

1-1-2014

**Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, No. 2:08CV447, 2013 WL 6091882 (E.D. Va. Nov. 18, 2013).**

Lillie Parker

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

---

## Custom Citation

Lillie Parker, Court Report, Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, No. 2:08CV447, 2013 WL 6091882 (E.D. Va. Nov. 18, 2013), 17 U. Denv. Water L. Rev. 416 (2014).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

First, regarding the claims against the Federal Defendants, the United States District Court for the District of Nebraska (“court”) noted that the dispute involved appropriation or apportionment of water resources, which is a matter of state law. State law governs water apportionment and the Federal Defendants did not have a corresponding obligation under Federal law. Second, the court found the Irrigation Districts failed to show an unequivocal waiver of the United States’ sovereign immunity because not all entities with water rights in the RRB were parties to the suit, thereby making the McCarran Amendment inapplicable. The McCarran Amendment makes state courts the primary forum for water rights claims and can waive the United States’ sovereign immunity in certain state water cases. Here, the amendment was inapplicable because the Irrigation Districts advanced water rights that arose under Nebraska law and turned on an interpretation of Nebraska law. Also, the court found the Irrigation Districts failed to state a cognizable claim against the Federal Defendants because state law controlled the relevant water rights.

Having found the claims against the Federal Defendants subject to dismissal, the court declined to exercise supplemental jurisdiction regarding the State and DNR Defendants. The court reasoned that the claim involved novel state law issues and a current action was pending in a Nebraska state court. The court did not address the Eleventh Amendment immunity issues because the Irrigation Districts did not allege any federal violations.

Accordingly, the court granted the motion to dismiss all of the Irrigation Districts’ claims.

*Dane Mueller*

## UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

**Precon Dev. Corp. v. U.S. Army Corps of Eng’rs, No. 2:08CV447, 2013 WL 6091882 (E.D. Va. Nov. 18, 2013).** (holding (i) the Corps’ extensive factual findings were not arbitrary and capricious and (ii) the Corps’ ultimate determination that a significant nexus existed between the relevant wetlands and the Northwest River was sufficiently persuasive to subject the wetlands to the Clean Water Act).

This case involved 4.8 acres of wetlands (“subject wetlands”) located in Chesapeake, Virginia for which Precon Development Corporation (“Precon”) sought a permit to develop. The development area contained a total of 658 acres, about half of which were wetlands. 166 of the wetland acres flowed into the St. Brides Ditch (“the Ditch”), including the subject wetlands. The Ditch is a tributary, running along the western boundary of the wetlands area, flows south until it joins with the Hickory Ditch, and then both ditches feed into the Northwest River (“the river”). The second tributary to the river consisted of a seasonal relatively permanent water that ran in the southwest corner of the wetlands and flowed into the Ditch.

The United States District Court for the Eastern District of Virginia (“district court”) received the case on remand from the United States Court of Ap-

peals for the Fourth Circuit (“court of appeals”). The court of appeals determined the original administrative record contained insufficient information to evaluate the United States Army Corps of Engineers’ (“Corps”) conclusion that a significant nexus existed between the wetland and the river. Thus, on remand, the district court examined the Corps’ improved and amended record in accordance with the court of appeals’ direction.

The court of appeals based their suggestions for remand upon the “significant nexus” test in Justice Kennedy’s concurrence in *Rapanos v. United States*. Before remanding the case, the court of appeals provided guidance to the Corps regarding the nature of the report needed for reconsideration. The court of appeals noted that the report did not need to include laboratory tests or quantitative measurements, but could instead include qualitative evidence like expert testimony about the functions of the relevant wetlands, adjacent tributaries, and the river. The court of appeals specifically stated that the administrative record should adequately address (i) the condition of the Northwest River, (ii) the actual flow rates of the two tributaries, and (iii) the significance of that flow. The court of appeals also charged the Corps with documenting how the wetlands significantly, rather than insubstantially, affected the integrity of the navigable waters.

After the court of appeals remand, the district court also remanded the case to the Corps for additional administrative review. After the Corps developed a new record, the district court considered cross-motions for summary judgment. A magistrate judge first heard oral arguments on the motions before filing a Report and Recommendation (“R&R”) with the district court. The R&R recommended that the district court grant the Corps’ motion for summary judgment. Precon subsequently filed an objection to three of the R&R’s findings: (i) the condition of the Northwest River, (ii) the flow of the relevant tributaries, and (iii) the function of the wetlands in relation to these tributaries and the river. The district court analyzed each in turn.

In considering the condition of the river, the district court noted that the river was an impaired body of water due to low dissolved oxygen (“DO”) levels. Low DO levels are generally the result of high levels of nitrogen or phosphorus. Precon asserted that the evidence did not support a finding of excessive nitrogen because the record found only phosphorus as a nutrient of concern. As such, Precon contended that any role the Precon wetlands and similarly situated wetlands have on nitrogen cycling did not significantly impact the chemical or biological quality of the river.

The district court found that the record did not support Precon’s logic. The court determined that excess nutrient inputs from the wetlands cause eutrophication, which contributes to low DO levels in the river. Further, the court of appeals previously found that the wetlands and their adjacent tributaries trap sediment and nitrogen. Based on this record, the district court made two determinations. First, the court determined that the Corps’ finding that the wetlands prevent additional nutrients from reaching the river was not arbitrary and capricious because the record showed that both nitrogen and phosphorus levels were important to downstream water quality, and that the wetlands trap sediment and nitrogen. Second, the district court noted that it was not necessary for the Corps to demonstrate that there were high nitrogen levels in the river and its relevant tributaries on remand—it only needed to make general findings about the river’s

impairment. Because the Corps provided evidence from both the Virginia Department of Environmental Quality and its own experts that showed that the river is an impaired body of water, the district court found that the Corps satisfied the court of appeals' mandate to consider the condition of the relevant navigable water.

The district court next considered evidence regarding the flow of the river's tributaries. The district court interpreted Precon's next objection to be that the Corps relied upon hypothetical rather than actual flow rates and, thus, such data was meaningless. However, the district court found that the Corps' reliance on hypothetical flow rates was appropriate and rational. Due to the lack of flow gauges in the river, the Corps had no actual flow rates, making a direct comparison of the flows from the river and the ditch impossible. The district court found that the Corps appropriately analyzed the available data points on the wetland and the navigable waterway and properly incorporated this information into the significant nexus determination. As the court of appeals instructed, the district court applied *Skidmore* deference and agreed that the analysis possessed the power to persuade.

Finally, the district court considered the Corps' findings regarding the functions of the wetlands in relation to the tributaries and the river. Precon argued that the Corps' experts simply expressed their opinions rather than provided quantitative and qualitative evidence to support a finding of a significant nexus. The district court found this objection meritless. The district court found that the Corps properly engaged in a lengthy discussion about the scientific validity of Precon's expert's findings and the conclusions drawn therefrom. The district court determined that Precon fundamentally misunderstood the district court's role when faced with divergent expert opinions. The district court relied upon the reasoning in *Marsh v. Oregon Natural Resource Council*, which states that courts should defer to the informed discretion of the responsible federal agencies. The Corps' administrative record also emphasized the wetlands' ability to support wildlife and the role tributaries performed in regulating water flows and quality. The district court therefore found that the Corps provided ample persuasive support for its finding of a significant nexus between the relevant wetlands and the river. The district court found that the Corps' determination was not arbitrary and capricious and that the ultimate determination of a significant nexus was highly persuasive.

Accordingly, the court adopted the magistrate judge's R&R, granted the Corps' motion for summary judgment, and denied Precon's motion for summary judgment.

*Lillie Parker*

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

*United States v. Hamilton*, 952 F. Supp. 2d 1271 (D. Wyo. 2013) (finding on a motion for partial summary judgment that (i) no genuine dispute existed that Slick Creek is a water of the United States subject to the Clean Water Act; but (ii) a genuine dispute of material fact existed regarding whether Hamilton's