

March 26, 2012

The Honorable Cass Sunstein  
Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
725 17<sup>th</sup> Street, NW  
Washington, DC 20503

Dear Administrator Sunstein:

We write to express serious concerns with the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) "Final Guidance on Identifying Waters Protected by the Clean Water Act" (Final Guidance). The Final Guidance is currently undergoing Office of Management and Budget (OMB) review. (RIN: 2040-ZA11).

We represent a broad coalition of the nation's construction, manufacturing, housing, real estate, mining, agriculture, and energy sectors, all of which are vital to a thriving national economy, including providing much-needed jobs. The Final Guidance increases regulatory uncertainty and imposes significant regulatory burdens on private landowners, industrial entities as well as local, state, and federal regulatory agencies. As a result, our interests will face significantly more federal regulatory and permitting burdens, compliance costs, delays, and constraints on use of land for economically productive activities and job creation.

The Guidance significantly expands the scope of waters to be regulated by EPA and the Corps, despite the United States Supreme Court decisions that have rejected the agencies' broad jurisdictional claims. As we have said in numerous forums, the guidance is inconsistent not only with the procedural requirements of the Administrative Procedure Act but also with the scope of the agencies' authority under the Clean Water Act (CWA) and Commerce Clause.

We strongly urge you to conduct a thorough review of the Final Guidance in a manner that adheres to the President's direction set forth in Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). Particularly, we ask that you focus on the EPA and the Corps' failure to fully consider the costs of implementing the Guidance. We believe EPA significantly underestimated the costs that they did attempt to quantify, while overstating the benefits.

The agencies' economic analysis employs an overly simple and flawed approach. While EPA states that "EPA Regions will use this guidance to oversee and implement programs under the CWA, including those under sections 303, 311, 401, 402, and 404," EPA's economic analysis (EA) accompanying the proposed guidance is limited only to costs associated with section 404 of the CWA. Unless EPA has analyzed the cost of implementing the Final Guidance throughout all CWA programs, including 303, 311, 401, 402, and 404, the EA will remain insufficient and inconsistent with the President's directive.

By proceeding with guidance, EPA and the Corps deprive the regulated community of important procedural safeguards to which they are entitled by law. Proceeding by Final Guidance also means EPA and the Corps avoid undertaking a number of mandatory steps to ensure that the agencies adopt the least burdensome alternative for small business under requirements of the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA). The agencies' determination that compliance with the RFA and SBREFA is not required is simply wrong.

We urge you to review EPA and the Corps' economic analysis accompanying the Final Guidance. In light of all of these concerns, we urge you to stop the issuance of this guidance document.

Sincerely,

Agricultural Retailers Association  
Agri-Mark, Inc.  
American Farm Bureau Federation®  
American Forest & Paper Association  
American Horse Council  
American Iron and Steel Institute  
American Petroleum Institute  
American Road and Transportation Builders Association  
American Sugar Alliance  
Associated General Contractors of America  
CropLife America  
Dairylea Cooperative, Inc.  
Dairy Producers of New Mexico  
Dairy Producers of Utah  
Edison Electric Institute  
Foundation for Environmental and Economic Progress  
GROWMARK, Inc.  
Idaho Dairymen's Association  
Industrial Minerals Association – North America  
International Council of Shopping Centers  
Irrigation Association  
Maryland Grain Producers Association  
Mid-America Croplife Association  
Mosaic Fertilizer, LLC  
National Apartment Association  
National Association of Home Builders  
National Association of Manufacturers  
National Association of Realtors®  
National Association of State Departments of Agriculture  
NAIOP, the Commercial Real Estate Development Association

National Cattlemen's Beef Association  
National Chicken Council  
National Corn Growers Association  
National Council of Farmer Cooperatives  
National Mining Association  
National Multi Housing Council  
National Pork Producers Council  
National Stone, Sand and Gravel Association  
National Turkey Federation  
National Water Resources Association  
Northeast Dairy Farmers Cooperatives  
Public Lands Council  
Real Estate Roundtable  
RISE, Responsible Industry for a Sound Environment  
Select Milk Producers  
Southern Crop Production Association  
South Dakota Agri-Business Association  
St. Albans Cooperative Creamery  
Texas Association of Dairymen  
Texas Cattle Feeders Association  
The Fertilizer Institute  
U.S. Cattlemen's Association  
United Egg Producers  
Upstate Niagara Cooperative, Inc.  
Virginia Poultry Federation  
Western Business Roundtable  
Women Involved in Farm Economics  
Wyoming Agricultural Business Association  
Wyoming Crop Improvement Association  
Wyoming Farm Bureau Federation  
Wyoming Wheat Growers Association

CC: Sen. Barbara Boxer  
Sen. James Inhofe  
Rep. John Mica  
Rep. Nick Rahall