Stormwater Permit MANUAL

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EPA Pushes CAFO Compliance Dates Back to July 31, 2007

In response to comments, the U.S. Environmental Protection Agency (EPA) pushed back the deadline for new concentrated animal feeding operations (CAFOs) to apply for National Pollutant Discharge Elimination System (NPDES) permit coverage to July 31, 2007 (71 Fed. Reg. 6978, Feb. 10, 2006). In its December 2005 proposal, EPA planned to extend the CAFO compliance dates to March 30, 2007. But after reviewing comments on the proposal, the agency pushed that date back to July 31, 2007, to give CAFOs more time to prepare and implement nutrient management plans and apply for NPDES permits after EPA finalizes changes to the original 2003 CAFO rule. The agency has yet to complete its revision of the 2003 rule to respond to a 2005 appeals court decision that invalidated large portions of the rule. ***Page 4***

Washington Fines Seattle Airport $100K for Stormwater Problems

Citing a litany of alleged stormwater violations, the Washington Department of Ecology has fined Seattle's airport and its contractor more than $100,000 and ordered the problems to be fixed. Numerous stormwater problems with an expansion project at Sea-Tac Airport in the fall of 2005 and problems with ongoing stormwater treatment, prompted Ecology to take action on Jan. 13 and Jan. 20. The majority of problems relate to discharging muddy water to nearby waterways. In one incident, about 1.5 million gallons of turbid water flowed from a stormwater holding pond to a creek and on into Puget Sound, Ecology alleged. The incident occurred when a plug failed overnight at the pond, Ecology said. The fines can be appealed. ***Page 7***

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- ¶890.42 updated with new information for South Dakota's stormwater program, including state contacts, Web site, and the state's industrial, construction and small MS4 general permits
- App. 3(b) updated with current EPA Web sites, guidance documents and stormwater-related *Federal Register* notices

Coming Soon

- Updates to several tabs concerning EPA's 2006 multi-sector general permit, which the agency is finalizing

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Supreme Court Hears Cases Related to Wetlands And Definitions Under the Clean Water Act

The definition of a tributary, what "adjacent to navigable waters" means, and what a "significant nexus" is were disputed in oral arguments Feb. 21 before the U.S. Supreme Court (*Rapanos v. United States*, No. 04-1034; and *Carabell v. U.S. Army Corps of Eng'rs*, No. 04-1384).

"This is a case of an agency overreaching its authority, contrary to the plain text of the [Clean Water] Act and claiming 404 jurisdiction over the smallest trickle to the largest river," said M. Reed Hopper, counsel for John A. Rapanos. Hopper was referring to Clean Water Act (CWA) Section 404, which constitutes the U.S. Army Corps of Engineers' dredge-and-fill permit program (also referred to as 404 permits). The earlier appeals court decision in the case marks a shift in the balance of power to the federal government, away from states, Hopper said.

In the *Rapanos* case, a costly legal battle stretching back to 1988, a Michigan developer filled in wetlands without a 404 permit. Subsequently, the federal government sued Rapanos concerning the wetlands and the construction. Rapanos argues that the filled-in wetlands are not adjacent to any navigable waters and that there is not a significant nexus between the property's wetlands and a navigable water body.

The U.S. government argued the Rapanos wetlands fell under 404 jurisdiction. One of three of the property's wetlands areas is adjacent to the Pine River, which has water year round and is clearly a tributary to a navigable water, argued Paul D. Clement, solicitor general of the U.S. Department of Justice.

Clement went on to explain that a tributary could be any channelized water.

Justice Antonin Scalia then asked Clement: "So you're including storm channels, such as the Erie Canal, [in your definition of tributary]? I think that's absurd as a water of the United States. It's extravagant."

Clement responded that the difference between manmade and natural waterways can be difficult and hard to determine in some cases, noting that in some urban areas natural waterways have been replaced by channelized water.

Scalia repeatedly asked all of the attorneys about the definition of a tributary.

"That's the problem," Hopper said. "The agency hasn't defined it." But when Scalia asked Hopper for his own definition, Hopper did not respond directly.

Trying another tact, Chief Justice John G. Roberts Jr. asked: "The Missouri River is a tributary of the Mississippi River. Is that covered under your definition?" Hopper again evaded a direct answer.

Clement also was vague on the definition of a tributary, with Scalia asking him: "You interpret tributaries to include ditches, storm drains, manmade [channels]? Is a reasonable usage of the term United States waters a storm drain in any way?"

Clement responded that some storm drains are deep, have a constant water flow and replace natural tributaries.

"There are various means of stopping pollution and that doesn't mean this [referring to the 404 case at hand] is a permissible way," Scalia said.

Without the current 404 permit program, there are only two options, Clement said. Either fingerprint the pollutants to determine their source, or regulate each point source at the known tributary, he said.

"I'd hate to be the guy discharging the tributary who's responsible for all the pollutants upstream," Clement said.

"There would be a free dump zone above the tributaries, if it were unregulated," said Clement. "There are real world consequences to contracting Clean Water Act jurisdiction."

See *Supreme Court*, p. 3

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ASSOCIATE PUBLISHER: **WILLIAM H. STEWART**
SENIOR MANAGING EDITOR: **LUIS HERNANDEZ**
EDITOR: **KELLY GORDON**
SENIOR DESKTOP PUBLISHING SPECIALIST: **RONDA QUILLEN**

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Supreme Court (continued from page 2)

The CWA was "a federal solution needed to get at point sources and tributaries, without which waters would continue to be polluted," he said.

Under the Corps' and the U.S. Environmental Protection Agency's (EPA) current view, about 80 percent of the nation's wetlands are regulated, Clement explained. Twenty percent of wetlands were excluded from regulation by the *SWANCC* decision, Clement said, referring to the court's 2001 ruling (*Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159). The banks of navigable rivers and tributaries also may be regulated under the 1899 Rivers and Harbors Act, Clement said.

Clement also noted that CWA Section 402 jurisdiction, which covers point sources and stormwater permitting, is coupled with 404 jurisdiction and the two are "joined at the hip" through Section 303. Clement said if the rationale for the 404 program were invalidated it would have consequences on the 402 permitting program as well.

Hopper argued that the government cannot show a clear indication that Congress intended to regulate wetlands adjacent to nonnavigable waters.

"You're saying, all you have to do is go further upstream to dump pollutants, and then, you get away scot-free," Justice David H. Souter said, in response. "I don't think Congress intended that."

"No, I don't agree with that," Hopper said. "The federal government can regulate downstream and every state in the nation has water regulations."

Souter responded: "So Congress can't [stop] a class of evil polluters, when all they have to do is go far enough upstream and that would be okay with you?"

"No, [under my interpretation], pollution would still be covered," said Hopper.

But then, Souter said, "science would have to analyze every molecule" to determine if it came from dredge and fill projects or another source.

Later, Hopper told the court that CWA Section 404(g) is irrelevant to the case.

"It is simply not true that the government is only identifying channels and point sources as tributaries," he said. "Congress did not intend wetlands 20 miles from navigable waters to be regulated," referring to the distance between the Rapanos property and Michigan's Lake St. Clair.

"But isn't Pine River much closer?" Justice Ruth Bader Ginsburg asked.

"The record is silent on how close it is," responded Hopper.

"But you know, don't you?" said Ginsburg.

"The record is silent," Hopper repeated. "Without a federal permit you can't dig a ditch in this country."

Carabell Case

A ditch was most of the reason for dispute in the consolidated case of *Carabell v. U.S. Army Corps of Eng'rs*. Carabell's attorney, Timothy A. Stoepker, argued that there was no discharge from his client's property.

"There is no evidence that water ever left petitioners' wetlands and went into navigable waters," Stoepker said. "The actual discharge is what's regulated … the [CWA] doesn't allow for speculation of a discharge."

In the case, June Carabell wanted to develop condominiums on about 16 acres of wetlands about one mile from Lake St. Clair in Michigan. Decades ago a drainage ditch was dug along one side of the wetland area and the resulting dirt formed a berm on either side of the ditch. The berm separates the wetlands from the ditch, which connects to a drain, which flows into a creek and on into the lake. Carabell applied for a fill permit through the state in 1993, and EPA objected; in 2000, the Corps denied the permit. Carabell filed suit challenging the permit denial.

Stoepker noted that due to impermeable clay soil, the isolated wetland is not receiving or discharging any water.

"The sole reason for jurisdiction is an adjacent nonnavigable, unnamed ditch that the county dug for sewer work," he argued, saying the ditch was designated as a point source when Michigan expanded its water quality rules in 1975 to include ditches.

Stoepker said there is no hydrological connection between Carabell's wetlands and navigable waters.

See *Supreme Court*, p. 8

EPA Sets CAFO Compliance Dates for July 2007

In response to public comments, the U.S. Environmental Protection Agency (EPA) pushed back the deadline for new concentrated animal feeding operations (CAFOs) to apply for National Pollutant Discharge Elimination System (NPDES) permit coverage to July 31, 2007 (71 Fed. Reg. 6978, Feb. 10, 2006).

In its Dec. 21, 2005, proposal, EPA planned to extend the CAFO compliance dates to March 30, 2007 (see *Newsletter*, February 2006, p. 7). After reviewing comments on the proposal, the agency pushed that date back to July 31, 2007, to give CAFOs more time to prepare and implement nutrient management plans (NMPs) and apply for permits after EPA finalizes changes to the original 2003 CAFO rule.

"At the time of the proposed rule, EPA believed that setting the revised dates to March 30, 2007, would allow sufficient time for the agency to complete the forthcoming rule to address the *Waterkeeper* decision," EPA said. "In proposing these date changes, EPA also reasoned that the rationales for these revised dates were generally consistent with the rationales that the agency had originally relied upon in setting the compliance dates in the 2003 CAFO rule and that these dates would ensure compliance with the NPDES regulations applicable to CAFO owners and operators within a reasonable timeframe consistent with the dates established in the 2003 rule."

In its *Waterkeeper* decision, the U.S. Court of Appeals for the 2nd Circuit invalidated several portions of EPA's 2003 rule, including the lack of public review and comment on CAFOs' NMPs (*Waterkeeper Alliance v. Envtl. Prot. Agency*, 399 F. 3d 486 (2005)). EPA plans to issue a proposed rule responding to the court decision in mid-2006 and a final rule "as expeditiously as possible." EPA plans to address which CAFOs must seek permits and the procedures for developing and implementing NMPs.

EPA noted that the compliance date changes do not apply to state CAFO programs unless they adopt the dates and do not affect CAFOs that were permitted before the 2003 rule.

"The action being announced today [Feb. 7] will not affect other aspects of the CAFO NPDES permitting program," EPA said. "It solely addresses timing issues associated with the court ruling."

The 2003 rule broadened the definition of a CAFO and required these "newly defined" CAFOs to obtain coverage by Feb. 13, 2006, and have NMPs in place by Dec. 31, 2006. EPA was unable to revise the 2003 rule to comply with the court decision before the original compliance dates.

The compliance date for existing operations that became defined as CAFOs due to operational changes after April 14, 2003, to seek permit coverage also was moved from April 13, 2006, to July 31, 2007. Various dates by which NMPs must be developed and implemented under the 2003 rule also were changed to July 31, 2007.

Comments on the Proposal

EPA seemed to indicate that the number of facilities included in the 2003 rule's definition of a CAFO may be reduced. In the *Federal Register* notice, EPA said that it expects its response to the *Waterkeeper* decision will "change the universe of who must apply for a permit and that those regulations will be finalized and effective before the new deadline of July 31, 2007."

"Only those CAFOs that are required to apply for a permit – as redefined in the upcoming rulemaking – will be subject to the permit application deadline's in today's rule," the Feb. 10 notice said.

Although EPA pushed back the compliance dates further than its December 2005 proposal indicated, not all industry members were satisfied with the July 31, 2007, deadline.

"The EPA has not yet promulgated a final rule, and they expect cattlemen to speculate on how to comply. That's not fair," said Tamara Thies, director of environmental issues for the National Cattlemen's Beef Association (NCBA), in a Feb. 8 statement. "There is much confusion and uncertainty about cattle producers' responsibilities under the [Clean Water] Act, and EPA needs to clarify for producers what is expected of them."

In its comments on the rule, NCBA urged EPA to consider a deadline for implementing NMPS of at least one year after the agency approves individual CAFO permits. "Such an approval is unlikely to occur prior to May 2009 or May 2010, depending on states' ability to craft appropriate legislation and regulations addressing [the 2nd Circuit decision]," NCBA said.

In the *Federal Register* notice, EPA noted that most of the technical provisions of the 2003 CAFO rule were unaffected by the court decision, so CAFOs do have some information on actions they will need to take. "Should the agency decide that a further extension of time is necessary to allow CAFOs an adequate opportunity to meet the requirements of the revised regulations, EPA could allow a further extension in the final rule."

For more information, see http://cfpub.epa.gov/npdes/afo/caforulechanges.cfm.

Vermont Proposes Draft MSGP That Mostly Echoes Federal Permit; Would Affect 2,500 Businesses

The state of Vermont proposed a multi-sector general permit (MSGP) in December that could affect as many as 2,500 businesses.

In 2002, Vermont proposed a MSGP, but the permit was withdrawn and never finalized. One of the big changes between the 2002 and 2005 permits is the requirements for salt piles – used by both municipalities and private industry to treat roadways.

Private and municipal facilities covered by the permit must enclose or cover storage piles of salt or sand piles containing salt used for deicing or other commercial or industrial purposes. Best management practices (BMPs) for salt storage include placing salt piles on impervious surfaces and building berms around storage piles to minimize stormwater runoff.

Tom DiPietro, an environmental analyst in the stormwater section of the Vermont Department of Environmental Conservation, said the biggest change between the 2002 and the 2005 draft permits is the new draft MSGP issued by EPA. "Generally, the permit is very similar to what the federal government is doing," he said.

DiPietro said the permit application fee will be $250, plus an annual operating fee of $55. "The cost will be $105 per year over the life of the [five-year] permit," he said. There also will be monitoring and BMP costs that will vary by industry sector.

No Exposure Exclusion

Covered facilities can qualify for a no exposure conditional exclusion. This exclusion will be available for facilities that keep all of their materials and activities from exposure to rain, snow, snowmelt, and/or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products and waste products.

Facilities that are not eligible for the no exposure exclusion must prepare a stormwater pollution prevention plan (SWP3) that evaluates the potential threat of the facilities' operations on stormwater quality, develops management procedures to minimize polluting stormwater runoff, performs water quality monitoring of impacts on stormwater, as well as periodically reports on the implementation of the procedures.

Anthony Iarrapino, a staff attorney with the Conservation Legal Foundation, said his organization has been lobbying hard for the regulation, and said they have been frustrated by the delays, especially because the permit mirrors the federal requirements. "If that is all they were going to do, they could have done that years ago and eased [the regulated community] into this," Iarrapino said.

He also supported the change in the treatment of salt piles. "We view this as positive because EPA information has shown that runoff can have serious implications for groundwater and surface water," he said.

DiPietro said he hoped the permit could be finalized this year. Iarrapino said any more delays would seem unnecessary. "The October 2002 draft went out for public comment," he said. "If the regulated community was unaware of this, they should have seen a clue in 2002."

At press time, the comment period had not ended, but Iarrapino said some auto salvage yard owners are complaining about the requirements. "They complain that it is very difficult for smaller operations. Some in Vermont run auto salvage yards on farm fields and do little to control runoff and deal with various industrial chemicals that leak out of these old machines," he said.

Iarrapino also objects to the permit's phased implementation, where different sectors will have notices of intent due on different dates. "The permit would have a phased in implementation for filing notices of intent and another phase in for implementing the SWP3. You still must have a SWP3 done, but to implement the best management practices, some dischargers will have up to 390 days from the effective date of the permit before they have to implement the measures in the SWP3," Iarrapino explained.

Four Mass. and N.H. Developers Agree to Pay $41K for Construction Site Stormwater Fines

Problems with stormwater pollution prevention plans (SWP3s) and, in one case, a lack of a stormwater permit cost four New England developers $41,025 in fines, U.S. Environmental Protection Agency (EPA) Region 1 announced Jan. 25.

The alleged stormwater violations were discovered during EPA inspections between August 2004 and July 2005 at construction sites in Hudson, N.H.; Framingham, Mass.; Swansea, Mass.; and Topsfield, Mass. Massachusetts and New Hampshire do not have National Pollutant Discharge Elimination System delegation of the stormwater program. The settlements were negotiated under EPA's Expedited Settlement Offer program that emphasizes compliance assistance and quick settlements for alleged violations.

"These cases make clear that EPA is serious about enforcing stormwater regulations," said EPA Region 1 Administrator Robert W. Varney. "We must control stormwater runoff from construction sites to protect our vital wetlands and waterways."

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>
> *— Robert W. Varney, EPA Region 1 administrator*

Details of the Violations

McCarron Development Corp. of Lakeville, Mass., agreed to pay $14,600 to settle numerous alleged stormwater violations related to its Swansea development. According to EPA, McCarron did not apply for a construction stormwater permit before it began construction on its 30-acre development. More than a year and a half went by before the developer applied for and obtained a stormwater permit, EPA said.The developer also allegedly did not prepare an SWP3 until a month after applying for permit coverage; failed to conduct and document site inspections; and did not implement interim stabilization at the site.

Runoff from the development flowed into adjacent wetlands that drain into a series of brooks and ponds and on into the Cole River.

Albermarle Realty Corp. of Natick, Mass., will pay $10,700 to settle EPA allegations that the developer filed to develop and put in place a site-specific SWP3 for a 20-home development in Framingham. During a surprise inspection in November 2004, EPA found that Albermarle had not conducted or documented site inspections; the site's entrance was not stabilized allowing soil to be tracked off site; catch basins at the entrance did not have sediment protection barriers; soils from a specific detention basin and an adjacent embankment were exposed; and stabilization measures were not initiated before the ground froze.

About four acres of land were disturbed at the time of EPA's inspection, but the development ultimately will disturb 28 acres, the agency said. Runoff from the site flows into wetlands that eventually reach the Sudbury River.

Thibeault Corp. of New England based in Londonderry, N.H., agreed to pay a $8,650 fine for claims alleging that the company failed to fully develop and implement an SWP3 at its Hudson construction site. The 60-acre development will eventually include 180 buildings and 400 residential units. EPA alleged that Thibeault also failed to document inspections of the site's best management practices. EPA also charged the company with discharging pollutants without a permit. EPA inspected the site in August 2004. Ultimately, about 30 acres of land were disturbed during construction at the site, which drains into a nearby brook and pond.

Spring-T Realty Trust of Topsfield, Mass., agreed to a $7,075 fine to settle allegations of stormwater violations at its Topsfield development. During a July 2005 inspection, EPA allegedly found that the developer had not documented site inspections; control measures were not installed according to the site's SWP3 (infiltration ponds were installed too deep and below the groundwater table); and two drainage ditches were clogged with sediment. The site's SWP3 also allegedly did not: describe post-construction stormwater controls; identify onsite operators; provide dates of major construction milestones; or contain a proper signature or certification of the plan.

Region 1 requests that construction site operators needing help with their stormwater permits or plans contact Abby Swaine at (617) 918-1841 or swaine.abby@epa.gov.

Washington Fines Seattle Airport and Its Contractor $100K for Numerous Stormwater Problems

Citing a litany of alleged stormwater violations, the Washington Department of Ecology fined Seattle's airport and its contractor more than $100,000 and ordered the problems to be fixed.

Numerous stormwater problems with an expansion project at Sea-Tac Airport in the fall of 2005 and problems with ongoing stormwater treatment, prompted Ecology to take action on Jan. 13 and Jan. 20. Sea-Tac is owned and operated by the Port of Seattle.

An $81,000 fine was issued Jan. 13 to the port and its contractor, TTI Constructors LLC, for six releases of muddy water in late 2005 and one instance of pumping industrial wastewater into a stormwater treatment system, Ecology said. The port is constructing a large earth-fill embankment for its runway expansion project, for which TTI is the prime contractor. A Jan. 10 companion order directs the port to thoroughly evaluate the operation, maintenance and management of the project's stormwater collection and treatment system, and report its findings to Ecology within 60 days.

"Before these serious violations, the project met its environmental requirements, not perfectly, but to an impressive degree, given its size and complexity," said David Peeler, manager of Ecology's water quality program, in a Jan. 13 statement. "We expect this penalty and order to mark a return to the higher performance that prevailed before this past fall."

Ecology detailed seven alleged incidents:

- Oct. 13, water used to flush mud and dirt off a road in the construction site entered Miller Creek through a hole in a filter fabric barrier;
- Also on Oct. 13, muddy water entered Miller Creek because a storm drain catch basin on a highway was not plugged while the highway was flushed;
- Oct. 31, storm drain access holes left uncovered in a dirt area allowed turbid water to discharge to Lake Reba;
- Nov. 1, turbid water in a stormwater holding pond reached the level of a pipe in the pond's berm, which allowed the water to flow into Miller Creek;
- Nov. 4, overnight a plug failed in a stormwater holding pond, allowing an estimated 1.5 million gallons of turbid water to flow the entire length of Walker Creek to Puget Sound;
- Dec. 5, turbid water drained from a pipe being dismantled and entered wetlands, a side channel and Miller Creek; and
- Dec. 15, contractor employees pumped industrial process wastewater from a basin of truck washwater into a stormwater holding pond that was not designed to treat the oil and grease contained in the process water.

An Ecology inspector, who monitors onsite construction activities and is paid by the port, observed and documented the alleged violations, the agency said.

"We expect this penalty and order to mark a return to the higher performance that prevailed before this past fall."
— David Peeler, Washington Department of Ecology

In a related notice, Ecology fined the Port of Seattle $20,000 Jan. 20 for releasing untreated stormwater from aircraft preparation and taxiing areas into Des Moines Creek. Between 2 million and 2.7 million gallons of water that should have flowed to the airport's industrial wastewater treatment plant entered the creek because of improper valve settings on Nov. 25, 2005, Ecology alleged. The stormwater contained oil, grease and de-icing fluids that drip from planes onto the taxi strips and aircraft parking areas.

"Sea-Tac has a well-designed industrial treatment system that needs careful and attentive management to work well," Kevin Fitzpatrick, Ecology's regional water quality program supervisor, said in a Jan. 20 statement. "Because of this incident the airport has acted to improve the system's management and oversight and to respond to problems rapidly."

"Stewardship of our precious environment is the highest priority for the Port of Seattle," said Patricia Davis, Port of Seattle commission chair, in a statement through Ecology. "We have already asked our staff to intensify prevention, oversight, training and compliance on all our projects."

Ecology has fined the port and TTI twice before for spilling muddy water into Miller Creek for a total of $24,000. The port and the contractor have 30 days to appeal the January penalties. At press time, it was unknown if any of the penalties would be appealed.

Supreme Court (continued from page 3)

Roberts asked what is meant by a hydrological connection. "Is it enough to have water seeping in or does it have to be a culvert?"

"Both [of those] would have a hydrological connection," Stoepker said. "But in this case, there was no discharge."

Ginsburg asked if the berm prevented a hydrological connection.

"It's the berm, the storm drain and the clay soil," Stoepker said.

So if the berm were directly next to a river, would that also break the hydrological connection, Ginsburg asked. Stoepker replied that it would.

Clement disputed the use of the term "hydrological connection." The fixation on a hydrological connection is not relevant to the cases, he said.

It's not a regulatory or statutory term, and the Corps has not used it, Clement said.

"In most cases, the berm is not going to prevent a hydrological connection," Clement said.

"But you must recognize that the Corps at some point has to stop?" Roberts asked. Clement said the problem with that approach is that all water flows downstream.

Significant Nexus

Also disputed was the term "significant nexus," which was used by the court in its SWANCC decision, which found that a wetland must have a significant nexus with navigable waters to be regulated by the Corps.

Clement commented on a significant nexus saying, "I think it excludes isolated wetlands next to wetlands."

"What's an example of an insignificant nexus?" Roberts asked. Clement responded there would not be any regulation or jurisdiction of an insignificant nexus.

In response to another question from Roberts, Clement conceded that a wetlands hydrological connection to a tributary of U.S. waters could be made with one drop.

"If the tributary flows in [to the wetland], then one drop is in the [Corps] jurisdiction," Clement said. A similar analogy would apply to wetlands flowing into tributaries, he said.

For copies of the various briefs and amici curiae submitted in the cases see the Web site for the *Endangered Species &Wetlands Report* at http://www.eswr.com/1105/rapanos. The court may rule on the cases any time before the end of June.