U.S. 715 (2006) ("*Rapanos*"), the Coalition's members submitted robust comments on the Agencies' 2008 Guidance Regarding Clean Water Act Jurisdiction After *Rapanos*.[11] In those comments, the Coalition again urged the Agencies to conduct a rulemaking to create the clarity and transparency long sought under the CWA.

C. Summary of Coalition Comments and Recommendations

Our comments today set forth numerous concerns with the new 2011 Draft Guidance. As a threshold matter, unlike prior guidance documents, which were limited to the section 404 program, the Agencies intend the Draft Guidance to apply to the *entire* CWA. The members of the Coalition are very concerned that the Draft Guidance and its supporting economic analysis fail to explain, consider, or analyze the implications that this Draft Guidance will have on other important CWA programs, programs that are vital to the proper functioning of the CWA. We believe that applying such broad jurisdictional principles such as the aggregation of all waters in a watershed and the regulation of agricultural, irrigation, and roadside ditches to the entire CWA structure (water quality standards, total maximum daily loads ("TMDLs"), etc.) does not make sense and, at a minimum, should be thought through carefully and with the full benefit and protections of the APA. Indeed, the APA was designed to address these types of expansive changes and, in particular, to provide administrative agencies with the input required to avoid unintended consequences.

[11] *See* American Farm Bureau Federation, *et al.*, "Comments in Response to the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Guidance Pertaining to Clean Water Act Jurisdiction After the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*," Docket No. EPA-HQ-OW-2007-0282-0204 (Jan. 22, 2008), (incorporated by reference herein).

Moreover, we believe that the Draft Guidance misconstrues the Supreme Court cases, is inconsistent with the Agencies' regulations and, as stated by the Agencies themselves, expands jurisdiction. In particular, we provide the following specific comments and recommendations:

- The Agencies should engage in an APA rulemaking rather than finalize the Draft Guidance.

- The Agencies' definition of "traditional navigable waters" ("TNWs") should be consistent with the Rivers and Harbors Act definition cited by the plurality and Justice Kennedy in *Rapanos*.

- Recreational boating or canoe trips are not sufficient evidence to demonstrate that a water is susceptible for use as a "waterborne highway used to transport commercial goods" and therefore qualifies as a TNW.

- The Agencies should not treat interstate waters as equivalent to TNWs.

- Justice Kennedy's significant nexus standard applies to wetlands only. The Agencies may not extend that standard to tributaries and other waters, whether physically proximate or not.

- The Agencies' watershed aggregation approach will lead to extremely broad assertions of jurisdiction over remote waters with insubstantial connections to TNWs and, therefore, directly contradicts Justice Kennedy's concurrence.

- The Agencies' overbroad interpretation of "similarly situated" waters will lead the Agencies to lump together disparate features that are not "similarly situated" with respect to TNWs in their significant nexus analysis.

- The Draft Guidance's watershed aggregation approach is as broad as the Migratory Bird Rule overturned in *SWANCC* and suffers from same constitutional concerns.

- Under the Draft Guidance, the Agencies will aggregate waters such as dry washes, arroyos, seasonal waterbodies, and ephemeral streams to establish a significant nexus. This approach is at odds with Justice Kennedy's significant nexus standard, which emphasized proximity to TNWs and regularity of flow.

- The Agencies turn Justice Kennedy's significant nexus standard upside down by allowing jurisdiction when the nexus needs only to be "more than speculative or insubstantial."

- Absent a rulemaking, the Agencies must apply Justice Kennedy's significant nexus standard on a case-by-case basis.

- Allowing a significant nexus determination for one water body in a watershed to bind other "similarly situated" waters in the watershed raises serious due process concerns.

- The Draft Guidance misinterprets Justice Scalia's opinion to allow any feature with a channel and at least seasonal flow to qualify as a tributary.

- The Agencies have essentially adopted another version of the "any hydrological connection" standard for tributaries that was rejected by five Justices in *Rapanos*.

- The Agencies may not presume that any feature that qualifies as a tributary will have a significant nexus to a TNW or interstate water.

- The Agencies should make clear that most ditches, including roadside and agricultural ditches, are not jurisdictional.

- The Agencies should clarify that point sources, such as municipal separate storm sewer systems ("MS4s"), regulated under section 402 of the CWA are not also "waters of the United States."

- The Draft Guidance misconstrues the *Rapanos* plurality's "continuous surface connection" principle for adjacent wetlands and allows for far too broad of an assertion of CWA jurisdiction over adjacent wetlands.

- The Draft Guidance's expansion of the term "adjacent" to include floodplain and riparian areas is an overreach of the Agencies' CWA jurisdiction over adjacent wetlands.

- The Agencies may not apply the regulatory definition of "adjacent" to waters other than wetlands as they attempt to do for "proximate other waters."

- Non-physically proximate other waters should not be subject to a significant nexus analysis.

- EPA's Economic Analysis completely omits consideration of impacts to other sections of the CWA besides section 404, underestimates the cost of complying with section 404, and does not give a reliable estimate of the benefits of the Draft Guidance.

- The Agencies intend to apply the Draft Guidance's expanded concept of "navigable waters" to the entire CWA, but have utterly failed to explain or consider the various practical, policy, and economic implications of that decision.

- The Agencies should clarify that the Draft Guidance will not be used to revisit previously issued jurisdictional determinations, even after the expiration of a determination, unless substantial new facts come to light about the nature of the water or wetland.

- The Agencies should confirm the regulatory exclusions for waste treatment systems and prior converted croplands in any final guidance.

- The Agencies should confirm the statutory and regulatory exemptions provided by CWA section 404(f), including those for normal agriculture, forestry and ranching practices in any final guidance.

- The Agencies should confirm the statutory and regulatory exemptions from NPDES permitting requirements for agricultural stormwater discharges and return flows from irrigated agriculture in any final guidance.

- In any final guidance, the Agencies should confirm that preliminary jurisdictional determinations will still be available, and may be relied on. The ability to obtain and rely on a PJD is especially critical for linear infrastructure projects such as pipelines that can cross numerous water bodies.

In sum, while we offer these comments on the Draft Guidance, the Agencies must cure the numerous legal infirmities reflected in the Draft Guidance and create the clarity and transparency long sought under the CWA. Indeed, both the EPA and the Corps have acknowledged that only through a rulemaking can real and meaningful standards, specificity, and direction be provided.[12]

II. The Draft Guidance Amounts to a Rule and Should be Abandoned.

For fundamentally important issues, such as the scope of the federal government's jurisdiction under the CWA, it is plainly wrong to proceed by guidance. The APA demands that binding pronouncements and amendments to pre-existing rules be adopted in accordance with the procedures set forth in the APA. The Draft Guidance amends the Agencies' existing regulations, and, therefore, must be adopted pursuant to the APA. Moreover, there are strong public policy reasons that support undertaking a rulemaking, rather than proceeding by guidance, and the courts, Congress, and the public have called upon the Agencies to do just that. The Coalition's member organizations urge the Agencies to abandon their "rulemaking by guidance" approach.

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[12] *See* "Transcription of Scottsdale, Arizona *Rapanos* Guidance Workshop Sponsored by the National Mining Association, the National Association of Home Builders, and Hunton & Williams LLP," Scottsdale, AZ (Sep. 13, 2007) at 28, 33 ("We didn't provide a cookbook. Obviously, we couldn't provide a cookbook recipe because we'd be in that rulemaking arena. So it is a case-by-case evaluation of the regulator in the field . . . we do need to go to rulemaking or some formal way of getting greater clarity, key terminology defined with greater specificity than we could do in a guidance document . . .") (attached hereto as Exhibit 3).