



## **Questions and Answers Regarding the Revised *Rapanos* & *Carabell* Guidance December 2, 2008**

### **1. What changes have been made to the *Rapanos* Guidance?**

EPA and the Corps have revised the *Rapanos* Guidance in consideration of public comments received and consistent with our experience implementing the guidance over the past 18 months. Specifically, the revised guidance:

1. Clarifies how to determine the reach of the “Traditional Navigable Waters (TNWs),”
2. Clarifies the regulatory term “adjacent wetlands,” and;
3. Refines the concept of “relevant reach.”

In addition, the Corps has issued a Regulatory Guidance Letter (RGL) 08-02 responding to public comments concerned with processing delays.

The June 2007 guidance discussed TNWs, as did Appendix D of the Instructional Manual that the agencies issued concurrently. Several public comments indicated that the concept of TNWs should be discussed further. The revised guidance clarifies, consistent with Appendix D, that TNWs are broader than Rivers and Harbors Act section 10 waters, and also include waters that have been determined to be navigable-in-fact by the courts, are currently being used or have historically been used for commercial navigation, or for which evidence showing susceptibility to future commercial navigation is more than insubstantial or speculative.

The June 2007 guidance also discussed the circumstances under which adjacent wetlands were jurisdictional after *Rapanos*, but did not discuss the meaning of adjacency other than to reference the regulatory definition as “bordering, contiguous, or neighboring.” The revised guidance clarifies, consistent with the regulatory definition, that a wetland is adjacent if it has an unbroken hydrologic connection to jurisdictional waters, or is separated from those waters by a berm or similar feature, or if it is in reasonably close proximity to a jurisdictional water.

The original guidance stated that, for purposes of the guidance, a tributary is the entire reach of the stream that is of the same order, and that the flow characteristics of a particular stream reach should be evaluated at the farthest downstream limit of the reach (i.e., the point the tributary enters a higher order stream). Several commenters indicated that assessing flow at the

downstream point was not the most appropriate approach to characterizing the entire stream. The revised guidance makes some changes with respect to assessing flow in tributaries for purposes of determining whether a tributary is relatively permanent, indicating that where the downstream limit is not representative of the stream reach as a whole, the flow regime that best characterizes the reach should be used.

Several comments suggested changes to other aspects of the Rapanos Guidance, such as the approach to significant nexus or the definition of relatively permanent waters. For such issues, the agencies struck a careful balance when interpreting the Supreme Court opinions and drafting the original guidance. The positions articulated by commenters were among those considered by the agencies when developing the guidance, and the agencies have decided to maintain the policy choices they made.

Some public comments addressed procedural, rather than substantive, issues raised by the guidance. In particular, many commenters expressed concerns about processing delays often caused by data-intensive approved jurisdictional determinations. They suggested that the Corps should accept a presumption of jurisdiction, requested and agreed to by a permit applicant, treating all waters on the project site as jurisdictional, as a basis for proceeding to the permitting stage without waiting for an approved jurisdictional determination. In response to this comment, the Corps in June 2008 issued Regulatory Guidance Letter 08-02, clarifying that project proponents may request a preliminary JD which is based on an “effective presumption of CWA/RHA jurisdiction over all of the wetlands and other water bodies at the site.” (See RGL 08-02, paragraph 9a.)

The agencies will continue to monitor implementation of the *Rapanos* decision in the field. In the future, further consideration of jurisdictional issues may be appropriate, either through issuance of additional guidance or through rulemaking.

## **2. Why did Guidance revisions take so long?**

EPA and the Corps received 66,047 public comments on the June 2007 Rapanos Guidance, many of which were extensive. Comments were received from states, environmental and conservation organizations, regulated entities, industry associations, and the general public. During discussions about potential amendments to the guidance, EPA and the Corps considered field implementation experiences of the 38 Corps District offices and 10 EPA Regional offices, in addition to these public comments. The revised guidance is the result of extensive discussions needed to fully consider public input and agencies’ implementation experiences.

## **3. In light of the large number of public comments, why are there relatively few changes to the Guidance?**

The agencies have decided it is not appropriate at this time to make changes to the guidance with respect to several issues on which comments were received. The agencies struck a careful balance when interpreting the *Rapanos* opinions. The positions articulated by commenters were among those considered by the agencies when developing the guidance, and for several issues the agencies have decided to maintain the policy choices they made in interpreting the decision.

#### **4. What waters does the Corps/EPA Guidance indicate are protected under the Clean Water Act (CWA) after *Rapanos*?**

Both the original and revised guidance have been developed to implement the U.S. Supreme Court decision in *Rapanos*. They address the regulatory definition of waters in (a)(1) (navigable waters), (a)(5) (tributaries), and (a)(7)(adjacent wetlands) addressed by the *Rapanos* opinions. In accordance with both the original and revised guidance, jurisdiction over these waters will be as follows:

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent (i.e., the tributaries typically flow year-round or have continuous flow at least seasonally)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally
- Wetlands adjacent to such tributaries
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies will apply the significant nexus evaluation as follows:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if in combination they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors.

#### **5. Many commenters requested that the agencies proceed with a rulemaking to clarify *Rapanos* and *SWANCC*. Why did the agencies decide not to address these cases in a regulation?**

The agencies recognize the advantages of clarifying the Supreme Court decisions in *Rapanos* and *SWANCC* through the rulemaking process, particularly with regard to improved opportunities for public participation and for providing greater clarity and specificity. EPA and the Corps appreciate the very helpful comments we received from the public on this issue. The agencies will continue to monitor implementation of the *Rapanos* Guidance and, as we gain experience, consider appropriate opportunities to provide additional guidance or to initiate rulemaking.