November 17, 2011

Ms. Jenny Thomas
Wetlands Division
Office of Wetlands, Oceans and Watersheds
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Comments Requested at Oct. 12, 2011, Small Entity Outreach Meeting

Dear Ms. Thomas:

The undersigned organizations submit these comments in response to the United States Environmental Protection Agency's (EPA) request for information from the groups invited to participate in the "Waters of the U.S. Small Entities Outreach Meeting" on October 12, 2011. At the meeting, EPA outlined the contents of the "Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act" (hereinafter Draft Guidance) issued in May 2011. The organizations specifically asked EPA not to finalize the

Consequently, our organization
important information. Because EPA and the U.S
Agencies) only provided an additional 14 days, o
an additional 60 days to prepare the information t
however, we provide the following partial respon
several significant concerns with how EPA is pro

EPA began the October 12 small business meetin
to comply with the Regulatory Flexibility Act (R
Enforcement Act (SBREFA), but that it would no
be "indistinguishable" from these laws' requirem
both counts. As explained fully below, the
"guidance" or as a rule, would have significant in
justifiably claim otherwise. Moreover, the proces

[1] We respectfully request that all documents cited in this letter and our October 26, 2011, letter (including all comments previously submitted to the Agencies) be considered by the Agencies and included in the administrative record for this action.

legitimately be described as indistinguishable from the RFA and SBREFA requirements. Ultimately, the process that EPA is undertaking will lead to incomplete and flawed data for the basis of any proposed rule.

A. A Proposed Rulemaking Expanding the Scope of Waters Regulated under the Clean Water Act Will Have Direct and Significant Impacts on Small Business Interests.

Contrary to EPA's position, complying with the RFA is not optional in this case. An agency promulgating a rule that has "significant" impact on "small entities" must undertake a number of mandatory steps to ensure that the agency adopts the least burdensome alternative for small business. 5 U.S.C. § 605(b). The assessment of regulatory alternatives is at the heart of the RFA and SBREFA. If EPA is moving forward with a rule defining, and, as stated, "expanding," the scope of Clean Water Act (CWA) jurisdiction, then EPA must comply with the RFA and SBREFA requirements. EPA tries to wordsmith its way around the RFA by claiming that any proposed rule revising the definition of "the waters of the United States" would merely have "indirect" effects on small entities, and, thus, it need not comply. But there can be no question that EPA's expansion of the scope of "waters of the United States" subject to CWA regulation has direct effects not only on regulated entities, but on the entire nation.

As EPA knows, the scope of CWA jurisdiction has implications that permeate all sections and programs under the CWA – section 303 water quality standards, section 311 oil spill prevention control and countermeasures, section 401 water quality certifications, the section 402 National ray

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have called loans or demanded more collateral to secure loans

definition will mean for the upcoming post-construction storm water rule is also of concern to MS4 operators and small business entities.

The potential costs and burdens on small businesses become too big to even quantify when "ditches" are considered "waters of the United States." For example, per U.S. Department of Transportation (DOT) design specifications, all federally-funded roads must be "designed …. and maintained to have adequate drainage, cross drains, and ditch relief drains."[5] The United States' highway network consists of 4 million miles of roads, and federally-funded road projects are ongoing in every state and major city across the nation.[6] Under the Draft Guidance, presumably *any and all* construction work on these roads (that have ditches running along them, per DOT requirements) would encounter "jurisdictional waters" and require section 404 permits. To state this another way, EPA appears to be moving forwara6Tqs tlD(of)3/9</M,wis aoviE. to tm(,)-nDt(a)a12

The bottom line is that the expansion of the waters regulated under the CWA has enormous implications for small business entities which EPA has not considered, much less explained. Ultimately, EPA should not force small businesses to figure out and explain the implications and costs of its expanded definition on these programs, but instead, should clearly articulate the implications to us.

Avoidance requirements, which involve leaving some portion of an area proposed for development in an undisturbed condition, result in a net loss of developable land unless other land is made available for development. *See* 40 C.F.R. § 230.10(a)(1). The cost of avoidance (*i.e.*, development foregone) averages about $400,000 per acre in Southern California and can be well over $1 million per acre in some parts of the country.[9] In extreme cases, the avoidance requirement can render an entire project infeasible and render the property unimproveable.

Section 404's compensatory mitigation requirements obligate permittees to undertake costly compensatory actions (*e.g.*, restoration of degraded wetlands or streams or creation of man-made wetlands). 40 C.F.R. § 230.91(c)(3). To meet the compensatory mitigation requirements, permittees can purchase credits from a mitigation bank. Mitigation bank prices for seasonal wetlands are over $200,000 per acre in the Sacramento region.[10] In a number of Corps districts, there are already limited credits available for third-party mitigation, and an increase in jurisdiction will lead to great uncertainty about, and possible exhaustion of, available mitigation credits. In such situations, this will certainly drive up mitigation costs and cause increased delays.

Furthermore, once a 404 permit is finally obtained, permittees now face the risk that their permit could be retroactively vetoed by EPA despite compliance with the permit terms and conditions. The threat of a retroactive EPA veto makes it more difficult for project developers to rely on essential CWA permits when making investment, hiring, or development decisions, and proponents must now account for the possibility of losing essential discharge authorization after work on the project has been initiated.[11]

In addition, because a broader definition of "waters of the United States" will require more dischargers to obtain permits under sections 402 and 404 of the Act, as discussed above, small entities engaged in previously unregulated activities will be required to obtain state water quality certifications under section 401. Under section 401, a State may impose a broad range of burdensome conditions in its certification that become federally enforceable permit conditions. These conditions, which can have tenuous, if any, effects on water quality, can cause a project to be modified or even abandoned.

If a landowner proceeds with work in an area designated "waters of the United States" subject to CWA jurisdiction, the Agencies can seek, and the court can impose, civil and even criminal penalties for violating the CWA. *See* 33 U.S.C. §§ 1319(c) - (d). Michael and Chantell Sackett, for example, faced fines of up to $37,500 per day for unknowingly beginning construction of

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[9] David Sunding, *Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction* (July 26, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514.

[10] *Id.*

[11] David Sunding, *Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal* (May 30, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514.

their family home on land that EPA claims contains jurisdictional wetlands.[12] Similarly, EPA assessed a $120,000 penalty for an Illinois farm that deposited 3,000 cubic yards of material into two acres of forested wetlands without obtaining a required permit.[13] One rancher in California was required to convey a 300-acre parcel for conservation to settle claims that he plowed 33 acres of vernal pools and swales on his land to prepare it for planting.[14] And CWA liability is not limited to property owners. Several courts have found construction contractors and consultants, as the "operators" of construction sites, to be liable for conducting discharge activities into "waters of the United States" without a permit despite the contractor's reliance on the property owner to obtain the necessary permit.

Finally, in addition to CWA penalties, an assertion that land contains "waters of the United States" subject to CWA jurisdiction exposes project proponents to third-party litigation pursuant to the CWA citizen-suit provision. All of these obligations and risks directly affect the landowner and the use of his property.

B. EPA's Theory that the Effects are "Indirect" Is Wrong.

EPA asserts that it is not required to comply with the RFA because any proposed rule revising the definition of "waters of the United States" is merely a "definitional change" and would only have "indirect" effects on small entities.[15] Although a proposed rulemaking that mirrors the Draft Guidance will dramatically widen the scope of CWA jurisdiction and therefore increase the number of activities for which small entities must obtain CWA permits, EPA claims that these impacts are not attributable to the rulemaking because they are mandated by the act itself and existing regulations. EPA is mistaken.

As previously explained, any rule expanding CWA jurisdiction as the Agencies have proposed in the Draft Guidance will have a "significant" impact on small entities. EPA relied on this questionable theory before in its Greenhouse Gas (GHG) Tailoring Rule and its Light-Duty Vehicle GHG Emission Standards.[16] EPA certified that these Clean Air Act rulemakings would not have a significant economic impact on small entities because the rules' effects were

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[12] *Sackett v. Envtl. Prot. Agency*, 622 F.3d 1139, 1141 (9th Cir. 2010), *cert. granted*, No. 10-1062 (Jun. 28, 2011).

[13] EPA cites Heser Farms for filling in wetlands without a permit (May 18, 2006), *available at* http://yosemite.epa.gov/opa/admpress.nsf/a8f952395381d3968525701c005e65b5/cb983f46563f391b85257172004ee4a5!OpenDocument.

[14] *See* EPA settles wetlands enforcement case in Tulare County (Sep. 22, 2004), *available at* http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/37159a7a88718df5852570d8005e169a!opendocument.

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purportedly only "indirect."[17] But the RFA certifications for these GHG rule proposals were improper because, when finalized, the rules would immediately and automatically trigger the imposition of additional permitting requirements on a panoply of small entities, thereby causing significant impacts. EPA's GHG rules have been challenged, and its unproven "indirect effects" theory is at issue in the ongoing litigation.[18] Likewise, it would be improper for EPA to certify that a proposed rule defining CWA jurisdiction would not have a significant economic impact on a substantial number of small entities because the proposed expansion of CWA jurisdiction will require many small entities to obtain CWA permits for activities that were not previously regulated, thereby causing immediate direct impacts.[19]

Moreover, EPA's assertion that only "indirect effects" will result from a change in the scope of CWA jurisdiction is based upon the agency's flawed economic analysis, "Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction" (Apr. 27, 2011). EPA's economic analysis: (1) fails to consider many major categories of impacts such as NPDES permitting, oil spill prevention and control, pesticide permits, state certification, and others; (2) significantly underestimates the costs that it did attempt to quantify, namely impacts relating to avoidance, delay, uncertainty, and transaction costs of section 404 permitting; and (3) lacks credibility when it comes to analyzing the economic benefits associated with the Draft Guidance.[20] EPA simply has not done enough to

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[17] *See* 74 Fed. Reg. 49,454, 49,629 (Sep. 28, 2009) (certifying that proposed Light Duty Vehicle GHG Emission Standards would not have a significant economic impact on a substantial number of small entities); 74 Fed. Reg. 55,292, 55,349 (Oct. 27, 2009) (certifying that the GHG Tailoring Rule would not have significant economic impact on a substantial number of small entities).

[18] *See Coalition for Responsible Regulation, Inc. v. U.S. Envtl. Prot. Agency*, No. 10-1092 (D.C. Cir. filed May 7, 2010); *Coalition for Responsible Regulation, Inc. v. U.S. Envtl. Prot. Agency*, No. 09-1322 (D.C. Cir. filed Dec. 23, 2009).

[19] EPA seems to be employing a double standard. While it claims that it need not comply with the RFA and SBREFA because the proposed rule has only "indirect effects" on small business entities, in response to requests from state and local officials to review the "federalism" effects of the proposed rule, EPA has switched course, seemingly recognizing that the proposed rule will eventually impose substantial costs and burdens on state and local governments. An EPA spokeswoman stated that, "[t]here is a federalism consultation on Nov. 10 to have a dialogue with the states on concepts that could be included in a proposed rule." EPA can't have it both ways. Either the proposed rulemaking has significant effects and consequences, or it doesn't. EPA cannot treat state and local agencies more favorably and accord them more protections in this process than industry groups. If, for example, the proposed rule imposes substantial costs and burdens on delegated states operating the 402 program, it imposes even greater costs and burdens on the small businesses which are subjected to the application of these very same permitting requirements.

[20] *See* David Sunding, *Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction* (Jul. 26, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514.

assess the true impacts of a future proposed rule, particularly on small entities. Unfortunately, this will only result in unintended consequences for small entities that EPA could potentially avoid if it lawfully complied with the RFA and SBREFA.

C. The Outreach Process that EPA Is Conducting Is Not Indistinguishable from the Requirements of the RFA and SBREFA.

EPA claims that its efforts to date at small business outreach are "indistinguishable" from what it is required to do under the RFA and SBREFA. These claims are mistaken. Among other things, these laws require EPA to take a number of important steps to ensure that the agency adopts the least burdensome alternative for small business. This assessment of less burdensome alternatives is at the heart of the protections afforded under the RFA and SBREFA. As explained below, leay004 SBi6."icT

attempts at formulating such less burdensome alternatives had been undertaken and pursued, and EPA did not solicit from the small business community any such alternatives. Thus, EPA cannot legitimately argue that informal outreach is the legal or functional equivalent to an SBAR panel. Instead, the "Small Entity Outreach Meeting" appears to have been designed to support EPA's predetermined conclusions and work backwards to bolster EPA's preferred outcome so that the

Ultimately, the Draft Guidance is riddled with inefficiencies and prospective implementation problems. We maintain that EPA has fallen "off course" from its directive to craft a revised definition of waters of the United States that "imposes the least burden on society" – namely small businesses.

III. EPA's Approach for Quantifying the Increase in Jurisdiction under the 2011 Draft Guidance Is Flawed and Underestimates Impacts.

A fundamental underpinning of all of EPA's analyses, economic and otherwise, is that there will only be a small increase in jurisdiction under the Draft Guidance. This assessment of "increase" is based on flawed data that does not accurately depict the full extent of the increase in jurisdiction because EPA uses the wrong baseline for analysis.

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the even more flawed 2011 Draft Guidance. Indeed, using the 2008 *Rapanos* Guidance as the baseline is also questionable because, as explained in extensive comments filed by some of the undersigned organizations, the 2008 *Rapanos* Guidance's standards exceed the lawful scope of jurisdiction under the CWA.[22]

IV. The Economic Analysis Previously Prepared by the Agencies Is Not Credible and Must Be Redone.

ephemeral water is a tributary and when it is not, recognizing that some ephemeral waters should not be federally regulated. It should also explain what a non-jurisdictional erosional feature is.

Second, EPA should explain when a ditch is a tributary subject to CWA jurisdiction. The *Rapanos* Court made it clear that many ditches are excluded from jurisdiction, even ditches that connect with waters of the Un