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[FOURTH CIRCUIT OFFERS PYRRHIC VICTORY ON CORPS JURISDICTION OVER DEVELOPER'S CLEAN WATER ACT PERMIT](#)

[*Precon Development Corporation, Inc. v. U.S. Army Corps of Engineers, 2011 WL 213052 \(C.A.4 \(Va.\)\)*](#)

By [Greg Woodard](#)

The Fourth Circuit Court of Appeal case, *Precon Development Corporation, Inc. v. U.S. Army Corps of Engineers, 2011 WL 213052 (C.A.4 (Va.))*, arises out of a determination by the Army Corps of Engineers ("Corps") that it has jurisdiction, under the Clean Water Act ("CWA"), over 4.8 acres of wetlands located on the appellant owner's property, approximately 7 miles from the nearest navigable water. The Corps denied the owner's application for a CWA permit to develop the property, and the owner appealed to federal district court. The district court granted summary judgment to the Corps, upholding both its jurisdictional determination, and its permit denial. The owner appealed the district court's jurisdictional determination, and the Fourth Circuit Court of Appeal reversed, holding that the Corps' administrative record was inadequate to support its conclusion that it had jurisdiction over the wetlands. However, the court's ruling will not likely have a large impact on future CWA permit applications given its limited holding.

Background Facts

The property owner is the developer of a 658-acre Planned Unit Development ("PUD") in Virginia. The PUD is a mixed-use development with both residential and commercial elements. Previous to this case, the Corps granted the owner permission to fill 77 acres of wetlands for development, based in part on an understanding that this was to entirety of the development planned for the PUD. The Corps was not pleased that the owner planned to develop additional wetlands on the property and the owner agreed to reduce the wetlands to be filled from 10.7 acres to 4.8 acres ("Site Wetlands").

The Site Wetlands are located adjacent to a man-made drainage ditch (the "Ditch") but they do not abut the Ditch because a berm was created between the Site Wetlands and the Ditch. The Ditch, which flows seasonally, joins a larger perennial drainage ditch (the "Perennial Ditch") downstream of the Site Wetlands. That ditch runs along the PUD boundary for approximately 3,000 feet before meeting up with a second perennial tributary 2.5 to 3 miles south of the PUD, before flowing into the Northwest River, approximately 3 to 4 miles downstream.

In 2007 the owner applied to the Corps for a jurisdictional determination whether the Site Wetlands were covered by the CWA, and a permit to fill the wetlands if the Corps decided a permit was required. The Corps determined it had jurisdiction over the Site Wetlands because they were adjacent to the Ditch that qualified as "waters of the United States" under the CWA, and denied the owner's request for a permit.

The owner administratively appealed both determinations. A Corps appeals officer remanded the Corps' jurisdictional decision for reconsideration under the new Corps "Rapanos Guidance" in light of the Supreme Court's recent decision in *Rapanos v. United States*, 547 U.S. 715 (2006). The Rapanos Guidance instructs the Corps how to make jurisdictional determinations that comply with the new

rules for CWA jurisdiction announced by the Supreme Court in *Rapanos*. Under *Rapanos*, wetlands like the Site Wetlands, which are adjacent to but not abutting a relatively permanent tributary, are not automatically subject to Corps jurisdiction. Rather, the Corps must evaluate the wetlands to determine whether there is a "significant nexus" with traditional navigable waters. Any such evaluation must include "similarly situated" wetlands in the area, which the Corps determined included 448 acres of wetlands that were separated from the Site Wetlands but were either on the owner's property or located nearby.

The Corps upheld its jurisdictional determination under the *Rapanos* Guidance, finding that there was a significant nexus with both the Ditch and the Perennial Ditch and the downstream Northwest River.

The owner filed suit in federal district court and the court granted the Corps' motion for summary judgment, finding that the Corps had properly defined the scope of its review area as including the entire 448 acres of similarly situated wetlands, and that the Corps' determination that the wetlands had a significant nexus to the Northwest River was supported by substantial factual findings.

The owner appealed to the Fourth Circuit arguing two flaws in the Corps' determination: (1) the Corps' decision to aggregate 448 acres of surrounding wetlands was impermissible, and (2) even if all 448 acres were properly included in the jurisdictional determination, the Corps did not provide sufficient evidence that the connection between the wetlands and the Northwest River was a "significant nexus."

Court's Ruling

The court gave an overview of the Supreme Court's prior rulings on CWA jurisdiction. It noted that the Supreme Court's fractured *Rapanos* decision resulted in two tests that could be applied when evaluating the Corps' assertion of jurisdiction over wetlands lying alongside "remote and insubstantial" ditches and drains. However, the parties to the suit agreed that only Justice Kennedy's test governed their situation. Under Justice Kennedy's test, when the Corps seeks jurisdiction over wetlands located adjacent to nonnavigable tributaries, it must establish that a "significant nexus" exists between the wetlands and navigable waters.

Drawing on the Supreme Court's prior ruling in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, Justice Kennedy noted that wetlands possessing the "significant nexus" are those that "perform critical functions related to the integrity of other waters - functions such as pollutant trapping, flood control, and runoff storage." (quoting *Bayview Homes* at p. 135.) Accordingly, Justice Kennedy found that a "significant nexus" exists if the wetlands, either alone or in combination with nearby similarly situated wetlands, significantly affect the chemical, physical, and biological integrity of more traditionally-defined "navigable" waters. When the wetlands' effects on water quality were speculative or insubstantial, the required nexus did not exist and they were not considered "navigable waters" under the CWA.

Applying the "significant nexus" test to the Site Wetlands, the court first upheld the Corps' labeling 448 acres of wetlands as "similarly situated" for purposes of its nexus determination. The court found that the Corps' identification of the relevant tributary as both the Ditch and the Perennial Ditch was proper. It also found that the Corps' use of all 448 acres in its analysis was proper as they were both abutting and adjacent to the tributary. The court rejected the owner's claim that the berm between the Site Wetlands and the Ditch disconnected the Site Wetlands from the surrounding wetlands because the berm did not inhibit wildlife movement or wetland functions.

The court did question the Corps' decision, after determining it would treat the Ditch and the Perennial Ditch together, to include

adjacent wetlands stretching over three miles downstream as "similarly situated." However, the court ultimately upheld the Corps' finding and merely urged the Corps to consider ways to gather more concrete evidence of similarity in the future before using such a large area of wetlands.

As to the owner's second argument, the court found that the record did not contain sufficient evidence to allow it to assess the Corps' conclusion that the Site Wetlands had a "significant nexus" with the Northwest River located several miles away. The court stated that the record had no evidence of the actual flow of the adjacent tributaries to support its claim that the tributaries helped diminish downstream flooding and erosion. Moreover, even if there was sufficient evidence of flow in the record, the record did not support the Corps' nexus determination in a case involving wetlands adjacent to two manmade ditches, flowing at unknown rates toward a river five to ten miles away, without any information on the river's condition.

Based on its holding, the court reversed the district court's grant of summary judgment and remanded the case to be sent back to the Corps for further consideration in light of the court's opinion. The court also admonished the Corps in cases like the current one, involving wetlands running along a ditch miles from any navigable water, to pay attention to documenting why such wetlands significantly affect the integrity of navigable waters. The court stated that such documentation should include some comparative information that allows it to meaningfully review the significance of the wetlands' impacts on downstream water quality.

Implications

The court's ruling will likely have only minimal impact on future development or other projects seeking to fill in wetlands under a CWA permit. The court upheld the Corps' decision to use a wide area in aggregating "similarly situated" wetlands, even though the Site Wetlands were separated from both the Ditch and the other wetlands. The court only reversed the grant of summary judgment because the Corps failed to adequately document the water quality impact the Site Wetlands and other wetlands would have on the Northwest River (the navigable water). In fact, the court gave the Corps a roadmap to meet its expectations on remand.

In sum, a developer seeking a CWA permit to fill wetlands should be aware that the court will require the Corps to adequately document its determination of a "significant nexus" between the wetlands and the navigable water. However, it appears the courts will still give significant deference to the Corps' decision.

An interesting side note relates to the court's use of only one of the two *Rapanos* tests. While the court did not address the issue of whether the other "continuous surface connection" test provides an alternate ground to establish Corps jurisdiction, it did hint that the berm separating the Site Wetlands from the Ditch could make the test's application questionable. In any event, developers should be aware that the courts can also use this second test in finding Corps jurisdiction, leading to an even greater possibility that the Corps' jurisdiction determination will be upheld.

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