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## U.S. EPA and the Army Corps of Engineers Issue Joint Guidance on Wetlands Jurisdiction

Last June, the Supreme Court issued its much anticipated decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006) (and its companion case *Carabell v. United States Army Corps of Engineers*). Both cases involved challenges to the U.S. Army Corps of Engineers assertion of jurisdiction over wetlands that were adjacent to non-navigable tributaries of traditional navigable waters. Unfortunately, the Court's decision did not clear the muddy waters of wetland jurisdiction.<sup>1</sup> The Court was split 4–1–4 and the justices issued five separate opinions (with no one opinion representing a majority) leading to more uncertainty among the agencies and the public over the scope of the Clean Water Act's wetland jurisdiction.

On June 5, 2007, the U.S. Environmental Protection Agency and the Army Corps of Engineers issued the Clean Water Act Jurisdiction Guidance (Guidance) in an attempt to promote consistent jurisdictional determinations and permitting actions based upon application of the *Rapanos* opinion. The Guidance (available at <http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf>) seeks to articulate those waters that the agency will categorically assert jurisdiction over and those that will be assessed on a case-by-case basis. While the guidance is effective immediately, the agencies are inviting public comments until December 5, 2007.

Based upon the Guidance, the agencies will assert jurisdiction over the following waters without making a "significant nexus" determination:

1. Traditional navigable waters, used in interstate commerce or subject to the ebb and flow of the tide, as defined in 33 C.F.R. § 328.3(a)(1) and 40 C.F.R. § 230.3(s)(1);
2. Wetlands adjacent to traditional navigable waters. Adjacent means "bordering, contiguous or neighboring." *Guidance* at 5. A determination of an adjacent wetland does not require a continuous surface connection to a traditional navigable water;
3. Relatively permanent non-navigable tributaries of traditional navigable waters. Relatively permanent means tributaries with year round flow or continuous seasonal flow for at least three months per year; and

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4. Wetlands that have a continuous surface connection with such relatively permanent non-navigable tributaries. A continuous surface connection exists when the wetland directly abuts the tributary and is not separated by uplands, berms, or dikes. *Id.* at 4–6.

The agencies will assert jurisdiction over the following waters after making a jurisdictional determination on a case-by-case analysis of whether there is a “significant nexus” between the water and a traditional navigable water:

1. Non-navigable tributaries that are not relatively permanent;
2. Wetlands adjacent to such non-navigable tributaries that are not relatively permanent; and
3. Wetlands adjacent to but not directly abutting a relatively permanent non-navigable tributary due to a break in the continuous surface connection. *Id.* at 7–10.

The agencies’ significant nexus analysis will follow Justice Kennedy’s significant nexus standard articulated in his concurring opinion in *Rapanos*. “Wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ 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.’” *Rapanos*, 126 S. Ct. at 2248.

The agencies generally will not assert jurisdiction over the following waters previously considered to be wetlands:

1. Swales, gullies, or erosional features that have low volume with infrequent or short duration flow; and
2. Ditches, including roadside ditches, that do not have a relatively permanent flow of water and were “excavated wholly in and draining only uplands.” *Id.* at 11.

Although the Guidance will serve as an aid in applying the *Rapanos* decision, there likely will continue to be significant debate and litigation over the interpretation of a “significant nexus” and its application to each particular situation.

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<sup>1</sup> Section 404 of the Clean Water Act prohibits the discharge of pollutants or fill materials into navigable waters, defined as “waters of the United States.” See 33 U.S.C. §§ 1311–1344. In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the Supreme Court concluded that federal jurisdiction extends to waters and wetlands “adjacent to” navigable waters. Following *Bayview*, the Corps promulgated wetlands regulations and included within the definition of “waters of the United States” isolated wetlands that could be visited by migratory birds. 51 Fed. Reg. 41206, 41217 (1986). In 2001, after the migratory bird rule was upheld by several courts, the Supreme Court held that the Corps had exceeded its authority in asserting Clean Water Act jurisdiction over isolated, intrastate, non-navigable waters based upon the migratory bird rule. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).