July 29, 2011

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

The Honorable Jo-Ellen Darcy
Assistant Secretary for Civil Works
U.S. Department of the Army
108 Army Pentagon, Room 3E446
Washington, DC 20310

Attention: Docket ID No. EPA–HQ–OW–2011–0409

Re: Draft Guidance on Identifying Waters Protected by the Clean Water Act (Draft Guidance)

Dear Administrator Jackson and Assistant Secretary Darcy:

Our organizations each play roles in protecting and enhancing the quality of the nation's waters. Whether as co-regulators under the Clean Water Act (CWA), implementing agencies of clean water programs, regulated entities that have spent billions of dollars to comply with water permits, or industries that have invested in the development and implementation of best management practices, we each have a commitment to ensure that the nation's waters remain clean. While we meet that commitment in different ways, we share concerns about the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) proposed Draft Guidance on Identifying Waters Protected by the Clean Water Act.

While each organization below may have its own specific concerns with the Draft Guidance and may submit individual comments to EPA and the Corps, we want to share with you several general concerns that we all agree must be addressed.

- A Guidance Document is not the Correct Path Forward. While the Draft Guidance states that it is a non-binding document, we believe the practical effect of the document on all stakeholders will be more like a rule. Given our past experience with guidance documents, we have reason to believe that EPA and Corps regional offices will inappropriately rely on this Draft Guidance to claim federal jurisdiction over waterbodies that are currently not under federal jurisdiction. We believe the wiser course involving a change as controversial as determining federal jurisdiction under the "waters of the U.S" definition is to look to the rulemaking process, which under the Administrative Procedures Act (APA) offers an open and transparent means of proposing and establishing regulations and ensures that state, local and private entity concerns are fully considered and properly addressed. We urge EPA and the Corps to move forward with a process consistent with the APA's rulemaking process.

- The Draft Guidance Fails to Consider the Effects on All CWA Programs. According to the Draft Guidance, the definition of "waters of the U.S." applies consistently to CWA programs. We are very concerned that the Draft Guidance and supporting economic analysis focuses primarily on the 404 permit program but fails to give consideration to

the effects the change will have on other CWA programs, such as the National Pollution Discharge Elimination System (NPDES), Total Maximum Daily Load (TMDL) and other water quality standards programs, or Spill Prevention, Control and Countermeasure (SPCC) programs. We believe an omission of this magnitude will have significant unintended financial consequences for federal, state and local governments, as well as businesses and private entities. We urge you to withdraw the Draft Guidance until a comprehensive and detailed analysis is made on how the proposed changes would impact all CWA programs beyond the 404 permit program.

- The Guidance Fails to Address Federalism Consultation and Preemption Issues. In addition to the rulemaking process outlined under the APA, there are additional procedures in place for consultation with state and local governments required during a rulemaking that were not applied to the development of the Draft Guidance. Under "Executive Order 13132: Federalism," agencies are required to consult with state and local governments on regulations that will have significant impact. Such consultation can lead to better results, while strengthening the federal, state, and local government partnership in implementing the Clean Water Act. In the case of the Draft Guidance, consultation consistent with the Executive Order would have provided an opportunity to address significant concerns about the preemption of traditional state and local government authority concerning the management of state waters.

- The Guidance Contains Conflicting Provisions. While the Draft Guidance document states that the intent is to provide clarity for agency field staff in making determinations about whether waters are protected by the CWA, we find that the Draft Guidance has a number of contradictions and conflicting provisions that further confuse the issue. For example, the Draft Guidance outlines certain criteria and requisites for determining if a waterbody has a significant nexus to traditionally navigable or interstate water. This leads one to conclude that there are limitations on waters that will be found jurisdictional. The Draft Guidance also states that a significant nexus determination should be made at the watershed scale. Our concern stems from the fact that it is difficult to determine any area of the country that is not part of a watershed, which would mean that all waters (and conveyances to these waters) could be found jurisdictional.

Thank you for the opportunity to raise with you our concerns with the Draft Guidance. We look forward to continuing to collaborate with your agencies as you move forward on these issues.

Sincerely,

Agriculture Retailers Association
The American Farm Bureau
American Forest and Paper Association
American Public Works Association
American Road & Transportation Builders Association
Associated General Contractors

CropLife America
Edison Electric Institute
The Fertilizer Institute
Florida Sugar Cane League
Illinois Pork Producers
Industrial Minerals Association
International Council of Shopping Centers
Irrigation Association
Mid America CropLife Association
NAIOP, The Commercial Real Estate Development Association
National Association of Counties
National Association of County Engineers
National Association of Manufacturers
National Association of State Departments of Agriculture
National Association of State Foresters
National Cattlemen's Beef Association
National Conference of State Legislatures
National Cotton Council
National Council of Farmer Cooperatives
National League of Cities
National Milk Producers Federation
National Mining Association
National Multi Housing Council
National Pork Producers Council
National Stone, Sand & Gravel Association
Public Lands Council
Responsible Industry for a Sound Environment
Southern Crop Production Association
United Egg Producers
The United States Conference of Mayors
Virginia Agribusiness Council
Virginia Poultry Federation
Western Business Roundtable
Wyoming Ag-Business Association
Wyoming Crop Improvement Association