

**CHIEF OF ENGINEERS  
ENVIRONMENTAL ADVISORY BOARD  
WASHINGTON, D.C. 20314-1000 (CECW-P)**

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11 August 2006

Lieutenant General Carl A. Strock  
Chief of Engineers  
441 G Street, NW  
Washington, D.C. 20314-1000

Dear General Strock,

The EAB is greatly concerned with the potential implications of the recent US Supreme Court ruling in *Rapanos/Carabell*. As a leader in Integrated Water Resources Management, the Corps must provide guidance that provides clear direction to ensure that wetland types and functions are maintained in a landscape context. Toward that end, the Corps should consult with states and other stakeholders in the interest of developing timely guidance (within the next 60-90 days) that

- 1) explicitly defines the wetland types and functions to be protected;
- 2) promotes consistency across districts;
- 3) recognizes interrelationships with state rules;
- 4) is consistent with the Corps' Environmental Operating Principles; and
- 5) establishes a framework for future rulemaking.

### **Background**

The recent decision of the US Supreme Court in *Rapanos/Carabell v. U.S. Army Corps of Engineers* raises many important issues. Among them is the interpretation of Justice Kennedy's opinion that the basis for jurisdiction of non-navigable streams and adjacent wetlands should be their 'significant nexus' to navigable water bodies. The Environmental Advisory Board is concerned that this decision may be construed by the Corps and EPA as a call to remove protection from the extensive wetlands of the US without a permanent surface water connection to navigable streams.

The importance of wetlands has been recognized by the President in his stated goal to create, improve, and protect at least three million wetland acres by 2009 to increase overall wetland acres and quality. We believe the Environmental Operating Principles provide important direction to the Corps as the agency considers the implications of the decision. Specifically, the Principles call on the Corps to seek balance and synergy among human development activities and natural systems by designing economic and environmental solutions that support and reinforce one another, to accept corporate responsibility and accountability under the law for activities and decisions under their control that impact the continued viability of natural systems, and to seek ways and means to assess and mitigate cumulative impacts to the environment.

### **Ramifications and Consequences**

Should interpretation of the decision lead to reduced protection of wetlands, it may lead to a cascade of negative consequences to the waters of the US. Many state and local rules have been integrated with

Section 404 wetland determinations, and use wetland determination methods that have been perfected over years of practice to be consistent among various levels of government. Uncertainty in future regulation may negatively affect the development community through difficulty in anticipating costs, and through potential discord among federal, state, and local regulation.

Despite the lack of an obvious surface water connection, development of isolated wetlands typically impacts surface water quality through contaminated stormwater runoff, increased runoff and resultant channel erosion. Alteration of isolated wetlands can reduce groundwater recharge and degrade aquifer water quality through infiltration of contaminated water, and reduce habitat for a myriad of wildlife species. Most land-use plans currently assume isolated wetlands hold water, and thereby reduce overall runoff, recharge groundwater, and provide treatment, thereby improving water quality. If isolated wetlands are developed, cumulative impacts may be substantial, requiring modifications of land-use plans.

### **Progress toward Substantive Guidance**

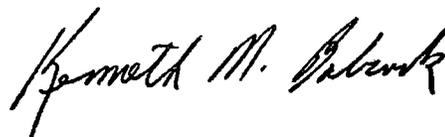
The Corps must react to the recent Supreme Court decision with instructions to the field offices allowing them to proceed with the permitting process while more substantive guidance is developed in both technical and legal arenas. There are also forces encouraging the Corps toward formal rulemaking. Rules provide a secure platform from which to make decisions. However rulemaking is a relatively elaborate and protracted process defined by its own rules and implementation of rules can become costly and restrictive, reducing flexibility.

Given the length of time needed for the rule-making process and the ongoing need to make wetland permitting decisions, it seems ever more likely that the Corps will be operating under the proposed Substantive Guidance for the foreseeable future. The importance of this issue cannot be understated as threats to wetlands nationwide are growing daily.

The use of "Guidance" has the advantage of allowing flexibility in the decision-making process and also provides an easier mechanism for policy adjustment than formal rulemaking. However, the inherently desirable flexibility of the guidance protocol unfortunately can, and historically has, led to inconsistency in decisions. This has been documented most often among districts but can even be found within a single field office. This is a major criticism of Corps permitting nationwide and must be recognized and anticipated as the Substantive Guidance is developed over the coming weeks.

Thank you for consideration of our recommendations. We look forward to continued productive discussions. Please feel free to call on me or any member of the Board if you have questions.

Sincerely,



Kenneth M. Babcock  
Chairman  
Environmental Advisory Board