

EPA Reconsider the proposed “Clean Water Protection Guidance”

From: The Honorable Bob Gibbs

Date: 4/6/2011

Dear Colleague:

In December 2010, the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) sent draft “Clean Water Protection Guidance” to the Office of Management and Budget for regulatory review. This “Guidance” describes how EPA and the Corps will identify waters subject to jurisdiction under the Clean Water Act (CWA). The document will substantively change the Agencies’ policy on waters subject to jurisdiction under the CWA and, as the agencies acknowledge, will significantly increase the scope of the CWA’s jurisdiction over more waters and more provisions of the Act as compared to current practice.

This “Guidance” not only will change agency policy without following the proper, transparent rulemaking process but will reverse decisions by the United States Supreme Court that set limits on the Federal Government’s authority to regulate waters. Moreover, the “Guidance” will undermine the Federal-State partnership that has long existed, resulting in confusion and further delaying permitting processes.

We have prepared a letter to EPA Administrator Lisa Jackson and Assistant Secretary of the Army Jo-Ellen Darcy that expresses our concerns over the “Guidance.” The letter states to the Administration our belief that it is inappropriate to address such a fundamental issue through informal guidance. This decision will have far reaching impacts on U.S. jobs and the economy, as well as place further burdens on the permitting process, impacting a number of American industries, including the agriculture, mining, construction, and manufacturing sectors.

Please join us in expressing our concern to the Agencies and urge them to reconsider the proposed “Clean Water Protection Guidance.” To sign onto the letter please contact Corry Marshall (Corry.Marshall@mail.house.gov or x5-6265) in Rep. Bob Gibbs office or Keith Pemrick (Keith.Pemrick@mail.house.gov or x5-5546) in Rep. Tim Holden’s office.

Sincerely,

Bob Gibbs
Member of Congress

Tim Holden
Member of Congress

April 6, 2011

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
for Civil Works
108 Army Pentagon
Room 3E446
Washington, DC 20310-0108

Dear Administrator Jackson and Assistant Secretary Darcy:

In December 2010, the Environmental Protection Agency and Corps of Engineers (collectively, the “Agencies”) sent draft “Clean Water Protection Guidance” to the Office of Management and Budget for regulatory review. The intent of the document is to describe how the Agencies will identify waters subject to jurisdiction under the Federal Water Pollution Control Act of 1972 (more commonly known as the “Clean Water Act”) and implement the U.S. Supreme Court’s decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* and *United States v. Rapanos (Rapanos)* concerning the extent of waters covered by the Act. Further, this document would supersede guidance that the Agencies previously issued in 2003 and 2008 on determining the scope of “waters of the United States” subject to Clean Water Act programs.

In our view, this “Guidance” goes beyond clarifying the scope of “waters of the United States” subject to Clean Water Act programs. Rather, it is aimed, as even the Agencies acknowledge, at “increas[ing] significantly” the scope of the Clean Water Act’s jurisdiction over more waters and more provisions of the Clean Water Act as compared to practices under the currently applicable 2003 and 2008 guidance. (“Guidance,” at 1.)

It appears that the Agencies intend to expand the applicability of this “Guidance” beyond section 404 to all other Clean Water Act provisions that use the term “waters of the United States,” including sections 402, 401, 311, and 303. Moreover, the Agencies intend to “alleviate the need to develop extensive administrative records for certain jurisdictional determinations” (“Guidance,” at 1), thereby shifting the burden of proving the jurisdictional status of a “water” from the Agencies to the regulated community, and thus making the provisions of this “Guidance” binding on the regulated community.

In light of the substantive changes in policy that the Administration is considering with this “Guidance,” we are extremely concerned that this “Guidance” amounts to a *de facto* rule instead of mere advisory guidelines. Additionally, we fear that this “Guidance” is an attempt to short-circuit the process for changing agency policy and the scope of Clean Water Act jurisdiction without following the proper, transparent rulemaking process that is dictated by the Administrative Procedure Act.

This “Guidance” would substantively change the Agencies’ policy on waters subject to jurisdiction under the Clean Water Act; undermine the regulated community’s rights and

obligations under the Clean Water Act; and erode the Federal-State partnership that has long existed between the States and the Federal Government in implementing the Clean Water Act. By developing this “Guidance,” the Agencies have ignored calls from state agencies and environmental groups, among others, to proceed through the normal rulemaking procedures, and have avoided consulting with the States, which are the Agencies’ partners in implementing the Clean Water Act.

The Agencies cannot, through guidance, change the scope and meaning of the Clean Water Act or the statute’s implementing regulations. If the Administration seeks statutory changes to the Clean Water Act, a proposal must be submitted to Congress for legislative action. If the Administration seeks to make regulatory changes, a notice and comment rulemaking is required.

We are very concerned by the action contemplated by the Agencies, and we strongly urge you to reconsider the proposed “Guidance.”

Thank you for your attention to this matter.

Sincerely,

Bob Gibbs
Member of Congress

Tim Holden
Member of Congress

John Mica
Member of Congress

Member of Congress

Member of Congress

Member of Congress

CC:

Nancy Sutley, Chair, White House Council on Environmental Quality (CEQ)

Cass Sunstein, Administrator, Office of Information and Regulatory Affairs (OIRA), OMB