

Congress of the United States

Washington, DC 20515

March 28, 2012

The Honorable Cass R. Sunstein
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Dear Administrator Sunstein:

On February 21, 2012, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (collectively, the “Agencies”) sent to the Office of Information and Regulatory Affairs of the Office of Management and Budget, for regulatory review, a final guidance document entitled “Guidance on Identifying Waters Protected by the Clean Water Act” (RIN: 2040-ZA11), relating to the identification of waters subject to jurisdiction under the Clean Water Act (CWA).

We continue to be concerned that this so-called guidance misconstrues and manipulates the legal standards announced in the *SWANCC* and *Rapanos* Supreme Court decisions, and will not further the goal of clarifying which waters are subject to CWA jurisdiction. We are also concerned that the Administration is seeking, through so-called guidance, to change the scope and meaning of the CWA.

If the Administration seeks statutory changes to the Clean Water Act, a proposal must be submitted to Congress for legislative action. If the Administration seeks to make regulatory changes, a notice and comment rulemaking is required, following the proper, transparent rulemaking process that is dictated by the Administrative Procedure Act.

We have informed the Agencies of this, and that we expect them to formally withdraw this guidance and undertake a formal rulemaking to address the definition of “waters of the United States” in the context of the *SWANCC* and *Rapanos* decisions. However, the Agencies have repeatedly ignored our calls to not finalize the guidance.

On April 14, 2011, 170 Members of the U.S. House of Representatives sent a letter to the Agencies stating concerns that the development of a new guidance document ignored calls from State agencies and environmental groups, among others, to proceed through the normal rulemaking procedures, and avoided consulting with the States, which are the Agencies’ partners in implementing the Clean Water Act. The letter went on to urge that the Agencies not pursue this guidance, but instead to conduct a rulemaking.

On June 30, 2011, 41 members of the U.S. Senate sent a letter to the Agencies outlining specific concerns with the draft guidance and expressing their concerns that the guidance contained clear legal and regulatory consequences that go beyond being simply advisory guidelines and that changing the legal rights and responsibilities of individuals must be done through formal rulemaking. The letter went on to request that Agencies abandon any further action on this guidance document.

On November 8, 2011, a bicameral letter from the committees of jurisdiction was sent to the Agencies, again insisting that the Agencies not finalize the guidance and further requesting that they solicit input from the general public, scientific communities, and Federal and State resource agencies to determine the appropriate scope of CWA jurisdiction and the range of issues to be covered by proposed regulations through an advance notice of proposed rulemaking.

In response to the November 8, 2011 letter, Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) said that, as was stated in the request for comment in the Federal Register on May 2, 2011(76 Fed. Reg. 24479), “the guidance would not go into effect until final guidance was issued after making changes in response to substantive comments.” However, the Agencies received over 200,000 comments in response to the Federal Register request, but the final guidance that was leaked to the press on March 7, 2012 appears to be substantively identical to the draft guidance. We find it incredulous that, with over 200,000 comments, a large portion of which proposed substantive changes, the proposed guidance has not been changed in any substantive way.

Further, we remain concerned that the Agencies have not fully taken into account the full extent of the changes the guidance would make in expanding the scope of Federal jurisdiction under the CWA.

For example, in the economic analysis completed by the Agencies, it was determined that as few as 2% or as many as 17% of non-jurisdictional determinations under the current 2003 and 2008 guidance would be considered jurisdictional using the expanded tests under the draft guidance.¹ However, this analysis was only for the Army Corps making §404 determinations compared to current practice.

Instead, the guidance is intended to apply to more jurisdictional interpretations, under other CWA programs, than just those covered by the Army Corps in making §404 determinations. Specifically, the guidance also would apply to jurisdictional determinations made under §402, which governs National Pollutant Discharge Elimination System permits, §311, covering oil spills and SPCC plans, §303, dealing with water quality standards and total maximum daily loads, and §401, involving State water quality certifications.

Because most States have authority to implement the programs under many of these sections, this change in guidance also would result in a change in the responsibilities of States in executing their duties under the CWA. Failing to consider the potential costs of changes for States and an increase in programs outside the §404 program dramatically underestimates the costs of the changes this guidance document would make.

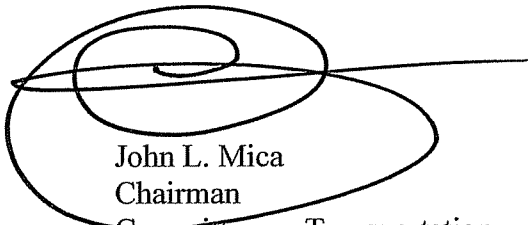
Finally, it was reported recently that there is no clear path forward on when or how the Agencies will proceed with a rulemaking. We are concerned that, like in 2003, following the Agencies’ issuance of an advance notice of proposed rulemaking to obtain public input on issues associated with the definition of “waters of the United States” under the CWA, the Agencies are simply going to change the guidance and fail to undertake a rulemaking. Changes in guidance will only exacerbate the confusion and legal uncertainty that surrounds the CWA and continue to embroil the States and regulated community in unending legal challenges.

¹ “Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction.” April 27, 2011 http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa_guidance_impacts_benefits.pdf

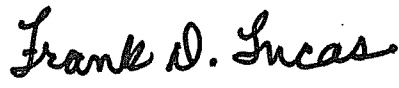
The scope of those affected by the guidance document is far reaching and it is clear that sufficient review of the impacts has not been considered by the agencies. We request that the guidance document not be finalized.

Thank you for your attention to this matter.


Sincerely,




John L. Mica
Chairman
Committee on Transportation
and Infrastructure



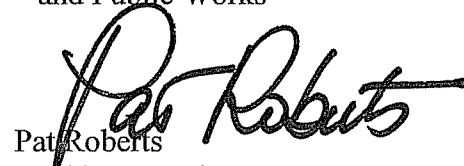
Frank D. Lucas
Chairman
Committee on Agriculture



Bob Gibbs
Chairman
Subcommittee on Water Resources
and Environment



James M. Inhofe
Ranking Member
Committee on Environment
and Public Works



Pat Roberts
Ranking Member
Committee on Agriculture,
Nutrition, and Forestry



Jeff Sessions
Ranking Member
Subcommittee on Water and Wildlife

cc: Lisa Jackson, Administrator, US Environmental Protection Agency
Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works)

Attachments:

April 14, 2011 letter from US House of Representatives to EPA and the Army Corps
June 30, 2011 letter from US Senators to EPA and the Army Corps
November 8, 2011 letter from Chairman Mica, Chairman Gibbs, Ranking Member Inhofe, and
Ranking Member Sessions to EPA and the Army Corps