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Overview

On April 27, 2011, the U.S. Environmental Protection Agency (EPA) issued proposed “Draft Guidance on Identifying Waters Protected by the Clean Water Act” (Draft Guidance)¹ concerning its jurisdiction under the Clean Water Act’s (CWA) dredge and fill provision.² The issue is important for farmers and ranchers due to the presence of seasonally ponded areas, drainage ditches, intermittently dry streams, prairie potholes, and other wet areas located on farm and ranch land that may be adjacent to other waters and over which the federal government may claim jurisdiction. In that event, agricultural activities can be curtailed substantially.

Under the Draft Guidance, the EPA is claiming expansive jurisdiction over certain waters well beyond what the existing regulations allow. Upon finalization, the Draft Guidance will replace present guidance that was first issued in 2003 and updated in 2008 after significant U.S. Supreme Court opinions did little to clear up existing questions about federal jurisdiction over isolated wetlands. The Draft Guidance is open for public comment until July 1, 2011.³

Clean Water Act⁴ (CWA) Background – The Regulation of Isolated Wetlands

With the enactment of the federal water pollution control amendments of 1972 (more commonly known as the CWA), the federal government adopted a very aggressive stance towards the problem of water pollution. Broadly speaking, the CWA essentially eliminates the discharge of any pollutants into the nation’s waters without a permit.⁵ Section 404 of the CWA makes illegal the discharging of dredge or fill material into the “navigable waters of the United States” without obtaining a permit from the Secretary of the Army acting through the Corps of Engineers (COE). Until 1975, the COE construed the term “navigable waters” to mean waters that were actually navigable. In accordance with regulations promulgated in 1975, however, the COE expanded its jurisdiction to “other waters” of the United States, including streams, wetlands, playa lakes, and natural ponds if the use, degradation, or destruction of those areas could affect interstate commerce.⁶ A series of court decisions beginning in the mid-1970s also contributed to the COE’s increasing jurisdiction over wetlands.⁷ Indeed, in 1983 one federal court held that the term “discharge” may reasonably be understood to include

“redeposit” and concluded that the term “discharge” covered the redepositing of soil taken from wetlands such as occurs during mechanized land clearing activities.⁸ Furthermore, since 1975, the COE and the EPA have defined “waters of the United States” such that the agencies assert regulatory authority over isolated wetlands or wetlands not adjacent to “waters of the United States” if a link exists between the water body and interstate commerce. This interpretation has been upheld in the courts.⁹

The migratory bird rule. In 1985, an EPA internal memorandum concluded that CWA jurisdiction could be extended to include isolated wetlands that were or could be used by migratory birds or endangered species.¹⁰ In 1986, the COE issued memoranda to its districts explaining that the use of waters by migratory birds could support the CWA’s jurisdiction.¹¹ In 1993, the United States State Court of Appeals for the Seventh Circuit agreed,¹² holding that isolated wetlands actually used by migratory birds presented a sufficient connection to interstate commerce to give the EPA and the COE jurisdiction under the CWA. This same court was faced with a similar case later in the 1990s. That time the plaintiff, Solid Waste Agency of Northern Cook County, was a consortium of suburban Chicago municipalities that selected for a 410-acre solid waste disposal site a 533-acre abandoned sand and gravel pit containing excavation trenches that had become permanent and seasonal ponds. The ponds and small lakes had become home to approximately 121 species of birds, including many endangered, water-dependent, and migratory birds. Because the proposal for the site required filling in some of the ponds, the plaintiff contacted the COE to determine if a landfill permit was required under §404 of the CWA. The COE asserted jurisdiction under the “migratory bird rule”

and refused to issue a permit in 1991 and 1994, citing a need to protect the habitat of the migratory birds. When the municipalities challenged the COE’s jurisdiction, the U.S. District Court granted the COE’s motion for summary judgment and, on appeal, the Seventh Circuit Court of Appeals held that the Congress had authority under the Commerce Clause to regulate intrastate waters and that the “migratory bird rule” was a reasonable interpretation of the CWA.¹³

The Supreme Court’s 2001 opinion. In early 2001, the U.S. Supreme Court reversed the Seventh Circuit and held that the “migratory bird rule” exceeded the authority granted to the COE under §404 of the CWA.¹⁴ But because the Court simply invalidated the regulation at issue, the Court did not address the scope of the COE’s jurisdiction under the Constitution’s Commerce Clause. The Court went on to state that the “migratory bird rule” raised significant constitutional questions and would significantly impinge upon traditional states’ power over land and water use. Since there was no clear congressional intent to do so, the Court interpreted the CWA to avoid raising the constitutional and federalism issues created by the COE’s interpretation of its jurisdiction.

The Supreme Court’s decision seemed to indicate rather strongly that the COE did not have a legal basis under the CWA to regulate isolated wetlands that did not have a substantive connection to interstate commerce. While room remained to argue over the issue of navigability, the Court’s opinion did appear to remove federal jurisdiction over private ponds and seasonal or ephemeral waters *where the only connection with interstate commerce was migratory waterfowl*. Since then, lower court opinions regarding federal jurisdiction

over isolated wetlands have indicated that other factors are relevant in determining whether the federal government can regulate isolated water. Those factors include recreational use for interstate or foreign travelers, fish or shellfish habitat, or use of the water for industrial purposes by industries engaged in interstate commerce. In any event, it has become clear since the Supreme Court's 2001 opinion that federal jurisdiction over open waters that ultimately flow into interstate waters or waters that are navigable-in-fact remains virtually unlimited.

The key question in any particular case is whether the isolated wetland at issue has a sufficient connection with "waters of the United States" to be subject to the permit requirement of §404 of the CWA.¹⁵

Carabell and Rapanos

The Supreme Court's most recent opinion concerning federal jurisdiction over isolated wetlands involved two separate Michigan landowners who were prevented from developing their properties without a §404 permit from the COE. Both landowners argued that the COE's assertion of jurisdiction over their respective tracts exceeded the scope of the CWA and surpassed the constitutional limits of the Commerce Clause. One landowner owned 16 acres of wooded wetlands over which the COE asserted jurisdiction because the tract abutted a ditch (but was hydrologically distinct from the ditch due to a man-made berm) that connected to a drain that emptied into a creek that eventually connected to Lake St. Clair. The other landowner's tract was over 10 miles from the nearest navigable waterway, but the COE asserted jurisdiction because water from the tract drained into a ditch that drained into a creek that flowed into a navigable river. The COE

claimed that the hydrological connection made the drain a "tributary" of navigable waters. The United States Court of Appeals for the Sixth Circuit ruled for the government in both cases.¹⁶ The U.S. Supreme Court agreed to hear the cases in late 2005,¹⁷ even though the federal government urged the Court to *not* take the cases on the basis that the lower court correctly determined that the federal government had jurisdiction over the isolated wetlands at issue in both cases.

The Scalia plurality opinion.

Unfortunately, in its 2006, ruling, the Court failed to clarify the meaning of the CWA phrase "waters of the United States" and the scope of federal regulation of isolated wetlands. While the Court did vacate the decisions of the Sixth Circuit in both of the cases, the Court did not render a majority opinion, instead issuing a total of five separate opinions. The plurality opinion, written by Justice Scalia and joined by Chief Justice Roberts and by Justices Thomas and Alito, would have construed the phrase "waters of the United States" to include only those relatively permanent, standing or continuously flowing bodies of water that are ordinarily described as "streams," "oceans," and "lakes" that are connected to traditional navigable waters, and would include adjacent wetlands that have a surface connection to jurisdictional waters. In addition, the plurality opinion also held that a wetland may not be considered "adjacent to" remote "waters of the United States" based merely on a hydrological connection. Thus, in the plurality's view, only those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between the two, are "adjacent" to such waters and covered by the permit requirements of §404 of the CWA.

Justice Kennedy's concurrence. Justice Kennedy authored a concurring opinion, but on much narrower grounds. *Thus, Justice Kennedy's opinion is the controlling opinion in the case.*¹⁸ In Justice Kennedy's view, the Sixth Circuit correctly recognized that a water or wetland constitutes "navigable waters" under the CWA if it possesses a "significant nexus" to waters that are navigable in fact or that could reasonably be so made.¹⁹ But in Justice Kennedy's view, the Sixth Circuit failed to consider all of the factors necessary to determine that the lands in question had, or did not have, the requisite nexus. Without more specific regulations comporting with the Court's 2001 opinion, Justice Kennedy stated that the COE, in order to avoid unreasonable application of the CWA, needed to establish a significant nexus on a case-by-case basis when seeking to regulate wetlands based on adjacency to non-navigable tributaries. Justice Kennedy believed the record in the cases contained evidence pointing to a possible significant nexus, but the Sixth Circuit had not required the COE to establish a significant nexus in accordance with the permissible factors. As a result, Justice Kennedy concurred that the Sixth Circuit opinions should be vacated and the cases remanded to the Sixth Circuit for further proceedings.

Justice Kennedy's opinion is not a clear victory either for the landowners in the cases or the COE. While he rejected the plurality's narrow reading of the phrase "waters of the United States," he also rejected the government's broad interpretation of the phrase. While the "significant nexus" test of the Court's 2001 opinion in *SWANCC* required regulated parcels to be "inseparably bound up with the 'waters' of the United States," Justice Kennedy would require the nexus to "be assessed in terms of the

[CWA's] goals and purposes" in accordance with the Court's 1985 opinion in *United States v. Riverside Bayview Homes*.²⁰

The conflicting and confusing Supreme Court opinions have certainly made it more difficult for farmers and others to obtain the necessary federal permits for areas that might impact arguably federally jurisdictional wetlands.²¹

Significant 2011 Opinion

In early 2011, the U.S. Court of Appeals for the Fourth Circuit decided a case that involved the court's need to apply Justice Kennedy's "significant nexus" test. In *Precon Development Corporation, Inc. v. United States Army Corps of Engineers, et al.*,²² the federal government claimed jurisdiction over 4.8 acres of wetland located on the plaintiff's property that was approximately seven miles from nearest "navigable" water. The government claimed jurisdiction on the basis that the 4.8 acres were adjacent to a ditch that qualified as "waters of the United States." Thus, the defendant denied the plaintiff a permit to develop the 4.8 acre tract. The government's claim of jurisdiction was consistent with Justice Kennedy's test set forth in *Rappanos* as being "similarly situated" to the wetlands at issue. However, the court determined that there was insufficient physical evidence to establish the required "significant nexus." The court opined that the government cannot simply say that an adjacent tributary flowed into the subject area without any measurements of the actual flow. The court also held that the government's interpretation of Justice Kennedy's "significant nexus" test that was contained in a non-binding agency regulatory guidance document was not entitled to the same level of deference as is an interpretive rule that is

promulgated in accordance with the requirements of the APA.²³

The April 27, 2011, Draft Guidance

The EPA's Draft Guidance is, in essence, an interpretation of both the plurality opinion and Justice Kennedy's "significant nexus" standard with the purpose of asserting expansive jurisdiction over isolated wetlands to a greater reach than is presently allowed by the regulations. Under the Draft Guidance, the EPA claims that interstate waters (including interstate wetlands that cross state lines) are *always* jurisdictional²⁴ – they don't require any significant nexus analysis (unless, apparently, the wetlands are merely "adjacent"). So, the EPA's position is that such interstate ponds, isolated wet areas, streams, etc., are fully subject to federal jurisdiction in every situation.²⁵ More troubling, however, is that the Draft Guidance redefines the EPA's regulatory definition of "other waters"²⁶ (which, as defined in the regulations, "could affect interstate or foreign commerce") and "physically proximate"²⁷ waters (which, under the regulations, are non-wetland waters that satisfy the regulatory definition of "adjacent" waters. Under the Draft Guidance, the regulatory (and judicial) definition of "adjacency" would no longer apply just to wetlands, but would also apply to lakes and ponds that aren't typically viewed as "wetlands" and isolated intrastate waters. These types of waters would only be subject to the "significant nexus" analysis – they would not, according to the EPA, require an interstate commerce connection. That is clearly beyond the scope of the existing regulations.²⁸ In addition, waters that have historically had a seasonal flow are jurisdictional, with EPA field staff having the ability to determine what seasonal flow means in each situation.²⁹ That could turn out to be very important to farmers and

ranchers, particularly in the more arid western half of the United States.

The Draft Guidance also expands the federal government's jurisdictional reach in another manner. As noted above,³⁰ Justice Kennedy stated that CWA jurisdiction extends to wetlands that have a "significant nexus" to traditional 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'." In the Draft Guidance, the EPA construes Justice Kennedy's phrase "in the region" to mean "watershed" – an area draining into the nearest traditional navigable water or interstate water through a single point of entry.³¹ The EPA says that the regulatory process is to identify all "similarly situated" waters in the "watershed" as the beginning point of the "significant nexus" analysis.³² So, where a significant nexus has been identified for a particular wetland, the EPA will presume that *all other comparable wetlands* in the same watershed are subject to jurisdiction.

While the Draft Guidance does not eliminate the exemption for "normal farming activities,"³³ that may not be that meaningful. Existing regulations limit the exemption to pre-established farming activities that do not bring a new area into farming or require modifications to the hydrological regime.³⁴ In addition, the courts have narrowly construed the exemption to those situations where the agricultural activity is extremely minimal and no additional areas of "navigable waters" are brought into use.³⁵ Also, exempt activities are subject to a "recapture" provision that requires a permit if a discharge changes the use of the waters, impairs the waters' flow or circulation,

brings an area of navigable waters into a use to which it was not previously subject, or reduces the reach of the waters.³⁶ On that point, a significant federal court opinion in 1994 held that the exemption only applied to activities occurring on the particular site in question regardless of the relationship to the activities occurring on the remainder of the land.³⁷ The part of the farm in question adjoined cropland that the landowner owned and operated and was part of the same drainage system. The court held as irrelevant for CWA purposes a prior SCS classification of the drainage activities as a “commenced conversion.” The court also noted that even if the activities were held to be exempt, they would be subject to the recapture provision. Thus, only routine activities with relatively minor impacts on waters are exempt and the exemption will be lost if the activity is a new use and the activity reduces the reach or impairs the flow of water.

Thus, the fact that the Draft Guidance retains the existing exemption for “normal farming activities” is essentially irrelevant. It only applies to routine activities with relatively minor impacts on waters, and the exemption is lost if the activity is a new use or reduces the reach or impairs the flow of water.

The Future of Federal Regulation of Isolated Wetlands

Clearly, the recent U.S. Supreme Court opinions injected enormous uncertainty into the law. In light of that, the Congress has attempted to step into the fray. In the spring of 2005, legislation was introduced in both the U.S. House and Senate, which would have expanded the federal government’s jurisdiction over isolated and adjacent wetland under the CWA.³⁸ The proposed legislation specified that the federal

government would have regulatory jurisdiction over, among other things, all interstate and intrastate waters and their tributaries, intermittent streams, mudflats, sandflats, prairie potholes, wet meadows, playa lakes, and natural ponds to the fullest extent possible under the Constitution. That is broad, sweeping language that would solidify the federal government’s ability to regulate wet areas on farm and ranch land. That legislation did not become law, and the Congress tried again in 2010 to expand the EPA’s powers by debating legislation that would have replaced the term “navigable waters” in the CWA with “waters of the U.S.”³⁹ That change in language would have expanded (probably significantly) the EPA’s regulatory reach. But, the law did *not* pass.

In a large sense, the Draft Guidance is the EPA’s attempt to obtain greater regulatory control over isolated wetlands than the courts and the Congress have given them. Indeed, the Chairman of a Congressional subcommittee that has jurisdiction over the CWA (among other environmental laws) has announced that oversight hearings will be held concerning the EPA’s release of the Draft Guidance.⁴⁰ At the present time, no legislation has been introduced to amend the CWA in light of the confusing U.S. Supreme Court opinions, but the release of the Draft Guidance may stimulate a legislative response.

Conclusion

The EPA admits in the Draft Guidance that it expects “the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance.”⁴¹ In addition, EPA notes that “each jurisdictional determination will be made on a case-by-

case basis considering the facts and circumstances of the case and consistent with applicable statutes, regulations, and case law.”⁴² Thus, it is probably correct to anticipate that wetland litigation will increase. If the Draft Guidance is finalized, all farmers, ranchers, rural landowners, businesses, land developers and others owning land with geographical and topographical characteristics that either contain wet areas or could be impacted by a watershed will have to determine whether the new rules could potentially apply and take whatever action is appropriate.

Interested parties have until July 1, 2011 to submit comments concerning the Draft Guidance.⁴³

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¹ The Draft Guidance is accessible at http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf.

² Section 404 of the CWA makes illegal the discharging of dredge or fill material into the “navigable waters of the United States” without obtaining a permit from the Secretary of the Army acting through the Corps of Engineers (COE). The guidance also applies to the EPA’s jurisdictional scope under the National Pollution Discharge Elimination System (NPDES) (§402 of the CWA), CWA’s oil spill program under §311, §303 water quality standards and §401 water quality certification.

³ From a legal standpoint, the Draft Guidance raises some important questions. For example, it is not possible to tell from the Draft Guidance what the timeline is for the rulemaking process, and the Draft Guidance is devoid of any indication that the states (who partner with the EPA on CWA implementation issues) were consulted in the development of the Draft Guidance. While EPA states that the Draft Guidance only contains guidelines that simply “clarify...existing understandings,” that is hard to believe. Clearly, EPA plans on using the finalized version of the Draft Guidance to govern the EPA’s jurisdictional determinations. Also, while it is difficult to confirm, it appears that the Draft

Guidance was not issued in accordance with formal rulemaking procedures required by the Administrative Procedures Act (APA). So, a real question exists as to whether the courts will give the finalized version of the Draft Guidance deference if the positions taken in it are asserted against private landowners. *See, e.g., Precon Development Corporation, Inc. v. Army Corps of Engineers*, 633 F.3d 278 (4th Cir. 2011)(court held, inter alia, that federal government agency interpretation of judicial opinion (the “significant nexus” test developed by U.S. Supreme Court) in non-binding agency guidance document not entitled to same level of deference as is agency interpretation of statutory phrase (“navigable waters” in the CWA) that is promulgated in accordance with the requirements of the APA). There are also cases bolstering this point involving federal farm programs.

⁴ 26 U.S.C. §§1251 *et seq.*

⁵ 26 U.S.C. §1344.

⁶ By the early 1990s, the term “waters of the United States” was defined to mean “all waters which are currently used or were used in the past, or may be susceptible to use in interstate or foreign commerce . . .”. 33 C.F.R. §328.3(a)(1).

⁷ *See, e.g., Save Our Sonoran, Inc. v. Flowers*, 381 F.3d 905 (9th Cir. 2004) (CWA dredge-and-fill permit required for construction project in Sonoran Desert; water flowing through desert washes and arroyos during periods of heavy rain considered jurisdictional navigable waters); *United States v. Ashland Oil & Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974) (CWA held to extend to any tributary of any navigable stream); *Natural Defense Council v. Calloway*, 392 F. Supp. 685 (D. D.C. 1975) (CWA held to extend §404 permit jurisdiction to all waters of the United States); *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974) (CWA held to manifest a clear intent to break from Rivers & Harbors Act limitations).

⁸ *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

⁹ *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979) (COE’s jurisdiction exists over all waters and adjacent wetlands within the COE’s constitutional reach under the Commerce Clause; COE has jurisdiction over wetlands adjacent to inland lakes if the lakes are visited by interstate travelers for recreational purposes). During reauthorization of the CWA in 1977, legislation designed to narrow significantly the scope of the COE’s regulatory authority over isolated wetlands lost by one vote in the U.S. Senate, with Senator John Chafee (RRI) casting the deciding vote.

¹⁰ Memorandum from Francis S. Blake, General Counsel, U.S. E.P.A., to Richard E. Sanderson, Acting Assistant Administrator, Office of External Affairs, U.S. E.P.A., September 12, 1985, “Clean Water Act jurisdiction over isolated waters.” *See also* 40 C.F.R. §230.3(s)(3) and 33 C.F.R. §328.3(a)(3).

¹¹ Memorandum from Brig. Gen. Patrick J. Kelly, Deputy Director of Civil Works, U.S. Army Corps of Engineers, Corps Field Offices (EPA memorandum on CWA jurisdiction over isolated waters, Nov. 8, 1985); memorandum from Brig. Gen. Patrick J. Kelly to Commander, Southwestern Division, U.S. Corps of Engineers (Commerce Clause jurisdiction in isolated waters, Feb. 11, 1986).

¹² *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (7th Cir. 1993) (use of phrase “could affect interstate commerce” in 40 C.F.R. §230.3(s)(3) indicates that the regulation covers waters with only a potential or minimal connection to interstate commerce).

¹³ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999).

¹⁴ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). The case is commonly referred to as the SWANCC case.

¹⁵ The issue of the scope of federal regulation over isolated wetlands has continued to generate significant litigation. *See, e.g., United States v. Morrison*, No. 05-1552, 2006 U.S. App. LEXIS 10478 (6th Cir. Apr. 26, 2006) (wetlands adjacent to navigable river subject to federal regulation); *United States v. Johnson*, 437 F.3d 157 (1st Cir. 2006) (cranberry bogs were “waters of the United States” due to hydrological connection to navigable stream); *Baccarat Fremont Develops, LLC v. United States Army Corps of Engineers*, 425 F.3d 1150 (9th Cir. 2005) (same).

¹⁶ *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004); *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004).

¹⁷ *Rapanos v. United States*, 126 S. Ct. 414 (2005); *Carabell v. United States*, 126 S. Ct. 415 (2005) (the cases were consolidated).

¹⁸ Under the rationale of *Marks v. United States*, 430 U.S. 188 (1977), when the Court fails to reach a majority opinion, the holding of the Court is viewed as the position taken by the concurring opinion rendered on the narrowest grounds. In this case, that is Justice Kennedy’s concurring opinion, as Chief Justice Roberts points out in his separate concurring opinion. But, see *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *cert. den.*, 128 S. Ct. 375 (2007)(by adhering to Justice Kennedy’s standard as the single controlling test, there could be

circumstances in which a site would be within CWA jurisdiction due to application of the “significant nexus” test, but that same site would not be considered within CWA jurisdiction, according to the plurality opinion; as such, a site could be within CWA jurisdiction if it satisfied either the plurality’s standard or Justice Kennedy’s standard).

¹⁹ According to Justice Kennedy, CWA jurisdiction extends to wetlands that have a “significant nexus” to traditional 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.’”
²⁰ 474 U.S. 121 (1985).

²¹ Much of the source of confusion traces to Justice Kennedy’s comments that “regulators must determine where there’s a “significant nexus” between a wetland and navigable waters. To determine the existence of a “nexus” the regulatory agencies must determine whether the wetlands “significantly affect the chemical, physical, and biological integrity of other covered waters.” That can be a very time consuming and costly process.

²² 633 F.3d 278 (4th Cir. 2011), *rev’g.*, 658 F. Supp. 2d 752 (E.D. Va. 2009).

²³ See the text of footnote 3, *supra*.

²⁴ Draft Guidance, Section 2, p. 7.

²⁵ The Draft Guidance states that the method for determining the extent of an interstate water is the use of a stream order for the full extent of the length upstream and downstream. Draft Guidance, Section 2, p. 7.

²⁶ 33 C.F.R. §328.3(a)(3).

²⁷ 33 C.F.R. §328.3(c).

²⁸ Based on this redefinition, it is entirely plausible that the EPA could assert jurisdiction over such things as drainage ditches and marshy low spots in fields. Drainage ditches could constitute “tributaries” and marshy areas could constitute wetlands. Under the Draft Guidance both would be subject to the “significant nexus” test.

²⁹ Draft Guidance, Appendix, Section 4, p. 28.

³⁰ See the text of footnote 19 *supra*.

³¹ Draft Guidance, Section 6, p. 19.

³² *Id.*

³³ 33 U.S.C. §1344(f)(1). The exemption covers such activities as plowing, seeding, cultivating, minor drainage, harvesting, upland soil and water conservation projects, construction or maintenance of farm ponds, irrigation ditches, maintenance of drainage ditches and construction or maintenance of farm roads not otherwise impairing navigable waters.

³⁴ 33 C.F.R. §323.4(a)(1)(ii).

³⁵ Thus, the exemption for agricultural activities applies only to prior established and continuing farming activities. See., e.g., *United States v. Cumberland Farms of Connecticut, Inc.*, 826 F.2d 1151 (1 st Cir. 1987, cert. den., 484 U.S. 1061 (1988)). In addition, the burden of proof to establish the exemption applies is on the particular farmer or rancher claiming the exemption; *United States v. Acquest Transit LLC*, No. 09-CV-055S, 2009 U.S. Dist. LEXIS 60337 (W.D. N.Y. Jul. 15, 2009)(normal farming activities exemption inapplicable where farming activity abandoned for 12 years and dredging activities necessary for farming to resume); The conversion of wetlands to fish farming ponds has been held, for example, to constitute a new use that is ineligible for the exemption. *Conant v. United States*, 786 F.2d 1235 (7th Cir. 1985). Also, filling to stabilize riverbanks and rechannel streambeds has been held not to fall within the scope of the exemption as normal ranching or upland soil and water conservation practices. See., e.g., *United States v. Zanger*, 767 F. Supp. 1030 (N.D. Cal. 1991)(landowner straightened a meandering creek by constructing a channel and moving streambed material along the banks to protect his property and allow further development for recreational purposes).

³⁶ 33 U.S.C. §1344(f)(2).

³⁷ *United States v. Brace*, 41 F.3d 117 (3d Cir. 1994).

³⁸ The Clean Water Authority Restoration Act of 2005. Introduced in the U.S. House on March 17, 2005, as H.R. 1356, and introduced in the Senate on April 27, 2005, as S. 912.

³⁹ The legislation, H.R. 5088, was commonly referred to as the “Oberstar-Feingold Bill” and was introduced in the 111th Congress.

⁴⁰ Announcement by Chairman Gibbs of the House Water Resources and Environment Subcommittee.

⁴¹ Draft Guidance, p. 3.

⁴² *Id.*

⁴³ Comments are to be identified by referring to Docket ID No. EPA-HQ-OW-2011-0409 and can be submitted electronically to owdocket@epa.gov. EPA-HQ-OW-2011-0409 is to be included in the subject line of the message.