## Overview of CWA Jurisdictional Guidance

This memorandum provides an analysis of the 39-page document entitled "Draft Guidance on Identifying Waters Protected by the Clean Water Act" ("Guidance" or "document"). EPA and the Corps of Engineers (together, the "Agencies") issued the Guidance on May 2, 2011 to identify the waters subject to federal jurisdiction under the Clean Water Act ("CWA") and implement the Supreme Court's decisions in *SWANCC* and *Rapanos*. 76 Fed. Reg. 24,479 (May 2, 2011). The Guidance is out for public comment until July 1, 2011. In addition to the Guidance, the Agencies also issued supporting scientific and legal information and an economic analysis of the impacts and benefits associated with the Guidance.

The document is less "guidance" and more a menu of options for field staff to employ to support a determination that a given waterbody is a "water of the United States." Those options are purportedly based on the Supreme Court's decisions in *Rapanos* and *SWANCC* (and some other case law), but in many cases the Guidance distorts the cases to support a very broad view of CWA jurisdiction. Once finalized the Guidance will replace the *SWANCC* Guidance issued in 2003 and the *Rapanos* Guidance issued in 2008. The document states that it applies to all CWA programs (not just Section 404 like the earlier guidance documents). It repeatedly notes that it is a not a rule and not binding, but, despite these statements, it is clear that that is exactly what it is. The Guidance also does not address CWA jurisdictional exclusions for waste treatment systems or prior converted croplands.

The Agencies purport that the Guidance will increase clarity and improve the consistency and predictability of Corps and EPA jurisdictional determinations, but the Guidance itself is convoluted and complicated. The Agencies state and expect that the number of waterbodies found subject to CWA jurisdiction "*will increase*" under this new Guidance.

### Summary of Guidance

The Guidance is divided into eight sections. The first two address traditional navigable waters and interstate waters. The third section provides the Agencies' new view of the "significant nexus" standard described in Justice Kennedy's *Rapanos* concurrence. Section 4 addresses tributaries *including roadside and agricultural ditches*. Section 5 addresses adjacent wetlands, and Section 6 discusses the two new categories of "other waters." Section 7 provides examples of waters that are generally not "waters of the United States" under the CWA. The final section provides guidance on the documentation necessary to support decisions concerning whether waters are protected by the CWA.

### Traditional Navigable Waters

- The term "traditional navigable waters" does not exist in the Agencies' regulations. The term has instead been used in the past by the United States Supreme Court to refer to the "navigable waters of the United States" regulated under the Rivers and Harbors Act ("RHA"). The navigable waters regulated by the RHA are generally those waters capable of transporting interstate commerce among states. The Guidance expands the scope of the term "traditional navigable waters" to now cover any waterbody that can

support *waterborne recreational use*, even if such use only occurred one time for the sole purpose of demonstrating that the water could be used for recreation. Guidance at 6. This expansive view of traditional navigable waters is not supported by the *Riverside Bayview*, *SWANCC*, or *Rapanos* decisions. This interpretation has instead been invented by the Agencies to broaden jurisdiction. Under this Guidance, all waters with a significant nexus to traditional navigable waters would be jurisdictional. Guidance at 7. In addition, all wetlands that are "adjacent" to traditional navigable waters are jurisdictional based on a showing of "adjacency" alone. Guidance at 15. That is, there is no need to show a significant nexus; an adjacent wetland would be presumed jurisdictional based on its location alone. Expanding the meaning of traditional navigable waters ultimately makes it easier for the Agencies to establish jurisdiction because there will simply be more traditional navigable waters with which to have a significant nexus or be adjacent.

**Interstate Waters**

- "Interstate waters" are currently listed as jurisdictional under the Agencies' regulations. However, the term is not defined. The Guidance adopts a definition of interstate waters that was contained in federal water pollution control statutes prior to the CWA. Guidance at 7. The Guidance defines interstate waters as "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries." *Id.* They do not need to be navigable. For the first time, this Guidance gives new special status to interstate waters, equating them with traditional navigable waters (as newly and expansively defined). Thus, waters or wetlands may be deemed jurisdictional because of their relationship to interstate waters. In other words, waters with a significant nexus to interstate waters are jurisdictional, as are wetlands adjacent to interstate waters. Moreover, waters that provide flow to interstate waters are deemed jurisdictional tributaries. Neither Kennedy nor Scalia discussed interstate waters in *Rapanos*, and there is no support for this definition in *SWANCC, Rapanos*, or *Riverside Bayview*. Again, the Agencies seek to expand the universe of waters to which a significant nexus can be made, making it easier for them to establish jurisdiction.

**Significant Nexus**

- The current regulations do not mention significant nexus. "Significant nexus" is derived from *SWANCC* and *Rapanos*. In particular, in his *Rapanos* concurrence, Justice Kennedy noted that wetlands that have a significant nexus to traditional navigable waters are "waters of the United States" "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 reading understood as 'navigable.'" 547 U.S. 715, 780 (2006). The 2008 *Rapanos* Guidance limited the notion of "similarly situated" to wetlands alone, consistent with Kennedy's use of that term. This Guidance applies Kennedy's significant nexus standard to tributaries, including ditches, wetlands, and non-wetland "physically proximate" other waters. Guidance at 7-9.

- The 2008 Guidance also limited the significant nexus analysis for tributaries to the tributary "reach." The reach was defined as the length of the tributary to where it joined

a higher order stream. For impacts to an adjacent wetland, the 2008 Guidance evaluated only wetlands within the reach of the tributary to which the wetland was adjacent.

- This Guidance eliminates the "reach" concept, and now requires all tributaries, wetlands, and "proximate other waters" "in the same watershed" to be aggregated and considered together in determining whether the water has a significant nexus. Guidance at 8. A watershed is defined by the single point of entry draining into the nearest traditional navigable water or interstate water. This means that all tributaries, wetlands, or proximate other waters in a watershed may be evaluated together for purposes of determining whether the water or wetland in question has a significant nexus to traditional navigable or interstate waters. This has the effect of adding potentially hundreds of tributaries, wetlands, and non-wetland waters to the significant nexus analysis, thus making it easier to find that there is a significant nexus.

- A hydrological connection is <u>not</u> necessary to establish a significant nexus. Guidance at 9.

- Instead, the Agencies have crafted a broad definition of significant nexus, which instructs the field staff to determine whether certain functions such as "sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, and provision of aquatic habitat" are present. Guidance at 9. Field staff are also instructed to look for indicators of hydrology, effects on water quality, and physical, chemical, and biological connections or functions. *Id.* The Guidance provides examples of each. Hydrology can significantly affect downstream waters through "transport of water and materials and compounds carried by the water, … water retention, … and water discharge." *Id.* Effects on the chemical integrity of downstream waters may be evidenced by the extent to which the waters have the capacity to carry pollutants or flood waters downstream, reduce the amount of pollutants or flood waters that would otherwise enter traditional navigable waters or interstate waters, and the extent to which the waters perform physical functions related to maintenance of downstream water quality, such as sediment trapping. Guidance at 10. Biological functions include the capacity to transfer nutrients and organic carbon to downstream food webs and the maintenance of habitat that provides spawning areas for species. *Id.* Indeed, many non-wet areas or uplands would likely serve these same functions.

- Moreover, the Guidance continues to perpetuate the notion from previous guidance that any relationship that is "more than speculative or insubstantial" will qualify as a "significant" nexus instead of requiring that the nexus actually be significant or substantial. The difference is important as even a minor nexus would qualify as "more than speculative" but a minor nexus is not the same as a significant nexus.

**Tributaries**

- "Tributaries" are currently listed as jurisdictional under the Agencies' regulations. However, the term is not defined. The 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." Guidance at 11. A tributary is physically defined by the presence of a channel with a bed and bank and an ordinary high water mark (OHWM). The Guidance notes that a tributary continues as "far as a channel (i.e., bed and bank) is present." The import of this is that channels are everywhere and most channels carry water.

- If a feature qualifies as a tributary (see above), the feature will be jurisdictional if it meets *either* the plurality standard or Justice Kennedy's standard set forth in *Rapanos*, as interpreted in the Guidance. *Id.*

    - **Plurality Standard for Tributaries**: Under this standard, a non-navigable tributary is jurisdictional when it: (1) is connected directly or indirectly to a downstream traditional navigable water and (2) flow in the tributary is at least seasonal. Guidance at 13. Under the Guidance, a water has "seasonal flow" when "it has predictable flow during wet seasons in most years." *Id.*

        - "Seasonal flow" is no longer defined as it was under the 2008 *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. *Id.* Claiming that the length or extent of what is "seasonal" may vary across the country, the Guidance eliminates these elements and grants field staff flexibility to determine what seasonal flow means in each particular case. *Id.*

        - The Guidance utilizes the plurality standard as a basis for asserting jurisdiction over ditches even though the plurality was clear that the Corps's assertion of jurisdiction over ephemeral waters and ditches was wrong.

    - **Justice Kennedy Standard for Tributaries**: Under the Guidance's interpretation of Justice Kennedy's opinion, a tributary is jurisdictional when: (1) it is a tributary to a traditional navigable water or interstate waterway (see above) and (2) it alone or in combination with other tributaries has a significant nexus with the traditional navigable water or interstate water. Guidance at 13.

        - Significantly, the Guidance finds that if number 1 is met, number 2 is likely met as well. If a tributary has a bed and bank and an OHWM and is part of tributary system, the Agencies "generally expect" that the tributary will have a significant nexus. Guidance at 14. The "presence of a bed and bank and OHWM are physical indicators of flow" and that is enough to show a significant nexus. This is directly contrary to Kennedy's opinion as Kennedy was skeptical of the Agencies' use of OHWM and did not allow them to make such presumptions.

**Ditches as Tributaries**

- The current regulations do not define "ditches" as a category of jurisdictional waters and the 2008 *Rapanos* Guidance generally excluded them.

- This Guidance makes clear that all *tidal* ditches are jurisdictional based on being subject to the ebb and flow of the tide (traditional navigable waters).

- *Non-tidal* ditches have a series of requirements associated with them and these requirements, as outlined in the Guidance, indicate that many ditches will likely be deemed jurisdictional. Guidance at 12.

    - To be jurisdictional, a non-tidal ditch must have 1) a bed and bank (anything with a channel appears to meet this requirement); 2) an ordinary high water mark 3) connect to directly or indirectly to a traditional navigable water or interstate water; and meet 1 of 5 characteristics:

    - natural streams that have been altered;

    - 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.;

    - ditches that drain natural water bodies (including wetlands) into the tributary system of a traditional navigable or interstate water." Guidance at 12.

- Most ditches carry flow, contain standing water, and drain areas that have water. This standard, while more complicated than before, ultimately amounts to the same standard that was rejected by both the plurality and Justice Kennedy in *Rapanos*, namely anything that connects to a navigable water is jurisdictional.

**Adjacent Wetlands**

- Wetlands adjacent to other jurisdictional waters (other than wetlands) are a category of jurisdictional waters under the Agencies' regulations.

- EPA and the Corps will assert CWA jurisdiction over adjacent wetlands that meet either the *Rapanos* plurality standard or the *Rapanos* Kennedy standard, as they are interpreted in the Guidance. Guidance at 15.

    - **Plurality Adjacent Wetlands Standard:** Under the plurality standard, wetlands are jurisdictional based on the "presence of a physical connection between the wetland and a relatively permanent water to which it is adjacent."

    - According to the Agencies, under the plurality standard, an adjacent wetland is jurisdictional when it satisfies the following characteristics: 1) wetland is

adjacent to a relatively permanent, non-navigable tributary that is connected to a downstream traditional navigable water; and 2) a continuous surface connection exists where the wetland directly abuts the relatively permanent water (no separation by dikes, berms, etc.).

- The Guidance however states that "a continuous surface connection does not require the presence of water at all times in the connection." Guidance at 15. In other words, a continuous surface connection does not require a continuous surface water connection.

- **Kennedy Adjacent Wetlands Standard:** 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.*, be "bordering, contiguous, or neighboring." In the Guidance, the Agencies now state that to meet this regulatory definition of adjacency, at least one of the following criteria must be satisfied:

    - 1) there is an unbroken surface *or shallow sub-surface* hydrologic connection between the wetlands and jurisdictional waters; or

    - 2) wetlands are physically separated by man-made dikes or barriers; or

    - 3) wetlands that "reasonably close" such that there is a "demonstrable ecological interconnection between the wetlands and the jurisdictional water body." For example, a wetland would be considered "neighboring" and therefore, "reasonably close" if the wetland is within a "riparian area" or in a "floodplain."

- If the wetland is "adjacent" (see definition above) to a traditional navigable water or non-wetland interstate water, it is "*per se* jurisdictional and do[es] not require a showing of significant nexus." Guidance at 16.

- If the wetland is "adjacent" (see definition above) to a tributary, lake, reservoir, or other jurisdictional water (other than a wetland), it must be evaluated pursuant to the broad significant nexus analysis set forth in Section 3.

**Other Waters**

- The "other waters" section of the Agencies' regulations is based on a Commerce Clause connection. The regulations define "other waters" to include "[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." Many of these "waters" are now covered elsewhere in the Agencies' Guidance (*e.g.*, lakes, rivers, streams).

- Substitution of significant nexus for specific interstate commerce connections.

- Under the 2008 Guidance, the Agencies recognized that *SWANCC* and *Rapanos* called into question jurisdiction over these waters and adopted a "phone home" approach to these waters, finding that if a field office was going to assert jurisdiction under the "other waters" section of the regulations, they would need to elevate the decision to Headquarters.

- This Guidance breaks apart the "other waters" section into two categories of waters:

    - First, the Agencies will assert jurisdiction over "physically proximate other waters," which are defined as "other waters that are in close physical proximity to traditional navigable waters, interstate waters, or their jurisdictional tributaries, and that alone or in combination with similarly situated proximate other waters in the region significantly affect the chemical, physical, or biological integrity of traditional navigable waters or interstate waters." Guidance at 19. Thus, the aggregation principle described above will be applied to determine "significant nexus."

    - Second, "non-physically proximate other waters," are considered "isolated" and may be jurisdictional but field staff are to elevate determinations for these "other waters" to their respective Headquarters and obtain project-specific approval before asserting or denying jurisdiction. Guidance at 20. Jurisdictional determination for these waters will not use the aggregation principle but will instead focus only on the individual water at issue and whether it has a significant nexus to a downstream traditional navigable water. The Agencies acknowledge that establishing a significant nexus for these waters "may be more challenging." *Id.*

**Waters Generally Not Jurisdictional**

- EPA and the Corps have previously described categories of waters that are generally not "waters of the U.S." in preambles to CWA regulations. 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986); 53 Fed. Reg. 20764, 20765 (Jun. 6, 1988). For example, "artificial reflecting pools or swimming pools excavated in uplands" are not jurisdictional. These exclusions are repeated in the Guidance.

- The Guidance states that "groundwater drained through subsurface drainage systems are not waters of the United States," but then says that "construction and associated maintenance" of the system may require a permit.

- The Guidance excludes "certain types of erosional features, such as gullies and rills" from the tributaries over which the Agencies will assert jurisdiction. Guidance at 11. Gullies are defined by the Guidance as "relatively deep channels that are ordinarily formed on valley sides and floors where no well-defined channel previously existed" and will be "commonly found in areas with low-density vegetative cover or with soils that are highly erodible. Other erosional features that are not tributaries under the Guidance may be found in areas where compacted soil and sparse vegetation have increased overland flow. Field staff are directed to consider downcutting and headcutting and the definition

of the bed and bank as they distinguish between jurisdictional streams and tributaries and those erosional features that are not subject to jurisdiction. Guidance at 11-12.