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April 15, 2019

U.S. Environmental Protection Agency and U.S. Army Corps of Engineers
c/o EPA Docket Center
Office of Water Docket, Mail Code 28221T
1200 Pennsylvania Ave. NW
Washington, DC 20460

RE: Comments on Proposed Revised Definition of “Waters of the United States” (Docket No. EPA-HQ-OW-2018-0149).

To the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers

The American Association of State Highway and Transportation Officials (AASHTO) appreciates the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) issued by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) on February 14, 2019, announcing proposed changes to the definition of “waters of the United States” under the Clean Water Act. See 84 Fed. Reg. 4154.

AASHTO is a nonprofit, nonpartisan association representing the State 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 U.S. Department of Transportation (USDOT) agencies to operate, maintain, and improve the nation’s transportation system.

In previous comment letters, we have advocated for a rulemaking that would provide clearer, simpler standards for determining the jurisdictional status of aquatic resources, and in particular we have emphasized the need to clarify the standards used for determining the jurisdictional status of roadside ditches. See AASHTO Comment Letters, Docket No. DOT-OST-2017-0057 (July 17, 2017); Docket No. EPA-HQ-OW-2011-0880 (Oct. 24, 2014); Docket No. EPA-HQ-OW-2011-0409 (Aug. 1, 2011). We have expressed concern about interpretations that could extend jurisdictional status to the majority of roadside ditches, noting the cost and delays that such an interpretation could impose on ditch maintenance activities, which are vital for maintaining road safety.

Overall, we welcome this rulemaking and believe it is broadly consistent with the recommendations in our previous comment letters. While we have concerns with some aspects of the rulemaking, we believe the proposed changes overall would bring greater clarity,

consistency, and simplicity to determinations regarding the jurisdictional status of aquatic resources. By doing so, these changes would help to provide greater certainty to the regulated community and reduce the time and cost associated with making jurisdictional determinations.

In this letter, we do not attempt to address every aspect of the proposed rule, but rather address five broad issues of particular interest to State DOTs: (1) the jurisdictional status of roadside ditches; (2) the jurisdictional status of tributaries; (3) the jurisdictional status of wetlands; (4) the exclusion for stormwater control features; and (5) the agencies' request for comments regarding States' roles in developing "geospatial datasets" regarding aquatic resources that fall within federal jurisdiction.

1. Jurisdictional Status of Roadside Ditches.

The proposed rule would, for the first time, establish a definition of the term "ditch" and define a category of ditches that are considered jurisdictional, while treating all other ditches as non-jurisdictional. We generally support these proposed changes, while recommending several clarifications as noted below.

Definition of "Ditch." The proposed rule would define a ditch as an "artificial channel used to convey water." The preamble explains that "artificial" means a channel that is "not a natural feature" but instead "has been constructed in some manner."¹ We concur that it is beneficial to include a definition of this term and concur that the proposed definition captures the core attribute of ditches – namely, that they are constructed rather than naturally occurring. We offer the following comment on this definition:

- **Examples of Ditches.** The preamble notes that the definition of "ditch" includes any human-constructed conveyance of water, including canals. However, in common usage, a canal is often understood to be distinct from a ditch; the preamble itself refers to "canals and ditches" at one point.² It would be helpful to add a non-exhaustive list of examples to the definition of "ditch" to confirm that it includes canals, irrigation ditches, roadside ditches, and drainage ditches.

Jurisdictional Status of Ditches. The proposed rule would define three types of ditches as jurisdictional: (1) ditches that are currently used, were used in the past, or are susceptible to being used for interstate or foreign commerce; (2) ditches that were constructed in or relocate a "tributary" and currently meet the criteria for a jurisdictional tributary; and (3) ditches that were constructed in an "adjacent wetland" and currently meet the criteria for a jurisdictional tributary. All other ditches would be deemed non-jurisdictional.³ We generally support the NPRM's treatment of ditches, and we offer the following specific comments:

- **Burden of Proof.** The preamble states that a ditch is presumed non-jurisdictional unless the agencies determine that there is evidence demonstrating that the relevant criteria are met: "In general, the burden of proof would be on the agencies to determine the historic status of the ditch construction..."⁴ We agree with the agencies' proposed approach, but we suggest stating this presumption in the text of the rule itself (not just in the preamble).

¹ 84 Fed. Reg. at 4181.

² 84 Fed. Reg. at 4179 ("In the 2015 Rule, the agencies promulgated a definition of 'waters of the United States' that expressly included man-made features such as ditches and canals in the definition of tributaries...").

³ 84 Fed. Reg. at 4179.

⁴ 84 Fed. Reg. at 4181.

A clear position on this issue is especially important given the potential difficulties involved with ascertaining conditions that existed decades or centuries in the past.

- ***Development of Evidence.*** The preamble acknowledges that the proposed rule would require consideration of historical evidence to ascertain whether a present-day ditch was in fact constructed in a tributary or an adjacent wetland, and notes that this evidence may include “historic topographic maps, historic aerial photographs, local and state records and surface water management plans,” as well as other materials.⁵ We concur that such materials may be relevant, and understand that the party seeking the determination can be expected to make a good-faith effort to submit reasonably available documents, but we recommend clarifying that the burden of collecting relevant information ultimately rests on the agency making the jurisdictional determination.
- ***“Use” for Interstate Commerce.*** The text of the proposed rule defines jurisdictional ditches to include waters currently or formerly used, or susceptible to use, in interstate or foreign commerce. We agree with this definition but suggest clarifying in the preamble that “used” in this context means “used for transportation on water” – that is, the waters themselves are used for travel. This clarification would ensure that a ditch is not considered to be used for interstate or foreign commerce simply because it is part of a roadway that is used for interstate or foreign commerce.
- ***Ditches in Artificially Created Wetlands.*** The proposed rule would treat ditches as jurisdictional if they were constructed in an “adjacent wetland” and currently meet the criteria for a jurisdictional tributary. We recommend excluding from this definition ditches that were constructed within wetlands or other aquatic resources that were themselves created solely as a result of excavation, impoundment, or other activities occurring in upland areas. In other words, a ditch constructed in an artificially created wetland should not be jurisdictional.
- ***Artificial Ditch Wetlands.*** Paragraph (a)(6) of proposed rule includes “adjacent wetlands” as jurisdictional waters, while paragraph (b)(4) excludes upland ditches. The rule should clarify that an “artificial ditch wetland” – that is, a wetland created by an excluded ditch – is not a jurisdictional water.

Jurisdictional Ditches vs. Point Sources. The preamble states that the proposed rule is intended to “address the confusion regarding whether ditches are point sources or ‘waters of the United States’ more generally.”⁶ However, the text of the rule does not clarify this distinction and instead solicits “comment on whether a ditch can be both a point source and a ‘water of the United States,’ or whether these two categories ... are mutually exclusive.”⁷ We recommend that the final rule state explicitly that a waterbody cannot be both a jurisdictional water and a point source. As the preamble notes, drawing a clear distinction between these categories is consistent with the plurality opinion in the *Rapanos* case.⁸ In addition, it would be illogical to require a permit for a discharge *into* and *from* the same water body.

⁵ 84 Fed. Reg. at 4181.

⁶ 84 Fed. Reg. at 4179.

⁷ 84 Fed. Reg. at 4182.

⁸ 84 Fed. Reg. at 4180. See *Rapanos v. U.S.*, 547 U.S. 715, 735 (2006) (“The definitions thus conceive of ‘point sources’ and ‘navigable waters’ as separate and distinct categories.”) (plurality opinion).

2. Jurisdictional Status of Tributaries.

The proposed rule would define a jurisdictional tributary to include “a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or indirectly...”⁹ Under this definition, tributaries “do not include surface features that flow only in direct response to precipitation, such as ephemeral flows, dry washes, arroyos, and similar features.”¹⁰

The preamble clarifies several important points, including (1) that non-jurisdictional ditches would not sever the jurisdictional status of a tributary as long as the ditches contribute perennial or intermittent flow to downstream jurisdictional waters; (2) that an ephemeral feature would sever jurisdictional status because it does not contribute perennial or intermittent flow to downstream waters; and (3) that the alteration or relocation of a tributary would not alter its jurisdictional status as a tributary if it continues to have perennial or intermittent flow and otherwise meets the definition of a tributary.¹¹

We agree that limiting the definition of “tributaries” to those with perennial or intermittent flow will provide greater clarity and predictability regarding jurisdictional status by avoiding the need to evaluate jurisdictional status of features with only ephemeral flow. We also concur that this interpretation finds support in the plurality opinion in the *Rapanos* case, which held that jurisdictional waters must have “relatively permanent” flow.¹²

We generally support this proposed change as a means of providing greater clarity about the extent of federal jurisdiction over aquatic resources and respecting States’ regulatory roles, subject to the following comments:

First, we note that the definition of “intermittent” includes water that flows “seasonally when the groundwater table is elevated or when snowpack melts.”¹³ We do not necessarily object to a definition of “intermittent” that includes seasonal flows. However, there could be significant practical concerns with defining what constitutes a sufficient seasonal flow to make a water jurisdictional. For example, melting snowpack is highly variable from year to year and depends on many factors, including environmental factors not related to the actual snow pack depth or moisture itself, such as speed of temperature change, melting time, ground thaw, etc. If seasonal flows are included, we suggest making clear that (1) the seasonal flows must come from a natural source and not, for example, from run-off from snowpiles produced from snow-plowing; and (2) that the breadth of the jurisdictional water is defined by the ordinary high-water mark, not by the lateral extent of the seasonal flow.

Second, we note that the term tributary is defined as “a river, stream, *or similar naturally occurring surface water* channel that contributes perennial or intermittent flow...”¹⁴ We recommend clarifying that the term “similar naturally occurring surface water channel” refers to the topographic feature itself – i.e., the physical channel through which water flows – such that

⁹ 84 Fed. Reg. at 4173.

¹⁰ 84 Fed. Reg. at 4173.

¹¹ 84 Fed. Reg. at 4173-74.

¹² *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (interpreting “waters of the United States” to include “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’ ...”).

¹³ 84 Fed. Reg. at 4204.

¹⁴ 84 Fed. Reg. at 4173.

water from a natural source (e.g., snow melt) flowing through an excluded upland ditch would not be considered a “naturally occurring surface water channel.”

Third, the NRPM requests comment on “the proposed treatment of natural and man-made breaks regarding the jurisdictional status of upstream waters, including whether these features can convey perennial or intermittent flow to downstream jurisdictional waters. The agencies also seek comment on the jurisdictional status of the breaks themselves.”¹⁵ We agree that it is important as a practical matter to provide clear direction regarding the treatment of breaks. While we do not have a specific recommendation about how to address this issue, we encourage the agencies to adopt an approach that is consistent with the rule’s overall emphasis on clarity and simplicity in jurisdictional determinations.

3. Jurisdictional Status of Wetlands.

The proposed rule would define a jurisdictional wetland to include all wetlands adjacent to traditional navigable waters; jurisdictional tributaries; jurisdictional ditches; jurisdictional lakes and ponds; and impoundments of otherwise jurisdictional waters.¹⁶ The term “adjacent” would be defined to mean wetlands that “abut or have a direct hydrologic surface connection” to a jurisdictional water in a typical year. The term “abut” would be defined as touching at either a point or a side; a “direct hydrologic surface connection” would be defined as “inundation” from a jurisdictional water to the wetland, or perennial or intermittent flow between the jurisdictional water and the wetland.¹⁷

The preamble clarifies several important points, including: (1) when a wetland is separated from jurisdictional waters by berm, dike, or similar structure, it would not be “adjacent” and therefore would not be jurisdictional; (2) it is sufficient if the inundation occurs seasonally, as long as it occurs in a typical year and has a jurisdictional water as its source; and (3) if any portion of the wetland abuts or has a direct surface hydrologic connection to a jurisdictional water, the entire wetland is deemed jurisdictional.¹⁸

We generally support this proposed change because it would provide greater clarity and consistency in determining the jurisdictional status of wetlands.

4. Stormwater Control Features

The proposed rule would exclude “stormwater control features excavated or constructed in upland” from the definition of “waters of the United States.”¹⁹ Importantly, the preamble explains that the agencies intend to interpret “stormwater control features” broadly to include not only traditional stormwater systems such as curbs and gutters, but also “green infrastructure” that seeks to treat stormwater before it is discharged:

... Stormwater control features have evolved considerably over the past several years, and their nomenclature is not consistent, so in order to avoid unintentionally limiting the proposed exclusion, the agencies have not included a list of excluded features in the rule. The proposed rule is intended to exclude [from federal

¹⁵ 84 Fed. Reg. at 4178.

¹⁶ 84 Fed. Reg. at 4184.

¹⁷ 84 Fed. Reg. at 4184.

¹⁸ 84 Fed. Reg. at 4184-86.

¹⁹ 84 Fed. Reg. at 4192.

jurisdiction] the diverse range of stormwater control features that are currently in place and may be developed in the future.

... More recently, treatment of stormwater has become more prevalent to remove pollutants before the stormwater is discharged. Even more recently, cities have turned to green infrastructure, using existing natural features or creating new features that mimic natural hydrological processes that work to infiltrate or evapotranspire precipitation, to manage stormwater at its source and keep it out of the conveyance system. These engineered components of stormwater management systems can address both flood control and water quality concerns, as well as provide other benefits to communities. This proposed rule is designed to avoid disincentives to this environmentally beneficial trend in stormwater management practices.²⁰

We support this proposed exclusion for the reasons stated in the preamble and encourage the agencies to retain this exclusion in the final rule.

5. Geospatial Datasets

In response to requests from some States, the agencies are seeking comments on “how they could establish an approach to authorize States, Tribes, and Federal agencies to establish geospatial datasets of ‘waters of the United States,’ as well as waters that the agencies propose to exclude, within their respective borders for approval by the agencies.”²¹ The preamble makes clear that this approach is not included in the current proposal, but could be the subject of a future rulemaking. The preamble also makes clear that any such approach would be optional.

In general, we support the concept of creating a regulatory framework under which States can be authorized to establish geospatial datasets that identify aquatic resources that are considered jurisdictional waters under the Clean Water Act. It is important that any such program remain optional and does directly or indirectly impose new mandates on States. If adopted on that basis, this type of program could help to make jurisdictional determinations more efficient, consistent, and widely accessible. AASHTO recommends a collaborative federal/state effort to discuss the numerous technical and policy issues involved in creating such databases.

Thank you for the opportunity to provide comments regarding potential changes to the definition of “water of the United States.” If you have any questions or would like additional information, please contact Shannon Eggleston, Program Director for Environment, at (202) 624-3649.

Sincerely,



Carlos Braceras
President, AASHTO and Executive Director, Utah Department of Transportation

²⁰ 84 Fed. Reg. 4192 (emphasis added).

²¹ 84 Fed. Reg. 4155-56.