



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
SIBLEY SQUARE AT MEARS PARK
190 FIFTH STREET EAST, SUITE 401
ST. PAUL MINNESOTA 55101-1638

OPERATIONS - REGULATORY

SUBJECT: Clean Water Act Guidance to implement the U.S. Supreme Court decision for the Rapanos and Carabell Cases

TO WHOM IT MAY CONCERN:

The purpose of this letter is to advise you that recent developments at the national level may impact the process, documentation, and length of time it takes for the U.S. Army Corps of Engineers, St. Paul District (Corps St. Paul District) to complete jurisdictional determinations and make permit decisions for proposed activities in waters of the United States (U.S.). At this time, we are adapting our internal procedures to implement the recently issued national guidance, and we are unable to provide supplemental information about this guidance and how it will affect our District procedures. However, I have compiled the following information to familiarize your agency with recent changes to the Clean Water Act Section 404 permit program.

In a recent decision on the consolidated cases *Rapanos v. United States* and *Carabell v. United States* (Rapanos), the Supreme Court addressed where the Federal government can apply the Clean Water Act (CWA), specifically by determining whether a wetland or tributary is a water of the U.S. On June 5, 2007, the U.S. Environmental Protection Agency (EPA) and Corps issued joint guidance to implement the Rapanos decision. The joint guidance will be used by EPA regions and Corps districts to determine whether aquatic resources such as lakes, streams, and wetlands are waters of the U.S., subject to regulation under the CWA.

As a result of the Rapanos decision, the Corps and EPA will be conducting a more thorough and robust analysis for determining the scope of the CWA Section 404 jurisdiction for waters of the United States. Several highlights of the guidance and its estimated effects on the Section 404 CWA program are included below for your information.¹ Additional information regarding the guidance can be found at <http://www.usace.army.mil/cw/cecwo/reg/> or <http://www.epa.gov/owow/wetlands/>.

¹ Information on general JD methodologies, oversight, and workload have been excerpted from "Guidance Highlights for Rapanos and Carabell Decision" found at http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/cwa_guide.htm.

GENERAL JD METHODOLOGIES

In accordance with the joint guidance, the agencies will continue to assert jurisdiction over traditional navigable waters (TNW's) and all wetlands adjacent to TNW's. Under the Supreme Court decision jurisdiction can be asserted over a water, including wetlands, that is not a TNW by meeting either of the following two criteria:

1. The first standard, based on the plurality opinion in the decision, recognizes regulatory jurisdiction over a water body that is not a TNW is that water body is "relatively permanent" (i.e., it flows year-round, or at least "seasonally," and over wetlands adjacent to such water bodies if the wetlands "directly abut" the water body (i.e., if the wetlands are not separated from the water body by an upland feature such as a berm, dike, or road). As a matter of policy, field staff will include, in the record, any available information that documents the existence of a significant nexus between a relatively permanent water body that is not perennial and a TNW.
2. The second standard, for tributaries that are not relatively permanent, is based on the concurring opinion of Justice Anthony P. Kennedy, and requires a case-by-case "significant nexus" analysis to determine whether waters and their adjacent wetlands are jurisdictional. A "significant nexus" may be found where waters, including adjacent wetlands, affect the chemical, physical or biological integrity of TNW's. Factors to be considered in the "significant nexus" evaluation include:
 - a. The flow characteristics and functions of the tributary itself in combination with the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of TNW's.
 - b. The consideration of hydrologic factors including, but not limited to, the following:
 - i. Volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary;
 - ii. Proximity to the TNW;
 - iii. Size of the watershed;
 - iv. Average annual rainfall;
 - v. Average annual winter snow pack.
 - c. The consideration of ecologic factors including, but not limited to, the following:
 - i. The ability for tributaries to carry pollutants and flood waters to TNW's;
 - ii. The ability of a tributary to provide aquatic habitat that supports a traditional navigable water;
 - iii. The ability of wetlands to trap and filter pollutants or store flood waters;
 - iv. Maintenance of water quality.

The guidance produced does not allow for the agencies to generally assert jurisdiction over non-jurisdictional features, including erosional features, swales, small washes characterized by low volume, infrequent, or short duration flow, and ditches

excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

OVERSIGHT

In the January 2003 Corps-EPA SWANCC guidance, Corps Headquarters (HQ) originally required the districts to request concurrence for only those actions where they would assert jurisdiction over non-navigable, intra-state, isolated waters, including wetlands. The Rapanos guidance now requires that all decisions involving such waters be elevated for agency HQ review prior to the district's making a final decision on jurisdiction, regardless if jurisdiction is asserted or declined. In addition, the guidance provides EPA an opportunity to review and to coordinate the determination at a higher level if there is a dispute regarding an action undergoing a "significant nexus" evaluation.

CORPS WORKLOAD

Workload throughout the 38 Corps districts will increase dramatically and there will be shifts in workloads depending on geographic factors. Additional costs could range from \$15 to \$20 million to:

- Develop and conduct staff training;
- Process a 5,500+ backlog of jurisdictional determinations and a concomitant backlog of project proposals;
- Perform additional field and desk review work;
- Conduct "significant nexus" determinations; and
- Implement coordination/elevation requirements.

At this time, the Corps St. Paul District is revising all operations and work products to comply with this guidance. In addition to the oversight noted above, we have temporarily instituted an internal review of all new jurisdictional determinations for consistency prior to any subsequent Corps HQ and/or EPA review. Until we have finished our internal reviews and procedural changes, we cannot provide you with supplemental information beyond what has been provided herein.

Sincerely,

Robert J. Whiting
Chief, Regulatory Branch