Civ. App. No. 2012-301

THE COURT OF APPEALS FOR THE TWELFTH CIRCUIT

ULTIMATE RESORTS, INC.,

Appellant,

v.

RIVERSIDE HOMEOWNERS ASSOCIATION, INC.,

Appellee,

v.

THE UNITED STATES OF AMERICA,

Appellee.

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

Civ. No. 2012-402

BRIEF FOR APPELLANT ULTIMATE RESORTS, INC.

Meredith M. Price
10015 S.W. Terwilliger Blvd.
Portland, OR 97219
Attorney for Ultimate Resorts, Inc.

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STATEMENT OF JURISDICTION

Defendant Ultimate Resorts, Inc. ("Ultimate") brings this timely appeal from an order of the United States District Court for the District of Bliss granting summary judgment to Plaintiff, Riverside Homeowners Association, Inc. ("Riverside") under Fed. R. Civ. P. 56(b). R. at 1. The District Court had subject matter jurisdiction over the case under federal question jurisdiction, 28 U.S.C. § 1331 (2006), and the citizen suit provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1365 (2006). The District Court granted Ultimate's motion to certify an interlocutory appeal, and jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291 (2006). App. R. at 1.

STATEMENT OF THE ISSUES

I. Does Riverside have standing to sue based on the speculative harm associated with owning property in a floodplain, and can Riverside establish causation based on a flood risk where Ultimate's contribution to that risk may be *de minimis* and where Riverside admits that "many others" besides Ultimate played a causal role?

II. Can a wetland that is not close to a navigable in fact water body be subject to jurisdiction under the CWA, and if so, does the mere movement of materials within a wetland constitute an "addition" under the CWA?

III. May the District Court adjudicate a claim under section 505(a) of the CWA based on an activity that is wholly past and outside the federal statute of limitations, 28 U.S.C. § 2462 (2006); and if so, is the isolated, intrastate pond on Ultimate's property (the "Pond") a navigable water under the CWA?

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of Bliss granting Riverside's motion for summary judgment and denying Ultimate's cross-motion. R. at 9. Riverside initiated a suit against Ultimate under the CWA's citizen suit provision, 33 U.S.C. § 1365(a). R. at 2. Three days later the Environmental Protection Agency ("EPA") filed a separate action under sections 309(b) and (d) of the CWA. 33 U.S.C. § 1319(b), (d) (2006); R. at 2–3. EPA also issued Ultimate a unilateral order under section 309(a)(3) of the CWA, 33 U.S.C.

§ 1319(a)(3), barring Ultimate from continuing its development of Wetland B. R. at 3. The District Court consolidated both actions. *Id.*

Both Ultimate and Riverside moved for summary judgment. App. R. at 1. The Court held that (1) Riverside had standing to challenge both the 2003 and 2011 golf course developments, (2) Wetland B was subject to jurisdiction under the CWA and Ultimate had violated section 404 of the CWA, and (3) Riverside's claim regarding the 2003 development was not barred and the CWA provides for jurisdiction over the intrastate Pond located on Ultimate's property. *Id.* Ultimate filed a Notice of Appeal challenging the District Court's order. *Id.*

STATEMENT OF THE FACTS

Ultimate has been building a successful business on the outskirts of the city of Fenario in the State of Bliss since 1991. R. at 1. Ultimate purchased 3,000 acres of farmland alongside the northern bank of the Fenario River, and over the first eight years of ownership built two high-end golf courses, a hotel, and resort amenities. *Id.* Ultimate drew up plans in 2002 focusing on new development opportunities, including an additional golf course. *Id.* As part of this expansion effort in 2003, Ultimate built a signature hole featuring a highly sought after "island green" feature within one isolated, intrastate Pond. *Id.* Ultimate did not contact either the EPA or the U.S. Army Corps of Engineers (the "Corps") based on Ultimate's understanding that the Pond was not a "navigable water" under the CWA. *Id.* at 1–2. There were no streams leading either into or out of the Pond, and it is buffered from the nearest jurisdictional water by a separate wetland ("Wetland A"). *Id.* at 1, 2 n.1.

In 2011, Ultimate created a new plan to develop four additional golf courses farther away from the Fenario River, parts of which would route through a 500-acre wetland ("Wetland B"). *Id.* at 2. Also in 2011, 20 years after Ultimate began its development activities and eight years

after the 2003 golf course development, Riverside decided to investigate Ultimate's business practices based on alleged harm to the Fenario River floodplain. *Id.* at 2, 4. Riverside then contended that the 2003 development of an island green within the isolated, intrastate Pond was a violation of the CWA. *Id.* at 2. Riverside also questioned whether the 2011 development plans within Wetland B were a violation of the CWA. *Id.*

Riverside sent a "60-day notice letter" under section 505(b) of the CWA, 33 U.S.C. § 1365(b) indicating its intent to file suit under the CWA. *Id.* Ultimate delayed its 2011 golf course development and earnestly sought a resolution to the controversy, without success. *Id.* Ultimate then began land preparation activities within Wetland B. *Id.* Riverside filed a citizen suit under the CWA, and three days later EPA filed a separate action against Ultimate pursuant to sections 309(b) and (d) of the CWA. *Id.* at 2–3. EPA also issued a unilateral order barring Ultimate from continuing its development activities within Wetland B during the course of the lawsuit. *Id.* at 3. Ultimate has fully complied with EPA's order. *Id.*

STANDARD OF REVIEW

Appellate courts use a *de novo* standard of review when evaluating a District Court's grant of summary judgment. *Pierce v. Underwood*, 487 U.S. 552, 557–58 (1988). Summary judgment is appropriately granted only 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(a).

SUMMARY OF THE ARGUMENT

The District Court erroneously determined that Riverside had standing for its separate claims regarding the Pond and Wetland B. With regard to the Pond, Riverside's alleged injury is speculative. Riverside bases its alleged injury on a probabilistic chain of inferences regarding *future* harm. Speculation regarding the dynamics of a 100-year floodplain does not state a

cognizable injury under Article III. Rather than require Riverside to prove causation and redressability for each of its claims, the District Court invented a new standard for citizen-suit plaintiffs based on a flawed interpretation of *Massachusetts v. Environmental Protection Agency ("Mass. v. EPA")*, 549 U.S. 497 (2007). Summary judgment was thus granted inappropriately. Riverside extends its precarious injury claims to Wetland B, but those claims are equally probabilistic and speculative. Furthermore, the District Court incorrectly determined that Riverside did not have to establish standing regarding Wetland B after Riverside's suit was consolidated with EPA's enforcement action. Decades of Supreme Court precedent establish that a citizen-suit plaintiff is obligated to establish standing at the *outset* of a lawsuit. The District Court's analysis was faulty and should be reversed.

Riverside independently challenges Ultimate's development of an isolated, intrastate Pond that occurred eight years in the past. The District Court lacked jurisdiction over Riverside's claim because any alleged "discharge" is wholly past and barred by the Supreme Court's holding in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). Riverside's claim is also time barred by the five year federal statute of limitations. A violation occurs under the CWA upon the discharge of a pollutant, and the Supreme Court has clarified that there is only a "continuing violation" for the purposes of extending statutes of limitations if there is a present violation. Ultimate did not discharge into the Pond after 2003. The District Court, rather than analyze the plain language of the CWA and the Supreme Court's holding in *Gwaltney*, based its ruling on policy concerns. These policy concerns ignore the interstitial nature of citizen suits. This Court should also decline to extend jurisdiction over the isolated, intrastate Pond. The Pond is not a tributary because it does not have a surface connection with another jurisdictional water. Jurisdiction cannot be based on a sub-surface,

hydrologic connection because groundwater is not subject to the CWA. The District Court insulated EPA's new tributary theory from review and seemed to say: "You could have done better but I don't mind." Bob Dylan, *Don't Think Twice, It's All Right*, on *The Freewheelin' Bob Dylan* (Columbia Records 1963). Agency interpretations that conflict with binding regulations, however, are afforded no deference. Likewise, the Pond is not an "other water" because there is no evidence it has any effect on interstate commerce.

Both EPA and Riverside claim that a CWA violation occurred within Wetland B, an isolated wetland a mile from the nearest navigable water. The grant of jurisdiction over Wetland B was misguided because inherent in the CWA is a respect for the power traditionally reserved to States. Wetland B is not a jurisdictional water under the plain meaning of the Agencies' definition of "adjacent," which only connotes physical proximity. The District Court was also incorrect to engraft the "significant nexus" test set forth by Justice Kennedy in his concurrence from *Rapanos v. United States*, 547 U.S. 715 (2006), into the "other waters" category. Even if Wetland B is jurisdictional, Ultimate's development activities did not constitute a violation of section 404. The Supreme Court in *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc. ("LA County")*, 133 S. Ct. 710, 713 (2013), held that the plain meaning of "addition" does not include the mere transfer of material within a single water body. Any alternative interpretation by the EPA and Corps (the "Agencies") is unreasonable because it interprets the jurisdictional trigger under the CWA in two conflicting ways.

ARGUMENT

I. Riverside lacks Article III standing to pursue its claims under the CWA.

The District Court concluded that Riverside had standing to challenge Ultimate's activities in relation to both the Pond and Wetland B. R. at 3–5. This Court should reverse

because Riverside has failed to satisfy the constitutionally irreducible minimum needed to establish standing. *Lujan v. Defenders of Wildlife ("Defenders")*, 504 U.S. 555, 560–61 (1992).

A. This Court has jurisdiction only if Riverside establishes constitutional standing.

It is axiomatic that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The essential question is whether Riverside has satisfied the "case or controversy" requirement of Article III of the Constitution. U.S. Const. art. III, § 2, cl. 1; *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc. ("Laidlaw")*, 528 U.S. 167, 180 (2000). To satisfy the requirements of Article III, a plaintiff must demonstrate: (1) an injury in fact, (2) that is causally connected to the conduct complained of, and (3) may be redressed by a favorable court decision. *Defenders*, 504 U.S. at 560–61. There can only be an "'injury in fact,'—an invasion of a legally protected interest"—if the injury is "(a) concrete and particularized," and "(b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Id.* at 560. For an injury to be "actual or imminent," that injury must be "*certainly* impending." *Id.* at 565 n.2 (citation omitted) (internal quotation marks omitted). Injuries alleged to occur "at some indefinite future time" are not imminent. *Id.*

At the summary judgment stage, a plaintiff cannot rest on mere allegations, but instead must set forth specific evidence or affidavits to establish standing. *Id.* at 561 (citing Fed. R. Civ. P. 56(e)). Riverside fails to meet this burden by basing standing on speculative allegations of future harm.

B. Riverside does not have standing to challenge Ultimate's development activities on the isolated, intrastate Pond.

Riverside grounds its injuries related to the Pond on (1) a risk of flooding due to Ultimate's land use practices, and (2) money that Riverside has spent in anticipation of an

alleged future harm. R. at 4. Both alleged injuries fall short of the standing requirements established by the Supreme Court.

1. The uncertain hydrology of a floodplain and the alleged specter of flooding do not establish an "imminent" injury.

An alleged risk of flooding does not establish an injury in fact that will satisfy Article III. *See Defenders*, 504 U.S. at 560–61. Riverside's stated fear of potential flooding is insufficient to establish standing. A mere risk of harm regarding a potential flood is the type of abstract and conjectural injury courts find insufficient to demonstrate standing.

The Supreme Court has made clear that "[a]llegations of possible future injury do not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). In order for a threatened injury to be imminent, it must be "certainly impending." *Id.* (citations omitted) (internal quotation marks omitted). The infirmity in Riverside's standing allegations is two-fold: (1) the affidavits allege only a speculative chain of possibilities; and (2) fluctuations within a floodplain are themselves probabilistic events that should not give rise to Article III standing.

First, the District Court's basis for finding standing, R. at 4, was squarely rejected by the Supreme Court in *Clapper v. Amnesty International USA*. No. 11-1025, 2013 WL 673253, at *8 (U.S. Feb. 26, 2013). The Court held that standing could not be based on an "attenuated chain of possibilities." *Id.* The respondents in *Clapper* based their standing on a *future* harm predicated on multiple, probabilistic events. *Id.* (explaining the five steps of probabilistic inferences respondents relied upon to establish standing). The Court described that probability layered upon probability is "speculative" and does not satisfy the "certainly impending" injury requirement. *Id.* The Court squarely rejected the notion that there can be a "substantial risk" where an injury is based on an "attenuated chain of inferences." *Id.* at *11 n.5. The *Clapper* decision reinforced the holding from *Summers v. Earth Island Institute* that a "statistical

probability" or "realistic threat" of future harm does not satisfy "the requirement of 'imminent' harm." *Id.* at *8 (citing 129 S. Ct. 1142, 1150–51 (2009)).

Riverside's injury claim is based on seven steps of speculation, R. at 4, and precisely the type of layered probability the Court rejected in *Clapper*. Of central concern in the District Court's analysis is its reliance on generic observations of the various water bodies on Ultimate's property without any explanation of their significance to the Fenario River. *Id.* This Court, and Ultimate, is left to speculate as to whether the "absorption capacity" of Wetland A has any actual impact on the water levels in the Fenario River. *Id.* (relating to the district court's observations regarding allegations (1)–(4)). Riverside's faulty theory rests on the assumption that its property will be affected because other properties in the same flood plain have suffered damage. *Id.* That observation has no bearing on Riverside's specific risk because these properties are not identical in their physical characteristics, nor are they even alleged to be adjacent to Riverside's property. Indeed, flooding at these other properties may have been caused by something as innocuous as a beaver dam in the Fenario River. The final three steps in Riverside's link of possibilities are speculative: fluctuations in a floodplain designation, the possibility that a flood will occur in an area affecting Riverside's property, and an allegedly exacerbated risk of minor flooding. *Id.*

Second, Riverside argues that its downstream property is located in a 100-year floodplain that is now a 10-year floodplain. *Id.* The science behind floodplains, however, is itself an exercise in predicting "possible future injury." *Whitmore*, 495 U.S. at 158. In *Shain v. Veneman*, the Eighth Circuit rejected standing for an injury based on a risk of flooding. 376 F.3d 815, 818 (8th Cir. 2004). The court reasoned that harm within a floodplain "is remote in the abstract," and the "the possibility" that a flood will occur "becomes a matter of sheer speculation." *Id.* Given that calculating risk in a floodplain is itself a statistical exercise to

predict insurance rates, the U.S. Geological Survey[1] has recognized that floodplain designations are subject to change. So too here, the speculative and ever-changing nature of flood occurrences means that this simple risk alone is not enough to establish standing.

There is a stark difference between the inherently probabilistic nature of a 100-year or 10-year floodplain and the documented occurrence of floods used to establish standing in *Village of Elk Grove Village v. Evans ("Elk Grove")*, 997 F.2d 328, 329 (7th Cir. 1993). The court declared in dicta that "even a small probability of injury is sufficient to create a case or controversy." *Id.* at 329. That was because floods were commonplace in the relevant area. The court found that those floods continually imposed flood-control costs—and thus the city would invariably absorb the cost of "sandbags [and] overtime salaries for rescue workers." *Id. Elk Grove* is factually distinguishable because Riverside's claim does not rest on Ultimate aggravating a "known and predictable danger." *Shain*, 376 F.3d at 819. Thus Riverside's claim rests upon two additional layers of probability: the fluctuating risk associated with a floodplain designation subject to change, and the hypothetical risk of damage in the event of a flood. R. at 4. Riverside expects this Court to discern the signal from the noise—yet it is Riverside who "bears the burden of proof" and thus must proffer at summary judgment admissible evidence of "specific facts" affirmatively establishing standing. *Defenders*, 504 U.S. at 561 (citation omitted). The "conclusory allegations" provided in Riverside's affidavits do not satisfy its affirmative evidentiary burden. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

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[1] U.S. Geological Survey, *Floods: Recurrence intervals and 100-year floods* (last modified Jan. 9, 2013), http://ga.water.usgs.gov/edu/100yearflood.html (flood levels often change "as more data comes in").

2. Riverside cannot manufacture standing by spending money in anticipation of a possible future injury.

Riverside alleges that Ultimate's activities in 2003 impacted the nature of the Fenario River floodplain such that is has "spent more than $50,000 in the last five years re-grading portions of its property." R. at 4. This Court should reject Riverside's standing claim because Riverside's expenditure of funds is a self-inflicted injury that is not cognizable under Article III.

Riverside's expenditure of funds is distinct from the type of injury the Supreme Court recognized in *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010). In *Monsanto*, the court found that the "farmers had established a reasonable probability" of harm that caused them to undertake testing for gene contamination. *Id.* at 2754–55 & n.3 (citation omitted) (internal quotation marks omitted). Inherent in this injury was that a cost was "reasonably" incurred. *Id.* There the conventional alfalfa farmers had concrete evidence to substantiate their concerns of genetic contamination: fields were being planted and pollinators had the range to move between the fields. *Id.*; *see also Clapper*, 2013 WL 673253, at *13 (distinguishing the injury in *Monsanto* as a reasonable expenditure of funds). Riverside's expenditure must be *reasonable*, rather than a "self-inflicted" injury based on an "unreasonable decision." *St. Pierre v. Dyer*, 208 F.3d 394, 403 (2d Cir. 2000).

Moreover, the Supreme Court in *Clapper* expressly rejected the notion that present expenditures "'stemming from a reasonable fear of *future* harmful . . . conduct'" satisfy the injury in fact requirement. 2013 WL 673253, at *11 (citation omitted). Riverside cannot "manufacture standing by choosing to make expenditures based on hypothetical future harm," *id.* at *3, and "secure a lower standard for Article III standing . . . based on a nonparanoid fear." *Id.* at *11. Likewise, the types of injuries that the Supreme Court has recognized based on a

"substantial risk" of harm are not predicated on an "attenuated chain of inferences" relating to independent actors not before the court. *Id.* at *11 n.5.

Even under cases recognizing an injury based on a "substantial risk" of harm, Riverside's factual allegations are insufficient. For example, the D.C. Circuit Court in *Public Citizen, Inc. v. National Highway Traffic Safety Administration* held there must be evidence of "*both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account." 513 F.3d 234, 237 (D.C. Cir. 2008). The court denied standing because there was no demonstrated "greater risk of injury." *Id.* at 239. So too here, there is no evidence that the risk of injury to Riverside in a 10-year floodplain is any greater than the risk of injury in a 100-year floodplain. R. at 4. In short, it is in Riverside's power to cease its self-inflicted harm without the exercise of this Court's power.

C. *Mass. v. EPA* does not alter the constitutionally irreducible minimum a citizen-suit plaintiff must satisfy to establish causation.

The District Court erroneously interpreted *Mass. v. EPA* to mean that a party with a particularized injury is subject to less scrutiny in satisfying the causation and redressability prongs if there are "multi-actor problems." R. at 5. The Supreme Court's holding in *Mass. v. EPA* is limited in two important regards: first, it dealt only with a State "protecting its quasi-sovereign interests," and second, it was tied to the enforcement of a "*procedural* right." 549 U.S. at 520 (emphasis added). The "special solicitude" afforded to Massachusetts is limited to state sovereigns. *Id.*; *see also Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1337–38 (Fed. Cir. 2008) (declining to extend special solicitude to the Government of Canada); *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 336–38 (2d Cir. 2009) (granting special solicitude to Connecticut based on injuries caused by carbon dioxide emissions affecting virtually the entire population), *rev'd on other grounds*, 131 S. Ct. 2527 (2011).

While *Mass. v. EPA* did relax the injury in fact requirement for a State, the traditional, polestar standards needed to establish Article III standing remain. This Court should be guided by the Supreme Court's statement that it was "of considerable relevance that the party seeking review here is a sovereign State and not . . . a private individual." *Mass. v. EPA*, 549 U.S. at 518; *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (Courts of Appeals do "not treat considered dicta from the United States Supreme Court lightly," but rather, "accord it appropriate deference").

Indeed, there is a strong argument that absent this "special solicitude," the claims in *Mass. v. EPA* were insufficient under the traditional Article III standing analysis. *Mass. v. EPA*, 549 U.S. at 540–49 (Roberts, C.J., dissenting). It is particularly unpersuasive under the traditional test to cite layered probabilistic risks of regional flooding "as a bootstrap for finding causation and redressability." *Id.* at 543–44. Citizen-suit plaintiffs bringing claims based on large-scale, regional environmental problems must show the alleged conduct made a "meaningful contribution" to the problem. *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1136 (D.N.M. 2011) (holding BLM's potential contribution to 0.0009% of global GHG emissions was not a "meaningful contribution") (citing *Mass. v. EPA*, 549 U.S. at 523–25); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 881 (N.D. Cal. 2009) (rejecting standing because the plaintiff's arguments "depend on an attenuated sequence of events" that are "removed both in space and time" from the defendants' conduct and thus could not meet the fairly traceable requirement), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

There is no evidence that Ultimate's activities made a "meaningful contribution" to Riverside's speculative future risk. In particular, the record does not establish a "reasonable probability" that Ultimate's activities in 2003 caused an alteration to the Fenario River water

levels *or* future risk of harm related to Riverside's expenditures between 2008 and 2013. R. at 4. There are admittedly multiple potential causes to Riverside's alleged injury, R. at 4, and yet Riverside has provided no explanation of the relevance or scale of Ultimate's contribution. In *Monsanto*, the Court was able to make that causal link because there was an immediate temporal connection between the deregulation of a seed and the need to test crops. 130 S. Ct. at 2755 n.3; *see also McConnell v. Federal Election Comm'n*, 540 U.S. 93, 225–26 (2003) (rejecting standing based on an injury "too remote temporally to satisfy Article III standing"), *overruled on other grounds sub nom., Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010). Here, we lack a temporal connection between Ultimate's development in 2003 and either of the alleged injuries. R. at 1, 4. The District Court's decision conflicts with the logic in *Monsanto*: a party cannot "reasonably incur costs to mitigate or avoid" a harm where the initial expenditure occurs long after the challenged activity and is based on an "attenuated chain of inferences." *Clapper*, 2013 WL 673253, at *11 n.5 (citing 130 S. Ct. at 2754–55).

Instead of alleging concrete facts, Riverside attempts to treat Ultimate as if it were the sole cause of the changed hydrology in the Fenario River floodplain. Riverside cannot rest its standing on even the most lenient tests used to prove causation. *Pub. Interest Research Grp. of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990). The Third Circuit in *Powell Duffryn* established an erroneous test to prove causation in water pollution cases, such that a litigant need only show that there is a discharge in excess of a CWA permit, into a waterway a party uses, that causes or contributes to the "types" of injuries alleged. *Id.* at 72. As an initial matter, this Court should decline to extend a judicial philosophy of "the shakiest of jurisprudential confidence." *Id.* at 83 (Aldisert, J., concurring). The *Powell Duffryn* test is divorced from an actual inquiry into whether a single source played any role at all in

causing an alleged injury. But even under the *Powell Duffryn* test, Riverside's claim fails because the floodplain dynamics are caused by changes throughout the region. R. at 4. Courts have correctly declined to extend the "contribution" approach where vast stretches of water or land are at issue. *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 361 (5th Cir. 1996) (holding that the relevant waterway was "too large to infer causation solely from the use of some portion of it"); *Tex. Indep. Producers & Royalty Owners Ass'n v. Envtl. Prot. Agency*, 410 F.3d 964, 974 (7th Cir. 2005) (holding that an environmental organization did not have standing because it could not point to the seed of its injury given the extensive pollution in a waterway from other sources). Placing the blame on Ultimate for an action ten years in the past and caused by many others is purely speculative and without support in the record.

D. The District Court erred in granting Riverside standing over Wetland B.

The constitutionally irreducible minimum to establish standing first requires a party to demonstrate it has suffered an injury in fact. *Defenders*, 504 U.S. at 560–61. The District Court summarily concluded that Riverside was relieved of the burden of establishing standing to challenge Ultimate's activities in Wetland B. R. at 3. Riverside's standing claims rest on mere allegations, and this court should reverse the District Court's ruling because the Article III standing requirements have not been satisfied.

1. Riverside must establish standing as to Wetland B independent of the EPA.

The District Court erroneously concluded that Riverside was not required to establish standing as to Wetland B after the District Court consolidated the two actions. R. at 3. EPA's ability to bring enforcement actions under section 309(b) and (d) of the CWA does not exempt a citizen-suit plaintiff from the burden of establishing standing. 33 U.S.C. § 1319(b), (d). This is because section 505(a) makes clear that a party is bringing suit "on his own behalf." 33 U.S.C.

§ 1365(a). The Supreme Court has unequivocally held that "a plaintiff must demonstrate standing separately for each form of relief sought." *Laidlaw*, 528 U.S. at 185. Moreover, as the party invoking federal jurisdiction, Riverside bears the burden of establishing standing on the day the suit was filed. *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2769 (2008). The District Court's "piggyback" analogy is inconsistent with the long-standing and independent duty a party bears under Article III.[2] R. at 3.

2. Riverside's alleged injuries related to Wetland B are too attenuated and speculative to be afforded judicial relief.

Riverside's alleged injuries related to Wetland B are predicated solely on the allegation that altering Wetland B would "diminish its ability to retain water and minimize downstream flooding." R. at 3 n.2. Riverside lacks standing to make any claims regarding Wetland B for two reasons: (1) Riverside has not met the minimum pleading requirements; (2) to the extent the Court is willing to accept Riverside's affidavits alleging a speculative chain of risk related to the Pond development, Riverside lacks standing over Wetland B due to the uncertain hydrology.

Riverside has not established sufficient facts to allege an injury in fact related to Wetland B because Riverside relies on a speculative chain of future events, not hard facts. The burden is on Riverside to allege specific facts regarding its alleged injury. *Salmon River Concerned Citizens v. Robertson,* 32 F.3d 1346, 1352 n.11 (9th Cir. 1994) (a "claimant must demonstrate specific facts, through affidavit *or other competent evidence*") (emphasis added). The District Court relied on the assertion that developing Wetland B would "diminish its ability to retain

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[2] The district court misapplied *Horne v. Flores*, 129 S. Ct. 2579 (2009). *Horne* simply held that a "named defendant in the case" had standing to challenge an order from the district court. *Id.* at 445. EPA was not a joint plaintiff when Riverside filed suit. R. at 2. Extending *Horne* to mean that a citizen-suit plaintiff need not establish standing where EPA pursues an enforcement action that is subsequently consolidated with a citizen suit would eviscerate the Article III standing requirements.

water and minimize downstream flooding," and that Riverside has thrown money at the problem. R. at 3 n.2, 4. This Court cannot take judicial notice of facts regarding the risk posed by changes to Wetland B not specifically alleged by Riverside. Fed. R. Evid. 201(b) (a court may only take judicial notice of "a fact that is not subject to reasonable dispute"). The evidence regarding Wetland B does not explain whether the changed water retention is anything more than a *de minimis* change in the overall risk of flooding, or risk of injury to Riverside's property. R. at 3 n.2, 4. Contrasted with the evidence regarding the Pond claim, the ethereal abstraction about "downstream flooding" is particularly specious.

The conclusion that sidecasting would "diminish [Wetland B's] ability to retain water and minimize downstream flooding" is based on conjecture and fails to satisfy the fairly traceable requirement. R. at 3 n.2; *Defenders*, 504 U.S. at 561 (rejecting standing where an injury is predicated on a mere allegation). Like the Pond claim above, this claim rests on layers of probabilistic risk and future injury. *Clapper*, 2013 WL 673253, at *8. The bar is not so low as to grant standing in this case because "[t]he more attenuated or indirect the chain of causation between the [defendant's] conduct and the plaintiff's injury, the less likely the plaintiff will be able to establish a causal link sufficient for standing." *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) (declining standing based on a speculative causal chain of future events related to climate change and third parties). The District Court should have required Riverside to provide evidence establishing that Ultimate's activities in Wetland B would have a measurable impact on the risk of flooding—not that land development over the past several decades may have caused the hydrology of the floodplain to change.

Also, to the extent this Court is willing to extend Riverside's affidavits regarding the Pond, the risk of a "downstream flood" is not an imminent injury, *supra* Part I.B, and is not fairly

traceable to Ultimate, *supra* Part I.C. Standing "assures there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Summers*, 129 S. Ct. at 1149 (internal quotation marks omitted). Riverside lacks standing over Wetland B and the Pond and cannot bring suit against Ultimate. Therefore, the District Court's standing analysis should be reversed in toto.

II. Riverside has failed to adequately establish jurisdiction to challenge Ultimate's lawful land development in its isolated, intrastate Pond.

The District Court's ruling regarding the 2003 discharge into the isolated, intrastate Pond should be rejected for two reasons. First, Riverside's challenge to Ultimate's Pond development is barred by the *Gwaltney* doctrine and the applicable five year statute of limitations. Second, there is insufficient evidence in the record to find that the Pond is a jurisdictional water.

A. The District Court lacked jurisdiction over Ultimate's wholly past activities and Riverside's claims are barred by the statute of limitations.

Riverside, over eight years after Ultimate's development of the island green, now seeks to bring a citizen suit under the CWA. R. at 1, 2. The sole basis for Riverside's claim lies within the general prohibition in section 301(a) of the CWA barring the unpermitted "*discharge* of any pollutant." 33 U.S.C. § 1311(a) (emphasis added); *see also id.* § 1362(12) (defining "discharge" as "any addition of any pollutant to navigable waters from any point source"). The Supreme Court has made clear that a section 505(a) citizen suit is not permitted where a defendant's conduct is wholly past. *Gwaltney*, 484 U.S. at 64. Only where a violation is ongoing or intermittent may a citizen bring suit under the CWA. *Id.* Moreover, a citizen "wishing to bring actions under the [CWA] must satisfy the five year statute of limitations." *Powell Duffryn*, 913 F.2d at 75 n.15; *see* 28 U.S.C. § 2462. There is no question that Ultimate's Pond project ended in 2003. R. at 8. The District Court's ruling was erroneous because it ignored the plain text of

the statute, is inconsistent with the nature of the prohibited conduct at issue, and misconstrues the central holding from *Gwaltney*.

1. The District Court's interpretation that a violation is continuing based on the presence of fill material is inconsistent with the plain language of the CWA.

Federal courts only have jurisdiction over suits against parties alleged to be "in violation" of the CWA. 33 U.S.C. § 1365(a). In matters of statutory construction, a court must first turn to the language of the statute itself. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Unless Congress clearly indicated otherwise, the language employed "must ordinarily be regarded as conclusive." *Id.* The Supreme Court has made clear that in order to find a "continuing offense," either there must be a clear indication in the text of the statute or the nature of the activity involved must indicate that Congress intended that the activity be treated as a continuing offense. *Toussie v. United States*, 397 U.S. 112, 115 (1970). Both the text of the statute and the nature of the conduct prohibited by Congress indicate that section 301(a) regulates *activities*, not effects. The District Court's opinion stretches the language of the CWA beyond congressional design.

The CWA predicates a violation on the *act* of discharging a pollutant, not the continued presence of the pollutant. 33 U.S.C. §§ 1311(a), 1362(12); *see also Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1145 (10th Cir. 2005) ("[s]ection 404 emphasizes the 'activity' giving rise to the discharge of dredged material"). In *United States v. Telluride Co.*, the court analyzed whether there could be a continuing violation based merely on the presence of dredged or fill material in a wetland. 884 F. Supp. 404 (D. Colo. 1995), *rev'd on other grounds*, 146 F.3d 1241 (10th Cir. 1998). The court reasoned that because the defendant was "not presently discharging pollutants . . . no present or continuing violation exist[ed]." *Id.* at 408. The court further explained that the continued effects of a past discharge were insufficient to create a

statutory violation. *Id.* Of central importance to the *Telluride* court was the Supreme Court's reasoning from *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). In *Evans*, the Supreme Court held that in the context of an employment discrimination case, a continuing impact from past violations is not actionable unless a "present *violation* exists." *Id.*

Riverside's claim amounts to nothing more than a continuing impact theory. This theory is divorced from the only affirmative prohibition in the text of the statute: an unauthorized "discharge." 33 U.S.C. § 1311(a). Various courts have held that the continuing environmental impacts from a past discharge are not actionable. The Second Circuit in *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.* explained, in the context of a section 505(a) suit, the "present violation requirement of the Act would be completely undermined if a violation included the mere decomposition of pollutants." 989 F.2d 1305, 1313 (2d Cir. 1993). Based on the command of the statute and logic, there must be a present discharge to establish CWA jurisdiction. *Id.*; *accord El Paso Gold Mines, Inc.*, 421 F.3d at 1140 (a violation is wholly past where the "discharging activity from a point source . . . ha[s] ceased"); *Froebel v. Meyer*, 217 F.3d 928, 938–39 (7th Cir. 2000) (the discharge of a pollutant requires "active conduct"). The nature of the conduct regulated by section 301(a) is only continuous where the *act* of discharging is itself ongoing. There is no element of section 301(a) that concerns past discharges or the ongoing effects of past discharges.

In the context of other environmental statutes, Congress has used language to establish a continuing offense. As the Supreme Court noted in *Gwaltney*, Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA) expressly authorizes a citizen suit against "any *past or present* generator . . . who *has contributed* or is contributing to the *past or present* . . . storage . . . or disposal of certain hazardous waste." 484 U.S. at 57 n.2 (citing 42 U.S.C.

§ 6972 (2006) (emphasis added) (internal quotation marks omitted)). As the Court further noted in *Gwaltney*, the fact that Congress used this language in RCRA demonstrates that Congress "knows how to avoid [the] prospective implication [of language like that used in the CWA] by using language that explicitly targets wholly past violations." *Id.* at 57; *accord Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 121 (E.D.N.Y. 2001) ("It is RCRA, rather than the CWA, that appropriately addresses liability for ongoing contamination by past polluters.").

The District Court grounded its interpretation of section 505(a) on two precarious decisions that should not be extended by this Court. First, the District Court cited *Sasser v. U.S. Environmental Protection Agency*, 990 F.2d. 127, 129 (4th Cir. 1993), as holding that a continuing violation exists under the CWA so long as fill remains in place. R. at 9. The *Sasser* decision, however, addressed the issue of whether a recent amendment to the CWA permitted the EPA to assess an administrative penalty against a defendant that engaged in fill activities at a time when the CWA had no provision for such fines. 990 F.2d at 129. The court did not analyze the meaning of the phrase "in violation" in section 505(a). The District Court's extension of *Sasser* is inconsistent with *Gwaltney*, which made a sharp distinction between EPA's ability to *retroactively* assess penalties and the inability of citizen suits to reach wholly past discharges. 484 U.S. at 58–59; *see* 33 U.S.C. § 1319(d).

Second, the *North Carolina Wildlife Federation v. Woodbury* decision is equally unavailing. No. 87-584-CIV-5, 1989 WL 106517 (E.D.N.C. Apr. 25, 1989). The *Woodbury* court, rather than grounding its decision on the statutory text, cited policy concerns related to citizen-suit plaintiffs' ability to enforce the CWA. This logic is on shaky grounds first as a matter of statutory interpretation because "a court cannot use policy considerations to reach a result inconsistent with statutory language." *United States v. Rutherford Oil Corp.*, 756 F. Supp.

2d 782, 793 (S.D. Tex. 2010) (rejecting the policy logic of *Woodbury* and holding that "[o]nce the violator ceases its discharging, its violation ends and the statute of limitations begins to run"); *see also Envtl. Def. Fund, Inc. v. City of Chicago*, 985 F.2d 303, 304 (7th Cir. 1993) ("Only Congress may change the law in response to policy arguments, courts may not do so."), *aff'd*, 511 U.S. 328 (1994). The second problem with the *Woodbury* logic is that rather than interpret what a "violation" is under the CWA, the court focused on the injury suffered by environmental plaintiffs. 1989 WL 106517, at *2. Section 505(a), however, does not allow a citizen-suit plaintiff to bring a claim if it merely suffers some "injury." This policy focus ignores the intended role of a citizen suit in the CWA's statutory scheme: "to supplement rather than to supplant government action." *Gwaltney*, 484 U.S. at 60. At all times, the EPA retains authority to assess penalties for past violations and its full criminal enforcement power. 33 U.S.C. § 1319(c), (d).

Riverside may attempt to rely on the substantive regulations relating to section 404 as a basis to establish a continuing violation. Even if this Court found buried in Agencies' regulations a hidden, ongoing duty, the *Toussie* court held that regulations alone cannot be the basis for an ongoing violation. 397 U.S. at 120–21 ("the statute itself, apart from the regulation," must justify the conclusion there is an continuing offense). Furthermore, section 404 of the CWA gives the Corps *discretionary* authority to issue a permit, yet imposes no ongoing duty on a party to procure a permit for a past discharge. 33 U.S.C. § 1344(a). The ability to get an after-the-fact permit under the Corps' regulations, because it is a *permissive* and not a mandatory option for a discharger, likewise does not establish that Congress intended the violation to be continuing. 33 C.F.R. § 326.3(e) (2012). The regulations themselves hint that an unpermitted discharge cannot be continuing because when jurisdictional determinations are being challenged,

as in this case, a permit application cannot be accepted unless the applicant furnishes a "statute of limitations tolling agreement to the district engineer." *Id.* at 326.3(e)(1)(v).

This focus on the prohibited activity, a "discharge," rather than on a permissive permit opportunity is reasonable in light of how other courts have interpreted a "violation" in the context of the statute of limitations. The Eleventh Circuit in *National Parks & Conservation Ass'n, Inc. v. Tennessee Valley Authority* held that a "discharge" in violation of the Clean Air Act's Prevention of Significant Deterioration ("PSD") program accrues when the violation occurs, even if a permit would have been required under applicable regulations. 502 F.3d 1316, 1325 (11th Cir. 2007); *accord Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1016 (8th Cir. 2010) (holding that building or altering a machine without a permit is not a continuing violation because the violation occurs at the time of the construction or modification). This Court should reject a creative interpretation of the CWA based on regulations divorced from the statute's plain language.

2. Justice Scalia's concurrence in *Gwaltney* reinforced that citizen suits cannot be based on wholly past violations.

Justice Scalia's analysis of the phrase "to be in violation" does not mean what Riverside may hope. *Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring in part and concurring in the judgment). The quotation cited by the District Court, read in context, is that the phase "to be in violation" "suggests a state rather than an act," and that a past violation is continuing until the violator has "put in place *remedial measures*." *Id.* (emphasis added). The purpose of remedial measures is to "clearly eliminate the cause of the violation." *Id.* Here there is simply no prospect of future discharges because once the point source of the discharge was removed—here the equipment used to create the island green—the cause of the violation was eliminated. While Riverside may attempt to limit the *Gwaltney* holding to section 402 discharges, the operative

language in both sections 402 and 404 is the same and rooted in the prohibition of unauthorized discharges. 33 U.S.C. § 1311(a); *see Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2481 (2009) ("Congress issued a core command" in section 301(a)).

3. Riverside's challenge is time barred under the five year statute of limitations.

The District Court ruled that because the fill material remains in the Pond, Ultimate remains "in violation" of section 301(a) the CWA. R. at 9. Riverside's claim is barred under the five year statute of limitations because any potential claim against Ultimate will have accrued when the alleged violation occurred. This court should focus on the language of section 2462,[3] whose meaning has been settled since Congress enacted the statute in 1839. *3M Co. (Minnesota Min. & Mfg.) v. Browner*, 17 F.3d 1453, 1462 (D.C. Cir. 1994). The court in *3M* correctly held that a claim begins to accrue once a violation occurs. 17 F.3d at 1461; *accord Tennessee Valley Auth.*, 502 F.3d at 1322. The CWA predicates a violation on the *act* of discharging a pollutant, not the continued presence of the pollutant. 33 U.S.C. §§ 1311(a), 1362(12). If Congress was concerned about tolling the statute of limitations until the effects of a discharge were discovered, it could have drafted language in the CWA. *See, e.g.*, 42 U.S.C. § 9612(d) (2006) (limiting CERCLA natural resources damages claim to three years from discovery); 28 U.S.C. § 2416(c) (2006) (establishing a discovery rule to the statute of limitations for government claims for money damages).

B. The isolated, intrastate Pond is not subject to CWA jurisdiction.

The CWA bars the discharge of a pollutant into "navigable waters," defined as "the waters of the United States." 33 U.S.C. § 1362(7), (12). The Agencies have established

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[3] Section 2462 provides that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462.

substantively identical regulatory definitions of "waters of the United States." *See* 40 C.F.R. § 122.2 (2012) (EPA); 33 C.F.R. § 328.3(a) (2012) (Corps). The District Court held that the isolated, intrastate Pond on Ultimate's property was subject to the CWA based on two theories. R. at 8. The first theory was that the Pond is a "tributary" under the Agencies' joint regulations. 33 C.F.R. § 328.3(a)(5). Next the Court found that the Pond qualified as an "other water" under 33 C.F.R. § 328.3(a)(3). Both findings were misplaced and this Court should reverse.

1. The District Court's determination that the Pond was jurisdictional is inconsistent with the language of the regulation.

The Agencies have included in the regulatory definition of "waters of the United States" "[t]ributaries of waters identified in paragraphs (a)(1) through (4) of this section." 33 C.F.R. § 328.3(a)(5). A tributary is not defined in the regulations, but is commonly understood as a "a stream feeding a larger stream or lake." Webster's Third International Dictionary 2441 (2002). The District Court reasoned that the Pond was a "tributar[y]" based on its proximity to the Fenario River and because of the "porosity of Wetland A between the pond and the River." R. at 8. Further, the Court granted deference to EPA's interpretation of the meaning of "tributaries," as announced for the first time in this litigation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

The Pond is not a tributary for two reasons. First, the Pond cannot be a jurisdictional water based on proximity. The only waters found to be jurisdictional due to proximity with other waters are "wetlands." 33 C.F.R. § 328.3(a)(7) (defining "[w]etlands adjacent to waters" as jurisdictional under the CWA); *see also S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707 (9th Cir. 2007) ("[N]othing in *Bayview, SWANCC* or *Rapanos* requires or supports the view that [a pond] is a water of the United States because it is adjacent . . . ."). To the extent the EPA advocated otherwise in its briefings to the District Court, that position conflicts with the text of

the binding regulations, the *2008 Guidance* document,[4] and the Agencies' informal 2011 *Draft Guidance* document[5] regarding waters of the United States. Subsequent, inconsistent interpretations of a regulation do not receive deference. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

Second, the Pond is not a tributary based solely on the "porosity" of Wetland A between the Pond and the Fenario River. R. at 8. The record establishes that the Pond has "no streams leading either into it or out of it." R. at 2 n.1. Further, Wetland A and the Fenario River only have a surface connection during storm events. R. at 4 n.3. Most courts finding jurisdiction over a tributary rely on facts establishing an existing surface flow. *United States v. TGR Corp.*, 171 F.3d 762, 764 (2d Cir. 1999) (non-navigable tributaries flowing into navigable streams are "waters of the United States"); *United States v. Eidson*, 108 F.3d 1336, 1341–42 (11th Cir. 1997) (manmade ditches and canals that flow intermittently into a creek may be tributaries). This result makes sense and is consistent with the common understanding of a tributary: a "'stream which contributes its flow to a larger stream or other body of water.'" *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (citing Random House College Dictionary 1402 (rev. ed. 1980)).

The common understanding of a tributary does not support the reliance on mere sub-surface hydrologic connections to establish jurisdiction. To the extent EPA is willing to consider

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[4] *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States *&* Carabell v. United States *("2008 Guidance")*, at 6 n.24 (Dec. 2, 2008), http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_ CWA_ Jurisdiction_Following_Rapanos120208.pdf (a tributary includes "water bodies that carry *flow* directly or indirectly into a traditional navigable water," and includes the "entire reach of the *stream* that is of the same order") (emphasis added).

[5] *Draft Guidance on Identifying Waters Protected by the Clean Water Act ("Draft Guidance")*, at 11 (April 27, 2011), http://www.epa.gov/tp/pdf/wous_guidance_4-2011.pdf (defining a tributary as a water that "contributes *flow* to a traditional navigable water or interstate water, either *directly* or *indirectly by means of other tributaries*") (emphasis added).

sub-surface hydrologic connections in this case, its jurisdictional determination encompasses groundwater. The Agencies do not have regulatory power over every drop of water. *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (holding that a groundwater connection between a treatment pond and a jurisdictional water was not a valid basis to exercise jurisdiction). Jurisdiction over groundwater is reserved to the states because the issue is so complex and varied. *Id.* (citing S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1972)). The Fifth Circuit has likewise declined to extend CWA jurisdiction over groundwater. *Exxon Corp. v. Train*, 554 F.2d 1310, 1325–29 (5th Cir. 1977). If EPA actually underwent rule making, it would "pose a harder question" to this Court. *Dayton*, 24 F.3d at 966. In this case, EPA's brief is in conflict with the language of the statute and should be afforded no deference. *White v. United States*, 543 F.3d 1330, 1336 (Fed. Cir. 2008) ("Since Congress spoke to the precise issue, the agency's statutory interpretation is not entitled to deference.").

2. The Pond is not an "other water" subject to CWA jurisdiction.

The District Court also found that Ultimate's isolated, intrastate Pond was an "other water" under 33 C.F.R. § 328.3(a)(3). R. at 8. There is no evidence that the Pond's "use, degradation or destruction . . . could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (the type of evidence that can be used to establish an impact on interstate commerce is explicitly provided in § (a)(3)(i)–(iii) of the regulation). At best, "proximity and porosity" may be relevant to determining whether a wetland adjacent to a tributary is subject to CWA jurisdiction. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). Unless the Pond is itself considered to be a "wetland," this Court cannot insert a "significant nexus" consideration into the "other waters" category. *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 998 (9th Cir. 2007) (analyzing the porosity of a pond and adjacency because the pond was found to be apart of

a surrounding wetland). To the extent the *Draft Guidance* extends a "significant nexus" analysis to every other category of waters, *Draft Guidance*, *supra*, at 26, that interpretation must be rejected as being in conflict with the plain language of the regulations. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (deference to an agency interpretation is unwarranted when the agency's "interpretation conflicts with a prior interpretation").

This Court should reiterate that the CWA does not give the Agencies "an essentially limitless grant of authority," and that such a "boundless view" fails to provide regulatory clarity. *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring). The Agencies are relying on an expansive definition of jurisdiction, *Draft Guidance*, *supra*, at 26, that conflicts with the police power of the States. *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs ("SWANCC")*, 531 U.S. 159, 174 (2001). This expansion of jurisdiction undermines the basic principle that the Agencies must give regulated parties "fair warning of the conduct [a regulation] prohibits or requires." *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.).

III. EPA and Riverside do not have statutory claims under the CWA relating to Wetland B.

The CWA prohibits the addition of a pollutant to "waters of the United States" unless a discharge is authorized by a permit under either sections 402 or 404 of the Act. 33 U.S.C. §§ 1311(a), 1342(a), 1344(a). EPA's assertion of jurisdiction over Wetland B should be reversed for two reasons. First, Wetland B is not a jurisdictional "water of the United States." 33 U.S.C. § 1362(7). Second, even if Wetland B is subject to the CWA, Ultimate's development in Wetland B does not constitute a discharge of a pollutant under the Act. 33 U.S.C. § 1311(a).

A. Wetland B is not a jurisdictional water of the United States.

The District Court's ruling that Wetland B is jurisdictional should be reversed for two reasons. First, the Agencies' lawfully enacted regulations, coupled with the *Draft Guidance*'s lack of authority, militate against finding Wetland B to be jurisdictional. Second, the Agencies' exercise of jurisdiction was faulty because Wetland B falls outside the "other waters" category.

1. Wetland B falls outside the scope of CWA jurisdiction because it is not a wetland adjacent to navigable waters.

The Agencies adopted a regulatory definition of "waters of the United States" that constitutes the *exclusive* list of jurisdictional waters. 33 C.F.R. § 328.3(a); *see Cargill*, 481 F.3d at 705 (there is "little doubt that the regulatory definition [of "waters of the United States"] is intended to be exhaustive"); *see also Shell Oil Co. v. Envtl. Prot. Agency*, 950 F.2d 741, 753 (D.C. Cir. 1991) (noting that using the phrase "*means,* as opposed to . . . *includes,*" connotes an exclusive list). The definition of "waters of the United States" includes "[w]etlands adjacent to waters." 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a)(7). The regulations further define "adjacent" to mean "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c). The District Court erroneously deferred to the nonbinding *Draft Guidance* issued by the Agencies in 2011 to find that Wetland B is jurisdictional. R. at 6. There are three reasons why the District Court's ruling should be reversed: (1) the plain meaning of "adjacency" connotes only physical proximity; (2) the Agencies' regulations do not permit jurisdiction over a wetland that is adjacent to another wetland; and (3) the *Draft Guidance* should be afforded no deference.

First, the *Draft Guidance*'s newly minted meaning of "adjacency" invents a "relational" approach to jurisdictional determinations. Yet the regulatory definition of "adjacent" is tied to physical proximity. 33 C.F.R. § 328.3(c) (defining adjacent to mean "bordering, contiguous, or neighboring"). In the context of the Clean Air Act, the Sixth Circuit analyzed a closely

analogous regulation relating to activities that are "located on contiguous or adjacent properties." *Summit Petroleum Corp. v. U.S. Envtl. Prot. Agency*, 690 F.3d 733, 741 (6th Cir. 2012). The EPA interpreted adjacent to include facilities "so long as they are functionally related, irrespective of the distance that separates them." *Id.* at 744. The court held that "both the dictionary definition and etymological history of the term adjacent" meant the term unambiguously refers only to physical proximity. *Id.* at 741. Underpinning the court's logic was that agencies do not have "unbridled discretion to interpret terms of their own [ambiguous] regulations in any conceivable manner." *Id.* at 746. Having scoured relevant dictionary definitions, the court could not find any authority suggesting that "'adjacent' invokes an assessment of the functional relationship between two activities." *Id.* at 742.

The definition of adjacent in the *Draft Guidance* is inconsistent with the plain language of the regulations in that it makes a wetland jurisdictional based on a mere "hydrologic connection" or "locat[ion] within the riparian area or floodplain." *Draft Guidance*, *supra*, at 16–17; R. at 5–6. The regulations only permit wetlands to be jurisdictional when they are "adjacent to waters." 33 C.F.R. § 328.3(a)(7). The two sub-classes of "adjacency" conjured up in the *Draft Guidance*, R. at 5–6, are divorced from proximity. *Draft Guidance*, *supra*, at 16–17; *see also Cargill*, 481 F.3d at 705 (refusing to find a pond jurisdictional based only on a hydrologic link). The *Draft Guidance* approach thus relies on sub-surface hydrologic connections no matter how great the distance, and is inconsistent with the notion that groundwater is not within the jurisdiction of the CWA. *Dayton*, 24 F.3d at 965 (holding that the CWA does not grant authority over groundwater merely on basis that it may be hydrologically connected with surface waters).

It is far fetched to give any weight to the Agencies' non-binding and tentative definition of adjacency.[6]

Second, under the Agencies' regulations, a wetland adjacent to another wetland is not jurisdictional. 33 C.F.R. § 328.3(a)(7) (wetlands are not jurisdictional if they are adjacent to other waters "*that are themselves wetlands*") (emphasis added). Wetland B best qualifies as a wetland adjacent to another wetland because it is buffered from the nearest navigable water by Wetland A. R. at 1–2, App. A. Wetland B is situated past the northern perimeter of the isolated, intrastate Pond, and is a mile from the nearest navigable-in-fact water. R. at 1–2. This geographic relationship is a far cry from the adjacency analysis upheld by the Supreme Court in *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121, 133 (1985) (a wetland physically abutting a jurisdictional water is subject to the CWA). The only binding standards this Court should recognize are the Agencies' lawfully enacted regulations. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (*Chevron* deference is afforded to formal agency rules because they carry the "force of law").

Third, the Agencie's *Draft Guidance* should be afforded no deference. This Court is only obligated to consider an Agency's informal policy statements to the extent it has the "power to persuade" under the *Skidmore* doctrine. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Under the "power to persuade" standard for interpretive agency statements, the *Draft Guidance* falls short. The infirmity in Agencies' approach to determining enforcement authority over jurisdictional waters is two-fold.

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[6] This Court should take note of a key lesson from *Rapanos*: while the Agencies "enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority," 547 U.S. at 758 (Roberts, C.J., concurring), proposed rulemaking that has gone nowhere is a questionable basis through which to establish jurisdiction in this case.

The limitless view of jurisdiction in the *Draft Guidance* is inherently suspect. Chief Justice Roberts noted in his concurrence in *Rapanos v. United States* that a boundless view of the CWA is "inconsistent with the limiting terms Congress had used in the Act." 547 U.S. at 757 (Roberts, C.J., concurring). The District Court found that a wetland "within the riparian area or floodplain of a jurisdictional water" will generally be an adjacent wetland. R. at 6. This amorphous standard, explained in the *Draft Guidance*, is that in a "significant nexus" analysis it is proper to consider "collectively" within a "wetland mosaic" the relationship between distinct wetlands. *Draft Guidance*, *supra*, at 17. Where the EPA interprets its authority beyond the scope of the applicable statute and regulations, its position is not entitled to deference. *SWANCC*, 531 U.S. at 174 (a boundless view of jurisdiction is a "significant impingement of the States' traditional and primary power over land and water use"). The *Draft Guidance* does just that—sweeping in wetlands over 100 miles away from the Mississippi River and aggregating 17 million acres of land in the Little Colorado River watershed.[7] R. at 6.

This Court should also reject the Agencies' interpretation because it is plainly erroneous and inconsistent with the binding regulations. *Auer*, 519 U.S. at 461. As an initial matter, the "*Auer* doctrine" should not be applied to the *Draft Guidance* because the text of the document explicitly disavows that it represents the Agencies' formal interpretation of its regulations and states that it is not binding law.[8] *Draft Guidance*, *supra*, at 1. Thus, the document cannot

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[7] *See* U.S. Army Corps of Engineers, *Magnitude-Frequency of Sediment Transport in the Lower Mississippi River*, p.4 (Miscellaneous Paper CHL-99-2, Aug. 1999); Waters Advocacy Coalition et al., Comments in Response to the Draft Guidance on Identifying Waters Protected by the Clean Water Act, Docket No. EPA-HQ-OW-2011-0409 (July 29, 2011) (discussing the Little Colorado River watershed); *see also Norton Constr. Co. v. U.S. Army Corps of Eng'rs*, 280 Fed. App'x 490, 493 (6th Cir. 2008) (describing the Muskingum Watershed, which "encompasses 18 counties in Ohio").

[8] The *2008 Guidance* likewise states that it does not replace any "legally binding requirements." *Id.*, *supra*, at 4 n.17. Specifically, "[t]his guidance does not substitute for those

embody the Agencies' "fair and considered judgment." *Auer*, 519 U.S. at 461–62. The government, in the only case addressing deference to the post-*Rapanos* guidance documents, conceded that the *2008 Guidance* was "not binding" on the Corps. Answering Brief of U.S. Army Corps of Eng'rs at 35–36, *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011) (No. 09-2239), 2010 WL 1256784. The Fourth Circuit appropriately limited its review of the *2008 Guidance* document to the *Skidmore* doctrine. *Precon*, 633 F.3d at 291. Whether the Agencies' took a similar position in 2008, R. at 6, is not a reason to afford the *Draft Guidance* greater legal weight. As noted in Part III.A, *supra*, the weight of authority does not support the Agencies' daisy chain theory of jurisdiction under the CWA. Therefore, the *Draft Guidance* lacks any power to persuade.

2. Wetland B does not fall within the "other waters" category.

The District Court sua sponte extended Justice Kennedy's "significant nexus" test to a wholly separate category of jurisdictional waters. R. at 7 (citing 33 C.F.R. § 328.3(a)(3)). The Agencies' regulations define "waters of the United States" to include "[a]ll other waters . . . the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3). The District Court's analysis conflicts with the inherent limits Congress established in the CWA and should be rejected for four reasons. R. at 7.

First, inventing an additional basis for jurisdiction because of a "significant nexus" is inconsistent with the Agencies' regulations. 33 C.F.R. § 328.3(a)(3). The regulation itself is concerned with activities that have an effect on "interstate commerce" and does not speak to the relationship between water bodies. *Id.* The three examples provided in the regulation are telling:

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provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances." *Id.*

interstate travelers, sales in interstate commerce, and industry related to interstate commerce are wholly unrelated to whether a water body has a "significant nexus" with another. *Id.* at § 328.3(a)(3)(i)–(iii). The *Draft Guidance* engrafts a new basis for jurisdiction that is disconnected from interstate commerce. *Draft Guidance*, *supra*, at 19–20. An interpretive guidance document cannot be inconsistent with the plain language of the regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954) (an agency is bound by its own regulations). The district court's "other waters" analysis should be reversed.

Second, even if this Court were to apply the "significant nexus" test,[9] there is insufficient evidence in the record to hold Wetland B is jurisdictional. The record establishes that Wetland B provides "flood control and water retention benefits." R. at 7. EPA, however, must establish that Wetland B has a "chemical, physical, *and* biological" connection with a jurisdictional water body. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). Justice Kennedy warned that a "mere hydrologic connection should not suffice in all cases" because a hydrologic link does not alone "establish the required nexus with navigable waters." *Id.* at 784–85. Contrary to the District Court's conclusion, R. at 7, "flood control" and "runoff storage" were merely examples from the Corps' regulations of the public benefits wetlands provide, *not* an independent basis to find a "significant nexus." *Rapanos*, 547 U.S. at 779 (citing 33 C.F.R. § 320.4(b)(2) (2012)).

Cases applying Justice Kennedy's analysis thus require all three aspects of the "significant nexus" test to be satisfied. *See, e.g.*, *United States v. Donovan*, 661 F.3d 174, 187 (3d Cir. 2011) (the "wetlands *alone* significantly affect the chemical, physical, and biological

[9] For the purpose of this argument, Ultimate agrees with the District Court that all Circuits addressing the question of which *Rapanos* opinion controls have found jurisdiction where Justice Kennedy's test is satisfied. R. at 7. The *Rapanos* tests, however, are confined to the question of whether a wetland adjacent to a tributary is jurisdictional. This case is really about whether Wetland B is adjacent to a traditional navigable in fact water, not a tributary.

integrity of 'waters of the United States'"); *United States v. Cundiff*, 555 F.3d 200, 211 (6th Cir. 2009) (jurisdiction was based on a significant nexus between wetlands and the navigable-in-fact Green River supported by expert testimony of lost ecological functions *and* flood prevention); *United States v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008) (jurisdiction was valid because of a wetlands' flood prevention *and* pollution connection with a navigable water). The evidence in the record is insufficient because it merely describes hydrologic features and not Wetland B's precise relationship to the Fenario River. R. at 7. The public interest considerations from the Corps' regulations in isolation, such as flood control and runoff retention, do not alone establish the "existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Rapanos*, *547* U.S. at 779 (Kennedy, J., concurring).

Third, the District Court erroneously concluded that the decision in *SWANCC* has no bearing on this case. R. at 7. While *SWANCC* did invalidate the "Migratory Bird Rule," it also placed important limits on jurisdiction under the CWA. The central rationale behind the ruling in *SWANCC* was that the agency's interpretation of the regulation was intrusive of State rights and thus potentially inconsistent with the Constitution. *SWANCC*, 531 U.S. at 174. Pursuant to *SWANCC*, not any connection with an isolated water is sufficient to establish jurisdiction. *Id.* There a mere biological connection based on the presence of migratory birds was not enough. *Id.* Interpreting the CWA to include waters that "could affect" interstate commerce based *solely* on a potential "significant nexus" implicates precisely the same issue discussed in *SWANCC*—a statute construed so broadly as to upstage the federal–state balance. *Id.* at 172; *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). The CWA protects the traditional authority of States over intrastate water management. 33 U.S.C. § 1251(b), (g).

Fourth, the *Draft Guidance* expands CWA jurisdiction beyond the scope of federal power delegated by the Commerce Clause. U.S. Const. art. I, § 8, cl. 3 (granting Congress the power to "regulate Commerce"). At present, the "other waters" regulation only covers activities that have a substantial affect on interstate commerce. 33 C.F.R. § 328.3(a)(3). Importing the "significant nexus" test into the "other waters" regulation unconstitutionally expands the Agencies' power beyond commercial activities. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586–87 (2012) (the "power to *regulate* commerce presupposes the existence of commercial activity"). Justice Kennedy's response to this concern in *Rapanos* is fruitless because "national water quality" concerns are *not* necessarily part of a "class of activities" regulated under the Constitution. *Rapanos*, 547 U.S. at 777 (Kennedy, J., concurring); *cf. Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) (aggregating like commercial activities); *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 277–81 (1981) (permitting regulation of intrastate coal mining). The *Draft Guidance* erodes the limits inherent in the Commerce Clause and draws every drop of water "'into its impetuous vortex.'" *Sebelius*, 132 S. Ct. at 2589 (citing *The Federalist No. 48*, at 309 (James Madison)).

B. The Agencies' interpretation of "dredged material" is inconsistent with the plain language of the CWA and should be afforded no deference.

The District Court found that the mere redeposit of materials within a wetland could constitute an "addition," even where no new materials are added. R. at 2, 8. This interpretation of "discharge of dredged material" cuts the definition loose from its moorings: section 301(a) of the CWA. 33 U.S.C. §1311(a). Section 301(a) bars the discharge of a pollutant into a water of the United States unless that activity is permitted under sections 402 or 404 of the CWA. Ultimate's activities do not fall within the scope of section 404 for two reasons. First, the regulation of "redeposits" is inconsistent with the plain language of the statute. Second, the

cases permitting jurisdiction over "redeposits" are in conflict with the clear dictates of Supreme Court precedent.

1. The EPA's interpretation of "discharge of dredged material" is unreasonable and should be afforded no deference under *Chevron*.

The EPA and Riverside contend that Ultimate's ditching activities in Wetland B triggered section 404 jurisdiction. R. at 8. The regulations define "discharge of dredged or fill material" to mean "[a]ny addition, including redeposit other than incidental fallback, of dredged material." 33 C.F.R. § 323.2(d)(1)(iii) (2012). There is no definition of "addition" within the CWA. *See* 33 U.S.C. § 1362. EPA and Riverside's interpretation must fail for two reasons: first, because it is in conflict with the plain meaning of "addition;" and second, because it is unreasonable under the *Chevron* doctrine.

The Supreme Court has already ascertained the plain meaning of "addition." The Supreme Court in *South Florida Water Management District v. Miccosukee Tribe of Indians* held that there is no "addition" where pollutants are merely moved within the same water body. 541 U.S. 95, 109 (2004). The Supreme Court adopted the approach of the Second Circuit and established through analogy the logic of this outcome: "'if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back in the pot, one has not 'added' soup or anything else to the pot.'" *Id.* at 110 (citing *Catskill Mountains Chapter of Trout Unlimited, Inc., v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001)). The Supreme Court recently upheld the central rule from *Miccosukkee*: the transfer of pollutants "between 'two parts of the same water body' does not constitute a discharge of a pollutants under the CWA." *LA County*, 133 S. Ct. at 713. The Court relied on the common understanding of "add" to mean "'to join, annex, or unite (as one thing to another) so as to bring about an increase . . . ." *Id.* (citing Webster's Third International Dictionary 24 (2002)).

The District Court's decision is in conflict with the decision in *LA County* and the plain meaning of "addition." 133 S. Ct. at 713. The first step in the *Chevron* analysis is whether the statute is "silent or ambiguous with respect to the specific issue." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). The EPA's theory on the meaning of "addition" after the *LA County* decision is in conflict with a central tenet of statutory construction: "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9. Moreover, because the Supreme Court has ruled on the plain meaning of "addition" under the CWA, the Agencies may not espouse a new conflicting interpretation of the word. *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1844 (2012) (holding that a judicial determination relating to the plain meaning of the statute precluded an agency's "gap-filling regulation"). Thus, the Agencies' current interpretation of "addition" cannot rely on a nonexistent ambiguity. *Id.*

Second, even if this Court finds lingering ambiguity in the term "addition," regulating the redeposit of materials that do not come from outside Wetland B is unreasonable. Where Congress has not directly spoken to the precise question at issue, a court will defer to an agency's construction of the statute only if the interpretation is reasonable. *Chevron*, 467 U.S. at 842–43. The interpretation adopted by EPA is that "sidecasting" will categorically trigger CWA jurisdiction, even if the "pollutant" at issue is unaltered soil from roughly the same place within a jurisdictional water. R. at 2, 8. The broad brush strokes EPA paints in defining "additions" for section 404 discharges are in stark contrast to the interpretation of "addition" within the context of a section 402 discharge. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982) (an "addition" requires the discharge to "*introduce* the pollutant into navigable water from the

outside world"); Water Transfers Rule, 73 Fed. Reg. 33,697, 33,699 (June 13, 2008) (embracing *Miccosukee* and declining to regulate pollutants transferred within waters). The inconsistent treatment of "addition" by the Agencies shows that the categorical regulation of "sidecasting" fails to warrant deference. *Chevron*, 467 U.S. at 843.

The Agencies' cannot espouse inconsistent interpretations of the term "addition." While sections 402 and 404 are mutually exclusive permitting programs, *see Coeur Alaska*, 129 S. Ct. at 2460, jurisdiction under both programs is triggered by the gateway provision in section 301(a) of the CWA. 33 U.S.C. § 1311(a). The Agencies attempt here to interpret the jurisdictional trigger "discharge," or "addition," in two different and inconsistent ways. This is in conflict with the Supreme Court's holding in *Clark v. Martinez*: a court may not interpret the same word in the same statutory provision to have multiple meanings, as it would "render every statute a chameleon." 543 U.S. 371, 382 (2005).

Courts that permit words within a statute to be interpreted differently ground their logic in the structure of the statute. For example, in *Environmental Defense v. Duke Energy Corp.*, the Court permitted EPA to espouse differing interpretations of the term "modification" under the Clean Air Act. 549 U.S. 561, 576 (2007). The PSD program cross-referenced the definition of "modification" in the New Source Performance Standards ("NSPS") program. *Id.*; *see* 42 U.S.C. § 7479(2)(C) (2006). The PSD program, however, was enacted in a subsequent amendment to the Clean Air Act in 1977, and there was no indication that Congress "had details of regulatory implementation in mind when it imposed PSD requirements on modified sources." *Duke Energy*, 549 U.S. at 576. Unlike the Clean Air Act, the CWA defines a "discharge of a pollutant" in section 502 *alone*. 33 U.S.C. § 1362(12). Under the Agencies' logic, there could be a unique meaning for "pollutant," "point source," and "navigable waters" for sections 402 and

404, despite the fact the programs were enacted at the same time. Pub. L. No. 92-500, 86 Stat. 880, 884 (1972) (codified as amended at 33 U.S.C. §§ 1342, 1344 (2006)).

This inconsistency demonstrates that the Agencies have not provided a "reasoned explanation for [their] current position." *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 n.4 (2005) (noting that "[a]ny inconsistency bears on whether the [agency] has given a reasoned explanation for its current position"). Moreover, EPA's attempt to invent two meanings of "discharge" under section 301(a) is inconsistent with one of the CWA's primary objectives in authorizing the "EPA to create and manage a uniform system of interstate water pollution regulations." *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992). EPA's current sidecasting position is thus untenable under *Chevron*. 467 U.S. at 842–43.

2. The sidecasting cases decided prior to *Miccosukee* and *LA County* have no legal significance.

The cases cited by the District Court that regulate "sidecasting" are in conflict with the decisions in *Miccosukee* and *LA County* and are unpersuasive. R. at 8. First, the Fourth Circuit in *United States v. Deaton* considered whether placing "excavated dirt on either side of a ditch" constituted a discharge of a pollutant. 209 F.3d 331, 333 (4th Cir. 2000). The court's rationale was that an addition occurs where "an activity transforms some material form a nonpollutant into a pollutant." *Id.* at 335. The *Deaton* court's logic is flawed because the CWA does not regulate "transformations," but instead, "additions." The materials removed from a wetland, however, already contain listed pollutants, such as rock, sand, and biological materials. 33 U.S.C. § 1362(6). After *LA County*, 133 S. Ct. at 713, *Deaton* lacks persuasive power.

Second, *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001) likewise fails to provide an adequate reason to categorically regulate "sidecasting." In *Borden Ranch*, EPA sought jurisdiction to regulate a process known as "deep ripping" that

punctured and placed soil in roughly the same place. *Borden Ranch*, 261 F.3d at 814. The Ninth Circuit relied on the *Deaton* decision and earlier circuit precedent. *Id.* at 814–15. Both the logic from *Deaton* and the earlier circuit precedent are distinguishable. In *Rybachek v. U.S. Environmental Protection Agency*, the Ninth Circuit found jurisdiction over placer mine discharges under two scenarios: (1) the "material discharged is coming not from the streambed itself, but from outside it," or (2) the "resuspension" of placer mining occurs after chemical and physical processing. 904 F.2d 1276, 1285 (9th Cir. 1990) (O'Scannlain, J.). The first scenario in *Rybachek* is inapplicable here—all the soil at issue is from Wetland B. Furthermore, the dirt moved within Wetland B has not undergone a chemical and physical processing and subsequent "resuspension." R. at 2. Neither *Deaton* nor *Borden Ranch* provide a valid basis for the categorical regulation of "sidecasting."

CONCLUSION

The District Court erred in granting Riverside's motion for summary judgment, and this Court should reverse for three reasons. First, Riverside has failed to satisfy the constitutionally irreducible minimum needed to establish standing. Second, Ultimate's isolated, intrastate Pond is not subject to the CWA and Riverside cannot bring an untimely claim under the CWA citizen suit provision for a wholly past violation. Third, Riverside does not have a statutory claim relating to Wetland B because it is not a navigable water under the CWA and the land development activities do not trigger jurisdiction under section 404. For the foregoing reasons, Ultimate respectfully requests that this Court reverse the District Court's order granting summary judgment.