



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240



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ER 07/1008

Donna M. Downing
U.S. Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: Environmental Protection Agency and the U.S. Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction After Rapanos (**Docket Number: EPA-HQ-OW-2007-0282**)

Dear Ms. Downing,

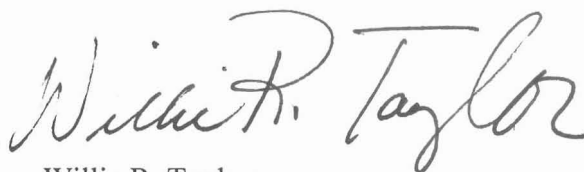
The Department of the Interior (Department) has reviewed the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) joint guidance regarding Clean Water Act (CWA) jurisdiction following the Supreme Court's decision in the consolidated Rapanos and Carabell cases.

We appreciate the effort to develop guidance for determining Federal jurisdiction under the CWA in response to the court decision. We offer the attached comments developed by our Fish and Wildlife Service (Service) and our Bureau of Reclamation (Reclamation) based upon their individual areas of jurisdiction and special expertise. These comments by the two bureaus are provided separately not because they are inconsistent with each other but as an overall reflection of the diverse mission of the Department and its bureaus, and our unique goals, which include resource protection and resource use.

Thank you for the opportunity to provide comments on the EPA and Corps Guidance Regarding Clean Water Act Jurisdiction Following Rapanos. If you have any questions regarding our comments, please contact Mr. Donald Treasure, Bureau of Reclamation, Environmental

Specialist, Water and Environmental Resources Office, at 303-445-2807 or Mr. David Stout, Fish and Wildlife Service, Chief, Division of Habitat and Resource Conservation, at 703-358-2161.

Sincerely,

A handwritten signature in black ink that reads "Willie R. Taylor". The signature is written in a cursive style with a large, prominent "W" and "T".

Willie R. Taylor
Director, Office of Environmental Policy
and Compliance

Attachments

Fish and Wildlife Service Comments on EPA and Corps Guidance Regarding Clean Water Act Jurisdiction Following Rapanos/Carabell (FR Vol. 72, No. 110, June 8, 2007)

The Fish and Wildlife Service has reviewed the joint agency guidance issued by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) (Agencies) regarding Clean Water Act (CWA) jurisdiction following the Supreme Court's decision in the consolidated Rapanos and Carabell cases. The guidance, effective immediately upon the June 8, 2007 issuance date, was issued to provide direction to EPA Regional staff and Corps District staff on implementing the Supreme Court's decision.

The Service appreciates the Agencies' attempt to provide a consistent framework for determining Federal jurisdiction under the CWA given the complex prescriptions arising from a split Supreme Court decision. The Service also acknowledges the difficulty the Agencies faced in developing guidance that both appropriately responded to a complex court decision and remained consistent with the purposes of the Act. In furtherance of that goal, the Service offers the following comments.

Impact of post-Rapanos/Carabell Guidance on the Landscape

In the few months following the issuance of the guidance the Service has had little substantive data to determine whether the guidance is leading to greater or fewer impacts to wetlands and waters nationally. The Service has not had a direct role in the implementation of the guidance or an ideal position from which to observe the effectiveness of implementation by the Corps or EPA. Currently, the Service's engagement in CWA permitting at the field level is predominantly through the review of permits under the responsibilities and roles described in the CWA at section 404(m) and in regulations at 33 CFR 320.4(c). Our current engagement is most often triggered by the availability of a public notice when a given proposal is beyond the jurisdictional determination phase. At that point, the focus of Service involvement is on overall project impacts on the aquatic environment.

So far, the Service, and possibly other stakeholders, have had limited access to data quantifying impacts to waters pre- and post-guidance. The Service recommends that the Corps and EPA develop an analysis plan to evaluate whether greater or fewer waters are being impacted or lost following issuance and application of the guidance (controlling for other variables). With potential tools such as the National Wetlands Inventory program, the Service could assist the agencies with longer-term analyses.

Discretionary Language and Potential for Regional Inconsistency

The Service is concerned that Corps Districts may implement the guidance inconsistently across the Nation due to language that appears open to subjective interpretation, potentially leading to increased degradation/destruction of waters. Again, the Service appreciates the challenge of converting discourse from the Justices' opinions into clear direction to Corps and EPA field staff, yet the guidance's fidelity to Justice Kennedy's description of significant nexus may not provide the consistency needed.

In the guidance the Agencies now require field staff to make a “significant nexus” determination before asserting jurisdiction over three groups of waters: tributaries that are non-navigable and not relatively permanent; wetlands adjacent to tributaries that are non-navigable, not relatively permanent; and wetlands adjacent to, but not directly abutting a relatively permanent non-navigable tributary. In the guidance, and in the Corps’ new Jurisdictional Determination (JD) form with its associated instructions, field staff is directed to consider the flow characteristics and functions of a tributary and all of its adjacent wetlands to determine if those flow characteristics and functions significantly affect a downstream traditionally navigable water. In describing what is meant by ‘significantly affect,’ the guidance and JD form use Kennedy’s language in defining the threshold of significance. The new JD form states:

“...a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a traditionally navigable water (TNW).”

Therefore, to ‘significantly’ affect a TNW means to ‘more than speculatively’ and ‘more than insubstantially’ affect a TNW. Unfortunately, these terms are not defined or further described in the guidance and the ambiguity in Kennedy’s opinion remains. As a result, individual Districts are presumably left to interpret ‘significantly’ on a discretionary basis. In making significant nexus determinations, field staff are asked to document the physical characteristics and ecological factors that may indicate the existence of a nexus, but are not advised how to weigh these documented characteristics and functions in deciding what constitutes the minimum necessary for declaring the existence of a significant nexus. The Service is concerned that due to the subjective nature of the analysis, it is likely this level of discretion will lead to inconsistencies between various Corps districts, especially as personnel change.

The guidance (p. 8-9) notes that “the ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature...” Similarly, the literature demonstrates the important ecological contributions of small streams and their associated wetlands to TNWs. These waters, which could be excluded from CWA jurisdiction based on local application and interpretation of the new guidance, are integral parts of river systems. In much of the United States, well more than half of the existing stream mileage consists of streams that may not qualify as relatively permanent waters. In arid systems, the percentage can be over 90%. Forming so much of a given watershed, these headwater streams maintain not only the physical integrity of watersheds by mitigating floods and moderating sediment transport, but the chemical integrity of watersheds as well. Small headwater streams buffer downstream waters through active uptake of excess nutrients and pollutants and their health is often the primary factor in downstream water quality. The biological integrity of river systems is also interdependent on headwater streams. These small tributaries are primary habitats for hundreds of taxa including numerous Federally-listed species, while also providing seasonal, spawning, and nursery habitats for many other species. These same streams also provide food that nourishes riparian and downstream systems (Meyer 2007).

Because the direct impacts of hydrologic and ecological functions of non-relatively permanent streams and associated wetlands on TNWs are so well documented, the Service suggests that the

guidance focus on how to determine when effects are only “speculative” or “insubstantial.” For example, certain non-relatively permanent waters and their adjacent wetlands or entire watersheds in some cases might be designated into categories that are presumed to be jurisdictional.

The Service notes that establishing National thresholds or magnitudes for the flow characteristics and ecological functions that inform the significant nexus determinations would be difficult and likely inappropriate. For example, we agree with the statement in the JD form that... “It is not appropriate to determine significant nexus based solely on any specific threshold of distance...” However, the Service recommends that the Corps and EPA consider working with other agencies to develop sideboards or minimum thresholds for the characteristics and functions on an eco-regional basis. This would recognize that hydrologic characteristics are influenced by factors such as vegetative composition, soil types, climate, elevations and watershed size that vary greatly, depending on eco-region. Development of eco-region-specific criteria for making significant nexus determinations may at least lead to more consistent implementation of the guidance within broader sections of the nation than if left to the subjective interpretation of individual Districts.

Implementing the post-Rapanos/Carabell Guidance in Arid Landscapes

Ecologically appropriate implementation of the guidance is particularly important in arid and semi-arid regions of the west where the jurisdictional status of ephemeral waters may be questioned. The Service recommends greater clarity with respect to ephemeral streams that are common in these western systems.

The guidance directs the Corps to assert jurisdiction over “relatively permanent” tributaries of traditional navigable waters. “Relatively permanent” is defined as flowing year-round or as having continuous flow at least seasonally (typically three months). The guidance states that such “relatively permanent” waters do not include ephemeral tributaries which flow only in response to precipitation. The majority of ephemeral streams in the West only flow briefly in the spring from snowmelt, and flow at other times of the year in response to rain events. Lacking the required flow duration, they would likely not qualify under the guidance as “relatively permanent.” The guidance establishes that jurisdiction over such streams (non-navigable tributaries that are not relatively permanent and their adjacent wetlands) will be based on a fact-specific analysis to evaluate if a significant nexus with a TNW exists. To pass the significant nexus test, the tributary must have more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of a TNW. The Service notes that these tributaries do contribute to the integrity of downstream waters and appreciates that the guidance acknowledges that ephemeral streams in the arid West should be distinguishable from non-jurisdictional erosional features and can possess a significant nexus to a TNW. The guidance notes:

“Ephemeral waters in the arid West that are tributaries may have a significant nexus to a TNW. 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 to the traditional navigable waters. These ephemeral tributaries, and associated riparian corridors, may provide habitat for

wildlife and aquatic organisms. 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 affect the integrity of a TNW.”

Historically, the Service has provided the Corps with numerous comments demonstrating that many of these stream systems include associated riparian habitats that provide refugia and foraging and breeding opportunities in arid and semi-arid regions with otherwise limited vegetation. These habitats often harbor species listed under the Endangered Species Act. Removal of these drainages from CWA jurisdiction could result in not only erosion and water quality impacts but direct and indirect effects to habitat that may be detrimental to listed species.

For example, the Mojave Desert region of Southwest Utah is a “hot spot” of species endemism and diversity and the Uinta Basin in Northeast Utah is home to many listed aquatic and terrestrial species. Both areas are undergoing rapid development that includes an increasing number of 404 permits related to population growth and energy development. Given the questions involving implications the guidance may hold for arid western systems, the rate of growth and development (and demand for 404 permits) in these areas, and the substantial Service trust resources involved, future conflicts will likely arise.

Much of the jurisdictional terminology in the guidance may require modified descriptions appropriate to an arid western context that is functionally different than other parts of the country. The Service recommends that Corps Districts and EPA Regions encompassing such systems work with the Service, particularly Service Regions 1, 2, 6 and 8, to address cooperative development of additional jurisdictional determination procedures/guidance specific to arid and semi-arid regions, to ensure that waters in these systems are appropriately afforded Federal protection under the CWA.

Cumulative Impacts

The Agencies may determine that a given non-relatively permanent tributary does not have a demonstrable nexus on a given TNW, yet filling multiple such tributaries in one watershed may lead to changes in some flow characteristics and ecological functions of the remaining un-impacted tributaries, as well as the downstream relatively permanent waters and TNWs. Currently, the guidance does not discuss cumulative effects of impacting non-relatively permanent tributaries.

The Service recommends that the guidance describe how cumulative impacts will be considered so that impacts to relatively permanent waters or TNWs that accrue from multiple upstream impacts to waters lacking significant nexuses may be avoided.

Definition of Relatively Permanent Waters

The Service recommends that the guidance include further detail on the origin of the definition that relatively permanent waters must have at least three months continuous flow. Specifically, the Service recommends the guidance include a discussion on why the three-month flow duration was chosen.

Documentation (“Development Plans”)

In the second sentence of the final paragraph of the guidance, the Agencies list examples of pertinent documentation that should be reflected in the record if used as a basis for asserting or declining jurisdiction. Most would provide pertinent resource information describing physical, chemical, or biological characteristics useful in making a significant nexus determination. However, it is unclear that consideration of ‘local development plans’ provides relevant data for determining if a demonstrable significant nexus exists. Such plans generally describe a construction project or maximizing building space and not the natural resource information required for the agencies to make their determinations. The Service recommends that the guidance clarify if the intended meaning is actually ‘local government land-use plans,’ ‘watershed plans,’ or similar.

REFERENCES

Meyer, J.L. 2007. Statement to the United States House of Representatives Committee on Transportation and Infrastructure. Hearing on “Status of the Nation’s Waters, including Wetlands, Under the Jurisdiction of the Federal Water Pollution Control Act,” 19 July 2007.

**Bureau of Reclamation Comments on EPA and Corps Guidance Regarding Clean Water Act Jurisdiction Following Rapanos/Carabell
(FR Vol.72, No. 110, June 8, 2007)**

General Comments

As of the date of these comments, the Bureau of Reclamation (Reclamation) has not had an opportunity to implement this guidance. Therefore, we are unable to provide direct comments, case studies, or specific experiences concerning implementation of the guidance at this time.

Nevertheless, several recommendations and edits are offered below. In general, Reclamation has particular interest in Clean Water Act (CWA or Act) jurisdictional issues. Indeed, Reclamation and its project beneficiaries are in need of guidance to better understand when and whether its dams and irrigation facilities, including ditches, canals, arroyos, and other water delivery channels and works (collectively referred to as “ditches”) are considered jurisdictional “waters” subject to regulation by the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) under the CWA, or as “tributaries” to such waters. Likewise, Reclamation has an interest in understanding when waters adjacent to these facilities are jurisdictional and when discharges into or from those facilities are subject to CWA jurisdiction and attendant permitting requirements.

While the regulatory guidance memorandum attempts to untangle the confusing knot of opinions issued by the Supreme Court in *Rapanos*, Reclamation is concerned that it does not provide much in the way of new or clearer advice on when irrigation water delivery facilities are regulated as “waters” or as “tributaries” under the Act. It appears the guidance memorandum largely maintains the status quo regarding the scope of the Corps’ and EPA’s jurisdiction under the Act, which, in the past, embraced an expansive definition of “tributaries” and of “waters of the United States” and which left many permitting decisions to be determined on a case-by-case basis, often with differing results in different jurisdictions. The expansive definition of non-navigable “tributaries” and of “waters of the United States” could also render many of Reclamation’s irrigation ditches as jurisdictional “features.” Reclamation appreciates that the guidance states that only ditches that bring water to a water of the United States are considered jurisdictional and that ditches that bring water away from a water of the United States are not considered jurisdictional, although this provision seems to be contradicted later through the definition of non-navigable tributaries, which does not distinguish between waters taken away from a water of the U.S. and waters delivered into a water of the U.S. In short, Reclamation is interested in promulgating additional guidance for water users on these issues. Reclamation is especially interested in how the definition of “tributaries to” waters of the United States applies in specific irrigation contexts that the existing guidance does not clearly address.

In addition, the guidance identifies classes of waters, such as swales, ditches, and some ephemeral waters, which will generally no longer be regulated pursuant to Section 404 of the CWA. However, in determining jurisdiction for such classes of waters, the Corps and/or EPA must verify and document whether such waters are navigable, have a significant nexus with navigable waters, and/or assess their flow characteristics, and physical and ecological functions.

This additional field verification of waterway characteristics and jurisdiction may be difficult to obtain, and will likely increase permitting time in those instances where permits are required.

A number of critical terms used in the guidance (such as “significant nexus,” “significant effect,” and “adjacent”) are not explicitly defined and remain subjective. Reclamation is concerned about the level of scientific analysis required in making a jurisdictional determination using these critical terms. To local irrigators on the ground, this offers little practical advice when trying to determine whether their ditches and drains are jurisdictional. The significant nexus test, for instance, takes into consideration biological, hydrological, and scientific and historical factors that are not available to the typical farmer. Reclamation suggests that the Corps and EPA consider issuing additional guidance clarifying these critical terms, and providing detailed examples.

Reclamation also contends that the tributary definition is far broader than required or indicated by the Supreme Court in *Rapanos*:

- The guidance states that “non-navigable tributaries” of traditional navigable waters includes waters that flow into a traditional navigable water either directly or indirectly by means of other tributaries. In the case of irrigation ditches, this could be the basis for asserting broad jurisdiction over irrigation ditches far removed from any navigable body of water because they are “indirectly” connected to a navigable water by other tributaries.
- The guidance states that “a tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water,” with no further distinction between man-made and natural water bodies. Reclamation believes that jurisdiction over man-made water delivery facilities should be limited. *See* fn. 21.
- The guidance states that “a tributary, for the purpose of this guidance, is the entire reach of the stream that is of the same order.” It provides that 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) and will be the basis for asserting jurisdiction over the entire reach of the tributary. Again, this is an overly broad basis for asserting jurisdiction and could include miles of irrigation ditches far removed from waters of the U.S. based on the characteristics of the irrigation ditches at the point where it empties into a water of the U.S. *See id.*

Overall, the guidance could be more useful to a wider audience if it contained more examples of how jurisdiction will be applied to the various situations discussed in the memorandum. As an example, on page 9, second paragraph, the last two sentences address the reasonableness of the stated approach rather than the mechanics of the process.

Specific Comments

1. Page 9, second paragraph. The language of this paragraph could lead to jurisdiction being asserted over wetlands that do not “significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters.” The guidance assumes all wetlands “adjacent” (based on those described on page 7) to the same tributary are “similarly situated,” as described by Justice Kennedy. Therefore, if a tributary and an adjacent wetland collectively have a significant nexus, then the tributary and all of its adjacent wetlands are considered jurisdictional under this guidance.

This will create situations where wetland areas that have more speculative or insubstantial effects on the chemical, physical, and biological integrity of a traditional navigable water to be considered jurisdictional. A more practical interpretation of “similarly situated” would be to consider only those wetland areas that share a similar hydrologic connection to the tributary as “similarly situated.”

2. Pages 7 through 12. The guidance for “Certain adjacent wetlands and Non-navigable Tributaries That Are Not Relatively Permanent” is still subjective. Jurisdictional decisions will vary individually among regulatory personnel. The guidance indicates these features have to be determined on a “case by case” basis using subjective criteria, if data is not available. Even if data is available such as volume, duration, or frequency of flow (including subsurface), the decision is still a subjective one, and likely delayed by data collection efforts. The guidance appears to state that if even one wetland on a tributary to navigable waters meets the criteria, all wetlands on that tributary meet the criteria. This seems to be overly broad in application.
3. The guidance adopts overly broad jurisdiction over seasonal flow tributaries and “ephemeral waters,” declaring that water flow for only three months of the year is a sufficient basis for jurisdiction. Reclamation believes that the asserted jurisdiction over seasonal flow tributaries and ephemeral washes should be much narrower.
4. The Ordinary High Water Mark test will result in CWA jurisdiction over features that have not carried any water for years. In the arid west, this test will unnecessarily expand CWA jurisdiction.
5. The guidance makes no distinction between native flows and introduced flows (transbasin diversions) or between natural wetlands and wetlands created by irrigation facilities. Reclamation contends that these distinctions are important in limiting Corps and EPA jurisdiction under the CWA.

6. Page 11, first paragraph. The last two sentences of the paragraph regarding geographic features, beginning with “Even when . . .” are confusing as written. The language of the first of these two sentences explores factors which would be considered in a significant nexus determination, yet the paragraph addresses non-jurisdictional geographic features. As a result, it is not clear if, for example, a swale with a surface hydrologic connection would or would not be considered jurisdictional under this guidance.
7. Page 11, second paragraph. Though this paragraph provides a good description of the function of ephemeral waters in the arid west, it does not state how the jurisdictional question will be applied to them. As this issue is relevant to many of the states within Reclamation’s area of jurisdiction, it would be helpful if the paragraph ended with a clear statement regarding how the agencies will assert jurisdiction. Without clarification, additional consultations may need to be conducted.
8. The guidance memorandum states that “[w]hen there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices. . . . Thus, regulatory jurisdiction under the CWA exists over a water body if either the plurality’s or Justice Kennedy’s test is satisfied.” *Guidance* at 3. Reclamation believes that the test as stated by the Supreme Court in *Marks v. United States*, 430 U.S. 188 (1977), is somewhat narrower, requiring that the decision based on the narrowest grounds be given the most weight in subsequent cases interpreting the same statute. Here, Justice Kennedy’s concurring opinion’s “significant nexus” test appears to be the narrowest of the three. It is not clear, however, whether the Corps and EPA are adopting the narrowest grounds in each of the categories delineated in the guidance, particularly with regard to traditional navigable waters and their adjacent wetlands. Instead, the guidance memorandum looks to the dissenting opinion for common ground with Justice Kennedy’s opinion as a basis for continuing to assert broad jurisdiction. *See* *Guidance* at 3.
9. Further, although not a comment specific to the memorandum, other Federal agencies (including Reclamation) would benefit from a review of a draft of the Corps’ and EPA’s planned coordination procedures referred to in the answer to question 8 in the attachment, “Key Questions for Guidance Release.”
10. In the memorandum’s “Key Questions for Guidance Release” attachment, the response to question 9 suggests some regulatory authority remains under the Section 404 program to achieve a no-net-loss goal, even if a wetland is determined to be non-jurisdictional. More discussion of this authority would be helpful.