

EPA Hosted Conference Call – Draft “US Waters Guidance”

The EPA hosted a conference call to introduce the first component of a board initiative described in the document, *Clean Water: Foundation of Healthy Communities and a Healthy Environment*, also released today and available at the [White House website](#). Hosting from EPA were Nancy Stoner, Acting Assistant Administrator for Water; Michael Shapiro, Deputy Assistant for Water; and David Evans, Director of Wetlands Division; and from the USACOE, Meg Gaffney-Smith, Chief of Regulatory Programs.

Nancy Stoner’s brief introduction carried an important message about the *Clean Water* document itself which she described as “... an outline of key actions that agencies are taking together and with our partners to protect water resources across the country both water pollution, water quantity, water supply, drinking water, all those sorts of things....” This description makes it worth a serious review by WESTCAS member agencies.

Nancy Stoner, Acting Assistant Administrator for Water. Key points from Ms. Stoner’s comments on the Guidance:

- Draft guidance, it is not immediately effective
- Open for public comment for 60 days (it will be published in FR on 5/2/11)
- Basic purpose: to clarify the scope of the CWA jurisdiction
- Applies to all CWA programs (Sections 404, 401 and 311 mentioned specifically)
- It is “...basically designed to close loop-holes in the way that...the statutes and the regulations have been previously interpreted.”
- Interpreting in light of the two key Supreme Court cases, “...in a way that we think will provide greater clarity, provide more certain protection...in a way that is more efficient as well.”
- The main benefit of the Guidance is protecting those small streams and the big streams that these flow into and wetlands’ benefits
- Guidance does maintain all the existing exemptions

In summary, Ms. Stone hoped that it will be viewed as a good ‘next step’ in terms of improving consistency and predictability in the application of the CWA. Anxious to get comments. EPA does intent to move forward with regulations as well.

Meg Gaffney-Smith, USACOE Chief of Regulatory Programs, read a brief statement with the following points:

- Goal is “...to protect aquatic resources in a manner that is consistent with the law and the Supreme Court decisions.”
- Look forward to continue partnership with States on 404 and 401 programs
- Guidance is to provide District’s regulatory staff with “clear direction on the geographic scope of CWA jurisdiction”
- Expects that Guidance when finalized “may afford greater protection to some aquatic resources.”
- Expect that uncertainty may be reduced.

Dave Evans, Director of the EPA Wetlands Division, gave the most detailed information, several critical points where the published draft Guidance deviated from the “leaked document”, and

answered the questions from audience and listeners. The following is a summary of the most pertinent points:

- Recognized the frustration of the States in not being consulted in the development of the Guidance (discussed this in some detail with OMB): the reason was the “extreme sensitivity of this policy”... “doing it in a more open manner clearly would have reduced the potential, we could even be at the point of having a public dialogue.”
- Guidance is envisioned to be the first step of a two-step process that will culminate in rulemaking (rulemaking will include the States)
- Reviewed the organization of the Guidance
- Documentation requirements on a case-by-case basis under the Guidance
 - Jurisdiction per se waters definitions
 - Crossing a State line is an interstate water (first EPA/COE guidance specific to interstate waters)
 - Significant nexus – from *Rapanos* decision (explains ‘similarly situated’ and other terms used in this decision)
 - “in the region” is defined more broadly than in previous guidance, “a watershed definition” to ‘in the region’ – significant change in this guidance compared to previous
 - Adjacent wetlands carries forward from the 1998 guidance... within floodplain or within riparian area, etc.
 - “other waters” or geographically isolated waters
- A significant difference from the guidance that was “leaked” is that geographically isolated waters “generally” must have a significant nexus “all by themselves”, generally not being combined within a watershed (unless there is a “compelling scientific mater” to do so)
- Guidance, as issued, would not have a lot of impact on geographically isolated waters and would be beyond CWA jurisdiction
- More specificity on ‘ditches’ for clarity

In response to questions, some key response of note:

- EPA is proceeding with Guidance first (then Rulemaking), because they believe there is value in articulating EPA’s view on what is considered jurisdictional without full regulatory process.
- NOTE: “We can’t establish jurisdiction for some resources through guidance that we believe we may be able to through regulation.” We can provide clarification more quickly for use during the Rule making process
- Expects Rulemaking process to begin in the next month or so
- The Guidance will be take several months to become final, not expected until this Fall
- “This Guidance, very clearly, is not expected to result in very many, if any, truly geographically isolated waters to be found jurisdictional.” It is possible through a Rulemaking process to present a scientific rationale, put out for public comment, that would some of those resources “as a group” to be significant nexus (e.g., prairie pot holes as examples as broad term that some sub-set could have clear evidence of function like nutrient processing and flood mitigation.

- Guidance is not the strongest foundation to implement policies; clearly would be stronger based on Rules to defend the policies.
- Within the next month or so, the Rulemaking timetable will be available.
- **Question and Significant Response:** Is it the intent to identify waters that had not previously been found jurisdictional to be jurisdictional? Answer: This question gives an opportunity to explain what EPA can do through Guidance and Rulemaking and what it cannot do:

“It is simply not possible legally to increase jurisdiction over what preceded the Supreme Court cases nor can we recover, restore, to that level of jurisdiction.”

“Other waters, especially isolated waters, need to have another legal basis that remains intact, the rationale that they meet to assert their jurisdiction.”

“I don’t think that there was anything that was not considered jurisdictional within the watershed (pre-SWANNC and pre-Rapanos) that using this Guidance approach could possibly be found to be jurisdictional.”