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A Client Alert from Paul Hastings

Navigating the Current of Federal Wetlands Cases

By Tom Mounteer, Noah Perch-Ahern and Jennifer Shea

Real estate developers and financiers are often frustrated by their counsel's or consultant's hesitance to provide an opinion as to whether an "isolated" or "remote" wetland is federally protected, and, in the past year, giving such an opinion has become even more challenging. Last year, in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), a divided Supreme Court articulated essentially two legal standards governing whether a wetland is federally protected. Since then, a number of federal courts have struggled with applying those two standards, and the federal government has delayed releasing guidance reconciling them.

This is not merely an academic issue. Regional divisions of the Army Corps of Engineers ("Corps") – the entity charged with issuing permits to dredge or fill wetlands – have delayed jurisdictional determinations over remote wetlands and other non-navigable waters until the Corps and Environmental Protection Agency ("EPA") release guidance reconciling the two standards. Additionally, the Corps has ceased asking the Department of Justice to bring enforcement actions involving non-navigable waters until the guidance is released.

The issue stems, in part, from the constitutional limits on Congress's authority. Federal protection of wetlands arises from Congress's authority to regulate interstate commerce. Because the interstate commerce authority traditionally has been thought to hinge on the navigability of waters, the Supreme Court has been reluctant to extend federal protection to wetlands located far from navigable-in-fact waters.

In the 2006 *Rapanos* decision, the Supreme Court addressed two different cases in which the question arose as to whether isolated wetlands were sufficiently connected to navigable water. In one case, the wetlands were separated from tributaries of navigable-in-fact waters by drains or ditches. The government had

brought an enforcement action against parties that had backfilled the wetlands without a permit. In the other case, the wetland was separated from a drainage ditch by an impermeable berm. The drainage ditch connected to a creek that flowed into a lake. The government denied permission to fill the wetland.

In both cases, the lower federal courts upheld the government's right to protect the isolated wetlands. The Supreme Court, however, sent both matters back to the lower courts for further consideration as to whether the wetlands were, in fact, within the federal jurisdiction conferred by the Clean Water Act. The Court did so with two differing legal standards. Led by Justice Scalia, four justices endorsed a standard that would require (1) tributaries to navigable waters to have a "relatively permanent" presence of water, and (2) a continuous surface connection to the abutting waterway or tributary in order for the wetland to come under federal protection. Justice Kennedy, who gave the majority its deciding vote, articulated a different standard. Rather than a "relatively permanent" presence of water, he would only require the government to find that "there is a significant nexus between the wetlands in question and navigable waters in the traditional sense." A "significant nexus," he declared, will be found where the wetlands significantly affect the water quality of the traditionally protected waters. The lower courts to which the cases were sent back have not yet issued their decisions.

Since the Supreme Court's decision last year, a number of federal courts have had to wrestle with applying the splintered decision. Several courts have held that they should use the decision that was decided on the narrowest grounds. Each court that has used this analysis has determined that Justice Kennedy's "significant nexus" test was the narrowest approach. Courts using this approach have come out both ways,

depending on the facts at hand. For instance, in *Environmental Protection Information Center v. Pacific Lumber Co.*, 2007 WL 43654 (N.D. Cal. 2007), the reliance on a hydrological groundwater connection was not enough to prove a “significant nexus” between ephemeral streams and a navigable creek into which the streams flowed. On the other hand, in *No. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006), a wastewater treatment plant that discharged into a rock quarry was adjudged within federal jurisdiction, because the quarry water would eventually seep into a navigable river. A third case, *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), was remanded for further exploration of the connection between a filled wetland that was connected to a river by a ditch in order to determine whether the filling of the wetland without a permit constituted a violation.

Finally, in *San Francisco Baykeeper v. Cargill Salt Division*, No. 04-17554 (9th Cir. March 8, 2007), the Ninth Circuit reversed a summary judgment motion by a lower court that held that a pond used for salt production, which was separated by a levee from a navigable tributary of the San Francisco Bay, was federally protected. The Ninth Circuit, using Kennedy’s analysis, determined that no evidence was presented to prove a significant nexus to the water quality of the tributary. However, the argument was also made that adjacency to the navigable water should by itself bring the pond within federal jurisdiction.

Another group of courts have determined that jurisdiction should be upheld if the particular water at issue passed either Scalia’s or Kennedy’s test. These courts reasoned that either approach would have attracted enough votes from other members of the court, and, therefore, the case should be assessed under both tests. Decisions taking this approach also indicate that determining jurisdiction can be difficult. For instance, in *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), the court remanded the case to the trial court to determine whether wetlands and streams that flowed into cranberry bogs were protected. In *Simsbury-Avon Preservation Society, LLC v. Metacon Gun Club, Inc.*, 2007 WL 268341 (D. Conn. 2007), the court decided that a gun club’s activities near wetlands were not under federal jurisdiction, because the wetland had a surface connection only during flooding, and there was no evidence that conclusively showed the impact of the gun range on the navigable waters. In another case,

United States v. Evans, 2006 WL 2221629 (M.D. Fla. 2006), the court had an easier time proving federal jurisdiction where a relatively permanent creek was a tributary of a navigable-in-fact water.

In yet a third approach to reconcile the splintered *Rapanos* decision, one court decided not to use the *Rapanos* decision at all, and instead applied the prior case law of its circuit. In *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006), an oil discharge into an intermittent channel that migrated into an unnamed creek was not under federal jurisdiction, because the channel and creek were normally dry and were not tributaries of navigable waters.

From even a cursory review of the decisions trying to apply the Supreme Court’s 2006 *Rapanos* decision, it becomes clear that jurisdictional determinations are factually intense. Moreover, these determinations are complicated by the geographic region in which the wetland lies. The fractured *Rapanos* decision has resulted in the federal circuits taking different approaches to jurisdictional determinations. Whether or not federal jurisdiction is found, the foregoing cases signify that activities near or on wetlands and other waters removed from navigable waters should be analyzed beforehand to help avoid costly regulatory and litigation actions.

Further muddling jurisdictional determinations, promised federal guidance may not reconcile the different approaches courts are taking post-*Rapanos*. The Environmental Protection Agency’s Assistant Administrator for water policy recently suggested at a public forum in Washington that the long-awaited guidance may afford the government discretion to apply either of the Supreme Court’s two standards depending upon which one serves to protect more wetlands. Federal legislation has also been introduced to expand the scope of federal jurisdiction, but the proposals certainly do not guarantee clarity with respect to what wetlands are within federal reach.

Federal jurisdiction of wetlands is an issue in flux at every level of the federal government. For the immediate future, real estate developers and financiers are presented with a significant challenge when determining whether isolated wetlands on land they are buying, or land acquisitions they are financing, are federally protected. Early identification of potentially protected wetlands in the diligence process remains

paramount. Close collaboration with counsel and technical consultants during development planning stages is essential to avoiding regulatory mishaps. For some so-called isolated wetlands, it may be straightforward to reach a conclusion as to their protection. In other cases, this determination may be more difficult and nuanced. Hopefully, applying the

forthcoming federal guidance will provide some comfort. This remains to be seen. Moreover, federal legislation could supersede, or at least complicate, the expected federal guidance. In the meantime, parties interested in potentially protected wetlands will have to navigate the current of recent post-*Rapanos* cases.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Washington, D.C.

Thomas R. Munteer
202-551-1775
tommounteer@paulhastings.com

Noah P. Perch-Ahern
202-551-1881
noahperch-ahern@paulhastings.com

Jennifer L. Shea
202-551-1793
jennifershea@paulhastings.com

Los Angeles

Mitchell B. Menzer
(213) 683-6111
mitchmenzer@paulhastings.com

Robert I. McMurry
213-683-6255
robertmcmurry@paulhastings.com

Elisa Paster
213-683-6128
elisapaster@paulhastings.com