C.A. No. 2013-301

THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

RIVERSIDE HOMEOWNERS ASSOCIATION, INC.,
Plaintiff-Appellee,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Plaintiff-Appellee,

v.

ULTIMATE RESORTS, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF BLISS

Civ. No. 2012-402

BRIEF FOR APPELLEE
U.S. ENVIRONMENTAL PROTECTION AGENCY

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QUESTIONS PRESENTED

I. Whether Ultimate Resorts, Inc. ("Ultimate") violated the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), by sidecasting within a 500-acre wetland ("Wetland B") that is hydrologically connected to the navigable-in-fact Fenario River and located one mile away from the river within the floodplain.

II. Whether Riverside Homeowners Association, Inc. ("Riverside") has brought a valid statutory claim under the citizen suit provisions of the CWA, 33 U.S.C. § 1365(a), by alleging that the pond within Wetland A is a jurisdictional water of the United States, and that the golf course island constructed within the pond in 2003 constitutes a continuing violation of the CWA under 33 U.S.C. § 1311(a).

III. Whether Riverside has standing to bring claims under the CWA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court of the United States Cases

United States Court of Appeals Cases

United States District Court Cases

United States Code Provisions

Federal Rules and Regulations

Federal Administrative Materials

Other Authorities

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE CASE

This is an appeal from a final judgment and order of the United States District Court for the District of Bliss granting summary judgment to the Environmental Protection Agency ("EPA") and Riverside. R. at 9. The EPA filed an enforcement action against Ultimate under sections 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b), (d) (2006), alleging that Ultimate violated the CWA by sidecasting within Wetland B. The district court consolidated EPA's claims with a citizen suit brought by Riverside under section 505(a) of the CWA, 33 U.S.C. § 1365(a). Riverside alleged the same violations as EPA with respect to Wetland B, but in addition, Riverside alleged that Ultimate's island within the pond near Wetland A also violated the CWA. The district court granted summary judgment to EPA and Riverside with respect to the claims for Wetland B, and summary judgment to Riverside with respect to the claims for the pond. Ultimate now appeals both grants of summary judgment.

In 1991, Ultimate began developing a 3000-acre area of farmland along the northern bank of the Fenario River in the State of Bliss. *Id.* at 1. The development included two golf courses, a hotel, and resort facilities constructed in and near wetlands within close proximity to the Fenario River. Ultimate contemplated additions to its resort community in the future, including a second stage of development that eventually expanded the resort by building 800 high-end homes and commercial area within a planned community. *Id.*

In 2003, Ultimate constructed a third golf course, which included a "signature" island hole located within a pond. *Id.* Course designers created the island hole by filling the center of a pond and building a narrow causeway from the island to shore. The island and causeway were

large enough to include the golf green, sand traps, and a tee box. *Id.* Ultimate accomplished the pond filling without raising the water level of the pond because the pond water naturally drains into an adjacent water feature, Wetland A. *Id.* Although no streams flow into or out of the pond, water from groundwater recharge and runoff flows into the pond, and displaced water from the island fill flows naturally back into the wetland. *Id.*

Wetland A immediately abuts the navigable-in-fact Fenario River. *Id.* at 4. Both the pond and Wetland A are within the floodplain of the Fenario River. Scientific experts have established that Wetland A has a limited absorption capacity and excess water not absorbed by Wetland A flows into the Fenario River, primarily through groundwater connections; however, during storm events, there is a surface hydrologic connection between the wetland and river. The experts also determined that Ultimate's pond filling and island caused Wetland A to be saturated most of the time, causing more water to be released into the Fenario during storm events. *Id.* Scientists agree that Ultimate's pond filling, combined with the activities of other actors in the Fenario floodplain, has increased the likelihood of a major flood—the 100-year flood is now likely to occur once every 10 years on average. *Id.* This flood event would have at least a 90 percent chance of causing significant damage to downstream landowners. *Id.*

In 2011, Ultimate began a new phase of development farther from the Fenario River. This development included four new golf courses, 700 homes, and a second commercial area. *Id.* at 2. Ultimate intended for major portions of the new golf course to be routed through a 500-acre wetland, known as Wetland B, on the northern side of the existing golf courses. Course designers planned to use a process called "sidecasting"—which involves plowing ditches through a wetland using earthmoving equipment—to drain water from the wetland, leaving dry land on which to place the golf courses. *Id.* Sidecasting involves digging up materials from the wetland

and redepositing those materials on either side of the ditch, essentially replacing those materials back into the wetland. *Id.* Ultimate admitted that it intended to use sidecasting to extend drainage ditches from Wetland B to the Fenario River, creating slow moving streams that would drain much of the wetland. *Id.*

Wetland B is located approximately one mile north of the Fenario River. The EPA determined that Wetland B is within the floodplain of the Fenario River, and provides "significant flood control and water retention benefits." *Id.* at 7. Unbroken surface or shallow sub-surface hydrological connections link Wetland B to the Fenario River. *Id.* at 7, 8. Ultimate did not seek prior regulatory approval for their plans to sidecast and drain Wetland B. *Id.* at 2.

Riverside operates a not-for-profit homeowners association within the State of Bliss and the city of Fenario. *Id.* at 2. The Riverside Homes Development consists of a subdivision of houses located approximately one mile downstream from Ultimate's resort. The waterfront houses of Riverside are susceptible to flood damage, and other similarly situated property owners have experienced flood damage in past winters. *Id.* at 4. Over the past five years, Riverside spent more than $50,000 re-grading parts of its property in order to reduce effects of flooding. *Id.*

After Ultimate announced its plans for the 2011 development, including sidecasting in Wetland B, Riverside became concerned about the downstream effects on houses and property. *Id.* at 2. Riverside sent a 60-day notice letter to Ultimate and the EPA indicating its intent to sue under CWA section 505(a), the citizen suit provision of the CWA. 33 U.S.C. § 1365(a); *Id.* at 2. Riverside included notice of alleged illegal discharges into the pond in 2003 and the proposed sidecasting in Wetland B. R. at 2.

The EPA became aware of Ultimate's proposed activities from the notice letter sent by Riverside. *Id.* at 2. The EPA contemplated joining Riverside's litigation, causing Ultimate to

delay its activities in Wetland B, but Ultimate maintained that the sidecasting activities were lawful. *Id.* At the conclusion of the 60-day notice period, Ultimate began sidecasting within Wetland B, and Riverside responded by filing its section 505(a) lawsuit in the United States District Court for the District of Bliss. *Id.*

Three days after Riverside filed its citizen suit, EPA issued a unilateral order to Ultimate under the EPA's enforcement provisions in CWA section 309. *Id.* at 3; 33 U.S.C. § 1319(a)(3). The order prohibited Ultimate from engaging in any further sidecasting until the court resolved the legal question of CWA jurisdiction. R. at 3. At the same time, the EPA filed suit in the United States District Court for the District of Bliss against Ultimate for violations of the CWA regarding Ultimate's sidecasting in Wetland B. *Id.* at 2, 3. The EPA sought an injunction prohibiting further sidecasting in addition to civil penalties for Ultimate's recent sidecasting activities. 33 U.S.C. § 1319(b), (d).

The district court consolidated Riverside's citizen suit and EPA's suit. All three parties moved for summary judgment on three issues: Riverside's and EPA's claims with respect to sidecasting in Wetland B, Riverside's claims with respect to the pond, and the question of whether Riverside had standing to bring the citizen suit. R. at 3. The EPA and Riverside agreed that Ultimate violated the CWA with respect to Wetland B; however, the EPA argued that Riverside's claims with respect to the ponds should be dismissed because Riverside lacked standing to bring a citizen suit. *Id.*

The district court granted summary judgment to EPA and Riverside on the claims regarding Wetland B. The court concluded that Wetland B was a water of the United States within the jurisdiction of the CWA. The court determined that Wetland B was adjacent to the Fenario River, deferring to EPA's interpretation of adjacent explained in EPA's CWA guidance

document. *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (2011) [hereinafter *2011 Guidance*].[1] The court also explained that sidecasting involves the addition of pollutants to the wetland because Congress intended for dredged spoils to be regulated. The court also deferred to EPA and Army Corps of Engineers ("Corps") regulations, 33 C.F.R. § 323.2(d) (2012), defining discharge of dredged material to include redeposits within wetlands. R. at 8.

The district court granted summary judgment to Riverside with respect to Ultimate's discharges into the pond. The court concluded that the pond was a water of the United States within the jurisdiction of the CWA because it was either a tributary of the Fenario River or an "other water" under EPA regulations. R. at 8–9; 33 C.F.R. § 328.3(a)(3). The court also agreed with EPA and Riverside that by leaving the island fill in place since 2003, Ultimate remained in continuing violation of the CWA. R. at 8–9. On the issue of standing, the court ruled that Riverside had standing to bring its CWA claims. *Id.* at 3–5. Ultimate brings this appeal challenging the district court's conclusions on all issues. R. on Appeal, at 1.

STANDARD OF REVIEW

The Supreme Court of the United States applies a de novo standard for reviewing the grant of summary judgment. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466 n.10 (1992). Appellate courts apply the same standards as the district court when reviewing matters of law. *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004); *Sierra Club v. Slater*, 120 F.3d 623, 632 (6th Cir. 1997). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); *see Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 204 (2d Cir. 2009).

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[1] *Available at* http://www.epa.gov/tp/pdf/wous_guidance_4-2011.pdf (last visited Mar. 13, 2013).

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's grant of summary judgment to EPA and reverse the grant of summary judgment to Riverside. First, EPA brought a valid claim against Ultimate for illegal discharges in Wetland B because Wetland B is a water of the United States and Ultimate's sidecasting resulted in an addition of a pollutant. Second, this Court should conclude that the pond is a water of the United States and that leaving unremediated fill materials in the pond constitutes a continuing violation of the CWA. Nevertheless, this Court should dismiss Riverside's CWA claims regarding the pond because Riverside delayed bringing this lawsuit for at least eight years. Third, Riverside lacks standing to bring its claims.

First, EPA is entitled to summary judgment with respect to its claims for Wetland B because Wetland B is a water of the United States and redeposits from sidecasting constitute an addition of pollutants. This Court should conclude that Wetland B is a water of the United States within the meaning of the CWA because the wetland is adjacent to the Fenario River. The *2011 Guidance* interprets EPA regulations defining "adjacent" to include wetlands that have a hydrologic connection to navigable waters or have a reasonably close physical proximity to navigable water. All parties agree that Wetland B satisfies both of these criteria.

This Court should affirm the district court's decision deferring to EPA's interpretation of "adjacent" in the *2011 Guidance*. The *2011 Guidance* represents the fair and considered judgment of the expert agency, which Congress has charged with administering the CWA. Under Supreme Court doctrine, agencies receive strong deference when interpreting their own regulations. Courts afford controlling weight to a fair, considered, and reasonable interpretation of an ambiguous regulation.

In this case, EPA's interpretation of "adjacent wetland" in the *2011 Guidance* should be given *Auer* deference. *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997). The EPA used its expertise in administering a highly technical regulatory program to provide a reasonable interpretation of "adjacent" that is based on the physical proximity of a wetland to the navigable water. The interpretation reflects considerable agency efforts to provide an interim guidance for the public and EPA staff while EPA attempts rulemaking to replace the current regulatory definition of "adjacent." Moreover, the interpretation represents a consistent agency view of the current regulation's meaning.

An alternative approach also supports the conclusion that Wetland B is a water of the United States. Under Justice Kennedy's significant nexus test, wetlands that have a significant nexus to a navigable water may be considered waters of the United States. Wetland B demonstrates the required significant nexus because the wetland has a hydrologic connection with the Fenario River and serves important ecological functions, including flood control and water retention.

This Court should also conclude that redeposits from sidecasting in a wetland constitute an addition of pollutants. The plain meaning of the statutory term "any addition of any pollutant" includes redeposits within a wetland that result from sidecasting because the mechanical activities transform wetland materials into pollutants. Thus, pollutants are added to the wetland where they had not previously been.

Second, this Court should reverse the district court's grant of summary judgment to Riverside. The EPA exercised its prosecutorial discretion to not bring claims with respect to the island fill in the pond. Although the EPA agrees with Riverside on the legal questions in this claim, the equitable doctrine of laches bars Riverside's suit.

The pond is a water of the United States because it possesses a significant nexus to the Fenario River. This Court should apply Justice Kennedy's significant nexus test to "other waters." The *2011 Guidance* applies the significant nexus test to physically proximate waters, such as the pond, because "other waters" that have the requisite chemical, physical, and biological connection with navigable waters should be treated the same as wetlands. Alternatively, the pond is a tributary of the Fenario River because the pond contributes water to the Fenario through a groundwater connection.

This Court should also determine that the CWA creates a continuing violation for unremediated discharges of fill material. The CWA's requirement that dischargers receive a permit, either before or after the discharge, implies a congressional intent to create a continuing violation. Federal regulations support an implied continuing violation because the EPA has interpreted "discharge of fill material" to include artificial islands—indicating that as long as the island exists, it continues to be a discharge.

But even though Riverside's allegations satisfy all of the elements of a CWA violation, this Court should conclude that the equitable doctrine of laches bars Riverside's suit. In this case, Riverside waited at least eight years before bringing suit against Ultimate. This inexcusable delay will cause undue prejudice to Ultimate because of the economic decisions that Ultimate has already made to construct the signature island golf green. The potential costs and disruption to Ultimate's activities, especially after eight years of reliance on the island's reputational value, tip the balance of equities in favor of dismissal.

Third, this Court should dismiss Riverside's claim regarding the pond because Riverside lacks standing. Riverside has alleged an injury based on increased risk of flood damage in the future, but this alleged injury is speculative and not imminent. Riverside's alleged injury is also

not clearly linked to the actions of Ultimate because the causal chain is attenuated over time and space. For these reasons, this Court should affirm the grant of summary judgment to EPA, and reverse the grant of summary judgment to Riverside.

ARGUMENT

I. ULTIMATE VIOLATED THE CWA BY SIDECASTING IN WETLAND B BECAUSE A) THE WETLAND IS A JURISDICTIONAL WATER OF THE UNITED STATES AND B) REDEPOSITS FROM SIDECASTING CONSTITUTE AN ADDITION OF POLLUTANTS.

This Court should affirm the district court's conclusion that Ultimate violated the CWA with respect to sidecasting in Wetland B. The CWA prohibits the "discharge of a pollutant" without a permit. 33 U.S.C. § 1311(a). Ultimate's activities satisfy all four elements of an unlawful discharge. 33 U.S.C. § 1362(12) (defining discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source"). Ultimate admits that it used point sources to conduct the sidecasting activities, and that the redeposits qualified as pollutants. R. at 5 n.4 (earthmoving equipment is a point source); R. at 8 (redeposits were dredged spoils, which are pollutants). This Court should conclude that the two remaining elements have been met: Wetland B is navigable water within the meaning of the CWA and sidecasting results in the addition of pollutants to a water of the United States.

A. Wetland B is a water of the United States because it is adjacent to the Fenario River.

This Court should determine that Wetland B is a water of the United States included within the jurisdiction of the CWA. First, regulations adopted by the EPA interpreting the CWA extend jurisdiction to wetlands that are adjacent to other jurisdictional waters. Second, Wetland B has a significant nexus to the Fenario River, satisfying Justice Kennedy's significant nexus test

for identifying waters of the United States. Under either approach, Wetland B is a water of the United States.

Section 502(7) of the CWA defines "navigable waters" to mean "the waters of the United States." 33 U.S.C. § 1362(7). In *United States v. Riverside Bayview Homes*, the Supreme Court recognized that "Congress chose to define the waters covered by the Act broadly," and that the phrase "waters of the United States" included not only navigable waters but also tributaries and wetlands adjacent to navigable waters. 474 U.S. 121, 124, 133 (1985).

Through joint regulations, the EPA and Corps have interpreted "waters of the United States" to confer CWA jurisdiction over several categories of wetlands and other non-navigable waters. 33 C.F.R. § 328.3. The regulations extend jurisdiction to wetlands that are adjacent to other jurisdictional waters. 33 C.F.R. § 328.3(a)(7); *see also Riverside Bayview*, 474 U.S. at 131, 138 (providing *Chevron* deference to a prior Corps regulation that included adjacent wetlands within the meaning of waters of the United States) (*Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984)). The EPA and Corps defined the term adjacent to include wetlands that are "bordering, contiguous, or neighboring" other jurisdictional waters. 33 C.F.R. § 328.3(c).

Following the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), the EPA and Corps issued a guidance document to clarify what kinds of wetlands, tributaries, and other waters the agencies considered to be jurisdictional under the CWA. *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States (2008) [hereinafter *2008 Guidance*].[2] Importantly for this case, the *2008 Guidance* interpreted the term "adjacent wetlands" to include wetlands that 1) had an

[2] *Available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_jurisdiction_Following_Rapanos120208.pdf (last visited Mar. 13, 2013).

unbroken surface or shallow sub-surface connection to other jurisdictional waters, 2) were physically separated from jurisdictional waters by man-made dikes, or barriers, natural river berms, beach dunes, and the like, or 3) were "reasonably close" to jurisdictional waters such that an ecological interconnection between the wetlands and jurisdictional waters could be inferred. *2008 Guidance*, *supra*, at 5–6.

In 2011, the EPA and Corps revised and re-issued the guidance; however significant portions of the *2008 Guidance* remained the same. *See 2011 Guidance*. Of particular importance here, the *2011 Guidance* contained a more thorough and detailed interpretation of adjacent wetlands. The agencies consider a wetland adjacent to jurisdictional waters if the wetland exhibits at least one of three characteristics:

> 1) There is an unbroken surface or shallow sub-surface hydrologic connection between the wetland and jurisdictional waters; or
>
> 2) The wetlands are physically separated from jurisdictional waters by "man-made dikes or barriers, natural river berms, beach dunes, and the like; or
>
> 3) Where a wetland's physical proximity to a jurisdictional water is reasonably close, that wetland is "neighboring" and thus adjacent. For example, wetlands located within the riparian area or floodplain of a jurisdictional water will generally be considered neighboring, and thus adjacent. One test for whether a wetland is sufficiently proximate to be considered "neighboring" is whether there is a demonstrable ecological interconnection between the wetland and the jurisdictional waterbody. For example, if resident aquatic species (e.g. amphibians, aquatic turtles, fish, or ducks) rely on both the wetland and the jurisdictional waterbody for all or part of their life cycles (e.g., nesting, rearing, or feeding), that may demonstrate that the wetland is neighboring and thus adjacent. The agencies recognize that as the distance between the wetland and jurisdictional water increases, the potential ecological interconnection between the waters is likely to decrease. *2011 Guidance*, *supra*, at 16–17.

In this case, Ultimate admits that Wetland B possesses the first and third characteristics described in the *2011 Guidance*. R. at 6. Wetland B has an unbroken surface or shallow sub-surface connection to the Fenario River. *See id.* Moreover, Wetland B is reasonably close, only

one mile away from the Fenario River, and exhibits an ecological interconnection based on flood control and water retention functions. *Id.* at 6, 7. Therefore, under the terms of the *2011 Guidance*, Wetland B is an adjacent wetland—a jurisdictional water under the CWA. The main question at issue in this appeal is whether the district court erred by deferring to EPA's expert and reasoned interpretation of the regulatory term "adjacent wetlands."

1. The EPA's interpretation of adjacent as explained in the *2011 Guidance* is entitled to deference by this Court.

This Court should defer to the *2011 Guidance* because EPA's interpretation of "adjacent wetlands," an ambiguous regulatory term, represents the reasonable and considered judgment of the expert agency. Deference is owed to agencies interpreting ambiguous regulatory provisions so long as the interpretation is reasonable and consistent with the regulation, and represents the agency's "fair and considered judgment." *Auer*, 519 U.S. at 461–62. EPA's interpretation of "adjacent" provides a thorough and consistent method for identifying adjacent wetlands and is reasonable in light of the CWA and Supreme Court precedent.

The Supreme Court's deference doctrines emphasize respect for the different constitutional roles of courts and administrative agencies charged with executing the laws of the United States. *See Chevron*, 467 U.S. at 865; *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In *Chevron*, the Supreme Court deferred to the EPA's interpretation of an ambiguous statutory provision, noting that Congress delegates policy-making responsibilities to the experts within agencies, which are part of a political branch of government and accountable to the dynamic policy concerns of the electorate. *Chevron*, 467 U.S. at 866. The *Chevron* court followed a two-step approach to analyzing regulatory interpretations of statutes. "First, always, is the question whether Congress has directly spoken to the precise question at issue." *Id.* at 842. Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is

whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Thus, when an agency interprets ambiguous statutory terms or writes regulations to fill gaps left in a statute's regulatory scheme, courts defer to the agency so long as the agency's interpretation is reasonable. *Id.* at 845.

The Supreme Court has also recognized that deference should be afforded to an agency's expert judgment when an agency interprets ambiguous terms contained in its own regulations. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945). In *Seminole Rock*, the Court attempted to ascertain the meaning of maximum price regulations during World War II. *Id.* at 413. The Court looked at regulations written by the Office of Price Administration and an existing interpretation of those regulations by the office's Administrator. *Id.* at 417. The Court determined that the Administrator's bulletin interpreting price regulations was controlling: "[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414. Therefore, any ambiguities in regulations that have been resolved by the agency will be afforded great deference by the courts.

More recently, the Supreme Court expanded the *Seminole Rock* doctrine, giving deference to an agency's interpretation of its own regulations offered in the form of an *amicus* brief in ongoing litigation. *Auer*, 519 U.S. at 461. In *Auer* the Supreme Court examined the Fair Labor Standards Act to determine whether a particular employee was exempt from overtime requirements. In an *amicus* brief submitted to the Court, the Secretary of Labor interpreted regulations promulgated under the Labor Act, concluding that the regulations did not exempt the employees from the overtime requirements of the statute. *Id.* at 461. The Court deferred to the Secretary's interpretations because "under [Supreme Court] jurisprudence," agency

interpretations of their own regulations are "controlling unless plainly erroneous or inconsistent with the regulation," and nothing indicated that the *amicus* brief did not represent the agency's fair and considered judgment. *Id.* (internal quotation marks omitted) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

The Supreme Court has applied *Seminole Rock* or *Auer* deference to a variety of forms in which agencies have interpreted their regulations. For example, internal agency memoranda interpreting regulations are controlling unless plainly erroneous or inconsistent with the regulation. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 277–78 (2009) (deferring to internal EPA memoranda); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) (deferring to an agency's internal advisory memorandum). The Court defers to informal interpretations where the agency has a history of taking positions consistent with its reading of the regulations. *See United States v. Larionoff*, 431 U.S. 864, 872–73 (1977) (deferring to the Department of Defense's interpretations of regulations, and finding the regulations invalid based on the Department's interpretation). *Amicus* briefs explaining agency regulations also receive deference when the resolution of ambiguous regulatory language resolves a dispute between two private parties. *See Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 397–98 (2008) ("[T]he agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force."). Moreover, the Court considers "complex and highly technical regulatory program[s]" even more worthy of *Auer* deference because the interpretation of regulatory criteria "necessarily require[s] significant expertise and entail[s] the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines. Inc.*, 501 U.S. 680, 697 (1991)).

The lower courts have followed the Supreme Court's *Seminole Rock* and *Auer* doctrines, deferring to agency interpretations of ambiguous regulations in a variety of formats. *See, e.g.*, *Am. Express Co. v. United States,* 262 F.3d 1376, 1381–83 (Fed. Cir. 2001) (agency memorandum and informal rulings); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 214–15 (4th Cir. 2009) (agency guidance letter); *L.A. Closeout, Inc. v. Dept. of Homeland Sec.,* 513 F.3d 940, 941–42 (9th Cir. 2008) (agency internal memorandum); *Dreiling v. Am. Express Co.*, 458 F.3d 942, 953 n.11 (9th Cir. 2006) (*amicus* brief); *Bassiri v. Xerox Corp.*, 463 F.3d 927, 930–31 (9th Cir. 2006) (agency interpretation published in the Federal Register). Reasonable agency interpretations receive deference as long as the interpretation is not a post hoc rationalization of agency action advanced to defend the agency against attack. *See Ctr. for Sierra Nevada Conservation v. U.S. Forest Serv.*, 832 F. Supp. 2d 1138, 1152 (E.D. Cal. 2011). Therefore, courts look to the substance of the agency interpretation, and not the form or formality in which it is offered to the court.

The methodology for applying *Auer* deference follows a two-step approach that mirrors the Supreme Court's *Chevron* framework. *Bassiri*, 463 F.3d at 930–31 (noting that *Auer* is more akin to *Chevron* than *Skidmore* deference) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). First, the court determines whether the relevant regulatory language is ambiguous. *Bassiri*, 463 F.3d at 931; *see Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (declining to apply *Auer* deference to an unambiguous regulation). Second, if the regulation is ambiguous, then the agency's interpretation "is controlling under *Auer* unless it is plainly erroneous or inconsistent with the regulation." *Bassiri*, 463 F.3d at 931 (internal quotations omitted) (citing *Auer*, 519 U.S. at 461). In determining whether the interpretation is plainly erroneous or

inconsistent, the Supreme Court has examined whether the interpretation is "reasonable." *See Fed. Express Corp.*, 552 U.S. at 398.

Although *Auer* deference follows the same two-step framework as *Chevron*, *Auer* has generally not been limited in the same way as *Chevron*. *See United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001) (requiring regulations to undergo a formal process of rulemaking in order to merit *Chevron* deference). *Auer* deference has been afforded to informal agency interpretations. *See Coeur Alaska*, 557 U.S. at 277–78; *Am. Express Co.*, 262 F.3d at 1381–83 (informal agency rulings); *but see Joseph v. Holder*, 579 F.3d 827 (7th Cir. 2009) (requiring some formality prior to affording *Auer* deference to ensure that the agency has adequately explained its interpretation). Therefore, after determining that the regulatory definition of "adjacent wetland" is ambiguous, this Court should give controlling weight to the EPA's interpretation contained in the *2011 Guidance*.

The regulatory definition of "adjacent wetland" supplied in 33 C.F.R. § 328.3(c) is ambiguous because "bordering, contiguous, or neighboring" does not provide a clear basis to determine jurisdiction for wetlands. As the Supreme Court noted, there are "inherent difficulties [in] defining precise bounds to regulable waters." *Riverside Bayview*, 474 U.S. at 463. In this case, the regulatory definition of "bordering, contiguous, or neighboring" does not draw clear lines for the EPA to apply in jurisdictional determinations. Bordering means "to lie along or adjacent to the border." American Heritage Dictionary of the English Language, available at http://www.ahdictionary.com (search "bordering") (last visited Mar. 9, 2013). Contiguous means "sharing an edge or boundary; touching; neighboring; adjacent." *Id.* (search "contiguous"). Neighboring means "next to" or "adjacent to." *Id.* (search "neighboring"). These definitions do not provide the level of guidance required to make determinations of wetland adjacency,

particularly because the EPA evaluates adjacency on a case-by-case basis. *2011 Guidance*, *supra*, at 1. Because the definitions of bordering, contiguous, or neighboring overlap and do not provide useful criteria in all wetland jurisdiction determinations, the regulatory definition is ambiguous and EPA was permitted to make a reasonable interpretation of the regulation.

This Court should also conclude that EPA's interpretation, embodied in the *2011 Guidance*, is a reasonable interpretation of adjacent and "bordering, contiguous, or neighboring." The *2011 Guidance* recognizes that physical proximity is one of the hallmarks of adjacency in the wetland context. *See Riverside Bayview*, 474 U.S. at 134 (adjacent wetlands include those "that form the border of *or are in reasonable proximity* to" other waters") (emphasis added); *see also United States v. St. Anthony R.R. Co.*, 192 U.S. 524, 530 (1904) ("the word [adjacent] is frequently uncertain and relative as to its meaning . . . [I]t must be defined with reference to the context"); *Summit Petroleum Corp. v. U.S. EPA*, 690 F.3d 733, 743 (6th Cir. 2011), *reh'g denied* (6th Cir. 2012) ("[A]djacency is a purely physical, even if case-by-case, determination."). Other courts have found that a wetland located a "reasonable" distance from a navigable water, as indicated by hydrologic connections, could be considered adjacent. *See United States v. Banks*, 115 F.3d 916, 921 (11th Cir. 1997) (wetland a half-mile away, connected to river by groundwater, and separated from river by a road was adjacent); *United States v. Lee Wood Contracting, Inc.*, 529 F. Supp. 119, 121 (E.D. Mich. 1981) (wetland separated from river by large parcels of land was adjacent).

The *2011 Guidance* emphasizes physical proximity, using hydrologic and ecologic connections as indicators of physical proximity. *2011 Guidance*, *supra*, at 17 ("The link between physical proximity and a physical or ecological (biological) connection is well documented in the scientific literature"). The first criterion, hydrologic connections, stems from the *Rapanos*

plurality's decision, approving *per se* adjacency whenever there is a "continuous surface connection to bodies that are waters of the United States in their own right." *Rapanos*, 547 U.S. at 742 (internal quotation marks omitted). The *Rapanos* plurality's interpretation of adjacent, however, does not compel the agency to interpret its own regulations in precisely the same way. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction"). The *2011 Guidance* supplemented the plurality's test for adjacency, reasoning that either a continuous surface connection or a shallow subsurface connection between the wetland and a jurisdictional water could demonstrate a physical and ecological link, which would serve as an indicator of physical proximity. *See 2011 Guidance*, *supra*, at 17–18. The third criterion specifically states that "[t]he agencies recognize that as the distance between the wetland and jurisdictional water increases, the potential ecological interconnection between the waters is likely to decrease and finding of adjacency is less likely." *Id.* at 17. The *2011 Guidance* establishes a reasonable interpretation of "bordering, contiguous, or neighboring," relying on physical connections and proximity in order to apply the adjacency test on a case-by-case basis. *Id.* at 1.

Based on the ambiguous regulatory terms and EPA's reasonable interpretation of the definition of "adjacent wetlands," the *2011 Guidance* merits *Auer* deference from this Court. First, the EPA's regulatory scheme for jurisdictional waters under the CWA represents a "complex and highly technical regulatory program" that warrants particular deference to the experts within the agency charged with making jurisdictional determinations. *Thomas Jefferson Univ.*, 512 U.S. at 512. The *2011 Guidance* considers advanced concepts in lotic ecology,

hydrogeology, and freshwater biology, and utilizes recent scientific studies to make conclusions about wetland jurisdiction. *2011 Guidance*, *supra*, at 36–39. The Supreme Court has recognized the expertise of the EPA on technical matters related to the determination of jurisdictional waters. *See Riverside Bayview*, 474 U.S. at 463 ("We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the "waters" of the United States—*based as it is on the Corps' and EPA's technical expertise*—is unreasonable") (emphasis added).

Second, the *2011 Guidance* reflects the EPA's "fair and considered" judgment about adjacent wetlands. *Auer*, 519 U.S. at 461–62. The EPA began the process of clarifying adjacent wetland determinations in June 2007, in order to "provide guidance to the field to enable them to make jurisdictional determinations that are defensible following the *Rapanos* decision." *Corps and EPA Responses to Rapanos Decision, Key Questions for Guidance Release* (2008).[3] The EPA provided a six-month public comment period in which it allowed the public and field staff to provide comments and case studies useful for improving the *Guidance*. *Id.* Consequently, the *2008 Guidance* was revised and re-issued in 2011. At this time the EPA indicated its intention to use the *2011 Guidance* as a basis for rulemaking, in which the agencies would replace the ambiguous definition of adjacent wetlands. *2011 Guidance*, *supra*, at 1. The *2011 Guidance*, titled "Draft Guidance," reflected the agency's desire to provide field staff with interim guidance while the rulemaking process unfolded. *Id.* Nevertheless, the EPA considers the *2011 Guidance* to be a final draft in the interpretive process. As required by Executive Order 12866, the EPA submitted the *2011 Guidance* to the Office of Information and Regulatory Affairs (OIRA), where executive officials will conduct an informal cost-benefit analysis. *See Coal. for Responsible*

[3] *Available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_5_wetlands_Rapanos_-20Guidance_QA-20120208.pdf (last visited Mar. 13, 2013).

Regulation, Inc. v. EPA, 684 F.3d 102, 124 (D.C. Cir. 2012); *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1348 (D. Ariz. 1995).

Third, the *2011 Guidance* is consistent with previous interpretations of "adjacent wetlands" issued by the EPA and Corps. The *2011 Guidance* incorporates an identical version of the first criterion for adjacent wetlands, hydrologic connections, from the *2008 Guidance*. *Compare 2011 Guidance*, *supra*, at 16 *with 2008 Guidance*, *supra*, at 5. Other provisions in the *2011 Guidance* elaborate on principles established in the *2008 Guidance*, remaining consistent with the former understandings of CWA jurisdiction while taking into account increased "science and recent field experience" and changing case law. *2011 Guidance*, *supra*, at 3. The fact that the EPA elaborated on the *2008 Guidance* and made additional interpretations consistent with long-established EPA policies does not undermine the argument for *Auer* deference. Agencies are entitled to supplement or revise their interpretations of ambiguous statutes and regulations even without changes to the statute or regulation itself, so long as there is an adequate explanation for the new interpretation. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56–57 (1983).

Importantly, the *2011 Guidance* section on "adjacent wetlands" should be understood as interpreting the Corps and EPA regulations, 33 C.F.R. § 328.3(c), not the Supreme Court's pronouncements on CWA jurisdiction. In this case, the *2011 Guidance* makes it clear that the agency is interpreting its own regulations "in light of *SWANCC* and *Rapanos*," but the section 5, "Adjacent Wetlands" provisions at issue only interpret the regulatory language, not Supreme Court doctrine. *2011 Guidance*, *supra*, at 16 ("The agencies consider wetlands to be bordering, contiguous, or neighboring, and therefore "adjacent" if at least *one* of the following three criteria is satisfied"). Although the second criterion ("[W]etlands are physically separated from

jurisdictional waters by 'man-made dikes or barriers, natural river berms, beach dunes, and the like'") repeats the regulatory language word-for-word and would not be entitled to *Auer* deference, *see Gonzales v. Oregon*, 546 U.S. 243, 257 (2006); the first and third criteria, which are relied upon in this case, offer true and reasonable interpretations of the ambiguous regulatory term "adjacent wetlands" and do not create any new legally binding requirements on the regulated community. *2011 Guidance*, *supra*, at 3. Therefore, this Court should afford *Auer* deference to the EPA's interpretation of adjacent wetlands contained in the *2011 Guidance*.

If this Court does not give *Auer* deference to the *2011 Guidance*, then at the very least a lower level of deference under the *Skidmore* doctrine is warranted. *Skidmore*, 323 U.S. at 140 (agency interpretations and opinions "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"). *Skidmore* deference is an appropriate alternative in this case because the *2011 Guidance* represents a well-considered and expert agency judgment. In *Precon Development Corp., Inc. v. U.S. Army Corps of Engineers*, the Fourth Circuit examined whether a group of wetlands adjacent to ditches and tributaries were jurisdictional waters. 633 F.3d 278, 282 (4th Cir. 2011). In that case, the question of wetlands adjacent to tributaries was factually similar to *Rapanos* and all parties agreed that the significant nexus test in Justice Kennedy's concurrence controlled. *Id.* at 288. The Fourth Circuit provided *Skidmore* deference to the EPA's application of the significant nexus test, as described in the *2008 Guidance*. *Id.* at 289–90 ("[W]e give deference to [the Corps'] interpretation and application of Justice Kennedy's test"). Although factually distinct from the question at issue before this Court, the *Precon* court correctly recognized that the expertise of the EPA and Corps, as demonstrated in the *2011* and *2008 Guidance* documents, must be given some level of deference by the courts.

2. Even if EPA's interpretation of adjacent is not given deference, Wetland B satisfies the *Rapanos* test for jurisdictional wetlands because there is a significant nexus between the wetland and the Fenario River.

Even if this Court does not defer to EPA's interpretation of "adjacent" in the *2011 Guidance*, Wetland B can still be considered a jurisdictional water under the significant nexus test. Justice Kennedy's concurrence in *Rapanos* established a test for determining wetland jurisdiction based on the wetland's ecological connection to other jurisdictional waters. *Rapanos*, 547 U.S. at 780. Wetland B easily meets the significant nexus test based on the hydrologic connection with the Fenario River and the wetland's flood control functions in the Fenario watershed.

In *Rapanos*, the Supreme Court addressed whether wetlands adjacent to tributaries of the nearest navigable-in-fact waterway, which was 11 to 20 miles away, could be considered jurisdictional waters under the CWA. *Id.* at 720. Four members of the Court concluded that CWA jurisdiction only extends to wetlands "with a continuous surface connection to bodies that are 'waters of the United States' in their own right." *Id.* at 742. But this opinion did not command a majority of the Court, and so it is of questionable precedential value. *See id.* at 758 (Roberts, C.J., concurring) ("It is unfortunate that no opinion commands a majority of the Court").

Justice Kennedy agreed with the plurality on the disposition of the case, but authored a separate opinion outlining different reasons for his conclusion. *Id.* at 759 (Kennedy, J., concurring in the judgment). Justice Kennedy opined that the test for determining wetland jurisdiction under the CWA depended on whether the wetland had a "significant nexus" with navigable waters. *Id.* The significant nexus test, according to Justice Kennedy, satisfied the constitutional concerns over extending CWA jurisdiction to non-navigable waters, such as

wetlands, because the ecological connection between wetlands and navigable waters substantially affects interstate commerce. *Id.* at 783.

The significant nexus test contemplates a number of factors that may be used to establish the required ecological connection between a wetland and the navigable water. According to Justice Kennedy, "a wetland possesses the requisite significant nexus . . . 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." *Id.* at 780. A wetland may have a significant nexus if it performs the critical functions central to the reason that Congress passed the CWA: "pollutant trapping, flood control, and runoff storage." *Id.* at 779.

Several circuit courts have agreed that Justice Kennedy's significant nexus test should be applied to wetland jurisdiction determinations. *See N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007), *cert. denied*, 552 U.S. 1180 (2008); *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006). Applying Justice Kennedy's test accords with the Supreme Court's rule that the holding of a case with no majority opinion is the position taken by members who concurred on the narrowest grounds. *Marks v. United States*, 430 U.S. 188, 193 (1977); *see also Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).

Wetland B should be considered jurisdictional under the CWA because the recorded facts compiled by the district court demonstrate that Wetland B has a significant nexus with the Fenario River. First, Wetland B has an unbroken surface connection or shallow sub-surface connection to the Fenario River, meaning that there is a hydrologic connection between the two water bodies. R. at 7, 8. Second, Wetland B performs "significant flood control and water retention benefits" for the Fenario River. *Id.* at 7. Wetland B is located entirely within the

Fenario River's flood plain. *Id.* at 7. Therefore, Wetland B satisfies the significant nexus test and should be considered a water of the United States under the CWA.

B. Sidecasting within a wetland results in the addition of pollutants because redeposits are added to the wetland.

This Court should conclude that Ultimate's development activities in Wetland B violate the CWA because sidecasting causes the addition of pollutants to a water of the United States. First, the plain meaning of the CWA contemplates regulation of redeposits into wetlands as additions of pollutants. Second, the Corps and EPA regulations have consistently and reasonably considered redeposits from dredged or fill material to be additions. Third, EPA's interpretation of addition in the wetland context is consistent with regulations of additions to navigable waters under section 402.

1. The plain meaning of section 502(12) of the CWA indicates that there can be an addition of pollutants from redeposits within a wetland.

The language that Congress used in CWA sections 502(6) and (12), defining "discharge of a pollutant" and "pollutant," indicates that an addition includes redeposits that result from sidecasting. 33 U.S.C. § 1362(6), (12). "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). Pollutants include "dredged spoils," and Ultimate concedes that the redeposits that result from sidecasting in Wetland B qualify as dredged spoils. *Id.* § 1362(6); R. at 8. Because there has been an addition of dredged spoils to the wetland, sidecasting and redeposits may be regulated under the CWA.

In *United States v. Cundiff*, the Sixth Circuit ruled that sidecasting in a wetland constituted an addition of pollutants in violation of the CWA. 555 F.3d 200, 214 (6th Cir. 2009). In that case, the defendants drained a 103-acre wetland by digging ditches and sidecasting the dredged materials from the ditches back into the wetland. *Id.* at 205. The Sixth Circuit analyzed

the statutory language in section 502(12), reasoning that an "addition" does not require the introduction of completely foreign materials to the wetland. *Id.* at 213. Rather, the court concluded that the CWA was concerned with the addition of pollutants, which may be created from within the wetland itself by ecological disruption. Importantly, the court emphasized that the definition of pollutant, which includes "dredged spoil" indicated that Congress intended redeposits from dredging activities, including sidecasting, to be considered additions. *Id.*

The *Cundiff* court's reasoning is consistent with traditional notions of statutory interpretation. When reading section 502(12) to determine the meaning of "addition," the statute's context and terms prove instructive. A familiar canon of statutory construction, *noscitur a sociis*, or a "word is judged by the company it keeps," cautions against reading "addition" in abstract isolation. *See United States v. Williams*, 553 U.S. 285, 294 (2008) ("a word is given a more precise context by the neighboring words with which it is associated"). A narrow reading of addition in which only materials from outside the waterbody may be considered additions would read out completely the possibility of dredged spoils being additions. *Cundiff*, 555 F.3d at 213. On the other hand, reading "addition" to mean the introduction of pollutants to a waterbody that previously lacked those particular pollutants remains true to the entire statutory phrase "addition of any pollutant" and gives effect to Congress's inclusion of dredged spoils in the list of pollutants in section 502(6).

Every court that has considered the issue has concluded that redeposits from wetland activities constitute an addition. The Fourth Circuit ruled that ditch-digging within a wetland resulted in the addition of pollutants because redeposits of soil and vegetation were transformed from non-pollutants to pollutants, thus adding pollutants to the wetland where none had been before. *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000). Similarly, the Ninth Circuit

in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, found that the use of bulldozers and tractors pulling metal prongs through a wetland (a technique to drain a wetland called deep-ripping) resulted in the addition of pollutants because wrenching and moving soils around added pollutants. 261 F.3d 810, 815 (9th Cir. 2001), *aff'd by an equally divided court*, 537 U.S. 99 (2002) ("it is true, that in [deep ripping], no new material has been 'added,' [but] a 'pollutant' has certainly been 'added'"). The Fifth Circuit came to the same conclusion regarding redeposits of materials within the same wetland. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 924 (5th Cir. 1983) (reasoning that considering redeposits to be additions was consistent with the purposes of the CWA).

2. The EPA and Corps have consistently and reasonably interpreted redeposits of dredged spoils to be additions.

The EPA and Corps have promulgated joint regulations interpreting "discharge of dredged material" and "discharge of fill material" as used in section 404 of the CWA. 33 C.F.R. § 323.2 (Corps); 40 C.F.R. § 232.2 (2012) (EPA). The regulations make it clear that discharges of dredged material includes redeposits of dredged spoils back into the same wetland. 33 C.F.R. § 323.2(d) (discharge of dredged material means "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States"). The regulation is a reasonable way to interpret the CWA in light of the purpose of section 404, which Congress intended to regulate redeposits. *See* 117 Cong. Rec. 38,853 (Nov. 2, 1971) ("moving spoil material from one place in the waterway to another, without the interjection of new pollutants" would be a discharge of dredged material and prohibited by the CWA) (statement of Sen. Ellender, sponsor of the amendment creating section 404). Therefore, the regulations are entitled to deference by this Court. *Cundiff*, 555 F.3d at 214 (33 C.F.R. § 323.2(d) is "a reasonable agency interpretation and must be accorded deference") (citing

Chevron, 467 U.S. at 843); *see Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988) (deferring to the EPA's interpretation of addition).

3. EPA's interpretation of addition is reasonable and consistent under both sections 404 and 402.

The CWA divides regulation of discharges into two programs: section 404 governs discharges of dredged or fill material and includes regulation of wetlands, and section 402 governs other discharges into navigable waters. *See Coeur Alaska*, 557 U.S. at 273. The EPA has issued a rule under section 402 exempting transfers of water from one waterbody to another. *See* 40 C.F.R. § 122.3 ("Water Transfers Rule"). Although the preamble of this rule interprets "addition" in the section 402 context to require the introduction of material from outside the waterway, the Water Transfers Rule only applies when the transferred water is not subject to an "intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i). Thus, the Water Transfers Rule as applied is consistent with the EPA's interpretation of "addition" in the section 404 context because section 404 regulations contemplate the addition of pollutants through mechanical or industrial use of wetland materials.

Other cases analyzing "additions" in the section 402 context have limited application to section 404. In *L.A. County Flood Control District v. Natural Resources Defense Council, Inc.*, the Supreme Court held that the transfer of polluted water from an upstream section of a river, through a concrete channel, and back into the downstream section of the same river did not constitute an addition of pollutants. 133 S. Ct. 710, 713 (2013). The Court adopted language from a Second Circuit decision concluding that a transfer of water and material from one part of a river to another could not be an addition. *Id.* at 713 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001)); *accord S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004). But these cases are

inapposite in the section 404 context. In *NRDC*, it was obvious that no pollutants had been added to a water of the United States because the pollutants were already present in the upstream section of the water. 133 S. Ct. at 713 ("no pollutants are 'added' to a water body when water is merely transferred"). In contrast, in the section 404 context and the case at hand, new pollutants are added to Wetland B when Ultimate conducts its sidecasting. A wetland that previously lacked pollutants has had pollutants introduced, or added, by the intervening use.

Even if this Court considers the interpretation of "addition" in the section 404 context to be different from section 402, the EPA is permitted to make inconsistent interpretations of regulatory terms for two separate regulatory programs. *See Envtl. Def. v. Duke Energy Corp*, 549 U.S. 561, 576 (2007). In *Duke Energy*, the EPA interpreted the term "modification" from the Clean Air Act to mean two different things in two different regulatory contexts. *Id.* The Supreme Court upheld the EPA's inconsistent interpretations, noting that when the agency is delegated rule-making authority by Congress, even two inconsistent interpretations receive *Chevron* deference when the interpretations are reasonable. *Id.*; *see Dongbu Steel v. United States*, 635 F.3d 1363, 1370 (Fed. Cir. 2011); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1249 (10th Cir. 2008). Therefore, even if the EPA has adopted inconsistent interpretations of "addition" under sections 402 and 404, the different interpretations are reasonable in light of the different purposes and structures of sections 402 and 404, and the EPA's regulations are entitled to deference. *See United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 203–04, 205 n.5 (D. Mont. 1990) (distinguishing section 402 from section 404 based on the inherent differences in the regulatory schemes).

II. RIVERSIDE'S CLAIMS REGARDING ULTIMATE'S DISCHARGES INTO THE POND SHOULD BE DISMISSED.

The EPA did not bring claims against Ultimate with respect to the island and causeway created in the pond near Wetland A. The EPA is charged by Congress with investigating and litigating claims, and an important function of the EPA includes exercising its prosecutorial discretion. A small island green constructed in 2003 simply did not merit the same attention from the EPA as the potential loss to the 500-acres in Wetland B. Nevertheless, the EPA agrees with Riverside on the merits of the legal questions raised by this claim and offers this analysis as an *amicus* party. *See Fed. Express Corp.*, 552 U.S. at 397–98 (agency *amicus* briefs interpreting federal regulations are entitled to *Auer* deference); *accord Chase Bank USA v. McCoy*, 131 S.Ct. 871, 880 (2011). First, the pond qualifies as a water of the United States because there is a significant nexus between the pond and the Fenario River. Second, leaving fill materials in place constitutes a continuing violation of the CWA. The EPA submits that the equitable doctrine of laches bars Riverside from bringing a valid claim under the CWA eight years after the claim accrued.

A. As a matter of law, the pond is a jurisdictional water of the United States.

This Court should determine that the pond qualifies as a jurisdictional water because it possesses a significant nexus with the Fenario River. Justice Kennedy's significant nexus test from *Rapanos* is appropriately applied to "other waters" through the *2011 Guidance*. *See* 33 C.F.R. § 328.3(a)(3) (defining "other waters"); *2011 Guidance*, *supra*, at 19. As an alternative, this Court should follow the reasoning of the district court, concluding that the pond is a tributary of the Fenario River, and thus is a water of the United States under 33 C.F.R. § 328.3(a)(5).

1. Under 33 C.F.R. § 328.3(a)(3), the pond qualifies as an "other water" because there is a significant nexus between the pond and the Fenario River.

This Court should extend Justice Kennedy's significant nexus test to ponds that have an ecological connection with a navigable water. EPA and Corps regulations interpret "waters of the United States" to include "other waters," meaning waters that "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3). The regulation expressly contemplates the inclusion of "lakes, rivers, streams . . . or natural ponds" as "other waters." *Id.*

The "other waters" provision in 33 C.F.R. § 328.3(a)(3) survives the Supreme Court's analysis of isolated ponds in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*. 531 U.S. 159, 166 (2001). In that case, the Court invalidated a previous regulatory provision that extended CWA jurisdiction to waters that had no relationship to navigable waters other than as habitat for migratory birds. *Id.* at 166 (describing the "Migratory Bird Rule"). Although this previous regulatory term was invalidated, the Court did not completely remove the "other waters" category from future waters of the United States determinations. *See Gerke Excavating*, 464 F.3d at 723. The EPA may still assert jurisdiction over "other waters" as long as there is a significant nexus between the other water and a navigable water.

The *2011 Guidance* offers the EPA's interpretation of the meaning of "other waters," and the test for determining the extent of CWA jurisdiction. *2011 Guidance, supra*, at 19. Physically proximate waters, or waters that would be considered adjacent if they were wetlands, are evaluated according to Justice Kennedy's significant nexus test. *Id.* This is a logical test to apply because Justice Kennedy's reasoning for extending jurisdiction to adjacent wetlands with a

significant nexus emphasized the "chemical, physical, and biological" effects that the adjacent wetlands could have on navigable waters. *Rapanos* 547 U.S. at 780. Similarly, "other waters" have the same potential to affect the chemical, physical, and biological integrity of nearby navigable waters. Important factors for evaluating the significant nexus of "other waters" include flood retention and runoff storage. *2011 Guidance*, *supra*, at 9.

This Court would not be alone in applying Justice Kennedy's significant nexus test to ponds. In *Northern California River Watch v. City of Healdsburg*, the Ninth Circuit applied the significant nexus test to a pond-wetland system that was located between fifty and several hundred feet from a navigable river. 457 F.3d 1023, 1026 (9th Cir. 2006). The court adopted Justice Kennedy's reasoning from *Rapanos*, concluding that the purpose of the CWA would be best served by including ponds that have a significant nexus to navigable waters. *Id.*

In this case, this Court should follow the example of the *Healdsburg* court and the interpretation provided in the *2011 Guidance* by applying the significant nexus test. Justice Kennedy's significant nexus parameters demonstrate that the pond is a water of the United States. The pond significantly affects the Fenario River's chemical, physical, and biological integrity. Both the pond and Wetland A are in the Fenario River's floodplain and there is a hydrologic connection between the pond and the river. R. at 4. Specifically, the pond, in combination with Wetlands A and B, provides "significant flood control and water retention benefits." *Id.* at 7. Therefore, there is a significant nexus between the pond and the Fenario River, and this Court should conclude that the pond is a water of the United States.

2. In the alternative, the pond is a tributary to the Fenario River under 33 C.F.R. § 328.3(a)(5).

Even if this Court concludes that the pond does not qualify as a water of the United States because it is an "other water," the pond is a tributary of the Fenario River. Waters of the United

States include tributaries that contribute to traditional navigable waters, 33 C.F.R. § 328.3(a)(5), "either directly or indirectly by means of other tributaries." *2011 Guidance*, *supra*, at 11.[4] After *Rapanos*, the test for whether a tributary is a water of the United States is the same significant nexus test that is used in the adjacent wetlands and "other waters" contexts. *Rapanos*, 547 U.S. at 781. As described in Part II.A.1, *supra*, the pond meets the significant nexus test. Therefore, this Court should conclude that the pond is a water of the United States.

B. As a matter of law, the *Gwaltney* doctrine and the statute of limitations do not apply because the discharge of fill material into the pond is a continuing violation.

This Court should determine that the CWA creates a continuing violation for unremediated discharges of fill material. The language that Congress used in creating the statutory prohibition against unpermitted discharges indicates that Congress intended to create a continuing violation. This conclusion is supported by the public policy goals of the CWA and the negative implications for wetland protection if this Court denies the application of a continuing violation to the facts of this case.

1. The plain meaning of sections 301 and 505(a) of the CWA indicates congressional intent to create a continuing violation for unremediated discharges of fill material.

Under the Supreme Court's holding in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, the CWA requires plaintiffs in citizen suits to allege a "continuous or intermittent violation" by the defendant. 484 U.S. 49, 57 (1987). The requirement for alleging a continuous

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[4] The hydrologic connection between the pond and the Fenario River occurs through a combination of surface and sub-surface connections. R. at 4. Although no court has determined that groundwater, or sub-surface hydrologic connections, are waters of the United States, Riverside's claims do not depend on the extension of CWA jurisdiction to groundwater. *See 2011 Guidance*, *supra*, at 11 ("underground flow . . . does not invariably halt CWA jurisdiction"); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (excluding groundwater from CWA jurisdiction). Riverside's claims merely depend on the extension of CWA jurisdiction to the pond, which is a tributary to the Fenario River via non-jurisdictional groundwater flows. *See Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1173 (D. Idaho 2001) (upholding jurisdiction for a pond connected by groundwater to a spring).

violation stems from the citizen suit provision in section 505(a), which authorizes citizen suits against dischargers "alleged to be in violation of" the CWA. 33 U.S.C. § 1365(a)(1). By emphasizing the present-tense language in section 505(a), the Court concluded that only present violations, including continuous or intermittent violations, were proper claims for citizen suits. *Gwaltney*, 484 U.S. at 57. The *Gwaltney* majority, however, declined to explain the scope of continuing violations.

In a concurring opinion in *Gwaltney*, Justice Scalia emphasized that the language in section 505(a), "to be in violation," "suggests a state rather than an act." *Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring in part and concurring in the judgment). Therefore, a discharger may be in a state of noncompliance by leaving an unpermitted discharge of dredged or fill material in place. Several courts have adopted this logic, concluding that unremediated discharges constitute continuing violations because leaving fill in place results in noncompliance with the CWA's permit requirements. *See Sasser v. Adm'r, U.S. EPA*, 990 F.2d 127, 129 (4th Cir. 1993); *City of Mountain Park, Ga. v. Lakeside at Ansley, LLC*, 560 F. Supp. 2d 1288, 1296 (N.D. Ga. 2008); *N.C. Wildlife Fed'n v. Woodbury*, No. 87-584-CIV-5, 1989 WL 106517, at *3 (E.D.N.C. Apr. 25, 1989).

The language creating a violation of the CWA in section 301(a) supports finding a continuing violation whenever the permit condition has not been satisfied. 33 U.S.C. § 1311(a) ("Except as in compliance with [various CWA sections, including section 404], the discharge of any pollutant by an person shall be unlawful"). Section 404 requires a permit for any discharge of dredged or fill material. 33 U.S.C. § 1344. Permits may be acquired under section 404 either before the discharge takes place, or after the discharge, in the form of an after-the-fact permit. *See* 33 C.F.R. § 326.3(e) (providing for an after-the-fact permit from the Corps). In a similar

context, the Sixth Circuit determined that regulatory schemes creating an opportunity to apply for an after-the-fact permit produced a continuing duty to acquire a permit. *Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.*, 480 F.3d 410, 416–17 (6th Cir. 2007). Therefore, without acquiring a permit prior to the discharge of fill material or an after-the-fact permit after the discharge, the discharger has not complied with the requirements of the CWA and remains in continuing violation.

Additionally, federal regulations adopted by the Corps are instructive on this issue. The Corps has defined "discharge of fill material" to include physical structures such as "site development fills," "causeways or road fills," "dams and dikes," and "*artificial islands*." 33 C.F.R. § 323.2(f) (emphasis added). The fact that these physical structures are listed as "discharges of fill material" indicate that the Corps viewed the presence of "artificial islands" as a continuing violation, regardless of whether the actual activity of adding fill material to the water has ceased. After examining the statutory and regulatory language, this Court should conclude that Congress intended the CWA to create a continuing violation for discharges of fill material.

The Supreme Court's jurisprudence interpreting other statutes allows courts to find an implied continuing violation based on congressional intent. *See Toussie v. United States*, 397 U.S. 112, 115 (1970). Courts have examined congressional intent and found continuing violations under other statutory schemes. *See, e.g.*, *United States v. Kerley*, 838 F.2d 932, 935 (7th Cir. 1988) (implying a continuing violation of the Selective Service Act: "The statute implies a continuing duty"); *but see United States v. Telluride Co.*, 884 F. Supp. 404 (D. Colo. 1995), *rev'd on other grounds*, 146 F.3d 1241 (10th Cir. 1998) (finding no continuing violation of the CWA). Therefore, after examining the statutory structure of the CWA, particularly the

requirement that all dischargers obtain permits, this Court should conclude that section 301 creates a continuing violation for unpermitted and unremediated discharges of fill material. Thus, Riverside's citizen suit alleges a continuing violation and is not barred by the *Gwaltney* doctrine or the statute of limitations, 28 U.S.C. § 2462.

2. The public policy goals of the CWA compel a continuing violation for unremediated discharges of fill material.

A vast majority of CWA cases consider unremediated discharges of dredged or fill material to be continuing violations. *See, e.g.*, *Sasser*, 990 F.2d at 129; *United States v. Cumberland Farms of Conn., Inc.*, 647 F. Supp. 1166, 1183 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987); *see also City of Mountain Park*, 560 F. Supp. 2d at 1294–97 (listing other cases). This is consistent with the public policy goals of the CWA, and sound judicial policy with respect to CWA enforcement. The CWA was enacted in order to restore and maintain the "chemical, physical and biological integrity" of the nation's waters. 33 U.S.C. § 1251. Limiting enforcement of the CWA by not implying a continuing violation would frustrate Congress's purpose. Treating violations of the CWA as one-time occurrences would incentivize illegal fill activities in wetlands and encourage polluters to hide evidence of their discharges. *City of Mountain Park*, 560 F. Supp. 2d at 1296. Because many discharges of fill material occur in a short time frame, there would be virtually no ability for citizen suits to enforce section 404 without a continuing violation, unless citizens were lucky enough to catch the violator in the act. *Stillwater of Crown Point Homeowner's Ass'n v. Kovich*, 820 F. Supp. 2d 859, 896 (N.D. Ind. 2011).[5]

[5] As the Supreme Court recognized in *Gwaltney*, the EPA's enforcement powers are different from citizen suits. *Gwaltney*, 484 U.S. at 58. Therefore, EPA retains the power to order compliance with the CWA even if there is no continuing violation for unremediated fill materials. *See* 33 U.S.C. §§ 1319(a), (b), and (d).

C. The equitable doctrine of laches bars Riverside from bringing claims eight years after the discharges first occurred.

But even assuming Ultimate meets all of the elements of a CWA violation, this Court should bar Riverside's claim because Riverside's delays in bringing this lawsuit unfairly prejudice Ultimate.[6] The island fill was complete in 2003, and Riverside waited until 2011 to bring its claims. It would unfairly prejudice Ultimate if this Court does not dismiss this claim.

The affirmative defense of laches developed as an equitable doctrine for courts to bar plaintiffs' claims when unreasonable delay prejudices the defendant. *See* Fed. R. Civ. P. 8(c)(1); *Cornetta v. United States*, 851 F.2d 1372, 1376 (Fed. Cir. 1988). Courts traditionally determine whether laches bars a lawsuit by considering three factors: "(1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted." *Envtl. Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 478 (5th Cir. 1980) (citing *Save Our Wetlands, Inc. (SOWL) v. U.S. Army Corps of Eng'rs*, 549 F.2d 1021, 1026 (5th Cir. 1977) *cert. denied*, 434 U.S. 836 (1977)). Ultimate satisfies each of these factors; therefore, the balance of the equities favors dismissal.

According to the Fifth Circuit, "the applicability of the doctrine of laches to environmental litigation is no longer open to doubt." *Alexander*, 614 F.2d at 478. In *Alexander*, the court barred a citizens group from bringing claims against the Secretary of the Army alleging an unlawful channel construction. *Id.* The Fifth Circuit bared the claims because the citizens had waited nine years to file suit. *Id.* at 479. Similarly, the Second Circuit has invoked laches to bar a citizens group from bringing Administrative Procedure Act claims just five months after a wetland fill was completed. *Allens Creek/Corbetts Glen Pres. Grp., Inc. v. West*, 2 F. App'x. 162,

[6] Even if this argument was not raised in the district court, this Court may consider the legal issue of laches in order to avoid a miscarriage of justice. *See Raich v. Gonzales*, 500 F.3d 850, 866 (9th Cir. 2007).

164, 165 (2d Cir. 2001) ("we conclude that the plaintiffs' delay is sufficiently unreasonable and that the prejudice to the defendants is sufficiently severe to warrant the application of laches").

Although it is true that some courts have cautioned that laches should be used sparingly in environmental cases, this caution applies only to citizen suits against the government. *See, e.g.*, *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998); *Coal. for Canyon Pres. v. Bowers*, 632 F.2d 774, 779 (9th Cir. 1980) (finding laches inappropriate in a suit against the federal government). These cases base their conclusion on the Supreme Court's rule that laches cannot be used as a defense when the government brings suit. *See Natural Res. Def. Council v. Fox*, 909 F. Supp. 153, 160 (S.D.N.Y. 1995) (citing *United States v. Summerlin*, 310 U.S. 414, 416 (1940)). Indeed, laches does not bar the government from bringing suit, nor claims against the government or agencies when the public interest is at stake. *Summerlin*, 310 U.S. at 416 ("It is well settled that the United States is not . . . subject to the defense of laches in enforcing its rights"); *City of Davis v. Coleman*, 521 F.2d 661, 678 (9th Cir. 1975). But laches may be used as a complete bar in a lawsuit between two private parties. *Underwood v. Dugan*, 139 U.S. 380, 383 (1891).

The facts of this case compel this Court to bar Riverside's claims. Riverside knew or should have known of Ultimate's island fill in 2003 because the island was a "signature" hole. R. at 1. Riverside then delayed bringing its suit for at least *eight years*, and provided no reasonable excuse for the delay. *Id.* at 1–2. The delay will result in unfair prejudice because Ultimate has already made an economic decision to construct the island green, and relies on the island as a "signature" hole, representing significant reputational value to Ultimate. *Id.* at 1. In *Allens Creek*, the Second Circuit found unfair prejudice to a wetland developer based on the potential costs and disruption to the defendants of the possibility of removing the fill. 2 F. App'x. at 165. The same

potential prejudice is present in this case if the Court finds that a violation of the CWA has occurred. Therefore, this Court should conclude that the doctrine of laches bars Riverside's claims with respect to the pond.

III. RIVERSIDE LACKS STANDING TO BRING CLAIMS REGARDING THE POND.

The district court erred by finding that Riverside satisfied the constitutional requirements of standing. R. at 3–5. This Court should reverse the district court on this issue; and therefore, dismiss the claims against Ultimate based on the discharge into the pond. Riverside cannot demonstrate a concrete injury-in-fact, that Ultimate's activities caused the injuries, or that a favorable outcome in court will likely redress those injuries.

The Supreme Court provided a three-part test for determining whether plaintiffs have standing in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). First, the plaintiff must allege an injury-in-fact that is "concrete and particularized" and "actual or imminent." *Id.* at 560. Second, the alleged injury must be caused by the activities of the defendant such that the injury is "fairly traceable" to the defendant. *Id.* Third, the alleged injury must be "likely" to be redressed by a favorable outcome in court. *Id.* Riverside fails on all three parts of the standing test.

A. Allegations of flood damage are speculative and not "actual or imminent."

Riverside's alleged injury, an increase risk of flood damage to the properties downstream from Ultimate, is not sufficient to meet the injury-in-fact requirement in *Lujan*. Experts have established that a 100-year flood event is now expected to occur in the Fenario floodplain on average once every 10 years. R. at 4. This magnitude of flood is expected to have a 90 percent chance of causing significant damage to Riverside's property. *Id.* Nevertheless, this allegation of increased risk is not sufficiently "actual or imminent" because the future probabilities of flood

events are by their nature speculative and indeterminant. *See Shain v. Veneman*, 376 F.3d 815, 818 (8th Cir. 2004) (the probability of a 100-year flood was "speculative and unpredictable").

In *Public Citizen v. National Highway Traffic Safety Administration (NHTSA)*, the D.C. Circuit produced a test for establishing injury-in-fact through increased risk to the plaintiff. 513 F.3d 234, 237 (D.C. Cir. 2008). According to that court, an increased risk to the plaintiff establishes standing only when there has been a "substantial increase" in 1) the probability of harm and 2) the risk to the particular plaintiff. *Id.* In this case, Riverside has alleged an increase flood frequency for a 100-year flood, satisfying the first part of the *NHTSA* test. But Riverside cannot allege that there has been an increase in the harm that a 100-year flood event would cause. Therefore, Riverside fails to allege an injury-in-fact based on an increased probability of harm.

B. Riverside's injuries are not fairly traceable to Ultimate or capable of redress.

Riverside's alleged injuries also fail to meet the *Lujan* test for causation and redressability. The increased flood risk to Riverside's properties cannot be fairly traced to Ultimate's pond filling because the causal link is too attenuated. The alleged injury relies on an increased risk of flooding caused by decreased water storage in the pond, which causes increased saturation of Wetland A and larger downstream floods. R. at 4. This chain of causation is too attenuated and speculative to establish that Ultimate's island caused Riverside's injury. The chain of causation relies on an indeterminable number of steps, inferences, and geographic and temporal distance from the injuries. Moreover, the increased risk of downstream flood damage relies on the cumulative effects of multiple actors who have engaged in wetland filling throughout the Fenario floodplain. *See Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 476–77 (D.C. Cir. 2009) (rejecting plaintiff's argument for causation based on attenuated causal chain with many different actors contributing to the injury).

Finally, Riverside's increased risk of flood injury is not "likely" to be redressed by a favorable outcome in court. Riverside cannot show that the available remedies in this CWA citizen suit, including fines or injunctive relief, would have an effect on the flood risk within the Fenario Basin. *See Massachusetts v. EPA*, 549 U.S. 497, 546 (2007) (Roberts, C.J., dissenting) ("What must be likely to be redressed is the particular injury in fact."). Redressability is not likely because Riverside has not demonstrated that remedying an incremental and attenuated "cause" of the injury would have any effect on the flood frequency or severity. This Court should reverse the decision of the district court because Riverside has not satisfied the constitutional requirements for standing.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision with respect to EPA's claims regarding Wetland B, and reverse the decision with respect to Riverside's CWA claims and standing. First, EPA has established that Wetland B is a water of the United States because it is an adjacent wetland within the meaning of federal regulations and Supreme Court precedent. Ultimate's sidecasting activities within Wetland B constituted an addition of a pollutant. Second, the pond is a water of the United States under the CWA, and leaving fill materials in place constitutes a continuing violation of the CWA. But Riverside's claims with respect to the pond are barred by the equitable doctrine of laches and because Riverside cannot establish standing. Therefore, this Court should affirm the grant of summary judgment to EPA, and reverse the grant of summary judgment to Riverside.