



# MARLOWE & COMPANY

GOVERNMENT AFFAIRS CONSULTANTS

## Memo

To: Marlowe & Company Clients  
From: Joel Porter, Legislative Fellow  
Re: EPA Draft Clean Water Protection Guidance  
Date: March 22, 2011

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### Executive Summary

In 1972, Congress passed the Clean Water Act in response to a fire on the Cuyahoga River in Ohio. The law focused on preventing pollution, to protect both fragile aquatic ecosystems and the quality of water used for human consumption. The statute additionally took measures to protect economic “navigable” uses of waterways through the use of Constitutional language and interpretations of the Commerce Clause. Since passage of the law, the term “navigable waterways” has been broadly applied by the Environmental Protection Agency (EPA) in its regulatory capacity. Following two Supreme Court cases, *United States v. Rapanos* (“Rapanos”) and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“SWANCC”), the EPA issued guidance to clarify which waters can be categorized as “Waters of the United States, thereby falling under the CWA’s purview. This guidance is derived from two tests developed by the Court in both Rapanos and SWANCC, with the goal of minimizing the bureaucracy involved in making jurisdictional determinations.

In Rapanos, Justice Kennedy asserted that a wetland or non-navigable water body falls under the CWA when it bears a “significant nexus” to a traditional navigable waterway (the “Rapanos Test”). The second Test (the “SWANCC Test”) follows from the court’s plurality opinion that the CWA authorizes federal jurisdiction over non-navigable waters only if they exhibit a relatively permanent flow, specifically in instances where there is a continuous connection between the wetland and the waterbody. The EPA’s guidance offers legal and scientific basis in applying federal jurisdiction to tributaries, “adjacent wetlands”, and ‘other waters’ (such as intrastate lakes, rivers, streams, mudflats, sand flats, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds).

## Overview of EPA Guidance

### *Interstate Waters:*

According to the Guidance, both the EPA and the Army Corps of Engineers (Corps) believe that there is clear Congressional Intent stemming from the CWA that interstate waters, including their tributaries, fall within the purview of CWA jurisdiction. What remained unclear, however, was the extent to which tributaries were covered. The EPA uses Justice Kennedy's opinion in *Rapanos* to assert jurisdiction over bodies of water when waters and wetlands have a "significant nexus" to one another and can potentially be harmed by pollution upstream. Additionally, the Guidance addresses the scope of *Rapanos* by asserting that all "waters of the United States" should fall under the CWA, including CWA sections 402, the National Pollutant Discharge Elimination System (NPDES) permit program, 311 (oil spill), 303 (water quality standards and total maximum loads program TMDLs), and 401 (state water quality certification) programs.

To evaluate whether there exists a significant nexus, the agencies apply three factors: 1) waters to be "similarly situated" with other waters of the same regulatory or resource type; 2) waters to be "in the region" if they fall within the same watershed (defined by the area draining into the nearest traditional navigable water or interstate water); 3) waters have a significant nexus if they alone or in combination with other similarly situated waters can have a chemical, physical, or biological effect on traditional navigable waters. The EPA also advises its staff to look for the ability of an upstream water source to maintain ecologic and chemical integrity to downstream waters (such as sediment trapping or floodwater deviation) or its ability to carry pollutants, as such a connection might prove the existence of a significant nexus.

The Guidance also specifies that waters that are "similarly situated" or adjacent to a small headwater tributary and have a significant nexus to traditional navigable water should be covered under the CWA. These types of waters are considered "in the region" if they are within a watershed that drains to a traditional navigable or interstate water. These types of "other waters" do not require a hydrologic connection in order to establish a significant nexus since "in some cases the lack of hydrologic connection would be a sign of the water's function in a relationship to the covered water, such as retention of flood waters or pollutants that would otherwise flow downstream". In these specific instances, the EPA would regulate such waters as covered.

### *Tributaries*

The Guidance further directs the EPA and the Corps to assert jurisdiction over tributaries (rivers, streams, lakes, and certain wetlands) by finding that they have a defined bed and bank. To make this determination, the EPA and/or Corps may identify an "ordinary high water mark" ("OHWM") which is defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas". Pursuant to the Plurality Standard provided by the Court in *Rapanos*, waters are nevertheless subject to the EPA's jurisdiction despite the finding of a significant nexus when: 1) it is connected to a downstream traditional navigable water; and 2) flows in the tributary, except for drought years, are at least seasonal. Under the Kennedy Standard, a tributary is jurisdictional when: 1) it is a tributary to a traditional navigable water or interstate water; and 2) the tributary has a significant nexus with the

traditional navigable water. To make these specific determinations, field staff should use topographic maps, gage data, historic records of water flow, statistical data, personal knowledge, etc.

#### *Wetlands and Other Waters*

Wetlands, streams, ponds, and other waters are brought under the EPA's purview by defining "adjacent wetlands" as having significant nexus to the nearest downstream traditional water when its "integrity" may be effected chemically, physically, or biologically by pollutants. The Guidance continues, saying, "as a general matter, "similarly situated" adjacent wetlands include all adjacent wetlands located in the region...(and) are *per se* jurisdictional and do not require a showing of significant nexus." However, these "adjacent wetlands" can be separated from other waters if they are connected relatively permanent, seasonal, or in the event that a hydrologic connection exists since in some cases it is a sign of the water's function in relationship to the traditional navigable water or interstate water (flood water retention water bodies or polluted waters that would otherwise flow downstream).

Other waters are said to be determined jurisdictional on a "case-by-case fact specific" basis on whether waters significantly affect the integrity of traditional navigable or interstate waters. Finally, the Guidance states that features such as swales, gullies, washes, and other small erosion features are generally not subject to CWA jurisdiction.

### **Political and Legislative Activity**

During the 110<sup>th</sup> and 111<sup>th</sup> Congress, several bills were introduced to "expand" the scope of the Clean Water Act and codify the practices articulated in this guidance. Specifically, one of the most contentious aspects of legislation modifies the CWA's scope over waters by changing the definition of "navigable waters".

A multitude of industry interests have expressed opposition to language that would accomplish said policy change. That opposition includes some of the large name fossil fuel companies, natural resource providers, and manufacturing trade associations such as the American Petroleum Institute (API), the National Mining Association (NMA), the Edison Electric Institute (EEI), the American Forest & Paper Association (AF&PA), and the National Association of Manufacturers (NAM).

In favor of this change are several environmental organizations such as the Natural Resource Defense Council and the National Wildlife Federation.

#### *Proposals*

H.R. 5088 (as introduced, by Rep. James Oberstar, D-MN-08) (111<sup>th</sup> Congress), "America's Commitment to Clean Water Act" would have replaced the term "navigable waters," with the term "waters of the United States" as the standard for determining which waters are subject to the CWA. The bill also defines scope surrounding waste water treatment plans and excludes them from the CWA's jurisdiction.

Co-sponsored by Rep. John Dingell (D-MI-15) and Rep. Vernon Ehlers (R-MI-03), H.R. 5088 was introduced in the House Committee on Transportation and Infrastructure, Subcommittee for

Water Resources and Environment. This bill was a modification of legislation introduced in the 110<sup>th</sup> Congress, HR 2421, under the name, the “Clean Water Restoration Act of 2007”. The earlier bill garnered 176 Democratic cosponsors and three committee hearings were held on the matter. Neither bill, however, was taken up for vote.

S. 787 (as introduced, by Sen. Russell Feingold, (D-WI) (111<sup>th</sup> Congress), the “Clean Water Restoration Act” reaffirms federal jurisdiction over all waters of the United States and overturns the decisions of the United States Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* and *Rapanos v. United States* by amending the CWA to replace the term "navigable waters" with the term "waters of the United States,"

Co-sponsored by 24 Senators, all Democratic, this bill was referred to the Senate Committee on Public Works. It died in committee.

### **Current Legislative Activity**

In the 112<sup>th</sup> Congress, the Republican-led House included language in H.R. 1, the “Full Year Continuing Appropriations Act, 2011,” that would prohibit funding to the EPA that would implement, administer, or enforce guidance documents pertaining to the definition of waters under the CWA. The bill passed the house with a vote count of 235 – 189 but failed in the Senate on a vote count of 44 – 56. As of this writing, additional versions of short-term Continuing Resolutions have not included this language.

*For further information on this issue, please contact your Marlowe & Company team leader or email [legislation@marloweco.com](mailto:legislation@marloweco.com).*