

# Congress of the United States

Washington, DC 20515

November 8, 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 May 2011, the Environmental Protection Agency and U.S. Army Corps of Engineers (collectively, the “Agencies”) published for comment “Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act” (“Draft Guidance”) that purports to describe how the Agencies will identify waters subject to jurisdiction under the Clean Water Act (“CWA”) and implement the U.S. Supreme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 *Rapanos v. United States* concerning the extent of waters covered by the Act. Rather than finalize the Draft Guidance, the Agencies have recently announced that they plan to propose and take comment on a rule in January 2012 to address the scope of CWA jurisdiction.

We commend the Agencies for finally deciding to undertake a rulemaking to address the definition of “waters of the United States” in the context of the *SWANCC* and *Rapanos* decisions. In light of this decision, we look forward to the Agencies formally withdrawing the Draft Guidance and beginning the rulemaking process with an open mind.

However, we are concerned that the approach the Agencies intend to take to revise these important regulations will not provide the clarity and transparency long sought under the CWA. Rather than soliciting input from the general public, scientific communities, and Federal and State resource agencies to determine the appropriate scope of CWA jurisdiction and the range of issues to be covered by those regulations, the Agencies plan to proceed ahead with a rulemaking that simply will codify their misinterpretations of legal standards articulated by the Supreme Court in *SWANCC* and *Rapanos*.

By planning to promulgate the essential elements of the guidance in the rule, the Agencies have the appearance of prejudging the final rule. This is clear since the Agencies are not taking into account the approximately 30,000 comments they received on the Draft Guidance in crafting the proposed regulation. Additionally, if the Agencies intend to utilize the Draft

Guidance in the rulemaking, the Agencies should incorporate all the comments on the Draft Guidance into the docket for the rulemaking and clearly identify the significant comments on the Draft Guidance and the Agencies' responses in the docket or preamble to the proposed regulation.

In the Draft Guidance, the Agencies misinterpret *SWANCC* and *Rapanos*, effectively turning those cases that placed limits on CWA jurisdiction into a justification for the Agencies to broaden their assertion of CWA jurisdiction. The Agencies seize on discrete language from these cases and manipulate terms used by the Justices in their opinions in an attempt to gain expanded jurisdictional authority over new waters, rather than heed the directive of the Justices that the Agencies had gone too far with their overly broad assertions of jurisdiction under the CWA.

To continue to forge ahead with a proposed rulemaking that is based on guidance that misconstrues and manipulates the legal standards announced in the Supreme Court decisions will not further the goal of clarifying which waters are subject to CWA jurisdiction. The Agencies cannot fix the insufficiencies of the current regulations defining the scope of CWA jurisdiction by relying on their incorrect interpretations of the Supreme Court's legal standards. Indeed, this course of action is not what the Supreme Court Justices intended in *Rapanos* when they called for a rulemaking. In fact, it is clear that the Agencies are under no legal obligation to issue either guidance or a rulemaking.

Even before the Supreme Court's decision in *Rapanos*, the Agencies acknowledged that they had not reviewed the regulations concerning CWA jurisdiction with the public for some time. Consequently, in 2003, the Agencies issued an advance notice of proposed rulemaking ("ANPRM") to obtain public input on issues associated with the definition of "waters of the United States" under the CWA. In the ANPRM, the Agencies explained that they would use the information or data received from the general public, the scientific community, and Federal and State resource agencies to determine the issues to be addressed and the substantive approach for a future proposed rulemaking addressing the scope of CWA jurisdiction. Although the Agencies inexplicably abandoned the 2003 ANPRM after receiving a multitude of comments, they correctly recognized that public input on the scope of CWA jurisdiction is crucial to any rulemaking.

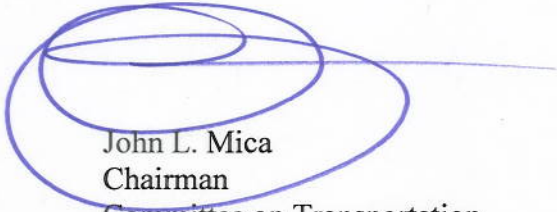
To determine how to revise the existing regulations, it is essential that the Agencies first issue an ANPRM to solicit input from the general public, the scientific community, and resource agencies on the scope of CWA jurisdiction, the range of issues to be covered by the regulations, and additional scientific data or studies to support a revised definition of "waters of the United States." The Agencies received approximately 30,000 comments on the Draft Guidance, which had "no force of law." It is reasonable to assume, then, that an ANPRM will solicit a much higher number of comments. By failing to properly restart the rulemaking process, the Agencies are effectively letting its flawed Draft Guidance dictate the scope and content of the proposed rule. The Agencies must *not* let the ends justify the means, as is happening here.

The scope of CWA jurisdiction is of fundamental importance not only to entities regulating, or discharging to, "waters of the United States," but to the entire Nation. The rulemaking will have sweeping economic implications. We expect that, as the Agencies move forward with this rulemaking, they will undertake a robust economic analysis, including a cost-benefit analysis, of whatever proposed rule is developed. This economic analysis must include an accurate analysis of impacts to jobs and small entities. It is critical that the Agencies take the proper steps to ensure that the regulations provide an appropriate and clear definition of "waters of the United States" consistent with the CWA and the Supreme Court decisions.

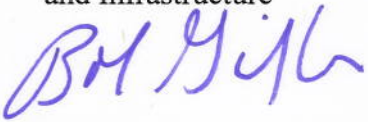
Consequently, we expect the Agencies to formally withdraw the Draft Guidance and begin the rulemaking process with an open mind, and not make a mockery of the rulemaking process under the Administrative Procedure Act. The Agencies must seek input from the public through an ANPRM to determine the appropriate scope of CWA jurisdiction and the issues that should be addressed in a future rulemaking instead of proceeding directly to a proposed rule based on misconstrued legal standards.

Thank you for your attention to this matter.

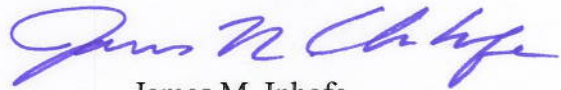
Sincerely,



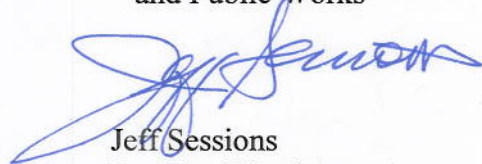
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