



AMERICAN COUNCIL OF ENGINEERING COMPANIES

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*Via electronic submission at [www.regulations.gov](http://www.regulations.gov)*

July 29, 2011

Ms. Donna M. Downing  
c/o Water Docket  
Environmental Protection Agency  
Mail Code 2822T  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Mr. David B. Olson  
Regulatory Community of Practice  
(CECW-CO-R)  
U.S. Army Corps of Engineers  
441 G Street, N.W.  
Washington, D.C. 20317

**Re: Draft Guidance on Waters Subject to Clean Water Act Jurisdiction  
Docket No. EPA-HQ-OW-2011-0409**

Dear Ms. Downing and Mr. Olson:

On behalf of the American Council of Engineering Companies (ACEC), we are pleased to submit our comments on draft guidance on “Identifying Waters Protected by the Clean Water Act,” published in the Federal Register on May 2, 2011. ACEC-member engineering firms work on a daily basis with their federal, state and local government clients to upgrade and improve the nation’s water infrastructure under the Clean Water Act. Our member firms are on the front lines in implementing the requirements of the Act and need to have a clear understanding of how federal law will apply to projects in which they are involved.

We appreciate the effort by the Environmental Protection Agency and the U.S. Army Corps of Engineers to clarify how the agencies will attempt to identify waters subject to federal jurisdiction under the Clean Water Act, but generally believe that an important issue of increasing the scope of waters subject to federal law should be more properly be the subject of agency rulemaking under the notice-and-comment requirements of the Administrative Procedures Act. Such a guidance document for use by field agency staff will not avoid the current case-by-case analysis that is required, and projects will still be subject to challenge by anti-development groups.

A formal rulemaking would also ease the burden of EPA and the Corps by creating a presumption that jurisdiction exists or not, and provide a clear method of challenging a final rule that is deemed to be excessive. While we are heartened to read in the draft guidance document that EPA and the Corps expect to undertake a rulemaking at some future date, without any definitive assurance that a rulemaking will be timely, we suspect that the proposed guidance document will be treated for all intents and purposes as law by those who are responsible for implementing wetlands determinations and enforcement actions.

## **General Concerns**

### Federal “Protection” Terminology

We take issue with the overall concept that the federal government is a better “protector” of local water bodies than states and local governments, or that waters that are not subject to federal jurisdiction are “unprotected,” as described by the terminology in the guidance. Many of our member firms work in states where regional bodies and local governments do an excellent job of planning and managing how development occurs while at the same time ensuring that water quality and habitat are safeguarded. EPA and the Corps could do far more to assist states and local governments in their environmental protection efforts rather than seek federal jurisdiction over waters that are of primary concern to the areas immediately surrounding them.

### Impermissible Expansion of Jurisdiction

Our overriding position is that there must be a line between federal and state jurisdiction over water bodies. The current term “navigable” in the Clean Water Act, while not fully descriptive, provides such a line and places some limits on federal authority. Guidance which tends to make this line less definitive has the potential to allow federal overreach, and we are wary of language in the draft guidance that tends in that direction.

In particular, we believe that the agencies’ expansion of jurisdiction in the guidance is contrary to the holding in *Rapanos v. United States* (547 U.S. 715) and impermissibly expands the Kennedy “significant nexus” test. At Draft Guidance 3, the agencies acknowledge that “the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance...” Such was not the intent of the significant nexus test and we believe the guidance has apparently misconstrued the *Rapanos* holding.

At Draft Guidance 8, the language states that the agencies should consider waters to have a significant nexus if “they alone or in combination with other similarly situated water in the same watershed have an effect on the chemical, physical, *or* biological integrity of traditional navigable waters or interstate waters that is more than *speculative or insubstantial*.” (emphases added).

Under such an analysis, any nexus beyond “speculative” or “insubstantial” would, for all intents and purposes, result in a finding of federal jurisdiction. We do not believe that the Kennedy concurrence supports this interpretation.

In addition, the Draft Guidance substitutes the conjunction “or” for “and” with regard to Justice Kennedy’s concurrence regarding identifying impacts to the “chemical, physical and biological integrity” of traditionally navigable waters. This mischaracterizes the Kennedy language which refers to impacts collectively, as opposed to the draft guidance’s reference to the identification of any single impact, thus creating a much broader nexus test than the Kennedy concurrence allows.

### Aggregation

The draft guidance has created a unique and unprecedented concept of “aggregation” of the cumulative impacts of all similar waters within an entire watershed. First, such a model is entirely inappropriate for a guidance document, and should be subject to a full and complete vetting through a regulatory public notice and comment process.

Secondly, the aggregation concept is without legal support in *Rapanos*. It takes the Kennedy significant nexus test and wrongly applies it to all waters in a watershed, in effect ensuring that nearly every ditch, canal, intermittent stream, retention pond and other wet spot within a watershed will by definition have a significant nexus with an expanded class of traditional navigable waters. We urge that this concept be abandoned in the draft guidance.

### **Specific Issues**

#### Artificial Ponds, Swales and Ditches

The guidance is unclear whether federal jurisdiction would apply over settling basins, detention ponds and roadside ditches. In the Summary of Key Points, the guidance lists such water bodies as “generally” not subject to the Clean Water Act, including:

- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; and
- Erosion features (gullies and rills), and swales and ditches that are not tributaries or wetlands.

The guidance states that the agencies’ position regarding waters such as settling basins is “unchanged” from that described in previous regulatory preambles, however the agencies’ existing interpretation has been inconsistently applied, with some settling basins potentially deemed “tributaries” to navigable waters, or subject to jurisdiction because they were created by excavating or diking jurisdictional waters. These inconsistent interpretations appear to remain unclarified by the guidance.

In addition, the statement that swales and ditches are “generally” not protected is made questionable by the detailed discussion at page 12 of the guidance. It suggests that “roadside and agricultural ditches” are not jurisdictional tributaries *except* where they “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 (channelized, straightened or relocated);

- ditches that have been excavated in jurisdictional waters (including wetlands);
- ditches that have relatively permanent flowing or standing water;
- ditches that connect two or more jurisdictional waters; or
- ditches that drain natural water bodies (including wetlands) into tributaries of jurisdictional waters.

Our concern is that all roadside drainage ditches eventually connect “indirectly” to a navigable water at some point, and will have at least one of these five characteristics, leaving the agency field staff once again in the position of making case-by-case determinations.

Secondly, the guidance states that “natural and man-made swales” are not jurisdictional tributaries *unless* they meet the regulatory definition of wetlands. Thus, ditches and swales will be considered wetlands when they meet the applicable criteria in the Corps’ Wetlands Delineation Manual, or in the “appropriate regional supplement” to that manual. Further, even when they are not jurisdictional waters themselves, the guidance states, swales and ditches “may still contribute to a surface hydrologic connection between” navigable waters and adjacent wetlands (presumably subjecting them to federal jurisdiction. The guidance also states that swales and ditches “may function as” point sources under the CWA, such that discharges through these features could be subject to NPDES permitting requirements.

ACEC does not believe all the interpretations described above reflect the intent of the Clean Water Act’s differentiation between state and local waters. These interpretations have the potential to lead to exponential increases in the number of permits required under Section 404 and will not reduce the regulatory burdens or threats of litigation.

#### “Adjacent” Wetlands

The guidance understates the extent to which CWA jurisdiction over “adjacent” wetlands could be expanded under its proposed language. In fact, an entirely new concept of “ecological (biological) connection” is created to expand the “physical proximity” or “hydrological connection” factors used to previously determine adjacency. The guidance suggests that the movement between jurisdictional waters and adjacent wetlands of species such as amphibians, reptiles, waterfowl, invertebrates and fish for “spawning, nesting, feeding, refuge and other life stage requirements” can be used to establish federal jurisdiction over those wetlands. This appears to us to be an effort to circumvent the U.S. Supreme Court SWANCC decision which clearly disapproved of the Migratory Bird Rule as a basis for federal wetlands jurisdiction.

ACEC appreciates the opportunity to comment on the proposed guidance. Please feel free to contact me if we can answer any questions, at [dshea@acec.org](mailto:dshea@acec.org), or 202-347-7474.

Sincerely,

/s/

Diane S. Shea, Director  
Environment & Energy Programs