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**Upcoming Events****January**

*State Bar of Georgia Mid-Year Meeting  
January 13-15, 2005*

*Environmental Law Section Luncheon  
January 13, 2005*

**NAVIGATING THROUGH CLEAN WATER ACT JURISDICTION AFTER SWANCC**

*Holly P. Cole and Martin A. Shelton  
Stack & Associates, P.C., Atlanta, Georgia\**

**INTRODUCTION**

The most important issue that has been, and continues to be, debated in the courts regarding The Federal Water Pollution Control Act of 1972, more commonly known as the Clean Water Act ("CWA")<sup>1</sup>, is the scope of the Act's jurisdiction. Essentially everyone who owns property containing or touching a body of water potentially faces CWA regulation. Thus, the most hotly debated question, at present, is what waters are subject to the Act? In 2001, the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC")<sup>2</sup> spawned a flurry of differing opinions among the federal courts regarding the limits of CWA jurisdiction. Three petitions of certiorari reached the U.S. Supreme Court on this issue. Rather than hear these cases, however, the Supreme Court left the issues to simmer in the lower courts. This article will provide a summary and analysis of jurisdiction under the CWA before and after the Supreme Court's decision in *SWANCC*.

**I. Historical Scope of the CWA.**

The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>3</sup> In order to achieve this objective, the CWA prohibits the discharge of pollutants, including dredge and fill material, into navigable waters except in accordance with standards promulgated and permits issued under the CWA.<sup>4</sup> The CWA defines "navigable waters" as "waters of the United States, including territorial seas."<sup>5</sup> Jurisdiction under the Act depends on a threshold determination that the receiving waters are "waters of the United States." The Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers (the "Corps") are charged with the administration of the CWA and the issuance of permits.<sup>6</sup> The EPA and the Corps have broadly defined "waters of the United States" to include: all waters which are, were, or "may be susceptible" for use in interstate or foreign commerce, all waters "subject to the ebb and flow

## Message From the Chair

The Environmental Law Section's 15th Annual Summer Seminar on July 30-31, 2004 at the King & Prince on St. Simons Island was a great success. Jeff Dehner, my program co-chair, and I would like to thank all the moderators and speakers for your hard work and enthusiasm. Over 100 attendees at the seminar enjoyed the opportunity to learn about a wide variety of topics ranging from enforcement to brownfields to wetlands and water resources issues. We welcomed both new and familiar faces on the panels, including representatives from state and federal governments, the public interest community, private practitioners, in-house counsel and non-lawyers. I would also like to thank our sponsors – AIG Environmental, Black & Veatch, Brown and Caldwell, Burns & McDonnell, Genesis Project, Inc., Golder Associates, Premier Environmental Services, Inc., Terracon and United Consulting. Most of all, I would like to thank Steve Harper with ICLE. Steve provides the oversight and wisdom necessary to make this seminar a success year after year. Mark your calendar for next year's Summer Seminar to be held August 4-7, 2005 at the Hilton Oceanfront Resort on Hilton Head Island, South Carolina.

On September 29, 2004, the Environmental Law Section held a brown bag luncheon at the Atlanta offices of Alston & Bird LLP. Approximately 30 Section members enjoyed an informative panel discussion by in-house counsel. Our speakers were Ronald T. Allen, Assistant General Counsel – Environmental for Georgia-Pacific Corporation, Seth D. Bruckner, Corporate Counsel, UPS, Inc., and Anne H. Hicks, Associate General Counsel for Georgia Transmission Corporation. Our Member-at-Large officer, David Rose, led the panel. The panelists presented their unique perspective on being an environmental practitioner within the corporate setting, highlighting interesting aspects of the panelist's career and helpful advice that private practitioners might follow when working with in-house counsel. Thanks to Alston & Bird for hosting this event.

The Section anticipates holding at least one more Brown Bag luncheon before the end of the year. Potential topics are being explored. Any suggestions are always welcome. Also, please watch for information about our annual luncheon to be held at the State Bar of Georgia's Mid-Year Meeting, to be held January 13-15, 2005. This luncheon will be co-sponsored with the Atlanta Bar Association's Environment and Toxic Tort Section. The featured speaker will be Paula Frederick, Deputy General Counsel, State Bar of Georgia. Ms. Frederick will discuss issues related to multi-disciplinary and multi-state practice. CLE credit will be offered. To register for this luncheon, the registration form for the Mid-Year meeting must be submitted to the State Bar. Reminders about this luncheon will be mailed closer to this event.

Finally, it is time again to nominate members for Section officer positions. Jeff Dehner, currently Chair-Elect, will become Chair in January 2005. Ballots for the remaining officer positions will be distributed in late October, so please remember to cast your vote and return your ballots by the specified date.

## Navigating Through Clean Water Act

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of the tide," wetlands, all intrastate waters, lakes, rivers, streams (including intermittent streams), mudflats, sandflats, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, "which could affect interstate or foreign commerce," and all impoundments and tributaries of such waters.<sup>7</sup>

Since the Act's inception, the courts have grappled with how to interpret the CWA's admittedly expansive scope of application. In *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court broadly interpreted the text of the CWA and the Corps' corresponding regulations:

Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," . . . the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.<sup>8</sup>

For a number of years, this recognition of "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems"<sup>9</sup> led the courts to abandon the cumbersome determinations of navigability previously set out in cases dealing with the Rivers and Harbors Act.<sup>10</sup> The intent was to give expansive meaning to the term "waters of the United States" to cover not just waters deemed "navigable-in-fact," but to cover any waters affecting those traditional "navigable waters" and ultimately interstate commerce.<sup>11</sup>

Consistent with the Supreme Court's broad interpretation in *Riverside Bayview*, the Seventh Circuit in *Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, held that the CWA applies to all tributaries of navigable waters and waters which have an effect on interstate commerce.<sup>12</sup> Furthermore, in *United States v. Eidson*, the Eleventh Circuit held that "tributaries of navigable waters" are not limited to natural waterways but also may include man-made routes such as canals and storm drains.<sup>13</sup> Noting that Congress enacted the CWA to protect the nation's waters and chose to define navigable waters as broadly as possible, the *Eidson* court further held that a tributary need only flow intermittently to qualify as "waters of the United States."<sup>14</sup> Thus, in short, the CWA has been construed as applying to any waters which can eventually find their way into navigable waters. However, the U.S. Supreme Court's most recent consideration of CWA jurisdiction in *SWANCC* has created uncertainty about the scope of CWA jurisdiction.

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# Federal Sentencing Guidelines Called Into Question: Recent Environmental Applications in the Courts

*Brandon A. Van Balen and Molly Haining,  
Hunton & Williams LLP, Atlanta, Georgia\**

In the past year, the Eleventh Circuit and Seventh Circuit have instituted novel approaches of the United States Sentencing Guidelines (“U.S.S.G.”) sentencing enhancements in cases involving criminal violations of environmental statutes. In *United States v. Perez*, a Clean Water Act (“CWA”) case, the Eleventh Circuit interpreted environmental sentencing enhancements under U.S.S.G. § 2Q1.3(b), which provides for sentencing enhancements for, among other things, “ongoing” or “continuous” discharges and discharges without a permit.<sup>1</sup> In *United States v. Snook*, the Seventh Circuit held that U.S.S.G. § 3B1.3, which provides for a sentencing enhancement for violations of public trust, applied to a *private* industry official for violations of the CWA, a public health and safety regime.<sup>2</sup>

Nearly two months after *Perez* and *Snook* were decided, the United States Supreme Court placed the constitutionality of the entire federal sentencing scheme in question. In *Blakely v. Washington*, the Supreme Court created a potential sea change in criminal sentencing law.<sup>3</sup> The Court held that Washington State’s sentencing guidelines, which were similar to the federal sentencing guidelines, violated the Sixth Amendment to the extent that they allowed judges to enhance a sentence based on facts not found by the jury or admitted by the defendant.<sup>4</sup> Due to the similarities between Washington State’s sentencing guidelines and the federal sentencing guidelines, some courts have extended *Blakely*’s ruling to find that the federal guidelines are unconstitutional. Notably, the Supreme Court heard arguments in two cases on the first day of its current term that may allow it to determine the constitutionality of the federal guidelines.<sup>5</sup> Thus, while *Perez* and *Snook* raise new concerns for environmental practitioners and clients that may be charged with criminal violations of environmental statutes, *Blakely* and its progeny may have placed the constitutionality of the federal sentencing guidelines in doubt.

## Recent Environmental Sentencing Cases

In *Perez*, the Eleventh Circuit affirmed the sentence given to the owner of a waste and debris hauling business for the illegal discharge of pollutants in wetlands without a permit.<sup>6</sup> In an issue of first impression, the court affirmed the application of sentencing enhancements under U.S.S.G. §§ 2Q1.3(b)(1) and 2Q1.3(b)(4). Section 2Q1.3(b)(1) provides: “(A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollut-

ant into the environment, increase by 6 levels; or (B) if the offense otherwise involved a discharge, release, or emission of a pollutant, increase by 4 levels.”<sup>7</sup> Section 2Q1.3(b)(4) provides: “If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.”<sup>8</sup>

The defendant in *Perez* argued that the § 2Q1.3(b)(1) enhancement was improper because the government did not prove that actual contamination resulted from the discharges. The court rejected this argument and found that the government need not prove that the dumping resulted in “actual environmental contamination.”<sup>9</sup> Instead, the court held that the plain language of U.S.S.G. § 2Q1.3(b)(1) and its commentary notes only require that “a discharge, release, or emission of a pollutant” occurred.<sup>10</sup> “Accordingly, the government does not have to prove actual environmental contamination for § 2Q1.3(b)(1) to apply.”<sup>11</sup>

As to the § 2Q1.3(b)(4) enhancement, the defendant in *Perez* argued that its application constituted impermissible double counting because his failure to obtain a permit was already taken into account by the base level offense.<sup>12</sup> The *Perez* court also rejected this argument because the base level offense did not “account for the permit element of his criminal conduct” since it involved only the “mishandling” of environmental pollutants.<sup>13</sup> Defendant’s “failure to procure a permit was a distinct offense which, pursuant to the sentencing guidelines, warranted its own enhancement.”<sup>14</sup> Further, the court noted that the Sentencing Commission “understands the concept of double counting, and expressly forbids it where it is not intended.”<sup>15</sup> Therefore, if the Sentencing Commission believed that § 2Q1.3(b)(4) “might result in impermissible double counting in some situations, the Commission could have included an application note expressing its concern.”<sup>16</sup>

While *Perez* has direct implications for practitioners and their clients in this jurisdiction, the Seventh Circuit has also recently delivered a noteworthy application of another sentencing enhancement in an environmental case. In *Snook*, by a 2-1 majority, the Seventh Circuit upheld the application of the U.S.S.G. § 3B1.3 public trust sentencing enhancement to an environmental manager at a *private* oil refinery for criminal reporting violations under the CWA.<sup>17</sup>

The *Snook* majority found that the defendant violated the public trust because he had discretion to devise the facility’s wastewater treatment and reporting program and because the CWA “is public-welfare legislation and the victims of violations are the public.”<sup>18</sup> Essentially, the court determined that Snook’s duties under the CWA to report monitoring results for the facility put Snook in a position of trust with the public, even though he was privately employed. In an attempt to restrict its ruling from extending to all statutes that require any self-reporting, the *Snook* majority declared that the public trust enhancement could be applied to health and safety regulations (e.g., the CWA), but not to non-health and safety regulations (e.g., income taxes).<sup>19</sup>

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## Federal Sentencing Guidelines Called Into Question

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Judge Coffey issued a noteworthy dissent as to the application of the public trust enhancement in *Snook*. Judge Coffey argued that self-reporting statutes and regulations, even public health and safety regimes such as the CWA, do not place a *private* employee like Snook in a position of trust with the public.<sup>20</sup> Judge Coffey explained that the public did not place Snook in a position of trust, but rather the private company placed him in this position: “To be sure, the public may have ‘trusted’ Snook to obey applicable environmental regulations, as it ‘trusts’ *any* citizen to abide by *any* law protecting matters in the public interest... but the public did not *entrust* Snook... with the duty of protecting its health and welfare interests in the environment...”<sup>21</sup>

Judge Coffey also argued that the majority erred in drawing a distinction between health and welfare statutes and non-health and welfare statutes for purposes of the public trust enhancement. “[T]he position of trust inquiry focuses *not* on the nature of the statute violated by the defendant, but rather on whether or not a ‘fiduciary or personal trust relationship existed with [the victim].”<sup>22</sup> Thus, Judge Coffey argued that “for a defendant to have occupied a position of trust with the public, he must have worked as an agent or employee of the government, or held some other fiduciary-type position *vis-à-vis* the government or public.”<sup>23</sup> Under Judge Coffey’s reasoning, private environmental officials such as Snook do not fit this mold.

Although the Eleventh Circuit has not addressed the exact issue in *Snook* regarding whether an employee of a private firm is eligible for a public trust enhancement for criminal violations of an environmental statute, the Eleventh Circuit in *United States v. Garrison*, has stated in *dicta* that “statutory reporting requirements do not create a position of trust relative to a victim of the crime.”<sup>24</sup> Such language suggests that the Eleventh Circuit would find environmental reporting requirements do not create a position of trust between the public and privately employed individuals. *Garrison*, however, involved Medicare fraud by a privately employed individual submitted to the government through an intermediary, and thus is distinguishable from environmental cases.

Previous cases from other jurisdictions indicate a possible circuit split on public trust issues similar to those in *Snook*. For example, in *United States v. Gonzalez-Alvarez*, the First Circuit applied the public trust enhancement to a private individual that violated health regulations by selling adulterated milk to the public.<sup>25</sup> The court reasoned that it is “relevant to a § 3B1.3 inquiry whether the public expects that people in the position of the defendant will comply with health and safety regulations for which they are responsible.”<sup>26</sup> In contrast, in *United States v. Technic Services*, the Ninth Circuit rejected the First Circuit’s reasoning and held that an employee’s position with a *private* firm (a government asbestos contractor), without more, was *not* in a position of public trust in relation to violations of the CWA

and Clean Air Act.<sup>27</sup> The *Technic Services* court stated: “An obligation to follow important laws that further the public health and safety cannot, merely by its own force, create a position of public trust. To hold otherwise would convert the [public trust] enhancement into the general rule.”<sup>28</sup> Therefore, under *Technic Services*, a “defendant holds ‘a position of public trust’ when the defendant is a government employee or exercises directly delegated public authority.”<sup>29</sup>

## Sentencing Guidelines Called Into Question

While Georgia practitioners must deal with the holdings in *Perez* immediately, and may face the issues in *Snook* in the future, the constitutionality of those sentencing enhancements is now in doubt. Therefore, environmental practitioners should become familiar with *Blakely* and its progeny and keep a close eye on the Supreme Court’s decisions in the coming months as it is expected to rule on the constitutionality of the federal guidelines.

Simply put, the Supreme Court’s recent decision in *Blakely* placed the federal sentencing scheme into a state of chaos.<sup>30</sup> In *Blakely*, the defendant pled guilty to the kidnapping of his estranged wife in the Washington State trial court. The facts admitted in his plea supported a maximum sentence of 53 months for the crime. The trial court judge made a judicial determination under Washington State law, however, that Blakely acted with “deliberate cruelty” justifying a sentencing enhancement above 53 months. Blakely appealed the enhanced sentence, arguing that the Washington State sentencing procedure violated his Sixth Amendment right to a jury trial.<sup>31</sup>

The Supreme Court agreed with Blakely and held that the Washington State sentencing procedure was unconstitutional because it allowed a judge rather than a jury to determine facts that increased criminal sentences within statutory maximums. Such a procedure violated the defendant’s Sixth Amendment right to a jury trial. In *Blakely*, the judge’s finding of “deliberate cruelty” required additional fact-finding during the sentencing phase of the trial. The Court held that when a judge imposes punishment based on facts not found by the jury or admitted by the defendant, the jury has not determined all facts beyond a reasonable doubt, and the judge exceeds his proper authority by doing so.<sup>32</sup>

The majority noted the similarity between the Washington State sentencing guidelines and the federal guidelines, but stated in a footnote that “[t]he Federal Guidelines are not before us, and we express no opinion on them.”<sup>33</sup> Further, the majority avoided finding determinate sentencing schemes (such as the federal guidelines) unconstitutional, and explained that its holding was limited to how determinate sentencing schemes can be implemented while respecting the Sixth Amendment.<sup>34</sup>

In contrast, the dissent forecasted that, since the Wash-

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# A Missed Opportunity: Clarification of Buffer Requirements in Coastal Areas

Lewis B. Jones

King & Spalding LLP, Atlanta, Georgia\*

At the direction of the General Assembly in Senate Bill 460, the Georgia Environmental Protection Division (EPD) recently proposed to revise the existing criteria and procedures for granting variances from the buffer requirement under the Georgia Erosion and Sediment Act, O.C.G.A. § 12-7-1 *et. seq.* (the “Georgia E&SA”). Unfortunately, the EPD chose to restrict its proposal narrowly to variances.<sup>1</sup> In doing so, the EPD missed an opportunity to clarify and improve other aspects of the law, including significant questions about the application of this Act in coastal areas. Specific issues that need attention include the application of the buffer requirement to lands adjacent to marshlands and to disturbed and “built areas,” where natural vegetation has been replaced with man-made structures such as bulkheads and sidewalks.

It is regrettable that the EPD declined to address these issues in its report to the Board of Natural Resources, as its current policies are ripe for legal challenge. Especially in the case of lands adjacent to marshlands, the EPD has adopted an interpretation of the statute that is highly debatable. The present rulemaking under S.B. 460 would have provided the EPD an opportunity to place the program on a more defensible footing, and at the same time to address the special requirements that pertain to coastal areas.

These issues are discussed below, after a brief background on the Georgia E&SA.

## Background on the Georgia Erosion and Sediment Act

The Georgia E&SA regulates “land-disturbing activities,” which the Act defines as

[a]ny activity which may result in soil erosion from water or wind and the movement of sediments into state water or onto lands within the state, including, but not limited to, clearing, dredging, grading, excavating, transporting, and filling of land but not including [certain agricultural practices].<sup>2</sup>

Before engaging in any land-disturbing activity, a property owner must apply to the “issuing authority” for a permit. To obtain a permit from the issuing authority, a property owner must submit plans that include soil erosion and sedimentation control measures and practices.<sup>3</sup> Such plans must meet the minimum standards set forth at O.C.G.A. § 12-7-6.

By default, the “issuing authority” for permits under the E&SA is the EPD. However, the Act also directs local counties and municipalities to adopt a comprehensive ordinance establishing the procedures governing land-disturbing activities within their respective boundaries.<sup>4</sup> The Act authorizes the EPD to review the local ordinances. If the EPD determines that the local ordinance complies with E&SA’s minimum standards, the EPD is authorized to certify the local government as the “local issuing authority” under the Act.<sup>5</sup> The EPD also is authorized to require a county or municipality to correct any deficiencies the EPD might find in the local authority’s implementation and enforcement of the ordinance.<sup>6</sup>

## The Buffer Requirement

The buffer requirement is just one of several requirements for erosion and sediment control plans under the Georgia E&SA. The Act states that such plans must provide for the preservation of a 25-foot buffer along the banks of state waters.<sup>7</sup> “No land-disturbing activities [may] be conducted within a buffer” unless certain exceptions apply or unless a variance is issued. The buffer must remain “in its natural, undisturbed state of vegetation until all land-disturbing activities on the construction site are completed.” Once final stabilization of the site is achieved, vegetation may be thinned or trimmed “as long as a protective vegetative cover remains to protect water quality and aquatic habitat.”<sup>8</sup>

Although a local county or municipality may be designated the “local issuing authority” for a given jurisdiction, only the Director of the EPD may grant a variance from the buffer requirement.<sup>9</sup> Under the existing standards for variances, this is rarely a feasible option. In recognition of this fact, the General Assembly passed Senate Bill 460 in 2003 to direct the Board of Natural Resources to adopt new, more flexible rules that contain specific criteria for the grant or denial by the Director of a variance.

Instead of solely addressing the variance procedure, however, the EPD should have taken this opportunity to reconsider other issues pertaining to the buffer requirement. The buffer requirement is subject to important limitations that have not generally been recognized. Properly construed, these limitations could be used to provide local issuing authorities with needed flexibility in the application of the E&SA without requiring applicants to petition the Director of the EPD for a variance.

## Wrested Vegetation

The first limitation to the buffer requirement stems from the fact that buffers are required to be measured from the point of “wrested vegetation.” The statute states that the 25-foot

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## II. The Supreme Court's Interpretation of CWA Jurisdiction in *SWANCC*.

Before *SWANCC*, the EPA and the Corps unquestionably regulated all waters that had any connection to interstate commerce, including “navigable-in-fact” waters that were used for transporting goods, all navigable and non-navigable tributaries of those waters, and wetlands that were adjacent to those tributaries or navigable waters.<sup>15</sup> Under the “Migratory Bird Rule” the EPA and the Corps interpreted the jurisdictional reach of the Act to extend even to isolated wetlands that could serve as a potential habitat for migratory birds.<sup>16</sup> Controversy ensued over the exercise of such jurisdiction, which led to litigation over the use of the Migratory Bird Rule. As a result, there was a split among the federal circuit courts concerning the use of that Rule as a valid basis for federal jurisdiction over isolated intrastate wetlands.<sup>17</sup> Consequently, the U.S. Supreme Court granted certiorari in *SWANCC* to consider the exercise of jurisdiction under the CWA based on the Migratory Bird Rule.<sup>18</sup>

The controversy in *SWANCC* arose from a consortium of suburban Chicago municipalities’ plans to develop a municipal solid waste disposal site on an abandoned sand and gravel pit with excavation trenches that had evolved into permanent and seasonal ponds. These ponds were completely isolated from any navigable waters and the site was located entirely within two counties of the state of Illinois. The Court was concerned with the Corps’ determination that “the seasonally ponded, abandoned gravel mining depressions” were “waters of the United States” solely because they “are or would be used as habitat by . . . migratory birds which cross state lines.”<sup>19</sup> In a 5-4 decision, the Court held that 33 C.F.R. § 328.3(a)(3), as clarified by the Migratory Bird Rule and applied to the site, exceeded the authority granted to the Corps under Section 404(a) of the CWA.

*SWANCC*’s analysis of whether the isolated wetlands are “waters of the United States,” relies on the holding in *Riverside Bayview*, in which the Court found that, given “the inherent difficulties of defining precise bounds to regulable waters,” wetlands which are not themselves navigable bodies of water may nonetheless be regulated under the CWA when they are adjacent to navigable waters.<sup>20</sup> Although the Court in *Riverside Bayview* explicitly declined to express any opinion on cases involving wetlands that are not adjacent to bodies of open water, it nonetheless recognized that the Corps’ authority extends to all wetlands adjacent to navigable or interstate waters and their tributaries. Nonetheless, the *Riverside Bayview* Court recognized that “the

regulation extends the Corps’ authority under [Section] 404 to all wetlands adjacent to navigable or interstate waters and their tributaries.”<sup>21</sup> The Court further reasoned:

[t]he regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.<sup>22</sup>

Thus, the *Riverside Bayview* Court concluded that adjacent wetlands, even those that do not derive their hydrology from open water, are “inseparably bound up with the waters of the United States,” because they may affect the water quality of adjacent lakes, rivers and streams.<sup>23</sup>

Revisiting the issue of wetlands jurisdiction, the *SWANCC* Court reasoned that it was the “significant nexus” between the wetlands and “navigable waters” that informed the Court’s reading of the CWA in *Riverside Bayview*. Accordingly, *SWANCC* held that the “waters of the United States” do not include isolated wetlands where the link to interstate commerce relies solely on migratory birds because the Court found “nothing approaching a clear statement from Congress that it intended [the CWA] to reach an abandoned sand and gravel pit.”<sup>24</sup> The court further concluded that to allow federal jurisdiction “over ponds and mudflats falling within the ‘Migratory Bird Rule’ would result in a significant impingement of the States’ traditional and primary power over land and water use.”<sup>25</sup>

Although the only issue before the Court was the application of the Migratory Bird Rule to the abandoned sand and gravel pit site, the *SWANCC* opinion contains some troubling *dicta*. Despite finding in *Riverside Bayview* the term “navigable” to be of “limited import,” the *SWANCC* Court refused to read the term “navigable” out of the CWA. Rather the Court found that “the term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be so made.”<sup>26</sup> Moreover, while in *Riverside Bayview*, the Court recognized that Congress clearly intended to “regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term,”<sup>27</sup> *SWANCC* implies that these waters do not include ponds that are not adjacent to open water.

Two distinct views of CWA jurisdiction have evolved as a result of the Court’s decision in *SWANCC*. Several courts have held that *SWANCC* applies only to “isolated waters,” and thus would permit continued CWA jurisdiction over all waters which have at least a minimal hydrological connection to navigable waters.<sup>28</sup> On the other hand, some courts have read the *SWANCC* opinion as

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representing a significant shift in the Court's CWA jurisprudence, calling into question the continuing validity of CWA jurisdiction over waters which are not either actually navigable or directly adjacent to navigable waters.<sup>29</sup>

### III. CWA Jurisdiction in the Aftermath of *SWANCC*.

In the wake of *SWANCC*, courts have struggled with evaluating the jurisdictional reach of the CWA. For example, the Fifth Circuit has stated in *dicta* in *Rice v. Harken Exploration Co.*<sup>30</sup> and *In Re Needham*<sup>31</sup> that the jurisdiction of the CWA extends only to the navigable-in-fact waters and any immediately adjacent waters. On the other hand, the Fourth, Sixth, Seventh, and Ninth Circuits have recently opined that the CWA jurisdiction is much more expansive.<sup>32</sup>

#### A. The Fifth Circuit's Broad Interpretation of *SWANCC*.

In both *Rice* and *Needham*, the U.S. Court of Appeals for the Fifth Circuit analyzed "navigable waters" under the Oil Pollution Act ("OPA"), not under the CWA. However, because Congress used the same jurisdictional language in both the OPA and the CWA, the court found that "navigable waters" should have the same meaning under both statutes and relied on existing case law under the CWA for its interpretation of the OPA. *Rice* suggests that *SWANCC* limited CWA jurisdiction to waters that are "actually navigable or . . . adjacent to an open body of navigable water," relying on the Court's statement in *SWANCC* that it would not extend CWA jurisdiction to "ponds not adjacent to open water."<sup>33</sup> Nevertheless, the *Rice* court concluded that "navigable waters" under the OPA does not include intermittent streams which flow underground before reaching "actually" navigable waters.

In *Needham*, the Fifth Circuit revisited the scope of "navigable waters" under the OPA. On appeal, the court reversed a district court decision that CWA jurisdiction did not reach over an oil spill that was not discharged into a body of water that is actually navigable or adjacent to an open body of navigable water. The oil was originally discharged into a drainage ditch which spilled into Bayou Cutoff and then into Bayou Folse. The parties had stipulated that Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico. Accordingly, the court held that because the oil spill leaked into Bayou Folse, which is adjacent to the Company Canal, a navigable-in-fact water, the spill was covered under the OPA.<sup>34</sup>

However, *Needham* maintained the interpretation of "navigable waters" first set forth in *Rice*. In *dicta*, the *Needham* court indicated

its disapproval of the Corps' regulatory definition of "navigable waters" as covering all waters having any hydrological connection with "navigable water." Citing *Rice*, the *Needham* court stated, "the CWA and OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters."<sup>35</sup> Thus, the *Needham* court concluded that because "adjacency" cannot include every possible source of water that eventually flows into a navigable-in-fact waterway, including all "tributaries" as "navigable waters" would extend the OPA beyond the limits set forth in *SWANCC*. Therefore, the Fifth Circuit has left little doubt on how it would interpret *SWANCC* if faced with a case under the CWA.

#### B. Limited Interpretation of *SWANCC* By Majority of Circuit Courts.

Despite the Fifth Circuit's sweeping interpretation of *SWANCC*'s impact on the definition of "waters of the United States," the other circuit courts which have addressed the issue have limited *SWANCC*'s holding.

##### 1. Ninth Circuit.

The Ninth Circuit has taken a broad construction of the CWA jurisdiction and thus a correspondingly limited view of *SWANCC*. In 2002, the Ninth Circuit in *Headwaters, Inc. v. Talent Irrigation District*, held that irrigation canals that are not navigable-in-fact were covered by the CWA because they were not "isolated waters" such as those at issue in *SWANCC*.<sup>36</sup> Rather, the *Headwaters* court found that the irrigation canals are connected as tributaries to other "waters of the United States" because they receive water from natural streams and lakes, and divert water to streams and creeks.<sup>37</sup> The court rejected the defendant's argument that the canals are not tributaries because they are sometimes isolated from the streams by a system of closed waste gates, holding instead that even tributaries that flow intermittently are "waters of the United States." Relying on the Eleventh Circuit's 1997 decision in *United States v. Eidson*, the court also held that even tributaries that flow intermittently are "waters of the United States," because "as long as the tributary would flow into the navigable body [under certain conditions], it is capable of spreading environmental damage and is thus a 'water of the United States' under the Act."<sup>38</sup> Thus, the court concluded that because the CWA is concerned with the pollution of navigable streams, it is necessarily concerned with the pollution of their tributaries.

Subsequently, in *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, the Ninth Circuit again held that a drain that carried return flows and other waters either

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## Navigating Through Clean Water Act

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directly or by connecting waterways into the Yakima River was a “navigable water” under the jurisdiction of the CWA.<sup>39</sup> Most recently in *United States v. Phillips*, the Ninth Circuit, relying on *Riverside Bayview, Eidson and Headwaters*, held that a creek was “navigable waters” even though it was not itself navigable-in-fact because it was a tributary to a navigable water.<sup>40</sup>

### 2. Fourth Circuit.

Similarly, in 2003, the Fourth Circuit decided the first of three pending cases concerning the scope of “waters of the United States” under the CWA in *United States v. Deaton*.<sup>41</sup> There, the court affirmed a district court’s finding of CWA jurisdiction over wetlands adjacent to a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay. *Deaton* held that the Corp’s jurisdiction over the ditch as a tributary “fits comfortably within Congress’s authority to regulate navigable waters,” because, “[a]ny pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of navigable waters themselves.”<sup>42</sup>

Moreover, the *Deaton* court found that the Corps’ exercise of jurisdiction over non-navigable tributaries of navigable waters as “waters of the United States” does not invoke “the outer limits of Congress’s power” or invade the states’ reserved police powers.<sup>43</sup> Thus, *Deaton* found that the Corps’ interpretation of its regulation was entitled to deference because the Corps has always used the word “tributary” to mean all of the streams whose water eventually flows into navigable waters.<sup>44</sup> Accordingly, the court concluded that there is a “significant nexus” as required under *SWANCC* between a navigable waterway and its non-navigable tributaries because non-navigable tributaries, like adjacent wetlands, have a substantial effect on water quality in navigable waters.

Three months later, in *Treacy v. Newdunn Associates, LLP*,<sup>45</sup> the Fourth Circuit again held that a man-made ditch running under an interstate highway was a tributary under the CWA. Relying on its earlier decision in *Deaton*, the *Newdunn* court reasoned that “if this court were to conclude that the I-64 ditch is not a ‘tributary’ solely because it is man-made, the CWA’s chief goal would be subverted. Whether man-made or natural, the tribu-

tary flows into traditional, navigable, waters.”<sup>46</sup> Moreover, the court ruled that because the wetlands on the defendant’s property historically had a natural hydrological connection to a navigable-in-fact waterway prior to the construction of an interstate, there existed a sufficient nexus between the wetlands and navigable-in-fact waters to support jurisdiction under the CWA.

In another case pending on appeal before the Fourth Circuit, *United States v. RGM, Corp.*, the U.S. District Court for the Eastern District of Virginia ruled that the Corps lacked jurisdiction over drainage ditches that eventually flow into navigable waters.<sup>47</sup> The district court rejected the argument that the ditches that form part of the hydrological connections between wetlands and traditionally navigable waters are tributaries. The Fourth Circuit ordered the case in abeyance pending its decision in *Newdunn*. Although the Fourth Circuit has yet to issue a written decision in *RGM*, the court’s position on the issue is clear. On April 5, 2004, the U.S. Supreme Court denied certiorari in *Deaton* and *Newdunn*.

### 3. Sixth and Seventh Circuits.

In the wake of *SWANCC*, several defendants convicted of violating the CWA have sought to overturn their convictions. For example, in *United States v. Rapanos*, the Sixth Circuit reversed a district court’s decision that wetlands connected to a man-made drain that flowed into a non-navigable stream that then flowed for several miles before flowing into navigable waters were not covered under the CWA.<sup>48</sup> Relying on *Deaton*, the Sixth Circuit rejected the broad interpretation of *SWANCC* taken by the district court, reasoning that the CWA “cannot purport to police only the navigable-in-fact waters . . . in order to keep those waters clean from pollutants. A pollutant can contaminate non-navigable water and pollute the navigable-in-fact waters downstream.”<sup>49</sup> The *Rapanos* court read *SWANCC* narrowly and found that it does not limit the application of the CWA only to wetlands directly abutting navigable waters. Rather, the court held that

the Rapanos wetlands are covered by the [CWA]. Any contamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters. Therefore, the protection of the wetlands on Rapanos’ land is a fair extension of the [CWA]. [*SWANCC*] requires a significant nexus between the wetlands and “navigable waters,” for there to be jurisdiction under the [CWA]. Because the wetlands are adjacent to the Drain and there exists a hydrological connection among the wetlands, the Drain, and the Kawkawlin River, we find an ample nexus to establish jurisdiction.”<sup>50</sup>

Along with *Deaton* and *Newdunn*, the U.S. Supreme Court

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denied the *Rapanos* Petition for Certiorari on April 5, 2004.

Likewise, several defendants have sought to vacate consent decrees voluntarily entered into under the CWA in light of *SWANCC*. For example, in *United States v. Krilich*, the Seventh Circuit affirmed a district court's ruling that "cases subsequent to *SWANCC* have not limited the definition of waters of the United States to those immediately adjacent to navigable (in the traditional sense) waters."<sup>51</sup> On appeal, the Seventh Circuit expressly rejected the defendant's argument that *SWANCC* took away the Corps' regulatory authority over waters that are not adjacent to bodies of open water. Rather, the *Krilich* court held that the *SWANCC* holding was limited to the federal agencies' authority to define waters of the United States under the Migratory Bird Rule.

Similarly, in *United States v. Rueth Development Co.*, the Seventh Circuit, relying on *Riverside Bayview* and *Deaton*, held that *SWANCC* did not affect the law regarding CWA jurisdiction over wetlands adjacent to waters that are not navigable-in-fact waters so long as there is a hydrologic connection to navigable waters.<sup>52</sup> However, in *dicta* the *Rueth Development* court stated that although *SWANCC* did not expressly strike down 33 C.F.R. § 328(a)(3), it may have invalidated the Corp's jurisdiction to intrastate waters for reasons other than those having to do with use by migratory birds.

#### 4. District Courts Follow Suit.

In addition, numerous district courts have also narrowly read *SWANCC* as applying only to isolated wetlands.<sup>53</sup> For instance, the U.S. District Court for the Middle District of Georgia addressed post-*SWANCC* OPA jurisdiction over "navigable waters" and rejected the reasoning of the Fifth Circuit. In a well-reasoned opinion, the court in *United States v. Jones* held that a complete reading of *SWANCC* reveals that the U.S. Supreme Court actually had no intention of defining "navigable waters" as narrowly as the *Needham* and *Rice* courts suggested.<sup>54</sup> Rather the court found that the Migratory Bird Rule was the only focus of the *SWANCC* decision and that "any other interpretative language in the case was merely *dicta*."<sup>55</sup> The *Jones* court agreed with the Ninth Circuit's interpretation in *Headwaters* that *SWANCC* did not dramatically alter jurisdiction under the CWA.

Additionally, in *California Sportfishing Protection Alliance v. Diablo Grande, Inc.*, the U.S. District Court for the Eastern District of California held that *SWANCC* did not alter the rule that tributaries are "navigable waters" under the Act.<sup>56</sup> Distin-

guishing the Fifth Circuit's decision in *Rice*, the court found that a creek which flows through an underground pipeline was a tributary of a navigable-in-fact waterway and, thus, was itself a "navigable water of the United States" within the meaning of the CWA. Likewise, in *United States v. Buday*, a companion case to *United States v. Phillips*, the U.S. District Court for Montana found that the CWA asserts jurisdiction over a creek located about 235 miles from the nearest navigable-in-fact water.<sup>57</sup> In support of its ruling, the court noted that the legislative history, in combination with the *Headwaters* and *Eidson* opinions, "establishes that Congress intended the [CWA] to reach any surface water that contributes to a water that is navigable-in-fact."<sup>58</sup> Thus, the court concluded that because water quality of a distant and non-navigable tributary is vital to the quality of navigable waters "[t]here is no limitation on federal jurisdiction over open waters that flow into interstate waters or waters that are navigable-in-fact."<sup>59</sup>

Finally, in *North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates, LLC*, the U.S. District Court for the Eastern District of North Carolina upheld the Corps' regulation of otherwise isolated impounded waters and held that because pollutants or fill materials discharged into the impoundment could reach a tributary or traditional navigable water via a drainage way and degrade the quality of a traditional navigable water, there is a clear "significant nexus" required for jurisdiction under *SWANCC*.<sup>60</sup>

## Conclusion

Despite the case law supporting a narrow reading of *SWANCC*, the EPA and the Corps issued an Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" on January 15, 2003, seeking to limit the scope of waters that are subject to the CWA, in light of the U.S. Supreme Court decision in *SWANCC*.<sup>61</sup> However, on December 16, 2003, in the face of strong opposition, the EPA and Corps abandoned their plans to re-evaluate the use of the factors in 33 CFR 328.3(a)(3)(i)-(iii) or the counterpart regulations in determining CWA jurisdiction over isolated, intrastate, non-navigable waters. In conclusion, although many would like to call the *SWANCC*, *Rice*, and *Needham dicta* "law," until the U.S. Supreme Court squarely addresses the issue, the limiting language in those cases remain *dicta*. While it is clear that isolated wetlands that rely solely on the migratory birds as a commerce clause nexus are no longer regulated under the CWA, it appears for now that the rest of the waters across this nation are subject to the jurisdiction of the CWA.

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**Endnotes**

\* Holly P. Cole is an associate and Martin A. Shelton is a partner with Stack & Associates, P.C. in Atlanta, Georgia. Their practices are primarily focused on environmental litigation. Ms. Cole and Mr. Shelton also assist clients with environmental compliance concerns and general corporate matters.

<sup>1</sup> 33 U.S.C. §§ 1251 *et seq.*  
<sup>2</sup> 531 U.S. 159 (2001).  
<sup>3</sup> 33 U.S.C. § 1251(a).  
<sup>4</sup> *Id.* §§ 1311, 1342, 1344; *City of Milwaukee v. Illinois*, 451 U.S. 304, 310-11 (1981).  
<sup>5</sup> 33 U.S.C. § 1362(7).  
<sup>6</sup> *Id.* §§ 1342, 1344.  
<sup>7</sup> See 40 C.F.R. § 122.2 (2002); 33 C.F.R. § 328(a)(3), (a)(5) (2002).  
<sup>8</sup> 474 U.S. 121, 133 (1985).  
<sup>9</sup> *Id.*  
<sup>10</sup> See, e.g., *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997); *Hoffman Homes Inc. v. Administrator, United States Envtl. Prot. Agency*, 961 F.2d 1310 (7th Cir. 1992); *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974).  
<sup>11</sup> *Leslie Salt Co. v. United States*, 896 F.2d 354, 357 (9th Cir. 1990).  
<sup>12</sup> 961 F.2d 1310, 1319 (7th Cir. 1992).  
<sup>13</sup> 108 F.3d 1336, 1342 (11th Cir. 1997).  
<sup>14</sup> *Id.*  
<sup>15</sup> 40 C.F.R. § 122.2; 33 C.F.R. §§ 328.3(a)(1), (5), (7).  
<sup>16</sup> See 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).  
<sup>17</sup> See *Solid Waste Agency of N. Cook County v. United States Corps of Eng'rs*, 191 F.3d 845 (7th Cir. 1999), *rev'd*, 531 U.S. 159 (2001); *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997); *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995).  
<sup>18</sup> 531 U.S. 159, 163.  
<sup>19</sup> *Id.* at 164-65.  
<sup>20</sup> *Id.* at 167-68; 474 U.S. 121, 133.  
<sup>21</sup> 474 U.S. at 129.  
<sup>22</sup> *Id.* at 129, 133-34.  
<sup>23</sup> *Id.* at 134.  
<sup>24</sup> 531 U.S. at 174.  
<sup>25</sup> *Id.*  
<sup>26</sup> *Id.*  
<sup>27</sup> 474 U.S. at 133.  
<sup>28</sup> See *United States v. Phillips*, 356 F.3d 1086 (9th Cir. 2004); *N. Cal. River Watch v. City of Healdsburg*, No. C01-04686WHA,

2004 WL 201502 (N.D. Cal. Jan. 23, 2004); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003); *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003); *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003); *Treacy v. Newdunn*, 344 F.3d 407 (4th Cir. 2003); *United States v. Jones*, 267 F. Supp. 2d 1349 (M.D. Ga. 2003); *N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs.*, 278 F. Supp. 2d 654 (E.D.N.C. 2003); *United States v. Dyer*, No. 00-11013 (D. Mass. 2003); *San Francisco Baykeeper v. Cargill, Co.*, 96-2161 (N.D. Cal. 2003); *Carabell v. U.S. Army Corps of Eng'rs*, 257 F. Supp. 2d 917 (E.D. Mich. 2003); *United States v. Hummel*, No. 00 C 5184, 2003 WL 1845365 (N.D. Ill. Apr. 8, 2003); *Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs*, No. C 02-331 CW (N.D. Ca. 2003); *United States v. Krilich*, 152 F. Supp. 2d 983 (N.D. Ill. 2001), *aff'd*, 303 F.3d 784 (7th Cir. 2002); *Cnty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943 (2002); *United States v. Interstate Gen. Co.*, 152 F. Supp. 2d 843 (D. Md. 2001), *aff'd*, 39 Fed. Appx. 870 (4th Cir. 2002); *United States v. New Portland Meadows, Inc.*, No. 00-507-AS, 2002 WL 31180956 (D. Or. Sept. 9, 2002); *Cal. Sport-fishing Prot. Alliance v. Diablo Grande, Inc.*, 209 F. Supp. 2d 1059 (E.D. Cal. 2002); *United States v. Lamplight Equestrian Ctr., Inc.*, No. 00-6486, 2002 WL 360652 (N.D. Ill. Mar. 8, 2002); *United States v. Adam Bros. Farming*, No. 00-7409 (C.D. Cal. 2002); *Brace v. United States*, 51 Fed. Cl. 649 (2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001); *United States v. Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81 (E.D.N.Y. 2001); *Colvin v. United States*, 181 F. Supp. 2d 1050 (C.D. Cal. 2001).  
<sup>29</sup> See, e.g., *In re Needham*, 354 F.3d 340 (5th Cir. 2003); *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001); *FD&P Enters. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509 (D.N.J. 2003); *United States v. RGM Corp.*, 222 F. Supp. 2d 780 (E.D. Va. 2002).  
<sup>30</sup> 250 F.3d 264, 270 (5th Cir. 2001).  
<sup>31</sup> 354 F.3d 340, 345-46 (5th Cir. 2003).  
<sup>32</sup> See *United States v. Phillips*, 356 F.3d 1086 (9th Cir. 2004); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003); *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003); *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003); *Treacy v. Newdunn*, 344 F.3d 407 (4th Cir. 2003); *United States v. Krilich*, 152 F. Supp. 2d 983 (N.D. Ill. 2001), *aff'd*, 303 F.3d 784 (7th Cir. 2002); *Cnty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002); *United States v. Interstate Gen. Co.*, 152 F. Supp. 2d 843 (D. Md. 2001), *aff'd*, 39 Fed. Appx. 870 (4th Cir. 2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001).

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## A Missed Opportunity

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buffer is to be measured “horizontally from the point where vegetation has been wrested by normal stream flow or wave action.”<sup>10</sup> This limitation is highly significant in coastal areas, where marsh vegetation often extends a considerable distance — more than 25 feet — from the high ground where land-disturbing activity would usually occur.

Notwithstanding the plain text of the statute, the EPD has taken the position that the buffer zone should be measured from the marsh / upland boundary — as opposed to the line of “wrested vegetation.” The apparent basis of the EPD’s position is an opinion of the Attorney General that was issued in response to a question about a prior, superseded version of the Georgia E&SA under which the buffer requirement was measured from the “stream bank.” Under the old wording, the question arose as to whether the buffer requirement applied to *all* state waters, or only to streams. Attorney General Bowers correctly determined that the reference to “stream banks” was not intended to limit the buffer requirement to “streams,” but “merely directs where the measurement of the buffer shall begin.”<sup>11</sup> Thus, the Attorney General stated his opinion that “the 25-foot natural undisturbed vegetative buffer . . . is normally to be retained adjacent to any state water, including, but not limited to, ponds, lakes, reservoirs, and coastal marshes.”<sup>12</sup>

The E&SA was amended in 1994 to clarify this issue by deleting the reference to “stream banks.” As amended, the 25-foot buffer must be measured “horizontally from the point where vegetation has been wrested by normal stream flow or wave action.”<sup>13</sup> The amended language removes all doubt that the buffer requirement applies to all state waters, including marshlands. It also removes all doubt, however, that the buffer is to be measured from the point of “wrested vegetation” — as opposed to the marsh / upland boundary.

Although the position currently advanced by the EPD is difficult to defend, this is an issue that can and should be addressed through rulemaking by the Department of Natural Resources (“DNR”). The issue can be addressed through rulemaking because the buffer requirement is only one aspect of the E&SA. Thus, even if the inflexible buffer requirement does not apply, the EPD still has the authority to regulate land-disturbing activities on upland areas adjacent to marshland to ensure that the purposes of the E&SA are fulfilled. The DNR could

exercise its discretion, therefore, to adopt rules to define acceptable erosion and sediment control practices for lands adjacent to marshlands that are not within the statutory buffer. In addition to placing the enforcement program on a more defensible footing, this solution would have the added advantage of decreasing reliance on variances that can only be issued by the Director, and increasing the ability of EPD and local issuing authorities to tailor the requirements of the E&SA to the special conditions that prevail in coastal areas.

## Natural Vegetation

A second limitation on the buffer requirement stems from the statutory definition of “buffer.” The area within which land-disturbing activities are prohibited — the “buffer” — is defined as “the area of land immediately adjacent to the banks of state waters in its natural state of vegetation, which facilitates the protection of water quality and aquatic habitat.”<sup>14</sup> By this definition, the buffer requirement applies only to areas that are currently “in a natural state of vegetation.” Areas where the natural vegetation has already been replaced by man-made structures — the areas landward of an existing bulkhead, for example — do not fit the definition of “buffers” that must be preserved under the terms of the Act.

Therefore, it is at least arguable that the statutory prohibition on land-disturbing activity within the buffer does not apply to activities within “built areas.” This is appropriate to the extent built structures perform the function of a natural buffer under the Georgia E&SA, which is to control erosion and sediment. Moreover, activities in such areas would still be subject to regulation by the local issuing authority, and to the requirement to use best management practices. The difference is that such activities could be regulated through the normal process, with special attention to local conditions, without the need to apply for a variance from the Director. If accepted, this interpretation of the statute could provide considerable flexibility to county officials in the implementation of this program.

## Conclusion

In summary, the EPD and the Board of Natural Resources should broaden the focus of the current rulemaking to address these and other issues, which could minimize reliance on the variance procedure and provide local permitting authorities with needed flexibility.

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## Federal Sentencing Guidelines Called Into Question

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ington State sentencing procedures were very similar to the federal sentencing guidelines, the majority's holding would lead to disastrous consequences for all sentences imposed under the federal guidelines. The dissent claimed that the "Court ignores the havoc it is about to wreak on trial courts across the country."<sup>35</sup>

*Blakely* indeed wrought havoc upon sentencing law, as several federal courts have since held that the federal guidelines are subject to the same constitutional infirmities as those reviewed in *Blakely*. In fact, several courts have found the sentencing enhancement provisions employed in *Perez* and *Snook* to be unconstitutional under *Blakely*.<sup>36</sup> As of this writing, however, lawyers and judges in the Eleventh Circuit involved in the sentencing of defendants convicted of criminal violations of federal environmental statutes may continue as they did pre-*Blakely*.<sup>37</sup> The Eleventh Circuit continues to hold that the federal guidelines are not invalidated by *Blakely*. The Eleventh Circuit's reasoning is twofold: (1) the U.S. Supreme Court expressly avoided determining whether the federal guidelines were unconstitutional in *Blakely*; and (2) the Eleventh Circuit has not previously resolved the issue, and other circuits are split.<sup>38</sup> The Eleventh Circuit is joined by the Second, Fourth, Fifth, and Sixth Circuits in holding that *Blakely* did not invalidate the federal guidelines.<sup>39</sup> Meanwhile, the Seventh and Ninth Circuits have found that *Blakely* invalidates the federal guidelines.<sup>40</sup>

The Eleventh Circuit, however, has not prohibited its district courts from taking proactive measures to protect themselves in the event the federal guidelines are found to be unconstitutional.

In light of this instability, we recognize that district courts might deem it wise and appropriate to take protective steps in case the Guidelines are later found unconstitutional in whole or in part. However, we are reluctant to provide specific advice with respect to what protective steps, if any, might be appropriate to reduce confusion and protect against duplicative judicial efforts should the Supreme Court so rule.<sup>41</sup>

While the Eleventh Circuit did not prescribe explicit "protective steps," courts in the Eleventh Circuit's jurisdiction and in other jurisdictions have taken to applying two sentences to defendants, one under the current guidelines in the event they are held to be constitutional, and one calculated as if the guidelines are unconstitutional.<sup>42</sup>

The Supreme Court heard oral argument in two cases, *Booker* and *Fanfan*, on October 4, 2004, that may allow it to determine the constitutionality of the federal guidelines. Until the Court's decision, practitioners must deal with split circuits regarding the constitutionality of the federal guidelines, as well as educate clients on the potential applications of cases such as *Perez* and *Snook*.

Importantly, *Perez* alerted Georgia practitioners and their clients to the fact that the Eleventh Circuit does not require evidence

of "actual contamination" to apply the § 2Q1.3(b)(1) enhancement. Instead, a mere "discharge, release or emission" is enough. *Perez* also held that the § 2Q1.3(b)(4) enhancement for discharging without a permit does not constitute impermissible double counting, at least for the charges brought in *Perez*. *Snook*, a Seventh Circuit case, also potentially opened a new door for greater sentences in cases involving criminal violations of environmental statutes by applying the § 3B1.3 public trust sentencing enhancement to a private industry official.

While *Perez* and *Snook* raise new concerns for environmental practitioners and clients that may be charged with criminal violations of environmental statutes, *Blakely* and its progeny may have placed the constitutionality of the federal sentencing guidelines in doubt. As the Eleventh Circuit continues to apply the federal guidelines as before, the Supreme Court is expected to address the issue as a result of two cases heard on October 4, 2004. Until the Supreme Court issues a decision, however, Georgia environmental practitioners must continue to apply the federal guidelines pre-*Blakely*, but face uncertainty as to the ultimate constitutionality of the federal sentencing guidelines.

## Endnotes

\* Brandon A. Van Balen and Molly Haining are associates in the Resources, Regulatory and Environmental Law Practice Group with Hunton & Williams LLP in Atlanta, Georgia. Mr. Van Balen is a graduate of Wake Forest University School of Law and Ms. Haining is a graduate of Georgia State University College of Law. Their practice focuses on all aspects of environmental enforcement, compliance, and defense. The views expressed in this article are those of the authors only, and are not to be attributed to any other person or entity.

<sup>1</sup> 366 F.3d 1178, 1182 (11th Cir. 2004) (noting that "interpreting § 2Q1.3 is an issue of first impression in this Circuit.").

<sup>2</sup> 366 F.3d 439 (7th Cir. 2004).

<sup>3</sup> 124 S.Ct. 2531 (2004).

<sup>4</sup> *Id.* at 2538.

<sup>5</sup> *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *cert. granted* 2004 U.S. LEXIS 4788 (U.S. Aug. 2, 2004) (No. 04-104); *United States v. Fanfan*, 2004 U.S. Dist. LEXIS 18593 (D. Me. June 28, 2004), *cert. granted before judgment*, 2004 U.S. LEXIS 4789 (U.S. Aug. 2, 2004) (No. 04-105).

<sup>6</sup> 366 F.3d at 1180.

<sup>7</sup> U.S.S.G. § 2Q1.3(b)(1).

<sup>8</sup> U.S.S.G. § 2Q1.3(b)(4).

<sup>9</sup> *Perez*, 366 F.3d at 1182.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1183-84.

<sup>13</sup> *Id.* at 1184-85.

## Federal Sentencing Guidelines Called Into Question

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<sup>14</sup> *Id.* at 1185.

<sup>15</sup> *Id.* at 1186.

<sup>16</sup> *Id.* (citing *United States v. Kuhn*, 345 F.3d 431, 440 (6th Cir. 2003)).

<sup>17</sup> 366 F.3d at 442. Section 3B1.3 provides, in relevant part:

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. U.S.S.G. § 3B1.3.

<sup>18</sup> *Id.* at 445 (citing *United States v. Technic Servs.*, 314 F.3d 1031, 1049 (9th Cir. 2002)).

<sup>19</sup> *Id.* at 446 (citing *United States v. Gonzalez-Alvarez*, 277 F.3d 73, 81-82 (1st Cir. 2002) (applying the abuse of trust increase to a dairy farmer who did not comply with regulations); *United States v. White*, 270 F.3d 356, 372-373 (6th Cir. 2001) (applying the abuse of trust increase to a public employee at a water treatment plant); *United States v. Turner*, 102 F.3d 1350, 1360 (4th Cir. 1996) (applying the abuse of trust increase to owners and operators of a coal mine)).

<sup>20</sup> *Id.* at 446 (Coffey, J., dissenting).

<sup>21</sup> *Id.* at 448 (Coffey, J., dissenting).

<sup>22</sup> *Id.* at 450 (Coffey, J., dissenting) (emphasis in original) (quoting *United States v. Caplinger*, 339 F.3d 226, 237 (4th Cir. 2003)).

<sup>23</sup> *Id.* at 450 (Coffey, J., dissenting) (citing *United States v. Kuhn*, 345 F.3d 431, 437 (6th Cir. 2003)).

<sup>24</sup> 133 F.3d 831, 839 (11th Cir. 1998) (citing *United States v. Broderson*, 67 F.3d 452 (2d Cir. 1995)).

<sup>25</sup> 277 F.3d 73, 81-82 (1st Cir. 2002).

<sup>26</sup> *Id.* at 81.

<sup>27</sup> 314 F.3d 1031, 1049 (9th Cir. 2002).

<sup>28</sup> *Id.* at 1051.

<sup>29</sup> *Id.*

<sup>30</sup> 124 S.Ct. 2531 (2004). To further complicate matters, the U.S. Sentencing Commission recently revised the federal guidelines. These revisions were sent to Congress on May 1, 2004, approximately seven weeks before the Court decided *Blakely*. The revisions are due to become law on November 1, 2004. The revisions primarily concern (1) the criteria for what constitutes an “effective” corporate compliance program; and (2) longer prison sentences for offenders convicted of most hazardous materials transportation offenses. If the Court does not issue an opinion within the month after oral arguments in *Booker* and *Fanfan*, it is uncertain whether Congress will adopt the revised guidelines as law or wait for the Court’s decision.

<sup>31</sup> 124 S.Ct. at 2534-36.

<sup>32</sup> *Id.* at 2537-38.

<sup>33</sup> *Id.* at 2538, n.9.

<sup>34</sup> *Id.* at 2540.

<sup>35</sup> *Id.* at 2549 (O’Connor, J., Kennedy, J., Breyer, J., dissenting).

<sup>36</sup> See, e.g., *United States v. Mueffellman*, 327 F. Supp. 2d 79 (D. Mass. 2004) (holding federal sentencing guidelines, including U.S.S.G. § 2Q1.3, unconstitutional); *United States v. Einstman*, 325 F. Supp. 2d 373 (S.D.N.Y. 2004) (holding U.S.S.G. § 3B1.3 unconstitutional).

<sup>37</sup> *United States v. Reese*, 2004 U.S. App. LEXIS 18605 (11th Cir. Sept. 2, 2004); *United States v. Duncan*, 2004 U.S. App. LEXIS 17250 (11th Cir. Aug. 18, 2004); *United States v. Curtis*, 380 F.3d 1308 (11th Cir. 2004).

<sup>38</sup> *Duncan*, 2004 U.S. App. LEXIS 17250, at \*10.

<sup>39</sup> *United States v. Mincey*, 2004 U.S. App. LEXIS 16629 (2d Cir. Aug. 12, 2004); *United States v. Hammoud*, 378 F.3d 426 (4th Cir. 2004); *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004); *United States v. Koch*, 2004 U.S. App. LEXIS 18138 (6th Cir. Aug. 26, 2004).

<sup>40</sup> *Booker*, 375 F.3d at 508; *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004). But see *United States v. Mercado*, 2004 U.S. App. LEXIS 19053, at \*12 (9th Cir. Sept. 8, 2004) (“Because the Supreme Court has pending two appeals that are likely to shed light on *Blakely*’s effect on the United States Sentencing Guidelines... [*Booker* and *Fanfan*]...we remand to the district court with instructions to resentence and conduct any other appropriate proceedings in accordance with those Supreme Court decisions if they affect [defendants’] sentences.”).

<sup>41</sup> *Reese*, 2004 U.S. App. LEXIS 18605, at \*11-12.

<sup>42</sup> See, e.g., *United States v. Grant*, 329 F. Supp. 2d 1305 (M.D. Fla. 2004); *United States v. Emmenegger*, 329 F. Supp. 2d 416 (S.D.N.Y. 2004); *United States v. Leach*, 325 F. Supp. 2d 557, 561 (E.D. Pa. 2004); Letter from J. Comey, U.S. Deputy Attorney General to All Federal Prosecutors Re: Department Legal Positions and Policies in Light of *Blakely v. Washington*, July 2, 2004.

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### Endnotes

\* Lewis B. Jones is an associate with King & Spalding LLP in Atlanta, Georgia. His practice focuses on air and water resource issues and general environmental litigation. The views expressed in this article reflect those of the author alone, and do not necessarily reflect the views of King & Spalding or its clients.

<sup>1</sup> The proposal and related documents are available at <http://environet.dnr.state.ga.us/7>.

<sup>2</sup> O.C.G.A. § 12-7-3(a)(9).

<sup>3</sup> See *id.* § 12-7-6(a).

<sup>4</sup> *Id.* § 12-7-4(a).

<sup>5</sup> See *id.* § 12-7-8.

<sup>6</sup> See *id.* § 12-7-8(b)&(c).

<sup>7</sup> *Id.* § 12-7-6(b)(15).

<sup>8</sup> *Id.* § 12-7-6(b)(15)(A).

<sup>9</sup> See *id.* § 12-7-6(b)(15) (stating that the buffer requirement applies “except where the Director determines to allow a variance that is at least as protective of natural resources and the environment”).

<sup>10</sup> *Id.*

<sup>11</sup> See 1993 Ga. Op. Att’y. Gen. 17 (Mar. 17, 1993).

<sup>12</sup> See *id.*

<sup>13</sup> O.C.G.A. § 12-7-6(a)(15).

<sup>14</sup> *Id.* § 12-7-3(3).

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<sup>33</sup> 250 F.3d at 269 (quoting *SWANCC*, 531 U.S. at 168).

<sup>34</sup> 354 F.3d at 347.

<sup>35</sup> *Id.*

<sup>36</sup> 243 F.3d 526, 533 (9<sup>th</sup> Cir. 2002).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 534.

<sup>39</sup> 305 F.3d 943 (9<sup>th</sup> Cir. 2002).

<sup>40</sup> 356 F.3d 1086, 1094 (9<sup>th</sup> Cir. 2004).

<sup>41</sup> 332 F.3d 698, 702 (4<sup>th</sup> Cir. 2003).

<sup>42</sup> *Id.* at 704-05, 707.

<sup>43</sup> *Id.* at 707-08.

<sup>44</sup> *Id.* at 708, 710.

<sup>45</sup> 344 F.3d 407 (4<sup>th</sup> Cir. 2003).

<sup>46</sup> *Id.* at 417.

<sup>47</sup> 222 F. Supp. 2d 780 (E.D. Va. 2002).

<sup>48</sup> 339 F.3d 447, 448 (6<sup>th</sup> Cir. 2003).

<sup>49</sup> *Id.* at 452-53.

<sup>50</sup> *Id.* at 453.

<sup>51</sup> 152 F. Supp. 2d 983, 992 n. 13 (N.D. Ill. 2001), *aff’d*, 303 F.3d 784 (7<sup>th</sup> Cir. 2002).

<sup>52</sup> 335 F.3d 598, 604 (7<sup>th</sup> Cir. 2003), *cert. denied*, 124 S. Ct. 835 (2003).

<sup>53</sup> *N. Cal. River Watch v. City of Healdsburg*, No. C01-04686WHA, 2004 WL 201502 (N.D. Cal. Jan 23, 2004); *United States v. Jones*, 267 F. Supp. 2d 1349 (M.D. Ga. 2003); *N.C. Shellfish Growers Ass’n v. Holly Ridge Assocs.*, 278 F. Supp. 2d 654 (E.D. N.C. 2003); *United States v. Dyer*, No. 00-11013 (D. Mass. 2003); *San Francisco Baykeeper v. Cargill, Co.* 96-2161 (N.D. Cal. 2003); *Carabell v. U.S. Army Corps of Eng’rs*, 257 F. Supp. 2d 917 (E.D. Mich. 2003); *United States v. Hummel*, No. 00 C 5184, 2003 WL 1845365 (N.D. Ill. Apr. 8, 2003); *Baccarat Fremont Developers v. U.S. Army Corps of Eng’rs*, No. C 02-331 CW (N.D. Ca. 2003); *United States v. New Portland Meadows, Inc.*, No. 00-507-AS, 2002 WL 31180956 (D. Or. Sept. 9, 2002); *Cal. Sportfishing Prot. Alliance v. Diablo Grande, Inc.*, 209 F. Supp. 2d 1059 (E.D. Cal. 2002); *United States v. Lamplight Equestrian Ctr., Inc.*, No. 00-6486, 2002 WL 360652 (N.D. Ill. Mar. 8, 2002); *United States v. Adam Bros. Farming*, No. 00-7409 (C.D. Cal. 2002); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001); *United States v. Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81 (E.D.N.Y. 2001); *Colvin v. United States*, 181 F. Supp. 2d 1050 (C.D. Cal. 2001). *But see FD&P Enters., Inc. v. United States Army Corps of Eng’rs*, 239 F. Supp. 2d 509 (D.N.J. 2003).

<sup>54</sup> 267 F. Supp. 2d 1349, 1360 (M.D. Ga. 2003).

<sup>55</sup> *Id.*

<sup>56</sup> 209 F. Supp. 2d 1059, 1075 (E.D. Cal. 2002) (citing *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1178 (D. Idaho 2001); *United States v. Buday*, 138 F. Supp. 2d 1282, 1295 (D. Mont. 2001); *United States v. Interstate Gen. Co.*, 152 F. Supp. 2d 843, 847 (D. Md. 2001); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 119 (E.D.N.Y. 2001).

<sup>57</sup> 138 F. Supp. 2d 1282 (D. Mont. 2001).

<sup>58</sup> *Id.* at 1290.

<sup>59</sup> *Id.* at 1291-92, 1295.

<sup>60</sup> 278 F. Supp. 2d 654, 675 (E.D.N.C. 2003).

<sup>61</sup> 69 Fed. Reg. 1991 (Jan. 15, 2003).

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## Environmental Law Section Officers

### Chair

*Susan H. Richardson*  
Kilpatrick Stockton LLP  
1100 Peachtree Street  
Suite 2800  
Atlanta, GA 30309  
404-815-6330 (phone)  
404-815-6555 (fax)  
surichardson@kilpatrickstockton.com

### Secretary

*David M. Meezan*  
Alston & Bird LLP  
1201 W. Peachtree Street  
Atlanta, GA 30309  
404-881-7000 (phone)  
404-881-7777 (fax)  
dmeezan@alston.com

### Member-at-Large

*David A. Rose*  
Black and Veatch  
1145 Sanctuary Pkwy.  
Suite 475  
Alpharetta, GA 30004  
770-521-8152 (phone)  
770-751-8322 (fax)  
roseda@bv.com

### Chair-Elect

*Jeffrey S. Dehner*  
Hartman Simons Spielman & Wood LLP  
Suite 400, 6400 Powers Ferry Road, NW  
Atlanta, GA 30339  
770-951-6577 (phone)  
770-303-1150 (fax)  
jdehner@hssw.com

### Treasurer

*Andrea L. Rimer*  
Troutman Sanders LLP  
600 Peachtree Street, N.E.  
Suite 5200  
Atlanta, GA 30308  
404-855-3000 (phone)  
404-855-3900 (fax)  
andrea.rimer@troutmansanders.com

---

**State Bar of Georgia**  
104 Marietta Street, NW  
Suite 100  
Atlanta, Georgia 30303

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