



RESPONSE TO COMMENTS
“CLEAN WATER ACT JURISDICTION FOLLOWING THE SUPREME
COURT’S DECISION IN RAPANOS v. UNITED STATES & CARABELL v.
UNITED STATES GUIDANCE” ISSUED JUNE 5, 2007

On June 5, 2007, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) issued guidance, effective immediately, regarding Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court’s decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States*. The agencies accepted public comments on the Rapanos guidance until January 20, 2008. The agencies received 66,047 public comments on the *Rapanos* Guidance (65,765 form letters, 282 non-form letters), from States, environmental and conservation organizations, regulated entities, industry associations, and the general public. EPA and the Corps have reviewed the comments and have revised the guidance in consideration of those comments and consistent with our experience implementing the guidance over the past 18 months.

The comments generally addressed four substantive issues and two procedural ones. The substantive areas were: the interpretation of the term “significant nexus;” the treatment of tributaries; the definition of “relatively permanent waters;” and the scope of “traditional navigable waters.” The procedural areas were: the delay in processing jurisdictional determinations and the coordination between the two agencies on jurisdictional determinations.

The agencies also received comments from some on other important issues. One of these, the definition of adjacency, which has been an important implementation issue for the agencies, is also discussed below.

Significant Nexus

In *Rapanos*, 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.’” When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’” The agency guidance states that the agencies will assess the flow characteristics and functions of the tributary itself,

together with the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters.

Comments:

Environmental and conservation communities commented that the guidance interprets the term significant nexus too narrowly. They commented that under the Kennedy standard the agencies have the ability to continue to protect wetlands when they collectively affect water quality and to apply that protection to similar waterbodies. The regulated community commented that significant nexus is interpreted too broadly in the guidance. These commenters argued that there needs to be actual data showing impacts to integrity of traditional navigable waters (TNWs) to establish a significant nexus. States commented that they were concerned about the analytical and data burden of making significant nexus determinations consistent with the guidance. Arid states were especially concerned that a narrow interpretation leaves many important streams unregulated and thus unprotected.

Response:

The agencies have made no changes to the guidance with respect to significant nexus findings. The agencies struck a careful balance when interpreting Justice Kennedy's opinion. The positions articulated by commenters were among those considered by the agencies when developing the guidance, and the agencies have decided to maintain their interpretation of the term significant nexus for purposes of determining when a water is a "water of the United States."

Treatment of Tributaries

The guidance interprets Justice Kennedy's standard to apply to tributaries as well as wetlands. The guidance also clarifies that a tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water. In addition, for the purposes of the guidance, a tributary is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point where such tributary enters a higher order stream). Under the guidance, the flow characteristics of a particular tributary will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream).

Comments:

The environmental community commented that *Rapanos* did not address the scope of CWA jurisdiction for tributaries, and they should be jurisdictional categorically. The conservation community commented that tributaries should be jurisdictional categorically, or, alternatively, any tributary with an ordinary high water mark should be presumed to have a significant nexus. The regulated community commented that

tributaries are subject to *Rapanos*. States expressed concern about the loss of jurisdiction over tributaries generally. Arid states in particular expressed concern about ephemeral, intermittent and headwater streams that are critical resources in their states.

A smaller number of commenters addressed the stream reach concept in the guidance. The general consensus among the regulated community was that the concept is overly broad in its interpretation and application when determining jurisdiction, and many suggested that the concept be abandoned. The environmental community commented that the concept limits jurisdiction and is not in keeping with Justice Kennedy's intent. Other commenters recommended the concept be more scientifically or ecologically based and that it should take into account a broader watershed approach. A few commenters opposed the guidance to assess flow at the farthest downstream limit. Some commented thought that this was simply not feasible, while others suggested that this was not the most appropriate approach to assessing an entire stream, suggesting that the stream flow be assessed where it is most representative of the entire stream.

Response:

The agencies have made no changes to the guidance with respect to utilizing Justice Kennedy's standard to determine the jurisdiction of tributaries. The agencies struck a careful balance when interpreting Justice Kennedy's opinion. The positions articulated by commenters were among those considered by the agencies when developing the guidance, and the agencies have decided to maintain their interpretation of the scope of Justice Kennedy's standard for purposes of determining when a tributary is a "water of the United States."

The agencies have made some changes with respect to assessing flow in tributaries for purposes of determining whether a tributary is relatively permanent. Footnote 24 of the guidance now clarifies that where data indicates the flow regime at the downstream limit is not representative of the tributary (e.g., where data indicates the tributary is relatively permanent at its downstream limit but not for the majority of its length, or vice versa), the flow regime that best characterizes the tributary should be used.

Definition of Relatively Permanent Waters

For purposes of implementing Justice Scalia's standard, the guidance interprets relatively permanent waters (RPWs) as "waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months)."

Comments:

The environmental community commented favorably on the agencies' approach to determining RPWs. The regulated community commented that RPWs should be limited to perennial streams or those that flow at least 290 days. The conservation community commented that the guidance's approach to RPWs could inappropriately

eliminate jurisdiction over some intermittent streams. They further commented that physical indicators, rather than timing of flow, should be used to meet the plurality test.

Response:

The agencies have made no changes to the guidance with respect to their approach to determining RPWs. The agencies struck a careful balance when interpreting Justice Scalia’s opinion. The positions articulated by commenters were among those considered by the agencies when developing the guidance, and the agencies have decided to maintain their interpretation of the term relatively permanent for purposes of determining when a water is a “water of the United States.” However, the agencies have provided additional technical guidance in footnote 24 on how to assess flow in a tributary to determine whether it is an RPW.

Traditional Navigable Waters

The agencies stated in the guidance that they considered section (a)(1) of their regulations defining “waters of the United States” to constitute the “traditional navigable waters” (TNWs) for purposes of Clean Water Act jurisdiction (see footnote 20 of the guidance and Appendix D of the field instructional manual).

Comments:

Environmental and conservation communities commented that TNWs should be interpreted as broadly as possible. The regulated community commented that TNWs are no broader than Section 10 waters under the Rivers and Harbors Act of 1899 (RHA).

Response:

The agencies have made some changes to the guidance to clarify the scope of “traditional navigable waters” for purposes of CWA jurisdiction. The agencies have edited footnote 20 of the guidance to make even more explicit that they consider Section 10 waters to be a subset of TNWs. In addition, changes to footnote 20 provide more guidance to the field on how to determine if a water is a TNW, including how to determine if it is susceptible for use in commercial navigation, including commercial water-borne recreation.

Processing Delay

To ensure that decisions are made on sound science and a defensible record, the guidance instructs Corps districts and EPA regions to document jurisdictional determinations (JDs) in a manner consistent with the standards laid out by the opinion. Specifically, the guidance indicates the “record shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination.”

The agencies issued a number of documents, in conjunction with the *Rapanos* guidance, to assist field staff to make accurate and appropriately documented JD decisions. These documents included a field instructional manual, a JD form, and a MOU establishing an interagency coordination process with specific deadlines.

Comments:

All commenter groups expressed concern regarding delay in finalizing official JDs (i.e., “approved JDs”), and implications of that delay for permitting decisions and timing of associated projects. Many identified as a source of delay the extent of data and analysis required to finalize an approved JD. A number of commenters from the regulated community, state departments of transportation, and the conservation community recommended that the agencies provide an opportunity to “opt into” jurisdiction, allowing project proponents willing to have all aquatic resource impacts evaluated and mitigated to move to the permitting process rather than awaiting an approved JD.

Response:

On June 26, 2008, the Corps of Engineers issued Regulatory Guidance Letter (RGL) 08-02, clarifying that project proponents may request a preliminary JD, which is based on an “effective presumption of CWA/RHA jurisdiction over all of the wetlands and other water bodies at the site.” (See RGL 08-02, paragraph 9a.) Consequently, a preliminary JD allows the Corps to proceed to the permitting process rather than waiting for an approved JD. RGL 08-02 indicates that, with such preliminary JDs, there is no legally binding determination of CWA jurisdiction over the particular water body or wetlands in question, but only a presumption of jurisdiction to facilitate permitting. For all cases where approved JDs are used, the agencies continue to believe that well-documented approved JDs are necessary to ensure that decisions are made based on sound science and a defensible record, and so the agencies have not modified documentation requirements for approved JDs in the guidance.

Coordination Process

Concurrent with issuance of the *Rapanos* guidance, the agencies established a coordination process for draft approved JDs involving a significant nexus or section (a)(3) of the regulatory definition of “waters of the United States.” The June 2007 coordination process provided specific timeframes for interagency review, and a process for field staff to elevate specific JDs to EPA and Corps headquarters for resolution if necessary. While the coordination procedures for (a)(3)-related JDs were to continue indefinitely unless the agencies agreed to modifications, coordination of significant nexus-related JDs was to end after six months unless the agencies agreed to continue.

Comments:

Several commenters from state environmental agencies, environmental nonprofits, and the general public emphasized the importance of JD coordination for consistent and accurate JDs. Some commenters from the regulated community and state departments of transportation indicated that the interagency coordination process caused delays and recommended that coordination with EPA be ended altogether.

Response:

On January 28, 2008, the Corps indicated that for significant nexus-related JDs, the coordination process was being changed to provide a shorter timeframe than was established when the guidance was originally issued. Under the new coordination process for significant nexus-related JDs, the EPA Region has 15 days to review the draft JD, discuss any questions or concerns with the Corps District, and “special case” the JD if they feel it is necessary after those discussions. Coordination of (a)(3)-related draft JDs remained unchanged. As a result, the Corps continues to provide EPA with all draft JDs involving significant nexus or (a)(3) waters. This does not apply to preliminary JDs, since these are only used in cases where a project sponsor agrees to a presumption of CWA/RHA jurisdiction over all waters on the project site.

Adjacency

The guidance states that the agencies will continue to assert jurisdiction over wetlands “adjacent” to traditional navigable waters as defined in the agencies’ regulations. Under EPA and Corps regulations and as used in this guidance, “adjacent” means “bordering, contiguous, or neighboring.” Finding a continuous surface connection is not required to establish adjacency under this definition. The Rapanos decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are “waters of the United States.”

Comments

Some in the regulated community commented that the automatic regulation of nearby wetlands based solely on their adjacency to a traditional navigable water is inappropriate. These commenters also requested that the definition of “adjacent” be clarified and the regulations be revised.

Response:

Under the revised guidance, the agencies continue to assert jurisdiction over wetlands that are adjacent to traditional navigable waters as that term is defined in the agencies regulations.. The agencies disagree with commenters and conclude that at least five justices agreed that such wetlands are “waters of the United States.” The agencies agree that the guidance should provide some further clarification of the term “adjacent”

and have revised the guidance to identify, consistent with the regulations and agency practice, the three criteria the agencies use to determine whether a wetland is adjacent.