

Wetland Regulation Changes
Clean Water Act Definition of "Waters of the United States"
Summary
(June 2007)

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have jointly issued a legal Memorandum of Agreement (MOA) **effective immediately** that interprets the June 19, 2006, Supreme Court decision in the consolidated cases *Rapanos v. U.S.* and *Carabell v. U.S.* (known as the "*Rapanos*" decision). The guidance is being released to Corps and EPA field offices to ensure nationwide predictability, reliability, and consistency in identifying wetlands, streams, and rivers subject to the Clean Water Act (CWA). Concurrently, the agencies released MOA setting forth a new process with specific and short timeframes to provide for EPA review of certain Corps jurisdictional determinations (JDs). Although the guidance is currently in effect, the public nevertheless has six months to submit comments. According to Dr. John Bruza of the New Orleans District of the Corps, all requests for JDs that are currently under review are subject to this guidance.

It appears that the Corps will require applicants for JDs to provide information and data beyond that previously necessary to support wetland delineations. The guidance requires that JDs for these classes of wetlands be coordinated with the EPA. The guidance states that certain wetlands, such as non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally and wetlands adjacent to such tributaries do not have a "significant nexus" to a traditional navigable water and may not be jurisdictional. The Corps must now provide the EPA with a draft JD and supporting documentation to verify the rationale for asserting or declining jurisdiction over intrastate, non-navigable, isolated waters. Although the agencies' coordination process has various timelines, the increased burden of proof and supporting documentation requirement placed on the Corps, wetland consultants, and applicants for JDs for some classes of wetlands is likely to increase the length of time involved in obtaining a JD.

Interagency coordination is not required for JDs involving traditional navigable waters, including their adjacent wetlands, and for relatively permanent non-navigable tributaries of traditional navigable waters, including wetlands with a continuous surface connection with such relatively permanent tributaries. If the Corps asserts jurisdiction without the necessity of establishing a significant nexus, the JD need not undergo EPA review.

It appears that the EPA and Corps acknowledge the *Rapanos* tests regarding "significant nexus" and "relatively permanent flow." Though the government does not assign the burden of proof on whether the applicant for a JD needs to show that no significant nexus exists or whether the government needs to do so, in reality, it appears

that this process may merely provide a mechanism to ensure adequate evidence is gathered to prove a significant nexus. In certain circumstances, regarding certain types of wetlands (such as isolated wetlands), the process for EPA's significant nexus review will likely extend the length of time involved in obtaining a JD. However, the guidance identified erosional features, swales, small washes (characterized by low volume, infrequent, and short duration flow), and any ditches excavated wholly in and draining only uplands as generally non-jurisdictional.

For additional information please call Charles Jones at (225) 766-7400 or see the source documents for this summary listed below.

- [June 2007 Legal Memorandum \(PDF\)](#) (12 pp, 149K, [About PDF](#)) discussing Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in *Rapanos v. United States* & *Carabell v. United States*.
- [June 2007 Memorandum of Agreement \(PDF\)](#) (7 pp, 103K, [About PDF](#)) regarding Coordination on JDs under Clean Water Act Section 404 in Light of the SWANCC and *Rapanos* Supreme Court Decisions.
- [June 2007 Questions and Answers \(PDF\)](#) (7 pp, 71K, [About PDF](#))
- For additional information, consult the [Army Corps Regulatory Program Homepage](#)
- [January 2003 Legal Memorandum \(PDF\)](#) (4 pp, 54K, [About PDF](#)) discussing the scope of the Clean Water Act jurisdiction in light of the SWANCC ruling and related court decisions.



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