Blogs
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California Land Use & Development Law Report

When Is Wetland a Wetland - And How Do We Find Out?

In recent years, two United States Supreme Court decisions have significantly reduced the scope of federal wetlands jurisdiction under the Clean Water Act. *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006). In *SWANCC*, the Court ruled the Act's reach did not extend to isolated ponds whose only connection to interstate commerce is their use by migratory birds. In *Rapanos*, the Court further scaled back the Act's coverage, ruling it protects only those water bodies with a "significant nexus" to a traditionally-defined navigable waterway such as a river, lake or bay.

Guidance from the EPA and Corps of Engineers

In the wake of these decisions, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers published joint guidance in 2007 and 2008 seeking to clarify the bounds of their Clean Water Act jurisdiction and to explain how "significant nexus" determinations are made. The stated purpose of the guidance was to create "certainty and consistency," but in reality the guidance did not alleviate the confusion—or stem the resulting tide of litigation in the federal courts—over what qualifies as a water of the U.S. The state of the law remained woefully unclear on a critical threshold issue under the Act:

- When are wetlands, ponds, ditches, ephemeral creeks and other small aquatic features regulated by the federal government as "waters of the United States"?
- And more specifically, what does it mean to have a "significant nexus" to navigable water?

"Clearer, More Predictable" Guidance and Maybe A Rule-Making (or Maybe Not)

In April 2011, the agencies jointly published new draft guidance that, compared with the prior guidance, provided a significantly higher level of environmental regulation. In publishing the draft guidance, the agencies stated it would help to establish "clearer, more predictable guidelines for determining which water bodies are protected from pollution under the Clean Water Act."

But instead the draft guidance unleashed a political firestorm. The agencies received more than 230,000 comments on the proposal, many of them harshly critical, and bitter partisan battles ensued in Washington, D.C. Opponents saw the new draft guidance as a "jurisdictional grab"—a backdoor effort to expand Clean Water Act protections beyond what the Supreme Court had prescribed. They also urged the agencies to pursue formal rule-making proceedings, instead of merely adopting interpretive guidance.

Earlier this year, there were indications that the agencies were on the verge of starting the rule-making process. But then in March the agencies reversed course—again—by indefinitely delaying the rule-making and instead submitting the 2011 draft guidance to the Office of Management and Budget for intra-governmental review and approval.

All of this has occurred against a backdrop of a growing line of court decisions refusing to defer to informal guidance under the Clean Water Act, and instead insisting on formal rules published in the Code of Federal Regulations in accordance with the Administrative Procedure Act. But no one really knows when such formal

rules will be proposed, let alone adopted. More importantly, no one really knows—especially before Election Day—what the content of the rules will be.

Congress, Can You Hear Us?

In the Supreme Court's recent decision in *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012), which held that Clean Water Act compliance orders are final agency actions subject to judicial review, Justice Alito emphasized in his concurring opinion that the best solution lies with Congress: "Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act."

But a legislative fix has proved elusive, as efforts thus far have failed on both sides of the aisle in Congress to clarify what the phrase "waters of the United States" means. Indeed, a recent proposal by House Republicans (H.R. 4965, introduced April 27, 2012) fails to offer any definition of this all-important phrase, other than to prohibit the Army Corps and EPA from finalizing or enforcing their 2011 draft guidance or from using the guidance as the basis for any rulemaking or decision on the scope of their Clean Water Act jurisdiction. If this legislation is ultimately enacted, at least we'll know what "waters of the United States" does ***not*** mean.

If You Don't Know Whether It's a Wetland, You Can Just Presume that It Is

Until we have a clearer definition, in many cases the question whether there is a "significant nexus" to a navigable water will remain a highly fact-specific and technical inquiry, requiring an expert environmental consultant to evaluate a variety of hydrological, chemical, biological and other ecological factors, and perhaps an extensive—and expensive—process of trying to reach agreement with the Corps and the EPA on where the jurisdictional line will be drawn.

In light of these complications, the agencies and permit applicants are increasingly relying on "Preliminary Jurisdictional Determinations," which simply ***presume*** that all aquatic features on the site at issue fall under the Clean Water Act's coverage. See Army Corps Regulatory Guidance Letter 08-02 (June 26, 2008). When it is clear that jurisdiction exists and the only issue is the ***extent*** of this jurisdiction, a Preliminary JD can make the permit process simpler and less time-consuming. But it also may result in unnecessary permitting and mitigation requirements, by allowing the Corps and the EPA to enlarge their jurisdiction beyond what the law would otherwise provide.

Another Layer of Uncertainty in California

In California, the issue is complicated by the fact that the State Water Resources Control Board and Regional Water Quality Control Boards have independent state law authority—regardless of the federal agencies' jurisdiction under the Clean Water Act—to regulate "waters of the state," which are broadly defined to include all surface water and groundwater in California. The Water Boards have been aggressively asserting this authority since the Supreme Court's *SWANCC* decision in 2001, in order to fill the gap caused by receding federal jurisdiction. So, even if you don't need a permit under the federal Clean Water Act, you may need a permit under state law. Or, you may need two different permits for the same project or activity—one from the Army Corps for federally jurisdictional waters, and the other from your Regional Water Board for waters that used to, but no longer, fall under federal jurisdiction.

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In his concurring opinion in the *Rapanos* case in 2006, Chief Justice Roberts lamented the uncertainty in this area of law and predicted that "lower courts and regulated entities will have to feel their way on a case-by-case basis." Given the apparent inability of the powers that be in Washington to resolve the uncertainty, this

indeterminate, ad hoc approach could well prevail for some time to come.

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