

# UNITED STATES SENATE REPORT



## From Preventing Pollution of Navigable and Interstate Waters to Regulating Farm Fields, Puddles and Dry Land:

A Senate Report on the Expansion of Jurisdiction Claimed by the Army  
Corps of Engineers and the U.S. Environmental Protection Agency under the  
Clean Water Act



United States Senate Committee on Environment and Public Works

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## **Executive Summary**

Case studies presented to the Senate Environment and Public Works Committee demonstrate that the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) new regulation defining "waters of the United States" (WOTUS), promulgated on June 29, 2015, will codify many of the most extreme overreaches of federal authority asserted by these agencies.

Although the new regulation is currently stayed, pending the outcome of litigation challenging the rule, these case studies demonstrate that assurances given by EPA and the Corps regarding the scope of the WOTUS rule and its exemptions to the positions taken by these agencies in jurisdictional determinations and in litigation are factually false.

The following conclusions can be drawn from these case studies:

- EPA and the Corps have and will continue to advance very broad claims of jurisdiction based on discretionary authority to define their own jurisdiction.
- The WOTUS rule would codify the agencies' broadest theories of jurisdiction, which Justice Kennedy recently called "ominous."
- Landowners will not be able to rely on current statutory exemptions or the new regulatory exemptions because the agencies have narrowed the exemptions in practice and simply regulate under another name. For example, if activity takes place on land that is wet:
  - plowing to shallow depths is not exempt when the Corps calls the soil between furrows "mini mountain ranges," "uplands," and "dry land;"
  - discing is regulated even though it is a type of plowing;
  - changing from one agricultural commodity constitutes a new use that eliminates the exemption; and
  - puddles, tire ruts, sheet flow, and standing water all can be renamed "disturbed wetlands" and regulated.
- If Congress does not act, the newly won ability to challenge Corps jurisdictional determinations and claim exemptions will be moot because the WOTUS rule establishes jurisdiction by rule that will extend to all the activities described in the case studies.

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## INTRODUCTION

This report examines claims made by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) regarding their jurisdiction over land and water under the Clean Water Act (CWA) under both the currently applicable regulations and the new WOTUS rule.

In 1972, with the enactment of amendments to the Federal Water Pollution Control Act (Clean Water Act or CWA), Congress gave the Administrator of the Environmental Protection Agency (EPA) and the Secretary of the Army (acting through the Chief of the Corps of Engineers) (Corps) the authority to regulate the discharge of pollutants (EPA) or the discharge of dredged or fill material (Corps and EPA) into navigable waters, which Congress defined as “waters of the United States.”<sup>1</sup> EPA and the Corps have promulgated several regulatory definitions of “waters of the United States.” Water bodies that are “waters of the United States” are subject to the multiple regulatory requirements under the CWA including permitting and reporting, enforcement, mitigation, and citizen suits.

Despite the fact that there has been no statutory change in the definition of “navigable waters” or “waters of the United States” since 1972, the history of the jurisdictional scope of the CWA has been a series of attempts to expand jurisdiction that were blocked by either Congressional or judicial action.<sup>2</sup> As discussed in Appendix A, below, challenges to expansions of authority have reached the Supreme Court three times. With the June 29, 2015, promulgation of a new regulation defining “waters of the United States” (WOTUS) this issue will likely reach the Supreme Court once again, unless EPA and the Corps withdraw the new rule, either voluntarily or at the direction of the courts or Congress.

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<sup>1</sup> CWA section 502(7); 33 U.S.C. 1362(7).

<sup>2</sup> A history of the evolution of the definition of waters of the United States and agency, Congressional, and judicial actions is found in Appendix A.

## I. WOTUS Rule: Reactions, Rebuttals, and Reality

On April 21, 2014 the EPA and Army Corps jointly published a proposed rule to change the regulatory definition of “waters of the United States” (WOTUS).<sup>3</sup> According to the agencies, the goal of the WOTUS rule is two-fold: (1) to make it easier for EPA and the Corps to assert jurisdiction over water and wetlands after 2006 when the Supreme Court called into question whether the agencies could regulate tributaries and their adjacent wetlands without evidence of a connection to water that is navigable in fact,<sup>4</sup> and (2) to reassert jurisdiction over the isolated water and wetlands that have not been regulated since 2001, when the Supreme Court struck down the “Migratory Bird Rule” under which EPA and the Corps claimed the ability to regulate based on use of water by migratory birds and endangered species.<sup>5,6</sup>

Since 2006, the agencies have continued to claim jurisdiction over vast areas of land and water by claiming on a case-by-case basis that these areas have a “significant nexus” to navigable water. Rather than simply “clarify” the scope of CWA jurisdiction, the new WOTUS rule would codify the overreaching federal control that the agencies claim today by codifying their assumption that most water and wetlands have a significant nexus to navigable water.

The proposed rule raised significant concerns among states, local governments, the Small Business Administration Office of Advocacy, farmers, homebuilders and landowners generally.<sup>7</sup>

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<sup>3</sup> 79 Fed. Reg. 22,188 (Apr. 21, 2014).

<sup>4</sup> *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*).

<sup>5</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001).

<sup>6</sup> On May 20, 2009, CEQ Chairman Nancy Sutley, EPA Administrator Jackson, Acting Assistant Secretary of the Army Rock Salt, Agriculture Secretary Tom Vilsack, and Interior Secretary Ken Salazar sent a letter to Senator Boxer urging Congress to amend the CWA to extend jurisdiction to the broadest extent of Commerce Clause authority, because in *SWANCC* and *Rapanos* the Supreme Court held that the scope of waters protected by the Clean Water Act was narrower than the scope claimed by the agencies, and put a “time consuming and expensive” burden on federal agencies trying to control private property. When that legislative effort failed, the agencies pivoted and pursued the same goals through administrative action. The letter is available at [http://www.epw.senate.gov/public/\\_cache/files/2ff603de-0013-4ae2-a7b6-5178603e0826/jackson-et-al-letter-to-boxer.pdf](http://www.epw.senate.gov/public/_cache/files/2ff603de-0013-4ae2-a7b6-5178603e0826/jackson-et-al-letter-to-boxer.pdf)

<sup>7</sup> Thirty-two states filed comments opposing the rule, as did the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, the National Association of Regional Councils, the National Association of County Engineers, the American Public Works Association, the National Association of Flood and Storm Water Management Agencies, the National Association of State Departments of Agriculture, and even the Chief Counsel for the Small Business Administration Office of Advocacy. The American Farm Bureau Federation, the National Association of Homebuilders and many state affiliates of both organizations also opposed the rule. See comments

As regulated entities began to criticize the rule, EPA unleashed an unprecedented grass roots media campaign parts of which the Government Accountability Office found to constitute illegal propaganda and lobbying.<sup>8</sup>

For example, after the American Farm Bureau Federation communicated its concerns about the rule to the public and its members,<sup>9</sup> in July 2014, EPA posted a response called “Ditch the Myth.”<sup>10</sup> This response and numerous “FAQs,” blogs and other advocacy pieces claim that puddles, water-filled areas on crop fields, and erosional features never have been regulated and will not be regulated under the new WOTUS rule. However, as demonstrated in the case studies discussed below, EPA, the Corps, and the Department of Justice already claim the authority to regulate these features, simply by calling them something else. By asserting broad jurisdiction, and failing to clearly define critical terms used in exemptions, such as “puddle” or “dry land” or “erosion features,” the final rule would give the federal government the discretion to claim jurisdiction over an exempt feature by simply referring to a “puddle” as “water” or “wetlands” or referring to an “erosion feature” as a “tributary.” As discussed below, the Corps and EPA are already employing this tactic.

In its media blitz and in testimony before Congress, EPA simultaneously denied the validity of substantive concerns with the WOTUS rule and made promises to make changes in the final rule to address those concerns.<sup>11</sup> For example, EPA claims that existing exemptions, including

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filed in EPA Docket No. EPA-HQ-OW-2011-0880, available at [www.regulations.gov](http://www.regulations.gov) According to Secretary Darcy, of the approximately 20,567 unique comments on the rule, 60% of the comments opposed the rule and 39% supported the rule and 1% was neutral. Letter dated May 14, 2015, from Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) to Senator Mike Rounds, available at [http://www.epw.senate.gov/public/\\_cache/files/72e386d7-9727-48fe-b88e-26fd79900e4f/rounds---darcy-response-regarding-the-joint-agency-rulemaking.pdf](http://www.epw.senate.gov/public/_cache/files/72e386d7-9727-48fe-b88e-26fd79900e4f/rounds---darcy-response-regarding-the-joint-agency-rulemaking.pdf).

<sup>8</sup> U.S. Government Accountability Office, Environmental Protection Agency—Application of Publicity or Propaganda and Anti-Lobbying Provisions, Dec. 14, 2015, available at: <http://www.gao.gov/assets/680/674163.pdf>

<sup>9</sup> See American Farm Bureau Federation’s “Ditch the Rule” <http://ditchtherule.fb.org/>

<sup>10</sup> See EPA’s “Ditch the Myth”: [https://www.epa.gov/sites/production/files/2014-07/documents/ditch\\_the\\_myth\\_wotus.pdf](https://www.epa.gov/sites/production/files/2014-07/documents/ditch_the_myth_wotus.pdf) See also various EPA twitter messages including <https://twitter.com/EPA/status/492306785538412544/photo/1> (“Know the Facts: Proposed Rule to Protect Clean Water, Puddles are not regulated”).

<sup>11</sup> See Hearing before the Senate Committee on Environment and Public Works and the House Committee on Transportation and Infrastructure, entitled, “Impacts of the Proposed Waters of the United States Rule on State and Local Governments,” Feb. 4, 2015, hearing available at: <http://www.epw.senate.gov/public/index.cfm/hearings?ID=20A76AF6-BD8C-CA44-B93E-C585D88A1E90>

exemptions for farming, remain unaffected.<sup>12</sup> However, as discussed below, EPA, the Corps, and the Department of Justice take a very narrow view of these exemptions. In addition, by making it easier to assert federal jurisdiction, the WOTUS rule allows EPA and the Corps to control more farm, ranch, and silviculture lands. In fact, the final WOTUS rule codifies both expansive federal jurisdiction and agency discretion to define the outer reaches of that jurisdiction, despite assurances to the contrary by the political leadership of EPA and the Corps.

The differences between EPA's assurances and the practices that are codified in the final WOTUS rule are stark. For example, on February 4, 2015, Administrator McCarthy told Congress that use of water by a bird or animal is "not sufficient as a sole reason for jurisdiction."<sup>13</sup> Despite the EPA Administrator's testimony, the WOTUS rule allows EPA and the Corps to use a *single function*, such as use of water as habitat for a bird or animal, to establish a "significant nexus" that allegedly creates jurisdiction.<sup>14</sup> That is essentially a return to the "Migratory Bird Rule" the Supreme Court disallowed in 2001.<sup>15</sup>

In response to questions for the record from the February 2015 hearing, Secretary Darcy told Congress: "The Corps has never interpreted groundwater to be a jurisdictional water *or a hydrologic connection* because the Clean Water Act (CWA) does not provide such authority."<sup>16</sup> As noted in case studies below, the Corps has already begun to claim that movement of water through a groundwater aquifer is a hydrologic connection that expands the Corps' jurisdiction.<sup>17</sup> Directly contradicting Secretary Darcy's statement to Congress that the Clean Water Act provides no such authority, the WOTUS rule would codify this practice.<sup>18</sup>

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<sup>12</sup> See *supra* note 11, written testimony of Administrator McCarthy ("I want to emphasize that farmers, ranchers, and foresters who are conducting the activities covered by the exemptions (activities such as plowing, tilling, planting, harvesting, building and maintaining roads, ponds and ditches, and many other activities in waters on their lands), can continue these practices after the new rule without the need for approval from the Federal government.").

<sup>13</sup> See *supra* note 11.

<sup>14</sup> 33 C.F.R. 328.3(c)(5)(ix).

<sup>15</sup> *SWANCC*, 531 U.S. 159 (2001).

<sup>16</sup> See June 2, 2015, response to Follow-Up Questions for Written Submission to Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) (emphasis added), available at [http://www.epw.senate.gov/public/\\_cache/files/bd664535-f1a2-4a60-a0ab-7c6112e91f50/darcy-senate-qfr-responses-on-wotus-hearing-02.04.2015.pdf](http://www.epw.senate.gov/public/_cache/files/bd664535-f1a2-4a60-a0ab-7c6112e91f50/darcy-senate-qfr-responses-on-wotus-hearing-02.04.2015.pdf).

<sup>17</sup> See *infra* notes 112 to 117 and accompanying text.

<sup>18</sup> 33 C.F.R. 328.3(c)(5)(vi). The Technical Support Document (TSD) accompanying the final rule makes it clear that the contribution of flow function listed in the rule includes contribution of flow through groundwater, including

On March 16, 2015, Administrator McCarthy told the National Farmers' Union that roadside ditches and irrigation ditches were of no interest to the agency.<sup>19</sup> However, the final rule continues to categorically include ditches and manmade canals in the definition of "tributary," even if for road drainage or for irrigation.<sup>20</sup> Even though the final rule includes an exclusion for certain ditches, EPA and the Corps can evade this exclusion simply by renaming a ditch as a regulated tributary or wetland.<sup>21</sup>

On April 6, 2015, Administrator McCarthy posted a blog on EPA's website that said: "We will respond to requests for a better description of what connections are important under the Clean Water Act and how agencies make that determination."<sup>22</sup> Similarly, in a May 26, 2015 letter EPA Administrator Gina McCarthy told Senator Bennet that "the rule would limit Clean Water Act jurisdiction only to those types of waters that have a significant effect on downstream traditional navigable waters – not just any hydrologic connection."<sup>23</sup> However, the final rule provides no guidance on what makes a connection significant enough to establish jurisdiction even though the Science Advisory Board panel that reviewed EPA's "Connectivity Report" recognized that not all connections are meaningful from a scientific perspective and in *Rapanos* Justice Kennedy recognized that not all connections are meaningful from legal perspective.<sup>24</sup>

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through an aquifer as well as a shallow subsurface connection. The TSD calls groundwater a "hydrologic flowpath." See TSD at 129, 132, 148. For example, the TSD discussion of vernal pools states that while they "typically lack permanent inflows from or outflows to streams and other water bodies," they can be "connected temporarily to such waters via surface or shallow subsurface flow (flow through) or groundwater exchange (recharge)." TSD, at 344 (emphasis added).

<sup>19</sup> Transcript of speech is available at:

<https://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/1a067fd006d60d4585257e0a005ed14e!OpenDocument> ("We're not interested in the vast majority of ditches—roadside ditches, irrigation ditches—those were never covered.")

<sup>20</sup> 33 C.F.R. 328.3(c)(3).

<sup>21</sup> As discussed below, the Corps is already employing this tactic to evade the ordinary farming exclusions by claiming that plowing is not plowing under the ordinary farming exclusions when a plow creates furrows. See *infra* notes 42 to 49 and accompanying text.

<sup>22</sup> EPA Connect: The Official Blog of the EPA Leadership: <https://blog.epa.gov/blog/2015/04/your-input-is-shaping-the-clean-water-rule/>

<sup>23</sup> Letter dated May 26, 2015 from Administrator Gina McCarthy to Senator Bennet, available at <http://www.epw.senate.gov/public/cache/files/cc7270a2-a11d-4962-a90d-6b4dbe0c62d9/michael-bennet-wotus.pdf>.

<sup>24</sup> 33 C.F.R. 328.3(c)(5) (water has a significant nexus to navigable water when it significantly affects navigable water). See "SAB Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*," dated October 17, 2014, at 9 ("Many of the public commenters remarked that the binary perspective in the Report implies that any connectivity must significantly affect the



The Administrator’s April 6 blog also promised that the final rule would distinguish between tributaries that are regulated and erosion features that are not.<sup>25</sup> Instead, the final rule provides no meaningful definitions to provide that distinction. In fact, the final rule increases the confusion between the two terms by claiming that the agencies can use aerial photographs and remote sensing technology to identify tributaries and wetlands, without even conducting a site visit to confirm the presence of regulated features. As noted in case studies cited below, the Corps is already using this technology and has tried to claim jurisdiction over lichen-covered rocks based on aerial photographs.<sup>26</sup> Use of this technology to assert jurisdiction also will create significant risk for older cities and towns that built their sewer systems in 19<sup>th</sup> century streams.<sup>27</sup>

The Administrator’s blog downplayed the reach of the final rule, claiming that: “The rule will protect wetlands that are situated next to protected waterways like rivers and lakes.”<sup>28</sup> In reality, the final rule is far broader, allowing agencies to claim jurisdiction over wetlands and water that are distant from any navigable river or lake.<sup>29</sup> In addition, as noted in case studies discussed below, the Corps is already claiming jurisdiction over land that fails to meet the definition of a wetland.<sup>30</sup>

The Administrator also downplayed the rule’s impact on ditches, claiming that: “We’re limiting protection to ditches that function like tributaries and can carry pollution downstream—like

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biological, physical, or chemical integrity of downstream waters. This is not always the case.”); *Rapanos*, 547 U.S. at 781-82 (Justice Kennedy, concurring) (“Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act’s scope in *SWANCC*.”).

<sup>25</sup> See *supra* note 22.

<sup>26</sup> See *infra* notes 75-80 and accompanying text.

<sup>27</sup> For a discussion of this issue see Senator James M. Inhofe, “Your Sewers and Streets Could be Wates of the United States,” *Municipal Water Leader*, vol. 1, issue 3, Oct. 2015, at 24, available at <http://www.waterstrategies.com/2015mwl-archive.html>

<sup>28</sup> See *supra* note 22.

<sup>29</sup> In the *U.S. Corps of Engineers v. Hawkes Co.* case, discussed *infra* at notes 121-127 and accompanying text, navigable water was 120 miles away from the wetland the Corps claims is subject to federal jurisdiction. Under the WOTUS rule to be subject to the Corps’ discretionary exercise of jurisdiction, water (including wetlands) need only be within 4,000 feet of regulated water, which includes ephemeral drainages that carry water only after rainfall. 33 C.F.R. 328.3(a)(8). This provides no limitation on federal authority in much of the United States. For example, mapping of ephemeral streams in Pennsylvania shows that 99 percent of the state is within 4,000 feet of water that would be regulated under the final rule. Maps available at: [http://www.fb.org/newsroom/news\\_article/344/](http://www.fb.org/newsroom/news_article/344/) (also includes maps for Missouri (99.7% of state), Montana (99% of state), New York (98% of state), Oklahoma (95% of state), Virginia (100%), and Wisconsin (92%)).

<sup>30</sup> See *infra* notes 81-117 and accompanying text.

those constructed out of streams.”<sup>31</sup> However, the Corps currently asserts jurisdiction over many ditches, regardless of whether they can carry pollutants downstream and the final rule would codify that practice. For example, instead of providing clarity, the final rule simply replaces the ambiguous term “uplands” in the proposed rule exclusions with the equally ambiguous and undefined term “dry land,” in the final rule exclusions. Given that the Corps takes the position that the tops of plowed furrows are “uplands,”<sup>32</sup> the Corps’ ability to expand the meaning of the term “upland” creates significant uncertainty, particularly for water management features that were built long ago.<sup>33</sup> Further, the ditch exclusions and the definition of tributary are circular, so the exclusions in the final rule for some ditches provide no protection from the discretionary jurisdictional authority of EPA and the Corps.<sup>34</sup>

Finally, the Administrator claimed that: “We will protect clean water without getting in the way of farming and ranching. Normal agriculture practices like plowing, planting, and harvesting a field have always been exempt from Clean Water Act regulation; this rule won’t change that at all.”<sup>35</sup> As discussed in the case studies below, EPA, the Corps, and the Department of Justice currently take the position that plowing, disking, and changing crops all are regulated.<sup>36</sup> Undoubtedly attempts to regulate these agricultural practices will increase under the WOTUS rule as more land falls under federal control.

EPA also made further assurance to farmers. At the behest of Senator Angus King, Administrator McCarthy met with Maine farmers in November 2015 and, according to the Portland Press Herald, told them that agricultural operations are exempt and farmers could bring former farmland back into production under the agricultural exemptions.<sup>37</sup> As discussed in the case studies below, in litigation against farmers the United States takes the opposite position.

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<sup>31</sup> See *supra* note 22.

<sup>32</sup> See *infra* notes 42-49 and accompanying text.

<sup>33</sup> For a discussion of this issue as it applies to city sewers, see the article cited *supra* note 27.

<sup>34</sup> Compare 33 C.F.R. 328(b)(3)(excluding certain ditches if they are not tributaries) with 33 C.F.R. 328(c)(3) (defining tributary to include ditches if not excluded).

<sup>35</sup> See *supra* note 22.

<sup>36</sup> See *infra* notes 42-74 and accompanying text.

<sup>37</sup> See Portland Press Herald, “Head of EPA meets with Maine Farmers amid controversy over water quality rules, November 30, 2015, available at <http://www.pressherald.com/2015/11/30/head-of-epa-meets-with-maine-farmers-amid-rules-controversy/>

On June 29, 2015, EPA and the Corps published the final WOTUS Rule, with an effective date of August 28, 2015.<sup>38</sup>

On August 27, 2015, the U.S. District Court of the District of North Dakota, issued a preliminary injunction, applicable in the states that had filed suit in that court, finding the scope of jurisdiction under the WOTUS rule to be “exceptionally expansive” and holding that the plaintiffs have a “substantial likelihood of success” in their claim that the rule is unlawful.<sup>39</sup>

On October 9, 2015, the Sixth Circuit Court of Appeals issued a nationwide stay of the WOTUS rule, finding EPA and the Corps failed to provide notice of distance-based definitions in the final rule and failed to identify specific scientific support substantiating the reasonableness of the definitions they chose and holding that the petitioners therefore had a substantial possibility of success in their bid to overturn the rule.<sup>40</sup>

Even though two courts thus far have determined that the WOTUS rule is likely unlawful, EPA and the Corps have and are continuing to assert federal control over land and water based on theories that they are seeking to codify in the WOTUS rule. The breadth of these jurisdictional claims raise significant questions about how the agencies are currently implementing the CWA, as well as how they would implement it should the WOTUS rule go into effect.

The following case studies were presented to the Environment and Public Works (EPW) Committee in a hearing on May 24, 2016, and in response to questions for the record of that hearing.<sup>41</sup>

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<sup>38</sup> 80 Fed. Reg. 37,054 (June 29, 2015).

<sup>39</sup> Memorandum Opinion and Order Granting Plaintiffs’ Motion for Preliminary Injunction, *States of North Dakota, et al. (13 states) v. U.S. Environmental Protection Agency, et al*, Civ. No. 3:15-CV-59 (Aug. 27, 2015).

<sup>40</sup> Order of Stay, *In re: Environmental Protection Agency and Department of Defense Final Rule; Clean Water Rule Definition of Waters of the United States*, 80 Fed. Reg. 37,054 (June 29, 2015), Case No. 15-3799 and consolidated cases (18 petitioner states then; currently 32) (Oct. 9, 2015).

<sup>41</sup> See Hearing before the Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife entitled, “Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States.” May 24, 2016, hearing transcript, testimony, and submissions for the record available at: <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66>

## II. Case Studies

### A. Regulation of Farmland

#### 1. Claim: Plowing is not exempt because plowed furrows are “small mountain ranges.”<sup>42</sup>

In order to ensure that agricultural and horticultural practices are not unduly impacted by the CWA, Congress amended the Act in 1977 to prevent agencies from requiring permits for “normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.”<sup>43</sup> The exemption does not apply to activities involving “a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.”<sup>44</sup>

Implementing this statutory exemption, Corps regulations provide that: “Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops.” The Corps regulations also provide that: “The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land.”<sup>45</sup>

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<sup>42</sup> See generally testimony of Damian Schiff, Pacific Legal Foundation, at 4, available at [http://www.epw.senate.gov/public/\\_cache/files/f4c0904d-1d38-468e-bde4-a52a7aa25e26/schiff-testimony.pdf](http://www.epw.senate.gov/public/_cache/files/f4c0904d-1d38-468e-bde4-a52a7aa25e26/schiff-testimony.pdf)

<sup>43</sup> CWA section 404(f)(1)(A); 33 U.S.C. § 1344(f)(1)(A). See also Appendix A.

<sup>44</sup> CWA section 404(f)(2); 33 U.S.C. 1344(f)(2). According to the Conference Report for the 1977 amendments to the Federal Water Pollution Control Act, enacting section 404(f), this “recapture clause” was intended to address activities that turn “*extensive areas of water into dry land* or impede circulation or reduce the reach or size of the *water body*.” See Committee Print, A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act (95<sup>th</sup> Cong. 2d Sess.) (hereinafter 1977 Act Leg. Hist.) v. 3, at 474 (emphasis added). According to Senator Stafford, “The bill includes the clarification that permits are not required for certain normal farming activities such as plowing and seeding *which are not discharges of dredged or fill material*. It should be noted, however, that permit will continue to be required for those farm, forestry, and mining activities that involve the discharge of dredged or fill material that [convert] water to dry land including, for example, those occasional farm or forestry activities that involve dikes, levees, other fills in wetlands or other waters.” *Id.* at 485.

<sup>45</sup> 33 C.F.R. 323.4(a)(1)(iii)(D).

Despite both a statutory and regulatory exemption, the Corps now claims that ordinary plowing that “disturbed the native wetland plant seed bed and turned it over” created furrows that are “mini uplands,” “dry land,” and “small mountain ranges.” According to the Corps, furrows tops are uplands and therefore plowing is not exempt because it converts wetlands to uplands:



“The furrow tops now serve as *small mountain ranges* (microtopographic high spots) that cross the swales and depressions in various directions.” Expert Report at 139. Further: “These furrow tops now provide conditions that are not conducive to growth and

development of wetland plant species. They are ‘*mini uplands*.’” Id.5 Thus, for the additional reason that Duarte’s activities changed one or more wetland areas to *dry land*, they did not constitute “plowing” as defined in 33 C.F.R. § 323.4(a)(1)(iii)(D).<sup>46,47</sup>

Even if a farmer could somehow plow without moving dirt or creating furrows, the Corps further claims that if land used for row crops is subsequently used for grazing, and plowing is necessary to reinstate row crops, that activity is a “new” use that falls outside the exemption. As a result of these interpretations, most if not all plowing would be considered a discharge of a pollutant that requires a permit.<sup>48</sup>

These assertions would come as a surprise to the members of Congress who voted for the 1977 amendments to the Federal Water Pollution Control Act that included the ordinary farming

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<sup>46</sup> United States’ Memorandum in Opposition to Duarte’s Motion for Summary Judgment on the Counterclaim, *Duarte Nursery, Inc., v. U.S. Army Corps of Engineers*, U.S. Dist. Court, Eastern District of California, No. 2:13-cv-02095 (Nov. 6, 2015), at 14 (emphasis added). The United States did not claim that Duarte engaged in “deep-ripping;” it is not disputed that his plow was set to plow no deeper than 12 inches. Due to the variation of the land plowed furrows ranged in depth between 6 and 14 inches so the United States had to come up with the new theory articulated in this memorandum to assert jurisdiction.

<sup>47</sup> Photograph from U.S. Department of Justice, Expert Team Rebuttal Report, *Duarte Nursery, Inc. et al. US Army Corps of Engineers/United States v. Duarte Nursery, Inc. et al.*, No. 2:13-cv-02095, Document 244-4, filed Aug. 15, 2016.

<sup>48</sup> See Order, *Duarte Nursery v. U.S. Army Corps of Engineers*, E.D. CA, No. 2:13-cv-02095 (June 10, 2016) at 34-35 (agreeing with the position of the United States).

exemptions. During consideration of the 1977 amendments in the Senate, Senator Muskie emphasized that plowing is a normal farming activity that is exempt from permitting.<sup>49</sup>

## 2. Claim: Plowing is regulated when it is disking.<sup>50</sup>

In May 2014, a landowner in California received an investigation letter from the Corps informing him that disking performed by a tenant farmer on his land may have resulted in an unauthorized discharge into WOTUS and that regulators had opened a case against the landowner.<sup>51</sup> This letter came as a surprise to the landowner, who had been disking this particular site periodically over the past 15 years to sustain grazing conditions for his cattle, a practice he believed was “normal” until he received this notice. The Corps told the landowner’s consultant that “all disking for *any* purpose and at *any* depth within any ‘potential WOTUS’ is a discharge into WOTUS *and* in the absence of a permit represents an unauthorized discharge and violation of the Clean Water Act.”<sup>52</sup>

So, according to the Corps, plowing does not include disking, even though it is expressly included in the Corps’ definition of plowing.<sup>53</sup> Ultimately, in this case the Corps told the landowner that he could disk the property if such activity was carried out in compliance with Conservation Practice Standard number 514, issued by the Natural Resources Conservation Service (NRCS), making an NRCS standard an additional condition of applicability for a section 404(f) exemption.<sup>54</sup>

With unfettered discretion to identify the scope of their own jurisdiction, the Corps can ignore its own regulations and add new conditions on statutory exemptions. In this case, the landowner,

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<sup>49</sup> See statement of Senator Muskie, August 4, 1977, 1977 Act Leg. Hist., v. 4, at 928.

<sup>50</sup> See *generally*, testimony of Don Parrish, American Farm Bureau Federation, and Jody Gallaway, Gallaway Enterprises, available at [http://www.epw.senate.gov/public/\\_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf](http://www.epw.senate.gov/public/_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf) and case studies submitted following that hearing, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66>

<sup>51</sup> See Case Study #8, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66>.

<sup>52</sup> *Id.*

<sup>53</sup> 33 C.F.R. 323.4(a)(1)(iii)(D).

<sup>54</sup> This transformation of NRCS standards into regulatory requirements is one of the reasons the agriculture community objected so strongly to the now withdrawn “Interpretive Rule.” See U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A), Mar. 25, 2014.

who had been a farmer for many years prior to the Corps investigation, resolved to sell his property and discontinue farming, demonstrating the consequences of leaving regulatory definitions to the arbitrary interpretation of federal officials.

### **3. Claim: Construction of a stock pond is not exempt.<sup>55</sup>**

Like plowing, construction and maintenance of farm or stock ponds or irrigation ditches are supposed to be exempt from CWA permitting.<sup>56</sup> This activity also is subject to “recapture” if it involves “a use to which it was not previously subject, where the flow or circulation of navigable waters maybe impaired or the reach of such waters be reduced.”<sup>57</sup>

Despite the clear language exempting the construction of stock ponds, EPA brought an enforcement action against a Wyoming rancher who in 2012 impounded a stream that ran through his property to create a stock pond for his livestock. The pond includes a spillway so the same volume of water flowed out of the pond as flowed into it, precluding any impairment of the flow or reach of the stream.<sup>58</sup> The pond also created habitat. For this reason, EPA claimed that the pond was too aesthetic to be a stock pond, and fell outside the stock pond exemption.<sup>59</sup>

EPA’s position would come as a surprise to the Senators that voted for the section 404(f) exemptions. According to the statement of the House conferees for the Conference Report on the 1977 amendment, the 404(f) exemptions codified the Corps’ 1977 regulatory exemptions.<sup>60</sup> According to the Assistant Secretary of the Army, in testimony before Senate Public Works Committee, under the Corps’ regulations a farmer could construct a stock pond in a tributary to capture spring snow melt for stock watering, as long as the pond did not exceed 5 acres in size and the pending legislation (that was adopted) would exclude all stock ponds regardless of size.<sup>61</sup>

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<sup>55</sup> See generally testimony of Damian Schiff, Pacific Legal Foundation, at 4-6, available at

[http://www.epw.senate.gov/public/\\_cache/files/f4c0904d-1d38-468e-bde4-a52a7aa25e26/schiff-testimony.pdf](http://www.epw.senate.gov/public/_cache/files/f4c0904d-1d38-468e-bde4-a52a7aa25e26/schiff-testimony.pdf)

<sup>56</sup> CWA section 404(f)(1)(C); 33 U.S.C. § 1344(f)(1)(C).

<sup>57</sup> CWA section 404(f)(2); 33 U.S.C. 1344(f)(2).

<sup>58</sup> See Complaint, *Andy Johnson v. EPA*, D. WY, Civil Action No. 15-CV-147, filed Aug. 27, 2015.

<sup>59</sup> See Testimony of Damien Schiff, at 5, *supra* note 55.

<sup>60</sup> Statement submitted by the House majority and minority managers on December 15, 1977. 1977 Act Leg. Hist. v. 3, at 348.

<sup>61</sup> Section 404 of the Federal Water Pollution Control Act Amendments of 1972, Hearings before the Committee on Public Works of the United States Senate, 94<sup>th</sup> Cong., 2d Sess., July 27 and 28, 1976, at 60, available at



Mr. Johnson recently settled his case favorably; he will not pay any penalties and will keep his pond.<sup>62</sup> However, EPA did not disavow its narrow interpretation of section 404(f) exemption for stock ponds, leaving other farmers, who may not have the resources to fight EPA in court, at risk.

#### **4. Claim: Changing crops is a new use that brings farmland under regulation**<sup>63</sup>

Despite repeated assurances that farmers are protected from regulation under section 404(f) of the CWA, the Corps continues to define those exemptions narrowly.

For example, in 2015, the Corps told a landowner that changing the use of a field from growing alfalfa to orchards would constitute a land use change and that Corps regulators could pursue an enforcement action against the landowner if they thought plowing the field to plant trees involved a discharge to wetlands. The Corps regulator informed the landowner that despite an extensive farming history, orchards were never planted on the ranch so they are not the same kind of farming and might not be considered a normal farming activity.<sup>64</sup>

According to testimony presented to the EPW Committee, the 5-year western drought has forced some farmers to shift their operations from one agricultural commodity to another. However, according to the Corps, planting a different commodity crop is a change in use that eliminates the ordinary farming exemption.<sup>65</sup>

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[http://www.epw.senate.gov/public/\\_cache/files/7ce6eb89-dc88-47cf-b7ec-01823fb5b02e/sec404amend1972hrg.pdf](http://www.epw.senate.gov/public/_cache/files/7ce6eb89-dc88-47cf-b7ec-01823fb5b02e/sec404amend1972hrg.pdf)

<sup>62</sup> Consent Decree, *Andy Johnson v. EPA*, D. WY, Civil Action No. 15-CV-147, filed Mar. 22, 2016.

<sup>63</sup> See generally, testimony of Don Parrish, American Farm Bureau Federation, and Jody Gallaway, Gallaway Enterprises, available at [http://www.epw.senate.gov/public/\\_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf](http://www.epw.senate.gov/public/_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf) and case studies submitted following that hearing, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66>.

<sup>64</sup> See Case Study #7, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66>

<sup>65</sup> Gallaway attachment to Parrish testimony at 9-10, available at:

<http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66>



This is a concern in Eastern states as well. For example, Maine farmers recently sought assurances from EPA Administrator McCarthy that they could bring fallow land back into agricultural production.<sup>66</sup>

This evisceration of the ordinary farming exemption is the “official” Corps policy. The Sacramento District website includes the following statement:

“if a property has been used for cattle grazing, the exemption does not apply if future activities would involve planting crops for food; similarly, if the current use of a property is for growing corn, the exemption does not apply if future activities would involve conversion to an orchard or vineyards.”<sup>67</sup>

#### **5. Claim: Prior converted cropland is not exempt.**<sup>68</sup>

Land that has been drained for farming prior to December 23, 1985, no longer meets the Corps’ definition of a wetland and therefore is not a “water of the United States” under the CWA.<sup>69</sup>

Despite this regulation clarifying the regulatory status of prior converted cropland, during the early 2000s, the Corps began to change the scope of this exemption through guidance. These guidance documents limited the exemption for prior converted cropland, allowing the Corps to regulate dry land because it was no longer used for agricultural activities.<sup>70</sup>

In 2010, a federal district court in Florida ruled that the prior converted cropland guidance in effect amended the Corps’ rules and the Corps could not modify a regulation without going through notice and comment rulemaking.<sup>71</sup> Despite this holding, the Corps continues to enforce their new policy outside of Florida.

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<sup>66</sup> See *supra* note 37.

<sup>67</sup> <http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Section-404-Exemptions/>

<sup>68</sup> See generally testimony of Damian Schiff, Pacific Legal Foundation, at 7, available at [http://www.epw.senate.gov/public/\\_cache/files/f4c0904d-1d38-468e-bde4-a52a7aa25e26/schiff-testimony.pdf](http://www.epw.senate.gov/public/_cache/files/f4c0904d-1d38-468e-bde4-a52a7aa25e26/schiff-testimony.pdf)

<sup>69</sup> 33 C.F.R. §328.3(a)(8); 58 Fed. Reg. 45008-01, at 45031 (Aug. 25, 1993).

<sup>70</sup> Memorandum from Stephen Stockton, Director of Civil Works, U.S. Army Corps of Engineers, for South Atlantic Division Commander (Apr. 30, 2009).

<sup>71</sup> See *New Hope Power Co. v. U.S. Army Corps of Eng’rs*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010).

For example, in 2009, a company in Louisiana applied for a permit to utilize prior converted cropland as a solid waste landfill. The Corps relied on the guidance declared invalid by a Florida court to assert jurisdiction over the land. The Company responded by filing suit against the agency, but the Fifth Circuit dismissed the case holding that a landowner has no right to challenge a Corps jurisdictional determination.<sup>72</sup> The Supreme Court recently unanimously rejected that assertion in another case, so this litigation continues.<sup>73</sup>

The Corps' position on prior converted cropland undermines agricultural property values and further demonstrates that assurances about the applicability of agriculture exemptions from CWA regulation are hollow.

Indeed, with the expansion of federal jurisdiction under the WOTUS rule, more farmers will need to rely on the farming exemptions. However, as one court put it, the interpretation of those exemptions by EPA and the Corps constitute "a virtual administrative repeal."<sup>74</sup>

## **B. Regulation Based on Remote Sensing and Aerial Photographs**

### **1. Claim: Rocks are wetlands and a tributary includes the 100-year floodplain.**<sup>75</sup>

The preamble to the new WOTUS rule claims that EPA and the Corps can identify wetlands and tributaries based on remote sensing technology and aerial photographs.<sup>76</sup> Agency reliance on this technology in lieu of actual site visits is already a huge concern for farmers and other landowners.<sup>77</sup>

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<sup>72</sup> *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 397 (5th Cir. 2014).

<sup>73</sup> *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. \_\_\_\_ (2016), slip op May 31, 2016 available at [https://www.supremecourt.gov/opinions/15pdf/15-290\\_6k37.pdf](https://www.supremecourt.gov/opinions/15pdf/15-290_6k37.pdf).

<sup>74</sup> See Memorandum and Order, *United States v. County of Stearns*, Civ. 3-89-616 (D. Minn. March 15, 1990), at 18.

<sup>75</sup> See generally, testimony of Don Parrish, American Farm Bureau Federation, and Jody Gallaway, Gallaway Enterprises, available at <http://www.epw.senate.gov/public/cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf> and case studies submitted following that hearing, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66>.

<sup>76</sup> 80 Fed. Reg. at 37,076.

<sup>77</sup> See American Farm Bureau Federation, "Final Waters of the U.S. Rule: No, No, No! No Clarity, No Certainty, No Limits on Agency Power, available at <https://www.iffb.org/media/2356956/final-rule-no-no-no-condensed->

The fallacies created from reliance on Global Positioning Satellite (GPS) and Global Information System (GIS) images and aerial photography were demonstrated in a 2015 attempt by a farmer to obtain a jurisdictional determination in California, for the purpose of planning agricultural operations to avoid wetlands impacts.<sup>78</sup>

In this example, a consultant mapped all wetland features on the property that were substantiated using actual data. The Corps insisted that the consultant add additional features based on GIS images. As explained in the consultant's August 17, 2015, response to the Corps' demands, the areas that the Corps wanted mapped as jurisdictional features included the entire 100-year floodplain of tributaries as well as rock outcroppings with lichens and mosses and other "biotic crust" that looked like wetlands on an aerial photograph but lacked the three wetland parameters.

As a result of the Corps' inappropriate demands, the landowner gave up its planned farming operations.

## 2. Claim: Aerial photographs can see streams under a tree canopy.<sup>79</sup>



In 2014, a farmer in Indiana cleared trees from his property to expand his farming operation. The Corps claimed that this activity destroyed an ephemeral drainage that the Corps characterized as a regulated tributary of a "water of the United States." The Corps claimed jurisdiction based on a soil survey (although the Corps did not claim wetlands were present), Google Earth aerial photographs taken before the trees were cleared, and speculation that a drainage existed beneath the tree canopy.

The landowner submitted an affidavit from the person

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[version.pdf](#); see also Progressive Farmer, August 2015, WOTUS Woes, available at [http://dtnpf-digital.com/article/WOTUS\\_Woes/2226926/266915/article.html](http://dtnpf-digital.com/article/WOTUS_Woes/2226926/266915/article.html)

<sup>78</sup> See Case Study #9, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66>.

<sup>79</sup> See Testimony for the Record, Mr. Merlin Martin, Martin Farms (May 24, 2016), available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66>.

who performed the clearing, affirming that no stream existed on the parcel cleared in 2014 and any marks on the ground were log skidder tracks from logging that took place in the early 2000's.

In this example, the Corps put the burden on the landowner to show that an ephemeral drainage, 118 miles from traditional navigable water and 1.5 miles from relatively permanent non-navigable water did *not* exist on the property before the trees were removed. The WOTUS rule would codify this overreach by allowing the Corps to infer the former existence of a stream, with no evidence of a bed bank and ordinary high water mark, relying instead on aerial photographs.<sup>80</sup>

### C. Regulating Roads, Ditches, and Puddles

#### 1. Claim: Tire ruts are wetlands.<sup>81</sup>



In 2007, the Corps required a landowner to obtain a permit for tire ruts along a dirt road even though the ruts, which collected rainwater, lacked both hydric soils and wetlands vegetation, and therefore did not meet the definition of a wetland.<sup>82</sup> To justify regulating a tire rut, the Corps surmised that use of the road prevented the growth of vegetation. In 2014, when the landowner was seeking approval of phase II of its

project, the Corps again asserted jurisdiction over the road. Depressions made by cars collected standing water following a heavy rain. The Corps again called these wetlands.

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<sup>80</sup> 80 Fed. Reg. at 37,076.

<sup>81</sup> See generally, testimony of Don Parrish, American Farm Bureau Federation, and Jody Gallaway, Gallaway Enterprises, available at [http://www.epw.senate.gov/public/\\_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf](http://www.epw.senate.gov/public/_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf) and case studies submitted following that hearing, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66> .

<sup>82</sup> See Case Study #1, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66> .

The same situation arose in 2013, when a different landowner sought approval of a delineation on property that included a dirt road. Again, the Corps called a man-made depression in the dirt road a wetland, despite the lack of wetland characteristics.<sup>83</sup>

The same situation arose in 2015, during a delineation in an urban setting.<sup>84</sup> The Corps claimed jurisdiction over tire ruts despite the fact that the tire ruts did not meet exhibit wetland features, as required under the 1987 Wetlands Delineation Manual.

The WOTUS rule would codify this practice because, under the new rule, the Corps no longer needs to show that land with standing water exhibits wetland characteristics before regulating it.<sup>85</sup> Further, the exclusion for upland ditches also would not apply to these tire ruts because the Corps did not call them ditches.<sup>86</sup> The Corps can undermine exemptions by simply calling the exempt feature by another name. There are few definitions in the WOTUS rule that would constrain the agencies' discretion, undermining the ability to rely on exemptions.

## 2. Claim: Puddles in parking lots are wetlands.<sup>87</sup>



EPA and the Corps claim that concern over regulation of puddles is based on “myth.”<sup>88</sup> However, the agencies have not defined the term “puddle” and can therefore claim that a puddle is a regulated “wetland” (under current regulations) or “water” (under the new WOTUS rule).

<sup>83</sup> Case Study #3, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66> .

<sup>84</sup> See Case Study #6, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66> .

<sup>85</sup> 33 C.F.R. 328.3(a)(6) (expanding the definition of WOTUS to include adjacent water, broadly defined).

<sup>86</sup> 33 C.F.R. 328.3(b)(3) and (c) (excluding ditches, but failing to define the term so the Corps could regulate any ditch simply by calling it a disturbed wetland or adjacent water).

<sup>87</sup> See generally, testimony of Don Parrish, American Farm Bureau Federation, and Jody Gallaway, Gallaway Enterprises, <http://www.epw.senate.gov/public/cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf> and case studies submitted for the record of that hearing, available at: <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66> .

<sup>88</sup> See EPA, “Ditch the Myth,” supra note 10.



In 2007, a landowner performed a wetlands delineation for its property and sought Corps approval. The Corps officials insisted that a manmade puddle in a gravel parking lot be identified as a wetland, even though no vegetation was present and therefore it did not meet the definition of a wetland.<sup>89</sup> The Corps assumed that but for disturbance by cars in the parking lot, the puddle would grow vegetation. However, but for disturbance by cars in the parking lot, the puddle would not exist.

As noted above, the practice of regulating puddles would be codified under the WOTUS rule because that rule expands jurisdiction to include “adjacent water” so the Corps will no longer be constrained by the 1987 Wetlands Delineation Manual; any adjacent water could be regulated whether or not wetlands characteristics are present. Further, without a definition of puddle, the Corps can call standing water, like the puddle in the gravel parking lot in this case study, regulated “adjacent water.”<sup>90</sup>

### **3. Claim: Roads and roadside drainage are wetlands.<sup>91</sup>**

During a wetlands delineation at a 3,000 acre ranch in 2015, the Corps again claimed jurisdiction



over features that were neither open water nor wetlands.<sup>92</sup> In this delineation, the Corps claimed jurisdiction over dirt roads used to access gas wells and cattle feeding stations by claiming the roads were regulated wetlands, based on puddles and erosional features. The features that the Corps claimed they could regulate included small depressions in dirt and

<sup>89</sup> See Case Study #2, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66> .

<sup>90</sup> 33 C.F.R. 328.3(a)(6) and (c)(1) (expanding the definition of WOTUS to include adjacent water, broadly defined, and failing to define puddles).

<sup>91</sup> See generally, testimony of Don Parrish, American Farm Bureau Federation, and Jody Gallaway, Gallaway Enterprises, available at [http://www.epw.senate.gov/public/\\_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf](http://www.epw.senate.gov/public/_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf) and case studies submitted following that hearing, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66> .

<sup>92</sup> See Case Study #5, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66> .



gravel roads that lacked wetlands vegetation, roadside drainages formed from erosion, roadside swales that lacked an ordinary high water mark, and the entire road itself if wetlands were present on each side, even though no vegetation was present on the road. None of these so-called wetlands have a hydrological connection to navigable water.

The WOTUS rule would codify these practices by regulating water, not wetlands, and by claiming jurisdiction based on distance from a navigable water, or a so-called “significant nexus,” not a hydrological connection.<sup>93</sup>

#### 4. Claim: Rainwater collected in a test pit or sheet flow is a water of the United States.<sup>94</sup>

“Test pits,” are often dug on properties during a wetlands delineation to determine soil structure and identify wetland hydrology. These man-made pits may collect water after it rains. Sheet flow is the movement of water over the land when it rains.



Wetland Feature 04.

In 2013, the Corps demanded that a wetlands consultant identify rain collected in test pits as jurisdictional wetlands when carrying out a wetlands delineation even though the test pits did not meet the criteria for identifying wetlands under the Corps’ 1987 delineation manual.<sup>95</sup> The Corps official also claimed jurisdiction over areas subject to sheet flow after recent heavy rain events.<sup>96</sup>

<sup>93</sup> 33 C.F.R. 328.3(a)(6), (a)(8) and (c)(1) and (2) regulating adjacent waters and defining adjacent and neighboring based on distance; regulating all waters in the 100-year flood plain or within 4,000 feet of other water based on a significant nexus determination that need not include a hydrological connection.

<sup>94</sup> See generally, testimony of Don Parrish, American Farm Bureau Federation, and Jody Gallaway, Gallaway Enterprises, available at <http://www.epw.senate.gov/public/cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf> and case studies submitted following that hearing, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66> .

<sup>95</sup> See Case Study #4, available at <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66> .

<sup>96</sup> *Id.*

EPA claims that the WOTUS rule will not regulate “rainwater that falls on lawns, farm fields, or playgrounds.”<sup>97</sup> Despite this claim, this case study demonstrates that the Corps is already asserting jurisdiction over rainwater. The WOTUS rule would codify this practice by allowing the Corps to assert jurisdiction over “adjacent water,” or any water within 4,000 feet of any other water based on an alleged “significant nexus.” That means that water in a test pit or on the land would no longer need to exhibit wetland characteristics to be regulated.<sup>98</sup>

#### **D. Expanding the Definition of Wetlands**

According to EPA, “[b]ecause the definition of wetland does not change under the rule, the agencies do not anticipate the rule will alter the current scope of CWA jurisdiction over wetlands underlain by permafrost.”<sup>99</sup> It is true that the WOTUS rule does not change the definition of the term “wetland.” The agencies had no need to do so, because the Corps has already expanded the meaning of that term, without going through notice and comment rulemaking.

##### **1. Claim: Permafrost is an “adjacent wetland”<sup>100</sup>**

The Schok family, owner of Tin Cup LLC, a small pipe fabrication and insulation company in North Pole, Alaska, wanted to expand the storage space for their business on their property. Their expansion plans were halted when the Corps claimed jurisdiction over their land on the basis that permafrost – permanently frozen water below the surface of the land – is a wetland that directly abuts a relatively permanent water and therefore is regulated under the Clean Water Act as an “adjacent” wetland.<sup>101</sup>

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<sup>97</sup> EPA, Facts About the Waters of the U.S. Proposal, available at [https://www.epa.gov/sites/production/files/2014-09/documents/facts\\_about\\_wotus.pdf](https://www.epa.gov/sites/production/files/2014-09/documents/facts_about_wotus.pdf)

<sup>98</sup> 33 C.F.R. 328.3(a)(6) (expanding the definition of WOTUS to include adjacent water); 33 C.F.R. 328.3(a)(8)(authorizing jurisdiction over all water in a 100-year floodplain and all water 4,000 feet from other water, based on finding a significant nexus).

<sup>99</sup> 80 Fed. Reg. at 37,088.

<sup>100</sup> See generally testimony of Damian Schiff, Pacific Legal Foundation, at 2-3, available at <http://www.epw.senate.gov/public/cache/files/f4c0904d-1d38-468e-bde4-a52a7aa25e26/schiff-testimony.pdf>

<sup>101</sup> Administrative Appeal Decision, Clean Water Act, *Tin Cup, LLC*, File No. POA-2003-1422, Alaska District, Corps of Engineers, March 2, 2015.



Under Corps' regulations "wetlands" are "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."<sup>102</sup> In 1987, the Corps published guidance for Corps officials and the public to follow when determining what hydrology, vegetation, and soil (the three characteristics identified in the regulation) are needed before land can be considered a regulated wetland.<sup>103</sup> In 1989, the Corps tried to change its manual to regulate land that exhibits only two wetland characteristics, rather than the required three. Congress reacted by passing legislation that requires the Corps to identify wetlands based on the criteria set forth in its own 1987 manual.<sup>104</sup>

Undeterred, the Corps subverted Congress' mandate by issuing regional supplements to their Wetlands Delineation Manual, effectively changing the definition of wetlands around the country. One such supplement was issued in 2007 for Alaska,<sup>105</sup> which expanded the Corps' definition of the growing season, a critical component of the test for wetlands hydrology, from the Congressionally enforced "portion of the year when soil temperatures at 19.7 in. below the soil surface are higher than biologic zero (5°C)"<sup>106</sup> to a more lenient standard that reads: "vegetation green-up, growth, and maintenance as an indicator of biological activity occurring both above and below ground."<sup>107</sup> The growing season is generally defined as dates when soil 20 inches below the surface is above freezing. In North Pole, Alaska, the permafrost is never above freezing. Nevertheless, the Corps asserted jurisdiction even though the site did not exhibit wetlands hydrology.<sup>108</sup> In claiming jurisdiction over property based on subsurface permafrost, the Corps claims that its "Alaska Supplement" authorizes it to expand its jurisdiction beyond areas that meet the definition of wetlands at 33 C.F.R. 328.3.

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<sup>102</sup> 33 C.F.R. 328.3.

<sup>103</sup> Waterways Experiment Station, Corps of Engineers Wetlands Delineation Manual (Jan. 1987) (1987 Manual).

<sup>104</sup> Energy and Water Development Appropriations Act of 1993, Pub. L. 102-377, 106 Stat. 1315, 1324 (Oct. 2, 1992).

<sup>105</sup> Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region, ERDC/EL TR-07-24 (Sept. 2007) available at [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg\\_supp/erdc-el\\_tr-07-24.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/erdc-el_tr-07-24.pdf)

<sup>106</sup> See Wetlands Delineation Manual, *supra* note 103, at A5.

<sup>107</sup> Alaska Regional Supplement, *supra* note 105, at 48.

<sup>108</sup> *Id.* at 85 (wetlands vegetation is presumed to be present if water is present 12 inches or less from the surface for 14 or more consecutive days during the growing season).

The Corps' disregard of its own regulations and failure to use the Congressionally-mandated manual is another example of the agency's efforts to expand its regulatory reach – this time to regulate vast swaths of land throughout the State of Alaska.<sup>109</sup> The Schok family is fighting back, by filing suit in federal district court against the Corps.<sup>110</sup> However, not all landowners will have the ability to fight back.

The WOTUS rule would exacerbate the situation by codifying the Corps' claim that subsurface water creates jurisdiction and by removing the requirement that any wetlands characteristics be present.<sup>111</sup>

## **2. Claim: Groundwater interface below the land surface creates an “adjacent wetland”<sup>112</sup>**

The ESG Company has been caught up in the evolution and expansion of the definition of waters of the United States for many years. ESG owns a parcel in the Commonwealth of Virginia and originally planned to build homes on 428 acres of the property. The property, which is surrounded by other development, includes non-tidal wetlands. After the 1985 Supreme Court *Riverside Bayview* case,<sup>113</sup> the Corps began asserting jurisdiction over non-tidal wetlands, whether or not they directly abutted a navigable water, by arguing that the wetlands were "adjacent." The Corps issued cease and desist orders to all persons planning to develop in non-tidal wetlands at that time, including an order to ESG.

About 253 acres of ESG's property meet the definition of a wetland under the Corps' 1987 delineation manual according to former Virginia Department of Environmental Quality official Ellen Gilinsky.<sup>114</sup> Dr. Gilinsky determined that ESG's proposed 428 acre development would

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<sup>109</sup> 80% of the state overlays permafrost.

<sup>110</sup> *Tin Cup, LLC v. United States Army Corps of Engineers*, No. 4:16-cv-00016-TMB (D. Alaska, complaint filed May 2, 2016).

<sup>111</sup> See 33 C.F.R. 328.3(c)(5)(vi) and the TSD referenced *supra* note 18 (authorizing regulation based on groundwater connections) and 33 C.F.R. 328.3(a)(6) (expanding the definition of WOTUS to include adjacent water, broadly defined).

<sup>112</sup> See generally, testimony of Valerie Wilkinson, CFO, ESG Companies, available at <http://www.epw.senate.gov/public/cache/files/0926ca53-4f05-4e52-a640-32bedc60509f/epw-valerie-wilkinson-testimony-5-20-16.pdf>

<sup>113</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121(1985). This case is discussed *infra*, in Appendix A.

<sup>114</sup> Dr. Gilinsky is currently a Senior Policy Advisor in EPA's Office of Water.

impact about 144 acres of those wetlands. In 2003, the state issued a permit authorizing the development and requiring mitigation for the impacted acres. The Corps undertook its own delineation in 2007, claimed that Dr. Gilinsky's delineation was wrong, and found that ESG's plan would impact 181 acres, requiring re-noticing of the permit. In its delineation, the Corps relied on "ponding water and blackened leaves in designated areas" as primary indicators of hydrology.<sup>115</sup>

In 2008, the Corps denied ESG's request for a permit to build a smaller development on 305 acres. ESG appealed and the appeal was denied. ESG submitted a third proposal to build on only 54 acres. In 2012, while the permit application for this reduced development alternative was pending, the Corps' 2007 delineation expired. In the meantime, the Corps changed the rules of the game by issuing a new regional supplement to the 1987 Wetlands Delineation Manual that significantly expanded federal jurisdiction.<sup>116</sup> This new supplement ratified the Corps' use of secondary indicators of hydrology (*i.e.* blackened leaves) as if they were primary indicators, turning uplands into wetlands with no change on the ground or in law. Under this new supplement, the Corps claimed that all but 6 of the 54 acres that ESG is currently seeking to develop are wetlands.

Not all wetlands are subject to federal jurisdiction. However, by expanding the definition of the term "adjacent" the Corps has greatly expanded its jurisdiction beyond the *Riverside Bayview* test for determining when open water ends and dry land begins. In the case of the ESG property, the Corps is claiming jurisdiction over these so-called wetlands by claiming that they are "adjacent" to a navigable water through a subsurface connection. The property is not located within a flood plain, has no surface water inflow or surface connection to any other waters and, due to relatively impervious soils, does not provide significant groundwater recharge.

To assert jurisdiction in the face of these facts, the Corps is claiming that groundwater that interfaces with soil 12 inches below the surface (a "capillary fringe") creates a connection to surface water in some other location and that connection establishes federal jurisdiction. This so-called connection never reaches the surface of ESG's land and no water is moving from the

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<sup>115</sup> See *supra* note 112.

<sup>116</sup> Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0). U.S. Army Corps of Engineers. November 2010.

surface of ESG’s land to the groundwater at the property. Under this theory the mere presence of water in soil creates federal jurisdiction.

The new WOTUS rule would codify the Corps’ theory that subsurface water creates a connection to navigable water.<sup>117</sup>

### **E. Ephemeral Drainage is Water of the United States<sup>118</sup>**

The Smith family owns a 20 acre parcel in Santa Fe, New Mexico. An arroyo, a dry creek bed that holds water only immediately following a major storm, runs across the property. Prior owners used the arroyo as a dump. The Smiths cleared debris out of the arroyo, and in doing so smoothed the bed of the arroyo. This process did not introduce any foreign fill material to the area.<sup>119</sup>

The Corps issued a “Notice of Violation” to the Smiths, arguing that rain could move sediment or fertilizer from the arroyo to a creek and ultimately to the Rio Grande, located 25 miles away.

The Smiths sued the Corps in 2012, challenging the Corps’ reliance on the possibility of the movement of pollutants with no data or support to assert jurisdiction, noting the similarity between the Corps’ claims in their case and allegations of jurisdiction that were disapproved by the Supreme Court in *Rapanos*. Three months into the suit, the Corps dismissed their claim, conceding that the Smiths’ arroyo was beyond its jurisdiction.

This case was a victory for the Smiths. However, if the WOTUS rule goes into effect the next land owner will not be so fortunate. Under the WOTUS rule, there is no need for the Corps to demonstrate the movement of any pollutants, or even water, from an ephemeral drainage to a navigable in fact water body. Instead, all the Corps needs to do is claim they can see a bed, bank and ordinary high water mark. That alone is sufficient to establish jurisdiction.<sup>120</sup>

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<sup>117</sup> See *supra* note 18.

<sup>118</sup> See generally testimony of Damian Schiff, Pacific Legal Foundation, at 6-7, available at <http://www.epw.senate.gov/public/cache/files/f4c0904d-1d38-468e-bde4-a52a7aa25e26/schiff-testimony.pdf>

<sup>119</sup> *Id.*

<sup>120</sup> 33 C.F.R. 328.3(c)(3).

## F. Ecological Functions, Not Impacts to Navigable Water, Create Jurisdiction

In a recent unanimous Supreme Court case, *Hawkes v. Corps of Engineers*, the Hawkes Company won the right to challenge a jurisdiction determination made by the Corps of Engineers.<sup>121</sup> The facts of this case provide another example of how the Corps is already implementing the WOTUS rule.

The owners of the Hawkes Company, located in Minnesota, purchased a plot of land in October 2010 for a planned peat mining operation. The owners applied for permits from the Corps and the Minnesota Department of Natural Resources. The Corps issued a jurisdictional determination that claimed the land in question met the criteria for a wetland with a “significant effect on the physical, chemical, or biological, integrity” of the Red River, 120 miles away.<sup>122</sup> In reaching this conclusion, the Corps cited the functions listed in the WOTUS rule, including the presence of standing water (showing the ability to hold water that allegedly would otherwise run off and reach the Red River); the possibility that snow melt and rainfall could leave the wetlands (showing contribution of flow); literature regarding the general use of the wetlands in Minnesota as habitat for amphibians, reptiles, mammals and birds, making the wetland “a valuable resource in the agricultural dominated landscape of western Minnesota” (showing use as habitat); and literature regarding the general ability of wetlands generally to store and transform nutrients.<sup>123</sup>

The *Hawkes* case provides further support for the testimony presented to the EPW Committee in May 2016 that the WOTUS rule would exacerbate existing overreach by EPA and the Corps.<sup>124</sup>

It also sends a warning to EPA and the Corps regarding the likely future of the WOTUS rule. The WOTUS rule relies on the “significant nexus” test articulated by Justice Kennedy in his

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<sup>121</sup> *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. \_\_\_\_ (2016), slip. op. May 31, 2016), available at [https://www.supremecourt.gov/opinions/15pdf/15-290\\_6k37.pdf](https://www.supremecourt.gov/opinions/15pdf/15-290_6k37.pdf)

<sup>122</sup> This is the new basis for jurisdiction asserted by EPA and the Corps in the WOTUS rule. 80 Fed. Reg. at 37,055-56.

<sup>123</sup> See Jurisdictional Determination, attached as Appendix C of Petition for Writ of Certiorari, *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, available at <http://www.scotusblog.com/wp-content/uploads/2015/09/Hawkes-cert-petition.pdf> These functions are listed at 33 C.F.R. 328.3(c)(5).

<sup>124</sup> Gallaway attachment to Parrish testimony available at: <http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66>

concurring opinion in *Rapanos*.<sup>125</sup> However, in a concurring opinion in *Hawkes*, Justice Kennedy expressed dismay over the breadth of jurisdiction claimed by the government, referring to the “Act’s ominous reach” that “continues to raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.”<sup>126</sup> To Justice Kennedy, “based on the Government’s representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern.”<sup>127</sup>

## CONCLUSION

The reach of federal authority claimed by EPA and the Corps is, in the words of Justice Kennedy, “ominous.” That ominous authority would be codified in the WOTUS rule. As a result, if that rule goes into effect, the hard-won right to challenge Corps jurisdictional determinations will become meaningless. Under the rule, to regulate any water that is in a 100-year floodplain and within 1,500 feet of another regulated water, the Corps need only a measuring device and, to regulate any water within 4,000 feet of another water, the Corps need only make the same kind of vague allegations about water retention, water runoff and use as habitat that it used to justify control over the *Hawkes* property. With the categorical regulation of ephemeral drains as “tributaries” the Corps and EPA will find the “tributaries” almost anywhere gravity moves water downhill.

These facts, in combination with the evisceration of the statutory exemptions for ordinary farming and ranching activities, demand a response from Congress.

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<sup>125</sup> See, e.g., 80 Fed. Reg. at 37,056.

<sup>126</sup> *Army Corps of Engineers v. Hawkes Co.*, *supra* note 121 (Justice Kennedy concurring).

<sup>127</sup> *Id.*

## Appendix A: Legislative and Regulatory History of the Clean Water Act

### I. 1972 Amendments

The jurisdictional reach of the Clean Water Act was established in 1972. Among the amendments to the Federal Water Pollution Control Act adopted that year was a definition of “navigable waters” as follows: “The term “navigable waters” means the waters of the United States, including the territorial seas.”<sup>128</sup>

In the Conference Report for the 1972 Amendments and in floor statements during consideration of the Conference Report the members made the following statement: "The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."<sup>129</sup>

A fuller explanation of Congressional intent was made by during floor consideration of the Conference Report in the Senate and in the House of Representatives.

On the Senate floor, Senator Muskie explained:

*It is intended that the term 'navigable waters' include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing high way over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce."*<sup>130</sup>

On the House floor Congressman Dingell explained:

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<sup>128</sup> CWA Section 502(7); 33 U.S.C. 1362(7). The term “navigable waters” alone appears in the Act 73 times. The term “navigable waters of the United States” appears in the Act 9 times. The term “waters of the United States” without the term “navigable” appears 5 times (not including the definition). Finally, the term “nation’s waters” appears twice, once in the goal statement and once in section 508, pertaining to procurement.

<sup>129</sup> Conference Report to accompany S. 2770, S. Rept. 92-1236 (92<sup>nd</sup> Cong., 2d Sess.), at 144; Committee Print, A Legislative History of the Water Pollution Control Act Amendments of 1972 (93d Cong., 1<sup>st</sup> Sess.) (hereinafter 1972 Act Leg. Hist.) v. 1, at 327.

<sup>130</sup> 118 Cong. Rec. 33699 (1972); 1972 Act Leg. Hist, v. 1, at 178. (Muskie statement) (emphasis added.)

[T]he conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographical sense. *It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws. The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the Daniel Ball case (77 U.S. 557, 563)—to include waterways which would be "susceptible of being used \* \* \* with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera.* [Citations omitted]

The U.S. Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution's grant to Congress of "Power \* \* \* To regulate commerce with Foreign Nations and among the several States \* \* \*" (art. I, sec. 8, clause 3). *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although most interstate commerce 150 years ago was accomplished on water ways, *there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation—highways, rail roads, air traffic, radio and postal communication, waterways, et cetera.* The "*gist of the Federal test*" is the *waterway's use "as a highway,"* not whether it is "part of a navigable interstate or international commercial highway." *Utah v. United States*, 403 U.S. 9, 11 (1971); *U.S. v. Underwood*, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972).

Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries for *water quality* purposes.<sup>131</sup>

With this context, it is clear the broadest possible constitutional interpretation of the term "navigable waters" referred to in the Statement of Managers are navigable waters that are part of a "highway of commerce" even if they do not cross state lines. In adopting this definition, Congress repudiated narrower agency administrative interpretations that limited the term "navigable waters" to include only waterways that carry goods across state lines, excluding wholly intrastate navigable waters unless they connected to waters in other states.<sup>132</sup> As a result, the "broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes" of the term "waters of the United States" encompasses waters that "by uniting with other waters *or other systems of*

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<sup>131</sup> 118 Cong. Rec. 33756-57 (1972); 1972 Act Leg. Hist., v. 1, at 250 (Dingell statement) (emphasis added).

<sup>132</sup> U.S. EPA, Office of General Counsel, A Collection of Legal Opinions, Vol. 1, at 400 (General Counsel Opinion, "Definition of Navigable Waters," Dec. 9, 1971) (available at [nepis.epa.gov](http://nepis.epa.gov)) (only navigable waters that are connected to other states via waterways are jurisdictional); 33 Fed. Reg. at 18,692 (Corps of Engineers Regulations under the Rivers and Harbors Act of 1899 limiting jurisdiction to interstate navigable waters). On September 9, 1972, shortly before the enactment of the 1972 Amendments, the Corps revised its definition of "navigable waters of the United States" to include water bodies wholly within one state when they physically connect via water with a waterway generally acknowledged to be an avenue of interstate commerce, such as the ocean or one of the Great Lakes. 33 C.F.R. 209.260 (1972); 37 Fed. Reg. 18,289, 18,290 (Sept. 9, 1972). Senator Muskie's and Congressman Dingell's floor statements make it clear that Congress intended to assert jurisdiction over navigable water with any transportation connection, not just a water connection.



*transportation*” are part of an interstate transportation system, as well as tributaries of such waters.<sup>133</sup>

## II. EPA and Corps Implementation of the 1972 Amendments

Despite this legislative history, EPA decided to assert jurisdiction over any virtually water, whether or not the water was used as part of a highway of commerce. In 1973, EPA issued regulations for implementing section 402 that defined navigable waters as:

- (1) All navigable waters of the United States;
- (2) Tributaries of navigable waters of the United States;
- (3) Interstate waters:
- (4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
- (5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
- (6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.<sup>134</sup>

In contrast, in 1974, the Corps of Engineers issued regulations defining “waters of the United States” for the purpose of implementing section 404 of the Clean Water Act, as well as sections 9, 10, 11, 13 and 13 of the River and Harbor Act of 1899, that reaffirmed the Corps’ view that its dredge and fill jurisdiction under section 404 is the same as its traditional jurisdiction under the Rivers and Harbors Act of 1899.<sup>135</sup>

There is contemporaneous evidence that the Corps’ view of the scope of its jurisdiction under section 404 was consistent with Congressional intent. In its 1973 report to the President and Congress, the congressionally chartered National Water Commission identified jurisdiction over intrastate, non-navigable water as a *gap* in federal regulation.<sup>136</sup> The National Water Commission also recommended that *States* should protect from drainage and development *State-*

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<sup>133</sup> Muskie statement, *supra* note 130.

<sup>134</sup> 40 C.F.R. 125.1 (1973); 38 Fed. Reg. 13,528, 13,529 (May 22, 1973). EPA did not propose this definition. The definition in the proposed rule merely copied the statutory definition. 38 Fed. Reg. 1362 (Jan. 11, 1973).

<sup>135</sup> 33 C.F.R. 209.120, promulgated at 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974) (referencing 33 C.F.R. 209.260 (1972), promulgated at 37 Fed. Reg. 18,289, 18,290 (Sept. 9, 1972)).

<sup>136</sup>“Water Policies For The Future: Final Report to the President and to the Congress of the United States by the National Water Commission (June 1973), at 200-201.

owned wetlands that have primary value for waterfowl propagation or other wildlife purposes.<sup>137</sup> This recommendation would have been moot if such wetlands were regulated under the Clean Water Act.<sup>138</sup>

Environmental groups disagreed with the Corps' definition. The Natural Resources Defense Council and the National Wildlife Federation challenged the Corps' regulation in the District Court for the District of Columbia based on the concern that the Corps' definition of navigable waters did not include tributaries or coastal marshes above the mean high tide mark or wetlands above the ordinary high water mark. These groups also expressed concern about lakes, isolated wetlands, and potholes.<sup>139</sup> In a terse, 389-word order, the District Court held that the term "navigable waters" is not limited to the traditional tests of navigability and ordered the Corps to revoke its definition and publish a new definition "clearly recognizing the full regulatory mandate of the Water Act."<sup>140</sup> Although the plaintiffs clearly invited the court to opine on what constitutes that "full regulatory mandate," the court merely said that because Congress asserted "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution" "[a]ccordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability."

In response to this District Court decision, in 1975 the Corps issued interim regulations that defined the term "navigable waters" to include periodically inundated coastal wetlands contiguous with or adjacent to navigable waters, periodically inundated freshwater wetlands contiguous with or adjacent to navigable waters, and, like EPA's 1973 regulations, certain intrastate waters outside the "highway of commerce."<sup>141</sup> In a press release accompanying its proposed rule, the Corps noted that under the proposal "practically all lakes, streams, rivers, and wetlands in the United States" would be regulated and "[u]nder some of the proposed

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<sup>137</sup> *Id.* at 279.

<sup>138</sup> Further, as noted by the Supreme Court, there is no evidence that the Corps' 1974 interpretation of section 404 jurisdiction was incorrect. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 168 (2001).

<sup>139</sup> See the discussion of this litigation in the preamble to the Corps' 1977 regulations. 42 Fed. Reg. 37,123-124 (July 19, 1977).

<sup>140</sup> *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

<sup>141</sup> These were: intrastate lakes, rivers and streams landward to their ordinary high water mark and up to their headwaters that are utilized: (a) by interstate travelers for water-related recreational purposes; (b) for the removal of fish that are sold in interstate commerce; (c) for industrial purposes by industries in interstate commerce; or (d) in the production of agricultural commodities sold or transported in interstate commerce. 42 Fed. Reg. at 37,127.

regulations, Federal permits may be required for a rancher who wants to enlarge his stock pond or the farmer who wants to deepen and irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion.”<sup>142</sup>

### III. 1977 Amendments

The backlash was quick, with Congressional hearings and introduced bills.<sup>143</sup> Ultimately, Congress amended the Clean Water Act in 1977 to add section 404(f), to exempt certain activities from permits, including the activities outlined in the Corps’ press release.<sup>144</sup>

Despite the backlash against the Corps’ 1975 interim regulations, the Corps’ final regulations, issued in 1977, went even further than EPA’s 1973 regulations and included “other waters” such as isolated lakes and wetlands, intermittent streams, prairie potholes and any other waters the degradation or destruction of which “could affect interstate commerce.”<sup>145</sup>

In 1977, the Supreme Court upheld the part of the Corps’ 1975 regulations that asserted jurisdiction over wetlands above the high tide line and beyond the ordinary high water mark, finding that the inclusion of adjacent wetlands in the Corps’ definition of “navigable waters” was a reasonable interpretation of the statute because:

In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which *water ends and land begins*. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, *between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs--in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land*. Where on this *continuum* to find the limit of “waters” is far from obvious.<sup>146</sup>

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<sup>142</sup> Press release. May 6, 1975. Department of the Army, Office of the Chief of Engineers, reprinted in “Section 404 of the Federal Water Pollution Control Act Amendments of 1972,” Hearings before the Committee on Public Works, United States Senate, 94<sup>th</sup> Cong., 2d Sess., July 27 and 28, 1976, Serial No. 94-H49, at 517-520 (Section 404 hearings), available at <http://www.epw.senate.gov/public/cache/files/7ce6eb89-dc88-47cf-b7ec-01823fb5b02e/sec404amend1972hr.pdf>

<sup>143</sup> Section 404 Hearings, *supra* note 142.

<sup>144</sup> See P.L. 95-216, sec. 67 (adding section 404(f) to the CWA).

<sup>145</sup> 33 C.F.R. 323.2(1977); 42 Fed. Reg. at 37,127, 37,144.

<sup>146</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (emphasis added). The Court did not express any opinion regarding “the authority of the Corps to regulate discharges of fill material that are not adjacent to bodies of open water” citing 33 CFR 323.2(a)(2) and (3). 474 U.S. at 131 n.8.

The Court also found that Congress had “acquiesced in the Corps' definition of waters as including adjacent wetlands” because Congress did not amend the statute to overturn those regulations in the 1977 Amendments to the Federal Water Pollution Control Act.<sup>147</sup>

#### **IV. SWANCC, RAPANOS, and the New WOTUS Rule**

Emboldened, in 1986 the Corps went even further and in a preamble to a revision to its regulations the Corps claimed that it could presume jurisdiction under the Commerce Clause over intrastate waters:

- a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- b. Which are or would be used as habitat by other migratory birds which cross state lines; or
- c. Which are or would be used as habitat for endangered species; or
- d. Used to irrigate crops sold in interstate commerce.<sup>148</sup>

Under this theory, the Corps could claim jurisdiction over any isolated wetland, puddle, or pond based on its potential use by a migratory bird. As such, it became known as the “Glancing Goose” test.<sup>149</sup>

In 2001, the Supreme Court rejected that expansive interpretation of federal authority, expressly found that there is no evidence that Congress acquiesced to “the Corps’ claim of jurisdiction over nonnavigable, isolated, intrastate waters,” and declined to hold “that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)’s definition of ‘navigable waters’ because they serve as habitat for migratory birds.”<sup>150</sup>

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<sup>147</sup> *Id.* at 138. The same regulations that Congress allegedly acquiesced to also exempted ponds smaller than 5 acres and streams with flow less than 5 cubic meters per second.

<sup>148</sup> 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

<sup>149</sup> See January 16, 2001 Wall Street Journal, available at <http://www.wsj.com/articles/SB979603030985179200>

<sup>150</sup> *SWANCC*, 531 U.S. at 171-72.

Despite this holding, the Corps and EPA continued to claim broad jurisdiction over isolated ponds and wetlands, by expanding their interpretation of what constitutes an adjacent wetland and what constitutes a tributary.<sup>151</sup>

At the same time their view of jurisdiction was expanding, the Corps and EPA, and the Department of Justice began narrowing their narrow view of the exemptions that Congress enacted in 1977.<sup>152</sup> Indeed, their view of the ordinary farming and ranching exemptions are so narrow that one judge called it “a virtual administrative repeal.”<sup>153</sup>

Concern that the Corps was continuing to exceed its statutory authority reached the Supreme Court again in 2006. In that case, four members of the Court rejected the Corps’ claim of jurisdiction over wetlands next to a ditch in Michigan based on its regulatory definition of “tributary,”<sup>154</sup> holding that there must be a relatively permanent hydrologic connection to navigable water before Clean Water Act jurisdiction could be invoked.<sup>155</sup> Justice Kennedy agreed that the Corps failed to demonstrate jurisdiction over the ditch in question, but articulated a different test. According to Justice Kennedy, a mere hydrologic connection may not be sufficient and instead there must be a “significant nexus” to navigable waters.<sup>156</sup>

At first, EPA and the Corps took the position that the *Rapanos* case severely limited their jurisdiction and asked Congress to amend the Clean Water Act to remove the term “navigable.”<sup>157</sup> When Congress rejected legislation to carry out that request, the administration

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<sup>151</sup> See “Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction,” GAO Report, February 2004, available at: <http://www.gao.gov/new.items/d04297.pdf>.

<sup>152</sup> See generally Benjamin H. Grumbles, “Section 404(f) of the Clean Water Act: Trench Warfare over Maintenance of Agricultural Drainage Ditches,” William Mitchell Law Review, Vol. 14, issue 4 (1991).

<sup>153</sup> See Memorandum and Order, *United States v. County of Stearns*, Civ. 3-89-616 (D. Minn. March 15, 1990), at 18.

<sup>154</sup> The 1986 definition of WOTUS at issue in *Rapanos* did not define the term “tributary” but the Corps implemented it in the same way that they now are seeking to codify in the WOTUS rule. *Rapanos*, 547 U.S. at 781 (“As noted earlier, the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as ‘a line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics,’ §328.3(e)”) (Justice Kennedy, concurring).

<sup>155</sup> *Rapanos*, 547 U.S. at 733.

<sup>156</sup> *Id.* at 781-82 (finding the same standard that the WOTUS rule would codify to be overly broad).

<sup>157</sup> See May 20, 2009, letter from CEQ Chairman Nancy Sutley, EPA Administrator Jackson, Acting Assistant Secretary of the Army Rock Salt, Agriculture Secretary Tom Vilsack, and Interior Secretary Ken Salazar to Senator Boxer.

pivoted and instead decided to reinterpret both the Clean Water Act, and Justice Kennedy's opinion, to claim even broader authority than it claimed in the 1986 "Glancing Goose" test.<sup>158</sup>

On June 29, 2015, EPA and the Corps published the final WOTUS Rule.<sup>159</sup> On October 9, 2015, the Sixth Circuit Court of Appeals stayed the implementation of the new rule, finding that there was a strong likelihood that it exceeded EPA's and the Corps' authority under the Clean Water Act.<sup>160</sup>

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<sup>158</sup> EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act," 76 Fed. Reg. 24,479 (May 2, 2011); Proposed WOTUS Rule, 79 Fed. Reg. 22,188 (Apr. 21, 2014).

<sup>159</sup> 80 Fed. Reg. 37,054 (June 29, 2015).

<sup>160</sup> Order of Stay, *In re: Environmental Protection Agency and Department of Defense Final Rule; Clean Water Rule Definition of Waters of the United States*, 80 Fed. Reg. 37,054 (June 29, 2015), Case No. 15-3799 and consolidated cases (18 petitioner states then; currently 32) (Oct. 9, 2015).