

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

JUN 21 2013

JAMES W. McCORMACK, CLERK
By: Saw
PLAINTIFF **DEP CLERK**

DAN EOFF

V.

CASE NO.: 4:13 cv 368 DPM

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY;
and
BOB PERCIASEPE, in his official
Capacity as Administrator of the Environmental
Protection Agency,**

This case assigned to District Judge Marshall
and to Magistrate Judge Deere

DEFENDANTS

**COMPLAINT FOR JUDICIAL REVIEW; DECLARATORY RELIEF; AND
INJUNCTIVE RELIEF**

COMES NOW the Plaintiff, Dan Eoff, by and through the undersigned Counsel and for his Complaint for Judicial Review, Declaratory Relief, and Injunctive Relief does state as follows:

INTRODUCTION

1. The Plaintiff brings this action for Judicial Review, Declaratory Relief, and Injunctive Relief, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq* along with 5 U.S.C. § 701 *et seq*, and in accordance with the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq*.

2. Defendants, United States Environmental Protection Agency and Bob Perciasepe, have issued an Administrative compliance Order under the CWA to the Plaintiff, determining that the Plaintiff's property is subject to the CWA, and that the Plaintiff has illegally placed fill material on his property.

3. The Order requires that the Plaintiff immediately remove alleged "fill," which in this case is a pond dam. The pond is currently full of water and approximately 13 acres in size.

The Order subjects the Plaintiff to civil penalties of \$37,500.00 per day if he fails to comply. The Environmental Protection Agency issued this Order without providing the Plaintiff an opportunity to be heard and to contest the Defendants' findings.

4. The Plaintiff asks for a declaratory ruling by this Court that the Plaintiff's property is not subject to the CWA, and that enforcement of the Order without providing Plaintiff a hearing violates Plaintiff's procedural due process rights. Further, Plaintiff seeks an injunction enjoining the Defendants from enforcing the Order without first providing Plaintiff a Hearing.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (Federal Question); § 2201 (Authorizing Declaratory Relief); § 2202 (Authorizing Injunctive Relief); and 5 U.S.C. § 702 (Providing for Judicial Review of Agency Action under the APA).

6. Venue in this Judicial District is proper under 28 U.S.C. §1391(e)(2), because the property that is the subject of the action is situated here.

PARTIES

7. The Plaintiff owns the property that is the subject of this action. The Plaintiff purchased the property with the intention to build a pond.

8. The Defendant, United States Environmental Protection Agency (EPA), is an Agency of the United States established pursuant to Reorganization Plan No. 3 of 1970, 84 Stat. 2086. It is the agency with primary responsibility for the enforcement of the CWA.

9. Defendant, Bob Perciasepe, is the Acting Administrator of EPA, and oversees EPA's enforcement of the CWA. He is sued in his official capacity only.

LEGAL BACKGROUND

10. In 1972, Congress enacted the CWA to regulate the navigable waters of the United States.

11. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the unpermitted discharge of pollutants, from a point source, into the navigable waters of the United States. Fill material can be considered a “pollutant,” under Section 502(6) of the Act, 33 U.S.C. §1362(6).

12. The U.S. Army Corps of Engineers (COE) is authorized by Section 404 of the CWA to issue permits for the discharge of fill material into navigable waters of the United States.

13. Section 309 of the CWA, 33 U.S.C. § 1319(a), authorizes EPA to issue compliance Orders for violations of the CWA, including unpermitted discharge of fill material into the navigable waters of the United States.

14. Section 502(7), *id.* § 1362 (7) defines “navigable waters” to mean the “waters of the United States.”

15. The EPA has promulgated regulations to define “Waters of the United States.” *See* 40 C.F.R. § 230.3(s).

16. Under those regulations, navigable waters, interstate waters, intrastate waters with uses that could affect interstate or foreign commerce, impoundments of waters, tributaries of waters, territorial seas, and wetlands adjacent to other waters that are not themselves wetlands, are considered “waters of the United States.” *See id.* §230.3(s)(1)-(7).

17. In 2006, the Supreme Court held in a split decision that the CWA does not provide the EPA with jurisdiction over certain wetlands that are connected to nonnavigable tributaries of traditional navigable waters. *See Rapanos v. United States*, 547 U.S. 715 (2006).

FACTUAL BACKGROUND

18. The Plaintiff owns piece of real property in Van Buren County, Arkansas, that is approximately 40 acres, in size. The property is hilly and contains woods and pasture.

19. The aforementioned real property contains numerous draws, ravines, and gullies. The property contains a good sized draw or “hollow,” known locally as Branch Hollow.

20. The topography of Branch Hollow is such that, in times of heavy rainfall, diffused surface water will run off of surrounding land and drain into the South Fork of the Little Red River, through Branch Hollow. Branch Hollow contains no named stream, and Branch Hollow does not contain a regularly flowing water body.

21. The 40 acre property owned by the Plaintiff does not substantially affect the physical, chemical, and biological integrity of the South Fork Little Red River.

22. The Plaintiff constructed a 13 acre pond on his forty (40) acre property in Van Buren County, Arkansas. The pond was built so that it incorporated Branch Hollow. A dirt “dam” was placed across a draw or gully of Branch Hollow. The pond later filled with water, as a result of rainfall.

23. On June 10, 2013, the Defendants issued a compliance Order to the Plaintiff, determining that Branch Hollow was a tributary of the South Fork Little Red River and that the Plaintiff’s property was subject to the CWA. Defendants further concluded that the Plaintiff had illegally placed fill material in a tributary in the construction of his pond. (Please see Order attached hereto As Exhibit A).

24. The Order mandated that the Plaintiff take action to comply with the Order or face Administrative Civil Penalties, in an amount of up to \$37,500.00 per day.

INJUNCTIVE RELIEF

25. The Plaintiff will be irreparably harmed, if this Court does not issue an Order enjoining Defendants from enforcing the attached Order. The Order constitutes a present and continuous injury as its threat of enforcement forces the Plaintiff to restore his property to original condition at an immense financial expense, or to subject himself to severe civil and criminal penalties.

26. The Plaintiff has no plain, speedy, or adequate remedy at Law.

27. If not enjoined by this Court, the Defendants will continue to threaten and, actually, enforce the compliance Order in derogation of Plaintiff's rights.

28. Defendant's attached Order is a final agency action subject to judicial review. Sackett v. Environmental Protection Agency, 132 S. Ct. 1367 (2012). *See also* 5 U.S.C. § 702.

29. As a result, Injunctive Relief is appropriate.

DECLARATORY RELIEF

30. An actual and substantial controversy exists between the Parties over Defendants' failure to comply with the CWA, the APA, and the Constitution in determining that the Plaintiff's property is subject to the CWA and that the Plaintiff can be held liable for violation of an Administrative Order, or the alleged underlying violation, without proof of a violation or an opportunity to be heard.

31. Defendant's attached compliance Order is a final agency action subject to judicial review. Sackett v. Environmental Protection Agency, 132 S. Ct. 1367 (2012). *See also* 5 U.S.C. § 702.

32. This case is justiciable because the Defendants failure to comply with the aforementioned Laws is the direct result of final agency action that has caused and will continue to cause immediate and concrete injury to the Plaintiff. The Plaintiff is presently and

continuously injured by the Order's issuance because its issuance and threat of enforcement will force Plaintiff to undertake restoration of his property at great financial expense, or to subject himself to severe civil and criminal penalties.

33. Declaratory relief is appropriate to resolve this controversy.

JUDICIAL REVIEW OF AGENCY DETERMINATION

34. The Plaintiff's property is not subject to the CWA under controlling law because the Plaintiff's property is not a tributary to navigable waters. The Plaintiff did not deposit fill materials into "waters of the United States." Moreover, the Plaintiff's property does not have a significant nexus with a traditional navigable water nor does Plaintiff's property substantially affect the physical, chemical, and biological integrity of any navigable water.

35. Defendant EPA's own Agency Guidance indicates that EPA jurisdiction as to non-navigable tributaries that are not relatively permanent is not clear and must be based on a "fact-specific analysis." (Please refer to EPA's Clean Water Act Jurisdiction Guidance Memo attached hereto as Exhibit B, page 1).

36. Defendant EPA's Jurisdictional Guidance Memorandum also plainly states that "agencies generally will not assert jurisdiction over. . . Swales or erosional features (e.g., gullies, smallwashes characterized by low volume, infrequent, or short duration flow.)" (Please refer to EPA's Clean Water Act Jurisdiction Guidance Memo attached hereto as Exhibit B, page 1).

37. Plaintiff's property, where he placed fill in the construction of his pond, was an erosional feature (gully or hollow) characterized by infrequent flow.

38. Defendants' determination that Plaintiff's property is subject to the CWA is, therefore, arbitrary, capricious, and contrary to law. *See* 5 U.S.C. § 706(2).

CONSTITUTIONAL VIOLATION (Procedural Due Process)

39. Defendants' issuance of a compliance Order threatening imminent imposition of civil penalties without first providing the Plaintiff an opportunity to be heard violates Plaintiffs' procedural due process rights. *See* U.S. Const. Amend. V.

40. The Plaintiff asks this Court to rule the compliance Order is therefore null and void, and without legal effect.

CONSTITUTIONAL VIOLATION (Substantive Due Process)

41. Section 309(a) of the CWA authorizes issuance, "on the basis of any information available," *see* 33 U.S.C. § 1319(a)(1), of a compliance order whose violation incurs significant civil penalties. The Defendants have issued a compliance order against the Plaintiff pursuant to Section 309(a)(1).

42. Defendants have thereby violated Plaintiff's substantive due process rights, because the standard for issuance of a compliance order is impermissibly vague and does not afford an adequate basis for judicial review. *See* U.S. Const. Amend. V.

43. Section 309(a)(1) of the CWA is therefore unconstitutional as applied to the Plaintiff, and is null and void.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays for Judgment as follows:

- a) A declaration that the Plaintiff's property is not subject to the CWA;
- b) A declaration that Defendants' compliance order is constitutionally invalid and not enforceable;

- c) A declaration that Section 309(a)(1) of the CWA, authorizing issuance of compliance orders “on the basis of any information available,” is unconstitutional and void for vagueness, as applied to the Plaintiff;
- d) An injunction enjoining Defendants from taking any enforcement action, or imposing any penalty, against the Plaintiff;
- e) An award of attorney’s fees, expenses, and costs; and
- f) For such other relief as the Court deems just and proper.

DATED: June 21, 2013.

Respectfully submitted,

DAN EOFF, Plaintiff

By: 

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

In the Matter of:

Mr. Dan Eoff

Respondent

§
§
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§
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§
§
§

Docket No. CWA-06-2013-2714

Proceeding Under Section 309(a) of
the Clean Water Act

ADMINISTRATIVE ORDER AND INFORMATION DEMAND

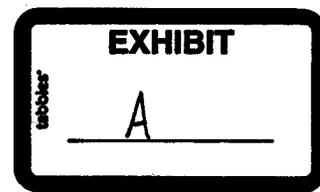
I. AUTHORITY

1. The following Findings of Facts and Conclusions of Law are made and an Order issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Sections 308 and 309(a) of the Clean Water Act ("the Act"), 33 U.S.C. §§ 1318 and 1319(a). The Administrator has delegated this authority to issue this Order to the Regional Administrator of EPA Region 6, who has further delegated such authority to the Director of the Water Quality Protection Division, EPA Region 6.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

2. Mr. Dan Eoff is a "person" as defined by Section 502(5) of the Act, 33 U.S.C. § 1362(5).

3. Between July 2012 and August 2012, Respondent discharged, caused the discharge, directed the discharge, and/or agreed with other persons or business entities, to discharge dredged material and/or discharge fill material, as those terms are defined by Section 502 of the Act, 33 U.S.C. § 1362, and 40 C.F.R. § 232.2 from point sources, including heavy equipment in, on, and to approximately 1,200 linear feet of other waters of the United States in Branch Hollow, a



tributary of the South Fork Little Red River, near Clinton, Arkansas, in Van Buren County ("site"). The discharges were associated with the construction of a large earthen dam approximately 30 feet high and more than 400 feet long. Approximately 1,200 linear feet of jurisdictional waters were impacted in the construction of this project. The 1,200 linear feet of jurisdictional waters impacted by Respondent's activities are identified on the attached aerial photograph as "Site #4." The impacted waters were hydrologically connected to a navigable-in-fact body of water.

4. Each piece of heavy equipment used during excavation or construction activities which resulted in a discharge acted as a "point source" as defined by Section 502(14) of the Act, 33 U.S.C. § 1362(14).

5. The dredged and/or fill material discharged was a "pollutant" as defined by Section 502(6) of the Act, 33 U.S.C. § 1362(6).

6. At all times relevant to the violations alleged herein, the approximate 1,200 linear feet of impacted waters of the United States referred to in paragraph 2, *supra*, were "navigable waters" as defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 232.2.

7. At all times relevant to the violations alleged herein, Section 301(a) of the Act, 33 U.S.C. § 1311(a), provides that it is unlawful for any person to discharge a pollutant from a point source to waters of the United States, except with the authorization of and in compliance with a permit issued under the Act.

8. At all times relevant to the violations alleged herein, Section 404 of the Act, 33 U.S.C. § 1344, authorized the Secretary of the Army, acting through the Chief of Engineers for the U.S. Army Corps of Engineers ("COE"), to issue permits for the discharge of dredged and/or fill material into navigable waters of the United States.

9. At no time relevant to the discharges alleged in paragraph 2, *supra*, did Respondent have a permit issued by the COE that authorized the discharges alleged in paragraph 2.

10. Each day of unauthorized discharge was a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

11. Based on these Findings of Fact and Conclusions of Law, the EPA finds that Respondent committed the violations alleged herein.

III. ORDER

12. Based on the foregoing Findings of Fact and Conclusions of Law and pursuant to the authority vested in Section 309(a) of the Act, 33 U.S.C. § 1319(a), the EPA orders Respondent to immediately cease any discharge of dredged and/or fill material into waters of the United States. In addition, Respondent shall remove the fill from the site described in paragraph 2.

IV. GENERAL PROVISIONS

13. Respondent may seek federal judicial review of the Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Section 706, which is set forth at <http://uscode.house.gov/download/pls/05C7.txt>, states the scope of such review.

14. Issuance of this Section 309(a)(3) Compliance Order and the Section 308 Information Demand shall not be deemed an election by EPA to forego any administrative action or judicial civil or criminal action to seek penalties, fines, or other relief under the Act for the violations alleged herein, or other violations that become known to EPA. EPA reserves the right to seek any remedy available under the law that it deems appropriate.

15. If the EPA issues an administrative complaint or a civil judicial action is initiated by the U.S. Department of Justice, Respondent may be ordered to pay a monetary penalty. If a

criminal judicial action is initiated by the U.S. Department of Justice, Respondent may be subject to a monetary fine and/or imprisonment.

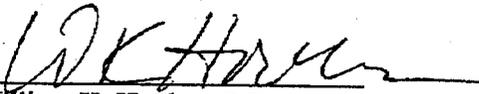
16. Failure to comply with this Order or the Act can result in civil judicial penalties of up to \$37,500 per day of violation. The actual determination of the amount of any penalty will be made by the relevant United States District Court after considering the seriousness of Respondent's violations, Respondent's economic benefit (if any) resulting from the violations, any history Respondent may have of such violations, any good faith efforts Respondent has made to comply with legal requirements, the economic impact a penalty may have upon Respondent, and such other matters as justice may require.

17. Failure to comply with the requirements of the Section 308 Information Demand may result in Respondent's liability for civil penalties for each violation of up to \$37,500 per day under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Upon suit by EPA, the relevant United States District Court may impose such penalties if the court determines that Respondent has failed to comply with the terms of the Information Demand. As noted above, in determining the amount of any penalty the court will consider the seriousness of Respondent's violations, Respondent's economic benefit (if any) resulting from the violations, any history Respondent may have of such violations, any good faith efforts Respondent has made to comply with legal requirements, the economic impact a penalty may have upon Respondent, and such other matters as justice may require. Respondent may also be subject to administrative remedies for a failure to comply with the Information Demand as provided by Section 309 of the Clean Water Act, 33 U.S.C. § 1319.

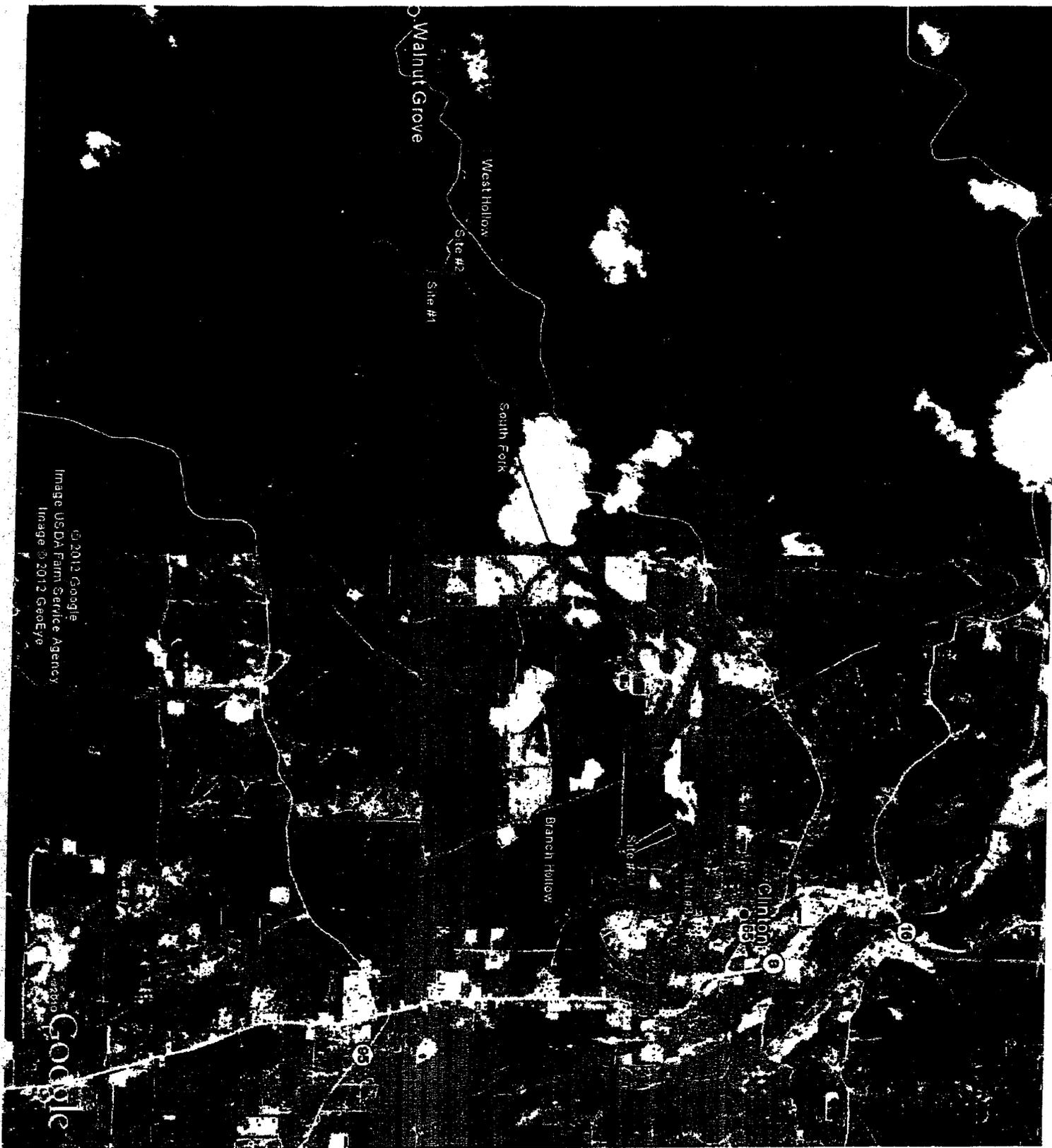
18. Compliance with the terms and conditions of this Order does not relieve Respondent of its obligation to comply with any applicable local, state, and federal laws.

19. The effective date of this Order is the date it is received by Respondent.

Issued: 06/10/13
Date



William K. Honker, P.E.
Director
Water Quality Protection Division





Clean Water Act Jurisdiction
Following the U.S. Supreme Court's Decision
in
Rapanos v. United States & Carabell v. United States



This memorandum¹ provides guidance to EPA regions and U.S. Army Corps of Engineers ["Corps"] districts implementing the Supreme Court's decision in the consolidated cases Rapanos v. United States and Carabell v. United States² (herein referred to simply as "Rapanos") which address the jurisdiction over waters of the United States under the Clean Water Act.³ The chart below summarizes the key points contained in this memorandum. This reference tool is not a substitute for the more complete discussion of issues and guidance furnished throughout the memorandum.

Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will apply the significant nexus standard as follows:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors

¹ This guidance incorporates revisions to the EPA/Army Memorandum originally issued on June 6, 2007, after careful consideration of public comments received and based on the agencies' experience in implementing the *Rapanos* decision.

² 126 S. Ct. 2208 (2006).

³ 33 U.S.C. §1251 *et seq.*

Background

Congress enacted the Clean Water Act (“CWA” or “the Act”) “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁴ One of the mechanisms adopted by Congress to achieve that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into “navigable waters” except in compliance with other specified sections of the Act.⁵ In most cases, this means compliance with a permit issued pursuant to CWA §402 or §404. The Act defines the term “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source[,]”⁶ and provides that “[t]he term ‘navigable waters’ means the waters of the United States, including the territorial seas[.]”⁷

In Rapanos, the Supreme Court addressed where the Federal government can apply the Clean Water Act, specifically by determining whether a wetland or tributary is a “water of the United States.” The justices issued five separate opinions in Rapanos (one plurality opinion, two concurring opinions, and two dissenting opinions), with no single opinion commanding a majority of the Court.

The Rapanos Decision

Four justices, in a plurality opinion authored by Justice Scalia, rejected the argument that the term “waters of the United States” is limited to only those waters that are navigable in the traditional sense and their abutting wetlands.⁸ However, the plurality concluded that the agencies’ regulatory authority should extend only to “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to” such relatively permanent waters.⁹

Justice Kennedy did not join the plurality’s opinion but instead authored an opinion concurring in the judgment vacating and remanding the cases to the Sixth Circuit Court of Appeals.¹⁰ Justice Kennedy agreed with the plurality that the statutory term “waters of the United States” extends beyond water bodies that are traditionally considered navigable.¹¹ Justice Kennedy, however, found the plurality’s interpretation of the scope of the CWA to be “inconsistent with the Act’s text, structure, and purpose[.]” and he instead presented a different standard for evaluating CWA jurisdiction over wetlands and other water bodies.¹² Justice Kennedy concluded that wetlands are “waters

⁴ 33 U.S.C. § 1251(a).

⁵ 33 U.S.C. § 1311(a), §1362(12)(A).

⁶ 33 U.S.C. § 1362(12)(A)

⁷ 33 U.S.C. § 1362(7). See also 33 C.F.R. § 328.3(a) and 40 C.F.R. § 230.3(s).

⁸ Id. at 2220.

⁹ Id. at 2225-27.

¹⁰ Id. at 2236-52. While Justice Kennedy concurred in the Court’s decision to vacate and remand the cases to the Sixth Circuit, his basis for remand was limited to the question of “whether the specific wetlands at issue possess a significant nexus with navigable waters.” 126 S. Ct. at 2252. In contrast, the plurality remanded the cases to determine both “whether the ditches and drains near each wetland are ‘waters,’” and “whether the wetlands in question are ‘adjacent’ to these ‘waters’ in the sense of possessing a continuous surface connection....” Id. at 2235.

¹¹ Id. at 2241.

¹² Id. at 2246.

of the United States” “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”¹³

Four justices, in a dissenting opinion authored by Justice Stevens, concluded that EPA’s and the Corps’ interpretation of “waters of the United States” was a reasonable interpretation of the Clean Water Act.¹⁴

When there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices.¹⁵ Thus, regulatory jurisdiction under the CWA exists over a water body if either the plurality’s or Justice Kennedy’s standard is satisfied.¹⁶ Since Rapanos, the United States has filed pleadings in a number of cases interpreting the decision in this manner.

The agencies are issuing this memorandum in recognition of the fact that EPA regions and Corps districts need guidance to ensure that jurisdictional determinations, permitting actions, and other relevant actions are consistent with the decision and supported by the administrative record. Therefore, the agencies have evaluated the Rapanos opinions to identify those waters that are subject to CWA jurisdiction under the reasoning of a majority of the justices. This approach is appropriate for a guidance document. The agencies will continue to monitor implementation of the Rapanos decision in the field and recognize that further consideration of jurisdictional issues, including clarification and definition of key terminology, may be appropriate in the future, either through issuance of additional guidance or through rulemaking.

¹³ Id. at 2248. Chief Justice Roberts wrote a separate concurring opinion explaining his agreement with the plurality. See 126 S. Ct. at 2235-36.

¹⁴ Id. at 2252-65. Justice Breyer wrote a separate dissenting opinion explaining his agreement with Justice Stevens’ dissent. See 126 S. Ct. at 2266.

¹⁵ See Marks v. United States, 430 U.S. 188, 193-94 (1977); Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal “test ... that lower courts should apply,” under Marks, as the holding of the Court); cf. League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); Alexander v. Sandoval, 532 U.S. 275, 281-282 (2001) (same).

¹⁶ 126 S. Ct. at 2265 (Stevens, J., dissenting) (“Given that all four justices who have joined this opinion would uphold the Corps’ jurisdiction in both of these cases – and in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied – on remand each of the judgments should be reinstated if either of those tests is met.”) (emphasis in original). The agencies recognize that the Eleventh Circuit, in United States v. McWane, Inc., et al., 505 F.3d 1208 (11th Cir. 2007), has concluded that the Kennedy standard is the sole method of determining CWA jurisdiction in that Circuit. The Supreme Court denied the government’s petition for a writ of *certiorari* on December 1, 2008.

Agency Guidance¹⁷

To ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions are consistent with the Rapanos decision, the agencies in this guidance address which waters are subject to CWA § 404 jurisdiction.¹⁸ Specifically, this guidance identifies those waters over which the agencies will assert jurisdiction categorically and on a case-by-case basis, based on the reasoning of the Rapanos opinions.¹⁹ EPA and the Corps will continually assess and review the application of this guidance to ensure nationwide consistency, reliability, and predictability in our administration of the statute.

1. Traditional Navigable Waters (i.e., “(a)(1) Waters”) and Their Adjacent Wetlands**Key Points**

- The agencies will assert jurisdiction over traditional navigable waters, which includes all the waters described in 33 C.F.R. § 328.3(a)(1), and 40 C.F.R. § 230.3(s)(1).
- The agencies will assert jurisdiction over wetlands adjacent to traditional navigable waters, including over adjacent wetlands that do not have a continuous surface connection to traditional navigable waters.

EPA and the Corps will continue to assert jurisdiction over “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or

¹⁷ The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.

¹⁸ This guidance focuses only on those provisions of the agencies’ regulations at issue in Rapanos -- 33 C.F.R. §§ 328.3(a)(1), (a)(5), and (a)(7); 40 C.F.R. §§ 230.3(s)(1), (s)(5), and (s)(7). This guidance does not address or affect other subparts of the agencies’ regulations, or response authorities, relevant to the scope of jurisdiction under the CWA. In addition, because this guidance is issued by both the Corps and EPA, which jointly administer CWA § 404, it does not discuss other provisions of the CWA, including §§ 311 and 402, that differ in certain respects from § 404 but share the definition of “waters of the United States.” Indeed, the plurality opinion in Rapanos noted that “... there is no reason to suppose that our construction today significantly affects the enforcement of §1342 ... The Act does not forbid the ‘addition of any pollutant *directly* to navigable waters from any point source,’ but rather the ‘addition of any pollutant *to* navigable waters.’” (emphasis in original) 126 S. Ct. 2208, 2227. EPA is considering whether to provide additional guidance on these and other provisions of the CWA that may be affected by the Rapanos decision.

¹⁹ In 2001, the Supreme Court held that use of “isolated” non-navigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. See Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). This guidance does not address SWANCC, nor does it affect the Joint Memorandum regarding that decision issued by the General Counsels of EPA and the Department of the Army on January 10, 2003. See 68 Fed. Reg. 1991, 1995 (Jan. 15, 2003).

foreign commerce, including all waters which are subject to the ebb and flow of the tide.”²⁰ These waters are referred to in this guidance as traditional navigable waters.

The agencies will also continue to assert jurisdiction over wetlands “adjacent” to traditional navigable waters as defined in the agencies’ regulations. Under EPA and Corps regulations and as used in this guidance, “adjacent” means “bordering, contiguous, or neighboring.” Finding a continuous surface connection is not required to establish adjacency under this definition. The Rapanos decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are “waters of the United States.”²¹

The regulations define “adjacent” as follows: “The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’”²² Under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. This hydrologic connection may be intermittent. Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based

²⁰ 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1). The “(a)(1)” waters include all of the “navigable waters of the United States,” defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka MN). For purposes of CWA jurisdiction and this guidance, waters will be considered traditional navigable waters if:

- They are subject to Section 9 or 10 of the Rivers and Harbors Act, or
- A federal court has determined that the water body is navigable-in-fact under federal law, or
- They are waters currently being used for commercial navigation, including commercial water-borne recreation (e.g., boat rentals, guided fishing trips, water ski tournaments, etc.), or
- They have historically been used for commercial navigation, including commercial water-borne recreation; or
- They are susceptible to being used in the future for commercial navigation, including commercial water-borne recreation. Susceptibility for future use may be determined by examining a number of factors, including the physical characteristics and capacity of the water (e.g., size, depth, and flow velocity, etc.) to be used in commercial navigation, including commercial recreational navigation, and the likelihood of future commercial navigation or commercial water-borne recreation. Evidence of future commercial navigation use, including commercial water-borne recreation (e.g., development plans, plans for water dependent events, etc.), must be clearly documented. Susceptibility to future commercial navigation, including commercial water-borne recreation, will not be supported when the evidence is insubstantial or speculative. Use of average flow statistics may not accurately represent streams with “flashy” flow characteristics. In such circumstances, daily gage data is more representative of flow characteristics.

²¹ Id. at 2248 (Justice Kennedy, concurring) (“As applied to wetlands adjacent to navigable-in-fact waters, the Corps’ conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.”).

²² 33 C.F.R. § 328.3(c).

inference that such wetlands have an ecological interconnection with jurisdictional waters.²³ Because of the scientific basis for this inference, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case-specific demonstration of an ecologic interconnection. In the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial. For example, species, such as amphibians or anadromous and catadromous fish, move between such waters for spawning and their life stage requirements. Migratory species, however, shall not be used to support an ecologic interconnection. In assessing whether a wetland is reasonably close to a jurisdictional water, the proximity of the wetland (including all parts of a single wetland that has been divided by road crossings, ditches, berms, etc.) in question will be evaluated and shall not be evaluated together with other wetlands in the area.

2. Relatively Permanent Non-navigable Tributaries of Traditional Navigable Waters and Wetlands with a Continuous Surface Connection with Such Tributaries

Key Points

- **The agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).**
- **The agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection to such tributaries (e.g., they are not separated by uplands, a berm, dike, or similar feature.)**

A non-navigable tributary²⁴ of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries. Both the plurality opinion and the dissent would uphold CWA jurisdiction over non-navigable tributaries that are “relatively permanent” – waters that typically (e.g., except due to drought) flow year-round or waters that have a

²³ See e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (“...the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.”).

²⁴ A tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water. Furthermore, a tributary, for the purposes of this guidance, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). The flow characteristics of a particular tributary generally will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream). However, for purposes of determining whether the tributary is relatively permanent, where data indicates the flow regime at the downstream limit is not representative of the entire tributary (as described above) (e.g., where data indicates the tributary is relatively permanent at its downstream limit but not for the majority of its length, or vice versa), the flow regime that best characterizes the entire tributary should be used. A primary factor in making this determination is the relative lengths of segments with differing flow regimes. It is reasonable for the agencies to treat the entire tributary in light of the Supreme Court’s observation that the phrase “navigable waters” generally refers to “rivers, streams, and other hydrographic features.” 126 S. Ct. at 2222 (Justice Scalia, quoting *Riverside Bayview*, 474 U.S. at 131). The entire reach of a stream is a reasonably identifiable hydrographic feature. The agencies will also use this characterization of tributary when applying the significant nexus standard under Section 3 of this guidance.

continuous flow at least seasonally (e.g., typically three months).²⁵ Justice Scalia emphasizes that relatively permanent waters do not include tributaries “whose flow is ‘coming and going at intervals ... broken, fitful.’”²⁶ Therefore, “relatively permanent” waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard described below. The agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding.

In addition, the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding. As explained above, the plurality opinion and the dissent agree that such wetlands are jurisdictional.²⁷ The plurality opinion indicates that “continuous surface connection” is a “physical connection requirement.”²⁸ Therefore, a continuous surface connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature).²⁹

²⁵ See 126 S. Ct. at 2221 n. 5 (Justice Scalia, plurality opinion) (explaining that “relatively permanent” does not necessarily exclude waters “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”).

²⁶ *Id.* (internal citations omitted)

²⁷ *Id.* at 2226-27 (Justice Scalia, plurality opinion).

²⁸ *Id.* at 2232 n.13 (referring to “our physical-connection requirement” and later stating that Riverside Bayview does not reject “the physical-connection requirement”) and 2234 (“Wetlands are ‘waters of the United States’ if they bear the ‘significant nexus’ of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States.”) (emphasis in original). See also 126 S. Ct. at 2230 (“adjacent” means “physically abutting”) and 2229 (citing to Riverside Bayview as “confirm[ing] that the scope of ambiguity of ‘the waters of the United States’ is determined by a wetland’s *physical connection* to covered waters...”) (emphasis in original). A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary. 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2 (defining wetlands as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support ... a prevalence of vegetation typically adapted for life in saturated soil conditions”).

²⁹ While all wetlands that meet the agencies’ definitions are considered adjacent wetlands, only those adjacent wetlands that have a continuous surface connection because they directly abut the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature) are considered jurisdictional under the plurality standard.

3. Certain Adjacent Wetlands and Non-navigable Tributaries That Are Not Relatively Permanent

Key Points

- The agencies will assert jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to a traditional navigable water.
- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.
- “Similarly situated” wetlands include all wetlands adjacent to the same tributary.
- Significant nexus includes consideration of hydrologic factors including the following:
 - volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary
 - proximity to the traditional navigable water
 - size of the watershed
 - average annual rainfall
 - average annual winter snow pack
- Significant nexus also includes consideration of ecologic factors including the following:
 - potential of tributaries to carry pollutants and flood waters to traditional navigable waters
 - provision of aquatic habitat that supports a traditional navigable water
 - potential of wetlands to trap and filter pollutants or store flood waters
 - maintenance of water quality in traditional navigable waters
- The following geographic features generally are not jurisdictional waters:
 - swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow)
 - ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent,³⁰ (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike or similar feature).³¹ As described below, the agencies will assess the flow characteristics and functions of the tributary itself, together with the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters.

³⁰ For simplicity, the term “tributary” when used alone in this section refers to non-navigable tributaries that are not relatively permanent.

³¹ As described in Section 2 of this guidance, the agencies will assert jurisdiction, without the need for a significant nexus finding, over all wetlands that are both adjacent and have a continuous surface connection to relatively permanent tributaries. See pp. 6-7, *supra*.

The agencies' assertion of jurisdiction over non-navigable tributaries and adjacent wetlands that have a significant nexus to traditional navigable waters is supported by five justices. Justice Kennedy applied the significant nexus standard to the wetlands at issue in Rapanos and Carabell: "[W]etlands 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.'"³² While Justice Kennedy's opinion discusses the significant nexus standard primarily in the context of wetlands adjacent to non-navigable tributaries,³³ his opinion also addresses Clean Water Act jurisdiction over tributaries themselves. Justice Kennedy states that, based on the Supreme Court's decisions in Riverside Bayview and SWANCC, "the connection between a non-navigable water or wetland may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. ... Absent a significant nexus, jurisdiction under the Act is lacking."³⁴ Thus, Justice Kennedy would limit jurisdiction to those waters that have a significant nexus with traditional navigable waters, although his opinion focuses on the specific factors and functions the agencies should consider in evaluating significant nexus for adjacent wetlands, rather than for tributaries.

In considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters. The ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. The flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus result from the ecological inter-relationship between tributaries and their adjacent wetlands. For example, the duration, frequency, and volume of flow in a tributary, and subsequently the flow in downstream navigable waters, is directly affected by the presence of adjacent wetlands that hold floodwaters, intercept sheet flow from uplands, and then release waters to tributaries in a more even and constant manner. Wetlands may also help to maintain more consistent water temperature in tributaries, which is important for some aquatic species. Adjacent wetlands trap and hold pollutants that may otherwise reach tributaries (and downstream navigable waters) including sediments, chemicals, and other pollutants. Tributaries and their adjacent wetlands provide habitat (e.g., feeding, nesting, spawning, or rearing young) for many aquatic species that also live in traditional navigable waters.

³² Id. at 2248. When applying the significant nexus standard to tributaries and wetlands, it is important to apply it within the limits of jurisdiction articulated in SWANCC. Justice Kennedy cites SWANCC with approval and asserts that the significant nexus standard, rather than being articulated for the first time in Rapanos, was established in SWANCC. 126 S. Ct. at 2246 (describing SWANCC as "interpreting the Act to require a significant nexus with navigable waters"). It is clear, therefore, that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in SWANCC. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non-jurisdictional by SWANCC.

³³ 126 S. Ct. at 2247-50.

³⁴ Id. at 2241 (emphasis added).

When performing a significant nexus analysis,³⁵ the first step is to determine if the tributary has any adjacent wetlands. Where a tributary has no adjacent wetlands, the agencies will consider the flow characteristics and functions of only the tributary itself in determining whether such tributary has a significant effect on the chemical, physical and biological integrity of downstream traditional navigable waters. A tributary, as characterized in Section 2 above, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). For purposes of demonstrating a connection to traditional navigable waters, it is appropriate and reasonable to assess the flow characteristics of the tributary at the point at which water is in fact being contributed to a higher order tributary or to a traditional navigable water. If the tributary has adjacent wetlands, the significant nexus evaluation needs to recognize the ecological relationship between tributaries and their adjacent wetlands, and their closely linked role in protecting the chemical, physical, and biological integrity of downstream traditional navigable waters.

Therefore, the agencies will consider the flow and functions of the tributary together with the functions performed by all the wetlands adjacent to that tributary in evaluating whether a significant nexus is present. Similarly, where evaluating significant nexus for an adjacent wetland, the agencies will consider the flow characteristics and functions performed by the tributary to which the wetland is adjacent along with the functions performed by the wetland and all other wetlands adjacent to that tributary. This approach reflects the agencies' interpretation of Justice Kennedy's term "similarly situated" to include all wetlands adjacent to the same tributary. Where it is determined that a tributary and its adjacent wetlands collectively have a significant nexus with traditional navigable waters, the tributary and all of its adjacent wetlands are jurisdictional. Application of the significant nexus standard in this way is reasonable because of its strong scientific foundation – that is, the integral ecological relationship between a tributary and its adjacent wetlands. Interpreting the phrase "similarly situated" to include all wetlands adjacent to the same tributary is reasonable because such wetlands are physically located in a like manner (i.e., lying adjacent to the same tributary).

Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water. In addition to any available hydrologic information (e.g., gauge data, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.), the agencies may reasonably consider certain physical characteristics of the tributary to characterize its flow, and thus help to inform the determination of whether or not a significant nexus is present between the tributary and downstream traditional navigable waters. Physical indicators of flow may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks.³⁶ Other physical indicators of flow may include

³⁵ In discussing the significant nexus standard, Justice Kennedy stated: "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters' ..." 126 S. Ct. at 2248. Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters.

³⁶ See 33 C.F.R. § 328.3(e). The OHWM also serves to define the lateral limit of jurisdiction in a non-navigable tributary where there are no adjacent wetlands. See 33 C.F.R. § 328.4(c). While EPA regions

shelving, wracking, water staining, sediment sorting, and scour.³⁷ Consideration will also be given to certain relevant contextual factors that directly influence the hydrology of tributaries including the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions.

In addition, the agencies will consider other relevant factors, including the functions performed by the tributary together with the functions performed by any adjacent wetlands. One such factor is the extent to which the tributary and adjacent wetlands have the capacity to carry pollutants (e.g., petroleum wastes, toxic wastes, sediment) or flood waters to traditional navigable waters, or to reduce the amount of pollutants or flood waters that would otherwise enter traditional navigable waters.³⁸ The agencies will also evaluate ecological functions performed by the tributary and any adjacent wetlands which affect downstream traditional navigable waters, such as the capacity to transfer nutrients and organic carbon vital to support downstream foodwebs (e.g., macroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream), habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which the tributary and adjacent wetlands perform functions related to maintenance of downstream water quality such as sediment trapping.

After assessing the flow characteristics and functions of the tributary and its adjacent wetlands, the agencies will evaluate whether the tributary and its adjacent wetlands are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water. As the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a traditional navigable water.

Accordingly, Corps districts and EPA regions shall document in the administrative record the available information regarding whether a tributary and its adjacent wetlands have a significant nexus with a traditional navigable water, including the physical indicators of flow in a particular case and available information regarding the functions of the tributary and any adjacent wetlands. The agencies will explain their basis for concluding whether or not the tributary and its adjacent wetlands, when considered together, have a more than speculative or insubstantial effect on the chemical, physical, and biological integrity of a traditional navigable water.

Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States

and Corps districts must exercise judgment to identify the OHWM on a case-by-case basis, the Corps' regulations identify the factors to be applied. These regulations have recently been further explained in Regulatory Guidance Letter (RGL) 05-05 (Dec. 7, 2005). The agencies will apply the regulations and the RGL and take other steps as needed to ensure that the OHWM identification factors are applied consistently nationwide.

³⁷ See Justice Kennedy's discussion of "physical characteristics," 126 S. Ct. at 2248-2249.

³⁸ See, generally, 126 S. Ct. at 2248-53; see also 126 S. Ct. at 2249 ("Just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries....") (citing to Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 524-25(1941)).

because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.³⁹ Even when not jurisdictional waters subject to CWA §404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e., “discernible, confined, and discrete conveyances”), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g., CWA §§ 311 and 402).⁴⁰

Certain ephemeral waters in the arid west are distinguishable from the geographic features described above where such ephemeral waters are tributaries and they have a significant nexus to downstream traditional navigable waters. For example, in some cases these ephemeral tributaries may serve as a transitional area between the upland environment and the traditional navigable waters. During and following precipitation events, ephemeral tributaries collect and transport water and sometimes sediment from the upper reaches of the landscape downstream to the traditional navigable waters. These ephemeral tributaries may provide habitat for wildlife and aquatic organisms in downstream traditional navigable waters. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters.

Documentation

As described above, the agencies will assert CWA jurisdiction over the following waters without the legal obligation to make a significant nexus determination: traditional navigable waters and wetlands adjacent thereto, non-navigable tributaries that are relatively permanent waters, and wetlands with a continuous surface connection with such tributaries. The agencies will also decide CWA jurisdiction over other non-navigable tributaries and over other wetlands adjacent to non-navigable tributaries based on a fact-specific analysis to determine whether they have a significant nexus with traditional navigable waters. For purposes of CWA §404 determinations by the Corps, the Corps and EPA are developing a revised form to be used by field regulators for documenting the assertion or declination of CWA jurisdiction.

Corps districts and EPA regions will ensure that the information in the record adequately supports any jurisdictional determination. The record shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination. The Corps districts and EPA regions will also demonstrate and document in the record that a particular water either fits within a class identified above as not requiring a significant nexus determination, or that the water has a

³⁹ See 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

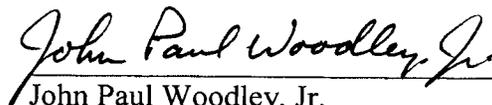
⁴⁰ 33 U.S.C. § 1362(14).

significant nexus with a traditional navigable water. As a matter of policy, Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

All pertinent documentation and analyses for a given jurisdictional determination (including the revised form) shall be adequately reflected in the record and clearly demonstrate the basis for asserting or declining CWA jurisdiction.⁴¹ Maps, aerial photography, soil surveys, watershed studies, local development plans, literature citations, and references from studies pertinent to the parameters being reviewed are examples of information that will assist staff in completing accurate jurisdictional determinations. The level of documentation may vary among projects. For example, jurisdictional determinations for complex projects may require additional documentation by the project manager.



Benjamin H. Grumbles
Assistant Administrator for Water
U.S. Environmental Protection Agency



John Paul Woodley, Jr.
Assistant Secretary of the Army
(Civil Works)
Department of the Army

⁴¹ For jurisdictional determinations and permitting decisions, such information shall be posted on the appropriate Corps website for public and interagency information.

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

DAN EOFF

(b) County of Residence of First Listed Plaintiff Van Buren
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
J. Grant Ballard, Charles A. Banks (501) 280-0100
BANKS LAW FIRM, PLLC
100 Morgan Keegan Drive, Suite 100, Little Rock, AR 72202
*Kent Tester
230 Hwy US N
#7
Clinton, AR 72031*

DEFENDANTS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and
BOB PERCIASEPE, in His Official Capacity as Administrator of the
Environmental Protection Agency

County of Residence of First Listed Defendant U.S. Gov.
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS---Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input checked="" type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation

VI. CAUSE OF ACTION Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
A.P.A. 5 U.S.C. § 551 et seq.; 5 U.S.C. § 701 & 33 U.S.C. 1251
 Brief description of cause:
Petition for Judicial Review of Agency Action (EPA)

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ Declaratory & Injunctive Relief CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 6/21/2013 SIGNATURE OF ATTORNEY OF RECORD [Signature]

FOR OFFICE USE ONLY
 RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____