No. 08-223

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,
*Petitioner*,

v.

MCWANE, INC., *ET AL.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF *AMICI CURIAE* AMERICAN FARM BUREAU FEDERATION®, AMERICAN FOREST & PAPER ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONER

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## INTERESTS OF *AMICI CURIAE*

The *Amici Curiae* jointly have broad and united interests, as described below.[1]

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of *Amici Curiae*'s intention to file this brief. Pursuant to Rule 37.6 of this Court, *Amici* state that their counsel authored this brief and *Amici* paid for it. No counsel for a party authored this brief in whole or in part, and no counsel or

*American Farm Bureau Federation*® ("Farm Bureau") is a not-for-profit, voluntary general farm organization incorporated in Illinois in 1919. It was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. The Farm Bureau has member organizations in all 50 states and Puerto Rico, representing more than six million member families. Farmers and ranchers routinely use ponds, lagoons, internal channeling ditches, stock ponds, and holding structures as part of productive and necessary farming and ranching activities and thus have a keen interest in the scope of the Clean Water Act.

*American Forest & Paper Association* ("AF&PA") is the national trade association of the forest, paper, and wood products industry. AF&PA members are engaged in growing, harvesting, and processing wood and wood fiber; manufacturing pulp, paper, and paperboard products from both virgin and recycled fiber; and producing engineered and traditional wood products. AF&PA participates in administrative proceedings arising under the Clean Water Act, and in litigation arising from those proceedings, that affect the forest, paper, and wood products industry.

*Associated General Contractors of America* ("AGC") is the leading national construction trade association, representing all facets of commercial construction for both public and private entities, including building, heavy, highway, and municipal projects. AGC and its

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party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

nationwide network of chapters have advocated for the construction industry for nearly a century. AGC's members' construction activities often require permits under the Clean Water Act, and, therefore, the scope of regulation under the Act is of great importance to AGC members.

*Chamber of Commerce of the United States of America* ("the Chamber") is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in federal and state courts throughout the country on issues of national concern, such as the scope of the Clean Water Act.

*National Mining Association* ("NMA") is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources. This includes policies under federal environmental laws like the Clean Water Act.

## SUMMARY OF ARGUMENT

This Court should grant the Petition of the United States for a Writ of *Certiorari* to resolve confusion regarding the scope of waters subject to the Clean Water Act ("CWA") created by the response of the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") (collectively, "Agencies") and the courts below to this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006).

The Agencies have failed to discern the holding in *Rapanos* consistent with rules for interpreting plurality decisions of the Supreme Court. This failure has led to the Agencies misinterpreting *Rapanos* and misapplying the CWA to reach waters that both the plurality and concurring opinions in *Rapanos* concluded are beyond the scope of the CWA. Faced with these broad assertions of CWA jurisdiction, the courts have struggled with and split over how to apply *Rapanos*.

This brief describes and provides examples of the degree of confusion and legal risk clouding the Agencies' extensive CWA regulatory program. This regulatory overreach, confusion, and legal risk will continue and extend unless this Court reviews the Court of Appeals' decision and gives direction to the Agencies.

## INTRODUCTION

*Amici* support *certiorari* in this case. The Agencies are ignoring basic rules that govern interpretation of this Court's decisions and are misconstruing key jurisdictional concepts set forth in *Rapanos*. The Agencies issue more than 100,000 jurisdictional determinations and review more than 80,000

individual and general permit applications in an average year.[2] Their response to *Rapanos* has serious implications for a wide range of commercial, agricultural, and public works projects.

*Rapanos* was the last CWA jurisdictional case decided by this Court. At issue in *Rapanos* was the Agencies' assertion of CWA jurisdiction over "four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters." 547 U.S. at 729 (plurality opinion). The Agencies claimed that CWA jurisdiction extended to any water with any hydrological connection to traditional navigable waters. *See id*. at 784 (Kennedy, J., concurring). The plurality opinion and Justice Kennedy's concurring opinion both rejected the Government's "any hydrologic connection" theory as a basis for CWA jurisdiction. *Id*. at 740-42 (plurality opinion), 784 (Kennedy, J., concurring).

The *Rapanos* plurality concluded that CWA jurisdiction is limited to waters that are (1) "relatively permanent, standing or continuously flowing bodies of water" connected to traditional interstate navigable waters, and (2) wetlands with a "continuous surface connection" to such waters such that "there is no clear demarcation between" the wetlands and the "relatively permanent waters." *Id.*

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[2] Statement of Benjamin H. Grumbles, Assistant Administrator for Water, U.S. Environmental Protection Agency, and John Paul Woodley, Jr., Assistant Secretary of the Army for Civil Works, Department of the Army, Before the Subcommittee on Fisheries, Wildlife, and Water of the Committee on Environment and Public Works, United States Senate (August 1, 2006), *available at* http://www.epa.gov/ow/speeches/060801bg.html.

at 739, 742 (plurality opinion) (internal citations and quotations omitted). The plurality specifically noted that wetlands with "only an intermittent, physically remote hydrologic connection . . . do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*." *Id*. at 742.[3] In a concurring opinion, Justice Kennedy concluded that CWA jurisdiction requires in all cases a "significant nexus" to traditional navigable waters, which must be demonstrated by substantial evidence showing the "measure of the significance of the connection" to traditional navigable waters. *Id*. at 784 (Kennedy, J., concurring). He, too, stated that a mere hydrological connection is not enough.

Members of the Court agreed that the Agencies should promptly address CWA jurisdiction through rulemaking. *See* 547 U.S. at 726 (plurality opinion) (the Corps proposed "rulemaking in light of *SWANCC* . . . but ultimately did not amend its published regulations"); *id*. at 758 (Roberts, C.J., concurring) (rather than "refining its view of its authority" through rulemaking, "the Corps chose to adhere to its essentially boundless view of the scope of its power"); *id*. at 782 (Kennedy, J., concurring) ("[a]bsent more specific regulations" the Corps must establish jurisdiction on a "case-by-case basis"); *id*. at 812 (Breyer, J., dissenting) (*Rapanos* opinions taken together call for the Corps "to write new regulations, and speedily so"). The *Amici* wholeheartedly agree.

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[3] Citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) and *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*").

But rather than conduct the rulemaking urged by Members of this Court, the Agencies issued "interim guidance."[4] EPA & Corps, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision In *Rapanos v. United States* & *Carabell v. United States* (June 5, 2007) (hereinafter "Guidance"), http://www.usace.army.mil/cw/cewo/reg/cwa_guide/app_a_rapanos_guide.pdf. The Agencies' Guidance and the determinations made under it are critically flawed because (1) the Agencies conclude that they can rely on the dissenting opinions to find two alternative holdings in this case, contrary to fundamental principles that govern interpretation of this Court's decisions, and (2) the Agencies have significantly misconstrued key elements of the *Rapanos* opinions, including "traditional navigable waters," "relatively permanent waters," and

[4] One reason this case is so important is that the avenues for judicial review of the Agencies' jurisdictional assertions under the CWA are very limited. By issuing guidance rather than undertaking rulemaking, the Agencies would offer members of the public a Morton's Fork for challenging their assertions of jurisdiction: (1) in an enforcement action, or (2) after spending between 313 and 788 days and between $28,915 and $271,596 to obtain a permit from the Corps. *See Rapanos*, 547 U.S. at 721 (plurality opinion) (noting the time and cost involved in obtaining a Corps CWA permit); *compare Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 216 (D.C. Cir. 2007) (discussing availability of judicial review of agency guidance which appears to be or is applied as binding) *and Fairbanks North Star Borough v. U.S. Army Corps of Eng'rs.*, No. 07-35545, 2008 WL 4181602 at *4-5 (9th Cir. Sept. 12, 2008) (holding that Corps jurisdictional determinations are not final agency action subject to judicial review at the time they are issued, but noting that CWA jurisdiction may be challenged in a later enforcement action or permit challenge).

"significant nexus," to substantially expand their jurisdiction under the CWA.

The Agencies seek a writ of *certiorari* to obtain this Court's endorsement of their flawed approach to interpreting *Rapanos*. They also want the Court to endorse their expansive view of the jurisdictional tests described in *Rapanos*. *Amici* strongly agree that *certiorari* is needed, but to correct rather than endorse the actions of the Agencies.[5]

## ARGUMENT

### I. THE AGENCIES HAVE NOT FOLLOWED FUNDAMENTAL RULES GOVERNING INTERPRETATION OF THIS COURT'S DECISIONS.

The Agencies fail to discern an actual holding in *Rapanos*. Instead, they take the astonishing position that they can pick and choose between *either* the plurality's "relatively permanent waters" test *or* Justice Kennedy's "significant nexus" test. *See* Guidance at 3. Even more surprising, they argue that they can rely on the dissenting opinions to establish majority support for either test because "[w]hen there is no majority opinion in a Supreme

[5] The focus of *Amici* is not on the facts of this case, but rather the serious legal and practical implications of the Agencies' and the courts' interpretation of CWA jurisdiction following *Rapanos*. However, the fact that this case arises in a criminal context while the public, the Agencies, and the courts are all struggling to understand and apply *Rapanos* underscores the gravity of the legal and practical issues at stake. Accordingly, *Amici* believe it is important to review CWA jurisdiction as it applies to all types of water bodies. If consideration of other cases in addition to this one would facilitate comprehensive review, *Amici* would support granting certiorari in those cases as well.

Court case, controlling legal principles may be derived from those principles espoused by five or more Justices." *Id*. This is counting heads, not the faithful execution of the law.

The Agencies cannot interpret a ruling of this Court as having two alternative holdings, and cannot rely on the views of dissenting Justices to identify a holding. It is fundamental that cases are interpreted through their holdings. A holding is the "necessary" and "pivotal" logic that results in a decision in the case. *See* BLACK'S LAW DICTIONARY 749 (8th ed. 2004) (defining "holding" as "a court's determination of a matter of law pivotal to its decision"); *id.* at 1102 (defining "*obiter dictum*" as a comment in a judicial opinion "that is unnecessary to the decision in the case and therefore not precedential"). It is also fundamental that dissenting opinions are not part of a case's holding. *See* 20 AM. JUR. 2D *Courts* § 138 ("A minority opinion has no binding, precedential value"); 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.05[2] (3d ed. 2006) ("Stare decisis does not apply to dissenting opinions.") These basic principles are reflected in this Court's *Marks* rule, which says:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as *that position* taken by those Members *who concurred in the judgments* on the narrowest grounds.

*Marks v. United States*, 430 U.S. 188, 193 (1977) (emphasis added and internal quotations omitted); *see also Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (referencing *Marks*).

The Agencies make no effort, as required by *Marks*, to determine "the holding" of "those Members who concurred in the judgments" in *Rapanos*. Instead, they reinvent *Marks* because they claim Justice Kennedy's opinion is not a perfect subset of the plurality's opinion or vice-versa. This narrow view misses the point. The Agencies' obligation is to find the common ground between the plurality and Justice Kennedy that produced the judgment in *Rapanos*. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182-83 (2d Cir. 1992) (the "essence" of *Marks* is to find "common ground" among Justices who concurred in judgment).[6] As explained in Part II below, the Agencies have not found that common ground at least in part because they misinterpret both the plurality and concurring opinions.

Even assuming, for the sake of argument, that no common ground exists between the plurality and Justice Kennedy, such a lack of commonality would not give the Agencies license to interpret *Rapanos* based on the views of dissenting Justices or to arrive at alternative holdings. The Agencies seek a writ of *certiorari* effectively to obtain such license from this Court. The Court of Appeals correctly rejected the Agencies' "either/or" approach. *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (that the dissenting Justices would find CWA jurisdiction under both tests "is of no moment under *Marks*"). The Agencies, however, continue to treat the dissent

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[6] *See* Brief of *Amici Curiae* National Association of Home Builders and Chamber of Commerce of the United States of America Supporting Petitioners on Petition for Writ of *Certiorari* at 12-17, *Lucas v. United States*, No. 07-1512, 2008 WL 2697353 (U.S. July 7, 2008), identifying seven points of convergence between the plurality and concurring opinions.

as part of *Rapanos*' holding, and, if the past is prologue, will continue to do so until this Court clarifies that *Rapanos* must be applied consistently with *Marks* and the basic definition of a holding.

## II. THE AGENCIES' INTERPRETATION OF KEY JURISDICTIONAL CONCEPTS FROM *RAPANOS* IS INCONSISTENT WITH THE PLURALITY AND CONCURRING OPINIONS THAT SET FORTH THOSE CONCEPTS.

This Court should grant *certiorari* because the Agencies are implementing the CWA in a manner fundamentally at odds with this Court's decision in *Rapanos*, which has led the lower courts to struggle with and split over how to apply *Rapanos*.

In particular, the Agencies have (1) deemed water bodies to be traditional navigable waters if they have enough water to "float a boat" or if they have the potential to be visited by out-of-state residents; (2) issued Guidance stating a water body may be deemed "relatively permanent" in accordance with the plurality opinion if it flows only three months a year (or even less); and (3) converted Justice Kennedy's "significant nexus" into "a" nexus. We address each of these elements in turn.

### A. Traditional Navigable Waters Must Be Highways for Trade and Travel in Interstate and Foreign Commerce.

Whether a water body is a traditional navigable water is of fundamental importance after *Rapanos* because both the plurality and Justice Kennedy premise jurisdiction over non-navigable waters on the non-navigable water's relationship to traditional

navigable waters. While the plurality and Justice Kennedy used varying formulations ("traditional interstate navigable waters" and "navigable waters in the traditional sense"),[7] the waters to which they are referring are unmistakable from the cases they cite – *The Daniel Ball v. United States* and *United States v. Appalachian Electric Power Company*.[8]

*The Daniel Ball* and *Appalachian Electric* are cornerstones in a series of cases defining "navigable waters of the United States." In *The Daniel Ball*, the Court held that:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are 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 contra-distinction 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.

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[7] 547 U.S. at 742 (plurality opinion); *id*. at 779 (Kennedy, J., concurring).

[8] *See Rapanos*, 547 U.S. at 734 (plurality opinion) (citing *The Daniel Ball v. United States*, 10 Wall. 557, 563 (1871) and *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-409 (1940)); *id.* at 761 (Kennedy, J., concurring) (same).

*The Daniel Ball*, 10 Wall. 557, 563 (1871) (emphasis added).[9] Seventy years later, in *Appalachian Electric*, the Court held that a water could also be deemed "navigable" if it could be made navigable by "reasonable improvements." 311 U.S. at 407.

The Agencies ignore the opinions' citations to *The Daniel Ball*, and instead define "traditional navigable waters" as:

> All waters which are currently used, or were used in the past, or may be susceptible to use in interstate commerce, including all waters which are subject to the ebb and flow of the tide. 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1).

Guidance at 4-5. They explain in a footnote that:

> The "(a)(1)" waters include all of the "navigable waters of the United States," defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN).

Guidance at 5 n.19.

In other words, *The Daniel Ball* waters are only a subset of the Agencies' new definition of traditional navigable waters. The definition also reaches waters that are, were, or could be subject to *any use* in interstate commerce. This is a critical – and impermissible – expansion of the traditional navig-

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[9] *See also Minnehaha Creek Watershed District. v. Hoffman*, 597 F.2d 617, 622-23 (8th Cir. 1979) ("*The Daniel Ball* test is bi-partite: first, the body of water must be navigable in fact; and second, it must itself, or together with other waters, form a highway over which commerce may be carried on with other states.").

able waters concept, which goes well beyond what the plurality and concurring opinions referred to as "traditional interstate navigable waters" or "navigable waters in the traditional sense." The cases cited by the plurality and Justice Kennedy in reference to traditional navigable waters emphasize the use of such waters as "highways for commerce." Use "*in* interstate commerce" is far broader than use *as* waterborne "highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 10 Wall. at 563.

Moreover, the unexplained reference to "navigable-in-fact" waters has bred confusion among field staff who have to apply the Guidance. Many of them do not know that "navigable-in-fact" is a legal term of art grounded in *The Daniel Ball*, and instead have read it literally to mean that a water is "navigable-in-fact" if it can "float a boat." Traditional navigable waters determinations issued in the wake of the Guidance reinforce that mistaken belief. Bah Lakes, an isolated 70-acre lake in Minnesota with 10-foot-deep water, was deemed a traditional navigable water because "its physical characteristics . . . indicate that the waterbody has the capacity to be navigated by watercraft." EPA, Memorandum for JD # 2007-04488-EMN (Jan. 16, 2008), http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/BahLakeEPA_memo2007-04488.pdf (hereinafter "Bah Lakes TNW Determination") at 2; *see also* EPA and Corps, Memorandum for MVP-2007-1497-RQM (Dec. 11, 2007), http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/TNW_MVP-2007-1497.pdf (hereinafter "Boyer Lake TNW Determination"). This is a far cry from the highways of commerce the Court described in

*The Daniel Ball* to explain what it meant when it said "navigable in fact."

Other traditional navigable waters determinations cite "affecting commerce" factors eerily reminiscent of the Migratory Bird Rule this Court rejected in *SWANCC*. A segment of the Little Snake River was deemed a traditional navigable water because it is "accessible to the public," various wildlife agencies float "various reaches of the . . . River . . . as part of aquatic life monitoring," and hunting and fishing lodges in the general vicinity are a "documented source of interstate travelers in the area." EPA and Corps, Memorandum for NWO-2007-1550 (Dec. 12, 2007), http://www.usace.army/mil/cw/cecwo/reg/cwa_guide/TNW_NWO-2007-1550.pdf (Little Snake River). Likewise, Boyer Lake in Minnesota was deemed a traditional navigable water because the public has access to the lake, the lake has the capacity to be navigated by watercraft, and some of the recreational fishermen using the lake come from North Dakota. *See* Boyer Lake TNW Determination at 2. The Bah Lakes traditional navigable waters determination mentioned above noted that the lake is approximately 60 miles from the North Dakota border and therefore "readily accessible to interstate travelers." Bah Lakes TNW Determination at 3.

None of these determinations meets the criteria of *The Daniel Ball* and its progeny. Rather, they go well beyond the limits recognized in the opinions of the plurality and Justice Kennedy in *Rapanos*. Of course, the farther up the watershed a traditional navigable water can be found, the easier it will be to find that other remote water bodies have a significant nexus to traditional navigable waters.

### B. Relatively Permanent Waters Must be Relatively "Permanent."

The Agencies specifically seek *certiorari* so that they can continue to apply their mistaken interpretation of the plurality's "relatively permanent waters" test. The Agencies' interpretation of this standard, however, completely misconstrues the plurality opinion by eliminating its hallmark – namely, that the waters in question be "permanent."

Emphasizing the significance of the statutory term "navigable," the *Rapanos* plurality determined that "waters of the United States" include "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 (plurality opinion) (emphasis added) (internal citations and quotations omitted). The plurality distinguished these "relatively permanent waters" from "ordinarily dry channels through which water occasionally or intermittently flows . . . transitory puddles . . . ephemeral flows of water . . . storm sewers and culverts . . . man-made drainage ditches, and dry arroyos in the middle of the desert." *Id*. at 733-34. By the plurality's view, even the "least substantial of the definition's terms, namely 'streams,' connotes a continuous flow of water in a permanent channel . . . " and "[u]nder no rational interpretation are typically dry channels" considered permanent waters. *Id.* at 733, 735.

The Agencies' definition of "relatively permanent waters" flouts the concept adopted by the plurality. Their Guidance says a water body may be deemed "relatively permanent" if it has "continuous flow at least seasonally (e.g., *typically three months*)."

Guidance at 5-6 (emphasis added). They cite footnote 5 of the plurality opinion, which, according to the Guidance, "explain[s] that 'relatively permanent' does not necessarily exclude waters 'that might dry up in extraordinary circumstances such as drought' or '*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.'" Guidance at 6 n.22, citing 547 U.S. at 733 n.5 (plurality opinion) (emphasis in original). This is a non sequitur. A statement that "seasonal" waters are "not necessarily excluded" does not mean that all waters that flow "seasonally" are *necessarily included*.[10]

Even more troubling, the Agencies have deleted from their quotation of the plurality opinion the example the plurality used to explain what it meant by a "seasonal river" – *i.e.*, "the 290-day, continuously flowing stream postulated by Justice Stevens' dissent." 457 U.S. at 733 n.5 (plurality opinion). The plurality's 290-day example has been excised, and the "seasonal river" it exemplified converted to 90 days of flow. Ninety days is 200 days less than 290 days. Moreover, using 90 days of flow to define a water as "relatively permanent" is completely at odds with the plurality's observation that "[c]ommon sense and common usage distinguish between a wash and a seasonal river." *Id.* The Agencies have set forth an

[10] The Agencies' creative interpretation of the plurality's opinion is not limited to the term "permanent." The Guidance observes that the plurality requires that wetlands have a "continuous surface connection" to relatively permanent waters, and then notes boldly that for purposes of the Guidance "[*a*] *continuous surface connection does not require surface water to be continuously present* . . . " Guidance at 6 n.25 (emphasis added).

interpretation of the relatively permanent standard that can allow jurisdiction over a wide range of non-permanent waters that are the *opposite* of permanent, such as streams that are ordinarily dry.

Notwithstanding the infirmities of the Agencies' three-month flow standard, some Corps districts and EPA regions are ignoring even this overbroad test and applying their own *ad hoc* test, allowing the "relatively permanent" standard to be met by flow for even *less than three months each year*. For example, in response to questions regarding how to apply the Guidance to ephemeral drainages in the arid West, an e-mail broadly circulated within the South Pacific Division in July 2007 states the following:

> EPA has indicated to us that the requirement for an RPW to have three consecutive months of flow annually is guidance only. They have indicated that any watercourse which has "predictable, seasonal flow" could be considered an RPW.

*See* E-mail from Corps official to various stakeholders (July 23, 2007, 3:34 p.m.) (attached hereto at Appendix A). As this communication suggests, field staff appear to be disregarding the Guidance because it is "guidance only," and thus applying their own *ad hoc* interpretation of what constitutes "relatively permanent" flow. Under a "predictable, seasonal flow" standard suggested by this field communication, an ephemeral drainage with any amount of flow, whether for one hour, one day, one week, or one month per year could be deemed jurisdictional provided such flow is merely "predictable" and "seasonal."

Defining a relatively permanent water as any "predictable, seasonal flow" – without regard to vol-

ume, duration, and frequency of flow, and without regard to the relationship to a traditional navigable water – is not only at odds with the *Rapanos* decision, but undermines the consistency and clarity the Agencies should be providing, preferably through rulemaking. Moreover, that certain districts are claiming that they can disregard the Guidance because it is not legally binding demonstrates the degree of confusion and legal risk clouding the Agencies' extensive CWA regulatory program. This regulatory overextension and confusion will continue unless this Court reviews the Court of Appeals' decision.

### C. Significant Nexus Must Be "Significant."

The Agencies have, since this Court decided *Rapanos*, heavily employed the "significant nexus" label to assert CWA jurisdiction (as an alternative to using the "relatively permanent waters" label, discussed above). But the Agencies have eliminated "significant" from the "significant nexus" test described by Justice Kennedy, instead asserting jurisdiction over all waters that "have a more than speculative or insubstantial effect on" traditional navigable waters. Guidance at 10. The Agencies' misapplication of the "significant nexus" test has, similar to their misapplication of the "relatively permanent waters" test, sweeping and impermissible implications for CWA jurisdiction.

In his concurring opinion in *Rapanos*, 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." *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). The

wetlands must "*significantly affect* the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780 (emphasis added). Justice Kennedy explained that there must be "substantial evidence" showing the significance of the connection to traditional navigable waters. *Id.* at 786. "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.'" *Id*. at 784. A "mere hydrologic connection" between a wetland and a traditional navigable water will not suffice absent "some measure of the significance of the connection for downstream water quality." *Id*. Nor will speculation suffice. *Id*. at 786. Justice Kennedy criticized the Agencies and the lower courts for finding jurisdiction based on the "*potential* ability of the wetland to act as a sediment basin" and a likelihood that downstream areas would "see an increase in *possible* flooding." *Id*. at 785-86 (emphasis added).

The Agencies' Guidance turns Justice Kennedy's significant nexus test upside-down, allowing jurisdiction when the nexus between a wetland and a traditional navigable water is "more than speculative or insubstantial." *See* Guidance at 10. Moreover, the Agencies' Guidance does not establish the "measure of the significance" Justice Kennedy called for. Thus, the Agencies define "significant nexus" to mean anything "more" than what Justice Kennedy said was insufficient. But "more than speculative or insubstantial" is not the same as "significant." *See Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003) (the "commonly understood" meaning of significant is "important").

The Agencies' significant nexus determinations made in accordance with the Guidance are, predictably, deficient. A significant nexus determination made for wetlands in Clark County, Washington, begins with a statement that there is a surface hydrological connection to a traditional navigable water, moves to a recitation of routine wetland functions, and concludes that the wetlands impact a traditional navigable water. EPA and Corps, Memorandum to Assert Jurisdiction for NWS-2007-749-CRS (Oct. 2, 2007), http://www.usace.army.mil/cw/cewo/reg/cwa_guide/Kennedy_N_RPW_NWS-2007-749-CRS.pdf (Clark County). *See also* EPA and Corps, Memorandum to Assert Jurisdiction for NWS-2007-435-NO (Aug. 29, 2007), http://www.usace.army.mil/cw/cewo/reg/cwa_guide/Kennedy_N_RPW_NWS-2007-435-NO.pdf (Snohomish County). Completely absent is a discussion of the extent to which the functions exist or the degree to which they impact the water quality of traditional navigable waters. A statement that certain wetlands provide wetland functions is tautological. More is needed than just "any connection" or, as here, any function. There must be a showing of the "*measure* of the significance of the connection for downstream water quality" before it can be determined whether the nexus rises to the level of "significant." *Rapanos*, 547 U.S. at 784 (Kennedy, J., concurring) (emphasis added).

## CONCLUSION

The public is confused, the circuits are split, and people are going to jail. For all of the foregoing reasons, the Court should grant the requested petition and clarify the meaning of "waters of the United States."

Respectfully submitted,

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September 22, 2008

**APPENDIX A**

From: Blaine, Marjorie E SPL [Marjorie.E.Blaine @spl01.usace.army.mil]

Sent: Monday, July 23, 2007 3:48 PM

To: Amy.Moore@ElPaso.com; Angela Barclay; territorial.chuck@frontiernet.net; Clint Glass; Fred Phillips; Greg Santo; Allen W. Gross; Jennifer Christelman; Chris Cawein; Jill Himes; jim@harcuvarco.com; Jim Tress; Karl Taylor; K_Thicks@yahoo.com; kwhitman@westlandresources.com; LSmith@ epgaz.com; RVanommere@aol.com; pnzomo @comcast.net; Rion Bowers; Stephen E. Glass; Russell C. Wise; David Taylor; Bowers, Garth; Catesby Willis; Kofi Awumah; Janice Hughes; Ken Kertell; Todd R. Bremner; SBreslin@tep.com; Avant, Paul; Larkin, Bob; PETER LIVINGSTON; Corby Lust; Chris Rod; D Warren; Don N. Anderson; Eric Koster; Gene_Rogge@URSCorp.com; Josh McEnany; kristin myers; Kim_Bidle@URSCorp.com; Martin, Marcie; Zeller, Mike -- ISG; Swaim, Phil; Tanner, Rene; Robert Pape; sce@corralesengineering.com; Udaya Prakash

Subject: FW: Rapanos Guidance

Attachments: Final JD Form.doc

One additional, important item I forgot to mention. My apologies....

The Corps is still looking at every wash that even MIGHT have been jurisdictional before the Rapanos guidance. The only things that are clearly not jurisdictional are swales, erosional features, and

manmade ditches constructed entirely in uplands which do not intersect, drain, or are not tributary to any water of the U.S. Since there is no definition of "small wash", we would like to look at everything and your proposed SN determination. So even really small washes . . . one foot wide which have an OHWM should be considered in your submittals. They will be determined to be jurisdictional or not on a case-by-case basis depending on whether they have a SN to a TNW.

Thanks again.

*Marjorie*

From: Blaine, Marjorie E SPL

Sent: Monday, July 23, 2007 12:34 PM

To: 'Moore, Amy M (Amy)'; Angela Barclay (cottonwood_environmental@cox.net); (territorial.chuck@frontiernet.net); 'Clint Glass'; 'Fred Phillips'; 'Greg Santo'; 'Allen W. Gross'; Jennifer Christelman; 'Chris Cawein'; 'Jill Himes'; (jim@harcuvarco.com); 'Jim Tress'; Karl Taylor (Karl.Taylor@co.mohave.az.us); K_Thicks@yahoo.com; kwhitman@westlandresources.com; LSmith@epgaz.com; 'RVanommere@aol.com'; 'pnzomo@comcast.net'; 'Rion Bowers'; 'Stephen E. Glass'; 'Russell C. Wise'; 'David Taylor'; 'Bowers, Garth'; 'Catesby Willis'; 'Kofi Awumah'; 'Janice Hughes'; 'Ken Kertell'; 'Todd R. Bremner; 'SBreslin@tep.com'; 'Avant, Paul'; 'Larkin, Bob'; 'PETER LIVINGSTON'; 'Corby Lust'; 'Chris Rod'; 'D Warren'; 'Don N. Anderson'; 'Eric Koster'; 'Gene_Rogge@URSCorp.com'; 'Josh McEnany'; 'kristin myers'; 'Kim_Bidle@URSCorp.com'; 'Martin, Marcie'; 'Zeller, Mike — ISG'; Swaim, Phil; 'Tanner, Rene'; 'Robert Pape'; 'sce@corralesengineering.com'; 'Udaya Prakash'

Subject: FW: Rapanos Guidance

I wanted to provide you all with a brief update on the Rapanos Guidance and the Corps' implementation of this guidance.

If you are working on delineations for Pima County, we are currently gathering the documentation to determine if the Rillito River and/or the Santa Cruz River are TNWs. We intend to meet on July 31st to

make a determination that will go to Headquarters for approval. We are hoping to receive approval from HQ quickly--within a couple of weeks. Therefore, it will be difficult for us to verify any jds until we know what the approved TNWs are for Pima County. Obviously, if you submit a jd with a significant nexus (SN) determination to the Colorado River, the results might be very different than if you are making a SN determination to the Rillito or Santa Cruz River. As a Branch, Arizona is also looking at the Virgin, Verde, Salt, Gila, San Pedro, and New Rivers as well as several creeks (i.e. Skunk Creek in Maricopa County). All of these will be submitted to HQ at one time for their approval.

EPA has indicated to us that the requirement for an RPW to have three consecutive months of flow annually is guidance only. They have indicated that any watercourse which has "predicatable, seasonal flow" could be considered an RPW. They have also stated that once a watercourse is determined to be an RPW, everything downstream of it would be jurisdictional.

When submitting jds, please be sure to submit a cd with all information or a third copy of the entire submittal for transmittal to EPA. If you submit a cd, please try to keep the submittal to 3 MB so I can transmit it electronically. Attached is an MS Word doc of the new jd form. You are welcome to complete it and submit it to us as it will help you define the information you need and will concisely help to submit it to us. It will also help us as it will expedite our completion of the form; please note, however, that we are under no obligation to use the form you submit if we disagree with it. There are directions for completing the form starting on page 47 of the

guidebook. The link to all the Rapanos guidance (including the guidebook) is:

http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/cwa_guide.htm

When you submit hydrology information, please keep it concise. We don't have the room to store 2-inch binders of drainage reports. For SN determinations, we are looking for volume, duration, frequency of flow (please provide the Q100); size of drainage area; distance to TNW; average annual rainfall; physical, chemical, biological significance to the closest TNW.

Please feel free to share this information. My apologies to anyone I might have missed that you forward this to.

*Marjorie Blaine*
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<<Final JD Form.doc>>

From: Blaine, Marjorie E SPL

Sent: Tuesday, June 05, 2007 11:07 AM

To: Amy.Moore@ElPaso.com; Angela Barclay (cottonwood_environmental@cox.net); (territorial.chuck@frontiernet.net); cglass@cmgdrainage.com; fphillips@commspeed.net; Greg Santo (greg.santo@dot.pima.gov); halgros @amug.org; Jennifer Christelman; Chris Cawein (chris.cawein@rfcd.pima.gov); jillhimes@cox.net; (jim@harcuvarco.com); Jim; Karl Taylor (Karl.Taylor@co.mohave.az.us); K_Thicks@yahoo.com; kwhitman@westlandresources.com; L.Smith@epgaz.com; 'RVanommere@aol.com'; pnzomo@comcast.net; rbowers@westlandresources.com; sglass@gaultgroup.com; 'Russell C. Wise'; 'David Taylor'; 'Bowers, Garth'; 'Catesby Willis'; 'kawumah@prestigeengineering.com'; jhughes@psomas.com'; 'Ken Kertell'

Subject: Rapanos Guidance

As many of you have heard by now, the Rapanos Guidance was announced by the Corps and EPA a short time ago. We will be receiving copies of the guidance about the same time as you do; we've been given no advance copies. The Los Angeles District Regulatory Division will be meeting today to discuss the guidance, in general. Please feel free to pass this email on to anyone else in your office or other consultants or your clients.

The guidance is evidently quite lengthy and it will take us some time to fully understand it and to also implement a procedure for verifying jds within the Los Angeles District and also the South Pacific

Division so we are consistent. It appears, though, that there will be some requirement for EPA approval of jds made under "significant nexus" and so we will also need time to sort that out with EPA Region IX as to the procedure.

We appreciate your patience to date on this lengthy process and hope that you see a light at the end of the tunnel. We must ask for your continued patience for just a few weeks more as we digest the guidance and determine the best implementation for it within our District and Division and with EPA. We anticipate that you can begin submitting jds within three weeks and ask that you, again, be patient with us until that time. I will send out another email when we are ready to begin accepting jds. Our first priority after the next few weeks is to verify the jds under the new guidance that we've been holding for the last 10-12 months. Then we will begin to review new jds.

If you have recently submitted a jd and asked us to do it under pre-Rapanos guidance as your client was willing to take the risk of having it redone, we will be reviewing those under the guidance to be received today. We will also be required to review any NWP PCNs that do not already have jds under the new guidance so if you planned to submit a NWP PCN shortly, we would appreciate your patience in that as we will not be able to process and issue the NWP verifications until we have our district implementation in place.

This is going to be a learning process for us all and I believe the review time for jds is going to be significantly longer until we get all the kinks ironed out and the backlog addressed. We truly appreciate your patience and are happy to answer any questions or assist you in any way we can. Please feel free to

call or email me if you have questions but my knowledge on this guidance will be minimal at this time. I will also be out of the office from June 8th-June 18th attending to family matters of urgency. I expect upon my return I will be able to fully assist you with any questions and then I will advise you when we are ready to accept jds. Again, that should be within just a few weeks.

Thank you all very much. I look forward to working with you in the future and please advise your clients we will do the best we can.

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