

July 29, 2011

Water Docket  
U.S. Environmental Protection Agency  
Mail Code 2822T  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

**Attention: Docket ID No. EPA-HQ-OW-2011-0409**

To Whom It May Concern:

**Re: EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. 24,479 (May 2, 2011)**

The forestry organizations listed below submit the following comments on the *EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act*, 76 Fed. Reg. 24,479 (May 2, 2011) (“Proposed Guidance”). We appreciate the opportunity to submit these comments on behalf of our members.

**Private Forest Land**

Private U.S. working forests support 2.5 million U.S. jobs and \$87 billion annually in paychecks. 10 million private forest owners manage 427 million acres – 57% of the forested land in the U.S. These working forests are vital to our nation’s natural resource infrastructure, providing forest products, open space, wildlife habitat, clean air and water, recreation, and more. U.S. forest owners are the world leaders in sustainable forestry. Individual states administer the world’s most effective framework of forestry laws, regulations, and agreements in a way that is carefully tailored to local conditions and needs.

Today the greatest threat of deforestation comes from the conversion of forests to non-forest uses that produce a higher economic value. The families, businesses and individuals that own nearly 60% of our nation’s forests depend on the returns they get from the products their forests produce to make additional investments in sound, long-term forest management. When

existing markets for their products are strong, or when new markets like bio-energy emerge, they provide forest owners the means to keep their land forested by keeping their forests economically competitive with other uses. However, when regulatory costs are imposed, this reduces the ability to maintain the land as forested and at some point will tip the balance in favor of the non-forest use. The Proposed Guidance is a great source of consternation for the future of forestry; not only is it overreaching in jurisdictional terms, but it is too subjective for practical application in most forestry settings.

### **Summary of Major Comments**

- The Supreme Court has twice rebuffed the Agencies on the scope of their CWA jurisdiction. The Proposed Guidance circumvents those decisions and establishes jurisdictional tests that are essentially coextensive with the Agencies' positions before the Supreme Court spoke. The Agencies must revise the Proposed Guidance to reflect the actual limits placed on CWA jurisdiction by the majority opinion in *SWANCC* and the plurality and concurring opinions in *Rapanos*.
- The Proposed Guidance needs to establish bright-line standards for identifying tributaries meeting the significant nexus test. The Proposed Guidance's subjective analysis of the collective impact of all tributaries in a watershed will lead to uncertain results and will result in an over-inclusive exercise of jurisdiction.
- The Proposed Guidance needs to clarify that it does not expand the Agencies' jurisdiction over ditches.
- The Proposed Guidance needs to establish an objective standard for determining the "adjacency" of jurisdictional waters.
- The Agencies should implement a lawful interpretation of CWA jurisdiction through formal rulemaking.

### **Detailed Comments**

#### **I. The Proposed Guidance's Jurisdictional Analysis Exceeds the Jurisdictional Limits Imposed in *SWANCC* and *Rapanos***

The scope of federal regulatory jurisdiction exercised by EPA and the U.S. Army Corps of Engineers ("the Corps") (collectively, "the Agencies") under the Clean Water Act ("CWA")

over “navigable waters” has been debated since the CWA’s enactment, but two Supreme Court decisions from the past decade establish controlling limits on that jurisdiction: *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“*SWANCC*”), 531 U.S. 159 (2001), and *Rapanos v. United States & Carabell v. U.S. Army Corps of Engineers* (“*Rapanos*”), 547 U.S. 715 (2006). Indeed, the Agencies’ desired jurisdictional reach was rejected in both cases. The standards for identifying “navigable waters” under the Proposed Guidance, however, appear to exceed the limits established by the Supreme Court, as well as the Agencies’ own regulatory definitions of “waters of the United States” at 33 C.F.R. § 328.3 and 40 C.F.R. §§ 122.2, 232.2. The undersigned forestry organizations request that the Agencies establish standards for their CWA jurisdiction through formal rulemaking to ensure consistency with Supreme Court precedent and to provide greater clarity and predictability in the Agencies’ exercise of their CWA jurisdiction.

The CWA authorizes the regulation of “navigable waters,” which are defined as “waters of the United States.” 33 U.S.C. § 1362(7). The CWA does not, however, further define “waters of the United States.” In *SWANCC*, the Supreme Court established an outer limit of that definition, holding that the Corps could not assert jurisdiction over an isolated pond based on the pond’s use as a migratory bird habitat. The Court explained that although “navigable waters” does include at least some waters not traditionally deemed to be “navigable,” it does not include nonnavigable, isolated, intrastate waters. Allowing jurisdiction over an isolated pond solely based on the presence of migratory birds would fail to give effect to the term “navigable” in the CWA’s jurisdictional provision and also raise “significant constitutional and federalism questions.” 531 U.S. at 172, 174.

The Supreme Court revisited the Agencies' CWA jurisdiction over "navigable waters" in *Rapanos* and could not produce a majority view, but five Justices again rejected the asserted reach of agency jurisdiction. The plurality opinion by Justice Scalia held that "the CWA authorizes federal jurisdiction only over 'waters[]'" that are "relatively permanent, standing or flowing bodies of water." 547 U.S. at 731–32. Thus, "channels containing merely intermittent or ephemeral flow," including ditches, are excluded from the definition of "waters of the United States." *Id.* at 733–34.

In a concurring opinion widely viewed as the outer limit of CWA jurisdiction when read in conjunction with the plurality, Justice Kennedy wrote that a water or wetland would constitute "navigable waters" only if it possessed a "'significant nexus' to waters that are or were navigable in fact or that could reasonably be made so." *Id.* at 759. Focusing on wetlands, Justice Kennedy sought to establish a "significant nexus" test that both gave meaning to the term "navigable" and reflected the function of wetlands in achieving the goals and purposes of the CWA. Recognizing that wetlands serve "functions such as pollutant trapping, flood control, and runoff storage," Justice Kennedy concluded that wetlands should be deemed jurisdictional if they "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 779–80. Wetlands are not, however, "navigable waters" if their "effects on water quality are speculative or insubstantial . . . ." *Id.* at 780.

Justice Kennedy also addressed the Corps' standard for treating wetlands as jurisdictional solely based on their adjacency to navigable-in-fact waters. While crediting a prior Supreme Court decision finding that standard reasonable because "in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem," *id.* at 772–73

(quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 n.9); see also *id.* at 780–81 (discussing *Riverside Bayview*), Justice Kennedy warned that a wetland’s adjacency to a tributary is not alone sufficient to identify the wetland as a “navigable water.” Although adjacency could be sufficient to establish jurisdiction over wetlands adjacent to “certain major tributaries,” *id.* at 780, the Corps’ standard for tributaries, which included any water feeding into a “navigable water” or “navigable water tributary” that had an ordinary high water mark, left “wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it . . . .” *Id.* at 781. Thus the Corps would have to conduct a case-by-case significant nexus analysis before exercising jurisdiction over wetlands based on “adjacency to nonnavigable tributaries.” *Id.* at 782. Justice Kennedy allowed, however, that the Corps could identify through regulations “categories of tributaries that, due to their volume of flow . . . , 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.” *Id.* at 781.

The Agencies’ stated intent for the Proposed Guidance is that it provide greater clarity and predictability in the identification of “navigable waters” under *SWANCC* and *Rapanos*.<sup>1</sup> The Agencies have concluded, however, that their previous guidance “did not make full use of the authority provided by the CWA . . . as interpreted by the Court.” Proposed Guidance at 2. Thus, the Proposed Guidance expands the Agencies’ previous standards for determining jurisdiction. Indeed, the Agencies expect that the Proposed Guidance will increase the extent of waters over

---

<sup>1</sup> U.S. EPA, Guidance to Identify Waters Protected by the Clean Water Act Fact Sheet (last viewed July 27, 2011), available at [http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters\\_guidesum.cfm](http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters_guidesum.cfm); see also Proposed Guidance 1, 3.

which they assert jurisdiction under the CWA, but that jurisdiction will not exceed the jurisdiction “typically asserted prior to . . . *SWANCC* and *Rapanos*.” *Id.* at 3. This statement plainly exposes the unlawfulness of the Proposed Guidance, as both Court decisions struck down prior jurisdictional grabs. The Agencies failed to convince the Supreme Court twice that their view of their jurisdiction was lawful. It is no response to these Supreme Court decisions that the Agencies are not exceeding what was deemed unlawful.

Moreover, as discussed further below, the Proposed Guidance appears to allow the Agencies to exercise jurisdiction beyond the limits established in *SWANCC* and *Rapanos*. Indeed, the Agencies appear to read *SWANCC* too narrowly, asserting that the case only rejected the migratory bird nexus for CWA jurisdiction. Proposed Guidance at 23. In fact, the Court gave import to the concepts of navigability and a commercial nexus in determining the presence of CWA jurisdiction, while recognizing that adjacent nonnavigable waters could also be jurisdictional. Justice Kennedy in *Rapanos* affirmed the adjacency component of the *SWANCC* analysis, but did not change the basic requirements of navigability and a nexus to interstate commerce. Justice Scalia further emphasized these factors. The Agencies, however, appear to read *Rapanos* too broadly and in a way that ignores the navigability and commerce elements of the *SWANCC* analysis.<sup>2</sup> The Proposed Guidance appears to assume that Justice Kennedy’s opinion in conjunction with the permissive dissenting opinion provide the jurisdictional guideposts, when in fact, Justice Kennedy’s concurrence places important *limits* on jurisdiction and should be considered in concert with the Justice Scalia plurality. The Agencies must reel in their jurisdictional reach through regulations that align with the actual result in *Rapanos*, which

---

<sup>2</sup> The regulatory definition of “waters of the United States” also emphasizes the necessary nexus to interstate commerce, which is essentially ignored in the Proposed Guidance. *See* 30 C.F.R. § 328.3; 40 C.F.R. §§ 232.2, 122.2.

rejected jurisdictional overreaching and imposed important limits on the scope of federal CWA jurisdiction.

**II. Neither the *Rapanos* Plurality nor the “Significant Nexus” Test Comports With the Proposed Guidance’s Analysis of Tributaries**

The Proposed Guidance’s significant nexus test for tributaries appears to exceed the jurisdictional limit established by Justice Kennedy in *Rapanos* and flies in the face of the plurality’s limit of jurisdiction to relatively permanent waters. It also does not appear to support the Agencies’ goals of providing clarity and predictability in identifying waters protected by the CWA. *See* Proposed Guidance at 3. We request that the Agencies establish through regulations a bright-line rule for identifying tributaries that have a significant nexus with navigable waters and thus fall under the Agencies’ CWA jurisdiction.

Under the Proposed Guidance, “tributaries” are waters that “contribute[] flow to a traditional navigable water or interstate water, either directly or indirectly by means of other tributaries.” Proposed Guidance at 11. Tributaries are deemed to continue “as far as a channel (i.e., bed and bank) is present. A natural or man-made break . . . in the presence of a bed and bank or ordinary high water mark does not establish the upstream limit of a tributary in cases where a bed and bank and an ordinary high water mark can be identified upstream and downstream of the break.” *Id.* Under the Proposed Guidance, the Agencies will “generally expect” that a nonnavigable tributary is jurisdictional if it “has a bed and bank, and an [ordinary high water mark], and is part of a tributary system to a traditional navigable water or interstate water, and therefore can transport pollutants, floodwaters or other materials to a traditional navigable water or interstate water . . . .” *Id.* at 13.

Routinely, forestry operations are undertaken near intermittent and ephemeral streams, as well as multiple other drainage features that can be in close proximity to each other. If the

Agencies expand their CWA jurisdiction to include such drainage features, forest landowners would need to respond, likely by establishing expanded riparian management zones, which would remove large acreages from forest management and causing significant financial hardship for forest landowners. In addition, the sheer complexity of the Proposed Guidance's nexus approach to jurisdiction is impractical to address in the context of the scale of most forestry operations. In contrast to a typical development, which will involve intense activity over a relatively small area with a dramatic and permanent change in land use after development, forestry is practiced over a broad scale, with activities occurring once every few years or even decades. It is not operationally feasible or cost effective for forest landowners to undertake the complicated analysis called for in the Proposed Guidance on the scale that would be required; faced with the specter of enforcement actions and citizen suits, most landowners would be forced to treat broad areas as jurisdictional waters, with the attendant adverse impacts.

**A. The Proposed Guidance Should Eliminate Collective Analyses for Tributaries**

The Proposed Guidance's standard for identifying jurisdictional tributaries is based on an assessment of the collective impact that *all* tributaries in a watershed will have on downstream, traditional navigable waters. Explaining the basis for the standard, the Agencies state that the physical characteristics of a bed, bank, and original high water mark are indicators of flow, "and it is likely that flows through *all of the tributaries collectively in a watershed* with the above characteristics are sufficient to transport pollutants." Proposed Guidance at 14 (emphasis added). If a tributary is deemed to have a significant nexus based on the standard above, then all other tributaries in the watershed would be expected to have a significant nexus with a downstream navigable water and thus fall within the Agencies' CWA jurisdiction. *Id.* 13–14.

It is not clear that the Proposed Guidance's standard for identifying tributaries protected by the CWA will in the majority of cases identify tributaries with a significant nexus to a navigable water. Instead, the standard is based on the theory that *all* tributaries in a watershed will have a *collective* impact on the downstream water quality of navigable waters. This standard will result in the Agencies exercising jurisdiction over single tributaries that do not on their own have a significant nexus to a navigable water.

The Proposed Guidance's reliance on the impact of *all tributaries* in a watershed, rather than a single tributary, does not appear to be supported by Justice Kennedy's opinion in *Rapanos* (and it certainly does not meet the plurality's demand that to qualify as a water of the U.S., the waterbody must have relatively permanent waters). Justice Kennedy approved a collective analysis for determining the impact of wetlands because of wetlands' collective contribution in a given region to the specific functions of "pollutant trapping, flood control, and runoff storage." 547 U.S. at 779. Justice Kennedy gave no indication that a collective analysis would be appropriate for other waters. Also, the functions served by tributaries do not similarly depend on the collective impact of the other tributaries in the area.<sup>3</sup>

To the extent that tributaries may have a collective impact on downstream navigable waters, the approach of the Proposed Guidance appears overly-broad because it allows the inclusion of waters that may not contribute to the collective impact. The Proposed Guidance allows the Agencies to make a jurisdictional determination "based on consideration of a subset of

---

<sup>3</sup> The Proposed Guidance identifies the following functions for tributaries: "distributing sediment to maintain stream and riparian habitat; nutrient and cycling removal; providing habitat for amphibians, fish, and other aquatic or semi-aquatic species living in and near the stream that may use the downstream waters for other portions of their life stages . . . ; improving or maintaining biological integrity in downstream waters; and transferring nutrients and organic carbon vital to support downstream food webs . . . ." Proposed Guidance at 15.

similarly situated waters.” Proposed Guidance at 10. This could result in the Agencies exercising jurisdiction over tributaries that are present in the same region as jurisdictional tributaries but do not individually impact or contribute to a collective impact on downstream navigable waters. Thus, a remote, low-volume water with no impact on downstream navigable waters could be deemed jurisdictional simply because it is in the same region as other tributaries that do have a significant nexus. Justice Kennedy expressly disclaimed such tributaries as having the requisite significant nexus. *See* 547 U.S. at 781 (explaining that “drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it” would not have a sufficient nexus to constitute “navigable waters”). Thus, the Proposed Guidance’s standard exceeds the jurisdictional scope established by Justice Kennedy.

The collective analysis also undermines the Agencies’ goals of certainty and predictability. *See* Proposed Guidance at 3. Rather than relying on objective, physical indicators (e.g. duration of flow), a person seeking to determine whether a tributary is a water of the U.S. must await an analysis of an entire watershed and the numerous factors accompanying that analysis. Such an analysis increases subjectivity, complexity, and delay and will lead to increased disputes over what tributaries should be considered jurisdictional. In effect, the Proposed Guidance defines almost any tributary as jurisdictional through what will be inconsistent application of subjective factors on a watershed-wide basis.

For the reasons discussed above, the Agencies should remove the watershed-based collective analysis in the tributaries standard and establish through rulemaking a single tributary analysis based on objective indicators such as duration of flow.

**B. The Agencies Should Include Additional Objective Criteria for Identifying Jurisdictional Tributaries**

Although the Proposed Guidance utilizes some objective criteria for identifying jurisdictional tributaries, those criteria are not sufficient to show a significant nexus with a navigable water. As the Proposed Guidance explains, the physical indicators of a bed, bank, and original high water mark are only sufficient indicators that the tributary can have a significant nexus together with *other* tributaries. Proposed Guidance at 14. Justice Kennedy explained that a standard merely consisting of a bed, bank, and ordinary high water mark “leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it,” which do not have a significant nexus with navigable waters. *Rapanos*, 547 U.S. at 781–82. Thus, the tributaries standard in the Proposed Guidance is over-inclusive. The Agencies should adopt through rulemaking additional objective factors, such as duration of flow, that will identify tributaries with a significant nexus to navigable waters.

**C. The Agencies Should Revise Their Standard for Determining Tributary Length to Ensure a Significant Nexus**

The Proposed Guidance’s objective standard for determining the length of a tributary is also over-inclusive. Under the Proposed Guidance, a tributary may extend beyond a natural or man-made break as long as the Agencies can identify a bed, bank, and original high water mark. Proposed Guidance at 11. This appears to be an expansion from prior guidance, which defined the extent of the tributary as “the entire reach of the stream that is of the same order (*i.e.*, from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a high order stream).” EPA and U.S. Army Corps, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) (“2008 Guidance”) at 10.

While the test in the prior guidance accounted for downstream flow, the test under the Proposed Guidance does not consider whether those upstream segments have any flow that affects the downstream aquatic ecosystems. Again, this definition risks the inclusion of “drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it.” *Rapanos*, 547 U.S. at 781. In light of this express warning from Justice Kennedy about the outer reaches of the Agencies’ jurisdiction over tributaries, the Agencies should propose regulations that stand by the existing standard for determining the length of a tributary or introduce alternative objective criteria for ensuring that the furthest extent of the jurisdictional tributary has a significant impact on a navigable water.

**D. Justice Kennedy’s *Rapanos* Discussion of Tributaries As a Limit on Jurisdiction Should Guide the Scope of the Proposed Guidance**

The Agencies attempt to distinguish Justice Kennedy’s concerns about remote, low-volume waters by claiming that such concerns only apply to wetlands and not to tributaries, *see* Proposed Guidance at 28, but the Agencies’ logic fails, as Justice Kennedy’s analysis certainly evaluated the impact of individual tributaries on downstream navigable-in-fact waters. Indeed, in describing categories of tributaries that could support a wetlands “adjacency rule,” Justice Kennedy explained that the tributaries’ connection to navigable waters must be “significant enough” for the adjacent wetlands to “perform important functions for an aquatic system incorporating navigable waters.” *Rapanos*, 547 U.S. at 781. In other words, wetlands adjacent to tributaries could not satisfy the “significant nexus” test if the tributaries themselves did not have the requisite significant nexus to navigable waters. Indeed, it makes little sense to find that a wetland adjacent to a tributary could have a significant nexus when the tributary itself did not. Justice Kennedy specifically warned against a definition of tributaries that would lead to the Agencies’ jurisdiction over wetlands that “might appear 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. The Agencies should heed Justice Kennedy’s views on when a tributary is jurisdictional, rather than attempt to reason around it and unlawfully expand the scope of tributaries subject to CWA jurisdiction.<sup>4</sup>

\* \* \* \*

Accordingly, the undersigned organizations request that the Agencies adopt through rulemaking a standard for identifying jurisdictional tributaries that (1) does not depend on a collective analysis of tributaries in a watershed, (2) includes objective, bright-line standards that will identify tributaries with a significant nexus to navigable waters, and (3) adopts the existing standard for determining the length of a tributary. Without such standards, the forest landowners may find that they must prove a tributary is *not* jurisdictional, and such proof would necessarily have to take into account extensive tributary systems beyond the boundaries of individual owners. Making such a showing would be impractical and unaffordable for those forest landowners who are carrying out normal silvicultural activities that do not produce sufficient financial returns to justify the analysis. The result will be a loss of the ability to manage lands and an incentive for landowners to seek other less benign uses for their land.

**III. The Proposed Guidance’s Analysis of Ditches Exceeds the Jurisdictional Scope Under *Rapanos***

The Proposed Guidance expressly brings non-tidal ditches within the definition of “tributaries,” and thus jurisdictional waters (provided the plurality or substantial nexus test is

---

<sup>4</sup> Here again, the Agencies appear to be reading Justice Kennedy’s opinion in isolation or in conjunction with the *Rapanos* dissent. There is no question that the Agencies’ strained interpretation of jurisdiction over tributaries would not survive under the plurality opinion, and it is through that prism that Justice Kennedy’s opinion should be read – as imposing limits on jurisdiction, not endorsing broad grants of it.

met). A ditch is a “tributary” if (1) it has a bed, bank, and original high water mark, (2) connects directly or indirectly to a navigable water, and (3) has one of the following five characteristics: (a) it is a natural stream that has been altered, (b) it is a ditch that has been excavated in waters of the U.S., including wetlands, (c) it has relatively permanent flowing or standing water, (d) it connects two or more jurisdictional waters of the U.S., or (e) it drains natural water bodies (including wetlands) into the tributary system of a traditional navigable or interstate water. Proposed Guidance at 12.

Despite the Agencies’ declaration that the Proposed Guidance does not expand their CWA jurisdiction, the Proposed Guidance’s treatment of ditches appears to do exactly that. Historically, both EPA and the Corps limited their CWA jurisdiction over ditches under Section 404. In 1975, the Corps explained that “[d]rainage and irrigation ditches have been excluded” from its Section 404 jurisdiction.<sup>5</sup> In the 1977 final rule, the Corps “adopted the suggestion of many commenters that [it] incorporate into [the regulatory] definition . . . the statement that nontidal drainage and irrigation ditches that feed into navigable waters will not be considered ‘waters of the United States’ . . . . To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA . . . .”<sup>6</sup> Through the mid-1980s, both Agencies confirmed that “waters of the United States” generally do not include “non-tidal drainage and irrigation ditches excavated on dry land,” and “artificially irrigated areas which would revert to upland if the irrigation ceased.”<sup>7</sup>

---

<sup>5</sup> 40 Fed. Reg. 31,319, 31,321 (July 25, 1975).

<sup>6</sup> 42 Fed. Reg. 37,121, 37,127 (July 19, 1977).

<sup>7</sup> See 53 Fed. Reg. 20,764, 20,765 (June 6, 1988); 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

Thus, under longstanding precedent, the Agencies have traditionally discussed ditches in the CWA context to *exclude* them from the definition of “waters of the United States.”<sup>8</sup> In contrast, the Proposed Guidance establishes a broad standard to *include* ditches within their jurisdiction. Indeed, because many upland ditches may have “permanent flowing or standing water” under the Agencies’ loose definition of that phrase, the Agencies can easily apply the Proposed Guidance standard to deem ditches to be tributaries, and consequently, jurisdictional waters.

Justice Scalia affirmed EPA’s historical exclusion of upland ditches from “waters of the United States,” noting that the CWA distinguished “point sources,” which includes ditches, from “navigable waters” themselves. *Rapanos*, 574 U.S. at 735. It would make little sense, Justice Scalia argued, “if the two categories were significantly overlapping. The separate classification of ‘ditch[es], channel[s], and conduit[s]’ – which are terms ordinarily used to describe watercourses through which *intermittent* waters typically flow – shows that these are, by and large, *not* ‘waters of the United States.’” *Id.* at 735–36; *see also id.* at 739 (explaining that waters of the U.S. “does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”); *id.* at 752 (explaining that waters of the U.S. “does not conceivably extend to whether storm drains and dry ditches are ‘waters’”).

---

<sup>8</sup> EPA also has restrained its jurisdiction over ditches under CWA Section 402. Explaining repeatedly that “not every ditch, waterbar or culvert is meant to be a point source under the Act,” EPA explicitly distinguished ditches that were and were not subject to its Section 402 jurisdiction. 41 Fed. Reg. 6,281, 6,282 (Feb. 12, 1976) (internal quotations omitted) (silviculture rule); *see also* 41 Fed. Reg. 11,303, 11,304 (Mar. 18, 1976) (explaining that although conveyances which collect highway runoff and included within the definition of “separate storm sewer” are subject to regulation, “by taking this position EPA is not thereby requiring that a permit be issued to every ditch and culvert throughout the Nation, a result which is entirely contrary to EPA’s intent in promulgating these regulations.”).

In the southern United States, ditches are ubiquitous on the forested landscape. Many are legacy ditches from when the land was farmed. While present on the ground, they may be invisible from the air or on aerial photographs and therefore may not be included on maps. In other cases they may be part of “minor drainage” ditches that are currently considered outside of CWA jurisdiction. As with other currently non-jurisdictional tributaries, a broad inclusion of ditches, along with the eventual riparian management measures that must follow, will take extensive acreage out of forest production, creating a significant financial hardship for forested landowners.

The Proposed Guidance’s definition of ditches appears to effect an inappropriate and burdensome expansion of the Agencies’ jurisdiction over ditches. The Agencies should re-affirm in regulations their long-standing position that non-tidal, upland drainage and irrigation ditches are not waters of the U.S. and provide certainty to the regulated community that the Agencies will not expand their jurisdiction over ditches.

**IV. The Proposed Guidance’s Analysis of Adjacency Exceeds the Jurisdictional Limits of Both *SWANCC* and *Rapanos***

The Proposed Guidance appears to increase the number of wetlands that are deemed jurisdictional because they are “adjacent” to jurisdictional waters. Like the Agencies’ regulations and previous guidance, the Proposed Guidance establishes that a wetland is jurisdictional if it is “[a]djacent to a traditional navigable water or non-wetland interstate water,” or it is adjacent to an other jurisdictional water and “either alone or in combination with other wetlands in the watershed has a significant nexus to the nearest downstream navigable or interstate water.” Proposed Guidance at 16. The Proposed Guidance states that for jurisdictional purposes, wetlands may be deemed “adjacent” to “neighboring” other jurisdictional waters. *Id.* An other jurisdictional water is “neighboring” if there is an ecological interconnection between

the wetland and the water, which can be established by the residence of aquatic species, such as amphibians, aquatic turtles, fish, or ducks, that “rely on both the wetland and the jurisdictional water body for all or part of their lifecycles.” *Id.* at 16–17. This greatly expands the potential identification of “adjacent” wetlands because animals such as birds and turtles may rely on waters and wetlands much further from each other than would an amphibian or fish.

This standard for identifying “neighboring” waters appears to expand the Agencies’ jurisdiction over wetlands beyond that permitted by Justice Kennedy’s significant nexus test. While Justice Kennedy recognized that the presence or absence of a hydrologic connection is not dispositive in determining a significant nexus, he made clear that there must be a connection to navigable waters. As Justice Kennedy explained, a significant nexus must be assessed in terms of the CWA’s goals and purposes to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Rapanos*, 547 U.S. at 779 (quoting 33 U.S.C. § 1251(a)). Thus, a wetland could have a significant nexus to a navigable water even though it did not have a hydrologic connection “*in the sense of interchange of waters,*” because its pollutant filtering, flood control, and runoff storage had a significant effect on the *aquatic system*. *Id.* at 786 (emphasis added). Justice Kennedy never approved the finding of a significant nexus where there was *no* connection to waters of the U.S. In fact, throughout his opinion, Justice Kennedy makes clear that what is at stake is *downstream water quality*. See, e.g., *id.* at 784 (requiring “some measure of the significance of the connection for downstream water quality”).

The ecologic interconnection established by the residence of aquatic species has no bearing on a wetlands impact on downstream water quality. Indeed, aquatic species such as turtles and ducks can travel great distances and may use several waters across their life cycle that

have no hydrologic connection at all. This test could result in isolated wetlands with *no* connection to navigable waters being deemed jurisdictional.

This new definition of adjacency is of even greater concern because the Agencies use it for determining whether they have CWA jurisdiction over “other waters” such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds. Under the Proposed Guidance, these “other waters” would be, alone or in combination, subject to the significant nexus test if they are “physically proximate” to jurisdictional waters. Proposed Guidance at 19. A “physically proximate” other water is one that would be considered “adjacent” if it was a wetland. *Id.* Thus, an “other water” could be deemed jurisdictional based on the ecological inter-connection established by a duck or turtle. Designating an adjacent water “jurisdictional” based on biological factors, rather than an actual connection to navigable waters as required by Justice Kennedy, overreaches and unlawfully expands the Agencies’ CWA jurisdiction.

Further, this new adjacency test for isolated wetlands and “other waters” appears to reinstate the Agencies’ pre-*SWANCC* jurisdiction and raises the same concerns. *SWANCC* struck down the Agencies’ jurisdiction over isolated, intrastate, nonnavigable waters. The Agencies’ jurisdiction over such waters raised both constitutional and federalism issues because of the potential expansive reach into waters traditionally within the power of the States. *SWANCC*, 531 U.S. at 174. “Other waters” by their nature tend to be isolated, intrastate, nonnavigable waters. The Proposed Guidance’s definition of “adjacency” allows the Agencies to exercise jurisdiction over these waters based on their use by turtles and birds and absent any type of connection affecting water quality. This raises the same constitutional and federalism concerns expressed in *SWANCC*.

The below-signing organizations request that the Agencies adopt through rulemaking a bright-line rule that establishes adjacency only when a wetland or “other water” is connected in sufficiently close proximity to affect the chemical, physical, and biological qualities of downstream navigable waters.

**V. Agencies Should Undertake Formal Rulemaking**

The Agencies must promulgate the Proposed Guidance as a rule pursuant to the formal notice and comment rulemaking procedures of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553, because the Proposed Guidance constitutes a significant substantive change in policy that will have binding effect. *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000). Although purportedly “not binding and lack[ing] the force of law,” Proposed Guidance at 1, the Proposed Guidance establishes standards for the Agencies’ future exercise of their CWA jurisdiction, which the Agencies admit will increase their jurisdiction from their previous policy. Additionally, once finalized, the Proposed Guidance will, in practice and effect, be binding both on the Agencies and on the public. Indeed, the most important factor for determining whether a document must undergo formal rulemaking is “whether the action has binding effects on private parties or on the agency.” *Gen. Elec. Co. v. EPA*, 290 F.3d at 382. “If an agency acts as if a document . . . is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency’s document is for all practical purposes ‘binding.’” *Appalachian Power Co.* at 1021.

Regardless of the Agencies’ boilerplate language that the Proposed Guidance is not binding, the public must behave as if it is. The Proposed Guidance governs activities and permits under the entire CWA. Persons conducting activities potentially subject to CWA

regulation cannot risk non-compliance with the standards of the Proposed Guidance just because the Agencies declare it to be “non-binding.” Indeed, the Proposed Guidance will control public conduct going forward.

Separate from the APA’s requirements, the Supreme Court specifically implored the Agencies to correct their jurisdictional position through rulemaking. In *Rapanos*, Chief Justice Roberts noted that the Agencies previously commenced rulemaking procedures to align their position with *SWANCC*. 547 U.S. at 757–58. He observed that “[g]iven 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.” *Id.* at 758. But “[t]he proposed rulemaking went nowhere . . . [and] the Corps chose to adhere to its essentially boundless view of the scope of its power,” leaving lower courts and regulated entities uncertain of how the Agencies’ regulations should apply. *Id.*

The Agencies should thus correct their failure to revise their jurisdictional position through rulemaking. Their plan to undertake formal rulemaking after finalizing the Proposed Guidance is not sufficient because the Proposed Guidance, once in effect, will be binding on the public and have the effect of a legislative rule. Thus, the Agencies should forego the Proposed Guidance and initiate the proposed changes with a formal rulemaking and, importantly, amend their proposed changes to be in accord with Supreme Court precedent, as described in these comments.

\* \* \* \*

We appreciate the opportunity to provide these written comments and thank you in advance for your consideration. If you have any questions concerning these comments or if you would like additional information, please do not hesitate to contact us.

Sincerely,



William R. Murray  
Vice President for Policy & General Counsel  
National Alliance of Forest Owners  
122 C Street, NW  
Washington, DC 20001  
(202) 747-0742

Date: July 29, 2011

On Behalf of:

Alabama Forestry Association  
American Forest & Paper Association  
California Forestry Association  
Empire State Forestry Association  
Florida Forestry Association  
Forest Landowners Association  
Georgia Forestry Association  
Louisiana Forestry Association  
Michigan Forest Products Council  
Mississippi Forestry Association  
National Alliance of Forest Owners  
North Carolina Forestry Association  
Oregon Forest Industries Council  
South Carolina Forestry Association  
Texas Forestry Association  
Virginia Forestry Association  
Washington Forest Protection Association