



*"FY12 Appropriations", continued from page 4*

- Prohibit the use of funds to be used to implement or enforce recommendations or guidance proposed in the final draft of the McNary Shoreline Management Plan, Lake Wallula, Wash.
- Reduce construction by \$1.75 million and increase O&M by \$1 million (purportedly for levees along the Missouri River System)
- Reduce expenses by \$6.3 million and increase O&M by

\$6.3 million for efficient cargo transportation by improving dredging and navigation of waterways

- Reduce O&M by \$4.9 million applicable to climate change projects
- Reduce expenses by \$1 million and increase construction by that amount for the purpose of coastal restoration

The House bill would require the Corps to submit quarterly reports

on the allocation of funds, with the first one due 60 days after enactment. It is unclear how the "suggested" allocation of funds in the various amendments will be addressed, given the earmark moratorium. The bill now moves to the Senate, and an uncertain fate. Mark-up in the Senate will not occur prior to September, and even then will depend on the outcome of the current debate over the debt ceiling.

## EPA and Corps Propose Guidance on Clean Water Act Jurisdiction By Steven Burns

**W**hen is a water a water, and how significant is significant?

The U.S. Environmental Protection Agency and the Corps of Engineers tangle with those questions and more in "Draft Guidance on Identifying Waters Protected by the Clean Water Act," which the agencies published this past May. The Draft Guidance is intended to clarify how the agencies "will identify waters to be protected under the Act consistent with the statute, regulations, Supreme Court caselaw, relevant science related to aquatic ecosystems, and the agencies' field experience."

It's hard to argue against greater clarity. Since the Supreme Court's

split decision in the *Rapanos* case, the scope of CWA jurisdiction has been anything but clear. However, the Draft Guidance presents a number of problems. NWC addresses those concerns in comments to the agencies.

Here are some of our concerns:

### **The use of a "guidance" format is unlawful and unfair.**

The Draft Guidance essentially functions like new regulations. It seeks to change the application of the CWA on a uniform, national basis. However, instead of pursuing a rulemaking, the agencies called it "guidance" and declared that it lacks the force of law.

Industry and citizen groups may wish to challenge the guidance

in court. When that happens, the agencies are poised to argue that the case is not ripe for review, since the document purportedly has no legal effect. In other words, the agencies would have their cake and eat it too: expand regulatory control, but without legal accountability.

As a result, a permit applicant would have to exhaust the permitting process on an actual project before getting a fair judicial hearing on the legal issues raised by the Draft Guidance. That puts a permit applicant in a difficult position. The process of developing the project and seeking a permit costs time and money. In any given case, the rational decision may be to accept conditions, however unreasonable

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they may be, as the price of staying on schedule. If additional conditions are unlawful, it amounts to regulatory blackmail. That is an unfair and unnecessary outcome.

### **The Draft Guidance is contrary to the *Rapanos* case.**

CWA section 404(a) requires a Corps permit for the “discharge of dredged or fill material into the navigable waters.” The question in *Rapanos* was whether the permitting requirement applied to a fill in a wetland that was not adjacent to a traditionally navigable water. No opinion in *Rapanos* won a majority of the justices of the Supreme Court. Only four of the nine justices associated themselves with the opinion of the Court, written by Justice Scalia. Meanwhile, Justice Kennedy wrote an opinion that concurred in the result, but for different reasons. A dissenting opinion of four justices would have upheld the agencies’ jurisdiction.

The Scalia and Kennedy opinions presented different tests to determine CWA jurisdiction. That division has led to debate on how to interpret the case. However, both the Scalia and Kennedy opinions limited CWA jurisdiction. Based on the case and the facts presented to Court, there is no reasonable way to interpret either opinion or the two together as expanding regulatory authority – yet the Draft Guidance tries to do just that.

NWC’s comments also explain that the Draft Guidance relies on

unreasonable interpretations of both the Kennedy and Scalia tests for jurisdiction. Justice Kennedy’s concurring opinion applied a “significant nexus” text. Jurisdiction attaches only “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.” The impact to water quality had to be more than “speculative or insubstantial.”

Under the agencies’ interpretation, virtually any nexus beyond “speculative” or “insubstantial” would result in a finding of jurisdiction under the agencies’ guidance. Any discernible downstream effect – such as the retention of any amount of upstream drainage, or the addition of any substance deemed to be a nutrient, sediment, or pollutant – is sufficient to confer jurisdictional status. That is not a plausible interpretation of Justice Kennedy’s opinion.

The Scalia plurality opinion found that “navigable waters” must be “relatively permanent, standing or continuously flowing bodies of water,” which does not include intermittent streams and tributaries that empty into navigable waters. In addition, wetlands must have a “continuous surface connection” to jurisdictional waters. However, the Draft Guidance asserts that jurisdictional tributaries may include intermittent and ephemeral

stream reaches “as dynamic zones within stream networks,” and that these waters may satisfy the Scalia test depending on “the length and timing of seasonal flows in the ecoregion in question.” It reads more like an implementation of the dissenting opinion than that of Justice Scalia.

### **The Draft Guidance is contrary to the *Solid Waste Agency of Northern Cook County* case.**

In *SWANCC*, the Supreme Court reviewed the agencies’ assertion of CWA jurisdiction over a nonnavigable, isolated, intrastate pond based on its use as a habitat for migratory birds. The Court reasoned that jurisdiction does not extend to ponds that are completely isolated from traditionally navigable waters. The Draft Guidance violates that principle by asserting jurisdiction in certain cases, such as a water that crosses state boundaries, without any demonstration of the necessary connection to traditionally navigable waters.

### **The Draft Guidance impermissibly suggests CWA jurisdiction based on groundwater.**

The Draft Guidance provides that a “sub-surface hydrologic connection” may establish a significant nexus between wetlands and jurisdictional waters. That language blurs the distinction between groundwater and surface water. Groundwater is subject to state and local



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regulation, not the CWA. NWC's comments urge the agencies to clarify that groundwater cannot provide a "significant nexus" or otherwise establish jurisdiction for purposes of the CWA.

### **The impacts of the Draft Guidance extend beyond the wetlands program.**

To the extent the Draft Guidance impermissibly expands CWA jurisdiction, the implications extend far beyond CWA Section 404. The same jurisdictional principles would apply to all CWA programs, including state water quality certifications under Section 401; National Pollutant Discharge Elimination System permits under Section 402; total maximum daily loads and "impaired water" designations under Section 303; oil spill provisions under Section 311; and environmental reviews and documentation under the National Environmental Policy Act. That makes it all the more important for the agencies to undergo an orderly rulemaking process.

NWC's comments conclude by urging the agencies to withdraw the Draft Guidance and, instead, issue proposed regulations, with corrections to implement NWC's recommendations.

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## Industry Events

**August 10-12, 2011**

**Gulf Intracoastal Canal Assn.**

New Orleans, LA  
[www.gicaonline.com](http://www.gicaonline.com)

**August 30–September 2, 2011**

**Tennessee-Tombigbee  
Waterways Development Council**

Point Clear, AL  
[www.tenntom.org](http://www.tenntom.org)

**September 7-9, 2011**

**Mississippi Water Resources Assn.**

Natchez, LA  
[www.mswater.org](http://www.mswater.org)

**September 11-15, 2011**

**American Assn. of Port Authorities**

Seattle, WA  
[www.aapa-ports.org](http://www.aapa-ports.org)

**September 13-16, 2011**

**Smart Rivers**

New Orleans, LA  
[www.pianc.us](http://www.pianc.us)

**October 3-5, 2011**

**Arkansas Regional Waterways  
Conference**

Little Rock, AR  
[www.waterway.dina.org](http://www.waterway.dina.org)

**October 5-7, 2011**

**American Waterways Operators**

New York, NY  
[www.americanwaterways.com](http://www.americanwaterways.com)

**October 17-18, 2011**

**Tennessee River Valley Assn.**

Gatlinburg, TN  
[www.trva-tcwc.org](http://www.trva-tcwc.org)

**October 19-21, 2011**

**Waterways Council, Inc.**

Pittsburgh, PA  
[www.waterwayscouncil.org](http://www.waterwayscouncil.org)

**October 25, 2011**

**The Horinko Group**

2011 Water Resources Summit  
College Park, MD  
[www.thehorinkogroup.org](http://www.thehorinkogroup.org)

**October 31-November 3, 2011**

**National Assn. of Flood and  
Stormwater Management  
Agencies**

St. Petersburg, FL  
[www.nafsma.org](http://www.nafsma.org)

**December 8-10, 2011**

**Mississippi Valley Flood Control  
Association**

New Orleans, LA  
901-861-9918

### *Upcoming NWC Events*

**September 19- 21, 2011**

**Annual Meeting**

Hilton Fort Worth  
Fort Worth, TX

**March 12-14, 2012**

**Legislative Summit**

The Madison  
Washington, DC

**September 19-21, 2012**

*(Tentative)*

**Annual Meeting**

Tunica, MS