**SENT VIA EMAIL:** Thomas.Jenny@epa.gov

October 26, 2011

Mr. David S. Evans
Director, Wetlands Division
Office of Wetlands, Oceans and Watersheds
USEPA Headquarters
1200 Pennsylvania Avenue, N. W.
**Mail Code:** 4502T
Washington, DC 20460

RE: Oct. 12, 2011, Small Entities Outreach Meeting - Def. of "Water of the United States"

Dear Mr. Evans:

Thank you for the opportunity to provide you with information on how federal regulation over water and wetlands impacts my company and my community. I am Vice President of McAllen Construction located in McAllen, Texas. McAllen is a small, family owned and operated business that installs municipal utilities, such as waterlines, sanitary sewers, and storm sewers. We have 133 employees and annual revenues of around $20 million.

My company urges this Administration to move forward expeditiously with a rulemaking on the critical jurisdictional terms of the Clean Water Act (CWA) so that the regulated community can determine which waters are subject to federal regulation. Doing so would provide long over-due clarity to federal jurisdiction and allow the regulated community to continue to deliver critical infrastructure projects in a timely and cost-effective manner while protecting and enhancing the environment.

## Background

I am an active member of the Associated General Contractors of America (AGC) and currently serve as chairman on AGC's Environmental Network Steering Committee. AGC is the largest and oldest national construction trade association in the United States representing more than 33,000 firms. AGC members are engaged in the construction of private and public facilities and are a major contributor to employment, gross domestic product, and manufacturing.

I am also an elected Trustee of the McAllen Public Utilities Board. This is an at-large position that oversees water and wastewater infrastructure and management in my community. As an elected official and a public steward, water quality is very important to me. In my position, I am challenged to make decisions about how to best protect water

quality and the health and welfare of our citizens. And because our resources are limited, I must also make sure the projects we fund are done in a timely and cost-effective manner.

For the foregoing reasons, I am very interested in the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) plans to issue a rulemaking under the Clean Water Act, and more specifically, to revise the current the definition of "Waters of the United States" (hereinafter U.S. waters) at 68 FR 1991 (Jan. 15, 2003). I believe that a rulemaking is necessary to clarify and simplify the criteria for identifying U.S. waters and to ultimately provide an improved definition that is consistent with both law and science.

In the *Carabell/Rapanos* U.S. Supreme Court decisions, both Justice Roberts and Justice Breyer called for rulemaking. Their request has been echoed by many leading industry groups including the Associated General Contractors of America.

**Clarification Needed to Prevent Permitting Delays**

Construction projects that lie in U.S. waters, within the meaning of the Clean Water Act, require federal discharge permits that are both **costly and time-consuming** to obtain. I am also a bridge contractor. Many of our projects require permits and have been delayed while we waited on the Corps district office to issue them. These delays have cost us money.

As noted by Justice Scalia who wrote the plurality opinion in the *Carabell/Rapanos* Supreme Court decisions, the regulated community is already spending about $1.7 billion annually to obtain CWA Section 404 discharge permits. (What is more, the study he cites in support of this figure does not appear to include either the costs or time associated with ascertaining whether the property in question is appropriately subject to federal jurisdiction under the CWA. *See* Sunding & Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," 42 Natural Resources J. 59, 74-76, 81 (2002).)

In addition, recent reports show that the current backlog of pending requests for necessary permits is between 15,000 and 20,000, and, on average, an individual permit takes 2-3 years to receive.

Given the issues that *Carabell/Rapanos* has raised, applicants are likely to suffer even longer delays and incur additional costs while trying to determine whether or not their property is subject to federal jurisdiction. To establish that a non-navigable water (including a non-navigable wetland) is a U.S. water, AGC believes that the Court requires the agencies to measure and establish the nature of the non-navigable water's connection to, and relationship with, traditional navigable waters. Proceeding on a case-by-case basis is unacceptable to my company and AGC members.

If project delays and costs increase, critical construction projects will inevitably go unbuilt. In my line of work, this means impeding water supply and waste treatment projects that are vital to improving public health and welfare and fixing our aging infrastructure.

Other AGC members build highway and transit infrastructure, repair dams, construct flood control projects, and renovate schools, among many other things. Any delay in these types of projects deprives the general public of the benefits they would derive from them.

**Clarification Needed to Prevent Inconsistent Jurisdictional Determinations**

Today, my industry faces a lot of uncertainty regarding whether any one project lies in U.S. waters and requires a permit because the exact meaning of that term continues to be in debate. It can take a lot of time and effort just for the Corps and EPA to make a jurisdictional determination to see if a permit is even needed. The existing guidance is useful in identifying some broad considerations that should be included in making jurisdictional determinations; however, it provides little scientific or technical direction that would create certainty and specificity. The existing guidance requires the application of a great deal of best professional judgment on a case by case basis. This means there has and will continue to be variability in what waters are identified as jurisdictional around the country.

The Corps and EPA should revise their regulatory definition of U.S. waters to clarify which waters are subject to federal regulation. Without clear definitions to guide field staff, permitting decisions will continue to be arbitrary and inconsistent. Vague and ambiguous regulatory provisions cause confusion, deny the regulated community fair notice of what is required, and waste time and money; all with little benefit to the environment. This lack of clarity is unduly burdensome for critical infrastructure and private projects.

**Clarification Needed to Prevent Unwarranted Risk and Liability**

As explained above, my company (and AGC members) performs a variety of activities that would be directly impacted by a change to the Corps/EPA regulations defining "waters of the United States."

Contractors and property owners alike want predictability and consistency in the application of law and need fair notice of what activities are regulated. As the "operators" of construction sites, both property owners and their construction contractors risk civil and criminal penalties for failure to obtain a necessary permit.

The CWA is a strict liability statute. If a discharge occurs, civil liability attaches. Generally speaking, landowners who conduct discharge activities in waters of the United States without a permit are in violation of the Act. Many courts have also found that contractors (and even consultants) are responsible for compliance. In several cases, courts have found both the owner and the contractor to be liable where the contractor had control over or responsibility for the discharge activity, despite the contractor's reliance on the owner to obtain the necessary permits. Even where the defendant contractor (or consultant) did not directly commit the violation, he or she may still be liable, depending on his or her degree of involvement.

**Protection of States' Rights Remains Critical**

I am concerned about any regulatory action that would fundamentally expand the federal jurisdictional scope of the Clean Water Act and displace state and local jurisdiction over land and water use. Such efforts would cause significant disruption to the construction industry and adversely affect not only AGC's membership, but also the health and welfare of the general public.

My company and AGC's membership are committed to protecting and restoring the nation's waters, but we do not believe that it is in the nation's best interest to put everything under federal jurisdiction in the interest of clarity or to expand the Clean Water Act beyond its original scope. State and local governments that have long assumed primary responsibility for land and water use. EPA and the Corps should preserve the role that states and localities have traditionally played and not expand the scope of the Clean Water Act. States and local authorities should lead the regulation of land and water use, not the federal government.

To this end, any regulatory proposal that would give the Corps and EPA unlimited regulatory authority over groundwater would be a serious concern to us as underground contractors. Under this expansion, contractors, especially underground contractors like McAllen, would continually face the threat of legal liability for unforeseen (and unpreventable) encounters with groundwater. Every trenching operation—perhaps every hole dug in America—would require a permit to avoid risk of violation.

The jurisdiction of the CWA is limited by the concept of "navigability." Other federal regulatory programs, such as the "Swampbuster" provision, remain in place. In addition, many state governments already have regulatory programs in place that regulate isolated waters. And other states are moving forward to develop such programs. AGC believes that state regulation can be an efficient means of regulating non-navigable waters because states are free to tailor their wetland programs to local conditions and preferences. AGC supports the development of responsible and balanced state wetlands regulatory programs.

**EPA Proceeding Too Quickly**

Speaking as a small-business representative, I am concerned that EPA is planning to proceed directly to a rulemaking that mirrors the 2011 Draft Guidance. Although many of the 300,000 comments received on the Draft urged the agencies to undertake a rulemaking, they did not suggest that the agencies simply turn the Draft into a rule. Such an approach would limit the discussion to EPA's predetermined baseline (as established by the Draft) and likely lead to a misrepresentation of the real-world impacts. My company recommends that the agencies conduct broader outreach before issuing a proposal and solicit real examples from the field (as EPA and the Office of Management and Budget have requested that we provide) on the implications of any changes to the existing limits on CWA jurisdiction.

For my part, unfortunately, the two-week response deadline has not allowed me enough time to provide company-specific examples and cost estimates, as EPA has requested in several instances. I support AGC of America's and others' request for an additional 60 days to respond to the specific

questions EPA presented to those who participated in the "Waters of the U.S. Small Entities Outreach Meeting" on October 12, 2011.

As stated above, my company appreciates that the agencies appear to be undertaking a long-overdue rulemaking to clarify the definition of U.S. waters subject to CWA jurisdiction. But it is critical that the agencies take the proper steps to provide a fair and appropriate opportunity for meaningful participation by small business entities, and others, in that process.

**Conclusion**

To clarify the scope of CWA jurisdiction, this Administration should move forward with a rulemaking. But that process must comply with the law. And the conclusions should not be foregone.

Fundamental principles of due process and good government require the regulatory agencies to clearly and uniformly set forth the scope of federal jurisdiction. The regulated public must be given fair notice as to what conduct is prohibited under the CWA. As the "operators" of construction sites, both property owners and their construction contractors risk fines and penalties for any failure to obtain a necessary permit. Without clear definitions to guide field staff, permitting decisions will continue to be arbitrary and inconsistent. What is more, vague and ambiguous regulatory requirements lead to lengthy, costly, and often unnecessary permitting requirements for critical public infrastructure and private projects.

McAllen Construction seeks to ensure that the construction industry can continue to contribute to the nation's quality of life. While attentive and sensitive to the many risks of environmental degradation, the construction industry must continue to support the physical infrastructure on which all Americans are heavily dependent.

Thank you, again, for the opportunity to participate in the Small Entities Outreach Meeting held Oct. 12. Please contact me at if you have any questions or need additional information.

Respectfully submitted,

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