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EPA AND ARMY CORPS ISSUES REVISED JOINT GUIDANCE REGARDING THE AGENCIES' JURISDICTION UNDER RAPANOS

The U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") issued a revised guidance that will replace their previous policy issued in June 2007 and clarifies the June 2006 Supreme Court decision in Rapanos vs. United States, regarding the scope of the agencies' jurisdiction under the Clean Water Act ("CWA"). This revised guidance will clarify the geographic scope of jurisdiction under the CWA and help ensure America's wetlands, streams, and other waters are better protected under the CWA. The revised guidance follows the agencies' evaluation of more than 18,000 jurisdictional determinations and reviews of more than 66,000 comments.

Background

The CWA prohibits the discharge of dredged or fill material into "navigable waters" without a permit. "Navigable waters" is defined broadly as "the waters of the United States, including the territorial seas." The Corps, which issues permits for the discharge of dredged or fill material into navigable waters, interpreted "the waters of the United States" expansively to include tributaries within the "ordinary high water mark" and wetlands adjacent to those tributaries, even if the wetlands are separated by "man-made dikes or barriers, natural river berms, beach dunes and the like."

The Rapanos decision had been widely anticipated by developers and environmentalists as one that might establish a clear test for defining a jurisdictional wetland. However, the Court failed to reach a majority opinion on the correct test to apply under the CWA. Instead, the Court's 4-1-4 split failed to offer clear guidance for defining a jurisdictional wetland. In a plurality opinion authored by Justice Scalia, four Supreme Court justices concluded that the agencies' regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters. Justice Kennedy authored a concurring opinion in which he presented a different standard for evaluating CWA jurisdiction over wetlands and other bodies. Justice Kennedy concluded that wetlands are "waters of the United States" 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. In other words, Justice Kennedy would require a "significant nexus" between the wetlands and navigable waters for regulatory jurisdiction to exist.

Original Guidance

On June 5, 2007, the EPA and the Corps issued joint guidance for their field offices to clarify regulatory jurisdiction pursuant to the CWA following the Supreme Court's decisions in Rapanos vs. United States. The guidance only addressed the interpretation of the term "waters of the United States" under §404 of the CWA and expressly reserved judgment on how it will be interpreted under other provisions of the CWA, such as §402 regulating discharges of pollutants from point sources into regulated waters. The agencies hoped that the guidance would result in jurisdictional determinations and permit actions that are consistent with the Court's decision.

The agencies will continue to assert jurisdiction over traditional navigable waters, wetlands adjacent to traditional navigable waters, non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months), and wetlands that directly abut such tributaries.

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The agencies will decide jurisdiction based on a case-by-case, fact-specific analysis to determine whether there is a significant nexus with a traditional navigable water for non-navigable tributaries that are not relatively permanent, wetlands adjacent to non-navigable tributaries that are not relatively permanent, or wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.

The significant nexus standard will be applied by assessing the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream navigable waters. Additionally, the significant nexus analysis includes consideration of hydrologic and ecologic factors.

The agencies generally will not assert jurisdiction over swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) or ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

The June 5, 2007 joint guidance requested comments on its implementation in the field. As a result, the EPA and the Corps received 66,047 public comments on the Rapanos Guidance, spanning from states, environmental and conservation organizations, regulated entities, industry associations, and the general public. The revised guidance is the result of extensive discussions needed to fully consider public input and the agencies' implementation experiences.

Jurisdictional Guidance Revisions

The EPA and the Corps revised the Rapanos Guidance in consideration of public comments received and consistent with their experience implementing the guidance over the past eighteen months. Specifically, the revised guidance: (1) clarifies how to determine the reach of "Traditional Navigable Waters ("TNWs)," (2) clarifies the regulatory term "adjacent wetlands," and (3) refines the concept of "relevant reach."

Traditional Navigable Waters

The revised guidance defines traditional navigable waters as waters that: (1) are subject to Section 9 or 10 of the Rivers and Harbors Act or (2) have been determined to be navigable-in-fact under federal law by a federal court or (3) have historically been used for commercial navigation, including commercial water-borne recreation or lastly (4) are susceptible to being used in the future for commercial navigation, including commercial water-borne recreation. Whether a water is susceptible for future use will be determined by examining the physical characteristics and capacity of the water (i.e. size, depth, and flow velocity, etc.), including commercial recreational navigation, and the likelihood of future commercial navigation or commercial water-borne recreation. Evidence of future commercial navigation use must be clearly documented. Susceptibility for future commercial navigation, including commercial water-borne recreation, will not be supported when the evidence is insubstantial or speculative.

Adjacent Wetlands

The revised guidance also clarifies the definition of an adjacent wetland. The June 2007 guidance discussed the circumstances under which adjacent wetlands were jurisdictional after Rapanos, but did not discuss the meaning of adjacency other than to reference the regulatory definition as "bordering, continuous or neighboring." See 33 C.F.R. §328.3(c). The regulatory definition also continues to define adjacent wetlands as wetlands that are "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like."

Relying on the existing definition, the agencies will consider wetlands to be adjacent if: (1) there is an unbroken surface or shallow sub-surface connection to jurisdictional waters that may be intermittent; (2) they are physically separated from jurisdictional waters by man-made dikes or barriers, or natural river berms, beach dunes, and the like; and (3) they are reasonably close to a jurisdictional water, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters. To satisfy this third requirement, the revised guidance concludes that it is not necessary to perform a case-specific demonstration of ecological interconnection because of the scientific basis for the inference that wetlands have an ecological connection with jurisdictional waters. In the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial. In assessing whether a wetland is reasonably close to a jurisdictional water, the proximity of the wetland in question will be evaluated independently of other wetlands in the area.

“Relative Reach” of Tributaries

Finally, the revised guidance addresses the issue of whether a tributary is relatively permanent. The original guidance stated that a tributary is the entire reach of the stream that is of the same order, and that the flow characteristics of a particular stream reach should be evaluated at the farthest downstream limit of reach. The revised guidance makes some changes with respect to assessing the flow in tributaries for purposes of determining whether the tributary is relatively permanent. Specifically, where the downstream limit is not representative of the stream reach as a whole, the flow regime that best characterizes the reach should be used. A primary factor in making this determination is the relative lengths of segments with differing flow regimes.

Conclusion

The agencies will continue to monitor the implementation of the Rapanos decision in the field. In the future, further consideration of jurisdictional issues may be appropriate, either through issuance of additional guidance or through rulemaking. In the meantime, landowners and developers seeking to fill or clear wetland areas proceed at their risk, unless they first obtain a favorable jurisdictional determination or §404 permit from the Corps.

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