

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2007-0282; FRL_XXXX-X]

EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after *Rapanos*

AGENCY: U.S. Army Corps of Engineers, DoD; Environmental Protection Agency (EPA).

ACTION: Notice of Availability.

SUMMARY: The U.S. Environmental Protection Agency and U.S. Army Corps of Engineers are today issuing agency guidance, effective immediately, regarding Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court's decision in the consolidated cases Rapanos v. United States and Carabell v. United States ("Rapanos"). The agencies are issuing this guidance to ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions being conducted under the CWA are consistent with the Rapanos decision and provide effective protection for public health and the environment. The agencies are concurrently providing a six-month public comment period to solicit input on early experience with implementing the guidance. The agencies, within nine months from the date of issuance, will either reissue, revise, or suspend the guidance after carefully considering the public comments received and field experience with implementing the guidance.

DATES: Comments must be received on or before [insert 180 days following the date of this publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2007-0282, by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.
- Email: OW-Docket@epa.gov. Include the docket number, EPA-HQ-OW-2007-0282 in the subject line of the message.
- Mail: Water Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW, Washington, DC 20460.
- Hand Delivery: 1301 Constitution Ave, NW, Room 3334, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OW-2007-0282. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov your

e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Water Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

FOR FURTHER INFORMATION CONTACT: Russell L. Kaiser, Regulatory Community of Practice (CECW-CO), U.S. Army Corps of Engineers, Headquarters, 441 G Street, NW, Washington, D.C. 20314; telephone number: (202) 761-7763; fax number: (202) 761-5096; email address: Rapanos.Comments@usace.army.mil. Donna M. Downing, Office of Water (4502T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460; telephone number: (202) 566-1783; email address: CWAwaters@epa.gov

SUPPLEMENTARY INFORMATION:

I. General Information

The U.S. Environmental Protection Agency and U.S. Army Corps of Engineers are issuing agency guidance, effective immediately, regarding Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court's decision in the consolidated cases Rapanos v. United States and Carabell v. United States (126 S. Ct. 2208 (2006)) ("Rapanos"). Congress enacted the Clean Water Act ("CWA") (33 U.S.C. §1251(a)) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." One of the mechanisms adopted by Congress to achieve that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in compliance with other specified sections of the CWA (33 U.S.C. §§1311(a) and 1362(12)(A)). In most cases, this means compliance with a permit issued pursuant to CWA §402 or §404. The CWA defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source[,]"(33 U.S.C. §1362(12)(A)) and provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas[,]" (33 U.S.C. §1362(7); 33 C.F.R. §328.3(a) and 40 C.F.R. §230.3(s)). In Rapanos, the Court addressed where the Federal government can apply the CWA, specifically by determining whether a wetland or tributary is a "water of the United States." The justices issued five separate opinions in Rapanos (one plurality opinion, two concurring opinions, and two dissenting opinions), with no single opinion commanding a majority of the Court.

During the first six months implementing the guidance, the agencies invite public comment and case studies on early experience with implementing the guidance. The agencies, within nine months from the date of issuance, will either reissue, revise, or suspend the guidance after carefully considering the public comments received and field experience with implementing the guidance. A copy of the guidance can be found on EPA's website at <http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html> and on the Corps' website at <http://www.usace.army.mil/cw/cecwo/reg/>

The Court's split decision is causing uncertainty among agency field personnel and the general public regarding the scope of Federal jurisdiction under the CWA's §404 program. As a result, many jurisdictional determinations and their associated permitting actions have been delayed. For this reason, the agencies believe it is imperative that the guidance be issued immediately, so that agency field personnel can address the backlog of pending jurisdictional determinations.

At the same time, the agencies appreciate that the public has considerable interest in the issues addressed in this guidance. The agencies are particularly interested in hearing from the public regarding their actual experience with implementing the guidance. For this reason, we are providing a six month public comment period, which will allow us to address the backlog of pending jurisdictional determinations, while encouraging the public to provide comments, case studies, and experiences with the use of this guidance. 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 will within nine months from the date of issuance either reissue, revise, or suspend the guidance.

Dated:

Benjamin H. Grumbles
Assistant Administrator