



COMMITTEE FOR A CONSTRUCTIVE TOMORROW

July 21, 2011

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NM
Washington, DC 20460

Attn: Docket ID No.: EPA-HQ-OW-2011-0409

Re: Comments on the US EPA and the US Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, Docket No., EPA-HQ-OW-2011-0409

To Whom It May Concern:

The Committee For A Constructive Tomorrow is a non-profit, public policy institute.

The proposed guidance (unlike previous guidance documents) will be used by the EPA and the Army Corps of Engineers (Agencies) to interpret the term “waters of the United States” in the context of *all* programs authorized under the Clean Water Act (CWA) , including Section 404 discharges of dredged or fill material , the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the Section 311 oil spill program, the Section 401 state water quality certification process, and the Section 303 water quality standards and total maximum daily load (TMDL) programs. As such, this proposed guidance will encompass all stages of the nation’s natural resources production and will have a significant impact on agriculture and the timber, mining, and energy industries.

The Agencies’ decision to issue Guidance on this issue as opposed to a rule-making runs counter to the expressed views of the majority of the US Supreme Court and the requirements of the Administrative Procedures Act (APA). Despite repeated assurances by the Agencies that they would undertake a rule-making, they have chosen not to do so. Instead, they continue to make important changes to their regulations and expand their CWA jurisdiction through guidance, circumventing critical rule-making requirements, such as providing a response to public comments, providing a rationale and factual basis for agency decisions, and producing a final decision that can undergo judicial review.

The Guidance represents a significant rewrite of current regulations, guidance, and agency policy that governed judicial determinations throughout the history of the regulatory process. The Guidance expands the universe of waters that will be considered “traditional navigable waters” by including, for the first time ever, waters that support one-time recreational use. In addition, the guidance gives new and expanded regulatory status to “interstate waters,” equating them with traditional navigable waters and, in the process, making it easier to declare jurisdiction over adjacent wetlands, tributaries, and other waters judged by a newly crafted “significant nexus” test. The Agencies have expanded their CWA jurisdiction in a manner unsupported by their own regulations and Supreme Court decisions. Moreover, the Guidance provides *completely new definitions* to terms contained in existing statutes. Under law, only Congress has the power to redefine such terms.

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The Guidance completely eliminates the requirement that a hydraulic connection is necessary and further expands jurisdiction beyond what Congress and the Supreme Court intended by applying a broadened view of Justice Kennedy's "significant nexus" standard not only to wetlands (as Kennedy did) but also to tributaries and isolated waters. Furthermore, the Guidance also allows for decisions to be based on general scientific literature describing functions applicable to the types of waters in question, in lieu of actual case-specific analysis of the water itself. Therefore, according to the Guidance, an entire group of waters could be determined jurisdictional, without ever performing an analysis of those waters. This approach is clearly inconsistent with the Kennedy decision and not scientifically based. When questioned about this matter, the Agencies could not name a body of water that would not provide at least one of these functions, making the point that use of functionality to find federal jurisdiction is overly inclusive and threatens to capture all waters. This, in fact, may be exactly what it's supposed to do.

In addition, the Guidance creates a completely new concept of allowing for "aggregation" of the contribution of all similar bodies of water *within an entire watershed*, making it far easier to establish a "significant nexus" between these small intrastate waters and the newly expanded roster of traditional navigable waters. This novel concept results in a blanket jurisdictional for an entire class of waters within an entire watershed. Similarly, a blanket determination imposing federal CWA jurisdiction diminishes private property and mineral lease values while neglecting important due process rights of those individual property owners.

It should be noted that the Guidance is completely inconsistent with the Agencies' regulations and Supreme Court decisions. For example, the current regulations say nothing about ditches, but the Guidance regulates all roadside and agricultural ditches that have a channel, have an ordinary high-water mark, and can meet one of five characteristics. In addition, the current regulations determine jurisdiction over all waters not in any of the other categories (also known as the "other waters") based on certain specific connections to interstate commerce. The Guidance replaces this standard with the "significant nexus" test. Furthermore, the Guidance defines a "significant nexus" as anything that is "more than speculative or insubstantial," thus turning Justice Kennedy's "significant nexus" into an "any nexus" standard. These changes in the Guidance, which greatly expand CWA jurisdiction, have no basis in Supreme Court decisions.

While the Agencies have acknowledged that implementation of the Guidance will entail economic impacts, their estimates understate the Guidance's real cost. For its part, EPA estimates that the annual costs of implementing the Guidance will be between \$87 million and \$171 million. EPA arrived at that number without taking into consideration permitting costs, the increased delays associated with expanded federal jurisdiction, and the costs of new land-use restrictions. The Guidance will negatively affect an already weak economy and place significant burdens on the nation's natural resources industry.

Finally, if the Guidance is allowed to go into effect, it will almost certainly be challenged in court. In circumventing the rule-making process in favor of a Guidance, the Agencies have chosen to allocate new powers to themselves, ignore Supreme Court decisions, and reduce the role of the regulated and tax-paying public to that of a bystander.