

**JURISDICTIONAL DETERMINATIONS (JD) AUTHORITY
OF THE ARMY CORPS OF ENGINEERS (CORPS) UNDER
THE CLEAN WATER ACT (CWA)**

Requested by:

American Association of State Highway
and Transportation Officials (AASHTO)

Standing Committee on the Environment

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Abstract

The overall objective of the study is to develop guidelines for transportation and environmental staff (agency and/or consultants) which details the information needed and the sufficiency of the information required to support JDs by the Corps under the CWA Section 404. The purpose of this memo is to present the findings of Subtask 1—Review and Summary of *Rapanos* Decision and Subtask 2—Review and Summary of Transportation JDs. Recommendation for how the study should proceed is presented and a glossary containing an explanation of key terms in appended to this technical memo.

Based on the survey results, it was determined that the DOTs and the Corps staffs have adapted to the post-*Rapanos* system and that the significant delays that occurred in the early days of the *Rapanos* decision are no longer present. Therefore, it is recommended that this project be closed with no further action.

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Subtask 1—Review and Summary of *Rapanos* Decision

The Clean Water Act prohibits the discharge of any pollutant (defined to include dredged or fill material) into navigable waters without a permit. Over the years, there has been significant controversy over the applicability of the Act to waters that are not navigable in the traditional sense, such as isolated waters and wetlands.

In the landmark case of *Rapanos v. United States* and *Carabell v. United States*, 126 S.Ct. 2208 (2006) (collectively, “*Rapanos*”), the United States Supreme Court considered whether the federal government could exercise jurisdiction over certain wetlands and tributaries under the Clean Water Act. On a 5-4 vote, the Court decided that the Corps had exceeded its authority when asserting jurisdiction over the wetlands at issue in that case. But the five justices in the majority disagreed on the legal test that should be applied in determining how far the Corps’ jurisdiction extends. Four of those five justices signed a plurality opinion authored by Justice Scalia. The fifth, Justice Kennedy, wrote a separate opinion.

From *Rapanos*, two distinct jurisdictional tests emerged – Justice Kennedy’s “significant nexus” test and Justice Scalia’s “relatively permanent, standing or continuously flowing” test. Because a clear test did not emerge from the Court, the implementation of the *Rapanos* decision by the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency and lower courts has been challenging at best.

This section of the report is intended to illustrate how *Rapanos* and subsequent case law limit the Corps’ ability to provide clarity and consistency in issuing Jurisdictional Determinations (JDs) under the Clean Water Act. To that end, this section will:

- (1) explain the statutory and regulatory background of the Clean Water Act;
- (2) describe the *Rapanos* jurisdictional tests;
- (3) summarize how the *Rapanos* tests have been applied in subsequent court cases; and
- (4) discuss the guidance issued by the U.S. Environmental Protection Agency and/or the U.S. Army Corps of Engineers to implement *Rapanos*, including guidance on (a) the standards for making jurisdictional determinations, (b) coordination procedures, and (c) procedures for making “preliminary jurisdictional determinations.”

This section also includes an Appendix, which includes a glossary of key terms used in the regulations and case law regarding jurisdictional determinations.

I. The Clean Water Act

As noted above, the Clean Water Act prohibits the discharge of dredged or fill material into “navigable waters” without a permit. The term “navigable waters” means “the waters of the United States, including the territorial seas.” The Corps, responsible for the issuance of permits for the discharge of dredged or fill material into navigable waters, has promulgated regulations to construe the Act. The Corps regulations define “waters of the United States” broadly to include “traditional navigable waters” as well as interstate waters (including interstate wetlands), other

waters including lakes and rivers, tributaries of all such waters, and wetlands “adjacent” to such waters and tributaries.

Based on the broad definitions in its regulations, the Corps has asserted jurisdiction over waters neighboring traditional navigable waters and their tributaries. This broad assertion of jurisdiction has resulted in numerous court challenges, including the *Rapanos* cases, in which landowners challenge the Corps’ assertion of jurisdiction over wetlands

II. The *Rapanos* Decision

Both *Rapanos* and *Carabell* involved broad assertions of Corps jurisdiction over wetlands that were not directly adjacent to navigable waters.

In *Rapanos*, the property owners sought to construct a shopping center on their property, which contained wetlands adjacent to waters that traveled approximately 11 miles through manmade drains and small streams before reaching “navigable” waters. The United States brought a civil enforcement action against the property owners for filling in 54 acres of wetlands on the property without first obtaining a permit. Eventually, the U.S. Court of Appeals for the Sixth Circuit found that the wetlands were covered by the Clean Water Act based on the site’s hydrologic connections to the nearby ditches or drains, or to more remote navigable waters.

In *Carabell*, the property owners sought to construct 130 condominium units on their property, which contained forested wetlands separated by an impermeable berm from a non-navigable tributary that flowed into navigable waters. The property owners applied for a permit to fill the wetlands, which was denied. The property owners then sued the government, challenging, among other things, the Corps’ jurisdiction over the wetlands. Eventually, the Sixth Circuit found the wetlands were adjacent to navigable waters and therefore covered by the Clean Water Act.

The Supreme Court agreed to hear both cases and consolidated them because they presented similar issues. As noted above, two distinct jurisdictional tests emerged from *Rapanos* – Justice Kennedy’s test and Justice Scalia’s test. These two tests are described below.

A. Justice Scalia’s “Continuous Surface Connection” Test

Justice Scalia wrote the plurality opinion in *Rapanos* (an opinion signed by four justices). This opinion concluded that the Corps’ jurisdiction under the Act should extend only to: (1) “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters; and (2) “wetlands with a continuous surface connection to” such relatively permanent waters. Under this test, wetlands with a “continuous surface connection” to waters of the United States are covered by the Act, while wetlands that have only a “hydrologic connection” to waters of the United States are not covered by the Act.

B. Justice Kennedy’s “Significant Nexus” Test

Justice Kennedy wrote a concurring opinion in the case (an opinion signed only by himself). Justice Kennedy articulated a “significant nexus” test for Clean Water Act jurisdiction. Under that test, “if the wetlands, either alone or in combination with similarly situated lands in the

region, significantly affect the chemical, physical, and biological integrity” of traditional navigable waters, then they are covered by the Act. The Justice Kennedy test allows waters to be deemed jurisdictional even if they would not meet Justice Scalia’s test: a wetland could be found to have a “significant nexus” to navigable waters even if it does not have a “continuous surface connection” to those waters.

Thus, the Justice Kennedy test provides a broader definition of “waters of the United States.” But this test also involves a greater degree of subjective judgment, and in some cases may require more extensive data collection.

III. Post-Rapanos Court Decisions

Since the Supreme Court’s decision in *Rapanos*, federal courts have wrestled with the issue of *which* standard to apply – the “continuous surface connection” standard or the “significant nexus” standard – as well as the issue of *how* to apply these tests. This section briefly summarizes a few representative cases applying each of these tests.

A. What Constitutes a “Continuous Surface Connection?”

There are only a few cases that review the application of the “continuous surface connection” test. Examples include:

In *Simsbury-Avon Pres. Society v. Metacon Gun Club, Inc.*, the U.S. District Court for the District of Connecticut found that a pond did not have a “continuous surface connection” with the river, notwithstanding the proximity of the pond to the river and the seasonal flooding of the area, because there was a clear demarcation between the waters and wetlands.

In *United States v. Cundiff*, the U.S. District Court for the Western District of Kentucky found that wetlands had a “continuous surface connection” with the various creeks and channels of the river where it was “difficult to determine where the water ends and the wetland begins.” Here, the wetlands physically abutted the creeks and channel and were connected by a permanent surface water flow to one of the creeks.

B. What Constitutes a “Significant Nexus?”

A number of courts have applied the “significant nexus” standard to determine whether certain waters are subject to federal jurisdiction. Examples include:

In *Northern California River Watch v. Healdsburg*, the U.S. Court of Appeals for the Ninth Circuit held that the pond and its adjacent wetlands have a “significant nexus” with the river because both “significantly affect the chemical, physical, and biological integrity” of the river. The court noted that pond water seeps into the river and that this hydrologic connection is sufficient to show a “significant nexus.” The court also noted that “a significant nexus may be inferred when wetlands are adjacent to navigable waters.”

In *United States v. Cundiff*, the U.S. District Court for the Western District of Kentucky found a “significant nexus” where the wetlands served important ecological functions affecting a river and where the defendants’ activities diminished the wetlands’ ability to store water and filter or

trap sediment, resulting in increased flooding in the river and impacting navigation and crop production.

Finally, in *Simsbury-Avon Preservation Society, LLC v. Metacon Gun Club, Inc.*, the U.S. District Court for the District of Connecticut found no “significant nexus” with a river, despite seasonal flooding, where the plaintiffs did not present any evidence to show the possibility of contaminants migrating from the wetland to the river and therefore did not establish that the wetlands affect the chemical, physical, and biological integrity of the river.

IV. Guidance for Implementing the Rapanos Decision

Since *Rapanos*, the Corps and EPA have issued several guidance documents to assist their staff in determining when to assert jurisdiction over wetlands and related waters. These include:

- EPA and U.S. Army Corps of Engineers, “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States*” (June 2007; revised Dec. 2008) (“*Rapanos* Guidance”)
- EPA and U.S. Army Corps of Engineers, “Memorandum of Agreement regarding Coordination on Jurisdictional Determinations under Clean Water Act Section 404 in Light of the SWANCC and *Rapanos* Supreme Court Decisions” (June 2007) (“Coordination Guidance”)
- U.S. Army Corps of Engineers, “Regulatory Guidance Letter 07-01, Practices for Documenting Jurisdictional Determinations under Section 404 of the Clean Water Act and Sections 9 and 10 of the Rivers and Harbors Act” (June 2007) (“RGL 07-01”)
- U.S. Army Corps of Engineers, “Regulatory Guidance Letter 08-02, Jurisdictional Determinations” (June 2008) (“RGL 08-02”)

The following sections summarize three key issues addressed in these guidance documents: (1) the standards for making jurisdictional determinations; (2) the procedures for making jurisdictional determinations; and (3) the option of obtaining a “preliminary jurisdictional determination.”

For copies of the joint EPA/Corps guidance documents, refer to <http://www.epa.gov/wetlands/guidance/CWAwaters.html>. For copies of the Corps’ regulatory guidance letters, refer to: <http://www.saw.usace.army.mil/wetlands/Library/rgl.htm>.

A. Standards for Jurisdictional Determinations

In the *Rapanos* Guidance, the Corps and EPA identified three categories of waters for purposes of determining when it is necessary to apply the *Rapanos* tests. As described below, waters in Category 1 are presumed to fall within the Corps’ jurisdiction; waters in Category 2 require application of the significant-nexus test to determine their jurisdictional status; and waters in Category 3 are presumed to fall outside the Corps’ jurisdiction.

(1) Waters Presumed to Fall Within the Corps’ Jurisdiction

Under the *Rapanos* Guidance, the agencies will assert jurisdiction over the following waters without having to first undergo a fact-specific analysis to determine whether the waters have a significant nexus with traditional navigable waters:

- Traditional navigable waters;
- Wetlands adjacent to traditional navigable waters;
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally; and
- Adjacent wetlands that directly abut relatively permanent, non-navigable tributaries.

(2) *Waters Requiring Application of the “Significant Nexus” Test*

For certain waters, the *Rapanos* Guidance requires a fact-specific analysis to determine whether the waters have a significant nexus with traditional navigable waters such that the waters are jurisdictional. Waters requiring this analysis are:

- Non-navigable tributaries that are not relatively permanent;
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent; and
- Wetlands adjacent to, but not directly abutting, a relatively permanent non-navigable tributary.

The significant nexus analysis involves an assessment of the flow characteristics and functions of the waters, as well as the functions performed by all wetlands adjacent to those waters, to determine if the waters and wetlands adjacent thereto significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters. The agencies will consider both hydrologic factors and ecological factors. Hydrologic factors include, among others, volume, duration and frequency of flow; physical characteristics; proximity to the traditional navigable water; size of the watershed; and average annual rainfall and average annual winter snow pack. Ecologic factors include, among others, the potential for the tributaries to carry pollutants and flood waters to traditional navigable waters; provision of aquatic habitat that supports a traditional navigable water; potential of wetlands to trap and filter pollutants or store flood waters; and maintenance of water quality in traditional navigable waters.

(3) *Waters Presumed to Fall Outside the Corps’ Jurisdiction*

Under the *Rapanos* Guidance, the Corps generally will not assert jurisdiction over the following “features”:

- Swales or erosional features; and
- Ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

The *Rapanos* Guidance states that these features “are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.”

B. Coordination Procedures for Making Jurisdictional Determinations

In June 2007, the Corps and EPA issued the Coordination Guidance. In conjunction with that joint guidance, the Corps issued a RGL 07-01, which further defined the Corps’ procedures for documenting jurisdictional determinations. The coordination procedures outlined in those documents are briefly summarized below.

1. Requests for Jurisdictional Determinations

Any “affected party” may request that the Corps provide a jurisdictional determination. When such a request is made, the Corps seeks to complete the jurisdictional determination “in a timely manner.” The Corps may give higher priority to requests for which a delineation has been prepared by a qualified consultant, as these requests will likely take less time to review than a request requiring the Corps to perform the delineation itself. The Corps has discretion in deciding the degree of investigation and resource allocation necessary to make a jurisdictional determination, including whether a site visit is necessary.

2. Documentation

The Corps must “clearly demonstrate the basis for asserting or declining CWA jurisdiction.” Information that assists the Corps in completing accurate jurisdictional determinations includes maps, aerial photography, soil surveys, watershed studies, local development plans, literature citations, and references from pertinent studies.

The Corps must maintain a record of all documentation to support any jurisdictional determination. The record should “explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination.” The record should also demonstrate that the waters at issue either fit within a class of waters that does not require a significant nexus determination or that the waters have a significant nexus with traditional navigable waters. The level of documentation may vary among projects.

3. Coordination with EPA

The guidance prescribes certain coordination procedures that the Corps and EPA must use prior to finalizing the following categories of jurisdictional determinations:

- Determinations for intra-state, non-navigable, isolated waters potentially covered solely under 33 C.F.R. § 328.3(a)(3) where jurisdiction is/is not asserted based on factors of interstate commerce; and

- Determinations based on a finding of a “significant nexus” with traditional navigable waters.

Interagency coordination is not required for jurisdictional determinations involving waters that do not fall into one of the above categories.

For jurisdictional determinations that do not involve significant nexus determinations, the Corps district will conduct the jurisdictional determination, documenting the basis and rationale for the same, and provide a copy of the Jurisdictional Determinations Form to the EPA regional office indicating whether the Corps district intends to assert or decline jurisdiction. The Agencies will then attempt to resolve any issues within 15 calendar days of the EPA regional office’s receipt of the form. During this time, the EPA Regional Administrator may elect to elevate the determination for review by EPA headquarters. If the EPA Regional Administrator elects to elevate the determination, it must so notify the Corps district in writing.

For jurisdictional determinations that do involve significant nexus determinations, the EPA regional office has 15 calendar days to decide whether to take the draft jurisdictional determination as a special case under the January 19, 1989 “Memorandum of Agreement Between the Department of the Army and the USEPA Concerning the Determination of the Section 404 Program and the Application of the Exceptions under Section 404(f) of the Clean Water Act.” If the EPA regional office does not respond to the Corps district within 15 days, the district may finalize the jurisdictional determination.

Within 21 calendar days of when the Corps district provided the copy of the jurisdictional determination to the EPA regional office, either Corps headquarters or EPA headquarters may choose to initiate a joint headquarters review of a jurisdictional determination involving intrastate, non-navigable, isolated waters. If neither the Corps headquarters nor EPA headquarters chooses to initiate joint review and the EPA Regional Administrator does not elevate the jurisdictional determination, the Corps district may finalize the jurisdictional determination.

When a determination is elevated to EPA headquarters or a joint headquarters review is initiated, the agencies must initiate discussions within 5 calendar days of the notification of elevation. If the agencies reach a mutual decision that jurisdiction should be asserted or declined, the agencies must issue a joint headquarters decision memorandum discussing the rationale for the decision within 14 calendar days after the discussions were initiated. If EPA and the Corps cannot not reach a mutual decision, EPA must issue a decision memorandum explaining EPA’s rationale in support of an approved jurisdictional determination and provide the decision memorandum to Corps and EPA field offices within 21 calendar days after the discussions were initiated. Upon receipt of this decision memorandum, the Corps district may issue an approved jurisdictional determination.

C. Preliminary Jurisdictional Determinations

On June 26, 2008, the Corps issued RGL No. 08-02. The purpose of the guidance letter was to distinguish “approved jurisdictional determinations” and “preliminary jurisdictional determinations” and provide guidance on when a party may request a preliminary jurisdictional

determination based on an “effective presumption” of jurisdiction over all waters at a given site. RGL No. 08-02 was issued as a means to avoid the processing delays that can result from requesting an approved jurisdictional determination, which requires substantial data collection and analysis.

RGL-08-02 establishes the following guidelines for making preliminary jurisdictional determinations:

- Preliminary jurisdictional determinations are “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.” Unlike approved jurisdictional determinations, a preliminary jurisdictional determination is “advisory in nature and may not be appealed.”
- Any “affected party” may request a preliminary jurisdictional determination from the Corps based on an “effective presumption” of jurisdiction over all wetlands and waters at a particular site.
- Preliminary jurisdictional determinations may be used to waive or set aside questions regarding jurisdiction, usually allowing an expedited acquisition of a Corps permit. Preliminary jurisdictional determinations are commonly used in enforcement situations where access to a site may be impracticable or unauthorized.
- The Corps may authorize an activity with only a preliminary jurisdictional determination where the District Engineer determines this approach to be appropriate, and where the permit applicant has been notified of the option to receive an approved jurisdictional determination and has declined to exercise that option.
- The Preliminary Jurisdictional Determinations Form is used to support and document the determination. The information included on the form is limited to the amount and location of wetlands and other waters on the site and should be sufficiently accurate and reliable to support an enforceable permit decision.
- An approved jurisdictional determination can be requested anytime during the review of a preliminary jurisdictional determination or subsequent to its issuance.

Subtask 2—Review and Summary of Transportation JDs

The objective of Subtask 2 was to identify a range of transportation JDs and to obtain approximately 20 JDs for inclusion in the study that have been submitted to the Corps post *Rapanos*, since June 2007 from eight (8) selected DOTs. In addition, the JDs would be comparatively assessed with the use of an evaluation matrix having a number identified project factors such as region, project complexity, and review duration and with a focus on identifying the key variables affecting the timeliness of JD approvals.

Selected DOTs

The Research Team identified Florida, Virginia, California, Washington, Colorado, Minnesota, Massachusetts and Texas for inclusion in the study. The selections were based on having representation across Corps Districts that encounter various types of jurisdictional waters and wetlands that exist in the lower 48. The list also contains DOTs that panel members requested for inclusion during the project kickoff conference call and finally DOTs in Corps districts we know have large workloads and have experienced long turn-around on JDs. Concerns expressed by panel members included the distribution of DOTs across ASSHTO regions and the need for representation in the lower Midwest and from the mid-south. The Research Team initiated the study by contacting the selected DOTs and the following table summarizes the responses received from the selected DOTs, results of the internet search to access JDs from the Corps District websites as well as communication with Corps officials.

Table 1: Summary of Selected DOTs Responses Regarding Post-*Rapanos* JDs

DOT	Corps District	Date Contacted	Contact	Outcome	Sample JD
Florida		12/30/08 01/09/09	Joshua Boan	FDOT is not having any delays or difficulties in obtaining approved JDs.	N/A
Virginia	Baltimore/ Norfolk		Ricky Woody	VDOT implements an interagency process and does not use JDs and have no issues with permitting delays.	N/A
California				Caltrans did not response to request for information.	
Colorado		01/09/09	Rebecca Pierce	CDOT is not having any delays and has had “surprisingly quick responses”	N/A
Massachusetts	New England	12/17/08	Henry Barbaro	MHD has a cooperative relationship with Corps district and is not experiencing any delays or difficulties.	N/A

DOT	Corps District	Date Contacted	Contact	Outcome	Sample JD
Washington	Seattle	12/16/08	Rebecca McAndrew	The <i>Rapanos</i> decision has made a substantial difference in how they do their jobs. Prior to <i>Rapanos</i> , a JD took 1/2 hour or less. Following <i>Rapanos</i> , a JD takes between 1/2 hour and 48 hours, with 48 hours being the worst-case scenario. The Seattle District Corps FHWA/WSDOT projects have only resulted in five isolated wetlands and none of the JDs were elevated to EPA and Corps Headquarters. The time commitment varies based on how many waters of the U.S. there are in a given project and whether or not we have to coordinate with EPA.	NWS-2008-890 NWS-2008-623 NWS-2008-254 NWS-2007-1015
Minnesota	St. Paul	12/16/08	Nick Tiedeken	As a panel member was concerned that there was not an established criteria for identifying JD, however indicated that he would identify some interesting examples.	Have not received examples to date.
Texas	Fort Worth Galvenston	01/05/09	Charlotte J. Kucera	TxDOT has had severe delays and applies for an approved JD only when an appeal is involved. The vast majority of TxDOT projects involve preliminary JDs and they take 90 to 120-day turnaround timeframes.	SWF-2008-00558

Since the Research Team was experiencing difficulties with obtaining representative JD samples, a survey was developed and directed to the environmental/permitting contact at each of the DOTs. The purpose of the survey was to more efficiently determine which DOTs if any are actually having post-*Rapanos* problems.

Therefore, each AASHTO Committee Member in the lower 48 States was sent an e-mail with a link to the survey, which started on January 16, 2009 with request for response by January 30, 2009, the survey was ultimately closed on February 26, 2009. The following table presents the questions and summary of the responses:

Table 2: Survey

Have you experienced an increase in time it takes to prepare JD applications post-<i>Rapanos</i>?—24		
Option	Count	Percent
Yes	20	83.3
No	4	16.7
Total:	24	100
If yes, what is the average increase in hours?—19		
Option	Count	Percent
1-5 hours	9	47.4
6-10 hours	8	42.1
10-20 hours	1	5.3
20+ hours	1	5.3
Total:	19	100
Have you experienced an increase in time to obtain JDs post-<i>Rapanos</i>?—20		
Option	Count	Percent
1 to 3 months	15	75
3 to 6 months	5	25
6 to 12 months	0	
12 months+	0	
Total:	20	100
If you are experiencing delays, can you provide examples?—21		
Option	Count	Percent
Yes	6	28.6
No	15	71.4
Total:	21	100

Survey Respondent DOTs

The six (6) DOTs that indicated that they had examples were: North Dakota, Wyoming, Tennessee, Utah, Missouri and Oregon. However, during follow-up North Dakota, Wyoming (Omaha District—Cheyenne) and Oregon (Portland District) indicated that they would not provide samples, specifically North Dakota contributed their issues to personnel problems with the Corps District that has been resolved; however both Wyoming and Oregon indicated that the Corps staff was not processing requests and therefore had no further information to provide.

Missouri provided two (2) examples (from Kansas City District) that took longer than one year to finalize: the Strother Road Project (NWK 2007-808) and the Warrensburg East Loop Project (NWK 2007-1410). The Research Team concluded after reviewing the project details that both projects took a year because they were submitted at the time *Rapanos* guidance was issued and there was a high degree of uncertainty in the agencies. Additionally, at the beginning of the *Rapanos* era EPA contested many decisions and it took over a year for the two agencies to come to some reasonable agreement on how to handle the JD's. Therefore, we concluded that both of these were unique to the time and would not happen now.

Tennessee's example was the SR 840 project which had over 200 features; typically their projects vary from zero to 50 features but will have about ten each year on the scale of SR 840. Tennessee indicates that if they submit the permit applications without completing the forms and

allow the Corps to complete the forms, then it will take several months longer than normal to get the permits issued. Therefore, *Rapanos* has resulted in significantly more time and money to complete all the forms, however, this does not hold up the permits for construction.

Utah (Sacramento District) indicated that they were experiencing Corps staffing issues and identified three (3) projects with contact person for follow-up. The Research Team as requested the JDs but have not received a response to date.

Other Survey Comments

Bill Cody of Ohio DOT provided the following comment after completing the survey: “Overall it is taking longer to receive JD's but after much discussion and many field reviews this past season we feel we finally understand what information that the Corps truly needs. We have worked on a 'standard' descriptive method and tables to illustrate a given resource's attributes.”

The respondent from Oklahoma indicated that the survey did not reflect how they have been operating. They have been assuming jurisdiction and proceeding, not waiting on formal JD's.

Corps Communication

The Research Team contacted the Corps North Atlantic Division and the New York District regarding their experience with JDs post-*Rapanos* and they indicated that delays were due primarily to applicant's need to provide additional information and that JDs elevated to the EPA had a 15 day response time. They provided the following link to identify JDs that have been elevated. However due to the fact that most Corps District sites only post the approved JDs for two months, access to the JDs identified were not possible.

http://www.usace.army.mil/CECW/Pages/cwa_guide.aspx

Recommendation

Based on the results to date, it appears that the DOTs and the Corps staffs have adapted to the post-*Rapanos* system and that the significant delays that occurred in the early days of the *Rapanos* decision are no longer present. Therefore, it is the recommendation of the Research Team that this project be closed with no further action.

Appendix Glossary of Key Terms Used in Jurisdictional Determinations

Adjacent vs. Abutting: The Corps regulations define “adjacent” as “bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’” In *Rapanos*, the plurality opinion found that the Corps does not have the statutory authorization to interpret the phrase “adjacent wetlands” and focused on the Court’s prior use of the term “adjacent” to conclude that the term means “physically abutting” and not “merely ‘nearby.’” The Court also stated that a wetland’s adjacency to covered waters is not determined by its ecological relationship thereto. The Court elaborated that when applying the “continuous surface connection” standard, “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.” In his concurring opinion, however, Justice Kennedy found the Corps’ broader definition of “adjacent” to be reasonable when applied to wetlands adjacent to traditional navigable waters. The Guidance expands the Court’s definition of “adjacent,” considering wetlands to be adjacent to jurisdictional waters if: (1) there is a hydrologic connection, or an unbroken surface or shallow sub-surface connection, to jurisdictional waters, which may be intermittent; (2) the wetlands are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) the wetlands’ proximity to a jurisdictional water is reasonably close, supporting the scientific inference that such wetlands have an ecological interconnection with jurisdictional waters. By contrast, the Guidance provides that a wetland “abuts” jurisdictional waters if there is a “continuous surface connection” between the wetland and the jurisdictional waters. The Guidance explains that “[a] continuous surface connection does not require surface water to be continuously present between the wetland and the tributary.” The definition of “adjacent” is inherently ambiguous and continues to undergo significant debate.

Continuous Flow: In *Rapanos*, the Court describes waters that have a “continuous flow” as those that are “continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows,” such as “transitory puddles or ephemeral flows.” The Court equates a “continuous flow” to “a *steady flow*,” “anything issuing or moving with *continued succession* of parts,” or “a *continued current* or course.” The Court notes that this definition should not exclude “*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.”

Continuous Surface Connection: In *Rapanos*, the Court describes a “continuous surface connection” as a connection that makes it “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” The Court indicates that this requirement is a “physical-connection requirement” and that “[w]etlands are ‘waters of the United States’ if they bear the ‘significant nexus’ of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States.” The Court further states that “[w]etlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ [sic] lack the necessary connection.” The Guidance elaborates on

the Court's definition, stating that "a continuous surface connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature)."

Ditch: In *Rapanos*, the Court defines "ditches," along with channels, conduits and similar features, as "watercourses through which intermittent waters typically flow." The Court distinguished ditches and similar features from "rivers," "creeks," or "streams," stating that although the former "can all hold water permanently as well as intermittently," when they do hold water permanently, they are usually referred to as the latter. The Guidance identifies ditches as including roadside ditches.

Ephemeral: In *Rapanos*, the Court defines "ephemeral" as "through which rainwater or drainage may occasionally or intermittently flow." The Court further states that ephemeral and intermittent streams are those "whose flow is coming and going at intervals... broken, fitful... or existing only, or no longer than, a day." The Guidance distinguishes certain ephemeral waters in the arid west – such waters may still be jurisdictional where they are tributaries and they have a significant nexus to downstream traditional navigable waters.

Hydrologic Connection: In *Rapanos*, the Court appears to use "hydrologic connection" to refer to a "continuous surface connection." The Guidance supports this reference, defining "hydrologic connection" as "an unbroken surface or shallow sub-surface connection."

Non-Navigable Tributaries: The Guidance defines a non-navigable tributary of a traditional navigable water as "a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries." The Guidance further states that "tributaries" can be "natural, man-altered, or man-made" and that a tributary is "the entire reach of the stream that is of the same order."

Relatively Permanent: In *Rapanos*, the Court states that only waters that are "relatively permanent" may be "waters of the United States." The Court states that this does not exclude from jurisdiction "streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," nor does this exclude "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." The Court also states that relatively permanent waters do not include ephemeral or intermittent tributaries "whose flow is coming and going at intervals... broken, fitful... or existing only, or no longer than, a day." Citing to *Rapanos*, the Guidance defines tributaries that are "relatively permanent" as "waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months). The Guidance further states that "relatively permanent" waters "do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally." In determining whether a tributary is relatively permanent, the flow characteristics off the downstream limit of the tributary should be evaluated. Where data show that the flow regime at the downstream limit is not representative of the entire tributary, the flow regime that best characterizes the entire tributary should be used.

Seasonally: In *Rapanos*, the Court refers to waters that flow “seasonally” as those that “contain continuous flow during some months of the year but no flow during dry months.” The Guidance defines waters that flow “seasonally” as those that typically flow for three months of the year.

Significant Nexus: In *Rapanos*, Justice Kennedy stated that a wetland meets the “significant nexus” test “if the 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.’” Justice Kennedy further stated that a “mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.” Justice Kennedy also stated that the *absence* of a hydrologic connection may create a significant nexus because the wetland may prevent polluted waters from reaching the traditional navigable waters. The Ninth Circuit has elaborated on Justice Kennedy’s reasoning, stating that “a significant nexus may be inferred when wetlands are adjacent to navigable waters.”

Swales and Erosional Features: The Guidance identifies swales and erosional features as including “gullies, small washes characterized by low volume, infrequent, or short duration flow.”

Traditional Navigable Waters: The Act defines “navigable waters” as “the waters of the United States, including the territorial seas.” The Corps regulations defines “navigable waters” as “those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.” The Guidance states that traditional navigable waters are waters described in the Corps regulations at 33 C.F.R. § 328.3(a)(1). These waters are “waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” The Guidance further states that waters will be considered traditional navigable waters if: (1) they are subject to Section 9 or 10 of the Rivers and Harbors Act, 33 U.S.C. §§ 401 and 403.; (2) a federal court has determined that the water is navigable-in-fact; (3) the waters are currently being used for commercial navigation, including commercial water-borne recreation; (4) the waters have historically been used for commercial navigation, including commercial water-borne recreation; or (5) the waters are susceptible to being used in the future for commercial navigation, including commercial water-borne recreation, which may be determined by examining a number of factors and must be based on substantial and specific evidence that is clearly documented.