Comments in Response to the
Environmental Protection Agency's and U.S. Army Corps of Engineers'
Draft Guidance on Identifying Waters Protected by the Clean Water Act
EPA-HQ-OW-2011-0409

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July 29, 2011

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I. Introduction and Coalition's Interests

The organizations listed on the cover page of these comments ("Coalition") write, yet again, to provide comments to the U.S. Army Corps of Engineers ("Corps") and U.S. Environmental Protection Agency ("EPA") (jointly, the "Agencies") on "guidance" on the issue of Clean Water Act ("CWA" or "Act") jurisdiction.[1] We are providing comments on the Agencies' "Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act," 76 Fed. Reg. 24,479 (May 2, 2011) ("Draft Guidance"). As detailed in our comments, the Coalition sets forth numerous concerns with the Draft Guidance. Fundamentally, however, the Coalition asks, once again, that the Agencies not finalize a flawed guidance document on this important topic.

A. The Coalition's Members Are Diverse and of Critical Importance to the Nation's Economy.

The Coalition's members, which include the Waters Advocacy Coalition ("WAC") and additional industry groups and agricultural organizations, are committed to the protection and restoration of America's wetlands and waters. Members of the Coalition include: Agricultural Retailers Association, American Farm Bureau Federation®; American Forest & Paper Association; American Gas Association, American Iron and Steel Institute; American Petroleum Institute; American Road and Transportation Builders Association; America's Natural Gas Alliance; Associated General Contractors of America; CropLife America; Edison Electric

[1] The organizations listed as Coalition members for the purpose of these comments are not necessarily identical to those that participated with the Coalition in previous comments.

Institute; The Fertilizer Institute; Florida Sugar Cane League; Foundation for Environmental and Economic Progress; Industrial Minerals Association-North America; International Council of Shopping Centers; Irrigation Association; National Association of Home Builders; National Association of Industrial and Office Properties; National Association of Manufacturers; National Association of State Departments of Agriculture; National Cattlemen's Beef Association; National Corn Growers Association; National Council of Farmer Cooperatives; National Milk Producers Federation; National Mining Association; National Multi Housing Council; National Pork Producers Council; National Stone, Sand and Gravel Association; Public Lands Council; The Real Estate Roundtable; RISE - Responsible Industry for a Sound Environment®; Southern Crop Production Association; United Egg Producers; Utility Water Act Group; and Western Business Roundtable.[2]

The Coalition represents a large cross-section of the Nation's construction, housing, mining, agriculture, and energy sectors, all of which are vital to a thriving national economy, including providing much-needed jobs. For example, many of the Coalition's members construct residential developments, multi-family housing units, commercial buildings, shopping centers, factories, warehouses, waterworks, and other utility facilities. From March 2010 to March 2011, public and private investment in the construction of residential and commercial structures alone totaled over $300 billion.[3] This investment is critical to our economy because "every $1 of spending on residential construction, utility and transportation infrastructure or commercial construction generates roughly $3 of economic activity throughout the economy."

[2] *See* Interests of Coalition Members (attached hereto as Exhibit 1).

[3] *See* David Sunding, *Economic Incentive Effects of EPA's After the Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal*, at 3 (May 30, 2011) (attached hereto as Exhibit 2) (hereinafter "2011 Sunding Report").

2011 Sunding Report at 3. Every $1 billion of residential construction generates around 16,000 jobs. *Id.* Spending on commercial and institutional facilities such as shopping centers, schools, office buildings, factories, libraries, and fire stations has a somewhat larger job creation effect, at around 18,000 jobs per $1 billion of spending. *Id.*

Many of the Coalition's members construct critical infrastructure: highways, bridges, tunnels, airports, electric generation, transmission, and distribution facilities, and pipeline facilities. In 2009, the federal government spent $39 billion on new highway infrastructure. *Id.* Not only are investments in infrastructure critical to quality of life throughout the nation, as with residential and commercial construction, the multiplier effect on job creation resulting from such investment is substantial. Every $1 billion in transportation and water infrastructure construction creates approximately 18,000 jobs. *Id.* Moreover, research has shown that the benefits of infrastructure investments go beyond measures of output and employment and can increase economic growth, productivity, and land values. *Id.* at 2.

The Coalition's agricultural members produce virtually every agricultural commodity produced commercially in the United States, including, but not limited to, significant portions of the U.S. milk, corn, sugar, egg, pork, and beef supply. In addition, other coalition members sell and distribute fertilizer, crop protection, and biotechnology products used by American farmers. In 2009, the gross value added to the U.S. economy by agriculture sector production was $142.2 billion.[4]

Additionally, Coalition members represent producers of most of America's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral processing

[4] U.S. Department of Agriculture, Economic Research Service, "Farm Income and Costs: Farm Sector Income Forecast" (Feb. 14, 2011), http://www.ers.usda.gov/briefing/farmincome/data/va_t1.htm.

machinery, equipment, and supplies; and the engineering and consulting firms, financial institutions, and other firms serving the mining industry. In 2008, U.S. mining activities (activities associated with mining of coal, metal ores, and non-metallic minerals) directly and indirectly generated nearly 1.8 million U.S. jobs, $107 billion in U.S. labor income, and $189 billion in contribution to U.S. gross domestic product ("GDP").[5] America's steel industry adds $350 billion annually to the U.S. economy and generates more than one million direct and indirect jobs.[6]

The Coalition also consists of groups representing the energy industry that generate, transmit, transport, and distribute our Nations' energy to residential, commercial, industrial, and institutional customers. The electric power industry is a $372 billion industry that employs nearly 400,000 American workers and represents 3 percent of the U.S. GDP.[7] In 2009, the oil and natural gas industry supported a total value added to the national economy of more than $1 trillion or 7.7 percent of the U.S. GDP.[8] Natural gas currently constitutes approximately 25 percent of energy consumption in the United States, and should approach 30 trillion cubic feet by the end of the next decade if the supply of gas is developed.[9] This critical growth will be dependent upon large amounts of natural gas pipeline infrastructure being built.

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[5] PricewaterhouseCoopers for the National Mining Association, *The Economic Contributions of Mining in 2008*, at E-2 (Oct. 2010), *available at* http://www.nma.org/pdf/pubs/mining_economic_report.pdf.

[6] American Iron and Steel Institute, "Industry Profile," http://www.steel.org/About%20AISI/Industry%20Profile.aspx.

[7] Edison Electric Institute, "About the Industry," http://www.eei.org/whoweare/AboutIndustry/Pages/default.aspx.

[8] American Petroleum Institute, "About Oil and Natural Gas," http://www.api.org/aboutoilgas/.

[9] *See* Interstate Natural Gas Association of America Foundation, "An Updates Assessment of Pipeline and Storage Infrastructure for the North American Gas Market: Adverse Consequences of Delays in the Construction of Natural Gas Infrastructure," INGAA Foundation,

Both individually and collectively, the Coalition's members possess a wealth of expertise directly relevant to the issues addressed in the Draft Guidance.

B. The Scope of CWA Jurisdiction Is Important, and the Coalition Has Been Active in Advocating on this Issue for Years.

The Coalition members' projects and operations are all regulated (albeit in different ways) by the numerous sections of the CWA -- 402, 404, 401, 303, and others. The Coalition believes that the scope of jurisdiction under the CWA is of fundamental importance not only to the Coalition's members, but also to the Nation. For years, the Agencies have acknowledged the importance of this issue, yet have been unwilling, or unable, to address it in the proper and legal manner: through rulemaking under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*. Continuing to address and readdress this fundamentally important issue through guidance (which will now be applied to the entire CWA) does a disservice to all.

Following the Supreme Court's decision in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"), the Coalition's members submitted comments on the Agencies' ensuing ANPRM, which sought comment on whether or how the Agencies regulations should be amended to account for the *SWANCC* decision.[10] In those comments, we urged the Agencies to conduct a rulemaking to address key jurisdictional concepts of the CWA. Likewise, after the Supreme Court's decision in *Rapanos v. United States*, 547

Inc., F-2004-01 (July 2004), *available at* http://www.ingaa.org/Foundation/Studies/FoundationReports/45.aspx. *See also* "Preliminary Draft, The Transportation Secretary's Report to America on Pipeline Safety" at 6 (July 8, 2011), available at http://www.aga.org/our-issues/safety/pipleinesafety/AGAcomment/2011/Pages/PreliminaryDraftoftheTransportationSecretary%E2%80%99sReporttoAmericaonPipelineSafety.aspx.

[10] *See* Foundation for Environmental and Economic Progress, *et al.*, "Comments in Response to the U.S. Army Corps of Engineers' and the U.S. Environmental Protection Agency's Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States,'" Docket No. EPA-HQ-OW-2002-0050-1829 to -30 & -1832 to -35 (Apr. 16, 2003, corrected Apr. 30, 2003), (incorporated by reference herein); 68 Fed. Reg. 1991 (Jan. 15, 2003).

U.S. 715 (2006) ("*Rapanos*"), the Coalition's members submitted robust comments on the Agencies' 2008 Guidance Regarding Clean Water Act Jurisdiction After *Rapanos*.[11] In those comments, the Coalition again urged the Agencies to conduct a rulemaking to create the clarity and transparency long sought under the CWA.

C. Summary of Coalition Comments and Recommendations

Our comments today set forth numerous concerns with the new 2011 Draft Guidance. As a threshold matter, unlike prior guidance documents, which were limited to the section 404 program, the Agencies intend the Draft Guidance to apply to the *entire* CWA. The members of the Coalition are very concerned that the Draft Guidance and its supporting economic analysis fail to explain, consider, or analyze the implications that this Draft Guidance will have on other important CWA programs, programs that are vital to the proper functioning of the CWA. We believe that applying such broad jurisdictional principles such as the aggregation of all waters in a watershed and the regulation of agricultural, irrigation, and roadside ditches to the entire CWA structure (water quality standards, total maximum daily loads ("TMDLs"), etc.) does not make sense and, at a minimum, should be thought through carefully and with the full benefit and protections of the APA. Indeed, the APA was designed to address these types of expansive changes and, in particular, to provide administrative agencies with the input required to avoid unintended consequences.

[11] *See* American Farm Bureau Federation, *et al.*, "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*," Docket No. EPA-HQ-OW-2007-0282-0204 (Jan. 22, 2008), (incorporated by reference herein).

Moreover, we believe that the Draft Guidance misconstrues the Supreme Court cases, is inconsistent with the Agencies' regulations and, as stated by the Agencies themselves, expands jurisdiction. In particular, we provide the following specific comments and recommendations:

- The Agencies should engage in an APA rulemaking rather than finalize the Draft Guidance.

- The Agencies' definition of "traditional navigable waters" ("TNWs") should be consistent with the Rivers and Harbors Act definition cited by the plurality and Justice Kennedy in *Rapanos*.

- Recreational boating or canoe trips are not sufficient evidence to demonstrate that a water is susceptible for use as a "waterborne highway used to transport commercial goods" and therefore qualifies as a TNW.

- The Agencies should not treat interstate waters as equivalent to TNWs.

- Justice Kennedy's significant nexus standard applies to wetlands only. The Agencies may not extend that standard to tributaries and other waters, whether physically proximate or not.

- The Agencies' watershed aggregation approach will lead to extremely broad assertions of jurisdiction over remote waters with insubstantial connections to TNWs and, therefore, directly contradicts Justice Kennedy's concurrence.

- The Agencies' overbroad interpretation of "similarly situated" waters will lead the Agencies to lump together disparate features that are not "similarly situated" with respect to TNWs in their significant nexus analysis.

- The Draft Guidance's watershed aggregation approach is as broad as the Migratory Bird Rule overturned in *SWANCC* and suffers from same constitutional concerns.

- Under the Draft Guidance, the Agencies will aggregate waters such as dry washes, arroyos, seasonal waterbodies, and ephemeral streams to establish a significant nexus. This approach is at odds with Justice Kennedy's significant nexus standard, which emphasized proximity to TNWs and regularity of flow.

- The Agencies turn Justice Kennedy's significant nexus standard upside down by allowing jurisdiction when the nexus needs only to be "more than speculative or insubstantial."

- Absent a rulemaking, the Agencies must apply Justice Kennedy's significant nexus standard on a case-by-case basis.

- Allowing a significant nexus determination for one water body in a watershed to bind other "similarly situated" waters in the watershed raises serious due process concerns.

- The Draft Guidance misinterprets Justice Scalia's opinion to allow any feature with a channel and at least seasonal flow to qualify as a tributary.

- The Agencies have essentially adopted another version of the "any hydrological connection" standard for tributaries that was rejected by five Justices in *Rapanos*.

- The Agencies may not presume that any feature that qualifies as a tributary will have a significant nexus to a TNW or interstate water.

- The Agencies should make clear that most ditches, including roadside and agricultural ditches, are not jurisdictional.

- The Agencies should clarify that point sources, such as municipal separate storm sewer systems ("MS4s"), regulated under section 402 of the CWA are not also "waters of the United States."

- The Draft Guidance misconstrues the *Rapanos* plurality's "continuous surface connection" principle for adjacent wetlands and allows for far too broad of an assertion of CWA jurisdiction over adjacent wetlands.

- The Draft Guidance's expansion of the term "adjacent" to include floodplain and riparian areas is an overreach of the Agencies' CWA jurisdiction over adjacent wetlands.

- The Agencies may not apply the regulatory definition of "adjacent" to waters other than wetlands as they attempt to do for "proximate other waters."

- Non-physically proximate other waters should not be subject to a significant nexus analysis.

- EPA's Economic Analysis completely omits consideration of impacts to other sections of the CWA besides section 404, underestimates the cost of complying with section 404, and does not give a reliable estimate of the benefits of the Draft Guidance.

- The Agencies intend to apply the Draft Guidance's expanded concept of "navigable waters" to the entire CWA, but have utterly failed to explain or consider the various practical, policy, and economic implications of that decision.

- The Agencies should clarify that the Draft Guidance will not be used to revisit previously issued jurisdictional determinations, even after the expiration of a determination, unless substantial new facts come to light about the nature of the water or wetland.

- The Agencies should confirm the regulatory exclusions for waste treatment systems and prior converted croplands in any final guidance.

- The Agencies should confirm the statutory and regulatory exemptions provided by CWA section 404(f), including those for normal agriculture, forestry and ranching practices in any final guidance.

- The Agencies should confirm the statutory and regulatory exemptions from NPDES permitting requirements for agricultural stormwater discharges and return flows from irrigated agriculture in any final guidance.

- In any final guidance, the Agencies should confirm that preliminary jurisdictional determinations will still be available, and may be relied on. The ability to obtain and rely on a PJD is especially critical for linear infrastructure projects such as pipelines that can cross numerous water bodies.

In sum, while we offer these comments on the Draft Guidance, the Agencies must cure the numerous legal infirmities reflected in the Draft Guidance and create the clarity and transparency long sought under the CWA. Indeed, both the EPA and the Corps have acknowledged that only through a rulemaking can real and meaningful standards, specificity, and direction be provided.[12]

II. The Draft Guidance Amounts to a Rule and Should be Abandoned.

For fundamentally important issues, such as the scope of the federal government's jurisdiction under the CWA, it is plainly wrong to proceed by guidance. The APA demands that binding pronouncements and amendments to pre-existing rules be adopted in accordance with the procedures set forth in the APA. The Draft Guidance amends the Agencies' existing regulations, and, therefore, must be adopted pursuant to the APA. Moreover, there are strong public policy reasons that support undertaking a rulemaking, rather than proceeding by guidance, and the courts, Congress, and the public have called upon the Agencies to do just that. The Coalition's member organizations urge the Agencies to abandon their "rulemaking by guidance" approach.

[12] *See* "Transcription of Scottsdale, Arizona *Rapanos* Guidance Workshop Sponsored by the National Mining Association, the National Association of Home Builders, and Hunton & Williams LLP," Scottsdale, AZ (Sep. 13, 2007) at 28, 33 ("We didn't provide a cookbook. Obviously, we couldn't provide a cookbook recipe because we'd be in that 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 . . .") (attached hereto as Exhibit 3).

A. When an Agency Revises its Regulations or Makes Binding Pronouncements, it Must Follow the APA.

The APA mandates that specific, binding pronouncements and amendments to pre-existing rules 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 "rule making" as the agency's process for "formulating, amending, or repealing a rule." *Id.* § 551(4), (5). The APA's various procedural requirements generally include a notice of proposed rule making published in the *Federal Register*, which includes an explanation of the proposed rule, the data supporting it, and an opportunity for interested persons to submit written data, views, or arguments. 5 U.S.C. § 553(b)-(c). An agency is required to consider the comments it receives and to publish a final rule together with a statement of basis and purpose explaining the rationale for its decision. *Id.* § 553(c). As explained by the courts, the agency's explanation must set forth the facts and data supporting its decision and must meet the test of "reasoned decisionmaking." *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (agency must provide adequate basis and explanation for its decision or it will be set aside). These rules are then subject to judicial review. The Draft Guidance constitutes "rulemaking" within these definitions, and, thus, should have been adopted in accordance with the APA's procedural requirements, because it does far more than merely "describe for agency field staff the agencies' current understandings." Draft Guidance at 1. 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) – and the regulation at issue in *SWANCC* -- 33 C.F.R. § 328.3(a)(3) and 40 C.F.R. § 230.3(s)(3) -- by describing new conditions under which the Agencies may assert jurisdiction. The Draft

Guidance expressly "supersedes" prior interpretations on the scope of "waters of the United States." Draft Guidance at 1.

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 obviously would undermine those APA requirements." *Paralyzed Veterans of Am. 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). Thus, legislative 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 Natural Res. Def. Council v. EPA*, No. 10-1056, 2011 WL 2601560, at *8 (D.C. Cir. July 1, 2011) (vacating guidance that allowed states to propose alternatives to statutorily required fees for ozone non-attainment areas as legislative rule that required notice and comment). *Nat'l Mining Ass'n v. Jackson*, No. 10-1220 (RBW), 2011 U.S. Dist. LEXIS 3710, at *20-21 (D.D.C. Jan. 14, 2011) (finding challenge to EPA guidance and process memoranda met criteria of final agency action because, among other things, they "'reflect[] an obvious change' … in the permitting regime set forth in Section 404 of the Clean Water Act and in the regulations implementing that provision" and were binding and being implemented); *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d. 1272, 1283-84 (S.D. Fla. 2010) (striking Corps

guidance purporting to amend the prior converted croplands exclusion because it amounted to new legislative and substantive rules that created a binding norm and the Corps failed to comply with the APA).

The idea that the Draft Guidance is "not binding and lacks the force of law" as the Agencies claim is simply not true. Draft Guidance at 1. The same statement was made with respect to *Rapanos* guidance. Yet, it was accompanied by a detailed form for implementing that guidance and was imposed on applicants and strictly adhered to by Corps Districts. There is no reason to expect that this latest guidance will be implemented any differently. The Agencies issue more than 100,000 jurisdictional determinations in an average year and, in 2010, the Corps reviewed more than 62,000 individual and general permit applications and granted 57,000 permits.[13] Once the Draft Guidance is finalized, field staff will apply the guidance and the principles it establishes. Because the guidance expressly supersedes previous guidance documents issued in 2003 and 2008, Draft Guidance at 1, field staff will effectively be precluded from invoking them. Therefore, there can be no question that the guidance will be binding upon landowners, regulators, and permit applicants alike.

The case law thus establishes that 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 a rule under the guise of reinterpreting it." *Molycorp, Inc. v. U.S.*

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[13] Statement of Margaret Gaffney-Smith, Chief, Regulatory Program, U.S. Army Corps of Eng'rs, Dep't of the Army, Before the Subcomm. on Regulatory Affairs, Stimulus Oversight and Gov't Spending of the Comm. on Oversight and Gov't Reform., U.S. House of Representatives (July 14, 2011), http://democrats.oversight.house.gov/images/stories/SUBCOS/714%20coal/Gaffney-Smith%20Testimony.pdf; Corps Regulatory Program Data FY 2003 to FY 2010, attached hereto as Exhibit 4.

EPA, 197 F.3d 543, 546 (D.C. Cir. 1999). *See also Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("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.").

Here, despite the Agencies' repeated assertions that the Draft Guidance is nothing but "guidance," it amounts to a modification of the Corps's and EPA's existing regulations, which cannot be undertaken without undergoing formal notice and comment rulemaking. For example, the Agencies effectively engage in rulemaking by amending the meaning of the regulatory definition of "waters of the United States." 33 C.F.R. § 328.3(a)(5). Because this new definition will have a substantial, binding impact on the Agencies and the public, it should be defined through rulemaking -- not guidance. The Agencies also claim that the Draft Guidance will apply to all programs, including the CWA section 311 oil spill program. In *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165 (D.D.C. 2008), the court ruled that EPA's proposed new definition of "navigable waters" of the United States for the oil spill program was invalid because the Agency failed to comply with the APA. The court vacated EPA's new definition and directed the Agency to reinstate the 1973 definition of "navigable waters" of the United States. Accordingly, EPA cannot use this guidance to modify the 1973 definition of "navigable waters" of the United States without going through a rulemaking.

Moreover, the Draft Guidance simply does not meet the definition of guidance. An agency pronouncement is guidance when it "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 Draft Guidance does more than fill in the details of pre-existing regulations. It prescribes specific tests for establishing

jurisdiction in great detail, and, as explained further in these comments, it effectively revises those regulations. The public and Agency staff will now have to revisit the regulations that have, for many years, defined the scope of the Agencies' regulatory activities in light of the Draft Guidance.

Finally, administrative agencies, like EPA and the Corps, are always obligated to assure themselves of their own jurisdiction *before* issuing rules founded on that jurisdiction. Jurisdiction, after all, is the *sine qua non* of agency action. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act... unless and until Congress confers power upon it"). And the Agencies must support their action by "reasoned decisionmaking." *See Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43, 52 (1983) (agency action found to be arbitrary and capricious for failure to articulate a satisfactory explanation for its action including a "'rational connection between the facts found and the choice made'") (quoting *Burlington Truck Lines, Inc.* v. *United States,* 371 U. S. 156, 168 (1962)). The Draft Guidance fails to explain the bases for the Agencies' purported jurisdiction and fails to articulate a connection between "'the facts found and the choice made.'" *Id.* For example, as discussed further herein, the Agencies have not articulated their rationale for calling proximate other waters jurisdictional and concluding that tributaries that have some flow have a significant nexus. This Draft Guidance also applies broadly to all CWA programs, not just section 404, like earlier guidance. And the Agencies have failed to explain the implications of the Draft Guidance on those other programs. An agency must cogently explain why it has exercised its discretion in a given manner, *see, e.g., Atchison, T. & S. F. Ry. Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800, 806 (1973); *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 249 (1972); *NLRB* v. *Metro. Life Ins. Co.,* 380 U.S. 438, 443 (1965). The Draft Guidance does not even begin to meet this standard.

Therefore, it is the Coalition's position and recommendation that the Draft Guidance not be finalized.

B. The Agencies' Pledge to Promulgate a Rulemaking at Some Later, Undefined Date is Cold Comfort.

For over two decades, the Agencies have ignored court precedent and their own promises to correct jurisdictional deficiencies and uncertainties in their regulations. In 1988, the U.S. District Court for the Eastern District of Virginia held that the Migratory Bird Rule was illegally promulgated without notice and comment and therefore could not be used to establish jurisdiction over isolated waters and wetlands.[14] In response to the district court's ruling, the Department of the Army and EPA issued a joint guidance memorandum on January 24, 1990, "provid[ing] direction on the continued assertion of jurisdiction over isolated waters. . . in the wake of the *Tabb Lakes* decision."[15] The guidance memo states that "[t]he United States does not intend to appeal the Fourth Circuit's *Tabb Lakes* decision. Instead, the EPA and the Corps intend to undertake *as soon as possible* an APA rulemaking process regarding jurisdiction over isolated waters."[16]

In furtherance of this objective, on April 23, 1990, EPA included on its semiannual regulatory agenda its intent to promulgate a rulemaking to revise the definition of "waters of the United States" by October 1990.[17] EPA did not meet that deadline. But from 1990 through May 2003, EPA included its intent to revise the definition of "waters of the United States" on every

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[14] *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

[15] Memorandum from John Elmore, Department of the Army, Directorate of Civil Works, and David Davis, EPA, Office of Wetlands Protection, re: Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*, at 1 (Jan. 24, 1990), Exhibit 5.

[16] *Id.* at 2 (emphasis added).

[17] 55 Fed. Reg. 16,818, 16,845 (Apr. 23, 1990).

semiannual regulatory agenda.[18] Yet, in November 2003, after receiving "133,000 comments [on the ANPRM] with widely differing views on the need for a new regulation and the scope of Clean Water Act jurisdiction,"[19] the Agencies decided instead to abandon these efforts and considered the matter "completed" and "withdrawn."[20]

In 1997, the Fourth Circuit considered another case addressing the Corps' authority over "isolated waters." In *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), defendants appealed a conviction of felony violations of the CWA for discharging fill and excavated material into wetlands of the United States without a permit. Defendants challenged, among other things, the validity of federal regulations that regulated activities that "could affect" interstate commerce. The Fourth Circuit invalidated 33 C.F.R. § 328.3(a)(3), even before *SWANCC*, on the ground that the regulation of activities that "could affect" interstate commerce exceeded the Corps' statutory authorization.[21]

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[18] *Id.*; 55 Fed. Reg. 45,134, 45,162 (Oct. 29, 1990); 56 Fed. Reg. 17,980, 18,008 (Apr. 22, 1991); 56 Fed. Reg. 54,012, 54,042 (Oct. 21, 1991); 57 Fed. 17,378, 17,407 (Apr. 27, 1992); 57 Fed. Reg. 52,024, 52,055 (Nov. 3, 1992); 58 Fed. Reg. 24,996, 25,028 (Apr. 26, 1993); 58 Fed. Reg. 56,998, 57,030 (Oct. 25, 1993); 59 Fed. Reg. 21,042, 21,079 (Apr. 25, 1994); 59 Fed. Reg. 58,200, 58,237 (Nov. 14, 1994); 60 Fed. Reg. 23,928, 23,965 (May 8, 1995); 60 Fed. Reg. 60,604, 60,645 (Nov. 28, 1995); 61 Fed. Reg. 23,610, 23,651 (May 13, 1996); 61 Fed. Reg. 63,122, 63,168 (Nov. 29, 1996);62 Fed. Reg. 22,296, 22,345 (Apr. 25, 1997); 62 Fed. Reg. 58,080, 58,126 (Oct. 29, 1997); 63 Fed. Reg. 22,602, 22,734 (Apr. 27, 1998); 63 Fed. Reg. 62,348, 62,463 (Nov. 9, 1998); 64 Fed. Reg. 21,898, 22,037 (Apr. 26, 1999); 64 Fed. Reg. 65,010, 65,141 (Nov. 22, 1999); 65 Fed. Reg. 23,430, 23,574 (Apr. 24, 2000); 65 Fed. Reg. 74,478, 74,612 (Nov. 30, 2000); 66 Fed. Reg. 26,120, 26,258 (May 14, 2001); 66 Fed. Reg. 62,240, 62,384 (Dec. 3, 2001); 67 Fed. Reg. 33,724, 33,864 (May 13, 2002); 67 Fed. Reg. 74,051, 74,215 (Dec. 9, 2002) and 67 Fed. Reg. 75,168, 75,299 (Dec. 9, 2002); 68 Fed. Reg. 30,942, 31,101 (May 27, 2003).

[19] U.S. General Accounting Office, GAO-04-297, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION, at 10 (Feb. 2004), *available at* http://www.gao.gov/new.items/d04297.pdf.

[20] 68 Fed. Reg. 73,540, 73,686 (Dec. 22, 2003).

[21] *Wilson*, 133 F.3d at 257.

Following the decision in *Wilson*, EPA and the Corps issued another joint document to provide guidance on the regulations concerning jurisdiction over "isolated waters." *See* EPA & Corps, "Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *United States v. James J. Wilson*" (May 29, 1998) ("*Wilson* guidance") (attached hereto as Exhibit 6). Once again, the Agencies emphasized in the *Wilson* guidance that "[i]n the near future, EPA and the Corps intend to promulgate a rule addressing the jurisdictional issues discussed in this guidance, with full opportunity for public review and comment."[22]

Following the *SWANCC* decision, the Agencies reiterated the need for a rulemaking. On September 19, 2002, the Corps and EPA, in joint testimony before the United States House of Representatives Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs of the Committee on Government Reform, announced that in light of *SWANCC*, the agencies would conduct a rulemaking to define the "federal role under the Clean Water Act."[23]

And, most recently, 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 potentially avoided "another defeat" if they had completed the rulemaking they began following *SWANCC*. *Rapanos*, 547 U.S. at 758 (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.").

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[22] *Id.* at 7.

[23] *See* Complete Statement of Dominic Izzo, Former Principal Deputy Assistant Sec'y of the Army for Civil Works, Dep't of the Army & Robert E. Fabricant, Former Gen. Counsel, EPA, Before the Subcomm. on Energy Policy, Natural Res. & Regulatory Affairs of the Comm. on Gov't Reform, U.S. House of Representatives, at 1 (Sep. 19, 2002), http://www.epa.gov/ocir/hearings/testimony/107_2001_2002/2002_0919_ref.pdf.

Justice Breyer was even more direct, calling on the Corps "to write new regulations, and speedily so." *Id.* at 812 (Breyer, J., dissenting). And Justice Kennedy's admonition that, "[a]bsent more specific regulations," significant nexus must be determined "case-by-case," *id*. at 782, casts doubt on some of the categorical positions the Draft Guidance adopts. Thus, the overall message from the Court is unmistakable – the Agencies must engage in rulemaking to define their jurisdictional authority.

But rather than follow this instruction, the Agencies issued yet more guidance.[24] Until a comprehensive set of rules regarding which water bodies the Agencies will regulate as waters of the United States is promulgated, the public and Agency field staff will be beleaguered by partial answers, confusing standards, and *ad hoc*, overbroad, and arbitrary decisions pertaining to the scope of federal CWA jurisdiction.

C. Policy Reasons Support Conducting a Rulemaking Rather than Adopting Final Guidance.

The Agencies plan to receive and "tak[e] account of public comments" before finalizing the Draft Guidance and then quickly undertaking a rulemaking. Draft Guidance at 1. But this two-step procedure makes little sense when one of those steps is sufficient. Why invest the time and resources in a finalizing yet more guidance only to turn around and "quickly" engage in a rulemaking? Instead, the Agencies should abandon the Draft Guidance.

Regulations, in contrast to guidance, could provide clarity and consistency for both the Agencies' staff and the public. Guidance can be changed at a whim and from administration to

[24] U.S. EPA & Dep't of the Army, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," (June 5, 2007, revised Dec. 2, 2008) ("Rapanos Guidance"), http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm; 72 Fed. Reg. 31,824 (June 8, 2007); U.S. EPA, U.S. Army Corps of Eng'rs & Dep't of the Army, "Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States,' Appendix A, Joint Memorandum," 68 Fed. Reg. at 1995 ("WOTUS Guidance").

administration. Carefully focused and well founded rulemaking, on the other hand, will advance the public interest by setting clear and consistent regulatory standards that promote compliance with the law, inform the public about the rules by which they must live, and provide guidance to field regulators who must apply these complex regulations to hundreds of thousands of projects every year.

Rulemaking requires agencies to provide a statement of basis and purpose and the data that support the decisions the agencies have reached. *Burlington Truck Lines*, 371 U.S. at 168 (the APA requires findings and analysis to support the agency's choice and an indication of the bases upon which the agency relied in exercising its discretion); *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 430 (D.C. Cir. 1980) (the APA requires adequate proof to support an agency decision). The Agencies are, furthermore, required to articulate a connection between those facts and the conclusions they have reached to the public. *Burlington Truck* Lines, 371 U.S. at 168. Here, for example, the Agencies have determined that all tributaries or all other waters are "similarly situated" and, through the Draft Guidance, the Agencies have created a category of "closely proximate" other waters. But, the Agencies have not provided any data to support those decisions or a rationale connecting the facts found with the decisions made. Therefore, the public has no means by which to evaluate the conclusions the Agencies have drawn.

Further, an important element of rulemaking is what follows after the Agencies receive and review comments from the public. Consideration of those comments provides the Agencies with the benefit of stakeholders' experience and expertise and a thorough understanding of the practical implications of alternative policy choices. This process is designed to produce the best, and most reasoned, final decision. When the Agencies provide their required response to the submitted comments, the Agencies have the opportunity to revise the final rule in accordance

with the comments and to send a clear and consistent message about what the final rule does. Currently, the Agencies have been participating in one-on-one meetings with various stakeholders, including members of the Coalition. Through these meetings, the Coalition's members have received informal comments from the Agencies about their intent and rationale for the Draft Guidance, and what certain provisions may or may not mean in practice. This type of ad hoc communication only creates confusion and inconsistent messaging. Rulemaking, on the other hand, explains agency decisionmaking in a systematic way that is more transparent.

Finally, rules are subject to judicial review and thus protect against agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A reviewing court will scrutinize the record developed by the Agencies to determine whether they acted within their lawful discretion and reached appropriate decisions based on the relevant evidence. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). Absence of sufficient and formal findings will result in a remand to the agency, *id.* at 417, which will only delay implementation.

In sum, the Draft Guidance is more than mere guidance. It binds the Agencies into treating certain waters as "waters of the United States." Accordingly, the Coalition requests 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 set aside this latest iteration of guidance on the subject.

III. The Draft Guidance Runs Afoul of Other Mandatory Statutory and Regulatory Requirements.

In addition to the APA's requirements, there are a number of other statutory and regulatory requirements, including Executive Orders, that the Agencies must follow when defining their regulatory authority under the CWA. *See Farkas v. Tex. Instrument, Inc.*, 375 F.2d

629, 632 n.1 (5th Cir. 1967) (Executive Orders issued pursuant to statutory authority have the force and effect of law). While the Coalition sets forth several of those requirements here, for illustrative purposes, there are undoubtedly others that equally apply and also require appropriate compliance.

First, the Draft Guidance should have been adopted in compliance with the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-612. The RFA was developed in recognition of the economic importance of small businesses, and it attempts to ensure that regulations be promulgated with these entities in mind. Thus, the RFA requires agencies to analyze the impact a rule may have on small business, and, if that impact is substantial, the agency must seek a less burdensome alternative. *Id.* § 604 (a)(4). Agencies must publish initial and final regulatory flexibility analyses, with time for notice and comments. The final regulatory flexibility analysis must contain a statement of the need for, and objectives of, the rule; a summary of the significant issues raised in public comments, the agency assessment of such issues, and a statement of any changes made in the proposed rule as a result of such comments; an estimate of the number of small entities to which the rule will apply; a description of compliance requirements of the rule; and a description of the steps the agency has taken to minimize the significant economic impact on small entities. *Id.* § 604(a).

Second, the Agencies must ensure that any final guidance complies with Executive Order No. 12,866 of September 30, 1993, titled "Regulatory Planning and Review" ("E.O. 12,866"). 58 Fed,. Reg. 51,735 (Oct. 4, 1993). Pursuant to E.O. 12,866, each agency "shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies." *Id*. § 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. *Id.* § 1(b)(11). Lastly, E.O. 12,866 requires that the public be provided "meaningful participation" in the regulatory process. *Id.* § 6(a)(1). Where appropriate, agencies must seek involvement of those who will either benefit or be burdened by the proposed regulation. *Id.*

Third, Executive Order 13,132 of August 4, 1999, titled "Federalism" ("E.O. 13,132"), establishes requirements for policies that have "federalism implications," defined as agency regulations or other policy statements or actions with substantial direct effects on the states, their relationship with the national government, or the distribution of power and responsibilities among the levels of government. 64 Fed. Reg. 43,255 (Aug. 10, 1999), § 1(a). The purpose of E.O. 13,132 is to ensure that, in formulating and implementing policies with federalism implications, agencies are guided by certain fundamental principles. For example, the federal government must be deferential to states when taking action affecting the state's policymaking discretion and must carefully assess the need for action limiting state discretion and limit state discretion only where national activity is appropriate in light of a problem of national significance. With respect to federal statutes and regulations administered by states, states are to be granted the maximum administrative discretion possible and encouraged to develop state policies to achieve program objectives. Finally, the federal government must consult with state and local officials regarding the need for national standards. *Id.* §§ 2-3. Accordingly, agencies may not promulgate a regulation that has federalism implications, imposes substantial direct compliance costs on state and local governments, and is not required by statute unless the federal government provides funds necessary to pay the direct costs of complying with the regulation or the agency, before formally promulgating the regulation, consults with state and local officials

early in the development of the proposed regulation and conveys their concerns and steps taken to address them to the Office of Management and Budget ("OMB") and the public. *Id*. § 6(b).

In addition, E.O. 13,132 requires agencies to: (1) provide a federalism summary impact statement in the preamble to the regulation that summarizes the extent of the agency's consultation with state and local officials, the nature of state and local concerns and the agency's position supporting the need to issue the regulation, and the extent to which state and local concerns have been met, *id*. §§ 6(b)(2)(B), 6(c)(2); and (2) provide any written communications submitted to the agency by state and local officials to the Director of the OMB, *id*. §§ 6(b)(2)(C), 6(c)(3). As explained later in greater detail, the substantial increase in federal jurisdiction effected by this Draft Guidance has profound federalism implications that should be considered carefully by the Agencies.

Finally, the Draft Guidance fails to comply with the letter and the intent of the Paperwork Reduction Act ("PRA"). 44 U.S.C. §§ 3501-3521. The PRA was enacted "to reduce and minimize the burden Government paperwork imposes on the public." *United States v. Smith*, 866 F.2d 1092, 1094 (9th Cir. 1989) (quoting S. REP. NO. 930, 96th Cong., 2d Sess. 2 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6241, 6242). Thus, the PRA mandates that an agency shall obtain approval from the Director of OMB ("Director") before conducting a "collection of information."[25] 44 U.S.C. § 3507(a)(2). The 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

[25] 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." 44 U.S.C. § 3502(3)(A)(i).

of information," regardless of whether the collection is contained in a proposed rule or another format. 44 U.S.C. §§ 3507(a)(3), (c). 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; 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(c)(2). 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*. § 3506(c)(3).

Implementation of the Draft Guidance, which applies broadly to all CWA programs, not just CWA section 404 like previous guidance, will cause a substantial increase in the number of jurisdictional determinations and permits sought. The process of obtaining a jurisdictional determination or permit requires the compilation of a substantial amount of information. The Draft Guidance does not contain an OMB control number signifying OMB approved of the additional paperwork burden being imposed on the public. Moreover, the Agencies did not

provide a certification and supporting record demonstrating that the collection of information reduced to the extent practicable the burden on the persons supplying the information.

In sum, there are a number of regulatory and statutory requirements, in addition to the rulemaking requirements of the APA, that must be followed when revising the Agencies' CWA regulations. This Administration has committed itself to public participation and transparency. *See, e.g.,* Memorandum by President Barack Obama on Transparency and Open Government to the Heads of Executive Departments and Agencies (Jan. 21, 2009), http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/ (encouraging public, state, and local participation in the creation of policy; and instructing agencies to take steps to ensure that the government is transparent, participatory, and collaborative). Therefore, it is of critical importance that issues, such as this one, that implicate the nation's economy and have broad application are addressed in compliance with the APA and other applicable regulatory and statutory requirements.

IV. The Draft Guidance Misconstrues Supreme Court Cases, Is Inconsistent with the Agencies' Regulations, and Expands Jurisdiction.

Throughout the Draft Guidance, the Agencies misconstrue and reinterpret the *Rapanos* plurality and concurring opinions to support their new, expansive definition of "waters of the United States." The Coalition believes that the Agencies go too far in their attempt to broaden CWA jurisdiction by proposing to adopt as guidance new definitions and jurisdictional standards for the various types of water bodies that conflict with the Agencies' own regulatory definitions and are inconsistent with the Supreme Court decisions on which they are purportedly based.

A. Traditional Navigable Waters

Whether a water body is a "traditional navigable water" ("TNW") is of fundamental importance after *Rapanos* because both the plurality and Kennedy opinions premise jurisdiction

over non-navigable waters on the non-navigable water's relationship to TNWs.[26] Instead of acknowledging that TNWs are the waters that were recognized as such by both the plurality and Justice Kennedy in *Rapanos* and that have, for generations, been consistently identified as such under the RHA, the Agencies have developed a new definition in the Draft Guidance that applies to a far broader category of waters.

In *Rapanos*, both the plurality and Justice Kennedy base their jurisdictional tests on what they referred to, respectively, as "traditional interstate navigable waters" and "navigable waters in the traditional sense." *Rapanos*, 547 U.S. at 742 (Scalia, J., plurality); *id.* at 779 (Kennedy, J., concurring). The plurality held that establishing that a wetland is covered by the CWA requires a 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 742. Similarly, Justice Kennedy 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 789.

Although the plurality and Justice Kennedy express the concept of TNWs in slightly varying formulations (*i.e.*, "traditional interstate navigable waters" and "navigable waters in the traditional sense," respectively) the waters to which they are referring are unmistakably clear from the cases they cite to describe them— *The Daniel Ball* and *Appalachian Elec. Power Co*. *See id.* at 723, 734 (Scalia, J., plurality) (citing *The Daniel Ball v. United States*, 77 U.S. 557, 563 (1870) and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406-09 (1940)); *see also id.* at 760-61 (Kennedy, J.) (same). These cases are cornerstones in a series of well-

[26] In addition to being subject to regulation under the CWA, TNWs are the waters that today are subject to regulation under the Rivers and Harbors Act of 1899 ("RHA"). Of course, the CWA is 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 regulation under the CWA.

established, well-recognized cases that define TNWs as 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. *See The Daniel Ball*, 77 U.S. at 563 (interpreting "navigable waters" to mean waters "which are navigable in fact" and explaining that 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").

It is well accepted that Congress adopted *The Daniel Ball*'s definition of "navigable water of the United States" in the RHA. *See Hardy Salt Co. v. S. Pac. Transp. Co.*, 501 F.2d 1156, 1168 (10th Cir. 1974); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 622 (8th Cir. 1979). 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); *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 121-22 (1921) (same); *Appalachian Elec. Power Co.*, 311 U.S. at 406-07 (same). More recent decisions have confirmed the two-part definition of navigable waters, as understood pursuant to *The Daniel Ball* and RHA case law, such as *Appalachian Elec. Power Co*. *See Minnehaha Creek Watershed Dist.*, 597 F.2d at 622-23; *Hardy Salt Co.*, 501 F.2d at 1169.

Accordingly, when the plurality and Justice Kennedy referred to "traditional interstate navigable waters" and "navigable waters in the traditional sense" and cited *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. However, as explained below, the Agencies' definition of TNW in the Draft Guidance is inconsistent with this body of law and, therefore, inconsistent with the plurality and Kennedy opinions in *Rapanos*.

1. The Agencies' Definition of "Traditional Navigable Waters" Is Inconsistent with the RHA Definition Cited by the Plurality and Justice Kennedy in *Rapanos*.

The Agencies have defined TNW in the Draft Guidance as:

> [a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign 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); 40 C.F.R. § 122.2 ("waters of the U.S." (a)); 40 C.F.R. § 110.1 ("navigable waters" (a)) . . . The traditional navigable waters include all of the "navigable waters of the United States," as 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 (for example, the Great Salt Lake, Utah, and Lake Minnetonka, Minnesota). Thus, the traditional navigable waters include, *but are not limited to*, the "navigable waters of the United States" within the meaning of section 10 of the Rivers and Harbors Act of 1899 . . . .

Draft Guidance at 6 (emphasis in original). Thus, under the Draft Guidance, the Agencies will consider a water body to be a TNW if it meets *any* of the following criteria:

- The water body is subject to section 9 or 10 of the RHA;
- A federal court has determined that the water body is navigable-in-fact under federal law;
- The water body is currently being used for commercial navigation, including "commercial waterborne recreation" (*e.g.*, boat rentals, guided fishing trips, water ski tournaments);
- The water body has historically been used for commercial navigation, including commercial waterborne recreation; or
- The water body is susceptible to being used in the future for commercial navigation, including commercial waterborne recreation.

Id. The Agencies' new definition broadly expands the concept of TNWs and is inconsistent with the definition in *The Daniel Ball* and *Appalachian Elec. Power Co.* relied on by the plurality and Justice Kennedy.

First, by conflating their regulatory definition of 33 C.F.R. § 328.3(a)(1) waters and the new definition of TNW, 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 the Agencies' TNW definition (and 33 C.F.R. § 328.3(a)(1)) use terms similar to the second prong of the classic TNW 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 expansion, 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, the Draft Guidance notes that "traditional navigable waters include, *but are not limited to*, the 'navigable waters of the United States' within the meaning of section 10 of the Rivers and Harbors Act of 1899." Draft Guidance at 6 (emphasis in original). It is clear that the Agencies believe that the concept of TNWs expands beyond the "navigable waters of the United States" under the RHA. But the definition of TNWs relied on by the plurality and concurring opinions in *Rapanos* was based on *The Daniel Ball* and subsequent RHA case law. And the Agencies have not provided any support for their expanded definition or explained how TNWs and "navigable waters" under the RHA are different.

2. The Agencies Rely on Two Inapposite Cases to Support Their Novel Evidentiary Standard for Demonstrating Susceptibility for Use for Commercial Navigation.

The Agencies explain that waters will be considered TNWs if "[t]hey are susceptible to being used in the future for commercial navigation" and that this can be demonstrated by "current boating trips or canoe trips for recreation or other purposes." Draft Guidance at 6. Thus, the Draft Guidance suggests that the Agencies intend to treat a water body as a TNW simply because a canoe or a kayak can float on it.[27] This is an impermissible expansion of the "navigable waters" definition under *The Daniel Ball* and subsequent case law interpreting the RHA, that was relied on by both the plurality and concurring opinions in *Rapanos*.[28]

In the Appendix to the Draft Guidance, the Agencies cite to two cases as support for the broadened definition of TNWs and claim that these cases provide specific examples of evidence that is sufficient to show a water is "susceptible to being used for commercial navigation such that it is a traditional navigable water": *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151 (D.C. Cir. 2002) and *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989). Draft Guidance at 23-

[27] This new single-recreational use standard for TNWs is substantially similar to the Agencies' regulatory definition of 33 C.F.R. § 328.3(a)(3) "other waters" ("(a)(3)" or "other waters"). In the Agencies' regulatory definition of "waters of the United States," the Agencies identify as jurisdictional "all other waters," which, among other things, "are or could be used by interstate or foreign travelers for recreational or other purposes." 33 C.F.R. § 328.3(a)(3)(i). The *SWANCC* Court questioned the Agencies' attempt to regulate (a)(3) other waters, which are isolated and of limited flow, based on tenuous impacts on commerce. *See SWANCC*, 531 U.S. at 173 (finding that the Corps' assertion of jurisdiction over isolated ponds was "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends"). Yet the Agencies now apply this same thin standard based on tenuous impacts to commerce to find that a water is a TNW.

[28] Even in the Agencies' 2008 *Rapanos* Guidance, the Agencies required a fairly substantial amount of evidence of regular usage to show susceptibility for future use for commercial navigation such that a water would be considered a TNW. The *Rapanos* Guidance noted that "[s]usceptibility to future commercial navigation, including commercial water-borne recreation, will not be supported when the evidence is insubstantial or speculative." *Rapanos* Guidance at 5 n.20. Under the *Rapanos* Guidance, a water body would not have been considered a TNW simply because a canoe or a kayak can float on it.

24. However, these two cases cited by the Agencies are inapposite because neither arises in the context of the CWA or the RHA and, therefore, they do not involve the "navigable water" standard that the plurality and Justice Kennedy both relied on in *Rapanos*. As the Supreme Court has explained, "any reliance upon judicial precedent" on the subject of navigability "must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) (emphasis in original). The United States recently made this point in its *Amicus Curiae* brief recommending the denial of a petition for *writ of certiorari* in *PPL Mont., LLC v. Montana*, stating that "the precise legal standard [for navigability] and its application vary depending on the purpose for which a specific determination is being made."[29] It is contradictory for the United States, on the one hand, to rely on the distinction between legal standards for navigability in the *PPL Mont.* brief, but, on the other hand, to rely on *FPL Energy Me. Hydro LLC* and *Ahtna, Inc.*, which do not examine "navigability" for CWA or RHA purposes, to support the Draft Guidance's definition of "traditional navigable waters" under the CWA.

In *FPL Energy Me. Hydro LLC*, the D.C. Circuit examined whether a stream was "navigable" under the Federal Power Act ("FPA") and found that there was sufficient evidence that the stream met the FPA's broad definition of "navigable waters" based on three experimental canoe trips and the stream's physical characteristics. 287 F.3d at 1160. The Agencies' reliance on this case as an example of evidence that is sufficient to show a water is a TNW is problematic for several reasons. First, the case does not address whether the stream was "navigable" under *The Daniel Ball* and RHA case law, but instead focuses on whether the stream met the FPA's broad statutory definition of "navigable waters." *See id.* at 1154. Unlike *The*

[29] Brief for the United States as *Amicus Curiae*, Petition for *Writ of Certiorari*, *PPL Mont., LLC v. Montana*, at 3 (U.S. May 20, 2011) (No. 10-218).

Daniel Ball and RHA standard, which requires that "navigable waters" be used or are susceptible to being used "as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water," *The Daniel Ball*, 77 U.S. at 563, to meet the broader FPA statutory definition of "navigable waters," waters must simply be "'used or suitable for use for the transportation of persons or property in interstate or foreign commerce.'" *FPL Energy Me. Hydro LLC*, 287 F.3d at 1154 (citing 16 U.S.C. § 796(8)). Second, *FPL Energy Me. Hydro LLC* does not arise in the context of the CWA and, thus, does not examine whether a water meets the CWA's definition of "navigable waters." Third, the Agencies use this case in the Draft Guidance to support the notion that "[a] trip taken solely for the purpose of demonstrating a waterbody can be navigated would be sufficient" to show that a water is susceptible to future commercial navigation and therefore can be considered a TNW. *See* Draft Guidance at 6 n.v. However, this overstates the holding of *FPL Energy Me. Hydro LLC*. The Court's decision in that case that the stream at issue was a "navigable water" was based in part on the stream's physical characteristics—depth, width, etc.—and the separate determination that because of the stream's physical characteristics, it could support commercial navigation. 287 F.3d at 1159. The stream at issue had certain "obstacles" (three sets of rapids or "rips," a bridge, and two islands), but the three canoe trips taken for the purpose of litigation "successfully crossed" the rapids and other obstacles. *Id.* at 1158. As such, the Court found that there was sufficient evidence that the stream satisfied the FPA's navigability test based on the physical characteristics of the stream (which demonstrated the stream's conduciveness to commercial navigation) and the three experimental canoe trips (which demonstrated that navigation of the stream was possible in spite of the stream's obstacles). *Id.* at 1159. Although the stream at issue satisfied the FPA's definition of "navigable water," it would not necessarily satisfy *The Daniel*

Ball and RHA standards. That a canoe can be successfully navigated downstream does not demonstrate that the stream is a "highway of commerce," or susceptible of becoming one. Therefore, contrary to the Agencies' suggestion, the *FPL Energy Me. Hydro LLC* decision does not stand for the proposition that a canoe trip taken solely for the purpose of demonstrating navigability is sufficient to show that a water is a TNW under the CWA.

The Agencies also claim that *Ahtna, Inc.* provides a specific example of evidence that is sufficient to show a water is "susceptible to being used for commercial navigation such that it is a traditional navigable water." Draft Guidance at 23-24. In that case, the Ninth Circuit examined whether a river was navigable such that title to the lands beneath the water would be vested in the State of Alaska under the Submerged Lands Act of 1953 and the "equal footing doctrine." *Ahtna, Inc.*, 891 F.2d at 1404. The court held that at the time of statehood, the river was susceptible to use as a highway for commerce and thus was "navigable" under the Submerged Lands Act based on the river's present commercial use by a fishing and sightseeing industry that employs approximately 400 people. *Id.* at 1405. However, in its decision, the Ninth Circuit provides no explanation or case law to support the notion that recreational use demonstrates that a water is susceptible for use as a "highway[] for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water" and thus meets *The Daniel Ball* test. As such, the case is of little use in explaining how this type of evidence of recreation could be sufficient to satisfy the definition of TNWs. The Agencies point to no cases under the RHA supporting the view that "recreational waterborne commerce" qualifies as an interconnected highway for transport in interstate commerce. Moreover, to the extent that federal law beyond the RHA is relevant, such law does not support the Agencies' interpretation of this Ninth Circuit case. *See, e.g.*, *United States v. Oregon*, 295 U.S. 1, 23

(1935) (finding that five bodies of water were not "navigable" for purposes of title action despite use by fur trappers, canoes, row boats and limited use by motor boats); *North Dakota v. United States*, 972 F.2d 235 (8th Cir. 1992) (finding that evidence of modern-day canoe use was not sufficient to show that the Little Missouri River was a "navigable water" at the time of North Dakota's statehood under the "equal footing doctrine"). As explained by the Fourth Circuit, although activity such as recreational boat use "might amount to commercial activity, which even may affect interstate commerce, the [water body] does not thereby become a waterway for commerce between the states." *See Alford v. Appalachian Power Co.*, 951 F.2d 30, 33 (4th Cir. 1991) (finding that Smith Mountain Lake was not a "navigable water" for purposes of admiralty jurisdiction despite use of the lake for dinner and sightseeing cruises and recreational boat use). Thus, federal law does not support a navigability determination based on recreational use of water.

Waters that do not meet the two-part definition of navigable waters, as understood pursuant to *The Daniel Ball* and RHA case law, may still be regulated under the CWA. However, such non-TNWs cannot be labeled TNWs as the term was used by the plurality and Justice Kennedy. The plurality and Justice Kennedy make it clear that the Agencies' regulation of non-TNWs under the CWA is based on the relationship 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. *See Rapanos*, 547 U.S. at 734 (Scalia, J., plurality opinion); *id.* at 760-61 (Kennedy, J.). Thus, the Agencies' definition of TNWs should be limited to the traditional scope as defined in *The Daniel Ball* and subsequent RHA case law and cannot base a TNW determination on recreational use.

B. Interstate Waters

The Agencies' regulations list interstate waters as jurisdictional. 33 C.F.R. § 328.3(a)(2) (defining "waters of the United States" to include "[a]ll interstate waters including interstate wetlands"). Neither the regulations nor the statute specifically define "interstate waters." The Draft Guidance, however, attempts to do so by importing the definition of interstate waters from the federal water pollution control statutes enacted prior to the CWA. Draft Guidance at 7. The Draft Guidance defines interstate waters as "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries," and says that these waters do not need to be navigable. *Id.* The Agencies assert that this early and potentially out-dated definition will now determine what constitutes an interstate water subject to the Agencies' jurisdiction as a "water of the United States." *Id.*; U.S. EPA, WOUS Interstate Waters Attachment, *Interstate Waters are "Waters of the United States" Under Section (a)(2) of the Agencies' Regulations*, at 1 (undated) ("Interstate Waters Attach."), http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm.

The Draft Guidance accords new status to interstate waters, equating them, for the first, time, with TNWs. Guidance at 7. Under the Draft Guidance, interstate waters are per se jurisdictional and do not have to have a significant nexus to TNWs.[30] *Id.* Moreover, because interstate waters are equated to TNWs, waters or wetlands may be deemed jurisdictional because of their relationship to interstate waters -- meaning that waters with a significant nexus to interstate waters will be deemed jurisdictional, as will wetlands adjacent to interstate waters. In addition, waters that provide flow to interstate waters will be deemed jurisdictional tributaries under the Draft Guidance's new approach. *Id.*

[30] There is no evidence to support the Agencies' position that a significant nexus to TNWs is not required to assert jurisdiction over interstate waters. Interstate waters, like all other waters, should be subject to the significant nexus standard.

The Interstate Waters Attachment to the Draft Guidance does not provide any explanation why interstate waters are now deemed to be the equivalent of TNWs. And, in fact, there is no rational explanation. For example, Exhibit 7 shows the Little Colorado River watershed indicating many streams and tributaries of varying sizes and flows. Some of the minor streams shown in this Exhibit happen to cross the border between Arizona and New Mexico. Under the Draft Guidance, these tiny features will be considered interstate waters and will be equated to TNWs. These small features that happen to cross the border are a far cry from the Colorado River, the closest TNW,[31] yet the Draft Guidance treats them the same. To say that such minor non-navigable waters equate to traditional *navigable* waters is linguistically, logically, and legally indefensible. There is no support for the Agencies' new definition of interstate waters in *SWANCC, Rapanos,* or *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), because those decisions did not concern interstate waters -- they dealt solely with TNWs. To be clear, neither Justice Kennedy nor Justice Scalia even discussed interstate waters in *Rapanos*. And, interstate waters differ from TNWs because they can be non-navigable or may not qualify as highways for commerce. *See infra* Section IV.A.1. Therefore, it simply makes no sense to equate the two and accord them the same treatment. Further, the significant nexus principles that originated in *SWANCC* and *Rapanos* are tied to TNWs -- not interstate waters. Therefore, the case law offers no support for the position the Agencies have articulated with respect to interstate waters.

[31] *See* U.S. Army Corps of Engineers, Los Angeles District, Regulatory Division, "Jurisdictional Determinations; Traditional Navigable Waters (TNW) Decisions," http://www.spl.usace.army.mil/regulatory/.

In sum, the Agencies have failed to articulate any reason to justify the status they have now accorded to interstate waters. It is not defensible under the CWA, the case law, or common sense.

C. Significant Nexus Analysis

1. Origins of the Significant Nexus Standard

a. *SWANCC*

The Supreme Court first addressed the proper interpretation of "waters of the United States" in *Riverside Bayview*, where the Court upheld the Corps' interpretation of "waters of the United States" to include wetlands that actually abutted a traditional navigable waterway. 474 U.S. at 135. Following *Riverside Bayview*, the Corps adopted increasingly broad interpretations of its own regulations under the CWA, such as the Migratory Bird Rule, which purported to extend its jurisdiction to any intrastate waters "[w]hich are or would be used as habitat" by migratory birds. *See SWANCC*, 531 U.S. at 163-64.

In *SWANCC*, the Supreme Court considered the Corps' use of the Migratory Bird Rule to assert jurisdiction over an abandoned sand and gravel pit in Northern Illinois. *Id.* at 162. In examining whether the isolated ponds could be considered "navigable waters" such that the Corps could assert CWA jurisdiction, the *SWANCC* Court explained that CWA section 404(a)'s use of the term "navigable waters" has the import of showing that Congress's understanding of its authority for enacting the CWA was its "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. As such, the Court found that the Corps's attempt to assert jurisdiction over isolated waters because they were used as habitat by migratory birds "[was] 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. The *SWANCC* Court explained that it was the "significant nexus" between the wetlands and the "navigable waters" to

which they abutted that informed its reading of the CWA in *Riverside Bayview* and that *Riverside Bayview* did not establish that the Corps' jurisdiction "extends to ponds that are *not* adjacent to open water." *Id.* at 167-68 (emphasis in original). Rather, the Court found that the Corps could not use the Migratory Bird Rule to assert jurisdiction over "nonnavigable, isolated, intrastate waters"—which, unlike the wetlands at issue in *Riverside Bayview*, did not actually abut a navigable waterway—as "waters of the United States." *Id.* at 168, 171. Thus, the *SWANCC* Court held that the Corps had exceeded its authority under the CWA in asserting jurisdiction over the isolated sand and gravel pit at issue through the Migratory Bird Rule. *Id.* at 174.

b. *Rapanos* Plurality Opinion

After *SWANCC*, in an attempt to side-step the *SWANCC* Court's limitations on CWA jurisdiction, the Agencies began to assert jurisdiction over any non-navigable water that had "any hydrological connection" to navigable waters. Essentially, the Agencies had figured out a way to limit substantially the ruling in *SWANCC*, because if a water had a hydrological connection, then it could not be considered "isolated," and therefore, *SWANCC* did not apply. This approach to jurisdiction was challenged in two consolidated cases, *Rapanos v. United States* and *Carabell v. United States*, in which the Court considered whether wetlands that were not adjacent to TNWs constituted "waters of the United States" under the CWA. *Rapanos*, 547 U.S. at 729. At issue in *Rapanos* were three wetland parcels (two "adjacent" to a drain, one "adjacent" to a river) located 11 to 20 miles away from the nearest navigable water. *Id.* at 720, 729. At issue in *Carabell* was a wetland located about a mile away from a navigable water. *Id.* at 730. The wetland was near a drainage ditch but separated from the drainage ditch by an intervening berm. *Id.* The government argued that the wetlands at issue in *Rapanos* and *Carabell* could be considered

"adjacent to" a remote TNW and therefore jurisdictional under the CWA, because of a mere hydrological connection between them. *Id.* at 740.

The *Rapanos* Court, in a four-Justice plurality opinion authored by Justice Scalia and a separate concurrence by Justice Kennedy, rejected the Corps' assertion of jurisdiction over the wetlands at issue in *Rapanos* and *Carabell* and rejected the notion 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 the Agencies' had expanded their CWA jurisdiction too far and that the Agencies' rationale did not support CWA jurisdiction over the wetlands at issue.

In examining the Corps' assertion of jurisdiction over wetlands that were not adjacent to TNWs, the *Rapanos* plurality explained that although the reach of the CWA is broader than just TNWs, it is not so broad as to read the word "navigable" out of the statute. *Id*. at 734. Against that background, the plurality set forth specific limiting principles for each type of water body. The plurality expressed outrage that the Corps had asserted such broad jurisdiction and noted that "the Corps has stretched the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction." *Id.* at 734.

c. *Rapanos* Kennedy Concurrence

Justice Kennedy concurred in the judgment and agreed that a mere hydrological connection between a wetland and a TNW is not sufficient to establish jurisdiction over the wetland. *See id*. at 784. Like the plurality, Justice Kennedy sought to limit the Agencies' CWA jurisdiction. Based on *Riverside Bayview* and *SWANCC*, Justice Kennedy established a significant nexus framework for determining whether a wetland may be deemed a "navigable

water" and thus whether the Agencies may assert jurisdiction under the Act. *See id.* at 767. Justice Kennedy explained:

> Taken together [*Riverside Bayview* and *SWANCC*] establish that in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking.

Id.

As a result of the reasoning in *Riverside Bayview* and *SWANCC*, Justice Kennedy held that wetlands possess the requisite nexus, and thus can be considered "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.'" *Id*. at 780. As an example of the opposite extreme, Justice Kennedy explained that "[w]hen, 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.*

Throughout the concurrence, Justice Kennedy uses remoteness and low quantity of flow as recurring indicia that a "significant nexus" with navigable waters is lacking. *See id.* at 781-82. For example, although he required a case-by-case significant nexus analysis absent regulations, Justice Kennedy explained that through regulation, the Corps "may choose to identify categories of tributaries that, *due to their volume of flow (either annually or on average), their proximity to navigable waters,* or other relevant considerations" will, in the majority of cases, have adjacent wetlands with a significant nexus to TNWs. *See id.* at 780-81 (emphasis added). In addition, he criticized the Corps' existing standard for tributaries, noting that the standard "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 toward it*," which precludes the standard's adoption as the determinative measure of jurisdiction. *Id.* at 781 (emphasis added). Justice Kennedy also used remoteness and quantity and regularity of flow as indicators in his application of the significant nexus test to the facts of *Rapanos* and *Carabell*. He explained that in *Rapanos*, "the record gives little indication of the *quantity and regularity of flow* in the adjacent tributaries—a consideration that may be important in assessing the nexus." *Id.* at 786 (emphasis added).

Justice Kennedy repeatedly cautions that waters that are "remote" and have "insubstantial," "speculative," or "minor flows" are insufficient to establish a significant nexus. He criticized the government's argument in *Rapanos*, stating that "[t]he Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, *however remote and insubstantial*—raises concerns that go beyond the holding of *Riverside Bayview* . . . ." *Id.* at 780 (emphasis added). In addition, he critiqued the dissent opinion:

> [T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, *however remote and insubstantial*, *that eventually may flow into traditional navigable waters*. The deference owed to the Corps' interpretation of the statute does not extend so far.

Id. at 778-79 (emphasis added). Throughout Justice Kennedy's opinion, he emphasizes proximity to TNWs and quantity and regularity of flow as critical factors in his significant nexus analysis.

Justice Kennedy recognized that the Agencies could use generic data in a rulemaking to establish categories of waters that are jurisdictional and, in fact, called for a rulemaking if the Agencies seek to identify general categories of tributaries that in the majority of instances have a significant nexus with adjacent wetlands based on quantity of flow, proximity to navigable waters, or other relevant considerations. *Id.* at 781. However, Justice Kennedy found that

"[a]bsent more specific regulations, . . . 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." *Id.* at 782. Because of the overbreadth of the Corps' regulations, Justice Kennedy found that a case-by-case determination is necessary to "avoid unreasonable applications of the statute." *Id.*

2. The Draft Guidance's Application of the Significant Nexus Standard

Under the Draft Guidance, the Agencies propose to apply Justice Kennedy's significant nexus test when determining jurisdiction over tributaries, adjacent wetlands, and "other waters." Draft Guidance at 8. According to the Draft Guidance, in evaluating the presence or absence of a significant nexus:

- The Agencies will consider waters to be "similarly situated" with waters of the same "resource type," specifically (a) tributaries; (b) adjacent wetlands; or (c) "proximate other waters."
- The Agencies will consider waters to be "in the region" if they fall within the same watershed, which is defined as all waters draining to a single point of entry to the TNW.
- The Agencies will consider waters to have a significant nexus if they alone or in combination with other similarly situated waters in the same watershed have an effect on the chemical, physical, or biological integrity of TNWs or interstate waters *that is more than "speculative or insubstantial."*

See id. (emphasis added). As explained below, the Draft Guidance's application of the significant nexus analysis is wholly inconsistent with Justice Kennedy's *Rapanos* concurrence and impermissibly expands the definition of "the waters of the United States."

3. The Agencies' Application of the Significant Nexus Standard Is Problematic for Many Reasons.

a. The Significant Nexus Standard Should Apply to Wetlands Only.

Justice Kennedy's significant nexus standard was only for wetlands and may not be extended to tributaries and other waters, whether physically proximate or not. As the Ninth Circuit explained in *San Francisco Baykeeper v. Cargill Salt Div.*, "*Rapanos*, like *Riverside*

Bayview, concerned the scope of the Corps' authority to regulate adjacent *wetlands*. . . No Justice, even in dictum, addressed the question whether all waterbodies with a significant nexus to navigable waters are covered by the Act." 481 F.3d 700, 707 (9th Cir. 2007).

Indeed, Justice Kennedy's concurrence explained that only wetlands with a significant nexus to TNWs are covered by the Act: "[*W*]*etlands* possess the requisite nexus . . . if the *wetlands*, either alone or in combination with similarly situated *lands* in the region, significantly affect the chemical, physical, and biological integrity of other covered waters . . ." *Rapanos*, 547 U.S. at 780 (emphasis added). Justice Kennedy noted that the *Riverside Bayview* Court upheld jurisdiction over wetlands directly abutting TNWs because "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water." *Id.* at 779. Thus, Justice Kennedy explained that "wetlands' status as 'integral parts of the aquatic environment'—that is, their significant nexus with navigable waters"—is what enables the Agencies to establish jurisdiction over them as waters of the United States. *Id.*

Justice Kennedy's rationale for the assertion of CWA jurisdiction over wetlands with a significant nexus to TNWs is applicable only for wetlands. Yet, the Draft Guidance applies the significant nexus standard beyond wetlands to tributaries, including ditches, non-wetland "physically proximate" other waters, and non-wetland "non-physically proximate" other waters. Draft Guidance at 8, 19. The Draft Guidance acknowledges that Justice Kennedy's significant nexus test and statements about similarly situated waters were focused only on adjacent wetlands. *Id*. at 26. But the Agencies claim that "it is reasonable to utilize the same analysis for tributaries and other waters such as ponds, lakes and non-adjacent wetlands that are not themselves directly connected to a tributary system but may still have a significant nexus to a

traditional navigable water or interstate water." *Id.* However, the Agencies do not explain why it is "reasonable" to extend the application of Justice Kennedy's significant nexus test to tributaries and non-wetland "other waters" that are not serving the same integral ecologic functions for those TNWs that wetlands are. Justice Kennedy instructed the Agencies to apply a case-by-case significant nexus analysis when they "seek[] to regulate wetlands based on adjacency to nonnavigable tributaries." *Rapanos*, 547 U.S. at 782. It is unreasonable for the Agencies to extend Justice Kennedy's significant nexus test to tributaries and "other waters" because it will lead to the Agencies' assertion of jurisdiction beyond what Justice Kennedy intended.

b. The Draft Guidance's Watershed Aggregation Approach Is Inconsistent with Justice Kennedy's Opinion which Requires Consideration of Proximity and Quantity and Regularity of Flow.

Under Justice Kennedy's significant nexus standard, wetlands come within the statutory phrase "navigable waters" if they "alone or in combination with similarly situated lands *in the region*" have a significant nexus to navigable waters. *Id*. at 780 (emphasis added). According to the Draft Guidance, the Agencies will consider waters to be "in the region" if they fall within the same watershed (*i.e.*, if they drain to the nearest traditional or interstate water through a single point of entry). Draft Guidance at 8. Therefore, to evaluate whether the water at issue has a significant nexus with TNWs or interstate waters, the Agencies intend to aggregate all "similarly situated" waters within the watershed as defined by the Draft Guidance and look at whether those "similarly situated" waters, taken together, have a significant nexus to the nearest TNW or interstate water. *Id.*

However, Justice Kennedy's reference to wetlands "in the region" should not equate to waters that "fall within the same watershed." Watersheds cover large distances—according to

the Draft Guidance, small Hydrologic Unit Code ("HUC")-10 watersheds are typically between 40,000 - 250,000 acres in size (*i.e.*, approximately 60-390 square miles), *id.,* HUC-8 watersheds average 450,000 acres in size, and HUC-6 watersheds average 6,780,000 acres in size. The Draft Guidance defines the watershed as the area draining into the nearest TNW or interstate water through a single point of entry. *Id.* Exhibit 8 of the Little Colorado River in Arizona illustrates this point. In Arizona, the Corps and EPA have designated only three rivers, or sections thereof, as TNWs: all of the Colorado River, two segments of the Gila River, and two segments of the Santa Cruz River.[32] In this Exhibit, the nearest TNW is the Colorado River and the watershed is defined as all of the water draining through the Little Colorado River and to the point of confluence of the Little Colorado River with the Colorado River; this watershed is depicted in pink. There is a wetland adjacent to the Little Colorado River at point A on this Exhibit, which is approximately 280 river miles from the point of entry to the Colorado River.[33] Yet under this Draft Guidance, point A will be viewed as lying in the same region as point B, which is approximately 270 river miles away, even though, as is evident from the aerial photographs of these two wetlands, they have very different relationships to the Colorado River and are located in very different landscapes.[34] As a result, the Agencies will make significant nexus determinations based on the aggregation of waters that are many miles apart from each other and have distinctly different relationships with the TNW and, therefore, are not in the same region.

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[32] *See* U.S. Army Corps of Engineers, Los Angeles District, Regulatory Division, "Jurisdictional Determination; Traditional Navigable Waters (TNW) Decisions," http://www.spl.usace.army.mil/regulatory/.

[33] *See* Multi-Resolution Land Characteristics Consortium, 2006 National Land Cover Dataset ("NLCD"), http://www.mrlc.gov/nlcd2006_downloads.php.

[34] The difference between these two wetlands is evidenced by the wide discrepancy in the two wetlands' elevation. The wetland at point A has an elevation of approximately 7,500 feet, while the wetland at point B has an elevation of about 3,100 feet.

Moreover, the watershed aggregation approach will lead to extremely broad assertions of jurisdiction over remote waters with insubstantial connections to TNWs, in contradiction of Justice Kennedy's opinion.[35] In his concurrence, Justice Kennedy rejected the Agencies' assertion of jurisdiction over non-navigable waters based on "any hydrological connection" to navigable waters. Furthermore, Justice Kennedy repeatedly cautioned that "remote," "insubstantial," "speculative," or "minor" flows are insufficient to establish a "significant nexus." *Rapanos*, 547 U.S. at 778-79 ("[T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far."). The Agencies recognized the importance of proximity to navigable waters and amount and regularity of flow in their *Rapanos* Guidance, explaining that "[p]rincipal considerations when evaluating significant nexus include the volume, duration, and frequency of flow of water in the tributary and the proximity of the tributary to navigable water."[36]

However, with its new watershed aggregation approach, the Draft Guidance makes distance and amount and regularity of flow of little or no consequence to the significant nexus determination.[37] For example, Exhibit 7 is a depiction of the same Little Colorado River

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[35] An EPA economic report, for example, assumes that 100 percent of the waters evaluated under the significant nexus test will be found to be jurisdictional. U.S. EPA, *Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction*, at 6 (Apr. 27, 2011) ("WOUS Economic Report"), http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm.

[36] *Rapanos* Guidance at 10.

[37] To give effect to the regularity of flow as an important factor in determining significant nexus for streams, for example, the Draft Guidance should, at a minimum, develop certain specific criteria tied to water-level gauging and the ability to support aquatic organisms for a specified minimum period of time.

watershed, indicating many of the tributaries that could potentially have adjacent wetlands. This watershed is over 17 million acres and is replete with drainages of varying sizes and flows. If, in determining the jurisdiction of the wetland at point A, all of the wetlands in this 17 million acre watershed are aggregated, then it is inevitable that the point A wetland will be considered jurisdictional even though it is hundreds of miles from the nearest TNW and may adjoin a drainage that flows only after a heavy rain. Such an aggregation principle completely supersedes any consideration of the wetland's remoteness or its adjacent drainage's irregularity of flow. Thus, the Draft Guidance's instruction to field officers to aggregate all "similarly situated" waters within a watershed to evaluate a water's significant nexus to TNWs and interstate waters expands the significant nexus analysis far beyond what Justice Kennedy intended[38] and allows for the same type of broad jurisdiction that Justice Kennedy rejected in *Rapanos*.

For example, the West is covered with dry washes, arroyos, seasonal waterbodies, and ephemeral streams.[39] These waters were historically outside federal CWA jurisdiction. Rarely can an industrial facility, such as a wind farm or solar facility, be constructed without affecting one or more of these ubiquitous features. These washes flow only rarely, and even more rarely in quantities that could affect other more permanent or significant waterbodies. Under the Draft

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[38] Justice Kennedy's own application of the significant nexus test in *Rapanos* and *Carabell* did not contain any aggregation of wetlands in the same watershed. He did not instruct the lower courts to determine jurisdiction over the wetlands at issue based on the aggregate impacts of all the wetlands surrounding the wetlands at issue (or even to consider other wetlands in the region). Rather, he instructed the lower courts to apply an individual significant nexus test and to examine the distance, quantity and regularity of flow for each wetland at issue. *See Rapanos*, 547 U.S. at 784-87.

[39] The unique hydrologic conditions of the West have been recognized by the Western Governors' Association, which acknowledges that "[t]he arid West includes a wide variety of waters; small ephemeral washes and large perennial rivers; effluent-dependent streams and wild, scenic rivers; as well as natural streams and lakes and man-made reservoirs and water conveyance structures." Western Governors' Association Policy Resolution 08-18, *Water Quality Issues in the West*, *available at* http://www.westgov.org/policies.

Guidance, however, these washes will all be aggregated together to establish a significant nexus. Applying the Draft Guidance's aggregation approach to jurisdiction makes little sense and appears at odds with Kennedy's significant nexus standard and his emphasis on proximity to TNWs and regularity of flow.

c. The Agencies Misconstrue Justice Kennedy's Use of "Similarly Situated" in the Significant Nexus Test.

Under Justice Kennedy's significant nexus test, "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.'" *Id.* at 780 (emphasis added). In the Draft Guidance, the Agencies state that waters of the same "resource type" are "similarly situated." Draft Guidance at 8. The Draft Guidance lists three possible resource types: tributaries, adjacent wetlands, and proximate other waters. *Id.* So, for example, if field staff categorize the water as a tributary, it will be considered to be "similarly situated" with all other waters in the watershed that are also categorized as tributaries. Then, in this example, the Draft Guidance would direct the field staff to aggregate the tributary they are evaluating with all other tributaries in the watershed to make a significant nexus determination. *Id.* at 9. In other words, field staff will determine if all tributaries in the watershed, taken together, have a significant nexus to a TNW or interstate water. The same is true for wetlands and "proximate other waters."

The Agencies' application of "similarly situated" is overbroad and inconsistent with Justice Kennedy's *Rapanos* concurrence. As discussed above, Justice Kennedy explained that "wetlands' status as 'integral parts of the aquatic environment'—that is, their significant nexus with navigable waters"—is what enables the Agencies to establish jurisdiction over them as

waters of the United States. *Rapanos*, 547 U.S. at 779. That is, the foundation for the significant nexus standard is the relationship between a TNW and an adjacent wetland. As such, the Agencies' assertion that all wetlands in a watershed are "similarly situated," regardless of where they are physically located in relation to a TNW, is inconsistent with Justice Kennedy's opinion. As discussed above, watersheds can encompass millions of acres and, therefore, using this standard will result in the Agencies aggregating wetlands that are many miles apart from each other and thus are not in fact "similarly situated" with respect to proximity to navigable waters and regularity of flow or duration of the function being performed. For example, in Exhibit 8, the wetland of point B is not "similarly situated" to the wetland at point A in any physical or ecological sense. Wetland B is fairly close to the Colorado River while wetland A is several hundreds of miles away, and their contributions to the Colorado River are not similar in any demonstrable way. Moreover, as depicted in the photos on this Exhibit, the wetlands themselves are quite different with the wetland at point B occupying a narrow strip next to the Little Colorado River in a steep canyon while the wetland at point A sits on a plateau surrounded by forest and is adjacent to a small drainage. Thus, the Draft Guidance's lumping together of all wetlands regardless of their proximity to a TNW or their ecology is completely arbitrary and is contrary to Justice Kennedy's opinion.

Similarly, the position that the Agencies take in the Draft Guidance that all tributaries in a watershed are "similarly situated" is overbroad. In the Draft Guidance, the Agencies give a broad definition of "tributaries," which includes a wide variety of features such as rivers, streams, lakes, and ditches that have different functions and characteristics. *See* Draft Guidance at 11. However, the Draft Guidance treats all of these different types of tributaries as "similarly situated" if they are located within the same watershed. A watershed could have miles and miles

of such tributaries and, as such, all of these tributaries within a watershed are not "similarly situated" with respect to TNWs. They differ in distance, quantity and regularity of flow. For example, the Agencies would consider an ephemeral headwaters stream to be similarly situated with a perennial stream in the same watershed.[40] But these two different types of tributaries are not "similarly situated" with respect to TNWs. An ephemeral stream will have a much lower quantity and regularity of flow and will likely be much more remote than a perennial stream.[41] As another example, the Agencies would consider a headwater stream to be "similarly situated" to a tributary emptying into a TNW. In Exhibit 8, for instance, the Agencies would treat the small stream near point A as similarly situated in the Little Colorado River near point B. But, again, these two different tributaries are hundreds of miles apart from each other with very different flow regimes and should hardly be considered "similarly situated" with respect to the TNW.

Likewise, all "other waters" are not "similarly situated" with respect to a TNW. Physically proximate "other waters" or "(a)(3) waters" can include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds . . ." Draft Guidance at 19 (citing 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3)). Under the Draft Guidance, all of these various types of

[40] In similar fashion, the Draft Guidance would consider a roadside ditch to be similarly situated to a perennial stream.

[41] EPA's position in this Draft Guidance appears to contradict its position in the recent Spruce Mine veto, where EPA asserted that there is an important distinction between perennial and intermittent streams. *See* Final Determination of the U.S. Environmental Protection Agency Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia, Appendix 6 at 130 (Jan. 13, 2011), http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/spruce.cfm (The classification of stream—perennial, intermittent, or ephemeral—"plays an important role in the types of expected aquatic communities, the degree in which each resource provides structure and function, and the amount of organic matter and nutrients (and contaminants) ultimately retained or loaded to receiving streams.").

"other waters" within a watershed will be considered "similarly situated" even though they differ in physical and ecological characteristics, remoteness from TNWs, and quantity and regularity of flow. For example, under the Draft Guidance, the Agencies would consider a lake to be "similarly situated" to a prairie pothole. But these two different types of features are not "similarly situated" with respect to TNWs. The lake is likely to have a much higher quantity of flow and far different physical and ecological characteristics than a prairie pothole. And, the Draft Guidance would consider a "slough" to be "similarly situated" with a playa lake, even though the duration of saturation and the physical and ecological characteristics of those features are quite different. The Agencies cannot equate all "other waters" as "similarly situated" because the features included in that category are so varied.

Under the Draft Guidance, the Agencies use an overbroad application of Justice Kennedy's "similarly situated" language to aggregate disparate features that may be located miles apart and have different flow regimes and physical and ecological characteristics in the significant nexus analysis. Moreover, the Agencies have failed to provide any scientific support for their application of the "similarly situated" concept. Under the standards set forth in the Draft Guidance, the Agencies will be able to assert jurisdiction over tributaries and other waters that may have minor or modest volume, duration, and frequency of flow and may be located a far distance from navigable waters by asserting, without evidence, that disparate features are "similarly situated." This broad assertion of jurisdiction is an impermissible expansion of Justice Kennedy's significant nexus standard.

d. The Agencies Have Misinterpreted Justice Kennedy's Significant Nexus Test as Being Satisfied When the Impact Is "More than Speculative or Insubstantial."

Justice Kennedy's significant nexus test requires that there must be a "significant nexus" between the wetland in question and TNWs. *Rapanos*, 547 U.S. at 779. Thus, Justice Kennedy

set a minimum "significance" requirement that the Agencies must establish to assert jurisdiction. The wetlands in question must "*significantly affect* the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (emphasis added).

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 that 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).

Justice Kennedy rejected the Government's argument that the Agencies could assert CWA jurisdiction over any non-navigable water with "any hydrological connection" to navigable waters. *See Rapanos*, 547 U.S. at 784. Justice Kennedy explained that the presence of a hydrological connection did not suffice to establish jurisdiction—a showing of a significant nexus with jurisdictional waters was required. *Id.* ("[M]ere hydrologic 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."). The Draft Guidance turns Justice Kennedy's significant nexus test upside down by allowing jurisdiction when the nexus between a wetland and a TNW is "more than 'speculative or insubstantial.'" Draft Guidance at 8. Just because a connection is "more than 'speculative or insubstantial'" does

not mean that it is "significant." Yet, this is precisely how the Draft Guidance has interpreted Justice Kennedy's significant nexus test. In fact, the Agencies' assertion of jurisdiction over waters with only a "more than 'speculative or insubstantial'" connection is all too similar to the "any hydrological connection" standard that Justice Kennedy explicitly rejected. Rather, Justice Kennedy made clear in his opinion that waters with a "speculative or insubstantial" connection to TNWs fall far short of this test. Justice Kennedy specifically contrasted wetlands that displayed the requisite significant nexus by virtue of their demonstrable chemical, physical and biological impact to TNWs to waters with only speculative or insubstantial impacts. *Rapanos*, 547 U.S. at 780 ("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.'").[42]

Thus, Justice Kennedy 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. The Draft Guidance has attempted to collapse this continuum by ignoring the plain meaning of the word "significant" and transforming Justice Kennedy's significant nexus test into a merely-more-than-speculative-or-insubstantial test.

[42] Not only are the Agencies vastly expanding the scope of the significant nexus test, but they are not accurately representing the plain language of the CWA. As explained by Justice Kennedy, "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to 'restore and maintain the chemical, physical, *and* biological integrity of the Nation's waters.'" *Rapanos*, 547 U.S. at 779 (citing 33 U.S.C. § 1251(a)) (emphasis added). However, the Draft Guidance substitutes *or* for *and*, thus lowering the threshold to establish a significant nexus. Draft Guidance at 7.

4. The Agencies Have Ignored Justice Kennedy's Mandate for a Rulemaking if the Agencies Wish to Establish Categories of Potentially Jurisdictional Wetlands.

a. The Draft Guidance's Aggregation Approach Vitiates Justice Kennedy's Requirement for Case-By-Case Significant Nexus Analysis.

The hallmark of Justice Kennedy's jurisdictional test is a case-by-case determination of whether the water body in question has a significant nexus. Justice Kennedy explained,

> the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.

Rapanos, 547 U.S. at 780-81. Justice Kennedy noted that "[a]bsent more specific regulations . . . 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." *Id.* at 782. Thus, absent a rulemaking, to comply with Justice Kennedy's concurrence, the Agencies must look at each particular wetland individually to determine if it has a significant nexus with TNWs.[43]

The Agencies ignore Justice Kennedy's case-by-case requirement, however, and intend to evaluate whether the water at issue has a significant nexus with TNWs or interstate waters by aggregating all waters of the same "resource type" within a watershed and looking at whether those "similarly situated" waters, taken together, have a significant nexus to the nearest TNW or interstate water. Draft Guidance at 8. With this watershed aggregation approach, the Agencies are not examining the particular wetland at issue, as Justice Kennedy intended, but are making

[43] Even with a rulemaking that establishes a category of wetlands that are likely to be jurisdictional, the Agencies will still need to evaluate whether a particular wetland actually fits into that category. As such, some case-by-case demonstration of a nexus will be necessary post-rulemaking.

categorical determinations based on "resource types" within a watershed and thereby vitiating Justice Kennedy's case-by-case requirement. As explained by Justice Kennedy, the Agencies may avoid purely case-by-case analysis only with "more specific regulations." *See Rapanos*, 547 U.S. at 782. To the extent the Agencies find it advisable to adopt categorical tests, they should proceed through notice and comment rulemaking, as Justice Kennedy instructed. *Id.* at 780-81.

b. A Significant Nexus Determination for One Water in a Watershed Should Not Bind Other "Similarly Situated" Waters in the Watershed.

Justice Kennedy's opinion requires the Agencies to establish a significant nexus on a case-by-case basis when they seek to regulate wetlands. Justice Kennedy also provided that if the Corps established an adequate nexus for a particular wetland, the Corps could "presume covered status for other comparable wetlands in the region." *Id*. at 782. However, this is not a license for wholesale jurisdiction, but rather a matter of administrative efficiency. *See id.* Absent a rulemaking, Justice Kennedy's approach still requires an individual examination of each particular wetland to determine whether it has a significant nexus to TNWs. For example, if a landowner requests that the Agencies do a jurisdictional determination for a wetland on the landowner's land, Wetland A, and, based on the individual characteristics of Wetland A, the Agencies determine that Wetland A is a "comparable" wetland—*i.e.* a wetland that is similarly situated with respect to a TNW—to a wetland the Agencies have previously deemed jurisdictional, Wetland B, they may assert jurisdiction over Wetland A based on the previous jurisdictional determination for Wetland B. But Justice Kennedy's allowance for the assertion of jurisdiction over comparable wetlands does not eliminate the requirement, in the absence of a rulemaking, that the Agencies conduct a case-by-case significant nexus evaluation for each particular wetland.

Yet, under the Draft Guidance, "if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. . . ." Draft Guidance at 9. In other words, because all waters of the same "resource type" within the watershed are considered "similarly situated," a significant nexus finding for one wetland will apply to all wetlands in the watershed. This is contrary to Justice Kennedy's requirement that, absent a rulemaking, a significant nexus determination must be made for each wetland on its own merits. To assert jurisdiction over a wetland based solely on its location in a watershed with another jurisdictional wetland is not consistent with Justice Kennedy's opinion.

Moreover, the Agencies' assertion of jurisdiction over one wetland based on a significant nexus determination for a different wetland in the watershed would raise several due process concerns. First, a landowner's interests can be compromised or destroyed by someone else who came before him without the landowner having the opportunity to be involved in the jurisdictional determination for waters on his own property. Second, the landowner may not even have notice or be aware of jurisdictional determinations for other "similarly situated" waters in the same watershed. For example, in the example given above, the landowner at Wetland A would have no reason to know about the Corps' dispositive determination of Wetland B, and the Draft Guidance makes no attempt to provide such due process to the landowner of Wetland A.

The arbitrariness of the Agencies' position can be seen by an examination of Exhibit 8. Suppose the Corps found that the wetland at point B is jurisdictional due to its physical proximity to the Colorado River and, by virtue of this proximity, its contribution of significant sediment retention and habitat value to the Colorado River. Such a determination would not

have any bearing on the jurisdictional status of the wetland at point A, which is hundreds of miles away and situated in a different ecosystem. Yet, the Draft Guidance proposes to treat the determination for Wetland B as dispositive of Wetland A, skipping any analysis of Wetland A's remoteness from the Colorado River or the regularity of its connection to the Colorado River. This result is utterly contrary to the entire import of Justice Kennedy's opinion. And the landowner at Wetland A will be unaware that the Agencies have thus remotely and indirectly asserted CWA jurisdiction over water bodies on their land.

Third, if the landowner is bound by a significant nexus determination of another "similarly situated water," the landowner will have no ability to appeal the decision because he will not have a final jurisdictional determination for his parcel that can be challenged. Alternatively, if the Agencies allow anyone to challenge a jurisdictional determination, even if it is not a final jurisdictional determination for their own land, this could lead to an excess of challenges that will cause confusion and delay.

The Agencies may not impose such broad assertion of jurisdiction without conducting a rulemaking that will give those affected notice and the opportunity to comment on the practical implications of the proposed system.

c. Use of General Studies Instead of Site-Specific Information Is Inconsistent with Justice Kennedy's Opinion.

As discussed above, absent a rulemaking, Justice Kennedy intended for the Agencies to conduct case-by-case significant nexus evaluations for each particular wetland at issue to determine jurisdiction. *See Rapanos*, 547 U.S. at 782. Indeed, the Fourth Circuit recently held in *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, that general information, such as the documentation of flow of adjacent tributaries, will not suffice to establish a significant nexus under Justice Kennedy's test. 633 F.3d 278, 294 (4th Cir. 2011) (finding that the record

contained insufficient support for the Corps' conclusion that 4.8 acres of wetlands had a significant nexus to the Northwest River, a body of water situated miles away). The Corps argued in *Precon* that the significant nexus test does not require site-specific empirical or quantitative evidence. But the Fourth Circuit rejected this argument and found that, although laboratory tests and quantitative measurements are not necessary, the Corps must undertake a case-by-case inquiry into the significance of the particular wetlands at issue. *Id.* at 293-94. General documentation on adjacent tributaries will not suffice. *Id.* The Fourth Circuit explained, "The significant nexus inquiry emphasizes the comparative relationship between the wetlands at issue, their adjacent tributary, and traditional navigable waters." *Id.* at 294. As such, the significant nexus test cannot be satisfied without site-specific information regarding the significance of the particular wetlands at issue. *Id.* Under Justice Kennedy's concurrence, general studies may be used to support a rulemaking to identify categories of tributaries whose adjacent wetlands are likely to have a significant nexus to TNWs and interstate waters. *Rapanos*, 547 U.S. at 780-81. However, in the absence of a rulemaking, site-specific information on the particular wetland at issue is required.

The Draft Guidance, however, impermissibly allows for the use of general studies to support a significant nexus determination. For example, in its explanation to field staff of the procedures for performing a significant nexus analysis for a tributary, the Draft Guidance notes that "[d]irect observation of the tributary is not necessary if other available documentation is sufficient to establish the significant nexus." Draft Guidance at 14. In addition, for a significant nexus evaluation of adjacent wetlands, the Draft Guidance explains that field staff may use "scientific literature on the functions and effects of wetlands within the watershed generally." *Id.* at 18. With the use of these general studies instead of site-specific information, the Agencies are

attempting to side-step the case-by-case inquiry and allow field staff to make significant nexus determinations without specific information on the particular wetland at issue.[44] This is inconsistent with Justice Kennedy's opinion.

The Agencies' attempt to side-step the case-by-case analysis requirement underscores the need for a rulemaking. Unless the Agencies conduct a rulemaking, they must adhere to Justice Kennedy's standard and establish a significant nexus for each particular wetland on a case-by-case basis with site-specific information.[45]

5. The Agencies' Interpretation of "Significant Nexus" is So Broad As to Exceed the Limits of Congress's Commerce Clause Power.

The Agencies do not explain the constitutional authority for their interpretation of "significant nexus" or the requirement that all "similarly situated" tributaries, wetlands, or proximate other waters in the same watershed be aggregated and considered together to determine whether the water at issue has a significant nexus to TNWs or interstate waters. Congress's commerce power over navigation and its authority to regulate navigable waters under the CWA is based on the second category of activity that Congress may regulate under its commerce clause power—"the channels of commerce." *See United States v. Lopez*, 514 U.S. 549, 559 (1995).

SWANCC held that the Agencies could not rely on Congress's third category of power under the commerce clause—"activities that substantially affect interstate commerce"—to assert CWA jurisdiction under the Migratory Bird Rule. In *SWANCC*, the Supreme Court rejected the

[44] To the extent that the Corps is permitted to develop site-specific information in part based on desktop studies, applicants should similarly be permitted to utilize such desktop information.

[45] Similarly, when determining exactly which wetlands or other features can be aggregated, the Agencies must develop site-specific information to show that the aggregated features are "similarly situated" to the feature being evaluated with respect to their relationship to the TNW.

government's assertion that CWA jurisdiction reached isolated ponds because the ponds were habitat for migratory birds. 531 U.S. at 174. The government argued that such jurisdiction was consistent with "Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce." *Id.* at 173. But the Court rejected these arguments, observing that they raised "significant constitutional questions." *Id.*

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 [the court] 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. The *SWANCC* Court held that although a 1972 Conference Report included a statement expressing the intent that the term "navigable waters" be given a broad interpretation, "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. The *SWANCC* Court found that the Migratory Bird Rule exceeded the scope of the CWA and called into question the Corps' reliance on Congress's broader power to regulate activities substantially affecting interstate commerce to assert jurisdiction under the CWA. *See id.* at 173. As the Court observed, the Corps' attempt to assert CWA jurisdiction through the Migratory Bird Rule "is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.*

Similarly, the Agencies' attempt to assert jurisdiction where the nexus between a non-navigable water and a TNW is "more than speculative or insubstantial" based on the aggregation of all tributaries, wetlands, and proximate other waters in the same watershed is so broad as to approach the outer limits of Congress's Commerce Clause authority in the same way that the

Migratory Bird Rule did. The Agencies do not explain the constitutional basis for their interpretation of "significant nexus" or articulate how their reading of "significant nexus" is based on Congress's commerce power over navigation.

D. Tributaries

"Tributaries" are currently listed as jurisdictional under the Agencies' regulations, but the regulations do not define the term. In *Rapanos*, both the plurality and Justice 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 water body itself. *See, e.g.*, *Rapanos*, 547 U.S. at 781-82 (stating that 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 toward it."). Yet, this is exactly what the Draft Guidance does by adopting an overly broad definition of "tributaries."

The Draft Guidance defines a water as a tributary if it "contributes flow to a traditional navigable water or interstate water, either directly or indirectly by means of other tributaries." Draft Guidance at 11. Under the Draft Guidance, a tributary is physically defined by the presence of a channel with a bed and bank, and an ordinary high water mark ("OHWM"). *Id.* This definition of tributary directly conflicts with Justice Kennedy's rejection of the Corps' previous standard that deemed a water a tributary "if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark. . . ." *Rapanos*, 547 U.S. at 781. Justice Kennedy found that the breadth of this standard "precludes its adoption as the determinative measure [of jurisdiction.]" *Id.* Yet, the standard that the Agencies establish in the Draft Guidance is indistinguishable from the standard that Justice Kennedy rejected in his *Rapanos* concurrence.

If a feature qualifies as a tributary under the Draft Guidance's definition, the feature will be jurisdictional if it meets *either* the plurality standard or Justice Kennedy's standard set forth in *Rapanos* as interpreted by the Draft Guidance.[46] However the Draft Guidance's interpretations of both the plurality standard and the Justice Kennedy standard are inconsistent with each of the corresponding opinions.

1. The Draft Guidance Misconstrues the *Rapanos* Plurality's "Relatively Permanent Waters" Standard and Applies a "Seasonal Flow" Concept that Is Inconsistent with the Plurality Opinion.

In the *Rapanos* plurality opinion, Justice Scalia chided the Corps for its "expansive interpretation" of "waters of the United States" and criticized the assertion of broad CWA jurisdiction over "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." *Rapanos*, 547 U.S. at 734. The plurality criticized the Corps for "stretch[ing] the term 'waters of the United States' beyond parody" and asserting jurisdiction that goes beyond the plain language of the statute. *Id.* Disagreeing with the government's expansive interpretation, the plurality 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

[46] Although the weight of judicial authority rejects the view that *Rapanos* can be interpreted as having multiple holdings, the Draft Guidance adopts an "either/or" standard for asserting jurisdiction over tributaries and adjacent wetlands—*i.e.*, allowing jurisdiction when either the plurality's or Justice Kennedy's test is satisfied. *See, e.g., United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (rejecting United States' argument that the court could follow either the plurality or concurring opinions); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (applying Justice Kennedy's opinion as the single, governing jurisdictional test). In fact, the Draft Guidance acknowledges the Eleventh Circuit's rejection of this "either/or" approach by noting that the Agencies "will not assert jurisdiction over such waters under the plurality standard within the Eleventh Circuit, *i.e.*, waters in the states of Florida, Georgia and Alabama." Draft Guidance at 12 n.viii.

intermittently flows." *Id*. at 732-33. The plurality acknowledged that an extraordinary circumstance, such as a seasonal drought that would interrupt continuous flow, does not necessarily cause a water to be excluded from classification as "relatively permanent." *Id.* at 732 n.5. As such, the plurality would allow for jurisdiction over the 290-day, continuously flowing stream referenced in Justice Stevens's dissent and explained that "[c]ommon sense and common usage distinguish between a wash and seasonal river." *Id.*

The Agencies have misconstrued the plurality's jurisdictional test, which emphasized the continuous presence of flow and a connection to TNWs, by asserting in the Draft Guidance that a non-navigable tributary meets the plurality's "relatively permanent" standard and thus is jurisdictional when it (1) is connected, directly or indirectly, to a downstream TNW, and (2) has at least seasonal flow, except for drought years. Draft Guidance at 13. This standard is problematic for two reasons. First, the Draft Guidance's remoteness standard—that the tributary must be "connected, directly or indirectly to a downstream traditional navigable water"—will allow the Agencies to extend their CWA jurisdiction to water bodies with remote proximity and tenuous connections to TNWs. *Id*. This broad standard is dangerously close to the "any hydrological connection" standard that the *Rapanos* plurality rejected. Moreover, this standard could provide a way for the Agencies to assert jurisdiction over waters such as "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," which the plurality found to be beyond the reach of CWA jurisdiction. *Rapanos*, 547 U.S. at 734. Ephemeral streams only flow in response to precipitation events, which in some parts of the country only occur occasionally during a portion of a stormy season. Thus, many ephemeral streams experience occasional, short duration flows during one season. Under the Agencies'

flexible Draft Guidance however, the Agencies may characterize this flow as "seasonal," completely contrary to the plurality's clear direction that ephemeral streams are not covered by the "relatively permanent" standard.

Second, the Draft Guidance's use of the "at least seasonal flow" criterion is inconsistent with the plurality opinion. Under the Draft Guidance, a water has "seasonal flow" when it has "predictable flow during wet seasons in most years." Draft Guidance at 13. Thus, the Draft Guidance abandons the definition of "seasonal flow" used in the *Rapanos* Guidance which stated that, under the plurality standard, the Agencies would assert jurisdiction over such tributaries based on "continuous flow" and utilize a three month duration (which itself is too short under the plurality opinion). *Rapanos* Guidance at 6-7. Claiming that the length or extent of what is "seasonal" may vary across the country, the Draft Guidance eliminates these elements and grants field staff flexibility to determine what "seasonal flow" means in each particular case. Draft Guidance at 28. But the Draft Guidance's use of a "seasonal flow" standard is contrary to the *Rapanos* plurality opinion's "relatively permanent waters" standard. Justice Scalia included a footnote to make clear that by describing jurisdictional waters as "relatively permanent," the Court "do[es] not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months . . .," and he cited to an example of a 290-day, continuously flowing stream. *Rapanos*, 547 U.S. at 732 n.5 (emphasis in original). Simply because the plurality said that seasonal waters are "not necessarily exclude[d]" does not mean that such waters are automatically *included*. Yet this is exactly how the Draft Guidance is using footnote 5. In fact, the Draft Guidance is bold enough to actually cite footnote 5 as support for the reversal of the plurality's logic. Draft Guidance at 27, n.68. But footnote 5's acknowledgement of the possibility of CWA jurisdiction over "relatively permanent waters"

whose flow may be interrupted during a seasonal drought, such as a stream that continuously flows for 290 days, does not allow for the assertion of jurisdiction over any water with at least seasonal flow. The seasonal flow concept relied on by the Agencies in the Draft Guidance is contradictory to the plurality's jurisdictional test and its clear direction that ephemeral streams, wet meadows, and dry arroyos do not come close to meeting this jurisdictional test. *See Rapanos*, 547 U.S. at 732.

With the "plurality standard" for tributaries announced in the Draft Guidance, the Agencies incorrectly rely on the plurality opinion's "relatively permanent" waters standard and reference to "seasonal rivers" to justify the assertion of CWA jurisdiction over water bodies with remote proximities and tenuous connections to TNWs and all waters with a seasonal flow without any specific duration of the flow throughout one or more seasons. As such, this standard is contrary to limits that the plurality opinion sought to impose on the Agencies' jurisdiction under the CWA.

2. The Draft Guidance Misconstrues Justice Kennedy's Standard for Tributaries by Presuming that if Certain Physical Characteristics Are Established, There Is a Significant Nexus.

In *Rapanos*, Justice Kennedy criticized the Agencies' broad definition of tributary:

> [T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark . . . . 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 toward it—precludes its adoption as the determinative measure of [jurisdiction].

547 U.S. at 781. Justice Kennedy was skeptical about the Agencies' use of the OHWM to establish jurisdiction and noted that in many cases the waters that would be jurisdictional under this broad standard would be "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 781-82. Rather than

limiting the scope of jurisdiction over tributaries in accordance with the Justice Kennedy concurrence, the Agencies announce a similarly broad standard in the Draft Guidance and ignore Justice Kennedy's concern with the reliance on OHWM to determine jurisdiction.

Under the Agencies' "Kennedy standard" in the Draft Guidance, a tributary is jurisdictional where it (1) is a tributary (has a bed and bank and OHWM) to a TNW or interstate water, and (2) it alone or in combination with other tributaries has a significant nexus with the TNW or interstate water. Draft Guidance at 13. The Draft Guidance suggests that if a water meets the Draft Guidance's definition of a tributary—has a bed and bank and OHWM—and is part of a tributary system, the Agencies "generally expect" that the tributary will have a significant nexus. *Id.* at 13-14. The Draft Guidance explains that "[t]he presence of a bed and bank and an OHWM are physical indicators of flow" and suggests that is enough to show a significant nexus with a downstream TNW or interstate water. *Id.* at 14. This standard, however, is directly contrary to Justice Kennedy's opinion.[47] Justice Kennedy criticized the Agencies' use of OHWM to determine whether tributaries are jurisdictional because he was concerned that such a standard was overbroad and would leave room for the Agencies to assert jurisdiction over waters that do not have significant nexus to TNWs. *Rapanos*, 547 U.S. at 781-82. However, the Agencies ignore this concern and reverse Justice Kennedy's logic to support the Draft Guidance's new standard.

In addition, the hallmark of Justice Kennedy's jurisdictional test is a case-by-case determination of whether the water body in question has a significant nexus to TNWs. *Id*. at

[47] In addition, the Agencies seem to presume that ephemeral and intermittent streams that are headwaters streams will always have a significant nexus to downstream waters and will therefore always be jurisdictional. *See* Draft Guidance at 30. This directly contradicts Justice Kennedy's opinion and the factors, such as proximity and quantity and regularity of flow, that he emphasized as important for a significant nexus analysis. *See Rapanos*, 547 U.S. at 786.

782. Noting the Agencies' overbroad definition of "tributaries," Justice Kennedy explained that a case-by-case significant nexus evaluation was necessary to "avoid unreasonable applications of the statute." *Id.* As such, the presumption that all waters with a bed and bank and an OHWM will generally meet Justice Kennedy's significant nexus test is contrary to his basic premise. And the Agencies' statement that "Justice Kennedy's opinion may reasonably be read as allowing the agencies to determine that a case-specific significant nexus determination is not necessary for tributaries possessing an ordinary high water mark" is a mischaracterization of his opinion. Draft Guidance at 29.

The Agencies' overly broad definition of "tributaries" is inconsistent with both the *Rapanos* plurality and concurring opinions and ignores the limits that both Justice Scalia and Justice Kennedy sought to impose on the Agencies to prevent the assertion of jurisdiction beyond what is reasonable under the Act.

E. Ditches

The Agencies' regulations do not define "ditches" as a category of jurisdictional waters. Historically, the Agencies took the position that ditches were excluded from jurisdiction. The Draft Guidance asserts that the scope of waters considered to generally be non-jurisdictional is unchanged. Draft Guidance at 20. And the Agencies cite the preamble to the 1986 rule as describing those waters that they have generally considered to be excluded from the waters of the United States. *Id.* (citing, among others, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986)). Yet under the 1986 regulations, "[n]on-tidal drainage and irrigation ditches excavated on dry land" were a category of waters that were explicitly excluded from "the waters of the United States." *Id*. at 41,217. The Draft Guidance changes this explicit exclusion by entirely eliminating this category of excluded waters and replacing it with "[e]rosional features (gullies and rills), swales and ditches that are not tributaries or wetlands (see Section 4)." Draft Guidance at 21. The

Agencies do not explain this change, and it is contrary to the Agencies' long-standing practice of excluding upland, drainage, and irrigation ditches from CWA jurisdiction.

Section 4 of the Draft Guidance, makes clear that all *tidal* ditches are jurisdictional as "tributaries" based on being subject to the ebb and flow of the tide (TNWs).[48] Draft Guidance at 12. Section 4 then further asserts jurisdiction over *non-tidal* ditches as "tributaries" if a series of easy-to-meet requirements can be established. *Id*. These requirements, as outlined in the Draft Guidance, indicate that many ditches will likely be deemed jurisdictional. This is a significant change, and, as discussed below, the Coalition believes the Agencies' attempt to regulate these non-tidal ditches goes too far. Most ditches carry flow, contain standing water, and drain areas that have water because the purpose of ditches is to convey water away from a saturated or ponded area (*e.g.*, field or roadway). Under the Draft Guidance, these pervasive features of our landscape may qualify as tributaries, and, thus, may be considered "waters of the United States."

The standard created by the Agencies through this Draft Guidance is equally as broad (if not broader) than the standard that was rejected by both the plurality and Justice Kennedy in *Rapanos*. The Coalition recommends that the Agencies make clear that most ditches, including roadside and agricultural ditches, are not jurisdictional.[49] Moreover, the Agencies should also clarify that point sources, such as MS4s, that are covered by National Pollutant Discharge Elimination System ("NPDES") permits are not "waters of the United States."[50]

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[48] Of course, ditches on prior converted cropland are excluded from the Agencies' jurisdiction. *See* 33 C.F.R. § 328.3(a)(8) ("[w]aters of the United States do not include prior converted cropland").

[49] There may be some ditches that qualify as "waters of the United States," but the Agencies have failed to explain when a ditch is a ditch, when a ditch is upland, and what bases the field should use to identify ditches that may be jurisdictional.

[50] Similarly, any ditch or other feature upstream of the MS4 or any other NPDES outfall should also not be considered jurisdictional.

1. Historically, the Agencies Excluded Ditches from CWA Jurisdiction.

The Corps' 1975 regulations stated explicitly that "[d]rainage and irrigation ditches have been excluded" from the definition of jurisdictional waters.[51] The Corps' 1977 regulations similarly disavowed jurisdiction over ditches. ("[M]anmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition").[52] In fact, the Corps, in the preamble to its 1977 jurisdictional regulations, emphasized that:

> . . . nontidal drainage and irrigation ditches that feed into navigable waters will not be considered 'waters of the United States' under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA [Federal Water Pollution Control Act, now the Clean Water Act], including Section 208 and 402.

Id. at 37,127.[53]

The Corps continued to maintain through the 1980s and 1990s that man-made upland ditches were not jurisdictional. For example, in proposed rules in 1980, the Corps stated that "man-made, non-tidal drainage and irrigation ditches excavated on dry land are not considered

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[51] 40 Fed. Reg. 31,320, 31,321 (Jul. 25, 1975).

[52] 42 Fed. Reg. 37,122, 37,144 (Jul. 19, 1977).

[53] Historically, EPA has also resisted regulating ditches under the CWA. In developing CWA section 402 regulations, for example, EPA recognized that not all ditches are subject to the section 402 permit program and that it would be impossible and inappropriate to regard all ditches and other conveyances that carry water as point sources. *See, e.g.*, 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976) (EPA recognized for the purpose of the silviculture rule that "not every ditch, water bar or culvert is mean[t] to be a point source under the Act . . . ." EPA further stated that "[i]t is evident, therefore, that ditches, pipes and drains that serve only to channel, direct, and convey nonpoint source runoff from precipitation are not meant to be subject to the § 402 permit program"). *Id*. (internal quotation marks omitted). EPA did not even discuss the possibility that ditches might be waters of the United States until 1988, and then in an extremely pusillanimous manner that suggested it would take unusual circumstances for this to occur. *See* 53 Fed. Reg. 20,764, 20,765 (June 6, 1988).

waters of the United States."[54] In addition, in 1983, in proposed jurisdictional rules, the Corps stated "Waters of the United States do not include the following man-made waters: (1) Non-tidal drainage and irrigation ditches excavated on dry land, (2) Irrigated areas which would revert to upland if the irrigation ceased."[55]

The preamble to 1986 regulations, which adopted the broad Migratory Bird Rule, continued to maintain the exclusion for ditches ("we generally do not consider [drainage and irrigation ditches excavated on dry land] to be 'Waters of the United States.'"[56]), albeit with a new reservation of "case-by-case" regulatory authority to claim jurisdiction after all. And, in a Regulatory Guidance Letter ("RGL") dated July 4, 2007, the Corps confirmed that, pursuant to Corps and EPA guidance, upland ditches are generally not subject to CWA jurisdiction. U.S. Army Corps of Eng'rs, RGL No. 07-02: *Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act* (July 4, 2007), http://www.usace.army.mil/CECW/Pages/rglsindx.aspx. Nonetheless, the Agencies' position on ditches has equivocated over time, beginning in the mid- to late-1980s, when the Agencies asserted jurisdiction over ditches on a case-by-case basis, using OHWM and the Migratory Bird Rule tests.[57] At no time did Congress authorize this accretion of

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[54] 45 Fed. Reg. 62,732, 62,747 (Sept. 19, 1980).

[55] 48 Fed. Reg. 21,466, 21,474 (May 12, 1983).

[56] 51 Fed. Reg. at 41,217. The Draft Guidance, citing this preamble, asserts that the Agencies' position regarding these waters is unchanged. Draft Guidance at 20. However, the Draft Guidance appears to broaden the Agencies' jurisdiction over ditches. Therefore, the Agencies should clarify that, in accordance with this preamble language and the Agencies' stated intent to maintain their existing position, upland, drainage, and irrigation ditches are not considered to be waters of the United States.

[57] *See e.g.,* 65 Fed. Reg. 12,818, 12,823-24 (Mar. 9, 2000) (Nationwide Permit ("NWP") Regulations) (in the March 9, 2000 NWPs, the Corps' disavowal of jurisdiction shrank to "ditches constructed entirely in upland areas" finding that "non-tidal drainage ditches are waters of the United States if they extend the OHWM of an existing water of the United States").

administrative authority. The Agencies have expanded their claims of jurisdiction on their own, without any change in the law. And, the Draft Guidance goes even farther.

2. The Standard for Regulation of *Non-Tidal* Ditches Set Forth in the Draft Guidance Is Equally Broad as the Standard that Was Rejected in *Rapanos.*

The Draft Guidance asserts jurisdiction over *non-tidal* ditches if the ditch (1) has a bed and bank (anything with a channel appears to meet this requirement); (2) has an OHWM; (3) connects to directly or indirectly to a TNW or interstate water; and (4) meets 1 of 5 characteristics: "natural streams that have been altered (e.g., channelized, straightened or relocated); ditches that have been excavated in waters of the U.S., including wetlands; ditches that have relatively permanent flowing or standing water; ditches that connect two or more jurisdictional waters of the U.S.; or ditches that drain natural water bodies (including wetlands) into the tributary system of a traditional navigable or interstate water." Draft Guidance at 12. The breadth of these requirements is equally broad (if not broader) than the standard rejected by both the plurality and Justice Kennedy in *Rapanos*.

Rapanos made clear that many ditches are excluded from jurisdiction, even ditches that connect waters of the United States. Justice Scalia's plurality opinion in *Rapanos* emphasized the plain language of the CWA in regulating "navigable" waters and lambasted the agencies for regulating ditches, drains, and desert washes far removed from navigable waters. Justice Scalia interpreted the phrase "the waters of the United States" to include only "those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams [,] . . . oceans, rivers, [and] lakes,'" and to exclude "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." 547 U.S. at 739. Justice Kennedy noted, with disapproval, that the "dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain,

however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation does not extend so far." *Id*. at 778-79 (Kennedy, J., concurring). *See also id.* at 757 (Roberts, C.J., concurring) ("The Corps had taken the view that its authority was essentially limitless; [but] this Court explained that such a boundless view was inconsistent with the limiting terms Congress had used in the Act.").

Moreover, even ditches that "connect" waters of the United States may not satisfy Justice Kennedy's "significant nexus" standard if the ditch is remote from the TNW or its flow is small or "speculative." *Id*. at 780-82 (Kennedy, J., concurring) ("Yet the breadth of [the Corps] standard [defining "tributaries"] — 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 toward it* — precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system….") (emphasis added); *see also id.* at 786 ("[A] similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow toward it. A more specific inquiry, based on the significant nexus standard, is therefore necessary.") Accordingly, under either the Scalia or Kennedy standard, many ditches should be excluded from jurisdiction, and the Agencies should revise the Draft Guidance to be consistent with *Rapanos*.

3. Ditches are Prevalent throughout the Country and Necessary to Support the Nation's Infrastructure, Agriculture, Construction, Transportation, and Mining Activities (Among Others) and to Prevent Flooding.

The issue of ditches is critically important because ditches are pervasive and endemic to every type of landscape and human activity across the Nation. Millions of miles of ditches are encountered, built, and relied on every day by Coalition members, as part of the construction, operation, and maintenance of homes, natural gas pipelines, electric generation facilities and

transmission and distribution lines, agricultural irrigation, rural drains and roads, railroad corridors, and mines located across the country.

Drainage ditches play a major role in all of these activities, ensuring that stormwater is properly channeled away from facilities and from land where it otherwise would pond, interfering with the intended use of the land and facilities. Ditches are also an integral part of creating a proper drainage system, which in turn prevents flooding. Flooding can be a major cause of recurring crop loss and can severely disrupt rural and urban economies as well. The Federal Emergency Management Agency has noted that 14.25 million acres (41 percent) in the State of Florida are flood prone.[58] Subsurface drainage to ditches offers a way to remove excess water from agricultural fields, roads, and vital urban spaces, without the erosion rates and pollution transport that results from direct surface runoff.

The Coalition's members include residential and commercial builders who utilize ditches for their developments. Our members' developments will typically include stormwater management systems that manage post-development stormwater runoff and convey it from development sites to streams, rivers, and the oceans. Under existing EPA and state CWA stormwater regulatory requirements, post-development stormwater management controls include the attenuation of peak flow rates and quantities of runoff, as well as water quality best management practices ("BMPs") that minimize the adverse impacts of runoff from developments. Ditches serve to collect and convey overland stormwater flows. If such ditches are considered to be "waters of the United States," and buffers that prevent and/or restrict stormwater outfalls are required to be created along their length, there will be redundancy in surface drainage systems, which may lead to increased flow velocities and erosion within sub

[58] *See* Plant Management in Florida Waters, http://plants.ifas.ufl.edu/guide/floodcon.html (last visited June 26, 2011). 1.3 million Floridians live in a flood-prone area. *Id.*

watersheds. Further, increased flow velocities and resulting erosion will lead to sediment deposition and cause adverse impacts to ditches. Requiring such buffers alongside ditches could also significantly reduce the ability to develop adjacent sites.

Ditches are also of utmost importance to meet the agricultural needs of the country. Growing crops require scheduled and predictable water patterns so the crops get just enough, but not too much, water. Drainage control structures, such as ditches, are required to maintain that proper flow. Further, controlling the water flow also allows for the capturing of water that may irrigate the same lands. Fields are often connected to water supplies through irrigation ditches and canals. Accordingly, the use of ditches is essential to promote agriculture and meet the growing demands of our nation.

Ditches also play a critical role as part of the suite of BMPs that control and manage stormwater discharges from nonpoint silvicultural activities such as forest roads. Indeed, since the enactment of the CWA, all states with significant forest management activities have developed either regulatory or non-regulatory BMP programs under Sections 208, 319, and 404 to achieve water quality goals. We would direct you, for example, to the Florida BMPs (116 pages), Fla. Dep't of Agric. & Consumer Serv., *Silviculture Best Management Practices* (revised 2011), *available at* http://www.fl-dof.com/forest_management/bmb/index.html, and the Minnesota management guidelines (hundreds of pages addressing a range of forest management practices, including a 44-page section on forest roads), Minn. Forest Res. Council, *Sustaining Minnesota Forest Resources: Voluntary Site-Level Forest Management Guidelines for Landowners, Loggers and Resource Managers* (June 2005 with 2007 biomass harvesting guidelines), available at http://www.frc.state.mn.us/FMgdline/Guidelines.html.

Ditches that control silvicultural stormwater have never been considered jurisdictional waters. Designating them as such now would place undue regulatory burdens on a key component of water quality preservation and control on forested lands nationwide.

Ditches are critical for transportation-related infrastructure, including airports, railroads, and roads. Roadside ditches are an essential part of any transportation project and contribute to the public health and safety of the nation by dispersing water from roadways, promoting traffic safety via proper road drainage, protecting rail track integrity on railroad corridors, and preventing flooding. Office of Surface Mining Reclamation and Enforcement regulations require that any federally funded primary road must be "designed . . . and maintained to have adequate drainage control, using structures such as, but not limited to bridges, ditches, cross drains, and ditch relief drains." 30 C.F.R. § 816.151(d)(1). Similar requirements are commonplace under state and local law. Flooding can cause traffic accidents and railroad track integrity failures. Therefore, many roads have ditches on both sides and in the median strip. The United States highway network consists of 4 million miles of roads and streets.[59] Highway bridges also make up a critical link in the Nation's infrastructure. At present, there are about 600,000 bridges on the entire highway network. Ditches are commonly used for the maintenance and construction of airports and railroads. According to the National Plan of Integrated Airport Systems ("NPIAS"), there are 3,356 existing publicly owned, public-use airports in the United States, with an additional 55 proposed. There are also 522 commercial service airports, and of these, 383 have more than 10,000 annual enplanements and are classified as primary airports. Federal Aviation

[59] http://www.nationalatlas.gov/transportation.html. *See also* U.S. Department of Transportation, Federal Highway Admin., Highway Statistics 2008, Public Road Length 2008 Miles by Ownership, Table HM-10 (Oct. 2009), http://www.fhwa.dot.gov/policyinformation/statistics/2008/hm10.cfm (last visited Jun. 26, 2011).

Administration, U.S. Department of Transportation, NPIAS Report to Congress 2009-2013, Sept. 30, 2008). Ditches are also critical for railroad transportation services to maintain sufficient drainage for structurally sound transportation infrastructure. As of 2006, Class I railroads owned and operated 140,249 miles of railroad track. This adds up to a lot of ditches. The vast reach of ditches throughout the country and the many activities that rely upon those ditches demonstrates the profound impact regulating ditches will have on this country.

4. Regulating Ditches Infringes upon State and Local Agencies' Authority.

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 Lopez*, 514 U.S. at 575 (Kennedy, J., joined by O'Connor, J., concurring). The Supreme Court recently noted that "[f]ederalism has more than one dynamic. … The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Bond v. United States*, No. 09-1227, 2011 WL 2369334, at *2, *7 (U.S. Jun. 16, 2011).

Congress, when it enacted the CWA, intended to "recogni[ze], preserv[e], and protect[]" the State's primary authority and responsibility over local land and water resources. 33 U.S.C. § 1251(b). To that end, section 101(g) of the CWA clarifies that each State has authority to "allocate quantities of water within its jurisdiction" and that nothing in the CWA "shall be construed to supersede or abrogate" those rights to quantities of water that have been established by any State. 33 U.S.C. § 1251(g). Further, the federal agencies are instructed to "co-operate with the State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." *Id*.

Overreaching interpretations of the CWA, like the Draft Guidance's approach to ditches, threaten to trample the jurisdiction of the several States over land use activities. "[R]egulation of land use is perhaps the *quintessential* state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (emphasis added); *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality) (same); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (regulation of land use within a State's borders is a traditional State function). *See also New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 460 (1905) (control of drainage, in the interest of public health and welfare, is one of the most important police powers exercised by the State). As described above, ditches are usually constructed, operated, maintained and managed at the local level for various beneficial public purposes, including transportation, flood control, and agricultural purposes. State and local regulations require that such ditches be maintained by local authorities, such as Drain and Road Commissions, to assure the protection of natural resources and prevent water pollution into such conveyances.[60] Therefore, the federal government's insertion of itself into the regulation of ditches amounts to 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.[61] *See SWANCC* at 174 ("'[R]regulation of land use [is] a function traditionally performed by local governments,'" *citing Hess*, 513 U.S. at 44). 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

[60] In some states, there is an existing regulatory program to regulate ditches. If, in addition to states and local Drain and Road Commissions, the Corps and EPA have jurisdiction over activities in ditches, this could result in three tiers of regulatory permitting.

[61] *See SWANCC,* 531 U.S. at 172-74 (holding that administrative interpretation that pushes the limits of Congressional authority to intrude on local authority may not be upheld without clear Congressional statement, and CWA section 101(b) evinces contrary intent, *i.e.*, to preserve authority of states).

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

> [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.

547 U.S. at 738.

The Draft Guidance, by defining inherently local conveyances, such as ditches, as "waters of the United States," not only impermissibly intrudes on State and local land use, but also redirects scarce federal and state funding away from more environmentally sensitive and important resources, such as wetlands.[62] Local governments have the most immediate knowledge of the geographic, hydrologic, and geomorphic conditions of the water bodies within their jurisdictions, and should be given the right to decide how best to regulate their local land and water resources. Although the Coalition believes that the Draft Guidance is fundamentally flawed and should be abandoned in total, at a minimum, the Coalition recommends that the Agencies revise any final guidance to make clear that non-tidal man-made ditches, irrigation ditches, MS4s, roadside ditches, county drains, and street gutters, among others, are excluded, as they traditionally have been, from the definition of "waters of the United States."

[62] The broad definition of "waters of the United States" proposed in the Draft Guidance would lead to unnecessary, lengthy, and costly permitting requirements for critical public infrastructure projects, which ultimately would delay the delivery of important public services. The added costs associated with this delay would ultimately be borne by taxpayers and at the expense of other public needs.

5. The Agencies Should Clarify that Point Sources, like MS4s, that Are Regulated Under Section 402 of the CWA, are Not Also "Waters of the United States."

The CWA's regulatory scheme, for all its detail, is quite simple: Congress intended to regulate the discharge of pollutants to "navigable waters" by requiring permits to control pollutants discharged from "point sources." 33 U.S.C. § 1311(a) (prohibiting the "discharge of any pollutant[s]" unless permitted elsewhere in the Act). CWA section 502 defines the two key terms in this regulatory scheme: "navigable waters" and "point source." *See* 33 U.S.C. §§ 1362(7), (14). *See also Rapanos*, 547 U.S. at 735 ("The definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories."). The term "'point source' means any discernible, confined and discrete *conveyance*, including but not limited to any pipe, *ditch*, channel, tunnel, . . . from which pollutants are or may be discharged. . . ." 33 U.S.C. § 1362(14) (emphasis added).

The CWA further provides that "'discharge of a pollutant' . . . means . . . any addition of any pollutant to navigable waters from any point source. . . ." 33 U.S.C. § 1362(12). The Act thus contemplates that point sources are not themselves "navigable" waters, but instead are "discrete conveyances" for conveying pollutants so as to *add* them to navigable waters. *See Rapanos*, 547 U.S. at 735 ("Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.'"). The Draft Guidance ignores this distinction and has the potential to define some well-recognized "point sources" as "waters of the United States.

For example, the Draft Guidance defines ditches in such a broad manner as to potentially cover MS4s and local county drain storm water conveyances that Congress designated as point

sources subject to section 402(p) of the CWA.[63] EPA defines an MS4 as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, *ditches*, man-made channels or storm drains)" owned and operated by a State or municipality and "[d]esigned or used for collecting or conveying storm water …." 40 C.F.R. § 122.26(b)(8) (emphasis added). These systems are owned and operated by public entities, including States, local governments, and special governments created under State law, such as sewer districts, flood control districts, or drainage districts. As point sources, MS4s are required to control the volume while reducing the discharge of pollutants in storm water. "Rather than regulate individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential 'nightmare'), … Congress put the NPDES permitting requirement at the municipal level to ease the burden of administering the program." *Nat. Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 636 F.3d 1235, 1247 (9th Cir. 2011).[64] The point being that, because States and local governments are already charged with controlling storm water volume and reducing pollution from urban runoff through the NPDES program, for purposes of administrative efficiency there is no benefit to be gained by treating the same drainage systems as jurisdictional waters. The potential classification of MS4s as "waters of the

[63] Congress amended the CWA in 1987 and added section 402(p) which, among other things, required EPA to develop regulations for an MS4 permit program regarding stormwater discharges. *See* 33 U.S.C. § § 1342(p)(3)(B), (4). The history of the MS4 permit program, and its phased approach for regulation of municipalities based on their population size is traced in *Envtl. Def. Ctr., Inc. v. U.S. EPA*, 344 F.3d 832, 841-42 (9th Cir. 2003). According to EPA, approximately 70 percent of the Nation's population lives within an urbanized area subject to EPA's MS4 regulations. *See* U.S. EPA, Fact Sheet 2.2 (EPA 833-F-00-004), *Storm Water Phase II Final Rule, Urbanized Areas: Definition and Description* (Dec. 1999, revised Dec. 2005), http://cfpub.epa.gov/npdes/stormwater/swfinal.cfm (last viewed June 26, 2011).

[64] The Ninth Circuit cited a statement from Senator Wallop: "'[T]he regulations can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source. … Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare.'" *Id*. (citing 131 CONG. REC. 15616, 15657 (Jun. 13, 1985)).

United States" would enormously disrupt State and local government programs to maintain, manage, and treat stormwater discharges under section 402(p).

Indeed, EPA and the Corps have repeatedly stated that MS4s are not "waters of the United States." In the 1990 preamble to EPA storm water regulations, EPA made clear that storm water runoff *into* municipal sewers (roads, ditches, storm drains, etc.) is not a discharge of a pollutant into a water of the United States. 55 Fed. Reg. 47,990, 47,991 (Nov. 16, 1990) ("[M]ost urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA. These discharges are subject to the NPDES program."). In fact, one municipality commented "that neither the term 'point source' nor 'discharge' should be used in conjunction with industrial releases into urban storm water systems because that gives the impression that such systems are navigable waters." *Id*. EPA responded that, in the regulations, EPA "always addresses such discharges as 'discharges *through* municipal separate storm sewers' as opposed to 'discharges *to* waters of the United States.'" *Id*. (emphasis added). In a 2005 memorandum from EPA's then General Counsel and Assistant Administrator for Water, the agency confirmed that MS4s are "by definition" *not* CWA "navigable waters."[65]

Moreover, the case law makes clear that "a two-permit regime is contrary to the statute and the regulations … [and] would cause confusion, delay, expense, and uncertainty in the permitting process." *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S.Ct. 2458, 2474 (2009) (Op. by Kennedy, J.). The Supreme Court concluded, "[i]n agreement with all of the parties, … that, when a permit is required to discharge fill material, *either* a § 402 *or* a § 404

[65] Memorandum from Ann R. Klee, Former General Counsel, and Benjamin H. Grumbles, Former Assistant Administrator for Water, EPA, to Regional Administrators, re: Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers, at 18 n.18 (Aug. 5, 2005), http://www.epa.gov/ogc/documents.htm.

permit is necessary." *Id*. (emphasis added). The same principle holds true here -- where a point source, such as an MS4, is regulated under section 402 of the Act, it is contrary to the statute, the case law, and common sense to also treat that "ditch" as a "water of the United States." It may not have been the Agencies' intent to regulate MS4s as "waters of the United States," but the Draft Guidance is broad enough to create confusion.[66] Therefore, the Coalition requests that the Agencies confirm that point sources, such as MS4s, that are regulated by CWA section 402 are not also "waters of the United States."

F. Adjacent Wetlands

1. The Draft Guidance Misconstrues the Plurality Opinion's "Continuous Surface Connection" Standard.

In *Rapanos*, the plurality found that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." 547 U.S. at 742 (emphasis in original). The plurality emphasized that the *Riverside Bayview* decision finding CWA jurisdiction over wetlands directly abutting a TNW rested upon the inherent ambiguity in defining where water ends and adjacent wetlands begin, whereas the isolated ponds at issue in *SWANCC* did not present the same boundary-drawing problem. *Id.* The plurality explained that "[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.* Thus, to establish that wetlands are jurisdictional under the plurality's standard, (1) the adjacent channel must contain a "water of the United

[66] Indeed, members of the Coalition are aware of stormwater permits where parts of MS4s have been identified as "waters of the United States."

States" (*i.e.*, a relatively permanent body of water connected to a TNW), and (2) the wetland must have a continuous surface connection with that water, "making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* However, the Draft Guidance misconstrues the plurality's "continuous surface connection" principle for adjacent wetlands and allows for a much broader assertion of CWA jurisdiction than is consistent with the plurality opinion.

According to the Draft Guidance, the Agencies will assert CWA jurisdiction over adjacent wetlands under the plurality standard where: (1) the wetland is adjacent to a relatively permanent, non-navigable tributary that is connected to a downstream TNW, and (2) a continuous surface connection exists where the wetland directly abuts the water (*e.g.*, they are not separated by uplands, a berm, dike, or similar feature). Draft Guidance at 15. The Draft Guidance states, however, that "[a] 'continuous surface connection' does not require the presence of water at all times in the connection between the wetland and the jurisdictional water." *Id.* In other words, the Agencies are proposing that a continuous surface connection does not require a continuous surface *water* connection. The logic of this statement is puzzling, and the idea that a continuous surface water connection is not required is inconsistent with the plurality's requirement for a continuous surface connection "making it difficult to determine where the 'water' ends and the 'wetland' begins." *Rapanos*, 547 U.S. at 742. The Agencies have ignored the guiding principle of the plurality's standard for adjacent wetlands—that "[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 are not jurisdictional under the CWA. *See id.* Because the Agencies' standard does not require a "continuous surface water connection," the Draft Guidance will allow for the assertion of

jurisdiction over wetlands with the type of remote hydrological connection to TNWs that the Supreme Court in *SWANCC* and the *Rapanos* plurality.

2. The Draft Guidance Impermissibly Changes the Regulatory Definition of "Adjacent."

According to the Draft Guidance, under the Kennedy standard, the Agencies will assert CWA jurisdiction over an "adjacent" wetland that is either (1) adjacent to TNWs or non-wetland interstate waters, or (2) adjacent to a jurisdictional water (except another wetland) and "either alone or in combination with other adjacent wetlands in the watershed has a significant nexus to the nearest downstream traditional navigable or interstate water." Draft Guidance at 16. In other words, wetlands that are "adjacent" to TNWs or non-wetland interstate waters are *per se* jurisdictional and do not require a showing of significant nexus. *Id.* Wetlands that are "adjacent" to a tributary, lake, reservoir, or other jurisdictional water (other than a wetland) must be evaluated pursuant to the Draft Guidance's broad significant nexus analysis. *Id.*

The Agencies recognize that to be an "adjacent wetland" under the Kennedy standard, the wetland must first meet the Agencies' regulatory definition of "adjacent," *i.e.*, "bordering, contiguous, or neighboring." *Id.*; 33 C.F.R. § 328.3(c). Under the Draft Guidance, the Agencies will consider wetlands to be "bordering, contiguous, or neighboring," and therefore "adjacent" if just one of the following three criteria is satisfied:

> (1) There is an unbroken surface or shallow sub-surface hydrologic connection between the wetland and jurisdictional waters;
>
> (2) Wetlands are physically separated from jurisdictional waters by man-made dikes or barriers; or
>
> (3) The wetland's physical proximity to a jurisdictional water is "reasonably close" (and therefore is considered "neighboring"). Wetlands located within the riparian area or floodplain of a jurisdictional water will generally be considered neighboring, and thus adjacent.

Draft Guidance at 16.

This standard gives new criteria for establishing that a wetland meets the Agencies' regulatory definition of "adjacent" and is problematic for several reasons. First, the Draft Guidance is expanding the regulatory definition of "adjacent" to include wetlands with an unbroken *sub-surface* hydrological connection to jurisdictional waters. Because there are many complicated underground hydrological connections and it is unclear what the Agencies are attempting to include with this standard, the Agencies should clarify the meaning of "sub-surface hydrological connections." For example, it is not clear whether this standard includes man-made surface connections or whether there are any limitations on the distance of the sub-surface connection between the "adjacent" wetland and the non-navigable water. Moreover, the Agencies' inclusion of sub-surface hydrological connections as a method of establishing adjacency is new and effectively changes the regulatory definition of "adjacent."

Second, the Draft Guidance expands the term "neighboring" in the Agencies' regulatory definition to include floodplain and riparian areas. This expansion is an apparent overreach of the Agencies' CWA jurisdiction. The Agencies do not state what type of floodplain is intended to define "adjacent," but the most commonly defined floodplain is the 100-year floodplain. If that is what is intended, this goes far beyond the ruling in *Rapanos*.[67] Exhibit 9, for example, depicts the extent of the 100-year floodplain along a stretch of the Illinois River. As evidenced by this map, the 100-year floodplain extends almost 3.5 miles from the Illinois River and thus under this new standard adopted in the Draft Guidance, a wetland situated 3.5 miles away from

[67] In fact, the *Rapanos* plurality criticized the overbreadth of the Corps' jurisdictional determinations and, as an example, specifically cited the practice of some Corps districts to assert jurisdiction over wetlands "if they lie within the '100-year floodplain' of a body of water—that is, they are connected to the navigable water by flooding, on average, once every 100 years." *Rapanos*, 547 U.S. at 728.

the river could be considered "adjacent"—a far cry from what is generally understood by that term.[68] This pattern of a broad floodplain is not at all unusual and would be repeated in physiographic circumstances where the lands adjacent to the river or stream are flat or level for a long distance. Thus, the Agencies have proposed that wetlands which are miles from the nearest stream or river are nevertheless "adjacent," in contradiction of the plain meaning of the term and without clear support in the rulemaking at issue in *Riverside Bayview*.[69] In addition, the 100-year floodplain is the area that would be expected to be flooded by the subject stream or river only once in 100 years. This extremely infrequent event is not the type of close connection that can establish "adjacency," and its use is clearly not supported by the rulemaking at issue in *Riverside Bayview*. As a result, the 100-year floodplain is far too broad an area to delimit the term "adjacency."[70]

A wetland that is located miles away from a jurisdictional water is hardly "neighboring" or "adjacent," and a wetland whose hydrologic connection with the river or stream occurs once every 100 years scarcely has any nexus with the river or stream, much less a "significant nexus." Again, the Agencies are impermissibly attempting to broaden their CWA jurisdiction in a manner that is wholly inconsistent with the *Rapanos* plurality's and Justice Kennedy's rejection of the Agencies' "any hydrological connection" standard as overbroad.

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[68] The Draft Guidance apparently intends to apply the same definition of "adjacency" regardless of whether the flowing water is a TNW or a non-navigable water, so this same overbreadth could occur with respect to wetlands "adjacent" to non-navigable waters.

[69] *See generally* 40 Fed. Reg. 31,320 (July 25, 1975); 42 Fed. Reg. 37,122 (July 19, 1977).

[70] Similar problems would occur with a 10-year, 25-year, or 50-year floodplain because in each instance, the area would be expected to be flooded by the subject stream very infrequently and far too remote in time to support a rule or "significant nexus" determination.

G. Other Waters

1. The Agencies' Use of the Significant Nexus Test for (A)(3) "Other Waters" Is Inconsistent with the Agencies' Own Regulatory Definition Because it Eliminates the Requirement for an Interstate Commerce Connection.

The Agencies' regulations identify "other waters" or "(a)(3)" waters that are subject to CWA jurisdiction as follows:

> The term *waters of the United States* means . . . [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) [w]hich are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) [f]rom which fish or shellfish are or could be taken and sold into interstate or foreign commerce; or (iii) [w]hich are used or could be used for industrial purpose by industries in interstate commerce.

33 U.S.C. § 328.3(a)(3). However, in the Draft Guidance, the Agencies appear to be substituting the significant nexus standard for the commerce analysis provided for by the regulatory definition of "waters of the United States." The Draft Guidance states that the Agencies intend to assert CWA jurisdiction over "other waters that are in close physical proximity to traditional navigable waters" using the same significant nexus analysis discussed in Section IV.C. Draft Guidance at 19. As such, the Draft Guidance abandons the requirement for specific interstate commerce connections that is present in the regulatory definition and creates a new definition for identifying jurisdictional "other waters" that is inconsistent with the Agencies' own regulations.

2. The Agencies' Creation of Two Categories of Other Waters—Physically Proximate and Non-Physically Proximate—Is a Blatant Change from the Agencies' Regulations.

The regulatory definition for "waters of the United States" lists the types of "other waters" that are jurisdictional: "intrastate lakes, rivers, streams (including intermittent streams),

mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 U.S.C. § 328.3(a)(3). However, in the Draft Guidance, the Agencies provide two categories of "other waters"—those that are "physically proximate" to jurisdictional waters and those that are not. Draft Guidance at 19-20. This is inconsistent with the Agencies' own regulations. The Agencies may not change the regulatory scheme for jurisdictional "other waters" without undergoing a notice and comment rulemaking.

3. It Is Impermissible for the Agencies to Treat "Physically Proximate" Other Waters the Same as Adjacent Wetlands.

Under the Draft Guidance, the Agencies will assert CWA jurisdiction over "physically proximate other waters" where they, alone or in combination with similarly situated proximate other waters in the watershed, have a significant nexus with TNWs or interstate waters. Draft Guidance at 19. The Draft Guidance asserts that because proximate other waters are "non-wetland waters that would satisfy the regulatory definition of 'adjacent' if they were wetlands," the Agencies believe that "it is scientifically appropriate and consistent with Justice Kennedy's opinion to evaluate significant nexus for such waters in the same manner as for adjacent wetlands." *Id.* However, the Agencies' approach is inconsistent with Justice Kennedy's opinion and with the Ninth Circuit's decision in *San Francisco Baykeeper*.[71]

As discussed in Section IV.C.3, the use of the significant nexus test for waters other than wetlands is inconsistent with Justice Kennedy's *Rapanos* concurrence. In addition, as demonstrated by the Court in *San Francisco Baykeeper*, the Agencies' attempt to apply the regulatory definition of "adjacent" to waters other than wetlands is impermissible. At issue in

[71] And, as explained earlier, the numerous types of waters included in the catchall definition of (a)(3) are far too varied to be "similarly situated."

San Francisco Baykeeper was whether the Agencies had CWA jurisdiction over a non-navigable pond. 481 F.3d at 702. San Francisco Baykeeper argued that the pond was a "water of the United States" because it was adjacent to the Mowry Slough, a navigable tributary of the San Francisco Bay. *Id.* at 702-03. The Court rejected this argument and held that asserting CWA jurisdiction over bodies of water that are adjacent to navigable waters by reason of that adjacency is an improper expansion of the regulatory definition of "waters of the United States." *Id.* at 704. The court noted that "[u]nder the controlling regulations . . . the only areas that are defined as waters of the United States by reason of adjacency to other such waters are 'wetlands'" and that "[t]here is little doubt that the regulatory definition is intended to be exhaustive . . ." *Id.* at 705. San Francisco Baykeeper also argued that there was a significant nexus between the pond at issue and Mowry Slough such that the pond was subject to CWA jurisdiction, but the Court rejected San Francisco Baykeeper's "adjacency-plus-nexus" argument, emphasizing the fact that Justice Kennedy's standard was for wetlands and did not apply to other non-wetland waters. *Id.* The Agencies' attempt to use this "adjacency-plus-nexus" approach to assert jurisdiction over non-wetlands was rejected in *San Francisco Baykeeper* and is an impermissible expansion of the regulatory definition of "waters of the United States." The Agencies may not apply the regulatory definition of "adjacent," which clearly applies to wetlands only, to assert CWA jurisdiction over non-wetland waters.

Moreover, the Draft Guidance states that the Agencies believe it is "scientifically appropriate" to apply the same significant nexus analysis for adjacent wetlands to "physically proximate" non-wetlands. Draft Guidance at 19. But the Agencies do not provide any scientific or evidentiary basis for their assertion that non-wetland waters that are "physically proximate" to TNWs or interstate waters should be treated in the same manner as adjacent wetlands and there is

substantial doubt whether such evidence exists, in light of the substantial differences between wetlands and the wide array of other features encompassed by "other waters."

Finally, this aspect of the Guidance would unlawfully attempt to claim jurisdiction over isolated ponds. Exhibit 10 is a depiction of prairie potholes in northern South Dakota. The area colored in yellow is the 100-year floodplain of the James River which has an approximately 1-mile width along this segment of the River. Under the Draft Guidance, the prairie potholes within this colored area could be considered "closely proximate" and could then be aggregated with all sloughs, streams, ponds, and other types of "other waters" within the floodplains of all waters that drain to a TNW, even though prairie potholes are normally perched systems with no surface or subsurface hydrologic connection to the James River or any of those "other waters." Those prairie potholes and other isolated "other waters" fit squarely within the holdings of *SWANCC* and *San Francisco Baykeeper* and should not be regulated under the CWA.

4. Non-Physically Proximate Other Waters Are Not Jurisdictional and Should Not Be Subject to a Significant Nexus Analysis.

Under the Draft Guidance, the Agencies will assert jurisdiction over "other waters that are not physically proximate to jurisdictional waters" using the same significant nexus analysis that they will use for adjacent wetlands. Draft Guidance at 20. Jurisdictional determinations for these waters will not use the aggregation principle but will instead focus on the individual water at issue and whether it has a significant nexus to a downstream TNW. *Id.* Because the Agencies "recognize that for other waters that are geographically separated from jurisdictional tributaries, establishing a significant nexus may be more challenging," field staff are required to refer determinations for non-physically proximate other waters to their respective Headquarters. *Id.*

The Agencies' application of the significant nexus test to "non-physically proximate" other waters is inconsistent with *SWANCC*. In *SWANCC*, the Supreme Court found that isolated

ponds that did not actually abut a navigable waterway were not jurisdictional under the CWA. 531 U.S. at 168. The *SWANCC* Court explained that it was the "significant nexus" between the wetlands and "navigable waters" that informed its reading of the CWA in *Riverside Bayview* and that *Riverside Bayview* did not establish that the Corps' jurisdiction "extends to ponds that are *not* adjacent to open water." *Id.* at 167-68 (emphasis in original). Rather, the Court found that "nonnavigable, isolated, intrastate waters"—which unlike the wetlands at issue in *Riverside Bayview* did not actually abut a navigable waterway—were not included as "waters of the United States." *Id.* at 169, 171. The Court's holding in *SWANCC*, including its rationale for rejecting jurisdiction in the case of intrastate, non-navigable isolated waters, was reaffirmed in Justice Kennedy's *Rapanos* concurrence. *See Rapanos*, 547 U.S. at 767. In *SWANCC*, there was no need to perform an elaborate analysis because lack of proximity alone was sufficient to determine there was no significant nexus. Like the ponds at issue in *SWANCC*, "non-physically proximate" other waters are truly isolated waters that are not jurisdictional under the CWA. Accordingly, Justice Kennedy's significant nexus test is not applicable for "non-physically proximate" other waters.

Moreover, the Draft Guidance's requirement that field staff refer determinations for "non-physically proximate other waters" to their respective Headquarters goes against the fabric of the Corps' permitting program and is impractical. Under the Corps' regulations, "District engineers are authorized to determine the area defined by the terms 'navigable waters of the United States' and 'waters of the United States.'" 33 C.F.R. § 325.9. Under the current permitting regime, district engineers are tasked with jurisdictional determinations. Headquarters is not equipped with the staff or budget to handle the increased workload that will result from

numerous referrals for jurisdictional determinations. The referral process will be unduly burdensome to the Corps and increase time delays in the permitting process for applicants.

V. The Economic Analysis Completed by EPA Both Underscores and Underestimates Impacts of the Draft Guidance.

The Coalition commissioned a review and analysis of the Agencies' Preliminary Economic Analysis of the Draft Guidance ("Economic Analysis") from Dr. David Sunding, the Thomas J. Graff Professor in the College of Natural Resources at the University of California, Berkeley and the Co-Director of the Berkeley Water Clinic.[72] Following a review of the methods EPA utilized to evaluate the economic impacts of the Draft Guidance, the Sunding Review concludes that (1) the Agencies failed to consider many major categories of impacts; (2) the Economic Analysis, as a whole, significantly underestimated the costs that were quantified, and (3) the Economic Analysis lacks credibility. For these reasons alone, the Coalition recommends that the Agencies redo their Economic Analysis and provide a more detailed and thorough analysis of the true cost impacts associated with implementation of the Draft Guidance.

A. The Agencies Failed to Consider Many Major Categories of Impacts.

In estimating the costs associated with the Draft Guidance, the Economic Analysis focuses solely on impacts, under CWA section 404, to future development. Thus, the Economic Analysis entirely fails to consider impacts occurring under any other section of the CWA or other federal law. The Sunding Review provides several examples of activities that are subject

[72] David Sunding, *Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction* (July 26, 2011) (attached hereto as Exhibit 11) (hereinafter "Sunding Review"). Dr. Sunding's biography is attached as Exhibit 12. Dr. Sunding has won several important awards for his research, including grants from the National Science Foundation, EPA, the Departments of the Interior and Agriculture, the State of California, and private foundations. He has served on panels of the National Research Council and the EPA Science Advisory Board. Dr. Sunding's work has been recognized across the country and was cited by the Supreme Court in *Rapanos.*

to NPDES permitting, including MS4s and certain agricultural activities involving application of pesticides. Because the Draft Guidance expands the scope of navigable waters, many additional sources will require NPDES permits for these same activities, but these impacts were not analyzed by the Agencies or included in the Economic Analysis.

The Sunding Review also analyzes the impacts the Draft Guidance will bring to bear upon States. The expansive interpretation of "the waters of the United States" will, for example, lead to an increase in the required state certifications required pursuant to CWA section 401. The increased administrative burden placed upon States' limited resources, as a result of the Draft Guidance, will lead to "significant expenditures by the states, and increase the backlog for permit processing times." Sunding Review at 8. Moreover, the Economic Analysis fails to consider the financial burden that will be placed upon facilities subject to the oil spill provisions set forth in section 311 of the CWA and neglects to analyze the impact associated with creating a federal nexus that will subject more private development to consultation under the Endangered Species Act, the National Historic Preservation Act, and other federal laws. The substantial economic costs associated with these laws, among others, have not been quantified in the Economic Analysis.

Finally, the Economic Analysis fails to address the costs associated with increased market demand for energy. By way of one example, it is estimated that by the year 2015, the natural gas industry will require $61 billion (in constant 2003 dollars) of investment in pipeline and storage infrastructure in the United States and Canada. Moreover, existing pipeline infrastructure requires on-going maintenance. Indeed, Congress and others are looking at the important issue of pipeline safety which will also certainly require the replacement of additional pipelines across the country. Similarly high levels of investment in electricity infrastructure are

anticipated in the coming decade, in part in response to EPA air, water, and solid waste regulations that will require upgrades to and replacements of many existing generation facilities, as well as federal and state reliability, open-access, renewable energy, distributed generation, energy efficiency, and demand response initiatives that will require upgrades to electric transmission and distribution infrastructure.

The construction of new and replacement pipelines and electric infrastructure, and the maintenance of existing pipelines and electric infrastructure, may involve relatively few, if any, impacts on aquatic resources, or they may involve the construction of hundreds of miles of pipeline or power lines that can cross large numbers of wetlands and other water bodies, depending on the geography and nature of the project. The expansive view of jurisdiction set forth in the Draft Guidance has the potential to require even more of these activities that have only minimal and temporary impacts to be forced into the cumbersome and delay-ridden permitting process. In turn, that will increase costs and delay meeting the Nation's growing energy demand and critical maintenance and safety-driven activities. These additional costs and delays are ultimately borne by the consumer public in the form of higher energy cost and also by way of the deferral of the non-financial benefits of a project (e.g., supply reliability or the availability of clean-burning natural gas for electric generators and other consumers, including residential consumers).

Thus, the Economic Analysis fails to accurately represent and quantify the costs of compliance with the Draft Guidance.

B. The Economic Analysis Significantly Underestimates the Costs that Were Quantified.

The Sunding Review concludes that the Agencies' "simple" analysis, which solely focuses on the section 404 regulatory program, vastly underestimates the costs of compliance

because it "mischaracterizes the actual effects of [section 404] regulation, and underestimates total impacts by focusing only on one aspect of the program, namely mitigation." Sunding Review at 2. When a party seeks a section 404 permit (either pursuant to a general or individual permit), the Corps typically specifies certain conservation requirements, including avoidance and mitigation. Avoidance requirements entail leaving some portion of the area proposed for development in an undisturbed condition, which, consequently, has significant economic costs because it results in a net loss of developable land. The Sunding Review estimates that this restriction can account for over 80 percent of the market price of the land, but the Agencies' Economic Analysis fails to account for this loss of value. The Economic Analysis also substantially underestimates the annual estimated processing costs to the applicant for obtaining new section 404 permits. Further, the Economic Analysis does not accurately account for the many time-consuming and expensive delays associated with obtaining a section 404 permit, which can include lost opportunity costs. Finally, mitigation requirements associated with regulation of land under section 404 can impact land development projects by altering costs and output levels and delaying competition. Sunding Review at 3-4.

The Agencies typically seek mitigation requirements that oblige the developer to improve or protect wetlands or other waters either onsite or offsite at specified ratios. Utilizing these cost elements, the Sunding Review presents an expression for the per-acre welfare cost of federal regulation. Sunding Review at 5. The Sunding Review concludes, based on academic research from land markets across the country, that the Agencies' Economic Analysis "underestimates the costs" of federal land use regulation. *Id*. at 10.

C. The Benefits Section of the Agencies' Economic Analysis Lacks Credibility.

The Sunding Review casts doubt upon the studies the Agencies have relied on to value the types of wetlands rendered jurisdictional by the Draft Guidance. These studies rely on

questionable methods and, as a result, the Economic Analysis is speculative and misleading. For example, the unit value of wetlands is derived from an unpublished, non-peer reviewed 1998 study by a group of agricultural economists at the U.S. Department of Agriculture. The five examples cited by the Agencies to explain the unit benefit estimates are not representative of the types of wetlands that will become jurisdictional under the Draft Guidance. Indeed, at least two of the examples involve wetlands that are in all likelihood already jurisdictional. Further, with respect to the "nonmarket nonuser habitat" value component, which accounts for nearly two-thirds of the Agencies' benefits estimate, the Agencies relied on twelve studies, six of which are from other countries. Two of the remaining studies concern the value of estuarine wetlands in California and are, therefore, not broadly representative of the areas that would become jurisdictional under the Draft Guidance. Accordingly, the Sunding Review concludes that the benefits section is seriously flawed, lacks credibility, and should be redone.

In sum, the Sunding Review raises clear questions about the validity, scope, and credibility of the Agencies' Economic Analysis. The Agencies should address the flaws in the analysis in order for the government and the public to have a clear understanding of the real costs associated with the Draft Guidance. The Coalition recommends that the Agencies undertake a true economic analysis and provide the public with an opportunity to review and comment upon the economic implications of this Guidance before it is finalized.

VI. Practical, Policy, and Economic Implications of Regulating All Waters.

The Agencies intend to apply the Draft Guidance's expanded concept of "navigable waters" to the entire CWA, but have utterly failed to explain or consider the various practical, policy, and economic implications of their decision. The unprecedented expansion of CWA jurisdiction envisioned by the Draft Guidance will most certainly have implications that permeate all sections and programs under the CWA. Although we believe that it is incumbent

on the agencies to explain their decision making on these important issues in a rulemaking, we set forth some of the concerns below.

A. CWA Permitting Programs

1. Section 404 Permitting Program

CWA section 404 requires a permit for projects and activities that involve the discharge of dredged or fill material into the navigable waters. A broad scope of projects are subject to section 404's permitting requirements, including pipeline and electric transmission and distribution lines; residential and commercial development; renewable energy projects like wind, solar, and biomass; transportation infrastructure, including roads and rail; and agriculture. Under the Draft Guidance, virtually all waters could be jurisdictional under the CWA and, as a result, even more projects and activities will be required to obtain section 404 permits.

The Corps' regulatory program has already reached a tipping point. The delays and cost spent processing permits are high and are not borne solely by the applicants.[73] Asserting jurisdiction over virtually every ditch or other water body will not only tax the limited resources of the Corps, but also will substantially increase processing times, not only for the new applicants swept into the system but for all other pending permit applicants as well.[74] The Agencies' limited resources could, and should, be better spent evaluating projects that truly are

[73] But the costs borne by the applicants are also significant. If it becomes necessary to obtain a section 404 permit, that is no small burden. One study found that obtaining a "nationwide" general permit took, on average, 313 days at a cost of $28,915, and obtaining an individual permit took, on average, 788 days at a cost of $271,000. *See* David Sunding and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," 42 NAT. RESOURCES J. 59, 73-82 (Winter 2002). And these were simply processing costs. They did not include the costs of land, mitigation, delay, and development opportunities foregone which can be quite extreme.

[74] In addition, broadened CWA jurisdiction could lead to additional third-party litigation in instances in which the Corps or another federal agency determines that a water body is not jurisdictional.

"federal" in nature, could cause significant impacts to a natural resource closely tied to TNWs, and require the true permitting expertise of the Corps and other permitting agencies for environmental protection purposes.

Applying for a section 404 permit triggers many additional requirements that involve consultation with multiple state and federal agencies. For example, as discussed below, permit applicants must obtain a state water quality certification to proceed with the section 404 permit process. In addition, permit applicants may often need to engage in consultations with various federal agencies to evaluate the impacts of the proposed activity under the National Environmental Policy Act, the Endangered Species Act, the National Historic Preservation Act, and other federal statutes. These consultations are often lengthy and burdensome.[75] Moreover, given the technical complexity required for a section 404 permit application, many permit applicants are forced to hire expensive outside consultants to assist with the application. As the number of waters covered by the CWA increases, many more activities and projects will be required to seek a section 404 permit and will be subject to the costly and burdensome requirements of the section 404 permitting process.

In addition, the Agencies' increased jurisdiction is certain to have impacts on mitigation for streams and wetlands. In a number of Corps districts, there are already limited credits available for third party mitigation, and an increase in jurisdiction will lead to great uncertainty about and possible exhaustion of available mitigation credits. In such situations, this will certainly drive up mitigation costs and, due to the onerous nature of some assessment

[75] For example, a section 404 permit has enhanced and costly endangered species requirements. Such requirements may include consultations with the Corps, the U.S. Forest Service and other agencies that can, for example, take longer than the time it takes to build a house. The goal for completing such consultations is 135 days—a very long delay. *See* U.S. Government Accountability Office, Endangered Species: More Federal Management Attention is Needed to Improve the Consultation Process at 7 (Mar. 2004).

methodologies and other mitigation requirements, this will also substantially increase the amount of time needed to obtain general and individual 404 permits. These increased costs and delays are a serious problem for industry, particularly when they involve critical infrastructure.

Furthermore, once a 404 permit is finally obtained, permittees are subject to general and specific permit conditions that impose restrictive limits on authorized activities. And now, permittees even face the risk that their permit could be retroactively vetoed by the EPA despite their full compliance with its terms and conditions. In 2007, the Corps issued a section 404 discharge permit to Mingo Logan Coal Company ("Mingo Logan") in connection with the Spruce No. 1 Mine in Logan County, West Virginia. Mingo Logan subsequently operated the mine in compliance with its permit. Nonetheless, more than three years after the Corps issued the 404 permit, EPA exercised its claimed authority to withdraw a discharge authorization so as to effectively revoke the permit over the objections of the Corps and the State of West Virginia. As demonstrated in a report prepared by Dr. Sunding on the economic impacts of EPA's after-the-fact veto of Arch Coal's permit, the threat of an EPA retroactive veto makes it more difficult for project developers to rely on essential 404 permits when making investment, hiring, or development decisions, and proponents must now account for the possibility of losing essential discharge authorization after work on the project has been initiated. Exhibit 2, 2011 Sunding Report.

2. Section 402 NPDES Permitting Program

Under section 402 of the CWA, dischargers must obtain a NPDES permit for any point source discharge into "navigable waters." 33 U.S.C. § 1342(a). With the proposed expansion of the scope of navigable waters to include waters such as remote waters and ditches that were not previously governed by the CWA, many more activities will become classified as discharges that are required to have NPDES permits.

In most cases, the NPDES permit program is administered by authorized States. As the number of NPDES permits that must be issued increases, the cost of issuing, monitoring, and enforcing these permits will fall predominantly on the States at a time when most State budgets are under severe strain. This expansion of the program will inevitably lead to delays in the issuance of these important permits and delays in or cessation of many new, job-creating economic activities.

In addition, expanding the use of NPDES permits will broaden the availability of the CWA's enforcement provisions. Most importantly, it will provide the opportunity for citizen suits in federal courts enforcing effluent limitations against discharges that, if formerly regulated at all, were subject solely to state regulation under which citizen suits are generally not available. In many cases, the expanded jurisdiction will authorize suits for activities with a tenuous connection to water quality by citizens seeking to delay or disrupt new construction or industrial activities.

a. Stormwater Program

Under section 402(p), NPDES permits are required for stormwater discharges from certain industrial activities, including construction activities, and MS4s. 33 U.S.C. § 1342(p). Stormwater permits generally require permittees to implement best management practices to reduce their pollutant discharge and contain costly constraints on how permitted activities may be carried out. As the Agencies expand the scope of "navigable waters" with the Draft Guidance, many activities that formerly were not considered to generate discharges to waters of the United States will be forced to bear the heavy expense of obtaining and complying with these stormwater permits because of their proximity to ditches or other newly covered waters.

For example, regulation of ditches would affect some State soil erosion and sedimentation control programs where the local government is the permitting authority. If

ditches become regulated, the permit load for the local agency would significantly increase with no federal funding to support the increased burden. This would also create a dual permitting regime that would ultimately result in the delays of construction projects and have negative effects on the creation and sustainability of jobs and economic growth with no environmental gain or benefit. Regulation of ditches could also affect those ditches (with a bed and bank) that are located at an industrial or commercial site used to convey storm water to retention or detention ponds. If the definition of "ditches" does not exclude such conveyances, these regulations will negatively affect wastewater and stormwater conveyances designed to protect the receiving waters prior to discharge. To avoid dual or triplicate regulation, industry, commercial entities, and local, city, and municipal governments would be forced to enclose their open ditch storm water conveyances by replacement with pipe, concrete, or conduit. Funding this type of design change to existing infrastructure would be enormous.

Also, as a practical matter, almost all industrial activities may be confronted with the decision whether to seek a stormwater permit as a result of the Draft Guidance because of the possibility that any drainage ditch near the activity's site could be a navigable water subject to regulation. And, whenever a permit is obtained, permittees for these industrial activities will be required to monitor discharges from every outfall covered by the permit and adopt costly stormwater control measures that ensure the attainment of numeric and non-numeric effluent limitations, such as relocating activities indoors, implementing erosion controls, adopting maximum spill prevention measures, and diverting or reusing runoff.[76] Similarly, construction activities, such as most home building projects, must obtain stormwater permits whenever they disturb more than one acre of land, or disturb less than one acre but are a part of a common plan

[76] "Multi-Sector General Permit for Stormwater Discharges Associated With Industrial Activity (MSGP)" at 13, 33, http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf.

of development that will ultimately disturb one acre or more. By expanding CWA jurisdiction to include all construction activities that discharge into newly covered waters such as ditches, the Draft Guidance could place severe limitations on the location and conduct of virtually all construction projects of eligible size. In addition, the increase in jurisdiction will lead to an increase in the number of water features covered by the new proposed general stormwater permit for construction, which requires a "50-foot buffer of undisturbed natural vegetation between the disturbed portions of your site and the waters of the U.S."[77] Application of the new buffer zone proposal in the wake of the Draft Guidance's broad expansion of "waters of the United States" will present extremely difficult, if not impossible, logistical problems for construction projects and will substantially increase costs.

Moreover, many features are specifically designed and constructed to manage and convey contaminated stormwater to treat it before it is released into waters of the United States. As discussed in Section IV.D.3., MS4s and other point sources are required to reduce the discharge of pollutants in stormwater that they are contributing to the MS4 system and infrastructure. The Agencies have not explained how contaminated storm water from small businesses like dental offices, medical offices, malls, large and small parking lots, and other contributors will be managed if these conveyances designed to manage storm water runoff flow and pollution control are now deemed "waters of the United States." For example, if recharge ponds, which serve to store contaminated stormwater, are deemed "waters of the United States," they will be subject to TMDL and NPDES permit requirements, as well as other requirements discussed throughout this section, and they will be deprived of their functionality and benefit. Moreover, in some States,

[77] *See* Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges From Construction Activities, 76 Fed. Reg. 22882 (Apr. 25, 2011); National Pollutant Discharge Elimination System General Permit for Discharges from Construction Activities, *available at* http://www.epa.gov/npdes/pubs/cgp_proposed.pdf.

the entire MS4 NPDES permit pre-treatment program would have to be altered. Currently, States regulate contributors to the MS4 system through a combined system under the MS4 NPDES permit pretreatment program, whereas if MS4s were considered "waters of the United States," States would have to revise the program to regulate each individual contributor to the MS4 system.

b. NPDES Program for Pesticide Applications

Although many agricultural activities are currently exempt from NPDES permit requirements, certain applications of pesticides to, on, or near waters of the United States will soon require an NPDES permit. EPA is developing a general permit for pesticides that covers discharges of biological or chemical pesticides that leave a residue when the pesticide is applied for mosquito and flying insect pest control, weed and algae pest control, animal pest control, or forest canopy pest control.[78] The permit will apply in areas where EPA issues NPDES permits, and States that issue NPDES permits are likely to adopt an analog.

All of these sources will be required to implement costly control measures to minimize the discharge of pesticides through alternative pest management measures such as prevention, mechanical or physical methods, cultural methods, or biological control agents. *See* Draft Pesticide Permit at 2-2. Certain large dischargers will also be required to develop a Pesticide Discharge Management Plan that describes the relevant pest problem, evaluates pest management options, and documents response procedures for spills and other adverse incidents. *Id.* at 5-1. The permit also contains recordkeeping and corrective action provisions, as well as

[78] *See* Draft National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharges From the Application of Pesticides, 75 Fed. Reg. 31,775 (proposed June 4, 2010); 2011 Pre-publication Draft Final NPDES Pesticide General Permit (Apr. 1, 2011), *available at* http://www.epa.gov/npdes/pubs/draftfinal_pgp.pdf (hereinafter Draft Pesticide Permit).

other standard NPDES permit provisions. *Id.* at 6-5, 7-1 to -5. It is estimated that under the new NPDES permit program for pesticides, 365,000 new sources will be required to obtain NPDES permits, but this estimate was made before, and does not account for, the expansion of jurisdiction proposed in the Draft Guidance.[79] Now, with the proposed expansion of the scope of navigable waters to include waters such as ditches that were not previously governed by the CWA, many additional sources will become classified as dischargers that are required to have NPDES permits for pesticides. The Agencies fail to appreciate the costs and legal jeopardy the changes in the Draft Guidance will impose on landowners and pesticide applicators who may encounter newly-defined jurisdictional "waters of the United States" while spraying pesticides, but who are not covered by the simultaneously-issued Pesticide General Permits.[80] Moreover, as discussed above, States are responsible for administering the NPDES permit program. As such, the cost of issuing, monitoring, and enforcing these new NPDES permits for pesticide discharges will fall predominantly on the States at a time when most States are already facing enormous fiscal strains.

c. Water Quality Standards

As part of the NPDES program, section 303 requires States to develop, submit for approval, and periodically review and revise water quality standards within their jurisdiction. 33 U.S.C. § 1313(c). As part of this process, States must identify the "designated uses of the

[79] *See* EPA, "Background Information on EPA's Pesticide General Permit," http://cfpub.epa.gov/npdes/pesticides/aquaticpesticides.cfm (viewed Jun. 26, 2011).

[80] The Pesticide General Permit expressly does not cover situations where pesticide applications are made to features or waters not defined as "waters of the United States. *See* http://cfpub.epa.gov/npdes/home.cfm?program_id=410. Because the Draft Guidance's cumbersome jurisdictional process makes it difficult to determine what is a "water of the United States" and, therefore, when pesticide discharges are covered by the Pesticide General Permit, it is likely that the confusion will lead to overbroad assumptions of jurisdiction over pesticide discharges.

navigable waters" and once a use has been designated, the State must establish water quality criteria sufficient to protect that navigable water's designated use, through the adoption of either numerical measurements or, where numerical criteria cannot be established, through narrative criteria. 40 C.F.R. § 131.11(b).

As the Agencies expand the scope of jurisdictional waters under the CWA, States will be required to identify new waters that fall under the Draft Guidance's definition of "navigable waters." For each of these new waters, the State must designate a use and engage in the costly process of calculating numerical criteria based on a "sound scientific rationale" that protects the water's ability to support fishing, swimming, or any other use the state designates. The costs and delays resulting from this process will be exacerbated by section 303's requirement that the State hold public hearings to review applicable water quality standards. 33 U.S.C. § 1313(c)(1). In addition, the States must review their water quality standards every three years and modify them as appropriate, meaning that the inclusion of new waters within the Act's jurisdiction will not be a one-time burden. Moreover, through citizen suits, members of the public can force EPA to enact water quality standards where the State has not done so. As a result of its expansion of "navigable waters," EPA is opening itself, and potentially the States, up to potential liability where States are not able to undertake the costly and burdensome process of designating a use and setting water quality standards for each new navigable water.

d. TMDL Standards

As part of the section 303 process for designating water quality standards, each State must identify impaired waters within its boundaries for which technology-based effluent limits included in NPDES permits are not stringent enough to implement the applicable water quality standard. *Id.* § 1313(d)(1)(A). Based on extensive analysis and a complicated technical process, the State must then establish TMDLs describing the maximum amounts of pollutants that the

navigable water can receive and still meet its water quality standard or designated use. *Id.* § 1313(d)(1)(C). The State must go through this complicated process of calculating a TMDL for each pollutant contributing to the water's impairment. As a result of the Draft Guidance's expansion of jurisdictional waters covered by the CWA, the States will be required to go through the costly and time-consuming TMDL process for many additional waters. Again, if the States are not able to comply with this burdensome process, EPA is subjecting itself, and potentially the States, to potential liability from citizen lawsuits.

B. State Water Quality Certification

Under section 401 of the CWA, applicants for a federal license or permit to conduct any activity that "*may* result in *any discharge* into the navigable waters" must provide the permitting agency with a certification from the State where the discharge would occur stating that the discharge will comply with all applicable water quality standards. 33 U.S.C. § 1341(a)(1) (emphasis added). This state certification requirement is already broad and encompasses potential dischargers and dischargers that do not add any pollutants to navigable waters. *See S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370 (2006) (requiring state certification for a dam where discharge consisted solely of water). Any expansion in the scope of "navigable waters" will expand the state certification requirement even further by triggering the certification requirement for almost every federal project, including activities that previously affected only non-regulated intrastate waters and have very tenuous, if any, effects on water quality. In addition, because a broader definition of "waters of the United States" will require more dischargers to obtain permits under sections 402 and 404 of the Act, as discussed above, entities engaged in previously upland discharges will be required to obtain state water quality certifications.

The Agencies' proposed expansion in scope will greatly increase the administrative burden borne by the States. For each potential discharge for which a federal permit is sought, the State will have to assess the impact of that activity on navigable waters in the state, determine whether there is a reasonable assurance that the activity will not violate applicable effluent limitations or water quality standards, and develop any conditions that must be placed on the activity in order to achieve such reasonable assurance. 40 C.F.R. § 121.2(a). In addition, the State must provide public notice of applications for certifications and, in some circumstances, hold "public hearings in connection with specific applications." 33 U.S.C. § 1341(a)(1). The additional administrative burden placed on the States by an increased number of certification requests could frustrate States' ability to effectively maintain the quality of waters within their boundaries by spreading thin the limited resources that each State is able to devote to evaluating certification requests. Moreover, the influx of new applications could lead to additional backlog and costly delays that will impact all applicants seeking certification from the State and will delay the creation of jobs and the production of goods and services for the public.[81]

At the same time, under section 401(d), a State may set forth limits in its certification that it feels are necessary to ensure the applicant's compliance with relevant effluent limits, water quality standards, or other appropriate requirements of state law in the applicant's permit. 33 U.S.C. § 1341(d). These limits become a federally enforceable condition on the federal license or permit sought by the applicant. *Id.* With this authority, States can impose a broad range of conditions that are not required to relate to the discharge that initially triggers the certification requirement and have very little to do with water quality. *See PUD No. 1 of Jefferson Cnty v.*

[81] Although the opportunity for waiver of certification through state inaction imposes an upper limit on the length of any potential delay, such a waiver does not take effect until six months to one year after an applicant submits a request for certification. 40 C.F.R. § 121.16(b).

Wash. Dep't of Ecology, 511 U.S. 700 (1994) (allowing State of Washington to condition its certification of a hydroelectric dam for a Federal Energy Regulatory Commission ("FERC") license on the imposition of minimum stream flow rates where such measures were unrelated to the discharge of a pollutant); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) (allowing Vermont to insert broad conditions with indirect connections to water quality maintenance into FERC licenses for hydroelectric dams, including provisions reserving the state's authority to approve any plans for maintenance, repair, or significant changes to the projects). In addition, States are able to use their section 401(d) authority to effectively kill interstate projects such as pipelines and transmission lines. *See, e.g., Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 165 (2d Cir. 2008) (Although the Second Circuit noted in its review of the Connecticut Department of Environmental Protection's ("CTDEP") first denial of a water quality certificate application for a proposed interstate natural gas pipeline that there was some evidence that CTDEP "had predetermined to deny certification in this case, affording the pipeline proposal only perfunctory review," the court upheld CTDEP's second denial of water quality certification.). Although the State's section 401(d) authority is not unbounded, it gives States a power over federal waters that will be expanded as more and more projects must obtain state water quality certification. Requiring more activities to obtain section 401 state certification allows the States to impose burdensome and potentially abusive conditions on activities with tenuous, if any, effects on water quality.

C. Oil Spill Prevention Control and Countermeasure ("SPCC") Plans

Under the Act's oil spill provisions at section 311, any facility which, due to its location, could reasonably be expected to discharge oil in quantities that may be harmful into or upon the navigable waters is required to develop a comprehensive SPCC plan. 33 U.S.C. § 1321(b)(3); 40 C.F.R. § 112.1(b). Because the definition of "quantities that may be harmful" is broad,

encompassing amounts that "[c]ause a film or sheen upon or discoloration of the surface of the water," the primary limiting factor for whether a facility is subject to the SPCC requirements is its location. 40 C.F.R. § 110.3(b), § 112.1(b). This determination is based solely upon "geographical and location aspects of the facility," such as proximity to navigable waters. *Id.* § 112.1(d)(1)(i). Because under the Draft Guidance many more waters are considered "navigable waters," many more facilities will be subject to section 311's SPCC requirements solely based on their proximity to formerly unregulated intrastate features, such as ditches.

Any facility subject to SPCC requirements must develop an SPCC plan that requires, among other things, discharge prevention measures, discharge or drainage controls, countermeasures for discharge discovery and response, and a prediction of the direction, rate of flow, and total quantity of oil that could be discharged as a result of major equipment failures. *Id.* § 112.7. In addition, the SPCC plan must provide for inspections, tests, and appropriate training for oil-handling personnel. *Id.* All of these provisions must be reviewed and certified by a licensed professional engineer in order to satisfy the facility's obligations. *Id.* § 112.3(d). Given the technical complexity required of SPCC plans, many facilities are forced to hire expensive outside consultants to develop an appropriate plan. As a result of these costs and the actual costs of implementing the plan's provisions, the Draft Guidance's expanded concept of navigable waters will place a heavy financial burden on these facilities solely based on their proximity to formerly unregulated features.

In sum, these are but a few of the consequences that may arise given the expansive nature of federal jurisdiction as contemplated in the Draft Guidance.

VII. Additional Clarifications

Should the Agencies adopt final guidance regarding identification of waters under the CWA, there are several important procedural and substantive issues that the Coalition suggests

should be clarified. First, the Agencies have noted in the Draft Guidance that "it is not the agencies' intention that previously issued jurisdictional determinations be re-opened as a result of this guidance." Draft Guidance at 2. The Coalition agrees that any new guidance should not affect previously issued jurisdictional determinations. In addition, the Agencies should confirm that the Draft Guidance will not be used to revisit previously made determinations, even after the expiration of that determination, unless substantial new facts come to light about the nature of the water or wetland. Thus, once a determination has been made regarding a particular wetland, water body, or area, the Agencies should confirm that the determination will stand indefinitely, absent a substantial change in physical circumstances. Otherwise, there will be no finality in the CWA program, and project proponents, landowners, and regulators alike will face a great deal of uncertainty regarding the status of already made determinations going forward.

Second, the Agencies have stated that the Draft Guidance "does not address the regulatory exclusions from coverage under the CWA for waste treatment systems and prior converted croplands, or practices for identifying waste treatment systems or prior converted croplands." Draft Guidance at 3. These regulatory exclusions and practices as applied and interpreted by case law are of utmost importance to the Coalition's member organizations, including, for example, the American Farm Bureau Federation®, whose more than six million farmer and rancher members produce virtually every agricultural commodity produced commercially in the United States, and have relied for decades on the prior converted croplands exclusion, as well as the many municipal and industrial entities which have relied for decades on the waste treatment exclusion. The Coalition agrees that the Draft Guidance does not address these exclusions and their accompanying practices and, moreover, lawfully may not. Those exclusions are covered in the Agencies' regulations, *see* 33 C.F.R. § 328.3(a)(8); 40 C.F.R.

§ 230.3(s), and, therefore, may not be revised by guidance. *See Paralyzed Veterans of Am.*, 117 F.3d at 579. The Draft Guidance also does not "affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal agriculture, forestry and ranching practices." Draft Guidance at 3. Finally, the Agencies state the Draft Guidance "does not address the statutory and regulatory exemptions from NPDES permitting requirements for agricultural stormwater discharges and return flows from irrigated agriculture." Draft Guidance at 3. The Coalition asks the Agencies to confirm these exclusions and exemptions in any final guidance.

Third, we ask the Agencies to confirm that preliminary jurisdictional determinations ("PJDs"), as defined by 33 C.F.R. § 331.2, will still be utilized, and may be relied on. PJDs serve as a useful tool for members of the Coalition who seek the Corps' early written view whether there may be jurisdictional waters on a particular parcel. For example, linear projects such as pipelines, by their very nature, can be very long and can cross hundreds of water bodies. The PJD process under Corps RGL 08-02: *Jurisdictional Determinations* (June 26, 2008), http://www.usace.army.mil/CECW/Pages/rglsindx.aspx, is important in allowing these projects when appropriate to presume jurisdiction to avoid delay. Indeed, many members of the Coalition have relied on PJDs and therefore, seek to confirm that the agencies will continue to allow the use of PJDs.

It is quite likely that the Draft Guidance, if issued and implemented, will create a considerable amount of confusion for Corps districts and applicants alike, and to avoid the confusion and delay perpetuated by this Draft Guidance, applicants may need to avail themselves of the PJD process in order to provide necessary goods and services to the public in a timely fashion. Thus, the Agencies need to confirm that applicants still retain the PJD option.

VIII. Conclusion

In sum, we believe that the Guidance misconstrues the relevant Supreme Court cases, is inconsistent with the CWA and the Agencies' regulations, impermissibly expands jurisdiction, fails to follow proper APA procedures, and will impose enormous burdens on EPA and Corps staff, state permitting authorities, and the regulated community, including residents, businesses, and landowners, while providing few if any corresponding benefits. For these reasons, the Agencies should not finalize but instead should withdraw the Draft Guidance.