



Army Corps Issues Guidance Regarding Scope of Jurisdiction under the CWA and *Rapanos* Decision

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The Clean Water Act requires a permit from the Army Corps of Engineers before an activity involving a discharge of dredged or fill materials into the “navigable waters of the United States” can take place. Until recently, the Army Corps regulations broadly defined “navigable waters of the United States” to include some tributaries and wetlands that are separated from navigable waters. Several owners of land containing wetlands that were not connected or adjacent to navigable waters challenged the Army Corps definition in the consolidated cases, *Rapanos v. United States* and *Carabell v. United States*. The Supreme Court issued a confusing plurality decision that limits federal jurisdiction over wetlands by providing two separate tests for determining whether a tributary or wetland has a connection with “navigable waters of the United States.”

This week, the EPA and the Army Corps of Engineers finally issued a Regulatory Guidance Letter (RGL) which clarifies the determination of federal jurisdiction over waters and wetlands under *Rapanos*. The RGL delineates three classes of waters and discusses the agencies’ actions as follows:

- 1) Agencies will continue to assert jurisdiction over “traditionally navigable waters,” such as rivers and waterways that are large enough for the transport of commerce and any adjacent wetlands;
- 2) Agencies will continue to assert jurisdiction over “non-navigable tributaries that are relatively permanent and wetlands that are physically connected to these tributaries”; and
- 3) Agencies will regulate on a case-by-case basis other tributaries and adjacent wetlands that have a “significant nexus” with a traditional navigable water.

The RGL explains that the “significant nexus” standard is applied by analyzing the characteristics of the tributary and adjacent wetlands to determine if they significantly affect the chemical, physical, and biological integrity of downstream navigable waters. The RGL clarifies that agencies will not assert jurisdiction over swales, gullies, and ditches.

The RGL states that implementation of this guidance will require agencies to be more thorough in documenting their jurisdictional determinations. To achieve this goal, the Army Corps will be using a standardized jurisdictional determination (JD) form as well as posting results on the Army Corps website. The RGL warns that the time required to investigate, process, and complete JDs will be substantially greater than before the *Rapanos* decision. The RGL suggests that while each individual Army Corps district has authority to prioritize JD

requests, it is reasonable to give higher priority to JD requests for which a delineation of “waters of the United States,” has been prepared by a qualified consultant.

More information on the Army Corps/EPA guidance can be found at:
<http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html>

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