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July 29, 2011

The Honorable Lisa P. Jackson  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

The Honorable Jo-Ellen Darcy  
Assistant Secretary for Civil Works  
U.S. Department of the Army  
108 Army Pentagon, Room 3E446  
Washington, DC 20310

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

Re: Draft Guidance on Identifying Waters Protected by the Clean Water Act (“Draft Guidance”)

Dear Administrator Jackson and Assistant Secretary Darcy:

The National Association of Manufacturers (NAM) respectfully submits the following comments on the draft guidance by the United States Environmental Protection Agency (EPA) and Army Corps of Engineers (the Army Corps) (collectively, “the agencies”) implementing the U.S. Supreme Court’s decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC) and *Rapanos v. United States*, 547 U.S. 715 (2006) concerning the scope of “waters of the United States” that are covered by the federal Clean Water Act. See *Environmental Protection Agency And U.S. Army Corps Of Engineers, Draft Guidance On Identifying Waters Protected By The Clean Water Act (2011)*, 76 Fed. Reg. 24,479 (May 2, 2011) (“2011 Draft Guidance”).<sup>1</sup>

The NAM appreciates the opportunity to provide comments on the proposed guidance. The NAM is the largest manufacturing association in the United States, representing over eleven thousand small, medium, and large manufacturers in all fifty states. We are the leading voice in Washington for the manufacturing economy, which provides millions of high-wage jobs in the United States and generates more than \$1.6 trillion in GDP. Some two-thirds of our members are small businesses, the chief engine of American job growth.

Our mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth. Our members are simultaneously attempting to recover from the harshest economic downturn since the Great Depression, and to bring high-wage jobs back to the United States. Regrettably, American manufacturers face an unprecedentedly heavy-handed regulatory environment. Overregulation paralyzes companies and discourages investment. Ever-shifting regulations fuel uncertainty and tie up much-needed capital.

Our organization has long commented on regulatory matters pertaining to “waters of the United States,” the jurisdictional reach of which is vital to American manufacturers, farmers, ranchers, and business owners. We are concerned that the 2011 Draft Guidance defines “waters of the United States” in a manner inconsistent with governing Supreme Court precedent. These are not merely legal errors that will lead to protracted litigation and ongoing uncertainty for industry. By going beyond the framework constructed by the Clean Water Act as

<sup>1</sup> See [http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous\\_guidance\\_4-2011.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf).

interpreted by the federal courts, the draft guidance risks upsetting the appropriate balance between environmental protection and economic growth carefully crafted by U.S. legislators. Indeed, by going beyond existing Supreme Court precedent and already existing agency guidance, the agencies would significantly increase the number of waters found to be subject to jurisdiction, as compared to current practices. The impacts will be economically significant, as EPA and the Army Corps can expect to receive tens of thousands of additional jurisdictional determination requests and permit applications, with the potential to create significant permitting delays, impose billions of dollars in costs and endanger job growth opportunities.

Moreover, if the agencies are going to re-open this question, the NAM is very troubled by the agencies' proposal to first issue new agency guidance, rather than to proceed directly to initiate notice-and-comment rulemaking. While we understand it is the agencies' present intention to initiate a rulemaking at some point in the near future, the agencies have been unable to follow through on previous agency efforts to complete a rulemaking on this topic. Regardless, the nature and scope of this guidance suggests that it would itself be applied like a rule and on that basis alone it would be unlawful to proceed by guidance. Instead, as NAM has urged previously, a formal rulemaking process should be followed, building on existing regulations with carefully selected and drawn proposals to provide clarity without broadly expanding jurisdiction. Indeed, as Chief Justice Roberts has recognized, the meaning of the term "waters of the United States" could best and most efficiently be addressed by the agencies if they were to complete a rulemaking to define the phrase properly. As such, any agency efforts on this topic should provide the regulated community with clear regulatory guidance adopted through established, formal notice-and-comment processes that fully address industry concerns and are subject to the full measure of judicial review.

### **Background**

The scope of "waters of the United States" under the Clean Water Act is framed and limited by the two rulings of the Supreme Court in *SWANCC* and *Rapanos*. In *SWANCC*, the majority held that the presence of migratory birds did not make isolated, non-navigable, intrastate ponds "waters of the United States" under the Act, and that the agencies' contrary interpretation "would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174.

In *Rapanos*, the plurality opinion of four justices and the concurring opinion of Justice Kennedy provide the legal framework. The plurality reasoned that the "waters of the United States" include only "traditional navigable waters," "relatively permanent, standing or flowing bodies of water," and wetlands with a "continuous surface connection" to other jurisdictional waters. *Rapanos*, 547 U.S. at 739-42. Justice Kennedy's concurring opinion, in contrast, stated that "waters of the United States" included wetlands that had a "significant nexus" to traditional navigable waters, so long as "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.'" *Id.* at 780 (Kennedy, J., concurring).

If the 2011 Draft Guidance is finalized, it would supersede two earlier guidance documents addressing these same issues. See *Environmental Protection Agency And U.S. Army Corps Of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision In Rapanos v. United States & Carabell v. United States* 1 (Dec. 2, 2008) ("2008

Guidance”) and *Joint Memorandum Providing Clarifying Guidance on SWANCC* (Jan. 15, 2003).<sup>2</sup>

## **Summary**

We divide our comments into two sections. First, we outline why the NAM believes the 2011 Draft Guidance exceeds the agencies’ authority as a matter of law. In the wake of *Rapanos*, the agencies had provided detailed guidance on how they intended to adhere to the Court’s directions to the broadest extent possible. See, e.g., 2008 Guidance at 1. Now, just over two years later, the agencies have prepared another guidance document – but instead of adhering to the Supreme Court’s limitations, we are concerned that the agencies have exceeded the authority granted by Congress, as interpreted in *Rapanos* and *SWANCC*. Specifically, the draft guidance would, among other things:

- Improperly define what is meant by “significant nexus.”
- Expand the “significant nexus” analysis to non-navigable interstate waters.
- Aggregate waters to bring entire watersheds within the agencies’ jurisdiction.
- Expand federal jurisdiction over ephemeral and intermittent streams.
- Expand the scope of what waters are “relatively permanent.”
- Expand federal jurisdiction over non-navigable tributaries.
- Expand federal jurisdiction over ditches.
- Expand jurisdiction over “non-physically proximate other waters.”
- Expand agency powers improperly through guidance.

Second, in section two, in the limited time available to submit these comments, we identify some of the potential implications of this proposal to expand the agencies’ regulatory power. The NAM and its members are committed to protecting our environment, but those protections must be balanced to ensure continued growth, particularly during these challenging economic times. Expanding the scope of “waters of the United States” would layer yet another costly regulatory burden on manufacturers deciding whether to expand operations here or move them abroad. We urge the agencies to reconsider their approach.

### **I. The Agencies Have Exceeded the Authority Granted by Congress to Regulate the “Waters of the United States,” as Interpreted in *Rapanos* and *SWANCC*.**

#### **A. The Draft Guidance Misstates Justice Kennedy’s Standard for Finding a “Significant Nexus,” Thereby Potentially Greatly Expanding Jurisdiction.**

The “significant nexus” test proffered by Justice Kennedy in *Rapanos* is a key legal guideline for determining whether property is regulated as “waters of the United States.” The NAM is concerned that the 2011 Draft Guidance would re-write that core test by changing the level of effect required to show a nexus. Quite simply, it would no longer be the “significant” nexus test—it would be the “more than speculative or insubstantial” nexus test.

Specifically, the Draft Guidance provides that “[w]aters have a significant nexus if they ... have an effect on the chemical, physical, or biological integrity of traditional navigable or interstate waters that is more than ‘speculative or insubstantial.’” 2011 Draft Guidance at 8. To require only that the effect be “more than speculative or insubstantial,” however, fundamentally

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<sup>2</sup> See [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2003\\_12\\_19\\_wetlands\\_Joint\\_Memo.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2003_12_19_wetlands_Joint_Memo.pdf), and [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008\\_12\\_3\\_wetlands\\_CWA\\_Jurisdiction\\_Following\\_Rapanos120208.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf).

changes the essence of Justice Kennedy's analysis. Justice Kennedy wrote that "wetlands possess the requisite nexus . . . if the wetlands . . . *significantly affect* the chemical, physical, and biological integrity of other covered waters . . . . When, in contrast, wetlands' effects on water quality are *speculative or insubstantial*, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) (emphasis added). "Speculative or insubstantial" effects foreclose the requisite nexus (and jurisdiction). To actually establish a significant nexus, however, what is required is a "significant effect," not merely something "more than" a speculative or insubstantial effect.

The 2011 Draft Guidance would continue to grant substantial discretion to agency field staff to make a "significant nexus" determination. It is essential, however, that staff understand that the nexus must in fact be significant—that the threshold is material, and not simply "more than speculative." We urge the agencies to revise any final guidance to address this error.

**B. The Draft Guidance Errs by Treating All "Interstate Waters" as Jurisdictional and Applying the Significant Nexus Test to Waters Connected to "Interstate Waters."**

The 2011 Draft Guidance would also exceed the agencies' authority by expanding jurisdiction to cover all "interstate waters" whether navigable or not and to waters that merely have a "significant nexus" to "interstate waters." This expansion inappropriately departs from the "navigable" focus of the CWA, and this expansion of the "significant nexus" test misconstrues Justice Kennedy's analysis, which requires that when evaluating whether a water has a "significant nexus" to another water, the connection must necessarily be to traditional, navigable-in-fact waters, and *not* non-navigable waters in this traditional sense.

In *Rapanos*, Justice Kennedy's concurrence established that to confer jurisdiction, a significant nexus must connect to *traditional navigable waters*. In determining whether wetlands are jurisdictional, Justice Kennedy stated that "jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question *and navigable waters in the traditional sense*." *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring) (emphasis added). Elsewhere in his concurrence, Justice Kennedy reiterated that "wetlands possess the requisite nexus . . . if the wetlands . . . significantly affect the chemical, physical, and biological integrity of other covered waters *more readily understood as navigable*." *Id.* at 780 (emphasis added). Justice Kennedy also criticized jurisdictional claims over waters that are "remote from any *navigable-in-fact water*." *Id.* at 782 (emphasis added).

Of course, the Court has recognized that "navigable waters of the United States" may include waters not navigable in the traditional sense. *See, e.g., id.* at 731 (plurality opinion); *see also id.* at 767 (Kennedy, J., concurring). However, Justice Kennedy required that "navigability" be given some meaning. *See id.* at 778-79 (Kennedy, J., concurring). Furthermore, Justice Kennedy indicated that a *jurisdictional* "significant nexus" is not merely a nexus between the water-in-question and "navigable waters" generally, but rather a nexus between the water-in-question and *traditional, navigable-in-fact waters*. *See, e.g., id.* at 779, 782.

Hence, as the agencies recognized correctly in 2008, under *Rapanos*, a significant nexus between the water-in-question and a non-navigable water will *not* suffice. Rather, the 2008 Guidance properly hewed closely to Justice Kennedy's concurrence in *Rapanos*. Consistent with the Court's direction, the agencies used Justice Kennedy's significant nexus analysis to assert jurisdiction only over waters with "a significant nexus with a *traditional navigable water*." 2008 Guidance at 1 (emphasis added).

In contrast, in the 2011 Draft Guidance the agencies have asserted jurisdiction over interstate waters without regard to navigability, and they have repeatedly employed the significant nexus test to “assert jurisdiction over waters with a significant nexus to traditional navigable waters *or interstate waters*.” 2011 Draft Guidance at 7 (emphasis added). The implication of these expansions is that the waters being analyzed need not be or have any connection whatsoever to a navigable-in-fact water. The mere fact that a water happens to cross a state line should not be—and is not—a sufficient reason to bring it and all connected waters within the protection of the Act. Accordingly, we urge the agencies to revise their proposal.

**C. The Proposal to Expand the “Significant Nexus” Test to Evaluate Whether a Water Has a Significant Nexus in Combination With Similar Waters in the Same Watershed is Contrary to Law and Not Sound Policy.**

The NAM is further concerned that the agencies are proposing a sweeping expansion of jurisdiction by interpreting a “significant nexus” to include a water that, in combination with similarly situated waters in the region, would significantly impact the chemical, physical, and biological integrity of other covered waters. 2011 Draft Guidance at 7. Left as proposed, the 2011 Draft Guidance would not only exceed the legal framework authorized by the Court, but it would establish a policy that could bring broad categories of resources within an entire watershed under the agencies’ jurisdiction.

The genesis of this issue is Justice Kennedy’s direction in *Rapanos* that in some instances it may be appropriate to evaluate whether a particular wetland has a significant nexus to traditional navigable waters by considering certain similar wetlands in the region. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) (noting the appropriateness of evaluating the significant nexus of “wetlands . . . in combination with similarly situated lands in the region. . .”). In the 2008 Guidance, the Agencies again followed the Court’s direction closely by stating that they would consider “all wetlands adjacent to the same tributary” to be the “similarly situated lands in the region” that Justice Kennedy contemplated. 2008 Guidance at 10. There, the agencies stated they adopted that “adjacency” approach “because of its strong scientific foundation—that is, the integral ecological relationship between a tributary and its adjacent wetlands. Interpreting the phrase ‘similarly situated’ to include all wetlands adjacent to the same tributary is often reasonable because such wetlands are physically located in a like manner (*i.e.*, lying adjacent to the same tributary).” 2008 Guidance at 10.

Under the 2011 Draft Guidance, however, the agencies propose to cover far more than “adjacent” wetlands, by finding that “waters” are “similarly situated” if they are the same “resource type” and “in the region” if they are “within the same watershed.” 2011 Draft Guidance at 8. This creates a three-step analysis: (1) identify the type of waters proposed to be covered (*i.e.*, whether they are a tributary, an adjacent wetland, or “other waters” in close proximity to covered waters), (2) determine the relevant watershed and the “similarly situated” waters in the same category in the watershed, and (3) determine whether the water being evaluated in combination with the other similarly situated waters in the watershed impacts the chemical, physical, or biological integrity of the nearest traditional navigable or interstate waters. If that impact is found, then a “significant nexus” has been shown and jurisdiction would be asserted.

This proposed expansion first erroneously expands the analysis to cover *all* waters, including tributaries and “other” waters. In other words, under the 2011 Draft Guidance, in evaluating whether a tributary has a significant nexus to covered waters, the agencies would look at other tributaries in the region to determine if the tributary in question has the requisite connection. Justice Kennedy, however, wrote only of evaluating the significant nexus of

“wetlands . . . in combination with similarly situated lands in the region...” *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) (emphasis added). Because subjecting tributaries and other waters to this same expanded approach was not contemplated by Justice Kennedy’s concurrence, it would represent an unlawful expansion of jurisdiction through agency guidance.

Second, the agencies’ broad definition of “region” likewise exceeds the intention of the Court under *Rapanos*. Justice Kennedy repeatedly expressed concern about jurisdictional claims over “remote” waters. See *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring) (criticizing the dissent for “permit[ting] federal regulation whenever wetlands lie alongside a ditch or drain, *however remote and insubstantial*, that may flow into traditional navigable waters.”) (emphasis added). Justice Kennedy also criticized jurisdictional claims over “remote” tributaries, see *id.* at 780, identified “proximity to navigable waters” as a factor in establishing significance, see *id.* at 781, and rejected “regulation of drains, ditches, and streams *remote* from any navigable-in-fact water . . . .” *Id.* (emphasis added). So while Justice Kennedy permitted the combined analysis of similarly situated wetlands within a “region” to determine whether the wetland in question has a significant nexus to traditional navigable waters, any such analysis necessarily has to be mindful of physical proximity.

The agencies, however, have defined “region” extraordinarily broadly—as “within the same watershed.” 2011 Draft Guidance at 8. “Watershed,” in turn, is defined as “the area draining into the nearest traditional navigable water or interstate water.” *Id.* The 2011 Draft Guidance recognizes that a “watershed” can be a very large geographic area, noting that

[t]here may be circumstances in which field staff . . . elect to *begin* the case-by-case significant nexus analysis utilizing a *smaller* watershed (for example, in some circumstances, the Hydrologic Unit Code (HUC)-10 “watershed” as identified by the U.S. Geological Survey and the Natural Resources Conservation Service . . .).

*Id.* (emphasis added). Since the draft guidance speaks of HUC-10 watersheds as “smaller” units with which to “begin” an analysis, the guidance could give agency staff the discretion to use larger watersheds as the evaluating “region,” such as an HUC-8 watershed or larger.

Yet, even the “smaller” HUC-10 watershed typically ranges from 40,000 to 250,000 acres or 62-390 square miles. See *id.* (To put it in perspective, the island of Manhattan is approximately 23 square miles, so an HUC-10 watershed is three to sixteen times larger.) The larger HUC-8 watershed is often hundreds of square miles in size; the average HUC-8 watershed in Arizona, for example, is 1,357 square miles—larger than the state of Rhode Island. See *Surf My Watershed*, ENVIRONMENTAL PROTECTION AGENCY, <http://cfpub.epa.gov/surf/locate/index.cfm> (last visited June 16, 2011).

As such, the guidance raises the real possibility that waters geographically *remote* from traditional navigable waters will be subjected to federal jurisdiction, directly contrary to Justice Kennedy’s concurrence. See, e.g., *Rapanos*, 547 at 778, 780-81 (Kennedy, J., concurring). The guidance also permits a significant nexus to be found based on the aggregation of one water with a “similarly situated water” located many miles away within the watershed. This compounds the error.

Moreover, the application of an expansive “watershed”-based approach could have grave implications for property owners within that watershed. Once the agencies have made a jurisdictional determination for one water within that watershed, the 2011 Draft Guidance contemplates that the agencies could apply the jurisdictional determination against the owners

of all other similar waters in that same watershed—regardless of whether those other landowners participated in or had any actual knowledge of the jurisdictional determination. Indeed, while acknowledging the need to make “case-specific determinations,” the Draft Guidance provides that agency staff “may use information used in previous determinations, and the agency would generally expect that if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus.” 2011 Draft Guidance at 9.

Such an expansive approach threatens to bind countless thousands of property owners across a watershed—possibly covering hundreds of square miles – by a single staff determination made at one remote property. At a minimum, if the guidance is not narrowed by the agencies, one determination involving one landowner could act as precedent that could affect thousands of other landowners who had neither real notice nor opportunity to be heard in the first proceeding. Whether binding or precedent, the Draft Guidance does not satisfy basic due process requirements. Moreover, even if more notice and process were provided, the nature of that process could end up strangling economic development and overwhelm the agencies’ resources as interested parties across a watershed demand an opportunity to be heard. We strongly urge the agencies to reconsider this approach.

#### **D. The Agencies Should Reconsider the Expansion of Jurisdiction Over Ephemeral and Intermittent Streams.**

The NAM is also concerned about the proposed expansion of jurisdiction over ephemeral and intermittent streams. Under *Rapanos*, ephemeral and intermittent streams may be subject to the Clean Water Act as tributaries if they are connected directly or indirectly to a traditional navigable water and have “at least seasonal flow” (the plurality standard) or if they have “a significant nexus” to traditional navigable waters (the Kennedy standard). The 2008 Guidance had pushed jurisdiction to the limit of the law to cover those non-navigable tributaries of traditional navigable waters that are relatively permanent and where the tributaries “typically ... flow year round” or “have a continuous flow at least seasonally (e.g., typically three months).” 2008 Guidance at 6-7.

In contrast, in the 2011 Draft Guidance, the agencies have proposed an extremely malleable standard. The agencies now propose that there is no typical time period of seasonal flow, because “the time period constituting ‘seasonal’ will vary across the country.” 2011 Draft Guidance at 13. Likewise, there are no “distinct, rigid boundaries” because “stream reaches classified as perennial, intermittent, and ephemeral may more accurately be described as dynamic zones within stream networks.” *Id.* These zones are “highly variable” and will depend upon the “seasonal flows in the ecoregion in question.” *Id.* The agencies decline jurisdiction only over “ephemeral tributaries which flow *only* in response to precipitation and intermittent streams which do not have continuous flow at least seasonally.” *Id.* at 27 (emphasis added). Thus the agencies would allow jurisdiction over any ephemeral tributaries which are not *solely* the product of precipitation, meaning a flow which is *overwhelmingly* the product of rain or snow could potentially be jurisdictional. Ultimately, the “field staff” is given substantial discretion, such as the “flexibility to determine what seasonal flow means in each particular case.” *Id.* at 28.

This highly malleable approach conflicts squarely with the view of the plurality in *Rapanos*. Justice Scalia’s opinion had firmly rejected jurisdiction over ephemeral flows. See, e.g., *Rapanos*, 547 U.S. at 722 (criticizing assertions of jurisdiction over “ephemeral” channels with “occasionally or intermittently” flowing water); *id.* at 733 (declining to include “ephemeral flows” within “navigable waters”); *id.* at 733 n.5 (distinguishing between a wash and a seasonal

river); *id.* at 735 (noting that “[u]nder no rational interpretation are typically dry channels described as open waters” subject to federal jurisdiction) (emphasis omitted).

Moreover, as a practical matter, the agencies would reject jurisdiction over such a narrow subset of ephemeral flows, that the 2011 Draft Guidance thereby reserves potential jurisdiction over the most intermittent of waters. Indeed, read in concert with the other expansions of the “significant nexus” framework described in these comments, the prospect of expanded application of jurisdiction is substantial. We urge the agencies not to expand jurisdiction beyond the approach in the 2008 Guidance on this issue.

#### **E. The Draft Guidance Misapplies Both the Plurality and Concurrence on Ditches.**

As with ephemeral and intermittent streams, the NAM is also concerned about the potential for expansion of jurisdiction over man-made “ditches.” The 2008 Guidance had clearly stated that such ditches “are generally not waters of the United States.” 2008 Guidance at 11-12. In contrast, while the 2011 Draft Guidance does not contradict that statement, it specifies in detail those conditions under which ditches—including roadside and agricultural ditches—could potentially be jurisdictional. See 2011 Draft Guidance at 12 (listing conditions and noting that a ditch could also be jurisdictional if it were to meet the definition of “wetlands” within existing delineation guidelines). Accordingly, if field staff concluded one or more conditions are met, then a ditch would be evaluated as if it were a potential “tributary,” and so might be brought under federal jurisdiction. See 2011 Draft Guidance at 12.

We urge the agencies to definitively exclude “ditches” from consideration. Even as conditioned, the 2011 Draft Guidance’s willingness to consider applying federal jurisdiction over “ditches” is inconsistent with the direction from the Supreme Court, as both the plurality and the concurrence in *Rapanos* looked askance at jurisdictional claims over ditches. The plurality was quite direct in stating that ditches, “by and large, [are] *not* ‘waters of the United States,’” *Rapanos*, 547 U.S. at 735-36 (emphasis in original), and that applying “waters of the United States” to “man-made drainage ditches” was to “stretch[] the term ‘waters of the United States’ beyond parody.” *Id.* at 734. Justice Kennedy, in turn, expressed alarm at the prospect of jurisdiction over “ditches . . . remote from any navigable-in-fact water and carrying only minor water-volumes toward it . . .” *Id.* at 781 (Kennedy, J., concurring).

The proposed guidance, however, could allow jurisdiction over precisely such ditches. For example, a ditch would be eligible for evaluation as a tributary if it has a bed, bank, and ordinary high water mark; is connected indirectly to a traditional navigable water or interstate water; and contains “relatively permanent” flowing or standing water. See 2011 Draft Guidance at 12. Given the agencies’ reliance here on the ordinary high water mark, the agencies’ broad reading of “relatively permanent,” and that the ditch need not have a direct connection to any actually navigable waters (or potentially *any* connection, given the allowance of a significant nexus to non-navigable interstate waters), the guidance would permit jurisdiction over a “ditch . . . remote from any navigable-in-fact water and carrying only minor water-volumes toward it,” precisely as Justice Kennedy feared.<sup>3</sup>

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<sup>3</sup> As discussed further in the next subsection of these comments, it unquestionably would be inconsistent with the plurality’s view, given their assessment that “on its only plausible interpretation, the 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.’” *Rapanos*, 547 U.S. at 739 (alteration in original) (citation omitted).

**F. The Draft Guidance Misconstrues the Plurality’s Requirement that Waters Be “Relatively Permanent” to Be Subject to Jurisdiction Under the Act.**

In areas where the *Rapanos* plurality opinion may govern, the 2011 Draft Guidance also would expand jurisdiction by expanding the “relatively permanent” requirement that was essential to that opinion. Indeed, this proposed expanded interpretation is particularly egregious, as it is quite clear from Justice Scalia’s opinion that the plurality advocated very strongly for a less expansive application of the Act. The agencies should revise the 2011 Draft Guidance to correct this error.

Specifically, the plurality in *Rapanos* construed “waters of the United States” to reach “only relatively permanent, standing or flowing bodies of water.” *Rapanos*, 547 U.S. at 732. Under its application of the plurality analysis, the 2011 Draft Guidance would allow jurisdiction over a non-navigable tributary when the tributary is directly or indirectly connected to a downstream traditional navigable water, and when flow is at least seasonal in non-drought years. According to the proposed guidance, a tributary would be understood to be “seasonal” when it has predictable flow during wet seasons in most years. As noted, under the proposed guidance, the time period constituting ‘seasonal’ will vary across the country.” 2011 Draft Guidance at 13. In contrast, the agencies’ previous guidance had required that a tributary continuously flow for at least three months of the year to qualify as “seasonal.” 2008 Guidance at 7.

As an application of the plurality’s standard, however, this is incorrect. Although the plurality noted that it did “not necessarily exclude . . . seasonal rivers,” *Rapanos*, 547 U.S. at 733 n.5, the plurality nowhere envisioned allowing jurisdiction over a short-term flow (such as one so fleeting as the two-month seasonal flow given as an example in the draft guidance). 2011 Draft Guidance at 28. On the contrary, when the plurality referenced a seasonal river, it referenced “the 290-day, continuously flowing stream postulated by Justice Stevens’ dissent...” *Rapanos*, 547 U.S. at 733 n.5. The two-month flow in the guidance is surely closer to a non-jurisdictional wash than to Justice Stevens’ seasonal river. Furthermore, the broad grant of “flexibility” to field staff “to determine what seasonal flow means in each particular case” is at odds with the plurality’s critique of “definitions used to make jurisdictional determinations” being “deliberately left vague.” *See id.* at 727.<sup>4</sup>

**G. The Draft Guidance Misapplies the *Rapanos* Concurrence on Tributaries.**

We also urge the agencies to reconsider the way in which the Draft Guidance would apply the significant nexus test to evaluate tributaries. The proposal directs field staff to rely heavily on the ill-defined notion of an “ordinary high water mark” (“OHWM”) in determining jurisdiction. *See* 2011 Draft Guidance at 13-14 (noting that “[i]f it can be demonstrated that the tributary has a bed and bank, and an OHWM, and is part of a tributary system to a traditional navigable water or an interstate water . . . then the agencies would generally expect that the tributary, along with the other tributaries in the watershed . . . can be demonstrated to have a significant nexus . . . .”)

This reliance is troubling, particularly in an application of Justice Kennedy’s concurrence, since Justice Kennedy noted a General Accounting Office (GAO) report that questioned the reliability of the OHWM. *See Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring) (citing General Accounting Office, *Report to the Chairman, Subcommittee on Energy Policy, Natural*

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<sup>4</sup> The guidance’s vague, varying, and short-term flow is not only in tension with the plurality’s discussion of “seasonal,” but is also at odds with the plurality’s repeated criticism of jurisdiction over ephemeral flows, as discussed *supra*.

*Resources and Regulating Affairs, Committee on Reform, House of Representatives, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297, 3-4 (Feb. 2004) (“GAO Report”).<sup>5</sup> The GAO noted that the OHWM is currently inadequately defined, so that “it is possible that well trained and competent staff might interpret the term differently.” GAO Report at 11. This definitional problem, though noted by Justice Kennedy, is unaddressed by the draft.

The guidance’s application of the concurrence to tributaries deviates from Justice Kennedy’s analysis in two additional respects, both noted above. First, Justice Kennedy spoke only of evaluating *wetlands* “either alone or in combination with similarly situated lands in the region,” see *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring), but the agencies propose to evaluate *tributaries* in combination with other tributaries in the region. 2011 Draft Guidance at 8. This is not supported by Justice Kennedy’s opinion. Second, Justice Kennedy required a significant nexus to traditional navigable waters to establish jurisdiction, but the draft guidance allows a significant nexus to either traditional navigable waters *or* to interstate waters (regardless of their non-navigability).

#### **H. The Draft Guidance Contradicts SWANCC by Permitting Jurisdiction Over “Non-Physically Proximate Other Waters.”**

A further concern is the agencies’ proposal to expand jurisdiction over “other waters” into remote “non-physically proximate” waters that were the type of waters excluded from coverage in *SWANCC*. The agencies should confine any assertion of jurisdiction over “other waters” to the limits plainly authorized by the Supreme Court’s rulings.

The 2011 Draft Guidance defines “other waters” as including “intrastate lakes, rivers, streams . . . mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds . . . .” 2011 Draft Guidance at 19 (citing to 33 C.F.R. § 328.3(a)(3) (2009) and 40 C.F.R. § 230.3(s)(3) (2009)). The proposed guidance then evaluates such other waters as either physically proximate, or non-physically proximate. The latter category is at odds with *SWANCC*, which rejected efforts to regulate isolated wetlands as “waters of the United States.”

Yet, the 2011 Draft Guidance would allow the agencies to renew their historic efforts to address isolated lands by leaving it to individual staff evaluations. In discussing “other waters that are geographically separated from jurisdictional tributaries,” the agencies say only that

establishing a significant nexus may be more challenging. Thus, at this time, we are not providing specific guidance on making such determinations and are instead directing agency field staff to continue the current practice of referring determinations for non-physically proximate other waters to their respective Headquarters

. . . .

2011 Draft Guidance at 20. The agencies do mention *SWANCC*, but only for a very limited purpose—to establish that “consideration of use by migratory species is not relevant to the significant nexus determination for such waters.” *Id.*

The agencies’ proposed narrow application of *SWANCC* conflicts with how the plurality and Justice Kennedy actually applied the case in *Rapanos*. The plurality applied *SWANCC* not merely to exclude the Migratory Bird Rule as a means of establishing a jurisdictional link between waters-in-question and waters of the United States. Rather, the plurality noted that in

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<sup>5</sup> The GAO Report is available at <http://www.gao.gov/new.items/d04297.pdf> .

SWANCC, “we held that ‘non-navigable, isolated intrastate waters’—which, unlike the wetlands at issue in *Riverside Bayview*, did not ‘actually abut on a navigable waterway—were not included as ‘waters of the United States.’” *Rapanos*, 547 U.S. at 726 (alteration in original) (citation omitted). Likewise, Justice Kennedy wrote that “in *SWANCC* the Court rejected the Corps’ assertion of jurisdiction over isolated ponds and mudflats bearing no evident connection to navigable-in-fact waters.” *Id.* at 779 (Kennedy, J., concurring).

Thus, the *Rapanos* plurality and concurrence correctly focused on the remote and isolated nature of the waters at issue in *SWANCC*. The Draft Guidance misses the mark on this. As written, the draft guidance potentially allows jurisdiction over a “geographically isolated,” “intrastate,” “mudflat[]” or “prairie pothole[],” deferring almost entirely to field staff on this question, and constraining them only in their deliberations by forbidding the consideration of migratory species. Thus, the kinds of geographically remote “waters” expressly excluded under *SWANCC*—intrastate “isolated ponds and mudflats”— could potentially be brought under federal jurisdiction under the draft guidance. We urge the agencies to reconsider this approach.

### **I. The 2011 Draft Guidance Amounts to a Legislative Rule.**

As evidenced by the above, the 2011 Draft Guidance simultaneously provides a great deal of detail and allows field staff a great deal of leeway. Both aspects of the proposed guidance drive home the need for a proper rulemaking defining by regulation which waters are subject to the jurisdiction of the Clean Water Act. The NAM has long encouraged EPA and the Corps to initiate a rulemaking to that end. Nor are we alone in that regard. In *Rapanos*, the Chief Justice, Justice Kennedy, and Justice Breyer all urged the agencies to begin a rulemaking, as opposed to continuing to address this difficult issue through informal guidance. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring); 782 (Kennedy, J., concurring); 811 (Breyer, J., dissenting).

In fact, the 2011 Draft Guidance has many indicia of a rule. The proposal is dozens of pages long, including multiple appendices, with detailed analysis of the different types of waters and the agencies’ views of when the waters are “waters of the United States” under the law. Although the agencies deny that the guidance would be binding, such denials have rightly been characterized as boilerplate. See *e.g.*, *Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

Regardless, many aspects of the 2011 Draft Guidance belie the agencies’ denials. As just one example, as noted above, the guidance would purport to detail a new process whereby the agencies could assert jurisdiction over multiple water resources within a single watershed. See, *e.g.*, 2011 Draft Guidance at 1, 6, 7. In the absence of this new guidance, there surely would be inadequate basis for agency action over such a sweeping array of other waters within a watershed. If the draft guidance is finalized, however, the agencies could seek to assert jurisdiction and pursue enforcement. That definitive expansion of authority is precisely the type of legal effect from “guidance” that the D.C. Circuit has said – as recently as earlier this month – results in a legislative rule that requires proper notice and comment rulemaking. See *Natural Resources Defense Council v. EPA*, No. 10-1056 (D.C. Cir. July 1, 2011); see also *American Mining Congress v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

Proceeding with a judicious, reasonable, and carefully undertaken notice-and-comment rulemaking is not merely correct under the law; it is good policy. Such a notice-and-comment rulemaking will assure full opportunity for public participation, better attention to legal issues and industry concerns, and judicial review. Further, the often vague language and considerable deference to the agencies’ field staff to determine whether specific property would be subject to

jurisdiction cannot but raise the risk of inconsistent enforcement. A notice-and-comment rulemaking could define with greater specificity when jurisdiction would be invoked by the agencies. A regulation would also supply greater certainty to business, as opposed to the agencies issuing another guidance document that may be more easily changed (as evidenced by this proposal to supersede the 2008 Guidance). Manufacturers will thus be able to gauge the regulatory environment with greater certainty.

## **II. The Draft Guidance Will Have a Negative Economic Impact on U.S. Manufacturing.**

By broadening the definition of “waters of the United States” and increasing the number of waters subject to federal jurisdiction, the agencies will significantly increase burdens on U.S. businesses. At this juncture in our nation’s history, with high rates of unemployment and an already unrelenting and growing regulatory burden imposed on American manufacturing by existing and new federal regulations, the additional burdens of the 2011 Draft Guidance cannot be justified.

The economic impact analysis of the draft guidance prepared by EPA acknowledges a portion of the additional burden presented by the proposal. It indicates that significant costs will be incurred by Clean Water Act 404 permit applicants (regarding permits for filling in wetlands and streams). See Environmental Protection Agency, Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction at 5 (April 27, 2011) (“EPA Economic Impact Analysis”).

As an example, the agencies acknowledge that the expanded policy of evaluating “similarly situated waters” will have a significant impact on the scope of covered waters. The Agencies estimate that 17 percent of previous “no jurisdiction” decisions for other waters would have been differently decided under the proposed 2011 Draft Guidance, and that most of those would have been decided differently due to the revised aggregation policy. See EPA Economic Impact Analysis at 28. This would have led to 1,717 newly protected acres of wetlands. *Id.* at 7.

This is the type of additional regulatory burden that should not be imposed at this time. EPA’s analysis, however, ignores the probable economic impact of the 2011 Draft Guidance on other programs including pollutant discharge permitting, oil spill prevention, and state water quality standards and water restoration programs. Indeed, the agencies’ overall expansion of jurisdiction over previously uncovered waters could result in significant costs to the NAM’s membership, particularly as our members attempt to study, permit and develop new or expanded business locations. For example:

- The potential expansion of NPDES permit requirements for discharges to non-traditionally navigable waters such as washes and drainage ditches.
- The potential for increased restrictions on grading permits or the expansion of the requirement to purchase wetlands mitigation credits if land were to be filled that would now be covered waters under the draft guidance.
- The unknown future restrictions that would apply with the adoption of future storm water numeric limits or 303(d) listings or Total Maximum Daily Load allocations from the expanded scope of covered waters.

Moreover, as a consequence of the expanded jurisdiction presented by the 2011 Draft Guidance, the agencies can expect to receive thousands of additional jurisdictional determination requests and permit applications. Agency staffing and budgets have been cut, leaving fewer resources available to handle a substantially increased workload. Significant

delays in permitting would be inevitable, and job growth in the manufacturing sector—particularly growth tied to new plants and plant expansions—would be endangered.

The economic damage inflicted by the expansion of Clean Water Act jurisdiction will only be exacerbated by the agencies' continued and ill-advised reliance on expansive guidance rather than a judicious notice-and-comment rulemaking. The agencies' overreliance on guidance and over-deference to field staff reduces certainty and makes economic planning more difficult for the NAM's members. See EPA Economic Impact Analysis at 13-14. Such ill effects would be unwelcome at any time, let alone at present, as the private sector struggles to recover from the economic downturn and promote job creation.

### **Conclusion**

In view of the above, we ask the agencies to withdraw the draft guidance.

We thank you for the opportunity to comment on the proposed guidance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Paul A. Yost', with a long horizontal line extending to the right.

Paul A. Yost  
Vice President  
Energy and Resources Policy