



PACIFIC LEGAL FOUNDATION

June 23, 2011

Water Docket
Environmental Protection Agency
Mailcode:2822T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: *EPA and Army Corps of Engineers' Draft Guidance On
Identifying Waters Protected by the Clean Water Act*

EPA-HQ-OW-2011-0409

Pacific Legal Foundation appreciates the opportunity to provide the following comments on the subject Guidance. Pacific Legal Foundation represented John Rapanos in *Rapanos v. United States*, 547 U.S. 715 (2006), and has litigated numerous cases addressing federal jurisdiction under the Clean Water Act. Comment is warranted here because the Guidance provides a faulty interpretation of federal jurisdiction under the Clean Water Act that exceeds all prior interpretations and is inconsistent with federal law and Supreme Court precedent.

Among other things, the Guidance misrepresents the judicial standard for “traditional navigable waters” asserting that transport by boat alone is sufficient to establish federal jurisdiction. This standard is incorrect and conflicts with the agencies’ own regulations and the case law on which they rely. The Guidance also asserts jurisdiction over all interstate waters without legal precedent. In addition, the Guidance distorts the jurisdictional tests under *Rapanos* and expands the “significant nexus” analysis to entire watersheds, including the Mississippi basin which covers more than a million square miles, extending from the Rockies to the Appalachians. Contrary to explicit Supreme Court directives, and established constitutional limitations, the Guidance asserts federal control over virtually every pond, puddle, and ditch in the country as “tributaries” or “other waters.” So broad is the putative reach of the government under this Guidance that the agencies expressly refuse to exclude even artificial ponds and swimming pools from federal regulation. It is, undoubtedly, the largest expansion of power ever proposed by a federal agency. It would far exceed federal authority, usurp the power of the States to manage local land and water resources, and undermine our constitutional way of life.

Section 1: Traditional Navigable Waters

The Guidance defines “traditional navigable waters” as those waters that are or could be used for commercial navigation. Page 6 states that the “likelihood of future commercial navigation, including commercial waterborne recreation, **can be demonstrated by current boating** or canoe trips for recreation or other purposes.” In support of this proposition, the Guidance relies on *FPL Energy Marine Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (emphasis added). But a close reading of that case shows the Guidance overstates the case.

In *FPL*, the District of Columbia Circuit upheld a FERC determination that a stream was a “traditional navigable water” based, in part, on the fact that the stream had minimal rapids and had been traversed by canoe and therefore could be used for simple forms of transportation. *Id.* at 1158. However the court acknowledged FERC also had determined that streams traversed only by expert kayakers, “or specialized sporting craft designed for river running,” were not “traditional navigable waters.” *Id.* Therefore, the implication in the Guidance that navigability can be demonstrated by any type of current boating is not supported by the authority it cites.

The Guidance overstates the *FPL* case in other ways as well. The court was clear that under United States Supreme Court precedent future navigability cannot be based solely on transport by canoe, but must be supported by other factors: “‘capacity [of a waterway to meet the needs of commerce] may be shown by physical characteristics **and** experimentation as well as by uses to which the streams have been put.’” *Id.* at 1157 (citing *United States v. Utah*, 283 U.S. 64, 83 (1931) (emphasis added)). Transport by canoe can satisfy the experimentation part of the Supreme Court’s navigability standard, but it does not satisfy the physical characteristics part of the Supreme Court standard. As in *FPL*, so in other cases, the agency must show that the stream is suitable for commercial navigation by its physical characteristics, such as by flow, depth, gradient, and capacity. *See id.* at 1159. But the Guidance does not mention this requirement.

Also, the Guidance (page 6) states that the future navigability of a stream **should** “be supported by evidence,” and implies such evidence may be limited to boating, whereas the court in *FPL* held that both the experimentation **and** physical characteristics parts of the navigability determination **must** be supported by **substantial evidence**. *Id.* at 1159-60.

More importantly, the Guidance conflicts with the agencies’ own regulations. Formally adopted EPA and Corps regulations define “waters of the United States” as “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use **in interstate or foreign commerce ...**” 33 C.F.R. § 328.3(a)(1) (emphasis added). In other words, current federal regulations recognize that “traditional navigable waters” under the Clean Water Act must not only be susceptible to future

