

Not a Mirage: Most Ephemeral and Intermittent Streams in Arid Environments Would be Subject to Federal Agency Permits under Proposed Rules

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Summary: Proposed New Rules Will Increase Permitting Burdens and May Conflict with Precedent

New regulations proposed by the U.S. Environmental Protection Agency (“EPA”) and Army Corps of Engineers (“Corps”) seek to reassert federal jurisdiction over waters in areas that are murky in the aftermath of significant Supreme Court decisions. These changes would sharply increase the number of permits required under Section 404 of the Clean Water Act, (“CWA”), 33 U.S.C. §§ 1251 *et seq.* and concomitantly increase costs for developers who would require such permits. Despite agency assertions that the new regulations are consistent with precedent, there appear to be some instances where this is not the case. Additionally, the regulations appear to extend coverage to issues that are not currently or historically of major environmental concern. Public comments should advocate for narrower rules that would result in less conflict (i.e., litigation) over the regulations’ validity and less burden on regulated businesses.

Introduction

In 2006, the United States Supreme Court issued the final opinion in a trilogy of decisions intended to delineate the jurisdictional scope of the CWA. Two earlier cases provided fairly bright line rules regarding federal jurisdiction over wetlands adjacent to a navigable water (*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)) and lack of jurisdiction over isolated ponds (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”). The fragmented third installment, *Rapanos v. United States*, 547 U.S. 715 (2006), offered two competing jurisdictional standards. The first test, crafted by the plurality, gave the Corps jurisdiction over all navigable-in-fact waters (traditionally navigable waters, or “TNWs”) and relatively permanent waters with a continuous surface connection to TNWs. The second test, conceived of by Justice Kennedy in his concurrence, extended the Corps’ jurisdiction to all wetlands with a “significant nexus” to TNWs, meaning wetlands that, “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.’”¹

In a separate concurrence, Justice Roberts expressed frustration with the fact that EPA and the Corps failed to follow through with a proposed rulemaking in 2003 to develop regulations “clarifying what waters are subject to CWA jurisdiction”² Even in the aftermath of *Rapanos*, which introduced

significant confusion regarding how and when to apply what jurisdictional test, new regulations were still not forthcoming. The agencies instead prepared a memorandum of understanding that described several types of waters over which they would automatically assert jurisdiction (TNWs, wetlands adjacent to TNWs, relatively permanent, non-navigable tributaries of TNWs and their abutting wetlands) and those over which they would assert jurisdiction after a case-by-case analysis of the significant nexus between a non-navigable water and a TNW.³

The case-by-case approach proved to be an unduly taxing experiment, and on March 25, 2014, the agencies released a pre-publication version of new regulations that would replace case-by-case jurisdiction determinations under a variety of circumstances with per se definitions. Of particular interest to those with development interests in the arid west, the proposed regulations would automatically provide jurisdiction over channels (including intermittent, ephemeral, and perennial streams) that appear to feed into other waters of the United States (e.g., TNWs and interstate waters). In addition, the agencies seem intent on re-establishing their authority over seemingly isolated waters, which the Supreme Court stripped away in *SWANCC*. These changes, supported by over 300 pages of analysis that provides a detailed defense of the agencies' historic exercise of its CWA jurisdiction, will likely accomplish the stated goal of reducing agency paperwork. However, it is not clear that the regulations in their current form comply with Supreme Court precedent.

Legal Background: Recent Discord in the Law Governing the Scope of Federal Jurisdiction over "Waters of the United States"

The CWA requires authorization (in the form of a "Section 404 permit") from the Secretary of the Army, acting through the Corps, for the construction of any structure in or over any navigable water of the United States.⁴ The CWA does not define "water of the United States," or "navigable water," and leaves this task to the discretion of the Corps and the EPA.⁵ Seizing this authority, the Corps, through routine rulemakings, regularly expanded these definitions, and the reach of the CWA, in an effort to provide aquatic ecosystems with maximum protection and to fulfill the ambitious mandate of the CWA: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁶ The rules most recently adopted by the agencies broadly define "navigable waters" to mean tidal waters (and all waters subject to the ebb and flow of the tide), all waters currently used, historically used, or susceptible to use in interstate or foreign commerce (TNWs), interstate waters, waters that if used, degraded, or destroyed could affect interstate or foreign commerce, impoundments of any of the aforementioned types of waters, tributaries to any of the waters just described, and wetlands adjacent to all of the above.⁷

In *SWANCC*, the Supreme Court held for the first time that federal regulatory authority over waters of the United States has limits (coinciding with the scope of the Commerce Clause of the U.S. Constitution) and that the Corps' regulation of non-navigable, isolated, intrastate waters (waters that if used, degraded, or destroyed could affect interstate or foreign commerce) exceeded its authority.⁸ Five years after *SWANCC*, the Court again intervened to refine the scope of the Corps' jurisdiction, this time with respect to navigable waters and tributaries and wetlands adjacent to the same. As noted above, the Court's fractured opinion in *Rapanos* (4-4-1 with two concurrences and two dissents) articulated two frameworks for decision-making, with Justice Kennedy's "significant nexus" test appearing to emerge as the applicable guidance going forward. However, even the significant nexus test lacked the comprehensive clarity that only new regulations – informed by agency expertise – might provide.⁹

The Long Awaited Agency Response to *SWANCC* and *Rapanos* – Perhaps Not the Benign Restatement of Prior Policy It Purports to Be

In their introduction to the March, 2014 proposal for new CWA regulations, EPA and the Corps observe that “[t]he *SWANCC* and *Rapanos* decisions resulted in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clear and efficient implementation of the CWA.”¹⁰ One of the primary objectives of the proposed rule is accordingly to “make the process of identifying ‘waters of the United States’ less complicated and more efficient.”¹¹ The agencies represent that in pursuing this objective, they propose to adopt a rule that “is narrower than that under the existing regulations.”¹² As explained in more detail below, whether the proposed rule actually has this effect is debatable.

Reasserting Jurisdiction over “Other Waters”

According to the agencies:

The most substantial change [in the proposed regulations] is the proposed deletion of the existing regulatory provision that defines “waters of the United States” [to include] other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce [i.e., waters that] could be used by interstate or foreign travelers for recreational or other purposes; from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or which are used or could be used for industrial purposes by industries in interstate commerce. Under the proposed rule, these “other waters” (those which do not fit within the proposed categories of waters jurisdictional by rule) would only be jurisdictional upon a case-specific determination that they have a significant nexus [to some other form of jurisdictional water].¹³

This change – a new definition of “other waters” – is rather unremarkable, given that *SWANCC* significantly emasculated the existing provision in 2001.¹⁴ However, underlying this new definition is a much greater objective, one not obviously recognized by the pre-publication analysis, to reassert jurisdiction over geographically isolated waters.

While some might argue that *SWANCC* foreclosed federal jurisdiction over non-navigable, geographically isolated, intrastate waters, the Corps and EPA have previously taken the position that *SWANCC* only “squarely eliminate[d] jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds”¹⁵ Consistent with this view, the agencies now propose to continue to exert jurisdiction over, *inter alia*, “other waters” that are geographically isolated and even seldom, if ever, hydrologically connected, but are nevertheless “biologically connected to each other and to downstream waters through the movement of seeds, macroinvertebrates, amphibians, reptiles, birds, and mammals.”¹⁶ The Corps and EPA justify this approach by reasoning that the significant nexus test requires only proof of a significant effect on the chemical, physical, or biological integrity of TNWs, interstate waters, and territorial seas.¹⁷ Although this rationale is more firmly rooted in concerns about the impacts of isolated waters on jurisdictional waters, rather the actual or potential use of isolated waters in a manner loosely tied to commerce, this is an arguably fine distinction that might not hold up against judicial scrutiny in light of the reasoning in *SWANCC*. Moreover, efforts to establish chemical or biological connections among physically separated waters are sure to result in

significant litigation, which would thwart the agencies' objective to streamline jurisdictional determinations.

Per se Coverage for Intermittent and Ephemeral Streams

Moving "intermittent streams" out of the "other waters" category and under the "tributary" category,¹⁸ where all streams, "including perennial, intermittent, and ephemeral streams," would presumably be "physically and chemically connected to downstream traditional navigable waters, interstate waters, and the territorial seas" is another significant change proposed in the draft regulations.¹⁹ Specifically, if a bed and banks and an Ordinary High Water Mark ("OHWM")²⁰ are perceivable for an intermittent stream, and the stream appears to contribute flow to a water of the United States, then the water would be a jurisdictional tributary. This is true even if culverts, pipes, dams, debris piles, boulder fields, or underground flow interrupts the stream.²¹ The agencies will not consider whether, on a case-by-case basis, such streams (which would potentially include dry-but-discernable desert washes) demonstrate a chemical or biological connection to a TNW, interstate water, or territorial sea, as defined in sections (a)(1) through (a)(3) of the regulation.²²

The agencies represent that this proposed definition for tributaries "is consistent with long-standing practice and historical implementation of CWA programs."²³ They furthermore assert that this approach is consistent with Justice Kennedy's analysis in *Rapanos*, where he observed that

"[t]hrough regulation or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters."²⁴

However, notwithstanding the fact that tributaries come in many shapes and sizes, and even more significantly, flow at different intervals, the agencies have not identified *categories* of tributaries that are per se jurisdictional waters. The regulation proposes to universally classify *all* tributaries as waters of the United States. This approach is seemingly at odds with both the plurality's and Justice Kennedy's holdings in *Rapanos*, which cast doubt on efforts by the Corps to regulate, among other things, typically dry channels, including desert washes.²⁵

Specifically, the *Rapanos* plurality opined that the most implausible of all features over which the Corps has ever asserted jurisdiction are "'washes and arroyos' of an 'arid development site,' located in the middle of the desert, through which 'water courses . . . during periods of heavy rain . . .'"²⁶ Justice Kennedy's critique of this interpretation was more tempered, but he still recognized that while "torrents thundering at irregular intervals through otherwise dry channels" *could* constitute waters of the United States, instances where irregular (not seasonal) ephemeral flows qualify as waters of the United States should be the exception rather than the rule.²⁷ Under the regulations proposed by EPA and the Corps, however, coverage for intermittent and ephemeral streams identified by a bank and bed and OHWM, would in fact be the rule.²⁸

Per se regulation of intermittent and ephemeral streams and washes additionally appears to be inconsistent with prior agency policies.²⁹ The Corps has previously recognized that "small desert wash systems . . . that . . . only convey[] surface flow during extremely large storm events . . . would not usually constitute a jurisdictional water of the United States."³⁰ The Corps has also recognized that an ephemeral stream over which it would assert jurisdiction in other contexts would at least have "flowing water . . . during, and for a short duration after, precipitation events in a typical year",

suggesting that an ephemeral water that typically does not flow (flows only after infrequent flood-like events) would be outside of its jurisdiction.³¹ Indeed, the Corps' early interpretations of its jurisdiction over tributaries extended upstream only to the point where flow was normally greater than five cubic feet per second ("cfs") and landward to "that point on the shore that is inundated 25% of the time."³²

In light of these materials, it appears that the Corps as a matter of policy has not previously asserted jurisdiction over irregular (non-seasonal) ephemeral flows.³³ In fact, the Supreme Court cautioned the Corps in *Rapanos* that it does not have authority to define "waters of the United States" to include "virtually any land feature over which rainwater or drainage passes and leaves a visible mark"³⁴ While the case made in the pre-publication materials regarding the general importance of tributaries to the health of our nation's waters is very compelling,³⁵ the agencies have not made a convincing case for sweeping ephemeral and intermittent desert washes into a per se rule that eliminates consideration of the actual chemical and biological impacts. This category of potential tributaries arguably requires a separate (case-by-case) analysis.

Next Steps in the Rulemaking Process

Although EPA and the Corps issued a pre-publication version of the proposed rule and supporting materials on March 25, 2014, much work remains to be done. The public comment period, currently proposed to run for 90 days, will not commence until the agencies publish the proposed rule in the Federal Register. Several Republican senators, led by Sen. Pat Toomey, R-Pa, have called for a six-month review period to give the public more time to consider the detailed, scientific studies underlying the proposal. Even with this extension, the "draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters," which served as the cornerstone for the analysis of the proposed rule, is not expected to be available in final form until late 2014 or early 2015.³⁶ The pre-publication materials note that "the rule will not be finalized until that review and the final Report are complete."³⁷

When the draft rule is made available for comment, land developers should consider participating in the process to ensure that the agencies adopt final regulations that will not unnecessarily increase permitting costs by forcing companies to pursue fill permits in accordance with per se rules in areas where the Corps would not have had jurisdiction in the first instance under a case-specific analysis. Input is also needed on a threshold to determine when a significant nexus analysis might be warranted to ensure that developers are not unnecessarily burdened with expensive scientific inquiries into fanciful connectivity theories. It is likely that, even with significant refinements, the substantial changes discussed here, as well as other changes that are beyond the scope of this discussion, will continue to spawn more litigation over the Corps' jurisdiction in the short run. But addressing the aforementioned issues could at least stem this tide.

In making comments, companies should additionally be sensitive to the fact that there are some very compelling anecdotes that illustrate an imperative need for broader jurisdiction over tributaries and other waters, where devastating spills have gone unpunished due to a lack of enforcement authority.³⁸ A proposal that recognizes the different needs of enforcement and permitting statutes, that still manages to provide a coherent (i.e., not arbitrary) definition of the scope of the agencies' jurisdiction, will require careful consideration and drafting. Paul Hastings is well positioned and able to help clients navigate these matters and expedite permitting without jeopardizing environmental outcomes.

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- ¹ *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).
 - ² *Id.* at 757-58 (Roberts, C.J., concurring) (citing 68 Fed. Reg. 1991 (Jan. 15, 2003)).
 - ³ EPA & Corps, *Joint Memorandum: Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States* (June 5, 2007) ("2007 Joint Jurisdiction Policy"); see also EPA & Corps, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States* (Dec. 2, 2008) ("2008 Guidance") (providing additional interpretation of select terms).
 - ⁴ 33 U.S.C. § 1344 (specifically regulating the "discharge of dredged or fill material" into "navigable waters").
 - ⁵ *Riverside Bayview Homes*, 474 U.S. at 133-34.
 - ⁶ *Id.* at 132-33; *United States v. RGM Corp.*, 222 F. Supp. 2d 780, 783 (E.D. Va. 2002); see also 33 U.S.C. § 1251(a).
 - ⁷ *Id.* § 1362(7); 33 C.F.R. § 328.3(a).
 - ⁸ U.S. Const. Art. I, § 8; see also *SWANCC*, 531 U.S. at 168 n.3 (observing that while Congress may have intended "that the term "navigable waters" be given the broadest possible constitutional interpretation,' neither this, nor anything else in the legislative history . . . signifie[d] that Congress intended to exert anything more than its commerce power over navigation." (citing S. Conf. Rep. No. 92-1236, p. 144 (1972))).
 - ⁹ See *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007) (applying Justice Kennedy's test without foreclosing the possibility of applying the plurality's test); see also 2014 Proposed Regulations at 275-76 (discussing the circuit split on which standard(s) to apply). For insights on whether either test should apply outside of the context of a wetlands delineation, compare *San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 707-08 (9th Cir. 2007) (holding that even if the significant nexus test applied, something that "[n]o Justice, even in dictum, addressed" in *Rapanos*, plaintiff failed to produce any evidence of a hydrological connection between allegedly polluted water in a man-made pond and a TNW), with *United States v. Rosenblum*, No. CR-07-294, 2007 WL 4969140, at *9 (D. Minn. Dec. 21, 2007) (reasoning that because the significant nexus test had its roots in earlier Supreme Court cases, one of which did not involve wetlands, the "test is not limited to cases involving wetlands" (citing *SWANCC* and *Riverside Bayview Homes*)).
 - ¹⁰ EPA & Corps, Pre-publication of Proposed Rule Defining the Scope of Waters Protected Under the Clean Water Act (CWA) (Docket No. EPA-HQ-OW-2011-0880) at p. 2 (Mar. 25, 2014), available at http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_20140325_prepublication.pdf ("2014 Proposed Regulations").
 - ¹¹ *Id.* at p. 13.
 - ¹² *Id.* at p. 19.
 - ¹³ *Id.* (citing 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 122.2).
 - ¹⁴ *United States v. Wilson*, 133 F.3d 251, 256 (4th Cir. 1997).
 - ¹⁵ 68 Fed. Reg. at 1995-96.
 - ¹⁶ 2014 Proposed Regulations at p. 258.
 - ¹⁷ *Id.* at pp. 325-26, 328-29 (proposed text of 33 C.F.R. §328.3(a)(7), (c)(7)).

- ¹⁸ Historically, the Corps appears to have exercised jurisdiction over desert washes and other ephemeral waters pursuant to its authority over “other waters,” as defined in 33 C.F.R. § 328.2(a)(3). See *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118 (9th Cir. 2005); *P & V Enters. v. U.S. Army Corps of Eng’rs*, 466 F. Supp. 2d 134, 138 (D.D.C. 2006); see also Approved Jurisdictional Determination Form for Ivanpah Valley Solar Energy Project, SPL-2007-415-SLP (JD-5) (Mar. 18, 2009) (determining that desert washes connected to an interstate dry lake that floods seasonally were not jurisdictional waters because these non-Relatively Permanent Waters had no downstream connectivity to a TNW and no nexus to water-based interstate or foreign commerce (including recreation and fisheries); they were not “other waters” as defined by 33 C.F.R. § 328.3(a)(3)).
- ¹⁹ 2014 Proposed Regulations at p. 37.
- ²⁰ 33 C.F.R. §§ 328.3(e) (defining OHWM to mean the “line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas”).
- ²¹ This provision in particular was aimed in part at “dry-land systems in the arid and semi-arid west, [where] OHWM indicators can be discontinuous within an individual tributary due to the variability in hydrologic and climatic influence” 2014 Proposed Regulations at p. 58. Allowing for breaks in tributary waters is not a new concept. See USACE (Corps), Approved Jurisdictional Determination Form (May 30, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/app_b_approved_jd_form.pdf (“A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody’s flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.”). However, the proposed language for the new rule does not appear to recognize the importance of evidence of continuous flow. See *Deerfield Plantation Phase II-B Prop. Owners Ass’n v. United States Army Corps of Eng’rs*, 801 F. Supp. 2d 446, 463-64 (D.S.C. 2011).
- ²² *Id.* at p. 47. Note that the requirement to demonstrate a physical connection to a water of the United States, the requirement to “contribute flow,” still applies on a case-by-case basis to tributaries. See *id.* at 56-57 (“The flow in the tributary may be ephemeral, intermittent or perennial, but the tributary must drain, or be part of a network of tributaries that drain, into an (a)(1) through (a)(4) water under today’s proposed rule.”).
- ²³ *Id.* at p. 56.
- ²⁴ *Id.* at p. 314 (quoting *Rapanos*, 547 U.S. at 780-81).
- ²⁵ *Precon Dev. Corp. v. U.S. Army Corps of Eng’rs*, No. 2:08cv447, 2013 U.S. Dist. LEXIS 113481 at *20 (E.D. Va. July 25, 2013) (observing that under *Rapanos*, “simply finding a hydrologic connection between the wetlands and the navigable water was insufficient, “[a]bsent some measure of the significance of the connection for downstream water quality” (quoting *Rapanos*, 547 U.S. at 784 (J. Kennedy, concurring))).
- ²⁶ *Rapanos*, 547 U.S. at 727.
- ²⁷ *Id.* at 769 (“Though the plurality seems to presume that such irregular flows are too insignificant to be of concern in a statute focused on ‘waters,’ that *may not always be true.*” (emphasis added)).
- ²⁸ 2014 Proposed Regulations at p. 245 (“Most prairie streams and southwest intermittent and ephemeral streams are likely to be considered tributaries to (a)(1) through (a)(3) waters”).
- ²⁹ As recently as 2007, in the Joint Jurisdiction Policy prepared by the Corps and EPA post-*Rapanos*, the agencies noted that more than a mere physical connection is required to establish a jurisdiction over non-navigable waters. To demonstrate that the effects of such waters are not insubstantial, one must consider “volume, duration, and frequency of flow,” proximity to the TNW, size of the watershed, and average annual rainfall. 2007 Joint Jurisdiction Policy at p. 7.
- ³⁰ Corps, Guidelines for Jurisdictional Determinations for Waters of the United States in the Arid Southwest 7 (June 2001), available at http://www.azdot.gov/docs/default-source/environmental-planning-library/jd_guidelines_for_jd_arid_southwest.pdf?sfvrsn=2.
- ³¹ 65 Fed. Reg. 12,818 (Mar. 9, 2000). Although the Corps stated that these regulatory materials “address[ed] only NWP[s] [Nation Wide Permits], and in no way affect[ed] or alter[ed] the geographic or activities-base jurisdiction of the CWA”, it would be disingenuous for the agency to interpret the scope of the CWA to include irregular ephemeral streams but use a different definition for covered ephemeral streams when administering another aspect of the CWA. *Id.* at 12,822; *Riverside Bayview Homes*, 474 U.S. at 138 n.11 (observing that various provisions of the CWA “should be read *in pari materia*”).

- ³² 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975). *But see* 42 Fed. Reg. 37,121, 37,129 (July 19, 1977) (explaining that the 1977 revised definition of headwaters (point after which median annual flow is less than 5 cfs) “is the point on the stream above which individual or general permits ordinarily will not be required. It is not to be construed as the point beyond which a stream ceases to be a water of the United States under Section 404 . . .”).
- ³³ 2008 Guidance at p. 8 (stating that the Coprs and EPA “generally *will not assert jurisdiction over* . . . [s]wales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow)”). *Cf. SWANCC*, 531 U.S. at 168 (holding that the Migratory Bird Rule exceeded the Corps’ regulatory authority because, *inter alia*, it significantly extended the scope of the agency’s jurisdiction without any evidence that the original interpretation was incorrect); 2014 Proposed Rule at 121 (requesting comments on how the agencies might “provide greater clarity on how to distinguish swales, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional”); *see also Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng’rs*, 425 F.3d 1150, 1156 (9th Cir. 2005) (to be “properly classified as a ‘tributary’ subject to Corps jurisdiction, that water must exchange water, *at least intermittently*, with a water of the United States.” (emphasis added)); *Nw. Env’tl Def. Ctr. v. Grabhorn, Inc.*, No. CV-08-548-ST, 2009 WL 3672895, at *20 (D. Or. Oct. 30, 2009) (evidence of a one-time discharge is insufficient, as a matter of law, to establish that a water “at least intermittently” exchanged water with a water of the United States and was thus “a ‘tributary’ for purposes of the CWA”).
- ³⁴ *Rapanos*, 547 U.S. at 725; *see also* Robert W. Lichvar & Shawn M. McColley, A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States 21-28 (Aug. 2008), *available at* <http://www.crrel.usace.army.mil/library/technicalreports/ERDC-CRREL-TR-08-12.pdf> (explaining that a jurisdictional tributary to a water of the United States can be established based on the presence of just one of the geomorphic or vegetative OHWM indicators along a wash at a given interval).
- ³⁵ 2014 Proposed Regulations at pp. 177-198 (discussing case studies that highlight the importance of ephemeral streams “to downstream waters, despite their small size and ephemeral or intermittent flow regime”).
- ³⁶ *Id.* at p. 13 (discussing EPA, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (2013)); Office of Research and Development, No. EPA/600/R-11/098B (Sept. 2013), [http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/\\$File/WOUS_ERD2_Sep2013.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf).
- ³⁷ *Id.*
- ³⁸ Jon Devine, Everything you wanted to know about the EPA/Army Corps proposed clean water rules but were afraid to ask (NRDC Blog entry, Mar. 25, 2014), *available at* http://switchboard.nrdc.org/blogs/jdevine/everything_you_wanted_to_know.html.