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CLEAN WATER ACT § 404: HOW SO FEW WORDS RE WETLANDS HAVE SO GREATLY IMPALED PRIVATE PROPERTY RIGHTS

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CLEAN WATER ACT § 404:
HOW SO FEW WORDS RE WETLANDS HAVE
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I. The Legislation as Influenced by International Law

A. 1956 Amendments to the Federal Pollution Control Act's[1] International Focus on Transboundary Water Pollution and Interstate Compacts

1. § 3, entitled "Interstate Cooperation and Uniform Laws" –
   a. § 3(a) Congress encouraged States to enter into compacts "for the prevention and control of water pollution.
   b. § 3(b) Congress consented to States negotiating and entering into "agreements or compacts, not in conflict with any law or treaty of the United States, for (1) cooperative effort and mutual assistance for the prevention and control of water pollution and the enforcement of their respective laws relating thereto…", subject to the approval of Congress.
   c. The 1956 Act followed the 1955 execution of the Great Lakes Basin Compact by the eight Great Lakes States.[2]
      i. Congress did not grant its consent to the Compact via enactment of federal law until 1968, with reservations.[3]
      ii. The Compact created an interstate agency that continues in operation today known as the Great Lakes Commission consisting of representatives from each of the Great Lakes States, the recommendations of which remain legally non-binding.[4]

B. 1972 Federal Water Pollution Control Act's[5] International Focus on Watersheds Per the 1972 Canada-US Water Quality Agreement

1. § 404, entitled, "Permits for Dredged or Fill Material" -
   a. § 404 is limited to one paragraph, but there is NO mention of "wetlands" in this provision, or in the entire statute.[6]
2. § 108, entitled, "Pollution Control in Great Lakes" –
   a. Authorizes the EPA Administrator to seek cooperation on developing projects with, and to enter into agreements with State and local public agencies and political subdivisions, to secure protection of the Great Lakes watershed.[7]

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[1] *See Water Pollution Control Act Amendments of 1956*, P.L. 660, 84th Cong. (July 9, 1956), https://www.govinfo.gov/content/pkg/STATUTE-70/pdf/STATUTE-70-Pg498.pdf.

[2] *See* Great Lakes Commission, *Great Lakes Basin Compact* (1955), https://www.glc.org/wp-content/uploads/GLC-GreatLakes-Basin-Compact-2019.pdf.

[3] *See Great Lakes Basin Compact*, P.L. 90-419, 90th Cong. (July 24, 1968), https://www.govinfo.gov/content/pkg/STATUTE-82/pdf/STATUTE-82-Pg414.pdf ("Granting the consent of Congress to a Great Lakes Basin Compact…").

[4] *See* Lawrence A. Kogan, *The Europeanization of the Great Lakes States' Wetland Laws and Regulations (At the Expense of Americans' Constitutionally Protected Private Property Rights)*, 2019 Mich. St. L. Rev. 687, 725 (2019), https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1245&context=lr.

[5] *See* Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816 et seq., 92nd Cong. (Oct. 18, 1972), at § 404(a), at: https://www.govinfo.gov/content/pkg/STATUTE-86/pdf/STATUTE-86-Pg816.pdf.

[6] P.L. 92-500, 86 Stat. at 884.

[7] Congress added Section 108 – "Pollution Control in Great Lakes," authorizing the new EPA Administrator to enter into agreements with any State, political subdivision, interstate agency, or other public agency "to demonstrate new

b. Canada-U.S. Great Lakes Water Quality Agreement ("GLWQA") (executed on April (April 15, 1972)[8]
   i. The GLWQA is an executive agreement (not a treaty),[9] implementing Article IV of the Boundary Waters Treaty of 1909, *infra*.

3. CWA § 310, entitled, "International Pollution Abatement" –
   a. Directs the EPA Administrator, if he/she "has reason to believe," upon receipt of reports, studies or surveys from an international agency, "that pollution is occurring which endangers the health or welfare of persons in a foreign country," and upon receipt of a request from the U.S. Secretary of State "to abate such pollution," he/she must "give formal notification thereof to the State water pollution control agency of the State or States in which such discharge or discharges originate and to the appropriate interstate agency, if any."
   b. "Nothing in this subsection shall be construed to modify, amend, repeal, or otherwise affect the provisions of the 1909 Boundary Waters Treaty between Canada and the United States or the Water Utilization Treaty of 1944 between Mexico and the United States (59 Stat. 1219), relative to the control and abatement of pollution in waters covered by those treaties."
      i. 1909 Boundary Waters Treaty between Canada and the United States (April 1, 1910)[10]
         I. Article IV – "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."
         II. Covers water quantity and water quality issues in shared waterways and related watersheds along the entire Canada–U.S. border.[11]

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methods and techniques and to develop preliminary plans for the elimination or control of pollution, within all or any part of the watersheds of the Great Lakes." (emphasis added). *See also* P.L. 92-500, 86 Stat. at 828, CWA § 107 focusing on the protection of the watersheds of the Appalachian Region from the toxic pollution caused by mining activities.

[8] *See Canada and U.S. Great Lakes Water Quality Agreement: Overview*, GOV'T CANADA, https://www.canada.ca/en/environment-climate-change/services/great-lakes-protection/canada-united-states-water-quality-agreement/overview.htm.

[9] *See* U.S. Department of State, 11 FAM, EXERCISE OF THE INTERNATIONAL AGREEMENT POWER, CONST. REQUIREMENTS 723.2 (2006), https://fam.state.gov/FAM/11FAM/11FAM0720.html (explaining the distinction between treaties and international agreements other than treaties (i.e., executive agreements).

[10] *See* Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada, U.K.–U.S., Jan. 11, 1909, 36 Stat. 2448, https://www.loc.gov/law/help/us-treaties/bevans/b-gb-ust000012-0319.pdf.

[11] *See* Lawrence A. Kogan, *The Europeanization of the Great Lakes States' Wetland Laws and Regulations (At the Expense of Americans' Constitutionally Protected Private Property Rights)*, 2019 Mich. St. L. Rev., *supra* at 743.

ii. Water Utilization Treaty of 1944 between Mexico and the United States[12]
   I. Ratified by the U.S. Senate on April 18, 1945.
   II. Ratified by the President on November 1, 1945.
   III. Article 3, which refers to the preferred order of joint uses which Mexico and the U.S. can make of international waters, states that, "All of the foregoing uses shall be subject to any *sanitary* measures or works which may be mutually agreed upon by the two Governments, which hereby agree to give preferential attention to the solution of all border *sanitation* problems."

C. Clean Water Act Amendments of 1977[13] Employ the Term "Wetlands" For State §404(g) Assumption Programs
   1. Introduces the term "Wetland" in only one provision, without defining it. CWA § 404(g), expressing Congress' intent for the States to assume the administration of the CWA § 404(a) dredge and fill permitting program.

D. Water Quality Act of 1987 (Clean Water Act Amendments of 1987)[14]
   1. Adds new CWA § 118, entitled, "Great Lakes," "*to achieve the goals embodied in the Great Lakes Water Quality Agreement of 1978*[15] through improved organization and definition of mission on the party of the [Environmental Protection] Agency, funding of State grants for pollution control of the Great Lakes area, and improved accountability for implementation of such agreement."
   2. Adds new CWA § 319, entitled, Nonpoint Source Management Programs," which *inter alia* requires State Governors to submit to the EPA Administrator reports identifying nonpoint sources of pollution, and describing the process, including intergovernmental coordination, "to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source," and "identifies and describes

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[12] *See* Treaty Between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande (Feb. 3, 1944) and Protocol (Nov. 14, 1944), (Treaty Series 994, 59 Stat. 1219), https://www.ibwc.gov/Files/1944Treaty.pdf and https://www.loc.gov/law/help/us-treaties/bevans/b-mx-ust000009-1166.pdf.

[13] *See* Clean Water Act 1977 Amendments – P.L. 95-217, 91 Stat. 1566 et seq., 95th Cong. (Dec. 27, 1977), at § 404(m), at: https://www.govinfo.gov/content/pkg/STATUTE-91/pdf/STATUTE-91-Pg1566.pdf;.

[14] *See Water Quality Act of 1987*, P.L. 100-4, 101 Stat. 7, 11, 100th Cong. (Feb. 4, 1987), Sec. 104 "Great Lakes," adding new CWA Section 118, at 118(a)(1)(B), https://www.govinfo.gov/content/pkg/STATUTE-101/pdf/STATUTE-101-Pg7.pdf#page=5.

[15] *See* Canada-United States Collaboration for Great Lakes Water Quality, *About the Great Lakes Water Quality Agreement*, https://binational.net/glwqa-aqegl/ ("In 1978, the GLWQA was revised to reflect a broadened goal 'to restore and maintain the chemical, physical and biological integrity of the waters of the Great Lakes Basin Ecosystem.' The two significant shifts of the 1978 GLWQA were the introduction of the 'ecosystem approach'- the notion of taking the whole ecosystem into account (and not just certain parts) – and the call for 'virtual elimination' of *toxic pollution*. (emphasis added)."). *See also* International Joint Commission, *A Guide to the Great Lakes Water Quality Agreement: Background for the 2006 Governmental Review* (2006), at 1–2, https://legacyfiles.ijc.org/publications/ID1625.pdf.

State and local programs for controlling pollution added from nonpoint sources to, and improving the quality of, each such portion of the navigable waters…" *See* CWA § 319(a)(1)(C)-(D).

a. "A State shall, to the maximum extent practicable, develop and implement a management program under this subsection on a *watershed-by-watershed basis* with such State." CWA § 319(b)(4).

E. The Great Lakes Critical Programs Act of 1990[16] Implements 1987 GLWQA

1. Added new CWA § 118(c)(2), directing the EPA Administrator to public in the Federal Register for public notice and comment proposed water quality guidance for the Great Lakes System.
   a. The guidance "shall conform with the objectives and provisions of the Great Lakes Water Quality Agreement," and with the restrictions of the CWA, and "shall specify numerical limits on pollutants in ambient Great Lakes waters to protect human health, aquatic life, and wildlife," and "shall provide guidance to the Great Lakes States on minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System."
2. Added new CWA § 118(c)(3) directing the EPA Administrator, for each area of concern for which the U.S. has agreed to draft a Remedial Action Plan, to ensure that the Great Lakes State in which such area of concern is located, submits a Remedial Action plan to the Great Lakes Program Office and to the International Joint Commission.
3. Added new CWA § 118(c)(4) directing the EPA Administrator to publish in the Federal Register for public notice and comment proposed Lakewide Management Plan for Lake Michigan.
4. Amended CWA § 118(a)(3) by adding new clauses (F)-(J) inter alia defining "Area of Concern," "Great Lakes States," "Great Lakes Water Quality Agreement," "Lakewide Management Plan" and "Remedial Action Plan."[17]
   a. Clause (H) stated: – "'Great Lakes Water Quality Agreement' means the bilateral agreement, between the United States and Canada which was signed in 1978 and amended by the Protocol of 1987."[18]

F. The Great Lakes Water Quality Agreement Protocol of 2012[19]

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[16] *See The Great Lakes Critical Programs Act of 1990*, P.L. 101-596, 104 Stat. 3000, 101st Cong. (Nov. 16, 1990), https://www.govinfo.gov/content/pkg/STATUTE-104/pdf/STATUTE-104-Pg3000.pdf#page=1 (containing CWA amendments implementing the provisions of the 1987 GLWQA Protocol, *infra*).

[17] *See* Lawrence A. Kogan, *The Europeanization of the Great Lakes States' Wetland Laws and Regulations (At the Expense of Americans' Constitutionally Protected Private Property Rights)*, 2019 Mich. St. L. Rev., *supra* at 746-750, 826-828.

[18] *See* United States Environmental Protection Agency, *United States and Canada Sign Amendments to Great Lakes Water Quality Agreement*, Press Release (Nov. 18, 1987), https://archive.epa.gov/epa/aboutepa/united-states-and-canada-sign-amendments-great-lakes-water-quality-agreement.html.

[19] *See* Protocol Amending the Agreement Between Canada and the United States of America on Great Lakes Water Quality, 1978, as Amended on October 16, 1983, and on November 18, 1987 (Sept. 7, 2012), https://ijc.org/sites/default/files/2018-07/GLWQA_2012.pdf. *See also* International Joint Commission, *A Guide to the Great Lakes Water Quality Agreement: Background for the 2006 Governmental Review* (2006), *supra* at 7 ("The

1. EPA issued a press release announcing the execution of the 2012 Protocol.[20]
2. EPA dedicated a series of agency website pages to the GLWQA[21]

II. CWA § 404(a) Permit Program Nonmention of Wetlands Triggered Congressional Debate and Abdication, Agency Infighting and Overbroad Regulations, Judicial Deference,[22] and Creative Legislative Interpretation/Legislating From the Bench[23]

A. Relevant CWA Statutory & Regulatory Provisions and Case Law –

1. CWA § 404(a) Permit Obligation: CWA § 301(a) – 33 U.S.C. § 1311(a) – prohibits discharge of pollutants into navigable waters without a CWA § 404(a) permit.
2. Exemptions From CWA § 404(a) Permit Obligation:
   a. CWA § 404(f)(1) – 33 U.S.C. § 1311(f)(1) – "*Except as provided in (f)(2)* […] the discharge of dredged or fill material […] is not prohibited by or otherwise subject to regulation under this section (404(a)) or section 301(a)…"
      i. "from 'normal farming,' silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." – CWA § 404(f)(1)(A) [*no mention of pasturing livestock or haying*].
         I. *United States v. Brace*, 41 F.3d 117 (3d Cir. 1994) –
            A. "The district court held that Brace's activities on the thirty-acre wetland site were exempt

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Protocol added everal new programs and initiatives through comprehensive new annexes. For example, a new annex identified specific Areas of Concern (AOCs), or the most seriously polluted areas in the basin, and procedures for cleanup through the development and implementation of Remedial Action Plans (RAPs). This annex also prescribed principles and procedures to address critical pollutants in the open waters of the lakes by developing and implementing Lakewide Management Plans.").

[20] *See* United States Environmental Protection Agency, *United States and Canada Sign Amended Great Lakes Water Quality Agreement – Agreement Will Protect the Health of the Largest Freshwater System in the World*, Press Release (Sept. 7, 2012), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/9e6415ec5260e5c885257a7200669766.html.

[21] *See* United States Environmental Protection Agency, *Great Lakes Water Quality Agreement (GLWQA)*, https://www.epa.gov/glwqa.

[22] *See* Lawrence A. Kogan, *Harmonizing 'Converted Wetland' Under the Clean Water Act and Food Security Act Would Reaffirm Congress' Intent To Limit EPA And Army Corps 404 Jurisdiction*, 12 Kentucky Journal of Equine, Agricultural and Natural Resources Law (2019-2020), (forthcoming), SSRN version at 2-31 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3361982.

[23] *See* Catherine Cook, *Legislating from the Bench*, Harvard Political Review (March 3, 2009), https://harvardpolitics.com/online/legislating-from-the-bench/. *See also* Bruce G. Peabody, *Legislating From the Bench: A Definition and a Defense*, 11 Lewis & Clark L. Rev. 185, 231 (2007), https://law.lclark.edu/live/files/9581-lcb111peabodypdf ("This Article also reminds us that those attacking the judiciary for its overreach or institutional meddling should consider the role that elected and other political officials contribute to this supposed abuse of power. If some forms of legislating from the bench are a problem, they are a problem arising as much from the compliance, deference, and lack of clarity of presidents and members of Congress as from zealous and ambitious jurists.").

from Section 404's permit requirement 'because they constitute: (a) normal farming activities; (b) upland soil and water conservation practices; and (c) maintenance of drainage ditches.' *Brace*, slip op. at 22. We find that the district court's determination is erroneous as a matter of law. The district court's conclusion that Brace's discharges on the thirty-acre site constituted 'normal farming activities' which are exempt from Section 404's permit requirement cannot be reconciled with the statute, the applicable regulations, and case law governing the 'normal farming activities' exemption." 41 F.3d at 124.

B. "In determining that Brace's activities fell within this provision, the district court relied on facts that are irrelevant to the inquiry required by the applicable law. The district court appears to have based its conclusion on a casual observation that what Brace did was 'normal' activity for a farmer in Erie County, *rather than on the application of the regulatory construction accorded the statutory term 'normal farming activities' by the agencies charged with the implementation of the statute*." *Id*.

C. "The applicable regulation provides that, to constitute 'normal farming activity' within the meaning of the statute, the activity: 'must be part of an established (i.e., ongoing) farming . . . operation and must be in accordance with the definitions in § 323.4(a)(1)(iii) . . . . Activities which bring an area into farming . . . use are not part of an established operation. An operation ceases to be established when the area on which it was conducted *has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations*." 41 F.3d at 124-125, quoting Joint Corps-EPA Regulation, 33 CFR § 323.4(a)(1)(ii).

D. "Brace's activities between 1985 and 1987 meet neither prong of this provision: they

were neither part of an 'established (i.e., on-going) farming operation,' nor were they conducted 'in accordance with the definitions in § 323.4(a)(1)(iii).'" 41 F.3d at 125 (referring to the definitions of "cultivating", "harvesting," "minor drainage," "plowing," "seeding," "construction or maintenance of irrigation ditches", or "the maintenance (but not construction) of drainage ditches.").

E. "The regulations provide that, '[a]ctivities which bring an *area* into farming . . . use are not part of an established operation.' 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.3(c)(1)(ii)(B). […] The regulations do not specify the precise area to which we should look in determining whether there is an established farming operation. There are no minimum limits placed on the 'area' being brought into farming use. Thus, we read the regulations to provide that an exemption is available only to activities that are part of an 'established farming operation' *at the site*. A proper 'contextual review of its total activities' only requires us to analyze whether such activities are "established and continuing" on the thirty-acre wetland site itself." *Id*. (italicized emphasis in original).

II. *Duarte Nursery, Inc. v. U.S. Army Corps of Engineers*, Case No. 2;13-CV-02095 (E.D. CA 2016) <https://casetext.com/case/duarte-nursery-inc-v-us-army-corps-of-engrs-5; https://pacificlegal.org/wp-content/uploads/pdf/duarte-nursery-v-u-s-army-corps-of-engineers/Duarte-Nursery-Order-on-Summary-Judgment-Motions-6-10-16.pdf>.

A. "[W]hile § 1344(f)(1) provides a farming exemption, to fall under the exemption, the farming activities must be 'established and ongoing.' A farming operation ceases to be established when the area has been converted to another use, or modifications to the 'hydrological regime' are necessary for continue the farming operations. […] In addition, even if the arming activities are established and ongoing, if they convert

waters of the United States into a new use to which they were not previously subjected, or impair the flow or circulation of waters of the United States, then a permit is required." Slip op. at 33-34, citing 33 C.F.R. § 323.4(a)(1)(ii) and § 323.4(c).

B. "Here, there is *no evidence* the Property supported farming activity between 1988 and the summer of 2012. […] Unruh, who performed the tillage service for the Nursery and John Duarte in 2012, stated the ground on the Property was hard and difficult to penetrate from the grazing activities. […] Plaintiffs have provided *no support* to show grazing is analogous to the farming activity they conducted beginning in 2012. The court is *not persuaded that*, *after nearly twenty-four years of no activity* that meets the applicable definition of farming, the tillage and planting of wheat by plaintiffs can be considered a continuation of established and ongoing farming activities." Slip op. at 34.

C. "Moreover, the aerial photos provided in the Stokely Expert Report show a substantial amount of wetlands impacted by the tillage and planting activities. […] The photos demonstrate substantial changes in the hydrological regime, which are prohibited if a party is to benefit from the farming exemption under § 1344(f)(1)." Slip op. at 34.

ii. "for the purpose of maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters…" CWA § 404(f)(1)(B).

iii. "for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, *or* the maintenance of drainage ditches…" CWA § 404(f)(1)(C).

I. The construction of *dual-function* irrigation/drainage ditches (ditches that served as either irrigation or drainage ditches) had remained exempt under CWA § 404(f)(1)C) until 8-17-87.

A. "Another issue that has been raised is the applicability of § 404(f)(1)(C) to construction of ditches that can serve as either irrigation or

drainage ditches. The regulations and preamble do not explicitly address this issue. However, since the statute clearly does not exempt the construction of drainage ditches,[] and the legislative history indicates that limitation was deliberate and important, it follows that dual function ditches[] should be considered drainage ditches, i.e., their construction is not exempt. […] Of course, a ditch is not considered 'dual function' in this sense if the water it carries away is not water which contributes to the maintenance of [WOTUS] (e.g., wetlands) but rather is simply irrigation return flow." *See* Memorandum from Gerald H. Yamada, Acting General Counsel, EPA to Josephine S. Cooper, Assistant EPA Administrator for External Affairs re *Issues Concerning the Interpretation of Section 404(f) of the Clean Water Act* (Feb. 8, 1985), at 151-152.[24]

B. Since this 2-8-85 EPA G.C. (Yamada) memorandum arguably did not rise to the level of an agency policy memorandum or an interpretative regulatory guidance document that could be considered normatively binding, it could not then have legally bound Mr. Brace. *See, e.g., New Hope Power Company v. United States Army Corps of Engineers*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010) < https://casetext.com/case/new-hope-power-company-v-us-army-corps-of-eng> (holding that agency official's memorandum reflecting current agency policy that is normatively binding on regulated community without affording opportunity for public notice and comment violates the U.S. Administrative Procedure Act.).

C. The CWA § 404(f)(1)(C) exemption afforded dual-function irrigation/drainage ditches had

[24] *See* Memorandum from Gerald H. Yamada, Acting General Counsel, EPA to Josephine S. Cooper, Assistant EPA Administrator for External Affairs re *Issues Concerning the Interpretation of Section 404(f) of the Clean Water Act* (Feb. 8, 1985), at 151-152, in United States Environmental Protection Agency, General Counsel Opinions From the Office of General Counsel, January 31, 1980, Through June 7, 1985 (April 1987), https://nepis.epa.gov/Exe/ZyPDF.cgi/20015CIE.PDF?Dockey=20015CIE.PDF (EPA's decision to deny the CWA Section 404(f)(1)(C) irrigation ditch construction exemption to constructed dual-function irrigation/drainage ditches like those running through Mr. Brace's Murphy Farm tract, appears not to have occurred until 8-17-87.).

not been previously revoked by the then applicable October 5, 1984 regulations, which had merely revised the exemption from CWA § 404(a) permitting for construction of agricultural irrigation ditches to include certain connections. *See* 49 Fed. Reg. 39478, 39482 (Oct. 5, 1984).[25]

D. The first official regulatory guidance document issued by a federal agency on this issue with the potential to have legally bound Mr. Brace was Corps Regulatory Guidance Letter ("RGL") 87-07 developed in cooperation with EPA, which had been issued on 8-17-87. *See* RGL 87-07 (Aug. 17, 1987) at para. 5.d, p.2.[26] (This point had not previously been argued in *United States v. Brace*. *See* 41 F.3d at 128. However, it was argued in a Federal Rule of Civil Procedure 60(b)(5) Motion to Vacate Consent Decree as a defense to the Consent Decree enforcement action the United States subsequently initiated against Mr. Brace in Jan. 2017. *See United States v. Robert Brace and Robert Brace Farms, Inc.*, Case No. 1:90-cv-00229-SPB, ECF No. 279 at 28, n. 9).

3. Recapture CWA § 404(f)(2) – 33 U.S.C. § 1311(f)(2) – CWA § 404(a) Permit Obligation Despite Availability of Exemption:

a. Notwithstanding the availability of an exemption under CWA § 404(f)(1), a CWA § 404(a) permit is required where there is "[a]ny discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced. "Section 404(f)(2) has two requirements: the 'new use' requirement, *and* the 'reduction

[25] *See* Department of Defense, Corps of Engineers, Department of the Army, *Final Regulations for Controlling Certain Activities in Waters of the United States – Final Rule*, 49 Fed. Reg. 39478, 39482 (Oct. 5, 1984), at 33 CFR § 323.4(a)(3), https://cdn.loc.gov/service/ll/fedreg/fr049/fr049195/fr049195.pdf. Although the 1984 regulations (33 C.F.R. § 323.4(a)(3); 40 C.F.R. § 232.3(c)(3)) had failed to address dual-function irrigation/drainage ditches, these agencies, in RGL 87-07, exercised their administrative discretion to determine *prospectively* that dual-function irrigation/drainage ditch construction activities no longer would be exempted as constructed irrigation ditches under CWA § 404(f)(1)(C).

[26] *See* US Army Corps of Engineers, *Regulatory Guidance Letter 87-07, Section 404(f)(1) Statutory Exemption for Drainage Ditch Maintenance* (Aug. 17, 1987), at Sec. 5.d, https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1354 ("Because the statute clearly does not exempt "construction" of drainage ditches from regulation under the CWA, ditches being built for the dual function of irrigation and drainage are considered drainage ditches and their construction is not exempt.").

in reach/impairment of flow or circulation' requirement. Although *both* requirements must be met, it is the interpretation of the first that raises the most questions." *See* Memorandum from Gerald H. Yamada, Acting General Counsel, EPA to Josephine S. Cooper, Assistant EPA Administrator for External Affairs re *Issues Concerning the Interpretation of Section 404(f) of the Clean Water Act* (Feb. 8, 1985), *supra* at 153.

i. "[I]f there is already an established farming operation in a wetland, any discharges resulting from farming activities listed in the regulation which do not convert the wetland to upland *are* exempt, whether or not there is an intensification of farming, change in crops, etc. Similarly, discharges from the construction of irrigation ditches are exempt, even if they affect a wetland, as long as they do not convert the wetland to upland, bring it into initial farming use, and reduce or impair its reach, flow, or circulation." *See* Memorandum from Gerald H. Yamada, Acting General Counsel, EPA to Josephine S. Cooper, Assistant EPA Administrator for External Affairs re *Issues Concerning the Interpretation of Section 404(f) of the Clean Water Act* (Feb. 8, 1985), *supra* at 154.

ii. "To give some concrete examples, if there is an established hay harvesting operation in a wetland, discharges associated with the activities listed in § 404(f)(1)(A) would not need a permit, even if new agricultural crops were introduced, as long as the wetland was not destroyed. If annual 'upland' crops could be grown in the wetland (during the dry season, presumably) without such an effect, their introduction would not *per se* eliminate the exemption. Conversely, if the listed farming activities are employed to grow a perennial upland crop that cannot survive in a wetland, it follows that establishing that crop so that it survives from year to year will require effectively eliminating the wetland; the associated discharges would not be exempt (because elimination of the wetland would be a 'new use' and a reduction in reach)". *See* Memorandum from Gerald H. Yamada, Acting General Counsel, EPA to Josephine S. Cooper, Assistant EPA Administrator for External Affairs re *Issues Concerning the Interpretation of Section 404(f) of the Clean Water Act* (Feb. 8, 1985), *supra* at 154.

b. *See* RGL 87-07, *supra*, at para. 6 ("For the 404(f)(2) recapture provision to apply, both the 'change in use' requirement and the 'reduction in reach/impairment of flow or circulation' requirement must be met.").

i. *See also* RGL 87-07, at para. 7(a) ("[T]he discharge of dredged or fill material itself does not need to be the sole cause of the destruction of the [WOTUS] (e.g., wetlands) or other change in use or the sole cause of the reduction in or impairment of, reach, flow or circulation of such waters. The discharge need only be 'incidental to' or 'part of' an activity that is intended to or will foreseeably bring about that result.").

ii. *See also* RGL 87-07, at para. 7(b) A discharge of dredged or fill material which converts a Section 404 wetland to a non-wetland is a change in use of an area of the [WOTUS] (33 CFR § 323.4(c))). For purposes of determining whether a discharge associated with the maintenance of a drainage ditch is recaptured under 404(f)(2), it is necessary to determine whether such maintenance activities would convert wetlands to a use to which the area was not previously subject. Determining the previous use requires a case-by-case assessment which applies a rule of reason to the facts.").

c. *United States v. Brace*, 41 F.3d 117 (3d Cir. 1994) – The Third Circuit arguably failed to address both requirements of the § 404(f)(2) recapture provision, having focused only on the "new use" prong.

i. Held: "The regulation governing the 'recapture' provision stipulates in part that '[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of waters of the United States,' 33 C.F.R. § 323.4(c), and states as an example, that 'a permit will be required for the conversion of a cypress swamp to some other use. . . when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of . . . structures used to effect such conversion.'" 41 F.3d at 123-124.

ii. "Thus, *to be exempt from the CWA permit requirement*, a defendant has the *burden* of demonstrating that proposed activities both satisfy the requirements of Section 404(f)(1) and avoid the recapture provision of Section 404(f)(2)." 41 F.3d at 124.

iii. "Read together, the two parts of Section 404(f) provide a *narrow exemption for agricultural activities that have little or no adverse effect on the waters of the United States*." *Id*.

iv. "The applicable regulation provides that '[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of the [WOTUS].' 33 C.F.R. § 323.4(c). […] The evidence establishes that Brace's activities drained the site

to convert it from a wetland to a new, non-wetland use: the district court found that the site was inundated with water at various times in the past; the parties stipulated, and the court found, that the site constitute a wetland at the time of the discharges; Brace admitted that the purpose of installing the four miles of plastic tubing at the site in 1986 and 1987, and of clearing the vegetation from the site between 1985 and 1987, was to drain the site and make the ground ready for growing crops; and the court found that as a result of Brace's leveling, spreading and tiling, he began to grow crops on the site in 1986 and 1987. Thus, Brace's activities fall squarely within the statutory definition of 'recapture.'" 41 F.3d at 128-129.

v. [**As the result of the Third Circuit's interpretation, *United States v. in Brace*, of the normal farming exemption and the recapture provision, any farmer or rancher engaged in longstanding land-use rotations between wetland and non-wetland crops involving conversions from wetland pasturing and haying to cropping would first need to secure federal agency approval through a time-consuming and very costly CWA § 404 permitting process subject to agency discretion.**]

d. *Duarte Nursery, Inc. v. U.S. Army Corps of Engineers*, Case No. 2:13-CV-02095 (E.D. CA 2016)

i. "[P]laintiff's argument that all the existing wetlands on the Property still exist, and no waters of the United States have been converted to dryland […] ignores not only the statute but also the purpose of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). *The CWA does not simply prohibit the complete conversion of waters of the United States.* Even under the farming exemption, a discharge of dredged or fill material incidental to the farming activities that impairs the flow of the waters of the United States still requires a permit, because it changes the chemical, physical and biological integrity of the waters. 33 C.F.R. § 323.4(c); 33 U.S.C. § 1344(f)(2)." Slip op. at 34-35.

4. Key Terms –

a. "Pollutant" – CWA § 502(6) - 33 U.S.C. § 1362(6) –includes "dredged spoil," "rock," "sand," and "cellar dirt." *Cf.* "Toxic Pollutant" CWA § 502(13).

i. *Duarte Nursery, Inc. v. U.S. Army Corps of Engineers*, Case No. 2:13-CV-02095 (E.D. CA 2016).

I. "Echoing both the Fourth and Fifth Circuits, the Ninth Circuit is clear that 'soil' is a pollutant: 'Plain

dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing harm to the environment.' […] In sum, soil is a pollutant." Slip op. at 29, quoting *Borden Ranch P'ship v. U.S. Army Corps of Eng'r*, 261 F.3d 810, 814 (9th Cir. 2001) < https://casetext.com/case/borden-ranch-partnership-v-us-army-corps>.

b. "Discharge of pollutant" – CWA 502(12) - 33 U.S.C. § 1362(12) - "any addition of any pollutant to navigable waters from any point source."

i. *Duarte Nursery, Inc. v. U.S. Army Corps of Engineers*, Case No. 2:13-CV-02095 (E.D. CA 2016), Slip op. at 29.

I. "The equipment Unruh used caused the material, in this case soil, to move horizontally, creating furrows and ridges. This movement of the soil resulted in its being redeposited into waters of the United States, at least in areas of the wetlands as delineated by NorthStar on the Property. Thus, the Nursery's activities discharged a pollutant."

c. "Point Source" – CWA 502(14) - 33 U.S.C. § 1362(14) – includes "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

i. *Duarte Nursery, Inc. v. U.S. Army Corps of Engineers*, Case No. 2:13-CV-02095 (E.D. CA 2016), Slip op. at 31

I. "Under the broad statutory language, courts have found 'bulldozers and backhoes' to be 'point sources' under the CWA because they collect and pile material that may eventually find its way into the [WOTUS]. […G]rader, tractor pulling discs, and a ripper are point sources […S]idecasting, whereby excavated dirt is piled in either side of a ditch, through the use of a backhoe, front-end loader, and bulldozer is a point source." *Id*., at 31, citing *United States v. Akers*, 785 F.2d 814, 817–20 (9th Cir. 1986) < https://casetext.com/case/united-states-v-akers-4> and *U.S. v. Deaton*, 209 F.3d 331 (4th Cir. 2000) < https://casetext.com/case/us-v-deaton-4>.

II. "Here, Unruh used the Equipment, a 360-horsepower International Harvester Case Quadtrac 9370 with Wilcox ripper, NSC 36-24-7, as an attachment for tilling. […] The Equipment has seven shanks with 24-inch spacing in between the shanks, and each shank is 36 inches long. […] Material moved horizontally, and the shanks created furrows and

> ridges to the left and right of each furrow. […] The Equipment did not have to be an immobile 'container,' but could be any means of transport in which a pollutant is carried by a 'discernible, confided, and discrete conveyance' into the waters of the United States. […] The Equipment loosened and moved the soil horizontally, pulling the dirt out of the wetlands and redepositing it there as well. […] The Equipment, with the ripper attachment, is a 'point source' under the CWA." Slip op. at 31.

d. "Person" – CWA 502(5) - 33 U.S.C. § 1362(5) – includes "an individual [or] corporation, partnership, [or] municipality."

e. "Dredged Material" – Corps Regulations - 33 CFR 323.2(k) - "material that is excavated or dredged from [WOTUS]." 42 Fed. Reg. at 37145 (July 19, 1977).

f. "Discharge of Dredged Material" – Corps Regulations - 33 CFR 323.2(l) - "Any addition of dredged material into the [WOTUS], includ[ing] without limitation, the addition of dredged material to a specified disposal site located in the" WOTUS "and the runoff or overflow from a contained land or water disposal area." 42 Fed. Reg. at 37145 (July 19, 1977).

   i. *Excluded*: "discharges of pollutants into [WOTUS] resulting from onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill), which are subject to" the permitting restrictions of CWA § 402. *Id*.

   ii. *Excluded*: "plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products" (But NOT natural and cultivated wetland pasturing and haying."). *Id. See also* 42 Fed. Reg. at 37130.

   iii. "Incidental Fallback" – "Tulloch I Rule" – Joint Corps-EPA Regulations - includes "any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States, […] includ[ing], but not limited to:

      I. The addition of dredged material to a specified discharge site located in WOTUS;

      II. The runoff or overflow from a contained land or water disposal area; and

      III. Any addition, including any redeposit, of dredged material, including excavated material, into WOTUS which is *incidental* to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 33 CFR 323.2(d)(1)(i)-(iii); 40

CFR 232.2). 58 Fed. Reg. 45008, 45035 (Aug. 25, 1993).[27]

iv. *American Mining Congress v. United States Army Corps of Engineers*, 951 F. Supp. 267 (D.D.C. 1997) < https://law.justia.com/cases/federal/district-courts/FSupp/951/267/1381371/> – however, held that the Tulloch Rule exceeded the Corps' authority under the CWA because it impermissibly regulated "incidental fallback" (which results in the return of dredged material virtually to the spot from which it came, and thus, not in an "addition") of dredged material.

v. *National Mining Association v. United States Army Corps of Engineers,* 145 F.3d 1339, 1403 (D.C. Cir. 1998) < https://casetext.com/case/national-mining-v-us-army-c-of-eng>, *aff'd American Mining Congress v. United States Army Corps of Engineers, supra*.

vi. *United States v. Hallmark Construction Co.,* 30 F. Supp. 2d 1033, 1036-1037 (N.D. Ill. 1998) citing *National Mining Association v. United States Army Corps of Engineers,* 145 F.3d 1339, 1404 (D.C. Cir. 1998) ("determin[ing] that a straightforward interpretation of the statutory term 'addition' could not reasonably 'encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back.'"). < https://casetext.com/case/us-v-hallmark-const-co-3>.

vii. 1999 Joint Corps-EPA Regulations - modified 1993 Corps-EPA regulations to comply with D.C. Circuit Court ruling in *NMA v. Corps*. "Today's rule "expressly *excludes* 'incidental fallback' from the definition of 'discharge of dredged material.' Today's rule does not alter the well-settled doctrine, recognized in NMA, that some redeposits of dredged material in [WOTUS] constitute a discharge of dredged material and therefore requires a 404 permit. […] Deciding when a particular deposit is subject to CWA jurisdiction will require a case-by-case evaluation, based on the particular facts of each case. […] Determining whether a particular redeposit constitutes incidental fallback and, under the court's decision is not subject to section 404, will also require evaluation on a case-by-case basis." 64 Fed.

[27] *See* Department of Defense, Department of the Army and Environmental Protection Agency, *Clean Water Act Regulatory Programs – Final Rule*, 58 Fed. Reg. 45008, 45022 (Aug. 25, 1993), https://cdn.loc.gov/service/ll/fedreg/fr058/fr058163/fr058163.pdf (presumed that "the addition or redeposit of *any* dredged material into waters of the U.S. associated with mechanized landclearing, ditching, channelization and other excavation constitutes a 'discharge,' and is therefore prohibited if no permit is obtained under Section 404, unless otherwise exempted under Section 404(f).")

Reg. 25120, 25121 (May 10, 1999).[28] 33 CFR 323(d); 40 CFR 232.2(l).

viii. "Incidental Fallback" – "Tulloch II Rule" - 2001 Joint Corps-EPA Regulations modified 1999 Joint Corps-EPA Regulations to reflect that "the agencies regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining, or other earth-moving activity in [WOTUS] as resulting in a discharged of dredged material *unless* project-specific evidence shows that the activity results in only incidental fallback." 66 Fed. Reg. 4550, 4552 (Jan. 17, 2001). Defined as: "the redeposit of small volumes of dredged material that is incidental to excavation activity in [WOTUS] when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls back into substantially the same place from which it was initially removed." 66 Fed. Reg. at 4575; 33 CFR 323.2(d)(2)(i)-(ii); 40 CFR 232(d)(2)(i)-(ii).[29]

I. "We thus are clarifying that we are addressing mechanized 'earth-moving' equipment (e.g., bulldozers, graders, backhoes, bucket dredges, and the like). Earth-moving equipment is designed to excavate or move about large volumes of earth, and we believe it is reasonable and appropriate for the agencies to view the use of such equipment in [WOTUS] as resulting in a discharge of dredged material, unless there is case specific information to the contrary." 66 Fed. Reg. at 4552.

II. Some Farming Practices Presumed Exempted - "Other examples of *activities that would generally not be regulated* include discing, harrowing, and harvesting where soil is stirred, cut, or turned over to prepare for planting of crops. These practices involve only minor redistribution of soil, rock, sand, or other surface materials. The use of K-G blades and other forms of vegetation cutting such as bush hogging or mowing that cut vegetation above the soil line do not

[28] *See* Department of Defense, Department of the Army, Corps of Engineers and Environmental Protection Agency, *Revisions to the Clean Water Act Regulatory Definition of 'Discharge of Dredged Material' – Final Rule*, 64 Fed. Reg. 25120-25122 (May 10, 1999), https://www.govinfo.gov/content/pkg/FR-1999-05-10/pdf/99-11680.pdf.

[29] *See* Department of Defense, Department of the Army, Corps of Engineers and Environmental Protection Agency, *Further Revisions to the Clean Water Act Regulatory Definition of 'Discharge of Dredged Material' – Final Rule*, 66 Fed. Reg. 4550 (Jan. 17, 2001), https://www.govinfo.gov/content/pkg/FR-2001-01-17/pdf/01-1179.pdf.

involve discharge of dredged material." 64 Fed. Reg. at 4554.

ix. *National Association of Homebuilders v. U.S. Army Corps of Engineers*, Case No. 01-0274 (D.D.C. 2007) (Jan. 30, 2007) <https://ecf.dcd.uscourts.gov/doc1/04511732052> The District Court found that "[t]he difference between incidental fallback and redeposit is better understood in terms of two other factors: (1) the time the material is held before being dropped to earth; and (2) the distance between the place where the material is collected and the place where it is dropped." Case No. 01-0274 (D.D.C. 2007), Slip op. at 7-8. "Tulloch II addresses the 'geographic ambiguity' […] – material must fall back to 'substantially the same place as the initial removal' [,but] it makes no reference to the amount of time that the material is held before it is dropped. For that reason, and because it improperly includes a volume requirement, the rule must be rewritten." Case No. 01-0274 (D.D.C. 2007), Slip op. at 8.

I. "Although the decisions of this court and the Court of Appeals have described incidental fallback in terms of volume, neither court has gone so far as to require that the volume of fallback be small. Conceivably, the operator of a shovel removing 500 tons of dirt could accidentally drop all 500 tons back to the earth without redepositing anything. In determining whether fallback is incidental -- i.e., not an addition within the meaning of the Clean Water Act -- the volume of material being handled is irrelevant." *See* Case No. 01-0274 (D.D.C. 2007), Slip op. at 7.

II. "Even if the agencies were to use volume as a factor in distinguishing incidental fallback from redeposits, a more accurate parsing of prior decisions -- as well as the government's own filings in this case -- would have revealed that incidental fallback is repeatedly described in relative, not absolute, terms." *See* Case No. 01-0274 (D.D.C. 2007), Slip op. at 7, n. 4.

III. The Court ultimately found that "the Tulloch II rule violate[d] the Clean Water Act [and was] invalid ("The agencies cannot require 'project-specific evidence' from projects over which they have no regulatory authority"), and it granted NAHB's

motion for summary judgment." *See* Case No. 01-0274 (D.D.C. 2007), Slip op. at 9-10.

x. 2008 Joint Corps–EPA Regulations Reinstate 1999 Joint Corps-EPA Regulations – Conforming agency Regulations to *NAHB v. US Army Corps* court ruling invalidating Jan. 2001 regulatory definition of "incidental fallback," by reinstating the agency regulations as of May 10, 1999.

I. "This rule conforms the language in the Code of Federal Regulations with the legal state of the regulations defining ''discharge of dredged material'' following the DC district court's decision invalidating the 2001 amendment to the regulations made by the Tulloch II rule. The effect of the district court's 2007 NAHB order was to reinstate the 1999 rule text. *See Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987), aff'd 499 U.S. 2104 (1988) (''the effect of invalidating an agency rule is to 'reinstat[e] the rules previously in force.'''). Before the Tulloch II rule was promulgated in 2001, the regulations governing discharges of dredged material were last amended on May 10, 1999. The regulations in force following the 1999 amendments, therefore, have been reinstated by the court's decision on the Tulloch II rule." 73 Fed. Reg. at 79643 (Dec. 30, 2008); [30] *See* 64 Fed. Reg. 25120 (May 10, 1999) *supra*.

II. 2012 Corps Acknowledgement re Incidental Fallback and Farming: Drainage tile can be installed without involving a "discharge of dredged or fill material" triggering the requirement of a CWA § 404 permit.[31]

g. "Fill Material" – Corps Regulations - 33 CFR 323.2(m) - "Any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 42 Fed. Reg. at 37145 (July 19, 1977).

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[30] *See* Department of the Army, Corps of Engineers, and Environmental Protection Agency, *Revisions to the Clean Water Act Regulatory Definition of 'Discharge of Dredged Material' – Final Rule*, 73 Fed. Reg. 79641 (Dec. 30, 2008), https://www.govinfo.gov/content/pkg/FR-2008-12-30/pdf/E8-30984.pdf.

[31] *See also* Steve Naylor, *Corps of Engineers Clean Water Act and Rivers and Harbor Act Permitting Requirements*, U.S. Army Corps of Engineers South Dakota Regulatory Office (Sept. 25, 2012), at 32-34, http://sdlegislature.gov/docs/interim/2012/documents/WTF09-25-12CorpsofEngineersCleanWaterActRiversHarborActPermittingRequirements.pdf (acknowledging that drainage tile can be installed without involving a discharge of dredged or fill material triggering the requirement of a CWA § 404 permit.)

i. *Excluded*: "any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under" CWA § 402. *Id*.

h. "Discharge of Fill Material" – Corps Regulations - 33 CFR 323.2(n) - "the addition of fill material into the [WOTUS]," including "dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments…" 42 Fed. Reg. at 37145 (July 19, 1977).

i. "Wetlands" –
   i. Corps Regulations - 33 C.F.R. § 328.3(b) - "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."
   ii. EPA Regulations - 40 C.F.R. § 232.2.

j. "Adjacent" –
   i. Corps Regulations - 33 C.F.R. § 328.3(c) (11-13-86) – "bordering, contiguous, or neighboring. Wetlands separated from other [WOTUS] by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"
   ii. EPA Regulations - 40 C.F.R. § 230.3(b).
   iii. *United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993) < https://casetext.com/case/us-v-pozsgai>
      1. "The Court noted [in *Riverside Bayview*, 474 U.S. 132, 134 (1985)] that, "in determining 'the landward limit of Federal jurisdiction under Section 404 [of the Clean Water Act] must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States,' the Corps concluded that 'water moves in hydrologic cycles, and the pollution of [adjacent wetlands]… will affect the water quality of the other waters within that aquatic system.' *Riverside Bayview*, 474 U.S. at 134, 106 S.Ct. at 463 (quoting 42 Fed. Reg. 37128 (1977)). Upholding this interpretation, the Court recognized 'the evident breadth of congressional concern for protection of water quality and aquatic ecosystems' embodied in the Act, 474 U.S. at 133, 106 S.Ct. at 462, and determined: '[w]e cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the `waters' of the United States — based as it is on the Corps' and EPA's technical expertise — is unreasonable,' *id*. at 134, 106 S.Ct. at 463." 999 F.2d at 728-729.

2. "[..] Accordingly, because the wetlands here qualify as 'adjacent' within the meaning of the regulation, the government was not required to prove that 'the use, degradation or destruction of [the Pozsgais' wetlands] could affect interstate commerce,' 33 C.F.R. § 328.3(a)(3), in order to subject the Pozsgais to liability under the Clean Water Act. Under the regulation, the requisite interstate commerce nexus was established because the wetlands were adjacent to a tributary of a waterway formerly used in interstate commerce. 33 C.F.R. § 328.3(a)(1), (7)." 999 F.2d at 733.

k. "Isolated Wetlands" –
   i. Included in definition of WOTUS in 1977 regulations – "All other [WOTUS] not identified in paragraphs (1)-(4) above, such as isolated wetlands..." *See* 33 CFR § 323.2(a)(5) (7-19-77) [32]
   ii. "Isolated Waters" – "[T]hose nontidal [WOTUS] that are: (1) Not part of a surface tributary system to interstate or navigable [WOTUS]; and (2) Not adjacent to such tributary waterbodies." 33 CFR § 330.2(e)(1)-(2) (7-1-12).

l. "Navigable waters" - CWA 502(7) - 33 U.S.C. § 1362(7); 33 CFR § 328.3(a)(1) (11-13-86) – includes ['WOTUS']**
   i. *United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993)
      1. "The regulation grants the Corps jurisdiction over 'waters of the United States,' defined in 33 C.F.R. § 328.3(a) to include: '[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce,' § 328.3(a)(1); 'tributaries of [these] waters,' § 328.3(a)(5); and 'wetlands adjacent to [these] waters [or their tributaries],' § 328.3(a)(7). Applying this regulation, the district court found the Pozsgais discharged into wetlands (§(a)(7)), which were 'adjacent' to a stream on the Pozsgais' property which was a 'tributary of the Pennsylvania Canal' (§ (a)(5)). The Canal, in turn, flowed into the Delaware River, which, the court ruled, satisfied the requirement that the Pennsylvania Canal is, was, or could be used in interstate commerce (§ (a)(1)). We

[32] *See* Department of the Army, U.S. Army Corps of Engineers, *Regulatory Programs of the Corps of Engineers*, 42 Fed. Reg. 37122, 37144 (July 19, 1977), https://s3.amazonaws.com/archives.federalregister.gov/issue_slice/1977/7/19/37088-37142.pdf#page=35 ("All other [WOTUS] not identified in paragraphs (1) – (4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable [WOTUS], the degradation or destruction of which could affect interstate commerce.").

review these factual findings under the clearly erroneous standard. *Sheet Metal Workers Int'l Assn. Local 19 v. 2300 Group, Inc.*, 949 F.2d [1274,] 1278 [3d Cir. 1991)]." < https://casetext.com/case/sheet-metal-wkrs-l-19-v-2300-group-inc> 999 F.2d at 730.

2. Notwithstanding the Pozsgais' dispute of the Government's claim "that *the Pennsylvania Canal is, was, or could be used in interstate commerce*. The district court reached this conclusion by noting the Canal flowed into the Delaware River, which it believed was enough to satisfy the broad reach of the Clean Water Act. The Pozsgais argue that this fact, without more, *does not establish the Canal itself was, is, or could be used in interstate commerce*. Even if true, this argument is unavailing, because the government has pointed to other evidence supporting the conclusion the Canal in the past was used in interstate commerce, which satisfies the terms of § 328.3(a)(1)." 999 F.2d at 731.

3. "The government requests that we take judicial notice of the Canal's historic significance as an interstate commerce route. It cites Robert McCullough Walter Leuba, The Pennsylvania Main Line Canal (1960), and C.P. Yoder, Delaware Canal Journal (1972), two history books which discuss the Canal's nearly 100-year history as a shipping route for coal and other commodities. Under Fed. R. Evid. 201, we may take judicial notice of any fact 'not subject to reasonable dispute in that it is…capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.' Fed. R. Evid. 201(b). Furthermore, because 'judicial notice may be taken at any stage of the proceeding,' Fed. R. Evid. 201(f), we may take judicial notice of a fact although the district court did not." 999 F.2d at 731.

4. "A cursory review of The Pennsylvania Main Line Canal and Delaware Canal Journal reveals the Canal's important role as a shipping route carrying coal in interstate commerce. In the middle of the century, the Canal consistently carried more than half a million tons of coal per year, reaching its peak volume with 792,000 tons of coal in 1866. Many of the coal barges served the Philadelphia market. Others continued on to New York City, after being

towed by steam boats across the Delaware River to Bordentown, New Jersey, where they reached the Delaware and Raritan Canal. In 1939, the Delaware Division Canal Company donated the entire canal property to the Commonwealth of Pennsylvania, which established Roosevelt State Park. In recognition of its vital role in 'providing a convenient and economic means of transporting coal to Philadelphia, New York and the eastern seaboard,' the Canal was designated a National Historic Landmark in 1976. United States Army Corps of Engineers, Preliminary Case Report for Neshaminy Water Resources Authority, Point Pleasant Diversion Project, Point Pleasant, Bucks County, Pennsylvania § 2.1 at 7 (1982)." 999 F.2d at 731.

5. "This is at least as much evidence of an effect on interstate commerce as that found to satisfy this jurisdictional requirement in prior similar cases. See *Quivira Mining Co. v. United States E.P.A.*, 765 F.2d 126, 130 (10th Cir. 1985) (non-navigable creeks and 'arroyos' affect interstate commerce because during times of 'intense rainfall' there could be a surface connection between these waterways and navigable streams), cert. denied, 474 U.S. 1055, 106 S.Ct. 791, 88 L.Ed.2d 769 (1986); *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1329 (6th Cir. 1974) (Act constitutionally applies to discharge of oil into non-navigable tributary three waterways removed from navigable river). In so holding, these courts recognized Congress' intent to give the term 'navigable waters' the 'broadest possible constitutional interpretation.' *Ashland Oil*, 504 F.2d at 1324 (citing 118 Cong. Rec. 33756-57 (1972) (statement of Representative Dingell)); *Quivira Mining*, 765 F.2d at 129. The Pozsgais maintain these cases are distinguishable as both involved discharge into waterways rather than wetlands. But this is a distinction without a difference in light of the Corps' regulation, which equates adjacent wetlands with waterways." 999 F.2d at 731-732.

6. *Cf. The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871) < https://supreme.justia.com/cases/federal/us/77/557/ > (holding that "[t]hose rivers must be regarded as public navigable rivers in law which are *navigable in*

fact. And they are navigable in fact *when they are used, or are susceptible of being used*, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

7. *Cf. PPL Montana, LLC v. Montana,* 565 U.S. 576, 592 (2012) < https://casetext.com/case/ppl-mont-llc-v-montana-2>. (holding that "[t]he *Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds. *See, e.g., ibid.*; *The Montello*, 20 Wall. 430, 439, 22 L.Ed. 391 (1874); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406, and n. 21, 61 S.Ct. 291, 85 L.Ed. 243 (1940) (Federal Power Act); *Rapanos v. United States*, 547 U.S. 715, 730–731, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (plurality opinion) (Clean Water Act); id., at 761, 126 S.Ct. 2208 (KENNEDY, J., concurring in judgment) (same). It has been used as well to determine questions of title to water beds under the equal-footing doctrine. *See Utah, supra*, at 76, 51 S.Ct. 438; *Oklahoma v. Texas*, 258 U.S. 574, 586, 42 S.Ct. 406, 66 L.Ed. 771 (1922) ; *Holt State Bank, supra*, at 56, 46 S.Ct. 197. It should be noted, however, that the test for navigability is not applied in the same way in these distinct types of cases.").[33]

ii. *Rapanos v. United States*, 547 U.S. 715 (2006). [<https://casetext.com/case/rapanos-v-us-4 >] *See* discussion, *infra*.

[33] *See* 565 U.S. at 592-593 ("Among the differences in application are the following. For state title under the equal-footing doctrine, navigability is determined at the time of statehood, *see Utah*, *supra*, at 75, 51 S.Ct. 438, and based on the 'natural and ordinary condition' of the water, *see Oklahoma*, supra, at 591, 42 S.Ct. 406. In contrast, admiralty jurisdiction extends to water routes made navigable even if not formerly so, *see, e.g., Ex parte Boyer*, 109 U.S. 629, 631–632, 3 S.Ct. 434, 27 L.Ed. 1056 (1884) (artificial canal); and federal regulatory authority encompasses waters that only recently have become navigable, *see, e.g., Philadelphia Co. v. Stimson*, 223 U.S. 605, 634–635, 32 S.Ct. 340, 56 L.Ed. 570 (1912), were once navigable but are no longer, *see Economy Light & Power Co. v. United States*, 256 U.S. 113, 123–124, 41 S.Ct. 409, 65 L.Ed. 847 (1921), or are not navigable and never have been but may become so by reasonable improvements, *see Appalachian Elec. Power Co., supra*, at 407–408, 61 S.Ct. 291. With respect to the federal commerce power, the inquiry regarding navigation historically focused on interstate commerce. *See The Daniel Ball, supra*, at 564. And, of course, the commerce power extends beyond navigation. *See Kaiser Aetna v. United States*, 444 U.S. 164, 173–174, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). In contrast, for title purposes, the inquiry depends only on navigation and not on interstate travel. See Utah, supra, at 76, 51 S.Ct. 438. This list of differences is not exhaustive. Indeed, '[e]ach application of [the *Daniel Ball*] test ... is apt to uncover variations and refinements which require further elaboration.' *Appalachian Elec. Power Co., supra*, at 406, 61 S.Ct. 291.").

iii. *Duarte Nursery, Inc. v. U.S. Army Corps of Engineers*, Case No. 2:13-CV-02095 (E.D. CA 2016).

I. "While a majority of the Supreme Court has yet to agree on an explanation of when wetlands are sufficiently adjacent to navigable waters to confer CWA protection, the narrowest grounds of agreement among members of the Court were established in *Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, a 4-4-1 plurality opinion, the Supreme Court considered the definition of 'navigable waters' under the CWA. Justice Kennedy, casting the fifth vote for reversal along with four other Justices, concurred only in the judgment. His concurrence provides the narrowest ground on which a majority of Justices would agree if required to choose, in almost all cases. Following Justice Kennedy's concurrence, the Ninth Circuit adopted his 'substantial nexus' test […]" *Duarte Nursery, Inc.*, Slip op. at 29-30.[34]

II. "The Ninth Circuit directs courts deciding whether there is a hydrological linkage to look for a 'reasonable inference of ecological interconnection.' *A 'significant nexus' exists* where wetlands have a significant effect on the chemical, physical, and biological integrity of the nearby navigable waters." Slip op. at 30.

III. The Court found that the 2012 draft wetland delineation report of Duarte Nursery's retained environmental consultant (NorthStar Environmental) noted that "'Wetlands within the [Property] hold floodwaters and intercept sheet flow from uplands, releasing water in a more consistent manner. These wetlands collect and hold water during significant rain events acting as a biological filter collecting the first flush prior to filtering into [downstream waters].'" Slip op. at 30. [******This reads like an ecological assessment, rather than a wetlands identification and delineation report******].

[34] *See Id*., at 30, quoting *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (2007) < https://casetext.com/case/northern-california-river-watch-v-city-of-healdsburg>, citing *Rapanos*, 547 U.S. at 784–85 ("[A] 'mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." Rather, the 'required nexus must be assessed in terms of the statute's goals and purposes,' which are to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"). (emphasis added).

IV. "The Army Corps investigation report noted that 'The wetlands and water on-site are hydrologically connected…and help to moderate flood flows due to storm events, provide filtration to sediments and pollutants prior to entering Coyote Creek and are designated critical habitat and are known to support the Federally-listed vernal pool fairy shrimp and…tadpole shrimp." Slip op. at 30.

V. "The wetlands within the Property thus have physical connections to Coyote Creek, a tributary of the traditional navigable waters of the Sacramento River. […] In addition, the United States' expert report provides that the dissolved and particulate organic carbon and dissolved nutrients on the Property are related to the Coyote Creek/Oak Creek system, which flows to the Sacramento River. […] Plaintiffs do not point to any 'specific facts showing that there is a genuine issue for trial.' The court thus finds that the wetlands on the Property have a 'significant nexus' with the Sacramento River, which is a traditionally navigable waterway." Slip op. at 30-31.[35]

m. "Waters of the United States" – "WOTUS" -

i. *Rapanos v. United States - See discussion, infra*

I. Corps-EPA *Rapanos* Guidance (Dec. 2, 2008).[36]

ii. *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011) <https://casetext.com/case/precon-devel-v-us-army-corps-of-engineers> (focusing on the evidentiary burden the Corps and EPA carries in quantitative and qualitative terms, for purposes of establishing that waters have a "significant nexus" to a WOTUS:

I. The Court rejected the Corps' assertion that a significant nexus determination can be established

[35] On August 15, 2017, John Duarte and the United States settled the lawsuit by executing a Consent Decree pursuant to which Duarte agreed to pay to the United States $330,000 in civil penalties, and to expend $770,000 to either purchase vernal pool establishment credits, credits from the National Fish and Wildlife Foundation's In Lieu Fee Program for the Northeastern Sacramento Valley Vernal Pool Service Area, or to "effect[] such mitigation in another manner approved by the Corps." *See United States v. Duarte Nursery, Inc.*, Case No. 2:16-cv-01498-KJM-DB (E.D. Ca.), Consent Decree (Aug. 15, 2017), at paras 20, 27 < https://pacificlegal.org/wp-content/uploads/pdf/duarte-nursery-v-u-s-army-corps-of-engineers/Duarte-Nursery-Settlement-8-15-17.pdf>.

[36] *See* U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) at 7 n. 28, https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf ("interpret[ing] the plurality's 'continuous surface connection' as not requiring a continuous surface water connection – ('A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary.') [,which t]he agencies continue to endorse…"). *See* Prepublication Version at 61, n. 32.

based on "its documentation of the flow of the adjacent tributaries […] standing alone" – i.e., that "a measurement of these tributaries' flow adequately demonstrated that this area 'help[ed] to slow flows/retain floodwaters, releasing them slowly so that downstream waters do not receive as much flow volume and velocity, all working to diminish downstream flooding and erosion…'" 633 F.3d at 294, 295.

II. First, the Court reasoned that it could not accept this conclusion because "the Corps' administrative record [did] not appear to contain any measurements of actual flow," and counsel had been unable "to point to such measurements at oral argument. Instead, the record reflects measures of the water storage capacity and the resultant potential flow rates of the [ditches in question – i.e., the Saint Brides Ditch and the 2,500-foot Ditch], without any indication of how often this capacity is[/was] reached or how much flow is[/was] typically in the ditches." 633 F.3d at 294.

III. Second, the Court reasoned that, "even if the record had sufficiently documented flow," it did "not believe that recitation of the flow of an adjacent tributary *alone, absent any additional information regarding its significance*, would necessarily suffice to establish a significant nexus." (emphasis added). The Court emphasized how Justice Kennedy's concurring opinion had "draw[n] a critical distinction between wetlands with 'significant' effects versus only 'insubstantial' effects on navigable waters." 633 F.3d at 294, citing *Rapanos*, 547 U.S. at 780.

IV. The Fourth Circuit Court of Appeals held that, there must be sufficient "documentation in the record that would allow us to review [the Corps'] assertion that the functions that these wetlands perform are 'significant' for the [tributary in question] Northwest River. […W]e do not even know if the Northwest River suffers from high levels of nitrogen or sedimentation, or if it is ever prone to flooding." 633 F.3d at 295.

V. Given the absence of such evidence, the Court held that the record did not support the Corps' determination that a significant nexus existed

"between the 448 acres of similarly situated wetlands and the Northwest River." 633 F.3d at 295.

VI. The Fourth Circuit had referenced Ninth and Sixth Circuit cases that "provide good examples of the types of evidence, either quantitative or qualitative, that could suffice to establish 'significance.'" 633 F.3d at 296.

VII. As an example of *quantitative* evidence, the Fourth Circuit noted how the Ninth Circuit Court of Appeals had "held the significant nexus test satisfied in part because the district court found increased chloride levels in the relevant navigable water, from 5.9 parts per million to 18 parts per million, due to chlorine seepage from the wetlands in question into the navigable river." 633 F.3d at 296, citing *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir.2007), *supra* n. 11.

VIII. As an example of *qualitative* evidence, the Fourth Circuit noted how the Sixth Circuit Court of Appeals' opinion, in *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009) < https://casetext.com/case/us-v-cundiff-5>, had rested on presentation of documentary "evidence that the wetlands' acid mine drainage storage capabilities and flood storage capabilities *had 'direct and significant' impacts on navigation* in the Green River, via sediment accumulation, and that the diversion of water from the wetlands *had 'increased* the flood peaks,' in the Green River." (emphasis added). 633 F.3d at 296, citing *United States v. Cundiff*, 555 F.3d 200, 210-211 (6th Cir.2009).

IX. In sum, the Fourth Circuit Court of Appeals emphasized the need for federal agencies to develop sufficient documentation showing how or why "wetlands running alongside a ditch miles away from any navigable water" "significantly, rather than insubstantially, affect the integrity of the navigable waters." 633 F.3d at 297. According to the Court, "[s]uch documentation need not take the form of any particular measurements, but should include some comparative information that allows [the court] to meaningfully review the significance of the wetlands' impacts on the downstream water quality." 633 F.3d at 297.

iii. (As of 8-27-15),[37] both Corps Regulations - 33 C.F.R. § 328.3(a)(1), (2), (5) and (7); and EPA Regulations - 40 C.F.R. § 232.2 – included (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce ("traditional navigable waters"); (ii) all inter-state waters; (iii) tributaries to such waters; and (iv) wetlands adjacent to such waters or their tributaries.

iv. (Effective, 8-28-15)[38] – Obama WOTUS Rule – Joint Corps and EPA Regulations redefined and expanded WOTUS so as to include:

I. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce ("traditional navigable waters") - 33 U.S.C. § 328.3(a)(1) (8-28-15);

II. All interstate waters, including interstate wetlands - 33 U.S.C. § 328.3(a)(2) (8-28-15);

III. The territorial seas - 33 U.S.C. § 328.3(a)(3), as defined by CWA 502(7) (8-28-15);

IV. All tributaries to traditional navigable waters, interstate waters, and territorial seas - 33 U.S.C. § 328.3(a)(5) (8-28-15);

V. All waters adjacent to such waters, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters - 33 U.S.C. § 328.3(a)(6) (8-28-15);

VI. All waters combined, for purposes of a *significant nexus* analysis, in the watershed that drains to the nearest traditional navigable waters, inter-state waters, and territorial seas, including (a) prairie potholes; (b) Carolina bays and Delmarva bays; (c) pocosins; (d) western vernal pools; and (e) Texas coastal prairie wetlands - 33 U.S.C. § 328.3(a)(7)(i)-(v) (8-28-15);

VII. All waters located within the 100-year floodplain of a water identified in traditional navigable waters, interstate waters, and territorial seas, and all waters located within 4,000 feet of the high tide line or ordinary high water mark of traditional navigable waters, interstate waters, and all tributaries to such waters, *where* they are determined on a case-specific

[37] The 2017 action Brace Complaint cited to those provisions effective through August 27, 2015, *before* the Obama WOTUS Rule revision defining the scope of waters covered by the CWA took effect on August 28, 2015.

[38] *See* Department of Defense, Department of the Army, Corps of Engineers and Environmental Protection Agency, *Clean Water Rule: Definition of 'Waters of the United States' – Final Rule*, 80 Fed. Reg. 37054 (June 29, 2015), https://www.govinfo.gov/content/pkg/FR-2015-06-29/pdf/2015-13435.pdf.

basis to have a *significant nexus* to traditional navigable waters or interstate waters - 33 U.S.C. § 328.3(a)(8). (8-28-15).[39]

v. Obama WOTUS Rule identified by category the following waters:

I. Jurisdictional-By-Rule in All Cases – Traditional navigable waters, interstate waters, the territorial seas, and impoundments of these waters are "jurisdictional-by-rule" in all cases, meaning that no additional analysis was required. (These waters had been jurisdictional under prior regulations). *See* 80 Fed. Reg. at 37058.

II. Jurisdictional-By-Rule As Defined – Tributaries and adjacent waters are "jurisdictional-by-rule" if, based on a case-specific evaluation, they met the regulation's definitions, which were intended to cover waters meeting the "significant nexus standard" set forth in the Supreme Court's *Rapanos* decision. *See* 80 Fed. Reg. at 37058;

A. "Tributaries" - defined as "waters that are characterized by the presence of physical indicators of flow – bed and banks and ordinary high water mark – and that contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas. […] The great majority of tributaries as defined by the rule are headwater streams that play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream waters. The physical indicators of bed and banks and ordinary high water mark [OHWM] demonstrate that there is sufficient volume, frequency, and flow in such tributaries to a traditional navigable water, interstate water, or the territorial seas to establish a significant nexus." Only tributaries that "provide chemical, physical, or biological functions to downstream waters and meet the significant nexus test were covered. "The rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries or, in certain circumstances, drain

[39] *See* 80 Fed. Reg. at 37104-37105.

wetlands, or that science clearly demonstrates are functioning as a tributary." The rule excluded "ditches that flow only after precipitation," as well as, "gullies, rills, and ephemeral streams that do not have a bed and banks and ordinary high water mark [OWHM]." *See* 80 Fed. Reg. at 37058;

B. "Adjacent Waters" – defined as "bordering, contiguous, or neighboring, including waters separated from other [WOTUS] by constructed dikes or barriers, natural river berms, beach dunes and the like. Further, waters that connect segments of, or are at the head of, a stream or river are 'adjacent' to that stream or river." They "include wetlands, ponds, lakes, oxbows, impoundments and similar water features." They "do not include waters that are subject to established normal farming, silviculture and ranching activities" qualifying for exemption under CWA § 404(f)(1)(A). "Neighboring" (ADDED NEW CATEGORY) – defined as: (1) "Waters located in whole or in part within 100 feet of the ordinary high water mark [OWHM] of a traditional navigable water, interstate water, the territorial seas, or a tributary;" (2) "Floodplain Waters" - "Waters located in whole or in part in the 100-year floodplain and that are within 1,500 feet of the ordinary high water mark [OHWM] of a traditional navigable water, the territorial seas, an impoundment or a tributary;" (3) "Waters located in whole or in part within 1,500 feet of the ordinary high tide line of a traditional navigable water or the territorial seas and within 1,500 feet of the ordinary high water

mark of the Great Lakes."[40] *See* 80 Fed. Reg. at 37058.[41]

III. "Case-Specific Significant Nexus" – "[W]aters that are not jurisdictional by rule but are subject to case-specific analysis to determine if a significant nexus exists and the water is a [WOTUS]." A significant nexus with WOTUS will be shown to exist if such waters "significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas." The significant nexus "determination will most typically be made on a water individually, but can, when warranted, be made in combination with other waters where waters function together" (i.e., they "are considered similarly situated by rule because they function alike and are sufficiently close to function together in affecting downstream waters"):

A. 33 CFR § 328.3 "(a)(7) waters" – "Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands." *See* 80 Fed. Reg. at 37059, 37104-37105.

B. 33 CFR § 328.3 "(a)(8) waters" – "[W]aters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and waters within 4,000 feet

[40] *See* Lawrence A. Kogan, *The Europeanization of the Great Lakes States' Wetland Laws and Regulations (At the Expense of Americans' Constitutionally Protected Private Property Rights)*, 2019 Mich. St. L. Rev. 687 (2019) *supra*, at 785, n. 586 (discussing generally how the Canada-U.S. Great Lakes Water Quality Agreement ("GLWQA") and a number of related compacts, programs and initiatives including the Obama WOTUS regulation, incorporated European legal and science standards that the State of Michigan and other Great Lakes States (e.g., Pennsylvania) incorporated within their enacted State laws, implementing regulations, and enforcement practices, and specifically, how the 2013 Michigan Legislature Act No. 631 amendments to the State's Natural Resources and Environmental Protection Act ("NREPA") MCL § 324.30301(1)(n) defined a regulated "wetland" consistent with the federal definition of regulated wetlands contained within former Obama administration regulations that overbroadly defined the term "waters of the United States"(WOTUS) – i.e., "adjacent waters").

[41] *See Id*., at 727-760, (discussing how the U.S. and Canada had adopted their most substantive and far-reaching amendments to the Great Lakes Water Quality Agreement ("GLWQA") on September 7, 2012). Significantly, the 2012 GLWQA amendments preceded the publication of the Obama 2015 WOTUS Rule by approximately three years. Arguably, absent the ability to work with Congress to amend the CWA, the Obama administration instead turned to international law to achieve the same result, relying upon the legal obligations the United States assumed under the GLWQA 2012 Protocol as the basis, in part, for amending the 2015 WOTUS Rule. While the 2015 Obama WOTUS Rule's definition of the term "neighboring" for purposes of assessing the "adjacency" of waters to WOTUS can be seen as furthering CWA §§ 108(a)'s and 118(3)(C)'s goals, respectively, of protecting the Great Lakes' "*watersheds*" and "*drainage basins*," (emphasis added), clearly, the 2015 Obama WOTUS Rule reflects the prior administration's embrace of postmodern international law. *See* Lawrence A. Kogan, *The Europeanization of the Great Lakes States' Wetland Laws and Regulations (At the Expense of Americans' Constitutionally Protected Private Property Rights)*, 2019 Mich. St. L. Rev. 687 (2019) *supra*, at 729-738.

of the high tide line or the ordinary high water mark [OHWM] of a traditional navigable water, interstate water, the territorial seas, impoundments, or covered tributary are subject to case-specific determinations, unless the water is excluded." *See* 80 Fed. Reg. at 37059.

C. "(a)(7) waters" are 'similarly situated' only if they are of the same type in the same point of entry watershed. "For example, only pocosins may be evaluated with other pocosins in the same point of entry watershed. […] The point of entry watershed is the area drained by the nearest traditional navigable water, interstate water, or the territorial seas and is typically defined by the topographic divides between one traditional navigable water, interstate water, or the territorial seas and another. […] The waters identified in paragraph (a)(7) are similarly situated by rule and shall be combined with other waters of the same category located in the same watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas *with no need for a case-specific similarly situated finding*." *See* 80 Fed. Reg. at 37092.

D. "(a)(8) waters" are 'similarly situated' if it is determined that "a group of waters in the region [] meet the distance thresholds [and] can reasonably be expected to function together in their effect on the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters or the territorial seas. […] Similarly situated waters can be identified as sufficiently close together […] when they are within a contiguous area of land with relatively homogenous soils, vegetation, and landform (e.g., plain, mountain, valley, etc.)." *See* 80 Fed. Reg. at 37092.

E. "The agencies will consider the hydrologic, geomorphic, and ecological characteristics and circumstances of the waters under consideration. Examples include:

Documentation of chemical, physical, or biological interactions of the similarly situated waters; aerial photography; USGS and state and local topographical or terrain maps and information; NRCS soil survey maps and data; other available geographic information systems (GIS) data; National Wetlands Inventory maps where wetlands meet the CWA definition; and state and local information. The evaluation will use any available site information and pertinent field observations where available, relevant scientific studies or data, or other relevant jurisdictional determinations that have been completed in the region." *See* 80 Fed. Reg. at 37092.

F. "The analysis will include an evaluation of the functions listed in paragraph [33 CFR § 328.3](c)(5) of the rule, which defines significant nexus. A water has a significant nexus when *any single function or combination of functions* performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest traditional navigable water, interstate water, or the territorial seas." *See* 80 Fed. Reg. at 37093, 37106.

G. "A water may be determined to have a significant nexus based on performing *any* of the following functions: sediment trapping, nutrient recycling, pollutant trapping, transformation, filtering and transport, retention and attenuation of floodwaters, runoff storage, contribution of flow, export organic matter, export of food resources, or provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a traditional navigable water, interstate water, or the territorial seas." *See* 80 Fed. Reg. at 37093.

H. "The documentation for each case should be complete enough to support the specific

jurisdictional determination, including an explanation of which waters were considered together as similarly situated and in the same region." See 80 Fed. Reg. at 37095.

vi. *North Dakota v. USEPA*, 127 F. Supp. 3d 1047 (D.C. ND 2015) (Case No. 3:15-cv-59, Aug. 27, 2015) < https://scholar.google.com/scholar_case?case=10938752936736085 76&hl=en&as_sdt=6&as_vis=1&oi=scholarr> (wherein the U.S. District Court for the District of North Dakota imposed a stay on the implementation/operation of the Obama WOTUS Rule in the 13 states of: North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming and New Mexico).

vii. *In re E.P.A. and Department of Defense Final Rule*, 803 F.3d 804 (6th Cir. 2015) (Oct. 9, 2015) < https://www.opn.ca6.uscourts.gov/opinions.pdf/15a0246p-06.pdf> (wherein the Sixth Circuit Court of Appeals, in four actions filed collectively by 18 states, imposed a temporary nationwide stay upon the implementation/operation of the Obama WOTUS Rule).

viii. *National Association of Manufacturers v. Department of Defense*, 137 S. Ct. 811 (2017) (granted certiorari) < https://www.leagle.com/decision/insco20170113f93>.

ix. *National Association of Manufacturers v. Department of Defense*, 583 U.S. ___ 138 S.Ct. 617 (2018), Docket No. 16-299 (Jan. 22, 2018) < https://www.supremecourt.gov/opinions/17pdf/16-299_8nk0.pdf> (wherein the U.S. Supreme Court held that because the Obama WOTUS Rule fell outside the ambit of the seven EPA Administrator actions identified in 33 U.S.C. § 1369(b)(1) entitled to direct and exclusive Circuit Court of Appeals review, any challenges to the Obama WOTUS Rule (or even the Trump WOTUS Rule) would have to be filed in federal district courts. Slip op. at 9-20.[42]

x. *In re Department of Defense & EPA Final Rule*, 713 Fed. Appx. 489 (6th Cir. 2018) (Sixth Circuit lifted stay and dismissed corresponding petitions for review) <>.

xi. *North Dakota v. USEPA*, Case No. 3:15-cv-59 (D.C. ND 2018) (March 23, 2018) < https://attorneygeneral.nd.gov/sites/ag/files/documents/MediaAttachments/2018-03-23-OrderLiftingStay.pdf> (noted

[42] *See* H. David Gold, Andrew Spielman, Nathaniel Custer, Rachel Jacobson, Heidi Ruckriegle, *SCOTUS: WOTUS Rule Suits Belong in District Courts*, CaseText (Jan. 25, 2018), https://casetext.com/analysis/scotus-wotus-rule-suits-belong-in-district-courts?sort=relevance&PHONE_NUMBER_GROUP=C&resultsNav=false&q=.

that, following the Supreme Court's decision in *NAM v. Dept. of Defense*, the Sixth Circuit, not having issued a mandate, vacated its previous stay of the Obama WOTUS Rule and dismissed the more than 18 cases brought before it for lack of jurisdiction. *See North Dakota v. USEPA*, *supra*, Slip op. at 2, n.1. Also granted the motion filed by 7 of the 13 plaintiff states to lift the District Court's prior stay. Slip op. at 2, n.1, and at 16.).

xii. *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1370 (S.D. Ga. 2018) [No. 2:15-cv-079] (S.D. Ga. 2018) (June 6, 2018) < https://casetext.com/case/georgia-v-pruitt-1> (issued preliminary injunction enjoining application of the 2015 WOTUS Rule in the States of Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin, and the Commonwealth of Kentucky).

xiii. *State of Texas v. United States Environmental Protection Agency*, No. 3:15-cv-00162 (S.D. Tx. 2019) (Sept. 12, 2018) < https://ecf.txsd.uscourts.gov/doc1/179131015214> (issued a preliminary injunction temporarily enjoining the application of the 2015 WOTUS Rule in the States of Texas, Louisiana, and Mississippi until the case is resolved).

xiv. *State of Texas v. United States Environmental Protection Agency*, No. 3:15-cv-00162 (S.D. Tx. 2019) (May 28, 2019) < https://www.eenews.net/assets/2019/05/29/document_gw_01.pdf> (remanding the 2015 WOTUS Rule to the agencies for revision, and maintaining the preliminary injunction issued on September 12, 2018).

I. "The Final Rule violated the APA's notice-and-comment requirements by deviating from the Proposed Rule in a way that interested parties could not have reasonably anticipated. Instead of continuing to use ecologic and hydrologic criteria to define 'adjacent waters' as originally proposed, the summary judgment evidence reflects that the Final Rule abandoned this approach and switched to the use of distance-based criteria. […] This shift in terminology and approach led to the promulgation of a Final Rule that was different in kind and degree from the concept announced in the Proposed Rule." Slip op. at 9-10, comparing 79 Fed. Reg. at 22,263 with 80 Fed. Reg. at 37,105. "This change is significant – it alters the jurisdictional scope of the Act." Slip op. at 10, citing *Nat'l Ass'n of Mfrs.*, 138

S. Ct. at 624. "As a result, the Final Rule was deprived of the benefit of comment 'by those most interested and perhaps best informed on the subject of the rulemaking at hand.'" Slip op. at 10, citing *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994) < https://casetext.com/case/phillips-petroleum-co-v-johnson-2>.

II. "The Final Rule also violated the APA by preventing interested parties from commenting on the studies that served as the technical basis for the rule. As the courts have held, '[a]n agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.' Slip op. at 11, quoting *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007) < https://casetext.com/case/independent-drivers-v-fed-motor-carrier>. "Indeed, it is a 'fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.'" Slip op. at 11-12, quoting *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) < https://casetext.com/case/amn-radio-relay-v-fcc>. "'The most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation.'" Slip op. at 12, quoting *Air Transportation Association of America v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) < https://casetext.com/case/air-trans-assn-of-america-v-faa>. "Here, the Agencies failed to give commentators an opportunity to refute the most critical factual material used to support the Final Rule – the Final Connectivity Report. Indeed, the summary judgment record establishes that the Final Connectivity Report[43] was the technical basis for the

[43] *See* United States Environmental Protection Agency, Office of Research and Development, *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence*, EPA/600/R-14/475F (Jan. 2015), at ES-2, https://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=523020 ("Based on the review and synthesis of more than 1,200 publications from the peer reviewed scientific literature, the evidence supports five major conclusions.").

Final Rule and was instrumental in determining what changes were to be made to the definition of the phrase WOTUS…" Slip op. at 12.

xv. *Oregon Cattlemen's Association v. Environmental Protection Agency*, No. 3:19-cv-00564 (D. Or. 2019) (July 26, 2019 < https://ecf.ord.uscourts.gov/doc1/15117176758> (issued a preliminary injunction enjoining the application of the 2015 WOTUS Rule in the State of Oregon).[44]

xvi. *Georgia v. Wheeler*, No. 2:15–cv–079 (S.D. Ga. 2019) (Aug. 21, 2019) < https://casetext.com/case/georgia-v-wheeler> (wherein the District Court issued an order remanding the 2015 Rule to the agencies for revision, finding that the 2015 Rule exceeded the agencies' statutory authority under the CWA and was promulgated in violation of the APA.). Slip op. at 36.

I. "The Agencies' assertion of jurisdiction over all interstate waters is not a permissible construction of the CWA because they assert jurisdiction over waters that are not navigable-in-fact and otherwise have no significant nexus to any other navigable-in-fact water. Specifically, the WOTUS Rule states that Agencies have jurisdiction over all interstate waters 'even if they are not navigable' and even if they 'do not connect to such [navigable] waters.'" Slip op. at 34.

II. "Therefore, under this definition of interstate waters, any interstate water, regardless of navigability, flow, or effect on the chemical, physical, or biological integrity of navigable-in-fact water (a 'significant nexus') is included under the definition of waters of the United States. Under such a broad definition, a mere trickle, an isolated pond, or some other small, non-navigable body of water would be under federal jurisdiction simply because it crosses a state line or lies along a state border. Because this broad definition would include waters that have little or no connection to navigable-in-fact waters like the ponds in *SWANCC*, the inclusion of all interstate waters violates the significant-nexus test and therefore

[44] The Trump (Obama) WOTUS Repeal Rule discussed *infra*, notes that two other suits filed during 2019 seeking a preliminary injunction enjoining the application of the Obama WOTUS rule in the States of Ohio, Michigan and Tennessee (*Ohio v. EPA*, No. 2:15–cv–02467, 2019 WL 1368850 (S.D. Ohio Mar. 26, 2019)) and in the State of Oklahoma (*Oklahoma v. EPA*, No. 4:15–cv–00381, slip. op. at 11–12 (N.D. Okla. May 29, 2019)) were unsuccessful. *See* 84 Fed. Reg. 56626, 56629-56630, *infra*. A third action seeking a preliminary injunction to enjoin the application of the Obama WOTUS Rule in the State of Oregon also was unsuccessful. (*Oregon Cattlemen's Association v. EPA*, No. 19–00564 (D. Or. Dec. 30, 2019)) <https://ecf.wawd.uscourts.gov/doc1/19718910119>.

exceeds the Agencies' authority under the CWA. *Rapanos*, 547 U.S. at 767 ('Absent a significant nexus, jurisdiction under the Act is lacking.')." Slip op. at 34-35.

III. "[I]n developing such rules to the reach of their authority, the Agencies must adhere to the plain language of the CWA and Supreme Court precedent interpreting that language. Moreover, the Agencies must also adhere to the procedural requirements imposed by the APA to promulgate a lawful rule. Here, the Agencies failed in both of these respects. The WOTUS Rule's definition of 'waters of the United States' fails to comply with Justice Kennedy's significant-nexus test defining the reach of the Agencies' authority under the CWA, and it substantially interferes with an area of traditional state authority without a clear indication from Congress allowing such interference in the CWA. Moreover, the Agencies failed to promulgate a final rule that was the logical outgrowth of the proposed rule, and portions of the Final Rule were promulgated arbitrarily and capriciously." Slip op. at 81.

vii. Trump (Obama) WOTUS Repeal Rule[45] 84 Fed. Reg. 56626 (Oct. 22, 2019) – ("repeal[ing] the 2015 Clean Water Rule: Definition of 'Waters of the United States' ('2015 Rule'), which amended portions of the Code of Federal Regulations (CFR), and to restore the regulatory text that existed prior to the 2015 Rule.

I. Primary Bases for Repeal:

A. "[T]he agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the […] (CWA) as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*." 84 Fed. Reg. at 56626.

B. "[T]he agencies conclude that in promulgating the 2015 Rule the agencies failed to adequately consider and accord due weight of the policy of the Congress in CWA

[45] *See* Department of Defense, Department of the Army, Corps of Engineers and Environmental Protection Agency, *Definition of 'Waters of the United States' – Recodification of Pre-Existing Rules – Final Rule*, 84 Fed. Reg. 56626 (Oct. 22, 2019), https://www.govinfo.gov/content/pkg/FR-2019-10-22/pdf/2019-20550.pdf.

section 101(b) to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution' and 'to plan the development and use…of land and water resources.' 33 U.S.C. 1251(b)." 84 Fed. Reg. at 56626.

C. "[T]he agencies repeal the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority." 84 Fed. Reg. at 56626.

D. "Lastly, the agencies conclude that the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support." 84 Fed. Reg. at 56626.

II. Regulatory Mandate:

A. "The agencies will implement the pre-2015 Rule regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice. […] With this final rule, the regulations defining the scope of federal CWA jurisdiction will be those portions of the CFR as they existed before the amendments promulgated in the 2015 Rule." 84 Fed. Reg. at 56626.

B. "[T]he regulatory definitions of [WOTUS] in effect beginning on the effective date of this final rule are those portions of 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 239, 232, 300, 302, and 401 as they existed immediately prior to the 2015 Rule's amendments." 84 Fed. Reg. at 56664 citing *API v. EPA*, 883 F.3d 918, 923 (D.C. Cir. 2018) (regulatory criterion in effect immediately before enactment of criterion that was vacated by the court 'replaces the now-vacated' criterion)." < https://casetext.com/case/institution-v-envtl-prot-agency-1>.

C. Repeal Effective Date – December 23, 2019. 84 Fed. Reg. at 56626.

viii. Trump WOTUS – Redefining "Waters of the United States" (pre-publication version 1-23-20)[46] (*effective 60 days after date of publication in the Federal Register*). *See* Prepublication Version at 2. [Doesn't help already pending violation or enforcement cases]

I. "Jurisdictional Waters" - 33 CFR §328.3(a); 40 CFR § 120.2(1)[47]

A. "Territorial seas and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide." – (Traditional Navigable-in-Fact Waters")[48] 33 CFR §328.3(a)(1); 40 CFR § 120.2(1)(i).[49]

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[46] *See* Department of Defense, Department of the Army, Corps of Engineers and Environmental Protection Agency, *The Navigable Waters Protection Rule: Definition of 'Waters of the United States' – Final Rule* (Jan. 23, 2020) (prepublication rule), https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepbulication.pdf.

[47] These new CWA regulations also revise for the EPA the definition of "navigable waters" in 40 CFR § 120.2, which are distinguishable from "WOTUS." "*Navigable waters* means waters of the United States, including territorial seas."

[48] INTERSTATE WATERS NO LONGER INCLUDED IN 'WOTUS. '"[T]his final rule removes interstate waters, including interstate wetlands, as a separate category of ['WOTUS'] […] Interstate waters and interstate wetlands remain subject to CWA jurisdiction under the final rule if they are paragraph (a)(1) through (a)(4) waters." *See* Prepublication Version at 121-122. "By eliminating a separate category for interstate waters, the final rule adheres to the legal principles discussed in Section II.E by including within the definition of ['WOTUS'] traditional navigable waters, the territorial seas, and waters subject to the ebb and flow of the tide; tributaries to such waters; certain lakes, ponds, and impoundments of otherwise jurisdictional waters; and wetlands adjacent to jurisdictional waters. Because the agencies' authority flows from Congress' use of the term 'navigable waters' in the CWA, the agencies lack authority to regulate waters untethered from that term." *See* Prepublication Version at 127. "Therefore, those interstate waters that would satisfy the definitions in this final rule are jurisdictional; interstate waters without any surface water connection to traditional navigable waters or the territorial seas are not within the agencies' authority under the CWA and are more appropriately regulated by the States and Tribes under their sovereign authorities." *See* Prepublication Version at 127-128.

[49] According to the final regulations, "[t]he final definition of ['WOTUS'] aligns with the intent of Congress to interpret the term 'navigable waters' beyond just commercially navigable-in-fact waters. This definition recognizes Congress' intent 'to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term,' *Riverside Bayview*, 474 U.S. at 133, but at the same time acknowledges that '[t]he grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.' *SWANCC*, 531 U.S. at 173. The definition also recognizes the constitutional underpinning of the CWA, which was Congress' exercise of 'its commerce power over navigation.' *Id*. at 168 n.3." *See* Prepublication Version at 87. In addition, the final regulations provide that, "whether a water is susceptible to use in interstate commerce requires more than simply being able to float a boat to establish jurisdiction over navigable-in-fact waters under paragraph (a)(1); it requires evidence of physical capacity for commercial navigation and that it was, is, *or* actually could be used for that purpose. *See, e.g.*, Appendix D (citing *The Montello*, 87 U.S. 430, 441-42 (1874) < https://casetext.com/case/the-montello>; *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) < https://casetext.com/case/united-states-v-holt-bank>; *United States v. Utah*, 283 U.S. 64 (1931) < https://casetext.com/case/united-states-v-utah>; *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940)) < https://casetext.com/case/us-v-appalachian-power-co>." *See* Prepublication Version at 119.

1. *See* discussion below re commerce clause.
2. "The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. [Such waters…] end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects." 33 CFR §328.3(c)(11); 40 CFR § 120.2(3)(xi).

B. "Tributaries" 33 CFR §328.3(a)(2); 40 CFR § 120.2(1)(ii). "Tributary" means:
1. "[A] river, stream or similar naturally occurring surface water channel that contributes surface water flow to (a)(1) traditional navigable-in-fact waters and territorial seas in a "typical year" either directly or through (a)(2) through (a)(4) waters (tributaries; lakes, ponds and impoundments of jurisdiction waters; and/or "adjacent wetlands.") 33 CFR §328.3(c)(12); .
2. "A tributary must be perennial or intermittent in a 'typical year.' 33 CFR §328.3(c)(12); 40 CFR § 120.2(3)(xii).
   a. "Typical Year" "means when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period." 33CFR § 328.3(c)(13); 40 CFR § 120.2(3)(xiii).

"Implementation of this section of the traditional navigable waters provision of paragraph (a)(1) in the final rule will be case-specific, as it has always been." *See* Prepublication Version at 120.

b. "Perennial" "means surface water flowing continuously year-round." 33 CFR §328.3(c)(8); 40 CFR § 120.2(3)(viii).

c. "Intermittent" "means surface water flowing continuously during certain times of the year and *more than in direct response to precipitation* [50](e.g., seasonally when the groundwater table is elevated or when snowpack melts.") 33 CFR §328.3(c)(5); 40 CFR § 120.2(3)(v).

3. "The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the 'flow conditions' of this definition." 33 CFR §328.3(c)(12); 40 CFR § 120.2(3)(xii).

4. "A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a 'typical year' through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field or similar natural feature." 33 CFR §328.3(c)(12); 40 CFR § 120.2(3)(xii).

5. "[I]ncludes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch

[50] In the *Pozsgai* case, although the Court found, in March 2007, that the Government's expert witness had "submitted a declaration [stating] that in his opinion, 'the stream between the Pozsgai site and the Pennsylvania Canal flows continuously for most of the year, except during the summer and early fall,' although rain provides some temporary flow during those times,'" it held the wetlands alleged as present on the property were jurisdictional. Arguably, under the definition contained in this new final regulation, the stormwater channel (as opposed to stream) would be considered "ephemeral" ("surface water flowing or pooling only in direct response to precipitation)" and thus non-jurisdictional, as opposed to "intermittent" ("surface water flowing continuously during certain times of the year and more than in direct response to precipitation") and consequently, jurisdictional.

satisfies the flow conditions of this definition." 33 CFR §328.3(c)(12); 40 CFR § 120.2(3)(xii).[51]

a. "Ditch" – "means a constructed or excavated channel used to convey water." 33 CFR §328.3(c)(2); 40 CFR § 120.2(3)(ii).

C. "Lakes and ponds, and impoundments of jurisdictional waters." 33 CFR §328.3(a)(3); 40 CFR § 120.2(1)(iii).

D. "Adjacent wetlands" –

1. "Wetlands" – "means 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 CFR §328.3(c)(16); 40 CFR § 120.2; 40 CFR § 120.2(3)(xvi).[52]

2. "Adjacent" – "means wetlands that:"

a. "abut, meaning to touch at least at one point or side of, a paragraph (a)(1) through (3) water (traditional navigable-in-fact waters; tributaries; lakes and ponds and impoundments of jurisdictional waters) 33 CFR § 328.3(c)(1)(i); 40 CFR § 120.2(3)(i)(A).

b. "are inundated by flooding from a paragraph (a)(1)

[51] In the *Brace* case, a portion of the ditch network Mr. Brace had excavated 30 years ago on his Erie County farm had been intended to improve surface water flows to the headwaters of Elk Creek which were located downstream from the Brace farm. The Government ultimately treated that portion of the ditch network as an extension of Elk Creek, and thus, as a tributary of Lake Erie, a navigable-in-fact water located 30 miles downstream.

[52] This definition comports with the Corps 1977 regulations and with the 1987 US Army Corps of Engineers Wetland Delineation Manual. *See* 42 Fed. Reg. at 37144, 33 CFR § 323.2(c). *See also* 1987 US Army Corps of Engineers, *Wetland Delineation Manual – Final Report* (Jan. 1987), at A14, https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id/4530 and https://www.cpe.rutgers.edu/Wetlands/1987-Army-Corps-Wetlands-Delineation-Manual.pdf. .

through (3) water (traditional navigable-in-fact waters; tributaries; lakes and ponds and impoundments of jurisdictional waters) in a 'typical year' 33 CFR § 328.3(c)(1)(ii); 40 CFR § 120.2(3)(i)(B).

c. "are physically separated from a paragraph (a)(1) through (3) water (traditional navigable-in-fact waters; tributaries; lakes and ponds and impoundments of jurisdictional waters) only by a natural berm, bank, dune, or similar natural feature" 33 CFR § 328.3(c)(1)(iii) 40 CFR § 120.2(3)(i)(C); *OR*

d. "are physically separated from a paragraph (a)(1) through (3) water (traditional navigable-in-fact waters; tributaries; lakes and ponds and impoundments of jurisdictional waters) only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the paragraph (a)(1) through (3) water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature." 33 CFR § 328.3(c)(1)(iv); 40 CFR § 120.2(3)(i)(D).

e. "An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct

hydrologic surface connection through or over that structure in a typical year." 33 CFR § 328.3(c)(1)(iv); 40 CFR § 120.2(3)(i)(D).[53]

II. "Non-jurisdictional Waters" – 33 CFR §328.3(b); 40 CFR § 120.2(2).

A. "Waters or water features that are not identified in paragraphs (a)(1) through (4)." 33 CFR §328.3(b)(1); 40 CFR § 120.2(2)(i).

B. "Groundwater, including groundwater drained through subsurface drainage systems." 33 CFR §328.3(b)(2); 40 CFR § 120.2(2)(ii).

1. "[T]he agencies exclude groundwater, including groundwater drained through subsurface drainage systems.[54] The agencies have never interpreted [WOTUS] to include groundwater, and they continue that practice through this final rule by explicitly excluding groundwater." *See* Prepublication Version at 248-249.

2. "The agencies also note that groundwater, as opposed to subterranean rivers or tunnels, cannot serve as a connection between upstream and downstream jurisdictional waters."

a. "[A] losing stream [as frequently exists out West] that flows to groundwater without resurfacing does not meet the definition of 'tributary' because it does not

[53] Pursuant to this definition, unless the wetlands alleged to be present on Mr. Brace's Murphy and Marsh farm tracts *are scientifically disproven*, they would arguably be considered jurisdictional in their entirety even though they are separated only by a 30-foot-wide dirt and gravel road, since EPA has shown that a direct hydrologic surface connection was made possible via a culvert through which an abutting tributary flows (e.g., Elk Creek), and that they are periodically inundated by that tributary (Elk Creek), which is located in a floodplain and contributes to the surface flow to a traditional navigable-in-fact water (e.g., Lake Erie).

[54] Pursuant to this definition, waters flowing through subsurface agricultural drainage tile would not constitute "jurisdictional waters." However, if such drainage tile waters emptied into and contributed to the surface flow of a tributary, and the tributary waters contributed to the surface flow of traditional navigable-in-fact waters, the tributary waters would be considered "jurisdictional waters," as in the Brace cases.

contribute to surface flow to a downstream jurisdictional water."

b. "However, a subterranean river does not sever jurisdiction of the tributary if it contributes surface water flow in a typical year to a downstream jurisdictional water."[55] *See* Prepublication Version at 248-249.

C. Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools." 33 CFR §328.3(b)(3); 40 CFR § 120.2(2)(iii).

1. "Ephemeral" – "means surface water flowing or pooling *only* in direct response to precipitation (e.g., rain or snow fall)." 33 CFR §328.3(c)(3); 40 CFR § 120.2(3)(iii).

D. "Diffuse stormwater run-off and directional sheet flow over upland." CFR §328.3(b)(4); 40 CFR § 120.2(2)(iv).[56]

E. "Ditches that are not paragraph (a)(1) or (2) waters, and those portions of ditches constructed in paragraph (a)(4) waters ["Adjacent Wetlands"] that do not satisfy the

[55] In the context of the *Pozsgai* case, the storm waters drain from Morrisville Borough and Falls Township, Bucks County, PA onto the surface of the Pozsgai property from two directions (the north and the west) via man-made ditches. The stormwaters from the west proceed via a manmade ditch through the area the Government has alleged constitutes jurisdictional wetlands. These ditched stormwaters eventually meet up with a third source of Falls Township stormwaters southwest of the Pozsgai property, and all such waters make their way via several concrete culverts and drainage channels to the 60-mile Delaware Canal portion of the Pennsylvania Canal. It is well known that Delaware Canal waters connect and mix with waters from the Lehigh Canal, which is also a part of the Pennsylvania Canal network, as they proceed underground in pipes and through culverts and on the surface at different locations towards, presumably, the Delaware River, constituting traditional navigable-in-fact waters. The Government *has never scientifically or otherwise proven* that the stormwaters proceeding from Morrisville Borough and Falls Township through the Pozsgai property have a surface connection to or a significant nexus with the traditional navigable-in-fact waters of the Delaware River. The Government can utilize either test to establish the presence of jurisdictional waters in Pennsylvania. *See Donovan v. United States*, 661 F.3d 174, 184 (3d Cir. 2011) < https://casetext.com/case/us-v-donovan-4> ("hold[ing] that federal jurisdiction to regulate wetlands under the CWA exists if the wetlands meet either the plurality's test or Justice Kennedy's test from *Rapanos*. […] Because each of the tests for Corps jurisdiction laid out in *Rapanos* received the explit endorsement of a majority of the Justices, *Rapanos* creates a governing standard for us to apply: the CWA is applicable to wetlands that meet either the test laid out by the plurality or by Justice Kennedy in *Rapanos*.). The Government also *has never scientifically proven* that groundwater or a subterranean river served/serves as the source of the alleged wet(holding land hydrology on the Pozsgai property.

[56] In the Phillips pre-enforcement case, the facts reveal that the source of Phillips property hydrology derives from diffuse stormwater runoff from lands managed by the City of Payson, Utah.

conditions of paragraph (c)(1)." 33 CFR §328.3(b)(5); 40 CFR § 120.2(2)(v).

F. "Prior converted cropland." 33 CFR §328.3(b)(6); 40 CFR § 120.2(2)(vi).

3. "means any areas that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product[57] possible.[58] EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture."[59] 33 CFR §328.3(b)(9); 40 CFR § 120.2(3)(ix).

4. "An area is no longer considered prior converted cropland for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands, as defined in paragraph (c)(16) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, *agricultural purposes* at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned." 33 CFR

[57] FSA Section 1221(1) referred to the term "agricultural commodity," not "agricultural product" *which is arguably broader and may encompass other than crop products*. FSA § 1201(a)(1)(A) defined the term "agricultural commodity" as "any agricultural commodity planted and produced in a State by annual tilling of the soil, including tilling by one-trip planters." This definition of the term "agricultural commodity" also comports with the definition contained in the interim 1986 Corps regulations – "'agricultural commodity'" meant "'any crop planted and produced by annual tilling of the soil or on an annual basis by one-trip planters or sugarcane planted or produced in a State." *See* U.S. Department of Agriculture Farmers Home Administration, *Highly Erodible Land and Wetland Conservation – Interim Rule*, 51 Fed. Reg. 23496, 23502, at Sec. 12.2, 7 CFR § 12.2(a)(1), https://cdn.loc.gov/service/ll/fedreg/fr051/fr051124/fr051124.pdf.

[58] NFSAM § 512.15(a) defines "prior converted croplands" as "wetlands that before December 23, 1985, were drained, dredged, filled, leveled, or otherwise manipulated for the purpose, or to have the effect of, making the production of an agricultural commodity possible." *See* 180-V-NFSAM, Second Ed., Aug. 1988, at § 512.15(a).

[59] This provision could help Mr. Brace's post-enforcement consent decree case. *See* Lawrence A. Kogan, *Harmonizing 'Converted Wetland' Under the Clean Water Act and Food Security Act Would Reaffirm Congress' Intent To Limit EPA And Army Corps 404 Jurisdiction*, 12 Kentucky Journal of Equine, Agricultural and Natural Resources Law (2019-2020), forthcoming, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3361982.

§328.3(b)(9); 40 CFR § 120.2(3)(ix).[60]

G. "Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease." 33 CFR §328.3(b)(7); 40 CFR § 120.2(2)(vii).[61]

1. "Upland" – "means any land area that under normal circumstances does not satisfy all three wetland factors (i.e., hydrology, hydrophytic vegetation, and hydric soils) identified in paragraph (c)(16) […] and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water." 33 CFR §328.3(c)(14); 40 CFR § 120.2(3)(xiv).[62]

H. "Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (c)(6)." 33 CFR §328.3(b)(8); 40 CFR § 120.2(2)(viii).[63]

I. "Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of

[60] This provision could help Brace by finally rendering a determination regarding whether his commenced conversion of the Murphy and Marsh farm tracts (which are the subject of the post-enforcement consent decree action and the new wetlands violation action) had been "abandoned" where EPA and the Corps, along with environmental extremists disrupted Brace's completion of that commenced conversion to prevent it from becoming a prior converted cropland not subject to federal jurisdiction. *See* Lawrence A. Kogan, *Ducking the Truth About the Great 'Commenced Conversion' Conspiracy Against America's Farmers*, 27 San Joaquin Ag. L. Rev. 19-65 (2017-2018), http://www.sjcl.edu/images/stories/sjalr/volumes/V27N1A2.pdf.

[61] Could help Phillips pre-enforcement case combined with diffuse stormwater exemption.

[62] *Cf.*1987 U.S. Army Corps of Engineers Wetlands Delineation Manual, *supra* at A13 (defining the term "Upland" *for scientific purposes*, as: " any area that does not qualify as a wetland because the associated hydrologic regime is not sufficiently wet to elicit development of vegetation, soils, and/or hydrologic characteristics associated with wetlands. Such areas occurring within floodplains are more appropriately termed non-wetlands.").

[63] The Boyce-owned artificial structures known as the Edenville, Smallwood, Secord and Sanford Hydroelectric Dams (three of which are currently FERC-licensed to generate electricity) impound waters from the Tittabawassee and Tobacco Rivers, which constitute traditional navigable-in-fact waters constituting WOTUS.

obtaining fill, sand, or gravel." 33 CFR §328.3(b)(9); 40 CFR § 120.2(2)(ix).

J. "Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off." 33 CFR §328.3(b)(10); 40 CFR § 120.2(2)(x).[64]

K. "Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters." 33 CFR §328.3(b)(11); 40 CFR § 120.2(2)(xi) .

L. "Waste treatment systems." 33 CFR §328.3(b)(12); 40 CFR § 120.2(2)(xii).

III. General Rationale Behind and Scope of Waters Subject to Regulation - "[T]he Navigable Waters Protection Rule defin[es] the scope of waters subject to federal regulation under the […] CWA" in light of and consistent with:

A. The U.S. Supreme Court cases in:

1. *United States v. Riverside Bayview Homes* (*Riverside Bayview*), [474 U.S. 121 (1985)] < https://casetext.com/case/united-states-v-riverside-bayview-homes-inc>;

2. *Solid Waste Agency of Northern Cook County v. United States* (*SWANCC*), [531 U.S. 159 (2001)] < https://casetext.com/case/solid-waste-agency-northern-cook-cty-v-us-army-corps-engr>; and

3. *Rapanos v. United States* (*Rapanos*) < https://casetext.com/case/rapanos-v-us-4>, and

B. Executive Order 13778, signed on February 28, 2017, entitled 'Restoring the Rule of Law, Federalism, and Economic Growth by

[64] Pursuant to this definition, the concrete culverts and steel pipes conveying stormwaters from Morrisville Borough and Falls Township, Bucks County, PA to the Pozsgai property would not themselves be considered jurisdictional because they were constructed in uplands.

Reviewing the 'Waters of the United States' Rule.'"[65] *See* Prepublication Version at 5.

C. Federal Jurisdiction is based on the following unifying legal theory:

1. [F]ederal jurisdiction [is] over those waters and wetlands that maintain a sufficient surface water connection to traditional navigable waters or the territorial seas. This definition strikes a reasonable and appropriate balance between Federal and State waters and carries out Congress' overall objective to restore and maintain the integrity of the nation's waters in a manner that preserves the traditional sovereignty of States over their own land and water resources." *See* Prepublication Version at 9.

2. "Congress […] crafted a non-regulatory statutory framework to provide technical and financial assistance to the States to prevent, reduce, and eliminate pollution in the nation's waters generally. […] In addition to the Act's non-regulatory measures to control pollution of the nation's waters generally, Congress created a federal regulatory permitting program designed to address the discharge of pollutants into a subset of those waters identified as 'navigable waters,' defined as 'the waters of the United States,' 33 U.S.C. 1362(7). Section 301 contains the key regulatory mechanism […] Congress, therefore intended to achieve the Act's objective 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters' by

[65] *See* White House, Executive Order 13778 - *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule* (Feb. 28, 2017), 82 Fed. Reg. 12497 (March 3, 2017), at Sections, 1, 2(a), 3, https://www.govinfo.gov/content/pkg/FR-2017-03-03/pdf/2017-04353.pdf (indicating that the EPA Administrator and Secretary of the Army, in a future proposed rulemaking, "shall consider interpreting the term 'navigable waters,' as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).").

addressing pollution of all waters via non-regulatory means *and* federally regulating the discharge of pollutants to the subset of waters identified as 'navigable waters.'" *See* Prepublication Version at 12-14.

3. "*Fundamental principles of statutory interpretation support the agencies' recognition of a distinction between the 'nation's waters' and 'navigable waters.'* As the Supreme Court has observed, '[w]e assume that Congress used two terms because it intended each term to have a particular, non-superfluous meaning.' *Bailey v. United States*, 516 U.S. 137, 146 (1995) (recognizing the canon of statutory construction against superfluity). Further, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks and citation omitted); *see also United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 ("Statutory construction…is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear[.]") (citation omitted). Here, the non-regulatory sections of the CWA reveal Congress' intent to restore and maintain the integrity of the nation's waters using federal assistance to support State and local partnerships to control pollution in the nation's waters, *and* a federal regulatory prohibition on the discharge of pollutants to the navigable waters. If

Congress had intended the terms to be synonymous, it would have used identical terminology. Instead, Congress chose to use separate terms, and the agencies are instructed by the Supreme Court to presume Congress did so intentionally." *See* Prepublication Version at 15-16.

IV. Periods of Regulatory Focus

A. (1986) – "The EPA and the Corps have maintained separate regulations defining the statutory term 'waters of the United States,' but the text of the regulations has been virtually identical starting in 1986. In 1986, for example, the Corps consolidated and recodified its regulations to align with clarifications that the EPA had previously promulgated. *See* 51 Fed. Reg. 41206 (Nov. 13, 1986).[66] *See* Prepublication Version, at 19.

"The 1986 regulatory text identified the following as [WOTUS]:"

1. "All traditional navigable waters,[67] interstate waters and the territorial seas;"
2. "All impoundments of jurisdictional waters;"
3. "All 'other waters' such as lakes, ponds, and sloughs, the 'use, degradation or destruction of which could affect interstate or foreign commerce;"
4. "Tributaries of traditional navigable waters, interstate waters, impoundments, or 'other waters'; and
5. "Wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments, tributaries, or 'other waters' (other than waters that are themselves

[66] *See* Department of Defense, Corps of Engineers, Department of the Army, *Final Rule for Regulatory Programs of the Corps of Engineers – Final Rule*, 51 Fed. Reg. 41206 (Nov. 13, 1986), https://cdn.loc.gov/service/ll/fedreg/fr051/fr051219/fr051219.pdf.

[67] *See* Prepublication Version, at n. 7 – ("Traditional navigable waters" (or waters that are traditionally understood as navigable) refers to all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide.")

wetlands)." *See* Prepublication Version at 20.

B. (1993) – "On August 25, 1993, the agencies amended the regulatory definition of [WOTUS] to categorically exclude 'prior converted croplands.' 58 Fed. Reg. 45008, 45031 (Aug. 25, 1993) ("1993 Rule")[68] (codified at 33 CFR 328.3(a)(8) (1994)). The stated purpose of the amendment was to promote 'consistency among various federal programs affecting wetlands,' in particular, the Food Security Act of 1985 (FSA)[69] programs implemented by the U.S. Department of Agriculture (USDA) and the CWA programs implemented by the agencies.

1. The agencies did not include a definition of 'prior converted cropland' in the text of the Code of Federal Regulations, *but* noted in the preamble to the 1993 Rule that the term was defined at that time by the USDA National Food Security Act Manual (NFSAM)." [58 Fed. Reg. at 45031].[70] *See* Prepublication Version at 20-21.

2. "The agencies at that time also declined to establish regulatory text specifying when the prior converted cropland designation is no longer applicable. In the preamble to the 1993 Rule, the agencies stated that '[t]he Corps and EPA will use the [Natural Resources Conservation Service's] provisions on 'abandonment,' thereby ensuring that PC cropland that is abandoned within the meaning of those provisions and which exhibit[s] wetlands characteristics will be considered

[68] *See* Department of Defense, Department of the Army and Environmental Protection Agency, *Clean Water Act Regulatory Programs – Final Rule*, 58 Fed. Reg. 45008, 45031 (Aug. 25, 1993), *supra*.
[69] *See* Food Security Act of 1985, P.L. 99-198, 99 Stat. 1354, 99th Cong. (12-23-85), https://www.govinfo.gov/content/pkg/STATUTE-99/pdf/STATUTE-99-Pg1354.pdf.
[70] *See* Department of Defense, Department of the Army and Environmental Protection Agency, *Clean Water Act Regulatory Programs – Final Rule*, 58 Fed. Reg. 45008, 45031 (Aug. 25, 1993), *supra*.

wetlands subject to Section 404 regulation.'" [51 Fed. Reg. at 45034.] *See* Prepublication Version at 21.

3. "The agencies summarized these abandonment provisions by explaining that prior converted cropland which meets wetland criteria is considered to be abandoned unless: at least once in every five years the area has been used for the production of an agricultural commodity, *or* the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes, or pasture production." [51 Fed. Reg. at 45034.] *See* Prepublication Version at 21.

C. (1996) – "Congress amended the FSA wetland conservation provisions in 1996 to state that USDA certifications of eligibility for program benefits (e.g., determinations by the Natural Resources Conservation Service (NRCS) that particular areas constitute prior converted cropland) 'shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary [of Agriculture].' Pub. L. No. 104-127, 322(a)(4), 110 Stat. 888 (1996); 16 U.S.C. 3822(a)(4)."

1. "[T]he 1996 amendments designate as prior converted cropland those areas that may not have qualified for the CWA exclusion under the abandonment principles from the 1993 preamble, so long as such areas remain agricultural use. The agencies did not update their prior converted cropland regulations for purposes of the CWA following the 1996 amendments to wetland conservation provisions of the FSA, as those

regulations neither defined prior converted cropland nor specified when a valid prior converted cropland determination might cease to be valid." *See* Prepublication Version at 22.

D. (2005) – "[I]n 2005, the Army and USDA issued a joint Memorandum to the Field (the 2005 Memorandum) in an effort to again align the CWA Section 404 program with the FSA amendments. The 2005 Memorandum provided that a 'certified [prior converted] determination made by [USDA] remains valid as long as the area is devoted to an agricultural use. If the land changes to a non-agricultural use, the [prior converted] determination is no longer applicable and a new wetland determination is required for CWA purposes.'"[71]

1. "The 2005 Memorandum did not clearly address the abandonment principle that the agencies had been implementing since the 1993 rulemaking. The change in use policy was also never promulgated as a rule and was declared unlawful by one district court because it effectively modified the 1993 preamble language without any rulemaking process." *See* Prepublication Version at 22-23, citing *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1282 (S.D. Fla. 2010) < https://casetext.com/case/new-hope-power-company-v-us-army-corps-of-eng>.

See Prepublication Version at 22.

V. Supreme Court Caselaw Focus – *Commerce Clause* of the U.S. Constitution and "Navigable Waters"

A. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) < https://casetext.com/case/gibbons-

[71] *See* USDA-Natural Resources Conservation Service and United States Department of the Army, *Memorandum to the Field – Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and Section 404 of the Clean Water Act* (Feb. 25, 2005), Sec. III.5, at 4, https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2508.

v-ogden-5> "Congress' authority to regulate navigable waters under the CWA derives from its power to regulate the "channels of interstate commerce" under the Commerce Clause." *See* Prepublication Version at 47.

B. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) < https://casetext.com/case/us-v-lopez> (holding that "the Commerce Clause gives Congress the authority to regulate in three areas: the 'channels of interstate commerce,' the 'instrumentalities of interstate commerce,' and those additional activities having 'a substantial relation to interstate commerce.'"). *See* Prepublication Version at 48.

C. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (*SWANCC*), *supra* (clarified "that the term 'navigable' indicates 'what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made so.'"). *See* Prepublication Version at 48.

D. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. at 167-168 n .3; *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133, 138 (1985), *supra* ("recognized that Congress intended 'to exercise its powers under the Commerce clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.'") *See* Prepublication Version, at 48, 50.

E. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871), *supra* (holding that "[t]hose rivers must be regarded as public navigable rivers in law which are *navigable in fact*. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of

trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."). *See* Prepublication Version, at 48-49.

VI. Supreme Court Caselaw Focus – "*Adjacent Wetlands*"

A. *United States v. Riverside Bayview Homes*, 474 U.S. at 133, 135 (1985), *supra* (found that, "for adjacent wetlands: The limits of jurisdiction lie within the 'continuum' or 'transition' 'between open waters and dry land,'" and, that "it is a permissible interpretation of [the CWA] to conclude that 'a wetland that actually abuts on a navigable waterway' falls within the 'definition of [WOTUS].' Thus, a wetland that abuts a water traditionally understood as navigable is subject to CWA jurisdiction because it is 'inseparably bound up with the ['WOTUS']." 474 U.S. at 34. "The Supreme Court in *Riverside Bayview* declined to decide whether wetlands that are not adjacent to navigable waters could also be regulated by the agencies.") *See* Prepublication Version at 51-53.

B. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. at 167-168, *supra* (noting that *Riverside Bayview* upheld 'jurisdiction over wetlands that actually abutted on a navigable waterway' because the wetlands were 'inseparably bound up with the 'waters' of the United States,' given the significant nexus between the wetlands and 'navigable waters'…") In *SWANCC*, the Court "rejected the argument that the use of the abandoned ponds by migratory birds fell within the

power of Congress to regulate activities that in the aggregate have a substantial effect on interstate commerce, or that the CWA regulated the use of the ponds as a municipal landfill because such use was commercial in nature." 531 U.S. at 173. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." 531 U.S. at 172-173. "'Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose [in the CWA] to 'recognize, preserve, and protect the primary responsibilities of States…to plan the development and use…of land and water resources…'" 531 U.S. at 174, quoting 33 U.S.C. 1251(b)). "The Court found no clear statement from Congress that it had intended to permit federal encroachment or traditional State power and construed the CWA to avoid the significant constitutional questions related to the scope of federal authority authorized therein. *Id*." "[T]he reasoning in the *SWANCC* decision stands for key principles related to federalism and the balancing of the traditional power of States to regulate land and water resources within their borders with the need for national water quality regulation." *See* Prepublication Version at 54-56.

C. *Rapanos v. United States*, 547 U.S. 715 (2006), *supra*.

1. Scalia Plurality:

a. "The *plurality* determined that CWA jurisdiction extended to only adjacent '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.' 547 U.S. at 742 (Scalia, J., plurality)."

b. "The plurality interpreted *Riverside Bayview* and the Court's subsequent *SWANCC* decision characterizing *Riverside Bayview* as authorizing jurisdiction over wetlands that physically abutted traditional navigable waters. *Id*. at 740-42.

c. The plurality focused on the 'inherent ambiguity' described in *Riverside Bayview* in determining where on the continuum between open waters and dry land the scope of federal jurisdiction should end. *Id*. at 740. It was 'the inherent difficulties of defining precise bounds to regulable waters,' *id*. at 741 n.10, according to the plurality, that prompted the Court in *Riverside Bayview* to defer to the Corps' inclusion of adjacent wetlands as 'waters' subject to CWA jurisdiction based on proximity. *Id*. at 741."
See Prepublication Version at 57-59.

d. "The plurality [noted…] that the '*Riverside Bayview* opinion required' a 'continuous physical connection,' *Rapanos*, 547 U.S. at 751 n. 13. *See* EPA/Corps *Rapanos* Guidance (Dec. 2, 2008).[72]

e. "The plurality also noted that

[72] *See* U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) at 7 n. 28, https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf ("interpret[ing] the plurality's 'continuous surface connection' as not requiring a continuous surface water connection – ('A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary.') [,which t]he agencies continue to endorse…"). *See* Prepublication Version at 61, n. 32.

its standard includes a 'physical-connection requirement,' not hydrological, between wetlands and covered waters. *Id*. at 751 n.13. "In other words, the plurality appeared to be more focused on the abutting nature rather than the source of water creating the wetlands at issue in *Riverside Bayview* to describe the legal constructs applicable to adjacent wetlands. *See id*. at 747." *See* Prepublication Version at 59-60.

f. "The plurality agreed with Justice Kennedy and the *Riverside Bayview* Court that '[a]s long as the wetland is 'adjacent' to covered waters…its creation *vel non* by inundation is irrelevant.' *Rapanos*, 547 U.S. at 751 n.13 (Scalia, J., plurality)."

g. "Because wetlands with a physically remote hydrologic connection do not raise the same boundary-drawing concerns presented by actually abutting wetlands, the plurality determined that the 'inherent ambiguity in defining where water ends and abutting ('adjacent') wetlands begin' upon which *Riverside Bayview* rests does not apply to such features. Id. at 742." *See* Prepublication Version at 60.

h. "The plurality supported this position by referring to the Court's treatment of certain *isolated* waters in *SWANCC* as non-jurisdictional.

Rapanos, 547 U.S. at 741-42; *see also id*. at 726 ("We held that 'non-navigable, *isolated*, intrastate waters—which, unlike the wetlands at issue in *Riverside Bayview*, did not 'actually abu[t] on a navigable waterway,'—were not included as 'waters of the United States.'") *See* Prepublication Version at 60-61.

2. Kennedy Concurrence:
   a. "Justice Kennedy disagreed with the plurality's conclusion that adjacency requires a 'continuous surface connection' to covered waters. *Id*. at 772 (Kennedy, J., concurring in the judgment)."
   b. "Kennedy stated that 'when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters—even though such navigable waters were traditionally subject to federal authority." *Id*. at 776. He noted that the *Riverside Bayview* Court "deemed it irrelevant whether 'the moisture creating the wetlands . . . find[s] its source in the adjacent bodies of water." *Id*. at 772 (internal citations omitted); *see also Riverside Bayview*, 474 U.S. at 134 ('[A]djacent wetlands may be defined as waters under the Act. This holds true even for wetlands that are not the result of flooding or permeation by water having

its source in adjacent bodies of open water.')." *See* Prepublication Version at 59-60.

c. "Justice Kennedy focused on the 'significant nexus' between adjacent wetlands and traditional navigable waters as the basis for determining whether a wetland is a water subject to CWA jurisdiction. He quotes the *SWANCC* decision, which explains that '[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the [Act] in *Riverside Bayview Homes*.' *SWANCC*, 531 U.S. at 167." *See* Prepublication Version at 61-62.

d. "But Justice Kennedy also interpreted the reasoning of *SWANCC* to exclude certain isolated waters. His opinion notes that: 'Because such a nexus [in that case] was lacking with respect to isolated ponds, the Court held that the plain text of the statute did not permit the Corps' action.' *Rapanos*, 547 U.S. at 767 (Kennedy, J., concurring in the judgment)."

e. "According to Justice Kennedy, whereas the isolated ponds and mudflats in *SWANCC* lacked a 'significant nexus' to navigable waters, it is the 'conclusive standard for jurisdiction" based on *'a reasonable inference of ecological interconnection'*

between adjacent wetlands and navigable-in-fact waters that allows for their categorical inclusion as 'waters of the United States.' *Rapanos*, 547 U.S. at 780 ('[T]he assertion of jurisdiction for those wetlands [adjacent to navigable-in-fact waters] is sustainable under the Act by showing adjacency alone.')." *See* Prepublication Version at 62.

f. "Justice Kennedy surmised that it may be that the same rationale 'without any inquiry beyond adjacency…could apply equally to wetlands adjacent to certain major tributaries.' *Id*. He noted that the Corps could establish by regulation categories of tributaries based on volume of flow, proximity to navigable waters, or other relevant factors that 'are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.' *Id*. at 780-81." *See* Prepublication Version at 62-63.

g. "However, '[t]he Corps' existing standard for tributaries" provided Justice Kennedy '*no such assurance' to infer the categorical existence of a requisite nexus between waters traditionally understood as navigable and wetlands adjacent to non-navigable tributaries*. *Id*. at

781.[73] […] To avoid this outcome, […] the Corps 'must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacencies to non-navigable tributaries. Given the potential overbreath of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute.' *Id*., at 782." *See* Prepublication Version at 63.

h. "Kennedy stated that adjacent 'wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable.'' *Id*. at 780." *See* Prepublication Version at 63.

i. "With respect to *wetlands adjacent to non-navigable tributaries*, Justice Kennedy therefore determined that 'mere adjacency… is insufficient[.] A more specific inquiry, based on the significant-nexus standard, is ….necessary.' *Id*. at 786." *See* Prepublication Version at 64.

[73] *See Rapanos*, 547 U.S. at 781-782 ("[*T]he breadth of the [tributary] standard*—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it—*precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood*. Indeed, in many cases, wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in SWANCC."). (emphasis added).

VII. Supreme Court Caselaw Focus – "Tributaries"
Rapanos v. United States, 547 U.S. 715 (2006)

A. *Plurality and Concurrence Agree*:

1. "[T]he jurisdictional scope of the CWA is not restricted to traditional navigable waters. *Rapanos*, 547 U.S. at 731 (Scalia, J., plurality) ('[T]he Act's term 'navigable waters' includes something more than traditional navigable waters.'); *id*. at 767 (Kennedy, J., concurring in the judgment) ('Congress intended to regulate at least some waters that are not navigable in the traditional sense.')."

2. "Both also agreed that federal authority under the Act has limits. *See id*. at 731-32 (Scalia, J., plurality) (''[T]he waters of the United States' …cannot bear the expansive meaning that the Corps would give it.''); *id*. at 778-79 (Kennedy, J., concurring in the judgment) ('The deference owed to the Corps' interpretation of the statute *does not extend' to* 'wetlands' which 'lie alongside a ditch or drain, however remote or insubstantial, that eventually may flow into traditional navigable waters.')." *See* Prepublication Version at 66.

3. "Both the plurality and Justice Kennedy also agreed that *the Corps' existing treatment of tributaries* raised significant jurisdictional concerns."

a. "[T]he the plurality was concerned about the Corps' broad interpretation of tributaries. *See Rapanos*, 547 U.S. at 738 (Scalia, J., plurality) ('Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral

flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.').

b. "And Justice Kennedy objected to the categorical assertion of jurisdiction over wetlands adjacent to waters deemed tributaries under the Corps' then-existing standard, 'which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it.' Id. at 781 (Kennedy, J., concurring in the judgment)." *See* Prepublication Version at 68.

B. *Plurality and Concurrence Share Foci*: "With respect to *tributaries* specifically, <u>both</u> the plurality and Justice Kennedy <u>focused in part on a tributary's contribution of flow to and connection with traditional navigable waters</u>."

1. *The Plurality* –

c. <u>Relatively Permanent & Connected</u> - "[W]ould include as [WOTUS] 'only relatively permanent, standing or flowing bodies of water' and would define such 'waters" as including streams, rivers, oceans, lakes and other bodies of waters that form geographical features, noting that all such 'terms connote continuously present, fixed bodies of water.' Rapanos, 547 U.S. at 732-33, 739 (Scalia, J., plurality)."

d. Relatively Permanent & Connected to Traditional Navigable Waters - "[W]ould have also required relatively permanent waters to be connected to traditional navigable waters in order to be jurisdictional. *See id*. at 742 (describing a ''[WOTUS]'' as 'i.e., a relatively permanent body of water connected to traditional interstate navigable waters') (emphasis added)." *See* Prepublication Version at 66.

e. Ephemeral Flows Excluded - "[W]ould also have excluded ephemeral flows and related features, stating '[n]one of these terms encompasses transitory puddles or ephemeral flows of water.' *Id.* at 733; *see also id.* at 734 ('In applying the definition to 'ephemeral streams,'…the Corps has stretched the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction.')." *See* Prepublication Version at 66-67.

2. *The Concurrence* –

a. Merest Continuous Trickle Excluded - Justice Kennedy likely would exclude some streams considered jurisdictional under the plurality's opinion, but he may include some that would be excluded by the plurality. *See id*. at 769 (Kennedy, J., concurring in the judgment)

(noting that under the plurality's test, '[t]he merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not')." *See* Prepublication Version at 67.

C. *Plurality and Concurrence Share Consensus*:

1. Some Seasonal or Intermittent Streams Included - "Both the plurality and Justice Kennedy would have included some seasonal or intermittent streams as waters of the United States. *Rapanos*, 547 U.S. at 732 n.5, 733 (Scalia, J., plurality); id. at 769 (Kennedy, J., concurring in the judgment)."
2. "The plurality noted, for example, that its reference to 'relatively permanent' waters did 'not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,' or '*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.' *Id*. at 732 n.5 (emphasis in original).
3. However, "[n]either the plurality nor Justice Kennedy, however, defined with precision where to draw the line."
   a. "*See, e.g., id*. (Scalia, J., plurality) ("[W]e have no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel as a 'wate[r] of the United States.' It suffices for present purposes that

channels containing permanent flow are plainly within the definition, and that …streams whose flow is '[c]oming and going at intervals…[b]roken, fitful,'… or 'existing only, or no longer than, a day; diurnal…short-lived,'…are not.') (internal citations omitted). The plurality provided, however, that *'navigable waters' must have 'at a bare minimum, the ordinary presence of water,' id.* at 734."

b. "Justice Kennedy noted that the Corps can identify by regulation *categories of tributaries based on 'their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations'* that 'are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters,' *id*. at 780-81 (Kennedy, J., concurring in the judgment)." *See* Prepublication Version at 67-68.

III. CWA Administrative Considerations

A. U.S. Army Corps Permit Authority - CWA 404(a), 404(d) - 33 U.S.C. § 1344(a) and (d) – The Secretary of the Army, acting through the Corps of Engineers, can issue permits for discharge of dredged or fill material into navigable waters at specified disposal sites after public notice and comment afforded.[74]

1. The Corps' issuance of a CWA § 404 permit does not convey a property right. 33 CFR § 320.4(g) (7-1-12)

[74] P.L. 92-500, 86 Stat. at 884, CWA 404(a).

<https://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/CFR_References_2012/33CFR_320_332_CorpsRegs.pdf>.

a. *"An inherent aspect of property ownership is a right to reasonable private use. However, this right is subject to the rights and interests of the public in the navigable and other waters of the United States, including the federal navigation servitude and federal regulation for environmental protection."* (i.e., private interests are subjugated to public interests).

2. Type of CWA § 404 Permits US Army Corps of Engineers is authorized to issue and process – *See* 33 CFR Part 325 (7-1-11) <https://www.govinfo.gov/content/pkg/CFR-2011-title33-vol3/pdf/CFR-2011-title33-vol3-part325.pdf> :

a. Individual (Standard) Permit – issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of 33 CFR § § 323.2(o) and Part 325, and a determination that the proposed discharge is "in the public interest." Corps Regulation - 42 Fed. Reg. at 37145 (July 19, 1977), 33 CFR § 323.2(o).[75]

i. "A standard permit is one which has been processed through the public interest review procedures, including public notice and receipt of comments, described throughout this part. The standard individual permit shall be issued using ENG Form 1721." 33 CFR § 325.5(b)(1) (7-1-11).

ii. Letter of Permission – "A letter of permission will be issued where procedures of 325.2(e)(1) have been followed. It will be in letter form and will identify the permittee, the authorized work and location of the work, the statutory authority, any limitations on the work, a construction time limit and a requirement for a report of completed work. A copy of the relevant general conditions from ENG Form 1721 will be attached and will be incorporated by reference into the letter of permission." 33 CFR § 325.5(b)(2) (7-1-11).

I. Letters of Permission are "a type of permit issued through an abbreviated processing procedure which includes coordination with Federal and State fish and wildlife agencies, as required by the Fish and Wildlife Coordination Act,[76] and a public interest

[75] *See* Department of the Army, U.S. Army Corps of Engineers, *Regulatory Programs of the Corps of Engineers*, 42 Fed. Reg. at 37145, *supra*.

[76] *See* Fish and Wildlife Coordination Act, [Chapter 55 of the 73rd Congress, Approved March 10, 1934, 48 Stat. 401] [As Amended Through P.L. 116-9, Enacted March 12, 2019], https://legcounsel.house.gov/Comps/Fish%20And%20Wildlife%20Coordination%20Act.pdf; 16 U.S.C. Chap. 5A – Protection and Conservation of Wild Life (1934), https://cdn.loc.gov/service/ll/uscode/uscode1934-00101/uscode1934-001016005a/uscode1934-001016005a.pdf. *See also* US Fish and Wildlife Service, Digest of

evaluation, but without the publishing of an individual public notice."[77]

b. General Permit ("GP") – issued for a category or categories of discharges of dredged or fill material that are substantially similar in nature and that cause only minimal individual and cumulative adverse environmental impact. A general permit is issued following an evaluation of the proposed category of discharges in accordance with the procedures of 33 CFR §§ 323.3(c) and Part 325, and a determination that the proposed discharges will be "in the public interest." Corps Regulation - 42 Fed. Reg. at 37145 (July 19, 1977), 33 CFR § 323.3(c). No general permit shall be for a period of more than five years after the date of issuance, and such permit may be revoked or modified by the Secretary following public notice and comment.

   i. "Regional permits are a type of general permit. They may be issued by a division or district engineer after compliance with the other procedures of this regulation. If the public interest so requires, the issuing authority may condition the regional permit to re-quire a case-by-case reporting and acknowledgment system. However, no separate applications or other authorization documents will be required." 33 CFR § 325.5(c)(1) (7-1-11).

   ii. Duration of General Permits – "General permits are usually valid for no more than five (5) years. CWA § 404(e)(2).

c. Nationwide Permit ("NWP") – issued pursuant to 33 CFR § 323.4 to permit certain discharges of dredged or fill material into waters of the United States throughout the Nation. Corps Regulation - 42 Fed. Reg. at 37145 (July 19, 1977), 33 CFR § 323.2(q).

   i. "Nationwide permits are a type of general permit and represent D[istrict] A[dministrator] authorizations that have been issued by the regulation (33 CFR part 330) for certain specified activities nationwide. If certain conditions are met, the specified activities can take place without the need for an individual or regional permit. 33 CFR § 325.5(c)(2) (7-1-11); 33 CFR § 330.2(b) (7-1-12).

   ii. Duration of Nationwide Permits – "The NWPs are proposed, issued, modified, and revoked from time to time (generally five years), after an opportunity for public notice and comment. […] In addition, Section 404(e) of the Clean Water Act limits the issuance of general permits, including

Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service, *Fish and Wildlife Coordination Act*, https://www.fws.gov/laws/lawsdigest/fwcoord.html.

[77] *See* US Army Corps of Engineers, Philadelphia District, *Decision Status Information on Demand*, https://www.nap.usace.army.mil/Missions/Regulatory/Permits/.

NWPs, to a maximum of five years."[78] *See* CWA § 404(e)(2).

d. Programmatic Permit – "a type of general permit founded on an existing state, local or other Federal agency program and designed to avoid duplication with that program." 33 CFR § 325.5(c)(3) (7-1-11).
   i. *See e.g.,* Pennsylvania State Programmatic General Permit – 5 (PASPGP-5),[79] issued for a period of five years.[80]
   ii. *See* PASPGP-5 Wetland Monitoring Report for Temporary Impacts <https://www.nab.usace.army.mil/Portals/63/docs/Regulatory/Permits/PASPGP-5_Wetland_Monitoring_Report_for_Temporary_Impacts.pdf?ver=2019-01-30-093222-750>.
   iii. *See* PASPGP-5 Permit Compliance, Self-Certification Form < https://www.nab.usace.army.mil/Portals/63/docs/Regulatory/Permits/PASPGP-5_Self_Cert_10-5-18.pdf?ver=2019-01-30-094809-183>.

e. Guidelines for CWA § 404 (a) Permit Applications and § 404(b)(1) Analysis re Permit Applications:[81] - 40 CFR Section 230 (1980)[82] *Cf.* 40 CFR Part 230 (7-1-10) < https://19january2017snapshot.epa.gov/sites/production/files/2015-03/documents/cwa_section404b1_guidelines_40cfr230_july2010.pdf> .
   i. Substantive criteria issued by EPA used in evaluating discharges of dredged or fill material into WOTUS.
   ii. Guidelines provide regulations outlining measures to avoid, minimize and compensate for impacts to wetlands. For ANY

[78] *See* Department of Defense, Department of the Army, Corps of Engineers, *Nationwide Permit Program – Final* Rule, 78 Fed. Reg. 5726, 5730 (Jan. 28, 2013), at Preamble, https://www.govinfo.gov/content/pkg/FR-2013-01-28/pdf/2013-01655.pdf.

[79] *See* U.S. Army Corps of Engineers, *Pennsylvania State Programmatic General Permit-5 (PASPGP-5)* (July 1, 2016), https://www.lrp.usace.army.mil/Portals/72/docs/Final%20PASPGP-5%2019%20Apr%202016.pdf?ver=2016-07-01-115912-327; U.S. Army Corps of Engineers, News Release Archive, *New General Permit for Work in Pennsylvania Wetlands, Waterways* (July 1, 2016), https://www.nab.usace.army.mil/Media/News-Releases/Article/823197/new-general-permit-for-work-in-pennsylvania-wetlands-waterways/.

[80] *See* U.S. Army Corps of Engineers, *Pennsylvania State Programmatic General Permit-5 (PASPGP-5)* (July 1, 2016), *supra* at 26, 52; *See also* U.S. Army Corps of Engineers, *Special Public Notice # SPN 16-22* (May 2, 2016), https://www.nab.usace.army.mil/Portals/63/docs/Regulatory/SPN16-22.pdf (informing the public that the Pennsylvania State Programmatic General Permit-5 (PASPGP-5) has been issued for a 5-year period…").

[81] *See* U.S. Army Corps of Engineers, *Guidelines For Preparation of Analysis of Section 404 Permit Applications Pursuant to the Section 404(b)1) Guidelines of the Clean Water Act (40 CFR, Section 230)*, https://www.sas.usace.army.mil/Portals/61/docs/regulatory/IP_SAS_404_b_1_Guidelines.pdf.

[82] *See* Environmental Protection Agency, *Guidelines for Specification of Disposal Sites for Dredged or Fill Material – Rule*, 45 Fed. Reg. 85336 (Dec. 24, 1980), https://cdn.loc.gov/service/ll/fedreg/fr045/fr045249/fr045249.pdf.

permit to issued under CWA § 404, the proposed action must address all relevant portions of the Guidelines.

iii. US Army Corps of Engineers Permitting Process Information < https://www.lrl.usace.army.mil/Portals/64/docs/regulatory/Permitting/PermittingProcessInformation.pdf>.

iv. "Public Interest Review" entails a (a highly discretionary) evaluation of the probable impacts the proposed activity and its intended use will have on the public interest, requiring a "careful weighing" of numerous factors relevant to each particular case, and a balancing of all the benefits which reasonably may be expected to accrue from the proposal against its reasonably foreseeable detriments. The decision regarding whether to authorize the project and the conditions to place upon such an authorization should reflect the national concern for both protection and utilization of important resources, taking into account numerous identified factors, the specific of weight of each is determined by its importance and relevance to the particular proposal. Full consideration and appropriate weight will be given to all comments, including those of federal, state, and local agencies, and other experts on matters within their expertise. 33 CFR § 320.4(a)(1)-(2). *See also* 33 CFR § 320.4(b) (effects on wetlands).

f. Permit Declined & Denied –

i. *Declined* – Where an applicant has refused to accept an original or modified proffered individual permit, including as evidenced in a letter of permission, based on the terms and conditions imposed in the proffered permit. Such a permit, if declined is not deemed valid. 33 CFR § 331.2 (7-1-12).

ii. *Denied* – Where an applicant receives a letter from the District Engineer detailing the reasons why a permit was denied with prejudice. 33 CFR § 331.2 (7-1-12).

3. Corps must confer with U.S. Fish and Wildlife Service re any CWA 404 permit applications before issued,[83] in accordance with Fish and Wildlife Coordination Act, *supra*. *See also* 33 CFR § 320.4(c).

4. Corps authorized to make comments on any CWA 404 permit a State proposes to issue in implementation of the State's authority to administer its own CWA 404 program pursuant to CWA 404(g).

a. The States of Michigan and New Jersey are the only two U.S. states EPA has vested (in lieu of the Corps of Engineers) with full control over CWA § 404 dredge-and-fill permitting decisions, pursuant to CWA § 404(g), the CWA § 404 "assumption program." Where EPA has approved of a state 404 program, the Corps suspends

[83] P.L. 95-217, 91 Stat. at 1604, CWA 404(m);

processing of 404 permits everywhere, except that it maintains jurisdiction and control over traditionally navigable waterways used to transport interstate or foreign commerce under § 10 of the Rivers and Harbors Act of 1899, as amended, codified in 33 U.S.C. § 403.[84]

5. Pre-Permit Notifications of Unauthorized Activities - 33 CFR Part 326

a. Cease and Desist Orders – Issued to responsible parties when District Engineer determines a violation exists involving a project that is not complete. Such an order prohibits any further work pending resolution of the violation in accordance with the prescribed procedures contained in 33 CFR Part 326. 33 CFR § 326.3(c)(1) (7-1-13). <https://www.govinfo.gov/content/pkg/CFR-2013-title33-vol3/pdf/CFR-2013-title33-vol3-part326.pdf>.

b. Violation Notices – Issued to responsible parties when District Engineer determines a violation exists involving a completed project. 33 CFR § 326.3(c)(2) (7-1-13).

i. Initial Corrective Measures – "The district engineer should, in appropriate cases, depending upon the nature of the impacts associated with the *unauthorized, completed work*, solicit the views of the [EPA]; the [USFWS]; the National Marine Fisheries Service [NMFS], and other Federal, state, and local agencies to facilitate his decision on what initial corrective measures are required. If the district engineer determines as a result of his investigation, coordination, and preliminary evaluation that initial corrective measures are required, he should issue an appropriate order to the parties responsible for the violation. […] In his order, the district engineer will specify the initial corrective measures required and the time limits for completing this work." 33 CFR § 326.3(d)(1) (7-1-13).

ii. "An order requiring initial corrective measures that resolve the violation may also be issued by the district engineer in situations where the acceptance or processing of an after-the-fact [("ATF")] permit application is prohibited or considered not appropriate pursuant to § 326.3(e)(1) (iii) through (iv)…" 33 CFR § 326.3(d)(1) (7-1-13).

c. Contents of Notifications – All Cease and Desist Orders and Violation Notices "should identify the relevant statutory authorities, indicate potential enforcement consequences, and direct the

[84] *See* Lawrence A. Kogan, *The Europeanization of the Great Lake States' Wetlands Laws and Regulations (at the Expense of Americans' Constitutionally Protected Private Property Rights)*, 2019 MICH.ST.L.REV. 687, 795 (2020), https://digitalcommons.law.msu.edu/lr/vol2019/iss3/3/.

responsible parties to submit any additional information that the district engineer may need at the time to determine what course of action he should pursue in resolving the violation; further information may be requested, as needed in the future." 33 CFR § 326.3(c)(3) (7-1-13).

6. After-the-Fact ("ATF") Permit Applications – Issued ONLY after the completion of any required Initial Corrective Measures:
   a. "[T]he District Engineer will accept an [ATF] *unless* he determines that one of the exceptions listed in […] subparagraphs (e)(i)-(iv) is applicable." 33 CFR § 326.3(e)(1). NO PERMIT APPLICATION WILL BE:
      i. "processed when restoration of the waters of the United States has been completed that eliminates current and future detrimental impacts to the satisfaction of the district engineer." 33 CFR § 326.3(e)(1)(i) (7-1-13);
      ii. "accepted in connection with a violation where the district engineer determines that *legal action is appropriate* (§ 326.5(a)) until such legal action has been completed." 33 CFR § 326.3(e)(1)(ii) (7-1-13) (i.e., prospectively);
         I. Where the district engineer is aware that EPA is considering enforcement action, he should coordinate with EPA to attempt to avoid conflict or duplication. Such coordination applies to interim protective measures AND ATF permitting, as well as to appropriate legal enforcement actions. 33 CFR § 326.3(g) (7-1-13).
      iii. "accepted where a Federal, state, or local authorization or certification, required by Federal law, has already been denied." 33 CFR § 326.3(e)(1)(iii) (7-1-13); OR
      iv. "accepted nor will the processing of an application be continued when the district engineer is aware of *enforcement litigation* that has been *initiated by other Federal, state, or local regulatory agencies*, unless he determines that concurrent processing of an after- the-fact permit application is clearly appropriate." 33 CFR § 326.3(e)(1)(iv) (7-1-13) (i.e., retrospectively).
   b. ATF applications will be processed in accordance with applicable procedures in 33 CFR Parts 320 thru 325.
7. Corps is Authorized, at Their Discretion, to Inspect Permitted Activities to Ensure Compliance with permit(s) granted. 33 CFR § 326.4 (7-1-13).
8. Corps is Authorized to Issue Final Orders Describing the Violation(s) and Imposing Administrative Civil Penalties Upon Violators Pursuant to CWA § 309(g), Subject to Written Notice Requirements, that Inform the Permittee

of His/Her Right to Request a Hearing Within 30 Days In Lieu Of Initiating Judicial Action. - 33 CFR § 326.6(a)(1) and (2); 33 CFR § 326.6(b) (7-1-13).

9. Corps is Authorized to Initiate Legal Action Against Violators –
   a. Where district engineer determines that legal action is appropriate, he will prepare a litigation report and other documentation, in cooperation with local U.S. Attorney, containing an analysis of the information contained during his investigation of the violation or during the processing of a permit application and recommending appropriate legal action. 33 CFR § 326.5(b) (7-1-13).
      i. District Engineers are generally authorized to refer cases directly to the local U.S. Attorney. 33 CFR § 326.5(c) (7-1-13).
      ii. This report must be forwarded to Chief of Engineers, Wash., D.C. when case meets the following criteria, *inter alia*:
         I. Significant precedential or controversial questions of law or fact;
         II. Requests for elevation by U.S. Dept. of Justice, D.C.;
         III. Cases with respect to which the local U.S. Attorney declines to take legal action, but the district engineer believes warrant(s) special attention. 33 CFR § 326.5(d)(1),(2),(7); 33 CFR § 326.5(e) (7-1-13).

10. Corps is Authorized to Issue CWA § 404 Jurisdictional Determinations ("JDs")-
   a. These are "formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities *or tracts of land* and the applicability of general permits or statutory exemptions to proposed activities." 33 CFR § 320(a)(6) (7-1-12).
   b. "[A] written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under [CWA] Section 404 (33 U.S.C. 1344)…" 33 CFR § 331.2 (7-1-12).
   c. JDs "includes[] a written reverification of expired JDs and a written reverification of JDs where new information has become available that may affect the previously written determination." 33 CFR § 331.2 (7-1-12).
   d. "All JDs will be in writing and will be identified as either preliminary or approved. JDs do not include determinations that a particular activity requires a [Department of the Army CWA § 404(a)] permit." 33 CFR § 331.2 (7-1-12).
   e. JDs "shall constitute a Corps final agency action." *But, they do not "affect any authority EPA has under the [CWA]*." – *EPA Override*.
      i. Approved Jurisdictional Determination ("AJD") – "a Corps document stating the presence or absence of [WOTUS] on a

parcel or a written statement and map identifying the limits of [WOTUS] on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document." 33 CFR § 331.2 (7-1-12).

I. *See* Corps-EPA JD Form Instructional Guidebook[85]

II. The bases of an AJD "can include, but are not limited to: indicators of wetland hydrology, hydric soils, and hydrophytic plant communities; indicators of ordinary high water marks, high tide lines, or mean high water marks; indicators of adjacency to navigable or interstate waters; indicators that the wetland or waterbody is part of a tributary system; or indicators of linkages between isolated water bodies and interstate or foreign commerce." 33 CFR § 331.2 (7-1-12).

III. "[S]uch geographic JDs may include, but are not limited, to one or more of the following determinations: the presence or absence of wetlands; the location(s) of the wetland boundary; ordinary high water mark, mean high water mark, and/or high tide line; interstate commerce nexus for isolated waters; and adjacency of wetlands to other [WOTUS]." 33 CFR § 331.2 (7-1-12).

IV. AJD Denials are subject to administrative appeal. 33 CFR § 331.2 (7-1-12). "Appealable action means an approved JD, a permit denial, or a declined permit." CFR § 331.2 (7-1-12).

V. AJDs are valid for 5 years, and they must include a statement that the determination is valid for a period of years from the date of the letter. 33 CFR Part 331, App. C (7-1-12). *See also* RGL 05-02 (June 14, 2005), rescinding RGL 94-01 and RGL 90-06.[86]

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[85] *See* U.S. Army Corps of Engineers, *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (May 30, 2007), https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2310 ("**This document is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an approved determination (JD) and documenting practices to support an approved JD until this document is further revised and reissued**. This document was prepared jointly by the U.S. Army Corps of Engineers and the Environmental Protection Agency […] The CWA provisions and regulations described in this document contain legally binding requirements.") (boldfaced emphasis in original).

[86] *See* U.S. Army Corps of Engineers, *Regulatory Guidance Letter (RGL) No. 05-02 - Expiration of Geographic Jurisdictional Determinations of Waters of the United States* (June 14, 2005), at Section 1.a https://www.nap.usace.army.mil/Portals/39/docs/regulatory/rgls/rgl05-02.pdf ("This Regulatory Guidance Letter (RGL) reaffirms that all approved geographic jurisdictional determinations completed and/or verified by the Corps must be in writing and will remain valid for a period five years, unless new information warrants revision of the

VI. AJDs do not remain valid for an indefinite period of time *"[s]ince wetlands and other [WOTUS] are affected over time by both natural and man-made activities, [and] local changes in jurisdictional boundaries can be expected to occur."* RGL 05-02, Sec. 2, at 1.

VII. AJDs can be issued independent of and apart from permit applications.

ii. Preliminary JDs ("PJDs") – "are written indications that there may be [WOTUS] on a parcel or indications of the approximate location(s) of [WOTUS] on a parcel. Preliminary JDs are advisory in nature and may not be appealed. *Preliminary JDs include compliance orders that have an implicit JD, but no approved JD*." 33 CFR § 331.2 (7-1-12). *See also* RGL 05-02, at Sec. 1.a ("Preliminary jurisdictional determinations are not definitive determinations of the presence or absence of areas within regulatory jurisdiction and do not have expiration dates.") - i.e., they are NOT legally binding.

I. *See* RGL 08-02, *supra* at Sections 4-7.

B. EPA Administrator Enforcement Authority –
CWA 309(a) - 33 U.S.C. § 1319(a)(1) and (a)(3) – When EPA Administrator finds a person is in violation of CWA 301, or in violation of any permit issued under CWA 404, can issue a violation order (cease & desist order/violation notice) requiring that person's compliance with such CWA provision, or to bring a civil action in accordance with CWA 309(b).

1. Authority to Bring Civil Action - CWA 309(b) - 33 U.S.C. § 1319(b) - Authorizes commencement of a civil action, in the federal district court "in which the defendant is located or resides or is doing business," for appropriate equitable remedies, including permanent or temporary injunction for violations committed under CWA 309(a).
2. Authority to Impose Civil Penalties - CWA 309(d) - 33 U.S.C. § 1319(d); (EPA Regulations - 40 C.F.R. § 19.4) - Authorizes imposition of civil penalties against any "person" who violates CWA 301, a permit issued under CWA 404, or an EPA order (cease & desist order/violation notice) requiring that person's compliance. Penalties shall not exceed $37,500 per day for each violation occurring between 1/12/09 and 11/2/15, and up to $51,570 per day for violations occurring after 11/2/15 (as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461

determination before the expiration date…"). *See also Id*., at Section 3.a ("The Corps must include a statement that the determination is valid for a period of five years from the date of the letter, unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.").

note; Pub. L. 101-410), as amended by the Debt Collection Improvement Act of 1996, and most recently, by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (28 U.S.C. § 2461 note; Pub. L.114-74, Section 701)).[87]

3. EPA Possesses Primary CWA 404 Implementation & Enforcement Authority – '*Civiletti Memorandum*' 43 Op. Att'y. Gen. 197 (9-5-79): ("[T]he overall structure of the Clean Water Act impliedly place[d] responsibility on EPA to determine the scope of 'navigable waters' for the entire statute" (emphasis added). *See* "Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act," < https://www.epa.gov/sites/production/files/2015-08/documents/civiletti_memo.pdf>)
   a. Ushered in an aggressive EPA CWA § 404 enforcement era;
   b. Inferred that, while the CWA charges the Secretary [of the Army] with the duty of issuing and assuring compliance with the terms of § 404 permits, it does not expressly charge him with responsibility for deciding when a discharge of dredged or fill material into the navigable waters takes place so that the § 404 permit requirement is brought into play. […] I therefore conclude that final authority under the Act to construe § 404(f) is also vested in the Administrator." Id., at 201-202.
   c. EPA Compliance Orders – PRE-ENFORCEMENT STAGE
      i. *Sackett v. EPA*, 566 U.S. 120, 124-126, 131 (2012) < https://casetext.com/case/sackett-v-envtl-prot-agency> (Scalia majority op. and Ginsburg concur. op. - held that an EPA Compliance Order stating that the property in question contained wetlands meeting the criteria for jurisdictional wetlands in the 1987 Federal Manual for Identifying and Delineating Wetlands, and directing defendants to restore

[87] *See* Environmental Protection Agency, *Civil Monetary Penalty Inflation Adjustment Rule*, 84 Fed. Reg. 2056, 2059 (Feb. 6, 2019), https://www.govinfo.gov/content/pkg/FR-2019-02-06/pdf/2019-00785.pdf; United States Environmental Protection Agency, Memorandum from Office of Civil Enforcement, *Transmittal of the 2019 Annual Civil Monetary Penalty Inflation Adjustment* (March 4, 2019), https://www.epa.gov/sites/production/files/2019-03/documents/2019annualcivilmonetarypenalinflationtransmittal.pdf; Environmental Protection Agency Office of Enforcement and Compliance Assurance, *Civil Monetary Penalty Inflation Adjustment Rule*, 73 Fed. Reg. 75340, 75345 (Dec. 11, 2008), https://www.govinfo.gov/content/pkg/FR-2008-12-11/pdf/E8-29380.pdf; United States Environmental Protection Agency Office of Enforcement and Compliance Assurance, *Memorandum from Assistant Administrator, Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule* (Effective January 12, 2009) (Dec. 29, 2008), https://www.epa.gov/sites/production/files/documents/amendmentstopenaltypolicies-implementpenaltyinflationrule08.pdf. *See also* The Executive Officer of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies – Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* (Dec. 14, 2018), https://www.whitehouse.gov/wp-content/uploads/2017/11/m_19_04.pdf; The Executive Officer of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies – Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* (Dec. 15, 2017), https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf.

the property in accordance with the EPA-created restoration plan, and to provide access to all records and documentation related to the conditions at the Site, constituted a "final agency action" under the Administrative Procedure Act "for which there is no adequate remedy other than APA review," and consequently, that "the Sacketts may immediately litigate their jurisdictional challenge in federal court."

C. Interior Secretary vis-à-vis Director of U.S. Fish and Wildlife Service (USFWS) Conferral Authority –

1. CWA § 404(m) - *shall* submit any comments with respect to any individual permit application the Secretary of the Army has received or any general permit the issuance of which the Secretary of the Army has proposed.
   a. CWA § 404(g)(3) - The Director of the USFWS *shall* submit any comments in writing with respect to the review of any State's proposed individual and general permit program for the discharge of dredged or fill material into the navigable waters he/she has reviewed.
   b. CWA § 404(j) – The Director of the USFWS is authorized to make comments regarding each permit to be issued by a State already authorized to administer its own CWA § 404 permit program, which are to be submitted to the Administrator for his/her consideration.

IV. Important CWA Litigation Issues Not to be Overlooked

A. "Persons" May Be Subject to Individual Liability for Civil Penalties – *Duarte Nursery, Inc. v. U.S. Army Corps of Engineers*, Case No. 2;13-CV-02095 (E.D. CA 2016).

1. "While in the context of criminal enforcement, the term "person" includes any responsible corporate officer, § 1319(c)(6), the CWA's civil enforcement provision does not expressly reference responsible corporate officers. *Compare id*. § 1362(5) with § 1319(c)(6)." Slip op. at 25.
   a. "Although the Ninth Circuit has yet to decide the issue, other courts have found the RCOD [Responsible Corporate Officer Doctrine] applies in both criminal and civil actions […] And the RCOD has been applied in both criminal and civil CWA cases by district courts within this Circuit." *Id*. […They have] found that 'individuals whose acts or omissions have led to such pollution may be held responsible individually, notwithstanding the fact that they may have been acting in their capacity as an employee or officer of a company or entity that owns the property in question or conducts business on it.' […]" Slip op. at 25-26, quoting *Humboldt Baykeeper v. Simpson Timber Co.*, No. 06-04188, 2006 WL 3545014, at *4 (N.D. Cal. Dec. 8, 2006).
2. *The court finds persuasive the rationale for consistent application of the RCOD in civil CWA cases*, and agrees that a corporate officer with authority

over the activities underlying alleged violations should not escape liability by virtue of having delegated certain implementing tasks. […] The court finds the RCOD applicable here." *Id*.

a. "The Ninth Circuit has held that a person is a responsible corporate officer if he or she has authority to exercise control over the corporation's activity that is causing discharges. […] It is undisputed John Duarte was the president of the Nursery when it purchased the 2,000 acres of real estate in Tehama County, California.[…] And, in 2012, he had significant input into the activities conducted on and precautions taken with respect to the real estate. […] It was also his decision whether to follow up with the Army Corps after Kelley's call in December 2012 and again after the Nursery received the subsequent C&D Letter. […] John Duarte authorized and controlled the Nursery's activity on the Property, including the tillage by Unruh. […] Under the RCOD, it is sufficient for John Duarte to have the authority over the tillage operations without actually operating the equipment. […] Accordingly, John Duarte is a responsible corporate officer." Slip op. at 26.

b. "Finally, *the CWA is a strict liability statute*, thus whether John Duarte had intent or not is irrelevant under the CWA. […] The court finds John Duarte can be held individually liable." Slip op. at 26-27.

B. The Corps Refusal to Process a Standalone AJD Request

1. Corps longstanding administrative practice reflects that the agency processes "standalone" AJDs/NJDs (i.e., independent of and apart from CWA 404 permit applications) upon request.

a. *See* MOA: Exemptions Under Section 404(f) of the Clean Water Act;[88]

b. *See* EPA-Corps MOU re Jurisdiction of Dredged and Fill Program;[89]

c. *See* 33 CFR 331.1(a) (7-1-12);

d. *See* RGL 07-01 (June 5, 2007), Sec. IV.C, at 4 ("The Corps should strive to provide such a timely JD whether the JD request

[88] *See* U.S. Department of the Army and the Environmental Protection Agency, *MOA Between the Department of the Army and EPA Concerning the Determination of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act* (Jan. 19, 1989), at Sections. II, IV.b, VI.a, https://www.epa.gov/cwa-404/memorandum-agreement-exemptions-under-section-404f-clean-water-act and

[89] *See* Department of Defense, Department of the Army, Corps of Engineers, *Jurisdiction of Dredged and Fill Program' Memorandum of Understanding*, 45 Fed. Reg. 45018, 45019 (July 2, 1980), https://cdn.loc.gov/service/ll/fedreg/fr045/fr045129/fr045129.pdf (referring to the (former) Attorney General Civiletti Memorandum opining that the EPA Administrator "has the ultimate authority to determine the jurisdictional scope of Section 404 [WOTUS]," and discussing at Sec. 4 the "pre-application inquiry" – i.e., standalone request for a jurisdictional determination).

accompanies a permit application or is made independent of any permit application.");[90]

e. *See* RGL 08-02 (June 26, 2008).[91]

2. *United States Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. __ (2016), 136 S.Ct. 1807 (2016) (unanimously held that both pre-enforcement "approved jurisdictional determinations" made as part of the CWA 404 permitting process AND "standalone" pre-enforcement AJDs (both "positive" AJDs and "negative" AJDs ("NJDs")), and constitute binding "final agency actions" *for five years* entitled to the presumption of judicial reviewability under the Administrative Procedure Act.[92] *See Hawkes*, Slip op. at 5-6; 10, quoting *Sackett v. EPA*, 566 U.S. 120, Slip op. at 8, and citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) ("'the mere fact' that permitting decisions are 'reviewable should not suffice to support an implication of exclusion as to other[]' agency actions, such as approved JDs.").

a. In *Hawkes*, EPA had argued that, but for its adoption of an administrative practice of issuing standalone JDs upon request, there would have been no other available avenue for obtaining review of its decision, except either defending against an EPA enforcement action, or appealing a permit denial. *See Hawkes*, Slip op. at 10. The Court stated in response, "True enough. But such a 'count your blessings' argument is not an adequate rejoinder to the assertion of a right to judicial review under the APA. […A property owner…] "need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.' […And a landowner need not] "apply for a permit and then seek judicial review in the event of an unfavorable decision," given the significant cost involved.[93] *Id*., Slip op. at 8-9.

b. In *Hawkes*, former Justice Kennedy's concurring opinion referred to the Corps' and EPA's ability to exercise their discretion to amend

[90] *See* U.S. Army Corps of Engineers, *Regulatory Guidance Letter No. 07-01: Practices for Documenting Jurisdiction Under Sections 9 & 10 of the Rivers & Harbors Act (RHA) of 1899 and Section 4 of the Clean Water Act (CWA)* (June 5, 2007), https://cdm16021.contentdm.oclc.org/digital/collection/p16021coll9/id/1279/rec/1.

[91] *See* U.S. Army Corps of Engineers, *Regulatory Guidance Letter No. 08-02 – Jurisdictional Determinations* (June 26, 2008), https://www.nap.usace.army.mil/Portals/39/docs/regulatory/rgls/rgl08-02.pdf (distinguishing between AJDs and PJDs, and noting, in Sec. 7, that "the Corps retains the ability to use a "no-permit required" letter to indicate that a specific proposed activity is not subject to CWA […] jurisdiction…").

[92] Although the facts of the case revealed that the Corps had issued the AJD in question "in connection with the permitting process," the Court's holding was broader encompassing, as well, standalone AJDs issued independent of and apart from any permitting process, given the Corps' practice of allowing standalone JDs specifying whether a particular property contains WOTUS. *Id*., Slip op. at 5-6, citing 33 CFR §320.1(a)(6), 33 CFR pt. 331, App. C, RGL 05-02; Syllabus, citing 33 CFR §331.2.

[93] *See also Hawkes Co., Inc. v. U.S. Army Corps of Engineers*, 782 F.3d 994, 1001 (8th Cir. 2015) ("*Hawkes II*") (quoting *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion) (reporting that the average individual 404 permit is secured in 788 days and costs $271,596, which can never be recovered).

or revoke their MOA/MOU concerning the issuance of AJDs upon request – i.e., to no longer offer such agency service to the public. In former Justice Kennedy's view, a Corps-issued AJD should be deemed binding even if the agencies later decide to abandon their MOA/MOU, "in light of the fact that in many instances, it will have a significant bearing on whether the Clean Water Act comports with due process." Kennedy, J., Concur. Op. at 1-2. Justice Kennedy also concluded that the possible exercise of such discretion to foreclose the possibility of standalone AJDs "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *Id.*, at 2.[94]

3. The Corps issued regulatory guidance in reaction to the *Hawkes* decision that conveyed how the agency *could* exercise its discretion to discontinue its longstanding practice of providing standalone AJDs as a public service. *See* RGL 16-01 (Oct. 31, 2016).[95]
   a. "The Corps recognizes the value of JDs to the public and reaffirms the Corps' commitment to continuing its practice of providing JDs when requested to do so," consistent with "[t]he district engineer['s…] reasonable priorities based on the district's workload and available regulatory resources For example, it may be reasonable to give higher priority to a JD request when it accompanies a permit request." *See* RGL 16-01, Sec. at 2. "The use of [JDs] was not addressed by [the CWA…] and the regulations make their use discretionary and do not create a right to a JD. The regulations authorize their use as a service to the public, and the Corps has developed a practice of providing JDs when requested, and in appropriate circumstances." *Id*.
   b. Legal commentators have interpreted such statements as indicating several likely outcomes. The Corps will either: (a) "prioritize processing 'Approved JD' request[s] with a permit application versus 'Stand Alone Approved JD' request[s];"[96] (b) "eliminat[e] the offer to approve standalone JDs, which is not compelled by the

[94] *See* Robert L. Glicksman, *United States Army Corps of Engineers v. Hawkes Co., Inc.: Navigating the Clean Water Act*, The George Washington Law Review – On the Docket (Oct. Term 2015) (6-4-16), available at: https://www.gwlr.org/united-states-army-corps-of-engineers-v-hawkes-co-inc/ (surmising that former Justice Kennedy's reference to due process reflects his "concern[] about the lack of notice to those owning property that includes wetlands as to whether or not those wetlands trigger section 404 permitting requirements.").

[95] *See* US Army Corps of Engineers, *Regulatory Guidance Letter 16-01* (Oct. 31, 2016), https://www.spn.usace.army.mil/Portals/68/docs/regulatory/resources/RGL/RGL16-01.pdf and https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1256.

[96] *See* Joseph Koncelik, *Army Corps of Engineers Issues Regulatory Guidance in Response to Hawkes Case*, Ohio Environmental Law Blog (Nov. 3, 2016), available at: https://www.ohioenvironmentallawblog.com/2016/11/wetlands-and-streams/army-corps-of-engineers-issues-regulatory-guidance-in-response-to-hawkes-case/.

statute itself;"[97] or (c) "modify the timing of [i.e., delay] its jurisdictional determinations or even choose to not make them independent of permitting decisions."[98]

c. The Corps' refusal to process AJD requests would be tantamount to agency "inaction" under the Administrative Procedure Act, which would engender the same analysis as that undertaken by the Supreme Court in *Hawkes*.[99] *See also See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62-65, 73, n.1 (2004) (holding that under the APA, courts apply the same fundamental principles of administrative law, with inaction encompassing agency refusals/ failures to act (where legally required to do so and not entirely left to agency discretion) and interminable delays.

4. The Corps regulatory guidance also conveys how the agency could delay its processing of standalone AJD requests.

a. Were the Corps to engage in the intentional delay of processing AJD requests engenders a different analysis, the agency must ensure that the delay is not unreasonable. Federal Courts in the District of Columbia have interpreted APA § 555(b) as imposing upon federal agencies a legal obligation to proceed within a reasonable time once the agency "decides to take a particular action." *See Pub. Citizen Health Research Grp. v. FDA*, 724 F. Supp. 1013, 1020 (D.D.C. 1989) (citing *Cutler v. Hayes*, 818 F.2d 879, 895 (D.C. Cir. 1987) ("Once FDA elected to respond to its legislative directive…the APA imposed an obligation to proceed with reasonable dispatch."). *See also Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79–80 (D.C. Cir. 1984) ("*TRAC*") (explaining that § 555(b) coupled with 5 U.S.C. Sec. 706(1) requires agencies to decide matters within a reasonable time); *Ctr. for Sci. in the Pub. Interest v. FDA*, 74 F. Supp. 3d 295, 299–300 (D.D.C. 2014) ("CSPI"), quoting *Pub. Citizen Health Research Group v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C.Cir.1984) ("The APA requires an agency to 'proceed to conclude a matter presented to it' within 'a reasonable time,' 5 U.S.C. §555(b), and directs courts to 'compel agency action…unreasonably delayed.' *Id*. § 706(1). Together, '[t]hese

[97] *See* Joan E. Drake, *The U.S. Supreme Court Confirms You Can Challenge the Corps' Clean Water Act Jurisdictional Determination Without First Going Through a Permit or Enforcement Process*, Modrall Sperling Latest News and Information (6-9-16), available at: https://www.modrall.com/2016/06/09/the-u-s-supreme-court-confirms-you-can-challenge-the-corps-clean-water-act-jurisdictional-determination-without-first-going-through-a-permit-or-enforcement-process/.

[98] *See* Duke K. McCall, III and Douglas a. Hastings, *US Supreme Court Holds US Army Corps Clean Water Act Determinations Reviewable*, Morgan Lewis Lawflash (6-3-16), available at: https://www.morganlewis.com/pubs/us-supreme-court-holds-us-army-corps-clean-water-act-determinations-reviewable.

[99] *See* Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 Va. Env. L. J. 461-462 (2008), available at: https://www.law.berkeley.edu/php-programs/faculty/facultyPubsPDF.php?facID=6482&pubID=5 ("Agency inaction implicates a sweeping area of administrative law, including an agency's refusal to issue a regulation, an agency's interminable delay in hearing an adjudication, and an agency's mid-stream abandonment of a rulemaking.").

provisions give courts authority to review ongoing agency proceedings to ensure that they resolve the questions in issue within a reasonable time.'").

b. "'In the context of a claim of unreasonable delay,' the Court must consider whether the agency's failure to respond is 'so egregious' as to warrant relief," taking into account the Court's own limited "institutional competence in the highly technical area at issue." *CSPI*, 74 F. Supp. 3d at 300, quoting *TRAC*, 750 F.2d at 79-80, and quoting *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 476 (D.C.Cir.1998).

c. The Corps' longstanding practice is to issue JDs within reasonable time:

i. *See* 33 CFR § 325.2(d)(3) and (d)(6) (7-1-11) (decision w/in 60 calendar days);

ii. *See* RGL 05-02 (June 14, 2005), Sec. 3.d, at 2 (as soon as practicable);

a. *See* RGL 07-01 (June 5, 2007), Sec. IV.C, at 4 (in a timely manner);[100]

b. *See* RGL 08-02 (June 26, 2008) *supra*, at Sec. 5, 5.a, p. 4 (60 days).

C. Developing a Strong Offense and Defense in Response to Allegations of a CWA § 404 Violation(s) and "Potential Violations"[101]

1. The site does not constitute a wetland at all or to the extent the agency alleged.

a. Retain wetland and land survey experts with pretrial deposition and/or trial-related testimony experience to perform a science-based wetland identification and delineation of the site, consistent with the 3-parameter test set forth in the 1987 U.S. Army Corps of Engineers Wetland Delineation Manual and the applicable regional supplement, and to develop a professional report indicating their findings, as needed, to determine the presence or absence and the geographic scope of wetland soils, vegetation and hydrology at the site. Ascertain whether the experts themselves retain soil, botanical and hydrology experts.

i. Wetland Identification – identifies the presence or absence of the 3-parameters at the site

[100] *See also Id.*, at Sec. IV.C at 4 ("Some requests for JDs that are not accompanying (or supporting) a permit application are deserving of relatively high priority treatment. For example, a landowner may need a JD to allow or facilitate the sale of his or her land. Consequently, as a general rule, no [District Engineer] DE should relegate every request for a JD that is not supporting a permit application to a priority level below that of every JD request that is supporting a permit application. […A]s a general rule it may be reasonable to give higher priority to JD requests for which a delineation for [WOTUS], including wetlands, has been prepared by a qualified consultant…"); Sec. IV.D, at 5 ("JDs supported by adequate information, including data sheets, delineation maps, and aerial photographs, may not require a site visit and should not be delayed pending an onsite investigation, unless that is necessary.").

[101]

ii. Wetland Delineation – identifies the geographic boundaries of the areas on the site that constitute wetland and upland.

b. Retain the experts directly (rather than through the client) preserves attorney-client work confidentiality and work product from discovery.

ii. The evaluation and reporting can be undertaken at the pre-enforcement or violation stage to scientifically determine the presence or absence of wetlands.

2. Even if the site contains a wetland, the wetland is not a jurisdictional wetland.

a. If necessary, retain, in addition to wetland experts, hydrologic/hydraulic engineering experts with pretrial deposition and/or trial-related testimony experience to determine the extent, if any, of the hydrologic connection between wetlands and navigable-in-fact waters as part of a "significant nexus" evaluation and/or surface connectivity evaluation to assess and develop a professional report indicating their findings regarding whether and the extent to which the wetlands are "jurisdictional." Consider whether a hydraulic analysis is also necessary to determine the rate of streamflow (velocity).

i. Hydrologic Analysis – provides discharge or flow estimates based on a given rain event and frequency over a defined watershed. This is typically referred to as the streamflow and defined in units of volume over time.

ii. Hydraulic Analysis – uses the hydrology or discharge (streamflow) calculated for a given event and models how the water will move in a channel and calculates water surface elevations and velocity along the channel. A hydraulic analysis also can be used to evaluate how a structure or obstruction will impact the water surface elevation and channel.

b. Retain the experts directly (rather than through the client) preserves attorney-client work confidentiality and work product from discovery.

3. Arrange a field visit of the site with the experts and the client to discuss observations, strategies and tactics.

4. Arrange an office visit with the client to review documentation, imagery, etc. showing the history and use of the property, activities undertaken on the property and any federal, state and local agency correspondences issued to the client regarding the property.

5. Confer with the experts during and following the completion of their evaluation(s) and during and following the completion of their report(s) to ensure consistency with field observations and incorporate within your legal analysis.

6. Review all legal and scientific bases claimed for an agency's allegations of a CWA § 404 allegations and have respective science experts review all such correspondence. Confer with experts to discuss.
7. Prior to the initiation of a violation action, consider filing Freedom of Information Act request(s) if agency personnel refuse to provide documentation of the bases for the violation or "potential" violation claim.
8. Conducting Vigilant Discovery
    a. Requests for Information
    b. Interrogatories
    c. Depositions
        i. Offensive
            I. Fact Witness – Gov't
            II. Expert Witness – Gov't (re Gov't Report(s))
        ii. Defensive
            I. Fact Witness – Client
                A. FRCP 30(b)(6) Witness[102]
            II. Expert Witness – Client
    d. *Daubert* (In-Limine) Challenges[103]
        i. Must ensure experts test Government experts' adherence to the standards set forth in the 1987 U.S. Army Corps of Engineers Wetland Delineation Manual, *supra* and the applicable regional Corps manuals (e.g., 2012 Northeast and Northcentral Region Manual;[104] Eastern Mountains and Piedmont Region Manual[105]), prior to commencing *Daubert* challenges, including those relating to:
            I. Whether the 1987 Manual's 3-parameter scientific test – hydric soil, hydrophytic vegetation, and wetland hydrology was/were followed;
            II. Whether there was a proper determination of an "atypical situation" warranting offsite analysis at a "comparable" site.

[102] Federal Rule of Civil Procedure 30(b)(6) entitles a party to depose a corporation, government agency, or other organization. If the notice describes the matters for examination with 'reasonable particularity,' it requires an entity to designate one or more individuals to testify on its behalf. FRCP 30(b)(6) places the burden on the organization to designate individuals reasonably educated to testify on those matters. This Rule is intended to provide a party with the means to inquire into basic organizational information, to depose someone who speaks for the entity, and to acquire leads to purse through other discovery tools.

[103] *See* Lawrence A. Kogan, *Weight of the Evidence: A Lower Expert Evidence Standard Metastasizes in Federal Courts*, Washington Legal Foundation Critical Legal Issues Working Paper Series, No. 215 (March 2020), https://www.wlf.org/2020/02/19/publishing/wlf-working-paper-kogan-march-2020/.

[104] *See* US Army Corps of Engineers Engineer Research and Development Center, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region* (v. 2.0) (Jan. 2012), https://usace.contentdm.oclc.org/utils/getfile/collection/p266001coll1/id/7640.

[105] *See* US Army Corps of Engineers Engineer Research and Development Center, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region* (v. 2.0) (April 2012), https://usace.contentdm.oclc.org/utils/getfile/collection/p266001coll1/id/7607.

A. Did the site entirely or in part meet the 3-Parameter Test?
B. If yes, was the "wetland" demonstrated to be adjacent to a WOTUS?
C. Was the condition of the site so poor that the agency wetland investigator was unable to identify a single "indicator" evidencing the presence of each of the three wetland parameters - hydric soil, vegetation, and hydrology?

III. Whether a proper "comparable site" analysis has been performed?
IV. Whether the activities giving rise to the alleged "human disturbance" at the site actually constituted the "normal circumstances" of the site, entailing the historical use of the land;
V. Whether the wetlands were the natural circumstances of the site or were "man-induced," including, e.g., vis-à-vis federal-state beaver restoration programs;
VI. Did the agency properly apply the relevant US Department of Agriculture Soil Survey data?
VII. Did the agency aerial photographic interpreter properly establish that the aerial images demonstrated wetland "signatures" and properly distinguish them from upland "signatures," such as "cropping" or cultivated "pasturing"/"haying"?

V. Recent Wetland-Related Litigations

A. Federal CWA 404 Wetland Violation Case Against Farmers Engendering Application of FSA Agriculture (Legacy Case – 30+ Yrs)
1. *United States v. Robert Brace and Robert Brace Farms, Inc.*, Case No. 1:90-cv-00229-SPB (90-00229) (W.D. Pa.) (Hon. Susan Paradise Baxter)
a. Consent Decree Enforcement Action initiated by the U.S. Department of Justice against Brace in January 2017 to enforce the provisions of a Consent Decree entered into in December 1996 in settlement of the above action, which the Government alleged Brace had violated by depositing dredge and fill materials and trying to convert a portion of the Consent Decree Area, without a CWA 404 permit or agency authorization, during 2013 and 2014.[106]

[106] The original CWA 404 enforcement action had been initiated by the U.S. Department of Justice in October 1990 for activities Mr. Brace conducted from 1985 through 1987, in noncompliance with EPA and Corps violation notices and cease and desist orders. Neither prior, nor during the pretrial period did Mr. Brace commission a wetlands science expert to prepare a proper wetland identification and delineation of the 30-acre site area known as "the Murphy farm tract" the United States had alleged constituted wetlands. Mr. Brace had signed a joint stipulation before trial that the farm tract site area in question constituted a wetland: "At the time of the Defendants' alleged 'discharges,' the

2. *United States v. Robert Brace, Robert Brace Farms, Inc. and Robert Brace & Sons, Inc.* 1:17-cv-00006-BR (17-00006) (W.D. Pa.) (Hon. Barbara J. Rothstein)
    a. CWA 404 violation case the United States Department of Justice initiated in January 2017 against Mr. Brace, his sons and his farming businesses for unauthorized discharges of dredge and fill material into alleged wetlands located on 14 of 20 acres of an adjacent farm tract during 2013 and 2014 without a CWA 404 permit or agency authorization.
3. Counsel had retained experienced wetland and aerial photographic interpretation experts (Kagel Environmental, LLC, Rigby, ID ("KE")) to defend Mr. Brace in both actions by developing three expert reports (two wetland rebuttal reports and one wetland identification and delineation report) and providing deposition testimony.

B. Federal CWA 404 Wetland Violation Case Against Private Owners of an Unofficial Community Dump Site (Legacy Case – 30+ Yrs.)
1. *United States v. Pozsgai* (*Gizella Pozsgai*), Case No. 2:88-cv-6545-AB, (E.D. Pa.) (Hon. Anita B. Brody)
    a. Pursuant to the Court's imposition of a Contempt Order in 2007, for allegedly violating the original 1990 and subsequent 1991 Court Orders by reversing previously restored wetland areas and excavating and depositing dredged and fill material on additional portions of the wetland site, Mrs. Pozsgai, her husband having passed, remains legally obligated to restore up to 6.8 acres of their 14.23-acre undeveloped lot.[107]
    b. Mrs. Pozsgai has endeavored to stay the restoration obligation until after the Court has provided her with an opportunity to conduct discovery for the first time in this 30-year action to support the conclusions contained in her retained wetland experts' newly developed expert forensic wetland identification and delineation report, and the Court has thereafter reviewed the updated expert report. The expert report bears extensive new evidence of the historical use of her property and the flawed scientific bases underlying the U.S. Corps of Engineers erroneous determination that 11.5 acres of her 14.23-acre lot consists of jurisdictional wetlands. Ultimately, based on the new evidence, Mrs. Pozsgai will

approximately thirty-acre site that is the subject of this lawsuit was wetlands as defined at 33 C.F.R. 328.3(b), and 40 C.F.R. 232(r)." This stipulation had been based on the legal definition of "wetland" set forth in final Corps and EPA regulations - 33 C.F.R. § 328.3(b) (51 Fed. Reg. 41206, 41251 (11-13-86)) and 40 C.F.R. § 232.2(r) (53 Fed. Reg. 20764, 20774 (6-6-88)). This stipulation had <u>not</u> been based on the factual findings of EPA's 1989-1990 wetland delineation of the Murphy tract which had been scientifically flawed. Since it was arguably a stipulation of law, applicable case law shows that the district court was not and is not bound by it, and it can review the threshold matter of the status of the Murphy farm wetlands *de novo*.

[107] The original CWA 404 enforcement action had been initiated by the U.S. Attorneys Office, Philadelphia, PA in the U.S. District Court

seek to vacate the Contempt Order and to modify the underlying 1990 Order upon which it is based.

c. Counsel had retained experienced wetland and aerial photographic interpretation experts (Kagel Environmental, LLC, Rigby, ID ("KE") to defend Ms. Pozsgai by developing the first wetland identification and delineation report bearing a forensic wetland evaluation component focusing on the historical land use of and around her Morrisville Borough and Falls Township, Bucks County, PA property, and by offering deposition testimony, if necessary.

2. *In re Gizella Pozsgai*, Defendant (Hon. Anita B. Brody, nominal Respondent), Case No. 19-3872 (Mandamus Petition, 3d Cir. Panel Review)

a. During the course of recent district court proceedings, it came to Mrs. Pozsgai's attention that the extrajudicial statements and the former clerkship and ongoing relationship between the federal Article III judge and the newly assigned Assistant U.S. Attorney could lead reasonable persons to question the judge's impartiality, and that the U.S. Magistrate Judge assigned to that judge previously had and continues to maintain a pecuniary and non-pecuniary leadership and membership affiliation with a nonprofit organization the charitable mission of which is the preservation of the Delaware Canal portion of the historical Pennsylvania Canal. As noted above in a prior section of this outline, the United States continues to rely on the prior history of the Delaware Canal serving as navigable waters contributing to interstate commerce as the basis for its claim of federal jurisdiction over the alleged wetlands on Mrs. Pozsgai's property. Consequently, Mrs. Pozsgai filed a Petition for a Writ of Mandamus in the Third Circuit Court of Appeals seeking to compel the recusal of the Article III judge from this action, pursuant to 28 USC § 455(a).

C. Michigan State Natural Resource and Environmental Protection Act ("NREPA")[108] Part 303, 301, 91, 31 Violation Case Initiated by the Michigan Attorney General Against the Business Landowners and Operators and the Directing Manager of a FERC-Licensed Hydroelectric Dam[109]

1. Michigan DEQ v. Boyce Hydro, LLC, Boyce Hydro Power, LLC, Boyce Michigan, LLC, Edenville Hydro Property, LLC, Lee W. Mueller (Boyce Hydro, LLC et al.), Case No. 16-8538-CE, Circuit Court for the 55th Judicial Circuit, Gladwin County (Hon. Thomas R. Evans)

2. The Attorney General initiated this action in June 2016, and Boyce and the State recently settled their dispute in December 2019, per a consent

[108] *See* Michigan Legislture, Act 451 of 1994, *Natural Resources and Environmental Protection Act*, http://www.legislature.mi.gov/(S(1p5jqtwqlsp5mfjwff1y1bgs))/mileg.aspx?page=GetObject&objectname=mcl-Act-451-of-1994.

[109] *See* Lawrence A. Kogan, *The Europeanization of the Great Lakes States' Wetland Laws and Regulations (At the Expense of Americans' Constitutionally Protected Private Property Rights)*, 2019 Mich. St. L. Rev., *supra* at 782-830.

judgment entered by the local court. The CJ entailed the imposition of a sizeable fine, a not inexpensive retrospective wetland, inland stream and floodplain restoration plan, and a not inexpensive prospective soil erosion and sedimentation control plan overseen by a county or state-certified stormwater operator. Michigan is only one of two U.S. States to have assumed responsibility and control over the CWA § 404(a) permitting program under CWA § 404(g), which status is subject to 5-year review by the EPA Administrator.

3. Boyce had retained several local wetland experts, and out-of-state hydrologic and hydraulic engineering experts to defend it against the State's alleged NREPA violations.
4. The State agencies involved were the Michigan Department of Environmental Quality ("MDEQ")[110] and the Michigan Department of Natural Resources ("MDNR").

D. U.S. Army Corps of Engineers Pre-Enforcement Administrative CWA 404 "Potential" Violation Matter Against a Payson, Utah-Based Closely Held Land Development Company, S and V Phillips Development, LLC

1. The owners of an approximately 9.5-acre undeveloped lot currently bordered by a residential subdivision, an office building and pastureland, but previously farmed decades ago, had sought to develop their family land. The property is located on the outskirts of downtown Payson, UT, Payson, a quickly growing community located in Utah County, approximately 50 miles south of Salt Lake City.[111] The City of Payson is situated in the Spanish Fork quadrangle covering part of southeast Utah Valley,[112] and within the Utah Lake and Jordan River sub-basins of the Great Salt Lake Basin.[113]

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[110] In 2019, as part of an executive branch reorganization, MDEQ changed its name to the Michigan Department of Environment, Great Lakes, and Energy ("EGLE"). *See* State of Michigan, *Michigan Department of Environment, Great Lakes, and Energy*, https://www.michigan.gov/egle.

[111] *See* Wikipedia, *Payson, Utah*, https://en.wikipedia.org/wiki/Payson,_Utah. *See also* Payson City, https://paysonutah.org/city-info/history; Distance Between Cities, *Distance from Payson, UT to Salt Lake City, UT*, https://www.distance-cities.com/distance-payson-ut-to-salt-lake-city-ut.

[112] *See* Barry J. Solomon, Donald L. Clark, and Michael N. Machette, *Geologic Map of the Spanish fork Quadrangle, Utah County, Utah* (2007), https://ugspub.nr.utah.gov/publications/geologicmaps/7-5quadrangles/m-227.pdf.

[113] *See* Ralf R. Woolley, *Water Powers of the Great Salt Lake Basin*, U.S. Department of the Interior and U.S. Geological Survey, Water-Supply Paper 517 (Gov't Print. Off. 1924), at xi, 24-25, 30, https://pubs.usgs.gov/wsp/0517/report.pdf ("The Great Salt Lake basin comprises that part of the Great Basin that drains into Great Salt Lake, Utah. It is about 27,000 square miles in area and includes the northern part of Utah, a small part of eastern Nevada, the southeast corner of Idaho, and the southwest corner of Wyoming. […] Jordan River and Utah Lake Basins […] All the southern part of the Great Salt Lake drainage basin is included in this area, and it embraces Utah County and parts of Wasatch, Summit and Juab counties. […] *Payson or Peteetneet Creek*. Payson Creek, often called Peteetneet Creek, is a small spring-fed stream that rises in the Wasatch Mountains 10 miles southeast of Payson. Its drainage basin consists largely of rolling hills having smooth slopes. From its source this stream flows for 10 miles through a comparatively shallow canyon, which opens into Utah Lake valley just south of Payson. The direction of flow is northerly, and during some periods of high water the stream reaches Utah Lake 6 miles northwest of the town, but all the low-water flow is diverted into irrigation canals at the mouth of the canyon. This stream is controlled by the city of Payson, and a number of small storage reservoirs have been constructed by the city on the headwaters of the creek.").

2. Client retained and counsel engaged with experienced wetland and aerial photographic interpretation experts (Kagel Environmental, LLC, Rigby, ID ("KE")) to defend the closely held Utah company by developing an update to its previously developed wetland identification and delineation report of the property, which had been submitted in July 2019, along with a formal request for an Approved Jurisdictional Determination (without a CWA § 404 permit application) to the Corps Bountiful, UT local offices for their review. The report found that only 0.03 acres of the approximate 9.5-acre lot qualified as "jurisdictional wetlands."
3. In August 2019, a field representative from the Corps Bountiful, UT offices wrote to KE and Mr. Phillips requesting their consent for Corps personnel to undertake an inspection of the property, which consent was granted. During one day in September 2019, the field representative and several colleagues proceeded to conduct a field visit of the Phillips property.
4. In October 2019, the Corps Bountiful, UT office field representative responded in writing, indicating that the office(s) did not agree with the findings of the wetland identification and delineation report. According to the local and Sacramento, California District office, the report significantly understated the number of acres and the location of wetlands on the site, which he instead estimated at approximately 5.1 acres. Although the field representative acknowledged receipt of the AJD request, he indicated the processing of the AJD request could not be completed until the office had received additional information regarding the use and natural characteristics of the property, its ownership, photographs of the site, and the reasons why a CWA § 404(a) permit application had not been filed. In addition, the field representative's indicated that the local and district offices had "opened an investigation into the *potential* unauthorized activities" (emphasis added) on the site, based on the offices' "[r]eview of *remote sensing data and observations made* during [the September 2019] site visit" (emphasis added). According to the representative, approximately 2.7 acres of the site had apparently been covered with fill material in 1997 and 2002,[114] and "2.4 acres of wetlands" located on the site had been covered with fill material sometime in 2017 and 2018.[115]
5. Counsel subsequently telephoned the Corps Bountiful, UT office field representative and requested copies of the field data and the remote sensing images – aerial photographic images. The representative responded that

[114] A review of applicable case law indicates that the Corps' allegation that remote sensing technology revealed "potential" unauthorized activities had taken place on the site in 1997 and 2002, is arguably barred as a matter of law, in part, by the federal 5-year statute of limitations – 28 U.S.C. § 2462, as regards the imposition of civil fines and penalties. However, other applicable case indicates that the Corps is generally not barred by the 5-year SOL from seeking equitable (nonmonetary) remedies (restoration/remediation) against the property owner for any unauthorized activity demonstrated to have occurred, which could conceivably be greater than a monetary fine.

[115] As of December 2, 2018, the approximate date of the alleged "potential" violation on one side of the site, the 2015 WOTUS Rule did not apply in Utah, by reason of the preliminary injunction a district court in George had issued in June of 2008. *See Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1370 (S.D. Ga. 2018) [No. 2:15-cv-079] (S.D. Ga. 2018), *supra*.

counsel would first need to file a Freedom of Information Act ("FOIA") request with the Corps Sacramento District Office to obtain such information, which counsel expeditiously pursued.

6. Counsel thereafter traveled to the site, and met with the client, wetland experts, Corps officials and municipal officials to ascertain the basis for the Corps' position, and the source of the hydrology on the site, which counsel discovered to be largely diffuse municipal stormwaters. Counsel subsequently received the Corps' FOIA response with certain images requested, but with others missing and without source files.
7. At the present time, the wetland report is in the process of being updated with new information and will soon be submitted to the Corps for review in support of the AJD request. Unfortunately, the client remains unable to develop his property because of the unsubstantiated "potential"[116] violation grounds asserted.

[116] The phrase "potential unauthorized activity" does not appear anywhere within Clean Water Act § 404 (33 U.S.C. § 1344) or within the applicable Corps implementing regulations (33 CFR § 326.3). Meanwhile, 33 CFR § 326.3 (rev. 7-1-11) employs the phrase "suspected violations" in its direction to the Corps to encourage members of the public to report "suspected violations." Notwithstanding their use of the phrase "suspected violations," the Corps regulations fail to define it as well. However, the lack of any definition for the phrase "potential unauthorized activity" has not prevented the Corps Sacramento District Office from hosting a website page entitled, *Regulatory Enforcement – Reporting a Potential Unauthorized Activity*, https://www.spk.usace.army.mil/Missions/Regulatory/Enforcement/ (stating "[t]he Corps heavily relies on the public to report *unauthorized activities* [and encouraging members of the public, i]f [they *suspect an unauthorized activity* has occurred or is still underway, […] by completing the following form: Report *Potential Unauthorized Activity Sheet*[, which] form can be emailed to regulatory-info@usace.army.mil, faxed or mailed to [their] local district office or to the Sacramento District…") (emphasis added). It would, thus, appear that the Corps Sacramento District Office has freely interchanged its coined phrase "potential unauthorized activities" with the regulatory phrase "suspected violations" to benefit from the imprimatur of regulatory authorization for its use, but without defining either term.