

Memo Hints At Limited EPA, Corps Clean Water Changes After Rapanos Ruling
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The U.S. Army Corps of Engineers is distributing informal interim guidance that suggests EPA and the Corps will be making only narrow changes in how they determine whether a wetland or other waterbody is subject to Clean Water Act (CWA) protections in the wake of the Supreme Court's divided ruling last month on the scope of the water act, according to a copy of the guidance obtained by Inside EPA.

In an internal memo distributed to Corps district officials July 5, Corps regulatory branch chief Mark Sudol says the Corps and EPA are in the process of developing joint guidance clarifying CWA jurisdiction following the high court's ruling in *Rapanos et ux., et al. v. United States* on June 19.

However, Sudol's memo stresses that any changes expected in the forthcoming EPA/Corps guidance will focus on the tests and justifications the Corps uses when it makes its jurisdictional determinations -- rather than making significant changes to the definition of "waters of the United States," which are subject to CWA protections. The memo says EPA and the Corps hope to issue the final guidance within the next three weeks.

The memo states that the Corps will likely "make some changes in how we describe and document the justifications that underlie some of our CWA jurisdictional determinations (JDs). In other words, the tests that we cite and the facts that we document in some of our JD administrative records will probably change somewhat," to ensure that the determinations are consistent with the *Rapanos* ruling.

The agencies' decision to move forward with the guidance comes in the face of uncertainty over how appellate and district courts will interpret the *Rapanos* decision in a number of separate cases that address CWA jurisdiction (see related story).

As a result, the upcoming guidance will likely provide a roadmap to how the agencies interpret the high court's ruling. An EPA official, speaking just after the high court's ruling in June, said the agency is awaiting the Justice Department's (DOJ) interpretation of the decision before making any decisions on how to move forward.

The Sudol memo also calls on Corps personnel to refrain, as much as possible, from "taking a position on the scope of 'waters of the U.S.,'" until the Corps and EPA issue their final, "substantive" guidance document on the Rapanos decision. For example, the Corps urges staff to "defer action if possible" in legal and administrative proceedings where the Corps would be expected to take a position on the scope of the CWA.

Similarly, the memo calls on Corps officials to avoid referring new enforcement actions to the Justice Department for prosecution, unless the waterbody involved is "traditionally navigable" -- and therefore unquestionably protected by the CWA. However, the memo does note that CWA violations that cause "significant, immediate environmental harm" may be considered for enforcement action on a "case by case basis."

In a separate informal interim guide, EPA goes into much less detail -- asking only that agency officials "not represent an agency position on the effect of [the Rapanos] decision on Clean Water Act jurisdiction in pleadings or in dealings with outside parties." EPA adds that, if an agency official "cannot defer action that requires taking a position on the scope of the 'waters of the U.S.,'" then they should contact EPA headquarters staff.

Corps and EPA officials could not be reached for comment.

The agencies' efforts follow the high court's June 19 decision in Rapanos, which failed to resolve longstanding uncertainty over when EPA and the Corps can regulate some wetlands. Justice Anthony Kennedy backed a plurality decision to remand the case to the lower courts but wrote a concurring opinion -- which legal observers say will hold sway with lower courts -- that many industry sources say fails to create a bright-line test for when wetlands are regulated.

Kennedy's opinion calls for a case-by-case analysis to determine whether a significant nexus links wetlands to navigable waters, while suggesting that the Corps craft regulations to resolve the issue. "Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters," Kennedy says.

As a result, many industry groups have been calling on EPA and the Corps to take administrative steps to settle the issue.

However, it is not clear whether the changes to how the agencies justify future jurisdictional determinations will satisfy many industry calls for new regulatory certainty. Several industry groups are also suing regulators in a bid to force them to revise their current regulatory practices.

Several other justices also called for new regulations to address the issue. Justice Stephen Breyer, writing in his dissenting opinion, calls for the Corps to "write new regulations, and speedily so," a position backed by Chief Justice John Roberts. All three justices indicate that the Corps needs to clarify its methodology for determining what waters are subject to CWA regulations regarding the dredging and filling of wetlands.

In an official statement issued after the high court's decision, EPA said it will "continue to use our clean water regulatory tools to provide effective and predictable protection for the nation's rivers, streams and wetlands." -- Matt Shipman

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