

EPA, ARMY CORPS ISSUE NEW WETLANDS REGULATORY GUIDANCE

On June 5, 2007, EPA and the U.S. Army Corps of Engineers (collectively “the agencies”) issued joint guidance interpreting the bounds of federal Clean Water Act (“CWA”) jurisdiction following last year’s splintered Supreme Court decision in *Rapanos v. United States*. In *Rapanos*, the Court considered whether CWA jurisdiction extends to: (1) wetlands adjacent to non-navigable waters of the United States; and (2) wetlands close to but isolated from non-navigable waters of the United States. The Court split 4-1-4 on these issues, creating two vastly different tests for CWA jurisdiction and leaving the lower federal courts, government regulators, and stakeholders awash in confusion. (For a detailed analysis of the *Rapanos* decision, please see <http://www.bdlaw.com/news-59.html>). The agencies intend for their new guidance to clear up this confusion and lead to clear, consistent, and predictable jurisdictional determinations under the CWA. We respectfully think it will not.

CWA JURISDICTION UNDER *RAPANOS*

The agencies’ joint guidance attempts to reconcile the two divergent jurisdictional tests articulated by the Supreme Court in *Rapanos*. The first test (endorsed by Justices Scalia, Thomas, Alito, and Chief Justice Roberts) understands the term “waters of the United States” to include “only those relatively permanent, standing or continuously flowing bodies of water,” but not “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” The Scalia test further explains, wetlands adjacent to such non-navigable waters are not jurisdictional under the CWA absent a “a continuous surface connection” to those waters resulting in “no clear demarcation” between the two. The second test (proposed by Justice Kennedy) pins CWA jurisdiction on “the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.” Under the Kennedy test, “wetlands possess the requisite nexus and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”

THE AGENCIES’ JOINT GUIDANCE

Despite the substantial differences between the two *Rapanos* tests, the new joint guidance instructs the agencies’ field offices to assert CWA jurisdiction when either test is met. To streamline these evaluations, the guidance creates three separate classes of waters, each of which will receive a different level of regulatory scrutiny.

The first class of waters, “traditional navigable waters and their adjacent wetlands,” includes those features over which the agencies will categorically assert federal jurisdiction. Because the government’s longstanding jurisdiction over traditional navigable waters was not at issue in *Rapanos*, the guidance explains that agency personnel may continue regulating these features without the need for additional analysis. Likewise, the agencies may continue asserting jurisdiction over wetlands adjacent to traditional navigable waters, even if there is no continuous surface connection between the wetlands and the waters.

Features in the second class of waters, those considered “relatively permanent non-navigable tributaries of navigable waters and wetlands with a continuous surface connection with such tributaries,” are also considered jurisdictional. According to the guidance, non-navigable tributaries are natural, man-altered, or man-made water bodies “whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries.” The guidance considers such non-navigable bodies to be “relatively permanent” and thus jurisdictional if they “typically (e.g., except due to drought) flow year-round” or have “continuous flow at least seasonally (e.g., typically three months).” In addition, adjacent wetlands that maintain a “continuous surface connection” with relatively permanent non-navigable tributaries are subject to the agencies’ federal jurisdiction. The guidance explains that while such a connection exists “where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature),” it is not necessary for “surface water to be continuously present.” Thus, wetlands having only a groundwater connection or fragmented surface water connection to relatively permanent non-navigable features do not fall within this second class of waters.

Jurisdiction over features in the third class of waters, described as “certain adjacent wetlands and non-navigable tributaries that are not relatively permanent,” is evaluated on a case-by-case basis. According to the guidance, the agencies will regulate the following three types of hydrologic features “when they have 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 not directly abutting, a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike or similar feature).”

To determine whether these features have the required significant nexus to traditional navigable waters, the agencies will first evaluate the flow characteristics and functions of the tributary or wetland at issue and the additional functions performed by any wetlands adjacent to that tributary or wetland. The agencies state that by considering the characteristics and functions of these features collectively, the evaluation will account for the ecological relationship between wetlands and the tributaries and the role these features play in protecting the integrity of downstream navigable waters. Thus, the guidance concludes that when “a tributary and its adjacent wetlands collectively have a significant nexus with traditional navigable waters, the tributary and all of its adjacent wetlands are jurisdictional.” For tributaries lacking adjacent wetlands, the function and characteristics of only the tributary will be assessed.

Among the factors the agencies will examine for the significant nexus evaluation are a tributary’s “volume, duration, and frequency of flow,” its proximity to traditional navigable waters, available hydrologic records and data, “physical indicators of flow” (e.g., presence of an ordinary high water mark, water staining, and scour), and various contextual considerations (e.g., watershed size, channel dimensions, slope, and average annual rainfall). When a tributary has adjacent wetlands, the agencies will consider the functions of these features and the tributary collectively. Some of these functions may include carrying pollutants or flood waters to traditional navigable waters or reducing the flow of pollutants or flood waters to navigable waters, transporting nutrients that support downstream foodwebs, providing upstream spawning areas, and contributing to maintenance of downstream water quality (e.g., sediment trapping).

After the agencies have assessed the features' functions and flow characteristics, the joint guidance instructs their field personnel to "evaluate whether the tributary and its adjacent wetlands [if any] are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water." Finally, in anticipation of controversy and litigation to come, the agencies must document for the administrative record all information taken into account as part of the significant nexus determination and explain why this information led them to conclude that the feature(s) at issue would or would not have the necessary effect on the integrity of navigable waters. To assist with this documentation, the agencies are currently developing a new jurisdictional determination form for use by field personnel.

While the guidance does not categorically exclude as non-jurisdictional any types of hydrologic features from the significant nexus analysis, it does suggest that certain low-flow features, such as drainage swales, gullies, and low-volume washes, generally do not qualify as tributaries or possess the requisite significant nexus to navigable waters to confer jurisdictional status. Likewise, ditches and roadside ditches "excavated wholly in and draining only uplands" that lack relatively permanent flow typically do not qualify as jurisdictional waters for the same reasons. However, the guidance adds that, even if these minor features are not independently jurisdictional under the CWA, they may still serve as a surface hydrologic connection between wetlands and traditional navigable waters or function as a point source that is subject to regulation under Sections 311 or 402 of the CWA.

WHAT COMES NEXT?

Because the *Rapanos* Court was unable to distill a single test for analyzing the jurisdictional status of non-navigable waters and associated wetlands, it is hardly surprising that EPA and the Army Corps had such a difficult time creating their joint guidance or that it took them so long to do so. However, because a full year has now passed since *Rapanos* was handed down, the agencies' local offices face massive backlogs of jurisdictional determinations that have been awaiting instructions on how to apply the opinion in the field. At the same time, faced with the agencies' silence in the wake of *Rapanos*, federal courts across the country have found themselves in a three-way split over the appropriate interpretation of the opinion. Despite the agencies' best efforts, this new joint guidance is unlikely to resolve either of these problems.

Because the guidance was not promulgated as a regulation, it is not legally binding on the agencies, the courts, or the regulated community. The agencies and the courts are free to apply or disregard the guidance as they see fit, which will likely exacerbate judicial disharmony and stakeholder uncertainty and lead to increasingly divergent regulatory practices among the Corps' 38 district offices. Moreover, while the guidance provides a number of factors for regulators to consider when evaluating CWA jurisdiction under the new significant nexus standard, it does not attempt to explain how to apply these factors, how much weight to give to each, or how to relate these factors to a determination of "significance." Because much of the debate has been, and will continue to be, focused on the jurisdictional status of the faint tributaries and distant wetlands now subject to the significant nexus analysis, such ambiguity will only pave the way for future litigation. The agencies themselves appear to recognize this and have indicated that they plan to consider the propriety of providing further clarification of these issues by rulemaking or other policy mechanisms. In the meantime, over the next six months they are

soliciting public comment on the agencies' implementation of the guidance, and they plan to either reissue, revise, or suspend it by March 5, 2008 depending in part on the feedback received.

The guidance may be viewed in its entirety at the EPA Office of Wetlands, Oceans and Watersheds' website: <http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html>.

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