

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'g* 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*, 393 F.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 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 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