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**Questions and Answers for the
Traditional Navigable Waters Determination for the
Los Angeles River pursuant to the
Supreme Court *Rapanos* and *Carabell* Decision**

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**Questions and Answers for the
Traditional Navigable Waters Determination for the
Los Angeles River**

General Questions on the Corps' Decision Concerning the Los Angeles River:

1. What decision was made by the U.S. Army Corps of Engineers about the Los Angeles River?

A. Colonel Thomas H. Magness, Commander of the Corps Los Angeles District has determined that a 2-mile segment of the Los Angeles River above the Sepulveda Dam qualifies as a “traditionally navigable water”. In addition, the mouth of the Los Angeles River, which is under tidal influence, is also considered to be a traditional navigable water.

2. Why is this decision important?

A. This decision will facilitate evaluations of tributaries to the Los Angeles River. Under the Federal Clean Water Act (CWA), the Corps must determine whether particular waterways are covered by CWA jurisdiction. Pursuant to authority under Section 404 of the CWA, the Corps regulates discharges of dredged or fill material into such jurisdictional waterways. Section 404 provides the Corps mandate to safeguard traditional navigable waters, relatively permanent waters, ocean areas, wetlands, and other waters of the United States. As a result of Col. Magness' decision, more tributaries to the Los Angeles River will be afforded Clean Water Act protection.

3. Are other portions of the Los Angeles River considered traditional navigable waters?

A. The Corps Los Angeles District Regulatory Division will continue to evaluate other portions of the Los Angeles River as possible traditional navigable waters. If sufficient evidence is identified to warrant designating additional segments of the river as traditional navigable waters, the Corps will document those findings and publish them on the District's web site (www.spl.usace.army.mil).

4. Why was it necessary to evaluate the Los Angeles River as a traditional navigable water?

A. A 2006 U.S. Supreme Court decision followed by joint 2007 Corps and Environmental Protection Agency (EPA) implementing guidance for that decision requires much more detailed analysis in order to assert CWA

jurisdiction of wetlands, rivers, and tributaries. Now, when land owners submit Section 404 permit applications, the Corps must first decide whether the waterways in question are jurisdictional consistent with this Supreme Court decision. A rancher in the Santa Susana Hills near Chatsworth (which is within the Los Angeles River Watershed) requested a CWA jurisdictional determination for his property. Part of CWA jurisdictional analyses of small ephemeral watercourses (as in this case) involves identification of the nearest downstream traditional navigable water. In addition to the rancher in the Calabasas hills, there are several other jurisdictional determination requests and permit applications that have been submitted to the Corps for sites within the Los Angeles River watershed. All of these require jurisdictional determinations for which Colonel Magness' decision will be relevant.

5. What is the jurisdictional status of the Los Angeles River itself?

A. Because the Los Angeles River is a “relatively permanent water”, it continues to be regulated and protected by the CWA just as it was before the Supreme Court Decision. Though the two mile segment in the Sepulveda Basin is now considered a traditional navigable water, for safety reasons, the Corps discourages unauthorized access to the Los Angeles River, both in the concrete channel portions and undeveloped areas. Currently, the Los Angeles River channel is primarily a flood control channel. As a flood control channel, the Los Angeles River isn't expected to become the domain of recreational boaters anytime soon. However, in conjunction with the city of Los Angeles, the Corps is proud to be a part of the Los Angeles River Revitalization team. The Corps is looking at how to continue to protect the environment, enhance water quality and make the best use of water resources. The master plan will help provide open space, could increase riparian habitat along the river and provide an interconnected trail system for recreation and physical fitness. The Corps of Engineers remains a committed partner in the community and will continue to pursue opportunities for environmental enhancement of the river while ensuring that neighborhoods along the river are protected from flood events.

6. Will Colonel Magness' determination increase protection of the Los Angeles River?

A. Clean Water Act protections for the Los Angeles River and other waters of the United States, including tributaries and adjacent wetlands, are unaffected by Col. Magness' determination. But with designation of a segment of the river in the Sepulveda Basin as a traditional navigable water, there is a higher likelihood that small ephemeral drainages in the upper most reaches of the watershed upstream of the Sepulveda Basin will remain under Clean Water Act jurisdiction.

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

7. What is the significance of the *Rapanos and Carabell* decision (hereinafter referred to as *Rapanos*) with respect to Clean Water Act (CWA) jurisdiction?

A. The Supreme Court decision allows the Corps and EPA (“the agencies”) 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.

8. 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).

9. What is “a traditional navigable water”?

A. “A traditional navigable water” includes all of the “navigable waters of the United States,”: 1) defined in 33 C.F.R. § 329; 2) determined by numerous decisions of the Federal courts; as well as 3) all other waters that are navigable-in-fact. The Supreme Court held in previous cases that so long as a water is susceptible to use as a highway of commerce, it meets the legal definition of navigable-in-fact, even if the water has never been used for any commercial purpose.

10. 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.’

11. 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).

12. 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.”

13. 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.

14. 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.

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

A. 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 goals. 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.

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:

16. 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.

17. 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.

18. 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*.

19. 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.

20. 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.

21. 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:

22. 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).

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

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. 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. In California, the Regional Water Quality Control Boards have jurisdiction under state law to regulate waterways, as defined by the state.

Documentation and Coordination Requirements:

30. 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 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/>.

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

A. The Corps districts will provide the EPA regional offices with draft 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. Where EPA disagrees with the Corps draft determination, they have the ability to assert “special case authority” within 15 days. EPA becomes the decision maker for CWA jurisdictional determinations for any areas where they have asserted special case authority.

32. 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. Jurisdictional determinations are technical in nature unlike permit decisions which are discretionary and which typically have opportunities for public review.

33. 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:

34. 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. Because of the arid climate, a majority of water courses within the Los Angeles District will require significant nexus determinations.

35. 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.

36. 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.

37. 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.

38. 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.

Questions Regarding State/Tribal Programs to Protect Aquatic Resources

39. 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 (e.g., California) 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. In California, the state agencies with independent authorities to regulate activities in waterways include the Regional Water Quality Control Boards, the Department of Fish and Game, and the California Coastal Commission.