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August 1, 2011

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

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

Dear Sir or Madam,

On behalf of the more than 160,000 members of the National Association of Home Builders (NAHB), I am pleased to submit the attached comments to the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) (collectively, the Agencies) on the *Draft Guidance on Identifying Waters Protected by the Clean Water Act,* as published in the *Federal Register* on May 2, 2011 (Draft Guidance).

NAHB is a Washington DC-based trade association whose members are involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with over 800 state and local home builders associations around the country. NAHB's builder members will construct about 80 percent of the new housing projected for 2011.

Because the nature of the home building industry involves substantial earth-moving activities and because the Corps and EPA have historically asserted such broad jurisdiction over "waters of the United States," NAHB members often must obtain and operate pursuant to Clean Water Act (CWA) Section 404 permits. In addition, our members must normally obtain CWA Section 402 permits before beginning most construction projects and are often impacted by other CWA programs, as well. Thus, we are well aware of the implications associated with areas being deemed jurisdictional under the Act and the myriad of programs, permits, and limitations associated with such designation. Based on this extensive experience, it is clear that the Draft Guidance will have a broad and substantial impact on regulated entities and the public.

For years, industry, the states, and regulators alike have been frustrated with the continued uncertainty regarding the scope of federal jurisdiction over waters of the U.S. However, because the Draft Guidance will materially change the Agencies' interpretations of what may be considered jurisdictional under the CWA, and in effect, the legal status of many land areas, NAHB strongly believes a rulemaking, not guidance, is necessary.

The extent of federal jurisdiction over waters of the U.S. is of extreme importance to the nation, to landowners, and to home builders. As such it deserves a full rulemaking with adequate time given to the development and consideration of a proposed rule, including the opportunity for public participation and comment. Though the Agencies promise to undertake a rulemaking after finalizing the Draft Guidance, NAHB is concerned that the guidance will predetermine the results of any future rulemaking. First and foremost, NAHB believes that EPA and the Corps must rescind the Draft Guidance and begin a long-overdue rulemaking in accordance with the Administrative Procedure Act.

The failure to complete a rulemaking, however, is but one of the many problems associated with the Draft Guidance. Should the agencies proceed, we offer the following recommendations:

- The Agencies must premise the scope of jurisdiction based on the authority provided to Congress under the Commerce Clause (i.e., traditional navigable waters as "highways of commerce");

- The Agencies' must reinterpret the *SWANCC* and *Rapanos* cases and remain faithful to their holdings throughout the Guidance, as many provisions in the current draft are not supported by the plurality or the Kennedy opinion (e.g., traditional navigable waters, interstate waters, watershed aggregation and similarly situated waters, significant nexus, and tributaries, among others);

- The Agencies should reconfirm their long-standing position, consistent with the CWA text, that ditches, municipal separate storm sewer systems, and other "discrete conveyances" are "point sources," subject to CWA Section 402, and not "waters of the U.S.";

- The Agencies must clarify that Low Impact Development (LID) structures/ devices and other stormwater controls must continue to be treated as "waste treatment systems" permitted under CWA Section 402 and not considered as "waters of the U.S.";

- Because the Agencies intend to apply the Guidance to the entire CWA, the Agencies must fully examine and analyze the full effects associated with their newly-minted jurisdiction on all impacted CWA and related programs, such as CWA §303, §311, § 305, §402, the Endangered Species Act, and others that are predicated on, or

influenced by, an area being deemed a "water of the U.S.";

- The Agencies must reopen the economic analysis completed for the Draft Guidance to better account for the costs and the burdens that the document will impose on affected industries, states and municipalities, and U.S. citizens; and

- The Agencies must reiterate that the Guidance will not be used to reopen or revisit any previously issued and approved Jurisdictional Determinations unless new information is made available regarding the status of that area.

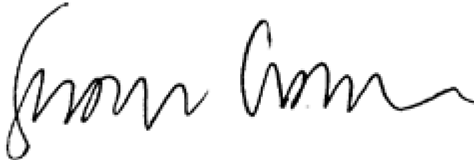
Finally, because the CWA's jurisdictional reach is such an important subject, NAHB belongs to several coalitions that are submitting comments on the Draft Guidance, and we wish to endorse those comments in addition to submitting the attached comments. Those coalitions are:

- The Federal Water Quality Coalition served by Fred Andes of Barnes & Thornburg LLP; and

- The coalition of industries served by Deidre Duncan of Hunton & Williams LLP.

Thank you for the opportunity to comment on the Draft Guidance. If you have any questions concerning these comments or related matters, please do not hesitate to contact NAHB staff member Glynn Rountree at (202) 266-8662 or grountree@nahb.org.

Sincerely,



Susan Asmus
Senior Vice President
National Association of Home Builders

National Association of Home Builders

Comments and Recommendations on the Draft Guidance on Identifying Waters Protected by the Clean Water Act

EPA Docket ID No. EPA-HQ-OW-2011-0409

NAHB Regulatory Affairs

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I. Introduction

NAHB is a trade association representing more than 160,000 members involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with over 800 state and local home builders associations around the country. NAHB's builder members will construct about 80 percent of the new housing projected for 2011.

NAHB and its members have been advocates of the Clean Water Act (CWA) since its inception. The CWA has helped the Nation make significant strides in improving the quality of our water resources. Because the nature of the home building industry involves substantial earth-moving activities and because the U.S. Army of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) have historically asserted such broad jurisdiction over "waters of the United States," NAHB members must often obtain section 402 and 404 permits for their home building projects. Beyond the permit requirements, our members regularly design their projects to avoid sensitive areas, showcase natural resources, and mitigate adverse impacts. As an organization, NAHB has tirelessly advocated for the CWA and an associated permitting scheme that is consistent, predictable, timely, and focused on protecting true aquatic resources. NAHB has also strongly supported implementing measures that honor the Congressional intent to provide a cooperative federal and state program where the Corps' and EPA's efforts are complemented by states' efforts.

While NAHB and its members have continued to work with the Corps and EPA on required permits, the housing industry has been experiencing one of the greatest housing downturns in recent memory. Housing affordability, accessible housing and housing finance, primary components to NAHB's mission and philosophy, have been severely impacted. Likewise, because residential construction already is one of the most heavily regulated industries in the country, we remain concerned about any government action, like the Draft Guidance, that will impose broad obligations on and substantially impact regulated entities and the public. As the Agencies' jurisdiction expands, so does the time and costs of compliance. This not only impacts a business's ability to thrive and grow, it can also negatively affect housing affordability and stifle economic development. In the current economic times, the decrease in production and loss of jobs within the residential construction industry points to the need to reduce regulatory burdens, not increase them.

Residential construction is one of the few industries in which a government-issued permit is typically required for each unit of production. The rules do not stop there, as a constricting web of regulatory requirements affects every aspect of the land development and home building process, adding substantially to the cost of construction and preventing many families from becoming homeowners. The breadth of these regulations is largely invisible to the home buyer,

the public, and even the regulators themselves, yet nevertheless has a profound impact on housing affordability and homeownership. While each of these regulations on its own may not be significantly onerous or problematic, builders and developers are often subject to a layering effect, where numerous regulations are stacked on top of one another. When 10 or more seemingly insignificant regulations are imposed concurrently, the cost implications, complexities and delays can be considerable. Likewise, the overabundance of these regulatory policies tends to distort and cause inefficiencies in the market due to decreased competition. When there are fewer builders, land, design and construction costs increase, housing prices expand and profit margins are skewed.

The nation's home builders recognize the need for certain rules and regulation, but when the government goes too far, as it is proposing to do with the Draft Guidance, the implications can be widespread and untenable. For years, landowners and regulators alike have been frustrated with the continued uncertainty regarding the scope of federal jurisdiction over "the waters of the United States" under the CWA. However, implementation of the Draft Guidance would vastly increase federal regulatory power over private property and trigger issues and results that the Agencies have not even considered. Such proposed changes are not consistent with the original legislative intent of the CWA when developed in 1972. They would also represent a marked departure from Supreme Court decisions and raise significant constitutional questions. If implemented, new responsibilities will be imposed, costs borne, and the rights and responsibilities of private property owners curtailed by the new regulations, leading to further and unwarranted impacts on the housing industry, economic instability, and job loss.

II. Background

The CWA applies only to waters that are "waters of the United States." For nearly ten years, however, due to two Supreme Court decisions, identifying which waters may be protected under the Act has not been easy or predictable. In 2003, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"),[1] the Court addressed CWA jurisdiction over isolated non-navigable intrastate ponds, and concluded that jurisdiction could not be based solely on the presence of migratory birds. In 2006, in *Rapanos v. United States* & *Carabell v. United States* (*Rapanos*),[2] the Court addressed CWA protections for wetlands adjacent to non-navigable tributaries, and issued five opinions with no single opinion commanding a majority. The plurality opinion, authored by Justice Scalia, stated that "waters of the United States" extended beyond traditional navigable waters to include "relatively permanent, standing or flowing bodies of water." The plurality went on to clarify that relatively permanent waters "do not necessarily exclude" streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought, and seasonal rivers, which contain continuous flow during some

[1] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001).
[2] *Rapanos v. United States*, 547 U.S. 715 (2006).

months of the year but no flow during dry months. The plurality opinion also asserted that only wetlands with a "continuous surface connection" to other jurisdictional waters are considered "adjacent" and protected by the CWA.

Justice Kennedy's concurring opinion took a different approach from Justice Scalia's. Justice Kennedy concluded that "waters of the United States" included wetlands that had a significant nexus to traditional navigable waters, "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" Finally, the four justices who signed on to Justice Stevens' dissenting opinion would have upheld jurisdiction under the Agencies' existing regulations and stated that they would uphold jurisdiction under either the plurality or Justice Kennedy's opinion.

In an attempt to clarify and implement this decision in the field, the Corps and EPA issued two memoranda in June 2007 and a guidance document in 2008 to address which waters are subject to CWA § 404 jurisdiction. Specifically, the guidance identified those waters over which the Agencies will assert jurisdiction categorically and on a case-by-case basis, based on the reasoning of the *Rapanos* opinions. In short, the 2008 guidance stated that the Agencies will:

- Assert jurisdiction over traditional navigable waters, wetlands adjacent to traditional navigable waters, non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (i.e., typically three months), and wetlands that directly abut such tributaries;
- Decide jurisdiction over non-navigable tributaries that are not relatively permanent, wetlands adjacent to non-navigable tributaries that are not relatively permanent, and wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water;
- Generally not assert jurisdiction over swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow), or ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water; and
- Apply the significant nexus standard as follows: "A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters."

Implementation of the 2008 guidance has been a challenge for both property owners and Corps staff, as the documentation is lengthy and cumbersome, there is little consistency across districts,

subjective decision-making still occurs, and there is no assurance that by following their guidance, the Agencies are staying within the bounds of the authority conferred by the CWA.

Even Congress has joined in on the debate over the scope of CWA jurisdiction. For nearly a decade, legislation has been introduced in the House and Senate that would fundamentally alter and greatly expand the scope of the CWA by deleting the term "navigable." The first such version of a bill was introduced in 2002 and various iterations have been reintroduced in the 108th, 109th, 110th and 111th Congresses. None of these bills have come to a vote due to the fact that changing the CWA's scope has always been highly controversial. Despite Congress' reluctance to do so, the Agencies have sought to expand the scope of their authority to effectively take control over every puddle, ditch and wash, regardless of its environmental value or connection to a navigable water. Even though the language of the CWA has remained unchanged for decades, the Agencies continue to broaden their reach.

In an attempt to rectify the uncertainties of its earlier guidance, as well as to "make full use of the authority provided by the CWA to include waters within the scope of the Act," on April 27, 2011, the Agencies issued new Draft Guidance on identifying waters protected by the CWA. The Agencies continue to believe, as expressed in previous guidance, that it is most consistent with *Rapanos* to assert jurisdiction over waters that satisfy either the plurality or the Justice Kennedy standard, since the dissent would have upheld jurisdiction under either test. However, after careful review of the opinions, the Agencies concluded that the previous guidance did not make full use of their CWA authority, as interpreted by the Court. Thus, the Draft Guidance claims to provide a more complete discussion of the Agencies' interpretation, including how waters with a "significant nexus" to traditional navigable waters or interstate waters are protected by the CWA.

The Agencies expect, based on relevant science and recent field experience, that the extent of waters over which they assert jurisdiction under the CWA will increase under this Draft Guidance, compared to the extent of waters over which jurisdiction has been asserted under existing guidance. They also emphasize that each jurisdictional determination will be made on a case-by-case basis considering the facts and circumstances of the case and consistent with applicable statutes, regulations, and case law.

Because there is only one CWA definition of "waters of the United States," the Draft Guidance is intended to apply to decisions concerning whether a waterbody is subject to any of the programs authorized under the CWA. Although *SWANCC* and *Rapanos* specifically involved section §404 of the CWA and discharges of dredged or fill material, the term "waters of the United States" must be interpreted consistently for all CWA provisions that use the term, including the §402 National Pollutant Discharge Elimination System (NPDES) permit program, the water quality standards and total maximum daily load programs under §303, and the §401

state water quality certification process. However, while there is only one CWA definition of "waters of the United States," there may be other statutory factors that define the reach of a particular CWA program or provision.

EPA and the Corps are now seeking public comment on the proposed joint Draft Guidance regarding identification of waters protected by the Clean Water Act. The Agencies intend for the final joint guidance to supersede the ''Joint Memorandum'' providing clarifying guidance on *SWANCC,* dated January 15, 2003 (68 FR 1991, 1995), and ''Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos* v. *United States & Carabell* v. *United States,*'' dated December 2, 2008. Until that final guidance is issued, both the 2003 and 2008 CWA jurisdiction guidance remain in effect.

III. Overall Comments

A. The Agencies Should Conduct a Rulemaking In Lieu of Finalizing the Guidance

Interpreting the phrase "navigable waters" has never been easy. It was not easy in *Riverside Bayview* in 1985, it was not easy in *SWANCC* in 2001, and it was not easy in *Rapanos* in 2006. Despite this ongoing challenge and the Agencies' long series of attempts to "clarify" their authority through various memos, guidance documents, permits, and forms, the Corps and EPA now believe they can clarify what is and is not considered jurisdictional through regulatory fiat. NAHB disagrees. Because the Draft Guidance represents an expansive interpretation and significant change in policy, imposes binding mandates, conflicts with Administration goals, and is contrary to suggestions made by the Supreme Court, Congress, and the public, NAHB asserts that any attempt to address the CWA's jurisdictional scope demands careful thought and the benefits of the Administrative Procedure Act (APA). A rulemaking is necessary.

1. The Draft Guidance Significantly Changes Longstanding Policy

The Agencies suggest that the two primary goals of the Draft Guidance are to clarify "how the EPA and the Corps understand existing requirements of the CWA and the Agencies' implementing regulations in light of *SWANCC* and *Rapanos*;" and provide "guidance to agency field staff in making determinations about whether waters are protected by the CWA."[3] The Draft Guidance, however, does not simply rehash existing protocol. Instead, it modifies the Agencies' existing regulations and imposes binding requirements on the Agencies and the

[3] *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, (May 2, 2011) p. 1 (hereinafter Draft Guidance).

public. Rather than issue yet another guidance document, the Agencies should follow the rulemaking process outlined in the APA. [4]

The APA sets out the procedural requirements that federal agencies must follow when proposing or finalizing new rules or regulations. The APA defines a rule or regulation as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[5] Because the Draft Guidance effectively amends 33 C.F.R. §§ 328.3(a)(1), (a)(3), (a)(5), and (a)(7) and 40 C.F.R. §§ 230.3(s)(1), (s)(3), (s)(5), and (s)(7) by describing new conditions under which the Agencies may assert jurisdiction, it clearly falls within the APA's spectre. In fact, the D.C. Circuit has made clear that substantive amendments to, or new interpretations of, pre-existing regulations can only be accomplished through the APA's specified notice-and-comment rulemaking process because "[t]o allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements."[6] As a result, this undertaking should not and cannot be finalized without the Agencies undergoing a formal notice and comment rulemaking.

Further, the APA directs the agency, when promulgating any applicable rule or regulation, to disclose the purposes and legal authority for the action and provide the public the opportunity to meaningfully participate in the rulemaking process by submitting comments, data, views, or arguments. The agency is then required to fully consider these public comments and other information before it finalizes the rule. When finalized, the agency must provide the public with a notice of the rules adopted and a concise general statement of their basis and purpose.[7] Instead of following these well thought-out and explicit procedures, the Agencies are skirting the system by proposing Draft Guidance and voluntarily putting them out for public comment. But because there are no requirements to consider or even look at those comments, this pseudo-notice-and-comment process does not involve meaningful public participation, transparency or reasoned decisionmaking as envisioned and mandated by the APA.

Finally, the APA prohibits any agency from taking an action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[8] Therefore, EPA and the Corps must thus engage in reasoned decisionmaking with an affirmative showing that all factors relevant to the decision have been considered, and must provide an administrative record supporting their decision. The Agencies, however, have failed to explain the basis for expanding their CWA jurisdiction nor have they provided a rational connection between the facts found and

[4] 5 U.S.C. 501 et seq.
[5] 5 U.S.C. 551(4).
[6] *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).
[7] 5 U.S.C. 551(4).
[8] 5 U.S.C. 706.

the choices made. For example, there is little data supporting the rationale for suggesting all similarly situated waters in a watershed should be jurisdictional or that tributaries with minimal flows have a significant nexus to traditional navigable or interstate waters. Likewise, there is no evidence that the Agencies have considered the various impacts and challenges that their new definition of CWA jurisdiction will have on the other programs of the CWA, such as those dealing with wetlands protection, discharge permits, oil spill prevention and response, state water quality certifications, and total maximum daily loads.

Absent an administrative record that adequately supports the Draft Guidance, the public is unable to knowledgeably comment on or meaningfully participate in its development. As courts have recognized, an agency's failure to disclose especially relevant information can preclude meaningful public comment. It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data or data that is known only to the agency.[9] In light of the APA requirements and the scope of the Draft Guidance, NAHB does not believe it is prudent for the Agencies to issue another guidance document. Instead of working to finalize Guidance that is problematic, does not meet the procedural requirements of the APA, and suffers from other infirmaries as will be described below, the Corps and EPA are strongly urged to abandon the Guidance and commence a formal notice-and-comment rulemaking.

2. The Draft Guidance Imposes Binding Requirements

The Draft Guidance states that it is "intended to describe for agency field staff the agencies' current understandings; it is not a rule, and hence it is not binding and lacks the force of law." It then goes on to state, "although guidance does not have the force of law, it is frequently used by Federal agencies to explain and clarify their understandings of existing requirements."[10] Thus, the guidance appears to be more of a mandate than a clarification, more of an expectation than an option, thus more of a regulation than mere advice. Because the Draft Guidance will result in a set of requirements that bind the public, NAHB submits that a rulemaking is necessary.

While it could be argued that the Draft Guidance was issued to instruct or inform the public about agency procedures, much of its focus is directed to agency employees for their use in making jurisdictional determinations that have binding consequences. A staff member at an agency has to make a decision, and that decision may not flow unambiguously from the statute and regulations. While trying conscientiously to follow the statutes, regulations, and judicial interpretations that are relevant, the agency staff must also consider the preferences of supervisors and the plans of the agency. In addition, agency staff will have preferences and viewpoints of their own that may influence their decisions. Therefore, the agency decision – which is the staff member's decision – is subject to many influences beyond the facts and the

[9] *Portland Cement Assn.v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), cert.denied, 417 U.S. 921 (1974).
[10] *Draft Guidance*, p. 1.

law. The purpose of the Draft Guidance, in theory, is to make those decisions uniform by telling the staff and the public exactly what the agency policy is. Because the Draft Guidance lays out a framework of scientific questions that are ultimately used to inform a subjective and ad hoc opinion, however, this formulaic outcome is not possible, as staff are free to express their opinions and desires in whatever fashion they deem appropriate.

These individualized, non-policy or rule-based decisions are not thought to have legal consequences because they do not determine any generally-applicable principle. However, jurisdictional determinations have a binding and constraining effect on otherwise legal land-use activities. A builder cannot proceed with construction without a final jurisdictional determination and a wetlands permit, if applicable. Whether the permit will be issued depends on Corps' headquarters policy, Corps' regional policy, and local office policy, as well as the inclinations of relevant Corps staff. These all affect a crucial question for builders: whether the permit will be issued. A denial has same effect on the builder whether the denial is due to clear provisions of the CWA or due to a staffer's idiosyncrasies. Thus, the Draft Guidance and office policies determine the way regulatory power is applied. Unfortunately, the Draft Guidance, as written, does not have the appropriate mechanisms in place to ensure this power is applied in a uniform, transparent, and fair manner or in accordance with the law. It also does not sufficiently guard against misuse or misapplication. In fact, the Agencies have even stated that application of the Draft Guidance will result in more areas being deemed jurisdictional, which could be construed as creating a bias toward inclusion vs. exclusion.

NAHB's concerns stem from the Corps' previous application of policy and guidance. For example, after the 2001 *SWANCC* decision in which the Supreme Court invalidated the basis the Corps had used to regulate isolated intrastate wetlands, the Corps and EPA issued an advance notice of proposed rulemaking (ANPRM) for new rules that would allow jurisdiction based on a different legal basis.[11] Eventually, the Agencies announced that they would not issue any proposed rules,[12] but instead rely on the guidance that was published at the same time as the ANPRM ("Appendix A"). Unfortunately, implementation of Appendix A resulted in stark policy differences from one Corps region to another, with the result that some Corps districts – such as the Philadelphia and Seattle offices – subsequently treated roadside drainage ditches as "the waters of the United Sates," while other Corps districts did not.

In a similar fashion, the Corps attempted to prevent a recurrence of the post-*SWANCC* uncertainty when the *Rapanos* decision came down. Instead of issuing a public directive, Corps Headquarters distributed Interim Guidance on the *Rapanos* and *Carabell* Supreme Court Decisions (HQ Memo).[13] In the HQ Memo, headquarters admits its confusion about *Rapanos*

[11] 68 *Fed. Reg.* 1991, (January 15, 2003).
[12] EPA Press release, December 16, 2003.
[13] Sudol, Mark F., *Interim Guidance on the Rapanos and Carabell Supreme Court Decision*, U.S. Army Corps of Engineers headquarters, July 5, 2006.

and therefore instructed its district offices to "delay making CWA jurisdictional determinations for areas beyond the limits of the traditional navigable waters . . . for the next three weeks." Furthermore, the HQ Memo stated that Corps headquarters would send advice "as soon as possible and in the very near future." That "three week" delay became almost a year, when the Corps finally released the draft 2008 Guidance, leaving potential applicants in limbo and permit writers at a loss for what to do.

Implementation of the 2008 guidance has been a challenge for both property owners and Corps staff, as the documentation is lengthy and cumbersome, there is little consistency across districts, subjective decision-making still occurs, and there is no assurance that by following their guidance, the agencies are staying within the bounds of the authority conferred by the CWA. In the end, whether a builder needs a permit for a culvert is determined by what Corps district encompasses the land, not by the governing law of the land. Following the Supreme Court's decisions in *SWANCC* and *Rapanos*, the federal law means different things in different parts of the country, for no reason other than bureaucratic dysfunction. While it was thought that new authoritative guidance procedures would prevent jurisdictional questions of national policy from being set by regional officials, neither of the previous guidance documents nor the Draft Guidance meet that need.

One of the reasons that Appendix A and the HQ Memo have had such problematic results is that they were issued as notices, not formal regulations. Publication and comment were unavailable to cure their abuse or prevent other ways of compelling actions on the part of the public. Any agency statement of general applicability with future effect and that has the force and effect of law is a rule. As such, it must be issued in accordance with the requirements of the APA.

NAHB thoroughly agrees with the sentiment raised in the joint letter recently sent by nearly half the Senate to EPA Administrator Lisa Jackson and Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works, which said, it is "fundamentally unfair to the states and the regulated community (including our nation's farmers and other property owners) to subject lands and waters under their control to a change in a legal status of this magnitude via a 'guidance document.'" Changes in legal status, they said, should only be done "through the regulatory process, specifically under the Administrative Procedure Act."[14]

3. Issuing Guidance Instead of a Rule Conflicts with Government Principles

[14] United States Senate Letter to Administrator Jackson and Assistant Secretary Darcy, June 30, 2011, accessed at http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=ec609d07-a036-49e8-a8a0-c46652b479bd on July 25, 2011.

Most U.S. Presidents serving over the past 20+ years have made concerted efforts to improve administrative functions, regulatory processes, and government accountability. Most recently, the Obama Administration has taken numerous steps to compel regulatory reform, enhance government transparency, expand the use of good science, and eliminate excessive and unjustified burdens. Issuing guidance instead of a rule to identify waters protected by the CWA, however, is clearly at odds with the both President's commitments and a number of other government initiatives, and thus should be abandoned.

On January 21, 2009, President Obama issued a Memorandum for the Heads of Executive Departments and Agencies on Transparency and Open Government.[15] The memo expressed the President's vow to work with agencies to ensure the public trust and establish a system of transparency, public participation, and collaboration. Two years later, in another effort to promote good governance, the President simultaneously issued Executive Order (EO) 13563 *Improving Regulation and Regulatory Review*[16] and the *Memorandum on Regulatory Flexibility, Small Business, and Job Creation.*[17] The EO specifically called for regulations to be cost effective and cost justified, transparent, coordinated, flexible and science-driven, and largely instructs the agencies to comply with EO 12866, which was issued in 1993 and has historically provided the blueprint for agencies to follow when considering and adopting rules. The Memorandum directs all federal agencies, when proposing new regulations, to include regulatory flexibilities for small businesses such as extended compliance dates, simplified reporting requirements, or even regulatory exemptions.

Following this lead, in February 2011, the U.S. House of Representatives' Committee on Oversight and Government Reform completed a preliminary study about regulations that affect the ability of businesses to create jobs. Among the findings, the study states, "[t]he administrative process to develop rules and regulations should be executed with maximum transparency and predictability, while also providing the regulated community with a meaningful opportunity for dialogue with those crafting the regulatory mandates."[18] This newly energized focus on government accountability is taking center stage, yet for some reason, the Corps and EPA do not feel compelled to follow this trend.

Instead, by proposing guidance instead of a rule, the Agencies have eroded the public's trust and skirted the very ideals the Administration was hoping to facilitate and promote. For example, the Corps and EPA have provided little detail to justify their actions or to describe why certain areas or features deserve protection under the Act. Similarly, although the Agencies are accepting public comment on the Draft Guidance, but that participation carries little weight or promise of

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[15] 74 *Fed. Reg.* 4685 (January 26, 2009).
[16] 76 *Fed. Reg.* 3821, (January 21, 2011).
[17] 76 *Fed. Reg.* 3828 (January 21, 2011).
[18] U.S. House of Representatives, Committee on Oversight and Government Reform, A*ssessing Regulatory Impediments to Job Creation*, Preliminary Staff Report, February 9, 2011.

effectiveness because the Agencies are not following the tenets of the APA. The Agencies have not undertaken a formal rulemaking under the APA, and thus the Agencies are not required to consider or respond to any public comment. Although a central goal of the Obama Administration, the Agencies are ignoring the principles of transparency and openness, purportedly for ease and expediency. This is the wrong approach.
Moreover, assuming for argument's sake that issuing guidance was appropriate, the Agencies have not followed the processes set forth by the Office of Management and Budget (OMB) for issuing guidance. In January 2007, in an effort to increase the quality and transparency of agency guidance practices and the significant guidance documents produced through them, OMB issued its Final Bulletin for Agency Good Guidance Practices.[19] Specifically, the Bulletin states that "[t]he purpose of Good Guidance Practices (GGP) is to ensure that guidance documents of Executive Branch departments and agencies are: Developed with appropriate review and public participation, accessible and transparent to the public, of high quality, and not improperly treated as legally binding requirements." Although the Bulletin is intended to remove some of the uncertainties and problems associated with guidance documents, its application is limited to those deemed "significant."

A ''significant guidance document'' is defined as a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to: (i) lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (ii) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (iii) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended. [20] In sum, under the Bulletin, significant guidance documents include interpretive rules of general applicability and statements of general policy that have the effects described in Section I(4)(i)–(iv).

Because the Draft Guidance raises novel legal and policy issues, it clearly falls within the definition of "significant." If there is any doubt as to the Bulletin's applicability, the preamble explains, "[I]f the agency compiles and publishes informal determinations to provide guidance to, and with a substantial impact on, regulated industries, then this Bulletin would apply. Guidance documents are considered ''significant'' when they have a broad and substantial impact on regulated entities, the public or other Federal agencies."[21] Expanding the universe of what is considered jurisdictional under the CWA, and thus what areas are subject to the myriad of programs, permits, and limitations associated with such designation will clearly have a broad

[19] 72 *Fed. Reg.*, 3433 (January 25, 2007).
[20] 72 *Fed. Reg.*, 3439 (January 25, 2007).
[21] 72 *Fed. Reg.*, 3435 (January 25, 2007).

and substantial impact on regulated entities and the public. The Bulletin obviously applies and must be followed. However, there is no evidence within the Draft Guidance or its supporting documentation that the Agencies have even considered the applicability of the Final Bulletin or taken steps to ensure compliance. Indeed, the Draft does not even have a date and fails to consistently indicate which part of the regulations the Agencies are seeking to "interpret" – both standard requirements of the Bulletin. Likewise, it is unclear if the Agencies have been working with OMB and its Office of Information and Regulatory Affairs to review the Draft Guidance, as directed by a 2009 OMB memo.[22]

There is no doubt that the Draft Guidance and the decisions that stem from its use raise important policy issues and will have a broad and substantial impact on regulated entities. Therefore, contrary to the Agencies' actions, it is of critical importance that major issues, such as the applicability of the CWA, which implicates the overall economy and impacts landowners nationwide, are legitimized and adopted in compliance with the APA and other applicable regulatory and statutory requirements. Likewise, the Agencies are urged to heed the President's pledges and follow the rulemaking path to ensure an outcome that allows for meaningful public input and is cost-effective and cost-justified, transparent, coordinated, flexible and science-driven.

4. A Rulemaking Satisfies Court, Congressional, and Public Sentiment

The need for rulemaking is not a new phenomenon and is not solely a result of *Rapanos*. Instead, the Agencies have for years recognized the need for rulemaking to define the scope of their regulatory authority in a consistent and predictable manner. For example, on January 15, 2003, the Corps issued an Advanced Notice of Proposed Rulemaking ("ANPR") seeking comment on whether or how its regulations should be amended to account for the Supreme Court's *SWANCC* decision. The Agencies, however, have never followed through with this rulemaking effort.

In response to recent pleas to conduct a rulemaking, the Agencies have stated that they intend to conduct a rulemaking in the future. Even the Guidance states, "[A]fter receiving and taking account of public comments on this document, EPA and the Corps expect to finalize it and to undertake a rulemaking consistent with the Administrative Procedure Act."[23] But given the myriad of issues, it makes little sense to proceed on two different tracks. Similarly, there is no guarantee that such a rulemaking will ever commence, as past promises and commitments to clarify the definition of waters of the United States and the scope of CWA jurisdiction have all

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[22] Office of Management and Budget, *Memorandum for the Heads and Acting Heads of Executive Departments and Agencies RE: Guidance for Regulatory Review*, which reiterated the Administration's commitment to having OIRA review all significant proposed or final agency actions, including significant policy and guidance documents. March 4, 2009, accessed on July 30, 2011, from http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf.

[23] *Draft Guidance,* p. 1.

fallen flat.[24] Indeed, there is no mention of any such rulemaking in EPAs most recent Semi-Annual regulatory agenda, which was published in July![25]
Now, in the wake of *Rapanos* and failed earlier guidance documents, there is even greater need for a regulation to provide a comprehensive set of rules regarding which water bodies the Agencies may regulate as waters of the United States. Indeed, Chief Justice Roberts wrote in *Rapanos* that the Agencies would be "afforded generous leeway" if they conducted a rulemaking interpreting statutory "navigable waters."[26] And "the Corps and EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority."[27] Justice Breyer concurred, observing that the various *Rapanos* opinions, "taken together, call for the Army Corps of Engineers to write new regulations, and speedily so."[28] And finally, Justice Kennedy: "Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic ecosystem incorporating navigable waters."[29]

Similarly, on April 14, 2011, 170 Members of Congress sent a joint letter to EPA Administrator Lisa Jackson and Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works, claiming that the Guidance "amounts to a *de facto* rule instead of mere advisory guidelines," and that the Guidance "is an attempt to short-circuit the process for changing agency policy and the scope of the Clean Water Act jurisdiction without following the proper, transparent rulemaking process that is dictated by the Administrative Procedure Act." Finally, it states, "[i]f the Administration seeks to make regulatory changes, a notice and comment rulemaking is required."[30] Likewise, on June 30, 2011, 41 Senators sent a similar letter, suggesting that "[b]ecause the Draft Guidance will substantively change how the Agencies decide which waters are subject to federal jurisdiction and will impact the regulated community's rights and obligations under the CWA, this guidance has clear regulatory consequences and goes beyond being simply advisory

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[24]For example, on April 23, 1990, EPA included on its semiannual regulatory agenda its intent to promulgate a rulemaking to revise the definition of "waters of the United States" by October 1990 (55 Fed. Reg. 16,818, 16,845 (Apr. 23, 1990)). EPA did not meet that deadline. But from 1990 through May 2003, EPA included its intent to revise the definition of "waters of the United States" on every semiannual regulatory agenda. Yet, in November 2003, the Agencies decided instead to abandon these efforts and considered the matter "completed" and "withdrawn." (68 Fed. Reg. 73,540, 73,686 (Dec. 22, 2003)).
[25] U.S. Environmental Protection Agency, Semiannual regulatory flexibility agenda and semiannual regulatory agenda, 76 Fed. Reg. 40118, (July 7, 2011), also accessed on July 29, 2011 at http://www.reginfo.gov/public/do/eAgendaMain;jsessionid=9f8e89cb30d67cebd44859114fcabfaa84851d5da8f9.e34ObxiKbN0Sci0SbhaSa3aLchr0n6jAmljGr5XDqQLvpAe?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCd=2000&Image58.x=13&Image58.y=17.
[26] *Rapanos*, 547 U.S. at 757-58.
[27] *Id.* (original emphasis).
[28] *Id.* at 811.
[29] *Id.* at 780-81.
[30] United States Congress letter to Administrator Jackson and Assistant Secretary Darcy, April 14, 2011, accessed at http://agriculture.house.gov/pdf/letters/EPAguidanceletter.pdf on July 26, 2011.

guidelines… we believe that the agency must go through the formal rulemaking process."[31] The overall message from the Court, Congress, and the public is unmistakable – the Agencies must engage in rulemaking to define their jurisdictional authority.

Finally, "an agency literally has no power to act . . . unless and until Congress confers power upon it."[32] In the CWA, Congress defined "navigable waters" as "the waters of the United States."[33] This definition has not changed since the Act was enacted in 1972. And yet, the Agencies expect that "the extent of waters over which the agencies assert jurisdiction under the CWA will increase."[34] It is "beyond parody"[35] that the government believes that after almost forty years, the term "that waters of the United States" now has a different meaning.

Until such regulations are enacted, the public will be beleaguered by partial answers, confusing standards, and ad hoc and arbitrary decisions pertaining to the scope of federal jurisdiction under the CWA. Accordingly, NAHB respectfully requests that the Agencies follow the Supreme Court's instruction in *Rapanos*, carry through on their many and long-standing promises to provide clarity and predictability, and engage in rulemaking to define the scope of their regulatory authority under the CWA.

B. The Draft Guidance Misconstrues the Court Cases, is Inconsistent with Existing Regulations, and Impermissibly Expands Jurisdiction

Congress established the limits of federal jurisdiction under the CWA based on impacts to navigable waters, which are those waters used in commerce. This exercise of Congressional authority is based on Congress' authority to regulate channels of commerce under the Commerce Clause. The Agencies, however, seem to have forgotten this fundamental link, as through the Draft Guidance, they have attempted to subvert and override not only Congress' directives, but also their own regulations and policies. If the Draft Guidance were put into use, the agencies would assert jurisdiction over land and water resources that are not subject to the CWA, thereby exceeding their authority under the Act. Such a result is neither proper nor acceptable.

1. Traditional Navigable Waters

The Draft Guidance indicates that all navigable-in-fact waters qualify as "traditional navigable waters" (TNWs), a position that NAHB believes is flawed. There is no indication in the 1972 CWA's history that Congress intended to exponentially stretch federal authority to the extremes

[31] United States Senate Letter to Administrator Jackson and Assistant Secretary Darcy, June 30, 2011, accessed at http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=ec609d07-a036-49e8-a8a0-c46652b479bd on July 25, 2011.
[32] *Louisiana Public Service Com'n v. F.C.C.*, 476 U.S. 355, 374 (1986).
[33] 33 U.S.C. § 1362(7).
[34] *Draft Guidance,* p. 3.
[35] *Rapanos*, 547 U.S. at 734 (2005)(plurality opinion).

contemplated by the Draft Guidance. Congress's focus in 1972 was indeed to provide "the broadest possible constitutional interpretation" of traditional navigable waters, insofar as such bodies affect navigation or provide linkages to channels of interstate commerce. However, there is simply no evidence that the CWA's founders sought to subject isolated ponds, erosional drainages, upland ditches, swales, or the like, to federal control. The Agencies' expansive interpretation does not comport with the Supreme Court test for traditional regulatory authority over "navigable waters of the United States." If allowed to stand, the Draft Guidance will have the effect of sweeping "virtually any land feature over which rainfall or drainage passes and leaves a visible mark," into the federal regulatory net.[36]

i. The Legal Test for Navigability

As an initial matter, NAHB wants to make clear our position that jurisdiction under the CWA covers more than just TNWs. In *Rapanos*, both Justice Scalia (writing for the four-justice plurality) and Justice Kennedy (concurring in the judgment) agreed that the CWA's scope extends beyond TNWs.[37] However, the determination of whether an aquatic feature is a TNW is the crucial, foundational component of each of their CWA analyses. Justice Scalia wrote that one "finding" necessary to determine if a wetland is covered by the CWA is if the "adjacent channel contains a 'wate[r] of the United States,' (*i.e.,* a relatively permanent body of water connected to a traditional interstate navigable water)…."[38] Justice Kennedy stated that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[39] Thus, while the CWA's purview is not coterminous with TNWs, waters deemed navigable in the traditional sense remain critical to determining the reach of Corps and EPA authority.

The Draft Guidance states that the phrase "traditional navigable waters" means those waters referred to in 33 C.F.R. § 328.3(a)(1).[40] It further adds that TNW's include waters regulated as navigable waters of the United States under the Rivers and Harbors Act (RHA), but then confuses the issue by stating that such waters include waters that are "navigable-in-fact." This position not supported by the history of federal regulation of navigable waters, the text of (a)(1) itself, or the Supreme Court's discussion of the issues in *Rapanos*.

The test for traditional regulatory authority over "navigable waters of the United States" was set forth in *The Daniel Ball*.[41] That test has two parts. The first is denoted by the use of the word

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[36] *Rapanos,* 547 U.S. at 725 (2006) (plurality opinion).
[37] *Id.* at 731 (Justice Scalia: "[T]he Act's term 'navigable waters' includes something more than traditional navigable waters …."); *id*. at 799 (Justice Kennedy: "…[T]he Act contemplates regulation of certain 'navigable waters' that are not in fact navigable").
[38] *Id*. at 742 (emphasis added).
[39] *Id*. at 779 (emphasis added) (Kennedy, J., concurring).
[40] *Draft Guidance,* p. 6.
[41] *The Daniel Ball*, 77 U.S. 557, 563 (1870).

"navigable" and involves a determination of whether a water body is "navigable-in-fact." The second is denoted by the phrase "of the United States" and involves a determination of whether the waterbody forms by itself or in conjunction with other waters, a continuous interstate highway for waterborne commerce. It is worth quoting the entire text of this test from *The Daniel Ball,* as the Draft Guidance leaves out the second part.

> The test by which to determine the navigability of our rivers is found in their navigable capacity. Those rivers are public navigable rivers in law which are navigable in fact. Rivers are navigable in fact when they are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[42]

Under this test, a water body must be used, or be susceptible of being used, as a highway for commerce and, either by itself or in conjunction with other waters, form a continuous interstate highway for water-borne commerce in order to be deemed jurisdictional. The Draft Guidance fails to heed these limits.

ii. Recreational use, by itself, is not sufficient to establish a TNW

One of the emerging misconceptions about TNW determinations is that recreational use alone is sufficient to demonstrate the presence of a TNW. The Draft Guidance feeds this misconception by allowing "boating or canoe trips for recreation or other purposes" to form the basis of a TNW determination.

The Appendix to the Draft Guidance references two cases, *FLP Energy Marine Hydro v. FERC*,[43] and *Alaska v. Ahtna, Inc.*,[44] that the Agencies offer as evidence that recreational use demonstrates that a water is "susceptible to being used for commercial navigation such that it is a traditional navigable water."[45] In fact, neither case demonstrates that mere recreational use alone is sufficient to prove the existence of a TNW. Recreational use, to the extent it is relevant at all, is merely evidence of commercial use (if the recreational use is itself commercial) or is evidence of susceptibility of use for commercial purposes. This proposition is demonstrated in the *Ahtna* case, where the court upheld a finding of navigability of the Gulkana River based on evidence of

[42] *Id*. at 557.
[43] *FLP Energy Marine Hydro v. FERC*, 287 F.3d 1151 (D.C. Cir. 2002).
[44] *Alaska v. Ahtna, Inc.*, 891 F.2d 1404 (9th Cir. 1989).
[45] *Draft Guidance*, p. 23-24.

commercial recreational use of the river. The *FPL* case, an extremely marginal case of navigability based on canoe use, likewise found that a waterbody with physical characteristics of continuous, substantial flow, plus experimental use indicated susceptibility to future use for commercial purposes. NAHB finds the Agencies citation to these two cases is odd because neither offer any support in explaining how evidence of recreation alone could be sufficient to satisfy the definition of a TNW.

As *The Daniel Ball* makes clear, for a waterbody to be classified as a TNW, the waterbody must have been used, or be susceptible to use, as a highway for water-borne interstate commerce, as opposed to being capable of floating a boat or canoe. Subsequent decisions of the Supreme Court have refined this test, but it has remained largely unchanged for 140 years.[46] Each of these decisions was decided before the CWA was enacted, and evidence that the standard for determining the navigability of a particular water body is a judicial standard, not a regulatory standard. Indeed, the term "traditional navigable water" is not found in the CWA or its implementing regulations.

2. Interstate Waters

The Commerce Clause provides Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[47] The Supreme Court has stated there are:

> [T]hree broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.,* those activities that substantially affect interstate commerce.[48]

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*), the Supreme Court provided that Congress enacted the CWA pursuant to its "commerce power over navigation."[49] Yet, in its Draft Guidance, the government is asserting jurisdiction over "interstate waters" that have no connection with navigation.[50]

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[46] *See, e.g., Utah v. United States*, 403 U.S. 9, 10-11 (1971); *United States v. Appalachian Elec. Power Co*., 311 U.S. 377, 405-09 (1940); *United States v. Utah*, 283 U.S. 64, 76-77 (1931); *United State v. Holt State Bank*, 270 U.S. 49, 56 (1926); *United States v. Rio Grande Dam & Irr. Co*., 174 U.S. 690, 698-699 (1899).
[47] U.S. Const. art. I, § 8, cl. 3.
[48] *United States v. Lopez*, 514 U.S. 549, 558 (1995) (internal quotations omitted).
[49] *SWANCC*, 531 U.S. 159, 168 n.3 (2001).
[50] *Draft Guidance*, p. 6.

The Agencies find support in earlier water pollution control acts that included the phrase "interstate waters" and conclude that "[i]nterstate waters" are waters of the several states, and, thus, waters of the United States.[51] Furthermore, the government relies on the use of the phrase "interstate waters" in CWA section 1313(a)(1) to support its jurisdiction. However, in section 1313(a)(1), Congress was again referring to the actions taken by the states under the pollution control acts that preceded the CWA.

In *SWANCC*, the Supreme Court explained that "[where an administrative interpretation of a statute invokes the outer limits of Congress' power, [the Court] expects a clear indication that Congress intended that result."[52] NAHB suggests that by asserting authority over water bodies simply because they cross state lines, the Agencies are at the "outer limits" of congressional authority.[53] In addition, there is no "clear indication" in the CWA that Congress provided the Agencies with authority over all water bodies in the United States that cross state lines. Therefore, the Agencies cannot automatically assume all interstate waters are jurisdictional because the CWA does not provide the Agencies such authority. Any attempt to regulate water bodies simply because they are "interstate" must be abandoned.

3. Significant Nexus

i. The Agencies Reliance on Justice Kennedy's *Rapanos* Decision Is Excessive

The Agencies are building a national policy based on one Supreme Court Justice's opinion in one case. NAHB suggests that this is a flawed approach to create national policy. In *Rapanos*, four Justices joined a plurality opinion (written by Justice Scalia) and Justice Kennedy concurred. To detect a court holding among five Justices the so called "*Marks* formulation" requires an examination of those differing opinions that "concurred in the judgments."[54] Therefore, any holding from *Rapanos* must be limited to an examination of Justice Scalia's plurality and Justice Kennedy's concurrence—because only those opinions garnered support from five Members who concurred in the judgment by vacating the Sixth Circuit's too-expansive

[51] *See* 33 U.S.C. § 1361(7); *but see Virginia v. Maryland*, 540 U.S. 56 (2003)(illustrating that simply because a waterbody crosses state lines, the authority to regulate its use does not automatically rest with the federal government).
[52] *SWANCC*, 531 U.S. at 172.
[53] By analogy, if a geographic or other physical feature other than a waterbody crosses a state line, Congress does not automatically posses the power to regulate it.
[54] *Marks v. United States*, 430 U.S. 188, 193 (1977).

interpretation of the CWA.[55] Justice Stevens' dissent does not factor into this calculus because it did not vacate the Sixth Circuit.[56]

The *Marks* formulation is workable when one opinion is a subset of the other. For example, assume Justice Scalia's opinion required that four factors be met before the government could assert jurisdiction over a water body, and Justice Kennedy's concurrence agreed with the four factors, but required a fifth factor. Then, under *Marks*, Justice Kennedy's opinion would control, because if a water body met all five factors, all five Justices would agree that it is jurisdictional.

Unfortunately, in *Rapanos*, one opinion is not a subset of the other. Therefore, NAHB suggests that the Agencies can only build their policy based on points of consensus between the two opinions that concurred in the judgment.

Illustrative topics of commonality between the plurality and Justice Kennedy's concurrence are as follows:

- **The CWA's scope is not restricted to traditional navigable waters.**
  - Plurality: "The Act's term 'navigable waters' includes something more than traditional navigable waters …."[57] The plurality "affirmatively reject[ed]" an interpretation that the CWA "includes only navigable-in-fact waters."[58]
  - Kennedy Concurrence: "Congress' choice of words creates difficulties, for the Act contemplates regulation of certain 'navigable waters" that are not in fact navigable."[59]

- **The word "navigable," in the phrase "navigable waters," has meaning.**
  - Plurality: "[T]he traditional term 'navigable waters' … carries *some* of its original substance …."[60]
  - Kennedy Concurrence: "[T]he dissent reads a central requirement out [of the CWA]—namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance."[61] "Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends

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[55] *Rapanos v. United States,* 547 U.S. 715, 756 (plurality) ("We vacate the judgments of the Sixth Circuit in both No. 04-1034 *[Rapanos]* and No. 04-1384 *[Carabell]*, and remand both cases for further proceedings"); *id.* at 787 (Kennedy, J. concurring) ("In these consolidated cases I would vacate the judgments of the Court of Appeals ….").
[56] *Rapanos,* 547 U.S. at 809 (Stevens, J., dissenting) ("I would affirm the judgments in both cases, and respectfully dissent from the decision of five Members of this Court to vacate and remand").
[57] *Rapanos,* 547 U.S. at 731.
[58] *Id.* at 751.
[59] *Id.* at 779.
[60] *Id.* at 734.
[61] *Id.* at 778.

upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[62]

- **A mere hydrological connection can *not* provide the basis for CWA jurisdiction.**
  - Plurality: Rejecting the federal government's hydrologic connection theory in deciding that the phrase "the waters of the United States" "cannot bear the expansive meaning that the Corps would give it."[63] "[R]elatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition."[64]
  - Kennedy Concurrence: Criticizing the dissent because it "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that may eventually flow into traditional navigable waters."[65] "[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."[66]
- **Hypothetical, speculative, or eventual water flows do *not* support CWA jurisdiction.**
  - Plurality: "[T]he phrase 'the waters of the United States' includes *only* those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] … oceans, rivers, [and] lakes."[67] *"[O]nly* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[68]
  - Kennedy Concurrence: "The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, *however remote and insubstantial*—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case."[69] "When … wetlands' effects on water quality *are speculative or insubstantial,* they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[70] In remanding *Carabell* back to the Sixth Circuit, Justice Kennedy stated that "[t]he conditional language in [the Corps's] assessments—'potential ability,' 'possible flooding'—could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence supporting the Corps' claims …."[71] In *Carabell*, "the Corps based its jurisdiction solely on the wetlands' adjacency to the ditch opposite the berm on the property's edge …. *[M]ere adjacency* to a tributary of this sort *is*

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[62] *Id.* at 779.
[63] *Id.* at 731.
[64] *Id.* at 736 n.7.
[65] *Id.* at 778.
[66] *Id.* at 784.
[67] *Id.* at 739 (emphasis supplied).
[68] *Id.* at 742.
[69] *Id.* at 780 (emphasis added).
[70] *Id.* (emphasis added).
[71] *Id.* at 786.

insufficient; a similar ditch could just as well be located many miles away from any navigable-in-fact water and *carry only insubstantial flow* towards it."[72]

- **Mere presence of an ordinary high water mark does not render a feature a jurisdictional "tributary," or the wetlands next to such a feature jurisdictional "adjacent wetlands."**
  - Plurality: As set out above, "'the waters of the United States' includes *only* those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features'…."[73] And, as to wetlands, *only* those with a "continuous surface connection to bodies that are 'waters of the United States' in their own right …."[74]
  - Kennedy Concurrence: "[T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or tributary thereof) and possesses an *ordinary high-water mark* …. *This standard* presumably provides a rough measure of the volume and regularity of flow. … *[T]he breadth of this standard*—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it—*precludes its adoption as the determinative measure* of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered *by this standard* 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*."[75]

- **CWA jurisdiction is not lost simply because a waterbody is regularly wet during certain seasons and dry during others.**
  - Plurality: Recognizing that the Los Angeles River would be jurisdictional under the CWA, and stating: "We … do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day continuously flowing stream postulated by Justice STEVENS' dissent …."[76] "[N]o one contends that federal jurisdiction appears and evaporates along with water in such regularly dry channels."[77]
  - Kennedy Concurrence: "The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river … Yet it periodically releases water-volumes so powerful and destructive that it has been encased in concrete … over a length of some 50 miles … Though this particular waterway *might*

[72] *Id.* at 786 (emphasis added).
[73] *Id.* at 739 (emphasis added).
[74] *Id.* at 742 (original emphasis).
[75] *Id.* at 781 (emphasis added).
[76] *Id.* at 732 n.5.
[77] *Id.* at 733 n.6.

satisfy the plurality's test, it is illustrative of what often-dry watercourses can become when rain waters flow."[78]

- **As a general matter "navigable waters" and "point sources" are *not* the same thing, and normally a feature can't be both.**
  - Plurality: The CWA's definitions "conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping."[79]
  - Kennedy Concurrence: "[E]ven were the statute read [as the plurality does] to require continuity of flow for navigable waters, certain waterbodies *could conceivably* constitute both a point source and a water."[80]

NAHB does not offer these points as an exhaustive list of all areas in which Justices Scalia and Kennedy agree. But these examples of consensus are important and are a superior basis for defining the term "waters of the United States" than reliance on one Justice's concurring opinion.

ii. Watershed Aggregation

For the first time in the Act's history, the Agencies plan to assert jurisdiction over waterbodies under a new "watershed aggregation approach" that is overbroad and inconsistent with *Rapanos*. Under Justice Kennedy's "significant nexus" standard, wetlands are "waters of the U.S." if they "alone or in combination with similarly situated lands *in the region*" have a significant nexus to navigable waters.[81] According to the Draft Guidance, the Agencies will consider waters to be "in the region" if they fall within the same watershed (*i.e.*, if they drain to the nearest traditional navigable or interstate water).[82] Under this new approach, the Agencies will evaluate whether the waterbody at issue has a significant nexus with TNWs or interstate waters by: (1) aggregating all "similarly situated" waters within the watershed; and (2) determining whether those "similarly situated" waters, taken together, have a significant nexus to the nearest TNW or interstate water.[83] In short, the Agencies have taken a frolic and detour on one phrase in one line of a concurring opinion and used it to turn the Clean Water Act on its head.

As discussed above, NAHB disagrees with the emphasis that the Agencies place on Justice Kennedy's test. But even if the "significant nexus" test drives determinations for jurisdictional waters, the new watershed aggregation approach goes far beyond what the Supreme Court anticipated. Justice Kennedy's reference to wetlands "in the region" did not specifically refer to

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[78] *Id.* at 769-70 (emphasis added).
[79] *Id.* at 735-36.
[80] *Id.* at 772 (emphasis added).
[81] *Rapanos*, 547 U.S. at 780 (emphasis added).
[82] *Draft Guidance*, p.8.
[83] *Id*.

those that "fall within the same watershed." The Draft Guidance defines the watershed as the area draining into the nearest TNW or interstate water.[84] However, as noted in the Draft Guidance, watersheds cover large distances, averaging "between 40,000 and 250,000 acres in size."[85] Given their vast size, there are often significant distances between a wetland and the "nearest" (relatively speaking) TNW or interstate water, and thus it makes little sense to consider such waterbodies as "similarly situated" or "in the region." Under the Draft Guidance, the Agencies will make significant nexus determinations based on the aggregation of waters that are many miles apart from each other and have distinctly different relationships with the TNW and, therefore, are not reasonably within the same region.

The watershed aggregation approach also appears inconsistent with the analysis rejected in *Rapanos*. As discussed above, both the plurality and the Kennedy concurrence agreed that a mere hydrological connection (like this watershed-based approach) may not provide the basis for CWA jurisdiction.[86] In his concurrence, Justice Kennedy rejected the Agencies' assertion of jurisdiction over non-navigable waters based on "any hydrological connection" to navigable waters, and repeatedly cautioned that "remote," "insubstantial," "speculative," or "minor" flows are insufficient to establish a "significant nexus."[87] Instead, the Kennedy concurrence directs the Agencies to make these determinations on a "case-by-case basis" that reflects the "the significance of the tributaries to which the wetlands are connected," a "measure of the significance of [the hydrological connection] for downstream water quality," and "the quantity and regularity of flow in the adjacent tributaries."[88] Indeed, the Agencies recognized the importance of proximity to navigable waters, and the amount and regularity of flow in their last guidance following *Rapanos*.[89]

This new watershed aggregation approach deviates from past guidance and marginalizes the distance, amount, and regularity of flow in the significant nexus determination.[90] Instead, a wetland could be jurisdictional despite its remoteness – possibly located hundreds of miles from the nearest TNW – and the irregularity of its flow. Thus, the Agencies' instruction to aggregate

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[84] *Id.*
[85] *Id.*
[86] *Rapanos*, 547 U.S. at 731, 736 n.7, 778, 784.
[87] *Id*. at 778-79 ("[T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far.").
[88] *Id.* at 782, 784, 786.
[89] "Principal considerations when evaluating significant nexus include the volume, duration, and frequency of flow of water in the tributary and the proximity of the tributary to navigable water." U.S. EPA & Dep't of the Army, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," at 10 (June 5, 2007, revised Dec. 2, 2008) ("Rapanos Guidance"), http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf.
[90] To give effect to the regularity of flow as an important factor in determining significant nexus for streams, for example, the Draft Guidance should, at a minimum, develop certain specific criteria tied to water-level gauging and the ability to support aquatic organisms for a specified minimum period of time.

all "similarly situated" waters within a watershed to evaluate a water's significant nexus to TNWs and interstate waters expands the significant nexus analysis far beyond what Justice Kennedy intended.[91] It also allows for the same type of broad jurisdiction that Justice Kennedy rejected in *Rapanos* and is inconsistent with recent case law. Earlier this year, the Fourth Circuit "urge[d] the Corps to consider ways to assemble *more concrete evidence of similarity* before again aggregating such a broad swath of wetlands," and remanded that decision to the Corps to articulate a "significant nexus" between that "broad swath of wetlands" and the navigable water located several miles away.[92]

iii. The Agencies Are Misinterpreting Justice Kennedy's Opinion.

a. Justice Kennedy Required a Physical, Chemical AND Biological Nexus to Satisfy a "Significant Nexus."

Under Justice Kennedy's "significant nexus" analysis, wetlands that "significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense" are "waters of the United States."[93] The Agencies have misread Justice Kennedy's test by replacing the word "and" with the word "or."

Justice Kennedy used the conjunctive "and," not the disjunctive "or" to describe a "significant" nexus. By interpreting "and" to mean "or", the Agencies are violating two rules of construction.[94] First, words must be given their ordinary meaning.[95] "And" is generally a conjunctive, meaning "along with or together with."[96] Second "and" can mean "or" if using the word "and" would produce an absurd result or defeat the writers purpose.[97] However, there is no indication that Justice Kennedy would agree that a wetland is jurisdictional if it had only a biological, physical or chemical affect on a traditional navigable water. In fact, in *Rapanos,* the government had shown that the wetlands in question had a hydrological connection (a physical

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

[92] *Precon Development Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 293-95 (4th Cir. 2011) (emphasis added).

[93] *Rapanos*, 547 U.S. at 717; 33 U.S.C. § 1362(7).

[94] NAHB recognizes that the Agencies are not interpreting the language used by Congress, but the same rules should apply when interpreting the language used by the Supreme Court. Furthermore, NAHB suspects that Justice Kennedy is well aware of the difference between "and" and "or."

[95] *E.g.*, *Wall v. Kholi*, 131 S.Ct. 1278, 1284 (2011).

[96] *American Bankers Ins. Group v. United States*, 408 F.3d 1328, 1332 (2005); Websters Third New International Dictionary 80 (2nd ed. 2002).

[97] *E.g.*, *Officemax, Inc. v. United States*, 428 F.3d 583, 589-90 (6th Cir. 2005).

connection) to downstream waters, and yet five Justices rejected this as a basis for jurisdiction. Thus, the plain language used by Justice Kennedy requires that all three factors (physical, chemical and biological) must be satisfied before a wetland is jurisdictional.[98]

Furthermore, by substituting "and" with "or" the Agencies now claim that a water body that retains water, i.e., does not have a physical connection to a TNW, can have a significant nexus.[99] Thus, under the government interpretation, if a waterbody either has or does not have a physical connection to a TNW, it can satisfy the significant nexus test. This leads to the conclusion that all waterbodies have a significant nexus to a TNW and are therefore jurisdictional. Justice Kennedy demanded more.

b. Justice Kennedy Required the "Significant Nexus" Test to be Used For Wetlands, Not All Waterbodies.

Justice Kennedy applied his significant nexus test only to "wetlands."[100] Yet the Agencies claim that it is reasonable to apply this test to tributaries, and all other waters (*i.e.,* physically proximate waters that are not wetlands and non-physically proximate other waters). Justice Kennedy adopted the significant nexus test from *Riverside Bayview Homes*,[101] an earlier wetland case, and his *Rapanos* opinion is focused on wetlands. Not even in dicta does he suggest the same test for other types of waterbodies.

As the Corps has long recognized, wetlands have specific ecological functions and these functions are different than the functions of tributaries or other waterbodies. Justice Kennedy was also aware of these differences,[102] and it is unreasonable for the Agencies to expand the significant nexus test beyond his intent.

c. "Significant" Does Not Equate to "More Than Speculative or Insubstantial."

Justice Kennedy provided that if the impact of a wetland on a TNW is "speculative or insubstantial" that wetland is not within the jurisdiction of the Agencies.[103] On the other end of the spectrum, the significant nexus test requires that the Agencies prove that the wetland in

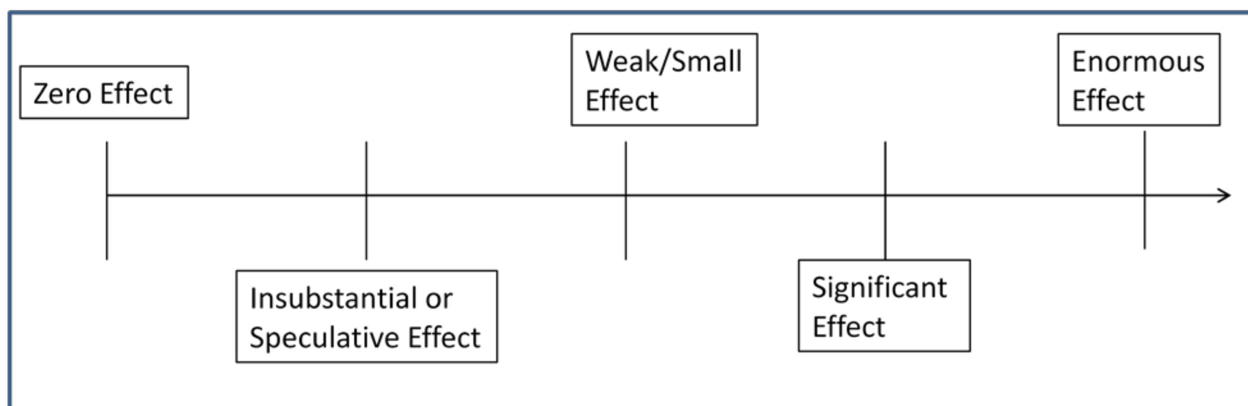
[98] *See Bruce v. First Federal Sav. and Loan Ass'n of Conroe, Inc.*, 837 F.2d 712, 715 (5th Cir. 1988) ("The word "and" is . . . to be accepted for its conjunctive connotation rather than as a word interchangeable with "or" except where strict grammatical construction will frustrate clear legislative intent.")
[99] Draft Guidance, p. 32-33.
[100] *Rapanos*, 547 U.S. at 779 (explaining that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.")
[101] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).
[102] *Rapanos*, 547 U.S. at 766.
[103] *Id*. at 780.

question has a significant chemical, physical, and biological effect on the TNW to fall within CWA jurisdiction.[104] The Agencies, however, 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.'[105]

The government has engaged in word play, by failing to add the word "significant" before "effect" and claiming that a nexus that is more than "speculative or insubstantial" is "significant." "An effect" is not a "significant effect."

NAHB submits that there is a range of effects that are more than "speculative or insubstantial" and yet not "significant."



For example, a wetland could have a small effect on a TNW, but that effect would not rise to one that is significant. Under the government's view, such a wetland would be jurisdictional. This is incorrect because a small effect is not a significant one. By equating the term "significant" with "more than insubstantial or speculative," the government has improperly removed words from Justice Kennedy's *Rapanos* decision, and again misinterpreted it. If the government wants to use Justice Kennedy's decision to create its policy, it must do so correctly. Therefore, the Agencies should explain that only wetlands that "significantly affect the chemical, physical, and biological integrity"[106] of a TNW are jurisdictional under the CWA.

d. The Agencies Must Make Clear That Certain Systems Are not Waters of the United States.

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[104] *Id.*
[105] *Draft Guidance,* p. 8 (emphasis added).
[106] *Rapanos*, 547 U.S. at 717 (Justice Kennedy concurring).

1. Low Impact Development Devices Are Not Waters of the United States.

The Draft Guidance "does not address the regulatory exclusions from coverage under the CWA for waste treatment systems."[107] This omission is unsettling to NAHB's more than 160,000 members, who regularly employ low impact development devices and other stormwater waste control technologies to reduce runoff and associated pollutant discharges from construction sites. The Agencies should acknowledge that on-site stormwater control systems do not contain waters of the United States and, furthermore, are exempt from protection under the CWA's waste treatment system exception.

Construction site operators must secure a NPDES construction stormwater permit (general or individual) before discharging stormwater to a surface water of the United States or a municipal separate storm sewer system (MS4).[108] The most significant component of NPDES construction stormwater permit is a Storm Water Pollution Prevention Plan (SWPPP), which identifies sediment and erosion control measures necessary to protect water quality. Historically, the preferred method of treating stormwater under a SWPPP has been through the use of on-site detention ponds. These manmade ponds are designed to slow concentrated runoff and trap sediment to protect receiving streams, lakes and other downstream water bodies. Low Impact Development (LID) systems represent another widely used stormwater waste treatment management option. The LID approach promotes the use of structural devices (engineered systems) and non-structural devices (vegetated natural systems) that capture stormwater, reduce runoff, enhance filtration, and filter out pollutants from the site at which they are generated.[109]

The U.S. Army Corps of Engineers has defined "waters of the United States" in its governing regulations at 33 C.F.R. § 328.3(a). The broad definition specifically excludes "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of [the] CWA" from the Act's list of protected waterbodies.[110] EPA's definition, which mirrors the Corps definition, at one time included a clarifying sentence noting that "this [waste treatment] exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal areas in wetlands) nor resulted from the impoundment of waters of the United States."[111] This exclusion was suspended following industry concern that the "manmade" component was overbroad and would outlaw existing

[107] *Draft Guidance*, p 3.
[108] 33 U.S.C. §§ 1311-1342.
[109] Common LID stormwater management devices include drainage swales, bio-retention basins, infiltration trenches and vegetated open channels.
[110] 33 C.F.R. § 328.3(a).
[111] 45 Fed. Reg. 48,620, July 21, 1980; 40 C.F.R. § 122.2 n. 1.

waste treatment facilities, including those constructed in streams or other "waters of the United States" predating the regulation.[112]

Judicial interpretation of the "waste treatment system" exemption bolsters NAHB's position that stormwater treatment systems designed to control both the quality and quantity of stormwater discharges from construction sites do not contain "waters of the United States." In *Northern California River Watch v. City of Healdsburg*, 2004 WL 201502 (N.D.Cal.), the district court rejected a claim that a pond formed from an abandoned gravel mining pit was a waste treatment system exempt from coverage under the Act. Although the pond served as a percolating filter for wastewater received from the defendant waste treatment facility, the pond "itself was not 'designed' to meet the requirements of the Clean Water Act or 'designed' to be part of the waste-treatment system."[113] Also noteworthy was the fact that that the pond preexisted both the CWA and construction of the waste treatment plant.[114]

On appeal the Ninth Circuit affirmed, holding that the pond fell outside the exemption "because it is neither a self-contained pond nor is it incorporated in an NPDES permit as part of a treatment system."[115] The Court added that the exception "was meant to avoid requiring dischargers to meet effluent discharge standards for discharges *into* their own closed system treatment ponds."[116]

The case of *West Virginia Coal Ass'n v. Reilly*, 728 F.Supp. 1276 (S.D.W.Va.1989), addressed whether sedimentation ponds constructed in streams were "waste treatment systems" excluded from the definition of "waters of the United States." Plaintiffs had challenged EPA's decision to overrule state approval of several NPDES permits authorizing in-stream sedimentation ponds. EPA claimed that the ponds were inconsistent with the CWA and state water quality standards.[117] The court deferred to EPA's interpretation of the CWA and position that "the 'waters of the United States' over which EPA has regulatory control cannot be removed from the purview of the Clean Water Act merely by impounding those waters."[118]

[112] *Id.*
[113] 2004 WL 201502 at 11.
[114] *Id.*
[115] *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1002 (9th Cir. 2007). *See also California Sportfishing Protection Alliance v. California Annonia Company*, 2007 WL 273847, at 6 (E.D.Cal) (holding that the "key question" for the court in determining whether stormwater pooling in a manmade detention pond qualifies for the waste treatment system exception was whether the pond is a "treatment system covered by a valid NPDES permit").
[116] *Id.* at 1032 (citing 45 Fed. Reg. 48620 (July 21, 1980)).
[117] *West Virginia Coal Ass'n*, 728 F.Supp. at 1279.
[118] *Id.* at 1283. *See also Ohio Valley Environmental Coalition v. U.S. Army Corps*, 2007 WL 2200686, at 12 (S.D.W.Va.) (rejecting the Corps position that construction of treatment ponds in stream segments previously classified as "waters of the United States" cause protected waters to temporarily lose that status and qualify for the "waste treatment system" exception because they assist in the discharge of pollutants).

Under existing case law the vast majority of stormwater systems used to control both the quality and quantity of stormwater discharges from construction sites form waste treatment systems. These systems are specifically "designed" to be incorporated in an NPDES permit as detailed in a site-specific SWPPP. They are manmade, constructed separate and apart from existing waters of the United States and do not themselves create new waters of the United States.

A general purpose of the "waste treatment system" exclusion is to encourage the development of innovative waste treatment technologies and further the goals of the CWA. Absent the exclusion, construction site operators would be punished. In addition to the required § 402 NPDES permit covering construction-related stormwater discharges exiting a site, they would be forced to secure a § 404 dredge and fill permit for discharges *into* their stormwater control systems. Furthermore, stormwater impoundments might be interpreted as artificially created waters of the United States, imposing additional regulatory burdens on construction site operators and surrounding landowners. This perverse outcome is inconsistent with the common sense interpretation of the Agencies "waste treatment system" exclusion.

2. Multiple Storm Sewer Systems Are Not Waters of the United States.

NAHB urges the Agencies to clarify that point sources, like municipal separate storm sewer systems ("MS4s"), are "point sources" regulated under CWA Section 402, and are not also "waters of the United States."[119] The CWA's regulatory scheme, for all its detail, is quite simple: the Act prohibits the discharge of pollutants from "point sources" to "navigable waters" unless authorized by a permit.[120] The term "'point source' means any discernible, confined and discrete *conveyance*, including but not limited to any pipe, *ditch*, channel, tunnel, . . . from which pollutants are or may be discharged. . . ."[121] The CWA further provides that "'discharge of a pollutant' . . . means . . . any addition of any pollutant to navigable waters *from* any point source. . . ."[122] The Act thus contemplates that point sources are not themselves "navigable waters," but instead are "discrete conveyances" for conveying pollutants to navigable waters.[123] The Draft Guidance ignores this distinction and may potentially define some well-recognized "point sources" as "waters of the United States."

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[119] Similarly, any ditch or other feature upstream of the MS4 or any other NPDES outfall should also not be considered a jurisdictional "water of the U.S."
[120] 33 U.S.C. § 1311(a) (prohibiting the "discharge of any pollutant[s]" unless permitted elsewhere in the Act).
[121] 33 U.S.C. § 1362(14) (emphasis added).
[122] 33 U.S.C. § 1362(12) (emphasis added).
[123] *See also Rapanos*, 547 U.S. at 735 ("The definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories;" "Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.'").

Similarly, the Agencies should clarify that no permit is necessary to contribute pollutants that are conveyed to a local government-owned MS4.[124] Otherwise, the Agencies will upset the CWA framework by requiring a permit for "discharging" pollutants to a "point source," which is well beyond the Agencies' CWA authority.[125] For example, the Draft Guidance defines ditches in such a broad manner as to potentially cover ditches that flow into MS4s, which Congress designated as point sources subject to CWA section 402(p).[126] EPA defines an MS4 as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, *ditches*, man-made channels or storm drains)" owned and operated by a State or municipality and "[d]esigned or used for collecting or conveying storm water."[127]

Treating MS4s, and the ditches that convey runoff to them, as "waters of the U.S." would mark a 180-degree turn from the Agencies' traditional practice. For example, in the 1990 preamble to EPA stormwater regulations, EPA made clear that stormwater runoff *into* municipal sewers (roads, ditches, storm drains, etc.) is not a discharge of a pollutant into a water of the United States.[128] EPA has "always addresse[d] such discharges as 'discharges *through* municipal separate storm sewers' as opposed to 'discharges *to* waters of the United States.'"[129] Similarly, in 2005, EPA confirmed that MS4s are "by definition" *not* CWA "navigable waters."[130]

Moreover, the case law makes clear that "a two-permit regime is contrary to the statute and the regulations … [and] would cause confusion, delay, expense, and uncertainty in the permitting process."[131] The Supreme Court concluded "that, when a permit is required to discharge fill material, *either* a § 402 *or* a § 404 permit is necessary."[132] The same principle holds true here – where a point source like an MS4 (including ditches flowing to the MS4) is regulated under

[124] These systems are owned and operated by public entities, including states, local governments, and special governments created under state law, such as sewer districts, flood control districts, or drainage districts.
[125] The Act authorizes the Agencies to control "discharges" of pollutants to navigable waters. A "discharge" covers only the "addition of any pollutant to navigable waters *from* any point source;" not a discharge from a point source to a point source. 33 U.S.C. § 1362(12) (emphasis added).
[126] Congress amended the CWA in 1987 and added section 402(p) which, among other things, required EPA to develop regulations for an MS4 permit program regarding stormwater discharges. *See* 33 U.S.C. § § 1342(p)(3)(B), (4). The history of the MS4 permit program and its phased approach for regulation of municipalities based on their population size is summarized in *Envtl. Def. Ctr., Inc. v. U.S. EPA*, 344 F.3d 832, 841-42 (9th Cir. 2003). According to EPA, approximately 70 percent of the nation's population lives within an urbanized area subject to EPA's MS4 regulations. *See* U.S. EPA, Fact Sheet 2.2 (EPA 833-F-00-004), *Storm Water Phase II Final Rule, Urbanized Areas: Definition and Description* (Dec. 1999, rev. Dec. 2005), http://cfpub.epa.gov/npdes/stormwater/swfinal.cfm.
[127] 40 C.F.R. § 122.26(b)(8) (emphasis added).
[128] 55 Fed. Reg. 47,990, 47,991 (Nov. 16, 1990) ("[M]ost urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA. These discharges are subject to the NPDES program.").
[129] *Id*. (emphasis added).
[130] Memorandum from A. Klee, Former General Counsel, and B. Grumbles, Former Assistant Administrator for Water, EPA, to Regional Administrators at 18 n.18 (Aug. 5, 2005) ("Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers"), *available at* http://www.epa.gov/ogc/documents.htm.
[131] *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S.Ct. 2458, 2474 (2009) (Op. by Kennedy, J.).
[132] *Id*. (emphasis added).

section 402 of the Act, it is contrary to the statute, the case law, and common sense to also treat that "ditch" as a "water of the United States." It may not have been the Agencies' intent to regulate MS4s as "waters of the United States," but the Draft Guidance is broad enough to create confusion.

As point sources, MS4s are local government-owned systems that are required to control the volume while reducing the discharge of pollutants in stormwater. Congress conceived of this framework so that, "[r]ather than regulate individual sources of runoff, such as churches, schools and residential property, . . . the NPDES permitting requirement [operates] at the municipal level to ease the burden of administering the program."[133] Because states and local governments are already charged with controlling stormwater volume and reducing pollution from urban runoff through the NPDES program, there is no benefit or administrative efficiency gained by treating the same drainage systems as jurisdictional waters. Classifying MS4s as "waters of the United States" would disrupt state and local government programs that maintain, manage, and treat stormwater discharges under section 402(p).

Case law and the Agencies' long-standing position on MS4s are also consistent with how these systems operate. MS4s are like waste treatment systems for sediment, and thus they should be excluded from the definition of "waters of the U.S." Under EPA regulations, "[w]aste treatment systems . . . are not waters of the United States."[134] Instead, they are "manmade bodies of water which neither were originally created in waters of the United States . . . nor resulted from the impoundment of waters of the United States."[135] Because MS4s collect stormwater runoff and remove pollutants (like sediment) from stormwater runoff, they operate like waste treatment systems and are, therefore, not jurisdictional waters.

A more common sense approach is to treat MS4s and those entities that release pollutants through them like POTWs and to treat those that introduce pollutants into them as part of the POTW. Under this approach, discharges from the point source (*i.e.,* the MS4) are appropriately permitted under section 402, and no permit is required for persons to discharge into the point source, as is consistent with the Act. Those entities who introduce pollutants to the MS4, which then discharges the pollutants to navigable waters, must then comply with the requirements that the MS4 establishes.

Because the Draft Guidance broadly asserts jurisdiction over conveyances within an MS4 or that convey pollutants through an MS4, it has the potential to treat MS4s as "waters of the U.S."

[133] *Nat. Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 636 F.3d 1235, 1247 (9th Cir. 2011). The Ninth Circuit quoted Senator Wallop, who called the alternative approach an administrative nightmare: "'[T]he regulations can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source. . . . Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare.'" *Id.* (citing 131 CONG. REC. 15616, 15657 (Jun. 13, 1985)).
[134] 40 C.F.R. § 122.2 (defining waste treatment systems).
[135] *Id.*

rather than as a point source. Therefore, NAHB requests that the Agencies confirm that point sources, such as MS4s, that are regulated by CWA section 402 are not also "waters of the United States."

4. Tributaries

i. The Agencies Misuse the Significant Nexus Test To Assert Jurisdiction Over Tributaries

Throughout the Draft Guidance, the Agencies use (misuse) Justice Kennedy's *Rapanos* decision when it suits their needs, but ignore it when it does not. Foremost, the government has directed staff to use the significant nexus test to determine if a tributary is jurisdictional. Justice Kennedy, as did Justice Scalia, understood the significant nexus test originated from the Court's earlier decision in *Riverside Bayview Homes* which concerned a wetland that abutted a TNW.[136] In *Rapanos*, Justice Kennedy nowhere suggests that this same test should be applied to features other than wetlands.

Furthermore, with respect to tributaries, the Draft Guidance provides "[w]hen performing a significant nexus analysis for a tributary, the first step is to determine whether the tributary has a bed and bank and an ordinary high water mark."[137] The Agencies then provide that if water flows from the tributary to a TNW, a "significant nexus" is present and it is jurisdictional. Thus, according to the Draft Guidance, a tributary is jurisdictional if it has an ordinary high water mark, and the government can trace water from it to a TNW.

The Agencies interpretation of *Rapanos* ignores the fact that the Court rejected the so called "hydrologic theory" of jurisdiction (i.e., if the government can trace the flow of water to a navigable water, then the government can assert CWA jurisdiction). Specifically, the government's Draft Guidance concerning tributaries mimics the standard that Justice Kennedy rejected when he wrote:

> [T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or tributary thereof) and possesses an *ordinary high-water mark*. . . . *This standard* presumably provides a rough measure of the volume and regularity of flow. . . . *[T]he breadth of this standard*—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it—*precludes its adoption as the determinative measure* of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters

[136] *Id.* at 766-67.
[137] *Draft Guidance*, p 13.

> as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered *by this standard* 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.*[138]

Finally, the government expects that tributaries will have a "significant nexus" and that the field staff should document it. In other words, the Agencies' headquarters assume jurisdiction and have guided staff the support it.[139] Justice Kennedy, however, explained that with respect to wetlands[140] the government "must establish a significant nexus on a case-by-case basis."[141] Therefore, he did not expect general theories to support the significant nexus analysis, but on the ground, waterbody specific, data. Again, the government has failed to read *Rapanos* in its entirety, and ignored sections of the decision that do not meet its needs.

ii. The Agencies Illegally Assert Broad Jurisdiction Over Non-Tidal Ditches and Swales

The Agencies deviate from the Clean Water Act, *Rapanos*, and long-standing agency interpretations in their claim that certain "non-tidal ditches" are "tributaries" and that certain "natural or man-made swales" are "wetlands." Specifically, the Agencies claim that non-tidal ditches (including roadside and agricultural ditches) are not tributaries *except* where they: (a) have a bed, bank, and ordinary high watermark; (b) connect directly or *indirectly* to a traditional navigable or interstate water; and (c) have one of the following five characteristics:

(1) natural streams that have been altered (*e.g.,* channelized, straightened, or relocated);
(2) ditches that have been excavated in waters of the U.S., including wetlands;
(3) ditches that have relatively permanent flowing or standing water;
(4) ditches that connect two or more jurisdictional waters of the U.S.; or
(5) ditches that drain natural water bodies (including wetlands) into the tributary system of a traditional navigable or interstate water.[142]

NAHB is concerned that the Agencies' new standard leaves few non-tidal ditches untouched by the Agencies' jurisdiction and that the Agencies failed to define this so-called "indirect" connection to traditional navigable or interstate waters. Under this new expansive language, all non-tidal ditches could "indirectly" connect to a navigable water. NAHB is also concerned that the Agencies' new standard, particularly under the broadening impact of characteristics (c)(3)-(5) above, oversteps the Agencies' authority under the Clean Water Act. Similarly, the Agencies' claim that certain natural and man-made swales meet the regulatory definition of wetlands and covers water features that were never intended to be regulated by the Clean Water Act.

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[138] *Rapanos*, 547 U.S. 781-82 (emphasis added)(internal citations omitted).
[139] *Draft Guidance,* p. 14.
[140] As stated earlier, Justice Kennedy only applied his significant nexus test to wetlands.
[141] *Rapanos*, 547 U.S. at 782 (Justice Kennedy concurring).
[142] *Draft Guidance,* p. 12.

a. Ditches Are Not Navigable Waters

The Agencies have often disclaimed jurisdiction over upland ditches as "navigable waters."[143] But the Agencies' Draft Guidance deviates from this long-standing practice and assumes that non-tidal upland ditches are waters of the U.S. The Agencies, however, have proffered no explanation or statutory authority for their assertion that drainage ditches are jurisdictional waters. First, as Congress made clear, ditches are "point sources" and therefore not navigable waters. Second, even if ditches were not specifically excluded, their regulation as waters of the U.S. presents many challenges and could overwhelm state and federal regulators if they are suddenly deemed jurisdictional waters. Third, the regulation of upland ditches impinges on Congress' clear directive to ensure that the states retain their traditional rights to manage water resources within their boundaries.

b. Ditches Are Point Sources

Under the Clean Water Act's simple regulatory scheme, Congress intended to regulate pollutants going into "navigable waters" by requiring permits for discharges coming out of "point sources." If a water feature is defined as either a "navigable water" or a "point source," it cannot reasonably be both. The geographic scope of CWA jurisdiction extends to "navigable waters," defined by Congress to mean: "[T]he waters of the United States, including the territorial seas."[144] By regulation, the Corps includes "tributaries" within the statutory phrase "waters of the United States,"[145] but interestingly, in the preamble to the 1986 rule that provided the current definition of the term "waters of the U.S.," the Corps expressly stated that it generally did not consider "non-tidal drainage and excavation ditches excavated on dry land" to be waters of the United States.[146] Similarly, ditches are not among the jurisdictional waters enumerated in 33 C.F.R. §328.3(a)(3). Despite these discrepancies, the Agencies have shifted course and, without reasoned explanation, now claim that certain ditches may be "tributaries." This approach is unsupported and illegal.

> Ditches are not navigable waters. Congress clearly intended ditches to be regulated as "point sources," as evidenced by the Act's "point source" definition, which reads:

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[143] *See, e.g.,* 40 Fed. Reg. 31,320, 31,321 (July 25, 1975) ("[d]rainage ditches have been excluded" from the definition of jurisdictional waters); 42 Fed. Reg. 37,122, 37,144 (July 19, 1977) ("man-made nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States"); 42 Fed. Reg. at 37,127 (preamble to 1977 regulations; same); 45 Fed. Reg. at 62,732, 62,747 (Sept. 19, 1980) (same); 48 Fed. Reg. 21,466, 21,474 (May 12, 1983) ("Waters of the United States do not include the following man-made waters: (1) Non-tidal drainage and irrigation ditches excavated on dry land….); 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) ("we generally do not consider [drainage and irrigation ditches excavated on dry land] to be waters of the United States"); 65 Fed. Reg. at 12,823-24 (nationwide permit regulations: "ditches constructed entirely in upland areas" are not jurisdictional).

[144] 33 U.S.C. §1362(7).

[145] 33 C.F.R. §328.3(a)(5).

[146] 51 Fed. Reg. at 41,217. The Corps reserved the right to find certain ditches to be jurisdictional on a case-by-case basis.

> *[A]ny* discernible, confined and discrete *conveyance*, including but not limited to *any* pipe, *ditch*, channel, tunnel, conduit well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.[147]

Under the statute's plain language, "point sources" are not themselves statutory "navigable waters," but are features that *convey* pollutants and add them to "navigable waters." In light of the separate definitions of "navigable waters" and "point sources," ditches, pipes, and other conveyances that meet the CWA's definition of "point source" are regulated as such and should not be considered "navigable waters." This conclusion is consistent with the Agencies' earlier determinations to exclude ditches from regulation.

Further, under basic canons of statutory interpretation, a "ditch" (and particularly a non-tidal upland ditch) is not a water of the U.S. Under the rule that specific provisions supersede general ones, the precise inclusion of "ditch" in the "point source" definition trumps any interpretation that ditches are somehow "navigable waters." Similarly, based on the import of the "clear statement rule,"[148] because the CWA contains no clear statement that a ditch is a "navigable water," but the Act is unequivocal that a ditch is a "point source," the Agencies must heed the clear congressional directive to treat "ditches" as "point sources." Justice Scalia recognized this in *Rapanos* when he explained that the CWA conceives of "'point sources' and 'navigable waters' as separate and distinct categories."[149] NAHB urges the Agencies to abandon their illegal effort to regulate non-tidal ditches. In short, the Agencies cannot regulate as "navigable waters," because those *features* that satisfy the "point source" definition.

c. Regulating Ditches As Navigable Waters Is Problematic

If the Agencies' expand their jurisdictional authority to cover non-tidal ditches, all of the Act's requirements and programs for "navigable waters" would be triggered for ditches, creating absurd results. If all ditches were deemed "navigable waters," states would then be required to adopt water quality standards (WQS), including designated uses, for all of those ditches. There are an estimated 4.1 million miles of roads in the nation,[150] and regulations require that federally funded primary roads must be "designed . . . and maintained to have adequate drainage, cross drains, and ditch relief drains."[151] If all of these roadside ditches are "navigable waters," then the Act would require States to establish WQS for each of them. Congress could not have intended such an illogical result. The practicalities associated with deeming all ditches "navigable waters"

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[147] 33 U.S.C. § 1362(14) (emphases added).

[148] I Laurence Tribe, American Constitutional Law, § 5-9 at 853 (3d ed. 2000).

[149] *Rapanos*, 547 U.S. at 735-36 (2006).

[150] Federal Highways Administration, U.S. Department of Transportation, Highway Statistics 2009 § 4, Highway Infrastructure Tbl. HM-20, *available at* http://www.fhwa.dot.gov/policyinformation/statistics/2009/hm20.cfm (last updated April 4, 2011).

[151] 30 C.F.R. § 816.151(d).

demonstrate that this was not the intended result. Thus, the Agencies should refrain from regulating ditches as "navigable waters." Indeed, "statutes should be interpreted to avoid . . . unreasonable results whenever possible."[152]

d. Regulating Ditches Impinges on States Rights

Regulating ditches under the Clean Water Act impermissibly intrudes on states' rights and ignores bedrock principles of federalism. The Clean Water Act specifically warns the Agencies against impinging on quintessential state and local authority to control pollution and to regulate land uses and water resources: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources . . . ."[153] Similarly, Congress directed federal agencies to cooperate with states to manage water resources: "federal agencies *shall* co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources."[154] These directives illustrate that it is improper for the federal government to assert jurisdiction over every wet puddle or trickle of water, or over every activity that may affect a waterbody or wetland. Instead, the Act mandates a cooperative approach to addressing pollution through water management programs, not through coercive control of the permitting program.

As the Supreme Court recognized in *SWANCC*, the government's expansive interpretation of what may be regulated "would result in a significant impingement of the States' traditional and primary power over land and water use."[155] A plurality of the Court further admonished the Agencies in its *Rapanos* opinion, declaring that:

> [T]he extensive federal jurisdiction urged by the Government would authorize the Corps to function as a de facto regulator of immense stretches of intrastate land – an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority.[156]

If the Agencies have reservations over whether states take such delegation authority seriously, they need look no further than the numerous water pollution control, wetlands, and resource protection statutes enacted by the states. For example, Connecticut regulates "any operation within or use of a wetland or watercourse involving removal or deposition of material, or any

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[152] *Am. Tobacco Co. v. Patterson*, 456 U.S. 63,71 (1982).
[153] 33 U.S.C. § 1251(b).
[154] *Id.* at § 1251(g) (emphasis added).
[155] *SWANCC*, 531 U.S. at 174 (2001) (*SWANCC*) ("Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of States' traditional and primary power over land use and water use.").
[156] *Rapanos*, 547 U.S. at 738.

obstruction, construction, alteration, or pollution, of such wetlands or watercourses."[157] Similarly, Washington regulates "the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level."[158] The Agencies' assertion of jurisdiction over non-tidal ditches is not only illegal, it is plainly unnecessary and will divert federal and states funding from protection of environmentally sensitive resources.

e. Swales and Stormwater BMPs Should Not Be Designated Jurisdictional Waters

Similarly, NAHB is concerned about the Agencies' plan to regulate certain "swales" as waters of the U.S. The Agencies claim that natural and man-made swales are not jurisdictional *unless* they meet the regulatory definition of wetlands. However, regulating swales as waters of the U.S. covers many water features that were never intended to be jurisdictional under the Clean Water Act. In *SWANCC*, the Supreme Court held that federal regulation of small water features (like swales), such as "abandoned sand and gravel pit[s], . . . ponds and mudflats, . . . would result in a significant impingement of the States' traditional and primary power over land and water use."[159] As discussed above, regulating small water features like swales under the Act is precisely the improper intrusion on state and local rights that the Act warns against[160] and that the Supreme Court struck down in *SWANCC*.[161]

Furthermore, many swales are created to remove sediment from stormwater runoff, and therefore operate like waste treatment systems and best management practices (BMPs), which are categorically excluded from jurisdictional waters. Under EPA regulations, "[w]aste treatment systems . . . are not waters of the United States."[162] Instead, they are "manmade bodies of water which neither were originally created in waters of the United States . . . nor resulted from the impoundment of waters of the United States" and are used to remove pollutants from stormwater runoff.[163] Many swales, particularly those created through low impact development measures, fit this definition. They are man-made waterbodies (not created in jurisdictional waters) that are used to collect rain and prevent stormwater runoff.

Similarly, many swales operate as stormwater Best Management Practices (BMPs), defined as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States.' BMPs

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[157] Inland Wetlands and Watercourses Act, Connecticut General Statutes §§22a-36-22a-45.
[158] Washington State Water Pollution Control Act, RCW §90.48.
[159] *SWANCC*, 531 U.S. at 174.
[160] 33 U.S.C. § 1251(b), (g).
[161] *SWANCC*, 531 U.S. at 174.
[162] 40 C.F.R. § 122.2 (defining waste treatment systems).
[163] *Id.*

also include treatment requirements, operating procedures, and practices to control plant site runoff . . . ."[164] As a BMP or a waste treatment system, swales are used to treat stormwater runoff and therefore are not "waters of the U.S." Additionally, regulation of swales as "wetlands" is simply bad policy and may discourage low impact development.

The expanding national use of LID, green infrastructure, and water harvesting as BMPs used for stormwater management brings many environmental and social benefits and, at the same time, raises a number of concerns. LID devices and similar stormwater measures are designed to infiltrate, evaporate, or reuse all of the stormwater flow to the devices, when practicable. The benefits of using such devices includes lessening the environmental footprint of the project, making communities more appealing to some home buyers by retaining more vegetation and open spaces, recharging underground aquifers, and helping new developments to retain the natural conditions of the building site. The concerns with LID include the long-term environmental performance of the devices, how best to maintain them, how to assign liability for the maintenance of the devices, and how best to pay for that maintenance. While some LID devices contain underground drainpipes as a backup measure, other LID devices do not contain such pipes. LID devices and green infrastructure methods typically convey water for short periods of time and they are permitted under the Section 402 program. Since they cannot be both a permitted point source and a water of the U.S., NAHB believes that the Agencies do not mean the guidance to infer that stormwater devices or features such as swales used as part of a stormwater plan, a common LID feature used by home builders in their Stormwater Pollution Prevention Plans (SWPPPs), may be a water of the U.S. However, the limits of the guidance are not clear and NAHB requests that it be made plain that such devices are not waters of the U.S.

Such clarity is needed because many home builders, other types of construction companies, and municipalities are all in the process of installing LID devices to meet new stormwater goals being implemented under EPA's stormwater program. In the case of municipalities, they will be installing hundreds or thousands of LID devices within their boundaries over the next several years under EPA consent agreements for their combined municipal septic and sewer systems or to meet the goals of their municipal separate storm sewer system (MS4) permits.

NAHB cautions that tracking and maintenance issues associated with LID and green infrastructure are quickly growing due to the many new state and local requirements or incentives for their use. If the Guidance should complicate the current stormwater permitting process governing the use and maintenance of such devices, that will add to the confusion about how states and MS4s can best utilize LID and minimize the problems associated with the use of LID.

[164] *Id.* (defining best management practices).

The Draft Guidance states that the "key goals of this draft guidance are to increase clarity and to reduce costs and delays in obtaining CWA permits…."[165] Because this guidance covers all sections of the CWA, it blurs the distinctions between the Section 402 permitting program and the Section 404 program. The Corps has already determined that maintenance activities for some flood control facilities[166] and for some stormwater measures[167] require 404 permits, even though they must be permitted under the Section 402 program. Because LID and green infrastructure are not addressed directly in the guidance, some may argue that under the language of the draft guidance their use will also require 404 permits for installation and maintenance of the devices. That would be a policy disaster since the numbers of such devices are going up exponentially in the U.S. along with their maintenance requirements, resulting in an enormous burden on municipalities and property owners to maintain the devices. If they were to have to obtain a 404 permit for the maintenance, it would threaten to bog down stormwater programs across the country.

In short, the Draft Guidance defines inherently local conveyances, such as ditches, as "waters of the United States," and small water features, like swales, that remove sediment from stormwater discharges, as potential "wetlands." Thus, the guidance not only impermissibly intrudes on state and local land use authority, but also redirects scarce federal and state funding away from more environmentally sensitive and important resources, such as wetlands.[168] Although NAHB believes that the Draft Guidance is fundamentally flawed and should be abandoned in total, at a minimum, NAHB recommends that the Agencies revise any final guidance to make clear that non-tidal man-made ditches, irrigation ditches, MS4s, roadside ditches, county drains, street gutters, and all stormwater BMPs including swales, among others, are excluded, as they traditionally have been, from the definition of "waters of the United States."

5. Other Waters

In Section 6, the government has relied on its "other waters" definition to assert jurisdiction over certain waterbodies.[169] However, the Agencies have not explained how its guidance will be utilized in the states of the Fourth Circuit Court of Appeals.

In *United States v. Wilson*,[170] certain individuals and corporations (the defendants) were convicted of knowingly filling wetlands without a permit. On appeal, the defendants argued that

[165] *Draft Guidance,* p 3.
[166] See the comments of the National Assoc. of Flood and Stormwater Mgmt. Agencies submitted to the docket on June 22, 2011.
[167] Proposed Corps reissuance of nationwide permits, Feb. 16, 2011 *Fed. Reg*.
[168] The broad definition of "waters of the United States" proposed in the Draft Guidance will lead to unnecessary, lengthy, and costly permitting requirements for critical public infrastructure projects, which ultimately delays the delivery of important public services. The added costs associated with this delay are ultimately borne by taxpayers and at the expense of other public needs.
[169] 33 C.F.R. § 328.3(a)(3).
[170] 133 F.3d 251 (4th Cir. 1997).

the "other waters" regulation exceeded the government's authority under the U.S. Constitution. They argued that if the government could assert jurisdiction over areas that "could affect" commerce, its jurisdiction would be "limitless." The Fourth Circuit agreed, holding that "33 C.F.R. § 328.3(a)(3) is invalid."[171]

Since 1997, the Agencies have not changed 33 C.F.R. § 328.3(a)(3) in accordance with the Fourth Circuit's decision. Thus, in the states of Maryland, Virginia, West Virginia, North Carolina or South Carolina the Agencies may not lawfully rely on their "other waters" regulation to assert CWA jurisdiction. The government must clarify that in the Fourth Circuit states, staff may not rely on 33 C.F.R. § 328.3(a)(3) to assert jurisdiction.

C. The Draft Guidance Is Vague And Fails To Rectify Inconsistencies

One of the primary goals of the Guidance is to clarify "how the EPA and the Corps understand existing requirements of the CWA and the Agencies' implementing regulations in light of *SWANCC* and *Rapanos* and provide "guidance to agency field staff in making determinations about whether waters are protected by the CWA."[172] The Draft Guidance, however, establishes a set of unsystematic requirements that bind the public in an arbitrary manner. Led by the lack of clarity, the failure to defensibly justify why certain areas may be deemed "in" or "out," and the absence of a reasonable decision-making process, the Draft Guidance is expected to experience the same fate as other efforts that preceded it. Most troubling is that the Draft Guidance unjustifiably results in even more waters being brought under the umbrella of federal regulation and, unlike prior documents, is intended to apply to the entire CWA, yet the Agencies have failed to fully consider or analyze the implications of this broad reach. In short, the Draft Guidance lacks the clarity and consistency needed for a nationally-applicable program.

1. Key Terms Must Be Clarified And/Or Defined.

The very purpose of the Draft Guidance is to clarify the definition of "the waters of the U.S." Central to this effort is the adoption of a clear, common, set of criteria and principles that will generally be followed to determine the jurisdictional status of the waters of the U.S. and that do so within the confines of the Act. Due to the introduction of new terms, coupled with the subjective nature of the criteria that have been forwarded, this end result cannot be realized without a concurrent set of definitions. Definitions which have general applicability and the force and effect of law can only be effectuated through a rulemaking process in compliance with the Administrative Procedure Act. Specific terms that must be clearly defined include: "relatively permanent water," "significant nexus," "similarly situated" wetlands, "stream reach,"

[171] *Id*. at 255-257.
[172] *Draft Guidance,* p. 1.

"swale," "erosional feature," "small wash," "ditch," "dry wash," "continuous surface connection," "sub-surface hydrological connection," and "floodplain."

Another glaring need for further clarity is what will happen when a tributary is affected by a significant nexus decision. What is unclear, is how far up and down the tributary does the jurisdiction extend? To the first fork in both directions, or some other measure?

2. Implementation Will Be Neither Predictable Nor Consistent.

Consistency encompasses both the idea that the law should be same for each person and the idea that federal law should be the same in all parts of the country. As a corollary, the law should be the same at all agencies and the public shouldn't be held to violate one agency's policies when it hews to the requirements of another agency. For example, the criteria for whether a water of the U.S. is jurisdictional should be the same regardless of whether that decision is made by EPA or the Corps. Yet the Draft Guidance does not guarantee this result. Further, because guidance can be changed on a whim and from administration to administration, there is no assurance that decisions stemming from the guidance will be either consistent or predictable.

While it was hoped that the Draft Guidance would make strides toward the goal of consistency, the subjective nature of the factors, criteria, and personnel making the decisions have negated any gains. Similarly, allowing for public feedback has enabled interested parties to make observations and call to the Agencies' attention inconsistencies in the JD and permitting processes. However, these comments will not affect the inconsistencies that arise when several agencies have jurisdiction over aspects of an activity, the agencies have differing ideas of the goals of the regulatory scheme, and there is minimal if any justification on which to base decisions, as is the case here.

For example, the mission of the Corps of Engineers' Regulatory Program is to protect the Nation's aquatic resources, while allowing reasonable development through fair, flexible and balanced permit decisions.[173] EPA's mission, on the other hand, is to protect human health and protect and restore watersheds and aquatic ecosystems.[174] While these goals are not necessarily mutually exclusive, the considerations that go into jurisdictional and permitting decisions made by the Corps could be very different from those made by EPA. Although it was hoped that any effort to refine the scope of CWA jurisdiction would address these inconsistencies, the Guidance merely reduces them to a set of procedures, without ever addressing the real challenge – how to get two very distinct and discrete agencies to operate in a similar manner and make relatively

[173] http://www.usace.army.mil/CECW/Pages/index.aspx
[174] See *An Introduction to the Water Elements of EPA's Strategic Plan*, accessed on July 28, 2011 at http://water.epa.gov/aboutow/goals_objectives/goals.cfm.

predictable and consistent decisions. This is even more difficult when considering the agencies now intend the Guidance to apply to all CWA programs, not just wetlands permitting.

It is not only the Corps and EPA Headquarters offices that experience these challenges. Inconsistencies between and among District and regional offices, and between staff, can be equally problematic. In 2004, the Government Accounting Office (GAO) completed a study that looked at the regulations and guidance used to determine jurisdictional waters and wetlands and the extent to which the 38 Corps district offices vary in their interpretation of those regulations. GAO found vast differences in how the districts interpret and apply the federal regulations when determining which waters and wetlands are subject to federal jurisdiction.[175] Interestingly, the *Rapanos* Court also found this information compelling. Justice Scalia observed, "[t]he Corps' enforcement practices vary somewhat from district to district because "the definitions used to make jurisdictional determinations" are deliberately left "vague."[176]

If the Agencies were to adopt legally-binding requirements that comport with the design of the CWA, they could greatly improve regulatory accountability and consistency. Regulation could provide uniformity for both the Agencies' staff and the public. Regulation would also benefit from input from the public, as the rulemaking process provides stakeholders the opportunity to participate in significant interpretive changes, thereby giving the public a role in defining their duties and obligations. This public participation would also provide a benefit to the Agencies, and the Agencies can use the comments and suggestions of the regulated community to craft a better set of regulations. Unfortunately, the Agencies have decided upon a different path – one that does not provide clarity, transparency, or ensure consistency. In the end, both the Agencies and the regulated community unnecessarily will be beleaguered by partial answers, confusing standards, and a*d hoc*, overbroad, and arbitrary decisions pertaining to the scope of CWA jurisdiction.

D. Better Data and Justification is Necessary

The APA requires agencies to provide a statement of basis and purpose, as well as the data that supports the decisions the agencies have reached. Similarly, it requires agencies to articulate a connection between the facts they have relied on and the conclusions they have reached. The Draft Guidance fails to meet these requirements. Although the Agencies rely heavily on the language of *Rapanos* to justify many portions of the Draft, the language is misconstrued and misapplied to meet their desired outcome. In other instances, they provide no explanation to support their claims. The Agencies must clearly document their rational and formal findings so that the public can understand how their conclusions have been made and determine whether

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[175] See "*Waters and Wetlands: Corps of Engineers Needs to Evaluate its District Office Practices in Determining Jurisdiction*," prepared for the Chairman on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives, GAO-04-297 (Feb. 27, 2004).
[176] *Rapanos,* 547 U.S. at 727-28, quoting from GAO Report 26.

they have acted within their lawful discretion and reach appropriate decisions based on relevant evidence.

Concurrent with the various efforts to improve the overall rulemaking process, the Obama Administration has sought to improve the transparency, quality and legitimacy of the data and information upon which regulations and other decisions are based. As a starting point, the Agencies must comply with the federal information quality requirements that were adopted by Congress in §515 of the 2001 Treasury and General Government Appropriations Act.[177] The Information Quality Act was supplemented by OMB's Information Quality Guidelines, which served as a model for each agency's implementing guidelines. Under OMB's Information Quality Guidelines, "influential information" (*i.e.,* information having or likely to have important public policy or private sector impacts) must include sufficient "transparency" about data and methods such that the analytic results are "reproducible" by a qualified member of the public. Also, influential information concerning risks to human health, safety, or the environment must meet the new more stringent standard of quality from the 1996 Safe Drinking Water Act.[178]

Under this requirement, the Agencies are required to use only the "best available, peer reviewed science" and "best available methods."[179] For this reason, they must ensure that any technical or scientific studies or information used in developing the any new regulation meets this data quality standard. Most agencies also operate pursuant to policies that generally require independent peer review of all scientific or technical work products that are used to support significant rulemakings. Although both the Information Quality and Peer Review policies have been in place for years, it is not clear that they are being consistently followed.

In response, the President in March 2009 introduced the *Memorandum on Scientific Integrity* and explained that, "more than ever before, science holds the key to our survival as a planet and our security and prosperity as a nation. It's time we once again put science at the top of our agenda and worked to restore America's place as the world leader in science and technology."[180] This Memorandum established steps designed to improve the use of good science and instructed the Director of the Office of Science and Technology Policy to develop recommendations for Presidential action designed to guarantee scientific integrity throughout the executive branch.

On Dec. 17, 2010, John P. Holdren, Assistant to the President for Science and Technology and Director of the Office of Science and Technology Policy, issued a Memorandum to the Heads of

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[177] P.L. 106-554.
[178] 42 U.S.C. 300g-1(b)(3)(A) and (B).
[179] See, for example, U.S. Environmental Protection Agency, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity, of Information Disseminated by the Environmental Protection Agency*, EPA/260R-02-008, October 2002, p. 22.
[180] White House, *Fact Sheet on Presidential Memorandum on Scientific Integrity*, March 2009, accessed July 28, 2011 at http://www.whitehouse.gov/the-press-office/fact-sheet-presidential-memorandum-scientific-integrity.

Executive Departments and Agencies.[181] The Memorandum offered further guidance as to how the Administration's policies on scientific integrity were to be implemented and recognized that:

> Science and technological information is often a significant contributor to the development of sound policies. Thus it is important that policymakers involve science and technology experts where appropriate and that the scientific and technological information and processes relied upon in policymaking be of the highest integrity. Successful application of science in public policy depends on the integrity of the scientific process both to ensure the validity of the information itself and to engender public trust in Government.

The memo further explained that agencies should develop policies that: ensure a culture of scientific integrity; strengthen the actual and perceived credibility of government research; facilitate the free flow of scientific and technological information; and establish principles for conveying scientific and technological information to the public. NAHB could not agree more.

Meanwhile, as the agencies were developing their plans for implementing these goals, President Obama issued EO 13563, which specifically states, "[o]ur regulatory system must … be based on the best available science." It further devotes an entire section to Science, which reads, "Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, 'Scientific Integrity' (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions."[182]

The Agencies, however, have not adequately met these standards. For example, the Agencies have determined that all tributaries or all other waters are "similarly situated" and, through the Draft Guidance, have created a category of "closely proximate" other waters and concluded that tributaries that have some flow have a significant nexus. But, the Agencies have not provided any data to support those decisions or a rationale connecting the facts found with the decisions made. How can a lack of *any science* be construed to equate to best available science or even science at all? Likewise, how can a lack of data meet the transparency or objectivity standards? The collection and evaluation of data and the sharing of that data with the public is the cornerstone to developing and implementing meaningful and legitimate policies, rules, and regulation. The Agencies are strongly urged to comply.

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[181] Holdren, John P., *Memorandum for the Heads of Executive Departments and Agencies on Scientific Integrity*, December 17, 2010, accessed July 28, 2011 at http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf.

[182] 76 *Fed. Reg.* 3822, (January 21, 2011).

E. The Agencies' Economic Analysis is Incomplete

According to the economic analysis, the Agencies anticipate that the Draft Guidance will result in the assertion of jurisdiction over *all* tributaries and wetlands and 17% of isolated waters. [183] Despite this recognition, the Agencies have failed to account for many of the impacts that will accrue. For example, although they reiterate that the Guidance will apply to all of the CWA, the Agencies have limited their estimates of costs to only the Section 404 program. Furthermore, it does not analyze the costs associated with *obtaining* section 404 permits[184] or the costs associated with expanding jurisdiction under sections 303, 311, 401, and 402 of the CWA – each of which can be significant alone, and together, untenable.

For example, in its cost analysis, the Corps assumed that *all* tributaries that had been found non-jurisdictional over the past 2 years (1938 or 2% of the total number of tributaries examined), would now be jurisdictional under the new guidance.[185] There is no evidence, however, of the costs or efforts that must be undertaken in these newly-deemed jurisdictional waters regarding a state's development of 401 water quality certifications, the development of water quality standards, or any of the other programs that may apply, much less the costs to permit applicants and/or landowners to comply with any new requirements. Indeed, in these days of shrinking state dollars, a full accounting must be provided prior to adoption.

Similarly, the Economic Analysis suggests that the Corps understands that as more waters are determined to be jurisdictional by the Agencies, there will be an increase in permit applications and JD documentation. This, in turn, will increase the need for required consultations under the Endangered Species Act (ESA) and section 106 of the National Historic Preservation Act, but the Analysis does not include these real and significant costs. Likewise, although the Corps indicates that costs for other federal agencies, such as the Fish and Wildlife Service could increase and there may also be an increase in enforcement situations, potentially increasing the after-the-fact permit workload, none of these factors are included.

Even though they have not fully analyzed the breadth of costs associated with the Draft Guidance, the Agencies estimate increased mitigation costs of between $79 million and $222 million annually. The Agencies also estimate that the Draft Guidance will result in an additional $8 million to $20 million in costs per year for the Corps to process section 404 permits and for the regulated community to obtain such permits. Together, based on these cost categories only, the Agencies thus estimate that the 2011 Draft Guidance will increase costs by between $87 million and $242 million annually – clearly qualifying this action as "significant" under Executive Order 12866.[186]

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[183]U.S. Environmental protection Agency, Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction, April 27, 2011, p. 7.

[184] As noted in the plurality opinion in *Rapanos:* "The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915--not counting costs of mitigation or design changes." 547 U.S. at 721.

[185]U.S. Environmental protection Agency, Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction, April 27, 2011, p. 26.

[186] From RegInfo.gov "A regulatory action is determined to be "economically significant" if OIRA determines that it is likely to have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or

There are significant deficiencies in the Agencies' economic analysis for the Draft Guidance. By failing to include or examine the costs associated with the myriad of other programs that will be affected, the Agencies have significantly underestimated the total burdens the Guidance will plane on federal and state authorities and private citizens. Prior to proceeding, the Corps and EPA are urged to conduct a full regulatory impact analysis in accordance with E.O. 12866 and the Regulatory Flexibility Act.

F. The Practical Implications of Deeming More Waters Jurisdictional are Significant

The Draft Guidance will result in an increase in the number of waters deemed jurisdictional under the CWA. In addition to now being subject to Section 404, these newly minted "waters of the U.S. will also be subjected to a number of other programs with far reaching impacts.

1. CWA Section 303 Water Quality Standards

In order to attain CWA goals and restore water quality, states are required to specify the "designated uses," for each water of the U.S. in the state. This is the first step towards setting water quality standards for the waterbody and the resulting attainment decisions to be made for any TMDLs if the water body is found to be impaired. The TMDLs will then become part of the NPDES permit for the dischargers into the waterbody.

The above actions require significant resources from the states and municipalities. To the extent that the Guidance increases the number of jurisdictional waters, the more resources will be demanded from the states to deal the water quality actions mandated under the CWA for such waters. In addition to the difficult regulatory decisionmaking entailed in the above paragraph, States will need to carefully sample and analyze the water quality of each federally protected water body, and if impairment is found, research any possible pollutants that may have led to the impairment and develop TMDLs to rectify the impairment.

At this time, when many states and localities are on the verge of bankruptcy, the regulatory actions and financial costs that come with federal jurisdiction is a major occurrence for the state, whether the waterbody is impaired or not, since water quality investigation and analysis must be done for all U.S. waters. If the water quality is impaired, the resources required go up in a major way since TMDLs must be developed and pollution reductions must become part of the NPDES permits for dischargers to the waterbody. It seems incredible that the economic analysis done for the Guidance did not take these costs into consideration.

State, local, or tribal governments or communities. For all "economically significant" regulations, the Executive Order directs agencies to provide (among other things) a more detailed assessment of the likely benefits and costs of the regulatory action, including a quantification of those effects, as well as a similar analysis of potentially effective and reasonably feasible alternatives." Accessed on July 30, 2011 at http://www.reginfo.gov/public/jsp/Utilities/faq.jsp.

2. CWA Section 303 Total Maximum Daily Loads

As described above, the states must research any new jurisdictional water for its water quality. Any impaired and threatened segments of the waterbody must be listed on the state's 303(d) list of impaired waters and TMDLs developed to improve water quality and remove the waterbody from the state 303(d) list. Since states today are struggling to deliver the normal level of services for their citizens, it is not surprising that tens of thousands of TMDLs are on state lists as needing to be developed. Not only is the state on the hook to develop a scientifically valid TMDL, stakeholder meetings and public comments are be part of the TMDL process, adding to the costs to the state. And, once the TMDL is implemented, additional economic costs become apparent for businesses and state activities that discharge the offending pollutants to the impaired waterbody. Again, the economic analysis for the Draft Guidance has overlooked these costs.

3. ESA Section 7 Consultations

Section 402.03 of the Endangered Species Act (ESA) imposes Section 7 consultation requirements on "all actions in which there is discretionary Federal involvement or control." Because an *action* is defined under the ESA as "all activities or programs of any kind authorized, funded, or carried out including granting of licenses,… permits," the Draft Guidance's expansion of the scope of CWA jurisdiction will subsequently capture significantly more projects than ever before and will ultimately increase the number of CWA 404 permits as well as ESA section 7 consultations in unoccupied critical habitat areas.

Landowners wishing to obtain a 404 permit to conduct an activity located in an area designated as critical habitat under the ESA are required to enter into the Section 7 consultation process to determine what impacts, if any, will come to listed species. The process, as it is currently practiced by the Fish and Wildlife Service (FWS), is not only onerous and antiquated, but has been the subject of review by the Government Accountability Office (GAO). A 2004 report released by the GAO, *Endangered Species – More Federal Management Attention is needed to Improve the Consultation Process*,[187] evaluated the existing 1986 Section 7 consultation program and found a great deal of confusion regarding roles and responsibilities between the various action agencies (e.g., EPA, US Army Corps of Engineers (Corps), US Forest Services (USFS), etc) and the Services during the Section 7 consultation process. Furthermore, GAO found it impossible to determine with any certainty the extent of the delays within the Section 7 consultation process because the Services failed to track, monitor, or report the significant amount of time spent in the "pre-consultation" process.[188] This confusion frequently results in excessive permitting delays impacting federal agencies and private landowners alike. For example, a review by FWS following the recommendations of the GAO report found that routine

[187] GAO (2004). *Endangered Species – More Federal Management Attention is Needed to Improve the Consultation Process,* GAO-04-93, available at: http://www.gao.gov/new.items/d0493.pdf.
[188] GAO (2004) *More Federal Management Attention Is Needed to Improve the Consultation Process*, GAO-04-93, available at http://www.gao.gov/docsearch/repandtest.html, page 12.

Corps nationwide permits for private dock building had been delayed by over two years, costing private landowners approximately $10,000 in additional construction costs per permit.[189]

In 2009, the FWS reported to Congress on the rapid increase in the number of consultations (informal and formal) it performed over the past decade. In short, FWS reported the number of consultations performed in FY 1999 was 40,000, however, by FY 2006, the total number of annual consultations had increased by greater than 50% to 67,000.[190] As the Corps and EPA further expand the scope of federal jurisdiction under the CWA, these numbers are certain to grow even more. Thus, the Draft Guidance's expansion of the scope of CWA jurisdiction will, by necessity, mean significantly more land development projects will have to undergo the ESA's consultation process. Unfortunately, neither the Guidance nor the economic analysis performed by the agencies attempts to quantify or reduce those costs.

4. Affected Property Owners Need to be Informed of a Federal Decision that Impacts the Value of their Property

The Draft Guidance portends an increasing number of decisions taking federal CWA jurisdiction over local waters and wetlands. And, the decisions are proposed to be watershed-based, meaning that such a decision will impact future federal CWA decision-making in that same watershed. For example, once a decision is made that a wetland, when aggregated with the other wetlands in the watershed, is jurisdictional, it makes sense to expect that other wetlands in the watershed will also be deemed jurisdictional under the same test. Federal jurisdiction brings with it severe regulatory restrictions on land use and thus lowers the property's value. In fact, under the Draft Guidance, the value of all the property owners in a watershed with wetlands on their property may be expected to lose value for their land when the first wetland in the watershed is judged to be jurisdictional.

For the above reason, all property owners in a watershed should be informed whenever a decision is made to impose federal jurisdiction on a wetland, whenever that decision uses a watershed-based test for jurisdiction. NAHB appreciates the burden that this will place on the Corps, but we see no other viable option that would be fair to the affected property owners. Establishing a website detailing such decision-making we would deem to be insufficient, since the most vulnerable property owners, the elderly, are unlikely to appreciate the implications of a wetland jurisdictional decision by the Corps, nor will they likely take advantage of a website listing and explaining the federal decision. At a minimum, the Corps should send a postcard or

[189] GAO (2003). *Despite Consultation Improvements in the Pacific Northwest, Concerns Persist About the Process*, GAO-03-949T. Washington D.C. page 12.
[190] U.S. FWS, F.Y. 20009 Budget Request, U.S. FWS website, http://www.fws.gov/budget/, page ES-19.

deliver a phone message to each property owner in the affected watershed upon the first positive test for federal jurisdiction, if a watershed-based test was used for the decision.

IV. In Summary

There is no doubt that wetlands, navigable waters, and non-navigable waters serve important ecological and societal functions. Their protection is necessary and is provided by a cooperative effort between the federal government and the individual states. CWA guidance cannot go to extreme lengths so as to subvert the Act's purpose to recognize, preserve, and protect the primary rights and responsibilities of States to control water resources and pollution within their borders. With these considerations in mind, the Draft Guidance seems to be legally and constitutionally questionable since it interprets the CWA in a manner that protects most all intrastate and interstate waters. This approach wanders far astray from the 1972 Act's original intent. It would greatly undermine the careful balance among competing policies that Congress, the Supreme Court, and the Executive Agencies have been searching for since the CWA's enactment.