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New federal wetland guidance reflects Rapanos S.C. decision

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In June 2007, the U.S. Army Corps of Engineers (USACE) and U.S. Environmental Protection Agency (USEPA) issued a joint memorandum providing guidance for the determination of federal jurisdictional wetlands under Section 404 of the Clean Water Act (CWA) in the wake of the June 2006 Supreme Court Rapanos decision. The Supreme Court's 2006 decision overturned two previous appellate court decisions that had upheld the Corps' broad based "waters of the United States" interpretation of jurisdictional wetlands. Although five Justices rejected this interpretation, they failed to establish a clear and concise ruling for making a jurisdictional determination of wetlands that are remote from navigable bodies of water.

The new guidance attempts to implement the Rapanos decision through a two-tiered approach. The first tier categorically asserts jurisdiction over some waters, while the second requires a "significant nexus" evaluation on a case-by-case basis to determine jurisdiction. The guidance affirms the agencies' jurisdiction over: traditional navigable waters; wetlands "adjacent" to traditional navigable waters; relatively permanent non-navigable tributaries of traditional navigable waters (i.e., flow for at least 3 months); and wetlands directly abutting relatively permanent non-navigable tributaries.

For features not meeting the above standards, the agencies will assert jurisdiction based on a fact-specific, case-by-case determination of evidence that a "significant nexus" to traditional navigable waters exists.

This "significant nexus" approach applies to: non-navigable tributaries that are not relatively permanent; wetlands adjacent to non-navigable tributaries that are not relatively permanent; and wetlands adjacent to, but that do not directly abut, a relatively permanent non-navigable tributary. The determination of whether a "significant nexus" exists requires consideration of the flow characteristics and functions of the tributary and its adjacent wetlands, including both hydrologic and ecological factors, and whether they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.

The guidance further asserts that the following features will generally not fall under federal jurisdiction: swales or erosional features (e.g., gullies, small washes of low flow volume, infrequent or low-duration flow); and ditches excavated wholly in and draining only uplands that do not carry a relatively permanent flow of water.

Unfortunately, the new guidance does not specify how these different considerations should be weighed, although the effect on navigable waters must be "more than speculative or insubstantial."

Ultimately, the new guidance will create additional documentation requirements for jurisdictional determinations associated with Section 404 CWA Permit applications, but may also effectively reduce the number of wetlands considered jurisdictional by the USACE and USEPA. This creates the potential for opening up previously "wetland constrained" sites for development.

Therefore, if you are considering developing a site with wetland constraints, it is in your best interest

to work with an experienced wetland expert and do your due diligence early on in the process. For additional information go to: www.usace.army.mil/cw/cecwo/reg/cwa_guide/cwa_guide.htm.

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