

June 22, 2011

BY ELECTRONIC MAIL

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Major General William T. Grisoli
Deputy Commanding General, Civil and Emergency Operations
U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street, NW
Washington, DC 20314-1000

Re: Guidance Regarding Identification of Waters Protected by the Clean Water Act

Dear Ms. Jackson and Major General Grisoli,

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration submits these comments to the U.S. Army Corps of Engineers and the Environmental Protection Agency (together the “Agencies”) on the proposed Guidance Regarding Identification of Waters Protected by the Clean Water Act (the “Guidance”).

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),¹ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),² gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.³ The agency must include, in any explanation or discussion accompanying the final rule’s publication in the Federal Register, the agency’s response to these written comments submitted by Advocacy on the

¹ 5 U.S.C. § 601 et seq.

² Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

³ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

proposed rule, unless the agency certifies that the public interest is not served by doing so.⁴

Background

On May 2, 2011, the Agencies published the proposed Guidance for determining whether a waterway, water body, or wetland is protected by the Clean Water Act. The Guidance would replace previous guidance concerning the scope of protection for critical waters.

The Clean Water Act and Endangered Species Act Obligations

Small businesses have expressed concern about the relationship between the Clean Water Act and the Endangered Species Act. The Clean Water Act is often cited as the federal nexus giving rise to Endangered Species Act obligations for small businesses. Thus, increasing the number and kind of waters that will be subject to permitting requirements under the Clean Water Act will also increase small businesses expenses with respect to the Endangered Species Act. It is not clear whether these costs were taken into account in the document entitled “Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction” that was published with the proposed Guidance.

Clean Water Act Jurisdiction is Best Determined under the Rulemaking Process Rather than As Guidance

Advocacy is concerned that the Agencies are choosing to address the very important issue of the determination of jurisdictional decision in guidance rather than through the rulemaking process. Advocacy believes that imposition of the changes the Agencies propose in the Guidance is properly made through the rulemaking process as governed by the Administrative Procedure Act. Advocacy realizes that the Agencies are soliciting comments on the proposed guidance. However, the rulemaking process provides the public and small businesses with important protections beyond the ability to comment such as the right to a Regulatory Flexibility Analysis and the requirement that agencies respond to comments.

The Agencies acknowledge that the proposed Guidance will significantly increase the waters that are subject to the provisions of the Clean Water Act and the Agencies’ jurisdiction. As a consequence small businesses will now have to engage the permitting process in a greater number of their business dealings resulting in a concomitant increase in costs for these small businesses. As noted above, the proposed Guidance will also have effects that reach beyond permitting such as possibly triggering Endangered Species Act obligations. By publishing this Guidance, the Agencies escape responsibility for analyzing and publishing the effects that will be borne by small businesses as a result of the increase in jurisdictional waters.

In this Guidance, the Agencies state that they intend to proposed revisions to the regulations in light of *Solid Waste Agency of Northern Cook County v. Army Corps of*

⁴ Id.

Engineers (SWANCC)⁵ and *Rapanos v. United States*.⁶ In response to past guidance on this issue, several commenters requested that the Agencies proceed with a rulemaking following the publication of the current guidance. Given the public's requests and the fact that the Agencies have at various times since the SWANCC decision, considered initiating rulemaking and even published an advanced notice of proposed rulemaking that was not finalized,⁷ Advocacy strongly encourages the Agencies to pursue the changes made in the Guidance as a rulemaking.

The proposed Guidance which will expand the reach of the Agencies' jurisdiction will have a significant effect on small businesses and the public in general. Advocacy believes that under these circumstances it more appropriate that the changes proposed be made pursuant to the rulemaking process rather than published as guidance.

The Agencies Should Extend the Comment Period

Advocacy notes that the Agencies have already received several hundred comments with respect to this Guidance. Many of these comments request that the Agencies extend the comment period. Many interested parties feel that more time is needed in order to properly review and comment upon guidance that makes considerable changes to the scope of the definition of waters of the United States and that will have major effects on a number of industries. Advocacy encourages the Agencies to extend the comment period for this Guidance, allowing all interested parties a voice in the process.

Please contact me or Kia Dennis at 202-205-6936 should you have any questions.

Best regards,

/s/

Winslow L. Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/

Kia Dennis
Assistant Chief Counsel for Advocacy

Cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs

⁵ 547 US 715, 757-758 (2006).

⁶ 547 U.S. 715 (2006)

⁷ Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States, 68 Fed. Reg. 1991 (January 15, 2003).