

October 26, 2011

Jenny Thomas
Wetlands Division
Office of Wetlands, Oceans and Watersheds
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Ms. Thomas:

We are writing on behalf of the small entities that are members of the undersigned organizations to request an additional 60 days to provide responses to the Environmental Protection Agency's (EPA) request for information related to participation in the "Waters of the U.S. Small Entities Outreach Meeting" on Oct. 12, 2011. At the meeting, EPA outlined the contents of the "Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act" (Draft Guidance) issued in May 2011 and posed specific questions on the implications of the Draft Guidance on small entities. EPA requested a response to those questions by Oct. 26, 2011. Given the complexity of the analysis required to provide a meaningful response, the two weeks provided is not sufficient time to obtain the information requested. In the interim and for the record, we resubmit our comments filed on the Draft Guidance. *See* Waters Advocacy Coalition, *et al.*, Comments in Response to the Environmental Protection Agency's and U.S. Army Corps of Engineers' Draft Guidance on Identifying Waters Protected by the Clean Water Act, Docket No. EPA-HQ-OW-2011-0409-3514 (July 29, 2011), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514>. In addition, we also write to explain our concerns regarding EPA's current actions.

We appreciate that EPA and the U.S. Army Corps of Engineers (collectively, the Agencies) appear to be undertaking a long-overdue rulemaking to clarify the definition of "waters of the United States" subject to Clean Water Act (CWA) jurisdiction. But that process must comply with the law. We are concerned that EPA is proceeding on this critical issue with undue haste; is not taking the proper steps to ensure a fair and appropriate opportunity for meaningful participation by small business entities and others; and that outcomes have the appearance, if not the reality, of being preordained.

First and foremost, because the Draft Guidance (or any ensuing rule) amends the Agencies' existing regulations by describing new conditions under which the Agencies may assert jurisdiction, it must be undertaken in compliance with the Administrative Procedure Act (APA) and all other mandatory statutory and regulatory requirements, including the Small Business Regulatory Enforcement Fairness Act (SBREFA) and the Regulatory Flexibility Act (RFA). Yet, rather than first solicit input from the general public, scientific communities, federal and state resource agencies, and small entities to determine the appropriate scope of CWA jurisdiction and the range of issues to be covered by any amendment to their existing regulations, the Agencies appear ready to proceed directly to a rulemaking that mirrors the Draft Guidance. Although

many of the 300,000 comments received on the Draft Guidance urged the Agencies to undertake a rulemaking, they did not suggest that the Agencies simply turn the Draft Guidance into a rule, which is what EPA appears to be doing. Such an approach limits the discussion to EPA's predetermined baseline as established in the Draft Guidance and leads to a complete misunderstanding of the real impacts.

Instead, we believe that EPA should conduct legitimate outreach to small entities and the general public across the nation to determine the appropriate scope and content of any rule defining CWA jurisdiction. As EPA has done in numerous other contexts (*e.g.*, development of Plan EJ 2014, EPA's strategy for advancing environmental justice), the Agencies should conduct a series of public outreach sessions in the Midwest, Southeast, West and East to solicit feedback on the issues to be addressed in and the potential scope of a rulemaking. This kind of outreach would enable the Agencies to obtain real examples from the field (as EPA and the Office of Management and Budget (OMB) have requested that we provide) on the implications of any changes to the existing boundaries of CWA jurisdiction.

Only after such full public outreach should the Agencies issue an advance notice of proposed rulemaking (ANPRM) to obtain written input from the general public, the scientific community, and federal and state resource agencies on issues associated with the definition of "waters of the United States." The Agencies should use responses to an ANPRM to determine the issues to be addressed and the substantive approach for a future proposed rulemaking addressing the scope of CWA jurisdiction. EPA is taking a significant risk, and jeopardizing its own rulemaking, by failing to complete these necessary procedural steps.

Contrary to the statements made in the Oct. 12 meeting, EPA must comply with the RFA. The RFA recognizes the economic importance of small businesses and attempts to ensure that regulations be promulgated with these entities in mind. To that end, agencies promulgating a rule that will have a "significant" impact on "small entities" are required to undertake a number of mandatory steps to ensure that the agency adopts the least burdensome alternative for small business. 5 U.S.C. § 605(b).

At the small entity meeting, EPA characterized its small entity outreach as "indistinguishable" from the outreach required by RFA and SBREFA, but that is flatly wrong. To comply with the RFA, EPA must provide a fair and appropriate opportunity for small business entities to participate in this process. The Small Entity Outreach Meeting did not do that. The invitations were limited to only a very few EPA-selected small business entities. In addition, we are aware that other legitimate small business interests that will clearly be impacted requested to be included in the meeting and were rejected due to space constraints, despite the fact that several participants were allowed to participate by phone. Highlighting the fact that the outreach was inadequate are the attendee lists that clearly show that there were more government personnel in attendance than small business entities (including those who participated by phone).

We appreciate that the Agencies finally appear to be undertaking a long-overdue rulemaking to clarify the definition of “waters of the United States” subject to CWA jurisdiction, but that process must comply with the law, and the conclusions should not be foregone. It is critical that the Agencies take the proper steps to ensure that the regulations provide an appropriate and clear definition of “waters of the United States” consistent with the CWA, and the Agencies must provide a fair and appropriate opportunity for meaningful participation by small business entities, and others, in that process.

Thank you for your attention to this matter.

Sincerely,

American Farm Bureau Federation
Associated General Contractors
International Council of Shopping Centers
National Association of Home Builders