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**Via Email: OW-Docket@epa.gov**

Water Docket, Mailcode 2822T  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

**Re: Comments on EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction, EPA-HQ-OW-2007-0282**

Dear Sir or Madam:

The Western Urban Water Coalition (WUWC) submits these comments on the joint guidance to U.S. Army Corps of Engineers (Corps) field offices and U.S. Environmental Protection Agency (EPA) regions entitled “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*.” (June 5, 2007) (Guidance).

The WUWC consists of the largest urban water utilities in the West, serving over 35 million western water consumers.<sup>1</sup> WUWC members are involved in a number of activities that are subject to section 404 permits and will be impacted by the Guidance. In general, WUWC is in favor of clarifying Clean Water Act jurisdictional issues, but believes that EPA and the Corps should do more to streamline jurisdictional determinations and define key terms that currently are subject to varying interpretations.

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<sup>1</sup> The WUWC includes the following urban water utilities: Arizona – Central Arizona Project, City of Phoenix, City of Tucson; California – East Bay Municipal Utility District, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utilities Commission, Santa Clara Valley Water District; Colorado – Denver Water Department, City of Aurora; Nevada – Las Vegas Valley Water District, Southern Nevada Water Authority, Truckee Meadows Water Authority; Oregon – Portland Water Bureau; Washington – Seattle Public Utilities.

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WUWC members, like other large municipal utilities, undertake a variety of public works projects, transportation and utility improvements, and maintenance activities that require section 404 authorizations. These construction and maintenance activities are essential to maintaining the water, wastewater, flood control, road, bridge, and utility infrastructure of large urban areas in the West. Specifically, WUWC members engage in activities such as construction of detention basins for flood control, erosion control structures, wells and well houses, diversion structures, dams, and water treatment facilities; enlarging culverts at road crossings in watershed areas; cleaning out sediment from basins, reservoirs, dam under-drains, and facilities for draining water pipelines; road grading; clearing of vegetation; and repairing water conveyance facilities damaged by storms, floods or other events.

WUWC appreciates the Corps and EPA's efforts to provide consistent national guidance for making jurisdictional determinations in light of the *Rapanos* case. While we recognize the need for the Guidance and in many respects agree with its recommendations, we have several important concerns.

First, the jurisdictional status of ephemeral and intermittent waters depends on whether the waters meet the Scalia or Kennedy tests articulated in the *Rapanos* opinion.<sup>2</sup> However, the key terms described in these jurisdictional tests – “relatively permanent waters” and “significant nexus” – are highly subjective and open to vastly differing interpretations.

Specifically, the Guidance states that the agencies will assert jurisdiction over “relatively permanent waters” that either flow year-round or that have “continuous flow at least seasonally (e.g., typically three months.” There is no clear guidance on distinguishing between relatively permanent waterways and intermittent waterways. Determining whether a stream “flows” at least three months of the year is subjective. Methods to assess seasonality are not specified in the Guidance, nor is there direction within the Guidance to suggest what type of methods would be acceptable to the agencies.

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<sup>2</sup> Justice Scalia, writing the plurality opinion, stated that the agencies' regulatory authority should extend only to “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to” such relatively permanent waters. Justice Kennedy's concurring opinion set forth a “significant nexus” standard, under which wetlands are considered 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 covered waters more readily understood as “navigable.”

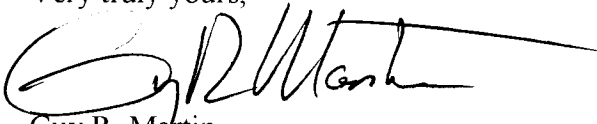
Moreover, the term “significant nexus” is not well understood by Corps staff.<sup>3</sup> The Guidance only lists assorted factors to consider in assessing whether there is a “significant nexus,” including volume, duration and frequency of flow; physical characteristics; proximity to the traditional navigable water; size of the watershed; and average annual rainfall, the potential of the tributaries to carry pollutants and flood waters to traditional navigable waters; and provision of aquatic habitat that supports a traditional navigable water. The Guidance does not explain the relative importance of these factors or when they will cumulatively establish a significant nexus. For example, what threshold is to be applied in determining whether the volume, duration and frequency of flow are “significant?” As currently written, the Guidance allow for subjective determinations of jurisdiction in all cases. There is a lack of understanding by Corps districts about how to apply the Guidance, leading to a lack of uniformity from district to district.

In addition, the procedure for completing jurisdictional determinations (JDs) is unacceptably cumbersome. A lengthy JD form is required for every wetland or water body on a site. In some cases, this means that multiple JD forms are required for a single project.

Not surprisingly, the Guidance has substantially increased permit processing times and documentation requirements. The Corps has been overwhelmed with the process of having to complete the JD forms, even where an applicant would be willing to concede jurisdiction. The review time is extended even further as a result of Corps headquarters and EPA oversight.

WUWC recognizes that the underlying legal principles for making jurisdictional determinations remain unclear and unresolved, and that the Guidance is not the sole cause of all of these concerns. However, WUWC urges EPA and the Corps to take all actions within their authority to further clarify the key terms and to simplify and streamline the process for making jurisdictional determinations.

Very truly yours,



Guy R. Martin

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<sup>3</sup> The Guidance states that “a significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.”