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Office of Environmental Information Docket  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

EPA Headquarters Docket Center  
Water Docket  
U.S. Environmental Protection Agency  
Mail Code 2822T  
1200 Pennsylvania Avenue, 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**

The National Corn Growers Association (NCGA) appreciates the opportunity to provide comments to the U. S. Environmental Protection Agency (EPA) regarding the EPA and the Corps of Engineers (Corps) proposed "Guidance Regarding Identification of Waters protected by the Clean Water Act," 76 Fed.Reg.24479 (May 2, 2011).

NCGA is the largest trade association of corn growers in the United States and represents 35,000 dues-paying corn farmers nationwide and the interests of more than 300,000 growers who contribute through corn check-off programs in their states. NCGA is the voice for the corn growers' concerns in national legislative, judicial and regulatory agencies' decisions affecting agriculture. Our members live and farm in 47 states. Our national headquarters is located in St. Louis, Missouri and NCGA also has an office in Washington, D.C.

Our growers are concerned about the implications and impacts of the draft guidance regarding the identification of waters which are protected by the Clean Water Act (CWA). The proposed guidance, unlike previous guidance documents which were limited to Section 404, 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 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, and Section 303 water quality standards and total maximum daily load programs. Our growers are concerned that this guidance modifies the current regulatory structure without the benefit of formal rulemaking and that if implemented as proposed it has the potential to impose significant regulatory burden and costs to growers. Currently, farmers do not have to obtain permits under Section 402 of the CWA for any

nonpoint sources. However, with the expansion of numbers of jurisdictional waters as a result of the implementation of this guidance, EPA could interpret some traditional nonpoint sources as point sources where permits may be required. The application of the principles of aggregation of all waters in a watershed and the modifications to other definitions for “other waters”, significant nexus, etc., in the Guidance will result in some agricultural, irrigation and roadside ditches being considered jurisdictional waters under the CWA. Based on the Guidance, farms with self-contained ponds with no interface with navigable waters could become subject to CWA requirements which could lead to 402 and/or 404 permits being required. Certainly, if these Guidance definitions are implemented in conjunction with the pesticide application permit requirements, more permits will be required. The Guidance creates more uncertainty and confusion for landowners and farmers. As such, this proposed guidance will pervade all stages of operations, and will have a substantial impact on producers.

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 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 judged by a newly crafted significant nexus test. The Agencies have expanded their CWA jurisdiction in 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 question, 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 waters not in any of the other 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 the NCGA members.

The Agencies have stated that the Guidance does not address the regulatory exclusions from coverage under the CWA for prior converted wetlands or the practices for identifying these. The Guidance also states that it does not "affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404 (f), including those for normal agriculture, forestry, and ranching practices". NCGA agrees that these exclusions are not addressed and that the Agencies may not lawfully address them in a guidance document.

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.

As a member of the Waters Advocacy Coalition, the NCGA fully supports the extensive comments submitted by the Coalition.

The NCGA appreciates the opportunity to submit these comments and would welcome the opportunity to discuss them in more detail with EPA.

Sincerely,



President

National Corn Growers Association