

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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