November 17, 2011

Ms. Jenny Thomas
Wetlands Division
Office of Wetlands, Oceans and Watersheds
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Comments Requested at Oct. 12, 2011, Small Entity Outreach Meeting

Dear Ms. Thomas:

The undersigned organizations submit these comments in response to the United States Environmental Protection Agency's (EPA) request for information from the groups invited to participate in the "Waters of the U.S. Small Entities Outreach Meeting" on October 12, 2011. At the meeting, EPA outlined the contents of the "Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act" (hereinafter Draft Guidance) issued in May 2011. The organizations specifically asked EPA not to finalize the "overly legalistic" Draft Guidance or use it as a basis for a proposed rule, and instead, to develop regulatory alternatives that would establish clear and understandable limits on jurisdiction.

Following the meeting, you asked for our response to some specific questions regarding implementation of the Draft Guidance. As we noted in our letter of October 26, 2011, many of the EPA questions call for our members to analyze the cost implications associated with the Draft Guidance.[1] Consequently, our organizations asked for a 60-day extension to develop this important information. Because EPA and the U.S. Army Corps of Engineers (jointly, the Agencies) only provided an additional 14 days, our response today is limited. We again ask for an additional 60 days to prepare the information that you requested. As set forth below, however, we provide the following partial response to your questions and note that we have several significant concerns with how EPA is proceeding both as a matter of law and policy.

I. EPA Must Comply with the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act.

EPA began the October 12 small business meeting by explaining that it is "not legally required" to comply with the Regulatory Flexibility Act (RFA) and Small Business Regulatory Enforcement Act (SBREFA), but that it would nonetheless be conducting a process that would be "indistinguishable" from these laws' requirements. We respectfully disagree with EPA on both counts. As explained more fully below, the Draft Guidance, if implemented, either as "guidance" or as a rule, would have significant impacts on small business interests. EPA cannot justifiably claim otherwise. Moreover, the process that EPA is currently conducting cannot

[1] We respectfully request that all documents cited in this letter and our October 26, 2011, letter (including all comments previously submitted to the Agencies) be considered by the Agencies and included in the administrative record for this action.

legitimately be described as indistinguishable from the RFA and SBREFA requirements. Ultimately, the process that EPA is undertaking will lead to incomplete and flawed data for the basis of any proposed rule.

A. A Proposed Rulemaking Expanding the Scope of Waters Regulated under the Clean Water Act Will Have Direct and Significant Impacts on Small Business Interests.

Contrary to EPA's position, complying with the RFA is not optional in this case. An agency promulgating a rule that has "significant" impact on "small entities" must 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). The assessment of regulatory alternatives is at the heart of the RFA and SBREFA. If EPA is moving forward with a rule defining, and, as stated, "expanding," the scope of Clean Water Act (CWA) jurisdiction, then EPA must comply with the RFA and SBREFA requirements. EPA tries to wordsmith its way around the RFA by claiming that any proposed rule revising the definition of "the waters of the United States" would merely have "indirect" effects on small entities, and, thus, it need not comply. But there can be no question that EPA's expansion of the scope of "waters of the United States" subject to CWA regulation has direct effects not only on regulated entities, but on the entire nation.

As EPA knows, the scope of CWA jurisdiction has implications that permeate all sections and programs under the CWA – section 303 water quality standards, section 311 oil spill prevention control and countermeasures, section 401 water quality certifications, the section 402 National Pollutant Discharge Elimination System (NPDES) program (including pesticide permits and soon to be issued post-construction storm water regulations), and the section 404 dredge and fill permit program. These programs regulate all sorts of diverse small business activities across the nation, from home building to manufacturing to agriculture. Now, EPA is expanding the CWA program geographically to cover more areas across the landscape including ditches, dry washes, and desert drainages. As a result, EPA's so-called "definitional changes" that broaden the scope of CWA jurisdiction have direct impacts. When public or private property is deemed "waters of the United States" by the Agencies, there are numerous impacts that flow from that determination, including the reduced value of land, the need to hire consultants to prepare permits, delays, restrictions on land use, and the cost of complying with permitting requirements, including mitigation. These wide-spread impacts are felt acutely by small business entities.

In Florida, for example, it is estimated that 40 percent of the value of farmland is directly attributable to its future development potential.[2] Thus, when CWA regulatory jurisdiction or permitting requirements are expanded over farmland, the value of that land decreases significantly because of the associated regulatory burdens. For farmers and ranchers, their land is typically their principal asset and frequently provides collaterals for loans and other capital purchases needed to operate their farm or ranch. EPA's determination that CWA jurisdiction exists over ditches and other features on farmland may affect small farmers' ability to obtain loans. Indeed, members of the undersigned organizations have direct experience where banks

[2] Plaintiga, A.J., Lubowski, R.N., and R.N, Stavins, *The Effects of Potential Land Development on Agricultural Land Prices*, 52 J. of Urban Economics 561, 581 (2002).

have called loans or demanded more collateral to secure loans when the mortgaged property was determined to be subject to CWA regulation.

There is also no question that an assertion of CWA jurisdiction significantly limits the activities farmers, ranchers, and landowners can undertake on their property. For example, although normal farming activities are supposed to be exempt from CWA permitting requirements, the Agencies often require permits for changing from one type of farming to another, or moving dirt into areas deemed "waters of the United States" to allow movement of farm equipment from one field to the next. Our members have direct experience where the Agencies have required permits for cranberry growers to expand their cranberry bogs, for ranchers to convert land from pasture to cherry orchards, for farmers to build a pond on their property, and for dairy farmers to expand forage acres to support their dairy herds.

Expanding the scope of waters regulated under the CWA and applying that expanded definition to the entire CWA raises numerous concerns for farmers, home builders, and other small businesses. For example, as you know, many agricultural activities may now be subject to National Pollutant Discharge Elimination System (NPDES) requirements under EPA's new permit program for pesticides.[3] Some small business owners have estimated that it will cost an additional $50,000 per year to comply with the new paperwork burden imposed by the pesticide permit program alone.[4] These burdensome NPDES requirements place severe limitations on the location and operation of many activities undertaken by small entities. Expanding the scope of waters that are regulated as "waters of the United States" to ditches and other ephemeral features only adds to the "waters" at issue in the pesticides general permit and thus exacerbates the complexities and costs of implementing this new program.

Indeed, the same can be said for the section 402 storm water program, the section 311 oil spill prevention program, and other CWA programs that have only become more complex in recent years. With respect to the storm water program, as you know, MS4 operators have NPDES permit liability, including oversight over illicit discharges into the system. In light of the expanded scope of waters being considered and the fear of third-party litigation, many MS4 authorities are now being required to exercise greater authority in local permits. For example, we understand that in response to the expanded definition of waters of the United States, the City of Denver is likely going to require every construction project that will discharge to the MS4 system to require a 404 permit and 401 water quality certification. Moreover, what the expanded

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[3] It is estimated that under the new NPDES permit program for pesticides, 365,000 new sources will be required to obtain NPDES permits, but this estimate was made before, and does not account for, the expansion of jurisdiction proposed in the Draft Guidance. *See* EPA, "Background information on EPA's Pesticide General Permit," http://cfpub.epa.gov/npdes/pesticides/aquaticpesticides.cfm (viewed Jun. 26, 2011).

[4] *See* Responsible Industry for a Sound Environment, "Comments in Response to Draft National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharge from the Application of Pesticides," Docket No. EPA-HQ-OW-2010-0257, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2010-0257-0490 (Jul. 19, 2010).

definition will mean for the upcoming post-construction storm water rule is also of concern to MS4 operators and small business entities.

The potential costs and burdens on small businesses become too big to even quantify when "ditches" are considered "waters of the United States." For example, per U.S. Department of Transportation (DOT) design specifications, all federally-funded roads must be "designed …. and maintained to have adequate drainage, cross drains, and ditch relief drains."[5] The United States' highway network consists of 4 million miles of roads, and federally-funded road projects are ongoing in every state and major city across the nation.[6] Under the Draft Guidance, presumably *any and all* construction work on these roads (that have ditches running along them, per DOT requirements) would encounter "jurisdictional waters" and require section 404 permits. To state this another way, EPA appears to be moving forward with a program that would mandate section 404 permit coverage before the construction industry can perform any of the much-needed repairs and maintenance to the nearly 4 million miles of our U.S. highway system. The implications of this would be staggering for the millions of small business construction firms that perform roadwork. Our goal is to protect industry from such costly, prescriptive, and unnecessary regulation that would hurt the economy without benefitting the environment.

The bottom line is that the expansion of the waters regulated under the CWA has enormous implications for small business entities which EPA has not considered, much less explained. Ultimately, EPA should not force small businesses to figure out and explain the implications and costs of its expanded definition on these programs, but instead, should clearly articulate the implications to us.

With respect to the section 404 program, as you know, obtaining a 404 permit typically takes at least a year, costs hundreds of thousands of dollars, and requires the support of expert technical consultants (and often lawyers).[7] For those that have the means to apply for a 404 permit, the regulations also impose certain avoidance, minimization, and mitigation requirements.[8]

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[5] U.S. Department of Transportation Federal Highway Administration, Technical Advisory: Developing Geometric Design Criteria and Processes for Nonfreeway RRR Projects, T 5040. 28, http://www.fhwa.dot.gov/design/t504028.cfm (Oct. 17, 1988).

[6] U.S. Department of Transportation Federal Highway Administration, 2008 Status of the Nation's Highways, Bridges, and Transit: Conditions and Performance, http://www.fhwa.dot.gov/policy/2008cpr/es.htm (2008).

[7] *See* David Sunding & David Zilberman, *The Economics of Environmental Regulations by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74 (2002) (study concluding that the average applicant spent $271,596 ($337,577 in 2011 dollar values) to prepare an individual section 404 permit application and $27,915 ($35,954 in 2011 dollar values) to prepare a nationwide permit application).

[8] In addition, applying for a permit under section 404 of the CWA triggers mandatory consultation with multiple state and federal agencies under, for example, the National Environmental Policy Act, the Endangered Species Act, and the National Historic Preservation Act. These consultations are often lengthy and burdensome and can take longer than the time it takes to build a house.

Avoidance requirements, which involve leaving some portion of an area proposed for development in an undisturbed condition, result in a net loss of developable land unless other land is made available for development. *See* 40 C.F.R. § 230.10(a)(1). The cost of avoidance (*i.e.*, development foregone) averages about $400,000 per acre in Southern California and can be well over $1 million per acre in some parts of the country.[9] In extreme cases, the avoidance requirement can render an entire project infeasible and render the property unimproveable.

Section 404's compensatory mitigation requirements obligate permittees to undertake costly compensatory actions (*e.g.*, restoration of degraded wetlands or streams or creation of man-made wetlands). 40 C.F.R. § 230.91(c)(3). To meet the compensatory mitigation requirements, permittees can purchase credits from a mitigation bank. Mitigation bank prices for seasonal wetlands are over $200,000 per acre in the Sacramento region.[10] In a number of Corps districts, there are already limited credits available for third-party mitigation, and an increase in jurisdiction will lead to great uncertainty about, and possible exhaustion of, available mitigation credits. In such situations, this will certainly drive up mitigation costs and cause increased delays.

Furthermore, once a 404 permit is finally obtained, permittees now face the risk that their permit could be retroactively vetoed by EPA despite compliance with the permit terms and conditions. The threat of a retroactive EPA veto makes it more difficult for project developers to rely on essential CWA permits when making investment, hiring, or development decisions, and proponents must now account for the possibility of losing essential discharge authorization after work on the project has been initiated.[11]

In addition, because a broader definition of "waters of the United States" will require more dischargers to obtain permits under sections 402 and 404 of the Act, as discussed above, small entities engaged in previously unregulated activities will be required to obtain state water quality certifications under section 401. Under section 401, a State may impose a broad range of burdensome conditions in its certification that become federally enforceable permit conditions. These conditions, which can have tenuous, if any, effects on water quality, can cause a project to be modified or even abandoned.

If a landowner proceeds with work in an area designated "waters of the United States" subject to CWA jurisdiction, the Agencies can seek, and the court can impose, civil and even criminal penalties for violating the CWA. *See* 33 U.S.C. §§ 1319(c) - (d). Michael and Chantell Sackett, for example, faced fines of up to $37,500 per day for unknowingly beginning construction of

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[9] David Sunding, *Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction* (July 26, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514.

[10] *Id.*

[11] David Sunding, *Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal* (May 30, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514.

their family home on land that EPA claims contains jurisdictional wetlands.[12] Similarly, EPA assessed a $120,000 penalty for an Illinois farm that deposited 3,000 cubic yards of material into two acres of forested wetlands without obtaining a required permit.[13] One rancher in California was required to convey a 300-acre parcel for conservation to settle claims that he plowed 33 acres of vernal pools and swales on his land to prepare it for planting.[14] And CWA liability is not limited to property owners. Several courts have found construction contractors and consultants, as the "operators" of construction sites, to be liable for conducting discharge activities into "waters of the United States" without a permit despite the contractor's reliance on the property owner to obtain the necessary permit.

Finally, in addition to CWA penalties, an assertion that land contains "waters of the United States" subject to CWA jurisdiction exposes project proponents to third-party litigation pursuant to the CWA citizen-suit provision. All of these obligations and risks directly affect the landowner and the use of his property.

B. EPA's Theory that the Effects are "Indirect" Is Wrong.

EPA asserts that it is not required to comply with the RFA because any proposed rule revising the definition of "waters of the United States" is merely a "definitional change" and would only have "indirect" effects on small entities.[15] Although a proposed rulemaking that mirrors the Draft Guidance will dramatically widen the scope of CWA jurisdiction and therefore increase the number of activities for which small entities must obtain CWA permits, EPA claims that these impacts are not attributable to the rulemaking because they are mandated by the act itself and existing regulations. EPA is mistaken.

As previously explained, any rule expanding CWA jurisdiction as the Agencies have proposed in the Draft Guidance will have a "significant" impact on small entities. EPA relied on this questionable theory before in its Greenhouse Gas (GHG) Tailoring Rule and its Light-Duty Vehicle GHG Emission Standards.[16] EPA certified that these Clean Air Act rulemakings would not have a significant economic impact on small entities because the rules' effects were

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[12] *Sackett v. Envtl. Prot. Agency*, 622 F.3d 1139, 1141 (9th Cir. 2010), *cert. granted*, No. 10-1062 (Jun. 28, 2011).

[13] EPA cites Heser Farms for filling in wetlands without a permit (May 18, 2006), *available at* http://yosemite.epa.gov/opa/admpress.nsf/a8f952395381d3968525701c005e65b5/cb983f46563f391b85257172004ee4a5!OpenDocument.

[14] *See* EPA settles wetlands enforcement case in Tulare County (Sep. 22, 2004), *available at* http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/37159a7a88718df5852570d8005e169a!opendocument.

[15] Ironically, in most other contexts, EPA argues that indirect effects can lead to "significant" impacts on small entities, but here, EPA takes the opposite position.

[16] *See* 75 Fed. Reg. 31,514, 31,599 (Jun. 3, 2010); 75 Fed. Reg. 25,324, 25,541 (May 7, 2010).

purportedly only "indirect."[17] But the RFA certifications for these GHG rule proposals were improper because, when finalized, the rules would immediately and automatically trigger the imposition of additional permitting requirements on a panoply of small entities, thereby causing significant impacts. EPA's GHG rules have been challenged, and its unproven "indirect effects" theory is at issue in the ongoing litigation.[18] Likewise, it would be improper for EPA to certify that a proposed rule defining CWA jurisdiction would not have a significant economic impact on a substantial number of small entities because the proposed expansion of CWA jurisdiction will require many small entities to obtain CWA permits for activities that were not previously regulated, thereby causing immediate direct impacts.[19]

Moreover, EPA's assertion that only "indirect effects" will result from a change in the scope of CWA jurisdiction is based upon the agency's flawed economic analysis, "Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction" (Apr. 27, 2011). EPA's economic analysis: (1) fails to consider many major categories of impacts such as NPDES permitting, oil spill prevention and control, pesticide permits, state certification, and others; (2) significantly underestimates the costs that it did attempt to quantify, namely impacts relating to avoidance, delay, uncertainty, and transaction costs of section 404 permitting; and (3) lacks credibility when it comes to analyzing the economic benefits associated with the Draft Guidance.[20] EPA simply has not done enough to

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[17] *See* 74 Fed. Reg. 49,454, 49,629 (Sep. 28, 2009) (certifying that proposed Light Duty Vehicle GHG Emission Standards would not have a significant economic impact on a substantial number of small entities); 74 Fed. Reg. 55,292, 55,349 (Oct. 27, 2009) (certifying that the GHG Tailoring Rule would not have significant economic impact on a substantial number of small entities).

[18] *See Coalition for Responsible Regulation, Inc. v. U.S. Envtl. Prot. Agency*, No. 10-1092 (D.C. Cir. filed May 7, 2010); *Coalition for Responsible Regulation, Inc. v. U.S. Envtl. Prot. Agency*, No. 09-1322 (D.C. Cir. filed Dec. 23, 2009).

[19] EPA seems to be employing a double standard. While it claims that it need not comply with the RFA and SBREFA because the proposed rule has only "indirect effects" on small business entities, in response to requests from state and local officials to review the "federalism" effects of the proposed rule, EPA has switched course, seemingly recognizing that the proposed rule will eventually impose substantial costs and burdens on state and local governments. An EPA spokeswoman stated that, "[t]here is a federalism consultation on Nov. 10 to have a dialogue with the states on concepts that could be included in a proposed rule." EPA can't have it both ways. Either the proposed rulemaking has significant effects and consequences, or it doesn't. EPA cannot treat state and local agencies more favorably and accord them more protections in this process than industry groups. If, for example, the proposed rule imposes substantial costs and burdens on delegated states operating the 402 program, it imposes even greater costs and burdens on the small businesses which are subjected to the application of these very same permitting requirements.

[20] *See* David Sunding, *Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction* (Jul. 26, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514.

assess the true impacts of a future proposed rule, particularly on small entities. Unfortunately, this will only result in unintended consequences for small entities that EPA could potentially avoid if it lawfully complied with the RFA and SBREFA.

C. The Outreach Process that EPA Is Conducting Is Not Indistinguishable from the Requirements of the RFA and SBREFA.

EPA claims that its efforts to date at small business outreach are "indistinguishable" from what it is required to do under the RFA and SBREFA. These claims are mistaken. Among other things, these laws require EPA to take a number of important steps to ensure that the agency adopts the least burdensome alternative for small business. This assessment of less burdensome alternatives is at the heart of the protections afforded under the RFA and SBREFA. As explained below, there is no indication that EPA has any intent of looking at alternatives to its proposed Draft Guidance approach.

Critical to proper consideration and evaluation of these alternatives is the convening of a Small Business Advocacy Review Panel (SBAR panel) to review the potential impacts of the proposed rule on small entities. 5 U.S.C. § 609(b). While EPA has some discretion in choosing the participants for the SBAR panel, its discretion is not unlimited. EPA must act rationally when it chooses the participating small entity representatives (SERs). Typically, when EPA convenes a SBAR panel, it notifies the public, seeks voluntary participants, and solicits recommendations for participants from affected trade associations and government agencies. Here, rather than notify the public and seek recommendations on appropriate participants, the government merely picked and chose as it desired and extended invitations to its "non-RFA-compliant-small business outreach meeting" to a select few. And, to add insult to injury, EPA rejected several legitimate small business interests that will clearly be impacted by any change in the Agencies' regulations that requested to be included in the meeting. As a result, SERs that will likely be subject to a future rulemaking were not able to share their views on potential impacts of the rule and on ways to reduce those impacts as they normally would in an official SBAR panel.

Section 609(b) of the RFA directs the SBAR panel to consider the experience and recommendations from the SERs, through public outreach meetings and written comments, about the potential impacts of the proposed rule. Based on this important consultation, the panel issues a formal report with findings, including a description of any significant alternative to the proposed rule that minimizes the significant economic impact of the proposed rule on small entities. Without the proper constituency informing the SBAR panel of the impacts of the proposed rule, the SBAR panel simply cannot do its job.

Moreover, based on our meeting with EPA, it did not appear that any alternatives (one of the primary objectives of the panel process) were being considered, as none were articulated. During the meeting, we asked EPA if it had considered abandoning the legalistic approach and instead adopting new regulations that clearly articulate the categories of waters that are regulated and not regulated by the federal government. It did not appear that approach had been considered. Had EPA considered clear exemptions for particular types of features? Had EPA considered short forms for jurisdictional decisions or elimination of elevation procedures? Had EPA considered self-certification by small businesses or dedication of agency teams to make jurisdictional decisions for small businesses in 45 days or less? There was no evidence that any

attempts at formulating such less burdensome alternatives had been undertaken and pursued, and EPA did not solicit from the small business community any such alternatives. Thus, EPA cannot legitimately argue that informal outreach is the legal or functional equivalent to an SBAR panel. Instead, the "Small Entity Outreach Meeting" appears to have been designed to support EPA's predetermined conclusions and work backwards to bolster EPA's preferred outcome so that the results appear to be as legitimate as possible and allow EPA to perfunctorily check the "Small Business" box. Consultation between EPA, the Office of Management and Budget, and the Small Business Administration does not take the place of the deliberative process that occurs between panel members and the SERs. EPA's informal consultation and public outreach is wholly inadequate to satisfy EPA's obligation under the RFA.

II. EPA Should Rectify the Draft Guidance's Inconsistency with the Administration's Improving Regulation and Regulatory Review Executive Order.

On January 21, 2011, President Obama issued Executive Order 13563, Improving Regulation and Regulatory Review. 74 Fed. Reg. 3,821 (Jan. 21, 2011). That order provides: "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." It adds that regulatory agencies must (1) base their requirements on the best available science, (2) promote predictability and reduce uncertainty, and (3) propose or adopt regulatory requirements only upon a reasoned determination that their benefits justify their costs. See Executive Order 13563 at §§ 2, 5. Also, the President has commanded EPA to tailor its regulations to impose the least burden on society, consistent with obtaining its regulatory objectives, taking into account the costs of cumulative regulations, and to identify and assess available alternatives to direct regulation. See *id*. at § (1)(b). In putting the Draft Guidance together, it appears that the agency chose to ignore or avoid its obligations under Executive Order 13563. Specifically:

- There is no evidence that EPA has made a reasoned determination that the Draft Guidance's environmental benefits (if any) will justify its jobs, development, and consumer cost burdens.

- There is no evidence that EPA has tailored the Draft Guidance to impose the least burden on society, consistent with obtaining regulatory objectives, and taking into account, among other things and to the extent practicable, the costs of cumulative regulations affecting developers, builders, and consumers.

- There is no evidence that EPA has considered alternative approaches, much less selected the measures that maximize net economic and environmental benefits.

- There is no evidence that EPA has identified and assessed available alternatives to the measures specified in the Draft Guidance for the purpose of developing the least burdensome permit program possible.

- There is no evidence that EPA has considered or specified metrics for determining the efficacy of the Draft Guidance in order to facilitate retrospective review and evaluation.

Ultimately, the Draft Guidance is riddled with inefficiencies and prospective implementation problems. We maintain that EPA has fallen "off course" from its directive to craft a revised definition of waters of the United States that "imposes the least burden on society" – namely small businesses.

III. EPA's Approach for Quantifying the Increase in Jurisdiction under the 2011 Draft Guidance Is Flawed and Underestimates Impacts.

A fundamental underpinning of all of EPA's analyses, economic and otherwise, is that there will only be a small increase in jurisdiction under the Draft Guidance. This assessment of "increase" is based on flawed data that does not accurately depict the full extent of the increase in jurisdiction because EPA uses the wrong baseline for analysis.

EPA provided the small business entities in attendance at the October 12 meeting with a chart that depicts EPA's assessment of the percentage of aquatic resources that were jurisdictional under the 2008 *Rapanos* Guidance compared to those areas that would be found jurisdictional under the 2011 Draft Guidance. EPA estimates that, under the 2008 Guidance, 92.3 percent of streams, wetlands, and other waters would be jurisdictional, while, under the 2011 Draft Guidance, 95 percent of these same areas would be considered jurisdictional. As explained in the meeting, however, these numbers were based on Corps jurisdictional determinations for the year 2009-2010. Currently, 62 percent of Corps jurisdictional determinations are preliminary jurisdictional determinations, meaning that the applicant has presumed jurisdiction. The numbers utilized by the Agencies to assess the percentage increase in jurisdiction includes these presumed jurisdictional areas in the baseline. In addition, the EPA baseline numbers include waters that are subject to nationwide permits that also frequently rely on preliminary jurisdictional determinations. Reliance on data that includes preliminary jurisdictional determinations has the effect of greatly *overestimating jurisdiction* in the baseline, and therefore *underestimating the increase in jurisdiction*. At a minimum, it makes EPA's analysis unreliable. Finally, the figures do not account for other situations where project proponents simply assume that a ditch or erosional feature is not a "water of the United States" because the Agencies have not been clear about when these features are jurisdictional. These factors, if applied to the numbers provided, might significantly change the analysis of the true "increase" in jurisdiction.

Moreover, it is disingenuous for EPA to compare the percentage of resources that are jurisdictional under the 2008 *Rapanos* Guidance with what they predict for the 2011 Draft Guidance and then claim that the 2011 Draft Guidance represents only a small change in CWA jurisdiction. The existing CWA regulations were adopted in 1977, and, although they have not undergone any major changes since that time, the scope of CWA jurisdiction asserted by the Agencies has been all over the map. If the Agencies are promulgating new guidance or regulations that amend the 1977 regulations, then they must assess the change in jurisdiction between the 1977 regulations and the proposed action.[21] The Agencies' assertion of CWA jurisdiction has been flawed since the "Migratory Bird Rule," and the Agencies cannot legitimately use the flawed 2008 *Rapanos* Guidance as a baseline for comparing the impacts of

[21] In addition, as discussed at the small entity outreach meeting, the baseline definition for the oil spill prevention section is the 1973 Oil Pollution Prevention regulation, which is much narrower than what is reflected in the Corps's jurisdictional determinations from 2009 to 2010.

the even more flawed 2011 Draft Guidance. Indeed, using the 2008 *Rapanos* Guidance as the baseline is also questionable because, as explained in extensive comments filed by some of the undersigned organizations, the 2008 *Rapanos* Guidance's standards exceed the lawful scope of jurisdiction under the CWA.[22] Furthermore, the Agencies did not satisfy RFA and SBREFA requirements in promulgating the 2008 *Rapanos* Guidance and never attempted to develop less burdensome alternatives for small entities.

IV. The Economic Analysis Previously Prepared by the Agencies Is Not Credible and Must Be Redone.

The preliminary economic analysis that EPA included with the Draft Guidance, "Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction" (Apr. 27, 2011), lacks credibility.[23] As a threshold matter, it bases its analysis on the flawed calculation for the increase in jurisdiction under the Draft Guidance as explained above. In addition, and as explained in prior comments, an expansion of CWA jurisdiction means that more facilities will be subject to CWA section 311's oil spill prevention control and countermeasure requirements, placing a heavy financial burden on these facilities solely based on their proximity to formerly unregulated features. Similarly, as explained above, with the proposed expansion of the scope of "waters of the United States" to include waters such as remote waters and ditches that were not previously subject to CWA jurisdiction, many entities that formerly were not required to obtain NPDES permits will be forced to bear the expense of obtaining and complying with these stormwater permits because of their proximity to ditches or other newly covered waters. This will affect almost all industrial activities and will place severe limitations on the location and conduct of virtually all construction projects that disturb more than one acre of land. Likewise, a broadened standard for CWA jurisdiction will cause many additional landowners and pesticide applicators to become classified as dischargers that must obtain permits under EPA's new NPDES permit program for pesticides. Each of the CWA programs has huge cost implications for small entities that EPA's economic analysis does not adequately examine.

V. The Draft Guidance Is Flawed, and Any Rule Based on it Will Also Be Flawed.

The Draft Guidance is complicated legalese that is very difficult to understand, let alone implement in the field. Fundamentally, and as explained in the October 12 meeting, the Draft Guidance does not reflect the limits of federal CWA jurisdiction as defined by the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* and *Rapanos v. United States*. For example, in *Rapanos*, Justice Kennedy rejected

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[22] *See* American Farm Bureau Federation, *et al.*, "Comments in Response to the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Guidance Pertaining to Clean Water Act Jurisdiction After the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*," Docket No. EPA-HQ-OW-2007-0282-0204 (Jan. 22, 2008).

[23] *See* David Sunding, *Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction* (Jul. 26, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514.

the Corps's previous standard for tributaries that relied on possession of ordinary high water mark (OHWM) as overbroad. 547 U.S. 715, 781 (2006) (Kennedy, J., concurring). Yet, the Draft Guidance directly conflicts with Justice Kennedy's opinion and provides a standard for tributaries that again relies on OHWM. Draft Guidance at 11. Similarly, although the *Rapanos* plurality criticized the Agencies for regulating ditches, drains, and desert washes far removed from navigable streams, 547 U.S. at 739 (Scalia, J., plurality), the Draft Guidance nevertheless relies on the plurality's opinion to undertake sweeping regulation of ditches. Draft Guidance at 12. In addition, the Draft Guidance's assertion of jurisdiction over certain isolated waters is inconsistent with the *SWANCC* Court's holding that isolated ponds that did not actually abut a navigable waterway were not jurisdictional under the CWA. *See SWANCC*, 531 U.S. 159, 171-72 (2001). The *Rapanos* plurality and Kennedy concurrence both rejected the notion that the federal government may regulate any non-navigable water that has "any hydrological connection" to navigable waters. *See Rapanos*, 547 U.S. at 734 (Scalia, J., plurality); *id.* at 784 (Kennedy, J., concurring). Yet the standard created by the Agencies through this Draft Guidance is equally as broad (if not broader) than the "any hydrological connection" standard that was rejected by the *Rapanos* Court.

Moreover, the Draft Guidance wrongly interprets "traditional navigable water" (TNW), which is of fundamental importance after *Rapanos* because both the plurality and Kennedy opinions premise jurisdiction over non-navigable waters on the non-navigable water's relationship to TNWs. *Id.* at 742 (Scalia, J., plurality); *id.* at 789 (Kennedy, J., concurring). In the Draft Guidance, the Agencies collapse the regulatory definition of 33 C.F.R. § 328(a)(3) waters into the new definition of TNWs, thereby eliminating the critical requirement that the water in question, together with other water bodies, form an interconnected highway to carry commercial goods in interstate or foreign commerce. Draft Guidance at 6. Under the Draft Guidance, for example, a water body can qualify as a TNW under the CWA if it can float a canoe or kayak. *Id.* at 6, 24. This interpretation is an impermissible expansion of the definition of TNW.

The Draft Guidance takes an aggressive view of the Agencies' jurisdiction, despite two admonitions from the Supreme Court for the Agencies to hew to congressional intent. EPA should not move forward with a rulemaking that by its own pronouncements expands jurisdiction to the very areas and features that the Supreme Court questioned.

VI. Rather Than Turn the Draft Guidance into a Rule, the Agencies Should Look at Alternative Regulatory Approaches that Would Clarify Key Issues of CWA Jurisdiction.

Rather than proceed with a rulemaking that mirrors the opaque Draft Guidance, it is crucial that EPA examine alternatives that would address the gray areas that cause the public and field regulators to consistently ask for clarification. This is particularly true from a small business perspective. The issues on which clarity is needed are not a secret. First, any future rulemaking should clearly define when a water is a tributary. As discussed above, EPA may not assert jurisdiction over waters as tributaries based on the presence of an OHWM or based on "any hydrological connection" to navigable waters. The definition of tributaries should not be based on connections, but rather, consistent with Supreme Court precedent, EPA should draw clear lines based on flow, duration, and proximity to navigable waters. It should explain when an

ephemeral water is a tributary and when it is not, recognizing that some ephemeral waters should not be federally regulated. It should also explain what a non-jurisdictional erosional feature is.

Second, EPA should explain when a ditch is a tributary subject to CWA jurisdiction. The *Rapanos* Court made it clear that many ditches are excluded from jurisdiction, even ditches that connect with waters of the United States. Thus, the current approaches to OHWM and standing water are not appropriate standards for determining whether a ditch is jurisdictional because, as stated by EPA, those standards would likely bring many ditches under federal regulation. If many ditches are now regulated under the CWA, then EPA should explicitly state that in the rulemaking. EPA should also explain the number of ditches that are expected to be jurisdictional and the cost implications for small businesses of regulating all ditches. Rather than hiding behind the legalese used in the Draft Guidance, EPA should address these important implications in any future rulemaking.

Third, EPA should explain clearly that, consistent with *SWANCC*, isolated waters are not subject to CWA jurisdiction. This would include clearly defining the terms "isolated" and "adjacent" and not allowing one to simply be defined in a way to make the other a null set. These issues all demand EPA clarification.

We appreciate the opportunity to participate in EPA's Small Entities Outreach Meeting and provide comments. It is critical that the Agencies take the proper steps to ensure that regulations provide an appropriate and clear definition of "waters of the United States" consistent with the CWA. Moreover, before a proposed rule is crafted, it is crucial that the Agencies provide a fair and appropriate opportunity for meaningful participation by small entities in that process.

Thank you for your attention to this matter.

Sincerely,

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