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July 29, 2011

Water Docket
Attention: Docket ID No. EPA-HQ-OW-2011-0409
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

**RE: Guidance Regarding Identification of Waters Protected by the Clean Water Act
Published May 2, 2011.**

Dear Administrator,

The National Water Resources Association (NWRA) represents numerous municipalities, conservation and conservancy districts, ditch companies, farmers and ranchers in the Reclamation States of the West. All of its constituencies are involved in the diversion, storage and use of water for a variety of beneficial purposes. They must construct, repair and replace associated water supply infrastructure. Such infrastructure is often times many miles in length. Hence, the scope of federal jurisdiction under the Clean Water Act, with specific reference to its exercise in the context of Sections 404 and 402 permitting, is an issue of great importance to NWRA members.

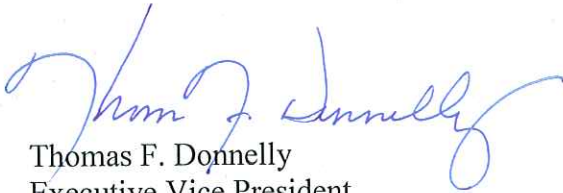
NWRA attempts to work collaboratively with other water organizations, including the Western Urban Water Coalition, the American Water Works Association, the Federal Water Quality Coalition, and the Family Farm Alliance. Hence, it has had the opportunity to review the draft comments of these entities and is in general agreement with their observations. That said, though NWRA will not repeat, in detail, the various concerns with the proposal as expressed by these organizations, it will summarize the major concerns of the NWRA membership.

1. The proposal greatly expands the current scope of federal jurisdiction over "waters of the United States" as reflected in existing guidance. Given both the significance of this change and its real world impacts, the proposal must initially be the subject of APA rulemaking as compared to the issuance of an agency guidance document. This is the case based not only on a legal analysis of the situation, but also a practical one. Guidance alone will necessitate a case-by-case challenge to agency decisions, a very costly and time consuming proposition for permittees and one which could lead to inconsistent results amongst various agency offices.

2. Under the proposal, the significant nexus test would apply to the definitions of “tributaries,” “interstate waters” and “adjacency.” In developing a significant nexus test, Justice Kennedy focused on adjacent wetlands in light of the particular facts before the Court. He did not support the presumptions established in the proposed guidance. The interpretation of the Court’s decision reflected in the proposal will inappropriately expand the number of waters subject to federal oversight.
3. In the more arid portions of the United States, there are numerous ephemeral and intermittent drainages, streams and wetlands that under current agency guidance are found to be “isolated” or lacking a significant nexus to traditional navigable waters (TNWS). Hence, they are not subject to Section 404 jurisdiction and the other provisions of the Act. The proposed guidance is an arbitrary and marked departure from past practice, as it would largely eliminate the concept of isolated water bodies as reflected in the 2003 Agency SWANNC guidance. This would detrimentally impact public utilities and others who need to construct, repair and replace necessary infrastructure.
4. The proposal would encompass waters susceptible to navigation in the future, albeit by simply demonstrating that a canoe trip has been taken for recreational purposes (or in order to prove that canoeing is possible), ignoring any need whatsoever to establish a Commerce Clause connection. This will greatly expand the number of TNWS, with an accompanying exponential increase in jurisdictional determinations based on the significant nexus test.

Thank you for the opportunity to comment on the proposed guidance. Should you any questions, please feel free to our office at 703-524-1544.

Sincerely,



Thomas F. Donnelly
Executive Vice President