Appendix F

Agency Correspondence

Montana Department of
ENVIRONMENTAL QUALITY
Brian Schweitzer, Governor
P.O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • www.deq.mt.gov

Tom Martin, P.E.
Environmental Services Bureau
MDT Environmental Services
MDT
2701 Prospect Avenue
P.O. Box 201001
Helena, MT 59620-1001

Dear Mr. Martin:

The Department of Environmental Quality's (DEQ) will be a cooperating agency with the Montana Department of Transportation's (MDT) in its environmental assessment (EA) of the proposed Boulder-South project on State Primary Route 69, south of Boulder, MT, in Jefferson County.

The DEQ reviewed the information received from MDT on May 8, 2008. Due to the substantial wetland/water quality values impacted by the existing highway, the department had the following concerns:

- There are several TMDL (Total Maximum Daily Load) water quality impaired streams in the adjacent project area. MDT has accurately listed the two upstream TMDL segments (Little Boulder River, and the Boulder River from Basin to the town of Boulder) as water quality impaired from highway construction (among several causes). In addition, the Boulder River from the town of Boulder to Cottonwood Creek (within the proposed highway project) is water quality impaired (TMDL impaired list), with wetland/habitat alteration impairments as major causes (also metals, sediment and flow alteration). The lowest Boulder River segment (from Cottonwood Creek to the Jefferson River) is also impaired from wetland/riparian alteration from highways. Both of these segments should be included in the project scoping data and in the project goals/constraints considerations.

- In 2006, DEQ described the stream channel conditions in the highway project area as:

1 – Biology: Severe impairment indicated by fish population numbers relative to numbers upstream of Basin (<25% of reference);
2 – Habitat: Moderately impaired, based on 64% DEQ assessment score, partial dewatering;
3 – Chemistry: Severe impairment due to silver, copper, lead, iron and zinc aquatic life standard exceedences in > 10% of data set, and elevated temperatures;
4 - Agriculture: High metals concentrations may discourage use for livestock watering;
5 - Drinking Water: Lead and silver human health standard exceedences; and
6 - Primary Contact (recreation): Dewatering discourages use for recreation.

In summary, the middle Boulder River is a highly degraded stream segment that needs substantial habitat and stream restoration work to meet water quality standards.

- Wetland/Water Quality Restoration - There are substantial physical constrictions (including river channel meander blockages) which the current highway alignment has imposed on the historic channel morphology (since the highway pushes through several wetlands and forces itself between the river and nearby rock cliffs). The proposed project design alternatives should include significant channel restoration work and wetland mitigation (including highway and/or stream channel relocation to mitigate the current highway's design and location which is a substantial contributor to the Boulder River's impairment..

- The project area is rife with wetlands and sensitive fish habitat. Staff with the Department of Fish, Wildlife and Parks would have much better fisheries and aquatic organism information (and would be important technical participants in the project design/restoration work).

- Highway Relocation - The majority of the existing highway alignment appears to not meet current safety standards and to have antiquated low-visibility narrow roadways. DEQ suggests consideration of a substantive relocation of the highway right-of-way onto the wide gentle grassy north-bank hill slopes, which are mostly beyond the Boulder River flood plain and riparian zone. This highway relocation probably would include a north side right-of-way combining Highway 69 with the existing upland county road (i.e. changing/improving the highway between ~MP31.1 to MP 35). This relocation would allow MDT to restore almost all of the existing highway-degraded wetlands, and would significantly reduce future road maintenance expenses and winter-time sanding/plowing operations. The county road folks should be consulted to develop relative highway maintenance conditions and costs for this type of relocation.

- In general, best management practices (BMPs) should include no direct discharge of stormwater from bridge surface or approaching road surfaces or drainage ways.

Additionally, steps should be taken to ensure that sand or other friction materials is prevented from entering adjacent state waters from the road surface. BMPs could include retention facilities (dry or wet ponds), vegetated swales, check dams within vegetated swales, and on-going maintenance (e.g. removal of accumulated sediment) from retention facilities and vegetated swales.

Thank you for the opportunity to comment.

Sincerely,

Tom Ellerhoff
Science Program Manager

cc: J. Ryan
M. Kelley
R. Ray

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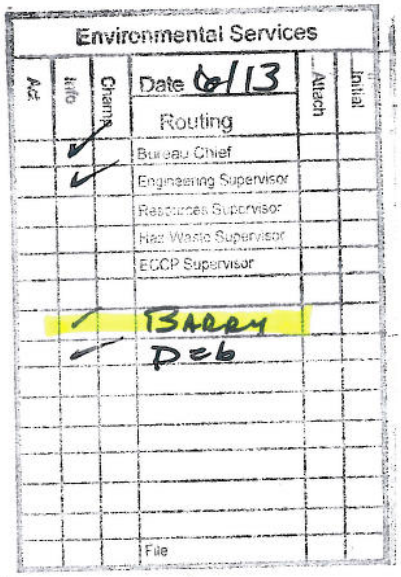
JUN 13 2008
ENVIRONMENTAL

United States Department of the Interior

FISH AND WILDLIFE SERVICE
ECOLOGICAL SERVICES
585 SHEPARD WAY
HELENA, MONTANA 59601
PHONE (406) 449-5225, FAX (406) 449-5339



M.44 MDT (I)

June 11

Tom Martin
Montana Department of Transportation
Environmental Services
2701 Prospect Avenue
PO Box 201001
Helena, Montana 59620-1001

Dear Mr. Martin:

This is in response to your letter dated May 7, 2008 in reference to Montana Department of Transportation's initiation of an Environmental Assessment (EA) for the proposed Boulder - South project (STPP 69-1(9)22; Control No. 2019) on State Primary Route 69 in Jefferson County, Montana. This proposed project would improve approximately 6.3 miles of Highway 69 just south of the town of Boulder. Your letter requested that the US Fish and Wildlife Service (Service) be a cooperating agency in the preparation of the EA. Your letter also requested information from the Service regarding threatened or endangered species in the vicinity of the proposed project area, or any information relative to Service lands adjacent to this area. The Service's Montana Field Office received your letter on May 12, 2008.

As correctly identified in your letter, the only federally-listed threatened or endangered species that may occur in the vicinity of the project area is the threatened Ute ladies'-tresses orchid (*Spiranthes diluvialis*). No species that have been proposed for listing or that are candidates for listing under the Act are likely to be present in the project area. No critical habitat has been designated for any listed species within the project area. If it is determined that the proposed project "is likely to adversely affect" any listed species, formal consultation should be initiated with this office. If it is concluded that the project "is not likely to adversely affect" listed species, the Service should be asked to review the assessment and concur with the determination of no adverse effect.

The Service agrees to be a cooperating agency for this project. As such, we will review and respond to documents required for compliance with the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.), the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), and other applicable laws.

We are not aware of any Service-owned or administered lands that may occur near, or be impacted by, the proposed project subject to Section 4(f) of the 1966 Department of Transportation Act (49 U.S.C. 303).

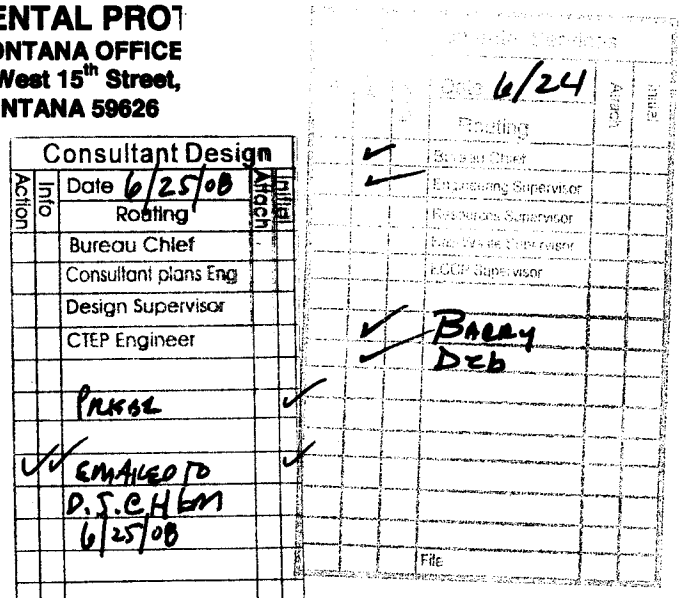
Given its location, it seems likely that construction activities associated with this proposed project could impact wetlands or other waters of the United States. If so, a Section 404 permit may be required from the Corps of Engineers (Corps). In that event, depending on permit type and other factors, the Service may be required to review permit applications and will recommend any protection or mitigation measures to the Corps as may appear reasonable based on the information available at that time.

We look forward to working with you on this project. If you have questions regarding this letter, please contact Scott Jackson at the address above or by phone at (406) 449-5225, extension 201.

Sincerely,

for R. Mark Wilson
Field Supervisor

UNITED STATES ENVIRONMENTAL PRO
REGION 8, MONTANA OFFICE
FEDERAL BUILDING, 10 West 15th Street,
HELENA, MONTANA 59626



Ref: 8MO

June 19, 2008

Mr. Tom Martin, P.E.
Environmental Services Bureau Chief
Montana Dept. of Transportation
2701 Prospect Avenue, P.O. Box 202001
Helena, MT 59620-1001

Re: MDT Project No. STPP 69-1(9)22; MDT Control No. 2019; Boulder–South Project

Dear Mr. Martin:

The Environmental Protection Agency (EPA) Region VIII Montana Office received your invitation to become a cooperating or participating agency on the above referenced Boulder – South highway project on Montana Primary Route 69, in Jefferson County, south of Boulder, Montana.

The EPA is interested in providing meaningful input on environmental issues of concern for this project, and in reviewing the draft EA. We are particularly interested in helping to ensure protection of water quality, wetlands and riparian areas, fisheries, and wildlife. The Agency, however, has resource limitations and other program commitments which will have to limit the degree and extent of EPA's participation in the EA preparation process. These resource constraints and other program commitments make it difficult for me to agree to full fledged participation as a cooperating agency during the preparation of the EA (see 40 CFR 1501.6(c)).

The EPA will agree, however, to be involved in the EA process as a participating agency, and expects to participate in project review to the extent that our resources, other program commitments, and schedules allow. Mr. Stephen Potts of my staff will provide EPA input for this project, including review the draft EA, in accordance with our responsibilities under the National Environmental Policy Act (NEPA) and Section 309 of the Clean Air Act. At this time Mr. Potts is planning to attend the July 30, 2008 meeting scheduled at MDT's Helena Offices for interagency discussion of this project.

If you have any questions please contact Mr. Stephen Potts in Missoula at (406) 329-3313, or in Helena at (406) 457-5022 , or via e-mail at potts.stephen@epa.gov. Thank you for your consideration.

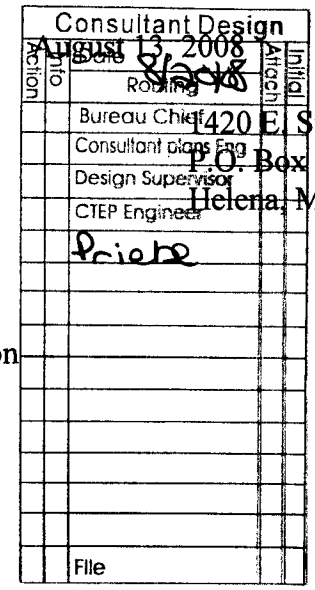
Sincerely,

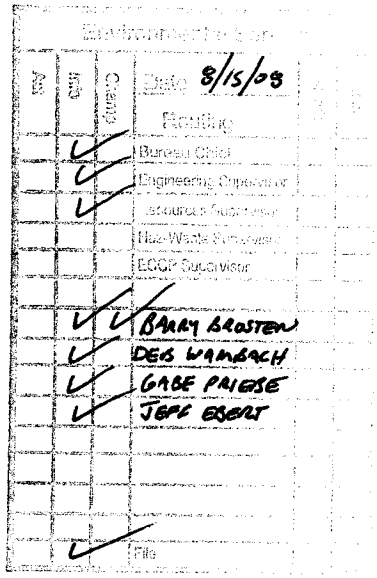
for John F. Wardell
Director
Montana Office

cc: Larry Svoboda/Julia Johnson, EPA, 8EPA-N, Denver
Jeff Ryan, MDEQ, Helena

Montana Fish, Wildlife & Parks

1420 E. Sixth Avenue
P.O. Box 200701
Helena, Montana 59620-0701





August 13, 2008

Tom S. Martin, Chief
Environmental Services Bureau
Montana Department of Transportation
2701 Prospect Avenue
P.O. Box 200701
Helena, Montana 59620-1001

Dear Mr. Martin:

Thank you for the opportunity to attend the July 30, 2008, meeting regarding Montana Department of Transportation's (MDT) Alternatives Analysis (AA) for the Boulder-South project. It is encouraging that MDT is initiating efforts to seek input from cooperating and regulatory agencies earlier in planning, NEPA and MEPA processes. Your introductory remarks that you were attempting to "break the old paradigm" of developing a preferred plan with little or no involvement or input from other agencies sounded promising. However, is was discouraging thereafter to hear that MDT has prepared a document (the AA) that basically identifies a preferred plan, again without prior agency involvement in the alternatives formulation or review process. It is a step forward that MDT agreed to include a reference to environmental and social concerns within the project purpose and need statement and add an objectives section to the environmental document. It appears that the "paradigm", however, is not and will not be broken until MDT initiates a program that seeks and involves active participation from other agencies prior to identification, evaluation and selection of alternatives.

Fish, Wildlife and Parks (FWP) does not concur at this time that an alternative alignment or other means of improving safety or reducing hazards to the public do not exist beyond that presented in the AA. There are likely other viable alternatives that would result in less damage to aquatic and riparian resources than the identified preferred plan, while minimizing hazards and improving safety. Some potentially viable alternatives were identified by the agencies present at the meeting.

We remain encouraged by MDT's intent to seek early coordination and agency input. We believe that with early agency involvement, a preferred plan can be developed that protects and/or enhances aquatic and associated riparian resources as well as improves safety for the general public and at the same time meet regulatory requirement.

Thank you again for the opportunity to discuss the AA. We look forward to coordinating with MDT on the Boulder-South project and improve general communication and cooperation between our agencies.

If you have any questions on these comments, please contact me at 444-3175.

Sincerely,

dougmcdonald

Doug McDonald
Stream Protection Coordinator
Habitat Protection Bureau/Fisheries

Copy: FWP Region 3 – Ron Spoon/Tom Carlsen
DEQ – Jeff Ryan/Mark Kelley
FHWA – Carl James
EPA – Steve Potts
USFWS – Scott Jackson
USACE – Deborah Blank

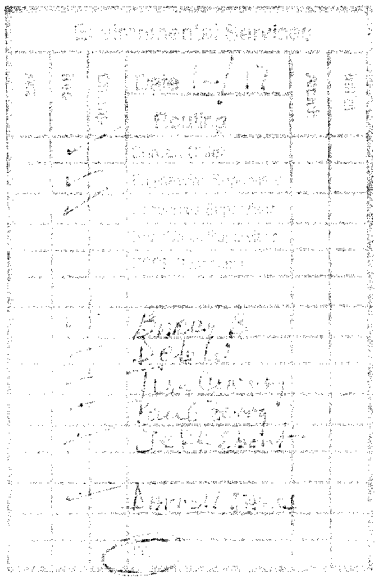
From: McDonald, Doug [mailto:dmcdonald@mt.gov]
Sent: Monday, October 06, 2008 3:35 PM
To: MDT Comments - Boulder EA
Cc: James, Darryl; 'mt.gov'; 'Allan.E.Steinle@usace.army.mil'; 'Potts.Steven@epamail.epa.gov'; 'scott_jackson@fws.gov'
Subject: Comment on Boulder South EA

Hello Darryl - a comment on the Boulder South project - after a site visit i believe there are notably less wetland impacts associated with the alternative alignment than stated in the EA; there are virtually no wetlands located on the south end of the alternative route that would be impacted and very few acres of Category II-IV wetlands at the upper end; the potential wetland impacts associated with the alternative route should be in the 3-4 acre category rather than the 30 or so as stated; the EA should also note that the alternative along the existing route could also result in the loss of several thousand trees/shrubs that now border the route and secondary impacts to improving the existing road could result in additional adverse impacts to wetlands and aquatic resources via modification of existing hydrology. Thankx Darryl !

Montana Department of
ENVIRONMENTAL QUALITY

P.O. Box 200901 • Helena, MT 59620-0901 •

Brian Schweitzer, Governor



December 16, 2008

Tom Martin, P.E.
Environmental Services Bureau Chief
MDT Environmental Services
Montana Department of Transportation
2701 Prospect Avenue
P.O. Box 201001
Helena, MT 59620-1001

Dear Mr. Martin:

The Department of Environmental Quality (DEQ) appreciates being a cooperating agency with the Montana Department of Transportation (MDT) in its environmental assessment (EA) of the proposed Boulder-South Highway Project, located south of Boulder, MT, in Jefferson County. This letter is in response to letters Judy Hanson, DEQ Permitting and Compliance Division Administrator received October 23, 2008, relative to MDT requesting DEQ to review the project Alternatives Analysis (AA), and a November 12, 2008 MDT request for DEQ to review the project's Draft Biological Resources Report (BRR).

DEQ's review of the BRR concludes it is a reasonably thorough analysis of the biological resources and impacts associated with reconstruction of only the roadway along the existing highway alignment; however, that leads to DEQ's principle concern with this AA.

The AA concludes, and as stated in the previous MDT October 23, 2008, correspondence to Judy Hanson:

> "Through that analysis, it was determined that the relatively small differences in impacts coupled with substantial differences in cumulative effects, right-of-way acquisition, maintenance requirements, and cost did not warrant further exploration of the proposed alternate alignment in the corridor, and that reconstruction/rehabilitation of the existing alignment should be carried forward in the NEPA process."

DEQ does not support this office level environmental inventory, these preliminary route comparison metrics, or the proposed route conclusions from this exercise. Recent, multi-

agency site visits, by DEQ, Montana Department of Fish, Wildlife and Parks (FWP), and the Army Corps of Engineers, of both AA alignments have resulted in virtual unanimous agency consensus, that at a minimum, the potential environmental impacts associated with both alignments are not "relatively small differences." The other factors in the alternatives analysis, such as cost, maintenance, and right-of-way acquisition, may also be open to question and appear to notably tilt towards the reconstruction/rehabilitation of the existing alignment alternative.

Having stated that, DEQ wants to make it perfectly clear that it is not supporting or promoting selection of either alternative. DEQ is suggesting the current alternatives analysis needs to be revisited. Since the current review process/analysis is serving as a pilot project of SAFETEA-LU, and has been noted as an opportunity to suggest alternatives analysis methodologies, DEQ is asking MDT to consider a different approach based in MDT's Planning Division's routing analysis processes.

Recent meetings at MDT sponsored by the MDT Planning Division with DEQ and multiple agencies, on the Sidney Bypass Study, and prior to that, the Great Falls South Arterial Study supported a very productive early resource agency assessment and input method. The process used on these two projects appears to negate many potential biases in alternatives analysis. In particular, the application of the new Quantum software system by MDT's Planning Division to evaluate alternative routes would seem highly suited for the Boulder-South Project routing alternatives analysis.

DEQ believes, if MDT /Federal Highway Administration and the resource agencies are truly interested in moving beyond the old "paradigm" of premature transportation project decisions followed by ongoing project revisions/conflicts in response to permitting concerns, we strongly need to consider a change in direction for the Boulder South Project to use this more productive route analysis approach. Again, thank you for the opportunity be a cooperating agency for this project's environmental review. DEQ looks forward to discussing the issues raised in this letter and other pertinent issues at the up-coming December 17, 2008, meeting at MDT.

Sincerely,

Tom Ellerhoff
Science Program Manager

cc: J. Ryan
M. Kelley
R. Ray
J. Hanson
J. Chambers
D. McDonald, FWP
S. Potts, EPA

A. Steinle, COE
S. Jackson, USFWS

-----Original Message-----
From: Blank, Deborah L NWO [mailto:Deborah.L.Blank@usace.army.mil]
Sent: Wednesday, December 17, 2008 4:28 PM
To: Nicolai, Sarah; scott_jackson@fws.gov; tlythgoe@jeffco.mt.gov; djudge@fs.fed.us; Carlsen, Tom; Carlsen, Tom; McDonald, Doug; Spoon, Ron; Kelley, Mark; Ryan, Jeff; Kelly_Acree@blm.gov; Mike_Wyatt@blm.gov; potts.stephen@epa.gov
Cc: Priebe, Gabe; Brosten, Barry; Bruner, Heidy; Martin, Tom; Wambach, Deborah; Djames@gallatinpublicaffairs.com
Subject: RE: Boulder - South Environmental Assessment - Second Agency Coordination Meeting; MDT Control Number 2019

I am sorry I was not able to make the meeting this morning. I would like a copy of the meeting notes. I heard there was a response requested from the Agencies by December 19, but I am not finding where that request is and what it was for?

As a reminder, as you go forward on this project, the CWA 404 (b)(1) analysis must determine the least damaging practicable alternative based on cost, logistics and technology. The road on the other side of the river and improving HWY 399 to Whitehall appear to be less damaging to Waters of the US, so they, as a minimum, need to be analyzed under the 404(b)(1) alternatives analysis (more specific than an EA level analysis) according to cost, logistics and technology.

Thank you,

Deborah Blank
Helena Regulatory Office
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Helena, MT 59620
(406)441-1375
(406)441-1380 (fax)
Helena Regulatory Web Site
https://www.nwo.usace.army.mil/html/od-rmt/mthome.htm

12/22

UNITED STA ECTION AGENCY

FED Suite 3200

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ENVIRONMENTAL

✓ Barry
Deb
Tim Conway
Paul Ferry
Jeff Ebert
Darrel James
File

Consultant Design

Info Action	Routing	Date 12/23/08	Attach	Initial
	Bureau Chief			
	Consultant plans engr			
	Design Supervisor			
	CTEP Engineer			
	Priebe			
	File			

Ref: 8MO

December 18, 2008

Mr. Tom Martin, P.E.
Environmental Services Bureau Chief
Montana Dept. of Transportation
2701 Prospect Avenue, P.O. Box 202001
Helena, MT 59620-1001

Re: MDT Project No. STPP 69-1(9)22; MDT Control No. 2019; Boulder–South Project

Dear Mr. Martin:

The Environmental Protection Agency (EPA) Region VIII Montana Office reviewed a copy of the Draft Biological Resources Report (BRR) for the above referenced Boulder–South highway improvement project on Montana Primary Route 69, in Jefferson County, south of Boulder, Montana. We are enclosing some preliminary comments (see comments enclosed). We are also sharing some perspectives regarding this project based on our review of the draft BRR, Alternatives Analysis (dated September 2006), and correspondence received on the project.

EPA supports efforts of the Montana Dept. of Transportation (MDT) to improve safety for travelers on Montana Highway 69, although we also believe it is important to mitigate adverse environmental effects and address public concerns as much as possible. We are concerned about potential adverse impacts that could occur to the Boulder River and wetlands and other sensitive aquatic and terrestrial habitats that are in close proximity to the existing road. Road reconstruction, widening, straightening, and other improvements have potential to result in significant adverse effects to the river, wetlands, and other sensitive habitats depending on the extent of road widening or straightening that may be proposed.

Review of the public meeting transcripts and comments that are included in the appendices of the Alternatives Analysis Report (AA, dated September 2006) show that many members of the public in the project area questioned the need for the project, and/or thought only minor improvements needed to be made to the highway. For example, among the public comments shown in the AA appendices were:

-"I am in favor of no build option"

-"don't spend $17 million for a $2 problem-build pullouts for highway patrolman"

- "guard rails, signs on corners, enforce speed limits"

- "concerned about building a new road when the existing road is more than adequate"

- "no build alternative w/ways to improve safety w/o change"

- "open weigh station"

Many public comments identified concerns about high speeds and commercial truck traffic. For example,

-"safety issues are almost always because of trucks and wildlife on the road"

- "will the State do anything to slow down trucks?"

-"ban trucks-lower speed limit-enforce speed limit"

Some were concerned that highway improvements would encourage more traffic, more trucks, and higher speeds. For example,

-"concerned about truck speed and increased traffic due to improved road"

-"proposals to widen the road are going to have the unintended consequence of making safety worse"

-"plans for widening or a route change of the highway is an intrusion to a Montana way of life"

Many were concerned about impacts to wetlands, wildlife, water quality and scenery. For example,

-"why should wildlife, wetlands, water quality be negatively impacted to encourage traffic and international trucking?"

-"trees and foliage in the Fall are spectacular, I don't want to see the trees, foliage, and vegetation stripped out of the area to make a huge expanse of pavement"

EPA shares many of the public concerns in regard to potential impacts to water quality, wetlands, vegetation, and wildlife that could occur in association with widening and straightening of Highway 69. We believe the public concerns about impacts to these resources as well as concerns about excessive speed should be fully considered as project purpose and need and alternatives are further developed and evaluated. We recommend that careful evaluation of the purpose and need for the project and proposed alternatives take place in light of the extent of potential environmental impacts that could result from road widening and straightening in this sensitive location.

The public meeting transcript in the AA indicates that the Transportation Commission can set speed zones in certain areas, and notes that the Commission often does this on highway approaches to Towns. Given the sensitive location of Highway 69 adjacent to the Boulder River and in close proximity to many wetlands, we believe innovative thinking is needed in regard to project planning. We recommend that the MDT consider incorporating the lowering of speed limits on this 5.7 mile length of road, along with pullouts that facilitate speed limit enforcement, and other potential road improvement activities (e.g., improved road signs, rumble strips, guard rails, opened weigh stations, improved bridges and culverts, etc.). We believe adjustment of speed limits in association with other road improvement activities should be considered among the practicable alternatives that are available to address safety issues and public concerns, mitigate environmental impacts, and reduce project costs.

We also want to take this opportunity to note that the letter from MDT regarding "Agency Involvement Opportunities and Coordination Plan," sent to EPA, dated October 23, 2008, stated that evaluation of the alternate alignment east of the Boulder River was not going to be carried forward and evaluated further during NEPA analysis. The letter stated that the reasoning for dropping further analysis of the alternate alignment was that it had been determined that there were relatively small differences in impacts coupled with substantial differences in cumulative effects, right-of-way acquisition, maintenance requirements, and costs.

While it appears to us, based on the preliminary information presented in the AA report, that there are significant drawbacks to the alternate alignment for Highway 69 east of the Boulder River, we did not see adequate environmental analyses to conclude that there are "relatively small differences in impacts" between roadway improvements along the existing alignment and the alternate alignment. It did not appear to us that the AA Report provided an equivalent level of environmental analysis for the existing and alternate alignment alternatives to conclude that there are relatively small differences in environmental impacts between the two alternatives.

For example, the AA estimated that approximately 45 acres of wetland impacts may occur from highway improvements along the existing alignment, while the level of wetland impacts occurring from road construction on the alternate alignment was not quantified. The AA estimated that approximately 30 acres of wetlands may be present along the alternate alignment, but the amount of these wetlands potentially impacted was not clearly stated. It would appear that many of the 30 acres of wetlands along the alternate alignment could likely be avoided, which would result in significantly less wetland impacts with the alternate alignment. It does not appear, therefore, that small differences in impacts between the two alternatives has been shown.

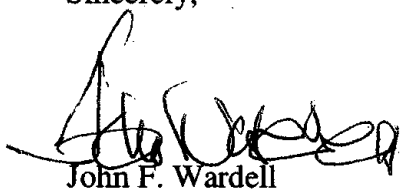
However, the AA Report does indicate that there are significant cost differences between the two alignments (estimated at $9.2 million cost difference in September 2006, and this figure may be even higher in current dollars), and there would be two new bridge crossings of the Boulder River, with additional (unquantified) impacts with the alternate alignment. The AA report also indicates significant opposition by the public and local officials to the alternate alignment, including the possible need for condemnation of land to obtain highway right-of-way. An amount of 100 acres of new right-of-way acquisition may be needed for the alternate alignment. It is also mentioned that two paved roads on either side of the Boulder River, which would occur if the alternate alignment was constructed and the existing road was not removed,

would result in increased adverse effects to wildlife migration, and likely increased road kill, and disrupted agricultural operations. Maintenance requirements would also increase with the need to maintain two paved roads.

We believe these factors may provide more appropriate and compelling reasons to justify dismissal of detailed analysis of a new alignment east of the Boulder River, and it would be more appropriate to discuss these factors in greater detail in regard to consideration and/or dismissal of alternatives. We recommend that an accurate and comprehensive description of the reasoning for consideration or dismissal of any alternatives be provided.

Finally, we thank you for the opportunity to review and comment on the AA Report and draft BRR, as well as to participate in the agency coordination meetings held on July 30, 2008 and December 17, 2008. If you have any questions regarding our comments please contact Mr. Stephen Potts of my staff in Missoula at (406) 329-3313, or in Helena at (406) 457-5022 , or via e-mail at potts.stephen@epa.gov. Thank you for your consideration.

Sincerely,



John F. Wardell
Director
Montana Office

cc: Larry Svoboda/Julia Johnson, EPA, 8EPA-N, Denver
Jeff Ryan/Mark Kelley, MDEQ, Helena
Doug McDonald, MDFWP, Helena
Scott Jackson, USFWS, Helena
Deborah Blank, COE, Helena

Preliminary EPA Comments on Draft Biological Resources Report, Boulder-South Highway 69 Project

Brief Project Overview:

The MDT proposes to reconstruct and widen a portion of Montana Highway 69 south of the Town of Boulder, Montana from MP 31.8 to MP 37.5 (5.7 miles), to correct several horizontal and vertical curve deficiencies with the existing road. A bridge over the Little Boulder River would need to be reconstructed. The wetland survey delineated 24 wetlands throughout the project area, of which 15 were considered to be jurisdictional wetlands. The project area includes 150 feet on both sides of the existing road. The highway bisects an extensive riparian/wetland complex as it enters the valley bottom, and follows the Boulder River to the north end of the project.

Comments:

1) It would be helpful if the high-use wildlife crossing area noted at MP33 on page 15 were shown on Figure 1 (page 18) showing road kill locations. It would also be helpful if Browns Gulch, which is mentioned on page 15 (bottom of page), were also shown on Figure 1. It is also suggested that the Appendix E aerial photos, which include wildlife collision locations, be referenced in the report narrative where animal-vehicle collisions are discussed (page 16), so the reader of the report can refer to these photos when reading the narrative.

2) It is interesting that the tables showing animal-vehicle collisions and road kills by location on pages 16 and 17 (Table 7 and two Table 8's (??)) show the highest animal mortalities near MP 34 (36%) and MP 37 (43%), while the narrative says that the high use wildlife crossing is at MP 33. The discussion on page 19 provides a potential explanation in regard to why there isn't also a higher mortality rate near the high use wildlife crossing at MP33 (i.e., it is explained that animals hit by cars may get into the vegetation and out of sight of the road before expiring, thus reducing road kill evidence).

   There is a reference to an "apparently successful crossing zone" at MP 33 (page 19), which is somewhat confusing when considered in relation to the explanation that MP 33 may not have a high mortality rate due to the possibility of animals expiring out of sight in nearby vegetation, thus reducing road kill evidence. If this explanation is correct MP33 may not be as "successful a crossing zone" as suggested on page 19.

3) It is stated that it would be difficult to integrate bridge structures or large culverts into the road design at MP 33 due to the high water table, and it is suggested that leaving the vegetation in this area as intact as possible on both sides of the highway may help to maintain the apparently successful crossing zone (page 19). While there may be difficulties associated with using large culverts and bridge structures to promote safer wildlife crossings and improved highway safety, it would appear to be possible. We very much support the concept of providing culverts for small mammal crossings, and larger culverts and bridge structures that would allow for other wildlife crossings, and reduce vehicle-animal collision accidents. We also recommend consideration of using fencing to

deter wildlife crossing at areas with high mortality rates, and to direct wildlife to safer crossing areas wherever possible. The BRR recommends that the Little Boulder River bridge be expanded to act as an animal passage structure (page 30), and we fully support this recommendation.

4) We also agree with the recommendation included on page 26 that a river geomorphologist specializing in Rocky Mountain streams should be consulted during engineering design in regard to avoiding and minimizing impacts to the Boulder River channel. In addition, we support shifting the roadway alignment away from the river and from wetlands to reduce encroachments upon aquatic areas as much as possible.

5) We recommend expanding the discussion regarding the bridge reconstruction over the Little Boulder River (page 30) to state that the bridge should adequately span the river channel, floodway and riparian area to pass flood flows, with minimal river channel, floodplain and riparian encroachment. For that matter, all road stream crossings should pass flood flows, flood borne debris, sediment, and bedload, with minimal creation of scour or erosive eddies, sedimentation, gravel deposition, and backwater, with minimal river channel, floodplain and riparian encroachment. As noted above, we very much support the concept of providing for animal passage with an expanded Little Boulder River bridge span design.

6) We generally support the recommended conservation measures shown on pages 8, 22, 30, 36, 38, 42, 45, 47, and 65, although we have questions regarding the extent of highway improvements and widening that may be proposed, since even with the recommended conservation measures significant impacts to aquatic and other resources may occur. We believe careful evaluation of the purpose and need for the project and proposed improvements should take place, with improvements evaluated and weighed vs. the extent of potential environmental impacts that could result from such improvements. Review of the public comments presented in the Alternative Analysis (AA) indicate that many members of the public believe only minor roadway improvements are needed, with the greatest support shown for reduced speed limits and enforcement to improve highway safety. There was also great concern over the amount of commercial truck traffic. We believe these public concerns should be fully considered, with speed limit lowering incorporated into development of alternatives. This would likely reduce environmental impacts and project costs and better realize safety benefits.

7) The draft Biological Resources report says that only 15 of the 24 wetlands along the existing alignment are jurisdictional, and that only 84 acres of the total 93 acres of wetlands jurisdictional (page 50). The AA report had indicated that 19 of the 24 wetlands along the existing alignment were jurisdictional; and that the total delineated acreage along the existing alignment was 115 acres, with 104 acres of jurisdictional wetlands (AA pages 9, 10). The AA report also said an additional 2 wetlands may be jurisdictional because of a "strong subsurface connection with the Boulder River" (wetlands 18 and 19 in the AA report). If wetlands 18 and 19 were considered jurisdictional that would add 6 acres, bringing the total jurisdictional wetlands along the existing alignment to 110 acres.

The draft BRR, therefore, reports a reduced amount of wetland acreage along the existing alignment from 115 acres (104-110 jurisdictional) to 93 acres (84 jurisdictional), and reduces the estimated level of wetland impacts that had been identified as 45 acres in the AA down to 20 acres (page 63).

We note that revisions to Clean Water Act jurisdictional guidance were recently released by the Corps of Engineers and EPA on December 2, 2008 (see copy enclosed). We recommend that this recent jurisdictional guidance be considered in regard to determinations of the acreage of jurisdictional wetlands along the alignments in the Environmental Assessment. The revised guidance clarifies, consistent with the regulatory definition, that a wetland is adjacent if it has an unbroken hydrologic connection to jurisdictional waters, or is separated from those waters by a berm or similar feature, or if it is in reasonably close proximity to a jurisdictional water. It may be that the "strong subsurface connection with the Boulder River" (as stated in the AA Report) of some wetlands near the Boulder River could increase the acreage of jurisdictional wetlands.

Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States

This memorandum[1] provides guidance to EPA regions and U.S. Army Corps of Engineers ["Corps"] districts implementing the Supreme Court's decision in the consolidated cases Rapanos v. United States and Carabell v. United States[2] (herein referred to simply as "Rapanos") which address the jurisdiction over waters of the United States under the Clean Water Act.[3] The chart below summarizes the key points contained in this memorandum. This reference tool is not a substitute for the more complete discussion of issues and guidance furnished throughout the memorandum.

Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- **Traditional navigable waters**
- **Wetlands adjacent to traditional navigable waters**
- **Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)**
- **Wetlands that directly abut such tributaries**

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- **Non-navigable tributaries that are not relatively permanent**
- **Wetlands adjacent to non-navigable tributaries that are not relatively permanent**
- **Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary**

The agencies generally will not assert jurisdiction over the following features:

- **Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)**
- **Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water**

The agencies will apply the significant nexus standard as follows:

- **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**
- **Significant nexus includes consideration of hydrologic and ecologic factors**

[1] This guidance incorporates revisions to the EPA/Army Memorandum originally issued on June 6, 2007, after careful consideration of public comments received and based on the agencies' experience in implementing the *Rapanos* decision.

[2] 126 S. Ct. 2208 (2006).

[3] 33 U.S.C. §1251 et seq.

Background

Congress enacted the Clean Water Act ("CWA" or "the Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[4] One of the mechanisms adopted by Congress to achieve that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in compliance with other specified sections of the Act.[5] In most cases, this means compliance with a permit issued pursuant to CWA §402 or §404. The Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source[,]"[6] and provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas[,]." [7]

In Rapanos, the Supreme Court addressed where the Federal government can apply the Clean Water Act, specifically by determining whether a wetland or tributary is a "water of the United States." The justices issued five separate opinions in Rapanos (one plurality opinion, two concurring opinions, and two dissenting opinions), with no single opinion commanding a majority of the Court.

The Rapanos Decision

Four justices, in a plurality opinion authored by Justice Scalia, rejected the argument that the term "waters of the United States" is limited to only those waters that are navigable in the traditional sense and their abutting wetlands.[8] However, the plurality concluded 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.[9]

Justice Kennedy did not join the plurality's opinion but instead authored an opinion concurring in the judgment vacating and remanding the cases to the Sixth Circuit Court of Appeals.[10] Justice Kennedy agreed with the plurality that the statutory term "waters of the United States" extends beyond water bodies that are traditionally considered navigable.[11] Justice Kennedy, however, found the plurality's interpretation of the scope of the CWA to be "inconsistent with the Act's text, structure, and purpose[,]" and he instead presented a different standard for evaluating CWA jurisdiction over wetlands and other water bodies.[12] Justice Kennedy concluded that wetlands are "waters

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[4] 33 U.S.C. § 1251(a).
[5] 33 U.S.C. § 1311(a), §1362(12)(A).
[6] 33 U.S.C. § 1362(12)(A)
[7] 33 U.S.C. § 1362(7). See also 33 C.F.R. § 328.3(a) and 40 C.F.R. § 230.3(s).
[8] Id. at 2220.
[9] Id. at 2225-27.
[10] Id. at 2236-52. While Justice Kennedy concurred in the Court's decision to vacate and remand the cases to the Sixth Circuit, his basis for remand was limited to the question of "whether the specific wetlands at issue possess a significant nexus with navigable waters." 126 S. Ct. at 2252. In contrast, the plurality remanded the cases to determine both "whether the ditches and drains near each wetland are 'waters,'" and "whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection...." Id. at 2235.
[11] Id. at 2241.
[12] Id. at 2246.

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.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[13]

Four justices, in a dissenting opinion authored by Justice Stevens, concluded that EPA's and the Corps' interpretation of "waters of the United States" was a reasonable interpretation of the Clean Water Act.[14]

When there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices.[15] Thus, regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied.[16] Since Rapanos, the United States has filed pleadings in a number of cases interpreting the decision in this manner.

The agencies are issuing this memorandum in recognition of the fact that EPA regions and Corps districts need guidance to ensure that jurisdictional determinations, permitting actions, and other relevant actions are consistent with the decision and supported by the administrative record. Therefore, the agencies have evaluated the Rapanos opinions to identify those waters that are subject to CWA jurisdiction under the reasoning of a majority of the justices. This approach is appropriate for a guidance document. The agencies will continue to monitor implementation of the Rapanos decision in the field and recognize that further consideration of jurisdictional issues, including clarification and definition of key terminology, may be appropriate in the future, either through issuance of additional guidance or through rulemaking.

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[13] Id. at 2248. Chief Justice Roberts wrote a separate concurring opinion explaining his agreement with the plurality. See 126 S. Ct. at 2235-36.

[14] Id. at 2252-65. Justice Breyer wrote a separate dissenting opinion explaining his agreement with Justice Stevens' dissent. See 126 S. Ct. at 2266.

[15] See Marks v. United States, 430 U.S. 188, 193-94 (1977); Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test ... that lower courts should apply," under Marks, as the holding of the Court); cf. League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); Alexander v. Sandoval, 532 U.S. 275, 281-282 (2001) (same).

[16] 126 S. Ct. at 2265 (Stevens, J., dissenting) ("Given that all four justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases – and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied – on remand each of the judgments should be reinstated if *either* of those tests is met.") (emphasis in original). The agencies recognize that the Eleventh Circuit, in United States v. McWane, Inc., et al., 505 F.3d 1208 (11th Cir. 2007), has concluded that the Kennedy standard is the sole method of determining CWA jurisdiction in that Circuit. The Supreme Court denied the government's petition for a writ of *certiorari* on December 1, 2008.

Agency Guidance[17]

To ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions are consistent with the Rapanos decision, the agencies in this guidance address which waters are subject to CWA § 404 jurisdiction.[18] Specifically, this guidance identifies those waters over which the agencies will assert jurisdiction categorically and on a case-by-case basis, based on the reasoning of the Rapanos opinions.[19] EPA and the Corps will continually assess and review the application of this guidance to ensure nationwide consistency, reliability, and predictability in our administration of the statute.

1. Traditional Navigable Waters (i.e., "(a)(1) Waters") and Their Adjacent Wetlands

Key Points

- **The agencies will assert jurisdiction over traditional navigable waters, which includes all the waters described in 33 C.F.R. § 328.3(a)(1), and 40 C.F.R. § 230.3 (s)(1).**
- **The agencies will assert jurisdiction over wetlands adjacent to traditional navigable waters, including over adjacent wetlands that do not have a continuous surface connection to traditional navigable waters.**

EPA and the Corps will continue to assert jurisdiction over "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or

[17] The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It 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. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.

[18] This guidance focuses only on those provisions of the agencies' regulations at issue in Rapanos -- 33 C.F.R. §§ 328.3(a)(1), (a)(5), and (a)(7); 40 C.F.R. §§ 230.3(s)(1), (s)(5), and (s)(7). This guidance does not address or affect other subparts of the agencies' regulations, or response authorities, relevant to the scope of jurisdiction under the CWA. In addition, because this guidance is issued by both the Corps and EPA, which jointly administer CWA § 404, it does not discuss other provisions of the CWA, including §§ 311 and 402, that differ in certain respects from § 404 but share the definition of "waters of the United States." Indeed, the plurality opinion in Rapanos noted that "... there is no reason to suppose that our construction today significantly affects the enforcement of §1342 ... The Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" (emphasis in original) 126 S. Ct. 2208, 2227. EPA is considering whether to provide additional guidance on these and other provisions of the CWA that may be affected by the Rapanos decision.

[19] In 2001, the Supreme Court held that use of "isolated" non-navigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. See Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). This guidance does not address SWANCC, nor does it affect the Joint Memorandum regarding that decision issued by the General Counsels of EPA and the Department of the Army on January 10, 2003. See 68 Fed. Reg. 1991, 1995 (Jan. 15, 2003).

foreign commerce, including all waters which are subject to the ebb and flow of the tide."[20] These waters are referred to in this guidance as traditional navigable waters.

The agencies will also continue to assert jurisdiction over wetlands "adjacent" to traditional navigable waters as defined in the agencies' regulations. Under EPA and Corps regulations and as used in this guidance, "adjacent" means "bordering, contiguous, or neighboring." Finding a continuous surface connection is not required to establish adjacency under this definition. The Rapanos decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are "waters of the United States."[21]

The regulations define "adjacent" as follows: "The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"[22] Under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. This hydrologic connection may be intermittent. Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based

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[20] 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1). The "(a)(1)" waters include all of the "navigable waters of the United States," defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka MN). For purposes of CWA jurisdiction and this guidance, waters will be considered traditional navigable waters if:

- They are subject to Section 9 or 10 of the Rivers and Harbors Act, or
- A federal court has determined that the water body is navigable-in-fact under federal law, or
- They are waters currently being used for commercial navigation, including commercial water-borne recreation (e.g., boat rentals, guided fishing trips, water ski tournaments, etc.), or
- They have historically been used for commercial navigation, including commercial water-borne recreation; or
- They are susceptible to being used in the future for commercial navigation, including commercial water-borne recreation. Susceptibility for future use may be determined by examining a number of factors, including the physical characteristics and capacity of the water (e.g., size, depth, and flow velocity, etc.) to be used in commercial navigation, including commercial recreational navigation, and the likelihood of future commercial navigation or commercial water-borne recreation. Evidence of future commercial navigation use, including commercial water-borne recreation (e.g., development plans, plans for water dependent events, etc.), must be clearly documented. Susceptibility to future commercial navigation, including commercial water-borne recreation, will not be supported when the evidence is insubstantial or speculative. Use of average flow statistics may not accurately represent streams with "flashy" flow characteristics. In such circumstances, daily gage data is more representative of flow characteristics.

[21] Id. at 2248 (Justice Kennedy, concurring) ("As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.").

[22] 33 C.F.R. § 328.3(c).

inference that such wetlands have an ecological interconnection with jurisdictional waters.[23] Because of the scientific basis for this inference, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case-specific demonstration of an ecologic interconnection. In the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial. For example, species, such as amphibians or anadramous and catadramous fish, move between such waters for spawning and their life stage requirements. Migratory species, however, shall not be used to support an ecologic interconnection. In assessing whether a wetland is reasonably close to a jurisdictional water, the proximity of the wetland (including all parts of a single wetland that has been divided by road crossings, ditches, berms, etc.) in question will be evaluated and shall not be evaluated together with other wetlands in the area.

2. Relatively Permanent Non-navigable Tributaries of Traditional Navigable Waters and Wetlands with a Continuous Surface Connection with Such Tributaries

Key Points

- **The agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).**
- **The agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection to such tributaries (e.g., they are not separated by uplands, a berm, dike, or similar feature.)**

A non-navigable tributary[24] of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries. Both the plurality opinion and the dissent would uphold CWA jurisdiction over non-navigable tributaries that are "relatively permanent" – waters that typically (e.g., except due to drought) flow year-round or waters that have a

[23] See e.g., United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985) ("...the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.").

[24] A tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water. Furthermore, a tributary, for the purposes of this guidance, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). The flow characteristics of a particular tributary generally will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream). However, for purposes of determining whether the tributary is relatively permanent, where data indicates the flow regime at the downstream limit is not representative of the entire tributary (as described above) (e.g., where data indicates the tributary is relatively permanent at its downstream limit but not for the majority of its length, or vice versa), the flow regime that best characterizes the entire tributary should be used. A primary factor in making this determination is the relative lengths of segments with differing flow regimes. It is reasonable for the agencies to treat the entire tributary in light of the Supreme Court's observation that the phrase "navigable waters" generally refers to "rivers, streams, and other hydrographic features." 126 S. Ct. at 2222 (Justice Scalia, quoting Riverside Bayview, 474 U.S. at 131). The entire reach of a stream is a reasonably identifiable hydrographic feature. The agencies will also use this characterization of tributary when applying the significant nexus standard under Section 3 of this guidance.

continuous flow at least seasonally (e.g., typically three months).[25] Justice Scalia emphasizes that relatively permanent waters do not include tributaries "whose flow is 'coming and going at intervals ... broken, fitful.'"[26] Therefore, "relatively permanent" waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard described below. The agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding.

In addition, the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding. As explained above, the plurality opinion and the dissent agree that such wetlands are jurisdictional.[27] The plurality opinion indicates that "continuous surface connection" is a "physical connection requirement."[28] Therefore, a continuous surface connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature).[29]

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[25] See 126 S. Ct. at 2221 n. 5 (Justice Scalia, plurality opinion) (explaining that "relatively permanent" does not necessarily exclude waters "that might dry up in extraordinary circumstances such as drought" or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months").

[26] Id. (internal citations omitted)

[27] Id. at 2226-27 (Justice Scalia, plurality opinion).

[28] Id. at 2232 n.13 (referring to "our physical-connection requirement" and later stating that Riverside Bayview does not reject "the physical-connection requirement") and 2234 ("Wetlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States.") (emphasis in original). See also 126 S. Ct. at 2230 ("adjacent" means "physically abutting") and 2229 (citing to Riverside Bayview as "confirm[ing] that the scope of ambiguity of 'the waters of the United States' is determined by a wetland's *physical connection* to covered waters...") (emphasis in original). A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary. 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2 (defining wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support ... a prevalence of vegetation typically adapted for life in saturated soil conditions").

[29] While all wetlands that meet the agencies' definitions are considered adjacent wetlands, only those adjacent wetlands that have a continuous surface connection because they directly abut the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature) are considered jurisdictional under the plurality standard.

3. Certain Adjacent Wetlands and Non-navigable Tributaries That Are Not Relatively Permanent

Key Points

- **The agencies will assert jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to a traditional navigable water.**
- **A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.**
- **"Similarly situated" wetlands include all wetlands adjacent to the same tributary.**
- **Significant nexus includes consideration of hydrologic factors including the following:**
  - **volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary**
  - **proximity to the traditional navigable water**
  - **size of the watershed**
  - **average annual rainfall**
  - **average annual winter snow pack**
- **Significant nexus also includes consideration of ecologic factors including the following:**
  - **potential of tributaries to carry pollutants and flood waters to traditional navigable waters**
  - **provision of aquatic habitat that supports a traditional navigable water**
  - **potential of wetlands to trap and filter pollutants or store flood waters**
  - **maintenance of water quality in traditional navigable waters**
- **The following geographic features generally are not jurisdictional waters:**
  - **swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow)**
  - **ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water**

The agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent,[30] (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike or similar feature).[31] As described below, the agencies will assess the flow characteristics and functions of the tributary itself, together with the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters.

[30] For simplicity, the term "tributary" when used alone in this section refers to non-navigable tributaries that are not relatively permanent.

[31] As described in Section 2 of this guidance, the agencies will assert jurisdiction, without the need for a significant nexus finding, over all wetlands that are both adjacent and have a continuous surface connection to relatively permanent tributaries. See pp. 6-7, supra.

The agencies' assertion of jurisdiction over non-navigable tributaries and adjacent wetlands that have a significant nexus to traditional navigable waters is supported by five justices. Justice Kennedy applied the significant nexus standard to the wetlands at issue in Rapanos and Carabell: "[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' 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.'"[32] While Justice Kennedy's opinion discusses the significant nexus standard primarily in the context of wetlands adjacent to non-navigable tributaries,[33] his opinion also addresses Clean Water Act jurisdiction over tributaries themselves. Justice Kennedy states that, based on the Supreme Court's decisions in Riverside Bayview and SWANCC, "the connection between a non-navigable water or wetland may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. ... Absent a significant nexus, jurisdiction under the Act is lacking."[34] Thus, Justice Kennedy would limit jurisdiction to those waters that have a significant nexus with traditional navigable waters, although his opinion focuses on the specific factors and functions the agencies should consider in evaluating significant nexus for adjacent wetlands, rather than for tributaries.

In considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters. The ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. The flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus result from the ecological inter-relationship between tributaries and their adjacent wetlands. For example, the duration, frequency, and volume of flow in a tributary, and subsequently the flow in downstream navigable waters, is directly affected by the presence of adjacent wetlands that hold floodwaters, intercept sheet flow from uplands, and then release waters to tributaries in a more even and constant manner. Wetlands may also help to maintain more consistent water temperature in tributaries, which is important for some aquatic species. Adjacent wetlands trap and hold pollutants that may otherwise reach tributaries (and downstream navigable waters) including sediments, chemicals, and other pollutants. Tributaries and their adjacent wetlands provide habitat (e.g., feeding, nesting, spawning, or rearing young) for many aquatic species that also live in traditional navigable waters.

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[32] Id. at 2248. When applying the significant nexus standard to tributaries and wetlands, it is important to apply it within the limits of jurisdiction articulated in SWANCC. Justice Kennedy cites SWANCC with approval and asserts that the significant nexus standard, rather than being articulated for the first time in Rapanos, was established in SWANCC. 126 S. Ct. at 2246 (describing SWANCC as "interpreting the Act to require a significant nexus with navigable waters"). It is clear, therefore, that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in SWANCC. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non-jurisdictional by SWANCC.

[33] 126 S. Ct. at 2247-50.

[34] Id. at 2241 (emphasis added).

When performing a significant nexus analysis,[35] the first step is to determine if the tributary has any adjacent wetlands. Where a tributary has no adjacent wetlands, the agencies will consider the flow characteristics and functions of only the tributary itself in determining whether such tributary has a significant effect on the chemical, physical and biological integrity of downstream traditional navigable waters. A tributary, as characterized in Section 2 above, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). For purposes of demonstrating a connection to traditional navigable waters, it is appropriate and reasonable to assess the flow characteristics of the tributary at the point at which water is in fact being contributed to a higher order tributary or to a traditional navigable water. If the tributary has adjacent wetlands, the significant nexus evaluation needs to recognize the ecological relationship between tributaries and their adjacent wetlands, and their closely linked role in protecting the chemical, physical, and biological integrity of downstream traditional navigable waters.

Therefore, the agencies will consider the flow and functions of the tributary together with the functions performed by all the wetlands adjacent to that tributary in evaluating whether a significant nexus is present. Similarly, where evaluating significant nexus for an adjacent wetland, the agencies will consider the flow characteristics and functions performed by the tributary to which the wetland is adjacent along with the functions performed by the wetland and all other wetlands adjacent to that tributary. This approach reflects the agencies' interpretation of Justice Kennedy's term "similarly situated" to include all wetlands adjacent to the same tributary. Where it is determined that a tributary and its adjacent wetlands collectively have a significant nexus with traditional navigable waters, the tributary and all of its adjacent wetlands are jurisdictional. Application of the significant nexus standard in this way is reasonable because of its strong scientific foundation – that is, the integral ecological relationship between a tributary and its adjacent wetlands. Interpreting the phrase "similarly situated" to include all wetlands adjacent to the same tributary is reasonable because such wetlands are physically located in a like manner (i.e., lying adjacent to the same tributary).

Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water. In addition to any available hydrologic information (e.g., gauge data, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.), the agencies may reasonably consider certain physical characteristics of the tributary to characterize its flow, and thus help to inform the determination of whether or not a significant nexus is present between the tributary and downstream traditional navigable waters. Physical indicators of flow may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks.[36] Other physical indicators of flow may include

[35] In discussing the significant nexus standard, Justice Kennedy stated: "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters' ..." 126 S. Ct. at 2248. Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters.

[36] See 33 C.F.R. § 328.3(e). The OHWM also serves to define the lateral limit of jurisdiction in a non-navigable tributary where there are no adjacent wetlands. See 33 C.F.R. § 328.4(c). While EPA regions

shelving, wracking, water staining, sediment sorting, and scour.[37] Consideration will also be given to certain relevant contextual factors that directly influence the hydrology of tributaries including the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions.

In addition, the agencies will consider other relevant factors, including the functions performed by the tributary together with the functions performed by any adjacent wetlands. One such factor is the extent to which the tributary and adjacent wetlands have the capacity to carry pollutants (e.g., petroleum wastes, toxic wastes, sediment) or flood waters to traditional navigable waters, or to reduce the amount of pollutants or flood waters that would otherwise enter traditional navigable waters.[38] The agencies will also evaluate ecological functions performed by the tributary and any adjacent wetlands which affect downstream traditional navigable waters, such as the capacity to transfer nutrients and organic carbon vital to support downstream foodwebs (e.g., macroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream), habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which the tributary and adjacent wetlands perform functions related to maintenance of downstream water quality such as sediment trapping.

After assessing the flow characteristics and functions of the tributary and its adjacent wetlands, the agencies will evaluate whether the tributary and its adjacent wetlands are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water. As the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a traditional navigable water.

Accordingly, Corps districts and EPA regions shall document in the administrative record the available information regarding whether a tributary and its adjacent wetlands have a significant nexus with a traditional navigable water, including the physical indicators of flow in a particular case and available information regarding the functions of the tributary and any adjacent wetlands. The agencies will explain their basis for concluding whether or not the tributary and its adjacent wetlands, when considered together, have a more than speculative or insubstantial effect on the chemical, physical, and biological integrity of a traditional navigable water.

Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States

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and Corps districts must exercise judgment to identify the OHWM on a case-by-case basis, the Corps' regulations identify the factors to be applied. These regulations have recently been further explained in Regulatory Guidance Letter (RGL) 05-05 (Dec. 7, 2005). The agencies will apply the regulations and the RGL and take other steps as needed to ensure that the OHWM identification factors are applied consistently nationwide.

[37] See Justice Kennedy's discussion of "physical characteristics," 126 S. Ct. at 2248-2249.

[38] See, generally, 126 S. Ct. at 2248-53; see also 126 S. Ct. at 2249 ("Just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries....") (citing to Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 524-25(1941)).

because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.[39] Even when not jurisdictional waters subject to CWA §404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e., "discernible, confined, and discrete conveyances"), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g., CWA §§ 311 and 402).[40]

Certain ephemeral waters in the arid west are distinguishable from the geographic features described above where such ephemeral waters are tributaries and they have a significant nexus to downstream traditional navigable waters. For example, in some cases these ephemeral tributaries may serve as a transitional area between the upland environment and the traditional navigable waters. During and following precipitation events, ephemeral tributaries collect and transport water and sometimes sediment from the upper reaches of the landscape downstream to the traditional navigable waters. These ephemeral tributaries may provide habitat for wildlife and aquatic organisms in downstream traditional navigable waters. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters.

Documentation

As described above, the agencies will assert CWA jurisdiction over the following waters without the legal obligation to make a significant nexus determination: traditional navigable waters and wetlands adjacent thereto, non-navigable tributaries that are relatively permanent waters, and wetlands with a continuous surface connection with such tributaries. The agencies will also decide CWA jurisdiction over other non-navigable tributaries and over other wetlands adjacent to non-navigable tributaries based on a fact-specific analysis to determine whether they have a significant nexus with traditional navigable waters. For purposes of CWA §404 determinations by the Corps, the Corps and EPA are developing a revised form to be used by field regulators for documenting the assertion or declination of CWA jurisdiction.

Corps districts and EPA regions will ensure that the information in the record adequately supports any jurisdictional determination. The record shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination. The Corps districts and EPA regions will also demonstrate and document in the record that a particular water either fits within a class identified above as not requiring a significant nexus determination, or that the water has a

[39] See 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).
[40] 33 U.S.C. § 1362(14).

significant nexus with a traditional navigable water. As a matter of policy, Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

All pertinent documentation and analyses for a given jurisdictional determination (including the revised form) shall be adequately reflected in the record and clearly demonstrate the basis for asserting or declining CWA jurisdiction.[41] Maps, aerial photography, soil surveys, watershed studies, local development plans, literature citations, and references from studies pertinent to the parameters being reviewed are examples of information that will assist staff in completing accurate jurisdictional determinations. The level of documentation may vary among projects. For example, jurisdictional determinations for complex projects may require additional documentation by the project manager.

Benjamin H. Grumbles
Assistant Administrator for Water
U.S. Environmental Protection Agency

John Paul Woodley, Jr.
Assistant Secretary of the Army
(Civil Works)
Department of the Army

[41] For jurisdictional determinations and permitting decisions, such information shall be posted on the appropriate Corps website for public and interagency information.

Questions and Answers
Regarding the Revised *Rapanos & Carabell* Guidance
December 2, 2008

1. What changes have been made to the Rapanos Guidance?

EPA and the Corps have revised the *Rapanos* Guidance in consideration of public comments received and consistent with our experience implementing the guidance over the past 18 months. Specifically, the revised guidance:

1. Clarifies how to determine the reach of the "Traditional Navigable Waters (TNWs),"
2. Clarifies the regulatory term "adjacent wetlands," and;
3. Refines the concept of "relevant reach."

In addition, the Corps has issued a Regulatory Guidance Letter (RGL) 08-02 responding to public comments concerned with processing delays.

The June 2007 guidance discussed TNWs, as did Appendix D of the Instructional Manual that the agencies issued concurrently. Several public comments indicated that the concept of TNWs should be discussed further. The revised guidance clarifies, consistent with Appendix D, that TNWs are broader than Rivers and Harbors Act section 10 waters, and also include waters that have been determined to be navigable-in-fact by the courts, are currently being used or have historically been used for commercial navigation, or for which evidence showing susceptibility to future commercial navigation is more than insubstantial or speculative.

The June 2007 guidance also discussed the circumstances under which adjacent wetlands were jurisdictional after *Rapanos*, but did not discuss the meaning of adjacency other than to reference the regulatory definition as "bordering, contiguous, or neighboring." The revised guidance clarifies, consistent with the regulatory definition, that a wetland is adjacent if it has an unbroken hydrologic connection to jurisdictional waters, or is separated from those waters by a berm or similar feature, or if it is in reasonably close proximity to a jurisdictional water.

The original guidance stated that, for purposes of the guidance, a tributary is the entire reach of the stream that is of the same order, and that the flow characteristics of a particular stream reach should be evaluated at the farthest downstream limit of the reach (i.e., the point the tributary enters a higher order stream). Several commenters indicated that assessing flow at the

downstream point was not the most appropriate approach to characterizing the entire stream. The revised guidance makes some changes with respect to assessing flow in tributaries for purposes of determining whether a tributary is relatively permanent, indicating that where the downstream limit is not representative of the stream reach as a whole, the flow regime that best characterizes the reach should be used.

Several comments suggested changes to other aspects of the Rapanos Guidance, such as the approach to significant nexus or the definition of relatively permanent waters. For such issues, the agencies struck a careful balance when interpreting the Supreme Court opinions and drafting the original guidance. The positions articulated by commenters were among those considered by the agencies when developing the guidance, and the agencies have decided to maintain the policy choices they made.

Some public comments addressed procedural, rather than substantive, issues raised by the guidance. In particular, many commenters expressed concerns about processing delays often caused by data-intensive approved jurisdictional determinations. They suggested that the Corps should accept a presumption of jurisdiction, requested and agreed to by a permit applicant, treating all waters on the project site as jurisdictional, as a basis for proceeding to the permitting stage without waiting for an approved jurisdictional determination. In response to this comment, the Corps in June 2008 issued Regulatory Guidance Letter 08-02 , clarifying that project proponents may request a preliminary JD which is based on an "effective presumption of CWA/RHA jurisdiction over all of the wetlands and other water bodies at the site." (See RGL 08-02, paragraph 9a.)

The agencies will continue to monitor implementation of the *Rapanos* decision in the field. In the future, further consideration of jurisdictional issues may be appropriate, either through issuance of additional guidance or through rulemaking.

2. Why did Guidance revisions take so long?

EPA and the Corps received 66,047 public comments on the June 2007 Rapanos Guidance, many of which were extensive. Comments were received from states, environmental and conservation organizations, regulated entities, industry associations, and the general public. During discussions about potential amendments to the guidance, EPA and the Corps considered field implementation experiences of the 38 Corps District offices and 10 EPA Regional offices, in addition to these public comments. The revised guidance is the result of extensive discussions needed to fully consider public input and agencies' implementation experiences.

3. In light of the large number of public comments, why are there relatively few changes to the Guidance?

The agencies have decided it is not appropriate at this time to make no changes to the guidance with respect to several issues on which comments were received. The agencies struck a careful balance when interpreting the *Rapanos* opinions. The positions articulated by commenters were among those considered by the agencies when developing the guidance, and

for several issues the agencies have decided to maintain the policy choices they made in interpreting the decision.

4. What waters does the Corps/EPA Guidance indicate are protected under the Clean Water Act (CWA) after *Rapanos*?

Both the original and revised guidance have been developed to implement the U.S. Supreme Court decision in *Rapanos*. They address the regulatory definition of waters in (a)(1) (navigable waters), (a)(5) (tributaries), and (a)(7)(adjacent wetlands) addressed by the *Rapanos* opinions. In accordance with both the original and revised guidance, jurisdiction over these waters will be as follows:

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent (i.e., the tributaries typically flow year-round or have continuous flow at least seasonally)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally
- Wetlands adjacent to such tributaries
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies will apply the significant nexus evaluation as follows:

- 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 in combination they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors.

5. Many commenters requested that the agencies proceed with a rulemaking to clarify *Rapanos* and *SWANCC*. Why did the agencies decide not to address these cases in a regulation?

The agencies recognize the advantages of clarifying the Supreme Court decisions in ***Rapanos*** and ***SWANCC*** through the rulemaking process, particularly with regard to improved opportunities for public participation and for providing greater clarity and specificity. EPA and the Corps appreciate the very helpful comments we received from the public on this issue. The agencies will continue to monitor implementation of the ***Rapanos*** Guidance and, as we gain experience, consider appropriate opportunities to provide additional guidance or to initiate rulemaking.

RESPONSE TO COMMENTS
"CLEAN WATER ACT JURISDICTION FOLLOWING THE SUPREME COURT'S DECISION IN RAPANOS v. UNITED STATES & CARABELL v. UNITED STATES GUIDANCE" ISSUED JUNE 5, 2007

On June 5, 2007, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) issued guidance, effective immediately, regarding Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court's decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States.* The agencies accepted public comments on the Rapanos guidance until January 20, 2008. The agencies received 66,047 public comments on the *Rapanos* Guidance (65,765 form letters, 282 non-form letters), from States, environmental and conservation organizations, regulated entities, industry associations, and the general public. EPA and the Corps have reviewed the comments and have revised the guidance in consideration of those comments and consistent with our experience implementing the guidance over the past 18 months.

The comments generally addressed four substantive issues and two procedural ones. The substantive areas were: the interpretation of the term "significant nexus;" the treatment of tributaries; the definition of "relatively permanent waters;" and the scope of "traditional navigable waters." The procedural areas were: the delay in processing jurisdictional determinations and the coordination between the two agencies on jurisdictional determinations.

The agencies also received comments from some on other important issues. One of these, the definition of adjacency, which has been an important implementation issue for the agencies, is also discussed below.

Significant Nexus

In *Rapanos*, Justice Kennedy concluded that wetlands are "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.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" The agency guidance states that the agencies will assess the flow characteristics and functions of the tributary itself,

together with the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters.

Comments:

Environmental and conservation communities commented that the guidance interprets the term significant nexus too narrowly. They commented that under the Kennedy standard the agencies have the ability to continue to protect wetlands when they collectively affect water quality and to apply that protection to similar waterbodies. The regulated community commented that significant nexus is interpreted too broadly in the guidance. These commenters argued that there needs to be actual data showing impacts to integrity of traditional navigable waters (TNWs) to establish a significant nexus. States commented that they were concerned about the analytical and data burden of making significant nexus determinations consistent with the guidance. Arid states were especially concerned that a narrow interpretation leaves many important streams unregulated and thus unprotected.

Response:

The agencies have made no changes to the guidance with respect to significant nexus findings. The agencies struck a careful balance when interpreting Justice Kennedy's opinion. The positions articulated by commenters were among those considered by the agencies when developing the guidance, and the agencies have decided to maintain their interpretation of the term significant nexus for purposes of determining when a water is a "water of the United States."

Treatment of Tributaries

The guidance interprets Justice Kennedy's standard to apply to tributaries as well as wetlands. The guidance also clarifies that a tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water. In addition, for the purposes of the guidance, a tributary is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point where such tributary enters a higher order stream). Under the guidance, the flow characteristics of a particular tributary will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream).

Comments:

The environmental community commented that *Rapanos* did not address the scope of CWA jurisdiction for tributaries, and they should be jurisdictional categorically. The conservation community commented that tributaries should be jurisdictional categorically, or, alternatively, any tributary with an ordinary high water mark should be presumed to have a significant nexus. The regulated community commented that

tributaries are subject to *Rapanos*. States expressed concern about the loss of jurisdiction over tributaries generally. Arid states in particular expressed concerned about ephemeral, intermittent and headwater streams that are critical resources in their states.

A smaller number of commenters addressed the stream reach concept in the guidance. The general consensus among the regulated community was that the concept is overly broad in its interpretation and application when determining jurisdiction, and many suggested that the concept be abandoned. The environmental community commented that the concept limits jurisdiction and is not in keeping with Justice Kennedy's intent. Other commenters recommended the concept be more scientifically or ecologically based and that it should take into account a broader watershed approach. A few commenters opposed the guidance to assess flow at the farthest downstream limit. Some commented thought that this was simply not feasible, while others suggested that this was not the most appropriate approach to assessing an entire stream, suggesting that the stream flow be assessed where it is most representative of the entire stream.

Response:

The agencies have made no changes to the guidance with respect to utilizing Justice Kennedy's standard to determine the jurisdiction of tributaries. The agencies struck a careful balance when interpreting Justice Kennedy's opinion. The positions articulated by commenters were among those considered by the agencies when developing the guidance, and the agencies have decided to maintain their interpretation of the scope of Justice Kennedy's standard for purposes of determining when a tributary is a "water of the United States."

The agencies have made some changes with respect to assessing flow in tributaries for purposes of determining whether a tributary is relatively permanent. Footnote 24 of the guidance now clarifies that where data indicates the flow regime at the downstream limit is not representative of the tributary (e.g., where data indicates the tributary is relatively permanent at its downstream limit but not for the majority of its length, or vice versa), the flow regime that best characterizes the tributary should be used.

Definition of Relatively Permanent Waters

For purposes of implementing Justice Scalia's standard, the guidance interprets relatively permanent waters (RPWs) as "waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months)."

Comments:

The environmental community commented favorably on the agencies' approach to determining RPWs. The regulated community commented that RPWs should be limited to perennial streams or those that flow at least 290 days. The conservation community commented that the guidance's approach to RPWs could inappropriately

eliminate jurisdiction over some intermittent streams. They further commented that physical indicators, rather than timing of flow, should be used to meet the plurality test.

Response:

The agencies have made no changes to the guidance with respect to their approach to determining RPWs. The agencies struck a careful balance when interpreting Justice Scalia's opinion. The positions articulated by commenters were among those considered by the agencies when developing the guidance, and the agencies have decided to maintain their interpretation of the term relatively permanent for purposes of determining when a water is a "water of the United States." However, the agencies have provided additional technical guidance in footnote 24 on how to assess flow in a tributary to determine whether it is an RPW.

Traditional Navigable Waters

The agencies stated in the guidance that they considered section (a)(1) of their regulations defining "waters of the United States" to constitute the "traditional navigable waters" (TNWs) for purposes of Clean Water Act jurisdiction (see footnote 20 of the guidance and Appendix D of the field instructional manual).

Comments:

Environmental and conservation communities commented that TNWs should be interpreted as broadly as possible. The regulated community commented that TNWs are no broader than Section 10 waters under the Rivers and Harbors Act of 1899 (RHA).

Response:

The agencies have made some changes to the guidance to clarify the scope of "traditional navigable waters" for purposes of CWA jurisdiction. The agencies have edited footnote 20 of the guidance to make even more explicit that they consider Section 10 waters to be a subset of TNWs. In addition, changes to footnote 20 provide more guidance to the field on how to determine if a water is a TNW, including how to determine if it is susceptible for use in commercial navigation, including commercial water-borne recreation.

Processing Delay

To ensure that decisions are made on sound science and a defensible record, the guidance instructs Corps districts and EPA regions to document jurisdictional determinations (JDs) in a manner consistent with the standards laid out by the opinion. Specifically, the guidance indicates the "record shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination."

The agencies issued a number of documents, in conjunction with the *Rapanos* guidance, to assist field staff to make accurate and appropriately documented JD decisions. These documents included a field instructional manual, a JD form, and a MOU establishing an interagency coordination process with specific deadlines.

Comments:

All commenter groups expressed concern regarding delay in finalizing official JDs (i.e., "approved JDs"), and implications of that delay for permitting decisions and timing of associated projects. Many identified as a source of delay the extent of data and analysis required to finalize an approved JD. A number of commenters from the regulated community, state departments of transportation, and the conservation community recommended that the agencies provide an opportunity to "opt into" jurisdiction, allowing project proponents willing to have all aquatic resource impacts evaluated and mitigated to move to the permitting process rather than awaiting an approved JD.

Response:

On June 26, 2008, the Corps of Engineers issued Regulatory Guidance Letter (RGL) 08-02, clarifying that project proponents may request a preliminary JD, which is based on an "effective presumption of CWA/RHA jurisdiction over all of the wetlands and other water bodies at the site." (See RGL 08-02, paragraph 9a.) Consequently, a preliminary JD allows the Corps to proceed to the permitting process rather than waiting for an approved JD. RGL 08-02 indicates that, with such preliminary JDs, there is no legally binding determination of CWA jurisdiction over the particular water body or wetlands in question, but only a presumption of jurisdiction to facilitate permitting. For all cases where approved JDs are used, the agencies continue to believe that well-documented approved JDs are necessary to ensure that decisions are made based on sound science and a defensible record, and so the agencies have not modified documentation requirements for approved JDs in the guidance.

Coordination Process

Concurrent with issuance of the *Rapanos* guidance, the agencies established a coordination process for draft approved JDs involving a significant nexus or section (a)(3) of the regulatory definition of "waters of the United States." The June 2007 coordination process provided specific timeframes for interagency review, and a process for field staff to elevate specific JDs to EPA and Corps headquarters for resolution if necessary. While the coordination procedures for (a)(3)-related JDs were to continue indefinitely unless the agencies agreed to modifications, coordination of significant nexus-related JDs was to end after six months unless the agencies agreed to continue.

Comments:

Several commenters from state environmental agencies, environmental nonprofits, and the general public emphasized the importance of JD coordination for consistent and accurate JDs. Some commenters from the regulated community and state departments of transportation indicated that the interagency coordination process caused delays and recommended that coordination with EPA be ended altogether.

Response:

On January 28, 2008, the Corps indicated that for significant nexus-related JDs, the coordination process was being changed to provide a shorter timeframe than was established when the guidance was originally issued. Under the new coordination process for significant nexus-related JDs, the EPA Region has 15 days to review the draft JD, discuss any questions or concerns with the Corps District, and "special case" the JD if they feel it is necessary after those discussions. Coordination of (a)(3)-related draft JDs remained unchanged. As a result, the Corps continues to provide EPA with all draft JDs involving significant nexus or (a)(3) waters. This does not apply to preliminary JDs, since these are only used in cases where a project sponsor agrees to a presumption of CWA/RHA jurisdiction over all waters on the project site.

Adjacency

The guidance states that the agencies will continue to assert jurisdiction over wetlands "adjacent" to traditional navigable waters as defined in the agencies' regulations. Under EPA and Corps regulations and as used in this guidance, "adjacent" means "bordering, contiguous, or neighboring." Finding a continuous surface connection is not required to establish adjacency under this definition. The Rapanos decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are "waters of the United States."

Comments

Some in the regulated community commented that the automatic regulation of nearby wetlands based solely on their adjacency to a traditional navigable water is inappropriate. These commenters also requested that the definition of "adjacent" be clarified and the regulations be revised.

Response:

Under the revised guidance, the agencies continue to assert jurisdiction over wetlands that are adjacent to traditional navigable waters as that term is defined in the agencies regulations.. The agencies disagree with commenters and conclude that at least five justices agreed that such wetlands are "waters of the United States." The agencies agree that the guidance should provide some further clarification of the term "adjacent"

and have revised the guidance to identify, consistent with the regulations and agency practice, the three criteria the agencies use to determine whether a wetland is adjacent.

Montana Fish, Wildlife & Parks

420 E. Sixth Avenue
P.O. Box 200701
Helena, Montana 59620-(

December 18, 2008

Consultant Design

Action	Date	Routing	Initials
	12/23/08		
		Bureau Chief	
		Consultant planning	
		Design Supervisor	
		CTEP Engineer	
		Priebe	
		File	

12/22

- ✓ Barry
- Deb
- Tim Conway
- Paul Ferry
- ✓ Jeff Ebert
- Darrel James
- File

Tom S. Martin, Chief
Environmental Services Bureau
Montana Department of Transportation
2701 Prospect Avenue
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Helena, Montana 59620-1001

Boulder - South
STPP 69-1(9)22
CN: 2019
Alternatives Analysis
Biological Resources Rep

Dear Mr. Martin:

This letter is in regard to Montana Department of Transportation's (MDT) Alternatives Analysis (AA) referenced in your October 23, 2008 letter and Biological Resources Report (BRR) submitted with your November 12, 2008 letter. On August 13, 2008 we provided a letter in response to the AA and the agency coordination meeting held on July 30, 2008.

Our August 13, 2008 letter notes our gratification that Montana Department of Transportation (MDT) had initiated efforts to coordinate with participating/cooperating agencies in the Boulder-South project in accordance with the SAFETEA-LU process. However, we were discouraged that an alternative had been selected without opportunity for agency contribution, negating the intent of the process. After additional review of the AA, BRR and site visits, we believe that the selection of an alternative without prior agency participation in the development of the project purpose and need, range of alternatives, methodologies to be used and level of detail for analysis of alternatives did not comply with the National Environmental Policy Act (NEPA) nor the Montana Environmental Policy Act (MEPA) nor the SAFETEA-LU process. The difficulties in resolving issues surrounding this project should serve as a reminder that meaningful early involvement by the agencies will facilitate a smoother permitting process.

FWP believes that other viable, less damaging practicable alternatives exist and the rationale for dismissing the alternate (upland) route warrants clarification. We believe there are more than "relatively small differences in impacts" between the two alternatives evaluated. Adverse impacts to wetlands, streams, riparian areas and floodplains should be identified for the upland, proposed or other potential alternative route. Costs relevant to the acquisition and development of lands for mitigation of adverse impacts should also be compared for each alternative. The methods and level of detail for identifying impacts and costs should be consistent.

We request that MDT more thoroughly delineate the relative environmental, social and economic impacts of the alternative routes, including the upland route, and fully explain the overriding issues

that led to dismissal of that route. To the extent possible for this stage of the process, we request the following:

a. Regarding additional right-of-way (ROW), identify the number of landowners that would be directly affected by each alternative. The Alternatives Analysis notes that 100 acres of new ROW would be needed for the upland route. Please specify the amount of existing county road easement that could be utilized for a new alignment in addition to ROW that would be required from privately owned land.
b. Consider use of the existing Red Bridge as an integral part of a new bridge to reduce costs and impacts associated with an upland route.
c. Revisit wetland acreage impact figures and associated costs for acquisition and development of land for mitigation of direct and indirect impacts to wetlands, streams, floodplains, riparian lands, existing vegetation and supporting surface and groundwater hydrology.
d. Estimate costs for renovations to irrigation systems/canals.
e. Provide a more detailed analysis of the use of the existing corridor to include an expanded consideration of route adjustments that avoid encroachment upon the Boulder River and tributary streams along with traffic speed modification and pullouts.
f. Estimate potential costs associated with encountering contaminated soils, initial and future riprap and stream modifications.

We remain encouraged by and support MDT's intent to implement the SAFETEA-LU process and believe a preferred plan can be developed that would protect and/or enhance aquatic resources, improve safety for the general public and meet statutory requirements. If you have any questions about these comments or wish to discuss them, please contact Doug McDonald at 444-3175.

Sincerely,

Chris Hunter
Fisheries Division Administrator

Copy: FWP Region 3 – Ron Spoon/Tom Carlsen
DEQ – Jeff Ryan/Mark Kelley
FHWA – Jeff Patten
EPA – Steve Potts
USFWS – Scott Jackson
USACE – Allan Steinle

Montana Fish, Wildlife & Parks

To: Deborah Wambach
From: Tom Carlsen
Subject: Highway 69 Project
Date: 12/19/2008

Deb,

Just a few comments on the Biological Resources Report for this project a few comments on the project in general. As you are probably aware, Western States, including Montana are placing an emphasis on corridors and the movement and connections provided by corridors to the long-term viability of wildlife species. Highway 69, in the section being reconstructed, is the primary corridor and connection between two mountain ranges, the Elkhorn Mountains ands the Bull Mountains. Big game species, including bighorn sheep are known to move through this corridor.

Fish, Wildlife and Parks concerns in relation to potential impacts to wildlife, in regards to improvements in Highway 69, would be the increased potential for collisions between wildlife and vehicles due to increased traffic and increased speeds of vehicles. As mentioned in the Biological Resources Report (BRR), most passive means of controlling speed of vehicles, including reduced speed limits are ineffective. Therefore, the most viable alternative to ensure safe wildlife crossing is to develop wildlife crossings.

I haven't spent the time on the ground that you probably have looking for crossing potential but based on where I see big game species, primarily elk and mule deer in this area when I fly aerial surveys, I would expect movement between Ryan Mountain in the elkhorn Mountains and Hadley Park in the Bull Mountains towards the south end of the highway project. Additionally, movement would likely occur in the vicinity of Brown's Gulch and the Bull Mountains.

Two potential wildlife crossings are mentioned in the BRR. It is likely that only the Little Boulder River Bridge crossing has any merit based on a couple of factors including location. Ideally, I believe that there should be three wildlife crossings focused in the area from the Little Boulder River Bridge to the south end of the project. I realize this is a difficult section of the highway to construct crossings but I think that there is yet potential to identify potential sites and am willing to try to help with that effort. Please let me know if I can be of help.

Tom Carlsen
Wildlife Biologist - FWP