

Client Alert

December 8, 2008

New Guidance on Agencies' Jurisdiction Under Clean Water Act**Areas of Interest****Environmental****Real Estate****United States**

On December 2, 2008, the US Environmental Protection Agency ("EPA") and Army Corps of Engineers (the "Corps") issued a memorandum providing new guidance on the agencies' view of their jurisdiction under the Clean Water Act ("CWA"), including over wetlands.¹ This new guidance (the "2008 Guidance") revises the June 6, 2007, guidance (the "2007 Guidance") put out by the agencies following the US Supreme Court's decision in *Rapanos v.*

United States and Carabell v. United States, 547 U.S. 715 (2006) (collectively, "*Rapanos*"), and attempts to alleviate some of the uncertainty that continues as a result of that decision.

According to the agencies, the 2008 Guidance "clarifies the geographic scope of jurisdiction under the CWA." *Rapanos* addressed the question of when wetlands qualify as "waters of the United States" and thus are subject to Section 404 of the Clean Water Act. A majority of the court rejected the notion that a wetland qualifies as a "water of the United States" if it merely is hydrologically connected to a traditionally navigable water. No majority existed, however, on the issue of exactly how far federal jurisdiction over wetlands extends. Instead, an opinion written by Justice Scalia representing a plurality of the Court and a concurring opinion by Justice Kennedy put forth differing views. This difference created uncertainty for the agencies, lower courts and private parties alike as each tried to determine the correct standard to be applied.

The 2008 Guidance reiterates the agencies' position that "regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied." This "either/or" approach gives the agencies a significant amount of flexibility.

According to the agencies, the 2008 Guidance:

- "1. Clarifies how to determine the reach of the 'Traditional Navigable Waters (TNWs)'
2. Clarifies the regulatory term 'adjacent wetlands'
3. Refines the concept of 'relevant reach'"

The agencies conclude that Traditional Navigable Waters "are broader than Rivers and Harbors Act section 10 waters, and also include waters that have been determined to be navigable-in-fact by the courts, are currently being used or have historically been used for commercial navigation, or for which evidence showing susceptibility to future commercial navigation is more than insubstantial or speculative."

On the issue of "adjacent" wetlands, the agencies essentially conclude that "a wetland is adjacent if it has an unbroken hydrologic connection to jurisdictional waters, or is separated from those waters by a berm or similar feature, or if it is in reasonably close proximity to a jurisdictional water."

In addition to describing the categorical and significant nexus groups of waters, the 2008 Guidance also notes instances in which jurisdiction generally will not be asserted. Those instances include swales or erosional features such as gullies; small washes characterized by low volume, infrequent or short duration flow; and ditches, including roadside ditches, excavated wholly in and draining only uplands and that do

not carry a relatively permanent flow of water.

The 2008 Guidance does not replace the text of the Clean Water Act, implementing regulations or interpretive case law. As a result, an argument might be made that the 2008 Guidance attempts to extend the agencies' CWA jurisdiction beyond the scope advanced by either the plurality or the Kennedy concurrence in *Rapanos*, and that the agencies wrongly have adopted the "either/or" approach instead of following one of the two tests. At the same time, some environmentalists have expressed dissatisfaction with the 2008 Guidance, complaining that the agencies failed to assert their full jurisdiction under the Clean Water Act.

Some indications exist that Congress, in the upcoming session, may attempt to amend the Clean Water Act to more clearly define jurisdictional waters. Review and revision of the 2008 Guidance by the incoming administration of President-elect Obama is another possibility.

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1. For the complete text of the 2008 Guidance and related documents, please go to www.epa.gov/owow/wetlands/guidance/CWAwaters.html.

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