

# PUBLICATION

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## Congress Gearing up for Fight over New Clean Water Act Guidance

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On April 27, 2011, the Obama Administration issued a draft guidance document that, according to the EPA, will provide "clearer, more predictable guidelines for determining which water bodies are protected from pollution under the Clean Water Act (CWA)." By all accounts, the guidance dramatically changes the Administration's position on the scope of jurisdictional coverage under the Clean Water Act by re-interpreting the Supreme Court's 2006 decision in *Rapanos et ux., et al. v. United States (Rapanos)*.

Senator James Inhofe, an Oklahoma Republican who is Ranking Member of the Senate Committee on Environment and Public Works, stated that "EPA's interpretation of the Clean Water Act...knows no bounds, as the agency sees nearly every body of water in the United States, no matter how insignificant, as potentially falling within its reach...This guidance document further shifts the balance of regulatory authority away from states to the federal bureaucracy. EPA should instead follow the Clean Water Act, which gives states primary authority over controlling water pollution within their borders. States have the experience and the competence to do exactly that."

Republican Congressmen John Mica of Florida, who chairs the Transportation and Infrastructure Committee, and Bob Gibbs of Ohio, who chairs the Water Resources and Environment Subcommittee are spearheading the opposition in the House. "The effect of the guidance will be to reverse decisions by the United States Supreme Court that recognized limits to the federal government's regulatory authority, and to undermine the long-standing federal-state partnership in the regulation of waters," Gibbs and Mica said in a joint statement.

Interpretations of U.S. Supreme Court rulings over the past decade have removed some waters from federal protection, and caused confusion about which waters and wetlands are actually protected under the CWA. As a result, said the EPA, "important waters now lack clear protection under the law, and businesses and regulators face uncertainty and delay." According to the Army Corps of Engineers (Corps), the "guidance will clarify [CWA] jurisdiction and help the Corps and its partner agencies protect important aquatic resources and watersheds that communities rely on for their quality of life and essential services." But whether the new draft guidance makes these guidelines "clearer" and "more predictable" remains to be seen.

In *Solid Waste Agency of Northern Cook County v. Corps of Engineers (SWANCC)*, the Supreme Court ruled in 2001 that non-navigable, isolated, intrastate waters do not fall under the jurisdiction of the CWA.

In *Rapanos*, five of the nine Supreme Court justices agreed to void lower court rulings against plaintiffs who wanted to fill their wetlands to build a shopping mall and condos. The Supreme Court, however, was deeply divided and issued a fractured 4-1-4 opinion with four conservative justices favoring a more restrictive reading of the term "navigable waters," four liberal favoring a more expansive view, and with Justice Kennedy somewhere in the middle.

The new joint guidance document offers a revised and broader interpretation of Justice Kennedy's "significant nexus" test in *Rapanos* that would give the EPA and the Corps nearly limitless jurisdiction over wetlands and other waters. Conversely, EPA and the Corps assert that the draft CWA jurisdiction guidance reaffirms protections for small streams that feed into larger streams, rivers, bays and coastal waters and for wetlands that filter pollution and help protect communities from flooding.

There is no question, however, that the draft guidance largely rewrites *SWANCC* and *Rapanos* and ignores concerns from Congress and industry by dramatically expanding the regulatory authority of the EPA and the Corps under the CWA.

The draft guidance is open for 60 days of public comment to allow all stakeholders to provide input and feedback before it is finalized.

Click [here](#) to read the draft guidance and accompanying documents.

For questions about this draft guidance document, or concern about any other environmental or EPA-related issues, please contact your [Baker Donelson](#) attorney or any of our Environmental attorneys.