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June 23, 2011

Ms. Donna Downing
Office of Water (4502-T)
Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
Attn: Docket ID No. EPA-HQ-OW-2011-0409

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

Re: EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act

Dear Ms. Downing and Mr. Olson:

On behalf of the Family Farm Alliance (Alliance), I write to share our concerns and comments on the Environmental Protection Agency (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 Reg. 24479), referred to in this letter as "draft guidance".

The Alliance is a grassroots organization of family farmers, ranchers, irrigation districts and allied industries in 16 Western states. The Alliance is focused on one mission: To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers. The Alliance has long worked on finding ways to streamline and improve the federal regulatory processes with past administrations and Congress towards that end.

While we appreciate the time and effort your agencies have expended to develop the draft guidance, we remain concerned that Clean Water Act (CWA) jurisdictional issues are uncertain, particularly in areas where Western farmers and ranchers store, move and apply water for irrigation. Section 6 of the draft guidance, which addresses "other waters" of the U.S., is particularly vague. This uncertainty brings with it the risk of additional regulations, time-consuming and potentially expensive procedures, expanded opportunities for litigation, and a

shift from local and state water management towards increased federal agency regulation and oversight. While the draft guidance would theoretically preserve current CWA exemptions enjoyed by the agricultural community such as the agricultural return flow exemption and the agricultural operations exemption, the draft guidance's approach to defining "other waters" is so expansive that it could be interpreted to render such exemptions meaningless. Our farmers and ranchers simply do not need another layer of difficulty added to a profession that is already saddled with significant challenges.

Further, we do not believe that additional enforcement and regulation are needed at this point. The case for expanded federal jurisdiction of the CWA and attendant tightened regulation has been greatly exaggerated, in our view.

Finally, the draft guidance is seen by many of our members as a "rule in disguise". It should be withdrawn, and EPA and the Corps should commence with a transparent, formal rulemaking process.

These issues are further detailed below.

"Big-Picture" Concerns

Western water users are becoming increasingly concerned about the number of regulations and policies that are currently being rewritten or reconsidered by the Obama Administration. In particular, recent policy decisions and regulatory efforts at EPA and the White House Council on Environmental Quality carry the risk of real potential harm for Western irrigators and the rural communities that they serve.

Two key, related actions taken by EPA in the past year have catalyzed the concerns we have with the draft guidance:

- On June 2, 2010 EPA released its draft National Pollutant Discharge Elimination System (NPDES) general permit for point source discharges from the application of pesticides in, near or above waters of the United States. This EPA permit, and similar permits required in all delegated states, will adversely impact pest and weed control activities throughout the United States. As part of this effort, and other recent activities, EPA signaled its intent to broaden federal jurisdiction over an expanded number and variety of water bodies.
- Last year, EPA released its draft Strategic Plan for 2011-2016, which strongly indicates that EPA will attempt to take control of watershed and water planning activities from the states (which would by default result in managing water via water quality instead of through the allocation to beneficial uses), place more emphasis on regulating greenhouse gases, setting nutrient standards for water bodies, environmental cleanup, chemical regulation, and enforcing environmental laws through "vigorous and targeted civil and criminal enforcement" actions.

These types of federal water resource actions and regulatory practices threaten to undermine the economic foundations of rural communities in the arid West by making farming and ranching increasingly difficult and costly. In the rural West, irrigation water is critically important to farmers and ranchers and the communities they have built over the past century. Further, the importance of a vibrant, fiscally sound rural part of Western states is critical to the entire state, not just the rural part of those states. However, in recent decades, we have seen once-reliable water supplies for farmers steadily being diverted away to meet new needs. Rural farming and ranching communities are being threatened because of increased demand for limited fresh water supplies caused by continued population growth, diminishing snow pack, increasing water consumption to support domestic energy production, continually expanding environmental demands -- and additional, burdensome requirements imposed by EPA.

A reliable, safe and sustainable domestic food supply is just as important as a strong military to the protection of our national interests. The post 9/11 world of terrorist threats makes the stability of domestic food supply even more pressing. Further, a recent United Nations study finds that global food production must be increased by 70% in the next four decades to meet escalating world hunger demands. American family farmers and ranchers for generations have grown safe food and fiber for the world, and we will have to muster even more innovation to meet this critical challenge. That innovation must be encouraged rather than stifled with new federal regulations and uncertainty over water supplies for irrigated farms and ranches in the rural West. The draft guidance is just the latest example of this type of expanded federal regulation.

Jurisdictional Over-Reach

1. Overview

There have been suggestions made by certain environmental activists and their supporters that jurisdiction under the CWA has been reduced, most notably by the *SWANCC* and *Rapanos* decisions. However, the real question is what the jurisdiction, or reach, of the CWA was upon its enactment in 1972 and subsequent to that. Jurisdiction has been a moving target for many years. The Corps and EPA historically took a narrower view of jurisdiction under the CWA. This has been expanded over the decades through citizen lawsuits and ever-broadening interpretations by federal agencies charged with its implementation. Only recently are we seeing some of the courts, including the U.S. Supreme Court, conclude that the agencies have, in some instances, overreached, going beyond the bounds of Congress' intent in enacting the CWA. By and large, however, the jurisdiction that is asserted by the agencies remains extensive and goes well beyond what was intended with the passage of the CWA.

2. The Case for Expanding Federal Jurisdiction Has Been Greatly Exaggerated

After reading the justifications provided by supporters of the draft guidance, one not familiar with this nation's regime for regulation of the environment would understandably conclude that

there is some giant gap in the regulatory scheme that is allowing unchecked pollution in waters that are not currently within the jurisdiction of the CWA. However, this is simply not the case.

Even though smaller intrastate waters and wetland areas may not be within the jurisdiction of the federal government, they are within the jurisdiction of state and local governments. The necessary implication is that these governments are incapable of effectively protecting their water resources. Otherwise, there would be no need for changes to the existing guidance.

In addition, it is important to keep in mind that the federal government does have jurisdiction over discharges of solid wastes, hazardous wastes, and hazardous substances to non-jurisdictional waters through the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation, and Liability Act.

It is also worth noting that the CWA is widely recognized as an extremely successful statutory regime. All of this progress has been achieved under the current version of the CWA. And more than nine years' worth of this progress has been achieved since the Supreme Court's *SWANCC* decision in 2001, which some proponents of the draft guidance allege was the beginning of the Court's attempts to limit the reach of the CWA. Simply put, the supporters of the draft guidance have only spoken of the need for an expansion of federal jurisdiction in the broadest, most vague terms possible, without establishing any real need.

3. Jurisdictional Overreaching: Some Real-World Examples

It is important to note that the jurisdiction asserted by federal agencies before and after the *SWANCC* and *Rapanos* decisions has been and continues to be extensive. The practical realities for water providers -- agricultural and municipal -- have been real-world consequences in the form of increased costs for everyday consumers of water. These costs many times come without any real improvements in water quality. In fact, they actually threaten to divert resources away from some of the real water quality problems that exist.

Three practical, illustrative examples under the CWA are provided below.

a. Section 303. Application of TMDLs to Artificial Water Conveyance Facilities

Under Section 303 of the CWA, water quality limited segments -- those rivers and streams that do not meet established water quality standards -- are identified. Thereafter, clean-up plans, or total maximum daily loads (TMDLs) are established with allocations made to the various users that impact the water quality of the rivers and streams. These TMDLs allow real water quality problems to be addressed in a focused way.

Unfortunately, the federal government has in some instances asserted jurisdiction over canals and drains and treated them as water quality limited segments. By labeling these artificial, manmade water conveyances -- many of which are concrete-lined, exhibit no fish habitat characteristics or other stream-like qualities whatsoever, and are completely dry during certain

portions of the week, month and/or year -- as “waters of the United States”, the federal agencies have been successful only in diverting limited resources away from improving the quality of our rivers and streams.

Requiring TMDLs for lined water conveyance channels, rather than focusing on the rivers and streams that were intended to be protected under the CWA, has resulted in real-world consequences for water providers, as well as the everyday citizens that use the water. No relief to this problem appears in sight, and the draft guidance may exacerbate the problem by expanding such efforts well beyond rivers and streams.

b. Sections 401 and 402. Requiring NPDES Permits for Aquatic Herbicide Use

Under Sections 401 and 402 of the CWA, discharges of point source pollutants into waters of the United States are prohibited without a National Pollutant Discharge Elimination System (NPDES) permit. Again, this program, like the TMDL program, has allowed real water quality problems to be addressed in a very focused way. However, over the 35 year history of the CWA, litigious environmental groups have been successful in some cases in convincing federal courts that jurisdiction should be asserted over canals, ditches and drains as “waters of the United States”. This has had the effect of dragging agricultural and municipal water providers into regulatory terrain that they never imagined could exist.

c. Section 404. Asserting Jurisdiction over Work in Canals, Ditches and Drains

Finally, much of the jurisdictional focus has centered on Section 404, the so-called dredge-and-fill permit program. Again, this program was designed to protect the nation’s rivers and streams, including adjacent wetlands. Unfortunately, aggressive regulators in the past have expanded the reach of Section 404 by attempting to extend it to canals, ditches and drains.

Irrigation districts, canal companies and other water providers do routine maintenance work in their conveyance facilities every year. In addition, they are required to make more extensive improvements in the form of rehabilitation or replacement of some of the works from time to time. Water conservation activities such as lining or piping canals and drains are also commonplace activities, along with relocating portions of these water conveyance facilities for improved efficiencies. Without the ability to conduct these necessary activities, agricultural water delivery would come to a screeching halt.

The Corps, in certain instances, had asserted that these activities are being conducted in “waters of the United States” and therefore require a 404 permit, rather than applying one of the existing exemptions contained in the CWA. As a result, we spent the better part of two years during the Bush Administration working with the Corps, EPA and the Bureau of Reclamation to obtain Regulatory Guidance Letter (RGL 07-02), helping to clarify the scope and breadth of the exemptions contained in the Act as they apply to these activities.

The Corps already faces significant challenges with the timely processing of 404 permits. Requiring such permits for activities in water conveyance facilities would substantially increase this already considerable workload and cause further and significant undue burdens on water conveyance operators and their customers. The burden of this permitting would also discourage and hinder the type of work that enhances stream health through water conservation actions undertaken by the water conveyance operators.

These few, but very concrete examples make it clear that jurisdiction under the CWA has been getting broader over the years, not narrower. *SWANCC* and *Rapanos* did not wipe the slate clean or shackle the agencies. Unfortunately, we have and will continue to face, many jurisdictional uncertainties and associated problems under the draft guidance as it currently exists.

Positive Aspects of Draft Guidance

We believe the draft guidance has major implications for agriculture, and we were pleased to see that it does not modify the regulatory exclusions from coverage under the CWA for prior converted cropland or practices for identifying prior converted croplands. It does not affect any of the CWA exemptions from CWA section 404 permitting requirements, including those for normal agriculture, forestry and ranching practices. This guidance also does not change the existing statutory and regulatory exemptions from NPDES permitting requirements for agricultural stormwater runoff and return flows from irrigated agriculture.

The draft document also provides guidance in determining jurisdiction over certain “ditches” as tributaries to waters of the U.S., but it appears that the EPA definitions used in the Regulatory Guidance Letter (RGL) No. 07-02 regarding CWA exemptions for construction and maintenance of ditches and the maintenance of drainage ditches have not changed. Our understanding is that the draft guidance would not affect the RGL on the exemption but would instead merely clarify the definition of jurisdictional “ditches” along the same lines as the existing guidance provided by the RGL.

These existing exemptions, on balance, are helpful and maintain some clarity and assurances to Western farmers and ranchers.

The goal of the draft guidance should be to provide further certainty and predictability to jurisdictional determinations. Accordingly, the draft guidance should include as many "bright line" tests as possible. For example, the draft guidance should include a clear statement that artificial conveyances that do not spill into waters of the United States are non-jurisdictional. Similarly, the draft guidance should provide that artificial channels will only be considered potentially jurisdictional if they regularly or intentionally spill into waters of the United States, and that spills into dry channels will not result in jurisdiction as long as the spill water has dissipated before waters of the United States reach it in the channel.

Concerns with Draft Guidance

1. “Other Waters” - Section 6 – Is Muddled, Not Clarifying

The draft guidance’s expansive interpretation of “other waters” (Section 6) suggests that EPA is attempting to expand its jurisdiction beyond what Congress has mandated. The draft guidance defines “other waters” or “(a) (3) waters” as “All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce...” Our members have grave concerns that this language creates the potential for federal agencies to substantially increase their jurisdictional reach over private property and negatively impact agriculture.

It appears that EPA will review whether such water bodies may “significantly affect” water by draining to a traditional navigable water or interstate water. However, at this time, it is uncertain whether EPA regulators can claim that certain agricultural areas which are close to traditional navigable waters as being adjacent, and therefore, wetlands. We emphasize that the “prior converted cropland” exemption will be critical in terms of protecting property under this interpretation.

Under Section 6 of its draft guidance, EPA claims possible jurisdiction of “...lakes, ponds, and other non-wetland waters that are bordering, contiguous, or neighboring to jurisdictional waters, including waters that are separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes and the like.” EPA believes that these lakes and ponds should be evaluated, and if there is a “significant nexus”, these waters will be regulated.

We are concerned with the draft guidance’s direction to regulate waters which are not physically close to jurisdictional waters. The draft guidance calls these waters “non-physically proximate” and states clearly these waters are isolated and can be intrastate and even non-navigable. The draft guidance goes on to declare that EPA will rely on whether there is a “significant nexus” that can connect these waters to a jurisdictional tributary. In so doing, the draft guidance appears to be skirting the governing case law in an effort to improperly expand CWA coverage in a manner never contemplated or sanctioned by Congress or the Supreme Court.

In a nutshell, we are concerned that the draft guidance goes far beyond the law in this regard, and that as a result tremendous uncertainty will be generated by these vague standards, especially in areas where our farmers and ranchers produce food and fiber.

The draft guidance notes that it is more difficult evaluating geographically separated water from jurisdictional tributaries and says “...establishing a significant nexus may be more challenging.” The draft guidance declares that even though “...such waters may be widely scattered geographically, and physically remote from jurisdictional waters, field staff should generally

conduct a “significant nexus” analyses for such waters individually, unless there is a compelling scientific basis for treating a group of such waters as similarly situated waters in the same region.” This was exactly the issue with which the U.S. Supreme Court struggled with in the series of cases regarding the extent of federal jurisdiction. EPA appears to be trying to overturn the Supreme Court’s case law via this guidance, far exceeding its authority as an administrative agency.

We believe this will cause the agencies to spend millions of dollars hiring more staff and consultants and will substantially burden Western farmers and ranchers as regulators strive to determine if an isolated water has a significant impact on a navigable water located miles away.

We question how much of this burden will ultimately fall on already strapped state regulatory agencies. EPA needs to provide an estimated summary of the costs incurred with this and similar measures contemplated in the draft guidance. This seems to us to be heavy-handed and expensive. We also question the effectiveness of this overarching policy direction. We believe that incentive-driven, voluntary and collaborative approaches are the best means of effectively dealing with our nation’s environmental challenges.

2. The Draft Guidance Will Have Uncertain But Potentially Adverse Impacts on Agricultural Activities

Because of the uncertainty associated with how “other waters” of the U.S. will be dealt with, the draft guidance could be interpreted by some to extend jurisdiction to virtually all agricultural irrigation facilities. Such an assertion of jurisdictional extension could paralyze the ability of Western irrigators to efficiently operate and maintain these facilities, and generate significant and unnecessary regulatory and litigation activity.

First, seeking to extend CWA jurisdiction over agricultural irrigation facilities could subject them to water quality standards that these facilities were not designed and are not operated to support. Irrigation facilities are owned, operated, and maintained to supply irrigation water. In many instances, irrigation entities are both contractually and state law-bound to deliver this water. These facilities were not designed, and they are not operated, to serve as fish and wildlife habitat or as recreational attractions. These facilities are often privately owned and paid for by the water users who benefit from the water that they deliver. In other areas, the large systems are operated by public entities, supported financially by the water users, and governed by a board elected by the water users. Those water users paid for the development of the system and pay for annual operations and maintenance. Operation and maintenance of both private and public irrigation facilities includes the application of various aquatic herbicides and other chemicals both to the water and to the banks of these facilities. These chemical applications are necessary to promote efficient water flows, to prevent plant induced water losses, and to protect life and property by preventing plant and/or animal induced destabilization or destruction of these facilities. While these chemical applications could have short term water quality effects that

would violate newly imposed water quality standards for such facilities, traditional navigable waters would see no impact from such applications.

Second, irrigation facility operation and maintenance activities include physical and structural modification and upkeep. These maintenance activities include, but are not limited to, facility dredging, lining, piping, and relocation. The time, effort, and expense of securing permits for these activities would be astronomical, which underscores the importance of maintaining the RGL on the exemption. These added expenses would, by necessity, be borne by water users who in many instances would not be able to shoulder the additional financial burden. Traditionally, farmers have little available cash, as their resources are invested in their land. Delay in permitting could lead to very long delays and hamper operators' ability to do work in irrigation water delivery systems because that work is limited to the non-irrigation season, when the canals are not flowing water. Work could also be further limited by requirements to protect fish and wildlife.

Third, the draft guidance fails to account for the exigencies of operating and maintaining Western irrigation systems. Many Western states require that irrigation systems be operated not only to ensure the flow of water to water users, but that the operation of these systems be accomplished without harm to neighboring property owners. Emergency situations (such as facility failure) that cut off water supply, or that flood adjoining lands must be dealt with in a timely manner. Irrigation entities do not have the luxury of applying for a permit when time is of the essence. The draft guidance could leave irrigation entities in an untenable position of having to choose between violating state law (and federal law, for those states that have not assumed section 404 permitting or where there are other differences between state and federal laws), by failing to timely address a problem that interferes with water supply or that causes flooding due to permit application and processing procedures, or violating the CWA as interpreted in the draft guidance, by acting immediately to rectify a problem that requires a permit prior to proceeding.

Fourth, the draft guidance does not reflect the unique challenges western water managers face in arid climates. For example, under the draft guidance, dry channels may become regulated under the CWA. In the West, dry channels can remain that way –dry – sometimes, for years on end. Without further definition, including all dry channels as jurisdictional will increase unnecessary permitting requirements associated with pipeline and other projects.

Some may argue that the aforementioned concerns are unfounded given the draft guidance's adherence to existing regulatory exemptions. Theoretically, the draft guidance would preserve current CWA exemptions enjoyed by the agricultural community such as the agricultural return flow exemption and the agricultural operations exemption. The problem, however, is that the draft guidance's approach to defining "other waters" is so expansive that it could be interpreted to render such exemptions meaningless. While various agricultural exemptions may be preserved on paper, it remains to be seen whether those exemptions will be preserved in practice. Once something is jurisdictional, overzealous enforcement and lawsuits initiated by environmental organizations can, and oftentimes do, follow.

3. The Draft Guidance is a “Rule in Disguise”: It Should be Withdrawn and EPA and the Corps Should Commence with Formal Rulemaking

As we understand it, the draft guidance was not prepared in accordance with the Administrative Procedures Act (APA) and is instead merely intended to provide guidance to field offices. It therefore does not rise to the level of a regulation and technically does not supersede the pre-existing regulations. The vague descriptions and uncertain processes with defining “other waters” opens up the potential for enforcement through CWA citizen suits and federal penalties.

Agency field staff will be expected to employ the content of the draft guidance to support a determination that a given water-body is a “water of the U.S.” The draft guidance will be used by EPA and the Corps in enforcement actions, permitting decisions, and jurisdictional determinations which will give the draft guidance a legal effect equal to a formally adopted rule. To avoid judicial review, the agencies have carefully crafted the draft guidance with phrases such as “it is not a rule, and hence it is not binding and lacks the force of law”. However, based on precedents established under the APA, it is highly likely that the draft guidance will be considered a rule, if finalized and implemented. The agencies cannot avoid this outcome by claiming that they will initiate a rulemaking on this issue at some unspecified time in the future. This is particularly troublesome when the draft guidance appears to exceed the legal parameters of the CWA itself.

For these reasons, the draft guidance violates the APA for rulemaking and must be withdrawn.

4. The Draft Guidance Could Lead to Increased Litigation

Large, corporate environmental groups often use "citizen suits" to reap rich rewards for themselves with little positive impact on the environment, and we are concerned that this disruptive behavior will only be encouraged under the current language in the draft guidance.

Most major federal environmental statutes allow citizens to sue for violating the laws. But most of these suits are brought by environmental organizations, not individuals, and most of the filings do not end in a court decision; they end in settlements. According to a 2006 report prepared by the *Property and Environment Research Center* (PERC), from 1995-2002, there were 4,438 notices of intent to sue under four environmental statutes - 6.6 times more than actual federal court decisions in citizen suits. Presumably most of the others were settled. According to the PERC report, there is a clear and compelling reason for this: settlements bring in money environmental groups can use to pursue other goals. Although statistics are hard to come by, most citizen suits appear to be filed under the CWA and the Resource Conservation Recovery Act (RCRA) – both laws that govern EPA activities. Provisions in these laws enable citizen prosecutors to craft settlements that compensate them generously for legal costs (amounts well above actual costs). According to PERC, “These laws make prosecutions easy because they require companies to keep detailed records of their activities; in other words, evidence of technical violations is provided by the companies themselves.” Furthermore, the laws saddle

"violators" with very heavy penalties (up to \$27,500 per day), but these penalties can be waived if the case is settled.

An August 9, 2006 editorial piece in the *Wall Street Journal* (WSJ) noted that most of the violations are trivial and technical. "Defendants who have not even minimally harmed the environment are roped in," said the article in the WSJ. "Companies settle simply to avoid expensive litigation."

Given the manner in which some environmental groups abuse citizen lawsuit provisions of environmental laws, we are very concerned that EPA is apparently advocating that citizen science can help communities "spur local industry and others to do a better job of complying with environmental laws and regulations" (2010 EPA Strategic Plan). The draft guidance, as written, may indirectly encourage citizen lawsuit provisions, rather than encouraging some environmental groups to refocus on activities that actually enhance environmental quality. It would also allow EPA to dedicate more of its resources to constructive, on-the-ground actions to protect the environment, rather than defending itself in litigation.

5. The Draft Guidance Could Diminish the Role of the States and Local Government

The Family Farm Alliance is concerned that the expanded scope of Federal authority set forth in the draft guidance will diminish state and local authority. Well-settled legislative and judicial authority has long recognized state and local government control over land and water use and development. For example, the Equal Footing Doctrine provides that new states enter the Union having the same sovereign powers and jurisdiction as the original thirteen states. Under this doctrine, among other things, a new state generally acquires title to the beds of inland navigable waters. This is as true of the Western states as it is for all other states. In addition, the Submerged Lands Act of 1953 declares that states generally have title to all lands beneath inland navigable waters and beneath offshore marine waters within their "boundaries," which generally extend three miles from the coastline. Finally, Section 8 of the Reclamation Act of 1902 provides that nothing in the Reclamation Act may be construed as affecting or in any way interfering with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation. Moreover, Section 8 explicitly requires that the Secretary of the Interior proceed in conformity with state law in carrying out the Act. Collectively, these federal authorities and many others recognize the authority of each respective state to administer the waters of the state.

The CWA is no different. Section 101(b) of the CWA specifically and expressly recognizes, preserves, and protects the "primary responsibilities and rights of States" to prevent, reduce, and eliminate pollution, as well as to plan and develop the use of land and water resources. Similarly, CWA Section 101(g) provides and confirms the Congressional policy that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by" the CWA. As the United States Supreme Court declared in the landmark case of *California v. United States* in 1978, "[t]he history and

relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.”

The guidance extends federal jurisdiction over waters that have been traditionally under state jurisdiction as recognized by the U.S. Supreme Court. The draft guidance would essentially employ the CWA to manage state waters via water quality requirements instead of the state authority to allocate water based on beneficial uses and state priorities. The CWA did not intend to federalize the nation’s waters, yet that is exactly what the proposed draft guidance would do.

Conclusion

The true test of progress here is the current condition of the “waters of the US”. EPA has made significant progress since enactment of the landmark CWA and Safe Drinking Water Act almost forty years ago. The enhanced quality of our surface waters and the greater safety of our drinking water are testaments to decades of environmental protection and investment. Other challenges remain, and EPA clearly seems intent on working more aggressively to reduce and control pollutants that are discharged from industrial, municipal, agricultural, and stormwater point sources and nonpoint sources.

Of course there is still work to be done and there will always be some individuals who flaunt the law and conduct environmentally –questionable practices that create visible consequences and cause additional scrutiny of the regulated community. Still, we firmly believe it was never the intent of Congress to grant EPA the kind of authority that some continue to seek by a variety of means.

There are some positive and clarifying aspects contained within the draft guidance. However, overall it appears that EPA is moving in a direction where a heavier regulatory hammer will be wielded and the potential for court actions will be enhanced through the use of “citizen suits”. It also appears that the Obama Administration is advancing this draft guidance to achieve by administrative fiat that which they failed to achieve through legislation in the 111th Congress. If the Administration desires statutory changes to the CWA, they should submit a proposal to Congress for legislative action. It is inappropriate, and contrary to law, to expand the reach of the CWA beyond that intended by Congress by regulation, much less by guidance.

While the draft guidance would theoretically preserve current CWA exemptions enjoyed by the agricultural community such as the agricultural return flow exemption and the agricultural operations exemption, the draft guidance’s approach to defining “other waters” is so expansive that it could be interpreted to render such exemptions meaningless.

The draft guidance violates the APA for rulemaking and must be withdrawn. Further, the guidance is not needed. We look forward to working with EPA and others to positively address water quality needs within the existing regulatory and statutory framework to develop an

approach that actually works for the agricultural community.

American family farmers and ranchers for generations have grown food and fiber for the world, and we will have to become more innovative than ever before to meet this critical challenge. That innovation must be encouraged rather than stifled with new federal regulations and uncertainty. Unfortunately, many existing and proposed federal policies on water issues make it more difficult for farmers in an arena where agricultural values are at a disadvantage to federal ecological and environmental priorities. Right now, it seems that water policies being developed at EPA and the White House Council on Environmental Quality are being considered separately from foreign and domestic agricultural goals, including national security. Many of these administrative changes are drawing praise from environmental organizations that have been advocating for them for some time, but ultimately the huge negative impacts of such destructive policies will be aimed at the heart of the economy in rural America.

We can only hope that the Obama Administration will give equal consideration to the concerns of the states, agricultural organizations like ours, and other producers in the “regulated community”. We welcome your leadership to help make that possible.

Thank you for this opportunity to share our comments with you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dan Keppen', with a stylized flourish at the end.

Dan Keppen
Executive Director