I. INTRODUCTION

As a very broad goal, Congress passed the Clean Water Act ("CWA") to "restore and maintain the chemical, physical and biologic integrity of the nation’s waters."\(^1\) Under the authority of the Constitution’s Commerce Clause, our legislature, acting through the CWA, asserted federal control over the nation’s "navigable waters,"\(^2\) which the statute defines as "waters of the United States…."\(^3\) Finding the distinction between these two terms in describing the nation’s water resources has caused problems ever since, and has resulted in the expansion of federal environmental regulatory jurisdiction across the country. It has also been, and continues to be, the source of considerable tension as surprised citizens and organizations find themselves to be members of the regulated community.

Congress left it to the newly-formed Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers\(^4\) ("Corps") to determine how extensive the federal reach should be in permitting and regulating activities that affect the water courses of America\(^5\) under two permitting systems. The permitting mechanism adopted to regulate pollution from point-source discharges under CWA Section 402 is known as a "NPDES" permit, which establishes the permittee’s water discharge quality.\(^6\) The NPDES program is administered by the EPA,
however, the CWA allows states the opportunity to administer certain aspects of the CWA with approval by EPA.\(^7\) In Kentucky, the NPDES program is administered by the Kentucky Energy and Environment Cabinet, Department of Environmental Protection, Division of Water Quality ("KY DEP").\(^8\)

Not only does the CWA regulate the quality of discharges into the waters of the United States, it also regulates certain activities in the water bodies that can obstruct or affect water quality. A permit from the Corps is required for a party wishing to “discharge dredged or fill material into navigable waters.”\(^9\) In fundamental terms under CWA Section 404,\(^10\) any digging in or dumping of material in the waters of the United States requires a permit, commonly known as a “404 permit.” Although the CWA allows the states to assume jurisdiction of the “404 Program,”\(^11\) Kentucky, as most states, does not administer the program.\(^12\) Hence, any dredging or filling in the waters requires federal authority.\(^13\)

Due to the difference between statutory terms “navigable waters” and “waters of the United States” within the statute itself, it is not surprising that there has been confusion across the nation regarding the reach of federal jurisdiction over activities in water bodies under Section 404. To understand the dilemma, one must focus on the basic terms as defined by the courts.

A. “Navigable” Waters

The term “navigable waters” historically included only waters that were navigable in fact\(^14\) and eventually found a statutory home in the Rivers and Harbors Act of 1899.\(^15\) Over time, the term has expanded to include smaller waterways. The Supreme Court has repeatedly recognized the fiction that “navigable waters” includes “all waters of the United States” and that Congress “evidently intended 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.” Following this expansive Commerce Clause interpretation, the federal agencies have developed very broad regulatory definitions of “waters of the United States” that define waters to encompass not only navigable waters used in traditional interstate commerce, but also tributaries of those traditional navigable waterways, and wetlands adjacent to those waters. Congress left it to the agencies to define just how far upstream and to what water bodies federal regulation should attach as “waters of the United States,” and they eventually followed the Commerce Clause upstream all the way to ephemeral streams and even to isolated wetlands and other water bodies.

B. EPA and The Corps - Joint Jurisdiction?

Both the EPA and the Corps have jurisdiction under Section 404 and both have broadly defined “waters of the United States.” Both agencies have also included wetlands adjacent to those waters in their definitions, despite the fact that wetlands are never expressly mentioned in the CWA.

The CWA has two permitting schemes for protecting water quality: the “Section 402” NPDES program administered by EPA (and analogous KPDES program administered by KY DEP) related to pollutional discharges; and the “Section 404” program related to certain “activities in the water bodies,” primarily administrated by the Corps. The Section 404 program provides an exception to the NPDES discharge requirements, since it may allow a discharge of dredged or fill material into a water course. The 404 permittee must, however, minimize stream impacts and mitigate for any unavoidable losses of stream functions by restoring, recreating or preserving other waters.
Although the Corps has had the primary role in permitting activities for the waters of the United States, the CWA gives the EPA the ultimate authority to “prohibit the specification (including withdrawal of specification) of any defined area as a disposal site” [for dredge or fill material].

Hence, all 404 permits issued by the Corps are subject to the EPA’s veto.

II. SECTION 404 PERMITTING REQUIREMENTS

A. What Activities Require Permits?

A party must obtain a Section 404 permit from the Corps to conduct activities in the water courses subject to 404 jurisdiction. Although the CWA generally describes the 404 regulated activities as “the discharge of dredged or filled material into the navigable waters at specified disposal sites,” such activities include almost any activity where one would disturb or change the bottom elevation of a water course or body by dredging, filling or conducting construction activities therein. Such activities include, but are not limited to, constructing outfall and intake structures, bank stabilization, hydropower projects, docks, submerged utility lines, harbor pile development, residential developments, and almost any activity that can be imagined in the “waters” of the United States. The term “dredged material” means material that is excavated or dredged from the waters of the United States. The phrase “discharge of dredged or fill materials” means any addition of dredged material into … the waters of the United States, and includes any addition of excavated material into the waters of the United States from any activity including mechanized land clearing, ditching channelization, or any other excavation. The latter definition is very broad, encompassing many activities in the land development and natural resource extraction businesses where landowners have “filled” wetlands for development, and mining companies have filled ephemeral headwater drainage channels for spoil storage.
B. Nationwide Permits

Certain discharges specified in the Corps’ regulations are permitted as general permits under the CWA, which are referred to as Nationwide Permits (NWPs). Other discharges may be authorized by the Corps on a regional basis. If a specific type of activity is not either exempted by the regulations or allowed under a NWP, an individual permit is required. NWPs are issued on nationwide basis for any category of activities involving discharges of dredged or fill material if the activities in the category are similar in nature, will cause only minimal adverse environmental effects if performed separately, and will have only minimal cumulative adverse effect on the environment. Some NWPs require advance “pre-construction” notice to the Corps. The benefit to the regulated community is that the NWP program is designed to provide timely authorizations while protecting the nation’s aquatic resources. Unlike an individual permit, which requires significant engineering, environmental and regulatory analysis, the NWP program is designed to allow the Corps to focus its limited resources on more extensive evaluation of projects that have the potential for causing environmentally damaging adverse effects. NWPs in Kentucky and the Appalachian coal fields may be affected by the significant litigation and recent suspension of NWP-21 - “Surface Coal Mine Activities” used by the mining industry for, inter alia, storage of mine spoil in “head of hollow” or “valley fills” in headwater, intermittent or ephemeral streams. Any practitioner studying the classification and regulation of activities in these upstream areas of a watershed must be aware of recent cases and agency actions addressing the issue of whether such “wet weather only” streams are jurisdictional waters. The subject is not within the scope of this paper.
Within this statutory and regulatory framework, the following discussions address the conflicts between environmental protection and private property rights that have resulted in significant litigation. Simply: “What waters are we talking about?”

III. JURISDICTIONAL THRESHOLD ISSUES - “CAN THEY DO THIS TO ME?”

A. Courts Decide What Are “Waters”

Following the broad definitions of jurisdictional waters adopted by the agencies, it was not surprising to see the tendrils of agency authority extending upstream to headwater, intermittent and wet weather ephemeral streams and even to isolated wetlands. As a result, it is not surprising that the issue of how far federal CWA jurisdiction extends has been before the United States Supreme Court three times since 1985, as property owners discovered jurisdictional waters of the United States on their tracts and became entangled and embroiled in a complicated federal regulatory experience.

After each Supreme Court decision, there has been significant litigation in the lower federal courts, as well as agency attempts to conform policy to the Court’s further refined interpretation of Congressional intent in vaguely defining what are, in fact, “waters of the United States.” Akin to the complexity of an aquatic ecosystem, the federal courts’ attempts to develop some legal homeostasis in this turbulent area of environmental law continue. Although many segments of our economy can be affected by the regulatory framework surrounding potential 404 program activities, agricultural, natural resource extraction and land development industries are particularly impacted. Members of the regulated community (be they individual landowners or business entities) may not only have their private property rights affected, they may also be subject to civil penalties of up to $25,000 per day of violation and criminal enforcement actions including imprisonment for violations of Section 404 and its permitting requirements.
B. Adjacent Wetlands

In the first case to reach the Supreme Court, *United States v. Riverside Bayview Homes*, a Michigan land developer challenged the Corps’ authority to restrict land development in wetlands that did not have a direct physical connection to a traditionally navigable waterway. The developer was placing fill materials on his property adjacent to the shores of Lake St. Clair, Michigan. The Court held that CWA jurisdiction extends to intrastate wetlands adjacent to, but not directly connected with, a larger body of water that ultimately flows into a navigable waterway “if it performs a greater ecological function beyond the wetland.” The Court, in reviewing congressional intent, found that “the regulation of activities that cause water pollution cannot rely on … artificial lines … but must focus on all waters that together form the aquatic system,” and seemed to acknowledge the functional values of the intact ecosystem and a broader view of environmental protection. Perhaps foreshadowing the next case, the Court noted that isolated bodies of water do not have a continuous surface connection.

C. Isolated Water Bodies

The agencies continued to expand their CWA jurisdiction, even to the point of regulating isolated man-made ponds and land features, until the Court’s 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*. In that case, the Corps exerted jurisdiction over an abandoned sand and gravel pit containing isolated, non-navigable, intrastate, “permanent and seasonal ponds.” The site was being permitted as a landfill to serve the City of Chicago and, like many abandoned quarries, contained impounded water. The Corps’ jurisdiction was based on its “Migratory Bird Rule”, which extended jurisdiction under the Commerce Clause by finding a nexus to interstate commerce since the site was visited by migrating birds. In *SWANCC*, the Supreme Court struck down the broad Migratory Bird Rule,
noting that it was not within the scope of the CWA authority. Although the SWANCC decision trimmed the Corps’ reach under Section 404, the agency still maintained significant authority over navigable waters, tributaries to navigable waters, wetlands adjacent to navigable waters, and wetlands adjacent to the tributaries of navigable waters. The Corps continued to assert jurisdiction broadly, ultimately reaching activities allegedly affecting the hydrologic regime far removed from navigable waters of the United States. The Corps’ extensive reach was challenged and came to a head in 2006 for the third time in *U.S. v. Rapanos.*

D. Remote Waters

John Rapanos was a land developer in Michigan who, in the late 1980s, began moving earth on his property, most of which was dry, and digging ditches to drain moist areas discharging into wetlands. These wetlands were adjacent to non-navigable waters and twenty miles from a real navigable waterway, Saginaw Bay. Rapanos’ property was connected to Saginaw Bay by twenty miles of ditches; however, the Corps charged that he was hydrologically connected to waters of the United States and he was convicted on criminal charges, fined hundreds of thousands of dollars, and ordered to perform two hundred hours of community service.

In *Rapanos,* the Supreme Court addressed the jurisdictional reach of the CWA, and in particular, whether a wetland or a tributary is a “water of the United States.” Unfortunately, the Justices issued five separate opinions in *Rapanos:* one plurality opinion, two concurring opinions, and two dissenting opinions, with no single opinion commanding a majority of the Court. A majority of the Court did find that the Corps’ definition of “waters of the United States” was overly broad since it allowed, as a matter of course, jurisdiction over wetlands adjacent to non-navigable waters. Generally speaking, however, the Court created significant
confusion since it did not provide a better definition of the disputed term; rather, it provided multiple definitions.

E. Justice Scalia vs. Justice Kennedy

Most of the analysis of the *Rapanos* decision focuses on the four-member plurality opinion authored by Justice Scalia\(^48\) ("Scalia opinion"), and on Justice Kennedy’s concurring opinion\(^49\) ("Kennedy opinion"). The opinions have proved to be complex and confusing, and have produced uncertainty on what is the post-*Rapanos* standard for Section 404 jurisdiction.

The Scalia opinion limited jurisdiction to "relatively permanent standing or continuously flowing bodies of water" and "wetlands with a continuous surface connection" to such waters.\(^50\) More in line with ecological principles, the Kennedy opinion found all waters that possess a "significant nexus" to navigable waters are jurisdictional waters.\(^51\) The Kennedy opinion further found that a determination of whether there is a significant nexus to navigable waters requires a case-by-case analysis of whether wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters that are more readily understood as navigable.\(^52\)

F. Lower Courts’ Interpretation of *Rapanos*

Interpretation of Section 404 of the Clean Water Act in light of the *Rapanos* decision has proven to be confusing, and not surprisingly has led to inconsistent decisions by the lower courts and the agencies, and to confusion in the regulated community. Even Chief Justice Roberts recognized the confusion that would be caused by the *Rapanos* decision: "It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act. Lower courts and regulated entities now have to feel their way on
a case-by-case basis.” Since Rapanos, the courts of appeals have split on which test to follow:
the Scalia test, the Kennedy “significant nexus” test, or either. The Sixth Circuit in United States v. Cundiff highlighted the tension between Justices Scalia and Kennedy by noting that Scalia stated, “Justice Kennedy’s test simply rewrites the statute,” while Justice Kennedy stated that, “the plurality reads nonexistent requirements into the Act.” The tension expressed between the two Justices is perhaps an apt metaphor for the uncertainty created by Congress in its ambiguous definition of waters of the United States.

G. Interpreting a Plurality

In deciding how to interpret a plurality opinion, particularly one as splintered as Rapanos, many courts have studied the law regarding interpretation of fragmented court decisions. Several have cited Marks v. United States to discern the holding in Rapanos. The Marks case quotes Gregg v. George, where the Supreme Court instructed that “when a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”

H. Sixth Circuit Interpretation

In a case from the Western District of Kentucky, United States v. Cundiff, the Sixth Circuit spent considerable time and effort describing the Marks rule in an attempt to adopt the narrowest grounds of the Rapanos decision. The Sixth Circuit found that it was almost impossible to find the narrowest grounds on which at least five members concurred in Rapanos. The Cundiff Court, in a well-written description of the CWA’s historical background and Section 404, explained the complexities of the Rapanos decision, noting that “parsing any one of Rapanos lengthy and statutory exegesis is taxing, but the real difficulty comes in determining
which, if any, of the three main opinions lower courts should look to for guidance." The *Cundiff* case involved a father-son farming team that chose to drain a tract of land adjacent to abandoned coal mines and affected by acid-mine-drainage in order to convert the property to crop land. The property was also adjacent to the Green River in Muhlenberg County, Kentucky. Cited by the Kentucky Division of Water, the Corps and ultimately the EPA, the Cundiffs chose to ignore the agencies’ administrative orders. Finding that CWA jurisdiction was proper under both the Scalia and Kennedy tests, the Court noted that it did not need to reach a decision whether either test applied, and noted that the Supreme Court had recently denied *certiorari* in two cases presenting the same question.

IV. AGENCIES (ONCE AGAIN) TRY TO PROVIDE GUIDANCE

As they did in 2003 and again in 2008, to provide guidance to agency staffs and the regulated community in identifying jurisdictional waters, EPA and the Corps issued their latest attempt to provide guidance on the jurisdictional water issue on April 27, 2011 (“2011 Guidance”). The agencies’ goal is to reconcile the various Supreme Court opinions and both of the *Rapanos* standards. The 38-page 2011 Guidance attempts to weave a regulatory fabric that will cover all natural facts and circumstances in the hydrologic system. Some waters are *de facto* jurisdictional waters, while others require significant technical and scientific analysis. The agencies maintain that the 2011 Guidance is consistent with the principles established by the Supreme Court cases, and that it is supported by the agencies’ scientific understanding of how water bodies and watersheds function. The 2011 Guidance discusses six categories of waters subject to federal jurisdiction:
A. **Traditional Navigable Waters**

As discussed previously, traditional “navigable waters” include “all 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.” Under the 2011 Guidance, “navigable waters” also includes waters suitable for commercial waterborne recreation.

B. **Interstate Waters**

Any waters that flow across or form a part of state boundaries are subject to Section 404 jurisdiction. Under this definition, lakes, ponds or other still-water features that cross state boundaries will be deemed interstate waters in their entirety.

C. **Significant Nexus Analysis Waters**

Presenting perhaps the most complicated situation, the agencies will assert jurisdiction over waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical or biological integrity of traditional navigable waters or interstate waters. The agencies have stated that they will apply the significant nexus standard in a manner that restores and maintains any of those three attributes. Clearly, there are many variables in such an analysis that will likely require interpretation by the courts.

D. **The Tributaries**

EPA and the Corps will assert jurisdiction over tributaries under either the Supreme Court’s plurality standard or Justice Kennedy’s significant nexus test if the tributary contributes flow to a traditional navigable water or interstate water, either directly or indirectly by means of other tributaries. The agencies have determined that a tributary can be natural, or a man-altered...
or man-made water body. A tributary is physically characterized by the presence of a channel in a defined bed and bank.

E. **Adjacent Wetlands**

Taking details from both the Scalia and Kennedy opinions, the agencies will assert jurisdiction over “wetlands with a continuous surface connection to relatively permanence, standing, or continuously flowing bodies of water” connected to traditional navigable waters. Further, the significant nexus test will require jurisdiction over adjacent wetlands if they, either alone or in combination with similarly situated wetlands, have an effect on the chemical, physical or biological integrity of traditional navigable waters or interstate waters that is more than “speculative or insubstantial.” Interestingly, the term “similarly situated” adjacent wetlands includes all wetlands located in a particular watershed. It appears that this definition could lead to litigation regarding distinct water features contained within the same watershed, depending on the size of the watershed.

F. **Other Waters**

This catch-all phrase includes waters such as intrastate lakes, rivers, streams (including intermittent streams), mud flats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes or natural ponds, if the use, degradation or destruction of those waters could affect interstate or foreign commerce. The agencies, recognizing that these “other waters” may be difficult to generalize, have announced that they will make a case-by-case fact-specific determination of their jurisdiction over them. Based on the history of litigation regarding jurisdiction over waters on private property, it seems that the stage may be set for litigation where an unsuspecting property owner finds that features on his/her property have been determined to be “other waters.”
V. CONCLUSION

The assertion of federal jurisdiction over water-related features and activities on private property has created significant litigation for many years. Though the courts and agencies have attempted to refine the scope of jurisdiction under the Clean Water Act, the latest enunciation from the Supreme Court, followed by the latest generation of guidance from EPA and the Corps of Engineers, guarantees additional disputes and litigation regarding the extent of the federal reach upstream to regulate activities on private property. Clearly, the protection of valuable water resources is paramount and was Congress’ intent in passing the Clean Water Act. The implementation, however, of bright-line rules to deal with complex ecosystems and countervailing private property rights guarantees that disputes will arise that can only be resolved in the courts.

To the legal practitioner advising clients, it is wise to conduct necessary regulatory and technical analysis prior to any activities being undertaken on land with or near hydrologic features. If there are “waters of the United States” under any definition, a determination of whether or not such activities are covered by the Nationwide Permits as discussed above, or would require individual Permits, should be determined long before any activities commence. Otherwise, as has happened to many unsuspecting landowners across America, the client may find itself dealing with an environmental regulatory enforcement program well beyond any expectation.

The U.S. Army Corps of Engineers has been involved in regulating certain activities in the nation’s waters since 1890 and until 1968, the primary thrust of the Corps regulatory program was the protection of navigation. See 33 C.F.R. § 320.1(a).

33 U.S.C. § 1344(a)-(c).

33 U.S.C. § 1342; NPDES stands for “National Pollutant Discharge Elimination System.”

See, e.g., 33 U.S.C. § 1342(b) regarding the NPDES permitting program. See also, 33 U.S.C. § 1318(c) regarding inspections, monitoring and entry associated with point sources.

See KRS § 224.70 et seq.; 401 KAR Chapter 5. The permitting program regulating point source discharges in Kentucky is referred to as the “KPDES” program.

33 U.S.C. § 1344(a) (emphasis added).

Id.

See 33 U.S.C. § 1344(g)-(h).

The KY DEP does maintain some jurisdiction over activities resulting in permanent loss of streams and wetlands through what is referred to as the “401 Water Quality Certification” requirements. In its basic framework, the KY DEP is required to certify whether activities under a federal permit or license (e.g., 404 permit) will comply with other state water quality standards. See 401 KAR 9:020.


See The Daniel Ball, 77 U.S. (10 WALL) 557, 563 (1870) - (“Rivers are navigable in fact when they are used or susceptible of being used in their ordinary condition as highways for commerce…”).

33 U.S.C. § 401 et seq.


See 33 C.F.R. § 328.3(a)(1), 328.3(a)(5), 328.3(a)(7).

See 33 U.S.C. § 1344(a)-(d).


Cf. 33 C.F.R. § 328.3(a) (2009) and 40 C.F.R. § 230.3(s) (2009).

33 C.F.R. § 332.1(c)(2).

33 C.F.R. 332.3(a).

33 U.S.C. § 1344(c).

See 33 U.S.C. § 1344(b) (404(b) stating that permits are “subject to” 33 U.S.C. § 1344(c) (404(c); See also, 40 C.F.R. § 231.1(a) noting Administrator’s “veto.”

33 U.S.C. § 1344(a), 33 C.F.R. § 320.3(f).

30 C.F.R. § 323.2(c) (emphasis added).

30 C.F.R. § 323.2(d)(1) (emphasis added).

30 C.F.R. § 323.2(d)(1)(iii).

33 U.S.C. § 1344(e).

See 33 C.F.R. § 330.

33 C.F.R. § 323.4 provides specific exemptions from 404 permitting including normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products.
32 33 U.S.C. § 1344(e).

33 Of the forty-nine activities allowed under NWPs, thirty require preconstruction notification to the Corps for certain activities, and twenty of those NWPs require preconstruction notifications for all activities. Preconstruction notification to the Corps allows the agency to review the notice and project to determine if it should assert its discretionary authority to require an individual permit if it is determined that adverse impacts will be more than minimal. See Nationwide Permit General Conditions, 33 C.F.R. § 330.4.


35 33 C.F.R. § 328.3(a) See also, Leslie Salt v. Froehlke, et al. 578 F.2d 742, describing jurisdiction under the Migratory Bird Rule.


38 33 U.S.C. § 1319(c); See, e.g., Pozsgai v. United States, 510 U.S. 1110 (1994), where landowner John Pozsgai was charged with forty counts of knowingly filling wetlands without a 404 permit in Bucks County, PA. He was sentenced to inter alia three years in prison; See also U.S. v. Lucas, et al., 516 F.3d 316 (5th Cir. 2008) where the developer was sentenced to nine years in prison and significant fines for filling in wetlands and selling property to low-income families.


40 supra note 1.

41 474 U.S. 133-134.

42 474 U.S. 738-739.

43 In its 1986 Guideline interpreting its jurisdiction under Section 404, the Corps stated that it had permitting jurisdiction over waters that are used to irrigate crops sold in interstate commerce and waters that are or could be used as habitat by migratory birds or endangered species.

44 531 U.S. 174.

45 Carabell v. U.S. Army Corps of Engineers, 391 F.3d 704 (6th Cir. 2004); U.S. v. Rapanos, 376 F.3d 629 (6th Cir. 2004). These cases were consolidated at the Supreme Court and were decided under Rapanos v. U.S., 547 U.S. 715 (2006).

46 33 C.F.R. § 328.3(a).

47 See 547 U.S. at 739 (plurality opinion; Id. at 781-782 (Kennedy, concurring).

48 531 U.S. 719-57 (plurality opinion).

49 Id. at 759-87 (Kennedy, J., concurring).

50 547 U.S. at 739, 742.

51 Id. at 779-780.
52 547 U.S. at 755 citing the purpose of the CWA. See infra note 1.

53 547 U.S. at 758 (Roberts, C.J., concurring).

54 The First Circuit noted in U.S. v. Johnson, 467 F.3d 56 (1st Cir. 2006) that either the Scalia test or Kennedy test would determine whether wetlands qualify as “waters of the United States.” The Seventh and Ninth Circuit Courts of Appeals found that Justice Kennedy’s significant nexus test controlled. See respectively N. Cal. Riverwatch v. City of Healdsburg, 457 F.3d 1023 (9th Cir., 2006) and U.S. v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006). The Eighth Circuit in U.S. v. Bailey, 571 F.3d 791 (8th Cir. 2009) joined the First Circuit and found that the Corps had Clean Water Act jurisdiction over wetlands if the wetlands met either of the tests cited in Rapanos. Most recently, the Fourth Circuit in Precon Development v. U.S. Army Corps of Engineers F.3d (4th Cir. 2011) held that it would follow Justice Kennedy’s significant nexus test, which governs and provides the formula for determining whether the Corps has jurisdiction over site wetlands.

55 Infra note 60.

56 547 U.S. at 756.

57 Id. at 778.


60 555 F.3d 200 (6th Cir. 2009).

61 555 F.3d at 206.

62 555 F.3d at 210 “…we leave ultimate resolution of the Marks-meets-Rapanos debate to a future case that turns on which test in fact controls.”


64 http:\\water.epa.gov\lawsregs\guidance\wetlands\CWAwaters.cfn.


66 Id.

67 2011 Guidance at pp. 6, 23.

68 See, e.g., 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1).


70 Id. at 7, 25.

71 Id. at 11, 27, 28.

72 Id. at 15, 30.

73 Id. at 19, 32.