Guidance Highlights for *Rapanos* and *Carabell*

The U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency have issued two joint guidance memoranda to their field offices about how to determine Clean Water Act (CWA) jurisdiction in waters of the United States.

The **Rapanos Guidance memorandum** provides guidance to ensure jurisdictional determinations under the CWA are consistent with the Supreme Court decision in the *Rapanos* and *Carabell* litigation. As a result of the *Rapanos* decision, the agencies will be conducting a more thorough and robust analysis for determining the scope of the Clean Water Act (CWA) section 404 jurisdiction for waters of the United States.

The **Coordination memorandum** is in response to both the Rapanos and Carabell litigation, and the Supreme Court decision in the Solid Waste Agency of Northern Cook County (SWANCC) case. In the January 2003 Corps-EPA SWANCC guidance, 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 the 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.

In accordance with the **Rapanos Guidance memorandum**, the agencies will continue to assert jurisdiction over traditional navigable waters (TNWs) and all wetlands adjacent to TNWs. 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 standards:

- The first standard, based on the plurality opinion in the decision, recognizes regulatory jurisdiction over a water body that is not a TNW if 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.

- 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 TNWs. Factors to be considered in the "significant nexus" evaluation include:

- 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 TNWs.

- The consideration of hydrologic factors including, but not limited to, the following:
    - volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary
    - proximity to the traditional navigable water
    - size of the watershed
    - average annual rainfall
    - average annual winter snow pack

- The consideration of ecologic factors including, but not limited to, the following:
    - the ability for tributaries to carry pollutants and flood waters to TNWs
    - the ability of a tributary to provide aquatic habitat that supports a traditional navigable water
    - the ability of wetlands to trap and filter pollutants or store flood waters
    - maintenance of water quality

The guidance:

- Does not change the jurisdictional reach;
- Does not allow for districts to assert jurisdiction over non-jurisdictional features, including erosional features, swales, small washes characterized by low volume, infrequent, and short duration flow, and many ditches excavated wholly in and draining only uplands;
- Does not reverse or allow for jurisdiction to be asserted over waters, including wetlands, deemed non-jurisdictional by *SWANCC*; and,
- Should not affect the ability to support the Administration's goal of a no-net-loss, programmatically, of wetlands in the U.S.

Implementation of the *Rapanos* decision and guidance requires the agencies to be more thorough in documenting their jurisdictional determinations (JD). To meet this requirement the Corps will use a standardized form and continue to post results on the respective district websites. HQ will provide the JD form to the districts, with an Instructional Guidebook. The Guidebook clarifies terms commonly used in the form, presents an overview on jurisdictional practices, and supplements the form instructions.

A regulatory guidance letter (RGL) is in development now to provide additional clarification on CWA jurisdiction, by providing additional information on documentation requirements for approved JDs. Additionally, the Corps and EPA staff are coordinating on a potential follow-up RGL pertaining to drainage and irrigation features to further clarify the CWA regulatory environment.

Workload throughout the 38 Corps districts will increase dramatically and there will be shifts in workloads depending upon geographic factors. Additional costs could range from $5 to $60 million to:

- Develop and conduct staff training;
- Process a 20,000+ 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.

The additional time required to investigate, process, and complete JDs will be substantially greater than in the pre-Rapanos regulatory climate. Although the greatest workload impact falls on the Corps field personnel, EPA also will experience increased staffing demands associated with jurisdictional determinations. In conducting its environmental oversight of the regulatory program, EPA Regional staff will have increased field and desk review activities, especially in resolving any controversial jurisdictional determination cases.

The Administration intends to undertake rulemaking, as fully informed through consultation with the interested public.

Section 404 of the CWA protects wetlands, streams, and other waters, including wetlands, by requiring permits with appropriate environmental safeguards before an activity involving a discharge of dredged or fill material into waters of the U.S. can take place. Individual tribal, state and local laws may further protect water resources.

To increase agency accountability, the Army-EPA *Rapanos* guidance calls for more transparency and public accessibility. All relevant materials associated with the guidance will be published on the internet for public access. Information on the Army-EPA *Rapanos* guidance may be found at http://www.usace.army.mil/cw/cecwo/reg/.