

US EPA ARCHIVE DOCUMENT



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MEMORANDUM

TO: EPA DEPUTY ASSISTANT ADMINISTRATOR FOR WATER
EPA REGIONAL ADMINISTRATORS (REGIONS I – X)
USACE CHIEF OF ENGINEERS
USACE DIVISION AND DISTRICT ENGINEERS

SUBJECT: Administration of Clean Water Programs in Light of the Stay of the Clean Water Rule; Improving Transparency and Strengthening Coordination

On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the Clean Water Rule nationwide pending further action of the court. The agencies are fully complying with the stay.¹ We look forward to vigorously defending the merits of the Clean Water Rule, which we continue to believe is fully consistent with the law and based on the best available peer-reviewed science. We are confident that, when implemented, the new rule will make the process of identifying waters protected under the Clean Water Act (CWA) easier to understand, more predictable, and more consistent with current science, while protecting the streams and wetlands that form the foundation of our nation's water resources.

Even as we defend the Clean Water Rule in court, we intend to move forward with measures to improve implementation of the national CWA section 404 program that were announced concurrent with the Rule. It is critical that we capitalize on the momentum already established to improve transparency, strengthen our coordination processes, increase public participation, utilize the best available science and technical data for making case-specific significant nexus determinations, and to promote public health and environmental protection for all Americans who depend on reliable and abundant sources of clean water.

Improving Transparency: A key component of making the agencies' programs more consistent, predictable, and environmentally effective is to increase the public's access to information about how our decisions are made. As reflected in our joint memorandum to

¹ See joint EPA/Army memorandum issued October 10, 2015.

you dated July 8, 2015, we made an unequivocal commitment to make publicly available all jurisdictional determinations made under the CWA section 404 program and conducted under the Clean Water Rule. That commitment will also apply to CWA section 404 program jurisdictional determinations made under the prior regulations during the pendency of the stay. Accordingly, EPA and Corps staff will continue to work together to expeditiously complete development of an easily accessible and up-to-date website providing comprehensive information about jurisdictional determinations being made under the CWA section 404 program. This website will be publicly available nationwide by the end of 2015. We also committed to improving implementation of the CWA section 404 permit program by reducing delays, making the program more understandable, increasing consistency nationwide, and making the public notice process more effective and accessible.

Strengthening Coordination: It remains our goal for the agencies to work together more effectively than ever to improve and expedite administration of CWA Section 404. During the pendency of the stay, as the agencies implement the prior regulatory definition of “waters of the United States” as clarified by the 2008 *Rapanos* Guidance, the agencies should follow the 2007 Army-EPA joint memorandum on coordination² as modified by the January 2008 Corps of Engineers memorandum.³ We will continue to work together to identify means to improve this coordination.

In addition, we remain committed to improving the efficiency of the federal CWA permit process as outlined in our joint memorandum to you dated July 8, 2015. The EPA and Corps workgroup continues the effort to identify opportunities to reduce costs and delays, increase consistency and predictability, and improve protection for human health and the environment. One important element of this effort will be early engagement and close coordination between our two agencies in revising the Nationwide Permits. The revision of the Nationwide Permits will occur over the course of the coming year and presents an important opportunity to improve the effectiveness and efficiency of the section 404 permit program. We are committed to working closely together on this effort from the outset to ensure effective cooperation between the two agencies.

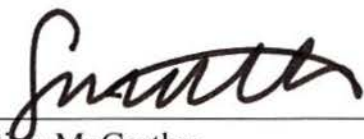
Compliance with the Stay: Since the Sixth Circuit stay was issued, the Army Corps of Engineers and the EPA resumed use nationwide of the agencies’ prior regulations defining the term “waters of the United States.” During the pendency of the stay, we will continue to apply these prior regulations together with relevant case law, applicable policy, and the best available science and technical data in determining which waters are protected by the CWA. Our two agencies will work closely with the Department of Justice to ensure our actions remain consistent with the stay, and we will continue to

² June 5, 2007, Army/EPA joint guidance clarifying coordination on CWA jurisdiction after *Rapanos*, http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_guide_memo.pdf.

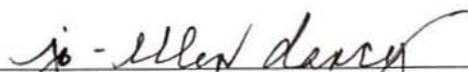
³ January 28, 2008, Corps of Engineers memorandum modifying EPA/Corps jurisdiction coordination after *Rapanos*, available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_coord_proc_28jan08.pdf.

provide you with the latest information and answer your questions regarding the stay and other relevant court decisions to help as you implement our responsibilities under the CWA. It is important that we work together to meet our responsibilities under the statute to protect the nation's clean water as consistently and as effectively as possible, while remaining fully consistent with the terms of the stay.

In closing, we want to use this opportunity to thank you and your staff for your commitment to public service and for the work you do to implement our shared CWA responsibilities. This work is critically important to the protection of our nation's water resources, upon which public health, the economy and the environment depend. Your commitment to this work is reflected in your accomplishments and your dedication to continued improvement, and we look forward to working closely with you to meet our goals on behalf of all Americans.



Gina McCarthy
Administrator
U.S. Environmental Protection Agency



Jo-Ellen Darcy
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