IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA, Plaintiff, v. CHAMELEON LLC and GARY V. LAYNE, Defendants.	)	Civil Action No. 3:23cv763

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

As this Court previously and repeatedly stated, the "fossilized rule" is that intermittent streams are not WOTUS. (Apr. 4, 2024 Hr'g Tr. 11:9-19; 35:1; 39:3-9.) The Government remains hyper-focused on what has occurred on-Site, and in its Amended Complaint has added a sum-total of two, single-day observations of the mere presence of water within approximately 400 feet of the Site. The Government has added ***zero*** facts beyond those 400 feet to support that ***at least*** 1.38 miles of a branch of Lickinghole Creek and the creek itself ("1.38 Mile Stretch") are ***anything but*** intermittent.

The Government's Opposition only underscores that its Amended Complaint is deficient for multiple reasons.

First, in dismissing the original Complaint, this Court admonished the Government that it needed to provide "details" to establish jurisdiction. The Government has pled no such details or facts demonstrating that the long, 1.38 Mile Stretch of Lickinghole Creek between Lakeridge Parkway and its uppermost reach is relatively permanent.

To escape this, the Government attempts to fashion out of whole cloth an exception to *Sackett*'s tight jurisdictional requirements: that to establish jurisdiction, it need not plead that every link in the chain of waters leading from traditional navigable waters to the Site is "waters of the United States" ("WOTUS"). Instead, according to the Government, it need only plead some "indirect" connection to jurisdictional waters. This is a throwback to the "significant nexus" test enunciated by Justice Kennedy in *Rapanos*, unanimously rejected by the Supreme Court in *Sackett,* and clearly contrary to post-*Sackett* case law.

Second, the Government again tries to claim jurisdiction by labeling this 1.38 Mile Stretch as "seasonal." But again, the Amended Complaint contains no facts supporting the Government's undefined concept of "seasonality" along this 1.38 Mile Stretch. The Government also somewhat bafflingly contends that a "seasonal" stream can be an "intermittent" stream. This Court could not have been more clear—the "fossilized rule" is that intermittent streams are not WOTUS, yet the Government is telling the Court that Lickinghole Creek is WOTUS because its definition of a "seasonal" stream includes an "intermittent" stream.

The Government is not entitled to a second leave to amend. The Government has investigated Mr. Layne for five years. It has had two full opportunities to plead sufficient facts establishing jurisdiction. The Court directed the Government to provide important jurisdictional "details," yet it chose not to do so. Allowing the Government to proceed yet again would only serve to prejudice Mr. Layne in the further expenditures of his time, effort, and money.

As Mr. Layne has repeatedly acknowledged, the Commonwealth of Virginia has jurisdiction over the Site, not the Federal Government. Dismissal with prejudice will allow for productive conversations with the Commonwealth to move forward to address the Site, unabated by the Government's continued pursuit of Mr. Layne.

For these reasons and the reasons previously stated, the Court should grant the Motion to Dismiss the Amended Complaint, and do so with prejudice.

ARGUMENT

I. The Court provided a roadmap to the Government for amendment, which it chose not to follow.

In dismissing the Government's original Complaint, the Court provided a roadmap for what facts may suffice to state a plausible claim. The Court stated that while the Complaint "describes the location and names of each of the[] bodies of water, it alleges no facts to substantiate the conclusions that a 'continuous surface connection' exists or that the tributaries at issues are 'relatively permanent.'" (Doc. 56 at 14.) As it related to the Government's first Site inspection, the Government merely plead that one occurred. (Doc. 56 at 15.) The Complaint "provide[d] no ***details*** about the results or findings or the inspection." (*Id.* (emphasis added).) The Complaint claimed that the inspection "'identified the aquatic resources discussed above,' [but] those resources were only discussed in terms of legal conclusions." (*Id.*) Simply stating that "an inspection occurred and identified 'wetlands' ***[was] not enough***" to establish jurisdiction. (*Id.* (emphasis added).)

While the Amended Complaint does provide additional allegations, they ***solely*** relate to on-Site particulars, and the small area within 400 feet of the Site and before the end of a drainage channel running approximately 478 feet (yellow in Figure A-2 below) from the Site. (Mem. 1.)

The Government provides no additional facts or details about the long, 1.38 Mile Stretch beyond in either the Amended Complaint or in its Opposition. Put simply, there are no pled "***details***" about this long stretch that covers both a .36 mile non-jurisdictional/intermittent stream branch of Lickinghole Creek (orange) and a 1.02 mile section of Lickinghole Creek itself (red). (Mem. 1.)

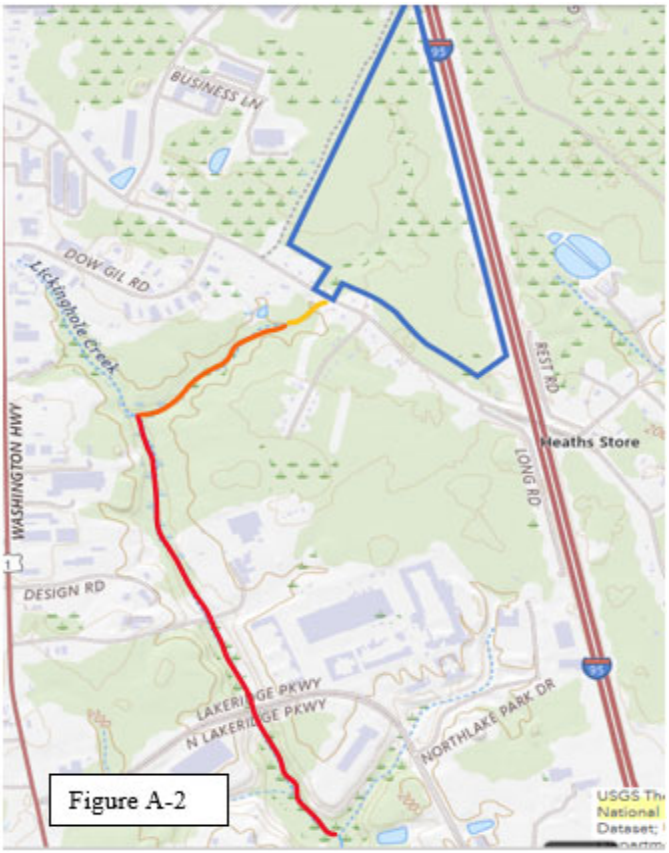

Figure A-2

As explained more fully below, this failure to plead facts, rather than legal conclusions, regarding the 1.38 Mile Stretch is dispositive here.

II. The Government has failed to establish that that the 1.38 Mile Stretch is jurisdictional under the CWA.

The Government willfully ignores the long, 1.38 Mile Stretch approaching the Site. Without conceding that the paltry addition of observations on Site or within 400 feet of the Site suffices to establish jurisdiction here, (*see* Mem. 18-29), the Government's failure to address the 1.38 Mile Stretch demonstrates its stubborn overreach and is fatal to any jurisdictional claim.

As Mr. Layne explained in his opening brief, the USGS's National Hydrology Database ("NHD") provides critical, up-to-date information regarding portions of mapped streams, including their lengths. (Mem. 12 n.7.)[1] And the Government recognizes USGS's maps as

[1] Notably, the dates for these measurements, and the USGS categorization of these portions as intermittent are from 2012, (*see id.*), long before Mr. Layne purchased the Site, (Opp'n 5). This

"probative." (Opp'n 13.) The USGS classifies every inch of this long 1.38 Mile Stretch as intermittent. (Mem. 15-18.) In turn, the USGS defines an intermittent stream as one that "flows only when it receives water from rainfall runoff or springs, or from some surface source such as melting snow." *See* Water Basics Glossary, https://water.usgs.gov/water-basics_glossary.html (last visited Feb. 5, 2025) (cited by Opp'n 13 n.10). This definition aligns with common sense: an intermittent stream is simply reacting to precipitation.[2] This aligns with *Rapanos*'s holding that WOTUS "does not include channels that periodically provide drainage for rainfall." 547 U.S. 715, 739 (2006). *Sackett*'s "fossilized rule" that intermittent streams are not WOTUS dictates that this 1.38 Mile Stretch is not jurisdictional.

Ignoring this, the Government relies on three "facts" to try to show that this 1.38 Mile Stretch is jurisdictional: that it is a named stream with a channel; that StreamStats, Hillshade data, and digital elevation models show that this channel exists; and that this channel has a "strong historical presence." (Opp'n 16.) None of these alleged "facts" discuss water flow. And none of

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cuts against any argument that Mr. Layne's alleged activities somehow altered the flow regime from the Site. (*See* Opp'n 19.) The Government's unsupported allegations on this point also defy logic and common sense, which are not thrown out at the motion to dismiss stage. *See Phatisis v. Clark*, 2013 WL 4098488, at *6 (E.D. Va. Aug. 13, 2013) (Hudson, J.) (stating that when "determining whether a complaint states on its face a plausible claim for relief and therefore can survive a Rule 12(b)(6) motion will be a context-specific task that requires the reviewing court to draw on its judicial experience ***and common sense.***" (internal citations omitted)). In 2012, the Site was not disturbed and contained approximately 102 acres of "undeveloped forest." (Am. Compl. ¶ 26.) And it was full of all sorts of plants and trees. (*See* Am. Compl. Fig. 2.) Common sense shows that these plants and trees soaked up water and, if anything, removing those plants and trees would only ***increase*** flow, not decrease it.

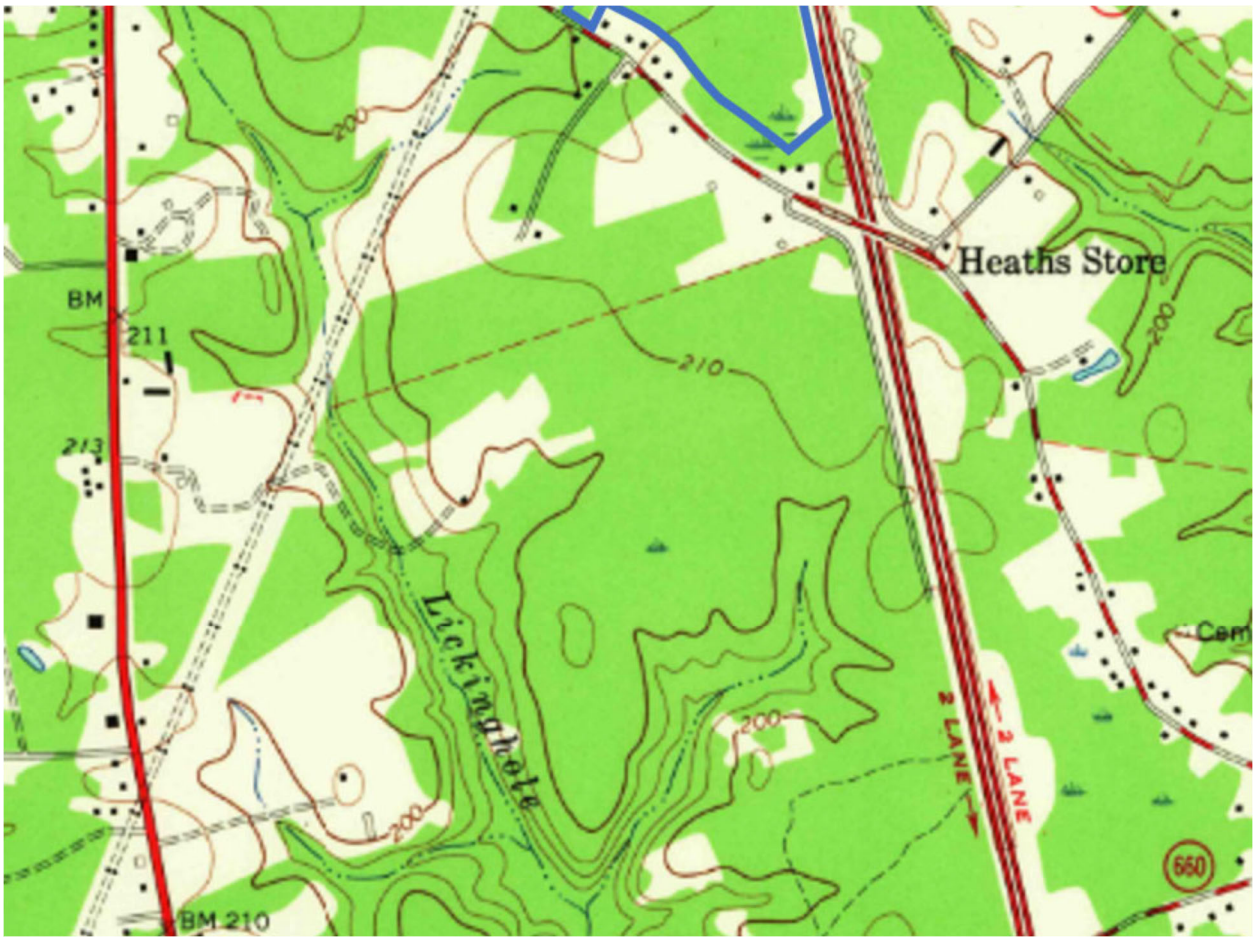
[2] The Amended Complaint makes no mention of any "spring" whatsoever. That said, the USGS provides a specific topographic map symbol for a spring. *See* Topographic Map Symbols 4, https://pubs.usgs.gov/gip/TopographicMapSymbols/topomapsymbols.pdf. The Court can and should take judicial notice of this fact because it is contained on a governmental website. *See Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (noting that it was proper to take judicial notice from information on government website in disposing of 12(b)(6) motion). None appears on or near the Site or the 1.38 Mile Stretch. (*See, e.g.*, Mem. Ex. C at 19 (2022 USGS Map).) Accordingly, the 1.38 Mile Stretch is merely reacting to precipitation.

these reasons suffice. This comes notwithstanding the Government's previous representation that whether any stream met *Sackett*'s requirements was a "highly fact-sensitive inquir[y]" and in disregard of the Court's finding that "[d]espite this recognition, the United States fails to provide facts beyond legal conclusions.". (Doc. 56 at 14.)

First, merely alleging that part of the 1.38 Mile Stretch is named and has a channel does not establish that it constitutes a relatively permanent water. Campbell Creek, which the Government previously claimed was "relatively permanent," is "named" and it too has a "channel." (*See* Mem. 13-14.; Doc 12-4 at D-6.) But the Government's consultant previously confirmed that Campbell Creek near the Site is an intermittent stream—just as the USGS classifies it. (*See id.* & Exhibit E.) This is unsurprising because even ephemeral and intermittent streams have channels. *See Rapanos v. United States*, 547 U.S. 715, 722 (2006) ("[T]he entire land area of the United States lies in some drainage basin, and ***an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls***." (emphasis added).) The Court has correctly emphasized the "fossilized rule" that these ephemeral and intermittent streams are not jurisdictional. (*See* Apr. 4 Hr'g Tr. 11:18-19.) Just because a part of the 1.38 Mile Stretch has a name, and a channel says nothing about relative permanence.

Second, the Government argues that Lickinghole Creek has a "strong historical presence." (Opp'n 16.) This again does not support the legal conclusion that it is "relatively permanent." For example, an isolated intrastate lake, far from traditional navigable waters, does not become jurisdictional simply because it has been shown on a map for a century. Moreover, the Government cannot use the maps as both a shield and a sword. Instead, it must acknowledge that for over ***sixty years*** the USGS maps (starting with the 1963 map, excerpted below) that it incorporates into the

Amended Complaint and relies on in its Opposition have identified this 1.38 Mile Stretch as ***intermittent,*** which is ***non-jurisdictional***:



(*See* Mem. 16 Fig. C-10 & Exhibit C at 10.)[3]

Finally, the Government relies on "StreamStats, Hillshade data, and a digital elevation model" in an attempt to claim jurisdiction over this 1.38 Mile Stretch which they have chosen to ignore for nearly half a decade. (Opp'n 16.) But as the Court recalls, this is exactly what the Government relied on in their original Complaint. (*See* Original Compl. ¶ 32 (stating that

[3] Use of these USGS maps is permissible as the Government incorporates them by reference and relies on them in the Amended Complaint and in its Opposition. (*See, e.g.*, Am. Compl. ¶ 74; Opp'n 10.) The Court previously allowed their use on this basis. (*See* Doc. 56 at 11.) And the Government agrees that these maps are "probative." (Opp'n 13.)

"Lickinghole Creek [is] mapped by the United States Geologic Survey in its StreamStats online mapping application and visible in the hillshade elevation data").) And the Court already ruled that this information was insufficient to meet the Government's pleading requirements. (*See* Doc. 56 at 10-16.)

Moreover, the relevant allegations of the Amended Complaint reveal that there is no "detail" to support that the 1.38 Mile Stretch is relatively permanent. For example, the Government cites to the Amended Complaint's Figures 5-7. (Opp'n 16.) Figure 5 merely shows the drainage basin including the branch of Lickinghole Creek denoted in orange in the map above, (Fig. A-2), and what the Government describes as "Unnamed Tributary 1," (*see* Am. Compl. Fig. 5.) This tells us nothing about flow in that channel. It also does not address the additional 1.02 miles of the 1.38 Mile Stretch south to Lakeridge Parkway. (*See id.*) Figure 6 similarly shows the drainage basin in "Unnamed Tributary 1" headed towards the intersection of the drainage basin with Lickinghole Creek, but it also tells us nothing about flow and is cutoff at that intersection. (*See* Fig. 6.) Figure 7 shows a hypothetical, computer-generated drainage path for Unnamed Tributary 1 to where it intersects Lickinghole Creek. (*See* Am. Compl. Fig. 7.) As Mr. Layne previously explained, this application is completely hypothetical, showing a computer model predicting drainage paths in this area, not any actual facts. (Mem. 27.) Indeed, the blue pixilated lines run through buildings. (*See id.* (excerpting Am. Compl. Fig. 7).) While this figure shows a section of Lickinghole Creek relying on USGS maps, those maps clearly show that Lickinghole Creek is intermittent at this point. This figure also does not continue south to where jurisdiction ***potentially*** lies, approximately 1.38 miles downstream. (*See id.*) Most tellingly, none of these figures discuss or mention the presence of any flow in the channels.

As the Court previously explained to the Government, it needed to provide sufficient details in the Amended Complaint to establish jurisdiction. But the Government has not. It has relied on the same legal conclusions cloaked as supposed "facts" that it did previously, and completely ignores that this 1.38 Mile Stretch is intermittent. The only surficial change is that the Government now repeatedly alleges that portions of this 1.38 Mile Stretch are "perennial" (without factual support and in contrast to the maps it incorporates into its Amended Complaint) instead of "relatively permanent" (also without factual support), as alleged in the original Complaint. (*Compare* Am. Compl. ¶ 74 (stating that "Lickinghole Creek is a named stream with an incised channel containing flow perennially or at least seasonally"), *with* Original Compl. ¶ 33 (stating that "Lickinghole Creek is a relatively permanent tributary of Stony Run").)

And there is no dispute or conflict between the USGS mapping and the Amended Complaint's allegations. That is so because the Amended Complaint contains ***no facts or details, rather than legal conclusions, about flow*** in this 1.38 Mile Stretch. The USGS maps incorporated by reference into the Amended Complaint, judicially-noticeable, *see, e.g.*, *Beltran v. United States*, 2008 WL 11449236, at *1 n.1 (D. Ariz. Dec. 15, 2008) (taking judicial notice of USGS maps at Government's request), "probative," (Opp'n 13), and they establish that this long stretch is an intermittent stream, (*see* Mem. 12-18). Two things cannot conflict where one does not exist.

Even if the Court considered there to be conflict, which there is not, the USGS NHD map itself controls. *See Call v. GEICO Advantage Ins. Co.*, 2023 WL 5109549, at *3 (E.D. Va. Aug. 9, 2023) (Hudson, J.) (stating that where "bare allegations" of complaint conflict with documents that documents control). As noted above, there are no factual allegations supporting the bare allegation that this 1.38 Mile Stretch is perennial, which the Government defines as "year-round"

flow. (Am. Compl. ¶ 73.) And the USGS NHD maps and data unequivocally establish that this long stretch is intermittent. Accordingly, the USGS maps control.

The Government's own USGS NHD maps are admittedly "probative" and establish that this 1.38 Mile Stretch is a non-jurisdictional, intermittent stream; accordingly, the Government's Amended Complaint should be dismissed.

III. The Government's position that it need not plead facts supporting jurisdiction for each water connecting the Site to traditionally navigable waters would undermine and contradict *Sackett*.

In an attempt to escape the inevitable, the Government claims that it does not have to plead facts supporting that "every inch of the connection between a wetland and a downstream traditional navigable water contain[s] relatively permanent waters." (Opp'n 22.) On this, Mr. Layne agrees. It would be absurd to require that the Government include an additional 87,437 paragraphs—one for every inch of the 1.38 miles—to meet the Federal Rules' requirements that the Amended Complaint contain "sufficient" facts to meet federal pleading standards. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Unfortunately for the Government, it must actually plead ***something,*** as ***nothing*** is plainly insufficient. Simply calling Lickinghole Creek "perennial" instead of "relatively permanent" is a distinction without a difference. What is more, Mr. Layne made this argument related to this long stretch nearly a year ago. (*See, e.g.*, Doc. 12 at 23.) Yet the Government decided to sit on its hands and do nothing to remedy this obvious defect.

Having lacked any diligence over the past five years to plausibly assert jurisdiction over this critical stretch, the Government conjures out of thin air a new exception to *Sackett* and *Rapanos*: that it need not plead facts showing that every water body between the Site and traditionally navigable waters is relatively permanent. (*See* Opp'n 12 n.6.) The Government's

position is an end-run around *Sackett* and *Rapanos* and would create an exception that would swallow the rule.

Indeed, the Government's position is "de-ja-vu all over again."[4] In *Rapanos*, Justice Scalia lamented that the Government's repeated response to decisions limiting its jurisdiction under the CWA was to simply ignore those limits. *See Rapanos*, 547 U.S. at 726 (noting that "Corps did not significantly revise its theory of federal jurisdiction" after Supreme Court struck down jurisdiction based on "Migratory Bird" rule). *Sackett* reinforced Justice Scalia's observations. *See Sackett v. Environmental Protection Agency*, 598 U.S. 651, 667 (2023) (noting that agencies "admitted that 'almost all waters and wetlands across the country could be subject to a case-specific jurisdictional determination" under post-*Rapanos* guidance documents).

Here, the Government continues its past practices. It maintains that all that is required to demonstrate jurisdiction is for it to sufficiently plead the existence of a sliver of an alleged relatively permanent water that connects to a wetland and extends—however minimally—off the wetland itself. (*See* Opp'n 12 n.9.) All that the Government claims that it needs to do is plead that this "relatively permanent" sliver of water "*connect*, directly or ***indirectly***, to a traditional navigable water" and that it need not show that the "*connection* itself is not required to be relatively permanent." (*Id.* (second emphasis added).) Put differently, the nexus[5] can be indirect to traditional navigable waters. It need only affect it indirectly or tangentially.

This is just another recitation of the "significant nexus" test that the *Sackett* Court ***unanimously*** rejected, while adopting Justice Scalia's test from *Rapanos*. All that was required to show a "significant nexus" was that "the wetlands, either alone or in combination with ***similarly***

[4] *See* Yogi-isms, Yogi Berra Museum & Learning Center, https://yogiberramuseum.org/about-yogi/yogisms/ (last visited Feb. 5, 2025)
[5] *See* https://www.dictionary.com/browse/nexus ("nexus" is "a means of connection")

situated lands in the region, ***significantly affect*** the chemical, physical, and biological integrity" of traditionally navigable waters. *Sackett*, 598 U.S. at 662 (citing Post-*Rapanos* Guidance at 8). Under this test, "a wide range of *open-ended hydrological* and ecological factors" were considered. *Id.*; *see* Post-*Rapanos* Guidance at 8-12 (discussing various factors to apply to determine "significant nexus"), attached as Exhibit A. And "by the EPA's own admission, 'almost all waters and wetlands' are potentially susceptible to regulation under that test." *Sackett*, 598 U.S. at 662.

As an initial matter, without actually defining what it means by an "indirect" nexus, the Court and Mr. Layne are simply left to guess. Does the Government mean that there may be some "indirect" nexus to traditional navigable waters because a drainage basin or ditch lies between the supposedly-relatively-permanent Unnamed Tributary 1 and a traditional navigable water? Could it be that this connection, in combination with Unnamed Tributary 1, significantly affects the chemical, physical, and biological integrity of WOTUS? This is plainly not enough to show jurisdiction.

Additionally, this footnote is pure sophistry. It claims that the "EPA and Corps reasonably maintain th[is] interpretation," yet it provides no citation to any authority. Is it the EPA consultants ***on this case*** who have concocted this "interpretation"? Is it EPA's regulatory interpretation? Is it EPA post-*Sackett* guidance? Again, it appears the Government is simply ignoring or disregarding *Sackett*. In discussing these Agencies' historical disregard of Supreme Court precedent in case after case, *Sackett* lamented that the inquiry into jurisdiction developed into "fact-specific determinations regarding the presence of significant nexus." 598 U.S. at 667. And the EPA admitted that these "case-specific jurisdictional determination[s]" meant that it could claim jurisdiction over nearly every wetland in this Nation. *Id.*

What is worse, this amorphous "indirect" nexus test that the Government invents without any legal basis leads to such dramatic uncertainty for ordinary citizens such as Mr. Layne. If the Government's position is correct, it can utilize this "potent weapon"—the CWA—with impunity and without any rules of engagement. *Id.* at 660. It raises serious due process concerns as the Government's interpretation here is so vague that an ordinary citizen cannot understand what conduct may be prohibited because of murky CWA jurisdiction. *Id.* at 680-81 (discussing due process concerns with EPA's "hopelessly indeterminate" and vague interpretation of its jurisdiction under CWA and potential severe penalties); *see also Rapanos*, 547 U.S. at 721 (noting that the Corps "exercises the discretion of an enlightened despot").

While the Government stakes out a new position regarding the reach of CWA jurisdiction (without any legal authority supporting it and *Sackett* to the contrary) in a footnote of a brief in federal district court, post-*Sackett* case law completely ignored by the Government confirms that its position is incorrect.

In *Lewis v. United States*, the Fifth Circuit addressed jurisdiction over wetlands where the "nearest relatively permanent body of water [wa]s removed miles away" from the property at issue. 88 F.4th 1073, 1078 (5th Cir. 2023). Between the property and the relatively permanent (jurisdictional) body of water were roadside ditches (non-jurisdictional), a culvert (non-jurisdictional), and a non-relatively permanent tributary (non-jurisdictional). *Id.* Thus, it was "not difficult to determine where the 'water' ends and any 'wetlands' . . . begin." *Id.* In fact, there was "***simply no connection whatsoever***." *Id.* (emphasis added). *Lewis* forecloses the Government's argument and bolster's Mr. Layne's, and the Government has not a single word to answer for it. Much like the 1.38 Mile Stretch, the Government simply ignores this on-point, post-*Sackett* case that dooms their claim here. (*See* Mem. 23 ("The Government cannot connect the wetlands on

Site through a culvert, an ephemeral stream/drainage area, and a long stretch of intermittent stream." (citing *Lewis*, 88 F. 4th at 1077)).

Similarly, in *United States v. Sharfi*, the court found that there was no jurisdiction where the interconnected chain of bodies of water between traditionally navigable waters and the wetlands contained non-jurisdictional sections. *See* 2024 WL 4483354, at *12 (S.D. Fla. Sept. 21, 2024). There, ditches "closest" to the wetlands—approximately two miles from any traditional navigable waters—were non-jurisdictional. *See id.* These ditches did not constitute "relatively permanent, standing or continuously flowing bodies of water." *Id.* (quoting *Sackett*, 598 U.S. at 671). Additionally, there can be no continuous surface connection to determine where the "water ends and the wetland begins" when there is a ***break*** in the "water." *See id.*

Like *Lewis* and *Sharfi*, there is a fatal link in the jurisdictional chain here—the 1.38 Mile Stretch that is classified as intermittent by the USGS. That *Lewis* and *Sharfi* were decided at the summary judgment stage is of no moment. They stand for the proposition that every link in the chain of waters serving to establish CWA jurisdiction must be established by the Government as jurisdictional. Because the Government has failed to provide ***facts*** to establish that each water in the 1.38 mile chain meets the test for jurisdiction, the Government's Amended Complaint fails.

And as this Court correctly enunciated, the appropriate test requires that the Government "establish first, that the adjacent body of water constitutes 'water[s] of the United States, (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." (Doc. 56 at 14 (quoting *Sackett*, 598 U.S. at 678-79).) The Government needs to provide facts and "***details***" to meet this test.

While Mr. Layne disputes that two observations within 400 feet of the Site are sufficient to demonstrate relative permanence or year-round flow, (*see* Mem. 18-23), that is at least ***something***. The Government could have gone to this 1.38 Mile Stretch at any point over the last five years and attempted to demonstrate water flow and stream characteristics to include as allegations in the original or Amended Complaint. The Government could have gone out to this 1.38 Mile Stretch ***after*** being on notice that Mr. Layne had challenged jurisdiction on this very basis. Like the Government did with the neighboring property where it confirmed that Campbell Creek is an intermittent stream, (*see* Mem. 13-14 & Exhibit E), it could have asked for permission for entry or subpoenaed adjacent landowners to take observations, but it did not. The Amended Complaint also mentions seeing supposed "stream channel" and "channelized features" just off Site during a previous inspection, (Am. Compl. ⁋⁋ 55, 58), but it does not mention witnessing any flow or otherwise performing any testing to demonstrate flow. In short, the Government chose not to tempt the same fate with Unnamed Tributary 1 and Lickinghole Creek by potentially developing case-killing evidence as it did with Campbell Creek. (*See* Mem. 13-14 & Exhibit E (describing Government's consultant's classification of Campbell Creek as "intermittent).)

III. The Government's "position" regarding "seasonal" streams is indecipherable, contrary to *Rapanos* and *Sackett*, and lacking any factual support.

The Government claims that Lickinghole Creek qualifies for jurisdiction because it flows at least "seasonally." Yet if fails to define what constitutes "seasonal." Instead, it argues that courts have found that varying degrees of "seasonal" flow may count. (*See* Opp'n 27-29.) Much like the "indirect" nexus test it enunciates, the Government provides no clear guideposts for what it means by "seasonal."

Moreover, the Government's own non-specific definition of "seasonally" is self-defeating. It boldly tells the Court to "[n]ote also that the terms 'intermittent' and 'seasonal' could be used interchangeably, since a flow regime that is 'seasonal' could be categorized scientifically as 'intermittent,' as some resources define that term, because it flows less than perennially." (Opp'n 26 n.17.) In other words, the Government asserts that a jurisdictional "seasonal stream" can also be an "intermittent stream." Again, the "fossilized rule" is that intermittent streams are not WOTUS. This Court could not have been more clear on this point, and the Government's Opposition simply ignores that correct statement of the rule. (*See* Opp'n 30.) It is quite telling (and unsurprising) that the Government cannot bring itself to ***agree*** with the Court that the "fossilized rule" is that intermittent streams are not jurisdictional and, instead, has chosen to rephrase the Court's own clear words to suit its contrary position here. (*See id.*)

Even if the Government had set out a sound test for jurisdictional seasonal streams or could point to any reasoned guidance doing so, the Amended Complaint utterly fails to plead any facts establishing the existence of a seasonal stream. Instead, it only provides two specific instances of an inspector seeing water present within 400 feet of the Site during a single month of the year (April, the rainy season) and ***nothing*** in the 1.38 Mile Stretch. While the Government claims to have seen "channelized features that convey flow," (Am. Compl. ¶ 58), in this same area on other occasions, there is no allegation that the Government ***actually saw*** flow. Moreover, the Government does not provide specific dates. Thus, without those specific dates, it cannot be determined whether the Government observed such flow in the middle of downpours or after several days without rain. Nor can an actual application of the (non-existent) facts to the (made up) rule determine whether the Amended Complaint passes Rule 12(b)(6) muster. Indeed, the Court previously rejected the Government's attempts to state a claim by relying on vague

"observations" during an inspection as outlined in the original Complaint. (*See* Doc. 56 at 15 ("Simply stating that an inspection occurred and identified 'wetlands' is not enough to adequately allege that the wetlands in this case are WOTUS.") Allowing the Government to proceed on this non-specific theory on non-specific allegations would endorse a "Land is Waters" approach that the Supreme Court has squarely foreclosed and that this Court has already rejected.

Second, the Government's ill-defined "seasonal" position is unsupported by the law. The Government draws the term "seasonal" from Justice Scalia's admonition in footnote 5 of *Rapanos* that a "seasonal river" is not necessarily excluded as jurisdictional and can be considered "relatively permanent." *See Rapanos*, 547 U.S. 733 n.5. By its very terms, the footnote discusses seasonal ***rivers***. *See Sharfi*, 2024 WL 4483354, at *12 ("Initially, I note that this footnote [5] regarding seasonality, by its own terms, applies to rivers and not ditches."). Thus, the Government tries to paint its jurisdiction with too broad a stroke given Justice Scalia's words. And, in fact, post-*Sackett*, at least one court has held that ditches containing "seasonal" flow do not qualify as jurisdictional. *See id.*

The Government's cited cases provide it no support.

As an initial matter, every single case—save one—predated *Sackett*. Accordingly, the "significant nexus" test for jurisdiction was at play and also an alternative basis for CWA jurisdiction. That sweeping, amorphous test offered a safety valve to the Government which safeguarded against the lack of connection to relatively permanent waters. But *Sackett* was a sea change that now requires more.

The only case cited by the Government that post-dates *Sackett* is *City of San Francisco Baykeeper v. City of Sunnyvale*, 2023 WL 8587610 (N.D. Cal. Dec. 11, 2023). But there the court denied a motion for reconsideration on a pre-*Sackett* motion for summary judgment in which the

court applied the "significant nexus" test. *Id.* at *1-3. The court denied reconsideration because its prior decision found that a channel at-issue "flow[ed] seasonally," seizing on *Rapanos*'s language that "seasonal rivers" were not necessarily excluded from CWA jurisdiction. *Id.* at *5. Thus, the court's decision—even post-*Sackett*—was infected by the "significant nexus" test.

Accordingly, the Government cannot proceed on any "seasonal" theory, and the Court should dismiss the Government's Amended Complaint.

IV. The Government should be denied leave to amend.

This Court already provided the Government an opportunity and ample time to cure a deficient Complaint. The Court should deny the Government a second opportunity when the Government failed to follow the Court's clear directions and such a third chance at amendment would severely prejudice Mr. Layne.

The Government has been investigating Mr. Layne for nearly ***five years***. It has been afforded every opportunity to present its case for jurisdiction. With the issuance of *Sackett* well ***before*** it filed its Complaint, the Government knew that the 1.38 Mile Stretch was a major, insurmountable problem for it. (*See* Doc. 12 at 23.) Yet the Government has chosen to do nothing to assess jurisdiction over that stretch, apparently hoping that the Court will allow it to slip past the initial pleading stage. The Court should not countenance such willful ignorance and intentional inaction which seeks to avoid what admitted "probative" evidence (the USGS NHD maps) has established—that the entire 1.38 Mile Stretch is a non-jurisdictional intermittent stream. The sole person bearing the costs of the Government's abject shortcomings and failures is Mr. Layne. He would suffer further prejudice by having to incur additional significant expenditures of time, effort, and money in defending litigation that has gone on far too long. *See Warren v. Aditya*, 2024 WL 3740058, *3 (E.D. Va. June 24, 2024) (Novak, J.).

The Government claims that it "painstakingly" amended after the Court held that it failed to meet well-established pleading standards with its original Complaint. As the Court is aware, the Government boasted that it could "easily" amend in response to Mr. Layne's original motion to dismiss. (*See* Doc. Doc. 19 at 28.) The Government went so far as to tell the Court in April 2024 that it could amend "today." (*See* Hr'g Tr. 29:22-24.) Even after the Court admonished the Government to provide facts and "***details***" to substantiate its claims, it did nothing more and simply ignored the Court and its ruling just as it has continually ignored this 1.38 Mile Stretch. The Government should not be afforded another chance to the detriment of Mr. Layne. *See Warren*, 2024 WL 3740058, at *3 (denying leave to amend where plaintiff's second amended complaint "fail[ed] for the same reasons outlined in the Court's prior Order").

The Government, as plaintiff, is master of its Complaint, can plead or not plead whatever it would like. It should suffer the consequences of its actions and inactions and Mr. Layne should be freed from the Government for its's own failures, so that he can get on with this matter and work with the Commonwealth of Virginia to address the Site.

CONCLUSION

For the reasons previously stated and for the reasons stated herein, the Court should grant Defendants' Motion to Dismiss and dismiss the Government's Amended Complaint with prejudice.

Dated: February 5, 2025

Respectfully submitted,

/s/ *Frank Talbott V*

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CERTIFICATE OF SERVICE

I certify that on February 5, 2025, I filed the forgoing electronically, which sent a notice of electronic filing to all counsel of record in this matter.

/s/ *Frank Talbott V*

Exhibit A

Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States

This memorandum[1] provides guidance to EPA regions and U.S. Army Corps of Engineers ["Corps"] districts implementing the Supreme Court's decision in the consolidated cases Rapanos v. United States and Carabell v. United States[2] (herein referred to simply as "Rapanos") which address the jurisdiction over waters of the United States under the Clean Water Act.[3] The chart below summarizes the key points contained in this memorandum. This reference tool is not a substitute for the more complete discussion of issues and guidance furnished throughout the memorandum.

Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- **Traditional navigable waters**
- **Wetlands adjacent to traditional navigable waters**
- **Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)**
- **Wetlands that directly abut such tributaries**

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- **Non-navigable tributaries that are not relatively permanent**
- **Wetlands adjacent to non-navigable tributaries that are not relatively permanent**
- **Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary**

The agencies generally will not assert jurisdiction over the following features:

- **Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)**
- **Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water**

The agencies will apply the significant nexus standard as follows:

- **A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters**
- **Significant nexus includes consideration of hydrologic and ecologic factors**

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[1] This guidance incorporates revisions to the EPA/Army Memorandum originally issued on June 6, 2007, after careful consideration of public comments received and based on the agencies' experience in implementing the *Rapanos* decision.

[2] 126 S. Ct. 2208 (2006).

[3] 33 U.S.C. §1251 et seq.

Background

Congress enacted the Clean Water Act ("CWA" or "the Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[4] One of the mechanisms adopted by Congress to achieve that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in compliance with other specified sections of the Act.[5] In most cases, this means compliance with a permit issued pursuant to CWA §402 or §404. The Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source[,]"[6] and provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas[,]." [7]

In Rapanos, the Supreme Court addressed where the Federal government can apply the Clean Water Act, specifically by determining whether a wetland or tributary is a "water of the United States." 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.

The Rapanos Decision

Four justices, in a plurality opinion authored by Justice Scalia, rejected the argument that the term "waters of the United States" is limited to only those waters that are navigable in the traditional sense and their abutting wetlands.[8] However, the plurality concluded that the agencies' regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters.[9]

Justice Kennedy did not join the plurality's opinion but instead authored an opinion concurring in the judgment vacating and remanding the cases to the Sixth Circuit Court of Appeals.[10] Justice Kennedy agreed with the plurality that the statutory term "waters of the United States" extends beyond water bodies that are traditionally considered navigable.[11] Justice Kennedy, however, found the plurality's interpretation of the scope of the CWA to be "inconsistent with the Act's text, structure, and purpose[,]" and he instead presented a different standard for evaluating CWA jurisdiction over wetlands and other water bodies.[12] Justice Kennedy concluded that wetlands are "waters

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[4] 33 U.S.C. § 1251(a).
[5] 33 U.S.C. § 1311(a), §1362(12)(A).
[6] 33 U.S.C. § 1362(12)(A)
[7] 33 U.S.C. § 1362(7). See also 33 C.F.R. § 328.3(a) and 40 C.F.R. § 230.3(s).
[8] Id. at 2220.
[9] Id. at 2225-27.
[10] Id. at 2236-52. While Justice Kennedy concurred in the Court's decision to vacate and remand the cases to the Sixth Circuit, his basis for remand was limited to the question of "whether the specific wetlands at issue possess a significant nexus with navigable waters." 126 S. Ct. at 2252. In contrast, the plurality remanded the cases to determine both "whether the ditches and drains near each wetland are 'waters,'" and "whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection...." Id. at 2235.
[11] Id. at 2241.
[12] Id. at 2246.

of the United States" "if the 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 more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[13]

Four justices, in a dissenting opinion authored by Justice Stevens, concluded that EPA's and the Corps' interpretation of "waters of the United States" was a reasonable interpretation of the Clean Water Act.[14]

When there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices.[15] Thus, regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied.[16] Since Rapanos, the United States has filed pleadings in a number of cases interpreting the decision in this manner.

The agencies are issuing this memorandum in recognition of the fact that EPA regions and Corps districts need guidance to ensure that jurisdictional determinations, permitting actions, and other relevant actions are consistent with the decision and supported by the administrative record. Therefore, the agencies have evaluated the Rapanos opinions to identify those waters that are subject to CWA jurisdiction under the reasoning of a majority of the justices. This approach is appropriate for a guidance document. The agencies will continue to monitor implementation of the Rapanos decision in the field and recognize that further consideration of jurisdictional issues, including clarification and definition of key terminology, may be appropriate in the future, either through issuance of additional guidance or through rulemaking.

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[13] Id. at 2248. Chief Justice Roberts wrote a separate concurring opinion explaining his agreement with the plurality. See 126 S. Ct. at 2235-36.

[14] Id. at 2252-65. Justice Breyer wrote a separate dissenting opinion explaining his agreement with Justice Stevens' dissent. See 126 S. Ct. at 2266.

[15] See Marks v. United States, 430 U.S. 188, 193-94 (1977); Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test … that lower courts should apply," under Marks, as the holding of the Court); cf. League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); Alexander v. Sandoval, 532 U.S. 275, 281-282 (2001) (same).

[16] 126 S. Ct. at 2265 (Stevens, J., dissenting) ("Given that all four justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases – and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied – on remand each of the judgments should be reinstated if *either* of those tests is met.") (emphasis in original). The agencies recognize that the Eleventh Circuit, in United States v. McWane, Inc., et al., 505 F.3d 1208 (11th Cir. 2007), has concluded that the Kennedy standard is the sole method of determining CWA jurisdiction in that Circuit. The Supreme Court denied the government's petition for a writ of *certiorari* on December 1, 2008.

Agency Guidance[17]

To ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions are consistent with the Rapanos decision, the agencies in this guidance address which waters are subject to CWA § 404 jurisdiction.[18] Specifically, this guidance identifies those waters over which the agencies will assert jurisdiction categorically and on a case-by-case basis, based on the reasoning of the Rapanos opinions.[19] EPA and the Corps will continually assess and review the application of this guidance to ensure nationwide consistency, reliability, and predictability in our administration of the statute.

1. Traditional Navigable Waters (i.e.,"(a)(1) Waters") and Their Adjacent Wetlands

Key Points

- **The agencies will assert jurisdiction over traditional navigable waters, which includes all the waters described in 33 C.F.R. § 328.3(a)(1), and 40 C.F.R. § 230.3 (s)(1).**
- **The agencies will assert jurisdiction over wetlands adjacent to traditional navigable waters, including over adjacent wetlands that do not have a continuous surface connection to traditional navigable waters.**

EPA and the Corps will continue to assert jurisdiction over "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or

[17] The CWA provisions and regulations described in this document contain legally binding requirements. This guidance 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 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 statutes, regulations, and case law.

[18] This guidance focuses only on those provisions of the agencies' regulations at issue in Rapanos -- 33 C.F.R. §§ 328.3(a)(1), (a)(5), and (a)(7); 40 C.F.R. §§ 230.3(s)(1), (s)(5), and (s)(7). This guidance does not address or affect other subparts of the agencies' regulations, or response authorities, relevant to the scope of jurisdiction under the CWA. In addition, because this guidance is issued by both the Corps and EPA, which jointly administer CWA § 404, it does not discuss other provisions of the CWA, including §§ 311 and 402, that differ in certain respects from § 404 but share the definition of "waters of the United States." Indeed, the plurality opinion in Rapanos noted that "... there is no reason to suppose that our construction today significantly affects the enforcement of §1342 ... The Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" (emphasis in original) 126 S. Ct. 2208, 2227. EPA is considering whether to provide additional guidance on these and other provisions of the CWA that may be affected by the Rapanos decision.

[19] In 2001, the Supreme Court held that use of "isolated" non-navigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. See Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). This guidance does not address SWANCC, nor does it affect the Joint Memorandum regarding that decision issued by the General Counsels of EPA and the Department of the Army on January 10, 2003. See 68 Fed. Reg. 1991, 1995 (Jan. 15, 2003).

foreign commerce, including all waters which are subject to the ebb and flow of the tide."[20] These waters are referred to in this guidance as traditional navigable waters.

The agencies will also continue to assert jurisdiction over wetlands "adjacent" to traditional navigable waters as defined in the agencies' regulations. Under EPA and Corps regulations and as used in this guidance, "adjacent" means "bordering, contiguous, or neighboring." Finding a continuous surface connection is not required to establish adjacency under this definition. The Rapanos decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are "waters of the United States."[21]

The regulations define "adjacent" as follows: "The term *adjacent* means 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.'"[22] Under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. This hydrologic connection may be intermittent. Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based

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[20] 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1). The "(a)(1)" waters include all of the "navigable waters of the United States," defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka MN). For purposes of CWA jurisdiction and this guidance, waters will be considered traditional navigable waters if:

- They are subject to Section 9 or 10 of the Rivers and Harbors Act, or
- A federal court has determined that the water body is navigable-in-fact under federal law, or
- They are waters currently being used for commercial navigation, including commercial water-borne recreation (e.g., boat rentals, guided fishing trips, water ski tournaments, etc.), or
- They have historically been used for commercial navigation, including commercial water-borne recreation; or
- They are susceptible to being used in the future for commercial navigation, including commercial water-borne recreation. Susceptibility for future use may be determined by examining a number of factors, including the physical characteristics and capacity of the water (e.g., size, depth, and flow velocity, etc.) to be used in commercial navigation, including commercial recreational navigation, and the likelihood of future commercial navigation or commercial water-borne recreation. Evidence of future commercial navigation use, including commercial water-borne recreation (e.g., development plans, plans for water dependent events, etc.), must be clearly documented. Susceptibility to future commercial navigation, including commercial water-borne recreation, will not be supported when the evidence is insubstantial or speculative. Use of average flow statistics may not accurately represent streams with "flashy" flow characteristics. In such circumstances, daily gage data is more representative of flow characteristics.

[21] Id. at 2248 (Justice Kennedy, concurring) ("As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.").

[22] 33 C.F.R. § 328.3(c).

inference that such wetlands have an ecological interconnection with jurisdictional waters.[23] Because of the scientific basis for this inference, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case-specific demonstration of an ecologic interconnection. In the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial. For example, species, such as amphibians or anadramous and catadramous fish, move between such waters for spawning and their life stage requirements. Migratory species, however, shall not be used to support an ecologic interconnection. In assessing whether a wetland is reasonably close to a jurisdictional water, the proximity of the wetland (including all parts of a single wetland that has been divided by road crossings, ditches, berms, etc.) in question will be evaluated and shall not be evaluated together with other wetlands in the area.

2. Relatively Permanent Non-navigable Tributaries of Traditional Navigable Waters and Wetlands with a Continuous Surface Connection with Such Tributaries

Key Points

- **The agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).**
- **The agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection to such tributaries (e.g., they are not separated by uplands, a berm, dike, or similar feature.)**

A non-navigable tributary[24] of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries. Both the plurality opinion and the dissent would uphold CWA jurisdiction over non-navigable tributaries that are "relatively permanent" – waters that typically (e.g., except due to drought) flow year-round or waters that have a

[23] See e.g., United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985) ("...the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.").

[24] A tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water. Furthermore, a tributary, for the purposes of this guidance, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). The flow characteristics of a particular tributary generally will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream). However, for purposes of determining whether the tributary is relatively permanent, where data indicates the flow regime at the downstream limit is not representative of the entire tributary (as described above) (e.g., where data indicates the tributary is relatively permanent at its downstream limit but not for the majority of its length, or vice versa), the flow regime that best characterizes the entire tributary should be used. A primary factor in making this determination is the relative lengths of segments with differing flow regimes. It is reasonable for the agencies to treat the entire tributary in light of the Supreme Court's observation that the phrase "navigable waters" generally refers to "rivers, streams, and other hydrographic features." 126 S. Ct. at 2222 (Justice Scalia, quoting Riverside Bayview, 474 U.S. at 131). The entire reach of a stream is a reasonably identifiable hydrographic feature. The agencies will also use this characterization of tributary when applying the significant nexus standard under Section 3 of this guidance.

continuous flow at least seasonally (e.g., typically three months).[25] Justice Scalia emphasizes that relatively permanent waters do not include tributaries "whose flow is 'coming and going at intervals ... broken, fitful.'"[26] Therefore, "relatively permanent" waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard described below. The agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding.

In addition, the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding. As explained above, the plurality opinion and the dissent agree that such wetlands are jurisdictional.[27] The plurality opinion indicates that "continuous surface connection" is a "physical connection requirement."[28] Therefore, a continuous surface connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature).[29]

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[25] See 126 S. Ct. at 2221 n. 5 (Justice Scalia, plurality opinion) (explaining that "relatively permanent" does not necessarily exclude waters "that might dry up in extraordinary circumstances such as drought" or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months").

[26] Id. (internal citations omitted)

[27] Id. at 2226-27 (Justice Scalia, plurality opinion).

[28] Id. at 2232 n.13 (referring to "our physical-connection requirement" and later stating that Riverside Bayview does not reject "the physical-connection requirement") and 2234 ("Wetlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States.") (emphasis in original). See also 126 S. Ct. at 2230 ("adjacent" means "physically abutting") and 2229 (citing to Riverside Bayview as "confirm[ing] that the scope of ambiguity of 'the waters of the United States' is determined by a wetland's *physical connection* to covered waters...") (emphasis in original). A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary. 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2 (defining wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support ... a prevalence of vegetation typically adapted for life in saturated soil conditions").

[29] While all wetlands that meet the agencies' definitions are considered adjacent wetlands, only those adjacent wetlands that have a continuous surface connection because they directly abut the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature) are considered jurisdictional under the plurality standard.

3. Certain Adjacent Wetlands and Non-navigable Tributaries That Are Not Relatively Permanent

Key Points

- **The agencies will assert jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to a traditional navigable water.**
- **A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.**
- **"Similarly situated" wetlands include all wetlands adjacent to the same tributary.**
- **Significant nexus includes consideration of hydrologic factors including the following:**
  - **volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary**
  - **proximity to the traditional navigable water**
  - **size of the watershed**
  - **average annual rainfall**
  - **average annual winter snow pack**
- **Significant nexus also includes consideration of ecologic factors including the following:**
  - **potential of tributaries to carry pollutants and flood waters to traditional navigable waters**
  - **provision of aquatic habitat that supports a traditional navigable water**
  - **potential of wetlands to trap and filter pollutants or store flood waters**
  - **maintenance of water quality in traditional navigable waters**
- **The following geographic features generally are not jurisdictional waters:**
  - **swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow)**
  - **ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water**

The agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent,[30] (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike or similar feature).[31] As described below, the agencies will assess the flow characteristics and functions of the tributary itself, together with the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters.

[30] For simplicity, the term "tributary" when used alone in this section refers to non-navigable tributaries that are not relatively permanent.

[31] As described in Section 2 of this guidance, the agencies will assert jurisdiction, without the need for a significant nexus finding, over all wetlands that are both adjacent and have a continuous surface connection to relatively permanent tributaries. See pp. 6-7, supra.

The agencies' assertion of jurisdiction over non-navigable tributaries and adjacent wetlands that have a significant nexus to traditional navigable waters is supported by five justices. Justice Kennedy applied the significant nexus standard to the wetlands at issue in Rapanos and Carabell: "[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the 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 more readily understood as 'navigable.'"[32] While Justice Kennedy's opinion discusses the significant nexus standard primarily in the context of wetlands adjacent to non-navigable tributaries,[33] his opinion also addresses Clean Water Act jurisdiction over tributaries themselves. Justice Kennedy states that, based on the Supreme Court's decisions in Riverside Bayview and SWANCC, "the connection between a non-navigable water or wetland may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. ... Absent a significant nexus, jurisdiction under the Act is lacking."[34] Thus, Justice Kennedy would limit jurisdiction to those waters that have a significant nexus with traditional navigable waters, although his opinion focuses on the specific factors and functions the agencies should consider in evaluating significant nexus for adjacent wetlands, rather than for tributaries.

In considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters. The ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. The flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus result from the ecological inter-relationship between tributaries and their adjacent wetlands. For example, the duration, frequency, and volume of flow in a tributary, and subsequently the flow in downstream navigable waters, is directly affected by the presence of adjacent wetlands that hold floodwaters, intercept sheet flow from uplands, and then release waters to tributaries in a more even and constant manner. Wetlands may also help to maintain more consistent water temperature in tributaries, which is important for some aquatic species. Adjacent wetlands trap and hold pollutants that may otherwise reach tributaries (and downstream navigable waters) including sediments, chemicals, and other pollutants. Tributaries and their adjacent wetlands provide habitat (e.g., feeding, nesting, spawning, or rearing young) for many aquatic species that also live in traditional navigable waters.

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[32] Id. at 2248. When applying the significant nexus standard to tributaries and wetlands, it is important to apply it within the limits of jurisdiction articulated in SWANCC. Justice Kennedy cites SWANCC with approval and asserts that the significant nexus standard, rather than being articulated for the first time in Rapanos, was established in SWANCC. 126 S. Ct. at 2246 (describing SWANCC as "interpreting the Act to require a significant nexus with navigable waters"). It is clear, therefore, that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in SWANCC. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non-jurisdictional by SWANCC.

[33] 126 S. Ct. at 2247-50.

[34] Id. at 2241 (emphasis added).

When performing a significant nexus analysis,[35] the first step is to determine if the tributary has any adjacent wetlands. Where a tributary has no adjacent wetlands, the agencies will consider the flow characteristics and functions of only the tributary itself in determining whether such tributary has a significant effect on the chemical, physical and biological integrity of downstream traditional navigable waters. A tributary, as characterized in Section 2 above, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). For purposes of demonstrating a connection to traditional navigable waters, it is appropriate and reasonable to assess the flow characteristics of the tributary at the point at which water is in fact being contributed to a higher order tributary or to a traditional navigable water. If the tributary has adjacent wetlands, the significant nexus evaluation needs to recognize the ecological relationship between tributaries and their adjacent wetlands, and their closely linked role in protecting the chemical, physical, and biological integrity of downstream traditional navigable waters.

Therefore, the agencies will consider the flow and functions of the tributary together with the functions performed by all the wetlands adjacent to that tributary in evaluating whether a significant nexus is present. Similarly, where evaluating significant nexus for an adjacent wetland, the agencies will consider the flow characteristics and functions performed by the tributary to which the wetland is adjacent along with the functions performed by the wetland and all other wetlands adjacent to that tributary. This approach reflects the agencies' interpretation of Justice Kennedy's term "similarly situated" to include all wetlands adjacent to the same tributary. Where it is determined that a tributary and its adjacent wetlands collectively have a significant nexus with traditional navigable waters, the tributary and all of its adjacent wetlands are jurisdictional. Application of the significant nexus standard in this way is reasonable because of its strong scientific foundation – that is, the integral ecological relationship between a tributary and its adjacent wetlands. Interpreting the phrase "similarly situated" to include all wetlands adjacent to the same tributary is reasonable because such wetlands are physically located in a like manner (i.e., lying adjacent to the same tributary).

Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water. In addition to any available hydrologic information (e.g., gauge data, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.), the agencies may reasonably consider certain physical characteristics of the tributary to characterize its flow, and thus help to inform the determination of whether or not a significant nexus is present between the tributary and downstream traditional navigable waters. Physical indicators of flow may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks.[36] Other physical indicators of flow may include

[35] In discussing the significant nexus standard, Justice Kennedy stated: "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters' ..." 126 S. Ct. at 2248. Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters.

[36] See 33 C.F.R. § 328.3(e). The OHWM also serves to define the lateral limit of jurisdiction in a non-navigable tributary where there are no adjacent wetlands. See 33 C.F.R. § 328.4(c). While EPA regions

shelving, wracking, water staining, sediment sorting, and scour.[37] Consideration will also be given to certain relevant contextual factors that directly influence the hydrology of tributaries including the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions.

In addition, the agencies will consider other relevant factors, including the functions performed by the tributary together with the functions performed by any adjacent wetlands. One such factor is the extent to which the tributary and adjacent wetlands have the capacity to carry pollutants (e.g., petroleum wastes, toxic wastes, sediment) or flood waters to traditional navigable waters, or to reduce the amount of pollutants or flood waters that would otherwise enter traditional navigable waters.[38] The agencies will also evaluate ecological functions performed by the tributary and any adjacent wetlands which affect downstream traditional navigable waters, such as the capacity to transfer nutrients and organic carbon vital to support downstream foodwebs (e.g., macroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream), habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which the tributary and adjacent wetlands perform functions related to maintenance of downstream water quality such as sediment trapping.

After assessing the flow characteristics and functions of the tributary and its adjacent wetlands, the agencies will evaluate whether the tributary and its adjacent wetlands are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water. As the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a traditional navigable water.

Accordingly, Corps districts and EPA regions shall document in the administrative record the available information regarding whether a tributary and its adjacent wetlands have a significant nexus with a traditional navigable water, including the physical indicators of flow in a particular case and available information regarding the functions of the tributary and any adjacent wetlands. The agencies will explain their basis for concluding whether or not the tributary and its adjacent wetlands, when considered together, have a more than speculative or insubstantial effect on the chemical, physical, and biological integrity of a traditional navigable water.

Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States

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and Corps districts must exercise judgment to identify the OHWM on a case-by-case basis, the Corps' regulations identify the factors to be applied. These regulations have recently been further explained in Regulatory Guidance Letter (RGL) 05-05 (Dec. 7, 2005). The agencies will apply the regulations and the RGL and take other steps as needed to ensure that the OHWM identification factors are applied consistently nationwide.

[37] See Justice Kennedy's discussion of "physical characteristics," 126 S. Ct. at 2248-2249.

[38] See, generally, 126 S. Ct. at 2248-53; see also 126 S. Ct. at 2249 ("Just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries....") (citing to Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 524-25(1941)).

because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.[39] Even when not jurisdictional waters subject to CWA §404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e., "discernible, confined, and discrete conveyances"), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g., CWA §§ 311 and 402).[40]

Certain ephemeral waters in the arid west are distinguishable from the geographic features described above where such ephemeral waters are tributaries and they have a significant nexus to downstream traditional navigable waters. For example, in some cases these ephemeral tributaries may serve as a transitional area between the upland environment and the traditional navigable waters. During and following precipitation events, ephemeral tributaries collect and transport water and sometimes sediment from the upper reaches of the landscape downstream to the traditional navigable waters. These ephemeral tributaries may provide habitat for wildlife and aquatic organisms in downstream traditional navigable waters. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters.

Documentation

As described above, the agencies will assert CWA jurisdiction over the following waters without the legal obligation to make a significant nexus determination: traditional navigable waters and wetlands adjacent thereto, non-navigable tributaries that are relatively permanent waters, and wetlands with a continuous surface connection with such tributaries. The agencies will also decide CWA jurisdiction over other non-navigable tributaries and over other wetlands adjacent to non-navigable tributaries based on a fact-specific analysis to determine whether they have a significant nexus with traditional navigable waters. For purposes of CWA §404 determinations by the Corps, the Corps and EPA are developing a revised form to be used by field regulators for documenting the assertion or declination of CWA jurisdiction.

Corps districts and EPA regions will ensure that the information in the record adequately supports any jurisdictional determination. The record shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination. The Corps districts and EPA regions will also demonstrate and document in the record that a particular water either fits within a class identified above as not requiring a significant nexus determination, or that the water has a

[39] See 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).
[40] 33 U.S.C. § 1362(14).

significant nexus with a traditional navigable water. As a matter of policy, Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

All pertinent documentation and analyses for a given jurisdictional determination (including the revised form) shall be adequately reflected in the record and clearly demonstrate the basis for asserting or declining CWA jurisdiction.[41] Maps, aerial photography, soil surveys, watershed studies, local development plans, literature citations, and references from studies pertinent to the parameters being reviewed are examples of information that will assist staff in completing accurate jurisdictional determinations. The level of documentation may vary among projects. For example, jurisdictional determinations for complex projects may require additional documentation by the project manager.

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[41] For jurisdictional determinations and permitting decisions, such information shall be posted on the appropriate Corps website for public and interagency information.