AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS
AASHTO
THE VOICE OF TRANSPORTATION

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August 1, 2011

Attn: Ms. Donna Downing
Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW.
Washington, DC 20460

Re: Comments on "Draft Guidance on Identifying Waters Protected by the Clean Water Act" (Docket ID No. EPA–HQ–OW–2011-0409)

Dear Ms. Downing:

The American Association of State Highway and Transportation Officials (AASHTO) welcomes the opportunity to submit these comments on the "Draft Guidance on Identifying Waters Protected by the Clean Water Act," issued by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) on May 2, 2011.

AASHTO is a nonprofit, nonpartisan association representing highway and transportation departments in the 50 states, the District of Columbia, and Puerto Rico. It represents all five transportation modes: air, highways, public transportation, rail, and water. Its primary goal is to foster the development, operation, and maintenance of an integrated national transportation system. Our members work closely with USDOT agencies to operate, maintain, and improve the nation's transportation system.

While we agree that there is a need to clarify the standards used for determining the jurisdictional status of aquatic resources, we have significant concerns with this draft guidance. Our principal concerns include:

- While the guidance states that it is non-binding, it is highly prescriptive and will have an effect that is equivalent to legally binding regulations.

- The guidance establishes complex new legal standards that will make jurisdictional determinations even more time-consuming and unpredictable than they are now. The increased cost and complexity of making jurisdictional determinations will not only create delays and strain agency resources; it also will have effectively force State DOTs and others to concede jurisdiction simply in order to obtain a permit and move forward with urgent work – and thus the guidance will expand jurisdiction will beyond the parameters authorized under the Clean Water Act.

- The treatment of roadside ditches is likely to result in greatly expanded assertions of jurisdiction – potentially encompassing the vast majority of roadside ditches. This change will greatly increase compliance costs for State DOTs and deter State DOTs from conducting environmentally beneficially maintenance activities. This change also will force State DOTs to obtain permits for many routine maintenance activities that currently do not require permitting by the Corps; it also would require individual permits for activities that currently can be conducted with a nationwide permit or regional general permit.

Overall, our concern is that this guidance will impose substantial and unjustified new compliance costs and delays. We urge EPA and the Corps to withdraw this draft guidance and undertake a rulemaking to better define the extent of federal jurisdiction over aquatic resources. If this guidance is to be issued in some form, we urge EPA and the Corps to re-circulate the guidance for additional public comment after revising it to address the issues raised in this letter.

1. The Guidance Will Have the Practical Effect of Creating Binding New Legal Standards for Making Jurisdictional Determinations

The draft guidance states that it "is intended to describe for agency field staff the agencies' current understandings; it is not a rule, and hence it is not binding and lacks the force of law." (p. 1) It goes on to say that it "does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances." (p. 3) We welcome the inclusion of these statements, but we are concerned that the guidance establishes interpretations that will as a practical matter have the force of law.

The guidance does not merely interpret specific provisions in statutes or case law, or describe methods that are available for use. The guidance contains a detailed and highly prescriptive set of criteria for determining jurisdictional status. These are just a few examples:

- "Thus, for rivers and streams the "interstate water" would extend upstream and downstream of such boundary for the entire length that the water is of the same stream order." (p. 7)

- "Waters have the requisite significant nexus if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters or interstate waters." (p. 7)

- "[F]ield staff should first determine whether the water to be evaluated is a tributary, adjacent wetland, or proximate other water under the regulations - waters in the same category should be considered the similarly situated waters. Next, field staff should determine the watershed, as defined by the area draining into the nearest traditional navigable water or interstate water, and should identify the "similarly situated" waters in that watershed. … Finally, field staff should determine whether the water they are evaluating, in combination with other similarly situated waters in the watershed, has a significant nexus to the nearest traditional navigable water or interstate water." (pp. 8-9)

- "A hydrologic connection is not necessary to establish a significant nexus, because in some cases the lack of a hydrologic connection would be a sign of the water's function in relationship to the traditional navigable water or interstate water ..." (p. 9)

- "[T]he agencies have an obligation to evaluate waters in terms of how they interrelate and function as ecosystems rather than as individual units, especially in the context of complex ecosystems where their integrity may be compromised by environmental harms that individually may not be measurably large but collectively are significant." (p. 10)

These are just a few examples; the guidance includes many other similar statements, which specifically direct field staff on the legal standards and process steps to be used when making jurisdictional determinations. While the Corps will nominally have the authority to depart from these standards, the Corps' field staff will understandably be reluctant to make determinations contrary to this guidance. Therefore, from the standpoint of permit applicants, this guidance will be binding.

The federal courts have strongly cautioned EPA and other federal agencies not to use guidance as a substitute for notice-and-comment rulemaking. See *Appalachian Power Co. v. EPA*, 208 F.3d 1015. (D.C. Cir. 2000) ("If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.'"). Consistent with that case, EPA and the Corps should substantially revise this guidance to make clear that it is non-binding (or withdraw it altogether and initiate a rulemaking).

2. The Guidance Will Create a Dramatically More Complex and Time-Consuming Process for Determining Jurisdictional Status

For years, State DOTs and many other permit applicants have expressed concern that the process for obtaining a jurisdictional determination is too costly and time-consuming. The process is so onerous because the legal standards for making jurisdictional determinations have become so complex. The complexity results from the U.S. Supreme Court's confusing case law, which does not articulate a clear or consistent legal standard for making jurisdictional determinations. But this guidance interprets the case law in a way that will compel the Corps to gather even more information, and conduct even more analysis, than it does now.

One change that could increase delays is the requirement to consider "similarly situated" waters when making a jurisdictional determination. We note that – as stated in the draft guidance – there is a basis for this requirement in Justice Kennedy's concurring opinion in the *Rapanos* case, which suggested that "similarly situated" waters should be considered together when applying the "significant nexus" test for jurisdiction.[1] Our concern with the draft guidance is that it interprets this concept to *require consideration of similarly situated waters across an entire watershed as a standard part of every jurisdictional determination* (at least when the significant-nexus test is potentially applicable). The guidance states that:

[1] *See Rapanos v. United States*, 547 U.S. 715 (2008) (finding that the significant nexus test is met "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'").

> [F]ield staff should determine the watershed, as defined by the area draining into the nearest traditional navigable water or interstate water, and should identify the "similarly situated" waters in that watershed. ... Finally, field staff should determine whether the water they are evaluating, in combination with other similarly situated waters in the watershed, has a significant nexus to the nearest traditional navigable water or interstate water. (pp. 8-9)
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> "... the agencies would generally expect that if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus, because under Justice Kennedy's test, similarly situated waters in the region should be evaluated together. (p. 9)

This expansive interpretation of Justice Kennedy's opinion in *Rapanos* will greatly increase data-gathering requirements for even the most minor jurisdictional determination, because applicants will be required to conduct a watershed-wide assessment as a standard practice, in order to develop the information that the Corps will need to apply the significant-nexus test.

Moreover, the legal standard defined in the guidance makes the initial determination highly consequential – because once one type of water in a watershed has been determined jurisdictional, it becomes nearly automatic that all "similarly situated" waters in that watershed are also jurisdictional. The high-stakes nature of the initial decision will further heighten the documentation requirements for the initial jurisdictional determination, and also will increase the potential for contentious, drawn-out proceedings, due to the number of stakeholders potentially affected in a watershed.

As this example illustrates, the new guidance does not simply clarify the standards articulated in the previous *Rapanos* guidance; it defines new legal standards, which will require a more much far-reaching investigation than is currently required. The result will be a significant slow-down in a process that is already subject to frequent delays. For applicants, the practical effect of this change will be to create an even stronger incentive to "concede jurisdiction" by accepting a preliminary jurisdictional determination that finds the waters to be jurisdictional. While conceding jurisdiction is rational in the context of an individual project, it will expand the Corps' jurisdiction to encompass many resources that may not meet the standards defined by the Supreme Court in *Rapanos.*

3. The New Guidance Will Expand Jurisdiction to Include the Majority of Roadside Ditches, Bringing the Full Range of Clean Water Act Regulations to Bear on Ditches

The draft guidance provides criteria for determining whether roadside ditches should be considered jurisdictional as "tributaries". The guidance states that:

> Non-tidal ditches (including roadside and agricultural ditches) are also not tributaries except where they have a bed, bank, and ordinary high water mark; connect directly or indirectly to a traditional navigable or interstate water; and have one of the following five characteristics:

- natural streams that have been altered (e.g., channelized, straightened or relocated);
- ditches that have been excavated in waters of the U.S., including wetlands;
- ditches that have relatively permanent flowing or standing water;
- ditches that connect two or more jurisdictional waters of the U.S.; or
- ditches that drain natural water bodies (including wetlands) into the tributary system of a traditional navigable or interstate water.

If a ditch is considered a tributary, it will be evaluated in the same manner as other tributaries (i.e., plurality standard or Kennedy standard, as appropriate). Note that tidal ditches are by definition waters of the U.S. (p. 12).

Under these criteria, the majority of roadside ditches will be considered jurisdictional based on an "indirect" – and potentially very remote and tenuous – connection to a navigable or interstate water. The practical consequences of turning upland ditches into jurisdictional waters are enormous. State DOTs maintain hundreds of thousands of miles of roadway, and many of those roads include roadside ditches as part of the road's stormwater management system. In many cases, these ditches were constructed by the DOT specifically for the purpose of accepting run-off from roadway. If the ditches are now considered jurisdictional, the ditches will become subject to the full range of Clean Water Act regulatory requirements:

- Water quality standards will need to be established for ditches.
- Total maximum daily load requirements will be established for ditches.
- Point-source discharge permits will be required for discharges into ditches.
- Section 404 permits will be required for discharges into ditches.

Moreover, many projects that formerly qualified for nationwide or regional general Section 404 permits will now require individual permits, because the impacts on ditches will cause the projects to exceed the thresholds for the nationwide and regional permits.

To illustrate the potential impact of this guidance, we will briefly describe the experience of one State DOT – the Delaware Department of Transportation (DelDOT).

- DelDOT has maintenance responsibility for over 12,000 lane miles of roadway or 89 percent of all roadways in Delaware. It is responsible for maintaining 8,056 miles of roadside ditches.

- DelDOT currently processes about 75 nationwide permits (NWPs) annually for both capital improvements and maintenance-related projects. All of the NWPs typically require some coordination in advance of initiating any work under the NWP. The coordination typically includes concurrence letters from other federal and state agencies, documenting their agreement with findings that are required for the NWP to apply.

- If the proposed guidance is adopted, it is likely that the vast majority of the 8,056 miles of roadside ditches in Delaware will be considered jurisdictional, including ditches cut through uplands. If this is true, then most maintenance activities involving ditches will likely require a NWP or other Section 404 permit. Examples of these activities include: ditch cleaning, reshaping, repair of roadside rutting and pavement edge drop-offs, installation of rip-rap and similar erosion and scour protection, installation of residential driveway entrance pipes, and repairs to headwalls, wingwalls, and other structures.

- In a 12-month period, from July 22, 2010 through July 21, 2011, DelDOT crews performed 848 ditch maintenance activities, according to DelDOT's maintenance log. Together with other minor activities that were not logged, DelDOT estimates that it completed at least 1,000 separate ditch maintenance projects during this 12-month period.

- If all of the roadside ditches in Delaware are considered jurisdictional, or even a majority of them, the number of NWPs required for DelDOT operations will increase exponentially. Currently, DelDOT obtains about 75 NWPs annually in total, for all types of projects. Under the draft guidance, DelDOT may need to obtain hundreds of NWPs annually, and perhaps more than 1,000, just for ditch maintenance projects. DelDOT is highly concerned that the vastly increased workload – for DelDOT, the Corps, and other agencies – will create unacceptable project delays and increased project costs.

Of course, larger States would experience the same types of increased regulatory burdens, only on a much greater scale. The Texas Department of Transportation (TxDOT) is responsible for 80,067 miles of roadway (measured in centerline miles), and estimates that the majority of those roads have ditches or other types of drainage features. The Illinois Department of Transportation estimates that it maintains 26,000 miles of roadside ditches. The Ohio Department of Transportation estimates that it maintains 98,500 miles of roadside ditches.[2] These States carry out thousands of routine maintenance activities in these roadside ditches every year. Requiring permits for all or even the majority of these maintenance activities will trigger an avalanche of permit applications, which will overwhelm the Corps' permitting staff and severely impede States' ability to maintain a safe and functional roadway system.

Before issuing guidance that could expand federal jurisdiction to encompass thousands of miles of currently unregulated roadside ditches, the Corps and EPA should carefully evaluate the potential practical impacts of this new interpretation. Clearly, such an interpretation will create an extreme burden on the Corps' and EPA's field staff, exacerbating existing delays. The increased cost and delay will have the unfortunate effect of deterring State DOTs from carrying out routine maintenance work in ditches, because the maintenance will now be more likely to require individual Section 404 permits or more extensive documentation to satisfy the requirements for nationwide or regional general permits.

In short, we have significant concerns with this draft guidance. For the reasons set forth above, we strongly urge EPA and the Corps to re-circulate the guidance for additional public comment after revising it to address the issues raised in this letter, or to withdraw it altogether and conduct notice-and-comment rulemaking.

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[2] It is important to understand that the number of miles *under a State DOT's jurisdiction* is not necessarily indicative of the *total* number of roadway miles within the State. In some States, such as Delaware, the State DOT owns most of the roadways, with few if any roads owned by local governments. In other States, counties and other local governments own a large percentage of the roadways. This proposed guidance would adversely affect maintenance activities on all types of roadways, including those owned by counties and other local governments. Thus, the total mileage of ditches affected by this guidance is actually far greater than the mileage represented by the size of the State DOT's road system.

We thank you for considering these comments. If you would like to discuss any of these comments, please contact Shannon Eggleston at (202) 624-3649 or segglestón@aashto.org.

Sincerely,

John Horsley
Executive Director

Typical Roadside Ditch Maintenance:

Exemptions for Ditch Maintenance Projects Under Existing Laws and Regulations

1) The exclusion for maintenance of ditches found in Section 404(f)(1)(c).

2) The exclusion of "waste treatment systems" from the definition of "waters of the United States" in both the Corps' Section 404 regulations (33 CFR 328.3(a)) and EPA's NPDES regulations (40 CFR 122.2).