



NATIONAL CONFERENCE *of* STATE LEGISLATURES

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July 29, 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

**Re: Comments on Draft Guidance on Identifying Waters Protected by the Clean Water Act
[EPA-HQ-OW-2011-0409]**

Dear Administrator Jackson and Assistant Secretary Darcy:

I am writing on behalf of the National Conference of State Legislatures (NCSL) in response to the Environmental Protection Agency's (EPA) request for comment on the proposed guidance document that describes how the agencies will identify waters protected by the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA or Act) and implement the Supreme Court's decisions on this topic (*i.e.*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* (531 U.S. 159 (2001)) and *Rapanos v. United States* (547 U.S. 715 (2006)) (*Rapanos*)).

NCSL welcomes the opportunity to provide comments on the guidance document given that we remain concerned about a number of substantive and procedural issues associated with the development and issuance of the draft guidance. NCSL first raised these issues with the Office of Management and Budget while the guidance document was still under review. Along with other national associations representing state and local elected officials NCSL questioned the lack of transparency associated with the development of a guidance document that could have major implications on both public and private sector activity at the state and local level. In addition, NCSL raised concerns over the fact that the guidance could have the practical effect of expanding federal jurisdiction under the Clean Water Act effectively preempting existing state authority and establishing new mandates for the management of water bodies previously regulated solely as state waters.

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The basic jurisdictional construct under the Clean Water Act applies the same definition of waters of the United States to all programs under the Clean Water Act and not just the wetlands program under Section 404. The draft guidance and the supporting economic analysis ignore this basic fact and do not consider nor analyze the impact of the provisions of the draft guidance on those other programs, such as the National Pollutant Discharge Elimination System (NPDES) permitting, the Total Maximum Daily Loads (TMDL), or the Spill Prevention, Control, and Countermeasure (SPCC) programs, to name a few. A related concern that is not fully addressed in the guidance are the implications for the state-federal partnership in implementing all of these programs given the draft guidance specifically states that it will have the impact of expanding the number of water bodies determined to be jurisdictional. Since many of the Clean Water Act programs are based on a clear demarcation between the roles of the federal government and that of states and local governments any expansion of federal jurisdiction will impact traditional state and local authority.

Since the notice of availability and request for public comment was published in the Federal Register NCSL has reviewed the guidance and has participated in several stakeholder briefings with EPA on the guidance. While the draft takes great pains to indicate that it is a non-binding guidance document the reality of on the ground implementation of the guidance could affect stakeholders as if it were a rule as it represents the agency's interpretation of existing statutory and regulatory authority. One example of how this may come into play is through the application of the new guidance on determining jurisdiction through aggregating tributaries, wetlands and physically proximate other waters on a watershed level. The agency has assumed for the purpose of its own economic analysis that any water subject to aggregation will be determined to be jurisdictional. Under these assumptions this will expand the number of jurisdictional water bodies subject to CWA requirements and potentially expand the need for new water quality assessment and monitoring by state agencies of small water bodies.

NCSL appreciates that the administration has provided an opportunity for public comment on the draft guidance. However, in light of the concerns above, we believe the administration should withdraw the draft guidance and conduct additional analyses. If after conducting these analyses the administration still believes additional instruction on these issues is warranted, we believe the correct path is to undertake a rulemaking, which provides administrative procedures that are more amenable to raising and resolving the detailed technical issues inherent in the guidance. NCSL feels that regulation to clarify the waters of the United States definition would trigger the federalism consultation requirement under Executive Order 13132. Such consultation would offer an opportunity to address issues such as the implications of these jurisdictional changes on state and federal water programs covered under other Clean Water Act provisions that have not been sufficiently addressed or explained in the guidance document or its associated economic analysis. NCSL strongly believes that early consultation can lead to better results, while strengthening the federal, state, and local government partnership. In addition, NCSL would urge the agency to ensure that in the future requirements for consultation with state and local elected officials should

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be applied in a consistent manner by the agency regardless of the vehicle chosen for enacting or clarifying changes in agency policy including guidance documents.

If you have questions about these comments, or for further discussion, please do not hesitate to contact NCSL staff: Tamra Spielvogel (202-624-8690 or tamra.spielvogel@ncsl.org) or Max Behlke (202-624-3586 or max.behlke@ncsl.org). Thank you again for the opportunity to provide comments on the Draft Guidance on Identifying Waters Protected by the Clean Water Act. NCSL looks forward to continuing conversations with EPA and the Corps on the Draft Guidance and the related issues it raises for state government.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Morris". The signature is stylized and includes a horizontal line at the end.

Representative Jeff Morris, Washington
Chair, NCSL Environment Standing Committee