UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF: BP America Production Company, Respondent.	)	Docket No. CWA-08-2014-0037 **RESPONDENT'S RESPONSE OPPOSING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION ON LIABILITY**

Respondent, BP America Production Company, respectfully submits this Response Opposing Complainant's Motion for Partial Accelerated Decision on Liability.

I. INTRODUCTION

In its Motion for Partial Accelerated Decision on Liability ("Motion"), the United States Environmental Protection Agency ("EPA"), Region 8 ("Complainant") seeks a summary determination of BP's liability under Section 301 of the Clean Water Act ("Act") for the alleged unpermitted discharge of a pollutant. 33 U.S.C. § 1311(a). A required element of Complainant's proof of liability, however — that the discharge was into regulated "navigable waters"— is not appropriate for summary determination in this matter. At issue is a small, 25' x 8' area above a nearby unnamed drainage that flows only intermittently. The jurisdictional water analysis therefore involves a detailed, fact-intensive inquiry and the application of a highly nuanced and often contradictory and controversial area of the law. Given this legal backdrop and the outstanding factual questions further described below, the Motion must be denied, and a full evidentiary hearing should be conducted on this threshold issue.

Congress provided little guidance on what constitutes a "navigable water," defining it only as waters of the United States, including the territorial seas. 33 U.S.C. § 1362(7). What waters and wetlands fit this vague definition have been the subject of significant litigation and political debate for many years due to the associated legal and factual complexities. These complexities are well illustrated by the Supreme Court's most recent opinion on the subject, by plurality, in *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208 (2006), in which the Supreme Court Justices strongly disagreed with each other about what constitutes a regulated navigable water. Indeed, EPA and the U.S. Army Corps of Engineers ("Corps") are currently engaged in a contentious rulemaking to define the term "waters of the United States" under the Clean Water Act, over 40 years after it was passed, and have received tens of thousands of adverse comments on their proposal. Situations such as the one at hand, involving small wet areas upgradient from unnamed drainages that flow only periodically, have been particularly controversial and uncertain.

As discussed below, Complainant's argument that BP is now precluded from challenging whether the affected area is a jurisdictional water, either because of BP's business decision to obtain a Section 404 permit for a subsequent repair in the subject wetland, or the Corps' "advisory" determination that there "may be" waters of the United States present at the project site, is without merit. Further, as highlighted by the declaration BP provides herewith, there are genuine questions of material fact regarding whether the impacted area is a wetland and, if so, whether it is covered by the Act.

II. FACTS

This matter arises from an accidental leak from BP's Y#1 Lateral Pipeline ("Pipeline") discovered on March 15, 2013. (Answer, ¶ 5, ¶ 7). The leak occurred at a section of the Pipeline

underlying a small sandy area upgradient from a small unnamed drainage located on the Southern Ute Reservation ("Impacted Area"). (Answer, ¶ 5, ¶11.) The downgradient drainage flows only intermittently and runs into Spring Creek, a small stream also within the Reservation. (*Id*.) The Pipeline transports a two-phase stream consisting of coal bed methane gas (in the gaseous phase) and produced water, which is naturally occurring in the formation and does not contain any liquid hydrocarbons. (Answer, ¶ 6).

The leak consisted predominately of pressurized gas and a small amount of produced water. At the time of discovery, BP estimated that no more than 5 barrels of produced water were accidentally released from the Pipeline. (Answer, ¶ 7.)

Upon discovery of the leak, BP immediately shut in the well supplying the Pipeline and isolated the affected segment of the Pipeline. BP then promptly replaced[1] the affected Pipeline segment and restored the depression in the overlying Impacted Area believed to have been caused by the leak. The depression is believed to have been created in the sandy soil of the overlying Impacted Area by the release of pressurized gas at approximately 100 pounds per square inch from the Pipeline. (BP's Supplemental Response to March 18, 2014 Clean Water Act Section 308 Information Request Regarding the Southern Ute Tribal Y#1 Lateral Pipeline Leak at p.2, attached as Exhibit 1.) Specifically, the pressurized gas likely churned up groundwater which could be expected to erode the sidewalls of the opening and create a depression. *Id.*

In completing these repairs, BP made the business decision to invoke coverage of Clean Water Section 404, Nationwide Permit No. 3 ("NWP 3"). Electing to proceed under this general

[1] In coordination with the U.S. Army Corps of Engineers, the decision was made to leave the affected Pipeline segment in place to prevent any environmental disturbance associated with removing it.

permit coverage was the most expedient, prudent, and environmentally protective path forward. Obtaining a formal Jurisdictional Determination from the U.S. Army Corps of Engineers ("Corps") or EPA that the small Impacted Area is not a regulated jurisdictional water takes several weeks or more and would have substantially delayed the remediation of the pipe leak and affected area. The Corps here instead quickly performed only an advisory, non-binding "Preliminary Jurisdictional Determination" that allowed the Corps to grant authorization for BP to proceed with the repairs under NWP 3. In that non-binding Preliminary Jurisdictional Determination, the Corps concluded only that there "*may be*" waters of the United States at the project site. (Declaration of Kara Hellige, Exhibit 4.)

III. STANDARD OF REVIEW

The administrative law judge may grant a motion for accelerated decision as to any or all parts of a proceeding if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. 40 C.F.R. § 22.20(a). As discussed below, there are genuine issues of fact material to the highly fact-specific jurisdictional water analysis, which must be explored in a full evidentiary hearing on this matter.

IV. ARGUMENT

A. BP's acceptance of a Nationwide Section 404 permit to promptly remediate this site does not preclude its affirmative defense to an enforcement action unrelated to that permit under Section 301 of the Act.

Complainant argues that BP's acceptance of a Section 404 permit, Nationwide Permit No. 3, to promptly respond to and fix this pipeline leak now legally precludes BP from challenging the jurisdictional status of the small Impacted Area in this Section 301 action. In support of its argument, Complainant cites two cases where permit holders challenged the validity of state-issued National Pollutant Discharge Elimination System ("NPDES") permits

during federal enforcement actions for violations of those same NPDES permits. *General Motors Corp. v. EPA*, 168 F.3d 1377 (D.C. Cir. 1999); *California Public Interest Research Group v. Shell Oil Co.*, 840 F.Supp 712 (N.D. Calif. 1993). These cases narrowly held that a NPDES permittee may not avoid liability in a federal enforcement action for violations of a state-issued NPDES permit by challenging the same permit during the federal enforcement action. *Id.*

Those cases are inapposite. Those decisions did not involve or address whether a NPDES holder may challenge the jurisdictional status of the water body receiving the discharge. Rather, one case involves whether, after having sought a NPDES permit to discharge regulated pollutants, a party can later challenge their obligation to comply with the NPDES permit by claiming that one of the substances discharged is not regulated. *General Motors Corp. v. EPA*, 168 F.3d 1377 (D.C. Cir. 1999). In the other case, the permittee unsuccessfully challenged the effective date of certain modified effluent limits in its NPDES permit and could not avoid liability in a federal enforcement action based on a challenge to the NPDES permit in state court. *California Public Interest Research Group v. Shell Oil Co.*, 840 F.Supp 712 (N.D. Calif. 1993). Here, Complainant does not seek to enforce a permit that BP is trying to disavow. Instead, Complainant alleges an unpermitted discharge to a regulated navigable water.

BP here is neither challenging the validity of its Nationwide 404 Permit nor defending against a violation of that permit. Rather, BP is challenging the jurisdictional status of the small Impacted Area near an unnamed drainage for purposes of this enforcement action, which does not seek to enforce a permit. BP is not precluded from its affirmative defense that there was no discharge here to a regulated navigable water.

B. The Corps' Preliminary Jurisdictional Determination cited in Complainant's Motion is advisory only, and is not conclusive or binding, and does not resolve the material factual question questions regarding the jurisdictional status of the Impacted Area.

Complainant's Motion further mischaracterizes the nature of the Preliminary Jurisdictional Determination ("JD") performed here by the Corps. The Corps' regulations implementing Section 404 plainly state that "Preliminary JDs are advisory in nature and may not be appealed." 33 C.F.R. § 329.14(a) (emphasis added); *Fairbanks North Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008) *cert. denied*, 557 U.S. 919 (2009). The rules also emphasize that Preliminary JDs, such as the one performed here, are not conclusive and merely "are written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel." 33 C.F.R. § 331.2 (emphasis added).

In addition, a Preliminary JD is the least documented type of determination and is made by the Corps solely for purposes of allowing the Corps to issue a requested 404 permit. In contrast, a formal "approved JD," which is final and appealable, must be made by the Corps division engineer, and must be based on a report of findings prepared at the district level in accordance with the criteria set out in this regulation. 33 C.F.R. § 329.14(b). Each report of findings must be prepared by the district engineer, accompanied by an opinion of the district counsel, and forwarded to the division engineer for final determination. *Id.* Each report of findings must contain detailed information on all aspects of the subject water body, as specified in paragraph (c) of section 329.14. *Id.* As noted above, even with the rigor required by formal approved JD, even that is not legally binding and is subject to independent review and modification by the federal courts. In sum, a non-binding JD does not preclude BP's affirmative defense regarding the jurisdictional status of the Impacted Area.

C. There are genuine issues of material fact regarding the jurisdictional status of the Impacted Area and the unnamed drainage that preclude an accelerated decision on liability.

1. There is a genuine dispute about whether the Impacted Area is a wetland.

For several reasons, the Impacted Area is probably not a wetland, and a summary determination on this issue would be inappropriate. First, the Impacted Area lacks the requisite hydrophytic vegetation community required by the Corps' wetland delineation manuals. The URS Wetland Delineation ("URS Delineation") that Complainant relies upon incorrectly characterizes the vegetation community present in the Impacted Area and erroneously concludes the Impacted Area is a wetland. (Declaration of Noah Greenberg, p. 4 – 6, attached as Exhibit 2.) Mr. Greenberg's in-person evaluation of the Impacted Area further supports his conclusion that the Impacted Area is more likely a non-wetland area. Specifically, Mr. Greenberg observed big sagebrush (*Artemisia tridentate*) in the Impacted Area, a plant which almost never occurs in wetlands. (*Id.* at 8.) Mr. Greenberg further noted that the presence of willows is not a definitive wetland characteristic in the Colorado environment. (*Id.* at 9.)

Second, the URS Delineation's soil characterization barely meets the wetland soil criteria. (*Id.* at 6.) This characterization is performed by comparing the color of a soil sample with a color chart. Mr. Greenberg notes that it would not be surprising if another wetlands scientist characterized the soil slightly differently in a way that did not meet the wetland soil criteria. (*Id.* at 6.)

Third, the URS Delineation does not sufficiently support the presence of wetland hydrology and raises significant questions about the accuracy of the hydrology characterization. (*Id.* at 6 – 7.) URS's soil moisture characterization and measurements appear to be inconsistent with spring conditions existing at the time of the URS Delineation (*e.g.*, snowmelt and spring

precipitation recharging groundwater, artificial irrigation, and relatively low plant evapotranspiration). URS' conclusions, therefore, raise questions about the accuracy of the hydrology assessment and do not adequately demonstrate compliance with the Corps' 2005 Technical Standard for Water-Table Monitoring of Potential Wetland Sites. (*Id.*) Further, the URS Delineation inappropriately identified the presence of Drift Deposits (B3) (Nonriverine), as a primary wetland indicator. Unlike the subject intermittent drainage, this should only be used in non-riverine settings that are not subject to variable flow. (*Id.* at 7.)

Fourth, the URS Delineation does not appear to meet the Corps' minimum standards for wetland delineations. For example, mapping inadequacies (*e.g.*, absence of location sample sites and surveyed and labeled points), preclude confirmation of the delineated boundaries. (*Id.* at 8.)

In sum, an accelerated decision on liability here is not appropriate because the available information demonstrates that the Impacted Area is most likely a non-wetland because: (1) it lacks the necessary vegetation community; (2) includes a plant that is almost never found in wetlands; (3) does not adequately demonstrate the hydrology criteria; and (4) the location of URS' delineation cannot be confirmed based on the available information.

2. Even if the Impacted Area is a wetland, there is a genuine issue of material fact as to whether it is an artificially irrigated area excluded from coverage under the Act.

If there are any wetlands present in the Impacted Area, they are dependent upon artificial irrigation and therefore excluded from coverage under the Act consistent with the Corps' long-standing practice and policy. Final Rule for Regulatory Programs for the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (codified at 33 C.F.R. Parts 320 – 330); Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20764, 20765 (June 6, 1988) (codified at 40 C.F.R. Parts 232 – 233);

Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22188, 22193 (proposed April 21, 2014) (to be codified at 33 C.F.R. Part 328 and 40 C.F.R. Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401); Jacob F. Berkowitz and Darrell E. Evans, U.S. Army Corps of Eng'rs, A Review of Recent Scientific Literature on Irrigation Induced and Enhanced Wetlands 2 (2014).[2]

Substantial irrigation is necessary to support agriculture in the arid west including the subject watershed. Indeed, approximately one third of the subject watershed is irrigated with imported water for agriculture. (Declaration of Noah Greenberg, p. 10). The imported water is delivered through a series of canals and ditches spanning approximately four miles. (*Id.* at 10 – 11.) Hydrologic modeling demonstrates that the majority of water available to the unnamed drainage and thus the Impacted Area is irrigation water. (*Id.* at 11 – 12.) Specifically, the unnamed drainage receives approximately 55 percent of its water from irrigation runoff, not including canal and ditch seepage, which may be a significant additional input. (*Id.* at 11.) Thus, if irrigation ceased, there would be at least a 55 percent decrease in water availability to the unnamed drainage. *Id.* This significant decrease in water would very likely cause wetlands, if any, in the Impacted Area to revert to non-wetlands. (*Id.* at 11 – 12.) Because any wetlands in the Impacted Area would likely be dependent on irrigation, they are excluded from coverage

[2] BP is aware of cases from other jurisdictions which are critical of a defense to alleged 404 violations based on the presence of man-made or "artificial wetlands." *See, e.g., U.S. v. Akers,* in which a court determined that an alleged irrigation-dependent wetland was covered by the Act; *U.S. v. Akers*, 651 F. Supp. 320 (E.D. Cal. 1987) and *Bailey v. U.S.*, in which a court determined that a wetland resulting from dam construction was covered by the Act; *Bailey v. U.S.,* 647 F.Supp 44 (D. Idaho 1986). These cases, however, were argued and decided before the Corps' practice and policy with respect to irrigation-dependent wetlands was published in the Federal Register, before the practice was well established, and prior to the Supreme Court's decision in *Rapanos v. United States* which generally limited the Corps' jurisdiction over wetlands. *Rapanos v. U.S.*, 547 U.S. 715 (2006). Accordingly, these cases are not instructive.

under the Act consistent with the Corps' long-standing practice and policy and EPA's proposed definition of "Waters of the United States."

> 3. Additionally, there are issues of material fact regarding the relationship of the Impacted Area with the unnamed drainage and the duration and amount of flow in the unnamed drainage that preclude an accelerated decision under *Rapanos v. United States*.

EPA's argument that a release to the Impacted Area meets the jurisdictional requirements of the Act rests entirely upon its assertion that the supposed wetland is located next to an unnamed tributary. Adjacency, however, is not sufficient to establish the requisite relationship for jurisdictional purposes under *Rapanos.* Further, the Motion does not muster evidence sufficient to conclude that the unnamed tributary itself meets the definition of a jurisdictional water, even assuming EPA could adduce evidence to prove the required relationship between the Impacted Area and that tributary.

In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court, delivered a plurality opinion[3] wherein Justice Scalia opined that in order for a wetland to be covered by the Act, it must: (1) be adjacent to a water of the United States; *and* (2) have a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins. *Rapanos*, 547 U.S. 715, 742.

Justice Kennedy concurred but opined that a wetland is covered by the Act if it has a "significant nexus" to traditional navigable waters. A wetland has a significant nexus if the wetland either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity of the other covered waters more readily

[3]The Supreme Court has held that when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. U.S.*, 430 U.S. 188, 193 (1977). However, the circuit courts have not agreed on how to apply *Rapanos.*

understood as "navigable." *Id.* at 780. However, where the wetland's effects on water quality are speculative or insubstantial, it is not covered by the Act. *Id.*

With respect to water bodies covered by the Act, Justice Scalia opined that, based on the statutory definitions of "navigable waters" and "point sources," the Act confers jurisdiction only to waters which are relatively permanent, standing, or flowing bodies of water. *Id.* at 732-33. Specifically, intermittent flowing channels and conduits are included within the definition of "point sources." *Id.* at 735-36. He reasoned that if these definitions were intended to significantly overlap, the definition of "discharge of a pollutant," (*i.e.*, "addition of any pollutant to navigable waters from a point source") would make little sense. *Id.* Thus, channels containing intermittent or ephemeral flow or that periodically provide drainage for rainfall are not included in the definition of "navigable waters." *Id.* at 739. However, seasonal rivers are not necessarily excluded. *Rapanos*, 547 U.S. 715 at 732, n.5. In describing seasonal flow, Justice Scalia noted that such waters flow continuously for some months of the year. *Id.*

Justice Kennedy concurred but opined that the agency may interpret the Clean Water Act to cover impermanent streams such as those that carry substantial flow to navigable waters. *Rapanos*, 547 U.S. 715, 770-71.

EPA's motion for partial accelerated decision on liability should be denied for two reasons under *Rapanos*. First, EPA has not provided sufficient evidence that the Impacted Area has any continuous surface connection to a navigable water or a significant nexus to a traditionally navigable water, as required by *Rapanos*. Ms. Hellige's Declaration states that the wetland "directly abuts the unnamed tributary" and thus summarily concludes that "there is a continuous surface connection with the tributary." However, "abutting" a navigable water is not legally sufficient. Instead the connection must be such that it is difficult to determine where the

"water" ends and the "wetland" begins. *Rapanos*, 547 U.S. 715, 742. Photos of the Impacted Area demonstrate demarcation between the unnamed drainage and the Impacted Area. (*See,* Kara Hellige's Declaration, Exhibit 1, Figure 4.)

Further EPA has not met its burden of proving that the intermittent flowing unnamed drainage downgradient from the Impacted Area is relatively permanent, *i.e.*, that it contains continuous flow during some months of the year or contributes substantial flow to a navigable water as required by *Rapanos*. *Id.* at 733, n.5 and 770 – 71. Ms. Hellige's Declaration does not establish that the intermittent unnamed drainage is a regulated navigable water because it does not include information about the duration and amount of flow in the unnamed drainage or any other information that may indicate the presence of a regulated navigable water. Similarly, Mr. Nylander's Declaration and Ms. Davis' Declaration are also lacking any information on the duration or amount of flow or any other information that may indicate the presence of a regulated navigable water. Mr. Nylander attests only that when he drives by the unnamed tributary, it is flowing. He does not attest to continuous flow for a period of months or to the amount of flow.

Second, assuming wetlands are present, EPA has not provided <u>any</u> evidence that a pollutant entered the unnamed drainage, or of the Impacted Area's effect on or significant nexus, if any, to the chemical, physical, and biological integrity of any downgradient traditionally navigable waters. Accordingly, EPA has not adduced sufficient evidence in the Motion to meet the legal requirement for establishing that the supposed wetland at issue here has the requisite relationship with the unnamed drainage (or even the jurisdictional state of that drainage) or to any downgradient traditionally navigable waters.

V. CONCLUSION

BP's acceptance of a Nationwide Section 404 permit to promptly perform the requisite pipeline repair and wetland restoration work, and the Corps' performance of an advisory Preliminary JD in connection with such permit, do not preclude BP's affirmative defense based on the jurisdictional status of the Impacted Area. In addition, there are issues of material fact regarding the nature of the Impacted Area, its jurisdictional status, its relationship to the unnamed drainage, and the jurisdictional status of the unnamed drainage that preclude an accelerated decision on liability.

WHEREFORE, BP respectfully requests that Complainant's Motion for Partial Accelerated Decision on Liability be denied and a full hearing be provided on these issues.

Dated: January 26, 2015

/s/ Nicole M. Abbott

Andrea Wang
Nicole M. Abbott
DAVIS GRAHAM & STUBBS LLP
1550 17th Street, Suite 500
Denver, CO 80202
Telephone: 303.892.9400
Facsimile: 303.893.1379
Email: andrea.wang@dgslaw.com
nicole.abbott@dgslaw.com
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2015, an original and one true and correct copy of the foregoing RESPONDENT'S RESPONSE OPPOSING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION ON LIABILITY was served on the following via EPA's E-Filing System:

Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue, NW
Washington, D.C. 20004

I further hereby certify that on this 26th day of January, 2015, one true and correct copy of the foregoing RESPONDENT'S RESPONSE OPPOSING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION ON LIABILITY was served on each of the following by electronic mail and Federal Express overnight service:

Margaret J. (Peggy) Livingston
Enforcement Attorney
Office of Enforcement, Compliance and Environmental Justice
U.S. Environmental Protection Agency (8ENF-L)
1595 Wynkoop Street
Denver, Colorado 80202-1129

/s/ Tamara A. Stires
Tamara A. Stires