Congress of the United States
Washington, DC 20515

June 12, 2012

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460

Dear Administrator Jackson:

In May 2011, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers published for comment, "*Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act*,"[1] which sought to clarify EPA jurisdiction under the Clean Water Act (CWA). The final version of the guidance (Final Guidance) was submitted to the Office of Management and Budget (OMB) for review on February 21, 2012. The purpose of this letter is to seek information on the scientific, technical, and legal justifications and bases for the Final Guidance as well as the potential impacts on jobs and the economy of the Final Guidance.

The Final Guidance submitted by EPA circumvents the traditional rulemaking process and appears to directly disregard recent decisions by the U.S. Supreme Court[2] addressing and resolving disputes over the Environmental Protection Agency's Clean Water Act jurisdiction under the law. Instead of working to definitively clarify Clean Water Act jurisdiction through a formal rule, as strongly advised by the Supreme Court,[3] the EPA advanced informal guidance in the form of the May 2011 Draft Guidance and February 2012 Final Guidance submitted to OMB. The Agency has yet to issue an Advance Notice of Proposed Rulemaking (ANPR) and appears to be on a path to bypass the formal rulemaking process by merely issuing the pending Final Guidance as a de facto rule, as evidenced by the removal of the topic from the latest publication of the EPA Regulatory Agenda.[4]

Once issued and implemented, the EPA Final Guidance will further confuse the CWA regulatory process and significantly expand federal regulatory authority, while introducing entirely new concepts that blur the distinction between federal and state water and land use regulatory authorities. Moreover, corresponding actions by EPA, including two recent supporting water studies, have raised questions over the due diligence, open process, and scientific basis for the Agency's action on this issue.

---

[1] http://yosemite.epa.gov/opa/admpress.nsf/ab2d81eb088f4a7e85257359003f5339/5f0513dc19601d728525788d00524d3d!OpenDocument

[2] *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, (99-1178) 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006); *Sackett v. United States Environmental Protection Agency*, 566 U.S. ___ (2012).

[3] *Rapanos v. United States*, 547 U.S. 715 (2006).

[4] http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OA-2012-0077-0001

PRINTED ON RECYCLED PAPER

The Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC,* 2001), *Rapanos v. United States* (2006) and *Sackett v. EPA* (2012) prescribe the relevant context for the significance, impact, and relevance of the Final Guidance, as well as EPA's corresponding administrative efforts. In both the *SWANCC* and *Rapanos* decisions, the Supreme Court sought to establish legal standards for the complex and persistently ambiguous process of identifying the, "waters of the United States,"[5] subject to federal Clean Water Act jurisdiction. The *Sackett* decision determined that recipients of EPA administrative orders would have the right to challenge the Agency's claims to federal jurisdiction prior to potential penalization. The *Sackett* ruling highlights the consequences of EPA CWA jurisdiction that is defined only by guidance and not a formal rule.

In his concurring opinion in *Sackett,* Justice Alito stated,

> The reach of the Clean Water Act is notoriously unclear...the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase ["waters of the United States"]. Instead, the agency has relied on informal guidance. But far from providing clarity and predictability, the agency's latest informal guidance advises property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff.[6]

Furthermore, EPA has yet to respond to comments submitted on the Draft Guidance in July 2011. Instead, by moving to a final guidance, EPA seeks to further eliminate the opportunity for public input that would be required as part of a proposed policy revision conducted through the formal rulemaking process. This ignores the key elements of open and transparent public participation.

Many of the comments emphasize that the Final Guidance will amount to *de facto* new regulations and would have the potential to cause significant economic harm to numerous industries.

For example, the Agricultural Retailers Association and its coalition raised concerns over the influence and effect of the Draft Guidance on all CWA regulatory programs, and the significant economic consequences of this expanded scope for stakeholders.[7] The Texas and Southwestern Cattle Raisers Association criticized EPA's cost-benefit analysis for the Draft Guidance, noting the omission of enforcement costs, costs incurred by states, increased permitting time delays, and the loss of property value associated with new land use restrictions.[8] Finally, the National Association of Manufacturers (NAM) highlighted the economic damage and direct impact on job growth from the Draft Guidance and bureaucratic stagnation noting, "Significant delays in permitting would be inevitable, and job growth in the manufacturing sector—particularly growth tied to new plants and plant expansions—would be endangered."[9]

Raising further questions regarding the justification for and ultimate use of the Final Guidance, the EPA Office of Water has advanced a study entitled, "Estimating the Value of Water to the U.S. Economy" ("Value of Water study"). Additionally, the Office of Research and Development (ORD) has begun the process of seeking data and input from states regarding the so-called

---

[5] 33 U.S.C. §1251 et seq. (1972).

[6] *Sackett v. United States Environmental Protection Agency*, 566 U.S. ___ (2012). http://www.supremecourt.gov/opinions/11pdf/10-1062.pdf

[7] http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3543

[8] http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3677

[9] http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3489

"Connectivity Study" on the underlying issue of the connection between marginal water bodies and "navigable waters".

Value of Water Study

With regard to the Value of Water study, the Committee on Science, Space, and Technology has outlined its concerns in the past over the methodology behind EPA's cost-benefit analyses, particularly within the Office of Air and Radiation for "Utility MACT," among others.[10] These specific concerns were echoed in a February 18, 2012 Economist article that stated, among other critiques, that EPA cost-benefit analyses', "...calculations have been criticized for resting on assumptions that yield higher benefits and lower costs..." and that, "[t]he values placed on such private benefits are highly suspect."[11] Furthermore, a recent National Research Council report on EPA's economic analysis of water quality standards in Florida stated, "Uncertainty is pervasive in estimating the incremental cost of implementing the [proposed] rule and is inadequately represented in the EPA analysis."[12]

Given these concerns, and in light of the importance that any cost-benefit analysis associated with the Final Guidance be rigorous and accurate, we ask that you please respond to the following:

1. Please outline all actions taken in support of the Value of Water study and those expected in the future, as well as a detailed timeline going forward.
2. Please describe any and all future purpose for the study with regard to any clarification and/or expansion of CWA jurisdiction.
3. Please detail the cost-benefit analysis undertaken in development of the Draft Guidance. Will the Final Guidance incorporate information from and include a cost-benefit analysis related to the Value of Water study? Will the cost-benefit analysis be consistent with requirements under OMB Circular A-4 and EPA's Guidelines for Preparing Economic Analyses?[13]
4. Will this study be deemed a "Highly Influential Scientific Assessment" (HISA) as defined by OMB?
5. A review of the EPA website demonstrates that 15 of 19 listed members of the SAB Environmental Economics Advisory Committee reviewing the Value of Water study, nearly 80%, have recently received EPA funding.[14] Will EPA appoint a new SAB panel to review the final study? What steps would the Agency take to ensure a new panel's independence? Has EPA changed the regional or industry related scope of the study in response to SAB suggestions?
6. A recent Congressional staff briefing by the EPA on the study[15] described a so-called "background report" that will be compiled by a contractor, IEC, as a synthesis of papers solicited from environmental, industry and economic experts in the water sector. What specific methodology will

---

[10] http://science.house.gov/sites/republicans.science.house.gov/files/documents/Letters/12-12-2011%20Letter%20to%20Administrator%20Sunstein.pdf

[11] http://www.economist.com/node/21547772

[12] http://www.nap.edu/openbook.php?record_id=13376&page=114

[13] http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0516-01.pdf/$file/EE-0516-01.pdf

[14] http://yosemite.epa.gov/sab/sabpeople.nsf/WebCommitteesSubCommittees/Environmental%20Economics%20Advisory%20Committee%20Augmented%20for%20the%20Consideration%20of%20the%20Value%20of%20Water%20to%20the%20U.S.%20Economy

[15] Congressional staff briefing, Committee on Science, Space, and Technology, April 16, 2012: Laurie Alexander, Office of Research and Development (ORD), U.S. EPA; Michael H. Shapiro, Principal Deputy Assistant Administrator, Office of Water, U.S. EPA.

be used to determine the authors and content of these papers? Have the authors, content or topic areas been finalized? If so, please provide them.

7. When does EPA anticipate publishing the "background report" for required public review and comment?

Connectivity Study and CWA Definition of "navigable waters"

In the concurring opinions of the 4-4-1 *Rapanos* split decision, the Supreme Court outlined two separate tests for determining the legal and jurisdictional definition of "navigable waters". In Justice Scalia's plurality opinion, only "relatively permanent" waters that hold a "continuous surface connection" to traditionally navigable waters are jurisdictional. In Justice Kennedy's plurality opinion, a second test is outlined stating that waters sharing a "significant nexus" with jurisdictional waters are subject to federal CWA regulation. EPA's draft guidance submitted in May 2011 proceeds solely within the confines of the interpretation outlined in the Kennedy opinion, stating, "In *Rapanos,* Justice Kennedy provides an approach for determining what constitutes a 'significant nexus' that can serve as a basis for statutory jurisdiction."[16]

In his concurring opinion in *Rapanos*, Chief Justice Roberts expressed concern with the practical implications of the Court's split decision, its precedent and importance going forward, and its connection to EPA's inaction. "Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented... What is unusual in this instance, perhaps, is how readily the situation could have been avoided."[17]

The scientific basis for EPA's incorporation of only the Kennedy "significant nexus" test in the Draft and Final Guidance remains unclear and problematic. Given Chief Justice Roberts' rather pointed opinion and the legal precedent for all subsequent, granular interpretations of CWA language regarding jurisdiction resulting from the *Rapanos* decision—whether by the lower courts, private citizens, businesses, or the EPA itself—the importance of the Agency's underlying science and corresponding administrative efforts is paramount.

EPA's "Water Quality Research Multi-Year Plan 2009-2014" (Five-Year Research Plan) states that it expects, "[b]y 2013, [to] provide research and develop tools for assessing significant nexus and permanence of hydrologic connections in head water streams, adjacent wetlands, and isolated wetlands. The research will provide a relatively stepwise approach to evaluating the existence of connectivity or a significant nexus. Following the framework, a preliminary classification system for evaluating connectivity and nexus will be developed..."[18] According to the Five-Year Research Plan it appears that a research framework—and necessary tools—for assessing significant nexus are expected by 2013. After this framework has been developed, only a "preliminary" system for evaluating connectivity would be developed.

In light of the ongoing uncertainty regarding the science of "assessing significant nexus" outlined in EPA's Five-Year Research Plan, the current Connectivity Study conducted at ORD has a potentially significant bearing on the broader issue of near-term EPA CWA authority, the recently submitted Final Guidance, and any eventual proposed rule.

---

[16] http://www.epa.gov/indian/pdf/wous_guidance_4-2011.pdf
[17] http://www.supremecourt.gov/opinions/05pdf/04-1034.pdf
[18] http://www.epa.gov/ord/npd/pdfs/water_research_myp_nov09.pdf (p. 26)

Accordingly, we ask that you please respond to the following questions regarding the details of the Connectivity Study and its relationship to the Final Guidance:

1. Please provide the current draft of the study.
2. Please provide a detailed and comprehensive explanation of the justification and basis for incorporating only the Kennedy "significant nexus" test in the Draft and Final Guidance.
3. Please provide a comprehensive explanation of the specific need, content, and future utility of the Connectivity study, with particular regard to the priorities and requirements put forth in ORD's five year "Water Quality Research Multi-Year Plan 2009-2014".[19]
4. Please outline all actions taken in support of the Connectivity Study and those expected in the future, as well as a detailed timeline going forward.
5. Please describe any and all future or jurisdictional purpose for the study.
6. Why was the Connectivity Study not completed prior to release of the Draft Guidance? Would the findings of the study have been significant or instrumental in the draft process of future CWA Guidance (May 2011 Draft Guidance; February 2012 Final Guidance)?
7. Will this study be deemed a "Highly Influential Scientific Assessment" (HISA) as defined by OMB?[20] Who will conduct the peer review and when? At the April 16 EPA and Congressional staff briefing on this study EPA staff stated that external peer reviewers have read a draft study. Please identify those peer reviewers and when the review occurred.
8. EPA Staff described the study as a synthesis report of relevant technical literature and research since the *Rapanos* decision, to be compiled by contractor ERG. The stated focus was to comprise both what is known and unknown with regard to the science of connectivity (including all three components: physical, chemical and biological). Following a presentation to the National Institute of Water Resources by then-Acting Administrator for the Office of Water, Nancy Stoner, it was reported that the final study was, "...slated for release sometime this spring..." and that, "...could help the agency defend its draft guidance...and a possible rulemaking to codify the guidance..."[21] Will this study be released prior to the Final Guidance? If so—and if not—what will be its direct and/or indirect bearing on the guidance and further, on the guidance's impact with respect to CWA jurisdiction and regulation?
9. In the EPA staff briefing cited above, a recent scientific method being developed by ORD for assessing the physical characteristics of streams and their potential impacts on downstream water bodies was discussed. According to an EPA ORD fact sheet, the "Streamflow Duration Assessment Method for Oregon" (Method) is to be used for, "[m]apping hydrological landscape regions for use in developing a system for classifying the effects of non-navigable waters on navigable waters..." and "[e]xamining the connectivity of non-navigable streams and influence on navigable rivers with respect to water sources, nitrogen and fish."[22] With particular regard to the Method's development under the Five Year Research Plan and the stated gaps in connectivity and significant nexus science therein, what will be the comprehensive and future connections between the Method, the Connectivity Study, and the content and future interpretation of the Final Guidance?

---

[19] http://www.epa.gov/ord/npd/pdfs/water_research_myp_nov09.pdf
[20] http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/peer_review041404.pdf
[21] http://insideepa.com/Inside-EPA/Inside-EPA-02/17/2012/epa-readies-connectivity-study-to-bolster-clean-water-jurisdiction-policy/menu-id-153.html
[22] http://www.epa.gov/research/npd/pdfs/Headwaters+Research+Fact+Sheet_Final.pdf

10. The same fact sheet states that EPA is, "developing methods to estimate hydrologic permanence." What is EPA's definition of "hydrologic permanence," and what does estimating it entail beyond a measurement of water flow? What specific consideration is given to both frequency and duration of flow in EPA's definition of "hydrologic permanence"? What authority is EPA operating under when the Agency states that it is "classifying watersheds and landscapes to aid in determining the contributions of headwaters and non-navigable streams to downstream waters"[23] ?
11. Please provide a detailed description of laboratory data associated with conductivity and total dissolved solids in the database for the experimental stream facility in Clermond County, OH, also cited in the ORD fact sheet. [24]
12. Does EPA plan to provide detailed and comprehensive responses to public comments submitted on the Draft Guidance in July 2011? When will these responses be made publicly available?

Please respond to the questions contained herewith by close of business, Tuesday, June 26, 2012. If you have any questions regarding this request please contact Mr. Alex Matthews, Subcommittee on Energy and Environment, Committee on Science, Space, and Technology at (202) 225-6371.

Sincerely,

Rep. Andy Harris, M.D.
Chairman
Subcommittee on Energy
and Environment
Committee on Science, Space,
and Technology

Rep. Bob Gibbs
Chairman
Subcommittee on Water Resources
And Environment
Committee on Transportation
and Infrastructure

cc: Lieutenant General Thomas P. Bostick
Chief of Engineers
United States Army Corps of Engineers

Rep. Brad Miller
Ranking Member
Subcommittee on Energy
and Environment

Rep. Timothy Bishop
Ranking Member
Subcommittee on Water Resources
and Environment

[23] http://www.epa.gov/research/npd/pdfs/Headwaters+Research+Fact+Sheet_Final.pdf
[24] http://www.epa.gov/research/npd/pdfs/Headwaters+Research+Fact+Sheet_Final.pdf