



"Serving Western Legislatures"

POLICY ACTION 2011-03

Regarding the U.S. Environmental Protection Agency and the U.S. Army Corp of Engineers' Draft Guidance on Identifying Waters Protected by the Clean Water Act

- *CSG-WEST* endorses the comments submitted by the Western States Water Council on the U.S. Environmental Protection Agency (EPA) and U.S. Army Corp of Engineers' *Draft Guidance on Identifying Waters Protected by the Clean Water Act*;
- Having reviewed the comments by the Western States Water Council and other entities, the members of *CSG-WEST* are concerned that the *Draft Guidance* would potentially increase the number and extent of waters over which the federal government asserts jurisdiction under the Clean Water Act. Moreover, *CSG-WEST* recommends that its members discuss with their appropriate committees and agencies within their states the potential direct or indirect policy and budgetary consequences on states, which have responsibility under the Clean Water Act, to develop and issue National Pollutant Discharge Elimination System (NPDES) permits, water quality standards, total maximum daily loads, and water quality certifications;
- As specified in the letter by the Western States Water Council, the membership of *CSG-WEST* expresses its preference for U.S. EPA and U.S. Army Corp of Engineers' to promulgate a clarifying rule in consultation with Western states; and
- *CSG-WEST* expresses its strong interest to work with U.S. EPA and the U.S. Army Corp of Engineers in a cooperative fashion to ensure state involvement in this process.

Adopted by the *CSG-WEST* Executive Committee on August 2, 2011
Assembled at the 64th Annual Meeting in Honolulu, Hawaii



WESTERN STATES WATER COUNCIL

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Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: EPA-HQ-OW-2011-0409

To Whom It May Concern:

On behalf of the Western States Water Council, representing the governors of 18 western states, we are writing to provide our comments on the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' *Draft Guidance on Identifying Waters Protected by the Clean Water Act*. Before commenting on the guidance, we wish to express our preference for EPA and the Corps promulgating a clarifying rule, as opposed to legally unenforceable guidance.

We understand that the intent of the draft guidance is to provide clearer, more predictable guidelines for determining which water bodies are subject to Clean Water Act (CWA) jurisdiction, consistent with the U.S. Supreme Court's *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*¹ and *Rapanos v. United States (Rapanos)*² decisions. It is also our understanding that EPA and the Corps intend to undertake rulemaking after the guidance is final to provide further clarification regarding the extent of CWA jurisdiction. Indeed, Justice Kennedy's opinion in the *Rapanos* decision would appear to invite promulgation of a rule.

The guidance provides no clear and concise limits to federal jurisdiction. Further, it could actually lead to an expansion of claims of jurisdiction beyond the limitations delineated in *SWANCC* and *Rapanos*, and if promulgated as regulations, once applied, would likely lead to further litigation.

A. State Water Resources Allocation and Water Rights Administration

Section 101(g) of the CWA expressly states: "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."

Section 101(b) of the CWA further states: "It is the policy of Congress to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"

The guidance and any subsequent regulations regarding the extent of CWA jurisdiction should reference Sections 101(b) and 101(g), and should not infringe upon the states' primary authority to allocate water and administer water rights within their borders and protect water quality.

¹ 531 U.S. 159 (2001).

² 547 U.S. 715 (2006).

B. The Watershed Approach to Jurisdiction

The draft guidance sets forth a “watershed” approach for satisfying Justice Kennedy’s “significant nexus” test in which CWA jurisdiction is determined by reference to the nexus between the watershed and the closest traditional navigable water, not the nexus between the particular wetland or tributary in question and the navigable waters. Under this approach, virtually any tributary or wetland, or “other waters,” no matter how far removed, no matter how small or insignificant, could become jurisdictional if aggregated with all other tributaries and wetlands or other waters within a watershed. Such an outcome raises questions as to whether a watershed approach is consistent with *SWANCC* and *Rapanos*, which hold that the CWA’s jurisdiction is not without limits.³

Questions also remain as to whether the EPA and the Corps can use guidance to promulgate a “watershed” approach instead of a “case-by-case” determination. In particular, Justice Kennedy stated in his concurring opinion in *Rapanos* that “absent more specific regulations,” a “case-by-case” analysis is needed to determine jurisdiction for wetlands based upon adjacency to navigable tributaries.⁴ Kennedy further stated that such a showing is necessary to avoid “unnecessary application” of the CWA given the “potential overbreadth” of the federal regulations at issue in *Rapanos*.⁵ The draft guidance, while not a regulation, needs further clarification to ensure that it complies with this requirement.

With respect to CWA jurisdictional determinations for tributaries, the draft guidance states that a significant nexus is presumed to be established if it can be shown that the tributary: (1) contains a bed, bank, and ordinary high water mark; and (2) drains, or is part of a network of tributaries that drain, into a downstream navigable water or interstate water. However, the draft guidance does not address how much water a tributary is required to drain in order to meet this test, leaving open the possibility that an ephemeral or other stream with a *de minimis* volume of flowing water is enough to constitute a jurisdictional tributary. This could create uncertainty and lead to further confusion about the types of waters subject to CWA jurisdiction, particularly in the arid West where there are a variety of waters with minimal flows.

In light of the above, the Council urges EPA and the Corps to ensure that the guidance and any related regulations comply with *SWANCC* and *Rapanos*, while also providing clear and recognizable limits on CWA jurisdiction. In carrying out these tasks, EPA and the Corps should also ensure that the guidance does not displace nor circumvent the regulatory and legislative processes.

C. Groundwater

Page 16 of the draft guidance states that a wetland can be deemed to be “adjacent,” and therefore jurisdictional, if there is an unbroken “surface or shallow sub-surface hydrologic connection between the wetland and the jurisdictional waters.” Although the draft guidance does not use the term “groundwater,” nor define the term “shallow sub-surface hydrologic connection,” it could be interpreted as referring to groundwater, tributary or alluvial groundwater, water stored in the bed and banks of streams, or even soil

³ See *Rapanos*, 547 U.S. at 739 (stating, “The Corps’ expansive interpretation of the ‘waters of the United States’ is thus not ‘based on a permissible construction of the statute.’”); *Id.* at 778 – 79 (J. Kennedy concurring) (stating that the deference owed to regulations at issue in *Rapanos* does not extend so far as to apply CWA jurisdiction “... whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.”). *Id.* at 778-79 (Kennedy concurring)

⁴ *Id.* at 782.

⁵ *Id.*

moisture, again expanding the jurisdictional reach without legal basis or limit, resulting in greater uncertainty and likely litigation.

Groundwater is not subject to the CWA and states are solely responsible for protecting, allocating and administering water rights pertaining to this resource. Accordingly, administrative and judicial interpretations of the CWA have consistently treated groundwater separately from “waters of the United States.” The guidance and any related regulations regarding the extent of CWA jurisdiction should make clear that such jurisdiction does not extend to groundwater, and that groundwater allocation and water rights administration fall under the exclusive purview of the states.

D. States as Co-Regulators

The states, EPA, and the Corps have made progress in working together to carry out the CWA’s goal of controlling water pollution. The EPA and Corps should continue to view states as co-regulators and should ensure that state water managers have a robust and meaningful voice in the development of any guidance and/or regulations regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.

E. Conclusion

In sum, the guidance and/or regulations that EPA and the Corps may promulgate regarding CWA jurisdiction should: (1) provide clear and concise limits to federal jurisdiction; (2) not infringe upon the states’ primary authority to allocate water and administer water rights within their borders; (3) be consistent with *SWANCC* and *Rapanos*, while also providing clear and recognizable limits on the extent of CWA jurisdiction; (4) make clear that CWA jurisdiction does not extend to groundwater and that groundwater allocation and water rights administration fall under the exclusive purview of the states; and (5) be developed with robust and meaningful state participation.

We very much appreciate the opportunity to comment on the draft guidance, and look forward to continuing our work with EPA and the Corps to address water quality in the West. Thank you again for considering the Council’s views on this matter.

Sincerely,

Weir Labatt, III
Chair, Western States Water Council