

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

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 persons 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.

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

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.