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. at 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, instream, 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 the guidance of how to apply the applicable legal principles to individual cases. Should questions arise concerning CWA jurisdiction, the regulated community should seek assistance from the Corps and EPA.

A. Isolated, Instream Waters That Are Non-Navigable

SWANCC squarely eliminates CWA jurisdiction over isolated waters that are in stream, intrastate, and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the water 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).”)

Because SWANCC’s interpretation of section 404(a) of the CWA was clearly intended to encompass the “baffle fill” 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, instream vernal pools, playa lakes and pocosins. SWANCC also calls into question whether CWA jurisdiction over isolated, instream, 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, instream 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, jurisdictional. Traditional navigable waters are the subject of 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. 173, 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, instream 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

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, susceptible to use, or historically used, to transport goods or people in commerce, do not form part of a continuous waterborne highway.
man-made water body capable of boating found to be “waters 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 ruled in *Riverside* that a wetland adjacent to Black Creek, a traditional navigable water, 474 U.S. 121 (1985); see also *SWANCC*, 531 U.S. at 167. (“In *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 navigable waters 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 eliminated jurisdiction over non-navigable waters based upon 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. Talen 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’d 152 F.3d 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*, 393 F.3d 784 (7th Cir. 2002) (rejecting motion to vacate consent decree, finding that SWANCC did not alter Corps’ jurisdiction over “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”); *Asello 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”); *Lamploft Equestrian Ctr.*, No. 00 C 6486, 2002 WL 360652, at *8 (N.D. 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. Rueh Tuning*, No. 2001 CV 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*, supra (court 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 defendant’s release of oil into 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 also*United 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 man-made 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 assume CWA jurisdiction over 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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