Appendix A

Joint Memorandum

Introduction

This document provides clarifying guidance regarding the Supreme Court's decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers,* 531 U.S. 159 (2001) (''SWANCC'') and addresses several legal issues concerning Clean Water Act (''CWA'') jurisdiction that have arisen since *SWANCC* in various factual scenarios involving federal regulation of ''navigable waters.'' Because the case law interpreting *SWANCC* has developed over the last two years, the Agencies are issuing this updated guidance, which supersedes prior guidance on this issue. The Corps and EPA are also initiating a rulemaking process to collect information and to consider jurisdictional issues as set forth in the attached ANPRM. Jurisdictional decisions will be based on Supreme Court cases including *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985) and *SWANCC,* regulations, and applicable case law in each jurisdiction.

Background

In *SWANCC,* the Supreme Court held that the Army Corps of Engineers had exceeded its authority in asserting CWA jurisdiction pursuant to section 404(a) over isolated, intrastate, non-navigable waters under 33 C.F.R. 328.3(a)(3), based on their use as habitat for migratory birds pursuant to preamble language commonly referred to as the ''Migratory Bird Rule,'' 51 FR 41217 (1986). ''Navigable waters'' are defined in section 502 of the CWA to mean ''waters of the United States, including the territorial seas.'' In *SWANCC,* the Court determined that the term ''navigable'' had significance in indicating the authority Congress intended to exercise in asserting CWA jurisdiction. 531 U.S. at 172. After reviewing the jurisdictional scope of the statutory definition of ''navigable waters'' in section 502, the Court concluded that neither the text of the statute nor its legislative history supported the

Corps' assertion of jurisdiction over the waters involved in *SWANCC. Id.* at 170–171.

In *SWANCC,* the Supreme Court recognized that ''Congress passed the CWA for the stated purpose of 'restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters' '' and also noted that ''Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.' '' *Id.* at 166–67 (citing 33 U.S.C. 1251(a) and (b)). However, expressing ''serious constitutional and federalism questions'' raised by the Corps' interpretation of the CWA, the Court stated that ''where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.'' *Id.* at 174, 172. Finding ''nothing approaching a clear statement from Congress that it intended section 404(a) to reach an abandoned sand and gravel pit'' (*id.* at 174), the Court held that the Migratory Bird Rule, as applied to petitioners' property, exceeded the agencies' authority under section 404(a). *Id.* at 174.

The Scope of CWA Jurisdiction After SWANCC

Because *SWANCC* limited use of 33 CFR § 328.3(a)(3) as a basis of jurisdiction over certain isolated waters, it has focused greater attention on CWA jurisdiction generally, and specifically over tributaries to jurisdictional waters and over wetlands that are ''adjacent wetlands'' for CWA purposes.

As indicated, section 502 of the CWA defines the term navigable waters to mean ''waters of the United States, including the territorial seas.'' The Supreme Court has recognized that this definition clearly includes those waters that are considered traditional navigable waters. In *SWANCC,* the Court noted that while ''the word 'navigable' in the statute was of 'limited import' '' (quoting *Riverside,* 474 U.S. 121 (1985)), ''the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'' 531 U.S. at 172. In addition, the Court reiterated in *SWANCC* that Congress evidenced its intent to regulate ''at least some waters that would not be deemed 'navigable' under the classical understanding of that term.'' *SWANCC* at 171 (quoting *Riverside,* 474 U.S. at 133). Relying on that intent, for many years, EPA and the Corps have interpreted their regulations to assert CWA jurisdiction over non-navigable tributaries of navigable waters and their adjacent wetlands. Courts have upheld the view that traditional navigable waters and, generally speaking, their tributary systems (and their adjacent wetlands) remain subject to CWA jurisdiction.

Several federal district and appellate courts have addressed the effect of *SWANCC* on CWA jurisdiction, and the case law on the precise scope of federal CWA jurisdiction in light of *SWANCC* is still developing. While a majority of cases hold that *SWANCC* applies only to waters that are isolated, intrastate and non-navigable, several courts have interpreted *SWANCC*'s reasoning to apply to waters other than the isolated waters at issue in that case. This memorandum attempts to add greater clarity concerning federal CWA jurisdiction following *SWANCC* by identifying specific categories of waters, explaining which categories of waters are jurisdictional or non-jurisdictional, and pointing out where more refined factual and legal analysis will be required to make a jurisdictional determination.

Although the *SWANCC* case itself specifically involved Section 404 of the CWA, the Court's decision may affect the scope of regulatory jurisdiction under other provisions of the CWA as well, including the Section 402 NPDES program, the Section 311 oil spill program, water quality standards under Section 303, and Section 401 water quality certification. Under each of these sections, the relevant agencies have jurisdiction over ''waters of the United States.'' CWA section 502(7).

This memorandum does not discuss the exact factual predicates that are necessary to establish jurisdiction in individual cases. We recognize that the field staff and the public could benefit from additional guidance on how to apply the applicable legal principles to individual cases.[1] Should questions arise concerning CWA jurisdiction, the regulated community should seek assistance from the Corps and EPA.

A. Isolated, Intrastate Waters That are Non-Navigable

SWANCC squarely eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations. 531 U.S. at 174 (''We hold that 33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 FR 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA.''). The EPA and the Corps are now precluded from asserting CWA jurisdiction in such situations, including over waters such as isolated, non-navigable, intrastate vernal pools, playa lakes and pocosins. *SWANCC* also calls into question whether CWA jurisdiction over isolated, intrastate, non-navigable waters could now be predicated on the other factors listed in the Migratory Bird Rule, 51 FR 41217 (*i.e.*, use of the water as habitat for birds protected by Migratory Bird Treaties; use of the water as habitat for Federally protected endangered or threatened species; or use of the water to irrigate crops sold in interstate commerce).

By the same token, in light of *SWANCC,* it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.3(a)(3)(i)–(iii) over isolated, non-navigable, intrastate waters (*i.e.*, use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce). Furthermore, within the states comprising the Fourth Circuit, CWA jurisdiction under 33 CFR § 328.3(a)(3) in its entirety has been precluded since 1997 by the Fourth Circuit's ruling in *United States* v. *Wilson,* 133 F. 3d 251, 257 (4th Cir. 1997) (invalidating 33 CFR § 328.3(a)(3)).

In view of *SWANCC,* neither agency will assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the ''Migratory Bird Rule.'' In addition, in view of the uncertainties after *SWANCC* concerning jurisdiction over isolated waters that are both intrastate and non-navigable based on other grounds listed in 33 CFR § 328.3(a)(3)(i)–(iii), field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters, including permitting and enforcement actions.

B. Traditional Navigable Waters

As noted, traditional navigable waters are jurisdictional. Traditional navigable waters are waters that are subject to the ebb and flow of the tide, or waters that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. 33 CFR § 328.3(a)(1); *United States* v. *Appalachian Elec. Power Co.,* 311 U.S. 377, 407–408 (1940) (water considered navigable, although not navigable at present but could be made navigable with reasonable improvements); *Economy Light & Power Co.* v. *United States,* 256 U.S. 113 (1911) (dams and other structures do not eliminate navigability); *SWANCC,* 531 U.S. at 172 (referring to traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made).[2]

In accord with the analysis in *SWANCC,* waters that fall within the definition of traditional navigable waters remain jurisdictional under the CWA. Thus, isolated, intrastate waters that are capable of supporting navigation by watercraft remain subject to CWA jurisdiction after SWANCC if they are traditional navigable waters, *i.e.*, 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

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

[2] These traditional navigable waters are not limited to those regulated under Section 10 of the Rivers and Harbors Act of 1899; traditional navigable waters include waters which, although used, susceptibale to use, or historically used, to transport goods or people in commerce, do not form part of a continuous wateborne highway.

man-made water body capable of boating found to be ''water of the United States'').

C. Adjacent Wetlands

(1) Wetlands Adjacent to Traditional Navigable Waters

CWA jurisdiction also extends to wetlands that are adjacent to traditional navigable waters. The Supreme Court did not disturb its earlier holding in *Riverside* when it rendered its decision in *SWANCC. Riverside* dealt with a wetland adjacent to Black Creek, a traditional navigable water. 474 U.S. 121 (1985); *see also SWANCC,* 531 U.S. at 167 (''[i]n *Riverside,* we held that the Corps had section 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway''). The Court in *Riverside* found that ''Congress'; concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with' '' jurisdictional waters. 474 U.S. at 134. Thus, wetlands adjacent to traditional navigable waters clearly remain jurisdictional after *SWANCC.* The Corps and EPA currently define 'adjacent' as ''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.' '' 33 CFR § 328.3(b); 40 CFR § 230.3(b). The Supreme Court has not itself defined the term ''adjacent,'' nor stated whether the basis for adjacency is geographic proximity or hydrology.

(2) Wetlands Adjacent to Non-Navigable Waters

The reasoning in Riverside, as followed by a number of post-SWANCC courts, supports jurisdiction over wetlands adjacent to non-navigable waters that are tributaries to navigable waters. Since SWANCC, some courts have expressed the view that SWANCC raised questions about adjacency jurisdiction, so that wetlands are jurisdictional only if they are adjacent to navigable waters. *See, e.g., Rice* v. *Harken,* discussed *infra.*

D. Tributaries

A number of court decisions have held that *SWANCC* does not change the principle that CWA jurisdiction extends to tributaries of navigable waters. *See, e.g., Headwaters* v. *Talent Irrigation Dist.,* 243 F.3d 526, 534 (9th Cir. 2001) (''Even tributaries that flow intermittently are 'waters of the United States' ''); *United States* v. *Interstate Gen. Co,* No. 01–4513, slip op. at 7, 2002 WL 1421411 (4th Cir. July 2, 2002), *aff'ing* 152 F. Supp. 2d 843 (D. Md. 2001) (refusing to grant writ of coram nobis; rejecting argument that *SWANCC* eliminated jurisdiction over wetlands adjacent to non-navigable tributaries); *United States* v. *Krilich,* 393F.3d 784 (7th Cir. 2002) (rejecting motion to vacate consent decree, finding that *SWANCC* did not alter regulations interpreting ''waters of the U.S.'' other than 33 C.F.R. § 328.3(a)(3)); *Community Ass. for Restoration of the Env't* v. *Henry Bosma Dairy,* 305 F.3d 953 (9th Cir. 2002) (drain that flowed into a canal that flows into a river is jurisdictional); *Idaho Rural Council* v. *Bosma,* 143 F. Supp. 2d 1169, 1178 (D. Idaho 2001) (''waters of the United States include waters that are tributary to navigable waters''); *Aiello* v. *Town of Brookhaven,* 136 F. Supp. 2d 81, 118 (E.D. N.Y. 2001) (non-navigable pond and creek determined to be tributaries of navigable waters, and therefore ''waters of the United States under the CWA''). Jurisdiction has been recognized even when the tributaries in question flow for a significant distance before reaching a navigable water or are several times removed from the navigable waters (*i.e.,* ''tributaries of tributaries''). *See, e.g., United States* v. *Lamplight Equestrian Ctr.,* No. 00 C 6486, 2002 WL 360652, at *8 (ND. Ill. Mar. 8, 2002) (''Even where the distance from the tributary to the navigable water is significant, the quality of the tributary is still vital to the quality of navigable waters''); *United States* v. *Buday,* 138 F. Supp. 2d 1282, 1291–92 (D. Mont. 2001) (''water quality of tributaries * * * distant though the tributaries may be from navigable streams, is vital to the quality of navigable waters''); *United States* v. *Rueth Dev. Co.,* No. 2:96CV540, 2001 WL 17580078 (N.D. Ind. Sept. 26, 2001) (refusing to reopen a consent decree in a CWA case and determining that jurisdiction remained over wetlands adjacent to a non-navigable (man-made) waterway that flows into a navigable water).

Some courts have interpreted the reasoning in *SWANCC* to potentially circumscribe CWA jurisdiction over tributaries by finding CWA jurisdiction attaches only where navigable waters and waters immediately adjacent to navigable waters are involved. *Rice* v. *Harken* is the leading case taking the narrowest view of CWA jurisdiction after *SWANCC.* 250 F.3d 264 (5th Cir. 2001) (rehearing denied). *Harken* interpreted the scope of ''navigable waters'' under the Oil Pollution Act (OPA). The Fifth Circuit relied on *SWANCC* to conclude ''it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water.'' 250 F.3d at 269. The analysis in *Harken* implies that the Fifth Circuit might limit CWA jurisdiction to only those tributaries that are traditionally navigable or immediately adjacent to a navigable water.

A few post-*SWANCC* district court opinions have relied on *Harken* or reasoning similar to that employed by the Harken court to limit jurisdiction. *See, e.g., United States* v. *Rapanos,* 190 F. Supp. 2d 1011(E.D. Mich. 2002) (government appeal pending) (''the Court finds as a matter of law that the wetlands on Defendant's property were not directly adjacent to navigable waters, and therefore, the government cannot regulate Defendant's property.''); *United States* v. *Needham,* No. 6:01–CV–01897, 2002 WL 1162790 (W.D. La. Jan. 23, 2002) (government appeal pending) (district court affirmed finding of no liability by bankruptcy court for debtors under OPA for discharge of oil since drainage ditch into which oil was discharged was found to be neither a navigable water nor adjacent to an open body of navigable water). *See alsoUnited States* v. *Newdunn,* 195 F. Supp. 2d 751 (E.D. Va. 2002) (government appeal pending) (wetlands and tributaries not contiguous or adjacent to navigable waters are outside CWA jurisdiction); *United States* v. *RGM Corp.,* 222 F. Supp. 2d 780 (E.D. Va. 2002) (government appeal pending) (wetlands on property not contiguous to navigable river and, thus, jurisdiction not established based upon adjacency to navigable water).

Another question that has arisen is whether CWA jurisdiction is affected when a surface tributary to jurisdictional waters flows for some of its length through ditches, culverts, pipes, storm sewers, or similar manmade conveyances. A number of courts have held that waters with manmade features are jurisdictional. For example, in *Headwaters Inc.* v. *Talent Irrigation District,* the Ninth Circuit held that manmade irrigation canals that diverted water from one set of natural streams and lakes to other streams and creeks were connected as tributaries to waters of the United States, and consequently fell within the purview of CWA jurisdiction. 243 F.3d at 533–34. However, some courts have taken a different view of the circumstances under which man-made conveyances satisfy the requirements for CWA jurisdiction. *See, e.g., Newdunn,* 195 F. Supp. 2d at 765 (government appeal pending) (court determined that Corps had failed to carry its burden of establishing CWA jurisdiction over wetlands from which surface water had to pass through a spur ditch, a series of man-made ditches and culverts as well as non-navigable portions of a creek before finally reaching navigable waters).

A number of courts have held that waters connected to traditional navigable waters only intermittently or ephemerally are subject to CWA jurisdiction. The language and reasoning in the Ninth Circuit's decision in *Headwaters Inc.* v. *Talent Irrigation District* indicates that the intermittent flow of waters does not affect CWA jurisdiction. 243 F.3d at 534 (''Even tributaries that flow intermittently are 'waters of the United States.' ''). Other cases, however, have suggested that *SWANCC* eliminated from CWA jurisdiction some waters that flow only intermittently. *See, e.g., Newdunn,* 195 F. Supp. 2d at 764, 767–68 (government appeal pending) (ditches and culverts with intermittent flow not jurisdictional).

A factor in determining jurisdiction over waters with intermittent flows is the presence or absence of an ordinary high water mark (OHWM). Corps regulations provide that, in the absence of adjacent wetlands, the lateral limits of non-tidal waters extend to the OHWM (33 CFR 328.4(c)(1)). One court has interpreted this regulation to require the presence of a continuous OHWM. *United States* v. *RGM,* 222 F. Supp. 2d 780 (E.D. Va. 2002) (government appeal pending).

Conclusion

In light of *SWANCC,* field staff should not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the ''Migratory Bird Rule.'' In addition, field staff should seek formal project-specific HQ approval prior to asserting jurisdiction over waters based on

other factors listed in 33 CFR 328.3(a)(3)(i)–(iii).

Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands). Field staff should make jurisdictional and permitting decisions on a case-by-case basis considering this guidance, applicable regulations, and any additional relevant court decisions. Where questions remain, the regulated community should seek assistance from the agencies on questions of jurisdiction.

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