



**DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
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WASHINGTON DC 20310-0108**

28 AUG 2015

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Chairman Inhofe:

Thank you for your July 6, 2015 and July 27, 2015 letters regarding the Environmental Protection Agency (EPA)/Department of the Army ("the agencies") final Clean Water Rule ("the rule") defining the scope of Clean Water Act jurisdiction. The agencies developed the rule in response to requests from a broad range of interests nationwide who recognized the urgent need to make the process of identifying waters subject to the Clean Water Act easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of our nation's water resources. Implementing the rule will reduce delays in making jurisdictional determinations, save time and money for permit applicants, and improve protection for clean water on which all Americans depend for public health and a strong economy.

Your letters seek field observations relied upon by the Army for certain statements in the Technical Support Document and the rule. The letters suppose that there are specific field observations in the administrative record that correspond to each statement. In fact, rather than relying on individual field observations, the rule was the product of years of collaborative decision-making, taking advantage of decades of peer-reviewed scientific studies and the EPA and the Army's cumulative experiences in administering the Clean Water Act. The result is a rule that will be more efficiently implemented in the field and that will give greater clarity and certainty to the regulated community.

You also asked about "the difference between a resident and non-resident migratory bird," as well as whether the Army has ever sought to establish jurisdiction over water based on waterfowl or mammal excretions or based on the attachment of insects and seeds to birds or mammals. Additionally, you inquired as to whether the Army has ever sought to establish jurisdiction over geographically isolated waters "based on infiltration of that water into the ground, the allegation that the water reaches a groundwater aquifer, the allegation that the aquifer recharges surface water at some other location, and the allegation that the surface water that obtains part of its baseflow from this groundwater recharge eventually reaches some navigable water."

Regarding your question about migratory birds, the passage cited in your letter from the preamble to the rule refers to “[r]esident aquatic or semi-aquatic species present in the case-specific water and the tributary system,” such as “aquatic birds.” Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,094 (June 29, 2015). Such “[r]esident aquatic or semi-aquatic species” are distinguished from “species such as non-resident migratory birds,” which “do not demonstrate a life cycle dependency on the identified aquatic resources and are not evidence of biological connectivity for purposes of this rule.” *Id.* Thus, the passage distinguishes between those birds that reside in a case-specific water and tributary system and those migratory birds that do not reside in a case-specific water and tributary system. The relevant factors for demonstrating biological connectivity are described in the preamble. *Id.*; see also Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States* (“2008 Rapanos Guidance”) at 6, available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf (“Migratory species, however, shall not be used to support an ecologic interconnection.”).

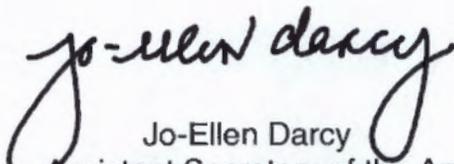
Regarding your question about the impact of birds and mammals on jurisdictional determinations, to the best of my knowledge, since the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Army has not established jurisdiction over an isolated water body based solely on the presence of migratory birds as an indicator of interstate or foreign commerce. However, while not dispositive of jurisdiction, the presence of birds and mammals—and indicators of their presence, such as excretions, insects, or seeds—could be noted by practitioners in the field as one factor among many that demonstrates an ecological interconnection with jurisdictional waters, which in turn may support a finding of jurisdiction based on significant nexus to traditional navigable waters. The agencies’ 2008 Rapanos Guidance acknowledged the “science-based inference” that wetlands that are reasonably close to other waters of the United States “have an ecological interconnection with jurisdictional waters.” 2008 Rapanos Guidance at 5-6. The agencies noted that “such implied ecological interconnectivity is neither speculative nor insubstantial,” because “species, such as amphibians or anadromous and catadromous fish, move between such waters for spawning and their life stage requirements.” *Id.* at 6. Additionally, the 2008 Rapanos Guidance observed that “[t]ributaries and their adjacent wetlands provide habitat (e.g., feeding, nesting, spawning, or rearing young) for many aquatic species that also live in traditional navigable waters,” and instructed the agencies to “evaluate ecological functions performed by the tributary and any adjacent wetlands which affect downstream traditional navigable waters,” including “habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters.” *Id.* at 9, 11. Thus, the presence of excretions, insects, or seeds could factor into a determination of the interconnectedness of a water to downstream navigable waters, but jurisdiction could not be based on the presence of excretion, insects, or seeds alone.

Regarding your question about isolated waters, to the best of my knowledge, since the *SWANCC* decision, the Army has not asserted jurisdiction over any isolated, intrastate, non-navigable waters. See 2008 Rapanos Guidance at 4 n.19; 68 Fed. Reg. 1995, 1996 (Jan. 15, 2003). You also asked about how the Army determines “[w]hat makes a nexus provided by a function sufficient.” The agencies discussed that question at length in the rule’s preamble. See Clean Water Rule, 80 Fed. Reg. at 37,060-73. Finally, you asked about the *SWANCC* decision’s impact on the rule. In drafting the rule, the agencies considered the limits of Clean Water Act jurisdiction as interpreted by the Supreme Court. See, e.g., *id.* at 37,056-57 (discussing *Riverside Bayview Homes*, 474 U.S. 121 (1985), *SWANCC*, and *Rapanos v. United States*, 547 U.S. 715 (2006)). The rule is wholly consistent with all of the Supreme Court case law interpreting the Clean Water Act, including the *SWANCC* decision.

I have also received a July 16, 2015 letter from you. In that letter you requested “all communications or documents, electronic or otherwise, sent to [me] or [my] office by employees of the Corps of Engineers of [sic] the Office of the Army General Counsel between ... November 14, 2014 and ... May 27, 2015, containing comments or concerns regarding the revisions to the regulatory definition of ‘waters of the United States.’” Because of the voluminous number of records requested and considerations related to ongoing litigation, the less-than-one-month deadline suggested in your letter could not have been met. I have personally directed my staff to prepare the appropriate communications and documents for your office with utmost speed.

The Army hopes to respond to these requests in the most helpful manner possible, while respecting the ongoing legal challenges. Please contact me if you have questions, or your staff may contact Let Mon Lee of my staff at (703) 614-3977.

Very truly yours,


Jo-Ellen Darcy
Assistant Secretary of the Army
(Civil Works)