
Scope of U.S. Corps of Engineers' wetland jurisdiction still unclear

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A significant ruling by the United States Supreme Court on June 19, 2006 involving two consolidated wetlands cases has rejected the United States Corps of Engineers' interpretation that any hydrologic connection to a navigable waterway is sufficient to allow for wetland regulation by the federal government.

The split decision in *John A. Rapanos, et al. v United States* (No. 04-1034) and *June Carabell, et al., v United States Army Corps of Engineers et al.* (No. 04-1384) left many questions unanswered leaving developers, government agencies and the environmental community with no clear understanding about the scope of "waters of the United States" that will be protected under the Clean Water Act (CWA).

Despite the widespread expectation that the highest court in the land would finally resolve federal wetland jurisdiction, the unfortunate outcome is that even today no clear path exists for the regulated community.

Two Michigan Wetland Cases

The two cases addressed by the Supreme Court involved two Michigan developers that sought to build in wetlands located on their property. In *Rapanos*, the two wetland sites at issue are located adjacent to non-navigable drainage ditches that have a surface water connection to non-navigable waters some 11 and 20 miles, respectively, from the plaintiffs' two properties.

The matter was referred to the Department of Justice when the plaintiffs filed the wetlands and subsequently refused to obey administrative compliance orders issued by the EPA. The trial court agreed with the government that the plaintiffs had violated the federal Clean Water Act because each of the wetlands had a hydrological connection sufficient to meet the Act's jurisdictional "significant nexus" test. The United States Court of Appeals for the Sixth Circuit affirmed that decision.

In *Carabell*, the wetlands at issue bordered a ditch that empties into Lake St. Clair, which is one mile away. The wetlands were not hydrologically connected to the ditch because a four-foot berm separated the wetlands from the ditch. Petitioners appealed the denial of its wetland fill permit, which was ultimately rejected by the district court. The Sixth Circuit affirmed that decision, holding that the wetlands were adjacent as contemplated under the CWA, and therefore, jurisdiction was proper even though no hydrological connection existed.

Where Do We Go From Here?

In light of the separate decisions by the Supreme Court in *Rapanos* and *Carabell*, great uncertainty still

exists regarding what may happen in the United States District Court on remand of these two cases, and their ultimate effect on the development community. At a minimum, five Supreme Court Justices agree that there is jurisdiction above navigable waters, including the four most conservative Justices who would draw the line closer to those truly navigable waters and tributaries with continuously flowing water.

Justice Anthony Kennedy, however, believes that jurisdiction goes further and depends on a host of site-specific factors such as how far away the site is from a truly navigable waterway, how small it may be, what flow rate is involved, and the importance of the wetlands to the water body in terms of flood storage and water quality. From that standpoint, it may be fair to say that a majority of Justices are in agreement that small roadside ditches and insignificant drains and other isolated waters should no longer be regulated by the Corps of Engineers.

But what about those situations where wetlands are adjacent to intermittent tributaries or those located by an artificial ditch or drain? These situations provide room for developers and others to argue that no federal jurisdiction exists.

For those situations involving artificial ditches or drains, the Corps of Engineers will likely attempt to build a case using the factors supporting a finding of "significant nexus." Owners will need to respond by utilizing legal and technical consultants to build a record that no significant nexus exists.

These consultants will be called upon by the regulated community to prepare reports based on a multitude of factors to properly delineate the wetlands at issue, the conveyance channel that leads to a navigable water, and the existence (or non-existence) of factors tending to support a significant ecological relationship between the wetlands and navigable waterway.

How these reports are conducted and presented to the courts in the coming years will significantly impact which wetlands the federal government ultimately regulates.

EPA and Corps of Engineers' Response

Underscoring the importance of the Supreme Court's decision, officials of the U.S. Environmental Protection Agency and the Department of the Army recently testified during Senate hearings held on Aug. 1 regarding the steps the agencies are undertaking to address the status of federal jurisdiction in light of the Supreme Court's rulings.

Officials testified that they are currently working on a joint EPA/Corps of Engineers' guidance to clarify CWA jurisdiction in light of *Rapanos* and *Carabell*. Immediate guidance to field staff included instructions to continue to process permits, but where circumstances permit, to temporarily delay making jurisdictional calls beyond the limits of the traditional Section 10 navigable waters.

Until further guidance is provided by both agencies, field staff has also been instructed to defer decisions on CWA jurisdiction where delays are not possible and permanent action is required. How the regulated community, the environmental community and the lower deciding courts receive this final joint guidance will simply be another chapter in this evolving saga.

Conclusion

In the end, neither the regulated community nor the environmentalists truly got what they wanted.

As a result, the federal district and circuit courts are now charged with determining to what extent jurisdiction exists above genuine navigable waters. This will not be an easy task since the United States

Supreme Court's decision, while helping some owners and developers avoid federal regulation, failed to provide direction on what factors must be present for a wetland to have a sufficient nexus to navigable waters.

For now, the development community must press the Corps of Engineers for strict decision making regarding what constitutes a "significant nexus" and monitor how those findings are reviewed by the district and circuit courts during the coming years.

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