

July 14, 2011

Ms. Nancy K. Stoner, Acting Assistant Administrator for Water  
Ms. Jo Ellan Darcy, Assistant Secretary of the Army (Civil Works)  
Water Docket  
Environmental Protection Agency  
Mail Code 2822T  
1200 Pennsylvania Ave, NW  
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2011-0409  
EPA and Army Corps of Engineers Guidance Regarding the Identification of Waters Protected  
by the Clean Water Act

Dear Ms. Stoner and Ms. Darcy:

The water-related agencies in the State of Kansas appreciate the opportunity to comment on the referenced Guidance document. This Guidance and its implementation is extremely important to the citizens of Kansas. Kansas has a long history of protecting water quality dating back to laws established in 1907. To further enhance the Clean Water Act (CWA,) which provides for protection of *Waters of the United States*, the Kansas Legislature has adopted laws which provide protection to the *Waters of the State*. The definition of *Waters of the State* is far more expansive than the pre-SWANCC<sup>1</sup> and Rapanos<sup>2</sup> Supreme Court decisions, and even includes groundwater<sup>3</sup>. Therefore, state authorities exist in Kansas to protect all waters. Implementing this Federal Guidance would undoubtedly usurp a large portion of that state authority. Therefore, we strongly urge that you forego the Guidance.

Both EPA and the Corps acknowledge the *waters* over which jurisdiction will be applied "will increase." EPA and the Corps also acknowledge the asserted jurisdiction will apply to all programs of the CWA - including §303(c) Water Quality Standards; §303(d) Impaired Waters and Total Maximum Daily Loads (TMDL); §311 Oil and Hazardous Substance Liability; §401 Certification of federally issued permits; §402 National Pollutant Discharge Elimination System (NPDES); and §404 Dredge and Fill Permits. In Kansas, we believe that increase in scope is an unwarranted infringement of the state's rights. As stated above, Kansas laws have adequately provided for protection of waters not currently determined jurisdictional under the Clean Water Act. Under state law, however, federally mandated CWA programs are not required – states have discretion in how they choose to go about protecting the additional waters. That is important to Kansas because many currently non-jurisdictional waters are generally ephemeral waters. Ephemeral waters only flow in response to precipitation runoff and are always above the water table. As such, we find it wholly unnecessary and wasteful of limited state program resources to set water quality standards, issue wastewater permits, assess impairment, and develop TMDLs for surface drainage features that may have flowing or standing water no more than a few days each year. In addition, Kansas will be subject to more federal control over development and agricultural activities associated with §404 dredge and fill permits.

<sup>1</sup> U.S. Supreme Court. Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)

<sup>2</sup> U.S. Supreme Court. Rapanos v. United States, 547 U.S. 715 (2006)

<sup>3</sup> Kansas Statutes Annotated 65-161(a) - "Waters of the state" means all streams and springs, and all bodies of surface and subsurface waters within the boundaries of the state

Clearly, the efforts behind the Guidance and the unsuccessful Congressional efforts to redefine *Waters of the United States* are associated with improving wetland protection. To gain enhanced wetland protection, EPA and the Corps are seeking to assert jurisdiction to adjacent wetlands of these newly *jurisdictional waters*. Such expansion is unnecessary in states like Kansas which address such waters under state law using their authorities to protect waters of the state. We understand not all states have laws that are as protective as Kansas', however that is a conscious decision those states and their citizens have made regarding the reach of government. To override that state discretion with sweeping, expansive federal intervention is not appropriate and probably unconstitutional. The conflict that will arise by applying the wetlands adjacency argument is unneeded in Kansas and will result in waste of state program resources by forcing Kansas to assign Federal standards to what amounts to surface depressions that only function during sufficient precipitation. Further, after Kansas completes that effort, we face having to assess these normally dry drainage features for impairment and potentially develop TMDLs.

Applying CWA programs to all ephemeral waters will force private entities and local governments to expend resources "protecting" these newly jurisdictional "waters" for little if any environmental benefit.

To summarize, the approach the EPA and the Corps has developed is far too expansive and too important to address as a Guidance document. For Kansas, we can easily see where this Guidance would bring up to 100,000 miles of ephemeral drainages under the purview of the Clean Water Act and subject those drainages to its numerous mandatory requirements – requirements producing little if any demonstrable improvement in water quality. Far more appropriate is to manage those marginal waters under the authority of State law. Many states, including Kansas, not only have sufficient legal authority to manage all their waters without additional federal intervention, but have used that authority effectively and responsibly.

Respectfully,



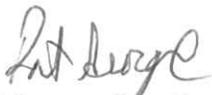
Sam Brownback, Governor  
State of Kansas



Robert Moser, MD, Secretary  
Kansas Department of Health and Environment



Robin L. Jennison, Secretary  
Kansas Department of Wildlife and Parks



Pat George, Secretary  
Kansas Department of Commerce



Dale A. Rodman, Secretary  
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Tracy D. Streeter, Director  
Kansas Water Office

cc: Sen. Pat Roberts  
Sen. Jerry Moran  
Rep. Lynn Jenkins

Rep. Mike Pompeo  
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