



Opportunity for Review and Comment
Environmental Protection Agency
and Army Corps of Engineers
*Guidance Regarding Clean Water Act Jurisdiction
After Rapanos*



Summary:

On June 5, 2007, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) issued joint guidance to their field offices, effective immediately, regarding Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court's decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States* (72 FR 31824, <http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html>). In *Rapanos*, the Supreme Court addressed where the Federal Government can apply the CWA, specifically by determining whether a wetland or tributary is a "water of the United States." The agencies are issuing this guidance to ensure that jurisdictional determinations and administrative enforcement actions being conducted under the CWA are consistent with the *Rapanos* and *Carabell* litigation and the Supreme Court decision in the Solid Waste Agency of Northern Cook County (SWANCC) case. Specifically, this guidance:

- Does not allow for the Corps or EPA to generally assert jurisdiction over non-traditional features, including erosional features, swales, small washes characterized by low volume, infrequent, or short duration flow, and ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water;
- Does not reverse or allow for jurisdiction to be asserted over waters, including wetlands, deemed non-jurisdictional by SWANCC. An information brief, *The Supreme Court's SWANCC Decision* (see http://homer.ornl.gov/nuclearsafety/nsea/oeпа/guidance/cwa/swancc_info_brf.pdf); and
- Allows the Corps to continue to regulate on a case-by-case determination for other tributaries and adjacent wetlands that have certain characteristics that significantly affect traditionally navigable waters.

Importance to DOE Operations:

DOE sites are required under Section 404 of the CWA to apply for a permit issued by the Corps to discharge dredged or fill materials into waters of the U.S. The guidance clarifies those circumstances where a DOE site may need to obtain a 404 permit before conducting activities in wetlands, tributaries, and other waters.

Solicitation of Review and Comments:

Please note that EPA and the Corps are seeking comments only on experiences and lessons learned through the application of the guidance. Submit any comments you may have by November 1, 2007, to Lois Thompson of the DOE Office of Nuclear Safety and Environmental Assistance (lois.thompson@hq.doe.gov; 202-586-9581). This will allow time to consolidate comments and provide a coordinated response to EPA before December 5, 2007. Questions concerning the guidance should be directed to Ms. Thompson.