



PACIFIC LEGAL FOUNDATION

September 25, 2006

The Honorable Steven L. Johnson
Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Mail Code 1100
Washington, D.C. 20460

Lieutenant General Carl A. Strock
Commander
United States Army Corps of Engineers
Headquarters
441 G Street, NW
Washington, D.C. 20314

Re: Petition for rulemaking under Administrative Procedure Act to amend regulatory definition of "waters of the United States" as found in 33 C.F.R. § 328.3

Dear Administrator Johnson and Lieutenant General Strock:

Pursuant to subsection 553(e) of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, Pacific Legal Foundation respectfully petitions the Environmental Protection Agency and the Army Corps of Engineers to exercise their rulemaking authority as set forth below. In *Rapanos v. United States*, 126 S. Ct. 2208 (2006), a majority of Supreme Court justices determined that the Administration's current regulatory interpretation of the term "waters of the United States" under the Clean Water Act is unreasonable and invalid. Therefore, new rulemaking is necessary.

Several months have passed since the Supreme Court's decision in *Rapanos*, and no rule changes have even been announced. This delay is unfortunate and unnecessary. Without new regulations, the public will continue to be subject to uncertain and inconsistent jurisdictional standards that have been the hallmark of Clean Water Act enforcement for more than thirty years.

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The adoption of internal “guidelines,” as the Administration has proposed, is insufficient. On the two occasions when the Supreme Court has invalidated the government’s application of the Clean Water Act, the agencies had failed to adopt their regulatory interpretations by means of formal rulemaking. The EPA and the Corps should not make this mistake again. As the Chief Justice observed in *Rapanos*:

[After this Court’s Clean Water Act decision in 2001] The proposed rulemaking went nowhere. Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.

Rapanos, 126 S. Ct. at 2236 (Roberts, C.J., concurring).

Justice Breyer expressed some urgency on the matter: “Hence I believe that today’s opinions [*Rapanos* and *Carabell*], taken together, call for the Army Corps of Engineers to write new regulations, and speedily so.” *Id.* at 2266 (Breyer, J., dissenting). We agree. The immediate adoption of new regulations, consistent with the intent of Congress as interpreted by the Supreme Court in *Rapanos*, is vital to the public interest.

Although the majority in *Rapanos* did not agree on the legal standard that should be applied to determine federal jurisdiction under the Clean Water Act, Supreme Court precedent (*Marks v. United States*, 430 U.S. 188 (1977)) suggests that the opinion authored by Justice Scalia, and joined by three other justices, is controlling. The Scalia opinion provides a common denominator such that when its jurisdictional test is met, it would garner a unanimous Supreme Court vote. Additionally, it is the only definition of “waters of the United States” that is readily determinable by both the public and regulatory officials. It also hews more closely to the plain statutory language and the government’s original interpretation of the Act in 1974 when it concluded that “waters of the United States” meant navigable-in-fact waters. See *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 168 (2001). More importantly, the Scalia approach is the most likely to produce consistent and predictable enforcement standards that satisfy constitutional safeguards for fairness and justice.

Under the Scalia opinion, the language, structure, and purpose of the Clean Water Act requires limiting federal authority to “relatively permanent, standing or continuously flowing bodies of water” traditionally recognized as “streams, oceans, rivers and lakes” that are connected to navigable-in-fact waters. Wetlands abutting these water bodies would also be subject to federal regulation if they contain a continuous surface water connection such that the wetland and navigable-in-fact waterway are “indistinguishable.” But drains, ditches, and channels with only intermittent flows would not

be subject to federal control. Instead, they would be subject to state regulation.

Accordingly, Pacific Legal Foundation petitions for the amendment of 33 C.F.R. § 328.3 to read as follows:

§ 328.3 Definitions

For the purposes of this regulation these terms are defined as follows¹:

(a) The term “waters of the United States” means

(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 the 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 any 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;~~

~~(iii) Which are or could be used for industrial purpose by industries in interstate commerce;~~

(2) All other relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes that have a continuous surface-water connection to a body of water described in paragraph (a)(1);

¹ Language to be deleted from the existing regulation is indicated by ~~strikeout~~. Language to be added is indicated by underlining.

~~(4) All impoundments 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) (3) The territorial seas;~~

(4) Waters of the United States do not include groundwater;

~~(7) (5) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(3) of this section.~~

~~(8) (6) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.~~

Waters of the United States do not include sheet flows or channels, ditches, or streams through which water flows intermittently or ephemeraly, or channels that periodically provide drainage for rainfall.

Waste treatment systems, including waterworks appurtenances, such as mains, pipes, hydrants, machinery, buildings, or treatment ponds or lagoons designed to meet the requirements of the Clean Water Act CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

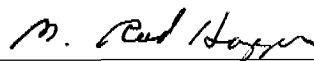
(b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) ~~The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made ditches or barriers, natural river berms, beach dunes and the like are "adjacent wetlands." A wetland is "adjacent" to a body of water described in paragraphs (a)(1) through (3) if and only if the wetland has a continuous surface water connection with that body of water such that the two are indistinguishable and there is no clear demarcation between water and wetlands, making it difficult to determine where the water ends and the wetland begins. Abutting wetlands with only an intermittent hydrologic connection, or no connection at all, to a body of water described in paragraphs (a)(1) through (3) are not "adjacent."~~

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Pacific Legal Foundation respectfully urges a timely response to this petition and stands ready to assist in the promulgation of new rules.

Yours sincerely,



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