



April 4, 2011

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

The Honorable Jo-Ellen Darcy
Assistant Secretary
Army for Civil Works
108 Army Pentagon
Washington, DC 20310

Dear Administrator Jackson and Assistant Secretary Darcy:

We are writing on a matter of great importance to all the undersigned organizations and requesting your personal attention to address our concerns regarding a potential guidance on the Clean Water Act (CWA).

Members of the Water Advocacy Coalition (WAC) have an interest in preserving and protecting our nation's water resources. However, we also require a regulatory program that is sensible and is based on the statute and credible regulatory proceedings. Unfortunately, according to documents released in a recent press story, it appears that the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are actively considering issuing "regulatory guidance" that would take an overly broad view of the scope of "waters of the U.S.," encompassing many features that are not generally recognized as "waters." Our concern is that such an overly broad view of jurisdiction would create significant problems. It would almost invariably be a hindrance if not an outright barrier to economic growth. It would almost certainly result in both a permitting and enforcement tangle. It would switch the burden from the government to the individual to demonstrate that a particular feature is not a 'water of the United States.' And given the history of the CWA, it would undoubtedly increase litigation and expenses for the regulated community and regulatory agencies.

In effect, the regulatory guidance as currently drafted attempts to implement unsuccessful legislative proposals without a vote by Congress. For nearly a decade, legislation has been introduced in the House and Senate that would fundamentally alter the scope of the CWA by deleting the term 'navigable' from the statute. This effort has always been highly controversial. One fact is irrefutable: Congress has not voted on such an expansion of the CWA.

WAC members have reviewed the draft EPA-Corps' guidance document and find it to be less "guidance" and more a menu of options for the federal government to employ to use in designating nearly all water (and, in many instances, dry features that are only occasionally wet) as "water of the United States." It is troubling that

the document states from the very beginning that "This guidance supersedes previously issued guidance on the scope of 'waters of the United States' subject to CWA programs" and that *"the agencies expect that the number of waters found to be subject to the CWA jurisdiction will increase significantly compared to practices under the 2003 SWANCC guidance and the 2008 Rapanos guidance."* The aforementioned guidance was published to make sure that jurisdictional decisions comported with two Supreme Court decisions interpreting the scope of federal jurisdiction under the CWA.

The language strongly suggests that EPA and the Corps intend to expand their regulatory control to include most wet areas, including waters now considered entirely under state jurisdiction. This expansive federal approach signals a clear intent to restrict the use of private land and supersede the authority of state and local governments to make local land and water use decisions.

Any attempt to re-write the jurisdictional scope of the CWA by developing and finalizing this "guidance" ignores calls by the courts, state agencies, environmental groups and many others to proceed through the appropriate rulemaking procedures; anything less would be an unjustifiable effort to legitimize a policy that has never been sanctioned by Congress. In fact, in the only instance in which a House of Congress has actually voted, it has taken the exact opposite position by voting to withhold funds from EPA to promulgate such guidance.

We are very concerned by the apparent intent to issue a guidance document on this important issue and strongly urge you to withdraw the proposed "guidance." If you believe further action is warranted, we urge you instead to initiate a formal rulemaking process that will allow the public to file comments about any agency proposal.

Sincerely,

Members of the Waters Advocacy Coalition

American Farm Bureau Federation®
American Forest & Paper Association
American Road and Transportation Builders Association
Associated General Contractors of America
CropLife America
The Fertilizer Institute
Florida Sugar Cane League
Foundation for Environmental and Economic Progress
Industrial Minerals Association – North America
International Council of Shopping Centers
National Association of Home Builders
National Association of Manufacturers
National Association of State Departments of Agriculture
National Cattlemen's Beef Association

National Corn Growers Association
National Council of Farmer Cooperatives
National Milk Producers Federation
National Mining Association
National Multi Housing Council
National Pork Producers Council
National Stone, Sand and Gravel Association
Public Lands Council
Responsible Industry for a Sound Environment
Southern Crop Production
Western Business Roundtable

CC:
House Transportation and Infrastructure Committee
Senate Environment and Public Works Committee