



Fact Sheet

Federal Control of Non-Navigable Waters

Revised May 22, 2011

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have released a proposed guidance document that will substantially change the EPA's policy on waters subject to jurisdiction under the federal Clean Water Act (CWA). This could significantly increase the scope of the waters and provisions the agencies regulate.

A guidance document is a set of instructions used to explain an agency's interpretation of the law. This specific guidance document will give EPA and Corps field staff a plethora of alternative approaches to enforce the CWA. In short, this proposed guidance document is an avenue for the EPA and the Corps to regulate any bodies of water they determine by circumventing the regular law making process of Congress.

In 2001 and again in 2006, the U.S. Supreme Court ruled that the word "navigable" had important meaning within the context of the CWA, which limited the EPA's and Corps' authority over non-navigable waters. Legislation was introduced in Congress in 2009 and 2010 that would have eliminated the word "navigable", giving the EPA and Corps unprecedented authority over all bodies of water.

Had it become law, the new definition would have expanded the EPA's and Corps' control over all wet areas within a state, including stock tanks, drainage ditches, ponds, small and intermittent streams, creek beds, playa lakes and mud holes. It could have required landowners to obtain federal permits and allowed federal officials to come on private property for inspections of non-navigable waters. There is no guarantee that the EPA and/or Corps will issue a permit, and landowners could wait up to a year or longer to find out if they even qualify. The permits and enforcement would make it necessary for landowners to hire engineers and attorneys to guide them through the permitting process and defend themselves against unnecessary federal regulation.

TSCRA worked to defeat these bills in Congress.

Now, the EPA and the Corps is using a backdoor approach to give itself the authority to regulate all waters through this proposed guidance document. States and landowners will be forced to comply with this regulation or run the risk of more federal oversight.

What is TSCRA doing?

TSCRA continues to strongly oppose all forms of this legislation and continues to work to convince the U.S. Congress to strip the EPA and the Corps of their power to issue and implement this type of guidance.

TSCRA members and staff have communicated with members of Congress and their staff to garner opposition for any type of regulatory action and/or legislation that would allow the federal government to regulate non-navigable waters.

TSCRA will submit comments to the Federal Register stating our opposition to the proposed guidance document.

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