

No. 09-2239

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PRECON DEVELOPMENT CORP., INC.
Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of Virginia, Norfolk Division

**PROPOSED BRIEF AMICI CURIAE OF NATIONAL WILDLIFE
FEDERATION, CHESAPEAKE BAY FOUNDATION AND NATURAL
RESOURCES DEFENSE COUNCIL IN SUPPORT OF DEFENDANT-
APPELLEE UNITED STATES ARMY CORPS OF ENGINEERS AND
AFFIRMANCE OF DISTRICT COURT DECISION**

COUNSEL FOR AMICI:

Deborah M. Murray
Southern Environmental Law Center
201 West Main Street, Suite 14
Charlottesville, Virginia 22902
(434) 977-4090
dmurray@selcva.org

Counsel of Record

Additional Counsel Listed on Following Page

James G. Murphy
Ramya Sivasubramanian
Alex Phipps
National Wildlife Federation
149 State Street
Montpelier, VT 05602
(802) 552-4325
JMurphy@nwf.org

Jon Devine
Rebecca Hammer
Natural Resources Defense Council
1200 New York Ave. NW, Suite 400
Washington, DC 20005
(202) 289-6868
jdevine@nrdc.org

Jon A. Mueller
Chesapeake Bay Foundation
6 Herndon Avenue
Annapolis, MD 21403
(410) 268-8816
jmueller@cbf.org

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

No. 09-2239 Caption: Precon Development Corporation, Inc. v. U.S. Army Corps of Engineers

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Wildlife Federation, Natural Resources Defense Council, and Chesapeake Bay Foundation, who are Amici, make the following disclosure:

1. Is any amicus a publicly held corporation or other publicly held entity? NO
2. Does any amicus have any parent corporations? NO
3. Is 10% or more of the stock of any amicus owned by a publicly held corporation or other publicly held entity? NO
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? NO
5. Is any amicus a trade association? NO
6. Does this case arise out of a bankruptcy proceeding? NO

CERTIFICATE OF SERVICE

I certify that on March 12, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Deborah M. Murray

March 12, 2010

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iv

STATEMENT OF INTEREST.....1

INTRODUCTION.....1

ARGUMENT.....5

 I. HEADWATER WETLANDS SIGNIFICANTLY IMPACT THE HEALTH OF THE TRADITIONALLY NAVIGABLE NORTHWEST RIVER.....5

 A. An Overview of the Northwest River and the Currituck Sound.

 B. Functions and Values of Wetlands.

 II. EITHER THE SCALIA OR KENNEDY TESTS OF THE SPLIT *RAPANOS* DECISION MAY BE USED TO ASSERT JURISDICTION OVER WETLANDS ADJACENT TO NON-NAVIGABLE TRIBUTARIES.....13

 III. THE GOVERNMENT HAS DEMONSTRATED THAT THE WETLANDS HAVE A SIGNIFICANT NEXUS WITH TRADITIONALLY NAVIGABLE WATERS.....20

 A. Ecological Factors are Determinative of a Significant Nexus and these Factors Need Not Be Quantified20

 B. The Significant Nexus Test Allows for Broad Region-Wide Aggregation of Wetland Functions24

CONCLUSION.....27

CERTIFICATE OF COMPLIANCE.....28

CERTIFICATE OF SERVICE.....29

TABLE OF AUTHORITIES

FEDERAL CASES

Alexander v. Sandoval, 532 U.S. 275 (2001)..... 17

Christensen v. Harris County, 529 U.S. 576 (2000) 26

King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991)..... 16

League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006) 17

Marks v. United States, 430 U.S. 188 (1977) 15, 16, 18, 19

Massey v. Massanari, 305 F.3d 226 (4th Cir. 2002) 16

Northern California River Watch v. City of Healdsburg,
496 F.3d 993 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1225 (2008) 18, 22

Precon Dev. Corp. v. United States Army Corp of Eng’rs, 658 F. Supp. 2d 752
(E.D. Va. 2009) 23, 24, 25

Rapanos v. United States, 547 U.S. 715 (2006) 1-4, 13-22, 24

Skidmore v. Swift & Co., 323 U.S. 134 (1944)..... 26

United States v. Bailey, 571 F.3d 791 (8th Cir. 2009)..... 17

United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 74
(2009)..... 22

United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972
(2004)..... 14

United States v. Deaton, 209 F.3d 331 (4th Cir. 2000) 10

United States v. Gerke, 464 F.3d 723 (7th Cir. 2006), *cert. denied*, 552 U.S. 810
(2007)..... 18

United States v. Johnson, 467 F.3d 56 (1st Cir. 2006),
cert. denied, 128 S. Ct. 375 (2007)..... 17, 18

United States v. Lucas, 516 F.3d 316 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 116
 (2008)..... 22

United States v. Mashburn, 406 F.3d 303 (4th Cir. 2005)..... 15

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) 21

United States v. Robison, 505 F.3d 1208 (11th Cir. 2007), *cert. denied*, *McWane, Inc. v. U. S.*, 129 S. Ct. 630 (2008)..... 19

Waters v. Churchill, 511 U.S. 661 (1994) 17

FEDERAL STATUTES

33 U.S.C. § 1251(a). 2

33 U.S.C. § 1311(a) 2

OTHER FEDERAL LAW AND GUIDANCE DOCUMENTS

33 C.F.R. § 328.3(a)..... 14

33 C.F.R. § 328.3(c)..... 14

Fed. R. App. P. 29(a) 1

U. S. Environmental Protection Agency and U.S. Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States* (June 5, 2007), *available at* <http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf>, noticed at 72 Fed. Reg. 31,824 (June 8, 2007)..... 4, 25

OTHER AUTHORITIES

Albemarle-Pamlico National Estuary Program, About the APNEP Estuary, <http://www.apnep.org/pages/about-ap.html> ... 6

America’s Wetlands: Our Vital Link Between Land and Water (Dec. 1995); U.S. EPA, Mid-Atlantic Wetlands, <http://www.epa.gov/reg3esd1/wetlands/>. 11-12

S.W. Ator, *et al.*, *Hydrologic and Geochemical Controls on Pesticide and Nutrient Transport to Two Streams on the Delmarva Peninsula*. U.S. Geological Survey, Scientific Investigations Report 2004-5051, available at <http://pubs.usgs.gov/sir/2004/5051/SIR2004-5051.pdf> 10

James F. Berry, *Ecological Principles of Wetland Ecosystems*, in Wetlands: Guide to Science, Law and Technology 18, 62 (Mark S. Dennison & James F. Berry, eds., 1993)..... 9

Brinson, M.M., Changes in the Functioning of Wetlands Along Environmental Gradients, *Wetlands* 13(2), 65-74 (1993)..... 9

David G. Burke, *et al.*, *Protecting Nontidal Wetlands*, American Planning Association, Report No. 412/413, 4-9 (1988) 8

City of Chesapeake, Natural Hazards Mitigation Plan, *available at* <http://www.vdem.virginia.gov/library/plans/mitigateplans/CityChesapeake/ChesapeakeHazardMitigationPlan.pdf>..... 11

M. Clark, *The Value of Wetlands* (The Center for Wetlands & Water Resources (University of Florida ed.); http://www.epa.gov/owow/wetlands/pdf/fun_val.pdf. 11

B.A. Colburn, *Small Pools Close Up: Examining Vernal Pools of the Northeast*, 23(1) *National Wetlands Newsletter* (2001)..... 12

Council on Environmental Quality, *Environmental Trends* 102-103 (1989)11

W.J. Mitsch, J.G. Gosselink, *Wetlands* (2d.ed. 1993) 8, 9

David K. Mueller & Dennis R. Helsel, *Nutrients in the Nation’s Waters – Too Much of a Good Thing?*, U.S. Geological Survey Circular, No. 1136 (1996) 10

N.C. Division of Water Quality, *The Water Quality in Headwater Wetlands and Associated Streams in the Coastal Plain and Piedmont of North Carolina*, at 11-12 (17 August 2007), *available at* http://h2o.ehnr.state.nc.us/ncwetlands/documents/DWQ_Research_JRD_Memo_2007_10_29-1.pdf. 9

Bruce J. Peterson *et al.*, *Control of Nitrogen Export from Watersheds by Headwater Streams*. 292 *Science* 86-90 (April 6, 2001) 9

D.K. Skelly, *et al.*, *Long-term Distributional Dynamics of a Michigan Amphibian Assemblage*, 80 *Ecology* 2326-37 (1999)..... 12

R.W. Tiner, Jr., *Mid-Atlantic Wetlands: A Disappearing Natural Treasure*, U.S. Fish and Wildlife Service, June 1987, *available at* http://www.fws.gov/wetlands/_documents/gSandT/StateRegionalReports/MidAtlanticWetlandsDisappearingNaturalTreasure.pdf..... 11

Ralph W. Tiner, Jr. U.S. Fish and Wildlife Service, U.S. Department of the Interior, *Wetlands of the United States: Current Status and Recent Trends* 18 (1984)..... 9

R.W. Tiner and D.G. Burke, *Wetlands of Maryland*, U.S. Fish and Wildlife Service, Ecological Services, Region 5, Hadley, MA and Maryland Department of Natural Resources, Annapolis, MD (1995)..... 12

U.S. Army Corps of Engineers, Wilmington District, *Currituck Sound Project Management Plan*, October 2006. <http://www.saw.usace.army.mil/Currituck/Draft%20PMP/CURRITUCK%20SOUND%20%20PMP%20OCT%2006-Clean%20for%20website.pdf>.....8

U.S. Environmental Protection Agency for the Chesapeake Bay Program, *Chesapeake Bay: Introduction to an Ecosystem*, 17-19 (1995) 11

U.S. Environmental Protection Agency for the Chesapeake Bay Program, *Protecting Wetlands: Tools for Local Governments in the Chesapeake Bay Region*, 2-3 (1997)..... 12

U.S. Environmental Protection Agency, Office of Wetlands Oceans and Watersheds, Functions and Values of Wetlands (Sept. 2001), http://www.epa.gov/owow/wetlands/pdf/fun_val.pdf..... 8, 11

Virginia Department of Conservation and Recreation (“DCR”), Division of Natural Heritage, Natural Heritage Technical Report 00-12, *Conservation Plan for the Southern Watershed Area* (Feb. 2001), *available at* http://www.dcr.virginia.gov/soil_and_water/documents/15-SWAMP-2001.pdf. 5

Virginia Department of Environmental Quality, Virginia Water Quality Assessment: 305(b) / 303(d) Integrated Report at 3.3a - 69 to 70(Oct. 2008), *available at* http://www.deq.virginia.gov/wqa/pdf/2008ir/ir08_Pt3_Ch3.3a_Category_5_List.pdf..... 7

Virginia DEQ, 2008 Impaired Waters Fact Sheets, *available at* <http://gisweb.deq.virginia.gov/FactSheets2008/Choose.aspx>. 7

Virginia Department of Game and Inland Fisheries, Virginia’s Comprehensive Wildlife Conservation Strategy at 4-80 (2005) *available at* <http://www.bewildvirginia.org/wildlifeplan/plan.asp>. 6

STATEMENT OF INTEREST

National Wildlife Federation, Chesapeake Bay Foundation, and Natural Resources Defense Council (“Amici”) have a long history of involvement in, and expertise concerning the implementation of, the Clean Water Act (the “CWA” or the “Act”) and the protection of our Nation’s waters, including those in Virginia. Through testimony to Congress, advocacy before the Executive Branch, and litigation, Amici have pursued these interests repeatedly for nearly four decades since the enactment of the seminal 1972 amendments that gave the Act its current structure. Amici have members who use and rely on a wide array of waters throughout our Nation and the Commonwealth of Virginia for recreation, hunting, angling, scientific study, and protection of their health, safety, property, drinking water, and food supply. Additionally, all Amici filed amici curiae briefs in *Rapanos v. United States*, 547 U.S. 715 (2006), and have been involved in several cases regarding the scope of jurisdiction under the CWA.

The source of authority for Amici filing this brief is Fed. R. App. P. 29(a). Pursuant to this rule, Amici have submitted a motion for leave to file this proposed brief.

INTRODUCTION

This case concerns whether wetlands in Chesapeake, Virginia are protected by pollution control programs of the CWA. The Act’s goal is “to restore and

maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). To achieve this goal, the Act prohibits the discharge of pollutants, like dredged and fill material, from a point source into waters of the United States, which includes wetlands, unless the discharge complies with certain provisions of the Act. 33 U.S.C. § 1311(a). The Corps of Engineers concluded that the wetlands in this case were protected “waters of the United States” and denied Precon’s permit application to impact 4.8 acres of wetlands in order to develop the Edinburgh planned development unit. Precon contends that these wetlands are not protected by the Act and that therefore a permit to destroy them is not needed.

Amici contend that these wetlands are protected because they are covered under applicable regulations and also because they meet the “significant nexus” test set forth in Justice Kennedy’s concurring opinion in *Rapanos*. *Rapanos* is a split decision with no majority legal rationale concerning the question of whether wetlands adjacent to non-navigable tributaries of traditionally navigable waters are covered by the Act. Due to its fractured nature, *Rapanos* does not provide a clear legal standard for lower courts to follow. However, at a minimum, this Court should find that such wetlands are protected if either Justice Scalia’s plurality test or Justice Kennedy’s concurring test is met.

The wetlands at issue in this case meet the test set forth in Justice Kennedy's concurring opinion in *Rapanos* because they have a "significant nexus" to traditionally navigable waters, in that they "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).¹ The four dissenting votes would support jurisdiction under Justice Kennedy's test as well the plurality test.

In this case, the Corps has demonstrated that the wetlands have a significant nexus to the Northwest River due to their extensive ecological connections to the river. The 4.8 acres of wetlands slated to be impacted by Precon "function ecologically as one system,"² within the total 166 acres of wetlands on site in the Saint Brides Ditch drainage. The district court properly upheld the Corps' assessment that the 166 acres of wetlands, including the 4.8 acres at issue, also continue to function ecologically as part of a 448-acre wetland area.

In determining how broadly to aggregate wetland functions in the region, the Corps relied on specific evidence of "historical and current drainage systems" and "natural geographically defined" drainage features,³ rather than artificially

¹ While not conceding the issue, the Corps did not indicate one way or the other whether the plurality test was satisfied in this case. Thus, the court need not reach that issue.

² Administrative Record ("AR") 0160_01_002

³ AR0160_01_008

constricting its inquiry to the suggestion in the 2007 Corps' *Rapanos* Guidance⁴ that aggregation only occur along a particular stream order. The court correctly upheld the Corps' determination that the wetlands in question meet the test set forth in Justice Kennedy's concurring opinion in *Rapanos* because they, alone and in combination with the 282 acres of similarly situated wetlands offsite and the tributaries in the relevant reach, have a significant nexus to the Northwest River (the "River"), a traditionally navigable water.

The 166 acres of adjacent wetlands, as well as the majority of the remainder of the approximately 282 acres of similarly situated wetlands, are palustrine forested wetlands, and they also belong to a class of wetlands known as "mineral flats."⁵ These wetlands are capable of storing large quantities of water as a result of the low-level relief, slow drainage of the site, and the specific characteristics of the soils on site.⁶ As the district court found and as is discussed below, the government overwhelmingly demonstrated significant ecological connections between the wetlands at issue and the Northwest River.

⁴ U. S. Environmental Protection Agency and U.S. Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (June 5, 2007), available at <http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf>, noticed at 72 Fed. Reg. 31,824 (June 8, 2007). The Guidance was amended in 2008, but no changes were made to the portions used by the Corps to make its determination.

⁵ AR0160_01_019.

⁶ AR0160_01_021; see AR0160_14_010.

As such, Amici respectfully request that this Court AFFIRM the district court's ruling.

ARGUMENT

I. HEADWATER WETLANDS SIGNIFICANTLY IMPACT THE HEALTH OF THE TRADITIONALLY NAVIGABLE NORTHWEST RIVER.

A. An Overview of the Northwest River and the Currituck Sound.

This section provides an overview of the Northwest River and its relationship to headwater wetlands to aid understanding of the significant nexus between the wetlands at issue and the River. The River's watershed occupies nearly 140,000 acres in southeastern Virginia and northeastern North Carolina, in a nearly flat landscape. Historically, the River originated in the Great Dismal Swamp (the "Swamp"). As a result of the draining and conversion of significant portions of the Swamp ecosystem, the River now emerges from groundwater on peat-mantled flats just east of the Swamp.⁷

The River is in the upstream limit of the Albemarle Sound located in North Carolina. The River flows about 23 river miles to the Virginia state line, then another 10 river miles through North Carolina, emptying into Tull Bay and the

⁷ See Virginia Department of Conservation and Recreation ("DCR"), Division of Natural Heritage, Natural Heritage Technical Report 00-12, *Conservation Plan for the Southern Watershed Area*, at 7 (Feb. 2001) [hereinafter DCR Report], available at http://www.dcr.virginia.gov/soil_and_water/documents/15-SWAMP-2001.pdf.

Currituck Sound, which is an embayed arm of the Albemarle Sound.⁸ The Albemarle/Pamlico Sounds estuary is the second largest estuarine complex in the United States. It was designated as an estuary of “national significance” in 1987.⁹ “More than 70% of the commercially or recreationally valuable fish species of the Atlantic seaboard rely on this [estuary] system for some portion of their life cycle.”¹⁰

The River itself is the primary public water supply source for the City of Chesapeake.¹¹ It also has tremendous wildlife value. The biological diversity of the River’s watershed is remarkable, in part because southeastern Virginia is uniquely located at both the northern and southern range limits for many species.¹² The South Atlantic freshwater ecoregion, which includes the Northwest River area, is considered “globally outstanding” in terms of biological distinctiveness.¹³ Decomposition of organic matter in the adjacent tributaries supports fish species such as yellow perch, white perch, large mouth bass, bluegill, and pumpkinseed

⁸ DCR Report at 10.

⁹ See Albemarle-Pamlico National Estuary Program, About the APNEP Estuary, *available at* <http://www.apnep.org/pages/about-ap.html>.

¹⁰ See Environmental Defense Fund, Albemarle Sound, *available at* <http://www.edf.org/page.cfm?tagID=8181>.

¹¹ DCR Report at 6.

¹² *Id.*

¹³ Virginia Department of Game and Inland Fisheries, Virginia’s Comprehensive Wildlife Conservation Strategy at 4-80 (2005) *available at* <http://www.bewildvirginia.org/wildlifeplan/plan.asp>.

that are present in the River, as well as shad and herring, which migrate there in the spring to spawn.¹⁴

The River and its tributaries are listed as impaired for aquatic life uses because of low dissolved oxygen.¹⁵ Low dissolved oxygen levels are suspected to be naturally occurring.¹⁶ Nevertheless, the pollutant removal functions of the wetlands at issue help to prevent further degradation of water quality and adverse impacts on aquatic life. In addition, as the area continues to grow, water quality is threatened from increased nutrient and sediment loading and chemical inputs from commercial and residential areas.¹⁷

Currituck Sound is also in trouble. Recently, it has suffered a significant loss of submerged aquatic vegetation (“SAV”). SAV is essential to the health of the Sound as it provides spawning and/or nursery habitat for a variety of freshwater, anadromous, and estuarine fish species as well as a primary food source for wintering migratory waterfowl. In the 1980’s, Currituck Sound supported a large sport fishing and hunting industry that contributed significantly

¹⁴ AR0160_01_015.

¹⁵ Virginia Department of Environmental Quality, Virginia Water Quality Assessment: 305(b) / 303(d) Integrated Report, at 3.3a - 69 to 70 (Oct. 2008), *available at* http://www.deq.virginia.gov/wqa/pdf/2008ir/ir08_Pt3_Ch3.3a_Category_5_List.pdf.

¹⁶ See Virginia DEQ, 2008 Impaired Waters Fact Sheets, *available at* <http://gisweb.deq.virginia.gov/FactSheets2008/Choose.aspx>.

¹⁷ See DCR Report at 23.

to Currituck County's economy.¹⁸ The loss of SAV has harmed freshwater fisheries and waterfowl populations.¹⁹ Changes in land use, modification of freshwater input, and the cumulative loss of wetlands have significantly altered environmental conditions in Currituck Sound, threatening its continued viability as a freshwater ecosystem.²⁰ Because the Northwest River is a major source of freshwater, sediment, and nutrients to Currituck Sound, wetlands in the River's watershed, such as those at issue, have a direct impact on the ecology of the Sound.

B. Functions and Values of Wetlands.

"Wetlands are among the most important ecosystems on Earth."²¹ Wetlands are indispensable to our environment and economy because they regulate water flow, filter pollutants, reduce flooding, support commercial and sport fishing and hunting, and provide habitat for waterfowl, shorebirds, threatened and endangered species, and a diversity of plants and other wildlife.²²

1. *Wetlands filter pollutants and prevent eutrophication.*

¹⁸ U.S. Army Corps of Engineers, Wilmington District, Currituck Sound Project Management Plan (Oct. 2006), *available at* <http://www.saw.usace.army.mil/Currituck/Draft%20PMP/CURRITUCK%20SOUND%20%20PMP%20OCT%2006-Clean%20for%20website.pdf>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ W.J. Mitsch & J.G. Gosselink, *Wetlands* (2d.ed. 1993), at 3.

²² *See generally*, U.S. Environmental Protection Agency Office of Wetlands Oceans and Watersheds, *Functions and Values of Wetlands* (Sept. 2001), *available at* http://www.epa.gov/owow/wetlands/pdf/fun_val.pdf; David G. Burke, *et al.*, *Protecting Nontidal Wetlands*, American Planning Association, Report No. 412/413 (1988), at 4-9 (detailing functions and values of nontidal wetlands).

Wetlands play an important role in improving and protecting water quality by serving as natural filters. Headwater wetlands are the first to receive and process nutrients, sediments and toxic materials associated with human activities. A study of Piedmont and coastal plain headwater wetlands in North Carolina found that they significantly improve water quality as water flows into the headwater streams.²³

Nontidal wetlands are tremendously important in protecting the resources of the River and Currituck Sound by trapping, transforming, precipitating, and recycling excess nutrients, mainly nitrogen and phosphorus.²⁴ Excess nutrients from air pollution, septic systems, lawn fertilizers, and agricultural fields reach surface waters and can cause eutrophication – low dissolved oxygen from

²³ See N.C. Division of Water Quality, *The Water Quality in Headwater Wetlands and Associated Streams in the Coastal Plain and Piedmont of North Carolina*, at 11-12 (Aug. 17, 2007), available at http://h2o.ehnr.state.nc.us/ncwetlands/documents/DWQ_Research_JRD_Memo_2007_10_29-1.pdf.

²⁴ See James F. Berry, “Ecological Principles of Wetland Ecosystems,” *Wetlands: Guide to Science, Law and Technology* 18, 32, 38 (Mark S. Dennison & James F. Berry, eds., 1993); William J. Mitsch & James G. Gosselink, *Wetlands* 128-130, 139-142, 152-155 (2d ed. 1993); Ralph W. Tiner, Jr., U.S. Fish and Wildlife Service, U.S. Department of the Interior, *Wetlands of the United States: Current Status and Recent Trends* 18 (1984); Brinson, M.M., *Changes in the Functioning of Wetlands Along Environmental Gradients*, *Wetlands* 13(2), 68, 73 (1993); Bruce J. Peterson *et al.*, *Control of Nitrogen Export from Watersheds by Headwater Streams*, 292 *Science* 86-90 (Apr. 6, 2001) (explaining that headwater streams play a disproportionately large role in reducing nitrogen exports downstream).

excessive plant and algae growth and its subsequent die-off and decomposition.²⁵

Wetlands also remove pesticides and heavy metals from runoff. Wetland filtration processes protect surface water and groundwater drinking water supplies.

If headwater wetlands are drained or filled, upland runoff will move directly into streams, compromising downstream water quality.²⁶

In fact, as this Court explained in *United States v. Deaton*, when wetlands are drained and developed, their filtering effect is actually reversed, releasing trapped pollutants back into surface and groundwater:

Wetlands perform a vital role in maintaining water quality by trapping sediment and toxic and non-toxic pollutants before they reach streams, rivers, or other open bodies of water. . . . When a wetland is dredged, however, and the dredged spoil is redeposited in the water or wetland, pollutants that had been trapped may be suddenly released.

²⁵ See generally David K. Mueller & Dennis R. Helsel, *Nutrients in the Nation's Waters – Too Much of a Good Thing?*, U.S. Geological Survey Circular, No. 1136 (1996) (nutrient contamination as one of two leading causes of water-quality degradation); see also S.W. Ator et al., *Hydrologic and Geochemical Controls on Pesticide and Nutrient Transport to Two Streams on the Delmarva Peninsula*, U.S. Geological Survey, Scientific Investigations Report 2004-5051, available at <http://pubs.usgs.gov/sir/2004/5051/SIR2004-5051.pdf>.

²⁷ Office of Wetlands, Oceans & Watersheds, U.S. Env'tl. Prot. Agency, *America's Wetlands: Our Vital Link Between Land and Water* (Dec. 1995) [hereinafter *America's Wetlands*], available at <http://www.epa.gov/owow/wetlands/vital/wetlands.pdf>; Region III, U.S. Env'tl. Prot. Agency, *Mid-Atlantic Wetlands*, <http://www.epa.gov/reg3esd1/wetlands/>; see also Chesapeake Bay Program, U.S. Env'tl. Prot. Agency, *Chesapeake Bay: Introduction to an Ecosystem* 17-19 (1995) [hereinafter *Chesapeake Introduction*]; M. Clark, *The Value of Wetlands* (The Center for Wetlands & Water Resources, University of Florida ed.); Office of Wetlands, Oceans and Watersheds, U.S. Env'tl. Prot. Agency, *Functions and Values of Wetlands* (2001), available at http://www.epa.gov/owow/wetlands/pdf/fun_val.pdf.

209 F.3d 331, 336 (4th Cir. 2000).

2. *Wetlands act as nature's sponges.*

The ability of wetlands to absorb, store, and then gradually release water (either directly to surface waters or through groundwater flows) alleviates downstream flooding and erosion.²⁷ Wetlands' sponge-like quality also recharges groundwater supplies,²⁸ and base flows sustain aquatic stream life.²⁹

Wetlands' flood storage functions are particularly important in this case in light of the significant potential for flooding in the City of Chesapeake. Flooding is considered one of the most significant natural hazards to which the City of

²⁷ Office of Wetlands, Oceans & Watersheds, U.S. Env'tl. Prot. Agency, *America's Wetlands: Our Vital Link Between Land and Water* (Dec. 1995) [hereinafter *America's Wetlands*], available at <http://www.epa.gov/owow/wetlands/vital/wetlands.pdf>; Region III, U.S. Env'tl. Prot. Agency, *Mid-Atlantic Wetlands*, <http://www.epa.gov/reg3esd1/wetlands/>; see also Chesapeake Bay Program, U.S. Env'tl. Prot. Agency, *Chesapeake Bay: Introduction to an Ecosystem* 17-19 (1995) [hereinafter *Chesapeake Introduction*]; M. Clark, *The Value of Wetlands* (The Center for Wetlands & Water Resources, University of Florida ed.); Office of Wetlands, Oceans and Watersheds, U.S. Env'tl. Prot. Agency, *Functions and Values of Wetlands* (2001), available at http://www.epa.gov/owow/wetlands/pdf/fun_val.pdf.

²⁸ M. Clark, *supra* note 28.

²⁹ Council on Environmental Quality, *Environmental Trends* 102-103 (1989); R.W. Tiner, Jr., U.S. Fish & Wildlife Serv., *Mid-Atlantic Wetlands: A Disappearing Natural Treasure* 5 (1987), available at http://www.fws.gov/wetlands/_documents/gSandT/StateRegionalReports/MidAtlanticWetlandsDisappearingNaturalTreasure.pdf.

Chesapeake is vulnerable.³⁰ The City has a “lengthy history” of both tidal and riverine flooding, which occurs when runoff generated from heavy rains exceeds stream capacity.³¹

3. *Wetlands provide critical habitat for wildlife.*

Over 43 percent of the threatened and endangered species in the United States are directly or indirectly dependent on wetlands for habitat.³² Numerous plants and animals, including birds and waterfowl, use wetlands for part or all of their life cycle, both as habitat and food source.³³ Headwater wetlands are particularly important for salamanders, frogs, and other amphibians that require water for only part of their life cycles.³⁴ In addition, wetlands provide important

³⁰ See City of Chesapeake, Va., & Dewberry & Davis LLC, *City of Chesapeake Natural Hazards Mitigation Plan* 49 (2003), available at <http://www.vdem.virginia.gov/library/plans/mitigateplans/CityChesapeake/ChesapeakeHazardMitigationPlan.pdf>.

³¹ *Id.* at 49-50.

³² Clark, *supra* note 28.

³³ Burke, *supra* note 22, at 8; *America’s Wetlands*, *supra* note 27.

³⁴ See D.K. Skelly, et al., *Long-term Distributional Dynamics of a Michigan Amphibian Assemblage*, 80 *Ecology* 2326 (1999); B.A. Colburn, *Small Pools Close Up: Examining Vernal Pools of the Northeast*, 23:1 *National Wetlands Newsletter* at 7 (2001); see generally *Chesapeake Introduction*, *supra* note 28 (discussing functions and values of wetlands within the Chesapeake Bay watershed); Chesapeake Bay Program, U.S. Env’tl. Prot. Agency, *Protecting Wetlands: Tools for Local Governments in the Chesapeake Bay Region* 2-3 (1997) (discussing functions performed by wetlands in the Chesapeake Bay watershed); Burke, *supra* note 22, at 4-9 (detailing the functions and values of nontidal wetlands).

breeding, overwintering, and feeding grounds for waterfowl and many other wetland-dependent birds.³⁵

4. *Virginia has already experienced staggering wetland losses.*

Southeastern Virginia has already experienced tremendous wetland losses, making the remaining wetlands all the more crucial to the health of traditionally navigable waters. The U.S. Fish and Wildlife Service (“FWS”) maps wetlands through its National Wetlands Inventory Program and has conducted specific studies documenting wetland trends in southeastern Virginia.³⁶ Earlier FWS studies identified southeastern Virginia as a major area of wetland alteration, with 80 percent of the state’s loss of palustrine wetlands occurring there from the 1950s to the 1970s and with nearly 5,000 acres converted to upland between 1982 and 1989.³⁷ The FWS’s 2005 study, looking at the period 1994 to 2000, showed a net loss of palustrine forested wetlands of 3,306 acres, or about 3.1 percent of the 1994 total forested wetland acreage in just six years,³⁸ in an area encompassing parts of four counties (Gloucester, Isle of Wight, James City, and York) and eight

³⁵ R.W. Tiner, Jr., and D.G. Burke, U.S. Fish & Wildlife Serv., *Wetlands of Maryland* 142-143 (1995).

³⁶ See R.W. Tiner, et al., U.S. Fish and Wildlife Serv., *Recent Wetland Trends in Southeastern Virginia 1994-2000* 1 (2005), available at <http://library.fws.gov/Wetlands/sevirginia05.pdf>.

³⁷ According to FWS’s 2005 report, “this area may actually have experienced the heaviest recent wetland losses in the Service’s Northeast Region (which includes 13 states from Maine through Virginia) in the past 25 years.” *Id.*

³⁸ *Id.* at 9, 11 (Table 5).

independent cities (Chesapeake, Hampton, Newport News, Norfolk, Poquoson, Portsmouth, Suffolk, and Virginia Beach) in southeastern Virginia.³⁹ Conversion of forested wetlands to upland amounted to more than 2,100 acres, with over 70 percent of this loss attributed to residential development.⁴⁰

II. EITHER THE SCALIA OR KENNEDY TESTS OF THE SPLIT RAPANOS DECISION MAY BE USED TO ASSERT JURISDICTION OVER WETLANDS ADJACENT TO NON-NAVIGABLE TRIBUTARIES.

Rapanos concerned the question of whether wetlands adjacent to non-navigable tributaries are properly jurisdictional under the Act. The decision resulted in a 4-1-4 split with no majority rationale. The decision did not overturn or invalidate any regulation of the Corps defining the extent of the Act’s jurisdiction.⁴¹

Justice Scalia, for a four-member plurality, wrote that the Act covered “those relatively permanent, standing or continuously flowing bodies of water” and “*only*

³⁹ *Id.* at 1.

⁴⁰ *Id.* at 10, 13-14 (Table 7), 15.

⁴¹ Relevant to this case, applicable regulations state that wetlands “adjacent” to other covered waters, such as “tributaries” are protected. 33 C.F.R. § 328.3(a)(5) and (7). “Adjacent” is defined as “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.’” 33 C.F.R. § 328.3(c). *See also U.S. v. Deaton*, 332 F.3d 698 (4th Cir. 2003) (holding that Corps’ interpretation of regulations to cover wetlands adjacent to roadside ditch considered to be a “tributary” was reasonable), *cert. denied*, 541 U.S. 972 (2004).

those wetlands with a continuous surface connection to [other regulated waters].” *Rapanos*, 547 U.S. at 739-42 (emphasis in original).

Justice Stevens, for four dissenting justices, took a comprehensive view of the Act’s jurisdiction, deferring to the Corps’ current categorical regulation of all wetlands adjacent to other jurisdictional waters. *Id.* at 796 (Stevens, J., dissenting). The dissenters also specified that they would uphold jurisdiction for any water body that either the plurality or Justice Kennedy would protect. *Id.* at 810 & n.14 (Stevens, J., dissenting).

Justice Kennedy, in a solo concurring opinion, rejected the plurality’s test, stating that it is “without support in the language and purposes of the Act or in our cases interpreting it.” *Id.* at 768 (Kennedy, J., concurring). Instead, he largely agreed with Justice Stevens’ view that the Act reasonably could be interpreted to provide comprehensive protection for adjacent wetlands based on ecological considerations. *Id.* at 774-75 (Kennedy, J., concurring). Justice Kennedy, however, concluded that the Corps could not, without additional analysis, apply its regulations to categorically cover wetlands adjacent to certain non-navigable tributaries. For these waters only, Justice Kennedy would require the agencies to demonstrate, on a case-by-case basis, a physical, biological, or chemical linkage – a “significant nexus” – between a water body and a traditionally navigable one in order for it to be protected. *Id.* at 779-80 (Kennedy, J., concurring). Consequently,

he supported the majority judgment to remand the cases in *Rapanos* back to the lower courts.

In interpreting fractured Supreme Court decisions, this Court typically looks to *Marks v. United States*, 430 U.S. 188 (1977). E.g., *United States v. Mashburn*, 406 F.3d 303, 308-309 (4th Cir. 2005). In *Marks*, the Supreme Court stated: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....’” 430 U.S. at 193 (citation omitted).

This Court, however, has concluded that “[t]he *Marks* rule does not apply . . . unless ‘the narrowest opinion represents a ‘common denominator of the Court’s reasoning’ and ‘embod[ies] a position implicitly approved by at least five Justices who support the judgment.’” *Massey v. Massanari*, 305 F.3d 226, 236 (4th Cir. 2002) (citations omitted).⁴² Where no common denominator of the Supreme Court’s rationale exists, this Court attempts to find an interpretation with at least five Justices’ support that narrowly applies to factual situations “‘substantially identical’” to those at issue in the split decision, rather than

⁴² The D.C. Circuit has articulated the meaning of the “common denominator” or “logical subset” principle as follows: “When... one opinion supporting the judgment *does not fit entirely* within a broader circle drawn by the others, *Marks* is problematic.” *King v. Palmer*, 950 F.2d 771, 782 (D.C. Cir. 1991) (emphasis added).

applying *Marks* to arrive at a more general and broadly applicable rule. *Id.* at 237 (citation omitted).

Applying the above principles to *Rapanos*, a court may not reject the Corps' authority to protect waters covered by the regulations except in situations substantially identical to *Rapanos*. Thus, *Rapanos* does not govern except in the specific case of wetlands adjacent to non-navigable tributaries where the Corps has neither shown that "the ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection," as indicated by the plurality, nor shown that "wetlands' effects on water quality are [more than] speculative or insubstantial," consistent with Justice Kennedy's opinion. 547 U.S. at 757, 780 (Kennedy, J., concurring).

Two other circuit courts have already ruled that wetlands adjacent to non-navigable tributaries remain protected if they are shown to meet either test in *Rapanos*. *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2008). As articulated by the First Circuit in *Johnson*, allowing for jurisdiction to be established under either *Rapanos* test "ensures that lower courts will find jurisdiction in all cases where a majority of the Court would support such a

finding.” 467 F.3d at 64.⁴³ It further avoids the possibility of an absurd outcome – denying protection where eight Justices would support it, but one would not. *See Johnson*, 467 F.3d at 64 (explaining that “in cases where there is a small surface water connection to a stream or brook, the plurality’s jurisdictional test would be satisfied, but Justice Kennedy’s balancing of interests might militate against finding a significant nexus”).

Circuit court decisions that have attempted to apply *Marks* rule to the conflicting opinions in *Rapanos* have demonstrated the logical shortcomings of doing so and created confusion. These courts have also mischaracterized the *Marks* test. For instance, in *United States v. Gerke*, the Seventh Circuit construed the *Marks* test as a speculative endeavor, finding that Justice Kennedy’s opinion controls because it “is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases.” 464 F.3d 723, 724 (7th Cir. 2006), *cert. denied*, 552 U.S. 810 (2007); *see also Northern California River*

⁴³ In relying on Justice Stevens’s guidance, the First Circuit cited Supreme Court cases where the Court has indicated that in fractured opinions lower courts should look to plurality, concurring, and dissenting opinions to extract legal principles a majority would support. *Johnson*, 467 F. 3d at 65-66 (citing *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 test that lower courts should apply); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 413-14 (2006) (Kennedy, J.) (finding agreement among one concurring and four dissenting Justices establishes majority support for a legal proposition); *Alexander v. Sandoval*, 532 U.S. 275, 281-82 (2001) (Scalia, J.) (noting the agreement of five Justices who joined plurality and various dissenting opinions)).

Watch v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007) (finding same), *cert. denied*, 552 U.S. 1180 (2008). The Seventh Circuit further concluded that Justice Kennedy’s opinion is “narrower ... in most cases, though not in all” *Gerke*, 464 F.3d at 724-25. That court acknowledged the possibility of situations where “[Justice Kennedy] would vote against federal authority only to be outvoted 8-to-1” *Id.* at 725. In their rulings, *Gerke* and *Healdsburg* left unclear whether factual situations exist where those courts might apply the plurality test to establish jurisdiction – a result which has created confusion for regulators and the regulated.

Similarly, the Eleventh Circuit, in *United States v. Robison*, relied on *Marks* to find that Justice Kennedy’s opinion is the only test that may be used. 505 F.3d 1208, 1221-22 (11th Cir. 2007), *cert. denied sub nom., McWane, Inc. v. U.S.*, 129 S. Ct. 630 (2008). The court, however, conceded that in the very case it was deciding “Justice Scalia’s test may actually be more likely to result in CWA jurisdiction than Justice Kennedy’s test,” suggesting that the court’s decision to find Justice Kennedy’s opinion controlling under *Marks* had the peculiar effect of giving Justice Kennedy’s view veto power over all of the other Justices. *Id.* at 1223 (citation omitted).

For the above reasons, under the guiding principles of this Court with respect to the interpretation of fractured opinions, *Rapanos* does not restrict the coverage

of the Clean Water Act rules over wetlands adjacent to non-navigable tributaries except in situations substantially identical to those in *Rapanos*. In practice, this means that either the plurality or Kennedy tests may be used to demonstrate jurisdiction. The lack of agreement in the *Rapanos* decision precludes a more broadly applicable rule, and existing regulations thus continue to govern most cases.

III. THE GOVERNMENT HAS DEMONSTRATED THAT THE WETLANDS HAVE A SIGNIFICANT NEXUS WITH TRADITIONALLY NAVIGABLE WATERS.

A. Ecological Factors are Determinative of a Significant Nexus and these Factors Need Not be Quantified.

In *Rapanos*, Justice Kennedy took the position that a wetland adjacent to a non-navigable tributary would be protected by the Act's pollution control programs where it possesses a "significant nexus" with traditionally navigable waters. Justice Kennedy held that a "significant nexus" exists when such 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.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) (emphasis added). The key indication Justice Kennedy gave about the *amount* that wetlands needed to affect downstream waters to be covered is that the connection not be "speculative or insubstantial." *Id.*

Relying on a dictionary definition, and Justice Kennedy’s statement that the failure to provide “some measure of the significance of [wetlands’] connection for downstream water quality” required remand in *Rapanos*, 547 U.S. at 784 (Kennedy, J., concurring), Precon suggests that Justice Kennedy’s test is an onerous exercise in quantitative mathematics. *E.g.*, Precon Opening Br. at 12, 29 (citing a Webster’s on-line dictionary of “measure” and later stating the significant nexus test requires the agency to “quantify” wetland functions); *see also id.* at 25-43 (arguing the lack of numeric measurements doom a finding of jurisdiction). Yet nothing in Justice Kennedy’s opinion states quantitative, numeric measurements are required.⁴⁴ Instead, Justice Kennedy states that ecological considerations inform his significant nexus test:

The required nexus must be assessed in terms of the statute’s goals and purposes. Congress enacted the law to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” and it pursued that objective by restricting dumping and filling in “navigable waters[.]”

Rapanos, 547 U.S. at 779 (Kennedy, J., concurring) (citations omitted) (emphasis added).

Justice Kennedy’s ecological focus is derived from both the Act and prior case law. In addition to the Act’s goals, Justice Kennedy looked to the Supreme

⁴⁴ As detailed in the Corps’ brief, ample quantitative information was compiled by the Corps and, while not required, strongly supports the Corps’ finding of jurisdiction in this case. Corps’ Proof Answering Br. at 48-56.

Court decision in *U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985), to articulate the significant functions wetlands perform that link them to navigable waters:

Where wetlands perform ... filtering and runoff-control functions, filling them may increase downstream pollution, much as a discharge of toxic pollutants would. Not only will dirty water no longer be stored and filtered but also the act of filling and draining itself may cause the release of nutrients, toxins, and pathogens that were trapped, neutralized, and perhaps amenable to filtering or detoxification in the wetlands. In many cases, moreover, filling in wetlands separated from another water by a berm can mean that flood water, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways.

Rapanos, 547 U.S. at 775 (Kennedy, J., concurring) (internal citations omitted).

In a similar case, *U.S. v. Cundiff*, the Sixth Circuit ruled that a significant nexus existed where it was shown that the wetlands at issue in the case “perform significant ecological functions in relation to the [traditionally navigable water] and [its tributaries], including: temporary and long-term water storage, filtering of the acid runoff and sediment from the nearby mine, and providing an important habitat for plants and wildlife.” 555 F.3d 200, 211 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 74 (2009). The Sixth Circuit rejected the argument that “a ‘significant nexus’ may only be proved by ‘laboratory analysis’ of soil samples, water samples, or through other tests.” *Id.* While other courts have found quantitative data *sufficient* to demonstrate wetlands had a significant nexus to downstream waters, no court has held that numeric measurement is *necessary* to establish a significant

nexus. *See, e.g., U.S. v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008) (“The evidence presented at trial is also sufficient [to satisfy the significant nexus standard, where] ... [t]he Government presented evidence that the BHA wetlands control flooding in the area and prevent pollution in downstream navigable waters.”), *cert. denied*, 129 S. Ct. 116 (2008); *Healdsburg*, 496 F.3d at 1000-01 (finding that evidence of physical connections (subsurface and occasional surface flow), ecological connections (shared wildlife habitat), and chemical connections (evidence of chloride migrating from the pond to the river) between the Pond and the River were significant and “not speculative or insubstantial”).

In the present case, the government has demonstrated overwhelmingly significant ecological connections between the wetlands at issue and the navigable Northwest River. As the district court concluded, the record shows that: (1) the wetlands store flood waters and moderate flows on the River; (2) the wetlands store sediments and other pollutants which would otherwise migrate downstream; (3) loss of the wetlands would impact downstream waters through increased runoff and erosion; (4) the wetlands convert nitrogen that would otherwise flow downstream; (5) the wetlands’ microtopographic complexity, along with its storage functions, maximize removal of pollutants that would otherwise flow downstream; and (6) the loss of the wetlands would have “substantial negative impact on ... biological communities of the river’s ecosystem.” *Precon Dev. Corp. v. U.S. Army*

Corp of Eng'rs, 658 F.Supp.2d 752, 766 (E.D. Va. 2009). As such, the district court correctly found that “neither statute nor case law requires the Corps to prove a significant nexus by a specific quantitative measurement” and that the Corps demonstrated that “the wetlands’ effect on the water quality of the Northwest River is neither ‘speculative’ nor ‘insubstantial,’” justifying the Corps’ assertion of jurisdiction. *Id.* at 766-767.⁴⁵

B. The Significant Nexus Test Allows for Broad Region-Wide Aggregation of Wetland Functions.

In determining whether wetlands have a “significant nexus” to traditionally navigable waters, Justice Kennedy stressed the importance of examining the collective, as well as individual, impacts of wetlands on traditionally navigable waters. Primarily, Justice Kennedy stated that wetlands have a significant nexus to traditionally navigable waters when “*either alone or in combination with similarly situated lands in the region*” the wetlands significantly affect the chemical,

⁴⁵ The district court noted that “a ‘measure of the significance’ is only necessary when the Corps attempts to rely on a ‘mere hydrologic connection,’” whereas “in the present case, the Corps d[id] *not* rely solely on the hydrologic connection between wetlands and tributaries, but rather, base[d] the nexus on [a number of factors].” *Precon*, 658 F.Supp.2d at 766. The district court did not rule that the measurement of significance need be quantitative. More importantly, neither did Justice Kennedy impose this requirement. Justice Kennedy merely concluded that for wetlands next to non-navigable tributaries mere hydrologic connection “should not suffice in all cases” to establish jurisdiction. *Rapanos*, 547 U.S. at 784 (Kennedy, J., concurring). In discussing possible “measures” of factors like tributary flow, Justice Kennedy mentions ecological factors – e.g., the presence of an ordinary high water mark – and not numbers. *Id.* at 780-82.

physical, and biological integrity of traditionally navigable waters. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) (emphasis added).

Justice Kennedy's appreciation of the cumulative impacts wetlands can have on traditionally navigable waters is apparent from his discussion of the hypoxia event in the Gulf of Mexico. This event is an enormous area of low oxygen in the Gulf that occurs in the summer because of nutrient pollution and excess algae growth. The loss and degradation of countless small streams and wetlands in the Upper Mississippi basin have collectively contributed to increased nutrient levels in the Mississippi River. The dead zone is so severe it can approach the size of Massachusetts and New Jersey. *Id.* at 777-78. While Justice Kennedy never defines "region," this example suggests that Justice Kennedy was concerned with aggregation of the impacts of wetlands functions on a large regional scale.

The district court's decision properly recognized this broad scope of aggregation. In doing so, it correctly upheld the Corps' aggregation analysis in this case, which included approximately 448 acres of wetlands along multiple nearby tributaries in the Saint Brides Ditch subwatershed. *Precon*, 658 F.Supp.2d at 765.

The district court correctly found that the Corps' 2007 Guidance cannot limit the Corps to consider in its aggregation analysis only "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),” which can often be quite limited in scope compared to the overall region of which it is a part.⁴⁶ The district court properly determined that “the Corps is not legally bound by agency guidance documents” and that, under Justice Kennedy’s test, “the scope of the review area is not limited by stream order determinations” as the 2007 Guidance suggests, but rather “the review area can include ‘similarly situated lands in the region’.” *Id.* at 764-65. Accordingly, although the Corps arguably deviated from the framework of the Guidance by broadly aggregating the 4.8 acres at issue as part of a total of approximately 448 acres of “similarly situated” regional wetlands, its reasons for doing so were supported by Justice Kennedy’s opinion and thus were persuasive.

*See id.*⁴⁷

⁴⁶ U. S. Environmental Protection Agency and U.S. Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States*, at 9.

⁴⁷ The court analyzed the Corps’ decision under *Skidmore* deference. If an agency’s interpretation of law is contained in an opinion letter, policy statement, guidance manual, or other agency document, such as the 2007 Guidance, lacking the “force of law,” the interpretation is “entitled to respect” under the Supreme Court’s decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Under *Skidmore*, courts decide case-by-case how much weight to afford to an agency’s interpretation based upon “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” 323 U.S. at 140. The 2007 Guidance is unpersuasive in its approach to aggregation, given Justice Kennedy’s evident concern with the ecological role of wetlands over a broad region. Amici do not take a position whether the Corps’ decision to deviate from that guidance and aggregate more broadly in this case should be evaluated under *Skidmore*

This conclusion is correct, as the context of Justice Kennedy's opinion and sound ecological principles indicate that the term "region" easily includes a watershed- or subwatershed-wide approach to aggregation. As such, the broad aggregation used by the Corps in this case is appropriate under Justice Kennedy's opinion and should be upheld.

Rather than blindly following the 2007 Guidance's stream order approach to aggregation, the Corps appropriately dismissed that approach in this case. The Guidance's focus on the concept of "relevant reach" finds no support in Justice Kennedy's opinion. Nowhere does Justice Kennedy mention stream orders as a point of relevant analysis. And the Guidance itself fails to provide any ecological rationale or legal command requiring the agencies to limit the "region" over which effects can be limited.

CONCLUSION

Amici respectfully request that this Court AFFIRM the ruling of the district court.

Dated this 12th day of March 2010.

Respectfully submitted,

/s/ Deborah M. Murray

deference or under the Administrative Procedure Act's ("APA") "arbitrary and capricious" standard. Regardless, the Corps' aggregation in this case is appropriate under Justice Kennedy's test and should be upheld under either standard of review.

Deborah M. Murray
Southern Environmental Law Center
201 West Main Street, Suite 14
Charlottesville, VA 22902
434.977.4090
dmurray@selcva.org

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,407 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as determined by an electronic word count performed by Microsoft Word.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

Signed,

/s/ Deborah M. Murray

CERTIFICATE OF SERVICE

I hereby certify that on 12th March 2010, I will electronically file the foregoing Proposed Brief Amici Curiae of National Wildlife Federation, Natural Resources Defense Council and Chesapeake Bay Foundation in Support of Defendant-Appellee United States Army Corps of Engineers and Affirmance of District Court Decision with the Clerk of Court using the CM/ECF system, which will then send notification of such filing to the following:

Mary Gabrielle Sprague
U.S. Department of Justice
Environment and Natural Resources Division
Appellate Section
P.O. Box 23795
Washington, D.C. 20026
Mary.gay.sprague@usdoj.gov
Counsel for Appellee

Mark R. Baumgartner
Pender & Coward, P.C.
222 Central Park Avenue, Suite 400
Virginia Beach, VA 23462-3026
mbaumgar@pendercoward.com
Counsel for Appellant

/s/ Deborah M. Murray
Southern Environmental Law Center
201 West Main Street, Suite 14
Charlottesville, VA 22902
Phone: 434.977.4090
dmurray@selcva.org
Counsel for Amici