

U.S. Supreme Court Issues Wetlands Decision

On June 19, 2006, the United States Supreme Court issued its opinion in *Rapanos et ux., et al v. United States* specifically addressing how federal regulators interpret the Clean Water Act.

Background

The Clean Water Act makes it unlawful to discharge dredge or fill material into navigable waters without a permit, defining navigable waters as “the waters of the United States including the territorial seas.” The Army Corps of Engineers has traditionally applied this definition by maintaining that *any* hydrological connection between a body of water and a navigable waterway confers jurisdiction. *Rapanos* combined two separate lower court cases which both held the broad jurisdiction exercised by the Army Corps of Engineers exceeds commerce clause authority.

Analysis

In a 5-4 opinion issued by the Court, Justice Kennedy stated that to come within federal protection of the Clean Water Act, a wetland must have a “significant nexus” to a body of water that is actually navigable which requires much more than simply some hydrological connection. Justice Kennedy went on to state that the existence of a “significant nexus” is a technical and scientific judgment that should be deferred to federal regulators. This interpretation puts the Army Corps of Engineers at a crossroads. The interpretation previously relied upon by the Army Corps of Engineers is no longer acceptable under the *Rapanos* decision. However, the Justices did not provide the regulators a specific rule to utilize in rewriting its regulations.

Impact

The long term impact of *Rapanos* will become clear when the Sixth Circuit Court of Appeals revisits the two decisions vacated by the Supreme Court. However, because Ohio Revised Code § 6111 is already much more restrictive than the Clean Water Act regulations, this US Supreme Court decision will have little impact on Ohio law. Currently, the State requires a permit to fill any wetland, including isolated wetlands, which are not subject to federal regulation under the Clean Water Act. The *Rapanos* decision is also unlikely to have an effect on wetland permitting done by the Ohio Environmental Protection Agency.

For more information on this decision or other Wetlands issues, please contact Mike McMahon at mmcahon@mdllp.net.

The Caxton Building
812 Huron Road-Suite 650
Cleveland, OH 44115
p 216-621-1312

www.mdllp.net

McMahon DeGulis's FYC is published to provide information to our clients and friends. Information in this news brief should not be used as a substitute for specific legal advice. Readers are encouraged to seek professional advice.

