



2011 Kentucky Farm Bureau Agricultural Contact Team (FBACT)

CLEAN WATER ACT GUIDANCE

JUNE 3, 2011

ACTION ALERT:

ISSUE: On May 2, 2011, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) issued ***“Guidance Regarding Identification of Waters Protected by the Clean Water Act.”*** The 39-page guidance was prepared for agency field staff to use in identifying “waters of the United States” subject to Clean Water Act (CWA) regulation. The guidance applies to all CWA programs and specifically lists sections 303 (water quality standards and Total Maximum Daily Loads), 311 (oil spills and Spill Prevention Control and Countermeasure (SPCC) plans), 401 (state water quality certifications), 402 (National Pollutant Discharge Elimination System (NPDES)) and 404 (wetlands). The agencies’ decision to issue guidance on this topic as opposed to a rulemaking runs contrary to the expressed views of the U.S. Supreme Court and the requirements of the Administrative Procedure Act (APA).

IMPACT: EPA and the Corps acknowledge in the guidance document that the number of jurisdictional waters ***will increase*** under the guidance. It does this by:

- Applying a broader view of Justice Kennedy’s significant nexus standard not only to wetlands, but also to tributaries and isolated waters.
- Finding that a hydrological connection is not necessary in establishing a significant nexus
- Eliminating the “reach” concept, and now requiring all tributaries, wetlands, and “proximate other waters” “in the same watershed” to be aggregated and considered together in determining whether the water has a significant nexus.
- Regulating all roadside and agricultural ditches that have a channel, have an ordinary high water mark and can meet one of 5 characteristics (one characteristic listed is the ditch has standing water, another characteristic is that the ditch drains a natural body of water).
- Defines the “traditional navigable waters” to include all waters that support one-time recreational use. This might include someone kayaking down a drainage ditch during a flood event.
- Giving new and expanded regulatory status to “interstate waters,” by equating them with traditional navigable waters making it easier to find jurisdiction for adjacent wetlands and waters judged by the significant nexus test.

While the document notes that it is not a rule, is not binding and lacks the force of law it certainly appears to be developed for more than *just* guidance. The guidance also does not

address CWA jurisdictional exclusions for waste treatment systems or prior converted croplands. In addition to this guidance, the agencies expect at a later date to propose revisions of existing regulations to further clarify which waters are subject to CWA jurisdiction.

ACTION: EPA and the Corps will accept comments on this proposed guidance that are received *on or before July 1, 2011*. Those making comments should identify their comments as Docket ID No. **EPA-HQ-OW-2011-0409**. You can submit your comments by clicking on [CWA Comments](#), at www.regulations.gov or by mailing comments to:

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

Leaders are encouraged to submit comments on this proposed guidance stressing the potentially disastrous affects this guidance could have not only on agricultural production, but on general land management operations, construction and general economic development. Leaders are also encouraged to make local, county and state officials aware of the far-reaching implications this proposed guidance could have on all areas of Kentucky's economy.

Sample language, along with the Federal Register notice and various background materials are available on the Kentucky Farm Bureau homepage at kyfb.com under the Legislative Affairs tab.

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