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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



SENT VIA EMAIL: Thomas.Jenny@epa.gov

October 26, 2011

Mr. David S. Evans
Director, Wetlands Division
Office of Wetlands, Oceans and Watersheds
USEPA Headquarters
1200 Pennsylvania Avenue, N. W.
Mail Code: 4502T
Washington, DC 20460

RE: Oct. 12, 2011, Small Entities Outreach Meeting - Def. of "Water of the United States"

Dear Mr. Evans:

The Associated General Contractors of America (AGC) is pleased to submit these preliminary comments in response to the U.S. Environmental Protection Agency's (EPA) request for information from those who participated in the "Waters of the U.S. Small Entities Outreach Meeting" on October 12, 2011. AGC previously submitted a letter – jointly signed by the American Farm Bureau Federation, International Council of Shopping Centers and the National Association of Home Builders – requesting an additional 60 days to provide company-specific examples and cost estimates, as EPA has requested in several instances, and to explain our concerns regarding EPA's current actions.

At the Oct. 12 meeting, EPA outlined the contents of the "Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act" (Draft Guidance) issued in May 2011 and posed specific questions on the implications of the Draft Guidance on small entities. EPA requested a response to those questions by today, Oct. 26, 2011. Given the complexity of the analysis required to provide a meaningful response, the two weeks provided has not been sufficient time for AGC to respond to most of the questions you have raised. In the interim and for the record, we resubmit our comments filed on the Draft Guidance. *See* Waters Advocacy Coalition, *et al.*, Comments in Response to the EPA's and U.S. Army Corps of Engineers' Draft Guidance on Identifying Waters Protected by the Clean Water Act, Docket No. EPA-HQ-OW-2011-0409-3514 (July 29, 2011), available online at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514>.

AGC appreciates that the agencies appear to be undertaking a long-overdue rulemaking to clarify the definition of U.S. waters subject to CWA jurisdiction. But it is critical that the agencies take the proper steps to provide a fair and appropriate opportunity for meaningful participation by small business entities, and others, in that process.

Introduction

The Associated General Contractors of America (AGC) is the leading trade association in the construction industry. It dates back to 1918, and today, it represents 33,000 firms in nearly 100 chapters across the United States. AGC's members include 7,500 of the nation's leading general contractors, nearly 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry.

AGC members engage in the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development. Many of their bridge and other construction projects lie in "waters of the United States," within the meaning of the Clean Water Act (CWA), and therefore require federal permits. An equal if not greater number of their projects may or may not lie in such "waters," depending on the precise contours of that term.

Today, the contours are far from certain, and the uncertainty, in and of itself, 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 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 \$37,500 per day per violation and the criminal penalties for "negligent" violations can include \$50,000 per day, 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 where 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 seeks to ensure that the construction industry can continue to contribute to the nation's quality of life. While attentive and sensitive to the many risks of environmental degradation, they must continue to support the physical infrastructure on which all Americans are heavily dependent.

In light of the Supreme Court's decision in *Rapanos*, and for the reasons outline below, AGC supports a prompt common sense rulemaking that will enable the relevant agencies to establish readily identifiable limits to federal jurisdiction over waters and wetlands.

Background

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.”¹ 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.”²

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 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,”³ or “play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.”⁴

The remaining four Justices (Justices Stevens, Souter, Ginsburg and Breyer) expansively interpreted the CWA to grant the Corps and 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*⁵ and *Marks v. United States*⁶ 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.’”⁷ 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.

¹ Scalia, slip op. at 20-21.

² Scalia, slip op. at 23-24.

³ Kennedy, slip op. at 24.

⁴ Kennedy, slip op. at 25.

⁵ 539 U.S. 306, 325 (2003).

⁶ 430 U.S. 188, 193 (1977).

⁷ *Id.* at 193.

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

Following *Rapanos*, to establish that a 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.”⁸

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.⁹ (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.¹⁰) Given the issues that *Rapanos* has raised, applicants are likely to suffer even longer delays and incur additional costs while trying to determine whether or not their property is subject to federal jurisdiction.

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”¹¹ and that the two agencies need to launch an

⁸ Roberts, slip op. at 2.

⁹ Scalia, slip op. at 2.

¹⁰ 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).

¹¹ 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.

immediate effort to update those regulations. We agree with four of the Justices who specifically suggested a clarifying rule.¹² 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."¹³ AGC urges 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.
- 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.¹⁴

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.

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.

¹² *Rapanos v. United States*, 547 U.S. 715, 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).

¹³ Scalia, slip op. at 3.

¹⁴ Kennedy, slip op. at 28.

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.’¹⁵

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.’¹⁶ 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*.¹⁷

Justice Scalia was likewise unpersuaded by the Corps’ treatment of “tributaries” and use of OHWM.¹⁸ 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.”¹⁹ Justice Kennedy adds that the Corps “[t]hrough regulations or adjudication may choose to identify categories of tributaries that, due to their

¹⁵ Kennedy, slip op. at 23.

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

¹⁷ Kennedy, slip op. at 24-25.

¹⁸ Scalia, slip op. at 6-9.

¹⁹ Kennedy, slip op. at 25.

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.²⁰ He repeatedly cautions that “insubstantial,” “speculative,” or “minor flows” are insufficient to establish a “significant nexus.”²¹

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.²² This was the opinion of the Court in its 2001 decision in *SWANCC*.²³ 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”²⁴

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

Conclusion

To clarify the scope of CWA jurisdiction, in light of *Rapanos*, this Administration should move forward with a rulemaking. The commonalities between Justice Scalia’s plurality opinion and Justice Kennedy’s concurrence not only provide a starting point to fashion a rational policy; they

²⁰ Kennedy, slip op. at 24.

²¹ Kennedy, slip op. at 22-24.

²² 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).

²³ *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

²⁴ Kennedy, slip. op. at 17.

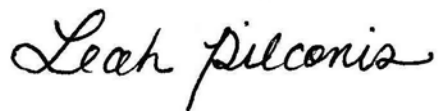
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also provide the Administration with an opportunity to implement balanced, effective regulations in an area that has generated endless litigation for decades.

Without clear definitions to guide field staff, 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 infrastructure and private projects.

AGC appreciates the opportunity to comment. Thank you for taking our concerns into account. If you have any questions, please contact me at pilconisl@agc.org or (703) 837-5332.

Sincerely,

A handwritten signature in black ink that reads "Leah Pilconis". The signature is written in a cursive, flowing style.

Leah F. Pilconis
Senior Environmental Advisor to AGC of America