



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 4 2008

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

- SUBJECT TO DELIBERATIVE PROCESS PRIVILEGE -

MEMORANDUM

SUBJECT: OECA's Comments on the June 6, 2007 Memo, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*

FROM: Granta Y. Nakayama
Assistant Administrator

A handwritten signature in black ink, appearing to read "Granta Y. Nakayama", written over the printed name and title.

TO: Benjamin Grumbles
Assistant Administrator for Water

Thank you for the opportunity to provide comments on the June 6, 2007 memo, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* ("the Guidance"). OECA's comments reflect our experience over the last seven months in implementing the Guidance. The Guidance was issued to apply solely to the wetlands program (Section 404) under the Clean Water Act (CWA); nonetheless, EPA Regions have applied the guidance when identifying violations for both the NPDES (Section 402) and Oil Spill (Section 311) enforcement programs, and our comments therefore reflect those experiences as well.

OECA collected and compiled data from the regions describing the CWA enforcement program impacts of the *Rapanos* decision and the Guidance. We have included a summary of those findings to illustrate the importance of these issues to OECA. We have also identified specific areas of the Guidance that have impeded our efforts to pursue enforcement, and where clarifications and modifications to the Guidance can significantly improve the predictability and efficiency of our CWA compliance determinations and enforcement efforts to ensure that our nation's water quality is protected.

Post-Rapanos Impacts on Enforcement

Data collected from the regions shows that a significant portion of the CWA enforcement docket has been adversely affected. While we are not able to distinguish whether these impacts are due primarily to the *Rapanos* decision or to the Guidance, this information revealed that from July 2006 to the present, the regions decided not to pursue formal enforcement in 304 separate instances where there were potential CWA violations because of jurisdictional uncertainty. In addition, the regions identified 147 instances where the priority¹ of an enforcement case was lowered due to jurisdictional concerns. Finally, the regions indicated that lack of CWA jurisdiction has been asserted as an affirmative defense in 61 enforcement cases since July 2006. Thus, since July 2006, the *Rapanos* decision or the Guidance negatively affected approximately 500 enforcement cases. When compared to EPA's annual enforcement results for FY2007 where EPA resolved a total of approximately 1,000 civil administrative and judicial enforcement cases under CWA sections 311, 402 and 404, it is clear that there has been a significant impact on enforcement. Attached to this memo is a copy of the table that shows the volume of Federal enforcement activities affected by the *Rapanos* decision.

Since the *Rapanos* decision and the issuance of the Guidance, my staff has been assisting the regions in collecting evidence to support violation determinations where CWA jurisdiction is at issue. The largest burden in these efforts stems from the implied presumption of non-jurisdiction for the most common types of waters in our country, intermittent and ephemeral tributaries to traditionally navigable waters and headwater wetlands. This presumptive exclusion can only be overcome by a resource-intensive "significant nexus analysis" as described in the Guidance. Performing these analyses has had a detrimental impact on CWA 404 enforcement efforts by significantly increasing resources expended on gathering jurisdictional evidence, reducing the predictability of these evaluations, and increasing the time it takes to complete the determination. For example, in order to demonstrate jurisdiction in small administrative cases, regions are spending thousands of dollars to model flow and conduct extensive field investigations.

The *Rapanos* decision and the resulting Guidance have created uncertainty about EPA's ability to maintain an effective enforcement program with respect to other CWA obligations. For instance, it is unclear whether NPDES and Oil Pollution Act (OPA) programs should use the Guidance when collecting evidence for enforcement cases, or, because footnote 17 restricts the application of the Guidance to section 404, whether EPA's evaluation of jurisdiction is governed by some other standard, such as the *Rapanos* decision itself. This creates uncertainty for EPA and the regulated community as to whether there has been a violation of the Act. Such uncertainty results in delays in enforcement and increases the resources needed to bring enforcement cases under these programs.

¹ "Lowering of a priority" means changing from a formal to an informal enforcement response, reducing the amount of the civil penalty, or significantly delaying the initiation of a case.

Impediments to Determining Violations Under the Guidance

The Guidance's procedure for establishing jurisdiction for not-relatively permanent (intermittent and ephemeral) tributaries and their adjacent wetlands has created the most significant challenge to maintaining an effective and efficient enforcement program. This challenge is significant because these types of waters are the most prevalent types of water bodies found in the United States. One estimate² of the extent of intermittent and ephemeral tributaries in the United States found that 95% of the stream channels and 75% of the total stream channel length are composed of first and second order streams;³ in arid areas, this percentage is even higher. Region 9 estimates that 95% of Arizona's streams and rivers are intermittent and ephemeral and that 97% of the state's NPDES permits are located on intermittent and ephemeral streams.⁴ These intermittent and ephemeral waters are vital to the protection of our Nation's streams and rivers and are where many compliance determinations and enforcement actions arise.

The most significant challenge affecting CWA enforcement is found in Section 3 of the Guidance. The Guidance redefines the word tributary by restricting the definition of a tributary to a single stream segment of the same stream order. This has come to be known as the concept of "relevant reach." In applying the Guidance to evaluate whether a tributary has a significant nexus to a traditionally navigable water, EPA is limited to the geographic extent of the "relevant reach" of that tributary. The concept of relevant reach is not found in the technical literature, the dictionary definition of a tributary, or in the *Rapanos* decision. Applying the concept of relevant reach as the unit of measure for a significant nexus evaluation of smaller tributaries (including intermittent and ephemeral tributaries) isolates the small tributary and ignores the nexus of the tributary system as a whole to the traditionally navigable water. The concept of relevant reach also ignores longstanding scientific ecosystem and watershed protection principles critical to meeting the goals of the CWA. A more traditional and scientifically accepted ecological concept, which is not precluded by the *Rapanos* decision, recognizes the vital role tributary systems play in maintaining the biological, physical and chemical integrity of waters of the United States, including traditionally navigable waters.⁵ The relevant reach concept artificially isolates each element of a watershed into numerous individual and seemingly independent tributaries.

² Fritz, K.M., B.R. Johnson, D.M. Walters, and J.E. Flotemersch, *Assessing Headwater Streams: Linking Landscapes to Stream Networks*. Presented at Science Forum 2004, Washington, DC, June 10-3, 2004.

³ First and second order streams are roughly equivalent to ephemeral and intermittent streams in arid areas and are collectively referred to as head water streams.

⁴ U.S. EPA Region 9. 2003. Comment letter on the Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States."

⁵ Alexander, Richard B., Elizabeth W. Boyer, Richard A. Smith, Gregory E. Schwarz, and Richard B. Moore, 2007. The Role of Headwater Streams in Downstream Water Quality. *Journal of the American Water Resources Association (JAWRA)* 43(1):41-59. DOI: 10.1111/j.1752-1688.2007.00005.x

Recommendations Consistent with the *Rapanos* Decision

A few targeted revisions to the Interagency Guidance would address these issues, while remaining consistent with the *Rapanos* decision. These recommendations would significantly improve the efficiency of compliance determinations, reduce the extraordinary resource burden on the enforcement program, and result in a more predictable and efficient enforcement program for the regulated public and industries.

The Definition of a Tributary

We recommend modifying the definition of a tributary to eliminate the relevant stream reach concept embodied in the second sentence of Footnote 21 and on Page 9. Instead, we recommend that the definition simply include what is found in the first sentence of Footnote 21: "A tributary is a natural, man-altered, or man made water body that carries flow directly or indirectly into a traditionally navigable water." This will result in a more commonly recognized definition of tributary that is more consistent with the way tributaries are defined, for example, in the fields of hydrology and geography. The term "relevant reach" is not found in the *Rapanos* decision, and by removing it from the guidance, the guidance will be more consistent with the tributary discussions found in the *Rapanos* decision. Moreover, our recommendation will also remove the single most restrictive element of the Guidance that is adversely affecting CWA enforcement.

Significant Nexus for Wetlands Adjacent to "Not Relatively Permanent" Tributaries

We recommend revising the Guidance to incorporate Justice Kennedy's suggestion that, when evaluating jurisdiction, it is appropriate to consider wetlands either alone or in combination with other "similarly situated lands in the region." (*Rapanos*, 126 S.Ct. 2208, 2249 (2006)). This increases the certainty and predictability of jurisdictional determinations by considering the collective effects from all wetlands in the same region when evaluating significant nexus. Moreover, this approach would create resource efficiencies because, as Justice Kennedy articulates in his statements on administrative convenience (*Rapanos*, 126 S.Ct. at 2249), the initial exercise of demonstrating significant nexus for a similar group of wetlands could be applied to the next enforcement case on comparable wetlands in the same region. The Guidance should include a framework for an acceptable regional analysis for a significant nexus evaluation, for example, by incorporating watershed boundaries such as those defined by the Hydrologic Unit Code that are currently used in the implementation of Section 303(d) of the CWA and the development of TMDLs.

Significant Nexus for Not Relatively Permanent Tributaries

We recommend revising the Guidance's approach for determining whether tributary streams, without associated wetlands, are subject to CWA jurisdiction. Justice Kennedy's opinion in the *Rapanos* decision leaves sufficient room for developing a separate, more workable standard for determining whether EPA has authority to regulate streams without associated wetlands. For these types of waters, Justice Kennedy stated

that “[an ordinary high-water mark] may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute “navigable waters” under the Act.” (*Rapanos*, 126 S.Ct. at 2249). OECA recommends that the Guidance include a discussion of using the ordinary high water mark, combined with other factual data on flow, chemistry or biology, to provide a valid and efficient measure of sufficient nexus to other regulated waters for these types of tributaries. The measured use of the ordinary high water mark would be simple to apply in the field, reduce resources expended, and provide more predictability for the regulated public. By making this revision, the Guidance would recognize the traditional and accepted ecological concepts of the vital role tributary systems play in maintaining the chemical, physical and biological integrity of waters of the United States, including traditionally navigable waters.

Scope of the Guidance Beyond Section 404

To the extent that the Guidance is not applicable to enforcement under sections 311 and 402 of the CWA, we recommend that the Office of Water provide additional clarification on how to establish jurisdiction for these programs, either by: (1) indicating that jurisdictional determinations in CWA cases (other than 404) are not restricted by the Guidance and that the existing regulations should be applied to jurisdictional determinations to the extent they were not affected by the *Rapanos* decision; or (2) providing clear guidance as to how jurisdiction should be determined in cases involving CWA section 402 and 311.

Conclusion

We appreciate the Office of Water’s efforts to provide guidance in the wake of the questions raised by the *Rapanos* decision and hope that our comments, based on field experience in applying the Guidance, can inform appropriate revisions to the Guidance. It is very important that the regulated community and the regulators have clear and predictable standards and approaches by which to determine and understand Clean Water Act jurisdiction, as well as to ensure the American public that the goals of the Clean Water Act are being met. Please feel free to call me or have your staff call Mark Pollins at 202-564-4001, if you would like to discuss these comments further.

cc:

Roger Martella
Craig Hooks
Jim Hanlon
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Steve Neugeboren
David Evans
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- SUBJECT TO DELIBERATIVE PROCESS PRIVILEGE -

**Effects of Rapanos on EPA's Civil Enforcement Program
Summary of Regional Responses
Covering Period of July 2006 through December 2007**

| Region | 1. Instances where an enforcement action was considered to be appropriate based on existing violations, but where the Region chose not to pursue formal enforcement based on the uncertainty about EPA's jurisdiction over the receiving waters. | 2. Cases where an enforcement action was considered to be appropriate based on existing violations, but where the Region chose to "lower the priority" of the case based on the uncertainty about EPA's jurisdiction over the receiving waters. | 3. Any case where lack of CWA jurisdiction has been asserted by the alleged discharger as an affirmative defense to an enforcement action. |
|-----------------|--|---|--|
| 1 | 1 (404) | 1 (OPA); 2 (402) | 1 (404); 1 (402) |
| 2 | 0 | 1 (402) | 1 (402/404) |
| 3 | 4 (402/404) | 6 (402) | 4 (402/404) |
| 4 | 13 (OPA); 8 (402) | 19 (404); 6 (402) | 14 (404) |
| 5 | 3 (404) | 14 (404); 15 (402) | 6 (404); 1 (402) |
| 6 | 86 (OPA); 52 (402/404) | 4 (402/404) | 3 (OPA); 2 (402/404) |
| 7 | 3 (OPA); 10 (402); 4 (404) | 5 (OPA); 3 (404); 19 (402) | 2 (OPA); 1 (404); 3 (402) |
| 8 | 106 (OPA); 3 (402/404) | 8 (OPA); 9 (402/404) | 2 (OPA); 2 (402/404) |
| 9 | 11 (404) | 4 (OPA); 4 (404); 11 (402); 2 (402/404) | 4 (404); 5 (402); 1 (402/404) |
| 10 | 1 (402) | 1 (OPA); 4 (404); 9 (402) | 5 (404); 5 (402) |
| TOTALS * | 305 | 147 | 63 |

* The total number of cases affected by Rapanos may be less than the total number of all cases in the three categories; a single case may have met the criteria of more than one category.