Interstate Natural Gas Association of America

Honorable Benjamin Grumbles
Assistant Administrator for Water
Environmental Protection Agency
Office of Water (4101M)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Honorable John Paul Woodley, Jr.
Assistant Secretary of the Army
Civil Works
Department of the Army
108 Army Pentagon
Room 3E446
Washington, DC 20310-0108

Re: Docket ID No. EPA-HQ-OW-2007-0282

Via E-mail and Hand Delivery

Dear Messrs. Grumbles and Woodley:

The Interstate Natural Gas Association of America ("INGAA") respectfully submits the attached comments to the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Guidance Regarding Clean Water Act Jurisdiction After *Rapanos*. INGAA appreciates the opportunity to offer both agencies the perspective of America's natural gas pipeline industry.

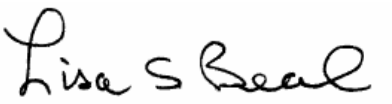
INGAA is a non-profit trade association that represents the interstate and interprovincial natural gas pipeline industry operating in North America. INGAA's United States members transport over 95 percent of the nation's natural gas through a network of 200,000 miles of pipelines. INGAA represents virtually all of the interstate natural gas transmission pipeline companies operating in the United States, as well as comparable companies in Canada and Mexico.

As you can appreciate, our members have extensive experience in obtaining Clean Water Act ("CWA") section 404 permits for their many and varied projects. That experience has taught us that certain fundamental principles must be included in any national regulatory program in order for that program to achieve its goals. Among these principles are clarity of purpose, efficiency in execution, and a true partnership between the regulators in the field and project applicants.

While not perfect, the pre-*Rapanos* Guidance regime for issuing CWA permits (especially nationwide permits) for linear energy infrastructure projects such as natural gas pipelines has worked relatively well for most projects. In contrast, many of the new procedures and obligations in the *Rapanos* Guidance would undermine the efficiency and clarity of the CWA permitting regime while providing no attendant environmental benefit. As such, INGAA's chief recommendation is for the agencies to modify the Guidance in order to provide the project applicants the flexibility to either proceed with an informal delineation process (as under the pre-Rapanos system) or to elect a more formal jurisdictional determination from the Corps. INGAA's comments are designed to be constructive by offering concrete recommendations for this and other fundamental problems in the Guidance which, if left unchanged, run the risk of undermining the integrity of the CWA section 404 program for linear utility infrastructure projects while substantially complicating and delaying our members' obligation to provide clean, affordable, and reliable energy to America's citizens.

We very much appreciate your time and effort in this important matter.

Sincerely,



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U.S. ENVIRONMENTAL PROTECTION AGENCY
AND
U.S. ARMY CORPS OF ENGINEERS

Comments in Response to the "EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after *Rapanos*," 72 Fed. Reg. 31,824 (June 8, 2007) 72 Fed. Reg. 67,304 (Nov. 28, 2007) (extension of comment period)

Docket No. EPA-HQ-OW-2007-0282

Submitted by

The Interstate Natural Gas Association of America

January 21, 2008

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Comments of the Interstate Natural Gas Association of America

I. Interest of Commenters

The Interstate Natural Gas Association of America ("INGAA") submits the following comments on the U.S. Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("Corps") (collectively "the agencies") Guidance Regarding Clean Water Act Jurisdiction After *Rapanos* ("*Rapanos* Guidance" or "Guidance").[1]

INGAA is a non-profit trade association that represents the interstate and interprovincial natural gas pipeline industry operating in North America. INGAA's United States members transport over 95 percent of the nation's natural gas through a network of 200,000 miles of pipelines. INGAA represents virtually all of the interstate natural gas transmission pipeline companies operating in the United States, as well as comparable companies in Canada and Mexico.

Natural gas plays a prominent role in our nation's energy mix, and interstate natural gas pipelines are an integral part of the energy infrastructure. Natural gas currently constitutes approximately 25 percent of energy consumption in the United States. According to an INGAA Foundation Study,[2] United States natural gas consumption should approach 30 trillion cubic feet by the end of the next decade if the supply of gas is developed. If this growth in consumption is

[1] Docket No. EPA-HQ-OW-2007-0282, 72 Fed. Reg. 31,824 (June 8, 2007); 72 Fed. Reg. 67,304 (Nov. 28, 2007) (extension of comment period). For purposes of these comments, the term "Guidance" shall mean the 85-page "U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook" ("Corps Instructional Guidebook") and its eight appendices.

[2] Interstate Natural Gas Association of America Foundation, "An Update Assessment of Pipeline and Storage Infrastructure for the North American Gas Market: Adverse Consequences of Delays in the Construction of Natural Gas Infrastructure," INGAA Foundation F-004-01 (July 2004).

to occur, however, large amounts of infrastructure, including pipeline capacity, storage capacity, and liquefied natural gas terminal capacity, must be built in the United States and Canada.

It is estimated that by the year 2015 the natural gas industry will require $61 billion (in constant 2003 dollars) of investment in pipeline transmission and storage infrastructure in the United States and Canada. Approximately $19 billion will be needed for replacement of current pipe simply to maintain existing pipeline capacity. Nearly $42 billion would be needed for new pipeline and storage projects. In terms of distance, this translates to the need for more than 35,000 miles of new pipe and 10,000 miles of replacement pipe to meet market demands.

The natural gas pipeline industry constructs new pipelines in hundreds of acres of wetlands annually and conducts maintenance operations in approximately 2,800 acres of wetlands. These projects also cross hundreds of thousands of tributaries and streams in a given year. These activities require permitting and mitigation, typically under the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251 *et seq*., including permits under sections 402 and 404 and State water quality certifications under section 401. Given these activities and the large construction outlook ahead, INGAA is impacted by and has a strong interest in the agencies' *Rapanos* Guidance.

In *Rapanos v. United States* and its companion case *Carabell v. U.S. Army Corps of Eng'rs* ("*Rapanos*"),[3] the United States Supreme Court interpreted the scope of federal jurisdiction under the CWA and, thus, when a permit or authorization is required under the Act. The *Rapanos* Guidance sets forth the legal interpretation of the decision by the Corps and EPA. In addition, the Guidance also establishes several fundamentally new and different procedural requirements for obtaining a section 404 permit from the Corps.

[3] 126 S. Ct. 2208 (2006).

Although INGAA is critical of some of the substantive elements of the Guidance, its comments are focused primarily on the procedural changes to the Corps' permit process, as INGAA is concerned that these new procedures have the potential to significantly burden its members and negatively impact their ability to obtain in a timely fashion permits for construction, operation, and maintenance of interstate natural gas systems.[4]

II. Summary of Comments

The agencies' *Rapanos* Guidance makes several significant procedural changes to the Corps' section 404 permitting process and regulations. None of these changes are dictated by the *Rapanos* decision. Instead, in an apparent attempt to achieve greater consistency in the Corps' permitting program, the agencies have created a series of processes that are wholly unworkable in the context of linear infrastructure projects such as pipelines. Several Corps districts have stated to INGAA members that they too are struggling with how to implement the requirements in light of existing Corps workload and budgetary constraints. The end result is increased costs and delay in Corps permitting of linear infrastructure projects, the effects of which are ultimately borne by the consumer public in the form of higher energy costs.

INGAA member pipeline projects are often hundreds of miles long and impact large numbers of wetlands and other water bodies. The impacts created by these linear facilities are usually only temporary and involve minor impacts to the aquatic environment. Therefore, pipeline companies are usually able to rely on Nationwide Permits ("NWPs") 3 and 12 and other

[4] Appendix A of the Corps Instructional Guidebook specifies that the agencies' *Rapanos* Guidance applies only to the section 404 program, but that EPA is considering whether to provide additional guidance on the impact of *Rapanos* on other provisions of the CWA such as section 402. App. A at 4 n.17. At this time, INGAA limits its comments to the applicability of the Guidance to the section 404 program.

general permits, such as regional general permits and State Programmatic General Permits ("SPGPs"). Pipeline companies also obtain individual permits ("IPs") from the Corps.

Regardless of the type of permit obtained, the jurisdictional determination process for INGAA members prior to the *Rapanos* Guidance was generally the same. A pipeline project applicant would submit a delineation of all waters and wetlands to the Corps. Unless the applicant sought to challenge jurisdiction over the delineated waters, it generally would not request an approved jurisdictional determination. As explained in our comments below, a delineation and approved jurisdictional determination are different. A determination is a final Corps decision that the delineated waters meet the legal requirements of jurisdiction under the CWA. A determination constitutes an appealable action under the Corps' administrative appeals regulations; a delineation does not.

Therefore, when a pipeline company did not wish to challenge jurisdiction, it did not request an approved jurisdictional determination, instead allowing the Corps to assume for purposes of processing the application that the delineated waters met the CWA legal jurisdictional requirements. This process avoided delays associated with debating jurisdiction when it was not at issue and provided the company with increased flexibility to make alignment and other project changes that are inevitable in pipeline planning. In sum, this pre-*Rapanos* process worked fairly efficiently for INGAA's member companies.

The *Rapanos* Guidance changes this existing process in several significant ways. The Guidance now requires all applicants, including pipeline companies, to prepare a seven-page approved jurisdictional determination form for each "tributary reach" and all adjacent wetlands impacted by a project, regardless of whether the applicant intends to challenge jurisdiction. Moreover, certain forms must now be coordinated with EPA Regional and Headquarters offices.

In the context of pipelines, these requirements often translate into thousands of pages of forms and supporting information and months of added coordination, all to establish legal jurisdiction over waters that the applicant is often already willing to accept as jurisdictional. Moreover, the ability to obtain such information is strained by the fact that pipeline companies generally do not own the land on which a pipeline is constructed and therefore would have to obtain access from hundreds of landowners to conduct the necessary assessments. The upshot of the Guidance is that the cost to the applicant is exorbitant, the burden on the agencies' workload is extreme, the potential for delay is great, and the benefit to the environment is nil.

Worse yet, this entire process applies in the context of NWPs which are meant to streamline Corps permitting decisions. Indeed, the process is specifically in contravention of the NWP regulations, which have been interpreted to be a Rule under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*. Therefore, the agencies' specific changes to the NWP Rule are legally problematic and should not be adopted without going through the proper rulemaking procedures set forth under the APA. Finally, the *Rapanos* Guidance fails to square or integrate the new requirements with the overall Federal Energy Regulatory Commission ("FERC") process that also requires permit streamlining and better coordination among agencies.

INGAA appreciates the challenges facing the Corps and EPA in managing a nationwide regulatory program which is designed to be protective of our nation's waters and responsive to the need of permit applicants such as pipeline companies to be able to move forward expeditiously and responsibly with important energy infrastructure projects to meet the growing need of Americans for reliable, affordable sources of energy. To that end, INGAA recommends that the agencies revise the *Rapanos* Guidance in the following fundamental respects:

- Eliminate the requirement that all project applicants must obtain approved jurisdictional determinations, and return to the agencies' well-established flexible approach that allows project applicants to elect whether they want an approved jurisdictional determination;

- When a linear project applicant does request an approved jurisdictional determination, limit the geographic scope of the tributary reach analysis to the project's approved right-of-way and limit unnecessary paperwork and forms;

- Retain the important regulatory time limits and processes for NWPs; and

- Eliminate the EPA coordination process for jurisdictional determinations involving significant nexus and isolated water determinations.

III. The Process for Obtaining Corps Section 404 Permits Prior to the *Rapanos* Guidance Worked Efficiently for Pipelines and Other Linear Infrastructure Projects.

INGAA's members, like other proponents of linear infrastructure projects, must often obtain section 404 permits from the Corps for the discharge of dredged or fill material into navigable waters under the CWA. Typical projects include the expansion of existing facilities that are designed to meet increased market demands and hundreds of routine pipeline maintenance activities. Such projects may be relatively small and have few, if any, impacts on aquatic resources, or they may involve the construction of hundreds of miles of pipeline that cross large numbers of wetlands and other water bodies and have greater or lesser aggregate impacts on aquatic resources, depending on the geography and nature of the project. Where such projects impact aquatic resources, INGAA's members obtain various types of permits from the Corps, including general permits such as NWPs and SPGPs, and IPs.

Under the NWP, SPGP, and IP processes prior to the *Rapanos* Guidance, INGAA's members would generally submit a *delineation* to the Corps of all waters and wetlands on the project site/corridor. The Corps would then process the permit with the delineation, or, at most, a preliminary jurisdictional determination. Under the Corps' regulations, a *delineation* and *preliminary* jurisdictional determination are different from an *approved* jurisdictional determination. The latter is considered an appealable action; the former are not.

Since INGAA's members, like many linear project proponents, are usually not interested in appealing jurisdiction over the waters and wetlands in a delineation, they rarely request or receive approved determinations from the Corps.[5] From the project proponent's point of view, it is often more efficient to proceed on the assumption that all delineated waters along the pipeline corridor are jurisdictional. This avoids the time-consuming process of debating whether legal jurisdiction exists, and instead, allows the company to proceed expeditiously with its other project planning. Challenging jurisdiction, on the other hand, especially on a linear project that involves hundreds of aquatic resources, would significantly delay permitting. Hence, INGAA members seldom requested or received from the Corps an approved determination of jurisdiction. Instead, they would either receive a NWP or SPGP authorization with no determination or proceed through the IP process based on a preliminary jurisdictional determination. Ultimately, by signing the permit at the end of the process, an applicant legally acquiesced to the Corps' jurisdiction, formally cutting off the right to appeal jurisdiction. As explained below, this process has been critical for INGAA members and other linear infrastructure proponents to obtain timely and efficient authorization from the Corps.

A. INGAA Members' Use of Nationwide and Other General Permits.

Like many regulated entities, INGAA members rely heavily on the general permit process, in particular NWPs and SPGPs, to obtain streamlined authorization for their projects involving minimal adverse effects on the environment. Prior to the Guidance, the majority of

[5] There may be times where an INGAA member might want to challenge jurisdiction over one or more water bodies depending upon the nature of the project involved. In such circumstances, a pipeline company might disagree with the Corps' assertion of jurisdiction and request an approved jurisdictional determination from the agencies in order to appeal jurisdiction.

INGAA members' general permit authorizations were for pipeline maintenance projects that consisted of minor impacts to "waters of the United States."

Under the NWP program, INGAA members generally rely on NWP 3, "Maintenance," for both routine and emergency maintenance and repair to previously permitted pipeline water body crossings.[6] In addition, INGAA members rely on NWP 12, "Utility Line Activities," for certain pipeline system expansion projects.[7] Although sometimes lengthy, with many crossings of waters and wetlands, pipeline system expansion projects typically impact relatively small areas and create only temporary construction impacts and no permanent waters or wetlands fill. This is due in part to the minimal nature of the crossing (which is buried underground) and because INGAA members must comply with the FERC regulations for construction and restoration in wetlands and waterbodies.[8] Following pipeline construction, the ground surface of waters and wetlands is restored to preconstruction contour and elevation, so no permanent fill is typically caused by pipeline construction or operation. The only long-term impact is typically a

[6] NWP 3 authorizes the "repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, . . ., provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification." 72 Fed. Reg. 11,091, 11,181 (Mar. 12, 2007). In addition, NWP 3 also provides authorization for the removal of accumulated sediments and debris in the vicinity of and within existing structures (*e.g.*, bridges, culverted road crossings, water intake structures, etc.) and the placement of new or additional riprap to protect structures such as natural gas pipelines and gas utility lines. *Id.* These latter activities authorized under NWP 3, although minimal and temporary, require pre-construction notification ("PCN") prior to commencing the activity. *Id.*

[7] NWP 12 authorizes certain minimal impacts associated with pipeline construction, maintenance, and repair, provided the activity does not result in the loss of greater than ½ acre of waters of the United States for every single and complete project. *Id.* at 11,182. A PCN is required for certain types of utility line activities, such as mechanized land clearing in a forested wetland or those that result in the loss of greater than 1/10 of an acre of waters of the United States. *Id.* at 11,183.

[8] FERC, *Wetland and Waterbody Construction and Mitigation Procedures* (2003), *available at* http://www.ferc.gov/industries/gas/enviro/wetland.pdf (last visited Jan. 16, 2008).

potential conversion of wetland habitat type (*e.g.*, forested wetland conversion to herbaceous wetland) from periodic vegetation maintenance over the pipeline centerline. Generally, as part of the section 404 permitting process, compensatory wetland mitigation is performed by pipeline companies to offset the losses of wetland functions caused by the permanent conversion. The pipeline construction process and the resultant wetland impacts are consistent from project to project, and the procedures are well established and efficient. These construction procedures have been reviewed by the Corps time and time again, and the impacts from pipeline construction are already well known. Therefore, due to the lack of permanent fill and the ability to compensate for losses of wetland functions caused by conversion of wetland habitat types, NWP 12 is often applicable.

NWP 3 and NWP 12, like some other NWPs, require a PCN if certain acreage thresholds or other conditions are met. The Corps' PCN requirements are found in General Condition ("GC") 27 of the NWP Rule.[9] Among other things, GC 27 requires the applicant to submit a delineation of special aquatic sites and other waters of the United States on the project site, prepared in accordance with the current method required by the Corps.[10]

Once a PCN is submitted to the Corps, the NWP regulations set forth important binding timelines for processing NWPs that are critical for INGAA members and other linear infrastructure projects. For example, upon receipt of a PCN application, the district engineer has thirty calendar days to determine whether the PCN is complete. In some cases, the district engineer will request additional information. Upon receipt of a complete PCN, the district engineer has *45 calendar days* to determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects, or may be

[9] 72 Fed. Reg. at 11,194-96.

[10] *Id*.

contrary to the public interest. The district engineer will then provide a written response to the applicant stating that the project may proceed under the terms and conditions of the NWP. If no response is received from the Corps within 45 days, the applicant may begin the proposed activity – a crucial aspect of the NWP program for natural gas pipelines, which must meet critical in-service dates. Accordingly, under the NWP Rule, an applicant can expect a response from the Corps as to whether the proposed activity is authorized within 45 days of a complete PCN application or may proceed with the proposed activity if no response is received.[11]

In some states, the use of NWPs has been suspended or revoked, and the Corps has adopted SPGPs specific to each State. In general, under a SPGP, the Corps authorizes certain types of activities, including repair and maintenance work, within waters of the United States that are defined as either Category I or Category II Projects (sometimes Minor or Major Projects, depending on the State). Category I Projects are considered non-reporting by the Corps and do not require a formal filing with them; however, the work must be completed in accordance with all SPGP conditions, which include but are not limited to obtaining state 401 Water Quality Certification, local wetland permits, and other applicable federal and state resource agency clearances. Category II Projects are those projects that exceed the impact thresholds and definitions of Category I Projects and require screening by the Corps as well as other federal and state agencies. Category II Projects require a joint filing with the Corps and the appropriate State wetlands agency.

INGAA members generally have used SPGPs on a limited basis for certain pipeline operation and maintenance projects, particularly in New England. Like NWPs, SPGP applications require a delineation of waters and wetlands. Following the submission of a

[11] *Id*. at 11,194-95.

complete application, the Corps will conduct interagency consultation, and, within 45 days of the interagency screening meeting, will notify the applicant whether the project is authorized.

B. INGAA Members' Use of Individual Permits.

There are instances when the NWPs are not applicable, such as with the construction of new permanent aboveground facilities (*e.g.*, compressor stations or meter stations) that are unable to be located in an upland area, making a permanent fill of wetlands necessary. In these instances, an INGAA member would seek to obtain authorization from the Corps.

As part of the IP process, INGAA members, like most applicants, would again submit a delineation of all waters and wetlands on a project site with a permit application. They would submit the delineation even though it is not required under the individual permit regulations because providing a delineation to the Corps will help the Corps and the public evaluate an application. Prior to the *Rapanos* Guidance, the Corps would then process the IP application with a preliminary jurisdictional determination.[12]

C. Prior to the *Rapanos* Guidance, Only a Wetlands *Delineation* Was Required, and INGAA Members Rarely Requested an *Approved Jurisdictional Determination*.

One of the most critical components of the NWP, SPGP, and IP processes, prior to the *Rapanos* Guidance, was that the applicant was required to submit only a *delineation* of all waters and wetlands on the project site, as opposed to an *approved jurisdictional determination*. Delineations are different from a Corps jurisdictional determination. Delineations are generally submitted by an applicant or consultant and indicate the nature of the waters and wetlands that exist on the project site. These waters and wetlands that are delineated may or may not meet the

[12] In general, prior to the *Rapanos* Guidance, most Corps districts used one preliminary jurisdictional determination form, ranging in length from 2 to 3 pages, to document jurisdiction for an entire pipeline project. Only one form was required even where a linear project had hundreds of water or wetland crossings and impacts.

legal definition of jurisdictional waters under the CWA. A jurisdictional *determination*, on the other hand, is a determination made by the Corps that the waters and wetlands meet the legal requirements of jurisdictional waters under the CWA.[13] Under the Corps' regulations, determinations can be either *preliminary* or *approved.*[14] Preliminary jurisdictional determinations are "advisory in nature" and indicate that jurisdictional waters "may" be present.[15] Approved jurisdictional determinations, on the other hand, are final, binding determinations made by the Corps that legal jurisdiction actually exists.[16] Significantly, only approved jurisdictional determinations can be appealed; delineations and preliminary determinations cannot.[17]

Since INGAA members did not generally intend to challenge jurisdiction under the NWP, SPGP, or IP processes for their pipeline projects, they usually never requested nor received an approved determination from the Corps.[18] Instead, they prepared and submitted to the Corps a thorough delineation report of all the waters and wetlands on the project site,

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[13] The Corps' administrative appeals regulations define a jurisdictional determination as "a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act . . . . All JDs will be in writing and will be identified as either preliminary or approved." 33 C.F.R. § 331.2.

[14] *Id.*

[15] Preliminary jurisdictional determinations are "written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel. Preliminary JDs are advisory in nature and may not be appealed." *Id.*

[16] Approved jurisdictional determinations are "a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States." *Id.*

[17] The Corps states that "approved JDs are clearly designated appealable actions and will include a basis of JD with the document." *Id.*

[18] As stated above, although INGAA members rarely requested approved jurisdictional determinations in the past, there are times where an approved jurisdictional determination may have been requested because of the nature of the project.

regardless whether legal jurisdiction attached, and proceeded through the permit process accepting that the waters delineated along the pipeline route were subject to Corps jurisdiction.

Significantly, in proceeding without a Corps approved jurisdictional determination, INGAA members recognized and accepted that under this process they did not have any rights to appeal the Corps' determination of jurisdiction over the wetlands and waters to be impacted by a pipeline project. Moreover, by signing the permit at the end of the process, the INGAA members legally acquiesced to the Corps' jurisdictional determination, formally cutting off their right to appeal jurisdiction or the permit.[19]

INGAA members generally preferred proceeding without an approved jurisdictional determination in most circumstances, as doing so resulted in fairly efficient, flexible, and streamlined permitting for their pipeline projects. From their point of view, proceeding on the assumption that all delineated waters are jurisdictional avoided the time-consuming process of debating whether legal jurisdiction existed over hundreds of water bodies. Most importantly, it allowed an applicant to proceed expeditiously with its other project planning. Challenging jurisdiction, on the other hand, especially on a project that involves hundreds of aquatic resources, would significantly delay permitting.

By their nature, linear infrastructure projects are complex and require a flexible and predictable permitting process. The Corps review process prior to the *Rapanos* Guidance

[19] Under pre-Guidance practice, the Corps issued a "Notification of Administrative Appeal Options and Process and Request for Appeal" form with its permit decisions. The form gave recipients 60 days to notify the Corps of an appeal of a jurisdictional determination. If the applicant did not appeal the determination within 60 days, it was deemed to have waived appeal rights and was bound by the determination. Pursuant to the form, a recipient of a preliminary jurisdictional determination was not required to respond to the Corps within 60 days, since the preliminary determination was not appealable. A recipient could, however, request an approved jurisdictional determination thereafter for purposes of appeal or if new information were available.

provided that flexibility, especially when dealing with the review of pipeline route changes (many of which are out of the control of the project proponent) that inevitably arise late in the permitting process. Project changes can be driven by, among other things, physical obstructions, contamination, sensitive resources, landowner input, and other state and federal agency requirements. Often the reason for the changes is not readily identifiable at the outset of the Corps process. By foregoing the time-intensive process of preparing and documenting an approved jurisdictional determination, the applicant and the Corps were spared having to prepare multiple determinations if the project alignment changed later in the process, thus greatly eliminating unnecessary costs and delays for the project.

In sum, the process for obtaining NWPs, SPGPs, and IPs that existed prior to the *Rapanos* Guidance provided necessary flexibility and allowed applicants the ability to obtain permits in a timely fashion. By not requiring approved jurisdictional determinations for all permit applicants, and requiring them only in the case of applicants who sought to challenge jurisdiction, the Corps eliminated unnecessary paperwork and coordination while ensuring maximum protection for water bodies and wetlands impacted by linear projects. In particular, and as explained below, the Corps' new decision to require added documentation about the jurisdictional status of waters and wetlands, including requiring approved determinations for all projects, transforms a once streamlined and efficient process into a complicated and burdensome one, leading to a substantial increase in costs and delays in Corps permitting, which in turn translates to additional costs and delays for the proposed project and the deprivation of benefits to the public.

IV. The *Rapanos* Guidance Establishes Several New, Lengthy, Complicated, and Unnecessary Processes that Will Result in Increased Costs and Delays for Pipelines and Other Critical Linear Infrastructure Projects.

The *Rapanos* Guidance establishes several new processes that all applicants for CWA section 404 permits, including those for pipelines and other linear infrastructure projects, must follow. As outlined below, INGAA has several concerns with these new processes and how they will result in substantial and unnecessary costs and delays in the development of its members' pipeline projects.

A. The Agencies' New "Tributary Reach Analysis" Poses Unique Problems for Non-Landowner Permit Applicants Such as Pipeline Companies Who Have Limited Land Access and Is Not Required By *Rapanos*.

The new *Rapanos* Guidance requires that all applicants for CWA section 404 permits identify and document whether the water bodies and wetlands to be impacted by a proposed project are subject to the agencies' CWA jurisdiction.[20] Among other things, the agencies state in the Guidance that they will assert CWA jurisdiction over certain non-navigable tributaries and wetlands, including non-navigable tributaries that are relatively permanent waters ("RPWs"), wetlands abutting RPWs, and all other non-RPWs tributaries, including adjacent wetlands, that have a significant nexus to traditional navigable waters ("TNW").[21] The agencies define a non-navigable tributary as a "water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries."[22] For purposes of determining whether a tributary and its wetlands meet the jurisdictional standards set forth in the Guidance (*i.e.*,

[20] Corps' Instructional Guidebook at 7, 47.

[21] *Id.* at 15.

[22] App. A at 5.

whether a tributary is a RPW or has a significant nexus), the agencies require an applicant for a Corps permit to conduct a "tributary reach analysis."[23]

The tributary reach analysis is not discussed in the *Rapanos* decision, nor does it exist in the CWA, regulation, or policy. Instead, the agencies set forth for the first time in the *Rapanos* Guidance that a tributary includes "the entire reach of the stream that is of the same order (*i.e.*, from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream.)."[24] The Guidance further states that the flow characteristics of a particular tributary are to be evaluated at the farthest downstream limit of the tributary, *i.e.*, the point the tributary enters a higher order stream.[25] Therefore, under the Guidance, if the tributary at the downstream limit is determined to be a RPW, the entire stream reach (or stream order) will be deemed a RPW. If the tributary does not qualify as a RPW at this downstream point, it must then be evaluated to determine whether it has a significant nexus to TNW.

With respect to the significant nexus evaluation, the Guidance states that the agencies will consider the flow and functions of the tributary (at the farthest downstream limit of the tributary) together with the functions performed by all wetlands adjacent to the entire reach of the tributary in evaluating whether such a nexus to TNW exists. Where it is determined that collectively the tributary and the adjacent wetlands have a significant nexus, the entire stream reach and all adjacent wetlands will be documented by the applicant or Corps as jurisdictional.

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[23] App. A states that the "reach analysis" applies to all non-navigable tributaries, but the agencies have stated informally that the same analysis will likely apply for TNW as well.

[24] Corps Instructional Guidebook at 40.

[25] *See* App. A at 5 n.21 (seeking to justify treating the stream reach as a whole based on *Rapanos*).

The breadth and scope of the tributary reach analysis is perhaps best understood by referencing a diagram that was recently distributed to the public by regulatory officials with the Wilmington District Corps of Engineers.[26] The diagram depicts a stream reach with a circle drawn around it from the furthest upstream point all the way to the furthest downstream point. The diagram labels this area as the tributary reach analysis "review area." The Guidance directs that all applicants for a Corps permit collect detailed information and data about the entire review area, including all adjacent wetlands in the review area. Given this broad scope, conducting the reach analysis will usually involve gathering information about lands and waters well beyond the applicant's project's boundaries. As detailed below, identifying and documenting the relevant reach of a tributary will be difficult for all applicants, but particularly problematic for non-landowner proponents of linear infrastructure projects.

1. Conducting the Tributary Reach Analysis Will Be Difficult for Linear Projects, as They Often Involve Multiple Water Bodies and Have Limited Access to On-Site and Off-Site Project Lands.

Linear projects such as pipelines, by their very nature, can be very long and can cross hundreds of water bodies. Identifying each stream reach and the scope of the review area on a project that may run several hundred miles and impact several hundred water bodies is a time-consuming and burdensome task in itself. However, the task is made even more difficult given the fact that linear infrastructure projects, such as pipelines, generally do not own any of the lands on which the project is constructed. Instead, in the case of a pipeline, the pipeline right-of-way is secured only by an easement, not by the fee ownership of the property. Early in the development of a proposed pipeline, the project proponent must obtain permission from the

[26] Justin McCorcle, Esq.; Ken Jolly, Chief, Regulatory Division; Richard L. Darden, Ph.D., U.S. Army Corps of Engineers, Wilmington District, "*Rapanos* Guidance" (Carolina Wetlands Conference, Jan. 10, 2008) at F-16, F-17, *see* Exhibit A.

underlying landowners to survey and evaluate the project. The typical construction right-of-way for a pipeline is 75 to 100 feet wide, and a "study corridor," within which civil, environmental, and cultural resource surveys are conducted, is typically two to four times wider than the construction right-of-way (collectively "the right-of-way").

Because of the varying length of pipeline projects, the number of landowners involved within the right-of-way can range from one to several thousands. While most landowners will grant survey permission, in INGAA's experience, a significant number will not. Even in cases where the landowner grants permission, the right to be on the property for purposes of survey and other activities is generally limited to the width of the right-of-way. Finally, in many cases where landowner permission is not granted, the pipeline company will not have access to the property for survey purposes until it acquires an easement for the right-of-way, which may not be until after the issuance of the final FERC Certificate.

The lack of access to lands inside and outside the right-of-way will make it very difficult to conduct the tributary reach analysis and significant nexus determination as detailed in the *Rapanos* Guidance for linear projects. Depending on the geographical and hydrological features of a streams system, a reach can be very short or very long and may stretch for miles and include land owned by hundreds of landowners. It is very likely that the tributary reach and adjacent wetlands or review area will far exceed the limited portion of the tributary that is within the right-of-way. As explained, obtaining access can be very difficult, even for property within the right-of-way, and neither the project proponent nor the Corps is likely to have access to lands outside the right-of-way.

Moreover, the problem is compounded by the large number of wetland and water body crossings and landowners involved. Requiring an analysis of the tributary reach over hundreds

of water bodies far from the project corridor places an extremely difficult, if not impossible, burden on the project proponent and the Corps. For a significant nexus determination, the Guidance requires even more detailed, site-specific data. Yet, it is unclear how a project proponent will ever be able to gather such information for even one reach, let alone hundreds. The reach analysis will require the assessment of lands to which neither the applicant, nor the Corps for that matter, has any rights of access.

Finally, conducting this reach analysis will involve enormous amounts of time and money that previously were not required under the pre-*Rapanos* process. Some consultants have estimated that the expense involved in obtaining the necessary data for a reach analysis will double the costs associated with preparing a Corps permit application. In addition, because of the amount of information involved, the time to prepare the application will also likely double or triple, depending upon the geography of the project. This increase in time and money necessary to complete an application will translate into increased costs and delay in constructing critical linear infrastructure projects, including not only natural gas pipelines, but also roads, electric transmission lines, and water and sewer infrastructure. Increased costs and delays associated with such important public infrastructure unfortunately are ultimately borne by the public. Such additional costs and delays are manifested not only in adverse financial impacts, but also by way of the deferral of the non-financial benefits of a project (*e.g.*, supply reliability or the availability of clean-burning natural gas for electric generators and other consumers, including residential consumers).

2. The Reach Analysis Is Not Required by the *Rapanos* Decision Nor Consistent with It.

The reach analysis set forth in the Guidance is neither required by, nor consistent with, the *Rapanos* decision. Nothing in the opinions by any of the Justices requires or even suggests

that the Corps establish the reach analysis or define its jurisdictional review so broadly. The plurality and Justice Kennedy focus generally on when wetlands and tributaries qualify as "waters of the United States" under the CWA. In this regard, each establishes a jurisdictional test, *e.g.*, Justice Kennedy's significant nexus or Justice Scalia's relatively permanent waters. They do not specifically identify what part of the tributary to measure and certainly do not require an analysis as broad in scope as that employed by the Corps.

The agencies have created the reach analysis without precedent or adequate justification. Moreover, they fail to explain the legal basis for the requirement and instead merely state that Justice Scalia finds that "[i]t is reasonable for the agencies to treat the stream reach as a whole in light of the Supreme Court's observation that the phrase 'navigable waters' generally refers to 'rivers, streams, and other hydrographic features.' The entire reach of a stream is a reasonably identifiable hydrographic feature."[27] This justification, however, finds no support in the text of Justice Scalia's opinion. In discussing types of hydrological features (such as rivers, stream, and lakes), Justice Scalia never suggested that the Corps identify the whole length of a tributary, assess the furthest downstream reach, and then presume jurisdiction over the entire reach.

In fact, such a presumption of jurisdiction appears completely at odds with Justice Kennedy's significant nexus test, which is to be based on an actual case-by-case, site-specific analysis of the water body or wetland directly impacted by a project.[28] Justice Kennedy was clear that the focus of his jurisdictional test was the wetlands at issue, not wetlands and water located in some distant location: "the Corps' jurisdiction over wetlands depends upon the

[27] App. A at 5 n.21.

[28] *Rapanos*, 126 S. Ct. at 2249 (J. Kennedy, concurring).

existence of a significant nexus between *the wetlands in question* and navigable waters in the traditional sense."[29]

Accordingly, if anything, *Rapanos* would suggest that the point of measurement be where the project impacts a particular water body or wetland. This latter interpretation appears more reasonable because it determines a nexus based on actual conditions at the site impacted by the project, whereas conditions at the lowest end of the reach may be completely different and unaffected by activities well above it.[30]

B. The Agencies' New Requirement for Approved Jurisdictional Determinations Increases the Cost and Delay of Corps Permitting for Linear Infrastructure Projects, Is Not Required under Agency Regulations, and Has Other Negative Consequences.

The Guidance requires all applicants for all projects to prepare a separate approved jurisdictional determination form for each water body impacted by a project, including the entire tributary reach and adjacent wetlands, or the "review area."[31] This new requirement will result in proponents of linear infrastructure projects having to prepare hundreds of approved jurisdictional determination forms for hundreds of water bodies over which they have limited access. The sheer cost, burden, and time of preparing and reviewing hundreds of approved jurisdictional determination forms for all projects and all impacts, regardless of whether jurisdiction is being challenged, is staggering, unnecessary, and will most certainly lead (and has led) to increased costs and delay in Corps permitting decisions. Costs and delays in permitting

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[29] *Id.* at 2248 (emphasis added).

[30] The Guidance notes that distance from the tributary to the navigable water may be an important factor in a significant nexus test but does not apply that same reasoning to the distance between a point of impact on a tributary and the lowest end of the reach of that tributary, where flow characteristics are measured. App. A at 10. Just as a distant tributary can have a "speculative or insubstantial nexus" to a traditional navigable water, so too a distant wetland or portion of a tributary high up on a reach may bear little resemblance to the lower end.

[31] *See* Guidance, App. B.

critical linear infrastructure projects such as pipelines have direct negative consequences for the public. This new process wastes both the applicants' and the Corps' scarce resources and does not benefit the environment. Moreover, this procedural change represents a major departure from the Corps' past practice in which the jurisdictional inquiry focused on the project site and was documented through a wetlands delineation or other less formal methods such as preliminary jurisdictional determinations. In contrast, prior to the Guidance, approved jurisdictional determinations were usually prepared only at the request of the applicant in circumstances where the applicant wished to challenge jurisdiction. Moreover, this new process is not required by the *Rapanos* decision, has unintended consequences on landowners, and should not be continued.

1. Requiring Approved Jurisdictional Determination Forms for Each Water Impacted Is Completely Unworkable in the Context of Linear Infrastructure Projects, Results in Increased Costs and Delays, and Is Unnecessary.

Corps Regulatory Guidance Letter ("RGL") 07-01 and the Guidance direct that all applicants must now prepare a seven-page approved jurisdictional determination form for each water body and wetland impacted by the project.[32] The seven-page form at Appendix B requires copious amounts of information for the Corps to make a formal, legal determination that each tributary reach and adjacent wetlands impacted by a project is subject to the agencies' jurisdiction under the CWA. The form requires detailed data on the size of the watershed and drainage areas, the physical characteristics of the tributary and its relationship to TNW, and the tributary's flow and chemical and biological characteristics. The form also requires significant nexus analysis between a waterway or wetland and the TNW, including supporting

[32] Guidance at App. B and U.S. Army Corps of Engineers, RGL No. 07-01, "Practices for Documenting Jurisdiction under Section 9 & 10 of the Rivers & Harbors Act (RHA) of 1899 and Section 404 of the Clean Water Act (CWA)" (June 5, 2007) at 1-5.

documentation. Accordingly, completing the approved jurisdictional determination form is much more than a ministerial task.

a. Requiring Linear Project Applicants to Fill Out Hundreds of Forms Will Be Difficult, Time-Consuming, and Costly for the Applicant and the Corps.

In the case of linear projects such as pipelines that may cross hundreds of miles of waters and wetlands, this new requirement translates into thousands of pages of paper and supporting documentation. As stated before, interstate pipeline projects can run for hundreds of miles and involve many wetland and water body crossings. For example, one 200-mile pipeline had as many as 1,400 wetland crossings and 650 water body crossings. Under the Guidance, the proponent of such a project would have to document, prepare, and obtain approved jurisdictional determinations for each water or reach impacted by the project, all to formally establish jurisdiction over waters that it may already be willing to accept are jurisdictional.

As explained previously, obtaining the information necessary to complete a particular approved jurisdictional determination form will be extremely difficult for proponents of pipelines and other linear projects who have limited access to land and waters even in the project corridor and probably none outside that corridor. Nevertheless, such proponents will have to develop detailed and comprehensive hydrological, chemical, and biological data on the full reach of a tributary and associated wetlands, even if the proposed project would impact only a small portion of the tributary. Much of this data requires sampling and field observations, making desktop jurisdictional determinations difficult. It is hard to conceive how a proponent could gather reliable information without access to the full reach of the tributary, access neither it nor the Corps will have.

The Corps itself acknowledges that this process is going to impose a substantial financial burden on the project proponent and result in delays in project permitting. As a band-aid

solution, the Corps urges applicants to fill out the approved jurisdictional determination forms themselves to speed the process and to engage consultants to do so.[33] Even where consultants are engaged, however, the process will be expensive and prolonged. A several-hundred-mile-long interstate linear project may require the simultaneous completion of several hundred forms, one for each reach impacted by the pipeline route, before a permit may be secured.

Moreover, the requirement to prepare approved jurisdictional determination forms creates a process that is too inflexible to meet the practical needs of linear infrastructure projects which often change alignment. As explained, after a pipeline project proponent has conducted its initial surveys and filed its applications with the agencies, it is not unusual that issues will be identified that may warrant a re-alignment of the proposed pipeline. These issues may be identified as a result of additional surveys, further conversation with landowners, or input from agencies and other stakeholders. Some typical reasons for such a re-route would include incompatible land use, physical obstructions, contamination, sensitive resources, and avoidable adverse impacts. These reasons are not always identifiable at the outset when tributary reaches are being identified, and forms are being filled out, and instead may arise quite late in the permitting process, after approved jurisdictional determination forms will have been submitted and considered.

The re-routes required in these circumstances may by only a few hundred feet in length but could be several thousand feet or even miles. Under the Guidance, it is unclear if, once a re-

[33] In fact, the Corps has stated a preference for applications to be filled out by a qualified consultant "so that every requester of a JD will have an incentive to employ such a qualified consultant if that is feasible and appropriate . . . ." RGL 07-01 at 4. *See also* Corps Instructional Guidebook at 80 ("For certain projects, it may be advisable for applicants to consider the use of consultants to help perform the jurisdictional determination and prepare the permit application along with the supporting compensatory mitigation plan that demonstrates compliance with the § 404(b)(1) guidelines . . . . Such steps would unquestionably speed up the permit process.").

alignment is identified, whether the project proponent will then have to re-start the process of obtaining landowner survey permission, conducting the surveys, and amending its approved jurisdictional determination forms. In the past, the applicant's reliance on delineation and preliminary jurisdictional determinations has helped alleviate this problem by providing the Corps and the pipeline proponent with necessary flexibility to move quickly to address changed circumstances. Having to prepare a new approved jurisdictional determination if a project alignment changes will only exacerbate the increased costs associated with this new requirement.

b. The Corps Itself Is Struggling to Implement the Guidance, Thus Causing Delays in Corps Permitting.

Several Corps districts understand the unique concerns raised by linear projects, and we understand are themselves struggling with how to apply this policy to such projects. Some have identified creative, but conflicting, policies around the Guidance requirements to alleviate workload concerns. Others have simply been paralyzed, not sure how to implement the policies for linear projects and fearful of straying from the Guidance. Most Corps districts have informed applicants that they simply do not have the resources to process approved jurisdictional determination forms, especially the number that would be required for linear infrastructure projects.

In this regard, even the Guidance itself candidly admits that the agencies may not have the resources to review and evaluate the volume of approved jurisdictional determinations the guidance will create. The Guidance expressly states that the new process will "increase [the] workload for [Corps] field staff as they document and make significance [sic] nexus determinations" and that the Corps "probably" does not have enough staff to document jurisdictional determinations "in a timely manner."[34] Ultimately, the increased workload,

[34] Guidance at 78.

inconsistency, confusion, and paralysis in the Corps' permitting program translate into increased delay and costs in the field for critical linear infrastructure projects like pipelines. Indeed, such delays have already been documented.

For example, INGAA is aware of one 300-mile pipeline project that had 700 water body crossings. In accordance with the pre-*Rapanos* process, the pipeline company at issue had submitted a delineation of all waters and wetlands in the project corridor with its individual permit application, which was being processed under a preliminary jurisdictional determination. While the applicant was waiting to receive its permit, the *Rapanos* Guidance was issued, and the district informed the applicant that, in accordance with the Guidance, it must prepare 700 approved jurisdictional determination forms and comply with other elements of the Guidance, including EPA coordination. Needless to say, the district informed the applicant that the permit for the project would be substantially delayed pending compliance with these requirements.

INGAA is aware of several other pipeline projects in which the Guidance will impose considerable burdens on the project applicant and Corps district personnel. In one pipeline expansion project, over 770 individual jurisdictional determinations will be required if the Guidance is applied as presently written. In that case, the Corps district office told the project applicant that the Corps simply does not have the staff to conduct the necessary 770 jurisdictional determinations. In another case, a series of coordinated pipeline projects processed under NWPs involved more than 800 wetland and water crossings. Had these projects been subject to the Guidance, the Corps would have been compelled to prepare 800 approved jurisdictional determinations totaling 5,600 pages of documentation. These projects simply could not have been processed in a timely manner under the terms of the present Guidance. Given the undeniable need to expand America's critical energy infrastructure over the coming

years, the delays created by the Guidance will only increase as project applicants, Corps district offices, and the public as a whole suffer under the burden of the weight of reams of additional paper for no demonstrable benefit to the environment.

c. Increased Costs and Delays in Permitting Linear Infrastructure Have Negative Impacts on the Public.

Delays in Corps permitting harm not only the project proponent, but also the customers it seeks to serve and even the general public. A pipeline company cannot construct an interstate natural gas pipeline unless the FERC determines that the project is required by the public convenience and necessity, as will be discussed below. Thus, FERC-approved pipeline projects have demonstrated a public need to provide the necessary services.

In this respect, pipelines have targeted in-service dates for completion. This date is generally driven by a contractual commitment to the pipeline's customer, who may be a local distribution company ("LDC") or a generator of electricity, and the customer itself may have contractual obligations relying on timely delivery of gas. The in-service dates for these customers are dictated by their need for the additional gas supply that the proposed pipeline will provide. For LDCs, the demand is usually based on the need for additional gas due to load growth for the heating season. For generators of electricity, the demand is often based on the need to run the facility to meet regional needs and/or to burn natural gas due to environmental restrictions. In either case, these needs are identified in advance, and the planning of the LDCs and electric generators are based on the gas being available on the targeted in-service date.

In the Northeast, for example, most in-service dates correspond to the beginning of the winter heating season. This also ties to the practical end of the construction season in the Northeast, as frozen ground conditions and cold weather are not conducive to pipeline construction. Consequently, a delay in the permitting process of even a few months could cause

a project's in-service date to shift an entire year and deprive the customers of that natural gas for an entire heating season. In addition to cold weather restrictions on construction, other limitations related to environmental conditions that may restrict construction windows can greatly exacerbate the delay of even a few months in the permitting process. These delays not only deprive customers of reliable gas supplies, but also have significant ramifications on the cost of construction, costs that are ultimately borne by the consumer in the form of higher energy prices. Further, any delay in the project deprives the end-users and the public of benefits that the FERC has determined are provided by the project. For example, a delay in providing natural gas to an electric generating facility may require older, less efficient generating facilities to burn coal or oil, thus depriving the public of significant clean air benefits for the duration of the delay.

d. The Corps Has Not Demonstrated that the Approved Jurisdictional Determination Requirement Is Necessary or Will Benefit the Environment.

The Guidance acknowledges that "funding for resources may be requested to mitigate the impact to the regulatory program, and to maintain the current level of protection over the Nation's aquatic resources."[35] Although this is a helpful acknowledgement that the Corps does not have the resources to comply with its own unnecessary paperwork demands, the Corps' conclusion (*i.e.*, that the Nation's waters will not be protected without this paperwork) is demonstrably false. The Guidance provides no evidence that the pre-*Rapanos* process (a delineation, or at most a preliminary jurisdictional determination) was not protective of the Nation's aquatic resources. Nor is there any evidence that protection will be improved if all applicants prepare approved jurisdictional determination forms for each water body to be impacted. As explained, many applicants are willing to be processed through the Corps' permit

[35] Corps Instructional Guidebook at 78. The Corps also recognizes the burden placed on EPA Regional offices in reviewing significant nexus determinations. *Id.*

process without an approved jurisdictional determination and are willing to accept that all waters and wetlands delineated for a given project are subject to Corps jurisdiction. In such circumstances, the agencies can rest assured that the nation's waters will receive maximum protection, but without the voluminous, unnecessary and time-consuming paperwork. In exchange, INGAA members and other linear infrastructure project proponents can expect a relatively streamlined and efficient permitting process without being forced to participate in a process that is intended only for applicants who wish to challenge jurisdiction.

2. RGL 07-01 Unnecessarily Changes the Existing Regulatory Process by Requiring All Applicants to Receive Approved Jurisdictional Determinations.

The burdens of the process outlined above become all the more problematic when one realizes that none of it is legally required under the agencies' regulations. This is because securing an *approved jurisdictional determination* is not a condition precedent to obtaining a permit under the regulations.[36] To the contrary, the only legal significance of an approved jurisdictional determination is that one is necessary if an applicant wishes to challenge jurisdiction, as only approved jurisdictional determinations are appealable.[37] Indeed, an approved jurisdictional determination is a term with meaning only in the administrative appeals context, and is not used in any other section of the Corps' regulations. Therefore, prior to the *Rapanos* Guidance, applicants who did not wish to challenge jurisdiction could proceed through the permit process without being forced to obtain an approved jurisdictional determination.

[36] This is in contrast to a delineation, which must be prepared for PCN for certain NWPs under the regulations and are commonly done for individual permits.

[37] The Corps states that "[a]pproved JDs are clearly designated appealable actions and will include a basis of JD with the document." 33 C.F.R. § 331.2. Preliminary jurisdictional determinations and delineations are not appealable. *Id.*

RGL 07-01 turns the agencies' regulations on their head by now requiring approved jurisdictional determinations for essentially all Corps permit applicants, even those who do not wish to challenge jurisdiction.[38] While the Corps acknowledges that under the regulations a Corps district engineer has full discretion to use either preliminary or approved jurisdictional determinations,[39] RGL 07-01 severely limits that discretion by establishing only three limited circumstances under which a preliminary jurisdictional determination can now be used: (1) when a jurisdictional determination is made by another agency for SPGPs and/or Regional General Permits; (2) when the district has requested and received a Headquarters categorical waiver of a General Permit class; and (3) when the jurisdictional determination is made to address alleged violations and/or enforcement action.[40] In practice, these circumstances are even further limited, as we understand that the Corps Headquarters has not been approving waiver requests, and the applicability of the new process to SPGPs and Regional Permits is unclear.[41]

Hence, the Corps, through the issuance of RGL 07-01 and its curtailment of the use of preliminary jurisdictional determinations except in limited circumstances, has converted an approved jurisdictional determination – a discretionary tool needed only for those applicants

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[38] The Guidance appears to exempt "non-reporting" NWPs from the process, in other words, NWPs that do not require PCN.

[39] The Corps' administrative appeals regulations define a jurisdictional determination as "a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act . . . . All JDs will be in writing and will be identified as *either preliminary or approved*." 33 C.F.R. § 331.2 (emphasis added). Thus, under the regulations, the district engineer has discretion to allow the use of *either* preliminary *or* approved jurisdictional determinations.

[40] *See* RGL 07-01 at 5-6.

[41] The applicability section of RGL 07-01 acknowledges that the RGL does not apply to SPGPs. The Corps should clarify the scope of this exemption. In other words, the Corps should specifically explain that if an applicant is obtaining a permit under a SPGP, such as in Massachusetts and several other states, the SPGP process negates the need to obtain approved jurisdictional determinations.

seeking to appeal jurisdiction – into a new mandatory requirement that must be prepared by all applicants, for all types of permits, and for every water body to be impacted. Nothing in *Rapanos* dictates the preparation of approved jurisdictional determinations. Indeed, none of the five opinions issued in *Rapanos* even refer to the term "jurisdictional determination." Rather, like the reach analysis, the Corps has developed this new requirement on its own, allegedly to help ensure consistency and better documentation across districts.[42] Yet there are many ways to achieve consistency without creating an unnecessarily burdensome process that is entirely unworkable for critical linear infrastructure projects.

3. Requiring Approved Jurisdictional Determinations is Unnecessary Unless the Applicant Requests One or Wants to Challenge Jurisdiction.

Not all applicants want to appeal jurisdiction.[43] Many applicants are willing to proceed through the permit process without an approved jurisdictional determination, with the understanding that in so doing they cannot challenge the agencies' jurisdiction. RGL 07-01 seems to acknowledge that approved jurisdictional determinations should be prepared only when "requested" by an applicant, but at the same time dictates that all projects must have them. The Corps must clarify that only applicants that request approved jurisdictional determinations must obtain them.[44]

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[42] RGL 07-01 at 1-2. Ironically, however, by dictating that all projects must prepare approved jurisdictional determinations, the Corps may ultimately undermine its own goal of national consistency. It is likely that Districts facing significant backlogs, new demands, and no new resources may be simply unable to comply with the Guidance's new mandates.

[43] Indeed, the number of applicants wishing to appeal jurisdiction appears quite low. Recent Corps statistics indicate that in 2007, there were only 60 administrative appeals of approved determinations of Corps jurisdiction. *See* Charles R. "Chip" Smith, Assistant for Environment, Tribal and Regulatory Affairs, Office of the Assistant Secretary of the Army (Civil Works), "Keynote Presentation" (Carolina Wetlands Conference, Jan. 10, 2008) at E-3, *see* Exhibit B.

[44] As stated above, there are circumstances where a pipeline company may seek an approved jurisdictional determination. Similarly, other section 404 permit applicants may have

The applicability section of RGL 07-01 states that it applies "to all JD *requests* received by a district for waters including wetlands" subject to Corps jurisdiction.[45] The RGL distinguishes between requests for preliminary jurisdictional determinations and request for approved jurisdictional determinations.[46] Similarly, section C of the RGL is entitled "JD *Requests*" (emphasis added) and sets forth that "[w]hen a landowner or other 'affected party' (in the sense that term is used at 33 C.F.R. 331.2) *requests* that the Corps provide a JD" then the Corps must provide one.[47] Moreover, the RGL goes on to explain that as a "general rule, a preliminary JD should not be used to respond to a *request* for an approved JD."[48] Although the RGL does not define the term "request," the common sense reading of these provisions is that the Corps will provide the jurisdictional determination that the applicant requests. If an applicant does not request an approved jurisdictional determination, the Corps will not require one. If the applicant requests an approved jurisdictional determination, the Corps will provide one.

The Corps, however, appears to be taking a different tack. Instead of simply requiring an approved jurisdictional determination when an applicant requests one, as outlined above, the Corps is requiring all applicants to prepare approved jurisdictional determinations for all impacted waters, including the entire tributary reach and adjacent wetlands. The Corps' opinion

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reason to request these determinations, such as landowners or buyers of land who want to identify exactly where jurisdictional waters are prior to the sale of their property. In addition, some builders, in the course of constructing projects, need to know the exact boundaries of jurisdiction to allow for the maximum development on the property, and so may request an approved jurisdictional determination.

[45] RGL 07-01 at 1 (emphasis added).

[46] *Id* at 6. The RGL concludes that "[a]s a general rule, a preliminary JD should not be used to respond to a request for an approved JD."

[47] *Id.* at 4 (emphasis added).

[48] *Id.* at 6 (emphasis added); *see also* Corps Instructional Guidebook at 47 n.4 ("An Approved JD shall be completed when requested by an affected party.").

is that a request for a NWP authorization or application for an IP is tantamount to a request for an approved jurisdictional determination. This is simply false and contrary to the express desires of many applicants. As explained, most linear project proponents are willing to proceed through the permit process without receiving a formal jurisdictional determination with the full understanding that doing so means they cannot appeal any Corps determination of jurisdiction. Accordingly, in most circumstances, linear project proponents specifically do *not* request approved jurisdictional determinations, and therefore, under the terms of the existing regulations and the RGL 07-01, should not be required to obtain one.

4. Requiring Approved Jurisdictional Determinations for Non-Landowner Applicants When Not Requested Raises Unintended Consequences for the Underlying Landowners.

As explained previously, linear project proponents often do not own the lands on which the project is constructed. Instead, linear projects usually acquire easement interests on those lands within a limited project area or right-of-way. An approved jurisdictional determination that will include the entire tributary reach and all adjacent wetlands will necessarily include lands owned by third parties who may not even be aware that the Corps is making an approved jurisdictional determination about their property.

Requiring non-landowner applicants to obtain approved jurisdictional determinations for a tributary stream reach may have the unintended consequence of making binding, appealable jurisdictional determinations for all landowners on the identified reach. This is because the appeals regulations appear to give all "affected parties" the ability to appeal an approved jurisdictional determination. "Affected party" under the Corps administrative appeals regulations is defined to mean "a permit applicant, landowner, a lease, easement or option holder . . . who has received an approved JD, permit denial, or has declined a proffered individual

permit."[49] It is not clear from this definition, nor from the regulation, whether a non-landowner's approved jurisdictional determination would apply to the underlying landowner in the future, given that it did not request or receive the determination. Similarly, it is also not clear whether a landowner who has not received nor requested an approved jurisdictional determination can appeal a determination of a non-landowner applicant. RGL 07-01 does not directly address such questions, but rather hints at some troubling answers.

In this regard, it seems obvious that when a non-landowner applicant receives an approved jurisdictional determination for the reach it will be impacting, that only the applicant, and not the owners of all land along the reach, will be bound by the approved jurisdictional determination. However, the Corps Guidance seems to imply otherwise. The Corps states that "if the Corps district has not received a formal jurisdictional request for the [waters in question], the Corps district is not obliged to inform property owners, other than the permit applicant, that jurisdictional features may be present on their property."[50] Accordingly, the Guidance sets up the very real and problematic scenario that a non-landowner pipeline company could be forced to obtain an approved jurisdictional determination for an entire stream reach and adjacent wetlands, thereby making binding decisions on the underlying landowners, who may or may not have notice of the Corps' determination.[51]

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[49] 33 C.F.R. § 331.2; *see* RGL 07-01 at 4 (A landowner or other "affected party," in the "sense that term is used at 33 C.F.R. 331.2," can request an approved jurisdictional determination).

[50] *See* Corps Instructional Guidebook at 75.

[51] The impact on a party's legal rights without its notice or participation raises concerns similar to those of parties whose rights may be impacted by adjudications in which they are neither noticed nor involved. Courts have long held that a judgment, decree, or settlement among parties to a lawsuit "resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989); *see also Mullane v. Central Hanover Bank & Trust Co*., 399 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice

C. The Agencies' New Requirement to Coordinate Certain Jurisdictional Determinations with EPA Is Time-Consuming and Exacerbates the Potential for Increased Costs and Delay in Corps Permitting.

If the preparation of hundreds of approved jurisdictional determination forms is not certain to result in increased cost and delay, the new requirement to coordinate jurisdictional determination forms with EPA most certainly will. Under the Guidance, Corps districts must now coordinate with EPA on any significant nexus or isolated water determination prior to finalizing the determination.[52] Corps districts coordinate with the appropriate EPA Regional offices except for jurisdictional determinations concerning isolated waters, when the district must coordinate with the Headquarters of both agencies.

The *Rapanos* Guidance sets forth separate processes for Corps-EPA coordination on jurisdictional determinations supporting NWPs and IPs. Within those categories, additional procedures are provided for jurisdictional determinations requiring a significant nexus evaluation and those involving isolated waters. The procedures set forth are complicated, lengthy, and difficult to follow. In RGL 07-01 alone, they constitute seven single-spaced pages of instructions and several highly complex flow charts. Significantly, the Guidance provides specific timelines for EPA Regional office and Headquarters review of jurisdictional determinations once interagency review is initiated, but it does not specify a timeline for when a Corps district must initiate interagency or higher level review in the first place. It merely states

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reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment . . . in a litigation in which he is not designated as a party . . . and judicial action . . . against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires.") These concerns argue against requiring approved jurisdictional determinations on the property of non-applicant owners rather than requiring their notice and intervention in a determination, which would further substantially delay the permit process.

[52] *See generally* RGL 07-01 at 8-14.

that the Corps should provide the jurisdictional determination "immediately" to EPA but does not discuss what happens if the Corps district does not comply with this admonition.[53]

As with other elements of the Guidance, the complicated interagency coordination process is unnecessary for most linear infrastructure projects such as pipelines. It is not needed when the project proponent does not wish to challenge jurisdiction. In other words, when the applicant does not request an approved jurisdictional determination and does not intend to challenge jurisdiction, requiring EPA coordination is wasteful and diverts scarce agency resources away from situations in which jurisdiction is being contested, as well as conducting other important permitting responsibilities.

D. The New *Rapanos* Guidance Significantly Changes the NWP Rule and Undermines the Efficiency of the NWP Program.

For over thirty years, NWPs have provided a critical regulatory safety valve to ensure that the CWA section 404 permitting program operated efficiently and that the Corps focuses its resources on those activities having the greatest potential impact on the environment – as Congress intended when it authorized the NWP program.[54] The Corps' records show that 88

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[53] RGL 07-01 at 9, 11. The Corps is to complete a jurisdictional determination in "a timely manner." *Id*. at 4. The district is encouraged to continue work on other aspects of the application during the review period "to further minimize potential time delays in processing the application request." *Id*. at 8.

[54] NWPs date back to 1975, when the Corps adopted the first NWP and established a procedure for adopting additional general permits through regulations, which, "once issued would preclude the need for any further permit." 40 Fed. Reg. 31,320, 31,322 (July 25, 1975). At that time, the Corps expressed the view that authorizing permits "through the regulation is essential in order to make this program manageable from a manpower and resources point of view, and still protect the aquatic environment." *Id*. The Corps explained that "[i]f certain conditions are met, a person would not have to go through any of the paperwork or delay required for a regular permit from the Corps of Engineers." 42 Fed. Reg. 24,756, 24,757 (May 16, 1977). Shortly thereafter, the Senate began consideration of a bill to amend the CWA. A key issue was the Corps' workload and the burdens the permitting program imposed on the general public. Congress was aware of the Corps' general permitting initiatives and enacted CWA section 404(e) (33 U.S.C. § 1344(e)(2)) to "grant authority for nationwide permits . . ." to

percent of all permit decisions made in 2003 were via general permit and that nearly half of these were NWPs. In fact, approximately 35,000 projects each year are authorized through NWPs.[55] As noted above, proponents of linear infrastructure projects, including INGAA members, regularly make use of NWPs whenever and wherever possible to streamline CWA permitting.

The *Rapanos* Guidance runs counter to the streamlining purposes underlying the NWPs and, if implemented, will result in a large increase in burdensome red tape without any real environmental benefit. Most significantly, the Guidance attempts to modify a rule through guidance in contravention of the APA. Specifically, the requirement that each applicant for a NWP authorization obtain an approved jurisdictional determination, in addition to providing a delineation as required by the NWP Rule,[56] will transform the NWP program from a system of general authorizations designed to avoid over-regulation of minor activities to a program that differs little in procedure, timing, or substance from the individual permitting process. As discussed below, the Guidance's requirements that an applicant for a NWP authorization obtain an approved jurisdictional determination and that it be coordinated with EPA should be eliminated.

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be issued for five-year terms. 123 Cong. Rec. 26,771 (Aug. 4, 1977) (Sen. Muskie), *reprinted in* 4 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 1054 (1978).

[55] In FY 2003, the Corps authorized 35,317 projects with NWPs and 43,486 with regional general permits. *See* U.S. Army Corps of Engineers, "All Permit Decisions FY 2003" *available at* http://www.usace.army.mil/cw/cecwo/reg/2003webcharts.pdf (last visited Jan. 15, 2008). The Corps has recognized that administering such a wide-reaching program has been a massive undertaking that could not have been maintained without an effective general permit program. *See, e.g.,* 64 Fed. Reg. 39,252, 39,268 (July 21, 1999) (the Corps "does not have the resources to review each activity that requires a Section 404 . . . permit through the individual permit process . . . .").

[56] 72 Fed. Reg. 11,092 (Mar. 12, 2007).

1. NWPs are Rules as Defined by the APA.

It is important to recognize that the NWPs are "rules," so any changes the Guidance imposes on them must be accomplished through the proper statutorily defined administrative methods. "This is so because each NWP, which authorizes a permittee to discharge dredged and fill material (and thereby does not allow others without an individual permit), is a legal prescription of general and prospective applicability which the Corps has issued to implement the permitting authority the Congress entrusted to it in section 404 of the CWA."[57]

Because the NWPs are legislative rules, any changes made to the NWPs must follow the rulemaking procedures set forth in the APA.[58] The central tenet of the APA is that the public must receive adequate notice of proposed rules (including revisions to existing rules) and be afforded a meaningful opportunity to participate through the submission of written data, experience, or arguments. Moreover, even an interpretation of a legislative rule "cannot be modified without the notice and comment procedure that would be required to change the underlying regulation – otherwise, an agency could easily evade notice and comment requirements by amending a rule under the guise of reinterpreting it."[59]

The courts, Congress, and other authorities have emphasized that rules which do not merely interpret existing law or announce tentative policy positions, but which establish new

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[57] *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1284 (D.C. Cir. 2005) (each NWP is "[a]n 'agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.'") (quoting 5 U.S.C. § 551(4)). *Id*. at 1285.

[58] 5 U.S.C. §§ 551 *et seq*.

[59] *Molycorp, Inc. v. EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment under the APA).

policy positions that the agency treats as binding, must comply with the APA, regardless of how they are labeled.[60] Hence, the Corps cannot modify the NWPs or its interpretation of the permits through guidance[61] rather than undergoing formal notice and comment rulemaking.[62] However, as illustrated below, the *Rapanos* Guidance makes several significant changes to the NWP Rule.

2. The *Rapanos* Guidance Makes Certain Fundamental Changes that Violate the APA and Are Inconsistent with the NWP Rule.

The Guidance makes several substantive and significant changes to the NWP Rule that will adversely impact project proponents and undermine the fundamental purpose of the NWP process. These changes include adding a requirement for NWP applicants to obtain approved jurisdictional determinations, requiring extensive coordination with EPA Regional offices for every substantial nexus and EPA Headquarters for every isolated wetlands determination implicated by a NWP application, and in so doing explicitly overriding the time frames set forth in the NWP Rule. The Corps cannot implement such changes through a guidance document, but

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[60] *See, e.g., Appalachian Power Co v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (striking down emissions monitoring guidance as legislative rule); *Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206 (D.C. Cir. 1999) (striking OSHA Directive as legislative rule); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L. J. 1311 (1992).

[61] As compared to a rule, guidance is "an interim measure that provides clarification to a regulation or clarifies implementation of a legally binding decision of the Federal Courts. Guidance development is an informal process that may be coordinated with other Federal agencies, but not necessarily the public." Corps Instructional Guidebook at 84.

[62] Moreover, the Corps must ensure that its Guidance complies with Executive Order No. 12,866 ("E.O. 12,866"). Pursuant to E.O. 12,866, each agency "shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies." Section 1(b)(10). An agency also has the duty to tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities consistent with obtaining regulatory objectives, taking into account, among other things, the cost of cumulative regulations. Section 1(b)(11). For the reasons explained in these comments, the Guidance runs afoul of E.O. 12,866.

must instead subject such substantive regulatory revisions to the APA's procedures for revising legislative rules.[63]

a. An Approved Jurisdictional Determination Is Not Required by the NWP Rule.

The Corps has fundamentally changed the NWP Rule by requiring an approved jurisdictional determination for NWPs. Before the Guidance, a project proponent seeking a NWP need only submit as part of its PCN a delineation of wetlands and other waters on the project site or corridor. But the guidance essentially transforms this PCN requirement for a delineation into one for an approved jurisdictional determination.

As stated above, an approved jurisdictional determination is distinguishable from a wetlands delineation. Corps regulations define an approved jurisdictional determination as a written document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel and is clearly designated as an appealable action. [64]

Delineations, on the other hand, do not create appealable rights and do not involve a written Corps determination. Instead, as previously explained, a delineation is generally submitted by an applicant or consultant and indicates the size and boundaries of a subject property that is an aquatic resource, *e.g.*, a wetland delineated in accordance with the 1987 Corps of Engineers *Wetlands Delineation Manual* ("1987 Manual"). The 1987 Manual defines a wetland as an area that is 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

[63] *See* 5 U.S.C. §§ 551(4), 553; *Appalachian Power Co.*, 208 F.3d at 1021.

[64] 33 C.F.R. § 331.2 ("All JDs will be in writing and will be identified as either preliminary or approved. JDs do not include determinations that a particular activity requires a DA permit.")

vegetation typically adapted for life in saturated soil conditions.[65] A wetlands delineation establishes a line that separates and identifies the wetlands areas on a parcel from the non-wetland (upland) areas. The fact that a feature is delineated as wetland or water does not mean that legal jurisdiction actually exists over that feature. Also, the overlying FERC procedures are applied to delineated wetlands, not just jurisdictional wetlands, so the difference does not change the project impacts. Therefore it is unnecessary to differentiate the two.

The Corps knows that a wetlands delineation differs from an approved jurisdictional determination.[66] Nonetheless, the *Rapanos* Guidance erroneously transforms the PCN requirement for a wetlands delineation into one for an approved jurisdictional determination. In RGL 07-01, the Corps acknowledges that "[a] complete PCN includes a delineation of waters of the U.S., including wetlands, for the project site."[67] Yet on the very next page, the Corps, with no explanation at all, claims that a draft jurisdictional determination is required.[68] Of course, the notion that a "*draft* jurisdictional determination" is required does not last for long. A few lines

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[65] *See* Corps Instructional Guidebook at 68 (relying on 1987 Manual for definition of wetlands).

[66] In fact, the *Rapanos* Guidance makes several references to wetlands delineations, which demonstrates that it recognizes that the two are separate and distinct. *See, e.g.*, Corps Instructional Guidebook at 79 ("Additional RGLs will be developed to support wetland delineations. Regional supplements are being prepared to supplement the 1987 Wetland Delineation manual."); *Id.* at 81 (In response to a question whether field staff can begin the process of verifying wetland delineations prior to finalizing a jurisdictional delineation, the Corps states that "the project manager can verify delineations for both waters and wetlands; however, the delineation decision is not final until the jurisdictional determination is approved.")

[67] RGL 07-01 at 8.

[68] *See id.* at 9 ("Based on the information the prospective permittee provides to a district, that district will provide the appropriate EPA Regional Office with *any draft JD* requiring a significant nexus determination, in accordance with the procedures in the 'EPA/Corps Memo' and as outlined below. Furthermore, districts also will provide Corps HQ with records for *every draft JD* involving non-navigable, isolated waters, and the records will be reviewed at the HQ level by EPA and the Corps pursuant to the procedures in the 'EPA/Corps Memo' . . . .") (emphasis added).

later, again without explanation or citation, the Corps erroneously asserts that an *approved* jurisdictional determination is required for all NWPs that require a PCN.[69] But neither is the case.

This change in what is required to support a PCN has serious implications for applicants seeking authorization under a NWP. By requiring submission of an approved jurisdictional determination, the Corps presumes that an applicant for a NWP is actually requesting an approved jurisdictional determination, with all of the attendant burdens and benefits that attach to an approved jurisdictional determination. But, since the NWP Rule requires only a delineation, a request for an authorization under a NWP does not necessarily mean that the applicant is seeking an approved jurisdictional determination. In fact, as previously explained, in many instances, an applicant will not want an approved jurisdictional determination. And yet, the applicant is forced to comply with this erroneous and rigorous new requirement or be denied an authorization under the NWP. This requirement not only violates the fundamental principles underlying the NWP Rule, but is a glaring inconsistency that needs to be rectified in order for the Guidance to comply with federal law.

b. The *Rapanos* Guidance Specifically Overrides the Important Regulatory Time Frames Set Forth in the NWP Rule.

The Guidance also contravenes the explicit time frames set forth in the NWP Rule. Under the NWP Rule, when an applicant is required to submit a PCN, the decision whether the project may be authorized by a particular NWP must be made within 45 days.[70] Thus, prior to the *Rapanos* Guidance, an applicant could proceed with a project pursuant to the NWP Rule, at the latest, within 45 days of submitting its PCN.

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[69] *Id.* at 9 ("For JD requests associated with PCN for NWPs, the coordination process is as follows . . . .").

[70] *See* GC 27, 72 Fed. Reg. at 11,168-71.

The Corps' *Rapanos* Guidance makes it clear that the agency believes the Guidance can "override" the 45-day PCN clock in the NWPs.[71] The Corps claims, "[w]here a jurisdictional determination is associated with potential authorization of a project under a Nationwide Permit . . ., it may be necessary for the Corps and EPA to establish an alternative consultation schedule *to accommodate NWP timeframes* potentially associated with the particular project."[72] In RGL 07-01, however, the Corps notes that if it "cannot complete its review of the PCN and the proposed project within the 45-day time period specified in the NWPs, then *the Corps should suspend or revoke the NWP authorization* . . . to ensure that the proposed activity will not be authorized to proceed by the expiration of the 45-day period."[73]

These two material revisions to the NWP Rule – the inflexible requirement for approved jurisdictional determinations rather than nonbinding delineations and the ability to effectively disregard the 45-day timeline for processing NWPs – amount to de-facto revisions of the Corps' binding regulations. The courts have made clear that such revisions to legislative rules may not be made through agency guidance documents: "If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely on the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures."[74] By failing to

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[71] *See, e.g.*, Guidance, App. C, Figure 2a ("45-day PCN clock stops until adequate information is received. District immediately forwards information to HQ once determined adequate and district restarts PCN processing clock."); *Id*. at Figure 2b ("45-day PCN clock stops until information necessary to make the PCN complete is received. District immediately forwards information to HQ once determined adequate and district restarts PCN").

[72] App. C at 2 n.2. (emphasis added).

[73] RGL 07-01 at 9 (emphasis added).

[74] *General Elec. Co. v. E.P.A.*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (internal citations omitted).

follow the APA's statutory requirements for modifying a legislative rule, the agencies have suggested procedures that are unenforceable as well as unworkable.

Notwithstanding the agencies' boilerplate disclaimer,[75] there is little doubt that these new requirements are being treated as binding new regulatory requirements in the field, with negative consequences for both project applicants and Corps field personnel. In fact, it is clear that the *Rapanos* Guidance is already delaying permitting and regulatory decisions. The Chicago District, for example, issued a regulatory bulletin, dated June 26, 2007, and updated October 1, 2007, stating that it must utilize the "new mandatory JD form" available on the Corps' website, which "is a significant change from the one used the last few years."[76] In addition, the Chicago District has suspended the 45-day written response time contained in its regional permit program to enable the district to identify whether a proposed activity qualifies for a regional general permit authorization: "In light of the need to complete a JD prior to making a [general permit] call, we are suspending the 45 day requirement until March 9, 2008."[77] The fact that the district cannot comply with its own 45-day response period due to the approved jurisdictional determination requirement provides clear evidence that the *Rapanos* Guidance is being treated as "controlling in the field"[78] and shows every sign of converting the process that was previously

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[75] *See* Guidance, App. A n.16 ("This guidance does not substitute for those [CWA statutory] provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community . . . .").

[76] U.S. Army Corps of Engineers Chicago District Regulatory Information Public Notice, *available at* http://www.lrc.usace.army.mil/co-r/rapanosinfopn.htm (last visited Jan. 16, 2008).

[77] The suspension covers all projects submitted for consideration under the Regional Permit Program, including but not limited to: projects that have received a jurisdictional determination previous to application submittal, as well as those needing to complete a jurisdictional call prior to regional permit review." *Id.*

[78] If an agency acts as if a guidance document issued at headquarters is controlling in the field, the agency's document is functionally binding and is therefore subject to the APA requirements for revising legislative rules. *Appalachian Power Co.*, 208 F.3d at 1021.

undertaken in issuing general permit authorizations. In this regard, the Guidance runs counter to Congress's intent in promulgating the NWP program, which is designed to streamline authorizations for activities that result in no more than minimal adverse effects on the aquatic environment.

The Chicago District is no different from any other. As the district notes "[e]veryone is struggling with accommodating the new requirements," and "[t]he workload resulting from the Rapanos guidance is significant and no additional staff is anticipated in the short term, if at all."[79] Given the approved jurisdictional determination requirement set out in the Guidance, it may be impossible for the Corps to ever meet the 45-day time period set forth in the NWP Rule.

c. The New EPA Coordination Process Exacerbates the Delays in Meeting the NWP Rule's Regulatory Time Frames.

The requirement to coordinate significant nexus and isolated water approved jurisdictional determination forms with EPA necessitates huge delays and runs counter to the underlying purposes of the NWP program.[80]

i. Jurisdictional Determinations Requiring Significant Nexus Coordination.

An examination of the significant nexus coordination process for NWPs illustrates the problem. The Guidance specifies that the district engineer must forward the significant nexus

[79] U.S. Army Corps of Engineers Chicago District Bulletin - Jurisdictional Determinations 28 Sep 2007, *available at* http://www.lrc.usace.army.mil/co-r/jdbulletin.htm (last visited Jan. 17, 2008).

[80] *See, e.g.*, Aaron O. Allen, Ph.D., U.S. Army Corps of Engineers, Los Angeles District, Regulatory Division, "The Rapanos Guidance: The Los Angeles District Perspective" (Nov. 5, 2007) at 19, *see* Exhibit C ("Jurisdictional determinations requiring a significant nexus determination have increased the amount of required information and staff time substantially").

evaluation "immediately" to the EPA Regional office.[81] Next, the EPA Regional office will decide, within 15 days, whether they will elevate the jurisdictional determination to the agencies' headquarters. If the determination is elevated, EPA and Corps Headquarters will have 10 days to determine whether additional information is required for a decision. If EPA requests additional information from the district on the determination, the district will immediately provide the information requested to EPA if available. Then, the Corps and EPA will have up to 40 days to resolve the issue. If the Corps Headquarters does not respond to the district within 40 days, the district may finalize the determination and proceed with the NWP verification process. If, on the other hand, the Corps Headquarters provides recommendations on the determination, the district "will finalize the JD in accordance with the recommendations and proceed with the NWP verification process."[82]

If the information requested by EPA is not available and the district is required to request additional information, the time to respond is suspended until the information is received and determined adequate by the Corps. Once it is, the Corps and EPA have 40 days to make a decision on the determination.[83] At a minimum, this new coordination process adds up to 65 days – assuming that the Corps sends EPA the draft jurisdictional determination as soon as it is received. But it seems unlikely that any jurisdictional determination would be processed that quickly, given current Corps backlogs, resource pressures, and its own admission. And the time

[81] RGL 07-01 at 9. As stated above, the Guidance does not provide a precise deadline for the Corps to send a jurisdictional determination to EPA for its consideration, and there are no clear provisions that would prevent delay or enforce "immediate" transmittal.

[82] *Id.* at 9.

[83] *Id.* at 10.

frames could stretch out for months and even years.[84] Regardless of the scenario, it does not appear possible that the NWP authorization would be received within the 45 days after the PCN is complete, as required by the NWP Rule. The Corps' solution of overriding the NWP Rule time frames is not an appropriate solution to the problem.

ii. Jurisdictional Determinations Requiring Isolated Waters Coordination.

The Corps' process for coordinating isolated waters determinations with the Headquarters of both agencies is similarly complicated and leads to the same result: an inability to meet the NWP Rule's regulatory time frames. Moreover, with respect to isolated waters, the Corps makes several statements that are confusing and appear contradictory. First, the Corps claims that "requested information must relate to that information necessary to make the PCN complete."[85] But, as discussed previously, a PCN does not require an approved jurisdictional determination, nor is a PCN a request for an approved jurisdictional determination. Therefore, any requested information falls outside of what is required to complete a PCN under the NWP, so the entire premise appears incorrect. Second, the Corps asserts that "if the expiration of the 45-day time period specified in the NWPs would preclude proper consideration of the CWA jurisdictional issues, the DE may suspend the NWP authorization."[86] But the 45-day period specified in the NWPs pertains solely to the PCN requirement of the NWP Rule, not to interagency jurisdictional

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[84] *See, e.g.*, Exhibit C at 19 ("Required coordination process with EPA and HQ has augmented the amount of time required for a jurisdictional determination substantially"). Note that the Corps, in part (a)(4) of the coordination process, reiterates its self-declared authority to suspend the 45-day time period specified in the NWPs. "If the Corps is unable to make a decision on the NWP within 45 days of receipt of the completed PCN," the District Engineer may suspend the NWP authorization pursuant to 33 C.F.R. § 330.5(d)(2). RGL 07-01 at 10.

[85] RGL 07-01 at 9, 11.

[86] *Id*. at 11. This is a clear recognition that the procedures established in the Guidance are not governed by the NWP Rule and can and often will supersede the NWP Rule.

consultations; it was intended to apply to a delineation rather than an approved jurisdictional determination, which was not part of the NWP Rule. The Guidance, however, would allow interagency jurisdictional consultations to suspend the 45-day regulatory deadline. Thus, for most, if not all, requests for authorizations under NWPs, the Corps will likely suspend the time frame found in the NWP Rule for a requirement not even contained in the Rule.

As a point of reference, the IP process is generally considered to be more burdensome, timely, and costly. But the *Rapanos* Guidance and its concomitant requirement for an approved jurisdictional determination may change that norm. Pursuant to RGL 07-01, any jurisdictional determinations associated with IPs will be processed in a manner similar to approved jurisdictional determinations allegedly required for a NWP. In fact, the time period for receipt of an approved jurisdictional determination authorizing an IP could be less than that for an approved jurisdictional determination supporting a NWP.[87] Therefore, while it will take EPA Headquarters and Corps Headquarters at least 65 days to reach a decision on an approved jurisdictional determination to support a NWP, it will take only between 44 and 51 days for the agencies to reach a similar decision to support an IP, assuming the Corps transmits the determination immediately upon receipt. There is no reason given for that apparent inconsistency, which is completely contrary to the purpose of the general permits.

In sum, the *Rapanos* Guidance makes several fundamental changes to the NWP Rule outside the APA's rulemaking requirements, changes that undermine the purpose and utility of

[87] Once an IP jurisdictional determination is forwarded to the EPA Regional office staff, the staff has 15 days to review and coordinate with Corps District staff, 15 days for the district engineer/regional administrator to decide if the determination will be elevated to Headquarters, and then 14 or 21 days for the agency headquarters to make a decision on the determination. *Id.* at 13-14.

the NWP process through the imposition of unnecessary and delay-causing administrative procedures.[88]

E. The Guidance Does Not Explain How it Will Integrate into the FERC's Schedule for Approving Pipeline Projects.

Under the Natural Gas Act ("NGA"), 15 U.S.C. § § 717 *et seq*., proponents of natural gas pipeline projects must secure a Certificate of Public Convenience and Necessity ("Certificate") from the FERC authorizing the construction of the pipeline. Once a Certificate application is filed, the FERC will assess the project pursuant to the National Environmental Policy Act ("NEPA").[89] Congress, recognizing that a project proponent will have to secure permits from numerous other agencies in addition to the FERC, sought to streamline the entire process. Pursuant to section 313 of the Energy Policy Act of 2005 ("EPAct"),[90] the FERC is designated lead agency for the purpose of NEPA review of the overall project. The FERC is further required to establish a schedule for all federal authorizations for the project, and other federal agencies exercising authority over the project, including the Corps, must generally comply with the deadlines established by the FERC.[91] The FERC has implemented this authority through

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[88] By choosing a Guidance over rulemaking to change the NWP and other permit processes, the Corps also ignores the opinions of several Justices in *Rapanos* who expressed frustration with the Corps for failing to eliminate the uncertainties of the CWA section 404 process through rulemaking. 126 S. Ct. at 2236 (C.J. Roberts, concurring); at 2249 (J. Kennedy, concurring); 2266 (J. Breyer, dissenting).

[89] 42 U.S.C. §§ 4321 *et seq*. The FERC encourages proponents of natural gas pipeline projects to participate in a Pre-Filing Process in which the proponent engages in early outreach with the public and agencies. This process allows FERC to commence its NEPA review by beginning the scoping process and reviewing draft resource reports before the proponent files the FERC certificate application. After approximately six months of Pre-Filing activity, the project proponent will file its application for a FERC Certificate.

[90] Pub. L. 109-58, 119 Stat. 594 (2005) (codified as amended in scattered sections of 42 U.S.C.)

[91] Section 313 does require that the schedule established by the FERC comply with all applicable schedules established by Federal law. *Id.*

Order No. 687,[92] which contemplates that a project proponent will file its other federal permit applications, including CWA section 404 permit applications, on or before the time the FERC Certificate application is filed or else explain why the federal permit application was not submitted prior to filing the FERC application.[93] The FERC then notifies the other federal agencies of the application, issues a schedule for all authorizations, and requires the completion of all federal agency review no later than 90 days after the FERC issues its environmental assessment or environmental impact statement for a proposed project.

It is extremely unclear how the Corps' lengthy process for determining jurisdiction over water bodies affected by a project will integrate into the FERC's overall schedule for completion of its NEPA review and processing of a Certificate. Any substantial delay in conducting significant nexus evaluations, coordinating determinations with EPA, finalizing approved jurisdictional determinations, or processing NWPs for the many reaches affected by a pipeline project simply does not take account of, and can easily violate, the streamlined process enacted under section 313 of EPAct.

The Corps is evidently mindful of its obligations under EPAct to meet the FERC's scheduling needs. In RGL 07-03, "Department of the Army Permit Processing for Proposed Natural Gas Projects" (Sept. 19, 2007), it sets forth guidance on processing Corps permits for activities in waters of the United States associated with proposed natural gas projects subject to the NGA. RGL 07-03 sets forth procedures for the Corps to coordinate its processing of CWA section 404 permits with the FERC, including granting any authorizations no later than 90 days after the FERC issues its final NEPA document and following "existing practices" for general

[92] 71 Fed. Reg. 62,912 (Oct. 27, 2006).

[93] 18 C.F.R. §§ 153.8(a)(9), 157.14(a)(12).

permits and nationwide permits. If the Corps does not act within the 90-day deadline, EPAct allows the matter to be brought to the attention of the applicable Court of Appeals.[94]

Significantly, though, RGL 07-03 does not even mention the *Rapanos* Guidance, though it was issued several months after the Guidance was released. Thus, the Corps makes no provision for situations in which delays arising from the processing of jurisdictional determinations or from interagency controversies would prevent the Corps from making a timely authorization decision. The possibility certainly exists that the new *Rapanos* Guidance may create administrative delays that would adversely impact the Corps' and the FERC's obligations under EPAct and the NGA. Therefore, in the case of natural gas pipelines, it is necessary for the agencies to modify the Guidance procedures to assure that the Corps complies with the statutory mandate of section 313 and the regulatory mandate of the FERC's rule.[95]

F. The Guidance Violates the Paperwork Reduction Act.

The Guidance also fails to comply with the letter and the intent of the Paperwork Reduction Act. The Paperwork Reduction Act of 1980 ("PRA")[96] was enacted "to reduce and minimize the burden Government paperwork imposes on the public."[97] To this end, the PRA mandates that an agency shall obtain approval from the Director of the Office of Management

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[94] RGL 07-03 at 2-3.

[95] Indeed, the potential for delay is particularly acute when a natural gas pipeline may not even be able to obtain access to land necessary to conduct a reach analysis and approved jurisdictional determination until after the issuance of the FERC Certificate, thus necessitating the documentation of the approved jurisdictional determination and coordination with EPA within a 90-day window. Accordingly, once again, the Guidance may run afoul of, at a minimum, E.O. 12,866 that requires each agency to "avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies." Section 1(b)(10).

[96] 44 U.S.C. §§ 3501-3521.

[97] *United States v. Smith*, 866 F.2d 1092, 1094 (9th Cir. 1989) (quoting S. REP. NO. 930, 96th Cong., 2d Sess. 2 (1980)).

and Budget ("Director") before conducting a "collection of information."[98] Under the PRA, "collection of information" means "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for . . . answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons."[99] The agency "shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information . . . the agency has obtained from the Director a control number to be displayed upon the collection of information," regardless of whether the collection is contained in a proposed rule or another format.[100] If the agency fails to display a valid control number assigned by the Director on a collection of information, the collection is considered "bootleg," and the public may ignore it without penalty.[101]

In addition to obtaining a control number, an agency must provide the public with notice and an opportunity to comment on (i) whether the proposed collection of information is necessary; (ii) whether the agency's estimate of the burden of the proposed collection of information is accurate; (iii) how to enhance the quality, utility, and clarity of the information to be collected; and (iv) how to minimize the burden of the collection of information on those who are to respond. Moreover, the agency must certify, and provide a record supporting such certification, that the collection of information, among other things, is necessary for the proper performance of the agency, is not unnecessarily duplicative of information otherwise reasonably

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[98] 44 U.S.C. § 3507(a)(2).

[99] *Id*. at § 3502(3)(A)(i).

[100] *Id*. at § 3507(a)(3).

[101] *Smith*, 866 F.2d at 1094; 44 U.S.C. § 3512 (penalties may not be imposed for failure to comply with an information collection request if the request does not display a valid control number).

accessible to the agency, and reduces to the extent practicable and appropriate the burden on persons providing such information.[102]

Issuance of the Guidance, and in particular the requirement to obtain an approved jurisdictional determination using the new and more burdensome approved jurisdictional determination form, violates the PRA. Although the Guidance and approved jurisdictional determination form clearly require the compilation of a substantial amount of new information (*e.g.,* tributary width, depth, geometry, gradient, stability, and substrate; wetland biological characteristics; cumulative analysis of all wetlands adjacent to a tributary reach), the Guidance and the approved jurisdictional determination form do not appear to contain an OMB control number, signifying OMB approved of the additional paperwork burden being imposed on the public. Moreover, contrary to the other provisions of the PRA, the agencies did not provide the public with notice and an opportunity to comment prior to the adoption of the Guidance and approved jurisdictional determination form nor did they provide a certification and supporting record demonstrating that the collection of information reduced to the extent practicable the burden on the persons supplying the information. Given the extremely burdensome nature of these new information collection requirements, solicitation of public comment would undoubtedly have apprised the agencies of numerous requirements, such as the new requirement to obtain approved jurisdictional determinations for NWPs, which should have been modified or eliminated in order to comply with the PRA. Moreover, had the agencies prepared a certification and accompanying record, the agencies themselves would have undoubtedly devised a variety of means to reduce the substantial unnecessary paperwork imposed by the Guidance.

[102] 44 U.S.C. §§ 3506(a)(2), (a)(3).

V. The Agencies Should Make the Following Changes to the *Rapanos* Guidance.

None of the problematic procedural changes discussed above are required by the *Rapanos* decision. Instead, they are self-imposed policies that have unintended and negative consequences that the agencies can, and should, readily correct. In order to reduce the Guidance's unwarranted compliance burdens on permit applicants and minimize the APA rulemaking problems with the current Guidance, INGAA requests the agencies modify the existing Guidance in the following key areas.

A. Eliminate the Requirement that Project Applicants Must Obtain an Approved Jurisdictional Determination. Instead, Return to the Agencies' Well-Established Flexible Approach that Allows Project Applicants to Elect Whether They Want an Approved Jurisdictional Determination.

The Guidance's inflexible mandate of compelling applicants to obtain a jurisdictional determination is not required by the *Rapanos* decision and imposes new, unnecessary burdens on permit applicants and the general public. As was the established practice prior to the Guidance and consistent with the agencies' binding regulations, the agencies should require an approved jurisdictional determination *only* when (a) an applicant requests one; or (b) an applicant wants to challenge the agencies' assertion of jurisdiction.

Implementing this recommendation is critical to the efficient permitting of all linear infrastructure projects, including pipelines. This flexible, case-by-case approach is superior to the Guidance's "one-size-fits-all" mandate because it:

- Avoids preparation of costly and time-consuming forms for waters that the applicant is willing to accept are jurisdictional for purposes of processing its application;
- Avoids the delay of having agency personnel review, process, and coordinate hundreds of forms over water bodies that the applicant is willing to accept are jurisdictional for its application;
- Reduces agency workload concerns by limiting agency coordination to only approved jurisdictional determinations requested by the applicant or that are subject to challenge;

- Allows a flexible process whereby an applicant can make changes in the alignment or route of the project without necessitating the revision of hundreds of forms and additional coordination and processing by the agencies;

- Avoids binding jurisdictional determinations prepared in the context of a non-landowner applicant, such as a pipeline company, that could prejudice landowners;

- Preserves the ability of all applicants, including linear infrastructure proponents, to obtain an approved jurisdictional determination in the circumstances where they may request one or want to challenge jurisdiction;

- Maximizes protection of the environment by allowing an applicant to rely on a delineation which by its very nature will likely include waters and wetlands that may not be legally jurisdictional under the CWA;

- Comports with the agencies' existing administrative appeals regulations and NWP Rule, thereby avoiding potential APA rulemaking violations; and

- Promotes consistency across Corps districts by ensuring that when an approved jurisdictional determination is conducted, it will be prepared in accordance with the standardized approved jurisdictional determination form and with all the information necessary to make the legal finding that "waters of the United States" are present on the property in question.

B. When a Linear Project Applicant Does Request an Approved Jurisdictional Determination, Limit the Geographic Scope of Tributary Reach Analysis to the Project's Approved Right-Of-Way and Minimize Unnecessary Paperwork.

Although INGAA believes most linear project applicants would, if given the choice, choose to permit their projects under the more flexible delineation approach, there are occasions where a more formal jurisdictional determination will make sense for a particular project. In such cases, the geographic scope of the tributary reach analysis should be limited to the approved right-of-way. By requiring project applicants and the Corps to obtain information about lands and waters in a "review area" that may extend well beyond the pipeline (or other linear infrastructure project) right-of-way, the Guidance improperly expands the agencies' scope of review to areas over which neither the Corps nor the project applicant may have authorized access. This expansive new reading of Corps' scope of review imposes a complicated new compliance burden on project applicants and Corps personnel, delays the approval of important

energy and other infrastructure projects, and runs the risk of needlessly antagonizing neighboring landowners.[103]

C. Retain the Important Regulatory Time Limits for Processing NWPs.

The Guidance unnecessarily contravenes the important 45-day time requirement within which the Corps must determine whether a project may go forward under a NWP. This time frame, which is a creature both of Corps regulations and operational utility, should be retained in the Guidance.[104]

D. Eliminate the EPA Coordination Process for Jurisdictional Determinations Involving Significant Nexus and Isolated Water Determinations.

This additional layer of administrative review is an unwarranted new procedural burden on the agencies and project applicants alike which will result in numerous delays for important energy infrastructure projects.[105]

E. If The Agencies Remain Committed to the New Burdensome and Problematic Mandatory Jurisdictional Determination Process, the Agencies Should, at a Minimum, Make the Following Fundamental Revisions and Clarifications to the Guidance.

- Clarify that the applicant can complete the forms itself as opposed to the Corps district;
- Simplify the existing forms for projects that involve multiple crossings of similar water bodies;
- Clarify that if an applicant is obtaining a permit under a SPGP such as in the New England states, the SPGP process negates the need to obtain and complete multiple approved jurisdictional determination forms and coordinate such forms with EPA;
- Grant waivers from the process for certain types of projects such as linear infrastructure projects;
- Clarify that an application will still be deemed "complete" even though the approved jurisdictional determination forms have not been received;

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[103] *See* Section IV-A above.

[104] *See* Section IV-D-2-b above.

[105] *See* Section IV-D-2-c above.

- Provide a flexible process for making changes to the approved jurisdictional determination forms to allow for project realignments;

- Allow supplements to the approved jurisdictional determination forms until the time of permit issuance;

- Allow desktop review of any proposed changes when a project needs to be amended or re-aligned after submission of the forms;

- Clarify that an approved jurisdictional determination obtained by a non-landowner applicant does not bind the underlying landowner who did not request or receive the jurisdictional determination;

- Establish binding timelines for the Corps to follow in providing the approved jurisdictional determinations forms to EPA for coordination; and

- Comply with Paperwork Reduction Act requirements.

EXHIBIT A

"*Rapanos* Guidance"

presented by

Justin McCorcle, Esq.
Ken Jolly, Chief, Regulatory Division
Richard L. Darden, PhD, Regulatory Division
U.S. Army Corps of Engineers
Wilmington, NC

NEW TERMS AND ACRONYMS

TRADITIONAL NAVIGABLE WATERS (TNW)

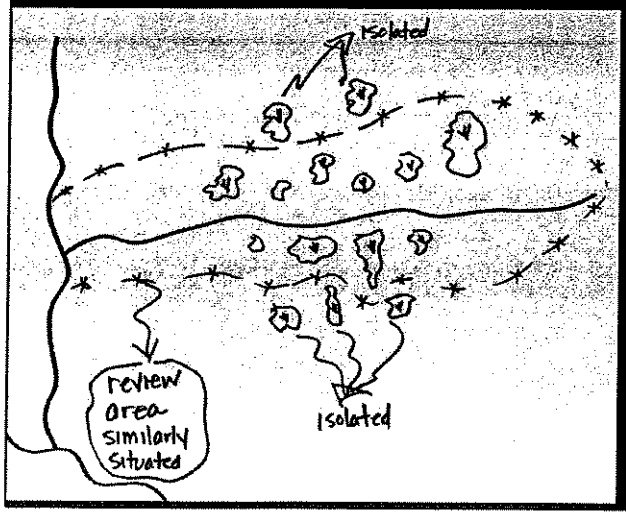
all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

"A traditional navigable water" includes all of the "navigable waters of the United States," defined in 33 C.F.R. § 329, and by numerous decisions of the Federal courts, plus all other waters that are navigable-in-fact.

NEW TERMS AND ACRONYMS

RELEVANT REACH

for the purposes of the significant nexus determination process, a relevant reach is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary of interest, downstream to the point such tributary enters a higher order stream).



The flow characteristics of a particular tributary will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream).

NEW TERMS AND ACRONYMS

REVIEW AREA

In the context of SND, refers to the relevant reach of the water body being reviewed for determination of CWA jurisdiction

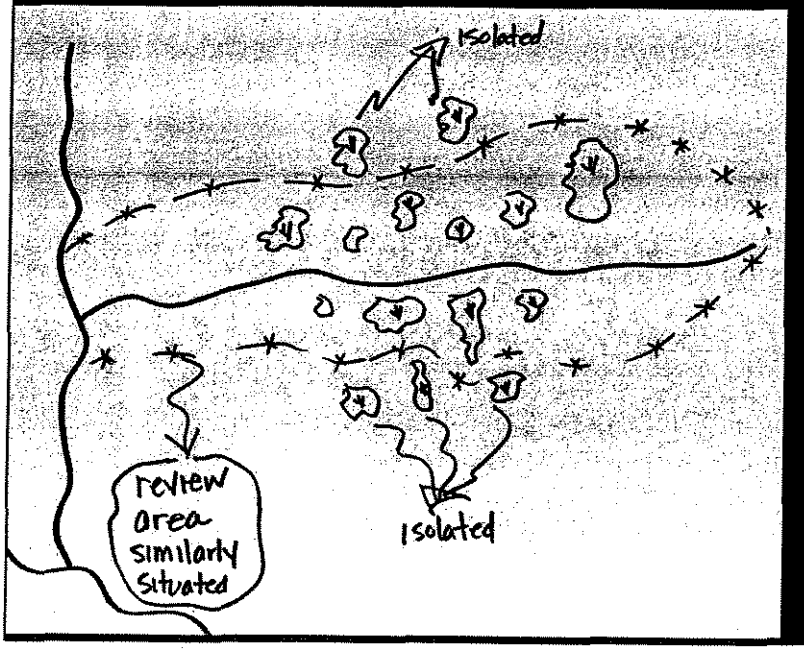


EXHIBIT B

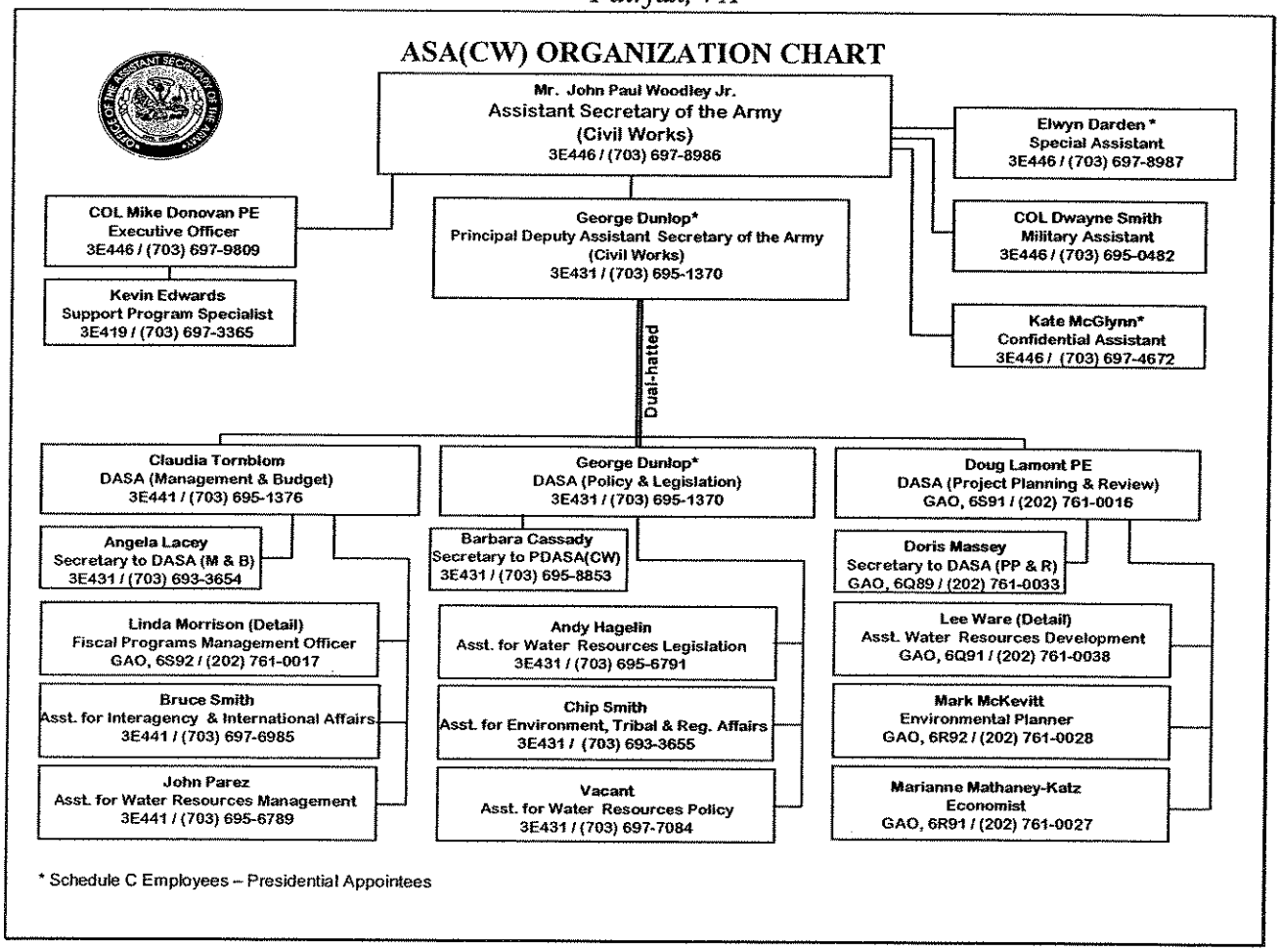
"Keynote Presentation"

presented by

Charles R. "Chip" Smith, Assistant for Environment, Tribal and Regulatory Affairs

Office of the Assistant Secretary of the Army (Civil Works)

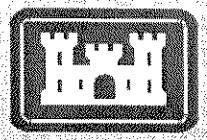
Fairfax, VA



Annual Program Facts

- Over $220 billion of economic development is affected by 1,200+ Corps regulators
- ~100,000 written authorizations affecting waters of the U.S., including wetlands
  - Private property
  - Property under the control of other agencies, NGOs
  - Tribal lands
- ~110,000 jurisdictional determinations
- About 600 enforcement cases
- About 60 appeals cases (denials, JDs)
- **Rapanos: Isolated=~450; disputed JDs=60**

EXHIBIT C



US Army Corps
of Engineers

The Rapanos Guidance: The Los Angeles District Perspective

Aaron O. Allen, Ph.D.

November 5, 2007

U.S. ARMY CORPS OF ENGINEERS
Los Angeles District
Regulatory Division

US Army Corps
of Engineers

Conclusions

- **This presentation does not represent guidance**
- Jurisdictional determinations requiring a significant nexus determination have increased the amount of required information and staff time substantially
- Required coordination process with EPA and HQ has augmented the amount of time required for a jurisdictional determination substantially
- Los Angeles District Website (www.spl.usace.army.mil/regulatory)