

## Legal Updates & News

### Bulletins

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## New Guidance Narrows Federal Regulation of Some Wetlands, Streams and Ditches

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On June 5, 2007, the U.S. EPA and United States Army Corps of Engineers (Corps) issued their long-awaited guidance on the scope of regulation under the Clean Water Act, based on the Supreme Court's June 2006 decisions in *Rapanos v. United States* and *Carabell v. United States*.

The Clean Water Act, under which the Corps and EPA derive their jurisdiction to regulate wetlands and other aquatic features, applies only to "navigable waters," defined as "waters of the United States." 33 U.S.C. §§ 1344(a), 1362(7). The Agencies' regulations, in turn, explain the scope of "waters of the United States" as "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce." See, e.g., 33 C.F.R. § 328.3(a). The new guidance clarifies what features fall under this rubric, distinguishing between certain features long-regulated by the Agencies and those features that, under *Rapanos* and *Carabell*, may require some additional analysis by the Agencies to determine if they fall under the Act.

The new guidance reaffirms the Agencies' jurisdiction over four established categories of aquatic features: (1) traditionally navigable rivers and streams; (2) non-navigable tributaries that are "relatively permanent" (in that they flow year-round or have a continuous seasonal flow); (3) wetlands adjacent to (i.e., bordering, contiguous to or neighboring) traditionally navigable waterways; and (4) wetlands with physical continuous surface connections (i.e., not separated by an upland, berm, dike or similar feature) to relatively permanent non-navigable tributaries. The Agencies will assert jurisdiction over such features without any further analysis.

For all other aquatic features, the new guidance now requires the Agencies to find a "significant nexus" between the feature and a traditionally navigable water to assert jurisdiction. This "significant nexus" determination requires the examination of specific hydrologic, ecologic and geographic factors with respect to the aquatic feature and its impact on the watershed.

Some important areas in which the guidance differs from prior regulation, guidance, or administrative practice are highlighted below:

- **Wetlands:** Wetlands with no physical continuous surface connection to a non-navigable tributary (whether relatively permanent or not) because they are separated from it by uplands, a berm, dike, or similar feature, have to be shown to have a "significant nexus" with a traditionally navigable water to be jurisdictional.
- **Ephemeral and Intermittent Streams:** Ephemeral streams (i.e., streams that flow only when it rains) and intermittent streams that do not flow continuously at least seasonally have to be shown to have a significant nexus with a traditionally navigable water to be jurisdictional.
- **Swales, Other Erosional Features, and Ditches:** Swales, gullies, and the like, are usually not jurisdictional "because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters." In addition, "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States" for the same reasons.

While the new guidance provides some clarification of the scope of the Agencies' jurisdiction post-*Rapanos*, as

a practical matter, the Corps will enjoy great discretion in making the significant nexus call, on the basis of information it will require landowners' wetland consultants to generate. In the permitting context for wetlands and streams, this will mean more work for consultants and attorneys. The most helpful aspect of the guidance is its discussion of swales, other erosional features, and ditches; if followed, the Agencies will no longer assert jurisdiction over many such features. Also, the new guidance should prove helpful in the litigation context, especially for landowners defending citizen suits brought under the Clean Water Act.

Ironically, while getting out from under Corps jurisdiction is presumptively desirable, this may not be the case if state water quality agencies choose to "fill the gap" and assert jurisdiction under state laws (which can be much broader than the federal counterpart). Moreover, regardless of whether state agencies decline to step in to regulate in the absence of Corps jurisdiction, where species listed under the federal Endangered Species Act (ESA) are present, it may be desirable to have Corps jurisdiction in order to be able to obtain ESA "coverage" through the section 7 consultation process (rather than the more costly and time-consuming section 10 process for incidental take permits).