

**ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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<b>In Re:</b>	)		
	)		
<b>Four Corners Power Plant</b>	)	<b>NPDES Appeal No. 19-06</b>	
<b>NPDES Renewal Permit: NN0000019</b>	)		
<b>Arizona Public Service Company (Permittee)</b>	)		
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	)		

**ARIZONA PUBLIC SERVICE COMPANY'S RESPONSE TO  
PETITION FOR REVIEW**

**ATTACHMENT 14**



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**INSIDE EPA - 09/20/2013**

## Agencies Float CWA Jurisdiction Rule But Drop Plan For Interim Guide

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September 18, 2013

EPA and the Army Corps of Engineers have submitted to the White House for interagency review a long-awaited draft proposed rule clarifying the reach of the Clean Water Act (CWA) over marginal waters but have dropped plans for issuing interim guidance on the issue prior to the rule's release.

EPA's acting water chief Nancy Stoner announced Sept. 17 that the agencies had submitted the draft plan to the Office of Management & Budget (OMB), touting the document to the Environmental Council of the States (ECOS) as one that will provide regulatory certainty by speeding jurisdictional determinations and will likely prompt regulation of fewer waters than are currently regulated.

"The focus of this is on improving clarity," Stoner told ECOS. "It is fewer waters than were previously regulated, and for the first time, it identifies waters not covered by the Clean Water Act as well as waters that are covered by the Clean Water Act."

The document is aimed at "making it faster to identify which waters are in [the jurisdiction of the CWA] and which are out" and includes input from groups such as ECOS.

Stoner also announced that EPA's Science Advisory Board (SAB) Sept. 17 released for public comment a draft version of the agency's long-awaited "connectivity" study, a document that will provide a scientific basis for EPA determinations on when marginal waters, such as wetlands and headwater streams, are connected to navigable waters and are potentially jurisdictional. *The draft study is available on InsideEPA.com. (Doc ID: 2446970)*

The study, which an SAB panel is slated to peer review in the coming weeks, "is to address the best science to inform policymaking [and] to address that confusion and lack of clarity about the scope of the Clean Water Act," Stoner said.

While the CWA's jurisdiction generally extends to navigable waters, courts have held that tributaries, upland streams, adjacent wetlands and others can also be subject to regulation. But Supreme Court rulings on when such waters are jurisdictional has created significant legal uncertainty.

In its 2006 ruling in *Rapanos, et al. v. United States*, a fragmented court offered two tests for determining jurisdiction. Justice Anthony Kennedy held that waters sharing a "significant nexus" with jurisdictional waters can also be subject to CWA regulation while Justice Antonin Scalia offered a competing test that only "relatively permanent" waters that hold a "continuous surface connection" to a traditionally navigable water of the United States can be considered jurisdictional.

And in its 2001 ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the court held that regulators could not cite the presence of migratory birds as the sole basis for asserting federal jurisdiction over solely intrastate waters.

**After Congress failed to pass legislation clarifying the issue, many called on the the administration to launch a rulemaking that would provide legal certainty.**

In 2011, the administration issued proposed guidance that sought to address the issue. But the proposal drew significant opposition from many GOP lawmakers and industry groups who viewed it as an expansion of the agencies' jurisdiction.

EPA is seeking to assuage such concerns, arguing that the certainty provided by the proposed rule will enhance the ability of agricultural lands that are currently exempted from the law's requirements to participate in voluntary Agriculture Department (USDA) programs to protect farm land.

The proposed rule "does not propose changes to existing regulatory exemptions and exclusions, including those that apply to the agricultural sector," the agency said on its website.

"In fact, the proposed rule will enhance the ability of the Clean Water Act and USDA's conservation programs to work in tandem to protect water quality and improve the environment by encouraging expanded participation in conservation programs by farmers and ranchers. It will do so by providing greater clarity on which waters are not subject to Clean Water Act jurisdiction and greater certainty on which activities do not require Clean Water Act permits."

While critics of the guidance urged the administration to craft a regulation that would provide additional legal certainty, they opposed use of the proposed guidance as the starting point for any rulemaking. Although the agencies took comment on the proposed guidance and revised it to reflect the comments, the measure had been under OMB review since February 2012.

But environmentalists, who also favored the certainty provided by a rulemaking, had urged the administration to issue the guidance even as it proceeded with the rulemaking, saying it was necessary as an interim measure during what is expected to be a lengthy regulatory proceeding.

The administration has now dropped plans for the guidance. An EPA spokeswoman confirmed that the guidance would be withdrawn from interagency review.

Steven Stockton, director of civil works for the Corps, recently told *Inside EPA* that while the agencies generally agree on the substance of the planned policy, "there is just not agreement within the administration" on whether a final guidance should precede a rulemaking process.

EPA Administrator Gina McCarthy told ECOS Sept. 16 that it was important to quickly clarify the law's reach. "We need to strategically think together about making progress on water," she said. "And perhaps the first thing we can do is to identify what the jurisdiction of the Clean Water Act is. It's nice to talk about these things, but we need to continue to build the framework for our work together on water." -- *Amanda Palleschi*

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