Permits For Puddles? The Constitutionality and Necessity of Proposed Agency Guidance Clarifying Clean Water Act Jurisdiction

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PERMITS FOR PUDDLES?: THE CONSTITUTIONALITY AND NECESSITY OF PROPOSED AGENCY GUIDANCE CLARIFYING CLEAN WATER ACT JURISDICTION

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INTRODUCTION

The Federal Water Pollution Control Act, enacted in 1948 and amended in 1972, has a broad and ambitious goal: "The objective of this [Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters."¹ To achieve this goal, Congress prohibited the discharge of pollutants into "navigable waters" and gave the federal Environmental Protection Agency (EPA) and Army Corps of Engineers (the "Corps") control over point source discharges and the dredging and filling of navigable waters.² For a long period of time, the agencies were afforded expansive jurisdiction over waters of the United States through the Commerce Clause power and EPA’s interpretation of the statute. Science also played a role in jurisdictional determinations, where the theory of hydrological connection suggested even vernal streams and remote wetlands required protection from contamination that would inevitably run downstream.³ Until 2001, the agencies’ broad reading of their jurisdiction met no opposition in the courts.⁴

This deference to the agencies’ interpretation of the law began to unravel at the turn of the century. Two Supreme Court cases, Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (hereinafter SWANCC) and Rapanos v. United States, imposed multiple divergent jurisdictional tests and confusing limitations on

¹ 2012 J.D. candidate, Chicago-Kent College of Law. I would like to thank Professor Dan Tarlock and Professor Keith Harley for their guidance not only in the development of this paper, but throughout my law school experience. I would also like to thank my parents, Rich and Sue Baader, as well as Chris Montes, for their endless encouragement and support.

EPA and Corps jurisdiction. Agency guidance documents issued in 2003 and 2008 further limit the jurisdiction of the Clean Water Act by withdrawing federal protection from tens of millions of acres of streams, wetlands, and other waters. Confusion as to which court-introduced jurisdictional approach should apply, combined with the protracted nature of the tests, led to a decrease in agency efficiency and general enforcement. By 2008, approximately 500 enforcement cases had been "negatively affected" by the court holdings and administrative guidance, and over 300 Clean Water Act violations were abandoned due to lack of jurisdiction. EPA resources ran thin as additional staff time was devoted to interpreting and applying the ambiguous jurisdictional tests and guidelines. As circuit courts argued over which Supreme Court test governed jurisdictional determinations, and agency documents continued to narrow the scope of waters afforded crucial pollutant protection, it became apparent the nation was in dire need of a comprehensive simplification of water policy.

Congress, the Supreme Court and the federal environmental agencies all had the capacity to address these murky issues. There were several attempts made to legislatively restore protection to the nation’s waterways, most recently with the Clean Water Restoration Act of 2009. These efforts have all failed, however, and amendments to the Clean Water Act through legislative action seem unlikely in the near future. The Supreme Court, while eager to establish its position in SWANCC and Rapanos, has since refused to clarify its stance via a grant of certiorari. Therefore, it fell to the Environmental Protection


8. Id. at 6, 7 (“the amount of time necessary to perform and write up a jurisdictional determination has gone from a few hours, to several days, including more field work”).


Agency and the Army Corps of Engineers to draw a definitive path through this jurisdictional ambiguity.

On April 27, 2011, the Obama Administration released a national Clean Water Framework to address current clean water challenges facing the nation. This framework contained important new agency initiatives, including a draft guidance (the “Guidance”) which would expand the scope of the Clean Water Act.\textsuperscript{12} This Guidance, issued by both the EPA and the Corps, would increase environmental protection by allowing Clean Water Act jurisdiction to be established under either \textit{Rapanos} test, by establishing an aggregate approach to jurisdictional determinations, by categorically protecting more waterways, and by expanding the application of the \textit{Rapanos} tests to additional types of water bodies.\textsuperscript{13} The agencies state that this Guidance will increase jurisdictional clarity, cut down on application costs and delays by reducing the complexity of the permitting process, and increase the consistency and predictability of jurisdictional determinations across the country.\textsuperscript{14}

While the Guidance would ensure the protection of vital national waterways, many industry advocates oppose the agency document, stating that the practical economic implications of broadening Clean Water Act jurisdiction could be devastating.\textsuperscript{15} However, the financial detriment that would arise from the Guidance is overestimated and will be outweighed by the positive economic impacts on the hunting and angling industries and the savings generated by streamlined agency practices. Yet ultimately, adoption of the Guidance will not hinge on the costs and benefits of agency action, but on its constitutionality. Senators and industry supporters alike argue this Guidance is an unlawful expansion of statutory jurisdiction, a circumvention of Congress,
and an inappropriate form of agency decision-making. Yet, upon detailed review of the agency document, it is clear that the EPA and Corps do not seek to expand federal Clean Water Act jurisdiction beyond the Act’s original boundaries, and the Guidance is not in conflict with existing Supreme Court precedence.

The Guidance should be promptly adopted and implemented. While change in agency policy via a guidance document lacks the force of law, such action is direly needed in the short term to mandate more protective practices regarding our national waterways. This step will allow for immediate protection of additional bodies of water, but to ensure the lasting preservation of these waters, the agencies should proceed to a rulemaking. While it will call for comprehensive and time-consuming cost-benefit analyses, both opponents and advocates of the Guidance stand in support of rulemaking procedures which will lead to stronger and clearer Clean Water Act regulations. This is the appropriate way to proceed, because a rule fashioned by the agencies will be afforded greater deference by the courts than a guidance document, and will therefore be harder to challenge within the judicial system.

Too long have government agencies and industry alike struggled to make sense of the confusing field of federal water law jurisdiction. Quick change implemented through this Guidance will not only resolve the current legal ambiguity and protect waters crucial to the nation’s public health, it will boost wildlife-based commerce and allow for greater productivity and surety in government and industry. Part I of this Comment will outline the history of Clean Water Act jurisdiction, explore the effect of recent Supreme Court holdings and agency actions addressing the topic, and describe the circuit courts’ current state of confusion. Part II will address the important changes introduced in the 2011 Guidance. Finally, Part III will compare the benefits and the det-


ments of the Guidance while showing that (1) it does not unlawfully expand Clean Water Act jurisdiction, (2) it appropriately addresses the associated costs, and (3) it is a critical step towards protecting our nation’s waters. The Comment will conclude with the suggestion that the proposed Guidance be quickly implemented, and followed expeditiously by complete rulemaking procedures to establish strong regulations which will prove harder to challenge in court.

I. JURISDICTION UNDER THE CLEAN WATER ACT

In 1948, the Federal Water Pollution Control Act was enacted for the purpose of protecting public water supplies, the propagation of fish and aquatic life, and the recreational, agricultural, and industrial uses of the nation’s waters.18 The Federal Water Pollution Control Act amendments were passed in 1972 and thereafter, the Act became known as the Clean Water Act.19 The amendments were passed in part to “repeal the limits that had been placed on federal regulation by earlier water pollution control statutes....”20 What resulted was sweeping federal jurisdiction over national waterways that went undisturbed for almost three decades. Recent court cases have chipped away at this federal jurisdiction, however, leaving more and more waterways unprotected.

A. The Clean Water Act

The primary federal law governing water pollution in the United States, the Clean Water Act was created to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” by regulating pollutant discharges, managing industry plants and advocating environmentally-conscious advances in technology.21 Historically, the federal government derived its power to regulate national waterways through the United States Constitution’s Commerce Clause, which permits Congress to regulate commerce among the states.22 Federal

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19. Id. at 6.
22. See Wickard v. Filburn, 317 U.S. 111, 125 (1942) (“even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce”).
jurisdiction over waterways was henceforth associated with the idea of "navigability," as only navigable waters had a connection to interstate commerce. Therefore the Act’s Section 40224 and Section 40425 permitting programs were limited to “navigable waters,” defined in the Act as “waters of the United States, including the territorial seas.”

This bare description was further developed in Army Corps of Engineers (the Corps) and Environmental Protection Agency (EPA) federal regulations, which defined the term "waters of the United States" as:

1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce . . .
2. All interstate waters including interstate wetlands;
3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . .
4. Tributaries of waters identified [above];
5. The territorial seas;
6. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified [above].

The Corps went on to further define “navigable waters” as “waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.” These definitions were initially interpreted to encompass virtually all bodies of water, in part due to the assumed hydrologic connection between most national waters.

23. See United States v. Lopez, 514 U.S. 549, 593 (1995) (The Court examined Gibbons v. Ogden, which held that “Congress could regulate ‘navigation’ because ‘[a]ll America. . . has uniformly understood, the word ‘commerce,’ to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed”) (quoting Gibbons v. Ogden, 22 U.S. 1, 190 (1824)).

24. Regarding discharge into surface water.
25. Regarding discharge into wetlands.
27. 33 C.F.R. § 328.3(a) (2011) (Corps regulations); 40 C.F.R. § 122.2 (2011) (EPA regulations). The EPA defines “wetlands” as “those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions” 40 C.F.R. § 122.2.
28. 33 C.F.R. § 329.4.
Early Supreme Court cases addressing Clean Water Act jurisdiction regularly deferred to agency interpretation. The leading case of *United States v. Riverside Bayview Homes, Inc.*, decided in 1985, addressed whether the Corps retained jurisdiction over wetlands adjacent to navigable bodies of water and their tributaries, therefore requiring a Section 404 permit prior to discharge.30 The Court demonstrated “Chevron deference,” a standard which requires a court to defer to an agency’s expert interpretation of a statute where the statute in question is ambiguous, where enforcement of such statute has been delegated to the agency, and where the agency’s interpretation is not “arbitrary, capricious, or manifestly contrary to the statute.”31 Noting Congress’ concern for water cycles in their entirety and adopting the Corps’ analysis, the Supreme Court held it was reasonable to interpret the term “waters” as inclusive of adjacent wetlands not inundated or frequently flooded by navigable water.32

The initial cooperation between the executive and judicial branches produced one cohesive understanding of Clean Water Act jurisdiction that led to productive changes in the nation’s waterways. While in 1972 only 30-40% of assessed US waters were safe for swimming, fishing and drinking, by 2008, nearly 60-70% of assessed waters were meeting state water quality goals.33 Much of this improvement was due to the agencies’ broad power over different waterways across the nation. The expansive jurisdiction acknowledged by the courts did not persist, however, and by the turn of the century, the understanding that previously existed between the Supreme Court and the agencies disappeared, launching a decade-long movement aimed at restricting federal jurisdictional expansion.

**B. Supreme Court Cases Limiting Clean Water Act Jurisdiction**

After the adoption of the Clean Water Act, the Supreme Court decided several cases which in effect limited federal jurisdiction over

hensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.”

31. Id at 131 (“An agency’s construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress.”); Chevron v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984).
32. Riverside Bayview Homes, 474 U.S. at 132-34.
national waterways. United States v. Lopez, one of the most influential cases, did not directly address the Clean Water Act, but rather discussed the limit of Congress’ power to regulate activities under the Commerce Clause. This ruling, which allows regulation under the Commerce Clause only where the regulated activity "substantially affects" interstate commerce, sparked many Commerce Clause challenges to existing federal statutes, including the Clean Water Act. The Supreme Court took a more direct look at the Act in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers and United States v. Rapanos.

1. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers and Federal Jurisdiction Over Isolated Waters

Decided in 2001, Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC) was the first of two cases which limited the prior expansive federal jurisdiction found under the Clean Water Act. The petitioner, a conglomerate of municipalities, had purchased an abandoned gravel and mining pit with the intention of developing a nonhazardous waste-dumping site. By that time, several seasonal and permanent ponds had developed at the bottom of the pit, providing a habitat for various migratory bird species. The Corps argued that under the Migratory Bird Rule, such isolated, non-navigable and intrastate ponds were nevertheless "waters of the United States" due to the presence of migratory bird species. Refusing to defer to the agency’s interpretation, the Court held that the expansion of jurisdiction to isolated waters exceeded the authority granted to the Corps under the Clean Water Act. Despite the dissent’s

35. Id. at 559.
37. Id. at 162-63.
38. Id. at 163-64.
39. The Migratory Bird Rule, promulgated in 1986 by the Corps, gave the Corps authority to regulate all wetlands and waters that served as a habitat for migratory birds, even where those waters were isolated from navigable waters. Migratory Bird Rule, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).
40. SWANCC, 531 U.S. at 162.
41. Id. at 171-72 ("We cannot agree that Congress’ separate definitional use of the phrase ‘waters of the United States’ constitutes a basis for reading the term ‘navigable waters’ out of the statute… it is one thing to give a word limited effect [discussing the opinion in Riverside Bayview Homes which suggested the ‘navigation’ aspect was of ′limited import′] and quite another to give it no effect whatever.”). But see id. at 182 (Stevens, J., dissenting) ("The majority accuses respondents of reading the term ‘navigable’ out of the statute… [b]ut that was accomplished by Congress when it deleted the word from the § 502(7) definition.”) (citation omitted).
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... call for deference, the Majority acted under the assumption that “Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.” Congress’s authority to regulate waters and activities was limited to those that had a “substantial affect” on interstate commerce, and in an effort to avoid the constitutional question of whether the presence of migratory birds in these waters “substantially affect[ed] interstate commerce,” the Court rejected the dissent’s request for administrative deference.

SWANCC embodied the Supreme Court’s changing opinion that Clean Water Act jurisdictional questions should be narrowly interpreted by the courts, not by the agencies that enforce the Act. Following this decision, no isolated waters have been declared jurisdictional by a federal agency, thus severely limiting the number of waterways that receive crucial pollution protection under the Act.

2. Rapanos v. United States and the Resulting Scalia and Kennedy Jurisdictional Tests

The Supreme Court once again limited agency jurisdiction under the Clean Water Act when it addressed the Act’s scope of protection over wetlands adjacent to non-navigable tributaries in Rapanos v. United States. In a consolidated review of two Michigan cases, the Court considered whether isolated wetlands which lay near ditches and man-made drains (that eventually emptied into traditional navigable waters) constituted “waters of the United States” under the Act. The case culminated in a confusing and fractured decision consisting of five

42. Id. at 185 (Stevens, J., dissenting) (The dissent mentions that the Corps broad reading of its jurisdiction was not limited by Congress, demonstrated by the failure of a proposed bill that would have clearly limited Corps jurisdiction to waters used to transport interstate commerce.).
43. Id. at 172-73.
44. Id. at 173.
47. Id. at 729-30.
48. Id. at 729. In this case, the Court considered the appropriateness of federal jurisdiction over isolated wetlands, or wetlands connected to non-navigable tributaries, unlike the facts in Bayview where the Court acknowledged Clean Water Act jurisdiction over wetlands abutting navigable-in-fact waters. Id. at 746.
non-majority opinions and two different tests for determining agency jurisdiction over certain wetlands.49

a. The "relatively permanent" and "significant nexus" tests

The Rapanos decision established two main tests for jurisdiction: the “relatively permanent” test found in Justice Scalia’s plurality opinion, and the “significant nexus” test found in Justice Kennedy’s concurring opinion. Under Scalia’s test, “waters of the United States” included only “relatively permanent, standing or continuously flowing bodies of water,” not “intermittently or ephemerally” flowing waters, and wetlands were only “adjacent” if (1) the adjacent waterway was a “water of the United States” (a relatively permanent body of water connected to traditional interstate navigable waters), and (2) the wetland in question had a “continuous surface connection” with the adjacent water that was not “intermittent” or “physically remote.”50 Adopting a literalist approach, Scalia suggested that the Act applies only to “waters,” and argued that a continuous surface connection which muddles any “clear demarcation between ‘waters’ and wetlands” is the only way for wetlands to be considered “waters of the United States” for purposes of jurisdiction.51

Justice Kennedy, in his concurrence, adopted a more purposivist approach to jurisdiction under the Clean Water Act. Criticizing the plurality’s “relatively permanent” and “continuous” requirements as unrelated to the Act’s main concern for downstream water quality,52 Justice Kennedy proposed a test where the required nexus would be assessed “in terms of the statute’s goals and purposes.”53 Under this “significant nexus” test, wetlands fall under the term “navigable waters” (and therefore “waters of the United States”) if the wetlands, “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other

49. Justice Scalia authored the judgment of the court which supported the “relatively permanent” test. Id. at 716. Justice Kennedy filed a concurring opinion supporting the “significant nexus” test. Id. at 758. Justice Roberts filed a separate concurring opinion. Id. at 757. Justice Stevens filed a dissenting opinion joined by Justices Souter, Ginsburg and Breyer. Id. at 787. Justice Breyer also filed a separate dissenting opinion. Id. at 810-11.
50. Id. at 739, 742.
51. Id. at 742, 755 (Justice Scalia addressing Justice Kennedy’s significant nexus test) (“[W]hat possible linguistic usage would accept that whatever (alone or in combination) affects waters of the United States is waters of the United States?”).
52. Id. at 769 (Kennedy, J., concurring).
53. Id. at 779.
covered waters more readily understood as ‘navigable.’” 54 Wetlands that have a “speculative or insubstantial” effect on water quality would not fall under the term “navigable waters.” 55

The significant nexus test is considered the more expansive view, in that it allows for widespread implementation of Clean Water Act jurisdiction by stressing the interconnected nature of the country’s hydrologic features.56 Yet, the individualized nature of the test (which requires the finding of a “significant nexus” during every jurisdictional determination) imposes additional work for agencies and individuals seeking permits, and could add to the exhaustion of limited government resources.57 Since significant nexus determinations often need to be made on a case-by-case basis, there is also a likelihood that application of the test will vary widely from court to court.58

b. Rapanos’ abandonment of previous agency deference

The line of cases before Rapanos, including Bayview, applied Chevron deference to create a historically expansive scope of agency jurisdiction. Yet in Rapanos, only the dissent championed this previously pervasive trend. Justice Stevens stressed the suitability of judicial deference in this situation,59 and argued that “concerns about the appropriateness of the Corps’ 30-year implementation of the Clean Water Act should be addressed to Congress or the Corps rather than to the Judiciary.” 60

54. Id. at 780.
55. Id.
57. Rapanos, 547 U.S. at 809 (Stevens, J., dissenting) (“Justice Kennedy’s approach will have the effect of creating additional work for all concerned parties.”).
58. Petition for Writ of Certiorari at 28-29, United States v. McWane, Inc., 505 F.3d 1208 (11th Cir. 2007) (No. 08-223), 2008 WL 3894295, at *28-29 (“Justice Kennedy’s standard (at least until it is more clearly elucidated by this Court or the lower courts) is less determinate than the plurality’s, its application is likely to vary more widely from judge to judge, and from jury to jury.”).
59. Rapanos, 547 U.S. at 788 (Stevens, J., dissenting) (“The Corps’ resulting decision to treat these wetlands as encompassed within the term ‘waters of the United States’ is a quintessential example of the Executive’s reasonable interpretation of a statutory provision.”).
60. Id. at 799 (“Unless and until [those adversely affected by the Corps’ permitting decisions] succeed in convincing Congress (or the Corps) that clean water is less important today than it was in the 1970’s, we continue to owe deference to regulations satisfying the ‘evident breadth of congressional concern for protection of water quality and aquatic ecosystems’ that all of the Justices on the Court in 1985 recognized in Riverside Bayview.”) (citation omitted).
Both Justice Scalia and Justice Kennedy, however, declined to follow Justice Stevens’ counsel. Scalia argued that “waters of the United States,” based on the dictionary definition, included only those waters which were “relatively permanent” or “continuously flowing.”61 Since the Corps’ interpretation of “waters” appeared to include “channels through which water flows intermittently or ephemerally,” Scalia stated that their “expansive interpretation of the ‘the waters of the United States’ [was] thus not ‘based on a permissible construction of the statute,’” and refused to apply Chevron deference.62 He also criticized the dissent’s approach, suggesting that it “[appealed] not to a reasonable interpretation of enacted text, but to the great environmental benefits that a patently unreasonable interpretation can achieve.”63 Justice Kennedy avoided a discussion on deference altogether, though he managed to criticize the plurality’s holding, which he argued gave “insufficient deference to Congress’ purposes in enacting the Clean Water Act . . . .”64

While neither test sufficiently addresses the policy considerations nor resolves the concerns underlying Congress’ passage of the Clean Water Act, the Scalia and Kennedy tests have become the main tools for determining Clean Water Act jurisdiction post Rapanos. Confusion, due to the lack of a clear majority holding, has subsequently led to varied implementation of the tests in district and circuit courts when determining wetland jurisdiction under the Act.

c. The resulting jurisdictional confusion and circuit court split

When addressing jurisdictional analyses under the Clean Water Act, courts across the country are split regarding their implementation of the Rapanos tests. Numerous Circuits, including the 1st, 2nd, 3rd, 4th, 5th, 6th and 8th, have held or suggested that either the relatively permanent or significant nexus test may be used to establish jurisdiction.65 Other courts, such as those in the 7th, 9th and 11th Circuits, have held that the governing rule of Rapanos is embodied solely in Justice Ken-

61. Id. at 739 (plurality opinion).
62. Id. at 739. “[W]aters of the United States’ is in some respects ambiguous. The scope of that ambiguity, however, does not conceivably extend to whether storm drains and dry ditches are ‘waters,’ and hence does not support the Corps’ interpretation.” Id. at 752.
63. Id. at 753.
64. Id. at 778 (Kennedy, J., concurring).
65. See Glaze, supra note 26, at 10120 n.24, for a list of cases and jurisdictions where either test may apply.
nedy’s test.66 Further complicating an already convoluted area of law, a federal district court judge in D.C. suggested in *NRDC v. Kempthorne* that waters of the United States could only be deemed jurisdictional under Justice Scalia’s relatively permanent test.67

The significant nexus test ultimately emerged as the most commonly used analysis for determining whether a wetland falls under Clean Water Act jurisdiction.68 While a majority of courts apply Kennedy’s test, confusion still surrounds the particular method of determining a significant nexus. The Northern District of California, in *Environmental Protection Information Center v. Pacific Lumber Co.*, held that a significant nexus jurisdictional determination required evidence of a hydrologic connection,69 while Justice Kennedy in *Rapanos* suggested that the required connection need not be hydrologic.70 In *Cordiano v. Metacon Gun Club, Inc.*, the Second Circuit found that a significant nexus determination required proof that pollutants are actually being discharged into jurisdictional waters, not just the possibility that such a discharge may occur in the future.71

While lower courts continue to address this jurisdictional confusion, the Supreme Court has failed to clarify its perplexing Clean Water Act holdings,72 insisting instead that the question of “[w]hether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by ap-
pointed judges.”73 This ongoing legal ambiguity had a negative effect on environmental protection measures as well as industrial projects. Many businesses chose not to pursue large-scale projects near waterways in the face of uncertain permitting and enforcement measures. Agency productivity also declined as permitting confusion led to more time consuming jurisdictional deliberations. Therefore the government, Congress and federal agencies alike took it upon themselves to interpret and clarify the state of the law post SWANCC and Rapanos.

C. Restrictive Administrative Actions, Failed Congressional Bills, and the Current State of Clean Water Act Enforcement

Both Congress and federal agencies addressed the confusion resulting from the SWANCC and Rapanos plurality decisions, but their efforts were directed towards different objectives. The early agency guidance documents sought to expand the jurisdictional limitations introduced by the Supreme Court. In response, Congress fought to return widespread protection to crucial national waters through a congressional bill.

1. 2003 and 2008 EPA Guidance and Failed Rulemakings

In 2003, the EPA and Corps issued a joint memorandum clarifying the SWANCC holding and explaining its impact on the agencies’ jurisdictional determinations.74 It echoed the Supreme Court’s conclusion that jurisdiction should not be found for isolated intrastate and non-navigable waters where the sole basis for asserting jurisdiction rests on the “Migratory Bird Rule.”75 The agencies, however, expanded this narrow holding, suggesting that many categories of waters, from wetlands to seasonal streams, non-navigable ponds, and even some river tributaries, should be treated as “isolated waters.”76 Agency officials were then required to grant permission before an agency could extend protection over “isolated” waters, though the agencies were not required to defend or document their actions when they decided not to extend such protections.77 This one-sided process created a default

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73. Rapanos, 547 U.S. at 753, 799 (Stevens J., dissenting); see also Morrison, supra note 11, at 409 (“[T]he Supreme Court has denied petitions for writ of certiorari from five of the seven circuit court decisions addressing the jurisdictional question that Rapanos left unanswered.”).
74. Joint Memorandum, supra note 6, at 1995.
75. Id. at 1996.
76. Earthjustice et al., supra note 6, at 2.
77. Id. at 4.
unprotected status for “isolated” waters, ignoring the fact that, scientifically, the cleanliness of those waters was often just as important as the purity of the traditional navigable waters. In 2003, the EPA estimated that 20 million acres of wetlands were currently at risk of losing Clean Water Act protection under this agency guidance. 78

While the administration was able to narrow the Clean Water Act’s scope via a guidance document, when they sought to take similar action through a 2003 rulemaking, the nation’s response was overwhelmingly negative. The EPA and Corps received approximately 135,000 comments regarding the rulemaking, close to 99% of which opposed limiting the Clean Water Act. 79 The public, several states, regional authorities and Senators urged the agencies to abandon the rulemaking, which they eventually did, though the 2003 guidance was not withdrawn. 80

In 2008, the agencies again sought to limit federal jurisdiction by instituting a post-Rapanos guidance. 81 This guidance was also flawed, the main problem being its failure to recognize or implement the “aggregate analysis” technique described in Kennedy’s significant nexus test. This “limited consideration of cumulative effects” meant aggregation would be set aside by the agencies, and replaced with time-consuming and costly case-by-case jurisdictional analyses. 82 Opponents alleged that the guidance “not only fails to correctly interpret the Court’s opinions, but is itself rife with striations of political leanings that improperly interpret important aspects of the opinions and further limit the Act’s ability to protect waters.” 83

A government investigation into Clean Water Act enforcement after the 2008 guidance stated that the Rapanos decision, coupled with the Administration’s guidance, “negatively affected approximately 500 enforcement cases.” 84 In light of the agencies’ efforts to further limit the Clean Water Act’s jurisdictional reach, some members of Congress

78. Id. at 2.
79. Id. at 5.
80. Id. Thirty-two states and a bi-partisan group of 219 U.S. Representatives and 26 U.S. Senators publically opposed the rulemaking. Id.
82. Assessing Jurisdiction, supra note 72, at 10781; Henn, supra note 33, at 281.
83. Morrison, supra note 11, at 410 (quoting James Murphy & Stephen M. Johnson, Significant Flaws: Why the Rapanos Guidance Misinterprets the Law, Fails to Protect Waters, and Provides Little Certainty, 15 SOUTHEASTERN ENVTL. LJ. 431, 433 (2007)).
84. Memorandum, supra note 7, at 3 (quoting Memorandum from Granta Y. Nakayama, EPA’s Assistant Administrator for Enforcement and Compliance Assurance, to Benjamin Grumbles, EPA’s Assistant Administrator for Water (Mar. 4, 2008)).
decided to challenge such restrictions, and cement environmental protection of U.S. waters, thorough the creation of a bill.


Certain members of Congress, upset by the confusion, increasing administrative costs and the lack of protection national waters were receiving due to *Rapanos*, re-introduced a bill in 2009 (originally introduced in 2007) amending the Clean Water Act.\(^85\) This legislation, titled the Clean Water Restoration Act, sought to reinstate broad federal jurisdiction over waterways by, among other things, replacing the term “navigable waters” with “waters of the United States” in the Act.\(^86\) The Act would have restored federal protection to the level that existed before the limiting Supreme Court holdings and administrative guidance documents.\(^87\) Strongly opposed by a large majority of industry and agricultural interest groups, however, the bill never made it to a Senate vote due to the defeat of the Act’s two main proponents in the 2010 elections.\(^88\) Any optimism regarding Congress’ ability to address the Clean Water Act’s shrinking jurisdictional boundaries fades as the partisan rift grows, and it is unlikely a bill will be passed in the near future.\(^89\)


At a time when Americans are genuinely concerned about water pollution and contamination,\(^90\) the Clean Water Act continues to lose its grip on many national waterways. The EPA’s enforcement activities have dwindled in the aftermath of *SWANCC* and *Rapanos*. The number of enforcement cases initiated and convictions obtained has dropped by nearly 60% since the late 1990s,\(^91\) and the EPA has abandoned over

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86. Id. at 413.
87. Henn, *supra* note 33, at 289.
89. Morrison, *supra* note 11, at 413.
90. See Lydia Saad, “Water Issues Worry Americans Most, Global Warming Least,” *GALLUP* (March 28, 2011), http://www.gallup.com/poll/146810/water-issues-worry-americans-global-warming-least.aspx (In a recent Gallup poll, 79% of Americans were concerned a “great deal” about “contamination of soil and water by toxic wastes” and “pollution of rivers, lakes, and reservoirs,” as compared to “air pollution” (72%), “global warming” (51%) and “extinction” (64%).
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1,500 pollution probes due to jurisdictional uncertainty. Productivity and effectiveness have also been negatively affected as agency staff struggle to interpret and apply the case law and guidance to individual waterways. Resulting permitting delays and inconsistent jurisdictional determinations across the country led to uncertainty and slow development of industry projects. Water conservation efforts have also been thwarted with the loss of Clean Water Act protection for over twenty million acres of wetlands. Many of the bodies of water at risk for contamination provide critical habitat for waterfowl and fish, and eventually flow into the public drinking water systems of more than 117 million Americans.

In light of these dangers, and in an effort to reduce permitting complexity and increase clarity, procedural predictability and national consistency, the Environmental Protection Agency and the Army Corps of Engineers introduced the “Draft Guidance on Identifying Waters Protected by the Clean Water Act” in 2011.

II. 2011 PROPOSED AGENCY GUIDANCE

In collaboration with the Obama Administration’s release of a national Clean Water Framework, the proposed Guidance seeks to rectify past flawed interpretations of the Clean Water Act by specifically identifying the waters that fall under the agencies’ jurisdiction. Once finalized, this Guidance would supersede the 2003 and 2008 guidance documents and create an enforcement system more in line with the original intent of Congress and the Supreme Court.

The EPA and the Corps are quick to point out that this Guidance is not a rule, and therefore lacks the force of law. But neither is this

93. Memorandum, supra note 7, at 6.
96. Draft Guidance, supra note 13, at 3.
97. Id. at 1.
98. Id. “[The Guidance] does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances.” Id. at 3.
administrative document “just some bureaucratic piece of paper.”

The EPA expects most “non-isolated” waters to be designated jurisdictional under this Guidance, and a Corps analysis estimates that 17% of isolated waters previously found to be non-jurisdictional will become jurisdictional if the Guidance is implemented.

Numerous industry groups argue that the agencies are attempting to “run around” the Supreme Court’s decisions by issuing this draft Guidance, which gives staff a "plethora of approaches" to obtain jurisdictional determinations. Due to requests from numerous stakeholders, the EPA and the Corps extended the original public comment period by sixty days, to end on July 13, 2011, by which time almost 4,000 public comments had been submitted to the docket. While certain Senators and Congressmen believe the EPA is likely to withdraw this Guidance and, in the alternative, opt for a rulemaking process, such action has not yet been taken by the agencies.

A. Jurisdictional Determinations: Changes the Guidance Will Introduce

The draft 2011 Guidance will institute multiple changes in the way the EPA and the Corps determine jurisdiction, and ultimately provide broader protection of our nation’s waterways. One of the first ambiguities the Guidance addresses is the question of which Rapanos holding governs. Conforming to previous guidance, the agencies here express their intent to assert jurisdiction over waters that fall under either


100. Potential Indirect Economic Impacts, supra note 45, at 9-10.

101. Id. at 28.


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Scalia’s or Kennedy’s Rapanos test.105 The Guidance expands Clean Water Act jurisdiction from its scope under the current 2008 guidance by introducing the following changes to existing water law.

1. Adoption of the “Similarly Situated” Watershed Approach

The key difference between the 2008 guidance and the 2011 draft Guidance is the use of aggregation at a watershed level.106 In Rapanos, Kennedy held that wetlands, “either alone or in combination with similarly situated lands in the region,” could be deemed navigable waters if they had the requisite affect on other navigable waters.107 While the current guidance in place allows for minimal aggregation at the level of a “specific stream reach,” the draft Guidance will allow for aggregation of all similarly situated waters located within the same watershed when determining the presence of a significant nexus.108 The agencies stress that each determination should be made individually, but generally expect that “if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the water-watershed would also be found to have a significant nexus.”109

Proponents of this expansion argue that it is more scientifically grounded than the original approach in that it takes into account the interconnected nature of aquatic ecosystems, and addresses the danger upstream degradation can pose to water quality downstream.110 Extending the scope of aggregation also increases the speed of significant nexus determinations. Regulators will be able to analyze a proposed development’s effect on an entire waterway network111 while avoiding piecemeal stream-by-stream analyses.112

106. Id. at 8.
108. Draft Guidance, supra note 13, at 8. Under the 2011 Guidance, field staff will “first determine whether the water to be evaluated is a tributary, adjacent wetland, or proximate other water . . . waters in the same category should be considered the similarly situated waters.” Second, the staff will determine the extent of the watershed, “defined by the area draining into the traditional navigable water or interstate water” and identify all similarly situated waters in that watershed. Finally, the staff will determine if the water they are evaluating, “in combination with other similarly situated waters in the same watershed,” has a significant nexus to the nearest traditional navigable water or interstate water. Id.
110. Assessing Jurisdiction, supra note 72, at 10783; Murphy, supra note 4, at 51.
111. Wl: Clean Water Act, supra note 16.
112. EPA, Army Corps Expand Clean Water Act Coverage, ENVTL. LEADER (April 28, 2011), http://www.environmentalleader.com/2011/04/28/epa-army-corps-expand-clean-water-act-coverage/; see also Quinlan, Wetlands, supra note 17 [Joan Mulhern, Senior Legislative Counsel for Earthjustice, stated, “[i]f you have to prove that one little tributary is affecting the physical, chem-
Oponentss argue this expansion oversteps the federal government’s authority to regulate waterways under the Clean Water Act. The application of Kennedy’s original “similarly situated” test was confined to wetlands, and the draft Guidance seeks to extend aggregation to most types of waterways. Industry advocates, especially in the western United States, indicate that using the “watershed” approach will lead to confusion and indecision for regulated individuals whose stream in question may be similarly situated with a stream hundreds of miles away. Opponents of the draft Guidance fear that the net result will be many more “desktop, broad-evidentiary jurisdictional calls” that apply jurisdiction to insignificant waterways with no demonstrated nexus.

While opposition exists, this expansion is logical, for as the draft Guidance points out, “the agencies have an obligation to evaluate waters in terms of how they interrelate and function as ecosystems rather than as individual units, especially in the context of complex ecosystems where their integrity may be compromised by environmental harms that individually may not be measurably large but collectively are significant.” The court in Rapanos failed to define the extent of a “region” used for similarly situated waters, leaving the agencies to delineate its boundary using their modern scientific understanding of hydrological connections. Finally, the Guidance does not unduly expand the similarly situated analysis, as exhibited by its exclusion of “isolated other waters,” unless there is a “compelling scientific basis” for aggregation.

113. Glaze, supra note 26, at 10124-25.
114. Assessing Jurisdiction, supra note 72, at 10779, 10786-87. Barrasso, supra note 17 (“Because the agencies have historically looked solely at the waterbody in question when making jurisdictional decisions, haven’t they now effectively expanded their scope of review to include the overall watershed which may or may not reflect the actual functions of the singular water on the traditional navigable water?”).
115. Assessing Jurisdiction, supra note 72, at 10779.
117. Id. at 20 (”Non-physically proximate other waters are isolated, intrastate, non-navigable waters and wetlands that would not meet the regulatory definition of ‘adjacent’ with respect to jurisdictional waters . . . [b]ecause such waters may be widely scattered geographically, and physically remote from jurisdictional waters, field staff should generally conduct significant nexus analyses for such waters individually, unless there is a compelling scientific basis for treating a group of such waters as similarly situated waters in the same region.”).
2. Categorical Protection of Interstate Waters and its Effect on the “Significant Nexus” Test

A second change the draft Guidance will introduce is the categorical protection of additional waterways. Historically, waters designated as "traditional navigable waters" were automatically subject to Clean Water Act federal jurisdiction.118 The draft Guidance, unlike the current guidance, expands this categorical protection to all interstate waters, even if such waters are not traditionally navigable.119 While none of the Supreme Court cases dealing with Clean Water Act jurisdiction addressed the role of interstate waters, precursor statutes to the Clean Water Act routinely subjected interstate waters and their tributaries to federal jurisdiction.120 Though never before discussed in a guidance document, interstate waters have been included in the regulatory definition of “waters of the United States” since the 1970s.121

Many who challenge the draft Guidance suggest that even if expanding categorical protection to interstate waters was not erroneous, allowing jurisdiction under the significant nexus test to be determined by either a significant nexus to a traditionally navigable water or an interstate water is an excessive expansion of agency jurisdiction.122 They fear that even “remote and insubstantial” waters will be deemed jurisdictional due to their interstate location, as well as any other waterways with a significant nexus to such waters.123

118. Id. at 6 (stating traditional navigable waters are “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide”).

119. Id. at 7 (stating that interstate waters are “all rivers, lakes, and other waters that flow across, or form a part of, State boundaries”).

120. Assessing Jurisdiction, supra note 72, at 10776; Draft Guidance, supra note 13, at 24.

121. Assessing Jurisdiction, supra note 72, at 10776; Interstate Waters, supra note 18, at 3 ("It would contravene Congress' clearly stated intent for a court to impose an additional jurisdictional requirement on all rivers, lakes, and other waters that flow across, or form a part of, State boundaries . . . such that interstate waters that were previously protected were no longer protected because they lacked a connection to a traditional navigable water.").

122. Glaze, supra note 26, at 10120-21 (though the magnitude of the jurisdictional expansion will depend on how many interstate waters are currently not already considered traditional navigable waters).

123. Id. at 10129 (Opponents argue "the reason the agencies have expanded relevant waters to include such potentially remote waters is to ensure that remote unconnected waters and their associated connected and neighboring waters are not overlooked. While the approach is perhaps environmentally more protective, it is not consistent with Rapanos . . . adjacency to an interstate water based solely on geopolitical accident is insufficient for jurisdiction.").
Although watershed aggregation and categorical protection of interstate waters are the most controversial aspects of the 2011 Guidance, the agencies also introduced several smaller changes that would increase the scope of Clean Water Act jurisdiction. First, the agencies established an assumption of jurisdiction over waters that meet the characteristics of a “tributary,” since it is generally expected that such tributaries will maintain a significant nexus with down-stream traditional navigable waters or interstate waters because of the same ... watershed should be evaluated together as similarly situated waters in the region. 127
Opponents argue that these expansions will harm the regulated community by allowing the federal agencies to command sweeping jurisdiction over previously unregulated waterways. The effects would be felt most notably in the western states, where existing, dry, vernal pools and prairie potholes, which have no noticeable connection to navigable waters, and assert jurisdiction by arguing a bed and bank and an ordinary high water mark, and is part of a tributary system of traditional navigable waters or an interstate water, and therefore, can transport pollutants, floodwaters or other materials to a traditional navigable water or an interstate water. The agencies believe it is scientifically appropriate to recognize the tributary, along with the other tributaries in the watershed, as having a significant relationship to the traditional navigable waters. 124
Draft Guidance supra note 13 at 13-14. It is also important to note that traditional navigable waters also refer to “all other waters such as intermittent streams, steams, wetlands, ponds, playa lakes, or natural ponds, which could affect interstate commerce.” 125
Draft Guidance supra note 13 at 17.
that they play a role in flood control during the wet season. This aggregation and expansion of the current guidance is legitimate, however, and necessary for the continued protection of our nation's vital waters.

III. DUE TO ITS SIGNIFICANT POSITIVE IMPLICATIONS AND ULTIMATE CONSTITUTIONALITY, THE GUIDANCE SHOULD BE ADOPTED WITHOUT DELAY AND FOLLOWED BY COMPREHENSIVE RULEMAKING PROCEDURES

The nation is in a grave state. More critical waterways go unprotected every day. The Guidance would safeguard these waters, and in doing so, save millions of dollars by streamlining agency procedure and supporting tourist and wildlife recreation industries. While these positive factors should sway public opinion towards adoption of the Guidance, those who oppose it will ultimately challenge its legality. These legal challenges will fail, however, because the Guidance is not an illegitimate expansion of agency jurisdiction under the Clean Water Act, and it does not overstep any of the previously discussed Supreme Court holdings.

A. The Positive Effects of the Guidance Will Ultimately Outweigh Any Negative Effects

1. Benefits of Increased Water Protection

In the wake of the controversial Supreme Court holdings and restrictive guidance documents, several states, political figures, environmental groups, and the general public have clamored for additional protection over waters of the United States. Multiple Senators, in a letter to President Obama, stressed the importance of this protective Guidance by demonstrating the positive effect it would have on "our most treasured water bodies" including the Great Lakes, Chesapeake Bay, and Lake Champlain. This Guidance will ensure that no waterway meant to be included in the Clean Water Act is abandoned, and will guarantee the protection of additional waters from pollution degradation. While advocates routinely stress its environmental benefits,
the Guidance will also positively influence regulated industry by increasing permitting clarity, reducing application costs and delays, and ensuring the consistency and predictability of jurisdictional determinations across the country.

a. The effect on the environment and wildlife recreation

The proposed agency Guidance will lead to the additional protection of numerous waterways through its adoption of strong science-based standards for determining federal jurisdiction. The benefit of these safer, cleaner waters will be felt most notably by individuals who reside near them, recreate in them, and drink from them. While those individuals may experience the most immediate positive effects, the nation as a whole will profit from the increase in hunting and angling that a pristine environment can support.130 The economic benefit these industries bring to the nation is considerable, with wildlife-dependent recreation generating nearly $80 billion in hunting and fishing expenditures annually.131 By reinstituting the protections they were previously afforded, the agencies will facilitate these industries by defending habitats that are crucial for the continued development of hunting and fishing activities in the United States. Salmon, for example, are the third largest commercial catch in the U.S., and they often reproduce in small, intermittent streams that currently do not fall under agency jurisdiction.132 Waterfowl would also benefit from the Guidance, as over 50% of the nation’s ducks are born in the northern Great Plains’ prairie potholes region.133

Industry and private individuals alike will experience financial gain from the preservation of additional wetlands and intermittent streams. The protection of these types of waterways is essential, considering 60% of streams are intermittent and contribute to the drinking water supply for over 117 million people.134 These bodies of water act as natural filters, positively influencing downstream water quality by separating out pollutants, trapping sediment, and cycling nutri-

130. National Hunting, Angling Groups Applaud Release of Clean Water Guidance, supra note 94 (Steve Moyer, vice president of government relations for Trout Unlimited, stated "[r]estoring these lost protections means more habitat in the long run for all the fish and wildlife that sportsmen love to pursue.").
131. Id.
132. Potential Indirect Economic Impacts, supra note 45, at 31. The U.S. fishing industry boasts 40 million anglers and nets around $45 billion a year. Id.
133. Id. Many seasonal wetlands also serve as nurseries for juvenile frogs, toads, and salamanders. Earthjustice et al., supra note 6, at 24.
134. Potential Indirect Economic Impacts, supra note 45, at 12.
ents.\textsuperscript{135} Small streams and wetlands mitigate the downstream effects of flooding by retaining surplus surface water in times of severe precipitation. By slowly releasing the excess water, these natural storage systems prevent harmful erosion and damage to crops.\textsuperscript{136} The protection of these bodies of water will reduce flood severity and resulting economic loss, an important consideration seeing as the great Midwest flood of 1993 caused nearly $20$ billion in economic damage and destroyed more than 50,000 homes.\textsuperscript{137}

\textit{b. The effect on industry and the agencies' permitting process}

Not only will the Guidance provide for a safer and healthier environment, it will also have positive implications on industry and land development. Property developers and businesses are less willing to invest in projects involving water permitting when the regulatory laws are ambiguous and the probability of obtaining a permit is uncertain. With greater jurisdictional clarity and transparency, professionals will be able to safely (and with additional peace of mind) invest and proceed with projects involving the development of natural resources, roads and houses.\textsuperscript{138} The Guidance will also allow industry members to more quickly and cheaply obtain jurisdictional determinations by reducing the complexity of agency decision-making through the adoption of specific unambiguous guiding principles.\textsuperscript{139} As the Guidance states, the agencies will not have to choose between applying Justice Scalia's or Justice Kennedy's test, because both will become legitimate means of determining jurisdiction. The current process calls for a time consuming case-by-case individual assessment of waterbodies under vague guidelines, directing taxpayer funds away from other important environmental issues.\textsuperscript{140} The Guidance will speed this process and save money by allowing for increased aggregation (at the watershed level) of similarly situated waters under Justice Kennedy's test. Such changes will positively address the time-consuming jurisdictional


\textsuperscript{136} Potential Indirect Economic Impacts, supra note 45, at 34.

\textsuperscript{137} Id.

\textsuperscript{138} Id. at 13-14.

\textsuperscript{139} Draft Guidance, supra note 13, at 3.

\textsuperscript{140} Quinlan, Wetlands, supra note 17.
questions that currently plague field staff.\footnote{Potential Indirect Economic Impacts, supra note 45, at 13.} The Guidance’s concrete principles will also allow for nation-wide consistency in jurisdictional decision-making, enhancing predictability in the overall permitting process.\footnote{Draft Guidance, supra note 13, at 3.}

In light of the immediate and growing threat to important national waterways and the steadily decreasing record of legal enforcement by governmental agencies, the proposed Guidance should be accepted and implemented without delay. Ben Grumbles, head of the EPA’s water office during the George W. Bush administration, maintains that the Guidance is necessary, even amidst arguments that such a document is an “inappropriate mechanism” to institute such change.\footnote{Quinlan, Oil Industry, supra note 16.} He states, “it’s very easy to get conflicting interpretations and to get lost in the weeds and to come out with contrary views…. My view is that some form of guidance is necessary.”\footnote{Id.} While a full rulemaking would aid in cementing the proposed policies, the Guidance must be accepted promptly to allow for the protection of waterways that will continue to degrade as the nation waits for a finalized rule.

2. Negative Aspects of Implementation of the Guidance

Though the proposed Guidance will lead to cleaner national waterways, increased revenue via the hunting and angling industries, and streamlined agency practices, opponents still argue that it should not be accepted. The opponents’ arguments that the Guidance is a barrier to economic growth and an instrument that will increase costs to both industry and government actors are important factors for the Obama Administration to consider before implementing the Guidance. When viewed in the aggregate, however, the economic and environmental benefits of the Guidance ultimately outweigh any claims that it will have a predominantly negative effect.

\begin{itemize}
  \item \textit{The Guidance does not act as a barrier to economic growth, and will not lead to excessive costs for industry and government actors}
\end{itemize}

Industry players insist that implementation of this Guidance will lead to many negative economic impacts for themselves and the government. In their letter to EPA Administrator Lisa Jackson regarding
the draft Guidance, multiple Senators highlighted the economic tribulations that would stem from such policy changes.145 These industry players argue that expanding federal jurisdiction over additional waterways will expose more property owners to the Clean Water Act’s mandates and the resulting permitting procedures and fees.146 This increase in the number of permit applications, they contend, will lead to greater permitting delays, hindering “[c]ommercial and residential real estate development, agriculture, electric transmission, transportation, energy development and mining” and causing “thousands of jobs” to be lost in those industries.147 The EPA itself notes that the majority of any additional costs incurred due to the Guidance would result from permitting fees and mitigation expenses borne by entities seeking 404 permits under the Clean Water Act.148 Mitigation itself under the Guidance’s new policy is estimated to cost between 79 and 151 million dollars, yet this would only constitute a 4% increase from the current total of 2.1 to 3.9 billion dollars per year.149

Industry supporters also argue that expansion of the program will lead to greater administrative costs for the EPA and the Corps due to additional “program management, training, and associated environmental compliance costs….150 Such expenses are estimated to increase by 7.9 to 20 million dollars, bringing the total cost of Guidance implementation to approximately 87 to 171 million dollars per year.151 This cost, however, must be balanced against the benefits of increasing federal jurisdiction over national waterways. Although these benefits are frequently difficult to quantify due to their nature as “public goods,” measureable economic profits often stem from such goods.152 As discussed above, cleaner waters would provide habitat for various forms of wildlife that are essential for maintaining stable ecological

145. Barrasso, supra note 16 (signed by 20 Senators).
146. Id.
147. Id.
148. Potential Indirect Economic Impacts, supra note 45, at 5. (Costs to permit applicants would include “wetlands mitigation, stream mitigation, and project re-design and relocation.”).
149. Id. at 9.
150. Id. at 5; Barrasso, supra note 16. However, the EPA suggests that administrative costs may go down since the guidance may “reduce some permitting costs and speed the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and confusing for field staff and the regulated community.” Potential Indirect Economic Impacts, supra note 45, at 13.
151. Potential Indirect Economic Impacts, supra note 45, at 10. Additional costs will be borne by other government agencies such as the Fish and Wildlife Service as the need for consultations under the Endangered Species Act increases. Id. at 9.
152. Id. at 11.
structures and various recreational money-making activities. Picturesque environments not only provide aesthetic pleasure, they draw tourism to geographic areas that subsequently benefit from the influx of money invested in local hotels and restaurants. Wetland and floodplain restoration would also help communities avoid costs stemming from flood prevention and subsequent community renovation. With “fishing and hunting expenditures . . . and the value of wetlands for storm protection services” totaling in the tens of billions of dollars per year, any expansion in the protection of national waters will lead to significant additional profits in these areas. Consequently, while there are costs associated with implementing the Guidance, both the EPA and the Corps have considered them at length, and it is evident that the positive implications of the Guidance outweigh the associated costs.

b. The Guidance is Constitutional and the Appropriate Method for Implementing Crucial Change in the Short Term

While the Guidance will be undeniably beneficial, this fact is inconsequential if the agency action is deemed unconstitutional. Opponents argue that the agencies are acting to illegitimately expand their jurisdiction beyond what the Clean Water Act and Supreme Court cases mandate, and that a guidance document is an inappropriate method to address such change.

i. The Guidance is not an Illegitimate Expansion of Federal Jurisdiction

The Guidance, contrary to what the opposition argues, is not an illegitimate expansion of federal agency power under the Clean Water Act. The EPA and the Corps are afforded some flexibility when clarifying aspects of the Clean Water Act, since under Chevron, when “Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute . . . .” This was notably demonstrated in Riverside Bayview Homes where the Court upheld the Corps’ interpretation and decision

153. Id. at 11-12.
154. Id. at 12.
155. Id.
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to include wetlands adjacent to waters in the existing broad congressional definition of “waters.”

While federal agencies are allowed to fill these congressional “gaps” with expletory documents, opponents of the draft Guidance argue that the EPA and Corps are executing an unlawful expansion of Clean Water Act jurisdiction. Under the Administrative Procedures Act, agency actions will be held unlawful and set aside if they are found to be “in excess of statutory jurisdiction” or “authority.” Politicians urge the EPA to abandon the Guidance and pursue a rulemaking, stating that the agency “cannot, through guidance, change the scope and meaning of the Clean Water Act or the statute’s implementing regulations.” House Republicans call the Guidance “a dramatic federal jurisdiction grab and expansion of the Clean Water Act” which reverses “decisions by the United States Supreme Court that recognized limits to the federal government’s regulatory authority . . . .” Federal agencies cannot set policies that are contrary to existing Supreme Court holdings, for only congressional action can countermand judicial statutory interpretation. Opponents of the Guidance suggest that the agency document reverses the previous SWANCC and Rapanos Supreme Court holdings, which established constitutional limits on the reach of federal jurisdiction over waters of the United States. They contend that since many additional waters would be protected under the Guidance, it illegitimately expands the scope of the statute and ignores previous Supreme Court decisions. The Guidance, however, is constitutional and not an illegitimate expansion of previous set statutory and judicial jurisdictional limits.

161. Assessing Jurisdiction, supra note 72, at 10774; Henne, supra note 33, at 282; The Clean Water Act Guidance: What It Does and Does Not Do, supra note 29, at 2 (“The proposed guidance does not, and cannot, restore protections to all the wetlands and other waters that were protected for almost 30 years prior to 2001.”).
162. Jonathan Benson, EPA, Army Corps draft new Clean Water Act guidelines that threaten to seize control of all water supplies, NAT. NEWS.COM (May 4, 2011), http://www.naturalnews.com/032278_water_supplies_EPA.html (“By undoing these decisions, the EPA and ACE will essentially be giving themselves a free pass to arbitrarily develop and establish their own rules, and they will be able to do so without proper congressional approval.”).
163. Id.
Opponents have commented that “[o]ne is hard pressed to conjure just what [waters are now] not included in EPA’s ambit,”164 and they suggest that this Guidance will allow for almost unlimited government jurisdiction, making the EPA and the Corps “kings of every drop of water in the country—except maybe a backyard swimming pool.”165 Agricultural groups, such as the National Corn Growers Association, fear this Guidance will expand federal jurisdiction to cover ditches and farm ponds used in crop production.166 The agencies, however, rebut this and explain that the myth that every “farm field, every mud puddle, every birdbath, [and] every tire rut” will now be regulated is a lie.167 The Guidance maintains all of the original Clean Water Act permitting exemptions for farming, ranching, agricultural and construction purposes, and excludes many artificial water features.168 Additionally, “prior converted cropland” and “waste treatment systems” are excluded from being considered “waters of the United States” subject to regulation.169

Though the Guidance is expected to grant the EPA and Corps additional jurisdiction over certain waterways, it does not act as an “expansion of federal reach” but simply as a restoration of the traditional protections Congress granted in the Clean Water Act.170 Congress intended to safeguard the “chemical, physical, and biological integrity of the Nation’s waters” and the Guidance aims to achieve that goal by updating the water quality protection program through utilization of twenty-first century scientific knowledge and understanding.171

The Guidance is also in line with the existing judicial framework and does not expand upon the SWANCC and Rapanos jurisdictional

165. Benson, supra note 162 (quoting Ashley Lyon, Deputy Environmental Counsel for the National Cattlemen’s Beef Association). According to Lyon, if the Guidance is finalized, “the only thing cattle producers can be clear and certain about is that any stream, ditch and pond on their land could easily be subject to regulation.” National Cattlemen’s Beef Association, supra note 15.
167. Assessing Jurisdiction, supra note 72, at 10782.
168. Draft Guidance, supra note 13, at 3. The Guidance also does not protect certain artificially irrigated areas, artificial lakes or ponds, ornamental waters, or water-filled depressions created through construction activity, among others. Id. at 5.
holdings, but rather sheds additional light on their findings. Through the Guidance, the agencies seek to clarify ambiguities that were left in the wake of those cases, such as which jurisdictional test rules and what the term “region” signifies in “similarly situated waters” determinations. The document encompasses a “more faithful” reading of Kennedy’s significant nexus test by taking into account modern understanding of hydrological cycles and the importance of upstream water quality.172 While the Guidance respects the limits the Supreme Court placed on Clean Water Act jurisdiction, it permissibly challenges the 2003 and 2008 guidance documents that were issued in response to those findings.173 The 2003 guidance instructed staff to abandon jurisdiction over not only the waters described in SWANCC, but over any intrastate waters not traditionally navigable, unless they obtained prior approval from the agency.174 The 2008 guidance further narrowed federal jurisdiction by instructing field staff to delay exercising jurisdiction over waters that were not traditionally navigable.175 These limitations were agency-mandated in guidance, not judicially commanded, and can therefore be ignored or reversed in later agency guidance documents.176 All of these cases illustrate that the Guidance, while more comprehensive than the existing policies, is not an illegitimate, all-encompassing expansion of agency authority.

ii. Adoption of Agency Interpretations Need not be Done Through a Rulemaking

Numerous large industry groups, including the agricultural, home building, and oil communities, have expressed their concerns regarding the implementation of the Clean Water Act Guidance.177 Worried that the Administration is showing too little regard for the “practical implications of their actions,”178 the groups argue a rulemaking is required to adequately lay out all of the costs and benefits associated

172. Assessing Jurisdiction, supra note 72, at 10781.
173. Id.
175. Id.
176. Id. at 408.
177. Quinlan, Oil Industry, supra note 16. Specifically, Exxon Mobil Corp., Marathon Oil Corp. and the American Petroleum Institute have threatened to bring suit against the Obama Administration if it issues the Guidance. Id.
with such an “economically significant” change in policy. Opponents suggest the Administration is improperly circumventing Congress by essentially implementing the goals of the Clean Water Restoration Act, which Congress never approved, and adopting what is in reality a de facto rule with “substantive impacts” on the regulated community.

While guidance documents are not subject to the same procedural requirements as rulemakings under the Administrative Procedures Act, and are therefore not required to contain a detailed analysis of the costs and benefits of the changes they propose, the Guidance in question does. On April 27, 2011, the EPA and the Corps released a detailed report, based partly on industry concerns, in an attempt to estimate the “possible indirect costs and benefits associated with implementing the proposed guidance when compared to implementation of existing guidance.” They also held a 60-day public comment period (later extended by 30 days due to national interest) where they received nearly 4,000 letters from industry and environmental supporters alike. The agencies completed a careful analysis of the effects, both positive and negative, that the Guidance would have on industry. It is clear that the agencies embraced the opposition’s concerns, and will consider them in the final implementation of the Guidance. Advocates of the Guidance suggest that drafting a rule on the same issues could take as long as two years, reinforcing the need for this temporary policy until that time. Therefore while a rulemaking should be conducted to strengthen and cement its findings, a guidance document remains the appropriate method of regulation in the short term.

179. Ellperin, supra note 92 (quoting Khary Cauthen, director of federal relations for the American Petroleum Institute).
180. Barrasso, supra note 16; Benson, supra note 162 (U.S. Congressman Paul Gosar stated, “[t]his is just another example of the Environmental Protection Agency’s attempt to circumvent Congress and develop rules and regulations that far exceed the authority granted to the agency under existing public law.”).
181. Assessing Jurisdiction, supra note 72, at 10779; WI: Clean Water Act, supra note 16.
182. 5 U.S.C. § 553.
183. Potential Indirect Economic Impacts, supra note 45, at 5 (“EPA typically conducts ... an economic assessment in conjunction with proposed rules, and is providing a general assessment of potential indirect economic impacts of the proposed guidance to help inform decision-makers and the public.”).
184. Id. at 3.
185. Update on Waters of the U.S. Draft Guidance (June 27, 2011), supra note 103; Docket Folder Summary, supra note 103.
186. Quinlan, Wetlands, supra note 17.
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B. The Guidance Should be Followed by a Rulemaking Which Will Satisfy the Opposition and Ultimately Strengthen the Agencies’ Determinations

Numerous industry and agricultural groups are calling for the EPA and the Corps to abandon the Guidance and move forward with formal rulemaking procedures.\(^{187}\) While environmental groups generally support the Guidance in the short term, they are also encouraging the Administration to produce a final rule, which would prove more difficult for a subsequent administration to undo.\(^{188}\) The Supreme Court itself encouraged rulemaking procedures in this scenario, as seen in Rapanos, where both Justice Roberts and Justice Breyer (authors of concurring and dissenting opinions) urged the agencies to solve the Clean Water Act jurisdictional confusion with a rulemaking.\(^{189}\) The Guidance itself states that a rulemaking consistent with the Administrative Procedures Act is expected to follow its implementation.\(^{190}\) It is crucial that the agencies continue in this direction, for while the Guid-

187. Id. (Don Parrish, senior director of regulatory relations for the American Farm Bureau Federation, stated “guidance on top of guidance” was the wrong approach.). The Administrative Procedure Act defines a rulemaking as “agency process for formulating, amending, or repealing a rule.” The Act defines a rule as the “whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . .” 5 U.S.C. §§ 551(4), (5).

188. National Hunting, Angling Groups Applaud Release of Clean Water Guidance, supra note 94 [Jan Goldman-Carter, Wetlands and Water Resources Counsel for the National Wildlife Federation, stated “[t]here is also widespread agreement that a rulemaking is needed to further clarify and restore protections that existed prior to the SWANCC decision for our nation’s wetlands, streams and other waters. This guidance is very encouraging, and we now look forward to a solid rule further clarifying and reinforcing these protections.”]; A Stronger and Clearer Clean Water Act, N.Y. TIMES (Apr. 28, 2011), available at http://www.nytimes.com/2011/04/29/opinion/29fri3.html. Some groups even argue that the Guidance is under-inclusive in that it does not provide enough protection for isolated wetlands which have no significant nexus with traditionally navigable waters (such as prairie potholes), despite their importance to wildlife and local ecology. Hannah Kett, US Aims to Expand Wetland Protection, ECOSYSTEM MARKETPLACE [May 9, 2011], http://www.ecosystemmarketplace.com/pages/dynamic/article.page.php?page_id=8288&section=news_articles&eid=1.

189. Rapanos v. United States, 547 U.S. 715, 758 (2006) (Roberts, J., concurring) (“Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. What is unusual in this instance, perhaps, is how readily the situation could have been avoided [through a rulemaking].”) (citations omitted); Id. at 812 (Breyer J., dissenting) (“I believe that today’s opinions . . . call for the Army Corps of Engineers to write new regulations, and speedily so.”).

190. Draft Guidance, supra note 13, at 1. The Guidance expressly mentions two topics the rulemaking will consider: which (a)(3) or “other waters” should be considered jurisdictional, and whether the presence of an ordinary high water mark alone is enough to establish a tributary’s significant nexus to downstream waters. Id. at 19, 29.
ance is necessary in the short term, a rulemaking will allow for more stable, binding and long term policy change.

As the EPA and the Corps indicate multiple times in the draft Guidance, since it is not a rule, the Guidance is not binding and lacks the force of law.\textsuperscript{191} Instead, it is simply “intended to describe for agency field staff the agencies’ current understandings . . . .”\textsuperscript{192} Meant as a quick way for agencies to “speak[] to themselves” and inform staff on how to interpret current regulations, guidance documents require no notice or comment, and can therefore be changed quickly and easily.\textsuperscript{193} Due to these qualities, courts show limited deference to agency opinions and guidance letters, usually extending deference only to the extent that such agency interpretation is “persuasive.”\textsuperscript{194} Only rulemakings that are implemented after full notice and comment procedures are afforded full \textit{Chevron} deference.\textsuperscript{195} This elevated level of deference would grant the agencies greater legal strength when countering inevitable lawsuits from the opposition.

While a rule offers additional protection to agencies in their decision-making, the required notice and comment procedures can prove costly and time consuming. Such procedures can also condemn the rule, as seen when an advance notice of proposed rulemaking was issued in correspondence with the 2003 guidance document, but later withdrawn due to the overwhelmingly negative response from the public.\textsuperscript{196} Additionally, the Obama Administration is likely to face resistance from industry supporters challenging a rulemaking as contrary to Obama’s existing pledge to reduce regulation and aid small

\textsuperscript{191}  \textit{Id.} at 1. \textit{But see} Barasso, \textit{supra} note 16 (Doubting the Guidance’s lack of “force of law,” Senators questioned EPA Administrator Lisa Jackson, stating “please elaborate and describe a scenario under which an applicant would not have to rely on the guidance, yet be free of legal consequences.”).

\textsuperscript{192}  \textit{Draft Guidance, supra} note 13, at 1.

\textsuperscript{193}  \textit{Assessing Jurisdiction, supra} note 72, at 10786.

\textsuperscript{194}  Roderick E. Walton, \textit{Judicial Deference to Agency Interpretations: The Ups and Downs of the Chevron Doctrine,} 15 SOUTHEASTERN ENVTL. L.J. 405, 425 (2007); see Jeff Kray, \textit{EPA/Corps Release Draft Guidance in Bid to Expand Federal Jurisdiction over Wetlands, MARTEN L.} (May 4, 2011), http://www.martenlaw.com/newsletter/20110504-federal-jurisdiction-over-wetlands; \textit{see, e.g.} Precon Dev. Corp., Inc v. U.S. Army Corps of Eng’rs, 633 F.3d 278, 290 n.10 (2011) (“We do not, however, review the Corps’ interpretation of the phrase ‘significant nexus’ under the greater deference accorded to some agency interpretations under \textit{Chevron} . . . because—although it could—the Corps has not adopted an interpretation of ‘navigable waters’ that incorporates this concept through notice-and-comment rulemaking, but instead has interpreted the term only in a non-binding guidance document.”).

\textsuperscript{195}  Daniel Riesel et al., \textit{Challenging Environmental Agency Action,} ST038 ALI-ABA Course of Study 587, 622 (Feb. 2012).

\textsuperscript{196}  Earthjustice et al, \textit{supra} note 6, at 5.
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business. Yet with the rare consensus between industry, environmental groups and government agencies as to the necessity of a rulemaking, the Administration should seek to avoid legal challenges and opposition in the long term by instituting a rule following implementation of the Guidance.

CONCLUSION

Many national waterways provide drinking water for local communities, habitat for important wildlife, and pristine environments where we can appreciate the unspoiled nature of the great outdoors. Yet these waters are in danger of contamination and general degradation due to the current ambiguity surrounding the reach of Clean Water Act jurisdiction. In order to reverse the downhill trend in enforcement and protection of these critical waterways, the Administration must adopt the EPA and Corps’ proposed Clean Water Act Guidance without delay, and follow it with a comprehensive rulemaking that addresses pertinent industry concerns.

197. Quinlan, Wetlands, supra note 17.