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Executive Director & General Counsel
Alexandra Dapolito Dunn

July 29, 2011

Ms. Nancy K. Stoner, Acting Assistant Administrator for Water
Ms. Jo Ellen Darcy, Assistant Secretary of the Army (Civil Works)
Water Docket
U.S. Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave, NW
Washington, DC 20460

Via e-mail to: ow-docket@epa.gov

**RE: Docket ID No. EPA-HQ-OW-2011-0409
EPA and Army Corps of Engineers Draft Guidance on Identifying
Waters Protected by the Clean Water Act (hereinafter "Draft Guidance")**

Dear Ms. Stoner and Ms. Darcy:

The Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) appreciates the opportunity to comment on the above-referenced Draft Guidance. ASIWPCA is the national voice of state, interstate, and territorial officials (hereinafter "states") responsible for implementation of programs that protect surface waters across the nation.

Particularly relevant to the Draft Guidance, ASIWPCA's membership includes water quality program administrators throughout the nation, and therefore represents a wide variety of geographic, hydrologic, biological, and regulatory conditions among its member states. ASIWPCA members support U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) actions that aid in the identification of waters protected by the Clean Water Act (CWA), provided that such actions increase regulatory certainty and predictability without further expanding federal jurisdiction. ASIWPCA is concerned that any re-expansion (post-SWANCC) of the scope of CWA jurisdiction to waters without a significant impact on downstream waters will strain states' increasingly limited water pollution control resources at a time when federal and state funding of these programs are being drastically cut.

ASIWPCA appreciates the difficulty in trying to develop procedures that apply equally and equitably to all states. ASIWPCA commented on the 2008 Guidance, and while we commend the agencies for clarifying some of the questions raised by that Guidance, many of the issues we raised at that time still remain inadequately addressed in the Draft Guidance.

I. The EPA/Corps should establish procedures through formal rulemaking

CWA jurisdiction has been the source of great confusion, uncertainty, and controversy, particularly after the fractured ruling in *Rapanos* and its much debated "significant nexus" test. Although the Draft Guidance attempts to

interpret and translate “significant nexus” for practical applications, the complexities of jurisdiction and its broad ramifications across CWA programs warrant that the procedures to identify waters protected by the Act be established through an open, rigorous, and formal rulemaking process.

As co-regulators, the vast majority of states are responsible for the implementation and ongoing administration of CWA programs within their borders. We are partners with the EPA/Corps in the efforts to protect and improve the quality of our nation’s waters. Yet the EPA/Corps did not consult with states while drafting the Draft Guidance, and did not share a draft with states in advance of its release to the public in late April. Unlike guidance, a formal rulemaking would have facilitated early and ongoing stakeholder engagement via the notice and comment process for a proposed rule. Likewise, the federalism implications would have triggered consultation under Exec. Order 13132 that would have provided states a further opportunity to review the proposed regulation and offer perspectives prior to publication.

Additionally, a formal rule is accompanied by the due process afforded by the Administrative Procedure Act. With guidance, there is no clear final agency action that triggers a permittee’s right to appeal and review a jurisdictional determination. Furthermore, the guidance itself is insulated from judicial review.

Therefore, the EPA/Corps should proceed with formal rulemaking and the Draft Guidance should not be issued or applied in the interim.

II. The EPA/Corps should focus more on regional differences

In attempting to craft a consistent approach to jurisdictional determinations, the Draft Guidance does not give adequate attention to regional differences that play a significant role in whether a particular stream in a watershed has a “speculative or insubstantial” impact on downstream waters. The Draft Guidance’s treatment of waters that are not relatively permanent, such as intermittent and ephemeral streams, provides an illustration of this concern.

Ephemeral and intermittent waters are often placed into a single category, yet the two types of waters are vastly different – particularly in the west – and should not be treated as equivalents. By definition, ephemeral waters are those that flow only in response to a precipitation event and the local groundwater table is always below their channel bottom. This definition differs from intermittent waters where there typically is sustained base flow from groundwater or snowmelt for a portion of the year.

Because the impacts of these waters varies greatly, physical characteristics alone (i.e., presence of bed and bank and ordinary high water mark) should not serve as a primary basis for jurisdictional determinations. Many intermittent waters, with at least a seasonal sustained flow, impact downstream waters. The downstream impact of ephemeral waters, however, is greatly influenced by site-specific factors, including volume and duration of discharges and distance to downstream waters. For example, in some arid states these ephemeral waters are effluent dominated, and in others they serve as headwaters that replenish reservoirs or recharge groundwater aquifers. In other states ephemeral waters are more likely to fall into the “speculative or insubstantial” impact on downstream waters

category.¹ Treating those waters as always jurisdictional could result in overbroad application of CWA programs. Conversely, a blanket exception to jurisdiction could have the unintended consequence of leaving waters with significant downstream impacts outside of CWA protection, which would particularly reduce protection in states that cannot be more stringent than the CWA.² We urge the EPA/Corps to address the complex area of intermittent/ephemeral streams by providing a clear role for the input and expertise of the state water quality regulators in making these jurisdictional determinations.

III. There is inadequate consideration of implications for non-section 404 programs

As the EPA/Corps acknowledges in the Draft Guidance, “there is only one CWA definition of ‘waters of the United States.’ Thus this draft guidance, like the earlier guidance it replaces, necessarily will apply to decisions concerning whether a waterbody is subject to any of the programs authorized under the CWA . . . The provisions include the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 311 oil spill program, the water quality standards and total maximum daily load programs under section 303, and the section 401 State water quality certification process.” The implications on the whole suite of CWA programs need to be fully explored and factored into the decision making process. As mentioned above, the ramifications of deeming an ephemeral stream jurisdictional without considerations of site-specific conditions to the contrary may necessitate many important responsibilities under the CWA, such as NPDES permitting, assessing impairments, and TMDL development.

The potential resource demands are further compounded by the estimated jurisdictional re-expansion (with a post-SWANCC universe as the baseline) in some states. Although the guidance places the jurisdictional re-expansion overall at 17%, preliminary estimates in some states forecast much greater numbers. For example, Kansas estimates that application of the Draft Guidance would quadruple the miles of streams within that state that are jurisdictional.

Therefore, we request that EPA/Corps further study and explore through a formal rulemaking how the application of the procedures will impact the administration of all CWA programs before making further jurisdictional determinations.

IV. No significant role for the states

ASIWPCA is concerned that the Draft Guidance never addresses how the EPA or the Corps will interact with state partners in any aspect of the decision-making process related to identification of jurisdictional waters. In most of the nation, state agencies are charged with implementation of CWA programs. These states will need to implement measures under the CWA programs on these additional waters without providing any input on the federal jurisdictional determinations. As noted in Section II, above, we encourage the EPA and the Corps to include provisions that will meaningfully involve states in the jurisdiction determination process. This includes 1) notification to a state that a request for a jurisdictional determination has been made for a particular water; 2) opportunity to provide relevant information, including ability for states to suggest waters which should (or should not) be considered

¹ *Rapanos v. United States*, 547 U.S. 715 (2006)

² *See, e.g.*, A.R.S. § 49-255.01.B.

subject to CWA jurisdiction based upon scientific evidence; 3) notification as final jurisdictional determinations are made; 4) an administrative appeal process to challenge agency determinations; and 5) opportunities to delegate regulatory management of a given water to the state agency using state authorities.

In conclusion, the members of ASIWPCA recognize the need for clarification of the scope of CWA jurisdiction. However, significant concerns remain on the generalized sweeping scope of the Draft Guidance to include all types of waters, both streams and wetlands. The geographic, hydrologic, biological and institutional diversity among the states makes developing a comprehensive jurisdictional guidance difficult. Navigation of these complexities is best accomplished through formal rulemaking to ensure a transparent, uniform, yet flexible framework to appropriately apply jurisdiction of the CWA to the variety of waters needing protection.

Thank you for considering the comments above. Please feel free to contact ASIWPCA's Executive Director and General Counsel Alexandra Dapolito Dunn to discuss and/or clarify any of these comments at (202) 756-0600 or a.dunn@asiwPCA.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "Walter L. Baker".

Walter L. Baker, P.E.
Director, Utah Division of Water Quality
ASIWPCA President