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Ron Phipps
ABR, CRS, GRI, GREEN, e-PRO, SFR
2011 President

Dale A. Stinton
Chief Executive Officer

GOVERNMENT AFFAIRS DIVISION

Jerry Giovaniello, Senior Vice President
Gary Weaver, Vice President
Joe Ventrone, Vice President
Jamie Gregory, Deputy Chief Lobbyist

500 New Jersey Ave., NW
Washington, DC 20001-2020
Ph. 202-383-1194 Fax 202-3837580
www.REALTOR.org

July 29, 2011

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: "Guidance Regarding Identification of Waters Protected by the Clean Water Act," Docket No. EPA-HQ-OW-2011-0409

To Whom It May Concern:

On behalf of 1.1 million members of the NATIONAL ASSOCIATION OF REALTORS® (NAR), I urge you to withdraw the draft "Guidance Regarding Identification of Waters Protected by the Clean Water Act," proposed at 76 Fed. Reg. 24,479 (May 2, 2011). By promulgating this Guidance, the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") blatantly overstepped their limited authority provided by Congress under the Clean Water Act.

Congress specifically limited the scope of regulations under the Clean Water Act (CWA) to "navigable waters." This deliberately narrow term applies to all of the Act's regulatory programs, including sections 404 (dredged or fill material), 402 (NPDES permits), 311 (oil spill), 401 (state water quality), and 303 (total maximum daily loads). However, this Guidance would reinterpret the term in dangerous, untested ways that would significantly expand the universe of waters subject to federal jurisdiction. To arrive at its decision to expand the number of U.S. regulated waters, the Agencies proposed to adopt the following concepts for determining jurisdiction, including:

- **Aggregation.** This novel concept involves aggregating the contributions of all similar waters *within an entire watershed*, making it far easier to establish a significant nexus between these small intrastate waters and the newly expanded roster of traditional navigable waters. It would allow agency staff to make blanket jurisdictional determinations for an entire class of waters within an entire watershed. Agency staff merely has to find these waters to be similar for them to be regulated.
- **Function-based general analysis.** The Guidance completely eliminates any requirement that a hydrologic connection is necessary and further expands jurisdiction beyond what Congress and the Supreme Court intended. It does so by allowing decisions to be based on general scientific literature describing functions applicable to the types of waters in question, in lieu of actual case-specific analysis of the water itself. Therefore, according to the Guidance, an entire group of waters could be determined jurisdictional without ever performing an analysis of those waters. This approach appears inconsistent with Justice Kennedy's concurrence in *Rapanos v. United States* and lacks any scientific basis. (See *Rapanos*, 547 U.S. at 782.)



- **Recreational use as a new jurisdictional criterion.** The Guidance expands the universe of waters that will be considered “traditional navigable waters” by including, for the first time ever, waters that support one-time recreational use. The notion that floating a kayak in a water body makes that water navigable for commercial uses was a concept explored solely for litigation purposes in *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151 (D.C. Cir.2002), but has never been used in a real-world, economic context.
- **Interstate as traditional navigable waters.** The Guidance gives new and expanded regulatory status to “interstate waters,” by including all “interstate waters” as traditional navigable waters, and makes it easier to find jurisdiction for adjacent wetlands, tributaries and other waters judged by a newly-crafted significant nexus test.

The Guidance is not consistent with the Agencies’ current regulations. For example, the current regulations say nothing about ditches, but the Guidance would regulate all roadside and agricultural ditches that have a channel, have an ordinary high water mark, and can meet one of five characteristics. We are concerned that making ditches jurisdictional would create additional permitting requirements and could add tremendous costs, unnecessary administrative requirements and delays to ongoing, existing and new projects.

In addition, the Guidance is not consistent with previous Supreme Court decisions. The current regulations determine jurisdiction over all waters not included in any of the other categories (also known as the “other waters”), and based on certain specific connections to interstate commerce. The Guidance replaces this standard with the “significant nexus” test, as described by Justice Kennedy in his *Rapanos* concurrence (See *Rapanos*, 547 U.S. at 767), but goes much further by defining a significant nexus as anything that is “more than speculative or insubstantial”. This turns Justice Kennedy’s significant nexus standard into an “any” nexus standard. These changes made by the Guidance – changes that purport to significantly broaden the Agencies’ jurisdiction under the CWA – are not supported by previous Supreme Court decisions or the law.

The Guidance would create significant economic burdens on property owners through higher costs of real estate development and decreased economic development. The Agencies have acknowledged some of the material economic impacts of the Guidance. EPA has estimated that the annual costs imposed by the Guidance will be between \$87 million and \$171 million. However, EPA developed that cost data without taking into consideration the costs related to obtaining permits, the increased delays associated with expanded federal jurisdiction or the costs of new land use restrictions. EPA’s economic analysis also fails to incorporate the impact this Guidance would have on other regulatory programs, such as the National Pollution Discharge Elimination System (NPDES), Total Maximum Daily Load (TMDL) and other water quality standards programs.

In conclusion, NAR believes that EPA and the Corps of Engineers have gone well beyond their congressionally-authorized mandates to protect the waters of the U.S. NAR is adamantly opposed to the proposed Guidance, and we urge you to withdraw it immediately. More importantly, EPA and the Corps should not move forward with fundamental changes to the CWA unless directed to do so by Congress.

Sincerely,

A handwritten signature in black ink, appearing to read "Ron Phipps", written in a cursive style.

Ron Phipps, ABR, CRS, GRI, GREEN, e-PRO, SFR
2011 President, National Association of REALTORS®