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Lisa P. Jackson, Administrator
Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Docket No: **EPA-HQ-OW-2011-0409**

Dear Ms. Jackson:

Thank you for the opportunity to comment on the Environmental Protection Agency and the U.S. Army Corps of Engineers' ("Agencies") proposed guidance document, "Draft Guidance on Identifying Waters Protected by the Clean Water Act" ("Guidance"). This comment is being submitted in the public interest; the **Minnesota Free Market Institute** has no direct interest in the jurisdictional reach of the Clean Water Act ("CWA") other than as it relates to our stated mission.

The **Minnesota Free Market Institute** is a non-partisan, non-profit educational organization dedicated to the principles of individual sovereignty, private property and the rule of law. We advocate for policies that limit government involvement in individual affairs and promote competition and consumer choice in a free market environment.

This Guidance attempts to clarify the scope of the Agencies' jurisdiction under the Clean Water Act following the 2006 decision by the U.S. Supreme Court in *Rapanos v. United States.* Through these actions, the Agencies expect to provide clarity for field staff and the regulated community, and fulfill the full extent of their obligations under CWA. The intended clarity, however, will not be provided by the Guidance document, because it leaves unresolved questions of proper rulemaking procedure, runs contrary to recent Supreme Court decisions, provides an unduly broad and ambiguous test for jurisdiction,

and is insufficiently supported by scientific and economic data in its cost-benefit analysis.

The Rulemaking Process

It is well-established that, despite not being strictly legally binding, guidance documents can have the same practical effect as a traditional final rule.[1] In fact, the Administrator of the Office of Information and Regulatory Affairs ("OIRA") recently alluded to this fact in an address to the American Enterprise Institute in Washington, DC:

> "There is jurisprudence on the distinction between guidance documents and rules… sometimes guidance documents are effectively rules, either because they are legally binding or because they are practically binding, and of course I have a problem with that."[2]

While Agencies certainly should be free to give guidance on how to implement given regulations, some subjects are too complicated, far-reaching, or precedent-setting to be addressed through agency guidance. The topic of EPA jurisdiction in CWA regulation, because of its practical binding effect, is one such subject.

It is true that this Guidance is not *legally* binding, and is not judicially reviewable; however, its practical effect is to bind the regulated public through the promulgation of new guidelines for determining EPA's jurisdiction over waters and wetlands. Because it is unlikely that EPA field staff will develop alternate methods of making these jurisdictional decisions, and the jurisdictional decisions made by EPA field staff will directly bind the American public, this Guidance will have the practical effect of a rulemaking, but without the same deliberative process afforded a rulemaking under the Administrative Procedure Act ("APA").

Because of the broad economic and precedent-setting impact of this Guidance, it is unreasonable not to promulgate it through the rulemaking process. Not only does this shortcut the important procedural safeguards intended through the APA, but, as scholar Robert Anthony notes, it also threatens the fairness and effectiveness of the American administrative process and the American system of limited government in doing so:

> "[W]hen an agency uses rules to set forth new policies that will bind the public, it must promulgate them in the form of legislative rules. The statutory procedures for developing legislative rules serve values that have *deep importance for a fair and effective administrative process and indeed for the maintenance of a democratic system of limited government*."[3] (Emphasis added)

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1 Anthony, Robert A. "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like: Should Federal Agencies Use Them to Bind the Public?" *Duke University School of Law* 41.6 (1992): 1311-384. Print.

2 Sunstein, Cass. "Regulatory Look-Back: A First Look." Regulatory Look-Back: A First Look. Address at the American Enterprise Institute, Washington, D.C. 26 May 2011.

3 Anthony, Robert A. "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like: Should Federal Agencies Use Them to Bind the Public?" *Duke University School of Law* 41.6 (1992): 1311-384. Print.

The requirements of the APA are meant to improve regulatory outcomes by compelling agencies to adhere to procedural safeguards. These safeguards protect the interests of the American public by giving voice (and legal backing) to those who wish to participate in the rulemaking process, while reflecting the American system of limited government. When the agency opts to issue guidance in lieu of a traditional rule these safeguards are circumvented.

The 2007 OMB bulletin on agency good guidance practices lists the ways in which guidance documents do not receive the same "careful consideration" as rules promulgated by the agency subject to the APA and other agency best practices for rulemaking:

> "[G]uidance documents may not receive the benefit of careful consideration accorded under the procedures for regulatory development and review. These procedures include: (1) internal agency review by a senior agency official; (2) public participation, including notice and comment under the Administrative Procedure Act (APA); (3) justification for the rule, including a statement of basis and purpose under the APA and various analyses under Executive Order 12866 (as further amended), the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act; (4) interagency review through OMB; (5) Congressional oversight; and (6) judicial review. Because it is procedurally easier to issue guidance documents, there also may be an incentive for regulators to issue guidance documents in lieu of regulations."[4]

While this Guidance document will have the same practical effect on the general public as a rule, it is not being held to the procedures for regulatory development and review listed by OMB, and the agency is consequently not sufficiently accountable to the public.

There are a number of reasons why APA procedural safeguards are warranted for this agency action. First, the economic effect of this guidance is too significant to be dealt with other than through a rulemaking. Cass Sunstein remarked on this threshold for determining the appropriate context for guidance documents:

> "*If a guidance document is costing $100 million dollars or more a year, then it ain't a guidance document*. There's a legitimate place for guidance documents. We work very closely with agencies to make sure they are properly guidance documents. *If they're costing money, then they might not be guidance documents at all*."[5] (Emphasis added)

As examined later in this comment, the cost-benefit analysis provided by the Agencies for this Guidance understates the costs on a number of counts. Even while omitting a number

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4 Final Bulletin for Agency Good Guidance Practices, 72 Federal Register No. 16 (2007).

5 Sunstein, Cass. "Regulatory Look-Back: A First Look." Regulatory Look-Back: A First Look. Address at the American Enterprise Institute, Washington, D.C. 26 May 2011Address.

of cost factors in this analysis, the Agencies' cost estimates still range from *$87 to $171 million annually*.[6] That is, even the underestimated set of costs in this analysis would classify this Guidance as causing enough economic impact to merit a rulemaking, according to the Administrator of OIRA.

Secondly, this redefinition of the federal scope of authority is incredibly broad, going beyond the "outer bound" of the Agencies' legal authority discussed in *Rapanos*. Chief Justice Roberts wrote a concurring opinion in *Rapanos*, specifically chastising the Agencies for failing to use the rulemaking process to define the scope of CWA regulations:

> "Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority. The proposed rulemaking went nowhere. 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."[7]

In his dissent, Justice Stephen Breyer echoed Roberts' concern, concluding that the cumulative effect of the *Rapanos* opinions "call for the Army Corps of Engineers to write new regulations, and speedily so" rather than resorting to non-rule guidelines, such as the current guidance.[8]

Although EPA and the Corps certainly took a step in the right direction by soliciting public comment on this Guidance, the Agencies are not required by law to address the concerns of commenters in the final draft of the guidance or otherwise substantively respond to public participation. Because guidance are not judicially reviewable, it will be impossible for participants to seek remedies in court if their concerns are not adequately addressed by the Agencies, despite the fact that the participants will still be bound by the jurisdictional decisions made using this guidance.

For these reasons, the Agencies should only pursue such binding jurisdictional rules through a rulemaking, and, as Justice Breyer and Chief Justice Roberts recommended, they should do so ***immediately***. Private citizens should not be bound by jurisdiction which was made without the statutory guarantees of public participation in the APA. We reject the idea that the Guidance should serve temporarily until it can be replaced by a final rule.

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[6] United States. Army Corps of Engineers and Environmental Protection Agency. Office of Water. <http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa_guidance_impacts_benefits.pdf>.

[7] Rapanos v. United States Army Corps of Engineers. Supreme Court of the United States. 19 June 2006. Web. <http://www.law.cornell.edu/supct/html/04-1034.ZC.html>.

[8] Rapanos v. United States Army Corps of Engineers. Supreme Court of the United States. 19 June 2006. Web. < http://www.law.cornell.edu/supct/html/04-1034.ZD1.html>.

Supreme Court Precedent

The introduction of the proposed Guidance explicitly notes that the Agencies have drafted the document to provide clarity in the wake of recent decisions by the Supreme Court, specifically *SWANCC* and *Rapanos*. It is therefore surprising and disquieting to note that, with the proposed Guidance, the Agencies seem more determined to circumvent and even roll back those decisions, rather than actually apply them in agency practice.

The Guidance document correctly notes that the *Rapanos* decision produced two tests for jurisdiction, neither of which commanded a majority of the court. The plurality opinion allows jurisdiction over tributaries to traditionally navigable interstate waters that are "relatively permanent," and over wetlands that have a "continuous surface connection" to those tributaries. Contrarily, the Kennedy opinion allows jurisdiction for wetlands and tributaries where there is a "significant nexus" to traditionally navigable interstate waters. Faced with this reality, the proposed Guidance argues that the Agencies may properly assert guidance under either test, at its discretion. This "heads I win, tails you lose" approach to interpreting *Rapanos* runs contrary to the Guidance document's assertion that "(t)here is only one CWA Definition of 'waters of the United States,'" and to common sense. The attempt to use both standards also runs contrary to Supreme Court precedent. In *Marks v. United States*, the Court ruled that:

> "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .' Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976)."

Indeed, the Chief Justice, in his concurring opinion in *Rapanos*, suggested that lower Courts should look to *Marks* in interpreting the decision in that case. Whether the plurality or the Kennedy opinion is more narrow is a subject of legitimate debate. The most obvious interpretation of *Marks* here is that the most narrow opinion is that which makes the most narrow grant of power to the government—the plurality. The 11th Circuit Court of Appeals has held that the Kennedy opinion, being the least restrictive of the Agencies, is narrower. The bizarre position taken by the proposed Guidance regarding that case, suggesting that the term "waters of the United States" has a different meaning in Alabama, Georgia, and Florida is different than in the other 47 states, suggests that the Agencies should have sought to clarify the current bounds of their authority before attempting to expand them. It borders on the absurd, however, to suggest that the Court's decision in *Rapanos* allows the Agencies to mix and match from two separate and contradictory opinions in order to maximize their jurisdiction as an end-run around a decision which specifically limited their jurisdiction.

Not only does the Agencies' use of a dual standard violate Court precedent, but its interpretations of both tests run counter to the Court's decisions in *Rapanos* and *SWANCC*. The plurality opinion in *Rapanos*, for example, allows that the term "relatively permanent," as used in the Court's definition of "waters," does not

"necessarily exclude" waters that dry up in extraordinary circumstances or that are "seasonal."[9] The proposed Guidance claims jurisdiction over all waters that are "at least seasonal,"[10] a transformation from a presumption of exclusion to a presumption of inclusion. Moreover, the Guidance asserts that "intermittent and ephemeral" flows may be considered "relatively permanent" under the plurality standard, because they have been verbally reclassified as "dynamic zones within stream networks."[11] No amount of linguistic acrobatics, however, can avoid the plurality's demand that seasonal rivers must contain continuous flow during wet seasons. Intermittent and ephemeral streams are specifically and explicitly excluded from that classification, and they are therefore also excluded from jurisdiction. Nor is this exclusion hidden; it is laid out clearly in the same footnote from which the Agencies claim their authority over seasonal waters in the first place![12]

The Kennedy standard is similarly overextended by the proposed Guidance. Under that standard, tributaries and wetlands may be considered jurisdictional if and only if a "significant nexus" to traditional navigable waters can be shown. The general inappropriateness of the agency's definition of "significance" is discussed below, but it should be noted that the proposed Guidance here also uses the test to justify jurisdiction on a basis explicitly forbidden by the opinion in which the test is given. Specifically, the proposed Guidance states that:

> "The field staff should look for indicators of hydrology, effects on water quality, and physical, chemical, and biological (including ecological) connections or functions when assessing whether a water, alone or in combination with similarly situated waters has a more than speculative or insubstantial effect on the chemical, physical, or biological integrity of downstream traditional navigable waters or interstate waters. Examples of ways in which hydrology can significantly affect downstream waters include, but are not limited to, transport of water and materials and compounds carried by the water […], water retention, […] and water discharge."

But the Kennedy opinion in *Rapanos* gave as the reason for reversing the Court of Appeals that they had identified a significant nexus "by the presence of a hydrologic connection" without "some measure of the significance of the connection for downstream water quality." The idea that "transport of water," "water retention," and "water discharge" present a measure of significance beyond the mere presence of a hydrologic connection is absurd on its face, and makes a mockery of the Court.

Even more disturbing is the attempt by the Agencies to claim that the Kennedy opinion in *Rapanos* has allowed a wider jurisdiction than did the decision under *SWANCC*, when the entire basis for the significant nexus test in the Kennedy opinion was the use of that term

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[9] Ft. 5
[10] 13
[11] 13
[12] *Rapanos*, Ft. 5

in *SWANCC*. In that earlier case, the Court held that, absent specific direction from Congress, the Agencies were not enabled by the Clean Water Act to expand their reach to the full extent of Congress' authority or to raise new questions on the bounds of federalism, and that they were therefore not granted jurisdiction over isolated, intrastate waters. The proposed Guidance, however, attempts to cling to an expansive authority using the Kennedy opinion's "significant nexus" to claim jurisdiction where that low bar can be met, so long as migratory birds are not the particular indicator of the nexus. There are no pyrrhic Supreme Court cases: Agencies do not expand their authority when they are found not to have jurisdiction.

The proposed Guidance even hints at the fragility of its standing on this point, first by refusing to set out guidelines for field staff (or for landowners), and second by reiterating the meaningless reassurance that the Guidance "lacks the force of law." It is unsettling that the Agencies would rather attempt to barricade through obfuscation and duplicity an indefensible position than admit that they do not have a certain authority that was never granted them by Congress and was specifically forbidden them by the Supreme Court.

Taken together, these factors suggest an unhappy disregard for the rule of law and the authority of the judicial branch on the part of the Agencies with regard to the proposed Guidance. The disregard for precedent in interpreting *Rapanos*, the evasion of limitations in both the plurality and Kennedy opinions, and the attempt to overturn *SWANCC* using a case the Agencies did not even win simply invites further court action, imposes further confusion for landowners and small business, and raises questions about the Agencies' respect for the separation of powers and the Constitution.

The Proposed Significance Test

In interpreting the "significant nexus" test put forth by Justice Kennedy, the proposed Guidance gives such a broad and unqualified definition of that term as to render the test—imposed by Justice Kennedy as a limitation on the Agencies—effectively toothless. The proposed Guidance defines a "significant nexus" this way:

> "Waters […] 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 traditional navigable waters or interstate waters that is more than "speculative or insubstantial."[13]

The document expands on the phrase "more than 'speculative or insubstantial'" by saying "a 'significant nexus' includes having a predictable or observable chemical, physical, or biological functional relationship between the similarly situated waters and the traditional navigable water or interstate water."[14] This definition, however, considerably weakens the burden placed upon the Agencies. The fact that an effect is observable does not *ipso facto* mean that it is not insubstantial. Such an interpretation essentially reads the word "significant" out of the phrase "significant nexus" altogether.

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The guidance that follows these definitions reinforces this point. Field staff is instructed to look for indicators of hydrology, including "transport of water" and "water discharge."[15] They are told to look for capacity to carry—not actual carriage, but merely the capacity—sediments and organic carbon.[16] The message which field staff is likely to take is that any connection whatsoever, as long as it can be observed, should be considered a significant nexus.

Moreover, the proposed guidance warns field staff not to mistake the absence of such a connection for the absence of a significant nexus. It argues "in some cases, the lack of a hydrologic connection would be a sign of the water's function in relationship to the traditional navigable water or interstate water."[17] In these cases, the apparent argument of the proposed guidance is that, in order to improve water quality of navigable and interstate waters, Congress granted the agency the authority to oversee waters that do not connect to navigable and interstate waters, precisely because they do not do so.

The authority thus claimed by the proposed Guidance is as breathtaking in scope as it is puzzling in logic. The document fails to set any meaningful standard for "significance" and thereby sets a bar so low as to be nonexistent. Not only does the proposed Guidance therefore grant such extensive discretion to field staff as to ensure that the Clean Water Act will not be consistently enforceable, but it also withholds any certainty whatever from the farmers, small businesses, and landowners who must now guess whether or not they own land which the Agencies will claim to be jurisdictional. Such breadth and lack of clarity are inappropriate even for legislation and formal rules; in the supposedly limited scope of a guidance document they are wholly misplaced.

Cost-Benefit Analysis

The cost-benefit analysis prepared for this guidance by EPA and the Corps has a number of egregious oversights that must be addressed before the agency takes any further action. The most significant of these oversights is the explicit decision by the authors to focus only on the costs of applying the guidance to CWA 404 programs, when in fact it will affect all CWA programs. This is in stark contrast to the guidance documents issued following the *SWANCC* and *Rapanos* decisions. Both were exclusively directed at Section 404, while the proposed Guidance's aim is to clarify "the regulatory definition of 'waters of the United States' **affecting all CWA programs**". This significant change in policy will have major cost implications that the Agencies have wrongfully overlooked.

Clean water programs cost more annually than any other policy focus of the EPA, with the CWA expected to consume about half ($4.587B) of the EPA's projected $10 billion budget in FY 2011.[18] Although the Guidance states it will be used to oversee and implement all sections of the CWA - including 303, 311, 401, 402 and 404 - only section 404 is given a detailed analysis in the report. Section 402 is briefly mentioned, but only to

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18 US. Environmental Protection Agency. Office of the Chief Financial Officer (2710A). *FY2011 Budget in Brief*. 2010. Feb. 2010. Web. 17 June 2011. <http://nepis.epa.gov/EPA/html/DLwait.htm?url=/Adobe/PDF/P100A5RE.PDF>.

dismiss any cost implications that may result from the new guidance. The EPA argues because it "has delegated operation of the 402 permit program to most (46) states and states apply jurisdiction to 'waters of the state' which must be inclusive as 'waters of the US'" there will be negligible cost increases. This assertion is false.

Firstly, even under a program assumed by states, the EPA is required by law to review all permits for potential impacts to national historic properties, threatened or endangered species, essential fish habitats, waters of another state, and discharges to "critical areas" (e.g., wilderness areas, national parks, etc.).[19] With expanded jurisdiction over various water bodies, watersheds and tributaries, and the unique biological habitat that wetlands provide, the complexity and possible conflicts from assessing state permits will likely increase.

Secondly, many states use federal guidance to govern their environmental permitting process. About one third of states have statutory provisions that limit or condition the ability of their regulatory agencies from adopting rules that are more stringent than any federal environmental regulations.[20] Since they are required by law to at least meet federal standards, a change in federal jurisdiction will have a tangible impact on their operations. As then Acting Assistant Administrator of the EPA Benjamin Grumbles concluded in his response to the GAO's 2004 report:

> "Interpretation and clarification of the scope of 'waters of the US' after *SWANCC* therefore requires consideration of Congressional intent and impacts on all CWA programs, not just section 404. In addition, because many States administer CWA programs and often rely on Federal definitions for jurisdiction, State regulatory agencies are also affected by these decisions."[21]

This was one of the reasons given for the EPA and Corps' decision against pursuing formal rulemaking after the *SWANCC* decision. Moreover, Justice Scalia acknowledged in the plurality's decision in *Rapanos* that their narrower definition of "navigable waters" would apply to section 402.

Consequently, there are both direct and indirect cost implications that have not been properly recognized in the report. The annual transfers to states for sections 402, 319 and 106 alone are projected to be $475 million in FY 2011, pre-guidance.[22] The indirect costs to states, which are required to "review and update their water quality standards as required by the Clean Water Act", will be extensive under expanded jurisdiction. States

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19 "EPA -NPDES Permits - Other Federal Laws." *U.S. EPA*. Web. 22 June 2011. <http://cfpub.epa.gov/npdes/fedlaws.cfm?program_id=445>.

20 "Nonpoint Source: Appendix | Polluted Runoff." *US EPA*. Web. 20 June 2011. <http://water.epa.gov/polwaste/nps/appendix.cfm>.

21 Grumbles, Benjamin H. "Comments from the Environmental Protection Agency." Letter to Anu Mittal, Director, GAO. 4 Feb. 2004. *GAO-04-297: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*. U.S. GAO. 42-44. Print

22 US. Environmental Protection Agency. Office of the Chief Financial Officer (2710A). *FY2011 Budget in Brief*. 2010. Feb. 2010. Web. 17 June 2011.

will have to determine water quality standards, total maximum daily loads for relevant pollutants and, if judged necessary, antidegredation plans that impose additional costs on landowners and businesses. This complex process is resource intensive, both scientifically and legally, for state agencies.

The impact to state wetlands programs will be especially costly. Twenty-two states have no independent regulatory initiatives to address isolated wetlands. Their sole regulatory mechanism consists of exercising their right under Section 401 of the CWA to approve, condition, or deny federal wetland permits. Only thirteen states have adopted independent water quality criteria, designated uses or antidegredation policies specific to wetlands resources.[23] With an expanded federal jurisdiction over wetlands, these will now be requirements for all states. For the EPA to entirely ignore these cost drivers in their analysis for the Guidance is unacceptable.

Long term implications are also considerable, but unacknowledged in the report. According to the last published *Clean Watersheds Needs Survey* to Congress in 2008, $298.1 billion of capital was assessed to be required to meet the goals of the Clean Water Act.[24] With expanded jurisdiction over numerous wetlands and other water bodies, this figure will certainly increase. If no further analysis is made—on either indirect or direct consequences for all CWA programs—then the agency should follow precedent and clarify that the Guidance is restricted only to section 404.

One of the most fundamental flaws of the cost-benefit analysis is the method used to project future filing demand for 404 permits under the new guidance. The Agencies estimated the number of future permit applications by using 2009-2010 filing records. Using data from a time when jurisdiction was more limited to infer the permitting expected when jurisdiction is significantly expanded is absurd. It guarantees an incomplete determination of costs. Many more landowners will be compelled to file once the new guidance is enacted. The report affirms this fact, saying: "while not possible to quantify absent a major independent study, informed observers conclude some level of impacts to waters for which JDs are not now being requested is likely." To mitigate the uncertainty, the EPA added 10% to their estimated mitigation costs, but there is no adequate justification for this calculation. Because of the potentially large ramifications of this guidance across all CWA programs and the uncertainty it creates, the agency should perform the aforementioned independent study. It would be imprudent on the Agencies' part to move forward with the guidance without a more thorough and accurate analysis.

There are independent assessments that illustrate just how substantial the increase in federal jurisdiction may be under the new Guidance, further proving this point. The National Resource Conservation Service of the USDA estimated that about 8 million acres in agricultural locations could be exempted from federal jurisdiction by the

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[23] *State Wetland Protection: Status Trends and Model Approaches*. Issue brief. Environmental Law Institute, 2008. Print

[24] *Clean Watersheds Needs Survey 2008: Report to Congress*. Rep. no. EPA-832-R-10-002. U.S. EPA, 2008. Print.

SWANCC decision after the trial's resolution.[25] That amounts to about 7.6% of all wetlands in the contiguous United States.[26] Considering the estimate included only farmlands and did not take into account the possible consequences of new jurisdictional determination methods like the watershed approach or the significance nexus test, it is quite alarming. Indeed, the National Wildlife Association put the number of wetlands, tributaries and isolated waters that have been taken out of federal CWA jurisdiction since both *SWANCC* and *Rapanos* at 20 million acres.[27] After *Rapanos*, the EPA also estimated that small, intermittent and ephemeral streams make up 59% of all stream miles in the U.S. (outside Alaska).[28] The extent to which all these water bodies will become jurisdictional is uncertain, but what is clear is that the unedited first draft of this Guidance was correct when it stated that federal jurisdiction would "increase significantly" compared to previous practices.

One of the key selling points of the cost-benefit analysis is the alleged certainty that the new guidance will provide over past guidance documents. It is hard to justify this claim; in fact, reviewing the standards for jurisdiction in this Guidance and the reliance on case-by-case determinations of jurisdiction on the part of the Agencies, it is impossible to say that this Guidance provides additional certainty. A more accurate comparative analysis of the guidance to those issued after *Rapanos* and *SWANCC* is that the agency has done everything in its power to increase uncertainty and reduce clarity in an effort to maximize jurisdiction.

For example, the 2008 guidance stated that the Agencies would generally not assert jurisdiction over "swales or erosional features or over ditches excavated wholly in and draining only uplands and that do not carry relatively permanent water."[29] However, this Guidance clarifies that ditches may be jurisdictional under certain circumstances, broadening jurisdiction and increasing uncertainty. Another example of increased uncertainty is the change in policy towards non-navigable tributaries of traditionally navigable waters that are relatively permanent. The 2008 guidance claimed jurisdiction if these tributaries "typically flow year round or have continuous flow at least seasonally (e.g. three months)." This Guidance eliminates the "continuous flow" and "three month" specifications, and replaces them with the assertion that non-navigable tributaries are deemed jurisdictional if "they are relatively permanent, meaning at least seasonal." The interpretation of "at least seasonal" is left open to be decided on a case-by-case basis.

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[25] Zinn, Jeffrey A., and Claudia Copeland. *Wetlands: An Overview of Issues*. Rep. no. RL33483. Congressional Research Service, 2006. Print.

[26] *Status and Trends of Wetlands in the Conterminous United States 1998 to 2004*. Publication. U.S. Fish And Wildlife Service, Mar. 2006. Web. 20 June 2011. http://www.fws.gov/wetlands/_documents/gSandT/NationalReports/StatusTrendsWetlandsConterminousUS1998to2004FS.pdf.

[27] "Sneak Attack on Clean Water and Clean Air Acts." *Wildlife Promise*. National Wildlife Federation, 12 Feb. 2011. Web. 23 June 2011. <http://blog.nwf.org/wildlifepromise/2011/02/sneak-attack-on-clean-water-and-clean-air-acts/>.

[28] *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest*. Publication. U.S. Environmental Protection Agency Office of Research and Development, 2008. Print.

[29] *Clean Water Act Jurisdiction: Following the U.S . Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*. Publication. U.S. EPA, 2008. Print

Moreover, in determining whether a water body is traditionally navigable, the 2008 guidance mandated that a likelihood of future commercial navigation, including waterborne recreation, "must be clearly documented" and "will not be supported when evidence is insubstantial or speculative." The proposed Guidance replaces this statement with weaker language: "a determination that water is susceptible to future commercial navigation, including waterborne recreation, should be supported by evidence."

Even when the new Guidance looks to provide some certainty as to which water masses are not jurisdictional, the language in the "Summary of Key Points" is uncertain: "the following aquatic resources **are generally not protected** by the Clean Water Act". This language does not afford private citizens enough information to know whether they are in violation of the law, and creates an unnecessary amount of uncertainty.

One of the most troublesome implications of the Guidance is the disconcerting notion that "it is not the agencies' intention that previously issued jurisdictional determinations be re-opened as a result of this guidance." Whether or not it is the *intention* of the Agencies does not provide any predictability. The significant nexus and watershed aggregation practices in particular could have unintended consequences for landowners. Theoretically, an area in which a significant nexus is found would automatically determine jurisdiction for all waters in the area, including waters that may have been determined not to be under federal jurisdiction in the past. This could open current landowners to civil and criminal charges for being in violation of the CWA without them even knowing it. This regulatory uncertainty is amplified by the agency's unprecedented veto of a previously issued Section 404 permit in January.[30] The Agencies should immediately clarify that previous jurisdictions will not be reopened through the watershed aggregation approach or significant nexus test – especially absent formal rulemaking.

The increased litigation that will occur under the new guidance, both by and against the EPA, has been omitted in the cost-benefit analysis. Considering that more than 75% of wetlands are located on private property, it is certain that, with an enhanced ability to claim jurisdiction over wetlands, more lawsuits will be filed. The EPA has publicly stated clean water to be a "Priority Goal" for its $651 million Enforcement and Compliance Assurance Program for FY 2011.[31] Moreover, as noted in its October 2009 "Clean Water Enforcement Action Plan", the EPA "intends to increase its criminal and civil enforcement measures for the Clean Water Act as soon as it can resolve the conflict of defining the "waters of the United States."[32] This is, without a doubt, the goal of the proposed guidance. In fact, the EPA estimates that over 50% of its enforcement docket in

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[30] Environmental Protection Agency. *EPA Halts Disposal of Mining Waste to Appalachian Waters at Proposed Spruce Mine*. 13 Jan. 2011. Web. 21 June 2011. <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/6b9ecfafebce79a5852578170056a179!OpenDocument>.

[31] US. Environmental Protection Agency. Office of the Chief Financial Officer (2710A). FY2011 Budget in Brief. 2010. Feb. 2010. Web. 17 June 2011.

[32] *Clean Water Act Action Plan*. Rep. Office of Enforcement and Compliance Assurance (OECA), 15 Oct. 2009. Web. 22 June 2011. <http://www.epa.gov/compliance/resources/policies/civil/cwa/actionplan101409.pdf>.

2007 was negatively affected by *Rapanos*, either because the case was dropped entirely, the level of the enforcement response was lowered, or resolution of the case was delayed because lack of jurisdiction was raised by the defendant as a reason to dismiss the case.[33]

This increased enforcement will be especially costly to business owners and private citizens who will have to defend themselves against both EPA lawsuits and citizen lawsuits. Under the law, any US citizen may file a citizen suit against any person who has allegedly violated an effluent limitation regulation or against the EPA Administrator if the EPA Administrator failed to perform any non-discretionary act or duty required by the CWA. With increased federal jurisdiction more citizens and landowners will be open to suit. The unintended consequence will ultimately be the redirection of resources from productive activities towards costly, wealth-destroying litigation that will weigh unfairly against individuals and small businesses.

Land developers are among the most disproportionately affected stakeholders of the guidance. Despite the title of the cost-benefit analysis, indirect costs to the development community are not even mentioned in the document. Ironically, the report claims that land developers and owners will see indirect benefits from enhanced certainty in determining CWA jurisdiction. Not only is the uncertainty of the new guidance costly, but land developers will have to seek previously unnecessary permits and face project delays or even cancellations because of the implications of the expanded jurisdiction to all CWA programs. With more restrictions placed on their land, both farmers and other private owners will see the value of their property diminished. This loss of value is an indirect cost that a complete analysis should acknowledge. Moreover, based on court precedent, devaluation could lead to direct compensatory costs to both the federal and state governments.[34] Ultimately, the costs of developing land will increase dramatically because of the new Guidance. To increase the burden of an industry already over-regulated and suffering in a distressed economic climate seems nonsensical.

In conclusion, the cost-benefit analysis vastly underestimates the true economic costs of the proposed Guidance. At the very least, the proposed Guidance will result in $100 million in annual impact. It should therefore not be issued in the form of a guidance document and a full independent analysis of its ramifications should be conducted before proceeding with a traditional rulemaking.

Conclusion

In summary, the Agencies should take into account the following suggestions. Firstly, the content of this action does not lend itself to guidance for the reasons previously mentioned above, and ought to be immediately promulgated through a rulemaking which would be afforded the statutory safeguards of the APA instead. We reject the idea that the Guidance should serve temporarily until it can be replaced by a final rule.

Secondly, because the content of this Guidance is clearly at odds with Supreme Court

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[33] US. EPA. *WUS Guidance Q & As – External, for Public Release*. 2008. Web. 21 June 2011. <http://www.epa.gov/owow/wetlands/wus_guid_qas.docx>.

[34] As upheld by the Supreme Court in 2002 in Palzzolo v. Rhode Island.

precedent, the standards for determining jurisdiction should be reconsidered, and promulgated through the rulemaking process. Thirdly, the standard for significance expressed in the Guidance is inappropriate, both because of court precedent and because it does not grant either clarification or certainty to those who must abide by it. Fourthly, the Agencies overlooked a number of cost factors which would seriously impact the cost-benefit analysis provided for in this Guidance, and which, if included, would make a strong case against proposing these standards through a guidance document rather than through the rulemaking process. Barring further analysis, the Agencies should clearly specify that the Guidance will only affect CWA Section 404 programs.

Thank you for considering this comment on "Draft Guidance on Identifying Waters Protected by the Clean Water Act."

Sincerely,

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