

## Alaska Oil and Gas Association

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*Kate Williams, Regulatory Affairs Representative*

July 31, 2011

Water Docket  
U.S. Environmental Protection Agency  
Mail Code 28222T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

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

**Re: EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act**

Dear Docket Clerk:

The Alaska Oil and Gas Association (“AOGA”) appreciates this opportunity to comment on the Environmental Protection Agency’s (“EPA”) and U.S. Army Corps of Engineers’ (“the Corps”) proposed guidance describing how the agencies will identify waters protected by the Clean Water Act (“CWA”). AOGA is a non-profit trade association whose member companies account for the majority of oil and gas exploration, development, production, transportation, refining, and marketing activities in Alaska.

AOGA acknowledges the effort by the EPA and Corps to draft a document clarifying the types of water bodies protected by the CWA. However, we believe the guidance as proposed exceeds the authority of the agencies to regulate “waters of the United States,” as defined by statute, regulation, and U.S. Supreme Court decisions, and therefore urge the agencies to withdraw the guidance.

The proposed guidance represents a significant expansion of federal permitting authority that will be felt across many industries, including oil and gas, without a legal or legislative mandate to do so. The agencies themselves recognize this increased jurisdiction in the Federal Register Notice announcing the proposed guidance – i.e. “The agencies believe that under this proposed guidance the number of waters identified as protected by the Clean Water Act will increase compared to current practice.”

We are particularly concerned about the expansion of jurisdiction over intrastate waters, wetlands, and “other waters” contrary to Supreme Court decisions. These changes, which we believe have no basis in law or regulation, have the potential to impact millions of acres of land across the country, calling into question or halting hundreds if not thousands of economic development projects, at a time when the focus should be on increasing, not threatening, job opportunities within our borders.

We believe the EPA significantly understated the economic impacts of the proposed guidance and should revisit the economic analysis the agency completed in April. Importantly, it does not include any substantive analysis of the number of new projects that would not require jurisdictional determinations under the current guidance, but would require such determinations under the proposed guidance, or the associated employment impacts. Given the increase in the numbers of water bodies that would be regulated under the proposed guidance, the agencies must quantify these numbers, as well as impacts due to delayed permit processing.

Furthermore, the proposed guidance still does not clearly delineate between water bodies that are protected by the CWA and water bodies that are not. In fact, the guidance complicates rather than clarifies jurisdiction. At best, this uncertainty will lead to project delays and increased costs, and at worst, endless litigation and project abandonment.

For example, for oil and gas operations, the proposed guidance creates uncertainty with regard to the requirements for OPA-90 Oil Spill Response Plans and Spill Prevention Control and Countermeasure Plans, more specifically the identification of the nearest “navigable water” and the associated analysis of spill risks and worst case/most probable spill events. The proposed guidance also creates uncertainty about the need for National Pollutant Discharge Elimination System permits for discharges to “navigable waters.” Exactly which type of water body the agencies may consider a “navigable water” is simply not clear from the proposed guidance. These are just a few examples of the kind of confusion the proposed guidance would cause if implemented.

AOGA is also concerned the increased jurisdiction will actually hamper the agencies’ ability to manage truly important waters of the U.S. which the CWA was intended to protect. The agencies are not set up for and do not have adequate resources to regulate such a vast swath of water bodies as it intends to do under the proposed guidance. This guidance simply exceeds the purpose of the CWA.

The agencies fail to sufficiently explain the impetus for such a broad assertion of authority in the guidance documents. As mentioned previously, the proposed guidance is not based on any new statutory or regulatory provision or Supreme Court decision – none of which, to the best of our

knowledge, have been enacted, issued, or handed down since the last guidance was issued in 2007/8. Again, we call into question the rationale for issuing this guidance and introducing such uncertainty into project planning processes at a time when the country can ill afford further project delays or abandonment and the associated job losses.

Though the agencies state that the proposed guidance is “not a rule” and thus is “not binding and lacks the force of law,” clearly the intent is for agency staff to actually implement the policies and procedures contained in the guidance documents. Putting aside for a moment the question of authority, at the very minimum, changes to the definition of “waters of the U.S.” must be implemented not through guidance, but the standard notice and comment rulemaking process so the public has adequate opportunity to review the new policies and procedures and weigh in. This is consistent with Supreme Court decisions in which the Court has called upon the agencies to promulgate rules, not guidance, regarding “waters of the U.S.”

We are also concerned by language in the proposed guidance stating that the agencies do not intend to re-open previously issued jurisdictional determinations as a result of this guidance. Should the agencies move forward with the guidance, there should be a safe-harbor for determinations that have already been made to provide the regulated public with assurance that they are in compliance with law and regulation.

The Administration has committed to facilitating oil and gas development in Alaska, both onshore and offshore. This is in addition to the Administration’s strategy to spur domestic energy production on public lands such as the National Petroleum Reserve-Alaska (“NPR-A”). The proposed guidance is clearly contrary to these goals, particularly in Alaska. To re-iterate the point once more, at best, the guidance would lead to uncertainty regarding oil and gas development projects and further delay, and at worst, would result in endless litigation and complete abandonment of these projects and the associated employment opportunities.

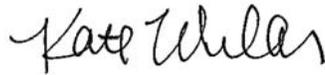
There has already been substantial litigation over the scope of the “waters of the United States” protected by the CWA. The Supreme Court has addressed this issue in at least three major cases, including *Riverside Bayview Homes* (1985), *SWANCC* (2001), and *Rapanos* (2006). The lower courts have also heard numerous cases challenging the regulation of water bodies under the Act. As history over the last 30 years has shown, and given the controversy surrounding the expansive view the agencies have taken regarding their authority to regulate water bodies pursuant to the CWA, this proposed guidance would no doubt result in continued litigation.

For all these reasons, AOGA urges the EPA and Corps to withdraw the proposed guidance. No new guidance should be issued outside of the federal rulemaking process so any changes

regarding the regulation of “waters of the United States” may be reviewed by the public and more thoroughly vetted by the agencies.

If you have any questions on these comments, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Kate Williams". The signature is written in a cursive, flowing style.

KATE WILLIAMS  
Regulatory Affairs Representative