



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

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THE STATES

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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.

* * *

Alexandra Dapolito Dunn
Executive Director and General Counsel

**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 States 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 *Riverside 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 a 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

Marks 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 Service*, 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-*Rapanos* 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 biological³ 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. *Douglas 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 biological⁶ 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. *Douglas 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 expert 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. Env’tl. 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. Env'tl. 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. Env’tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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 rule⁸.

(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 or 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

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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. Env'tl. 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 Calabazas 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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_NW0-2007-1550.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. Env'tl. 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. Env'tl. 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:
 - o (p) The term ‘navigable waters’ includes:
 - o (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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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 fine 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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 of 33 CFR 328.3(a), such as subsection (a)(1) (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. Env'tl. 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:
 - o (1) By interstate travelers for water related recreational purposes;
 - o (2) For the removal of fish that are sold in interstate commerce;
 - o (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. Eenvtl. 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. Eenvtl. Prot. Agency and ACOE

http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2_dec08.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:
 - o Non-navigable tributaries that are not relatively permanent
 - o Wetlands adjacent to Non-navigable tributaries that are not relatively permanent
 - o 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:
 - o Swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow)
 - o 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:
 - o 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
 - o Significant nexus includes consideration of hydrologic and ecologic factors.

Memorandum for JD SWG-2007-1769 (June 13, 2008)

U.S. Env'tl. 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. Env'tl. 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 turn 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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. Env'tl. 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)(1) 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.