

BRIEFING PAPER

Scope of Federal Jurisdiction under Section 404 of the Clean Water Act

Issue or Request

The proposed repeal of Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, and relinquishment of the federal Section 404 authority to the United States Army Corps of Engineers (USACE) has resulted in questions regarding the scope of federal jurisdiction under Section 404. This paper will summarize the current status of federal Section 404 jurisdiction in general, and how this might apply in Michigan.

Background: Jurisdiction under Section 404 of the Clean Water Act

Section 404 of the Clean Water Act regulates placement of dredged or fill material in “Waters of the United States” including wetlands. The term, “Waters of the United States” is defined in federal regulations at 40 CFR §232.2. The scope of these federal regulations has been the subject of two highly publicized decisions in the United States Supreme Court.

- In 2001, in the *Solid Waste Agency of Northern Cook County v Corps (SWANCC)*, the Court ruled that isolated intrastate waters may not be regulated based solely on the presence of migratory birds. Some additional measure of interstate commerce must be used to justify regulation by the federal agencies.

Since the *SWANCC* ruling, federal jurisdiction over isolated waters and wetlands has depended upon a case-by-case finding of a connection to interstate commerce. Isolated wetlands and waters are those that are not connected to interstate navigable waters.

In January of 2003, the United States Environmental Protection Agency (USEPA) proposed rulemaking, following the *SWANCC* decision, that would have removed federal protection from extensive portions of waters of the United States as previously defined in federal regulations. The MDEQ submitted formal comments in response to the proposed rulemaking on April 16 2003, explaining the extent to which protection of isolated wetlands would be compromised. No formal rulemaking followed, but the federal agencies have continued to operate under interim guidance limiting jurisdiction over isolated wetlands and other waters.

- In 2005, in *Rapanos v. United States* and *Carabell v. United States (Rapanos)*, the United States Supreme Court failed to achieve a majority ruling regarding the scope of federal jurisdiction over wetlands adjacent to tributaries to navigable waters. In a fractured decision, four justices defined a set of legal tests regarding the scope of federal jurisdiction; a group of four justices dissented and defined different standards; and the ninth justice established yet a third standard, a portion of which has been referred to as the “significant nexus” test. A plurality was formed in remanding the *Rapanos* and *Carabell* cases for further consideration.

The response to *Rapanos* by the federal courts has been mixed; subsequent federal appellate court rulings have not clarified the situation. A December 9, 2008, Sixth Circuit decision *United States of America v Cundiff* includes the following statement regarding *Rapanos*:

In its short life, Rapanos has indeed satisfied any “bafflement” requirements. The first court to decide what opinion was controlling decided to ignore all of them and instead opted for earlier circuit court precedent which it felt was clearer and more readily applied. [citation omitted] The Courts of Appeal have not fared much better.

In *Cundiff*, the Sixth Circuit ultimately determined that the wetlands in question were under federal jurisdiction applying multiple legal tests.

The USEPA and the USACE issued a field guidance memo and an 85 page field *Instructional Guidebook* in June of 2007 to direct federal permit staff in making jurisdictional determinations following the *Rapanos* decision¹. This guidance summarizes the federal jurisdiction over non-isolated waters as follows.

The agencies will assert jurisdiction over the following waters:

- *Traditional navigable waters*
- *Wetlands adjacent to traditional navigable waters*
- *Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries flow year-round or have continuous flow at least seasonally (e.g. typically three months)*
- *Wetlands that directly abut such tributaries*

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- *Non-navigable tributaries that are not relatively permanent*
- *Wetlands adjacent to non-navigable tributaries that are not relatively permanent*
- *Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary*

The agencies will apply the significant nexus standard as follows:

- *A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all the wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters*
- *The significant nexus includes consideration of hydrologic and ecologic factors*

This decision-making process must be applied to each wetland site associated with a permit application (e.g. with each wetland crossing associated with a highway project). Application of this federal guidance has resulted in major, multi-month regulatory backlogs in states where it has been applied. As a result, the federal agencies recently issued guidance essentially allowing the permit applicant to waive their right to a jurisdictional determination, and to assume that federal jurisdiction exists in order to minimize delays.

Governor Jennifer M. Granholm has previously urged Michigan's Congressional Delegation to support amendment of the Clean Water Act to clarify the scope of federal jurisdiction (letters of September 26, 2003 and December 12, 2007). Her letters express concern that federal jurisdiction in other Great Lakes states will not be sufficient to protect interstate resources.

Scope of Federal Jurisdiction in Michigan

In light of the U.S. Supreme Court Decisions, and the current federal process for case-by-case determination of federal jurisdiction, it is impossible to evaluate the scope of Section 404 jurisdiction on a statewide basis. The USEPA has determined that Michigan's wetland law is consistent with federal law in that the state maintains jurisdiction over any wetland where the federal government is likely to assert jurisdiction on a case-by-case basis.

If the Section 404 Program is returned to the USACE, it is expected that – at a minimum – the USACE may require a detailed case-by-case determination of jurisdiction in the following

¹ Copies of federal guidance memos, additional explanatory documents, and the *Instructional Guidebook* are available at www.epa.gov/owow/wetlands/guidance/CWAwaters.html.

geographic areas, and would assert jurisdiction only based on specific legal findings in accordance with the *SWANCC* and *Rapanos* cases.

Isolated wetlands. The MDEQ has estimated that 930,856 acres, or 17 percent of the wetlands in Michigan, are not physically connected to lakes or streams². Federal jurisdiction over these wetlands would rely on an assertion of a connection to interstate commerce. Isolated wetlands include both relatively common habitat types and rare ecosystems types such as fens, bogs, and lakeplain prairies. The MDEQ provided information on species that would be impacted by loss of isolated wetlands, including reptiles and amphibians, in its previous comment regarding the *SWANCC* rulemaking.

Wetlands adjacent to non-navigable tributaries that are not relatively permanent.

According to an evaluation of the National Hydrography Dataset, 36 percent of the streams in Michigan are intermittent or ephemeral. Federal jurisdiction over wetlands that are adjacent to these streams would rely on a finding that the stream in question has a “significant nexus” with the downstream traditionally navigable waters. No analysis has been completed to determine what percentage of the State’s wetlands are adjacent to intermittent or ephemeral streams that do or do not have such a significant nexus.

Wetlands that are adjacent to, but do not directly abut, permanent non-navigable tributaries.

An unknown percentage of the streams that are adjacent to Michigan’s perennial streams may not meet this legal test, which will be based on a case-by-case analysis of the hydrologic connectivity between the wetland and the stream.

Wetlands adjacent to other isolated waters. There are 26,384 inland lakes and ponds in Michigan with no outlet³. Inland lakes or ponds that do not have an outlet connecting the lake to a navigable water would not be considered to be under federal Section 404 jurisdiction unless an interstate commerce connection is established. Examples of factors that have been used to establish interstate commerce include the use of the lake by individuals from another state, commercial boat rentals, and trapping of furbearing mammals; such decisions must be made by the federal agencies. If such an interstate commerce connection is not established, then wetlands adjacent to the lake would not be regulated.

Analysis

Given the current uncertainty associated with federal law, it is impossible to determine the quantitative scope of jurisdiction over wetlands in Michigan on a statewide basis. In those states where the federal agencies are the lead regulatory agencies, jurisdictional decisions are largely made on a case-by-case basis resulting in a significant degree of delay and uncertainty for permit applicants.

² See MDEQ comments to USEPA, dated April 16, 2003, in response to USEPA Advanced Notice of Proposed Rulemaking and Governor Granholm’s letter of September 23, 2003.

³ *Michigan Lakes and Pond*, C.R. Humphrys et al, 1965 as cited in MDEQ comments of April 16, 2003

In Michigan, it is anticipated that case-by-case jurisdictional determinations for the following categories of wetlands would delay permit processing. It is likely that the USACE would not protect all of these wetlands under the Clean Water Act.

- **Isolated wetlands not physically connected to lakes or streams.**
This category includes 930,856 acres, or 17 percent of Michigan's wetlands.
- **Wetlands adjacent to streams that are not relatively permanent.**
36 percent of Michigan's streams are intermittent or ephemeral. No estimate exists of the acreage of wetlands that would be impacted.
- **Wetlands that are adjacent to, but not directly abutting, relatively permanent streams.** The USACE must determine whether wetlands are "abutting" or "adjacent to" a perennial stream based on an evaluation of site hydrology. No estimate of the acreage of wetlands impacted exists.
- **Wetlands that are adjacent to isolated lakes and ponds.**
There are 26,384 isolated lakes and ponds in Michigan; wetlands adjacent to these ponds would be regulated only if an interstate connection were defined for the lake or pond.

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