

Identifying protected waters

McAfee & Taft RegLINC - September 2011

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The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers are in the final stages of updating their Draft Guidance on Identifying Waters Protected by the Clean Water Act (“Guidance”). While the period for public comment was extended from July 1 to July 31, the groups do not anticipate the extension will slow their efforts. Instead, they plan to take into consideration continued stakeholder and public comment while finalizing the update.



The Guidance is not new. Previous guidance on the scope of “waters of the U.S.” was issued in 2003 and 2008 by field staff for use by field staff. The intent was to identify which waters fall within the definition of “waters of the United States” and, therefore, the protection of the Clean Water Act. While not a legal document and not binding on the government, the Guidance provides a framework for application of the law and valuable insight regarding agency staff views of the scope of the protection.

The desire to update the 2008 Guidance document arose following the U.S. Supreme Court decisions in *Rapanos v. United States* and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps* (“SWANCC”). Courts and agencies around the country attempted to determine how “waters of the U.S.” may have changed as a result of these decisions. The fact that the justices of the U.S. Supreme Court could not even agree on how to categorize water in the *Rapanos* decision furthered the desire to update the Guidance document to reflect the agency’s position on the identification of protected waters. Again, while the Guidance contains much information and insight, it does not carry the force of law and it is not required that the government or each individual field officer follow the document’s provisions. Nonetheless, it is a valuable tool; not only is it valuable to those within the agencies who are attempting to carry out the law, but it is also valuable for those attempting to comply with government regulation.

The draft Guidance contains several sections:

- Traditional navigable waters classification
- Interstate waters classification

- “Significant nexus” standard, as described by Justice Kennedy in the *Rapanos* decision
- Tributary jurisdictional issues
- “Adjacent wetlands” jurisdiction
- “Other waters” classification
- Examples of waters generally not considered “waters of the U.S.”
- Necessary documentation to support decisions regarding whether waters are protected

The agency’s interpretation of the statutes, regulations implementing the statutes, and case law is valuable to those who interact with the agency on water issues. Within each of the sections of the Guidance is valuable legal and scientific information regarding the relevant areas of regulation and considerations the agency will make in determining whether particular water is protected, within the bounds set by the U.S. Supreme Court. Additionally, the Guidance contains an appendix which contains the legal and scientific bases for the sections within the document.

While the time to comment on the draft Guidance document has passed, those with an interest in water issues should keep an eye out for the final product, which will supersede the 2008 Guidance upon finalization.

LINKS

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