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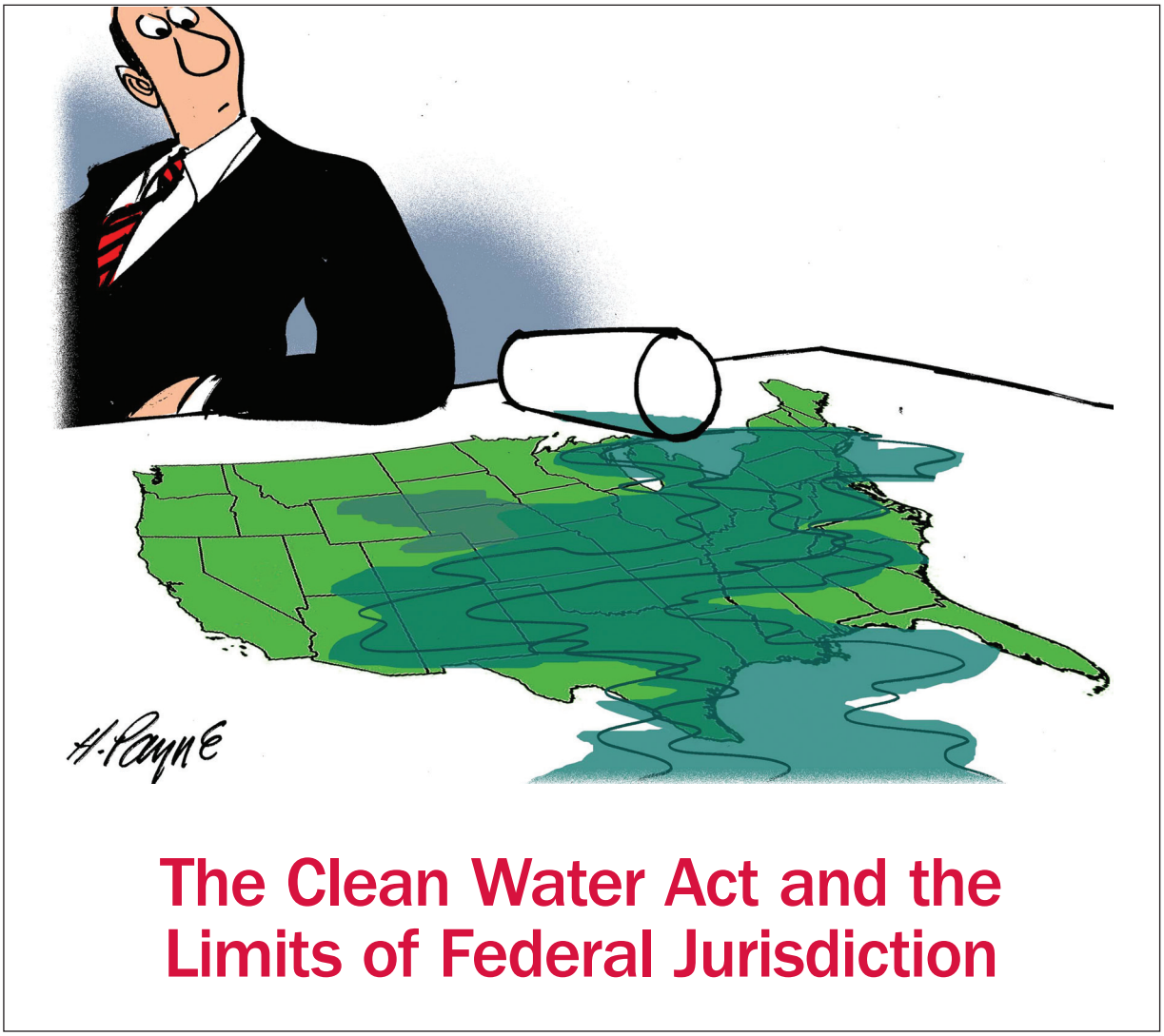

The Clean Water Act and the Limits of Federal Jurisdiction

Civil Rights
EPA and a Tale of Two Legal Sections

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The Historical Scope of Clean Water Act Jurisdiction

The authors look at the statute's legislative and regulatory history to address what waters the law historically covered. They argue that a broad range have been covered and that current and future guidance and regulations should be aimed to restore the act's full protections for "waters of the United States"

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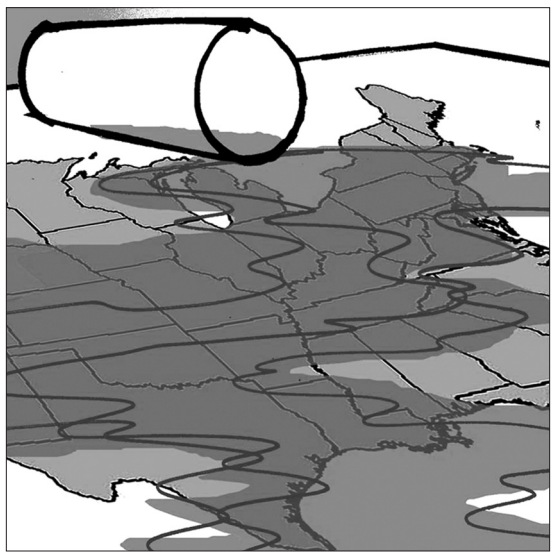
In an unnecessarily exaggerated response to U.S. Supreme Court decisions over the past decade, the agencies that implement the Clean Water Act have substantially reduced the scope of waters that are considered jurisdictional "waters of the United States" under the act. The agencies are now working on new guidance and regulations that would be a step toward restoring the intended scope of "waters of the United States." However, in an attempt to narrow interpretations of the act, opponents of clean water regulation have sought to rewrite the history of the act and its implementation. Their revisionism seeks to obfuscate the intended scope of "waters of the United States" and dissuade the agencies from reaffirming the broad scope and purpose of the act.

This article addresses head-on the allegations that the CWA was never intended to cover ditches, non-perennial streams, and so-called "isolated" waters. It shows that the early legislative and regulatory history of the act demonstrate a broad intent and understanding that these waterbodies are "waters of the United States." In addition, contrary to the frequent claims that the agencies implementing the act have sought to expand their jurisdiction over the past four decades, this article shows that regulatory practices, motivated in part by recent Supreme Court decisions, have actually narrowed the traditional scope of CWA jurisdiction. This new jurisdictional uncertainty presents a serious threat to the health of the nation's waters and indicates that the time is ripe for the agencies to revise their guidance and regulations to restore the full, intended scope of CWA protections.



The CWA was enacted in 1972 to "restore and maintain the chemical, physical, and biological integrity of the nation's waters."[1] Faced with such severe water pollution that rivers literally caught on fire,[2] the U.S. Congress created a comprehensive legislative scheme to clean up and restore the nation's waters with a goal that "the discharge of pollutants into the navigable waters be eliminated by 1985."[3] The fundamental premise of the CWA was that all pollutant discharges to the nation's waters were prohibited, unless authorized by a permit.[4] This system of controlling pollution at the source relied for its success in part on the new law's assertion of jurisdiction over all "waters of the United States," an expansion over previous laws that focused on waters that are actually navigable.[5]

Over the subsequent four decades, the polluting industries subject to the act's permitting requirements have worked diligently to roll back the act's protections and resume their unfettered use of the nation's waters for waste disposal. Over the past decade, their advocacy has found sympathetic ears at the Supreme Court. In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, the Court issued a limited ruling invalidating the use of the Corps' "Migratory Bird Rule" to assert CWA jurisdiction over certain ponds.[6] The *SWANCC* decision is now being used to call into question whether the CWA covers so-called "isolated" waters.[7] In *Rapanos v. United States*, the Court issued a divided decision regarding jurisdiction over wetlands not adjacent to navigable-in-fact waters.[8] Discussions of CWA jurisdiction in the *Rapanos* opinions authored by Justices Antonin Scalia and Anthony M. Kennedy are now being used to raise questions about the act's coverage of ditches and non-perennial streams.[9]

Following *SWANCC* and *Rapanos*, bills were proposed in Congress that would restore the protections afforded to waterbodies by the CWA prior to the Supreme Court decisions, but were never brought up for a floor vote.[10] Instead, efforts to interpret *SWANCC* and *Rapanos*, and to clarify the reach of the act, have been left to the Army Corps of Engineers and the Environmental Protection Agency, the agencies charged with implementing the CWA. They have proposed new guidance to describe how they will identify CWA jurisdiction and also affirmed that they intend to revise their regulations defining the reach of the CWA after the guidance is finalized.[11]

Even as EPA and the Corps work through these

administrative processes, it is clear today that the well-settled legal protections the CWA provided to numerous waterbodies before *SWANCC* and *Rapanos* have been dramatically undermined. While it would be incorrect to say that the agencies have used precisely the same jurisdictional boundaries since the CWA was enacted in 1972, it is indisputable that Congress intended a broad coverage in the law and that the agencies had — for many years prior to *SWANCC* in 2001 — faithfully implemented that vision for a variety of waterbodies whose jurisdictional status is now in question.

This article discusses several kinds of waters — ditches, intermittent or ephemeral streams, and "isolated" waterbodies — the protections for which have been questioned in the wake of *SWANCC* and *Rapanos*, and demonstrates that these waters were intended to be protected by the CWA. It also refutes the contention that the Corps and EPA have steadily expanded their assertions of the act's scope. Contrary to this "regulatory creep" hypothesis, this article demonstrates that the agencies have actually retreated from the jurisdictional scope initially intended and asserted for the CWA.

Ditches

The alleged uncertainty: According to some industry opponents of comprehensive CWA coverage, ditches — i.e., man-made conveyances of water — typically may not legally be protected from pollution or destruction by the CWA for various reasons, including that since these conveyances may also be point sources, they cannot themselves be "waters of the United States."[12] This theory has gained some traction in recent years,[13] even though there is little legal or historical evidence to suggest that the position is correct.

The full history: To hear clean water opponents describe the situation, treating ditches as "waters of the United States" subject to the CWA has evolved over time from something the government did not do to something it does regularly. This view is based on mistaken interpretations of the Corps' regulations, the failure to acknowledge the primacy of EPA's interpretation of CWA jurisdiction, and the failure to take note of relevant court decisions.

First, the Corps' position on ditches has not been inconsistent over the past several decades. The Corps has never taken the position that the jurisdiction of the CWA cannot reach ditches. It is true that in 1975 the Corps stated that "[d]rainage and irrigation ditches have been excluded" from jurisdiction.[14] However, the Corps did not suggest that this was because the CWA *cannot* legally reach such features. To the contrary, as the Corps' notice went on to say, "[w]e realize that some ecologically valuable waterbodies or environmentally damaging practices may have been omitted. To insure that these waters are also protected, we have given the District Engineer discretionary authority to also regulate them on a case by case basis."[15] Similarly, in 1977, the Corps included in its jurisdictional regulations a statement that "manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition,"[16] but did not claim that its declination of jurisdiction was required by the act.[17] It was therefore not legally inconsistent when the Corps stated in 1986 that such features "generally" are not considered "waters of the United States,"[18] or when the Corps indicated in 2000 that ditches are covered unless they are constructed entirely in uplands.[19] Although the Corps' *policy* choices about when to assert jurisdiction may have shifted somewhat, the Corps' *legal* interpretation of jurisdiction under the CWA has not changed.

Second, and more importantly, the Corps is *not* the federal agency that has responsibility for determining what is and is not a "water of the United States" subject to the CWA. EPA has that duty. This authority was confirmed in a 1979 opinion from the U.S. attorney general stating, "[t]he administrator of the Environmental Protection Agency rather than the secretary of the army has ultimate administrative authority to construe the jurisdictional term 'navigable waters' under §404 of the Federal Water Pollution Control Act."[20] So, it is EPA's view of the status of ditches that carries legal weight under the act, not the Corps' view.

EPA did not view ditches as categorically excluded from the CWA, even quite early in the act's implementation. The agency's general counsel concluded in 1977 that the Arlington Canal, in Buckeye, Arizona, was a "water of the United States," despite describing the canal as

> an earthen irrigation ditch which flows roughly parallel to the Gila River[, has flow that] consists primarily of groundwater pumped from wells, irrigation return flows and treated sewage effluent[, and] takes in water from the main Gila River channel only during periods of heavy flow when upstream users are not diverting all of the flow of the river.[21]

The opinion states that the "facts clearly support the regional administrator's finding that the Arlington Canal is a tributary of the Gila River, which is navigable water."[22] And this conclusion was not an aberration; a separate opinion from the general counsel two years earlier was consistent with this view.[23]

Third, several federal courts have concluded that man-made channels can properly be considered "waters of the United States." For instance, in a case involving non-navigable artificial mosquito canals connected to Papy's Bayou in Florida, the court ruled (less than two years after the passage of the CWA) that the canals were "waters of the United States":

> The conclusion that Congress intended to reach water-bodies such as these canals with the FWPCA is inescapable. The legislative history . . . manifests a clear intent to break from the limitations of the Rivers and Harbors Act to get at the sources of pollution. Polluting canals that empty into a bayou arm of Tampa Bay is clearly an activity Congress sought to regulate. The fact that these canals were man-made makes no difference. They were constructed long before the development scheme was conceived. That the defendants used them to convey the pollutants without a permit is the matter of importance.[24]

Similarly, in a case involving the discharge of raw sewage during the 1970s into a Louisiana canal that was adjacent to (and from which water was periodically pumped into) wetlands that were considered to be "waters of the United States," the court found that the canal could be protected either as a water linked to interstate commerce or as a tributary to the wetlands.[25]

In the last decade — before and after both *SWANCC* and *Rapanos* — numerous federal courts of appeal have found that man-made channels properly can be considered protected "waters of the United States." Specifically, the U.S. Court of Appeals for the Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits found that artificial conveyances were properly protected by the CWA.[26] Similarly, the U.S. Court of Appeals for the Second Circuit rejected an attempt to limit jurisdiction over a natural tributary, which had been "channeled in some places . . . into underground pipes to make room for development."[27]

In keeping with this approach, the George W. Bush Administration staunchly defended the protection of the entire tributary system, ditches included, before the Supreme Court. Solicitor General Paul Clement explained that "the definition of a tributary is basically any channelized body of water that takes water in a flow down to the traditional navigable water."[28] Specifically, he noted that "[t]he Corps has not drawn a distinction between man-made channels or ditches and natural channels or ditches. And, of course, it would be very absurd for the Corps to do that since the Erie Canal is a ditch."[29]

Non-perennial Streams

The alleged uncertainty: In 2003, EPA and the Corps suggested that *SWANCC* created some uncertainty about the jurisdictional status of streams that do not flow year-round.[30] The *Rapanos* plurality opinion openly questioned CWA protections for such streams.[31] And, pending the adoption of revised guidance and rules, the Corps and EPA are currently operating under a guidance document that does not categorically protect all seasonal and ephemeral streams, but instead requires a case-by-case demonstration of a "significant nexus" with downstream traditionally navigable waters (TNWs).[32]

The full history: The agencies charged with implementing the CWA, courts interpreting the law, and members of Congress have for decades understood that streams with less than year-round flow quite properly can be considered "waters of the United States." Indeed, with the exception of the Corps' initial regulations, which were quickly found to be unlawful,[33] the agencies' rules and practice have consistently provided authority to protect impermanent streams.

Since 1973, EPA's regulations have regulated "tributaries" to TNWs, without limitation on the frequency or duration of flow, and have further provided that intrastate rivers and streams with certain connections to interstate commerce were protected.[34] By 1979, and to this day, the EPA rules also specifically mentioned "intermittent streams" as waterbodies that could be considered "waters of the United States" where they had specified connections to interstate commerce.[35] Similarly, the Corps' regulations foresaw the need to protect streams that do not flow continuously in 1975,[36] and put such provisions into action in 1977.[37]

Even before the words "intermittent streams" appeared in the regulations, EPA understood that continuous flow was not a prerequisite to CWA jurisdiction. In a 1976 opinion, EPA's general counsel considered the status of the Salt River, which had intermittent flow even without being diverted but also was used intensively: "[v]irtually the entire flow . . . is diverted about twenty[-]five miles upstream of Phoenix at Granite Reef Dam for irrigation and municipal use."[38] The opinion concluded that the Salt River could be protected by the CWA.[39]

Indeed, this 1976 opinion shows that EPA had been of the same view for several years, as it cites a 1973 memorandum, which indicates intermittent streams could be jurisdictional if they were interstate, served as tributaries to navigable waters, or were linked to interstate commerce. It said "a stream which flows intermittently is navigable wa-

ters 'unless the stream is normally dry, has only a short-term runoff which does not reach navigable water or cross a state line, and there is no use of the stream by interstate travelers or for other interstate commercial purposes.'"[40]

As further evidence that non-continuously flowing streams were included in the CWA regulatory program early on, one crucial opponent of comprehensive coverage said so explicitly. Senator Lloyd Bentsen (D-Texas), who led the charge in the U.S. Senate in 1977 to significantly roll back the scope of the act's restrictions on the discharge of dredged or fill material, objected to an amendment proposed by the Environment and Public Works Committee that would exempt certain activities from needing permits, but which did not backtrack on jurisdiction. He complained: "The committee's amendment skirts the fundamental problem: the definition of federal jurisdiction in the regulation of dredge and fill activities. The program *would still cover* all waters of the United States, including small streams, ponds, isolated marshes, and *intermittently flowing gullies*."[41]

Judicial interpretations of the law before *SWANCC* and *Rapanos* likewise generally found that the CWA authorized the protection of streams that did not flow yearround. In 1975, a federal court in Arizona observed:

> For the purposes of this act to be effectively carried into realistic achievement, the scope of its control must extend to all pollutants which are discharged into any waterway, including normally dry arroyos, where any water which might flow therein could reasonably end up in any body or water, to which or in which there is some public interest, including underground waters.[42]

Accordingly, the court ruled:

> Thus a legal definition of "navigable waters" or "waters of the United States" within the scope of the act includes any waterway within the United States also including normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, reservoir, bay, gulf, sea or ocean either within or adjacent to the United States.[43]

Later court decisions have reached similar conclusions in cases involving CWA jurisdiction over: an Oklahoma stream with a small amount of water at the time of discharge, but not clearly flowing to another protected water body continuously;[44] an intermittent creek in California;[45] a New Mexico creek and arroyo, where "during times of intense rainfall, there could be a surface connection between the [contested waters] and navigable-in-fact streams," where the contested waters "flow[ed] for a period after the time of discharge of pollutants into the waters," and where "the flow continue[d] regularly through underground aquifers [*sic*] fed by the surface flow";[46] and an intermittent tributary to the Sheyenne River in North Dakota.[47]

In *Rapanos*, the government was adamant that the entire tributary system was within the CWA's ambit. In particular, the Bush administration told the Supreme Court that "the text, history, and purposes of the CWA amply support the expert agencies' decision to define the term 'waters of the United States' to include all tributaries of traditional navigable waters."[48] It continued, "Effective regulation of the traditional navigable waters would hardly be possible if pollution of tributaries fell outside the jurisdiction of those responsible for maintaining water quality downstream."[49]

Finally, with regard to these waters, it is worth noting that all tributaries of TNWs — without any express limitation regarding the permanence or seasonality of their flow — were covered by federal law even prior to the passage of the 1972 CWA. One of the predecessor federal water pollution control laws of the modern CWA is the 1899 Refuse Act. That act does not merely govern discharge into TNWs; it encompasses discharges "into any navigable water of the United States, *or into any tributary* of any navigable water from which the same shall float or be washed into such navigable water."[50]

Geographically "Isolated" Waters

The alleged uncertainty: In the wake of *SWANCC*, waterbodies that are non-navigable and geographically "isolated," i.e., lacking an obvious surface connection to other navigable waters, have been largely excluded from the CWA, and some have suggested that Congress never intended the law to protect such waters.[51]

The full history: Very soon after the enactment of the 1972 CWA, EPA and the Corps both promulgated regulations treating inland waters that were not part of the tributary system as "waters of the United States." EPA did so right away, in May of 1973, with regulations that said "[t]he term 'navigable waters' includes" such waters as "intrastate lakes, rivers, and streams" with specified connections to interstate commerce.[52] The Corps responded to the invalidation of its initial, narrow, regulations with provisions that classified, as "waters of the United States," several categories of waterbodies, including:

> All other waters of the United States . . . 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 waters of the United States, the degradation or destruction of which could affect interstate commerce.[53]

The Corps' rules actually included a footnote explaining that this provision was intended to

> incorporate all other waters of the United States that could be regulated under the federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily obvious or where the location or size of the waterbody generally may not require regulation through individual or general permits to achieve the objective of the act.[54]

EPA changed its rules in 1979 to specify that actual connections to commerce need not be specifically shown, so long as such connections could be present.[55] This scope was constrained somewhat in the states of the Fourth Circuit due to the circuit's 1997 decision in *United States v. Wilson*, but otherwise remained in place.[56]

It is not the case, as clean water opponents frequently claim, that the Reagan administration expanded the regulatory coverage of the law in 1986 by explaining that waterbodies could qualify as "waters of the United States" based on connections to interstate commerce if they are or would be used as habitat for interstate migratory birds or endangered species, or are used to irrigate crops sold in interstate commerce.[57] Rather, as the Corps explained at that time, this was a mere clarification of the existing rules.[58]

This regulatory status quo was likewise reflected in administrative and judicial decisions implementing the CWA. Numerous interpretations of the regulations recognized that the agencies protected so-called "isolated waters."[59] Consistent with the agencies' approach, Congress rejected an attempt in 1977 to amend the act so that inland wetlands, including isolated ones, would lose protection.[60] Moreover, the "migratory bird" clarification was generally upheld in the courts.[61]

Regulatory Retreat, Not "Creep"

Opponents of broad clean water protections often suggest that CWA jurisdiction has been expanding since 1972, thanks to overzealous environmentalists, courts, and regulators.[62] The history of the act's regulations detailed above show this is not the case. The principles of CWA jurisdiction have remained largely consistent since the act's passage, especially in the case of EPA's regulatory scheme. It also bears noting that the agencies have not sought to apply the act to various waters in practice. Indeed, at least with respect to certain waste treatment systems, the agencies have disclaimed CWA coverage for features that plainly are and should be protected.

First, in the 1990s, the agencies stated that "prior converted cropland" would not be considered "waters of the United States." The Corps initially created this exception as an interpretation of its regulatory definition of wetlands.[63] Thereafter, both agencies amended their regulations to provide an exemption from the regulatory definition of "waters of the United States" for such cropland.[64]

Second, the Corps has described a number of features that the agencies will generally treat as nonjurisdictional, but which could be protected as needed. These waters are:

- Nontidal drainage and irrigation ditches excavated on dry land.
- Artificially irrigated areas that would revert to upland if the irrigation ceased.
- Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.[65]

Third, the agencies have excluded "waste treatment systems" from being considered "waters of the United States" by regulation, and have attempted to expand this exemption to cover waters for which it was plainly not intended. In 1980, EPA amended its regulations to provide that:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to

> manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.[66]

The agency explained, however, that the exclusion was limited; in view of the fact that the act "was not intended to license dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States."[67] Although the second sentence of the regulatory exclusion was suspended in order to dispel concerns that preexisting treatment systems would be improperly brought into the regulatory system,[68] the exemption was not meant to be a wholesale authorization of anything described as a "waste treatment system." To the contrary, EPA's initial implementation of the rules rejected a sweeping interpretation; the agency argued in litigation that in-stream disposal of coal mining waste did not qualify for the exemption.[69]

EPA and the Corps have since tried to reverse this interpretation, and to use the regulatory exemption to treat newly created waste treatment facilities as excluded from the CWA. Under the agencies' revised interpretation, a new impoundment of waters of the United States is able to qualify for the waste treatment system exclusion if it is covered by a §404 permit; that way, the system is "designed to meet the requirements of the act," as required by the regulation.[70] This position was reaffirmed by EPA in a 1998 *Federal Register* notice[71] and a 2000 guidance document,[72] and by the Corps in recent litigation.[73]

Despite this gradual expansion of the waste treatment system exclusion over time, the basic idea expressed in the second sentence of EPA's 1980 regulations — that the exclusion generally does not apply to impoundments of waters of the United States — has continued to be the default rule in the absence of a §404 permit. For that reason, EPA has reaffirmed that a reinstatement of the exclusion's second sentence would not expand the scope of CWA jurisdiction, as new treatment systems constructed in waters of the United States have typically not been allowed to claim the exemption.[74]

Conclusion

Today, waterbodies that EPA and the Corps had historically and regularly protected as "waters of the United States" face an unclear future under the CWA. In many cases, especially with respect to so-called "isolated" waters, the agencies are commonly denying federal clean water protections. The increasing uncertainty and loss of jurisdiction are the direct result of the Supreme Court's decisions in *SWANCC* and *Rapanos*, and of the agencies' interpretations and expansion of those decisions.

New agency guidance and regulations will help to clear this uncertainty by reestablishing categorical protections for the types of streams, tributaries, wetlands, and so-called "isolated" waters left at greater risk of pollution and destruction in the wake of *SWANCC*, *Rapanos*, and recent administrative actions. The attempts of the opponents of clean water to claim that the law's jurisdiction was never well-settled, that these water types were not previously protected, or that the agencies expanded the act's jurisdiction over time in ways not intended by Congress are unavailing. These claims do not refute the fact that, prior to 2001, agency regulations faithfully implemented the intent of Congress to broadly protect our nation's waters. And they certainly do not justify calls for regulatory inaction.

The notion that Congress ever intended to adopt anything like the cramped jurisdictional scope offered by clean water opponents is untenable. To the contrary, faced with rivers literally catching fire due to pollution,[75] the 1972 Congress concluded that "the previous legislation was 'inadequate in every vital aspect'" — and responded by enacting a "comprehensive" statute whose intent "was clearly to establish an all-encompassing program of water pollution regulation."[76] Indeed, in 1987, a unanimous Supreme Court found that the CWA "applies to all point sources and virtually all bodies of water."[77] To correct the jurisdictional retreat that occurred in the wake of *SWANCC* and *Rapanos*, new agency guidance and regulations are needed to avoid dramatically shrinking the range of waters protected by federal law back to a narrow geographic scope not seen for more than four decades. The agencies' failure to assert their jurisdiction under the CWA would, in effect, render the act a practical nullity and risk a return to pre-1972 levels of water pollution, for the law's approach of "eliminating pollution at its source" cannot be achieved if discharges into a substantial portion of the nation's waters are cut out of the law's jurisdiction.

Endnotes

1. 33 U.S.C. §1251(a).
2. *See, e.g.*, *United States v. Ashland Oil and Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974).
3. 33 U.S.C. §1251(a)(1).
4. 33 U.S.C. §1311(a).
5. *United States v. Holland*, 373 F. Supp. 665, 671-73 (D. Fla. 1974) (discussing legislative history of the act).

6. 531 U.S. 159, 174 (2001).
7. *See infra* Part III.
8. 547 U.S. 715 (2006).
9. *See infra* Parts I & II.
10. Clean Water Restoration Act of 2009, S. 787, 111th Cong. (2009); Clean Water Restoration Act of 2007, H.R. 2421, S. 1870, 110th Cong. (2007).
11. EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. 24479 (May 2, 2011). The proposed guidance is available at http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm.
12. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 699 F. Supp. 2d 209, 215-17 (D.D.C. 2010) (rejecting argument that ditches cannot be "navigable waters" because the term "ditch" is used in the statutory definition of "point source"), vacated, 663 F.3d 470 (D.C. Cir. 2011) (finding NAHB lacked standing and stating, "by the time [Nationwide Permit] 46 issued, the Corps had routinely signaled that, although upland ditches were not generally within its jurisdiction, some ditches certainly could be"). *See also* Brief of Nat'l Ass'n of Home Builders, *Rapanos v. United States,* 547 U.S. 715 (2006), at 3-12 (Dec. 2, 2005) (claiming that "ditches" may only be considered CWA "point sources," not "waters of the United States"); Testimony of Duane Desiderio, Staff Vice President for Legal Affairs, Nat'l Ass'n of Home Builders, Hearing of Senate Environment & Public Works Committee: "The Clean Water Act following the recent Supreme Court decisions in *Solid Waste Agency of Northern Cook County* and *Rapanos-Carabell*," at 28-29 (Dec. 13, 2007) (claiming that Rapanos plurality and Justice Kennedy had consensus that "[a]s a general matter 'navigable waters' and 'point sources' are not the same thing, and normally a feature can not be both"), available at http://epw.senate.gov/public/index. cfm?FuseAction=Files.View&FileStore_id=ab14b9d9- 6720-4bf0-98b0-d5b-1d1666c94.
13. *See* Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1997 (Jan. 15, 2003) (stating that, after *SWANCC*, a "question that has arisen is whether CWA jurisdiction is affected when a surface tributary to jurisdictional waters flows for some of its length through ditches, culverts, pipes, storm sewers, or similar manmade conveyances," but saying that field staff should—"generally speaking"—protect tributary systems, without saying when they should not, and how man-made conveyances fit into the analysis); *Rapanos*, 547 U.S. at 735-36 (plurality opinion): "The definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping. The separate classification of 'ditch[es], channel[s], and conduit[s]'—which are terms ordinarily used to describe the watercourses through which intermittent waters typically flow—shows that these are, by and large, not 'waters of the United States.'"
14. 40 Fed. Reg. 31320, 31321 (July 25, 1975).
15. *Id.*
16. *See* 42 Fed. Reg. 37122, 37144 (July 19, 1977) (promulgating 33 C.F.R. §323.2(a)(3)).
17. *Cf. United States v. Deaton*, 332 F.3d 698, 710 (4th Cir. 2003) ("Although the Corps has not always chosen to regulate all tributaries, it has always used the word to mean the entire tributary system, that is, all of the streams whose water eventually flows into navigable waters.").
18. 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).
19. 65 Fed. Reg. 12818, 12823-24 (Mar. 9, 2000).
20. 43 U.S. Op. Atty. Gen. 197 (Sept. 5, 1979); *see also id.* at 200-01:
    The term "navigable waters," moreover, is a linchpin of the act in other respects. It is critical not only to the coverage of § 404, but also to the coverage of the other pollution control mechanisms established under the act, including the § 402 permit program for point source discharges, the regulation of discharges of oil and hazardous substances in § 311 and the regulation of discharges of vessel sewage in § 312. Its definition is not specific to § 404, but is included among the act's general provisions. It is, therefore, logical to conclude that Congress intended that there be only a single judgment as to whether-and to what extent-any particular water body comes within the jurisdictional reach of the Federal Government's pollution control authority. We find no support either in the statute or its legislative history for a conclusion that a water body would have one set of boundaries for purposes of dredged and fill permits under § 404 and a different set for purposes of the other pollution control measures in the act. On this point I believe there can be no serious disagreement. (Citations omitted.)"
21. U.S. EPA, Office of General Counsel, *In re: Town of Buckeye, Arizona,* 1977 WL 28254, at *1 (Nov. 11, 1977).
22. *Id.* (citation omitted).
23. U.S. EPA, Office of General Counsel, *In re: Riverside Irrigation Dist., Ltd. & 17 Others,* 1975 WL 23864, at **3-4 (June 27, 1975) (discussing objection about irrigation return canals, EPA's regulations defining "waters of the United States" and a judicial interpretation, which noted that tributaries to navigable waters were protected, and concluding, "[i]t thus appears that the waters that are the subject of these permits may well be determined by the finder of fact, applying the statutory and regulatory test to the facts of these cases, to be navigable waters within the definition in the act").
24. *United States v. Holland,* 373 F. Supp. 665, 673 (D. Fla. 1974).
25. *United States v. St. Bernard Parish,* 589 F. Supp. 617, 620 (E.D. La. 1984).
26. *See, e.g., Precon Development Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 292 (4th Cir. 2011) (affirming Corps' determination that particular ditches are tributaries but remanding for further determination of whether wetlands adjacent to those ditches have a significant nexus to navigable-in-fact waters); *United States v. Cundiff,* 555 F.3d 200, 213 (6th Cir. 2009) (finding jurisdiction based in part on man-made ditches and noting that "in determining whether the act confers jurisdiction, it does not make a difference whether the channel by which water flows from a wetland to a navigable-in-fact waterway or its tributary was manmade or formed naturally"); *United States v. Deaton,* 332 F.3d at 712 (considering effect of pollution into non-navigable tributaries, noting Corps' interpretation that whole tributary system is protected under applicable rules, and holding, "[t]he act thus reaches to the roadside ditch and its adjacent wetlands"); *Carabell v. U.S. Army Corps of Engineers,* 391 F.3d 704, 708 (6th Cir. 2004) (finding that both ends of ditch along border of the property are connected to tributaries of "waters of the United States," making it a tributary, and thus a protected water), *vacated sub nom. Rapanos v. United States*, 547 U.S. 715 (2006); *United States v. Gerke Excavating, Inc.,* 412 F.3d 804, 805-06 (7th Cir. 2005) ("A stream can be a tributary; why not a ditch? A ditch can carry as much water as a stream, or more; many

streams are tiny. It wouldn't make much sense to interpret the regulation as distinguishing between a stream and its man-made counterpart."), *vacated*, 548 U.S. 901 (2006), *on remand*, 464 F.3d 723 (7th Cir. 2006) (remanding to district court to apply *Rapanos*), *cert. denied*, 552 U.S. 810 (2007); *Headwaters, Inc. v. Talent Irrigation Dist.,* 243 F.3d 526, 533 (9th Cir. 2001) (holding that irrigation canals were "tributaries" protected as "waters of the United States"); *United States v. Eidson,* 108 F.3d 1336, 1342 (11th Cir. 1997) ("There is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes."), *cert. denied*, 522 U.S. 899 (1997). *But see U.S. v. Robison,* 505 F.3d 1208, 1216 (11th Cir. 2007) (noting that plurality opinion in *Rapanos* called *Eidson* into question).

27. *United States v. TGR Corp.,* 171 F.3d 762, 765 (2d Cir. 1999).
28. Transcript of Oral Argument, *Rapanos v. United States,* 547 U.S. 715 (2006), at 39 (Feb. 21, 2006), *available at* http://www.oyez.org/cases/2000-2009/2005/2005_04_1034.
29. *Id.*
30. 68 Fed. Reg. 1991, 1997-98 (Jan. 15, 2003).
31. 547 U.S. at 739 ("The phrase ['the waters of the United States'] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."); *but see id.* at 732 n.5 ("We . . . do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months").
32. U.S. EPA & 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*, at 1 (June 5, 2007) (providing for "significant nexus" analysis for "[n]onnavigable tributaries that are not relatively permanent").
33. *See NRDC v. Callaway,* 392 F. Supp. 685 (D.D.C. 1975) ("Defendants . . . are without authority to amend or change the statutory definition of navigable waters and they are hereby declared to have acted unlawfully and in derogation of their responsibilities under Section 404 of the Water Act by the adoption of the definition of navigability."); *see also* Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands,* 34 Envtl. L. Rep. 10187, 10212 (Feb. 2004) ("[T]he Corps' final rule of April 3, 1974, decidedly was *not* an earnest, legitimate attempt by the Corps to discern and implement the 'true intent' of Congress regarding the geographic jurisdiction of the FWPCA of 1972.").
34. 38 Fed. Reg. 13527, 13529 (May 22, 1973) (promulgating 40 C.F.R. §125.1(o)).
35. *West Virginia Coal Ass'n v. Reilly,* 728 F. Supp. 1276, 1288-89 (S.D. W. Va. 1989) (quoting 40 C.F.R. §122.2(t) (1979)); 40 C.F.R. §122.2 (2007).
36. 40 Fed. Reg. 31320, 31324-25 (July 25, 1975) (promulgating 33 C.F.R. §209.120(d)(2), including subsection (i), which classified, as protected waters, "[t]hose other waters which the District Engineer determines necessitate regulation for the protection of water quality," including, inter alia, "intermittent rivers, streams, tributaries"); *id.* at 31,326 (delaying implementation of portions of regulation).
37. 42 Fed. Reg. 37,122, 37,144 (July 19, 1977) (promulgating 33 C.F.R. §323.2); 33 C.F.R. §328.3(a) (2007).
38. U.S. EPA, Office of General Counsel, *In re: City of Phoenix, Arizona,* 1976 WL 25247, at *2 (Dec. 17, 1976).
39. *Id.* at **3-4.
40. *Id.* at *5, app. A. This 1973 memorandum contains an obvious error—it says that "[t]here is no basis for assertion of Federal jurisdiction over" waterbodies "contained entirely on the property of one person," *id.*—but its reasoning on intermittent streams is not affected by this erroneous conclusion.
41. Legislative History of the Clean Water Act of 1977, at 903 (Oct. 1978) (emphasis added).
42. *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975).
43. *Id.*
44. *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979): "While there is nothing in this record to show the effect on interstate commerce of this unnamed tributary, without question it is within the intended coverage of the FWPCA. It was flowing a small amount of water at the time of the spill. Whether or not the flow continued into the Red River at that time, it obviously would during significant rainfall. The intent of the act was to cover all tributaries to waters like the Red River. It makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense. (Citation omitted.)"
45. *United States v. Zanger,* 767 F. Supp. 1030, 1033-34 (N.D. Cal. 1991): "Pacheco Creek is undoubtedly one of the "waters of the United States." Pacheco Creek and the Pajaro River fall within the scope of 33 C.F.R. §328.3(a)(3) in that their "use, degradation or destruction" could affect interstate commerce in that they (i) are used or could be used by interstate or foreign travelers for "recreational" purposes, e.g., fishing, bathing, drinking, and (ii) fish "are or could be taken and sold in interstate or foreign commerce" from either of them. Steelhead trout can be taken from the creek, and commercial fishing has occurred on the creek. Although Pacheco Creek is a "water of the United States" in its own right, it is also a tributary of other "waters of the United States," and thus covered under the regulations. Pacheco Creek is a tributary of the Pajaro River, and both the creek and the river are tributary to Monterey Bay and the Pacific Ocean. (Citations omitted.)"
46. *Quivira Mining Co. v. U.S. EPA,* 765 F.2d 126, 129-30 (10th Cir. 1985); *cf.* Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333 (D.N.M. 1995) (holding, consistent with *Quivira*, that intermittent streams can be protected either if they have requisite commerce connections or if they function as tributaries, but denying summary judgment where proof of either was lacking).
47. *United States v. Sheyenne Tooling & Mfg. Co., Inc.,* 952 F. Supp. 1414, 1417-18 (D.N.D. 1996) ("The record here shows that the Cooperstown POTW discharges from three stabilization ponds into an unnamed tributary of the Sheyenne River, a creek or stream which is intermittently dry. However, such a stream may constitute a water of the United States, even when normally dry, i.e. intermittently wet." (citations omitted)). *See also* Driscoll v. Adams, 181 F.3d 1285, 1291 (11th Cir. 1999) ("Thus, the Spiva Branch stream is a 'navigable water' under the CWA, even if it flows only intermittently.").
48. Brief for the United States, *Rapanos v. United States,* 547 U.S. 715 (2006), at 18 (Jan. 2006); *see also id.* ("Indeed, the coverage of such tributary waters would appear to be more obvious than the coverage of adjacent wetlands upheld in *Riverside Bayview*.").
49. *Id.* at 19.
50. 33 U.S.C. §407 (emphasis added).
51. *See* Desiderio Testimony, *supra* note 18, at 3 ("Review of the

legislative history reveals that, in 1972, Congress did not intend to sweep all intrastate features that did not support commercial traffic, such as isolated waters, drainage ditches, and erosional depressions, into the federal regulatory net."); *see also* 68 Fed. Reg. 1995, 1996 (Jan. 15, 2003) ("[I]n light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under [the applicable regulatory provisions] over isolated, nonnavigable, intrastate waters."); U.S. Government Accountability Office, Waters and Wetlands: Corps of Engineers Needs to Better Support Its Decisions for Not Asserting Jurisdiction, at 5 (Sept. 2005) ("Subsequent to the *SWANCC* ruling, the Corps is generally not asserting jurisdiction over isolated, intrastate, nonnavigable waters using its remaining authority in [the regulations]."); U.S. EPA, Potential Indirect Economic Impacts and Benefits Associated With Guidance Clarifying the Scope of Clean Water Act Jurisdiction 3 (2011), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa_guidance_impacts_benefits.pdf ("Since *SWANCC*, no isolated waters have been declared jurisdictional by a federal agency.").

52. 38 Fed. Reg. at 13529 (promulgating 40 C.F.R. §§125.1(o)(4)-(6)). A few months earlier, an EPA General Counsel opinion laid the groundwork for these rules. *See* U.S. EPA, Office of General Counsel, Meaning of the Term "Navigable Waters" (Feb. 6, 1973) (note that the opinion uses the term "interstate" in several places where "intrastate" is clearly meant—or else there would be no need for its separate treatment of all interstate waters).
53. 42 Fed. Reg. 37122, 37144 (July 19, 1977) (promulgating 33 C.F.R. §323.2(a)(5)).
54. *Id.* at 37144 n.2.
55. *Compare* 38 Fed. Reg. at 13529 (issuing 1973 rules covering waters which "*are utilized* by interstate travelers," "from which fish or shellfish *are taken* and sold in interstate commerce," and "*are utilized* for industrial purposes by industries in interstate commerce" (emphasis added)), *with* West Virginia Coal Ass'n v. Reilly, 728 F. Supp. 1276, 1288-89 (S.D. W. Va. 1989) (quoting 1979 rules covering various waters, "the use, degradation or destruction of which *would affect or could affect* interstate or foreign commerce" (emphasis added)).
56. *United States v. Wilson,* 133 F.3d 251, 257 (4th Cir. 1997) ("we believe that in promulgating 33 C.F.R. §328.3(a)(3) (1993), the Army Corps of Engineers exceeded its congressional authorization under the CWA, and that, for this reason, [the provision] is invalid"); U.S. EPA & the Corps, Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *United States v. James J. Wilson*, at 6 (May 29, 1998): stating that "neither the Corps nor the EPA will cite or rely upon the regulatory provision of 33 CFR 328.3(a)(3) as a basis for asserting CWA jurisdiction over any area for any purpose within the Fourth Circuit"; noting, however, that "both the Corps and EPA will continue to assert CWA jurisdiction over any and all isolated waterbodies, including isolated wetlands, within the Fourth Circuit, based on the CWA statute itself, where (1) either agency can establish an actual link between that water body and interstate or foreign commerce, and (2) individually and/or in the aggregate, the use, degradation or destruction of isolated waters with such a link would have a substantial effect on interstate or foreign commerce."
57. 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).
58. *Id.*; *see also Hoffman Homes, Inc. v. U.S. EPA,* 999 F.2d 256, 261 (7th Cir. 1991) ("We also agree with the [EPA Chief Judicial Officer] that it is reasonable to interpret the regulation as allowing migratory birds to be that connection between a wetland and interstate commerce."); Utah v. Marsh, 740 F.2d 799, 804 (10th Cir. 1984) (finding an intrastate lake to be jurisdictional under the act because: "[w]aters from Utah Lake are used to irrigate crops which are sold in interstate commerce, and the lake supports the State's most valuable warm water fishery which markets most of the catch out of state. The lake also provides recreationists with opportunities to fish, hunt, boat, water ski, picnic, and camp, as well as the opportunity to observe, photograph, and appreciate a variety of bird and animal life; . . . Finally, the lake is on the flyway of several species of migratory waterfowl which are protected under international treaties.)" (citations omitted); Brief of United States, *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), at 32-33 n.24 (Sept. 2000) (discussing "repeated references to the need for comprehensive protection of the country's wetlands and other waters as habitat for birds and other wildlife" in 1977 legislative history); U.S. EPA, Office of General Counsel, CWA Jurisdiction Over Isolated Waters, 1985 WL 195307, at *2 (Sept. 12, 1985) (finding application of CWA based on migratory bird usage proper one year prior to 1986 notice; stating, "If the evidence reasonably shows that the waters "are used or would be used" by migratory birds or endangered species, it is covered by EPA's regulation. Of course, as the preamble to the 1979 regulation points out, the clearest evidence would be evidence showing actual use in at least a portion of the stream. In addition, if a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established and those characteristics make it likely that the waterbody in question will also be used by migratory birds, it would also seem to fall clearly within the definition (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used)."
59. *See*, *e.g.*, *Marsh*, 740 F.2d at 803-04 (upholding application of CWA to intrastate lake used for irrigating crops sold in interstate commerce, fishing for catch sold out of state, and providing recreational opportunities for interstate travelers, and which was in flyway of migratory birds); United States v. Byrd, 609 F.2d 1204, 1210-11 (7th Cir. 1979) ("We conclude that Congress constitutionally may extend its regulatory control of navigable waters under the Commerce Clause to wetlands which adjoin or are contiguous to intrastate lakes that are used by interstate travelers for water-related recreational purposes."); Leslie Salt Co. v. Froehlke, 578 F.2d 742, 755-56 (9th Cir. 1978) (upholding application of CWA to nontidal salt ponds from which extracted salt is sold in interstate and foreign commerce).
60. 1977 Legislative History, *supra* note 47, at 917 (statement of Senator John Chafee (R-R.I.)) (urging rejection of legislative rollback of CWA jurisdiction and stating, "The inland marshes and the wetlands and those above the high water mark will suffer because, under the Bentsen amendment, the protection by the Federal Government of the coastal wetlands only goes up to mean high water mark. . . . We must care about what happens to inland wetlands. . . . [T]he wetlands serve to purify the water by filtering out and absorbing silt, nutrients, and pollutants that otherwise would enter domestic water supplies. They help to preserve the waters for irrigation, for streams, estuaries, and ground water.)."
61. *See, e.g.*, *Hoffman Homes*, 999 F.2d at 261-62 (upholding

reasonableness of applying CWA to habitat suitable for migratory birds, but concluding no evidence presented of wetland's suitability); Leslie Salt Co. v. United States, 896 F.2d 354, 360 (9th Cir. 1990) ("The commerce clause power, and thus the CWA, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species."), *cert. denied*, 498 U.S. 1126 (1991); *see also* Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995), *cert. denied*, 516 U.S. 955 (1995); *Rueth v. U.S. EPA*, 13 F.3d 227, 231 (7th Cir. 1993) ("As our decision in *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir.1993), makes clear, however, nearly all wetlands fall within the jurisdiction of the CWA since one test for whether the wetland affects interstate commerce is whether migratory birds use the wetland."); United States v. Sargent County Water Resource Dist., 876 F. Supp. 1081, 1087 (D.N.D. 1992) ("The court determines that CWA jurisdiction exists over the sloughs in this case as isolated wetlands, both because of their importance to migratory waterfowl and because of their potential use by interstate travelers for recreational purposes."). In similar fashion, even while embracing a rollback in the CWA's wetlands protections in 1995, the U.S. House of Representatives adopted an amendment to strike a bill provision that read: "For purposes of this section [404], no water of the United States or wetland shall be subject to this section based solely on the fact that migratory birds use or could use such water or wetland." 104th Cong., 1st Sess., Cong. Rec. H. 4987-88 (May 16, 1995). *But see* Tabb Lakes Ltd. v. United States, 715 F. Supp. 726 (E.D. Va. 1998) (refusing to apply interpretation embodied in Corps memorandum prior to the 1986 notice because it had not been issued via notice-and-comment rulemaking), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

62. *See* Testimony of Norman M. Semanko, Exec. Dir. & Gen. Counsel, Idaho Water Users Ass'n, Inc., Hearing of House Transportation & Infrastructure Committee: Status of the Nation's Waters, Including Wetlands, Under the Jurisdiction of the Federal Water Pollution Control Act, at 2 (July 19, 2007) ("Jurisdiction has been a moving target for many years. The Corps of Engineers and EPA historically took a narrower view of jurisdiction under the act. This has been expanded over the decades through citizen lawsuits and ever-broadening interpretations by the federal courts and, consequently, the federal agencies charged with its implementation."); *Rapanos*, 547 U.S. at 738 (plurality opinion) ("The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board.").
63. U.S. Army Corps of Engineers, Regulatory Guidance Letter 90-7: Clarification of the Phrase "Normal Circumstances" as It Pertains to Cropped Wetlands (Sept. 26, 1990).
64. 58 Fed. Reg. 45008, 45031 & 45036-37 (Aug. 25, 1993).
65. 51 Fed. Reg. 41206, 41216 (Nov. 13, 1986).
66. *West Virginia Coal Ass'n v. Reilly,* 728 F. Supp. 1276, 1289 (S.D. W. Va. 1989) (quoting 40 C.F.R. §122.3 (1980)).
67. *Id.* (quoting 45 Fed. Reg. 33298 (May 19, 1980)).
68. *Id.* (citing 45 Fed. Reg. 48620 (July 21, 1980)).
69. *Id.* at 1289-90 (deferring to EPA's interpretation that treatment ponds were regulated "impoundments" not excluded "waste treatment systems"). *See also* Memorandum from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarbrough, EPA Region IV Residuals Management Branch Chief, attach. B (Apr. 2, 1986) ("EPA applies a standard which treats newly created impoundments of waters of the U.S. as 'waters of the U.S.,' not as 'waste treatment systems designed to meet the requirements of the CWA,' whereas impoundments of 'waters of the U.S.' that have existed for many years and had been issued NPDES permits for discharges from such impoundments are 'wastewater treatment systems designed to meet the requirements of the CWA' and therefore are not 'waters of the U.S.'"), *available at* http://yosemite.epa.gov/osw/rcra.nsf/documents/4BD7508AD59EA15F852565DA006F0A63.
70. Memorandum from LaJuana S. Wilcher, EPA Assistant Administrator, to Charles E. Findley, Director, Water Div., Region X, U.S. Army Corps of Engineers, on Clean Water Act Regulation of Mine Tailings Disposal (Oct. 2, 1992).
71. State Program Requirements; Approval of Application to Administer the NPDES Program; Texas, 63 Fed. Reg. 51164, 51183-84 (Sept. 24, 1998).
72. U.S. EPA, Guiding Principles for Constructed Treatment Wetlands at 16 (Oct. 2000), *available at* http://www.epa.gov/owow/wetlands/pdf/constructed.pdf.
73. *See* Ohio Valley Envtl. Coalition v. Aracoma Coal Co., 556 F.3d 177, 211-16 (4th Cir. 2009) (upholding the agencies' interpretation).
74. Letter from Lisa P. Jackson, Administrator, EPA, to Rep. James L. Oberstar at 1 (Apr. 30, 2010).
75. *See United States v. Ashland Oil and Transp. Co.,* 504 F.2d 1317, 1326 (6th Cir. 1974).
76. *Milwaukee v. Illinois,* 451 U.S. 304, 317-19 (1981) (citation omitted).
77. *International Paper Co. v. Ouellette,* 479 U.S. 481, 492 (1987).