

January 18, 2008

Water Docket  
Environmental Protection Agency  
Mailcode: 2822T  
1200 Pennsylvania Ave, NW  
Washington, D.C. 20460

RE: Comments on the Implementation of Guidance Regarding Clean Water Act Jurisdiction after *Rapanos*, Docket ID No. EPA-HQ-OW-2007-0282

The International Council of Shopping Centers (ICSC), on behalf of its over 73,000 members, is pleased to provide the following comments to the EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after *Rapanos* (72 Fed. Reg. 110) dated June 8, 2007.

Founded in 1957, ICSC is the trade association of the retail real estate industry. Its members include owners, developers, managers, retailers, lenders and others having a professional interest in the shopping center industry. More than 12 million people are employed in shopping centers, or about 10 per cent of the non-farm employees in the United States. Annual retail sales in shopping centers generate over \$116 billion in state sales tax revenue, not to mention payroll taxes, property taxes, and other revenue, and produce \$2 trillion in annual sales. In a typical month, 190 million adults visit at least one shopping center -- 94 per cent of the population over 18 years of age.

#### Attempts to bring clarity and consistency to Jurisdictional Determinations have not succeeded

ICSC members rely on the agencies to make timely jurisdictional and permitting decisions so that they may avoid and minimize wetlands impacts when planning construction projects. Unfortunately, while the Guidance improved conditions in the field by compelling the Corps to start making decisions, our members believe it has resulted in continued confusion and uncertainty among Corps Districts. ICSC appreciates the motivation behind the guidance -- to give clarity and consistency -- but does not believe that has occurred.

#### Rulemaking is Needed

ICSC contends that the best way to bring clarity and consistency to these matters is through a rulemaking that clearly delineates the limits of federal jurisdiction under the Clean Water Act's Section 404 permitting program, as articulated by the U.S. Supreme Court. ICSC especially notes in the Guidance document that the EPA and the Corps state their intention "to more broadly consider jurisdictional issues, including clarification and definition of key terminology, through rulemaking or other appropriate policy process." EPA and the Corps should move forward immediately with the development of a proposed rulemaking upon evaluation of the comments on the *Rapanos* Guidance.

#### Removal of ditches is appropriate

ICSC has maintained for many years that roadside drainage ditches should not be considered jurisdictional under Section 404 since they are not waters of the U.S., nor are they tributaries of those waters. This determination is long overdue, but nonetheless welcomed by ICSC.

## The significant nexus test remains undefined with no clear threshold for decision-making

ICSC believes the agencies should focus considerable effort to changes to the significant nexus test, particularly with respect to evaluation of ephemeral streams. The agencies should modify their methodology for making each significant nexus determination so that it is easily implemented, quantifiable, based on science, transparent, and consistent across the nation. In addition, it should provide a mechanism by which applicants may voluntarily allow jurisdiction in lieu of completing the jurisdictional determination form.

The Jurisdictional Determination form asks many questions, but provides no guidance as to which criteria are necessary to find a significant nexus. It is suggested that the agencies focus not only on the frequency, volume, and duration of water flow, but also incorporate evidence of *significant* downstream effects as the primary factor in determining *significant* nexus. Consideration of drainage area, base flow index, and minimum annual flow could also help to direct decision-making, but these factors must be quantified so that the end result is an objective score, not a subjective or hypothetical opinion.

## Insufficient Field Resources Remain a Problem

Although beyond the scope of these Guidance comments, ICSC feels it necessary to reiterate that a shortage of trained personnel and related resources remains a significant obstacle to streamlining the process of issuing permits. Until Congress funds these critical activities at an appropriate (that is, increased) level, this bottleneck will continue to plague the program.

## EPA and the Corps should revise and reissue the Guidance

As noted above, ICSC believes the best solution is a formal rulemaking, but in the interim the agencies must revise and reissue the Guidance and give a high priority to all reasonable suggestions made during the comment period that simplify the JD forms, streamline the process, assist in documenting permitting decisions, and make the process more consistent, transparent, and less burdensome.

Finally, the agencies must categorically limit their jurisdiction to those areas that meet the traditionally interstate navigable waters, relatively permanent water, continuous surface connection, or significant nexus tests.

Thank you for your consideration of these comments.

Sincerely,

Kent Jeffreys  
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International Council of Shopping Centers