

The Western Coalition of Arid States
W E S T C A S

Comments
Of
Western Coalition of Arid States

On

Clean Water Act Guidance to Implement the U.S.
Supreme Court Decision for *Rapanos* and *Carabell* Cases

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The Voice of Water Quality in the Arid West

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**Comments by WESTCAS on CWA Guidance to Implement the
U.S. Supreme Court Decision for *Rapanos* and *Carabell* Cases.**

I. Introduction

Since its conception in 1992, WESTCAS has had an interest in addressing issues associated with CWA jurisdiction and the adoption of appropriate water quality of standards in the arid west. The focus of WESTCAS concerns has been the inappropriate application of aquatic standards based on “wet” ecosystems to an “arid/dry” ecosystem.

For example, in 1994 WESTCAS successfully advanced amendments to the CWA concerning arid west water quality standards and jurisdictional issues. However, these amendments were not adopted. The recently completed Pima County “Arid West Water Quality Research Project”, overseen by WESTCAS and funded by an EPA grant (P.L. 103-327), when utilized by EPA in the development of water quality standards for the arid west, could alleviate some water quality standard concerns. In the meantime, appropriate determinations of CWA jurisdiction could actually correct problems caused by inappropriate standards.

WESTCAS filed an Amicus Curiae Brief before the Supreme Court in *Rapanos* and *Carabell*. WESTCAS argued that a “tributary should not be defined so broadly that it includes virtually all dry land.” Rather, tributary jurisdiction should be limited to waters inseparably bound up with navigable water. Further, we asserted that an overextended definition of “tributary” is not needed to protect navigable waters.

The Supreme Court responded positively to the arguments made by WESTCAS and others and clearly supported a change in CWA jurisdictional determinations by the Corps and EPA.

“The use of the definite article “the” and the plural number “waters” show plainly that § 1362(7) does not refer to water in general, but more narrowly to water “as found in streams,” “oceans, rivers, [and] lakes,” Webster’s New International

Dictionary 2882 (2d ed.). Those terms all connote relatively permanent bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Pp. 12-15.”¹

Justice Kennedy concurred, but elaborated by emphasizing:

“that a water or wetland constitutes ‘navigable waters’ under the Act if it possesses a ‘significant nexus’ to waters that are navigable in fact or that could reasonably be so made, *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 167, 172, 121 S. Ct. 675, 148 L. Ed. 2d 576 (*SWANCC*), but did not consider all the factors necessary to determine that the lands in question had, or did not have, the requisite nexus. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419, and *SWANCC* establish the framework for the inquiry here. The nexus required must be assessed in terms of the Act's goals and purposes. Congress enacted the law to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters,” 33 U.S.C. § 1251(a), and it pursued that objective by restricting dumping and filling in “waters of the United States,” §§ 1311(a), 1362(12).... Absent more specific regulations, the Corps must establish a significant nexus on a case-by-case basis when seeking to regulate wetlands based on adjacency to nonnavigable tributaries, in order to avoid unreasonable applications of the Act.”²

The Supreme Court found that EPA and Corps criteria for determining jurisdiction under the CWA were overly broad. They suggested that clarifying regulations be adopted. The Corps responded with this guidance.

Unfortunately, the guidance has failed to achieve clarification of the jurisdictional problems, especially as applied to the arid west. **A clear regulation consistent with the Supreme Court’s mandate is needed.**

¹ *Rapanos*, ___ U.S. ___, 126 S. Ct. 2208, 2208, 165 L. Ed. 2d 159, 164-65 (2006) (Scalia Plurality).

² *Id.* at ___, 2208, 166.

1. The Problem

a. Jurisdictional Determinations are taking longer and costing more.

- i. Applicants have experienced unreasonable delays in the 404 application cycle. Scalia noted that prior to *Rapanos*, an individual application took an average of 788 days to be approved, costing the applicant over \$250,000. Additional delays are being incurred now as the Corps of Engineers explore how to modify the 404 process.
- ii. “EPA and the Corps emphasized that wetlands jurisdiction decisions are not ‘fact-intensive and site-specific,’ with each jurisdictional decision made on a case-by-case basis.... While the guidance sets up an elaborate coordination procedure to ensure that a decision is reached in a timely fashion, few test cases have been heard since the guidance was issued.... When one participant asked if applicants can just accept the agencies’ jurisdiction and escape the burdensome and costly significant nexus test, the answer was no because the agencies need to document their decisions.”³ Applicants have no choice but to postpone or alter their building projects if they wish to proceed on a timely basis.
- iii. At a September 2007 meeting in Scottsdale with members of the National Association of Homebuilders and other interested stakeholders, the Corps representative for the Los Angeles District stated that four applications had been passed to the second stage of the application process in the previous

³ Calli Schmidt, *Regulator Discuss Post-Rapanos Wetlands Guidance*, Nation’s Building News, Sept. 24, 2007.

eighteen months. This creates serious delays for proposed construction projects in the booming West.

- iv. Applicants have received conflicting informal guidance from staff of the Corps of Engineers about what is necessary to meet the 404 requirements post-*Rapanos*. This is due to the ambiguity of the Guidance and uncertainty as to what Western waters are traditional navigable waters (TNWs). For example, the only TNW in Arizona is the Colorado River.

b. Current application of EPA/Corps guidance cause unintended consequences because of its ambiguity.

- i. State agencies are empowered to regulate isolated urban lakes; however, could the significant nexus test cause these lakes to be considered tributaries of navigable waters?
- ii. Wastewater treatments plants are required to conduct whole effluent toxicity testing for aquatic organisms on discharged effluent used to irrigate trees, where there is no possibility of aquatic life being affected by the discharge.
- iii. Delays in permit approvals are causing road projects to be canceled or rerouted at great additional expense.
- iv. Precedents on jurisdiction are being decided without stakeholders having an opportunity to participate.

c. The EPA needs to issue regulations, not guidance.

- i. Under the Federal Administrative Procedures Act, an agency is required to create a set of rules when making a statement of general or particular applicability and future effect designed to implement law or policy or

describe the practice requirements of a governmental agency. 5 U.S.C. § 531(4). As the Guidance is intended to describe the practical requirements of permit applications under the Clean Water Act, rulemaking is required by statute.

- ii. In the *Rapanos* decision, Chief Justice Roberts (concurring) and Justice Stevens (dissenting) called attention to the Corps' prior attempts at rulemaking and noted the need for regulations to establish "some notion of an outer bound to the reach of their authority.... What is unusual in this instance, perhaps, is how readily the situation could have been avoided." *Rapanos*, 126 S. Ct. at 2236.
- iii. The guidance is not user friendly. As a result, builders have resorted to designing their projects around the CWA limits rather than delay construction for years. This results in possible unnecessary costs without adding value.
- iv. *Rapanos* identifies only traditional navigable waters (§ 328.3(a)(1)) as waters of the United States. This implies that the other waters identified in the CWA are no longer within that definition. The agency needs to revisit their underlying assumptions about water classifications to ensure they are within the *Rapanos* boundaries.

2. Helpful aspects of the Guidance

- a. The Corps provides clear definitions of traditional navigable waters and relatively permanent waters (RPWs). Relatively permanent waters are restricted to waters that flow through a tributary to a TNW for at least 90 continuous days of the year. (Guidebook, P. 21)

- b. The guidance recognizes that, generally, water channels created through erosion or for the purpose of draining land are not tributaries and do not have a significant nexus to traditional navigable waters. (Guidebook, P. 54)

3. Factors to be Considered in the Final Guidance Rule Drafting

a. Federal jurisdiction under CWA is not the sole means available for environmental protection; loss of CWA jurisdiction over dry land does not abandon the land to pollution.

- i. Federal programs including the Clean Air Act, RCRA/HSWA, Safe Drinking Water Act, CERCLA, Endangered Species Act, and FIFRA will continue to protect the environment.
- ii. States have jurisdiction over waters of the state, and are responsible for maintaining their natural resources. States have primary control over groundwater and surface waters without a significant nexus to Traditional Navigable Waters.
- iii. Many states have substantial regulatory programs in place – i.e. Arizona’s Aquifer Protection Program or California’s Regional Boards waste discharge requirements.

b. Unclear treatment under current guidance.

- i. The Guidance does not explicitly state that the jurisdictional definitions of the CWA apply to both Section 402 and 404 permits. Section 301 of the CWA prohibits all discharges of pollutants into “navigable waters” unless in compliance with Section 402 or 404. 33 U.S.C. § 1311. Section 502 of the Act defines “navigable waters” as “waters of the United States, including the

territorial seas.” 33 U.S.C. § 1362. Permits available under Sections 402 and 404 are both exceptions to the general prohibition on release of pollutants in Section 301. Numerous courts have applied the same jurisdictional requirements on the activities covered under Section 402 and 404.

- ii. The guidance does not offer criteria to determine what qualifies as a biological, chemical, or physical ‘significant nexus’ as required by *Rapanos*. While the guidance contains specific examples of when a significant nexus is present, it does not identify factors to be weighed by examiners.
- iii. While insubstantial, speculative, or minor flows are insufficient to establish a significant nexus, “quantity and regularity of flow in the adjacent tributaries” is a determinative factor. Rules need to be established for how much flow and how long the flow must continue to qualify as a significant nexus.
- iv. The rules should create separate tests for tributaries based on volume of flow (annually or average) and proximity to navigable water (where flow goes to TNW).
- v. There is no discussion of man-made structures that create wet ecosystems (urban lakes) in a previously dry area.
- vi. Similarly, the guidance does not address treatment for clients who create dry land in an existing water channel (New Orleans levees).

c. Inconsistent treatment of wet and arid ecosystem water features.

- i. The guidance notes that “[e]phemeral waters in the arid west that are tributaries may have a significant nexus to a TNW” if they serve as a transitional area and affect the biological or physical integrity of a TNW.

(Guidebook, P. 54). As an example, the guidance suggests that the mere act of transporting sediment following a storm is sufficient to establish a physical significant nexus. This implies that different standards will be used to evaluate applications in arid Western states. This does not create a rational difference between uplands and dry washes.

- ii. The RPW seasonably predictable flow guideline does not take into account the unpredictable rainfall in arid regions. A streambed can remain dry for months between storms.
- iii. An intermittent arid stream that does not contain aquatic life should not have to participate in environmental testing and treatment designed to support non-existent fish as if this was a perennial stream.

4. Unique physical challenges faced by residents of the ‘arid West’.

- a. Pima County receives approximately eleven inches of rainfall each year. *Pima County Regional Flood Control District*.
- b. The Arizona Navigable Stream Adjudication Commission found that the Santa Cruz River is not a navigable body of water as of February 14, 1912. The Commission noted that there was no historic evidence that the lower Santa Cruz River ever supported a perennial flow or was able to support commercial traffic or fishing. Instead, the river “flows/flowed primarily in direct response to precipitation and seasonal storms.” (Commission Report, P. 28). Paradoxically, the Rillito River, a tributary of the Santa Cruz River, is featured in the Guidance as an example of a non-RPW that flows directly into a TNW and thus falls under the CWA. (P. 24) This is not consistent with the Commission’s decision, nor the physical facts.

5. Inappropriate Findings of U.S. Jurisdiction

According to the guidance, “[a] significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the chemical, physical, and/or biological, integrity of a [Traditional Navigable Water].”

a. Ed Pastor Kino Environmental Restoration Project (KERP)

- i. We do not understand how this project could be considered as being in jurisdictional waters after *Rapanos*. This project was built under a 404 permit and is maintained under a continuing 404 permit. It has also been required to obtain a 402 permit for the addition of reclaimed water. This reclaimed water is pumped from a reservoir in the basin for the purpose of irrigation of terrestrial plants and turf.
- ii. The purpose of this restoration project was two-fold: terrestrial habitat has been created out of a mud-lined retention basin located in a storm drainage area and captured water is used to irrigate the Kino Sports Complex, Kino Hospital, and Ajo Way medians in place of ground water. The KERP Project contains a series of man-made lined ponds and water courses for storage and disposal of storm water. The recaptured water is augmented with reclaimed water during the Arizona dry season. All the KERP ponds are lined with 40 mil HDPE liners, while the water courses are lined with a reinforced gunite shell with embedded cobbles, HDPE lines, or soil cement. The project designers created a riparian habitat of native plant life to attract migrating birds and mammals. The project has an overflow basin outlet to the reservoir; the project design specifies that discharge will occur only during

100-year flood events. Is the probability of discharge every 100 years to the Colorado River over 300 miles away a significant nexus?

- iii. The overflow is discharged to a cement-lined channel that flows into the Santa Cruz River, a dry river bed. The Santa Cruz River drains to a playa which indirectly drains into the Gila River 12 miles southwest of Phoenix. The Gila River is also substantially dry, except for storm events. The water must travel over 200 miles along the Gila River before reaching the TNW of the Colorado River near Yuma, Arizona.
- iv. Despite these insignificant contacts, Pima County was required to obtain a 404 and 402 permit. The project must conduct bio-monitoring, chlorination and de-chlorination of the reclaimed water, at an annual cost of \$800,000. Discharge leaves the project only in 100-year storm events; any runoff would be a result of storm water overflow from the retention basins. Is there a significant biological, chemical, or hydrological connection to any water of the U.S., as required by *Rapanos*?

b. Avra Valley Wastewater Treatment Facility

- i. This facility has been required to obtain both 404 and 402 permits. It is built in what has previously been considered jurisdictional waters because virtually the entire eight-mile-wide valley has been characterized as jurisdiction.
- ii. The Avra Valley Wastewater Treatment Facility has five discharge outfalls to the Black Wash Spray Fields, which are used to irrigate a bosque of native mesquite trees. The spray fields drain into the Black Wash, which is a tributary to the ephemeral Brawley Wash. The Brawley Wash, which is dry

at the Black Wash terminus except for storm events, eventually drains into the lower Santa Cruz River. The Santa Cruz River drains to a playa, which may discharge to the Gila River. The Gila River ultimately discharges into the Colorado River near Yuma. The flow path moves through six different USGS watersheds, covering almost 300 miles of arid desert. The facility was determined to be a tributary of navigable waters and was required to obtain 404 and 402 permits. Additionally, whole effluent toxicity testing is required for spray irrigation of a Mesquite Bosque.

c. Mt. Lemmon Wastewater Treatment Facility

- i. This facility is required to have a 402 permit for a discharge to a pine tree and fern meadow at the top of a 9,000 foot high mountain. The permitted flow is limited to 12,500 gallons per day, based on a monthly average. The Mt. Lemmon project has three discharge points along Oracle Ridge. These discharge points flow into a ditch adjacent to an unnamed dirt road and then pass into a series of unnamed washes along Alder Canyon. After 18.4 miles, the unnamed washes flow into Alder Wash, which intersects with San Pedro River six miles downstream. The San Pedro, which has run dry in 2005 and 2006, drains into the Gila River more than 40 miles later. The Gila eventually intersects with the Colorado River near Yuma, over 200 miles downstream. The total path from the treatment facility to the Colorado River is mostly dry except for storm events.

d. Pima County Dept. of Transportation's construction of rural roadways

- i. Pima County Department of Transportation constructed a 5.25-mile two lane dirt road to provide access to a rural subdivision. During the application process, the road was found to cross 38 jurisdictional washes. One wash (Mendoza) was named; the remaining 37 were unnamed ephemeral washes. How can these washes be considered anything more than water channels created through erosion for the purpose of draining land? All of the washes originally drained to Brawley Wash; ranching activities has created several stock ponds and berms on the southern end of the project. These features prevented flow from the mountains from draining to the Brawley Wash. The Corps included the southern washes in the jurisdiction finding, although they were not connected to Brawley wash. Several of the washes were only one foot wide – 14 were less than five feet wide. 20 of the jurisdictional washes exhibited only the “Sandy Bottom” channel characteristic. Permanent loss, due to installation of corrugated metal pipe culverts and rip-rap outlets at 6 washes, was limited to 0.14 acres total. One culverted crossing consisted of 0.104 acres of permanent loss, triggering the need to obtain a Nationwide Permit No. 14. The permitting process, from initial data collection to receipt of the 404 permit, took approximately 14 months, and cost approximately \$150,000.
- ii. Additionally, during the early permitting process, it was determined that a total of three Pima Pineapple Cactus (PPC) were located in the vicinity of the project. None were going to be impacted by the installation of the road, but during consultation with the United States Fish and Wildlife Service

(USFWS), USFWS indicated that they believed that the entire project area was PPC habitat. As a condition of the consultation with the Corps of Engineers, USFWS required that DOT purchase 16.5 acres of PPC habitat from the County's PPC bank.

e. North San Jacinto Water Supply Pipeline

- i. San Jacinto Eastern Municipal Water District installed a new water distribution line along Ramona Expressway, a two lane highway. The pipeline was installed parallel with the highway, in a graded shoulder about eight feet off the edge of the roadway. Along the alignment there were five culvert crossings under the highway. These culverts facilitated the flow of rainwater off both the roadway and the slightly elevated agricultural fields on the south side of the highway, directing the flow under, versus over, the road surface. Approximately one-half mile to the north is the San Jacinto River, which in this reach is dry 95 percent of the time. Between the highway and river are additional agricultural fields and a dairy farm. Adjacent to the southern opening of each culvert, vegetation was growing due to those locations being the low points in the road shoulders. Irrigation runoff, and runoff from the highway kept those areas moist (not flooded) enough to promulgate the growth of this vegetation. It was alleged by the Corps that these areas, perhaps 15 feet x 20 feet each, were jurisdictional due to their nexus with the San Jacinto River. In reality, it would take a 25 to 50 year storm event for water from these areas to co-mingle. This would probably be

due more to the flooding of the river to reach the highway, rather than highway runoff reaching the river. A nationwide permit was required.

f. Antelope Road Trunk Sewer

- i. A sewer line was installed within the alignment and in the traveled way of three county roads, two of which were paved. An unnamed USGS blue-line stream crossed the roads in four separate places. The terrain was fairly flat so the stream courses flowed across the roads. Three of the crossings were upon a paved road, one was unpaved. Due to new housing developments in the area, the streams were cutoff from their original source and now only carry urban runoff to an adjacent field and ultimately to an earthen ditch along a freeway. The ditch eventually connected to Salt Creek 2.2 miles away, which made its way to the San Jacinto River, another 3 miles away. Again, the stream is dry 99 percent of the time; the creek and the river are dry 90 percent of the time. Nationwide permits were required to trench within the roads across the points where the streambed intersected (about 20 feet each).

6. Recommendations

a. Issue regulations to provide a clear legal framework for the application process.

- i. As noted above, the Administrative Procedures Act requires rulemaking when an agency is making a statement to describe practice regulations. 5 U.S.C. § 531(4).

b. Create a temporary application procedure while the rulemaking is in progress.

- i. This would allow states and developers to continue development, rather than subjecting them to further years of delay.

c. Simplify the “significant nexus” test.

- i. To reduce costs to the individual applicants, the Corp of Engineers should create a simple test that would tell builders if their project impacted federal waters.
- ii. It could be as simple as identifying traditional navigable waters and their relatively permanent tributaries on a map for each region, and identifying a bright-line rule for what factors will be used in significant nexus determinations.
- iii. The Corps should consult with experts in the fields of biology, chemistry, and hydrology to establish a scientific basis for determining whether a biological, chemical, or hydrological significant nexus is present.

d. Permit third parties affected by the jurisdictional determination to appeal the decision.

- i. The Corps should create an appeal process for third parties that have a property interest in a jurisdictional determination (i.e. discharges, land owners, recreational users).