REPRINTED FROM THE

FRIDAY, AUGUST 11, 2006 ne NEW ENGLAND

Real Estate Journal

THE LARGEST BUSINESS PUBLICATION OF ITS KIND IN THE NATION

Federally-regulated wetlands: Any clarity in this murky area?

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For years, property rights advocates and environmental preservationists have been battling over the extent of federal regulation of wetlands. No one questions the federal role in protecting marshes along ocean fronts and swamps on navigable rivers. The conflict is over jurisdiction in those areas distant and isolated from navigable waters.

On June 26th the U.S. Supreme Court handed down a decision in a case called Rapanos that all had hoped would add some clarity in this murky area. It did not.

Congress gave the U.S. Army Corps of Engineers jurisdiction over wetlands when it enacted the Clean Water Act. The Act describes regulated waters in general terms. The Corps has interpreted that definition expansively by regulation. While there have been sharp encounters during the regulatory process, even more blood has been shed in court.

Two significant cases worth knowing about have come to dominate the landscape, each marking out the extremes of permissible regulation. In United States v. Riverside Bayview Homes, Inc., 474 U.S .121 (1985), the Court held that there was jurisdiction under federal law over those wetlands "adjacent" to traditional navigable waters. Simple enough. Wetlands that are not physically part of navigable waters at least had to be adjacent to be regulated. Problem is, what is "adjacent"?

Just a year after Riverside Bayview the Corps found itself having to determine whether it had jurisdiction over wetlands used by migratory birds. The Corps further defined "navigable waters" to include "wetlands... which are or could be used by interstate or foreign travelers for recreational or other purposes." This became known as the Migratory Bird Rule or, derisively, the Reasonable Duck Rule over the silly notion that all it took was for some duck flying south for the winter to look down at an isolated pond, not even remotely adjacent to anything navigable, and reasonably contemplate stopping there for a break. Really, that is what the rule essentially allowed.

In Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001), the U.S. Supreme Court said enough is enough and held that the Clean Water Act conferred no jurisdiction over truly isolated wetlands. But that, of course, didn't settle the question, because what was adjacent and what was connected, including whether a subsurface hydrological connection was sufficient, remained unanswered.

On June 26th in the Rapanos v. U.S. decision, the U.S. Supreme Court vacated and remanded for further proceedings two Sixth Circuit opinions holding that the U.S. Army Corps of Engineers had jurisdiction over wetlands adjacent to a tributary of traditional navigable waters. There was no majority on the Court. Four justices, in an opinion by Justice Scalia, held that there had to be a continuous permanent surface flow and connection to traditional navigable waters for the Corps to have jurisdiction. These four wanted to vacate the lower court decisions. Four dissenters, led by Justice Stevens, believed the Court should affirm the decisions of the Sixth Circuit. In the middle stood Justice Kennedy, who took the position that Corps jurisdiction over the wetlands required a significant nexus between the wetlands and traditional navigable water, a test requiring a case-by-case analysis of whether the wetlands significantly affect the chemical, physical, and biological integrity of the traditional navigable water. He concurred in remanding because the lower courts had not applied the significant nexus test. Thereby the Scalia Four became the plurality and the cases were remanded.

Unfortunately, Rapanos leaves the development community up the creek without a paddle. We're not even sure which opinion – the Scalia Four or Kennedy's – is controlling. Is it enough that there be a significant nexus (Kennedy), or do we use the more limiting analysis of a continuous permanent surface flow and connection to traditional navigable waters (Scalia Four)? Because Kennedy's view gave the Scalia Four their remand when he concurred, the bet is that Kennedy's view controls.

Hopefully, the Corps will promulgate new rules, Congress will step in and provide some direction, and the lower courts will give some definition to the fractured Rapanos decision. But until we have something more definitive, land owners and developers will struggle to figure out whether their properties have federally-regulated wetlands.

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