March 26, 2012

The Honorable Cass Sunstein  
Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
725 17th Street, NW  
Washington, DC 20503  

Dear Administrator Sunstein:

We write to express serious concerns with the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) “Final Guidance on Identifying Waters Protected by the Clean Water Act” (Final Guidance). The Final Guidance is currently undergoing Office of Management and Budget (OMB) review. (RIN: 2040-ZA11).

We represent a broad coalition of the nation’s construction, manufacturing, housing, real estate, mining, agriculture, and energy sectors, all of which are vital to a thriving national economy, including providing much-needed jobs. The Final Guidance increases regulatory uncertainty and imposes significant regulatory burdens on private landowners, industrial entities as well as local, state, and federal regulatory agencies. As a result, our interests will face significantly more federal regulatory and permitting burdens, compliance costs, delays, and constraints on use of land for economically productive activities and job creation.

The Guidance significantly expands the scope of waters to be regulated by EPA and the Corps, despite the United States Supreme Court decisions that have rejected the agencies’ broad jurisdictional claims. As we have said in numerous forums, the guidance is inconsistent not only with the procedural requirements of the Administrative Procedure Act but also with the scope of the agencies’ authority under the Clean Water Act (CWA) and Commerce Clause.

We strongly urge you to conduct a thorough review of the Final Guidance in a manner that adheres to the President’s direction set forth in Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). Particularly, we ask that you focus on the EPA and the Corps’ failure to fully consider the costs of implementing the Guidance. We believe EPA significantly underestimated the costs that they did attempt to quantify, while overstating the benefits.

The agencies’ economic analysis employs an overly simple and flawed approach. While EPA states that “EPA Regions will use this guidance to oversee and implement programs under the CWA, including those under sections 303, 311, 401, 402, and 404,” EPA’s economic analysis (EA) accompanying the proposed guidance is limited only to costs associated with section 404 of the CWA. Unless EPA has analyzed the cost of implementing the Final Guidance throughout all CWA programs, including 303, 311, 401, 402, and 404, the EA will remain insufficient and inconsistent with the President’s directive.
By proceeding with guidance, EPA and the Corps deprive the regulated community of important procedural safeguards to which they are entitled by law. Proceeding by Final Guidance also means EPA and the Corps avoid undertaking a number of mandatory steps to ensure that the agencies adopt the least burdensome alternative for small business under requirements of the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA). The agencies’ determination that compliance with the RFA and SBREFA is not required is simply wrong.

We urge you to review EPA and the Corps’ economic analysis accompanying the Final Guidance. In light of all of these concerns, we urge you to stop the issuance of this guidance document.

Sincerely,

Agricultural Retailers Association
Agri-Mark, Inc.
American Farm Bureau Federation®
American Forest & Paper Association
American Horse Council
American Iron and Steel Institute
American Petroleum Institute
American Road and Transportation Builders Association
American Sugar Alliance
Associated General Contractors of America
CropLife America
DairyLea Cooperative, Inc.
Dairy Producers of New Mexico
Dairy Producers of Utah
Edison Electric Institute
Foundation for Environmental and Economic Progress
GROWMARK, Inc.
Idaho Dairymen’s Association
Industrial Minerals Association – North America
International Council of Shopping Centers
Irrigation Association
Maryland Grain Producers Association
Mid-America Croplife Association
Mosaic Fertilizer, LLC
National Apartment Association
National Association of Home Builders
National Association of Manufacturers
National Association of Realtors®
National Association of State Departments of Agriculture
NAIOP, the Commercial Real Estate Development Association
National Cattlemen’s Beef Association
National Chicken Council
National Corn Growers Association
National Council of Farmer Cooperatives
National Mining Association
National Multi Housing Council
National Pork Producers Council
National Stone, Sand and Gravel Association
National Turkey Federation
National Water Resources Association
Northeast Dairy Farmers Cooperatives
Public Lands Council
Real Estate Roundtable
RISE, Responsible Industry for a Sound Environment
Select Milk Producers
Southern Crop Production Association
South Dakota Agri-Business Association
St. Albans Cooperative Creamery
Texas Association of Dairymen
Texas Cattle Feeders Association
The Fertilizer Institute
U.S. Cattlemen’s Association
United Egg Producers
Upstate Niagara Cooperative, Inc.
Virginia Poultry Federation
Western Business Roundtable
Women Involved in Farm Economics
Wyoming Agricultural Business Association
Wyoming Crop Improvement Association
Wyoming Farm Bureau Federation
Wyoming Wheat Growers Association

CC: Sen. Barbara Boxer
Sen. James Inhofe
Rep. John Mica
Rep. Nick Rahall