PACIFIC LEGAL FOUNDATION

Environmental Protection Agency and Army Corps of Engineers

Hearing on Proposed Regulations Interpreting "Navigable Waters" under the Clean Water Act

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Reardon Convention Center, Kansas City, Kansas

Testimony of Tony Francois

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Good Morning, my name is Tony Francois, I am a senior attorney with the Pacific Legal Foundation. I would like to thank the agencies for holding this hearing and providing this opportunity to testify. I also want to commend the agencies on the important work they have done so far to reform the regulatory interpretation of the statutory team "navigable waters." While the balance of my remarks highlight improvements that remain to be made, the proposal is a good beginning.

The agencies should anchor their interpretive effort in the text of the statute, where they will find little evidence that "navigable waters" includes significant waters upstream of navigable-in-fact waters. *Riverside Bayview Homes* is not to the contrary. That decision offers little analysis of the text itself, and we think the agencies are correct to question their prior practice of applying *Riverside Bayview Homes* broadly.

The Supreme Court in *SWANCC* narrowed *Riverside Bayview Homes* by saying that the word "navigable" in the text of the Act is significant, and by noting that the legislative history of the Act shows no more than Congress' historic focus on navigation. These statements undermine interpretations of "navigable waters" that employ the broader aspects of the Commerce power, and so we also think the agencies are correct to question their prior practice of narrowly applying *SWANCC*.

not even precedentially binding on the Supreme Court. Clearly, the Court has unfinished business on the meaning of "navigable waters."

While we all await that clarity, the agencies are tasked with a rule based on the *Rapanos* plurality. Unfortunately the proposal misses the mark in important ways due to the agencies effort to read the *Rapanos* plurality and concurrence coherently, to tease a single rule out of those two widely disparate opinions. But the Supreme Court's *Marks* decision precludes this approach to fractured decisions. If the agencies are going to use the plurality, they must use the plurality as they find it, not blended with the concurrence.

Proper application of the plurality would limit the proposal to continuously flowing tributaries, not intermittent ones, with a threshold flow criteria, and would allow at most for 90 or 120 days without continuous flow. This is the only way to give effect to the plurality's statement that the "ordinary presence of water" is determinative, and that tributaries must be what would be called a stream in ordinary parlance.

And, proper application of the plurality would only allow regulation of wetlands that comingle with navigable-in-fact waters or regulable tributaries to the degree that one cannot identify where one ends and the other begins.

Thank you.