Clean Water Act Section 404 Jurisdiction: What is Regulated?

Presentation for the MnDOT Environmental Stewardship and Streamlining Workshop by Tim Smith

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Clean Water Act Jurisdiction

How much do you know (or think you know)?

How much do you want to know?
Regulatory Program Overview - Authorities

Construction and Dredging
Section 10 Rivers and Harbors Act of 1899

Discharge of Dredged and Fill Material
Section 404 Clean Water Act, 1972 & 1977

Transport and Discharge of Dredged Material
Section 103 Ocean Dumping Act

One Corps Serving the Armed Forces and the Nation
Clean Water Act Jurisdiction

33 USC §1344(a): authority to issue permits for discharge of dredged or fill material into *navigable waters* (CWA §404)

33 USC §1362(7): navigable waters defined = “the *waters of the United States*, including the territorial seas”

33 CFR §328.3(a): Corps issued regulations defining “waters of the US”
Waters of the United States

33 CFR §328.3(a)

(1) All waters used or that may be susceptible to use in interstate or foreign commerce,
(2) All interstate waters including wetlands,
(3) All other waters, the use degradation, or destruction of which could affect interstate or foreign commerce,
(4) Impoundments of waters of the United States,
(5) Tributaries of 1-4,
(6) The territorial seas,
(7) Wetlands adjacent to waters (other than waters that are wetlands themselves) in 1-6.
Relevant Case Law
Prior to 2001

U. S. v. Riverside Bayview Homes (1985)


Missouri v. Holland (1920)
SWANCC

Request for §404 Permit for Landfill

- Corps denied application
- SWANCC appealed on jurisdiction
- 7th Circuit: Affirmed
- Supreme Court: NO
What the Supreme Court said:

The Clean Water Act does not allow regulation of isolated, intrastate waters based solely on their use by migratory birds.

Broader issues: CWA jurisdiction requires some “connection” to navigability (beginning of the significant nexus concept).
SWANCC Aftermath

Texas playa lake

Northeast kettle-hole bog

California vernal pool

Prairie Potholes
Status After SWANCC

Invalidation of the “migratory bird rule”

Eliminated clear bright line criteria that allowed Corps regulators to make efficient and timely Section 404 jurisdiction determinations on isolated intrastate waters and

Brought the scope of CWA jurisdiction into question
Rapanos and Carabell

First real test of CWA jurisdiction post-SWANCC

District Court held wetlands were jurisdictional due to surface water connection to waters of the US, even given restrictions of SWANCC

6th Circuit affirmed the District Court’s decision

Supreme Court granted certiorari in October 2005

Supreme Court handed down decision on June 19, 2006
It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case by case basis…

Chief Justice John Roberts
Rapanos Plurality
(Scalia, Roberts, Thomas and Alito)

In deciding whether to grant or deny a permit, the U. S. Army Corps of Engineers exercises the discretion of an enlightened despot…

Justice Antonin Scalia
“Waters of the U.S.” -- "only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams …, oceans, rivers, [and] lakes’
  - phrase does not include channels through which water flows intermittently or ephemerally
  - OR channels that periodically provide drainage for rainfall
  - But seasonal streams are included

Corps’ interpretation too expansive -- "waters of the US" NOT "based on a permissible construction of the statute"

So which wetlands can we still regulate?
  - only those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so there is no clear demarcation between "waters" and wetlands, "adjacent to" such waters and covered by the Act
  - “neighboring” is insufficient to show adjacency, bordering and contiguous appear to be OK.
Rapanos Plurality

Thus, establishing that wetlands ... are covered by the Act requires two findings:

1. that the adjacent channel contains a "water of the United States," (a relatively permanent body of water connected to traditional interstate navigable waters).

2. that the wetland has a continuous surface connection with that water.
The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow.

The Corps' resulting decision to treat these wetlands as encompassed within the term "waters of the United States" is a quintessential example of the Executive's reasonable interpretation of a statutory provision.
The Tiebreaker?
Justice Kennedy

Kennedy concurs, but with what?
- Definitely on vacating the 6th Circuit judgment
- Definitely on the remand to the lower courts for more factual development

Not Much Else: Neither with the plurality NOR the dissent

Creates the “test” for wetlands
- When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction
  - Absent more specific regulations
    - “the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries”

What is a significant nexus?
A Tale of Two Tests

Scalia’s –

First, that the adjacent channel contains a relatively permanent body of water connected to traditional interstate navigable waters and

Second, that the wetland has a continuous surface connection with that water.

Kennedy’s –

Wetlands adjacent to navigable-in-fact waters

adjacency is enough

Wetlands adjacent to non-navigable tributaries

other waters – adjacency + individual “significant nexus” determination

do the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of navigable-in-fact waters
A Tale of Two Tests

Which test should be used to establish jurisdiction?

- 7th Circuit - Kennedy (Gerke)
- 1st Circuit - Kennedy or Scalia (Johnson)
- N.D. Texas - Scalia (Chevron)

Corps and USEPA are finalizing guidance for establishing jurisdiction.
What has changed?
Post-Rapanos Case Law Update

Northern California River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006)

U. S. v. Hubenka, 438 F. 3d 1026 (10th Cir. 2006)


What Does it Mean For You?

- Guidance from HQ forthcoming
- Less is more
- Potential increase in permit processing times
- Public information/education
How to Stay Informed

Corps Regulatory HQ web page


St. Paul District Regulatory webpage

http://www.mvp.usace.army.mil/regulatory/

When all else fails........
How to Stay Informed

Let me fail too:

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Questions?