KRISTINE L. YOUNG, President
JOSEPH H. [illegible]

SENT VIA EMAIL: Thomas.Jenny@epa.gov

October 26, 2011

Mr. David S. Evans
Director, Wetlands Division
Office of Wetlands, Oceans and Watersheds
USEPA Headquarters
1200 Pennsylvania Avenue, N. W.
Mail Code: 4502T
Washington, DC 20460

RE: Oct. 12, 2011, Small Entities Outreach Meeting - Def. of "Water of the United States"

Dear Mr. Evans:

The Associated General Contractors of America (AGC) is pleased to submit these preliminary comments in response to the U.S. Environmental Protection Agency's (EPA) request for information from those who participated in the "Waters of the U.S. Small Entities Outreach Meeting" on October 12, 2011. AGC previously submitted a letter – jointly signed by the American Farm Bureau Federation, International Council of Shopping Centers and the National Association of Home Builders – requesting an additional 60 days to provide company specific examples and cost estimates, as EPA has requested in several instances, and to explain our concerns regarding EPA's current actions.

At the Oct. 12 meeting, EPA outlined the cont

actually navigable waters. These cases themselves involved wetlands adjacent to a series of drainage ditches, non-navigable creeks and culverts, and wetlands separated from a drainage ditch by a berm. In both cases, the Sixth Circuit held that the wetlands are "waters of the United States" because they are hydrologically connected to navigable waters. The Supreme Court vacated these decisions—with a majority of the Court agreeing that the Corps had overstepped its bounds—and remanded the cases to the lower court for further inquiry into the facts. Four Justices (Justices Scalia, Thomas, Alito and Chief Justice Roberts) reasoned that the CWA authorizes federal jurisdiction over "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams [,] … oceans, rivers, [and] lakes,'" and that the statute excludes from federal jurisdiction "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[1] These four Justices also interpreted the CWA to cover "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right" such that it is "difficult to determine where the 'water' ends and the 'wetland' begins."[2]

Justice Kennedy concurred in the judgment but for different reasons. He reasoned that the "significant nexus" standard is the operative standard for determining whether a non-navigable water should be regulated under the CWA. In his concurring opinion, he repeatedly emphasized the importance of the relationship to traditional navigable waters, stating that to be a "water of the United States," a non-navigable water must "perform important functions for an aquatic system incorporating navigable water,"[3] or "play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood."[4]

The remaining four Justices (Justices Stevens, Souter, Ginsburg and Breyer) expansively interpreted the CWA to grant the Corps and EPA jurisdiction over waters and wetlands only remotely c/Span 6od."itiond undeusly

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volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely…" to have a significant nexus to navigable waters.[20] He repeatedly cautions that "insubstantial," "speculative," or "minor flows" are insufficient to establish a "significant nexus."[21]

Inappropriately, the Corps' current definition of "adjacent" purports to allow the federal government to control all wetlands that are "bordering, neighboring, or contiguous" to any of the waters covered in the regulation at Section 328.3(a)(1)-(7) (the seven categories of waters of the United States), including all tributaries, however defined.

also provide the Administration with an opportunity to implement balanced, effective regulations in an area that has generated endless litigation for decades.

Without clear definitions to guide field staff, permitting decisions will continue to be arbitrary and inconsistent. Vague and ambiguous regulatory provisions will continue to cause confusion, deny the regulated community fair notice of what is required, and waste time and money; all with little benefit to the environment. This lack of clarity is unduly burdensome for critical infrastructure and private projects.

AGC appreciates the opportunity to comment. Thank you for taking our concerns into account. If you have any questions, please contact me at pilconisl@agc.org or (703) 837-5332.

Sincerely,

Leah F. Pilconis
Senior Environmental Advisor to AGC of America