



U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Catalyst for Improving the Environment

Special Report

Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation

Report No. 09-N-0149

April 30, 2009



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
INSPECTOR GENERAL

April 30, 2009

The Honorable James L. Oberstar
Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This is in response to your request dated April 24, 2009, asking that the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA) provide information we have collected on the impact of the *Rapanos* case on Clean Water Act (CWA) enforcement.

As discussed with your staff, the OIG is conducting an evaluation of the effectiveness of EPA's identification of violations of Section 404 of the CWA that fall under its enforcement authority. We are not evaluating the impacts of the *Rapanos* decision on EPA's enforcement of the CWA. During our work, OIG evaluators visited EPA Headquarters and six regions, seven U.S. Army Corps of Engineers' Districts, and six States. During those visits the topic of *Rapanos* came up in some of our meetings. Although the subject was not the focus of our evaluation, the comments were documented in our working papers. I am providing you a compilation of those comments by organizational location. I caution that this information was not verified or substantiated by us nor did we analyze its content or draw any conclusions from it.

Thank you for your interest in our work. Should you have any questions on this report, please contact Wade T. Najjum, Assistant Inspector General for Program Evaluation, at (202) 566-0827.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill A. Roderick", written over a horizontal line.

Bill A. Roderick
Acting Inspector General

Attachment

Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation

During our interviews, while conducting the wetlands enforcement evaluation, the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers, and State wetlands staff spoke about a variety of impacts to their programs caused by the *Rapanos* decision (*Rapanos v. United States*). Included below are excerpts from our interviews, which we have grouped by location. This information was not verified or substantiated by Office of Inspector General (OIG). The OIG did not analyze its content or draw any conclusions from this information.

EPA Headquarters

The following comments were from an interview with the Director, Office of Enforcement and Compliance Assurance (OECA), Wetlands Enforcement Division, and his staff.

- Prior to the *Rapanos* decision OECA was relatively uninvolved in Section 404 cases. However, more EPA Regions are now referring cases to Headquarters for review. Unlike other Clean Water Act (CWA) programs, Headquarters cannot initiate a Section 404 case; instead, it just processes referrals from the EPA Regions. Follow-up for consent decrees and other enforcement actions are handled at the regional level.
- *Rapanos* has been a major resource drain for the program, far more so than *SWANCC* (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*). It has not necessitated a change in program direction.
- *Rapanos* has created a lot of uncertainty with regards to EPA's compliance and enforcement activities. Processing enforcement cases where there is a jurisdictional issue has become very difficult.
- There is a definitional issue that resulted from the *Rapanos* decision concerned with the meaning of the words "Traditionally Navigable Water" and "Adjacency." The Office of Wetlands, Oceans and Watersheds is running a workgroup, which also involves OECA, the Council on Environmental Quality, the Army Corps of Engineers, the Office of General Counsel, and other agencies, to address this issue. An Attorney, Water Enforcement Division, noted that the Office of Management and Budget is trying to restrict the definition of "traditionally navigable waters."
- What constitutes incidental fallback is now decided on a case-by-case basis, as it was in 1998 (i.e., EPA is revoking "Tulloch 2"). However, these definitional issues are insignificant compared to current issues with jurisdictional determination brought about by the *Rapanos/Carabell* decisions.
- Overall, CWA enforcement activities (for Sections 311 (oil spills), 402 (National Pollutant Discharge Elimination System), and 404) have decreased since the *Rapanos* ruling. An estimated total of 489 enforcement cases (Sections 311, 402, and 404 combined) have been affected such that formal enforcement was not pursued as a result of jurisdictional uncertainty, case priority was lowered as a result of jurisdictional uncertainty, or lack of jurisdiction was asserted as an affirmative defense to an enforcement action.

- OECA described the judicial referral process as "working well." It is rare for the Department of Justice to send a case back to an EPA Region for administrative action. In the wake of *Rapanos*, however, it has become "almost impossible" for EPA to refer a case to the Department of Justice on "significant nexus" grounds. Lingering uncertainty over the limits of Federal jurisdiction has made the Department of Justice reticent to accept referrals wholly on these grounds.
- Staff also stated that the Department of Justice is "willing" to take CWA Section 404 cases, in principle, but they are often loathe to right now because of the lingering jurisdictional uncertainties associated with *Rapanos*. However, the Regions erroneously see the Department of Justice as "unwilling" to take any CWA Section 404 cases.

The following comments were from an interview with Office of Water, Office of Wetlands, Oceans and Watersheds (OWOW) staff, including the Acting Chief, Wetlands Strategies and State Programs Branch, and the Chief, Wetlands and Aquatic Resources Regulatory Branch.

- OWOW is working with the Office of Research and Development (ORD) on a number of jurisdiction-related issues, including the use of scientific data to address the concepts of stream flow and significant nexus such that relatively few analytical observations may be applied across multiple jurisdictional cases in an effort to expedite the post-*Rapanos* jurisdictional determination.
- The Federal regulations governing State program assumption under Section 404(c) of the CWA have not been updated in the wake of *Rapanos*, though they are sufficiently broad that the regulations, themselves, may not need updating. The Acting Chief, Wetlands Strategies and State Programs Branch noted that OWOW also made an attempt to develop guidance for the regions on State assumption, but that has not occurred. Instead, EPA Headquarters provides the regions with a "script" for State/tribal assumption. OWOW feels the *Rapanos* implementing guidance needs to be better defined before it can revise the "script" to reflect *Rapanos* considerations. Typically, State assumption is a separate guidance discussion from *Rapanos*.
- It has been difficult for EPA to craft jurisdictional determination guidance that is both legal and usable for field staff. For instance, many streams have no U.S. Geological Survey gauging data. In response, OWOW is partnering with ORD on a method that will turn daily field observations into something that can serve as the basis for a defensible decision about the stream's ephemerality. Ideally, one would need several years of biotic observations before he/she could really determine whether a "significant nexus" exists. Since the Army Corps of Engineers cannot conduct 130,000 jurisdictional determination field visits, some intermediate approach is preferable.
- Currently, significant nexus calls are settled at the regional level. The region has 15 days to look at the draft jurisdictional determination and most nexus calls are resolved within this period. If EPA still has issues, it follows the procedure for "Special Cases" established in the 1989 Memorandum of Agreement between EPA and the Army Corps of Engineers. If the Regional Administrator classifies a jurisdictional determination as a "special case," the Army Corps of Engineers must stand down for 10 days and defer the jurisdictional determination to EPA. There have been nine special case requests, six of which have been granted.

The following comments were from an interview with two staff attorneys of the Office of General Counsel (OGC), Water Law Office.

- The OGC is very involved with litigation associated with Army Corps of Engineers' actions, especially the coordination of briefs between the two agencies. OGC helps the Army Corps of Engineers assess the legal ramifications of asserting jurisdiction in certain contexts in the post-*Rapanos* environment. Often, OGC advises the Army Corps of Engineers on whether more information is needed to support a position in a particular case.
- Traditional navigable waterways evade easy definition; even the Supreme Court has been vague on the precise scope of traditional navigable waterways. Traditional navigable waterways have arisen in multiple legal contexts over the years, not just in CWA discussions. Many stakeholders find the Appendix D definition to be still too broad to adequately serve the jurisdictional issues created by the *Rapanos* decision. The OGC attorneys noted that there had been considerable discussion about the scope of traditional navigable waterways in Fall 2007. Traditional navigable waterways continue to be an issue in some "isolated (a)(3)" elevations.
- Adjacency was not addressed by the Supreme Court. Although there are 1-2 sentences on it in the interim June 2007 guidance, it remains an imprecise term. However, OGC staff is working with various program offices to create a follow-up to the June 2007 *Rapanos* guidance where adjacency, among other things, will be addressed. The real debate involves the interpretation of one aspect of the "adjacency" definition: "neighboring." This "neighboring" term was a cornerstone of the debate in the *Carabell* case.
- There have been close to 50 post-*Rapanos* cases: a pretty significant increase over prior case loads. Many cases have histories stretching back before the *Rapanos* ruling. The Circuit courts have been deciding, with varying opinions, whether the Kennedy, Scalia or both tests hold in establishing CWA jurisdiction.
- Although *Rapanos* has "trumped everything," OGC is engaged in some other Section 404-related work.
- The 11th Circuit Court of Appeals (Atlanta) recently held that only the Kennedy test applies, even though the plurality's test is easier to apply. The 7th and 9th Circuits, meanwhile, have used Kennedy's opinions. Both EPA and the Department of Justice hope that either the plurality or Kennedy tests can be applied in Section 404 jurisdictional decisions. Prior to *Rapanos*, the 5th Circuit had taken a more restrictive reading of CWA jurisdiction.

EPA Regions

Region 1

- According to the Acting Manager, Legal Enforcement Office, Office of Environmental Stewardship, EPA Region 1, legal resources in EPA Region 1 are much tighter and have been in decline, and the *SWANCC* and *Rapanos* fallouts have severely exacerbated this; some cases have not yet been assigned to lawyers (cases need to be prioritized with other environmental media as well).
 - He said that EPA Region 1 has a strong team of jurisdiction experts.
 - He said that EPA Region 1 recently held two sessions of *Rapanos* training in mid-February 2009, and sent it out as a webinar for people throughout the country.

Region 3

- The Associate Director, Environmental Assessment and Innovation Division, EPA Region 3, said Region 3 resources have remained steady post-*Rapanos* and he is trying to assure that the resource base remains steady.
 - He said that today it is more difficult to prove a jurisdictional relationship between wetlands and "Waters of the U.S" and more effort is needed to put a case file together. EPA Region 3 considers itself lucky because it has water; it is easy to follow the hydric soils and vegetation to establish a connection to water.
 - He said that in EPA Region 3, wetlands cases in the Fourth Circuit of Appeals are based on the *Wilson* decision, which does not recognize isolated waters as waters of the United States. Within Region 3, Maryland, Virginia, and the lower half of West Virginia are located in the Fourth Circuit of Appeals. The Fourth Circuit of Appeals decision to follow *Wilson* has not affected wetlands resources that much because these States regulate isolated waters under their State programs.
- The Stormwater Team Leader, Office of NPDES Permits and Enforcement, EPA Region 3 stated that the "*Rapanos* effect" has not affected the pursuit of joint (Section 402/404) cases; it just takes more work to process them.

Region 4

- A staff member from Wetlands Enforcement Section, Clean Water Enforcement Branch, EPA Region 4, said that *Rapanos* has raised the bar on establishing jurisdiction. Even if *Rapanos* were to "go away" the likelihood exists that conducting jurisdictional determinations will require more data and expertise than before.
 - He has provided extensive training within Region 4 on Section 404 to Section 402 staff and legal counsel. This training has also been shared with the 10 Army Corps of Engineers Districts that work within Region 4.
- The Chief, Office of Water Legal Support, Office of Environmental Accountability, EPA Region 4, said that generating the referrals to the Department of Justice is time

consuming; it easily takes 1 full-time equivalent several months working full-time on the case to prepare the referral package.

- The Chief, Clean Water Enforcement Branch (CWEB), EPA Region 4, stated that Section 404 enforcement was combined with National Pollutant Discharge Elimination System (NPDES) enforcement to form the CWEB in November 2008. This recombination was spurred by *Rapanos* and the associated introduction of jurisdictional issues into the NPDES program. Now, the Region's Section 402 staff have to start doing jurisdictional determinations. In the past, it had been only typical for Section 404 staff to do jurisdictional determinations.

Region 5

- The Branch Chief, Watersheds and Wetlands Branch, EPA Region 5 said that EPA Region 5 has ¼ full-time equivalents dedicated to reviewing Army Corps of Engineers jurisdictional determinations, but is probably using well over 1 full-time equivalent, not including training. He said that in a recent resources bid EPA Region 5 estimated that two additional full-time equivalents would be necessary for enforcement in the post-*Rapanos* world. The bid did not result in the requested resources.
 - He said that, as a result of *Rapanos*, more work and resources are required at all stages of processing an enforcement case.
 - He said that EPA is now required to review certain jurisdictional calls made by the Army Corps of Engineers where jurisdiction is in doubt and EPA Region 5 has had to conduct more reviews than any other Region.
 - He further stated that EPA Region 5 has recently overturned Army Corps of Engineers jurisdictional determination decisions, using its authority under the Civiletti Memorandum, because the agencies have disagreed over their jurisdictional status. For example, EPA Region 5 overrode the Army Corps of Engineers St. Paul District by exerting jurisdiction over some isolated lakes in Minnesota and Wisconsin. These disagreements often hinge on the agencies' understandings of proximity to traditionally navigable waters.
 - He said that a lot of EPA Region 5 surface waters that would be considered Aquatic Resources of National Interest by EPA (e.g., fens, bogs, dunes/swales) are seen as non-jurisdictional to the Army Corps of Engineers due to *Rapanos* and *SWANCC*.
 - He said that EPA's OECA has had to conduct CWA Jurisdiction webinars for Section 402 and 311 personnel, since *Rapanos* has created new issues for these programs.
 - He said Region 5's Watersheds and Wetlands Branch management team met with the Army Corps of Engineers St. Paul District to review which cases the Region would accept from the Corps. This was done because the effects of the *Rapanos* decision on EPA Region 5 enforcement cases were significant in the short run (an increase in staffs' case review time). EPA Region 5 has offered this review to two other Army Corps Districts, but as of December 2008 there has been no date set for this encounter.

- He said that, since *Rapanos*, the Department of Justice requires more jurisdictional evidence than necessary for enforcement cases. Even after EPA Region 5 has successfully established jurisdiction without a nexus test, the Department of Justice requests a nexus justification anyway. The Deputy Branch Chief, Watersheds and Wetlands Branch, EPA Region 5 added that, in their understanding, this is the case nationally. This may also cause Statute of Limitations issues.
 - He said that, in some cases, the Department of Justice has had to provide assistance to EPA regional enforcement personnel by hiring consultants to assist in the accumulation of jurisdictional evidence.
 - He said that, even before an enforcement action is taken, it is now more likely that enforcement cases will have to go to an administrative hearing due to *Rapanos*.
- The Deputy Branch Chief, Watersheds and Wetlands Branch, EPA Region 5 supplied the following numbers related to EPA's required reviews of Army Corps of Engineers jurisdictional determinations. Of the 654 jurisdictional determinations, 206 were significant nexus (i.e. *Rapanos*) calls, of which 28 were found to be non-jurisdictional, and 450 isolated (i.e. *SWANCC*) calls, of which 449 were found to be non-jurisdictional.
 - She said that, in addition to spending more time preparing a case, the *Rapanos* significant nexus requirement puts EPA Region 5 in a situation where it has to collect more intensive data.
- An Associate Regional Counsel, EPA Region 5 said that Regional Counsel is requiring significant nexus determinations (and the associated resource demand) for all enforcement cases, regardless of necessity, in anticipation that other Circuit Courts would adopt the Seventh Circuit's stance that the significant nexus is the only acceptable *Rapanos* test. Another Associate Regional Counsel, EPA Region 5 added that it has become necessary to meet the toughest legal standard.
 - He said that it appears as though Section 402 may be vulnerable to jurisdictional issues as well. Another Associate Regional Counsel, EPA Region 5 said that, due to the *Rapanos* decision, a conveyance between a Section 402 discharge source and the receiving "Water of the U.S." has to be verified. In other words, this is another nexus determination. Now, when a Section 402 issue arises, EPA Region 5 has to walk the entire nexus in order to establish the connection. This is difficult to do when dealing with large distances through multiple properties and unfriendly terrain.
 - He said that there has been at least one instance in EPA Region 5 where it could not process a Section 402 violation (which would have been processed pre-*Rapanos*), because they could not establish a nexus.
 - He said that there were jurisdictional issues for enforcement in most EPA Region 5 States, where State-level wetlands enforcement is lacking. Michigan is the only EPA Region 5 State with a decent enforcement program.
- An Associate Regional Counsel EPA Region 5 said that, in combination with *Rapanos*, the Environmental Appeal Board's *Bricks* decision (2003) is requiring that EPA "walk the water" (i.e., field verify all applicable significant nexus connections) to establish

significant nexus in all CWA cases, which can be very difficult to do without trespassing. EPA Region 5 lost one case before the Environmental Appeal Board because no one walked property, i.e., the wetland near Interstate 88 in Illinois.

- He said that the *Rapanos* ruling is downplaying the environmental importance of smaller waters, such as headwater streams, since jurisdiction only exists when a tie-in to prominent aquatic features is established. Another Associate Regional Counsel, EPA Region 5 added that the *Rapanos* jurisdiction standards depend on permanence of stream flow, and there is currently no standard stream flow assessment methodology.
 - He said that *Rapanos*' biggest impact to jurisdiction is out in the arid West, where it is comparatively difficult to prove significant nexus.
- The Associate Branch Chief, Office of Regional Counsel, EPA Region 5 said that the increased case preparation time causes cases to get "stale" over time, which can adversely affect enforcement outcome.
- The Section Chief, Office of Regional Counsel, EPA Region 5 said that all Section 402 issues are with Concentrated Animal Feeding Operations (CAFOs), where individuals are announcing that they will not reapply for Section 402 permits because they feel that the *Rapanos* decision has removed their CAFO from CWA jurisdiction.
- An Associate Regional Counsel, EPA Region 5 noted that differing evidentiary requirements among Circuit Courts of Appeals is sometimes affecting enforcement outcome: for instance, in one case Region 5's Office of Regional Counsel (ORC) had a better argument for jurisdiction under the Scalia test than under the Kennedy test. However, ORC will have to use the Kennedy test, because the case took place in the 7th Circuit, where Kennedy is the accepted standard.
- A staff member of the Watersheds and Wetlands Branch, EPA Region 5 said that, after *Rapanos*, EPA Region 5 had to re-evaluate jurisdictional determinations for pending enforcement cases that were conducted prior to the Supreme Court decision.
- An attorney from the Office of Regional Counsel, EPA Region 5 said that it is hard to see if *Rapanos* would have affected one of its cases, but it could have been more time consuming to establish jurisdiction. However, EPA Region 5 did have to conduct a post-SWANCC evaluation for this case to establish proximity to a tributary.
- An Enforcement Officer, Watersheds and Wetlands Branch and an attorney from the Office of Regional Counsel, EPA Region 5 personnel said that it was necessary for the federal government to use SWANCC arguments to substantiate jurisdiction in a case that predated *Rapanos*. They added that the Army Corps of Engineers St. Paul District, may also have performed a significant nexus analysis in this case.
- According to a staff member of the Watersheds and Wetlands Branch, EPA Region 5, *Rapanos*-related jurisdictional issues were why the violators in three related cases "got off so easily." He said that it was difficult to establish a nexus by measuring stream flow in coal caverns.
- An Enforcement Officer, Watersheds and Wetlands Branch and an attorney from the Office of Regional Counsel, EPA Region 5 said that in one case the violator's attorney tried to argue against jurisdiction in the aftermath immediately following the *Rapanos* decision, but was unsuccessful.

Region 7

- A staff member of the Water Enforcement Branch, EPA Region 7 noted that some Army Corps of Engineers Districts are referring fewer Section 404 cases post-*Rapanos*. She speculated that Army Corps staff may be preoccupied with jurisdictional determinations and permits.
 - She stated that she believes there will be more informal enforcement actions because of the *Rapanos* decision. She indicated that EPA Region 7 does not have sufficient resources to make jurisdictional determinations.
- A staff member of the Water Enforcement Branch, EPA Region 7 said that when EPA Region 7's construction stormwater inspectors first visited the site of one case to follow-up on a report of a possible Section 404 violation, the inspectors could only list a potential nexus in their report. An attorney from the Office of Regional Counsel, EPA Region 7 reported that she had to establish that the affected water was jurisdictional before she could tell the inspector that there was a Section 404 violation at this site.

Region 8

- The Chief, Ecosystems, Wetlands, and Watersheds Unit, EPA Region 8 noted that Region 8's Wetlands Unit still had about five full-time equivalents, the same amount of staff as it had pre-*Rapanos*, despite an increase in its responsibilities post-*Rapanos*, e.g., a new requirement to collaborate with the Army Corps of Engineers on jurisdictional determinations after June 2007.
 - He stated that his unit has no guidance or approach for non-404 jurisdictional determinations, though they are trying to coordinate with other Regions. He also indicated that some Corps office managers were completely ignoring the June 2008 regulatory guidance letter on preliminary jurisdictional determinations
- EPA Region 8 Water Technical Enforcement Program staff said the region has hired three consultants to deal with *Rapanos* issues on cases in the Sioux Falls, South Dakota area; in the absence of *Rapanos*, none of these consultants would have been necessary.
- The Acting Deputy Assistant Regional Administrator, EPA Region 8 estimated that it takes EPA Region 8 as much as three times longer to process a case post-*Rapanos*. This has also reportedly made things more difficult when dealing with the Department of Justice.
- The Director, Water Technical Enforcement Program, EPA Region 8 added that a significant nexus determination is necessary in almost every case. Only 17 percent of Region 8's waters are perennial, so there are considerable amounts of nexus tie-ins.
 - She noted that Region 8 is now walking the nexus for every applicable CWA section (e.g., Section 311, 402 and 404 cases).
 - She stated that, in some instances, EPA has to do a considerable amount of extra work to support CWA jurisdiction for cases in litigation.
 - She reported that a lot of the cases that were in progress at the time of the *Rapanos* decision received milder settlements than they would have otherwise because of the accompanying jurisdictional uncertainty.

- She indicated that there were a few situations in EPA Region 8 where violators, citing *Rapanos*, unsuccessfully tried to avoid fulfilling the terms of their consent decrees.
 - She stated that, just after *Rapanos*, there was a "logjam" at the Army Corps of Engineers. EPA Region 8 was not receiving any new referrals because the Army Corps was trying to figure out what it was going to do with permits. Now that things have cleared out, EPA Region 8 has been receiving a lot of Army Corps of Engineers referrals.
 - She stated that the *Rapanos* decision was sufficiently oblique that the resulting guidance requires a lot of analytical data, much of which does not exist in the West.
 - She noted that, relative to Section 402 cases, where there is at least some proximity to a surface water, storage tanks can be quite far away from "Waters of the United States." The Region often faces more challenges with establishing nexus under OPA the Oil Pollution Act (OPA) than it does under other Sections of the Clean Water Act.
- An attorney, Legal Enforcement Program, EPA Region 8 indicated that some issues related to the documentation of isolated waters (per the *SWANCC* decision) had complicated EPA Region 8's referral to the Department of Justice.
- Water Technical Enforcement staff indicated that the violator in one of its cases tried to use *Rapanos* in its defense. Although, in the end, the arguments did not hold, the violator did succeed in prolonging the case's penalty phase. EPA Region 8 had to reference data on traditionally navigable waters and relatively permanent waters during the settlement negotiations.
- A Staff Attorney, Office of Regional Counsel, EPA Region 8 noted that EPA Region 8 has a lot of ephemeral streams, as well as streams which exhibit perennial flow relatively close to the headwaters. However, after miles of irrigation and other supply demands, these streams actually become more ephemeral further downstream. She indicated that the EPA was currently grappling with whether flow could be used to establish a significant nexus for certain waters. She described the "Badger Gulch" jurisdictional determination that EPA Region 8 had elevated to EPA Headquarters. The case concerns the contribution of flow considerations to a significant nexus decision.
 - She added that, especially in western States, it is too difficult to break jurisdictional determination calls down into isolated and significant nexus calls.
- A staff member from the Ecosystems, Wetlands, and Watersheds Unit, EPA Region 8 noted that EPA Region 8 has lots of borderline "ephemeral" features such as vernal pools and playa lakes.
 - She said that EPA Region 8 has issues with prairie potholes where the Army Corps of Engineers will not accept the sub-surface connections. The Army Corps of Engineers is unwilling to assert jurisdiction because of a lack of site-specific evidence. However, EPA Region 8 feels that it is possible to assert jurisdiction based on general patterns of prairie pothole sub-surface connectivity.
 - She stated that EPA Region 8 has lost a lot of surface waters to *Rapanos*. The Chief, Ecosystems, Wetlands, and Watersheds Unit, EPA Region 8

followed with some additional information showing that the Army Corps of Engineers Districts operating in EPA Region 8 (Sacramento, Omaha and Albuquerque) failed to assert jurisdiction in nearly 72 percent of their jurisdictional calls between June 2007 (the date that the initial *Rapanos* guidance was released) and August 2008. *SWANCC*, not *Rapanos*, was cited as the basis for the lack of federal jurisdiction on 88 percent of these non-jurisdictional determination calls.

- Several staff from EPA Region 8 and the Army Corps of Engineers Omaha District noted that the federal government must often reach a higher jurisdictional standard on Section 404 enforcement actions than it does on permitting decisions.
- Another staff member of the Ecosystems, Wetlands, and Watersheds Unit, EPA Region 8 noted that the Army Corps of Engineers has been in the habit of calling waters "isolated" simply because there is no surface connection. However, some of these waters may still have a sub-surface connection. Shallow sub-surface connections are important in some contexts. There are consistent fluctuations between waterbodies in dune environments, for instance. Sub-surface connections are pervasive in the San Luis Valley of Colorado.
- A staff member of the Ecosystems, Wetlands, and Watersheds Unit, EPA Region 8 reported that the States in EPA Region 8 have very weak wetlands programs. Another staff member of the Ecosystems, Wetlands, and Watersheds Unit, EPA Region 8 added that State programs in Region 8 have little to no State or federal funding.
- The Deputy Regional Counsel, EPA Region 8, indicated that, because the Region has a large amount of energy development, it has significant OPA issues. Nexus to surface water bodies is critical in making jurisdictional determinations under OPA. He reported that the Region's OPA program has found both a drop in spill reporting and a decrease in the submission of Facility Response Plans since *Rapanos*. In the wake of *Rapanos*, OPA jurisdiction has been especially in flux in Wyoming.
- A staff member of the Ecosystems, Wetlands, and Watersheds Unit, EPA Region 8 added that the Corps is finding that its authority is expanding because its jurisdictional decisions are affecting Clean Water Act Sections with which it had no previous involvement (e.g., Sections 311 and 402).

Army Corps of Engineers Districts

Rock Island

- The Chief, Enforcement Section, Regulatory Branch, Rock Island Army Corps of Engineers District and the Chief, Regulatory Branch, Rock Island Army Corps of Engineers District said *Rapanos* has not really changed their jurisdictional extent, just the effort required to establish jurisdiction. The Rock Island District's workload has increased as a result, but not significantly.
- They both said that *Rapanos* changed the effort required to establish jurisdiction. Rock Island District workload has increased as a result, but not significantly.
- The Chief, Regulatory Branch, Army Corps of Engineers Rock Island District said that, unlike out West, the potential for *Rapanos* issues would not keep the Rock Island District from pursuing an enforcement action.

- He said the Rock Island District is now experiencing difficulty establishing jurisdiction in headwater areas and in areas where jurisdiction was being asserted through upland-excavated ditches prior to *Rapanos*.
- Army Corps of Engineers Rock Island District Regulatory Branch personnel reported that the *SWANCC* decision removed a considerable area from CWA jurisdiction. They stated that it has many farmed wetlands and prairie potholes; *SWANCC* removed both of these features from CWA jurisdiction.

Savannah

- The Chief, Northern Section, Regulatory Branch, Army Corps of Engineers Savannah District said the *Rapanos* decision has affected the Savannah District in that it takes more time to document jurisdictional determinations; and the review process for jurisdictional determinations now goes up to the Division Chief for the Regulatory Branch.
 - He said making jurisdictional determinations is especially more time consuming for streams and isolated wetlands.

Jacksonville

- The Program Manager, Regulatory Division, Enforcement Branch, Army Corps of Engineers Jacksonville District feels that the only difference after the *Rapanos* decision is the need for more documentation, and she believes that this has somewhat abated as a result of the reinstatement of the Preliminary Jurisdictional Determination; if a permit applicant or violator agrees to accept all surface waters on a property as Section 404-regulated waters and forego the Kennedy or Scalia tests, resolution is much faster. This usually works out to everyone's benefit.

St. Paul

- The Enforcement Coordinator, Regulatory Branch, Army Corps of Engineers St. Paul District reported that *Rapanos* has made enforcement cases much more difficult in that they have to assemble a considerable amount of data to prove significant nexus. The St. Paul District now goes beyond the 1989 Wetland Delineation Manual and brings hydric soils into almost all of its cases.
 - He stated that the St. Paul District has gone from using two expert witnesses per case to 4, 5 or 6.

Detroit

The following comments were from an interview with Chief, Regulatory Branch, Army Corps of Engineers Detroit District and his staff.

- *Rapanos'* main impact has been to increase the amount of time it takes the District to process Section 404 violations.

- EPA must reportedly limit its use of the Corps' jurisdictional language (e.g., the District believes that this water is a "relatively permanent water" per *Rapanos*) to their inspections. EPA cannot rely on the Corps' language when it conducts its own discovery.
- *Rapanos* has only forced EPA Region 5 to drop one case, reporting that Region 5 was unable to take any action against the violator in Indiana because it was unsure whether it had jurisdiction.
- *Rapanos* poses the biggest hurdle for waters away from the Great Lakes, especially if multiple types of waters are present on the same piece of property.

Omaha

- Army Corps of Engineers Omaha District staff stated that although *Rapanos* made jurisdictional determinations much more complicated (the form is eight pages long), the Army Corps of Engineers has benefited from the re-institution of preliminary jurisdictional determinations. Preliminary jurisdictional determinations are much simpler, making the jurisdictional decision more like it was pre-*Rapanos*. The Army Corps of Engineers is currently re-training people on how to do jurisdictional determinations for enforcement.
- The Regulatory Project Manager, South Dakota Regulatory Office, Army Corps of Engineers Omaha District noted that the Army Corps of Engineers needs the "RPW" (relatively permanent water) on enforcement jurisdictional determinations, whereas a significant nexus analysis would suffice for a permitting jurisdictional determination.
- The Enforcement Coordinator, Army Corps of Engineers Omaha District stated that *Rapanos* has made it more difficult to develop cases.
 - He provided an example of how jurisdictional issues affect case referrals to EPA. He cited an enforcement case which began as a permit application: After its initial review, the Omaha District asked the applicant to perform a wetlands delineation in an "incomplete application" letter. Three months later, the Omaha District called the applicant to check up on the application and found that work had already been done. The Omaha District Project Manager wanted the violation sent to EPA Region 8 as a flagrant violation. However, the Enforcement Coordinator thought that the size of the violation was so small, probably qualifying under a Nationwide Permit, that EPA Region 8 would not take it. Instead, he decided to personally process the case, attempting to resolve it as an after-the-fact Nationwide Permit 39 (for residential commercial and institutional developments) provided the violator sent the required additional information and mitigation plan. The additional information took 10 months to arrive, and there was no restoration plan -- in fact, the developer hired an attorney to dispute the Omaha District's claim that the site was jurisdictional. He then threatened to send the case to EPA Region 8. However, Region 8's Office of Regional Counsel said there could be issues with jurisdiction. To bolster its claim, the Omaha District verified a significant nexus (60 miles to next traditionally navigable waters; only flows after rain; flows into a relatively permanent water). EPA Region 8 agreed with the Omaha District's call and the violator was notified of the

agencies' decision to pursue the case. Now the applicant (who is the local sheriff) is trying to appeal jurisdictional determination, but his appeal might not work because EPA plans to take an enforcement action. All of this has taken a lot of time.

- He stated that there are some areas in eastern Colorado, as well as near Rapid City, South Dakota, where the Army Corps of Engineers would have claimed jurisdiction in the past. It is now much more difficult for the Army Corps of Engineers to claim jurisdiction.
- He noted that one of the Army Corps' biggest jurisdictional issues is tying surface waters to the nearest traditionally navigable water, especially in those instances where mudflow and alluvial fan deposits force surface water flow underground. In one example, a violation was 60 miles away from the nearest traditionally navigable water, and the connecting creek went underground for 5 miles en route to the traditionally navigable water. These jurisdictional challenges are a huge problem around Rapid City, South Dakota, where rapid development and alluvial fans are common.
- He noted that there are also areas in Wyoming and Colorado where the Army Corps of Engineers has had to use a significant nexus analysis because there is only infrequent flood flow. In the past, everyone just assumed that these areas were jurisdictional.
- He stated that there are related problems in the Salt Lake City area, where the Sacramento District hired the Omaha District to conduct a large-scale analysis of the mudflow deposits that are common to that area.
- He stated that the Omaha District has not taken two cases against large developers because of jurisdictional uncertainty.
- A Counsel for the Army Corps of Engineers Omaha District stated that the last case the Omaha District filed with the U.S. attorney was pulled back because of *Rapanos*. He categorized the case as initially a "slam dunk," but then *Rapanos* came through and created jurisdictional issues.

States

Michigan

- A staff member of the Michigan Department of Environmental Quality noted that the U.S. Army Corps of Engineers has been unable to get the U.S. Department of Justice to take criminal complaints in the wake of *Rapanos*.

Appendix A

Distribution

Office of the Administrator
Acting Assistant Administrator for Enforcement and Compliance Assurance
Acting Assistant Administrator for Water
Acting Associate Administrator for Congressional and Intergovernmental Relations
Acting Associate Administrator for Public Affairs
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