When the Corps & EPA Comes a-Knockin' on the Farm: Navigating Wetlands Issues

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INTRODUCTION

For more than 40 years the nation has used section 404 of the Clean Water Act (CWA) as the federal regulatory program to protect wetlands. The relationship between the statute and agriculture is perhaps more uncertain than at any time in the past. In my opinion there are at least two factors at work. First, there is an increasing public perception of many common agricultural activities as ecologically harmful; a perception which federal employees share as members of the public. When this perception is coupled to the ever expanding reach of federal jurisdiction and the ever increasing complexity of dealing with the 404 program the chance that questions will be asked concerning whether agricultural activities violate the CWA is greatly increased. This means there is an enhanced potential for federal scrutiny and potentially enforcement of activities the farmer perceives as normal business. The regulation of agricultural storm water in the Chesapeake Bay is a growing reality. For Section 404 of CWA the agricultural exemption contained in Section 404(f) is of course critical. Section 404(f) may not form a complete shield for some agricultural activities, even on existing farms. A general understanding of the CWA is becoming another of the myriad of skills that a successful farmer or rancher must have access to. This paper addresses the history of the CWA regulatory program as well as practical aspects of how to navigate, or even better to avoid, the regulatory program. It also provides an update of the current status of 404(f) and the federal courts.

A. Federal and State Legislation

Development activities in wetlands, rivers, streams, lakes and other water bodies are regulated by two federal statutes: the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403, 407 (1988), and the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. §§ 1251-1387. Rivers and Harbors Act § 10 requires a federal permit for construction of structures, dredging, filling, and conducting other activities that may obstruct navigation. 33 U.S.C. § 403. Navigable waters subject to the Rivers and Harbors Act are limited to those that are, have been, or could with reasonable modifications be used for commercial transport and those waters subject to the ebb and flow of the tide. *See* 33 C.F.R. § 329.4 (1990). Rivers and Harbors Act restrictions apply across the entire width of a navigable waterway, to the line of mean high water. *See id.*; *Bayou des Familles Dev. Corp. v. U.S. Corps of Eng'rs*, 541 F. Supp. 1025, 1034 (E.D. La. 1982). Thus, the Rivers and Harbors Act requires a permit for construction activities on tidal wetlands below mean high water. *Bayou des Familles*, 541 F. Supp. at 1034.

The primary statutory provision regulating development in wetlands, however, is § 404 of the CWA, 33 U.S.C. § 1344. The CWA prohibits the discharge of pollutants from discrete point sources into waters of the United States. *Id.* at § 1311(a). Under the CWA, the EPA administers the National Pollutant Discharge Elimination System (NPDES) permit program for the discharge of traditional pollutants. *Id.* at § 1342. However, because Congress recognized the United States

Army Corps of Engineers' (Corps) established role in protecting navigability and regulating construction in the navigable waters under the Rivers and Harbors Act of 1899, the Corps is authorized by § 404 of the CWA to administer a separate permit program for discharges of dredged or fill material. The Corps' § 404 permit program has evolved into the federal government's primary mechanism to limit development in valuable wetlands.

B. Regulated Activities

The § 404 permit program applies to point source discharges of dredged or fill material into waters of the United States. Discharges of dredged and fill material have been defined so broadly that, unless carefully planned, many development activities in jurisdictional wetlands will involve a regulated discharge.

1. Discharge of Dredged Material

The six-year-long upset to this area of Corps jurisdiction, which began with the Corps' settlement of *North Carolina Wildlife Federation, et al. v. Tulloch*, Civil No. 090-713-CIV-5BO (E.D.N.C. 1992), is now over, at least for a while. The incidental discharge of material during excavation is not considered the addition of a pollutant and does not require a permit from the Corps.

In 1993, the Corps promulgated a rule that was subsequently invalidated. The Corps began to require permits for even *de minimis* discharges of dredged material associated with excavation in jurisdictional wetlands. The 1993 rules were successfully challenged in *American Mining Congress v. United States Army Corps of Engineers*, 951 F. Supp. 267, 269 (D.D.C. 1997), *aff'd sub nom. National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998).

This jurisdictional battle over incidental fallback and regulable redeposit is not really over, however, and the true extent of Corps jurisdiction has yet to be determined. Courts have widely divergent views. At least one judge in the Fourth Circuit believes that the sidecasting of material from excavated ditches does not result in a discharge. *See United States v. Wilson*, 133 F.3d 251, 259 (4th Cir. 1997) (reversing felony wetland convictions on several grounds). Although, a unanimous panel of the Fourth Circuit later ruled that the sidecasting of excavated material is a discharge subject to regulation. *See United States v. Deaton*, 209 F.3d 331, 334–36 (4th Cir. 2000) ("[T]he Clean Water Act's definition of discharge as 'any addition of any pollutant to navigable waters' encompasses sidecasting in a wetland."). More typically, courts apply the rule against enforcement actions that had been initiated using the invalidated approach. *E.g., United States v. Hallmark Constr.*, 30 F. Supp. 2d 1033 (N.D. Ill. 1998). The regulated community continues to push the issue but few jurisdictions seem likely to extend the decision. The concept that if dirt is "purposefully relocated" within a jurisdictional water then it is regulated seems likely to emerge as the majority position. *E.g., United States v. Bay-Houston Towing Co.*, 33 F. Supp. 3d 596 (E.D. Mich. 1999).

The federal government moved quickly to minimize the effect of the *National Mining Congress* decision. The rules proposed in 2000, and finalized in 2001, modified the definition of discharge of dredged material in both EPA and Corps regulations. 33 C.F.R. § 323.2(d) (Corps);

40 C.F.R. § 232.2 (EPA). The modification established a presumption that a discharge subject to CWA regulation results from certain activities. In particular, the rule applies the presumption to mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the United States, including wetlands. The preamble to the regulations suggests that if a project proponent wishes to attempt to rebut the presumption, the Corps will evaluate the nature of the equipment used, how it was used, and whether re-deposited material is suspended in the water column so as to release contaminants or increase turbidity, as well as whether downstream transportation and relocation of re-deposited dredged material results. The regulation did not establish a new formal process or new recordkeeping requirements.

Perhaps emboldened by the initial victory over the *Tulloch* rules, the National Association of Homebuilders challenged the rule for failing to define the term "incidental fallback" in these regulations. On March 31, 2004, the case was dismissed on grounds that the controversy lacked ripeness. *Nat'l Ass'n of Homebuilders vs. U.S. Army Corps of Eng'rs*, 311 F.Supp.2d 91 (D.D.C. 2004). The plaintiffs' pleas about the time and money consumed by the permit process did not persuade the federal judge: "The uncertainty of not knowing how or when the agencies will require a permit for their excavation-type activities in wetlands isn't a hardship for purposes of a ripeness injury." *Id*. at 100.

On February 3, 2006, the Court of Appeals for the D.C. Circuit reversed this decision, holding that the challenge was ripe for review. *Nat'l Ass'n of Homebuilders vs. U.S. Army Corps of Eng'rs*, 440 F.3d 459 (D.C. Cir. 2006). The court wrote that the "hardship prong of the ripeness test . . . poses no obstacle to industry." *Id.* at 465. The court considered hardship "obvious" where each dredger faced the option of applying for a permit or facing civil or criminal enforcement. *Id.* The decision was reversed and remanded to the District Court. *Id.*

On January 30, 2007, Judge Robertson of the U.S. District Court for the District of Columbia ruled in favor of *Tulloch II's* challengers and invalidated the rule. *Nat'l Ass'n of Homebuilders vs. U.S. Army Corps of Eng'rs*, No. 01-0274, 2007 WL 25994 (D.D.C. Jan. 30, 2007). Specifically, Judge Robertson held that the agencies failed to follow the criteria suggested in Judge Silberman's *National Mining Association* concurrence by: (1) improperly including a volume requirement in their definition of incidental fallback, and (2) ignoring temporal considerations. *Id.* at *3. Reasoning that a "faithful and logical interpretation of Tulloch II" would seem to require regulation "of any activity that results in the . . . fallback" of large amounts of dredged material, Judge Robertson reiterated that under the CWA "the volume of material being handled is irrelevant." *Id.*

In line with Judge Silberman's *National Mining* concurrence in the court of appeals, Judge Robertson further explained that the difference between incidental fallback and regulable redeposit is better understood in terms of two specific factors: (1) "the time the material is held before being dropped to earth," and (2) "the distance between the place the material is collected and the place where it is dropped." *Id.* Judge Robertson concluded by reminding the agencies that "not all uses of mechanized earth-moving equipment may be regulated." *Id.* Judge Robertson further admonished the Corps for its "official recalcitrance" in continuing to require 'project-specific evidence' from projects over which they have no regulatory authority. *Id.*

After the 2001 rule was invalidated, the Corps and the EPA revised the rule once again. On December 30, 2008, the agencies returned the definition of discharge of dredged material to that set forth in the 1999 rule. *See* 73 Fed. Reg. 79,641, 79,645 (Dec. 30, 2008) (codified at 33 C.F.R. § 323.2(d)(1)). Thus, the agencies eliminated the definition of incidental fallback, as well as the presumption regarding earth-moving activities. *Id.* The 2008 rule defines the "discharge of dredged material" as "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States." *Id.* The 2008 rule also defines "discharge of dredged material" to include "any addition, including redeposit other than incidental fallback, of dredged material, including excavated material . . . incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." *Id.*

The new rule does not establish a bright line between a regulable redeposit and incidental fallback. Indeed, whether a particular redeposit of material falls within § 404 will be decided on a case-by-case evaluation, consistent with the agencies' CWA authority and governing case law. *Id.* at 79,643.

One case that narrowly construes the "incidental fallback" provision is *Borden Ranch Partnership v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 814 (9th Cir. 2001), which held that "deep ripping," a form of plowing is a jurisdictional activity. The Supreme Court accepted the review of this decision, and affirmed *per curiam* the Ninth Circuit opinion by an evenly divided Court. Justice Kennedy did not participate. 537 U.S. 99, 100 (2002).

The incidental fallback provision is also the subject of *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), and *Green Acres Enterprises v. United States*, 418 F.3d 852 (8th Cir. 2005). In *Moses*, the government prosecuted an Idaho developer for alleged discharges of pollutants without a § 404 permit. *Id.* at 985–86. The developer, ignoring repeated warnings from the Corps that the development work required a § 404 permit, conducted various excavation activities that resulted in the massive movement and redistribution of materials from one part of a water of the United States to another. *Id.* at 986, 991–92. The Ninth Circuit rejected the developer's argument that such geographic redistribution was merely incidental fallback and held that the developer's activities amounted to a regulable redeposit of material. *Id.* at 991–92.

In *Green Acres*, a group of landowners brought an action against the Corps under the Federal Tort Claims Act on the grounds that the Corps violated the *National Mining* injunction when it asserted jurisdiction over the landowners' proposed excavation activities to repair a damaged farm levee, which according to the landowners, involved only incidental fallback. 418 F.3d at 856. The Corps claimed that the landowners' activities amounted to more than incidental fallback and required a § 404 permit, because such activities would involve bulldozer work that would redeposit soil from one place to another within waters of the United States. *Id.* at 855. The Eighth Circuit deferred to the Corps' judgment and held that the Corps' assertion of jurisdiction over the landowners' activities did not violate the *National Mining* injunction. *Id.* Although neither *Moses* nor *Green Acres* relied on Judge Silberman's standard, both holdings fit his two-factor approach.

2. Discharge of Fill Material

"Discharge of fill material" is a broad category, covering many activities that involve earthmoving or discharges into wetlands. Among the regulated activities are: "[p]lacement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills;" causeway or road fills; levees; mine tailings; and many shore protection devices such as riprap, breakwaters, and seawalls. 33 C.F.R. § 323.2(f) (2007). Even the temporary stockpiling of soil from the construction of a drainage ditch or similar excavation may be a regulated discharge. Placement of structures, as opposed to fill material, is not regulated, however.

A municipal landfill constructed in wetlands does not require a § 404 permit, at least in the Ninth Circuit. *Res. Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162 (9th Cir. 1998). That court, in a well-reasoned decision, ruled that jurisdiction for these discharges rests solely with the EPA or states with solid waste permit programs approved by the EPA under RCRA. This decision is not being uniformly applied outside of the Ninth Circuit.

At least one court granted a defendant's Motion to Dismiss in an enforcement action on the grounds that increased siltation that resulted from poorly maintained erosion control structures near a construction site was not a discharge of dredged or fill material. *United States v. United Homes, Inc.*, No. 98 C 3242, 1999 WL 117701 (N.D. Ill. Mar. 1, 1999).

The Seventh Circuit has found that downstream landowners had presented an issue of fact concerning whether the drawdown of a supply pond into a river, which resulted in the downstream deposit of silt, constituted a discharge. *Greenfield Mills v. Macklin*, 361 F.3d 934 (7th Cir. 2004). The appellate court found that a reasonable fact finder could find, assuming the facts in the light most favorable to plaintiffs, that the true purpose was not to maintain the dam, but to dredge the pond behind the dam. *Id.* at 950.

The scope of the regulatory definition of "discharge of dredged material" continues to attract the attention of the courts. In 2007, the Ninth Circuit held that a § 402 permit, incorporating EPA's standard of performance under § 306 of the CWA for froth-flotation mill operations, was required for the discharge of process wastewater from a gold mine. *See. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638 (9th Cir. 2007). The slurry produced from the mine process was about forty-five percent water and fifty-five percent tailings. Over the life of the permit, the discharge would raise the bottom of the lake fifty feet. Nevertheless, in 1982, the EPA adopted specific performance standards for gold mines using the froth-flotation process. The court held that if the EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, §§ 301 and 306 prohibit the use of a § 404 permit to authorize that discharge. Two years later, the Supreme Court reversed and remanded the case, holding that the CWA gave authority to the Corps, rather than the EPA, to issue permits for discharge of mining waste, and that § 404 grants the Corps authority to determine whether or not to issue a permit allowing the slurry discharge without regard to the EPA's new source performance standard. *See Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009).

3. The Water Transfer Rule

Water transfers are routine and occur in many different contexts across the United States. *National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule*, 73 Fed. Reg. 33,697 (June 13, 2008). Typically, water transfers, through tunnels, channels or other means, are conducted by federal, state, and local agencies across the United States, for purposes such as providing public water supply, irrigation, power generation, flood control, and environmental restoration. *Id.* at 33,698. For example, the United States Bureau of Reclamation administers significant transfers in western states to provide approximately 14,000 farms with irrigation water. *Id.*

The question of whether or not an NPDES permit is required for water transfers arises because diverting water from one area can have the effect of also placing contaminants from the source water body into the receiving water body. Under EPA's "unitary waters" theory, water transfers do not trigger the NPDES permit requirement because even though pollutants are carried from one water body to another through a point source, the transfer does not result in an "addition" of pollutants. Citizen groups, and other stakeholders, however, have long argued that the CWA unambiguously requires a permit when pollutants are added from one distinct water body to another.

Historically, courts have treated EPA's unitary water theory harshly. For example, in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (*Catskill I*), which involved the City of New York's use of a tunnel to transfer drinking water from a reservoir, without a discharge permit, to a premier trout fishing stream, causing increased heat, suspended solids, and turbidity, the Second Circuit held that "the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit."

Likewise, although it explicitly declined to address the merits of the unitary waters theory and left it open on remand, in 2004, the Supreme Court wrote dicta in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107 (2004), that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach." Plaintiffs in *Miccosukee* alleged that defendants violated the CWA by discharging stormwater containing pollutants into Lake Okeechobee. Both the trial court and the Eleventh Circuit found the pumping to be a discharge of a pollutant from a point source. Thus, the Supreme Court considered the question whether the pumping of the stormwater—where the water itself contains pollutants but the pump station adds no pollutants—was an addition of a pollutant from a point source.

Following *Miccosukee*, the EPA in 2005 issued a legal memorandum entitled "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers." The memo addresses the question of whether the movement of pollutants from one water body of the United States to another by a water transfer is the "addition" of a pollutant, potentially subjecting the activity to the permitting requirement under § 402 of the CWA. The interpretive memo concludes that Congress intended for water transfers to be subject to oversight by water resource management agencies and state non-NPDES authorities, rather than the permitting program under § 402. *See* 71 Fed. Reg. at 32,889 (June 7, 2006). In 2006, the EPA issued a proposed

water transfer rule designed to expressly exclude water transfers from regulation under § 402 of the CWA. *National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule*, 71 Fed. Reg. 32,887 (proposed June 7, 2006) (to be codified at 40 C.F.R. § 122.2). However, just days following the publication of the proposed rule, the Second Circuit dealt the unitary waters theory a blow, rejecting the City of New York's arguments that the unitary waters theory excluded water transfers from NPDES requirements. *Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006) (*Catskill II*). The Second Circuit affirmed its prior decision in *Catskill I*, concluding that the EPA's 2005 interpretive memorandum, "simply overlook[ed the] plain language" of the CWA. *Id.* at 84.

Following *Catskill II*, the Southern District of Florida addressed whether back-pumping water containing pollutants, primarily for flood control purposes and only occasionally for water supply purposes, from particular canals into Lake Okeechobee requires NPDES permitting. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309, 2006 WL 3635465 (S.D. Fla. Dec. 11, 2006) (*Friends I*). The district court held that "water transfers between distinct water bodies that result in the addition of a pollutant to the receiving navigable water body are subject to the NPDES permitting program." *Id.* at *48. On August 9, 2007, the South Florida Water Management District and DOJ on behalf of EPA, along with other defendants, appealed the decision to the Eleventh Circuit Court of Appeals.

On June 9, 2008, with *Friends I* awaiting the Eleventh Circuit's review, the EPA published the Final Water Transfers Rule explicitly excluding most "water transfers" from the NPDES permitting requirements. 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)). In response, environmental groups initiated lawsuits against the EPA in federal district courts and circuit courts around the country. These lawsuits were consolidated and assigned to the Eleventh Circuit. *See Friends of the Everglades v. U.S. EPA*, No. 08-13652-CC (11th Cir. consolidated Sept. 10, 2008) (*Friends II*). Challenges filed at the district court level were consolidated in the Southern District of New York, *Catskill Mountains Ch. of Trout Unlimited, Inc. v. EPA*, No. 08-cv-05606-KMK (S.D.N.Y. consolidated Oct. 8, 2008) (*Catskill III*), and in the Southern District of Florida, *Friends of the Everglades v. United States*, No. 08-cv-21785-CMA (S.D. Fla. consolidated Sept. 18, 2008). Each of the three consolidated petitions was stayed pending the disposition of *Friends I*.

On June 4, 2009, the Eleventh Circuit overturned the district court decision. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist*., 570 F.3d 1210 (11th Cir. 2009), *rehearing en banc denied*, 605 F.3d 962 (11th Cir. 2010). It squarely rested its holding on the application of deference to the Final Water Transfers Rule as required under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), a landmark Supreme Court case holding that to the extent that a statute does not speak clearly to a specific issue, the agency interpretation must be upheld if it is based on a permissible construction of the statute.

The consolidated lawsuits in the Eleventh Circuit were dismissed for lack of subject matter jurisdiction. *Friends of the Everglades v. U.S. EPA*, Nos. 08-13652, 08-13653, 08-13657, 08-14921, 08-16283, 2012 WL 5274826 (11th Cir. Oct. 26, 2012).

On January 8, 2013, the Supreme Court unanimously held in *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.* that the flow of water from a

concrete channel or other engineered improvement on a river to a lower un-improved portion of the same river is not a "discharge" under the CWA and does not require an NPDES permit. No. 11-460, 2013 WL 68691 (U.S. Jan. 8, 2013). The Court followed its previous ruling in *Miccosukee* that the transfer of polluted water between two parts of the same water body is not a "discharge" because it fails to result in the addition of any pollutant. 541 U.S. 95, 109–10 (2004).

Both parties and the amicus United States all agreed that the Ninth Circuit's holding—that a party in control of concrete-lined channels was liable for the water flowing out of those channels and into lower portions of the river—should be reversed. *Id.* at *1. The Court accommodated and reversed the Ninth Circuit on that narrow issue, but it declined to address other issues in the case. The case does, however, illustrate how difficult it is for regulators to identify which of thousands of permitted dischargers are violating the CWA, particularly as it relates to stormwater discharges.

The dispute arose after the Natural Resources Defense Council ("NRDC") identified the presence of several pollutants in excess of water quality standards in concrete channels of the Los Angeles and San Gabriel Rivers. The Los Angeles County Flood Control District ("District") operates a municipal separate storm sewer system that collects and transports stormwater that is eventually discharged at hundreds of outfalls into these two rivers. Though the District is the predominant discharger into the rivers, there are thousands of other permit-holders also discharging to these rivers. *See NRDC v. County of Los Angeles*, 673 F.3d 880, 889–90 (9th Cir. 2011). The District discharges its water under its own NPDES permit. Portions of the two rivers exist within concrete channels built for flood control, and the water monitoring stations at issue are located within these channelized portions. The NRDC alleged that these exceedances demonstrated that the District was violating the terms of its permit and sued under the CWA's citizen suit provision.

The district court found that the NRDC had not shown that the exceedances registered at the monitoring stations were attributable to the District's discharges to the river, and not attributable to any of the thousands of other dischargers, and the court granted summary judgment in favor of the District. *See id.* at 890–91. The Ninth Circuit reversed, stating that because the District owns and operates the concrete channels where the monitoring stations exist, the District is the one in control of the polluted water being discharged to the rivers at the tail end of the concrete channel. *Id.* at 899–900. In other words, the Ninth Circuit viewed the locations where the channelized portion of the river ended as outfalls, or point sources, from which discharges to navigable waters were occurring. The Supreme Court granted certiorari on the question of whether the flow of water out of a concrete channel into a lower portion of the same river qualifies as a "discharge" of a pollutant under the CWA.

The Court followed its earlier ruling in *Miccosukee*, which held that "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same navigable waterway does not qualify as a discharge of pollutants" under the CWA. *Los Angeles County Flood Control Dist.*, 2013 WL 68691, at *4.

During oral argument, members of the Court pressed the District on the terms of its permit and the placement of the monitoring stations at the downstream ends of the rivers.

Counsel for the District reiterated that the permits provide that each permittee is only responsible for its own discharges and that the downstream monitoring stations were intended to help gauge the river systems' general water quality, not to track individual permittee compliance. As the Court noted in its opinion, the District's renewed NPDES permit requires additional monitoring at representative outfalls farther upstream from the original monitoring location. *Id.* at *3, n.2.

Thus, the Supreme Court squarely held that the CWA does not regulate movement of water from one part of a river, through a concrete channel, into a lower portion of the same river. One possible result of this case is that regulators may now require more vigorous testing upstream of these types of monitoring stations and closer to the specific outfalls of individual NPDES permit-holders. Plaintiffs suing under the CWA's citizen suit provisions may also try to obtain sampling results nearer outfalls when multiple permittees exist upstream.

4. The Mountaintop Mining Controversy

The regulation of mountaintop coal mining in Appalachia is administered by the states, EPA, the Department of the Interior (DOI), and the Corps, under the Surface Mining Control and Reclamation Act (SMCRA), the CWA, and the National Environmental Policy Act (NEPA). Developments in federal case law and agency action over the last several years indicate a shift towards a more stringent approach to protecting against the environmental consequences of valley fills, a necessary practice in mountaintop mining. Surface mining for coal typically results in the production of excess overburden material that is placed permanently into the heads of valleys, with a sedimentation pond located downstream of the so-called valley fills.

SMCRA establishes a nationwide program to protect society and the environment from adverse effects of surface coal mining operations, while striking a balance between protection of the environment and the nation's need for coal as an essential source of energy. *See* 30 U.S.C. § 1202. In striking this balance, SMCRA utilizes a "cooperative federalism" approach, allocating responsibility for the regulation of surface coal mining among both state and federal agencies. *Ohio Valley Envtl. Coal. v. Aracoma Coal Co*., 556 F.3d 177, 189 (4th Cir. 2009). Under SMCRA, states have exclusive jurisdiction over the regulation of surface coal mining and reclamation operations on non-federal lands, so long as their regulatory program has been approved by the Secretary of the Interior as satisfying the Act's minimum requirements. *See* 30 U.S.C. § 1253. Once a state's SMCRA program has been approved, anyone wishing to engage in surface coal mining operations within the state must first obtain a permit from the state's regulatory authority. *See id.* at § 1256(a).

Currently, regulation of the disposal of excess spoil material from surface coal mining operations is within SMCRA's purview. *Aracoma*, 556 F.3d at 190. Thus, a permit from the state regulatory authority under SMCRA is needed to conduct mountaintop mining. A SMCRA permit by itself, however, does not suffice to allow a mine operator to construct a valley fill in conjunction with its mountaintop removal activities; mining companies must also obtain permits certifying their project's compliance with the CWA. *Id.*

Surface mining projects that intend to dispose of excess spoil from their mining operations in jurisdictional waters must obtain a CWA § 404, 33 U.S.C. § 1344, permit from the

Corps. *Id*. The Corps uses § 404 permits to authorize the fill activity itself, as well as the construction of downstream sediment ponds. *Id.* at 190–91.

Environmental groups have challenged the issuance of permits required for mountaintop mining operations under SMCRA, CWA, and NEPA in the Fourth Circuit in an attempt to halt mountaintop mining. Generally, the federal district courts in Appalachia have been sympathetic to the concerns raised by the environmentalists; however, the Fourth Circuit has consistently overturned the lower court's rulings.

On May 3, 2002, the Corps changed the definition of "fill" and deleted the waste exclusion to clarify the Corps' authority over mountaintop removal coal mining. *See* 33 C.F.R. § 323.2(e) (2003). Under the new definition, mining waste and other construction debris may be used to fill in waters.

In *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, environmentalists argued that the Corps did not have authority to issue permits (NWP 21) allowing mining companies to deposit spoil into valleys, under § 404 of the CWA. 317 F.3d 425 (4th Cir. 2003). The district court agreed and reasoned that § 404 only allowed the Corps to approve the deposit of material for some beneficial purpose, not for waste disposal. *Id*. at 430. Thus, the district court agreed with the environmentalists and found that the "Corps' approval of waste disposal as 'fill material' under § 404 of the CWA was *ultra vires* and beyond the authority of the Corps." *Id*.

On appeal, the Fourth Circuit reversed the lower court and concluded "that the Corps' practice of issuing Section 404 permits, including the permit to create valley fills with the spoil of mountaintop coal mining is not *ultra vires* under the Clean Water Act and that the injunction issued by the district court was overbroad." *Id*. The Fourth Circuit reasoned, "Because the Clean Water Act does not define 'fill material,' nor does it suggest on its face the limitation of 'fill material' found by the district court, the statute is silent on the issue before us, and such silence normally creates ambiguity." *Id*. at 441. In light of the CWA's ambiguity, the Fourth Circuit deferred to the Corps' interpretation of "fill material," after applying the two-step *Chevron* analysis. *Chevron* requires courts to first decide whether a statute is ambiguous, and if there is ambiguity, whether the construction of the statute by the pertinent agency is either permissible or plainly erroneous. If the construction is permissible, the court must defer to the agency's interpretation. *See Chevron U.S.A. Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

In sum, the Fourth Circuit concluded "that the Corps' interpretation of 'fill material' as used in Section 404 of the Clean Water Act to mean all material that displaces water or changes the bottom elevation of a water body except for 'waste' - meaning garbage, sewage, and effluent that could be regulated by ongoing effluent limitations as described in Section 402 - is a permissible construction of Section 404." *Rivenburgh,* 317 F.3d at 448. Thus, the Fourth Circuit vacated the district court's declaration that the Corps acted *ultra vires* in issuing valley fill permits. *Id*. Reflecting on the decision in *Rivenburgh*, the Fourth Circuit in *Ohio Valley Environmental Coalition v. Aracoma Coal Co*. stated, "over six years ago, in our decision in *Rivenburgh,* this Circuit found that CWA Section 404 did in fact give the Corps the authority to issue such permits (NWP 21)." 567 F.3d 130, 132 (2009) (denying petition for rehearing and rehearing en banc).

In *Ohio Valley Environmental Coalition v. Bulen*, a coalition of environmental groups (OVEC) raised various challenges to NWP 21. 429 F.3d 493 (4th Cir. 2005). The district court held simply that NWP 21 conflicts with the unambiguous meaning of § 404 of the CWA and is thus facially invalid. *Id*. at 497. The district court accordingly suspended existing authorizations under NWP 21 and enjoined the Corps from issuing further NWP 21 authorizations in the Southern District of West Virginia. *Id*.

On appeal, the Fourth Circuit held that NWP 21 issuances are not in conflict with § 404 of the CWA, in the areas identified by the district court. The Corps complied with § 404 when it issued NWP 21 because the Corps: (1) identified a category of activities; (2) determined that those activities would have a minimal environmental impact both separately and cumulatively; and (3) provided notice and opportunity for public hearing before issuing the permit. *Id*. at 505. The Corps' issuance of NWP 21 thus fell within its authority under § 404. *Id*. The Fourth Circuit vacated the injunction against NWP 21 authorizations and remanded the case to the district court for further proceedings.

Litigation in this area continues. *See Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs,* 479 F. Supp. 2d 607 (S.D. W. Va. 2007). The district court invalidated four permits issued by the Corps for mining because the Corps had not adequately analyzed impacts. Specifically, the court found that the Corps failed to analyze impacts to headwaters and failed to demonstrate how the proposed mitigation would compensate for losses. The Fourth Circuit Court of Appeals reversed the decision, *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009), and the Supreme Court subsequently denied a writ of certiorari, *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 131 S. Ct. 51 (2010).

In a June 13, 2007 order in the same case, the district court held that the waste treatment exclusion in the CWA did not apply to sediment ponds because these ponds are constructed on tributaries. And, in an October 31, 2008 order, the district court granted plaintiffs' motion for preliminary injunction of a permit that allowed for the placement of fill in 32,731 linear feet of stream, in conjunction with the creation of eleven valley fills. According to the district court, "while damage to existing streams is certain, the mitigation of this damage is uncertain. . . . The issuance of an injunction will maintain the status quo until the Court can more fully evaluate the merits of the case." *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, No. 3:08-0979, 2008 WL 4810800, at *2 (S.D. W. Va. Oct. 31, 2008). Because the court recognized that the mining company is a "foundation" of the Clay County economy, it stayed the injunction only as it applied to Valley Fills 2 and 3 on the Ike Fork 1 permit. *Id.* at *7. Thus, it assured that the mining company could continue to operate at full capacity well into 2009, allowing the district court and the Fourth Circuit time to address the merits. *But see Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, Nos. 3:05-0784, 3:06-0438, 2009 WL 3424175, at *3 (S.D. W. Va. Oct. 21, 2009) (granting extension of stay of litigation to allow for the necessary coordination between EPA, the Corps, and Mingo Logan so that the EPA can initiate the administrative process to exercise its 404(c) authority).

On March 26, 2010, the EPA proposed a first-ever veto for a previously issued § 404 permit. In early 2007, the Corps issued a § 404 permit authorizing discharges of fill material, including construction of six valley fills, associated with the Spruce No. 1 mine. Shortly thereafter, environmental groups challenged that permit in federal district court. That litigation

remains pending; however, a stay ordered until February 2011 to provide the EPA enough time to properly assess all factors before exercising its discretion to issue a final veto or provide terms by which Spruce No. 1 can operate has not been extended. *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs,* Nos. 3:05-0784, 3:06-0438, 2010 WL 4642023, at*4 (S.D. W. Va. Nov. 2, 2010).

In 2007, the mining company commenced limited operations on the Spruce No. 1 project pursuant to their Department of the Army permit subject to an agreement with the environmental groups who are plaintiffs in the litigation, including construction of one valley fill. The EPA published its Proposed Determination in the Federal Register (EPA-R03-OW-2009-0985) on April 2, 2010 with a sixty-day public comment period concluding in June 2010. 75 Fed. Reg. 16,788 (Apr. 2, 2010). In September 2010, the EPA issued its Recommended Determination to withdraw authorization for the discharges because the agency determined that these discharges would "bury wildlife that live in . . . streams or within the footprint of the valley," and "[o]ther wildlife will lose important . . . habitat on which they depend for all or part of their lifecycles. Recommended Determination of the U.S. Environmental Protection Agency Region III Pursuant to Section 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia, U.S. Environmental Protection Agency Region III (Sept. 24, 2010), *available at* http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/sprucerecdeterm.pdf.

On January 13, 2011, the EPA issued its Final Determination and revoked the Spruce No. 1 mine permit, halting the proposed disposal of mining waste in streams. Final Determination of the United States Environmental Protection Agency Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia (Jan. 13, 2011), *available at* http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/Spruce_No_1_Mine_Final_Determination_011311_signed.pdf. The EPA believed that the mining operation would adversely affect fish and wildlife resources to an unacceptable level.

In addition to EPA's March 2010 404(c) veto, the EPA released, on April 1, 2010, detailed guidance to EPA Regions III, IV, and V for those Regions' review of surface coal mining operations. *Detailed Guidance: Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order* (Apr. 1, 2010). 75 Fed. Reg. 18,500 (April 12, 2010). The EPA issued the guidance for public comment, but stated that the guidance was effective immediately. Likewise, the EPA urged regional officials overseeing four Appalachian states to more closely scrutinize state discharge permits for mountain top mining operations, suggesting that regions should object to proposed permits issued under § 402 that do not adequately ensure attainment with water quality standards. In a July 13, 2010 memorandum to EPA Regions III, IV and V, the agency states "Regions should consider objecting to permits that do not assess reasonable potential [to violate standards] effectively, or fail to implement numeric and narrative standards." Review of Clean Water Act § 402 Permitting for Surface Coal Mines by Appalachian States: Findings & Recommendations (July 13, 2010), *available at* http://www.epa.gov/owow/wetlands/guidance/pdf/Final_Appalachian_Mining_PQR_07-13-10.pdf. The memorandum summarizes permit quality reviews conducted for Kentucky, Ohio, Tennessee, and West Virginia. The memo found that the states generally do an "effective job in implementing technology-based limitations based upon the coal mining effluent limitations guidelines (40 CFR 434)," but that states generally fall short with respect to documentation. For

example, the review found that "there was little evidence in the NPDES permit administrative records to demonstrate that meaningful water quality impact assessments are performed for facilities covered under NPDES general permits." Likewise, "no documentation was found to indicate that States request data beyond that required in the permit application form to support a reasonable potential analysis, establish effluent limits, or require effluent monitoring for whole effluent toxicity for surface mining discharges."

The memorandum offered a number of specific recommendations, including, among other things, that regions request specific procedures "from each State as to how that State is applying applicable numeric and narrative water quality standards;" that regions consider "objecting to permits that do not assess reasonable potential effectively, or fail to implement numeric and narrative standards," and that regions "work with States to improve documentation in the administrative record."

In June 2009, the EPA and the Corps signed a *Memorandum of Understanding on Implementing the Interagency Action Plan on Appalachian Surface Coal Mining* (MOU). Memorandum of Understanding Among the U.S. Department of the Army, U.S. Department of the Interior, and U.S. Environmental Protection Agency: Implementing the Interagency Action Plan on Appalachian Surface Coal Mining (June 11, 2009), *available at* http://www.epa.gov/owow/wetlands/pdf/Final_MTM_MOU_6-11-09.pdf. The MOU outlined a series of short term actions to be implemented to existing policy and guidance, including coordinated reviews of pending § 404 permits. The agencies then issued an "enhanced coordination memorandum" to facilitate review of pending § 404 permits for surface coal mines (EC Memo). The EC Memo established a two-step process whereby the EPA would identify pending applications raising environmental concerns and warranting further environmental review and coordination. In this process, the EPA first conducted a screening process called the Multi-Criteria Integrated Resource Assessment (MCIR) where the agency applied § 404(b)(1) guidelines and directed the Corps on what permits merited further review. If the EPA identified a permit application meriting further review, then the permit would be subjected to the enhanced coordination process outlined in the EC Memo.

On July 20, 2010, the National Mining Association (NMA) filed suit against the EPA and the Corps challenging the guidance documents and accusing the agencies of failing to follow formal rulemaking procedures. *See Nat'l Mining Assoc. v. Jackson*, No. 1:10-cv-01220-RBW (D.D.C.). NMA sought a preliminary injunction to block enforcement of the guidance, but the court rejected the injunction request in January 2011. *Nat'l Mining Assoc. v. Jackson*, 768 F. Supp. 2d 34, 56 (D.D.C. 2011). NMA then moved for summary judgment on its challenges to the EC Memo and MCIR Assessment.

In October 2011, the court granted summary judgment to the plaintiffs, ruling that the EPA exceeded its statutory authority under the CWA and violated the Administrative Procedures Act (APA) in issuing the guidance documents. *Nat'l Mining Assoc. v. Jackson (Nat'l Mining Assoc. I)*, 816 F. Supp. 2d 37, 43, 46 (D.D.C. 2011). In its decision, the court observed that the CWA outlines specific roles for the EPA in the permitting process. *Id.* at 45. The Corps serves as the principal agency in the process. *Id.* at 44. The EPA exceeded its statutory authority by using the guidance documents to assume roles outside those specified in the CWA. *Id.* at 45.

The EPA also violated the Administrative Procedure Act (APA) using the guidance documents to change environmental rules and bypassing formal rulemaking procedures. *Id.* at 49.

On July 21, 2011, the EPA issued its Final Guidance, which, according to EPA, reflected public input on the interim guidance and accounted for and responded to key concerns raised by the Appalachian states and the mining industry during earlier stages of litigation. *See* Final Memorandum: Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order (July 21, 2011), *available at* http://appvoices.org/images/uploads/2012/08/Final_Appalachian_Mining_Guidance_07211111.pdf. NMA disagreed, however, arguing that the Final Guidance exceeded EPA's authority under the SMCRA and CWA, was arbitrary and capricious, and was an abuse of discretion. *See Nat'l Mining Ass'n v. Jackson (Nat'l Mining Ass'n II)*, Nos. 10-1220 (RBW), 11-0295 (RBW), 11-0446 (RBW), 11-0447 (RBW), 2012 WL 3090245, at *3 (D.D.C. July 31, 2012). The EPA argued that a number of procedural obstacles precluded the district court from reviewing its Final Guidance, and, alternatively, that the Final Guidance was consistent with existing statutory and regulatory authority and in line with the APA. *Id.*

The District Court for the District of Columbia held that the Final Guidance was reviewable at the district court level and that it was not consistent with existing statutory and regulatory authority. Specifically, the court held that the EPA impermissibly interjected itself into the states' § 303 domain by including conductivity criterion for water quality in its Final Guidance, and also by recommending that state permitting authorities should not defer reasonable potential analyses until after permit issuance under § 402 of the CWA. *Id.* at *14, 17. As a result, the court granted the plaintiffs' motion for partial summary judgment and set aside EPA's Final Guidance.

National Mining Association I and *II* follow the recent trend of courts challenging the use of interpretative guidance documents as a substitute for formal rulemaking. *See, e.g., Natural Res. Def. Council v. EPA*, 643 F.3d 311 (D.D.C. 2011).

5. Landclearing

In the past, it has not been altogether clear to what extent landclearing in wetlands was regulated under § 404. Courts have held that extensive landclearing operations involving a redeposit of vegetation and leveling of land constitute a discharge of fill prohibited by the CWA. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 924 (5th Cir. 1983)(Cypress forest converted o soybean field); *United States v. Huseby*, 862 F. Supp. 2d 951, 964 (D. Minn. March 26, 2012) (hardwood swamp to Red Pine Plantation). On the other hand, landclearing activities involving felling trees and windrowing vegetation were not subject to § 404 in *Save Our Wetlands v. Sands*, in part because the purpose of the clearing was not intended to change an aquatic area to upland. 711 F.2d 634, 647 (5th Cir. 1983).

The effect of *National Association of Homebuilders v. U.S. Army Corps of Engineers*, No. 01-0274, 2007 WL 259944 (D.D.C. Jan. 30, 2007), invalidating the *Tulloch II* rules, which presumed that "the use of mechanized earth-moving equipment to conduct landclearing,

ditching, channelization, in-stream mining or other earth-moving activity . . . unless project-specific evidence shows that the activity results in only incidental fallback," remains unclear.

In a 1990 Regulatory Guidance Letter (RGL), the Corps adopted a narrow view of permitted landclearing. The agency stated that, as a general rule, mechanized landclearing will result in re-deposition of soil and require a permit under § 404. Thus, the Corps' current position is that land clearing using bulldozers, rakes, discs, and backhoes is regulated. One exception noted by the agency may be chain saw cutting trees above the soil surface. *See* Corps of Engineers, Regulatory Guidance Letter No. 90-5, "Landclearing Activities Subject to Section 404 Jurisdiction" (July 18, 1990), *available at http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl90-05.pdf*. This general policy was adopted by the Corps in the invalidated 1993 *Tulloch II* rules. Even when those rules were in place, however, the Corps provided clear guidance as to the type of activities that will or will not involve a discharge and, thus, be subject to the rule. *See* 58 Fed. Reg. 45,017–18 (Aug. 25, 1993) (for example, bushrakes, disc harrows, bulldozer plows and similar equipment typically scrape the ground and involve discharges; tree pushers rip roots out of the ground and may involve discharges; however, tree shears or tree pinchers may be operated in such a manner that they will not cause a discharge of dredged material, provided vegetation is cut above the ground while leaving the soils and roots intact). The guidance should still be useful, although RGL90-05 is no longer officially endorsed by the Corps. *See* Corps of Engineers Regulatory Guidance Letter No. 05-06, "Guidance on Expired Regulatory Guidance Letters," *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-06.pdf.

6. Pilings

The Corps has advised permit applicants that the placement of certain structures and pilings in wetlands is not a regulated discharge. However, one New Jersey developer's plan to construct a large office and hotel complex on pile-supported structures in wetlands has led the Corps to revise its position. *See* 11 Inside E.P.A. 1, 1 (Dec. 21, 1990). According to a Regulatory Guidance Letter, the Corps will require a permit for pilings that have the functional effect of fill. Corps of Engineers, Regulatory Guidance Letter No. 90-8, "Applicability of Section 404 to Pilings" (Dec. 14, 1990). One test used by field personnel is the "is this type of work usually done with fill" test. If the answer to the question is yes, an assertion of jurisdiction is likely.

7. Drainage as a Regulated Activity

One court has held, contrary to the position of the Corps and EPA, that drainage of wetlands by pumping is itself a regulated activity, even without a discharge. *Save Our Cmty. v. U.S. EPA*, 741 F. Supp. 605 (N.D. Tex. 1990). That decision was reversed by the Fifth Circuit on appeal. *See Save Our Cmty. v. EPA*, 971 F.2d 1155 (5th Cir. 1992). The Corps' *Tulloch* rule does not regulate drainage, such as the pumping of water from a wetland, absent a discharge.

Indeed, many activities that drain wetlands remain unregulated. A court dismissed a citizen's suit brought to challenge the poorly executed removal of a dam that had resulted in increased downstream siltation. *See Froebel v. Meyer*, 13 F. Supp. 2d 843 (E.D. Wis. 1998), *aff'd*, 217 F.3d 928 (7th Cir. 2000). The *Froebel* court found that the increased siltation was

neither a point source nor the addition of a pollutant. *But see Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934 (2004) (holding that drainage of pond into river was "addition" of dredged spoil subject to CWA permit requirement).

8. The Agricultural Exemption

Section 404(f) is known as the agricultural exemption. The statute provides that six categories of activities commonly associated with ongoing agricultural production, such as harvesting, are not prohibited by the CWA. The scope of § 404(f) has been severely limited by regulation and the courts over the years, however. The statute itself includes a "recapture" provision in § 404(f)(2), which states that even an exempt activity will require a permit if it brings an area into a use to which it was not previously subject; or if flow, circulation, or reach of the water is affected. *See, e.g., United States v. Acquest Transit LLC*, No. 09-CV-055S, 2009 WL 2157005, at *10 (W.D.N.Y. July 15, 2009) (finding that development of a retail nursery on farmland was not part of an "established farming operation" where land had lain fallow for a decade, rendering subsequent planting a new farming operation falling outside the 404(f) farming exemption).

Even if a tract of farmland has been certified under the Food Security Act of 1985 (Swampbuster), that does not guarantee that a farmer is protected from a CWA enforcement action. *United States v. Brace*, 41 F.3d 117 (3d Cir. 1994). In November 1995, the Corps issued guidance on the application of the agricultural exemption to silvicultural (timber production) activities conducted at pine plantations in the southeast. *See* 61 Fed. Reg. 7,242 (Feb. 27, 1996). The guidance recognizes that mechanical silvicultural site preparation activities may have significant impacts on wetlands. It prescribes certain best management practices and location restrictions designed to ensure that the silvicultural cultivation will have minimal impacts on the aquatic ecosystem and avoid a § 404 permit requirement.

The scope of the agricultural exemption, and the impact of the "recapture" provision were both at issue in *Borden Ranch Partnership v. U.S. Army Corps of Eng'rs,*261 F3d 810, 814 (9th Cir. 2001). That case held that the use of "deep ripping," a form of plowing that breaks up relatively shallow impermeable layers was a jurisdictional activity. The US Supreme Court accepted review of this decision, and affirmed the Ninth Circuit opinion *per curium* by an evenly divided Court. Justice Kennedy did not participate. 537 U.S. 99, 100 (2002).

Courts have interpreted the recapture provision to mean that a party needs a permit only when it is starting or expanding farming operations, not when it is building a new pond to support an existing farming operation. See *Conant v. United States*, 786 F.2d. 1008 (11th Cir. 1986). The U.S. Court of Appeals for the Second Circuit observed that the agricultural exemption would be rendered meaningless by an interpretation that required permits for all new uses, including new ponds. *Coon ex rel. Coon v. Willet Dairy, LP*, 536 F.3d 171 (2d Cir. 2008). The court observed that the CWA expressly exempts "the construction or maintenance of farm or stock ponds." 33 U.S.C. § 1344(f)(1)(c); s*ee also Peconic Baykeeper, Inc. v. Suffolk County*, 585 F. Supp. 2d 377 (E.D.N.Y. 2008), *aff'd*, 600 F.3d 180 (2d Cir. 2010) (finding that county's maintenance of mosquito grid ditch system fell within statutory exemption from CWA's pollutant discharge provisions, as stated in 33 U.S.C. § 1344(f)(1)).

A strict interpretation of the "ongoing" element for the 404(f) exemption occurs in *Ogeechee-Canoochee Riverkeeper, Inc. v. United States Army Corps of Engineers*, 559 F. Supp. 2d 1336 (S.D. Ga. 2008). The court held the determination by the Corps that a proposed timber harvest was exempt under 404(f) to be arbitrary and capricious. The court considered evidence of past timber harvests to be insufficient, and concluded that ongoing silviculture requires evidence of efforts to regenerate the timber beyond simply natural regrowth. Likewise, in *United States v. Huseby*, the Minnesota district court held that a landowner's actions in clearing land and constructing logging roads without a permit fell within the CWA's recapture provision. 862 F. Supp. 2d 951, 965 (D. Minn. 2012). The court found that the landowners clearing and construction activities, which resulted in the discharge of pollutants into wetlands, violated the CWA regardless of whether his activities were exempt under the exemptions for normal silviculture or construction and maintenance of forest roads because he developed the site with the intent of establishing a red pine plantation that had not previously existed there. *Id.*

An interesting case found Swampbuster did not preempt local regulation of farming in wetlands because Swampbuster is predicated on the "spending clause" of the U.S. Constitution rather than the "commerce clause." *Citizens for Honesty & Integrity in Reg'l Planning vs. County of San Diego*, 258 F. Supp. 2d 1132 (S.D. Cal. 2003).

United States v. Hamilton, 952 F. Supp. 2d 1271 (D.Wyo. 2013) involved an enforcement action. On the issue of jurisdiction over Slick Creek, a tributary that ultimately reaches the Missouri River, the court granted Summary Judgment for the US. The court found a fact issue as to whether the area of Slick Creek that was filled as part of a 2005 channelization project was previously subject to farming. The defendant presented testimony that the filled portions of Slick Creek were irrigated and farmed in the past and that by filling the creek they were "only reclaiming lands that had been previously irrigated and farmed." *Id. a*t 1276.

United States v. Brink, 795 F. Supp. 2d 565 (S.D. Texas 2011) is another enforcement action were jurisdiction was decided in favor of the government on Summary judgment. Defendants claimed that their actions were exempt, and that summary judgment was not appropriate because it was the Government's burden to prove that the exemption does not apply. The court disagrees. In an enforcement action it is the burden of the defendant to show both that the activity is part of established or on-going agricultural operations involving exempt practices and that the recapture provision does not apply. *Id.* At 582-583.

Even when the Corps agrees that agricultural activities fall within the 404(f) exemption and are not subject to recapture that decision can be challenged in a citizen suit. The presumption works, again, in favor of the Corps. Thus, a Corps decision that the construction of a farm pond was exempt under 404(f)(1)(c) was upheld in *Craig v. US Army Corps, 2014 WL* 5488751 (D. S. Car. October 29, 2014)(slip op.). In dealing with the recapture provision the court cited an Opinion by the Attorney General of the United States, "[a]ll impoundments will interfere with flow to some extent, so the recapture provision must be applied in a reasonable way to support the legitimate purpose of the farm pond exemption while remaining consistent with the statutory intent that only minor environmental impacts be exempted." *Id.* (citing 43 Op. Atty Gen. 197, 1979 WL 16529).

The challenge of a Native American tribe to a Corps decision approving certain farm roads were held to be time barred in S*isseton-Wahpeton Oyate v. U. S. Army Corps,* 918 F.Supp. 2d 962 (D. S. Dak. 2013). The Court also ruled that the Corps decision not to modify, suspend, or revoke its determinations was committed to the Corps' absolute discretion.

9. Concentrated Animal Feeding Operations (CAFOs)

Although "agricultural stormwater discharges" are exempted from EPA permit requirements, the CWA does enable the EPA to regulate non-agricultural stormwater runoff from concentrated animal feeding operations (CAFOs) under the NPDES permit program. Thus, some CAFOs are required to obtain NPDES permits. Controversy exists among environmental groups and industry stakeholders about which CAFO operators should be required to apply for NPDES permits.

The EPA began regulating wastewater and manure discharges from CAFOs in the 1970s. *See* 39 Fed. Reg. 5,704 (Feb. 14, 1974); 41 Fed. Reg. 11,458 (Mar. 18, 1976). In 2003, the EPA amended its CAFO regulation to include a "duty to apply" provision, which required all CAFOs to apply for an NPDES permit unless they could demonstrate that they had no potential to discharge. In 2005, the U.S. Court of Appeals for the Second Circuit found in *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486 (2d Cir. 2005) that the duty to apply, which the EPA had based on a presumption that all CAFOs have at least a *potential* to discharge, was invalid. This is because the CWA subjects only *actual discharges* to regulation rather than potential discharges. The Court acknowledged that the EPA had strong policy reasons for seeking to impose a duty to apply to all CAFOs, but eventually found that the Agency nevertheless lacked statutory authority to do so.

In response, the EPA announced a new rule in 2008 "deleting the requirement that all CAFOs apply for an NPDES permit [and] . . . [e]liminating the procedures for a no potential to discharge determination." 73 Fed. Reg. 70,422 (Nov. 20, 2008). The 2008 regulation required that: "[t]he owner or operator of a CAFO must seek coverage under an NPDES permit *if the CAFO discharges or proposes to discharge*. A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur." 40 C.F.R. § 122.23(d) (2009) (emphasis added). The new regulation also "establish[ed] a voluntary option for unpermitted CAFOs to certify that they do not discharge or propose to discharge." 73 Fed. Reg. 70,422–23 (Nov. 20, 2008). In December 2008, the EPA published and made available on its website a "Concentrated Animal Feeding Operations Final Rulemaking – Q & A" document, which explained that "the evaluation of whether the CAFO discharges or will discharge is based on a factual objective assessment," but the EPA warned that "[u]nder the CWA, operators that do not apply for permits operate at their own risk because any discharge from an unpermitted CAFO (other than agricultural stormwater) is a violation of the CWA subject to enforcement action, including third party citizen suits."

In 2008, the Natural Resources Defense Council, Inc., Sierra Club, and Waterkeeper Alliance sought judicial review of the EPA's 2008 CAFO rule. The petition for review, filed in the Ninth Circuit, was transferred to the Fifth Circuit Court of Appeals and consolidated with

seven other petitions challenging the final rule under the case caption *National Pork Producers Council v. United States Environmental Protection Agency*, No. 08-61093 (5th Cir.). On May 25, 2010, the parties entered into a settlement agreement, in which the EPA agreed (1) to no later than May 28, 2010, publish a guidance document that would assist permitting authorities in implementing the NPDES permit regulations and effluent limitations guidelines for CAFOs, and (2) to propose a rule under 33 U.S.C. § 1318 (§ 308 of the CWA) to require all owners or operators of CAFOs, regardless of whether they discharge or propose to discharge, to submit information to the EPA regarding their operations. *See* Settlement Agreement (May 25, 2010), *available at* http://www.waterkeeper.org/ht/action/GetDocumentAction/i/17717.

EPA's guidance document draws a distinction between the 2003 CAFO rule and the final 2008 CAFO rule. *Implementation Guidance on CAFO Regulations—CAFOs That Discharge or Are Proposing to Discharge*, EPA-833-R-10-006 (May 28, 2010) (hereinafter CAFO Guidance). It explains that "unlike the 2003 rule, which categorically required a permit for any CAFO with 'a potential to discharge,' the revised regulations call for a case-by-case evaluation by the CAFO owner or operator as to whether the CAFO discharges or proposes to discharge." It further explains that this determination should be based on an "objective assessment" considering the possible sources of pollutants at the CAFO as well was any pathways for pollutants from the CAFO to reach waters of the United States. The CAFO Guidance also assures that the no-discharge certification option is voluntary for CAFOs not subject to NPDES permitting requirements. The remainder of the CAFO Guidance lays out specific factors for CAFO operators to consider in making their objective analysis of whether a duty to apply exists on their CAFO. These factors include the nature of the animal confinement areas, waste storage and handling, mortality management, with specific guidance for the swine, dairy, and poultry sectors.

In the 2010 settlement agreement, the EPA also agreed to propose a rule under 33 U.S.C. § 1318 (§ 308 of the CWA) to require all owners or operators of CAFOs, regardless of whether they discharge or propose to discharge, to submit information to the EPA regarding their operations. The information that the EPA agreed to require includes name of owner, operator, and integrator, as well as location, type of facility, number and types of animals, type and capacity of manure storage, quantity of manure, amount of wastewater and litter generated annually by the CAFO, whether the CAFO has applied for an NPDES permit, and more. The EPA also agreed to propose a provision requiring that this information be submitted every five years and agreed to take final action on the proposed rule within two years of the settlement agreement.

Arguably, a proposed rule requiring all CAFOs to submit information to the EPA regarding their operations is beyond the scope of the CWA. Section 308 of the CWA limits the Administrator's information-gathering power to instances "when[] [the Administrator is] required to carry out the objective of this chapter." The chapter's objective is not to regulate CAFOs that have not added pollutants to navigable waters of the United States. The court supported this principle in *Waterkeeper Alliance* when it held that the 2003 CAFO rule which "impose[d] obligations on all CAFOs regardless of whether or not they have, in fact, added any pollutants to the navigable waters" violated the statutory scheme of the CWA. 399 F.3d at 505. Thus, this proposed rulemaking, which imposes the obligation to submit information on all CAFOs, may violate the statutory scheme of the CWA.

In *National Pork Producers Council v. U.S. EPA*, 635 F.3d 738 (5th Cir. 2011), the Fifth Circuit held that the EPA exceeded its statutory authority by requiring all CAFOs to obtain wastewater discharge permits even when a facility is not actually discharging and imposing penalties for merely failing to apply for a permit. The opinion vacated those portions of the 2008 CAFO Rule requiring CAFOs that propose to discharge to apply for an NPDES permit. The March 2011 *National Pork Producers* decision is consistent with the earlier *Waterkeeper Alliance* ruling limiting the ability of the EPA to regulate CAFOs only where a facility has *actual discharges*.

On July 30, 2012, the EPA published a final rule, effective immediately, that removes the specific "propose to discharge" requirement in the 2008 CAFO regulations at 40 C.F.R. § 122.23(d). *See* National Pollutant Discharge Elimination System Permit Regulation for Concentrated Animal Feeding Operations: Removal of Vacated Elements in Response to 2011 Court Decision, 77 Fed. Reg. 44,494 (July 30, 2012). The final rule also deletes the timing requirements in the 2008 rule related to when CAFO owners and operators must seek coverage under an NPDES permit. The new provisions extended the time by which facilities newly required to obtain NPDES permits must apply for a permit, clarifying that all CAFOs must have a permit at the time that they discharge.

The final rule also removes the option in 40 C.F.R. §§ 122.23(i) and (j) for owners and operators to voluntarily certify that a CAFO does not discharge or propose to discharge. The option provides that properly certified CAFOs would "not be in violation of the requirement that CAFOs that propose to discharge seek permit coverage." Removing the requirement that CAFOs apply for permits if they "propose to discharge" renders the option to certify unnecessary.

At least one court has rejected the impact of the *Pork Producers* ruling. In *Rose Acre Farms Inc. v. North Carolina Department of Environmental and Natural Resources*, a Superior Court judge rejected a series of industry arguments in a motion for summary judgment that a NPDES permit was not needed for emissions of feathers and dust from a poultry farm that may pollute federal waters. No. 12-CVS-10, 2013 WL 459353 (N.C. Sup. Ct. Jan. 4, 2013). Rose Acres did not appeal this decision. The judge has ordered Rose Acre Farms – North Carolina's largest egg farm – to present evidence that feathers and dust from ventilation fans, which can include ammonia and other pollutants, are not discharges subject to regulation, and thus the facility is not required to obtain a NPDES permit. At least as of July 2015 the state administrative process continued.

In this case, Rose Acre was appealing a decision by the North Carolina Environmental Management Commission ("EMC"), which remanded an earlier ruling by an administrative law judge ("ALJ") in the CAFO's favor. The ALJ had initially found that Rose Acre did not discharge and therefore did not need a NPDES permit. But DENR appealed that to the EMC, which ordered the ALJ to reconsider his original decision and hold an evidentiary hearing.

The farm originally only challenged the best management practices for controlling feathers and dust included in its renewed permit, but the ALJ, basing its decision on the Fifth Circuit's *Pork Producers* opinion, ruled that the facility did not need a NPDES permit at all. Since Rose Acres was not discharging, the ALJ held, it did not need a permit.

Industry groups reiterated this argument and also argued that the releases were exempted from permit requirements due to the CWA's agricultural stormwater exemption, which waives permit requirements for manure applications. In addition, they cited a law that sought to clarify that an "emission" cannot be a "discharge." Nevertheless, the court rejected the impact of the *Pork Producers* ruling, saying that in this case, Rose Acre had discharged and therefore could be subject to permit requirements: "An examination of the entire record reveals a forecast of evidence of discharge by the respondent."

Moreover, the court rejected industry's argument that the new state law that sought to exclude emissions limits from NPDES permits backed their claims: "The 2012 amendments to [the law] do not require summary judgment be granted for petitioner, as there exists a question of fact as to whether [Rose Acre] discharges 'air contaminants' or something else from its ventilation fans."

In March 2014 Rose Acres filed a declaratory Judgment Action in federal court alleging that the emissions from its ventilation fans were exempt from regulation under the Clean Water Act. *Rose Acre Farms v. N.C. DEP,* No. 5:14-CV-00147-D (E.D. N. Car. March 12, 2014). After much motion practice and the participation of intervenors and Amici the Court dismissed the federal action for want of jurisdiction. *Rose Acres Farms v. N.C. DEP*, No. 5:14-CV-147-D (E.D. N. Car. July 30, 2015).

More recently, similar allegations that stormwater from poultry operations that may contain emissions are not exempt but require CWA permits as a discharge were rejected by a federal court. See *Lois Alt v. EPA,* No. 2:12-CV-42 (N.D. W. Vir. Oct. 23, 2013). Ms. Alt filed suit when EPA issued a Compliance Order concluding that her operation was a CAFO and that the CAFO had " discharged pollutants from man-made ditches via sheet flow to Mudlick Run during rain events generating runoff without having obtained an NPDES permit." *Slip Op. at 5.* The court focused on the 1987 amendment to Section 1362(14) of the CWA which added an exemption to the statutory definition of "point source;" "This term [point source] does not include agricultural stormwater discharges and return flows from irrigated agriculture." After substantial analysis the court concluded "that the litter and manure which is washed from the Alt farmyard to navigable waters by a precipitation event is an agricultural stormwater discharge and therefore not a point source discharge, thereby rendering it exempt from the NPDES permit requirement of the Clean Water Act." *Slip Op. at 25.*

While any precedent is likely to be limited, the outcome of these cases are nevertheless significant because they could provide an indication of how federal courts might rule on whether regulators can subject air emissions to NPDES permits in other pending cases involving CAFOs, as well as possible future cases addressing power plants and other industrial emitters.

10. The Irrigation and Maintenance Ditch Exemptions Guidance

Under § 404(f)(1)(C) of the CWA, discharges of dredged or fill material associated with construction or maintenance of irrigation ditches, or the maintenance (but not construction) of drainage ditches, are not subject to § 404 permit requirements. S*ee, e.g., Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180 (2d Cir. 2010) (holding county's maintenance dredging of mosquito ditches did not violate CWA because of the 404(f)(1)(C) exemption). On June 4, 2007,

the EPA and the Corps issued joint guidance to set forth the national approach for conducting exemption determinations for the construction and maintenance of irrigation ditches and the maintenance of drainage ditches consistent with § 404(f) of the CWA. The guidance clarifies when § 404(f) exempts from permitting requirements discharges of dredged or fill material into waters of the U.S. associated with the construction and maintenance of irrigation ditches and maintenance of drainage ditches. The guidance indicates that three issues should be analyzed in making the exemption determination.

First, is there a discharge of dredged or fill material into a water of the U.S.? To make that determination, the statute, regulations, and guidance provided by the Corps and the EPA regarding what areas constitute "waters of the United States" subject to CWA jurisdiction must be consulted and followed. Discharges of dredged or fill material into waters that fall outside the CWA geographic jurisdiction are not subject to either CWA permitting requirements or the § 404(f) exemptions. Second, if it has been determined that there has been a discharge of dredged or fill material into regulated waters, then identify the type of ditch and activity to determine whether the activity is eligible for the exemptions under § 404(f)(1)(C). The exemption applies to the construction and maintenance of irrigation ditches, but only to the maintenance of drainage ditches.

Third, does the recapture provision in § 404(f)(2) apply? The recapture provision details that even an exempt activity will require a permit if it brings an area into a use to which it was not previously subject; or if flow, circulation, or reach of the water is affected. It is a two-part test. First, is the discharge part of an activity whose purpose is to convert an area of the waters of the U.S. into a use to which it was not previously subject? Second, will the activity also impair the flow or circulation of waters of the U.S. or reduce the reach of such waters? If the answers to both parts are "yes," then a permit is required for the activity. If one part of the test is not satisfied and that activity otherwise qualifies for an exemption under § 404(f)(1), it is not recaptured under § 404(f)(2).

11. Coal and Lignite Mining in Texas

On October 24, 2013, the Corps issued the "Notice of Intent to Prepare a Regional Environmental Impact Statement for Surface Coal and Lignite Mining in the State of Texas." 78 Fed. Reg. 63463. Surface coal and lignite mining projects in Texas typically require Section 404 authorization and often require authorization under Section 10 of the Rivers and Harbors Act. The Corps anticipates expansion of coal and lignite mining in Texas, and historically, such expansions have resulted in lengthy review times. Accordingly, the Corps is undertaking this REIS "to streamline the NEPA aspect of the permitting process, as well as to develop information, data and analyses to be used in 404(b)(1) guidelines and public interest review analyses." *Id.* The REIS will focus on the potential direct, indirect and cumulative impacts on aquatic and other environmental resources that could be affected by future surface mining activities.

C. Delineating Regulated Wetlands

1. History of Corps' Geographic Jurisdiction

While the geographic scope of federal jurisdiction has seldom remained static for any significant time period, the past decade has had still greater variability in the application of the program, which has resulted in increasing confusion within the regulated community. A current understanding of the rules that define the geographic limits of jurisdiction is not easy to obtain.

The Corps has not always asserted jurisdiction over wetlands and isolated waters. When § 404 was enacted, the Corps considered its CWA jurisdiction to mirror its jurisdiction under the Rivers and Harbors Act. As a result of litigation, however, the Corps was forced to expand its jurisdiction to include all waters of the United States that may have an impact on interstate commerce. *See Natural Res. Def. Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975). In two rulemakings in 1975 and 1977, the Corps gradually implemented its jurisdiction over additional waters. The extension of the EPA's jurisdiction in § 404(g) to include waters "other than" traditional "navigable waters" was interpreted as an indication that Congress recognized and accepted a broad definition of "navigable waters" that included non-navigable, isolated, intrastate waters. Thus, "waters of the United States" regulated under the CWA's § 404 permit program included wetlands that were adjacent to other regulated waters of the United States and isolated wetlands whose use, degradation or destruction could affect interstate or foreign commerce. *See* 40 Fed. Reg. 31,320 (July 25, 1975); 42 Fed. Reg. 37,122 (July 19, 1977); *see also* 33 C.F.R. § 328.3(a) (1990) (definition of "waters of the United States").

On January 9, 2001, the United States Supreme Court ruled to restrict federal authority to regulate intrastate waters. *Solid Waste Agency of N. Cook County (SWANCC) v. U. S. Army Corps of Eng'rs*, 531 U.S. 159 (2001). The Supreme Court's ruling appears to represent one of the most significant retrenchments of federal jurisdiction under the CWA in years, calling into question federal authority to regulate certain intrastate waters not adjacent or connected to "navigable waters."

This decision provoked the following legislation:

2. The Clean Water Authority Restoration Act

The authority of the federal government under the CWA continues to interest members of Congress. Senator Feingold (D-Wis.) and Congressmen Dingle (D-Mich.) and Oberstar (D-Minn.) introduced legislation in 2002, 2003, 2005, and 2007 into the Senate and House, respectively, designed to "remedy" the Supreme Court's decision in *SWANCC* that removed federal protection for "isolated" wetlands across the United States.

The proposed legislation, titled the Clean Water Authority Restoration Act of 2007, sought to restore the protection that existed for all waters and wetlands prior to the *SWANCC* decision by adopting a statutory definition of "waters of the United States" based on a longstanding definition of waters in the Corps' regulations (at 33 C.F.R. § 328.3). The bill struck "navigable waters of the United States" and "navigable waters" from the Act and inserted "waters of the United States" to clarify that Congress' primary concern in 1972 was to protect the nation's waters from pollution, rather than just sustain the navigability of waterways. More

specifically, the legislation replaces the existing term "navigable waters" with "waters of the United States", which means "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." The legislation also included a set of findings that explained the factual basis for the Congressional assertion of constitutional authority over waters and wetlands, including those that are called "isolated."

Congress failed to pass the Clean Water Authority Restoration Act of 2007, but Senator Feingold continued to push for its passage by reintroducing the legislation in 2009 and 2010. It failed both times. Senator Feingold suffered defeat in the 2010 mid-term congressional elections, and other congressional members did not reintroduce the Clean Water Restoration Act in the 112th Congress.

It should also be recognized that Congress does hold the power to directly shape the scope of the Corps' regulatory program. *See Norton Constr. Co. v. U.S. Army Corps of Eng'rs*, 280 F. App'x 490 (6th Cir. 2008) (Section of Energy and Water Development Appropriations Act that prohibited Corps from granting new landfill applications in specific watershed demonstrates Congress' authority)

3. Oil Pollution Act of 1990 and EPA's 1973 "Waters" Definition

The EPA reverted to the 1973 definition of "waters" for the purposes of regulating under Oil Pollution Act of 1990 (OPA). The 1973 definition includes waters that are "currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce" but also includes a list of entirely intrastate water types such as sloughs and playa lakes, if they "could affect interstate or foreign commerce." The 1973 Spill Prevention, Countermeasure and Control (SPCC) rule was originally promulgated on December 11, 1973. *See* Oil Pollution Prevention, 38 Fed. Reg. 34,164 (Dec. 11, 1973) (codified at 40 C.F.R. pt. 112).

On July 17, 2002, the EPA promulgated a final rule which included revisions to the definition of "navigable waters" in the SPCC regulation. The American Petroleum Institute, the Petroleum Marketers Association of America, and Marathon Oil Company challenged certain aspects of this regulation. On March 31, 2008, the United States District Court for the District of Columbia in *American Petroleum Institute v. Johnson*, 571 F. Supp. 2d 165 (D.D.C. 2008), ruled that the EPA's promulgation of the revised definition of "navigable waters" violated the APA. The court concluded that the EPA failed to provide a reasoned explanation for its decision to broaden the definition of "navigable waters."

The court restored the regulatory definition of "navigable waters" promulgated by the EPA in 1973. On November 26, 2008 the EPA promulgated a final rule amending the definition of "navigable waters" in part 112 of CWA. *See* Order Approving Proposed Rule Changes Relating to Regulatory Definition of "Navigable Waters", Fed. Reg. 71,941 (Nov. 26, 2008) (codified at 40 C.F.R. pt. 112).

4. Definition of Wetlands

Wetlands are defined as:

> "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and that under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. 328.3(b).

5. Bottomland Hardwood Forests

In the early 1980s, federal agencies and the courts first acknowledged that the definition of wetlands encompasses areas such as bottomland hardwood forests that have a dominance of wetland-tolerant plant species. *See Avoyelles Sportsmen's League, Inc. v. Alexander*, 511 F. Supp. 278 (W.D. La. 1981), *aff'd in part*, *Avoyelles v. Marsh*, 715 F.2d 897 (5th Cir. 1983). Wetlands protected by § 404 are not limited to traditional swamps and marshes, characterized by cattails and marsh grasses. Rather, they include areas with plant species many people do not immediately associate with "wetlands." As a result, many landowners have been surprised to learn that their property contains protected wetlands.

6. Artificial Wetlands

Regulated wetlands are not limited to those created naturally. Artificial wetlands, constructed by damming or inundating upland areas, perform many of the same ecological functions as natural wetlands and in most cases have been afforded the same protection by the federal courts. The Supreme Court denied certiorari in a California case in which the court held that abandoned artificial salt-crystallizer pits that had been used for commercial salt production were protected wetlands. *See Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991). The Corps has acknowledged that there are some categories of artificial water bodies, such as stock ponds and active gravel pits that it will not generally consider to be regulated waters. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986) (codified at 40 C.F.R. pt. 328).

7. Isolated Wetlands

As mentioned previously, regulated wetlands include not only wetlands that border or are adjacent to a stream, lake, or other water, but may also include isolated wetlands that affect interstate commerce. Traditionally, the Corps has considered on a case-by-case basis whether a wetland has the requisite interstate nexus and is, thus, regulated under § 404. Wetlands and waters used for irrigation, fishing, interstate recreation or industry have been held to have an impact on interstate commerce. *See Utah v. Marsh*, 740 F.2d 799, 803–04 (10th Cir. 1984). However, the *SWANCC* decision, while only invalidating one of the several bases for the federal government's assertion of jurisdiction over intrastate waters, seems likely to foreclose federal regulation of small, ephemeral, isolated wetlands.

At issue before the court in the *SWANCC* case was whether the Migratory Bird Rule allowed the Corps to assert jurisdiction over "wholly" intrastate waters which are not adjacent or connected to "waters of the United States." In deciding whether isolated wetlands were subject to § 404's requirements, the Corps and the EPA had frequently relied on the use of isolated wetlands by migratory birds, a category of wildlife that Congress has the authority to protect under its constitutional Commerce Clause powers. In 1985, the Corps adopted an EPA policy statement on isolated wetlands and informed its field offices that § 404 jurisdiction extended to waters that were or could be used by migratory birds. Because almost any spot of water "could be" used by birds that cross state lines, virtually all isolated wetlands were regulated under this standard, no matter how small or remote. Ultimately, the Supreme Court in *SWANCC* invalidated the Corps' use of the Migratory Bird Rule to extend federal jurisdiction under the CWA. The Court maintained that the Migratory Bird Rule was not fairly supported by the CWA and could not serve as the interstate commerce nexus between interstate waters and waters of the United States.

The delineation of regulated wetlands, particularly isolated wetlands, has been an active area of litigation for some time. In *Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 999 F.2d 256 (7th Cir. 1993), the Seventh Circuit upheld EPA and Corps jurisdiction over isolated waters, holding that EPA's construction of its regulations, codified at 40 C.F.R. § 230.3(s)(3) (1995) (definition of "waters of the United States," which encompasses wetlands whose use, degradation or destruction "could" affect interstate commerce), is entitled to deference. Potential use by migratory birds constituted sufficient interstate commerce effect to justify regulation. However, in this case the EPA had not demonstrated sufficient evidence that the wetland area in question was suitable for migratory bird habitat. Where there was no evidence that the wetland was visited by migratory birds or contained any characteristic rendering it more attractive than other periodically wet land, the court refused to find federal jurisdiction. "After April showers not every temporary wet spot necessarily becomes subject to government control." *See also Rueth v. U.S. EPA*, 13 F.3d 227, 231 (7th Cir. 1993) ("Nearly all wetlands fall within the jurisdiction of the CWA since one test for whether the wetland affects interstate commerce is whether migratory birds use the wetland. On the other hand, it is not inconceivable that the EPA or the Corps might completely overextend their authority."). An odd twist underscores the perils for a landowner in these situations. Rueth ultimately signed a Consent Decree requiring penalties and restoration of wetlands. When, after *SWANCC*, Rueth attempted to avoid the provisions of the decree on the grounds that the wetlands involved were not adjacent, he failed. The Seventh Circuit held that Rueth's signing the Consent Decree waived the right to litigate the adjacency issue. *See United States vs. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003).

A three-judge panel of the same court that decided *Hoffman Homes* revisited the issue of jurisdiction over isolated waters in *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994). This case involved a six-acre artificial stormwater retention pond. The court appeared to apply a more stringent test because the pond was artificial, rather than natural. In *Village of Oconomowoc Lake*, the court focused on the pond's groundwater connection to other natural waters. The Seventh Circuit held that the possibility of a hydrologic connection between an artificial pond and natural streams and lakes was not sufficient grounds to conclude that the pond was subject to the CWA. Thus, the extent of federal jurisdiction over isolated

waters remained an unsettled area of the law. *See, e.g., United States v. Suarez*, 846 F. Supp. 892, 893 (D. Guam 1994).

The Supreme Court's ruling regarding the Migratory Bird Rule was not altogether surprising given the history of litigation regarding isolated wetlands delineation. Prior to *SWANCC*, a petition for certiorari in the *Leslie Salt* litigation, discussed *supra*, sought to challenge the Corps' reliance on the use of wetlands by migratory birds as a basis for interstate commerce-based jurisdiction. *See Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 407 (1995). Although most prior attempts to challenge federal jurisdiction over isolated wetlands had been unsuccessful, the Supreme Court ruling overturning Congressional handgun bans on interstate commerce grounds suggested that the high Court would be receptive to a similar challenge to the Corps' Commerce Clause jurisdiction. *See United States v. Lopez*, 514 U.S. 549 (1995). The Supreme Court declined to review the constitutional challenge to the Corps' jurisdiction over isolated wetlands, although Justice Thomas issued a stern dissent, citing *Lopez* and warning that in that Justice's opinion, although Congress has the power to preserve migratory birds and their habitat, that power "does not give the Corps *carte blanche* authority to regulate every property that migratory birds use or could use as habitat." *Cargill, Inc. v. United States*, 516 U.S. 955 (1995).

Similarly, prior to the *SWANCC* decision, the Fourth Circuit reversed a felony wetlands conviction at least partially on the grounds that the instructions to the jury specified that a wetland was subject to regulation if its degradation "could affect" interstate commerce. *United States v. Wilson*, 133 F.3d 251, 255 (4th Cir. 1997). The court considered that the Corps' definition of "waters of the United States" by reaching to those that "could affect" interstate commerce went beyond the authority granted by the CWA. The court noted that the regulation does not require a substantial effect on interstate commerce, nor any sort of nexus with the navigable—or even interstate—waters. In the view of the *Wilson* court, were the Corps' regulation a statute, "it would present serious constitutional difficulties, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause." *Id*. at 257.

Despite the importance of the Supreme Court's decision in *SWANCC*, it is unclear at this point just how significantly the decision will change federal regulatory requirements pertaining to wholly intrastate waters. The Corps will likely try to retain its jurisdiction over these waters through a jurisdictional hook other than the presence of migratory birds. Only very limited guidance has been provided on how the Corps intends to interpret *SWANCC*. *See* Memorandum from Gary S. Guzy, EPA General Counsel, and Robert M. Anderson, Chief Counsel of the Corps, regarding Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters, January 2001, *available at* http://www.spn.usace.army.mil/regulatory/misc/swancc.pdf. It is also possible that in light of the Supreme Court's decision, states may seek to bolster their own regulation of intrastate waters.

On January 15, 2003, the EPA and the Corps published an Advance Notice of Proposed Rulemaking (ANPRM) on the CWA Regulatory Definition of "Waters of the United States." *See* 68 Fed. Reg. 1,991 (proposed Jan. 15, 2033) (codified at 40 C.F.R. pt. 112). Attached to that notice was some additional guidance in the form of a "Joint Memorandum" from the General Counsels of the EPA and the Corps. One element of guidance to the Districts has had only

spotty acceptance by Corps Districts. The joint memorandum states that "field staff should seek formal project-specific HQ approval prior to asserting jurisdiction over waters based on other factors listed in 33 CFR § 328.3(a)(3)(i)-(iii)," which is the regulation dealing with areas jurisdictional as a result of links to interstate commerce.

Although, or perhaps because, the Advance Notice generated thousands of comments, no rules to clarify the situation have been proposed. The Advance Notice seeks a wide array of information and asks for comments on two specific questions from the public.

1) Whether, and, if so, under what circumstances the factors listed in 33 C.F.R. § 328.3(a)(3)(i)-(ii) (*i.e.*, use of water by interstate or foreign travelers for recreation or other purpose, the presence of fish or shellfish that could be taken and sold in interstate commerce, the use of the water for industrial purposes by industries in interstate commerce) or any other factors provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters?

2) Whether the regulations should define "isolated waters," and, if so, what factors should be considered in determining whether a water body is or is not isolated for jurisdictional purpose?

The Bush Administration announced in mid-December 2003 that it did not intend to propose new regulations to clarify the issue of jurisdiction. Thus, the regulated community must gain what it can from an increasingly bewildering array of case law.

Not surprisingly, the ANPRM and the joint memorandum appended to it were not final agency action reopening the 1986 rule invalidated by SWANCC. *See P&V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021 (D.C. Cir. 2008).

Post *SWANCC*, case law is developing at both the trial and appellate court levels. The following is a listing of the circuit court cases.

CIRCUIT COURT DECISIONS

- **Headwaters, Inc. v. Talent Irrigation District**, 243 F.3d 526 (9th Cir. 2001)
- **Community Association for Restoration of the Environment v. Henry Bosma Dairy**, 305 F.3d 943 (9th Cir. 2002)
- **Rice v. Harken Exploration Co.**, 250 F.3d 264 (5th Cir. 2001), reh'g (en banc) denied, 263 F.3d 167 (2001)
- **United States v. Interstate General Co.**, 39 F. App'x 870 (4th Cir. 2002)
- **United States v. Krilich**, 303 F.3d 784 (7th Cir. 2002), *cert. denied*, 538 U.S. 977 (2003)
- **United States vs. Deaton**, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004)

- **United States v. Rueth Development Co.**, 335 F.3d 598 (7th Cir. 2003)
- **Treacy v. Newdunn Associates**, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 538 U.S. 977 (2004)
- **United States vs. Needham**, 354 F.3d 340 (5th Cir. 2003)
- **United States v. Rapanos**, 376 F.3d 629 (6th Cir. 2004)
- **Carabell v. United States Army Corps of Engineers**, 391 F.3d 704 (6th Cir. 2004)
- **Baccarat Freemont Developers, LLC v. United States Army Corps of Engineers**, 425 F.3d 1150 (9th Cir. 2005)
- **Bricks, Inc. v. EPA**, 426 F.3d 918 (7th Cir. 2005)
- **United States v. Johnson**, 437 F.3d 157 (1st Cir. 2006)
- **United States v. Hubenka**, 438 F.3d 1026 (10th Cir. 2006)
- **Northern California River Watch v. City of Healdsburg**, 457 F.3d 1023 (9th Cir. 2006)
- **San Francisco Baykeeper v. Cargill Salt Division**, 481 F.3d 700 (9th Cir. 2007)
- **P & V Enterprises v. United States Army Corps of Engineers**, 516 F.3d 1021 (D.C. Cir. 2008)
- **United States v. Lucas**, 516 F.3d 316 (5th Cir. 2008)

The range of positions in these cases is substantial. Moreover, in some, the procedural posture of the case predetermined the end result. At the present time, geographic jurisdiction under the CWA is not uniform.

The leading Fifth Circuit case on the scope of jurisdiction is *Rice v. Harkin Exploration*, 250 F.3d 264, 267 (2001), *reh'g en banc denied*, 263 F.3d 167 (2001). The *Rice* court, interpreting the OPA, held that the OPA's and CWA's legislative history and identical statutory language "strongly" indicated that Congress intended the term "navigable waters" to have the same meaning. The plaintiffs alleged discharges of oil and other pollutants into Big Creek, a tributary of the Canadian River. The Court wrote as follows:

> "There is arguably some evidence in the record that some naturally occurring surface waters on Big Creek Ranch have actually been contaminated with oil. . . . But, the presence of oil does not grant jurisdiction under the Act. Instead, a body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water." *Id.* at 270.

The second Fifth Circuit opinion on jurisdiction is *Needham vs. United States.*, 354 F.3d 340 (2003). While the court reversed and remanded the opinion of the district court, the opinion follows a narrow view of federal jurisdiction first expressed in *Rice*. The United States' position in *Needham* was that the regulatory definition of "navigable waters" includes all "tributaries" of navigable-in-fact waters, and that this definition covers all waters, excluding groundwater, that have any hydrological connection with "navigable water." The Fifth Circuit found this position "unsustainable under *SWANCC*." While noting that at least two courts have agreed with the government position, the court wrote:

> The CWA and the OPA are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters. Consequently, in this circuit the United States may not simply impose regulation over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water." *Id.* at 345–46 (alteration in original) (citations omitted).

The factual discussion of the case affirmed in *Needham* is found at *In Re: Needham*, 279 B.R. 515 (W.D. La. 2001). *See also FD&P Enters. v. United States*, 239 F. Supp. 2d 509 (D.N.J. 2003).

The Fifth Circuit addressed the question of CWA jurisdiction in *City of Shoreacres v. Waterworth*, 420 F.3d 440 (5th Cir. 2005). Faced with the contention that the Corps had asserted jurisdiction over too little area, the court wrote that the Corps has "broad discretion" in defining the "hydrological nexus." The court sidestepped the issue, applying "judicial restraint," since it noted that "the Corps clearly would have made the same decision even if it used the wetlands determination that appellants advocate."

In contrast *United States v. Deaton* held that a roadside ditch was a tributary to a navigable water thus subject to regulation under § 404. The early trend in the case law is supportive of the position that the Corps is entitled to substantial deference in defining a hydrologic connection to navigable water for purposes of defining jurisdiction. *See, e.g., United States v. Thorson*, No. 03-C-0074-C, 2004 WL 737522, 58 ERC 1700 (W.D. Wis. Apr. 6, 2004). *Thorson* contains an excellent summary of the then current expansive view of CWA jurisdiction.

8. Rapanos and Carabell

a. The Opinions

On June 19, 2006, in a divided opinion, the Supreme Court issued its long-awaited decision in the consolidated *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers* wetlands cases. *See Rapanos v. United States*, No. 04-1034; *Carabell v. U.S. Army Corps of Eng'rs*, No. 04-1384, 547 U.S. 715 (2006). At issue in the cases was the reach of the CWA, specifically the scope of "waters of the United States" under § 404 of the CWA. Section 404 requires that a permit be obtained for the discharge of dredged or fill material into

"navigable waters." 33 U.S.C. § 1344. "Navigable waters" is defined under the CWA as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). "Waters of the United States" has been defined by regulation and case law to include wetlands.

Petitioner John Rapanos filled fifty-four acres of wetlands on property in Michigan without obtaining a § 404 permit. The wetlands at issue were eleven to twenty miles away from the nearest navigable water. Rapanos was not only found civilly liable for violations of the Act but also was convicted of criminal charges and sentenced to sixty-three months in prison. The Carabells, on the other hand, applied for a permit under § 404 to fill wetlands on property in Michigan. This permit was denied, and they brought suit against the Corps, which administers the § 404 program.

The case divided the Supreme Court. Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, wrote a plurality opinion. Justice Roberts also wrote a short concurring opinion admonishing the Corps for not pursuing proposed rulemaking on the definition of "waters of the United States." Justice Kennedy wrote a lengthy concurring opinion, joining in the plurality's decision to remand the cases for additional fact finding but not in its opinion. Thus, apart from the decision to vacate and remand, there was no majority opinion in the case. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, authored a dissenting opinion. Finally, Justice Breyer also wrote a separate dissent. The resulting fractured opinion led Chief Justice Roberts to comment, "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis."

In a sometimes strongly worded opinion, the plurality sought to limit the reach of the CWA and the Corps' jurisdiction. The plurality recognizes that the term "navigable waters" is broader than the traditional understanding of that term but that the qualifier "navigable" is not without significance. The plurality finds that the phrase "the waters of the United States" cannot bear the expansive meaning that the Corps would give it. The plurality bases this decision on the fact that the CWA does not refer to "water" of the United States. Rather, "[t]he use of the definite article ("the") and the plural number ("waters") show plainly that § 1362(7) does not refer to water in general."

Relying on the definition of "waters" in the Webster's dictionary, the plurality holds that the phrase "the waters of the United States" includes "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." This term excludes "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." The plurality stated that in asserting jurisdiction over ephemeral streams, wet meadows, storm sewers, culverts, overland sheetflow, man-made ditches, and dry arroyos, the Corps had "stretched the term 'waters of the United States' beyond parody." *Id.*

The plurality believes that its definition of "waters of the United States" not only makes common sense but is consistent with the Court's prior decisions, the terms and structure of the CWA, and the purpose of the CWA. According to the plurality, only its definition is consistent with the stated purpose of the CWA to preserve and protect the rights of the States to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources.

By the plurality's account, the Corps' reading of the term would bring virtually all planning of land and water resource use and development under federal control.

The plurality then turns to the question of whether a wetland may be considered "adjacent to" remote "waters of the United States" and thus itself a "water of the United States," because of a mere hydrologic connection to such waters. The plurality holds that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." Wetlands with "only an intermittent, physically remote hydrologic connection to 'waters of the United States' lack the necessary connection."

Thus, the plurality states that establishing that wetlands such as those present at the Rapanos and Carabell sites are jurisdictional requires two findings: (1) that the adjacent channel contains a "water of the United States," as defined above (*i.e.*, "a relatively permanent body of water connected to traditional interstate navigable waters"); and (2) that the wetland has a "continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

The plurality notes that its restrictions on the scope of "navigable waters" under the Act will not frustrate enforcement against "traditional water polluters" under §§ 301 and 402 of the CWA. These sections prohibit the "discharge of a pollutant" without a permit under § 402. "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters" from any point source. 33 U.S.C. § 1362(12). The plurality cites cases in which courts have held that upstream, intermittently flowing channels themselves constitute "point sources" and that there can be a violation of the Act when pollutants wash downstream through conveyances into covered waters, even if the pollutants were not discharged directly into covered waters. Under these cases, the courts have seen no need to classify the intervening conveyances as "waters of the United States." The plurality emphasized that to prove a violation, the federal agencies must "prove that the contaminant-laden waters ultimately reach covered waters."

In response to arguments that its definition of "waters of the United States" will hamper federal efforts to preserve the Nation's wetlands, the plurality notes that it was not clear that state and local conservation efforts are insufficient to preserve wetlands. Moreover, the plurality states that a "Comprehensive National Wetlands Protection Act" was not before it, and the wisdom of such a statute was "beyond [the Justice's] ken."

The plurality therefore concludes that the Sixth Circuit applied the wrong standard in determining whether the wetlands at issue were covered "waters of the United States." Because of the paucity of the record in both cases, the plurality remanded the cases for a determination under the two-part test set forth above, namely whether the ditches or drains near each wetland are "waters" in the sense of containing a relatively permanent flow, and if they are, whether the wetlands are "adjacent" to these waters because they possess a continuous surface connection.

Justice Kennedy concurs only in the plurality's judgment to remand the cases for additional fact finding. In nearly every other respect, however, he disagrees with the plurality's opinion. Kennedy disagrees with the plurality's opinion that "waters" can only refer to relatively permanent, standing, or flowing bodies of water. In his opinion, intermittent flow can constitute

a stream while it is flowing, and it is reasonable for the Corps to interpret the Act to cover the paths of such "impermanent streams." Kennedy also disagrees with the plurality's requirement that to be jurisdictional, wetlands must have a continuous surface connection to other jurisdictional waters. In sum, he finds the plurality's opinion to be inconsistent with the Act's text, structure, and purpose, and to be "unduly dismissive of the interests asserted by the United States in these cases." Kennedy also, however, disagrees with the dissenting opinion of Justice Stevens to the extent that it reads the requirement of "navigability" out of the term "navigable waters."

In Kennedy's opinion, the Corps' jurisdiction over wetlands depends on a "significant nexus" between the wetlands and traditionally navigable waters. Wetlands possess this nexus 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.'" Kennedy opines that the Corps could assert jurisdiction over wetlands adjacent not just to navigable-in-fact waters but to tributaries of these waters. Kennedy states that the Corps may choose to identify categories of tributaries that are significant enough that wetlands adjacent to them are likely to perform important functions for an aquatic system incorporating navigable waters. He dismisses the Corps' current standard for identifying tributaries, however, through which the Corps deems a water a tributary if it feeds into a traditional navigable water or a tributary thereof and possesses an ordinary high-water mark. This standard, to Kennedy, is too broad because it would regulate drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it.

Kennedy finds that, in seeking to regulate wetlands adjacent to navigable-in-fact waters, the Corps may rely on adjacency to establish jurisdiction. In seeking to regulate wetlands based on adjacency to non-navigable tributaries, however, the Corps must establish a significant nexus on a case-by-case basis. Once such a nexus is shown, however, Kennedy finds that it may be permissible to presume covered status for other comparable wetlands in the region.

Kennedy concludes by finding that the records in the *Rapanos* and *Carabell* cases suggest the possible existence of a significant nexus, as he has outlined it. He appears to reject, however, the notion that a "mere hydrologic connection" will establish the requisite nexus, absent some evidence of the significance of the connection for downstream water quality or the significance of a wetland to the aquatic ecosystem. He therefore determines that the cases should be remanded for a consideration of whether the specific wetlands at issue possess a significant nexus with navigable waters. Thus, the question he would have answered on remand is different from the questions posed by the plurality.

The dissent is authored by Justice Stevens and joined by Justices Souter, Ginsburg, and Breyer. It narrowly defines the questions presented by the cases. For *Rapanos*, the only question is whether wetlands adjacent to tributaries of traditionally navigable waters are "waters of the United States" subject to the jurisdiction of the Corps. For *Carabell*, the question is whether a manmade berm separating a wetland from the adjacent tributary makes a difference to the jurisdictional determination. The dissent spends considerable time on the facts of the cases, focusing particularly on the history of the *Rapanos* case.

The dissent first argues that "[o]ur unanimous opinion in *Riverside Bayview* squarely controls these cases." Stevens reads *Riverside Bayview* as holding that the Corps' decision to assert jurisdiction over wetlands adjacent to, but not regularly flooded by, rivers, streams, and other hydrographic features more conventionally identifiable as "waters" is permissible. Thus, *Riverside Bayview* is dispositive of *Rapanos* and *Carabell* because, Stevens writes, "the cases before us today concern wetlands that are adjacent to "navigable bodies of water [or] their tributaries. Specifically, these wetlands abut tributaries of traditionally navigable waters." (citations omitted). Just as the dissent's statement of the issues presented ignores the question of whether the ditches in these cases are tributaries, this argument, that *Riverside Bayview* controls, assumes that the ditches at issue in *Rapanos* and *Carabell* qualify as tributaries and navigable waters.

Stevens clearly believes the Corps is entitled to substantial deference in interpreting the geographic scope of jurisdiction. He explains that deference is proper because "there is ambiguity in the phrase 'waters of the United States' and because interpreting it broadly to cover such ditches and streams advances the purpose of the Act." He dismisses the plurality's focus on the reservation of power to the States by stating that the States are given sufficient authority even with broad federal jurisdiction. Stevens' primary disagreement with Justice Kennedy is the application of the "significant nexus" test as an additional requirement for the Corps, substantially because it is unnecessary.

The end of the dissent highlights the odd nature of the split among the Court. Justice Stevens writes:

> It has been our practice in a case coming to us from a lower federal court to enter a judgment commanding that court to conduct any further proceedings pursuant to a specific mandate. That prior practice has, on occasion, made it necessary for Justices to join a judgment that did not conform to their own views. In these cases, however, while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if either of those tests is met.

In other words, the dissent urges the lower courts to uphold the Corps' jurisdiction and judgments if any of the tests outlined by the plurality or Justice Kennedy are met. Of course, the bottom line is what does this mean to the regulated community? The tributary system that is subject to CWA jurisdiction clearly extends somewhat upstream of permanently inundated water courses, and wetlands adjacent to all those jurisdictional tributaries are also jurisdictional. Something less than a "continuous surface connection" between a wetland and "waters" may satisfy the Court's definition of "adjacent," but other than a "significant nexus," this decision gives little practical guidance. This opinion will lead to additional litigation. Certain tests used by some Corps districts to establish jurisdiction likely will get close attention. For example, the

plurality opinion carries some pointed digs at the 100-year flood plain rule: "*Riverside Bayview* likewise provides no support for the dissent's complacent acceptance of the Corps' definition of 'adjacent,' which (as noted above) has been extended beyond reason to include, *inter alia*, the 100 year flood plain of covered waters."

b. Senate Hearings and Later Cases

On August 1, 2006, the Senate Subcommittee on Fisheries, Wildlife, and Water of the Committee on Environment and Public Works held a hearing titled "The Waters of the United States—Interpreting the *Rapanos/Carabell* Decision." *See Interpreting the Rapanos/Carabell Supreme Court Decision: Hearing Before the Subcomm. on Fisheries, Wildlife, and Water of the S. Comm. on Environment and Public Works*, 109th Cong. (2006), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109shrg47637/html/CHRG-109shrg47637.htm. At the hearing, Benjamin Grumbles, EPA Assistant Administrator for Water, and John Woodley, Assistant Secretary of the Army for Civil Works, presented joint written testimony on *Rapanos* and their efforts to develop agency guidance to interpret the divided opinion. Their testimony was very general and stated that the "development of guidance should not be about bigger or smaller jurisdiction but about better results." They noted that the agencies were working quickly to develop guidance "regarding the tests defined by the Supreme Court . . . in order to provide clarity for the public and to ensure consistency among CWA jurisdictional determinations nationwide." They noted that the agencies had issued field guidance immediately after *Rapanos*, in which they advised field staff to temporarily delay making jurisdictional determinations on waters that were not traditionally navigable.

John Cruden, Deputy Assistant Attorney General for Environment and Natural Resources, offered more specific testimony. He noted that the Supreme Court had decided another case with a fractured opinion, *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), which provided new guidance on how to interpret such opinions. Mr. Cruden testified that the DOJ has advised courts that "it believes the applicable standard to determine if a wetland is governed by the CWA is whether either the *Rapanos* plurality or Justice Kennedy's test is met in a particular fact situation." This testimony implied that the guidance to be issued may call for jurisdiction to be asserted if either test is met.

Mr. Cruden further noted that the *Rapanos* decision had already had an effect on the DOJ's decision to bring and settle CWA enforcement cases and on courts' decisions in pending cases. Within days of the *Rapanos* decision, a district court in the Northern District of Texas granted summary judgment to defendant Chevron Pipe Line Company in a case alleging violations of the OPA by holding that spilled crude oil did not reach "waters of the United States." *See United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006). In this case, Chevron admitted that its pipeline released approximately 3,000 barrels of crude oil. The oil migrated into an unnamed channel/tributary and downgradient into the bed of Ennis Creek. Chevron performed a cleanup of the spill, but the government brought an action under OPA for penalties. The court found that both the unnamed channel and Ennis Creek were intermittent streams that flowed only during or shortly after a significant rainfall.

In determining whether the spill occurred in jurisdictional "waters of the United States," the court first looked to prior Fifth Circuit precedent in *In re Needham*, 354 F.3d 340 (5th Cir.

2003), wherein the Fifth Circuit narrowly construed the scope of jurisdiction under OPA. The court found that under *Needham*, the proper question was "whether . . . the site of the farthest traverse of the spill, is *navigable-in-fact* or adjacent to an open body of navigable water." *Chevron Pipe Line*, 437 F. Supp. 2d at 612 (citing *id.* at 346). The court also looked to the *Rapanos* decision. Although the court purportedly based its holding on the plurality test, it repeatedly discussed Justice Kennedy's "significant nexus" test and applied it to the facts of the case. The court found that, as a matter of law in the Fifth Circuit, "the connection of generally dry channels and creek beds will not suffice to create a 'significant nexus' to a navigable water simply because one feeds into the next during the rare times of actual flow." *Id.* at 613. The court found that neither the unnamed channel nor Ennis Creek at the location of the spill were navigable-in-fact. Nor did the government offer any evidence that the spill actually reached navigable-in-fact waters.

As a result, the court held, based on *Needham* and the *Rapanos* plurality opinion, that the discharge of oil did not reach navigable waters of the United States. The court added a footnote to its holding, however, which stated that the government also had failed to establish a "significant nexus" with competent summary judgment evidence. Thus, the court ultimately held that the site of the spill was not jurisdictional under either *Rapanos* test.

In *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008), the Fifth Circuit upheld the convictions of real estate developers who sold house lots with septic tanks installed on wetlands thereby filling wetlands without a § 404 permit from the Corps. The court upheld the district court's jury instructions that contained elements of both the Rapanos plurality opinion and Justice Kennedy's "significant nexus" standard.

Another significant case was *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007). Applying Kennedy's significant nexus text, the court found that a NPDES permit was required for sewage discharge into an excavated pit. The pit was very near the Russian River, and the two were hydrologically linked by a porous gravel aquifer. The pollutants from the sewage were found in the river.

The Ninth Circuit also upheld federal CWA jurisdiction in *Baccarat Fremont Developers v. United States Army Corps of Engineers*, 425 F.3d 1150 (9th Cir. 2005). This case was pre-*Rapanos*, and it expressly rejected the need for a significant nexus. Nevertheless, the petition for writ of certiorari was denied. *Baccarat Fremont Developers v. United States Army Corps of Engineers*, 549 U.S. 1206 (2007).

In *Environmental Protection Information Center v. Pacific Lumber Company*, 469 F.Supp.2d 803 (N.D. Cal. 2007), the court considered whether a logging operation violated the CWA by discharging stormwater without a § 402 permit. Following Ninth Circuit jurisprudence, the court applied the significant nexus test and held that the small, mainly intermittent and ephemeral streams were not jurisdictional. The court found a hydrological connection existed for the streams based on a map showing flow patterns. Because of the intermittent and ephemeral nature of the water courses, they must "have some sort of significance for the water quality" of the navigable water to which they connect.

The Ninth Circuit continues to apply Justice Kennedy's significant nexus test. In *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), the Ninth Circuit applied and described Justice Kennedy's significant nexus test as the controlling law in determining the reach of the CWA. The court found federal jurisdiction to exist in this criminal case, despite flow existing only two months a year. In a more recent decision, the Ninth Circuit revisited its stance. In *Northern California River Watch v. Wilcox*, 620 F.3d 1075 (9th Cir. 2010), *amended and superseded by* 633 F.3d 766 (2011), the Ninth Circuit again described the significant nexus test as the controlling law. In response to the decision, the United States filed an amicus brief requesting that the Ninth Circuit revise its decision and state that its designation of the significant nexus test as the controlling law did not preclude the use of the plurality's standard. In January 2011, the Ninth Circuit issued an amended opinion consistent with this position. *See N. Cal. River Watch v. Wilcox*, 633 F.3d 766 (9th Cir. 2011). The Ninth Circuit continues to apply Kennedy's significant nexus test, however. *See United States v. Vierstra*, No. 11-30225, 2012 WL 3269211 (9th Cir. Aug. 13, 2012) (affirming a criminal conviction for discharging pollutants into waters of the United States because the evidence supported a conclusion that a significant nexus existed between the canal at issue and a tributary of a traditionally navigable water).

The Seventh Circuit spoke to the issue in *United States v. Gerke*, 464 F.3d 723 (7th Cir. 2006). Like the Ninth Circuit, the court ruled that Justice Kennedy set the standard: significant nexus. The court considered the Kennedy test to be "narrower than the [*Rapanos*] plurality's in most cases." The case was remanded to the district court for additional fact finding on September 22, 2006.

Seventh Circuit courts continue to follow the *Gerke* court's determination that Justice Kennedy's significant nexus test is the controlling standard arising from the divided *Rapanos* opinion. In *United States v. Fabian*, 522 F. Supp. 2d 1078 (N.D. Ind. 2007), the court discussed the significant nexus test as the decisive analysis. But ultimately, the court ruled that the wetlands in question were adjacent to a traditionally navigable waterway (TNW). In *United States v. Lippold*, 2007 WL 3232483 (C.D. Ill. Oct. 31, 2007), the district court followed the Seventh Circuit's approach and observed that the streams in question could be waters of the United States provided that the government could establish a significant nexus between the streams and a navigable-in-fact water.

The Eleventh Circuit adopted the Seventh and Ninth Circuit's approach, concluding that the "significant nexus" test articulated by Justice Kennedy provided the governing rule in *Rapanos*. In *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), the court remanded the case for a new trial because the district court failed to incorporate a "significant nexus" component in the jury instructions. The district court in *United States v. Robison*, 521 F. Supp. 2d 1247 (N.D. Ala. 2007) asked on remand for the case to be reassigned, criticized the lack of guidance offered by *Rapanos*, and critiqued the Eleventh Circuit's decision to adopt Justice Kennedy's "significant nexus" test.

A contrary view is taken by the First Circuit in *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006). That court ruled that CWA jurisdiction is proper if either the "significant nexus" or the plurality test applies, thus adopting the opinion of Justice Stevens in *Rapanos*. This court also remanded for additional fact finding. The facts in *Johnson* involved federal jurisdiction over cranberry bogs that were arguably distinct from navigable waters.

This split between the Eleventh and First Circuits prompted DOJ to file a petition for writ of certiorari in *United States v. Robison*. In its petition, DOJ argued that since the *Rapanos* decision, the courts of appeals have struggled to identify the controlling rule of law; that the Eleventh Circuit's decision created an acknowledged circuit split with the First Circuit; and that the Eleventh Circuit misinterpreted *Rapanos* and Supreme Court precedent in *Marks v. United States*, 430 U.S. 188 (1977), governing the interpretation of fractured decisions. According to DOJ, the Eleventh Circuit's decision created "bizarre outcome[s]" that could seriously impede enforcement of the CWA. DOJ further urged that review was warranted not only to clarify the operation of the *Marks* rule, but also to establish that waters that satisfy the *Rapanos* plurality standard were "waters of the United States" under the CWA, as eight Justices in *Rapanos* agreed. Moreover, DOJ argued that the conflict created by the Eleventh Circuit created significant practical ramifications for the operation and administration of the CWA programs administered by EPA. On December 1, 2008, the Supreme Court denied certiorari without comment.

The Sixth Circuit case on point is *United States v. Morrison*, 178 F. App'x 481 (6th Cir. 2006) (unpublished). This case upheld federal court jurisdiction over Michigan wetlands. The Johnsons filed a petition for writ of certiorari alleging that the lower courts allowed federal jurisdiction based on a "mere hydrological connection." The writ of certiorari was denied. *United States v. Morrison*, 549 U.S. 1265 (2007).

A subsequent ruling within the Sixth Circuit adopted the First Circuit's approach in its *Johnson* ruling. In *United States v. Cundiff*, 480 F. Supp. 2d 940 (W.D. Ky. 2007), the court held that the United States may establish jurisdiction if it can meet either Justice Kennedy's significant nexus test or the plurality's standard. In this case, the court found the wetlands at issue met both tests for jurisdiction. As a point of reference, this case provided a good discussion of the choice of the standard to be applied.

Likewise, the Eighth Circuit adopted the First Circuit's approach in its *Johnson* ruling. In *United States v. Bailey*, 516 F. Supp. 2d 998 (D. Minn. 2007), the court determined that the property on which the landowner built a road was a wetland adjacent to a navigable water, which satisfied Justice Kennedy's "significant nexus" test and established that the Corps had jurisdiction to require restoration of that wetland. The ruling was appealed to the Eighth Circuit and affirmed in July 2009.

In *Simsbury-Avon Preservation Society v. Metacon Gun Club*, 472 F.Supp.2d 219 (D. Conn. 2007), the court granted defendants motion for summary judgment in a citizens suit alleging ongoing violations of § 402 of the CWA resulting from the discharge of lead shot. Interpreting *Rapanos*, the court found that the wetlands involved were not subject to CWA jurisdiction. While the parties seemed to assume the plurality test should be used, the court also applied the "significant nexus" test. The court found that the water samples offered by the plaintiffs did not establish a significant nexus.

The Third Circuit recently joined the First and Eighth Circuits in holding that jurisdiction is proper if either *Rapanos* test is satisfied. In *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011), the Third Circuit upheld the district court's ruling that the defendant violated the CWA by depositing fill into jurisdictional wetlands. The Third Circuit held that jurisdiction may be

established under either Justice Kennedy's significant nexus test or the plurality's standard. In this instance, jurisdiction was proper under either test.

In *Precon Development Corp., Inc. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011), the Fourth Circuit applied the significant nexus test to assess jurisdiction over forty-eight acres of wetlands nearly seven miles from the nearest navigable water. The court did not address whether the significant nexus test or the plurality standard governed its evaluation because the parties previously agreed that the significant nexus text was controlling in the case.

The significant nexus test clearly has become the dominant approach. Indeed, one federal district court has gone so far as to state that "[t]o date, every federal court applying *Rapanos* . . . has concluded that the Corps may assert jurisdiction over a given site if the site meets Justice Kennedy's test." *United States v. Bailey*, 556 F.Supp.2d 977 (D. Minn. 2008).

In *United States v. Vierstra*, the defendant was convicted in the district court for the District of Idaho for the negligent discharge of a pollutant into the waters of the United States without a permit. No. 11-30225, 2012 WL 3269211, at *1 (9th Cir. Aug. 13, 2012). The defendant appealed, arguing that the evidence was insufficient to conclude that a significant nexus existed between the water and a TNW to establish adjacency for purposes of CWA jurisdiction. *Id.*

Citing *Rapanos* and *Northern California River Watch*, the Ninth Circuit held that the evidence was sufficient to support a jury finding that the water had a significant nexus to a TNW to establish adjacency and thus CWA jurisdiction. *Id.* The court cited Justice Kennedy's opinion in *Rapanos* specifically, and also the *Northern California* Court's discussion on the effect of the Supreme Court's various opinions. Nevertheless, the court applied only Justice Kennedy's significant nexus test to conclude that the evidence supported a jurisdictional finding and affirmed the conviction. However, no appellate court has concluded that the plurality or significant nexus test alone provides the rule, and the Supreme Court has yet to revisit the reach of CWA jurisdiction since *Rapanos*.

c. EPA and the Corps Issue Post-*Rapanos* Guidance

On June 5, 2007, the EPA and the Corps issued joint guidance ("2007 Guidance") interpreting the divided *Rapanos* decision on the geographic extent of regulatory jurisdiction under § 404 of the CWA. On the same day, the EPA and the Corps issued a "Jurisdictional Determination Form Instructional Guidebook" and entered into a memorandum of agreement (MOA) on the substantive and procedural aspects of the post-*Rapanos* "jurisdictional determination" (JD) process, the permit-by-permit procedure whereby the agencies determine the scope of the CWA § 404 permit program. For parties seeking permits for "dredge and fill" activities in "waters of the United States," these support documents outline how agencies will procedurally implement the government's *Rapanos* guidance.

For permit applications processed under the 2007 Guidance, whether the underlying activity is subject to a "categorical" assertion of regulatory jurisdiction or to a more involved significant nexus analysis is a critical issue. Pursuant to the agencies' 2007 Guidance, traditionally navigable waters, relatively permanent tributaries to these waters, and wetlands

directly abutting such tributaries are all "categorically" subject to federal regulatory jurisdiction. Non-navigable tributaries that are not relatively permanent, wetlands adjacent to such tributaries, and wetlands that are adjacent to but do not directly abut a relatively permanent non-navigable tributary are jurisdictional only if they have a "significant nexus" to a traditionally navigable water.

The MOA accompanying the 2007 Guidance gave EPA a direct role in the Corps' significant nexus analysis process. Under the 2007 MOA, if the Corps was preparing to assert CWA jurisdiction on the basis of a significant nexus finding, it was to make a draft JD available for review and approval by Corps headquarters, by the district's corresponding EPA regional office, and by EPA headquarters. This process expired by the terms of the MOA on January 5, 2008.

Rather than extend this significant nexus analysis process, the Corps' announced a new procedure in its January 28, 2008 memorandum. Now, should the Corps assert CWA jurisdiction on the basis of a significant nexus finding, it is merely required to send its finding to the appropriate EPA regional office. The EPA region will then have fifteen days to decide whether to make the final JD as a "special case," using a separate process in place since 1989. As a practical matter, the January 28, 2008 memorandum places significant nexus determinations back into the familiar process used to issue § 404 permits before *Rapanos*, wherein the Corps' districts made JDs, outside of regular EPA regional office or Washington, D.C. oversight. While the EPA has the "overall authority" in determining jurisdiction under the CWA, it has typically deferred to the Corps on JD matters, reserving "special case" determinations to unique circumstances.

In a coordination memorandum issued the same day as the *Rapanos* guidance, the EPA and the Corps agreed that JDs for waters subject to the "significant nexus" test will be subject to formal review by both agencies. The EPA has the overall authority in determining jurisdiction under the CWA and therefore generally oversees JDs made by the Corps. Under a previous joint memorandum issued after the *SWANCC* decision, Corps field officers were strongly encouraged to seek formal, project-specific headquarters approval prior to asserting jurisdiction over intra-state, non-navigable, isolated waters.

While the coordination memo dictates slightly different procedures for "significant nexus" waters and *SWANCC* waters, the basic coordination scheme will now be similarly regimented: for both classes of waters, the Corps district will conduct a draft JD and then will make the draft JD available for review by the EPA regional office. Should the regional office identify any issues upon review, the agencies will then attempt to resolve any differences of opinion, with both parties having opportunities to elevate the issue within their respective organizations. If issues remain unresolved, the JD can be elevated to both agencies' headquarters. Time limits are attached to most steps in the new coordination procedures, reflecting the importance of timely responses to applications for JDs and an attempt to limit delays in permitting decisions.

Although the January 28, 2008 memorandum affirms that Corps' districts will shoulder most of the burden in implementing the *Rapanos* decision, this does not mean that EPA and Corps headquarters have completely ceded the post-*Rapanos* field to local Corps offices. While

the review and approval procedure for significant nexus determinations under the June 5, 2007 MOA expired in January 2008, the MOA's provisions requiring formal, project-specific headquarters approval prior to assertions of jurisdiction over intra-state, non-navigable, isolated waters (so-called "SWANCC waters," after a key 2001 U.S. Supreme Court case) is still in place. Similarly unaffected is the provision in the June 2007 MOA requiring a tiered, multi-office review of non-assertions of CWA jurisdiction over certain SWANCC waters; Corps districts must still coordinate any JDs that do not assert regulatory jurisdiction over isolated waters on the basis of interstate commerce factors through the EPA regions, EPA headquarters, and Corps headquarters.

Issued solely by the Corps' Director of Civil Works, the January 28, 2008 memorandum indicates a partial shift of responsibility within the federal government over post-*Rapanos* permitting decisions away from policymakers and their staff in Washington, D.C., and towards local Corps regulators. The fact that the Corps was able to issue its January 28, 2008 memorandum without any apparent EPA objection may also indicate that the agencies no longer view significant nexus determinations as sufficiently unsettled or crucial to the CWA permitting process, as the Corps and the EPA have successfully asserted CWA jurisdiction after *Rapanos* in many cases using significant nexus determinations as well as other grounds.

The Army Corps' JD Form Instructional Guidebook also includes guidance to field staff in completing the agencies' new Approved JD form. This Approved JD form is the finalized version of the draft JD that proceeds through the interagency coordination process described above. As written, the approved form stresses the importance of documentation such as aerial photography, watershed studies, and local development plans in completing accurate JDs. The guidance and new form also provide additional insight into whether additional documentation will be needed for particular activities, such as when a particularly detailed evaluation of "significant nexus" will be required.

The new Corps/EPA coordination procedures are in effect indefinitely for isolated, intra-state, non-navigable waters, and are also in effect for six months in relation to *Rapanos* waters where jurisdiction is being asserted, unless the procedures are extended or modified by written agreement of both agencies. Industries and developers seeking permits under § 404 of the CWA for dredge and fill activities will likely first encounter the new post-*Rapanos* regulatory landscape through the lens of these procedures. With the EPA now firmly entrenched in the JD process, permit applicants can expect increased scrutiny over the quality of the scientific and environmental analyses accompanying their permit applications. Applicants can also expect potential permitting delays as the agencies spar on a case-by-case basis over the proper interpretation of *Rapanos*.

At least partly in recognition of the greatly increased time required for processing JDs, on June 26, 2008, the Corps issued Regulatory Guidance Letter No. 08-02 on the subject: Jurisdictional Determinations. This document explains the difference between approved and preliminary JDs, and provides additional guidance on necessary documentation. More importantly, it provides a procedure by which a permit applicant can decline to request an approved JD and proceed with permitting based on a much simpler preliminary JD, or in certain circumstances, no JD at all. If a permit is processed using a preliminary JD, all wetlands and waters are treated as jurisdictional, and mitigation is required for all impacts.

On December 2, 2008, the EPA and the Corps issued joint guidance intended to further clarify terms and procedures used in making JDs. The revised guidance maintains the Corps position that regulatory jurisdiction exists over a water body under CWA if either the plurality test or the Kennedy "significant nexus" test is met. The December 2008 guidance further provides, consistent with previous guidance, that the federal agencies will exercise categorical jurisdiction over certain classes of waters and exercise jurisdiction on a case-by-case basis over other waters. Waters subject to categorical jurisdiction include traditionally navigable waters, wetlands adjacent to those waters, relatively permanent non-navigable tributaries of traditionally navigable waters, and wetlands that directly abut such tributaries. The guidance provides clarification of the type of connections that will qualify a wetland as adjacent to traditionally navigable waters. Specifically, wetlands may be adjacent when there is a hydrologic connection, even if the connection is intermittent; when the wetlands are separated from jurisdictional waters by formations such as man-made dikes or natural river berms; or when the wetlands' proximity to jurisdictional waters is reasonably close, based on an ecological interconnection.

The December 2008 guidance is consistent with the June 2007 guidance in specifying that a significant nexus analysis will assess the flow characteristics and functions of the tributaries and wetlands. Hydrologic and ecologic factors are to be considered in the significant nexus analysis. The December 2008 guidance does not modify the process for coordinating JDs. That was articulated in the January 28, 2008 Corps memorandum.

Agency coordination efforts in making JDs have been complicated by the recent efforts by the EPA to restore pre-*Rapanos* JDs. For example, prior to 2006, the Los Angeles River (California) and Santa Cruz River (Arizona) were classified as "traditionally navigable waters." The *Rapanos* ruling complicated the navigable water concept and the Corps undertook a national review of its policies and suspended the "traditionally navigable waters" designation for these rivers.

In 2008, the EPA took the unusual step of informing the Corps that the agency would make the final determination on whether stretches of these rivers were "traditionally navigable waters." The EPA ultimately declared stretches of both rivers to be "traditionally navigable waters" thereby reestablishing CWA protections on these waterways, including the requirement that anyone proposing to dump fill material into these rivers must obtain a § 404 permit from the Corps.

In 2009, homebuilder organizations filed suit in the United States District Court for the District of Columbia seeking an injunction against the EPA and the Corps. The homebuilder organizations argued that the facts did not support the jurisdictional decision and claimed that the segments of the Santa Cruz River, north and south of Tucson, Arizona, ran intermittently and were mainly fed by water from sewage treatment plants. The DOJ, on behalf of the EPA and the Corps, urged the court to dismiss the suit arguing that the jurisdictional decision was not a final agency action subject to review.

In 2010, the district court agreed with the DOJ and dismissed the case, finding that the EPA designation was not "final" and the CWA bars pre-enforcement review of agency decisions. *Nat'l Ass'n of Home Builders v. EPA*, 731 F. Supp. 2d 50 (D.D.C. 2010). The ruling likely preserved the EPA's decision that the entire Los Angeles River is a "traditionally navigable

water" under the CWA. An appeal was filed with the D.C. Circuit in October 2010. The circuit court affirmed the dismissal, but did so on the alternative ground that the organizations lacked Article III standing to challenge the agencies' TNW determination. *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6 (D.C. Cir. 2011).

In 2011, the EPA and the Corps released new draft guidance for jurisdiction under the CWA. The EPA previously sent a preliminary draft of the guidance document to the Office of Management and Budget (OMB) for review on December 20, 2010. *See* Clean Water Protection Guidance, Office of Mgmt. & Budget, RIN No. 2040-ZA11 (2010). The OMB review is typically the last stage of review before an agency regulation or formal rule is published. The EPA did not comment on the details of the draft guidance, but the agency indicated that the guidance "would clarify Clean Water Act responsibilities for assuring consistent, predictable and environmentally effective protection" for waters under the Clean Water Act. Toxics Law Reporter – Hazardous Waste Law, *EPA, Corps Send Draft Guidance to OMB to Clarify Clean Water Action Jurisdiction* (Vol. 26, No. 1 – Jan. 2011).

This preliminary guidance memorandum was controversial, however, because to many in the regulated community, it read much more like a rule than nonbinding guidance. The draft guidance underwent revision to soften its tone and was not released for public comment until April 27, 2011. The draft guidance indicated that it was the first step in a process to undertake a formal rulemaking consistent with APA requirements. The agencies likely inserted this language to respond to strong criticism that use of guidance memorandum to refine jurisdiction under the CWA is inappropriate, and formal rulemaking is required.

The draft guidance differs from the existing guidance memoranda in a number of aspects that expand CWA jurisdiction. While the draft guidance allows the agencies to utilize either *Rapanos* test to establish jurisdiction, the memorandum places an increased emphasis on the application of the "significant nexus" standard. The draft guidance eliminates the pre-existing requirement to evaluate flow characteristics and articulates a watershed-based approach to the evaluation of chemical, physical, or biological impacts necessary to establish a "significant nexus."

In response to continued industry and environmental group pressure to develop new regulations for a more permanent solution, the agencies have agreed to continue working towards a formal rulemaking. In the meantime, however, the agencies continue to pursue finalizing the 2011 guidance document. Since the public comment period on the draft guidance concluded on July 31, 2011, the EPA and the Corps prepared a final guidance document, which was sent to the OMB on February 21, 2012.

On March 28, 2012, Senators Barrasso (R-Wy.), Inhofe (R-Okla.), Heller (R-Nev.) and Sessions (R-Ala.), along with twenty-six of their colleagues, introduced legislation in the Senate – S. 2245, "Preserve the Waters of the U.S. Act" – to stop the EPA and the Corps from implementing the 2011 guidance document. *See* Preserve the Waters of the United States Act, S. 2245, 112th Cong. (2012). The bill was referred to the Senate Committee on Environment and Public Works. The Senate bill did not initially proceed passed this stage, but it was re-introduced on May 22, 2013 and again referred to committee. A companion bill was also introduced in the House of Representatives, H.R. 4965, by Representatives Mica (R-Fla.), Rahall (D-W. Va.),

Peterson (D-Minn.), Lucas (R-Okla.) and Gibbs (R-Ohio) on April 27, 2012. *See* To Preserve Existing Rights and Responsibilities With Respect to Waters of the United States, H.R. 4965, 112th Cong. (2012). Like the Senate version, the bill would prevent the EPA and the Corps from issuing their final guidance on "Identifying Waters Protected by the Clean Water Act" or using it as a substantial basis for any rule. The Committee on Transportation and Infrastructure reported the bill to the House for consideration on September 20, 2012, and it was placed on the Union Calendar.

Also in June 2012, the House of Representatives passed an energy and water fiscal year 2013 spending bill that would, in essence, bar the agencies from implementing their final guidance. The bill, introduced by Representative Dennis Rehberg (R-Mont.) and passed by a vote of 29–20, prohibits using funds to "develop, adopt, implement, administer, or enforce" guidance that purports to clarify which waters of the United States fall under federal protection. In addition to congressional opposition, various groups have announced their willingness to bring suit challenging the guidance and litigation seems inevitable.

Even with the agency's draft guidance, determining what qualifies as a significant nexus under Kennedy's test is difficult for both property owners and permitting authorities. On September 17, 2013, EPA Office of Research and Development published the "Connectivity of Streams and Wetlands to Downstream Waters" draft report ("Report"), and the EPA and the Corps simultaneously withdrew the draft guidance and submitted a joint draft rule to the Office of Management and Budget (OMB) that seeks to clarify some of the jurisdictional confusion.

The Report, currently under review by EPA's Science Advisory Board, synthesizes more than 1,000 pieces of peer-reviewed scientific literature on the connectivity of tributaries, wetlands and open waters to downstream waters. It also highlights the important effects such connectivity has on the chemical, physical and biological integrity of downstream waters. The Report draws several key conclusions. First, it states that streams, regardless of size or frequency of flow, are connected to downstream waters. Second, bidirectional waters in riparian areas and floodplains also connect with downstream waters. Finally, the Report concludes that the available literature on unidirectional waters does not provide sufficient information to generalize about the degree of connectivity to downstream waters. Instead, these waters should be evaluated on a case-specific basis. EPA accepted public comment on the Report through November 6, 2013. EPA has convened a Science Advisory Board expert panel, consisting primarily of academics, to conduct peer review of the Report. The final report is expected in May of 2014.

The findings of the Report informed the EPA and the Corps in drafting the proposed rule, but it's interesting to note that the definition of wetland used in the Report is significantly different than the definition used for federal regulatory purposes. According to the Report, a wetland is an area that generally exhibits at least one of the following three attributes: (1) is inundated or saturated at a frequency sufficient to support, at least periodically, plants adapted to a wet environment; (2) contains undrained hydric soil; or (3) contains nonsoil saturated by shallow water for part of the growing season. This definition requires only one of the three common characteristics of wetlands, while the Federal regulatory definition requires all three. It is unclear how and to what extent the use of this expanded definition of wetlands will impact regulation going forward, but a wider shift to this definition could have a huge impact in Texas, whether water-loving plants are widespread.

d. The new WOTUS Rule

As of April 2016, perhaps the surest thing that can be said about the definition of 'Waters of the United States' is that it remains in flux. The regulation that remains in force has been in place since 1986 and is codified at 33 CFR Part 328. After releasing a proposed definition that generated huge controversy and hundreds of thousands of public comment letters the Corps and EPA finalized a new rule defining "Waters of the United States," whichwas effective as of August 28, 2015. *See* 80 Fed. Reg. 37054 (June 29, 2015). The new rule has been challenged in numerous courts, by numerous parties. On October 9, 2015 the 6th Circuit Court of Appeals issued a nationwide stay of the new rule. On February 22, 2016 a panel of the 6th Circuit ruled 2-1 that jurisdiction is proper in the Circuit courts. *See U.S. Dept. of Defense v. Murray Energy, No.* 15-3752, US App. LEXIS 3031. A motion for rehearing en banc was filed on February 29, 2016. The Corps and the EPA profess to be honoring the stay. Not all courts are falling in line with the 6th Circuit opinion. On February 23, 2016, nine states told the 11th Circuit that the law of that Circuit rejects the rational used by the 6th Circuit to find jurisdiction. *See State of Georgia v. McCarthy*, No. 15-14035. The situation in the district courts remains confused as well.

9. Groundwater

Seeps of polluted groundwater to surface waters have led some courts to extend federal CWA jurisdiction to groundwater, although this is not a majority view. A good discussion of this issue is found in *Umatilla Water Quality Protective Association v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312 (D. Or. 1997).

The post-*SWANCC* focus on adjacency of waters to the tributaries of navigable waters may have an impact in this area. A citizen suit against a city sought to require an NPDES (§ 402) permit for discharges into an excavated pond. *N. Calif. River Watch v. City of Healdsburg*, No. C01-04686WHA, 2004 WL 201502 (N.D. Cal. 2004). The hydrologic connection of the pond to the nearby river through groundwater was one focus of the court. *Id.* (slip op. at 29).

The city appealed the district court's decision. On appeal, the Ninth Circuit observed that the district court's finding of fact establishing a hydrological connection between the pond and river supported the conclusion that the substantial nexus between the pond and river was sufficient to establish federal CWA jurisdiction. *N. Calif. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007).

10. Prior Converted Cropland

In 1993, the Corps indicated in its regulations that "[w]aters of the United States do not include prior converted cropland." 33 C.F.R. § 328.3(a)(8). In a joint final rule by the EPA and the Corps, the agencies stated that Prior Converted Cropland ("PCC") included wetlands that

were drained, dredged, filled or otherwise manipulated to make agricultural activity possible prior to December 23, 1985. Furthermore, PCC no longer exhibits its natural hydrology or vegetation, and due to this manipulation, PCC no longer performs the functions or has the values that the area did in its natural condition and should not be treated as wetlands for the purposes of the CWA. The only method provided for PCCs to return to the Corps' jurisdiction under this regulation is for the cropland to be "abandoned," where cropland production ceases and the land reverts to a wetland state. *See* 58 Fed. Reg. 45,008-01 (Aug. 25, 1993). The rule goes on to explain that the EPA and the Corps used the term PCC as defined in the National Food Security Act Manual (NFSAM) published by the Soil Conservation Service. Revision to the Definition of Waters of the United States to Exclude Prior Converted Cropland, 58 Fed. Reg. 45031 (Aug. 25, 1993).

Pursuant to an interagency Memorandum of Agreement, the Natural Resources Conservation Service (NRCS) was designated as the lead federal agency for wetland delineations on agricultural land. Agricultural lands are defined as including cropland, hay land, pastureland, orchards and vineyards, but do not include range lands, silvicultural land, or uncultivated meadows or prairies where native vegetation has not been removed. A wetland delineation on agricultural land made by the NRCS will be effective for purposes of CWA's § 404. There is an appeals process for NRCS wetland delineations. *See* 59 Fed. Reg. 2,920 (Jan. 19, 1994).

In 2009, the Corps (Jackson Field Office) developed an Issue Paper outlining that any PCC shifted to non-agricultural use becomes subject to its jurisdiction. The Jackson Field Office submitted the Issue Paper to the Director of Civil Works for the Corps who affirmed the Issue Paper in a memorandum as accurately reflecting the Corps' nationwide position on PCC. Industry groups filed a complaint in federal court in the District of Columbia arguing that the Issue Paper and its affirming memorandum changed the Corps' PCC rule without adhering to the requirements of the APA. The case was transferred to a Florida district court overseeing a similar case where the Corps had applied the Issue Paper and affirming memorandum to a utility project.

In September 2010, the Southern District of Florida ruled that the Corps improperly extended the jurisdiction of the CWA. PCC does not fall within the Corps' jurisdiction simply because it is no longer farmed, even if it doesn't revert to its wetlands state. *New Hope Power Co., v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010). In *New Hope*, the Court found that a different Corps rule "created a second exception, in addition to abandonment, whereby prior converted croplands can lose their exempt status." 746 F. Supp. 2d 1272 at 1282. The court ruled that this new rule was procedurally improper because it did not undergo notice and comment procedures. It did not, however, reject the EPA's and Corps' abandonment rule.

In the 2013 case *William L. Huntress v. United States DOJ*, Plaintiff argued that the abandonment rule was no longer valid because of certain changes made to the Food Security Act. Huntress v. U.S. Dep't of Justice, 12-CV-1146S, 2013 WL 2297076 (W.D.N.Y. May 24, 2013). When the EPA and the Corps initially excluded PCC from the definition of "waters of the United States," they borrowed the Soil Conservation Service's definition of PCC and its abandonment rule. However, a 1996 amendment to the Food Security Act and the corresponding Soil Conservation Service regulations had the effect of doing away with the abandonment rule for purposes of federal farm subsidies. Plaintiffs argued the amendment, which did away with the

abandonment rule for purposes of farm subsidies, also did away with the concept of abandonment for purposes of the CWA. The U.S. District Court for the Western District of New York rejected the Plaintiff's argument, holding instead that the EPA's abandonment rule is unaffected by the 1996 Food Security Act amendments.

D. Permit Process under § 404 of the CWA

1. Types of § 404 permits

There are two main types of § 404 permits: individual and general. General permits authorize a specific category of activities on a state, regional or nationwide basis. The Clean Water Act provides that the Corps may issue general permits for any category of activities involving discharges of dredged or fill material if the Corps determines that the activities (1) are similar in nature; (2) will cause only minimal adverse environmental effects when performed separately; and (3) will have only minimal cumulative adverse effect on the environment. 33 U.S.C. § 1344(e)(1). Proceeding under the authorization of a nationwide or regional general permit avoids the delay and cost involved in submitting and processing an individual permit application. It is worthwhile to investigate the applicable general permits and, if necessary, consider reconfiguring or redesigning a project to come within the parameters of a general permit.

Some general permits require advance notification to the Corps in order to take advantage of the general authorization under the permit. Upon receipt of a preconstruction notification, the Corps may require the completion of an individual permit application if the agency believes the proposed discharge will have more than minimal environmental effects. General permits may include conditions prohibiting certain discharges or requiring best management practices to be employed. Moreover, states may withhold their approval of certain general permits, making that general permit unavailable for use in that state.

In addition, the nationwide permits (NWP) strongly encourage the various district offices of the Corps to develop their own lists of regional conditions. Those conditions may result in the complete unavailability of some permits for certain types of waters. A NWP may also be unavailable if a state has denied a § 401 water quality certification. Without a state § 401 certification, an applicant likely has no remedy against the federal government if a general permit is denied. See *Heck & Assocs. v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998) (affirming dismissal by the Court of Federal Claims on ripeness grounds due to lack of § 401 certification). Similarly, conditions imposed as part of the § 401 certification process may significantly restrict the applicability of the NWP.

Despite the administrative convenience of NWPs, there is a certain degree of litigation risk associated with NWPs. The path to judicial challenges to NWPs was smoothed somewhat by *National Association of Homebuilders v. U.S. Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005). The District Court dismissed the Homebuilders' challenges to certain NWPs based on the APA, Regulatory Flexibility Act (RFA), and National Environment Policy Act (NEPA), claiming they were not final agency action. The Circuit court reversed that decision and remanded for further proceedings.

Certain controversial NWPs are especially susceptible to challenge. For example, NWP 46, which authorizes discharges into non-tidal upland ditches, is controversial because the maintenance of existing drainage ditches is exempt from regulation § 404. See 33 U.S.C. § 1344(f); see also *United States v. Sargent County Water Res. Dist*., 876 F. Supp. 1081 (D.N.D. 1992) (finding the district's activities in maintaining a drainage ditch exempt from permit requirements). Litigation challenging NWP 46 is underway. See *Nat'l Ass'n of Homebuilders v. U.S. Army Corps of Eng'rs*, 539 F. Supp. 2d 331 (D.D.C. 2008*); Nat'l Ass'n of Homebuilders v. U.S. Army Corps of Eng'rs*, 699 F. Supp. 2d 209 (D.D.C. 2010) (denying plaintiff's facial challenge to Corps' authority to regulate ditches under NWP 46, because plaintiff failed to demonstrate that there is no set of circumstances under which NWP 46 would be valid), vacated and remanded, 663 F.3d 470 (2011).

As discussed above, NWP 21, covers surface coal mining operations. It was challenged in the Southern District of West Virginia and temporarily suspended as a result. *Ohio Valley Envtl. Coal. v. Bulen*, 410 F. Supp. 2d 450 (S.D. W. Va. 2004), aff'd in part, vacated in part and remanded, 429 F.3d 493 (4th Cir. 2005).

In *Crutchfield v. U.S. Army Corps of Engineers*, 214 F. Supp. 2d 593 (E.D. Va. 2002), plaintiffs challenged the use of several NWPs to permit the construction of a wastewater treatment plant. The court found the Corps' decision to grant the permits was arbitrary, capricious, and not in accordance with law. A critical factor in the decision was that the Corps started to process the application as an individual permit, and shifted partway through the process. The Fourth Circuit reversed the decision, however, finding the Corps' decision to proceed with a NWP was entitled to statutory deference and thus proper. Crutchfield v. County of Hanover, Va., 325 F.3d 211, 219 (4th Cir. 2003).

A similar case involving NWP 12 came before the Ninth Circuit recently. In that case, the Corps permitted a pipeline project under NWP 12, despite initially indicating that one of the pipeline's water crossings would likely require an individual permit. *Ctr. for Biological Diversity v. United States BLM*, 2012 U.S. App. LEXIS 22088 (9th Cir. Oct. 22, 2012). The Ninth Circuit stated that "once the Corps exercises its discretion to decide that a project requires an individual permit, it may restore authorization under the NWPs if it determines that the reason for asserting discretionary authority has been satisfied by a condition, project modification, or new information." *Id*., at *12. Here, since the permittee addressed the Corps' concerns through modification and mitigation, the Corps found that the regulatory requirements had been satisfied, and the court deferred to its determination.

Regional and statewide permits are also frequently the subject of litigation. A proposed regional general permit for oil and gas activities was held invalid in *Wyoming Outdoor Council v. United States Army Corps of Engineers*, 351 F. Supp. 2d 1232 (D. Wyo. 2005). The failure adequately to access cumulative impacts to non-wetlands and reliance on a mitigation plan that lacked monitoring were cited by the court as shortcomings under the CWA and NEPA.

The Maryland District Court remanded the Corps' decision to allow a residential development project to proceed under a state-wide general permit. *Maryland Native Plant Soc'y v. U.S. Army Corps of Eng'rs*, 332 F. Supp. 2d 845, 863 (D. Md. 2004). Interestingly, the court chose not to vacate the permit or halt construction of the development. The remand was to allow

the Corps to further explain the reasons for its decision. The court noted that remand without vacatur is especially appropriate where the agency is likely to be able to explain its decision. *Id*.

Five regional general permits issued for development in Anchorage, however, were upheld. *Alaska Ctr. for the Env't v. West*, 157 F.3d 680 (9th Cir. 1998). One of the challenges to these permits was an allegation that the Corps had made an illegal delegation of CWA authority to the City of Anchorage. A permit applicant was required to obtain an "opinion of compliance" with the permit from the City. The court ruled that there was no improper delegation of authority. Rather, the Corps had issued permits validly and the "opinion" was a mere condition to the use of the permit.

Another regional general permit was invalidated—at least at the preliminary injunction stage—in *Sierra Club v. United States Army Corps of Engineers*, 399 F. Supp. 2d 1335 (M.D. Fla. 2005). The general permit could be used to authorize almost any type of development (horse stables, public works, light industrial facilities, residential units, restaurants, roads, hospitals, churches, and so forth) within a 48,150 acre area. The court found this permit to violate the requirement in 33 U.S.C. § 1344(e) that general permits cover activities that are "similar in nature." Moreover, because the Corps had not put limits on the number or type of activities to be authorized, the Corps could not determine that the permitted activities would cause only minimal adverse environmental effects both separately and cumulatively. *Id*. at 1347.

On appeal in December 2007, however, the Eleventh Circuit upheld the challenged § 404(e) dredge and fill permit that allowed the development of over 48,000 acres in the Florida Panhandle for commercial and residential "suburban development" while preserving 10,000 acres of wetlands. *Sierra Club v. U.S. Army Corps of Eng'rs*, 508 F.3d 1332, 1333 (11th Cir. 2007). The court rejected arguments that the wide variety of construction-related activities authorized were not sufficiently similar, noting that the imposition of extensive special conditions in the permit sufficiently limited the scope of permitted activities and mitigated environmental impacts. *Id*. at 1334. The Eleventh Circuit approach may result in the use of more general permits that protect wetlands, while at the same time allow development to proceed without the need for multiple individual permits.

On March 18, 2012 the existing set of NWPs expired On February 16, 2011, the Corps gave notice of its proposal to reissue and modify the NWPs. Comments were due by April 18, 2011. See 76 Fed. Reg. 9,174 (Feb. 16, 2011). The Corps received more than 26,000 comments and on February 21, 2012, provided final notice that it was reissuing 48 of the 49 existing NWPs. The Corps issued two new NWPs, three new general conditions, and three new definitions. The effective date for the new and reissued NWPs was March 19, 2012. These NWPs will expire on March 18, 2017. See 77 Fed. Reg. 10,184 (Feb. 21, 2012). The two new permits cover certain activities in the following areas:

1) Land-Based Renewable Energy Generation Facilities; and

2) Water-Based Renewable Energy Generation Pilot Projects.

The reissued NWPs, particularly NWP 12, have already been the subject of considerable litigation. For example, plaintiffs have already brought both facial and as-applied challenges to

the reissued NWP 12. *See, e.g., Sierra Club v. Bostick*, CIV-12-742-R, 2012 WL 3230552 (W.D. Okla. Aug. 5, 2012), *aff'd*, 12-6201, 2013 WL 5539633 (10th Cir. Oct. 9, 2013) (rejecting the plaintiff's facial challenge to NWP 12's 2012 reissuance, and upholding the Corps' decision to grant a NWP12 permit for the construction of Keystone Southern pipeline); *Ouachita Riverkeeper, Inc., et al. v. Bostick*, April 10, 2013, U.S. District Court for the District of Columbia, ---F. Supp. 2d--- (upholding the Corp's verification of a wastewater pipeline project under NWP 12).

If a general permit is not available to authorize an activity, an individual permit is required. Applicants proposing to undertake a regulated activity in a wetland are required to complete a standard form, ENG Form 4345, and include both plan and section view drawings of the proposed project. In some cases an activity will require both a Rivers and Harbors Act § 10 permit (for dredging, filling, or construction of a structure in navigable waters such as a river or lake) and a § 404 permit (if the activity involves a regulated discharge). The single application form will be sufficient for both permits.

It is usually advisable to request a pre-application meeting with the Corps before submitting the permit application. See 33 C.F.R. § 325.1(b). This provides the agencies with an opportunity to suggest revisions that may make the project more acceptable. As will be discussed further infra, it is important to begin considering alternatives to a project at the earliest opportunity. In talking over the proposed activity with the Corps, an applicant may discover that it is covered by a nationwide or regional general permit or is statutorily exempt, thus avoiding the requirement of an individual permit application. Finally, a pre-application meeting may be very informative about what factors the Corps will focus on in making its permit decision and what type of mitigation the agencies may require.

2. Public Comment

When a § 404 permit application is received and deemed complete, the Corps will issue public notice of the application and solicit public comment. The comment period ranges from fifty to thirty days from the date of notice. 33 C.F.R. § 325.2(d)(2). If requested during the comment period, the Corps may conduct a public hearing on the permit application. Id. at § 327.4. Any person can submit oral or written comments, call witnesses, and make recommendations at the public hearing. Id. at § 327.8(b). The Corps has estimated that for the approximately 15,000 permit applications evaluated by the agency each year, fewer than fifty public hearings are held. See 55 Fed. Reg. 41,354 (Oct. 11, 1990). Nonetheless, the importance of public comment should not be underestimated, particularly if a project is sensitive or controversial. See, e.g., Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs, 674 F. Supp. 2d 783 (S.D. W. Va. 2009) (public notice containing no substantive information of mitigation violated the Council on Environmental Quality Guidelines related to agency requirements for public involvement and deprived the public of its procedural right to an adequate opportunity to participate in the permit evaluation process).

3. Criteria for Permit Evaluation

In evaluating a § 404 permit application, the Corps applies both its own public interest review criteria and specific guidelines promulgated by the EPA. The Corps' public interest

review, which is derived from historic review of Rivers and Harbors Act permit applications, weighs the benefits of the proposed activity against its detrimental impacts. The Corps considers not only effects on the environment, but also effects on such factors as floodplain values, land use, historic properties, navigation, shoreline erosion and accretion, water supply, energy needs, safety, considerations of property ownership, and economics. See 33 C.F.R. § 320.4(a)(1). Activities occurring in a state with a coastal zone management program will be evaluated for consistency with that state program.

The Corps typically prepares an Environmental Assessment (EA) to determine whether a full EIS is required by NEPA, 42 U.S.C. § 4332 (1988). The breadth of analysis required by NEPA remains an area of debate. See, e.g., Save Our Sonoran v. Flowers, 408 F.3d 1113 (9th Cir. 2005). A Texas decision of note is Lafitte's Cove v. United States Army Corps of Engineers, Civ. No. G-04-185, 2004 WL 3186592 (S.D. Tex. Dec. 14, 2004), which highlights the importance of cumulative impacts.

Proposed activities must also comply with guidelines issued by the EPA under CWA § 404(b)(1). See, e.g., Nw. Bypass Group v. U.S. Army Corps of Eng'rs, 552 F. Supp. 2d 97 (D.N.H. 2008) (finding the Corps' § 404(b)(1) analysis adequate, including the alternatives measured against the basic project purpose); City of Shoreacres v. Col. Leonard Waterworth, 332 F. Supp. 2d 992 (S.D. Tex. 2004) (upholding decision on § 404 permit); Alliance for Legal Action v. U.S. Army Corps of Eng'rs, 314 F. Supp. 2d 534 (M.D.N.C. 2004). The § 404(b)(1) guidelines set forth environmental considerations and objectives, including protection of the aquatic food chain, water quality, and fish and shellfish populations.

The § 404(b)(1) guidelines require the Corps to deny a permit if a practicable alternative with less adverse impact on the aquatic ecosystem exists. 40 C.F.R. § 230.10(a) (1995). The guidelines create the presumption that if an activity is not water dependent, a practicable alternative to discharging into wetlands exists. Thus, if a project does not require siting in a wetland (as is often the case with non-marina related commercial, industrial, and residential projects), the applicant faces the difficult burden of proving there are no practicable alternative sites. *See, e.g., Sierra Club v. Van Antwerp*, 362 F. App'x 100 (11th Cir. 2010) (holding Corps' action in granting permits arbitrary and capricious under the APA and vacating permits because Corps incorrectly determined that purpose of project, extraction of limestone, was water dependent, and thus failed to apply the presumption that practicable alternatives were available); *compare with Nw. Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs*, 817 F. Supp. 2d 1290 (D. Or. 2011) (finding that mining for high quality gravel was a water dependent activity due to the higher quality of in-stream gravel as compared to upland gravel).

Courts have interpreted the § 404(b)(1) guidelines to require an applicant to demonstrate that no practicable non-wetland alternatives were available at the time the decision was made to conduct the discharge. See Bersani v. United States EPA, 674 F. Supp. 405 (N.D.N.Y. 1987), aff'd, 850 F.2d 36 (2d Cir. 1988), cert. denied, 489 U.S. 1089 (1989). For this reason, an applicant's decision-making processes in selecting a property for development and considering alternative locations and designs are critical to obtaining a § 404 permit. It is also important to clearly articulate the purpose of a project in response to the Corps' inquiries regarding whether or not the activity is water dependent. Thus, the pre-application period is very important to the ultimate success of a § 404 application.

One Eighth Circuit case demonstrates the importance of effectively framing the purpose of a project to emphasize water dependence. In National Wildlife Federation v. Whistler, 27 F.3d 1341 (8th Cir. 1994), the Eighth Circuit upheld the Corps' decision to grant a real estate developer a § 404 permit to dredge wetlands in an abandoned river channel. In this case the developer identified the purpose of the project as providing water access to a planned upland residential development. Providing water access is "water dependent," the developer argued. Plaintiffs attacked the developer's characterization of the project, claiming that the overall objective was to build a residential development. Noting that the Corps' application of its regulations is entitled to some deference, the court upheld the Corps' acceptance of the developer's definition of the project purpose. Because the residential development was to be located on uplands, it was not arbitrary or capricious for the Corps to characterize the boat access work as a severable project.

The importance of the project's purpose to § 404(b)(1) analysis is recognized by a number of courts. See Louisiana Wildlife Fed'n v. York, 761 F.2d 1044, 1048 (5th Cir. 1985); Nw. Bypass Group v. U.S. Army Corps of Eng'rs, 552 F. Supp. 2d 97 (D.N.H. 2008) (finding the Corps' § 404(b)(1) analysis adequate, including alternatives measured against the basic project purpose); Nat'l Wildlife Fed'n v. Norton, 332 F. Supp. 2d 170 (D.D.C. 2004); Alliance for Legal Action v. U.S. Army Corps of Eng'rs, 314 F. Supp. 2d 534 (M.D.N.C. 2004); Florida Clean Water Network v. Grosskruger, 587 F. Supp. 2d 1236 (M.D. Fla. 2008) (finding the Corps' decision to include "compatibility with local and regional planning" as a component of airport relocation project purpose not a contrivance to avoid a serious alternatives evaluation and does not make the purpose illegitimate); Butte Envtl. Council v. U.S. Army Corps of Eng'rs, 607 F.3d 570 (9th Cir. 2010) (finding it appropriate for Corps to consider an applicant's project purpose, and that an area of a species' critical habitat can be destroyed without appreciably diminishing the value of the species' critical habitat overall); Lost Tree Village Corp. v. United States, 92 Fed. Cl. 711 (Fed. Cl. 2010) (denying land developer CWA permit to fill wetlands for development purposes on basis that development of five-acre plot did not fit with overall development plan and that tract should be considered to be a conservation wetlands).

In another case, Choate v. United States Army Corps of Engineers, No. 4:07-CV-01170-WRW, 2008 WL 4833113 (E.D. Ark. Nov. 5, 2008), the Corps' concluded that there was no practicable alternative location for the development of a multi-use lifestyle center and wetland park, and the district court found, with no explanation, that the Corps' decision was arbitrary and capricious, despite contradictory evidence in the record. The district court also found that the Corps improperly segmented the transportation improvements from the multi-use development. Accordingly, the court found the Corps' decision to proceed with an EA rather than an EIS arbitrary and capricious.

The Seventh Circuit recently heard another case on the scope of the Corps' duty to consider alternatives to proposed projects that threaten wetlands. *Hoosier Envtl. Council v. U.S. Army Corps of Engineers*, 722 F.3d 1053, 1060-61 (7th Cir. 2013). In *Hoosier*, environmentalists brought an action against the Corps challenging its decision to permit a federal highway project, despite the fact that the chosen route for the highway would destroy wetlands and require several streams to be filled. The plaintiffs argued that the Corps failed to adequately consider alternative routes, choosing instead to adopt the Federal Highway Administration's detailed alternatives analysis. The seventh circuit disagreed, noting that "although the Corps has an independent

responsibility to enforce the Clean Water Act and so cannot just rubberstamp another agency's assurances concerning practicability and environmental harm, it isn't required to reinvent the wheel. If another agency has conducted a responsible analysis the Corps can rely on it in making its own decision." Hoosier Envtl. Council v. U.S. Army Corps of Engineers, 722 F.3d 1053, 1061 (7th Cir. 2013).

A somewhat less demanding showing of alternatives is required for projects that will involve only minor impacts. A guidance memorandum issued jointly by the EPA and the Corps explains the application of EPA's § 404(b)(1) guidelines to these projects. See U.S. Environmental Protection Agency and Corps of Engineers, Memorandum to the Field, "Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements" (Aug. 23, 1993), available at http://water.epa.gov/lawsregs/guidance/wetlands/flexible.cfm.

A project will have "minor impacts" if it has little potential to degrade the aquatic environment and: (1) is located in aquatic resources of limited natural function; (2) is small in size and will cause little direct impact; (3) has little potential for secondary or cumulative impacts; or (4) will cause only temporary impacts. If the Corps concludes that an activity will have minor impacts, the Corps and the applicant need not undertake the rigorous alternatives analysis discussed above. Specifically, the Corps need not consider the practicability of alternatives to the project if the possible alternatives would result in no identifiable or discernible difference in adverse environmental impacts. Provided this is the case, the applicant's project will be presumed to satisfy this aspect of the guidelines, 40 C.F.R. § 230.10(a). Little Lagoon Pres. Soc'y, Inc. v. U.S. Army Corps of Eng'rs, No. 06-0587-WS-C, 2008 WL 4080216 (S.D. Ala. Aug. 29, 2008) (finding an EA sufficient where the Corps examined the relevant data on water quality and the Alabama Beach Mouse habitat in connection with permit authorizing construction of a marina with pier and boat slips on Little Lagoon in Gulf Shores, Alabama, and articulated a satisfactory explanation for its determination that water quality and Alabama Beach Mouse habitat impacts were likely to be minimal).

The guidance memorandum also provides the Corps and the EPA with discretion to consider factors such as projected cost and scope of the project in determining the practicability of alternatives. This is particularly intended to aid small businesses and individual homeowners, although the size and financial standing of the applicant is not the "primary consideration for determining practicability."

4. Interagency Coordination

A § 404 permit application will be reviewed not only by the Corps, but also by EPA, the United States Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (if coastal waters are impacted) and state environmental and natural resource agencies. The state must certify that a discharge will not violate state water quality standards prior to issuance of a § 404 permit. The United States Supreme Court has ruled that in issuing water quality certifications, states may impose any permit conditions necessary to achieve water quality standards. PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology, 511 U.S. 700 (1994). Coordination with resource agencies is required by the Fish and Wildlife Coordination Act, 16 U.S.C. § 662(a) (1988). Wildlife agencies, both at the state and federal level, frequently play a

significant role in setting mitigation requirements or conditioning a § 404 permit to reduce adverse environmental effects.

EPA's role is greater than that of the other agencies. As discussed above, the EPA promulgates guidelines for the Corps to apply in reviewing a permit application. It also shares enforcement responsibilities, makes ultimate determinations on jurisdiction, and may veto a Corps' permit decision. The EPA can veto a Corps permit if it concludes that the discharge activity "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . wildlife, or recreational areas." 33 U.S.C. § 1344(c). This power is known as a 404(c) veto. A plaintiff may maintain a citizen suit under § 1365(a)(2) when the "Administrator fails to exercise the duty of oversight imposed by Section 1344(c)." See, e.g., S.C. Coastal Conservation League v. U.S. Army Corps of Eng'rs, No. 2:07-3802-PMD, 2008 WL 4280376 (D.S.C. Sept. 11, 2008).

From October 1979 through August 2010, the EPA vetoed only thirteen actions. This is out of an estimated nearly two million permit applications. See EPA Clean Water Act Section 404(c) "Veto Authority" Fact Sheet, available at http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/404c.pdf. Nevertheless, this is a very powerful tool. The projects that were vetoed are described below:

	Project Name and Determination Date	**EPA Region**	**State**	**Corps District**
1	**North Miami** Landfill/Municipal Recreational Facility Veto Determination: January 19, 1981	4	FL	Jacksonville
2	**Norden Co.** Waste Storage/Recycling Plant Veto Determination: June 15, 1984	4	AL	Mobile
3	**Jack Maybank Site** Duck Hunting/Aquaculture Impoundment Veto Determination: April 5, 1985	4	SC	Charleston
4	**Bayou Aux Carpes** Flood Control Project Veto Determination: October 16, 1985	6	LA	New Orleans
5	**Attleboro Mall** Shopping Mall Veto Determination: May 13, 1986	1	MA	New England
6	**Russo Development Corps** Warehouse Development (*after-the-fact permit*) Veto Determination: March 21, 1988	2	NJ	New York
7	**Henry Rem Estates** Agricultural Conversion – Rockplowing Veto Determination: June 15, 1988	4	FL	Jacksonville

	Project Name and Determination Date	EPA Region	State	Corps District
8	**Lake Alma** Dam and Recreational Impoundment Veto Determination: December 16, 1988	4	GA	Savannah
9	**Ware Creek** Water Supply Impoundment Veto Determination: July 10, 1989	3	VA	Norfolk
10	**Big River** Water Supply Impoundment Veto Determination: March 1, 1990	1	RI	New England
11	**Two Forks** Water Supply Impoundment Veto Determination: November 23, 1990	8	CO	Omaha
12	**Yazoo Blackwater Pumps Project** Flood Control Project Veto Determination: August 31, 2008	4	MS	Vicksburg
13	**Spruce No. 1 Mountain-Top Coal Mine** Surface Coal Mine Veto Determination: January 13, 2011	3	WV	Huntington

The EPA's decision to veto the Yazoo Blackwater Pumps Project marks only the twelfth time that the EPA has exercised its power under the 1972 CWA to veto projects that could harm water supplies, wildlife, or recreational or fishing areas. The $220 million Yazoo Blackwater Project would have drained 26,300 acres of wetlands and impacted a total of 67,000 acres through the construction of a massive pumping station. The Corps first proposed the project, referred to as the Yazoo Pumps, in 1941, as part of the federal government's overall approach to Delta flood control. On March 18, 2008, the EPA announced its proposed veto of the Yazoo Blackwater Project and solicited public comment on the veto determination. See 73 Fed. Reg. 14,806 (Mar. 19, 2008). The EPA conducted a public hearing to discuss the veto determination on April 17, 2008, and, on September 2, 2008, vetoed the project.

Proponents of the Yazoo Blackwater Project challenged EPA's veto in district court. See Bd. of Miss. Levee Comm'rs v. Jackson, 785 F. Supp. 2d 592 (N.D. Miss. 2011). In its motion for summary judgment, the Levee Board argued that the Yazoo Pumps Project fell within an exemption provided by § 404(r) for certain congressionally-approved projects and therefore was not subject to EPA's 404(c) veto. The EPA asserted § 404(r) did not apply because: (1) the plaintiffs failed to submit an Environmental Impact Statement (EIS) to Congress; and (2) Congress did not specifically authorize the pump project. The Levee Board responded that the Chairman of House and Senate Public Works Committees were sent copies of all relevant reports including the Final EIS in March 1983. The district court did not agree.

The district court did not accept the position that sending letters and materials to the relevant House and Senate Committees qualified as a "submission to Congress" as required by § 404(r). The court found the plain language of the statute called for the submission of the EIS to Congress as a whole, and observed various other sections of the CWA where the statute specifically called for submissions to congressional committees. Additionally, the OMB never received an EIS for the pump project as required by Executive Order 12322. Executive Order 12322 required the parties to submit an EIS to the OMB before sending the EIS to Congress. The district court also rejected the argument that Congress intended it would have primary authority for determining exemptions under § 404(r). The district court granted the EPA's motion for summary judgment and upheld the veto.

The EPA veto of a municipal reservoir project in Virginia provided an opportunity for the Fourth Circuit Court of Appeals to address EPA's veto authority. Originally, the court held that the EPA improperly concluded that there were practicable alternative sources of water supply justifying its veto of the Ware Creek dam. See James City County, Va. v. United States EPA, 955 F.2d 254 (4th Cir. 1992). On appeal after remand, the issue facing the court was whether the EPA can veto a permit solely on the basis of adverse environmental effects. In other words, when the EPA considers whether or not adverse effects are unacceptable, must it consider the county's need for the project? The Fourth Circuit has held that a "veto based solely on environmental harm" is proper. James City County, Va. v. United States EPA, 12 F.3d 1330, 1336 (4th Cir. 1993).

Another proposed EPA veto was announced in March 1994 and involved a highway project in New Hampshire. EPA Region 1 proposed to veto a Corps permit that would authorize the disruption of more than forty acres of wetlands, eighteen streams and stream corridors, and 3,000 acres of wildlife habitat. 24 Envtl. L. Rep. (Envtl. L. Inst.) 10346 (June 1994). This veto was not finalized.

On March 26, 2010, the EPA announced a proposed veto for the Spruce No. 1 Mine permit in West Virginia, one of the largest Appalachian mountain-top removal coal mines. The proposed veto invalidated certain disposal site specifications in the Corps' permit for the Spruce No. 1 surface mine that was first issued in 2007, marking a first-ever veto for an already issued permit. The EPA published its Proposed Determination in the Federal Register—EPA-R03-OW-2009-0985—on April 2, 2010. 63 Fed. Reg. 16,788 (Apr. 2, 2010). The 60-day public comment period ran until June 4, 2010. In addition to accepting written comments, EPA's Region III (mid-Atlantic region) held a public hearing on May 18, 2010, in Charleston, West Virginia, in which members of the public had the opportunity to submit written or oral comments.

On January 13, 2011, the EPA issued its Final Determination and revoked the Spruce No. 1 Mine permit halting the proposed disposal of mining waste in certain streams. The EPA believed that the Spruce No. 1 Mine, as authorized, would result in unacceptable adverse effects to fish and wildlife resources. Final Determination of the United States Environmental Protection Agency Pursuant to §404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia (Jan. 13, 2011), available at http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/Spruce_No-_1_Mine_Final_Determination_011311_signed.pdf. This veto represents only the thirteenth time the agency has used its power to revoke a permit since 1972.

Mingo Logan immediately filed an action challenging EPA's veto. Mingo Logan Coal Co. Inc. v. U.S. E.P.A., 850 F. Supp. 2d 133 (D.D.C. 2012). It argued that EPA lacks the statutory authority to withdraw site specifications after a permit has already been issued, and that even if it does have such authority, EPA's decision to exercise it in this case was arbitrary and capricious. The U.S. District Court for the District of Columbia granted summary judgment in Mingo Logan's favor on the first ground without reaching the second. *Id.* EPA appealed, and the Court of Appeals reversed, finding that the plain language of CWA §404(c) clearly and unambiguously authorized the EPA to exercise its veto authority whenever the agency determines an adverse effect may result from a discharge, even after a permit has already been issued. Mingo Logan Coal Co. v. U.S. E.P.A., 714 F.3d 608 (D.C. Cir. 2013). The court remanded to the district court the question of whether the EPA's decision in this case was arbitrary and capricious. *Id.*

On June 7, 2013, Mingo Logan filed a petition for rehearing en banc, which the D.C. Circuit denied. Mingo Logan has since hired Paul Clement, and on November 13, 2013, Mingo Logan filed a petition for a writ of certiorari. Petition for Writ of Certiorari, Mingo Logan Coal Co. v. E.P.A., No. 13-599 (Nov. 13, 2013).

5. Judicial Review of Permitting Decisions

Under the current regulatory scheme, a project proponent or opponent must await an adverse decision on a permit application before obtaining any form of judicial relief challenging a Corps decision. A jurisdictional determination regarding the presence of wetlands or a decision by the Corps to require a permit for certain activities is not ripe for judicial review. See, e.g., Charfoos & Co. v. U.S. Army Corps of Eng'rs, No. 97-CV-74206-DT (E.D. Mich. April 3, 1998) (finding forty-three acres of a fifty-seven-acre tract subject to federal jurisdiction but finding no subject matter jurisdiction). The unfairness worked in this situation is particularly acute for the small applicant with weak financial standing.

The Corps has established an administrative appeals process for a variety of Corps regulatory determinations. See 33 C.F.R. Part 331. A citizen must exhaust the available administrative appeals before filing suit in district court regarding a Corps action. An administrative appeal process exists for: (1) wetland delineations/jurisdictional determinations; and (2) denial of a Corps permit application (including rejection by the applicant due to unacceptable conditions demanded by the reviewing agencies).

A determination that certain property is a regulated wetland (wetland delineation) subject to federal jurisdiction (jurisdictional determination) is subject to a two-level administrative appeals process. Delineations and jurisdictional determinations are made at the Corps' District office level. The District Engineer or a designated Corps official (preferably a delineation specialist) in the same Corps District is the first level of appeal. The selected review officer (RO) reports directly to the District's Regulatory Branch Chief. An adverse determination in the first level of review may be appealed to the Division Engineer or designated Division level RO. The Division level review is limited to the administrative record prepared during the District level appeal; thus, it is important to present all relevant information during the first level of appeal.

A decision by the Corps to deny a permit application or to require permit conditions that are unacceptable to the applicant is directly appealable to the Division level RO. The appeal process includes an opportunity for a review conference during which the Corps and the applicant may meet with the Division RO to explain or clarify the administrative record on the permit application. Factual determinations by the Corps District are reversed only if "clearly erroneous" or resulting from the "omission of a material fact." Unlike jurisdictional determinations, appeal of a permit denial is only a single-level review process; additional challenges to an adverse decision must be made in district court.

It remains difficult for a property owner to challenge the assertion of jurisdiction over property prior to the initiation of an enforcement action, as cases-after-case continues to be dismissed for lack of jurisdiction without final agency action. See Coxco Realty v. U.S. Army Corps of Eng'rs, No. 3:06-CV-416-S, 2008 WL 640946 (W.D. Ky. 2008); Acquest Wehrle LLC v. United States, 567 F. Supp. 2d 402 (W.D.N.Y. 2008); Lakewood Dev., L.L.C. v. U.S. Army Corps of Eng'rs, No. 07-9035, 2008 WL 4948779 (E.D. La. Nov. 18, 2008) (holding that the Corps' informal consultation involving a permit does not constitute final agency action under the APA); Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586, 591, 593–94 (9th Cir. 2008) (finding the Corps' issuance of a positive jurisdictional determination did not constitute final agency action under the APA for purposes of judicial review because it did not "impose an obligation, deny a right or fix some legal relationship"; "[i]t does not itself command Fairbanks to do or forbear from anything; as a bare statement of the agency's opinion, it can be neither the subject of "immediate compliance" nor defiance").

While CERCLA expressly prohibits pre-enforcement review, the CWA, Clean Air Act, and Resource Conservation and Recovery Act do not. Despite this fact, the EPA has long argued that these statutes have an implied bar on pre-enforcement review. In line with EPA's long-held view, the Ninth Circuit in 2010 held that the CWA precludes pre-enforcement judicial review and that such a preclusion does not violate the due process clause. See Sackett v. EPA, 622 F.3d 1139, 1146 (9th Cir. 2010). In Sackett, the plaintiffs received a Compliance Order from the EPA asserting the plaintiffs had illegally placed fill material into jurisdictional wetlands on their property. After trying unsuccessfully to obtain a hearing from EPA, the plaintiffs filed suit demanding an opportunity to contest the jurisdictional determination. The Ninth Circuit agreed with the district court ruling that the Compliance Order could only be challenged if the EPA brought an enforcement action seeking to impose civil and criminal penalties. The plaintiffs appealed the Ninth Circuit ruling, and the Supreme Court granted certiorari to determine whether the CWA contains an implied bar on "pre-enforcement review" and whether an implied bar would violate the due process clause. The Supreme Court heard oral arguments in January 2012. See Sackett v. EPA, No. 10-1062, 131 S. Ct. 3092 (2011).

A unanimous Supreme Court reversed the Ninth Circuit decision, holding that the Sacketts were entitled to bring a civil action under the Administrative Procedure Act to challenge the issuance by the EPA of an administrative compliance order under section 309 of the Clean Water Act. Sackett v. EPA, 132 S. Ct. 1367 (2012). The Court found that such a compliance order was final agency action, subject to review. Accordingly, when the EPA issues an order to stop development that the agency claims threatens the nation's waters, the property owner does not have to wait for the EPA to bring an enforcement action in order to challenge the agency's compliance order.

Following the Sackett decision there has been a flurry of cases that sought to expand the opportunity for judicial review, particularly for the Corps assertion of federal jurisdiction. Two reached the Circuit Courts of appeals, which has resulted in a split amon the circuits that is headed again for the Supreme Court. With the 9th Circuit (Fairbanks North Star Borough (Sept 1998) and the 5th Circuit (Belle Co. LLC v. Corps of Engineers, No. 13-30262 (5th Cir. July 30, 2014) holding that judicial review of Corps jurisdictional determinations is not allowed. The 8th Circuit concluded that a Corps jurisdictional determination is a final agency action subject to judicial review in Hawkes Co. v. U.S. Army Corps of Engineers, No. 13-3067 (8th Cir. April 10, 2015). US Supreme Court review was sought on both the Hawkes and Belle cases. In December 2015 the Court granted review of the Hawkes cases, and oral argument occurred on March 30, 2016. See U.S. Army Corps v. Hawkes, No. 15-290, US S Ct. The Supreme Court did not accept review of the 5th Circuit case.

Corps permitting decisions are subject to judicial review under the APA and the Corps' decision is upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Court of Appeals for the Eleventh Circuit overturned a district court for its failure to grant the proper level of deference to the Corps when considering the permit issuance. See Sierra Club v. Van Antwerp, 526 F.3d 1353 (11th Cir. 2008).

This deference to agency decision-making is a potent defense, whether the decision was to grant or deny a § 404 permit. E.g., Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 938 (9th Cir. 2008) (upholding grant of gold mining permit based on EA, allowing mine fill placed in 346.5 acres of wetlands); Norton Constr. v. U.S. Army Corps of Eng'rs, 280 F. App'x 490 (6th Cir. 2008) (upholding denial of permit for landfill); Schmidt v. U.S. Army Corps of Eng'rs, No. 2:08-cv-0076, 2008 WL 2783292 (W.D. Mich. July 15, 2008) (upholding denial of permit to construct residence).

The CWA does contain a citizen suit provisions, but citizens are required to provide 60-day notice to both the discharger and the federal and state authorities prior to filing suit. 33 U.S.C. § 1365(b)(1)(A). This notice must "tell a target precisely what it allegedly did wrong, and when." Ctr. for Biological Diversity v. Marina Point Dev. Co., 535 F.3d 1026, 1032 (9th Cir. 2008) (vacating the district court's judgment for lack of jurisdiction because the notices of citizen suit were insufficient). There is one exception to the general rule: where a citizen alleges violations of new source performance standards, the 60-day waiting period may be waived. 33 U.S.C. § 1365(b)(2).

A recent Eleventh Circuit case analyzed the CWA Citizen Suit provision and its notice requirements. Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc., 12-15409, 2013 WL 5998069 (11th Cir. Nov. 13, 2013). In this case, the court considered whether a plaintiff could avoid the 60-day waiting period and notice requirements by suing for violations of new source performance standards and not for violations of the discharger's permit, even though the permit incorporated the performance standards within its terms. The court noted that a citizen suit alleging violations of a NPDES permit is subject to the general rule of notice and a 60-day waiting period, and here, the discharger's permit was integral to the suit, because it incorporated the violated performance standards. Thus, the court found that the 60-day waiting period applied and affirmed the district court's grant of summary judgment in favor of Black Warrior Minerals.

E. Mitigation

The burdens imposed by the § 404 permit process are not limited to the cost and time required to process a permit application. Even if a permit is granted, the Corps may require changes to the project design and will usually require mitigation of unavoidable adverse impacts to wetlands. The most controversial form of mitigation is compensatory mitigation. This is the creation of new wetlands or restoration of existing wetlands to compensate for wetlands values lost due to a project. *See* 40 C.F.R. § 1508.20(e) (1990). Courts can require the Corps to explain why mitigation is adequate. *O'Reilly v. U.S. Army Corps of Eng'rs*, No. 04-940, 2004 WL 1794531 (E.D. La. 2004), *aff'd and amended in part, reversed in part on other grounds*, 477 F.3d 225 (5th Cir. 2007). The ability of the Corps to explain the adequacy of the mitigation for a project is particularly important when a mitigated Finding of No Significant Impact (FONSI) is involved. *See Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105 (9th Cir. 2000).

The Corps, EPA, Natural Resource Conservation Service, USFWS, and the National Oceanic and Atmospheric Administration (NOAA) have released final guidance on the creation, use, and operation of mitigation banks. *See* 60 Fed. Reg. 58,605 (Nov. 28, 1995). The guidance deals with several vital issues, including planning considerations, criteria for using banks, crediting and debiting procedures, and long-term management. The guidance envisions the use of a team approach by federal agencies in the development of mitigation banks.

In order to obtain credits for participation in a mitigation bank, the parties must enter into a formal written agreement with the Corps, EPA, and applicable federal and state resource agencies. The November 1995 guidance describes the necessary instruments for obtaining approval of a mitigation bank in advance of construction. It also provides that the Corps has final authority to approve a mitigation bank. To date, most mitigation banks have been developed by state or local agencies for use with highway or port development projects, although on a regional basis a handful of private development mitigation banks have received approval.

On December 24, 2002, the Corps issued a RGL, No. 02-2, "Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts." That same month the Corps, EPA, and the Departments of Agriculture, Commerce, Interior, and Transportation released the National Wetlands Mitigation Action Plan. Criticism of the effectiveness of wetlands mitigation has continued since that time.

On March 28, 2006, the Corps and the EPA published a proposed rule on "Compensatory Mitigation for Losses of Aquatic Resources." This proposed rule addresses permittee-responsible mitigation, mitigation banks, and in-lieu fee mitigation. The primary goals of the proposed rule were to: (1) use the best available science for mitigation decisions; (2) create a level-playing field for different types of mitigation; (3) increase the efficiency and predictability of the mitigation process; and (4) enhance public participation of the mitigation process.

On March 31, 2008, the Corps and the EPA issued the Final Compensatory Mitigation Rule governing compensatory mitigation for authorized impacts to wetlands, streams, and other jurisdictional waters. *See* 73 Fed. Reg. 19,594 (Apr. 10, 2008). One significant alteration in the new rule is that mitigation projects utilizing any of the three mechanisms must include mitigation

plans that include the same twelve fundamental components: objectives; site selection criteria; site protection instruments; baseline information; credit determination methodology; a mitigation work plan; a maintenance plan; ecological performance standards; monitoring requirements; a long-term management plan; an adaptive management plan; and financial assurances. Mitigation plans are now to be included in the public notice of an application. The new rule also seeks to establish equivalent sets of standards that are based on better science, increased public participation, and innovative market base tools.

F. Penalties

If a person discharges dredged or fill material into wetlands without a permit or in violation of a permit's terms, the EPA or the Corps may issue a cease and desist order and seek civil, criminal, or administrative penalties. 33 U.S.C. §§ 1319, 1344(s). Frequently, unauthorized discharges may be the subject of an after-the-fact permit. *See* 33 C.F.R. §§ 326.3(e). *See, e.g., Clifton Water Dist.* (Clifton, Colorado) (Consent Agreement signed May 30, 1991). However, courts have also ordered removal of fill material and restoration of wetlands. *See, e.g., United States v. Ellen*, 961 F.2d 462 (4th Cir. 1992), *cert. denied*, 506 U.S. 875 (1992); *United States v. Weisman*, 489 F. Supp. 1331 (M.D. Fla. 1980).

The CWA authorizes the Corps or the EPA to refer enforcement cases to the DOJ, which can seek criminal or civil penalties. Civil penalties are available under the Act, 33 U.S.C. §§ 1319(d), 1344(s)(4), and EPA is required by statute to adjust civil penalties for inflation at least once every four years to maintain their deterrent effect. 40 C.F.R. § 19. On November 6, 2013, EPA published a final rule increasing 20 of the 88 statutory civil penalty provisions it administers. Civil Monetary Penalty Inflation Adjustment Rule, 78 Fed. Reg. 215 (Nov. 6, 2013). The CWA class I civil penalties remained the same, but class II civil penalties were adjusted upwards. Now, the amount of class II civil penalties may not exceed $16,000 per day for each day during which the violation continues; except that the maximum amount cannot exceed $187,500. *Id.*

Because courts have interpreted "day of violation" to include not only the days on which material is discharged into wetlands, but also every day that unauthorized material remains in wetlands, substantial penalties are available under the CWA. *See United States v. Cumberland Farms of Conn., Inc.*, 647 F. Supp. 1166, 1183 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).

Negligent violations of the CWA subject a person to criminal fines of not less than $2,500 or more than $25,000 per day of violation or imprisonment of not more than one year, or both. 33 U.S.C. § 1319(c)(1). For knowing violations, the penalty ranges from $5,000 to $50,000 per day of violation or imprisonment of up to three years, or both. *Id.* at § 1319(c)(2). For knowing endangerment, a party may be liable up to $250,000 ($1 million for corporations) or up to fifteen years of imprisonment, or both. *Id.* at § 1319(c)(3). A responsible corporate officer is a "person" subject to these penalties. *Id.* at § 1319(c)(6). Because sentencing of individuals convicted under the CWA is now carried out through application of the U.S. Sentencing Commission Guidelines Manual, jail terms are expected to be imposed more frequently. *See, e.g., United States v. Ellen*, 961 F.2d 462 (4th Cir. 1992) (affirming a prison sentence under the Sentencing Guidelines for a project manager who knowingly filled wetlands

without a permit and noting that the property owner was placed on probation and ordered to pay a $1 million criminal fine and restoration costs of $1 million for negligent filling of wetlands). One example of the impact of the sentencing guidelines is *United States v. Suarez*, 15 F.3d 1094 (9th Cir. 1994) (mandating a four- or six-level increase in offense levels for knowingly discharging a pollutant into jurisdictional wetlands without a permit).

In *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008), the court approved a post-*Rapanos* jury charge, holding it was not in error to reject the following language:

> The Clean Water Act does not permit the federal government to impose regulations over tributaries that are neither themselves navigable nor truly adjacent to navigable waters . . . [sic] adjacency implicates a "significant nexus" between the water in question and the navigable in fact waterway. If the government fails to prove beyond a reasonable doubt that the wetlands at issue in this case are in fact navigable or truly adjacent to i.e. lying near, close, contiguous, or adjoining a navigable waterway, you must find the defendants not guilty on counts Twenty through Forty-One.

Id. at 324.

Warrantless searches for wetlands may be justified under the "open records" doctrine. *See United States v. Rapanos*, 115 F.3d 367 (6th Cir. 1997); *but see Lhotka v. United States*, 114 F.3d 751 (8th Cir. 1997) (holding that the FWS' wetlands restoration project on property supported landowner's prima facie case of trespass and nuisance under Minnesota law, regardless if the FWS' entry onto property was lawful).

The courts are divided as to whether imposing civil penalties under the CWA is mandatory or discretionary with the court. The increasing weight of authority, however, seems to be that a penalty is mandatory once a violation has been proved, but that the court has discretion to reduce the fine, even to a purely nominal amount. *See Leslie Salt v. United States*, 55 F.3d 1388 (9th Cir. 1995), *cert. denied sub nom. Cargill, Inc. v. United States*, 516 U.S. 955 (1995); *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990); *Stoddard v. W. Carolina Reg'l Sewer Auth.*, 784 F.2d 1200 (4th Cir. 1986).

In a civil enforcement action against a real estate development company and its subsidiary involving five alleged CWA violations, the companies agreed to pay a $175,000 penalty and provide $225,000 in funding for area wetland preservation projects as part of a settlement. The violations involved two road crossings and land clearing of a twenty-three-acre wetland site in 1988, as well as other wetland fills in the early 1980s. The companies further agreed to restore the twenty-three-acre wetland and preserve in perpetuity another fifty-five acres of onsite and offsite wetlands. 24 Env't Rep. (BNA) 1525 (Dec. 17, 1993).

This and similar enforcement actions alleging violations in the 1980s or earlier raise an interesting question that has not been frequently addressed by the courts: What statute of limitations applies to § 404 violations, and when does it begin to run? With respect to citizens suit enforcement under § 505 of the CWA, a court has held that the general five-year statute of

limitations at 28 U.S.C. § 2462 (1988) applies and begins to run when reports documenting the violation are filed with the EPA. *North Carolina Wildlife Fed'n v. Woodbury*, 29 Env't Rep. Cas. (BNA) 1941 (E.D.N.C. 1989). Another case has reached a similar conclusion with respect to EPA, rather than citizen, enforcement. *United States v. Hobbs*, 736 F. Supp. 1406 (E.D. Va. 1990). The federal government, moreover, has consistently argued that since there is a "continuing violation" until fill is removed from a jurisdictional area, the statute does not begin to run until that time. *See, e.g., Sasser v. United States EPA*, 990 F.2d 127, 129 (4th Cir. 1993); *City of Mountain Park v. Lakeside at Ansley, LLC*, 560 F. Supp. 2d 1288 (N.D. Ga. 2008). However, in a case involving administrative enforcement of violations under the Toxics Substances Control Act, the D.C. Circuit has held that the five-year statute of limitations applies to administrative enforcement of environmental statutes as well as judicial enforcement, and it begins to run on the date of the violation, not when the violation is or should have been discovered by the agency. Further, at least in a TSCA setting, the court rejected the continuing violation theory. *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994).

However, at least one more case on the statute of limitations for civil enforcement of § 404 applied the "continuing violation" theory and held that the five-year statute of limitations had yet to run. *See United States v. Reaves*, 42 Env't Rep. Cas. 1283 (M.D. Fla. 1996). In that case, dredged material was spread over seventeen acres in 1981 but did not become the subject of any enforcement action until a cease and desist order was issued in 1989. The court held that the civil complaint filed in 1994 was timely, despite the fact that it was filed more than thirteen years after the fill activity. Similarly, a court held that there is no statute of limitations for equitable relief in actions brought by the government. *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997). The Tenth Circuit has agreed with this position, holding that while a statute of limitations applies even to non-monetary penalties, a "restorative injunction" was not a penalty. *United States v. Telluride Co.*, 146 F.3d 1241 (10th Cir. 1998). The *Telluride* court declined to apply the concurrent remedy rule, which provides that when legal and equitable relief are available concurrently, equity will withhold its relief where the statute of limitations would bar the legal remedy. *Id*. at 1248. This remains an unresolved area of wetlands law.

Some courts have been very creative in their design of remedies for wetlands violations. *United States v. Van Leuzen*, 816 F. Supp. 1171 (S.D. Tex. 1993), involves an enforcement action out of the Corps' Galveston District. Van Leuzen denied numerous warnings and cease and desist orders issued by the Corps and proceeded to fill and level a less than half-acre marshy tract upon which he planned to move his home. Van Leuzen, who claimed to have limited financial resources, was ordered to remove the illegal fill; restore the wetlands, except those immediately under his house and driveway; remove his septic system and find other means to dispose of domestic waste; and erect a billboard publicizing his violation and penalty. Van Leuzen, a retiree, was also ordered to pay $350 per month for no less than eight and no more than twelve years to fund the restoration work and as civil penalties.

If a defendant fails to successfully prove the applicability of the 404(f) agricultural exemption in an enforcement actions the penalties may be severe. In United States v. Smith, 79 ERC 1886, (S.D. Ala. July 24, 2014) the court considered the appropriate remedies forviolations involing 4 dams and associated roads. The federal government sought 1) a permenant injunction against future 404 violations; 2) a temporary injunction requiring restoration according to the EPA plan; 3) compensatory mitigation for temporal losses of wetland values; and 4) civil

penalties in the amount of $1.5 million. The court declined to enter the permanent injunction as the government had no evidence showing that future violations were likely. The court adopted a modified restoration plan estimated to cost $89,000 and ordered annual reports to the court as to the status of the restoration. The court declined to require compensatory mitigation, reasoning that as there was no permit involved compensatory mitigation was not appropriate, noting that the court had found no case where compensatory mitigation was awarded when not permits were involved and an exemption applied. The court awarded a civil penalty of $78,000.

It is critical to comply with mitigation requirements or other terms of any settlement of a wetlands violation. In *United States v. Krilich*, two developers were ordered to pay a $1.3 million penalty for failing to meet the deadline for restoring 3.1 acres of illegally filled wetlands as required in a consent decree with the DOJ. *See* 948 F. Supp. 719 (N.D. Ill. 1996), *discussed in* 27 Env't Rep. (BNA) (Current Developments) 454 (June 14, 1996).

Finally, while *SWANCC* may have narrowed the reach of CWA's jurisdiction, it is likely not available to modify completed enforcement actions. *See United States v. Interstate Gen. Co.*, 39 F. App'x 870 (4th Cir. 2002). In 1999, Interstate General Company (IGC) pled guilty to one count of knowingly discharging fill into jurisdictional wetlands, and entered into a consent decree, which required a plan to restore wetlands. After *SWANCC*, IGC filed a petition for writ of error *coram nobis* and a motion to vacate the consent decree under Federal Rule of Civil Procedure 60(b)(5), arguing that *SWANCC* legalized the conduct underlying the criminal conviction. The court concluded that *SWANCC* did not change the decisional law in the case, and denied the requests.

G. Takings

The Takings Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation. Many wetlands cases evaluate the question of whether restrictions on land use in wetlands constitute a taking of the owner's property. A "takings" suit by the regulated wetland owner alleges that the government, by severely limiting the economic value of a wetland, has effectively "taken" the wetland. *See* Robert Meltz, *Wetland Regulation and the Law of Property Rights "Takings*," 23 National Wetlands Newsletter, May-June 2001, at 1.

In the 1960s and early 1970s state courts responded sympathetically to takings claims by wetland owners. However, in the 1970s with the implementation of the federal wetland permitting program under the § 404, courts began to enforce the public's interest in protecting wetlands. By the mid 1980s, the court changed its attitude yet again, embodying a more landowner friendly attitude and producing decisions that the government's actions resulted in a taking. *See id.* The Supreme Court case, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), represents another small victory for the aggrieved wetland owner. In *Palazzolo*, the Supreme Court addressed three important issues: (1) ripeness; (2) post-regulation acquisition of title; and (3) establishment of a "total taking."

1. Ripeness

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Court explained the ripeness doctrine as applied to takings claims. The Court held that a takings claim is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id*. at 186; *see also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986). A final decision by the state agency informs the constitutional determination of whether a regulation has deprived a landowner of "all economically beneficial use" of the property, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, *see Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Thus, under the ripeness rules a takings claim, based on a law or regulation which is alleged to go too far in burdening property, "depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including an opportunity to grant any variances or waivers allowed by law." *Palazzolo*, 533 U.S. at 620–21.

The central question in resolving the ripeness issue is whether the petitioner obtained a final decision from the council determining the permitted use for the land. In *Palazzolo*, the Rhode Island Supreme Court rejected Palazzolo's takings claim on ripeness grounds. The court based its holding primarily on the court's finding that Palazzolo had not fully explored potential other permissible uses of the property that would involve filling substantially less wetlands. The Supreme Court rejected this justification for denying Palazzolo's claim, concluding that the rulings of the Council made it clear that the Council's regulations did not permit Palazzolo to fill or develop any wetlands on the property: "there can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use." *Id*. at 621. According to the Supreme Court, the "ripeness doctrine does not require a landowner to submit applications for their own sake." *Id*. at 622. The Court held, where the state agency entertains an application from a landowner, and "its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable state law exhaustion or pre-permit process, federal ripeness rules do not require the submission of further and futile applications with other agencies." *Id*. at 626.

2. Post-Regulation Acquisition of Title

Arguably the most interesting part of the Supreme Court's decision in *Palazzolo* involved the effect of any prior notice to Palazzolo of the wetlands regulations before he assumed individual ownership of the property. Until *Palazzolo*, the notice rule had been widely endorsed. According to Robert Meltz, the leading Federal Circuit endorsement of the notice rule is in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). *See* Robert Meltz, *Wetland Regulation and the Law of Property Rights "Takings*," 23 National Wetlands Newsletter, May-June 2001, at 10. Like the *Loveladies Harbor* court, the Rhode Island Supreme Court denied Palazzolo's claim in part reasoning: "a purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Palazzolo*, 533 U.S. at 626.

The Supreme Court specifically rejected that proposition, holding a rule that allows the government to use prior notice as a mechanism to defeat a takings claim essentially allows the government to place an "expiration date on the Takings Clause. This ought not to be the rule." *Id*. at 627. The Court stated that "it would be illogical and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner." *Id*. at 628.

The concurring opinions by Justices O'Connor and Scalia mark a spirited debate concerning the true meaning of the majority opinion regarding the notice rule. According to Justice O'Connor, while prior notice itself would not defeat a takings claim, prior notice was still a factor to be used by the court in an evaluation of the landowner's "investment backed expectations," and should be used to determine whether the regulation works a total taking that requires compensation. *Id*. at 634. According to O'Connor, the *Palazzolo* decision restores "balance" to the courts' consideration of "the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred." *Id*. at 635. In contrast, Justice Scalia argues that the prior existence of the agency regulation should have "no bearing upon the determination of whether the restriction is so substantial as to constitute a taking." *Id*. at 637. Unfortunately, the majority opinion fails to shed light on this debate.

3. Total Taking

The Rhode Island Supreme Court held and the Supreme Court agreed that Palazzolo failed to show a total taking of his investment-backed expectations because there was evidence that a portion of the eighteen-acre tract could be developed and was potentially worth $200,000. The Court held that assuming a taking is established, a "State may not evade the duty to compensate on the premise that the landowner is left with a token interest." *Id*. at 609. However, under the *Penn Central* analysis the upland portion of the property had not been deprived of all its economically beneficial use.

Mr. Palazzolo argued for the first time at the Supreme Court that the upland parcel was distinct from the wetlands parcel and that "he should be permitted to assert a deprivation limited to the latter." *Id*. The Supreme Court commented that past decisions indicate that "the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole . . . [but the court has] at times expressed discomfort with the logic of this rule." *Id*. at 631. The Court declined to address this issue. However, the Court remanded the case to the state court with instructions to determine if there had been a compensable taking under the *Penn Central* analysis.

The impact of the *Palazzolo* decision is uncertain. The opinion suggests that more property owners will be able to bring takings claims; however, it does not mean that any of those claims will be granted.

Another wrinkle in the "total taking" doctrine is *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). The Tahoe Regional Planning Agency (TRPA) was created pursuant to an Interstate Compact between California and Nevada, which was approved by Congress in 1969. After Congress approved a 1980 amendment to the

Compact, the TRPA imposed two moratoria in 1981–1984 on virtually all residential development in the area of TRPA jurisdiction. The district court found the temporary loss of all economically viable use to be a taking. The court of appeals reversed, focusing on the temporary nature of the moratoria. The Supreme Court affirmed. Focusing on the public program benefiting the common good, the Court concluded the starting point ought to be whether there was a total taking of the entire parcel.

On June 25, 2013, the Supreme Court issued an opinion in a takings case related to wetlands mitigation. *Koontz v. St. Johns River Water Mgmt. Dist*., 133 S. Ct. 2586, 2589, 186 L. Ed. 2d 697 (2013). The Court held that when a government entity conditions the issuance of a permit on the landowner's performance of certain wetlands mitigation requirements, the government must show that there is a nexus and rough proportionality between its demands on the landowner and the effects of the proposed land use. Koontz sought to develop his property, part of which was a wetland, but the St. Johns Water Management District notified him that his permit would be denied unless he agreed to (1) scale back his planned development and give the District a large conservation easement; or (2) hire contractors to make improvements to separate land owned by the District. Koontz challenged the mitigation demands, arguing that under the circumstances, the permit denial would constitute an unconstitutional taking. The Florida Supreme Court dismissed the case, but the Supreme Court reversed. The Court found that although the government may obtain concessions that offset the public harms caused by certain land uses, any conditions imposed must have an essential nexus to the planned activity. Furthermore, there must be rough proportionality between the impact and the permit condition. The Court ruled that this "essential nexus" and "rough proportionality" analysis applies not only to demands that a property owner turn over property, but also to requirements that the property owner pay money.

H. Land Use Restrictions – Practical Considerations

1. EPA Initiatives on Stormwater Discharge under CWA

In a January 2010 memorandum to EPA employees, EPA Administrator Lisa P. Jackson outlined seven key priorities that she envisioned would focus the work of the agency in the following year. Memorandum from Lisa P. Jackson, EPA Administrator, to All EPA Employees, *Seven Priorities for EPA's Future* (Jan. 12, 2010), *available at* http://blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future/. (One of the priorities discussed in the memorandum was "protecting America's waters." Jackson explained that "America's waterbodies are imperiled as never before" and that new challenges, like stormwater runoff, "demand both traditional and innovative strategies." *Id.*

This Section summarizes and analyzes some of the "innovative" strategies employed by the EPA under the CWA to address stormwater discharge. These innovations include: (a) proposed numeric nutrient standards for stormwater in Florida; (b) the application of federal facility stormwater standards to non-federal entities in the Chesapeake; (c) effluent guidelines for discharges from the construction and development industry; (d) proposed rulemaking contemplating the establishment of a program to deduce stormwater discharges from new development and redevelopment; and (e) notable court rulings and challenges impacting the stormwater permitting program.

a. Florida Numeric Nutrient Standard

The EPA is addressing stormwater issues in the State of Florida by proposing a series of numeric limits on the amount of nutrients, specifically phosphorous and nitrogen, allowed in Florida's lakes, rivers, streams, springs, and canals. These proposed numeric nutrient standards have sparked a heated public debate.

i. History

Florida, like most states, is currently operating a water quality enforcement system that involves interpretation of *narrative* nutrient criterion on a case-by-case basis. In 2008, the Florida Wildlife Federation filed a lawsuit in the Northern District of Florida seeking to require the EPA to promulgate numeric nutrient water quality standards (WQS) for Florida waters. *Florida Wildlife Fed'n, Inc. v. Jackson*, No. 4:08cv324-RH/WCS. In January 2009, the EPA made a determination, under § 303(c)(4)(B) of the CWA, that Florida's case-by-case narrative nutrient approach was insufficient to ensure protection of the designated uses of Florida waters. *See Florida Wildlife Fed'n, Inc. v. Jackson*, 2009 WL 5217062, at * 2 (N.D. Fla. Dec. 30, 2009). The EPA stated it would propose numeric nutrient criteria for lakes and flowing waters within twelve months and for estuarine and coastal waters within twenty-four months. In August 2009, the plaintiffs and the Administrator entered into a phased consent decree. *See id.*; 75 Fed. Reg. 4,174, 4,175 (Jan. 26, 2010). The consent decree required the Administrator to sign for publication by January 14, 2010, one year after the 2009 determination, numeric nutrient standards for Florida lakes and flowing waters. The decree further required the Administrator to adopt standards by October 15, 2010. These requirements would not apply, however, if by the same deadlines the state proposed its own numeric standards and the Administrator approved them. The decree imposed analogous deadlines one year later on January 14, 2011, and October 15, 2011, for publication and adoption of numeric nutrient standards for coastal and estuarine waters.

ii. Proposed Standards for Florida Lakes and Flowing Waters

In January 2010, the EPA published a Proposed Rule for the Water Quality Standards for the State of Florida's Lakes and Flowing Waters. 75 Fed. Reg. 4,174 (proposed Jan. 26, 2010). The rule sets numeric nutrient criteria for lakes, streams, springs and clear streams, and canals. The EPA proposed classification of lakes into three groups and set total nutrient criteria for each group. It also proposed classification of streams into four different watershed-based regions and again set total nutrient criteria for each region. With regard to springs and clear streams, the EPA proposed nutrient criterion based on experimental data and field evaluations. For canals in south Florida, the EPA proposed nutrient standards based on canals that are meeting their designated uses.

The EPA explained that the proposed rule "could indirectly affect" entities discharging nitrogen or phosphorus to lakes and flowing waters "because WQS are used in determining . . . NPDES . . . permit limits." *Id.* at 4,177. More specifically, the categories of entities most likely to be effected are industries and publicly-owned treatment works that discharge pollutants into lakes and flowing waters and the stormwater management districts in Florida.

On December 6, 2010, EPA published its "Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Final Rule.'' 75 Fed. Reg. 75761. For many years the EPA has encouraged states to adopt numeric nutrient standards. *See* State Adoption of Numeric Nutrient Standards (1998–2008), EPA-821-F-08-0007 (Dec. 2008). Their implementation in Florida could very well be the beginning of stronger enforcement across the nation.

b. Application of Federal Facility Stormwater Standards to Non-Federal Facilities in the Chesapeake

Improving water quality in the Chesapeake Bay has become a high priority for the federal government. In May 2009, President Obama issued Executive Order 13508, in which he explained that: "the Chesapeake Bay is a national treasure constituting the largest estuary in the United States and one of the largest and most biologically productive estuaries in the world." 74 Fed. Reg. 23,099 (May 15, 2009). President Obama called for federal leadership and a commitment to controlling pollution from all sources. One year later, on May 10, 2010, the EPA entered into a settlement agreement with former elected officials in the Chesapeake area, in which the EPA agreed to: (1) establish Chesapeake Bay total maximum daily load (TMDL); (2) put in place an effective implementation framework; (3) expand its review of Chesapeake Bay watershed permits; and (4) initiate rulemaking for new regulations for concentrated animal feeding operations and urban and suburban stormwater. *See* Settlement Agreement (May 10, 2010), *available at* http://www.cbf.org/Document.Doc?id=512; *see Fowler v. EPA*, No. 1:09-cv-00005-CKK (plaintiffs filed suit in the District Court for the District of Columbia in January 2009, claiming that the EPA had failed to take adequate measures to protect and restore the Chesapeake Bay).

In keeping with this trend of stringent federal control over Chesapeake water quality, the EPA proposed in a draft municipal separate storm sewer system (MS4) permit, No. DC0000221 for Washington, D.C., released in April 2010, standards for non-federal facilities nearly identical to those created for federal facilities in the region. The permit includes enforceable requirements for using green infrastructure techniques to control stormwater and performance standards to limit runoff from newly developed or redeveloped land that are nearly identical to those contained in the federal facility guidance.

Federal facilities are required to maintain or restore pre-development hydrology of a property. One way this can be done is by utilizing stormwater management practices that manage rainfall on-site and prevent the off-site discharge of the precipitation from all rainfall events less than or equal to the 95th percentile rainfall event to the Maximum Extent Technically Feasible (METF). The April 2010 proposed MS4 permit would require non-federal facilities to retain stormwater on-site equal to a 90th percentile rainfall event or to achieve retention of the predevelopment runoff volume of stormwater from a 24-hour storm for the 1-, 2-, 10- and 100-year storm events. *See* Draft Fact Sheet; NPDES-MS4-Draft Permit No. DC0000221. This is drastic change from the 2004 version of the MS4 permit for Washington, D.C., which did not contain numeric performance standards for stormwater retention. The draft fact sheet accompanying the proposed permit indicates that the EPA "might have included a capture level closer to the 95% required for federal facilities" if D.C. had more land available for new development.

The permit also focuses on the promotion of low impact development (LID) practices and green infrastructure for retrofits in new and redeveloping areas. Up until this proposed permit, LID practices have been heavily emphasized for federal facilities, but only minimally incorporated into MS4 permitting practices. This, along with the increase in stormwater retention standards, marks a trend in the EPA's growing desire to exert federal standards on non-federal entities.

If the proposed MS4 Permit is adopted, and the District adopts the new statutes and regulations required by the proposed Permit, local businesses could be facing a number of very stringent stormwater requirements as early as fall of 2011. Likewise, broader application of the federal requirements could drive up construction and compliance costs. It remains to be seen whether similar permitting requirements may be exported to other regions of the United States.

The theme of application of federal standards to non-federal entities was continued in the EPA's Guidance for Federal Land Management in the Chesapeake Bay Watershed. EPA 841-R-10-002 (May 12, 2010); *see also* 75 Fed. Reg. 91,294 (Mar. 24, 2010). This guidance, which is over 800 pages long, provides information and data on land management practices for federal agencies with land, facilities, or installation management responsibilities affecting ten or more acres within the Chesapeake Bay watershed.

During the public comment period, some commentators raised concerns that the guidance "imposed federal mandates on state and local governments to regulate industry, agriculture and other businesses, and goes beyond the Agency's authority under the CWA by making specific recommendations concerning on-farm decisions and practices." Guidance for Land Management in the Chesapeake Bay Watershed - Response to Comments (May 12, 2009), *available at* http://water.epa.gov/polwaste/nps/upload/chesbay_responsetocomments.pdf. The EPA responded by saying that the publication was merely a technical guidance document meant to provide federal leadership in the implementation of best practices and that the guidance did not create any regulatory requirements for agencies or individuals in the private sector.

On December 29, 2010, the EPA established TMDL guidelines for the Chesapeake Bay designed to reduce yearly pollution and fully restore the Chesapeake Bay area by 2025. *Clean Water Act Section 303(d): Notice for the Establishment of the Total Maximum Daily Load for the Chesapeake Bay*, 76 Fed. Reg. 3 (Jan. 5, 2011). To achieve this goal, the levels of nitrogen, phosphorous, and sediment will be limited to 185.9 million pounds, 12.5 million pounds, and 6.45 billion pounds, respectively. Levels will be benchmarked frequently to ensure compliance.

In January 2011, the American Farm Bureau Federation and Pennsylvania Farm Bureau challenged the final guidelines. The suit against the EPA argues that the rules rely on flawed computer models and that the EPA failed to properly conduct the required notice and comment procedures. *Am. Farm Bureau Fed'n v. U.S. EPA*, No. 1:11-cv-00067-SHR (M.D. Pa. filed Jan 10, 2011), *available at* http://law.psu.edu/_file/aglaw/Chesapeake_Bay/Complaint_Jan_10_2011.pdf. The plaintiffs further argue that states, rather than the EPA, have the authority under the CWA to implement standards and the EPA lacks the authority to allocate limits on levels of nitrogen, phosphorus, and sediment.

Regardless of their eventual fate, the final TMDL guidelines evidence a strong desire by the federal government to exert control over, or at least influence, non-federal entity stormwater management decisions. It remains to be seen how this desire will evolve and manifest itself in the months and years to come.

c. EPA Imposes Effluent Limitation Guidelines for Discharges from the Construction and Development Industry

In February 2010, the EPA rule establishing national non-numeric and, for the first time, numeric effluent limitation guidelines (ELGs) on stormwater discharges from construction sites went into effect. The rule generally targets real estate developers and other construction site operators imposing regulatory controls to mitigate discharges of sediments and other pollutants from construction sites. While the pre-existing federal program failed to outline national performance standards or require monitoring for construction site discharges, the current rule establishes a new regulatory floor for NPDES permit programs. Now, all NPDES permits issued by the EPA or state authorities to construction site operators must incorporate the numeric and non-numeric ELGs.

Construction site owners and operators must now implement erosion and sediment control best management practices (BMPs) and pollution prevention measures to reduce the amount of pollution in stormwater discharges. Specifically, the rule requires construction site owners and operators with NPDES permits issued after February 2010, to implement BMPs related to: (1) erosion and sedimentation controls; (2) soil stabilization controls; (3) dewatering requirements; and (4) pollution prevention measures. The rule provides guidance on the minimum requirements for these BMPs.

Unlike the non-numeric ELGs, the EPA is phasing the implementation of the numeric ELG requirement over a period of four years to allow the regulated community adequate time to prepare for compliance. All construction sites that disturb twenty acres or more of land at a time must comply with the new turbidity standards by August 2011. By February 2014, these new ELGs will apply to all sites that disturb ten acres or more. NPDES permittees are also required to implement an assortment of erosion and sediment control measures as well as pollution prevention practices to control the discharge of pollutants from construction sites.

Once effective, NPDES permittees will be required to monitor nephelometric turbidity unit (NTU) amounts to ensure compliance with the limitation. The EPA expects that, at a minimum, NPDES permittees will collect three samples per day at each discharge point while a discharge is occurring. State permitting authorities, however, may require more frequent monitoring when incorporating the requirement into state NPDES permit programs. Likewise, NPDES permittees may desire to perform more frequent monitoring to ensure more representative sampling results.

EPA set the maximum daily discharge limitation at 280 NTU. This discharge limitation represents an order of magnitude increase over the 13 NTU limitation proposed by the EPA in November 2008. The numeric effluent limitation is a daily maximum limitation. NPDES permittees may sample the turbidity of construction site discharges multiple times during the course of a day. The average of all daily measurements must not exceed the maximum daily

discharge limitation. If one or more sample measurement exceeds the limitation but the average turbidity for the day does not exceed the limitation, the NPDES permittee is deemed to be in compliance with the limitation.

In December 2009, the National Association of Homebuilders and the Utility Water Act Group challenged the rule in the Seventh Circuit. *See Nat'l Ass'n of Home Builders v. EPA*, No. 09-4113 (7th Cir. 2010). The EPA filed an unopposed motion in the Seventh Circuit seeking to vacate and remand the 280 NTU limit contained in the Rule. The EPA also sought to hold the case in abeyance for eighteen months (until February 2012), arguing that remand and abeyance were appropriate because the agency needed to address the insufficiencies through the administrative reconsideration process. The Seventh Circuit granted the remand, but refused to vacate the numeric ELGs, meaning the limitations remain enforceable. Nearly a year after finalizing the construction stormwater rule, in response to objections from industry groups, the EPA has conceded that the controversial numeric turbidity limit in the Rule (or rather the science underlying the numeric limitations) was flawed. On November 5, 2010, the EPA stayed the 280 NTU limit in response to its mistakes in interpreting the data used to establish the limit. *See Direct Final Rule Staying Numeric Limitation for the Construction and Development Point Source Category*, 75 Fed. Reg. 68,215 (Nov. 5, 2010).

Owners and operators remain obligated to incorporate non-numeric BMPs into their stormwater programs, but uncertainty regarding the numeric ELGs undermines the ability of owners and operators to anticipate the costs associated with the stormwater pollution preventative measures and monitoring obligations associated with the ELGs.

d. EPA Proposed Rulemaking Contemplates Establishing a Program to Reduce Stormwater Discharges from New Development and Redevelopment

EPA has announced its plan to initiate a national rulemaking to establish a comprehensive program to reduce stormwater discharges from new development and redevelopment and make other regulatory improvements to strengthen its stormwater program. The EPA observed that stormwater discharges from developed sites can harm water quality through increases in stormwater volume and pollutant loading into nearby waterways. As sites are developed, stormwater volume increases due to the increased developed areas where water cannot infiltrate the surface. The resulting stormwater flows across roads, parking lots, rooftops, and other impervious surfaces transport pollutants that ultimately are discharged into waterways.

In its December 2009 Federal Register notice, the EPA cited commentators that have suggested that stormwater permits leave a great deal of discretion to the regulated community to set their own standards and to self-monitor. As a result, the EPA observed that there is inconsistency across the nation in the NPDES program and in stormwater management programs required by NPDES permits with respect to stormwater discharges from MS4s caused by stormwater discharges from developed sites. 74 Fed. Reg. 247 (Dec. 28, 2009).

To help make permitting more consistent, the EPA is considering ways to strengthen the MS4 permit regulations, including establishing specific requirements for stormwater discharges from, at a minimum, new development and redevelopment; expanding the area defined as MS4s

to include rapidly developing areas; and devising a single set of consistent regulations for all MS4s. The EPA intends to propose a rule to strengthen the national stormwater program by June 10, 2013, and complete a final action by December 10, 2014.

e. Notable Court Rulings and Challenges Impacting the Stormwater Permitting Program

Recent rulings from the Ninth Circuit may expand the stormwater permitting program. In 2010, the Northwest Environmental Defense Center (NEDC) sued Oregon forestry officials and various timber companies for failing to obtain permits for stormwater runoff. The questioned runoff flowed from logging roads into a system of ditches, culverts, and channels ultimately discharging into nearby streams and rivers. The district court found that the Silvicultural Rule exempted the discharges from NPDES permitting requirements.

The Ninth Circuit, however, read the Silvicultural Rule to exempt from permitting requirements natural runoff from silviculture activities unless the runoff is channeled and controlled in some systematic way. The defendants constructed the logging roads with a system of ditches, culverts, and channels to collect and convey stormwater runoff. The stormwater flows from the roads and the collection system deposited large amounts of sediment into nearby streams and rivers. NEDC argued that this runoff represented a discharge from a point source and required a NPDES permit for stormwater discharges. The defendants argued that the Silvicultural Rule exempted their activities from the definition of a point source discharge and therefore did not require a permit. The Ninth Circuit disagreed and held the Silvicultural Rule did not exempt the runoff in question from the definition of a point source discharge. *See Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1085 (9th Cir. 2011).

The defendants also argued the 1987 Amendments to the CWA represented Congressional approval of the Silvicultural Rule and exempted their activities from permitting requirements. While it acknowledged that Congressional reenactment of a statute can demonstrate Congressional approval of a longstanding agency interpretation, the Ninth Circuit did not interpret the lack of action by Congress in relation to the Silvicultural Rule as evidence of Congressional acquiescence. *Id.* at 1081.

The Ninth Circuit recognized that Congress exempted many stormwater discharges from NPDES permitting in the 1987 Amendments, but Congress did not exempt discharges "associated with industrial activities." Based on the applicable regulations, the Ninth Circuit characterized logging as an industrial activity. The Ninth Circuit concluded the stormwater runoff required an NPDES permit. The defendants appealed to the Supreme Court, and certiorari was granted in June 2012. *See Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 22 (U.S. 2012); *Georgia-Pacific W., Inc. v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 23 (U.S. 2012). In December 2011, the Supreme Court requested the United States submit a brief expressing its views on whether or not stormwater runoff from logging activities required a NPDES permit.

In another case, environmental groups filed an action in a California district court against Pacific Gas and Electric Company (PG&E) and Pacific Bell Telephone Company (Pacific Bell) alleging wooden utility and telephone poles discharge toxic chemicals without an NPDES permit violating the CWA. *See Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 803 F. Supp. 2d

1056 (N.D. Cal. 2011). The poles are pressure-treated with a chemical mixture to aid in preservation, and plaintiffs argued that rain caused the toxic chemicals to leak onto whatever surface the pole contacts creating a chemical mixture oozing to the surface contaminating various water bodies through rain runoff. *Id.* at 1058.

Relying on the Ninth Circuit's recent decision in *Northwest Environmental Defense Center v. Brown*, the plaintiffs asserted that the poles carried the chemical runoff to the San Francisco Bay, its tributaries, and wetlands. The district court distinguished this case from *Brown*, finding that the alleged chemical runoff from the poles make their way to jurisdictional waters by natural means, rather than by a specifically designed system. The court found this distinction critical, explaining that the stormwater was not collected or channeled and discharged, but rather ran off and dissipated in a natural and unimpeded manner. This type of discharge was not a discharge from a point source. *Id.* at 1062. The plaintiffs appealed this ruling to the Ninth Circuit.

In addition, another environmental group sued PG&E, arguing that the utility needed to obtain stormwater permits for ancillary "support facilities" it operated. *See Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 2011 WL 445091 (N.D. Cal. Feb. 4, 2011). The "support facilities" were alleged to produce industrial stormwater discharges sufficient to require an NPDES permit although the utility itself was classified in a SIC code normally considered exempt from the CWA. *See id.* at *1. The plaintiffs argued that otherwise exempt entities must obtain a stormwater permit if they operate ancillary facilities generating industrial-type stormwater discharges. *Id.*

The court observed the SIC manual was not clear whether geographically separate facilities providing support services to other establishments within the business enterprise should be classified according to the primary activities of those facilities themselves or the business enterprise as a whole. The court concluded that PG&E was required to obtain NPDES permits for the ancillary facilities as nothing exempted operations at a specific site merely because the site was owned and operated by a business entity engaged in a large business typically exempted from permitting requirements. *Id.* at *3.

EPA stormwater initiatives recently have sought to use the regulation of stormwater flow as a surrogate for pollutants when setting TMDLs for impaired waters. In two recent Missouri TMDLs, the EPA sought to regulate overall stormwater flow as a surrogate for "unknown pollutants." The cities of Columbia and Springfield filed lawsuits in response to the TMDLs, arguing the agency's failure to identify a specific pollutant while setting TMDLs was arbitrary, capricious, and an abuse of discretion under the APA.

In addition, Fairfax County, the State of Virginia, and the Virginia Department of Transportation ("Virginia DOT") sued the EPA for issuing a TMDL that would require the county to control the quantity or water flow in Accotink Creek. The U.S. District Court for the Eastern District of Virginia ruled on January 3, 2013, that the EPA has no authority to establish TMDLs for non-pollutants, even though regulation of a non-pollutant surrogate may be more effective than directly regulating the actual pollutant. *Virginia Dep't of Transp. v. E.P.A.*, 2013 WL 53741 (E.D. Va. Jan. 3, 2013).

In this case, the EPA sought to limit the amount of sediment flowing into Accotink Creek, a tributary of the Potomac River in Fairfax County, Virginia. Virginia failed to set TMDLs, and under a consent decree resolving litigation brought by third parties, the EPA agreed that it would set the TMDLs. *See Am. Canoe Ass'n, Inc. v. E.P.A.*, 30 F. Supp. 2d 908 (E.D. Va. 1998); Consent Decree, Am. Canoe Ass'n, No. 98-979-A, at 11 and Attachment A (E.D. Va. June 11, 1999) (expressing the EPA's expectation that Virginia would establish TMDLs by May 1, 2010, and in the event Virginia failed to do so, the EPA would establish TMDLs by May 1, 2011). The EPA believed high sediment loads were impairing the creek's benthic communities. However, the EPA opted to establish a TMDL for the stormwater discharges that carry sediment into the creek, rather than the sediment load itself. Sediment qualifies as a pollutant under the CWA's expansive definition for "pollutant," but stormwater does not. *See* 33 U.S.C. § 1362(6).

Fairfax County and the Virginia DOT sued the EPA to prevent its enforcement of the new stormwater TMDL. The Virginia DOT complained that in order to meet its newly allocated stormwater discharge limits, it would require a 50.5 percent reduction in the one-year, 24-hour flow rate over about 4,100 acres in the Accotink Creek watershed. *Compl. Va. Dep't of Transp. et al. v. E.P.A.*, No. 1:12-CV-775, at ¶¶ 25, 30 (E.D. Va. July 12, 2012). Virginia DOT claimed that doing so would cost about $70 million and would force Virginia DOT to regulate stormwater runoff that enters Virginia DOT property from adjacent properties owned and controlled by others. Fairfax County made similar claims, suggesting that it would cost an additional $110 to $215 million to comply with the TMDL's required 47.2 percent reduction to the one-year, 24-hour flow rate over almost 18,000 acres in the watershed. *Id.* at ¶¶ 45, 49.

The district court ruled that the EPA exceeded its statutory authority when it attempted to regulate a pollutant (sediment) using a surrogate non-pollutant (stormwater). The district court followed a straightforward *Chevron* analysis in deciding whether to defer to EPA's interpretation. *See Chevron, U.S.A. v. NRDC, Inc.*, 467 U.S. 837 (1984). Under Chevron Step 1, the court found that the CWA unambiguously grants authority for states and the EPA to establish TMDLs, but only for pollutants; neither states nor the EPA have any authority to set TMDLs for non-pollutants.

The EPA argued that its use of stormwater as a surrogate for sediment was more effective than regulating sediment directly. The district court rejected this argument as an "attempt by EPA to take liberties with the way Congress intended it to express its TMDLs." *Virginia Dep't of Transp.*, 2013 WL 53741, at *3. The EPA may not attempt to express a TMDL in terms other than those authorized by the statute. The district court compared this case to an earlier attempt by the EPA to express TMDLs not as daily limits, but as annual or seasonal limits, which the D.C. Circuit Court struck down as an expression outside the authorized terms dictated by Congress. *See Friends of the Earth, Inc. v. E.P.A.*, 446 F.3d 140 (D.C. Cir. 2006).

This ruling confirms that the EPA does not have free rein when establishing TMDLs: the EPA may not use TMDLs to reach beyond pollutants and regulate non-pollutants. The district court's opinion states that the EPA has approved 3,700 TMDLs for sediment across the United States but has only attempted to regulate sediment via flow in four instances, with all four being challenged in court. *Virginia Dep't of Transp.*, 2013 WL 53741, at *4. The EPA has authority, of course, to regulate sediment directly, but it may not attempt to do so using a surrogate when that surrogate is not itself a pollutant.

2. Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions and Use of Categorical Exclusions

The NEPA review process, through the development of either an EA or a more detailed EIS, is often a critical element dictating the timing and completion of federal permitting and authorization decisions. On February 18, 2010, the Council on Environmental Quality (CEQ) released draft guidance (i) on when and how federal agencies should consider the effects of greenhouse gas (GHG) emissions and climate change under NEPA, 42 U.S.C. § 4332; and (ii) that clarifies how agencies adopt and use categorical exclusions. 75 Fed. Reg. 8,046 (Feb. 23, 2010). According to the CEQ, these items will "modernize, reinvigorate, and ease the use and increase the transparency of implementation" of NEPA. 75 Fed. Reg. 8,046.

a. Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions

The draft NEPA guidance on consideration of the effects of climate change and greenhouse gas emissions "affirms the requirements of [NEPA] and their applicability to GHGs and climate change impacts." *Memorandum for Heads of Federal Departments and Agencies: Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions* (Feb. 18, 2010), *available at* http://ceq.hss.doe.gov/nepa/regs/Consideration_of_Effects_of_GHG_Draft_NEPA_Guidance_FINAL_02182010.pdf. If finalized without change, the CEQ guidance would advise federal agencies to consider both: "(1) the GHG emissions effects of a proposed action and alternative actions; and (2) the relationship of climate change effects to a proposed action or alternatives, including the relationship to proposal design, environmental impacts, mitigation and adaptation measures."

The CEQ guidance describes a framework for identifying instances where potential GHG emissions or climate change impacts rise to a level of significance requiring "meaningful" consideration in the NEPA process. The guidance proposes several key elements for the examination of GHG emissions and climate change impacts. First, the guidance directs that the initial NEPA scoping phase should consider the extent of GHG emissions from the proposed action over the life of the project and the likely climate change impacts within the foreseeable future. For GHG emissions, this would include projecting direct GHG emissions from the proposed federal action on an annual basis.

Where a proposed action is anticipated to cause direct emissions of 25,000 metric tons or more annually of CO_2-equivalent GHG emissions, this indicates that a "qualitative and quantitative assessment may be meaningful to decision makers and the public." If direct emissions fall below the 25,000 ton threshold, the guidance encourages agencies to consider whether to assess the long-term consequences of those emissions. The depth of analysis required, however, is unclear. The draft guidance is also unclear on how to account for indirect GHG emissions, noting chiefly that an agency's analysis "must be bounded by limits of feasibility in evaluating upstream and downstream effects of Federal agency actions."

The draft guidance emphasizes that the 25,000 metric ton per year level is not intended to establish a threshold for when agency action is deemed to have "significant effects" under

NEPA. An agency should still make its "significance" determination based on how an action is categorized in the agency's NEPA procedures and on the action's environmental impact. Additionally, CEQ seeks input from the public on whether it should provide guidance on when GHG emissions are "significant" for NEPA purposes and at what level GHG emissions should be considered to have "significant" cumulative effects. The draft guidance does recognize that in many cases, the GHG emissions of a proposed action may be so small as to be negligible, and it reminds federal agencies that the development of categorical exclusions may be appropriate for those cases.

Once an agency has decided to assess GHG emissions from a proposed action, CEQ proposes that the agency quantify both direct and indirect emissions on an annual and cumulative basis. With emissions quantified, agencies would then decide the extent to which they will analyze the environmental effects of those emissions. This decision, according to the CEQ, should be based on the "rule of reason." When assessing effects from direct emissions, the guidance directs that agencies should examine the "consequences of actions over which they have control or authority" and account for all phases and elements of the action over its expected life. Similarly, the guidance suggests that for actions meeting or exceeding the 25,000 ton annual threshold, agencies should consider mitigation measures and reasonable alternatives to reduce these emissions (and other energy consumption), as well as qualitatively discuss the link between the emissions and potential climate change impacts.

The link between a proposed action and its related climate change impacts can fall into at least two broad categories recognized in the draft guidance: (1) climate change can affect the proposed action; and (2) climate change can impact the resources, ecosystem, or human communities that are also impacted by the proposed action, including resulting in cumulative impacts that may be more damaging than impacts from the proposed action alone. The goal of identifying these links is to reduce an action's vulnerabilities to these impacts, adapt to changes in the environment, and mitigate the impacts of agency actions.

In determining whether any climate change impacts warrant analysis, the guidance directs the agency to evaluate the sensitivity, location, and timeframe of a proposed action. In assessing the effects of climate change on a proposed action, the draft guidance directs agencies to first establish a baseline environmental condition for the analysis that consists of the reasonably foreseeable future condition of the environment (including conditions resulting from climate change) if an agency took "no action" on the proposed action. The agency then would determine how the proposed action and any reasonable alternatives would result in deviations from the baseline condition. Agencies should limit this determination to the aspects of the environment affected by the proposed action and the significance of climate change for those affected aspects within the project's timeframe.

Finally, the draft guidance acknowledges that the best scientific information available on reasonably foreseeable climate change impacts is emerging and rapidly evolving. As a result, agencies would not need to conduct excessive research or analysis of projected climate change impacts, or analyze wholly speculative effects of climate change on the proposed action. Instead, agencies could simply summarize and incorporate by reference the relevant scientific literature.

The draft guidance currently exempts federal land and resource management actions from this GHG protocol, including changes in land use or land management strategies, but seeks comment on the appropriate means of assessing the GHG emissions affected by federal land and resource management activities.

b. Draft Guidance for Categorical Exclusions

Categorical exclusions (CEs) permit recognized types of actions that do not typically result in individual or cumulative significant environmental effects or impacts to go forward on an expedited basis. 40 C.F.R. § 1508.4. Agencies have relied on categorical exclusions since the 1970s as a method to satisfy their NEPA obligations.

Citing the wide use of categorical exclusions and prior recommendations by the CEQ NEPA Task Force, the CEQ released a draft memorandum in February 2010 that proposed guidance on "establishing, applying, and revising categorical exclusions" in accordance with NEPA. *Memorandum for Heads of Federal Departments and Agencies: Establishing and Applying Categorical Exclusions Under the National Environmental Policy Act* (Feb. 18, 2010) (Draft Guidance for CEs).

The Draft Guidance for CEs focused on the administrative process governing CEs generally, and comprehensively addresses how agencies should: (i) establish CEs; (ii) use public involvement and documentation to support a proposed CE; (iii) apply an established CE, and determine when to prepare documentation and involve the public; and (iv) periodically review CEs's continued propriety and usefulness. The Draft Guidance for CE applied only to CEs established by federal agencies pursuant to 40 C.F.R. § 1507.3, and does not address CEs established by Congress.

The Draft Guidance for CEs set forth a summary of steps to establish new CEs, explaining that the purpose for establishing new CEs is the "eliminat[ion of] unnecessary paperwork and effort reviewing the environmental effects of categories of actions that, absent extraordinary circumstances, do not have significant environmental effects."

The guidance reminded agency officials that they must "consult with CEQ when developing" CEs and that an agency must obtain a NEPA conformity determination from CEQ. Further, the guidance stressed that public involvement in establishing a CE is a "key aspect of NEPA," and "involvement beyond publication in the *Federal Register* should be considered," for example, by "post[ing] updates on [an agency's] official website whenever they issue *Federal Register* notices for new or revised categorical exclusions." Finally, the guidance announced that CEQ would conduct periodic reviews of CEs, beginning with "agencies currently reassessing or experiencing difficulties with implementing their categorical exclusions, as well as agencies facing litigation challenging their application of categorical exclusions."

CEQ received and reviewed a broad range of comments from private citizens, corporations, environmental organizations, and state agencies. In November 2010, the CEQ released its final guidance for establishing, applying, and revising categorical exclusions under NEPA. *Final Guidance for Federal Departments and Agencies on Establishing, Applying, and*

Revising Categorical Exclusions under the National Environmental Policy Act (Nov. 23, 2010) (Final Guidance for CEs).

The Final Guidance for CEs recommends best practices for the appropriate use of CEs and calls upon federal agencies to review their existing CE policies at least every seven years to avoid using outdated NEPA procedures. The Final Guidance for CEs further recommends that federal agencies should remain alert to new conditions and information that would cause an agency to reconsider the CE and make more effective use of information technology to inform the public about new or revised CEs and their underlying justifications. The guidance suggests that federal agencies should consider further public documentation and disclosure where applying established CEs would implicate extraordinary circumstances (e.g., when an agency uses a protected resource like a historic property or threatened and endangered species).

3. Floodplain Management Limitations on Land-Use

In 1977, President Carter sought to enhance the role of the federal government to regulate floodplain development because of concerns about unwise land use practices. Citing increasing losses from flood events and adverse alteration of floodplains, President Carter issued Executive Order 11988 on May 24, 1977, to encourage the active management of floodplains by the federal government to minimize the danger to human and nonhuman communities within floodplains and reduce the risk of flood damage to properties benefitting from federal assistance.

Executive orders provide presidents with a mechanism for setting policy while avoiding public debate and opposition. Although executive orders do not require congressional approval, federal courts consider such orders to be binding on federal agencies.

Executive Order 11988 directed federal agencies to assume a leadership role in the management of floodplains. In particular, it required federal agencies to avoid directly or indirectly supporting the occupancy and modification of floodplains whenever a practicable alternative could be identified. It outlined an eight-step process for federal agencies to utilize in their decision-making on projects with the potential to impact floodplains.

In the thirty years since Executive Order 11988, disaster-management experts have criticized the federal government for its failure to further develop a coherent policy governing floodplain management. The substantial and repetitive losses inflicted by flooding from major natural disasters, including the Midwest floods of 1993 and Hurricane Katrina in 2005, reinvigorated demands for the federal government to reform the federal management of floodplains.

a. Draft Executive Order from the Obama Administration Suggests Tougher Federal Approach on Floodplain Management

In 2009, the Obama Administration released a draft executive order that would replace Executive Order 11988. In its current form, the draft order would impose stricter regulatory requirements on the development of projects within floodplains and govern a wide-range of federal actions beyond the simple construction or improvement of federal facilities.

The draft order applies to "covered actions" including where federal agencies: (a) acquire or otherwise manage an interest in lands, structures, and facilities; (b) construct or substantially improve federal facilities; (c) finance or otherwise assist in the construction or improvement of facilities; (d) develop or evaluate water resource and land use plans; or (e) regulate, permit, or license water resource and land use activities. Facilities are defined to include "any man-made or man-placed items." Thus, a wide range of federal activities, including permits issued by the Corps, agricultural subsidies, and loan guarantees could be subject to the draft order.

The draft order directs federal agencies to consider floodplain management when developing and evaluating water or land use plans. Agencies must provide guidance to applicants regarding the impacts of proposed projects in a floodplain area when applicants seek federal licenses, permits, loans, or grants.

The draft order articulates a more formal process for the analysis of alternatives than President Carter's executive order did. If an agency determines that a covered action is in a floodplain or adversely impacts a floodplain, then the agency must conduct a full alternatives analysis, evaluating alternative actions (including a no action alternative) and sites. If, after evaluation of practicable alternatives, the federal agency decides to move forward with a project impacting a floodplain, the draft order outlines detailed procedural steps intended to identify and mitigate project effects.

The draft order also strengthens requirements for federal agencies to provide the public opportunities to comment on proposed federal actions impacting a floodplain. Specifically, a federal agency must first seek public comments on the proposed federal action when the agency decides, upon completion of its alternative analysis, to move forward with an action that adversely impacts a floodplain. After the agency completes its consideration of the initial public comments and modifies the proposed action to mitigate its effects on the floodplain, the agency must notify the public of its formal finding and allow an adequate period of time for the public to provide comments on the formal finding. At a minimum, this two-step solicitation for public comments can be expected to extend the time required to begin a project that requires a § 404 permit.

Under the draft order, an agency must provide the public with information regarding the project as well as the evaluation process, including descriptions of the project, its adverse effects on the floodplain, and all alternatives considered. This information must be made available to the affected public as well as federal, state, tribal, and local agencies with legal jurisdiction or "special expertise" in environmental and floodplain management matters. The draft order anticipates that its public involvement provisions may occur in conjunction with an agency's public comment procedures under NEPA.

Additionally, the draft order requires agencies to identify and mitigate the impacts of a proposed action. To the extent practicable, agencies are directed to avoid placing fill or other obstructions in a floodplain, floodway or coastal high hazard area. Agencies must ensure that a proposed action addresses any residual risks with levees and other flood risk reduction structures.

Furthermore, the draft order prohibits agencies from supporting "critical" actions in 500-year floodplains unless no practicable alternative outside the proposed project area exists. If an agency determines there is no practicable alternative, actions must be taken to protect the facility and minimize flood damages. "Critical" actions are those "for which even a slight chance of flooding is too great." According to the draft order, these actions include actions or facilities considered critical to the health and safety of the public and environment including hospitals, nursing homes, police and fire department facilities, data storage centers, power generation and other utility provider facilities, and facilities that produce, store or use toxic pollutants. Executive Order 11988 did not impose a similar restriction.

The draft order signals a shift towards a tougher approach to floodplain management by the federal government. Such a shift could significantly impact federal agencies and parties receiving federal support or requiring a federal permit for a project located in or affecting a floodplain. It is notable, however, that the adoption of a final Executive Order has apparently been substantially delayed.