



February 12, 2013

The Honorable Jo-Ellen Darcy
Assistant Secretary for Civil Works
Army Corps of Engineers
108 Army Pentagon
Washington, DC 20310

The Honorable Nancy Stoner
Acting Assistant Administrator, Office of
Water
US Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Acting Assistant Administrator and Assistant Secretary:

The Waters Advocacy Coalition (WAC) is a broad coalition of organizations representing the nation's manufacturing, housing, real estate, construction, transportation, mining, agriculture, and energy sectors. Our members are critical to a thriving national economy and the employment of millions of Americans. WAC members are keenly interested in the scope of federal jurisdiction under the Clean Water Act (CWA) as well as any regulatory action that would impact our ability to use our land or to obtain workable permits within a reasonable period of time. While we share your concerns about the difficulty of making CWA jurisdictional determinations under current regulatory guidance, we do not agree that more guidance is the solution.

Indeed, many CWA stakeholders have urged the Corps and EPA to redirect their time and resources to a notice-and-comment APA rulemaking to define "waters of the United States." Many have also requested that the agencies formally rescind the draft Guidance that was sent to OMB in 2011 so that it is clear to the public as well as agency field staff that the 2011 draft Guidance will not be implemented. We agree that rescission of the Guidance is an important first step.

We also urge you to consider the following recommendations for any rulemaking:

- A proposed rule must clearly identify the limits to federal CWA jurisdiction articulated by the U.S. Supreme Court in *SWANCC* and *Rapanos*. In these cases, the Supreme Court rejected the notion that CWA jurisdiction extends to any area with a connection to navigable waters and disagreed with the agencies for their "land is waters" approach. Thus, a proposed rule must acknowledge that not all water bodies are subject to CWA jurisdiction and provide specific examples of features that are not within the scope of CWA regulation.
- Specifically, a proposed rule should make clear that ditches and other upland drainage features far removed from navigable waters are not jurisdictional. In addition, the proposed rule should be consistent with the Supreme Court's decisions in *SWANCC* and *Rapanos*. In this regard, the rule should not allow for the watershed aggregation approach contained in the agencies' 2011 draft Guidance and consistent with *SWANCC*, the proposed rule should explicitly state that isolated (or "non-physically proximate") waters are not subject to CWA jurisdiction.

- The rulemaking must elicit public comments on how to define critical regulatory terms. The failure to adequately define those terms in the current regulations and the successive guidance documents has contributed to the confusion and difficulty in making consistent and timely jurisdictional determinations. The proposed rule must not simply adopt confusing legal standards, but rather establish clear and reasonable jurisdictional lines to assist the regulated public and regulators in implementing the CWA on the ground.
- As the plurality recognized in *Rapanos*, an overly broad definition of “waters of the United States,” like the definition the agencies have proposed in the 2011 draft Guidance, would significantly impinge on the States’ traditional and primary power over land and water use. To promote state primacy over local land and water use and maintain the balance required by Congress, a proposed rule must explain what waters are not regulated as waters of the United States and therefore, are solely subject to state authority.
- A rulemaking must identify and analyze the burdens on the federal permit program as well as the implications of implementing its definition of “waters of the United States” for the entire suite of CWA programs (section 303 water quality standards; section 311 oil spill prevention control; section 401 water quality certifications; section 402 water program; and section 404 dredge and fill permit program). All but two of these programs are federally administered. The 2011 draft Guidance focused on the section 404 program, leaving the public without sufficient information to meaningfully comment on the true scope of EPA’s and the Corps’ proposed guidance.
- Whereas the 2011 draft Guidance’s economic analysis focuses solely on impacts of the section 404 program, a proposed rule must contain a comprehensive economic analysis that assesses the cumulative impacts on industry and state and local governments when a proposed definition of “waters of the United States” is applied to all CWA programs. Consistent with the Small Business Regulatory Enforcement Fairness Act, the economic analysis should provide a detailed analysis of the economic impacts to small businesses. Moreover, rather than comparing the economic impacts of a proposed rule to impacts of guidance that has not been adopted through notice-and-comment rulemaking, a sound economic analysis must measure the proposed rulemaking’s impacts against the impacts of the existing regulations.
- The rulemaking should allow stakeholders sufficient time to submit a robust and meaningful response. Stakeholders need adequate time to develop analytical, technical, and economic information in response to the proposal. We understand that EPA and the Corps have taken years to develop a proposed rule, and we ask that the government afford the public no less than 180 days for public comment.

Finally, we urge the Corps and EPA to set aside the 2011 draft Guidance because it would significantly expand the scope of waters to be regulated, is inconsistent with the statute and with Supreme Court precedent, was developed without observing the procedural requirements of the Administrative Procedure Act, and would be prejudicial to the rulemaking.

We have long believed that there is an opportunity, through a rulemaking that balances the many interests that lie at the heart of the jurisdictional issues, to improve water quality without increasing burden and delay on activities that are at the core of a growing, vibrant economy.

Thank you for your consideration of these views.

Sincerely,

Agricultural Retailers Association
American Farm Bureau Federation
American Forest & Paper Association
American Iron and Steel Institute
American Petroleum Institute
American Road and Transportation Builders Association
Associated General Contractors
CropLife America
Edison Electric Institute
Florida Sugar Cane League
Foundation for Environmental and Economic Progress
Industrial Minerals Association-North America
International Council of Shopping Centers
Irrigation Association
NAIOP, The Commercial Real Estate Development Association
National Association of Home Builders
National Association of Manufacturers
National Association of REALTORS
National Cattlemen's Beef Association
National Corn Growers Association
National Council of Farmer Cooperatives
National Milk Producers Federation
National Mining Association
National Multi Housing Council
National Pork Producers Council
National Stone, Sand & Gravel Association
Public Lands Council
Responsible Industry for a Sound Environment
Southern Crop Production Association
The Fertilizer Institute
Treated Wood Council
United Egg Producers
Western Business Roundtable

CC: Boris Bershteyn, Acting Administrator, OMB Office of Information and Regulatory Affairs
Senator Barbara Boxer, Chair, Senate EPW Committee
Senator David Vitter, Ranking Member, Senate EPW Committee
Rep. Bill Shuster, Chair, House Committee on Transportation and Infrastructure
Rep. Nick Rahall, Ranking Member, House Committee on Transportation and Infrastructure