FY 11-12	643	1,090	**1,733**	627	1,259	**1,886**
FY 12-13	567	905	**1472**	559	938	**1497**
FY 13-14	636	1,062	**1,698**	670	1106	**1776**
FY 14-15	594	1,021	**1,615**	655	1116	**1771**

OMVH WORKLOAD REPORT FOR CURRENT YEAR 2014-2015

Case Type #	Description	CASES FILED	FINAL DECISIONS
01	Implied Consent or BAC	**6594**	**6447**
02	Habitual Offender 1st Declared	**63**	**45**
03	Habitual Offender Reduction	**44**	**33**
04	Financial Responsibility	**45**	**45**
05	Dealer Licensing	**7**	**8**
06	Physical Disqualification	**12**	**9**
07	IFTA	**11**	**15**
08	Self-Insured	**0**	**0**
09	Driver Training School	**0**	**1**
10	IRP	**1**	**5**
11	Miscellaneous	**4**	**5**
12	Points Suspension	**8**	**12**
13	HOR 2	**5**	**2**
14	IID (Ignition Interlock)	**2**	**0**
TOTAL		**6796**	**6627**

Attachment C



LITIGATING ENVIRONMENTAL WHISTLEBLOWER CLAIMS UNDER OSHA PROCEDURES

NEXT CHALLENGE. NEXT LEVEL.

NEXSEN | PRUET

JANUARY 22, 2016

David Dubberly
Certified Specialist in Employment and Labor Law

ENVIRONMENTAL WHISTLEBLOWER PROTECTIONS ENFORCED BY OSHA

- Clean Air Act, 42 U.S.C. § 7622
- CERCLA, 42 U.S.C. § 9610
- Federal Water Pollution Control Act, 33 U.S.C. § 1367
- Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)
- Solid Waste Disposal Act, 42 U.S.C. § 6971
- Toxic Substances Control Act, 15 U.S.C. § 2622

OTHER WHISTLEBLOWER PROTECTIONS ENFORCED BY OSHA

- Affordable Care Act, 29 U.S.C. § 1558
- AIR 21, 49 U.S.C. § 42121
- Consumer Financial Protection Act (Dodd-Frank), 12 U.S.C. § 5567
- Occupational Safety and Health Act, 29 U.S.C. § 660(c)
- Sarbanes-Oxley Act, 18 U.S.C. § 1514A
- 11 More

FALSE CLAIMS ACT

- FCA provides financial incentive for reports of alleged wrongdoing (including alleged environmental violations) in connection with federal contracts, and protection from retaliation, 31 U.S.C. §§ 3729-3730
- But this presentation focuses on protections enforced by OSHA

WHY OSHA?

- OSH Act one of first laws with whistleblower protections
- As Congress passed more, kept giving OSHA authority to investigate whistleblower complaints in areas that have nothing to do with workplace safety

OSHA WHISTLEBLOWER COMPLAINTS

- 3,060 complaints in FY 2014 (50+% increase over 10 years)
  - 1,729 under OSH Act
  - 52 under environmental statutes
  - 810 found to be "merits" cases

OSHA PROCEDURES

- Similar under most statutes
  - Investigation by OSHA, litigation before ALJ, appeal to ARB
  - But differences regarding burdens of proof, filing deadlines, and available damages
- Regulations for complaints under environmental statutes revised in 2011
  - Summarized in OSHA's "Desk Aid"; see attached excerpt

FILING COMPLAINT IS EASY
29 C.F.R. § 24.103(b)

- Phone, fax, e-mail
- Online
- In any language
- No requirement for sworn written statement

STATUTE OF LIMITATIONS
29 C.F.R. § 24.103(d)

- 30 days from when complainant learns of adverse action
- Time for filing may be tolled

PRIMA FACIE CASE
29 C.F.R. § 24.104(e)(2)

- Employee engaged in protected activity
- Employer knew or suspected employee engaged in protected activity
- Employee suffered adverse action
- There's enough evidence to raise at least inference that protected activity was "a motivating factor" in adverse action

PROTECTED ACTIVITY
29 C.F.R. § 24.102(b)

- Starting/being about to start proceeding for alleged violation of an environmental law
  - Includes reporting internally
- Testifying/being about to testify in such a proceeding
- Assisting or participating/being about to do so in such a proceeding

TEMPORAL PROXIMITY
29 C.F.R. § 24.104(e)(3)

- Required showing may be met if complainant shows adverse actin took place shortly after protected activity

BURDENS OF PROOF
29 C.F.R. §§ 24.104(e)(4), 109(b)(2)

- Employer must produce evidence adverse action motivated by legitimate, non-discriminatory reason
- If it does, employee must prove articulated reason was pretext for retaliation
- Even if there's evidence retaliation was "motivating factor" in adverse action, OSHA can still dismiss case if employer proves by preponderance of evidence it would have taken same action in absence of protected activity

PROMPT RESPONSE REQUIRED
29 C.F.R. §§ 24.104(b)-(c), 105(a)

- Employer has 20 days from receipt of notice of complaint to submit response (can secure extension)
  - May request meeting with OSHA
- Information submitted to OSHA shared with complainant
- OSHA investigates and decides if there's "reasonable cause" to believe complaint has merit
  - On April 20, 2015 OSHA published memo "clarifying" (*i.e.*, watering down) "reasonable cause" standard

AVAILABLE RELIEF
29 C.F.R. §§ 24.105(a)(1), 109(d)(1), 110(d)

- Reinstatement to former position with same terms and conditions of employment
- Back pay with interest for lost wages
- Compensatory damages (for emotional distress and loss of professional reputation)
- Costs and expenses, including attorney's fees
- Under SDWA and TSCA, punitive damages "where appropriate"

CHALLENGING OSHA'S FINDINGS
29 C.F.R. §§ 24.105(a)(1), (c), 106(a)-(b)

- If OSHA concludes there's "reasonable cause," will send written report of findings and preliminary order awarding relief
- Upon receipt, losing party has 30 days to appeal to DOL's Chief ALJ by filing objections and requesting hearing
- If timely appeal, provisions of order will be stayed
- If no timely appeal, order becomes final

ALJ HEARING AND DECISION
29 C.F.R. §§ 24.107(a)-(b), 108(a)-(b), 109(a), (e)

- Appealing party entitled to evidentiary hearing
  - Rules of procedure; see 29 C.F.R. Part 18
  - Discovery
  - Motions for summary decision
- OSHA may participate as party or amicus; EPA may participate as amicus
- ALJ decision must contain findings, conclusions, and order on remedies
- Decision effective in 10 business days unless losing party files petition for review with DOL's ARB

ARB REVIEW
29 C.F.R. §§ 24.110(a)-(c), 112(a)-(d)

- Petition must set out all ALJ errors and issues
- If ARB declines to review case, ALJ decision becomes final
- If case accepted for review, ARB will send briefing schedule
  - It has 90 days to issue final decision
- No new evidence is introduced; ARB makes decision based on record developed by ALJ
- Adverse decision by ARB can be appealed to Circuit Court of Appeals

SETTLEMENTS
29 C.F.R. §§1[illegible]24.111(a)-(d)

- Settlements under CAA, SDWA, and TSCA must be approved by OSHA
  - Confidentiality provisions?
  - Waiver of future employment provisions?

QUESTIONS/COMMENTS?

David Dubberly
803-253-8281
ddubberly@nexsenpruet.com
Twitter: @DavidDubberly

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes Desk Aid

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Safe Drinking Water Act (SDWA) (1974) *[42 U.S.C. § 300j-9(i)]. Protects employees from retaliation for, among other things, reporting violations of the Act, which requires that all drinking water systems assure that their water is potable as determined by the Environmental Protection Agency.* **29 CFR 24**	30	*Private sector Federal, state and municipal Indian tribes*	30	No	Yes	No	Yes	Yes	30	ALJ	Motivating
Federal Water Pollution Control Act (FWPCA) (1972) *[33 U.S.C. § 1367]. Protects employees from retaliation for reporting violations of the law related to water pollution. This statute is also known as the Clean Water Act.* **29 CFR 24**	30	*Private sector State and municipal Indian tribes Federal sovereign immunity bars investigation of FWPCA complaints filed by federal employees*	30	No	Yes	No	Yes	No	30	ALJ	Motivating
Toxic Substances Control Act (TSCA) (1976) *[15 U.S.C. § 2622]. Protects employees from retaliation for reporting alleged violations relating to industrial chemicals currently produced or imported into the United States and supplements the Clean Air Act (CAA) and the Toxic Release Inventory under Emergency Planning & Community Right to Know Act (EPCRA).* **29 CFR 24**	30	*Private sector*	30	No	Yes	No	Yes	Yes	30	ALJ	Motivating
Solid Waste Disposal Act (SWDA) (1976) *[42 U.S.C. § 6971]. Protects employees from retaliation for reporting violations of the law that regulates the disposal of solid waste. This statute is also known as the Resource Conservation and Recovery Act.* **29 CFR 24**	30	*Private sector Federal, state and municipal Indian tribes*	30	No	Yes	No	Yes	No	30	ALJ	Motivating

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes Desk Aid

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Clean Air Act (CAA) (1977) *[42 U.S.C. § 7622]. Protects employees from retaliation for reporting violations of the Act, which provides for the development and enforcement of standards regarding air quality and air pollution.* **29 CFR 24**	*30*	*Private sector Federal, state and municipal*	*30*	*No*	*Yes*	*No*	*Yes*	*No*	*30*	*ALJ*	*Motivating*
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (1980) *[42 U.S.C. § 9610] A.k.a. "Superfund," this statute protects employees from retaliation for reporting violations of regulations involving accidents, spills, and other emergency releases of pollutants into the environment. The Act also protects employees who report violations related to the clean up of uncontrolled or abandoned hazardous waste sites.* **29 CFR 24**	*30*	*Private sector Federal, state and municipal*	*30*	*No*	*Yes*	*No*	*Yes*	*No*	*30*	*ALJ*	*Motivating*

THE
ENVIRONMENTAL
COUNCIL OF
THE STATES

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50 F Street, N.W.
Suite 350
Washington, D.C. 20001

Tel: (202) 266-4920
Fax: (202) 266-4937
Email: ecos@ecos.org
Webpage: www.ecos.org

MEMORANDUM

To: **Whom It May Concern**
From: **Dick Pedersen, President**
Environmental Council of the States
Date: **September 11, 2014**
Re: ***ACOEL Memo on Waters of the U.S. Under the CWA***

The Environmental Council of the States (ECOS) is the national nonprofit, nonpartisan association of state and territorial environmental agency leaders. The American College of Environmental Lawyers (ACOEL) is a professional association of distinguished lawyers who practice in the field of environmental law.

Under a Memorandum of Understanding between ECOS and ACOEL, members of ACOEL provide input on legal issues of concern to ECOS. In the summer of 2014, ECOS requested ACOEL to develop a review of the history and background of how "waters of the U.S." has been defined and interpreted over the years under the Clean Water Act (CWA). ECOS asked that this legal review be extensive and neutral to help ECOS members better understand: this complex area of law; the numerous and sometimes conflicting court interpretations of this term; and how the legal history relates to the proposal to revise the waters of the U.S. definition by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (79 Fed. Reg. 22,188 (April 21, 2014)).

Today, ECOS is pleased to provide this ACOEL produced memorandum to ECOS members. This memorandum will be released to the public at ECOS' Fall Meeting on September 15.

While we believe this memorandum is very informative, we point out that any views, opinions or assumptions expressed or implied in the memo are those of the authors and do not necessarily reflect the official policy or position of ECOS or any ECOS member. ECOS does not endorse the memo in whole or in part, nor any of its conclusions or implications.

ECOS sincerely thanks those members of ACOEL who spent significant time and effort developing this comprehensive memorandum. We look forward to working with ACOEL in the future.

* * *

MEMORANDUM FOR ECOS
CONCERNING
WATERS OF THE UNITED STATES ISSUES

September 11, 2014

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Memorandum For ECOS
Concerning Waters of the United States Issues

A. Introduction

In May 2013 the American College of Environmental Lawyers (ACOEL) entered into a Memorandum of Understanding with the Environmental Council of the States (ECOS) to facilitate a relationship pursuant to which members of ACOEL will lend their expertise on issues of interest to ECOS without taking an advocacy role. This memorandum is in response to ECOS' request for a review of the history and background of Waters of the United States, and how that history relates to the new proposed federal rules.

In the Federal Register of April 21, 2014 (79 Fed. Reg. 22187) the United States Environmental Protection Agency ("EPA") and United Sates Army Corps of Engineers ("Corps") published a proposed rule to amend the definition of "Waters of the United States" under the Clean Water Act. The agencies stated that one of the purposes of the proposed rule is "to ensure protection of our nation's aquatic resources and make the process of identifying "waters of the United States" less complicated and more efficient… This rule provides increased clarity regarding the CWA regulatory definition of "waters of the United States" and associated definitions and concepts."

The memorandum is intended to serve as background and context for an analysis of that proposed rule. It is divided into three main sections: Section B is a summary of the case law leading to the proposed rules; Section C is a summary of agency guidance and regulations with a more extensive compilation provided in the Appendix; Section D is an analysis of the proposed rule and the extent to which it diverges from current policy; and Section E is a discussion of how the proposed rule might affect existing and pending permits and jurisdictional determinations.

The memorandum will not attempt to address policy issues, e.g. what actions EPA or the States should undertake in response to the proposed rule. It also does not analyze all possible issues raised by the proposed rule, but rather reviews the judicial and regulatory background of the rule and to highlight where the proposed rule may differ from that background. The undersigned authors are a diverse group of ACOEL members from academia, private law firms, and public interest groups. In providing this memorandum, neither ACOEL, nor its individual members, nor its member affiliations undertake an attorney-client relationship with ECOS. This memorandum is the product of a team effort and does not necessarily reflect the views of any individual attorney.

B. Case Law Interpreting "Waters of the United States"

Without further definition, the Clean Water Act imposes federal jurisdiction over "waters of the United States." By using such broad language, Congress has left a great deal of latitude to the federal implementing agencies. Lacking specific guidance from Congress, it has fallen to the federal courts to delineate the limits of government authority.

In this section of the ACOEL paper, the authors synthesize the case law interpreting "waters of the United States." The paper begins with a summary of Supreme Court jurisprudence concerning the Clean Water Act, culminating in the *Rapanos* case. In that case, a divided Court reached the conclusion that the government had exceeded its authority, but could not agree on a rationale for the outcome. Two tests emerged, one by a plurality of the Court written by Justice Scalia and the other by Justice Kennedy, who offered a separate opinion while joining the majority.

Since *Rapanos*, the lower federal courts have struggled to determine whether and when the Justice Scalia- or the Justice Kennedy test applied. Some courts chose one test over the other, some attempted to apply both, and others avoided having to apply either. The paper describes the efforts of the Circuit Courts of Appeals to further elucidate the Supreme Court's meaning in *Rapanos*, and then analyzes application of the *Rapanos* holding to specific facts by the District Courts.

1. Supreme Court

The following discussion sets forth the holdings and rationale for those holdings of the three seminal U.S. Supreme Court cases determining the jurisdiction of the Clean Water Act over waters of the United States.

a. Riverside Bayview Homes

In 1985, the Supreme Court decided the case of *United States v. Riverside Bayview Homes I*, 474 U.S. 121 (1985), upholding the jurisdiction of the U.S. Army Corps of Engineers ("Corps") jurisdiction and regulation of 80 acres of marsh lands near the shores of Lake St. Clair as an "adjacent wetland" within the jurisdiction of the Corps' regulation defining "waters of the U.S." In so holding, the Court overturned the Court of Appeals for the Sixth Circuit, finding that the Court of Appeals erred in narrowing the Corps' regulatory jurisdiction to avoid takings issues.

In a unanimous opinion by Justice White, the Court upheld the Corps' jurisdiction over wetlands adjacent to navigable or interstate waters and their tributaries. The Corps defined wetlands as lands that are "inundated or saturated by surface or groundwater at a frequency and duration sufficient to support… vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b) (1986).

The Court found that "the plain language of the regulation refutes the Court of Appeals' conclusion that inundation or 'frequent flooding' by the adjacent body of water is a sine qua non of a wetland under the regulation. Indeed, the regulation could hardly

state more clearly that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to and does support wetland vegetation." 474 U.S. at 129-30.

The Court found that the Corps definition covered the property in question because the soils were wet from groundwater which supported wetland aquatic life and were adjacent to the navigable waters of Black Creek beyond respondent's property. *Id*. at 131. Noting the inherent ambiguity of drawing a line where land ends and water begins, the Court found the Corps' construction was entitled to deference and that in light of the language, policy and history of the CWA intent to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," the Corps definition was reasonable. *Id*. at 133-34. The Court affirmed the Corps' judgment that "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water," and concluded that it could not say that the Corps' approach was unreasonable. Accordingly, the Court held "that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id*. at 135.

b. ***SWANCC***

In the 2001 case of *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001), the Supreme Court again addressed the issue of the scope of the waters of the United States, reversing the district court grant of summary judgment in favor of the Corps' requirement of a CWA fill permit for development of a 533-acre parcel. The Corps asserted jurisdiction over ponds and mudflats that were unconnected to other waters covered by the CWA. These permanent and seasonal isolated ponds had formed after the abandonment of a gravel operation at that site. The Corps asserted jurisdiction over the ponds under its Migratory Bird Rule and justified the rule based on the significant effect on interstate commerce represented by the millions of dollars the public spends annually on recreational pursuits relating to migratory birds. The Court held that the Corps lacked jurisdiction to require a federal CWA permit and that the Corps' asserted justification for jurisdiction over the isolated ponds under its Migratory Bird Rule was insufficient to support jurisdiction.

The majority opinion, authored by Chief Justice Rehnquist and joined by Justices Scalia, Kennedy, O'Connor, and Thomas, rejected the Corps' argument that Congress acquiesced to the Migratory Bird Rule in failing to pass House Bill 3199 despite its awareness that the Corps interpreted the definition of the "waters of the U.S." as including "isolated wetlands and lakes, intermittent streams, prairie potholes and other waters that are not part of a tributary system to interstate waters or to navigable water of the U.S., the degradation or destruction of which could affect interstate commerce." *Id*. at 168. The majority opinion stated that "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute." *Id*. at 160.

The Court did not overturn its decision in *Riverside Bayview*. Moreover, the Court acknowledged that the phrase "navigable waters" in the CWA includes waters beyond the classical understanding and interpretation of the term "navigable." *SWANCC*, 531 U.S. at 171. It nonetheless rejected the Corps application of the rules to the waters at issue in the case, holding that the "migratory bird rule" interpretation could not be the sole basis for jurisdiction and noting that the interpretation would "read the significance of the term 'navigable' out of the statute altogether." *Id.* at 171-72. Stretching the statute to the outer limits of Congress' power is justified in the view of the majority only "where Congress gave a clear indication that they intended to do so." *Id*. at 172. Additionally, the Court noted its concern that the Migratory Bird Rule had the potential to impose on the states' traditional and primary power of land and water use. *Id*. at 174.

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented, arguing that the majority's decision invalidating the Migratory Bird Rule rested on incorrect premises of the scope of the CWA, that Congress acquiesced to the Rule, and that the majority opinion was unfaithful to the precedent of R*iverside Bayview* and inconsistent with the deference to administrative agency statutory interpretation required under *Chevron. Id*. at 191.]

c. ***Rapanos***

In 2006, the Supreme Court construed the term "navigable waters" for the third time in *Rapanos v. United States,* 547 U.S. 715 (2006). Reversing decisions by the Court of Appeals for the Sixth Circuit that upheld Corps' actions in two consolidated cases, a divided Court delivered an important decision that evoked significant debate. The case arose from consolidation of a civil enforcement action by the United States alleging that developers (i.e. Rapanos) illegally filled protected wetlands and an action by property owners (the Carabells) against the government for denial of a permit request to fill wetlands on private property. While the record established that the wetlands at issue were located near ditches and man-made drains that eventually emptied into traditionally navigable waters, it was unclear regarding whether these ditches and drains contained continuous or merely occasional flows.

The Court held that the Corps exceeded its jurisdiction in both cases, but did not adopt a rationale supported by a majority of the justices. Justice Scalia, joined by Chief Justice Roberts, Justice Alito, and Justice Thomas, wrote the plurality opinion, which found that the Corps' authority to regulate limited waters of the United States was limited to "only relatively permanent, standing or flowing bodies of water . . . forming geologic features" and not "ordinarily dry channels through which water occasionally or intermittently flows." *Id.* at 732-33. Citing *Webster's New International Dictionary*, 2882 (2d. ed 1954), the plurality concluded that the term "navigable waters" refers to continuously present, fixed bodies of water rather than ephemeral, intermittently flowing bodies of water. It reasoned that to be a jurisdictional wetland "first, that the adjacent channel contains a "wate[r] of the United States," . . . and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins." *Id*. at 742.

The plurality opinion relied on the *Riverside Bayview* decision in which the Court stated that the phrase "waters of the U.S." referred to rivers, streams and "other hydrographic features more conventionally identifiable as water. *Id*. at 734-35. The interpretation of "the water of the U.S." includes "relatively permanent, standing or continuously flowing bodies of water forming 'geographic features' that are described in ordinary parlance as "streams, oceans, rivers and lakes." The plurality excluded from the definition "streams that flow intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id*. at 739. In response to the argument that a restricted definition will frustrate enforcement against polluters, the plurality opinion states that the Act does not require the discharge of a pollutant to be directly into the stream in order to confer jurisdiction. Addition of a pollutant into non-navigable waters that naturally washes into navigable waters is likely covered under § 1311 of the Act. *Id*. at 743.

While Chief Justice Roberts joined the plurality opinion, he wrote separately to observe that "[a]gencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer." *Id.* at 758. The Chief Justice noted that the Corps and Environmental Protection Agency had initiated a rulemaking after *SWANCC* to clarify what waters were subject to Clean Water Act jurisdiction, but that the agencies' proposed rulemaking "went nowhere." *Id.* Had the agencies completed that rulemaking, he wrote, they "would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority." *Id*. But "[r]ather than refining its view of its authority in light of our decision in SWANCC, and providing guidance meriting deference under our generous standards," the Corps had instead failed to promulgate such a clarifying rule and chosen "to adhere to its essentially boundless view of the scope of its power." *Id*. "The upshot," the Chief Justice wrote, "is another defeat for the agency." *Id*.

Justice Kennedy concurred in the result in *Rapanos* based on a separate rationale that wetlands adjacent to navigable waterways are waters of the United States based on a "reasonable inference of ecologic interconnection" under *Riverside Bayview*. *Id*. at 780. Justice Kennedy found that the Sixth Circuit correctly identified the "significant nexus" test from *Riverside Bayview* but found that neither the reviewing courts nor the Corps considered factors necessary to the determination of the test. Finding the Corps' theory of jurisdiction in the two cases reached beyond both the *Riverside Bayview* and the test and the CWA, and that the Corps and the reviewing courts failed to consider the necessary factors, Justice Kennedy concluded that the rulings should be vacated and remanded.

With regard to isolated wetlands or wetlands adjacent to a non-navigable tributary, Justice Kennedy's concurring opinion held that the Corps must establish a "significant nexus" to navigable waters in order to classify the wetlands as adjacent. *Id*. at 782. The significant nexus test requires a finding that "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." *Id*. at 780. Additionally, Justice Kennedy's opinion explores the other side of the coin, noting that "[w]hen, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term navigable waters." *Id*.

Justice Kennedy's concurrence rejected a bright-line connection test, noting that a "mere hydrologic connection should not suffice in all cases," *Id.* at 784-85, because the connection "may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.* Thus, Justice Kennedy's approach rejected the plurality view that only wetlands with a continuous surface water connection are jurisdictional under *Riverside Bayview,* reasoning that it is irrelevant where the moisture creating the wetlands came from. *Id.* at 772. Justice Kennedy's concurrence also adverted to *SWANCC* as evidence that the test prevents problematic applications of the statute. Absent more specific regulations, Justice Kennedy's approach requires the Corps to meet the significant nexus test on a case-by-case basis to justify regulation of adjacent wetlands.

Four justices dissented in the Rapanos case. Justice Stevens wrote the dissent, which was joined by three other justices (Justice Souter, Justice Ginsburg, and Justice Breyer). Justice Breyer wrote a separate dissent while joining the dissent authored by Justice Stevens.

Justice Stevens' dissent noted the broad goal of the Clean Water Act's "Herculean goal of ending water pollution" and the broad question before the Court as "whether regulations that have protected the quality of our waters for decades, that were implicitly approved by Congress, and that have been repeatedly enforced in case after case, must now be revised in light of the creative criticisms." *Id.* at 787. Additionally the Stevens dissent defined the "narrow question[s] presented by the two cases," identifying the question in *Rapanos* as "whether wetlands adjacent to tributaries of traditionally navigable waters are 'waters of the United States' subject to the jurisdiction of the Army Corps" and the question in *Carabell* as "whether a manmade berm separating a wetland from the adjacent tributary makes a difference." *Id.* at 787-788.

The Stevens dissent criticized the plurality opinion for "[r]ejecting more than 30 years of practice by the Army Corps," *Id.* at 788 and failing to accurately respect the "nature of the congressional delegation to the agency and the technical and complex character of the issues at stake." *Id.* Similarly, it faulted Justice Kennedy's concurring opinion for failing to defer sufficiently to the Corps. *Id.* Focusing on *Chevron* as controlling precedent, the Stevens dissent argued that the "proper analysis [of the cases] is straightforward" and found the agency's determination to be "a quintessential example of the Executive's reasonable interpretation of a statutory provision. *Id.* The Stevens dissent presented *Riverside Bayview* as an example of the Court's appropriate deference to the Corps, noting that the *Riverside Bayview* Court limited its review to whether the Corps' exercise of jurisdiction was reasonable. *Id., citing* 474 U.S. at 131.

The Stevens dissent saw the plurality's reading as "revisionist," arguing that *Riverside Bayview* did not imply that adjacent wetlands must have a "continuous surface connection" between the wetland and its neighboring creek. *Id* at 793. It "emphasized that the scope of the Corps' asserted jurisdiction over wetlands had been specifically brought to Congress' attention in 1977." *Id.* at 794. Additionally, it focused on the important water quality roles played by wetlands and the "ambiguity inherent in the phrase 'waters of the United States.'" *Id.* at 796. Citing *Riverside Bayview*, it found that

the Corps "reasonably interpreted its jurisdiction to cover nonisolated wetlands." *Id.*, *citing* 474 U.S. at 131–135. It also relied on *Riverside Bayview* for the view that jurisdiction "does not depend on a wetland-by-wetland inquiry, because "wetlands adjacent to tributaries generally have a significant nexus to the watershed's water quality" noting the authority of the Corps to issue permits when a particular wetland is "not significantly intertwined with the ecosystem of adjacent waterways." *Id.* at 797, *citing* 474 U.S. at 135, n. 9.

The Stevens dissent also disagreed with what it saw as the plurality's "assumption that the costs of preserving wetlands are unduly high," *Id.* at 798, focusing on the importance of wetlands and asserting that Congress or the Corps should consider questions of costs and benefits of the statute and regulations. "Whether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed judges." *Id.* at 799. The dissent accused the plurality of imposing "two novel conditions" on the exercise of the Corps' jurisdiction: (1) the requirement of "'relatively permanent'" presence of water," *Id.* at 802, and (2) the "'continuous surface connection' with its abutting waterway" making it difficult "to determine where the 'water' ends and the 'wetland' begins." *Id.* at 804. The Stevens dissent charges the plurality with "needlessly jeopardize[ing] the quality of our waters" , with failing to exercise deference, and with ignoring its own obligation "to interpret laws rather than to make them." *Id.* at 810. In closing, the Stevens dissent noted the "unusual feature" of the judgments that the decisions of the plurality and the concurrence "define[d] different tests to be applied on remand." *Id.* In light of this fact, the Stevens dissent asserted that "on remand each of the judgments should be reinstated if either of those tests is met."

In addition to joining in the dissent by Justice Stevens, Justice Breyer filed a separate dissent, "call[ing] for the Army Corps of Engineers to write new regulations, and speedily so." *Id.* at 812. The Breyer dissent relied on *SWANCC* for support for his conclusion that Congress "intended fully to exercise its relevant Commerce Clause powers" under the CWA, while rejecting the *SWANCC* "nexus" requirement as an unjustified addition to the statute. *Id.* at 811. Thus, he found without difficulty that the Corps had jurisdiction over the wetlands at issue in both cases before the Court. *Id.* Relying on *Chevron*, the Breyer dissent concluded that once the agency writes "regulations defining the term," courts will be required to "give those regulations appropriate deference." *Id.*

2. Circuit Courts of Appeals

Following the United States Supreme Court's decision in *Rapanos*, the Federal Circuit Courts of Appeals have been divided over how to interpret the meaning of the phrase "waters of the United States" in 33 U.S.C. §1362(7) of the Clean Water Act ("CWA"). Because no opinion in *Rapanos* commanded a majority, the lower courts have had to develop a rule of decision for how to create a majority holding where none existed.

a. The Supreme Court Rule For Interpretation of Decisions with No Majority Opinion

In order to understand the appellate decisions following *Rapanos*, one must first understand the Supreme Court's jurisprudence regarding the effect of its own decisions when no opinion commands of majority of justices. The leading case is *Marks v. United States*, 330 U.S. 188 (1977). *Marks* posed the question whether obscenity standards announced in *Miller v. California*, 413, U.S. 15 (1973) could be applied retroactively. The issue was whether *Marks* really represented a change from, or just a clarification of, prior law.

The prior law was set forth in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). *Id*. at 418. Unfortunately, as in *Rapanos*, no opinion commanded a majority in *Memoirs*. Thus, in order to determine whether *Miller* changed the law, the Supreme Court in *Marks* first had to determine what the holding in *Memoirs* actually was. The Court of Appeals decision in *Marks* had ignored *Memoirs*, concluding that, because no opinion commanded a majority, it provided no binding precedent. *Marks, supra*, at 192.

The Supreme Court disagreed. It found that Memoirs was binding. In a simple conclusion that has "baffled" courts of appeal attempting to implement it, the Supreme Court stated that:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

Id. at 193. All of the courts of appeal that have attempted to determine the scope of the term "waters of the United States" post-*Rapanos* have wrestled with how to give effect to this formulation. They have not agreed on how to do so.

b. The Seventh and Eleventh Circuits Find That Justice Kennedy's Opinion Governs Interpretation of "Waters of the United States"

Three courts of appeal have found *Marks* to provide clear guidance that they considered binding. Citing the quote above, the Seventh and Eleventh Circuits have held that Justice Kennedy's concurrence expresses the narrowest grounds of agreement in the judgment. *United States v. Gerke*, 464 F.3d 723, 724 (7th Cir. 2006); *United States v. Robison*, 505 F.3d 1209, 1222 (11th Cir. 2007).[1] As a result, they have concluded that

[1] In *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007), the Ninth Circuit Court of Appeals appeared to take this view as well. Citing to *Gerke* and *Marks*, the court stated that Justice Kennedy's concurrence "provides the controlling rule of law for our case." *Id.* However, in *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011), the court backed away from this position, stating that it "did not, however, foreclose the argument that Clean Water Act jurisdiction may also be established under the plurality's standard."

the "significant nexus" standard described in Justice Kennedy's concurrence states the binding precedent of the Supreme Court in *Rapanos*.

The Court in *Gerke* interpreted "narrowest ground" as meaning the holding that least constrained federal jurisdiction over wetlands. It then concluded that that narrowest ground was stated by Justice Kennedy, largely because "the plurality Justices thought that Justice Kennedy's ground for reversing was narrower than their own." *Gerke, supra*, at 724.

Notably, the court acknowledged that Justice Kennedy's concurrence would not always be narrower, i.e., less constraining of government jurisdiction:

> the exception being a case in which he would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality) because there was a slight surface hydrological connection…. But that will be a rare case, so as a practical matter the Kennedy concurrence is the least common denominator….

Id. at 725.

The decision in *Robison* also contains an extensive discussion of the issue, including the First Circuit Court of Appeals decision in *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), which, as will be discussed below, took a different approach.

The Court in *Robison* concluded that

> M*arks* expressly directs lower courts, including this Court, that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments* on the narrowest grounds." *Robison, supra*, at 1221 (emphasis in original). Thus, the court concluded that it had no flexibility and that *Marks* prohibits any consideration of the views of the dissenters. Its job was thus "to determine which of the positions taken by the *Rapanos* Justices *concurring in the judgment* is the 'narrowest,' i.e., the least 'far-reaching.'" *Id*. (Emphasis in original.)

It is worth noting that, like *City of Healdsburg*, the decision in *Gerke* might also be limited to its facts, though it has not been understood to be so limited. In *Gerke*, the court stated that Justice Kennedy's standard "must govern the further stages *of this litigation*…." *Gerke, supra*, at 725 (emphasis added).

The court then had no difficulty in concluding that Justice Kennedy's opinion was in fact the narrowest. "Justice Kennedy's test, at least in wetlands cases such as *Rapanos*, will classify a water as 'navigable' more frequently than Justice Scalia's test." *Id.*

The court acknowledged, as had the court in *Gerke*, that, in some circumstances, the *Rapanos* plurality would find jurisdiction where Justice Kennedy would not, and that, in those circumstances, the plurality opinion would be narrower, i.e., less restrictive of federal authority. Indeed, the court further acknowledged that the facts in *Robison* might even be such a case. *Id*. at 1223.[2] Nonetheless, the court concluded that, because Justice Kennedy's opinion would in most cases be narrower, it provided the rule that must govern – even though it wasn't obviously narrower in the case before it.

c. The First, Third, and Eighth Circuits Find That Both the Plurality's Interpretation of "Waters of the United States" and That of Justice Kennedy Have Precedential Effect

The First, Third, and Eighth Circuits agree that the "understanding of 'narrowest grounds' as used in *Marks* does not translate easily to [the *Rapanos* precedent]." *United States v. Johnson*, 467 F.3d 56, 64 (quoting *Marks*, 430 U.S. at 193); *United States v. Donovan*, 661 F.3d 174, 181 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). *Johnson*, and *Bailey* and *Donovan*, which followed it, rejected the notion that they were compelled by *Marks* to ignore the views of the *Rapanos* dissenters.

As an initial matter, it is worth noting that the First Circuit decision in *Johnson* rejected the *Gerke* rationale that the narrowest ground of concurrence in fragmented decisions "[is] also the ground least restrictive of federal jurisdiction." *Johnson*, 467 F.3d at 63. As the Court noted, the conclusion as to which holding is the narrowest is not at all clear:

> given the underlying constitutional question presented by Rapanos, it seems just as plausible to conclude that the narrowest ground of decision in Rapanos is the ground most restrictive of government authority (the position of the plurality), because that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause.

Id. at 63. The court concluded that the better view might simply to be to interpret "narrowest" as meaning the "less far-reaching common ground. *Id.* (Citations omitted.)

More significantly, the First Circuit found that the *Marks* approach is basically just unworkable given the divergent opinions in *Rapanos*.

[2] Indeed, as also discussed below, the record in *Robison* was clear that the waters at issue were part of a tributary system with year-round flow. There had never been any challenge to CWA permitting. *Robison* thus represents the case in which eight justices – the four members of the plurality and the four dissenters – would all agree that jurisdiction exists.

> *Marks* is workable - one opinion can be meaningfully regarded as 'narrower' than another - only when one opinion is a logical subset of other, broader opinions. In other words, the 'narrowest grounds' approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other.

Id. at 63-64.

The court concluded that *Marks* does not work well as applied to *Rapanos* precisely because neither the plurality opinion nor Justice Kennedy's opinion can be fairly seen as subsets of the other. Instead, as acknowledged in *Gerke*, sometimes Justice Kennedy's opinion results in broader jurisdiction, but sometimes that distinction goes to the plurality.

The First Circuit also noted that the:

> Supreme Court itself has moved away from the *Marks* formula." In *Nichols v. United States*, the court observed that "[t]his test is more easily stated than applied," adding, "[w]e think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it."

Id. at 65 (citations omitted).

The First Circuit thus concluded that it was not bound by *Marks*. That being the case, it concluded that the better rule was to follow Justice Stevens' suggestion in *Rapanos* that a "water of the United States" exists if either the plurality test or Justice Kennedy's test is met.

The opinion in *Johnson* was largely followed by the Eighth Circuit in *Bailey* and the Third Circuit in *Donovan*. In *Bailey*, the court noted that the Supreme Court itself has "recognized that applying a rule of law from its fragmented decisions is often more easily said than done." *Bailey, supra*, at 798. Concluding that it was not bound by *Marks*, and "find[ing] Judge Lipez's reasoning in *Johnson* to be persuasive" *Bailey* adopted the rule stated in *Johnson*.

Donovan is similar. The Third Circuit stated that "*Marks* is not a workable framework for determining the governing standards established by *Rapanos*." *Donovan, supra*, at 182. Agreeing with *Johnson*, the court concluded that:

> Because each of the tests for Corps jurisdiction laid out in *Rapanos* received the explicit endorsement of a majority of the Justices, *Rapanos* creates a governing standard for us to apply: the CWA is applicable to wetlands that meet either the test laid out by the plurality or by Justice Kennedy in *Rapanos*.

Donovan, supra, at 184. The court then laid out a summary of what it saw as the way the rule would work in practice:

> In any given case, this disjunctive standard will yield a result with which a majority of the Rapanos Justices would agree. If the wetlands have a continuous surface connection with "waters of the United States," the plurality and dissenting Justices would combine to uphold the Corps' jurisdiction over the land, whether or not the wetlands have a "substantial nexus" (as Justice Kennedy defined the term) with the covered waters. If the wetlands (either alone or in combination with similarly situated lands in the region) significantly affect the chemical, physical, and biological integrity of "waters of the United States," then Justice Kennedy would join the four dissenting Justices from *Rapanos* to conclude that the wetlands are covered by the CWA, regardless of whether the wetlands have a continuous surface connection with "waters of the United States." Finally, if neither of the tests is met, the plurality and Justice Kennedy would form a majority saying that the wetlands are not covered by the CWA.

Id. (Citations omitted.)

The First, Third, and Eighth Circuits argue that Justice Kennedy's concurrence is not necessarily less sweeping, or a logical subset, of the plurality's opinions because they can imagine a case where there is a small surface area connection between a wetland and a brook and "the plurality's test would be satisfied, but Justice Kennedy's balancing of interests might militate against finding a significant nexus." *Id.*; *Donovan*, 661 F.3d at 181; *Bailey*, 571 F.3d at 799 (finding the *Johnson* rationale persuasive). In such a case, recognizing Justice Kennedy's test as controlling would result in a "bizarre outcome — the court would find no federal jurisdiction even though eight Justices (the four members of the plurality and the four dissenters) would all agree that federal authority should extend to such a situation." *Johnson*, 467 F.3d at 64.

Essentially, the First, Third, and Eighth Circuits have followed the instruction given in Justice Stevens's *Rapanos* dissent: "the United States may elect to prove jurisdiction under either test." *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting). These Circuits, then, are willing to give precedential respect to dissenting opinions in order to construct a governing set of rules from *Rapanos*. By applying an either-or test, "lower courts will find jurisdiction in all cases where a majority of the Court would support such a finding." *Johnson*, 467 F.3d at 64.

d. One More Note on the Circuit Split

Following the panel opinion in *Robison*, the government sought rehearing *en banc*. The Eleventh Circuit denied rehearing. *United States v. Robison*, 521 F.3d 1319 (11th Cir. 2008) ("*Robison En Banc*"). However, Judge Wilson, joined by Judge Barkett, dissented from the denial. Obviously, the panel decision remains the law of the Circuit.

However, Judge Wilson's opinion is significant in that it provides the most extensive discussion of the different approaches to post-*Rapanos* judicial interpretation.

Like the First Circuit, Judge Wilson noted that the *Marks* test was baffling, stating that "the *Marks* framework makes sense only in circumstances in which one Supreme Court opinion truly is 'narrower' than another – that is, where it is clear that one opinion would apply in a subset of cases encompassed by a broader opinion." *Robison En Banc*, *supra*, at 1323. Again like the First Circuit, Judge Wilson had no trouble concluding that neither the plurality opinion nor Justice Kennedy's opinion was a subset of the other. Id. at 1324. "Justice Kennedy's test is not uniformly narrower than the plurality's, and Justice Kennedy did not regard it as such." *Id.* at 1325.

Finally, Judge Wilson emphasized that the panel decision in *Robison* went farther than either *Gerke* or *N. Cal. River Watch*. As noted above, the opinions in those cases could arguably be limited to those cases, though they have not been so interpreted. "No other circuit has held that the plurality's test is *never* applicable, even where, as here, that test may result in a finding of jurisdiction." *Id.* at 1327 (emphasis in original). Without taking a position on the merits of the panel decision in *Robison*, it is worth repeating that the panel decision adopted Justice Kennedy's substantial nexus test on the ground that it was a "narrower" restriction on federal jurisdiction than the plurality opinion, notwithstanding that, on the facts of *Robison*, the judges agreed that the plurality provided the narrower test. In other words, *Robison* was the rare case in which all Supreme Court justices *other* than Justice Kennedy would find jurisdiction, yet the court adopted the Justice Kennedy rule of decision, leading the court to remand for further proceedings consistent with its holding that the substantial nexus test controls.

e. The Second, Fourth, Fifth, Sixth, Tenth, and District of Columbia Circuits Have Not Decided Which *Rapanos* Test Governs

The Second, Fourth, Fifth, and Sixth Circuits have all not reached a decision on which *Rapanos* test governs, even though that issue was arguably before them. In *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009), the Second Circuit passed on determining whether wetlands were jurisdictional under the CWA because, even assuming that they were, the plaintiff failed to raise a material issue of fact as to whether defendant discharged pollutants into the wetlands from a point source. The Fourth Circuit has in two cases applied whichever test the parties before it agree is controlling. *Precon Dev. Corp. v. United States Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011) (parties agreeing that Justice Kennedy's test governs); *Deerfield Plantation Phase II-B Prop. Owners Ass'n v. United States Army Corps of Eng'rs*, 501 Fed. Appx. 268 (4th Cir. 2012) (parties agreeing that either test could establish jurisdictional waters). The Fifth Circuit, when reviewing a jury's criminal conviction of a CWA violation, found that the "evidence presented at trial support[ed] all three of the *Rapanos* standards." *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008). The Sixth Circuit similarly found CWA jurisdiction in the case before it under both the plurality's and Justice Kennedy's opinions, rather than "decide . . . once and for all[] which test controls in all future cases." *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009).

Before concluding that it need not decide which *Rapanos* decision governs, the Sixth Circuit rejected the view that the narrowest grounds of agreement between the *Rapanos* opinions is that which restricts jurisdiction the least, and also rejected the view that the narrowest grounds of agreement is that which restricts jurisdiction the most. *Id.* at 209.

It does not appear that the Tenth or the District of Columbia Circuits have heard a case in which they could have decided which is the controlling *Rapanos* opinion. Notably, the District of Columbia Circuit has taken a view concerning how lower courts should follow fragmented decisions from the Supreme Court that is at odds with the First Circuit decision in *Johnson*. In *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991), the court adopted the view expressed in *Gerke* that *Marks* prohibits courts from counting dissenters to form a binding majority decision. Judge Kavanaugh challenged the wisdom of that holding. Referring to *Rapanos* among other cases, he would instruct lower courts "to run the facts and circumstances of the current case through the tests articulated in the Justices' various opinions in the binding case and adopt the result that a majority of the Supreme Court would have reached." *United States v. Duvall*, 740 F.3d 604, 611 (D.C. Cir. 2013) (Kavanaugh, J., concurring). This advice was met with rebukes by other members of the District of Columbia Circuit. *See, e.g., id.* (Rogers, J., concurring) (Williams, J., concurring). The decision and the Rogers and Williams concurrences in *King v. Palmer* suggest that, if the District of Columbia Circuit were confronted with a "waters of the United States" interpretive question, it might be more inclined to follow *Gerke* than *Johnson*. However, it would probably be unwise to speculate how the District of Columbia Circuit would apply *Rapanos* based solely on its interpretation of *Marks* in a wholly different context.

3. U. S. District Courts

Given the lack of consensus among federal appellate courts, it is unsurprising that district courts have struggled in applying *Rapanos*. Indeed, one senior district court judge simply gave up trying to answer the jurisdictional question under the *Rapanos* framework and reassigned the case. "I am so perplexed by the way the law applicable to this case has developed that it would be inappropriate for me to try it again." *U.S. v. Robison*, 521 F.Supp.2d 1247, 1248 (N.D. Ala., 2007).

However, despite the uncertainties, overarching themes emerge from a review of post-*Rapanos* case law. The discussion that follows will analyze and compare the various factual analysis courts have used to determine whether a particular water body or wetland is jurisdictional, as represented by a sampling of like cases.

The Plurality held that "waters of the U.S." include "only relatively permanent, standing or flowing bodies of water . . . forming geologic features" and not "ordinarily dry channels through which water occasionally or intermittently flows." *Rapanos v. U.S.*, 547 U.S. 715, 732-33 (2006). Finding a wetland to be jurisdictional requires "first, that the adjacent channel contains a 'wate[r] of the United States,' . . . and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 742.

The *Rapanos* Plurality noted that,

> By describing waters as relatively permanent, we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.

Rapanos, 547 U.S., 732 n.5 (internal quotations omitted). The Plurality declined to decide "exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel." *Id*. at 732 n.5. Instead, the Plurality suggests that "[c]ommon sense and common usage distinguish between a wash and a seasonal river." *Id.* However, despite this "common sense" distinction, lower courts have struggled to give meaning to the permanency requirement.

a. Permanency

1. Permanency-fluctuating flows

Fluctuation of flow volume has been held not to affect the permanency of a water. Indeed even the Plurality noted that their standard may embrace seasonal rivers. *Id.* A seasonal river will most certainly have a fluctuating flow. *Hamilton* involved a creek fed primarily from irrigation runoff and canals. The creek had continuous flow "year round or nearly year round." *United States v. Hamilton*, 952 F.Supp.2d 1271, 1275 (D. Wyo. 2013). Evidence was presented that water flowing through the creek fluctuated on a daily, if not hourly, basis. *Id*. Defendants argued that permanence referred to the rate of flow in a channel. Thus, defendants argued, if flow is subject to frequent fluctuations then water is not permanent within the meaning of the Plurality test. *Id*. The district court found that defendant's argument rested on a misunderstanding of the Plurality's use of the term permanent:

> Permanence under the plurality test refers to whether flow exists in a channel over a period of time, not (as [d]efendants suggest) the rate of flow in the channel. Under the plurality test, what matters is not the amount of water flowing in a given channel but whether water is flowing in that channel. Here, whether the flow in Slick Creek amounted to a gentle babble or a raging torrent doesn't matter. What does matter is that, at the time Defendants filled Slick Creek, it had water flowing through it most of the year.

Id. at 1274. The court went on to find the creek was a relatively permanent, flowing body of water that connected to a traditional interstate navigable water, thus making the creek a water of the United States. It is worth noting that the court found the creek to be permanent when it had water flowing through it "most of the year." Thus, permanence does not require a 365-day a year flow. As discussed next, most courts agree with Hamilton that waters do not need a 365-day a year flow to be permanent.

2. Permanency-seasonal flows

The Army Corps of Engineers has interpreted the term "seasonal rivers" to include those bodies of water which have continuous flow at least seasonally, e.g. typically 3 months. *Deerfield Plantation Phase II-B Property Owners Ass'n, Inc. v. U.S. Army Corps of Engineers*, 501 Fed.Appx.268, 271 n.1 (4th Cir. 2012). Some district courts have used the Corps' three-month standard as a benchmark from which to evaluate permanency. *See U.S. v. Mlaskoch*, No. 10-2669 (JRT/LIB), 2014 WL 1281523 at *16-17 (D. Minn. Mar. 31, 2014) (where defendants raised three months as the necessary flow timeframe and the court evaluates the facts against the three month standard); *Deerfield Plantation Phase II-B Property Owners Ass'n, Inc.*, 501 Fed. Appx. 271 (seemingly accepting without discussing Corps guidance and use of three months as a benchmark).

The Ninth Circuit found water to be relatively permanent where a channel held water continuously for only two months out of the year. *United States v. Moses*, 496 F.3d 984, 989–91 (9th Cir.2007). *Moses* involved a portion of a creek that, due to an irrigation diversion, only contained flowing water during the spring runoff. *Id*. at 985. The circuit court observed that "[w]hen [the creek] does flow, the volume and power of the flow are high, even torrential." *Id.* at 985. The circuit court found pre-*Rapanos* case law influential in determining the creek's jurisdictional status. Previously the Ninth Circuit had held:

> [T]here is no reason to suspect that Congress intended to exclude from "waters of the United States" tributaries that flow only intermittently. Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage... Rather, as long as the tributary would flow into the navigable body of water "during significant rainfall," it is capable of spreading environmental damage and is thus a "water of the United States" under the Act.

Moses, 496 F.3d at 989 (quoting *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001) quoting *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir.1997)). The circuit court concluded that the *Rapanos* decision did not undercut the *Headwaters* decision. Rather, "the Supreme Court unanimously agreed that intermittent streams (at least those that are seasonal) can be waters of the United States." *Id.* at 991.

One could argue that the pre-*Rapanos* jurisprudence relied on by the Ninth Circuit has minimal application to the Plurality's standard. Factors such as "significant rainfall" and "capable of spreading pollution" ignore the Plurality's permanency and continuous surface connection requirements. Theoretically, a waterway could run only a few weeks out of the year during significant rainfall events and could be jurisdictional if it was capable of spreading pollution. It may be that in recognition of this, the Ninth Circuit also noted that the Plurality's standard allows for coverage of waters that are seasonal. *Id.* at 990. However, as will be discussed, multiple courts have cited *Moses* for the proposition that "significant rainfall" and "capable of spreading pollution" can establish jurisdiction, or at the very least be influential in establishing jurisdiction.

A district court later interpreted the *Moses* decision to recognize "that a seasonally intermittent, non-navigable tributary *can* fall within the definition of waters of the United States provided that the tributary would flow into a navigable body of water during significant rainfall and is capable of spreading environmental damage." *U.S. v. Vierstra*, 803 F.Supp.2d 1166, 1170 (D. Idaho 2011) (emphasis added). While the *Vierstra* court does not state that the *Moses* test is the exclusive test to determine waters of the United States, it does indicate that the *Moses* test is enough to qualify a water. The *Vierstra* court went on to note other factors indicative of permanence, such as flow for six to eight months out of the year, an ordinary high water mark, and a defined bed and bank. *Id.* However, the *Vierstra* court's conclusion relied almost exclusively on the *Moses* analysis:

> In sum, the Court is satisfied that the . . . canal meets the definition of "waters of the United States" as articulated by the plurality opinion in Rapanos. Though man-made, it is a "relatively permanent" tributary of navigable waters and thus capable of spreading pollution in an interstate fashion.

The district court in *Vierstra*, rather than using the *Moses* factors to prove the Plurality's permanency requirement, seems to use the Plurality's permanency requirement to prove the *Moses* factors.

At least one district court has found the *Moses* test applicable under Justice Kennedy's standard. *Sequoia Forestkeeper v. U.S. Forest Service*, No. CV F 09–392 LJO JLT, 2010 WL 5059621 at *15 (E.D. Cal. Dec. 3, 2010) (internal quotations omitted). This same court reconsidered the jurisdictional issue one year later under the Plurality test due to an apparent "intervening change in the controlling law." *Sequoia Forestkeeper v. U.S. Forest Ser*vice, No. CV F 09–392 LJO JLT, 2011 WL 902120 at *4 (E.D. Cal. March 15, 2011). Interestingly, on reconsideration, the court does not apply the *Moses* factors to the Plurality test. *Id.* at *4-5.

3. Permanency—other issues

Courts have found seasonal streams to be relatively permanent omitting any reference to how many months a year the stream is wet or dry. In *U.S. v. Donovan*, the court reasoned that the stream at issue met the definition of relatively permanent, citing facts contained in two expert reports:

> [T]he Launay report cites a "degree of soil saturation and surface ponding in wetlands during the summer months, morphological conditions of the vegetation such as buttressing of tree trunks and formation of hummocks, the presence and density of plant species adapted to saturated soil conditions, and the presence of bed, bank, ordinary watermark and flowing water in the tributary channels." . . . The Launay report also discusses downstream characteristics, including multiple large culverts, that reflect a perennial flow from the channels on Donovan's land. The Stroud report also concludes that the

> channels on Donovan's land are permanent based on the existence of several organisms in the wetlands and channels, as well as the presence of certain species of fish on the property.

U.S. v. Donovan, 661 F.3d 174, 185 (3rd Cir. 2011). Another court found a creek permanent where the creek was shown on a U.S. Geological Survey map and photos were presented that depicted flowing water in the creek. *U.S. v. Brink*, 795 F.Supp.2d 565, 578 (S.D. Tex. 2011). A different court found a creek to be permanent when it was labeled on a county tax map, had a width of seven to eight feet, a depth of one foot, and an EPA agent observed flowing water in it. *U.S. v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629 at *22 (M.D. Fla. Aug. 2, 2006).

b. Surface Connection

Where wetlands are at issue, the Plurality found that jurisdiction requires wetlands to have "a continuous surface connection with [a water of the U.S.], making it difficult to determine where the water ends and the wetland begins." *Rapanos*, 547 U.S. at 742 (internal quotations omitted). Courts have varied widely on the type and amount of evidence needed to prove a continuous surface connection.

Some courts cite little factual evidence to defend their finding of a continuous surface connection. Indeed, some courts do not even require physical evidence that a continuous surface connection is continuously present. One district court merely stated that "there is a continuous surface connection" because "the wetlands are adjacent to, contiguous with, directly abut, and drain into" a perennial stream connected to a traditional interstate navigable water. *U.S. v. Bedford*, No. 2:07cv491, 2009 WL 1491224 at *12 (E.D. Va. May 22, 2009). The court apparently did not feel the need to specify what evidence it considered in making its determination. Another district court found a wetland to have a continuous surface connection "by reason of one or more relatively permanent tributaries flowing across the wetland into the Chagrin River." U.S. v. Osborne, No. 1:11CV1029, 2011 WL 7640985 at *7 (N.D. Ohio, Dec. 15, 2011) A different district court simply found that wetlands at issue satisfied the plurality standard when they were "adjacent to a tributary to a tributary" to a traditionally navigable water. *Stillwater of Crown Point Homeowner's Ass'n Inc. v. Kovich*, 820 F.Supp.2d 859, 900 (N.D. Ind., 2011). The court noted the plurality's requirement of a continuous surface connection, but failed to make any factual findings regarding the connection. *Id*. at 898. Another district court was satisfied that a continuous surface connection was present based on plaintiff's declaration that, prior to defendant's activities, "it was difficult to see where the waters belonging to [a water of the United States and] the waters of the wetlands began." *Gulf Restoration Network, v. Hancock County Developments, LLC*, 772 F.Supp.2d 761, 772 (S.D. Miss., 2011).Other courts have interpreted the continuous connection test as requiring more. *Simsbury-Avon Preservation Soc., LLC v. Metacon Gun Club, Inc*., 472 F.Supp.2d 219, 220 (D. Connecticut, Jan., 31, 2007), involved a 137-acre property containing a vernal pond surrounded by wetlands and bordered by a jurisdictional river. Evidence presented included testimony that the vernal pool had a direct connection to another water that in turn drained into the jurisdictional river. *Id.* at

228. Other evidence showed that a surface connection occurred at least during times of heavy rainfall and thawing of snow and ice. *Id.* The Court found that,

> While plaintiffs have offered evidence showing that a surface water connection does at times exist, they offer no evidence demonstrating a continuous connection between the . . . wetland and [jurisdictional water] such that there exists no clear demarcation between waters and wetlands as required by the Plurality in *Rapanos*." (internal quotations omitted).

Id. at 229. In *Douglass Ridge Rifle Club* several wetlands had historically maintained hydrological connections with a jurisdictional water. However, these connections had then been destroyed by artificial means. *Benjamin v. Douglass Ridge Rifle Club,* 673 F.Supp.2d 1210, 1220 (D. Or. 2009). The court implied that a simple surface connection between the wetlands and the jurisdictional water would not suffice to confer jurisdiction. Rather, the surface connection would need to be such "that it would be difficult to demarcate the wetlands from the [water at issue]." *Id.*

4. Significant Nexus

Justice Kennedy found that wetlands adjacent to navigable waterways are automatically themselves waters of the United States by virtue of the "reasonable inference of ecologic interconnection." *Rapanos* at 780. These wetlands are waters of the United States based on a showing of adjacency alone. *Id.*

Justice Kennedy also found that isolated wetlands and wetlands adjacent to a non-navigable tributary of a navigable waterway are waters of the United States only when the Corps can establish a significant nexus to navigable waters. *Id.* at 782. A significant nexus exists "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." *Id.* at 780. However, "[w]hen, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term navigable waters." *Id*. Justice Kennedy also cautioned that a "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.* at 785.

a. Evidence Required

The significant nexus test is a flexible ecological inquiry into the relationship between the wetlands at issue and traditional navigable. *See Rapanos,* 547 at 779–80. However, the test requires some evidence of a nexus and its significance. "Otherwise, it would be impossible to engage meaningfully in an examination of whether a wetland had "significant" effects or merely "speculative or insubstantial" effects on navigable waters." *Precon Development Corp., Inc. v. U.S. Army Corps of Engineers,* 633 F.3d 278, 294 (4th Cir. 2011). The significant nexus test does not require "laboratory analysis of soil samples, water samples, or . . . other tests." *United States v. Cundiff,* 555 F.3d 200,

211 (6th Cir. 2009). Plaintiffs do not have to quantify the impact of a pollutant. *Id*.

b. Evidence must prove significance to the navigable water

Evidence presented to prove or disprove a significant nexus must relate to the significance of the water or wetland at issue to a navigable water. In *Environmental Protection Information Center* plaintiff's evidence of a significant nexus between a watershed stream and a jurisdictional water included field observations, a GIS map, and expert testimony. *Environmental Protection Information Center v. Pacific Lumber Company*, 469 F.Supp.2d 803, 823 (N.D. Cal. 2007). The court concluded that such evidence could suffice to establish a hydrological connection, even for an intermittent stream. However, "a hydrologic connection without more will not comport with the *Rapanos* standard in this case. . . [plaintiffs] must demonstrate that these streams have some sort of significance for the water quality of [the jurisdictional water]." *Id.* at 824.

Another court similarly found that the record must contain documentation "that would allow us to review [plaintiff's] assertion that the functions that these wetlands perform are "significant" for the [jurisdictional] river. *Precon Development Corp., Inc. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 295 (4th Cir. 2011). *Precon* involved wetlands that were divided by a berm from a seasonally flowing ditch that, when flowing, eventually emptied to a navigable river. Plaintiffs provided expert testimony that dredging and filling the wetlands at issue had contributed to flooding on the river and resulted in acid runoff into the river. *Id.* at 293. The court found this evidence unpersuasive and concluded that no significant nexus existed. *Id*. at 294.

> [T]here is no documentation in the record that would allow us to review [plaintiff's] assertion that the functions that these wetlands perform are "significant" for the Northwest River. In particular, although we know that the wetlands and their adjacent tributaries trap sediment and nitrogen and perform flood control functions, we do not even know if the Northwest River suffers from high levels of nitrogen or sedimentation, or if it is ever prone to flooding. This lack of evidence places the facts here in stark contrast to those in *Cundiff*, upon which [plaintiffs] rel[y]. There, the Sixth Circuit noted that the district court credited expert testimony about the wetlands "in relation to " the navigable river. . [In *Cundiff*,] the challenged actions had undermined the wetlands' ability to store water, which, in turn, had increased the flood peaks in the Green River. . . Additional testimony established that acid mine runoff that had previously been stored in the wetlands flowed more directly into the river, causing "direct and significant impacts to navigation ... and to aquatic food webs" in the river. . . There is no such testimony here.

Id. at 295. Thus, for some courts, recitation of effects a wetland has on a jurisdictional water are insufficient under the significant nexus test. Rather, an additional step is needed. The significant nexus test requires a showing that the effects cited will be significant based on the individual characteristics of the receiving jurisdictional water.

c. Different types and quantities of evidence used to find significant nexus

1. Cases requiring little factual evidence in determining significant nexus

Gulf Restoration Network involved the filling of wetlands bordering a jurisdictional tributary. *Gulf Restoration Network,*, 772 F.Supp.2d at 772. The court found that the significant nexus test was met simply because,

> [T]he wetlands significantly affect the chemical, physical, and biological integrity of [tributary]. It is undisputed that the filling in and alteration of the wetlands has contributed to increased flooding and pollution of the downstream Bayou Maron, for example. This is sufficient evidence of a significant nexus.

Id. No other evidence was presented.

The court in *ONRC Action* was called upon to decide if a ditch that emptied into the Klamath River was a water of the United States. *ONRC Action v. U.S. Bureau of Reclamation*, No. 97–3090–CL, 2012 WL 3526833 at *22 (D. Or. Jan, 17, 2012). There, the ditch had a minimum daily flow rate of 2.6 million gallons, an average daily flow of 64.2 million gallons, and contributed water to the Klamath River nearly every day of the year. *Id.* at 22. Thus the ditch met the Plurality's relatively permanent standard. *Id*. The court found that a significant nexus also existed, despite the lack of any evidence presented as to the effects of the ditch on the Klamath River:

> [B]ecause the court has found that the Drain satisfies the plurality's "relatively permanent" standard, it logically follows that the Drain also satisfies Justice Kennedy's more lenient "significant nexus" standard. Common sense also mandates this result. There can be no reasonable argument that the Drain, which contributes millions of gallons of water a day to the Klamath River, lacks a sufficiently "significant nexus" with the River.

Id. The ditch substantially contributed to the river. However, it is questionable whether the *Precon* court would accept the *ONRC Action* court's finding of a substantial nexus where no evidence was presented as to whether the effects of the ditch were significant to the individual characteristics of the Klamath River.

Wisconsin Resources Protection Council involved a mining site containing several intermittent streams and bordered by a river. The stream at issue was a "seasonally-flowing intermittent stream" that plaintiffs rerouted. *Wisconsin Resources Protection Council, Center for Biological Diversity v. Flambeau Min. Co.*, 903 F.Supp.2d 690, 694 (W.D. Wis. 2012). Defendants alleged that plaintiffs had not provided sufficient data regarding stream flow, duration, or a measurable impact of the pollutants from the stream on the water quality of the jurisdictional river necessary to prove a significant nexus. *Id* at 715. The court disagreed:

> There is no genuine factual dispute regarding whether Stream C has a significant nexus with the Flambeau River. . . The stream contributes its flow to the river, delivers water containing pollutants to the river and provides habitat for at least six species of fish that move between Stream C and the river. . . Thus, there is a physical, chemical and biological connection between Stream C and the river.

Id. The court reasoned that the significant nexus test is a "flexible inquiry" and that "[t]he required nexus must be assessed in terms of the statute's goals and purposes. *Id* (quoting *Rapanos*, 547 U.S. at 779-80). The *Wisconsin Resources Protection Council court* concluded that the seasonal and intermittent flow of the stream did not mean it lacked a significant nexus with the jurisdictional river. *Id.* In coming to this conclusion the court employed the previously discussed *Moses* test.

> [T]here is no reason to suspect that Congress intended to exclude from 'waters of the United States' tributaries that flow only intermittently. Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage.... Rather, as long as the tributary would flow into the navigable body of water 'during significant rainfall,' it is capable of spreading environmental damage and is thus a 'water of the United States' under the Act.

Id. at 715 (quoting *Moses*, 496 F.3d at 989).

It is worth noting that the *Wisconsin Resources Protection Council* court contradicts the *Precon* court in its significant nexus factual analysis. Evidence of a significant nexus in *Wisconsin Resources Protection Council* included evidence that the stream at issue delivered water-containing pollutants to a jurisdictional river. *Id.* at 715. In *Precon*, the court was presented with evidence that the activities on wetlands released pollutants to a jurisdictional river. *Precon* 633 F.3d at 295. However, the *Precon* court was not convinced this supported a significant nexus finding absent information on effects this pollutant would have on the navigable river. *Id*. In *Wisconsin Resources Protection Council*, the court required no such finding of the pollutants effect on the navigable river.

Interestingly, the *Wisconsin Resources Protection Council* court states that "even *potential* for [downstream pollutant transport may] be dispositive of a finding that a tributary to a navigable river is itself a water of the United States." *Wisconsin Resources Protection Council*, 903 F.Supp. at 715. The court then cites pre-*Rapan*os case law for the proposition that "the potential for pollutants to migrate from a tributary to navigable waters downstream constitutes a significant nexus between those waters." *Id*. (quoting *United States v. Hubenka*, 438 F.3d 1026, 1034 (10th Cir. 2006). However, arguably the *Wisconsin Resources Protection Council* court is incorrect as the *potential* for downstream pollutant transport does not actually affect any water. Rather, it constitutes a "speculative or insubstantial" effect, which according to Justice Kennedy, would thus

"fall outside of the zone fairly encompassed by the statutory term navigable waters." *See Rapanos*, 547 U.S. at 780.

2. Cases requiring more factual evidence in determining significant nexus

Other courts require a more thorough significant nexus analysis. Some courts have taken notice of Justice Kennedy's mention of effects to the "chemical, physical, and biological integrity" of navigable waters. *Rapanos*, 547 U.S. at 780. These courts closely examine chemical, physical, and biological effects to evaluate significance.

The court in *Northern California River Watch* analyzed chemical, physical, and biological connections in order to evaluate whether a significant nexus was present. *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007). The case involved a pond approximately 800 feet from a jurisdictional river. *Id.* at 996. The physical connection was satisfied because the river would sometimes overflow its levee, creating an actual surface connection. Additional evidence of a physical connection included an underground hydrologic connection and a finding that 26% of the pond's volume reached the river. *Id.* at 1000. The chemical connection was satisfied because chloride from the pond reached the river in higher concentrations as a direct result of discharge of sewage into the pond. Testimony demonstrated that the average chloride concentration upstream was 5.9 parts per million, compared to the 18 parts per million in the river portion adjacent to the pond. *Id.* at 1001. Finally, the biological[3] connection was satisfied because the pond and its wetlands supported substantial bird, mammal, and fish populations, all integral and indistinguishable from the rest of the river ecosystem. Fish indigenous to the river lived in the pond due to recurring breaches of the levee. *Id.* at 1000-01. The court concluded that the pond had a significant nexus to the river. *Id.* at 1001.

Issues in *Douglas Ridge Rifle Club* revolved around wetlands on a shooting range where soils contained high levels of lead. The range was traversed by a creek that would periodically overflow onto the shooting range.[4] The creek was connected to a jurisdictional water. *Douglass Ridge Rifle Club*, 673 F.Supp.2d at 1211-12. The court found that the wetlands had a significant nexus to a jurisdictional river based on their chemical, physical, and biological effects on the river. A physical connection was present because the creek periodically overflowed into the wetlands, thus providing a surface connection between the wetlands and the jurisdictional water. *Id.* at 1218. A chemical connection would be satisfied if lead contamination was detected downstream from the property.[5] *Id.* at 1219-20. Finally, the court found a biological[6] connection because the

[3] The court termed it an "ecological" connection. *City of Healdsburg*, 496 F.3d at 1001-01.
[4] Parties disputed whether the water was a ditch or a creek. For simplicity, this paper will refer to it as a creek.
[5] This case was decided on a motion for summary judgment. Plaintiffs did not allege lead detection in the creek.
[6] The court termed it an "ecological" connection. *Douglass Ridge Rifle Club*, 673 F.Supp.2d at 1219.

creek was listed as essential habitat for salmon found in the jurisdictional water. *Id.* at 1219. Interestingly, the court found that plaintiffs did not need to prove that a chemical, physical, and biological nexus existed. Rather, proving of only one nexus was sufficient to find the required significant nexus.

In *Precon* the court relied upon examples given by Justice Kennedy in *Rapanos* concerning what an adequate record may include when evaluating a significant nexus. *Precon Development Corp, Inc. v. U.S. Army Corps of Engineers*, 984 F.Supp.2d 538, 548, 555 (E.D. Va. 2013). Justice Kennedy's examples included documentation of the significance of the tributaries to which the wetlands are connected, a measure of the significance of the tributaries to which the wetlands are connected, a measure of the significance of the hydrological connections for downstream water quantity, and/or an indication of the quantity or regularity of flow in the adjacent tributaries. *Precon*, 984 F.Supp.2d at 548 (quoting *Rapanos*, 547 U.S. at 784, 786). The court then walked through a very factually intense analysis concerning each of these examples and ultimately found a significant nexus was present. Evidence provided included exert testimony, field tests, a topological survey, historical maps, scientific literature, pictures, and soil testing. *Id.* at 562.

C. Review of Prior Guidance on the Scope of CWA Jurisdiction

The following review is a summary of recent substantive prior agency guidance on the scope of jurisdiction under the Clean Water Act supporting the analysis in this memorandum. The review includes EPA and Corps guidance derived from key Supreme Court and appellate court cases. For convenience, the review is organized by categories of waters, generally following the organization of EPA's April 2014 proposed rule addressing "waters of the United States". For each category, the guidance is presented in reverse chronological order, with the most recent guidance presented first. Pertinent quotes from the guidance are included, but they are no substitute for reviewing the sources, which are referenced in full in the citation to the guidance. A complete review of prior guidance is contained in the appendix to this memorandum.

1. Traditional Navigable Waters

LA Special Case Letter (July 6, 2010)
U.S. Envtl. Prot. Agency, Los Angeles Special Case Letter (July 6, 2010), http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf

- "We conclude that the mainstem of the Los Angeles River is a 'Traditional Navigable Water' from its origins at the confluence of Arroyo Calabasas and Bell Creek to San Pedro Bay at the Pacific Ocean, a distance of approximately 51 miles." at 1.

- "In reaching this conclusion, Region 9 and Headquarters staff considered a number of factors, including the ability of the Los Angeles River under current conditions of flow and depth to support navigation by watercraft; the history of

navigation by watercraft on the river; the current commercial and recreational uses of the river; and plans for future development and use of the river which may affect its potential for commercial navigation." at 1.

CWA Jurisdiction Following *Rapanos* (Dec. 2, 2008)
U.S. Envtl. Prot. Agency, Memorandum on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2, 2008),
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf

- "EPA and the Corps will continue to assert jurisdiction over '[a]ll 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. These waters are referred to in this guidance as traditional navigable waters.'" at 4-5.

2. **Interstate Waters**

Definition of Waters of the United States, 33 CFR § 328.3 (Aug. 25, 1995); See also Definitions, 40 C.F.R. § 230.2 (Aug. 25, 1993)

(a) The term waters of the United States means
. . .
(2) All interstate waters including interstate wetlands

Final Rule, Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122 (July 19, 1977)

- Revises 40 Fed. Reg. 31320. Navigable waters include "Interstate waters and their tributaries, including adjacent wetlands." 42 Fed. Reg. at 37127.

3. Territorial Seas

Definition of Waters of the United States, 33 CFR § 328.3 (Aug. 25, 1995); See also Definitions, 40 C.F.R. § 230.2 (Aug. 25, 1993)

(a) The term waters of the United States means
. . .
(6) The territorial seas

Interim Final Rule, Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320 (July 25, 1975)

- "(i) The term, 'navigable waters,' as used herein for purposes of Section 404 of the Federal Water Pollution Control Act, is administratively defined to mean

waters of the United States including the territorial seas with respect to the disposal of fill material and excluding the territorial seas with respect to the disposal of dredged material." 40 Fed. Reg. at 31324-25.

4. Impoundments of 1-3 and 5

Jurisdictional Determination Form Instructional Guidebook (May 30, 2007)
U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook (May 30, 2007),
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf

- "Impoundments of jurisdictional waters. Generally, impoundment of a water of the U.S. does not affect the water's jurisdictional status." at 31.

Definition of Waters of the United States, 33 CFR § 328.3 (Aug. 25, 1995); See also Definitions, 40 C.F.R. § 230.2 (Aug. 25, 1993)

(a) The term waters of the United States means
. . .
(4) All impoundments of waters otherwise defined as waters of the United States under the definition

5. Tributaries of 1-4

CWA Jurisdiction Following *Rapanos* (June 5, 2007)
U.S. Envtl. Prot. Agency, Memorandum on Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in *Rapanos v. United States* & *Carabell v. United States* (June 5, 2007),
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2007_6_5_wetlands_RapanosGuidance6507.pdf

– "A non-navigable tributary of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries." at 5.

– "A tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water." at 5 n.21.

– "A tributary . . . is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). For purposes of demonstrating a connection to traditional navigable waters, it is appropriate and reasonable to assess the flow characteristics of the tributary at the point at which water is in fact being contributed to a higher order tributary or to a traditional navigable water." at 9.

6. Wetlands and All Waters Adjacent to 1-5

CWA Jurisdiction Following *Rapanos* (2008) (Dec. 2, 2008)
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf

- "The agencies will also continue to assert jurisdiction over wetlands 'adjacent' to traditional navigable waters . . . 'adjacent' means 'bordering, contiguous or neighboring.' Finding a continuous surface connection is not required to establish adjacency under this definition. The *Rapanos* decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are 'waters of the United States.'" at 5.

- "The regulations define 'adjacent' as follows: '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.'" at 5.

- "Under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. This hydrologic connection maybe intermittent. Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters." at 5-6.

7. Other Waters/Interstate Commerce

Memorandum to Decline Jurisdiction for LRC-2009-00053 (Aug. 14, 2009)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Decline Jurisdiction for LRC-2009-00053(Aug. 14, 2009), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/LRC-2009-00053.pdf

- Declines jurisdiction for two intrastate, isolated, non-navigable waters for which the sole prospective basis for asserting jurisdiction was the actual or potential use of this area for interstate commerce.

GAO, Waters and Wetlands (Sept. 2005)
U.S. Gov't Accountability Office, Waters and Wetlands: Corps of Engineers Needs to Better Support Its Decisions for Not Asserting Jurisdiction (Sept. 2005), http://www.gao.gov/assets/250/247705.pdf

– "Since January 2003, EPA and the Corps have required field staff to obtain headquarters approval to assert jurisdiction over waters based solely on links to interstate commerce. Only eight cases have been submitted, and none of these cases have resulted in a decision to assert jurisdiction." Executive Summary.

– "Subsequent to the *SWANCC* ruling, the Corps is generally not asserting jurisdiction over isolated, intrastate, non-navigable waters using its remaining authority in [the regulations]." at 5.

8. Other Waters/Significant Nexus

Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction), (April 27, 2011) . U.S. Envtl. Prot. Agency
http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa_guidance_impacts_benefits.pdf

- **"**Since SWANCC, no isolated waters have been declared jurisdictional by a federal agency. In June 2006, a split Supreme Court vacated and remanded judgments of the Sixth Circuit Court of Appeals in *Rapanos v. United States*. The pivotal opinions are those by the plurality (indicating that jurisdictional waters include "relatively permanent waters" and wetlands with a continuous surface connection to such waters) and by Justice Kennedy (indicating that waters are jurisdictional where they have a "significant nexus" to a traditional navigable water). The government position since *Rapanos* has been that a water is jurisdictional under the CWA when it meets either the plurality or Kennedy standard."

- **"**The effect of the *SWANCC* decision is primarily on so-called "isolated" waters. These waters include vernal pools, prairie potholes and playa lakes—waters that lie entirely within a single state and lack a direct, surface water connection to the river network. The effect of the *Rapanos* decision has been primarily on some small streams, rivers that flow for part of the year, and nearby wetlands."

9. "Relatively Permanent Waters" and Adjacent Wetlands

CWA Jurisdiction Following *Rapanos* (Dec. 2, 2008)
U.S. Envtl. Prot. Agency, Memorandum on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2, 2008),
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf

- "'[R]elatively permanent' waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically

flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard described below. The agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding." at 7.

10. Exemption (i): Waste Treatment Systems

Memorandum for POA-1992-574 & POA-1992-574-Z (Oct. 25, 2007)
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/WTS_POA-1992-574_POA-1992-574-Z.pdf

- "EPA and the Corps agree that the agencies' designation of a portion of waters of the U.S. as part of a waste treatment system does not itself alter CWA jurisdiction over any waters remaining upstream of such system. Both the Corps and EPA believe that all the waters upstream and downstream of the tailings dam that were jurisdictional prior to the authorized activity and that qualify as jurisdictional waters of the U.S, under the Rapanos guidance are still subject to CWA jurisdiction notwithstanding the construction of the tailings dam." at 1.

11. Exemption (ii): Prior Converted Cropland

Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12818 (Mar. 9, 2000)

- "Farmed wetlands as defined under the Food Security Act are waters of the United States provided they meet the criteria at 33 CFR 328.3. In addition, those criteria further provide that prior converted croplands are not waters of the United States." 65 Fed. Reg. at 12823-24.

12. Exemption (iii): Upland Ditches

Jurisdictional Determination Form Instructional Guidebook (May 30, 2007)
U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook (May 30, 2007),
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf

- "Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water generally are not jurisdictional under the CWA, because they are not tributaries or they do not have a significant nexus to TNWs. If a ditch has relatively permanent flow into waters of the U.S. or between two (or more) waters of the U.S., the ditch is jurisdictional under the CWA. Even when not themselves waters of the United States, ditches may still contribute to a surface hydrologic connection between an adjacent wetland and a TNW." at 36.

13. Exemption (iv): Ditches Not Contributing Flow to 1-4

Jurisdictional Determination Form Instructional Guidebook (May 30, 2007)
U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook (May 30, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf

- "Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water generally are not jurisdictional under the CWA, because they are not tributaries or they do not have a significant nexus to TNWs. If a ditch has relatively permanent flow into waters of the U.S. or between two (or more) waters of the U.S., the ditch is jurisdictional under the CWA. Even when not themselves waters of the United States, ditches may still contribute to a surface hydrologic connection between an adjacent wetland and a TNW." at 36.

14. Exemption (v.A): Artificial Irrigated Areas

Migratory Bird Rule, 51 Fed. Reg. 41217 (Nov. 13, 1986)

– "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.'

(b) Artificially irrigated areas which would revert to upland if the irrigation ceased."

15. Exemption (v.B): Artificial Lakes or Ponds Used for Certain Purposes

Migratory Bird Rule, 51 Fed. Reg. 41217 (Nov. 13, 1986)

– "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.'

(c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing."

16. Exemption (v.C): Artificial Reflecting or Swimming Pools

Migratory Bird Rule, 51 Fed. Reg. 41217 (Nov. 13, 1986)

– "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.'

(d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons."

17. Exemption (v.D): Ornamental Waters

Migratory Bird Rule, 51 Fed. Reg. 41217 (Nov. 13, 1986)

– "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.'

(d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons."

18. Exemption (v.E): Water From Construction Activity

Migratory Bird Rule, 51 Fed. Reg. 41217 (Nov. 13, 1986)

– "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.'

(e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the

resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).”

19. Exemption (v.F): Groundwater

See discussion of significant nexus.

20. Exemption (v.G): Gullies and rills

Q&A for *Rapanos* (June 5, 2007)
U.S. Army Corps of Engineers, Questions and Answers for *Rapanos* and *Carabell* Decision (June 5, 2007),
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_qa_06-05-07.pdf

- “Swales and erosional features (e.g., gullies, small washes characterized by low volume, infrequent, and short duration flow) are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. Likewise, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States, because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.” at 7.

- “Even when not jurisdictional waters subject to CWA § 404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e., “discernible, confined, and discrete conveyances”), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g., CWA §§ 311 and 402).” at 7.

D. Review of Proposed Rule

On April 21, 2014, EPA and the Corps ("the Agencies") issued a proposed rule defining “waters of the United States” under the CWA. Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22188 (proposed Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116). The proposed rule keeps many of the existing requirements, while modifying others. The following sections will assess and compare the proposed rule with respect to the regulations currently in place and will also discuss the effects of guidance developed by the Agencies in the wake of judicial interpretations, particularly SWANCC and Rapanos, which have modified the Agencies' interpretation and implementation of the jurisdiction under the existing regulations.

The Agencies maintain that the "the scope of regulatory jurisdiction of the CWA in this proposed rule is narrower than that under the existing regulations." 79 Fed. Reg. at 22192. The existing regulations were intended to extend the coverage of "the waters of the United States" to the outer limits of Congress's commerce power, 42 Fed. Reg. 37144, 37144 n.2 (1977). Indeed, under the Migratory Bird Rule, "waters of the United States" encompassed any surface waters, traditionally navigable or otherwise, that could be used by migratory birds. While the proposed rule's preamble continues to cite to the Commerce Power, the new regulations, as discussed below**,** rest on a different legal justification. The potential impact of this shift in the justification for the proposed rules is subject to competing interpretations and could result in litigation. Some practitioners agree with the Agencies that the scope of the proposed rule is narrower than under existing law and guidance, while others believe that some of the changes will expand jurisdiction in relation to certain waters, particularly when compared to the current guidance.

Following *SWANCC* and *Rapanos*, the Agencies adopted guidance that narrowed the circumstances in which they were likely to assert CWA jurisdiction, particularly with regard to wetlands and "other waters." Practitioners disagree about whether the guidance also narrowed jurisdiction over tributaries. Some practitioners believe that the Agencies could have continued to exercise jurisdiction over all tributaries under the guidance, even for tributaries that do not have relatively permanent continuous flow or a significant nexus to navigable-in-fact waters. Other practitioners believe that the Agencies no longer extend jurisdiction to all tributaries under the guidance, since the Agencies conduct case-by-case determinations for tributaries without relatively permanent continuous flow or a significant nexus to navigable-in-fact waters.

The Agencies estimate that the proposed rule will increase the Agencies' exercise of CWA jurisdiction by approximately 3% compared to current practices under the guidance. To develop that estimate, the Agencies undertook an economic analysis in which they reexamined jurisdictional evaluations from FY 2009-10 to determine whether the waters at issue would be deemed jurisdictional under the proposed rule, and compared the results to the Corps' determination under current guidance.[7] *See* Economic Analysis of Proposed Revised Definition of Waters of the United States. March 2014. U.S. Environmental Protection Agency. (http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf). Through its review, the Agencies estimate that:

- 98% of streams evaluated in the FY 2009-2010 baseline period were determined to be jurisdictional, compared to 100% under the proposed rule.
- 98.5% of wetlands evaluated during this baseline period were determined to be jurisdictional, compared to 100% under the proposed rule.

[7] ACOEL has conducted no independent review of the Agencies' Economic Analysis and expresses no opinion as to the conclusions stated therein.

- 0% of "other waters" evaluated during this baseline period were determined to be jurisdictional, compared to 17% under the proposed rule[8].

(See below Exhibit 3 from the Agencies' Economic Analysis of Proposed Revised Definition of Waters of the United States.)

Exhibit 3. Analysis of FY2009-2010 ORM2 Records Showing Jurisdictional Status of Aquatic Resources [Under Existing Guidance and Under Proposed Rule]

	Number of ORM2 Records	Positive Jurisdiction Records (09-10)	Projected Positive Jurisdiction Records	Percent of Total ORM2 Records	Percent Positive Jurisdiction (09-10)	Projected Percent Positive Jurisdiction
Streams	95,476	93,538	95,476	67%	98.0%	100.0%
Wetlands	38,280	37,709	38,280	27%	98.5%	100.0%
Other Waters	8,209	0	1,396	6%	0.0%	17.0%
Total	141,965	131,247	135,152	100%	92.5%	95.2%

The proposed rule would also include certain waters, absent from the above chart, that are more remote or isolated, such as prairie potholes, vernal pools, playa lakes, and Carolina/Delmarva inland bays that alone or in combination with other "similarly situated waters" have a significant nexus to other jurisdictional waters. The Agencies estimate that 5 to 10% of these additional waters would be considered jurisdictional under the propose rule, compared to 0% under the Agencies' current practices. *Id.* at 34-43. Disagreement exists among practitioners as to whether the Agencies' determination is accurate or too conservative,

1. Existing Regulations' Definition of "Waters of the United States"

Under existing regulations, "waters of the United States" are defined as:

> (a) All waters which are currently used, 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;
> (b) All interstate waters, including interstate "wetlands";
> (c) All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction

[8] As the Agencies explain in their analysis, most of this 17% of "other waters" would be jurisdictional under the proposed rule because they would constitute "adjacent waters." Economic Analysis of Proposed Revised Definition of Waters of the United States at pg. 34.

> of which would affect or could affect interstate or foreign commerce including any such waters:
>
> (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
>
> (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
>
> (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
>
> (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
>
> (f) The territorial sea; and
>
> (g) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

40 C.F.R. § 122.2 (2014).

Existing regulations further define "wetlands" as "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, marches, bogs, and similar areas." *Id.* The term "adjacent" is also specifically defined as "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.'" *Id.*

As will be discussed later in this memorandum, the proposed rule changes the existing rule to take into account the Supreme Court's intervening decisions in *SWANCC* and *Rapanos*. Like the existing rule, the proposed rule would provide jurisdiction over all tributaries of navigable-in-fact waters. Practitioners disagree about whether and, if so to what extent, the proposed rule would expand jurisdiction over wetlands and other waters covered by the existing rule.

2. Post-*Rapanos* Agency Guidance on "Waters of the United States"

Following the United States Supreme Court's decisions in *SWANCC* and *Rapanos*, the Agencies released guidance documents (the 2003 and, developed in the wake of *Rapanos*, 2008 guidance documents) that limited the scope of waters that the Agencies categorically treat as *per se* jurisdictional, established those waters for which jurisdiction will be determined on a case-by-case basis, and denoted the specific types of waters for which the Agencies will not exercise jurisdiction:

- Categorically covered under current guidance:
    - Traditional navigable and interstate waters;

- Wetlands adjacent to traditional navigable and interstate waters;
- Non-navigable tributaries of traditional navigable and interstate waters that are relatively permanent. Relatively permanent generally means the tributaries typically flow year-around or have continuous flow at least seasonally (e.g., typically three months); and
- Wetlands that directly abut such tributaries.

- Case-by-case under current guidance:
  - Non-navigable tributaries that are not relatively permanent;
  - Wetlands adjacent to non-navigable tributaries that are not relatively permanent;
  - Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary; and
  - Waters meeting the criteria in 33 C.F.R. § 328.3(a)(3)(i)-(iii), after seeking "project-specific HQ approval" to assert jurisdiction.[9]

- Exclusions under current guidance:
  - Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) and
  - Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.
  - "In light of *SWANCC*, field staff should not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the 'Migratory Bird Rule.'" 2003 Guidance, 68 Fed. Reg. at 1997.

Practitioners disagree about the extent to which the case-by-case determinations and exclusions outlined above reduced CWA jurisdiction as a practical matter. Some practitioners argue that, even with case-by-case determinations, the Agencies continued to assert jurisdiction over most if not all of the tributary system and only limited their jurisdiction over wetlands and other waters. Other practitioners believe that the case-by-case determinations resulted in more limited assertions of jurisdiction over more remote, less permanent tributaries, as well as wetlands and other waters, that would be reversed by the proposed rule.

[9] 2003 Guidance, 68 Fed. Reg. at 1997-98. Despite the possibility that such jurisdiction might be asserted upon headquarters approval, an EPA analysis accompanying its draft jurisdictional guidance in 2011 noted that, "[s]ince SWANCC, no isolated waters have been declared jurisdictional by a federal agency." Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction, at 3 (Apr. 27, 2011), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa_guidance_impacts_benefits.pdf.

3. Shift in Grounds for Jurisdiction Under Proposed Regulations

The proposed rule would revise the definition of "waters of the United States" based on a significant shift in the legal justification upon which the Agencies would be basing jurisdiction. With the regulatory definition currently in place, the Agencies base jurisdiction upon the potential scope of their authority under the Commerce Clause, hence the Migratory Bird Rule. *See SWANCC.* Specifically, the Agencies intended to extend the definition of "the waters of the United States" to the outer limits of Congress's commerce power. 42 Fed. Reg. 37144, 37144 n.2 (1977); *see also Solid Waste Agency, Inc. v. Army Corps of Engineers*, 191 F. 3d 845, 850 (7th Cir. 1999) (stating that the CWA was intended to reach as many waters as the Commerce Clause allowed). Jurisdiction is analyzed, under existing regulations, in relation to the Commerce Clause, not navigability or navigable waters.

In *SWANCC*, the Court concluded that applying the "Migratory Bird Rule" to the particular waters at issue there would "invoke[] the outer limits of Congress' power" under the Commerce Clause. 531 U.S. at 172-73. The Court's "prudential desire not to needlessly reach constitutional issues" required the Court to reject the assertion of jurisdiction over a water body that lacked any connection to traditionally-understood "navigable" waters simply because of migratory bird use of that water body. *Id.* As Justice Kennedy noted in his concurring opinion in *Rapanos*, "the word 'navigable' in 'navigable waters' [must] be given some importance." *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring). "The deference owed to the Corps' interpretation of the statute does not extend" where there is no connection to traditional navigable waters. *Id.* at 779; *see also. SWANCC*, 531 U.S. at 173 (stating that the Corps' "*post litem motam*" focus upon the commercial nature of the landfill site being regulated was "a far cry, indeed, from the 'navigable waters' and 'waters of the United States" to which the statute by its term extends.").

While the Commerce Clause continues to be cited in the proposed rule's preamble, the proposed rule would change the basis for jurisdiction to align with Justice Kennedy's concurring opinion in *Rapanos*. Rather than analyzing and defining jurisdiction based solely on the extent of the federal government's ultimate authority under the Commerce Clause, the primary justification for the proposed rule is the connectivity or "significant nexus" to traditional navigable and interstate waters. In general terms, authority extends to those waters that exert a significant impact (whether alone or in combination with similarly situated waters) on traditional navigable or interstate waters. This is important because the proposed revisions do not necessarily reflect a simple expansion or narrowing of the current regulations, but instead reflect a change in the underlying jurisdictional analysis.

4. The Agencies' Current Analysis: "Significant Nexus"

The proposed rule is based upon Justice Kennedy's concurring opinion in *Rapanos*, in which he notes that "[t]he 'objective' of the Clean Water Act (Act), is 'to restore and maintain the chemical, physical, and biological integrity of the Nation's

waters." 547 U.S. at 759 (quoting 33 U.S.C. § 1251(a)). To this end, Justice Kennedy's concurring opinion establishes the "significant nexus" test/analysis: whether or not "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 water more readily understood as 'navigable.'" *Id.* at 780.

Employing Justice Kennedy's analysis, the Agencies attempt through the proposed rule to establish jurisdiction over all waters that have a "significant nexus," in terms of their potential to affect the chemical, physical, and biological integrity of traditional navigable and interstate waters. As defined in the proposed rule (79 Fed. Reg. 22,188, 22,263 (April 21, 2014)):

> [S]*ignificant nexus* means that a water including wetland, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial.

Practitioners expect that one of the primary points of contention and litigation if the proposed rule is enacted will be whether it complies with the Supreme Court's decision in Rapanos, since no opinion in the Rapanos case commanded support from a majority of the Court. In addition to uncertainty about the Rapanos holding, practitioners disagree as to: 1) whether Justice Kennedy's concurring opinion would allow all tributaries to be waters of the United States (and thus whether a per se rule exceeds the jurisdiction contemplated by Justice Kennedy); 2) whether Justice Kennedy's analysis would allow all wetlands adjacent to tributaries to be considered waters of the United States; and 3) what constitutes sufficient connectivity for purposes of the "significant nexus" analysis, especially for "other waters" that would be jurisdictional under the proposed rule.

It merits emphasis that a critical component of the proposed regulations is its reliance on extensive scientific findings and, in particular, a scientific advisory panel convened by the Agencies. The Agencies have stated that the proposed rules would not become final until the scientific advisory panel has completed its work. Practitioners have competing views of the validity of the scientific analysis provided by the Agencies. But there is no question that the Agencies will rely on their scientific findings in arguing that the proposed rule is entitled to deference

5. Changes in the Proposed New Rule

The proposed rule retains the core categories that are consistent with the traditional notions of navigable and interstate waters. Specifically, the first four categories under the proposed rule are worded the same as they are in the current regulation:

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. The territorial seas;

4. All impoundments of [such].

Compare 79 Fed. Reg. at 22,262 *to* 33 CFR §328.3(a)(1), (2), (4), and (6).

In other respects, however, the proposed rule changes the existing rule to take into account the Supreme Court's intervening decisions in *SWANCC* and *Rapanos*. The proposed rule would include within CWA jurisdiction certain waters that some maintain are not included in the current regulations—but that others maintain were covered under those rules—and waters that were jurisdictional under existing regulations but over which the Agencies do not always assert jurisdiction under their current, post-*Rapanos* guidance. Notably, certain types of water bodies that are considered on a case-by-case basis under the post-*Rapanos* guidance would be *per se* jurisdictional under the proposed rule. Like the existing rule, the proposed rule would provide jurisdiction over all tributaries of navigable-in-fact waters. Practitioners disagree about whether and, if so, to what extent, the proposed rule would expand jurisdiction over wetlands and other waters covered by the existing rule.

Moreover, the proposed rule would redefine certain of the regulatory categories of waters considered "waters of the United States" and incorporate additional definitions left undefined in the current regulations. The effect of these new definitions is disputed among practitioners: some argue that the added definitions reduce uncertainty and provide express limitations that do not exist if the terms are left undefined; others argue that these proposed definitions would expand the Agencies' view of the waters over which they have jurisdiction.

In addition, the proposed rule acknowledges that certain elements of the proposed rule are still under review and seeks comment on them. *See, e.g.*, 79 Fed. Reg. Ditches: 22,188-22,203; Tributaries: 22,203; Adjacent water: 22,208; Floodplain: 22,209; Other water: 22,215; Single point of entry: 22,217; Regional vs. single water impact: 22,212; Ecoregions: 22,215; Hydrologic landscape: 22,216; Expressly including certain types of waters:22,216; and case-by-case determinations: 22,217.

a. Tributaries

- *Makes all tributaries per se jurisdictional, as under the existing regulation, but eliminating the case-by-case determination for tributaries that are not relatively permanent under the 2003 and 2008 guidance.*

- *No change for relatively permanent tributaries.*

The wording in the proposed rule is the same as that found in the regulations currently in place. *Compare* 79 Fed. Reg. at 22,262 *to* 33 CFR §328.3(a)(5). As with the current regulations, the proposed rule categorically designates as jurisdictional all tributaries (including impoundments of such) to traditional navigable and interstate waters (*i.e.* navigable waters, interstate waters, territorial seas, and impoundments of such)—whether the tributaries are perennial, intermittent, or ephemeral, and whether they connect to navigable waters directly or through a network of tributaries. The proposed rule is arguably different from the Agencies' practice under their current, post-*Rapanos* guidance (that guidance provides for case-by-case jurisdictional determinations for some tributaries) and, for the first time, defines "tributaries." Practitioners disagree about whether this is merely a shift in form (i.e. *per se* versus case-by-case determinations) or one of substance (i.e. maintaining or expanding CWA jurisdiction).

As the Agencies explained in their publication of the proposed rule, they have determined, through their reconsideration of "waters of the United States" and their assessment of hundreds of peer-reviewed scientific studies, that all tributaries and adjacent waters have such a significant nexus to downstream navigable waters that they necessarily have the potential to affect the chemical, physical, and biological integrity of downstream traditional navigable and interstate waters. *Id.* at 22,193. As a practical matter, this approach might expand jurisdiction beyond that exercised under the Agencies' current practices. Specifically, under existing guidance, tributaries that are not relatively permanent are evaluated on a case-by-case basis to determine whether they demonstrate a significant enough nexus to traditional navigable and interstate waters to come under the CWA's jurisdiction. *See* 2008 Guidance. It is not clear that all such case-by-case determinations would result in a finding of jurisdiction. Thus, it is possible that some tributaries that might not be found to be jurisdictional under current practices would be jurisdictional under the proposed regulations. Practitioners, however, disagree about whether any expansion of CWA jurisdiction over tributaries would occur under the proposed rule.

The proposed rule would also add an express definition for "tributaries" (*Id.* at 22,262):

> The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed

> and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flow underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, man-made water and includes water such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section.

The inclusion of a definition should reduce some of the current uncertainty about what "tributary" means. However, there is disagreement among practitioners about whether the addition of the definition would extend or limit the Agencies' jurisdiction. Some practitioners contend that the wording of this definition extends beyond what the Agencies, in practice, currently consider a "tributary" for jurisdictional purposes. Other practitioners contend that the Agencies do not limit their jurisdiction over tributaries in practice and, because existing regulations do not define "tributary," the addition of a legally binding definition would limit the agency's ability to assert jurisdiction over waters outside the new definition.

b. Adjacent Waters

- *Expands "adjacent wetlands" to "adjacent waters," of which wetlands is one type.*

- *Eliminates the parenthetical in the current regulations that excludes wetlands that are adjacent to waters that are themselves wetlands.*

- *Makes all "adjacent waters" per se jurisdictional, eliminating the current case-by-case determination for wetlands that are adjacent to tributaries that are not relatively permanent and for wetlands that are adjacent to, but do not directly abut, a tributary.*

- *No change for wetlands that directly abut traditional navigable and interstate waters or abut relatively permanent tributaries.*

In terms of the language employed in the current regulations, the proposed rule expands the provision referencing "adjacent wetlands" to now read "adjacent waters," of which wetlands is only one type. 79 Fed. Reg. at 22,263. Accordingly, the adjacency analysis is arguably extended to a broader range of waters under the proposed rule. *See San Francisco Baykeeper v. Cargill Salt*, 481 F.3d 700 (9th Cir. 2007) (holding that mere adjacency provides a basis for CWA coverage only when the relevant water body is a "wetland," not adjacent ponds).

"[A]djacent" is defined in both the current regulations and the proposed rule as "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.'" 79 Fed. Reg. at 22,263; 40 C.F.R. § 122.2. The proposed rule, however, adds definitions for "neighboring" and then "riparian area" and "floodplains."

The proposed rule defines "neighboring" to include (79 Fed. Reg. at 22,263):

1. Waters located within the riparian area;

2. Waters located within the floodplain; and

3. Waters with a shallow subsurface hydrologic connection or confined surface hydrological connection to a jurisdictional water (in other words waters that might be adjacent to a highly incised water body that has no meaningful floodplain or riparian area but is still hydrologically connected)

"Riparian area" is further defined as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and material between those ecosystems." *Id.* "Floodplain" is defined as "an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows." *Id.*

As a result, with the changes in the proposed rule, all waters that are located within the riparian area or flood plain are considered "adjacent" and thus are *per se* jurisdictional. According to the Agencies' review of the scientific evidence, all such adjacent waters necessarily have a significant nexus in terms of the chemical, physical, or biological integrity of the adjacent water body and then downstream to other water bodies due to the potential transfer of sediments, debris, contaminants, etc. with flood waters and the service that adjacent waters provide in water retention and retention of sediments, debris, contaminants, etc. that reduces the transport of such to adjacent or downstream navigable waters. 79 Fed. Reg. at 22,193, 22,197, 22,206-22,211, 22,224-22,225, and 22,236-22,246.

In comparison, under the current guidance, not all adjacent wetlands (broadened to waters under the proposed rule) are *per se* jurisdictional. Instead, the Agencies distinguish between those wetlands that abut traditional navigable or interstate waters or tributaries to such and ones that are more broadly determined to be "adjacent" to such water bodies, evaluating wetlands that are in close proximity to a water body (but that do not directly abut that water body) on a case-by-case basis. 2008 Guidance at pg. 8.

Also, with this change, the parenthetical in the current regulations that excludes the adjacency of a wetland to another regulated wetland as a basis for jurisdiction would

be eliminated. *Compare* 33 CFR §328(a)(7) to 79 Fed. Reg. at 22,263. Instead, the analysis would be whether the body of water in question is located within the riparian area or floodplain or has a shallow subsurface hydrologic connection or confined surface hydrological connection, irrespective of whether a wetland is situated between the two water bodies.

As with the current regulations, this category is intended to apply to waters that are adjacent to other waters over which the Agencies have jurisdiction. As a result, while the proposed rule would not expand jurisdiction over the existing regulations, it would expand the scope of waters considered "adjacent" when compared to the Agencies' implementation of its current, post-*Rapanos* guidance.

c. Other Waters

- *Adds coverage for more isolated waters that, by themselves or in combination with other similarly situated wetlands in the same "region," have a "significant nexus."*

- *Removes Commerce Clause-based jurisdictional provision.*

The current regulations include a provision for "all other waters," which was intended to reach waters to the extent allowed under the Commerce Clause. Specifically, the current regulations include within the CWA's jurisdiction all waters (which is followed by a non-exhaustive list of types of waters, such as mudflats, wetlands, prairie potholes, etc.) that could affect interstate or foreign commerce. *See* 33 CFR §328.3(a)(3).

While this provision has been deleted in the proposed rule, the proposed rule also includes a provision for case-by-case consideration of "other waters" outside of the specific categories listed. 79 Fed. Reg. at 22,263. This is where the change in the Agencies' analysis from the scope of jurisdiction allowed under the Commerce Clause to the connectivity to traditional navigable and interstate waters is most evident. Instead, of defining the remaining "other waters" in terms of interstate and foreign commerce, the proposed rule includes a provision for "other waters" but defines such "other waters" in terms of their connectivity to traditional navigable and interstate waters. *Id.* at 22,211-22,217, 22,246-22,250, and 22,263. This provision is intended to allow coverage of what are sometimes called "isolated" wetlands and other waters that are not within the riparian area or floodplain but could still affect traditional navigable and interstate waters.

Noting the need for sufficient flexibility to account for the variety of conditions and varied functions that different waters provide, the Agencies explain that waters also exist outside of the categorical waters expressly listed in the proposed rule that, through their connectivity or lack of connectivity, still have the potential to impact the chemical, physical, and biological integrity of traditional navigable and interstate waters. *Id.* As is explained with the proposed rule, such waters can through trapping sediments, debris, and contaminants and through the retention of floodwaters (in other words their absence of a hydrologic connection) significantly impact the chemical, physical, and biological

integrity of traditional navigable and interstate waters or, where some periodic hydrologic connection may exist, could ultimately release sediments, debris, contaminants, etc. that might affect traditional navigable and interstate waters. *Id.* at 22,248 The Agencies' proposal also places significant emphasis upon the potential ecological connectivity that these more "isolated" waters may still have to traditional navigable and interstate waters, specifically the ecological connectivity that such waters may have through use by insects, amphibians, and other species that rely upon aquatic environments, as well as aquatic plants and algae that might be transferred from one body of water to another by the wind or attached to insects in animals. *Id.* at 22,249.

The proposed rule therefore extends jurisdiction "on a case-specific basis, [to] other waters, including wetland, provided that those waters alone, or in combination with other similarly situated waters, including wetland, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) [the traditional navigable and interstate waters] of this section." *Id.* at 22,263. Accordingly, waters that are outside of the riparian area or floodplain may still constitute "waters of the United States" where there is enough connectivity in terms of potential impacts and proximity (or absence of connectivity such that waters in question impact categorical waters by preventing the flow of water or exchange of sediments/contaminants) to constitute a "significant nexus."

Specific to analysis of the aggregate impacts of other similarly situated wetlands, the concept of region is further defined in the definition for "significant nexus" as "the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section." *Id.* at 22,263. How such waters are aggregated for the Agencies' analysis of "significant nexus" depends on the functions they perform and their spatial arrangement within the region (i.e. watershed) and how they in combination can potentially affect the chemical, physical, or biological integrity of traditional navigable and interstate waters. *Id. at* 22,212-22,213 and 22,246-250.

As a result, the current case-by-case analysis that the Agencies perform is limited to these more isolated wetlands that do not have as direct a connection to traditional navigable and interstate waters. The challenge, however, will be in defining the degree of connectivity actually required to warrant jurisdiction.

It is also worth noting that, although they have not done so in the proposed rule, the Agencies state within the Supplementary Information section of the proposed rule that they are considering expanding the types of waters that are considered *per se* jurisdictional to expressly include certain types of wetlands that, although more isolated, may have a "significant nexus" to traditional navigable and interstate waters. Specifically, the Agencies are considering including such waters as prairie potholes, Carolina and Delmarva bays, pocosins, Texas coastal prairie wetland, and western vernal pools. *Id.* at 22,250-22,252.

d. Exclusions, Including the Exclusion for Ditches.

The Agencies also propose to codify the categories of waters noted in the preamble to the current regulations as waters that the Agencies "generally do not consider … to be "Waters of the United States" (in addition to the two categories, waste treatment systems and prior converted croplands that are expressly included in the current regulations). 51 Fed. Reg. at 41,217.

- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section.
- Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; and
- Water-filled depressions created incidental to construction activity.

In addition to these exclusions, the Agencies add exemptions in the rules for "groundwater, including groundwater drained through subsurface drainage systems" and for "gullies and rills and non-wetland swales." No specific exemption is proposed to address the situation where a particular feature might be considered an "other water" or a ditch, but is also part of a MS4 system.

Specific to the exemptions for certain ditches, the proposed rule incorporates the exception for ditches that has been the Agencies' practice (reflected in the 1986 and 1988 preamble language and expressly provided in the current guidance). Specifically, the proposed rule expressly excludes from the definition of "waters of the United States" "[d]itches that are excavated wholly in uplands, drain only upland, and have than perennial flow" and, where there is a perennial flow, the proposed rule excludes "[d]itches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section." *Id. at* 22,263. The outstanding question and uncertainty is how the Agencies will determine what constitutes an "upland" (which is neither discussed nor defined in the proposed regulation) for

purposes of this exclusion, especially given the definitions for riparian areas and floodplains that have been included.

E. Application of Revised Army Corps/EPA Regulations To Permits, Applications and Jurisdictional Determinations, and Mitigation Bank Agreements

The proposed rules are not likely to change existing determinations that waters are jurisdictional, or permits or mitigation requirements associated with waters previously found to be jurisdictional. There may, however, be a question as to the proposed rules application to waters that were previously found to be not-jurisdictional, but that are re-evaluated and found to be jurisdictional prospectively. Presumably, no permit or mitigation requirement would yet have been issued for such waters. Nonetheless, some questions about retroactivity and grandfathering may arise.

The extent to which a change in an agency regulation or law can be given retroactive effect, and the circumstances under which the application of a changed agency regulation or law constitutes a retroactive effect, are complex issues. As a general matter, a federal agency may enact a regulation with a retroactive effect only if Congress conveyed that authority in express terms. *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988). In *Bowen v. Georgetown University Hospital*, the Supreme Court stated that a statutory grant of legislative rulemaking authority will not generally be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. *Bowen* at 208-09. Some courts have determined that an administrative rule is retroactive if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." *National Mining Ass'n v. US Dept. of Interior*, 177 F. 3d 1 (D.C. Cir. 1999); *Association of Accredited Cosmetology Schs. v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992).

The proposed rules defining waters of the United States, if adopted, will set new standards for defining jurisdiction under the section 404 permitting program. This raises a question of whether and to what extent the new regulations will be applied to existing non-jurisdictional determinations, if the effect is to change the status of an area from non-jurisdictional to jurisdictional. The proposed rule is silent on this issue. While the expectation is that the Corps and EPA will address this issue in the final rule, comments that address the need for a smooth transition period would be useful.

1. Permits and Applications

The Corps issues individual permits, 33 CFR 325.5(b), letters of permission, 33 CFR 325.5(b)(2) and general permits, 33 CFR 325.5(c), 33 CFR Part 330. General permits consist of regional permits, nationwide permits and programmatic permits. The application process can be lengthy especially for individual permit applications and may involve substantial financial and other commitments by an applicant and other concerned parties.

Permits continue in effect until they automatically expire, or are modified, suspended or revoked. 33 CFR 325.6(d)(individual permits, including letters of permission and regional and programmatic permits); 33 CFR 330.5(d)(nationwide permits). An individual permit or a letter of permission may be extended at the permittee's request. A request for an extension is normally granted unless "the district engineer determines that an extension would be contrary to public interest." 33 CFR 325.6(d). Requests for an extension of an individual permit or a letter of permission requires public notice in the same manner as for the initial permit, except such processing is not required if the district engineer determines if there has been "no significant changes in the attendant circumstances since the authorization was issued". *Id.*

The district engineer also has the authority at any time to "reevaluate the circumstances and conditions of any permit including regional permits, either on its own motion, at the request of the permittee, or a third party, or the result of periodic inspections, and initiate action to modify, to suspend or revoke a permit as may be made necessary by considerations of the public interest". 33 CFR 325.7(a). In making modifications decisions the Army Corp is required to consider a variety of factors including whether the action would adversely affect "plans, investments and actions, the permittee has reasonably made or taken in reliance of the permit." 33 CFR 325.7(a).

The district engineer also retains similar authority to modify, suspend, revoke nationwide permits or authorization. Under 33 CFR 330.5(b) the Corps or any person at any time may suggest changes to existing nationwide permits which are appropriate for consideration. Further, division engineers are authorized to use discretionary authority to modify, suspend or revoke nationwide permit authorizations (in specific geographic areas, class of activities or other class of waters by issuing a public notice stating the environmental concerns. 33 CFR 330.5(c). See also 33 CFR 330.5(d) (further specifying considerations related to revoking, suspending or modifying nationwide permits.)
The EPA also has the authority at any time to seek modifications to permits through its Section 404(c) authority. Although the Corps makes permitting decisions under Section 404(c), the EPA has the power to veto a discharge to a disposal site if it makes certain findings:

> The [EPA] administrator is authorized to prohibit the specification (including the withdrawal of the specification) of any defined area of the disposal site, and is authorized to deny or restrict the use of any defined area per specification (including withdrawal of specification) as a disposal site *whenever* he determines after notice and opportunity for public hearings, that the discharge…will have an unacceptable adverse effect on municipal water supplies, shell fish beds and fishery areas…wildlife or recreation areas. Before making such determination the administrator shall set forth in writing and shall make public his findings and his reasons for making any determination under this subsection. 33 U.S.C. § 1344(c). (Italics added.)

The EPA interprets the word "whenever" in Section 404(c) as authorizing its exercise of Section 404(c) authority at any time before an application is filed, while an

application is pending or after a permit has been issued. 44 Fed. Reg. 58076, 58077. The District of Columbia has recently affirmed this view, holding that the plain language of the statute authorizes the EPA to veto a permit at any time, even years after its issuance. *Mingo Logan Coal Co. v. the United States EPA*, 714 F.3d 608 (D.C. Cir. 2013).

For these reasons, both the Corps and EPA retain regulatory authority to alter permits after they are issued in appropriate circumstances. Therefore, unless the final rule specifies otherwise, existing permits will be subject to revision based on the application of any new definitions of waters of the United States.

2. Approved and Preliminary Jurisdictional Determinations

Neither the Clean Water Act nor Corps and EPA regulations define the specific procedures for obtaining a determination of what areas constitute waters of the United States. Agency review of jurisdictional areas is instead, governed by memoranda of agreement between the Corps and the EPA, and regulatory guidance letters that the Corps has issued to guide its staff in reviewing requests for determinations of waters of the United States. Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemption under Section 404(f) of the Clean Water Act (January 19, 1989) ("MOA"); Regulatory Guidance Letter 08-02. (June 26, 2008)("RGL 08-02") and Regulatory Guidance Letter 07-01, Practices for Documenting Jurisdiction Under the Clean Water Act (June 5, 2007)("RGL 07-01").

The MOA provides that the EPA has the ultimate authority to determine the geographic jurisdictional scope of section 404 waters and the Section 404(f) exemption. The MOA allocates responsibilities between the Corps and EPA. It adopts a "policy" of having the Corps to perform the "majority" of the determinations and commits the Corps to implement EPA guidance. Case specific determinations made under the MOA are to be treated as binding on the government in any subsequent federal action or in litigation. Matters in which EPA takes the lead are referred to as "special cases".

Under RGL 08-02, the Corps currently provides for two types of jurisdictional determinations approved and preliminary. Both must be made in writing. The Corps will provide an approved JD to any landowner, permit applicant, or other affected party when an approved JD is requested by name or when an official jurisdictional determination is requested, whether or not it is referred to as an "approved JD"; when a landowner, permit applicant, or other "affected party" contests jurisdiction over a particular water body or wetland, and where the Corps is allowed access to the property and is otherwise able to produce an approved JD; or when the Corps determines that jurisdiction does not exist over a particular water body or wetland. RGL-08-02, page 1-2.

An approved JD constitutes the Corps' official, written representation that the JD's findings are correct, can be relied upon by a landowner, permit applicant, or other "affected party" (as defined at 33 C.F.R. 331.2) who receives an approved JD for five

years (subject to certain limited exceptions explained in RGL 05-02) and can be used and relied on by the recipient of the approved JD (absent extraordinary circumstances, such as an approved JD based on incorrect data provided by a landowner or consultant) if a CWA citizen's lawsuit is brought in the Federal Courts against the landowner or other "affected party," challenging the legitimacy of that JD or its determinations; and can be immediately appealed through the Corps' administrative appeal process set out at 33 CFR Part 331. RGL-08-02, page 1-2.

RGL 08-02 provides an alternative path to obtain a jurisdictional determination known as a preliminary JD and also allows for no JD at all for non-reporting nationwide permits. Preliminary JDs are non-binding, written indications that there may be waters of the United States, including wetlands, on a parcel or indications of the approximate location(s) of waters of the United States or wetlands on a parcel. They are advisory in nature and may not be appealed. (See 33 C.F.R. 331.2.) A landowner, permit applicant, or other "affected party" may elect to use a preliminary JD to voluntarily waive or set aside questions regarding CWA/RHA jurisdiction over a particular site, usually in the interest of allowing the landowner or other "affected party" to move ahead expeditiously to obtain a Corps permit authorization where the party determines that is in his or her best interest to do so.

A landowner, permit applicant, or other "affected party" may elect to use a preliminary JD even where initial indications are that the water bodies or wetlands on a site may not be jurisdictional, if the affected party makes an informed, voluntary decision that is in his or her best interest not to request and obtain an approved JD. A permit decision made on the basis of a preliminary JD will treat all waters and wetlands that would be affected in any way by the permitted activity on the site as if they are jurisdictional waters of the U.S. A JD is "preliminary" in the sense that it can later be challenged in the permit process at the stage of a proffered permit and the Corps makes no legally binding determination whether Corps jurisdiction is found on the site. This is true even though the Corps will issue permits and take enforcement actions based on a preliminary JD. RGL 08-02, page 3.

The key distinction between an approved JD and a preliminary JD is that a:

> preliminary JD can only be used to determine that wetlands or other water bodies that exist on a particular site "may be" jurisdictional waters of the United States.
>
> preliminary JD by definition cannot be used to determine either that there are no wetlands or other water bodies on a site at all (i.e., that there are no aquatic resources on the site and the entire site is comprised of uplands), or that there are no jurisdictional wetlands other water bodies on a site, or that only a portion of the wetlands or waterbodies on a site are jurisdictional.

3. Mitigation Bank Agreements

The Corps and EPA have adopted regulations that govern the creation and operation of mitigation banks. 33 CFR Part 332 and 40 CFR Part 230, Subpart J. Consistent with these regulations, the agencies have entered into mitigation banking and in-lieu agreements with private parties for mitigation banks. Mitigation banks often must obtain permits for work in jurisdictional areas. To the extent the proposed rule changes the jurisdictional status of features on a mitigation bank site from non-jurisdictional to jurisdictional, that will present a grandfathering issue, because a mitigation bank frequently requires a substantial investment and places land under restricted uses in exchange for approval of credits.

4. Examples of Previous Corps Determinations Providing Grandfathering

a. Nationwide Permits.

The Corps recognizes that changes to the nationwide permit program can significantly affect settled expectations. Reauthorization of the NWP program occurs every five years and reauthorization can make major changes in previously approved NWPs. For example, two successive changes to the nationwide permits lowered the limits for NWP 26 from ten acres to three acres and then to 0.5 acres. To accommodate potential changes, 33 CFR § 330.6(b) provides that "activities which have commenced (i.e., or under construction) or under contract to commence in reliance upon an NWP will remain authorized provided that the activity is completed within twelve months of the date of NWP's expiration, modification or revocation, unless discretionary authority has been exercised on a case-by-case basis to modify, suspend or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5(c) or (d)." No exceptions are normally made for pending applications for NWP authorization.

b. Mitigation Regulations

On April 10, 2008, 73 Federal Register 19670, the Corps and EPA adopted new regulations to govern compensatory mitigation for loss of aquatic resources. 30 CFR Part 332, 40 CFR Part 230, subpart J. The mitigation rule made substantive changes to how mitigation would be required and added new requirements for applications.

In the preamble to the final rule, the Corps and EPA responded to commenters recommending that the agencies clarify that the new regulations apply only to applications submitted after the effective date of the rules. The comments asked that new requirements should not be applied retroactively to permit applicants who have invested substantial efforts under the previous rules of guidance."

In response, the Corps and EPA determined that the final rule "will apply to permit applications received after the effective date of this rule unless the district engineer has made a written determination that applying these new rules to a particular project would result in substantial hardship to a permit applicant and that applications

received prior to the effective date would be processed in accordance with the previous compensatory mitigation guidance.

The preamble gave the district engineer the authority to consider whether the applicant could demonstrate that substantial resources had been expended on or committed in reliance on previous guidance governing compensatory mitigation for DA permits. Factors such as "final engineering design work, contractual commitments for construction, or purchase or long-term leasing of property will, in most cases, be considered a substantial commitment of resources." 73 Fed. Reg. 19608.

c. Other Changes in Jurisdictional Determinations.

In addition to the grandfather clauses described above, the Corps also instituted phase-in the grandfather requirements when it first made changes to the geographic scope of the Section 404 program in 1975. In *NRDC v. Calloway*, 392 F. Supp. 685, 686 (D.D.C. 1975), the Court rejected the Corps' position that the section 404 program was limited to only waters that were encumbered by the Federal navigation servitude, holding that "the Congress by defining the term "navigable waters" in Section 502(7) of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. § 1251 et seq. (the "Water Act") to mean "the waters of the United States, including the territorial seas," asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." The Court also set deadlines for the Corps to act on repealing its prior regulations and adopting new regulations.

On July 25, 1975 (four months after the court order), the Corps adopted new interim regulations to define waters of the United States. 40 Fed. Reg. 31320 (July 25, 1975). In Interim final regulations, the Corps adopted a three phased implementation program starting with partial implantation on the effective date of the regulation, adding additional regulated waters effective on July 1, 1976 and phasing in all waters effective on July 1, 1977. 33 CFR 209.120(e)(2*)(a)-(c)*, 40 Fed. Reg. 31326.

5. Options

The Corps/EPA could consider selecting from the following example options listed in order of most restrictive to least restrictive in exempting matters from the new regulations. The exemptions are cumulative. For example, exemption 3 also includes exemptions 1 and 2.

a. Only past fill activity is exempt from the new regulations.

b. All development associated with an authorized action is exempt from the new regulations for the term of the authorization but compliance is required for permit extensions and reauthorizations.

c. All development associated with authorized action is exempt from the new regulations for the term of the authorization and for permit extensions and reauthorizations.

d. All development associated with an application filed as of a particular date (for example April 21, 2014 the date of the proposed rule) is exempt from the new regulations.

e. All development associated with an approved JD is exempt from the new regulations for the period contained in the approval.

f. All development associated with a Preliminary JD is exempt from the new regulations if applying these new rules to a particular project would result in substantial hardship to a permit applicant.

g. All development associated with a mitigation bank is exempt from the new regulations for the period of the banking agreement unless otherwise mutually agreed to by the banker and the Corps.

F. Conclusion

We hope that this memorandum will provide useful background to ECOS' members as they consider the issues raised by the proposed rule addressing waters of the United States.

Very truly yours,[10]

Karen Crawford, Nelson Mullins Riley & Scarborough LLP
David M. Flannery, Steptoe & Johnson PLLC
Theodore L. Garrett, Covington & Burling LLP
Richard M. Glick, Davis Wright Tremaine LLP
Seth D. Jaffe, Foley Hoag LLP
Irma S. Russell, The University of Montana Law School
Mary Ellen Ternes, Crowe & Dunlevy
David Uhlmann, University of Michigan Law School
Robert Uram, Sheppard Mullin Richter & Hampton LLP
Michael Wall, Natural Resources Defense Council

[10] Fellow affiliations are included for identification purposes only. This memorandum does not necessarily reflect the views of any organization with which an author is affiliated.

APPENDIX

Review of Prior Guidance on the Scope of CWA Jurisdiction

The following review is a comprehensive synthesis of all substantive prior agency guidance on the scope of jurisdiction under the Clean Water Act supporting the analysis in foregoing memorandum. The review includes EPA and Army Corps of Engineers guidance derived from key Supreme Court and appellate court cases. For convenience, the review is organized by categories of waters, generally following the organization of EPA's April 2014 proposed rule addressing "waters of the United States". For each category, the guidance is presented in reverse chronological order, with the most recent guidance presented first. Pertinent quotes from the guidance are included, but they are no substitute for reviewing the sources, which are referenced in full in the citation to the guidance.

21. Traditional Navigable Waters

LA Special Case Letter (July 6, 2010)
U.S. Envtl. Prot. Agency, Los Angeles Special Case Letter (July 6, 2010), http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf

- "We conclude that the mainstem of the Los Angeles River is a 'Traditional Navigable Water' from its origins at the confluence of Arroyo Calabasas and Bell Creek to San Pedro Bay at the Pacific Ocean, a distance of approximately 51 miles." at 1.

- "In reaching this conclusion, Region 9 and Headquarters staff considered a number of factors, including the ability of the Los Angeles River under current conditions of flow and depth to support navigation by watercraft; the history of navigation by watercraft on the river; the current commercial and recreational uses of the river; and plans for future development and use of the river which may affect its potential for commercial navigation." at 1.

Santa Cruz Special Case Letter (Dec. 3, 2008)
U.S. Envtl. Prot. Agency, Santa Cruz Special Case Letter and Evaluation (Dec. 3, 2008), http://www.spl.usace.army.mil/portals/17/Docs/Regulatory/JD/TNW/SantaCruzRiver_TNW_EPALetter.pdf

- Concludes that two reaches of the Santa Cruz River are Traditional Navigable Waters because they "have the potential to be used for commercial recreational navigation activities, such as canoeing, kayaking, birding, nature and wildlife viewing." at 1.
- Also notes "[e]vidence that the physical characteristics within the Study Reaches indicate a susceptibility for use in the future for commercial navigation, including commercial water-borne recreation," "[e]vidence that the Study Reaches, or

portions thereof, have been navigated," and "[e]vidence of the likelihood of future commercial navigation use, including two ongoing Corps of Engineers river restoration feasibility studies." at 2.

CWA Jurisdiction Following *Rapanos* (Dec. 2, 2008)
U.S. Envtl. Prot. Agency, Memorandum on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2, 2008),
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf

- "EPA and the Corps will continue to assert jurisdiction over '[a]ll 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. These waters are referred to in this guidance as traditional navigable waters.'" at 4-5.

Q&A Regarding Revised *Rapanos* Guidance (Dec. 2, 2008)
U.S. Envtl. Prot. Agency, Questions and Answers Regarding the Revised *Rapanos* & *Carabell* Guidance (Dec. 2, 2008),
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_5_wetlands_Rapanos_-20Guidance_QA-20120208.pdf

- "TNWs are broader than Rivers and Harbors Act section 10 waters, and also include waters that have been determined to be navigable-in-fact by the courts, are currently being used or have historically been used for commercial navigation, or for which evidence showing susceptibility to future commercial navigation is more than insubstantial or speculative." at 1.

Memorandum for JD SWG-2007-1769 (June 13, 2008)
U.S. Envtl. Prot. Agency, Memorandum for JD SWG-2007-1769 (June 13, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/epa_swg_2007-1769.pdf

- Classifies three waterways as TNWs because they are "subject to the ebb and flow of the tide." at 3.

Memorandum to Decline Jurisdiction for POA-2000-1109 (Apr. 2, 2008)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Decline Jurisdiction for POA-2000-1109 (Apr. 2, 2008),
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/POA-2000-1109jmd.pdf

- Reassesses previous determination and declining to assert jurisdiction over wetlands, noting "new information indicating the wetlands are not adjacent to a traditional navigable water" because the adjacent body is not a TNW. at 1.

Memorandum for JD # 2007-5500-LMK (Mar. 3, 2008)
U.S. Envtl. Prot. Agency, Memorandum for JD # 2007-5500-LMK (Mar. 3, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/epa_mvp-2007-5500.pdf

– "The United States government has determined that Ranch Lake and its adjacent wetlands are waters of the United States" despite draft determination that "Ranch Lake and its adjacent wetlands are isolated non-jurisdictional waters with no connection to interstate (or foreign) commerce." at 1.

– "The United States government has determined that Ranch lake is navigable-in-fact, and thus a TNW, based on several factors, including presence of public boat ramps and beaches, actual current use for recreational navigation, availability of commercial facilities such as boat rentals and bait shops to users of Ranch Lake, and the lake's location in an area that attracts interstate travelers." at 2.

Memorandum to Assert Jurisdiction for POA-2000-1109 (Jan. 28, 2008)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Assert Jurisdiction for POA-2000-1109 (Jan. 28, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/POA-2000-1109jm.pdf

- Asserts jurisdiction over wetlands, noting that water body to which the wetland is adjacent is a TNW because there is documented use of the body for navigation, the physical characteristics also support a determination that it is capable of navigation, which is open to the public and located near conduits of interstate travel such that the body of water is likely to attract out-of-state travelers for recreational commercial navigation. at 2-3.

Memorandum to Assert Jurisdiction for NWP-2007-945 (Jan. 23, 2008)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Assert Jurisdiction for NWP-2007-945 (Jan. 23, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/NWP-2007-945.pdf

– Asserts jurisdiction over two ditches and their abutting wetlands because "the ditches are relatively permanent waters (RPWs), and that the subject wetlands have a continuous surface connection with the ditches. The agencies have also determined that the Ochoco Reservoir is the closest traditional navigable water (TNW) for this JD." at 1.

– "The agencies have determined that Ochoco Reservoir is a TNW due to several factors" including "documented use of Ochoco Reservoir for navigation," "[t]he physical characteristics also support a determination that the Reservoir is capable of navigation," the "Ochoco Reservoir is accessible to the public," "Ochoco

Reservoir supports water-body based attractions that are likely to be used by out-of-state travelers for commercial navigation," and its location "near conduits of interstate travel." at 2-3.

Memorandum for JD # 2007-04488-EMN (Jan. 16, 2008)
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/BahLakeEPA_memo2007-04488.pdf

– Determines that Bah Lakes is a TNW despite draft determination that Bah Lakes was an isolated non-jurisdictional water with no substantial connection to interstate (or foreign commerce). at 1.

- "The United States government has determined that Bah Lakes is a TNW based on the following factors:" "[t]he physical characteristics of the Bah Lakes, including its depth and size, indicate that the waterbody has the capacity to be navigated by watercraft," and "Bah Lakes has the potential to be used for activities involving navigation and interstate commerce, such as recreational commercial navigation." at 2.

Corps Jurisdictional Determination Form Instructional Guidebook (May 30, 2007)
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf

- "TNWs: include all of the 'navigable waters of the U.S.,' defined in 33 CFR Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact." at 17.

Memorandum for NW0-2007-1550 (Dec. 11, 2007)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum for NW0-2007-1550 (Dec. 11, 2007),
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/TNW_NWO-2007-1550.pdf

– Determines that Little Snake River is the closest TNW for a tributary under consideration.

– "The agencies have determined that the Little Snake is a TNW due to several factors" including that it "is accessible to the public via multiple locations on public land," "[t]here is documented seasonal navigation of the river," and there are "hunting and fishing lodges in the Baggs area with a national reputation" which are "a documented source of interstate travelers in the area seeking an outdoor experience." at 2.

Memorandum for MVP-2007-1497-RQM (Dec. 11, 2007)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum for MVP-2007-1497-RQM (Dec. 11, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/TNW_NWS-2006-82.pdf

– Determines that Boyer Lake is a TNW despite draft determination that "Boyer Lake was an isolated, non jurisdictional water with no substantial connection to interstate (or foreign) commerce." at 1.

– Boyer Lake is a TNW because "[t]here is current access to the water body that allows members of the public to place watercraft on the water body," "[t]he water body has the capacity to be navigated by watercraft," and "[t]he water body has the potential to be used for activities involving navigation and interstate commerce." at 2.

Memorandum for NWS-2006-82 (Dec. 10, 2007)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum for NWS-2006-82 (Dec. 10, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/TNW_NWS-2006-82.pdf

- Determines that the North Fork Stillaguamish River is a TNW, because "[t]he North Fork is accessible to the public," "[t]here is documented use of the river for navigation," and "[a] combination of the factors above demonstrate the North Fork is susceptible to being used for water-based interstate commerce by interstate and foreign travelers." at 1-2.

ANPRM on CWA Regulatory Definition of Waters of the United States, 68 Fed. Reg. 1991 (Jan. 15, 2003)

– "As indicated, section 502 of the CWA defines the term navigable waters to mean 'waters of the United States, including the territorial seas.' The Supreme Court has recognized that this definition clearly includes those waters that are considered traditional navigable waters. In *SWANCC*, the Court noted that while 'the word 'navigable' in the statute was of 'limited import''(quoting *Riverside*, 474 U.S. 121 (1985)), 'the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.' 531 U.S. at 172." 68 Fed. Reg. at 1996.

– "As noted, traditional navigable waters are jurisdictional. Traditional navigable waters are waters that are subject to the ebb and flow of the tide, or waters that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. 33 CFR § 328.3(a)(1); *United States v. Appalachian Elec. Power* Co., 311 U.S. 377, 407-408 (1940) (water considered

navigable, although not navigable at present but could be made navigable with reasonable improvements); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1911) (dams and other structures do not eliminate navigability); *SWANCC*, 531 U.S. at 172 (referring to traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made). In accord with the analysis in *SWANCC*, waters that fall within the definition of traditional navigable waters remain jurisdictional under the CWA. Thus, isolated, intrastate waters that are capable of supporting navigation by watercraft remain subject to CWA jurisdiction after *SWANCC* if they are traditional navigable waters, i.e., if they meet any of the tests for being navigable-in-fact. See, e.g., *Colvin v. United States*, 181 F. Supp. 2d 1050 (C.D. Cal. 2001) (isolated man-made water body capable of boating found to be 'water of the United States')." 68 Fed. Reg. at 1996-97.

Joint Memorandum, 68 Fed. Reg. 1995 (Jan. 15, 2003)
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2003_12_19_wetlands_Joint_Memo.pdf

- "Traditional navigable waters are waters that are subject to the ebb and flow of the tide, or waters that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." at 2.

Definition of Waters of the United States, 33 CFR § 328.3 (Aug. 25, 1995); See also Definitions, 40 C.F.R. § 230.2 (Aug. 25, 1993)

- (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

Final Rule, Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122 (July 19, 1977)

- Revises 40 Fed. Reg. 31320. Navigable waters include "Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands. . . . They include natural and artificial waters that are subject to the ebb and flow of the tide and/or that are used, were used in the past, or are susceptible to use to transport interstate or foreign commerce." 42 Fed. Reg. at 37127.

***In re City of Phoenix*, 1976 WL 2547 (Dec. 17, 1976)**

- "The Agency has promulgated regulations, 40 C.F.R. §125.1(p), implementing this broad interpretation of the statutory definition of 'navigable waters.' The regulation reads:
  - (p) The term 'navigable waters' includes:
  - (1) All navigable waters of the United States;

- (2) Tributaries of navigable waters of the United States;
- (3) Interstate waters;
- (4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
- (5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
- (6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

– "While the facts indicate that the Salt River may not be navigable in fact for commercial purposes, the stipulation does indicate that water uses in the Salt River below the sewage effluent outfalls provide an 'excellent fowl habitat, hunting, fishing and hiking area.' It also states that there may be body contact recreation in the Salt and Gila Rivers during periods of flow. Also, interstate travelers use and visit recreation facilities along the Gila River below its confluence with the Salt River. These facts meet the 40 C.F.R. §125.1(p)(4) criteria for a determination of coverage by the Act." at *3.

– "Under the combined tests coming from *Economy Light* and *Appalachian Electric* it has been stated that a river is navigable waters: '...if (1) it presently is being used or is suitable for use, or (2) it has been used or was suitable for use in the past, or (3) it could be made suitable for use in the future by reasonable improvement.' *Rochester Gas and Electrical Corp. v. F.P.C.*, 344 F. 2d 594T 596 (2nd Cir.)." at *4.

– "A stream which flows intermittently is navigable unless the stream is normally dry, has only a short-term runoff which does not reach a navigable water or cross a State line, and there is not use of the stream by interstate travelers or for other interstate commercial purposes."

– "In short, NPDES permits should be required for all municipal discharges into intermittent streams *unless* the stream is normally dry, has only a short-term runoff which does not reach a navigable water or cross a State line, and there is no use of the stream by interstate travelers or for other interstate commercial purposes."

Interim Final Rule, Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320 (July 25, 1975)

– "(1) 'Navigable waters of the United States.' The term, 'navigable waters of the United States,' is administratively defined to mean waters that have been used in the past, are now used, or are susceptible to use as a means to transport interstate commerce landward to their ordinary high water mark and up to the head of navigation as determined by the Chief of Engineers, and also waters that are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher high water mark on the Pacific Coast). See 33 CPR 209.260 (ER

1165-2-302) for a more definitive explanation of this term." 40 Fed. Reg. at 31324-25.

– Navigable waters includes "(a) Coastal waters that are navigable waters of the United States subject to the ebb and flow of the tide, shoreward to their mean high water mark (mean higher high water mark on the Pacific coast); . . . (c) Rivers, lakes, streams, and artificial water bodies that are navigable waters of the United States up to their headwaters and landward to their ordinary high water mark; (d) All artificially created channels and canals used for recreational or other navigational purposes that are connected to other navigable waters, landward to their ordinary high water mark." 40 Fed. Reg. at 31324-25.

– ACOE stated that, "drainage and irrigation ditches have been excluded" from jurisdiction. "… we realize that some ecologically valuable water bodies or environmentally damaging practice have been omitted. To insure these waters are also protected, we have given the District Engineer discretionary authority to also regulate them on a case by case basis." 40 Fed. Reg. 31321

Meaning of the Term Navigable Waters, 1973 WL 21937 (Feb. 6, 1973)

- "It will, of course, be a major task to determine, on a case by case basis, what waters fall within the category 'waters of the United States.' However, for the purpose of making initial administrative determinations, at least the following waters would appear to be 'waters of the United States': (1) All navigable waters of the United States."

22. **Interstate Waters**

Definition of Waters of the United States, 33 CFR § 328.3 (Aug. 25, 1995); See also Definitions, 40 C.F.R. § 230.2 (Aug. 25, 1993)

(a) The term waters of the United States means
. . .
(2) All interstate waters including interstate wetlands

Final Rule, Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122 (July 19, 1977)

- Revises 40 Fed. Reg. 31320. Navigable waters include "Interstate waters and their tributaries, including adjacent wetlands." 42 Fed. Reg. at 37127.

Interim Final Rule, Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320 (July 25, 1975)

- Navigable waters includes "(f) Interstate waters landward to their ordinary high water mark and up to their headwaters." 40 Fed. Reg. at 31324-25.

Meaning of the Term Navigable Waters, 1973 WL 21937 (Feb. 6, 1973)

- "It will, of course, be a major task to determine, on a case by case basis, what waters fall within the category 'waters of the United States.' However, for the purpose of making initial administrative determinations, at least the following waters would appear to be 'waters of the United States': . . . (3) Interstate waters; (4) Interstate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; (5) Interstate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and (6) Interstate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce."

23. Territorial Seas

Definition of Waters of the United States, 33 CFR § 328.3 (Aug. 25, 1995); See also Definitions, 40 C.F.R. § 230.2 (Aug. 25, 1993)

(a) The term waters of the United States means
. . .
(6) The territorial seas

Interim Final Rule, Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320 (July 25, 1975)

- "(i) The term, 'navigable waters,' as used herein for purposes of Section 404 of the Federal Water Pollution Control Act, is administratively defined to mean waters of the United States including the territorial seas with respect to the disposal of fill material and excluding the territorial seas with respect to the disposal of dredged material." 40 Fed. Reg. at 31324-25.

24. Impoundments of 1-3 and 5

Jurisdictional Determination Form Instructional Guidebook (May 30, 2007)
U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook (May 30, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf

- "Impoundments of jurisdictional waters. Generally, impoundment of a water of the U.S. does not affect the water's jurisdictional status." at 31.

Definition of Waters of the United States, 33 CFR § 328.3 (Aug. 25, 1995); See also Definitions, 40 C.F.R. § 230.2 (Aug. 25, 1993)

(a) The term waters of the United States means

. . .
(4) All impoundments of waters otherwise defined as waters of the United States under the definition

Final Rule, Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122 (July 19, 1977)

- "We have defined the term 'impoundment' as a 'standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area.' Responding to several suggestions, we have clarified what is not included in the term 'impoundment' by stating that it does not include artificial lakes or ponds created by excavating and or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing." 42 Fed. Reg. at 37130.

25. Tributaries of 1-4

Q&A Regarding Revised *Rapanos* Guidance (Dec. 2, 2008)
U.S. Envtl. Prot. Agency, Questions and Answers Regarding the Revised *Rapanos* & *Carabell* Guidance (Dec. 2, 2008),
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_5_wetlands_Rapanos_-20Guidance_QA-20120208.pdf

- "The original guidance stated that, for purposes of the guidance, a tributary is the entire reach of the stream that is of the same order, and that the flow characteristics of a particular stream reach should be evaluated at the farthest downstream limit of the reach (i.e., the point the tributary enters a higher order stream). Several commenters indicated that assessing flow at the downstream point was not the most appropriate approach to characterizing the entire stream. The revised guidance makes some changes with respect to assessing flow in tributaries for purposes of determining whether a tributary is relatively permanent, indicating that where the downstream limit is not representative of the stream reach as a whole, the flow regime that best characterizes the reach should be used." at 1-2.

Memorandum for NWS-2006-82 (Dec. 10, 2007)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum for NWS-2006-82 (Dec. 10, 2007),
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/TNW_NWS-2006-82.pdf

- Asserts that Wilson Lake is the closest TNW for purposes of determining whether an unnamed tributary has a sufficient significant nexus to constitute a water of the United States.

Memorandum to Assert Jurisdiction for SPL-2007-261-FBV (Dec. 6, 2007)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Assert Jurisdiction for SPL-2007-261-FBV (Dec. 6, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/Kennedy_N-RPW_SPL-2007-261.pdf

- Asserts jurisdiction over an unnamed tributary of Canyon Lake because it has a "significant chemical nexus with Canyon Lake, a traditional navigable water (TNW)." at 1.

- "A watercourse may have a significant nexus with a TNW where it can be demonstrated that the subject watercourse alone has the potential to contribute contaminants that would cause the TNW to exceed its water quality standards or otherwise degrade water quality of the TNW." at 1.

- "Findings from the site investigations and the desk analysis of available data confirmed [?] that the Ambris segment has pollutants present in its watershed and a hydrologic connection to a TNW (Canyon Lake). The soils in the Ambris segment watershed have slow infiltration rates when thoroughly wetted and are not conducive to infiltration. This indicates that the movement of pollutants to the TNW is highly possible. Additionally, modeling efforts similarly confirm that the pollutants in the Ambris sub-watershed have a reasonable likelihood of reaching and adversely affecting Canyon Lake, such that there is a significant chemical nexus from the subject water to Canyon Lake. The Ambris segment is a 'water of the United States' and is jurisdictional under the CWA." at 5.

CWA Jurisdiction Following *Rapanos* (June 5, 2007)
U.S. Envtl. Prot. Agency, Memorandum on Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in *Rapanos v. United States* & *Carabell v. United States* (June 5, 2007), http://water.epa.gov/lawsregs/guidance/wetlands/upload/2007_6_5_wetlands_RapanosGuidance6507.pdf

- "A non-navigable tributary of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries." at 5.

- "A tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water." at 5 n.21.

- "A tributary . . . is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). For purposes of demonstrating a connection to traditional navigable waters, it is appropriate and reasonable to assess the flow characteristics of the tributary at the

point at which water is in fact being contributed to a higher order tributary or to a traditional navigable water." at 9.

Jurisdictional Determination Form Instructional Guidebook (May 30, 2007)
U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook (May 30, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf

– "Tributary is a natural, man-altered, or man-made water body. Examples include rivers, streams, and lakes that flow directly or indirectly into TNWs." at 8.

– "RPWs flow directly or indirectly into TNWs where the flow through the tributary (a natural, man-altered, or man-made water body) is year-round or continuous at least 'seasonally.'" at 21.

Field Operation Manual for Headwater Streams (Oct. 2006)
http://www.epa.gov/eerd/methods/HISSmanual_full.pdf

- This document provides methods specifically designed for assessing the hydrologic permanence and ecological condition of headwater streams.

ANPRM on CWA Regulatory Definition of Waters of the United States, 68 Fed. Reg. 1991 (Jan. 15, 2003)

– "In addition, the Court reiterated in SWANCC that Congress evidenced its intent to regulate 'at least some waters that would not be deemed 'navigable' under the classical understanding of that term.' *SWANCC* at 171 (quoting *Riverside*, 474 U.S. at 133). Relying on that intent, for many years, EPA and the Corps have interpreted their regulations to assert CWA jurisdiction over non-navigable tributaries of navigable waters and their adjacent wetlands. Courts have upheld the view that traditional navigable waters and, generally speaking, their tributary systems (and their adjacent wetlands) remain subject to CWA jurisdiction." 68 Fed. Reg. at 1996.

– "A number of court decisions have held that *SWANCC* does not change the principle that CWA jurisdiction extends to tributaries of navigable waters. . . . Some courts have interpreted the reasoning in *SWANCC* to potentially circumscribe CWA jurisdiction over tributaries by finding CWA jurisdiction attaches only where navigable waters and waters immediately adjacent to navigable waters are involved. . . . Another question that has arisen is whether CWA jurisdiction is affected when a surface tributary to jurisdictional waters flows for some of its length through ditches, culverts, pipes, storm sewers, or similar manmade conveyances. A number of courts have held that waters with manmade features are jurisdictional. . . . However, some courts have taken a different view of the circumstances under which man-made conveyances satisfy

the requirements for CWA jurisdiction. . . . A number of courts have held that waters connected to traditional navigable waters only intermittently or ephemerally are subject to CWA jurisdiction. . . . Other cases, however, have suggested that *SWANCC* eliminated from CWA jurisdiction some waters that flow only intermittently. . . . A factor in determining jurisdiction over waters with intermittent flows is the presence or absence of an ordinary high water mark (OHWM). Corps regulations provide that, in the absence of adjacent wetlands, the lateral limits of non-tidal waters extend to the OHWM (33 CFR 328.4(c)(1)). One court has interpreted this regulation to require the presence of a continuous OHWM." 68 Fed. Reg. at 1997 (internal citations omitted).

Joint Memorandum, 68 Fed. Reg. 1995 (Jan. 15, 2003)
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2003_12_19_wetlands_Joint_Memo.pdf

- Contains a passage describing post-*SWANCC* cases and their holdings regarding tributaries. at 3.

Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12818 (Mar. 9, 2000)

– "An ephemeral stream is a water of the United States, provided it has an OHWM. An ephemeral stream that does not have an OHWM is not a water of the United States. The frequency and duration at which water must be present to develop an OHWM has not been established for the Corps regulatory program. District engineers use their judgement [SIC] on a case-by-case basis to determine whether an OHWM is present. The criteria used to identify an OHWM are listed in 33 CFR 328.3(e)." 65 Fed. Reg. at 12823.

– "We agree that ephemeral streams that are tributary to other waters of the United States are also waters of the United States, as long as they possess an OHWM. The upstream limit of waters of the United States is the point where the OHWM is no longer perceptible (see 51 FR 41217). Ephemeral streams that are part of an interstate surface tributary system are waters of the United States, because they are an integral part of that surface tributary system, which supports interstate commerce." 65 Fed. Reg. at 12823.

– "A drainage ditch constructed in a stream, wetland, or other water of the United States remains a water of the United States, provided an OHWM is still present. Since drainage ditches constructed in waters of the United States are constructed either by channelizing a stream or excavating the substrate to improve drainage, it is unlikely that the drainage ditches will become dry land unless the hydrology is removed by some other action. District engineers will determine, on a case-by-case basis, whether a particular area is a water of the United States. If the construction of a drainage ditch has legally converted the entire area to dry land, then the area drained is not a water of the United States, however, in most cases

the drainage ditch would remain a water of the United States." 65 Fed. Reg. at 12823

Definition of Waters of the United States, 33 CFR § 328.3 (Aug. 25, 1995); See also Definitions, 40 C.F.R. § 230.2 (Aug. 25, 1993)

(a) The term waters of the United States means
. . .
(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section

***In re Town of Buckeye*, 1977 WL 28254 (Nov. 11, 1977)**
U.S. Envtl. Prot. Agency, Office of General Counsel, *In re Town of Buckeye, Arizona*, 1977 WL 28254 (Nov. 11, 1977)

- "The Regional Administrator has found that the Arlington Canal is an earthen irrigation ditch which flows roughly parallel to the Gila River. The flow in the Canal consists primarily of groundwater pumped from wells, irrigation return flows and treated sewage effluent. The Canal takes in water from the main Gila River channel only during periods of heavy flow when upstream users are not diverting all of the flow of the River. The Town of Buckeye sewage treatment facility discharges effluent through an underground pipe into the Arlington Canal. The Arlington Canal follows a meandering course until it reaches the Gillespie Dam, where water from the Canal joins the main channel of the Gila River. These facts clearly support the Regional Administrator's finding that the Arlington Canal is a tributary of the Gila River, which is navigable water (Decision of the General Counsel No. 53). The Agency regulation governing this issue, 40 C.F.R. §125.1(p)(2), defines navigable waters to include tributaries of navigable waters, and thus encompasses the Arlington Canal."

Final Rule, Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122 (July 19, 1977)

- Revises 40 Fed. Reg. 31320. Navigable waters include "Tributaries to navigable waters of the United States, including adjacent wetlands." 42 Fed. Reg. at 37127.

Interim Final Rule, Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320 (July 25, 1975)

- Navigable waters include "(e) All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark." 40 Fed. Reg. at 31324-25.

***In re Riverside Irrigation Dist., Ltd.*, 1975 WL 23864 (June 27, 1975).**
U.S. Envtl. Prot. Agency, Office of General Counsel, *In re Riverside Irrigation Dist., Ltd. & 17 Others*, 1975 WL 23864 (June 27, 1975)

- Holds that discharge into an irrigation return flow canal is subject to the "authority exists under section 402 of the Act to regulate this activity as a discharge into navigable waters. . . . It is clear that the intent of Congress in adopting this definition of 'navigable waters' was to broaden the concept of navigable waters to 'portions thereof, tributaries thereof ... and the territorial seas and the Great Lakes.'. . . The conference report accompanying the agreed upon bill reflects the Congressional intention that the term be broadly interpreted, noting that "the conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation." Recent court decisions also indicate that traditional concepts of navigability have been abolished as a controlling factor in determining whether a body of water constitutes "waters of the United States" and that Congress intended to assert jurisdiction under the Act over all waters to which its power extends under the commerce clause of the Constitution." at *3 (internal citations omitted).

Meaning of the Term Navigable Waters, 1973 WL 21937 (Feb. 6, 1973)

- "It will, of course, be a major task to determine, on a case by case basis, what waters fall within the category 'waters of the United States.' However, for the purpose of making initial administrative determinations, at least the following waters would appear to be 'waters of the United States': . . . (2) Tributaries of navigable waters of the United States."

26. Wetlands and All Waters Adjacent to 1-5

Memorandum to Assert Jurisdiction for SWG-2008-00138 (Sept. 3, 2009)
U.S. Envtl. Prot. Agency, Memorandum to Assert Jurisdiction for SWG-2008-00138 (Sept. 3, 2009), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/SWG-2008-0138.pdf

– Asserting jurisdiction over wetlands, noting that the wetland is adjacent to a TNW and a tributary.

– "EPA and Corps regulations define 'waters of the United States' to include wetlands adjacent to other covered waters . . . 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.'' The *Rapanos* Guidance states that finding a continuous surface connection is not required to establish adjacency under this definition. In addition, the Guidance states 'the agencies consider wetlands adjacent if one of [the] following three criteria is satisfied. First, there is an unbroken surface or sub-surface connection to jurisdictional waters. This hydrologic connection may be intermittent. Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is

reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters." at 3 (internal citations omitted).

Memorandum to Assert Jurisdiction for SAC-2008-2191 (Apr. 22, 2009)
U.S. Envtl. Prot. Agency, Memorandum to Assert Jurisdiction for SAC-2008-2191 (Apr. 22, 2009), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/SAC-2008-2191_Wallace_Tract.pdf

- Determines that interdunal wetland is adjacent to TNWs on a barrier island. at 1.

- "The wetland on the Wallace tract is surrounded by marine deposited fine sands in an interdunal landscape on a relic barrier island. The interdunal landscape and find sands indicate that subsurface flow connects the wetland on the Wallace tract to the wetlands and open waters of Village Creek to the northeast, the tributary of Harbor River to the east and south, and Capers Creek to the west, through a free exchange of freshwater through the fine sands of the dunes. Based on the above physical characteristics this wetland is part of the larger network of interdunal and tidal creeks and wetlands that are physically connected, and reasonable close to support the inference of an ecological connection." at 4-5.

CWA Jurisdiction Following *Rapanos* (2008) (Dec. 2, 2008)
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf

- "The agencies will also continue to assert jurisdiction over wetlands 'adjacent' to traditional navigable waters . . . 'adjacent' means 'bordering, contiguous or neighboring.' Finding a continuous surface connection is not required to establish adjacency under this definition. The *Rapanos* decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are 'waters of the United States.'" at 5.

- "The regulations define 'adjacent' as follows: '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.'" at 5.

- "Under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. This hydrologic connection maybe intermittent. Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the

science-based inference that such wetlands have an ecological interconnection with jurisdictional waters." at 5-6.

Q&A Regarding Revised *Rapanos* Guidance (Dec. 2, 2008)
U.S. Envtl. Prot. Agency, Questions and Answers Regarding the Revised *Rapanos* & *Carabell* Guidance (Dec. 2, 2008), http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_5_wetlands_Rapanos_-20Guidance_QA-20120208.pdf

- "The June 2007 guidance also discussed the circumstances under which adjacent wetlands were jurisdictional after Rapanos, but did not discuss the meaning of adjacency other than to reference the regulatory definition as "bordering, contiguous, or neighboring." The revised guidance clarifies, consistent with the regulatory definition, that a wetland is adjacent if it has an unbroken hydrologic connection to jurisdictional waters, or is separated from those waters by a berm or similar feature, or if it is in reasonably close proximity to a jurisdictional water." at 1.

Memorandum for SWG-2007-1623 (Apr. 15, 2008)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum for SWG-2007-1623 (Apr. 15, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/swg-2007-1623.pdf

- Asserts jurisdiction over wetlands adjacent to the Gulf of Mexico and Corpus Christi Bay, TNWs. Wetlands are "part of an interdunal system separated from the Gulf of Mexico and Corpus Christi Bay by beach dunes." Wetlands were held to be adjacent because of "proximity of the wetlands to each other and the TNWs, physical characteristics (size, shape, and location in the floodplain), and the dominant wetland soils." at 1.

Memorandum to Decline Jurisdiction for POA-2000-1109 (Apr. 2, 2008)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Decline Jurisdiction for POA-2000-1109 (Apr. 2, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/POA-2000-1109jmd.pdf

- Reassesses previous determination and declining to assert jurisdiction over wetlands, noting "new information indicating the wetlands are not adjacent to a traditional navigable water" because the adjacent body is not a TNW.

Memorandum for JD # 2007-5500-LMK (Mar. 3, 2008)
U.S. Envtl. Prot. Agency, Memorandum for JD # 2007-5500-LMK (Mar. 3, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/epa_mvp-2007-5500.pdf

– "The United States government has determined that Ranch Lake and its adjacent wetlands are waters of the United States" despite draft determination that "Ranch Lake and its adjacent wetlands are isolated non-jurisdictional waters with no connection to interstate (or foreign) commerce." at 1.

– "The Rapanos Guidance highlights that EPA and the Corps will assert CWA § 404 jurisdiction over wetlands that are 'adjacent' to TNWs as defined in the agencies' regulations. . . . The 0.01 acre of wetland subject to his Memorandum was described by the St. Paul District in the draft JD form as directly abutting Ranch lake. Since, as discussed above, the United States government has determined that Ranch Lake is a TNW, the subject wetland is considered adjacent to a TNW." at 4-5.

Memorandum to Assert Jurisdiction for 2007-657-IJT (Feb. 12, 2008)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Assert Jurisdiction for 2007-657-IJT (Feb. 12, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/TNW_SAC-2007-657-1JT.pdf

– Asserts jurisdiction over wetlands adjacent to Privateer Creek, the North Edisto River, and the Atlantic Ocean. at 1.

– "Based on an examination of the site location and characteristics for the project wetlands, all five wetlands subject to this JD are part of an integrated interdunal wetland system. This is based on a variety of factors, including: proximity of the wetlands to each other and the TNWs, physical characteristics (size, shape, location in floodplain), the community profiles, and the dominant wetland soils and plants supported by the interdunal wetland system." at 2.

Memorandum to Assert Jurisdiction for POA-2000-1109 (Jan. 28, 2008)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Assert Jurisdiction for POA-2000-1109 (Jan. 28, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/POA-2000-1109jm.pdf

- Asserts jurisdiction over wetlands, noting that the wetland is adjacent to a TNW.

Memorandum to Re-Evaluate Jurisdiction for NWK-2007-369 (Nov. 15, 2007)
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/IW_Memo_NWK-2007-369.pdf

– Requires re-evaluation based on the determination that Cedar River is the closest traditional navigable water (TNW).

– "A combination of the factors above, including close proximity, position in the landscape, and indicators of a potential shallow subsurface connection, support the determination that the wetland is adjacent (as defined by 33 CFR 328.3(c)) to the unnamed creek. The fact that the wetland is separated from the other waters of the U.S. by a berm does not alter this determination, given that the agencies' regulations specify that '[w]etlands 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.'" at 3-4.

– Must return to evaluate whether the wetlands are jurisdictional based upon a significant nexus evaluation in relation to the nearest TNW.

CWA Jurisdiction Following *Rapanos* (June 5, 2007)
U.S. Envtl. Prot. Agency, Memorandum on Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in *Rapanos v. United States* & *Carabell v. United States* (June 5, 2007),
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2007_6_5_wetlands_RapanosGuidance6507.pdf

- "In addition, the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding. . . . [A] continuous surface connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature)." at 6.

Q&A for *Rapanos* (June 5, 2007)
U.S. Army Corps of Engineers, Questions and Answers for *Rapanos* and *Carabell* Decision (June 5, 2007),
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_qa_06-05-07.pdf

– "In accordance with the Corps 1987 Wetland Delineation Manual, the Corps and EPA jointly define 'wetlands' as: 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. We use three diagnostic environmental characteristics when making wetland determinations: vegetation, soil, and hydrology. Greater than 50% of the vegetation present must be considered hydrophytic. Hydric soil must be present. The hydrology requirement is satisfied when an area is saturated within 12 inches of the surface at some time during the growing season of the prevalent vegetation. Unless an area has been altered or is a rare natural situation, wetland indicators of all three characteristics must be present during some portion of the growing season for an area to be a wetland." at 3.

– "'Adjacent,' as defined in Corps and EPA regulations, 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.'" at 4.

– "Wetlands that are not separated from the tributary by an upland feature, such as a berm or dike is 'abutting.'" at 4.

– "In the context of CWA jurisdiction post-*Rapanos*, a water body is 'relatively permanent' if its flow is year round or its flow is continuous at least 'seasonally,' (e.g., typically 3 months). Wetlands adjacent to a 'relatively permanent' tributary are also jurisdictional if those wetlands directly abut such a tributary." at 4.

– "If the tributary has adjacent wetlands, the significant nexus evaluation must assess the aquatic functions performed by the tributary itself and in combination with the aquatic functions performed by the tributary's adjacent wetland(s), as these functions relate to the chemical, physical, and biological integrity of a traditional navigable water." at 9.

Jurisdictional Determination Form Instructional Guidebook (May 30, 2007)
U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook (May 30, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf

– "Wetlands Adjacent to TNWs: adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are adjacent. (See 33 CFR 328.3(c))." at 20.

– "Wetlands directly abutting RPWs that flow directly or indirectly into TNWs. Note that a continuous surface connection does not require surface water to be continuously present between the wetland and the tributary." at 26.

– "Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are adjacent. Note that a continuous surface connection does not require surface water to be continuously present between the wetland and the tributary." at 28.

– "Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are adjacent." at 29.

ANPRM on CWA Regulatory Definition of Waters of the United States, 68 Fed. Reg. 1991 (Jan. 15, 2003)

- "EPA and the Corps have interpreted their regulations to assert CWA jurisdiction over non-navigable tributaries of navigable waters and their adjacent wetlands. Courts have upheld the view that traditional navigable waters and, generally speaking, their tributary systems (and their adjacent wetlands) remain subject to CWA jurisdiction." 68 Fed. Reg. at 1996.

- "SWANCC also calls into question whether CWA jurisdiction over isolated, intrastate, non-navigable waters could now be predicated on the other factors listed in the Migratory Bird Rule, 51 FR 41217 (i.e., use of the water as habitat for birds protected by Migratory Bird Treaties; use of the water as habitat for Federally protected endangered or threatened species; or use of the water to irrigate crops sold in interstate commerce)." 68 Fed. Reg. at 1996.

- "By the same token, in light of SWANCC, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.3(a)(3)(i)-(iii) over isolated, non-navigable, intrastate waters (i.e., use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce)." *Id.*

- "In addition, in view of the uncertainties after SWANCC concerning jurisdiction over isolated waters that are both intrastate and non-navigable based on other grounds listed in 33 CFR § 328.3(a)(3)(i)-(iii), field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters, including permitting and enforcement actions." *Id.*

- "In accord with the analysis in SWANCC, waters that fall within the definition of traditional navigable waters remain jurisdictional under the CWA. Thus, isolated, intrastate waters that are capable of supporting navigation by watercraft remain subject to CWA jurisdiction after SWANCC if they are traditional navigable waters, i.e., if they meet any of the tests for being navigable-in-fact." *Id.*

- "Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands). Field staff should make jurisdictional and permitting decisions on a case-by-case basis considering this guidance, applicable regulations, and any additional relevant court decisions. Where questions remain, the regulated community should seek assistance from the agencies on questions of jurisdiction."

- "CWA jurisdiction also extends to wetlands that are adjacent to traditional navigable waters. The Supreme Court did not disturb its earlier holding in Riverside when it rendered its decision in *SWANCC*. *Riverside* dealt with a wetland adjacent to Black Creek, a traditional navigable water. 474 U.S. 121

(1985); see also *SWANCC*, 531 U.S. at 167 ('[i]n *Riverside*, we held that the Corps had section 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway'). The Court in *Riverside* found that 'Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with'' jurisdictional waters. 474 U.S. at 134. Thus, wetlands adjacent to traditional navigable waters clearly remain jurisdictional after *SWANCC*. The Corps and EPA currently define 'adjacent' as '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.'' 33 CFR § 328.3(b); 40 CFR § 230.3(b). The Supreme Court has not itself defined the term 'adjacent,' nor stated whether the basis for adjacency is geographic proximity or hydrology." 68 Fed. Reg. at 1997.

– "The reasoning in *Riverside*, as followed by a number of post-*SWANCC* courts, supports jurisdiction over wetlands adjacent to non-navigable waters that are tributaries to navigable waters. Since *SWANCC*, some courts have expressed the view that *SWANCC* raised questions about adjacency jurisdiction, so that wetlands are jurisdictional only if they are adjacent to navigable waters." 68 Fed. Reg. at 1997.

Definition of Waters of the United States, 33 CFR § 328.3 (Aug. 25, 1995); See also Definitions, 40 C.F.R. § 230.2 (Aug. 25, 1993)

(a) The term waters of the United States means

. . .

(2) All interstate waters including interstate wetlands;

. . .

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

. . .

(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.

Regulatory Guidance Letter 90-7: Clarification of the Phrase "Normal Circumstances as it Pertains to Cropped Wetlands (Sept. 26, 1990)

U.S. Army Corps of Engineers, Regulatory Guidance Letter 90-7: Clarification of the Phrase "Normal Circumstances" as It Pertains to Cropped Wetlands (Sept. 26, 1990) http://www.nap.usace.army.mil/Portals/39/docs/regulatory/rgls/rgl90-07.pdf

- "Since 1977, the Corps and the Environmental Protection Agency (EPA) have defined wetlands as: 'areas that are inundated or saturated by surface or groundwater 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...' (33 CFR 328.3(b)) (emphasis added)." at 1.

- "When the Corps adopted the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (Manual) on 10 January 1989, the Corps chose to define 'normal circumstances' in a manner consistent with the definition used by the Soil Conservation Service (SCS) in its administration of the Swamp-buster provisions of the Food Security Act of 1985 (FSA). Both the SCS and the Manual interpret 'normal circumstances' as the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed [7 CFR 12.31(b)(2)(i)] [Manual page 71]." at 1.

- "The primary consideration in determining whether a disturbed area qualifies as a section 404 wetland under "normal circumstances" involves an evaluation of the extent and relative permanence of the physical alteration of wetlands hydrology and hydro-phytic vegetation. In addition, consideration is given to the purpose and cause of the physical alterations to hydrology and vegetation." at 1.

Final Rule, Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122 (July 19, 1977)

- Revises 40 Fed. Reg. 31320. Navigable waters include "Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands; Interstate waters and their tributaries, including adjacent wetlands." 42 Fed. Reg. at 37127.

- Regarding wetlands: "The regulation of activities that cause water pollution cannot rely on these artificial lines, however, but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system. For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system." 42 Fed. Reg. at 37128.

– "We have also responded to the concerns raised over the absence of any definition of the terms 'adjacent' or 'contiguous' as those terms relate to the location of wetlands. Since 'contiguous' is only a subpart of the term 'adjacent,' we have eliminated the term 'contiguous.' At the same time, we have defined the term 'adjacent' to mean 'bordering, contiguous, or neighboring." The term would include wetlands that directly connect to other waters of the United States, or that are in reasonable proximity to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, and similar obstructions." 42 Fed. Reg. at 37129.

Interim Final Rule, Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320 (July 25, 1975)

- Navigable waters includes "(b) All coastal wetlands, mudflats, swamps, and similar areas that are contiguous or adjacent to other navigable waters. "Coastal wetlands" includes marshes and shallows and means those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction; . . . (h) Freshwater wetlands including marshes, shallows, swamps and, similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation. "Freshwater wetlands" means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." 40 Fed. Reg. at 31324-25.

27. Other Waters/Interstate Commerce

Memorandum to Decline Jurisdiction for LRC-2009-00053 (Aug. 14, 2009)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Decline Jurisdiction for LRC-2009-00053(Aug. 14, 2009), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/LRC-2009-00053.pdf

- Declines jurisdiction for two intrastate, isolated, non-navigable waters for which the sole prospective basis for asserting jurisdiction was the actual or potential use of this area for interstate commerce.

Memorandum to Decline Jurisdiction for NWP-2007-369 (Nov. 15, 2007)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Decline Jurisdiction for NWP-2007-369 (Nov. 15, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/IW_Memo_NWK-2007-369.pdf

- Declines jurisdiction for an intrastate, isolated, non-navigable lake for which the sole prospective basis for asserting jurisdiction was the actual or potential use of this area for interstate commerce.

GAO, Waters and Wetlands (Sept. 2005)
U.S. Gov't Accountability Office, Waters and Wetlands: Corps of Engineers Needs to Better Support Its Decisions for Not Asserting Jurisdiction (Sept. 2005), http://www.gao.gov/assets/250/247705.pdf

– "Since January 2003, EPA and the Corps have required field staff to obtain headquarters approval to assert jurisdiction over waters based solely on links to interstate commerce. Only eight cases have been submitted, and none of these cases have resulted in a decision to assert jurisdiction." Executive Summary.

– "Subsequent to the *SWANCC* ruling, the Corps is generally not asserting jurisdiction over isolated, intrastate, non-navigable waters using its remaining authority in [the regulations]." at 5.

ANPRM on CWA Regulatory Definition of Waters of the United States, 68 Fed. Reg. 1991 (Jan. 15, 2003)

– "In regulatory preambles, both the Corps and EPA provided examples of additional types of links to interstate commerce which might serve as a basis under 40 CFR 230.3(a)(3) and 33 CFR 328.3(a)(3) for establishing CWA jurisdiction over intrastate waters which were not part of the tributary system or their adjacent wetlands. These included use of waters (1) as habitat by birds protected by Migratory Bird Treaties or which cross State lines, (2) as habitat for endangered species, or (3) to irrigate crops sold in commerce. 51 FR 41217 (November 13, 1986), 53 FR 20765 (June 6, 1988). These examples became known as the 'Migratory Bird Rule,' even though the examples were neither a rule nor entirely about birds. The Migratory Bird Rule later became the focus of the *SWANCC* case." 68 Fed. Reg. at 1994.

– "*SWANCC* squarely eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations. 531 U.S. at 174 ('We hold that 33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 FR 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA.'). The EPA and the Corps are now precluded from asserting CWA jurisdiction in such situations, including over waters such as isolated, non-navigable, intrastate vernal pools, playa lakes and pocosins. *SWANCC* also calls into question whether CWA jurisdiction over isolated, intrastate, non-navigable waters could now be predicated on the other factors listed in the Migratory Bird Rule, 51 FR 41217 (i.e., use of the water as habitat for birds protected by Migratory Bird Treaties; use of the water as habitat

for Federally protected endangered or threatened species; or use of the water to irrigate crops sold in interstate commerce)." 68 Fed. Reg. at 1996.

– "In view of *SWANCC*, neither agency will assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the 'Migratory Bird Rule.' In addition, in view of the uncertainties after *SWANCC* concerning jurisdiction over isolated waters that are both intrastate and non-navigable based on other grounds listed in 33 CFR § 328.3(a)(3)(i)-(iii), field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters, including permitting and enforcement actions." 68 Fed. Reg. at 1996.

Guiding Principles for Constructed Treatment Wetlands (Oct. 2000)
U.S. Envtl. Prot. Agency, Guiding Principles for Constructed Treatment Wetlands (Oct. 2000), http://water.epa.gov/type/wetlands/constructed/upload/guiding-principles.pdf

- If your constructed treatment wetland is constructed in uplands and is designed to meet the requirements of the CWA, then it generally will not be considered a water of the U.S. under the waste treatment system exclusion to the definition of waters of the U.S. If the constructed treatment wetland is abandoned or is no longer being used as a treatment system, it may revert to (or become) a water of the U.S. if it otherwise meets the definition of waters of the U.S. This definition is met if the system has wetland characteristics (hydrology, soils, vegetation) *and* it is (1) an interstate wetland,(2) is adjacent to another water of the U.S.(other than waters which are themselves wetlands),or (3) if it is an isolated intrastate water which has a connection to interstate commerce (for example, it is used by interstate or foreign travelers for recreation or other purposes). At 16.

- "All waters that are currently used or were used in the past, or may be susceptible to use in interstate commerce, including: all waters that are subject to ebb and flow of the tide; all interstate waters including interstate wetlands; 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 would or could affect interstate or foreign commerce; all impoundments of waters otherwise defined as waters of the U.S. under this definition; tributaries of waters defined above; the territorial sea; and wetlands adjacent to waters (other than waters that are themselves wetlands) identified above. Courts have found that this includes such waters as isolated, intrastate waters which are used by migratory birds or which attract interstate travelers or from which fish or animals are or could be harvested and sold in interstate commerce. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA, are excluded from waters of the U.S. If such treatment systems are abandoned and otherwise meet the definition of waters of the U.S., they become or revert to regulated waters of the U.S." at 27 (citing 33 CFR § 328.3(a)(1-7).

CWA Jurisdiction Over Isolated Waters in light of United States v. Wilson (May 29, 1998)

U.S. Envtl. Prot. Agency and U.S. Army Corps of Eng'rs, Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *United States v. James J. Wilson* (May 29, 1998), http://nepis.epa.gov/Exe/ZyNET.exe/2000E9FO.TXT?ZyActionD=ZyDocument&Client=EPA&Index=1995+Thru+1999&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C95thru99%5CTxt%5C00000012%5C2000E9FO.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=p%7Cf&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL#

- "The Corps of Engineers regulation at 33 CFR Part 328.3(a)(2) is intended to interpret, explain, and implement the CWA's statutory mandate to assert jurisdiction over all 'waters of the United States' subject to Federal constitutional authority. These regulations provide an interpretive definition of the term 'waters of the United States' (i.e., those aquatic areas subject to Federal CWA jurisdiction), as follows: . . . (3) The next paragraph, (a)(3), further defines 'waters of the United States' to include all water bodies (including all wetlands) that are intrastate and isolated (i.e., that do not eventually drain or flow into traditional navigable waters or interstate waters), but which still have connections with interstate or foreign commerce, and are subject to Federal jurisdiction under the Commerce clause." at 3-4.

- "It must be emphasized that 33 CFR 328.3(a)(3) applies only to, and should be cited only regarding, CWA jurisdiction over truly isolated water bodies (i.e., intrastate lakes, streams, prairie potholes, etc.) that have no connection with any tributary system that flows into traditional navigable waters or interstate waters. For any water body, including any wetland, that is part of, or flows into, or is a wetland adjacent to, a tributary system of traditional navigable waters or interstate waters, one should not cite 33 CFR 328.3(a)(3), but instead cite the relevant subsections of33 CFR 328.3(a), such as subsection (a)(l) (covering traditional navigable waters); (a)(2) (covering interstate waters); (a)(5) (covering tributaries to navigable or interstate waters); and/or (a)(7) (covering adjacent wetlands)." at 4.

Definition of Waters of the United States, 33 CFR § 328.3 (Aug. 25, 1995); See also Definitions, 40 C.F.R. § 230.2 (Aug. 25, 1993)

(a) The term waters of the United States means
. . .

(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

Migratory Bird Rule, 51 Fed. Reg. 41217 (Nov. 13, 1986)

- "EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:
  - a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
  - b. Which are or would be used as habitat by other migratory birds which cross state lines; or
  - c. Which are or would be used as habitat for endangered species; or
  - d. Used to irrigate crops sold in interstate commerce."

CWA Jurisdiction Over Isolated Waters, 1985 WL 195307 (Sept. 12, 1985)
U.S. Envtl. Prot. Agency, Office of General Counsel, CWA Jurisdiction Over Isolated Waters, 1985 WL 195307 (Sept. 12, 1985)

- "The jurisdiction of the Clean Water Act extends to 'waters of the United States.' EPA's regulations define waters of the United States to include, inter alia:

  (c) 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 would affect or could affect interstate or foreign commerce including any such waters:
  - (1) Which are or could be used by foreign or interstate travelers for recreation or other purposes;
  - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (3) Which are used or could be used for industrial purposes by industries in interstate commerce." at *1.

- "The specific definition of waters of the United States in EPA's regulations has evolved over the years, and it is not necessary to trace here its entire history since passage of the Act in 1972. However, it is relevant to note that in 1979 the agency changed the prior definition, which simply referred to waters used by, inter alia,

industry in interstate commerce, to add the phrase 'waters the use, degradation, or destruction of which would affect or could affect' commerce." at *1.

– "As explained in the preamble, this language was intended to broaden the definition of waters of the United States based on the susceptibility of a stream of use by industries in interstate commerce (44 Fed. Reg. 32854, June 7, 1979). [T]he regulations now focus, not on the nature of the stream's users, but on the characteristics of the stream itself, and it will no longer be necessary to show actual industrial use for a stream to fall within the definition. It is now generally accepted that migratory birds and endangered species may be regulated under the Commerce Clause, and that this regulation extends to protection of habitat. The impact on commerce of the destruction of any one isolated wetland need not itself be significant; Congress has the authority to regulate activities which cumulatively could have a significant effect even if a particular individual activity would not." at *1-2 (internal citations omitted).

Final Rule, Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122 (July 19, 1977)

- "All other waters of the United States not identified in Categories 1-3, such as isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce. . . . Waters that fall within categories 1, 2, and 3 are obvious candidates for inclusion as waters to be protected under the Federal government's broad powers to regulate interstate commerce. Other waters are also used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce even though they are not interstate waters or part of a tributary system to navigable waters of the United States, The condition or quality of water in these other bodies of water will have an effect on interstate commerce. The 1975 definition identified certain of these waters. These included waters used: (1) By interstate travelers for water-related recreational purposes; (2) For the removal of fish that are sold in interstate commerce; (3) For industrial purposes try industries in interstate commerce; and (4) In the production of agricultural commodities sold or transported in interstate commerce." 42 Fed. Reg. at 37127-28.

Interim Final Rule, Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320 (July 25, 1975)

– Navigable waters includes "(g) Intrastate lakes, rivers and streams landward to their ordinary high water mark and up to their headwaters that are utilized:
  - (1) By interstate travelers for water related recreational purposes;
  - (2) For the removal of fish that are sold in interstate commerce;
  - (3) For industrial purposes by industries in interstate commerce; or

- (4) In the production of agricultural commodities sold or transported in interstate commerce." 40 Fed. Reg. at 31324-25.

28. Other Waters/Significant Nexus

Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction), (April 27, 2011) . U.S. Envtl. Prot. Agency
http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa_guidance_impacts_benefits.pdf

- **"**Since SWANCC, no isolated waters have been declared jurisdictional by a federal agency. In June 2006, a split Supreme Court vacated and remanded judgments of the Sixth Circuit Court of Appeals in *Rapanos v. United States*. The pivotal opinions are those by the plurality (indicating that jurisdictional waters include "relatively permanent waters" and wetlands with a continuous surface connection to such waters) and by Justice Kennedy (indicating that waters are jurisdictional where they have a "significant nexus" to a traditional navigable water). The government position since *Rapanos* has been that a water is jurisdictional under the CWA when it meets either the plurality or Kennedy standard."

- **"**The effect of the *SWANCC* decision is primarily on so-called "isolated" waters. These waters include vernal pools, prairie potholes and playa lakes—waters that lie entirely within a single state and lack a direct, surface water connection to the river network. The effect of the *Rapanos* decision has been primarily on some small streams, rivers that flow for part of the year, and nearby wetlands."

"Current practice may be under-representing Clean Water Act jurisdiction."

Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States December 2, 2008, U.S. Envtl. Prot. Agency and ACOE
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf

- The agencies will assert jurisdiction over the following waters:
    - Traditional navigable waters
    - Wetlands adjacent to traditional navigable waters
    - Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year round or have continuous flow at least seasonally (three months)
    - Wetlands that directly abut such tributaries

- The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:
    - Non-navigable tributaries that are not relatively permanent
    - Wetlands adjacent to Non-navigable tributaries that are not relatively permanent
    - Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

- The agencies generally will not assert jurisdiction over the following features:
    - Swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow)
    - Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

- The agencies will apply the significant nexus standard as follows:
    - A significant nexus analyses will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
    - Significant nexus includes consideration of hydrologic and ecologic factors.

Memorandum for JD SWG-2007-1769 (June 13, 2008)
U.S. Envtl. Prot. Agency, Memorandum for JD SWG-2007-1769 (June 13, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/epa_swg_2007-1769.pdf

– Asserts jurisdiction over wetlands that are adjacent to jurisdictional waters and have a significant nexus to downstream TNWs.

– The wetlands either abut Labitt Creek, a RPW, or are "separated from the channel to Labitt Creek by a micro ridge or berm or have a direct hydrologic connection to Labitt Creek." at 3.

– "[T]he channel to Labitt Creek and the adjacent NWI wetlands have a significant nexus to the downstream TNWs less than seven stream miles away. These wetlands are a high quality bottomland hardwood forested wetland system that was targeted by The Conservation Fund and the TRNWR for protection. These wetlands naturally retain and filter precipitation and runoff from surrounding lands, protecting the physical, chemical and biological integrity of downstream TNWs. Labitt Creek and the surrounding wetlands also support quality habitat for aquatic and semi-aquatic life." at 3.

Memorandum to Decline Jurisdiction for NWP-2007-617 (Feb. 7, 2008)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Decline Jurisdiction for NWP-2007-617 (Feb. 7, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/NWP-2007-617jm.pdf

- Declines jurisdiction for isolated wetland that is not adjacent to a water of the U.S or otherwise supports links to interstate commerce.

- "If it is determined that a wetland is not adjacent to a jurisdictional water, it then becomes necessary to determine whether there is a potential link to interstate commerce under 33 CFR 328.3(a)(3). Based upon the information in the project file, the wetland does not appear to support links to interstate commerce. Due to the location of the wetland and the nature of its low biological value, the wetland is not likely to support fish or wildlife species which in tum might provide for eco-based tourism. Furthermore, the wetland does not currently support agricultural or other uses in interstate commerce. It is not likely that the wetland could be used for any interstate commerce purposes." at 3.

Memorandum to Re-Evaluate Jurisdiction for NWS-2007-1706 (Feb. 5, 2008)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Re-Evaluate Jurisdiction for NWS-2007-1706 (Feb. 5, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/nws2007-1706_Adjacency_TNW.pdf

- Requires re-evaluation for significant nexus analysis based on the determination that wetlands are adjacent to a RPW and that Whatcom Creek Estuary is the closest TNW.

- "A combination of the factors above, including close proximity, position in the landscape, and indicators of a shallow subsurface connection, demonstrate that wetland C is adjacent (as defined by 33 CFR 328.3(c)) to Lincoln Creek" a RPW. at 3.

Memorandum to Assert Jurisdiction for NWP-2007-945 (Jan. 23, 2008)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Assert Jurisdiction for NWP-2007-945 (Jan. 23, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/NWP-2007-945.pdf

- Asserts jurisdiction over two ditches and their abutting wetlands because "the ditches are relatively permanent waters (RPWs), and that the subject wetlands have a continuous surface connection with the ditches. The agencies have also determined that the Ochoco Reservoir is the closes traditional navigable water (TNW) for this JD." at 1.

– "The agencies are returning the JD to the district to re-evaluate whether a third wetland on the site, wetland C, is jurisdictional based upon a significant nexus evaluation in relation to the Ochoco Reservoir, the nearest TNW. Wetland C is separated from a lateral of ditch 1 by a berm. In the re-evaluation, to identify the relevant reach the district will need to determine if the source of flow for the later is from the irrigation ditch network (originating from Marks Creek) or solely from an offsite source providing independent flow to the lateral. If it is only from the network via Marks Creek, the significant nexus evaluation should consider the flow and functions of Marks Creek and the ditch network, along with the functions performed by any other wetlands adjacent to Marks Creek and the ditch network. If the lateral supports independent or combined flow, the significant nexus evaluation should consider the flow and function of the entire reach of the non-RPW lateral, along with the functions performed by any other wetlands adjacent to that lateral reach, to determine whether collectively they have a significant nexus to the Ochoco Reservoir." at 4-5.

Memorandum for MVP-2007-3980-CKK (Nov. 30, 2007)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum for MVP-2007-3980-CKK (Nov. 30, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/Kennedy_N_RPW_MVP-2007-3980-CKK.pdf

- Remands for determination post-*Rapanos* after draft determination that they were isolated waters because "the subject wetlands have a hydrologic connection (even if non-relatively permanent) to downstream waters of the United States. The documents submitted by the St. Paul District indicate that the wetlands are hydrologically connected through a series of linked non-relatively permanent 'ditches' to the Wisconsin River, which is a Traditionally Navigable Water (TNW)." at 1.

Memorandum to Assert Jurisdiction for NWS-2007-749-CRS (Oct. 2, 2007)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Assert Jurisdiction for NWS-2007-749-CRS (Oct. 2, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/Kennedy_N_RPW_NWS-2007-749-CRS.pdf

– Asserts jurisdiction over three wetlands adjacent to a non-relatively permanent water (RPW), a ditch which flows into a second ditch which leads to an unnamed tributary, based on the "significant nexus between the wetlands and the East Fork Lewis River, a traditional navigable water (TNW)." at 1.

– "Evaluation of the non-RPW and adjacent wetlands A, B, and C in the review area demonstrate the wetlands have a significant nexus to a TNW. One of the site's wetlands (Wetland A) has a direct surface hydrologic connection to the non-RPW. The other two wetlands (Wetlands Band C) are approximately 100 and 300 feet away from the nonRPW, but are considered adjacent to the non-RPW. In a

separate JD for Wetland A, the Corps concluded that Wetland A has a significant nexus to the downstream TNW. In making this determination, the Corps considered the flow and functions of the tributary, together with the functions performed by Wetlands B and C." at 2.

- "The significant nexus evaluation demonstrates that the non-RPW and its adjacent wetlands impact the physical, chemical, and biological integrity of a downstream TNW. The non-RPW and its adjacent wetlands filter sediments, provide stormwater attenuation functions, maintain stream temperatures, and provide food chain support for anadromous fish populations and other aquatic species that use the East Fork Lewis River and its tributaries." at 2.

Memorandum to Assert Jurisdiction for NWS-2007-435-NO (Aug. 29, 2007)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Assert Jurisdiction for NWS-2007-435-NO (Aug. 29, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/Kennedy_N_RPW_NWS-2007-435-NO.pdf

- Asserts jurisdiction over four wetlands adjacent to a non-relatively permanent water (RPM) because of "significant nexus evaluation of wetlands to Ebey Slough, a traditional navigable water." at 1.

- A significant nexus exists because "[t]wo of the site's wetlands . . . have a direct surface hydrologic connection to the non-RPW" and "[t]he other two wetlands . . . are separated from the non-RPW by a berm, but are considered adjacent to the non-RPW." at 2.

- "The agencies will consider the flow and functions of the tributary together with the functions performed by *all* wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with TNWs." at 2.

- The significant nexus evaluation demonstrates that the non-RPW and its adjacent wetlands impact the physical, chemical, and biological integrity of a downstream TNW" in that they "a) provide detention and attenuation of runoff and floodwaters from the site and the adjoining road; b) conveys and filters sediments and other pollutants from the surrounding agricultural fields and roads to the TNW; c) provide baseflow to the TNW during the drier months of the year; d) support the food chain of the TNW through the creation and transfer of organic carbon and nutrients; e) provide feeding, staging and resting habitat for waterbirds that also utilized Quilceda Creek, Ebey Slough and Puget Sound." at 2.

CWA Jurisdiction Following *Rapanos* (June 5, 2007)
U.S. Envtl. Prot. Agency, Memorandum on Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in *Rapanos v. United States* & *Carabell v. United States* (June 5, 2007),

http://water.epa.gov/lawsregs/guidance/wetlands/upload/2007_6_5_wetlands_RapanosGuidance6507.pdf

- "A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters." at 7.

- "Significant nexus includes consideration of hydrologic factors including the following:
  - volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary
  - proximity to the traditional navigable water
  - size of the watershed
  - average annual rainfall
  - average annual winter snow pack

- Significant nexus also includes consideration of ecologic factors including the following:
  - potential of tributaries to carry pollutants and flood waters to traditional navigable waters
  - provision of aquatic habitat that supports a traditional navigable water
  - potential of wetlands to trap and filter pollutants or store flood waters
  - maintenance of water quality in traditional navigable waters." at 7.

- "The agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent, (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e. a., separated from it by uplands, a berm, dike or similar feature)." at 7.

Guidance Highlights for *Rapanos* (June 5, 2007)
U.S. Army Corps of Engineers, Guidance Highlights for *Rapanos* and *Carabell* Decision (June 5, 2007),
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/guidhigh_06-05-07.pdf

- "Under the Supreme Court decision jurisdiction can be asserted over a water, including wetlands, that is not a TNW by meeting either of the following two standards:

  - The first standard, based on the plurality opinion in the decision, recognizes regulatory jurisdiction over a water body that is not a TNW if

that water body is 'relatively permanent' (i.e., it flows year-round, or at least 'seasonally,' and over wetlands adjacent to such water bodies if the wetlands 'directly abut' the water body (i.e., if the wetlands are not separated from the water body by an upland feature such as a berm, dike, or road). As a matter of policy, field staff will include, in the record, any available information that documents the existence of a significant nexus between a relatively permanent water body that is not perennial and a TNW.

- The second standard, for tributaries that are not relatively permanent, is based on the concurring opinion of Justice Anthony P. Kennedy, and requires a case-by-case 'significant nexus' analysis to determine whether waters and their adjacent wetlands are jurisdictional. A 'significant nexus' may be found where waters, including adjacent wetlands, affect the chemical, physical or biological integrity of TNWs. Factors to be considered in the 'significant nexus' evaluation include:

– The flow characteristics and functions of the tributary itself in combination with the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of TNWs." at 1-2.

Q&A for *Rapanos* (June 5, 2007)
U.S. Army Corps of Engineers, Questions and Answers for *Rapanos* and *Carabell* Decision (June 5, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_qa_06-05-07.pdf

– "CWA jurisdiction over an ephemeral water body, and its adjacent wetlands, if any, will be assessed using the significant nexus standard. An ephemeral water body is jurisdictional under the CWA if the agencies can demonstrate that the ephemeral water body, in combination with its adjacent wetlands, if any, will have a significant effect (more than speculative or insubstantial) on the chemical, physical, and biological integrity of a traditional navigable water." at 8.

– "The agencies will first determine if there are physical indicators of flow, which may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks. Other physical indicators of flow may include such characteristics as shelving, wracking, water staining, sediment sorting, and scour. The agencies will next determine whether or not a hydrologic connection to a traditional navigable water exists. The agencies will then conduct an assessment of the aquatic functions performed by the tributary under consideration to establish whether that water body will have a significant affect (more than speculative or insubstantial) on the chemical, physical, and biological integrity of a traditional navigable water." at 9.

Jurisdictional Determination Form Instructional Guidebook (May 30, 2007)
U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook (May 30, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf

- "Isolated Waters (including Wetlands) are geographically isolated. Nothing herein should be interpreted as providing authority to assert jurisdiction over waters deemed nonjurisdictional by SWANCC. The following photos show isolated waters; these particular waters were determined to not be jurisdictional under the CWA because they lacked links to interstate commerce sufficient to serve as a basis for jurisdiction." at 32.

Joint Memorandum, 68 Fed. Reg. 1995 (Jan. 15, 2003)
Joint Memorandum, 68 Fed. Reg. 1995 (Jan. 15, 2003), http://water.epa.gov/lawsregs/guidance/wetlands/upload/2003_12_19_wetlands_Joint_Memo.pdf

- "*SWANCC* squarely eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations." at 2.

Geographically Isolated Wetlands (June 2002)
Ralph W. Tiner et al., U.S. Fish and Wildlife Service Report, Geographically Isolated Wetlands: A Preliminary Assessment of their Characteristics and Status in Selected Areas of the United States (June 2002), http://www.fws.gov/wetlands/Documents/Geographically-Isolated-Wetlands-A-Preliminary-Assessment-of-Their-Characteristics-and-Status-in-Selected-Areas-of-the-United-States-Fact-Sheet.pdf

- "Isolated wetlands were defined by landscape position as 'wetlands with no apparent surface water connection to perennial rivers and streams, estuaries, or the ocean.' These geographically isolated wetlands were surrounded by dry land. Streamside wetlands where the stream disappeared underground or entered an isolated (no outflow) lake or pond (as in karst topography) were also classified as isolated. Wetlands along intermittent streams connected to perennial streams were designated as non-isolated." at 1.

Interim Final Rule, Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320 (July 25, 1975)

- Navigable waters includes "(i) Those other waters which the District Engineer determines necessitate regulation for the protection of water quality as expressed in the guidelines (40 CFR 230). For example, in the case of intermittent rivers,

streams, tributaries, and perched wetlands-that are not contiguous or adjacent to navigable waters identified in paragraphs (a)-(h), a decision on jurisdiction shall be made by the District Engineer." 40 Fed. Reg. at 31324-25.

– ACOE stated that, "drainage and irrigation ditches have been excluded" from jurisdiction. "… we realize that some ecologically valuable water bodies or environmentally damaging practice have been omitted. To insure these waters are also protected, we have given the District Engineer discretionary authority to also regulate them on a case by case basis." 40 Fed. Reg. 31321

29. "Relatively Permanent Waters" and Adjacent Wetlands

CWA Jurisdiction Following *Rapanos* (Dec. 2, 2008)
U.S. Envtl. Prot. Agency, Memorandum on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2, 2008),
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf

- "'[R]elatively permanent' waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard described below. The agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding." at 7.

Ephemeral and Intermittent Streams Report (Nov. 2008)
U.S. Envtl. Prot. Agency, The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest (Nov. 2008), http://www.epa.gov/esd/land-sci/pdf/EPHEMERAL_STREAMS_REPORT_Final_508-Kepner.pdf

- Presents current knowledge of the ecology and hydrology of ephemeral and intermittent streams in the American Southwest, and may have important bearing on establishing nexus to traditional navigable waters and defining connectivity relative to the Clean Water Act

Memorandum to Assert Jurisdiction for NWP-2007-945 (Jan. 23, 2008)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Assert Jurisdiction for NWP-2007-945 (Jan. 23, 2008),
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/NWP-2007-945.pdf

– Asserts jurisdiction over two ditches and their abutting wetlands because "the ditches are relatively permanent waters (RPWs), and that the subject wetlands

have a continuous surface connection with the ditches. The agencies have also determined that the Ochoco Reservoir is the closest traditional navigable water (TNW) for this JD." at 1.

- "The agencies have determined that ditches 1 and 2 are RPWs because they have continuous seasonal flow" for two months a year, which is seasonal based on the particular patterns of precipitation in this region. "The *Rapanos Guidance* gave an example of waters that have a continuous flow at least seasonally as those waters that typically flow three months. Three months was provided as an example and the agencies have flexibility under the guidance to determine what seasonally means in a specific case." at 3-4.

- "The agencies are returning the JD to the district to re-evaluate whether a third wetland on the site, wetland C, is jurisdictional based upon a significant nexus evaluation in relation to the Ochoco Reservoir, the nearest TNW. Wetland C is separated from a lateral of ditch 1 by a berm. In the re-evaluation, to identify the relevant reach the district will need to determine if the source of flow for the latter is from the irrigation ditch network (originating from Marks Creek) or solely from an offsite source providing independent flow to the lateral. If it is only from the network via Marks Creek, the significant nexus evaluation should consider the flow and functions of Marks Creek and the ditch network, along with the functions performed by any other wetlands adjacent to Marks Creek and the ditch network. If the lateral supports independent or combined flow, the significant nexus evaluation should consider the flow and function of the entire reach of the non-RPW lateral, along with the functions performed by any other wetlands adjacent to that lateral reach, to determine whether collectively they have a significant nexus to the Ochoco Reservoir." at 4-5.

Memorandum to Assert Jurisdiction for POA-2006-1282-4 (Oct. 25, 2007)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Assert Jurisdiction for POA-2006-1282-4 (Oct. 25, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/RPW_POA-2006-1282-4.pdf

- Asserts jurisdiction over "a portion of the Palmer-Wasilla Highway drainage ditch and its abutting wetlands" because "the drainage ditch is a relatively permanent water (RPW), and that the subject wetlands physically abut it." at 1.

- "Wetland complexes generally are considered to be part of the same wetland system where there is a demonstrated connection via hydrology and/or other ecological factors. Furthermore, a wetland that is disconnected due to man-made dikes or barriers, natural river berms, and the like, remain part of the same wetland system." at 2.

Memorandum to Assert Jurisdiction for POA-2007-1072 (Sept. 7, 2007)
U.S. Envtl. Prot. Agency and U.S. Army Corps of Engineers, Memorandum to Assert Jurisdiction for POA-2007-1072 (Sept. 7, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/RPW_POA-2007-1072.pdf

- Asserts jurisdiction over East Fork Duck Creek, determined to be a relatively permanent water (RPW), and its abutting wetlands. at 1.

- East Fork Duck Creek is an RPW, "with continuous flow for most if not all months of the year" and "which flows into the Duck Creek estuary, a TNW." at 2.

- The abutting wetlands "are not isolated wetlands" and "are not separated from East Fork Duck Creek by uplands, a berm, a dike, or any other similar feature." at 2.

CWA Jurisdiction Following *Rapanos* (June 5, 2007)
U.S. Envtl. Prot. Agency, Memorandum on Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in *Rapanos v. United States* & *Carabell v. United States* (June 5, 2007), http://water.epa.gov/lawsregs/guidance/wetlands/upload/2007_6_5_wetlands_RapanosGuidance6507.pdf

- "[R]elatively permanent waters do not include tributaries 'whose flow is 'coming and going at intervals ... broken, fitful.' Therefore, 'relatively permanent' waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard described below. The agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding." at 6.

- "The agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent, (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e. a., separated from it by uplands, a berm, dike or similar feature)." at 7.

Q&A for *Rapanos* (June 5, 2007)
U.S. Army Corps of Engineers, Questions and Answers for *Rapanos* and *Carabell* Decision (June 5, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_qa_06-05-07.pdf

– "In the context of CWA jurisdiction post-*Rapanos*, a water body is 'relatively permanent' if its flow is year round or its flow is continuous at least 'seasonally,' (e.g., typically 3 months). Wetlands adjacent to a 'relatively permanent' tributary are also jurisdictional if those wetlands directly abut such a tributary." at 4.

– "If the tributary has adjacent wetlands, the significant nexus evaluation must assess the aquatic functions performed by the tributary itself and in combination with the aquatic functions performed by the tributary's adjacent wetland(s), as these functions relate to the chemical, physical, and biological integrity of a traditional navigable water." at 9.

Jurisdictional Determination Form Instructional Guidebook (May 30, 2007)
U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook (May 30, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf

– "Tributary is a natural, man-altered, or man-made water body. Examples include rivers, streams, and lakes that flow directly or indirectly into TNWs." at 8.

– "RPWs flow directly or indirectly into TNWs where the flow through the tributary (a natural, man-altered, or man-made water body) is year-round or continuous at least 'seasonally.'" at 21.

– "Wetlands directly abutting RPWs that flow directly or indirectly into TNWs. Note that a continuous surface connection does not require surface water to be continuously present between the wetland and the tributary." at 26.

– "Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are adjacent. Note that a continuous surface connection does not require surface water to be continuously present between the wetland and the tributary." at 28.

– "Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are adjacent." at 29.

30. Exemption (i): Waste Treatment Systems

Memorandum for POA-1992-574 & POA-1992-574-Z (Oct. 25, 2007) http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/WTS_POA-1992-574_POA-1992-574-Z.pdf

- "EPA and the Corps agree that the agencies' designation of a portion of waters of the U.S. as part of a waste treatment system does not itself alter CWA jurisdiction over any waters remaining upstream of such system. Both the Corps and EPA believe that all the waters upstream and downstream of the tailings dam that were jurisdictional prior to the authorized activity and that qualify as jurisdictional waters of the U.S, under the Rapanos guidance are still subject to CWA jurisdiction notwithstanding the construction of the tailings dam." at 1.

Memorandum from Diane Regas on CWA Regulation of Mine Tailings (May 17, 2004) http://www.epa.gov/aml/policy/akminingmemo.pdf.

– "Under the approach articulated in the 1992 memorandum from then EPA Assistant Administrator LaJuana Wilcher to the Region's Water Director Charles Findley regarding the A-J and Kensington proposals, issuance of a section 404 permit for the impoundment of waters for mine tailings would, under certain circumstances, create a waste treatment system that was excluded from the regulatory definition of 'waters of the United States.' In those circumstances, neither a section 404 permit nor a section 402 permit would be required to discharge tailings into the treatment system. A section 402 permit would be needed for any discharge of pollutants from the treatment system into waters of the United States. The 1992 memorandum provided that, as part of the analysis required under the section 404(b)(l) Guidelines, the physical impacts of the discharge of mine tailings into the system also would be considered." at 3.

– "Our current analysis of how the 2002 rulemaking applies to the permitting of discharges of mine tailings into impounded waters will help to ensure a more effective environmental review of any adverse impacts associated with these types of projects. The rulemaking did not, however, alter EPA's interpretation of the waste treatment exclusion contained in 40 C.F.R. §122.2. While the permitting framework described in this memorandum does not invoke the exclusion for the discharge of mine tailings to impounded waters, neither does it preclude its use for waste treatment systems or system components that meet the definition in 40 C.F.R. § 122.2." at 3.

Guiding Principles for Constructed Treatment Wetlands (Oct. 2000) http://www.epa.gov/aml/policy/akminingmemo.pdf.

- "Waters of the United States" or "waters of the U.S." are those waters regulated by the Clean Water Act (CWA) (see definition in Appendix I). By definition, waste treatment systems designed to meet the requirements of the Clean Water Act are not considered waters of the U.S.(40 CFR 122.2 9). If, however, your constructed treatment wetland is constructed in an existing water of the U.S., the area will remain a water of the U.S. unless an individual CWA Section 404 permit is issued that explicitly identifies it as an excluded waste treatment system designed to meet the requirements of the CWA." at 16.

Definition of Waters of the United States, 33 CFR § 328.3 (Aug. 25, 1995); See also Definitions, 40 C.F.R. § 230.2 (Aug. 25, 1993)

- 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.

31. Exemption (ii): Prior Converted Cropland

Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12818 (Mar. 9, 2000)

- "Farmed wetlands as defined under the Food Security Act are waters of the United States provided they meet the criteria at 33 CFR 328.3. In addition, those criteria further provide that prior converted croplands are not waters of the United States." 65 Fed. Reg. at 12823-24.

Definition of Waters of the United States, 33 CFR § 328.3 (Aug. 25, 1995); See also Definitions, 40 C.F.R. § 230.2 (Aug. 25, 1993)

- (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.

Final Rule, Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008 (Aug. 25, 1993)

– "The agencies proposed to add language in the definition of waters of the U.S. providing that the term does not include prior converted ('PC') cropland, as defined by the National Food Security Act Manual (NFSAM) published by the Soil Conservation Service (SCS). PC cropland is defined by SCS as areas that, prior to December 23, 1985, were drained or otherwise manipulated for the

purpose, or having the effect, of making production of a commodity crop possible. PC cropland is inundated for no more than 14 consecutive days during the growing season and excludes pothold or playa wetlands. EPA and the Corps stated in the preamble to the proposal that we were proposing to codify existing policy, as reflected in RGL 90-7, that PC cropland is not waters of the United States to help achieve consistency among various federal programs affecting wetlands." 58 Fed. Reg. at 45031.

- Includes additional text of 33 CFR § 328.2 added by final rule: "(a)(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." 58 Fed. Reg. at 45036.

- Includes additional text of 40 CFR § 110.1 added by final rule: Navigable waters 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." 58 Fed. Reg. at 45037.

Regulatory Guidance Letter 90-7: Clarification of the Phrase "Normal Circumstances as it Pertains to Cropped Wetlands (Sept. 26, 1990)
U.S. Army Corps of Engineers, Regulatory Guidance Letter 90-7: Clarification of the Phrase "Normal Circumstances" as It Pertains to Cropped Wetlands (Sept. 26, 1990) http://www.nap.usace.army.mil/Portals/39/docs/regulatory/rgls/rgl90-07.pdf

- "'Prior converted cropland' is defined by the SCS (Section 512.15 of the National Food Security Act Manual, August 1988) as wetlands which were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before 23 December 1985, to the extent that they no longer exhibit important wetland values. Specifically, prior converted cropland is inundated for no more than 14 consecutive days during the growing season. Prior converted cropland generally does not include pothole or playa wetlands. In addition, wetlands that are seasonally flooded or ponded for 15 or more consecutive days during the growing season are not considered prior converted cropland." at 2.

- "In contrast to 'farmed wetlands', 'prior converted croplands' generally have been subject to such extensive and relatively permanent physical hydrological modifications and alteration of hydro-phytic vegetation that the resultant cropland constitutes the 'normal circumstances' for purposes of section 404 jurisdiction. Consequently, the 'normal circumstances' of prior converted croplands generally do not support a 'prevalence of hydro-phytic vegetation' and as such are not subject to regulation under section 404. In addition, our experience and professional judgment lead us to conclude that because of the magnitude of hydrological alterations that have most often occurred on prior converted

cropland, such cropland meets, minimally if at all, the Manual's hydrology criteria." at 2.

– "If prior converted cropland is abandoned (512.17 National Food Security Act Manual as amended, June 1990) and wetland conditions return, then the area will be subject to regulation under section 404. An area will be considered abandoned if for five consecutive years there has been no cropping, management or maintenance activities related to agricultural production. In this case, positive indicators of all mandatory wetlands criteria, including hydrophytic vegetation, must be observed." at 2.

32. Exemption (iii): Upland Ditches

Jurisdictional Determination Form Instructional Guidebook (May 30, 2007)
U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook (May 30, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf

- "Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water generally are not jurisdictional under the CWA, because they are not tributaries or they do not have a significant nexus to TNWs. If a ditch has relatively permanent flow into waters of the U.S. or between two (or more) waters of the U.S., the ditch is jurisdictional under the CWA. Even when not themselves waters of the United States, ditches may still contribute to a surface hydrologic connection between an adjacent wetland and a TNW." at 36.

Migratory Bird Rule, 51 Fed. Reg. 41217 (Nov. 13, 1986)

– "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.'

(a) Non-tidal drainage and irrigation ditches excavated on dry land."

33. Exemption (iv): Ditches Not Contributing Flow to 1-4

Jurisdictional Determination Form Instructional Guidebook (May 30, 2007)
U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook (May 30, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf

- "Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water generally are not jurisdictional under the CWA, because they are not tributaries or they do not have a significant nexus to TNWs. If a ditch has relatively permanent flow into waters of the U.S. or between two (or more) waters of the U.S., the ditch is jurisdictional under the CWA. Even when not themselves waters of the United States, ditches may still contribute to a surface hydrologic connection between an adjacent wetland and a TNW." at 36.

Migratory Bird Rule, 51 Fed. Reg. 41217 (Nov. 13, 1986)

– "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.'

(a) Non-tidal drainage and irrigation ditches excavated on dry land."

Final Rule, Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122 (July 19, 1977)

- "We have adopted the suggestion of many commenters that we incorporate into our definition (and not in the Preamble as we did in 1975) the statement that nontidal drainage and irrigation ditches that feed into navigable waters will not be considered 'waters of the United States' under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA, including Sections 208 and 402 ." 42 Fed. Reg. at 37127.

34. Exemption (v.A): Artificial Irrigated Areas

Migratory Bird Rule, 51 Fed. Reg. 41217 (Nov. 13, 1986)

– "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.'

(b) Artificially irrigated areas which would revert to upland if the irrigation ceased."

35. Exemption (v.B): Artificial Lakes or Ponds Used for Certain Purposes

Migratory Bird Rule, 51 Fed. Reg. 41217 (Nov. 13, 1986)

– "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.'

(c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing."

36. Exemption (v.C): Artificial Reflecting or Swimming Pools

Migratory Bird Rule, 51 Fed. Reg. 41217 (Nov. 13, 1986)

– "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.'

(d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons."

37. Exemption (v.D): Ornamental Waters

Migratory Bird Rule, 51 Fed. Reg. 41217 (Nov. 13, 1986)

– "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.'

(d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons."

38. Exemption (v.E): Water From Construction Activity

Migratory Bird Rule, 51 Fed. Reg. 41217 (Nov. 13, 1986)

– "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.'

(e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a))."

39. Exemption (v.F): Groundwater

See discussion of significant nexus.

40. Exemption (v.G): Gullies and rills

Q&A for *Rapanos* (June 5, 2007)
U.S. Army Corps of Engineers, Questions and Answers for *Rapanos* and *Carabell* Decision (June 5, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_qa_06-05-07.pdf

– "Swales and erosional features (e.g., gullies, small washes characterized by low volume, infrequent, and short duration flow) are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. Likewise, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States, because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters." at 7.

– "Even when not jurisdictional waters subject to CWA § 404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e., "discernible, confined, and discrete conveyances"), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g., CWA §§ 311 and 402)." at 7.

Jurisdictional Determination Form Instructional Guidebook (May 30, 2007)
U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook (May 30, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf

– "Swales are generally shallow features in the landscape that may convey water across upland areas during and following storm events. Swales usually occur on nearly flat slopes and typically have grass or other low-lying vegetation throughout the swale. Swales are generally not waters of the U.S. because they are not tributaries or they do not have a significant nexus to TNWs. Even when not themselves waters of the United States, swales may still contribute to a surface hydrologic connection between an adjacent wetland and a TNW." at 38.

– "Erosional features, including gullies, are generally not waters of the U.S. because they are not tributaries or they do not have a significant nexus to TNWs." at 39.

41. General Interpretive Guidance

Final Rule, Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122 (July 19, 1977)

- "The legislative history of the term 'navigable waters' specified that it 'be given the broadest constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.' (H.R. Report No. 92-1465 at 44; A Legislative History of the FWPCA at p. 327), Article 1, Section 8 of the Constitution gives the Federal Government the authority 'to regulate commerce with foreign Nations and among the several states.' We have interpreted the guidance contained in this legislative history to be consistent with the Federal Government's broad constitutional power to regulate activities that affect interstate commerce as interpreted by the Supreme Court on several occasions." 42 Fed. Reg. at 37127.

- "In defining the jurisdiction of the FWPCA as the "waters of the United States," Congress, in the legislative history to the Act specified that the term "be given the broadest constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes." Footnote 2 at 37144.

- "… it is also recognized that the Federal government would have the right to regulate the waters of the United States identified in paragraph (a)(5) under this broad Congressional mandate to fulfill the objective of the Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"… Paragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal Government's Constitutional powers to regulate and protect interstate commerce, including those for which the

connection to interstate commerce may not be readily obvious or where the location and size of the waterbody generally may not require regulation through individual or general permits… Discharges into these… waters will be permitted by this regulation… unless the District Engineer develops information on a case-by-case basis…" Footnote 2 at 37144.

Interim Final Rule, Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320 (July 25, 1975)

- "With respect to the coastal regions of the country, Corps jurisdiction would extend to all coastal waters subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher high water mark on the Pacific Coast) and also to all wetlands, mudflats, swamps, and similar areas which are contiguous or adjacent to coastal waters. This would include wetlands periodically inundated by saline or brackish waters that are characterized by the presence of salt water vegetation capable of growth and reproduction, and also wetlands (including marshes, shallows, swamps and similar areas) that are periodically inundated by freshwater and normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction. In months to come, we intend to publish a list of fresh, brackish, and salt water vegetation that can be used as one of the indicators in determining the extent of Corps jurisdiction in these areas." 40 Fed. Reg. at 31320.

- "With respect to the inland areas of the country, Corps jurisdiction under Section 404 of the FWPCA would extend to all rivers, lakes, and streams that are navigable waters of the United States, to all tributaries (primary, secondary, tertiary, etc.) of navigable waters of the United States, and to all interstate waters. In addition, Corps jurisdiction would extend to those waters located entirely within one state that are utilized by interstate travelers for water related recreational purposes, or to remove fish for sale in interstate commerce, or for industrial purposes or the production of agricultural commodities sold or transported in interstate commerce. Corps jurisdiction over these water bodies would extend landward to their ordinary high water mark and up to their headwaters, as well as to all contiguous or adjacent wetlands to these waters which are periodically inundated by freshwater, brackish water, or salt water and are characterized by the prevalence of aquatic vegetation, as described in the preceding paragraph, that are capable of growth and reproduction. Manmade canals which are navigated by recreational or other craft are also included in this definition. Drainage and irrigation ditches have been excluded. We realize that some ecologically valuable water bodies or environmentally damaging practices may have been omitted. To insure that these waters are also protected, we have given the District Engineer discretionary authority to also regulate them on a case by case basis." 40 Fed. Reg. at 31320-21.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming; New Mexico Environment Department; and New Mexico State Engineer,

Plaintiffs,

vs.

U.S. Environmental Protection Agency, Regina McCarthy in her official capacity as Administrator of the U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, Jo Ellen Darcy in her official capacity as Assistant Secretary of the Army (Civil Works),

Defendants.

Civil No. 3:15-cv-59

MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. SUMMARY OF DECISION

Original jurisdiction is vested in this court and not the court of appeals because the "Clean Water Rule: Definition of Waters of the United States," jointly promulgated by the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, has at best only an attenuated connection to any permitting process. If the exceptionally expansive view advocated by the government is adopted, it would encompass virtually all EPA actions under the Clean Water Act, something precisely contrary to Section 1369(b)(1)(F)'s grant of jurisdiction.

The court finds that under either standard – "substantial likelihood of success on the

merits" or "fair chance of success" – the States are likely to succeed on their claim because (1) it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule at issue, and (2) it appears likely the EPA failed to comply with APA requirements when promulgating the Rule. Additionally, the court finds the other factors relevant to the inquiry weigh in favor of an injunction.

II. PROCEDURAL BACKGROUND

On April 21, 2014, the United States Army Corps of Engineers and the Environmental Protection Agency ("EPA") (collectively "the Agencies") issued a proposed rule to change the definition of "Waters of the United States" under the Clean Water Act. Following a period for comment, the Agencies promulgated a final rule ("the Rule") on June 29, 2015, which defines waters of the United States. The Rule has an effective date of August 28, 2015.

On June 29, 2015, twelve States[1] and the New Mexico Environment Department and the New Mexico State Engineer (collectively "the States") filed a complaint against the Agencies, the EPA Administrator in her official capacity, and the Assistant Secretary of the Army (Civil Works) in her official capacity.[2] On August 10, 2015, the States filed a motion for a preliminary injunction.[3] A hearing was held on the motion on August 21, 2015. The court, having considered the entire record as now developed including evidence presented at the hearing and the arguments of counsel, issues this memorandum opinion and order.

[1] States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming.

[2] Doc. #1.

[3] Doc. #32.

III. ANALYSIS

1. Jurisdiction

Title 33, of the United States Code, § 1369(b)(1)[4] defines the circumstances under which the United States Courts of Appeals have exclusive jurisdiction over an action of the EPA Administrator. Implicated here are the provisions of subsections (b)(1)(E) and (b)(1)(F) of § 1369. Section 1369(b)(1)(E) posits jurisdiction in the courts of appeals where the Administrator has approved or promulgated "any effluent limitation or other limitation under section 301, 302, 306, or 405, [33 USCS § 1311, 1312, 1316, or 1345]". "Effluent limitations" are defined by the act as "any restriction established by a state or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters."[5]

The Rule itself imposes no "effluent limitation." It merely redefines what constitutes "waters of the United States."[6] This is made plain by the specific language of the Rule itself, as it unequivocally states that it "imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments."[7]

The Agencies' claim that the Rule is an "other" limitation is equally unavailing. "[A]n agency action is [an 'other] limitation' within the meaning of section 509(b)(1)(E) if entities

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[4] Alternately known as, and commonly referred to as, § 509(b)(1) of The Federal Water Pollution Control Act.

[5] 33 U.S.C. § 1362(11).

[6] 80 Fed. Reg. 37054.

[7] 80 Fed. Reg. 37102.

subject to the CWA's permit requirements face new restrictions on their discretion with respect to discharges or discharge-related processes."[8] The Eighth Circuit Court of Appeals has noted that this phrase"leaves much to the imagination."[9] The Fourth Circuit Court of Appeals has defined an "other limitation" as "a restriction on the untrammeled discretion of the industry . . .[as it existed prior to the passage of the [CWA]."[10]

The Rule here imposes no "other limitation" upon the Plaintiff States. At the hearing, the EPA argued that the Rule places no new burden or requirements on the States, a position supported by the language of the Rule itself at 80 F.R. 37102. The contention is that the States have exactly the same discretion to dispose of pollutants into the waters of the United States after the Rule as before. Rather, the Rule merely changes what constitutes waters of the United States.

Section 1369(b)(1)(F) grants the courts of appeals jurisdiction in cases involving the "issuing or denying [of] any permit under section 1342 of this title." In Iowa League of Cities, the Eighth Circuit noted, that the Supreme Court, in Crown Simpson Pulp Co. v. Costle,[11] "interpreted broadly the direct appellate review provision" of § 1369(b)(1)(F).[12] In Crown Simpson, the Supreme Court interpreted Subsection F "to extend jurisdiction to those actions that have 'the precise effect' of an action to issue or deny a permit."[13] The

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[8] Iowa League of Cities v. E.P.A., 711 F.3d 844, 866 (8th Cir. 2013).

[9] Id.

[10] Va. Elec. & Power Co. (VEPCO) v. Costle, 566 F.2d 446, 450 (4th Cir. 1977).

[11] 445 U.S. 193, 196.

[12] 711 F.3d at 862.

[13] Friends of the Everglades v. U.S. E.P.A., 699 F.3d 1280, 1287 (11th Cir. 2012) (citing Crown Simpson Pulp Co. v. Costle, 445 U.S. 193, 196 (1980)).

precise holding in Crown Simpson is that original jurisdiction rests in the courts of appeal "when the action of the Administrator is functionally similar to the denial or issuance of a permit."[14]

The case at bar is much like that in Friends of the Everglades. The Rule "neither issues nor denies a permit"[15] Indeed, the Rule has at best an attenuated connection to any permitting process. It simply defines what waters are within the purview of the "waters of the United States."[16] This does not in itself implicate § 1369(b)(1)(F) because it is simply not the functional equivalent or similar to an action of the administrator in denying or issuing a permit.[17]

If the exceptionally expansive view advocated by the government is adopted, it would encompass virtually all EPA actions under the Clean Water Act. It is difficult to imagine any action the EPA might take in the promulgation of a rule that is not either definitional or regulatory. This view of §1369(b)(1)(F)'s grant of jurisdiction would run precisely contrary to Congress' intent in drafting the court of appeals jurisdictional provision as recognized in the Supreme Court in National Cotton Council of America v. U.S. E.P.A..[18]

The relationship between issuing or denying a permit and the Rule at issue is tangential to issuance or denial of a permit–a classic red herring. Under these

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[14] Id. (citing Crown Simpson Pulp Co., 445 U.S. at 196).

[15] Friends of the Everglades, 699 F.3d at 1287.

[16] 80 Fed. Reg. 37104-05.

[17] See Friends of the Everglades, 699 F.3d at 1287 (citing Crown Simpson Pulp Co., 445 U.S. at 196).

[18] See National Cotton Council of America v. U.S. E.P.A., 553 F.3d 927, 933 (6th Cir. 2009) (quoting Lake Cumberland Trust, Inc. v. EPA, 954 F.2d 1218 (6th Cir. 1992) ("Congress did not intend court of appeals jurisdiction over all EPA actions taken pursuant to the Act.")).

circumstances, original jurisdiction lies in this court and not the court of appeals.

2. Preliminary Injunction Motion.

The court applies the well-known four-factor inquiry in determining whether or not a preliminary injunction should issue.[19] Commonly referred to as the Dataphase factors, the court weighs (1) the threat of irreparable harm to the movant; (2) the balance of harms; (3) the movant's likelihood of success on the merits; and (4) the public interest.[20]

A. Likelihood of Success on the Merits

The court initially considers likelihood of success on the merits because if the movant fails to establish a likelihood of success, the quest for a preliminary injunction fails and the discussion is ended.

When issuing injunctive relief, the court must determine whether the moving party's claim has a likelihood of success on the merits.[21] Two separate likelihood standards can be applied by a reviewing court. A "substantial likelihood of success on the merits" standard applies when the issue arises out of a statute or regulation made in the presumptively reasoned democratic process.[22] In cases that do not meet the "presumptively reasoned requirement" a "fair chance of success" standard articulated in Heartland Acad. Cmty. Church v. Waddle[23] is applied.

As presaged by the phrasing of the cases describing the applicability of the higher

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[19] McKinney ex rel. N.L.R.B. v. Southern Bakeries, 786 F.3d 1119, 1122 (8th Cir. 2015).

[20] Dataphase Systems, Inc. v. C.L. Systems, Inc., 640 F.2d 109, 112-13 (8th Cir. 1981).

[21] Id. at 113.

[22] Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 530 F.3d 724, 732 (8th Cir. 2008).

[23] 335 F.3d 684, 690 (8th Cir. 2003).

"substantial likelihood of success" test, there is a presumption that the implementation process of the Rule here is reasoned. The presumption can be overcome where the evidence establishes a fundamentally flawed process, demonstrating that the regulation is not the product of a reasoned democratic process.

1. *Use of Deliberative Memoranda*

Generally, courts should not consider "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" when reviewing agency rules.[24] The deliberative process exemption permits non-disclosure if "the document is both predecisional and deliberative."[25] The purpose of the deliberative process exemption is to avoid the harm that agency discussions are "chilled" by the disclosure and use of the agencies deliberative process memoranda and correspondence.[26] A document is predecisional if it "contains personal opinions and is designed to assist agency decision-makers in making their decision."[27] A document is deliberative if its disclosure or use would "expose the decision-making process in such a way that candid discussion within the agency would be discouraged, undermining the agency's ability to perform its functions."[28] Even so, a court may "inquir[e] into the mental processes of administrative decision-makers" if "it is 'the only way there can be effective judicial

[24] 5 U.S.C. § 552(b)(5).

[25] Missouri Coalition for Enviornment Foundation v. U.S. Army Corps of Engineers, 542 F.3d 1204, 1211 (8th Cir. 2008).

[26] Id. at 1210.

[27] Id. at 1211.

[28] Id.

review.'"[29]

The States repeatedly point the court's attention to two clearly pre-decisional and deliberative interagency memoranda.[30] Ordinarily the court would not rely on these documents in its Dataphase analysis, however, the footing of the case leaves no other effective way to exercise judicial review in a timely manner. At this point, the Rule's effective date looms, the administrative record has not been produced, and the States assert irreparable harm. The court has reviewed both the memoranda at issue, the Technical Support Document, and the Economic Analysis document, and finds that the memoranda's opinion is supported by the underlying documents at the court's disposal.[31]

While the court would prefer an opportunity to review the entire administrative record, rather than rely on a handful of documents and deliberative memoranda, it is impossible to obtain the record prior to the effective date of the Rule. Under these unique circumstances, including a review of the Army Corps of Engineer's memoranda, consideration of the documents in the record is "the only way there can be effective judicial review."[32]

As noted in the internal memoranda and confirmed by a close review of the Economic Analysis document and Technical Support Document, the Agencies' internal

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[29] Voyageurs Nat. Park Ass'n v. Norton, 381 F.3d 759, 766 (8th Cir. 2004).

[30] Doc. #33, Exhs. A & P.

[31] In its reply brief, the States assert that since the memoranda are in the public record the Agencies have waived the deliberative process privilege. The court is unaware how these documents came to be in the public domain and no administrative record has been prepared for this proceeding. The court finds that waiver would be a decidedly unfair doctrine to apply to the Agencies and declines the invitation to find waiver under these circumstances.

[32] See id. (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

documents reflect the absence of any information about how the EPA obtained its presented results. Consequently, the subsequent results are completely unverifiable."[33] The court is placed in an even worse position than the internal reviewers to understand the process applied by the EPA because of a lack of access to the complete administrative record. Even so, a review of what has been made available reveals a process that is inexplicable, arbitrary, and devoid of a reasoned process. Under these circumstances, the applicable standard for likelihood of success on the merits is the "fair chance" standard. Regardless, it is worthy of note, that even if the court applied the higher "substantial likelihood of success" standard, its conclusions would be unchanged.

2. Analysis of Likelihood of Success Factor

a. EPA Violated Its Grant of Authority by Congress When It Promulgated the Rule.

The States are likely to succeed on the merits of their claim that the EPA has violated its grant of authority in its promulgation of the Rule. In United States v. Bailey[34], the Eighth Circuit Court of Appeals held that the EPA or Corps may assert Clean Water Act jurisdiction if the waters in question meet either the plurality's requirements or Justice Kennedy's concurring opinion in Rapanos v. United States.[35] Because the Agencies assert jurisdiction under Justice Kennedy's concurrence, the court's analysis will focuses on whether the Rule meets this criteria.

Justice Kennedy's analysis begins with 33 U.S.C. § 1251(a), requiring the court to be

[33] Doc. #33, Exh. P, ¶3.

[34] 571 F.3d 791, 799 (8th Cir. 2009).

[35] 547 U.S. 715 (2006).

cognizant that the purpose of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[36] In order to establish the requisite significant nexus, the Agencies must determine whether the waters in question do in fact affect the chemical, physical, and biological integrity of those waters.[37] Jurisdictional waters have the requisite nexus, if they "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[38] Waters fall outside the zone of "navigable waters" when the effect "on water quality [is] speculative or insubstantial."[39] In determining its jurisdiction over waters, an agency "may choose to identify categories of tributaries that, due to their volume of flow . . . , their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters."[40]

The Rule here likely fails to meet this standard. In Rapanos, the Corps defined a tributary as a water that "feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics."[41] Justice Kennedy noted that if it were applied consistently, "it may well provide a reasonable

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[36] Rapanos v. United States, 547 U.S. 715, 779 (2006) (Kennedy, J., concurring).

[37] Id. at 780.

[38] Id.

[39] Id.

[40] Id.

[41] Id. at 781.

measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act."[42] Justice Kennedy concurred in judgment finding that the breadth of the Corps standard in Raponos "seem[ed] to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact waters."[43]

The Rule at issue here suffers from the same fatal defect. The Rule allows EPA regulation of waters that do not bear any effect on the "chemical, physical, and biological integrity" of any navigable-in-fact water. While the Technical Support Document states that pollutants dumped into a tributary will flow downstream to a navigable water,[44] the breadth of the definition of a tributary set forth in the Rule allows for regulation of any area that has a trace amount of water so long as "the physical indicators of a bed and banks and an ordinary high water mark" exist.[45] This is precisely the concern Justice Kennedy had in Rapanos, and indeed the general definition of tributary is strikingly similar.[46] While the Agencies assert that the definitions exclusion of drains and ditches remedies the defect, the definition of a tributary here includes vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term.[47] The States have established a fair chance of success on the merits of their claim that the Rule violates

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[42] Id.

[43] Id.

[44] Doc. #66, Exhs. 2-10.

[45] 80 Fed. Reg. 37105.

[46] See Rapanos v. United States, 547 U.S. at 781.

[47] See id.

the congressional grant of authority to the EPA.

b. The Agencies Likely Failed to Comply with APA Requirements When Promulgating the Rule.

i. The Rule is Likely Arbitrary and Capricious

The court must set aside a final agency rule if it finds the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[48] The scope of this "standard is narrow and a court is not to substitute its judgment for that of the agency."[49] Nevertheless, the agency has a duty to "examine the relevant data and articulate a satisfactory explanation for its action."[50] An agency must base its explanation on a "rational connection between the facts found and the choice made."[51]

The States have a fair chance of success on the merits under this prong as well. The Agencies assert that any water that fits in the definition of a "tributary" will as of necessity "significantly affect the chemical, physical, and biological integrity of traditional navigable waters."[52] The Technical Support Document states that science demonstrates tributaries do in point of fact affect the integrity of traditional navigable waters.[53] Setting aside the issue as to whether the Technical Support Document conflates ephemeral streams with tributaries, the claims made by the Agencies appear to only apply to a subset within the

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[48] 5 U.S.C. § 706(2)(A).

[49] Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983).

[50] Id.

[51] Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

[52] 80 Fed. Reg. 37075.

[53] Corps and EPA, Tech. Support Document for the Clean Water Rule: Definition of Waters of the United States, 244-246 (May 27, 2015).

broad definition of the Rule. The Rule asserts jurisdiction over waters that are remote and intermittent waters. No evidence actually points to how these intermittent and remote wetlands have any nexus to a navigable-in-fact water. The standard of arbitrary and capricious is met because the Agencies have failed to establish a "rational connection between the facts found" and the Rule as it will be promulgated.[54]

The Rule also arbitrarily establishes the distances from a navigable water that are subject to regulation. The Army Corps of Engineers noted:

> The 4,000-feet limit arbitrarily cuts off which waters can be determined 'similarly situated' under [a significant nexus determination], as (a)(8) waters cannot be aggregated with other waters beyond 4,000 feet even if they are truly 'similarly situated,' further limiting the use of the 'key' factor under the final rule. The 4,000-foot limitation under (a)(8) conflicts with the TSD regarding the importance of connectivity.[55]

Once again, the court has reviewed all of the information available to it and is unable to determine the scientific basis for the 4,000 feet standard. Based on the evidence in the record, the distance from the high water mark bears no connection to the relevant scientific data purported to support this because any water that is 4,001 feet away from the high water mark cannot be considered "similarly situated" for purposes of 33 C.F.R. § 328.3(a)(8). While a "bright line" test is not in itself arbitrary, the Rule must be supported by some evidence why a 4,000 foot standard is scientifically supportable. On the record before the court, it appears that the standard is the right standard because the Agencies say it is. Under these circumstances the Rule setting the 4,000 feet standard is likely arbitrary

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[54] See Burlington Truck Lines, 371 U.S. at 168.

[55] Army Corps of Engineers, Memorandum for Deputy Commanding General for Civil and Emergency Operations: Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of "Waters of the United States, ¶ 17 (May 15, 2015).

and capricious.

ii. The Rule is Not Likely a "Logical Outgrowth" of the Proposed Rule

Title 5, of the United States Code, § 553(b) requires that an agency publish proposed rulemakings in the Federal Register including "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The statute further requires the agency to provide "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[56] The publication of notice of the proposed rule "need not contain every precise proposal which (the agency) may ultimately adopt as a rule."[57] Nevertheless, the final rule must be a "logical outgrowth" of the proposed rule.[58] In determining whether a final rule is a "logical outgrowth," the court should determine whether the interested parties "should have anticipated that such a requirement might be imposed."[59]

The definition of "neighboring" under the final rule is not likely a logical outgrowth of its definition in the proposed rule. The final rule greatly expanded the definition of "neighboring" such that an interested person would not recognize the promulgated Rule as a logical outgrowth of the proposed rule. The proposed rule defined waters of the United States as "includ[ing] waters located within the riparian area or floodplain of a water

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[56] 5 U.S.C. § 553(c).

[57] Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309, 1319 (8th Cir. 1981).

[58] Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007).

[59] Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A., 705 F.2d 506, 549 (D.C. Cir. 1983); see also Chocolate Mfrs. Ass'n of U.S. v. Block, 755 F.2d 1098, 1104 (4th Cir. 1985) ("[I]f the final rule materially alters the issues involved in the rulemaking or, as stated in Rowell v. Andrus, 631 F.2d 699, 702 n.2 (10th Cir. 1980), if the final rule 'substantially departs from the terms or substance of the proposed rule,' the notice is inadequate.").

identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrological connection or confined surface hydrological connection to such a jurisdictional water."[60] When the Agencies published the final rule, they materially altered the Rule by substituting the ecological and hydrological concepts with geographical distances that are different in degree and kind and wholly removed from the original concepts announced in the proposed rule. Nothing in the call for comment would have given notice to an interested person that the rule could transmogrify from an ecologically and hydrologically based rule to one that finds itself based in geographic distance.

iii. *The Alleged NEPA Violation*.

The States have asserted that the Agencies have violated NEPA by failing to provide an Environmental Impact Statement. This court is unpersuaded by the Agencies' argument that they have not failed to comply with NEPA, mainly because it is hamstrung by the lack of the administrative record. It is unnecessary to reach this issue because the States have already established that they will likely succeed on the merits of their other claims.

B. Irreparable Harm

To succeed on a motion for a preliminary injunction, the moving party must show that irreparable harm will result absent the injunction.[61] "In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief."[62]

The States here have demonstrated that they will face irreparable harm in the

[60] 79 Fed. Reg. 22264.

[61] Id. at 112.

[62] Iowa Utilities Bd. v. F.C.C., 109 F.3d 418 (8th Cir. 1996).

absence of a preliminary injunction. It is within the purview of the traditional powers of the States to maintain their "traditional and primary power over land and water use."[63] Once the Rule takes effect, the States will lose their sovereignty over intrastate waters that will then be subject to the scope of the Clean Water Act.[64] While the exact amount of land that would be subject to the increase is hotly disputed, the Agencies admit to an increase in control over those traditional state-regulated waters of between 2.84 to 4.65 percent.[65] Immediately upon the Rule taking effect, the Rule will irreparably diminish the States' power over their waters.

In addition to the loss of sovereignty, the States assert an irreparable harm in the form of unrecoverable monetary harm. It is undeniable that if the States incur monetary losses as a result of an unlawful exercise of regulatory authority, no avenue exists to recoup those losses as the United States has not waived sovereign immunity from suits seeking these sorts of damages.

The analysis thus turns to whether or not the States can show that the Rule subjects them to unrecoverable monetary harm. The States assert numerous losses that would be attributable to the Rule. For example, the Rule will make North Dakota subject to, among other things, undertaking jurisdictional studies for every proposed natural gas, oil, or water

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[63]See Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (citing Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments").

[64]See e.g., 80 Fed. Reg. 37105, Part 328(a)(6) (expanding qualifying adjacent waters as previously defined in 33 C.F.R. § 328.3(a)(6) as merely adjacent wetlands to the new Rule at 33 C.F.R. § 328.3(a)(6) to "[a]ll waters adjacent").

[65]80 Fed. Reg. 37101.

pipeline project.[66] This will incur both direct losses, including vast expenditures to map and survey large portions of the state, and indirect losses such as lost tax revenue while projects are stalled pending mapping. Wyoming also asserts that it will be required to bear the costs of the additional Clean Water Act § 401 certifications, including expansion of permitting, oversight, technical and legal analysis for reclamation and development projects.[67] These losses are unrecoverable economic losses because there is neither an alternative source to replace the lost revenues nor a way to avoid the increased expenses. The States will suffer irreparable harm in the absence of a preliminary injunction.

C. *Balance of the Harms* and *Effect on the Public Interest*

In exercising its power to grant a preliminary injunction, the court must balance the harms to the parties to the litigation while "pay[ing] particular regard for the public consequences."[68] For the court to grant an injunction, the moving party must establish that the entry of the relief would serve public interest.[69]

On balance, the harms favor the States. The risk of irreparable harm to the States is both imminent and likely. More importantly delaying the Rule will cause the Agencies no appreciable harm. Delaying implementation to allow a full and final resolution on the merits is in the best interests of the public.

The court acknowledges that implementation of the Rule will provide a benefit to an important public interest, both in providing some protection to the waters of the United

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[66] Doc. #33, Exh. D, ¶¶ 19-21.

[67] Doc. 33, Exh. H, ¶¶ 10-14

[68] Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008).

[69] Dataphase, 640 F.2d at 113.

States and because it would provide increased certainty as to what constitutes jurisdictional waters as some people will be categorically removed from the definition of waters of the United States (for example owners of an intermittent wetland 4,001 feet away from an established tributary). The benefit of that increased certainty would extend to a finite and relatively small percentage of the public. A far broader segment of the public would benefit from the preliminary injunction because it would ensure that federal agencies do not extend their power beyond the express delegation from Congress.[70] A balancing of the harms and analysis of the public interest reveals that the risk of harm to the States is great and the burden on the Agencies is slight. On the whole, the greater public interest favors issuance of the preliminary injunction.

IV. DECISION

The States have established that the Dataphase factors weigh in favor of injunctive relief. Their motion for a preliminary injunction, enjoining Fed. Reg. 37,054-127, jointly promulgated by the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, is **GRANTED**.

IT IS SO ORDERED.

Dated this 27th day of August, 2015.

/s/ Ralph R. Erickson
Ralph R. Erickson, Chief District Judge
District of North Dakota

[70] First Premier Bank v. U.S. Consumer Fin. Prot. Bureau, 819 F. Supp. 2d 906, 922 (D.S.D. 2011).