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July 18, 2011

United States Environmental Protection Agency
United States Army Corps of Engineers
Via email to: ow-docket@epa.gov

Re: EPA-HW-OW-2011-0409

Comments on Draft Guidance on Identifying Waters Protected by the Clean Water Act

These comments are submitted by a coalition of Illinois groups concerned with protecting clean water. Together we applaud the Environmental Protection Agency and the Army Corps of Engineers for taking a strong stand in support of our nation's waters by recognizing the essential role that tributaries and wetlands play in maintaining the nation's network of rivers, lakes, streams and coastal waters. The Draft Guidance on Identifying Waters Protected by the Clean Water Act (Draft Guidance) is much needed and heartily welcomed. We urge the agencies to finalize the Draft Guidance and to undertake a formal rulemaking to further clarify Clean Water Act protections.

Small tributaries and adjacent wetlands exert critical influences on downstream waters. These headwater systems provide a myriad of functions including mitigation of flooding, recycling of nutrients and other pollutants, maintenance and regulation of flow, and the creation of habitat.¹ Even seemingly isolated waters such as prairie potholes have been shown to have an important connection with downstream waters.² Alterations that degrade headwater systems impair these natural functions such that downstream waters can experience less consistent flow, nuisance algal growth, more frequent flooding, poorer water quality and less diverse flora and fauna.³ As we have seen in this year's

¹ Meyer, Judy L. et al., *Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands*, at 3 (Feb. 2007), available at <http://www.americanrivers.org/site/DocServer/WhereRiversAreBorn1.pdf?docID=182>.

² Texas A & M Agrilife Communications (2011, March 7). "Relationship of Texas coastal prairie-pothole wetlands to Galveston Bay."

³ Meyer, *Where Rivers are Born* at 5.

devastating floods in the Mississippi River Basin and in what is expected to be the largest-ever Gulf of Mexico dead zone, we can't afford more unchecked and unmitigated degradation.

I.

Small Tributaries and Adjacent Wetlands of Illinois and the Mississippi River Basin Play Key Role in Capturing Nutrient Pollution

Protection of tributaries and adjacent wetlands is of particular importance in the Mississippi River Basin (the Basin), where headwater streams and wetlands serve a vital role in removing excess nutrients. As you know, the effects of nitrogen and phosphorus pollution in the Mississippi River Basin and in the Gulf of Mexico are dire. Nitrogen and phosphorus pollution from Illinois has:

- Contributed to the creation of a huge “dead zone” every year in the Gulf of Mexico and other waters, killing aquatic life and endangering the livelihoods of fishermen and others who depend on healthy coastal waters; and
- Harmed fish and wildlife in numerous rivers, lakes and streams.

Headwater streams and wetlands can help counter these effects. Headwater streams retain nutrients before the pollutants reach larger rivers where nutrient removal is not occurring.⁴ The long shallow beds of headwaters and other tributaries are more effective at capturing dissolved nitrogen before it reaches deeper open waters.⁵

Wetlands in the Mississippi River Basin have been recognized as nutrient sinks⁶ retaining significant percentages of nitrates, ammonia, phosphorus and sediment.⁷ In fact, wetlands associated with the smallest streams have been shown to be most effective at removing nutrients.⁸ Prairie potholes, slope wetlands, and flats also retain nutrients.⁹ According to Ducks Unlimited, the Prairie Pothole Region is critical to Illinois waterfowl hunters. The vast majority of Illinois ducks migrates to the state from the Prairie Pothole Region.

Clearly, we cannot exacerbate the extent of nutrient pollution by failing to protect these important natural sinks and filters. Guidance and new regulations are needed to ensure

⁴ Alexander, Richard B. et al., Differences in Phosphorus and Nitrogen Delivery to the Gulf of Mexico from the Mississippi River Basin, 42 *Environ. Sci. Technol.* No. 3, pp. 822-830 (2008).

⁵ Triska, Frank J. et al., DIN Retention-Transport Through Four Hydrologically Connected Zones in a Headwater Catchment of the Upper Mississippi River, 43 *Journal of the American Water Resources Association*, pp. 60-71 (Feb. 2007).

⁶ National Research Council, Mississippi River Water Quality and the Clean Water Act: Progress, Challenges, and Opportunities, at 31 (2008).

⁷ U.S. Environmental Protection Agency, May is American Wetlands Month, available at <http://www.epa.gov/owow/wetlands/awm/#why>; see also National Wildlife Federation and Natural Resources Defense Council, Wetlands at Risk—Imperiled Treasures, at 3 (July 2002).

⁸ Meyer, Where Rivers Are Born at 8.

⁹ Whigham, Dennis F. and Jordan, Thomas E., Isolated Wetlands & Water Quality, 23 *Wetlands* 541 (Sept. 2003).

adequate protection. We commend EPA and the Corps for having the vision and courage to propose a guidance document that vastly improves the scope of Clean Water Act protections for America's waters.

II. Extent & Importance of Tributaries and Wetlands of Illinois Is Considerable

According to data provided by EPA, the extent of start reaches and intermittent and ephemeral streams in Illinois is significant Fifty-six percent (56%) of all streams in Illinois are start reaches, while 55% of streams are considered intermittent or ephemeral.¹⁰ As such, many miles of streams are in danger of losing Clean Water Act protections. More than 1.6 million people in Illinois depend to some degree on nonnavigable streams for their drinking water.¹¹

So-called isolated wetlands are also prevalent in Illinois. According to the Illinois Natural History Survey, more than 150,000 acres of wetlands in the state could be considered "isolated."¹²

The state of Illinois has recognized the importance of headwater tributaries and wetlands, and has expressed concern over the potential loss of Clean Water Act protections. In 2006, the state joined 33 other states in an amicus brief asking the Supreme Court to uphold broad legal protections for small tributaries and their adjacent wetlands. The Draft Guidance is a necessary first step in recognizing the vital role these resources play in restoring and maintaining the integrity of our nation's waters.

The Guidance should be strengthened by further clarifying the important connection between inland ponds and downstream waters. A recent study by researchers at Texas A & M University confirmed the connection between prairie potholes and navigable waters.¹³ According to the report to be published in the journal *Wetlands*, at least 17% of the water that fell on the inland ponds reached Galveston Bay, making these "isolated" wetlands a critical component of the watershed.

III. Jurisdictional Uncertainty under Current Guidance and Supreme Court Decisions Threatens Waters and Wastes Scare Resources

¹⁰ U.S. EPA, Table 1: State-by-State NHD Analyses of Stream Categories and Drinking Water Data on file with Natural Resource Defense Council.

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http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_12_28_wetlands_science_surface_drinking_water_surface_drinking_water_results_state.pdf

¹² Levin, G.A., L. Suloway, A.E. Plocher, F.R. Hutto, J.J. Miner, C.A. Phillips, J. Agarwal, and Y. Lin. 2002. Status and function of isolated wetlands in Illinois. Illinois Natural History Survey Special Publication 23.

¹³ Texas A & M Agrilife Communications (2011, March 7). "Relationship of Texas coastal prairie-pothole wetlands to Galveston Bay."

Substantial time and resource burdens have been imposed upon EPA, the Army Corps of Engineers, the United States Department of Justice, and others by the uncertainty created by Supreme Court decisions and subsequent agency guidance. The uncertainty has also placed waters in danger of un-permitted fills and discharges.

For example, in a special report by the US EPA Office of Inspector General, EPA Region 5 staff reported increased threats to aquatic resources and significant resource burdens. According to EPA Region 5, more work and resources are now required at all stages of processing of enforcement cases.¹⁴ According to staff, both regional counsel and the Department of Justice are requiring significant nexus determinations regardless of need, compelling intensive and unnecessary data collection.¹⁵ These demands lengthen case preparation time and threaten timely prosecutions.¹⁶ EPA Region 5 also noted disagreements with the Army Corps over jurisdictional determinations and that many waters considered aquatic resources of national interest by EPA were viewed as non-jurisdictional by the Corps.¹⁷

There is widespread fallout from *Rapanos* and its aftermath. Efforts to be extra careful in establishing jurisdiction are hampering CWA permitting and enforcement of those permits, and are unnecessarily draining limited government resources. Narrow views of significant nexus have also wrongly excluded important waters from CWA coverage. For these reasons and those set forth above, we support the draft guidance and new regulations that re-clarify the historical scope of the CWA.

IV.

EPA Should Amend Waters of U.S. Definition to Remove Waste Treatment System Exemption

As noted by the agencies in the Draft Guidance, the proposed guidance is not a rule, and hence is not binding and lacks the force of law. As such, revisions to existing regulations will be necessary. We urge the EPA to take this opportunity to not only formalize the principles set forth in the Draft Guidance, but to also amend 40 CFR 122.2 by removing the current exemption for “waste treatment systems.” In the alternative, the agency could limit the current exemption (as it once was) to manmade bodies of water not originally created in Waters of the U.S. and not resulting from the impoundment of Waters of the U.S.

¹⁴ United States Environmental Protection Agency, Office of Inspector General (April 2009). Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation. Report no. 09-N-0149, p. 5.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

Thank you for this opportunity to comment on this important issue. We look forward to finalization of the guidance and to the formalization of these principles in new regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "Glynnis Collins". The signature is fluid and cursive, with the first name "Glynnis" written in a larger, more prominent script than the last name "Collins".

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