

New guidance on identifying waters protected by the Clean Water Act

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By **Robert J. Joyce**

On April 27, EPA issued a draft of its controversial new Guidance on Identifying Waters Protected by the Clean Water Act (“Guidance”). The guidance is the latest effort by EPA and the Army Corps of Engineers (the “Agencies”) to put their gloss on recent Supreme Court decisions defining the Clean Water Act’s (“CWA”) core jurisdictional focus - “waters of the United States.” The new guidance would supersede two earlier guidance documents issued in 2002 and 2008 under the Bush Administration, and purportedly embodies “lessons learned since 2008” and “reflects the agencies’ understandings with respect to CWA jurisdiction.” As expected, the guidance is proving to be extremely controversial.



The controversy has its roots in two Supreme Court cases decided in 2001 and 2006. In the first decision, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“SWANCC”), a divided court ruled that the CWA does not grant the federal government jurisdiction over non-navigable, isolated, intrastate waters. As such, SWANCC removed a significant amount of water from federal jurisdiction. In the more recent decision in *Rapanos et ux. v. United States* (“*Rapanos*”), the justices were even more divided. In the *Rapanos* plurality opinion, Justice Scalia expressed the opinion that jurisdiction extends beyond traditional navigable waters to “relatively permanent, standing or flowing bodies of water.” While five of the justices voted to overturn a lower court ruling preventing the destruction of isolated wetlands, the decision of the court was essentially 4 to 4, with the last justice (Kennedy) not fully agreeing with either of the other groups. Justice Kennedy expressed the view that jurisdiction extends to waters that “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical or biological integrity of other covered waters more readily understood as ‘navigable.’”

In the new guidance, the agencies reaffirmed their prior position that they have jurisdiction over waters that meets either the *Rapanos* plurality’s

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standard or Justice Kennedy's "significant nexus" standard, but expressed the view that "previous guidance did not make full use of the authority provided by the CWA to include matters within the scope of the Act, as interpreted by the court." Consequently, the clear intent of the agencies is to expand the universe of waters that fall within limits of federal jurisdiction. The guidance is lengthy and complex, and a summary of its specific provisions is beyond the scope of this article. Suffice it to say, however, that the pendulum of federal control over isolated waters has swung in the far opposite direction from SWANCC's movement toward limited federal jurisdiction.

Because of its expansion of federal jurisdiction, the guidance has garnered staunch resistance from industry groups and conservative political leaders. Senator James Inhofe (R-OK), who is the ranking member of the Senate Committee on Environment and Public Works strongly opposes the guidance and is expected to play a significant role in crafting legislation to explicitly limit federal CWA jurisdiction. According to Inhofe, "It's long past time for EPA to follow the Supreme Court's ruling that circumscribe its water permitting authority." Organizations representing the oil and gas and agriculture industries have been very active in opposing the guidance. Because the guidance will affect not just wetlands issues, but also the NPDES permitting program, EPA's oil spill program and state water quality certification processes, virtually every industry should examine its impact on their operations.

Public notice regarding the guidance was published in the May 2, 2011 *Federal Register*. The agencies will be accepting public comment on the guidance through July 1, 2011. The agencies have indicated that once the guidance is finalized, they will initiate a formal rulemaking to further define the scope of their CWA jurisdiction.

- [The Guidance \(Guidance on Identifying Waters Protected by the Clean Water Act\) online](#)

LINKS

- [Robert Joyce's bio](#)
- [McAfee & Taft RegLINC - May 2011](#)

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