

# Management Alert

## *Rapanos v. U.S. Army Corps of Engineers:* Wetlands Ruling Leaves Developers High and Dry

The issue in the Supreme Court case was to interpret the extent of federal jurisdiction over wetlands under the Clean Water Act (CWA). The CWA requires a person, such as a developer, to obtain a permit from the Army Corps of Engineers (the Corps) to dredge or fill regulated “waters of the United States.” As interpreted by the Corps, CWA jurisdiction extends to the disturbance of any wetland (including water-logged soil), no matter how far that wet soil is from a waterway that is navigable in fact or one of its tributaries, so long as there is any potential hydrologic connection between the wetland and such waterway or tributary. Essentially, according to the Corps, the CWA confers and regulates every wetland located within a watershed, whether or not the wetland is actually adjacent to or part of a stream and regardless of whether the dredging or filling of such wetland has any actual impact on the water quality of the eventual receiving stream. For example, in the particular cases under review, some of the sites in question were near storm water drains while, at another site, a man-made berm separated the wetlands from a ditch that eventually made its way to a creek. The Court was asked to review the validity of this broad interpretation of federal jurisdiction.

### *Supreme Court Ruling*

The Court was unable to muster a five-person majority regarding the rationale for its decision. The four-member plurality opinion plus the concurrence of Justice Kennedy resulted in the case being remanded to the lower court. The remaining four Justices dissented and upheld the lower courts’ determinations that CWA jurisdiction extends to regulate the wetlands in question.

### *The Plurality’s Opinion*

Justice Scalia authored the opinion that was joined by Justice Thomas, plus the newest two Court members, Justice Alito and Chief Justice Roberts. This conservative bloc was just one vote shy of significantly narrowing the scope of regulation under the CWA. These Justices believe that the scope of regulation pertaining to the placement of fill material - the Section 404 program - must directly imperil water quality of a navigable waterway or one of its tributaries. While these Justices would allow regulation of a portion of a wetland directly adjacent to a stream, they would interpret the CWA to extend only to wetlands adjacent to perennial streams, not intermittent streams or ditches. Additionally, the wetlands must

have a continuous surface water connection to a navigable water or its tributaries. According to these Justices, the broad interpretation of the CWA offered by the Corps in its regulations is not based on a permissible construction of the statutory language and therefore is not entitled to deference by the judiciary.

### *Viewpoint of the Dissenting Justices*

The dissenting Justices (Stevens, Souter, Ginsburg and Breyer) thought that the Corps was properly within its authority to define by regulation the meaning of the CWA's triggering language, "navigable waters," which is defined in the statute as "the waters of the United States." According to these Justices, the Corps' definitions are entitled to judicial deference. These Justices have no problem extending the reach of the CWA to wetlands that are geographically distant from a navigable-in-fact waterway because they believe that these wetlands, either alone or in combination, play an important role in maintaining the quality of downstream waters.

### *Justice Kennedy's Concurrence*

Justice Kennedy issued an opinion concurring with the judgment to remand the cases back to the lower courts. However, his rationale was completely different than that of the plurality. In fact, Justice Kennedy expressly rejected two of the key limitations that the plurality would impose. Justice Kennedy saw no reason why CWA jurisdiction cannot extend to intermittent streams and waterways, nor did he believe that a wetlands must have a continuous surface connection to a jurisdictional water. Even so, he was troubled by the breadth of the Corps' regulations as currently promulgated. He believes that the CWA permissibly extends only to those waters that possess a "significant nexus" to waters that are navigable in fact. The requisite "ecological interconnection" would exist for wetlands adjacent to major tributaries, but beyond that, the Corps must use either additional regulation or case-by-case determination to establish that a particular wetland is performing "important functions for an aquatic

system incorporating navigable water."

### *The Law Today Given the Divided Nature of the Court's Ruling*

Anyone hoping that the Supreme Court would clarify the permissible scope of federal regulation over wetlands was sadly disappointed by the ruling. Because there was no majority opinion, the decision is not precedent. Until, and unless, the Corps acts to issue new regulations, the lower courts must now struggle to determine the bounds of federal jurisdiction. The ruling nonetheless does provide some guidance on when CWA regulation does attach, and when it may not. Wetlands immediately adjacent to perennial streams are still subject to the CWA. Wetlands that are only located within the same watershed as a navigable water may not be regulated if it can be demonstrated that the dredging or filling of that wetland would have no or only marginal impact on water quality or the receiving stream.

### *The Corps' Response*

The Corps is "evaluating" the ruling and has not announced how it intends to proceed. In several pending cases, its counsel, the Department of Justice, has moved for an extension of time, so that the Corps may formulate a position in light of the ruling.

### *Frequently Asked Questions Regarding the Ruling:*

*"My Project is Already Permitted, or I Am About to Seek a Permit - Should I Reevaluate in Light of this Ruling?"*

*"Did the Ruling Alter the Government's Authority to Issue an NPDES Permit to Discharge Pollutants Under the CWA?"*

*"What About Stormwater NPDES Permits Related to Construction Activity?"*

Read more about these issues on the following page.

### *“My Project is Already Permitted, or I Am About to Seek a Permit - Should I Reevaluate in Light of this Ruling?”*

For developers, the ruling means additional uncertainty, and perhaps delays, in obtaining necessary governmental approvals to initiate development. However, taken as a whole, the Supreme Court’s action suggests that where wetlands impacted by a development have a remote hydrologic connection to non-perennial streams or conveyances, such as trenches, sewers, man-made ditches, and so forth, a developer should not assume (as it might have in the past) that a Section 404 permit must be obtained from the Corps in order to fill or disturb all or any portion of the wetland. Instead, the developer, working with its environmental consultants and legal advisors, should evaluate whether the wetland in question is going to have any impact on downstream waters. An adequate demonstration that the wetland is not adjacent to a perennial stream and will have no adverse impact on CWA waters may be sufficient to convince the Corps that the wetland in question is not subject to federal jurisdiction. As such, if the wetland at issue is a significant factor in development plans, it may be worthwhile to re-visit the need for the permit with the Corps. Also, for some landowners, it may be worth pursuing a legal challenge should it receive an adverse determination from the Corps.

### *“Did the Ruling Alter the Government’s Authority to Issue an NPDES Permit to Discharge Pollutants Under the CWA?”*

The plurality took steps to observe that the extent of federal jurisdiction over the discharge of pollutants affecting stream water quality from point sources (including ditches, intermittent stream channels, storm sewers and pipes) that ultimately lead to a perennial stream were not the subject of the *Rapanos* decision and would continue to be the subject of CWA regulation. These Justices found CWA jurisdiction over pollutant discharges because the pollutants could eventually find their way to, and have an adverse impact on, a receiving stream. The plurality did not view the movement of dirt or silt

from a remote location to present the same circumstance of making its way to the receiving water. Hence, *Rapanos* deals only with the issue of whether the dredging or filling of a wetland that is not adjacent to a perennial stream requires a Section 404 dredge or fill permit. Even so, although the Supreme Court’s opinions would suggest that the NPDES program for pollutant discharges is not affected, a closer review of the opinions suggest that CWA jurisdiction would be lacking for any type of discharge - even one involving chemical pollutants - so long as the discharges do not result in an adverse impact on the water quality of the receiving stream. Indeed, a lower court recently ruled that a person who caused an oil spill into a then dry tributary was not subject to CWA jurisdiction because it removed and remediated all of the discharged oil before the oil came into contact with any stream. (*United States v. Chevron Pipe Line Co.*, N.D. Tex., No. 5:05-CV-293, 6/28/06)

### *“What About Stormwater NPDES Permits Related to Construction Activity?”*

Following the analysis of the preceding question, we believe the continuing validity of the current NPDES program for erosion and sedimentation control activities on construction sites is suspect in those situations where the soils disturbed by construction activity are in locations remote from a perennial stream and are unlikely to have any impact on the water quality of such stream. However, where a construction site is proximate to a perennial stream or storm sewer that discharges into a stream after a storm, then the *Rapanos* decision should not result in grounds to challenge the applicability of the NPDES permitting requirements for stormwater discharges relating to construction activity. In any event, we have no reason to believe at this time that the Government intends to alter its enforcement of the NPDES stormwater permitting program relative to construction activity.

*Should you have any additional questions or comments regarding the Supreme Court ruling, or wish to obtain a copy of it, please contact the Seyfarth Shaw attorney with whom you work, or any member of the Environmental, Safety and Toxic Tort Group. Visit our website at [www.seyfarth.com](http://www.seyfarth.com)*

**ATLANTA**

One Peachtree Pointe  
1545 Peachtree Street, N.E.  
Suite 700  
Atlanta, Georgia 30309-2401  
404-885-1500  
404-892-7056 fax

**BOSTON**

World Trade Center East  
Two Seaport Lane  
Suite 300  
Boston, Massachusetts 02210-2028  
617-946-4800  
617-946-4801 fax

**CHICAGO**

55 East Monroe Street  
Suite 4200  
Chicago, Illinois 60603-5803  
312-346-8000  
312-269-8869 fax

**HOUSTON**

700 Louisiana Street  
Suite 3700  
Houston, Texas 77002-2797  
713-225-2300  
713-225-2340 fax

**LOS ANGELES**

One Century Plaza, Suite 3300  
2029 Century Park East  
Los Angeles, California 90067-3063  
310-277-7200  
310-201-5219 fax

**NEW YORK**

1270 Avenue of the Americas  
Suite 2500  
New York, New York 10020-1801  
212-218-5500  
212-218-5526 fax

**SACRAMENTO**

400 Capitol Mall  
Suite 2350  
Sacramento, California 95814-4428  
916-448-0159  
916-558-4839 fax

**SAN FRANCISCO**

560 Mission Street  
31st Floor  
San Francisco, California 94105-2930  
415-397-2823  
415-397-8549 fax

**WASHINGTON, D.C.**

815 Connecticut Avenue, N.W.  
Suite 500  
Washington, D.C. 20006-4004  
202-463-2400  
202-828-5393 fax

**BRUSSELS**

Boulevard du Souverain 280  
1160 Brussels, Belgium  
(32)(2) 647 60 25  
(32)(2) 640 70 71 fax

**SEYFARTH**  
ATTORNEYS **SHAW** LLP

**Breadth. Depth. Results.**

This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Copyright © 2006 Seyfarth Shaw LLP. All Rights Reserved.