

## ARTICLES

# What Wetlands Are Regulated? Jurisdiction of the §404 Program

by Margaret “Peggy” Strand and  
Lowell M. Rothschild

Peggy Strand and Lowell Rothschild are partners  
at Venable, LLP in Washington, D.C.

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### *Editors' Summary*

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Despite the 1972 Clean Water Act approaching its 40th anniversary, the nation continues to struggle to define which waters fall within federal jurisdiction under that landmark statute. Wetlands frequently represent the geographical transition zone between open waters and uplands, such that wetland jurisdictional disputes are at the forefront of the Clean Water Act jurisdiction debate. This Article, excerpted from the *Wetlands Deskbook*, summarizes the status of wetland jurisdictional law, including standards for treating wetlands as “waters of the United States” subject to federal authority, as well as application of the three-parameter technical criteria for wetland delineation. The text addresses the confusing Supreme Court cases of *Rapanos* and *SWANCC*, which indicate that federal jurisdiction must cease at some (as yet not clearly defined) point within waterways. In addition, it discusses the many long-settled issues of wetland jurisdiction.

## I. Clean Water Act Jurisdictional Wetlands

Wetlands or other waters that are subject to federal control are referred to as “jurisdictional waters” because they are within the regulatory jurisdiction of federal law. The Clean Water Act (CWA)<sup>1</sup> regulations provide a set of definitions identifying physical standards used to determine what geographic features qualify as wetlands. These are discussed below. A separate set of definitions and legal standards is used to decide whether any specific feature falls under federal legal jurisdiction as discussed below. The legal jurisdiction—whether federal law regulates those physical features defined as wetlands—has presented the most challenging issues, as reflected in recent U.S. Supreme Court decisions.

The CWA does not define wetlands or even mention wetlands within the context of the permit and regulatory program. Rather, all of the rules and criteria for determining wetlands jurisdiction are found in regulations and in other policy guidance. The types of geographic or landscape features treated as wetlands subject to regulation under the CWA have changed over the course of the years. The geographic reach of CWA jurisdiction remains under active review by the agencies and the courts.

The definition of jurisdictional waters involves several provisions of the statute and the regulations. The CWA operates by prohibiting the “discharge of any pollutant by any person.”<sup>2</sup> The phrase “discharge of a pollutant” is defined, in pertinent part, as “any addition of any pollutant to navigable waters from any point source.”<sup>3</sup> The statute defines the key phrase “navigable waters” as “the waters of the United States, including the territorial seas.”<sup>4</sup> The U.S. Congress left it to the U.S. Army Corps of Engineers (the Corps) and the U.S. Environmental Protection Agency (EPA) to provide a regulatory definition for the term “waters of the United States,” which would determine the limits of CWA jurisdiction. As discussed more fully below, the Supreme Court, despite a serious split on these issues, has held that waters of the United States is limited by its relationship to the phrase navigable waters. The result has been an almost continuous effort to determine the geographic limits to federal wetlands jurisdiction. The precise extent of such limits remains uncertain, and will be established in regulatory practice and case law over the coming years. Congress may also amend the CWA to address this issue.

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*Editors' Note: The Wetlands Deskbook (Margaret “Peggy” Strand and Lowell M. Rothschild, eds., 3d ed. 2009) can be purchased at [http://www.islandpress.com/bookstore/details.php?prod\\_id=1924](http://www.islandpress.com/bookstore/details.php?prod_id=1924).*

1. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
2. 33 U.S.C. §1311(a), ELR STAT. FWPCA §301(a).
3. 33 U.S.C. §1362(12), ELR STAT. FWPCA §502(12).
4. 33 U.S.C. §1362(7), ELR STAT. FWPCA §502(7).

The Corps originally approached its jurisdiction under §404 in the same manner that it regulates pursuant to the Rivers and Harbors Act (RHA). Under the RHA, the Corps regulates activities in traditionally navigable waters.<sup>5</sup> Traditionally navigable waters are waters subject to the ebb and flow of the tide and/or waters that are, or have been, used to transport interstate or foreign commerce.<sup>6</sup> Tidal flats, subject to regular tidal flow, are considered to lie under traditionally navigable waters, and thus are subject to the RHA.<sup>7</sup> RHA jurisdiction also extends to the areas where a river customarily flows in its natural meanders.<sup>8</sup>

The initial Corps regulations under §404 extended coverage to the navigable waters, as had the RHA.<sup>9</sup> Since wetlands are generally non-navigable, this early definition excluded most wetlands and other isolated or shallow waters from CWA jurisdiction. Environmental groups challenged these regulations, arguing that the regulatory jurisdiction of the CWA extended beyond traditionally navigable waters to a broader aquatic system, including small streams, tributaries, and wetlands. The issue was first addressed in *Natural Resources Defense Council v. Callaway*,<sup>10</sup> where the Corps' regulations were invalidated on the grounds that they applied the CWA too narrowly. As a result, the Corps revised its regulations to include a broader range of waters, including adjacent wetlands and isolated waters. The Corps followed the instruction of the court and relied on the CWA's legislative history, which indicated that Congress intended the phrase "navigable waters" to be given the broadest constitutional interpretation.<sup>11</sup>

The current Corps and EPA regulations define waters of the United States to include:

- all traditionally navigable waters;
- all interstate waters, including interstate wetlands;
- all waters, including wetlands, the use, degradation, or destruction of which could affect interstate commerce;
- the territorial seas; and
- wetlands adjacent to, and tributaries and impoundments of, other waters within the definition.<sup>12</sup>

5. See 33 C.F.R. pt. 329.

6. 33 C.F.R. §329.4; see also *infra* Section II.C.1.a., addressing 2008 EPA guidance indicating the Agency's position that waters susceptible to future commercial use are also "traditionally navigable."

7. See *Buttrey v. United States*, 573 F. Supp. 283, 298, 14 ELR 20152 (E.D. La. 1983); *P.F.Z. Properties v. Train*, 393 F. Supp. 1370, 1380, 1382 (D.D.C. 1975).

8. See *United States v. Sunset Cove, Inc.*, 3 ELR 20370 (D. Or. 1973), *aff'd in part & remanded on other grounds*, 514 F.2d 1089, 5 ELR 20407 (9th Cir. 1975); *United States v. Zanger*, 767 F. Supp. 1030, 22 ELR 20231 (N.D. Cal. 1991).

9. See 42 Fed. Reg. 37122 (July 19, 1977).

10. 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975).

11. See 42 Fed. Reg. at 37127.

12. 33 C.F.R. §328.3(a), 40 C.F.R. §230.3(s).

The scope of these regulations, as impacted by Supreme Court decisions, is addressed more fully below. Under the §404 program, regulated parties are initially responsible for determining whether they have wetlands under the CWA's jurisdiction. The following sections provide more information on (1) the process for obtaining such wetlands determinations, (2) the criteria for establishing wetlands, and (3) the factors that affect whether wetlands fall within CWA jurisdiction.

## II. Process for Determining Wetlands Jurisdiction

### A. EPA/Corps Jurisdictional Authority

The division of authority between EPA and the Corps under the CWA is implicated in the issue of deciding what waters are subject to the §404 program. The CWA's single definition of waters of the United States defines the limits of authority for both the §404 permit program and other programs administered by EPA, such as the CWA §402 national pollutant discharge elimination system (NPDES) permit program. After EPA and the Corps disagreed over which agency had authority to define the scope of waters of the United States for purposes of the §404 program, the Corps requested the U.S. Attorney General to resolve the dispute. In 1979, U.S. Attorney General Benjamin Civiletti issued an opinion (Civiletti Opinion) concluding that EPA, not the Corps, had ultimate authority to decide the CWA's jurisdiction because EPA carried most of the responsibility for administering the statute.<sup>13</sup> The Civiletti Opinion also concluded that EPA, rather than the Corps, had the ultimate authority to decide the scope of the exemptions provided in §404(f).

While EPA was vested with the primary authority for the CWA's jurisdictional decisions,<sup>14</sup> the Agency lacked both the resources and the authority to take over the §404 permitting program from the Corps. However, for the Corps to administer §404 and process permit applications, it must be able to decide whether filling activities will occur in the CWA's jurisdictional waters. Thus, EPA and the Corps entered into a Memorandum of Understanding (MOU) on April 23, 1980, concerning geographical jurisdiction of the §404 program.<sup>15</sup> The 1980 MOU was superseded by a 1989 Memorandum of Agreement (MOA) between the Corps and EPA on jurisdictional determinations.<sup>16</sup> Under the 1989 MOA, EPA and

13. 43 Op. Att'y Gen. 15 (1979).

14. 33 U.S.C. §1344(a), ELR STAT. FWPCA §404(a), clearly gives the Army, not EPA, permit-issuing authority.

15. Memorandum of Understanding, Geographical Jurisdiction of the Section 404 Program (Apr. 23, 1980), *reprinted in* 45 Fed. Reg. 45018 (July, 2, 1980).

16. 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 Corps established practical divisions of responsibility for jurisdictional determinations.

The 1989 MOA recognizes that the Corps will make most jurisdictional determinations in the course of administering the §404 program.<sup>17</sup> Under the MOA, EPA reserves the authority to determine jurisdiction in “special cases,” which it may designate either in generic or project-specific instances.<sup>18</sup> Significantly, jurisdictional determinations by either agency are binding on the government as a whole.<sup>19</sup> The MOA also provides that final jurisdictional determinations must be in writing and signed by either an EPA regional administrator or a Corps district engineer.<sup>20</sup> As addressed more fully below, after the *Rapanos v. United States*<sup>21</sup> decision, the Corps and EPA established additional interagency coordination procedures for jurisdictional determinations.

In 1994, the federal agencies implemented a change to delineation practices to provide for closer coordination between the CWA and agricultural programs. Under a 1994 MOA, the U.S. Department of Agriculture (USDA) had the authority to delineate wetlands on agricultural lands for both CWA and Farm Bill programs.<sup>22</sup> Under the MOA, the USDA followed CWA delineation protocols when delineating wetlands for CWA purposes. The MOA recognized that USDA uses the National Food Security Act Manual (NFSM) for delineations under agricultural laws, which have somewhat different standards than CWA regulations.<sup>23</sup> Because of these differences, the MOA established procedures for training USDA delineators and for review of agricultural wetland delineations. EPA retained final authority as to questions of CWA jurisdiction, including wetland delineations. Under the MOA, each of the signatory agencies accepted final delineations by USDA for their programs, including the CWA. After the 2002 Farm Bill modified USDA wetlands provisions, the USDA advised the Corps and EPA that it would no longer participate in this MOA.<sup>24</sup>

## B. CWA Jurisdictional Determinations

Determinations or delineations of CWA jurisdiction can arise in a number of ways. The phrases “wetlands determination” and “wetlands delineation” are often used interchangeably.

However, a wetlands determination means an analysis and conclusion that wetlands are present; a wetlands delineation means a precise delineation, demarcation, or mapping of the location and extent of wetlands on a piece of property. Wetlands delineations or wetlands determinations can be conducted by private parties or the government. Both terms are distinct from a jurisdictional determination (JD), which is an official decision by the government identifying (or confirming) the extent of jurisdiction at a location. Most often, a wetlands delineation is done because a property owner wants to know if a §404 permit will be needed to conduct activities on the property. Several mechanisms exist to obtain a wetlands delineation or to determine the extent of waters on property.

Neither the CWA nor the regulations requires the Corps or EPA to conduct wetlands determinations on request. The Corps’ district engineers are authorized to make JDs.<sup>25</sup> However, Corps offices are often too understaffed to carry out all their required functions, including the processing of permits. Thus, it may be difficult for many of the Corps districts to devote resources to optional matters, such as responding to a request for a wetlands determination. Frequently, property owners will use the services of a well-respected private consultant to prepare a JD, and submit that work to the appropriate Corps district office for review and approval. The Corps will review the consultant’s delineation and conclusions on wetland jurisdiction, and provide its JD or confirmation of the consultant’s jurisdictional conclusions. Generally, the Corps will conduct a field visit, as well as review written materials, in making its JD.

The presence and extent of particular wetlands can change over time, and the CWA regulates waters in their present natural status at the time of the delineation, not their historic state.<sup>26</sup> The Corps issued a Regulatory Guidance Letter (RGL) in 2005 addressing expiration dates for JDs, superseding its 1990 RGL on the same topic.<sup>27</sup> JDs must be in writing and are valid for five years. The RGL makes clear that the Corps explicitly retains the authority to revise JDs when new information so warrants, and the Corps can determine that a location is changing so rapidly that review of JDs more frequently than five years would be warranted.

While JDs or delineations sometimes have been subject to judicial review on the administrative record,<sup>28</sup> the government strongly resists judicial challenges to affirmative JDs, and has convinced many courts that they are not reviewable. An affirmative JD by the Corps represents the Agency’s decision that wetlands are present and that the landowner must apply for a permit prior to filling the delineated wetlands. The government has resisted judicial review of such determinations, arguing that if the permit is granted, there would be no reason to review the JD.

the Exceptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989) [hereinafter 1989 MOA].

17. *Id.* at 1.

18. *Id.* at 2.

19. *Id.* at 5.

20. *Id.* Most §404 decisions by both EPA and the Corps are made by the agencies’ field offices, rather than at agency headquarters.

21. 547 U.S. 715, 36 ELR 20116 (2006).

22. Memorandum of Agreement Among the Department of Agriculture, the Environmental Protection Agency, the Department of the Interior and the Department of the Army Concerning the Delineation of Wetlands for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act (Jan. 6, 1994) (available from the ELR Document Service, ELR Order No. AD173).

23. The NFSM is available at [http://policy.nrcs.usda.gov/scripts/lpsis.dll/M/M\\_180.htm](http://policy.nrcs.usda.gov/scripts/lpsis.dll/M/M_180.htm).

24. See <http://www.nwk.usace.army.mil/regulatory/USDA%20Withdrawal%20Ltr.pdf>. Also available at <http://www.svg.usace.army.mil/reg/announce/withdrawal%20letter.pdf>, with the Corps’ response at <http://www.svg.usace.army.mil/reg/announce/Honorable%20Ray.pdf>.

25. 33 C.F.R. §325.9.

26. See *infra* Section III.A.4.b., Normal Circumstances.

27. Regulatory Guidance Letter 05-02, Regulatory Guidance Letter 90-06, 57 Fed. Reg. 6591 (Feb. 26, 1992), issued Aug. 14, 1990, expired Dec. 31, 1993, but was later extended to Dec. 23, 1999, by Regulatory Guidance Letter 94-01, issued May 23, 1994.

28. See *Golden Gate Audubon Soc’y, Inc. v. U.S. Army Corps of Eng’rs*, 717 F. Supp. 1417, 18 ELR 21401 (N.D. Cal. 1988); *National Wildlife Fed’n v. Hanson*, 623 F. Supp. 1539, 16 ELR 20388 (E.D.N.C. 1985).



Thus, in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*,<sup>29</sup> the U.S. Court of Appeals for the Ninth Circuit affirmed a district court decision that it could not review a JD related to a parcel of property on which Fairbanks wished to develop recreational facilities. The JD found that the wetlands on the property were jurisdictional, and Fairbanks appealed. The court held that all the JD does is “put Fairbanks on notice that the Corps believes a permit is necessary if Fairbanks decides to proceed with its project.”<sup>30</sup> Further, “Fairbanks’ rights and obligations remain unchanged by the approved jurisdictional determination. It does not itself command Fairbanks to do or forbear anything; as a bare statement of the agency’s opinion, it can be neither the subject of ‘immediate compliance’ nor of defiance.”<sup>31</sup> The court stressed that “in withholding judicial review of the Corps’ approved jurisdictional determination, we do not impair Fairbanks’ ability to contest the existence of regulatory jurisdiction.”<sup>32</sup>

The government has not resisted judicial review of negative JDs.<sup>33</sup> The Corps has an administrative appeals process, under which a landowner or permit applicant can seek review of approved JDs, declined permits, and permit applications denied with prejudice.<sup>34</sup>

EPA has authority to conduct wetlands determinations when it invokes the “special case” authority under the 1989 MOA.<sup>35</sup> EPA also conducts a program of advanced identification of wetlands in certain areas.<sup>36</sup> Under the advanced identification program, EPA will delineate the wetlands located in specific areas in advance of particular project proposals. The program is not a substitute for individual project review, but is designed to identify generally the wetland areas that may be suitable for future development, as well as those areas that are “generally unsuitable.”<sup>37</sup> EPA has undertaken advanced identification in localities where the federal and local authorities, as well as some private entities, were mutually interested in the project. Wetlands may also be identified on the National Wetlands Inventory (NWI) maps prepared by the U.S. Fish and Wildlife Service (FWS).<sup>38</sup>

Finally, in the course of processing an application for an individual permit to fill wetlands, the Corps will determine the extent of CWA jurisdiction.<sup>39</sup> Even in the permit context, however, the Corps will generally rely on the permit applicant to develop and present information concerning the extent of jurisdictional waters. The regulations require the permit applicant to provide a wetland delineation with an application for an individual permit. The initial burden is on the permit applicant to define the wetlands or other waters

on his or her property. The Corps encourages early, pre-application consultation by permit applicants so that sufficient information, including information about jurisdictional waters, can be assembled.<sup>40</sup> The Corps has the authority to decide the extent of wetlands, but the applicant has the burden of assembling sufficient information to enable the Corps to make that decision.

### C. Legal Issues of CWA Jurisdiction

Prior to the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*<sup>41</sup> and *Rapanos* decisions, if a geographical feature exhibited wetland characteristics, it was largely accepted by courts that it was within CWA jurisdiction.<sup>42</sup> After *SWANCC*, there was an active debate and series of court decisions addressing the extent of jurisdiction authorized under the statute and the U.S. Constitution. Since the *Rapanos* decision in 2006, although debate remains, it seems highly likely that not all features that exhibit wetland characteristics will be subject to the CWA.

The current Corps regulations continue to reflect the results of the 1975 *Natural Resources Defense Council v. Callaway*<sup>43</sup> decision and provide that the CWA applies to very broad categories of waters. Both EPA and the Corps use the same definition of waters. CWA regulations define “waters of the United States” to include not only traditionally navigable waters,<sup>44</sup> but also a broad range of waters, including<sup>45</sup>:

- all interstate waters, including interstate wetlands<sup>46</sup>;
- 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<sup>47</sup>;
- all impoundments of water that fit these definitions<sup>48</sup>;
- tributaries of any defined waters<sup>49</sup>;
- the territorial seas<sup>50</sup>; and
- wetlands adjacent to waters, other than adjacent to other wetlands.<sup>51</sup>

Some parts of these regulations have been overturned or seriously questioned by the Supreme Court. Jurisdictional

29. 543 F.3d 586, 38 ELR 20239 (9th Cir. 2008), *petition for cert. pending*, S. Ct. No. 08-0152.

30. *Id.* at 598.

31. *Id.* at 593.

32. *Id.* at 594.

33. *See, e.g., Golden Gate Audubon Soc’y*, 717 F. Supp. at 1417.

34. 33 C.F.R. pt. 331.

35. 1989 MOA, *supra* note 17.

36. *See* 40 C.F.R. §230.80.

37. *Id.* §230.80(a)(2).

38. U.S. Fish & Wildlife Service, National Wetlands Inventory, Wetlands Digital Data, *available at* <http://wetlandsfws.er.usgs.gov>.

39. Wetland delineations also are now required in connection with a number of nationwide permits.

40. 33 C.F.R. §325.1(b).

41. 531 US 159, 31 ELR 20382 (2001).

42. As addressed below, only the U.S. Court of Appeals for the Fourth Circuit had limited CWA jurisdiction prior to the *SWANCC* decision. *See* *Tabb Lakes Ltd. v. United States*, 715 F. Supp. 726, 19 ELR 20672 (E.D. Va. 1988), *aff’d without opinion*, 885 F.2d 866, 20 ELR 20008 (4th Cir. 1989).

43. *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975).

44. 33 C.F.R. §328.3(a)(1) (2008).

45. EPA’s definitions are found at 40 C.F.R. §§230.3(s) and 232.2(q) (2008).

46. 33 C.F.R. §328.3(a)(2).

47. *Id.* §328.3(a)(3).

48. *Id.* §328.3(a)(4).

49. *Id.* §328.3(a)(5).

50. *Id.* §328.3(a)(6).

51. *Id.* §328.3(a)(7).

standards will also be found in guidance documents and judicial decisions.

## I. The Major Supreme Court Decisions

The 2006 Supreme Court decisions involved relatively straightforward facts. *Rapanos*<sup>52</sup> involved appeal of civil enforcement actions for filling of wetlands that abutted ditches or man-made drains in which water eventually flowed to traditional navigable waters. The district court held Rapanos liable for filling without a permit, agreeing with the federal government that the wetlands at issue (four separate sites) were adjacent to tributaries of navigable waters, as described in the regulations. In *Carabell v. United States*,<sup>53</sup> the plaintiffs were denied a permit to fill wetlands that were separated from a man-made drainage ditch by a man-made berm. Water in the drainage ditch eventually flowed to navigable waters. The district court agreed with the government that these wetlands were within CWA jurisdiction under the regulatory standard of wetlands adjacent to a tributary. Under the regulations, “adjacent” is defined as “bordering, contiguous, or neighboring” and includes, by example, wetlands behind a man-made berm.<sup>54</sup> The U.S. Court of Appeals for the Sixth Circuit upheld the federal government in each case.<sup>55</sup> The Supreme Court consolidated the two cases. In each of the 2006 cases, the Court examined the Corps’ application of its regulations concerning wetlands adjacent to non-navigable tributaries. The Supreme Court did not expressly set aside any part of the regulation, but did reverse the application of the regulation in the two cases.

The Supreme Court divided 4-1-4 in *Rapanos*, with a plurality and a concurring Justice agreeing that the decisions should be reversed, but failing to agree on the reasons for reversal. At issue was the statutory term, “waters of the United States,” which is the term used for “navigable waters” in the CWA. The plurality opinion, authored by Justice Antonin Scalia (joined by Chief Justice John Roberts and Justices Samuel Alito and Clarence Thomas), expressed the position that “waters of the United States” includes only “relatively permanent” bodies of water.<sup>56</sup> After reviewing prior precedent, the plurality summarized:

on its only plausible interpretation, the phrase “waters of the United States” include only those 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 phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.<sup>57</sup>

52. 33 C.F.R. §328.3(a)(7).

53. No. 04-1384, 36 ELR 20116 (U.S. June 19, 2006).

54. 33 C.F.R. 328.3(c).

55. *Carabell v. U.S. Army Corps of Eng’rs*, 391 F.3d 704, 34 ELR 20147 (6th Cir. 2004); *United States v. Rapanos*, 376 F.3d 629, 34 ELR 20060 (6th Cir. 2004).

56. 126 S. Ct. 2208, 2222 (2006) (citing WEBSTER’S DICTIONARY 2882 (2d ed. 2005)).

57. *Id.* at 2225.

The plurality relied on defining the word “waters” rather than the qualifiers “of the United States” or “navigable.” This part of the decision addressed the kinds of water bodies that could qualify as tributaries. In addressing the matter of wetlands adjacent to tributaries, the plurality also emphasized water flow. It held that the CWA requires two findings:

First, that the adjacent channel contains a “wate[r] of the United States,” (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); 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.<sup>58</sup>

Concurring in the judgment to send both *Rapanos* and *Carabell* back to the lower courts, Justice Anthony Kennedy’s separate opinion established a different standard for defining “waters of the United States.” Justice Kennedy felt that to be consistent with prior Supreme Court decisions “and with the need to give the term ‘navigable’ some meaning, the Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”<sup>59</sup> Justice Kennedy found the plurality’s focus on level of water and flow “inconsistent with the Act’s text, structure and purpose.”<sup>60</sup> Rather, the concurring opinion indicated that criteria other than water level and flow could constitute a “significant nexus” between a wetland or tributary and traditionally navigable waters, drawing on the purposes of the CWA:

Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable 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 other covered waters more readily understood as “navigable.” When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable waters.”<sup>61</sup>

The four Justices dissenting (John Paul Stevens, David Souter, Ruth Bader Ginsberg, and Stephen Breyer) would have upheld the government and its interpretation of the regulations. Justice Breyer’s separate dissent, and Justice Kennedy’s concurring opinion, admonished the federal agencies to promulgate regulations refining the definition of waters of the United States. Chief Justice Roberts, concurring with the plurality, also commented that if the Corps had promulgated regulations, it would have been eligible for the “generous leeway” granted by reviewing courts. He admonished the Corps for, in essence, ignoring the Supreme Court’s 2001 *SWANNC* decision that had explained that the federal authority was not limitless.

All of the *Rapanos* opinions refer to and seek consistency with the 2001 *SWANCC* case. At issue in *SWANCC* was

58. *Id.* at 2227.

59. *Id.* at 2248.

60. *Id.* at 2246.

61. *Id.* at 2248.

a 533-acre parcel that was formerly the site of a sand and gravel pit mining operation, which, after its abandonment in 1960, evolved into a successional stage forest with a scatter of permanent and seasonal ponds of varying sizes (from under one-tenth of an acre to several acres) and depth (from several inches to several feet).<sup>62</sup> Although the Corps initially determined that it had no jurisdiction over the site—because the site contained no “wetlands” or areas which support “vegetation typically adapted for life in saturated soil conditions” under 33 C.F.R. §328.3(b)—it later became aware that some 121 species of migratory birds use the site.<sup>63</sup> As a result, the Corps determined that, although the site did not qualify as characteristic wetlands, it contained waters of the United States under the Migratory Bird Rule. The district court and the U.S. Court of Appeals for the Seventh Circuit affirmed the Corps’ finding of jurisdiction.<sup>64</sup> The Supreme Court reversed in a 5-4 decision, with Chief Justice William H. Rehnquist writing for the majority (joined by Justices Scalia, Thomas, Kennedy, and Sandra Day O’Connor) and Justice Stevens filing a dissenting opinion (joined by Justices Souter, Ginsburg, and Breyer).

The decision set aside, in part, 33 C.F.R. §328.3(a)(3), to the extent that the agencies relied upon use by migratory birds to find that a water of the United States was jurisdictional as an “intrastate [waters] the use of which could affect inter-state . . . commerce.” The Migratory Bird Rule that was set aside in the decision was the published statement of the government’s position that actual or potential use of a wetland by migratory birds would satisfy the “interstate commerce” connection of 33 C.F.R. §328.3(a).<sup>65</sup>

In *SWANCC*, and later in *Rapanos*, the Supreme Court addressed and maintained as good law its 1985 *U.S. v. Riverside Bayview Homes* decision, which upheld federal jurisdiction over wetlands adjacent to navigable waters.<sup>66</sup> However, the Court ultimately determined in *SWANCC* that, where “intrastate waters” are “isolated,” the Migratory Bird Rule is insufficient as the sole basis for establishing jurisdiction. In *SWANCC*, the Court was presented with both a constitutional challenge and a claim that the regulatory definitions were inconsistent with the CWA. In declining to rule on the constitutional challenge, the Court analyzed the statutory and constitutional issues in a manner that has fueled ongoing controversy:

We said in *Riverside Bayview Homes* that the word “navigable” in the statute was of “limited effect” and went on to hold that §404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever.

62. *Id.* at 678.

63. *Id.*

64. *Id.* at 679.

65. The so-called Migratory Bird Rule was published in 1986. See 52 Fed. Reg. 41217 (Oct. 26, 1986). It stated that the Corps’ jurisdiction over wetlands extended into intrastate wetlands that are or would be used as habitat by (1) birds protected by Migratory Bird Treaties, or (2) other migratory birds which cross state lines. *Id.*

66. 121 S. Ct. at 680-83 (citing *United States v. Riverside Bayview Homes*, 106 S. Ct. 455, 16 ELR 20086 (1985)).

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Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result . . . This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.<sup>67</sup>

The *SWANCC* majority opinion also expressed serious concerns over whether the Commerce Clause of the Constitution would support federal authority over isolated, wholly intrastate waters.<sup>68</sup> The plurality decision in *Rapanos* reiterated the concern that extension of CWA jurisdiction to intermittent or ephemeral waters would raise constitutional concerns similar to those identified in *SWANCC*.<sup>69</sup> In both cases, however, the Supreme Court has pulled back from the constitutional issues and based its decision on principles of statutory construction.

Albeit in significantly divided opinions, the Supreme Court has now twice expressed the position that Congress had intended some limits on federal jurisdiction, given the use of the term “navigable” and the statutory recognition of a major role for the states. Absent a change to the statute or precedent of the Supreme Court, the limit has to be addressed by the federal agencies.

#### a. Federal Agency Response

None of the federal regulations defining waters of the United States have been amended since the *SWANCC* or *Rapanos* opinions. In 2003, EPA and the Corps issued an Advanced Notice of Proposed Rulemaking (ANPR), requesting information on what wetlands or waters should be subject to federal protection in light of *SWANCC*.<sup>70</sup> The ANPR asked for comments on what other provisions of the jurisdictional regulations should be modified or otherwise addressed. The agencies subsequently announced that they would not conduct a rulemaking.<sup>71</sup>

There have been various federal guidance documents released. A year after the *Rapanos* decision, the EPA and the Corps released guidance on CWA jurisdictional determinations in light of the decision.<sup>72</sup> The guidance included a June 2007 joint Legal Memorandum discussing jurisdiction, which was open for public comment. Following public comment, it was supplemented in December 2008 with additional information regarding the meaning of the terms “traditional navigable water” and “adjacent.” Included in the guidance is an MOA to provide procedures for coordination

67. *SWANCC*, 121 S. Ct. at 683.

68. 121 S. Ct. at 683.

69. 126 S. Ct. at 2224.

70. 68 Fed. Reg. 1991 (Jan. 15, 2003).

71. Public Announcement, Dec. 16, 2003, available at <http://www.epa.gov/owow/wetlands/guidance/SWANCC/index.html>. In his concurring opinion in *Rapanos*, Chief Justice Roberts specifically criticized the agencies for not amending their regulations, noting the withdrawal of the advanced notice of proposed rulemaking. 126 S. Ct. at 2235.

72. The 2007 guidance replaced early policy guidance issued after *SWANCC* and after *Rapanos*.



between EPA and the Corps on jurisdictional determinations. The materials are accompanied by a Memorandum to the Field from both EPA and the Corps providing instructions for coordination.<sup>73</sup> In addition, the Corps updated its JD Form Instruction Manual to include two joint documents, a revised Approved JD Form, and Regulatory Guidance Letter 07-01. Subsequently, the Corps issued Regulatory Guidance 08-02, addressing documentation of JDs and authorizing Corps offices to act on either preliminary or approved JDs.<sup>74</sup> These 2007 and 2008 materials superseded a short, initial memorandum that had circulated in 2006 advising field offices to consult with headquarters on questionable jurisdictional matters after *Rapanos*.

The post-*Rapanos* guidance documents lay out circumstances in which the government generally will assert jurisdiction, identify circumstances in which it generally will not assert jurisdiction, and identify circumstances in which a case-by-case evaluation will be needed and the kind of information that will be used for those evaluations. The guidance maintains federal jurisdiction over traditional navigable waters and wetlands adjacent to such waters, as well as wetlands adjacent to relatively permanent waters, which are identified as flowing at least three months of the year.<sup>75</sup> Under the guidance, traditional navigable waters include waters that have not historically been used for commercial navigation (including recreational use) but are subject to such use in the future. Such waters and wetlands will not require a showing of significant nexus. The jurisdiction over relatively nonpermanent waters and wetlands adjacent to such nonpermanent waters will be determined on a case-by-case basis applying an evaluation of whether there is a significant nexus to navigable waters. As a general rule, the guidance provides that the government will not assert jurisdiction over swales and erosional features or ditches constructed in uplands without relatively permanent water flow. However, it also indicates that the government does not believe it needs to show that waters abut in order for them to be considered “adjacent.” For wetlands that are “reasonably close” to jurisdictional waters, a significant nexus to those waters is presumed.

While there are a number of issues concerning jurisdiction over tributaries that qualify as relatively permanent waters under the guidance, most of the new considerations for jurisdiction will involve application of the “significant nexus test.” For wetlands adjacent to non-navigable tributaries that are not relatively permanent, the guidance provides general information on how to assess whether there is a significant nexus. 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

However, the guidance does not specify how the indicia of significant nexus should be weighed, either individually or in relation to each other. It also leaves open the prospect that other factors could enter into the evaluation of “significant nexus.” The guidance puts focus on the ecological relationship of wetlands to the water body as the core of the significant nexus standard. There are general descriptions of what might constitute a “nexus,” but little indication of what might be “significant” other than the statement that the agencies will consider “whether the tributary and its adjacent wetlands are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water.” The definition of “significant” as meaning “more than speculative or insubstantial” comes straight from Justice Kennedy’s opinion; however, it remains to be seen how this term will be applied and developed through application.

Another important aspect of the significant nexus standard is aggregation of the impacts on wetlands adjacent to the same tributary. The guidance specifies that in determining jurisdiction under the significant nexus test, “the agencies will consider other relevant factors, including the functions performed by the tributary together with the functions performed by any adjacent wetlands.” This means that the significant nexus standard will look beyond the particular wetlands involved, i.e., subject to the permit application, and consider whether those wetlands, when considered together with all wetlands adjacent to the tributary, perform particular ecological functions. It is not clear who will have the burden of providing information about the other wetlands adjacent to a tributary when making a jurisdictional determination.

The guidance contains direction that the agencies must thoroughly document their jurisdictional determinations. However, in practice, the agencies request delineations and related information from permit applicants or applicants for

73. Available at <http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html>.

74. Available at <http://www.usace.army.mil/CECW/Documents/cecwo/reg/rgls/rgl08-02.pdf>.

75. Thus, the Corps asserts jurisdiction over the waters deemed jurisdictional both under Justice Kennedy’s test and under the plurality’s test. This is the most expansive reading of *Rapanos* available, in essence stating that, if either of the two tests applies, a majority of the Supreme Court will find that jurisdiction exists. As discussed below, the circuit courts do not all agree that this is the appropriate way to interpret the *Rapanos* decision.

a jurisdictional determination. While there has been a lot of attention to the increased workload on the Corps (resulting from *Rapanos*) to make jurisdictional determinations, there will also be additional work and burden on the applicants to provide information sufficient to meet the standards of the guidance.

In addition to the Corps and the applicant, EPA has assumed new duties, as the guidance requires that extensive consultation occur between the Corps and EPA in situations where the Corps' initial jurisdictional review indicates that the wetlands in question are nonjurisdictional. This consultation is extensive and time-consuming and requires significant resources from both the Corps and EPA.

It was an attempt to limit all of these burdens, in part, that led to the issuance of RGL 08-02.<sup>76</sup> That RGL describes the difference between "approved" JDs and "preliminary" JDs, with the implicit goal of allowing parties to rely on preliminary JDs where doing so would be beneficial for them. "Approved" JDs are those described above—written determinations that are valid for five years and can be relied upon as a defense to accusations of illegal filling. Preliminary JDs, in contrast, are nonbinding opinions. They may be in writing, but cannot be relied upon by the permittee. They can, however, be relied upon by the Corps in issuing a permit, to the extent that they assert jurisdiction over waters. Thus, a landowner may, in essence, use the preliminary JD to "agree" to jurisdiction. This allows the landowner to move forward with the permitting and, where necessary, mitigation for their project in situations where there might otherwise be extensive delay in identifying the presence or absence of jurisdictional waters.

Clearly, it will take time, experience, and likely a period of litigation to develop greater clarity on post-*Rapanos* jurisdiction, particularly with respect to waters or wetlands where jurisdiction depends upon the finding of a significant nexus to traditional navigable waters. In addition to federal agency guidance, others have issued summaries and guidelines for application in determining if the "significant nexus" standard is satisfied.<sup>77</sup>

Prior to *Rapanos*, EPA and the Corps had published a joint legal opinion describing their understanding of the *SWANCC* decision on January 10, 2003.<sup>78</sup> The 2003 legal opinion instructed Corps and EPA field personnel to continue to assert jurisdiction over wetlands to the full extent of their authority, with the exception of applying the Migratory Bird Rule. The 2003 opinion specified that the agencies would not assert jurisdiction based solely on the Commerce Clause connections of migratory bird usage under the Migratory Bird Rule. In addition, guidance clarified that a Commerce Clause nexus for jurisdiction could not be demonstrated

by use of the water to irrigate crops sold in interstate commerce or use of the water by endangered or threatened species, both of which had been identified as Commerce Clause categories under the Migratory Bird Rule. After carving out these categories from potential jurisdiction, if a local office believed that some other interstate commerce connection would support the assertion of jurisdiction, that field office had to obtain headquarters review before claiming jurisdiction. However, disclaimers of jurisdiction did not require headquarters review. As a result, any jurisdictional call based on an interstate commerce connection required headquarters review. The government consistently stressed that both interstate and navigable waters and their tributaries remain jurisdictional, as well as the wetlands adjacent to each.

### b. *Legislative Responses to Changes in Federal Jurisdiction*

There have been bills introduced to amend the CWA with the goal of restoring federal jurisdiction over wetlands and waters that were removed by *SWANCC* and *Rapanos*. Rep. James Oberstar (D-Minn.), Chairman of the U.S. House of Representatives Transportation and Infrastructure Committee, introduced the Clean Water Restoration Act of 2007,<sup>79</sup> with 170 co-sponsors. The bill would have amended 33 U.S.C. §1362 to substitute a new definition of waters of the United States as follows:

. . . all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.

Sen. Russell Feingold (D-Wis.), with 19 co-sponsors, introduced S. 1870,<sup>80</sup> a companion Clean Water Restoration Act, which would have made a similar change to the definition of waters of the United States. In April 2008, Senator Feingold and 23 cosponsors introduced S. 787,<sup>81</sup> containing essentially the same text. If the CWA is amended as set out in these bills, there would be statutory authority for the federal exercise of jurisdiction as practiced prior to *SWANCC* and *Rapanos*. It is likely, however, that there would continue to be litigation focused on the constitutional issues that have, to date, not been directly addressed by the courts.

Some states responded to *SWANCC* by taking steps to protect isolated waters. Virginia enacted a comprehensive nontidal wetlands law in 2000. Wisconsin also enacted new legislation after 2001. Information on state wetlands laws is available through various sources. The Association of State Wetland Managers maintains current information and links

76. Available at <http://www.usace.army.mil/CECW/Documents/cecwo/reg/rgls/rgl08-02.pdf>.

77. *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States* (Env'tl. L. Inst. June 5, 2007).

78. 68 Fed. Reg. 1995 (Jan. 15, 2003), available at [www.epa.gov/owow/wetlands/swanccnav.html](http://www.epa.gov/owow/wetlands/swanccnav.html). This 2003 opinion superseded a 2001 joint opinion that issued 10 days after the *SWANCC* decision.

79. H.R. 2421, 110th Cong. (1st Sess. 2007).

80. 110th Cong. (1st Sess. 2007).

81. 111th Cong. (1st Sess. 2008).



to state wetland programs.<sup>82</sup> Practitioners need to consult applicable state and local law carefully.

## 2. Historical Context for CWA Jurisdictional Issues

*Rapanos* and *SWANCC* were not the first or only cases addressing various issues of CWA jurisdiction over wetlands. The Migratory Bird Rule for jurisdiction over isolated waters or wetlands had been addressed in pre-*SWANCC* cases. Many cases between 2001 and 2007 addressed jurisdiction over non-navigable tributaries and wetlands adjacent to non-navigable tributaries. Various court decisions earlier in the CWA history addressed seasonal waters, man-made waters and issues of adjacent waters. While this section reviews and identifies some of this case law, the plurality and concurring opinions in *Rapanos* call into question the remaining validity of many of these cases. Indeed, the plurality opinion specifically identified some of these earlier jurisdiction cases and criticized them as inconsistent with a proper interpretation of the CWA. Nonetheless, older decisions on CWA jurisdiction provide some insight into the current controversies over wetlands jurisdiction and may retain some vitality in the future.

### a. Isolated Waters

The “migratory bird” basis for CWA jurisdiction, set aside in *SWANCC*, arose as a policy issue in the early 1980s. Based on discussions and differences of views between the federal agencies, in 1985, EPA General Counsel Francis S. Blake issued an opinion concluding that the CWA’s jurisdiction extended to isolated waters that were or could be used by migratory birds or endangered species.<sup>83</sup> However, the Corps’ exercise of such jurisdiction did not follow until environmental groups sued in 1986 for declaratory and injunctive relief to compel a change in Corps practices.<sup>84</sup> The plaintiffs argued that the Corps had declined to assert jurisdiction over an isolated water body in Texas, known as Pond 12, and that the agencies engaged in similar restraint by failing to exercise jurisdiction over isolated waters elsewhere in the country.

While the Pond 12 litigation was pending, the Corps announced that it concurred in EPA’s view that the CWA extends to isolated waters subject to use by, or used by, migratory birds and endangered species.<sup>85</sup> The Corps issued memoranda to its districts explaining that the use of waters by migratory birds could support CWA jurisdiction.<sup>86</sup> As a

result, all parties to the Pond 12 case were in agreement on the scope of the Commerce Clause jurisdiction of the CWA by the time the case was decided.<sup>87</sup>

Following the Pond 12 case, numerous courts interpreted the “migratory bird” rule as a basis for CWA jurisdiction, reaching widely disparate results. In the U.S. Court of Appeals for the Fourth Circuit, isolated waters jurisdiction was not accepted.<sup>88</sup> The Sixth Circuit also questioned jurisdiction on this basis.<sup>89</sup> In contrast, the Ninth Circuit and other district courts concluded that jurisdiction under the CWA extended to isolated waters used or subject to use by migratory birds.<sup>90</sup> The Supreme Court resolved this split of circuits in 2001.

### b. Between *SWANCC* and *Rapanos*

After *SWANCC*, many cases addressed the extent to which the *SWANCC* analysis compelled imposing additional limitations on CWA jurisdiction. The post-*SWANCC* cases involved water features that are regulated under various parts of the 33 C.F.R. §328.3 definition, including “tributaries.” Before accepting the certiorari petitions in *Rapanos* and *Carabell*, the Supreme Court denied certiorari in the six petitions raising similar issues, including the criminal enforcement case against the *Rapanos* defendants.<sup>91</sup> There are various ways to organize the body of post-*SWANCC* decisions, as the issues and analysis in the cases are varied. As noted above, some of these decisions are of questionable validity since the *Rapanos* decision. Others remain relevant, particularly those that address the question of “significant nexus.” For convenience, the cases are presented below in tabular form.

87. *Laubscher*, 662 F. Supp. at 549.

88. *See, e.g.,* *Tabb Lakes Ltd. v. United States*, 715 F. Supp. 726, 19 ELR 20672 (E.D. Va. 1988), *aff’d without opinion*, 885 F.2d 866, 20 ELR 20008 (4th Cir. 1989) (questioning jurisdiction based upon migratory bird usage without the Corps having promulgated a formal rule to this effect).

89. *Hoffman Homes, Inc. v. United States EPA*, 961 F.2d 1310, 22 ELR 21148 (7th Cir. 1992) (denying jurisdiction based upon migratory bird usage), *vacated without opinion*, 975 F.2d 1554, 22 ELR 21547 (7th Cir. 1992).

90. The *Leslie Salt* litigation has a long history, ultimately upholding jurisdiction based upon migratory bird usage. *Leslie Salt Co. v. United States*, 660 F. Supp. 183, 17 ELR 21006 (N.D. Cal. 1987), *judgment for plaintiffs*, 700 F. Supp. 476, 19 ELR 20420 (N.D. Cal. 1989), *revid & remanded*, 896 F.2d 354, 20 ELR 20477 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991), *on remand*, 820 F. Supp. 478 (N.D. Cal. 1992), *reh’g denied*, 1992 U.S. Dist. LEXIS 21115 (N.D. Cal. 1992), *aff’d*, 55 F.3d 1388, 25 ELR 21046 (9th Cir. 1995), *cert. denied sub nom.* *Cargill, Inc. v. United States*, 116 S. Ct. 407, 26 ELR 20001 (1995); *see also* *United States v. Hallmark Construction Co.*, 14 F. Supp. 2d 1069, 29 ELR 20168 (N.D. Ill. 1998) (supporting jurisdiction based upon migratory bird usage without need for regulatory promulgation to that effect); *United States v. Suarez*, 846 F. Supp. 892 (D. Guam 1994) (wetland violator not denied effective counsel where attorney failed to raise jurisdictional defense as wetlands were adjacent, not isolated).

91. *United States v. Rueth Development Co.*, 189 F. Supp. 2d 874 (N.D. Ind., 2001), *aff’d*, 335 F.3d 598, 33 ELR 20238 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 835 (2003); *United States v. Rapanos*, 190 F. Supp. 2d 1011 (E.D. Mich. 2002), *revid*, 339 F.3d 447, 33 ELR 20249 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 1875 (2004); *United States v. Deaton*, 332 F.3d 698, 33 ELR 20223 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1875 (2004); *United States v. Newdunn Associates*, 195 F. Supp. 2d 751, 32 ELR 20573 (E.D. Va. 2002), *revid*, 344 F.3d 407, 33 ELR 20268 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004); *United States v. Krilich*, 152 F. Supp. 2d 983, 31 ELR 20787 (N.D. Ill. 2001), *aff’d*, 303 F.3d 784, 33 ELR 20035 (7th Cir. 2002), *cert. denied*, 538 U.S. 977 (2003); *United States v. Phillips*, 356 F.3d 1086 (9th Cir. 2004), *amended*, 367 F.3d 846 (9th Cir. 2004), *cert. denied*, 2004 LEXIS 7431 (2004).

82. *See* <http://www.aswm.org/swp/index.htm>.

83. Memorandum from Francis S. Blake, General Counsel, U.S. Environmental Protection Agency, to Richard E. Sanderson, Acting Asst. Administrator, Office of External Affairs, U.S. Environmental Protection Agency (Sept. 12, 1985) (CWA jurisdiction over isolated waters).

84. *National Wildlife Fed’n v. Laubscher*, No. G-86-37, 17 ELR 20891 (S.D. Tex. 1987) (magistrate’s opinion); 662 F. Supp. 548, 17 ELR 20892 (S.D. Tex. 1987) (court opinion).

85. 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

86. Memorandum from Brigadier General Patrick J. Kelly, Deputy Director of Civil Works, U.S. Army Corps of Engineers, Corps Field Offices (Nov. 8, 1985) (EPA memorandum on CWA jurisdiction over isolated waters); Memorandum from Brigadier General Patrick J. Kelly, to Commander, Southwestern Division, U.S. Corps of Engineers (Feb. 11, 1986) (Commerce Clause jurisdiction in isolated waters).

### Cases Addressing the Geographical Jurisdiction of the Clean Water Act and Oil Pollution Act After SWANCC up to and Including *Rapanos*

CASE	OUTCOME
<i>Aiello v. Town of Brookhaven</i> , 136 F. Supp. 2d 81 (E.D.N.Y. 2001)	Jurisdiction existed over leachate from a landfill where it entered the groundwater, traveled 2,500 feet into a pond, into a stream, into a lake and into a navigable-in fact (NIF) lake. (The question of whether groundwater could be jurisdictional was not analyzed by the court.)
<i>Baccarat Fremont Developers, LLC, v. US Army Corps Of Engineers</i> , 425 F.3d 1150 (9th Cir. 2005)	Jurisdiction did not depend on the existence of an actual hydrological or ecological connection between the wetland and navigable waters. Even if significant nexus between wetlands and navigable waters was required, there was a connection between wetlands that were separated from flood control channels by berms, which were man-made barriers; wetlands were in reasonable proximity to channels, wetlands served important functions that contributed to aquatic environment in general and to nearby tidal waters, wetlands were within 100 year floodplain of tidal waters, and wetlands were part of hydric soil unit that was continuous with area covered by tidal waters.
<i>Bricks, Inc. v. EPA</i> , 426 F.3d 918 (7th Cir. 2005)	Jurisdiction existed where wetlands were adjacent to an unnamed tributary of Blackberry Creek, which itself was a tributary of Fox River, an interstate water within the jurisdiction of the CWA. The court held that a significant hydrological or ecological connection is not required to support the Corps' jurisdiction over particular adjacent wetlands.
<i>California Sportfishing Association v. Diablo Grande</i> , 209 F. Supp. 2d 1059 (E.D. Cal. 2002)	The court determined that a creek was jurisdictional because it flowed into an NIF river despite the fact that the creek flowed through an underground pipeline along the way.
<i>Carabell v. U.S. Army Corps of Engineers</i> , 391 F.3d 704 (6th Cir. 2004), cert. granted, 126 S. Ct. 415 (2005)	The wetlands at issue were jurisdictional where they were adjacent to a ditch that connects to a drain (or other ditches – there was no specific finding of fact on this issue) that empties into a creek into a lake into an NIF lake. Adjacency was not interrupted despite the presence of a berm between the wetlands and the ditch.
<i>City of Shoreacres v. Waterworth</i> , 332 F. Supp. 2d 992 (S.D. Tex. 2004), aff'd, 420 F.3d 440 (5th Cir. 2005)	Jurisdiction does not extend to waters that are neither navigable nor truly adjacent to navigable waters.
<i>Colvin v. United States</i> , 181 F. Supp. 2d 1050 (C.D. Cal. 2001)	Discharge of industrial waste into an NIF lake was jurisdictional, not having been affected by the SWANCC decision.
<i>Community Association for Restoration of the Environment v. Henry Bosma Dairy</i> , 2001 WL 1704240 (E.D. Wash. Feb. 27, 2001), aff'd, 305 F.3d 943 (9th Cir. 2002)	Discharge into a drain that flowed into an irrigation canal that emptied into a river which was a water of the U.S. was jurisdictional.
<i>FD &amp; P Enterprises, Inc. v. U.S. Army Corps of Engineers</i> , 239 F. Supp. 2d 509 (D.N.J. 2003)	States that in light of SWANCC, the "hydrological connection" test is no longer valid and, rather, for geographic jurisdiction to exist, there must be a "significant nexus" between the wetland and navigable waters. A significant nexus exists if the filling of the wetlands will have a substantial injurious impact upon the chemical, physical, and/or biological integrity of the navigable water. Here, wetlands that drain into a creek that flows into a river could have a substantial nexus.
<i>Headwaters, Inc. v. Talent Irrigation Dist.</i> , 243 F.3d 526 (9th Cir. 2001)	Canals that "exchange water" with "a number of natural streams and at least one lake" are regulated under the Clean Water Act. The canal system was not a closed system as evidenced by two pesticide releases from the canals into other waters.
<i>Idaho Rural Council v. Bosma</i> , 143 F. Supp. 2d 1169 (D. Idaho 2001)	A discharge into a spring was regulated by the Act where the spring ran into a pond, "across a pasture," into a canal and into a creek that is a water of the U.S.
<i>In re Smith et al.</i> , EPA Docket No. CWA-04-2001-1501, 2004 WL 1658484 (EPA July 15, 2004)	The property, a former lake bed that had been drained by the removal of a dam, was jurisdictional because it had a creek running through it which flowed into another creek, into a river, into a lake and into an NIF river. Jurisdiction also existed because interstate travelers fished in the pond.
<i>In re Needham</i> , 279 B.R. 515 (Bankr. W.D. La., July 30, 2001), aff'd, 2002 WL 1162790 (W.D. La., Jan. 22, 2002), rev'd, 354 F.3d. 340 (5th Cir. 2003)	The lower court followed <i>Rice v. Harken</i> and concluded that there was no jurisdiction over oil pumped into a drainage ditch that is connected to a bayou to another bayou to a canal that is tidally influenced. The circuit court upheld this interpretation, but, stressing that the facts showed that oil was discovered in the second bayou, overruled the decision. The fact that the bayou was adjacent to the NIF canal was a "significant nexus" sufficient to afford jurisdiction, concluded the court.
<i>Laguna Gatuna, Inc. v. United States</i> , 50 Fed. Cl. 336 (Fed. Cl. 2001)	Essentially ignores SWANCC and holds that a playa lake was within EPA's jurisdiction despite the fact that "it is not hydrologically connected to any other water source," even though even EPA thought that after SWANCC it did not have jurisdiction over the lake. The court stated that SWANCC addressed the Corps' authority not EPA's and dealt with 33 C.F.R. §328.3(a)(3), not 40 C.F.R. §122.2, upon which EPA had based its jurisdiction over the playa pre-SWANCC.

CASE	OUTCOME
<i>Northern California River Watch v. City of Healdsburg</i> , 2004 WL 201502 (N.D. Cal., Jan. 23, 2004)	NPDES permit is required for discharge to a former gravel pit, even though the pit is at least 50 feet from a navigable water and has no normal surface water connection to it. The court held that the pit was adjacent to the navigable water, noting the presence of a groundwater connection between the two but holding that such a connection was not a necessary precondition to the finding of adjacency.
<i>North Carolina Shellfish Growers Association v. Holly Ridge Association</i> , 278 F. Supp. 2d 654 (E.D.N.C. 2003)	Jurisdiction existed where the wetland complex was (apparently) adjacent to a creek that connected to a navigable water (the case is not completely clear on this point). A stormwater connection was a sufficient hydrologic connection. Wetlands adjacent to jurisdictional wetlands were also jurisdictional. Thus, the entire wetland network was jurisdictional.
<i>Ohio Valley Environmental Coalition v. Bulen</i> , 315 F.Supp2d 821 (S.D.W.Va. 2004), <i>reh'g denied</i> , 2004 LEXIS 17439 (S.D.W.Va.)	Ditches resulting from prior mining activities were jurisdictional, citing to <i>Deaton</i> .
<i>Parker v. Scrap Metal Processors, Inc.</i> , 386 F.3d 993 (11th Cir. 2004), <i>reh'g denied en banc</i> , 125 Fed.Appx. 979 (11th Cir. 2004)	Stormwater runoff entering a stream that is a tributary of a navigable water is jurisdictional.
<i>Rice v. Harken Exploration Co.</i> , 250 F.3d 264 (5th Cir. 2001), <i>reh'g denied en banc</i> , 263 F.3d 167 (5th Cir. 2001)	OPA case involving discharge to creek that flowed into a navigable water. The court equates OPA and CWA jurisdiction and finds that the discharge was not covered because "navigable" means only navigable waters and areas adjacent to such waters.
<i>San Francisco Baykeeper v. Cargill Salt Div.</i> , 263 F.3d 963 (9th Cir. 2001)	Overturned a district court decision that had, prior to SWANCC, relied upon the migratory bird rule as the basis for jurisdiction.
<i>United States v. Adam Bros. Farming, Inc.</i> , 369 F. Supp. 2d 1180 (C.D. Cal. 2004)	District court's finding of jurisdiction not subject to interlocutory appeal, despite owners' contention that there was circuit split on issue, where case fell squarely within scope of CWA regulatory jurisdiction as set forth in controlling circuit precedent (i.e., "a tributary need not be navigable-in-fact to qualify"), and owners waited five months before seeking certification of interlocutory appeal.
<i>United States v. Buday</i> , 138 F. Supp. 2d 1282 (D. Mont. 2001)	Wetlands adjacent to a creek that flows to another creek that flows into a navigable in fact river were jurisdictional.
<i>United States v. Deaton</i> , 332 F.3d 698 (4th Cir. 2003), <i>cert. denied</i> , 124 S. Ct. 1874 (2004)	Wetlands were jurisdictional where they were adjacent to a ditch that connected to a roadside ditch, to a culvert, under a road, to another ditch, to a creek, to another creek and to an NIF river.
<i>United States v. Gerke Excavating</i> , 412 F.3d 804 (7th Cir. 2005), <i>reh'g denied en banc</i> , 2005 LEXIS 17536 (7th Cir. Aug. 17, 2005)	Wetlands drained by ditch that ran into nonnavigable creek that ran into nonnavigable river, which in turn ran into navigable river, were "waters of the United States," for purposes of CWA, and thus could not be filled without first obtaining permit, despite contentions that filling in tract of wetlands in question did not have measurable effect on navigable river, and that broad definition of "wetlands" employed by Corps infringed on state's power.
<i>United States v. Hummel</i> , 2003 WL 1845365 (N.D. Ill. 2003)	Two sets of wetlands were deemed jurisdictional when applying the "significant nexus" test in the following circumstance. Some of the wetlands at issue were adjacent to a stream that flowed into a creek that flowed through some of the other wetlands at issue which flowed into a river which flowed into the Illinois River that flowed into the Mississippi River.
<i>United States v. Interstate General Co.</i> , 152 F. Supp. 2d 843 (D. Md. 2001), <i>aff'd</i> , 39 Fed.Appx. 870 (4th Cir. 2002)	SWANCC's holding is limited to an examination of isolated waters and did not require that jurisdictional wetlands be adjacent to traditionally navigable waters.
<i>United States v. Jones</i> , 267 F. Supp. 2d 1349 (M.D. Ga., 2003)	A discharge was covered by the OPA where it ran "off of the property" and into a storm sewer which connected to a roadside ditch to a creek to a river.
<i>United States v. Krilich</i> , 152 F. Supp. 2d 983 (N.D. Ill. 2001), <i>aff'd</i> , 303 F.3d 784 (7th Cir. 2002), <i>cert. denied</i> , 538 U.S. 977 (2003)	SWANCC is not a basis for overturning a consent decree because (1) the defendant had agreed that the wetlands were waters of the U.S. and (2) there was nothing in the consent decree establishing that the Migratory Bird Rule was the sole basis for the assertion of jurisdiction over the wetlands at issue.
<i>United States v. Lamplight Equestrian Center</i> , 2002 WL 360652 (N.D. Ill. March 8, 2002)	Wetlands adjacent to drainage ditch are waters of the U.S. where water from the ditch flows through a swale to a creek to an interstate waterway.
<i>United States v. Newdunn Associates</i> , 195 F. Supp. 2d 751 (E.D.Va. 2002), <i>rev'd</i> , 344 F.3d 407 (4th Cir. 2003), <i>cert. denied</i> , 124 S.Ct. 1874 (2004)	No jurisdiction existed over wetlands on a property where the connection was as follows: Water flows off of the property into a spur ditch that connects to a manmade ditch, to a 100-foot long culvert under a road, to another manmade ditch, to the Western Arm of Stony Run and then to Stony Run, which is NIF one mile downstream from the connection with the Western Arm.



CASE	OUTCOME
<i>United States v. Phillips</i> , 356 F.3d 1086 (9th Cir. 2004), amended, 367 F.3d 846 (9th Cir. 2004)	Upholds conviction based on work in a creek that flows into another creek that flows into an NIF river.
<i>United States v. Rapanos</i> , 190 F. Supp. 2d 1011 (E.D. Mich. 2002), <i>rev'd</i> , 339 F.3d 447 (6th Cir. 2003), <i>cert. denied</i> , 124 S. Ct. 1875 (2004), <i>aff'd</i> , 376 F.3d 629 (6th Cir. 2004)	A “hydrological connection” to a ditch which connected to a creek which connected to an NIF river is all that is required for jurisdiction to exist. There is no requirement of “direct abutment.” There are two <i>Rapanos</i> lines of cases, the first a criminal action and the second a civil enforcement action. Full history of the criminal case is 895 F. Supp. 165 (E.D. Mich. 1995), <i>rev'd</i> , 115 F.3d 367 (6th Cir. 1997), <i>cert. denied</i> , 522 U.S. 917 (1997), <i>appeal after remand</i> , 235 F.3d 256 (6th Cir. 2000), <i>cert. granted, judgment vacated</i> , 533 U.S. 913 (2001), <i>on remand</i> , 16 Fed. Appx. 345 (6th Cir. 2001), <i>on remand</i> , 190 F. Supp. 2d 1011 (E.D. Mich. 2002), <i>rev'd</i> , 339 F.3d 447 (6th Cir. 2003), <i>cert. denied</i> , 124 S.Ct. 1875 (2004), <i>aff'd</i> , 376 F.3d 629 (6th Cir. 2004).
<i>United States v. Rapanos</i> , 376 F.3d 629 (6th Cir. 2004), <i>cert. granted</i> , 126 S. Ct. 414 (2005)	This is the <i>Rapanos</i> civil enforcement case, which involved different property than the criminal action but reaches the same conclusions regarding jurisdiction as the criminal case on the basis of res judicata.
<i>United States v. RGM Corp.</i> , 222 F. Supp. 2d 780 (E.D. Va. 2002), <i>vacated</i> , 2005 LEXIS 1992 (E.D. Va. Jan. 18, 2005)	SWANCC shows “that the unilateral expansion of Corps jurisdiction [can] not be allowed to continue in a limitless fashion.”
<i>United States v. Rueth Development Co.</i> , 189 F. Supp. 2d 874 (N.D. Ind. 2001), <i>aff'd</i> , 335 F.3d 598 (7th Cir. 2003), <i>cert. denied</i> , 124 S. Ct. 835 (2003)	Jurisdiction existed where the wetlands were adjacent to a ditch that led to another ditch that led to a navigable water. The court noted that a drop of rainwater at the site would certainly intermingle with water in the navigable waterway. Elsewhere it stated that a “molecule of water” could flow toward and mix with the navigable waterway. However, following the signing by the Defendant of a Consent Decree, the finding of adjacency was vacated by the court.
<i>United States v. The New Portland Meadows, Inc.</i> , WL 31180956 (D. Or. Sept. 9 2002)	Jurisdiction existed over man-made drainage ditches that flowed into the Columbia Slough, a “water of the United States.” The court held that it was irrelevant that the water in the ditches was forced into the Columbia Slough by artificial pumps.
<i>United States v. Thorson</i> , 2004 WL 737522 (W.D. Wis. Apr. 6, 2004)	Jurisdiction existed over work on wetlands on 5.8 acre site where the western border of the site abutted a drainage ditch which led to a creek that led to a river which flowed into an NIF water. The court rejected arguments that the Corps only had jurisdiction over wetlands immediately adjacent to NIF waters and that extending jurisdiction farther upstream was a violation of the commerce clause

### c. Since *Rapanos*

The early litigation post-*Rapanos* focused on how the lower courts should apply the plurality Supreme Court decision. The federal government argued that because of the plurality opinion, it should be allowed to demonstrate jurisdiction using either the plurality standard (relatively permanent flow) or the “significant nexus” standard of Justice Kennedy’s

concurrency. In late 2007, the Supreme Court denied certiorari in *United States v. Johnson*,<sup>92</sup> which had upheld the government’s view of how lower courts should apply a plurality Supreme Court decision. A few other cases have addressed the substance of jurisdiction with mixed results. The post-*Rapanos* decisions are identified and summarized on the next few pages. Clearly, practitioners will need to follow emerging case law in this field very carefully.

92. 467 F.3d 56, 36 ELR 20040 (1st Cir. 2006).

### Cases Addressing the Geographical Jurisdiction of the Clean Water Act and Oil Pollution Act Since *Rapanos*

CASE	OUTCOME
<i>Northern California River Watch v. City of Healdsburg</i> , 457 F.3d 1023 (9th Cir. 2006), <i>withdrawn and superseded</i> , 496 F.3d 993 (9th Cir. 2007), <i>cert. denied</i> , <i>City of Healdsburg v. N. Cal. River Watch</i> , 2008 U.S. LEXIS 1230 (Feb. 19, 2008)	Upheld CWA jurisdiction over a pond separated from the Russian River by a berm, based on the flow of groundwater between the pond and the navigable river. Ninth Circuit found that the seepage of water from the pond into the river provided a significant nexus, based on facts showing increased chloride from the pond in the river.
<i>United States v. Gerke Excavating, Inc.</i> , 464 F.3d 723 (7th Cir. 2006), <i>pet. for reh'g denied</i> (Dec. 1, 2006)	After Seventh Circuit appealed civil judgment against contractor for illegal discharges, Supreme Court then granted certiorari, vacated the Seventh Circuit's decision, and remanded the case back to the Seventh Circuit for further consideration in light of <i>Rapanos</i> . On remand, the Seventh Circuit concluded that Justice Kennedy's standard governs the remaining stages of the litigation and remanded the case to the district court for further proceedings.
<i>United States v. Charles Johnson, et al.</i> , 467 F.3d 56 (1st Cir. 2006), <i>cert denied</i> 128 S.Ct. 375 (2007)	First Circuit issued a lengthy opinion holding that the United States may establish CWA jurisdiction under <i>Rapanos</i> by satisfying either the standard articulated by the plurality or the standard articulated by Justice Kennedy in concurrence. A dissenting opinion would have limited remand proceedings to the <i>Rapanos</i> plurality test, stating that the Kennedy test "leaves the door open to continued federal overreach."
<i>United States v. Moses</i> , 496 F.3d 984 (9th Cir. 2007)	Teton Creek flows only during spring run-off; land developer modified creek channel despite cease and desist order from Corps and other warnings. Criminal conviction upheld. Following its <i>City of Healdsburg</i> decision, Circuit held that seasonally intermittent tributary was jurisdictional
<i>United States v. Chevron Pipe Line Co.</i> , 437 F. Supp. 2d 605 (N.D. Tex. 2006)	No jurisdiction under the Oil Pollution Act, which uses the same definition of "navigable waters" as the CWA, where an oil spill occurred in a dry wash. The court followed pre- <i>Rapanos</i> Fifth Circuit precedent on what constituted a significant nexus to navigable waters. On the facts, the court concluded that the unnamed tributary, which was dry at the time of the spill and clean up, and rarely carried water, did not provide a significant nexus to navigable waters.
<i>United States v. Evans</i> , No. 3:05 CR 159 J 32HTS, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006)	In criminal enforcement action, the defendants moved to suppress evidence of CWA violations obtained via search warrants, arguing that the magistrate judge who issued the search warrants lacked jurisdiction under the CWA to do so in light of <i>Rapanos</i> . The district court adopted the magistrate judge's report and recommendation to deny the motions to suppress. The magistrate judge found that the allegations contained in the affidavits supporting the application for the search warrants were sufficient to support a finding that there was probable cause to believe the creek at issue fell within the definition of "waters of the United States."
<i>United States v. Marion L. Kincaid Trust, et al.</i> , No. 02-10149 (E.D. Mich. Nov. 3, 2006)	This decision relates to a civil enforcement action regarding beach grading operations along the shores of Saginaw Bay of Lake Huron. After the enforcement action was voluntarily dismissed in 2003, the defendants sought to recover attorneys' fees under EAJA. In denying the motion, the court held that the government's position on the ordinary high water mark, necessary to support the RHA claim, was not substantially justified. However, the court found that the government's CWA adjacent wetlands claim was substantially justified, based upon its reading of <i>Rapanos</i> and the fact that the wetlands "abut a Great Lake."
<i>Sierra Club v. U.S. Army Corps of Engineers</i> , No. 3:05-cv-362, 2006 WL 3365609 (M.D. Fla. Nov. 19, 2006)	Plaintiff challenged a regional general permit issued by the Jacksonville District of the Corps of Engineers. While cross-motions for summary judgment were pending, the Supreme Court decided <i>Rapanos</i> and the district court asked for supplemental briefing. All of the parties to the proceeding agreed that CWA jurisdiction was not an issue in the case and therefore should not affect the court's analysis. In upholding the regional permit, the court discussed <i>Rapanos</i> in a footnote.
<i>Environmental Protection Information Center v. Pacific Lumber Co.</i> , 469 F. Supp. 2d 803 (N.D. Cal. 2007)	In this CWA citizen suit, plaintiff contends that defendant's logging activities require an NPDES permit. In denying plaintiff's motion for summary judgment, the court ruled that the Kennedy opinion in <i>Rapanos</i> established the appropriate standard for CWA jurisdiction in the Ninth Circuit and that plaintiff had not demonstrated the existence of a significant nexus between the streams into which defendant's discharges occurred and traditional navigable waters. The case was voluntarily dismissed by the Plaintiffs following the bankruptcy and dissolution of the Defendants.
<i>United States v. Robison</i> , 505 F.3d 1208 (11th Cir. 2007), <i>motion for reh'g en banc denied</i> , 521 F.3d 1319 (11th Cir. 2008)	Reversed criminal conviction for CWA violations finding inadequate jury instructions on "navigable waters" in light of <i>Rapanos</i> . Court held that Kennedy opinion establishes standard.

CASE	OUTCOME
<i>P &amp; V Enterprises v. U.S. Army Corps of Engineers</i> , 466 F. Supp. 2d 134 (D.D.C. 2006)	Plaintiffs proposed to develop a large mixed-use community and challenged the facial validity of Corps' regulation 33 C.F.R. §328.3(a)(3) that asserts jurisdiction over all intrastate water, the "use, degradation or destruction [of which]...could affect interstate or foreign commerce." Case dismissed as barred by six year statute of limitations of 28 U.S.C. §2401 (a) since the regulation was promulgated in the 1980's. Court held that regulation could be challenged on an "as applied" basis.
<i>United States v. Lucas</i> , 516 F.3d 316 (5th Cir. 2008), cert. denied, 2008 U.S. LEXIS 6488 (Oct. 6, 2008)	Upheld criminal convictions for CWA violations holding that the wetlands at issue, which were adjacent to tributaries of navigable waters, were waters of the United States under all three tests set forth in <i>Rapanos</i> .
<i>United States v. Lippold</i> , No. 06-30002, 2007 U.S. Dist. LEXIS 80513 (C.D. Ill. Oct. 31, 2007)	In a brief opinion, the court followed the Seventh Circuit's opinion in <i>Gerke</i> and declined a motion to dismiss in a criminal case finding that the government could establish that the intermittently flowing stream at issue possessed a significant nexus to navigable waters.
<i>United States v. Fabian</i> , 522 F. Supp. 2d 1078 (N.D. Ind. 2007)	Defendant challenged the court's prior ruling, finding jurisdiction based on adjacency, claiming that because there was no definite standard establishing the proximity that must exist between the wetland and navigable waters, the issue was one of fact for a jury. The court rejected this argument finding that defendant failed to rebut government evidence of adjacency. The court found that the wetlands at issue were adjacent to a larger wetland "complex" that was adjacent to navigable waters; relying on Justice Kennedy's Opinion in <i>Rapanos</i> as controlling and observing that Justice Kennedy had adopted the Corps' definition of adjacency.
<i>Coldani v. Hamm</i> , No. S-07-660 RRB EFB, 2007 U.S. Dist. LEXIS 62644 (E.D. Cal. Aug. 14, 2007)	In a citizen suit against a dairy farm for unpermitted discharges to a navigable water via groundwater, the court characterized Justice Kennedy's Opinion as the controlling test. While distinguishing <i>Rapanos</i> as only applying to wetlands adjacent to navigable waters, the court relied on the "significant nexus" language in <i>Rapanos</i> and similar language in <i>Riverside Bayview</i> holding that allegations pollution reached navigable waters from contaminated groundwater were sufficient to survive a motion to dismiss. The court noted that a general assertion of hydrological connection between all waters would not suffice and also observed that other courts have ruled that the CWA does not regulate discharges to groundwater whether hydrologically connected to surface waters or not.
<i>United States v. Bailey</i> , 556 F. Supp. 2d 977 (D. Minn. 2008)	Writing that every federal court applying <i>Rapanos</i> has concluded that jurisdiction is valid if Justice Kennedy's test is met, the court granted summary judgment to the Corps finding that the Corps had established jurisdiction under both the plurality and Justice Kennedy's tests in a case involving restoration of filled-in wetlands.
<i>Sierra Club v. City &amp; County of Honolulu</i> , No. 04-00463 DAE-BMK, 2008 LEXIS 64262 (D. Haw. Aug. 18, 2008)	In a lengthy and complicated opinion, the court granted summary judgment for plaintiffs in a citizen suit for certain uncontested spills by a county sewer authority, but granted summary judgment for defendants for certain contested spills into storm drains and dry stream beds. The court held that the spills were not unlawful because they did not reach waters of the United States. In so holding, the court rejected Justice Kennedy's significant nexus test writing that it only applied to "an isolated wetland that is not adjacent to a navigable-in-fact-water." The court, however, did apply the plurality's test in determining, without analyzing whether the spills reached navigable waters, that a storm drain was not a water of the U.S. absent evidence of a "continuous flow of water during some months of the year." Likewise, the court held that allegations of spills to dry stream beds that were identified as tributaries of the Pacific Ocean were insufficient to withstand summary judgment where they failed to allege any "continuous" flow.
<i>United States v. Cundiff</i> , 480 F. Supp. 2d 940 (W.D. Ky. 2007)	Holding that jurisdiction could be established under either the plurality or Justice Kennedy's test, the court held that the wetlands at issue were waters of the U.S. under both tests and observed that the continuous surface connection element of the plurality's test could be demonstrated notwithstanding the fact that the level of water in the connected waterbodies was different.
<i>United States v. Rosenblum</i> , No. 07-294 (JRT/FLN), 2008 U.S. Dist. LEXIS 15957 (D. Minn. March 3, 2008)	Denying a motion to dismiss in a criminal case, the court discussed a Magistrate Judge's finding that relied on Justice Kennedy's test. The Magistrate Judge had found that a discharge into a sewer that led to a POTW which in turn emptied into the Mississippi River, was within federal jurisdiction finding that the discharge "significantly affects" the chemical, physical, and biological integrity of the River. The District Court Judge found that this analysis was not appropriate because discharges to POTWs were regulated under another section of the CWA which the court upheld as a valid exercise of Commerce Clause powers.
<i>Simsbury-Avon Preservation Society, LLC v. Metacon Gun Club, Inc.</i> , 472 F. Supp. 2d 219 (D. Conn. 2007).	Court granted summary judgment to Defendant finding, despite the fact that the parties had assumed in their briefs that the plurality test was controlling, that under either test the wetlands at issue did not fall under federal jurisdiction. The court noted that there was no continuous surface connection with navigable waters and relied on inconclusive testing for lead to find that there was only a speculative and insubstantial nexus with jurisdictional waters.



CASE	OUTCOME
<i>San Francisco Baykeeper v. Cargill Salt Div.</i> , 481 F.3d 700, 707 (9th Cir. 2007)	Holding that Justice Kennedy's test was controlling, the court overturned a District Court finding that a pond adjacent to a navigable slough was a water of the United States. The court held that notwithstanding that the pond was not a wetland and so was not necessarily subject to <i>Rapanos</i> analysis, the pond fell outside of federal jurisdiction because a significant nexus did not exist between the pond and the slough.
<i>American Petroleum Institute v. EPA</i> , 541 F. Supp. 2d 165 (D.D.C. 2008)	In a case that was stayed pending the outcome of <i>Rapanos</i> , the court vacated a 2002 regulatory definition of waters of the U.S. (pertaining to spill prevention plans from oil production facilities) as overly broad. Relying on <i>SWANCC</i> for the proposition that Congress did not intend to assert regulatory jurisdiction to the full extent of its Commerce Clause powers, but rather limited regulatory authority to navigable waters, the court agreed with plaintiffs that EPA's justification for the definition was inadequate given recent Supreme Court case law. The court noted that it was not clear whether the plurality or Justice Kennedy's test was controlling and stated that it need not determine the issue because its holding was based on EPA's failure to adequately explain the definition, though this failure was based on inadequate discussion of case law.

### 3. Other Jurisdictional Issues

Some of the jurisdictional issues that were previously resolved in cases interpreting the subparts of 33 C.F.R. §328.3 are now unsettled after *Rapanos*. It is appropriate to identify some of the issues and prior precedent, since these matters may be reexamined in light of *Rapanos*.

#### a. Man-Made Hydrologic Connections

Both before and after *SWANCC*, the majority of courts found that man-made<sup>93</sup> and/or intermittent connections to otherwise jurisdictional "waters of the United States" are sufficient to establish CW jurisdiction over wetlands. The Second Circuit has found that a brook channeled through passageways built by developers is a jurisdictional tributary.<sup>94</sup> The Ninth Circuit has determined that irrigation canals are subject to CWA jurisdiction even though the canals are separated from natural streams by a system of closed gates,<sup>95</sup> and also held that ditches, road beds, and culverts that are hydrologically connected to jurisdictional surface waters are sufficient to establish CWA jurisdiction.<sup>96</sup> The Eleventh Circuit has held that man-made drainage ditches and canals that flow intermittently into a jurisdictional creek qualify as "tributaries."<sup>97</sup> The Fourth Circuit has found that wetlands were jurisdictional where they were adjacent to a ditch that connected to a roadside ditch, to a culvert, under a road, to another ditch, to a creek, to another creek, and to a navigable-in-fact river.<sup>98</sup> The Sixth Circuit confirmed jurisdiction

over wetlands with an alleged "hydrological connection" to a ditch that connected to a creek that connected to a navigable-in-fact river.<sup>99</sup> Numerous district courts have reached similar results.<sup>100</sup> There have been contrary decisions. Notably, the U.S. Court of Appeals for the Fifth Circuit declined to extend CWA jurisdiction post-*SWANCC*, although the man-made nature of the conveyance was not the deciding factor.<sup>101</sup>

99. *United States v. Rapanos*, 339 F.3d 447, 33 ELR 20249 (6th Cir. 2003).

100. *See, e.g.*, *United States v. Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001) (seasonal creek that does not reach navigable-in-fact waterway for 235 miles is within CWA jurisdiction); *United States v. Interstate General Co.*, 152 F. Supp. 2d 843, 847 (D. Md. 2001), *aff'd*, 39 Fed. Appx. 870 (4th Cir. 2002) (wetlands connected to the Chesapeake Bay some 10 miles away and the Potomac River some six miles away, by intermittent streams and drainage ditches, are within CWA jurisdiction); *United States v. Lamplight Equestrian Center, Inc.*, 2002 WL 360652, 32 ELR 20526 (N.D. Ill. Mar. 8, 2002) (where wetlands draining to a man-made ditch that stops 50 feet short of a meandering swale, yet feed runoff to the swale during rain events that eventually channels into a creek and eventually a navigable river deemed sufficient to trigger CWA jurisdiction); *Track 12, Inc. v. District Engineer*, 618 F. Supp. 448, 449, 16 ELR 20163 (D. Minn. 1985) (highway construction); *United States v. Hummel*, 2003 WL 1845365 (N.D. Ill. Apr. 8, 2003) (wetlands were deemed jurisdictional when adjacent to a stream that flowed into a creek that flowed into a river that flowed into the Illinois River that flowed into the Mississippi River); *United States v. Jones*, 267 F. Supp. 2d 1349 (M.D. Ga. 2003) (discharge was covered by the Oil Pollution Act (OPA) where it ran "off of the property" and into a storm sewer that connected to a roadside ditch to a creek to a river); *North Carolina Shellfish Growers Ass'n v. Holly Ridge Ass'n*, 278 F. Supp. 2d 654 (D.S.C. 2003) (jurisdiction existed where the wetland complex was (apparently) adjacent to a creek that connects to a navigable water. A storm-water connection was a sufficient hydrologic connection. Wetlands adjacent to jurisdictional wetlands are also jurisdictional. Thus, the entire wetland network was jurisdictional.); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001) (discharge into a spring was regulated by the Act where the spring ran into a pond, "across a pasture," into a canal, and into a creek that is a water of the United States); *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 2001 WL 1704240 (E.D. Wash. Feb. 27, 2001), *aff'd*, 305 F.3d 943, 33 ELR 20048 (9th Cir. 2002) (discharge into a drain that flowed into an irrigation canal that emptied into a river that was a water of the U.S. was jurisdictional); *see also Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (Fed. Cl. 2001) (Essentially ignores *SWANCC* and holds that a playa lake was within EPA's jurisdiction despite the fact that "it is not hydrologically connected to any other water source," even though EPA thought that after *SWANCC* it did not have jurisdiction over the lake.).

101. *See In re Needham*, 354 F.3d 340 (5th Cir. 2003) (jurisdiction existed under the OPA of 1990 over discharges to a water that was adjacent to a navigable canal); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001) (no jurisdiction under OPA over discharges of oil to dry land that would potentially reach jurisdictional surface waters via groundwater, though no evidence to that effect was provided other than general assertions by experts that jurisdictional surface waters are down-gradient of the oil contamination).

93. Construction and maintenance of irrigation ditches, and maintenance of other ditches, is addressed under the scope of exempt activities under §404(f)(1).

94. *United States v. TGR Corp.*, 171 F.3d 762, 29 ELR 21059 (2d Cir. 1999); *see also United States v. DeFelice*, 641 F.2d 1169, 1175, 11 ELR 20505 (5th Cir. 1981), *cert. denied*, 454 U.S. 940 (1981) (jurisdiction over waters created by unauthorized activities of third parties).

95. *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001).

96. *Leslie Salt Co. v. United States*, 896 F.2d 354, 20 ELR 20477 (9th Cir. 1990); *see also Swanson v. United States*, 789 F.2d 1368, 16 ELR 20799 (9th Cir. 1986); *N. Cal. River Watch v. Healdsburg*, 496 F.3d 993 (9th Cir. 2007) (man-made nature of pond not important to determining jurisdiction).

97. *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997).

98. *United States v. Deaton*, 332 F.3d 698, 33 ELR 20223 (4th Cir. 2003). This issue—whether roadside ditches can be jurisdictional—was squarely presented in a petition for certiorari to the Supreme Court, which was denied.

The plurality opinion in *Rapanos* criticized decisions that had upheld jurisdiction over wetlands adjacent to roadside ditches that carried only intermittent or ephemeral water flow.<sup>102</sup> The opinion, and the dialogue among the plurality, concurring, and dissenting opinions, reflect an active debate over whether man-made ditches should be jurisdictional as tributaries. The plurality opinion states that ditches are normally watercourses through which only intermittent water flows, showing that “these are, by and large, not ‘waters of the United States.’”<sup>103</sup> The concurring opinion did not agree that such conveyances would normally reflect a low flow, nor that the jurisdictional extent of the CWA would vary depending on the nature of the channel (natural or man-made) at issue.<sup>104</sup> As summarized above, the 2007 post-*Rapanos* guidance states that “generally” ditches are not jurisdictional but leaves open the authority to assert jurisdiction over ditches.

On one level, *Rapanos* should not affect the question of jurisdiction based on whether a water body is man-made or natural. Under the plurality opinion, if permanent water flows, the non-navigable water body can be jurisdictional, and under the concurring opinion, if there is a significant nexus with navigable waters, the non-navigable water body can be jurisdictional. Neither test inquires into the nature of the channel, e.g., how it was formed, through which the water flows. However, the plurality opinion rests in part on distinguishing between “waters of the United States” and “point sources.” Because ditches and other conveyances are defined as point sources, the plurality opinion indicates that they would not be “waters of the United States.” While this may be analysis rather than a holding, the jurisdiction over man-made conveyances and ditches will likely remain highly controversial and the subject of ongoing litigation. A separate inquiry would be applied to wetlands adjacent to ditches, as the wetlands would need to be adjacent to a “water of the United States” for CWA jurisdiction. This is an area of law that is likely to see litigation post-*Rapanos*.

### b. Seasonal Waters

The first post-*Rapanos* case arose within the Fifth Circuit and dealt with seasonal waters. In *United States v. Chevron Pipeline Co.*,<sup>105</sup> the Northern District of Texas held that “generally dry channels and creek beds” do not have a significant nexus to navigable waters to support an enforcement action under the Oil Pollution Act, which uses the same definitions as the CWA. At issue was cleanup of an oil spill into an ephemeral channel that apparently had flowing water only in response to rainfall events. At the time of the oil spill and cleanup, the channel was dry.

102. 126 S. Ct. at 2217-18. Among the cases cited in the plurality opinion as inappropriate findings of tributary jurisdiction through ditches were: *Treacy v. Newdunn Association*, 344 F.3d 407, 33 ELR 20268 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698, 33 ELR 20223 (4th Cir. 2004); *Community Association for Restoration of Environment v. Henry Bosma Dairy*, 305 F.3d 943, 33 ELR 20048 (9th Cir. 2002); and *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001).

103. 126 S. Ct. at 2223.

104. 126 S. Ct. at 2246-47.

105. 437 F. Supp. 2d 605 (N.D. Tex. 2006).

Jurisdiction over streams that are only seasonally wet has always raised many issues, and will be the focus of post-*Rapanos* litigation. The Corps’ regulations include the term “intermittent streams” among the “other waters” subject to CWA jurisdiction.<sup>106</sup> The Corps and EPA have not promulgated formal definitions describing different types of stream flows for regulatory jurisdiction, but the Corps did include certain definitions with its nationwide permits.<sup>107</sup> These definitions recognize three types of streams, based upon the nature of the flow in each. A perennial stream “has flowing water year-round during a typical year.”<sup>108</sup> An intermittent stream “has flowing water during certain times of the year, when groundwater provides water for stream flow.”<sup>109</sup> An ephemeral stream “has flowing water only during, and for a short duration after, precipitation events in a typical year.”<sup>110</sup>

While these definitions distinguish among streams according to the nature and duration of flow, the agencies have not distinguished among the stream types for purposes of jurisdiction, except to the extent that the corps regulations include “intermittent streams” expressly. In application, the government has asserted jurisdiction over perennial, intermittent, and ephemeral streams, as well as wetlands adjacent to such water bodies.

Prior to *Rapanos*, the courts upheld CWA jurisdiction over normally dry arroyos that carry flow only during intense rainfall events.<sup>111</sup> Other seasonally dry locations also have been held to be jurisdictional.<sup>112</sup> It is worth noting that none of the cases have yet addressed the Corps’ recent definitions of intermittent and ephemeral waters. The *Rapanos* plurality specifically criticized exercise of jurisdiction over dry washes or arroyos that carried water only during periods of rain.<sup>113</sup> The plurality opinion states on the one hand that jurisdiction extends only to “continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.”<sup>114</sup> Footnote 5, however, preserves some potential for jurisdiction over intermittent waters:

By describing “waters” as “relatively permanent,” we do not necessarily exclude streams, rivers or lakes that might dry up

106. 33 C.F.R. §328.3(a)(1)(3) (2004).

107. 65 Fed. Reg. 12898 (Mar. 9, 2000).

108. The definition further provides: “The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.” *Id.*

109. The definition further provides: “During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.” *Id.*

110. The definition further provides: “Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.” *Id.*

111. *See, e.g., Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005); *Quivira Mining Co. v. U.S. EPA*, 765 F.2d 126, 15 ELR 20530 (10th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187, 5 ELR 20308 (D. Ariz. 1975).

112. *See, e.g., Leslie Salt Co. v. United States*, 896 F.2d 354, 360, 20 ELR 20477 (9th Cir. 1990).

113. The opinion referred to the “washes and arroyos” in the deserts as most implausible for jurisdiction, referring to *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005).

114. 126 S. Ct. at 2221.

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 . . . Common sense and common usage distinguish between a wash and seasonal river.<sup>115</sup>

Many scientists and nonscientists involved with wetlands and seasonal flow waters would not share the view that “common sense and common usage distinguish between a wash and seasonal river.” However, this distinction will have to be developed through agency practices, guidance, or rules in the aftermath of *Rapanos*.

### c. Groundwater Connections

The CWA does not authorize federal regulation over groundwater. Both the Corps and EPA have independently acknowledged this. Indeed, the Corps has argued in court and been upheld on the interpretation that groundwater is not a “water of the United States.”<sup>116</sup> EPA has made similar previous acknowledgments.<sup>117</sup> A number of courts have reached the same conclusion.<sup>118</sup>

Neither *Rapanos* nor *SWANCC* involved an assertion of federal jurisdiction based on a groundwater connection between a wetland and an adjacent tributary or other water of the United States. The *Rapanos* plurality opinion, however, repeatedly described “waters of the United States” in terms of a surface water connection to navigable waters. Based on the emphasis on the need for a steady flowing surface water body to support jurisdiction, it seems unlikely that the plurality would accept an argument that a connection through groundwater would support CWA jurisdiction. However, it is possible that the “significant nexus” test of Justice Kennedy’s concurrence could be satisfied where water flowed in part through groundwater but still impacted navigable waters. It remains to be seen how this line of precedent will sort out.

There have been cases and commentary that seem to distinguish between so-called isolated groundwater, i.e., groundwater with no hydrological connection to surface waters that would otherwise fall within CWA jurisdiction, and “tributary groundwater,” i.e., groundwater with a hydrological connection to surface waters that would otherwise fall within CWA jurisdiction.<sup>119</sup> In *Northern California River*

*Watch v. City of Healdsburg*,<sup>120</sup> the Ninth Circuit upheld the conclusions of the District Court of Northern California that an abandoned sand and gravel pit that lacked a surface water connection to a nearby navigable river, but was adjacent to the river, fell within CWA jurisdiction. While the district court found jurisdiction based on “adjacency,” i.e., proximity and underground flow, the court of appeals rejected that analysis post-*Rapanos*. While the lower court noted that underground flows are “tributaries,” sufficient to warrant CWA jurisdiction,<sup>121</sup> the court of appeals decision applied the Justice Kennedy concurrence of *Rapanos*, finding that the flow of water, subsurface, between the pond and the navigable river created a “significant nexus” that supported CWA jurisdiction. The court of appeals decision does not discuss whether the subsurface nature of the connection should change the analysis. The conclusion that subsurface flow (apparently shallow groundwater) could create a significant nexus opens the argument that the CWA, for jurisdictional determinations at least, regulates groundwater. It remains to be seen whether underground flow will be accepted as a jurisdictional nexus in other situations.

In pre-*Rapanos* decisions, the First Circuit and the Seventh Circuit denied CWA jurisdiction based on a groundwater connection only.<sup>122</sup> Their rationale is based largely upon close examination of the extensive legislative history expressly indicating that the CWA was not intended to address groundwater. By contrast, the Fifth Circuit and the Tenth Circuit have indicated some willingness to accept CWA jurisdiction where there is sufficient proof that groundwater is hydrologically connected to jurisdictional surface waters.<sup>123</sup> Their rationale is based upon a finding that failure to address discharges that directly impact the integrity of CWA jurisdictional waters will ultimately undo the very purpose of the CWA: “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>124</sup> Numerous district courts from other circuits have examined the issue, with most taking a position similar to that of the Fifth Circuit and the Tenth Circuit.<sup>125</sup> Where surface water has been diverted through culverts or pipes, it is generally not

115. *Id.* at fn. 5.

116. *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1450-51, 22 ELR 21337 (1st Cir. 1992) (“The Corps has interpreted this definition to rely only to surface waters.” “[W]e agree with the Corps. . .”).

117. “[T]he Clean Water Act does not give EPA the authority to regulate groundwater authority through NPDES permits.” 62 Fed. Reg. 20177, 20178 (Apr. 25, 1997).

118. *See, e.g., Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965, 24 ELR 21080 (7th Cir. 1994) (“Neither the Clean Water Act nor the EPA’s definition [of ‘waters of the United States’] asserts authority over ground waters.”); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001) (“The law in this Circuit is clear that ground waters are not protected waters under the CWA.”); *Patterson Farm v. City of Britton*, 22 F. Supp. 2d 1085, 1091 (D.S.D. 1998).

119. *See Philip M. Quatrochi, Groundwater Jurisdiction Under the Clean Water Act: The Tributary Groundwater Dilemma*, 23 B.C. ENVTL. AFF. L. REV. 603, 619 (Spring 1996).

120. 496 F.3d 993 (9th Cir. 2007).

121. 2004 WL 201502 (N.D. Cal. Jan. 23, 2004).

122. *See, e.g., Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1451 (1st Cir. 1992) (noting the Corps’ own interpretation that the CWA applies only to surface waters); *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965, 24 ELR 21080 (7th Cir. 1994) (“CWA does not impose federal authority over every drop of water.”).

123. *See, e.g., Rice v. Harken*, 250 F.3d 264, 272, 31 ELR 20599 (5th Cir. 2001); *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130, 15 ELR 20530 (10th Cir. 1985).

124. 33 U.S.C. §1251(a).

125. *See, e.g., Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001); *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 990, 25 ELR 20661 (E.D. Wash. 1994); *McLellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1196 (E.D. Cal. 1988), *rev’d on other grounds*, 47 F.3d 325 (9th Cir. 1995); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81 (E.D.N.Y. 2001); *Williams Pipeline Co. v. Bayer Co.*, 964 F. Supp. 1300 (S.D. Iowa 1997). *But see Umatilla Waterquality Protective Ass’n v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1318, 27 ELR 21411 (D. Or. 1997); *Kelley v. United States*, 618 F. Supp. 1103, 16 ELR 20080 (W.D. Mich. 1985).



considered to be groundwater<sup>126</sup> but rather may involve issues of man-made conveyances.

However, it is important to keep several caveats in mind concerning the prospect of CWA jurisdiction applying to wetlands based upon their groundwater connections to jurisdictional waters. First, most of the cases examining CWA jurisdiction based upon groundwater connections do not involve wetlands. They primarily involve the discharge of some form of contaminant into groundwater that eventually reaches surface waters within CWA jurisdiction. Such contamination arguably presents a more compelling argument for extending the jurisdiction of the CWA than loss of wetlands functions far removed from the otherwise jurisdictional waters.

Two groundwater cases that have involved wetlands are illustrative,<sup>127</sup> though neither significantly affects this first caveat. In one case, the court refused to extend jurisdiction to wetlands hydrologically connected by groundwater to jurisdictional surface waters, even though there was concern that filling the highly contaminated wetlands—located within a hazardous waste cleanup site—would further degrade the groundwater and, eventually, the jurisdictional surface waters.<sup>128</sup> In the other case, the court extended jurisdiction to the wetlands—even though there were no discharge or contamination issues—based, in part, on groundwater hydrology.<sup>129</sup> However, the court effectively applied something more akin to “adjacency jurisdiction,” reasoning that even though the flow of surface water between the wetlands and the nearby surface channels had been cut off by street construction, the two were sufficiently close in proximity that they could be considered ecologically linked as a “unified habitat.”<sup>130</sup>

A second caveat is necessary where groundwater jurisdiction is concerned—most of the cases examining the issue of jurisdiction established by groundwater hydrology are citizen suits. Few involve enforcement actions by agencies themselves, since asserting such jurisdiction seems contrary to express government positions.<sup>131</sup>

A subtext in both the *Rapanos* plurality and concurring opinions is the fact that the term “waters of the United States” applies not only to wetlands regulation, but to all water discharge prohibitions under the CWA. Under §402, 33 U.S.C. §1342, EPA regulates discharges of pollutants into waters of the United States, including industrial pollutants, sewage, toxics, or other contaminants. The plurality opinion found that limiting waters of the United States to permanent water bodies would not impact the §402 program, as discharge of these kinds of pollutants could be regulated under an “indirect discharge” rationale—as long as the pol-

lutant would find its way into waters of the United States, the fact that a ditch, channel, or other conveyance was not itself jurisdictional did not thwart federal authority.<sup>132</sup> It is possible that this same theory of “indirect discharge” would support an argument that the pollution or impacts of the pollution may pass through a groundwater connection.

#### d. Adjacent Wetlands

Corps’ regulations define “adjacent” wetlands as those “bordering, contiguous, or neighboring” otherwise jurisdictional waters.<sup>133</sup> Under the regulations, wetlands are considered to be adjacent to another body of water, even if they are separated by “man-made dikes or barriers, natural river berms, beach dunes and the like.”<sup>134</sup> In short, prior to *Carabell*, certain barriers between wetlands and other water bodies would not defeat a finding of adjacency. The *Carabell* determinations seriously call into question the remaining vitality of this definition.

Decisions on the Corps’ jurisdiction over adjacent wetlands started with the Supreme Court opinion in *Riverside Bayview Homes, Inc.*<sup>135</sup> In this landmark case, the court reviewed the jurisdictional changes in the Corps’ regulations, from originally covering only traditionally navigable waters to covering a broad category of waters, including wetlands. The Court found that Congress “chose to define the waters covered by the Act broadly” and held that the broader regulations were consistent with Congress’ concern for protecting entire aquatic ecosystems.<sup>136</sup> The Court further supported the Corps’ view that “even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water [the] wetlands may affect the water quality of the adjacent lakes, rivers, and streams.”<sup>137</sup> The Court was careful to note that it was not addressing the separate issue of the CWA’s jurisdiction over nonadjacent or isolated waters.<sup>138</sup>

After *Riverside Bayview Homes*, lower courts approved the extension of adjacent jurisdiction to wetlands beyond those that directly abut navigable waters. Jurisdiction has been extended to wetlands adjacent to intermittent and man-made tributaries that connect with navigable-in-fact waterways only after a great distance.<sup>139</sup> Some of these courts

126. See, e.g., *United States v. TRG Corp.*, 1998 U.S. Dist. LEXIS 9354 (D. Conn. 1998); *California Sportfishing Protection Alliance v. Diablo Grande, Inc.*, 209 F. Supp. 2d 1059 (E.D. Cal. 2002).

127. *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992), *United States v. Banks*, 873 F. Supp. 650, 25 ELR 20776 (S.D. Fla. 1995).

128. *Town of Norfolk*, 968 F.2d at 1444.

129. *Banks*, 873 F. Supp. at 658-59.

130. *Id.*

131. Again the *Banks* case is an exception here, but that case is one of “adjacent” jurisdiction more so than “tributary (groundwater)” jurisdiction.

132. The Ninth Circuit opinion in *Northern California River Watch v. Healdsburg*, 496 F.3d 993 (9th Cir. 2007), post-dating *Rapanos*, does not expressly address this matter. The court upheld CWA jurisdiction because of a groundwater connection between an otherwise “isolated” pond and a navigable river. The court also relied on evidence showing that pollutants flowed from the pond to the river.

133. 33 C.F.R. §328.3(c) (2004).

134. *Id.*; see also *Hough v. Marsh*, 557 F. Supp. 74, 80 n.4, 13 ELR 20610 (D. Mass. 1982).

135. 474 U.S. 121, 16 ELR 20086 (1985).

136. *Id.* at 133.

137. *Id.* at 134.

138. *Id.* at 131 n.8.

139. See, e.g., *United States v. Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001) (adjacent to creek 235 miles from impacted wetlands to first navigable-in-fact waterway); *Interstate General Co.*, 152 F. Supp. 2d 843, 847 (D. Md. 2001) (adjacent to headwaters of non-navigable creeks more than 10 miles from Chesapeake Bay and six miles from Potomac River); *United States v. Rueth Development Co.*, 2001 WL 1758078 (N.D. Ind., Feb. 21, 2002) (adjacency

have seized upon the significant nexus language used by the Supreme Court in *Riverside Bayview Homes* to justify this extension of jurisdiction.<sup>140</sup>

However, since 2001, other courts have followed the lead of Justice Stevens' dissent in *SWANCC*,<sup>141</sup> opining that the Supreme Court's decision has effectively excluded wetlands that are not contiguous or immediately adjacent to navigable waters from the scope of the Corps' jurisdiction. In *Rice v. Harken Exploration Co.*,<sup>142</sup> the Fifth Circuit concluded that "[u]nder [*SWANCC*], it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water."<sup>143</sup>

Other post-*SWANCC* cases had no trouble finding adjacency, if water could flow.<sup>144</sup> In *United States v. Deaton*,<sup>145</sup> the Fourth Circuit, in determining the nature of a tributary, held that the Corps "has always used the word to mean the entire tributary system, that is, all of the streams whose water eventually flows into navigable waters."<sup>146</sup> The Fourth Circuit upheld CWA jurisdiction in *Deaton*, after agreeing with the Corps that defining a roadside ditch as a tributary "fits comfortably within Congress' authority to regulate navigable waters."<sup>147</sup>

The proper application of the term adjacent in the regulations will be tested in the aftermath of *Carabell*. The plurality opinion would recognize as adjacent wetlands only those wetlands that "possess a continuous surface connection" to a water body.<sup>148</sup> This carries with it the message of "no gaps" between the wetland and its adjacent water body. The concurring opinion, however, states that "the Corps may rely on adjacency to establish its jurisdiction."<sup>149</sup> In such instances, the Corps must establish a significant nexus between the adjacent wetland and navigable waters.

### III. Physical Definition of Wetlands

Identifying the physical features that are characteristic of a wetland involves application of a separate regulatory definition. The Corps and EPA define wetlands as:

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.<sup>150</sup>

This definition is referred to as a "three parameter" test under which wetlands are characterized by hydrology (water at or near the surface for a sufficient time), hydrophytic vegetation (plants adapted to saturated soils), and hydric soils (specified soils and conditions). These three parameters are exhibited on the ground in myriad physical circumstances. A wetland, under CWA standards, must exhibit all three of these characteristics. Locating the boundaries of a wetland on the ground is called wetland delineation.

Application of the rules regarding physical features needed to qualify as a wetland under federal regulations has not been as contentious as the CWA definition of "waters of the United States." However, the regulatory definition of a wetland omits many details. For example, it does not specify how long an area must be saturated or inundated, how a prevalence of wetland vegetation is measured, or which kinds of soils can support a wetland ecosystem. To fill in these interstices, the federal agencies have developed a wetland delineation manual.<sup>151</sup> The manual is not designed to be used by laypersons, and consultation with properly trained experts is recommended.

As addressed above, after *Rapanos*, certain physical evaluations over and above the routine wetland criteria may be necessary to determine whether a wetland is within federal CWA jurisdiction. These physical evaluations, described in the 2007 post-*Rapanos* guidance, have some overlap with standard wetland delineation. The post-*Rapanos* evaluations will become part of a wetland delineation, particularly where jurisdiction is in question. The standard wetland delineation is addressed below.

#### A. Identifying Wetlands Using the 1987 Corps Delineation Manual

Since 1993, EPA and the Corps have both used the 1987 Corps Manual for wetlands delineation.<sup>152</sup> The Delineation

is based upon "significant nexus" not geographic proximity); *United States v. Lamplight Equestrian Center, Inc.*, (N.D. Ill., Mar. 8, 2002) (Where wetlands draining to a man-made ditch that stops 50 feet short of a meandering swale, yet feeds runoff to the swale during rain events that eventually channels into a creek and a navigable river at a significant distance deemed sufficient to trigger CWA jurisdiction.).

140. *See, e.g.*, *United States v. Banks*, 115 F.3d 916, 921, 28 ELR 20060 (11th Cir. 1997) (for wetlands at least one-half mile from the jurisdictional surface channels, the "man-made dikes or barriers separating wetlands from other waters of the United States do not defeat adjacency"); *United States v. Rueth Development Co.*, 189 F. Supp. 2d at 874, *aff'd*, 335 F.3d 598 (7th Cir. 2003); *United States v. Lamplight Equestrian Center, Inc.*, 2002 WL360652 at \*6, 32 ELR 20526 (N.D. Ill., Mar. 3, 2002).

141. 531 U.S. at 188 n.14.

142. 250 F.3d 264, 52 ERC 1321, 31 ELR 20599 (5th Cir. Apr. 25, 2001).

143. *Rice*, 250 F.3d at 269 (interpreting the definition of "navigable waters" under the OPA, which uses a definition similar to the CWA).

144. *See e.g.*, *United States v. Deaton*, 332 F.3d 698, 33 ELR 20223 (4th Cir. 2003); *Treacy v. Newdunn Ass'n*, 344 F.3d 407, 33 ELR 20268 (4th Cir. 2003).

145. 209 F.3d 331, 30 ELR 20508 (4th Cir. Apr. 7, 2000).

146. 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004).

147. *Id.*

148. 126 S. Ct. at 2226.

149. 126 S. Ct. at 2249.

150. 33 C.F.R. §328.3(b); 40 C.F.R. §§230.3(t), 232.2(r).

151. *Envtl. Lab. for Dep't of the Army*, Technical Report Y-87-1, *Corps of Engineers Wetlands Delineation Manual* (1987).

152. 58 Fed. Reg. 4995 (Jan. 19, 1993). This announcement ended a long period of controversy over wetland delineation manuals and practices. After the Corps, EPA, and other agencies had presented a new Joint Delineation Manual for use in 1989, there was a significant controversy over which delineation manual to use. Many observers felt that the 1989 Manual changed delineation standards significantly. In an effort to reduce the controversy, Congress authorized the National Academies of Sciences (NAS) to evaluate the science of wetland delineation. *See* Departments of Veterans Affairs and Housing and Urban Devel-

Manual is not a “cookbook” with easy recipes for identifying wetlands. Rather, it provides standards and methodologies for determining sufficient hydrology, vegetation, and soils to meet the regulatory definition. Applying these requires expertise and often professional judgment.

Wetland definitions and delineation criteria remain under active debate among scientists. In 1995, the National Academy of Sciences (NAS) released a report on wetlands characterization and delineation,<sup>153</sup> which was prepared by a committee of wetlands experts.<sup>154</sup> The NAS Report focuses primarily on the physical characteristics necessary to identify a wetland and distinguish it from upland. The report includes numerous conclusions and recommendations for improvement of wetlands delineation systems and methodology. Nevertheless, the NAS gave a stamp of approval to the existing federal wetlands identification system: “The federal regulatory system for protection of wetlands is scientifically sound and effective in most respects, but it can be more efficient, more uniform, more credible with regulated entities, and more accurate in a technical or scientific sense through constructive reforms of the type suggested in this report.”<sup>155</sup>

The NAS Report is not a delineation manual; rather, it reviews wetland science and past wetland delineation practices.<sup>156</sup> The report critically assesses the tools and criteria for wetland delineation and makes recommendations about these standards and practices.

Using the Corps Manual, wetlands are delineated by evaluating the soil, vegetation, and hydrology. It is important to be aware that the Corps has also released several final Regional Supplements to the 1987 Manual, including an Alaska Supplement, Arid West Supplement, Atlantic and Gulf Coast Supplement, Great Plains Supplement, Western Mountain Supplement, and Mid-West Supplement. These Regional Supplements provide specific criteria for wetland delineation, e.g., depth and duration of groundwater measurements. As a practical matter, delineation of wetlands will have to follow the Corps Manual and any Regional Supplement.

## I. Soil

Soils information, including soils maps if available, are an integral step in wetlands delineation. Hydric soils, due to wetness, develop certain morphological properties that can be observed. These include compacted organic material, such as leaves, stems, and roots, and particular colors for mineral soils. These soil characteristics generally survive periodic

changes in hydrology or vegetation and, thus, are not easily disturbed. Hydric soils are matched against criteria established by the National Technical Committee for Hydric Soils (NTCHS) to classify their nature.<sup>157</sup> Experts in soil science often have to resolve some of the questions about the nature of certain soils in a given situation. In any case, soil characteristics alone may not prove the existence of a wetland, because hydric soil can remain long after other wetlands indicators are gone. Nonetheless, hydric soils are an important indicator used in wetlands enforcement actions where wetlands jurisdiction must be determined.

## 2. Hydrology

Wetlands need sufficient water to establish the unique combination of soils and vegetation that characterize the wetland ecosystem. Hydrology varies widely in duration and character. Moreover, how wet a parcel must be to be classified as a wetland raises many technical issues. Under the 1987 Corps Manual, the source of water does not matter. Wetlands can become saturated from both subsurface sources, principally groundwater or the underground water table, or from inundation on the surface. It is well known that hydrological conditions may change from year to year and during annual cycles of wet and dry seasons. Personnel conducting wetlands delineations need guidance on the nature and persistence of the hydrology necessary to sustain a wetland. The 1987 Corps Manual provides that wetlands hydrology is present where there is inundation or saturation in major portions of the vegetation root zone (usually within 12-18 inches of the surface) during a sufficient portion of the growing season.<sup>158</sup> Hydrology can be found, not only by measuring actual water presence, but also by indicators such as watermarks on tree trunks, debris, or other conditions.

## 3. Vegetation

Identifying wetland-indicator vegetation also has the potential to be very controversial. Plants are adaptable, and wetland plant species include a range of plants that survive in a wide range of saturated soil conditions. Obligate wetland plants are those that are almost always found in saturated soil, i.e., do not usually survive in uplands. Other types of plant species, organized by their wetland indicator status, include facultative wetland plants, which usually occur in wetlands, but occasionally occur in nonwetlands; facultative upland plants, which usually occur in nonwetlands, but occasionally occur in wetlands; and obligate

opment and Independent Agencies Appropriations Act of 1993, Pub. L. No. 102-389, 106 Stat. 1571 (1992). By the time the NAS released its report in 1995 (*see infra* note 153), the agencies had withdrawn the 1989 Joint Manual and were using the 1987 Corps Manual.

153. National Academy of Sciences, National Research Council, Committee on Characterization of Wetlands, *Wetlands: Characteristics and Boundaries* (1995) [hereinafter NAS Report].

154. The author Ms. Strand had the privilege of serving on this committee. Well aware of the policy debate, the committee made every effort to separate issues of delineation science from wetlands protection policy.

155. NAS Report, *supra* note 153, at 12.

156. The NAS Report suggests moving away from the so-called three-parameter or three-criteria test for wetland delineation used in the 1987 Corps Manual. *Id.* at 62.

157. The NTCHS Hydric Soils list may be obtained from the Natural Resource Conservation Service (NRCS) and information on soil maps and data is available from the NRCS website, <http://www.nrcs.usda.gov/>.

158. This is a biologically based approach, which focuses on sufficient wetness in the root zone of plants needed to engender wetlands vegetation. Water in the root zone may not always be measured by saturation on the surface. The Manual states that 5-12% of the growing season is sufficient. As a result, in colder climates, sufficient hydrology may exist, even if water is present for only a week or two.



upland plants, which almost always occur in nonwetlands.<sup>159</sup> There are regional variations of wetlands plants and of species (the same plant may have a different wetland indicator in different regions of the country). In the field, personnel must have guidance regarding the prevalence of plants and the distribution of plant groups that indicate the presence of wetlands. Under the 1987 Corps Manual, wetlands vegetation is considered to exist if facultative, facultative wetland, or obligate wetland species account for more than 50% of the plants at a plot. Vegetation is measured separately by categories, such as grasses, brush/scrub, or overstory trees.

#### 4. Other Wetland Manual Issues

The 1987 Manual provides guidance for delineation in unusual or abnormal circumstances, such as disturbed locations where vegetation might have been removed. The Manual provides references to other resources that can be used to assist in making delineations, such as National Wetland Inventory Maps or soil survey information. Delineators may consult historic photographs to conduct delineations as well.

##### a. Delineating “Other Waters”

In contrast to wetlands, there is no standard delineation manual for “other waters,” such as tributaries, ephemeral streams, intermittent streams, or other similar waters. This can be problematic in dry climates, where features may carry water infrequently (only in very wet years) and for very short durations (only during extreme rain or flood events). These nonwetland features are generally identified using the Corps’ definition for the “limits of jurisdiction,” which provides that “[i]n the absence of adjacent wetlands, the jurisdiction extends to the ordinary high watermark.”<sup>160</sup> The “ordinary high watermark” is also defined<sup>161</sup> and, as a general rule, is not measured by unusual storm events. Corps RGL 05-05 (December 7, 2005) provides guidance on Ordinary High Water Mark Identification. The RGL provides a nonexclusive list of physical characteristics to be considered in identifying the ordinary high watermark. These include:

- Natural line impressed on the bank
- Shelving

159. The FWS maintains *A National List of Plant Species That Occur in Wetlands*, from 1988 with a 1996 update. The FWS also maintains regional and sub-regional lists. This information is available from the FWS website at <http://www.fws.gov/nwi/>. In 2006, responsibility to maintain this wetland plant list was transferred from the FWS to the Corps. See *December 12, 2006 Announcement of Transfer*, at [http://www.usace.army.mil/CECW/Documents/cecwo/reg/news/announce\\_tran.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/news/announce_tran.pdf). The transfer was accompanied by an MOA, preserving roles for the FWS, EPA, and NOAA in technical determinations for the national and regional wetland plant lists. See [http://www.fws.gov/wetlands/\\_documents/gOrg/MOAWetlandPlants.pdf](http://www.fws.gov/wetlands/_documents/gOrg/MOAWetlandPlants.pdf).

160. 33 C.F.R. §328.4(c)(1) (2008).

161. 33 C.F.R. §328.3(e) (2008) (noting that the term “ordinary high watermark” “means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas”).

- Changes in the character of soil
- Destruction of terrestrial vegetation
- Presence of litter and debris
- Wracking
- Vegetation matted down, bent, or absent
- Sediment sorting
- Leaf litter disturbed or washed away
- Scour
- Deposition
- Multiple observed flow events
- Bed and banks
- Water staining
- Change in plant community

Identification of the ordinary high watermark is often difficult for seasonal, ephemeral, or intermittent waters, which may have a flow frequency or duration that is not marked by a clear high watermark. There is an overlap between the kinds of water bodies that present challenges in finding the ordinary high watermark and the kinds of seasonal, ephemeral, or intermittent water bodies at issue in this post-*Rapanos* era of federal jurisdiction. The legal standards for deciding, for example, if an ephemeral water is jurisdictional (under the *Rapanos* concurring opinion) are somewhat distinct from the issues of physical identification of the ordinary high watermark for such a water body. It is possible, however, that the presence or absence of certain physical characteristics of an ordinary high watermark will play a role in subsequent litigation concerning the extent of CWA jurisdiction over such a feature. Presence of an ordinary high watermark could, for example, provide evidence that the intermittent flow was of a frequency or duration to present a significant nexus to downstream navigable waters.

##### b. Normal Circumstances

The Corps’ regulatory definition of wetlands requires that areas must exhibit wetlands characteristics (hydrology, vegetation, and soils) “under normal circumstances.”<sup>162</sup> The Corps included this qualifying phrase to ensure that the CWA is applied to conditions as they presently exist. The qualifier precludes the CWA’s jurisdiction over areas that may have been wetlands in the past, but have long since been changed. In addition, the phrase prevents application of the CWA to ponding or wetlands that are unusual and temporary, such as those that might emerge during the course of construction activities on uplands. The phrase also assures that a temporary loss of wetlands characteristics, such as when vegetation is removed or illegal fill is deposited, will not cause a parcel to lose its status as a wetland “under normal circumstances.”

162. 33 C.F.R. §328.3(b) (2008).

The Corps' 1986 RGL addressing "normal circumstances"<sup>163</sup> explained that the term "normal circumstances" was intended to meet the concerns described above, as well as to prevent partial and/or temporary disruptions of wetlands characteristics from escaping CWA authority. Thus, the destruction of wetland vegetation to avoid §404 would be thwarted, since the property would remain a wetland "under normal circumstances."

Permitless filling activities that convert wetlands to uplands cannot be the basis for claiming that a parcel is not a wetland "under normal circumstances." In *Golden Gate Audubon Society v. U.S. Army Corps of Engineers*,<sup>164</sup> the court concluded that the phrase "under normal circumstances" was intended only to prevent application of the CWA to areas that were formerly wetlands but which had been lawfully changed to uplands.

#### IV. Conclusion

Jurisdiction over wetlands under the CWA has been controversial for decades, and Supreme Court decisions in the last decade ensure that jurisdictional questions will remain uncertain for some time to come.<sup>165</sup>

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163. Regulatory Guidance Letter 86-9, *Clarification of "Normal Circumstances" in the Wetland Definition* (33 C.F.R. §323.2(c)) (Aug. 27, 1986) (expired Dec. 31, 1988). RGL 86-9 is identified as still "generally applicable to the Corps Regulatory Program" in RGL 05-06, addressing Expired Regulatory Guidance Letters.

164. *Golden Gate Audubon Soc'y, Inc. v. U.S. Army Corps of Eng'rs*, 717 F. Supp. 1417, 18 ELR 21401 (N.D. Cal. 1988);

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165. 717 F. Supp. 1417, 1421, 18 ELR 21401 (N.D. Cal. 1988).