

July 26, 2011



Lisa P. Jackson  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N. W. (1101A)  
Washington, DC 20460



Jo-Ellen Darcy  
Assistant Secretary of the Army (Civil Works)  
108 Army Pentagon  
Washington, DC 20310-0108



Re: Comments in response to *Federal Register* notice regarding  
Identification of Waters Protected by the Clean Water Act, May 2, 2011  
(Docket number EPA-HQ-OW-2011-0409)



Dear Administrator Jackson and Assistant Secretary Darcy:



The organizations below are pleased to provide the following comments in response to proposed guidance regarding the scope of jurisdiction under the Clean Water Act, as published by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) in the *Federal Register* on May 2, 2011. The guidance has been jointly reviewed by the signatory agencies and organizations that collectively support water resource protection and management interests of the states, as undersigned. While some of us may have additional comments specific to the concerns of our individual organizations, and will be submitting those comments separately, we all agree on a number of key points.



First, we thank you for extending the time provided for comment on this guidance. The guidance addresses long-standing complicated issues and organizations like ours needed to consult with members and each other to identify and suggest resolutions for issues presented within the guidance.



1. ***We acknowledge the critical need for clarification of the scope of jurisdiction under the Clean Water Act.***



Our state agencies have been entrusted – in partnership with the federal government – with protection of water, with conserving fish and wildlife and their habitats, with protecting drinking water supplies, and with managing our lands and waters to minimize damages from floods, droughts, and other natural hazards. Clarification of the scope of federal regulation is essential to building and retaining public trust, and to the efficient operation of our agencies in cooperative environmental programs.



We also agree that the proposed guidance alone will not achieve the needed clarity. In order to fully identify the scope of our nation's waters, further steps, such as rulemaking or legislation, will be necessary.

If EPA decides to proceed with rulemaking, we suggest that it do so as expeditiously as possible consistent with the need for transparency and public input. Appropriate technical guidance, to support implementation of the rule, should follow as rapidly as possible so that any remaining uncertainties are quickly addressed.

2. ***Technical, science-based methods that account for regional differences are crucial for the correct and reasonable identification of streams and isolated waters for regulatory purposes.*** The proposed guidance describes streams as having a bed, banks and an ordinary high water mark that limits their lateral extent, consistent with many state regulations and with established Corps procedures. However, given the vast differences in geography and climate in the various regions, guidance or rules that are applied nationwide will inevitably either fail to answer questions about the full upstream extent of water resources, or will be more appropriate for some regions than for others.

Guidance and rules, or new legislation, can clarify underlying principles, and provide direction on applying legal standards, e.g. by formally recognizing the basic link between waters of the United States and watershed boundaries. However, technical methods used to identify waters on the ground are regional in nature, reflecting local hydrology, geography, biology and climate. Stream channel structure as defined in the western states may not be useful in eastern states, and methods for mapping of streams in unpopulated regions may not reflect reality in agricultural states where hydrologic flow paths have been radically altered by man. In other words, while we recognize the need for a national framework and national standards, regional differences mandate identification of on-the-ground technical procedures that are regionally adapted. Technical guidance can also provide criteria for identifying the upper boundary of streams and the limits of federal jurisdiction thereof and distinguish them from swales, erosional features, manmade ponds, and upland ditches.

3. ***The proposed guidance and subsequent rules should more directly address the concerns of the Supreme Court regarding the limits of federal jurisdiction.*** In *Rapanos*, the Court refers back to its own opinion in *Riverside Bayview* in noting the difficulty of defining “where water ends and land begins.” However, the Court also expresses concern that federal agency practices prior to the *Rapanos* decision did not adequately limit federal jurisdiction. Although the guidance refers extensively to the Supreme Court decisions in *SWANCC* and *Rapanos*, it does not adequately describe how the guidance complies with the more limited scope of jurisdiction over headwaters, tributaries, and isolated waters that resulted from these decisions.

In defining jurisdiction, the Kennedy opinion relies on an analysis of the significant nexus between tributaries and connected traditional navigable waters, rather than on a simple classification of stream type (i.e. perennial versus intermittent). Kennedy notes the importance of intermittent or ephemeral streams in the western states (lending support to the need for regionalized technical field manuals).

The proposed federal agency guidance follows Kennedy’s approach, but does not fully explain how it will arrive at a decision regarding a significant nexus between tributaries and downstream waters other than outlining the watershed context for the decision. A watershed encompasses many landscape features besides water resources. Additional broad standards could be provided. Nor does the guidance explain to field staff or the public what the limits of federal jurisdiction are, other than the existing statutory and regulatory exemptions. This is a significant shortcoming of the guidance.

We therefore recommend that guidance and rules more clearly define tributaries based on the scientific understanding of stream channel formation and structure – including hydrology, connectivity and geomorphology – and also expand the explanation of how agencies will evaluate the nexus between tributaries and downstream navigable waters beyond simply saying they are in the

same watershed – and thus the extent of jurisdiction. We would expect that to do so may require the development of science-based regional stream delineation manuals.

4. ***EPA’s Economic Analysis Should More Adequately Reflect Costs to States.*** We appreciate EPA’s expectation that public benefits will far exceed increased costs associated with regulation under this guidance. However, we must also be pragmatic in acknowledging costs to state agencies and organizations. Executive Order 12866, Section 6(a)(3)(C)(ii) requires the agency to develop an assessment, including the underlying analysis, of costs anticipated from the regulatory action, such as the direct cost to the government administering the regulation. The proposed guidance anticipates an enlarged scope of regulation, which could increase the states' costs for Section 401 water quality certification, water quality standards and total maximum daily load (TMDL) development, National Pollutant Discharge Elimination System (NPDES) permitting, or for collaborative state-federal regulatory programs. States already receive very limited federal assistance for operation of dredge and fill regulatory programs in particular, and we therefore renew our request, through EPA, for additional federal funding to support state level protection of national water resources. EPA should clarify that existing funding programs such as Section 319 and 106 will continue to be applied to all waters including groundwater regardless of modifications to federal jurisdiction.
  
5. ***It is essential that federal jurisdictional guidance be consistent with a “common sense” and flexible understanding of the existence of public waters and their values.*** Our citizens generally recognize water and the importance of water – and the need to protect public waters for our health and well-being. They also appreciate that isolated wetlands and intermittent streams provide vital habitats for sustaining fish, wildlife and shellfish and the values that accrue from these renewable resources. Citizens have less understanding of the undertow of legal decisions, or of more technical scientific standards. As difficult as it may be, our final federal rules and guidelines must meet the test of common sense, along with legal tests and scientific methods. The resulting guidance will not build agency credibility if it can be interpreted to *exclude* waters that citizens find obvious and important (e.g. a large inland lake in a closed basin), or to *include* areas that are not intended to be regulated such as stormwater detention basins.

Common sense mandates a degree of flexibility, which again points to the development and use of regionalized technical guidance which can more readily incorporate local geography and terminology.

We appreciate the extra effort extended by the EPA to obtain input from the states and supporting agencies and organizations during the development of agency guidance. We urge EPA to keep the lines of communication open with state co-regulators as this effort goes forward. We trust that these comments will be helpful to you. Should you have questions or concerns, please feel free to contact any one of the signatories – or you may contact Steve Brown at Environmental Council of the States who will disseminate information to the entire group. We would welcome the opportunity to meet with you to discuss our comments in greater detail.

Sincerely,



R. Steven Brown  
Executive Director  
Environmental Council of the State



Kristen Fletcher  
Executive Director  
Coastal States Organization



Mike Paque  
Executive Director  
The Ground Water Protection Council



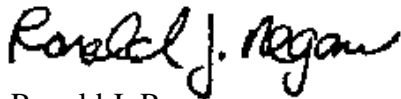
Larry Larson  
Executive Director  
Association of State Floodplain Managers



James D. Taft  
Executive Director  
Association of State Drinking Water  
Administrators



Alexandra Dapolito Dunn  
ASIWPCA Executive Director & General  
Counsel



Ronald J. Regan  
Executive Director  
Association of Fish & Wildlife Agencies



Jeanne Christie  
Executive Director  
Association of State Wetland Managers



Jay Farrell  
Executive Director  
National Association of State Foresters

Cc: Nancy K. Stoner, Acting Assistant Administrator for Water