January 15, 2008

U.S. Army Corps of Engineers; DOD;
and Environmental Protection Agency
Water Docket
Environmental Protection Agency
Mailcode:2822T
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: *Rapanos* Guidance - Docket Number EPA-HQ-OW-2007-0282

The Pacific Legal Foundation appreciates the opportunity to provide the following comments on the Memorandum of Understanding between the EPA and the Corps of Engineers entitled Clean Water Act Jurisdiction Following the U.S. Supreme Court 's Decision in Rapanos v. United States & Carabell v. United States. Pacific Legal Foundation represented John Rapanos in the *Rapanos* case and has litigated numerous cases addressing federal jurisdiction under the Clean Water Act.

The Controlling Opinion

On page 3 of the memorandum, the agencies assert: "When there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices." But this is a misstatement of the law.

In the 1977 case of *Marks v. United States*[1] the Supreme Court stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members **who concurred in the judgments** on the narrowest grounds."[2] While this rule has been difficult to apply in some cases, it is the only rule sanctioned by the Supreme Court for interpreting its split decisions.[3] "Narrowest grounds" has been interpreted to mean that opinion which is "a logical subset of other, broader opinions."[4] Put another way:

> The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rationale basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.[5]

In the *Rapanos* case, the Scalia plurality appears more narrowly drawn in that it is a

logical subset of the Kennedy test. The narrow plurality test is more like strict scrutiny whereas the broader Kennedy test is more like rational basis. Even the dissent thought it would be an "unlikely event that the plurality test is met but Justice Kennedy's is not.[6]

Thus, under *Marks*, the Scalia plurality is controlling. This makes sense from a pragmatic standpoint as well because a water body that satisfies the plurality test would also satisfy Justice Kennedy and even the dissent such that the jurisdictional determination would garner all nine votes on the Court for unanimous support.

Applicability of the Guidance

The agencies assumes that Clean Water Act jurisdiction may be established based on either the *Rapanos* plurality approach (described below) or the Kennedy "significant nexus" approach. But this is inconsistent with case law. So far, the Seventh, Ninth, and Eleventh Circuit Courts of Appeals have decided that the Kennedy test is controlling and federal jurisdiction **must** be based on the establishment of a "significant nexus" between the regulated wetland (or other water body) and a downstream traditional navigable water.[7] In these jurisdictions, which take in a large part of the United States, the agencies may not rely on the plurality approach. To that extent, the guidance is inapplicable in those jurisdictions.

The Plurality Test

The memorandum provides an incomplete description of the plurality jurisdictional test in *Rapanos*. This incomplete description leads to an erroneous understanding of the plurality test and an incorrect application of the *Rapanos* decision.

According to the memorandum, page 2, the plurality opinion authorizes the regulation of "wetlands with a continuous surface connection" to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters. But the plurality required much more:

> In sum, 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."[8]

The surface water connection must be not only continuous but the connection must be such that "there is no clear demarcation between 'waters' and wetlands."[9] The wetland must be "as a practical matter *indistinguishable*"[10] from the relatively permanent body of water:

> Thus, establishing that wetlands ... are covered by the Act requires two findings: First, that the **adjacent** channel contains a "wate[r] of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, **making it difficult to determine where the "water" ends and the**

"wetland" begins.[11]

Therefore, to satisfy the jurisdictional test under the *Rapanos* plurality, the agencies must establish: (1) that the water body is a "wetland;" (2) that the "wetland" is "adjacent" (i.e., abutting)[12] a relatively permanent body of water known in ordinary parlance as a stream, ocean, river or lake; (3) that the abutting stream, ocean, river or lake is connected to a "traditional interstate navigable water;" and (4), that the wetland and the adjacent water body are indistinguishable so as to make it difficult to determine where the "water" ends and the "wetland" begins.

Traditional Navigable Waters (i.e., "(a)(1) Waters") and Their Adjacent Wetlands

On page 4 of the memorandum, the agencies claim they will regulate all traditional navigable waters and wetlands "adjacent" to those waters. According to the agencies, "adjacent" means "bordering, contiguous, or neighboring." Page 5. But this categorical assertion of authority is inconsistent with both the plurality opinion and the Kennedy opinion.

In *Rapanos*, the plurality expressed incredulity at the breadth the Corps had given the plain term "adjacent" in the regulations. For example, the four justices noted the Corps had concluded that wetlands are adjacent to covered waters under the existing regulations, and are jurisdictional, if they are hydrologically connected "through directional sheet flow during storm events" to navigable waters; or, they lie within a 100-year floodplain that is connected to navigable waters.[13] The Corps had also concluded that presence within 200 feet of a tributary automatically renders a wetland "adjacent" and jurisdictional as well as wetlands separated from flood control channels by 70-foot-wide berms.[14]

But the plurality roundly rejected this regulatory definition of "adjacent" and offered a definition more consistent with the High Court's decisions in *Solid Waste Agency of Northern Cook County ("SWANCC") v. United States Army Corps of Engineers*[15] and *United States v. Riverside Bayview Homes, Inc*[16]. As the plurality observed, *SWANCC* "confirmed that *Riverside Bayview* rested upon the inherent ambiguity in defining where water ends and abutting ("adjacent") wetlands begin, permitting the Corps' reliance on ecological considerations only to resolve that ambiguity in favor of treating all abutting wetlands as waters." *Rapanos*, 126 S. Ct. at 2226. The plurality thus equated the term adjacent with abutting.

As the plurality took pains to point out, "[t]he phrase 'adjacent wetlands' is not part of the statutory definition that the Corps is authorized to interpret, which refers only to 'the waters of the United States.' In expounding the term 'adjacent' as used in *Riverside Bayview*, we are explaining our own prior use of that word to interpret the definitional phrase 'the waters of the United States.' However ambiguous the term may be in the abstract, as we have explained earlier, 'adjacent' as used in *Riverside Bayview* is not ambiguous between 'physically abutting' and merely 'nearby.'"[17] The only conclusion that can be drawn from this inconsistency is that the regulatory definition of "adjacent," on which the memorandum relies, is invalid and of no effect under the plurality approach.

The same conclusion must be drawn from the Kennedy approach as well. Although Justice Kennedy would allow the regulation of wetlands "adjacent" to traditional navigable waters based on *Riverside Bayview*, he observed that the only factual situation addressed by that case involved wetlands physically abutting traditional navigable waters and concluded that case could not be used to justify further regulation.[18] In other words, Justice Kennedy, like the plurality, gave the term "adjacent" its ordinary meaning–as directly adjacent or physically abutting.

Thus, under any interpretation of *Rapanos*, a categorically jurisdictional wetland must at least physically abut a traditional navigable waterway. The assertion of federal authority over all wetlands that are "bordering, contiguous, or neighboring" traditional navigable waters, therefore, goes too far.

Relatively Permanent Non-navigable Tributaries

The agencies asserts jurisdiction over all "natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water." Page 5, fn 21. But under the plurality opinion it is not the presence of water alone that determines jurisdiction. As noted above, under the plurality opinion, a jurisdictional water "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.'[19] The emphasis is on "ordinary parlance," not on "relatively permanent." Clearly a ditch or a drain is not a stream. In fact, most man-made conduits would not be characterized, in "ordinary parlance," as "streams[,] ... oceans, rivers, [and] lakes." This requirement is missing entirely from the guidance. The guidance therefore exceeds the plurality test for jurisdictional waters.

Wetlands "adjacent" to Non-Navigable Tributaries

The memorandum states the agencies will assert jurisdiction "over those adjacent wetlands that have a continuous surface connection to such [nonnavigable] tributaries (e.g., they are not separated by uplands, a berm, dike, or similar feature.)" Page 5-6. But this jurisdictional claim is inconsistent with both the plurality and Kennedy opinions.

As noted in some detail above, under the plurality approach the wetlands must be "indistinguishable" from the covered waterway (i.e., stream, river lake, etc.) in the same way that the wetland was indistinguishable from the traditional navigable waterway in *Riverside Bayview*. In other words, the agencies must demonstrate "that the wetland has a continuous surface connection with that water, **making it difficult to determine where the "water" ends and the "wetland" begins**."[20] This requirement precludes categorical regulation of wetlands adjacent to nonnavigable water bodies, but the guidance completely ignores this requirement.

Additionally, according to Justice Kennedy, the agencies may **categorically** regulate wetlands adjacent to nonnavigable tributaries **only** if they adopt formal regulations to that effect.

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Justice Kennedy discussed the dissent's assertion that the reasoning in *Riverside Bayview* as to wetlands directly adjacent to navigable-in-fact waters could apply equally to all non-isolated

wetlands, as the Corps had argued based on the existing regulations.[21] But Justice Kennedy opined: "This, though, seems incorrect."[22] "The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, however remote and insubstantial—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case."[23]

> When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable application of the statute.[24]

From this, Justice Kennedy reasoned that if the Corps wished to regulate wetlands adjacent to tributaries categorically, like the physically abutting wetlands in *Riverside Bayview*, it would need to determine whether, due to volume of flow, proximity to navigable waters, or other relevant considerations, the tributaries perform important functions for an aquatic system incorporating navigable waters.[25] Justice Kennedy concluded, as he must, that the Corps' existing standard for tributaries, however, provides no such assurance.[26] That is to say, neither the current case law nor the existing regulations are legally adequate to support federal regulation of wetlands based on their adjacency to tributaries as jurisdictional waters.

It should be clear that the *Rapanos* decision does not authorize categorical regulation of wetlands adjacent to nonnavigable tributaries. This requires a case by case analysis under the plurality or the Kennedy approach. And, no claim can be made that five justices support the categorical regulation of wetlands adjacent to nonnavigable water bodies.

This jurisdictional claim is completely without authority.

Wetlands Adjacent to Other Wetlands

All three factions on the *Rapanos* court called for the formal adoption of new regulations. This would not have been necessary if the Justices felt the existing regulations were still valid after *Rapanos*. They are not. Nevertheless, the agencies continue to operate as if the existing regulations were still in effect. But the agencies are not consistent in their application of the existing regulations. For example, the existing regulations specifically exclude from federal jurisdiction those wetlands that are adjacent to other wetlands: "[t]he term 'waters of the United States' means . . . wetlands adjacent to waters (other than waters that are themselves wetlands)."[27]

This definition is inconsistent with the memorandum which simply does not address the

exclusion. If the agencies are no longer recognizing this definition of "waters of the United States," they should say so. If they are recognizing this definition, they should explain how the definition is consistent with the guidance document.

In addition, it appears that Corps field personnel are "fudging" on the terms found in the memorandum. Although the guidance document indicates that the agencies will categorically regulate wetlands that "directly abut" a tributary (see page 6), this abutting requirement is circumvented by combining non-abutting wetlands with nearby wetlands and calling the wetland complex "abutting." Not only is this approach inconsistent with the guidance document itself, but if they are part of a wetland complex these non-abutting wetlands may well be excluded under the regulatory definition of "waters of the United States" as wetlands adjacent to other wetlands.

Application of the "Significant Nexus" Test

For waters not categorically regulated, the memorandum states the agencies will demonstrate the water body has a significant nexus with traditional navigable waters. However, the guidance document is not clear on the relative weight to give to the factors considered. Therefore, it should be noted that the Kennedy "significant nexus" test is very exacting:

> Wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, **and** biological integrity of other covered waters more readily understood as "navigable."[28]

This test is written in the conjunctive with emphasis on the word "and." On its face, the test calls for a demonstration that the subject wetland has a significant chemical effect on a traditional navigable water, **and** a significant physical effect, **and** a significant biological effect. By its plain terms, all three effects must be shown. A single significant effect is insufficient to establish federal jurisdiction. The guidance document does not require this and is therefore inconsistent with the Kennedy opinion.

The guidance document is inconsistent with the Kennedy opinion in another important respect. According to the memorandum, it is enough if the agencies show that the subject wetlands "have a more than speculative or insubstantial effect" on the traditional navigable water. See page 10. This is incorrect. There is a huge gap between an "insubstantial effect" and the "significant effect" required by the "significant nexus" test. A fair reading of the Kennedy opinion will reveal that the Justice was looking for a substantial effect and not merely anything more than a speculative or insubstantial effect. Therefore, if the guidance is to be true to the Kennedy opinion, it must require a demonstration of a **substantial** chemical, physical **and** biological effect.

Sincerely,

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1. 430 U.S. 188 (1977).

2. *Id.* at 193 (emphasis added).

3. *See In re Michael Francis Cook*, 322 B.R. 336, 341 (2005) ("The only approach approved by the Supreme Court is the 'narrowest grounds' approach.").

4. *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991)

5. Ken Kimura, *A Legitimacy Model For The Interpretation Of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-1604 (1992)

6. *Rapanos*, 126 S. Ct. at 2265 n.14. (Justice Stevens dissenting) (emphasis added)

7. *See U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006; *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *U.S. v. Robison*, 505 F.3d 1208 (11th Cir. 2007).

8. Id. at 2225.

9. *Id.* at 2226.

10. *Id*. at 2234.

11. *Id.* at 2227 (emphasis added).

12. The Scalia plurality rejected the agencies' regulatory definition that "adjacent" means "bordering, contiguous, or neighboring." Instead, the plurality adopted the ordinary meaning of the term–"adjacent" means abutting. Id. at 2225-2226.

13. *Rapanos*, 126 S. Ct. at 2218.

14. *Id*.

15. 531 U.S. 159 (2001).

16. 474 U.S. 121 (1985).

17. *Rapanos*, 126 S.Ct. at 2229-2230.

18. *Id.* at 2248.

19. *Id.* at 2225.

20. *Id.* at 2227 (emphasis added).

21. *Id*. at 2248.

22. *Id*.

23. *Id*.

24. *Id.* at 2249.

25. *Id*.

26. *Id*.

27. 33 CFR § 328.3(a) and (a)(7).

28. *Id.* at 2248 (emphasis added).