

EPA AND ARMY CORPS OF ENGINEERS ISSUE REVISED WETLANDS GUIDANCE

On December 2, 2008, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers issued its revised guidance memorandum clarifying the agencies' implementation of the U.S. Supreme Court's deeply-divided decision in the consolidated cases of *Rapanos v. United States* and *Carabell v. United States*. This memorandum revises and supersedes the agencies' earlier, June 5, 2007 guidance memorandum, and, according to the agencies, takes into account over 66,000 public comments the agencies received on the 2007 guidance and several "field implementation experiences" of the Army Corps' district offices and EPA's regional offices.

By way of background, *Rapanos* addresses the agencies' jurisdiction over wetlands and other waters under the Clean Water Act. A plurality of the Court concluded that regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters. In an opinion concurring in the judgment, Justice Kennedy concluded instead that wetlands can be regulated if they "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" In reaching this conclusion, Justice Kennedy relied on "significant nexus" language used by the Court in a previous wetlands decision, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, often referred to simply as "SWANCC."

The agencies' revised memorandum continues to specify that regulatory jurisdiction under the Clean Water Act exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied, and it also continues to maintain its position on regulatory jurisdiction with respect to four key issues.

First, the revised memorandum states that agencies "will assert jurisdiction" over the following waters: traditional navigable waters, wetlands adjacent to traditional navigable waters, non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months), and wetlands that directly abut such tributaries.

Second, the revised memorandum provides that the agencies "will decide jurisdiction" over certain waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water. These waters include non-navigable tributaries that are not relatively permanent, wetlands adjacent to non-navigable tributaries that are not relatively permanent, and wetlands adjacent to – but that do not directly abut – a relatively permanent non-navigable tributary.

Third, the revised memorandum describes how EPA and the Army Corps will apply the significant nexus standard. The agencies' significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters. This assessment must include a consideration of hydrologic factors, such as proximity to traditional navigable water, and ecologic factors such as the potential for a tributary to carry pollutants and flood waters to traditional navigable waters.

Fourth, the revised memorandum notes that the agencies "generally will not assert jurisdiction" over the following features: swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow), and ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

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The revised memorandum makes only a few changes to the agencies' earlier guidance memorandum. For example, it now clarifies how to determine the reach of a "traditional navigable water," and it clarifies the concept of "relevant reach." The revised memorandum also now clarifies the regulatory term "adjacent wetlands," and identifies three criteria the agencies will use to determine whether a wetland is adjacent. These criteria include: (1) an unbroken surface or shallow sub-surface connection to jurisdictional waters, which may be an intermittent hydrologic connection; (2) physical separation from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) reasonably close proximity to a jurisdictional water, supporting a science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.

Given the number of public comments the agencies received on their initial *Rapanos* guidance, and the fact that there are so few changes to the guidance, it is likely the agencies' revised guidance will ultimately satisfy no one, including states, environmental and conservation organizations, regulated entities, industry associations, and the general public. The agencies' stated intent of issuing revised guidance that will "enable the agencies to make clear, consistent, and predictable jurisdictional determinations within the scope of the Clean Water Act" may prove difficult to achieve in light of potential challenges from those who are dissatisfied with the guidance.

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