



January 22, 2008

Donna M. Downing
Office of Water (4502T)
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Russell L. Kaiser
Regulatory Community of Practice (CECW-CO)
U.S. Army Corps of Engineers, Headquarters
441 G Street, NW
Washington, DC 20314

RE: EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after Rapano; Docket No. EPA-HQ-OW-2007-0282

Dear Ms. Downing and Mr. Kaiser:

The American Council of Engineering Companies (ACEC) is pleased to submit these comments on joint guidance issued by the U.S. Army Corps of Engineers and the Environmental Protection Agency on June 5, 2007. The joint guidance addressed procedures for making Clean Water Act jurisdictional determinations following the U.S. Supreme Court's decisions in the Rapanos and Carabell cases.

These comments focus on the memorandum entitled *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* ("Guidance"). The EPA requested comments on these guidance documents in a Federal Register notice published on June 8, 2007. (72 Fed. Reg. 31,284)

ACEC commends EPA and the Corps for their efforts to provide consistent national guidance for making jurisdictional determinations in accordance with Rapanos and Carabell. The guidance supplies a comprehensive summary of the Court's decisions, including the distinctions between the plurality opinion and Justice Kennedy's concurring opinion. The guidance also provides answers to many important questions about how to apply the Rapanos and Carabell decisions in practice.

While we recognize the need for this guidance and in many respects agree with its recommendations, we have several important concerns. These include:

- The guidance has substantially increased permit processing times and documentation requirements. This is the single most commonly expressed concern among engineering firms and their municipal and private clients. The implementation of the guidance document requires the Corps and the EPA to

complete very detailed and lengthy paperwork when making jurisdictional determinations. We take particular note of the practice of requiring a jurisdictional determination for all wetlands, not just those for which jurisdiction is in question. Such a requirement is unnecessarily causing backlogs and delays. Engineering firms must build more time into project schedules, causing additional backlogs and delays and increasing project costs.

- There appears to be a lack of understanding by Corps districts on how the guidance is to be applied, and a wide divergence among Corps districts on how to interpret the guidance.

We recognize that because of conflicting views in the Court's Rapanos/Carabell decision, direction to the Corps and EPA on jurisdictional issues was lacking in clarity and failed to resolve many of the most pressing issues. Notwithstanding the underlying difficulties, ACEC strongly urges the Corps and EPA to issue a revised guidance document that will help to streamline and simplify the process for making jurisdictional determinations.

We would particularly like to raise the definitional issue of two terms used in the proposed guidance as problematic. The key terms -- "Relatively Permanent Waters" and "Significant Nexus" -- are imprecise and raise concerns about varying interpretations. We urge that the meaning of these terms be clarified in the guidance. For example, distinguishing between relatively permanent waterways and seasonal intermittent waterways is largely determined by the length of time that the stream flows throughout the year, but the guidance is silent regarding how seasonality will be determined. In addition, the guidance should describe methods for determining when and to what extent "significant nexus" exists.

Lastly, on behalf of their public clients, engineering firms design miles of roadside ditches to convey stormwater runoff away from roads. Under the guidance, jurisdictional determinations are being required for roadside ditches, despite not having been considered jurisdictional in the past. This is problematic because when categorized as the equivalent of a jurisdictional water, Section 404 requires permit applicants to evaluate alternatives that avoid the ditch or engage in mitigation. Such actions are gratuitous for mere ditches that hold water only during a rain event and are unavoidable components of a transportation project.

Thank you for the opportunity to provide input regarding EPA's and Army Corps of Engineers' Guidance Regarding Clean Water Act Jurisdiction after Rapanos. If you have any question regarding these comments please feel free to contact Diane S. Shea, ACEC Director for Environment and Energy Programs at 202-682-4354.

Sincerely,

/s/

David Raymond

President

ACEC is the business association of America's engineering industry, representing 5,700 independent engineering companies throughout the United States. ACEC members are directly engaged in the development of America's infrastructure, and play a particularly critical role in the effort to improve the nation's water and wastewater infrastructure. ACEC member firms represent the broad spectrum of the industry, from very large firms to small, family-owned businesses. Overall, our members employ well over 300,000 people throughout the 50 states and the District of Columbia. Founded in 1910 and headquartered in Washington, D.C., ACEC is a national federation of 51 state and regional organizations.