



EPA and Army Corps of Engineers Seek to Extend Reach of Clean Water Act

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On April 27, U.S. EPA and U.S. Army Corps of Engineers proposed new draft guidance that they assert will expand the number of waters currently protected by the Federal Clean Water Act ("CWA"). While the proposed guidance will be applicable to all CWA programs, including discharge permits, spill response, water quality certification, and wetlands, it is in wetlands that it will likely have its greatest impact.

The draft guidance provides interpretations of recent Supreme Court opinions on CWA jurisdiction, and asserts that the understandings of the court rulings as set forth in the guidance will lead to an increase in the extent of waters covered by the federal programs as compared to those currently covered. In the wake of Supreme Court opinions, such as that in *Rapanos v. United States*, 547 U.S. 715 (2006) where the court failed to muster a clear majority behind a clearly articulated standard, courts and the agencies have been uncertain about the jurisdictional boundaries of the CWA. This guidance is an attempt to restore some predictability and consistency.

However, the draft guidance still relies on a case-by-case analysis by EPA and the Corps. It therefore contains lengthy discussions of how the "significant nexus" test espoused by Justice Kennedy in *Rapanos* may be applied in various circumstances, as well as considerable scientific and legal analysis of the issues in its appendix.

Perhaps most significantly, the draft guidance clearly states that it is intended as a precursor to a rulemaking that will make the principles in the guidance legally enforceable. According to the Federal Register notice, the EPA is accepting public comments on the draft guidance through July 1, 2011.

The following is a summary of key points in the draft guidance.

According to the draft guidance, the following waters are subject to CWA jurisdiction:

- Traditional navigable waters
- Interstate waters
- Wetlands adjacent to either traditional navigable waters or interstate waters
- Non-navigable tributaries to traditional navigable waters that are relatively permanent, meaning they contain water at least seasonally
- Wetlands that directly abut relatively permanent waters

In addition, the following waters are protected by the CWA if a fact-specific analysis determines they have a "significant nexus" to a traditional navigable water or interstate water:

- Tributaries to traditional navigable waters or interstate waters
- Wetlands adjacent to jurisdictional tributaries to traditional navigable waters or interstate waters
- Waters that fall under the "other waters" category of the regulations. The guidance divides these waters into two categories, those that are physically proximate to other jurisdictional waters and those that are not, and discusses how each category should be evaluated.

The following aquatic areas are generally not protected by the CWA:

- Wet areas that are not tributaries or open waters and do not meet the agencies' regulatory definition of "wetlands"

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- Waters excluded from coverage under the CWA by existing regulations
- Waters that lack a “significant nexus” where one is required for a water to be protected by the CWA
- Artificially irrigated areas that would revert to upland should irrigation cease
- 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
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons
- Water-filled depressions created incidental to construction activity
- Groundwater drained through subsurface drainage systems and
- Erosional features (gullies and rills), and swales and ditches that are not tributaries or wetlands

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