administrative law

# Michigan's 404 Program

By Brian J. Considine

## How Will *Rapanos* Affect Us?

**FAST FACTS**

Michigan is one of two states authorized to administer its own wetland permitting program under Section 404 of the Clean Water Act.

If the EPA objects to or requests conditions on a wetland permit application proposing certain types of filling activity, the MDEQ cannot issue a permit without satisfying the EPA's conditions or objections.

In light of the United States Supreme Court's decisions in *Rapanos*, the EPA and Corps of Engineers have released interim guidance that encourages agency personnel to refrain from representing an agency position on the *Rapanos* decision and to "defer" action until more formal guidance has been issued.

**MICHIGAN IS ONE** of two states (the other being New Jersey) that has assumed administration of Section 404 of the Clean Water Act (CWA).[1] In comparison to other states that have separate state and federal wetland permitting programs, Michigan's assumption of the 404 program streamlines the permitting process for property owners in Michigan.

However, as a result of the Supreme Court's recent decision in *Rapanos,*[2] federal and state regulators are scrambling to figure out its impact on their respective wetland programs. The United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) have jointly issued interim guidance directing their agents and districts on what steps to take in light of *Rapanos,* and a final guidance document is in progress.

This article describes Michigan's 404 Program and discusses possible effects of the *Rapanos* decision on the Michigan Department of Environmental Quality's (MDEQ's) administration of the 404 program.

## Federal Regulation of State-Administered 404 Programs

The Clean Water Act gives the Corps the authority to control the discharge of dredged or fill material into navigable waters.[3] CWA § 404(g) allows states to administer the 404 permitting process if the EPA approves of the state program pursuant to CWA § 404(h). Further, states retain the right to implement their own regulations controlling the discharge of dredge or fill materials into navigable waters within that state; however, those regulations do not affect the Corps' ultimate authority over navigation.[4]

The CWA also sets forth the specific steps for processing wetland permit applications in a state-administered 404 program. Each permit application received by the state must be sent to the EPA.[5] The regulations, on the other hand, provide that the state need only provide EPA with copies of public notices.[6] After receiving the application, the EPA has 10 days to distribute copies of the application to the Corps and Fish and Wildlife Service.[7] If the EPA wants to comment on the application, the EPA must notify the state of its intent to provide comments within 30 days after receiving a copy of the public notice.[8] The EPA then has 90 days after receiving the state's public notice (60 days after submitting notice to the state) to submit its comments to the state.[9] *If the EPA has notified the state that it intends to comment, the state* ***cannot*** *issue a permit to the applicant until after it receives the comments or after the 90th day, whichever is first.*[10] If the EPA objects to the issuance of the permit (or requests conditions), the state cannot issue the permit until the objection has (or conditions have) been satisfied.[11]

Within the 90-day period after receipt of EPA's objections, two actions can be taken: (1) a public hearing can be requested[12] or (2) if no public hearing is requested, the state must either issue a permit satisfactory to the EPA or notify the EPA of its intent to deny the permit.[13] If a public hearing is held and the EPA submits a notification to the state that it is not withdrawing its objections, the state must, within 30 days of the EPA's notification, either issue a permit satisfying the EPA's objections or notify the EPA of its intent to deny the application.[14] *If the state neither issues a permit consistent with EPA's objections nor denies a permit within the required 90-day period after EPA objects, the Corps processes the application.*[15] Once the Corps has jurisdiction, the EPA cannot withdraw its objections to return jurisdiction to the state.[16]

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## Michigan's 404 Program

The EPA approved Michigan's wetland permitting program on October 16, 1984.[17] As part of the approval process, Michigan was required to enter into a memoranda of agreement with the EPA and Corps setting forth state and federal responsibilities for permitting administration and enforcement.[18] Michigan entered into the memorandum of agreement with the EPA (MOA) on December 9, 1983 and with the Corps (Corps MOA) on April 2, 1984. These MOAs were incorporated into the state's permitting program pursuant to 40 CFR 233.70. The EPA MOA provides, in pertinent part:

> The US EPA, US Fish & Wildlife Service (FWS), and the Corps of Engineers (Corps) shall, pursuant to Section 404(j) of the CWA, review each permit application received by MDNR [now the MDEQ] except for those categories of discharges for which such review has been waived in accordance with Section 404(k) of the CWA.[19]

In addition, the EPA waived review of all permit applications in Michigan except those involving certain categories of discharges.[20] The EPA expressly reserved the right to review the following types of wetland filling activity: major discharges of dredged or fill material as defined in the MOA, discharges authorized by general permit, discharges into critical areas established under state or federal law, and discharges that may affect waters of a state other than Michigan. The EPA MOA defines "major discharges of dredged or fill material" very broadly and includes, among other types of discharges, "wetland fills involving more than 10,000 cubic yards of material."[21]

Similarly, the Corps MOA sets forth the Corps' jurisdiction over certain waterways in Michigan and the permitting process to be followed. Paragraph III(A) provides, in pertinent part:

> All waters within the State of Michigan shall be regulated by DNR [now the DEQ] as part of this program OTHER THAN those waters which are presently used, or are susceptible to use in their natural

condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including wetlands adjacent thereto.

Like the EPA, the Corps has waived the right to review MDEQ permits except for discharges that may affect navigation in navigable waters.[22] The Corps MOA also establishes a joint permitting process for fills intended to take place in a navigable water that requires both a state permit and a federal permit under Section 10 of the Rivers and Harbours Act.[23]

## The *Rapanos* Decision

The *Rapanos* decision(s) established two (fundamentally different) tests for establishing federal jurisdiction and, according to the Department of Justice, the federal government can rely on either test.[24] Justice Scalia's opinion presented an entirely new theory of federal jurisdiction—that an area is regulated as a wetland only when there is a continuous surface water connection to a water of the United States.[25] Therefore, under Scalia's test, the determining factor is whether the wetland is connected to a continuously flowing channel of water. Justice Kennedy agreed that the Corps' rules for determining jurisdiction were overly broad, but argued that where wetlands are adjacent to non-navigable waters of the U.S., the government must show, on a case-by-case basis, that there is a "significant nexus" between the wetland and the "adjacent" stream or channel.[26] According to Kennedy, wetlands possess a "significant nexus" if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.[27]

## Real World Application Processing and the Effect of *Rapanos*

The number of permit applications sent by the MDEQ to the EPA for review each year is fairly small—only 2 percent according to MDEQ 404 Program Coordinator Peg Bostwick—and the balance is processed by the MDEQ.[28] When applications are received, they are reviewed by the MDEQ's Permit Consolidation Unit to determine, among other things, if the proposed projects fall within one of the categories identified in the MOA. If so, they are forwarded to the EPA. This step of the application process will not be affected by *Rapanos,* according to the program coordinator. Rather than take on the burden of determining federal jurisdiction in light of *Rapanos* for each application falling within the MOA, the MDEQ is leaving that decision to the EPA.

The EPA and the Corps, however, have issued joint interim guidance in light of *Rapanos* that affects their respective administration of 404 permits.[29] The Corps guidance explains that the tests relied on and facts documented will change to ensure that jurisdictional determinations will reflect the Supreme Court's *Rapanos* decision. The guidance further advises that, until more formal guidance is issued, Corps personnel should "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."[30]

The EPA guidance directs agency personnel "not to represent an Agency position on the effect of this decision on Clean Water Act jurisdiction in pleadings or dealings with outside parties" and that "in situations that require taking a position on the scope of 'waters of the U.S.' under the Clean Water Act, e.g. briefs or other filings in judicial or administrative proceedings, you should defer action if possible." As of the date of this article, neither EPA nor the Corps has issued more formal guidance; however, EPA personnel expect it to be issued very soon, perhaps by the time this article is published.

Although EPA Region V personnel cannot make any statements at this time regarding the effect of *Rapanos* on Michigan's 404 program, the *Rapanos* decision and the guidance are likely to create additional bottlenecks in EPA's application review process. As explained above, the EPA must adhere to certain deadlines. Once it objects or recommends conditions to a permit, the MDEQ arguably has between 91 and 180 days[31] from the date the EPA receives notice of an application within which to issue a permit satisfactory to EPA or deny it. However, the deadlines that the MDEQ must follow pursuant to state law do not mesh with the federal deadlines that the EPA must follow. In Michigan, if the MDEQ does not request additional information from the applicant within 30 days after the application is submitted, pursuant to MCL 324.1301(f)(viii) and 1307(4), the MDEQ has 90 days from the time the application is administratively complete (120 days from submission of the application) to grant or deny an application. If the MDEQ does not grant or deny the application within this time period, the permit is automatically granted by statute. According to Sue Elston, Wetland Coordinator of EPA Region V, the EPA attempts to work within the MDEQ's timeframes; however, at times it can be difficult to do so when the EPA is seeking comments from the other federal agencies.[32]

Thus, even in the absence of *Rapanos* and the guidance, an applicant whose application is being reviewed by the EPA faces a significant timing hurdle. If the EPA takes the full 30 days to issue its notice to MDEQ that it is going to comment on an application and issues its objection or recommendation for conditions at the end of the 90-day period in 40 CFR 233.50(e), there is a potential that a consultant/applicant will have only 30 days to resolve the EPA's objection before running up against the MDEQ's 90-day processing period deadline. An applicant can request an extension of the MDEQ processing period deadline, but by no more than 20 percent (18 days).[33] Consultants and applicants frequently are frustrated by the difficulty of trying to negotiate with the EPA and MDEQ within this timing constraint and, as a result, have to make the difficult decision to withdraw a permit application.

After the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers (SWANCC),*[34] EPA Region V personnel examined applications more closely to determine if the wetlands involved were "isolated" on the basis of the holding in that case. Thus, it is likely that the EPA will conduct a similar, if not more intensive, review of applications in light of *Rapanos.* Consultants and applicants should expect the timing constraints of the application process to continue or to become even more pronounced in light of *Rapanos.* Given that the significant nexus test requires a showing that a wetland must affect the adjacent receiving water's chemical, physical, and biological properties, applicants may find themselves with even less time to respond to the EPA's comments while the EPA decides if it has jurisdiction. In addition, because of its recommendation to defer action, the interim guidance could potentially disrupt the timing of the EPA's review of an application even further.

## Recommendation to Applicants/Consultants: Look Before You Leap

Despite the downsides to the *Rapanos* decision, there is potentially a significant benefit to applicants and consultants. Although there is no administrative appeals process to officially contest the EPA's determination of jurisdiction, just as with the *SWANCC* decision, the federal government's jurisdiction over a particular wetland that falls within the MOA is subject to debate, and the EPA will likely be reviewing Michigan applications to see if there is jurisdiction under the significant nexus test. Applicants and consultants should be encouraged to test the EPA's assertion of jurisdiction by hiring legal counsel before filing an application with the MDEQ, especially when it involves a project covered by the MOA. It is too often the case that consultants file applications with the MDEQ seeking authorization to fill wetlands under Part 303 without the benefit of review by an experienced attorney. Consultants often make unsupported assertions in wetland delineations and the applications regarding federal jurisdiction without any formal legal analysis of the issue. Such statements have absolutely no value to the applicant, but rather limit an applicant's ability to contest jurisdiction at a later date. Statements regarding federal jurisdiction should not be included in an application without confirmation by an attorney who specializes in the area.

With the *Rapanos* decision, applicants have a better opportunity to argue against federal jurisdiction in a permit application that falls within the MOA. Working with legal counsel, consultants should investigate whether there is any evidence a wetland has a sufficient biological, physical, or chemical effect on an adjacent water body to constitute a significant nexus. If such evidence exists, a carefully summarized legal argument showing that federal jurisdiction does not exist should be included in the application. If the EPA selects the application for review, there is a possibility that the carefully crafted legal argument could persuade the EPA to decline commenting on it or to state that there is no federal jurisdiction. Thus, applicants can avoid having to significantly modify their applications to satisfy the EPA's objections. Even if the EPA comments on the application, the applicant can request that the EPA justify its basis for jurisdiction under the significant nexus test or submit a Freedom of Information Act request for all the documentation EPA relies on in supporting its jurisdiction. If the EPA's justification is weak and the applicant has a strong case, the applicant might succeed in getting the EPA to withdraw its comments. At the very least, the jurisdictional argument in the application provides a legal basis for challenging the federal government's assertion of jurisdiction after the permit is issued. ◆

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**Footnotes**

1. 33 USC 1344 *et seq.*
2. *Rapanos v United States,* 547 US ____; 126 S Ct 2208 (2006).
3. CWA § 404(a).
4. CWA § 404(t).
5. CWA § 404(j).
6. 40 CFR 233.50(a)(1).
7. 40 CFR 233.50(b).
8. 40 CFR 233.50(d).
9. 40 CFR 233.50(e).
10. 40 CFR 233.50(d).
11. 40 CFR 233.50(f).
12. 40 CFR 233.50(g).
13. 40 CFR 233.50(i).
14. 40 CFR 233.50(h)(2).
15. 40 CFR 233.50(j).
16. *The Friends of the Crystal River v US EPA,* 35 F3d 1073 (CA 6, 1994).
17. 49 FR 38947-01 (October 2, 1984).
18. 40 CFR 233.13 and 233.14.
19. EPA MOA at ¶ 3.
20. *Id.* at ¶ 4.
21. *Id.* at ¶ 5(c).
22. Corps MOA at ¶ X(A)(2).
23. *Id.* at ¶ IV(A).
24. Statement of Stephen Samuels, U.S. Department of Justice, International Wetlands Symposium, August 28, 2006, Traverse City, Michigan.
25. *Rapanos, supra,* 126 S Ct at 2226.
26. *Id.* at 2248–2249.
27. *Id.* at 2248.
28. Telephone interview with Peg Bostwick, Michigan Department of Environmental Quality (September 21, 2006).
29. Corps/EPA Interim Guidance, July 5, 2006.
30. *Id.*
31. The timing can be longer if a hearing is held and considering time for mailing.
32. Telephone interview with Sue Elston, Region V, United States Environmental Protection Agency (September 26, 2006).
33. MCL 324.1307(1).
34. *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers et al.,* 531 US 159; 121 S Ct 675 (2001). The Supreme Court in *SWANCC* struck down the Corps' "Migratory Bird Rule," which the Corps relied on to regulate certain isolated wetlands on the basis that they provided habitat for migratory birds.