

EPA and Corps of Engineers' Joint Guidance on Rapanos: An In-field Perspective

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Nearly one year after the Supreme Court's fractured opinion in *Rapanos v. U.S.*, on June 5, 2007, EPA and the Corps of Engineers jointly issued a memorandum interpreting *Rapanos* in order to provide guidance to EPA and Corps' field offices to ensure consistency in identifying jurisdictional wetlands, streams and rivers under the Clean Water Act ("CWA"). The Guidance is limited to the regulatory provisions under Section 404 governing the dredging and filling of jurisdictional waters, including wetlands, at issue in *Rapanos* and does not apply to other CWA programs which share the definition of "waters of the U.S." such as Section 402 regulating pollutant discharges. As a result of the court's split decision in *Rapanos*, EPA and the Corps will now assert jurisdiction where a water body satisfies either Scalia's definition of "waters of the U.S." or Kennedy's "significant nexus" test. Prior to the *Rapanos* decision, EPA estimated more than fifty (50) percent of streams were subject to de-regulation. However, the agencies now anticipate that many of those endangered streams will satisfy one of the *Rapanos* standards.

Plurality's Definition of "Waters of the U.S."

Under Scalia's definition of "waters of the U.S.," EPA and the Corps will unquestionably assert jurisdiction over (1) traditional navigable waters, (2) wetlands adjacent to traditional navigable waters, (3) 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 (4) wetlands that directly abut such tributaries (e.g., they are not separated by uplands, a berm, dike, or other similar feature). "Adjacent" is defined in the regulations as "bordering, contiguous, or neighboring." A continuous surface water connection is not required if the wetlands are adjacent to traditional navigable waters.

Kennedy's "Significant Nexus Test"

EPA and the Corps will undergo case-by-case analysis of the following water bodies to determine if there exists a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent, (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary. In performing the significant nexus analysis, the agencies 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 together they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.

The significant nexus inquiry requires consideration of both hydrologic and ecologic factors. Hydrologic factors may include (1) volume, duration, and frequency of the flow of water, (2) proximity of the tributary to a traditional navigable water, (3) physical characteristics such as the presence of an ordinary high water mark and a channel defined by bed and banks, (4) size of the watershed, (5) average annual rainfall, and (6) average annual snow pack, slope and channel dimensions. Ecological factors may include (1) functions performed by the tributary and wetland such as their capacity to carry pollutants or flood waters to traditional navigable waters, (2) capacity to transfer nutrients to support downstream foodwebs, (3) ability to provide habitat to downstream waters, and (4) maintenance of downstream water quality.

What's Left?

The agencies generally will not assert jurisdiction over swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow) or ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water. However, these types of "water bodies" may still

contribute to a hydrologic surface water connection between an adjacent wetland and a traditional navigable water and/or may function as point sources for the discharge of pollutants into navigable waters.

Documentation Requirements and An In-field Perspective on Implementation of the Guidance

An important aspect of the Guidance is the requirement that EPA and the Corps fully document the basis and support for these jurisdictional determinations in the administrative record. The agencies concurrently issued a jurisdictional determination documentation form and instructions to field personnel. Practically speaking, the Guidance leaves much to be desired to the consultants tasked with conducting the jurisdictional delineations in the field. The Savannah Corps District and EPA Region 4 have significantly different interpretations of the Guidance. Unfortunately, limited training has been provided to the EPA and Corps officials and consultants to better understand implementation of the CWA under the Guidance. Additionally, agency technical personnel readily admit that few, if any, within the agency itself understand the Guidance.

Problems arising from the Guidance and the required documentation illustrate that the purpose of the Guidance, to provide consistency and reliability in jurisdictional determinations, has yet to be realized. Where a jurisdictional determination is made, even when the waters are non-jurisdictional, the determination is almost always accepted by the Corps. If a non-jurisdictional determination is made regarding a water under the Guidance, it is now subject to a more stringent and rigorous review by the Corps and EPA. However, the agencies lack the personnel to review and process the non-jurisdictional determinations and the waiting time for approvals on such determinations is currently at least eight (8) months. As a result, more and more consultants and developers are finding that it is faster and more economical to delineate

waters as jurisdictional, obtain permits and conduct mitigation than await review and approval of a non-jurisdictional determination. In some cases, under the Guidance more than half of the projects a consultant permits and mitigates are for non-jurisdictional streams and wetlands.

The new jurisdictional documentation form provided to field personnel is as equally flawed as the Guidance at providing a better understanding of what waters are covered under the CWA. The new form was not subjected to scientific field trials as were past forms, thus illustrating a lack of understanding of the aquatic systems and their features and functions. The data sheets are confusing to field personnel and attempt to coral “waters” into narrowly defined scopes. Terminology used is not scientifically appropriate, i.e., the newly created terms permanent waters, relatively permanent waters (RPW) and relatively non-permanent waters (RNPW) are used instead of the existing scientific classifications perennial, intermittent, or ephemeral.

In addition to these practical pitfalls of the Guidance and its current field documentation, the imposition of a relative permanent flow requirement may have detrimental impacts to important wetland systems in Georgia. Relative permanent flow is defined in the Guidance documents as ninety (90) consecutive days. However, intermittent streams in Georgia flow during the winter months, but may not flow for ninety (90) consecutive days. If the stream does not meet the flow criteria, it and associated wetlands will be classified as relatively non-permanent waters and thus non-jurisdictional unless a significant nexus is established. The result will be a significant loss of piedmont wetlands in the 100-year floodplain that provide extremely valuable functions. Such an impact is further exacerbated by the distinction between “adjacent” wetlands and “abutting” wetlands where many of Georgia’s piedmont wetlands are separated by natural berms.

Public Comment Period

The Guidance is subject to a six-month public comment period in order to evaluate its effectiveness on actual implementation in the field. Within nine months from the date of issuance, EPA and the Corps will either reissue, revise or suspend the Guidance based on the feedback provided during the public comment period. Come Spring 2008, it will be interesting to see just how much consistency and clarity the Guidance actually provided to practitioners, agency and field personnel or whether it will more quickly spawn the provision of new regulations or legislation. In any event, the Guidance does little to ease the process of jurisdictional waters delineations and permitting and is sure to result in further litigation in this area.