

Draft Guidance on Identifying Waters Protected by the Clean Water Act

Overview

- On April 27, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) issued yet another draft guidance concerning the scope of their jurisdiction under the Clean Water Act (CWA).
- The draft guidance is intended to clarify how the EPA and the Corps interpret the existing requirements of the CWA and their implementing regulations in light of the *SWANCC* and *Rapanos* Supreme Court cases and provides guidance to agency field staff in making determinations about whether waters are protected by the CWA.
- The guidance is expected to reduce complexity, improve predictability, and increase consistency of Corps and EPA jurisdictional determinations and, by doing so, reduce costs and delays in obtaining CWA permits.
- However, the agencies acknowledge and expect that the number of waterbodies found subject to CWA jurisdiction “will increase significantly” under the new guidance.
- Once finalized, the guidance will supersede the existing guidance issued in 2003 and 2008 on the scope of “waters of the United States” subject to the CWA.
- The good news is that the agencies are soliciting public comments on the draft. Comments are due July 1, 2011.
- After receiving and taking account of public comments on this document, the agencies intend to propose revisions to their existing regulations in 2011 “to provide further clarification” of the waters that are jurisdictional under the CWA.

Background

The CWA applies only to waters that are “waters of the United States.” For nearly ten years, however, due to two Supreme Court decisions, identifying which waters may be protected under the Act has not been easy or predictable. In 2003, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, the Court addressed the question of CWA jurisdiction over isolated, non-navigable, intrastate ponds, and concluded that jurisdiction could not be based solely on the presence of migratory birds. In 2006, in *Rapanos v. United States & Carabell v. United States (Rapanos)*, the Court addressed CWA protections for wetlands adjacent to non-navigable tributaries, and issued five opinions with no single opinion commanding a majority. The plurality opinion, authored by Justice Scalia, stated that “waters of the United States” extended beyond traditional navigable waters to include “relatively permanent, standing or flowing bodies of water.” The plurality went on to clarify that relatively permanent waters “do not necessarily exclude” streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought, and seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months. The plurality opinion also asserted that only wetlands with a “continuous surface connection” to other jurisdictional waters are considered “adjacent” and protected by the CWA.

Justice Kennedy’s concurring opinion took a different approach from Justice Scalia’s. Justice Kennedy concluded that “waters of the United States” included wetlands that had a significant

nexus to traditional navigable waters, “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.’”

Finally, the four justices who signed on to Justice Stevens’ dissenting opinion would have upheld jurisdiction under the agencies’ existing regulations and stated that they would uphold jurisdiction under either the plurality or Justice Kennedy’s opinion.

In an attempt to clarify what this decision meant in the field, the Corps and EPA issued two memoranda in June 2007, followed by a guidance document in 2008 to address which waters are subject to CWA § 404 jurisdiction. Specifically, the guidance identified those waters over which the agencies will assert jurisdiction categorically and on a case-by-case basis, based on the reasoning of the *Rapanos* opinions. In short, the 2008 guidance stated that the agencies will:

- Assert jurisdiction over traditional navigable waters, wetlands adjacent to traditional navigable waters, non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months), and wetlands that directly abut such tributaries;
- Decide jurisdiction over non-navigable tributaries that are not relatively permanent, wetlands adjacent to non-navigable tributaries that are not relatively permanent, and wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water;
- Generally not assert jurisdiction over swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow), or ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water; and
- Apply the significant nexus standard as follows: "A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.

Implementation of the 2008 guidance has been a challenge for both property owners and Corps staff, as the documentation is lengthy and cumbersome, there is little consistency across districts, subjective decision-making still occurs, and there is no assurance that by following their guidance, the agencies are staying within the bounds of the authority conferred by the CWA.

Even Congress has joined in on the debate over the scope of CWA jurisdiction. For nearly a decade, legislation has been introduced in the House and Senate that would fundamentally alter and greatly expand the scope of the CWA by deleting the term ‘navigable.’ The first such version of a bill was introduced in 2002 and various iterations have been reintroduced in the 108th, 109th, 110th and 111th Congresses. None of these bills have come to a vote due to the fact that changing the scope of the CWA has always been highly controversial. Despite Congress’ reluctance to do so, the agencies have sought to expand the scope of their authority to effectively take control over every puddle, ditch and wash, regardless of its environmental value or

connection to a navigable water. Even though the language of the CWA has remained unchanged for decades, the agencies continue to broaden their reach.

Draft Guidance Summary

In an attempt to rectify the uncertainties of its earlier guidance, as well as to “make full use of the authority provided by the CWA to include waters within the scope of the Act,” on April 27, the agencies issued new draft guidance on identifying waters protected by the CWA. The agencies continue to believe, as expressed in previous guidance, that it is most consistent with *Rapanos* to assert jurisdiction over waters that satisfy either the plurality or the Justice Kennedy standard, since a majority of justices would support jurisdiction under either. However, after careful review of the opinions, the agencies concluded that the previous guidance did not make full use of their CWA authority, as interpreted by the Court. Thus, the draft guidance provides a more complete discussion of the agencies’ interpretation, including how waters with a "significant nexus" to traditional navigable waters or interstate waters are protected by the CWA.

The agencies expect, based on relevant science and recent field experience, that the extent of waters over which they assert jurisdiction under the CWA will increase under this draft guidance, compared to the extent of waters over which jurisdiction has been asserted under existing guidance. They also emphasize that each jurisdictional determination will be made on a case-by-case basis considering the facts and circumstances of the case and consistent with applicable statutes, regulations, and case law.

Because there is only one CWA definition of “waters of the United States,” the draft guidance, like the earlier documents it replaces, necessarily will apply to decisions concerning whether a waterbody is subject to any of the programs authorized under the CWA. Although *SWANCC* and *Rapanos* specifically involved section §404 of the CWA and discharges of dredged or fill material, the term “waters of the United States” must be interpreted consistently for all CWA provisions that use the term, including the §402 National Pollutant Discharge Elimination System (NPDES) permit program, the water quality standards and total maximum daily load programs under §303, and the §401 State water quality certification process. However, while there is only one CWA definition of “waters of the United States,” there may be other statutory factors that define the reach of a particular CWA program or provision.

The draft guidance is divided into eight sections, which are summarized below:

Section 1: Traditional Navigable Waters

EPA and the Corps will continue to assert CWA jurisdiction over traditional navigable waters (TNWs) (e.g., “all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide”).

Change from 2008 Guidance:

- The scope of the TNWs is expanded in the guidance to include any waterbody that can support *waterborne recreational use*, even if such use only occurred one time for the sole purpose of demonstrating that the water could be used for recreation. This is important

because, under the guidance, all waters with a significant nexus to traditional navigable waters would be jurisdictional.

Section 2: Interstate Waters

EPA and the Corps will continue to assert CWA jurisdiction over all interstate waters (IWs) (e.g., all rivers, lakes and other waters that flow across, or form a part of, State boundaries).

Change from 2008 Guidance:

- There is currently no special status given to IWs, but the draft guidance now asserts that IWs are comparable to TNWs, thus waters with a significant nexus to IWs are jurisdictional, as are wetlands adjacent to IWs and waters/tributaries that flow into IWs.

Section 3: Significant Nexus Analysis

EPA and the Corps will assert CWA jurisdiction over waters with a significant nexus to TNWs, IWs, or their jurisdictional tributaries if the waters alone or in combination with other like waters that are “similarly situated” in the same watershed and in “close physical proximity” to the jurisdictional water have an effect on the chemical, physical, or biological integrity of the TNW or IW that is more than “speculative or insubstantial.” The guidance continues to perpetuate the notion from previous guidance that any relationship that is more than speculative or insubstantial will qualify as a “significant” nexus instead of requiring that the nexus actually be substantial.

Change from 2008 Guidance:

- All categories of waters, not just wetlands, can now be aggregated together to demonstrate a significant nexus to TNWs or IWs.
- The 2008 guidance limited the significant nexus analysis for tributaries to the tributary “reach,” defined as the length of the tributary to where it joined a higher order stream. For impacts to an adjacent wetland, the 2008 guidance evaluated only wetlands within the reach of the tributary to which the wetland was adjacent. The draft guidance eliminates the “reach” concept, and now requires all categories of waters “in the same watershed” to be aggregated and considered together in determining whether they have a significant nexus. A watershed is defined by the area draining into the nearest traditional navigable water or interstate water. This has the effect of adding potentially hundreds of tributaries and wetlands to the analysis, thus making it easier to find a significant nexus.

Section 4: Tributaries

EPA and the Corps will assert CWA jurisdiction over tributaries (defined in the draft guidance as a water that “contributes flow to a TNW or IW either directly or indirectly by means of other tributaries” and that have an ordinary high water mark and a bed and bank) if they meet either the plurality standard or the Kennedy standard.

- **Plurality:** A tributary is jurisdictional when it is connected directly or indirectly to a downstream TNW and flows at least seasonally. A water is considered to have “seasonal flow” when it has predictable flow during wet seasons in most years.

- **Kennedy:** A tributary is jurisdictional when it is a tributary to a TNW or IW and it, alone or in combination with other tributaries, has a significant nexus with the traditional navigable water or interstate water.

Certain types of erosional features, such as gullies and rills, are not tributaries for the purpose of the guidance, and are generally not considered jurisdictional.

Non-tidal ditches are also not tributaries except where they have a bed, bank, and ordinary high water mark; connect directly or indirectly to a TNW or IW; and have one of the following five characteristics:

- natural streams that have been altered (e.g., channelized, straightened or relocated);
- ditches that have been excavated in waters of the U.S., including wetlands;
- ditches that have relatively permanent flowing or standing water;
- ditches that connect two or more jurisdictional waters of the U.S.; or
- ditches that drain natural water bodies (including wetlands) into the tributary system of a traditional navigable or interstate water.

If a ditch is considered a tributary, it will be evaluated in the same manner as other tributaries. Tidal ditches are by definition waters of the U.S.

Natural and man-made swales are also not tributaries under the guidance. In certain circumstances ditches or swales include areas that meet the regulatory definition of “wetlands.”

Change from 2008 Guidance:

- The draft guidance takes liberties with the Plurality standard for tributaries and gives District personnel great discretion in finding that waters flow seasonally.
- If a tributary has a bed and bank, an ordinary high water mark and is part of a tributary system that drains into a downstream traditional navigable water or interstate water, generally EPA and the Corps will conclude that the tributary can be demonstrated on a case-by-case basis to have a significant nexus with the downstream traditional navigable water or interstate water. In other words, if the waterbody has the characteristics of a tributary as defined above, it will very likely satisfy the draft guidance’s significant nexus test because water generally flows downhill (and thus ‘drains to a downstream traditional navigable water or interstate water’).

Section 5: Adjacent Wetlands

EPA and the Corps will continue to assert jurisdiction over wetlands adjacent to TNWs and now also take jurisdiction over wetlands adjacent to IWs.

EPA and the Corps will assert CWA jurisdiction over wetlands that are adjacent to other waters if they meet either the plurality standard or the Kennedy standard.

- **Plurality:** An adjacent wetland is jurisdictional if it is adjacent to a relatively permanent, non-navigable tributary that is connected to a downstream TNW and a continuous surface connection exists between the wetland and a relatively permanent tributary where the wetland directly abuts the water. A “continuous surface connection” refers to a physical

connection between the wetland and the jurisdictional water, but does not require the presence of water between the wetland and the jurisdictional water.

- **Kennedy:** An adjacent wetland is jurisdictional if it is adjacent to a TNW or non-wetland interstate water or it is adjacent to a tributary, lake, reservoir, or other jurisdictional water (except another wetland) and either alone or in combination with other adjacent wetlands in the watershed has a significant nexus to the nearest downstream TNW or IW. In other words, where a wetland is adjacent to a jurisdictional waterbody other than a TNW or IW, the agencies will assert jurisdiction only if there is a showing of significant nexus. The agencies consider wetlands to be “adjacent” if one of the following three criteria is satisfied: there is an unbroken surface or shallow sub-surface hydrologic connection; the wetlands are physically separated from jurisdictional waters by man-made dikes or barriers and the like; or the wetland’s physical proximity to a jurisdictional water is reasonably close (“neighboring”).

Change from 2008 Guidance:

- None.

Section 6: Other Waters

The “other waters” or “(a)(3) waters” provision of EPA’s and the Corps’ regulations includes:

“All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.”

EPA and the Corps will make case-by-case, fact-specific determinations of CWA jurisdiction under (a)(3) depending on where the subject water lies within the landscape.

- Physically proximate other waters will be considered jurisdictional if they are in close physical proximity to traditional navigable waters, interstate waters, or their jurisdictional tributaries, and alone or in combination with similarly situated proximate other waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters or interstate waters. For purposes of the guidance, proximate other waters are non-wetland waters that would satisfy the regulatory definition of “adjacent” if they were wetlands. They include lakes, ponds, and other non-wetland waters that are bordering, contiguous, or neighboring to jurisdictional waters, including waters that are separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes and the like.
- Other waters that are not physically proximate to jurisdictional waters, including isolated, intrastate, non-navigable waters and wetlands that would not meet the regulatory definition of “adjacent” may be deemed jurisdictional if they have a significant nexus to jurisdictional waters and agency field staff refer the determination to Headquarters and obtain formal project-specific approval before asserting or denying jurisdiction.

Change from 2008 Guidance:

- Under the 2008 guidance, the agencies adopted a “phone home” approach to most (a)(3) waters, finding that if a District office was going to assert jurisdiction or decline

jurisdiction under the “other waters” section of the regulations, they would need to elevate the decision. The draft guidance requires elevation to Headquarters only for other waters that are not physically proximate to jurisdictional waters.

- It is clear that the agencies are seeking to revitalize jurisdiction over “other waters,” including those lacking a hydrologic connection to TNWs or IWs. This will be done with a case-by-case approach unless the agencies implement a rulemaking. It is this category of waters that is subject to some of the greatest confusion. The draft guidance only perpetuates that uncertainty.
- Ultimately, the agencies are trying to use Kennedy’s significant nexus standard to assert jurisdiction over isolated waters and “other waters” that may not fall into the other categories. The draft guidance essentially uses Kennedy’s *Rapanos* opinion to negate *SWANCC* – a decision with which Kennedy agreed.

Section 7: Waters Generally Not Jurisdictional

EPA and the Corps will not generally assert CWA jurisdiction over:

- Wet areas that are not tributaries or open waters and do not meet the regulatory definition of wetlands.
- Waterbodies excluded from coverage under the CWA by existing regulations.
- Waters that lack a significant nexus when one is required for jurisdiction.
- Artificially irrigated areas which would revert to upland if the irrigation ceased.
- Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- Artificial reflecting pools or swimming pools excavated in uplands.
- Small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel, unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.
- Groundwater drained through subsurface drainage systems.
- Erosional features (gullies and rills), and swales and ditches that are not tributaries or wetlands.

Change from 2008 Guidance:

- None. EPA and the Corps have previously described categories of waters that are generally not “waters of the U.S.” in preambles to CWA regulations. 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986); 53 Fed. Reg. 20764, 20765 (Jun. 6, 1988). These exclusions are simply repeated in the Guidance.

Section 8: Documentation

EPA and Corps field staff should document in the administrative record the available information supporting a jurisdictional determination. In addition to location and other descriptive information regarding the water at issue, the record should include a clear explanation of the rationale for the jurisdictional conclusion, and include, as appropriate:

- Information leading to a conclusion that a water falls within a category considered in the guidance to be jurisdictional without the need to demonstrate a significant nexus;
- Information used to conclude that a water has a significant nexus when one is required for jurisdiction;
- Information supporting a conclusion that a water lacks a significant nexus, when one is required for jurisdiction; or
- Information supporting a conclusion that a water falls within one of the categories of geographic features generally considered non-jurisdictional.

In short, both affirmative and negative jurisdictional determinations should be well-documented to ensure both public transparency and defensibility should a jurisdictional conclusion be challenged. The level of documentation may be greater for jurisdictional determinations associated with complex projects.

Change from 2008 Guidance:

- None.

The Federal Register notice for the EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act can be found at <http://edocket.access.gpo.gov/2011/pdf/2011-10565.pdf>.

The full draft guidance document can be accessed at http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/cwa_wous_guide.pdf.

Comments on the draft guidance are due to EPA and the Corps by July 1, 2011.

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