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Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave, NW
Washington, D.C. 20460
Attn: Docket ID No. EPA-HQ-OW-2011-0409

To Whom It May Concern:

The California State Association of Counties (CSAC) and Regional Council of Rural Counties (RCRC) appreciate this opportunity to offer comments on the Environmental Protection Agency (EPA) and Army Corps of Engineers' (Corps) Guidance Regarding Identification of Waters Protected by the Clean Water Act (CWA) (Guidance) published in the Federal Register dated May 2, 2011.

Together, CSAC and RCRC represent all 58 counties in California before the State Legislature, administrative agencies and the federal government. Our County Boards of Supervisors and County Public Works Departments are vital partners in the stewardship of our state's water resources. They take this role very seriously and are committed to carrying out provisions of the Clean Water Act (CWA) to aid in better protection of our water systems.

We understand that the intent of EPA and the Corps in promulgating this draft document is to provide guidance to agency field staff in making jurisdictional determinations under the CWA. While there may be a need to provide some level of clarification, our organizations have significant concerns with the approach taken by EPA and the Corps in providing this direction via a "guidance" document, as opposed to an official rulemaking or statutory change.

Despite the EPA and Corps' assertion that the draft Guidance is not binding and lacks the force of law, we fear that it will be used in enforcement actions, permitting decisions and jurisdictional determinations which will give it the effect of law. The proposal clearly goes beyond clarifying the scope of "waters of the United States" by also expanding the scope of the CWA to more water bodies, many of which don't make sense. The Guidance also introduces new definitions and regulatory requirements which should only be considered within the context of a formal rulemaking process, subject to consultation with other federal agencies and state and local governments.

In addition, while the stated goal of the draft Guidance is to improve the predictability and reduce costs and delays in obtaining CWA permits, we believe that the proposed requirements will make the process more cumbersome and prohibitively expensive. This is particularly true regarding the proposed procedural changes to the scope of the significant nexus test. The draft Guidance suggests that a “significant nexus” standard should be applied to all interstate waters, suggestively without the need to have surface connectivity to a navigable water. We have serious concerns about how the Corps will apply this standard to waters that do not have connectivity to traditional navigable waters downstream.

Moreover, it is unclear if the significant nexus standard would apply to man-made offline facilities such as spreading basins or treatment wetlands. The Guidance attempts to clarify that certain water bodies are not jurisdictional, but none of the non-jurisdictional categories appear to be applicable. It is conceivable that a jurisdictional determination could be made for an adjacent wetland simply because it has a significant nexus to a stream or river by beneficially affecting its chemical, physical, or biological integrity. Less clear but still conceivable is the possibility of a similar determination being made for spreading grounds facilities. Spreading grounds typically don’t return flows to the regulated water body, but a convoluted reasoning by agency staff might still lead to a significant nexus determination.

We also share the concerns of our members that EPA and the Corps plan to assert CWA jurisdiction over adjacent wetlands that meet either the plurality standard or the Kennedy standard under Rapanos. This very broad assertion of the CWA jurisdiction will leave little that is not jurisdictional for a wide range of areas and activities dealing with adjacent wetlands. Rather than risk being at odds with the Guidance, applicants will be forced to assume the area is jurisdictional, therefore requiring a permit.

With respect to ditches, the draft Guidance sets forth a series of associated requirements that in all likelihood will lead to many ditches being deemed jurisdictional. The same holds true for the conditions provided for natural and man-made swales. CSAC and RCRC have grave concerns with making ditches and swales jurisdictional, because such designations will result in additional permitting requirements, significant costs and delays to important public projects. We recommend that the draft Guidance approach to ditches and swales be completely revised, limiting jurisdiction and exceptions.

CSAC and RCRC also have concerns with the potential impacts the draft Guidance may have on local stormwater treatment systems if the water flowing from these systems runs into navigable or interstate waters or their jurisdictional tributaries. Cities and counties currently expend tremendous resources in an effort to control storm water discharges and to comply with existing permit monitoring and reporting requirements. We believe local stormwater treatment systems, including Low Impact Development (LID) techniques/devices, stormwater Best Management Practices, adjacent constructed stormwater treatment wetlands, bioswales and retention/detention basins

should be clearly exempt from the definition of “waters of the United States.” The guidance should be revised to clearly state this.

The comments noted above support our belief that the Guidance will result in subjective determinations by Corp staff given the lack of clarity regarding what is or what is not Waters of the U.S. We agree with comments offered by our member counties that the Guidance be revised to provide more specific criteria for determining elements of adjacency; significant nexus; relatively permanent, standing or flowing bodies of water; and geographic extent in analyzing similarly situated waters in the watershed.

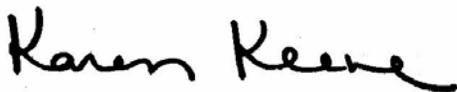
Our organizations are also concerned that the draft Guidance will result in a tendency for regulators in the field to require additional studies extending far beyond the limits of the project under consideration. No specific limit to the extent of the analysis is provided. If EPA and the Corps move forward with the Guidance, we recommend that it be revised to provide simplified procedural guidelines to assist regulators and permit applicants with a clearly understandable document that produces predictable results.

While we believe that the draft Guidance is the inappropriate venue to address the proposed requirements, we request that, once public comments have been incorporated, the EPA and Corps release the revised Guidance for another public review period before it is finalized. A second public comment period would ensure a much more robust and usable guidance for field staff and would also provide a sound foundation for the expected future formal rulemaking process.

Lastly, we support and concur with the comments submitted by the National Association of Counties (NACo) and the National Association of Flood and Stormwater Management Agencies (NAFSMA).

Thank you for considering our comments.

Sincerely,



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Senior Legislative Representative



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Regulatory Affairs Advocate