Clean Water Act Jurisdiction: Submitting Requests for Jurisdictional Determinations and Wetland Delineation Approvals/Verification

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April 29, 2010
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DoD Joint Ethics Regulation, ¶ 2-207
Presentation Outline

- Clean Water Act Jurisdiction
- Jurisdictional Determinations
- The Jurisdictional Determination Process
Clean Water Act Jurisdiction

- The Corps of Engineers regulates discharges of dredged or fill material into *waters of the United States*

  - Waters of the United States are defined in our regulations at 33 CFR 328 and include:
    - Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce
    - All interstate waters including interstate wetlands
    - All other waters the use, degradation or destruction of which could affect interstate or foreign commerce
    - All impoundments of waters of the United States
    - Tributaries of waters (as defined above)
    - The territorial seas
    - Wetlands adjacent to waters (other than waters that are themselves wetlands)
Clean Water Act Jurisdiction

- A short history

- 1972 Enacted
- 1974 Regulation
- 1975 NRDC vs. Calloway -- Interim regulations
- 1977 Regulation & Congressional Amendments
- 1979 Civiletti opinion on CWA authority
- 1985 Riverside Bayview Homes
  - EPA’s Migratory Bird Memo
- 1986 Preamble on “Migratory Bird Rule”
- 2001 Supreme Court decision in SWANCC v. USACE
- 2006 Rapanos & Carabell U.S. Supreme Court cases
Clean Water Act Jurisdiction

- The 2006 Supreme Court decision in *Rapanos* introduced two new standards for establishing Clean Water Act jurisdiction over a wetland or water.

- Initially either standard could be used nationwide to establish Clean Water Act jurisdiction, however, the lower courts have muddied the waters significantly since 2006.

- In Minnesota, both standards can be used to establish Federal jurisdiction over a wetland or water.
Clean Water Act Jurisdiction

- In *Rapanos*, the Supreme Court really tried to address two issues:
  - how far upstream does the CWA reach?
  - how “connected” does a wetland need to be in order for us to regulate it under the CWA?
- Really decided that both cases would be sent back to the lower courts to apply the correct standard, whatever that is.
- Resulted in 5 opinions – each with 4 votes or less
Clean Water Act Jurisdiction

- The Plurality (Scalia, Roberts, Thomas and Alito)

  - “waters of the U.S.” are -- "only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] …, oceans, rivers, [and] lakes.”

  - ... The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute."
The Plurality (continued)

- Therefore, only those wetlands with a *continuous surface connection* to bodies that are "waters of the United States" in their own right, so that there is *no clear demarcation* between "waters" and wetlands, are "adjacent to" such waters and covered by the Act.

- i.e. “neighboring” is insufficient to show adjacency.
The Plurality (continued)

Thus, establishing that wetlands ... are covered by the Act requires two findings: First, that the adjacent channel contains a "wate[r] of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.
Clean Water Act Jurisdiction

- Kennedy
  - In the decision to send the case back to the lower courts, Kennedy agreed with Justice Scalia and the plurality – he agreed that the lower courts had applied an incorrect standard.
  - After that, Justice Kennedy agreed with neither the plurality nor the dissent, at least not completely.
Clean Water Act Jurisdiction

- Kennedy

  - On wetlands covered under the Clean Water Act...

    "When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."
Clean Water Act Jurisdiction

- Kennedy

  - On flowing waters covered under the Clean Water Act…
    - The ‘significant nexus' standard applies to tributaries too
    - Justice Kennedy is not too bothered by ‘intermittent” waters -- LA River
    - But “ephemeral” waters are a potential issue – look for the OHWM
    - With the Kennedy standard, showing ‘significant nexus’ gets harder as you go farther up into the watershed
The long and short of the *Rapanos* decision

- New standards for establishing jurisdiction
  - Scalia standard (Plurality)
  - Kennedy standard

- New terminology
  - Relative permanent waters
  - Seasonal flow
  - Abutting (as a form of adjacency)
  - Significant nexus
CWA Geographic Jurisdiction: The Regulations in Graphic Form

- Navigable-in-fact waters
- Non-navigable tributaries
- Isolated waters
- Adjacent wetlands

Rapanos
Clean Water Act Jurisdiction

- Implementing the Supreme Court Decision
  - Guidance issued jointly by USEPA and USACE on June 5, 2007
  - “Guidance” consists of an Instructional Guidebook and 8 Appendices
  - Revised on December 2, 2008 following public comment period and agencies experiences
  - Available at:
Traditional Navigable Waters (TNWs) and their adjacent wetlands are jurisdictional under the CWA.
RPWs & Wetlands Directly Abutting RPWs

Wolf Trap Creek, Vienna, VA

Un-named water & wetlands, AK

Grindstone Creek, MO

Un-named water & wetlands, ND

RPWs and wetlands directly abutting RPWs are jurisdictional under the CWA.
Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a “significant nexus” with a TNW.
Non-RPWs are jurisdictional under the CWA where there is a “significant nexus” with a TNW.
Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a “significant nexus” with a TNW.
For each specific request for isolated waters (including isolated wetlands), field staff will need to make a case-by-case determination on jurisdictional status of resource.
Questions on Clean Water Act
Jurisdiction??????

If there are not then you are doing better than many Federal judges across the Country
What is a Jurisdictional Determination?

A written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act, Section 9 of the Rivers and Harbors Act, or Section 10 of the Rivers and Harbors Act. (33 CFR 331.2)

Jurisdictional Determinations focus on the regulatory status of the resource and do not address whether or not a particular activity requires a permit.
Clean Water Act Jurisdictional Determinations

- The Corps authority to issue jurisdictional determinations is explicit in our regulations at 33 CFR 325.9 but more fully described in our administrative appeal regulations at 33 CFR 331

- Requirements
  - All Jurisdictional Determinations must be in writing
  - The Jurisdictional Determination must identify whether it is preliminary or approved
Clean Water Act Jurisdictional Determinations

- Types of Jurisdictional Determinations
  - Approved Jurisdictional Determinations
  - Preliminary Jurisdictional Determinations

- Other Types of Concurrences/Verifications
  - Wetland Delineation Approvals
Clean Water Act Jurisdictional Determinations

- Approved Jurisdictional Determinations

  A Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel (33 CFR 331.2)

- Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.

- Approved JDs are valid for a period of five years from the issuance date unless new information warrants revision of the determination before the expiration date. (RGL 05-02)
Preliminary Jurisdictional Determinations

Written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel. (33 CFR 331.2)

Preliminary Jurisdictional Determinations are advisory in nature and may not be appealed
Clean Water Act Jurisdictional Determinations

- Other Types of Concurrences/Verifications

  ► Many Corps Districts across the Country have been providing delineation approvals/verifications outside of the JD process outlined in the regulations

  ► While this is a useful and efficient approach to managing workload, there is no explicit acknowledgement of this process or function in the Corps Regulatory program

  ► The St. Paul District has, and, continues to provide wetland delineation concurrence/verifications upon request
The Jurisdictional Determination Process

- Prior to *Rapanos* the process was very straightforward and efficient, even with SWANCC factored in
  - Primary emphasis was on establishing a surface hydrologic connection to a navigable water
  - Isolated calls were made by the respective Corps District based on an evaluation of their connection to a navigable water and potential use in interstate commerce
  - Most JDs were documented on a 2-page form and were completed in under 30 days
  - Other than the regulations and one or two RGLs there wasn’t much direction regarding the process
The Jurisdictional Determination Process

1. Request for JD Submitted to Corps
2. PM evaluates the request and determines pathway
   - Preliminary JD
   - Approved JD
   - Delineation Verification
3. Appeal Rights
The Jurisdictional Determination Process

- After *Rapanos* USEPA and the Corps jointly issued “Guidance” consisting of an Instructional Guidebook and 8 Appendices
  - Appendix B: Approved Jurisdictional Determination Form
  - Appendix C: Memorandum for the Field: Coordination on JDs under CWA Section 404 in light of SWANCC and *Rapanos* Supreme Court decisions
  - Appendix E: RGL 07-01 Practices for Documenting Jurisdiction under Section 404 of the CWA and Sections 9&10 of the Rivers and Harbors Act of 1899
The Jurisdictional Determination Process

- The *Rapanos* effect on the jurisdictional determination process
  - JD form increased from 2 to 8 pages (in blank form)
  - Mandatory procedures for coordinating all isolated wetland and significant nexus determinations with USEPA
  - Increased documentation for identification of seasonal flow in tributaries
  - Increased documentation for significant nexus determinations
  - Increased documentation for adjacency determinations
The Jurisdictional Determination Process

- Request for JD Submitted to Corps
- PM evaluates the request and determines pathway
  - Preliminary JD
  - Approved JD
  - Delineation Verification

(1) Potential for significant nexus determination; (2) Potential for RPW evaluation; (3) Potential for site-specific adjacency determination; (4) Potential for 15 or 21 day coordination period with Corps HQ and USEPA; (5) Must use revised 8 page form

- Appeal Rights
The Jurisdictional Determination Process

- **RGL 08-02 (Bureaucratic Drano)**
  - Addresses the use and documentation of JDs (process oriented) not how to make the call
  - Supersedes any inconsistent guidance regarding JDs contained in RGL 07-01
  - Defines the use of approved and preliminary jurisdictional determinations
  - Allows affected parties to decline an approved JD and elect to use a preliminary JD
  - Introduced the Preliminary Jurisdictional Determination form
Approved Jurisdictional Determinations

- An official Corps determination that jurisdictional waters of the US or navigable waters of the US or both are either present or absent on a particular site.

- Required when requested by an “affected party”

- Remain valid for a period of five years (RGL 05-02)

- Can be immediately appealed through the Corps administrative appeal process

- Must be documented on the JD form in Appendix B
Regulatory Guidance Letter 08-02

- Preliminary Jurisdictional Determinations
  - Assume all aquatic resources in the review area are subject to CWA jurisdiction
  - Are not appealable
  - Result in expedited reviews since the Corps does not have to evaluate each resource
  - Cannot be used for determinations that there are no jurisdictional resources in the review area
  - Can be replaced/superseded at any time at the request of the affected party or if determined necessary by the Corps
Preliminary JD Form introduced with RGL 08-02

Identification of waters in the review area. Can be augmented with Appendix A (table)

Signature Blocks for Corps and Affected Party

Incredibly lengthy explanation of options in very small font
The Jurisdictional Determination Process

Request for JD Submitted to Corps

PM evaluates the request and determines pathway

Preliminary JD

(1) Must use new 2-page PJD form; (2) Must be signed by PM and sent to landowner for signature and return to the Corps; (3) Not appealable but can be switched to AJD process at any time

Approved JD

(1) Potential for significant nexus determination; (2) Potential for RPW evaluation; (3) Potential for site-specific adjacency determination; (4) Potential for 15 or 21 day coordination period with Corps HQ and USEPA; (5) Must use revised 8 page form

Delineation Verification

Appeal Rights

BUILDING STRONG®
The MVP Jurisdictional Determination Process

- All requests for an Approved Jurisdictional Determination must be fulfilled with an Approved Jurisdictional Determination (non-discretionary).

- Information submitted for which there is no clear indication what is being requested are responded to in a form determined at the Corps PM’s discretion.
  - May take the form of an approved jurisdictional determination, a preliminary jurisdictional determination, or a delineation verification.

- To manage expectations, the St. Paul District has created a request cover sheet that affected parties should fill out when submitting wetland delineations.
The MVP Jurisdictional Determination Process

- Wetland Delineation Reviews
  - How delineation reviews are handled is a gray area
    - Strict reading of the regulations leads you to believe they are requests for a jurisdictional determination – but which type?
    - The more practical position is that we can respond to these requests with a letter verifying the wetland boundary
  - Wetland delineation reviews without a clear request for action tend to get set aside until a permit application arrives
  - Recent guidance (RGL 08-02, 07-01, and the *Rapanos* guidance) directs Corps Districts to act on all requests for JDs within 60 days.
Request for Corps of Engineers Wetland Delineation Review

Please enter the following general information about the property under review:

Name of property owner

Property Address (No. & Street, City, State, Zip Code)

Lat. ° Long. ° (decimal degrees)

County

Location: 1/4 Section  Township  Range

Size of review area  acre(s)

By submission of this wetland delineation report I am requesting that the U.S. Army Corps of Engineers, St. Paul District provide me with the following (check only one box):

☐ Wetland Delineation Concurrence. Concurrence with a wetland delineation is a written notification from the Corps, concurring or not concurring, or commenting on the wetland boundaries delineated on a property. Under this request, the Corps will not address the jurisdictional status of the wetlands on the property, only the boundaries of the resources within the review area.

☐ Preliminary Jurisdictional Determination. A preliminary jurisdictional determination is a nonbinding written indication that there may be waters of the United States, including wetlands, on a parcel or indication of the approximate location(s) of waters of the United States or wetlands on a parcel. For purposes of computation of impacts and compensatory mitigation requirements, a permit decision made on the basis of a preliminary jurisdictional determination will treat all waters and wetlands in the review area as if they are jurisdictional waters of the U.S. Preliminary jurisdictional determinations are advisory in nature and may not be appealed.

☐ Approved Jurisdictional Determination. An approved jurisdictional determination is an official Corps determination that jurisdictional waters of the United States or navigable waters of the United States, or both, are either present or absent on the property. An approved jurisdictional determination precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act or Rivers and Harbors Act. Approved jurisdictional determinations can be relied upon by the affected party for a period of five years. An approved jurisdictional determination may be appealed through the Corps’ administrative appeal process.

In order for the Corps to process your request, the wetland delineation must be prepared in accordance with the 1987 Corps of Engineers Wetland Delineation Manual, any approved Regional Supplements to the 1987 Manual, and the Guidelines for Submitting Wetland Delineations in Minnesota and Wisconsin (http://www.mvdr.usace.army.mil/regulatory/).

Requestor ___________________________ Date _______________________

Name (typed) ___________________________
The Bottom Line

- What you should (need) to know
  - The Corps is responsible for making the determination but USEPA remains the ultimate authority on CWA jurisdiction
  - There is a marked difference between approved and preliminary JDs
  - Approved JDs take time, sometimes a significant amount of time
  - You can be of great assistance to the Corps (and your client) by providing information necessary to make JD calls
How You Could Help Keep Things Moving

- Approved Jurisdictional Determinations have become very complicated and information intensive. Submitting only a wetland boundary doesn’t get us far into the process.

- Delineations should also identify any drainages on the site (streams, ditches, swales, etc.), the direction of flow, the location of any tile lines or culverts, storm sewer drains, and any other relevant information about the site.

- St. Paul District Guidelines for Submitting JD requests
What you should think about before submitting information to the Corps

► Do I need an approved JD?
  • Consider timeframes, reason for submission, compensatory mitigation, amount/degree of impact etc.

► Have I clearly stated what I am requesting from the Corps?

► Have I provided everything needed to expedite the process?
  • Wetland boundaries, tributaries, culverts, air photos, functional assessments, etc.
Questions??????