

Talking Points – Revised Rapanos-Carabell Guidance

On December 3, 2008, the Department of the Army and the U.S. Environmental Protection Agency issued revised guidance regarding Clean Water Act jurisdiction following the U.S. Supreme Court's decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States*.

This revised guidance replaces the original guidance issued on June 5, 2007.

The revised guidance was developed after reviewing over 66,000 comments submitted by tribes, states, environmental and conservation organizations, regulated entities, industry associations, and the general public after our initial Rapanos-Carabell guidance was issued on June 5, 2007.

The revisions to the June 5, 2007, guidance were also guided by the agencies implementation of the original guidance over the past 18 months, and review of hundreds of specific cases.

In response to the comments received, three key components of the Rapanos-Carabell guidance were revised: 1) how the flow regimes of tributaries will be classified for the purposes of making jurisdictional determinations; 2) application of the regulatory definition of "adjacency;" and, 3) the scope of "traditional navigable waters."

- The agencies have made some changes with respect to assessing flow in tributaries for purposes of determining whether a tributary is relatively permanent or non-relatively permanent.
- Under the revised guidance, the agencies continue to assert jurisdiction over adjacent wetlands. The revised guidance provides three criteria for the agencies to use to determine whether a wetland is adjacent. Only one of these criteria

needs to be met to support a finding of adjacency. The three criteria are:

1. The presence of an unbroken hydrologic connection to jurisdictional waters;
 2. The presence of physical barriers between wetlands and jurisdictional waters (e.g., man-made dikes or barriers; natural river berms); or
 3. Reasonably close physical proximity to jurisdictional waters that provides an ecological interconnection
- The agencies have made some changes to the guidance to clarify the scope of “traditional navigable waters” for purposes of CWA jurisdiction.

Two other key components of the Rapanos-Carabell guidance were not revised: 1) the agencies interpretation of the term “significant nexus”; and, 2) the definition of “relatively permanent waters.” In both cases, the agencies struck a careful balance between differing views and had already considered the positions raised by commenters when developing the guidance.

“Significant nexus” is an integral relationship between tributaries their adjacent wetlands to traditional navigable waters, where those tributaries and their adjacent wetlands significantly affect the chemical, physical, and biological integrity of those traditional navigable waters. That relationship is not speculative or insubstantial.

Earlier this year the agencies also are addressing several procedural issues that had been raised by commenters: 1) delays in processing required “approved” jurisdictional determinations; and, 2) the coordination and potential elevation to HQs of all jurisdictional determinations involving “significant nexus” determinations.

- Regulatory Guidance Letter 08-02, issued in June 2008, authorizes applicants and the Corps to use

“preliminary” JDs again, which we anticipate will significantly speed up the JD process, reduce paperwork, and save cost.

- The coordination process for jurisdictional determinations involving significant nexus has been changed from a fairly lengthy elevation process to one where EPA Regions have 15 days to review draft jurisdictional determinations.
- The coordination process for isolated waters remains unchanged.

The revised guidance takes effect immediately.