

Statement of

Stephen E. Sandherr, CEO

on behalf of
The Associated General Contractors of America

Presented to the

Committee on Transportation and Infrastructure
U.S. House of Representatives

For a hearing on

Status of the Nation's Waters, including Wetlands, Under the Jurisdiction of
the Federal Water Pollution Control Act

July 19, 2007



Building Your Quality of Life

The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 32,000 firms, including 7,000 of America's leading general contractors, and over 12,000 specialty-contracting firms. Over 13,000 service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

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STATEMENT
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THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES
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I. Introduction

On behalf of the Associated General Contractors of America (AGC), I am pleased to submit these comments on federal jurisdiction over waters and wetlands under the Clean Water Act (CWA). AGC strongly opposes H.R. 2421, the Clean Water Restoration Act of 2007, which would delete the term “navigable waters” from the CWA and subject all “waters of the United States”, including all “intrastate waters,” and all activities affecting such waters to federal jurisdiction. AGC encourages the Administration to undertake, and Congress to oversee, a common sense rulemaking that would establish readily identifiable limits to federal jurisdiction over waters and wetlands.

Without clear definitions to guide field staff in the regulatory agencies, permitting decisions will continue to be arbitrary and inconsistent. Vague and ambiguous regulatory provisions will continue to cause confusion, deny the regulated community fair notice of what is required, and waste time and money; all with little benefit to the environment. This lack of clarity is unduly burdensome for critical public infrastructure and private projects.

To clarify the scope of CWA jurisdiction, in light of *Rapanos v. United States* (No. 04-1034) and *Carabell v. U.S. Army Corps of Engineers* (No. 04-1384)¹ (hereinafter *Rapanos*), this Administration should move forward with a rulemaking; Congress should encourage and not pre-empt this effort by enacting H.R. 2421 or similar legislation. The commonalities between Justice Scalia’s plurality opinion and Justice Kennedy’s concurrence in *Rapanos* not only provide a starting point to fashion a rational policy; they also provide the Administration with an opportunity to implement balanced, effective regulations in an area that has generated endless litigation for decades. The Administration has taken a necessary first step towards a rulemaking through the issuance of joint guidance to aid regulatory agencies in making jurisdictional determinations. However, AGC believes that the guidance on its own is insufficient to provide clarity to this issue.

II. Statement of Interest

AGC is the oldest and largest of the national trade associations in the construction industry. It is a non-profit corporation founded in 1918 at the express request of President Woodrow Wilson, and it now represents more than 32,000 firms in nearly 100 chapters throughout the United States. Among the association’s members are nearly 7,000 of the nation’s leading general contractors, more than 12,000 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry.

¹ *Rapanos v. United States*, 547 U.S. ____, 126 S. Ct. 2208 (2006).

AGC members engage in the construction of commercial buildings and public works facilities, and they prepare the sites and install the utilities necessary for residential and commercial development. Many of their construction projects lie in “waters of the United States,” within the meaning of the Clean Water Act (CWA), and therefore require federal permits. Whether their projects lie in such “waters” depends on the precise contours of that term.

Today, the contours are far from certain, and the uncertainty has become a great burden for AGC members to bear. The federal permits required for construction activity in “waters of the United States” are both costly and time-consuming to obtain. While their environmental purposes are laudable, they do add to the cost and delay of the completion of the private and public infrastructure that literally forms the foundation of our nation’s economy.

At the same time, the penalties for failing to obtain a necessary permit can be severe. The civil fines can reach \$32,500 per day per violation, and the criminal penalties for “negligent” violations can include fines of \$50,000 per day per violation, three years’ imprisonment, or both. As the “operators” of construction sites, both property owners and their construction contractors risk such fines and penalties for any failure to obtain a necessary permit. Courts have found both the owner and the constructor of a project to be responsible for compliance, at least whether the contractor has control over the discharge activity, and whether or not the contractor reasonably relied on the owner to obtain a necessary permit.

AGC is committed to protecting and restoring the nation’s water resources, but it does not believe that it is in the nation’s best interest to expand the Clean Water Act beyond its original scope.

III. AGC Opposes H.R. 2421, the Clean Water Restoration Act of 2007

AGC strongly opposes H.R. 2421, the Clean Water Restoration Act of 2007, which would delete the term “navigable” from the Clean Water Act and replace it with a new legislative definition of “waters of the United States” that includes all “intrastate waters” and all “activities affecting these waters.” AGC believes that H.R. 2421 neither “restores” the original intent of the CWA nor “clarifies” CWA jurisdiction; rather, H.R. 2421 would create the greatest expansion of the CWA since it was signed into law in 1972.

H.R. 2421 would grant the Corps and EPA *for the first time ever* jurisdiction over all “intrastate waters”—essentially all wet areas within a state, including ground water, ditches, pipes, streets, municipal storm drains, gutters, and desert features, as well as authority over all “activities affecting these waters” (public or private, including construction), regardless of whether the activity is occurring in water or whether the activity actually adds a pollutant to the water.

H.R. 2421 changes the original intent of Congress in enacting the CWA from the Commerce Clause to the full “legislative power of Congress under the Constitution” and conflicts with CWA sections 101(b) and 101(g), which state Congressional intent to “recognize, preserve, and protect the primary responsibilities and rights of the States” to control the development and use of local land and water resources and to “allocate quantities of water within [State] jurisdiction.”

The practical impacts of H.R. 2421 are many and significant. The Corps and EPA will exercise unlimited regulatory authority over all intrastate waters, including, for example, waters now considered entirely under state jurisdiction, requiring enormous resources not provided by the legislation to expand and defend the federal regulatory program and exacerbating an existing CWA funding gap and leading to longer permitting delays. So dramatically expanding federal authority over water and land use would increase the cost of and delay or stop construction projects nationwide and slow economic growth.

In fact, a study of the CWA section 404 permitting process found that obtaining a nationwide general permit took on average 313 days at a cost of \$28,915. Moreover, obtaining an individual permit took on average 788 days at a cost of \$271,000. See David Sunding and David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetlands Permitting Process*, 42 Nat. Resources J. 59 (Winter 2002).

IV. Supreme Court Provides Starting Point for Administrative Rulemaking

AGC seeks to ensure that the construction industry can continue to contribute to the nation's quality of life. In light of the U.S. Supreme Court's U.S. Supreme Court's decisions in *Rapanos*, and for the reasons outlined below, AGC supports a rulemaking by the Administration to clarify federal limits over waters and wetlands and opposes legislation, such as H.R. 2421, the Clean Water Restoration Act of 2007, which would overly extend the jurisdictional reach of the CWA.

In the *Rapanos* decision, the Court vacated prior rulings by the U.S. Court of Appeals for the Sixth Circuit that the federal government has jurisdiction over wetlands connected in any way to actually navigable waters. These cases themselves involved wetlands adjacent to a series of drainage ditches, non-navigable creeks and culverts, and wetlands separated from a drainage ditch by a berm. In both cases, the Sixth Circuit held that the wetlands are "waters of the United States" because they are hydrologically connected to navigable waters.

The Supreme Court vacated these decisions—with a majority of the Court agreeing that the Corps had overstepped its bounds—and remanded the cases to the lower court for further inquiry into the facts. Four Justices (Justices Scalia, Thomas, Alito and Chief Justice Roberts) reasoned that the CWA authorizes federal jurisdiction over "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams [,] ... oceans, rivers, [and] lakes,'" and that the statute excludes from federal jurisdiction "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."² These four Justices also interpreted the CWA to cover "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right" such that it is "difficult to determine where the 'water' ends and the 'wetland' begins."³

Justice Kennedy concurred in the judgment but for different reasons. He reasoned that the "significant nexus" standard is the operative standard for determining whether a non-navigable water should be regulated under the CWA. In his concurring opinion, he

² Scalia, slip op. at 20-21.

³ Scalia, slip op. at 23-24.

repeatedly emphasized the importance of the relationship to traditional navigable waters, stating that to be a “water of the United States,” a non-navigable water must “perform important functions for an aquatic system incorporating navigable water,”⁴ or “play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.”⁵

The remaining four Justices (Justices Stevens, Souter, Ginsburg and Breyer) expansively interpreted the CWA to grant the Corps and the U.S. Environmental Protection Agency (EPA) jurisdiction over waters and wetlands only remotely connected to traditional navigable waters. While some have made much of the dissenting opinion, these four Justices did not concur in the judgment.

Chief Justice Roberts, lamenting this fractured result, pointed to *Grutter v. Bollinger*⁶ and *Marks v. United States*⁷ as a guide for lower courts in interpreting *Rapanos*. “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.’”⁸ AGC believes it clear that it was Justice Kennedy who “concurred in the judgment on the narrowest grounds.” AGC believes it equally clear that his opinion identifies important limitations on federal jurisdiction under the CWA and specific principles that the federal government must consider in making any jurisdictional determinations.

a. AGC Deems a ‘Case-by-Case’ Standard Unworkable

Following *Rapanos*, to establish that non-navigable water (including a non-navigable wetland) is a “water of the United States,” AGC believes that the agencies must measure and establish the nature of the non-navigable water’s connection to, and relationship with, traditional navigable waters. The agencies have not undertaken such a review in the past, and Chief Justice Robert lamented the “unfortunate” fact that, in the absence of any further guidance, “lower courts and regulated entities will now have to feel their way on a case-by-case basis.”⁹

Proceeding on a case-by-case basis is unacceptable to AGC. It would greatly increase the costs associated with processing permits and the days spent waiting for their issuance. As noted by Justice Scalia in the plurality opinion, the regulated community is already spending about \$1.7 billion annually to obtain CWA Section 404 discharge permits.¹⁰ (What is more, the study he cites in support of this figure does not appear to include either the costs or time associated with ascertaining whether the property in question is appropriately subject to federal jurisdiction under the CWA.¹¹) Given the issues that *Rapanos* has raised, applicants are likely to suffer even longer delays and

⁴ Kennedy, slip op. at 24.

⁵ Kennedy, slip op. at 25.

⁶ 539 U.S. 306, 325 (2003).

⁷ 430 U.S. 188, 193 (1977).

⁸ *Id.* at 193.

⁹ Roberts, slip op. at 2.

¹⁰ Scalia, slip op. at 2.

¹¹ Sunding & Zilberman, “The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,” 42 *Natural Resources J.* 59, 74-76, 81 (2002).

incur additional costs while trying to determine whether or not their property is subject to federal jurisdiction.

b. AGC Calls for Administrative Proceedings

AGC believes that the *Rapanos* decision seriously conflicts with EPA's and the Corps' current regulations on "waters of the United States"¹² and that the two agencies need to launch an immediate effort to update those regulations. We agree with four of the Justices who specifically suggested a clarifying rule.¹³ The Court's plurality noted "the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations."¹⁴ AGC urges Congress to instruct the Corps and EPA to issue new rules that adhere to the commonalities between Justice Scalia's plurality opinion and Justice Kennedy's concurrence.

AGC believes it is clear that Justice Kennedy's opinion establishes important limitations on the Corps and EPA's authority to regulate work in water and wetlands and identifies certain principles that the Corps must consider in determining whether non-navigable waters have the requisite nexus with traditional navigable waters, as follows—

- The federal government may no longer regulate non-navigable waters or wetlands based solely on their mere hydrological connection to a navigable waterbody.
- The federal government may not rigidly insist that an "ordinary high water mark" is the appropriate measure for identifying jurisdictional tributaries.

¹² The existing CWA regulations define "waters of the United States" as follows:

- (1) All 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 ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including such waters:
 - (i) which are or could be used by interstate or foreign travelers for recreational or other purposes;
 - (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) which are used or could be used for industrial purposes by industries in interstate commerce;
- (4) All impoundment of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA are not waters of the United States.

- (8) Waters of the United States do not include prior converted cropland...

Different CWA regulations contain slightly different formulations of the definition. For simplicity's sake, these comments refer to the Corps' version at 33 CFR § 328.3(a). Other versions appear at, e.g., 40 CFR §§ 110.1, 112.2, 116.3, 117.1, 122.2, 230.3(s), and 232.2.

¹³ *Rapanos v. United States*, 547 U.S. ___, slip op. at 25 (Kennedy, J. concurring); *Id.*, slip op. at 2 (Roberts, C.J. concurring); *Id.*, slip op. at 14 (Stevens, J. dissenting; and *Id.*, slip op. at 2 (Breyer, J. dissenting).

¹⁴ Scalia, slip op. at 3.

- The federal government may no longer consider all “connected” waters to be tributaries and may not automatically assert jurisdiction over any wetland “adjacent” to such connected waters.
- The federal government may no longer regulate “isolated” waters and wetlands.

In *Rapanos*, Justice Kennedy rejects the Corps’ practice of asserting jurisdiction over any non-navigable water that has any hydrological connection to any navigable water. Justice Kennedy holds that to be jurisdictional, a non-navigable waterbody’s relationship with traditional navigable waters must be “substantial:”

[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.¹⁵

Inappropriately, the government’s principle test for jurisdiction has been any hydrological connection to traditional navigable waters. Based on the assumption that water flows down hill, the Corps has asserted jurisdiction over non-navigable waters without even considering how far they lie from navigable water, how frequently they carry water, or how much water they carry.

Now, to establish that a non-navigable water (including a non-navigable wetland) is a “water of the United States,” it is apparent that the agencies must measure and establish the nature of the non-navigable water’s connection to, and relationship with, traditional navigable waters. To illustrate this point, Justice Kennedy requires, for non-navigable wetlands, a showing that:

[T]he wetlands, either alone, or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term, ‘navigable waters.’¹⁶

Justice Kennedy also rejects the Corps’ current approach to identifying “tributaries.” Specifically, Justice Kennedy calls into question the Corps’ use of “ordinary high water mark” (OHWM) as a measure for identifying tributaries. He starts by noting that the “Corps views tributaries as within its jurisdiction if they carry a perceptible ‘ordinary high water mark.’¹⁷ Ultimately, he concludes that the current regulations, as applied by Corps, stray too far from traditional navigable waters:

[T]he 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 carry only minor water-volumes towards it—precludes its adoption as a determinative measure ... Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act’s scope in *SWANCC*.¹⁸

¹⁵ Kennedy, slip op. at 28.

¹⁶ Kennedy, slip op. at 23.

¹⁷ 33 CFR 328.4(c); 65 Fed. Reg. 12,823 (2000).

¹⁸ Kennedy, slip op. at 24-25.

Justice Scalia was likewise unpersuaded by the Corps' treatment of "tributaries" and use of OHWM.¹⁹ Inappropriately, the Corps has been using the presence of an OHWM (which it defines in terms of physical characteristics, not ordinary flow) to claim federal jurisdiction over many ditches, dry desert drainages, swales, and gullies.

In addition, Justice Kennedy rejects the government's notion that the Corps may regulate all wetlands that are adjacent to all tributaries. Justice Kennedy's rejection of the Corps' tributary standard leads him also to reject the Corps' practice of regulating all wetlands that are adjacent to all tributaries. He finds that "[a]bsent more specific regulations, ... the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."²⁰ Justice Kennedy adds that the Corps "[t]hrough regulations or adjudication may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely..." to have a significant nexus to navigable waters.²¹ He repeatedly cautions that "insubstantial," "speculative," or "minor flows" are insufficient to establish a "significant nexus."²²

Inappropriately, the Corps' current definition of "adjacent" purports to allow the federal government to control all wetlands that are "bordering, neighboring, or contiguous" to any of the waters covered in the regulation at Section 328.3(a)(1)-(7) (the seven categories of waters of the United States), including all tributaries, however defined.

Finally, Justice Kennedy confirms that nonnavigable, isolated, intrastate waters are not jurisdictional.²³ This was the opinion of the Court in its 2001 decision in *SWANCC*.²⁴ Some interests have disputed this interpretation, claiming that such waters are beyond the scope of the CWA only where the only basis for asserting federal CWA jurisdiction is the use of such waters by migratory birds. But the Court in *Rapanos* clarified its previous decision. Under the plurality opinion in *Rapanos*, all isolated water and wetlands are clearly outside the authority of the federal agencies under the CWA. Justice Kennedy in his concurring opinion cites *SWANCC*'s "holding" that "nonnavigable, isolated, intrastate waters" are not "navigable waters"²⁵

Following *SWANCC*, the Corps has continued to inappropriately regulate any water/wetland that is not isolated by claiming that all connected waters are tributaries.

In sum, Justice Kennedy's analysis in *Rapanos* calls into question the Corps' current regulations at 33 CFR Section 328.3(a)(5) (tributaries) and (a)(7) (adjacent wetlands). The definitions of "adjacent" at Section 328.3(c) and "ordinary high water mark" at 33 CFR Section 328.3(e) are similarly suspect. Further, Justice Kennedy is writing against

¹⁹ Scalia, slip op. at 6-9.

²⁰ Kennedy, slip op. at 25.

²¹ Kennedy, slip op. at 24.

²² Kennedy, slip op. at 22-24.

²³ Current regulations define "isolated waters" as those non-tidal waters of the United States that are (1) not part of a surface tributary system to interstate or navigable waters; and (2) not adjacent to such tributary waterbodies. 33 CFR § 330.2(e)(2005).

²⁴ *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

²⁵ Kennedy, slip. op. at 17.

the backdrop of *SWANCC*, in which the Supreme Court had previously rejected the “other waters” regulation at 33 CFR Section 328.3(a)(3).

V. Corps/EPA Joint Guidance Not Enough

On June 5, 2007 the Corps and EPA jointly issued guidance regarding the scope of CWA jurisdiction following *Rapanos*. The agencies also issued an accompanying instructional guidebook to aid regulators and the public in making jurisdictional determinations. During the first 180 days implementing the guidance, the agencies will accept public comments on related case studies and experiences.

The guidance will influence regulators’ decisions on whether CWA section 404 discharge permits are required—and *whether they will be issued*—for construction activities impacting wetlands, tributaries, and other waters. It will also impact civil and criminal environmental enforcement. Many jurisdictional determinations beyond traditional navigable waters and their adjacent wetlands will be decided on a case-by-case basis according to a “significant nexus” test described in the guidance. The agencies also announced in the guidance hydrologic features that they generally will not assert jurisdiction over, including roadside ditches as long as they are excavated wholly in and only drain upland and do not carry a relatively permanent flow of water (i.e., less than three months).

During the 180-day comment period, AGC will evaluate the practical implementation of the joint guidance and provide comments to the agencies as appropriate. However, AGC believes that the issuance of the guidance, imperfect or not, is a necessary and first step towards the Administrative rulemaking recommended by the Supreme Court in *Rapanos*.

VI. Conclusion

AGC strongly opposes H.R. 2421, the Clean Water Restoration Act of 2007, or similar legislation that would redefine federal jurisdiction under the CWA and pre-empt the administrative rulemaking the Supreme Court recommended and provided important direction for in *Rapanos*. The Administration has taken a first and necessary step by issuing joint Corps/EPA guidance. Rather than obstruct this effort, Congress should encourage and oversee a subsequent rulemaking to provide further and long overdue clarity to CWA jurisdictional issues involving waters and wetlands. Doing so will allow the regulated community to continue to deliver critical infrastructure projects in a timely and cost-effective manner, while protecting and enhancing the environment.

Thank you.