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Sent: Wednesday, July 05, 2006 10:25 AM

To: CDL-REG-All; CDL-REG-CHIEFS; CDL-REG-MSD; CDL-REG-Ros

Cc: Barnes, Gerald W HQ02; Smith, Chip R HQDA; Wood, Lance D HQ02; Stockdale, Earl H HQ02; 'Schmauder, Craig R Mr OGC'; Dunlop, George S HQDA; Sherman, Rennie H HQ02; Cummings, Ellen M HQ02

Subject: Interim Guidance on the Rapanos and Carabell Supreme Court Decision

Everyone,

The Supreme Court handed down a decision on June 19, 2006, in the Rapanos and Carabell cases. That decision addresses the scope of Clean Water Act (CWA) jurisdiction over certain waters of the United States, including wetlands. I appreciate the difficulty you are facing in trying to keep an on-going program functioning in the face of the present uncertainty. Given the confusion created by the differing opinions that the Supreme Court justices filed in that case, it will take some time for the Corps and the EPA to analyze and reach consensus on what legal guidance is to be derived from the decision. In the near future we intend to issue joint EPA/Army guidance clarifying CWA jurisdiction in light of the Rapanos/Carabell decision.

We anticipate that the Rapanos/Carabell decision will lead the Corps and the EPA to 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 insure that our JDs reflect the Supreme Court's most recent legal tests for asserting CWA jurisdiction. We will try to send you our advice in this regard as soon as possible and in the very near future.

In the meantime, in order to allow the Corps and EPA to prepare and issue substantive guidance, I am recommending that, to the extent circumstances allow, you delay making CWA jurisdictional determinations for areas beyond the limits of the traditional navigable waters (i.e., outside the "Section 10" waters) for the next three weeks. Even though you should delay making CWA jurisdictional calls in areas outside the traditional navigable waters for the next three weeks, that does not mean that the processing and issuance of CWA permit authorizations in those areas using general permits and standard individual permits should be delayed, as is further explained below.

I also recommend that, until that substantive guidance is circulated, no Corps District or Division Office should announce or implement any change in (1) how we are documenting our jurisdictional determinations, or (2) regarding the areas over which we are asserting CWA jurisdiction, without prior coordination with and concurrence by Headquarters Regulatory Community of Practice and Headquarters Office of the Chief Counsel.

Until Corps Headquarters issues substantive guidance regarding the Rapanos/Carabell decision, Corps personnel should not represent any Corps position on the effect of these decisions on Clean Water Act jurisdiction in court pleadings or in any sort of dealings

with outside parties. Therefore, in situations that require taking a position on the scope of "waters of the US" under the Clean Water Act, e.g. briefs or other filings in judicial or administrative proceedings, you should defer action if possible. We recommend seeking an extension for any briefs due in administrative or judicial cases in the near term. By way of example, the U.S. sought an extension of 60 days for a brief in *United States v. Cundiff*, Nos. 05-5469 and 05-5905 (6th Cir.) due June 21st. Ongoing work in Clean Water Act cases, such as settlement negotiation meetings or inspections, should continue if that work does not require taking a position on the legal issues of CWA jurisdiction addressed by the Supreme Court's *Rapanos/Carabell* decision.

Similarly, during the period until we issue substantive guidance on how to implement the *Rapanos/Carabell* decision, you should not refer any new regulatory enforcement actions to the Department of Justice other than those involving illegal activities in or affecting traditionally navigable (Section 10) waters, or violation of the terms or conditions of Corps permits covering activities in Section 10 waters. If illegal discharges of dredged or fill material in other waters are causing significant, immediate environmental harm and would justify injunctive relief, notify CECC-L (Martin Cohen) and we will determine an appropriate response on a case by case basis.

Regarding the issuance of permit authorizations during the period before we issue substantive guidance on *Rapanos/Carabell*, all forms of Section 10 and CWA Section 404 permit authorizations for activities proposed to take place in the traditional navigable waters (i.e., the Section 10 waters) should continue to be issued as before, since the *Rapanos/Carabell* decision does not affect Section 10 of the Rivers and Harbors Act of 1899 at all, and does not affect CWA jurisdiction over any category of Section 10 waters. In waters other than the traditional navigable (Section 10) waters, where a permit applicant proposes to conduct an activity involving the discharge of dredged or fill material pursuant to any form of CWA general permit authorization (e.g., NWP, regional general permit, SPGP, etc.), the Corps will continue to authorize those activities using applicable general permits, recognizing that such a permit applicant has the right to seek a modification of the terms and conditions or such a general permit authorization at a later time, as explained below.

Regarding applications for standard individual permits under CWA Section 404 covering activities involving the discharge of dredged or fill material outside the limits of the traditional navigable (Section 10) waters, as a general matter we expect that those individual Section 404 permits will continue to be issued as expeditiously as is practicable, to meet the legitimate needs of permit applicants, during the next few weeks while we are preparing substantive "*Rapanos/Carabell* guidance." The primary exception to that general rule might be for any individual Section 404 permit covering activities outside the traditional navigable waters where permit issuance is feasible during the next few weeks, but where special conditions of the proffered permit would require the permittee to provide compensatory mitigation, and where that permittee might believe that some or all of his activities are now not subject to regulation under CWA Section 404 because of the *Rapanos/Carabell* decision, and thus that the mitigation requirements of the permit are excessive or unnecessary. In such a circumstance the Corps should inform the permit applicant that he or she has a number of options, as follows: The permit

applicant can accept and sign the proffered permit now, with its existing terms and conditions; or the permit applicant can ask for a delay in the issuance of the permit until the Corps District has received substantive Rapanos/Carabell guidance from Corps Headquarters, so that the amount of required compensatory mitigation can be re-evaluated (if appropriate) based on that new guidance.

For Corps CWA Section 404 permit authorizations made during the next few weeks for activities outside the traditional navigable waters pursuant to either a general permit or a standard individual permits, where the permittee later concludes that the terms or conditions of that permit authorization are inappropriate in light of the Rapanos/Carabell decision, that permittee can ask the Corps to modify the terms or conditions of that permit to rectify the matter subsequent to the issuance of the anticipated EPA/Army substantive Rapanos/Carabell guidance.

Corps Headquarters POCs are Mark Sudol and Russ Kaiser (Regulatory COP), Lance Wood (CCE), and, for litigation and enforcement matters, Martin Cohen (CCL).

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EPA INTERIM GUIDANCE

Initial Guidance on Supreme Court's Wetlands Decision

As you know, on June 19th the Supreme Court issued a decision in the consolidated wetlands cases. OGC, OECA, and OW are studying the opinions and do not yet have an Agency position on them. In the very near future, we intend to issue guidance on how the Agency should proceed in light of the decision. Until then, Agency personnel should not represent an Agency position on the effect of this decision on Clean Water Act jurisdiction in pleadings or in dealings with outside parties. Therefore, in situations that require taking a position on the scope of "waters of the US" under the Clean Water Act, e.g. briefs or other filings in judicial or administrative proceedings, you should defer action if possible. We recommend seeking an extension for any briefs due in administrative or judicial cases in the near term. By way of example, the U.S. sought an extension of 60 days for a brief in *United States v. Cundiff*, Nos. 05-5469 and 05-5905 (6th Cir.) due June 21st. Ongoing work in Clean Water Act cases, such as settlement negotiation meetings or inspections, should continue if that work does not require taking a position on the legal issue presented by the Supreme Court decision.

If you cannot defer action that requires taking a position on the scope of "waters of the U.S.," then call Susmita Dubey in OGC at (202) 564-5577, Tom Charlton at (202) 564-6960 (for civil cases) or J. T. Morgan (for criminal cases) at (202) 564-7684 in OECA. For program implementation issues that may involve taking positions regarding scope of jurisdiction, but do not directly involve ongoing enforcement actions or lawsuits yet are hard to delay, contact Donna Downing regarding the 404 program at (202) 566-1367 and Debora Clovis regarding the 402 program (202) 564-0739.