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January 22, 2008

Submitted Electronically And Hand Delivered

The Honorable Benjamin Grumbles
Assistant Administrator, Office of Water
United States Environmental Protection Agency
1301 Constitution Avenue, N.W.
Washington, D.C. 20460

The Honorable John Paul Woodley, Jr.
Assistant Secretary of the Army, Civil Works
108 Army Pentagon
Room 3E446
Washington, D.C. 20310

Re: Comments on the U.S. EPA and U.S. Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after *Rapanos*, Docket No. EPA-HQ-OW-2007-0282

Dear Assistant Administrator Grumbles and Assistant Secretary Woodley:

The undersigned organizations appreciate this opportunity to submit the following comments on the U.S. Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("Corps") guidance pertaining to Clean Water Act ("CWA") jurisdiction after the U.S. Supreme Court's decision in *Rapanos v. United States* and *Carabell v. United States*, 126 S. Ct. 2208 (2006) (hereinafter, the "*Rapanos*" decision). *See* Attachment. The question presented to the Supreme Court in *Rapanos* was a significant one involving the scope of the federal government's jurisdiction over wetlands and certain other non-navigable water bodies.

We commend both Agencies for seeking to develop guidance in light of the uncertainty and confusion that has abounded since the case was decided. We fully recognize and appreciate the challenges presented to the Agencies in seeking to provide greater clarity and consistency through the Agencies' interpretation of CWA jurisdiction post-*Rapanos*, and in the way and manner in which jurisdictional determinations are made. Further, we appreciate the opportunity to review and offer feedback on the *Rapanos* Guidance, and trust that these constructive comments will be received in the spirit in which they are offered.

It is important to note that our comments are not limited solely to the EPA's and Corps' 12-page legal memorandum (referenced herein as the "Legal Guidance" or "Guidance"). Rather, our

comments extend to all instructional documents the Agencies have assembled in the Corps of Engineers Jurisdictional Determination Form Instructional Guidebook dated May 30, 2007, and all of its appendices, A through H (referenced herein as the "Instructional Guidebook" or "Guidebook"). The appendices in the Instructional Guidebook include the Legal Guidance (App. A), approved JD form (App. B), coordination memorandum for field personnel (App. C), legal definition of "traditional navigable waters" (App. D), RGL No. 07-01 related to documenting jurisdiction (App. E), RGL 05-02 related to the expiration of jurisdictional determinations (App. F), RGL 06-01 pertaining to the timeliness of requests for appeal (App. G), and RGL 05-05 regarding the use of ordinary high water mark (App. F). While some of these documents were published prior to the *Rapanos* decision, it is clear the Agencies intended to publish them together as the Instructional Guidebook, that they are inextricably linked and, together, directly affect how the federal government proposes to approach jurisdictional matters post-*Rapanos*.

The undersigned organizations represent a large cross-section of the Nation's construction, housing, mining, agriculture, and energy sectors, and are responsible for planning and developing many large projects that are vital to a thriving national economy. For example, in 2006 alone, residential and nonresidential construction alone was valued at $1.2 trillion, or nine percent of the Nation's gross domestic product.[1] Many of the projects undertaken by the Commenters are large in scale, some crossing multiple state jurisdictions, and many entail multi-year planning and phased construction.

These activities and projects require many approvals at the local, state, and federal levels, including CWA permits, and such approvals must be carefully coordinated and timed in order for the projects to be successful. The undersigned are accustomed to obtaining the requisite CWA approvals and need and desire an efficient and predictable national permitting program. However, we are extremely concerned that the *Rapanos* Guidance sets forth cumbersome, inefficient, and time-consuming procedures that will invariably cause further confusion and costly delays in the CWA permitting program.

The amount of the national economy that is impacted by the Corps' regulatory program is staggering. According to the Corps' own statistics, over $220 billion of economic development is affected by its section 404 program.[2] Each year, the Corps, with only about 1,200 staff, issues about 110,000 jurisdictional determinations ("JDs") and 100,000 written authorizations affecting waters of the United States, pursues over 600 enforcement cases, and responds to 60

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[1] *See* Associated General Contractors Of America, *Quick Facts About the Construction Industry* (updated October 8, 2007) (attached hereto as **Exhibit 1**).

[2] *See* Corps Presentation at the CLE International Carolinas Wetlands Conference (Jan. 10, 2008) (PowerPoint presentation attached hereto as **Exhibit 2**).

administrative and judicial appeals. With resources being so limited and field staff stretched so thin, the Corps' regulatory program has reached a tipping point. The Guidance is causing confusion and added delays in an already burdened and strained permit decision-making process, which ultimately will result (and is resulting) in increased delays and costs to the public at large. The following observation offered during a recent meeting with EPA and Corps officials aptly reflects the current state of affairs:

> We are, I think as a community, very, very frustrated with the guidance. We don't know what a significant nexus is; we don't know what a navigable water is; we don't know what a relatively permanent water is; we don't know how long a delineation will take. There has been a suspension of normal processing of delineation since July '06 . . . One of the interesting things that is happening is this – you can go under the old rules and people are just "please, let me go under the old rules" – like they loved the old rules. We hated the old rules, but now we would just love to go under the old rules.[3]

As discussed in the detailed comments attached hereto, many of our concerns regarding the Guidance may be summarized as follows:

- The Agencies' incorrect legal interpretation of the *Rapanos* decision and, consequently, flawed policies, such as aggregation and tributary reach analysis, that flow from the Agencies' interpretation and the practical problems with implementing such policies;

- Confusion regarding key concepts such as "significant nexus" and "relatively permanent waters" due to the lack of specificity and clear instruction;

- Arbitrary application of the Guidance and key concepts – such as relatively permanent flow – by field staff for certain geographic features such as ephemeral drainages;

- Improper reclassification of certain waters as "traditionally navigable waters" based on a flawed legal interpretation and without public input;

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[3] This statement was made by a member of the public during a workshop on the Guidance held in Scottsdale, Arizona, on September 13, 2007 (hereinafter referred to as "Scottsdale *Rapanos* Workshop"). *See* Transcript of Public Comments During Scottsdale *Rapanos* Workshop at 51-52 (attached hereto as **Exhibit 3**).

- Complicated and confusing JD forms and procedures;
- Increased workload on applicants and field staff due to unnecessary, detailed paperwork, such as the requirement to obtain an approved JD, and cumbersome coordination requirements;
- Adverse impacts and challenges to the nationwide permitting ("NWP") program that modify the existing NWP regulations;
- Lack of sufficient and readily accessible data regarding agency jurisdictional decisions and analysis;
- Improper expansion of jurisdiction over certain water bodies (including ditches); and
- Continued improper assertion of jurisdiction over "isolated waters."

Unfortunately, the Agencies have adopted lengthy and cumbersome procedures and onerous documentation requirements not required by *Rapanos*. These policies are resulting in further confusion and delays, more costs, and less predictability and certainty with regard to permitting. While the plurality and Justice Kennedy in *Rapanos* criticized the Corps for assuming jurisdiction based solely on the presence of a hydrological connection, the *Rapanos* decision simply cannot be read to require in every case the level of documentation that the Guidance now requires. There may be cases in which applicants need to know precisely where the Corps and EPA believe jurisdiction begins and ends and, in such cases, if the applicant requests an approved jurisdictional determination, then additional documentation may be appropriate. But even in those situations where jurisdiction may be in dispute or a binding determination is needed, the approved JD form goes far beyond what *Rapanos* requires, and requiring that a separate form be prepared for each separate water body affected only compounds the unnecessary paperwork.

While we offer the attached comments to the Agencies to improve the Guidance, we are steadfast in our view that rulemaking must occur in order to cure the numerous legal infirmities reflected in the Guidance and to create the clarity and transparency long sought under the section 404 program. Indeed, both the EPA and the Corps have acknowledged that only through a rulemaking can real and meaningful lines, specificity, and direction be provided.[4] Thus, we strongly encourage the Agencies to quickly embark on this rulemaking effort.

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[4] *See* Scottsdale *Rapanos* Workshop Transcript, Exhibit 3 at 9 ("We didn't provide a cookbook. Obviously, we couldn't provide a cookbook recipe because we'd be in that

Outside of a rulemaking, however, there are a number of changes that should and must be made to the Guidance to provide greater efficiency, clarity, and predictability in the manner in which the Guidance is being implemented in the field. Toward this end, we offer the following suggestions:

- Clarify that the existing timelines under NWP Rule are binding and cannot be suspended or changed by the Agencies in Guidance;

- Eliminate the requirement that all project applicants must obtain an approved JD. Instead, return to the Agencies' well-established, flexible approach that allows applicants to elect whether they want an approved JD or not;

- Where an approved JD is requested, eliminate the overbroad tributary reach analysis involving lands and waters outside of the project site where an applicant may not own or have access to such properties;

- Clarify that the Corps and EPA will re-evaluate pre-*Rapanos* JDs upon the request of the applicant, permittee, or landowner;

- Eliminate making binding JD decisions that have the potential to impact non-applicant landowners;

- Simplify the JD form and the approved JD process so that hundreds of forms are not required to establish jurisdiction;

- Clarify that the Corps districts have the flexibility to allow applicants in appropriate circumstances to perform desktop reviews (*e.g.*, linear projects);

- Establish a public process for the designation of traditional navigable waters, and publish all designated traditional navigable waters;

- Clarify that a water body is not a traditional navigable water merely because it is capable of floating a boat;

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rulemaking arena. So it is a case-by-case evaluation of the regulator in the field . . . we do need to go to rulemaking or some formal way of getting greater clarity, key terminology defined with greater specificity than we could do in a guidance document . . .").

- Limit relatively permanent waters to waters that flow continuously for at least 290 days each year such that they are considered inseparable from traditional navigable waters;

- Clarify the distinction between ephemeral washes that are non-jurisdictional and those that are relatively permanent waters and consequently jurisdictional. Clarify that all desert washes that do not flow at least 290 days must meet the significant nexus requirement;

- Clarify that significant nexus is not satisfied simply because an impact is more than insubstantial;

- Eliminate jurisdiction over all upland ditches, regardless of whether they carry relatively permanent water;

- Eliminate the EPA coordination process for JDs involving significant nexus and isolated water determinations;

- Eliminate jurisdiction over isolated waters as per *SWANCC*; and

- Comply with Paperwork Reduction Act requirements.

We appreciate this opportunity to provide comments on the Guidance and look forward to continuing to work with both Agencies to develop the clarity and predictability that has long been needed.

Sincerely,

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Attachment

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U.S. Environmental Protection Agency
And
U.S. Army Corps of Engineers

Comments In Response To The U.S. Environmental Protection Agency's And U.S. Army Corps Of Engineers' Guidance Pertaining to Clean Water Act Jurisdiction After The U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*, 126 S. Ct. 2208 (2006)

Submitted by

American Farm Bureau Federation
American Gas Association
Associated General Contractors of America
Foundation for Environmental and Economic Progress
National Association of Home Builders
National Association of Realtors
National Mining Association
Utility Water Act Group

January 22, 2008

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TABLE OF CONTENTS

TABLE OF EXHIBITS

I. INTRODUCTION.

The undersigned organizations, which represent a large cross-section of the Nation's housing, construction, mining, agriculture and energy sectors, submit the following comments on the U.S. Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("Corps") guidance pertaining to Clean Water Act ("CWA") jurisdiction after the U.S. Supreme Court's decision in *Rapanos v. United States* and *Carabell v. United States*, 126 S. Ct. 2208 (2006) (hereinafter, the "*Rapanos*" decision). The question presented to the Supreme Court in *Rapanos* was profound, as it involved the scope of the federal government's jurisdiction over wetlands and certain other non-navigable water bodies.

The public has long desired greater clarity and transparency in the manner in which the federal government has asserted jurisdiction over waters of the United States. As discussed herein, the Agencies have misinterpreted *Rapanos*. As a result of a flawed legal interpretation involving such concepts as the reach analysis, aggregation and relatively permanent waters, the Agencies have adopted lengthy and cumbersome procedures and onerous documentation requirements not required by *Rapanos*. These policies are resulting in further confusion and delays, more costs, and less predictability and certainty with regard to permitting. While the plurality and Justice Kennedy in *Rapanos* criticized the Corps for assuming jurisdiction based solely on the presence of a hydrological connection, the

Rapanos decision simply cannot be read to require in every case the level of documentation that the Guidance now requires. There may be cases in which applicants need to know precisely where the Corps and EPA believe jurisdiction begins and ends and, in such cases, requiring more extensive documentation through, for example, an approved jurisdictional determination process, would be appropriate. But even in those situations where jurisdiction may be in dispute or a binding determination is needed, the approved JD form goes far beyond what *Rapanos* requires, and requiring that a separate form be prepared for each separate water body affected only compounds the unnecessary paperwork. While we offer the following comments to the Agencies to improve the Guidance, we are steadfast in our view that rulemaking must occur in order to cure the numerous legal infirmities reflected in the Guidance and to create the clarity and transparency long sought under the section 404 program.

Moreover, given the confusion and uncertainty that persists, it is important that the Agencies endeavor to create maximum transparency in their decision-making process and provide the public with as much data and analysis as possible as jurisdictional decisions are made. Currently, information regarding how the Guidance is being implemented is highly decentralized and difficult to locate. The lack of a timely and easy-to-locate record of jurisdiction determinations hinders the public's ability to provide meaningful comments on the way in which the

Guidance is being interpreted and implemented by field staff and Headquarters. While we commend the Corps for posting a handful of jurisdictional determinations on its website, we strongly recommend the Agencies establish a national website dedicated solely to posting decisions, data and analysis, and other relevant documents to provide the public with timely access to key decisions and guidance. We also believe that developing a centralized, web-based repository will help foster greater consistency in the manner in which the 38 Corps offices implement the Guidance and can help to avoid criticism previously aimed at the Corps' inconsistent practices and lack of documentation involving jurisdictional determinations.[1]

The comments set forth herein are divided into the following sections. Section II includes a statement of interest by the undersigned commenters regarding the importance of this issue to their organizations. Section III presents a strictly legal review and analysis of the *Rapanos* decision and highlights the Agencies' flawed interpretation of *Rapanos*. Section IV includes general

[1] *See* United States General Accounting Office, GAO-04-297, *Corps of Engineers Needs To Evaluate Its District Office Practices In Determining Jurisdiction* (2004). (GAO Report attached hereto as **Exhibit 4**). In its report, GAO noted that "few districts make documentation of their practices for making jurisdictional determinations publicly available." The GAO concluded that the Corps needed to prepare documentation that specifies the practices used in making jurisdictional determinations and make those documents publicly available. *Id.* at 40.

comments and identifies the practical concerns, confusion, and challenges that stem from an improper legal interpretation of *Rapanos* and field implementation of the Guidance. Section V sets forth recommendations regarding the need and justification for a rulemaking, as well as more immediate changes to the Guidance to provide the clarity and predictability warranted in this matter.

II. INTEREST OF THE UNDERSIGNED COMMENTERS.

The American Farm Bureau Federation® ("Farm Bureau") is a voluntary general farm organization established in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. The Farm Bureau has member organizations in all 50 states and Puerto Rico, representing more than 6.2 million member families. Farmers and ranchers routinely use ponds, lagoons, internal channeling ditches, stock ponds, and holding structures as part of productive and necessary farming and ranching activities and thus have a keen interest in the scope of the CWA.

The American Gas Association ("AGA"), founded in 1918, represents 200 local energy utility companies that deliver natural gas to more than 64 million homes, businesses, and industries throughout the United States. A total of 69 million residential, commercial, and industrial customers receive natural gas in the United States, and AGA's members deliver 92 percent of all natural gas provided by the Nation's natural gas utilities.

AGA's member companies are directly affected by section 404 permit approvals for the construction and maintenance of gas pipes. These projects are essential for providing safe, reliable transportation of cleaner burning natural gas to businesses and homes. Gas pipelines and distribution lines can cover many miles and often must cross streams, wetlands, or other water bodies, although utilities take steps to avoid such stream and wetland crossings wherever feasible. Natural gas line construction and repair projects usually have a limited, temporary impact on aquatic resources. The Corps has recognized these limited impacts by allowing smaller utility projects and pipeline integrity repairs to proceed under several Nationwide Permits, which has reduced paperwork burdens and delays. AGA is concerned that the *Rapanos* Guidance may undermine those efforts.

The Associated General Contractors of America ("AGC") is the oldest and largest national trade association in the construction industry. A nonprofit corporation founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 32,000 firms in more than 98 chapters throughout the United States. AGC's members include more than 7,000 of the Nation's leading general contractors, 11,000 specialty contractors, and 13,000 material suppliers and service providers to the construction industry. AGC members construct commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, and multi-family

housing units; and they prepare sites and install the utilities necessary for housing development. AGC members engage every day in dredge-and-fill activities in waters and wetlands. Whether those activities require a CWA permit depends upon statutory terms that agencies and courts have found difficult to construe. The resulting uncertainty over the scope of federal jurisdiction has unfairly exposed contractors to the risk of civil and criminal liability under the CWA.

The Foundation for Environmental and Economic Progress ("FEEP") is a national coalition of land-holding companies that advances balanced federal environmental law and policy affecting private land use. FEEP members own property throughout the Nation and must obtain CWA permits to manage and develop land.

The National Association of Home Builders ("NAHB") represents over 235,000 builder and associate members throughout the United States. Its members include individuals and firms that construct and supply single-family homes, and apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers. NAHB's members are frequently subject to regulation under the CWA. NAHB, as an organization, has extensive involvement in litigating CWA issues and regularly counsels and educates members on CWA issues. NAHB is a leader in advocacy efforts before the federal courts, Congress, and the regulatory agencies on CWA regulatory issues.

The National Association of Realtors® ("NAR") is a non-profit professional association of over 1.1 million members in the real estate industry. NAR's members' business activities are adversely affected by unwarranted limitations on the use of property, as are those of its members' clients and customers.

The National Mining Association ("NMA") is a trade association representing producers of most of America's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment, and supplies; and the engineering and consulting firms, financial institutions, and other firms serving the mining industry.

Predictability of regulation is especially important to the mining industry given the extraordinary amount of time, money, and planning inherent in the development and management of most mining operations. Mine operators must conduct a site delineation and assess CWA jurisdiction well in advance of any projects that could potentially require a permit. The ability to determine CWA jurisdiction up front, in a clear and predictable way, is critical to the mining industry's ability to compete in today's worldwide mineral and energy markets. Consequently, NMA members are interested in the establishment of a clear and predictable scope for federal CWA jurisdiction.

The Utility Water Act Group ("UWAG") is a voluntary, *ad hoc,* unincorporated group of 214 individual energy companies and three national trade associations of energy companies, the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. Supplying electricity to all areas across the Nation involves activities that often impact wetlands and other water bodies. Accordingly, the section 404 regulatory program is significant not only to UWAG members but to the public who rely upon a reliable source of electricity. UWAG has participated in virtually every major regulatory development in the section 404 program over the past 25 years. Although there are numerous aspects of the current Guidance which require clarification, UWAG is particularly concerned about the serious, adverse impact of the Guidance on planning, scheduling, and cost of installing transmission and distribution lines which are vitally needed by our communities.

III. THE GUIDANCE MISINTERPRETS *RAPANOS*.

The Guidance misinterprets *Rapanos* in several respects and, consequently, sows confusion instead of providing clarity. The issue in *Rapanos* was the scope of the federal government's authority to regulate wetlands and other non-navigable

waters under the CWA. The *Rapanos* Court, in a four-Justice plurality opinion authored by Justice Scalia (hereinafter the "plurality" or "Scalia" opinion) and a separate concurrence by Justice Kennedy (hereinafter the "concurrence" or "Kennedy" opinion), rejected the Corps' assertion that the CWA regulates any non-navigable water that has "any hydrological connection" to navigable waters. Although *Rapanos* was decided by a plurality of four Justices and a separate concurring Justice, those Justices agreed on a common framework and several limiting principles that restrain the Agencies' jurisdiction under the CWA. This is the holding that the Agencies must follow.

Yet, the Guidance makes no effort to identify this common ground. Instead, it interprets *Rapanos* as having two potentially inconsistent holdings – one based on the plurality opinion authored by Justice Scalia, and the second based on Justice Kennedy's concurring opinion. Such an interpretation has been explicitly rejected by the Eleventh Circuit, and at least implicitly rejected by the Seventh and Ninth Circuits. Moreover, this multiple-holding interpretation requires the Agencies to rely on the dissenting views in *Rapanos* – an approach that is contrary to basic common law principles that deny *stare decisis* effect to dissenting opinions, the Supreme Court's decision in *Marks v. United States*, 430 U.S. 188 (1977), which holds that a plurality decision should be interpreted by considering only the views of the concurring Justices, and several appellate opinions interpreting *Rapanos*.

Having broken *Rapanos* into two holdings, the Agencies compound the problem by isolating certain sentences and phrases within each opinion from the opinion's overall context – thus distorting the meaning of each individual opinion. As detailed below, the Agencies read isolated segments of each opinion as supporting certain categorical jurisdictional tests that are simply not justified by a whole reading of those opinions. This piecemeal approach results in a serious misinterpretation of the Court's decision, thereby making an already complex decision more difficult to implement in the field.

A. Basic Common Law Principles And The Supreme Court's *Marks* Decision Require The Agencies To Interpret *Rapanos* As Having A Single Holding.

Supreme Court precedent and basic common law principles require that the Agencies identify a single holding from *Rapanos*. That holding is the readily identifiable common logic of the plurality and Justice Kennedy that was "necessary" and "pivotal" to the decision in the case. *See* BLACK'S LAW DICTIONARY 749 (8th ed. 2004) (defining "holding" as "a court's determination of a matter of law pivotal to its decision"); *see also United States v. Garcia*, 413 F.3d 201, 232 n.2 (2d Cir. 2005) (Calabresi, J., concurring) (defining a holding as "what is necessary to a decision").

The common law definition of a holding does not change merely because there is more than one opinion explaining the Court's decision. Rather, the holding

of such a decision is still the necessary logic that produced the result, even if identifying that logic requires reconciling two opinions to find their common ground.

That is the teaching of *Marks v. United States*, 430 U.S. 188, 193-94 (1977). "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*, 430 U.S. at 193 (internal quotations omitted). The Court's reference to "*the holding*" as "*that position*" taken by the concurring Justices on the narrowest grounds clearly reinforces the principle that a plurality decision, like all other Supreme Court decisions, must be read to produce a single holding on the point of law at issue in the case.

B. The Single Holding Of *Rapanos* Is The Restriction Of Clean Water Act Jurisdiction Based On Limiting Principles Articulated By Both The Plurality And Justice Kennedy.

Applying the principles laid out in the preceding section, the holding of *Rapanos* is the plurality and concurrence's common reasoning on the boundaries of CWA jurisdiction. Both believed that the Corps had gone too far in *Rapanos*, and both articulated principles that were intended to limit CWA jurisdiction. At a conceptual level, both opinions assess the jurisdictional status of traditionally navigable waters ("TNWs") and their non-navigable tributaries based on the

presence or absence of certain *intrinsic characteristics* – *e.g.*, frequency and duration of flow, and proximity to TNWs. Wetlands, on the other hand, are deemed waters of the United States by reason of their *relationship* to TNWs, and the services they provide to them.

The plurality and concurring opinions start from a common understanding of TNWs – *i.e.*, the waters that were subject to regulation under the RHA prior to the passage of the CWA. Both cite *The Daniel Ball*, 77 U.S. 557 (1871), and *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), to identify those waters – *i.e.*, waters that (1) are navigable-in-fact (or reasonably susceptible to being made so), and (2) together with other waters, form a water-borne highway for the transport of goods in interstate commerce. *See Rapanos*, 126 S. Ct. at 2216 (plurality), 2237 (concurrence); *see also* discussion of TNWs at part IV *infra*. The plurality and concurrence further agree that the "meaning of 'navigable waters' in the Act is broader than the traditional understanding of that term … [but] that the qualifier 'navigable' is not devoid of significance," *id.* at 2220 (plurality), and must "be given some importance," *id.* at 2247 (concurrence). Against that background, both set forth specific limiting principles applicable to each type of water body.

First, with respect to tributaries, both Justices would allow jurisdiction over certain non-navigable tributaries based on the intrinsic characteristics of those tributaries. Kennedy criticized the Agencies' "existing standard" which "deems a

water a tributary [and therefore jurisdictional] if it *feeds into* a traditional navigable water (or a tributary thereof) and possesses an ordinary high water mark." *Id*. at 2248. Citing a GAO Report documenting jurisdiction claimed through the existing standard, Kennedy concluded that it could not be the "determinative measure" of jurisdiction because it "leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor volumes toward it" and brings into jurisdiction waters "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 2249.

The plurality's concerns about tributaries were strikingly similar. They criticized the Agencies' regulations for reaching "ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert." *Id.* at 2222. Observing that the language of the Act requires, "at a bare minimum, the ordinary presence of water," *id.*, the plurality concluded that for a tributary to be a water of the United States, it must be "a relatively permanent body of water connected to traditional interstate navigable waters." *Id.* at 2227.

With respect to wetlands, both opinions would allow jurisdiction over wetlands that are not directly abutting TNWs – but only if the Agencies demonstrate that such non-abutting wetlands bear the requisite relationship to

TNWs. Although Scalia and Kennedy at times spoke in different terms with respect to wetlands, *Marks* requires the Agencies to find their common ground – *i.e.*, the circumstance under which both Justices would agree a wetland is jurisdictional. As a starting point, both Scalia and Kennedy agree that a mere hydrological connection between a wetland and a TNW is not sufficient to establish jurisdiction over the wetland. *See Rapanos*, 126 S. Ct. at 2251 (Kennedy, J., concurring) ("mere hydrological connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood").

Beyond this starting point, Justice Scalia says that the wetland must have "a continuous surface connection with [a relatively permanent body of water connected to traditional interstate navigable waters], making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 2227. By contrast, he explained, "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*." *Id.* at 2226 (internal citations omitted). Kennedy's general rule is that there must be a "significant nexus" to TNWs such that the wetlands "significantly affect the chemical, physical, and biological integrity of other covered waters more

readily understood as 'navigable.'" *Id.* at 2248. Like Scalia, Kennedy offers an example of the opposite extreme: "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* at 2213. The combined impact of these limiting principles is that the Agencies cannot assert jurisdiction unless they demonstrate the wetlands have a continuous and significant relationship with TNWs. In other words, to show the requisite relationship exists so as to satisfy the limiting principles imposed by both Justices, the Agencies must demonstrate the wetland in question has a strong functional and physical relationship with TNWs.

In total, the pivotal logic that produced the result in *Rapanos* was Scalia's and Kennedy's common view that the CWA is broader than just TNWs but not so broad as to read the word "navigable" out of the statute. With those thresholds established, the two opinions agreed that tributaries were jurisdictional if they were relatively fixed bodies of water with a regular and strong connection to TNWs. In the case of wetlands, the necessary logic that produced the result was the agreement that, to be jurisdictional, the wetlands must bear a real relationship to TNWs – a requirement that could be met to the satisfaction of both opinions if the wetlands in question have a continuous and significant connection to a TNW that has an important impact on the chemical, physical, and biological integrity of

TNWs. Under *Marks* and basic common law principles, this framework represents the single holding of *Rapanos* that the Agencies are legally bound to follow.

C. The Guidance Cites No Legal Authority That Allows It To Interpret A Supreme Court Decision As Having Multiple, Inconsistent Holdings Or To Interpret A Supreme Court Decision Based On The Views Of Dissenting Justices.

Rather than attempting to find a holding that is common to both the plurality and Kennedy opinions, the Guidance allows the Agencies to exert regulatory jurisdiction under the CWA "if *either* the plurality's *or* Justice Kennedy's standard is satisfied." *See* Guidance at 3 (emphasis added). In support of this flawed approach, the Guidance states that "[w]hen there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices." *Id.* Further, the Guidance provides that *Rapanos* may be interpreted based on the opinions of *any* five Justices, even Justices who dissented from the Court's ruling. *See* Guidance at 5 (claiming jurisdiction over certain tributaries that flow at least three months on the basis that "[b]oth the plurality and the dissent would uphold CWA jurisdiction").

Interpreting *Rapanos* as supporting jurisdiction if either the plurality or Justice Kennedy's test is satisfied results in the Supreme Court's decision being interpreted as having two inconsistent holdings. For example, applying the Agencies' interpretations of the plurality and Kennedy opinions, in cases where there is a small yet insignificant surface water connection to a stream or brook, the

plurality's jurisdictional test would be satisfied, but Justice Kennedy's test likely would not. *See United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (Justice Kennedy would not recognize jurisdiction in such a case, whereas the plurality would). *Marks* precludes reading *Rapanos* in a manner that produces multiple and potentially inconsistent holdings and instead seeks a single holding reconciling the views of the Members of the Court who concurred in the judgment. *See Marks*, 430 U.S. at 193. *Marks* holds that "[w]hen 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*, 430 U.S. at 193 (internal quotations omitted). *Marks* cannot be interpreted as allowing cases such as *Rapanos* as having multiple holdings, as evidenced by its use of the phrases "the holding" and "that position."

Marks also precludes reliance on dissents in its statement that decisions such as *Rapanos* should be interpreted based on the common views of "those Members who *concurred in the judgments*." *Marks*, 430 U.S. at 193. *Marks*' holding in this regard is supported by centuries of common law experience, which by definition defines dissenting judges as not part of a court's judgment. *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.05[2] (3d ed. 2006) ("Stare

decisis does not apply to dissenting opinions."); 20 Am. Jur. 2d *Courts* § 138 ("A minority opinion has no binding, precedential value").

Significantly, courts have interpreted *Marks* as precluding reliance on the views of dissenting Justices in interpreting plurality opinions – including the Eleventh Circuit's recent rejection of an "either/or" interpretation of *Rapanos*. *See United States v. Robinson*, 505 F.3d 1208, 1221 (11th Cir. 2007); *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (*en banc*) (holding that the Court could not "combine a dissent with a concurrence to form a *Marks* majority"). The Eleventh Circuit's decision, which is discussed in more detail below, states "[i]t would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day and impose an 'either/or' test, whereby CWA jurisdiction would exist when either Justice Scalia's test or Justice Kennedy's test is satisfied." *Id.* at 1221.

Yet, the Agencies cite *Marks* and several other cases as supporting their multiple-holding interpretation of *Rapanos*. *See* Guidance at 3 n.14. The other "support" cited in the Guidance is as unavailing as *Marks*. The Guidance cites Justice Souter's lone concurrence in *Waters v. Churchill*, 511 U.S. 611, 685 (1984). There, he argued without the support of a single other justice, that, because two dissenting Justices supported parts of a plurality opinion, the plurality opinion could be treated as the Court's holding. *Id.* at 686. A concurring opinion by a single Justice is not a ruling of the Court and cannot overrule *Marks*.

League of Latin American Citizens v. Perry, 126 S.Ct. 2594 (2006) ("*LULAC*") is even weaker. In *LULAC*, the Court referred to dissents in an earlier case to show that in the past the Court had disagreed over how it should handle a particular justiciability issue. *Id.* at 2607. *LULAC* does not stand for the proposition that dissents can represent the holding of a case. Nor does *Alexander v. Sandoval*, 532 U.S. 275 (2001), which referred to dissents only to describe the history of an issue that was tangential to the case before the Court, not as forming the holding of a case. *Id.* at 281-82.

In the end, the Guidance simply offers no legal authority for its astonishing assertion that a Supreme Court case may be interpreted based on the views of the dissent. Nor does the Guidance point to anything that will allow it to escape *Marks*'s unambiguous instruction that plurality decisions must be interpreted based on the views of the Justices who "concurred in the judgments." *Marks*, 430 U.S. at 193.

D. The Eleventh Circuit Has Considered And Rejected The Agencies' Interpretation Of *Rapanos*, And The Decisions Of Other Circuits Preclude The Agencies' Either/Or Approach.

The legal infirmity of the Agencies' interpretation of *Rapanos* is reinforced by the fact that it has been considered and rejected by the Eleventh Circuit. *See United States v. Robinson*, 505 F.3d 1208 (11th Cir. 2007). In *Robinson*, the United States presented the same interpretation of *Rapanos* to the Court as it has

presented in the Guidance – *i.e.*, it argued that the Court could follow either the plurality or concurring opinions. *Id.* at 1221. The Eleventh Circuit explicitly rejected this interpretation, and in doing so explained "[i]t would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day and impose an 'either/or' test, whereby CWA jurisdiction would exist when either Justice Scalia's test or Justice Kennedy's test is satisfied." *Id*. The Eleventh Circuit also held that the views of dissenting Justices could not be relied upon in interpreting *Rapanos*' holding – a conclusion that is at odds with the Agencies' assertion that they may derive *Rapanos*' controlling legal principles from *any* five Justices, including dissenting justices. *Robinson* at 1221 ("Dissenters, by definition, have not joined the Court's decision. . . . The fact that the dissenting Justices would uphold CWA jurisdiction under both Justice Scalia's test and Justice Kennedy's test is of no moment under *Marks*.").

The Ninth Circuit has likewise declined to adopt the government's "either/or" argument. In *San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700 (9th Cir. 2007) and *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), the United States filed briefs arguing that *Rapanos* allows a court to find federal jurisdiction under the CWA pursuant to standards set forth in either the plurality opinion or Kennedy's opinion. The Ninth Circuit did not adopt the government's argument in either case; rather, in both

cases it interpreted *Rapanos* as establishing a single jurisdictional test based on Justice Kennedy's opinion. *See Cargill Salt Division*, 481 F.3d at 707; *City of Healdsburg*, 496 F.3d at 999. The Seventh Circuit's opinion in *Gerke Excavating,* which interpreted *Rapanos* as requiring a single jurisdictional test, is also at odds with the Agencies' interpretation. *United States v. Gerke Excavating*, 464 F.3d 723, 724 (7th Cir. 2006) (applying Justice Kennedy's opinion as the single, governing jurisdictional test). Thus, the Eleventh, Ninth, and Seventh Circuits have interpreted *Rapanos* in a manner that directly conflicts with the Guidance. If the Agencies adhere to their interpretation of *Rapanos*, they will effectively be requiring their staff in those jurisdictions to act in a manner that is contrary to the law of the Circuit. Moreover, in these jurisdictions the Guidance puts the public in the untenable position of having to choose between an interpretation set forth by the Executive branch and an inconsistent one set forth by the Judiciary.

Only one Circuit has interpreted *Rapanos* consistently with the Guidance. *See United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006). In *Johnson*, two members of the First Circuit panel – over the contrary dissenting opinion of Judge Torruella – cited the views of dissenting Justices in *Rapanos* to support their conclusion that CWA jurisdiction could be established under either the plurality or Justice Kennedy's opinion. *Id.* at 64-66. *Johnson*, however, is hardly a strong justification for the Agencies' two-holding interpretation of *Rapanos* given that the

Eleventh, Ninth, and Seventh Circuits have all interpreted *Rapanos* as having a single holding. Even more significant is that the Eleventh Circuit's decision in *Robinson* carefully considered the First Circuit's decision in *Johnson* and the United States' multiple-holding interpretation of *Rapanos*, but it specifically rejected this interpretation. *See Robinson*, 505 F.3d at 1220-21. Thus, the weight of judicial authority, including the most recent and most in-depth consideration of the Agencies' interpretation, rejects the view that *Rapanos* can be interpreted as having multiple holdings.

E. The Guidance Adopts A Definition Of Non-Navigable Tributaries And A Corresponding Reach Policy That Is Not Supported By Either The Scalia Or Kennedy Opinion.

The Guidance's broad definition of "tributary," combined with its adoption of a new "reach" policy, results in sweeping jurisdiction that goes far beyond that supported by either the Scalia or Kennedy opinions. The Guidance defines a tributary, in part, as a "natural, man-altered, or man-made *water body* that carries flow directly or indirectly into a traditional navigable water."[2] *See* Guidebook at 69; *see also* Guidance at 5, n.21 (emphasis added). The Guidance states that "a

[2] It is significant to note that this is the Agencies' first attempt to define the term "tributary." How "tributary" is defined will have profound consequences for the scope of CWA jurisdiction, because under the Corps' current regulations the term "waters of the United States means . . . [t]ributaries of [certain] waters." *See* 33 C.F.R. § 328.3(a)(5). Given that this term is a central element of the Agencies' jurisdiction, it should be defined by rule, as opposed to guidance. *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

non-navigable tributary [fn 21] of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries." *Id.* The Guidance also describes circumstances under which jurisdiction will extend to such non-navigable tributaries. *Id.* at 5-6. The definition of "non-navigable tributaries" and their extension of jurisdiction over such tributaries is based on the "flow . . . either directly or indirectly" of water between tributaries and TNWs. The Guidance's definition of tributary is problematic for a number of reasons.

As defined in the Guidance, the term "tributary" is sufficiently lacking in meaningful criteria and context that any source, regardless of its hydrographic or topographic features, that contributes any amount of flow, regardless of volume, frequency, or duration, to a TNW, without regard to how it reaches the TNW, may qualify as a tributary. This definition of "tributary" is no different from that criticized by Justice Kennedy in *Rapanos*. *Id*. at 2249 ("the Corps deems a water a tributary if it feeds into a traditional navigable waters (or a tributary thereof) and possesses an ordinary high-water mark . . . Yet the breadth of this standard – which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it – precludes its adoption as the determinative measure of [jurisdiction].").

Beyond these significant threshold problems, the Guidance introduces and indiscriminately applies a new "reach" assessment concept for determining which tributaries (including ditches and streams) are waters of the United States. With respect to the "reach" concept, the Guidance explains

> *a tributary, for the purposes of this guidance, is the entire reach of the stream* that is the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). The flow characteristics of a particular tributary will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream). *It is reasonable for the agencies to treat the stream reach as a whole* in light of the Supreme Court's observation that the phrase "navigable waters" generally refers to "rivers, streams, and other hydrographic features" . . . The entire reach of a stream is a reasonably identifiable hydrographic feature. The agencies will also use this characterization of tributary when applying the significant nexus standard . . .

Id. at 5 n.21 (emphasis added). The definition of tributary, combined with the reach concept, establishes a new policy under which the Agencies will assert jurisdiction reach-by-reach – *i.e.* jurisdiction will be extended to upstream waterways *not* because they independently contain the requisite nexus, but rather because they are part of a reach whose downstream confluence is determined to have a "significant nexus" to a TNW or to exhibit the characteristics of an RPW. The Agencies' jurisdictional reach could extend hundreds of feet or many miles

upstream from TNWs, as in the case of *Rapanos*, regardless of how much (or how little) the tributary would actually satisfy the jurisdictional tests in *Rapanos*.

Contrary to the Agencies' belief that it is reasonable to treat the stream reach as a whole, this categorical extension of jurisdiction over non-navigable tributaries is inconsistent with *Rapanos*, as both Scalia and Kennedy emphasized that it is the impacted wetland or stream crossing that must meet the tests of jurisdiction. *See Rapanos*, 126 S. Ct. at 2222 (Scalia, J., plurality opinion); *id.* at 2251 (Kennedy, J., concurring). The Agencies are *assuming* that the entire reach of a tributary is jurisdictional, based on an analysis of only one portion of the tributary at a point where, for that particular tributary, if a significant nexus exists at all, it will be found at that point because that will be the point of maximum flow. To make the *assumption* that the entire upstream reach of that tributary, whether meandering for several meters or several miles, is thereby jurisdictional directly conflicts with both Scalia's and Kennedy's jurisdictional tests. Both Scalia and Kennedy were concerned that the Corps' broad regulations allowed jurisdiction to be extended to water bodies with remote proximity and tenuous connections to TNWs, and without any specific analysis of the connections with the impacted waterbody itself. *See, e.g.*, *Rapanos*, 126 S. Ct. at 2249 (Kennedy, J.) (stating the Corps' regulations were overbroad because they left "wide room for regulation of drains,

ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it.").

Neither Scalia's nor Kennedy's tests allowed broad expanses of waters to be assumed to be jurisdictional simply because of their proximity to, or hydrological connection with, a water body that was deemed jurisdictional. The hallmark of Kennedy's jurisdictional test, for example, is a case-by-case determination of whether the water body in question has a significant nexus to traditional navigable waters. *See Rapanos*, 126 S. Ct. at 2249 (Kennedy, J.) ("the Corps must establish a significant nexus on a case-by-case basis"); *see also id.* at 2248 (Kennedy, J.) ("the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."). Scalia's jurisdictional test similarly focused on the particular connection between the impacted wetland or stream crossing and a TNW, and never suggested that broad expanses of tributaries could be deemed jurisdictional under a reach-wide assessment as the Agencies have set forth in the Guidance.[3] *Id.* at 2226-27 (Scalia,

[3] The Agencies cite the plurality's quotation of *Riverside Bayview*'s reference to "rivers, streams, and other hydrographic features" in support of their reach concept. *See* Guidance at 5 n.21 ("It is reasonable for the agencies to treat the stream reach as a whole in light of the Supreme Court's observation that the phrase 'navigable waters' generally refers to 'rivers, streams, and other hydrographic features.' 126 S. Ct. at 2222 (Justice Scalia, quoting Riverside Bayview, 474 U.S. at 131)."). This reference is a non-sequitur. A passing reference to "rivers, streams, and other hydrographic features" in the plurality's

J., plurality) (applying jurisdictional test and stating the wetland must have a continuous surface connection with TNWs).

In total, neither Scalia's nor Kennedy's opinions provide support for the Agencies' non-navigable tributary definition or its related reach concept. Both Scalia and Kennedy specifically rejected the idea that a mere hydrological connection between a tributary and a navigable water is sufficient to establish jurisdiction. Both faulted the Agencies' existing standard for tributaries as being boundless, requiring the Corps to issue more narrowly-tailored regulations. Neither the Corps nor EPA has issued such regulations. Instead, the Agencies have established a definition of non-navigable tributaries and an associated reach concept based on the theory, unsupported in *Rapanos*, that shifts the focus from the impacted wetlands or stream crossing to the point of maximum flow and all the hydrographic features within a surrounding region. In doing so, the Agencies have adopted precisely the same kind of broad, categorical approach that Scalia and Kennedy found unacceptable in *Rapanos*.

As a final note, the above-described problems with the Agencies' tributary definition and reach policy also result in two additional problems, both of which are addressed in more detail later in these comments. First, the tributary definition

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discussion of *Riverside Bayview* cannot be interpreted as an endorsement of the Agencies' reach concept.

and reach policy violate the Administrative Procedure Act ("APA") because they qualify as regulations not promulgated pursuant to the APA's rulemaking procedures. *See* 5 U.S.C. § 553; *see also infra* Section V. Second, the definition of tributaries and the extension of federal jurisdiction pursuant to the reach formulation present inordinate difficulties to implement in the field. The practical problems associated with the Agencies' tributary definition and reach formulation are detailed in Section IV below.

F. Justice Kennedy's Opinion Does Not Support The Agencies' Aggregation Policy.

The reach concept is not the only element of the Guidance that will extend jurisdiction in a manner contrary to *Rapanos*. The Guidance also announces an aggregation policy under which a wetland will be deemed to have a significant nexus to TNWs when that wetland and all other wetlands that are adjacent to the same tributary have a *collective* significant nexus to TNWs – even if the wetland in question does not exhibit the requisite nexus on its own. *See* Guidance at 9. The Agencies explain that:

> This approach reflects the agencies' interpretation of Justice Kennedy's term 'similarly situated' to include all wetlands adjacent to the same tributary.. . . . Interpreting the phrase 'similarly situated' to include all wetlands adjacent to the same tributary is reasonable because such wetlands are physically located in a like manner (i.e. lying adjacent to the same tributary).

Id.

For the same reasons that Justice Kennedy's opinion does not support the reach policy, it does not allow the Agencies to categorically claim jurisdiction over wetlands and tributaries based on their aggregate impact on TNWs. As explained above, the central feature of Kennedy's jurisdictional test is that every impacted water body must be judged in its own right to determine whether it (and it alone) has a significant nexus to TNWs. *See supra* at Section III, Subpart E. Justice Kennedy was clear that the focus of the significant nexus test was the wetland at issue, not on that wetland's impact when aggregated with many other wetlands: "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus *between the wetlands in question* and navigable waters in the traditional sense." *Rapanos*, 126 S. Ct. at 2248 (emphasis added); *see also id.* at 2249 ("the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands").

The policy of aggregating the impacts of all wetlands directly conflicts with Justice Kennedy's call for a case-by-case examination of the significant nexus of each "wetland in question." *Id.* at 2248. Moreover, when Justice Kennedy provided a relatively detailed explanation regarding how his standard should be applied to the facts of the *Rapanos* and *Carabell* cases on remand, he did not instruct the lower courts to determine jurisdiction over the wetlands at the *Carabell* and *Rapanos* sites based on the aggregate impacts of all the wetlands surrounding

the wetlands at issue (or even to consider other wetlands in the region). *Id*. at 2250-52. Rather, he instructed the lower courts to apply his significant nexus test to the individual wetlands at issue. *See, e.g.*, *id.* at 2252 (vacating and remanding both cases "for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters"). If Justice Kennedy had actually thought his significant nexus test could be satisfied through the aggregation policy, one would think that he would have at least mentioned the aggregation concept at some point in these detailed instructions or suggested that evidence concerning the functions of wetlands within the region would be relevant.

Kennedy's remand instructions are consistent with his opinion, which holds:

> Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable application of the statute. Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.

Id. at 2249. Kennedy's careful acknowledgement of the burdens of administrative process is not an invitation for wholesale aggregation. He is requiring case-by-case determinations (at least until the Agencies engage in rulemaking) because of the "potential overbreadth" of the current regulations and "to avoid unreasonable applications of the statute." *Id*. But he is also trying to avoid unnecessary

duplication of effort. So, where the Corps has determined that a given wetland has the requisite nexus and that a second wetland in the region is "comparable," the Corps may rely on the prior determination in assessing the jurisdictional status of the "comparable" wetland. *Id*. This allowance for administrative efficiency, however, does not authorize the Corps to circumvent Kennedy's individualized inquiry requirement through an aggregation policy.

G. The Combined Impact Of The Agencies' Reach And Aggregation Polices Would Be To Extend Jurisdiction Far Beyond What Would Be Allowed Under Either The Plurality Or Concurring Opinions.

The reach and aggregation policies are inconsistent with *Rapanos* on their own merits, as discussed above. Using them together only compounds the problem. For example, under the reach policy, jurisdiction could be asserted over a portion of a tributary far upstream (and downstream) so long as the downstream portion qualified as a jurisdictional tributary. The Agencies could then aggregate the combined impacts of all the "adjacent" wetlands to exercise jurisdiction over any or all of those wetlands.

The end result would be to allow the exercise of jurisdiction over waters and wetlands with only tenuous and insubstantial connections to TNWs, a result directly at odds with the reasoning of both the plurality and concurring opinions in *Rapanos*. To the extent the Agencies find it advisable to adopt categorical tests,

they should proceed through notice and comment rulemaking, as Justice Kennedy noted. *Id*. at 2249.

H. The Plurality Opinion Does Not Support Jurisdiction Over Tributaries That Flow Only Three Months.

The Agencies state that they will assert jurisdiction over non-navigable tributaries that flow seasonally, *i.e.*, for approximately three months, claiming that "[b]oth the plurality opinion and the dissent would uphold jurisdiction over non-navigable tributaries that are 'relatively permanent' – waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months)." Guidance at 5-6.

This statement is simply wrong with respect to the plurality. Scalia construed the statutory term, "the waters of the United States," to include "only relatively permanent, standing or flowing bodies of water . . . connot[ing] continuously present, fixed bodies of water as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Id.* at 2220-21. He dropped a footnote to make clear that "[b]y describing [jurisdictional] 'waters' as 'relatively permanent,' we do not *necessarily* exclude . . . *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months…" *Id.* at 2221 n.5 (emphasis in original). Simply because Scalia said that seasonal waters are "not necessarily excluded" does not mean that such waters are automatically *included*. Yet this is exactly how the Guidance is using footnote 5.

In fact, the Guidance is bold enough to actually cite it as support for the reversal of Scalia's logic. At most, footnote 5 acknowledges the possibility of CWA jurisdiction over seasonal rivers, streams, and tributaries, but only if those seasonal waters satisfy Scalia's over-arching jurisdictional test. *See Rapanos*, 126 S. Ct. at 2225.

Equally problematic, the Guidance suggests that when Scalia allowed for the possibility of jurisdiction over "seasonal waters," he meant a water body that has a flow for "typically three months" of the year. *See* Guidance at 5 (describing the plurality as extending jurisdiction to waters that flow "at least seasonally (e.g. typically three months)"). Scalia's opinion never states that a water can be subject to CWA regulation if it flows for three months. Quite the contrary. When Scalia discussed in footnote 5 the possibility that seasonal rivers were not necessarily excluded under his standard, he used as an example a river that flows continuously for 290 days per year. *Id.* at 2221 n.5 (stating that the meaning of "waters of the United States" did not "necessarily exclude *seasonal* rivers . . . such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent." (emphasis in original, internal citations omitted)). Two hundred ninety days is 200 days more than three months. It is hard to see how the Guidance can rely on the plurality to establish a three-month rule. Thus, if a definition of "relatively permanent" water is to be derived from the plurality opinion, the standard should

be tied to a continuous flow of 290 days, rather than a continuous flow of only 90 days. Similarly, the Guidance's three-month timeframe is undermined by the plurality's statement, after noting that a river that flowed continuously for 290 days *might* be a jurisdictional water, that "[c]ommon sense and common usage distinguish between a wash and a seasonal river." *Rapanos*, 126 S. Ct. at 2221 n.5.

I. The Agencies Have Misinterpreted Justice Kennedy's Significant Nexus Test As Being Satisfied When The Impact Is "More Than Speculative Or Insubstantial."

The basic requirement of Justice Kennedy's significant nexus test is that there must be a "significant nexus" between the wetland in question and traditional navigable waters.[4] *See Rapanos*, 126 S. Ct. at 2248 (Kennedy, J.) ("the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense"). Justice Kennedy thus set a minimum "significance" requirement that the Agencies must establish to assert jurisdiction, stating that the wetlands in question must "*significantly affect* the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* (emphasis added).

[4] Justice Kennedy's significant nexus test may not apply to tributaries. *See San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 707 (9th Cir. 2007) ("*Rapanos*, like *Riverside Bayview*, concerned the scope of the Corps' authority to regulate adjacent *wetlands*. . . No Justice, even in dictum, addressed the question of whether all waterbodies with a significant nexus to navigable waters are covered by the Act.").

Under the everyday use of the word "significant," it is apparent that Justice Kennedy meant the nexus had to be "full of import," "important," or "weighty." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2116 (1993); *see also Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003) (stating the "commonly understood" meaning of significant is "important"); *Onishea v. Hopper*, 171 F.3d 1289, 1299 (11th Cir. 1999) (holding that a "significant risk of HIV transmission does not mean "any risk" and "must be rooted in sound medical opinion and not be speculative or fanciful"); *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1189 (D.C. Cir. 1983) (television channels watched "occasionally" are not "significantly viewed" channels).

The Guidance turns Justice Kennedy's significant nexus test upside down by allowing jurisdiction when the nexus between a wetland and a traditional navigable water is "more than speculative or insubstantial." *See* Guidance at 10. Just because a connection is "more than speculative or insubstantial" does not mean that it is "significant." Yet, this is precisely how the Guidance has interpreted Justice Kennedy's significant nexus test. Justice Kennedy made clear in his opinion that waters with a "speculative or insubstantial" connection to traditional navigable waters fall far short of his test. He specifically contrasted wetlands that displayed the requisite significant nexus by virtue of their demonstrable chemical,

physical or biological impact on traditional navigable waters to waters with only speculative or insubstantial impacts. *Rapanos*, 126 S. Ct. at 2248 ("When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'").

Kennedy thus drew a sharp distinction between the two extremes on a continuum – those waters with a significant nexus and those waters with only a speculative or insubstantial nexus. But just because a wetland has more than a speculative connection to a TNW does not, by any means, demonstrate that such wetland has a "significant" nexus to that TNW. The Guidance has attempted to collapse this continuum by ignoring the plain meaning of the word "significant" and transforming Kennedy's significant nexus test into a merely-more-than-speculative-or-insubstantial test. This upside down reading of Justice Kennedy's test is very similar to the Agencies' upside down reading of footnote 5 of the Scalia opinion, discussed *supra* at Subpart H. Regardless of the context, this method of interpretation is just wrong, and the Guidance should be revised to correct it.

IV. THE GUIDANCE LACKS CLARITY, CREATES UNNECESSARY PROCEDURES, CAUSES UNINTENDED CONSEQUENCES, AND ADDS TO DELAYS.

Both Agencies have consistently acknowledged the need for greater clarity and consistency in the jurisdictional determinations made under the section 404

program.[5] However, as discussed below, we are concerned that the Guidance not only fails to provide the certainty and predictability sought, but it manages to create further and completely unnecessary regulatory confusion and delays in permit decision-making, and to expand the jurisdictional reach over certain waters contrary to the Supreme Court's decision in *Rapanos*.

A. The Guidance's Definition Of "Traditional Navigable Waters" Is Inconsistent With *Rapanos* And Fails To Provide The Public With Practical Guidance.

Whether a water body is a traditional navigable water is of fundamental importance after *Rapanos* because both the plurality and Justice Kennedy premise

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[5] *See Interpreting the Effect of the U.S. Supreme Court's Recent Decision in the Joint Cases of Rapanos and Carabell on "Waters of the United States," Before the S. Subcomm. on Fish, Wildlife and Water, S. Comm. on Environment and Public Works*, 109th Cong. (2006) (joint statement of B. Grumbles, Asst. Admin. for Water, EPA and J. P. Woodley, Jr., Asst. Sec. of the Army for Civil Works) ("EPA and the Corps are working quickly to develop interim guidance . . . to provide clarity for the public and to ensure consistency among CWA jurisdictional determinations nationwide.") (attached hereto as **Exhibit 5);** *Clean Water Act Jurisdictional Issues and Practices, Before the H. Subcomm. on Water Resources and Environment, H. Comm. on Transportation and Infrastructure*, 108th Cong. (2004) (joint statement of B. Grumbles, Asst. Admin. for Water, EPA and J. P. Woodley, Jr., Asst. Sec. of the Army for Civil Works) ("The section 404 regulatory program continues to face legal and technical challenges as jurisdictional determinations are made in a post-SWANCC environment [sic] The President has asked that the agencies continue their ongoing efforts to achieve regulatory clarity and predictability.") (attached hereto as **Exhibit 6**); *see also Clean Water Act: Review of Proposed Revisions to Section 404 Definition of "Fill" and "Dredged Fill," Before the S. Subcomm. on Clean Air, Wetlands, and Climate Change, S. Comm. on Environment and Public Works*, 107th Cong. 27 (2002) (joint statement of B. Grumbles, Asst. Admin. for Water, EPA and G. Dunlop, Deputy Asst. Sec. of the Army, Policy and Legislation) ("The Army and EPA sought to improve regulatory clarity . . .") (attached hereto as **Exhibit 7**).

jurisdiction over non-navigable waters on the non-navigable water's relationship to traditional navigable waters. Under the plurality's jurisdictional test, for example, a non-navigable tributary must be "a relatively permanent body of water connected to traditional interstate navigable waters" for that tributary to qualify as a water of the United States. *See Rapanos*, 126 S. Ct. at at 2227 (Scalia, J., plurality opinion). Justice Kennedy requires a "significant nexus" between the wetlands in question and "navigable waters in the traditional sense." *Id.* at 2248 (Kennedy, J.).

Although they express the concept of "traditional navigable waters" in varying formulations (*i.e.*, "traditional interstate navigable waters" and "navigable waters in the traditional sense") the waters to which they are referring are unmistakably clear from the cases they cite to describe them – *The Daniel Ball* and *Appalachian Electric Power Company*. *See id.* at 2222 (Scalia, J., plurality opinion) (referring to the "traditional understanding" of navigable waters and discussing *The Daniel Ball* and *Appalachian Electric Power Company*); *id.* at 2237 (Kennedy, J.) (citing *The Daniel Ball* and *Appalachian Electric Power Company* when referring to "the traditional understanding of the term 'navigable waters of the United States'"). These cases are cornerstones in a series of well-established, well-recognized cases that define traditional navigable waters as meaning waters that (1) are navigable-in-fact (or capable of being rendered so) and (2) together with other waters, form waterborne highways used to transport commercial goods

in interstate or foreign commerce. These are the waters that today are subject to regulation under the Rivers and Harbors Act of 1899 ("RHA") (in addition to the Clean Water Act). Of course, the CWA is far broader in its reach than the RHA, so the fact that a water body is not a TNW does not mean it is excluded from the CWA.

Instead of accepting that TNWs are the waters that have, for generations, been consistently identified as such under the RHA, the Agencies cobble together a new definition in Appendix D of the Instructional Guidebook. This new definition is inconsistent with *Rapanos* because it is based on the Agencies' regulations, which apply to a far broader category of waters than the traditional definition of TNW relied on by the plurality and Justice Kennedy in *Rapanos*. Moreover, as evidenced by the past six months of experience, this confused definition of TNW is nearly impossible for the public or the Corps's districts to apply in practice.

1. When Referring To Traditional Navigable Waters, The Plurality And Justice Kennedy Cited To Case Law Which Defines Traditional Navigable Waters As (1) Navigable-In-Fact Waterways That (2) Are Used To Transport Commercial Goods In Interstate Or Foreign Commerce.

In *Rapanos*, both the plurality and Justice Kennedy based their jurisdictional tests on what they referred to, respectively, as "traditional interstate navigable waters" and "navigable waters in the traditional sense." *Rapanos*, 126 S. Ct. at 2227 (Scalia J., plurality opinion); *id.* at 2248 (Kennedy, J.). For example, the

plurality held that establishing a wetland is covered by the Act requires showing "that the adjacent channel contains a 'wate[r] of the United States' (i.e. a relatively permanent body of water connected to traditional interstate navigable waters)." *Id*. at 2227 (Scalia J., plurality opinion). Kennedy similarly held that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 2248 (Kennedy, J.).

Significantly, when the plurality referred to "traditional interstate navigable waters" and when Justice Kennedy referred to "navigable waters in the traditional sense," they both cited *The Daniel Ball* and *Appalachian Electric Power Company*. *See id.* at 2222 (Scalia, J., plurality opinion) (citing *The Daniel Ball v. United States*, 77 U.S. 557, 563 (1871) and *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 457 (1940)); *see also id.* at 2237 (Kennedy, J.) (same). *The Daniel Ball* and *Appalachian Electric Power Company* reflect the well-established, two-part definition of TNW as (1) navigable-in-fact waters that (2) together with other water bodies, form an interconnected highway for waterborne, interstate transport of commercial goods. *See The Daniel Ball*, 77 U.S. at 563 (interpreting "navigable waters" as meaning waters "which are navigable in fact" and explaining waters "are navigable in fact when they are used, or are susceptible of being used,

in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water").

This definition has its origins in the Supreme Court's 1870 decision in *The Daniel Ball*. In that decision, the Supreme Court held that Congress had the power to regulate all "navigable waters" under the Commerce Clause, which it defined as meaning

> public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

77 U.S. at 563. It is well accepted that Congress adopted this definition when it employed the term "navigable water of the United States" in the RHA. *See Hardy Salt Co. v. So. Pacific Transportation*, 501 F.2d 1156, 1168 (10th Cir. 1974) (recognizing that Congress adopted *The Daniel Ball*'s definition of TNWs in enacting the RHA); *Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617, 622 (8th Cir. 1979) (same). Numerous cases handed down in the decades following enactment of the RHA interpreted the term "navigable waters" consistently with *The Daniel Ball* as meaning highways for waterborne, interstate transport of commercial goods – thereby establishing what today is referred to as *traditional* navigable waters. *See, e.g.*, *Leovy v. United States*, 177 U.S. 621, 630 (1900) (relying on *The Daniel Ball*'s definition of navigable waters in interpreting

the RHA); *Economy Light & Power v. United States*, 256 U.S. 113, 121-22 (1921) (same); *Appalachian Electric Power Co.*, 311 U.S. at 406-07 (same).

More recent decisions have confirmed the two-part definition of navigable waters, as traditionally understood pursuant to *The Daniel Ball* and RHA case law such as *Appalachian Electric Power*. *See Minnehaha Creek Watershed District*, 597 F.2d at 622-23 ("*The Daniel Ball* test is bipartite: first, the body of water must be navigable in fact; and second, it must itself, or together with other waters, form a highway over which commerce may be carried on with other states."); *Hardy Salt Co.*, 501 F.2d at 1169 ("We conclude that a navigable water of the United States within the meaning of Sections 9, 10, and 13 of the Rivers and Harbors Act must be construed in lien with the interpretation in *The Daniel Ball*, as contemplating such a body of water forming a continued highway over which commerce is or may be carried on with other states or foreign countries, by water.").

Accordingly, when the plurality and Justice Kennedy referred to "traditional interstate navigable waters" and "navigable waters in the traditional sense" and cited to *The Daniel Ball* and its progeny, they were clearly referring to the historical definition of "navigable waters" under *The Daniel Ball* and, subsequently, case law interpreting the RHA. This body of law is well-established, and cannot simply be ignored or avoided. As explained below, however, the

Agencies' definition of TNWs in Appendix D is inconsistent with this body of law and, therefore, inconsistent with the plurality and Kennedy opinions in *Rapanos*.

2. The Agencies Define Traditional Navigable Waters Based On Their Regulations, Resulting In A New Traditional Navigable Waters Definition That Is Inconsistent With The Rivers and Harbors Act Definition Cited By The Plurality And Justice Kennedy In *Rapanos*.

The Agencies have defined TNW in Appendix D as

> "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate commerce, including all waters which are subject to the ebb and flow of the tide." 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1). . . . [F]or purposes of the guidance, these "(a)(1) waters" are the "traditional navigable waters." These (a)(1) waters include all of the "navigable waters of the United States," defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN).

Guidebook, App. D at 1.

This definition deviates from the definition in *The Daniel Ball* and *Appalachian Electric Power Company* and relied on by the plurality and Justice Kennedy in several respects. First, by defining TNWs as section "(a)(1) waters" instead of based on the traditional RHA definition, the Agencies have completely eliminated the second prong of the well-established TNW definition – *i.e.*, the requirement that the water in question, together with other water bodies, form an interconnected highway to carry *commercial goods* in interstate or foreign

commerce. Although 33 C.F.R. § 328.3(a)(1) uses terms similar to the second prong of the classic TNWs definition, it reaches waters that are, were or could be subject to any use in interstate commerce, not as an interconnected highway for waterborne, interstate transport of commercial goods. This is a critical omission, as the cases cited by the plurality and Justice Kennedy as authorities for the meaning of TNW emphasize the use of such waters as "highways for commerce." *The Daniel Ball*, 77 U.S. at 563. Use *in* interstate commerce is far broader than use *as* "highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.*

Second, Appendix D's reference to "all waters that are navigable-in-fact" can be read to suggest that the Agencies intend to treat a water body as a TNW simply because a canoe or a kayak could float on it. The Agencies have in the past interpreted a waterway as being "navigable-in-fact" so long as *any* vessel, no matter how small it is or what purpose it serves, can float on the waterway. *See* Advance Notice of Proposed Rulemaking, 68 Fed. Reg. 1991, 1996-97 n.2 (Jan. 15, 2003) ("traditional navigable waters are not limited to those regulated under Section 10 of the Rivers and Harbors Act of 1899 . . . . isolated, intrastate waters that are capable of supporting navigation by watercraft remain subject to CWA jurisdiction after *SWANCC* if they are traditional navigable waters, i.e., if they meet any of the tests for being navigable-in-fact.").

Appendix D appears to endorse an expansive view of the navigable-in-fact concept by a case where a stream was determined to satisfy the Federal Power Act's ("FPA") definition of "navigable waters" based on three experimental canoe trips. *See* Guidebook, App. D at 4 n.1 (citing *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002)). This case is inapposite because it does not address whether the stream was navigable-in-fact under *The Daniel Ball* or the RHA; it was instead focused on whether the stream met the FPA's broad definition of "navigable waters." *See FPL Energy Maine Hydro*, 287 F.3d at 1154, 1156; *see also* 16 U.S.C. § 796(8) (broadly defining "navigable waters" under the FPA based on the full extent of Congress' Commerce Clause authority). The Agencies' citation suggests they will employ the FPA's experimental canoe standard for purposes of identifying TNWs regardless of the clear differences between the FPA and the waters traditionally identified as navigable under *The Daniel Ball* and its progeny. The Agencies' citation of this case is consistent with the Commenters' experience. The Commenters have had numerous exchanges with Agency staff who seem to believe that the ability to float a canoe on a small lake can render it navigable. Of course, assuming the lake were a relatively permanent water body connected to traditional interstate waters, it would likely be a CWA water based on those characteristics. But it would not be a TNW.

Moreover, under *The Daniel Ball* and cases construing the RHA, that a water is navigable-in-fact is not enough, by itself, to qualify it as a TNW. For example, in *The Montello*, the Supreme Court, relying on its decision in *The Daniel Ball*, explained that "not every small creek in which a fishing skiff or gunning canoe can be made to float at high water" qualifies as a "navigable water." *The Montello*, 87 U.S. 430, 422 (1874). Similarly, in *Leovy v. United States*, 177 U.S. 621 (1900), the Supreme Court rejected as overbroad a jury instruction stating that "the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another . . . is sufficient to constitute a navigable water of the United States." *Id.* at 633.

By properly limiting TNWs to their traditional scope as defined in cases such as *The Daniel Ball* and *Appalachian Electric Power* and under the RHA, the Agencies would not be saying that non-TNWs cannot be regulated under the CWA. Rather, such non-TNWs simply cannot be labeled TNWs as the term was used by the plurality and Justice Kennedy. Indeed, numerous cases have upheld the regulation of non-TNWs under the CWA, even though the waters at issue in those cases could not be regulated under the RHA. *See, e.g.*, *Minnehaha Creek Watershed District*, 597 F.2d at 624 (holding Lake Minnetonka was not a "navigable water" for purposes of the RHA, but applying the CWA to that same water body). In fact, both the plurality opinion and Justice Kennedy's opinion in

Rapanos make clear that the CWA provides the Agencies with authority to regulate beyond TNWs. *See Rapanos*, 126 S. Ct. at 2220 (Scalia, J., plurality opinion) (rejecting argument that the Corps' CWA jurisdiction is limited to the traditional definition of navigable waters); *id.* at 2208 (agreeing with plurality's conclusion that "in enacting the Clean Water Act, Congress intended to regulate at least some waters that are not navigable in the traditional sense"). However, the plurality and Justice Kennedy also make clear that the Agencies' regulation of non-TNWs under the CWA is based on the connections of those non-TNWs to TNWs – which they refer to in the truly *traditional* meaning of the term as established in *The Daniel Ball* and in case law interpreting the RHA. *Id.* at 2222 (Scalia, J., plurality opinion) (citing *The Daniel Ball v. United States*, 77 U.S. 557, 563 (1871) and *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 457 (1940)); *see also id.* at 2237 (Kennedy, J.) (same).

3. The Guidance Does Not Provide An Easily Understandable Definition That The Public Could Apply In Practice.

In light of the central importance of the TNWs concept to both the plurality and Justice Kennedy jurisdictional tests, the public would benefit from an easy-to-apply approach to identifying TNWs. Hereto, the Guidance could have simply applied the well-established meaning of TNWs under *The Daniel Ball* and its progeny, *i.e.*, waters that (1) are navigable-in-fact (or reasonably susceptible to being made so) and (2) form waterborne highways used to transport commercial

goods in interstate or foreign commerce. As discussed above, this definition is well-grounded in over a century of case law and application under the RHA, and thus has a well-known and well-understood meaning.

The Guidance, however, eschews this well-established definition of TNWs in favor of guidance that is difficult to understand even for lawyers, let alone non-lawyers. The discussion of TNWs in Appendix D of the Guidebook follows the format of a legal brief, consisting primarily of a case-by-case discussion of judicial rulings. This discussion of judicial precedent provides little insight as to how the Agencies will apply those decisions, and provides no practical guidance regarding how to identify TNWs in the field. Agency officials have openly admitted that Appendix D is not clear, but have simultaneously taken the position that they cannot provide more guidance because additional details would constitute a regulation that would have to be promulgated under the APA's rulemaking procedures.[6]

[6] For example, an Agency official acknowledged the following during a workshop that was held on the Guidance on November 14, 2007, in Atlanta, Georgia ("Atlanta *Rapanos* Workshop"):

> Appendix D is not as clear as it could be and it really is just a recitation of case law. It really doesn't provide much guidance beyond that.

See Transcript of Public Comments During Atlanta *Rapanos* Workshop at 18 (attached hereto as **Exhibit 8**). It was subsequently explained that the Agencies

Moreover, some of the cases discussed in Appendix D address issues of navigability outside the CWA context, such as under the Federal Power Act and the Alaska Native Claims Settlement Act. *See* Guidance, App. D at 4 n.1 (discussing *FPL Energy Marine Hydro v. FERC*, 287 F.3d 1151 (D.C. Cir. 2002) (Federal Power Act case) and *Alaska v. Ahtna, Inc.*, 891 F.2d 1404 (9th Cir. 1989) (Alaska Native Claims Settlement Act)). Appendix D's reference to cases under these other statutes further complicates matters because it suggests the public can only understand the Agencies' regulatory authority under the CWA by keeping abreast of all water-related decisions of the federal courts – despite the fact that the Agencies state Appendix D's guidance applies only to the CWA. *See* Guidebook, App. D at 1.

Just as Appendix D does not provide the public with practical guidelines or instructions regarding how to identify TNWs, it is also silent on how the Agencies will practically apply their definition of TNWs. For example, neither Appendix D

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did not issue more specific guidance out of a concern that additional details would qualify as rulemaking:

> [Appendix D] came out as it was because there is a lot of uncertainty whether if we put out more information about what a traditional navigable water is, are we really straying into rulemaking at that point, and the lawyers are telling us, yes we are, so that's why we're being very careful of what we put out and what we don't put out.

Id. at 20-21.

nor any of the other documents issued with the Guidance specify who will determine a waterway's TNW status (*e.g.*, the Corps district, Corps districts acting in consultation with officials at Corps headquarters?), in what context these determinations will be made (*e.g.*, in individual permitting decisions or through public notice and comment?), whether the public will be allowed to participate in these determinations, and how the public will be informed they have been made.

Corps field staff have also indicated that they do not know how to apply Appendix D's definition of navigable waters. *See, e.g.*, E-mail from Corps official to stakeholders (July 23, 2007, 12:34 p.m.) (attached hereto as **Exhibit 9**) (stating "it will be difficult for us to verify any jds until we know what the approved TNWs are for Pima County"); *see also* Scottsdale *Rapanos* Workshop Transcript, Exhibit 3 at 47 ("We haven't got to the point where we have JDs ready to be submitted up to EPA from our Arizona branch. What we are trying to do is, I think, focus first and foremost on coming to grips with where do we have TNWs – these traditionally navigable waters – because those are obviously key to the significant nexus determinations for these ephemeral streams. That's going to be a difficult task for us."). The Corps has also not indicated whether, for example, the districts will engage in a systematic review of waters to determine TNW status in light of Appendix D's new definition. Also left unanswered is whether the public will

have any input into a review of TNW status, or even if the public would be notified that such a review is ongoing.

In total, the Guidance is entirely lacking in transparency with respect to how the Agencies will make TNW determinations under their new definition and provides very little practical guidance for the public. This lack of transparency and easily understandable guidance is significantly compounded by the legal infirmity of the Agencies' definition of TNWs, which is contrary to the meaning of the term invoked by the plurality and Justice Kennedy. Given that TNWs is the foundation for both the plurality and Justice Kennedy's jurisdictional tests, the Agencies have greatly undermined their effort to bring clarity to *Rapanos* by adopting a definition of TNWs that is legally suspect and practically unworkable.

B. The Guidance's Definition Of "Relatively Permanent" Is Inconsistent With *Rapanos*, Confusing, and Being Applied *Ad Hoc*.

Neither the CWA nor the regulations define the term "relatively permanent" water ("RPW"). The Guidance defines an RPW as one that flows year-round or has a "continuous flow at least seasonally (e.g., *typically three months*)." Guidance at 5-6 (emphasis added). According to the Corps, where an RPW flows directly or indirectly into a traditional navigable water, it will be deemed jurisdictional, along with any wetlands abutting the RPW.[7] As previously discussed, the Agencies' adoption of a "three-month flow" standard for RPW is a

[7] *See* Scottsdale *Rapanos* Workshop Transcript, Exhibit 3 at 7-8.

complete misreading of *Rapanos*. *Id*. at 2221 n.5 ("We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months – such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent . . . Common sense and common usage distinguish between a wash and seasonal river.") (J. Scalia). The RPW which both the dissent and plurality in *Rapanos* had in mind flowed for 290 days – almost 10 months out of the year – not three months.

Notwithstanding the legal infirmities of this three-month flow standard, we were disappointed to learn that some Corps districts and EPA regions are ignoring even this overly liberal standard and applying their own *ad hoc* test, requiring flow for even less than three months each year. For example, in response to questions regarding how to apply the Guidance to ephemeral drainages in the arid West, an email broadly circulated by the South Pacific Division in July 2007 stated the following:

> EPA has indicated to us that the requirement for an RPW to have three consecutive months of flow annually is guidance only. They have indicated that any watercourse which has "predictable, seasonal flow" could be considered an RPW.

See E-mail from Corps official to various stakeholders (July 23, 2007, 3:34 p.m.) (attached hereto at **Exhibit 9**). As this communication suggests, field staff appear to be disregarding the Guidance because it is "guidance only," and thus applying

their own *ad hoc* interpretation of what constitutes "relatively permanent" flow. Under a "predictable, seasonal flow" standard suggested by this field communication, an ephemeral drainage with any amount of flow, whether for one hour, one day, one week, or one month per year could be deemed jurisdictional provided such flow is merely "predictable" and "seasonal." Defining an RPW as any "predictable, seasonal flow" – without regard to volume, duration, and frequency of flow and without regard to the relationship to a TNW – is not only at odds with the *Rapanos* decision, but undermines the consistency and clarity the Agencies sought to provide through the Guidance. This example illustrates the lack of clear, predictable interpretation and faithful implementation of the Guidance in the field. Moreover, the fact that certain districts are disregarding the Guidance because it fails to provide sufficient criteria or is not legally binding is all the more reason the Agencies need to adopt a rule.

C. The Guidance Correctly Deems Swales And Erosional Features, Including Small Washes, As Non-Jurisdictional, But Fails To Provide Meaningful Criteria Regarding Jurisdiction Of Ephemeral Washes, And Thus Field Staff Are Applying *Ad Hoc* Standards.

The Guidance provides that "[s]wales or erosional features (*e.g.*, gullies, small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters." Guidance at 11. We agree with the Agencies' conclusion that swales and erosional

features, including small washes and the like, satisfy neither Scalia's nor Kennedy's test for jurisdiction.

However, as an initial point of departure, we are perplexed by and disagree with the very next paragraph (a/k/a Paragraph "Arid West" or "AW") in the Guidance pertaining to "ephemeral waters in the arid west" which seems to completely negate the prior paragraph concerning the non-jurisdictional status of most swales and erosional features, including small washes characterized by low volume, or infrequent or short duration flow.[8] Guidance at 11. Paragraph AW provides that

> [c]ertain ephemeral waters in the arid west are distinguishable from the geographic features described above where such ephemeral waters are tributaries and they have a significant nexus to downstream traditional navigable waters. For example, in some cases these ephemeral tributaries may serve as a *transitional area* between the upland environment and the traditional navigable waters.

Id. (emphasis added). The Guidance goes on to describe the various ecological functions that ephemeral waters may provide:

> These ephemeral tributaries may provide habitat for wildlife and aquatic organisms in downstream traditional navigable waters. These biological and physical

[8] The attempt to distinguish ephemeral drainages in the arid West from ephemeral systems elsewhere is unclear and confusing. These juxtaposed paragraphs on page 11 of the Guidance are patently inconsistent and paradoxical, and almost appear as if they were written in complete isolation from each other. We simply cannot understand how these paragraphs can be reconciled.

> processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters.

Id. Paragraph AW defines an ephemeral drainage in the arid West as jurisdictional when such water both (1) is a tributary *and* (2) has a "significant nexus" with a TNW. As discussed below, the Guidance's construction of the requisite elements necessary to find jurisdiction under this two-pronged approach is confusing and legally flawed, and therefore the test is rendered meaningless.

First, as recounted in detail in Section III, the Guidance's expansive definition of "tributary," makes the first prong of Paragraph AW overbroad and virtually impossible to implement in the field with any meaningful level of predictability.

Second, the "significant nexus" prong of Paragraph AW appears to largely ignore one of the most fundamental tenets of jurisdiction articulated in the *Rapanos* decision and emphasized throughout the Guidance, *i.e.*, the importance of "volume, duration, and frequency" of flow. Consequently, the Guidance is likely to result (and is resulting) in the same expansive and unlawful jurisdictional determinations over ephemeral drainages as the former "any hydrologic connection" theory, which was resoundingly rejected in the *Rapanos* decision. *See Rapanos* at 2250-51 ("Absent some measure of the significance of the connection

for downstream water quality, this standard was too uncertain . . . mere hydrologic connection should not suffice . . .") (Kennedy J., concurring). All streams, whether ephemeral drainages or not, must have more than insubstantial flows. Moreover, in distinguishing between a non-jurisdictional dry wash and a potentially jurisdictional seasonal river flowing 290 days a year, Justice Scalia in *Rapanos* noted "[c]ommon sense and common usage distinguish between a wash and seasonal river." *Id.* at 2221.

Further, in attempting to distinguish between non-jurisdictional swales and erosional features on the one hand and ephemeral drainages on the other, the Guidance appears to be putting substantial weight on the unsubstantiated assumption that ephemeral ecosystems serve as *transitional areas* between uplands and TNWs, and may provide ecological functions, such as wildlife habitat, nutrient cycling, sediment retention, and pollutant trapping. Guidance at 11. This can be said, however, of any channel or upland riparian area and, therefore, this element is not a distinguishing feature of jurisdictional waters. Non-jurisdictional upland vegetated areas bordering waters, for example, often provide the same ecological and water quality functions provided by wetlands (*e.g.*, filtering pollutants and providing wildlife habitat).[9] Consequently, the mere existence of these types of

[9] Both Agencies have recognized the value of upland vegetated buffers in helping to maintain water quality. For example, vegetated buffers are an important part of the Corps' nationwide permit program. According to the Corps, "vegetated

ecological functions, by itself, provides absolutely no legal or scientific justification for the Agencies' assertion of jurisdiction.

Nothing in the *Rapanos* decision supports the Agencies' assertion of jurisdiction over anything beyond waters of the United States. Just because a certain geographic feature (upland or non-upland) may serve as a transitional area and provide important ecological and/or water quality benefits does not automatically transform that area into jurisdictional waters of the United States. There is simply no rational legal basis for the Agencies to assert jurisdiction over "transitional areas" which are not themselves waters of the United States. A water is either a water of the United States or not.

Further, on a practical note, because the Guidance fails to provide meaningful criteria, some districts are disregarding the direction of the Guidance that at least a three-month seasonal flow must generally exist before jurisdiction

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buffers are a critical element of the overall aquatic ecosystem in virtually all watersheds." *See* U.S. Army Corps of Engineers, Notice of Issuance of Nationwide Permits, 67 Fed. Reg. 2020, 2064 (Jan. 15, 2002). Similarly, EPA's National Wetlands Mitigation Action Plan provides that "[b]uffers enhance or provide a number of important aquatic resource functions including: sediment removal and erosion control, excess nutrient and metal removal, moderation of stormwater runoff, maintenance of habitat diversity, wildlife species distribution and diversity, and reduction of human impact." *See* http://www.mitigation actionplan.gov (last visited Jan. 7, 2008). And, in the proposed mitigation rule, both Agencies note the potential for upland buffers to provide compensatory mitigation. *See* 71 Fed. Reg. 15537 (March 28, 2006) (proposing 33 C.F.R. § 332.3(i)).

will be found. Despite the fact that the Guidance states that small washes are generally not jurisdictional, recent communications from the South Pacific Division suggest that field staff are ignoring the clear meaning and intent of the Guidance. In July 2007, field personnel wrote in a widely circulated email

> The Corps is still looking at every wash that even MIGHT have been jurisdictional before the Rapanos guidance. The only things that are clearly not jurisdictional are swales, erosional features, and manmade ditches constructed entirely in uplands which do not intersect, drain, or are not [sic] tributary to any water of the U.S. Since there is no definition of "small wash", we would like to look at everything and your proposed SN determination. So even really small washes . . . one foot wide which have an OHWM should be considered in your submittals. They will be determined to be jurisdictional or not on a case-by-case basis depending on whether they have a SN to a TNW.

See E-mail from Corps official to stakeholders (July 23, 2007, 3:48 p.m.) (attached hereto as **Exhibit 9**).

Once again, field staff appear either to be ignoring the Guidance because it is merely guidance (and not a binding rule) or because it fails to provide specific criteria to make such determinations. Regardless of the reasoning, the failure to understand that a "one foot wide" wash is not also a "small wash" and thus no longer jurisdictional in light of the Guidance reveals a real problem with how the Guidance is being interpreted and implemented in the field, but particularly as applied to ephemeral drainages.

We are also concerned the Guidance's new procedures may be causing significant delays and backlogs in permit decision-making and, in some cases, Corps districts may be improperly asserting jurisdiction over ephemeral drainages to avoid having to perform significant nexus evaluations. For example, we are aware of at least one large mining expansion project in the West where the time to obtain a JD for ephemeral drainages has been extended from an initial 90 days to over one year, due to the amount of data being required of the applicant and field staff. Requests by applicants for large projects are unfortunately being shuffled to the bottom of the stack to deal with smaller projects, because field staff are reportedly overwhelmed by the requirements imposed by the Guidance's new procedures. Similarly, we have learned some districts are using the mere presence of an ordinary high water mark to assert jurisdiction, without conducting significant nexus evaluations. This is not only contrary to the *Rapanos* decision, but is also at odds with the Guidance.

Therefore, the application of an overbroad concept of tributary "reach," combined with *ad hoc* and unpredictable application of the three-month seasonal flow requirement and improper use of an OHWM, results in a completely arbitrary approach to assessing jurisdiction for ephemeral drainages.

D. Ironically, The Guidance Results In More Jurisdiction Over Ditches, Not Less.

Unfortunately, the Guidance represents yet one more installation of the federal government's idiosyncratic handling of jurisdiction over ditches historically. This history is best characterized as fraught with inconsistencies and an ever increasing expansion of federal jurisdiction. The issue of ditches is critically important because ditches are pervasive and endemic to every type of landscape across the Nation and are relevant to the vast majority of construction activities. For example, the U.S. Department of Transportation regulations require that any federally funded primary road must be "designed . . . and maintained to have adequate drainage, cross drains, and ditch relief drains." 30 C.F.R. § 816.151(d)(1). Similar requirements are commonplace under state and local law. Thus, many roads have ditches on both sides and in the median strip as well. With more than 3.9 million miles of roads in this country, this adds up to a lot of ditches.[10] Further, millions of miles of ditches are encountered every day by the respective commenters, whether through the annual construction of 1.6 million homes,[11] the maintenance of a 300,000 mile network of gas pipelines (which grows

[10] U.S. Department of Transportation, Federal Highway Admin., Highway Statistics 2001 § V, Roadway Extent, Characteristics and Performance, Table HM-10, *available at* http://www.fhwa.dot.gov/ohim/hs01/hm10.htm (last visited Jan. 7, 2008).

[11] *See* http://www.nahb.org/news_details.aspx?newsID=4339 (last visited Jan. 5, 2008).

on average by about 2,000 miles each year),[12] construction and maintenance of critical transmission and distribution lines throughout the country, the construction and maintenance of irrigation ditches essential for agriculture, or the daily operations or routine expansion of over 14,000 mines located across the country.[13]

The question of whether the federal government has jurisdiction over ditches is profoundly important because the issue implicates "the significance of federalism in the whole structure of the Constitution." *See United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., joined by O'Connor, J., concurring). The federal government's insertion of itself into this realm is a serious encroachment on purely local matters and local decision-making authority in contravention of Congress's clear intent that local governments regulate local land use activities. *See SWANCC* at 174 ("regulation of land use [is] a function traditionally performed by local governments," *citing Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994)). As the Supreme Court concluded in *SWANCC*, "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement

[12] *See* national statistics at http://www.eia.doe.gov/emeu/cabs/Usa/NaturalGas.html (last visited Jan. 8, 2008).

[13] *See* http://www.nma.org/statistics/pub_fast_facts.asp (last visited Jan. 8, 2008).

of the States' traditional and primary power over land and water use." Similarly, Justice Scalia noted in *Rapanos*

> [t]he extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land -- an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board.

Id. at 2224.

Other troubling reports suggest that field staff are asserting jurisdiction over ditches where, prior to the Guidance, jurisdiction did not exist. The Guidance provides, in pertinent part, that "ditches (including roadside ditches) excavated wholly in and draining only uplands *and that do not carry a relatively permanent flow of water* are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters." Guidance at 11 (emphasis added). While, on one hand, the Guidance correctly clarifies that non-jurisdictional upland ditches are not jurisdictional, on the other hand, it extends the concept of "relatively permanent flows" – as defined in the Guidance (*e.g*., "typically three months") – to ditches, which can result in the jurisdiction of upland ditches that, prior to *Rapanos*, were not jurisdictional.

For example, the Corps recently evaluated a 500-acre development in coastal North Carolina prior to and after the *Rapanos* Guidance was issued. Pre-Guidance,

the Corps determined a number of the ditches on the project site were constructed entirely in uplands and therefore automatically deemed them non-jurisdictional. However, after the Guidance was issued, the Corps reassessed the ditches for an ordinary high water mark. In so doing, the district ultimately concluded that at least one of the ditches, excavated wholly in and draining only uplands, was a jurisdictional non-RPW based on the presence of an ordinary high water mark. In this case, the ditch was not even experiencing relatively permanent flow and no significant nexus analysis was performed; rather the JD was made solely on the presence of an ordinary high water mark – a method of analysis directly repudiated by Justice Kennedy. It is unseemly for the Corps to assert jurisdiction over an upland ditch in any case, and especially because it exhibits an ordinary high water mark or contains water for several months each year. All ditches regularly carry water – that is what ditches are designed and constructed to do. If the presence of water for three months is sufficient to make a ditch a water of the United States, there will be few ditches that are not jurisdictional. Certainly, upland drainage ditches are a far cry from the type of seasonal rivers, flowing 290 days a year, about which both Justices Scalia and Kennedy and the dissent in *Rapanos* spoke in the context of reasonably permanent waters.

Sadly, this illustration comports with the steady expansion of the federal government's jurisdiction over ditches over the past several decades. *See* Letter

from Waters Advocacy Coalition, to Rep. James Oberstar (Nov. 28, 2007) (discussing jurisdiction prior to SWANCC and Rapanos) (attached hereto as **Exhibit 10**). Beginning in the mid-1970s, the Corps' position was unequivocal: "[d]rainage and irrigation ditches have been excluded" from the definition of jurisdictional waters. *See* 40 Fed. Reg. 31,320-21 (July 25, 1975). This position was subsequently reinforced through the mid-1980s *via* various regulatory actions. *See* 42 Fed. Reg. 37,122, 37,144 (July 19, 1977) (". . . nontidal drainage and irrigation ditches that feed into navigable waters will not be considered 'waters of the United States'. . ."); 45 Fed. Reg. 62,732, 62,747 (Sept. 19, 1980) (". . . man-made, non-tidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States."); *see also* 48 Fed. Reg. 21,466, 21,474 (May 12, 1983). However, by the mid- to late-1980s, the Agencies began to equivocate in this position, asserting jurisdiction over ditches on a case-by-case basis, using ordinary high water mark and the "Migratory Bird Rule" tests. The inconsistency and confusion created by this *ad hoc* approach prompted the public to demand greater clarity and consistency in the manner in which jurisdictional determinations were to be made. Yet despite repeated promises by EPA and the Corps since 1990 to initiate a rulemaking to improve the clarity and predictability for jurisdictional determinations, no rulemaking has been forthcoming. And the jurisdictional creep over ditches continues.

E. The Term "Significant Nexus" Is Confusing And Not Adequately Defined.

Considerable confusion persists regarding what constitutes a "significant nexus," and the Guidance fails to provide sufficiently detailed criteria by which to identify and objectively measure the existence of such a connection. While we recognize the Agencies' concerns about being too specific or prescriptive in guidance, we believe that providing more specific criteria is essential in order to provide greater clarity on this issue. While we applaud Corps Headquarters' decision to post significant nexus determinations on its website,[14] much of the information being provided to the public is too conclusory, thus compounding the confusion regarding the type of data required and how such data are to be used.

1. The Agencies' Significant Nexus Documentation Is Too Conclusory And Not Helpful To The Public.

As a general observation, significant nexus memoranda posted on the Corps' website are too conclusory and lack sufficient detail regarding requisite, clarifying criteria.[15] For example, an August 29, 2007, JD memorandum (NWS-2007-435-CRS) reaches the conclusion that the non-RPW and wetlands at issue in that case have a significant nexus because they "impact the physical, chemical, and

[14] *See* http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/ cwa_guide.htm (last visited Jan. 8, 2008).

[15] It is somewhat ironic that the Agencies are insisting that the public provide significant amounts of data for the Corps to complete the JD forms, yet what the Agencies are posting to inform the public on their own decision-making process is so minimal.

biological integrity of downstream TNW." Further, this memorandum goes on to conclude broadly that the waters at issue provide detention and attenuation of runoff and floodwaters, convey and filter sediments and other pollutants from the surrounding area, provide a baseflow to the TNW during drier months, support the food chain of the TNW, and provide feeding, staging, and resting habitat for certain water birds. Completely absent is a discussion on the extent to which these functions exist, the degree to which they impact TNWs, and how these items bear on the "significant nexus" determination. We note that other JD memoranda also include similarly broad conclusory statements without a detailed discussion regarding the criteria that the Agencies used to reach a significant nexus determination. *See, e.g.,* U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, Memorandum to Assert Jurisdiction For NWS-2007-749-CRS (Oct. 2, 2007) (attached hereto as **Exhibit 11**). Just stating that certain waters provide these functions is not sufficient, because all waters provide these functions. More is needed than just "any connection" or, as here, any function. The Agencies must show the existence of a demonstrable, substantial impact to a TNW. With such limited information, the public is unable to understand the basis for the Agencies' decisions.

Further, each of these JD memoranda contain the following footnote: "The evidence included in this memorandum is a summary of the evidence considered

by the agencies in reaching this conclusion. Additional information regarding the determination is contained in the administrative record for this action." While we appreciate the Agencies' efforts to provide these summaries, it is imperative that the Agencies provide greater discussion regarding the underlying data and how such data is used to make significant nexus determinations. We believe such detail is essential to the Guidance to better inform the regulatory process. We also believe that providing more detailed information is consistent with Justice Kennedy's insistence on the presentation of robust data. *See Rapanos* at 2251. Thus, in those instances where an applicant has requested an approved JD and the Corps has published a "significant nexus" determination, the Corps needs to identify all of the relevant facts and explain how those facts lead to the determination of the existence or absence of a "significant nexus."

2. The Agencies' Significant Nexus Determination Based On The Potential For "Migratory Pollutants" To Reach TNWs Is Not Legally Defensible.

We note that one JD memorandum (SPL-261-FBV), dated December 6, 2007, involving an "unnamed first-order ephemeral tributary between one and three feet in width" located in Riverside County, California, contains a much more detailed account of the evidence and analysis underlying the Agencies' significant nexus determination. *See* U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, Memorandum to Assert Jurisdiction For SPL-2007-261-FBV

(Dec. 6, 2007) (attached hereto as **Exhibit 12**). We take issue with the supporting evidence used by the Agencies in reaching an affirmative significant nexus determination in this case. Specifically, the Agencies appear to have reached a significant nexus determination based on the possibility that the desert wash in question serves as a source of nonpoint source pollution to a TNW, apparently what the Agencies believe is the "significant nexus" link between the non-navigable was and the TNW. This "unnamed first-order ephemeral tributary" reportedly "flows for approximately 1,000 feet before it joins an unnamed second-order ephemeral tributary that flows two straight miles and three river miles" to the nearest TNW, Canyon Lake.[16] *Id*. at 1.

We do not believe that the potential for an ephemeral drainage to transport nonpoint source pollution to a TNW is an appropriate or legally defensible basis for concluding that a significant nexus exists, particularly since Congress made an express determination against the federal government regulating nonpoint source pollution under either Sections 402 or 404 of the CWA. Nonpoint source pollution is nothing more than runoff – *i.e.*, pollution that is picked up and transported by rainwater that flows across the ground. Because all rainwater flows downhill, it and any pollutants picked up along the way may ultimately reach a ditch, stream,

[16] The Agencies' conclusion that Canyon Lake is a TNW is highly questionable. *See* discussion *supra* in Section III.

and, in some cases, may eventually reach navigable waters. However, prior to reaching to reaching a TNW, runoff pools within ditches or gravel areas, evaporates, or percolates into the soils, thereby potentially never reaching a TNW. Therefore, it is simply too speculative to conclude that nonpoint source pollution from a particular location will reach a TNW, especially in this case where the ephemeral drainage is many miles removed from a TNW.

Unfortunately, under the Agencies' approach, any ditch or erosional feature (jurisdictional or not) that eventually leads to a TNW could potentially be found to convey nonpoint source pollution to a TNW, no matter how far removed from the TNW. To suggest that jurisdiction may exist merely because pollutants may pass through or be conveyed by an ephemeral drainage to TNWs is absurd and would seem to mark the beginning of a new federal test, the "migratory pollutant" rule. Such test would be akin to the "migratory bird" and "migratory molecule" rules, both of which have been resoundingly rejected by the Supreme Court in *SWANCC* and *Rapanos*.

As a policy matter, it is unnecessary to define ephemeral drainages as jurisdictional waters, because many such drainages in urban settings are part of a municipal separate storm sewer system ("MS4") and thus are already subject to

section 402 of the CWA.[17] An MS4 is a system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains). These systems are often owned and operated by States, local governments, and special governments, such as sewer districts, flood control districts, or drainage districts. As point sources, MS4s are already required to reduce the discharge of pollutants in storm water. Therefore, because States and local governments are already charged with reducing pollution from urban runoff, there is no reason why ephemeral drainages such as these should be deemed jurisdictional waters. And, in fact, the ephemeral drainage in this particular case is part of the Riverside County MS4 program, and the County is taking measures to reduce nonpoint source pollution.[18]

Nothing in the *Rapanos* decision supports a significant nexus finding based on the potential for an ephemeral channel to *convey* pollutants to a TNW. At most, these channels would constitute a "point source"[19] discharge under the CWA.

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[17] According to U.S. EPA, approximately 70% of the Nation's population lives within an urbanized area subject to EPA's MS4 regulations. *See* EPA Fact Sheet Regarding Storm Water Phase II Final Rule, Urbanized Areas available at http://cfpub.epa.gov/npdes/stormwater/smms4.cfm (last visited Jan. 9, 2008).

[18] *See* Storm Water Clean Water Protection Program, Riverside County Drain Area Management Plan, April 2007, available at www.waterboards.ca.gov/santaana/rcpermit/Riv_ROWD%20Appendix%20B%20DAMP%20April%202007.pdf (last visited Jan. 12, 2008).

[19] A point source is defined in pertinent part as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel,

Importantly, Justice Kennedy, in discussing the potential ecological functions of wetlands (not tributaries or washes) as a significant nexus to TNWs, talked about the possible importance of wetlands serving to "filter and purify" polluted water and "slow the flow of surface runoff" prior to reaching adjacent water bodies. *Rapanos* at 2245. Justice Kennedy stated

> [w]here wetlands perform these filtering and runoff-control functions, filling them may increase downstream pollution, much as a discharge of toxic pollutants would. Not only will dirty water no longer be stored and filtered but also the act of filling and draining itself may cause the release of nutrients, toxins, and pathogens that were trapped, neutralized, and perhaps amenable to filtering or detoxification in the wetlands.

Id. Kennedy went on to state,

> wetlands can perform critical functions related to the integrity of other waters-functions such as pollutant trapping, flood control, and runoff storage . . . Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," 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." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term " navigable waters."

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tunnel, conduit, well, discrete fissure . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Id. at 2248. It is abundantly clear, when reading Kennedy's discussion regarding ecological functions and significant nexus, that discussion is in the context of wetlands. He certainly was not talking about ephemeral drainages.

The JD memorandum also presents a speculative basis for drawing a speculative conclusion that "the movement of pollutants to the TNW is highly possible." Exhibit 12 at 5. For example, in discussing the possible sources of nonpoint source pollution impacting the nearest purported TNW, Canyon Lake, the memorandum states,

> [i]n addition to potential runoff of surfacing septage, other land uses . . . have the potential to create nonpoint source runoff of pollutants. For example, nutrient, pathogen, and sediment runoff from impervious surfaces, areas that house livestock and pets, and graded areas is [sic] likely in the area due to existing land uses.

Exhibit 12 at 2. Such speculative and insubstantial evidence is exactly the type of evidence Justice Kennedy rejected in *Rapanos*. *Id*. at 2251. ("The conditional language in these assessments – "potential ability," "possible flooding" – could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence . . .").

Because the small wash is not a wetland and therefore does not provide any of the filtering or purifying functions as contemplated by Kennedy, nor is there substantial, non-speculative evidence of a significant nexus with traditional

navigable waters, the Agencies' approach in this specific JD is misguided and inconsistent with *Rapanos*.

F. The Guidance Establishes Several New, Lengthy, Complicated, And Unnecessary Procedures That Will Result In Significant Costs And Delays For All Applicants, But, In Particular, Proponents For Linear Infrastructure Projects.

The Guidance establishes new procedures that all applicants must follow. The commenters have numerous concerns with these new procedures and how they will impact the timelines for obtaining both individual and nationwide permits.

1. The "Tributary Reach Analysis" Is Overbroad And Will Be Difficult to Implement, As Most Applicants Do Not Have Access to Off-Site Project Lands.

The Guidance requires all applicants to identify and document whether the waters impacted by a proposed project are subject to the Agencies' CWA jurisdiction. *See* Guidebook at 47. The Guidance states that jurisdiction will be asserted over RPWs, wetlands directly abutting RPWs, and all other non-RPW tributaries, including adjacent wetlands, that have a significant nexus to traditional navigable waters.[20] *See* Guidance at 1. Thus, not all "tributaries" are jurisdictional. Rather, only those that are RPWs or have a significant nexus with TNWs are waters of the United States. In order to determine whether a given

[20] The Guidance states that the "reach analysis" applies to all non-navigable tributaries, but the Agencies have stated informally that the same analysis will likely apply for TNWs as well. *See* Atlanta *Rapanos* Workshop Transcript, Exhibit 8 at 23, 26-27.

tributary meets the criteria to be an RPW or has a significant nexus, the Guidance requires a "tributary reach" analysis.

The tributary reach analysis is not discussed in, or suggested by, any part of the *Rapanos* decision, nor does it exist in the CWA, regulation, or policy. Indeed, as explained in Section III, it is inconsistent with the plurality opinion and Justice Kennedy. Instead, the Guidance introduces this new concept for the first time. The Guidance sets forth for purposes of the Guidance that a tributary is "the entire reach of the stream that is of the same order (*i.e.*, from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream.)" *See* Guidance at 5, n.21, and 9. The Guidance further states that the flow characteristics of a tributary are to be evaluated at the farthest downstream limit of the reach where the tributary enters a higher order stream. *Id*. According to the Guidance, if the downstream limit of the reach is determined to be an RPW, the entire stream reach (or stream order) will be deemed an RPW. If the reach does not qualify as an RPW, a significant nexus analysis is required to assess the connection with TNWs.

The reach analysis is to be applied to all tributaries regardless of whether they have any wetlands. For a reach that has wetlands associated with it, the Guidance states that the Agencies will consider the flow and functions of the tributary, together with the functions performed by all wetlands adjacent to the

entire reach of the tributary, in evaluating whether a significant nexus to TNWs exists. Guidance at 9. Where the reach and its adjacent wetlands collectively have a significant nexus, the entire stream reach and all adjacent wetlands will be deemed as jurisdictional. When the tributary has no adjacent wetlands, it would still be assessed reach-by-reach, with the downstream flow conditions dictating the jurisdictional outcome (*e.g.*, RPW and significant nexus) for the entire reach, regardless of how long the reach is or how far downstream the confluence point is from the project site.

A diagram used in a recent presentation by the Wilmington District Corps of Engineers illustrates the breadth of the reach analysis. *See* Corps Presentation On Rapanos Guidance at CLE International Carolinas Wetlands Conference (Jan. 10, 2008) (power point presentation attached hereto as **Exhibit 13**). It is clear from this diagram and the Guidance that the reach analysis encompasses a broad swath of lands and waters and will in many circumstances extend well beyond the limits of the project area. The Guidance's new reach analysis raises several concerns.

a. Most Applicants Lack Access To The Tributary Analysis "Review Area."

Identifying and documenting the relevant reach of a tributary will be problematic for almost all applicants, as very few have access to the entire tributary reach and all adjacent wetlands along that reach. Instead, as the Wilmington District diagram illustrates, the relevant reach concept makes no

distinction between lands that the applicant owns or has access to (project lands) and lands to which the applicant does not. It is clear from the Guidance that conducting a reach analysis will, in many circumstances, require obtaining and documenting detailed information about the entire stream reach (downstream and upstream from the project and all adjacent wetlands), not just the part of the reach that intersects the project in question. Depending upon geography, a stream reach may stretch for miles and cross lands owned by hundreds of landowners. It is simply too burdensome to require all applicants to obtain information about water and lands that lie far beyond the project location.

The scope of the reach analysis is particularly problematic for linear infrastructure projects such as electric utilities, roads, and pipelines. Generally, these projects involve non-landowner applicants, who may not have access even to lands within the project footprint, let alone beyond, at the time when a delineation is performed. Compounding this problem is the fact that many linear projects will often involve hundreds of waters and wetlands. For example, depending upon geography, a several-hundred-mile pipeline project might involve as many as 1,000 water body crossings and thousands of land owners. Under the Guidance's reach analysis, the non-landowner applicant would be required to obtain access from each of the landowners whose property is impacted, as well as the numerous other landowners along or near the reach, to be able to document and support its

reach analysis. Obviously, conducting this analysis in such circumstances places enormous costs and unnecessary burdens on linear project applicants.

b. Assessing Characteristics Of The Downstream Reach Tells The Agencies Nothing About Characteristics Of The Actual Project Site And Raises Concerns About Mitigation Requirements Authorized For Project Impacts.

The burden placed on the project applicant by the relevant reach analysis is further unwarranted since the analysis may provide evidence of hydrological, chemical or biological conditions that are unrelated to the portion of the tributary impacted by the project. A project may be located on a tributary miles from the lowest end of the reach, and the flow characteristics of the tributary at the project site may be completely different from those in the lower end of the reach. Therefore, the Corps' broadly stated reach analysis creates the very real possibility that the nature of the water body at the lowest portion of the reach does not reflect the nature of the water body where the crossing or other impact is occurring.

For example, the flow characteristics of a tributary, including the duration, frequency, and volume of flow, are a critical part of the significant nexus determination.[21] Hence, flow characteristics at the lowest end of a reach may support a finding that the entire reach and wetlands are jurisdictional, when the

[21] *See, e.g.* Guidance at 9 (volume, duration and frequency of flow are "principal considerations"); *see also* Guidebook, App. B at 6 (Approved JD Form) ("Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW . . . .").

project is impacting a portion with totally different, and potentially insignificant, hydrologic and ecological, characteristics far from the reach's end.

In this regard, the Guidance suggests that if the confluence point has flow characteristics of a relatively permanent water, the entire reach may be considered relatively permanent and automatically jurisdictional even though the upstream section of the stream which is being crossed or otherwise impacted has flow characteristics of a non-relatively permanent water. *See* Guidebook at 42-44, Illustrations 3-5. In such a situation, the Guidance may lead to an inaccurate determination about the jurisdictional status of the crossing based on downstream flow characteristics which are not representative of site conditions at the crossing.

Finally, focusing on the end point of the reach, rather than the location of the actual crossing, may have implications for mitigation. Existing Corps policy and the proposed EPA/Corps mitigation rule both establish a policy of achieving full functional replacement of the impacted aquatic resource "at the project site."[22] The reach analysis, on the other hand, determines flow characteristics and potentially other measures of stream function at the confluence point of the reach with the next order stream, rather than at the location for a given project. Thus, by

[22] *See* U.S. Army Corps of Engineers, Regulatory Guidance Letter 02-2 at 3 (explaining functional replacement and defining "debit") (attached hereto at **Exhibit 14**); *see also* U.S. Army Corps of Engineers, Compensatory Mitigation for Loss of Aquatic Resources, Proposed Rule, 71 Fed. Reg. 15520, 15535, 15539 (March 28, 2006) (proposing 33 C.F.R. §§ 332.2, 332.3(f)).

obtaining data on the confluence point and directing attention away from the project site, the reach analysis has the serious potential for assessing stream function at an inappropriate point for mitigation, which, at a minimum, will confuse the mitigation analysis and may, in all likelihood, lead to unwarranted mitigation requirements.

2. Requiring An Approved Jurisdictional Determination Form For Each Water Impacted By A Project Is A Significant Change In The Corps' Permitting Process, Is Unnecessary Except For Administrative Appeal Cases, And Results In Enormous And Unnecessary Costs And Delays.

The Guidance requires all applicants for all projects to prepare a separate approved JD form for each water body impacted by a project, including the entire tributary reach, and, if the reach has wetlands, all adjacent wetlands. *See* Guidebook, Appendix B. This procedural change represents a major departure from the Corps' past practice in which the jurisdictional inquiry focused on the project site and was documented through a wetlands delineation or other informal method such as preliminary JDs. The applicant's acceptance of the permit constituted acquiescence to the Corps' jurisdiction. Approved JDs were usually only prepared at the request of the applicant, for example, where the applicant needed a binding determination to sell or mortgage the property or to pursue an administrative appeal. *See* 33 C.F.R. § 331 (Corps' administrative appeal process). This new requirement, which is not required by the *Rapanos* decision, will

necessitate enormous amounts of paperwork, result in increased costs and delays in Corps permitting, and ultimately is unnecessary.

a. The Guidance Unnecessarily Changes The Existing Regulatory Process By Requiring All Applicants To Obtain Approved Jurisdictional Determinations.

Prior to the *Rapanos* Guidance, under the nationwide permit ("NWP"), regional general permit, or individual permit ("IP") process, an applicant would submit a delineation to the Corps for all waters and wetlands on the project site.[23] The Corps would then process the NWP or IP based on the delineation or, at most, a preliminary JD. Under the Corps' regulations, a *delineation* and *preliminary JD* are different from an *approved JD*. The latter is considered an appealable action; the former are not.

In this regard, the Corps' administrative appeals regulations define a jurisdictional *determination* as "a written Corps determination that a wetland and/or water body is subject to regulatory jurisdiction under Section 404 of the Clean Water Act . . . All JDs will be in writing and will be identified *as either preliminary or approved*." 33 C.F.R. § 331.2. Preliminary JDs 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. Preliminary JDs are advisory in nature and *may not be appealed*." *Id*. (emphasis

[23] Although these comments will frequently refer to NWPs, they apply with the same validity to the equally prevalent regional general permits.

added).[24] In contrast, approved JDs are "a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States." *Id*. The Corps states that "approved JDs are clearly designated appealable actions and will include a basis of JD with the document." *Id*.

It is important to note that securing an approved JD is *not* a condition precedent to a permit. A district engineer ("DE") has discretion under the existing administrative appeals regulations to allow the use of *either* preliminary or approved JDs. The sole reason for requiring an approved JD under the regulations is to create the administrative record where an applicant wishes to appeal a jurisdictional determination.[25] Indeed, Regulatory Guidance Letter ("RGL") 07-01 acknowledges that a DE has full discretion to use preliminary or approved JDs. *See* Guidebook, Appendix E, RGL 07-01, at 5 ("In accordance with the regulation

[24] Another form of informal and non-appealable determination is an applicant-prepared delineation, which must be prepared for certain NWPs under the regulations and which are commonly performed for IPs, followed by a Corps letter accepting or modifying the boundaries of the delineation.

[25] Under pre-Guidance practice, the Corps issued a "Notification of Administrative Appeal Options and Process and Request for Appeal" form with its permit decisions and approved and preliminary JDs. The form gave recipients of approved JDs 60 days to notify the Corps of an appeal, or otherwise the recipient waived appeal rights and was bound by the determination. On the other hand, a recipient of a preliminary JD was not required to respond to the Corps since the determination was not appealable. A recipient could, however, request an approved JD thereafter for purposes of appeal or if new information were available.

at 33 C.F.R. Part 331, the district currently has flexibility to determine when a 'preliminary' or an 'approved' JD shall be used to document jurisdiction.").

Despite this acknowledgment, however, the Guidance significantly limits that discretion, establishing only three limited circumstances under which a preliminary JD can be used: (1) when a JD is made by another agency for state programmatic general permits and/or regional general permits; (2) when the district has requested and received a Headquarters categorical waiver of a general permit class; and (3) when the JD is made to address alleged violations and/or enforcement action. *See* RGL 07-01 at 5-6. In practice, these circumstances are even further limited, as we understand the Corps Headquarters has not been approving waiver requests and the applicability of the new process to state programmatic general permits and regional general permits is unclear.

Hence, the Corps, through the issuance of RGL 07-01 and its curtailment of the use of preliminary JDs except in limited circumstances, has converted an approved JD – a discretionary tool needed only for those applicants seeking to appeal jurisdiction – into a new mandatory requirement that must be prepared by all applicants for every water body to be impacted. Nothing in *Rapanos* dictates that all applicants prepare approved JDs. Indeed, *Rapanos* does not even use the term "jurisdictional determination." Rather, like the reach analysis, the Corps has developed this new requirement purportedly to improve consistency and better

documentation across districts.[26] Yet, there are numerous circumstances where an approved JD is neither requested, necessary, nor appropriate.

b. Requiring Approved Jurisdictional Determinations Is Unnecessary Unless The Applicant Requests One Or Wants To Pursue An Administrative Appeal.

Only certain applicants want to appeal jurisdictional determinations and this will depend on the nature of the project and issues involved.[27] Indeed, many applicants are willing to proceed through the permit process without a formal approved JD, with the understanding that, in so doing, they cannot pursue an administrative appeal. RGL 07-01 seems to acknowledge that approved JDs should only be prepared where "requested" by an applicant, but then at the same time dictates that all projects must have approved JDs. This internal inconsistency must be clarified.

The applicability section of RGL 07-01 states that it applies "to all JD *requests* received by a district for waters including wetlands" subject to Corps

[26] RGL 07-01 at 1-2. Ironically, however, by dictating that all projects must prepare approved JDs, the Corps may ultimately undermine its own goal of national consistency. It is likely that districts facing significant backlogs, new demands and no new resources may choose to ignore the process and use their own variations or otherwise search for ways to circumvent the delays and unnecessary formalities.

[27] Indeed, the number of applicants wishing to appeal jurisdiction appears quite low. Recent Corps statistics indicate that in 2007, there were only 60 administrative appeals of Corps jurisdiction for all determinations. *See* Corps Presentation, Exhibit 2.

jurisdiction. RGL 07-01 at 1. The RGL distinguishes between requests for preliminary JDs and request for approved JDs. *Id.* at 6 (The RGL concludes that "[a]s a general rule, a preliminary JD should not be used to respond to a request for an approved JD."). Similarly, section C of the RGL is entitled "JD *Requests*" and sets forth that "when a landowner or other 'affected party' (in the sense the term is used in 33 C.F.R. 331.2) *requests* that the Corps provide a JD" then the Corps must provide one. *Id.* at 4. Moreover, the RGL goes on to explain that as a "general rule, a preliminary JD should not be used to respond to a *request* for an approved JD." *Id.* at 6; *see also* Guidebook at 47, n. 4 ("An Approved JD shall be completed when requested by an affected party.").

Although the RGL does not define the term "request," the common sense reading of this provision is that the Corps will provide the JD that the requestor seeks. If a permit applicant or holder of an interest in land does not request an approved JD, the Corps will not require one. Conversely, if the applicant or holder in interest requests an approved JD, the Corps will provide one.

The Corps, however, appears to be taking a different approach. Instead of limiting the use of an approved JD to applicants who specifically request one, as outlined above, the Corps is requiring all applicants or holders in interest to prepare approved JDs for all impacted waters including the entire tributary reach and adjacent wetlands. The Corps appears to be taking the view that a request for

an NWP authorization or application for an IP is tantamount to a request for an approved JD. This is simply false and contrary to the express desires of many applicants. As explained, many project proponents are willing to proceed through the permit process without receiving a formal JD with the full understanding that doing so means they cannot appeal any Corps determination of jurisdiction. Accordingly, in many circumstances, applicants are specifically not requesting approved JDs, and therefore, under the terms of RGL 07-01, should not be required to obtain one.

c. Requiring Approved Jurisdictional Determinations That Cover Land Not Owned By The Applicant Risks Unintended Consequences For Underlying Landowners.

Requiring approved JDs for all resource impacts related to a project, regardless of whether an applicant requests one, is a significant substantive change in the Corps' process. The Agencies have not fully evaluated the consequences of such a change either for the owner of the project site or the non-applicant landowner whose property is located within a tributary reach or its adjacent wetlands.

Linear project proponents, for example, often do not own the lands on which the project will be constructed. Instead, linear projects usually acquire easement interests on those lands within a limited project area. An approved JD on the entire tributary reach will therefore include lands owned by third parties.

Requiring non-landowner applicants to obtain an approved JD for a tributary stream reach may result in determinations that are binding, appealable JDs for all landowners on a reach. This is because the appeals regulations give affected parties the ability to appeal all approved JDs. The appeals regulations define the term "affected party" to mean "a permit applicant, landowner, a lease, easement or option holder . . .who has received an approved JD, permit denial, or has declined a proffered individual permit," and require an "affected party" to appeal an approved JD within 60 days. 33 C.F.R. § 331.2. If the affected party does not appeal within the 60-day period, the JD becomes binding. It is not clear from this definition, nor from the Guidance, whether a landowner that has not received nor requested an approved JD can appeal that determination or whether a non-landowner's approved JD would apply to the underlying landowner or the landowners along the reach who did not request or receive the determination.

When an easement holder or other project proponent requests and receives an approved JD that involves the reach it will be impacting, the Agencies should clarify that the easement holder or other project proponent, and not the owner of the impacted property or the non-applicant owners along the reach, will be bound by the approved JD. However, because the Guidance takes the position that "the Corps district is not obliged to inform property owners, other than the permit applicant, that jurisdictional features may be present on their property," *see*

Guidebook at 75 (Q/A 29), the Guidance sets up the very strong likelihood that landowners along the entire stream will be prejudiced by the Corps' approved JD, perhaps even bound by it.

Without adequate notice and an opportunity to challenge such a determination, this presents serious due process concerns to these landowners. In such a situation, the Corps may be making jurisdictional determinations about wetlands and water bodies on a property of an underlying owner which may have real legal effects on that owner if it later seeks to develop or sell its property. Once the Corps finds the property to be within its jurisdiction for one permit, it may unlikely find to the contrary in a later determination concerning the same property, absent a material change in the physical conditions of the property. The impact on a party's legal rights without adequate notice or participation raises concerns similar to those parties whose rights may be impacted by adjudications in which they are neither noticed nor involved. Courts have long held that a judgment, decree or settlement among parties to a lawsuit "resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989); *see also Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the

pendency of the action and afford them an opportunity to present their objections."); *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940) ("It is a fundamental principle of general application in Anglo-American jurisprudence that one is not bound by a judgment...in a litigation in which he is not designated as a party...and judicial action...against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require."). These significant concerns argue against requiring approved JDs on the property of non-applicant owners, rather than requiring their notice and intervention in a determination, which would substantially delay and complicate the permit process. In order to avoid these due process concerns entirely, the Corps should, therefore, freely allow an applicant to proceed with a preliminary JD or other informal determinations that will not prejudice the rights of third parties.

d. Requiring Applicants To Fill Out Hundreds Of Forms Increases Cost And Delay In Corps Permitting, Especially For Linear Infrastructure Projects, With No Benefit To The Environment.

The sheer cost, burden, and time of preparing and reviewing approved JD forms for all projects is staggering, unnecessary, and will most certainly lead (and has led) to delays in Corps permitting decisions.

In this regard, the JD forms require copious amounts of information for the Corps to make a legal determination regarding the jurisdictional nature of non-navigable tributaries and any adjacent wetlands impacted by a project. The form

requires detailed data on the size of the watershed and drainage areas, the physical characteristics of the tributary and its relationship to a TNW, and the tributary's flow and chemical and biological characteristics. The form also requires a "significant nexus" analysis between a water body or wetland and the TNW, including supporting documentation. Accordingly, completing the approved JD form is much more than a ministerial task and imposes a substantial burden on both the Corps and the applicant.

Moreover, as previously explained, obtaining the information necessary to complete a JD form and accompanying reach analysis will be extremely difficult for applicants with limited or no access to property they do not own, whether within or outside the project footprint. Nevertheless, the Guidance requires applicants to develop detailed and comprehensive hydrological, chemical, and biological data on the full length of a tributary and any associated wetlands, even if the proposed project would impact only a small crossing of the tributary. Because much of the data may require sampling and field observations, desktop JDs will be difficult at best. It is difficult to fathom how an applicant will gather such information without access to the full reach of the tributary, access neither it nor the Corps will have.

Ultimately, this new process will also impose a substantial financial burden on the applicant and increase the workload of Corps, thus resulting in significant

delays in project permitting and misallocation of the Corps' strained resources. Indeed, the Guidance itself even acknowledges the likelihood of delays. *See* Guidebook at 78 (Q&A 39-41). And, as predicted, delays are in fact occurring. We are aware of numerous projects where JD reviews that historically took only several months to complete will exceed one year, and possibly longer. In each case, the applicants are being told that the delays are due to the need to comply with the Guidance's requirements. We are also aware that JD requests for some larger mining and construction projects are being unfairly shuffled to the bottom of the review pile to make way for smaller projects.

Despite creating this lengthy and complicated process, and the additional cost and time it will require the applicant to gather and submit the data, the Corps quite candidly admits that it may not have the resources to handle the volume of approved JDs the Guidance will generate, let alone to protect the Nation's waters. The Guidance expressly states that the new process will "increase the workload for [Corps] field staff as they document and make significance [sic] nexus determinations" and that the Corps probably does not have enough staff to document jurisdictional determinations in a timely manner. *See* Guidebook at 78 (Q&A 39). It notes that further "funding for resources may be requested to mitigate the impact of the regulatory program, and to maintain the current level of protection over the Nation's aquatic resources." *Id.* (Q&A 40). The Corps also

recognizes the burdens placed on EPA regional offices in reviewing significant nexus determinations. *Id*. (Q&A 41).

Although we appreciate the Corps' acknowledgement regarding the resource constraints imposed by its own paperwork demands, the Corps' conclusion that the Nation's waters will not be protected without this paperwork is demonstrably false. The Corps provides no evidence that the pre-*Rapanos* Guidance methodology (a delineation, or at most a preliminary JD) was not protective of the Nation's aquatic resources. Nor is there any evidence that protection will be improved if all applicants prepare separate approved JDs for each water body to be impacted.

Many linear projects are critical to the Nation's energy infrastructure and need regulatory programs that incorporate procedures that facilitate, not delay, their construction. Accordingly, linear projects should be allowed to continue to the past practice of providing delineations on the project site with no requirement for a reach analysis or completion of an extensive JD form. The applicant should be able to delineate the affected waters and wetlands onsite and optionally accept federal jurisdiction without a formal JD process. This will minimize staff resources (agency and applicant) and delays in processing linear project permits, recognizing that many linear projects have very small impacts.

G. The New Jurisdictional Determination Procedures Undermine The Nationwide Permit Program.

For over 30 years, the Corps' NWP program has provided a critical regulatory safety valve to ensure that the section 404 permitting program operates efficiently and that the Corps focuses its resources on those activities having the greatest potential impact on the environment – as Congress intended when it authorized the NWP program.[28] The Corps' records show that 88 percent of all permit decisions made in FY 2003 were *via* general permit, of which nearly half were NWPs. In fact, approximately 35,000 projects each year are authorized through NWPs.[29]

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[28] NWPs date back to 1975, when the Corps adopted the first NWP and established a procedure for adopting additional general permits through regulations, which, "once issued would preclude the need for any further permit." 40 Fed. Reg. 31, 320, 31,322 (July 25, 1975). At that time, the Corps expressed the view that authorizing permits "through regulation is essential in order to make this program manageable from a manpower and resources point of view, and still protect the aquatic environment." The Corps explained that "[i]f certain conditions are met, a person would not have to go through any of the paperwork or delay required for a regular permit from the Corps of Engineers." 42 Fed. Reg. 24,756, 24,757 (May 16, 1977). Shortly thereafter, the Senate began consideration of a bill to amend the CWA. A key issue was the Corps' workload and the burdens the permitting program imposed on the general public. Congress was aware of the Corps' general permitting initiatives and enacted Section 404(e) (33 U.S.C. § 1344(e)(2)) to "grant authority for nationwide permits…." to be issued for five-year terms. 123 Cong. Rec. 26,771 (Aug. 4, 1977) (Sen. Muskie), *reprinted in* 4 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 at 1054 (1978).

[29] In FY 2003, the Corps authorized 35,317 projects with NWPs and 43,486 with regional general permits. *See* U.S. Army Corps of Engineers, "All Permit Decisions FY 2003" *available at* http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2003webcharts.pdf (last visited Sep. 27, 2007). The Corps has

Unfortunately, the Guidance runs contrary to the streamlining purposes underlying the NWPs and adds burdensome red tape without any significant environmental benefit. The Guidance also attempts to modify a rule through guidance in contravention to the Administrative Procedure Act ("APA"). 5 U.S.C. § 551 *et seq*. Specifically, requiring an applicant for an NWP authorization to obtain an approved JD, in addition to providing a delineation as required by the NWP Rule, creates an additional burdensome requirement not imposed by the NWP Rule and will transform the NWP program from one intended to be streamlined to one that differs little in procedure, timing or substance from the more cumbersome IP program. Therefore, the Guidance's requirements that an NWP applicant obtain an approved JD and that it be coordinated with EPA should be eliminated.

1. Nationwide Permits Are Rules As Defined By The Administrative Procedure Act.

The NWPs are rules and, therefore, any changes the Guidance seeks to make to them must be accomplished through the proper administrative process. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1284 (D.C. Cir. 2005) (each NWP is "[a]n 'agency statement of general or particular

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recognized that administering such a wide-reaching program has been a massive undertaking that could not have been maintained without an effective general permit program. *See, e.g.,* 64 Fed. Reg. 39,252, 39,268 (July 21, 1999) (the Corps "does not have the resources to review each activity that requires a Section 404 … permit through the individual permit process….").

applicability and future effect designed to implement, interpret, or prescribe law or policy.'") (quoting 5 U.S.C. § 551(4)). Any changes to NWPs must follow the rulemaking procedures set forth in the APA. 5 U.S.C. § 551 *et seq.* An underlying purpose of the APA is to ensure that the public is given adequate notice of proposed rules and a meaningful opportunity to participate through the submission of written data, views, or arguments. An interpretation of a legislative rule "cannot be modified without the notice and comment procedure that would be required to change the underlying regulation – otherwise, an agency could easily evade notice and comment requirements by amending the rule under the guise of reinterpreting it." *Molycorp, Inc. v. EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999).

The courts, Congress, and other authorities have emphasized that rules which do not merely interpret existing law or propose policies, but which establish new policies that an agency treats as binding, must comply with the APA, regardless of how they are labeled. *See, e.g., Appalachian Power Co v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (striking down emissions monitoring guidance as legislative rule); *see also* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L. J. 1311 (1992). Hence, the Corps can

neither modify the NWPs nor change its interpretation of the permits through Guidance, without undergoing formal notice and comment rulemaking.[30]

2. The Guidance Makes Certain Fundamental Changes That Violate The Administrative Procedure Act And Are Inconsistent With The Nationwide Permit Rule.

The NWPs are designed to provide administrative efficiency for activities that result in minimal effects to aquatic resources. However, as discussed below, the Guidance changes the NWP Rule significantly in violation of the APA.

a. An Approved Jurisdictional Determination Is Not Required By The Nationwide Permit Rule.

Prior to the Guidance, an applicant seeking coverage under an NWP need submit as part of its pre-construction notification ("PCN") only a delineation of wetlands and other waters on the project site. However, the Guidance transforms this PCN requirement for a delineation into one for an approved JD. Also, in contrast to approved JDs, delineations do not create appealable rights and do not involve a written Corps determination. Instead, a delineation is generally

[30] Moreover, the Corps must ensure that its Guidance complies with Executive Order No. 12866, titled "Regulatory Planning and Review" ("E.O. 12866"). Pursuant to E.O. 12866, each agency "shall avoid regulations or guidance documents that are inconsistent, incompatible, or duplicative with its other regulations or guidance documents or those of other Federal agencies." Section 1(b)(10). An agency also has the duty to tailor its regulations and guidance documents to impose the least burden on society, including individuals, businesses of differing sizes, and other entities consistent with obtaining regulatory objectives, taking into account, among other things, the cost of cumulative regulations. Section 1(b)(11). For the reasons explained in these comments, the Guidance runs afoul of E.O. 12866.

submitted by an applicant or consultant, indicating the extent and location of jurisdictional waters, including wetlands, on the subject property. *See* Guidebook at 68 (Q&A 7). A delineation merely identifies the boundaries separating the jurisdictional waters from non-jurisdictional upland areas and does not, standing alone, establish binding legal jurisdiction over the identified waters.

Although the Corps clearly understands and appreciates the distinction between a delineation and an approved JD, the Guidance treats the submission of a PCN as a "request" by the applicant for an approved JD[31] and, thereby, transforms the PCN requirement for a wetlands delineation into one for an approved JD.[32] This change to the PCN has serious implications for applicants seeking

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[31] This, of course, is a fiction. In the case of most PCNs, the applicant is simply seeking the DE's concurrence that the applicant qualifies under the terms of a particular NWP (General Condition 27(e)) or the elapsing of 45 days, not the time-consuming process of obtaining an approved JD. Most applicants pursuant to an NWP authorization are seeking speed and certainty, not the testing of their legal rights through a time-consuming approved JD and appeals process.

[32] In RGL 07-01, the Corps acknowledges that "[a] complete PCN includes a delineation of waters of the U.S., including wetlands, for the project site." *Id*. at 8. Notwithstanding the completeness of a PCN without an approved JD, on the next page of the RGL, the Corps states that a draft JD is required and must go through the process to become an approved JD. *See id.* at 9 ("Based on the information the prospective permittee provides to a district, that district will provide the appropriate EPA Regional Office with *any draft JD* requiring a significant nexus determination, in accordance with the procedures in the 'EPA/Corps Memo' and as outlined below. Furthermore, districts also will provide Corps HQ with records for *every draft JD* involving non-navigable, isolated waters, and the records will be reviewed at the HQ level by EPA and the Corps pursuant to the procedures in the 'EPA/Corps Memo'….") (emphasis added).

authorization under an NWP, because most applicants neither need nor desire an approved JD. By requiring applicants to comply with this new requirement, or face the deferral or denial of an authorization under the NWP, the Guidance appears to be contravening the fundamental principles underlying the NWP Rule in violation of federal law.

b. The Guidance Specifically Overrides The Important Regulatory Time Frames Set Forth In The Nationwide Permit Rule.

The Guidance also contravenes the explicit timeframes set forth in the NWP Rule. For NWPs that require a PCN, the decision whether the project may be authorized by a particular NWP must be made within 45 days of the Corps' receipt of the complete PCN. *See* 72 Fed. Reg. at 11,194-96 (General Condition 27).

The Guidance seems to suggest that Agencies can "override" the 45-day PCN clock in the NWPs. *See* Guidebook, App. C, Figure 2a ("45-day clock stops until adequate information is received. District immediately forwards information to HQ once determined adequate and district restarts PCN processing clock."). The Corps claims, "[w]here a jurisdictional determination is associated with potential authorization of a project under a Nationwide Permit …, it may be necessary for the Corps and EPA to establish an alternative consultation schedule *to accommodate NWP timeframes* potentially associated with the particular project." *Id*. at 2 n.2 (emphasis added). In RGL 07-01, however, the Corps notes

that if it "cannot complete its review of the PCN and the proposed project within the 45-day time period specified in the NWPs, then *the Corps should suspend or revoke the NWP authorization* … to ensure that the proposed activity will not be authorized to proceed by the expiration of the 45-day period." *See* Guidebook, RGL 07-01 at 9 (emphasis added).

Unfortunately, the Guidance is already causing substantial delays in permitting and regulatory decisions. The Chicago District, for example, issued a regulatory bulletin, dated June 15, 2007 and updated October 1, 2007 (hereinafter referenced as "Chicago Bulletin"), stating that it must utilize the "new mandatory JD form" available on the Corps' website, which "is a significant change from the one used the last few years."[33] In addition, the Chicago District has suspended the 45-day written response time contained in its regional permit program to enable the district to identify whether a proposed activity qualifies for a regional general permit authorization. *Id*. ("In light of the need to complete an approved JD prior to making a [general permit] call, we are suspending the 45 day requirement until March 9, 2008.").[34] The fact that the district cannot comply with its own 45-day

[33] *See* Chicago Bulletin, available at http://www.lrc.usace.army.mil/co-r/rapanosinfopn.htm (last visited Jan. 7, 2008).

[34] The suspension covers all projects submitted for consideration under the Regional Permit Program, including but not limited to: "projects that have received a jurisdictional determination previous to application submittal, as well as those needing to complete a jurisdictional call prior to regional permit review." *Id.*

response period due to the approved JD requirement strongly suggests that the Guidance contravenes the purpose of the general permit authorizations. The district observes that "[e]veryone is struggling with accommodating the new requirements" and "[t]he workload resulting from the Rapanos guidance is significant and no additional staff is anticipated in the short term, if at all." *Id*. As the district notes, given the approved JD requirement set out in the Guidance, it may be impossible for the Corps ever to meet the 45-day time period set forth in the NWP Rule. This unfortunate result is clearly contrary to Congress's intent in promulgating the general permit authority, which was established to streamline authorizations for activities that result in no more than minimal adverse effects on the aquatic environment.

3. The New EPA Coordination Process Exacerbates Delays In Meeting The Nationwide Permit Rule's Regulatory Time Frames.

The requirement to coordinate significant nexus and isolated water approved JD forms with EPA necessitates lengthy and costly delays and runs counter to the underlying purposes of the NWP program.[35] *See* Guidebook, App. E at 9 (significant nexus) and 11 (isolated wetlands). For significant nexus evaluations,

[35] *See, e.g.*, U.S. Army Corps of Engineers Los Angeles District Regulatory Division, presentation, "The Rapanos Guidance: The Los Angeles District Perspective" (Nov. 5, 2007) (hereinafter referred to as the "LA District Presentation") (attached hereto as **Exhibit 17**) ("Jurisdictional determinations requiring a significant nexus determination have increased the amount of required information and staff time substantially.").

the Guidance specifies that the DE must forward the draft significant nexus evaluation "immediately" to the EPA regional office. *See* RGL 07-01 at 9. The EPA regional office will then decide, within 15 days, whether to elevate the JD to Headquarters. If the JD is elevated, EPA and Corps Headquarters have an additional 10 days to determine whether additional information is required for a decision. If EPA requests additional information from the district, the district is required to immediately provide the information, if available, requested by EPA. The Corps and EPA have up to 40 calendar days to resolve the issue. If Headquarters does not respond within 40 days, the district may finalize the JD and proceed with the NWP verification process. Alternatively, if Headquarters provides recommendations on the JD, the district "will finalize the JD in accordance with the recommendations and proceed with the NWP verification process." *Id*. at 9-10.

If the information requested by EPA is not available and the district is required to request additional information, the 40-day clock is suspended until the information is received and determined adequate by the Corps. Under the best of circumstances, this coordination process will require 65 days – assuming that the Corps sends EPA the draft JD as soon as it is received. But it seems unlikely that any draft JD would be processed that quickly, given current Corps backlogs and resource constraints. And the timeframes could stretch out for months and even

years.[36] Regardless which scenario occurs, it does not appear possible that the NWP authorization would be received within the 45 days after the PCN is completed, as required by the NWP Rule. Overriding the NWP Rule timeframes for two large categories of determinations (*i.e*., significant nexus and isolated waters) is not an appropriate solution to the problem.

As with significant nexus evaluations, the Guidance's procedure for coordinating isolated waters determinations is similarly complicated and leads to the same inability to meet the NWP Rule's regulatory timeframes. This is particularly unnecessary since isolated waters were not at issue in *Rapanos,* and the basis of jurisdiction for waters identified in 33 C.F.R § 328.3(a)(3) was not supported by the statute, according to the Supreme Court in *SWANCC*. Moreover, there are a number of statements in the Guidebook regarding isolated waters that are confusing and appear contradictory. First, the Guidebook claims that "requested information must relate to that information necessary to make the PCN complete." *See* RGL 07-01 at 8. But, as discussed previously, a PCN neither

[36] *See, e.g.,* LA District Presentation ("Required coordination process with EPA and HQ has augmented the amount of time required for a jurisdictional determination substantially."). Note that the Corps, in part (a)(4) of the coordination process, reiterates its self-declared authority to suspend the 45-day time period specified in the NWPs. "If the Corps is unable to make a decision on the NWP within 45 days of receipt of the completed PCN," the DE may suspend the NWP authorization pursuant to 33 C.F.R. § 330.5(d)(2). Guidebook, App. E, RGL 07-01 at 10.

requires an approved JD nor constitutes a request for an approved JD. Therefore, any information requested for a JD would fall outside of what would be required to complete a PCN under the NWP; consequently, the entire premise appears incorrect. Second, the Guidebook states that "the additional coordination time that was used between the Corps district and the applicant to fill the information request does not count against" the coordination period. *Id*. at 10. However, if the expiration of the 45-day time period specified in the NWPs would preclude proper consideration of the CWA jurisdictional issues, the DE may suspend the NWP authorization.[37] *Id*. The 45-day period under the NWP Rule pertains solely to the PCN requirement, not to interagency jurisdictional consultations. This same 45-day clock is also intended to apply only to a delineation and not an approved JD (which was not part of the NWP Rule). Therefore, it would appear that for most, if not all, requests for authorizations under NWPs, the Corps will invariably be required to suspend the timeframe set forth in the NWP Rule – for a requirement not contained in the Rule.

It is common knowledge that the individual permitting process is generally more burdensome, timely, and costly. The Commenters are concerned that the Guidance and its concomitant requirement for an approved JD may change that

[37] This would appear to be a clear recognition that the procedures established through the Guidance are not governed by the NWP Rule and can and often will supersede the NWP Rule.

norm. Under the Guidance, any JDs associated with an NWP will be processed in a similar manner to approved JDs required for an IP. RGL-07-01 at 12-13. It is conceivable that the time period for receipt of an approved JD authorizing an IP could be less than that for an approved JD supporting an NWP.[38] For example, while it will take the EPA/Corps Headquarters at least 65 days to reach a decision on an approved JD to support an NWP, it will only take between 44 and 51 days for the Agencies to reach a similar decision to support an IP, assuming the Corps transmits the JD immediately upon receipt. Such a result is completely contrary to the purpose of the general permits.

Lastly, we question the wisdom of creating an entirely new process whereby, at the discretion of EPA regional offices, significant nexus and isolated waters evaluations may be unilaterally elevated to EPA and Corps Headquarters for review. In addition to creating a permitting backlog, we believe that this process has the potential to transform an otherwise efficient permitting program historically managed by the Corps into a unwieldy and inefficient joint EPA/Corps permitting program. We believe it is untenable and unworkable for the EPA to oversee and micromanage the Corps' decisions on such routine JDs.

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[38] Once an individual permit JD is forwarded to the EPA regional office staff, the staff has 15 days to review and coordinate with Corps district staff, 15 days for the district engineer/regional administrator to decide if the JD will be elevated to Headquarters, and then 14 or 21 days for EPA/Corps Headquarters to make a decision on the JD. *See* RGL 07-01 at 13-14.

H. The Guidance Creates Confusion Regarding Past Jurisdictional Determinations.

An important issue in light of the *Rapanos* decision is the extent to which the Supreme Court's decision impacts expired JDs or JDs made prior to the *Rapanos* decision. In the Question & Answer portion of the Guidebook, Q&A 46 provides as follows:

> Question: Will the Corps revisit jurisdictional decisions made prior to the Rapanos decision?
>
> Answer. No, the Corps will only revisit a jurisdictional determination completed after the Rapanos decision if the applicant requests revisitation. The new review will focus on information affected by the Rapanos decision. The Corps will not revisit jurisdictional determinations that were completed prior to the Rapanos decision.

Id. at 80. We understand that Q&A 46 represents the Agencies' attempt to clarify that the Corps would not, on its own volition, reconsider JDs that were completed prior to *Rapanos*. Our communications with officials at EPA and Corps Headquarters on this very point have been consistent and unequivocal, *i.e.,* the Agencies are open and willing to review pre-*Rapanos* determinations at the request of a project proponent permittee or landowner. *See* Question and Answer Session With Corps and EPA officials during ALI-ABA Conference, New Clean Water Act Guidance Post-*Rapanos* & *Carabell*: EPA and Army Corps Staff Explain the New Guidance (June 29, 2007) (transcription of discussion attached hereto as **Exhibit 15**) ("There are two opportunities. There is an appeal process that's

available in the Corps' regulations, or they can simply request that the Corps revisit the determination . . ."). Thus, we do not believe it was the Agencies' intent to establish a new policy to foreclose voluntary requests by applicants to have pre-*Rapanos* decisions revisited in light of changed law.

However, a recent article attributed a position to the Corps that seems to directly contradict our understanding and communications with the Agencies regarding Q&A 46 and its underlying purpose. *See Corps Rejects Industry Bid For Retroactive Wetlands Permit Reviews*, INSIDE EPA (Nov. 30, 2007) (attached hereto as **Exhibit 16**). The article recounts a developer's request that the Corps review a pre-*Rapanos* JD. Reportedly, the Corps declined the request purportedly on the grounds that Corps Headquarters' policy precluded such action, and that only JDs issued after *Rapanos* were subject to review.

We want to emphasize that a policy foreclosing voluntary requests to revisit pre-*Rapanos* decisions would not only contradict recent public statements made by EPA and Corps officials, but is contrary to the Agencies' actions after the *SWANCC* decision (involving isolated waters) as well as case law. *See In the Matter of Camp Pubie Hunting Club Partnership*, CWA-05-2005-0011, 2007 WL 2192950 (E.P.A. 2007) (EPA withdrew a complaint for alleged wetlands violations based on changed law resulting from *Rapanos*).

The EPA and Corps should shed light on the underlying purpose of Q&A 46 and clarify that the Agencies will consider voluntary requests by applicants to revisit JDs completed prior to or pending at the time of the *Rapanos* decision. Further, with respect to JDs that expired prior to *Rapanos*, we understand that Corps Headquarters is generally supportive of a policy that would, at the request of an applicant, reinstate an expired JD made under the pre-*Rapanos* rules for up to five years, provided (1) the applicant would be willing to agree to accept and abide by the original JD and (2) the physical conditions at the site have not significantly changed. We believe this is a reasonable and workable approach and would encourage the Corps to formally adopt that position.

I. The Guidance Confuses The Procedures For Isolated Waters And Incorrectly Assumes Jurisdiction Of Such Waters.

The Commenters have a number of substantive and procedural concerns with respect to how the Agencies may be treating isolated waters as reflected in the Instructional Guidebook. First, we are concerned with the interagency coordination procedures set forth in the Guidance for intra-state, non-navigable waters "covered solely under 33 C.F.R. § 328.3(a)(3), where jurisdiction is asserted or not asserted based on interstate commerce factors." *See* Guidebook, App. C at 1. To the extent these procedures reflect the Agencies' view that jurisdiction may exist based on "interstate commerce factors," we strongly disagree with that position. We are also concerned that the Guidance sets forth a

burdensome and illogical sequential evaluation involving significant nexus determinations and isolated waters.

1. The Agencies Incorrectly Consider Jurisdiction Over Isolated Waters Based On Interstate Commerce Factors.

The Supreme Court in *SWANCC* rejected the federal government's assertion that CWA jurisdiction reached isolated ponds because the ponds were habitat for migratory birds. *SWANCC*, 531 U.S. at 166. The government in that case argued that asserting jurisdiction based on the Migratory Bird rule was consistent with "Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce." *Id*. at 173. But the Court rejected this argument, observing that it raised "significant constitutional questions." Indeed, the Court stressed the plain text of the CWA, which grants jurisdiction over "navigable waters." The Court found that

> The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

Id. at 172. ("Although the Conference Report includes the statement that the conferees 'intend that the term 'navigable waters' be given the broadest possible constitutional interpretation,'" the Court held that "neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation.") *Id.* at 168 n.3.

Because the Migratory Bird Rule was based on Congress's broader power to regulate activities substantially affecting interstate commerce – not Congress's "commerce power over navigation" – the Migratory Bird Rule exceeded the scope of the CWA. As the Court observed, "this is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* at 173. Similarly, as discussed *supra*, the factors listed in Sections (a)(3)(i)-(iii) are not tied to Congress's navigation power and therefore do not provide a valid jurisdictional basis.

Importantly, the Court's holding in *SWANCC*, including its rationale for rejecting jurisdiction in the case of intra-state, non-navigable isolated waters, was reaffirmed in *Rapanos*. *See Rapanos*, 126 S. Ct. at 2241, (Kennedy, J., concurring in the judgment) ("Because such a [significant] nexus was lacking with respect to isolated ponds, the Court held that the plain text of the statute did not permit the Corps' action [of asserting jurisdiction].").

Because the CWA section (a)(3) waters, including intra-state, non-navigable isolated waters, are no longer jurisdictional, there is no valid justification for the Agencies to include references to such waters as possible subsets of waters of the United States. *See* Guidebook, App. B, at 2, and App. C at 1 and Figure 2b. To the extent these provisions are included based on the Agencies' continued view that the government's jurisdictional authority reaches any activities "substantially

affecting interstate commerce" – as opposed to "commerce power over navigation" – these references should be deleted from the Guidebook, including where such references appear, for example, in the JD Forms (App. B) and the Agencies' decision tree diagrams (App. C, Figure 2b).

2. The Guidance Creates A Burdensome And Illogical Procedure For Evaluating Isolated Waters.

Not only is the Agencies' treatment of isolated waters legally suspect, but the inclusion of such waters, for example, in Figure 2b of the Agencies' procedures, creates added confusion regarding the JD process and whether there are separate and distinct determinations for "isolated waters" and "significant nexus." By including Figure 2b (entitled "Coordination Requirements for JDs Involving Non-Navigable, Intra-State, Isolated Waters and Supporting NWP Applications") after 2a (entitled "Coordination Requirements for JDs Involving 'Significant Nexus' Evaluation with TNWs and Supporting NWP Applications"), the Guidance raises a question whether a sequential analysis is required.

If it is the Agencies' intent to require a sequential isolated water determination after a significant nexus evaluation, such a requirement would be unduly burdensome and illogical for the following reasons. First, if the question of whether a significant nexus exists is affirmed as a result of a significant nexus evaluation (pursuant to Figure 2a), for purposes of the Agencies' procedures, the

jurisdictional analysis should be complete.[39] Likewise, if the significant nexus evaluation results in a negative finding, then the absence of a significant nexus precludes the government's assertion of jurisdiction. Thus, under a significant nexus evaluation, the presence or absence of a significant nexus – and thus the basis of the government's jurisdiction – will be determined and consequently mark the end of any further inquiry into the jurisdictional element. Once a significant nexus analysis is complete, no further analysis should be required.

Because the Agencies no longer have any basis to assert jurisdiction over intra-state, non-navigable waters, all such reference should be deleted from the Guidance. Further, the Agencies must clarify that the Guidance does not require a separate, sequential evaluation over isolated waters.

J. The Guidance Violates the Paperwork Reduction Act.

The Guidance also fails to comply with the letter and the intent of the Paperwork Reduction Act of 1980 ("PRA"). 44 U.S.C. §§ 3501-3521. The PRA was enacted "to reduce and minimize the burden Government paperwork imposes on the public." *See United States v. Smith*, 866 F.2d 1092, 1094 (9th Cir. 1989) (quoting S. REP. NO. 930, 96th Cong., 2d Sess. 2 (1980)). The PRA requires the federal agencies to obtain approval from the Director of the Office of Management

[39] This does not mean, however, that the Corps' assertion of jurisdiction, based on an affirmative significant nexus finding, may not be contested pursuant to the Corps' administrative appeal process.

and Budget ("Director") before conducting a "collection of information." 44 U.S.C. § 3507(a)(2). Under the PRA, "collection of information" means "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for . . . answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons." *Id*. at § 3502(3)(A)(i). Under the PRA, an agency "shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information . . . the agency has obtained from the Director a control number to be displayed upon the collection of information," regardless of whether the collection is contained in a proposed rule or another format. *Id*. at § 3507(a)(3). If the agency fails to display a valid control number assigned by the Director on a collection of information, the collection is considered "bootleg," and the public may ignore it without penalty. *Smith*, 866 F.2d at 1094; *see also* 44 U.S.C. § 3512 (penalties may not be imposed for failure to comply with an information collection request if the request does not display a valid control number).

In addition to obtaining a control number, an agency must provide the public with notice and an opportunity to comment on (1) whether the proposed collection of information is necessary; (2) whether the agency's estimate of the burden of the

proposed collection of information is accurate; (3) how to enhance the quality, utility, and clarity of the information to be collected; and (4) how to minimize the burden of the collection of information on those who are to respond. 44 U.S.C. §§ 3506(a)(2), (a)(3). Moreover, the agency must certify, and provide a record supporting such certification, that the collection of information, among other things, is necessary for the proper performance of the agency, is not unnecessarily duplicative of information otherwise reasonably accessible to the agency, and reduces to the extent practicable and appropriate the burden on persons providing such information. *Id.*

Issuance of the Guidance and, in particular, the requirement to obtain an approved JD using the new and more burdensome JD form violates the PRA. Although the Guidance and approved JD form require the compilation of a substantial amount of new information (*e.g.,* tributary width, depth, geometry, gradient, stability, and substrate; wetland biological characteristics; cumulative analysis of all wetlands adjacent to a tributary reach), they do not exhibit an OMB control number, signifying OMB approval for the additional paperwork burden being imposed on the public. Moreover, contrary to the other provisions of the PRA, the Agencies did not provide the public with notice and an opportunity to comment prior to the issuance of the Guidance and approved JD form. Nor did the Agencies provide a certification and supporting record demonstrating that the

collection of information was reduced to the extent practicable the burden on the persons supplying the information. Consequently, the Guidance does not comport with the PRA.

V. RECOMMENDATIONS.

Based on the foregoing concerns regarding the Guidance, we offer the following recommendations. To resolve several of the fundamental issues and concerns for which we have identified in the Guidance, including, for example, the definition of TNWs and concepts such as "significant nexus," the new "reach-wide assessment" analysis, and aggregation, we believe the Agencies must initiate a rulemaking. However, short of a rulemaking, we firmly believe that a number of changes can be made to the Guidance immediately and without a rulemaking to provide greater efficiency, clarity and predictability in the manner in which the section 404 program is managed.

A. The Agencies Should Engage In Rulemaking To Define The Scope Of Their Regulatory Authority Under Section 404.

The public as well as federal, state and local governments would be better served if the Agencies engaged in administrative rulemaking to address the infirmities in the existing regulations that were exposed by *Rapanos*, and previously by *SWANCC* and *Lopez*. The Guidance was a well-intentioned effort to address the scope and reach of the federal government's jurisdictional authority. However, as evidenced by the foregoing discussion, the Guidance leaves many

questions unanswered. At the same time that the Guidance is ambiguous or fails to address some issues, it also goes into great detail on other issues and well beyond the permissible scope of guidance. It is time for the Agencies to finally deliver on providing the clarity and consistency that has long been promised and needed in this area.

Although some groups have advocated that Congress respond with sweeping new CWA legislation and authority – and certain Members of Congress seemed poised to act – we firmly believe that many of the problems and challenges facing both the public and the Agencies can and should be resolved through rulemaking. We do not believe this matter calls out for new legislation that would upset the delicate federal-state balance that has worked so well since Congress enacted the CWA in 1972 to manage our Nation's waters. The tool to fix the problem is neither a sledge-hammer nor a paint brush. Rather, the far better tool is the precision tool of rulemaking.

Rulemaking would enable the Agencies to systematically and comprehensively address the many questions left unanswered by the Guidance. It would also allow the Agencies to benefit from input from the public within a tried and proven regulatory structure. With respect to certain issues, the Agencies have no choice but to engage in rulemaking. The Guidance sets forth numerous binding statements of law or policy that either amend prior regulations or constitute new

regulations. As discussed earlier, the APA requires that the Agencies go through notice and comment rulemaking procedures before issuing such binding statements. Thus, for both administrative and legal reasons, the Agencies should engage in rulemaking to define the scope of their regulatory authority.

1. With Respect To Certain Issues, The Guidance Is Vague And Leaves Unanswered Questions That Can Be Resolved Only Through Rulemaking.

The Guidance seeks to "address [] which waters are subject to § 404 jurisdiction" so as to ensure that the Agencies' actions are consistent with the *Rapanos* decision. *See* Guidance at 4. However, the Guidance never fully addresses which waters are, in fact, subject to section 404 jurisdiction. The Guidance instead provides only a hint of which waters are jurisdictional, leaves many questions unanswered and, to the extent it provides answers, it often does so in a vague and confusing manner. The Guidance, for example, states that certain low-volume small washes are generally not jurisdictional, but does not further define which small washes are or are not subject to federal jurisdiction. Both Agencies have stated that such issues can only be fully resolved through rulemaking. *See* cover letter n.3 discussing limitations of guidance.

The Agencies' fallback position appears to be that any question left unanswered by the Guidance will be addressed case-by-case, rather than through regulations. As a general principle, relying on a case-by-case approach to fill these

voids and gaps is extremely problematic to the public and leaves the Agencies exposed to continuing criticism of inconsistent and unpredictable implementation of the section 404 program. Regulations, in contrast, could provide clarity and consistency for both the Agencies' staff and the public. Rulemaking would also be a vehicle for the Agencies to obtain the benefits of stakeholders' experience and expertise on these important jurisdictional issues, and to gain a thorough understanding of the practical implications of alternative policy choices. Regulations would also benefit from input from the public, as the rulemaking process provides stakeholders the opportunity to participate in significant interpretive changes, thereby giving the public a role in defining their duties and obligations. This public participation would also provide a benefit to the Agencies, and the Agencies can use the comments and suggestions of the regulated community to craft a better set of regulations.

Moreover, the Supreme Court made clear in *Rapanos* that the Agencies need to do a rulemaking. The Chief Justice stated in a sobering, concurring opinion that the Agencies could have avoided "another defeat" if they had only completed the rulemaking they began following *SWANCC*. *Id.* at 2235-36. (Roberts, C.J., concurring) ("Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope

of its power. The upshot today is another defeat for the agency."). Justice Breyer was even more direct, calling on the Corps "to write new regulations, and speedily so." *Id.* at 2266 (Breyer, J., dissenting). And Justice Kennedy's admonition that, "absent more specific regulations," significant nexus must be determined "case-by-case" casts doubt on some of the categorical positions the Guidance adopts. The overall message from the Court and the public is unmistakable – the Agencies must engage in rulemaking to define their jurisdictional authority.

The need for rulemaking is not a new phenomenon and is not solely a result of *Rapanos*. Instead, the Agencies have for years recognized the need for rulemaking to define the scope of their regulatory authority in a consistent and predictable manner. For example, on January 15, 2003, the Corps and EPA issued an Advance Notice of Proposed Rulemaking ("ANPRM") seeking comment on whether or how its regulations should be amended to account for the Supreme Court's *SWANCC* decision. *See* 68 Fed. Reg. 1991 (2003); *see also* discussion *supra* n.4, chronicling statements made by EPA and Corps officials before Congress. The Agencies, however, have never carried through with this rulemaking effort. Now, in the wake of *Rapanos*, there is even greater need for regulations to provide a comprehensive set of rules regarding which water bodies the Agencies will regulate as waters of the United States. Until such regulations are promulgated, the public and Agency field staff will be beleaguered by partial

answers, confusing standards, and *ad hoc* and arbitrary decisions pertaining to the scope of federal jurisdiction under section 404 of the CWA.

2. For Some Issues, The Agencies' Guidance Is A Generally Applicable Statement Of Binding Policy That May Be Promulgated Only Through Notice And Comment Rulemaking.

While the Guidance is vague with respect to whether or when some water bodies will be treated as jurisdictional waters, other portions of the Guidance are so specific as to constitute rules or amendments to a pre-existing rules. For example, as already discussed, the Guidance effectively amends the Corps' nationwide permit program by requiring each applicant for an NWP to obtain an approved JD, thus significantly complicating the NWP process. NWPs are rules and, therefore, may not be changed except through a notice-and-comment rulemaking.

Further illustration of how the Guidance effectively engages in rulemaking is found in its specific definition of a "non-navigable tributary of a traditional navigable water" as a "non-navigable water body whose waters flow into traditional navigable waters either directly or indirectly by means of other tributaries." Guidance at 5. This definition, and the related reach concept discussed previously have for the first time given specific meaning to a key term in the regulatory definition of "waters of the United States." 33 C.F.R. § 328.3(a)(5). Because this new definition will have substantial, binding impact on the Agencies and the public, it should be defined through rulemaking.

Under the APA, such specific, binding pronouncements and amendments to pre-existing rules must be promulgated pursuant to notice-and-comment rulemaking. *See* 5 U.S.C. § 553. The APA defines a "rule" in part as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" and "rulemaking" as the agency's process for "formulating, amending, or repealing a rule." *Id.* at 551(4) and (5). The Guidance constitutes "rulemaking" within these definitions because it does more than merely interpret *Rapanos*. It effectively amends the regulations at issue in *Rapanos* – 33 C.F.R. §§ 328.3(a)(1), (a)(5), (a)(7), and 40 C.F.R. §§ 230.3(s)(1), (s)(5), (s)(7) – by describing new conditions under which the Agencies may assert jurisdiction pursuant to those regulations. The D.C. Circuit has made clear that substantive amendments to, or new interpretations of, pre-existing regulations can only be accomplished through the APA's specified notice-and-comment rulemaking process because "[t]o allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment (and all of the other hallmarks of rulemaking) obviously would undermine those APA requirements." *Paralyzed Veterans of America v. D.C. Arena*, *L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

The APA draws a distinction between legislative rules, which are subject to notice and comment rulemaking requirements, and interpretive rules or guidance,

which are not subject to notice and comment rulemaking requirements. *See* 5 U.S.C. § 553(b)(3)(A). Notwithstanding the Agencies' labeling of their Legal Memorandum as "guidance," it in fact does not meet the definition of guidance. An agency pronouncement is guidance when it simply "spells out a duty fairly encompassed within the regulation that the interpretation purports to construe." *Paralyzed Veterans*, 117 F.3d at 588 (explaining distinction between rules and guidance). Much of the Guidance does more than fill in the details of pre-existing regulations. Rather, it effectively changes the playing field for the public and Agency staff, who will no longer be able to rely upon the regulations (*e.g.*, the NWP Rule) that have, for many years, defined the scope of the Agencies' regulatory activities. They will instead have to revisit the meaning of those regulations in light of the new analytical framework established in the Guidance. The D.C. Circuit has made clear that such a significant revision to a pre-existing regulatory scheme must adhere to the APA's rulemaking procedures: "When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *Alaska Professional Hunters Association v. Federal Aviation Administration*, 177 F.3d 1030, 1034 (D.C. Cir. 1999).

In total, the Guidance is more than mere guidance with respect to some issues, while entirely vague with respect to other issues. It binds the Agencies into treating certain waters as "waters of the U.S.," but simultaneously fails to fully define other jurisdictional waters. The end result is a document that raises (but in many cases does not resolve) issues that are best dealt with through the administrative rulemaking process. Accordingly, the undersigned commenters respectfully request that the Agencies follow the Supreme Court's admonition in *Rapanos*, carry through on their many and long-standing promises to provide clarity and predictability, and engage in rulemaking to define the scope of their regulatory authority under the CWA.

B. Regardless Of Rulemaking, The Agencies Should Make the Following Changes Immediately To The *Rapanos* Guidance.

Many of the problems identified in the Guidance, such as the procedural changes, are not required by the *Rapanos* decision. Instead, they are self-imposed policies that have unintended and negative consequences that the Agencies can, and should, readily correct. In order to reduce the Guidance's unwarranted compliance burdens on applicants, minimize the potential violation of the Administrative Procedure Act and the Paperwork Reduction Act, and provide more immediate clarity and consistency in the manner in which the Guidance is being implemented in the field, the Commenters request the Agencies, at a minimum, modify the existing Guidance in the following key areas.

1. Clarify that the existing timelines under NWP Rule are binding and cannot be suspended or changed by the Agencies in Guidance;

2. Eliminate the requirement that all project applicants must obtain an approved JD. Instead, return to the Agencies' well-established, flexible approach that allows applicants to elect whether they want an approved JD or not;

3. Where an approved JD is requested, eliminate the overbroad tributary reach analysis involving lands and waters outside of the project site where an applicant may not own or have access to such properties;

4. Clarify that the Corps and EPA will re-evaluate pre-*Rapanos* JDs upon the request of the applicant, permittee, or landowner;

5. Eliminate making binding JD decisions that have the potential to impact non-applicant landowners;

6. Simplify the JD form and the approved JD process so that hundreds of forms are not required to establish jurisdiction;

7. Clarify that Corps districts have the flexibility to allow applicants in appropriate circumstances to perform desktop reviews (*e.g.*, linear projects);

8. Establish a public process for the designation of traditional navigable waters, and publish all designated traditional navigable waters;

9. Clarify that a water body is not a traditional navigable water merely because it is capable of floating a boat;

10. Limit relatively permanent waters to waters that flow continuously for at least 290 days each year such that they are considered inseparable from traditional navigable waters;

11. Clarify the distinction between ephemeral washes that are non-jurisdictional and those that are relatively permanent waters and consequently jurisdictional. Clarify that all desert washes that do not flow at least 290 days must meet the significant nexus requirement;

12. Clarify that significant nexus is not satisfied simply because an impact is more than insubstantial;

13. Eliminate jurisdiction over all upland ditches, regardless of whether they carry relatively permanent water;

14. Eliminate the EPA coordination process for JDs involving significant nexus and isolated water determinations;

15. Eliminate jurisdiction over isolated waters as per *SWANCC*; and

16. Comply with Paperwork Reduction Act requirements.