



# Draft Clean Water Act Guidance Significantly Increases Agency Jurisdiction

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On May 2, 2011, the Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") published in the Federal Register a draft guidance document ("Guidance") explaining those waters that EPA and the Corps will now consider subject to the Clean Water Act ("CWA") regulatory and permitting processes. 76 Fed. Reg. 24479 (May 2, 2011). EPA and the Corps admit their new Guidance will significantly increase the waters covered by the CWA. The Guidance defines the jurisdictional reach of the CWA §404 dredge and fill permit program, the §402 National Pollution Discharge Elimination System permit program, the §311 oil spill program, the §303 water quality standards and total maximum daily load programs, and the §401 state water quality certification process. Anyone regulated, or needing a permit, under those programs should file comments on the Guidance by the July 1, 2011 deadline. After evaluating those comments, the agencies will publish a proposed rule, and later a final rule, pursuant to the Administrative Procedure Act. Affected parties should also participate fully in that rulemaking process.

Consistent with applicable Supreme Court decisions, the Guidance provides that if the water is already navigable, or can be made navigable, or the wetland is adjacent to navigable waters, it is jurisdictional. For everything else, the key test in the Guidance is whether there is a "significant nexus" between the tributary, wetland, or isolated water at issue and a traditionally navigable water.

The Guidance provides that a "significant nexus" can be found if the tributary, wetland, or isolated water (1) conveys or traps (thereby preventing the conveyance of) pollutants, sediment, nutrients, or flood waters through a hydrologic or other connection to a navigable water; or (2) provides habitat for resident species, including ducks and waterfowl, that move between the water in question and a navigable water. As to the evidentiary standard to be applied in determining "significance" for the nexus required to establish a tributary, wetland or isolated water as jurisdictional, the Guidance defines the word "significant" as "more than speculative or insubstantial."

The non-navigable water by itself need not have the significant nexus to a navigable water to be jurisdictional if the non-navigable water "in combination with similarly situated waters in the region" affects the chemical, physical, or biological integrity of jurisdictional waters. If the combination of similar waters "in the region" has a significant nexus to jurisdictional waters, then all such waters in the region are subject to the CWA even if the individual water by itself has no significant nexus. The Guidance defines "in the region" as "within the same watershed."

The Guidance is intended to explain how EPA and the Corps will implement the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006). However, the thrust of those decisions was that there are limits to the jurisdictional reach of the CWA. The Guidance appears to breach those limits and its "regional" provisions could be interpreted to bring virtually every waterway, wetland, and isolated water in the U.S. under the CWA. Following pollution, nutrients, flood waters etc. from any source to a navigable water; using an evidentiary standard of "more than speculative," and allowing the assertion of jurisdiction over any water belonging to a class of waters in the watershed that affects water quality in any way leaves the Corps and EPA with a vast amount of discretion to declare waters subject to the CWA and to require that persons obtain CWA permits for activities affecting those waters.

In addition to this significant proposed expansion in federal CWA jurisdiction that will require many more private and public persons and organizations to seek CWA discharge and dredge/fill permits, the State of California is currently proposing a duplicative regulatory policy that will expand State law jurisdiction even further than the proposed federal limits. The new State regulatory policy will require dischargers and projects in California to obtain duplicative State water board dredge and fill permits for any discharge or dredge/fill impacts to an even more broadly defined universe of "waters of the State." Therefore, it is even more imperative for affected parties in California to participate in the current proposed State guidance and federal rulemaking processes to protect their interests in light of the current efforts to expand the scope and scale of both State and federal regulatory jurisdiction.

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