



RUDER WARE

Clean Water Rule

By Russell W. Wilson

Definition of “Waters of the United States” Under the Clean Water Act (CWA)

I. INTRODUCTION

The terms “waters of the United States” and “navigable waters of the United States” are two separate definitions applied by the United States Army Corps of Engineers (Corps) in different contexts pursuant to different statutes.

Let us suppose you want to construct a hydroelectric plant. A fundamental concern would be whether the newly constructed generating facility and dam would obstruct navigation.

In that context, the jurisdiction of the Corps would turn on whether the particular body of water meets the definition of the “navigable waters of the United States” pursuant to the Rivers and Harbors Act of 1899 (RHA).

The regulatory definition of the “navigable waters of the United States” means:

“...those waters of the United States that are subject to the ebb and flow

of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.” (33 C.F.R. § 329.4)

The RHA and the “navigable waters of the United States” are concerned with navigation and navigation in the traditional sense.

This article is not about navigation in the traditional sense. Rather, our purpose here is to explore the meaning of the “waters of the United States” under the Clean Water Act (CWA).

For example, what if you want to develop a mixed-use commercial/residential project in an area where wetlands exist?

If the wetlands meet the definition of the “waters of the United States,” then they are under the jurisdiction of the CWA. Under section 404 of that statute, the Corps regulates the dredging and filling of wetlands through its permitting process.

The definition of the “waters of the United States” under the CWA (the subject of this article) is broader than the definition of the “navigable waters of the United States” under the RHA.

However, how much broader? Why is it that such controversy has arisen over the meaning of the term the “waters of the United States?”

It boils down to the fact that Congress chose an obtuse descriptor when it passed the CWA in 1972.

The statute applies to “navigable waters,” which Congress further defined in Section 502 as the “waters of the United States,” 33 USC § 6207 (emphasis mine). Congress omitted, however, to define the “waters of the United States,” leaving that phrase to be developed by the agencies that administer the CWA, i.e. the U.S. Environmental Protection Agency (EPA) and the Corps.

So, when the phrase “waters of the United States” is broader than the term “navigable waters of the United States” and when “navigable waters” means the “waters of the United States,” what then is the significance of the adjective “navigable”?

That puzzle is the source of the controversy. Widely divergent views of the significance of the word “navigable” have emerged in three United States Supreme Court cases that have interpreted the “waters of the United States.”

The opinion of one justice (Kennedy) articulates the significance of “navigable” in areas beyond waters that are navigable in the traditional sense. This analytical framework is Justice Kennedy’s “significant nexus” test, which is an “ecological inquiry.”

The EPA and the Corps have jointly proposed a new regulation defining the “waters of the United States” in response to the Supreme Court cases.

The proposed definition is premised on the ecological inquiry that is the significant nexus test of jurisdiction. In order to understand the proposed definition, we first need to review its history.

II. TIMELINE OF LEGISLATIVE, REGULATORY AND JUDICIAL DEVELOPMENTS

This section merely identifies the milestones in the development of the definitions of the “waters of the United States” under the CWA.

To describe each development is a more ambitious and lengthy undertaking.

The legislative, executive, and the judicial branches of the federal government added, pruned, and interwove individual strands since the 92nd Congress passed the Federal Water Pollution Control Act Amendments of 1972, which President Nixon signed into law.

Legislative bodies – federal and state – authorize regulatory agencies in the executive branch formally to develop regulations to refine statutes so they can be implemented and enforced.

The judiciary has the last word as to whether regulations exceed the scope of the legislation.

In 1974, the Corps initially issued its definition of the “waters of the United States” under Section 404 of the CWA to coincide with its definition of “navigable waters of the United States” under the RHA.

The EPA, which administers the CWA overall, called out to the Corps’ its mistake.

As would later be noted in Riverside Bayview, SWANCC and Rapanos, the “waters of the United States” under the CWA is broader than the “navigable waters of the United States” under the RHA.

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The question is not whether the definition is broader; it is how much broader and how to define it?

The Corps then issued its interim definition 1975. One definition in particular, “fresh water wetlands” contained the requirement that such wetlands be “periodically inundated.”

In 1977, two events took place. First, Congress amended the CWA, and in doing so, rejected a bill that, if enacted, would have changed the definition of “navigable waters” from the “waters of the United States” to the “navigable waters of the United States.”

Second, the Corps adopted its then final rule defining the “waters of the United States.”

Notably, the Corps removed the “periodic inundation” component of “freshwater wetland” from the 1977 definition.

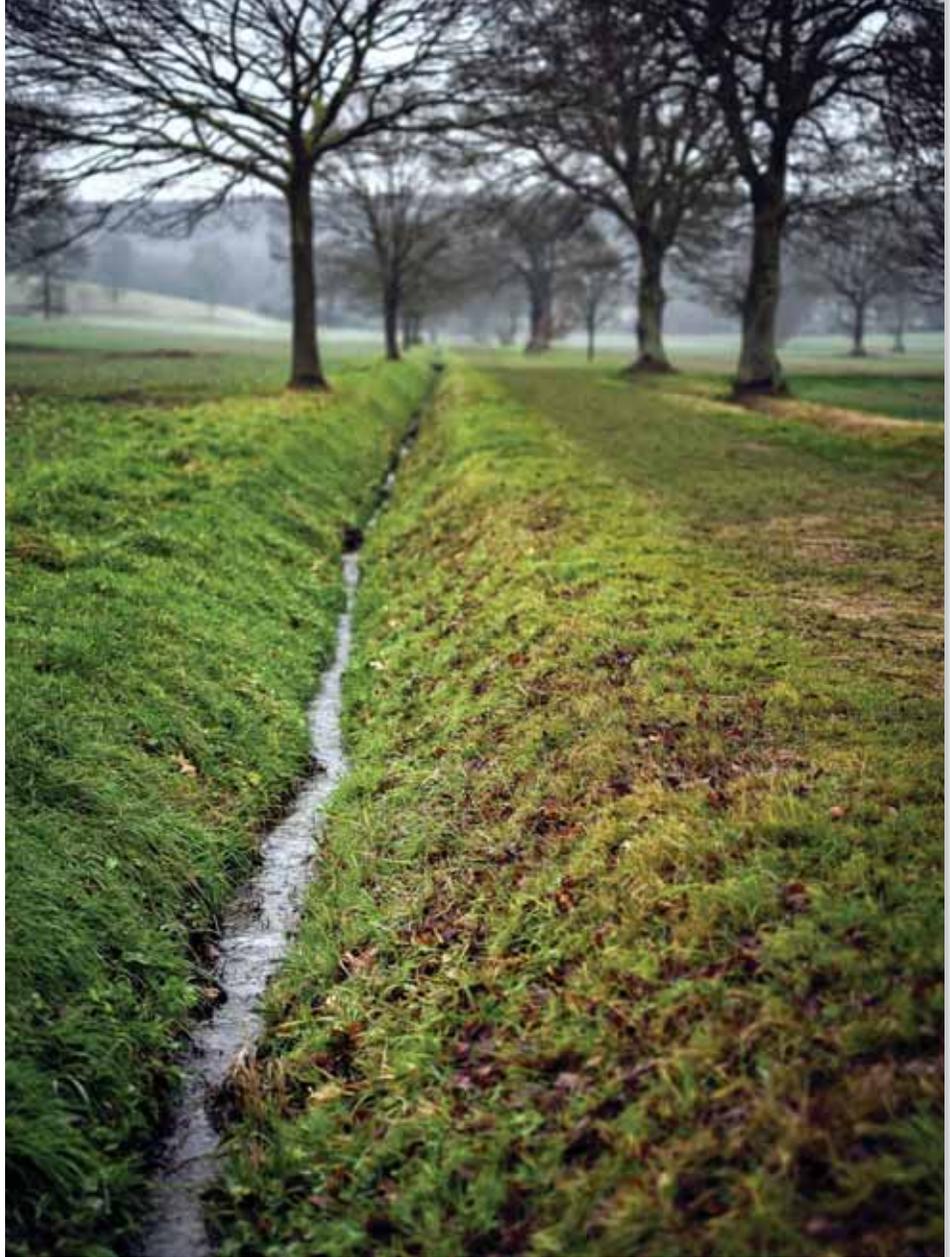
The Corps then made some language changes in 1982 that did not affect the substance of the definition.

The stage was set for the U.S. Supreme Court’s decision in *Riverside Bayview*. There, the deletion of the “periodic inundation” definition was instrumental in the unanimous opinion: “wetlands” that are “adjacent” to water that is navigable in the traditional sense are within the Corps’ jurisdiction under Section 404 of the CWA.

The Corps next promulgated its regulatory definition of the “waters of the United States” in 1986. At that time, it added what would become known as the “Migratory Bird Rule.”

That set the stage for the Court’s next ruling in *SWANCC*.

in *SWANCC*, the 5 to 4 majority ruled that the 1986 definition, which contained the Migratory Bird Rule, did not extend to isolated ponds and mud flats that were confined to the state of Illinois.



Looking back at its decision in *Riverside Bayview*, the Court in *SWANCC* voiced the notion of a “significant nexus” between the scope of jurisdiction under Section 404 of the CWA and traditional navigable water.

It is important to note what *SWANCC* did not do: it did not overturn any portion of the Corps’ definition of the “waters of the United States.”

SWANCC held that the reach of the “waters of the United States” did not extend to the facts in that case: wholly intrastate, isolated ponds and mud flats, which could serve as stopover points for migrating birds.

In 2006, the Court issued its decision in *Rapanos*. The four justices who took the narrow, states-rights view (plurality opinion) and the four who took the broad, federal view (dissenting opinion) cancelled each other out insofar as creating a framework to analyze these cases.

The plurality opinion and the dissenting opinion cannot be reconciled.

In the view of the plurality, Congress’ choice of words by which it defined “navigable waters” as the “waters of the United States” was not ambiguous.

Further, the plurality would require that in order for the Corps to have

jurisdiction under Section 404 of the CWA, there must be (1) a relatively permanent (not intermittent or ephemeral) body of water that must have (2) a surface connection to water that is navigable in the traditional sense.

Those elements were fashioned in the plurality opinion; they do not appear in any version of the regulatory definition or in cases that apply the definition.

In stark contrast, the dissenting view is that the definition of “navigable waters” as the “waters of the United States” is ambiguous.

In the dissenting view, the Corps has developed its definition of the “waters of the United States” based upon its technical expertise after having applied that expertise for over 30 years.

The dissenting opinion views the Corps’ definition of the “waters of the United States” as a reasonable

interpretation of congressional intent.

Therefore, the dissent would defer to the Corps’ regulatory definition.

The cancellation of the plurality and the dissent left Justice Kennedy standing alone to articulate the “significant nexus” analytical framework for defining the jurisdictional reach of Section 404 of the CWA. And, articulate it he did.

In response to Riverside Bayview, SWANCC and Rapanos, Justice Kennedy’s articulation of the “significant nexus” analytical framework, on May 26, 2015, the EPA and the Corps jointly proposed their “Clean Water Rule: Definition of “Waters of the United States.”

In the meantime, a wetlands case reached the United States Court of Appeals in 2015 that applied Justice Kennedy’s “significant nexus” analytical framework.

That case was Precon Development Corporation v. United States Army Corps of Engineers, decided by the Fourth Circuit. See The Fourth Circuit U.S. Court of Appeals Applies the “Significant Nexus” Test in Wetlands Litigation.

On the facts before it, the Fourth Circuit found that the “significant nexus” between the wetlands in question and traditional navigable waters was satisfied.

In doing so, the Fourth Circuit quoted Justice Kennedy’s “significant nexus” analytical framework verbatim and applied it. That test is a flexible ecological inquiry.

Likewise, the jointly promulgated “Clean Water Rule: Definition of ‘waters of the United States’ ” rests ultimately on Justice Kennedy’s test.

That wording serves as the segue to the content of the new regulatory

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definition: “A significant nexus exists when the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of traditional navigable waters. No significant nexus exists when the wetlands’ effects on water quality [of traditional navigable waters] are speculative or insubstantial.”

III. THE REVISED DEFINITION OF THE WATERS OF THE UNITED STATES

For convenience, I will use the acronym “WOTUS” in place of “Waters of the United States.” The revisions established in subsections (a), (b), and (c) to part 328.3. Subsection (a) identifies what is included in WOTUS in conjunction with further definitions of words and phrases in subsection (c). Subsection (b) identifies specific exclusions from WOTUS.

Let us begin with the features that are specifically exempted in subsection (b) from WOTUS “even where they otherwise meet the terms of paragraphs (a)(4) through (a)(8) of this section.”

The exemptions are:

- 1) Waste treatment systems including treatment ponds or lagoons designed to meet the requirements of the CWA;
 - 2) Prior converted cropland;
 - 3) The following ditches:
 - (i) ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary;
 - (ii) ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands;
 - (iii) ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section [i.e. traditional navigable waters, interstate waters and wetlands, and the territorial seas];
 - 4) The following features:
 - (i) artificially irrigated areas that would revert to dry land should application of water to that area cease;
 - (ii) artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
 - 5) Groundwater, including groundwater drained through subsurface drainage systems
 - 6) Storm water control features constructed to convey, treat, or store storm water that are created in dry land.
 - 7) Wastewater recycling structures constructed in dry land;
- (iii) artificial reflecting pools or swimming pools created in dry land;
 - (iv) small ornamental waters created in dry land;
 - (v) water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
 - (vi) erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
 - (vii) puddles.

detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

With respect to prior converted cropland, other federal agencies may have differing definitions, but subsection 328.3(b)(2) states that “for purposes of the Clean Water Act ... jurisdiction remains with the EPA.”

The identification of exempt ditches in subsection 328.3(b)(3) includes the phrases “ephemeral flow” and “intermittent flow.” These technical terms, along with “perennial flow,” are defined in the Preamble (Section IV) to the new rule.

“Perennial streams” flow year-round during a typical year from groundwater or contributions of flow from higher in the stream or river network as primary water sources.

“Intermittent streams” flow continuously only during certain times of the year and have as their water sources a mix of groundwater and precipitation (which includes snowmelt).

“Ephemeral streams” are composed entirely of precipitation and flow only during precipitation events.

We turn now to the six categorical inclusions under Section (a):

- (1) All waters which are currently used, 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 [i.e. traditional navigable waters];
- (2) All interstate waters, including all interstate wetlands;
- (3) The territorial seas;
- (4) All impoundments of waters otherwise identified as waters

of the United States under this section;

- (5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;
- (6) All waters adjacent to a water identified in paragraphs (a) (1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

Subsection 328.3(a) lists eight types of waters. The first six have been determined categorically to possess a significant nexus to the establishment and maintenance of the chemical, physical and biological integrity of the Nation’s waters.

The seventh and eighth categories require case-specific significant nexus determinations.

“Significant nexus” is defined (as

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Justice Kennedy did) at subsection 328.3(c)(5) to mean “...that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section” [i.e. traditional navigable water, all interstate waters, including all interstate wetlands, and the territorial seas].

Section 111 – (the significant nexus standard) clarifies that just one of the attributes of water integrity (chemical, physical, or biological) need be significantly affected.

The definition provides that “similarly situated” means the watershed that drains to the nearest traditional navigable water, interstate water or wetland, or territorial sea are functions to be considered in significant nexus evaluation:

- (i) sediment trapping;
- (ii) nutrient recycling;
- (iii) pollutant trapping, transformation, filtering and transport;
- (iv) retention and attenuation of floodwaters;
- (v) runoff storage;
- (vi) contribution of flow;
- (vii) export of organic matter;
- (viii) export of flood resources; and
- (ix) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

Subsection (c)(3) identifies the characteristics that make a given tributary jurisdictional.

Said another way, not all tributaries will meet the definition set forth in



subsection (c)(3); those that do not will not be subject to the CWA.

This new definition represents a reduction in scope because under the previous definition, all tributaries of the waters listed in subsections (a)(1) through (3) were included categorically.

Without repeating the lengthy definition verbatim here, in order to meet the definition of “tributary” or “tributaries,” a water must contribute, directly or indirectly, flow sufficient to produce physical indicators of (1) a bed and banks and (2) an ordinary high water mark.

These physical markers demonstrate the requisite volume, frequency and duration of flow to qualify as a covered tributary. Tributaries may be natural, altered or manmade.

A tributary does not lose its character as a tributary by the presence of natural breaks (such as wetlands, debris piles or boulder fields) or constructed breaks (such as bridges, culverts, pipes or dams).

Covered tributaries may flow through water that does not meet the definition of “tributary” or other non-jurisdictional water without losing its status so long as its flow reaches traditional navigable water, interstate

waters or wetlands, or the territorial seas.

Again without quoting the full definition of “adjacent” verbatim, that term means “bordering, contiguous, or neighboring a water identified in paragraphs (a) (1) through (5)... including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like...”

The definition further provides that “...an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark.

The definition encompasses not only adjacent waters located laterally, but also headwaters to those identified in subsections (a)(1) through (5).

However, “[w]aters being used for established normal farming, ranching, and silviculture activities are not adjacent.”

Under the new rule, the term “neighboring” is now defined as:

- (i) All waters located within 100 feet of the ordinary high water mark of a water identified in (a)(1) through (5)... The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

- (ii) All waters located within the 100-year flood plain of a water identified in paragraphs (a)(1) through (5)... and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
- (iii) All waters located within 1,500 feet of the high tide line of water identified in paragraphs (a)(1) or (a)(3)...and all waters with 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

There are two non-categorical types of WOTUS, they require case-specific significant nexus analyses.

Subsection (a)(7) requires the case-specific significant nexus analysis for certain types of water bodies that have been determined to be “similarly situated.”

They are prairie potholes, Carolina bays and Delmarva bays, tocsins, western vernal pools, and Texas coastal prairie wetlands.

In performing the significant nexus analysis, these similarly situated water types may not be combined with adjacent waters.

Subsection (a)(8) allows for case-specific significant nexus analysis for “all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5)...”

If these waters meet the definition of “adjacent” however, the significant nexus analysis is not required.

But, if they do not meet the adjacency definition, these waters

may not be combined with adjacent waters in the significant nexus analysis. The “if any portion, then the entire water” clause applies to subsection (a)(8).

Section (c) contains additional definitions:

Wetlands “means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.”

(a) Justice Kennedy’s now-familiar definition of “significant nexus” is set forth in subsection (c)(5). This definition includes development by the Corps of phrases that Justice Kennedy used but did not define.

The phrase “in the region” refers

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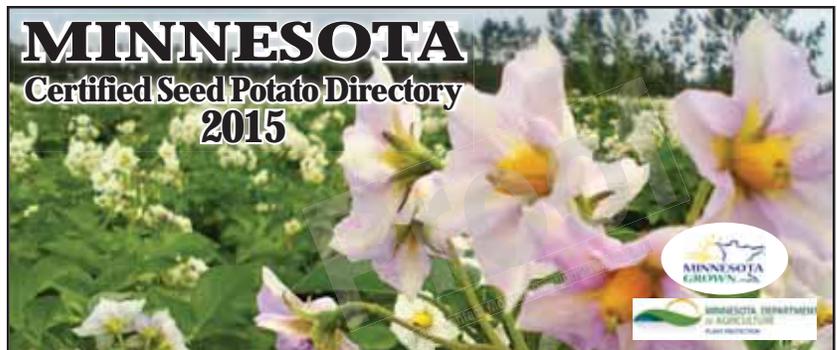


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to the watershed that drains to the nearest traditional navigable water, interstate water or wetland, or territorial sea.

The word “significant” means “more than speculative or insubstantial.”

“Similarly situated” waters are those that “function alike and are sufficiently close to function together in affecting downstream waters.”

The nine functions listed above are to be used in the significant nexus analysis.

“A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological

integrity of the nearest” traditional navigable water, interstate water or wetland, or territorial sea.

There are also definitions for ordinary high water mark and high tide line.

IV. TECHNICAL AND SCIENTIFIC SUPPORT

We will end with a brief word about the support for the definition of WOTUS.

Section III states that the EPA and Corps: “interpret specific aspects of the science, the law, and the agencies’ technical expertise: the scope of the region in which to evaluate waters when making a significant nexus determination, the waters to evaluate in combination with each other; and the functions provided by waters and strength

of those functions, and when such waters significantly affect the chemical, physical, or biological integrity of the downstream traditional navigable waters, interstate waters, or the territorial seas.”

The legal analysis focuses on the Supreme Court decisions in *Riverside Bayview*, *SWANCC* and *Rapanos*.

Scientific support came in large measure from “Connectivity of Streams and Wetlands to Downstream Waters: A Review of the Scientific Evidence” (the “Science Report”).

In September 2013, the draft of the Science Report was released for review by the Science Advisory Board, the agency established in 1978 to provide independent

scientific and technical advice to the EPA.

Twenty-seven technical experts were nominated by the public to perform the peer review of the draft report. The reviewers come from academia, non-profit organizations, a federal agency, and consulting firms.

Their technical specialties included hydrology, biology, wetland and stream ecology, geomorphology, biochemistry, and freshwater science. The selection process screened nominees for conflicts of interest.

The panel solicited over 133,000 comments from the public, and all of its proceedings, agendas, and minutes were made available to the public. The draft report reviewed and synthesized scientific literature from over 900 peer-reviewed articles.

The science advisory panel was highly supportive of the conclusions drawn in the draft Science Report.

The final peer review Science Report was issued in January 2015 and is available at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345>.

The terms “significant” and “nexus” are legal terms. Science Report uses the scientific concept of “connectivity” between streams and wetlands to downstream waters to describe the gradient of connectivity among them.

The final Science Report reviewed and synthesized over 1,200 peer reviewed scientific articles.

In addition to the support contained in the Science Report, the EPA and the Corps based the new rule in part on their own expertise.

Those agencies made over 400,000 CWA jurisdictional determinations, covering all of the states, since 2008.

Recall that Justice Kennedy’s significant nexus analysis was issued in Rapanos in 2006.

Of those, 120,000 were case-specific jurisdictional determinations.

At the time of this writing, lawsuits challenging the validity of the new definition of WOTUS have been filed.

Bills seeking to require a re-write of WOTUS have been introduced in the U.S. House of Representatives and the Senate. Stay tuned for developments on the judicial and legislative fronts. **BC'T**

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