OBAMA-BIDEN TRANSITION PROJECT

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Call for Change – Clean Water Act Jurisdiction

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The Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) has developed a set of recommendations believed necessary to maintain and continue to improve the water quality in the United States. This "Call for Change: Water Quality Improvement in the 21st Century" is an invitation to the Federal government to reestablish an effective partnership and forge a new course of action to protect and improve the nation's water resources. ASIWPCA looks forward to an on-going constructive dialogue with the US Environmental Protection Agency (EPA), the incoming Administration, and interested stakeholders to meet this challenge.

General Overview and Background:

Significant uncertainty regarding Clean Water Act (CWA) jurisdiction was created when the United States Supreme Court issued its *Rapanos* decision(s). The issuance of guidance by the EPA and the Army Corps of Engineers (Corps), in an attempt to ensure that jurisdictional determinations are consistent with *Rapanos*, added further confusion. States have expressed several concerns regarding the *Rapanos* decision and the guidance's implementation and present the following issues for improvement. Additionally, Congress is considering amendments to the Clean Water Act to clarify the scope of CWA jurisdiction.

Reason for Change:

On June 19, 2006 in *Rapanos v. United States*, the United States Supreme Court rendered a plurality decision in response to a challenge regarding jurisdictional waters covered under the CWA. The Court was split, with four justices opining that the jurisdiction of the CWA should only apply to "relatively permanent, standing, or continuously flowing" waters or wetlands immediately adjacent to such waters. Justice Kennedy voted with the plurality to remand the case to the lower court, but disagreed with the plurality's reasoning and rendered his own explanation. Justice Kennedy's opinion focused on whether the specific wetlands at issue possess a "significant nexus" with navigable waters. The EPA and the Corps issued guidance to "ensure nationwide predictability, reliability, and consistency in identifying wetlands, streams, and rivers" subject to the CWA.

Jurisdictional Guidance Impacts May Be Far Reaching

While the *Rapanos* guidance is implemented primarily by the Corps in its administration of the CWA §404 permitting program, States are very concerned about the potential impacts of the implementation across all of the CWA programs administered by EPA and the States. Corps decisions regarding traditional navigable waters and jurisdictional determinations are made without a formal role for States; States are not consulted regarding the status or jurisdiction of a water body and are not afforded opportunity to appeal Corps decisions under this guidance.

Though the guidance, on its face, applies only to the §404 program, the prescribed procedures and the determinations made in accordance with the guidance may impact jurisdictional determinations made by EPA and States in their administration of §303, §319 and §402, and other CWA programs. At a minimum, the guidance creates opportunities for parties to argue that the longstanding water quality standards and permitting requirements no longer apply to

waters determined to be non-jurisdictional under the guidance. The guidance, and to a certain degree the *Rapanos* decision, has and will continue to force States to use limited technical and legal resources to defend and maintain the CWA programs that have protected and improved water quality over the last 35 years.

The guidance also deviates from the *Rapanos* decision in a few key areas. For example, this guidance was drafted and is being implemented without regard to the body of CWA law that was not impacted by the Supreme Court decision, including the tributary rule. States and EPA long have used the tributary rule to implement CWA protections on headwaters, intermittent and ephemeral streams. Further, the guidance introduces terms and concepts that were not found in the *Rapanos* decision, namely the limitation of jurisdiction to the "relevant reach" of a stream. The guidance also omits an important concept found in the Kennedy concurrence opinion, namely that "similarly situated lands" may be a factor in determining the CWA jurisdiction of a stream.

A Legislative Approach

Legislation has been introduced in the United States House of Representatives with the purpose to "restore" CWA jurisdiction to its state prior to Supreme Court decisions that narrow the scope of CWA jurisdiction. An amendment to the CWA that restores jurisdiction, ensures the historic scope of the CWA remains in place to protect the physical, chemical, and biological integrity of the nation's waters. EPA defined the scope of CWA jurisdiction in its definition of "waters of the United States" in 40 CFR section 122.2 and States have long implemented this definition successfully. States support amending the CWA to clarify that its jurisdiction applies to "waters of the United States" as currently defined in 40 CFR section 122.2. The Environmental Council of States (ECOS) also has adopted a resolution in favor of this legislative change.

Recommendations:

- EPA, the Corps, and States should collaborate regarding the identification of an appropriate role for States in the jurisdictional determination process.
- EPA/Corps must consider that any guidance addressing the jurisdictional reach of § 404, also will impact and possibly become controlling administrative record for jurisdictional determinations in other programs.
- EPA/Corps must consider the entire body of CWA law that exists and remains unimpacted by the Rapanos decision, e.g. the tributary rule.
- EPA/Corps should not create legal terms of art not articulated in the rulings in *Rapanos* decision and should include substantive holdings that were part of the decision, e.g. "similarly situated lands."
- Congress should enact legislation that clarifies "waters of the United States" are CWA jurisdictional waters and should be defined exactly as it appears in 40 CFR 122.2 and as applied by the States prior to the Rapanos Supreme Court Decision and Federal Rapanos Guidance.

NOTE: *Throughout this document reference to States also refers to Interstate Water Pollution Control Agencies.*

For more information on ASIWPCA's Call for Change, go to www.asiwpca.org