WESTERN STATES WATER COUNCIL

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Web Page: www.westernstateswater.org

November 5, 2013

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OA-2013-0582

Dear Administrator McCarthy:

On behalf of the Western States Water Council, and its members, representing the governors of 18 western states, I am writing to comment on your agency's draft science report titled *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (September 2013 External Review Draft, EPA/600/R-11/098B). Our understanding is that the final version of this report will serve as the scientific basis for rulemaking that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers are jointly developing to clarify the extent of Clean Water Act (CWA) jurisdiction in light of the U.S. Supreme Court's *SWANCC* and *Rapanos* decisions. Our comments are based on our attached position and related letter dated April 10, 2013, which we sent to your agency and the Corps regarding the now withdrawn CWA guidance.

We are concerned that the report may be misinterpreted inappropriately to suggest that a scientific connection between waters alone is sufficient to establish CWA jurisdiction. The report only discusses well-known scientific principles of hydrology and geohydrology regarding the interconnections between waters, but does not and cannot describe how these principles apply to the legal and institutional boundaries that Congress and the Supreme Court have placed on CWA jurisdiction.

The overriding question in the rulemaking is not one of science, but of legal authority, namely the extent of federal authority over water resources under Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion in *Rapanos*. For example, under Justice Kennedy's test, a mere scientific connection or "nexus" between waters is not sufficient to determine CWA jurisdiction. Instead, Justice Kennedy's test requires a fact-intensive, case-by-case physical and legal inquiry to determine whether that nexus is "significant" enough to establish CWA jurisdiction. Since the report does not describe how its scientific findings apply to this test or Justice Scalia's plurality decision, it is insufficient alone to establish or support CWA jurisdiction.

The report should not be used to support a rule that improperly asserts that the scope of the CWA is essentially unlimited. We recognize that there are differing interpretations of *Rapanos*, but it is undisputed that the Court rejected the EPA's and the Corps' pre-*Rapanos* interpretation of CWA authority. A rule that attempts to return CWA jurisdiction to the pre-*Rapanos* "status quo," using the report's findings of global hydrologic connectivity would be contrary to the limits that Congress and the Court have established, and would be an improper use of the report and federal rulemaking authority. Moreover, the CWA does not apply to ground waters, which are protected and allocated by western states, which recognize the hydrogeologic connections. Any reference to ground waters, including "shallow subsurface flows," is inappropriate in any related rulemaking.

As stated in our position regarding the draft CWA guidance, efforts to expand CWA authority beyond the limitations the Court established in *SWANCC* and *Rapanos* "would likely lead to further litigation" and would do little to resolve the current uncertainty regarding the extent of CWA jurisdiction.

We are also concerned about the lack of state expertise and state representation on the Science Advisory Board. Not a single member of the board is a state agency expert or administrator. As stated in our April letter, the states have on-the-ground expertise and knowledge of water quality conditions and challenges within their borders.

In light of the above, we urge you to recognize the limitations of the report as it does not address the legal limits of CWA jurisdiction and authority, and how those limits apply to the scientific principles discussed in the report.

We appreciate your consideration of our concerns and look forward to continuing our work with EPA and the Corps to protect water quality in the West.

Sincerely,

Phillip C. Ward
Chair, Western States Water Council

Enclosures

cc: Office of Environmental Information (OEI), Docket (Mail Code: 28221T),
Docket ID No. EPA-HQ-OA-2013-0582, U.S. Environmental Protection Agency,
1200 Pennsylvania Ave. NW, Washington, DC 20460

WESTERN STATES WATER COUNCIL

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April 10, 2013

Sent via email: Perciasepe.bob@epa.gov
ASACWPOC@conus.army.mil

Mr. Robert Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Ms. Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

RE: EPA and Army Corps Draft Clean Water Act Guidance and Rulemaking

Dear Acting Administrator Perciasepe and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing the governors of 18 western states, I am writing to reiterate concerns regarding the *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, which the Council set forth in the enclosed comment letter dated July 29, 2011.

It is our understanding that your agencies are developing a proposed rule to clarify Clean Water Act (CWA) jurisdiction, as indicated in the Uniform Regulatory Agenda and Regulatory Plan published on December 21, 2012. As explained in our comment letter, the Council prefers rulemaking to clarify CWA jurisdiction instead of legally unenforceable guidance. Therefore, we urge you not to issue or apply the guidance to determine CWA jurisdiction while your agencies develop a new rule.

The vast majority of states have long worked as co-regulators with your agencies to protect water quality pursuant to the framework of cooperative federalism embodied in the CWA. Although states are responsible for implementing and administering most CWA programs, EPA and the Corps did not consult with the states in developing the draft guidance, nor did they share the document with the states prior to releasing it for public comment in April 2011. We understand your agencies have since revised the guidance after the public comment period and submitted it to the Office of Management and Budget for final review. Nevertheless, the revised guidance has not been made public nor has it been provided to the states for review.

We remain concerned about the lack of state consultation in developing the guidance and the potential that the final document may not adequately account for state needs and perspectives. The complexities of CWA jurisdiction and the broad ramifications for state and federal water quality programs warrant a formal and transparent rulemaking process. Unlike guidance, the notice and comment provisions of formal rulemaking facilitate early and ongoing engagement with states and other stakeholders. Formal rulemaking also triggers Executive Order 13132, which provides states with further opportunity to review a proposed regulation and offer perspectives prior to the publication of a rule.

States bear the primary responsibility for preventing, reducing, and eliminating water pollution. By providing greater consultation with states, formal rulemaking is more likely than guidance to produce actual water quality improvements because it would better take into account state needs and perspectives, as well as the states' on-the-ground expertise and knowledge of water quality conditions and challenges within their borders. Issuing the guidance in the interim while EPA and the Corps pursue rulemaking would be a distraction that would create unnecessary conflict and uncertainty that would hinder the development of an effective rule.

Lastly, we urge you to continue to view the states as co-regulators and to ensure that state water managers have a robust and meaningful voice in the development of any rule regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.

We appreciate your consideration of our concerns and look forward to continuing our work with EPA and the Corps to protect water quality in the West.

Sincerely,

Phillip C. Ward
Chair, Western States Water Council

Enclosure (WSWC Position #330.5)

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Position #330.5

July 29, 2011

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, 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 co-operate 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 . . . ."

[1] 531 U.S. 159 (2001).
[2] 547 U.S. 715 (2006).

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.

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

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[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.*

groundwater, tributary or alluvial groundwater, water stored in the bed and banks of streams, or even soil 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