



**Association of State and Interstate
Water Pollution Control Administrators**

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Benjamin H. Grumbles
Assistant Administrator, Office of Water
United States Environmental Protection Agency
Mailcode 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Attn: Water Docket, Re: ID No. EPA-HQ-OW-2007-0282-0001

Dear Mr. Grumbles:

The Association of State and Interstate Water Pollution Control Administrators (ASIWPCA), on behalf of its members, offers the following comments regarding the “*EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after Rapanos*” (Guidance) issued on June 8, 2007. 72 Fed. Reg. 31824. Our member States deal with Clean Water Act issues every day. We know that establishing Clean Water Act jurisdiction following the Supreme Court decision raises extremely complex issues that go far beyond Section 404. Unfortunately, those issues are not fully understood at this time by anyone, including USEPA and the Corps, and until there is a clear understanding the guidance as presented is problematic. This issue is further compounded because by and large the States have been excluded from the process of developing and implementing the guidance, although we are directly affected by it.

With that in mind, the ASIWPCA provides the following comments on the guidance as it pertains to our members’ programs:

There is no significant role provided for the States.

Currently there is no State role or involvement as the USEPA and the Corps administer the program. The guidance provides no process for consultation with affected States. In the context of Section 404 there is no procedure for the Corps to even notify the affected State that water has been determined to be non-jurisdictional or that a contaminant has been determined to not affect a navigable water. There is also the issue of States that are served by multiple Corps districts and how jurisdictional determinations will be coordinated between Corps districts to ensure consistent interpretations, on multiple projects or on aspects of the same project. We believe that a significant role for the States is needed, including:

- Notification that a request for a jurisdictional determination (JD) has been made for a particular water,
- Opportunity to provide relevant information, including ability for States to suggest waters which should (or should not) be considered subject to Clean Water Act jurisdiction based upon scientific evidence,
- Notification as JDs are made with access to the content and rationale for those decisions, and
- Opportunity to appeal the JD’s.

The guidance does not present a clear picture of what waters are in fact jurisdictional.

The guidance does not alleviate the uncertainty and confusion associated with the court cases that have questioned Clean Water Act jurisdiction. A one size fits all approach cannot recognize the diversity of our nation's water resources, including types of hydrological regimes occurring under the widely varying climatic conditions within the United States. At a minimum, consideration should be given to categories of wetlands and waters which should at least presumptively be considered subject to CWA jurisdiction. This would give the States a starting point from which to work in addressing protection of their surface waters. In addition, procedures for determining the cumulative importance of tributaries to rivers and streams and wetlands including headwater rivers and streams should be more fully developed.

There are important and still unknown non-Section 404 considerations.

There is inadequate consideration as to how the guidance and the procedures presented for jurisdictional determinations affect non-404 Clean Water Act programs (i.e., water quality standards, TMDLS, permitting). These implications need to be fully explored and factored into the decision making process. Coordination of jurisdictional determinations between the Federal agencies and the States pursuant to 401 and interstate implications are also issues. Does the guidance apply to only Section 404? What about situations alluded to by Justice Scalia where waters may not be jurisdictional under Section 404 but may be under other parts of the Clean Water Act (e.g. 402)?

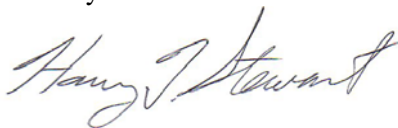
There is no clear plan of implementation presented.

As a precursor to that, an objective assessment is needed of the draft guidance's value to the program thus far as applied by the Corps Districts. This assessment should include discussion of how the guidance has been interpreted and applied in the field as well as how practical and user friendly it has been. For such a plan, explanatory materials may be helpful to clarify what is intended.

In summary, we understand that guidance may not resolve all of the States' concerns. Considerable work is needed to address issues raised by the States and others. We recommend that there be a higher level of State involvement built into the process and, to this end, we offer our assistance in endeavoring to meet our common goals.

The Association looks forward to working with the USEPA and the Corp on these most important issues.

Sincerely



Harry T. Stewart
President

Cc: James Hanlon
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ASIWPCA Membership