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Questions and Answers for *Rapanos* and *Carabell* Decision

Table of Contents

	<u>Page Number</u>
General Questions on the <i>Rapanos</i> Decision	2
General Questions on the Corps/EPA <i>Rapanos</i> Guidance	6
Questions on Jurisdictional Determinations Requiring a “Significant Nexus” Evaluation	8
Documentation and Coordination Requirements	12
Program Impacts	14
Permit Process Questions	17
Programmatic Questions	18
Questions Regarding State/Tribal Programs to Protect Aquatic Resources	20
General Questions on Rulemaking and Guidance	21

**Questions and Answers for
Rapanos and Carabell Decision**

General Questions on the *Rapanos and Carabell* Court Decision:

1. What issues were addressed by the Supreme Court in *Rapanos* and *Carabell* (hereinafter referred to as *Rapanos*)?

A. The Supreme Court addressed the following two questions:

(1) Whether wetlands that are adjacent to, and have a surface hydrologic connection with, non-navigable tributaries of traditional navigable waters are part of “the waters of the United States” within the meaning of the CWA, and (2) whether application of the CWA to the wetlands at issue in the *Rapanos* and *Carabell* cases is a permissible exercise of congressional authority under the Commerce Clause.

While the *Rapanos* case involved the CWA § 404 permitting program for discharged of dredged or fill material, the decision has implications for all CWA programs, such as § 402 National Pollutant Discharge Elimination System (NPDES) permits, § 311 oil spill prevention and cleanup, and § 303 water quality standards.

2. Did the Supreme Court reach an agreement in the *Rapanos* decision?

A. No, the Justices issued five separate opinions with no single opinion commanding a majority of the Court.

3. What is the “holding” in *Rapanos*?

A. The original judgments have been vacated and remanded to the 6th Circuit for further proceedings consistent with the *Rapanos* decision.

4. What is the significance of the *Rapanos* decision with respect to CWA jurisdiction?

A. The decision allows the Corps and EPA to establish CWA jurisdiction under one of two standards. The first standard, established by the plurality decision, upholds CWA jurisdiction if the water body is “relatively permanent,” and its adjacent wetlands directly abut that water body. The second standard, established by Justice Kennedy, upholds CWA jurisdiction if a water body, in combination with all wetlands adjacent to that water body, has a “significant nexus” with traditional navigable waters. Justice

Kennedy specifically indicated that the effect on the chemical, physical, and biological integrity of the traditional navigable water must be significant (i.e., not speculative or insubstantial).

The *Rapanos* decision did not affect CWA jurisdiction over traditional navigable waters and their adjacent wetlands.

5. The *Rapanos* opinions seem to agree that navigable waters are protected under the CWA, but do not define that term. How do the agencies define “navigable waters”?

A. Section 502(7) of the CWA defines the term “navigable waters” as “the waters of the United States, including the territorial seas.” The Agencies’ regulations further define the term “waters of the United States,” at 33 C.F.R. § 328.3(a) and 40 C.F.R. § 230.3(s).

6. What is “a traditional navigable water”?

A. “A traditional navigable water” includes all of the “navigable waters of the United States,” defined in 33 C.F.R. § 329, and by numerous decisions of the Federal courts, plus all other waters that are navigable-in-fact.

7. What is the Agencies’ definition of a “wetland”?

A. In accordance with the Corps 1987 Wetland Delineation Manual, the Corps and EPA jointly define “wetlands” as:

- **Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.**
- **We use three diagnostic environmental characteristics when making wetland determinations: vegetation, soil, and hydrology. Greater than 50% of the vegetation present must be considered hydrophytic. Hydric soil must be present. The hydrology requirement is satisfied when an area is saturated within 12 inches of the surface at some time during the growing season of the prevalent vegetation. Unless an area has been altered or is a rare natural situation, wetland indicators of all three characteristics must be present during some portion of the growing season for an area to be a wetland.**

8. What does “adjacent” mean if a wetland is “adjacent to a traditional navigable water”?

A. “Adjacent,” as defined in Corps and EPA regulations, means “bordering, contiguous, or neighboring.” Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’

9. What is a “tributary”?

A. A “tributary,” as defined in the *Rapanos* guidance document, means a natural, man-altered, or man-made water body that carries flow directly or indirectly into traditional navigable waters. For purposes of determining “significant nexus” with a traditional navigable water, 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 such tributary enters a higher order stream).

10. What does “abutting” mean if a wetland is adjacent to a tributary?

A. Wetlands that are not separated from the tributary by an upland feature, such as a berm or dike is “abutting.”

11. What does the term “relatively permanent” mean?

A. In the context of CWA jurisdiction post-*Rapanos*, a water body is “relatively permanent” if its flow is year round or its flow is continuous at least “seasonally,” (e.g., typically 3 months). Wetlands adjacent to a “relatively permanent” tributary are also jurisdictional if those wetlands directly abut such a tributary.

12. In the context of CWA jurisdiction post-*Rapanos*, what does the term “significance nexus” mean?

A. A water body is considered to have a “significant nexus” with a traditional navigable water if its flow characteristics and functions in combination with the ecologic and hydrologic functions performed by all wetlands adjacent to such a tributary, affect the chemical, physical, and biological integrity of a downstream traditional navigable water.

13. Will the ruling in *Rapanos* affect the Administration's goal of "no net loss" of wetlands in the § 404 Program?

The *Rapanos* decision is not expected to affect the Administration's goal of "no-net-loss" of wetlands in the United States. The decision focused on the interpretation of jurisdictional waters and their effect on navigable waterways. The decision did not address programs and/or policies regarding the "no net loss" of wetlands.

Since 1989 the Corps and EPA have implemented the § 404 program to achieve a Presidential goal of "no net loss" of wetlands. The § 404 program is responsible for ensuring the Administration's policy regarding "no net loss" of wetlands by requiring permit applicants to make every effort to avoid and minimize aquatic resource impacts, and provide compensatory mitigation to offset any permitted impacts. Recent estimates suggest that Department of the Army permits authorize yearly impacts to approximately 20,000 acres of jurisdictional waters. To compensate, the Corps requires mitigation to the permitted impacts at an average ratio of greater than 2:1. Subsequently, impacts to 20,000 acres of jurisdictional waters would require the creation of 40,000 acres, which is a net increase of 20,000 acres.

The Corps and EPA will continuously assess impacts of the *Rapanos* decision on attainment of the "no net loss" goal.

14. Beside the § 404 program, what other Federal programs protect our Nation's wetlands?

A. On Earth Day 2004, the President announced a new initiative to go beyond "no net loss" of wetlands and attain an overall increase in the quality and quantity of wetlands in America. Specifically, the Administration has projected that an additional 1.5 million wetland acres will be created, improved, or protected between Earth Day 2006 and 2007, with three million acres being obtained by 2009. These figures are in addition to the 1,797,000 acres of wetlands that have already been restored, created, protected, or improved since the onset of the 2004 initiative.

Numerous aquatic ecosystem restoration projects under the Aquatic Ecosystem Restoration Program are being funded within the Corps in an effort to support the President's wetland goal for 2007. For example, the Corps is actively involved in the Comprehensive Everglades Restoration Plan (CERP), which is the largest ecosystem restoration effort, and will assist in restoring the aquatic ecosystem of South Florida while ensuring clean and reliable water supplies and flood protection to urban areas. Additional large-scale restoration projects the Corps is involved with include the Louisiana Coastal Area Restoration and the Upper Mississippi River

Restoration, which focus on restoring, creating, and improving large wetland ecosystems. In summary, the Aquatic Ecosystem Restoration Program under the USACE is projected to create, restore, protect, or enhance 813,667 acres of wetlands by 2007.

Additional protection is provided by:

- **The Food Security Act's Swampbuster requirements;**
- **Federal agricultural benefit programs such as the Wetlands Reserve Program (administered by the U.S. Department of Agriculture);**
- **Grant-making programs such as**
 - **Partners in Wildlife (administered by the Fish and Wildlife Service),**
 - **Coastal Wetlands Restoration Program (administered by the National Marine Fisheries Service), and**
 - **Five Star Restoration and National Estuary Program (administered by EPA);**
- **The Migratory Bird Conservation Commission (composed of the Secretaries of Interior and Agriculture, the Administrator of EPA and Members of Congress).**

Many of these programs provide significant incentives for landowners and others to restore and create wetlands. In addition to these Federal programs, some States have authority under State law to regulate activities in waters that are beyond the jurisdiction of the CWA.

General Questions on the Corps/EPA *Rapanos* Guidance:

15. What is the purpose of the *Rapanos* guidance document?

A. The guidance document provides guidance to CWA section 404 field staff promoting clarity and consistent application of legal mandates enunciated in the *Rapanos* decision.

16. Did any Federal agency have the opportunity to review the *Rapanos* guidance document prior to its release?

A. Yes, several Federal agencies, including, Dept. of Justice, Dept. of Transportation, Counsel on Environmental Quality Office of Management and Budget, and Dept. of Interior, reviewed the document prior to its release.

17. Does the *Rapanos* guidance broaden or narrow CWA jurisdiction as compared with CWA jurisdiction asserted by the Corps and EPA before the *Rapanos* decision?

A. The guidance does not broaden or narrow CWA jurisdiction. The guidance document reflects the scope of CWA jurisdiction enunciated by the U.S. Supreme Court in *Rapanos*.

The guidance document, based on the *Rapanos* decision, discusses the application of two new analytical standards, plus a greater level of documentation, to support an agency finding that there is the presence or absence of CWA jurisdiction over a particular water body.

It will be important to demonstrate and document the basis for CWA jurisdiction over ephemeral tributaries that are remote from the traditional navigable waters. If an ephemeral tributary has few or no adjacent wetlands, demonstrating and documenting CWA jurisdiction over the tributary and its adjacent wetlands will be more demanding.

The Corps and EPA will continuously assess and evaluate the extent of changes, if any, to CWA jurisdiction pre-*Rapanos*.

18. How does the guidance address swales, erosional features, and small washes?

A. Swales and erosional features (e.g., gullies, small washes characterized by low volume, infrequent, and short duration flow) are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. Likewise, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States, because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.

Even when not jurisdictional waters subject to CWA § 404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e., “discernible, confined, and discrete conveyances”), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g., CWA §§ 311 and 402).

Certain ephemeral waters in the arid west may be tributaries having a significant nexus to a downstream traditional navigable water. For example, in some cases they may serve as a critical transitional area between the upland environment and the traditional navigable waters. During and

following precipitation events, ephemeral tributaries collect and transport water or sometimes sediment from the upper reaches of the landscape downstream to the traditional navigable waters. These ephemeral tributaries, may provide habitat for wildlife and aquatic organisms in downstream traditional navigable waters. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters.

19. How does the *Rapanos* guidance address ephemeral waters?

A. CWA jurisdiction over an ephemeral water body, and its adjacent wetlands, if any, will be assessed using the significant nexus standard. An ephemeral water body is jurisdictional under the CWA if the agencies can demonstrate that the ephemeral water body, in combination with its adjacent wetlands, if any, will have a significant effect (more than speculative or insubstantial) on the chemical, physical, and biological integrity of a traditional navigable water.

20. Were any components of the EPA and Corps regulatory definition of “waters of the United States” invalidated by the *Rapanos* decision?

A. No, while the Justices discussed the regulatory definition of “waters of the United States,” the *Rapanos* decision did not invalidate any of the EPA and Corps regulations.

Questions on Jurisdictional Determinations Requiring a “Significant Nexus” Evaluation:

21. Which aquatic resources will require, as a matter of law, a “significant nexus” evaluation to assert or decline CWA jurisdiction?

A. A “significant nexus” evaluation is required to assert CWA jurisdiction over the following categories of water bodies: 1) non-navigable tributaries that are not relatively permanent, including their adjacent wetlands; and 2) wetlands adjacent to, but not directly abutting, a relatively permanent tributary.

In addition, a policy decision has been made to collect information relevant to a significant nexus evaluation for all “intermittent” non-navigable tributaries and their adjacent wetlands, (i.e., even if the tributary’s flow may be relatively permanent, but is not perennial).

22. How will the agencies evaluate “significant nexus” to traditional navigable waters with respect to tributaries that do not have adjacent wetlands?

A. The agencies will first determine if there are physical indicators of flow, which may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks. Other physical indicators of flow may include such characteristics as shelving, wracking, water staining, sediment sorting, and scour. The agencies will next determine whether or not a hydrologic connection to a traditional navigable water exists. The agencies will then conduct an assessment of the aquatic functions performed by the tributary under consideration to establish whether that water body will have a significant affect (more than speculative or insubstantial) on the chemical, physical, and biological integrity of a traditional navigable water.

23. How will the agencies evaluate “significant nexus” to traditional navigable water with respect to tributaries that have adjacent wetlands?

A. If the tributary has adjacent wetlands, the significant nexus evaluation must assess the aquatic functions performed by the tributary itself and in combination with the aquatic functions performed by the tributary’s adjacent wetland(s), as these functions relate to the chemical, physical, and biological integrity of a traditional navigable water.

24. How will the agencies evaluate “significant nexus” to traditional navigable water with respect to adjacent wetlands?

A. If the wetlands are adjacent to a tributary, the significant nexus evaluation must assess the aquatic functions performed by the tributary itself and in combination with the aquatic functions performed by the tributary’s adjacent wetland(s), as these functions relate to the chemical, physical, and biological integrity of a traditional navigable water.

25. Do the agencies believe that “significant nexus” is different for tributaries that have no adjacent wetlands as opposed to tributaries that do have adjacent wetlands?

A. Although different methods and considerations may be used to determine if a significant nexus exists for a tributary that has no adjacent wetlands as opposed to a tributary that has adjacent wetlands, the basic concept of “significant nexus” is the same. For both types of tributaries, the significant nexus evaluation is based upon the aquatic functions performed by the reach of water body under consideration, including any and all of that water body’s adjacent wetlands. The agencies must demonstrate whether those

functions will have a significant affect (more than speculative or insubstantial) on the chemical, physical, and biological integrity of a traditional navigable water.

26. The different methods for determining jurisdiction require a case-by-case evaluation to assess relative permanency and/or the significant nexus between a tributary (in combination with its adjacent wetlands) and a traditional navigable water. Who will be responsible for performing the jurisdictional determination and documenting the findings?

A. The agencies will be responsible for performing the jurisdictional determination in a CWA Section 404 context and documenting the findings in a decision.

27. Prior to the *Rapanos* decision, did the agencies consider the significant nexus to traditional navigable waters to support jurisdictional determinations?

A. Yes, prior to the *Rapanos* decision, the field staff evaluated many of the aquatic functions currently required to establish a significant nexus to a traditional navigable water in determining jurisdiction under the CWA.

28. Will small ephemeral tributaries and their adjacent wetlands that are distant from traditional navigable waters no longer be jurisdictional?

A. The guidance requires a case-by-case documentation to support a finding that there is the presence or absence of jurisdiction, based on the standards provided in the *Rapanos* decision. Because Justice Kennedy specifically indicated that the affect on the chemical, physical, and biological integrity of the traditional navigable water must be significant (more than speculative or insubstantial), the agencies expect that it may be more difficult to document and justify jurisdiction over ephemeral washes (and some of their adjacent wetlands) that are remote from a traditional navigable water.

If the wetland is directly abutting a tributary that provides relatively permanent flow into a traditional navigable water, the wetland will be considered jurisdictional without a showing of significant nexus. However, if the wetland is adjacent to a not relatively permanent tributary, the agencies will have to demonstrate there is a significant nexus between the wetland (in combination with all other wetlands, if any, adjacent to the tributary) and the traditional navigable water. If a significant nexus is established, the wetland will also be jurisdictional.

As a result, some ephemeral tributaries and their adjacent wetlands will not be jurisdictional under the CWA.

29. If a significant nexus evaluation is made on the basis of a combination of wetlands adjacent to a non-navigable, not relatively permanent tributary, will the Corps assert jurisdiction over all the adjacent wetlands that were considered in the analysis regardless of whether or not they are proposed to be impacted and they are owned by individual property owners other than the permit applicant? If so, is the Corps obligated to inform the property owners they have jurisdictional wetlands on their property?

A. Wetlands adjacent to the tributary and used to support an affirmative jurisdictional determination for a specific tributary will also be jurisdictional under the CWA. However, if the Corps district has not received a formal jurisdictional request for the wetlands adjacent to the tributary, the Corps district is not obliged to inform property owners, other than the permit applicant, that jurisdictional features may be present on their property.

30. If a jurisdictional determination is made on adjacent wetlands other than those being considered for a § 404 permit as a result of a significant nexus analysis, can that initial jurisdictional determination apply to future requests for permits provided that they are initiated within five (5) years from the date of the approved jurisdictional determination? Would a new determination need to be performed if the Corps has already documented jurisdiction on wetlands adjacent to the tributary?

A. Yes, if wetlands adjacent to a non-navigable, not relatively permanent tributary are found to be jurisdictional, the documentation used during the initial jurisdictional determination can be used to support the significant nexus evaluation for the other wetlands. A new jurisdictional determination form would need to be completed for those wetlands if and when the landowner proposed to conduct any activity involving jurisdictional discharges of dredged or fill material associated with those wetlands.

NOTE: RGL 95-02 states that jurisdictional determinations are valid for a period of five (5) years unless there is new information that warrants a revision.

31. Is it true that implementation of this guidance will result in a loss of CWA jurisdiction over a significant portion of the waters and wetlands in the U.S.?

A. No, the agencies are not expecting that implementation of this guidance will result in the loss of CWA jurisdiction over a significant portion of the waters and wetlands in the U.S. While the Supreme Court's decision, as implemented in this guidance, may result in the loss of CWA jurisdiction over some waters and wetlands, such result does not mean these waters and wetlands will be lost completely. Where Federal jurisdiction of a particular water resource is lost, individual tribal, state, and local programs may provide for additional protection for these aquatic resources.

Documentation and Coordination Requirements:

32. What efforts are being used now to record and track jurisdictional determinations?

A. Currently, data collected to document jurisdictional determinations are entered into a standardized form that becomes part of the administrative record and is available to the public.

33. What efforts will be implemented to record and track jurisdictional determinations under the *Rapanos* guidance document?

A. Data collection efforts will be required to support all jurisdictional determinations. Data will be entered into a data base using a revised data form specifically designed to assist regulators in making determinations. This information will be part of the public record and findings will be posted on local Corps web sites. These links can be found also at <http://www.usace.army.mil/cw/cecwo/reg/>.

34. Are there quality assurance/quality control measures built-in to the new guidance?

A. The Corps districts will provide the EPA regional offices with copies of jurisdictional determination forms when a “significant nexus” evaluation is performed for the following categories of water bodies: 1) non-navigable tributaries that are not relatively permanent, including their adjacent wetlands; and 2) wetlands adjacent to, but not directly abutting, a relatively permanent tributary. EPA has the ability to elevate jurisdictional determinations to the EPA Regional Administrator and Corps HQ’s if there is a disagreement on the jurisdictional findings.

Additional measures to help streamline the regulatory process are under development including a standardized reporting form, an instructional guidebook, and new Regulatory Guidance Letters.

35. If EPA elects to elevate a jurisdictional determination, should field staff inform the applicant of the potential delay? If so, what form of correspondence will be used?

A. The Corps district will immediately notify the applicant/landowner in writing. The written notification may include electronic mail communication. Correspondence will be included in the administrative record.

The Interagency Coordination Memorandum of Understanding (MOU) released with the *Rapanos* guidance document establishes a short and specific timeframe for resolving issues and reaching a final conclusion regarding jurisdiction.

36. If EPA does not respond to the initial coordination of a jurisdictional determination, should field staff document the file? If yes, what form of documentation will be used?

A. If the EPA fails to respond within the time limits and the Corps district finalizes the jurisdictional determination request, the Corps district shall include a statement in the file documenting the process and steps taken to move the permit application forward.

37. Will the public have any opportunity to review or evaluate jurisdictional determinations before they are finalized?

A. No, the Corps and EPA will jointly evaluate jurisdictional determinations which will be completed without public disclosure. However, once the jurisdictional determination is approved, the public will have an opportunity to review the determination.

38. Will the Corps continue to post approved jurisdictional determinations?

A. Yes, Corps district offices will continue to post approved jurisdictional determinations on their web sites. These links can be found also at <http://www.usace.army.mil/cw/cecwo/reg/>.

Program Impacts:

39. Will there be an increase in workload as a result of the *Rapanos* decision?

A. Yes, there will be an increase in workload for field staff as they document and make significance nexus determinations. The percentage of waters and wetlands that will require a significant nexus determination will differ between Corps districts, therefore, predicting where delays may occur is not practicable.

40. Does the Corps have enough staff to conduct jurisdictional determinations in a timely manner in light of the new requirements resulting from the *Rapanos* decision?

A. Probably not. The agencies expect that the additional workload requirements will require that the Corps increase field staff in FY 08 in order to continue to timely process jurisdictional determinations and permit actions. As such, additional funding for resources may be requested to mitigate the impact to the regulatory program, and to maintain the current level of protection over the Nation's aquatic resources.

41. Will there also be increased workload for EPA staff?

A. 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.

42. Will new performance standards be proposed for implementing the *Rapanos* guidance?

A. No, however, some of the FY07 performance measures have been modified to reflect the additional workload projected by the *Rapanos* decision.

43. A critically important time for our economy and industry is the spring construction season. With a large backlog of jurisdictional determinations pending, coupled with the pending surge of permit applications, how will there not be a negative impact on the economy and industry this year? What will the Corps do to expedite many of these critical permits?

A. The Corps will work aggressively to process permit applications thereby minimizing potential impacts on the economy.

44. The Corps and EPA have been delaying many critical jurisdictional determinations since the *Rapanos* decision. What is the Corps going to do to expedite processing of these critical decisions and not delay issuance of the associated permits? What efforts are being made to streamline the regulatory process?

A. The Corps has several ongoing initiatives to expedite the processing of jurisdictional determinations and permit applications.

First, the Corps has prepared a new form for documenting jurisdictional determinations. In addition to the form, the Corps has developed an instructional guidebook to facilitate determination practices and documentation requirements. Furthermore, the Corps HQ's will work with the Corps districts to reduce the learning curve and ensure an understanding of the program impacts resulting from the *Rapanos* decision.

To further aid the decision-making process, several new Regulatory Guidance Letters (RGLs) are being prepared. One RGL will identify practices and documentation requirements to support jurisdictional determinations; yet another RGL will provide guidance on writing special conditions. The Corps is also developing a RGL to clarify the exemptions under section 404(f) for activities in irrigation and drainage ditches that would otherwise require a permit. Additional RGLs will be developed to support wetland delineations. Regional supplements are being prepared to supplement the 1987 Wetland Delineation manual. Finally, RGL 05-05 was developed to identify the physical indicators supporting an ordinary high water mark. Districts will be encouraged to publish requirements for jurisdictional determinations that would generally support the decision being made without a site visit.

Additionally, ORM v2.0 will provide a streamlined, step by step process that will assist in the evaluation of jurisdiction. Embedded GIS resources will support timely reviews of aerial photography, topographic mapping, and existing national wetland inventories and will provide for quick references to jurisdictional determinations already conducted. Use of GIS and geo-location tools will support data populations of standard geographical location, such as State, County, watershed and drainage basins. Users will be able to

document the nearest waterway and any large scale river network automatically by establishing the location of the project site. Users will identify the size and type of each aquatic resource on site and then document the jurisdiction or lack there of for each aquatic resource. The jurisdictional module of ORM v2.0 will be developed to include the required documentation for establishing or declining jurisdiction and will support electronic notification to the EPA and posting of the documentation on district web pages.

The Corps also is currently involved in completing a Lean 6 Sigma analysis of its regulatory program, which includes a thorough examination of budget, resource allocation, workload, and performance standards with the ultimate goal of eliminating unnecessary and non-valued added process and simplifying the § 404 regulatory program.

45. If there is a large backlog of permits and construction is delayed nationwide, what are the options available to the city, developer, construction firm, or public under deadlines that involve safety and/or significant financial hardship?

A. For certain projects, it may be advisable for applicants to consider the use of consultants to help perform the jurisdictional determination and prepare the permit application along with the supporting compensatory mitigation plan that demonstrates compliance with the § 404(b)(1) guidelines (measures to demonstrate avoidance and minimization of onsite impacts, and then, mitigation). Such steps would unquestionably speed up the permit process.

46. Will the Corps revisit jurisdictional decisions made prior to the *Rapanos* decision?

A. No, the Corps will only revisit a jurisdictional determination completed after the *Rapanos* decision if the applicant request revisitation. The new review will focus on information affected by the *Rapanos* decision. The Corps will not revisit jurisdictional determinations that were completed prior to the *Rapanos* decision.

Permit Process Questions:

47. Will the *Rapanos* guidance affect the Nationwide Permits for 2007?

A. No. The *Rapanos* guidance does not compel modifications to the 2007 Nationwide Permits.

48. With respect to Nationwide Permits, project managers are allowed *only* one request for additional information within the first 30 days of receipt of a permit application. If additional information is needed from the applicant in order to make a significant nexus determination, does this count towards the one-time request for additional information?

A. Yes. If additional information is needed to process the JD and the NWP application, only one request should be sent to the applicant outlining all information needed to complete the JD and to process the NWP application.

49. Do jurisdictional determinations need to be “approved” before a permit application can be processed (i.e. before the “clock” officially starts)?

A. No. While the JD is being reviewed, the district is encouraged to continue work on other aspects of the application to further minimize potential time delays in processing the application request. Additional information on this subject is provided in RGL 07-01: Practices for Documenting Jurisdiction under Section 404 of the CWA and Sections 9 & 10 of the Rivers & Harbors Act (RHA) of 1899.

50. Are there any processes that can begin, with respect to processing permit applications during the initial 15-day coordination period (e.g. internal/in-house reviews for impacts to Federal projects, cultural resource investigations, initial ESA assessments) that might help facilitate permit issuance?

A. Yes. Agency coordination should be initiated if an application has been received for a specific project and the regulatory project manager believes there may be waters of the United States within the review area to facilitate and expedite the permit process.

51. Can field staff begin the process of verifying wetland delineations prior to finalizing a jurisdictional determination?

A. Yes. The project manager can verify delineations for both waters and wetlands; however, the delineation decision is not final until the jurisdictional determination is approved.

52. Will the guidance have any affect on Federally protected species under the Endangered Species Act (ESA) or Critical Habitat?

A. No. The *Rapanos* guidance does not alter consultation or other requirements established by the ESA.

53. How will the *Rapanos* guidance affect those jurisdictions that have assumed all or parts of the CWA 404 program under the State Programmatic General Permits?

A. This guidance is applicable to jurisdictional determinations made by another agency for State Programmatic General Permits and/or Regional General Permits. The agencies will work with State agencies to determine specific requirements for documenting jurisdiction for their purposes as well as for our purposes. This will be most important for the States of Michigan and New Jersey, which have assumed the Section 404 regulatory program, and the 20+ States that have State Programmatic General Permits.

Programmatic Questions:

54. How will the guidance affect the Mitigation Rule the Army and EPA are working on?

A. The guidance will not affect the draft Mitigation Rule (71 FR 15520 [published on March 28, 2006]).

55. How does the *Rapanos* guidance affect the previously issued *SWANCC* guidance?

A. Prior to *Rapanos*, only those draft jurisdictional determinations proposing to assert jurisdiction over an intrastate, non-navigable, isolated water were elevated to HQ for concurrence. Following the *Rapanos* guidance, all jurisdictional determinations involving intrastate, non-navigable, isolated waters will be coordinated for concurrence with Corps/EPA HQs.

56. What was the issue and the “holding” in the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County vs. the Corps (SWANCC)*?

A. In SWANCC, the Corps asserted CWA jurisdiction over abandoned gravel pits by use of the Migratory Bird Rule, which was introduced into Preamble language to the 1986 Regulation.

The Court’s decision in SWANCC effectively precludes the assertion of § 404 jurisdiction over certain isolated waters based on their use by migratory birds. The Supreme Court determined that it was not the intent of the CWA to regulate isolated, intrastate, non-navigable waters based solely on their use by birds. As such, the field staff was instructed to not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the “Migratory Bird Rule.” NOTE: this case did not effect the regulation at 33 C.F.R. §328.

In addition, the Corps published the following guidance:

- **The SWANCC decision should be incorporated into current jurisdictional practices.**
- **Field staff is to use current case law and practices when conducting jurisdictional determinations; and**
- **All jurisdictional determinations based on commerce (§ 328.3(a)(3)) must be approved by HQ. Since the guidance has been in place, we have received 11 requests. Of these 11 requests, 3 cases were determined to be jurisdictional under other parts of the CWA [i.e., (a)(1) waters], 4 cases were determined to be not jurisdictional and 3 cases were withdrawn, and 1 is under review.**

NOTE: The guidance now requires that jurisdictional determinations involving any isolated water body be elevated for an agency HQ review prior to the district’s making a final jurisdictional determination.

Questions Regarding State/Tribal Programs to Protect Aquatic Resources

57. How does the definition of “waters of the United States” under the CWA affect State efforts to protect wetlands?

A. An important component of successful implementation of the CWA section 404 program is a close working relationship with the States and Tribes. States and Tribes may assume operation of the section 404 program, and to date two States 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 404 program. The CWA establishes a baseline level of protection; nothing in federal law prevents states from providing greater protection.

The agencies encourage States and Tribes to protect important waters in their jurisdiction, whether or not the waters are protected under federal law. The Administration remains committed to a strong Federal-State partnership to protect the Nation’s waters. Annually, EPA has awarded \$15 million to help enhance existing or develop new wetlands protection programs at the State, Tribal, and Local levels. The Bush Administration has asked Congress to appropriate an additional \$1 million for these important programs as part of its FY 2007 budget request.

58. Do states and tribes have the ability to step in and “fill the gap” to protect waters no longer protected under the CWA after *Rapanos*? What did States and Tribes do after SWANCC?

A. Since the SWANCC decision in January of 2001, two States (Wisconsin and Ohio) have enacted legislation designed to fill all or part of the “SWANCC gap,” North Carolina has revised regulations pertaining to wetlands. Twenty states have the ability to regulate dredge and fill activities through their own authorities.

Approximately 25 States have some limitations on their ability to establish environmental requirements that are more stringent than those called for under federal law. This ranges from notification requirements when programs proposed are more stringent, to strict prohibitions against state programs that are more stringent than the CWA.

Probably the most important limitation is that States face many of the budgetary challenges also faced at the Federal level.

General Questions on Rulemaking and Guidance:

59. Are the agencies considering rulemaking to further clarify the scope of “waters of the United States” in response to the *Rapanos* decision?

A. Yes. The agencies intend to more broadly consider jurisdictional issues, including clarification and definition of key terminology, through rulemaking or other appropriate policy practice.

60. What is the purpose of rulemaking and guidance?

A. Rulemaking is a deliberative process subject to the Administrative Procedures Act that enables Agencies to define binding policies for program implementation. Rulemaking requires thorough analysis and consideration of a range of approaches, and provides for public review and comment prior to final promulgation.

Alternatively, guidance is an interim measure that provides clarification to a regulation or clarifies implementation of a legally binding decision of the Federal Courts. Guidance development is an informal process that may be coordinated with other Federal agencies, but not necessarily the public.

The proposed strategy is to issue guidance immediately, with a six month public comment period. By issuing the guidance immediately, this will allow us to immediately rely on the guidance for consistent implementation of the decision. By collecting comments on the guidance, this will 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 intend, within nine months from the date of issuance, to decide whether the guidance should be revised or suspended, or remain in effect.