Congress of the United States
Washington, DC 20515

April 14, 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 of the Army
for Civil Works
108 Army Pentagon
Room 3E446
Washington, DC 20310-0108

Dear Administrator Jackson and Assistant Secretary Darcy:

In December 2010, the Environmental Protection Agency and Corps of Engineers (collectively, the "Agencies") sent draft "Clean Water Protection Guidance" to the Office of Management and Budget for regulatory review. The intent of the document is to describe how the Agencies will identify waters subject to jurisdiction under the Federal Water Pollution Control Act of 1972 (more commonly known as the "Clean Water Act") and implement the U.S. Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*) and *United States v. Rapanos* (*Rapanos*) concerning the extent of waters covered by the Act. Further, this document would supersede guidance that the Agencies previously issued in 2003 and 2008 on determining the scope of "waters of the United States" subject to Clean Water Act programs.

In our view, this "Guidance" goes beyond clarifying the scope of "waters of the United States" subject to Clean Water Act programs. Rather, it is aimed, as even the Agencies acknowledge, at "increas[ing] significantly" the scope of the Clean Water Act's jurisdiction over more waters and more provisions of the Clean Water Act as compared to practices under the currently applicable 2003 and 2008 guidance. ("Guidance," at 1.)

It appears that the Agencies intend to expand the applicability of this "Guidance" beyond section 404 to all other Clean Water Act provisions that use the term "waters of the United States," including sections 402, 401, 311, and 303. Moreover, the Agencies intend to "alleviate the need to develop extensive administrative records for certain jurisdictional determinations" ("Guidance," at 1), thereby shifting the burden of proving the jurisdictional status of a "water" from the Agencies to the regulated community, and thus making the provisions of this "Guidance" binding on the regulated community.

In light of the substantive changes in policy that the Administration is considering with this "Guidance," we are extremely concerned that this "Guidance" amounts to a *de facto* rule instead of mere advisory guidelines. Additionally, we fear that this "Guidance" is an attempt to

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short-circuit the process for changing agency policy and the scope of Clean Water Act jurisdiction without following the proper, transparent rulemaking process that is dictated by the Administrative Procedure Act.

This "Guidance" would substantively change the Agencies' policy on waters subject to jurisdiction under the Clean Water Act; undermine the regulated community's rights and obligations under the Clean Water Act; and erode the Federal-State partnership that has long existed between the States and the Federal Government in implementing the Clean Water Act. By developing this "Guidance," the Agencies have ignored calls from state agencies and environmental groups, among others, to proceed through the normal rulemaking procedures, and have avoided consulting with the States, which are the Agencies' partners in implementing the Clean Water Act.

The Agencies cannot, through guidance, change the scope and meaning of the Clean Water Act or the statute's implementing regulations. If the Administration seeks statutory changes to the Clean Water Act, a proposal must be submitted to Congress for legislative action. If the Administration seeks to make regulatory changes, a notice and comment rulemaking is required.

We are very concerned by the action contemplated by the Agencies, and we strongly urge you to reconsider the proposed "Guidance."

Thank you for your attention to this matter.

Sincerely,

Bob Gibbs
Member of Congress

Tim Holden
Member of Congress

John Mica
Member of Congress

Nick Rahall
Member of Congress

Sanford Bishop
Member of Congress

David McKinley
Member of Congress

Mac Thornberry
Member of Congress

Walter Jones
Member of Congress

Jeff Landry
Member of Congress

John Carter
Member of Congress

Pete Olson
Member of Congress

Wally Herger
Member of Congress

Raúl Labrador
Member of Congress

Michael Conaway
Member of Congress

James Lankford
Member of Congress

Jeff Flake
Member of Congress

Shelley Moore Capito
Member of Congress

Gary Miller
Member of Congress

Brett Guthrie
Member of Congress

Don Young
Member of Congress

Greg Walden
Member of Congress

Hal Rogers
Member of Congress

Jeff Denham
Member of Congress

Reid Ribble
Member of Congress

Cathy McMorris Rodgers
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Mike Rogers (AL)
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Dennis Cardoza
Member of Congress

Rodney Alexander
Member of Congress

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Member of Congress

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Member of Congress

Steve King
Member of Congress

Francisco Canseco
Member of Congress

Sam Graves
Member of Congress

Bill Shuster
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Tim Murphy
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Chip Cravaack
Member of Congress

Collin Peterson
Member of Congress

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Member of Congress

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Rick Crawford
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Bob Latta
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Spencer Bachus
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Aaron Schock
Member of Congress

Bob Goodlatte
Member of Congress

John Kline
Member of Congress

NY-29
Tom Reed
Member of Congress

Mario Diaz-Balart
Member of Congress

Jeff Duncan
Member of Congress

John J Duncan Jr.
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Member of Congress

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Member of Congress

Richard Hanna
Member of Congress

Ben Quayle
Member of Congress

Joe Donnelly
Member of Congress

Larry Kissell
Member of Congress

Steve Scalise
Member of Congress

CC:
Nancy Sutley, Chair, White House Council on Environmental Quality (CEQ)
Cass Sunstein, Administrator, Office of Information and Regulatory Affairs (OIRA), OMB