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**Defining “Waters of the United States”:
Canals, Ditches, and Drains**

by

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DEFINING “WATERS OF THE UNITED STATES”: CANALS, DITCHES, AND DRAINS

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I. INTRODUCTION

How did the federal government get into the business of regulating ditches? At first glance, this seems like an absurd question. There is, however, a legal method to this madness. This article attempts to answer this question by summarizing the federal government's navigation servitude, reviewing the historical meaning of "water of the United States" under the Clean Water Act (CWA), and analyzing recent court cases, particularly *Headwaters, Inc. v. Talent Irrigation District*,¹ that claim federal CWA jurisdiction over certain ditches and canals.

II. THE FEDERAL NAVIGATION SERVITUDE

A. The Origins of Federal Control over Navigable Waters

Federal regulatory authority over navigable waters necessarily derives from the United States Constitution, which gives Congress the authority to regulate interstate and foreign commerce.² The "deep streams" that pass through America's interior are vital to promote interstate and foreign commerce; thus, the United States Supreme Court, in the seminal case *Gibbons v. Ogden*³ ruled that congressional power under the Commerce Clause included the authority to control the navigable waters of the United States. Throughout the nineteenth century to the mid-twentieth century, the Supreme Court expanded the definition of navigable waters and accordingly federal control over these waters. *Ball v. United States*⁴ held that even non-

1. 243 F.3d 526 (9th Cir. 2001).

2. U.S. CONST. art. I, § 8, cl. 3.

3. 22 U.S. 1 (1824).

4. 77 U.S. 557 (1871).

tidal waters, which are presently used or are susceptible to being used as streams of commerce among the several states, are navigable waters. Further, in *Economy Light & Power Co. v. United States*,⁵ the Supreme Court held that navigable waters of the United States included all waters that at any time in the past had been capable of carrying water-borne commerce among the several states. Finally, the most expansive definition of navigable waters was provided in *United States v. Appalachian Electric Power Co.*,⁶ the Court held that waters that were or have ever been susceptible to use for transporting interstate goods, either in their natural state or with reasonable improvements, are navigable waters of the United States. The above-mentioned line of Supreme Court cases established what is now commonly referred to as "navigable in fact" waters or "traditional navigable" waters.

B. Army Corps of Engineers' Regulation of Navigable Waters Before the Clean Water Act

While the Supreme Court continued to refine and define federal authority over navigable waters, Congress gave the Army Corps of Engineers the authority to protect, enhance, and develop these navigable waters.⁷ During much of the twentieth century, the Corps of Engineers (Corps) used the authority provided by the RHA to protect the nation's navigable waters.⁸ Section 10 of the RHA gave the Secretary of the Army, through delegation to the Corps, regulatory authority to permit or deny the construction, excavation, or deposit of materials in navigable waters if such activity altered or modified the course, capacity, condition, or location of these waters.⁹ The Corps attempted to control water pollution and enhance water quality through § 13 of the RHA (Refuse Act), which made it unlawful to discharge any solid refuse matter into the nation's navigable waters unless permitted by the Corps.¹⁰

Until the 1960s, the Corps used its regulatory RHA authorities primarily for the protection of navigation on navigable waters that currently were being used to facilitate commerce. During the late 1960s, however, the Corps began to assert its RHA authorities over

5. 256 U.S. 113 (1921).

6. 311 U.S. 377 (1940).

7. See generally §§ 9, 10, and 13 of the Rivers and Harbors Act (RHA) of 1899 (codified as 33 U.S.C. §§ 401, 403, 407) (2000); The Flood Control Act of 1945, Pub. L. No. 79-14, 59 Stat. 10, (authorizing construction of the Lower Snake River Dams).

8. 33 U.S.C. § 401 (2000).

9. 33 U.S.C. § 403 (2000).

10. 33 U.S.C. § 407 (2000).

“traditional navigable waters” under any of the tests cited previously. In 1968, the Corps expanded its regulatory jurisdiction under the RHA by revising its regulations to state that the Corps, in considering an application for a permit to fill, dredge, discharge, or deposit materials, or conduct other activities affecting navigable waters, will evaluate all relevant factors. These factors include the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest.¹¹ The Corps used its modified regulatory power to deny a permit application in Florida because of potential damage to the environment.¹² As the 1970s commenced, it was apparent that the Corps’ RHA authorities served only as a temporary solution for the nation’s water pollution problems. The RHA specifically exempted a primary source of water pollutants—sewage and liquid discharges—from regulation, and the Corps did not adequately condition RHA permits to avoid or mitigate water pollution. The Federal Water Pollution Control Act of 1972 (FWPCA)¹³—also referred as the Clean Water Act (CWA)—was Congress’ attempt to comprehensively control water pollution of the nation’s waters.

III. THE CWA AND THE EVOLUTION OF THE CORPS’ REGULATORY JURISDICTION OVER NAVIGABLE WATERS

A. The Statutory Language of the CWA

The CWA ratified the Corps’ regulatory evolution under the RHA by authorizing the Secretary of the Army, acting through the Chief of Engineers, to permit, after notice and opportunity for public hearings, the discharge of dredged and fill material into “navigable waters” at specified disposal sites.¹⁴ The water quality criteria that § 404 applicants must meet are established in regulations promulgated by the Environmental Protection Agency (EPA) “in conjunction” with the Corps of Engineers.¹⁵

Notably, the CWA defined “navigable waters” as the “waters of the United States, including the territorial seas.”¹⁶ Further, Congress,

11. 33 Fed. Reg. 18,669 (Dec. 18, 1968); 33 C.F.R. § 209.120(d) (2000).

12. *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970) (upholding the Corps’ permit denial and holding that the Corps had a responsibility to consider more than just navigation in its decision to issue a permit).

13. The FWPCA was amended in 1977 and 1987. These amendments and the Act as a whole are commonly known as the Clean Water Act, 33 U.S.C. § 1251 (2000).

14. 33 U.S.C. § 1344(a) (2000).

15. *Id.* § 1344(b)(1); *see also* 40 C.F.R. Part 230 (2000).

16. 33 U.S.C. § 1362(7) (2000).

when passing the FWPCA of 1972, clearly expressed its desire that the term "navigable waters" be given the broadest possible constitutional interpretation.¹⁷ With this guidance, the Corps and the EPA, the federal agency primarily charged with controlling water pollution, set out to define the geographic reach of "navigable waters" subject to CWA jurisdiction.

B. The Army Corps of Engineers Defines "Navigable Waters" under the CWA

In 1974, the Corps concluded that "navigable waters" under the CWA was based on the traditional tests of navigability the Corps had used to assert jurisdiction under § 10 of the RHA. The Corps defined "navigable waters" as "those waters . . . which are subject to the ebb and flow of the tide, and/or are presently, or have been used in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."¹⁸

Initial efforts to define "navigable waters" faced opposition. The Natural Resources Defense Council (NRDC), a non-profit environmental group, challenged the Corps' definition in court as contrary to the clear intent of the CWA to expand the scope of federal jurisdiction beyond traditional navigable waters.¹⁹ The court agreed with NRDC and held that Congress, by enacting the CWA, intended to assert federal jurisdiction to the maximum extent possible under the Commerce Clause.²⁰ The court ordered the Corps to publish, within thirty days, "regulations clearly recognizing the full regulatory mandate of the [CWA]."²¹ The Corps responded to this order by drafting an interim rule that drastically expanded the definition of "navigable waters" under the CWA. The new definition included navigable coastal waters; all coastal wetlands; navigable rivers; lakes and streams; tributaries to navigable waters; intrastate waters that have a recreational, fishing, industrial or agricultural connection to interstate commerce; and freshwater wetlands adjacent to navigable waters.²²

In 1977, the Corps finalized this interim rule.²³ Notably, the Corps changed the term being defined from "navigable waters" to "waters of the United States" to better identify the manner in which the

17. S. REP. NO. 92-1236, at 144 (1972); H.R. REP. No. 92-911, at 131 (1972).

18. 30 Fed. Reg. 12,115, 12,119 (April 3, 1974).

19. Natural Res. Def. Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

20. *Id.* at 686.

21. *Id.*

22. 40 Fed. Reg. 31,329, 31,324 (July 25, 1975).

23. 42 Fed. Reg. 37,122 (July 19, 1977).

terms were used under the CWA.²⁴ Further, the final rule indicated that non-tidal drainage and irrigation ditches connected to navigable waters would not be considered "waters of the United States."²⁵ The Corps indicated that water quality problems caused by canal or ditch pollution could be adequately addressed by the EPA's § 402 National Pollutant Discharge Elimination System (NPDES) permit program.²⁶ This is significant because the Corps was essentially asserting that it viewed "waters of the United States," for purposes of § 404, differently than for the CWA as a whole. In 1979, the EPA issued a revised definition of "waters of the United States" to include all waters where the "use, degradation, or destruction . . . would affect or could affect" interstate commerce.²⁷ The EPA's definition was even more expansive than the Corps' definition, and questions soon arose as to which agency had the primary role in defining § 404 CWA jurisdiction.

C. The Civiletti Opinion

In 1979, the Secretary of the Army asked the United States Attorney General, Benjamin R. Civiletti, to determine whether the Corps or EPA had the definitive authority to determine the scope of "navigable waters" for purposes of § 404. Attorney General Civiletti stated that "*navigable waters' can have only one interpretation under the [CWA].*"²⁸ Accordingly, because the EPA was charged with administering the entire CWA, Attorney General Civiletti concluded that the EPA also had final authority to determine the scope of federal jurisdiction for § 404 and other CWA provisions.²⁹

D. The Army Corps of Engineers and EPA Define "Waters of the United States"

The Civiletti Opinion clearly indicated that the EPA would define "navigable waters" under the CWA. Accordingly, in 1986, the Corps issued a final rule revising its definition of "waters of the United States" to conform to the EPA's regulatory definition.³⁰ Thus, "waters of the United States" is now uniformly defined as follows:

- (1) All waters which are currently used, or were used in the

24. *Id.*

25. *Id.*

26. *Id.*

27. 44 Fed. Reg. 32,854 (June 7, 1979).

28. 43 Op. Att'y Gen. 197 (1979) (emphasis added).

29. *Id.*

30. 51 Fed. Reg. 41,206 (Nov. 13, 1986).

past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

Which are used or could be used for industrial purpose by industries in interstate commerce;

- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1)–(4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)–(6) of this section.³¹

The above-noted accounts of how the Corps and EPA identically define "waters of the United States" are of great importance when determining the jurisdictional reach of the CWA as it relates to canals and ditches. Clearly, there is but one definition of "waters of the United States" under the CWA. Thus, the federal government's CWA regulatory authority over these waters is the same regardless of

31. 33 C.F.R. § 328.3(a) (Corps' definition); *see also* 40 C.F.R. § 230.3(e) (EPA's definition).

whether the pollutant discharging activity is regulated under § 404 (dredged or fill material) or § 402 (point source pollutants).

IV. *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY V. U.S. ARMY CORPS OF ENGINEERS*

A. Decision Context

In the years leading up to the Supreme Court's pivotal decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*,³² the Army Corps of Engineers exerted federal jurisdiction to "the maximum extent possible under the Commerce Clause" as ordered years ago by the 1975 D.C. District court in *Callaway*.³³ Thus, isolated wetlands and other waters were subject to federal jurisdiction if the destruction or degradation of such waters, in any way, affected interstate commerce.³⁴ The specific rationale for federal jurisdiction over many isolated waters rested in what the Corps commonly referred to as the migratory bird rule.³⁵ The rule stated that EPA considered waters used either by birds protected under a Migratory Bird Treaty or by birds that crossed interstate lines to be "waters of the United States" under 33 C.F.R. § 328.3(a)(3).³⁶ In essence, the rule covered virtually all isolated waters in the United States. The federal government prevailed on two previous challenges to the rule.³⁷

In *SWANCC*, the Army Corps of Engineers, Chicago District, applied the migratory bird rule to take jurisdiction over a series of isolated, non-navigable, intrastate gravel pits in Cook County, Illinois.³⁸ Petitioners, a consortium of Chicago suburb municipalities, appealed the Corps' jurisdictional determination and permit denial pursuant to the applicable provisions of the Administrative Procedure Act.³⁹

The United States Supreme Court ultimately found for the municipalities and held that Congress did not grant the Corps authority to regulate non-navigable, intrastate, and isolated waters under the

32. 531 U.S. 159 (2001).

33. 392 F. Supp. at 685.

34. See 33 C.F.R. § 328.3(a)(3) (2003).

35. 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

36. *Id.*

37. See *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990); see also *Hoffman Homes, Inc. v. Administrator, United States E.P.A.*, 999 F.2d 256 (7th Cir. 1993).

38. *SWANCC*, 531 U.S. at 164-65.

39. *Id.*

CWA based solely on the presence of migratory birds or the migratory bird rule.⁴⁰ More significant, however, was the Court's articulation of the importance of navigation to federal jurisdiction under the CWA:

We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited import"... 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. *The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.*⁴¹

In one fell swoop, the decision in *SWANCC* changed the jurisdictional analysis of the CWA. Congress did not intend for CWA jurisdiction to reach the limit of congressional authority under the Commerce Clause. Rather, a nexus between navigable in fact or traditional navigable waters must exist to assert federal jurisdiction under the CWA. Both EPA and the Corps recognized that *SWANCC* cast doubt on whether any basis remains to assert jurisdiction over isolated, intrastate waters under the rationales of 33 C.F.R. § 328.3(a)(3).⁴² *SWANCC*, however, did not define the scope or extent of navigability needed to assert federal jurisdiction over waters that were not navigable in fact or traditionally navigable.

B. *SWANCC*'s Aftermath and the "Ditches" Defense

Shortly after *SWANCC*, persons involved in civil actions for unlawfully discharging pollutants into "waters of the United States" began affirmatively raising the defense that ditches or canals, and any adjacent wetlands thereto, were not subject to federal CWA jurisdiction because these waters do not establish a "significant nexus" with waters navigable in fact or traditionally navigable.⁴³ Importantly,

40. *Id.* at 174.

41. *Id.* at 172 (citations omitted) (emphasis added).

42. Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1995, 1996 (proposed Jan. 15, 2003).

43. See, e.g., *Headwaters, Inc., v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003); *Treacy v. Newdunn Assocs.*, 344 F.3d 407 (4th Cir. 2003).

the three Court of Appeals cases cited below as well as subsequent federal District Court cases involved the discharge of pollutants under §§ 402 and 404 of the CWA, thus confirming the notion that jurisdiction under both §§ 402 and 404 depends on a threshold determination that the waters involved are "waters of the United States." Finally, these cases were crucial in determining the scope of the SWANCC decision as it relates to federal jurisdiction under the CWA.

V. *HEADWATERS, INC. V. TALENT IRRIGATION DISTRICT*: THE HYDROLOGIC CONNECTION PRINCIPLE TAKES FLIGHT

A. The Holding in *Talent*

The first decision after SWANCC (and a decision of binding authority in Idaho) was *Headwaters, Inc. v. Talent Irrigation District*.⁴⁴ This Ninth Circuit Court of Appeals case involved an irrigation canal in southern Oregon.⁴⁵ The issue in this case was whether a water was isolated if a hydrologic connection existed between the water in question and navigable waters.⁴⁶

The Talent Irrigation District (TID) operated a series of irrigation canals in Jackson County, Oregon. Jackson County is located in southern Oregon between the Cascade and Siskyou mountain ranges.⁴⁷ The canals draw from a variety of surface streams and other bodies of water including Bear Creek, Emigrant Lake, Wagner Creek, and Anderson Creek. The canals also divert water to streams like Bear Creek, Wagner Creek, Anderson Creek, Coleman Creek, Dark Hollow Creek, and Butler Creek.⁴⁸

In May 1996, TID applied Magnacide H to the Talent Canal, which resulted in the deaths of more than 92,000 juvenile steelhead in nearby Bear Creek, around and downstream from a leaking canal waste gate.⁴⁹ This was the second major fish kill in Bear Creek caused by the application of Magnacide H.⁵⁰ The first fish kill occurred in 1983.⁵¹

On January 5, 1998, *Headwaters, Inc.* and the Oregon Natural Resources Action, two non-profit environmental corporations whose members use the streams near TID's canals, brought a citizen suit

44. 243 F.3d 526 (9th Cir. 2001).

45. *Id.* at 528.

46. *Id.* at 533.

47. *Id.* at 528.

48. *Id.*

49. *Talent*, 243 F.3d at 528.

50. *Id.*

51. *Id.*

under the CWA seeking declaratory and injunctive relief.⁵² Specifically, the complaint alleged a violation of § 301 of the CWA⁵³ when TID discharged Magnacide H into the irrigation canals and subsequently into Bear Creek without an NPDES § 402 permit.⁵⁴

To establish an unauthorized discharge of pollutants, plaintiffs must prove that the discharge occurred in navigable waters or "water of the United States."⁵⁵ Thus, a central issue in *Talent* was whether the irrigation canals are "waters of the United States" under the CWA. The Ninth Circuit ultimately determined that the irrigation canals at issue are "waters of the United States."⁵⁶ Because the irrigation canals receive water from natural streams and lakes, and divert water to streams and creeks, they are tributaries to other "waters of the United States."⁵⁷ Additionally, the court dismissed defendant's contention that the irrigation canals are not tributaries during the application of Magnacide H because they are isolated from the natural streams by a series of closed waste gates.⁵⁸ The court said:

Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage. . . . [I]t makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense. Rather, as long as the tributary would flow into the navigable body [under certain conditions], it is capable of spreading environmental damage and is thus a "water of the United States."⁵⁹

In other words, if there is a *surface hydrologic connection* (even if intermittent) whereby a canal is capable of carrying pollutants to other "waters of the United States," it is a tributary to other "waters of the United States" and jurisdictional under the CWA.

B. *Talent's* Line of Reasoning Followed in Other Federal Courts

The above noted hydrologic connection principle espoused in *Talent* has provided precedent and guidance to the Ninth Circuit Court of Appeals, the United States District Courts within the Ninth Circuit,

52. *Id.* at 528–29.

53. 33 U.S.C. § 1311 (2000).

54. *Talent*, 243 F.3d at 528–29.

55. 33 U.S.C. §§ 1311(a), 1362(12) (2000).

56. *Talent*, 243 F.3d at 533.

57. *Id.*; see 40 C.F.R. § 230.3(a)(5) (2003); see also, 33 C.F.R. § 328.3(a)(5) (2003).

58. *Talent*, 243 F.3d at 533.

59. *Id.* at 534 (quoting *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997)).

and other United States Courts of Appeals concerning drainage ditches and canals.

1. *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*

In *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*,⁶⁰ the plaintiff, a non-profit environmental group, brought a citizen suit under the CWA claiming that the defendant Bosma discharged pollutants into a drain system (J.D. 26.6) without an NPDES § 402 permit.⁶¹ Citing *Talent* exclusively, the Ninth Circuit held that J.D. 26.6 was a “water of the United States” as a tributary to other waters.⁶² J.D. 26.6 flows intermittently under a road and into an irrigation canal, which empties into the Yakima River, a navigable water.

2. *Idaho Rural Council v. Bosma*

In *Idaho Rural Council v. Bosma*,⁶³ the plaintiff Idaho Rural Council, a non-profit group representing various family farmers, brought a citizen suit under the CWA alleging that the defendant, Bosma, unlawfully dumped waste from its dairy farm into holding ponds and irrigation canals that seeped into groundwater and surface waters without first obtaining an NPDES § 402 permit.⁶⁴ Specifically, the plaintiff alleged that the defendant was discharging animal and pharmaceutical waste into Walker and Butler Springs.⁶⁵ Butler Spring drains directly into Clover Creek, which drains into the navigable-in-fact Snake River.⁶⁶ Walker Spring takes a more circuitous route: it drains northwest down a ravine into a pond and then across a pasture into the Northside Canal, which discharges into Clover Creek.⁶⁷ The district court, addressing the issue of jurisdiction under the CWA, asserted that the Ninth Circuit defines “waters of the United States” broadly, and that jurisdictional waters include tributaries to navigable waters.⁶⁸ The court then concluded, “Butler and Walker Springs

60. 305 F.3d 943 (9th Cir. 2002).

61. *Id.* at 946.

62. *Id.* 954–55; *see* 40 C.F.R. § 230.3(s)(5) (2003); *see also* 33 C.F.R. § 328.3(a)(5) (2003).

63. 143 F. Supp. 2d 1169 (D. Idaho 2001).

64. *Id.* at 1173.

65. *Id.*

66. *Id.*

67. *Bosma*, 143 F. Supp. 2d at 1173.

68. *Id.* at 1179.

are sufficiently connected through surface water to Clover Creek as to fall within the definition of waters of the United States.⁶⁹

Although the court in *Bosma* did not directly apply the *Talent* analysis, its line of reasoning was similar: where a surface hydrologic connection exists between a body of water and navigable waters such that a pollutant can move downstream and degrade the navigable waters, a "significant nexus" exists to invoke CWA jurisdiction.⁷⁰ Thus, in *Bosma*, the springs and all surface water conveyances downstream (including the canal) were jurisdictional waters under the CWA.

3. *California Sportfishing Protection Alliance v. Diablo Grande, Inc.*

In *California Sportfishing Protection Alliance v. Diablo Grande, Inc.*,⁷¹ the plaintiff, a non-profit organization, brought a CWA citizen suit against the defendant, Diablo Grande, for discharging sediment into Salado Creek in violation of a California NPDES § 402 general permit.⁷² The defendant argued that Salado Creek was not a "navigable water" under the CWA because part of the creek goes underground through a pipe. The district court, in rejecting this argument, followed the line of reasoning in *Talent* and *Bosma* (Idaho) and concluded that an underground pipe does not create a hydrologic disconnect between Salado Creek and the navigable in fact San Joaquin River.⁷³ Thus, Salado Creek, including the piped portion, is a tributary to an actually navigable waterway and is thus a "navigable water of the United States."⁷⁴

4. *United States v. Deaton*

Although *United States v. Deaton*,⁷⁵ is only persuasive authority in the Ninth Circuit, it provides a good analysis of the Corps' authority to regulate ditches as tributaries.

The United States (Army Corps of Engineers) brought suit against the defendant, Deaton, for placing fill material in wetlands without first obtaining a § 404 permit.⁷⁶ The only hydrologic surface connection between the wetlands and other navigable waters was a

69. *Id.*

70. *Id.* at 1179–80.

71. 209 F. Supp. 2d 1059 (E.D. Cal. 2002).

72. *Id.* at 1063.

73. *Id.* at 1076.

74. *Id.*

75. 332 F.3d 698 (4th Cir. 2003).

76. *Id.* at 703.

roadside ditch.⁷⁷ Thus, the issue centered on whether the Corps could legally assert jurisdiction over Deaton's wetlands because they are adjacent to the roadside ditch, which is a tributary of the Wicomico River, a traditional navigable water.⁷⁸

First, the defendants argued that Congress' Commerce Clause powers over navigable waters were limited to protecting or enhancing navigation and the flow of commerce.⁷⁹ In dismissing this argument, the court noted that for "channels of commerce," Congress had broad power to regulate non-navigable water if such regulation is necessary to protect navigable waters.⁸⁰

The defendants next argued that the roadside ditch was not a "tributary" under Corps regulations.⁸¹ The court dismissed this argument and found that the Corps had always used the term "tributary" to mean "the entire tributary system, that is, all of the streams whose water eventually flows into navigable waters."⁸² The court found that the Corps' interpretation had support in the dictionary and elsewhere, making it "not plainly erroneous" under a standard established in *Bowles v. Seminole Rock & Sand Co.*,⁸³ and thus entitled to "controlling weight."⁸⁴ Consequently, because the ditch eventually flowed to navigable waters, it was a "tributary" under the Corps' regulations.

Finally, the defendants argued that if the ditch was a "tributary" under the Corps' regulations, then these regulations are an unreasonable interpretation of the CWA.⁸⁵ The court dismissed this argument and asserted the following:

In *Riverside Bayview* the Supreme Court concluded that the Corps regulation extending jurisdiction to adjacent wetlands was a reasonable interpretation in part because of what SWAACC described as "the significant nexus between the wetlands and 'navigable waters.'" (citation omitted) There is also a nexus between a navigable waterway and its nonnavigable tributaries. The Corps argues, with supporting evidence, that discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters. . . . This nexus, in light of the "breadth of congressional concern for protection of water quality and aquatic eco-

77. *Id.* at 702.

78. *Id.* at 704.

79. *Id.* at 706.

80. *Id.* at 705-07.

81. *Deaton*, 332 F.3d at 708.

82. *Id.* at 710.

83. 325 U.S. 410 (1945).

84. *Deaton*, 332 F.3d at 710.

85. *Id.* at 711.

systems," (citation omitted) is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted. . . . *The [CWA] thus reaches to the roadside ditch and its adjacent wetlands.*⁸⁶

5. *Treacy v. Newdunn Associates, LLP*

In *Treacy v. Newdunn Associates, LLP*,⁸⁷ another Fourth Circuit case, the United States (Army Corps of Engineers) brought a civil suit against the plaintiffs, Newdunn, for filling wetlands without first obtaining a § 404 permit.⁸⁸ These plaintiffs' wetlands were hydrologically connected to the navigable waters of Stony Run by an intermittent surface flow of 2.4 miles of ditches and natural streams.⁸⁹ Citing *Deaton*, the court concluded, that the connecting ditch was a "tributary"; therefore, the plaintiff's wetlands were jurisdictional as adjacent to other "waters of the United States," and thus jurisdictional.⁹⁰ Notably, the court emphasized that the threshold issue for jurisdictional determinations should not be whether a body of water is man-made or natural. Rather, the question should be whether the surface connection of a the body has the capability of transporting pollutants to "navigable waters," thus subverting the CWA's goal of protecting the chemical, physical, and biological integrity of the nation's waters.⁹¹

VI. THE NATIONAL WILDLIFE FEDERATION THREATENS SUIT

Although the following case occurred specifically in Clark County, Washington, and concerned the Army Corps of Engineers, Seattle District, it provides a recent example of how the Corps will view ditches and canals, which can be applied regionally.⁹²

On December 18, 2003, the National Wildlife Federation (NWF) sent a letter to the Secretary of the Army of its notice of intent to file a citizen suit for failure to perform a non-discretionary duty or act un-

86. *Id.* at 712 (emphasis added). See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)

87. 344 F.3d 407 (4th Cir. 2003).

88. *Id.* at 410.

89. *Id.* at 409-10.

90. *Id.* at 417.

91. *Id.*

92. The Northwestern Division (NWD) consists of five Army Corps of Engineers Districts: Seattle, Portland, Walla Walla, Omaha, and Kansas City. NWD regulatory jurisdiction covers the states of Washington, Oregon, Idaho, Wyoming, Montana, North Dakota, South Dakota, Nebraska, Kansas, and parts of Missouri and Colorado.

der the CWA. Specifically, the non-discretionary duty at issue was the failure of the Army Corps of Engineers, Seattle District, to exert CWA jurisdiction over a wetland in Clark County (Vancouver), Washington. The only surface connection this wetland had to other "waters of the United States" was an agricultural ditch that flowed into Curtis Creek, a "navigable water" under the CWA.

As part of a settlement agreement with NWF, the Seattle District agreed to post the following language on its website:

In light of the 9th U.S. Circuit Court of Appeals decision on *Headwaters, Inc. v. Talent Irrigation District*,⁹³ the [Seattle] District Engineer has issued the following statement:

We view *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001) as binding on the U.S. Army Corps of Engineers, Northwestern Division, in the geographic jurisdiction of the U.S. Court of Appeals for the Ninth Circuit. In that case, the court held that irrigation canals that receive water from natural streams and lakes, and divert water to streams and creeks, are connected as "tributaries" to those other waters. The Ninth Circuit further held that a "stream which contributes its flow to a larger stream or other body of water is a tributary. . . . As tributaries, the canals are 'waters of the United States,' and are subject to the CWA and its permit requirement." *Headwaters*, 243 F.3d at 533. Moreover, the court held that, "Even tributaries that flow intermittently are 'waters of the United States.'" *Id.* at 534. Corps of Engineers regulations at 33 C.F.R. § 328.3(a)(5) assert CWA jurisdiction over all tributaries to other jurisdictional waters of the United States. In factual situations where the *Headwaters* precedent applies, it would supercede any contrary conclusion that might be drawn from previous Corps of Engineers policy statements regarding ditches.⁹⁴

93. 243 F.3d 526 (9th Cir. 2001).

94. U.S. Army Corps of Engineers, Seattle District, *available at*: <http://www.nws.usace.army.mil/PublicMenu/Menu.cfm?sitename=REG&pagename=Headwaters> (last updated May 19, 2004).

VII. CONCLUSION

"Waters of the United States" is a term of art that has changed over the last thirty years and continues to evolve. Federal CWA jurisdiction cannot be analyzed based on whether a body of water is man-made or natural, or whether the activity is regulated under §§ 311, 402, or 404 of the CWA. Rather, federal CWA jurisdiction occurs when a surface hydrologic connection exists between a body of water and a traditional navigable, or navigable in fact, water such that pollutants discharged into the body can move downstream and degrade the quality of the navigable water. Under these circumstances, the "significant nexus" required for CWA jurisdiction is clearly present. Additionally, the congressional power over navigable waters also carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters. Thus, federal CWA jurisdiction over canals and ditches are evaluated on a case-by-case basis to determine if a particular set of facts include the navigability nexus necessary to invoke federal CWA jurisdiction. Finally, and most importantly, just because a ditch is subject to federal CWA jurisdiction does not mean the activity within the ditch is subject to CWA regulation. CWA 404(f) may likely exempt many of the routine activities in and around canals and ditches.