



Wyoming Association of Conservation Districts
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July 12, 2011

Water Docket, Environmental Protection Agency
2822T, 1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: EPA-HQ-OW-2011-0409; Draft Guidance on Identifying Waters Protected by the Clean Water Act

Dear Sir/Madam,

On behalf of the Wyoming Association of Conservation Districts (WACD), representing Wyoming's 34 local Conservation Districts, which are governed by 170 locally elected officials and charged specifically, pursuant to §§ 11-16-101 *et seq.*, with the protection of natural resources, including water quality, the Association offers the following comments on the above referenced guidance document.

We appreciate the opportunity to provide input on this Draft guidance document. The WACD shares the commitment to maintaining, enhancing and restoring water quality for a multitude of uses.

Page 1-4;

1. Guidance vs. Rulemaking

The Conservation Districts in Wyoming have taken a lead role, in partnership with the state Department of Environmental Quality, USDA NRCS and Wyoming's local communities, in providing for the protection of Wyoming's water quality and watershed health. The districts statewide, with state legislative and local tax payer support, have implemented watershed assessment, planning and implementation efforts. These efforts demonstrate a commitment and capability of local governments in partnership with the state agencies, to address impaired and threatened waters listed by the state DEQ pursuant to section 303. These efforts are augmented, in many cases with Clean Water Act section 319 and NRCS Farm Bill funding. In addition, Districts in partnership with the USDA Natural Resources Conservation Service, often work with local landowners on projects that may be subject to regulatory requirements on the Clean Water Act, i.e. section 404, NPDES permitting, etc.

Protecting Wyoming's water quality is a priority to districts across the state. As a result, how federal decisions and mandates impact the local priorities of the districts is in important concern for us. Many times districts find themselves reacting to priorities based on federal decisions, despite the fact that the true on-the-ground priorities may vary from federal mandates. The guidance has a significant impact on how the districts implement their

programs and projects, expend their human and financial resources, as well as the assistance they provide to landowners.

The Association believes most waters, with the exception of those that are interstate, navigable or directly connected to navigable/interstate waters as established in the court decisions, are best suited to fall under state regulatory authorities and jurisdiction.

The agencies state in the guidance that ***“This draft guidance document is intended to describe for agency field staff the agencies current understandings; it is not a rule, and hence it is not binding and lacks the force of law.”***

WACD believes that this is an issue of semantics, as this guidance document does indeed describe waters that will be considered jurisdictional and subsequently fall under federal authority and be subject to a myriad of federal regulations. Hence, the guidance document in practical application will result in regulatory actions and therefore should be subject to the rulemaking process.

This guidance fails to provide clear and concise limits to federal jurisdiction. In fact the Association believes the guidance will result in an expansion of jurisdiction beyond the limits imposed by Congress and the Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* and *Rapanos v. United States (Rapanos)*. On page two, the agency state: ***“However, after careful review of these opinions, the agencies concluded that previous guidance did not make full use of the authority provided by the CWA to include waters within the scope of the Act, as interpreted by the Court”***. Clearly the guidance expands upon what the agencies previously viewed as appropriate for federal jurisdiction and the agencies acknowledge that the guidance will increase the number of waters falling under federal jurisdiction. Despite the agencies comment that the guidance would not result in jurisdiction being exerted to the extent that was asserted prior to SWANCC and Rapanos it appears after a careful review of the guidance that very few waters would fall outside the scope of federal jurisdiction.

2. Comments specific to determinations

Section 1. Traditional Navigable Waters Page 6;

WACD is concerned that one of the examples provided of waters falling into this category includes “guided fishing trips” (3rd bullet). One can assume from the context of the discussion that the intent is that the guided fishing trips, would be fishing trips that involve boats or watercraft. This clarification should be made.

Page 7; Section 2: Interstate Waters

WACD is concerned with the treatment of tributaries of interstate waters and will address that under the Section 3 comments given the Significant Nexus Analysis will be utilized to determine jurisdiction on tributaries to interstate waters.

Section 3; Significant Nexus, Page 8-

“To evaluate the presence or absence of a significant nexus, the agencies intend to, as a general matter, consider:

- (1) Waters to be “similarly situated” with waters of the same resource type, specifically (a) tributaries;***
- (b) adjacent wetlands; or (c) other waters that are in close physical proximity to traditional navigable***

waters, interstate waters, or their jurisdictional tributaries (“proximate other waters”);vii (2) Waters to be “in the region” if they fall within the same watershed. For the purposes of this analysis, the watershed is defined by the area draining into the traditional navigable water or interstate water; and (3) Waters to have a significant nexus if they alone or in combination with other similarly situated waters in the same watershed have an effect on the chemical, physical, or biological integrity of traditional navigable waters or interstate waters that is more than “speculative or insubstantial.”

There are number of concerns with the criteria for determining whether a significant nexus exists. The term “close physical proximity” does not appear to be defined. This area of the guidance clearly expands the jurisdiction from those that are directly connected/hydrologically connected to waters in close proximity and/or within the same watershed. The Association’s understanding of this language is that all waters within the watershed that may or may not actually drain into a navigable water or interstate water are jurisdictional. The guidance further indicates that the staff “need not unnecessarily expend administrative time and resources analyzing the entire single point of entry watershed.”

The guidance indicates that in order to meet the significant nexus test it requires more than a speculative or insubstantial affect on the physical, chemical or biological integrity, for waters to be considered jurisdictional. (page 9). The guidance provides that an analysis of the indicators (such as transfer of nutrients and organic carbon to downstream food webs, etc.) *“whether documented for an individual water or based on scientific literature describing the function applicable to the waters in question, along with an analysis of how the described functions affect a traditional navigable water or interstate water”....*

The above analysis appears to potentially lead to an enormous expenditure of taxpayer resources to conduct studies on waters within the watershed to justify federal jurisdiction. The same resources allocated to the state for state regulation and protection of water resources would seem to be a better expenditure of scarce resources resulting in more environmental protection.

On the other hand the guidance states *“In many circumstances, a reliable affirmative jurisdictional determination may be based on consideration of subset of similarly situated waters, since including additional waters in the analysis would only establish a more significant nexus to the traditional navigable water or interstate water.”*

The watershed approach proposed in this guidance results in virtually all waters falling under federal jurisdiction, with the exception of those specifically disclosed as being exempt. However, the agencies include a caveat even in the exemptions by including the verbiage “Waters **Generally** Not Jurisdictional” (*emphasis added*)

As indicated above there is a question as to whether 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. Kennedy further stated that such a showing is necessary to avoid “unnecessary application” of the CWA given the “potential over breadth” of the federal regulations at issue in *Rapanos*. The draft guidance, through appropriate rulemaking processes, needs further clarification to ensure that it complies with this requirement.

It is the Association’s interpretation that no field visits would be required prior to exerting jurisdiction. Although we appreciate the time and resources necessary to field verify on-the- ground conditions, it is inappropriate for the agency to exert jurisdiction, and subsequently expansive and costly regulatory

requirements on homeowners, landowners, industry, etc., absent an actual field verification, especially as it pertains to the magnitude of waters the guidance proposes to sweep into federal jurisdiction.

3. State authorities related to allocation of water rights

The Clean Water Act at Section 101(g) of the CWA expressly protects a state's authority to allocate water. Specifically it states 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." 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"

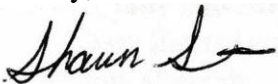
The guidance references water quantity as an issue justifying federal jurisdiction. Clearly that is beyond the authorities and scope of the Act and any such references in this document as well as any implementing regulations should be deleted and instead the above mentioned State authorities should be cited.

4. Groundwater

The Clean Water Act jurisdiction does not expand to encompass groundwater. The states reserve the authority to regulate and administer groundwater, however the guidance includes provisions that indicate authority if presented an unbroken "surface or shallow sub-surface hydrologic connection between wetland and the jurisdictional waters." (*page 16*) Although the term "groundwater" is not specifically used it is apparent that the guidance alludes to groundwater connections resulting in federal jurisdiction.

In conclusion, WACD appreciates the challenge the agency faces in providing concise guidance on jurisdictional determinations. However, WACD would suggest that further refinement, in the form of a rulemaking process, that maintain recognition of the state and local government's authorities and roles and the sideboards established by the judicial system on federal jurisdiction is necessary.

Sincerely,



Shaun Sims
President

Cc: Wyoming's Conservation Districts
DEQ
WDA
Congressional Delegation
Governor's Office