



Corps and EPA Responses to the *Rapanos* Decision



Key Questions for Guidance Release

1. EPA analysis performed prior to the *Rapanos* decision stated that 53% of the waters in the U.S. were potentially at risk in the *Rapanos* and *Carabell* cases. Are these waters no longer jurisdictional?

In preparation for the *Rapanos* litigation, EPA estimated that 53% of the streams mapped in the National Hydrography Database were headwater streams and that 59% were either intermittent or ephemeral (both excluding Alaska). EPA performed these analyses to better understand the extent of waters that could be potentially removed from jurisdiction were petitioner's interpretation of the scope of Waters of the US adopted by the court. The *Rapanos* decision did not adopt petitioner's interpretation. As a result, those estimates are not an accurate estimate of waters jurisdictional after *Rapanos*.

We expect that many of these streams will be able to satisfy one of the standards established in the *Rapanos* decision, however, until the guidance has been in-place for a period time, we will not have case specific data to evaluate the extent of changes to historic (pre-*Rapanos*) CWA jurisdiction. The Agency's "*Rapanos* Guidance" is not intended to either increase or decrease CWA jurisdiction, but rather to provide guidance to the field to enable them to make jurisdictional determinations that are defensible following the *Rapanos* decision.

2. What do the agencies anticipate will be the impact of this guidance on the scope of geographic jurisdiction under the Clean Water Act?

The objective of this guidance is to clarify requirements for CWA jurisdictional determinations (JD) following the Supreme Court's *Rapanos* decision. Our primary purpose in issuing the guidance and associated technical field tools is to ensure a clear understanding of JD documentation requirements and foster a high level of national consistency in JD documentation and decisions. The guidance itself is not intended to either expand or contract CWA jurisdiction, but rather to effectively implement the decision by the Supreme Court in *Rapanos*.

3. What is the purpose of the comment period?

We are providing a six month public comment period to allow us to immediately rely on the guidance for consistent implementation of the decision, and also allow the public to provide comments, case studies, and experiences with the use of this guidance.

The Court's split decision in the *Rapanos* and *Carabell* decisions has caused uncertainty among agency field personnel and the general public regarding the scope of Federal jurisdiction under the Clean Water Act's section 404 program. For this reason, the agencies believe it is important that the guidance be issued immediately. At the same time, the agencies appreciate that the public has considerable interest in the issues

addressed in this guidance. For this reason, we are providing a six month public comment period, which will allow us to immediately rely on the guidance for consistent implementation of the decision, and allow the public to provide comments informed by actual experience. To assure the public of our commitment to carefully consider their comments, and to address issues that may unexpectedly arise during implementation of the guidance, the agencies will within nine months from the date of issuance either reissue, revise, or suspend the guidance.

4. The holding in *Rapanos* seems limited to a vacatur of the agencies' jurisdictional determinations in these two cases and a remand back to the original circuit court? Does the agencies' guidance interpret the decision to require that CWA jurisdiction be reduced?

No, the agencies are not interpreting the *Rapanos* decision as requiring that CWA jurisdiction be reduced or expanded. The agencies will assert CWA protections to the maximum extent allowed under the *Rapanos* decision. The guidance provides clarification for the agencies field staff, consistent with the Supreme Court decision, of what waters are regulated under the CWA by indicating when a wetland, tributary, or other water is a "water of the United States". The guidance identifies situations under which CWA jurisdiction is clear, such as for traditional navigable waters and their adjacent wetlands, and situations where a case-by-case decision is needed to determine jurisdiction, such as for tributaries that are not relatively permanent.

On June 16, 2006, a split Supreme Court in *Rapanos* vacated and remanded the judgments of the Sixth Circuit Court of Appeals. The Court issued five opinions with no single opinion commanding a majority of the Court.

A plurality of the Court held that wetlands adjacent to non-navigable tributaries are "waters of the United States" under the Clean Water Act only if the tributary to which the wetland is adjacent is a relatively permanent waterbody and the wetland has a continuous surface connection with the tributary. Justice Kennedy concurred with the plurality that the cases should be remanded, but disagreed with the plurality's analysis. He concluded that the Clean Water Act's jurisdiction over wetlands depends on whether a "significant nexus" exists between the wetlands and navigable waters, and that a significant nexus between wetlands and traditional navigable waters exists "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of traditional navigable waters. The dissenting opinion, authored by Justice Stevens, viewed the government's interpretation of the scope of "waters of the United States" as a reasonable interpretation in light of the ambiguity of that statutory term and the important water quality role of wetlands.

5. The agencies' guidance concludes that certain waters (e.g., swales, gullies, washes, etc.) generally are not waters of the U.S. Are the agencies eliminating CWA protection for these waters?

The Corps/EPA Guidance does not categorically broaden or narrow CWA jurisdiction, but reflects the CWA as interpreted by the Supreme Court in *Rapanos*. The plurality standard indicates that waters that are traditionally navigable or wetlands immediately adjacent are jurisdictional, as well as tributaries that are “relatively permanent” and wetlands that have a continuous surface connection to such waters. The Kennedy standard provides that waters with a “significant nexus” to navigable-in-fact waters are jurisdictional.

As indicated in the Guidance, the jurisdictional status of some waters is dependent on a case-by-case showing of whether or not the particular water meets either the Plurality or Kennedy standards.

Ephemeral washes and intermittent streams? The jurisdictional status of ephemeral or intermittent waters depends on whether such waters meet either the Plurality or Kennedy standards, as described above. Waters that flow only following precipitation events (ephemeral) will need to meet the Kennedy significant nexus test to be jurisdictional. Intermittent streams will either need to flow at least seasonally to meet the Scalia relatively permanent flow standard, or will have to meet the Kennedy significant nexus standard to be jurisdictional.

Isolated waters? *Rapanos* did not address the question of isolated waters and the regulations found at 33 CFR 328.3(a)(3) and 40 CFR Sec. 230.3(s)(3), indicating such waters may be jurisdictional under some circumstances. The Guidance is focusing only on issues raised in *Rapanos*, and as a result does not address isolated waters. Note that the guidance does not find as jurisdictional those waters deemed non-jurisdictional in the 2001 Supreme Court decision in *Solid Waste Agency of Northern Cook County (SWANCC)*. In *SWANCC*, the Court held that a water could not be considered jurisdictional based solely on its use by migratory birds, although the decision did not invalidate (a)(3) or other regulations. Since the decision EPA and Corps field staff no longer base Clean Water Act jurisdiction solely on the presence of migratory birds. After *Rapanos* and *SWANCC*, some isolated waters may still be jurisdictional under other bases, such as where they are themselves navigable (such as the Great Salt Lake in Utah).

Ditches? The guidance indicates that ditches (including roadside ditches) excavated in and draining only uplands are generally not considered jurisdictional, where they do not carry a relatively permanent flow of water. However such waters may serve as hydrologic connections that are relevant to a significant nexus determination for other waters. Other ditches may be jurisdictional if they meet either the Scalia or Kennedy standards.

6. What waters does the Corps/EPA Guidance indicate are protected under the Clean Water Act (CWA) after *Rapanos*?

The guidance has been developed to implement the U.S. Supreme Court decision in *Rapanos*. In accordance with the guidance, jurisdiction will be as follows:

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent (i.e., the tributaries typically flow year-round or have continuous flow at least seasonally)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally
- Wetlands adjacent to such tributaries
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies will apply the significant nexus evaluation as follows:

- A significant nexus analysis 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 in combination they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors

7. Is the effect of the *Rapanos* decision (and the Guidance) limited to CWA Section 404, or all programs under the CWA?

The Guidance focuses only on those provisions of the Corps and EPA regulations at issue in *Rapanos* – 33 CFR 328.3(a)(1), (a)(5) and (a)(7) and 40 CFR Sec. 230.3(s)(1), (s)(5), and (s)(7), which are the provisions addressing jurisdictional status of these categories of waters. This is not to say that other CWA program are not affected, rather that the *Rapanos* guidance focuses on jurisdictional determinations in the context of the Sec. 404 program.

In light of this, EPA may issue additional guidance concerning the effect of *Rapanos* on other CWA programs that use the common “waters of the U.S.” definition, such as the NPDES program under section 402.

8. Does the agencies’ new guidance supersede their January 2003 guidance interpreting the *SWANCC* decision? Will the agencies continue to require that field staff get HQ approval before protecting isolated wetlands but not when they deny CWA protection for such waters?

The newly issued *Rapanos* guidance does not supersede the agencies’ January 2003 guidance interpreting *SWANCC*. The agencies will continue to evaluate jurisdiction over

isolated wetlands and streams on a case-by-case basis. Concurrent with release of the *Rapanos* guidance, however, the Corps and EPA are issuing a jurisdictional determination documentation form and instructions to field personnel along with a memorandum establishing coordination procedures to be followed for new jurisdictional determinations. These technical tools and coordination procedures will help to provide national consistency, predictability, and improve the scientific basis for the agencies' CWA jurisdictional determinations. The coordination memorandum also addresses the so called "phone-home" provision of the January 2003 guidance by directing that all draft jurisdictional determinations involving isolated waters potentially affected by *SWANCC* be coordinated with EPA and Corps HQ, including draft determinations that would decline CWA jurisdiction.

9. Does *Rapanos* and the Guidance mean the no-net-loss wetlands goal is unattainable?

The agencies will continue to apply all of their regulatory tools in order to meet the no net loss of wetlands goal in the section 404 permit program. Since 1990, the Corps and EPA have worked to achieve a National goal of no-net-loss of wetlands under the Section 404 regulatory program. This goal is pursued by evaluating all proposed Section 404 permits to assure that every effort is made to avoid impacts to aquatic resources, minimize those impacts that are unavoidable, and effectively compensate for all permitted aquatic resource losses

10. What is the role of states and tribes in protecting waters, including those not addressed by the federal CWA?

An important component of successful implementation of the Clean Water Act (CWA) section 404 program is a close working relationship with states and tribes. States and tribes may assume operation of the section 404 program, and to date two have done so (Michigan and New Jersey). Many states and tribes have chosen to protect wetlands under State/Tribal law, while working cooperatively with the federal agencies without formally assuming the section 404 program.

The Administration remains committed to a strong Federal-State partnership to protect the Nation's waters. Annually, EPA has awarded an average of \$15 million to help enhance existing or develop new wetlands protection programs at the State, Tribal, and local levels. In addition to Wetlands Program Development Grants, EPA provides funding assistance for a variety of CWA programs involving wetlands and other waters. For example, EPA awards grants to states and tribes to implement projects and programs to reduce "nonpoint" sources of pollution, to support approaches of controlling stormwater and other "wet weather flows," and to reduce and prevent pollution of specific waters such as the Great Lakes and the Chesapeake Bay. The Agency also advances the President's Cooperative Conservation agenda through collaborative efforts such as the Five Star Restoration Program and the National Estuary Program.

States have the authority to regulate waters that are not addressed under the Clean Water Act. Section 510 of the Act provides: “[e]xcept as expressly provided in this chapter, nothing in this chapter shall ... be construed as impairing or in any manner affecting any right or jurisdiction with respect to the waters (including boundary waters) of such States.” Since the Supreme Court ruled in *SWANCC* in 2001, at least two states enacted legislation specifically designed to protect isolated wetlands, and some states had authority to regulate such wetlands before the *SWANCC* decision on which they could rely.

11. Now that the agencies have issued “interim” guidance, will EPA and the Corps proceed to develop regulations to clarify the scope of CWA jurisdiction?

The guidance supports a strong regulatory program, which is one of three key elements to the Bush Administration wetlands policy: a strong regulatory program that ensures no net loss; an active management program that will result in the restoration, enhancement and protection of three million acres by 2009; and a commitment to conserve isolated wetlands such as prairie potholes.

Rulemaking is among several actions the Administration is considering in response to the *Rapanos* decision. Rulemaking takes time – certainly well over a year to develop a final rule, in part, because of the important public notice and comment provisions called for under the Administrative Procedure Act. Agency guidance can more quickly assist regulators, the regulated community, and the public to understand and consistently apply the CWA. As a result, EPA and the Corps have focused efforts to date on developing the Guidance issued today.

EPA and the Corps have a long history of working together closely and cooperatively in order to fulfill our important statutory duties on behalf of the public, and we expect this cooperative approach to continue as we implement the Clean Water Act as interpreted by the *Rapanos* decision. Any decision to pursue new rulemaking will be collaborative, as will the substantive work of developing any new rules to establish a revised regulatory definition of “waters of the US”

Also noteworthy, is the March 28, 2006 jointly issued U.S. Army Corps of Engineers - EPA proposed set of new standards to promote “no net loss” of wetlands and streams. This proposed mitigation rule represents a collaborative effort between the Corps and EPA to develop a consistent set of science-based standards to compensate for unavoidable impacts to wetlands, streams, and other aquatic resources. The rule establishes a single set of standards that all forms of compensation must satisfy, and that is based on better science, increased public participation, and innovative market-based tools.

12. Is legislation needed to clarify what waters are protected by the CWA?

The Administration has not has not taken a position on any legislation to clarify the scope of “waters of the US” protected under the CWA. EPA and the Corps appreciate the interest that legislation cosponsors have in strong protection of the Nation’s aquatic resources, but are still evaluating whether the *Rapanos* decision may be fully addressed by administrative means.

13. Will the scope of CWA regulatory controls over development activities remain unclear following implementation of the Rapanos guidance?

The Administration is committed to making timely and well documented decisions of the CWA jurisdictional status of aquatic resources that may be impacted by proposed development activities. Over the years, the reach of CWA jurisdiction to certain wetlands and other aquatic resources has by times been contentious, and the Supreme Court’s involvement in the *Rapanos* and *Carabell* cases is a clear example of this. Additional cases challenging CWA jurisdiction are tried and decided in lower courts on a regular basis. While today’s guidance provides more clarity for how decisions of the jurisdictional status of non-navigable tributaries and their adjacent wetlands will be made, it is likely that legal challenges to the scope of CWA jurisdiction will continue.

During the first six months implementing the guidance, the agencies invite public comments, case studies, and experiences with the use of this guidance.