

Water Docket, ID EPA-HQ-OW-2011-0409
Environmental Protection Agency
Mail Code 2822T, 1200 Pennsylvania Ave., NW
Washington, DC 20460
Via e-mail: ow-docket@epa.gov

Final Draft

Re: Water Association Comments on EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act (Docket ID EPA-HQ-OW-2011-0409, 76 FR 24479)

The undersigned associations represent publicly and privately owned drinking water utilities in the United States. Over the years we have strongly urged EPA to work with other federal agencies and to use its existing authorities to prevent pollution from entering sources of drinking water supply. We applaud EPA for cooperating with the U.S. Army Corps of Engineers (Corps) to determine which waters are subject to the Clean Water Act (CWA). The draft guidance offers an excellent vehicle for focusing a conversation on this critical issue.

In particular, we support the recognition of EPA and the Corps in the *Draft Guidance on Identifying Water Protected by the Clean Water Act* that jurisdictional determinations are largely case-by-case decisions, just as water resources decisions are often based on local or regional findings and precedents.

We also strongly support source water protection efforts to control pollutants at the source when feasible. To the extent that the guidance helps to control pollutants at their origin rather than after they have been released into the environment and entered a drinking water source, it is a positive step toward improving source water protection. Leveraging other statutes is a key goal of the agency's drinking water strategy, and we support EPA strengthening the nexus between the CWA and Safe Drinking Water Act to protect drinking water while avoiding conflicts between the two acts.

Further, we encourage EPA to continue to support source water protection efforts, including increased funding for watershed protection programs and training as well as continued support of source water protection coordinators at EPA regional offices.

Having said that, we believe the draft guidance to be procedurally flawed. Generally speaking, it is important for federal agencies to issue guidance to clarify understanding of existing laws and regulations. We have significant concerns about developing guidance in the absence of regulations, and would much prefer that regulations be developed on this subject as a prelude to guidance. By its own terms, the guidance at hand would not impose legally binding requirements on EPA or the Corps of Engineers. Although it posits that it does not impose legally binding requirements on the regulated community either, in fact the determinations made under the guidance will be legally binding on the regulated party. This constitutes an asymmetrical and unreasonable balance in the relationship between the federal agencies and those who must live by their decisions. It will also make it much more difficult to develop a consistent understanding on CWA jurisdiction for regulators and the regulated community alike.

In addition, while the draft guidance lays the foundation for identifying a "water of the U.S.," it lacks the direction needed to provide local authorities with the decision making tools necessary to promptly address conflicts arising with drinking water delivery and supply. While this issue may be beyond the intended scope of the draft guidance, it is one that merits consideration. For example, water utilities must construct, maintain, repair, and operate man-made ditches, canals, reservoirs, and spreading basins for the delivery of water. They often have to make emergency decisions such as employing algal controls to manage raw water reservoirs to protect public health or conducting repair and maintenance on aqueduct systems. We would be opposed to the

use of these guidelines to delay or prohibit these and other necessary actions that utility managers make daily to protect public health and provide a continuous supply of safe water to their customers.

Moreover, the draft guidance incorporates a number of policy-level changes in the determination of jurisdiction which are likely to be significant - even profound - in many parts of the country. These include:

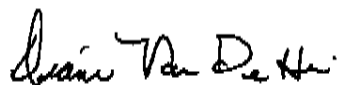
1. Application of the "significant nexus" test to all waters, not just to wetlands as suggested by the Supreme Court.
2. Lowering the threshold for the significant nexus test (by consistently changing "and" to "or" in the list of things which Justice Kennedy suggested be considered).
3. Adopting what is in effect a "cumulative impacts" test for isolated wetlands, intermittent streams, ephemeral streams, ditches, and canals in a watershed. And
4. Adopting a presumption that if one water body under 3 above is jurisdictional then all similar water bodies in the same watershed are also jurisdictional, with the burden of rebutting this presumption resting on the regulated community.

The combined effect of these changes is to significantly expand the jurisdiction of the Clean Water Act. In many cases, such expansion would help protect sources of drinking water and could merit our support. In other cases they could result in cancelled, delayed or more expensive water projects that might be critical to meeting human water requirements, particularly in arid regions. But either way, they clearly represent very significant changes to current policy, and should be handled in rulemaking first, to be followed by guidance.

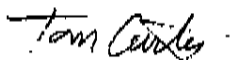
Like other rulemaking efforts, our interest would lie in seeing that rulemaking on Clean Water Act jurisdiction strikes an appropriate balance between protecting our nation's important ecological resources, and water utilities' obligation to provide safe water to satisfy the public health and safety needs of our country. Guidance should follow upon completion of that rulemaking, allowing both regulators and the regulated community to develop a consistent understanding on CWA jurisdiction.

Thank you for the opportunity to comment on the draft guidance. Please do not hesitate to contact us if you have any questions.

Sincerely,



Diane VanDe Hei
AMWA, Executive Director



Tom Curtis
AWWA, Deputy Executive Director



Mike Keegan
NRWA, Analyst