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Re: Draft Guidance on Waters Subject to Clean Water Act Jurisdiction
Docket No. EPA-HQ-OW-2011-0409

Dear Ms. Downing and Mr. Olson:

On May 2, 2011, the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) (together, “the agencies”) published a notice of availability of a document entitled “Draft Guidance on Identifying Waters Protected by the Clean Water Act” (“Draft Guidance”). 76 Fed. Reg. 24479 (May 2, 2011). This letter provides the comments of the National Waterways Conference (“NWC”) on the Draft Guidance.

NWC has a number of concerns about the Draft Guidance. NWC urges the agencies not to use a process that results in the issuance of guidance. This procedure offers no advantage to the agencies’ efforts to gather information or develop policy, but it imposes a severe disadvantage for permittees who are concerned about the imposition of unlawful permit conditions. A rulemaking is more appropriate where, as here, the proposal is a significant departure from current law and would substantially impact the regulated community. The Draft Guidance also exceeds the authority provided by Section 404 of the CWA, as interpreted by the Supreme Court. Contrary to *Rapanos*, it would apply jurisdiction where the nexus to navigable waters is not “significant.” Contrary to *SWANCC*, it would cover isolated interstate waters. The Draft Guidance signals an unlawful effort to extend federal jurisdiction over groundwater issues, which are properly the subject of state and local regulation.

NWC’s comments explain each of these issues more fully below.

About NWC

NWC, established in 1960, is dedicated to a greater understanding of the widespread public benefits of our nation's water resources infrastructure. Our mission is to effect common sense policies and programs, recognizing the public value of our Nation's water resources and their contribution to public safety, a competitive economy, national security, environmental quality and energy conservation. Conference membership includes the full spectrum of water resources stakeholders, including flood control associations, levee boards, waterways shippers and carriers, industry and regional associations, port authorities, shipyards, dredging contractors, regional water supply districts, engineering consultants, and state and local governments.

The Use of a "Guidance" Format is Unlawful, Improper and Unfair.

According to the agencies, the Draft Guidance "clarifies how EPA and the Corps will identify waters to be protected under the Act consistent with the statute, regulations, Supreme Court caselaw, relevant science related to aquatic ecosystems, and the agencies' field experience."¹ Clearly, the agencies intend to change the application of the CWA on a uniform, national basis.² Otherwise, this proceeding would have no purpose. At the same time, the Draft Guidance goes beyond internal administrative procedures or paper shuffling. Changing the reach of the CWA imposes real and substantial impacts on the regulated community. This proposal has an essentially regulatory effect, and that compels the agencies to propose regulations rather than issue "guidance" or some other informal policy or document.³

¹ Draft Guidance at 2.

² Despite the deference typically extended to an agency's interpretation of a statute under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that deference does not apply where an agency is "interpret[ing] a statute to push the limit of congressional authority." See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 172-73 (2001). "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon traditional state power." *Id.* at 173.

³ *Env'tl Integrity Project v. EPA*, 425 F.3d 992 (D.C. Cir. 2005) ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule"); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023, 1028 (D.C. Cir. 2000) (finding that guidance that "reads like a ukase" was a considered a rule); *Washington Legal Found. v. Kessler*, 880 F. Supp. 26, 35 (D.D.C. 1995) ("Once the agency publicly articulates an unequivocal position . . . and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review." (internal quotations and citation omitted)).

The Draft Guidance states that it is important for “field staff across the country” to receive centralized instructions from headquarters.⁴ However, EPA also claims that because “it is not a rule,” the Draft Guidance is therefore “not binding and lacks the force of law.”⁵ Together, those two concepts allow the agencies to have it both ways. EPA and the Corps get to expand the areas subject to CWA regulation – a regulatory function – while preserving an argument that because the guidance “lacks the force of law,” it is not subject to judicial review.⁶ That is unfair, improper, and unlawful.⁷ It also appears to be part of a larger effort of EPA to use guidance to circumvent the safeguards required by due process and the Administrative Procedure Act. It is a technique the courts have repeatedly rejected.⁸

The detail and depth of the Draft Guidance and the supporting documents indicate a clear vision of the direction the agencies are attempting to take. Parties on all sides of the issue will make essentially the same legal and technical arguments on how far 404 jurisdiction should extend, regardless of whether the proceeding involves draft guidance or regulations. Accordingly, a two-phase, “guidance before regulation” process provides no advantage with respect to the agencies’ administrative processes of information gathering and policy development.

⁴ Draft Guidance at 1.

⁵ *Id.*

⁶ The D.C. Circuit recounted EPA’s attempt to do the same thing in another case involving the use of guidance: “Firing nearly all the arrows in its jurisdictional quiver, EPA argues that petitioner lacks standing, that the Guidance does not qualify as final agency action, and that petitioner’s claims are unripe for judicial review.” *Natural Resources Defense Council v. EPA*, 2011 WL 2601560, *1 (D.C. Cir. 2011). However, the D.C. Circuit ruled that EPA’s effort to evade judicial review in that case was unlawful. *See id.* at *7-8.

⁷ *See, e.g., Kessler*, 880 F. Supp. at 36 (describing the agency practice of implementing de facto regulatory policies without formally adopting final agency positions as “disturbing” and “intolerable”).

⁸ *See NRDC, supra* n. 6, at *7-8 (noting that EPA’s guidance “alter[ed] the legal regime” and constituted a “legislative rule”); *Nat’l Mining Ass’n v. Jackson*, 768 F. Supp. 2d 34, 43-46 (D.D.C. 2011) (rejecting EPA’s claims on final agency action and ripeness). The *NMA* case also involved CWA guidance. In rejecting EPA’s attempt to avoid judicial review, the court observed that the guidance constituted a “reworking of the permitting process” that “gives rise to legal consequences for companies that must obtain those permits to operate.” *Id.* at 44. Where “EPA is treating the Guidance as binding,” it represents the agency’s final say on the matter, even acknowledging that EPA could change its approach through a modification to the guidance in the future. *Id.* at 45.

The use of guidance presents an unnecessary but difficult problem for the regulated community. If the Draft Guidelines are finalized, and if the agencies are successful in forestalling judicial review,⁹ the only resolution is to wait for the agencies to rely on the Draft Guidance to deny a 404 permit application or to impose additional permit conditions. By then, however, a typical permit applicant has already invested substantially in the proposed project. In addition to the permitting process, the applicant may have obtained necessary rights to the land, procured design and engineering services, identified options for financing, obtained any necessary legal services, and so on. Further, a project's time of completion is often critical for maintaining cost-effectiveness.

In that situation, an applicant's choices are to challenge the agency's determination, which may require a lengthy and expensive legal process, or to accept and pay for the conditions, regardless of the lawfulness or reasonableness of the agency proposal. For any given project, the rational decision may be to accept conditions, however unreasonable they may be, as the price of staying on schedule. To the extent additional conditions derive from an unlawful interpretation of CWA Section 404, such a result amounts to regulatory blackmail. That process could recur repeatedly at various Corps districts around the country, with essentially the same legal issues at stake, before an applicant finds it cost-effective to seek judicial review. Even then, the agencies may find it expedient to withdraw proposed conditions on a case-specific basis, in order to avoid the risk of an adverse judicial ruling. We understand the agencies' desire to act quickly and reserve a degree of flexibility for themselves, but in this instance, those considerations are outweighed by the negative impact to the regulated community and the unfairness inherent in making policy in a manner that denies straightforward judicial review.

Another cost associated with relatively informal guidance is piecemeal, inconsistent permitting decisions around the country. That contradicts the agencies' stated purpose of increasing regulatory clarity and the consistency of decisions across the country.¹⁰

The agencies' use of guidance rather than regulations serves no purpose other than to avoid judicial review. It does not help the agencies gather relevant information or develop policy. It is more likely to result in inconsistent regulatory actions in the field. It

⁹ There is every reason to believe that EPA will take advantage of this procedural setup to attempt to avoid judicial review. That is exactly what happened in the recent *NMA* case. There, EPA urged the court to reject an industry challenge on the grounds that a guidance document was not a final agency action, nor was it ripe for review. EPA specifically argued that the court's "review 'outside the context of a specific permitting decision would entangle the court in abstract considerations.'" *NMA, supra* note 8, at 46 (quoting EPA's pleadings). The court, however, rejected EPA's argument. *Id.*

¹⁰ See Draft Guidance at 3.

is extremely unfair to the regulated community. We urge EPA to withdraw the Draft Guidance. Should the agencies proceed, the appropriate procedure is a rulemaking.

The Draft Guidance Exceeds the Authority Provided by CWA Section 404.

Following is a brief summary of the statutory, regulatory, and judicial bases to determine the scope of Section 404 authority, followed by specific concerns about the jurisdictional reach proposed in the Draft Guidance.

Legal and Regulatory Background

Under CWA section 404(a), any person engaging in activities that result in the “discharge of dredged or fill material into the navigable waters” must obtain a permit from the Corps.¹¹ The term “navigable waters” is defined broadly by statute to mean all “waters of the United States, including the territorial seas.”¹² In turn, the Corps has further defined this term by regulation to include: (1) waters currently used or used in the past for interstate or foreign commerce, including waters subject to the ebb and flow of the tide (i.e., traditional navigable waters); (2) interstate waters and wetlands; and (3) “[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. . . .”¹³ This definition also includes “tributaries” of these waters, impoundments of these waters, and “wetlands adjacent to [these] waters.”¹⁴

The agencies’ stated intent for issuing the Draft Guidance is to implement the U.S. Supreme Court’s decisions in two noteworthy cases that address the scope of waters protected by the CWA: *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng’rs (SWANCC)* and *Rapanos v. United States (Rapanos)*. In *SWANCC*, the agencies attempted to use the Migratory Bird Rule to assert jurisdiction over a nonnavigable, isolated, intrastate pond based on its use as a habitat for migratory birds.¹⁵ The Court ruled that jurisdiction does not extend to ponds that are not adjacent to open water where the only connection to navigable waters was the presence of migratory birds.¹⁶ The *SWANCC* court noted that the word “navigable” in the CWA had been given limited

¹¹ 33 U.S.C. § 1344(a) (emphasis added).

¹² *Id.* § 1362(7).

¹³ *See id.* § 328.3(a).

¹⁴ *Id.* § 328.3(a)(5)-(7).

¹⁵ 531 U.S. 159, 165-66 (2001).

¹⁶ *Id.* at 167-68, 172-73 (citing *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985), which held that CWA section 404 coverage extended to wetlands adjacent to navigable waters).

effect, in the sense that the CWA could properly govern wetlands and other waters that were not themselves navigable.¹⁷ However, as the Court observed, “it is one thing to give a word limited effect and quite another to give it no effect whatever.”¹⁸ In other words, a water that is totally isolated from navigable waters is beyond the regulatory authority provided by Congress under the CWA.¹⁹

In the *Rapanos* case, the Supreme Court addressed the question of whether CWA jurisdiction extends to wetlands not “adjacent” to a navigable water. The Court’s decision was essentially split three ways: a four-member plurality opinion issued by Justice Scalia, a concurrence by Justice Kennedy, and a four-member dissent written by Justice Stevens. The three opinions may be briefly encapsulated as follows:

- The Scalia plurality opinion found that “navigable waters” must be “relatively permanent, standing or continuously flowing bodies of water,” which does not include intermittent streams and tributaries that empty into navigable waters.²⁰ In addition, wetlands must have a “continuous surface connection” to jurisdictional waters to be covered by the CWA.²¹
- The Kennedy concurrence established a “significant nexus” test. Under this test, for a water or wetland to constitute “navigable waters,” it must possess a “significant nexus” to waters that are or were navigable in fact (i.e., traditional navigable waters) or that reasonably could be so made.²² “[W]etlands possess the requisite nexus if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.”²³ In contrast, when “wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone of fairly encompassed by the statutory term ‘navigable waters.’”²⁴
- The Stevens dissent would have deferred to the Corps’ exercise of regulatory jurisdiction.

¹⁷ *Id.* at 172.

¹⁸ *Id.*

¹⁹ *See id.*

²⁰ *Rapanos v. United States*, 547 U.S. 715, 739 (2006).

²¹ *Id.* at 742.

²² *Id.* at 759.

²³ *Id.* at 780 (emphasis added).

²⁴ *Id.*

The Draft Guidance's Expansion of Jurisdiction Is Clearly Contrary to *Rapanos*.

The meaning and intent of *Rapanos* has been the subject of extensive debate, but one aspect of the case is clear: it limits the agencies' jurisdiction. The case vacated Sixth Circuit opinions which had upheld CWA jurisdiction in specific cases. Neither the plurality nor the Kennedy concurrence can reasonably be construed as invitation to expand jurisdiction compared to the law prior to *Rapanos*.

Yet as the agencies openly acknowledge, "the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance."²⁵ No reasonable construction of *Rapanos* can yield that conclusion.

The Agencies Should Apply Only the Kennedy Concurrence.

Under Supreme Court precedent, Justice Kennedy's concurring opinion should be viewed as the controlling test in future cases.²⁶ Indeed, as the Draft Guidance acknowledges, the Eleventh Circuit has adopted this reasoning and followed Kennedy's test as the sole basis for CWA jurisdiction.²⁷ However, rather than follow the court's instructions, the agencies have chosen to limit a "Kennedy only" test to Eleventh Circuit states.²⁸ Everywhere else, the agencies will assert jurisdiction where either the Kennedy or Scalia test is met. By applying an "either / or" test, the Draft Guidance most closely follows the dissent,²⁹ which obviously is not the controlling law. We urge the agencies to rely exclusively on the Kennedy concurrence, in keeping with the law as articulated by the Eleventh Circuit.

²⁵ Draft Guidance at 3 (emphasis added).

²⁶ See *Marks v. United States*, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.").

²⁷ See *United States v. Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007).

²⁸ Draft Guidance at 12 n. viii.

²⁹ See Draft Guidance at 2 ("The agencies continue to believe . . . that it is most consistent with the *Rapanos* decision to assert jurisdiction over waters that satisfy either the plurality or the Justice Kennedy standard" since "[t]he four justices who signed on to Justice Stevens' [dissenting] opinion . . . stated that they would uphold jurisdiction under either the plurality or Justice Kennedy's opinion.").

The Draft Guidance Exceeds the Scope of Jurisdiction Under the Kennedy Concurrence.

The Kennedy concurrence establishes a “significant nexus” test for jurisdiction. However, the agencies’ interpretation of the Kennedy test reads the word “significant” out of the text. The Draft Guidance states that agencies should consider waters to have a significant nexus if—

they alone or in combination with other similarly situated waters in the same watershed have an effect on the chemical, physical, or biological integrity of traditional navigable waters or interstate waters that is more than “speculative or insubstantial.”³⁰

Under the agencies’ interpretation, virtually any nexus beyond “speculative” or “insubstantial” would result in a finding of jurisdiction under the agencies’ guidance. Even areas that lack a hydrologic connection to a traditional navigable water can be deemed jurisdictional under the Draft Guidance’s expansive test.³¹ Virtually any discernible downstream effect – such as the retention of any amount of upstream drainage, or a function resulting in the addition of any substance that the agencies may deem to be a nutrient, sediment, or pollutant – is sufficient to confer jurisdictional status.³² That is not a plausible interpretation of Justice Kennedy’s opinion.

The misconception of the Kennedy concurrence is most apparent when comparing the Draft Guidance to Justice Kennedy’s instructions to identify impacts to the “chemical, physical, and biological integrity” of traditionally navigable waters. Where Justice Kennedy uses the conjunction “and” to refer to all kinds of impacts collectively, the agencies substitute “or,” allowing the identification of any one. The result of the agencies’ wordplay is an undeniably and unequivocally broader test than that articulated by Justice Kennedy.

The Draft Guidance Exceeds the Scope of Jurisdiction Under the Scalia Plurality Opinion.

While we believe the Kennedy concurrence provides the exclusive test for jurisdiction under *Rapanos*, the Draft Guidance also construes Justice Scalia’s plurality opinion in a manner that would apply jurisdiction more broadly than the Scalia test can reasonably support. For instance, the plurality states that intermittent streams are not tributaries unless they are relatively permanent and have at least seasonal flow.³³ As an

³⁰ See Draft Guidance at 8 (emphases added).

³¹ *Id.* at 9.

³² *Id.* at 8-9.

³³ See *Rapanos*, 547 U.S. at 736-39.

example of such stream, the Scalia opinion references the 290-day continuously flowing stream postulated by Justice Stevens in his dissent, and clarifies that while “channels containing permanent flow are plainly within the definition [of waters of the United States] . . . ‘intermittent’ and ‘ephemeral’ streams . . . are not.”³⁴ Conversely, the agencies’ Draft Guidance states that tributaries may include intermittent and ephemeral stream reaches “as dynamic zones within stream networks,” and that these waters may meet the plurality standard for relatively permanent waters depending on “the length and timing of seasonal flows in the ecoregion in question.”³⁵ The notion that that is consistent with Justice Scalia’s opinion is not credible.

The Draft Guidance Exceeds the Scope of Jurisdiction Under *SWANCC*.

The Draft Guidance asserts that “[n]either *SWANCC* nor the opinions in *Rapanos* invalidated any of the regulatory provisions defining ‘waters of the United States.’” That is incorrect. To the contrary, the Court in *SWANCC* stated that that 33 C.F.R. § 328.3(a)(3), “as clarified and applied . . . by the Migratory Bird Rule . . . exceeds the authority granted to the [Corps] under § 404 of the CWA.”³⁶

More importantly, the Draft Guidance overlooks the central principle of *SWANCC*: that isolated waters cannot be jurisdictional. In other words, there must be some connection to traditionally navigable waters before CWA jurisdiction can attach. The agencies attempt to assert jurisdiction over all “interstate waters,” which presumably includes waters crossing a state line but having no discernible connection to traditional navigable waters. Application of CWA exclusively on the basis of crossing a state border is without precedent, and it is contrary to *SWANCC*. As noted above, under *SWANCC*, any statutory construction that reads the word “navigable” entirely out of the CWA is impermissible.

The Draft Guidance Cannot Rely on Groundwater to Assert CWA Jurisdiction.

The Draft Guidance appears to suggest that a “sub-surface hydrologic connection” may be sufficient to establish a significant nexus between wetlands and jurisdictional waters.³⁷ That language blurs the distinction between groundwater and surface water. However, groundwater is subject primarily to state and local regulation, not the CWA. The agencies should clarify that identification of groundwater cannot provide a “significant nexus” or otherwise establish jurisdiction for purposes of the agencies’ regulation of surface waters pursuant to the CWA.

³⁴ *Id.* at 733 n.5 (internal citations omitted).

³⁵ *See* Draft Guidance at 13.

³⁶ 531 U.S. at 174.

³⁷ *See* Draft Guidance at 16-17.

The Impacts of the Draft Guidance Extend Beyond the Wetlands Program.

The implications of the Draft Guidance extend beyond CWA Section 404, as the agencies have acknowledged.³⁸ The Draft Guidance applies to all CWA programs, including section 401 State water quality certifications; section 402 National Pollutant Discharge Elimination System permits; section 303 water quality standards and the total maximum daily load program; section 303(d) “impaired waters” designations; section 311 oil spill provisions; and even the environmental impact statements, environmental assessments, and findings of no significant impact associated with the National Environmental Policy Act. This consideration raises the stakes even beyond the wetlands program and makes it all the more important for the agencies to undergo an orderly rulemaking process.

Conclusion

In summary, NWC urges the agencies to withdraw the Draft Guidance. The agencies should use regulations rather than guidance to issue any nationally binding pronouncements on CWA jurisdiction and instructions to the field staff and the regulated community. Further, the Draft Guidance exceeds the proper scope of the agencies’ authority as provided by the CWA and subsequently clarified by the courts. Most fundamentally, the Kennedy concurrence in the *Rapanos* case requires the establishment of a “significant” nexus to traditionally navigable waters. The Draft Guidance exceeds Justice Kennedy’s instructions and would assert jurisdiction on the basis of virtually any connection. We urge the agencies to reconsider and adopt a more reasonable construction of the Kennedy concurrence.

Thank you for the opportunity to provide these comments. Please feel free to contact me if I may provide additional information.

Respectfully submitted,

Amy W. Larson

Amy W. Larson, Esq.
President

³⁸ See Draft Guidance at 3.