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By Electronic Mail (ow-docket@epa.gov)

Office of Water  
United States Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Re: Draft Guidance on Identifying Waters Protected by the Clean Water Act  
Docket ID Number EPA-HQ-OW-2011-0409

Ladies and Gentlemen:

The New York City Department of Environmental Protection (“DEP”) offers the following comments in response to the May 2, 2011, request for comments made by the United States Environmental Protection Agency (“EPA”) and United States Army Corps of Engineers (“Corps”) regarding “Draft Guidance on Identifying Waters Protected by the Clean Water Act” (“Draft Guidance”). See 76 Fed. Reg. 24479. EPA and the Corps of Engineers issued the Draft Guidance to clarify the extent of waters subject to federal jurisdiction under the Clean Water Act (“CWA”) and to implement the United States Supreme Court’s decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”) and *Rapanos v. United States*, 547 U.S. 715 (2006) (“*Rapanos*”). DEP is generally supportive of the EPA’s and Corps efforts but has two specific suggestions to strengthen and clarify the Draft Guidance.

First, DEP is concerned that the Draft Guidance will not be a rule and therefore, as EPA and the Corps acknowledge, will not be binding. The Draft Guidance should be promulgated through notice and comment rulemaking. This suggestion derives from our overarching concern, and experience, that EPA adopts as “Guidance” standards, which, in effect, EPA enforces as a rule. The Draft Guidance constitutes a “statement of general ... applicability and future effect designed to implement, interpret, or prescribe law or policy” and is therefore a rule for purposes of the Administrative Procedure Act. 5 U.S.C. § 551(4). Rulemaking is both the appropriate mechanism for addressing these issues under the APA and also the safest way to ensure that the guidance is not subject to challenge. As such, EPA should follow the public comment and notice provisions required for rulemakings. As a matter of law and policy, DEP does not believe it is appropriate for agencies to use guidance documents as a substitute for duly adopted rules.

Second, EPA’s permitting and enforcement programs under other sections of the Clean Water Act, which are subject to the same jurisdictional limits, have

sought to regulate releases of wastewater from sewer systems, regardless of whether those releases reach the “waters of the United States.” In particular, the EPA enforcement office has sought to, and has obtained orders consenting to, oversight of street flooding and basement backups, on the theory that these conditions relate to what the Agency deems to be the proper operation of a sewer system. While street flooding and basement backups are important quality of life matters for citizens to be addressed by cities, there is no evidence that Congress intended to federalize such issues. If EPA is not consistent about its treatment of “waters of the United States” in the point source permitting and enforcement context, then it will create uncertainty about its jurisdiction in the wetlands permitting context. By inviting challenges to its jurisdiction in other contexts, EPA will undermine the objective of the Draft Guidance, which is to resolve such issues outside of litigation. We note that these comments are consistent with comments submitted by DEP on March 18, 2011, and June 27, 2011, in connection with EPA’s retrospective review of its regulations under Docket No. EPA-HQ-OA-2011-0156.

With those important considerations, DEP does support the approach reflected in the Draft Guidance, which would assist DEP in protecting drinking water quality by clarifying federal jurisdiction over several categories of waters of the United States, including intermittent and non-permanent tributaries and their adjacent wetlands that nonetheless have the potential to influence the quality of DEP’s drinking water supply. DEP supplies unfiltered drinking water from 19 reservoirs to 9 million residents of New York State, including 8 million residents of New York City. The New York City Watershed feeding these reservoirs spans millions of acres and includes portions both east and west of the Hudson River.

New York City’s reservoirs are fed by largely non-navigable tributaries in the upper reaches of the Croton, Delaware, and Neversink Rivers and the Esopus, Rondout, and Schoharie Creeks. In fact, approximately 36% of the approximately 3,200 miles of tributaries in the National Wetlands Inventory (“NWI”) for the New York City Watershed are mapped as intermittent features. Approximately 25% of NWI wetlands in the East of Hudson and 40% of wetlands in the West of Hudson Portion of the New York City Watershed are estimated to lack permanent connections to downstream waters. This includes approximately 5% of East of Hudson and 13% of West of Hudson NWI wetlands that are “isolated,” in the sense that they exhibit no discernible surface water connection to downstream waters. DEP has demonstrated the nexus of adjacent wetlands to downstream waters through its reference wetland monitoring program in the New York City Watershed, where significant baseflow support and carbon outflow were measured from wetlands adjacent to both relatively permanent and non-relatively permanent tributaries.

Confirming federal wetland jurisdiction over such wetlands would benefit the New York City Watershed, particularly in the West of Hudson portion of the watershed, where only one of 50 municipalities has adopted local regulations to protect wetlands, and nearly 70% of the wetlands of interest to DEP are not protected by State regulations.<sup>1</sup> Given the significant role of wetlands in water quality maintenance and amelioration, protecting these source areas is crucial for New York City’s unfiltered water supply watershed. Because of the importance of these wetlands to

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<sup>1</sup> As a general rule, the New York State Department of Environmental Conservation’s jurisdiction is limited to freshwater wetlands of over 12.5 acres. *See* 6 NYCRR § 664.2(f).

New York City's drinking water supply, DEP urges EPA to adopt regulations to reduce current ambiguities regarding CWA jurisdiction and thus ensure that these critical waters are protected.

DEP also strongly supports the Draft Guidance recommendation of watershed-scale evaluation of all waters within a single category, such as "tributaries," "adjacent wetlands," and "other waters." This watershed-scale treatment of "similarly situated waters" is scientifically valid and will benefit water quality, given the capacity of all tributaries to affect downstream traditionally navigable waters and interstate waters and the documented cumulative functions contributed by both adjacent and isolated wetlands on a watershed scale.

Particularly in the respects described below, the Draft Guidance provides a clearer and broader interpretation of the scope of Clean Water Act jurisdiction as established under the *SWANCC* and *Rapanos* decisions than the 2003 and 2008 guidance. See "Joint Memorandum," 68 Fed. Reg. 1991 (January 15, 2003) ("2003 Guidance") and "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*" (December 2, 2008) ("2008 Guidance"). DEP urges EPA and the Corps to adopt agency rules superseding and clarifying the existing regulations at 33 C.F.R. § 328.3(a) and 40 C.F.R. § 230.3(s). At a minimum, however, DEP supports the issuance of final guidance incorporating the following critical elements of the Draft Guidance, which will largely restore Clean Water Act jurisdiction over ecologically and hydrologically important waters, particularly non-relatively permanent tributaries to traditionally navigable waters and their adjacent wetlands, and thus bolster DEP's watershed protection efforts.

Significant Nexus Analysis: At the core of the term "significant nexus" as it has come to be used under the *SWANCC* and *Rapanos* decisions is the meaning of "similarly situated," because wetlands have a significant nexus to traditional navigable waters and are therefore "waters of the United States" "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." 547 U.S. 715, 780 (2006) (Kennedy, J. concurring). The 2008 Guidance interpreted "similarly situated" wetlands to include all wetlands adjacent to the same tributary. 2008 Guidance at 8, 10. The Draft Guidance considers waters to be "similarly situated" with waters of the same resource type and waters to be in the "same region" if they fall within the same watershed of the nearest traditionally navigable water through a single point of entry. Draft Guidance at 7-9. This proposed change is scientifically valid as it enables the agencies to cumulatively assess all tributaries, adjacent wetlands, and other waters within a watershed for a significant nexus determination. DEP supports this approach as it would restore jurisdiction to functionally significant "waters of the United States" and decrease workload in the long term.

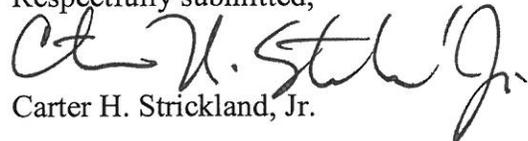
Tributaries: The Draft Guidance defines a water as a tributary "if it contributes flow to a traditional navigable water or interstate water, either directly or indirectly by means of other tributaries." Draft Guidance at 11. If a water qualifies as a tributary under either the plurality standard or Justice Kennedy's standard set forth in *Rapanos*, as explained in the Draft Guidance, the water will be jurisdictional. *Id.* With respect to the plurality standard, the Draft Guidance broadens the concept of "seasonal flow" as compared with the 2008 Guidance, by replacing the concept of a three-month duration with the notion that the length or extent of what is "seasonal"

may vary across the country. Draft Guidance at 13. DEP believes this language change is warranted given the wide range of flow conditions due to geologic, climactic, and seasonal variation. Similarly, in interpreting the Kennedy standard, the Draft Guidance relies on readily identifiable criteria such as the connectivity and capacity of tributary systems to affect downstream waters. Draft Guidance at 14. DEP expects that jurisdiction will be restored to non-relatively permanent tributaries under the Draft Guidance, again enhancing watershed protection efforts.

Adjacent Wetlands: As with tributaries, EPA and the Corps will assert CWA jurisdiction over adjacent wetlands that meet either the plurality standard or the Kennedy standard. Draft Guidance at 15. DEP particularly notes the importance of the clarification in the Draft Guidance that, for purposes of applying the Kennedy standard, the unbroken surface or shallow sub-surface hydrologic connection required to establish adjacency between a wetland and jurisdictional waters need not itself be a water of the U.S., or may be located beneath the root zone, and may be indicated by factors such as landscape position, soil survey, or stream hydrograph. Draft Guidance at 17. DEP believes that these factors are all reasonable indicators of hydrologic or ecological connectivity, and that these clarifications will broaden the scope of CWA jurisdiction, aiding in watershed protection efforts.

DEP appreciates the opportunity to provide these comments and to inform EPA's and the Corps's efforts to clarify the definition of "waters of the United States" under the Clean Water Act. DEP looks forward to working with the Agencies on this process as it moves forward, and would be happy to discuss these comments further.

Respectfully submitted,



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c: (U.S. Mail):  
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