



U.S. SUPREME COURT LIMITS U.S. ARMY CORPS OF ENGINEERS' JURISDICTION TO REGULATE WETLANDS

The United States Supreme Court's recent decision in *Rapanos v. United States* appears to have narrowed the scope of the U.S. Army Corps of Engineers' jurisdiction to regulate wetland areas. The Court cast doubt on past Corps interpretations of its jurisdiction but provided conflicting advice on what standard to apply in the future. The decision's immediate impact is likely to slow or stall the Corps' permitting decisions until the agency has an opportunity to issue interpretive guidance or initiate new rulemaking. The Court's ruling is also likely to have a significant effect on how courts and government agencies interpret Corps authority under the Clean Water Act ("CWA"). As a result, potential permit applicants should closely monitor developments in how the Corps and the courts resolve permitting decisions in light of *Rapanos*.

This is the second landmark Supreme Court case to address Corps wetland jurisdiction in the last five years. The Court's 2001 opinion in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)* also limited Corps jurisdiction by prohibiting the Corps from regulating isolated intrastate waters.

Background

At issue in the two cases consolidated before the Court were the qualities a wetland must have to fall under Corps jurisdiction. While the CWA gives the Corps jurisdiction over "navigable waters," the Corps faced opposition from businesses and individuals who questioned whether that jurisdiction includes wetlands that are removed from navigable waters (e.g., by barriers) and/or that are tenuously connected to navigable waters (e.g., via intermittent watercourses or water bodies).

The Court's Conflicting Standards

The Court delivered conflicting advice; while some members of the Court voted to restrict Corps jurisdiction, others voted to make no changes. Some members of the Court proposed a standard where the Corps may only regulate wetlands linked to *permanent* bodies of water by a *continuous* surface connection. This interpretation marks a significant departure from the long-standing interpretation of Corps jurisdiction and would have the effect of reducing the number of wetlands the Corps may regulate. Other members of the Court favored an interpretation that would require Corps jurisdiction to be determined on a "case-by-case basis," which can be a costly and time-consuming process. Finally, in a third variation, the remaining members of the Court voted to make no interpretive change to the way in which the Corps has traditionally viewed and exercised its jurisdiction.

Looking Ahead

The lack of a majority agreement on the appropriate jurisdictional standard leaves the Corps and the business community in confusion about how to proceed with projects involving some wetland areas, and lower courts are left without a standard to apply in judging whether these decisions are appropriate. To avoid significant disruptions in Corps operations, the Court encouraged the Corps to revise its regulations to address the issues in *Rapanos*. In the interim, it appears that the Corps permitting process could come to a standstill while the agency works to translate this decision into practical guidance.

In fact, the Corps and the Environmental Protection Agency recently issued joint Interim Guidance that counsels agency staff to “delay making CWA jurisdictional determinations for areas beyond the limits of the traditional navigable waters for the next three weeks” while substantive guidance is prepared to address the issues in *Rapanos*. Among other things, the Interim Guidance strongly recommends that the Corps “defer action” on addressing *Rapanos* issues in court or administrative proceedings, and encourages the Corps to postpone referring new enforcement actions to the Department of Justice unless the case involves activities in or affecting traditionally navigable waters.

If you have any questions about the *Rapanos* decision, or if you would like a copy of the joint EPA/Corps Interim Guidance, please contact Donald C. Bluedorn II at 412-394-5450 or dbluedorn@bccz.com or Emily T. Lewis at 412-394-5451 or elewis@bccz.com.