



July 29, 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 for Civil Works
U.S. Department of the Army
108 Army Pentagon, Room 3E446
Washington, DC 20310

Attention: Docket ID No. EPA-HQ-OW-2011- 0409

Dear Administrator Jackson and Assistant Secretary Darcy:

On behalf of the National Association of Counties (NACo), we appreciate the opportunity to provide input on the draft "Waters of the U.S." guidance, Docket ID No. EPA-HQ-OW-2011-0409 released on May 2, 2011 by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps). The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,068 counties.

We respectfully request the agencies to withdraw the Draft Guidance. Instead, we recommend moving forward through a formalized rule-making process to solicit comments from state and local governments. We also request a more detailed analysis on how the changes will impact all CWA programs, beyond Section 404, for federal, state, and local governments and private parties as well as an analysis of the time needed and associated costs.

The guidance document is confusing and contradictory, leaving more questions than answers and open to broad interpretations, which would be detrimental to county governments. For the following reasons, we must oppose the guidance: a formal rule-making process was not used; state and local governments were not consulted on Federalism and preemption issues; more analysis is needed on the guidance's impact on all Clean Water Act (CWA) programs; more waters and their conveyances will fall under Federal jurisdiction; and the guidance contains contradicting provisions.

The Timing of this Guidance is Misguided

Regardless of size, counties nationwide are coping with shrinking budgets. County revenues have declined and ways to effectively increase county treasuries are limited. Additional federal mandates require more money. Counties are laying off their staffs, delaying or cancelling capital infrastructure projects, cutting services, and fighting to keep firefighters and police on the streets.

Counties are tasked with the heavy responsibility to protect the health, welfare, and safety of their citizens, as well as maintain and improve their quality of life. This includes protection of

valuable water resources, whether as a regulated entity or regulator, to ensure the nation's waters remain clean.

A Guidance Document is not the Correct Path Forward

The draft guidance acknowledges “that decisions concerning whether or not a waterbody is subject to the CWA have consequences for State, tribal and local governments...,” however, the guidance does not analyze specific impacts to state and local governments. This will lead to a significant increase of state and local waters under federal jurisdiction, creating unfunded mandates and preemptions, without necessarily ensuring clean water. This is a huge concern for counties who are both the regulators and the regulated under the CWA.

Based on past jurisdictional determinations, we have reason to believe that EPA and Corps regional offices will rely on this Draft Guidance to claim federal jurisdiction over waterbodies that are currently not under federal jurisdiction. In other words, the guidance will be used more as a rule, rather than a guidance document.

Since this issue is so controversial, we urge the agencies to use the rulemaking process, rather than a guidance document. The Administrative Procedures Act (APA) offers an open and transparent means of proposing and establishing regulations and ensures that state, local and private entity concerns are fully considered and properly addressed. We urge EPA and the Corps to move forward with a process consistent with the APA's rulemaking process, involving state and local governments in the process.

The Lack of Federalism Consultation and Preemption Issues

While the Draft Guidance acknowledges that new “waters of the U.S.” designations have consequences for state, tribal and local governments, these relevant groups were not consulted during the crafting of this guidance. This is puzzling since we share CWA duties with the federal government.

It is imperative federal agencies involve state and local governments in crafting relevant federal rules, regulations and guidance, especially for those proposals that are controversial in nature. If the EPA and Corps consulted with us prior to publication of the Draft Guidance, we would have been able to identify areas of concern beforehand.

We believe the agencies should have followed “Executive Order 13132: Federalism.” Under E.O. 13132, agencies are required to consult with state and local governments on regulations that will have significant impact. Such consultations strengthen the federal, state, and local government partnership for Clean Water Act (CWA) implementation. In the case of the Draft Guidance, consultation consistent with the Executive Order would have provided an opportunity to address significant concerns over the preemption of traditional state and local government authority concerning the management of state and local waters.

Potential Negative Effects on All CWA Programs

According to the Draft Guidance, there is only one definition of “waters of the U.S.” within the CWA and must be applied consistently for all CWA programs that use the term “waters of the U.S.”

However, the Draft Guidance and supporting economic analysis focuses primarily on the 404 permit program and fails to give consideration to the effects the change will have on other CWA programs, such as the National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water quality standards programs, State water quality certification process, or Spill Prevention, Control and Countermeasure (SPCC) programs.

Because of the guidance’s complexity, there may be unintended consequences to state and local programs that have not been analyzed. **Again, we urge you to withdraw the Draft Guidance until a comprehensive and detailed analysis is made on how the proposed changes would impact all CWA programs beyond the 404 permit program.**

Section 404 Wetlands Permitting Program – The EPA and Corps state the purpose of the Draft Guidance is to provide clarity and to reduce costs and delays with the permitting process. Nonetheless, while the EPA and Corps maintain this guidance document is non-binding and does not have the force of law, the agencies acknowledge they will use the document to claim jurisdiction of 17 percent more waters under the CWA 404 permit program.

Based on our counties’ experiences, while the jurisdictional determination process may create delays, lengthy and resource intensive delays also occur AFTER federal jurisdiction is claimed. Once jurisdictional, the project is then subjected to a multitude of regulatory requirements required under CWA. It triggers application of other federal laws like environmental impact statements, NEPA and impacts on ESA. These involve studies and public comment periods, all of which can cost both time and money. And often, as part of the approval process, the permit requires the applicant to “mitigate” the environmental impacts of the proposed project, sometimes at considerable expense. There also may be special conditions attached to the permit for maintenance activities. These specific required conditions result in a lengthy negotiation process with counties. A number of our California counties have told us this process takes easily three to five years or more.

The Draft Guidance does little to negate these concerns since the agencies state that each jurisdictional determination will be made on a case by case basis “considering the facts and circumstances...” If 17 percent more waters are claimed under the guidance, the conditions attached to each permit must be negotiated individually. This, in turn, would lead to an even lengthier process, especially if the process is not streamlined nor accompanied by a Corps staff increase.

It is imperative 404 permits be processed in a timely manner by the Corps. Delays in the permitting process have resulted in flooding of constituent and business properties, placing our counties in a difficult position in choosing between public safety and environmental protection.

Stormwater Regulations (NPDES) – Under the NPDES program, all facilities which discharge pollutants from any point source into waters of the United States are required to obtain a permit; this includes localities with Municipal Separate Storm Sewer Systems (MS4s). The EPA is studying ways to expand the current NPDES program, which may encompass smaller, less financially stable counties. How will changes to the “Waters of the U.S.” definition impact both the current and proposed changes to the 402 NPDES permit program?

For example, if MS4s run into navigable and/or interstate waters and/or their jurisdictional tributaries, will relevant MS4s then become “waters of the U.S.”? Likewise, if a MS4 runs into a “waters of the U.S.,” how will MS4 discharges to a “water of the U.S.” be treated? – will they be covered under the NPDES program or required to comply with a new federal mandate in these tight fiscal times?

In *NRDC v. County of Los Angeles* (9th Cir. March 10, 2011), the court ruled Los Angeles County was responsible for discharges of polluted stormwater from its MS4 system into “waters of the U.S.” even though the water pollution did not originate from the county itself. The county’s MS4 system collects stormwater pollution from its incorporated cities and unincorporated areas into the county’s flood control and storm-sewer MS4 system. This ruling has a significant financial impact on any local government that operates a federally mandated MS4 system and may have implications within the Draft Guidance.

While agency staff has indicated the EPA has no plans to change the NPDES permit program based on the Draft Guidance, this intent is not stated in the draft documentation. The EPA must clarify whether and how the NPDES program is affected by the Draft Guidance.

County-owned Forest Roads (NPDES) – The Silvicultural Rule, 40 C.F.R. § 122.27(b)(1), specifically defines timber “harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff” to be “non point source silvicultural activities,” and thus, excluded from NPDES permitting requirements.

On August 17, 2010 the United States Court of Appeals for the Ninth Circuit disagreed with the Silvicultural Rule, holding that stormwater runoff that is collected and channeled in a system of ditches and culverts before being discharged into streams and rivers constitutes a point source and should be regulated under the NPDES program. The Court’s decision has potentially sweeping implications. If broadly read, this opinion would require NPDES permits for every road in the country that is served by ditches or culverts that eventually discharge to natural surface waters and that is not already regulated by the CWA.

Contrary to the court’s assumptions of fact, many forest roads, including the roads at issue in this case, are not dedicated just to logging. They are used for a variety of public and private purposes, beyond just logging and many are owned and operated by rural counties. Under the Draft Guidance, what implications are there for county-owned forest roads?

Pesticide Permit Program (NPDES) – The EPA is moving forward this year with a pesticide permit for all “waters of the U.S.” This means anytime a pesticide is applied on or near a “waters of the U.S.” a permit is needed. Counties use pesticides in a number of ways including treatment of weeds in ditches on the side of the road and treatment of mosquitoes and other pests.

This permit includes tight documentation requirements for communities of over 10,000 which will be a financial hardship for many of our rural counties. NACo considers a county under 50,000 to be rural. Rural counties often have small staffs, which are asked to do a wide variety of jobs and may not have the technical knowledge to comply with these documentation requirements.

If more waters become jurisdictional because of the guidance, has the EPA looked at additional financial costs for state and local governments to implement the pesticide permit program? How many more waters, including ditches, will be considered jurisdictional under the pesticide permit program by the Draft Guidance?

Total Maximum Daily Load (TMDL)/Water Quality Standards – An increase in the scope of CWA jurisdiction means the states would be required to expand and increase current water quality designations, TMDLs and wasteload and load allocations. The effects on state nonpoint-source control programs are difficult to determine, but they could be equally dramatic, without a significant funding source to pay for the proposed changes. Many counties, in the role of regulator, have their own watershed/storm water management plans that would also have to be modified.

Endangered Species Act (ESA) / National Environmental Policy Act (NEPA) – Once a “water” is deemed jurisdictional under CWA, it must go through a permit process for any activities affecting the “water” (aka ditch). This federal permit process includes Section 7 Consultations with U.S. Fish and Wildlife Service on ESA determinations. Likewise, the NEPA processes must be considered. Both Acts contain detailed consulting requirements which are time consuming and increase the costs associated with projects.

Emergency Exemptions – Counties who have experienced natural or man-made disasters have expressed concerns about clean-up around ditches classified as “waters of the U.S.” For example, one Gulf county said the U.S. Army Corps of Engineers would not let the county clean-up areas that were classified as “waters of the U.S.” after last year’s oil spill.

Additionally, after a number of tornados hit counties in the heartland last year, several local governments stated they were not allowed to clean up “waters of the U.S.” areas. It’s our understanding from counties that emergency waivers are rarely given. This, in turn, damages habitat and endangers public health. We would urge the EPA and the Corps to revisit that policy, especially if more waters are classified as “waters of the U.S.”

Increase of “Waters” under Jurisdiction and Contradicting Provisions

Tributaries - According to the EPA and the Corps, a tributary is jurisdictional if it has a bed, bank, and an ordinary high water mark (OHWM). This would include tributaries that have been “channelized” and lined in concrete. By our estimate, a large number of county-owned public infrastructure projects, including road-side ditches, flood control channels, culverts, etc, would become jurisdictional under this definition.

In conversations with the Corps and EPA, the agencies have stressed continuation of their current exemption of maintenance of ditches. However, while an exemption exists on paper, in

reality, a number of our counties are required to obtain 404 permits to cut down vegetation and/or clean out debris of man-made ditches. Delays in the process and associated financial requirements cause financial hardship on our counties (refer to above section, *Effects on All CWA Programs, Section 404 Wetlands Permitting Program*). NACo believes human-made ditches, streets, and gutters should not be considered “Waters of the U.S.”

Interstate Waters - Under the Draft Guidance, the term ‘interstate waters’ is defined for the first time as “other waters that flow across, or form a part of, state boundaries, even if such waters are not traditional navigable waters.” According to an EPA representative, if tributaries (aka ditches) meet the bed, bank, and OHWM and flow into interstate waters, regardless of distance, they could be regulated. Interstate water jurisdiction could be claimed over several miles or several thousand miles depending on the circumstances and waters flowing directly or indirectly into interstate waters could also be regulated. This means a number of traditional intrastate waters could be regulated as “waters of the U.S.” impacting a state’s authority over its “waters of the state.”

Significant Nexus Determination - Jurisdictional waters must have a significant nexus to navigable and/or interstate waters. A significant nexus is defined as a water that, “either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable or interstate waters.” This could include biological, hydrological, habitat of species, etc.

This definition uses the watershed approach to determine jurisdiction – if one “similarly situated” water is jurisdictional, it is likely that similar features in the same watershed will also be jurisdictional. It will also apply to all CWA programs, beyond the 404 permit program.

Seasonal Waters – The Draft Guidance attempts to define seasonal waters when it has a predictable flow during wet seasons. However, the document acknowledges the definition may differ across the country and will be determined by the regional Corps districts.

While this is a step in the right direction, away from a federal one-size-fits-all approach, this is still a top-down approach. A give and take is needed between the federal government and regulated entities, such as counties, to allow for local flexibility to account for local conditions. As stated in the Draft Guidance, what constitutes seasonal waters could vary greatly in the various regions. To that end, it is important that the federal, state and local government work together to craft reasonable and workable standards that impact them.

Contradicting Provisions – While the Draft Guidance document states that the intent is to provide clarity for agency field staff in making determinations about whether waters are protected by the CWA, the document contains contradictory and confusing criteria to determine federal jurisdiction.

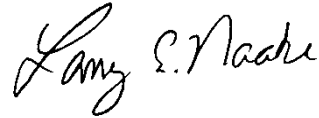
For example, the Draft Guidance sets up specific parameters on determining jurisdiction for traditionally navigable and/or interstate water using a significant nexus. The guidance document implies there is a limit to those waters deemed jurisdictional. However, the Draft Guidance states that determinations will be made from a watershed basis, thus negating the perceived limit

placed on federal jurisdiction. Conceivably, all waters and their conveyances to these waters could then be considered jurisdictional. It would be difficult to find an area of the country that is not in a watershed.

Many of the definitions used in the Draft Guidance are incredibly broad and may lead to further confusion and lawsuits. To lessen confusion, since there is no appeals process associated with jurisdictional determinations, we recommend the agencies implement a transparent and understandable appeals procedure for entities to challenge agency decisions without having to go to court.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry E. Naake". The signature is fluid and cursive, with the first name "Larry" being more prominent.

Larry E. Naake
Executive Director