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EPA and Army Corps of Engineers Issue Proposed Guidance That Would Expand Their Jurisdiction Under the Clean Water Act

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On May 2, 2011, the Environmental Protection Agency and U.S. Army Corps of Engineers jointly issued their proposed draft guidance for determining the extent to which wetlands and other water features are protected under the Clean Water Act. This guidance will likely result in a significant expansion of the agencies' scope of jurisdiction under that Act, in part because the draft guidance has a broad approach to what constitutes a "significant nexus" between water bodies. The agencies are soliciting comments on the proposed draft guidance, and the comment period will end on July 1, 2011.

The purpose of the draft guidance is to clarify how the EPA and Army Corps will identify waters protected by the Act and implement the U.S. Supreme Court's decisions concerning the extent to which waters are regulated under the Act. The Court has issued two such decisions in the past decade: *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC") and *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"). The draft guidance clarifies the agencies' view of their jurisdiction pursuant to the Act, its implementing regulations, and the SWANCC and *Rapanos* decisions. The draft guidance will inform agency field staff determinations as to whether a water feature can be regulated under the Act. Once finalized, the draft guidance will supersede previously issued guidance on the scope of "waters of the United States" regulated under the Act – guidance that was issued in the confused wake of the SWANCC and *Rapanos* decisions. Notably, previously issued jurisdictional determinations will not be re-opened as a result

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of the new guidance.

Both agencies acknowledge that the draft guidance will likely increase their jurisdiction. Specifically, the draft guidance provides that traditional navigable waters, interstate waters, wetlands adjacent to either traditional navigable waters or interstate waters, non-navigable tributaries to traditional navigable waters that are relatively permanent (i.e., contain water at least seasonally), and wetlands that abut relatively permanent waters will continue to be regulated under the Act. Additionally, tributaries to a traditional navigable waters or interstate waters, wetlands adjacent to jurisdictional tributaries to traditional navigable waters or interstate waters and waters that fall under the “other waters” category will also be regulated if a fact-specific analysis determines they have a “significant nexus” to a traditional navigable water or interstate water.

The draft guidance relies almost entirely on Justice Kennedy’s “significant nexus” standard from the *Rapanos* decision. This means that the agencies will scrutinize a water feature’s connection to traditional navigable waters to determine whether that feature, alone or in combination with similarly situated water features, has an effect on the chemical, physical, or biological integrity of traditional navigable waters or interstate waters that is more than “speculative or insubstantial.” The draft guidance also extends Justice Kennedy’s analysis of tributaries to interstate and “other waters,” addressing the failure of previous guidance to establish the proper framework for analyzing the scope of application of the Act to these water features.

Although the draft guidance does not currently have the force of law, it may become a regulation after it undergoes rulemaking and public comment review. We expect the draft guidance to spark a heated debate on the issue of the agencies’ reach over wetlands. Five opinions from five separate justices of the Supreme Court were issued in *Rapanos*, with no single opinion commanding a majority of the Court. Given that lack of consensus and the controversies remaining after the *SWANCC* decision, the agencies’ view of their scope of authority is likely to remain a source of controversy, particularly given that the draft guidance would expand that jurisdiction.

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