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Challenging an Army Corps Jurisdictional Determination After *Sackett*

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Whether a waterbody qualifies as a "water of the United States" (WOTUS) under the Clean Water Act (CWA) is often so difficult to determine that landowners, the courts, and the administering agencies can only hope to "feel their way on a case-by-case basis."[1] Many landowners attempt to resolve this uncertainty by seeking a "jurisdictional determination" (JD) from the U.S. Army Corps of Engineers (the Corps). When landowners disagree with the outcome of a JD, they have historically had limited ability to challenge the Corps' determination. Most courts have held that a JD may not be challenged in court as a "final agency action" under the Administrative Procedure Act (APA).[2] Although the 2012 U.S. Supreme Court decision, *Sackett v. EPA*, seemed to suggest such a challenge could be permissible,[3] a July 2014 case from the U.S. Court of Appeals for the Fifth Circuit appears again to preclude seeking judicial review of a JD.

Background

The CWA prohibits, among other things, the "discharge of any pollutant" into "navigable waters" unless authorized by a permit.[4] "Navigable waters" is defined as "waters of the United States." Under Section 404 of the CWA, the Corps has authority to issue permits for the discharge of a certain type of "pollutant" – dredged or fill material – into navigable waters. When the need for a § 404 permit is unclear, a party can obtain a JD (a "written Corps determination that a wetland and/or water body is subject to regulatory jurisdiction under . . . the Clean Water Act").[5]

Despite the value in proactively seeking a JD, landowners' plans are often frustrated by their inability to challenge the finding in a JD. Where, as in the context of JDs, no statute directly provides for judicial review of the agency's actions, the APA only authorizes judicial review of "final agency action for which there is no other adequate remedy in a court."[6] To be a "final agency action," a two-prong test must be met. First, the action must mark the consummation of the agency's decision-making process. Second, the action must be one by which rights are determined or obligations have been determined, or from which legal consequences will flow. These two conditions are called the *Bennett* prongs after the case in which they were announced.[7] If a case does not satisfy both of these prongs, there is no final agency action and a court lacks subject matter jurisdiction over the matter.[8]

Prior to the 2012 *Sackett* decision, courts found that a JD could not be challenged under the APA. A Ninth Circuit decision, *Fairbanks N. Star Borough v. Army Corps*, was typical of the outcome.[9] In that case, the city of Fairbanks, Alaska wanted to develop a 2-acre tract of property for its residents' recreational use. The Corps issued a JD, finding that the entire parcel contained jurisdictional wetlands. The JD further reminded the city that "Section 404 of the Clean Water Act requires that a permit be obtained for the placement or discharge of dredged and/or fill material into waters of the U.S., including wetlands, prior to conducting the work."[10] The city made an administrative appeal to the Corps, which the Corps found to be without merit. It then brought suit in federal district court seeking relief under the APA.

The Ninth Circuit rejected the city's claim on the grounds that a JD did not constitute final agency action under the APA. Under the *Bennett* two prong test, the court found that while the JD did mark the consummation of the agency's decision-making process, "it did not result in an action by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'"[11] The court stated, "Fairbanks' rights and obligations remain unchanged by the approved jurisdictional determination. It does not itself command Fairbanks to do or forbear from anything; as a bare statement of the agency's opinion, it can be neither the subject of 'immediate compliance' nor of defiance."[12]

Sackett v EPA

In 2012, the Supreme Court heard a somewhat similar case and issued an opinion which some thought would be game-changing. In *Sackett*, landowners in Idaho owned a 2/3 acre residential lot upon which they placed dirt and rock in preparation for construction of their home. Some months after they filled their lot, the Environmental Protection Agency issued a compliance order to the Sacketts asserting the lot contained jurisdictional wetlands. The order stated that the landowners were in violation of the CWA for failing to obtain a Section 404 permit prior to discharging dredged or fill material on their land. It ordered the landowners to immediately undertake restoration activities and to allow EPA access to the site. Failure to comply with the order could result in fines up to $75,000 per day.[13]

The Sacketts, believing their property was not subject to the CWA, asked EPA for a hearing. EPA denied their request. They then brought an action in federal district court seeking relief under the APA. The district court dismissed the claim, finding that the APA precluded pre-enforcement judicial review of compliance orders. The Ninth Circuit affirmed, but the Supreme Court reversed.

Applying the two-prong test, the Supreme Court found that the compliance order was the consummation of the agency's decision-making process. As the landowners learned when they unsuccessfully sought a hearing, the terms of the compliance order were not subject to further review. Turning to the second prong – whether the agency action determines rights or obligations – the Court unequivocally stated that the compliance order contained the legal obligation to "restore" their property and allow EPA access to their property. Also, it noted that other legal consequences flowed from the order, including sizeable penalties in a future enforcement proceeding should the landowners not comply with the order. Finally, the Court noted the landowners had no other adequate remedy in court, because in CWA enforcement cases, judicial review ordinarily comes by way of a civil action brought by the EPA. But, since the landowners could not initiate that process, such a review was unavailable to them.[14]

Justice Scalia, writing for a unanimous court, concluded: "There is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review – even judicial review of the question whether the regulated party is within the EPA's jurisdiction."[15]

Belle Company v. Army Corps

Following the Supreme Court's ruling in *Sackett*, *Belle* was the first decision by a Circuit Court regarding a party's ability to challenge a Corps-issued JD under the APA. In this case, the landowner (Belle) sought to develop its property into a landfill. Upon the landowner's request, the Corps issued a JD finding that part of the property was jurisdictional wetlands, and a § 404 permit would be required prior to filling the site. Belle appealed the JD through the Corps' administrative process with the Corps ultimately upholding the determination. Belle then sued in district court under the APA seeking to set aside the JD as unlawful.[16] The District Court found that the JD was not a final agency action under the APA.

On appeal, the Fifth Circuit upheld the District Court, relying on *Sackett*. Despite the Corps' argument

that the JD was only one step in an administrative process that could entail additional proceedings, the Fifth Circuit – utilizing the two prongs of *Bennett* – found that a JD marked the consummation of the agency's decision-making process. This finding was consistent with other pre-*Sackett* decisions.[17] The Court quoted *Sackett*, "The mere possibility that an agency might reconsider in light of informal discussion and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal."[18] However, turning to the second prong of the *Bennett* test, the Fifth Circuit held that the JD under its review was different from the EPA Compliance Order in *Sackett*. The Compliance Order imposed legal obligations, because it ordered the Sacketts to restore their property and give EPA access to their site. By contrast, the JD issued to the Belle Company was a notification of the property's wetlands classification, but it did not oblige Belle to do or refrain from doing anything with the property. Rather, it merely notified the company that a § 404 permit was required before filling. In so finding, the Court relied on a 1939 Supreme Court case:

> *Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the agency, that action is nonfinal and nonreviewable because it does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.*[19]

Next, the Court noted that the *Sackett* compliance order imposed, independently, coercive consequences for its violation, because it exposed the Sacketts to penalties in future enforcement proceedings. By contrast, the Belle JD had no penalty scheme, and neither the JD nor the Corps regulations nor the CWA required Belle to comply with the JD. Additionally, where the compliance order in *Sackett* limited the Sacketts' ability to obtain a § 404 permit, the JD informed Belle of the necessity of a § 404 permit to avoid an enforcement action. Finally, the compliance order in *Sackett* determined that the Sacketts' property contained wetlands and that they had unlawfully discharged materials onto those wetlands. Conversely, in *Belle*, there was no finding of a CWA violation, nor any mandate as to how Belle should manage its property.[20] Because the JD was not an action by which rights or obligations had been determined or from which legal consequences flowed, the Court concluded the JD did not meet the second prong of *Bennett*. As such, it affirmed the District Court's holding that the APA would not support a challenge to the JD.

Practical Implications of *Belle*

The *Belle* Court suggested Belle had two options in response to the JD—either file a § 404 permit application and initiate suit to challenge the permit decision as well as the underlying jurisdiction, or proceed without obtaining a § 404 permit and challenge whatever enforcement actions come. Belle and similarly situated landowners would likely find both courses of action unappealing.

As to the first, the Court noted it was "cognizant that the Corps's permitting process can be costly for regulated parties."[21] Depending on the characteristics of the property involved, significant sums may be required to comply with the requirements to submit a § 404 permit application. These sums, of course, must be spent long before a party can challenge the outcome of the permitting process.[22] Moreover, forcing a party to file a § 404 permit application in order to challenge the jurisdiction that requires the application appears legally backward. Whether this is mere irony or the basis for a successful appeal to the Supreme Court is yet to be seen.

As burdensome as the first option is, proceeding with depositing dredge or fill material without a permit in contravention of a JD is obviously a high-stakes proposition. Costly penalties and restoration work, not to mention the possibility of criminal sanctions, are a threat too great for most landowners. The *Belle* decision leaves a party with the meager options of challenging a JD through the Corps' administrative appeal process or negotiations with the Corps – and little recourse if these options fail.

Whether this decision will stand or the Supreme Court will grant certiorari is still an open question. On Oct. 28, 2014, Belle filed a certiorari petition to the Supreme Court, which is currently under consideration.

(Endnotes)

1 *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, J., concurring).
2 *See Belle Co., LLC v. Army Corps of Engineers*, 761 F.3d 383, 391 (2014) (collecting cases).
3 *Sackett v. EPA*, 132 S. Ct. 1367 (2012).
4 33 U.S.C. §§1311(a), 1344,1362(7)
5 33 C.F.R. §331.2.
6 5 U.S.C. §704.
7 *Id*. (Citing *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997)).
8 *Belle*, 761 F.3d at 388.
9 *Fairbanks N. Star Borough v. Army Corps*, 543 F.3d 586 (9th Cir. 2008).
10 *Id.* at 590.
11 *Id.* at 593-594 (citation omitted).
12 *Id*.
13 *Sackett v. EPA*, 132 S. Ct. 1367, 1370-71 (2012).
14 *Id*. at 1372.
15 *Id*. at 1373.
16 *Belle*, 761 F.3d at 387.
17 *E.g., Fairbanks,* 543 F.3d 586.
18 *Belle*, 761 F.3d at 388 (quoting *Sackett*, 132 S. Ct. at 1372.).
19 *Id*. at 390 (quoting *Rochester Tel. Corp., v. U.S,* 307 U.S. 125 (1939).
20 *Id*. at 391.
21 *Id*. at 391.
22 *See* 33 C.F.R. § 331.12 ("No affected party may file a legal action in the Federal courts based on a permit denial or a proffered permit until after a final Corps decision has been made and the appellant has exhausted all applicable administrative remedies under this part.").

Environmental Crimes Today's Large Corporations: Too Big to Punish

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In most criminal prosecutions, corporations are considered "persons." However, when it comes to sentencing, a corporation differs from a person in that it cannot be punished by incarceration. Only a monetary sanction is available to deter criminal corporate behavior.

When a big corporation makes a lot of money from its criminal conduct, the punishment, to be effective, must involve a large monetary sanction.[1] The Alternative Fines Act[2] provides, among other things, for the imposition of a criminal fine of up to twice the pecuniary gain resulting from the criminal conduct.

Large corporations are important to meeting many of the critical needs of our society for such things as energy production, chemical manufacturing, and mining. These industries also have some of the greatest potential for environmental harm and are thus highly regulated. However, with every regulation comes the potential for enormous economic advantage if the cost of environmental compliance can somehow be avoided. Thus, the existence of regulation provides the motive for criminal conduct by a large corporation.

United States v. CITGO Petroleum Corporation[3] is an example of a criminal case where a monetary fine based on the corporation's pecuniary gain from its criminal conduct is necessary for the punishment to be an effective deterrent. CITGO Petroleum Corporation and its wholly owned subsidiary, CITGO Refining and Chemical Company of Corpus Christi, Texas, were each convicted by a jury in 2007 on two counts of violating the Clean Air Act.[4] CITGO operated two large tanks, each 250 feet in diameter, as oil-water separators for nearly ten years without the emission controls required by the Clean Air Act. To keep its illegal operation from being discovered, CITGO removed oil from the open topped tanks just before state inspectors arrived. The first time the state conducted an unannounced inspection at the refinery, it discovered the tanks with oil ten feet deep emitting chemicals into the air.[5]

Under the Alternative Fines Act, $2 million is the total criminal penalty allowed to be imposed upon CITGO without considering the pecuniary gain.[6] Considering that the corporation made over $1 billion operating that refinery illegally for ten years, a criminal penalty of twice the pecuniary gain could be $2 billion— a thousand-fold difference in the maximum monetary penalty that could be imposed if the pecuniary gain were to be considered by the court.

After an unexplained delay of over six years, the federal District Court finally sentenced CITGO without ever determining the pecuniary gain amount. The court found that to convene a sentencing jury to determine the pecuniary gain would "unduly complicate or prolong" the sentencing process.[7] The court did not address the need for the sentence imposed "to afford adequate deterrence to criminal conduct."[8] Where CITGO is alleged to have made over $2 billion profit while operating the tanks illegally, the criminal fine of just $2 million seems unlikely to be much of a deterrent.

The Department of Justice declined to go forward with an appeal challenging the court's use or abuse of discretion in choosing not to determine the pecuniary gain.[9] After an unexplained delay of over six years from conviction to sentencing, the additional time required for a sentencing jury to determine pecuniary gain could hardly be considered as "unduly" prolonging the sentencing process.

This is not CITGO's first time operating outside the law. CITGO Petroleum Corporation's Lake Charles refinery used up space in its wastewater tanks storing waste oil much like it did in Corpus Christi. Unlike the Corpus Christi tanks, the Lake Charles tanks were covered to prevent unlawful air emissions. However, during a severe rain event, the tanks were filled with storm water and overflowed, discharging tens of thousands of barrels of oil into the river. CITGO pled guilty to criminal offenses under the Clean Water Act and paid a criminal fine of $13 million.[10] CITGO was also fined $6 million for civil violations related to its operation of the Lake Charles refinery.[11] The Justice Department appealed the small civil penalty, contending CITGO should have been fined

$197 million. The Fifth Circuit Court of Appeals remanded the penalty for the District Court to reconsider CITGO's past environmental violations and its decision to delay upgrades that might have prevented the oil spill.[12] The original $6 million penalty was noted by Department of Justice attorneys as "an amount scarcely more than one day's profit for CITGO at the time of the spill."[13]

Proving criminal conduct by a large corporation can be very difficult. However, when a jury finds a large corporation guilty of criminal wrongdoing, the penalty must be sufficient to dissuade the corporation from such practices. The larger the corporation, the larger that penalty must be to be effective as a deterrent. The Alternative Fines Act offers the courts a means for imposing an effective penalty by disgorging up to twice the pecuniary gain acquired by the criminal conduct. However, the larger the corporation, the more difficult it might be to determine the pecuniary gain. If, as in *CITGO*, the court too easily finds that determining the pecuniary gain for a large corporation will "unduly complicate or prolong the sentencing process," and if the Department of Justice is not willing to challenge such a finding on appeal, then a large corporation, like CITGO, is effectively "**too big to punish.**"

(Endnotes)

1 See 18 U.S.C. § 3553(a)(2), for the purposes of sentencing.
2 *Id.* § 3571(d).
3 United States v. CITGO Petrol. Corp., No. 2:06-cr-00563 (S.D. Tex., Corpus Christi Div., Dec. 20, 2012).
4 *See* Clean Air Act of 1990, 42 § U.S.C. 7401 *et seq.*, 42 U.S.C § 7413(c); 40 C.F.R. § 60.692-3.
5 *See* United States v. CITGO Petrol. Corp., No. 2:06-cr-00563 (S.D. Tex., Corpus Christi Div. Dec. 20, 2012), Doc. 1 (Indictment).
6 18 U.S.C. § 3571(c)(3), (d). The two CITGO corporate defendants were convicted of two felonies each, for a total of four felonies, subject to a maximum criminal fine of $500,000 each.
7 *See* United States v. CITGO Petrol. Corp., No. 2:06-cr-00563 (S.D. Tex., Corpus Christi Div. Dec. 20, 2012), Doc. 854 (Memorandum Opinion and Order) (quoting 18 U.S.C. § 3571(d)). The court, in asserting its discretion, chose not to sentence pursuant to the pecuniary gain provisions of subsection (d). Instead, the court chose to impose the maximum fine allowed pursuant to subsection (c)(3) of $500,000 per count for a total of $2 million. *See id.*, Doc. 923 and 924 (Judgment in a Criminal Case).
8 18 U.S.C. § 3553(a)(2)(B) (Factors to be Considered in Imposing a Sentence).
9 *See* U.S. v. CITGO Petrol. Corp., No. 14-40569, (5th Cir., Sept. 30, 2014), Doc. 00512788216.
10 U.S. v. CITGO Petrol. Corp., No. 2:08-cr-00077 (W.D. La., Lake Charles Div., Sept. 17, 2008), Doc. 15.
11 *See* U.S. v. CITGO Petrol. Corp., No. 11-31117 (5th Cir., July 17, 2013), Doc. 00512311654.
12 *See* U.S. v. CITGO Petrol. Corp., No. 11-31117 (5th Cir., July 17, 2013), Doc. 00512311654.
13 U.S. v. CITGO Petrol. Corp., No. 2:08-cv-00893 (W.D. La., Lake Charles Div.), Doc. 251 (United States Remand Brief Addressing Economic Benefit, Gross Negligence, and Reassessment of Clean Water Act Penalty, page 63, Mar.14, 2014).

Raising the Class Action Certification Bar in Georgia: *Georgia-Pacific Consumer Products, LP v. Ratner*

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In recent years, the U.S. Supreme Court has taken a decidedly more skeptical view of class action lawsuits, making it increasingly difficult for litigants in federal court to satisfy the test for class certification generally and the "commonality" element of that test in particular. *See, e.g.*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Because many of the Georgia provisions for class certification mirror the federal rules, Georgia courts frequently look to federal case law for guidance on these issues, making it only a matter of time before the Georgia Supreme Court weighed in on the U.S. Supreme Court's recent pronouncements and their applicability to Georgia law. With the recent decision in *Georgia-Pacific Consumer Products, LP v. Ratner*, 762 S.E.2d 419 (Ga. 2014), that time has now come.

Prior to its decision in *Ratner*, the Georgia Supreme Court had not substantively examined the commonality requirement for class certification in nearly a decade.[1] Much had happened during that time, particularly in the ongoing development of federal case law. Relying on these new decisions, particularly the U.S. Supreme Court's decision in *Dukes*, the Georgia Supreme Court reversed the grant of class certification in an environmental toxic tort case alleging impairment of property use and diminished property value allegedly resulting from releases of hydrogen sulfide over an extended period of time. Despite the fact that the alleged harm stemmed from the same course of conduct of a single defendant, and thus raised many "common questions" related to that conduct, Georgia's high court ultimately reversed class certification because there was no "common answer" to the question of the defendant's liability.

In so ruling, the *Ratner* decision joins the ranks of other post-*Dukes* opinions involving mass tort claims where variations in the level of exposure over time between class members and other individualized circumstances bar certification due to a lack of commonality. While *Ratner* does not close the door completely on class certification of environmental toxic tort claims, the complexity and variability of exposure and alleged harm resulting from ongoing releases like those at issue in that case will create high hurdles that will be difficult for purported classes to clear in all but a very narrow category of cases. Simply stated, potential class representatives claiming harm from releases of toxic substances are going to have a much more difficult task going forward in satisfying their burden to demonstrate commonality.

The Facts of *Ratner*

In *Ratner*, the named plaintiffs sought to represent a class of property owners in Effingham County suing Georgia-Pacific for nuisance, trespass, and negligence. The claims asserted stemmed from the purported impairment of the use and enjoyment of their properties and diminished property values allegedly caused by emissions of hydrogen sulfide gas[2] from Georgia-Pacific's Savannah River Mill. At the mill, Georgia-Pacific had since 1986 spread solid waste by-products onto sludge fields to decompose, resulting in releases of hydrogen sulfide gas. In years prior, Georgia-Pacific had received complaints from nearby property owners about the gas, particularly from homeowners in a new subdivision built directly across from the plant. These landowners alleged the gas interfered with their ability to enjoy their properties and caused a variety of health effects, including vomiting, headaches, and irritation to their eyes, skin, and lungs. Residents of the nearby subdivision also asserted that the releases of hydrogen sulfide damaged certain exterior home fixtures, particularly air conditioning units.

In 2010, the named plaintiffs—all of whom were homeowners in the neighboring subdivision—filed suit against Georgia-Pacific seeking monetary damages not only for themselves but also for other nearby property owners. The proposed class area was defined by major roads and other geographic features that encompassed 67 properties in a contiguous area near the plant.

The Trial Court Grants Class Certification

On its review of the evidence, the trial court found that the plaintiffs had met the class certification requirements of O.C.G.A. § 9-11-23.[3] Considering the "commonality" requirement in particular, which requires that there are common questions of law or fact to the class, the court listed several purportedly "common" legal and factual questions to the class, including:

- The materials used by Georgia-Pacific at the Mill, including the ways in which those materials are stored and used;
- The manner in which Georgia-Pacific operates the Mill, including its sludge fields;
- The reasons for releases of hydrogen sulfide gas from the sludge fields;
- The potential effects of a release of hydrogen sulfide gas, including the toxic and corrosive properties of the gas;
- The nature and adequacy of precautions taken by Georgia-Pacific to prevent the release of hydrogen sulfide gas;
- The "liability of Georgia-Pacific";
- The "common affirmative defenses raised by Georgia-Pacific"; and
- The remedies available to members of the class, including the appropriate measure of damages, exemplary damages, and expenses of litigation.

Ratner, 762 S.E.2d at 422 n.10.

In light of these considerations, the court found that the trial of the various individual claims would involve the same witnesses, documents, and testimony, and would further require the resolution of the same issues of fact and law. The court thus concluded that common issues would predominate any individual questions related to the amount of damages for each class member, making class action the best method for resolving these claims.

The Court of Appeals Affirms 4-3

In a 4 to 3 decision, the Georgia Court of Appeals affirmed, adopting the trial court's certification order with little further consideration of the legal issues. Instead, the appellate court's order largely quotes the trial court's legal analysis.[4] Judge Elizabeth L. Branch penned the strong three-member dissent, arguing that the plaintiffs had failed to establish commonality. Judge Branch noted, for example, that the class members' various symptoms, such as difficulty breathing, headaches, and vomiting, were inherently individual injuries. Her dissent further found that the class boundaries were in no way based on a determination that "each included property had actually been affected by any . . . hydrogen sulfide releases."[5] Rather, the class area was defined by "arbitrarily drawn lines on a map."[6]

Following *Dukes*, the Georgia Supreme Court Reverses

On appeal to the Georgia Supreme Court, Georgia-Pacific argued that these lower court decisions had failed to properly evaluate the commonality requirement in light of the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*.[7] *Dukes* involved a putative class of 1.5 million current and former female Wal-Mart employees alleging gender discrimination. Responding to an increased willingness by some courts to ease the class certification requirements, the Supreme Court directed district courts to strictly enforce the test for class certification and in doing so further clarified what must be shown to satisfy the commonality requirement. The Court began by stressing that class proceedings are "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"[8] Consequently, departure from this rule requires the party seeking certification to "affirmatively demonstrate" compliance with the class requirements. Certification is thus only proper if the trial court, after "a rigorous analysis," is satisfied that all required elements have been met.[9]

Turning to the commonality requirement in particular, the Court noted that this element of class certification is often misunderstood given that "any competently crafted class complaint literally raises common questions."[10] Rather than merely raising this sort of common question, the purported class members' claims must be based on a "common contention" that is capable of resolving a central class-wide issue "in one stroke."[11] Thus, the number of common questions raised in a class action is immaterial. Rather, what matters is "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."[12] The key inquiry, therefore, is whether the common question "can be proved on a classwide basis."[13] As to the facts before it, the Supreme Court in *Dukes* found that the proposed class members "'held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed . . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit.'"[14] The Court accordingly reversed class certification.

Given the decision in *Dukes*, Georgia-Pacific in *Ratner* likewise argued for reversal of class certification on grounds that the lower courts had merely identified common issues raised by the class claims, ignoring "that *resolving* those issues requires individualized determinations."[15] Plaintiffs, for example, had sought to prove up their "common contention" by stressing that all of the class members' properties were contaminated by hydrogen sulfide released from a single source—the Georgia-Pacific mill.[16] The plaintiffs further argued that unlike *Dukes*, which involved millions of independent employment decisions, their claims stemmed from the "emission of the same chemical by the same company from the same waste disposal area affecting landowners in the same neighborhood."[17]

The Georgia Supreme Court, however, found this supposed sameness wholly insufficient. Indeed, the Court concluded

that the list of "common" questions identified by plaintiffs (and the courts below) fell into "the very analytical trap against which the United States Supreme Court warned in *Dukes*."[18] While "common" in a sense, these questions failed to show the commonality required by O.C.G.A. § 9-11-23(a)(2).[19] The high court stressed that pointing to a "common contention" is merely the first step. Those seeking class certification must also show that the contention is "capable of classwide resolution with respect to the particular class that the trial court certified."[20] In other words, as explained in *Dukes*, what matters to class certification "is not the raising of common questions" but rather the capacity "to generate common *answers* apt to drive the resolution of the litigation."[21]

The plaintiffs in *Ratner*, the Supreme Court found, failed to satisfy this mandatory requirement. The Court noted, for example, that the plaintiffs failed to present any evidence as to the amount of hydrogen sulfide released, the rate of release, how the gas moved through the atmosphere, or how the gas would be expected to dissipate after being released.[22] Likewise, the Court emphasized there was very little evidence regarding local wind patterns and no evidence at all of air quality sampling across the class area.[23] While there was some evidence of noxious odors and damage to air conditioning units, this evidence was limited to properties located near the mill and failed to show "that the class area as a whole was contaminated by hydrogen sulfide gas."[24] By way of example, two air-conditioning technicians testified as to observed corrosion in air-conditioning units near the mill, but neither had conducted the required testing to demonstrate that the corrosion was in fact caused by hydrogen sulfide exposure.[25] Moreover, one of the technicians testified as to corrosion near the mill but not within the class area, while the other testified as to corrosion in the class area but only in close proximity to the mill, not throughout the class area.[26] This anecdotal evidence presented from a geographically compact and relatively small portion of the class area failed to "satisfy a rigorous analysis with respect to the commonality" of the entire class area.[27]

The Court in *Ratner* was particularly critical of the apparently arbitrary means of establishing the class boundaries, noting that a real estate appraiser simply drove around the mill looking for major roads and other boundaries that "seemed reasonable," without any scientific analysis of air quality, the expected movement of emissions in the atmosphere, wind patterns, alternative sources, and so forth.[28] While expressly stating that it was not foreclosing the possibility of class certification on remand, the Court emphasized that "if the plaintiffs are to satisfy the commonality requirement, they have some more work to do."[29]

Class Certification in Environmental Tort Cases Following *Dukes* and *Ratner*

Needless to say, the *Ratner* decision demonstrates the increased scrutiny and high hurdles that potential class representatives now face while seeking class certification. Variations in the type and length of exposure to an alleged environmental release or nuisance will in most cases substantially undermine class commonality or the closely related predominance requirement.[30] This is true not only in Georgia but elsewhere.

For example, in *Powell v. Tosh*, No. 5:09-cv-00121, 2013 WL 4418531 (W.D. Ky. Aug. 2, 2013), the U.S. District Court for the Western District of Kentucky decertified a class of property owners claiming nuisance damages from a nearby hog farm.[31] The court had initially found that commonality existed among the class members because they all asserted harm arising from the same course of conduct from a single hog farm. The court later held, however, plaintiffs' alleged nuisance claim required consideration of the kind, volume, and duration of the interference with property. This "would require a highly individualized inquiry into the experience of each Plaintiff."[32] Consequently, the common question of whether the hog farm constituted a nuisance could not be resolved by a common answer. Rather, the impact to each potential class member would have to be considered, making class action an inappropriate vehicle for resolving the dispute.

Similarly, the U.S. Court of Appeals for the Third Circuit recently affirmed the denial of certification for a class alleging property damage from an old chemical lagoon.[33] There the plaintiffs claimed that chemicals in the nearby lagoon seeped into the aquifer and degraded into carcinogens, which then evaporated into the air and were blown over their properties. In rejecting class certification, the Third Circuit noted that claims involving "extensive periods of contamination with multiple sources and various pathways" are usually not appropriate for resolution by class action.[34] In such cases, while there may be a number of questions common to the class, " resolution of those questions leaves significant and complex questions unanswered, including questions relating to causation of contamination, extent of contamination, fact of damages, and amount of damages."[35] Because the question of property contamination required a property-by-property analysis, the court found that the putative class representatives failed to meet the strict commonality requirement of *Dukes*.[36]

So what type of environmental class actions might survive this heightened scrutiny as to the commonality requirement following *Dukes*? The Georgia Supreme Court in *Ratner* appeared to point to one possible example by citing *Brenntag Mid South, Inc. v. Smart*, 710 S.E.2d 569 (Ga. Ct. App. 2011) (cited in *Rather*, 762 S.E.2d at 425), in support of its suggestion that it is still "conceivable" for plaintiffs in environmental mass tort cases to make the required showing. The alleged harm in *Brenntag* resulted from a single release of acidic gas from the defendant's East Point facility.[37] Following the release, government authorities established an evacuation zone. The named plaintiffs in turn sought certification of a class of those area residents who actually

evacuated in response to the release. The Georgia Court of Appeals found that the class under these circumstances exhibited sufficient commonality for certification.[38] It would appear, therefore, that narrowly tailoring a purported class to individuals demonstrably affected in the same way (e.g., all residents evacuated) by a discrete event (single release of acidic gas) would increase the likelihood of certification. Likewise, cases lacking the variability in duration of exposure, exposure pathways, and other comparable issues that are commonly found in complex long-term toxic tort cases would seem more likely candidates for class certification.

Conclusion

In the post-*Dukes* era, it will be critical for all class action litigants, both those who bring them and those who defend them, to devote considerable time and attention not only to identifying common questions, but to evaluating whether in fact those questions will yield common answers capable of contributing to the resolution of the alleged claims on a class-wide basis. With respect to environmental toxic torts in particular, *Ratner*'s application of this analysis would appear to substantially curtail if not entirely foreclose the ability to bring these types of class claims in all but a very limited subset of cases.

(Endnotes)

1 *See Carnett's, Inc. v. Hammond*, 610 S.E.2d 529 (Ga. 2005) (holding that trial court did not abuse its discretion in denying class certification for lack of commonality in case alleging that the defendant had faxed 73,500 unsolicited advertisements to Atlanta area residents).

2 Hydrogen sulfide is a colorless gas that has a rotten egg smell. Its health effects vary depending on the level and duration of exposure. Exposure to low concentrations of the gas may result in headaches and irritation to the eyes, nose, throat, and lungs. Prolonged exposure may result in eye inflammation, fatigue, insomnia, and weight loss. Occupational Safety & Health Administration, Hydrogen Sulfide Fact Sheet (2005), *available at* https://www.osha.gov/OshDoc/data_Hurricane_Facts/hydrogen_sulfide_fact.pdf (last visited Nov. 3, 2014).

3 Like Rule 23 of the Federal Rules of Civil Procedure, O.C.G.A. § 9-11-23(a) requires (1) that the class be so numerous that joinder is impractical; (2) that there are common questions of law or fact to the class; (3) that the claims raised by the named plaintiffs are typical to the class; and (4) that the named parties will fairly and adequately represent the class. In addition to the four requirements of O.C.G.A. § 9-11-23(a), plaintiffs seeking class certification must meet one of the three requirements of O.C.G.A. § 9-11-23(b). The *Ratner* plaintiffs sought certification pursuant to subsection (b)(3), which requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

4 *Georgia-Pacific Consumer Products, LP v. Ratner*, 746 S.E.2d 829, 834-37 (Ga. Ct. App. 2013).

5 *Id.* at 841 (Branch, J., dissenting).

6 *Id*.

7 Because O.C.G.A. § 9-11-23 is based on Rule 23 of the Federal Rules of Civil Procedure, Georgia courts regularly look to federal cases interpreting Rule 23 for guidance when interpreting the state statute. *See, e.g.*, *American Debt Found., Inc. v. Hodzic*, 720 S.E.2d 283 (2011).

8 *Dukes*, 131 S. Ct. at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

9 *Id.* at 2551 (internal quotes and citations omitted).

10 *Id.* (internal quotes and citations omitted).

11 *Id.* (internal quotes and citations omitted).

12 *Id.* (internal quotes omitted) (emphasis in original).

13 *Id.* at 2555.

14 *Id.* at 2557 (quoting *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) (C.J. Kozinski, dissenting)).

15 Brief for Appellant at *16, *Georgia-Pacific Consumer Products, LP v. Ratner*, 2013 WL 6696639 (Ga. Dec. 9, 2013) (No. S13C1723) (emphasis in original).

16 *Georgia-Pacific Consumer Products, LP v. Ratner*, 762 S.E.2d 419, 423 (Ga. 2014).

17 Brief for Appellees at *9, *Georgia-Pacific Consumer Products, LP v. Ratner*, 2013 WL 6928606 (Ga. Dec. 30, 2013) (No. S13C1723).

18 *Ratner*, 762 S.E.2d at 423 n.10.

19 *Id*.

20 *Id.* at 423.

21 *Id.* (quoting *Dukes*, 131 S. Ct. at 2551 (emphasis in original)).

22 *Id.* at 423-24.

23 *Id.* at 424.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.* at 425 n.15.

29 *Id.*

30 In class actions brought under Rule 23(b)(3), the question of whether questions common to the class predominate over individual questions is a more stringent form of the commonality requirement of Rule 23(a)(2). *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609 (1997). Thus, at times courts will bypass the commonality analysis and focus their attention on the more stringent predominance requirement. *See, e.g.*, *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on April 20, 2010*, 910 F. Supp. 2d 891, 915 (E.D. La. 2012).

31 *Powell v. Tosh*, No. 5:09-cv-00121, 2013 WL 4418531 (W.D. Ky. Aug. 2, 2013).

32 *Id.* at *8.

33 *Gates v. Rohm and Haas Co.*, 655 F.3d 255 (3d Cir. 2011).

34 *Id.* at 271.

35 *Id.* (internal quotes omitted).

36 Other decisions following *Dukes* have reached similar conclusions. *See, e.g.*, *Parko v. Shell Oil Co.*, 739 F.3d 1083 (7th Cir. 2014) (reversing class certification in a case alleging contamination occurring over a 90-year period and caused by six different defendants); *Ginardi v. Frontier Gas Services, LLC*, No. 4:11-cv-00420, 2012 WL 1377052 (S.D. Ark. 2012) (holding that individual issues predominated where the level of contamination caused by natural gas compressors varied from property to property); *Price v. Martin*, 79 So. 3d 960 (La. 2011) (finding that the question of contamination required a property-by-property inquiry); *Henry v. Dow Chemical Co.*, No. 03-47775 (Saginaw Cnty. Cir. Ct. July 18, 2011) (reassessing and reversing class certification in light of *Dukes*).

37 *Id.* at 572.

38 *Id.* at 575.

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Waters of the United States: Navigating the Channels of Law and Science

By Shelly Ellerhorst, Of Counsel, Kazmarek Mowrey Cloud Laseter LLP

In the decades old debate over what is and is not jurisdictional under the Clean Water Act (CWA),[1] disagreement abounds. This is understandable as the CWA sparked controversy from its inception. The CWA was originally vetoed by President Richard Nixon because of his concern that the bill would create "spiraling prices and increasingly onerous taxes." Only because of a subsequent bipartisan congressional override did the CWA become law in 1972. Many argue that the CWA is one of the most successful environmental laws in the United States: prior to its passage, only about one-third of the nation's waters were fishable and swimmable; today, almost two-thirds are. Based on this history and the CWA's ability to garner results, it is not surprising that approximately one million comments were filed on a recently proposed rule to re-define a critical term in the CWA – "waters of the United States" (WOTUS).[2] In proposing the rule, the Environmental Protection Agency and the United States Army Corps of Engineers' (collectively, the "Agencies") stated purpose was to "increase CWA program predictability and consistency by increasing clarity as to the scope of [WOTUS] protected under the Act."[3]

The Proposed Rule modifies existing regulations defining WOTUS which have been in place for over 25 years. Like existing regulations, the Proposed Rule includes waters traditionally considered navigable or inter-state to be WOTUS. In addition, the Proposed Rule includes tributaries of traditional waters and waters and wetlands adjacent to traditional waters as *per se* jurisdictional. The Proposed Rule also includes a category of "other waters." Whether an "other water" is jurisdictional is determined on a case-specific basis. Many commenters allege that the Proposed Rule, including newly defined terms such as "tributary," "adjacent," and "neighboring," will vastly expand federal jurisdiction.

With so many voices and interests represented among the commenters, it is tempting to want to divide the comments into two overly-simplistic camps: those who support the Proposed Rule and those who oppose it. This binary view, however, fails to account for the gradations of opinions on both sides of the Proposed Rule and fails to capture a critical point that traverses both camps – clean water is critical. It is critical to our health, it is critical to the environment, and it is critical to the economy. While nearly everyone agrees that clean water is a good thing, not everyone agrees on the best way to achieve clean water within the existing statutory and case-law confines. This latter point is what spurred a majority of the 700,000 comments and this article. Opponents of the Proposed Rule are not against clean water; instead, they are against a rule that appears to be legally unsupportable. While the potential problems with the Proposed Rule are many and varied, this article focuses on just one – that the Proposed Rule is inconsistent with the statutory text of the CWA. If promulgated, the Proposed Rule will expand the definition of WOTUS to cover waters that are not "navigable," an important statutory constraint on agency power that the Agencies cannot ignore.

The evolution of WOTUS by SCOTUS

Under the CWA, federal jurisdiction extends to "navigable waters," defined in the statute as "waters of the United States, including the territorial seas."[4] Certain categories of WOTUS, including waters which are navigable-in-fact, the territorial seas, and interstate waters and interstate wetlands (collectively referred to as "Traditional Waters"), are unquestionably jurisdictional. The limits beyond Traditional Waters, however, of what is and is not a WOTUS, have been at issue for decades. To understand the legal background against which the Proposed Rule was drafted, it is critical to focus on the Supreme Court precedent addressing WOTUS. Three cases over the last thirty years have addressed the issue head-on. The first was *United States v. Riverside Bayview Homes, Inc.*[5] In *Riverside,* the Court was asked to determine whether a wetland that "was adjacent to [Traditional Waters]" was a WOTUS.[6] Finding that "the transition from water to solid ground is not necessarily or even typically an abrupt one," and that "the Corps must necessarily choose some point at which water ends and land begins," the Court held that WOTUS included wetlands "inseparably bound up with" and "actually abut[ting] [Traditional Waters]."[7]

Although the *Riverside* decision dealt with the understandable difficulty of line drawing in a gradual change from water to land, the Agencies used the decision as a base for expanding their authority. As part of this expansion effort, the Corps introduced the "Migratory Bird Rule" in 1986 to "clarify" the reach of its jurisdiction.[8] Under the Migratory Bird Rule, the Corps could extend jurisdiction to any intrastate waters "[w]hich are or would be used as habitat" by migratory birds. The Supreme Court addressed both isolated wetlands and the Migratory Bird Rule in *Solid Waste Agency v. United States Army Corps of Engineers*,[9] the second Supreme Court case to assist in defining the boundaries of WOTUS. In *SWANCC*, the Court held "nonnavigable, isolated, intrastate waters" were not jurisdictional based solely on the presence of migratory birds.[10] The Court based this decision on the plain

text of the CWA, holding that whatever Congress might have intended navigable to mean, it did not intend for isolated pothole ponds to be considered "navigable" waters.[11]

The third Supreme Court to discuss the definition of WOTUS, *Rapanos v. United States Army Corps of Engineers*, is the main reason for the Proposed Rule.[12] Like the *SWANCC* Court before it, the *Rapanos* Court also invalidated the Corps' assertion of jurisdiction over wetlands. *Rapanos* involved the consolidation of two separate but factually similar cases entailing a similar issue: whether wetlands situated a great distance from Traditional Waters that drain through several features before eventually reaching Traditional Waters are jurisdictional. In a 4-1-4 plurality opinion, five justices (the four justices joining the plurality opinion issued by Justice Scalia and Justice Kennedy in his concurrence) held that the Corps' hydrologic connection theory of jurisdiction was impermissible.[13] The *Rapanos* plurality held that WOTUS "cannot bear the expansive meaning that the Corps would give it."[14] In addition, "[w]etlands with only an intermittent, physically remote hydrologic connection to [WOTUS] . . . . lack the necessary connection" to be considered jurisdictional.[15] Similarly, Justice Kennedy's concurrence found that "[t]he Corps' theory of jurisdiction in these consolidated cases – adjacency to tributaries however remote and insubstantial – raises concerns that go beyond the holding of *Riverside* . . . , and so the Corps' assertion of jurisdiction cannot rest on that case."[16] The Court vacated the Sixth Circuit's ruling upholding the Corps' jurisdiction over the wetlands.

Despite reaching a majority to strike down the Corps' jurisdictional theory, the Court could not reach a majority regarding the proper test for CWA jurisdiction. The plurality held that the "only plausible interpretation" of WOTUS "includes only those relatively permanent, standing or continuously flowing bodies of water. . . that are described in ordinary parlance as streams, oceans, rivers and lakes."[17] Justice Kennedy's test took a different approach. Seizing on the term "significant nexus" as first used in *SWANCC* to explain the relationship between wetlands physically abutting Traditional Waters in *Riverside*, Justice Kennedy held that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and [Traditional Waters]."[18]

Understanding this Supreme Court precedent leads to the conclusion that there are certain categories of waters that are indisputably WOTUS and certain that are not. In between those two categories (WOTUS and not-WOTUS) lies a third category of waters that are more challenging to classify. Under the Proposed Rule, the Agencies are improperly taking jurisdiction over the entire third category when, in reality, only a portion of the category is jurisdictional. Based on the case law, we can draw several important conclusions about the third category and greatly reduce its size. First, isolated ponds and wetlands (such as in *SWANCC*), waters with strained ecological connections (such as "migratory bird habitat"), and waters that are removed from navigable waters (such as the wetlands in *Rapanos*) fall out of the third category and into the not-WOTUS category. Second, as to what navigable waters do include, "navigable" waters, if not strictly limited to waters navigable in fact or can be "reasonably made so," goes no further than waters that have a real, substantial, and apparent connection to such waters. Wetlands with direct physical contact to navigable waters (such as in *Riverside*) and tributaries that are an obvious and substantial source of water to Traditional Waters fall out of the third category and into the WOTUS category. In sum, if the waters are not navigable in the traditional sense, then they are jurisdictional only if there is a self-evident reason there is no meaningful distinction between those waters and nearby navigable waters. Any other approach to the concept of WOTUS and navigability is inconsistent with the case law.

The Proposed Rule effectively nullifies the term "navigable," rendering the statutory phrase "navigable waters" meaningless.

The threshold issue in any analysis of the Proposed Rule is whether the Agencies have authority only over "navigable" waters. While the Supreme Court has recognized that the statutory term "navigable" in the CWA is not limited to waters that are navigable-in-fact, it has also clarified that the term "navigable" does create an important limitation on agency jurisdiction. The *SWANCC* court

painted a comprehensive picture of how the Agencies should understand "navigable":

We said in Riverside Bayview Homes that the word "navigable" in the statute was of 'limited effect' and went on to hold that Section 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatsoever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.[19]

Looking to *Rapanos*, it is again useful to consider both the plurality and Justice Kennedy opinions. The plurality held that "the traditional term 'navigable waters' . . . carries some of its original substance. . . ."[20] Justice Kennedy likewise highlighted the importance of "navigable:" "[c]onsistent with *SWANCC* and *Riverside Bayview* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends on a significant nexus between the wetlands in question and [Traditional Waters]."[21] He also chided the dissent for ignoring the term "navigable" when he noted that "the dissent reads a central requirement out of [the CWA] – namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance."[22]

Against the backdrop of the "navigable" discussions in *Riverside, SWANCC* and *Rapanos*, Congress had multiple opportunities to weigh in to remove the term from the CWA.[23] From 2003 through 2010, bills were introduced with the purpose of deleting the term "navigable" from the CWA. In all cases, Congress had the opportunity to give the Agencies the power to regulate *all* waters – not just "navigable" waters – under the CWA. But, in all cases, Congress chose not to do so because Congress recognized that "navigable" is an important limitation on the Agencies' jurisdiction.[24]

It is difficult to marry the Supreme Court and Congress's adherence to the statutory concept of navigability with the categories of waters considered jurisdictional in the Proposed Rule. Besides Traditional Waters, the Proposed Rule contains three other categories of WOTUS: tributaries of Traditional Waters; wetlands and waters adjacent to Traditional Waters and tributaries; and certain "other waters." Under the Proposed Rule, tributaries and adjacent waters (both newly defined) are *per se* jurisdictional (that is, no case-specific significant nexus must be established) while "other waters" are jurisdictional if, on a case-specific basis, the Agencies find that they have a significant nexus to Traditional Waters. Both tributaries and adjacent waters are defined so broadly that they are devoid of any "navigable" constraint. Examples of tributaries that the Proposed Rule would determine are *per se* jurisdictional:

- "man-altered tributaries, which may include certain ditches and canals;"[25]
- "tributaries, even when seasonally dry;"[26] and
- "ephemeral streams."[27]

The term "navigable" cannot possibly include every man-altered ditch, seasonally dry tributary, or ephemeral stream.[28] Even assuming the Agencies' scientific-basis for determining these water/land features are important is correct, scientifically-important differs greatly from statutorily-mandated "navigable." Agencies are not tasked to use policy or science in a vacuum as grounds for jurisdiction. Instead, when drafting rules, Agencies must stay within the bounds of the law as drafted by Congress. The only way for the Agencies to determine that an ephemeral stream is a WOTUS is to completely ignore the word "navigable" in the CWA's statutory language.[29]

The Proposed Rule treats the definition of "adjacent waters" in the same manner because its definition is similarly broad. Under the Proposed Rule, any water or wetland within a "floodplain" or "riparian area" of a tributary (as expansively defined) would be a WOTUS.[30] As defined, "floodplain may often coincide with," but is not limited by, the Federal Emergency Management Agency's 100-year floodplain (i.e., a flood has "1% probability of occurring in a given year").[31] Taken to its logical conclusion, the Corps could determine that an ephemeral stream that exchanges water once every 100 years with a man-made ditch is jurisdictional on the sole basis of a shared floodplain. "Navigable" cannot reasonably be interpreted to mean any ephemeral stream within the same floodplain as another ditch. At that point, most of the land mass in the United States becomes an integral part of the definition of WOTUS. And, most of the land mass in the United States is not "navigable."

Congress – not scientists – can amend the CWA.

The text of the Proposed Rule states throughout that one of its main purposes is to "clarify" the Agencies' jurisdiction under the CWA. Even if the Agencies achieve that goal, they do so in an unfounded manner by calling essentially all waters (and some lands) WOTUS. If everything is in, then nothing is out. This is not legally and cannot logically be the case. If promulgated, the Proposed Rule will defy the Supreme Court's continued recognition of Congressional statutory limits on the WOTUS concept (that is, navigability). Notably, under the standards in the Proposed Rule, the *SWANCC* waters[32] and *Rapanos* wetlands[33] likely would be considered WOTUS. Yet, the Supreme Court has already said that those waters are non-jurisdictional.

The Proposed Rule effectively amends the statutory text of the CWA to delete the term "navigable." Statutory amendments may not be done through agency rule making. Instead, if the Agencies believe that current science suggests non-navigable waters should be protected, the Agencies must ask Congress to act to protect those water by amending the CWA. Through the Proposed Rule, the Agencies have removed any notion of a "navigable" requirement from their jurisdictional constraints. And, fatal to the Proposed Rule, the Agencies do not have this power. If one million commenters agree that clean water is the ultimate goal, then the Agencies must find a way to reach that goal while working within their statutory and legal constraints.

(Endnotes)

1 33 U.S.C. § 1251, *et. seq.* (1972) (CWA).
2 Proposed Rule, "Definition of 'Waters of the United States' Under the Clean Water Act" (Docket No. EPA-HQ-OW-2011-0880), 79 Fed. Reg. 22,188 (Apr. 21, 2014) (the "Proposed Rule").
3 Proposed Rule at 22,188.
4 CWA at § 1362(7).
5 474 U.S. 121 (1985) (*Riverside*).
6 *Id*. at 131.
7 *Id*. at 135, 137.
8 51 Fed. Reg. 41,217 (1986).
9 531 U.S. 159 (2001) (*SWANCC*).
10 *Id*. at 171.
11 *Id*. at 174.
12 547 U.S. 715 (2006) (*Rapanos*).
13 *See, id.*
14 *Id*. at 732.
15 *Id*. at 742.
16 *Id*.at 780.
17 *Id*. at 739 (internal quotations omitted).
18 *Id*. at 811.
19 *SWANCC* at 172 (emphasis added).
20 *Rapanos* at 734.
21 *Id*. at 779.
22 *Id*. at 778.
23 *See* bills introduced in the 108th, 109th, 110th, and 111th Congresses to either delete the term "navigable" from the CWA or to expand jurisdiction under the CWA.
24 Notably, the Clean Water Restoration Act introduced in both the 110th and 111th Congress failed to pass the start line – neither made it to a vote in a House Committee.
25 Proposed Rule at 22,227.
26 *Id.*
27 *Id*. at 22,231.
28 The Proposed Rule flies in the face of direction from the *Rapanos* plurality. The restriction of [WOTUS] to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition [of WOTUS] to "*ephemeral streams*". . . [and] *man-made drainage ditches*, . . . , the Corps has stretched the term [WOTUS] beyond parody. *Rapanos*, 547 U.S. at 733-734 (emphasis added).
29 The Proposed Rule's inclusion of "ephemeral streams" is particularly concerning as it represents a marked change from the Agencies' past practices. Under current guidance and practice, ephemeral streams are rarely considered a WOTUS. "Therefore, 'relatively permanent' waters do not include *ephemeral tributaries* . . . .CWA jurisdiction over these waters will be evaluated under the significant nexus standard. . . ." December 2008 Corps Guidance at 7 (emphasis added). And, in practice, ephemeral streams failed the case-specific significant nexus test._
30 The term "adjacent" includes the term "neighboring" which is defined as "waters within the riparian area or floodplain of a [Traditional Water or tributary]."
31 Proposed Rule at 22,236.
32 The isolated ponds in *SWANCC* were connected to groundwater and were located in an area with a groundwater connection to the Fox River, a Traditional Water. Under the Proposed Rule, jurisdiction can be established by "subsurface hydrologic connections." Thus, under the Proposed Rule, the *SWANCC* ponds would be considered jurisdictional.
33 Despite being 11 to 20 miles from the closest Traditional Waters, the record shows that the *Rapanos* wetlands contributed flow to a Traditional Water. (*Rapanos v. United States*, 376 F.3d 629, 642-43 (2004)). Under the Proposed Rule, if a water body "contributes flow" to Traditional Waters it is a "tributary" and therefore jurisdictional.