

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2011-0409; FRL_XXXX-X]

EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act

AGENCIES: Environmental Protection Agency (EPA); and U.S. Army Corps of Engineers, Department of the Army, Department of Defense.

ACTION: Notice of availability and request for comments.

SUMMARY: The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) are publishing for public comment proposed guidance that describes how the agencies will identify waters protected by the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA or Act) and implement the Supreme Court's decisions on this topic (*i.e.*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* (531 U.S. 159 (2001)) and *Rapanos v. United States* (547 U.S. 715 (2006)) (*Rapanos*)). The agencies believe that under this proposed guidance the number of waters identified as protected by the Clean Water Act will increase compared to current practice and this improvement will aid in protecting the Nation's public health and aquatic resources. The proposed guidance is consistent with the principles established by the Supreme Court cases

and is supported by the agencies' scientific understanding of how waterbodies and watersheds function.

In addition, the agencies believe that when the revised guidance is finalized and goes into effect, it will improve CWA program predictability and clarity regarding the scope of "waters of the United States" protected under the Act and that this improvement will have benefits for both the government and regulated parties. When finalized, this guidance would supersede previously issued guidance on this matter. This guidance will apply to all CWA programs, including section 303 water quality standards, section 311 oil spill prevention and response, section 401 water quality certification, section 402 National Pollutant Discharge Elimination System permits, and section 404 permits for discharges of dredged or fill material. The agencies seek public comment on all aspects of the proposed guidance, including interpretations and scientific underpinnings.

In addition to this guidance, the agencies expect to propose revisions of existing regulations to further clarify which waters are subject to CWA jurisdiction, consistent with the Supreme Court's decisions. Public comment on any such revisions will be requested at the time they are proposed.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2011-0409

by one of the following methods:

- *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *E-mail*: owdocket@epa.gov. Include EPA-HQ-OW-2011-0409 in the subject line of the message.
- *Mail*: Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Attention: Docket ID No. EPA-HQ-OW-2011-0409.
- *Hand Delivery/Courier*: Deliver your comments to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20460, Attention Docket ID No. EPA-HQ-OW-2011-0409. Such deliveries are accepted only during the Docket's normal hours of operation, which are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information. The telephone number for the Water Docket is 202-566-2426.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OW-2011-0409. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to

EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA might not be able to consider your comment. Avoid the use of special characters and any form of encryption, and ensure that electronic files are free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Some information, however, is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is publicly available only in hard copy. Publicly available docket materials are available electronically at <http://www.regulations.gov> or in hard copy at the Water Docket, EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., N.W., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202-566-1744, and the telephone number for the Water Docket is 202-566-2426.

FOR FURTHER INFORMATION CONTACT: Ms. Donna Downing, Office of Water (4502-T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington DC 20460; telephone number 202-566-1783; email address: CWAwaters@epa.gov. Mr. David Olson, Regulatory Community of Practice (CECW-CO-R), U.S. Army Corps of Engineers, 441 G

Street, NW, Washington, DC 20314; telephone number 202-761-4922; email address: david.b.olson@usace.army.mil.

SUPPLEMENTARY INFORMATION:

EPA and the Corps are seeking public comment on proposed joint agency guidance regarding identification of waters protected by the Clean Water Act. The agencies intention is that the final joint guidance will supersede the “Joint Memorandum” providing clarifying guidance on *SWANCC*, dated Jan. 15, 2003 (68 FR 1991, 1995), and “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*,” dated December 2, 2008, and available at <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>. Until that final guidance is issued, both the 2003 and 2008 CWA jurisdiction guidance remain in effect.

Congress enacted the Clean Water Act (CWA) “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” (33 U.S.C. 1251(a)). One of the mechanisms adopted by Congress to achieve that purpose is a prohibition on the discharge of any pollutants into “navigable waters” except in compliance with other specified sections of the CWA (33 U.S.C. 1311(a) and 1362(12)(A)). In most cases, this means compliance with a permit issued pursuant to CWA section 402 (33 U.S.C. 1342) or section 404 (33 U.S.C. 1344). The CWA provides that “[t]he term ‘navigable waters’ means the waters of the United States, including the territorial seas” (33 U.S.C. 1362(7)). EPA and the Corps have further defined the term “waters of the United States” in regulations (40 CFR 230.3(s) and 33 CFR 328.3(a); substantively similar regulatory definitions appear at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 232.2, 300.5, part 300

App. E, 302.3 and 401.11).

The U.S. Supreme Court has addressed the scope of waters of the United States protected by the CWA in three cases, two of which are specifically addressed by the draft guidance. In *SWANCC*, the Court addressed the question of CWA jurisdiction over isolated ponds, and concluded that CWA jurisdiction could not be based solely on the presence of migratory birds. In *Rapanos*, the Court addressed CWA protections for wetlands adjacent to tributaries, and issued five opinions with no single opinion commanding a majority of the Court. Neither *SWANCC* nor the opinions in *Rapanos* invalidated any of the regulatory provisions defining “waters of the United States.” The Court also addressed the question of CWA jurisdiction in an earlier case, *Riverside Bayview Homes*. While not specifically addressed in the current guidance, this case informed the Court’s decisions in the latter two cases.

The agencies believe it is advisable to replace existing guidance documents interpreting *SWANCC* and *Rapanos* in order to implement the CWA in a manner that is consistent with those opinions, reflects the best available science, and recognizes recent field implementation experience. By reflecting such developments, the proposed guidance made available today for public comment is expected, once it is finalized after considering all comments received, to provide clearer direction to field staff in implementing the Court decisions and reduce uncertainty in the regulated community.

EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by
the Clean Water Act

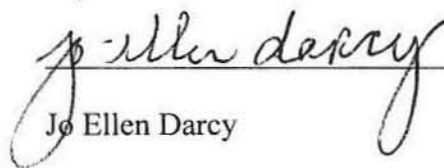
Dated: **APR 25 2011**

APR 26 2011

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Nancy K. Stoner

Acting Assistant Administrator for Water
Environmental Protection Agency

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Jo Ellen Darcy

Assistant Secretary of the Army
(Civil Works)
Department of the Army