

# ELR

NEWS & ANALYSIS

## The Continued Highway Requirement as a Factor in Clean Water Act Jurisdiction

by David E. Dearing

---

*Editors' Summary: U.S. courts have consistently ruled that navigable, intrastate waters are not traditional navigable waters unless they form part of a continued highway of interstate commerce. However, for purposes of its permitting duties pursuant to the CWA, the U.S. Army Corps of Engineers has defined a broader set of traditional navigable waters that includes all navigable, intrastate waters, regardless of whether the waters meet the continued highway requirement. In this Article, David E. Dearing examines the case law supporting the continued highway requirement, including the recent U.S. Supreme Court case, *Rapanos v. United States*, in order to argue that the Corps has no legal basis for redefining "navigable waters" to encompass navigable, intrastate waters that do not form a continued highway of interstate or foreign commerce. He concludes that navigable, intrastate waters that terminate in a closed basin are within the exclusive domain of the individual states, and that the Corps and EPA lack authority to regulate these waters under the CWA.*

---

In *Rapanos v. United States*,<sup>1</sup> the U.S. Supreme Court issued a fragmented decision in June 2006 concerning the geographic scope of federal jurisdiction under the Clean Water Act (CWA). A majority of the Court voted to vacate two rulings from the U.S. Court of Appeals for the Sixth Circuit that certain wetlands in Michigan were "waters of the United States" within the meaning of the CWA. Although the five Justices in the majority agreed that the lower court had used the wrong test to determine the status of the wetlands, all five could not agree on the correct test. Justice Antonin G. Scalia, joined by Chief Justice John G. Roberts and Justices Clarence Thomas and Samuel A. Alito, wrote a plurality opinion that formulated one test. Justice Anthony M. Kennedy, who provided the crucial fifth vote to vacate, wrote a separate opinion setting forth a different test.

Subsequent case law shows that the Court's inability to produce a single majority opinion has left the lower courts struggling to decide the correct approach to the issues of CWA jurisdiction addressed in *Rapanos*.<sup>2</sup> The situation brings to mind a comment made by then-Justice William H. Rehnquist in another context, that the Court has accom-

plished "the seemingly impossible feat of leaving this area of the law more confused than it found it."<sup>3</sup> Nevertheless, a common thread in both the plurality and Kennedy opinions is that the jurisdictional status of a wetland under the CWA turns on its relationship to "traditional navigable waters." Although differing on the precise nature of the required relationship, both the plurality and Justice Kennedy held, in effect, that "waters of the United States" are limited to traditional navigable waters of the United States, certain of their tributaries, and wetlands adjacent to either.

As explained below, the courts have ruled consistently that navigable, intrastate waters are not traditional navigable waters unless they form part of a continued highway of interstate commerce carried by water. This requirement is known as "the continued highway" requirement. The U.S. Army Corps of Engineers, which regulates discharges of dredge and fill material under §404 of the CWA, has administratively defined a broader set of traditional navigable waters for purposes of the CWA. The Corps' traditional navigable waters include all navigable, intrastate waters, even if they do not meet the continued highway requirement.

The jurisdictional status of at least one major water body is directly affected by the Corps' administrative definition—the Great Salt Lake (GSL). The GSL fluctuates in size, but in an average year covers approximately 1,700 square miles, all within the state of Utah. It is a "terminal lake," a term used to describe a lake that terminates in a

---

David E. Dearing is an attorney in private practice in Indianapolis, Indiana. He is also Senior Vice President of Wetland Training Institute, Inc. He represented John A. Rapanos in the U.S. District Court and the U.S. Court of Appeals for the Sixth Circuit. He may be contacted at dsquare72@aol.com.

1. 126 S. Ct. 2208, 36 ELR 20116 (2006).

2. *See, e.g.*, *United States v. Johnson*, 467 F.3d 56, 60-66, 36 ELR 20218 (1st Cir. 2006) (discussing the varied approaches to applying *Rapanos*).

3. *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting).

closed basin, i.e., it has no surface outlet.<sup>4</sup> Its major tributaries are the Bear, Provo/Jordan, and Weber rivers.<sup>5</sup> Of those rivers, only the Bear passes through another state, and it does not carry any commerce across state lines. Thus, as the Supreme Court noted in a 1971 case concerning ownership of the shorelands around the GSL, the lake is “not part of a navigable interstate or international commercial highway.”<sup>6</sup> Nevertheless, the Corps claims that the GSL is a traditional navigable water because it currently supports recreational boating and because boats transported goods and tourists across the lake in the late 19th century.<sup>7</sup>

Because it has no outflow, the GSL is obviously not a tributary of any other water. Thus, the Corps’ claim to CWA jurisdiction over the GSL rises or falls on the validity of its argument that the CWA embraces a broader set of traditional navigable waters to which the continued highway requirement does not apply. In addition, the Corps’ claim to CWA jurisdiction could depend on this theory even in the case of a navigable, intrastate lake that does have a surface outlet, if the lake does not have a sufficient relationship to a traditional navigable water (as defined by the courts) to meet either the plurality’s or Justice Kennedy’s test from *Rapanos*.

This Article will examine the Corps’ efforts to expand the meaning of traditional navigable waters to cover navigable, intrastate waters that do not meet the continued highway requirement. The Article will consider the impact of judicial decisions on those efforts, including the Supreme Court’s decisions in §404 cases, particularly *Rapanos*. The Article concludes that the continued highway requirement has survived, and that the Corps lacks authority under the CWA to regulate the GSL and any other navigable, intrastate waters that are terminal lakes.

## I. Navigable Waters of the United States Under the Rivers and Harbors Act

For over 100 years, the Corps has had authority to regulate certain activities in “navigable waters of the United States” under the Rivers and Harbors Act (RHA) of 1899.<sup>8</sup> Within such areas, §10 of the RHA prohibits “[t]he creation of any obstruction” absent affirmative authorization by the U.S. Congress, and makes it unlawful to build any structure, to excavate or fill, “or in any manner to alter or modify the course, location, condition or capacity” of the water, without a Corps permit.<sup>9</sup> Section 13 of the RHA,<sup>10</sup> commonly

known as the Refuse Act, generally prohibits the discharge of refuse matter into any navigable water of the United States or onto its bank, as well as into any of its tributaries or onto their banks, without a Corps permit.<sup>11</sup>

Prior to the enactment of the RHA, the Supreme Court defined the term “navigable waters of the United States” in an admiralty case, *The Daniel Ball*,<sup>12</sup> which first set forth the continued highway requirement. The Court explained that in the exercise of its powers under the Commerce Clause of the Constitution,<sup>13</sup> Congress may directly control only those waters that alone or in combination with other waters form “a continued highway” that carries or may carry interstate or foreign commerce.

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade or travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.<sup>14</sup>

Under this rule, which applies to all non-tidal waters,<sup>15</sup> a water that is navigable-in-fact, but lies within the borders of a single state, is a navigable water of the United States only if it connects directly to another navigable-in-fact water that crosses into another state or country. A navigable, intrastate water that merely has a land-based link to interstate or foreign commerce is not part of a continued highway and is therefore not a navigable water of the United States.

The Supreme Court has twice expanded the meaning of navigable waters of the United States. In *Economy Light & Power Co. v. United States*,<sup>16</sup> the Court ruled that the term covers waters that were historically navigable, although they no longer have that characteristic. In *United States v. Appalachian Electric Power Co.*,<sup>17</sup> the Court ruled that the term covers waters that can be rendered navigable by reasonable improvements.

4. U.S. Geological Survey, U.S. Dep’t of the Interior, *Great Salt Lake, Utah* (2001), <http://ut.water.usgs.gov/greatsaltlake/index.html> (last visited Aug. 1, 2007).

5. Great Salt Lake Basin Hydrologic Observatory, Univ. of Utah, *Great Salt Lake Watershed Description* (2004), <http://greatsaltlake.utah.edu/description/> (last visited Aug. 1, 2007).

6. *Utah v. United States*, 403 U.S. 9, 10, 1 ELR 20250 (1971).

7. *Perry City, Utah, 12100 West Street Extension Site*, U.S. Army Corps of Eng’rs Sacramento Dist. File No. 200250385, at 3-5 (2005) (admin. appeal), available at <http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/Perry%20City%201200%20West%20appeal%20decision.pdf>.

8. The 1899 statute is a revised version of the Rivers and Harbors Act of 1890. Act of Sept. 19, 1890, Pub. L. No. 51-907, ch. 907, 26 Stat. 426, 453-54 (1890). The 1890 statute and the original 1899 statute vested permitting authority in the Secretary of War. The title of Secretary of War was changed to Secretary of the Army when the U.S. Congress designated the Department of War as the Department of the Army. Act of July 26, 1947, Pub. L. No. 80-235, ch. 343, tit. II, §205(a), 61 Stat. 496, 501 (1947).

9. 33 U.S.C. §403.

10. 33 U.S.C. §407.

11. The Secretary of the Army has delegated §10 permitting authority to the Chief of Engineers. 33 C.F.R. §325.8(a) (2006).

12. 77 U.S. (10 Wall.) 557 (1870).

13. U.S. CONST. art. I, §8, cl. 3. Congress’ power to regulate under the Commerce Clause necessarily includes the power to regulate navigation. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193-97 (1824). Congress exercises its Commerce Clause power in three ways: (1) direct regulation of “the use of the channels of interstate commerce”; (2) regulation and protection of “the instrumentalities of interstate commerce, or persons or things in interstate commerce”; and (3) regulation of activities that substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted).

14. *The Daniel Ball*, 77 U.S. (10 Wall.) at 563.

15. All coastal waters subject to the ebb and flow of the tide are “navigable waters of the United States,” regardless of whether they are actually or potentially navigable. *United States v. Sasser*, 967 F.2d 993, 996 (4th Cir. 1992) (and cases cited therein).

16. 256 U.S. 113, 123-24 (1921).

17. 311 U.S. 377, 407-08 (1940).

For many years, in nontidal areas the Corps asserted RHA jurisdiction only in waters that met the test set forth in *The Daniel Ball*. In 1972, responding to the urgings of a congressional committee,<sup>18</sup> the Corps issued revised regulations that explicitly expanded the definition of navigable waters of the United States by adding historical navigable waters and those that might be susceptible in the future for use in interstate or foreign commerce. The revised definition stated that “[n]avigable waters of the United States are those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.”<sup>19</sup>

In addition, the Corps defined “interstate commerce” so broadly that it eliminated the *Daniel Ball* test, effectively expanding navigable waters of the United States to cover navigable, intrastate waters that merely had a land-based link to interstate commerce: “*Nature of Commerce: Interstate or intrastate*. Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same State. It is only necessary that goods may be brought from, or eventually be destined to go to, another State.”<sup>20</sup> Nevertheless, the Corps acknowledged that “[p]recise definitions of ‘navigable waters’ or ‘navigability’ are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies.”<sup>21</sup>

As noted, the Supreme Court had already extended the concept of navigable waters of the United States to historical navigable waters and those that could be rendered navigable with reasonable improvements. But the Court never eliminated the continued highway requirement and the lower courts spurned the Corps’ efforts to do so on its own.

The U.S. Court of Appeals for the Tenth Circuit was the first to reject the theory that navigable waters of the United States include navigable, intrastate waters that do not form a continued highway. In *Hardy Salt Co. v. Southern Pacific Transportation Co.*,<sup>22</sup> a case involving the GSL, the court said, “Although the definition of ‘navigability’ laid down in *The Daniel Ball* has subsequently been modified and clarified ... its definition of ‘navigable water of the United States,’ insofar as it requires a navigable interstate linkage by water, appears to remain unchanged.”<sup>23</sup> Applying this principle, the court ruled that the GSL was not a navigable water of the United States for purposes of the RHA, although goods transported on the lake were subsequently shipped by rail to other states in the 19th century.<sup>24</sup>

Later in the 1970s, two other circuits similarly ruled that navigable, intrastate lakes were not navigable waters of the United States under the RHA because they merely had

land-based links to interstate commerce during the 19th century.<sup>25</sup> There have been no reported decisions to the contrary. The Corps has since given up its attempts to use the RHA to regulate navigable, intrastate waters that do not form a continued highway,<sup>26</sup> although it has never changed the pertinent regulations.<sup>27</sup>

## II. Navigable Waters Under the CWA

### A. The Corps’ Initial CWA Regulations

A few weeks after the Corps expanded its definition of navigable waters of the United States for RHA purposes, Congress passed the Federal Water Pollution Control Act (FWPCA) Amendments of 1972,<sup>28</sup> now known as the CWA. Section 301 of the CWA,<sup>29</sup> with limited exceptions, prohibits the discharge of pollutants into navigable waters in the absence of a CWA permit. Congress gave the U.S. Environmental Protection Agency (EPA) authority to issue permits for wastewater discharges under §402 of the CWA<sup>30</sup> and the Corps authority to issue permits for discharges of dredged and fill material under §404 of the CWA.<sup>31</sup>

Congress defined navigable waters as “waters of the United States, including the territorial seas” in §502(7) of the CWA<sup>32</sup> and indicated in the legislative history of the Act that it wanted to expand the scope of federal regulation beyond the traditional concept of navigable waters.<sup>33</sup> But the Corps initially asserted jurisdiction under §404 only in those areas that it was regulating as navigable waters of the United States under the RHA.<sup>34</sup> In 1975, the Corps lost a federal court battle over this issue in *Natural Resources Defense Council v. Callaway*,<sup>35</sup> and was ordered to revise its regulations to recognize the “full regulatory mandate” of the CWA. In response, the Corps issued interim final regulations defining navigable waters under the CWA to mean “waters of the United States,” which it divided into nine categories.<sup>36</sup> Among the waters included were all navigable waters of the United States and their tributaries, all interstate

18. See Virginia S. Albrecht & Stephen M. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ELR 11042, 11045-46 (Sept. 2002) (discussing H.R. REP. NO. 92-1323, at 27-32 (1972); see also Lance D. Wood, *Don’t Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 ELR 10187, 10198 (Feb. 2004) (characterizing the committee’s report as “essentially the project of one activist chairman of a congressional oversight subcommittee”).

19. Definition of Navigable Water of the United States, 37 Fed. Reg. 18289, 18290 (Sept. 9, 1972).

20. *Id.*

21. *Id.*

22. 501 F.2d 1156 (10th Cir. 1974).

23. *Id.* at 1167 (citations omitted).

24. *Id.* at 1169.

25. *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 9 ELR 20334 (8th Cir. 1979) (Lake Minnetonka); *National Wildlife Fed’n v. Alexander*, 613 F.2d 1054, 10 ELR 20060 (D.C. Cir. 1979) (Devils Lake). In the latter case, the D.C. Circuit concluded that Congress objected to the Corps’ efforts to expand its RHA jurisdiction. In particular, the court pointed to provisions of the Water Resources Development Act of 1976 that completely exempted from §10 three intrastate lakes, 33 U.S.C. §59m, and exempted from the wharf and pier provisions of §10 any intrastate water classified as navigable solely on the basis of historical use, 33 U.S.C. §59l. *National Wildlife Federation*, 613 F.2d at 1064.

26. Wood, *supra* note 18, at 10199.

27. See 33 C.F.R. §§329.6(b), 329.7 (2006).

28. Pub. L. No. 90-500, 86 Stat. 816 (1972).

29. 33 U.S.C. §1311.

30. 33 U.S.C. §1342.

31. 33 U.S.C. §1344.

32. 33 U.S.C. §1362(7).

33. See S. REP. NO. 92-236, at 144 (1972) (Conf. Rep.) (stating that the term “navigable waters” should “be given the broadest possible constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes”).

34. Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12115 (Apr. 3, 1974).

35. 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975).

36. 33 C.F.R. §209.120(d)(2)(i)(a)-(i) (1975).



waters, and all coastal and freshwater wetlands adjacent to other navigable waters. Intrastate lakes, rivers, and streams were included, but only if they were involved in certain aspects of interstate commerce.<sup>37</sup>

As the courts acknowledged the expanded range of federal authority under the CWA, they began referring to navigable waters of the United States as “traditional navigable waters,” a subset of the broader navigable waters regulated under the CWA.<sup>38</sup> In contrast, the Corps’ regulations continued to use the term “navigable waters of the United States” to refer to the traditional scope of federal jurisdiction over the nation’s waters.

### B. The Corps’ 1977 CWA Regulations

The Corps replaced the interim final regulations with final regulations in 1977. At that time, it consolidated the nine categories of waters of the United States into four. Category 1 consisted of “[c]oastal and inland waters, lakes, rivers and streams that are navigable waters of the United States, including adjacent wetlands.”<sup>39</sup>

The Corps explained in the regulatory preamble that “[t]he Federal government’s authority to regulate all activities in or affecting navigable waters of the United States has always been recognized. As we have noted above, waters that fall within this category are also regulated under the River and Harbor Act of 1899.”<sup>40</sup> Thus, Category 1 of “waters of the United States” encompassed only traditional navigable waters. In the Corps’ view, this category included navigable, intrastate waters that at that time or historically had merely a land-based link to interstate commerce. Although the Tenth Circuit had already rejected this theory in *Hardy Salt*, the Corps continued to apply it in states outside that circuit.

As a practical matter, the controversy over the continued highway requirement in the context of the RHA made no difference for purposes of the Corps’ CWA regulations. Virtually all navigable, intrastate waters, along with many non-navigable waters, fell within the broad scope of Category 4, which consisted of:

All other waters of the United States not identified in paragraphs (1)-(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.<sup>41</sup>

This fourth category came to be known commonly as the “other waters provision.” The Corps explained that Category 4 waters were those that are “used in a manner that

makes them part of a chain or connection to the production, movement, and/or use of interstate commerce even though they are not interstate waters or part of a tributary system to navigable waters of the United States.”<sup>42</sup> The actual language of the provision went even further, encompassing any water that had the potential to play a role in interstate commerce (“the degradation or destruction of which could affect interstate commerce”). In a footnote to the text, the Corps said that it intended this provision to cover all “other waters” that Congress could regulate under the Commerce Clause.<sup>43</sup> The footnote justified this far-reaching provision by citing the statement from the 1972 Conference Committee Report that the term navigable waters in the CWA should be given “the broadest possible constitutional interpretation.”<sup>44</sup>

At the same time, the Corps issued a nationwide permit, providing for automatic authorization of fills into most of the “other waters,” without the need for an individual permit.<sup>45</sup> The Corps acknowledged that it was taking this step in response to many comments that questioned its authority over waters within this category.<sup>46</sup>

### C. The Corps’ 1982 CWA Regulations

In 1982, the Corps issued revised CWA regulations, which divided “waters of the United States” into seven categories, the first consisting of “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”<sup>47</sup> Aside from the addition of the reference to tidal waters, this provision set forth essentially the same definition that the Corps had used for navigable waters of the United States in its 1972 RHA regulations. This provision reads identically today and is codified at 33 C.F.R. §328.3(a)(1) (2006). As explained below, the Corps now asserts that this provision describes a special set of traditional navigable waters for CWA purposes that includes navigable, intrastate waters that do not form a continued highway. But this interpretation was far from evident when the Corps issued the regulation in 1982.

Unlike the 1972 RHA regulations, the 1982 CWA regulations did not include the broad definition of interstate commerce that clearly demonstrated an intent to eliminate the continued highway requirement. Furthermore, by this time three federal appeals courts had firmly endorsed the continued highway requirement, no contrary decisions existed, and the Corps had acknowledged that judicial interpretations of navigability trumped its administrative interpretations. If the Corps intended to define a new set of “traditional navigable waters” for purposes of the CWA, it should

37. These were intrastate waters utilized for water-related recreational purposes by interstate travelers; for removal of fish sold in interstate commerce; for industrial purposes by industries engaged in interstate commerce; and in the production of agricultural commodities sold or transported in interstate commerce. 33 C.F.R. §209.120(d)(2)(i)(g)(1)-(4) (1975).

38. The first reported case to use the term was *Leslie Salt Co. v. Froehle*, 403 F. Supp. 1292, 1296, 5 ELR 20039 (N.D. Cal. 1974), *rev’d, modified, and remanded in part on other grounds*, 578 F.2d 742, 8 ELR 20480 (9th Cir. 1978).

39. 33 C.F.R. §323.2(a)(2) (1977).

40. Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122, 37127 (July 19, 1977).

41. 33 C.F.R. §323.2(a)(5) (1977).

42. Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. at 32127-128. Category 2 waters were tributaries of navigable waters of the United States, including adjacent wetlands. 33 C.F.R. §323.2(a)(3) (1977). Category 3 waters were interstate waters and their tributaries, including adjacent wetlands. 33 C.F.R. §323.2(a)(4) (1977). The territorial seas were placed in a separate subsection, 33 C.F.R. §323.2(a)(1) (1977), which the Corps did not count as a category.

43. 33 C.F.R. §323.2(a)(5) n.2 (1977).

44. See *supra* note 33.

45. 33 C.F.R. §323.4-2 (1977).

46. Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. at 37128.

47. 33 C.F.R. §323.2(a)(1) (1983).

have made its intent clear in the public notice for the 1982 regulations, so that the public could have provided comment under the rulemaking provisions of the Administrative Procedure Act,<sup>48</sup> however, neither the public notice nor the preamble to the final regulations mentioned this subject.<sup>49</sup>

In any event, the “other waters” provision still provided a fallback for the assertion of CWA jurisdiction over any water that might have some relationship to interstate commerce. As revised in 1982, that provision read:

All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters:

- (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
- (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- (iii) Which are used or could be used for industrial purposes by industries in interstate commerce.<sup>50</sup>

The other waters provision reads identically today.<sup>51</sup>

### III. Supreme Court Rulings Concerning CWA Jurisdiction

On three occasions the Supreme Court has ruled whether particular waters fall under the jurisdiction of the CWA. Although the precise geographic scope of waters of the United States remains in question, a majority of the Court has determined that it extends no further than to traditional navigable waters, tributaries of traditional navigable waters, and wetlands adjacent to either. In addition, a majority of the Court equates traditional navigable waters with navigable waters of the United States, thus excluding navigable, intrastate waters that do not form a continued highway.

#### A. United States v. Riverside Bayview Homes<sup>52</sup>

In *Riverside Bayview Homes*, a unanimous Supreme Court ruled that the term “waters of the United States” includes a wetland adjacent to a traditional navigable water. The Court found that the CWA’s definition of “navigable waters” as “waters of the United States” evidenced congressional in-

tent “to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.”<sup>53</sup> The Court did not specifically identify the outer limits of CWA authority; however, it said that the Corps did not act unreasonably in asserting authority over wetlands adjacent to other bodies of water over which it had jurisdiction, because those wetlands are “inseparably bound up with the ‘waters’ of the United States.”<sup>54</sup>

#### B. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)<sup>55</sup>

In 1986, without notice and comment, the Corps essentially supplemented the other waters provision by issuing the “Migratory Bird Rule,” stating in a regulatory preamble that the term “waters of the United States” includes intrastate waters used or potentially useable as habitat by birds that are protected under Migratory Bird Treaties or that migrate across state lines.<sup>56</sup> That rule was the subject of *SWANCC*, which provided the first indication of the Court’s view that CWA jurisdiction is limited to traditional navigable waters, their tributaries, and adjacent wetlands.

In *SWANCC*, the Corps relied on the Migratory Bird Rule in determining that a group of isolated, non-navigable, intrastate ponds were waters of the United States. The Supreme Court struck down the rule, holding that the CWA did not allow the Corps to regulate the ponds as waters of the United States merely because they provided habitat for migratory birds.

The Court rejected the Corps’ argument that the ponds were jurisdictional under the precedent of *Riverside Bayview*. The Court noted that it had described the wetlands at issue in the earlier case as “inseparably bound up with the ‘waters’ of the United States[,]” adding that “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.”<sup>57</sup> In contrast, the Court said that the CWA’s reach did not extend to the waters at issue in *SWANCC*, because they were “ponds that are *not* adjacent to open water.”<sup>58</sup>

The Court acknowledged the statement in the CWA’s legislative history that navigable waters should “be given the broadest possible constitutional interpretation.”<sup>59</sup> Nonetheless, the Court found that nothing in the Act’s legislative history “signifies that Congress intended to exert anything more than its commerce power over navigation.”<sup>60</sup> Because *The Daniel Ball* limits Congress’ power to regulate naviga-

48. See 5 U.S.C. §553.

49. See Proposal to Amend Permit Regulations for Controlling Certain Activities in Waters of the United States, 45 Fed. Reg. 62732, 62733 (Sept. 19, 1980); Interim Final Rule for Regulatory Programs for the Corps of Engineers, 47 Fed. Reg. 31794, 31795 (July 22, 1982) (codified in scattered sections of 33 C.F.R.) (preamble to final regulations).

50. 33 C.F.R. §328.3(a)(3). In *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984), the court relied on this provision in rejecting a challenge to the Corps’ assertion of CWA jurisdiction over Utah Lake, a navigable, intrastate lake that has no navigable tributaries and drains into the GSL via the Jordan River. The court concluded that Congress had exercised the full extent of its Commerce Clause authority in enacting the CWA. Thus, the court reasoned, the Corps could regulate Utah Lake under the CWA as long as the lake supported an activity that either individually or in the aggregate might “have a substantial economic effect on interstate commerce,” although the lake itself does not cross state lines or connect to a navigable water body that crosses state lines. *Id.* at 803-04.

51. See 33 C.F.R. §328.3(a)(3) (2006).

52. 474 U.S. 121, 16 ELR 20086 (1985).

53. *Id.* at 133 (citations omitted).

54. *Id.* at 134.

55. 531 U.S. 159, 31 ELR 20382 (2001).

56. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986) (codified in scattered sections of 33 C.F.R.). The Migratory Bird Rule also states that the “waters of the United States” include isolated waters used or potentially useable by endangered species and isolated waters used to irrigate crops sold in interstate commerce.

57. *SWANCC*, 531 U.S. at 167.

58. *Id.* at 168.

59. See *supra* note 33.

60. *SWANCC*, 531 U.S. at 168 n.3.

tion under the Commerce Clause to the protection of “navigable waters of the United States,” this comment suggested strongly that CWA jurisdiction is limited to traditional navigable waters and other waters that may affect traditional navigable waters, i.e., tributaries and adjacent wetlands.<sup>61</sup> Elsewhere in the opinion, the Court more explicitly made this point by tying the use of the term “navigable” in the CWA to the “traditional” scope of Congress’ authority over waters:

The term “navigable” has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made. *See, e.g., United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940).<sup>62</sup>

As noted, *Appalachian Power* only extends the *Daniel Ball* test to waters that can be made navigable with reasonable improvements. This, of course, did not affect the continued highway requirement.

The Corps urged judicial deference to its interpretation that the CWA allowed it to regulate nonnavigable, isolated waters under the Migratory Bird Rule.<sup>63</sup> But the Court found that this argument raised “significant constitutional and federalism questions” that it should avoid if possible.<sup>64</sup> The constitutionality of the rule was problematic because the Corps tried to justify it as an exercise of Congress’ authority to regulate activities that “substantially affect” interstate commerce. The Court concluded that this argument required it to “evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce.”<sup>65</sup> The Corps, however, had not clearly identified that object or activity. The Court found a federalism problem because the Migratory Bird Rule amounted to “a significant impingement of the States’ traditional and primary power over land and water use.”<sup>66</sup> In order to avoid these problems, the Court determined that it must “read the statute as written,”<sup>67</sup> alluding to its ruling that the word “navigable” indicates that Congress intended the CWA to focus on the protection of traditional navigable waters, as defined by *The Daniel Ball* and *Appalachian Power*.

61. One article argues that Congress specifically intended the 1972 FWPCA Amendments to cover all navigable, intrastate lakes. Albrecht & Nickelsburg, *supra* note 18, at 11045-49. That argument relies on congressional hearings and floor statements that were largely unrelated to the FWPCA. *See* Wood, *supra* note 18, at 10197-98. The Wood article nevertheless suggests that Congress intended the FWPCA Amendments to include navigable, intrastate waters that are not part of a continued highway. *Id.* at 10201. The only specific evidence on this point cited by either article consists of two floor statements made by Sen. Edmund Muskie (D-Me.) and Rep. John Dingell (D-Mich.), respectively. *See* Albrecht & Nickelsburg, *supra* note 18, at 11048 n.60 (quoting 1 CONGRESSIONAL RESEARCH SERVICE, LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 178 (1973)); Wood, *supra* note 18, at 10201 (quoting 1 CONGRESSIONAL RESEARCH SERVICE, LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 250-51 (1973)).

62. *SWANCC*, 531 U.S. at 172.

63. *Id.*

64. *Id.* at 174.

65. *Id.* at 173.

66. *Id.* at 174.

67. *Id.*

## 1. The Lower Courts’ Application of *SWANCC*

Most courts interpreted *SWANCC* narrowly, holding that it only slightly restricted the reach of CWA jurisdiction.<sup>68</sup> Among the courts of appeals, only the U.S. Court of Appeals for the Fifth Circuit interpreted *SWANCC* broadly. That court ruled in two cases that *SWANCC* limits CWA jurisdiction to wetlands contiguous to navigable-in-fact waters.<sup>69</sup> The Fifth Circuit explained that inland waters are navigable-in-fact when they meet the test set forth in *The Daniel Ball*, as modified by *Appalachian Power* and *Economy Light*.<sup>70</sup>

## 2. The Corps’ Response to *SWANCC*

Although most courts adopted a narrow view of *SWANCC*, the “other waters” provision was clearly in jeopardy. As noted in one decision, albeit in dicta, “the only logical extension” of *SWANCC* would eliminate all isolated, intrastate waters from CWA jurisdiction.<sup>71</sup>

In a joint memorandum addressing *SWANCC*, the General Counsels of the Corps and EPA acknowledged that the Supreme Court not only invalidated the Migratory Bird Rule but may have eliminated completely the rationale underlying the other waters provision. The memorandum announced that thenceforth agency field staff would assert CWA jurisdiction over isolated waters or non-navigable, intrastate waters only with the specific approval of their headquarters.<sup>72</sup>

The potential demise of the other waters provision left the first category of waters of the United States—33 C.F.R. §328(a)(1)—as the Corps’ only option for asserting CWA jurisdiction over the GSL and any other navigable, intrastate water that terminates in a closed basin. In an effort to preserve its jurisdictional claims over such waters, the Corps, with help from EPA, administratively redefined traditional navigable waters, ostensibly eliminating the continued highway requirement. The joint memorandum noted that 33 C.F.R. §328.3(a)(1) describes traditional navigable waters,

68. *See, e.g., Treacy v. Newdunn Assos., LLP*, 344 F.3d 407, 415, 33 ELR 20268 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) (*SWANCC* applies only to waters that are not “inseparably bound up with the ‘waters of the United States’”); *United States v. Krilich*, 303 F.3d 784, 791, 33 ELR 20035 (7th Cir. 2002), *cert. denied*, 538 U.S. 977 (2003) (*SWANCC* only invalidated the Migratory Bird Rule); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533, 31 ELR 20535 (9th Cir. 2001) (*SWANCC* applies only to waters that are hydrologically isolated).

69. *In re Needham*, 354 F.3d 340, 345-46, 34 ELR 20009 (5th Cir. 2003); *Rice v. Harken*, 250 F.3d 264, 269, 31 ELR 20599 (5th Cir. 2001). Both cases involved the Oil Pollution Act (OPA), 33 U.S.C. §§2701 et seq.; however, the court addressed *SWANCC* because it found that the geographic scope of jurisdiction under the OPA is identical to that of the CWA. *In re Needham*, 354 F.3d at 344; *Rice*, 250 F.3d at 267-68.

70. *In re Needham*, 354 F.3d at 346-47.

71. *See United States v. Rueth Dev. Co.*, 335 F.3d 598, 603, 33 ELR 20238 (7th Cir. 2003). The U.S. Court of Appeals for the Fourth Circuit had previously ruled both the Migratory Bird Rule and the “other waters” provision unlawful on other grounds. *See United States v. Wilson*, 133 F.3d 251, 256-57, 28 ELR 20299 (4th Cir. 1997); *Tabb Lakes Ltd. v. United States*, 715 F. Supp. 726, 19 ELR 20672 (E.D. Va. 1988), *affd without opinion*, 885 F.2d 866, 20 ELR 20008 (4th Cir. 1989).

72. Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991, 1996, App. A (Jan. 15, 2003) (to be codified at 33 C.F.R. pt. 328).



adding that for purposes of the CWA, “[t]hese traditional navigable waters . . . include waters which, although used, susceptible [sic] to use, or historically used, to transport goods or people in commerce, do *not* form part of a continuous waterborne [sic] highway.”<sup>73</sup> Thus, the agencies attempted to cushion the impact of *SWANCC* by creating the impression that, for purposes of the CWA, there exists a special set of traditional navigable waters to which the continued highway requirement does not apply. In addition, the joint memorandum asserted that isolated, intrastate waters are navigable “if they meet any of the tests for being navigable-in-fact. *See, e.g., Colvin v. United States* 181 F. Supp. 2d 1050 (C.D. Cal. 2001) (isolated man-made water body capable of boating found to be ‘water of the United States’).”<sup>74</sup>

Arguably, the issuance of this new administrative definition of traditional navigable waters for CWA purposes required notice and comment under the Administrative Procedure Act; however, the agencies did not initiate a rulemaking or even acknowledge that anything had changed. Moreover, the sole authority cited by the joint memorandum for the new administrative definition was one district court case, *Colvin v. United States*,<sup>75</sup> which the memorandum discussed in a manner that was confused at best and specious at worst.

Prior to *SWANCC*, the defendant in *Colvin* was criminally convicted and sentenced for discharging fill into the Salton Sea without a §404 permit. Subsequently, he sought to vacate his conviction, arguing that *SWANCC* eliminated CWA jurisdiction over that water body, which is actually not a sea, but an isolated, intrastate lake. The district court, however, ruled that *SWANCC* had merely invalidated the Migratory Bird Rule and did not affect other potential grounds on which the jury could have found that the Salton Sea was a water of the United States.<sup>76</sup> The court then determined that the trial record contained sufficient evidence to support the jury’s finding on those other grounds, stating that “[u]nder most any meaning of the term [sic], the Salton Sea is a body of ‘navigable water’ and a ‘water of the United States.’”<sup>77</sup>

According to the joint memorandum, *Colvin* held that the Salton Sea fell under 33 C.F.R. §328(a)(1) because it is capable of boating. Relying on that interpretation, the memorandum concluded that the mere presence of “boating” establishes that an isolated, intrastate water is “capable of supporting navigation by watercraft” and is therefore a traditional navigable water.<sup>78</sup> In reality, *Colvin* relied only partially on subsection (a)(1), and that reliance was based on the curious conclusion that the Salton Sea, although landlocked and located many miles from the coast, has a “tide.”<sup>79</sup> The only mention of boating in *Colvin* concerned recre-

ational boats<sup>80</sup> and was part of the court’s analysis that applied the factors from the other waters provision:

The trial record reflects that the Salton Sea is a popular destination for out-of-state and foreign tourists who fish and recreate in and on its waters and shoreline. Some tourists visit the Salton Sea for medicinal purposes, believing its water is good for their skin. Other international and domestic visitors frequent the Salton Sea to water ski, fish, hunt ducks and race boats and jet skis on the Sea. Many Canadian tourists frequent the Sea in the winter, while many others use it in the summer.<sup>81</sup>

By finding that the Salton Sea had a tide, the court entirely begged the question of the continued highway requirement. As explained above, the *Daniel Ball* test does not apply to tidal waters.<sup>82</sup> Thus, even *Colvin* does not support the notion that traditional navigable waters include intrastate, navigable waters that fail to form a continued highway.

### C. Rapanos

The Supreme Court most recently addressed CWA jurisdiction in *Rapanos*,<sup>83</sup> which consisted of two consolidated cases. This decision further demonstrates that a majority of the Court is convinced that traditional navigable waters do not include navigable, intrastate waters that fail to form a continued highway.

In the lead case, *United States v. Rapanos*, a civil enforcement matter, the defendants filled wetlands at five sites in central Michigan without a §404 permit. The district court found John A. Rapanos liable for the unpermitted filling of “adjacent wetlands” at three of the sites. The district court determined that those wetlands were adjacent to ditches or man-made drains that eventually led to traditional navigable waters, located as far as 20 miles away. The Sixth Circuit affirmed the judgment, based on its conclusion that the wetlands were waters of the United States merely because they had a hydrological connection to traditional navigable waters.<sup>84</sup>

The companion case, *Carabell v. Corps of Engineers*, involved another Michigan landowner who challenged the Corps’ assertion of CWA jurisdiction over a wetland located approximately one mile from Lake St. Clair, a traditional navigable water. A man-made berm separated the Carabell wetland from a man-made drainage ditch that eventually led to the lake. In an administrative appeal, the Corps ruled that the wetland was subject to the CWA merely because it fell

73. *Id.* at 1996 n.2 (emphasis added).

74. *Id.*

75. 181 F. Supp. 2d 1050 (C.D. Cal. 2001), *affd.*, 246 F.3d 676 (9th Cir. 2000) (table), *cert. denied*, 532 U.S. 982 (2001).

76. *Id.* at 1055.

77. *Id.*

78. Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. at 1996-97.

79. *Colvin*, 181 F. Supp. 2d at 1055. Although inland lakes experience minuscule changes in water level due to the gravitational forces of the moon and the sun, *Colvin* appears to be the only instance where the term “tide” has been applied to an inland water in the context of regulatory jurisdiction.

80. Contrary to the joint memorandum, a determination of navigability requires more than a mere showing that a water is “capable of supporting navigation by watercraft.” Both well established case law and the Corps’ own regulations explicitly require a showing that the navigational capacity of the water is of a commercial nature. The presence of recreational boating is merely a possible indication that a water is capable of supporting commercial navigation. *See United States v. Appalachian Elec. Power*, 311 U.S. 377, 416 (1940) (conclusion of navigability may be made where “personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation”); 33 C.F.R. §329.6(a) (“[T]he presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce . . .”). The *Colvin* decision did not address the issue of commercial navigability.

81. *Colvin*, 181 F. Supp. at 1055 (emphasis added).

82. *See supra* note 15.

83. *United States v. Rapanos*, 126 S. Ct. 2208, 36 ELR 20116 (2006).

84. *United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004).

under the Corps' definition of "adjacent."<sup>85</sup> The landowner challenged the ruling in a district court, but lost on summary judgment<sup>86</sup> and the Sixth Circuit affirmed.<sup>87</sup>

By a five-to-four vote, the Supreme Court vacated and remanded both judgments. As noted above, the five Justices who voted to vacate agreed that the lower courts had used the wrong standard to determine whether the wetlands were waters of the United States, but those Justices could not agree on the correct standard.

The plurality said that the term waters of the United States "includes only relatively permanent, standing or flowing bodies of water," thereby excluding intermittent and ephemeral streams from consideration as tributaries. Wetlands are covered by the CWA, the plurality concluded, only if they have a continuous surface connection to another water of the United States that is "connected to traditional interstate navigable waters."<sup>88</sup> Thus, in the plurality's view, CWA jurisdiction extends only to (1) traditional navigable waters; (2) standing or flowing waters that have a more-or-less constant, surface hydrological connection to traditional navigable waters; and (3) wetlands that are continuously connected to either. This interpretation would eliminate CWA jurisdiction over any water that falls only within the other waters provision.

By specifying that the jurisdictional trigger is a continuous surface connection to a traditional navigable water that is "interstate," the plurality implicitly rejected the notion that, for purposes of the CWA, there exists a special set of traditional navigable waters, to which the continued highway requirement does not apply. The plurality also made that point explicitly, equating 33 C.F.R. §328.3(a)(1) with traditional interstate navigable waters.<sup>89</sup> Thus, under the plurality's interpretation, navigable, intrastate waters that fail to form a continued highway are not subject to the CWA.

Justice Kennedy voted with the plurality, but relied on a different rationale, which he set forth in a concurring opinion. He stated that any non-navigable water that flows into a traditional navigable water is a water of the United States if it has a "significant nexus" to the navigable water, regardless of the duration or frequency of its flow.<sup>90</sup> He rebuffed the plurality's requirement of a continuous surface connection for wetlands jurisdiction, stating that the significant nexus test should govern that determination as well. As he put it, "[c]onsistent with *SWANCC* and *Riverside Bayview* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."<sup>91</sup>

Justice Kennedy did not define significant nexus, making it difficult to compare his test meaningfully to that of the

plurality.<sup>92</sup> This problem notwithstanding, his requirement that the significant nexus exist between the wetlands and "navigable waters in the traditional sense" indicated that he agreed with the plurality's view that CWA jurisdiction is limited to traditional navigable waters, their tributaries, and adjacent wetlands, although he defined "tributary" and "adjacent" differently than did the plurality. In addition, Justice Kennedy agreed with the plurality's concept of traditional navigable waters. This agreement is apparent from the earlier part of his opinion, where he observed that 33 C.F.R. §328.3(a)(1) describes the navigable waters of the United States, as defined in *The Daniel Ball* and *Appalachian Power*:

In a regulation the Corps has construed the term "waters of the United States" to include not only waters susceptible to use in interstate commerce—the traditional understanding of the term "navigable waters of the United States," see e.g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406-408, 61 S. Ct. 291, 85 L. Ed. 243 (1940); *The Daniel Ball*, 10 Wall. 557, 563-564 (1871)—but also tributaries of those waters and, of particular relevance here, wetlands adjacent to those waters or their tributaries. 33 C.F.R. §§328.3(a)(1), (5), (7) (2005).<sup>93</sup>

By tying subsection (a)(1) to *The Daniel Ball* and *Appalachian Power*, Justice Kennedy, like the plurality, expressed the view that an inland water is traditionally navigable only if it forms a continued highway over which commerce is carried into another state or country by water. Like the plurality, Justice Kennedy has concluded that there is only one set of traditional navigable waters and that it is synonymous with "navigable waters of the United States." This leaves the Corps no room to argue that subsection (a)(1) describes a second set of traditional navigable waters to which the continued highway requirement does not apply.

#### D. The Corps' and EPA's Response to Rapanos

On June 5, 2007 the Corps and EPA issued a guidance memorandum to EPA regions and Corps districts to implement the *Rapanos* decision, along with responses to key questions relating to the guidance (*Rapanos* Guidance Mem.). The guidance memorandum asserts that "[w]hen there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices."<sup>94</sup> Based on this concept, the agencies have adopted a hybrid approach that purportedly identifies "those waters that are subject to CWA jurisdiction under the reasoning of a majority of the justices."<sup>95</sup> First, the agen-

85. See 33 C.F.R. §328.3(c) ("The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'").

86. *Carabell v. Corps of Eng'rs*, 257 F. Supp. 2d 917 (E.D. Mich. 2003).

87. *Carabell v. Corps of Eng'rs*, 391 F.3d 704, 34 ELR 20147 (6th Cir. 2004).

88. *Rapanos*, 126 S. Ct. at 2227 (emphasis added).

89. *Id.* at 2216.

90. *Id.* at 2241.

91. *Id.* at 2248.

92. Justice John Paul Stevens wrote a dissenting opinion, in which Justices David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer joined. The dissent endorsed the Corps' surface connection theory, which prescribes that a wetland is "adjacent" if water can flow from that wetland across the surface of the land and eventually reach a traditional navigable water, regardless of the frequency and volume of flow. *Id.* at 2256-57. The dissent also endorsed the Corps' position that a wetland may be "adjacent" although it has no hydrologic connection to another water. *Id.* at 2263.

93. *Id.* at 2237.

94. *Rapanos* Guidance Mem. at 3, citing *Marks v. United States*, 430 U.S. 188, 193-94 (1977); *Waters v. Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring); *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2607 (2006); *Alexander v. Sandoval*, 532 U.S. 275, 281-82 (2001).

95. *Rapanos* Guidance Mem. at 3.



cies assert CWA jurisdiction over all waters that meet the plurality's jurisdictional test, which they interpret to cover traditional navigable waters; wetlands adjacent to traditional navigable waters; traditional navigable waters' non-navigable tributaries that "are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months);" and wetlands directly abutting such tributaries.<sup>96</sup> Second, the agencies assert CWA jurisdiction over the following additional waters if a fact-specific analysis shows them to have a significant nexus with a traditional navigable water: non-navigable tributaries that are not relatively permanent, and wetlands that are adjacent to but do not directly abut non-navigable tributaries that are relatively permanent.<sup>97</sup> According to the guidance memorandum, the significant nexus standard turns on "the flow parameters and ecological functions" described by Justice Kennedy.<sup>98</sup> Finally, the agencies disclaim jurisdiction over swales, erosional features, or "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water[.]"<sup>99</sup>

The guidance memorandum specifically equates subsection 33 C.F.R. §328.3(a)(1) with traditional navigable wa-

ters, but asserts that "[t]he '(a)(1)' waters include all of the 'navigable waters of the United States,' defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN)."<sup>100</sup> Significantly, the agencies did not cite any authority for the assertion that the lakes fall within subsection (a)(1). Moreover, this aspect of the guidance directly conflicts with "those principles espoused by five or more justices" because, as explained above, both the plurality and Justice Kennedy would exclude terminal, intrastate lakes from the scope of subsection (a)(1).

#### IV. Conclusion

In *Rapanos*, a majority of the Supreme Court made clear that it recognizes only one set of traditional navigable waters and that the test set forth in *The Daniel Ball* remains good law. The Corps has no legal basis for redefining that term to encompass navigable, intrastate waters that do not form a continued highway of interstate or foreign commerce. The GSL and other navigable, intrastate waters that terminate in a closed basin are within the exclusive domain of the individual states; the Corps, as well as EPA, lacks authority to regulate them under the CWA.

---

96. *Id.* 4-5.

97. *Id.* at 5-6.

98. *Id.* at 8.

99. *Id.* at 11.

---

100. *Id.* at 5 n.19.