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CLIENT ADVISORY

WHEN DO YOU NEED A CLEAN WATER ACT PERMIT? EPA AND THE ARMY CORPS ISSUE NEW GUIDANCE

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In December 2008, following the US Supreme Court's 2006 *Rapanos* decision, the US Environmental Protection Agency (EPA) and the Army Corps of Engineers (Army Corps) issued final guidance intended to clarify the Government's position on the reach of the Clean Water Act. While the guidance sets forth some specific criteria for determining when the Clean Water Act applies, the Act's application to wetlands or water bodies with intermittent or ephemeral flow is far from clear. The guidance is complicated and leaves significant room for interpretation and fact-specific analysis, particularly with respect to wetlands. Moreover, the guidance does not rise to the level of a rulemaking, and its application to future cases may well lead to significant legal challenges.

In 2006, the Supreme Court's *Rapanos* decision limited the reach of the Clean Water Act by rejecting the Federal Government's long-standing position that virtually any hydrologic feature, including wetlands and drainage swales, were "navigable waters of the United States" and therefore subject to the Clean Water Act. But the Supreme Court did not speak with one voice in *Rapanos*, resulting in a plurality opinion, a concurring opinion, and a dissent, each offering a different view of the reach of the Clean Water Act. As a result, the Court created significant confusion about the scope of federal jurisdiction over wetlands, swales, storm channels, washes, and other hydraulic features that fall outside the common sense notion of navigable waters.

Thus, a party faced with a remediation or development project involving wetlands or ephemeral hydrologic features will need to assess carefully whether the Clean Water Act applies, and may need to pursue a formal jurisdictional determination or challenge in front of the EPA and Army Corps (collectively, the Agencies). Because the jurisdictional determinations can be fact-intensive and time-consuming, a project proponent may also need to explore strategies for ensuring that the permit application process does not unnecessarily delay the project. Moreover, because the *Rapanos* decision is far from a model of lucidity and the recent EPA guidance is complicated and fact-intensive, future legal challenges to the guidance are likely.

I. THE *RAPANOS* DECISION

The Clean Water Act generally prohibits the discharge of pollutants from a point source, including dredged or fill material, into "navigable waters of the United States" without a permit.[1] Everyone knows that the Mississippi River, Lake Erie,

and the Chesapeake Bay are "navigable waters of the United States." But what about a wetland? What about a shallow pond in the middle of a farm in Kansas? What about an intermittent stream that carries snow melts in the Rocky Mountains? Or a wash in Arizona? Or a drainage ditch in Maryland?

Before *Rapanos*, EPA and the Army Corps generally took the position that all of the above were "navigable waters of the United States" and that point source discharges, dredging, or filling of any of them required permits under the Clean Water Act. Thus, before *Rapanos*, navigable waters consisted of "all interstate waters including interstate wetlands; all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce; tributaries of [such] waters; and wetlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands)."[2] Under the Army Corps' interpretation, "waters of the United States" extended to virtually any land feature over which rainwater or drainage passed and left a visible mark—even if only "the presence of litter and debris."[3]

Rapanos changed that, but offered no clear path forward. In a plurality opinion written by Justice Scalia, four justices rejected the Government's broad interpretation of the term "navigable waters." Instead, the Justices concluded that the term extended to (a) traditionally navigable waters; (b) "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and (c) "wetlands with a continuous surface connection to such relatively permanent waters."[4]

Justice Kennedy authored a separate concurring opinion. Like the plurality, he rejected the Agencies' broad interpretation of the term navigable waters, but his interpretation of the term differed from that of the plurality. According to Justice Kennedy, the term navigable waters includes wetlands if "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[5] In a dissenting opinion written by Justice Stevens, four justices essentially upheld the Corps' broad interpretation of the term "navigable waters."

II. CLEAN WATER ACT JURISDICTION FOLLOWING *RAPANOS* V. *UNITED STATES*

On December 2, 2008, EPA and the Corps issued final guidance addressing Clean Water Act jurisdiction following *Rapanos*.[6] The guidance is complicated and, like the *Rapanos* decision, it can be vague and difficult to apply. In general, the guidance establishes three categories of water bodies that EPA and the Corps believe are subject to the Clean Water Act.

Category 1: Traditional Navigable Waters and Their Adjacent Wetlands. Not surprisingly, under the new guidance, the Mississippi River, Lake Erie, the Chesapeake Bay, and other "traditionally navigable waters" will remain subject to Clean Water Act prohibitions and permitting requirements. So will wetlands adjacent to those waters. In the Agencies' view, to be "adjacent" a wetland must: (1) have an unbroken surface or shallow sub-surface connection to jurisdictional waters; (2) be physically separated from jurisdictional waters only by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) be reasonably geographically close to the water body to support an inference that such wetlands have an ecological interconnection with jurisdictional waters.[7]

Category 2: Relatively Permanent Non-Navigable Tributaries and Adjacent Wetlands. EPA and the Army Corps will also assert Clean Water Act jurisdiction over non-navigable tributaries that are "relatively permanent."[8] These are waters that typically flow year-round or waters that have a continuous flow at least seasonally, but not "ephemeral" tributaries that flow only in response to precipitation or intermittent streams

that do not typically flow year-round or have continuous flow at least seasonally.[9] Thus, a small, shallow creek leading to the Mississippi is a "relatively permanent non-navigable tributary," and so is a snow melt stream in Colorado if it has continuous seasonal flow, but wash in Arizona is not.

The Agencies also assert Clean Water Act jurisdiction over adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary so long as there is a "physical connection."[10] A berm, dike, or other feature, however, that separated a wetland would break this physical connection, and thus might break the jurisdictional link.

Category 3: The Significant Nexus Test. Third, EPA and the Army Corps will apply a "significant nexus" test to determine Clean Water Act jurisdiction over other hydrologic features.[11] The "significant nexus" test applies to (a) non-navigable tributaries that are not relatively permanent; (b) wetlands adjacent to such tributaries; and (c) any other wetland that might have a significant nexus to a traditional navigable water—a Category 1 water.[12]

Under the "significant nexus" test, the Agencies will conduct a fact-specific analysis of the flow characteristics and ecologic functions of the hydrologic feature at issue to determine whether the feature significantly affects the chemical, physical, or biological integrity of downstream traditional navigable waters. This test looks at factors like the volume, duration, and frequency of flow, the size of the watershed, whether the feature provides important aquatic habitat, and whether the feature traps or filters pollutants and prevents them from reaching a traditionally navigable water.

The significant nexus test will be applied to intermittent streams and other hydrologic features with ephemeral flow as well as some wetlands. Thus, the test might apply to a major wash in Arizona, and to wetlands that are not adjacent to a major water body, but might have some connection to it.

So what's excluded? The guidance states that swales, erosional features such as small washes, and drainage ditches are often excluded from Clean Water Act jurisdiction. However, under *Rapanos,* there do not appear to be any hard and fast rules about what types of water features are excluded from Clean Water Act jurisdiction. More importantly, because the *Rapanos* decision is sufficiently muddled and the latest guidance is sufficiently complex, it will likely take several legal challenges and many years to figure out exactly what hydrologic features are subject to Clean Water Act requirements.

III. THE PRACTICAL RESULT OF THE NEW GUIDANCE

Clean Water Act jurisdiction most often arises with the question of whether or not a particular project needs a Clean Water Act permit. Often, that question is not controversial. Factories with point source discharges to major rivers need Clean Water Act permits. So, generally, do real estate development projects that have the potential to disrupt key wetlands along lakes, bays, or rivers.

Where the Act's reach becomes much murkier is in its application to "ephemeral" or non-permanent water bodies or to wetlands with tenuous geographic links to traditional navigable waters. And here, neither *Rapanos* nor the recent guidance creates bright line rules. Instead, the Agencies have indicated that they will make the determination on a case-by-case basis.

This fact-specific approach raises some significant pragmatic issues. How long, for example, should a developer wait for the Army Corps or EPA to determine whether it has jurisdiction over a wetland? Will that jurisdictional review significantly hold up a project in the permitting stages? If a party makes an independent decision that the Clean Water Act does not apply, should it seek such a determination from the Agency and prepare for a legal challenge or proceed at risk? When faced with such questions, one option some

project proponents have considered is to agree to a presumption of jurisdiction in the permit application process. If a proponent were to agree to such a presumption, the Agencies have indicated that they will process the permit application without waiting for the fact-specific and data-intensive jurisdictional determination to be completed.

We hope that you have found this client advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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(ENDNOTES)

1 33 U.S.C. §§ 1311(a), 1362(12)(A).

2 547 U.S. at 724.

3 *Id.* at 716, 725.

4 *Rapanos* v. *United States*, 547 U.S. 715 (2006).

5 *Id.* at 780.

6 Clean Water Act Jurisdiction Following the US Supreme Court's Decision in *Rapanos* v. *United States* & *Carabell* v. *United States* (Dec. 2, 2008), *available at* http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf.

7 *Id.* at 5.

8 *Id.* at 6.

9 *Id.* at 6-7. The guidance states that these waters will be evaluated under the significant nexus test.

10 *Id.* at 7.

11 *Id.* at 8.

12 *Id.*