

July 28, 2011



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

Attn: Docket ID No. EPA-HQ-OW-2011-0409

RE: Comments on the U.S. EPA and U.S. Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, Docket No. EPA-HQ-OW-2011-0409

EPA Staff:

Texas Cattle Feeders Association (TCFA) submits these comments regarding the Environmental Protection Agency ("EPA") and the Corps of Engineers ("Corps") proposed "Guidance Regarding Identification of Waters protected by the Clean Water Act," 76 F3d. Reg. 24,479 (May 2, 2011).

TCFA members produce and market 6.5 million head of fed cattle each year in Texas, Oklahoma and New Mexico, providing 30% of the nation's fed beef supply. Our feedyard members are located in the three-state area; however, our cattle feeder members are located throughout the U.S. This guidance proposes to extend additional regulatory authority over private property and will further impede our ability to produce beef for U.S. and international consumers, due to increased operating and production costs with no real or measureable protection of the environment.

We support reasonable environmental protection requirements, but we also support private property rights afforded to our members and protected through federal and state law, in addition to case law. The rights' of our members are threatened by the draft guidance and as such we are adamantly opposed to the draft guidance as written. In addition to the issues raised in this letter, TCFA supports the detailed comments submitted by the Waters Advocacy Coalition, including the National Cattlemen's Beef Association.

Unlike previous guidance documents, the proposed guidance will be used by the EPA and the Corps (Agencies) to interpret the term "waters of the United States" in the context of all programs authorized under the Clean Water Act (CWA), including Section 404 discharges of dredged or fill material; the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program; the Section 401 state water quality certification process; and Section 303 water quality standards and total maximum daily load programs. As members of one of the largest land owning sectors of our economy, livestock producers would be significantly affected by jurisdictional determinations made under this guidance. Additional jurisdictional determinations cause producers thousands of dollars in permitting costs, cause permitting delays on projects, and negatively affect their bottom line. Regulatory restrictions can totally eliminate productive uses of land without any compensation being paid to the producer. These impacts cause livestock producers great uncertainty and can prevent young producers from entering the industry. The negative effects of finalizing this guidance will not only hurt the livestock industry, but will hurt our economy as a whole. For both the legal and practical reasons outlined below, we ask the Administrator to withdraw the proposed draft guidance.

The Agencies' decision to issue Guidance on this topic as opposed to a rulemaking runs contrary to the expressed views of a majority of the U.S. Supreme Court justices and the requirements of the Administrative Procedure Act (APA). Despite repeated claims by the Agencies that they would do a rulemaking, they have not. Instead, they continue to make important changes to their regulations and expand their CWA jurisdiction through guidance, shortcutting critical rulemaking requirements such as a response to public comments; providing a rationale for changes in agency policies; and producing a final decision that can be judicially reviewed.

The Guidance represents a significant rewrite of the current regulations, guidance and agency policy that have governed jurisdictional determinations for the history of the regulatory program. It dramatically expands the universe of waters that will be considered "traditional navigable waters" by including, for the first time ever, all waters that support one-time recreational use. In addition, the Guidance gives new and expanded regulatory status to "interstate waters," equating them with traditional navigable waters. The Agencies have also made it easier to find CWA jurisdiction for adjacent wetlands, tributaries and other waters, which will now be judged by a newly-crafted significant nexus test. Also, while the current regulations say nothing about ditches, the Guidance would regulate all roadside and agricultural ditches that have a channel, have an ordinary high water mark, and can meet 1 of 5 characteristics. Furthermore, the Guidance completely eliminates any requirement that a hydrologic connection be present.

The Guidance further expands CWA jurisdiction beyond what Congress and the Supreme Court intended by applying a broadened view of Justice Kennedy's "significant nexus" standard not only to wetlands (as Kennedy did) but also to tributaries and isolated water. It expands the "significant nexus" standard to allow functions of waters to demonstrate a significant nexus exists. The list of functions is very broad. Furthermore, the Guidance also allows for 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 the Kennedy decision and not scientifically based. When asked, the Agencies could not name a water that would not provide at least one of these functions, demonstrating that use of functionality to find federal jurisdiction is overly inclusive and threatens to capture all waters.

The current regulations determine jurisdiction over all waters not in any of the other categories (also known as the "other waters") based on certain specific connections to interstate commerce. The Guidance, however, replaces this standard with the "significant nexus" test. Contrary to the "significant nexus" standard as presented by Supreme Court Justice Kennedy, the Guidance defines a significant nexus as anything that is "more than speculative or insubstantial," thus turning Justice Kennedy's "significant" nexus into an "any" nexus standard.

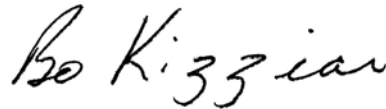
In addition, the Guidance creates a completely new concept of allowing for "aggregation" of the contributions of all similar waters "*within an entire watershed*", creating ample opportunity for the Agencies to establish a significant nexus between small intrastate waters and the newly expanded roster of traditional navigable waters. This novel concept results in a blanket jurisdictional determination for an entire class of waters within an entire watershed. A blanket determination imposing federal CWA jurisdiction diminishes private property and mineral lease values while neglecting important due process rights of those individual property owners. These and numerous other changes made by the Guidance that significantly broaden the Agencies' CWA jurisdiction find no support in the Supreme Court decisions.

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The Agencies have acknowledged the material economic impacts of the Guidance. EPA has itself estimated that the annual costs of implementing the Guidance will be between \$87 million and \$171 million, and EPA arrived at that number without taking into consideration permitting costs, the increased delays associated with expanded federal jurisdiction and the costs of new land use restrictions. The Guidance will impose a significant economic burden on TCFA members.

In conclusion, the Guidance is intended to and will significantly increase CWA permitting and enforcement nationwide because it broadly expands the Agencies' CWA jurisdiction. As such, the Agencies violated the APA and the express views of the Supreme Court by issuing Guidance on this topic as opposed to a rulemaking. TCFA respectfully requests that the Agencies withdraw the proposed Guidance.

Sincerely,

A handwritten signature in black ink that reads "Bo Kizziar". The signature is written in a cursive, slightly slanted style.

Bo Kizziar
Chairman