No. 11-1871

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

DEERFIELD PLANTATION PHASE II-B PROPERTY OWNERS ASSOCIATION, INCORPORATED

Plaintiff - Appellant

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ROBERT L. VAN ANTWERP, in his official capacity as Chief of Engineers, US Army Corps of Engineers, TREY JORDAN, Lieutenant Colonel, in his official capacity as District Engineer, US Army Corps of Engineers, Charleston District, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, LISA P. JACKSON, in her official capacity as Administrator of the US Environmental Protection Agency, GWEN KEYES FLEMING in her official capacity as Regional Administrator, Region IV, US Environmental Protection Agency, and DEERTRACK GOLF, INC.

Defendants-Appellees

---

# ANSWERING BRIEF FOR THE FEDERAL APPELLEES

---

IGNACIA S. MORENO
Assistant Attorney General

AARON P. AVILA
JENNIFER SCHELLER NEUMANN
ADAM J. KATZ
ELIZABETH ANN PETERSON
U.S. Department of Justice
Environment & Natural Resources
Division, Appellate Section
P.O. Box 7415
Washington, DC 20044
(202) 514-3888
ann.peterson@usdoj.gov

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES:**

**STATUTES:**



**REGULATIONS:**

**OTHER AUTHORITIES:**

## JURISDICTIONAL STATEMENT

Deerfield Plantation Phase II-B Homeowners Association, Inc. ("the Homeowners Association") filed a complaint on April 16, 2009, (Clerk's Record Entry No. 1 ("CR 1") Appendix page 1 ("App. 1")), seeking judicial review of a final decision of the Chief of the United States Army Corps of Engineers ("Corps") pursuant to (1) the Clean Water Act Section 505(a)(2), 33 U.S.C. § 1365(a)(2), and (2) the Administrative Procedure Act. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702. On July 13, 2011, the district court entered final judgment dismissing the complaint with prejudice (CR 77; App. 313).

The Homeowners Association filed a timely notice of appeal on August 12, 2011 (CR 80; App. 334). This Court has jurisdiction under 28 U.S.C. § 1291.

## ISSUES PRESENTED

The Homeowners Association represents owners and occupants of a residential development adjacent to a former golf course, the owner of which seeks to redevelop it for residential use (the "Deertrack Site"). Following an analysis of the relevant materials and two site inspections, the Corps issued a determination (the "jurisdictional determination") that "waters of the United States," subject to the United States' permitting authority under section 404 of the Clean Water Act, 33 U.S.C. § 1344, were

present on only a very limited area of the Deertrack Site. The Homeowners Association challenges the jurisdictional determination, contending that a system of artificial ponds on the Deertrack Site, and the ditches and swales that connect them, are also subject to the United States' CWA regulatory authority. The issues are:

1. Whether the Homeowners Association has standing to challenge the Corps' determination that only the two non-navigable tributaries on the Deertrack Site are subject to regulation pursuant to 33 U.S.C. § 1344.

2. Whether the Corps correctly applied the law, including the standards set out in *Rapanos v. United States*, 546 U.S. 547 (2006) ("*Rapanos*"), in determining that no "waters of the United States" subject to federal permitting authority pursuant to 33 U.S.C. § 1344, other than the two non-navigable tributaries, are present on the Deertrack Site.

## STATEMENT OF THE CASE

In this case, the Homeowners Association seeks reversal of the Corps' decision that "waters of the United States" subject to regulation pursuant to section 404 of the CWA, 33 U.S.C. § 1344, are present on only 0.37 acres of an approximately 85-acre area of the former Old South Golf Course owned by Deertrack Golf, Inc. ("Deertrack"). The Corps determined that no such waters are present on the remaining 84+ acres of the former golf course. The Homeowners Association is concerned that Deertrack intends

to develop its property in a manner that will destroy the artificial system of ditches, ponds and swales that were placed on the property when it was developed as a golf course. The Homeowners Association sought judicial review of the Corps' determination that the ditches, ponds and swales do not qualify as "waters of the United States." The district court held that the jurisdictional determination was consistent with the definition of that term provided in the Corps' regulatory guidance and the Supreme Court's *Rapanos* opinion and entered summary judgment for the Corps. The Homeowners Association appeals from that judgment.

## STATEMENT OF THE FACTS

### *A. Statutory and Regulatory Framework*

#### *1. The Clean Water Act and its implementing regulations*

CWA § 301(a) prohibits the "discharge of any pollutant[1/] by any person" unless in compliance with the Act. 33 U.S.C. § 1311(a). CWA § 404(a) authorizes the Secretary of the Army, acting through the Corps, EPA, or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified

---

[1/] "Discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

disposal sites." 33 U.S.C. § 1344(a).[2] The Act defines the term "navigable waters" to mean "the waters of the United States." 33 U.S.C. § 1362(7). The Corps and EPA share responsibility for implementing and enforcing the CWA, and have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." *See* 33 C.F.R. § 328.3(a) (Corps definition); 40 C.F.R. § 230.3(s) (EPA definition).[3] The definition encompasses, *inter alia*, traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, 33 C.F.R. § 328.3(a)(1); "tributaries" of traditional navigable waters, *id.* § 328.3(a)(5); and wetlands that are "adjacent" to other covered waters, *id.* § 328.3(a)(7).[4] "Adjacent" wetlands are ones that are "bordering, contiguous, or neighboring" other jurisdictional waters and include "[w]etlands separated from other waters of the United States by man-

---

[2] Under CWA § 402, which has the same jurisdictional scope, discharges of pollutants other than dredged or fill material generally must be authorized by a permit issued by the Environmental Protection Agency ("EPA") (or a State with an approved program) under the National Pollutant Discharge Elimination System. *See* 33 U.S.C. § 1342.

[3] Hereinafter, cites to Corps regulations only are used for simplicity.

[4] To avoid confusion between the term "navigable waters" as defined in the CWA, *see* 33 U.S.C. § 1362(7), and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used in interstate or foreign commerce, *see* 33 C.F.R. § 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

made dikes or barriers, natural river berms, beach dunes and the like." 33 C.F.R. § 328.3(c). The Corps interprets the regulatory definition of "waters of the United States" generally to exclude both "non-tidal drainage and irrigation ditches excavated on dry land" and "artificial * * * small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons." Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) ("1986 Rule").

*2. The Supreme Court's Decisions*

The Supreme Court has held that Congress intended regulation under the CWA to extend at least to some waters that are not navigable as traditionally defined, including wetlands adjacent to traditional navigable waters. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (enforcement action by Corps to enjoin owner from filling wetlands adjacent to Lake St. Clair, Michigan, without a CWA § 404 permit); see also *International Paper Co. v. Ouelette*, 479 U.S. 481, 486 n.6 (1987). In *Riverside Bayview*, the Court specifically upheld the exercise of CWA jurisdiction (pursuant to 33 C.F.R. §§ 328.3(a)(1) and (a)(7)) over wetlands that are adjacent to traditional navigable waters. *Riverside Bayview*, 474 U.S. at 134.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps*

*of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the Supreme Court rejected the Corps' reliance on use as habitat for migratory birds as the basis for interpreting "waters of the United States" to encompass "isolated" non-navigable intrastate waters.

The Supreme Court most recently construed the CWA term "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases[5] in which the CWA had been applied (pursuant to 33 C.F.R. §§ 328.3(a)(5) and (a)(7)) to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See *id.* at 729-730 (plurality opinion). All members of the Court reaffirmed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. *See id.* at 731 (plurality opinion); *id.* at 767-768 (Kennedy, J., concurring in the judgment); *id.* at 793 (Stevens, J., dissenting).

A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 547 U.S. at 739 (plurality opinion),

---

[5] The first case, *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), was a civil enforcement action against landowners for filling a wetland without a CWA § 404 permit. The second case, *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004), was an APA challenge by landowners to a permit denial.

that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection to such water bodies, *id.* Justice Kennedy interpreted "waters of the United States" to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment); *see id.* at 779-780 (wetlands "possess the requisite nexus" if the wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'").

Justice Kennedy also concluded that the Corps' assertion of regulatory authority over "wetlands adjacent to navigable-in-fact waters" is sustainable "by showing adjacency alone," and that the Corps's definition of adjacency "is a reasonable one." *Id.* at 775, 780. The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, *inter alia*, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. *See id.* at 810 & n.14 (Stevens, J., dissenting). *See* also *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467

F.3d 56, 66 (1st Cir. 2006). The Court reversed and remanded to allow consideration of the evidence in light of the appropriate legal standard. 547 U.S. at 757.

*3. The Rapanos Guidance*

The Corps and EPA thereafter prepared a memorandum that provides guidance to Corps districts and EPA regions in determining the presence of "waters of the United States." *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* Dec. 8, 2008) (Guidance) (App.158). The Guidance "focuses only on those provisions of the agencies' regulations at issue in *Rapanos*" (*i.e.*, 33 C.F.R. §§ 328.3(a)(1), (a)(5) and (a)(7)), and states (at 3, App. 160) that "regulatory jurisdiction under the [Clean Water Act] exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied." *Id.* at 3, 4 n.18.

*B. Factual Background*

*1. The Deertrack Site*

Appellee/Cross-Appellant[6] Deertrack owns an approximately 85-acre parcel of land in Horry County, South Carolina, that once comprised nine holes of the Old South Golf Course. In connection with Deertrack's

[6] Deertrack's appeal from the district court's denial of its petition for attorney fees has been consolidated with this appeal. The federal appellees are not parties to that appeal.

potential redevelopment of the site, in February 2006, the Corps received a request for its view on whether there are "waters of the United States" on the site that are subject to federal regulatory authority under the Clean Water Act (See App. 174). In August 2006, the agency issued a determination that the Site did not contain any "waters of the United States" (see App. 175). That determination – which the Corps prepared prior to the Supreme Court's decision in *Rapanos v. United States* – provided that it would be valid for five years, unless the Corps determined that "new information warrants revision * * * before the expiration date" (see *ibid*).

Shortly after the Homeowners Association filed this lawsuit in April 2009, the parties filed a joint motion asking that the Court grant a voluntary remand to the Corps so that the agency could reevaluate its Clean Water Act regulatory authority in light of new information (CR 32). The Court granted the joint motion and stayed litigation pending remand (CR 33).

*2. The Corps' 2010 Jurisdictional Determination*

The Corps issued the jurisdictional determination challenged here (App.58) on March 17, 2010. The jurisdictional determination consists of three new (post-*Rapanos*) "approved jurisdictional determination forms" (App. 69-91), an eight-page memorandum explaining the agency's findings (App. 58-65), and various pictures taken by the Corps during its two

inspections of the Site (see App. 93-96). The decision is supported by a substantial administrative record that includes scientific literature (Ad.Rec. (CR 42) at 584-623) and guidance documents (App. 158-173; Ad.Rec at 409-583), as well as over 150 pages of documents that the Homeowners Association provided to the Corps. The jurisdictional determination addresses the 84.96-acre Deertrack Site, and asserts Clean Water Act regulatory authority over two channels on the Site totaling 920.07 linear feet (approximately 0.37-acre).[7]

As the first step in determining the presence of "waters of the United States" subject to CWA regulatory authority, experts for the Corps and EPA reviewed various maps and other literature and reference materials. First, the agencies examined aerial photography from 1994 to 2006. *See* App. 60. These photographs revealed that the Deertrack Site has been "a golf course with associated ponds and lakes" since at least 1994. *Id.* The agencies then reviewed topographic maps prepared by the U.S. Geological Survey in 1984, which "did not contain any evidence of wetlands" on the Site. *Id.* Next, they reviewed the U.S. Fish & Wildlife Service's "National Wetlands Inventory" for Surfside Beach, prepared in the 1980s, which indicated that the Site consists entirely of "uplands" and "open water," *id.*;

[7] These "waters of the United States" are shaded black on the map appended to the Corps' jurisdictional determination (App. 67).

that is, no wetlands were shown on the Deertrack Site. Finally, the agencies reviewed the U.S. Department of Agriculture's Soil Survey for Horry County (1974). The soil survey indicated that, in 1974, three hydric soils were present on certain portions of the Site (*id.*), but the Corps concluded that the presence of hydric soils in 1974 was "not conclusive" that such soils remain today (*id.*), or that wetlands (as opposed to other waters) ever existed on the Deertrack Site.[8]

Because the agencies' in-office review was inconclusive on the question whether wetlands or other potential "waters of the United States" ever existed on the Deertrack Site, such that the structures at issue here might not have been excavated entirely in uplands, the Corps' supervisory

---

[8] The Corps' 1987 Wetland Delineation Manual interprets the regulatory definition of "wetlands" to require: (1) prevalence of plant species typically adapted to saturated soil conditions, determined in accordance with the U.S. Fish and Wildlife Service's National List of Plant Species that Occur in Wetlands; (2) hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time during the growing season to become anaerobic, or lacking in oxygen, in the upper part; and (3) wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at least five percent of the growing season in most years. *See Rapanos*, 547 U.S. at 761 (Kennedy, J., concurring); *see also United States v. Banks*, 115 F.3d 916, 920 (11th Cir. 1997) ("A 'wetland' under the CWA must meet the three criteria set out in the Corps' 1987 Wetlands Delineation Manual: (1) a prevalence of hydrophytic plants, (2) hydrological conditions suited to such plants, and (3) the presence of hydric soils."); *United States v. Malibu Beach, Inc.*, 711 F. Supp. 1301, 1307 (D. N.J.1989) ("Several courts have recognized the three-parameter approach as an appropriate method to determine whether an area is a wetland.")

biologist conducted two site inspections, accompanied on the second visit by an EPA wetlands expert. App. 61. Following those inspections, the Corps concluded that there are 0.37 acres of waters subject to the United States' regulatory authority on the Site, and that the remainder of the site contains no "waters of the United States." App. 59.

*a. The Tributaries on the Deertrack Site that Constitute "Waters of the United States."*

Following its two onsite inspections, the Corps concluded that there are two nonnavigable tributaries of the Atlantic Ocean on the Deertrack Site that contain relatively permanent flow, thereby satisfying the *Rapanos* plurality's standard for establishing regulatory authority over "waters of the United States." This conclusion has not been challenged.

The first tributary subject to the United States' regulatory authority flows offsite through a culvert, then through a stormwater retention pond and into a culvert under Highway 17, then into Dogwood Lake, and finally into the Atlantic Ocean (App. 62). This stream "had a firm, sandy bottom * * *[and] was free of vegetation." App. 61. Here, "it was evident that a steady influx of groundwater contributed to the constant recharge and flow," which are "strong indicators of a relatively permanent flow." *Id.*

This channel also contained a "clearly defined" ordinary high water mark. App. 61. For example, the Corps observed an "absence of terrestrial vegetation" and the "presence of litter and debris being transported

downstream from the riparian vegetation along the tributary," which are two physical characteristics that support its finding of an ordinary high water mark and relatively permanent flow. App. 61. The Corps further observed "red staining on vegetation along the channel" caused by iron-oxidizing bacteria; significant "sinuosity" (amount of curvature) consistent with a relatively permanent water flow; and "sediment deposition bars" resulting from a relatively continuous flow of water. App. 62. The Corps thus concluded that this nonnavigable tributary of the Atlantic Ocean is subject to the United States' regulatory authority under the *Rapanos* plurality's standard and the regulations.

The other tributary within the United States' CWA regulatory authority, which "flows into" the first, "share[s] the same characteristics as the tributary" described above. App. 62-63. The Corps observed water flowing in the tributary during both site visits; a "well-defined channel with a firm, sandy bottom;" "a well-defined ordinary high water mark;" and other "geomorphic indicators including groundwater influx," red staining from iron-oxidizing bacteria, channel sinuosity, and deposition bars. *Id.* The Corps concluded that the reach of the second tributary begins at the point in the excavated channel where there is an "abrupt change" in the amount of plant life and where it observed "abundant vegetation." *Id.* Upstream of this point, the Corps observed that "vegetation was thick

and prevalent," there was no longer an ordinary high water mark, there was "no evidence" of groundwater influx, the tributary exhibited less curvature, and there was no longer "continuous flow or relatively permanent flow. . . ." *Id.* Thus, the Corps determined that the reach of the second tributary that is subject to federal regulatory authority under CWA section 404 extends from the point at which an ordinary high water mark begins to the point of confluence with the first tributary. *Id.*; *see also* 33 C.F.R. § 328.4(c)(1).

b. *The Remaining Ditches, Ponds, and Swales on the Deertrack Site*.

The Corps determined that the remaining ditches, ponds and swales on the Deertrack Site were not "waters of the United States." As discussed above, the Corps interprets its regulatory definition of "waters of the United States" generally to exclude "non-tidal drainage and irrigation ditches excavated on dry land" and "artificial * * * small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons." 1986 Rule, 51 Fed. Reg. at 41,217. Here, other than the two tributaries that the Corps determined are "waters of the United States" under its regulations and the *Rapanos* plurality opinion, the Corps found that the remaining water features on the Deertrack Site lack the hydrologic characteristics and/or significant connections to traditional navigable waters necessary to be considered

"waters of the United States" under either standard announced in *Rapanos* and the agency's regulations. App. 63.

The Corps noted that there currently are no wetlands on the Deertrack Site (App. 61), and while historic surveys indicated that hydric soils may once have been present on the site, the Corps found "no evidence" (*e.g.*, no remnant hydric soils or hydrophytic vegetation) during its two site inspections that there ever were wetlands where water features exist today. App. 60-61. The Corps determined that the ditches, ponds and swales on the remaining portion of the Deertrack site were "excavated solely from and drain[] only upland * * * *." App. 64-65. *See also* AR at 662 (EPA memorandum explaining that all ponds on the Site "appeared to be constructed in uplands"). The Corps determined that the ditch and swale features "conveyed water from ponds and surrounding upland areas during and following storm events and there [was] no evidence of groundwater recharge." App. 64. The Corps additionally determined that the ponds "were constructed to maintain a certain water level" and would retain water unless the water level increased above a certain point (*id.*), a fact also documented in a photograph showing an elevated culvert designed to insure that water is maintained at the proper level. App. 93. Such structures ordinarily are not considered to fall within the regulatory definition of "waters of the United States" (see 1986 Rule), and the Corps

determined that the features on the Deertrack Site "d[id] not have a significant nexus to a traditional navigable water because of the low volume, duration and frequency of water flow from these features." App. 64. The Corps therefore concluded that they were not "waters of the United States."

*C. The Proceedings Below.*

In December 2008, the Homeowners Association notified the Corps and EPA of its intent to seek judicial review of the Corps' jurisdictional determination of Deertrack's property; and on April 16, 2009, it filed the original complaint, which named various Corps and EPA officials, along with Deertrack. In June 2009, the Corps supervisory biologist who prepared the August 2006 jurisdictional determination visited the Deertrack Site to evaluate the contentions made in the Homeowners Association's December 2008 notice of intent. During this visit, the official noticed certain water features that, in his view, warranted reconsideration of his prior jurisdictional determination. Thereafter, the district court granted the parties' joint motion for a voluntary remand of the August 2006 jurisdictional determination to the Corps and to stay the litigation pending completion of the reconsideration process.

On April 5, 2010, the federal defendants lodged a revised jurisdictional determination, which concluded that 0.37 acres of "waters of the

United States" were present on the Deertrack Site. The Homeowners Association amended its complaint (App. 178) on May 5, 2010, and the district court heard the case on cross-motions for summary judgment. *See* CR 52, 57, 58.

On July 25, 2011, the district court issued its Order (App. 283) granting summary judgment for the federal defendants and denying summary judgment on the private parties' motions. The district court concluded (App. 307) that the Corps reasonably interpreted the existing case law, regulations and guidance documents, and permissibly concluded that only two of the water bodies on the Deertrack Site were subject to the regulatory authority of the United States under the plurality's standard. It found that the Corps' conclusion that the remaining ponds, ditches and swales were excavated entirely in uplands was not arbitrary or capricious, and that the Corps' application of its longstanding interpretation of its regulations to them was reasonable and consistent with *Rapanos*. App. 305. It further held (App. 311) that, based on these features' low "flow" characteristics, "their ability to *affect* downstream navigable waters is insubstantial and speculative at best" (emphasis in original). It therefore held that the Corps' determination was not arbitrary or capricious, an abuse of discretion or otherwise not in accordance with law, granted summary judgment for the federal defendants (App. 312) and dismissed

the case with prejudice. The Homeowners Association appeals from that judgment.

## SUMMARY OF ARGUMENT

This case should be dismissed for want of jurisdiction. The Homeowners Association offered no evidence below or in this Court to support its allegations that it will suffer injury as a result of the Corps' decision that it lacks CWA authority over the artificial system of ponds, ditches and swales on its neighbor's property. The Homeowners Association has established none of the required elements of standing because the events that it alleges will give rise to both its injury and the redress of that alleged injury are matters for speculation.

In any event, the Homeowners Association has not shown that the Corps' determination was arbitrary, capricious or otherwise not in accordance with law. It attempts instead to persuade the Court to substitute its judgment for that of the agency on technical matters, such as the hydrological conditions present on the Deertrack Site. The Corps historically has interpreted the definition of "waters of the United States" to exclude both ornamental ponds constructed to retain water for aesthetic reasons and manmade drainage structures excavated entirely in uplands. The evidence in the administrative record established that the ditch and swale structures here were excavated in uplands, and the Corps found no

evidence of flow, other than ephemeral flow following rainfall or storm events (see App. 63-64), through the system. In light of the Corps' (and EPA's) longstanding interpretation of the CWA generally to exclude these types of features and the characteristics of the system, including minimal flow, the Corps concluded that there was no significant nexus between these features and traditional navigable waters. It therefore reasonably concluded that the system of artificial ponds, ditches and swales here are not "waters of the United States."

## ARGUMENT

### *A. Standard of Review*

This Court must consider *de novo* whether a plaintiff has satisfied the elements of standing regardless of whether the issue was passed on by the district court. *See Long Term Care Partners, LLC v. United States,* 516 F.3d 225 (4th Cir. 2008). This Court also reviews *de novo* the district court's grant of summary judgment on judicial review of an agency decision. *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009).

This case was before the district court on the Homeowners Association's amended complaint (App. 178, CR 43) seeking judicial review under the APA of the Corps' jurisdictional determination. As the Homeowners Association acknowledges (Br. 10-11), the Corps' action is reviewed under

Section 706(2) of the APA, 5 U.S.C. § 706(2). Section 706(2)(A) governs review of all challenges to agency action under the APA. *See Aracoma Coal*, 556 F.3d at 189; *Consumers Union of U.S., Inc. v. FTC*, 801 F.2d 417, 422 (D.C. Cir. 1986).

Section 706(2)(A) provides that a reviewing court may set aside "agency action, findings, and conclusions" that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See also Aracoma Coal*, 556 F.3d at 189 (4th Cir. 2009) (applying the APA's "arbitrary and capricious" standard to review of Corps' issuance of a Clean Water Act permit). Review under this standard is "highly deferential," with a presumption in favor of finding the agency action valid. *Aracoma Coal,* 556 F.3d at 192 (citing *Natural Res. Def. Council, Inc. v. EPA,* 16 F.3d 1395, 1400 (4th Cir. 1993)). This Court has explained that an agency's scientific determinations are entitled to special deference. See *American Paper Inst. v. EPA*, 660 F.2d 954, 963 (4th Cir. 1981). Thus, courts "must look at the agency's decision not as the chemist, biologist or statistician that the court is qualified neither by training nor experience to be, but as a reviewing court exercising its narrowly defined duty of holding agencies to certain minimal standards of rationality. . . ." *Id.* (brackets and citations omitted).

The Corps' application of its regulatory definition of "waters of the

United States" to the specific facts of this case is a mixed question of fact and law. This Court reviews such mixed questions under the deferential "arbitrary and capricious" standard of section 706(2)(A), and provides even greater deference where, as here, the agency decision relates to factual matters in which the agency has special technical expertise, *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972), as well as to matters of apparently mixed factual and legal issues in which the agency has expertise, *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965); *see also Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974) (deferential standard applies to review of an agency's reasoning not just its fact-finding). This Court stated in *Precon v. United States*, 633 F.3d 278, 290 (2011) that "recognizing the Corps' expertise in administering the CWA, we give deference to its interpretation and application of" the standards announced by the Supreme Court in *Rapanos*.[9]

[9] In *Precon*, the parties agreed that Justice Kennedy's "significant nexus" test governed, 644 F.3d at 688, and the Court thereafter explained that it must "give deference to [the Corps'], interpretation and application of Justice Kennedy's test where appropriate." *Id.* at 290. There is no reason for this Court to accord less deference to the Corps' interpretation and application of the *Rapanos* plurality's standard.

## I. THE HOMEOWNERS ASSOCIATION FAILED TO ESTABLISH STANDING TO INVOKE THE COURTS' JURISDICTION

"Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." *Steel Company v. Citizens for a Better Environment,* 523 U.S. 83, 95 (1998). The district court concluded that it had subject matter jurisdiction (App. 301-02), rejecting Deertrack's contention that issuance of a determination that the United States lacks jurisdiction under the CWA does not constitute final agency action subject to review pursuant to the APA. The district court did not, however, address the question of the Homeowners Association's standing to sue. Because, as we show below, the Homeowners Association failed to establish any of the elements of standing, this Court lacks jurisdiction and the case must be dismissed.

In *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992), the Supreme Court explained that the "irreducible constitutional minimum of standing" to invoke the power of the judiciary contains three requirements. First, a plaintiff must allege – and ultimately prove – that it has suffered an "injury in fact," defined as an injury or threat of injury that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical. *Ibid.* To support standing, the injury must be both "real

and immediate," not "conjectural" or "hypothetical." *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983). Second, the injury must be fairly traceable to the challenged action of the defendant. *Arizona Christian School Tuition Organization v. Winn*, 131 S.Ct. 1436, 1448 (2011). And third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Steel Company,* 523 U.S. at 102-03; *Friends of the Earth v. Laidlaw,* 528 U.S. 167, 180-81 (2000). The Homeowners Association failed to establish facts to demonstrate that it could meet any of these requirements.

The party invoking federal jurisdiction bears the burden of establishing its existence. *Summers*, 555 U.S. at 493; *Steel Company,* 523 U.S. at 104. Because the elements of standing are "not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife,* 504 U.S. at 561. At the pleading stage, general factual allegations may suffice. "In response to a summary judgment motion, however, the plaintiff can no longer rest on 'mere allegations, but must 'set forth' by affidavit or other evidence, 'specific facts,' * * * which for purposes of the

summary judgment motion will be taken to be true." *Id.* (quoting Fed. Rule Civ. Proc. 56(e)). "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Summers*, 555 U.S. at 493-494, quoting *Defenders of Wildlife*, 504 U.S. at 562. An organization may assert the standing of its members, but it must demonstrate injury to at least one member that is both "concrete and particularized" and "actual or imminent." *Summers, id.* at 493, 498.

In this case, the Homeowners Association presented no evidence, in affidavits or otherwise, to establish its standing to sue, and instead relied on "mere allegations" of injury. App. 181. For example, the Homeowners Association alleged (*id.*) that its members "use and enjoy[ment]" of the ponds, ditches and swales on the Deertrack site would be adversely affected by the proposed development plan for the property. This allegation was not supported by any evidence. Moreover, it is undisputed that the "waters" over which the Corps determined that it lacked regulatory authority comprise a man-made system of ditches, ponds and swales constructed on private property for use as a system of hazards on a former golf course. Accordingly, the Homeowners Association clearly has no legally protected right to use and enjoy these "waters," except with the permission of the landowner. *See*, *e.g.*, *Presley v. City of Charlottesville*,

464 F.3d 480, 492 n.2 (4th Cir. 2006) ("right to exclude" universally held to be a fundamental element of the property right); and *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991) ("[i]n the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession"). The Homeowners Association therefore cannot establish injury-in-fact based on its loss of the use and enjoyment of its neighbor's property.

The Homeowners Association alleged (App.181) that the planned development of the Deertrack Site would destroy the ditches, ponds and swales on the Deertrack Site resulting in damage to (1) wildlife habitat on the Deertrack Site and (2) downstream waters, including Lake Elizabeth, Lake Dogwood, and the Atlantic Ocean; and would injure the Homeowners Association and its members because they own property adjacent to the Deerfield Site. But the Homeowners Association offered no facts to support their claimed interest in wildlife habitat. Moreover, it also alleged (App. 180) that drainage from the Homeowners Association members' property "enters the waters and wetlands" on the Deertrack Site, not the other way around. Based on these allegations, the Homeowners Association property, would appear to be upstream from the Site, whereas the effects of any damage to the drainage system on the Deertrack Site would be felt downstream. Accordingly, the proximity of the Homeowners Association

members' property to the site does nothing to show that the members would be harmed by damage to the ditches, ponds and swales on the Deertrack Site.

In addition, the Homeowners Association produced no evidence to support their allegation that injury to downstream waters is likely to result from the implementation of Deertrack's development proposal. And even if downstream waters would be adversely affected, the Homeowners Association has not shown how such an injury affects its interests. The "party bringing suit must show that the action injures him in a concrete and personal way." *Summers*, 555 U.S. at 497, quoting *Defenders of Wildlife* 504 U.S., at 580-581). In *Morton v. Sierra Club*, for example, the Supreme Court concluded that the Sierra Club lacked standing where it "failed to allege that it or its members would be affected in any of their activities or pastimes" by the challenged action. 405 U.S. 727, 735 (1972). The Court found that "[n]owhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents." *Id.* at 735. Similarly here, the Homeowners Association offered no facts to establish that any of its members use waters downstream from the Deertrack Site such that they would suffer a concrete injury if downstream waters were degraded.

The Homeowners Association instead merely alleged (App. 181) that it has an interest in this case because "the failure to apply Clean Water Act protections" would eliminate or degrade the waters and wetlands on the site "and all the benefits and services they provide in the watershed." It thus failed to identify any injury to it or its members that is "concrete," even assuming that damage to downstream waters were likely, which itself is neither actual or imminent at this time, but rather is purely a matter for speculation. And in any event, an organization has standing to bring suit on behalf of its members only when the interests at stake are germane to the organization's purpose. *Friends of the Earth v. Laidlaw,* 528 U.S. at 181, citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). The Homeowners Association provided no facts showing that its members' alleged interests in protecting wildlife habitat and watershed values in areas that are not owned or occupied by its members are germane to its purpose.

The Homeowners Association additionally alleged, without elaboration, that its injury "includ[es] procedural injury." Any "procedural injury" that the Homeowners Association might claim from the Corps' determination that it lacks jurisdiction, however, does nothing to cure the defect in the Homeowners Association's standing. As the Supreme Court made clear in *Summers*, "deprivation of a procedural right without some

concrete interest that is affected by the deprivation – a procedural right in vacuo – is insufficient to create Article III standing. Only a 'person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy.'" *Summers*, 555 U.S. at 496, quoting *Defenders of Wildlife*, 504 U.S. at 572, n.7 (emphasis in original).

In short, the Homeowners Association has failed to establish that Article III jurisdiction exists in this case. At most, it offers unsupported allegations that it and its members may be harmed by the consequences of events that are themselves conjectural at this time.[10/] Accordingly, resolution of the legality of the Corps' action would invite the Court "into the area of speculation and conjecture, far removed from that concrete adverseness which sharpens the presentation of issues" necessary to the proper adjudication of legal issues. *Lebron v. Rumsfeld,* 670 F.3d 540, 561 (4th Cir. 2012) (internal quotation marks and citations omitted). This Court should decline that invitation.

II. THE CORPS CORRECTLY APPLIED THE STANDARDS FOR

---

[10/] The Homeowners Association's brief on appeal states (Br. 2) that its members expect Deertrack's development plans to exacerbate already significant flooding problems on their properties. This "injury" suffers from the same deficiencies of immediacy and proof as the allegations in the complaint.

IDENTIFYING "WATERS OF THE UNITED STATES"

Even if the Homeowners Association has standing, this Court must affirm the district court's judgment. The Homeowners Association seeks to persuade this Court to substitute its judgment with respect to the hydrological conditions on the Deertrack site for that of the agency, contrary to well-established principles of administrative law. Here, the Corps reasonably relied on its experts' conclusion that the ditches, ponds and swales on the Deertrack Site were excavated entirely in uplands, and exhibited no evidence that they were "waters of the United States." Nor, even assuming that the features are waters, did the evidence show that these features significantly affect traditional navigable waters. The district court correctly deferred to the Corps' analysis (App. 305). *See Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.").

The Homeowners Association inaccurately contends (Br. 21, 29, 30, 33, 34) that the Corps misapplied its own regulations and guidance by relying "solely" on the presence of "visible flow" in determining that the artificial ditches and swales on the Deertrack Site are not "waters of the United States." It further argues (Br. 27) – again, incorrectly – that the

Corps "failed" to apply the "significant nexus standard" established in Justice Kennedy's concurring opinion in *Rapanos*. It thus asserts that "[r]egardless of which standard is ultimately controlling [in] the Fourth Circuit" jurisdiction is present on the Deertrack site. While we agree with the Homeowners Association that there is no need to determine for purposes of this case whether one of the standards announced in *Rapanos* is controlling to the exclusion of the other, that is because the ponds, ditches and swales on the Deertrack Site clearly are not "waters of the United States" under the applicable regulatory definition, applying either of the two standards.

The Homeowners Association's arguments attempt to divorce each of the alternative standards set out in *Rapanos* from basic principles of hydrology, and to substitute the Homeowners Association's interpretation of them for the Corps' application of its own reasonable interpretation of "waters of the United States," set out in regulations and the published guidance. Under the applicable standard of review, this Court must defer to the Corps' reasonable determination that these structures are not subject to federal regulatory authority under the CWA.

A. *The Corps' Determination that the Ditches, Ponds and Swales above the two Tributaries on the Deertrack Site are not "Waters of the United States" was not Arbitrary, Capricious or Otherwise not in Accordance with Law.*

After determining that two nonnavigable tributaries are "relatively permanent waters" subject to CWA regulatory authority, the Corps determined that the remaining features lacked sufficient hydrologic characteristics to be considered "waters of the United States" under the *Rapanos* plurality's standard. App. 64. The Corps determined (App. 63-64) that CWA authority over the system of ditches and swales on the Deertrack Site ended at the upstream point within the channels where (1) there was no longer an ordinary high water mark; (2) there was an "abrupt change" in the amount of plant life and "abundant vegetation" was present in the channels, which is typically an indication of low or intermittent flow; (3) there was "no evidence" of groundwater influx; and (4) there was relatively less "sinuousity" of the channel. App. 62-63.

The Homeowners Association contends (Br. 15) that language in the *Rapanos* plurality opinion to the effect that CWA authority extends to "relatively permanent, standing or continuously flowing bodies of water that are connected to traditional navigable waters" (see *Rapanos*, 547 U.S. at 739) requires this Court to reverse the Corps' determination. According to the Homeowners Association, (Br. 23) the CWA extends equally to

"standing" and to "flowing" waters under the *Rapanos* plurality's standard. In other words, the Homeowners Association asks this Court to isolate the words, "relatively permanent, standing * * * waters" from the plurality's opinion and to conclude that such waters necessarily are subject to CWA jurisdiction. On this premise, the Homeowners Association contends that the Corps in this case improperly limited jurisdiction to "flowing" waters. But the Homeowners Association misunderstands both the standard and the Corps' determination in this case.

The Corps did not rely "solely" on the absence of flow for its determination that the ponds, ditches and swales here were not "waters of the United States" under the plurality's standard. The Corps interprets its regulatory definition of "waters of the United States" generally to exclude "non-tidal drainage and irrigation ditches excavated on dry land" and "artificial * * * small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons." *See* 1986 Rule, 51 Fed. Reg. at 41,217. The Corps generally does not consider ditches and swales to be within the regulatory definition of "waters of the United States" in the absence of a bed and bank and an ordinary high water mark (thus qualifying it as a tributary), and a significant connection to traditional navigable waters (App. 168-169 (Guidance at 11-12)); or unless the water meets the requirements of the

"other waters" provision, 33 C.F.R. 328.3(a)(3). Such waters, pursuant to the Supreme Court's decision in *SWANCC*, must have a significant nexus to other covered waters  As discussed *infra*, the Corps determined – in applying Justice Kennedy's significant nexus standard in *Rapanos* – that these features lack a significant nexus to traditional navigable waters, because of the low volume, duration, and frequency of flow.

The Homeowners Association does not challenge the Corps' finding that there currently are no wetlands on the Site (App. 221), or that, although hydric soils may have once been present on the Site, there is currently "no evidence" (*e.g.*, no remnant hydric soils or hydrophytic vegetation) that there ever were wetlands where water features exist today. See App. 220-21. It argues nonetheless (Br. 9) that the ditches, ponds and swales on the Deertrack site – including the retention ponds that were designed to retain water "primarily for aesthetic reasons" – which the agencies' experts determined to have been "excavated solely from and draining only upland" (See App. 224 (Corps); Ad. Rec. 662 (EPA)) are subject to CWA jurisdiction. The Homeowners Association bases its argument on photographs in the record that show water in the ditches and on witness statements made in another case, to which neither the Corps nor EPA was a party (see Br. 22), to the effect that they contain standing water "almost all the time."

The Corps found no evidence of hydric soils and no evidence that there are or ever were wetlands on the delineated area. It therefore concluded (App **) that no wetlands were present on the Site, confirming that the system of ponds, ditches and swales were created by excavating wholly from uplands. *See* 1986 Rule, 51 Fed. at 41,217. The Corps' experts further found that the ditches and swales exhibited no evidence of relatively permanent flow. They found instead that the "ditch and swale features convey water * * * during and following storm events and there is no[] evidence of groundwater recharge." App. 64. The Corps observed that in these features upstream from the two tributaries, "vegetation was thick and prevalent," there was "no longer an ordinary high water mark, the tributary exhibited less curvature" *Id.* Using all of the evidence gathered from onsite investigations, in addition to soil studies, topographic maps, and scientific literature, the Corps found that the ditches, ponds and swales on the remainder of the delineated portion of the Deertrack Site are not "waters of the United States." That decision was not arbitrary, capricious or contrary to law.

The Homeowners Association invites this Court to ignore the Corps' detailed analysis and to reverse the Corps' determination on the basis of its incorrect belief that the *Rapanos* plurality's standard requires the Corps to assert jurisdiction over *all* relatively permanent standing water,

coupled with the testimony of its witnesses to the effect that water occurs in these features "almost all the time." Under the deferential standard of review applicable here, this Court must reject the Homeowners Association's invitation. *Precon*, 633 F.3d at 290.

### *B. The Corps' Conclusion that the Ditches, Ponds and Swales Above the two Tributaries on the Deertrack Site lack a Significant Nexus to a Traditional Navigable Water was not Arbitrary, Capricious or Contrary to Law*

The Corps concluded, on the basis of its review of the soil and wetlands inventories, mapping, and available literature, as confirmed by its two site inspections, that the system of ponds, swales and ditches on the former golf course "as a whole, does not have a significant nexus to traditional navigable water because of the low volume, duration and frequency of water flow in these features, and therefore does not constitute 'waters of the United States.'" App. 64. Asserting that the Corps relied exclusively on its visual observations on its two inspections of the site in reaching this conclusion, the Homeowners Association contends (Br. 30) that the Corps "failed" to undertake the analysis necessary to conclude that the required nexus was absent. The record soundly rebuts this contention.

The preamble to the Corps' 1986 regulations and its published Guidance both provide that ornamental ponds, and swales and ditches

excavated in uplands, generally are not subject to regulation under section 404 of the Clean Water Act. *See* 33 C.F.R. § 328.3(c) as clarified by 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) ("non-tidal drainage and irrigation ditches excavated on dryland" or "artificial, small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons" are generally not "waters of the United States," and therefore are not the types of features over which the Corps traditionally has asserted regulatory authority. Nevertheless, and contrary to the Homeowners Association's contention (Br. 27), the Corps in this case assessed whether these upland features exhibit a significant nexus to a traditional navigable water, such that any of them could be "waters of the United States" subject to CWA regulation under Justice Kennedy's concurring opinion in *Rapanos*.

The Homeowners Association recites at length (Br. 31) the factors relevant to determining flow characteristics and functions of a tributary to determine its downstream effects, and charges that the Corps failed to conduct the necessary analysis in determining that the ponds, ditches and swales on the site lacked a "significant nexus" to traditional navigable waters. It then criticizes (Br. 32) the Corps' conclusion on the ground that "reliance on flow is insufficient to properly assess the nexus envisioned by Justice Kennedy." The Corps, following its Guidance, determined in this

case that there was no evidence of a volume of flow in the ponds, ditches and swales on the site that was sufficient to have more than a "speculative or insubstantial" effect on downstream traditional navigable waters (see Guidance at 11 App. 168). Under the Guidance (at 11) and Justice Kennedy's standard, the Corps considers in its significant nexus analysis various ecologic functions that waters perform and any impact such waters have on downstream traditional navigable waters. The factors include whether the water has the capacity to carry or reduce pollutants, to perform flood control functions, or to provide aquatic habitat with more than a "speculative or insubstantial" effect on downstream traditional navigable waters. *Id.* Here, the Corps found that the upland ditches, ponds, and swales were designed primarily to retain water, and that the ponds ordinarily would not "flow." App. 64. It further found that any flood control function of these small water features was insubstantial. *See id.* In light of the Corps' thorough analysis of its record and the Site, it was reasonable for the Corps in these circumstances to conclude that the ponds, ditches and swales at issue did not meet the "significant nexus" standard without also providing an elaborate discussion of the factors the Homeowners Association suggests (Br. 31 ) should have been the focus of the Corps' analysis.

In this case, the Corps properly applied its regulations and its

Guidance, and it reasonably concluded that its authority over the upland ditches on the Site is limited to the portions that demonstrated an ordinary high water mark. App. 224 (AR at 7). *See also* 33 C.F.R. § 328.4(c)(1); App. 164.[11/] The Homeowners Association suggests (Br. 35) that the mere presence of water in the features under consideration here distinguishes them, for purposes of the "significant nexus" analysis, from "high, dry ground with no indication of the recent presence of water." But, as discussed above, in this case the documentary and onsite evidence all indicated that the minimal, ephemeral flow in these structures to the

---

[11/] In *Rapanos,* Justice Kennedy described the Corps' standard for asserting jurisdiction over tributaries as follows: "the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high water mark[,]" and he acknowledged that this requirement of a perceptible ordinary high water mark for ephemeral streams "may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute navigable waters under the Act." 547 U.S. at 781, *see also id.* at 761. With respect to wetlands, however, Justice Kennedy concluded that the breadth of the Corps' standard for tributaries precluded the agency from relying solely on wetlands' adjacency to such tributaries as the determinative measure of whether such wetlands "are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." *Id.* at 781. As noted above, this case does not involve wetlands. Thus, it was both reasonable and consistent with Justice Kennedy's opinion for the Corps to have relied on signs of an ordinary high water mark to distinguish tributaries that categorically satisfy the significant nexus standard from others that do not.

"relatively permanent tributary" identified by the Corps could not significantly affect traditional navigable waters. Having concluded that these ditches and swales were of a type generally excluded from the scope of the CWA under the agencies' longstanding interpretation, and that their physical characteristics, including both frequency and volume of water that was too low to result in any significant effect on traditional navigable waters, the Corps reasonably concluded, based on the record before it, that the system of ditches ponds and swales above the two tributaries was not subject to CWA regulatory authority.

The Homeowners Association's suggestion (Br. 36) that this Court's decision in *Precon* dictates a contrary conclusion is unavailing. First, Precon addressed wetlands, which are not at issue here. In that decision this Court concluded, 633 F.3d at 294, that in announcing the "significant nexus" standard, Justice Kennedy intended for "some evidence of both a nexus and its significance to be presented," in order to permit a meaningful examination of the significance of effects of a nonnavigable water on traditional navigable waters. Where, as here, the evidence clearly indicated that any nexus between these ordinarily excluded structures and traditional navigable waters was speculative, the Corps reasonably concluded that further evaluation of the hypothetical significance of such a speculative nexus would not be meaningful. The Corps' decision not to

further evaluate the "significance" factors (see Br. 32) in these circumstances, and in light of this Court's finding that the Corps may not assert jurisdiction under Justice Kennedy's standard unless there is "some evidence of both a nexus and its significance," 633 F.3d at 294, was neither arbitrary nor capricious, as the district court correctly concluded (App. 311). This Court should affirm that conclusion.

## CONCLUSION

For the foregoing reasons, the this case should be dismissed for lack of jurisdiction, and if jurisdiction is found, the judgment of the district court should be affirmed.

Respectfully submitted,

s/ Elizabeth Ann Peterson

IGNACIA S. MORENO
Assistant Attorney General

AARON P. AVILA
JENNIFER SCHELLER NEUMANN
ADAM J. KATZ
ELIZABETH ANN PETERSON
U.S. Department of Justice
Environment & Natural Resources
Division
P.O. Box 7415
Washington, DC 20044
(202) 514-3888
ann.peterson@usdoj.gov

RESET FORM

**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**No.** 11-1871 **Caption:** Deerfield Plantation Phase II-B Property Owners Associ

**CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)**
Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

   This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   ☑ this brief contains 8,999 [*state number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   ☐ this brief uses a monospaced typeface and contains _____ [*state number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

   This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☑ this brief has been prepared in a proportionally spaced typeface using WordPerfect 12 [*identify word processing program*] in 14 point Century [*identify font size and type style*]; **or**

   ☐ this brief has been prepared in a monospaced typeface using _____ [*identify word processing program*] in _____ [*identify font size and type style*].

(s) /Elizabeth Ann Peterson

Attorney for Federal Appellees

Dated: 4/27/2012

04/13/2012
SCC

CERTIFICATE OF SERVICE

I certify that on April 27, 2012, copies of the foregoing Answering Brief for the Federal Appellees were served upon all parties or their counsel using this Court's CM/ECF system.

s/ *Elizabeth Ann Peterson*

Elizabeth Ann Peterson
Attorney, Department of Justice