

July 26, 2011

Water Docket  
Environmental Protection Agency  
Mail Code 2822T  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

Attn: Docket ID No. EPA-HQ-OW-2011-0409

**RE: Comments on the U.S. EPA and U.S. Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, Docket No. EPA-HQ-OW-2011-0409**

To Whom it May Concern:

The National Association of Wheat Growers (“NAWG”) writes regarding the Environmental Protection Agency (“EPA”) and the Corps of Engineers (“Corps”) proposed “Guidance Regarding Identification of Waters protected by the Clean Water Act,” 76 F3d. Reg. 24,479 (May 2, 2011).

NAWG is a federation of 21 state wheat grower associations that works to represent the needs and interests of wheat producers before Congress and federal agencies. Based in Washington, D.C., NAWG is grower-governed and grower-funded, and works in areas as diverse as federal farm policy, trade, environmental regulation, research and climate change.

The proposed guidance (unlike previous guidance documents) will be used by the EPA and the Corps (“Agencies”) to interpret the term “waters of the United States.” In the context of all programs authorized under the Clean Water Act (“CWA”), including section 404 discharges of dredged or fill material, the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the Section 311 oil spill program, the Section 401 state water quality certification process, the section 303 water quality standards and total maximum daily load programs. As such, this proposed guidance will pervade all stages of agricultural operations, and will have a substantial impact on the agricultural industry.

The Agencies’ decision to issue Guidance on this topic as opposed to a rulemaking runs contrary to the expressed views of a majority of the U.S. Supreme Court and the requirements of the Administrative Procedure Act (APA). Despite repeated claims by the Agencies that they would do a rulemaking, they have not. Instead, they continue to make important changes to their regulations and expand their CWA jurisdiction through guidance, shortcutting critical rulemaking requirements such as providing a response to public comments, providing a rationale and factual basis for agency decision and producing a final decision that can be judicially reviewed.

The Guidance represents a significant rewrite of the current regulations, guidance and agency policy that governed jurisdictional determinations for the history of the regulatory program. The Guidance expands the universe of the waters that will be considered “traditional navigable waters” by including for the first time ever waters that support one-time recreational use. In addition, the Guidance gives new and

expanded regulatory status to “interstate waters,” equating them with traditional navigable waters, and in addition, making it easier to find jurisdiction for adjacent wetlands, tributaries and other waters judges by a newly crafted significant nexus test. The Agencies have expanded their CWA jurisdiction on a manner unsupported by their regulations and the Supreme Court decisions.

The Guidance completely eliminates any requirement that a hydrologic connection is necessary and further expands jurisdiction beyond what Congress and the Supreme Court intended by applying a broadened view of Justice Kennedy’s significant nexus standard not only to wetlands (as Kennedy did) but also to tributaries and isolated water. Furthermore, the Guidance also allows for decisions to be based on general scientific literature describing functions applicable to the types of waters in questions, in lieu of actual case-specific analysis of the water itself. Therefore, According to the Guidance, an entire group of waters could be determined jurisdictional without ever performing an analysis of those waters. This approach appears inconsistent with the Kennedy decision and not scientifically based. Moreover, when asked, the Agencies could not name a water that would not provide at least one of these functions, making the point that use of functionality to find federal jurisdiction is overly inclusive and threatens to capture all waters.

In addition, the Guidance creates a completely new concept of allowing for “aggregation” of the contributions of all similar waters *within an entire watershed,*” making it far easier to establish a significant nexus between these small intrastate waters and newly expanded roster of traditional navigable waters. This novel concept results in a blanket jurisdictional determination for an entire class of waters within an entire watershed. Similarly, a blanket determination imposing federal CWA jurisdiction diminishes private property and mineral lease values while neglecting important due process rights of those individual property owners.

The Guidance is inconsistent with the Agencies’ regulations and the Supreme Court decisions. For example, the current regulations say nothing about ditches, but the Guidance regulates all roadside and agricultural ditches that have a channel, have an ordinary high water mark, and can meet 1 of 5 characteristics. In addition, the current regulations determine jurisdiction over all water not in any of the others categories (also known as the “other waters”) based on certain specific connections to interstate commerce. The Guidance replaces this standard with the significant nexus test. Moreover, the Guidance defines a significant nexus as anything that is “more than speculative or insubstantial,” thus turning Justice Kennedy’s “significant” nexus into an “any” nexus standard. These and numerous other changes made by the Guidance that significantly broaden the Agencies’ CWA jurisdiction find no support in the Supreme Court decisions.

The Agencies have acknowledged some of the material economic impacts of the Guidance. EPA has itself estimated that the annual costs of implementing the Guidance will be between \$87 million and \$171 million, and the EPA arrived at that number without taking into consideration permitting costs, the increased delays associated with expanded federal jurisdiction and the costs of new land use restrictions. The Guidance will impose a significant economic burden on NAWG and its members. These impacts are compounded exponentially by the 6<sup>th</sup> Circuit Court of Appeals’ decision EPA’s 2006 rule specifically exempting from Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permitting of aquatic pesticide applications. EPA is now forced to develop an NPDES permitting system

for aquatic pesticides. It would not cover pesticide applications registered and intended for terrestrial use. However, activists indicate that they believe most pesticide applications should be permitted if there is even a chance that the pesticide could come in contact with any “water,” either flowing water or seasonal drainage ditches that *could be a conveyance* to a water of the US. This creates a perfect storm nightmare scenario.

In conclusion, the Guidance is intended to and will have a material impact on CWA permitting and enforcement nation-wide because it broadly expands the agencies’ CWA jurisdiction. As such, the Agencies violated the APA and the express views of the Supreme Court by issuing Guidance on this topic as opposed to a rulemaking.