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Assessing Jurisdiction Under the New Clean Water Act Guidance

Editors' Summary

Two decisions of the U.S. Supreme Court have created enormous confusion around the question of what U.S. waters are subject to federal regulation. On May 2, EPA and the U.S. Army Corps of Engineers published proposed joint guidance that intends to clarify this issue by describing how the agencies will identify waters protected by the CWA. The document is intended to assist agency staff in implementing the Supreme Court's rulings in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC) *and* Rapanos v. United States. *The new guidance, which would supersede existing guidance documents (including 2008 Bush Administration guidance), seeks to reaffirm jurisdiction over important waters that currently lack clear protection under the law, and to provide clearer, more predictable guidelines to reduce uncertainty and delay for businesses and regulators. Although the guidance lacks the force of regulation, it is expected to be the first step in a formal rulemaking process. On June 28, 2011, ELI convened a panel to discuss the significant elements of the guidance, assess its likely impact, and highlight the challenges that lay ahead.*

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Bruce Myers: We are delighted to convene this panel to discuss the draft guidance on identifying waters protected by the Clean Water Act, jointly issued by the U.S. EPA and the U.S. Army Corps of Engineers.

Many of you here today and on the phone are seasoned lawyers who know a lot about the Clean Water Act,[1] and a lot about this particular set of issues, which have a long and storied history—for better or worse. But, we also have people in attendance—law students, reporters, etc.—who are coming to these issues for the first time. So, I want to very briefly set the stage for the panelists' discussion. They're really going to zero in on the guidance document as it stands in draft form, the reasons behind it, and what the implications might be from different perspectives.

First of all, I want to be clear that what we're talking about in the Clean Water Act jurisdiction arena is simply whether the Act applies to a particular body of water. So, for example, does federal law have anything to say about a builder who is going to disturb or fill a specific wetland feature? Does a regulated party need to obtain a federal permit before it takes actions that affect certain kinds of waters?

We're not yet talking about whether you ultimately can or can't impact the water, but simply whether the federal Clean Water Act is implicated at all—and, typically, whether you need a permit. The obvious starting point here is the text of the Clean Water Act. Well, the federal Act and all of its programs apply to "navigable waters." That is a term of art. That term is not so helpfully defined by the Act as "waters of the United States."

You can see that this does not provide much guidance as to exactly which waters are included and not included, which has led us to where we are today. What *are* waters of the United States? The agencies have themselves answered this question by way of regulation. Now, we get to the current state of affairs. Twice in the last decade, the U.S. Supreme Court has called into doubt the reach of the federal Act, as it has been interpreted by the agencies.

To set the stage, I'm going to very quickly cover these cases—we could spend forever talking only about them. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[2] affectionately known and beloved as the *SWANCC* case, the Court held in 2001 that the Clean Water Act did not, in fact, apply to "an abandoned sand and gravel pit in northern Illinois, which provides habitat for migratory birds."

Editors' Note: Materials presented at this seminar may be downloaded at http://www.eli.org/Seminars/past_event.cfm?eventid=628.

1. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
2. 531 U.S. 159, 31 ELR 20382 (2001).

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SWANCC spawned immediate confusion over what waters are covered by the Act and what waters are not covered. It created a cottage industry of so-called post-*SWANCC* litigation. Ultimately, for several years, you had people hunting for some kind of hydrological connections, a link between the water at issue and more traditional downstream waters.

The Supreme Court revisited the jurisdictional question in 2006 in the *Rapanos v. United States*[3] case. There, the Court considered whether wetlands are jurisdictional in situations where they are situated alongside a non-navigable body of water, such as a small stream or ditch, that empties into downstream waters—or where the water features are separated by a berm, an impermeable barrier, from those non-navigable waters that link to downstream waters. You're already getting a sense that this gets complicated and messy.

The Court train-wrecked in a 4-1-4 ruling, with no opinion carrying all five Justices. The only thing five Justices could agree on was reversing what the lower court did. This led us to where we remain today; to determine whether any particular water body implicates federal law, you have to look at two legal tests. The first one is Justice [Antonin] Scalia's plurality opinion test, which would find coverage under the Act where a wetland: (1) has a continuous surface water connection with (2) a relatively permanent, standing, or continuously flowing body of water that is connected to a traditional interstate navigable water.

Justice [Anthony M.] Kennedy, on the other hand, issued a one-man concurring opinion, and he came up with the "significant nexus test," which we're going to be talking about in greater detail today, He said that he would find Clean Water Act coverage for a wetland, if the wetland, either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, or biological integrity of any traditional navigable waters, or TNWs, as it tends to get abbreviated.

Okay, so you've got the Justice Kennedy test, which is potentially quite broad in its application—could bring in a lot of waters—but is cumbersome to apply. There could be a real administrative burden with carrying out the significant nexus test, at least on a case-by-case basis. Then, there is Justice Scalia's test, which is likely far narrower in the kinds and number of waters it picks up, but you can probably apply it a little more easily. And here, then, we have another cottage industry of litigation: post-*Rapanos*, instead of post-*SWANCC*. The lower courts are struggling to figure out what the significant nexus test means, as well as which of the tests from *Rapanos* actually applies. There's a split right now among the circuits as to whether it's *only* Justice Kennedy's test or whether you can show jurisdiction under *either* test. All of this, in the real world, has serious implications: delay; expense; gaps in federal enforcement; and, of course, the loss of protection for certain waters.

So, how do we escape from this quandary? One possibility is that the U.S. Congress steps in and really clarifies what it meant in 1972 with the Clean Water Act—or, at least, what it intends the Act to mean now. That has not yet happened. Although, there have been some bills introduced that are contenders, including as recently as last year, they've not really gotten traction. Another possibility is for the agencies to step in by way of regulations—or, as we are now seeing, by way of guidance—to try to bring clarity back to the situation, at least within the four corners of the Act. The agencies can't, of course, undo anything that the Supreme Court has said—that's really up to Congress.

This guidance we're talking about today has received a lot of attention and has been very controversial, certainly for a guidance document. You've got different folks who stepped in to oppose it or to support it very publicly. You've had bills introduced on the Hill that would, for example, strip the Corps of funding to be able to move forward with the guidance.

We have a top-notch group of panelists here today: I can't think of a better group to delve into these issues surrounding the draft guidance document. First, immediately to my right, we have Donna Downing. Donna is the jurisdiction team leader with the Office of Wetlands, Oceans, and Watersheds at [the U.S. Environmental Protection Agency (EPA)]. Next to her, we have David Olson. He's with the U.S. Army Corps of Engineers Directorate of Civil Works, Operations, and Regulatory Community of Practice. To his immediate right, we have Larry Liebesman, partner with Holland & Knight. And finally, last but not least, we have Jan Goldman-Carter, Wetlands and Water Resources Counsel with the National Wildlife Federation.

As I hand it over to Donna, I do want to highlight that we're very fortunate to have two representatives of these agencies here with us today. I think it goes without saying, and yet, I'm going to say it: there will be things that they simply cannot get into, where there is a pending draft guidance document on which public comment is still being taken. So, let's be aware of that over the course of the presentations, and certainly, in the Q&A. They're going to have to be a bit judicious in what they feel that they can tackle in terms of specific subject matter. And with that, I will pass it to Donna.

Donna Downing: Thanks, Bruce. I'd like to thank Bruce and Rebecca and the Environmental Law Institute for inviting me here today, and it looks like we have a good crowd, both here and on the phone. What I'm going to do is give an overview of the proposed guidance, touching on the public comment process, and then talk a bit about the proposed guidance, and then pass it to my colleague, Dave Olson, for more discussion about how jurisdictional determinations—determinations of whether or not a water is protected by Clean Water Act programs, including §404—actually get done in the field. So, that's my charter.

Some process observations, as Bruce indicated: we have proposed guidance put out for public comment. The public comment period was just extended to July 31st, same process as announced in the *Federal Register* notice, which was

3. 547 U.S. 715, 36 ELR 20116 (2006).

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printed, I believe, on May 1st. You'll also note that Dave and I are the designated contacts, so we anticipate becoming America's pen pal a little bit, but the comments themselves are submitted through regulations.gov. And I think we have something like 1,300 comments so far, and they're available for anyone to look at on regulations.gov. So, if you want to see what's going on, if you're commenting, you might be able to key your comments off of someone else's—that's available and possible to do.

The guidance will not be made final and take effect until after consideration of those comments. It's not currently in effect, unlike, for example, the first *Rapanos* guidance, which was made available for public comment for nine months as it was being implemented, to better understand how the implementation was going. This proposed guidance is not in effect. So, the guidance currently in effect continues to be the December 2008 *Rapanos* guidance and the January 2003 *SWANCC* guidance.

As indicated in the proposed guidance itself, and in discussions surrounding guidance roll-out for public comment, EPA and the Corps do expect to undertake notice-and-comment rulemaking to further clarify the regulation—the extent of Clean Water Act jurisdiction consistent with *SWANCC* and *Rapanos*. That's sort of the overview of the process.

We don't know how many comments we'll get. We got about 66,000 comments on the last *Rapanos* guidance. You'll see, in the *Rapanos* world, the word "significant." Suddenly, it makes you nervous. Substantial numbers of those were form letters, but we anticipate that we'll get a lot of interest.

So, what about this proposed guidance? A couple of general observations: Bruce mentioned one of the challenges in applying *Rapanos* is figuring out which standard applies. Is it the Justice Kennedy significant nexus standard or the plurality, the relatively permanent standard authored by Justice Scalia? The proposed guidance continues to reflect the approach in the December 2008 guidance, namely that it's most consistent with *Rapanos* to assert jurisdiction over a water if it satisfies either of those standards, be it the relatively permanent standard of the plurality or significant nexus standard under justice Kennedy. As Bruce indicated, the circuits are split on that, but a substantial majority of them seemed to view both as relevant.

The guidance discusses waters of the United States generally, not specifically under the §404 program, although both *SWANCC* and *Rapanos* arose in a §404 dredge permit context. And that reflects the fact that the Clean Water Act has one definition of waters of the Untied States. for all CWA programs affecting "navigable waters," with §502 helpfully defining "navigable waters" as "waters of the United States." When finalized, the proposed guidance would supersede the currently in effect December 2008 guidance and that January 2003 guidance.

And finally, just as a general observation, I need to point out, as the proposed guidance does a number of times, guidance is not a rule. So, it's not binding; it lacks the force of law. The guidance does, however, reflect how the agencies interpret the Clean Water Act and our current regulations.

So, with those process descriptions and general observations, let me walk through some of the provisions in the proposed guidance. I think those who have been preparing comments are probably familiar with the provisions. It might be new or surprising to others who have other things to do with their time and have been able to spend it on those other things.

First, the guidance talks about TNWs [traditionally navigable waters]. It indicates, consistent with the case law, that TNWs are per se jurisdictional. You show that it's a TNW—that water is jurisdictional. It also indicates that TNWs include §10 waters under the Rivers and Harbors Act, as well as waters adjudicated to be a TNW. For example, the Great Salt Lake was found by a court to be a TNW; although, by the way, it's not a §10 water. TNWs, also, include waters that are navigable in fact. To be considered navigable in fact, the proposed guidance indicates that navigable in fact can be navigable in the past, present, or in the future with reasonable improvements. The guidance indicates that if the water is navigable in fact because it's susceptible to commercial navigation in the future, it indicates that that susceptibility can be determined by a number of factors, including the water's physical characteristics. Is it big enough to handle water craft, for example, with the possibility of future commercial navigation? This is mirroring case law on the susceptibility for it to be navigable in fact. The proposed guidance, for example, cites the 2002 [U.S Court of Appeals for the District of Columbia (D.C.)] Circuit case, *FPL Energy Marine Hydro v. FERC*,[4] where there was a trip taken solely for the purpose of deciding could the water be navigated. That was viewed by the D.C. Circuit in 2002 as sufficient to indicate susceptibility to commercial navigation.

How does the proposed guidance differ from the December 2008 or the longstanding approach that the agencies have had toward TNWs? The proposed guidance has the same categories of TNWs that have been and are in the current guidance. It differs from the current guidance primarily in the type of information—a type of evidence—necessary to show that a water is navigable in fact, particularly that it is susceptible to future commercial navigation—and it clarifies that specific plans to develop commercial navigation are not required to be considered susceptible.

So, that's the approach for TNWs. TNWs are very important, because, under the Justice Kennedy standard, a water's relationship to TNWs helps decide if that water is itself jurisdictional as a water of the United States.

The proposed guidance then goes on to talk about interstate waters. It indicates that interstate waters are jurisdictional per se and discusses the language of the Clean Water Act that indicates Congress intended the term navigable waters to include interstate waters—without imposing

4. 287 F.3d 1151, 1157 (D.C. Cir. 2002).

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a requirement that those interstate waters themselves be TNWs or have a significant nexus to a TNW. Interstate waters are, by the way, an issue the Supreme Court has never addressed. Neither *SWANCC* nor *Rapanos* nor the *Riverside Bayview*[5] case in the mid-1980s that looked at the scope of waters in the United States touched on interstate waters.

But precursor statutes to the Clean Water Act, the Federal Water Pollution Control Act, always subjected interstate waters and the tributaries to jurisdiction. In light of Justice Kennedy's opinion in *Rapanos*, the proposed guidance reflects that the agencies think it's reasonable to assert jurisdiction over tributaries, adjacent wetlands, and the like, where they have a significant nexus to an interstate water as well as to a TNW. As a result, interstate waters, and their tributaries and adjacent wetlands, are treated in the proposed guidance similar to TNWs and their tributaries and adjacent wetlands.

For example, tributaries to the interstate waters are jurisdictional, and they have a significant nexus to that interstate water. Wetlands immediately adjacent to the interstate water are jurisdictional per se. That reflects, again, the approach of wetlands adjacent to TNWs. Wetlands adjacent to tributaries to an interstate water similarly need a significant nexus. The significant nexus need not be to TNWs under the proposed guidance, but could be to an interstate water.

There is no difference in the discussion of interstate waters from existing guidance, because interstate waters have never been clarified in guidance. They've been in the regulatory definition of "waters of the United States" since the late 1970s, however.

Justice Kennedy indicates that a water is jurisdictional where, either by itself or in combination with similarly situated lands in the region, it has a significant nexus to a TNW. "Similarly situated waters" are waters of the same regulatory category under the proposed guidance, for example, tributaries, adjacent wetlands, and the like. Similarly situated waters in the region are aggregated as part of the significant nexus analysis, and the guidance would indicate the waters are "in the region" if they fall in the same topographic watershed defined by the area draining to the nearest TNWs or interstate water.

Consistent with Justice Kennedy's opinion, the guidance indicates that significant nexus has to be more than speculative or insubstantial. The key difference that the proposed guidance has for significant nexus over the currently in effect December 2008 guidance is the watershed scale of aggregation. The currently in effect guidance aggregates tributaries *and* adjacent wetlands, but only on the scale of a specific stream reach. So, under the proposed guidance, you would aggregate, for example, tributaries or adjacent wetlands, but you would do it at a watershed scale.

Tributaries under the proposed guidance are jurisdictional under the Justice Kennedy standard, where they have a significant nexus to a TNW or interstate water. The guidance observes, as a general matter, tributaries—with defined channel, bed, and bank—that contribute flow to a TNW or interstate water are likely to have a significant nexus, because of their ability to carry pollutants downstream and affect the integrity of those interstate or TNWs.

The proposed guidance does not, however, focus entirely on Justice Kennedy. It indicates that waters are jurisdictional under the plurality standard when a tributary's flow is at least seasonal, which reflects footnote five in Justice Scalia's opinion. For tributaries, one difference from the current guidance occurs by more specifically describing the physical characteristics that denote tributaries—such as what ordinary high watermark means—which, in the regulations, OHWM indicates the lateral extent of a tributary, not its existence. A second difference the proposed guidance indicates is that because of tributaries' ability to carry pollutants downstream, they often will have a significant nexus.

For adjacent wetlands, the proposed guidance is similar to the current guidance, but it more clearly explains that ecological connections could be a basis for adjacency and that surface hydrologic links are not required.

In terms of the section of our regulations, (a)(3), the "other waters" provision, including isolated waters, the proposed guidance indicates that "other waters" should be jurisdictional where field staff, on a case-by-case basis, conclude that there's a significant nexus to a TNW or interstate water. The proposed guidance divides these "other waters" into two categories. Physically proximate other waters can be aggregated with similarly situated "other waters." For example, oxbow lakes could be aggregated. More geographically remote waters, though, also would be jurisdictional if they have a significant nexus, but that would need to be demonstrated individually, not aggregated, unless compelling science indicates it's appropriate to consider these geographically remote waters in combination. This approach differs from current guidance by treating physically proximate "other waters" differently from more geographically remote waters. The proposed guidance would continue the current practice that jurisdictional calls regarding these other waters, both positive and negative, should be coordinated with headquarters.

The proposed guidance also provides a section about waters that are generally not jurisdictional, and does not change or otherwise address the regulatory exemptions for the definition of waters of the United States for prior converted cropland or for waste treatment systems. It lists those waters identified as generally nonjurisdictional in preambles by the Corps in 1986, and by EPA in 1988, which includes such waters as stock-watering ponds excavated in uplands, water-filled upland depressions incidental to construction activity, and the like.

And finally, I'll conclude with just noting that ditches are treated similar to current guidance, the December 2008 guidance, but provides a bit more detail. So, with that, I'll pass it back to Bruce and on to Dave. Thank you.

5. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 16 ELR 20086 (1985).

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Bruce Myers: Thanks very much, Donna. David, the floor is yours.

David Olson: Thank you. Thanks for the opportunity to meet with you and discuss how the Corps does jurisdictional determinations (JDs) in the field. I'd like to basically talk about six things: who conducts jurisdictional determinations; what considerations do they apply; what types of information do they look at; the thought process for doing a jurisdictional determination; some of our jurisdictional determinations require coordination with EPA. I'd like to talk briefly about that and finish up with the different types of jurisdictional determination that there are.

Now, the jurisdictional determination process can be done generally in one or two ways. There can be desktop jurisdictional determinations, and that's for your more obvious waters. Let's just say someone's proposing to build a pier in a navigable water, have the permit application for that, so, we do a desktop JD to see whether or not that water body is regulated under the Rivers and Harbors Act. Normally, it is; therefore, that we have determined jurisdiction. But, for the more complex jurisdictional determinations, we have to go out in the field and do a site visit and look for on-site indicators of whether or not those wetlands or waters might be jurisdictional.

Who does these kinds of tasks? Under our regulations, the Corps staff is responsible for determining whether waters are regulated under §10 of Rivers and Harbors Act or under §404 of the Clean Water Act. Now, there are some exceptions. In order to determine whether a water body is regulated under the Rivers and Harbors Act, there is a process called a navigability determination, and those are made at the division level. If you're not familiar with the Corps' organization, basically, we have a headquarters, we have eight divisions, which span eight regions of the country, and within those eight regions, we have 38 district offices. So, the divisions make the navigability determinations, but there are also cases where EPA decides that they want to make the §404 jurisdictional determination instead of the Corps, and that's allowed under an opinion issued by the Attorney General back in 1979. We also have a memorandum of agreement with EPA that says, under certain cases, that EPA can take the lead on doing a jurisdictional determination.

So, what do our field staff consider when they do a JD? Well, of course, they have to look at the regulations and those are covered in Part 328 for the definition of waters of United States under the Clean Water Act and Part 329, which is the definition of navigable waters of United States under §§9 and 10 of the Rivers and Harbors Act. We also apply the 2003 *SWANCC* guidance,[6] the 2008 *Rapanos/Carabell* guidance,[7] and then, if there are wetlands involved, we use our 1987 wetlands delineation manual and then the appropriate regional supplement. Those two documents are used to identify whether wetlands are in the landscape and what their boundaries are. Some districts may also have local procedures for identifying waters based on their geologic characteristics, how the water flows through their area, so, there can be quite a bit of different things that we look at when we do a JD.

And this just kind of gives you an idea of where the jurisdiction is. It's divided up into tidal waters and freshwaters. Section 10 jurisdiction generally extends to the mean high water line in tidal waters, and it can extend along coastal wetlands for §404. In tidal waters, §404 also extends to the high tide line. In freshwaters, for streams and such, the lateral extent of jurisdiction is the ordinarily high watermark. Some of these freshwaters may be §10 waters. If it's §404, we either go to the ordinary high watermark or to any adjacent wetlands. So, to give examples of some of the information we look at, you have to understand this varies considerably from district-to-district and state-by-state.

One of the primary sources of information that we use are consultant reports. Many people will hire a consultant to delineate waters on their property. These are people often with very extensive experience, and they provide fairly detailed reports that we look at. Some of our staff may do desktop jurisdictional determination based on a consultant report if they've had a long relationship with the consultant and they know they do good work, but other consultants require a little bit more checking back on what information they provide in order to come up with a reliable JD.

We also use USGS [U.S. Geological Survey] topographic maps to quite an extent, even though some of them can be fairly old. But, on the other hand, they can provide good historic information, so that we can see where waters may have been in the past, such as if there was a ditch, and we want to see if that ditch was a stream at one time. Sometimes topographic maps can tell us that. We may also use surface water data from the USGS. That can help establish a significant nexus, if it has information on flow, duration, and volume. But to be honest with you, the USGS is underfunded these days, and they don't have many gauging stations left that are operational. So, having surface water data is nice if you can get it, but to be honest with you, it isn't available very often.

There may also be water resource reports that were issued by the USGS. If we're doing wetland delineations, soil surveys are an invaluable tool, and what's really nice these days is that they have a version of their soil survey on the Internet. You can come up with some maps of your project areas and see all the soils that are there. That really helps a great deal with our wetland delineations.

We also use National Wetland Inventory maps. But again, we have to use those with caution, because a lot of those were produced back in the mid-1980s. They can help give you a general indication of where wetlands are, but they're not all that reliable. But some information is better

6. 68 Fed. Reg. 1991 (Jan. 15, 2003).
7. U.S. Army Corps of Eng'rs, CWA Guidance to Implement the U.S. Supreme Court Decision for the Rapanos and Carabell Cases (June 5, 2007), *available at* http://www .usace .army.mil/cw/cecwo/reg/cwa_guide/cwa_guide .htm; U .S . EPA, Clean Water Act Definition of "Waters of the United States," *at* http://www.epa .gov/owow/wetlands/guidance/CWAwaters .html (last visited Sept .28, 2010).

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than no information, so they do have their uses. Local wetland inventory maps also can be used; some states produce those, some counties produce those. Counties may also produce local topographic maps. Another valuable tool is aerial photographs, especially color infrared photographs, because they might have a wetland signature, and we can find out where wetlands may be on a property, using those kinds of photographs. There's also a lot of information that's available on the Internet, such as maps you can download or meteorological data that may help support whether or not an area has wetland hydrology. So, there's a wealth of information available on the Internet.

We also use our navigability determinations that were done by our division engineers. Now, most of those were done probably in the 1960s, 1970s—some of them may be quite dated. But if something is subject to the Rivers and Harbors Act, it generally still is subject to that, so that can help us, especially with TNW determinations.

One of the first things we do when we go out and do a jurisdictional determination, we ask ourselves, what category of waters would this fall under? Generally, what we try to do is apply the most obvious category. So, if you're dealing with a large river, you want to call jurisdiction under a TNW, rather than just calling it a tributary, because traditional waters are a little more solid-based for jurisdiction. Interstate water is also another fairly obvious category. Now, there is one category that's in our current regulations that does require headquarters' approval, and those are the other waters under category A3. Those require headquarters' approval in order to assert jurisdiction over those waters. We also regulate impoundments of waters, the territorial seas, and wetlands adjacent to waters of the United States.

So, once we find a water body that is subject to jurisdiction, how far does that water body extend? If it's tidal waters, we go to the high tide line. But, if there are adjacent wetlands, we go to the limits of adjacent non-tidal wetlands. For non-tidal waters, we look for ordinary high watermark, if there are not any wetlands present. But, if there are adjacent wetlands present, then we go beyond that ordinary high watermark to that wetland boundary. And, if we're looking at a wetland, the extent of geographic jurisdiction is the wetland boundary. That's, of course, provided it satisfies all the tests under *SWANCC* and *Rapanos*.

So, we first look for, again, the more obvious jurisdictional waters, and this would be under the 2008 guidance, the TNWs, the waters adjacent to those TNWs, non-navigable tributaries that have relatively permanent flow, and also wetlands that directly abut those non-navigable tributaries that have relatively permanent flow. If we can put it in one of these four categories, then our documentation is a lot easier to do. But, if they don't fit there, then we have to go to these other categories, which require a lot more documentation. This includes the other waters category. Again, this requires headquarters' approval, and there's also the situation where case-specific significant nexus is required. Those are non-navigable tributaries that don't have relative permanent flows, wetlands adjacent to those non-navigable tributaries, and wetlands that are adjacent to, but don't abut, a non-navigable tributary that has relative permanent flow.

How do we define adjacency? Basically, it's bordering, neighboring, and contiguous to a water of the United States. There's no definition of neighboring, so it's at the discretion of the district on how they interpret that. Some of the things that are in the 2008 guidance to consider is do the wetlands have an unbroken hydrologic connection? Are they separated from a berm or other type of area, and are they reasonably in close physical proximity to jurisdictional waters? Some districts have established sort of rules of thumb to try to figure out whether a wetland is adjacent or not. Significant nexus analysis, again, this is a case-specific evaluation. What we're trying to do is determine whether the tributary and any adjacent wetlands has a significant effect on the chemical, physical, and biological integrity of downstream navigable waters. We look at hydrologic factors, as well as ecologic factors.

For any type of JD that involves isolated waters or significant nexus, there are coordination processes with EPA that we have to follow. These only apply under the Clean Water Act JDs. If it's a significant nexus determination, then what we do is we e-mail a draft JD to the EPA regional office. The EPA region has 15 days to decide whether or not they want to make a special case recommendation to EPA headquarters. If the headquarters agrees, they have 10 days to decide whether or not it is a special case or not. If it's an isolated waters determination, then our district e-mails a draft JD to the EPA regional office, and the EPA regional office has 21 days to request an elevation. So, if there is an elevation, both Corps headquarters and EPA headquarters review that JD documentation and make their own findings.

There are two basic types of jurisdictional determinations. The first kind is approved jurisdictional determinations. Basically, that's a positive finding of whether or not there are waters of the United States present or absent on the site. It's a legally binding determination. Those approved jurisdictional determinations are valid for a period of five years, unless there is new information or changing environmental conditions that warrant looking at that site again.

The approved JDs may look at what are the limits of those jurisdiction waters; there may be a simple presence/absence determination. They can be appealed through our administrative appeals process. Generally, districts post those finalized JD forms on district web pages, so people in this area can look at them and see what areas and waters have JDs.

The other type of jurisdictional determination is a preliminary jurisdictional determination, and these are nonbinding, just general indications that there may be waters of the United States on the site. We do them in order to advise landowner that they may have waters on their site. Some of them do this to avoid the time delays that it takes to get approved jurisdictional determinations. In other

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words, they just want to move on with their permit application process. They generally can see any aquatic feature on their properties of water of the United States, and then we make a permit decision based on that.

Preliminary jurisdictional determinations cannot be appealed through the division's engineer, and they have no expiration date. And that's all I have, right on time.

Bruce Myers: Thank you. So, now I think we've got most of the pieces out on the table, if you will, and our next two panelists will share stakeholder perspectives—and, in particular, the viewpoints of regulated industry and the environmental NGO [nongovernmental organization] community. So, with that I'll hand it over to Larry.

Lawrence Liebesman: Great. Thank you, Bruce, and it's a pleasure being here today. What I'd like to do is give the perspective of the development community on the history of guidance in the context of ongoing concerns that have been out there for quite some time. And so to start off with a proposition or overview of our concerns that this guidance admittedly expands clean water jurisdictions over the prior guidance. Indeed, we think it will have severe economic impacts on an economy that's really needed for expansion, given today's recession.

The obvious concerns are that, number one, we are very much in support of the Clean Water Act's goals, but we also feel that this guidance goes far beyond what Justice Kennedy intended in the *Rapanos* decision, and that there's no reason for doing an end-run around what the *Rapanos* decision was meant to do in order to achieve those goals without legislative direction. I think, to begin with, we're very concerned about going through the guidance route. For a long time, industry has said rulemaking is absolutely needed.

We now have an admitted expansion of jurisdiction with quantifiable additional cost on industry, and yet, what do the agencies do? Guidance, not rulemaking, notwithstanding the fact that [Chief Justice John G.Roberts Jr.] and [Justice Stephen G.] Breyer and *Rapanos* made it very clear that the agency should move forward with rulemaking, and hastily so. So, they've got it backwards. Instead of doing rulemaking and following with guidance, they started with guidance and say we're going to do rulemaking down the road, when, in fact, this really is a rule. It has substantive impacts, future effects on the regulated community and the public.

Now, some of the key challenges under this guidance, I think, start with this idea of this aggregation to a watershed approach, which we think will have the effect of essentially codifying Justice [John Paul] Stevens' dissent by exerting jurisdiction over any water or any tributary that may eventually flow through a TNW. When you hark back to the language of Justice Kennedy, he strongly criticized the dissent as permitting federal regulations whenever wetlands lie alongside a ditch, a drain—however remote or insubstantial—that may eventually flow into a TNW. In effect, this guidance will accomplish that in contravention to what he has to say.

Now, going to this aggregation approach, it's important to understand how this changes from the prior guidance. Under the prior guidance, significant nexus was sort of established by virtue of reaches of waters, higher streams of a higher order, let's say a headwater stream discharging to a lower order stream and looking at more of a site-specific analysis about the effects of impacts to the high order stream on a lower order stream, all the way down to the TNW.

Now, what the agencies have come up with based upon the watershed approach is aggregation. They're saying they can sort of look globally at a large watershed and then aggregate all "similarly situated," not just wetlands, but tributary streams and other waters within that watershed, and then reach a sort of global determination that all those water bodies—streams, channels, etc.—have a significant nexus. If you remove one, you are affecting the ecology of the TNW that's affected, so it's sort of this cumulative approach.

And, when you sort of look at it on the ground, you think about all the watersheds, especially out West. You look, for example, to the Colorado River in Arizona, which has a huge drainage area. The state of Arizona only has, I believe, three TNWs. Then, you look at the number of channels and streams. Essentially, what the agencies have done is say you can aggregate. You sort of pull together all the tributaries and wetlands within that large watershed, whether you're immediately adjacent to the Colorado River or hundreds of miles away, to claim that they're similarly situated, because they all have an ecological and water-quality effect on that TNW.

By taking that approach, it has the effect of making it very difficult to meet the Justice Kennedy test of substantiating based upon solid evidence of what the significant nexus would be, and again, sweep in these remote waters. It also has an effect on landowners. I mean, how are you as a landowner to know if another stream is determined to be similarly situated, in which the Corps relies upon that data—that particular stream that may be closer, for example, to the Colorado River—to lump in your drainage ditch on your property? I mean, so, there's sort of due process concerns about landowners knowing in advance what evidence is being supplied to achieve that goal.

That sort of brings me to the evidentiary concerns. While we heard David talk about the range of information and data that the agencies can rely upon, and, in many ways, sort of summarizes what was out there earlier, but it does sanction much more of a desktop approach on the theory, presumably, that it's very hard for Corps regulators to get out in the field in this entire exercise so they can rely upon regional studies, etc.

I think you couple that with the watershed approach and the net result is you're going to see a lot more desktop, broad-evidentiary jurisdictional calls by lumping in streams, tributary channels that may show up in the USGS

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topo[graphical] map, for example, and then conclude that they will cumulatively have an effect. So, I think the signal to the regulators out in the field and the folks making these calls is use your judgment. Again, the effect on the regulated community, we think, is serious problems.

Indeed, one of the theories that I've pursued is whether you can apply sort of the legal paradigm, or proximate causation and foreseeability, through the significant nexus test. We have an Article in the materials that makes the case similar to other statutes like the Endangered Species Act and NEPA, where you have the concepts of foreseeability and proximate causation—of cause-and-effect evidentiary relationship. For example, Justice [Sandra Day] O'Connor in *Sweet Home* can apply here. If you apply those theories, I think, at looking at the kind of evidence, there would be a greater burden, I believe, on the regulators to come up with more definitive evidence of a cause-and-effect relationship. So, I would request folks to take a look at that, and we'd be happy to answer any questions on that.

Let me go to tributaries. This is another major concern. What the Corps has done is say, well, the regulations say a tributary is a body that has a channel, a defined channel, unreserved ordinary high watermark, etc. But they go beyond that to say—essentially creating a presumption—that if you have a tributary, maybe a dry wash, it sort of presumes that it has a significant nexus. They don't come out and actually say it, but they suggest that it does. Yet, I believe that finding flies in the face of Justice Kennedy's clear language "where yet the breath of this standard," referring to the ordinary high watermark, "which seems to leave a wide room for regulations of the drainage ditches and streams remote from any navigable water and carry only minor water volumes towards it. It precludes that as a definitive determination of whether wetlands adjacent to that tributary play an important role to the navigable water." So again, Justice Kennedy questions that; they sanction it. I think that dichotomy is a real problem for the regulator community.

Then you get to the concept of adjacency. What they've essentially done, the regulators have said, well, even though Justice Kennedy was concerned about adjacent wetlands looking at significant nexus, we're not going to apply the concept of adjacency to waters. So essentially, you can have a TNW, a drainage ditch within this large watershed that they can call an adjacent stream. So, you lump all that together in adjacency; it's waters adjacent to waters, which we believe flies in the face of the Corps' regulations and case law. The [U.S. Court of Appeals for the] Ninth Circuit is basically saying, you can't have a water adjacent to another water. You only have a wetland adjacent to a water for the purposes of the significant nexus jurisdictional determination; so they've gone in that direction.

That brings me to the next major concern we have: other waters. They've now taken the significant nexus test under Justice Kennedy and said we can now apply that on a watershed basis to isolated waters, streams, and runoff pools. These are water bodies that in the past had to be reviewed at headquarters, as to whether they are jurisdictional under the Commerce Clause test. So, essentially what they've done is come up with saying, we're going to look at waters that are proximate—whatever that means—to a TNW. They're applying this watershed concept and saying that defines proximity, and we can aggregate all those "other waters," apply the adjacency analysis to the significant nexus test, and treat that all as jurisdictional.

Again, that's going to lead, we believe, to arbitrary findings on the ground, plus an end-run around what we think *SWANCC* said. When you're looking at isolated waters, you can't presume that those water bodies that are far away from TNWs should be considered jurisdictional. You have to go through some kind of Commerce Clause constitutional analysis, which means Congress did not intend to regulate every single wet spot in the entire country under the Clean Water Act; again, an end-run around that process.

Then, they drew a line between other waters that are proximate to TNWs and waters that are not, in which case you phone home. You can't aggregate; you must do it case-by-case. Well, how do you draw the line? If you're somebody on the ground in a western state, how do you know what's proximate and what's not when you're dealing with large watersheds? I mean, it's a totally arbitrary distinction that flies in the face, we believe, of the Clean Water Act as interpreted by the Supreme Court.

Next point, and why this is a real concern, are federalism concerns. The Clean Water Act is a shared joint federalism approach. It's a shared responsibility between the federal government and the state. It wasn't the idea that the federal government knows it all, that the federal government can regulate every wet spot in the country. It's a partnership between federal, state, and local governments.

We're concerned about this sort of plenary approach that is coming out of this guidance that segues—it violates those federalism principles. We're very, very concerned about that. I think the net result is intruding on actions that are fundamentally local—drainage ditches, for example. For the first time, this guidance comes out and allows regulation on certain drainage ditches that may move water directly or indirectly to a TNW. Now, come on now, so many road drainage ditches are regulated at the local level, now you're going to graft that on the federal in terms of federal regulation with all those costs and expenses?

So, I sort of want to wrap up, and what does this mean on the ground in today's world? In the first place, we're in a serious recession. It is very hard to justify broad reach of jurisdiction that is going to cause tremendous delays. We don't believe that the regulators have really taken into account a full range of economic impacts. This expansion of jurisdiction could regulate tributaries. Drainage ditches require states to come up with water quality standards. It could expand jurisdiction over dry washes, impact stormwater. I mean all these things add cost to projects.

It's not just the private sector, but we're looking also at infrastructure projects, public projects, roads, even projects

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with environmental applications. We've heard a lot about the delays that are preventing public works projects being built. I think the concern of the regulated community is that this will only add to those delays under the so-called guise of meeting the goals of the Clean Water Act.

We believe another approach has got to be one that is true, go through rulemaking, is true and fair to the Supreme Court's interpretation of *Rapanos* in the absence of legislation. That's the only reasonable solution to this process. So, those are my noncontroversial comments.

Bruce Myers: Thanks, Larry. Jan, bring us home.

Jan Goldman-Carter: All right. So first, I reserve my five minutes for rebuttal and I'll proceed hastily with my case in chief, because I'm under a time limitation. So, I'm going to present my main points that I want to get across upfront. If you listen carefully, you'll hear some rebuttal embedded in this.

First, the status quo that we're living with now is increased pollution and confusion, uncertainty, and wasted resources. That status quo is untenable. I'm going to let you look at the significant nexus test here. So, while I'm going through my main points, you can have the significant nexus test in front of you with kind of a squirrelly picture of Justice Kennedy. So first, the status quo is untenable.

Second, the proposed guidance, we feel, *is* faithful, and indeed more faithful to the *SWANCC* and *Rapanos* Supreme Court decisions and the science—importantly the science—underlying Justice Kennedy's significant nexus test.

Third, the proposed guidance does not represent an expansion of jurisdiction beyond that prior to the pre-*SWANCC* 2001 Supreme Court case and, as well, it mustn't, because it does not and cannot restore protections to all those waters protected pre-*SWANCC*, as Bruce mentioned initially, and it is well within the Supreme Court decisions.

Fourth, this proposed guidance does not infringe on states' rights, as 33 states and the District of Columbia attested to in their amicus brief in the *Rapanos* Supreme Court case.

Fifth, the Supreme Court and industry lobbyists alike have called for a formal rulemaking, as Larry mentioned, revising the definition of waters of the United States to be consistent with the court cases. The environmental groups and conservation groups generally agree with that point, so we have agreement on that.

But finally, my final point is that the appropriations riders that are currently before Congress would block this deliberative and transparent rulemaking process that we've called for, in direct contradiction of the call for rulemaking and ignoring the public interest in clean water.

So, given the split decision that Bruce mentioned, the 4-1-4 *Rapanos* decision, the agencies' response to this decision necessarily must incorporate Justice Kennedy's significant nexus test. And that test recognized the vital functions that wetlands play, not individually, but collectively, in protecting downstream navigable waters from flooding, from pollution, from drought, from loss of habitat, and the role they play in maintaining and restoring the chemical, physical, and biological integrity of the nation's waters—the goals of the Clean Water Act.

So, Justice Kennedy recognized the cumulative effect that wetlands similarly situated in a watershed, a region—he used the term region—but in a watershed can have on chemical, physical, and biological integrity of downstream waters. He recognized and the wording of the significant nexus test establishes that you look at those wetlands that are similarly situated within the watershed. You don't look simply at the wetlands associated with one stream segment.

But the 2007 and 2008 *Rapanos* guidance that we are living with now did not recognize these cumulative effects and essentially forced such a limited consideration of cumulative effects as to be often dismissed by Corps officials in their jurisdictional determinations. The effect of that has been to leave millions, over 20 million acres of wetland acres and 59%—almost 60%—of the nation's stream miles in the lower 48 states and their adjacent wetlands either without Clean Water Act protections or with so much confusion over jurisdiction as to undermine those pollution safeguards, and undermine those safeguards for the drinking water supplies for an estimated 117 million Americans.

These are just a few pictures of the types of waters that have either been found to be nonjurisdictional, or at least preliminarily so. This is just quickly a perennial stream in Alabama that feeds to the Black Warrior River, wetlands adjacent to a navigable Farmington River in Connecticut. Many, many ephemeral and intermittent streams in the West had been held nonjurisdictional because of the 2008 guidance and its very limited aggregation.

This is a seasonal stream in Texas that was polluted with an oil spill and found nonjurisdictional. This is what the water map of the state of Arizona looks like. The powder blue area, which covers a good deal of the state of Arizona, represents ephemeral streams. Only the dark blue lines there actually flow year-round. Ninety-six percent of the surface water stream miles in Arizona do not flow year-round and are at risk of losing Clean Water Act jurisdiction.

Lakes have been removed from jurisdiction that obviously have and support navigation. Entire closed basins in the state of New Mexico, simply because they do not flow out to a traditionally navigable water. Here is a map depicting huge swaths of the state of New Mexico that may have lost Clean Water Act jurisdiction for their waters. These are prairie potholes of the upper Midwest and the Great Plains that store enormous amounts of floodwater—until they're drained.

Now, the new guidance does, in fact, recognize the cumulative effects that we talked about and that Justice Kennedy articulates in his significant nexus test. In doing so, we believe that the draft guidance, if finalized, will bet-

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ter protect, not categorically protect, but better protect two major categories of waters. Those are tributaries to TNWs and interstate waters, and wetlands and other waters that are adjacent to or proximate to those tributaries.

Importantly, as Donna mentioned, the proposed guidance *excludes* artificial waters and preserves existing agricultural exemptions. So, the myths that are being perpetrated, in the media and on the Hill, that EPA is going out there to regulate every farm field, every mud puddle, every birdbath, every tire rut are really lies—pure and simple.

Now, where we would differ, I think, with Larry's characterization primarily is when it comes to these geographically remote waters, the prairie potholes. We do not believe that this guidance goes as far as it could go, consistent with the Justice Kennedy opinion and consistent with the science, in restoring protections to these geographically remote or isolated waters. In fact, we think they really are *not* protected and continue to be at risk under this guidance. So, that includes the prairie potholes, the playa lakes of southern Colorado, New Mexico and west Texas, very important waters for groundwater recharge, as well as for drinking water and migratory birds, again, the closed basins of New Mexico. I'd be happy to be convinced otherwise, but I do not believe that the final guidance, if it's formalized in the way that it is in draft form, would protect these waters.

The final point I would like to make, again, just summarizing the status quo means that we have at risk millions of acres of wetlands in the lower 48, about 60% of our stream miles. There is demonstrated evidence that this current situation has undermined enforcement of Clean Water Act pollution safeguards due to the uncertainty and confusion and delay, and that significant pollution problems, such as oil spills, are going unaddressed as a result of the existing *Rapanos* guidance.

In terms of the solutions, again, we think that the situation is untenable. It needs to be corrected. I think there's a fair amount of broad stakeholder agreement as to that point and that we've looked to Congress, as Bruce mentioned. We would have liked to have resolved this problem through congressional action, but we have had now a decade of inaction by Congress. The courts have only added to the confusion around this issue and are confused themselves. That leaves the Administration as the third branch of government, and we do agree that the waters of the United States rule, consistent with *SWANCC* and *Rapanos*, is in order. We believe that such a rulemaking is needed to strengthen the Clean Water Act's legal and scientific foundation, and that it will provide greater long-term certainty for landowners and protection for streams, wetlands, and other waters. Thanks.

Bruce Myers: Thanks, Jan. And thanks to the panel. Before we open Q&A to folks in the room and on the telephone, I would like to invite our panelists to share any further reaction or comment that you might have at this point. I want to avoid a situation where we start quizzing one another on the panel, but if you have any immediate observations, you're welcome to make them.

David Olson: I welcome everyone to comment on the guidance. I think that's what I like about this process is we can only develop a draft, and we need people's reaction to it in order to make it better.

Jan Goldman-Carter: I'll second that.

Lawrence Liebesman: I'm glad [Jan] and I agree on rulemaking. It is something we do agree with. I think that it's really critical and I just find it hard to believe after all this that the agencies don't go through straight to rulemaking, which is what Congress intended when they set up EPA—that it should be a full, open process.

I'm concerned about all the waters left unprotected and indeed, I think we all recognize the goals of the Clean Water Act, but there still to me is a significant federalism issue here. I think our concern is that the kind of the reach that's going on here would in many ways obliterate the federal, state, and local partnership that was set up through plenary jurisdictional approach, which is, I think, what sounds to me like you're advocating. Anyway, those are my general comments/inputs. I'd be happy to get to other questions.

Jan Goldman-Carter: As I was listening to Larry's concerns with the guidance and including the final federalism concern—I would just again say everything that was raised there in my view is directly addressed in the Justice Kennedy opinion. The aggregation test comes from the Justice Kennedy significant nexus opinion. The watershed approach is, in my view, actually conservative relative to Justice Kennedy's use of a region as a watershed, I mean as the basis for aggregation and the fact that he used the whole Mississippi Basin and the nutrient flow down to the Gulf of Mexico as an example.

So, to me, the notion of aggregating on a watershed basis and the way in which the agencies have elected to subcategorize the types of wetlands that they will aggregate is, in our view, overly conservative relative to Justice Kennedy, but it certainly has its roots in the Justice Kennedy opinion. And even the federalism concern, again, my reading of Justice Kennedy is that he saw his significant nexus test as, in essence, resolving those federalism and Commerce Clause concerns, and so a faithful compliance with the significant nexus test that he lays out would resolve those concerns.

Bruce Myers: If you were czar, if you had your way, what's the answer? What's the way out of all this? I guess you could answer it both from the perspective of your clients, but also more generally, what's the way forward?

Lawrence Liebesman: You're asking for maybe a simple response to a very complicated issue, and so I'm not sure

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there's an easy route out. There are a couple of approaches, there's obviously legislation. We certainly don't support the bills that were in Congress the last time. But if something could be worked out, which is true and faithful to the Clean Water Act as envisioned by Congress in 1972 as amended, that might be an option.

I'm not advocating that we go down this or we've done that route, but the second way is coming through with a rulemaking that I believe comes up with a reasonable approach to what Justice Kennedy meant in *Rapanos* and, frankly, what Justice Scalia meant in *Rapanos*. It looks more as sort of how do you come up with a reasonable cause-and-effect relationship between water bodies within a watershed and the water quality of a TNW?

Now, I heard Jan say and talk about her view that this guidance through the aggregation approach really implements Justice Kennedy's opinion. When you look at what the net result would be of aggregation, when you look at all the drainage ditches, swales, isolated waters, etc., and say that they can be aggregated to meet broad water quality goals and ensure that all these waters are protected and that could be done through desktop analysis from regional studies, the inevitable result is going to sweep in certain drainage ditches, swales, and remote waters that Justice Kennedy said should not be regulated.

I mean, there's clear language in his opinion drawing a line between waters that are so insubstantial that they don't have a demonstrated nexus to a traditionally navigable water. Yet, this would allow that to happen. I think that's the net result of all that, plus I'm really concerned about sweeping in isolated waters under the significant nexus test, because I don't think there's any support at all in the Justice Kennedy opinion for that kind of aggregation whatsoever. You can't read Justice Kennedy as going beyond aggregating adjacent wetlands, yet, that's the approach.

But in terms of the way out of this thing, the rulemaking process and everything that is involved in that is the way to go. Now, at the end of the day, you know, there's always going to be compromises in rulemaking, but in our view, it's got to be a rulemaking process that's open to the whole public. Everybody plays a role, so that the end result is something that is reasonable, fair, and is true to the Supreme Court's interpretation in *Rapanos*, *SWANCC*, and *Riverside Bayview Homes*. I can't say what that's going to be necessarily, and we have our concerns, you've heard me say that today, but that process has got to be followed.

Jan Goldman-Carter: Yeah. Similarly, I think that really at base, Larry and I have both worked on this issue for a really long time—

Lawrence Liebesman: One or two years.

Jan Goldman-Carter: —we've watched this jurisdiction issue move up and down. I've worked for the Corps of Engineers; I know how hard this is to do in the field. I can only imagine how hard it is to do in the field now. I think that fundamentally this has to be addressed through rulemaking because, even congressionally, we feel like the strongest fix is congressional action. But even with congressional action, we are talking about a very complicated science here, and the science is what underpins the Clean Water Act.

The fact sheet that I put up on the board, the quote directly from [Sen. Howard Baker (R-Tenn.)] back in 1977, when this issue was debated again, where he fundamentally, if you're talking about congressional intent, says, we get it. The aquatic system is interrelated. If you want to protect the downstream navigable waters, you have to protect the entire aquatic ecosystem. That's in the 1972 and 1977 legislative history.

It boils down to science, and it might be nice to draw these little bright lines about which waters are in and which waters are out, but that's not consistent with the underlying science and the underlying goals of the Clean Water Act. So, I don't see any way out of it other than a truly deliberative science-driven rulemaking process. I hope that's what we are going to get to here pretty soon.

Audience Member: I'm wondering if the Corps or EPA read the debate that was in 1977. I was in the gallery and saw it. Did you all read that?

Donna Downing: Yes, as well as a lot of the legislative history from the 1972 Act, and occasionally, if I'm still awake, go on to some of those associated with Federal Water Pollution Control Act in the 1940s. It is interesting to listen to the ongoing discussions and what Congress intended and also who was speaking at that time.

Audience Member: If federalism is such a great issue, why, almost uniquely, has §404 not been delegated to the states, or to put it differently, the states have not asked that it be delegated? It strikes that the alternatives here are, at the moment, federal regulation or virtually no regulation. I know there are a few states that for the most part have no regulations.

Bruce Myers: The question here for those on the phone goes to the federalism concern that's come up. I think the point is essentially this: if in fact the states under the Clean Water Act have not sort of taken up the offer to assume delegation with respect to the 404 program—and there we simply mean that the Corps of Engineers is primarily administering that program in all but two jurisdictions—

Donna Downing and Jan Goldman-Carter: New Jersey and Michigan.

Jan Goldman-Carter: For the time being.

Bruce Myers: —then what does that tell us about the federalism concern? I think that's the question.

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Lawrence Liebesman: Yeah. I want to respond to your very good comment in two regards. I think first of all, as far as assumption, we've had Michigan and New Jersey, several states. In Maryland, I was involved in an effort to get assumption there. I think the trouble is it's a very political process. You don't assume everything because tidal waters are still retained with the Corps, so it's not total assumption. So, I think that many states have sort of lost the stomach to do that, so the Corps as an alternative has come up with state a programmatic general permit, which is a shared federal and state process, so I think that's what you're seeing.

On the second point, are you facing no regulation without federal regulation? With all due respect, I don't agree, because if you look at all the states out there, there are a good number of states that have clean water regulations that in many ways are broader, and I would submit even more protective in certain regards than the Clean Water Act. The state of Maryland, for example, I was very involved in the development of the Maryland Non-Tidal Wetlands Protection Act, which is a wetlands statute that codifies a lot of language that's in the regulations.

The state of Maryland permits maybe 30 acres of non-tidal wetlands here to be impacted. That's one state that has picked up the ball on this. Virginia has got a wetland statute; New Jersey's got a wetland statute; Florida; and you go out to California—Porter-Cologne Water Quality Act. You're finding a lot of states that have picked up through the shared federalism approach of coming up with their own water quality and wetlands and programs and in many ways defining jurisdiction much more broadly than the federal government.

For example, Maryland includes groundwater as a water of the state, looking at things holistically. The Clean Water Act doesn't. So, to say that you need federal regulation to protect wetlands and water quality in this country is a misnomer. I think you have to have more of a shared federalism looking at these joint processes, rather than having a vast expansion that we would submit this guidance would do a federal regulation.

Donna Downing: Yeah. I think Larry's observation about some states—Maryland, Virginia, New Jersey, etc.—who have active wetlands protection programs or define waters of the state more broadly than the federal definition is a useful illustration of the fact that the scope of waters of the United States doesn't preempt states from going farther.

In comments that we received on the guidance that's currently in effect, a number of folks raised concerns that we were preempting state interests that states couldn't protect more water than federal waters if they wish to. There may be a number of issues you'd like to comment on or that you're worried about, but federal preemption in this area isn't one of them.

Jan Goldman-Carter: I just want to add that, as a practical matter, that is not what plays out, and we could have several cases in point. My native Florida, the state of Wisconsin, both of which, you know, had enormously controversial state legislative sessions this past year. They're both examples, along with most recently the state of North Carolina—where in the absence of this federal backdrop there is this rollback of Clean Water Act protections—these state programs, and what had been very strong, effective programs when married to the federal underpinnings, are now under threat of being completely dismantled at the state level.

I know in my state of Florida there was a bill passed this last legislature that completely shifted the burden of proof for all environment regulation, essentially creating such a burden that the laws that are on the books cannot be effectively enforced. The state of North Carolina, and a number of other states are pursuing these no-more-stringent-than rules, basically restricting the state programs and not allowing them to become more stringent than the federal underpinnings.

So, by weakening the federal law, you're actually undermining the base from which the state programs can function well. The cooperative federalism notion is about the programs working in concert together, and I think the state wetland managers I know are wont to say that the state programs—state wetland and water programs—are strongest when they're underwritten in effect by a strong federal program to back them up.

Bruce Myers: I would add a final gloss on those comments: ELI currently has some research underway that is looking at the fact that many states have on the books these so-called no-more-stringent-than laws, as well as various private-property rights acts that have the practical effect of placing limitations on what state agencies can do in regulating in this area. Certainly, the state legislature can do as it likes at any time, but in terms of state agency regulation—in addition to the obvious role of politics, you have some important state laws to contend with. We'll release our research on that pretty soon.

Lawrence Liebesman: Well, there's also another point that we sort of dance around, it's important to emphasize, and that's what's regulated under the Clean Water Act. I mean, even if you expand the jurisdiction, you're talking about discharges, the addition of a pollutant, NPDES pollutant discharges. So, when you look at many of the state programs, I with all due respect disagree that necessarily they're hurt by not having federal relations, but so many of these state programs regulate more activities.

They're intended to deal with a broad range of activities. Maryland, for example, regulates any impact to a wetland. Again, there is a disconnect between federal and state regulations. Again, states operate, and the evidence is that in many states they're doing a good job. There are issues at the state level in terms of resources and what's going on, but I would submit that the Clean Water Act in a shared federalism approach should not look to the federal insur-

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ance of the Clean Water Act in order to make those state laws effective. I don't think that's necessarily a conclusion I agree with.

Bruce Myers: When the Corps issues a §404 permit, is it just a yes or no decision, and can it impose limitations on how much fill is allowed or limits on the content of the fill or any other limits?

David Olson: Our permits certainly impose limits. They can also impose many conditions that can help lessen environmental impacts, so our permits are often quite detailed and have quite a bit of language in there that helps restrict those impacts in an enforceable manner.

Audience Member: Jan raised the observation that under the proposed guidance, prairie potholes do not receive jurisdiction, is that correct?

Jan Goldman-Carter: Just to clarify, I wasn't saying they wouldn't, or I didn't mean to say they wouldn't, but that it sets in our view a very high bar and makes it very difficult. I think the terms are—and Donna can clarify—compelling scientific evidence is required in order to be able to aggregate impact. So, it makes it very difficult, and so they continue to be at risk. That was our take.

Donna Downing: Essentially, Jan has provided the answer I would have given, which is the proposed guidance would look at non-physically proximate waters, waters that are more geographically remote, which includes many, but perhaps not all, prairie potholes. What you would do under the proposed guidance is look to see if a particular pothole had a significant nexus, what Justice Kennedy's opinion provides for us to have to do to determine jurisdiction.

The guidance proposes to not aggregate, unless there is compelling science that a group of potholes are working in effect as one ecological system together in the way that they impact the downstream TNW or interstate water. So, like much of the post-*Rapanos* world, you end up with a somewhat frustrating "it depends," on a case-by-case analysis, what the result would be.

Jan Goldman-Carter: Unless, we go to rulemaking, perhaps.

Bruce Myers: Could you please speak to the potential of other waters that are neither remote nor TNWs, such as groundwater, to come within CWA jurisdiction under this guidance.

Donna Downing: I can start with an easy one on that, which is that Congress, in its legislative history that the gentleman in the audience was talking about earlier, has viewed the Clean Water Act as a surface water statute. While groundwater, particularly shallow subsurface flows, may be relevant as a connection among different waters, it wouldn't be considered a water of the United States under the Clean Water Act. So no, I can't imagine that the guidance, nor frankly any rule without statutory change, would be able to include groundwater in its own right as a water of the United States.

Lawrence Liebesman: I would agree. . . . It's one thing we agree on.

Jan Goldman-Carter: Oh, we agree plenty, Larry.

Bruce Myers: Another question from the room?

Audience Member: I want to talk about the difference between a rulemaking and the guidance. Maybe you could [share your] perspectives on why [a rulemaking would] be a better solution.

Lawrence Liebesman: Well, it's just what is the imprimatur of law? I mean, I think that's the simple answer. I mean, you go through guidance; it can be changed any time. The agency even says this is just guidance; it does not have any substantive legal effect. I mean, they could issue the guidance and turn around and change it the next day without any notice and comment.

I think when you look at the history of the Administrative Procedure Act, Congress said there's a formal process by which you seek public comments, you make analysis of those comments, and you come up with a basis and purpose and the final rule that responds to comments. When that rule is issued, it's through the process in the sunshine with a sound analysis by the agency and strong support. Of course, we know many rules are given *Chevron* deference, so that to me is why rulemaking is absolutely essential here.

Again, I think doing guidance first and then rulemaking later is doing it backwards. It's not the way you make good, sound public policy.

Jan Goldman-Carter: I agree with that. Just a little bit further on the *Chevron* deference, I think that's even more important than maybe it seems on the surface. I'm just using as an example, I know you've referenced the *Precon* case[8]—

Lawrence Liebesman: Yeah, I was going to get to that.

Jan Goldman-Carter: —in the [U.S. Court of Appeals for the] Fourth Circuit. From our standpoint, one of the key takeaway points from that Virginia lawsuit was the judge—I think it's footnote 10, it was definitely a footnote—is basically saying that if this were a rule, I would be deferring to it. But now I'm basically going to just use my own judgment as a judge as to whether significant nexus exists here. I don't think—given again the scientific underpinnings of this—that it makes really any

8. Precon Development Corp. v. United States Army Corps of Engineers, No. 09-2239, 41 ELR 20071 (4th Cir. Jan. 25, 2011).

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sense or is terribly efficient or consistent to be having a judge making case-by-case decisions based on—not even based on—the guidance.

Lawrence Liebesman: Now, Jan, if I can just follow up for a minute on *Precon* because I didn't have a chance to mention it. But to me, it's a very important decision of the Fourth Circuit, and in my view, raises real questions about whether this guidance goes too far.

Essentially, what happened there is the Fourth Circuit reversed the decision by the district court as to whether certain wetlands adjacent to ditches in Virginia that went into a river three miles away had a significant nexus.

And he went at the evidentiary standard, the extent of evidence that needed to support significant nexus, and basically said to the Corps, you basically presumed that because certain wetlands have certain functions that they necessarily have a significant nexus to a TNW without coming up with evidentiary comparative relationship. In other words, do these wetlands serve a flood-control function, is that TNW impaired from the standpoint of flood control.

So, that evidentiary connection is important, and if you look at that, that's sort of, in my view, an evidentiary roadmap. We're talking about a sliding scale, the extent of evidence you need; the farther you get away from a TNW, the stronger you will need to have the evidence of cause-and-effect relationship. I think that's an important Fourth Circuit opinion, which I feel this guidance would run counter to by allowing aggregation of a lot of waters that are remote, based upon this broad watershed analysis.

Also, the Fourth Circuit said significant nexus is a legal determination. That's a really important point. You know this is a question of law, not a question just simply of fact and deference. So, I mean, I think it's an important case. Again, the article I mentioned earlier that we have about using proximate causation of foreseeability principles, I think do apply and can be applied as a legal paradigm to the evidence needed to meet the significant nexus test.

Donna Downing: I'll just observe that the proposed guidance does emphasize the importance of building for an individual water a case-by-case record that supports the jurisdictional determination. The guidance emphasizes the importance of a good record, and that is consistent with *Precon*.

Bruce Myers: I think to help drive home this point, especially for those who may not be familiar with the difference between guidance and regulation, I'll read a line from the second paragraph of the draft guidance. It says, "This draft guidance document is intended to describe for agency field staff the agency's current understandings. It is not a rule and hence it is not binding and it lacks the force of law." So, the agencies in a sense are speaking to themselves. Now, obviously, the question or issue then becomes to what extent are people outside of the agencies looking to that, and how is that influencing agency behavior? Hence, the sort of tussle between guidance versus regulation, how binding is this really, etc.

On this same topic, we just received another question, this one from the phone. It's directed to the agencies. I'm not sure if you'll be able to address this, but I'll leave that to you: why did you decide to do guidance prior to a rule?

Donna Downing: I can speak generically about the use of guidance. Guidance can be a faster way of explaining to our field staff how to interpret the existing regulations. In this particular instance, we felt that it was very important to get public comment before the guidance took effect. So, it's not as quick as guidance can be, but we think that when finalized, the guidance will be stronger for the public comment. Also that public comment that we will receive will help shape what we do in a future rule.

Jan Goldman-Carter: Can I just make the point that it should be obvious that there is existing guidance? There was a *Rapanos* decision; there was a *SWANCC* decision in 2003; there was an advanced notice of proposed rulemaking that ended up being withdrawn. There was *Rapanos* guidance in 2007, revised in 2008, no attempt to put forward a rulemaking since 2001, until now, a commitment to go forward. So, this is not a unique judgment on the need for guidance. This has been the landscape.

Audience Member: There'd been a lot of talk about the watershed [approach to] waters. This is a question for the agencies: has there been any discussion of the specific watershed scales that could be used?

David Olson: The scale of the watershed is really dependent on your TNW, where does it end upstream? What you do is you find the end, and then you draw a topographic watershed that drains into that point. Watersheds aren't a particular size. They can have an infinite number of sizes depending on where that cutoff point is.

So, our interpretation is that the region would be a watershed that would drain to a traditional water, because the test is significantly affecting the physical, chemical, and biological integrity of that watershed. Now, the guidance does offer some flexibility, but you can only do that in cases where you'd find positive jurisdiction.

Donna Downing: By the way, it also says it drains to the nearest TNW or interstate water. Now, the guidance would propose looking to the nearest, which would in some instances possibly result in a rather small watershed, and in other instances larger.

Larry Liebesman: In certain western states, they're already talking about huge geographic areas. When you look at the state of Arizona or Nevada, for example, where you may not have a lot of TNWs, couldn't you potentially be looking at hundreds of thousands of square miles within that

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watershed, and how would one landowner know that their wetland is similarly situated to another water or wetland within that watershed?

David Olson: That's certainly the case, yes.

Donna Downing: Yes, this is, by the way, one area where we anticipate getting a lot of helpful public comment because of the importance of the issue. It underlies the significant nexus analysis.

Audience Member: Has there been any discussion of using a standardized system for categorizing waters that have been deemed to be outside of federal jurisdiction?

David Olson: No. I think it's because it would require a fact-specific determination whether they are or not jurisdictional. It really doesn't matter what type it is, it's just a matter of where it's in landscape and whether it has significant nexus or not.

Donna Downing: The proposed guidance also does list waters that are not waters in the United States as categories. Two of them are present in the current regulatory definition. Prior converted cropland and waste treatment systems are excluded from the definition of waters of the United States. And it also, as Jan indicated and, I think, I did as well, lists other types of waters that generally speaking are not waters of the United States, picking up on language that's been in place since 1986 that, for example, water-filled depressions in uplands coincidental to construction, farm ponds excavated in uplands, and the like.

So, there is a list there, but David is right. We need to follow the *Rapanos* opinions and Justice Kennedy in effect says, look, it is a case-by-case determination. I think Chief Justice Roberts' one suggestion was that we should consider rulemaking. So, until rulemaking, it is case-by-case. It makes it hard to have categories of nonjurisdictional waters beyond the types that are in the guidance.

Larry Liebesman: I have a question for Donna, if you don't mind, just a follow-up to some of your points. Where do you see in Justice Kennedy's opinion the authority for EPA to aggregate and apply the significant nexus test to other waters within a watershed? Where do you see the authority to do that? I know that you say you interpret that, but where specifically in his language do you see that authority?

Bruce Myers: And I'm going to interpose the usual sort of caveat about the agency panelists having the prerogative to pass on a question as needed, given the ongoing public comment period on the pending draft guidance document.

Donna Downing: I'm not going to identify all the particular parts, because we are limited on time and may have other questions. But Justice Kennedy does speak back to the *SWANCC* opinion as being the genesis of the significant nexus concept. *SWANCC* was about geographically isolated waters, called "other waters" in the regulatory definition. Justice Kennedy then notes the Court in *SWANCC* held under the circumstances presented there that to constitute navigable waters under the Act, a water or wetland must possess a significant nexus to waters that are or were navigable in fact or that could so reasonably be made.

Now, as we know, *SWANCC* didn't say a great deal about significant nexus. The phrase appears, I believe, once, and then in *Rapanos*, Justice Kennedy talks a fair amount about what he meant by the concept of significant nexus. That's it in a nutshell.

Jan Goldman-Carter: Can I just make one point there, because I keep hearing suggestions that there is no specific reference to categorizing or aggregating streams based on *Rapanos*. Our position has always been that there is nothing in *Rapanos* that even addresses case-by-case review of tributaries. We've been arguing the categorical coverage of tributaries is justified based on *Rapanos* itself, and we shouldn't even be talking about applying the significant nexus test to tributaries. I think when you get beyond the narrow holding of significant nexus as it applies to adjacent wetlands, you're kind of on a little bit of vague ground anyway when it comes to *Rapanos*, and then you've got a fractured decision on top of it.

Bruce Myers: We have a requested clarification on an earlier question: is there—from a logistical perspective—a centralized database or some kind of source for tracking the kinds of waters that have been found to be nonjurisdictional?

David Olson: The Corps does have a database that tracks for its regulatory actions; of course, it includes jurisdictional determinations in those. So, it would include both findings of jurisdiction, which waters are not found to be jurisdictional and how do we classify those to be optional, but the important standard is the federal standard, so we would do that in some cases. But unfortunately, it doesn't capture everything. There are certain waters that don't fit well in that system.

So, really, in response to your question, we do keep track of those JDs, the level of details associated with those JDs is going to vary depending on what the project manager wants to enter. I mean, some of our project managers want to enter a lot of data, and some don't want to enter at all. So, we basically try to make them capture the basic data, but nothing that makes and supports consistent reporting like the kind that you might desire for those types of waters.

Jan Goldman-Carter: I'd just add real quick that from the conservation community standpoint, we have been pressing ever since the 2001 *SWANCC* decision, for the best possible and most transparent posting of positive

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jurisdiction determinations and no jurisdiction determinations. I think it's a very difficult logistical and data process. But we are going to continue to push for that level of documentation and posting because we think that part of the solution ultimately is being able to put together those pieces of the puzzle and bring some consistency to the jurisdictional calls.

Audience Member: How will this guidance, if at all, affect the USDA's [the U.S. Department of Agriculture's] actions, in particular, with respect to Swampbuster?

Donna Downing: The Swampbuster Program is under the Food Security Act, and the proposed guidance is talking about waters in the United States under the Clean Water Act. *SWANCC* did not affect—nor has *Rapanos*—the Swampbuster administration by the USDA. We don't anticipate that this guidance would either. There is, of course, always coordination amongst the agencies, but that's a different question and really isn't directly addressed by the proposed guidance.

Audience Member: Does the Corps envisions itself inventorying the NJDs going forward and monitoring the rationales and keeping track of the rationales, with the idea of having both the record of all of this and presumably more conformity across the local districts?

David Olson: For every jurisdictional determination we do, we do have an administrative record, and that has either the basis for finding jurisdiction or the basis for not finding jurisdiction. As you might expect, there is often a fair amount of litigation associated with some of our jurisdictional determinations. I mean that's a critical part of the record, and we have to document what we do and how we come to our conclusions. Now, that may not be available in an electronic database that can be easily sorted through and read, but they're certainly in the paper files.

Donna Downing: And both David and I talked with EPA and Corps field staff a great deal as they try to implement the *Rapanos* and *SWANCC* decisions. A lot of the issues that are addressed in the proposed guidance are directly trying to answer the types of questions that have come up as the field implements this rather challenging set of opinions.

Audience Member: I guess I had a question for David in terms of how much of a workload issue is it to make significant nexus calls.

David Olson: I can't think offhand what percentage of our JDs requires significant nexus evaluations. As I said in my talk, what we try to do is find the easiest category to put the water in. So, let's be honest, the significant nexus evaluation is not an easy thing to do. It requires a lot of thought, a fair amount of documentation, and anything that we can do to help make that more efficient, I think, would be a great tool to have. Unfortunately, those tools really are unavailable now, so we do the best we can.

Audience Member: Hi. This is a question for Jan: what is the possibility, given what people are saying today, that EPA might eventually withdraw this guidance and just go ahead and pursue the rulemaking?

Donna Downing: Actually, that is a question that is hard to give an answer to because such a decision hasn't been made. But that is an issue that we'll be looking for in public comments to see what commenters recommend. One of our goals is to be able to get scientifically informed, legally defensible insights to our field as quickly and clearly as possible. So, I think that we'll just have to wait and see.

Audience Member: I want to follow up on my question about the USDA. Historically, next to the Corps of Engineers, the USDA has been responsible for the destruction of more wetlands than any other federal agency. Since 1985 and 1986, they have flipped, and they now have a number of programs that allegedly are supposed to protect wetlands. Swampbuster is only one; there are several others. I see you nodding at that. Does the right hand not know what the left is doing? How is it possible for the two agencies, EPA and the Corps of Engineers, to say that the USDA isn't a third member of the triumvirate, if it is protecting more wetlands now than any of the other agencies? What are they doing with their guidelines?

Donna Downing: Yes, we coordinate with the USDA a great deal in wetlands protection issues. The earlier question was asking is this guidance on the definition of waters of the United States protected by the Clean Water Act going to be controlling for the USDA while it implements a different statute, the Food Security Act and its Swampbuster Program? The answer there was it's not, but that's different from us coordinating.

With respect to the USDA having suggestions, insights, opportunity to comment and discuss the proposed guidance, that definitely happened as part of interagency review before it was put out for public comment.

Audience Member: Are they going to apply this?

Donna Downing: Are they going to apply this? Not as limiting their Food Security Act protection of wetlands, no, but in terms of how they coordinate with us on wetlands that are protected under the Clean Water Act, yes, it will inform them as to what both EPA and the Corps view as covered by the Clean Water Act.

Audience Member: The Farm Bill and the Clean Water Act both deal with wetlands and to have major agencies that aren't saying this is exactly what we're going to apply—all of us—whether it's under the Farm Act or whether it's

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under the Clean Water Act—to say that it's under one Act and therefore it doesn't apply to another Act when the basis is wetland, strikes me as being unduly bureaucratic.

Bruce Myers: I want to get in one quick final question. I think none of these panels are complete without some kind of "reading the tea leaves" question, so this is for Larry and Jan. Whatever our views, we all agree that the Supreme Court has really fixed the constellation on this issue, with its rulings in *Riverside Bayview Homes* and *SWANCC* and *Rapanos*. More recently, the Court has denied *cert.* in various lower court cases post-*Rapanos*. What would it take to get the Supreme Court involved again in this set of issues?

Lawrence Liebesman: You want me to start?

Bruce Myers: Please. Just throw out your quick thoughts and we can wrap it up.

Lawrence Liebesman: Frankly, and maybe I'm being a pessimist, they don't want to touch this. I think they don't want to touch it until Congress acts or there's a formal rulemaking process. I think when they declined to take the *Robison* case at the [U.S. Court of Appeals for the] Eleventh Circuit, even though the Solicitor General expressly asked them to take the case, because it's splitting circuits. That's sending a signal that the Supreme Court says, hands-off—we don't want to touch it. Come to us maybe at some point—not now. So, I don't think the Supreme Court is going to get involved. I think we're living with *Rapanos* and, hopefully, a rulemaking real soon to deal with these issues.

Bruce Myers: Jan, you want to have the last word?

Jan Goldman-Carter: I'm comfortable with that answer. Yeah, I was only going to say, I shudder to think of the Supreme Court taking this up again, particularly without a rule in place. So, I hope that they are of that view that they will not look at it until there is a rule.

Bruce Myers: Please join me in thanking our panelists.