

C O M M E N T

Rapanos Guidance III: “Waters” Revisited

by Richard E. Glaze Jr.

Richard E. Glaze Jr. is a Partner at Balch & Bingham, LLP.

On May 2, 2011, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) issued draft joint guidance¹ for the interpretation of the phrase “waters of the United States” under the Clean Water Act (CWA).² Determinations of CWA jurisdiction are critical for the agencies in issuing permits to fill wetlands under §404 of the CWA³ and in CWA enforcement actions.⁴ The proposed guidance purports to “clarify” how the agencies will “understand” existing requirements of the CWA and identify waters protected by the CWA “in light of” the holdings in *Solid Waste Agency of Northern Cooke County v. U.S. Army Corps of Engineers* (SWANCC)⁵ and *Rapanos v. United States*.⁶ As argued below, the guidance would, if issued in its current

form, do more than “clarify understanding.” Instead, it would provide the agencies a basis for exercising broader authority over the nation’s waters than current policy supports. This expansion would be wrought by a few definitional and linguistic changes, some of which would be consistent with the CWA as interpreted in *Rapanos* and *SWANCC* and others that would be inconsistent.

To understand these issues, it is important to understand how waters over which the Corps and EPA have jurisdiction are defined in relevant statutes and regulations. Under the CWA, the term “navigable waters” is used for waters to which the act applies for several purposes, including, but not limited to: (1) §402 permitting (discharges to surface water); (2) §404 permitting (discharges into wetlands); and (3) enforcement related to discharges to water.⁷ The term “navigable waters” is defined in the CWA as “waters of the United States, including the territorial seas.”⁸ “Waters of the United States,” in turn, is broadly defined in agency regulations to include both traditionally navigable waters (TNWs) and other types of waters, including wetlands and “isolated waters” that may or may not be “navigable” as that word is commonly used.⁹

1. U.S. Environmental Protection Agency (EPA) and U.S. Department of the Army, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* 3 (May 2, 2011), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf [hereinafter proposed guidance in text and Proposed Guidance in citations]. The proposed guidance is noticed at 76 Fed. Reg. 24479 (May 2, 2011). The *Federal Register* notice describes the guidance as “proposed guidance that describes how the agencies will identify waters protected by the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA or Act) and implement the Supreme Court’s decisions on this topic (i.e., *Solid Waste Agency of Northern Cooke County v. U.S. Army Corps of Engineers* (SWANCC), 531 U.S. 159 (2001)) and *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*).” The comment period on the proposed guidance was originally scheduled to close July 1, 2011, but was extended to July 31, 2011.
2. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
3. See 33 U.S.C. §1344(a).
4. See 33 U.S.C. §§1319(b) and (c) (civil and criminal enforcement actions for violations of the CWA) and 33 U.S.C. §§1311(a); 1342(a)(1); 1344(a)(1) and 1362(7) (combined, requiring a permit to discharge a pollutant, including dredged and fill materials, into waters of the United States).
5. 531 U.S. 159, 31 ELR 20382 (2001).
6. 547 U.S. 715, 36 ELR 20116 (2006). See Proposed Guidance, *supra* note 1, at 1.

This draft guidance clarifies how the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) will identify waters protected by the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA or Act) and implement the Supreme Court’s decisions concerning the extent of waters covered by the Act (*Solid Waste Agency of Northern Cooke County v. U.S. Army Corps of Engineers* (SWANCC) and *Rapanos v. United States* (*Rapanos*)). This document clarifies how the EPA and the Corps understand existing requirements of the CWA and the agencies’ implementing regulations in light of *SWANCC* and *Rapanos* and provides guidance to agency field staff in making determinations about whether waters are protected by the CWA.

7. See 33 U.S.C. §1342, 33 U.S.C. §1344, and 33 U.S.C. §1319, respectively.
8. 33 U.S.C. §1362.
9. See 33 C.F.R. §328.3(a)(5); 40 C.F.R. §230.3(s)(5); and 40 C.F.R. §122.2 (“waters of the U.S.”). The term “navigable water” is therefore very broad and should be distinguished from the term “navigable in fact water,” which is much narrower. The latter term is used by Justice Kennedy in his concurring opinion in *Rapanos*. See *infra*, for a discussion of the *Rapanos* decision. See also *The Daniel Ball*, 77 U.S. 557, 563 (1870), where the term “navigable in fact” was apparently first used by the Supreme Court.

Another term for waters is “navigable waters of the United States,” which describes jurisdictional waters under the Rivers and Harbors Act of 1899. 33 U.S.C. §§401 et seq. This term is defined in 33 C.F.R. §329.4 as those waters that are “subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce,” a definition which is similar to the Justice Kennedy description of relevant waters for applying the significant nexus test in *Rapanos*. The proposed guidance incorporates this definition in the definition of TNW, providing that TNWs include waters that are subject to Sections 9 or 10 of the Rivers and Harbors Act. Proposed Guidance, *supra* note 1, at 6. Note, however, that the Corps regulations provide that “[t]his definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR Parts 323 and 328.” 33 C.F.R. §329.1.

In *SWANCC*, the U.S. Supreme Court ruled that federal authority under the CWA does not extend to isolated waters. The case involved a group of Illinois municipalities that had organized themselves into a municipal corporation known as the Solid Waste Agency of Northern Cook County. SWANCC purchased a 533-acre site for disposing of solid waste, but the Corps denied the permit required under §404 of the CWA to fill 17.6 acres of small, seasonal ponds and ditches, and SWANCC sought judicial review of the Corps' decision. The Corps based its assertion of jurisdiction over the waters at issue on the "migratory bird rule,"¹⁰ which provided that waters used as habitat for migratory birds established the necessary connection to interstate commerce for a water to be jurisdictional. The Court held, however, that the Corps' assertion of jurisdiction on this basis exceeded the authority granted to it under §404(a) of the CWA. The Court reasoned that the agencies' expansive definition of the term "waters of the United States" was so broad that the word "navigable" as used in the CWA had become meaningless. The Court believed that the U.S. Congress' use of the word "navigable" demonstrated that, in enacting the CWA, it had in mind "[the Corps'] traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."¹¹

In *Rapanos*,¹² the Supreme Court examined the Corps' jurisdiction over wetlands that were located near "ditches or manmade drains" that "eventually" emptied into "traditional navigable waters."¹³ One of the wetlands was sepa-

rated from the nearby ditch by a man-made berm.¹⁴ The Court endeavored to determine whether the wetlands were "waters of the United States" subject to jurisdiction under the CWA,¹⁵ and to provide an understandable framework for making the determination. According to the evidence as viewed by the Court, it was "not clear whether the connections between these wetlands and the nearby drains and ditches [were] continuous or intermittent, or whether the nearby drains and ditches contain[ed] continuous or merely occasional flows of water."¹⁶

The Court issued five opinions, none of which was accepted by a majority of the Court. The plurality opinion, authored by Justice Antonin Scalia, stated that the term waters of the United States includes "only . . . relatively permanent, standing or flowing bodies of water" and that only wetlands with a "continuous surface connection" to other jurisdictional waters are considered to be "adjacent" and protected by the CWA.¹⁷ Justice Scalia also explained that the term "waters of the United States" as used in the CWA should be limited to those that are "navigable in fact or susceptible of being rendered so."¹⁸ Justice Anthony Kennedy's concurring opinion, using a different approach, held that "waters of the United States" include only wetlands that have a significant nexus to TNWs, meaning that the wetlands must, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"¹⁹ Justice Kennedy explained that such TNWs include only waters that are "navigable in fact or susceptible of being made so."²⁰ Justice John Paul Stevens, and the three Justices who joined in his dissenting opinion, would have upheld CWA jurisdiction over the wetlands parcels under the agencies' existing regulations and under either the plurality test or Justice Kennedy's significant nexus analysis.²¹

Two earlier agency guidance documents issued by EPA and the Corps have attempted to clarify jurisdiction under *Rapanos*.²² The second guidance is currently effective.²³ As discussed below, the earlier versions of the guidance were

10. See 51 Fed. Reg. 41217.

11. See 531 U.S. at 165 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 16 ELR 20086 (1985)). In *Riverside*, the Court upheld jurisdiction over wetlands "adjacent" to navigable waters. In that case, the Court ruled that Congress intended the term "navigable waters" to include at least some waters that would not be deemed "navigable" under the classical understanding of that term. However, the Court in *SWANCC* noted that there is a difference between giving the term "navigable" limited effect and giving the term no effect at all.

12. *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006).

13. *Id.* at 729. As described by the Court:

the Rapanos and their affiliated businesses, deposited fill material without a permit into wetlands on three sites near Midland, Michigan: the "Salzburg site," the "Hines Road site," and the "Pine River site." The wetlands at the Salzburg site are connected to a man-made drain, which drains into Hoppler Creek, which flows into the Kawkawlin River, which empties into Saginaw Bay and Lake Huron. The wetlands at the Hines Road site are connected to something called the "Rose Drain," which has a surface connection to the Tittabawassee River. And the wetlands at the Pine River site have a surface connection to the Pine River, which flows into Lake Huron. . . . [t]he Carabells [petitioners in the consolidated case], were denied a permit to deposit fill material in a wetland located on a triangular parcel of land about one mile from Lake St. Clair. A man-made drainage ditch runs along one side of the wetland, separated from it by a 4-foot-wide man-made berm. The berm is largely or entirely impermeable to water and blocks drainage from the wetland, though it may permit occasional overflow to the ditch. The ditch empties into another ditch or a drain, which connects to Auvase Creek, which empties into Lake St. Clair.

Id. (citations omitted).

14. *Id.* at 730.

15. See 33 U.S.C. §1344(a).

16. *Rapanos*, 547 U.S. at 729.

17. *Id.* at 739.

18. *Id.* at 734.

19. *Id.* at 780.

20. *Id.* at 779.

21. *Id.* at 810.

22. See U.S. Environmental Protection Agency and U.S. Department of the Army, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (June 5, 2007), available at <http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf> [hereinafter Original Guidance] and U.S. Environmental Protection Agency and U.S. Department of the Army, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), available at http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos_120208.pdf [hereinafter Current Guidance].

23. Current Guidance, *supra* note 22.

somewhat limited in scope and also were more faithful to *Rapanos*, *SWANCC*, the CWA, and current regulations. However, they have had limited value as guidance, giving the agencies little assurance that the evidence they may gather to support jurisdictional determinations and enforcement decisions will be sufficient to withstand challenges, particularly in appellate circuits where the courts have not ruled on which *Rapanos* test will be applied.²⁴ An early example of the difficulties the agencies have faced is provided by *United States v. Robison*,²⁵ in which the U.S. Court of Appeals for the Eleventh Circuit held that proof that a tributary had an uninterrupted connection to a TNW (which would satisfy the Justice Scalia test under *Rapanos*) was insufficient to prove jurisdiction, since only the Justice Kennedy test would be allowed. Because the government investigated and tried the *Robison* case before the *Rapanos* decision was rendered, EPA and the U.S. Department of Justice could not have known what evidence would be needed to satisfy the application of the Justice Kennedy test to the facts. A more recent example of the difficulties EPA

faces in developing evidence for enforcement cases is the criminal case of *United States v. Freedman*²⁶ in the Eastern District of North Carolina, where, in an order regarding jury instructions for trial, the trial judge ruled that the jury must be charged based on the Justice Kennedy test alone.²⁷ This ruling is somewhat surprising, in that it comes close on the heels of *Precon Development Corp. v. U.S. Army Corps of Engineers*,²⁸ in which the U.S. Court of Appeals for the Fourth Circuit appeared to leave the door open for application of either *Rapanos* test.²⁹ The defendants in *Freedman* recently pled guilty, and the judge's ruling will therefore not be tested on appeal.³⁰

The proposed guidance provides more detailed direction to the agencies for making jurisdictional calls and for developing the evidence needed to support their calls and to support enforcement. It also makes no secret that the agencies will use the guidance to attempt to expand their jurisdiction. As stated in the proposed guidance,

the agencies expect, based on relevant science and recent field experience, that under the understandings stated in this draft guidance, the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance, though certainly not to the full extent that it was typically asserted prior to the Supreme Court decisions in *SWANCC* and *Rapanos*.³¹

While the agencies acknowledge that their proposed policy is intended to expand jurisdiction over waters of the United States, the second sentence of the guidance avers that the policy merely “clarifies how EPA and the Corps understand the existing requirements of the Clean Water Act . . . in light of *SWANCC* and *Rapanos*.”³² This implies that the agencies believe the intended expansion of jurisdiction is consistent with these precedents. As shown below, in several instances, it is not.

In evaluating the scope of the proposed guidance, it is useful to consider the concept of “relevant water.” As used in the guidance, a relevant water is the reference water for the significant nexus test³³—that is, it is the water to which the significant nexus test is applied to determine

24. In the U.S. Court of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, and Eighth Circuits, courts have held or suggested in dicta that either test may be used to establish jurisdiction. See *United States v. Johnson*, 467 F.3d 56, 36 ELR 20218 (1st Cir. 2006) (concluding that a water is jurisdictional if the government can meet either the Justice Kennedy or the plurality standard); *Simsbury-Avon Pres. Soc'y v. Metacon Gun Club*, 472 F. Supp. 2d 219, 37 ELR 20038 (D. Conn. 2007) (district court in Second Circuit stated that “this Court will consider [this case] under both the plurality’s and Justice Kennedy’s standards”); *United States v. Donovan*, 2010 U.S. Dist. LEXIS 94299, 40 ELR 20251 (D. Del. Sept. 10, 2010) (district court in Third Circuit found that where the various circuit courts had been inconsistent in which *Rapanos* test to apply, the magistrate judge did not err by applying both the plurality and the Justice Kennedy tests); *Precon Dev. Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 288, 41 ELR 20071 (4th Cir. 2011) (“The parties here agree that Justice Kennedy’s ‘significant nexus’ test governs . . . We therefore do not address the issue of whether the plurality’s ‘continuous surface connection’ test provides an alternate ground upon which CWA jurisdiction can be established.”); *United States v. Lucas*, 516 F.3d 316, 38 ELR 20041 (5th Cir. 2008) (holding jury instructions were not in error when they contained elements of both the plurality and concurring *Rapanos* opinions, requiring the jury to find the wetlands fit both adjacency and significant nexus requirements); *United States v. Cundiff*, 555 F.3d 200, 39 ELR 20025 (6th Cir. 2009) (adopting the First Circuit’s approach and concluding that either the Justice Kennedy or plurality standards may be met); *United States v. Bailey*, 571 F.3d 791, 39 ELR 20148 (8th Cir. 2009) (“we join the First Circuit in holding that the Corps has jurisdiction over wetlands that satisfy either the plurality or the Justice Kennedy’s test”). *But see*, with respect to the Fourth Circuit, *United States v. Freedman Farms, Inc.*, No. 7:10-CR-15-FL (E.D.N.C. May 18, 2011) (district court case in the Fourth Circuit holding that the Justice Kennedy test applies and the Justice Scalia test cannot be used).

The Eleventh Circuit appears to be the only circuit court holding that only the Justice Kennedy test is valid. See *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007) (holding the Justice Kennedy test to be the narrowest grounds and less restrictive of CWA jurisdiction); accord *Freedman*, No. 7:10-CR-15-FL.

The Seventh and Ninth Circuits applied the Justice Kennedy significant nexus test, but stated that the plurality test might apply in some cases. See *United States v. Gerke*, 464 F.3d 723, 36 ELR 20200 (7th Cir. 2006) (stating that Justice Kennedy’s test “must govern the further stages of this litigation”); *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023, 36 ELR 20163 (9th Cir. 2006) (finding the Justice Kennedy test the narrowest opinion and stating that Justice Kennedy’s significant nexus test provides “the controlling rule of law for our case”).

For jurisdictional determinations in circuits that have not settled the issue, agencies would be well-advised to build a record satisfying both tests, if possible.

25. 505 F.3d 1208 (11th Cir. 2007).

26. *Freedman*, No. 7:10-CR-15-FL.

27. *Id.*, Order, May 11, 2011.

28. 633 F.3d 278, 41 ELR 20071 (4th Cir. 2011).

29. See *id.* at 288 (“The parties here agree that Justice Kennedy’s ‘significant nexus’ test governs . . . We therefore do not address the issue of whether the plurality’s ‘continuous surface connection’ test provides an alternate ground upon which CWA jurisdiction can be established.”).

On the subject of the apparent discrepancy between the *Freedman* ruling and *Precon*, the *Freedman* trial judge apparently did not believe the Fourth Circuit had spoken definitively, but he did acknowledge that the court had pointed out that “several circuits held that the significant nexus test alone governed the cases immediately before them, but declined to foreclose the possible future application of the plurality’s test as an alternative basis for establishing jurisdiction in other cases.” *Freedman*, No. 7:10-CR-15-FL, 12.

30. *Id.*, Minute Entry for proceedings held before Chief Judge Louise Wood Flanagan in New Bern, N.C.

31. Proposed Guidance, *supra* note 1, at 2 (emphasis added).

32. *Id.* at 1.

33. *Id.* at 9 (first emphasis in original, second emphasis added) (“Among the most important tasks for field staff is demonstrating that a significant nexus exists between the ‘similarly situated’ waters that are the subject of a case-

whether the water being evaluated is a jurisdictional water, referred to as a “navigable water” or “water of the United States” in the statute and as a “water of the United States” in the regulations.³⁴ In *Rapanos*, Justice Kennedy held that waters are jurisdictional if they have a “significant nexus” to waters that are “navigable-in-fact or that could reasonably be made so.”³⁵ Such waters are thus the “relevant waters” under the Justice Kennedy test. Under the current guidance, the agencies use the term “traditional navigable waters,” alone, as the relevant water.³⁶ The proposed guidance would expand the relevant waters by adding interstate waters to TNWs,³⁷ so that all waters connected or adjacent to either interstate waters or TNWs would henceforth be jurisdictional. As explained in more detail below, this is a significant expansion beyond the scope of the current guidance and the Supreme Court rulings. The magnitude of the expansion is currently unknown and will depend upon how many interstate waters exist that are not also TNWs. Organization of this Article is roughly parallel to that of the guidance, beginning with the introductory paragraphs, and addressing each of the eight sections in order.

I. The Introduction

The introductory paragraphs summarize the legal basis for the guidance and its purposes, goals, and limitations. First, the guidance purports to “clarify” how EPA and the Corps will identify waters “in light of *SWANCC* and *Rapanos*.”³⁸ Taking pains to explain that the document is merely guidance and “lacks the force of law,” the agencies state that the primary purpose of the document is to “describe for agency field staff the agencies’ current understandings” regarding the subject matter, so they will benefit from lessons learned since 2008 when the existing guidance was issued.³⁹ The guidance states it is intended to be “consistent with the statute, regulations, Supreme Court caselaw [sic], relevant science . . . and the agencies’ field experience.”⁴⁰ After a succinct briefing of *United States v. Riverside Bay-*

view Homes,⁴¹ *SWANCC*,⁴² and *Rapanos*,⁴³ the agencies state their intention to assert jurisdiction over waters that satisfy either the plurality standard or the Justice Kennedy standard in *Rapanos*.⁴⁴ The agencies acknowledge that the proposed guidance will result in their exercising jurisdiction over interstate waters not covered by earlier guidance, and asserts that the guidance will provide the legal basis for this increased coverage.⁴⁵ It also asserts that the guidance will not affect any of the §404(f) exemptions for discharges of dredged or fill material into U.S. waters.⁴⁶ The agencies’ stated “expectation” that they will expand jurisdictional calls⁴⁷ under the proposed guidance contrasts with their approach under the current guidance, which they stated was “not intended to either expand or contract CWA jurisdiction but rather to effectively implement the decision by the Supreme Court in *Rapanos*.”⁴⁸

II. Section One: TNWs

The first of the eight sections in the proposed guidance describes TNWs, which, in addition to interstate waters, are the relevant waters upon which the concept of significant nexus depends.⁴⁹ This section provides examples of waters considered to be TNWs. They include: (a) waters subject to §9 or §10 of the Rivers and Harbors Act; and (b) waters currently used for commercial navigation, historically used for commercial navigation, or susceptible for future use for commercial navigation.⁵⁰ The latter category, according to the proposed guidance, also would include “commercial waterborne recreation,” with the guidance specifying that susceptibility to future use for commercial navigation may be demonstrated by “current boating and canoe trips for recreation or other purposes.”⁵¹ Recreational use as evidence of navigability has evolved from the concept of navigability for the transport of goods by canoe,⁵² and under this analysis, such waters would arguably be properly considered TNWs. Existing agency regulations provide that the “other waters” category of “waters of the United States” includes those used for recreation by interstate or foreign travelers, without tying the concept

specific jurisdictional determination and the *relevant traditional navigable water or interstate water*.”).

34. See *supra* note 9 and accompanying text, for a more detailed explanation of jurisdictional waters.

35. *Rapanos*, 547 U.S. at 739.

36. Current Guidance, *supra* note 22, at 4-5. Traditional navigable waters are defined in the current guidance as “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” *Id.* (citations omitted).

37. Proposed Guidance, *supra* note 1, at 2. (“This draft guidance provides a more complete discussion of the agencies’ interpretation, including of how waters with a ‘significant nexus’ to traditional navigable waters or interstate waters are protected by the CWA.”)

38. *Id.* at 1.

39. The proposed guidance expressly supersedes the agencies’ current guidance on *Rapanos*, as well as the agencies’ guidance on *SWANCC*, identified in the proposed guidance as “the ‘Joint Memorandum’ providing clarifying guidance on *SWANCC*, dated January 15, 2003 (68 Fed. Reg. 1991, 1995).” See *id.*

40. *Id.* at 2.

41. 474 U.S. 121, 16 ELR 20086 (1985).

42. 531 U.S. 159, 31 ELR 20382 (2001).

43. 547 U.S. 715, 36 ELR 20116 (2006).

44. Proposed Guidance, *supra* note 1, at 2.

45. *Id.* at 2-3.

46. *Id.* at 3. Section 404(f) of the CWA describes “non-prohibited discharge of dredged or fill material.” 42 U.S.C. §1344(f).

47. Proposed Guidance, *supra* note 1, at 3.

48. See Corps and EPA Response to the *Rapanos* Decision, Key Questions for Guidance Release at 1 (undated), available at <http://www.epa.gov/owow/wetlands/pdf/13RapanosQ&As.pdf>.

49. Proposed Guidance, *supra* note 1, at 6.

50. *Id.*

51. *Id.*

52. See, e.g., *United States v. Steamer Montello*, 87 U.S. (20 Wall.) 430 (1874), cited for this proposition in William W. Sapp et al., *The Float a Boat Test: How to Use It to Advantage in This Post-Rapanos World*, 38 ELR 10439 (July 2008). This Article provides a thought-provoking examination of the use of a recreational navigation to enhance navigability determinations.

to traditional commerce and without designating them as navigable-in-fact.⁵³

The current guidance says very little about the meaning of the term TNW. The original *Rapanos* guidance,⁵⁴ however, was issued with a document entitled “Legal Definition of ‘Traditional Navigable Waters,’”⁵⁵ a four-page legal memorandum explaining the legal underpinnings of the concept as envisioned by the agencies. In this document, the agencies explained that TNWs are equivalent to the waters defined in 33 C.F.R. §328.3(a)(1), the “(a)(1) waters,” which are in turn essentially equivalent to the navigable-in-fact waters in the Justice Kennedy test. Unlike in the proposed guidance, the original post-*Rapanos* description of TNW did not attempt to stretch the concept of navigability to include all commercial waterborne recreation. Instead, the agencies argued for a generous interpretation of navigability, citing favorably to *FPL Marine Hydro LLC v. FERC*,⁵⁶ which held that navigability could be based on “three experimental canoe trips taken specifically to demonstrate the river’s navigability.”⁵⁷ Under the proposed guidance, however, a water will be a TNW to the extent it can be paddled on or used for commercial waterborne recreation in addition to other accepted traditional concepts of navigability. The proposed guidance seems not to limit the concept of commercial waterborne recreation to recreation using boats, which could mean that recreational uses such as wading in smaller waters or flooded timber to bird watch, shoot ducks, or fish would qualify. If, for example, guided bird-watching trips occurred in the types of isolated waters discussed in *SWANCC*, in which the Supreme Court held that the migratory bird rule could not justify jurisdiction,⁵⁸ those isolated waters would become jurisdictional under the proposed guidance because birds used the waters. Would this result, which directly contradicts a Supreme Court holding, be accorded deference under the applicable standard?⁵⁹ This extension of the concept of navigability arguably broadens the term TNW beyond what was contemplated in the first two guidance documents. To the extent such an expansion is not unreasonable or in conflict with other authority, it might be accorded deference if challenged.⁶⁰

53. See 33 C.F.R. §328.2(a)(3)(i); 40 C.F.R. §230.3(s)(3)(i); and 40 C.F.R. §122.2 (definition of “waters of the United States” at (c)(i)).

54. Original Guidance, *supra* note 22.

55. This document is now included as Appendix D of the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (May 30, 2007), available at http://www.usace.army.mil/CECW/Docs/cecwo/reg/cwa_guide/jd_guidebook_051207final.pdf.

56. 287 F.3d 1151 (D.C. Cir. 2002).

57. *Id.* at 1157.

58. *SWANCC*, 531 U.S. at 160.

59. See *infra* discussion of deference standards.

60. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and *Christensen v. Harris County*, 529 U.S. 576 (2000) (*Skidmore* deference appropriate for agency policy statements); cf. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 14 ELR 20507 (1984) (greater deference under *Chevron* applicable to agency interpretations of statutes for rulemaking). For a more detailed discussion of *Skidmore* and *Chevron* deference in this context, see Section IV below.

III. Section Two: Interstate Waters

Section 2 describes the agencies’ view of “interstate waters,” stating that they will assert jurisdiction over “all rivers, lakes, and other waters that flow across, or form part of, State boundaries.”⁶¹ The agencies will use the concept of “stream order” to determine what part of a river or stream is an interstate water. The order of a stream is, in effect, a branch of the stream. The agencies will deem the entire order or branch of a river or stream that crosses a state line to be jurisdictional.⁶² In this section, the agencies describe a potentially substantial expansion of jurisdiction, announcing that they not only will consider interstate waters to be jurisdictional, but also

[w]ill analyze *tributaries to interstate waters* . . . under Justice Kennedy’s standard discussed in Section 4 below. Similarly, the agencies will analyze wetlands adjacent to *interstate waters* (except wetlands that are adjacent to interstate wetlands)⁶³ consistent with the treatment of adjacent wetlands under Justice Kennedy’s standard discussed in Section 5 below.⁶⁴

Here, the agencies add a new category of waters to TNWs that, as discussed below, extends the scope of relevant waters beyond the TNWs described in the current guidance and beyond the scope contemplated by Justice Kennedy in *Rapanos*.⁶⁵

IV. Section Three: Significant Nexus Analysis

This section, which addresses the overall application of the Justice Kennedy significant nexus analysis, is intended to be used as “general guidance for determining the presence or absence of a significant nexus”⁶⁶ and is followed by sections addressing specifically how the test will be applied to tributaries and adjacent wetlands. According to the proposed guidance, “[t]he agencies will assert jurisdiction over waters with a significant nexus to traditional navigable waters *or interstate waters* in accordance with *SWANCC* and *Rapanos*.”⁶⁷ The guidance then quotes Justice Kennedy in *Rapanos*:

In *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court

61. Proposed Guidance, *supra* note 1, at 7.

62. The order of a stream, in ordinary parlance, is a branch. As explained in the guidance, “[f]ield staff generally should use the Strahler method. In Strahler’s method, a first-order stream has no tributaries, a second-order stream is formed by the joining of any two first-order streams, and a third order stream is formed by the junction of any two second-order streams.” See Proposed Guidance, *supra* note 1, at 7 and n.14 (citation omitted).

63. As footnoted in the Proposed Guidance, wetlands adjacent to interstate wetlands are not included in the definition of “waters of the United States” contained in 33 C.F.R. §328.3(a)(7); 40 C.F.R. §230.3(s)(7); or 40 C.F.R. §122.2 (definition of “waters of the United States” at (g)). Proposed Guidance, *supra* note 1, at 7 and n.16.

64. Proposed Guidance, *supra* note 1, at 7 (emphasis added).

65. 547 U.S. at 780.

66. Proposed Guidance, *supra* note 1, at 7.

67. *Id.* (emphasis added).

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 reasonably be so made.⁶⁸

The guidance further asserts that there is but “one significant nexus standard for waters of the United States” that is satisfied by showing that waters, “either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters or interstate waters.”⁶⁹

Section 3 establishes a sequence for the agencies to use in applying the significant nexus test.⁷⁰ First, the relevant agency will examine the “resource type” of a water, that is, whether the water is a tributary, adjacent wetland, or “proximate other water, and consider all waters of the same type to be similarly-situated.”⁷¹ Next, the agencies will consider the “region” where the water is located to identify all similarly situated waters in the region.⁷² For this purpose, the “region” is the watershed that “drains to the nearest traditional navigable water or interstate water through a single point of entry.”⁷³ The final step in the analysis is determining whether the water being evaluated and all similarly situated waters have a significant nexus to a TNW or interstate water. Functions of waters to be considered for this purpose include “sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, and provision of aquatic habitat.”⁷⁴ According to the guidance, hydrologic connectivity is not necessary to establish a nexus “because in some cases the lack of a hydrologic connection would be a sign of the water’s function in relationship to the traditional navigable water or interstate water, such as retention of flood waters or pollutants that would otherwise flow downstream to the traditional navigable water or interstate water.”⁷⁵

This section of the guidance would expand CWA jurisdiction in at least two ways. The first is the addition of the words “interstate waters” to the significant nexus test,⁷⁶ to

the effect that interstate waters are made relevant waters for purposes of applying the significant nexus test.⁷⁷ The current guidance limits relevant waters to TNWs, including waters “used in commerce” and tidal waters, intentionally excluding interstate waters.⁷⁸ If, as the proposed guidance provides, interstate waters become relevant waters for the significant nexus test, then not only would every stream reach, pond, or other wet feature that crosses a state line become jurisdictional, but also every wet feature with a significant nexus to such waters (that otherwise meets the requirements of the proposed guidance) would be subject to CWA jurisdiction. This expands the scope of jurisdictional waters well beyond the intent of the Supreme Court as expressed in *SWANCC* and *Rapanos*.⁷⁹ In an attempt to justify this expansion of relevant waters, the agencies published simultaneously with the guidance⁸⁰ an extensive legal memorandum regarding the inclusion of interstate waters

nedy holding:

In *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court 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 reasonably be so made.

Id. at 7 (citing *Rapanos*, 547 U.S. at 759 (emphasis added)).

This is an interesting juxtaposition of fundamentally conflicting positions regarding the scope of waters subject to significant nexus analysis. Is it a direct challenge to the authority of the Supreme Court or a belief the interpretation deserves *Chevron* deference? See text accompanying notes 90-95, for a discussion of the *Chevron* deference standard; see also *supra* note 60.

77. Under the regulatory definition of waters of the United States, tributaries of interstate waters are considered jurisdictional. 33 C.F.R. §328.3(a)(5); 40 C.F.R. §230.3(s)(5); and 40 C.F.R. §122.2 (“waters of the United States” at (e)). This rule was specifically addressed in *Rapanos*, 547 U.S. at 715. It is clear from the Justice Kennedy opinion that the mere geographic *location* of water, without considering the characteristics of the water, cannot make it a relevant water under the significant nexus test. See discussion accompanying footnote 45; see also *United States v. Robison*, 521 F.3d 1319 (11th Cir. 2008) (proof that tributary at issue was connected to TNW was not sufficient to establish requisite nexus). Another case supporting this proposition is *Precon Development Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 41 ELR 20071 (4th Cir. 2011). *Precon* involved a 4.8-acre tract of wetlands adjacent to a man-made drainage ditch. The court approved of many of the factors the Corps identified to support significant nexus and agreed that it had properly identified similarly situated wetlands, but found that this was not sufficient evidence to demonstrate a significant nexus with the TNW. See 633 F.3d at 293-94.
78. The current guidance states that EPA and the Corps will continue to assert jurisdiction over “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” These waters are referred to in this guidance as traditional navigable waters.” Current Guidance, *supra* note 22, at 4-5. As authority for this proposition, footnote 20 of the current guidance cites 33 C.F.R. §328.3(a)(1) and 40 C.F.R. §230.3(s)(1) and explains the “(a)(1)” waters include all of the ‘navigable waters of the United States,’ defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka[, MN]).” Current Guidance, *supra* note 22, at 5 n.20. Immediately following this regulation appears 33 C.F.R. §328.3(a)(2), which includes as waters of the United States “all interstate waters including interstate wetlands,” but EPA and the Corps did not assert jurisdiction over these (a)(2) waters. By negative implication, therefore, the current guidance omitted interstate waters from the relevant waters to which the significant nexus test applies.
79. No inquiry was made for purposes of this Article into the number of waters that the concept might add. EPA is said to have identified remote interstate waters that would be difficult to argue as jurisdictional under *Rapanos*.
80. Proposed Guidance, *supra* note 1.

68. *Id.* (citing *Rapanos*, 547 U.S. at 759). Justice Kennedy reinforced this notion and stated later in the opinion that when he referred to “navigable waters,” he was referring to “navigable waters in the traditional sense.” *Rapanos*, 547 U.S. at 779.

69. Proposed Guidance, *supra* note 1, at 7 (emphasis added).

70. Simultaneously with the publication of the original guidance, the agencies also published a memorandum of agreement to address coordination on Jurisdictional Determinations under §404 of the CWA in light of *SWANCC* and *Rapanos*. See U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, *Memorandum for Director of Civil Works and US EPA Regional Administrators* (June 5, 2007), available at <http://www.epa.gov/owow/wetlands/pdf/RapanosMOA6507.pdf>.

71. Proposed Guidance, *supra* note 1, at 8.

72. *Id.*

73. *Id.* The term “region” is used by Justice Kennedy in *Rapanos* to describe the area in which similarly situated wetlands are found. See *Rapanos*, 547 U.S. at 717.

74. Proposed Guidance, *supra* note 1, at 9. Though Justice Kennedy used the term “region” in connection with “similarly situated” wetlands, he did not say that the relevant region is the entire watershed of the TNW where the wetlands and tributaries are located. See *Rapanos*, 547 U.S. at 717.

75. Proposed Guidance, *supra* note 1, at 9.

76. Immediately after stating that the significant nexus test includes “interstate waters,” the guidance cites the following part of the Justice Ken-

in the guidance.⁸¹ This legal memorandum is in addition to the discussion contained in the appendix to the proposed guidance.⁸² These justifications, however, focus on how interstate waters are properly considered jurisdictional, citing abundant authority.⁸³ Being jurisdictional, however, is not equivalent to being relevant waters for applying the significant nexus test, and neither the appendix nor the legal memorandum addresses this issue directly. Nowhere do the agencies argue that interstate waters are either navigable-in-fact waters as required in *Rapanos*⁸⁴ or TNWs, as relevant waters are referred to by the agencies. Instead, the legal memorandum merely argues that interstate waters should be considered to be equivalent to “navigable waters,” repeatedly using the term interchangeably with “waters of the United States.”⁸⁵ In short, these legal arguments offer no authority to support the concept that interstate waters are relevant waters for purposes of applying the significant nexus test.

Though the agencies do not provide direct legal support for the relevant waters concept, they argue that their interpretation in the guidance should be accorded “deference” under *Chevron U.S.A. v. Natural Resources Defense Council*.⁸⁶ *Chevron* deference is a generous deference standard that requires a court to defer to the agency interpretation if it is a “permissible construction of the statute.”⁸⁷ *Chevron* is the wrong deference standard, however, and applies to agency interpretations of statutes *via rulemaking*.⁸⁸ For nonbinding policy statements, such as agency guidance,⁸⁹ a less deferential standard applies. The current Supreme Court rule provides as follows:

Interpretations such as those in . . . policy statements, agency manuals and enforcement guidelines . . . which lack the force of law—do not warrant *Chevron*-style deference. They are “entitled to respect,” but only to the extent that they are persuasive, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124, which is not the case here.⁹⁰

Skidmore held that an agency policy statement must be examined in light of “the validity of its reasoning and its consistency with *earlier and later pronouncements*.”⁹¹ This suggests that, in a conflict between the policy interpreta-

tion and an earlier or later Supreme Court holding, the Court’s holding would prevail.

Under *Skidmore*, Justice Kennedy’s “earlier pronouncement” regarding the nature of relevant waters trumps the broader agency interpretation in the guidance.⁹² The conflict is apparent in the following excerpt from the Justice Kennedy opinion in *Rapanos*:

While the plurality reads non-existent requirements into the Act, the dissent reads a central requirement out—namely, the requirement that the word “navigable” in “navigable waters” be given some importance. Although the Court has held that the statute’s language invokes Congress’ traditional authority over waters navigable in fact or susceptible of being made so, *SWANCC*, 531 U.S., at 172, 121 S. Ct. 675, 148 L. Ed. 2d 576 (citing *Appalachian Power*, 311 U.S., at 407-408, 61 S. Ct. 291, 85 L. Ed. 243), the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, *however remote and insubstantial*, that eventually may flow into traditional navigable waters. The deference owed to the Corps’ interpretation of the statute does not extend so far.⁹³

Justice Kennedy would not agree that a relevant water can be one characterized solely by an accident of geopolitical determination, such as the drawing of state lines.

Another jurisdictional expansion proposed in Section 3 characterizes “similarly situated waters”⁹⁴ as potentially including all waters in the watershed of the relevant TNW. According to the proposed guidance, “[t]he logical and scientifically valid “region”⁹⁵ for determining whether similarly situated waters have a significant nexus is the watershed that drains to the nearest traditional navigable water or interstate water through a single point of entry.”⁹⁶ This application of “similarly situated” in the proposed guidance is much broader than in the current guidance, where “similarly situated” is interpreted to “include all wetlands adjacent to the same tributary.”⁹⁷ The current guidance also does not extend the concept to the grouping of tributaries, deciding instead, as did Justice Kennedy, to confine its application to wetlands.⁹⁸ The proposed guidance does not

81. The memorandum, entitled *Interstate Waters Are “Waters of the United States” Under Section (a)(2) of the Agencies’ Regulations*, is available at http://www.epa.gov/owow/wetlands/pdf/wous_interstate_waters.pdf [hereinafter Legal Memo].

82. See Proposed Guidance, *supra* note 1, at 23-33.

83. See generally Proposed Guidance, *supra* note 1, at 24-25 and Legal Memo, *supra* note 81.

84. *Rapanos*, 547 U.S. at 759.

85. See *supra* note 81 Legal Memo at 1 and 12.

86. 467 U.S. 837, 14 ELR 20507 (1984).

87. 467 U.S. at 843.

88. See *Christensen*, 529 U.S. at 578.

89. As the document itself states, the proposed guidance “is intended to describe for agency field staff the agencies’ current understandings; it is not a rule, and hence it is not binding and lacks the force of law.” Proposed Guidance, *supra* note 1, at 1.

90. *Christensen*, 529 U.S. at 578.

91. *Skidmore*, 323 U.S. at 140 (emphasis added).

92. It would also conflict with the plurality test because a remote interstate water and the waters connected to it may not be “relatively permanent”. See *Rapanos*, 547 U.S. at 739. As the proposed guidance provides, however, the significant nexus test (where the concept of relevant waters is applied) will only be applied to waters after determining that the Justice Scalia test is not satisfied. Proposed Guidance, *supra* note 1, at 13.

93. *Rapanos*, 547 U.S. at 778 (emphasis added).

94. Justice Kennedy held that the significant nexus test is to be applied to “wetlands, either alone or in combination with *similarly situated* lands in the region.” *Rapanos*, 547 U.S. at 780 (emphasis added).

95. Justice Kennedy used the term “region” to describe the area where similarly situated wetlands would be found, but he did not consider “region” as the entire watershed. *Id.*

96. Proposed Guidance, *supra* note 1, at 8.

97. Current Guidance, *supra* note 22, at 10.

98. According to the current guidance,

where evaluating significant nexus for an adjacent wetland, the agencies will consider the flow characteristics and functions performed by the tributary to which the wetland is adjacent along with the functions performed by the wetland and all other wetlands adjacent to that tributary. This approach reflects the agencies’ inter-

limit use of the concept of similarly situated to wetlands, instead applying it to waters generally. Like the interstate waters concept, the expanded view of what is similarly situated does not appear to be based on legal precedent or other legal authority. It is arguably a logical extension of current law, however,⁹⁹ and is not directly contradicted by *Rapanos*.¹⁰⁰ The Justice Kennedy opinion appears to leave plenty of room for interpretation of the phrase, using it only once in the opinion without further explication.¹⁰¹ If challenged, therefore, the interpretation of “similarly situated” in the proposed guidance may be more likely to survive a *Skidmore* analysis.

The proposed guidance takes pains to describe how the agencies should build a record to establish a significant nexus, describing what could be an involved process of evaluating characteristics that might affect downstream navigable-in-fact waters.¹⁰² Noteworthy in this discussion is the suggestion that the agencies do not have to evaluate every similarly situated water within a watershed, but that a significant nexus determination may be based on an evaluation of a representative subset of adjacent and proximate waters, suggesting that each water will not have to be reevaluated for each case, but only “as many waters of the same type as is necessary to support and document the presence or absence of a significant nexus for that type of water (e.g., adjacent wetland, tributary or proximate other water).”¹⁰³

V. Section Four: Tributaries

In Section 4 of the guidance, the agencies explain how they will apply the plurality and Justice Kennedy standards of *Rapanos* to assert jurisdiction over tributaries. The section first defines tributary as a natural, man-made or man-altered water body that contributes flow to a TNW or interstate water “either directly or indirectly by means of

other tributaries.”¹⁰⁴ Interestingly, in addition to the commonly understood meaning of the term, tributaries are said to include lakes and “certain wetlands” that are part of the tributary system, in addition to rivers and streams.¹⁰⁵ The guidance provides that “erosional features such as gullies and rills” will not be considered jurisdictional, distinguishing them from streams with more defined beds and banks.¹⁰⁶ However, despite the fulsome discussion of the “features,” no bright-line distinctions are drawn between them and tributaries.

Section 4 provides that the nontidal ditches will be considered to be tributaries if:

they have a bed, bank, and ordinary high water mark; connect directly or *indirectly* to a traditional navigable or interstate water; *and* have one of the following five characteristics:

- natural streams that have been altered (e.g., channelized, straightened or relocated);
- ditches that have been excavated in waters of the U.S., including wetlands;
- ditches that have relatively permanent flowing or standing water;
- ditches that connect two or more jurisdictional waters of the U.S.; or
- ditches that drain natural water bodies (including wetlands) into the tributary system of a traditional navigable or interstate water.¹⁰⁷

If a ditch is considered a tributary, the agencies will evaluate it “in the same manner as other tributaries” (i.e., plurality standard or Justice Kennedy standard, as appropriate).¹⁰⁸ Section 4 appears to expand jurisdiction over ditches (in addition to adding the concept of interstate water) by including *all ditches* that connect directly or *indirectly* to a TNW or interstate water and ditches with “standing water.”¹⁰⁹ By including ditches that connect *indirectly* to TNWs or interstate waters, the guidance apparently would include even ditches from which dispersed or underground flow reaches downstream waters. Thus, any ditch that has been in existence long enough to form a bed and bank and is uphill in the same watershed from a relevant water would be a water of the United States if it has any of the listed attributes.

The text of the CWA and its implementing regulations suggests that ditches were not intended to be covered by the CWA. The term “ditch” is not included in any definition of jurisdictional water found in the CWA or the regulations.

pretation of Justice Kennedy’s term similarly situated to include all wetlands adjacent to the same tributary.

Id.

99. The agencies’ rationale for the concept includes the following seemingly reasonable justification:

It is not appropriate to determine significant nexus based solely on any specific threshold of distance (for example, between a tributary and the traditional navigable water). Watershed ecosystems, and their interrelationships, are constructed of component parts that have relevance when considered collectively. Failure to protect the components can undermine the ecosystem in its entirety. Therefore, the agencies have an obligation to evaluate waters in terms of how they interrelate and function as ecosystems rather than as individual units, especially in the context of complex ecosystems where their integrity may be compromised by environmental harms that individually may not be measurably large but collectively are significant.

Proposed Guidance, *supra* note 1, at 10.

100. Justice Kennedy, for example, did not elaborate on the meaning of similarly situated other than to say the wetlands would be found in the “region.” *Rapanos*, 547 U.S. at 717.

101. If found to be reasonable and not contrary to the CWA and regulations or court decisions, the similarly situated concept should be given deference by the courts. See *Skidmore*, 323 U.S. at 140.

102. See Proposed Guidance, *supra* note 1, at 9-10.

103. *Id.* at 10.

104. *Id.* at 11.

105. The physical description of tributary immediately following this statement seems inconsistent with the concept of a lake being a tributary. It uses the phrases tributary and stream synonymously, and it describes a tributary as having a channel the lateral constraints of which are the “stream banks.” *Id.*

106. *Id.*

107. *Id.* at 12.

108. *Id.*

109. *Id.*

A ditch is not a “navigable water” in the statute, and “ditch” is not found in the comprehensive definition of “waters of the United States” at 33 U.S.C. §328.3(a)(1)-(8). This definitional rule contains a long list of examples of what are considered waters, including some relatively uncommon examples (such as playa flats) but, notably, does not include ditches, which are very common conveyances of water. Ditches are, however, included in the statutory and regulatory definitions of “point source.”¹¹⁰ The CWA and regulations thus acknowledge the existence of ditches, but by including them as point sources—which can convey pollutants to waters—and not as waters of the United States, it is apparent that Congress did not intend to regulate non-tidal ditches as waters under the CWA.¹¹¹ This treatment of ditches is further evidenced in §404(f)(1) of the CWA, where construction and maintenance of ditches in waters of the United States is specifically excluded from jurisdictional coverage under the CWA.¹¹²

Agency guidance does not squarely address the jurisdictional status of ditches. The current guidance, for example, acknowledges that upland ditches are not waters, so long as they do not carry a relatively permanent flow of water. The current guidance does not address the converse of this statement by describing when a ditch is a water, but does acknowledge that “these geographic features may function as point sources (*i.e.*, “discernible, confined, and discrete conveyances”), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g., CWA §§311 and 402).”¹¹³ Thus, like the statute and regulations, the prevailing guidance treats ditches as conveyances of water, *i.e.*, point sources, rather than waters themselves and does not define a ditch as a water of the United States.¹¹⁴ If a ditch is a point source, one who causes or allows pollutants to be discharged from it can be required to obtain a permit or be prosecuted for discharging without a permit.¹¹⁵ This being so, it is unwarranted to expand the universe of waters by turning ditches into tributaries.

Expanding the number of ditches that will be considered waters of the United States can be ecologically harmful. Ditches can rapidly form channels and bed and bank features and can also relatively easily establish wetland flora and hydric soil if not “maintained” by reshaping the banks or recontouring the bottom.¹¹⁶ Though there is an exemption from jurisdiction for ditch maintenance,¹¹⁷ it is more difficult to qualify for when working in jurisdictional waters because of “recapture provisions” triggered

by certain effects maintenance may have on jurisdictional functions.¹¹⁸ Ditches can often function adequately when allowed to establish the characteristics mentioned above and therefore might not need to be maintained by cleaning out the sediment and plant life. If however, they are converted into jurisdictional waters merely by acquiring these features, they can become expensive impediments to expansion projects and other development. To prevent this from happening, developers must frequently “maintain” the ditches, which can result in preventing the establishment of wetlands vegetation and stream characteristics and the unnecessary release of sediment. Broadening the scope of ditches that will be considered jurisdictional increases the incentive to perform destructive maintenance, an unintended effect the agencies should consider.

The proposed guidance would cause the presence of “relatively permanent . . . standing water” to convert a ditch into a jurisdictional tributary.¹¹⁹ The characterization as jurisdictional of a ditch that contains standing water only, without wetland characteristics and without being connected to a tributary or wetland system, is contrary to law and not supported by existing agency regulations. The concept was perhaps inspired by Justice Scalia’s statement that jurisdictional waters include “relatively permanent *standing* or flowing bodies of water.”¹²⁰ If so, however, this reliance is misplaced, since the remainder of Justice Scalia’s statement would contradict the conclusion, requiring that waters “form[] ‘geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’”¹²¹ Nor would Justices Scalia or Kennedy generally agree that a ditch holding water should be considered a tributary.¹²² Without other attributes of jurisdictional waters, such ditches would be no different from the isolated water bodies disqualified by the Supreme Court in *SWANCC*.¹²³

Section 4 states that natural and man-made swales are not tributaries, but that they, along with ditches, will be evaluated as wetlands under the Justices Scalia and Kennedy standards when they meet the applicable criteria of the Corps of Engineers Wetlands Delineation Manual¹²⁴ or the appropriate regional supplement. In addition, the

118. See 33 U.S.C. §404(f)(2).

119. Proposed Guidance, *supra* note 1, at 12.

120. *Rapanos*, 547 U.S. at 732.

121. *Id.*

122. See *Rapanos*, 547 U.S. at 736 n.7 (internal citations omitted), where Justice Scalia observes that

[i]t is of course true, as the dissent and Justice Kennedy both observe, that ditches, channels, conduits and the like “can all hold water permanently as well as intermittently” But when they do, we usually refer to them as “rivers,” “creeks,” or “streams.” A permanently flooded ditch around a castle is technically a “ditch,” but (because it is permanently filled with water) we normally describe it as a “moat.”

123. 531 U.S. 159, 31 ELR 20382 (2001) (abandoned sand and gravel pit with excavation trenches that had evolved into permanent and seasonal ponds were not jurisdictional when they had no other nexus to waters that were or had been navigable in fact or which could reasonably be so made).

124. U.S. Army Corps of Engineers, Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1 (January 1987), available at <http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf>.

110. See 33 U.S.C. §1362(14) and 40 C.F.R. §122.2.

111. All tidal waters are jurisdictional under the regulations. See, e.g., 33 C.F.R. §328.3(a)(1).

112. 33 U.S.C. §404(f)(1)(C).

113. Current Guidance, *supra* note 22, at 12 (emphasis added and bracketed material added).

114. 33 U.S.C. §1362(15) (point source includes “any . . . ditch . . .”).

115. See 33 U.S.C. §§1319(b) and (c).

116. Both of these activities are considered by the Corps to be permissible forms of maintenance. U.S. Army Corps of Engineers Regulatory Guidance Letter No. 07-02 at 4-5 (July 4, 2007).

117. See 33 U.S.C. §404(f)(1)(C) (exemption for maintenance of drainage ditches).

proposed guidance points out that even when nonjurisdictional, ditches and swales can “contribute to” a surface hydrologic connection between wetlands and TNWs,¹²⁵ which, of course, would be a factor supporting jurisdiction under the plurality test of *Rapanos*. The section then addresses how the agencies will apply the two *Rapanos* standards to non-navigable-in-fact tributaries. Under the plurality test, according to the guidance, a non-navigable tributary is jurisdictional when the tributary “is connected, directly or indirectly through other tributaries, to a downstream traditional navigable water,” and when “[f]low in the tributary, except for drought years, is at least seasonal,” meaning that the tributary “has predictable flow during wet seasons in most years.”¹²⁶ There is nothing controversial about this subsection of the guidance, which appears consistent with Justice Scalia’s opinion: “[b]y describing ‘waters’ as ‘relatively permanent,’ we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.”¹²⁷ The proposed guidance departs slightly from the current guidance, by not retaining the three months of flow guideline for determining seasonal rivers.¹²⁸ Instead, the proposed guidance states that the time period for seasonal flow “will vary across the country.”¹²⁹ This approach is more realistic than using a fixed time period justified not by any apparent empirical analysis.

The proposed guidance also indicates that the agencies will only evaluate a tributary under the Justice Kennedy test when they have determined that it is not relatively permanent.¹³⁰ One might expect, however, that in the many appellate jurisdictions that have not decided whether the Justice Scalia test, the Justice Kennedy test, or both are appropriate for determining jurisdiction over waters, the agencies will in fact perform a significant nexus evaluation for any cases that may involve contested proceedings. Otherwise, if a court holds that the Justice Scalia test is not allowable, as in *Robison*,¹³¹ the agency will not have established a sufficient record.¹³²

According to the proposed guidance, and consistent with *Rapanos* (except for the inclusion of interstate waters), the agencies will consider a tributary to be jurisdictional when “(1) It is a tributary as defined for purposes of th[e] guidance to a traditional navigable water or an interstate water; and (2) The tributary, alone or in combination with other tributaries in the watershed, has a significant nexus with the traditional navigable water or interstate water.”¹³³

The agency will first determine if the water has characteristics of a tributary, then whether it drains into a TNW or an interstate water or is part of a network of tributaries. Notably, the guidance asserts that if these conditions are satisfied, the agencies would “generally expect” the tributary and similarly situated waters to have a significant nexus to the downstream TNW or interstate water.¹³⁴ The rationale for this assumption is that

[t]he presence of a bed and bank and an [ordinary high watermark] are physical indicators of flow and it is likely that flows through all of the tributaries collectively in a watershed with the above characteristics are sufficient to transport pollutants, or other materials downstream to the traditional navigable water or interstate water in amounts that would significantly affect its chemical, physical or biological integrity.¹³⁵

Thus, for most waters normally understood as streams, the agencies will begin with the assumption that the water is jurisdictional.¹³⁶ This will not eliminate the need for the agency to build a record of evidence supporting significant nexus, however,¹³⁷ and the guidance details for tributaries the evidence that the agencies will be expected to develop to support a determination.¹³⁸

Note that the guidance states that in Alabama, Florida, and Georgia, the agencies will not apply the plurality test in evaluating streams or adjacent wetlands because of the Eleventh Circuit holding in *Robison*,¹³⁹ in which the court held that only the Justice Kennedy test is valid for making jurisdictional determinations for streams.¹⁴⁰

VI. Section Five: Adjacent Wetlands

As with streams, applying the plurality test to wetlands is relatively straightforward. Under the plurality standard, as explained in the proposed guidance, a wetland is considered jurisdictional if it is

adjacent to a relatively permanent, non-navigable tributary, that is connected to a downstream traditional navigable water, and . . . [a] continuous surface connection exists between the wetland and a relatively permanent tributary where the wetland directly abuts the water (e.g., they are not separated by uplands, a berm, dike, or similar feature).¹⁴¹

According to the proposed guidance, “a ‘continuous surface connection’ does not require the presence of water at all times in the connection between the wetland and the jurisdictional water.”¹⁴² The guidance appears to be at odds

125. Proposed Guidance, *supra* note 1, at 12.

126. *Id.* at 13.

127. *Rapanos*, 547 U.S. at 756.

128. The current guidance defines seasonal waters as waters having a “continuous flow at least seasonally (e.g., typically three months).” Current Guidance, *supra* note 22, at 7 (emphasis added).

129. Proposed Guidance, *supra* note 1, at 13.

130. *Id.* at 13.

131. 505 F.3d 1208, 1222 (11th Cir. 2007).

132. See discussion accompanying footnotes 24-30.

133. Proposed Guidance, *supra* note 1, at 13.

134. *Id.* at 13-14.

135. *Id.* at 14.

136. Such water bodies would also likely satisfy the Justice Scalia test as well. See *Rapanos*, 547 U.S. at 739.

137. Proposed Guidance, *supra* note 1, at 14.

138. *Id.* at 14-15.

139. *Id.* at 12 n.viii and 15 n.ix.

140. 505 F.3d. at 1224.

141. Proposed Guidance, *supra* note 1, at 15.

142. *Id.*

with Justice Scalia on this point, who recognized as jurisdictional “only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, *so that there is no clear demarcation between ‘waters’ and wetlands.*”¹⁴³ Arguably, a temporary breach in the connection between the adjacent wetland and the relatively permanent stream would be a “clear demarcation,” and an adjacent water with such a breach arguably would not be jurisdictional under the Justice Scalia test. The current guidance agrees with the proposed guidance on this matter and provides the following justification:

A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary. 33 C.F.R. §328.3(b) and 40 C.F.R. §232.2 (defining wetlands as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support . . . a prevalence of vegetation typically adapted for life in saturated soil conditions”).¹⁴⁴

This position is perhaps more defensible for wetlands than for streams, as wetlands do not always contain water above the surface of the ground, and it is thus not reasonable to require the presence of water “in the connection” at all times for wetlands.¹⁴⁵

In applying the Justice Kennedy test to wetlands, the agencies will assert CWA jurisdiction over wetlands “adjacent to traditional navigable waters or non-wetland interstate waters[,] or to another water of the U.S. when such wetlands have a significant nexus with downstream traditional navigable or interstate waters.”¹⁴⁶ To be considered adjacent under the guidance, a wetland must satisfy one of three conditions:

- (1) There is an unbroken surface or shallow sub-surface hydrologic connection between the wetland and jurisdictional waters; *or*
- (2) The wetlands are physically separated from jurisdictional waters by “man-made dikes or barriers, natural river berms, beach dunes, and the like”; *or*
- (3) Where a wetland’s physical proximity to a jurisdictional water is reasonably close, that wetland is “neighboring” and thus adjacent.¹⁴⁷

A primary difference between the plurality and the Justice Kennedy test as applied in the proposed guidance is that under the Justice Kennedy approach, an adjacent wetland is not required to directly abut the connecting water, nor is a hydrological connection required.¹⁴⁸ The proposed guidance elaborates on the meaning of “neighboring,” as including “a demonstrable ecological interconnection

between the wetland and the jurisdictional water body.”¹⁴⁹ An example of such interconnection is “resident aquatic species . . . rely[ing] on both the wetland and the jurisdictional waterbody for all or part of their life cycles”¹⁵⁰

The proposed guidance provides substantial justification for the adjacency concepts posed in the guidance and provides a road map to agency personnel for building a record to support an adjacency determination. It also takes pains to distinguish between what constitutes evidence of adjacency of a wetland to the nearest jurisdictional water and what constitutes evidence of a significant nexus between the wetland and the nearest TNW or non-wetland interstate water.¹⁵¹ As with tributaries, similarly situated wetlands are considered to be those within the same “point of entry” watershed.¹⁵²

The proposed guidance also proposes that all waters adjacent to *interstate waters* (except for those adjacent only to interstate wetlands) are to be deemed jurisdictional. As demonstrated below, this expansion is inconsistent with Justice Kennedy’s interpretation of the statute. In addressing the issue of whether mere adjacency to a connected tributary is sufficient for jurisdiction, Justice Kennedy pointed out that

[in] the administrative decision under review, however, the Corps based its jurisdiction solely on the wetlands’ adjacency to the ditch opposite the berm on the property’s edge. As explained earlier, mere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow toward it.¹⁵³

He also reasoned that

[t]he Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a “line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics,” §328.3(e). This standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application, it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute “navigable waters” under the Act. Yet the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related

143. *Rapanos*, 547 U.S. at 717 (emphasis added).

144. Current Guidance, *supra* note 22, at 7 n.28.

145. This concept is discussed in the Proposed Guidance, in the text accompanying note 36. Proposed Guidance, *supra* note 1, at 17.

146. *Id.* at 16.

147. *Id.* (emphasis added).

148. *Id.* at 16-17.

149. *Id.* at 16.

150. *Id.*

151. *Id.* at 16-17.

152. *Id.* at 16.

153. *Rapanos*, 547 U.S. at 786.

to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*.¹⁵⁴

Under the definition in the guidance, interstate waters might be any water, "however remote and insubstantial," including those carrying "minor water volumes," with the only definitional requirement for such waters being that they cross a state line. It seems likely, in fact, that the reason the agencies have expanded relevant waters to include such potentially remote waters is to ensure that remote unconnected waters and their associated connected and neighboring waters are not overlooked. While the approach is perhaps environmentally more protective, it is not consistent with *Rapanos*. As is the case with the significant nexus analysis for tributaries contained in the proposed guidance, adjacency to an interstate water based solely on geopolitical accident is insufficient for jurisdiction.

Apart from the expansion of jurisdiction with the interstate waters concept and the application of the watershed approach for similarly situated wetlands, Section 5 does not appear to be inconsistent with the current guidance. It does, however, contain a much more detailed rationale for the agencies' views regarding the concepts of adjacency and significant nexus, citing a full page of scientific articles in support of the concepts.¹⁵⁵

VII. Section Six: Other Waters

"Other waters" are the waters referred to in 40 C.F.R. §323(a)(3) and corresponding EPA regulations. Referred to as the "(a)(3) waters," they include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds . . ." ¹⁵⁶ For these waters, the agencies intend to take a case-by-case approach in recognition of the fact that the Supreme Court in *SWANCC* and *Rapanos* have identified limitations on the scope of (a)(3) waters that may be determined to be jurisdictional under the CWA.¹⁵⁷ In evaluating (a)(3) waters,¹⁵⁸ EPA and the Corps will make "fact-specific determinations" applying, as applicable, the concepts of the guidance related to significant nexus and adjacency determinations.¹⁵⁹ For such waters, therefore, the agencies will not attempt to regulate them under the CWA unless they meet the significant nexus analysis of Section 3 of the guidance (including, presumably, adding interstate waters to TNWs for the relevant waters).¹⁶⁰ This approach is therefore consistent with current legal precedent, except for the interstate waters expansion. The (a)(3) waters are not

specifically mentioned in the current guidance, presumably defaulting to the Justices Kennedy and Scalia tests.

The guidance also differentiates between "physically proximate" (to jurisdictional waters, TNWs, and interstate waters) and "non-physically proximate waters." The primary difference appears to be that physically proximate waters are non-wetland waters that "would satisfy the regulatory definition of 'adjacent' if they were wetlands," and include lakes, ponds, and other non-wetland waters that are near jurisdictional waters.¹⁶¹ The adjacency analysis of Section 5 of the guidance would therefore be applied. In contrast, nonphysically proximate waters are §(a)(3) waters that are remote from other waters. Although the significant nexus analysis is to be used for these waters, the proposed guidance recognizes that establishing the requisite nexus will be "challenging."¹⁶² Accordingly, the proposed guidance does not provide specific guidance for making such determinations. Instead, agency personnel are directed to call headquarters and obtaining approval before asserting or denying jurisdiction.¹⁶³

VIII. Section Seven: Waters Generally Not Jurisdictional

In this section, the agencies list waters they do not consider jurisdictional. An example of listed nonjurisdictional waters is "artificial reflecting pools or swimming pools excavated in uplands."¹⁶⁴ This list is not likely to generate controversy.

IX. Section Eight: Documentation

This section of the proposed guidance contains the advice, absent in the current guidance, that the agencies should develop a thorough administrative record.¹⁶⁵ The agencies would be well-advised to heed this warning. The proposed guidance provides in preceding substantive sections detailed descriptions of what the agencies should consider in building a record. After years of making virtually unchallenged jurisdictional determinations, the agencies are now faced with the need to build detailed records to support their calls. To date, the sufficiency of the agencies' evidence has yielded mixed results in the courts. In *Precon*¹⁶⁶ and *Robison*,¹⁶⁷ the Fourth and Eleventh Circuits, respectively, found EPA's evidence insufficient to establish jurisdiction and remanded the cases. In contrast, in *United States v. Lucas*¹⁶⁸ and *United States v. Cundiff*,¹⁶⁹ EPA was

154. *Id.* at 781-82.

155. See the footnotes at page 36 of the Proposed Guidance, *supra* note 1.

156. 33 C.F.R. §328.3(a)(3); 40 C.F.R. §230(s)(3); and 40 C.F.R. §122.2 (definition of "waters of the United States" at (c)).

157. Proposed Guidance, *supra* note 1, at 19.

158. The term "(a)(3) waters" refers to the waters listed in 33 C.F.R. §328(a)(3) and the parallel EPA regulations.

159. Proposed Guidance, *supra* note 1, at 19.

160. *Id.*

161. *Id.*

162. *Id.* at 20.

163. *Id.*

164. *Id.* at 21.

165. *Id.*

166. *Precon Development Corp. v. U.S. Corps of Engineers*, 633 F.3d 278, 41 ELR 20071 (4th Cir. 2011).

167. 505 F.3d at 1208 (finding that the government did not present any evidence . . . about the possible chemical, physical, or biological effect that Avondale Creek may have on the Black Warrior River).

168. 516 F.3d 316, 38 ELR 20041 (5th Cir. 2008).

169. 555 F.3d 200, 39 ELR 20025 (6th Cir. 2009).

found to have produced sufficient evidence of jurisdiction. Such mixed results post-*Rapanos* likely were at least part of the motivation for including this documentation section in the guidance.

X. Appendix

The appendix is entitled “Discussion of Legal and Scientific Basis for Guidance Sections.”¹⁷⁰ It focuses primarily on issues that do not have specific legal support, such as the interstate waters issues.¹⁷¹ A detailed analysis of this section is beyond the scope of this Article. Suffice it to say that the appendix was written as a brief in support of the agencies’ position and should be considered accordingly.

XI. Conclusions

The proposed guidance attempts to resolve issues that were once deemed fairly well-settled but which became problematic after the decisions in *SWANCC* and *Rapanos*. Many of the positions reflected in the guidance seem to be reasonable interpretations of the CWA consistent with the views of the Supreme Court. Others, however, appear to go beyond, or to be inconsistent with, current law and might encounter difficulty when subjected to deference analysis. The concept most difficult to reconcile with the Supreme Court views is the concept that interstate waters are relevant waters for the purpose of applying the significant nexus test. Other notable issues are the treatment of ditches and the expansion of “similarly situated waters.” The ultimate official treatment of these issues will become clearer after comments are evaluated and the final guidance is issued. Even more eagerly awaited will be the promised rulemaking on these issues, which is certain to be controversial. The only thing certain about these matters is that they will continue to be in flux for the foreseeable future.

170. Proposed Guidance, *supra* note 1, at 23-33.

171. *Id.* at 24-25.