

# New Federal Guidance on Identifying Waters Protected by the Clean Water Act

by Deborah L. Freeman and Steve Dougherty

*On May 2, 2011, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) released draft Guidance on identifying waters protected by the Clean Water Act (CWA). This article briefly reviews the U.S. Supreme Court's SWANCC and Rapanos decisions addressing CWA jurisdiction, discusses past EPA and Corps guidance implementing those decisions, and explains how further interpretations of those decisions under the new Guidance will affect what waters and wetlands likely will be considered jurisdictional.*

Over the last decade, the geographic scope of jurisdiction of the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) under Section 404 of the federal Clean Water Act (CWA) has been reduced by two U.S. Supreme Court opinions<sup>1</sup> and agency guidance interpreting these opinions.<sup>2</sup> Recent Guidance on Identifying Waters Protected by the CWA (2011 draft Guidance) from the Corps and EPA<sup>3</sup> reverses this trend for the first time since 2001.

This article discusses the 2011 draft Guidance as proposed at the time of publication. At that time, the final status of the draft Guidance was undecided. The public comment period on the draft Guidance closed July 31, 2011 and pending appropriation bills for the EPA and Corps had riders that would prohibit the agencies from implementing the Guidance.

## Background

With enactment of the CWA in 1972,<sup>4</sup> the U.S. Congress defined the “navigable waters” subject to CWA jurisdiction to mean the “waters of the United States.”<sup>5</sup> Regulations adopted by the Corps in the mid-1970s sought to extend the reach of Section 404 jurisdictional waters to the outer limits of Congress’s commerce power.<sup>6</sup> These regulations interpret Section 404 to cover waters and wet areas far beyond those that are traditionally navigable and used to transport interstate commerce.

Through the years, CWA permits have been required for activities involving discharges into a wide expanse of waters, including ephemeral streams, human-made irrigation ditches and drains that connect intermittently to covered waters, and desert arroyos through which water flows during periods of heavy rain.<sup>7</sup> Under its 1986 “migratory bird rule,” the Corps interpreted its Section 404 jurisdiction to extend to intrastate “isolated” waters that were not part of any tributary water system but could be used as habitat by migratory birds or endangered species or for the irrigation of crops sold in interstate commerce.<sup>8</sup>

## Limitations on CWA 404 Jurisdiction

In the last decade, the U.S. Supreme Court’s *SWANCC* and *Rapanos* decisions<sup>9</sup> identified limitations on the geographic scope of waters that may be determined jurisdictional and for which a Section 404 “dredge and fill” permit is required. These decisions are discussed below.

### The SWANCC Decision

In *SWANCC*, an abandoned sand and gravel pit had evolved into isolated seasonal ponds that lacked any physical connection to a tributary stream or to navigable waters. The Corps asserted jurisdiction over the site pursuant to its migratory bird rule, which was

## Coordinating Editors

Melanie Granberg (Environmental), Denver, Gablehouse Calkins & Granberg, LLC—(303) 572-0050, mgranberg@gcglc.com; Kevin Kinnear (Water), Boulder, Porzak Browning & Bushong LLP—(303) 443-6800, kkinnear@pbblaw.com; Joel Benson (Natural Resources and Energy), Denver, Davis Graham & Stubbs LLP—(303) 892-7470, joel.benson@dgsllaw.com

## About the Authors

Deborah L. Freeman is a shareholder with the law firm of Trout, Raley, Montañó, Witwer & Freeman, P.C. Her practice concentrates in the area of natural resources law, with emphasis on federal



Clean Water Act, Endangered Species Act, public lands, and NEPA compliance—dfreeman@troutlaw.com. Steve Dougherty is a senior ecologist and principal with ERO Resources Corporation. He specializes in wetland and riparian systems, Endangered Species Act compliance, and environmental issues associated with water supply—sdougherty@eroresources.com.

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due solely to the property's use by migratory birds. The Supreme Court held that the rule was not supported by the CWA, and that allowing federal jurisdiction over ponds with no physical adjacency or other connection to navigable waters overstepped the jurisdictional boundaries of Section 404.<sup>10</sup> In so holding, the Court noted that its earlier upholding of CWA jurisdiction in *United States v. Riverside Bayview Homes, Inc.*<sup>11</sup> was informed by the "significant nexus" between the navigable waters and abutting wetlands that were at issue in that case.

Subsequent guidance from the Corps and EPA in 2003 confirmed that *SWANCC* "squarely eliminate[d]" CWA jurisdiction over isolated intrastate nonnavigable waters where the sole basis for asserting jurisdiction was the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations (*SWANCC* guidance).<sup>12</sup> In view of the uncertainties after *SWANCC*, field staff were directed to obtain agency headquarters approval before asserting jurisdiction over any other intrastate isolated waters whose use, degradation, or destruction could affect interstate or foreign commerce.<sup>13</sup>

### The Rapanos Decision

Five years later, in *Rapanos*, the Supreme Court concluded that the record failed to support CWA Section 404 jurisdiction over wetlands that did not abut or drain directly to navigable waters. Some of these wetlands were hydrologically linked to navigable waters through drains and nonnavigable tributaries; others were adjacent to, but separated by, an impermeable berm from a drainage ditch that emptied into a tributary of navigable waters. As discussed in Steve Louthan's 2006 article in *The Colorado Lawyer*,<sup>14</sup> this case added to the complexity and confusion regarding limits on the jurisdictional reach of the CWA, in part because of the fractured 4:1:4 nature of the Supreme Court decision in which the justices disagreed on the underlying test for CWA jurisdiction.

According to the plurality opinion authored by Justice Scalia, the CWA extends only to relatively permanent, standing, or continuously flowing bodies of water connected to traditional navigable waters, and to wetlands with a continuous surface connection to such waters; jurisdiction does not extend to channels or ditches through which water flows only intermittently or ephemerally or that periodically provide drainage for rainfall, or to wetlands that are physically separated from navigable waters.<sup>15</sup> In contrast, Jus-

tice Kennedy's concurring opinion relies on the "significant nexus" test, finding jurisdiction lacking unless the waters or wetlands in question "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"<sup>16</sup> Justice Stevens's dissent would uphold the Corps' jurisdiction in cases in which either the plurality or Justice Kennedy's jurisdictional test is met.<sup>17</sup> Subsequent court decisions have grappled with the question of which test should control.<sup>18</sup>

### Post-Rapanos Guidance

In 2007 and 2008, the Corps and EPA released CWA guidance implementing the *Rapanos* decision (*Rapanos* guidance).<sup>19</sup> As discussed in an article on the *Rapanos* guidance appearing in the January 2008 issue of *The Colorado Lawyer*,<sup>20</sup> the *Rapanos* guidance did not change the existence of jurisdiction over traditional navigable waters and adjacent wetlands or over most perennial (continuously flowing) drainages and the wetlands that abut them. However, the *Rapanos* guidance called for a case-specific significant nexus evaluation to establish jurisdiction over wetlands that are adjacent to but not directly abutting a relatively permanent tributary, over drainages that lack relatively permanent flow, and over wetlands abutting or adjacent to those drainages.<sup>21</sup> Under the *Rapanos* guidance, erosional features (such as swales, gullies, and small washes with low, infrequent, and short duration flow) and ditches excavated wholly in and draining uplands generally are not waters of the United States because they do not have a significant nexus to downstream traditional navigable waters.<sup>22</sup> This guidance effectively reduced the reach of Section 404 in the Western United States, where large portions of the watersheds comprise intermittent and ephemeral drainages. The *Rapanos* guidance did not apply to isolated waters, which remained governed by the *SWANCC* decision and 2003 guidance.<sup>23</sup>

### The New Guidance

The stated goals of the 2011 draft Guidance are to increase clarity and reduce costs and delays in CWA permitting by reducing the complexity of agency decisions concerning the scope of waters subject to the CWA, improving predictability in the process of identifying covered waters, and increasing consistency of agency jurisdictional decisions across the country.<sup>24</sup> It is uncertain whether the 2011 draft Guidance will accomplish those goals. What is certain is that the number of waters found to be subject to CWA jurisdiction likely will increase under the 2011 draft Guidance if implemented as proposed, compared to practices under the *SWANCC* guidance and the *Rapanos* guidance.<sup>25</sup>

### Summary of Changes

The 2011 draft Guidance would supersede the previously issued guidance on the scope of waters of the United States subject to CWA programs.<sup>26</sup> The 2011 draft Guidance states the agencies' conclusion that previous guidance did not make full use of the authority provided by the CWA to include waters within the scope of the Act, as interpreted by the *Rapanos* Court.<sup>27</sup> The 2011 draft Guidance asserts jurisdiction over waters that satisfy either the Justice Scalia standard or the Justice Kennedy standard, while offering an expansive interpretation of Justice Kennedy's significant nexus test. The 2011 draft Guidance would broaden a number of

criteria used by the agencies to determine whether a water or wetland is jurisdictional, as summarized in Table 1.

The 2011 draft Guidance would create three key changes to the way the agencies assert their Section 404 jurisdiction over waters and wetlands:

1. A wider variety of evidence will be accepted to demonstrate navigability.
2. The lack of a physical connection to a jurisdictional water can no longer be used to demonstrate that a wetland or water is

isolated or lacks a significant nexus to a jurisdictional water. In the case of wetlands, the 2011 draft Guidance does not require a hydrologic connection to establish a significant nexus.

3. The test for significant nexus would allow the agencies to consider the subject water or wetland alone or in combination with other wetlands or waters in the watershed.

If the 2011 draft Guidance is implemented as proposed, the geographic scope of Section 404 jurisdiction is anticipated to sub-

**Table 1. Categories of wetlands and waters**

Category of Waters	Example	Effect of 2011 draft Guidance
traditional navigable waters (TNWs) and wetlands adjacent to TNWs	waters that are navigable-in-fact or previously determined by the U.S. Army Corps of Engineers or a federal court to be so	Guidance expands TNWs to waters that are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation as evidenced by a trip solely for the purpose of demonstrating a waterbody can be navigated.
interstate waters	rivers, lakes, and other waters that flow across, or form a part of, state boundaries	Interstate waters were not addressed expressly in previous guidance. This extends the length of an interstate water subject to jurisdiction to include areas upstream and downstream of the boundary for the entire length that the water is of the same stream order.
nonnavigable tributaries of TNWs that are relatively permanent waters (RPWs) and the wetlands that abut such tributaries	perennial streams and intermittent drainages with seasonal flow ( <i>i.e.</i> , with a predictable flow during wet seasons in most years)	Guidance broadens the definition of seasonal flow from typically 90 days or more under the <i>Rapanos</i> guidance to no minimum duration of flow.
nonnavigable isolated waters and wetlands	waters and wetlands that lack a physical connection to a TNW or wetlands that do not abut or are not adjacent to a RPW or non-RPW	Physical isolation (following the <i>SWANCC</i> guidance) would no longer be evaluated as a distinct basis for jurisdiction; the significant nexus test would be used to evaluate jurisdiction.
significant nexus analysis	applied to ephemeral and intermittent drainages that do not have relatively permanent flow, to wetlands that are adjacent to these drainages, and to wetlands that do not abut or are not adjacent to a RPW or non-RPW; also applied to waters and wetlands that, under the <i>SWANCC</i> guidance, were considered nonnavigable isolated	The analysis has been broadened to consider if the subject water or wetland, either alone or in combination with similarly situated waters or wetlands in the watershed, will have an effect on the chemical, physical, or biological integrity of TNWs or interstate waters that is more than speculative or insubstantial. The agencies generally expect that tributaries will be found to have a significant nexus.
waters generally not jurisdictional	swales, erosional features, small washes, and ditches excavated wholly in and draining uplands that are not tributaries or wetlands; also those areas commonly referred to as “preamble waters”*	There are no changes, but the 2011 draft Guidance provides no examples of what kinds of waters or wetlands would likely be considered nonjurisdictional due to the lack of a significant nexus.

\* 51 Fed. Reg. 41,217 (Nov. 13, 1986).

stantially increase, particularly in the Western United States, as a result of more traditional navigable waters (TNWs), elimination of the physical isolation of waters when considering jurisdiction, and use of a significant nexus test that considers the aggregate functions of all waters or wetlands in a watershed. These changes are described in more detail below.

### Increase in TNWs

TNWs provide the framework for determining the scope of waters subject to Section 404 jurisdiction, because jurisdiction over other waters is based on their relationship or significant nexus to TNWs. Under current Corps regulations, TNWs are recognized as “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce. . . .”<sup>28</sup> Under the *Rapanos* guidance, TNWs include waters that are susceptible to use for commercial navigation, including commercial waterborne recreation.

The 2011 draft Guidance would extend this further in stating that a single trip on a raft taken solely to demonstrate that a waterbody can be navigated will suffice to establish the requisite commercial waterborne recreation use.<sup>29</sup> This may lead to an increase in the number of TNWs in Colorado and an expansion in the geographic scope of CWA jurisdiction. Currently, only a few TNWs are recognized in Colorado and they are typically large rivers or reservoirs—for example, the Arkansas, South Platte, and Colorado Rivers and Chatfield, Cherry Creek, and Pueblo Reservoirs. More than seventy rivers and creeks in Colorado have reaches used by watercraft recreationists.<sup>30</sup>

### Reduced Role of Isolation

In the past, tests of “isolation” (*SWANCC* guidance) and/or “significant nexus” (*Rapanos* guidance) have been used on a case-specific basis to determine the extent of jurisdiction over intermittent and ephemeral drainages, wetlands adjacent to these drainages, and other waters. The 2011 draft Guidance focuses on the significant nexus test for determining whether these types of waters are jurisdictional instead of using the tests for isolation and significant nexus in tandem.

Based on the *SWANCC* guidance, the Corps and EPA typically have not exerted Section 404 jurisdiction over waters or wetlands that are physically isolated from jurisdictional waters. In Colorado, entire drainages have been considered nonjurisdictional because they lack a physical connection to a jurisdictional water. A physical connection often is demonstrated by the presence of a defined bed and bank or ordinary high water mark (OHWM). A “break” in the lower portion of an intermittent or ephemeral drainage has been determined sufficient to “isolate” the upper reaches of the drainage, supporting a nonjurisdictional determination, even where the upper reaches have a defined bed and bank, OHWM, or wetlands.

In contrast, the 2011 draft Guidance states that a natural or manmade break (e.g., rock outcrop, underground flow, dam, weir, diversion, or similar break) in the presence of a bed and bank or ordinary high water mark does not establish the upstream limit of a tributary in cases where a bed and bank and an ordinary high water mark can be identified upstream and downstream of the break.<sup>31</sup>

Due to this interpretation, the 2011 draft Guidance, if implemented as proposed, likely would increase the number of ephemeral and intermittent drainages that will be considered jurisdictional in Colorado, particularly in the arid intermountain and plains portions of the state.

### Aggregation of Impacts

In the past, when performing the significant nexus test, the subject wetland or water was evaluated to determine whether it had a more than speculative or insubstantial effect on the chemical, physical, or biological integrity of the nearest downstream TNW. Under the 2011 draft Guidance, the effect of the subject wetland or water would be considered alone or in combination with similarly situated waters or wetlands in the region.<sup>32</sup> The 2011 draft Guidance states the agencies’ general expectation that all ephemeral and intermittent tributaries will be found to have a significant nexus with downstream TNWs or interstate waters under this test.<sup>33</sup>

This is because the significant nexus test under the 2011 draft Guidance is in effect a cumulative impacts analysis. The test for jurisdiction over a single subject wetland or intermittent tributary is driven by a worst-case assumption of cumulative impacts. As part of the 2011 draft Guidance, the agencies have determined that the *Rapanos* decision allows them to analyze whether all similarly situated waters and/or wetlands in a region together have a significant nexus to the downstream TNW. The test asks whether the aggregating influence of all such waters or wetlands in the watershed would have a more than speculative or insubstantial effect on the chemical, physical, or biological integrity of the nearest downstream TNW. The agencies’ presumptive answer to this question is “yes,” and it will be challenging to demonstrate otherwise. This likely will result in a substantial increase in jurisdiction over headwater intermittent and ephemeral drainages and wetlands.

**Hydrologic Connection Not Required**

The 2011 draft Guidance states that field staff should look for indicators of hydrology; effects on water quality; and physical, chemical, biological, and ecological connections or functions when assessing whether waters have a more than speculative or insubstantial effect on the integrity of downstream TNWs or interstate waters.<sup>34</sup> The 2011 draft Guidance notes that a hydrologic connection is neither determinative of nor required to show a significant nexus.<sup>35</sup> In the *Rapanos* decision, Justice Kennedy noted that a hydrologic connection between a wetland and a tributary is not required to establish a significant nexus:

Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of a hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system.<sup>36</sup>

Similarly, in terms of determining whether a wetland is “neighboring” to a jurisdictional water, one test proposed by the 2011 draft Guidance for sufficient proximity is whether there is a “demonstrable ecological interconnection” between the wetland and the jurisdictional waterbody—for example, whether resident aquatic or semiaquatic species rely on both the wetland and the jurisdictional waterbody for all or part of their life cycle.<sup>37</sup> The 2011 draft Guidance notes that as the distance between the wetland and jurisdictional water increases, the potential ecological interconnection between the waters is likely to decrease.<sup>38</sup>

Given this Guidance, a physical connection is no longer needed to demonstrate a significant nexus and, for wetlands, the lack of a physical connection actually could demonstrate a significant nexus.

This Guidance, when combined with the cumulative effects approach to the significant nexus test, will make it challenging to demonstrate there is not a significant nexus for a subject water or wetland.

**New Terminology**

The 2011 draft Guidance brings a new set of terms into the CWA lexicon. These are shown in Table 2.

**Applicability of the 2011 Draft Guidance**

The 2011 draft Guidance applies to decisions concerning whether a waterbody is subject to any of the programs authorized under the CWA. Although the *SWANCC* and *Rapanos* decisions involved the discharges of dredged or fill material under Section 404, the 2011 draft Guidance states that its interpretation of jurisdictional waters of the United States is applicable to all CWA provisions that use the term, including the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the Section 311 oil spill program, the water quality standards and total maximum daily load programs under Section 303, and the Section 401 state water quality certification process.<sup>39</sup>

The 2011 draft Guidance does not address the statutory exemptions from CWA permitting requirements under Section 404(f), such as those for normal agriculture, forestry, and ranching practices.<sup>40</sup> It also does not change the agencies' position regarding Section 404's so-called “preamble waters” that are generally not considered to be waters of the United States.<sup>41</sup>

**Table 2. New terms associated with the 2011 draft Guidance**

Term	Effect on how Clean Water Act Jurisdiction will be determined
“either alone or in combination”	This applies to the significant nexus test. This allows the determination of a significant nexus to consider the individual water or wetland at issue or to group the individual water or wetland with other waters or wetlands in the watershed. If the destruction of all the grouped wetlands or waters could have an effect that is more than speculative or insubstantial on the TNW, any wetland or water in the group has a significant nexus.
“similarly situated”	Waters in the same category or the same resource type are similarly situated ( <i>e.g.</i> , tributaries and adjacent wetlands) relative to a TNW when evaluating the presence or absence of a significant nexus.
“in the region”	Waters are considered in the region if they fall within the same watershed. The watershed is defined by the area draining into the TNW or interstate water for the purposes of grouping similarly situated wetlands or waters in the region for determining the presence or absence of a significant nexus.
“single point of entry”	This is used to geographically define the watershed (in the region). The region for determining whether similarly situated wetlands or waters have a significant nexus is the watershed that drains to the nearest TNW or interstate water through a “single point of entry.”
“demonstrable ecological interconnection”	This is used to demonstrate if a wetland is adjacent or neighboring to a jurisdictional waterbody. An ecological interconnection can be demonstrated if resident aquatic species rely on both the wetland and the jurisdictional waterbody for all or part of their life cycle.

The 2011 draft Guidance also does not address the regulatory exclusions from coverage under the CWA for waste treatment systems and prior converted croplands.<sup>42</sup> It also does not address the statutory and regulatory exemptions from NPDES permitting requirements for agricultural stormwater discharges and return flows from irrigated agriculture.<sup>43</sup>

## Guidance Versus Regulations

The 2011 draft Guidance emphasizes that it is not a rule and does not impose legally binding requirements on EPA, the Corps, or the regulated community. Under the 2011 draft Guidance, jurisdictional determinations are to be made on a case-by-case basis considering the specific facts and circumstances at issue.<sup>44</sup> As with the agencies' previous CWA guidance, however, this Guidance contains new interpretations of controlling requirements under the CWA, its regulations, and case law, and likely will have a profound influence on how agency field staff will identify waters within the scope of CWA jurisdiction. Interpretations in guidance that are not codified in a rulemaking may be entitled to only limited deference from the courts.<sup>45</sup> The 2011 draft Guidance states that EPA and the Corps expect to undertake future formal notice and comment rulemaking under the Administrative Procedure Act to further clarify the extent of CWA jurisdiction.<sup>46</sup>

## Conclusion

Jurisdictional determinations under the CWA historically have proved controversial and challenging at the hands of the agencies,

regulated public, and courts. The 2011 draft Guidance is expected to increase the number of waters found subject to CWA jurisdiction but to afford little relief to the controversy surrounding this issue.

## Notes

1. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*); consolidated cases *Rapanos v. United States* and *Carabell v. United States*, 547 U.S. 715 (2006) (*Rapanos*).

2. Joint Memorandum regarding *SWANCC* decision issued by the General Counsels of the U.S. Environmental Protection Agency (EPA) and the Department of the Army on January 10, 2003, 68 Fed. Reg. 1995 (Jan. 15, 2003); Memorandum to EPA Regions and Corps Districts, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*" (originally issued June 5, 2007 and rev'd Dec. 2, 2008); Memorandum for Director of Civil Works and U.S. EPA Regional Administrators, "Coordination on Jurisdictional Determinations Under CWA Section 404 in Light of the *SWANCC* and *Rapanos* Supreme Court Decisions" (June 5, 2007); Memorandum for Commander, Major Subordinate Commands and District Commands, "Process for Coordinating Jurisdictional Determinations Conducted Pursuant to Section 404 of the CWA in Light of the *Rapanos* and *SWANCC* Supreme Court Decisions" (Jan. 28, 2008); U.S. Army Corps of Engineers *Jurisdictional Determination Form Instructional Guidebook* (including appendices) (May 30, 2007); U.S. Army Corps of Engineers Regulatory Guidance Letter No. 08-02 on Jurisdictional Determinations (June 26, 2008).

3. Draft Guidance on Identifying Waters Protected by the Clean Water Act issued by the U.S. EPA and U.S. Army Corps of Engineers, 76 Fed. Reg. 24479 (May 2, 2011) (2011 draft Guidance). This article focuses on Clean Water Act (CWA) Section 404 jurisdiction, although the 2011 draft Guidance by its terms applies to jurisdictional decisions under other programs authorized under the CWA.

4. Federal Water Pollution Control Act Amendments of 1972 (CWA), Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. §§ 1251 *et seq.*

5. CWA § 502(7); 33 U.S.C. § 1362(7).

6. 42 Fed. Reg. 37122, 37127 (July 19, 1977); 33 C.F.R. § 323.2(a) (1977). *See* 33 C.F.R. § 328.3(a) (current regulatory definition of "waters of the United States").

7. *See, e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001); *Quivira Mining Co. v. EPA*, 765 F.2d 126, 129 (10th Cir. 1985); *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997), *cert.*

denied, 522 U.S. 899 (1997); *Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999) (all involving National Pollutant Discharge Elimination System (NPDES) permits for discharges into “waters of the United States” under 33 U.S.C. § 1342).

8. 51 Fed. Reg. 41206, 41217 (1986).
9. *SWANCC*, *supra* note 1; *Rapanos*, *supra* note 1.
10. *SWANCC*, *supra* note 1 at 167, 174.
11. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).
12. Joint Memorandum regarding *SWANCC* decision, *supra* note 2.
13. *Id.* These “other” waters, addressed at 33 C.F.R. § 328.3(a)(3)(i) to (iii), include intrastate waters used by interstate travelers, those from which fish could be taken and sold in interstate commerce, and those used for industrial purposes by industries in interstate commerce.
14. Louthan, “Federal Jurisdiction Under the Clean Water Act After *Rapanos*,” 35 *The Colorado Lawyer* 47 (Dec. 2006).
15. *Rapanos*, *supra* note 1 at 2221, 2225-27.
16. *Id.* at 2241, 2248.
17. *Id.* at 2265.
18. See, e.g., *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *United States v. Gerke Excavating*, 464 F.3d 723 (7th Cir. 2006) (*per curiam*); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009).
19. 2007 and 2008 Memoranda, *supra* note 2.
20. Louthan and Dougherty, “EPA and Corps Guidance on Clean Water Act Jurisdiction,” 37 *The Colorado Lawyer* 39 (Jan. 2008).
21. Memorandum to EPA Regions and Corps Districts, *supra* note 2 at 8.
22. *Id.* at 11-12.
23. *Id.* at 4, nn. 19 and 32.
24. 2011 draft Guidance, *supra* note 3 at 3.

25. *Id.*
26. *Id.* at 1.
27. *Id.* at 2.
28. 33 C.F.R. § 328.3(a)(1).
29. 2011 draft Guidance, *supra* note 3, § 1 at 6.
30. Banks and Eckardt, *Colorado Rivers and Creeks* (2d ed., 1999).
31. 2011 draft Guidance, *supra* note 3, § 4 at 11.
32. *Id.*, § 3 at 7-10.
33. *Id.*, § 3 at 13-14.
34. *Id.*, § 4 at 9-10.
35. *Id.*, § 3 at 9.
36. *Rapanos*, *supra* note 1 at 2251.
37. 2011 draft Guidance, *supra* note 3, § 5 at 16.
38. *Id.*, § 5 at 17.
39. *Id.* at 3 (noting that, although there is only one CWA definition of “waters of the United States,” other statutory factors may define the reach of a particular CWA provision or program).
40. *Id.* at 3. See CWA § 404(f); 40 C.F.R. §§ 232.3 and 323.4.
41. *Id.*, § 7 at 20-21. See 51 Fed. Reg. 41,217 (Nov. 13, 1986).
42. 2011 draft Guidance, *supra* note 3 at 3. See 33 C.F.R. § 328.3(a)(8); 40 C.F.R. § 230.3(s); 40 C.F.R. § 122.2.
43. 2011 draft Guidance, *supra* note 3 at 3. See CWA §§ 402(I)(1) and 502(14); 40 C.F.R. §§ 122.2 and 122.3(f).
44. 2011 draft Guidance, *supra* note 3 at 1.
45. See *Precon Dev. Corp., Inc. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 297 n.10 (4th Cir. 2011).
46. 2011 draft Guidance, *supra* note 3 at 1. Among other things, such rulemaking is expected to address the scope of jurisdiction over 33 C.F.R. § 328.3(a)(3) intrastate isolated waters whose use, degradation, or destruction could affect interstate or foreign commerce. *Id.* at 19-20. ■