



In a second notice of supplemental authority (ECF No. 115), Plaintiffs Chantell and Michael Sackett contend that the Post-*Rapanos* Guidance, a document created by EPA and the U.S. Army Corps of Engineers (“the Agencies”) in the wake of the Supreme Court’s decision in *Rapanos v. United States*, 574 U.S. 715 (2006), was “implicitly rescind[ed]” by the Corps’ October 2016 Regulatory Guidance Letter No. 16-01 (“RGL 16-01”). In particular, Plaintiffs assert that RGL 16-01 did so by rescinding an earlier Corps Regulatory Guidance Letter (No. 07-01, “Practices for Documenting Jurisdiction under Section 9 & 10 of the Rivers and Harbors Act (RHA) of 1899 and Section 404 of the Clean Water Act (CWA)” (“RGL 07-01”), attached here as ECF 116-1) that mentions a Post-*Rapanos* Guidance document.

Not so. *First*, the version of the Post-*Rapanos* Guidance cited by EPA in its Summary Judgment briefing—and currently used by the Agencies—was issued on December 2, 2008.<sup>1</sup> RGL 07-01 was issued on June 5, 2007. *See* ECF 116-1 at 1. It is impossible that the 2007 RGL could have “incorporated by reference and implemented” the 2008 Guidance.

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<sup>1</sup> Plaintiffs’ Second Notice of Supplemental Authority refers to the “Post-*Rapanos* Guidance” without date or citation, and fails to acknowledge that EPA and the Corps issued two separate documents under that heading, one on June 6, 2007, and a second on December 2, 2008. That second document revised and effectively replaced the earlier one, and is the version currently used by the Agencies. *See* “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States*” (Dec. 2, 2008) (“Guidance”), available at [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf), at 1 n.1. Neither document is binding, and neither modified nor superseded any regulations defining “waters of the United States.” *Id.* at 4 n.17.

*Second*, nothing in RGL 07-01 indicates that it “incorporated by reference and implemented” even the earlier 2007 version of the Post-*Rapanos* Guidance. The 2007 version of the Guidance appears—along with 14 other documents including the Supreme Court’s decision in *Rapanos* and several sets of regulations codified in the Code of Federal Regulations—on a list of “Supporting Documents” in RGL 07-01. *See* ECF 116-1 at 1–2. Such inclusion does not mean that RGL 07-01 “implemented” those supporting documents, including the 2007 Post-*Rapanos* Guidance, nor that RGL 16-01 did, or could, rescind them. The Agencies continue to use the 2008 Post-*Rapanos* Guidance while the Clean Water Rule is stayed. *See* Joint Memorandum by EPA and U.S. Army Corps of Engineers, “Administration of Clean Water Programs in Light of the Stay of the Clean Water Rule; Improving Transparency and Strengthening Coordination” (Nov. 16, 2015), *available at* [https://www.epa.gov/sites/production/files/2015-11/documents/2015-11-16\\_signed\\_cwr\\_post-stay\\_coordination\\_memo.pdf](https://www.epa.gov/sites/production/files/2015-11/documents/2015-11-16_signed_cwr_post-stay_coordination_memo.pdf) (“During the pendency of the stay, we will continue to apply these prior regulations together with relevant case law, applicable policy [including the Post-*Rapanos* Guidance], and the best available science and technical data in determining which waters are protected by the CWA.”); *see also* 2008 *Rapanos* Guidance and Related Documents, <https://www.epa.gov/cwa-404/2008-rapanos-guidance-and-related-documents> (last visited February 20, 2017) (“Please note that in response to the temporary stay on implementation of the Clean Water Rule, EPA and the Department of Army resumed nationwide use of the agencies’ prior regulations, as clarified by this 2008 *Rapanos* guidance . . .”).

*Third*, RGL 16-01, like RGL 07-01 and RGL 08-02, does not provide substantive guidance on the definition of “waters of the United States.” Rather, it clarifies the differences between two types of jurisdictional determinations conducted by the Corps, and provides guidance on when each type (or neither) might be appropriate, particularly in light of the Supreme Court decision in *U.S. Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807 (2016). ECF 115-1 at 1. RGL 16-01 explicitly states that it does “not change or modify . . . the

documentation practices for each type of [jurisdictional determination],” nor does it “address which aquatic resources are subject to [CWA] . . . jurisdiction.” ECF 115-1 at 1.

Finally, it is illogical to conclude that the Corps would unilaterally and implicitly rescind the Post-*Rapanos* Guidance jointly issued by the Corps and EPA, especially where the EPA is the federal agency with the ultimate authority under the CWA to determine the geographic jurisdictional scope of waters of the United States. *See* Memorandum of Agreement Between the Department of the Army and the EPA Concerning the Determination of the Section 404 Program and the Application of the Exemptions Under Section 404(F) of the Clean Water Act (Jan. 19, 1989), *available at* <https://www.epa.gov/cwa-404/memorandum-agreement-exemptions-under-section-404f-clean-water-act>. RGL 16-01 itself states that “[t]he Corps will continue to coordinate with EPA per applicable memoranda,” ECF 115-1 at 4, and the Agencies’ Clean Water Rule Litigation Statement, <https://www.epa.gov/cleanwaterrule/clean-water-rule-litigation-statement> (last visited February 20, 2017), along with the web page for the 2008 Post-*Rapanos* Guidance, cited above, demonstrate that the Agencies continue to use the Post-*Rapanos* Guidance. The Corps’ RGL 16-01 did not rescind the Post-*Rapanos* Guidance.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of February, 2017, I filed the foregoing United States' Response to Plaintiffs' Notice of Supplemental Authority with the Clerk of Court using the CM/ECF system which will cause a copy to be served upon counsel of record.

/s/ Sheila Baynes  
SHEILA BAYNES