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Rapanos:

An Interpretive Dance

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The Band Begins to Play...

- The Supreme Court issued its opinion(s) in the consolidated cases of Rapanos v. United States and Carabell v. United States – 126 S.Ct. 2208 (2006)
 - **The Question:**
 - What constitutes “waters of the United States” for purposes of Clean Water Act jurisdiction?
 - **The Answer(s):**
 - Five separate opinions were issued by the Justices in Rapanos – one plurality opinion, two concurring opinions and two dissenting opinions. The divided Court vacated and remanded the case to the U.S. Court of Appeals for the Sixth Circuit



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Justice Scalia's Plurality Opinion

- “The ‘waters of the United States’ in § 1362(7) cannot bear the expansive meaning that the Corps would give it.”

The Proposed Test:

“Establishing that wetlands ... are covered by the Act requires two findings:

First, that the adjacent channel contains a ‘water of the United States,’ (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and

Second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the wetland begins”



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Justice Kennedy's Concurring Opinion

“It bears mention also that the plurality’s overall tone and approach ... seems unduly dismissive of the interests asserted by the United States in these cases. Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular”

The Proposed Test:

“When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries.”



The Interpretive Dance Begins ...

- The Corps and EPA have issued joint guidance interpreting the Rapanos decision and establishing new JD procedural requirements
- The Corps and EPA have also issued a new JD form
- The Corps and EPA have not decided whether to engage in rulemaking in the wake of Rapanos, but the agencies are accepting public input on the guidance until January 21, 2008



The Guidance

The Legal Memorandum and Memorandum of Agreement issued in June 2007:

- Provide guidance on the application of those Corps and EPA regulations which define the term “waters of the United States” with respect to the CWA 404 permitting program – 33 C.F.R. §§ 328.3(a)(1), (a)(5), and (a)(7) and 40 C.F.R. §§ 230.3(s)(1), (s)(5), and (s)(7)
- Expressly DO NOT apply to other regulations and other sections of the CWA
- Expressly DO NOT address the Supreme Court’s decision in SWANCC



The Guidance: What's “Clearly” Jurisdictional?

- Traditional Navigable Waters (“TNWs”) and wetlands adjacent to such TNWs
- “Relatively permanent” non-navigable tributaries of TNWs
- Wetlands adjacent to and with a continuous surface connection to relatively permanent, non-navigable tributaries to TNWs



The Guidance: What's “Clearly” Not Jurisdictional

- Waters that are not tributaries and that do not have a significant nexus to downstream TNWs
- Swales, erosion features, including gullies and small washes characterized by low volume, infrequent, or short duration flow
- Ditches, including roadside ditches, excavated wholly in, and draining only uplands that do not carry a relatively permanent flow of water



The Guidance: What May Be Jurisdictional?

The following wetlands must be evaluated on a case-by-case basis pursuant to the “significant nexus” test:

- Wetlands adjacent to, without a continuous surface connection to relatively permanent, non-navigable tributaries
- Non-navigable, not relatively permanent tributaries
- Wetlands adjacent to non-navigable, not relatively permanent tributaries



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The Guidance: What is a significant nexus?

The significant nexus inquiry requires the assessment of the flow characteristics and functions of the tributary itself together with the functions performed by any wetlands adjacent to that tributary, to determine whether, collectively, they have more than a speculative or insubstantial effect on the chemical, physical and biological integrity of a TNW



The Guidance: What is a significant nexus?

Factors to consider when evaluating whether there is a significant nexus:

- Volume, duration and frequency of flow
- Proximity of the tributary/wetland to a TNW
- Hydrological data
- Physical characteristics of the tributary's flow
- Contextual factors including the tributary's watershed, average precipitation, etc...
- Functions performed by the tributary/wetland including ecological functions and the capacity to convey pollutants and flood waters



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The Guidance: Procedural Requirements

- A new JD form and manual
- Specific documentation required in the administrative record
- The Corps must provide the appropriate regional EPA office with a copy of every draft JD proposing to assert or decline jurisdiction



What About SWANCC???

The language of the Guidance is clear that the significant nexus test should not be used to expand jurisdiction beyond the limits articulated in SWANCC.

However, it may be harder to establish SWANCC wetlands to the extent that the new JD form replaces, rather than supplements, former procedures used by the Corps to make jurisdictional determinations.



What does it mean in practice?

- For the Regulated Community:
 - All JDs are being sent to EPA for review, even when the applicant and Corps agree on the boundary
 - Less certainty now as to CWA 404 jurisdiction than pre-Rapanos



What does it mean in practice?

- For the Agencies:
 - The Corps and EPA estimate that there are over 100,000 CWA 404-related JDs completed each year
 - The Jacksonville District has the largest percentage of permit reviews in the Country
 - EPA Region 4 has received nearly 300 JDs to review since the Guidance was issued in June
 - Approximately 30% of these involve the significant nexus test



Lingering Questions

- Will there be rulemaking? Legislation?
- Will there be guidance as to how Rapanos affects other statutory regimes that rely on the definition of “waters of the United States”?
- How will the recent droughts affect the application of the significant nexus test?



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And the Beat Goes On...

The Corps and EPA opened a six month public comment period for the interagency guidance regarding Rapanos.

Yesterday, the agencies announced that the public comment period, which was to close in December, has been extended until January 21, 2008.



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For More Information

- Visit the U.S. Army Corps of Engineers Website :
http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/cwa_guide.htm
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Discussion

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