Wyoming
DEPARTMENT OF Agriculture

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The Wyoming Department of Agriculture is dedicated to the promotion and enhancement of Wyoming's agriculture, natural resources and quality of life.

July 22, 2011

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

Dear Sir or Madam:

Following are the comments from the Wyoming Department of Agriculture (WDA) on the Environmental Protection Agency (EPA) and Army Corps of Engineers Guidance Regarding Identification of Waters Protected (Guidance) by the Clean Water Act (CWA).

Our comments are specific to our mission within state government: dedication to the promotion and enhancement of Wyoming's agriculture, natural resources, and quality of life. As this proposal has major impacts upon our agriculture industry, our natural resources and the welfare of our citizens, we believe it is important you continue to inform us of proposed actions and decisions and provide us the opportunity to express pertinent issues and concerns.

The WDA appreciates the opportunity to comment on the draft Guidance. EPA's use of case law such as the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC) and Rapanos v. United States (Rapanos)* is a valid attempt to clarify waters protected by the Federal Water Pollution Control Act Amendments of 1972. When the CWA was enacted, its original intent was to "restore and maintain the chemical, physical, and biological integrity of the Nation's water." As it is written, the Guidance takes away most authority by states, which the WDA cannot support. The following are our comments to address specific and broad issues stating why the Guidance is the wrong approach when addressing water quality regulation.

Guidance Document

EPA's Guidance document states it is "intended to describe for agency field staff the agencies' current understandings; it is not a rule, and hence it is not binding and lacks the force of law." Furthermore the Guidance indicates "Each jurisdictional determination, however, will be made on a case-by-case basis considering the facts and circumstances of the case and consistent with applicable statutes, regulations and case law." While EPA has made progress on certain waters to address large scale issues, they create a perception that individual states are incapable of effectively protecting waters from pollution.

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The Guidance is a bureaucratic tool taking away states' primary authority regarding water rights and protecting water quality. Previous attempts to develop regulations and increase federal jurisdiction over waters have failed and the current version of the draft Guidance strips the states of nearly all authority to protect water quality and creates hardships for private landowners. The Guidance not only fails to prove how federal regulation will improve water quality and reduce litigation, but also lacks the reasoning as to why the states' current efforts are inadequate. EPA neglected to utilize state agencies, such as the Wyoming Department of Environmental Quality (DEQ), or other related state agencies prior to the development of the draft Guidance.

We strongly believe the state DEQs have a solid understanding of their state's water issues, they have established working relationships with landowners and agencies, and can utilize Best Management Practices to address localized issues on a case-by-case basis much better than the the federal government. Current efforts to improve or maintain water quality within the borders of Wyoming are utilizing the best available science and field staff who have established relations with landowners, and the localized knowledge to make sound decisions regarding the watershed.

Most of the Guidance relies on clarifying "significant nexus" to analyze the jurisdiction of waters beyond the defined traditional navigable waters or interstate waters. The interpretation or evaluation of a significant nexus takes nearly all state water jurisdictions away and places them into the hands of the federal government. The significant nexus on page 16 goes so far as to address connectivity of waters such as wetlands by "...unbroken surface or shallow sub-surface hydrologic connection..." Waters below the surface are defined as groundwater, which is not addressed by the CWA. Groundwater is yet again under the jurisdiction of the individual states.

Section 4: Tributaries of the Guidance discusses the "plurality standard," which includes non-navigable waters, connected to navigable waters. Page 13 describes exceptions during drought years and "seasonal flow" during "wet seasons in most years." EPA is guiding field staff to make subjective determinations of jurisdiction on tributaries, which not only vary year to year, but watershed to watershed. The Guidance lacks definition for how much water must flow through the intermittent and ephemeral channels and assumes field staff is available to measure tributaries immediately following storms with enough water to run the stream channels. We believe any inclusion of highly variable stream flows in intermittent or ephemeral channels is inappropriate and subject to misinterpretation.

Economic Impacts Document

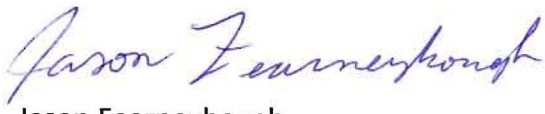
While we appreciate EPA's attempt at recognizing the economic costs and benefits of such a drastic change by developing the "Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Jurisdiction" it simply lacks full disclosure of who the Guidance will economically impact. The increase in Administrative Costs indicates it will cost agencies more money to implement the program. However, EPA neglects to remind readers that the unnecessary change in protocol from state to federal oversight will cost taxpayers. If the voting public had their say, it's safe to assume they would opt for current state management of waters instead of transferring them to federal oversight simply based on cost.

In addition to increases in taxes, private landowners will incur increased fees for permitting and a substantial increase in legal fees. The negative impacts upon landowners should have an appeals process, which is lacking in the Guidance document. A private landowner is entitled to appealing a decision by EPA. This appeal will likely require legal counsel at their expense. The Guidance should include examples or scenarios of expenses for legal representation to appeal decisions.

The EPA wrote and revised an unnecessary and cumbersome 39-page document to clarify, or rather dictate, what waters the federal government should have jurisdiction over, when they could simply have stated they intend to take away all states' rights and have authority over all waters, including surface water and groundwater. We do not support the revision of the Guidance by EPA nor will we support future regulation in which states will lose nearly all their authority and ability to make local decisions.

We appreciate the opportunity to comment on the Guidance document. If we can provide further assistance, please feel free to contact our office.

Sincerely,



Jason Fearneyhough
Director

JF/jw

Cc: Governor's Policy Office
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