

**WESTERN ASSOCIATION OF STATE HIGHWAY AND
TRANSPORTATION OFFICIALS**

Resolution 1-12

**Expressing Concern Regarding Environmental Protection Agency and US Army Corps of Engineers Joint
Guidance Pertaining to Clean Water Act Jurisdiction over Wetlands, Rivers, Streams and Lakes.**

WHEREAS, WASHTO affirms its commitment to environmental stewardship and the protection of our natural resources, and believes that regulatory streamlining and cost-effective implementation of environmental and transportation solutions can be achieved in concert with environmental protection; and

WHEREAS, WASHTO supports the objectives of the Clean Water Act (CWA) in protecting the waters of the United States, including wetlands, lakes, and streams, and recognizes the need to harmonize transportation facilities and programs with the objectives of the CWA; and

WHEREAS, decisions by the United States Supreme Court in 2001 (*Solid Waste Agency of Northern Cook County v. United States Corps of Engineers or SWANCC*) and in 2006 (*Rapanos v. United States or Rapanos*) limited the scope of the United States Army Corps of Engineers (Corps) CWA permitting program as applied to wetlands and isolated waters of the United States; and

WHEREAS, the Supreme Court's *Rapanos* decision clarifies that Section 404 of the CWA was not intended to protect ditches and other channels through which water flows intermittently, and also urges the Corps to consider whether wetlands possess a "significant nexus" with navigable waters; and

WHEREAS, *Rapanos* defines "significant nexus" as "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters;" and

WHEREAS, the CWA defines navigable waters as waters of the United States including territorial seas; and

WHEREAS, on December 2, 2008, the Corps and the United States Environmental Protection Agency (EPA) issued final guidance to implement the Supreme Court's *Rapanos* decision; and

WHEREAS, on May 2, 2011, the Corps and EPA developed draft guidance on Identifying Waters Protected by the Clean Water Act (draft CWA guidance) to clarify the Corps and EPA's understanding of the CWA following the Supreme Court decisions; and

WHEREAS, EPA and the Corps stated that the intent of the draft CWA guidance is to clarify existing understandings, reduce confusion, and increase certainty as it relates to making jurisdictional determinations about whether waters are protected by the CWA; and

WHEREAS, WASHTO believes that the draft CWA guidance actually creates further uncertainty and confusion and will cause a significant number of roadside ditches to fall within the definition of possessing a "significant nexus" with navigable waters; and

WHEREAS, the draft CWA guidance will greatly expand the number of ditch maintenance projects that require a jurisdictional determination or a CWA permitting, while the majority of ditch maintenance projects currently proceed without the need to obtain jurisdictional determinations or a CWA permit and these increased requirements to obtain a jurisdictional determination and a CWA permit will make ditch maintenance projects more time consuming and costly with little if any environmental benefit and diverting scarce resources from other programs that provide environmental benefit; and

WHEREAS, subsequent to implementation of the proposed guidance, the Corps and EPA intend to undertake a rulemaking to further clarify the extent of CWA jurisdiction consistent with the Supreme Court's decisions; and

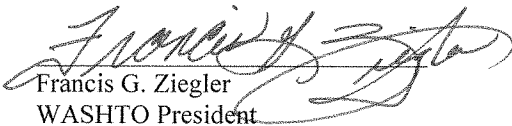
WHEREAS, WASHTO believes that the standards for making jurisdictional determinations under the CWA should be clarified first through a rulemaking, followed by implementing guidance, as this confusing and complex issue should be vetted through the full rulemaking process to ensure EPA and the Corps obtains the benefit of public and stakeholder input as they address this important and complex issue.

NOW THEREFORE BE IT RESOLVED THAT, WASHTO urges the Corps and EPA to:

- withdraw the draft CWA guidance and instead initiate a rulemaking;
- work collaboratively with states and local governments to clarify federal jurisdiction under the CWA in a manner that is reasonable, flexible and respects the roles and responsibilities of state and local governments in ensuring the protection of aquatic resources; and
- provide a "safe harbor" that allows ditch maintenance projects to proceed without the need for a jurisdictional determination or permitting under the CWA; and

BE IT FURTHER RESOLVED THAT, WASHTO supports legislation consistent with the above recommendations.

Adopted by the WASHTO Board of Directors on May 20, 2012.


Francis G. Ziegler
WASHTO President

5/20/12
Date