



May 26, 2011

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RE: EMWD Requests the EPA and the Corps to Withdraw CWA Guidance

Dear EMWD's Congressional Delegation:

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General Manager



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6) **EPA and the Corps should conduct a rulemaking.** The agencies have carefully crafted the Draft Guidance with phrases such as "it is not a rule, and hence it is not binding and lacks the force of law" to avoid judicial review. The Draft Guidance attempts to circumvent critical rulemaking requirements such as responding to the public's comments and engaging in reasoned decision-making that can be subject to judicial review. However, based on precedents established under the Administrative Procedure Act, the Draft Guidance would be considered a rule, if finalized and implemented. The agencies cannot avoid this outcome by claiming that they will initiate a rulemaking on this issue at some unspecified time in the future.

7) **The Administration is advancing the Draft Guidance in the face of opposition from Congress to expanded Federal authority.** The 111th Congress declined to move legislation that would have expanded Federal jurisdiction in manner similar to the Draft Guidance. EMWD is concerned that the Administration is advancing this Draft Guidance to achieve by administrative fiat that which they failed to achieve through legislation. The Administration should not attempt to change the law through "guidance." Only Congress can expand the scope of Federal authority (within the confines of the Constitution). Thus far, Congress has declined to do so.

With the potential for broad and costly regulatory impacts, careful consideration must be given to the ability of EMWD and others to provide essential services to constituents – including drinking water and recycled water delivery and wastewater collection and treatment – by increasing Federal regulation and control over those services.

Currently, EMWD must consider Corps permits for approximately 20 percent of its projects. The vast majority of EMWD project impacts is only temporary, such as pipelines crossing a ditch or wetland, and is immediately restored. EMWD predicts that the Draft Guidance could double that number of required permits. While EMWD does not shirk its responsibility to protect the environment, we question whether this Draft Guidance will truly result in substantial protection of waters and wetlands or will result in massive permitting delays, increased project costs, arbitrary mitigation requirements – and ultimately increased Federal control over the water that EMWD supplies to its customers.

As a strong advocate of the Clean Water Act, EMWD strongly believes in protecting the quality of our Nation's waters; regulating activities affecting water quality is absolutely necessary. Unfortunately, while the agencies claim that the Draft Guidance will improve the effectiveness, predictability and clarity of CWA, EMWD believes it will make CWA compliance obscure, and will increase uncertainty by expanding jurisdiction beyond the Clean Water Act, current regulations and Supreme Court decisions.

EMWD's Congressional Delegation

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For the reasons above, EMWD respectfully requests your support in urging the EPA and the Corps to withdraw the Draft Guidance and begin the formal rulemaking process, starting with a notice of inquiry to explore the need for changes to the current jurisdictional regulations through a transparent and deliberative process.

EMWD considers this Draft Guidance one of the most significant water resources issues in years and we greatly appreciate your consideration and attention to this issue.

Sincerely,



Ronald W. Sullivan
EMWD Board of Directors



Anthony J. Pack
General Manager