

KRISTINE L. YOUNG, President  
JOSEPH H. JARBOE, Senior Vice President  
PAUL W. DIEDERICH, Vice President  
HOWARD T. PEBLEY, Jr., Treasurer  
STEPHEN E. SANDHERR, Chief Executive Officer  
DAVID R. LUKENS, Chief Operating Officer

**AGC of America**  
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA  
**Quality People. Quality Projects.**



June 7, 2011

Ms. Donna Downing  
Office of Water (4502-T)  
Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

Mr. David Olson  
Regulatory Community of Practice (CECW-CO-R)  
U.S. Army Corps of Engineers  
441 G Street, N.W.  
Washington, D.C. 20314

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

**Docket ID No. EPA-HQ-OW-2011-0409**

**Re: Request for Extension of Comment Period on EPA and Army Corps of Engineers  
Guidance Regarding Identification of Waters Protected by the Clean Water Act**

Dear Ms. Downing and Mr. Olson:

The Associated General Contractors of America (AGC) requests an extension of the public comment period, for an additional 90 days, on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) Proposed Guidance Regarding Identification of Waters Protected by the Clean Water Act (76 *Fed. Reg.* 24479).

AGC is the leading trade association in the construction industry. The association represents more than 33,000 member companies in 96 chapters throughout the United States. This number includes more than 7,500 of the nation's leading general construction contractors and 25,000 specialty contractors and other firms, engaged in the construction of buildings, highways, utilities and federal projects. In building our quality of life, AGC members routinely operate in areas that would be affected by the scope of this guidance. We believe that additional time for comment is warranted for several important reasons as follows.

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 401 state water quality certification process, and Section 303 water quality standards and total maximum daily load programs. As a result, this proposed guidance will impact all stages of construction, and will have a substantial impact on the construction industry as a whole.

AGC of America  
Attn: Docket ID No. EPA-HQ-OW-2011-0409  
June 7, 2011

Of particular importance to the construction industry is that the newly proposed scope of “waters of the United States” would apply to the NPDES permit program and affect the Construction General Permit (CGP) for regulating stormwater discharges at construction sites. Under the new CGP that EPA recently proposed, site operators must ensure that any discharges flowing through the area between the disturbed portion of the site and “waters of the United States” (located on or immediately adjacent to the site) are treated by an area of undisturbed natural vegetation that alone or with alternative sediment and erosion controls achieves a reduction in sediment loads equivalent to a 50 foot buffer. The implications of this change alone are complicated enough to warrant an extension of the comment period.

Also, the agencies have stated that they intend to finalize this guidance and then potentially perform a rulemaking in the future. As you know, we disagree with this approach and believe that it violates the requirements of the Administrative Procedure Act (APA). Given that the guidance will likely be finalized and applied in the field pending some future rulemaking, our ability to have sufficient time to comment is all the more important. The 60-day comment period is simply insufficient given the scope and complexity of the proposal, as well as the fact that it will likely be immediately applied following the comment period and form the basis of the rulemaking.

An extended comment period is also warranted by the numerous legal, scientific and economic considerations implicated by the proposal. For example, in support of the draft guidance, the agencies have provided two appendices: a ten-page discussion on the legal and scientific basis for particular guidance sections, and a complex 44-page analysis of the indirect economic impacts associated with the proposed guidance. Additional time is needed for stakeholders to review and evaluate these complicated arguments and analyses. Indeed, the EPA itself has 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. Given the import of the proposal, the public should be permitted the opportunity to thoroughly review and comment upon EPA’s supporting documentation, including its lengthy economic analysis of the draft guidance.

The construction industry is already responding to several regulatory deadlines and numerous proposed and anticipated rulemakings—which span a host of programs covering oil spills, lead-based paint, criteria air pollutant emissions, greenhouse gas emissions, the beneficial use of fly ash and stormwater discharges. The industry needs additional time to assess the implications of each individual rule as well as the relationships between rulemaking efforts. On water issues alone, in addition to this proposed guidance covering all programs under the Clean Water Act and the anticipated rulemaking to follow, contractors are responding to—

- Proposed extensive changes to the federal Construction General Permit to regulate stormwater discharges from active construction sites (comments due June 24, 2011);

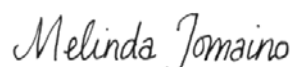
AGC of America  
Attn: Docket ID No. EPA-HQ-OW-2011-0409  
June 7, 2011

- Revisions to the Construction and Development Effluent Limitation Guidelines (ELGs) (EPA is expected to propose a revised numeric turbidity limit; this limit will be incorporated into the federal CGP and in subsequent years states will incorporate these changes into their permits);
- An anticipated national post-construction rule that would mandate post-construction stormwater management;
- Multiple total daily maximum load (TMDL) initiatives to limit sediment in watersheds across the United States, especially the “model” Chesapeake Bay TMDL. Included in these efforts are potential trading and offset programs for new development.

These regulatory initiatives come at a time when the construction industry is particularly hard hit from the economic recession. The construction industry has played a powerful role in sustaining economic growth and is necessary to any economic recovery as it makes a disproportionately large contribution to GDP. Construction spending in 2005 totaled \$1.12 trillion, including more than \$500 billion of equipment, goods, and services that generated jobs throughout the economy. Today’s construction industry is suffering from sustained unemployment levels between 16 and 20 percent with no expectation to change soon as work on stimulus projects tapers off.

In conclusion, the proposed guidance is intended to and will have a material impact on CWA permitting and enforcement nation-wide, and multiple industries and stakeholders will be subject to the new criteria set forth by the agencies. In light of the many important issues addressed by the proposal and the economic interests at stake, it is imperative that EPA and the Corps allow all interested parties time to provide meaningful and fully developed comments. AGC therefore requests that the comment period be extended by 90 days until Sept. 30, 2011.

Sincerely,



Melinda L. Tomaino  
Director, Green Construction