

FALL 2006 NEWSLETTER

THE RAPANOS/CARABELL "DECISION"

On June 19, 2006 the U.S. Supreme Court handed down a decision in both the *Rapanos* and *Carabell* cases. Both cases challenged the jurisdictional reach of the Corps of Engineers in regulating wetlands and were thus consolidated into one case.

Justices Roberts, Scalia, Thomas, and Alito delivered a plurality opinion stating that the Corps had exceeded their jurisdiction under the Clean Water Act (CWA). They felt that for a wetland to fall under CWA jurisdiction a permanent surface connection to a navigable waterway was required. Justices Stevens, Souter, Ginsburg, and Breyer dissented and issued an opinion in support of the current manner in which the Corps interprets the CWA.

Planted firmly between these two contradictory camps was Justice Kennedy. Although Justice Kennedy took issue with certain aspects of both the plurality's and dissenting opinions, he was agreeable to remanding these two cases to the Sixth Circuit, which was the legal outcome of this matter.

In the near term it appears that the Kennedy opinion will probably have the

most influence on jurisdictional decisions. The EPA and the Corps are reviewing the decision and have promised to issue guidance to help the regulators and the public understand what wetlands are covered under the CWA.

Justice Kennedy's opinion keyed on the phrase "significant nexus". He felt that if a significant nexus exists between a wetland and a navigable waterway, then the



A Nexus. A Significant Nexus?

wetland falls under Corps' jurisdiction. In this case, Justice Kennedy concluded that neither the Corps nor the lower courts had adequately documented such a nexus, thus the matter was remanded for further consideration.

So, in the mind of Justice Kennedy what constitutes a significant nexus? The following quotation from the Kennedy opinion summarizes his view on this matter.

"Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters", if the wet-

lands, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense. When, in contrast, their effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term "navigable waters"."

Dissecting this language in search of practical guidance is problematic. Obviously the first problem is defining "significantly affect". Swapping significant nexus for significantly affect gains us nothing—one is still faced with that word "significant". Ironically, the plurality's opinion would be of great help with this matter. If a wetland is not linked to a navigable water by a permanent surface connection, that might represent at least a logical reason

to claim that the nexus is not significant. But Justice Kennedy did not agree with that argument.

Then there is the issue of "in combination with similarly situated lands in the region". What does that mean? Was Justice Kennedy referring to other wetlands, or nearby upland floodplains, or landscape position?

It is not uncommon for Supreme Court decisions to raise more questions than they answer. But it appears that the *Rapanos/Carabell* decision has set a new standard in that regard. It will be interesting to see how the regulatory agencies sort this out.

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INDIANA BATS

Although the Indiana bat (*Myotis sodalis*) has been listed as an endangered species for many years, impact to this species was rarely raised during the review of permit applications in New York. That situation has changed recently and now both federal and state agencies frequently request that potential impacts to Indiana bats be addressed, especially if the project is located within 40 miles of a known hibernaculum. This heightened concern is due to a change in what we know about the spring and summer range of this species in New York.

Indiana bats hibernate in limestone caves. They emerge from their winter hibernacula from mid-April through May. Recent research found that bats leaving New York caves travel 20 to 40 miles, to spring roosting sites.

Roost trees are characterized by the presence of loose bark or narrow cracks and crevices that provide protection from the elements and predators. Mature shagbark hickory is one of the most commonly used trees because the "shaggy" bark offers perfect roosting conditions. Other tree species are used, especially if narrow gaps exist between the trunk and the bark. In the Hudson Valley Region, Indiana bats were found roosting under the bark of dead black locust trees. In central New York, where TES participated in a 2006 roost survey, a crack in a silver maple tree snag was used.

The key question is how to determine whether a proposed project represents a threat to bat roosting habitat and, more importantly, is this a threat to the species? Unfortunately, there is no simple answer, no cookbook approach that results in a definitive conclusion.

The first step is to assess the position of the site in the general landscape and determine whether or not appropriate forest conditions exist. Floodplains and riparian areas are preferred, especially if a forested wetland or wetland complex that includes large trees is present. Sites above 1,000 to 1,200 feet in elevation can be dismissed, because so far the research has located roosting females only at lower elevations.

If cutting trees for a project development will occur, the next step is to determine the potential suitability of those trees. Species, size, and condition are the key elements to be considered. Determining the presence or absence of large shagbark hickory trees is the easy part. But other trees with exfoliating bark might represent a potential roosting site. Lastly, determining if any tree, large or small, has a narrow crack or split in the trunk is the most difficult aspect of the assessment. Such trees can be living or dead, and the crack might occur where

visibility is limited.

Keep in mind the fact that Indiana bat roosting habitat may be an issue of concern only when a federal permit is needed, although it could be raised during a SEQR review. If no federal permit is required, or if no trees will be disturbed, then one need not worry about this potential issue.

Some developers have identified the mere question of Indiana bat habitat as a serious impediment to development, not only because of increased regulatory complexity, but because local citizens groups and even some competitors have seized upon this issue to delay proposed projects.



A tree that could be used for Indiana bat roosting.

The regulatory agencies face a very delicate problem regarding Indiana bats. The Endangered Species Act prohibits the harming or killing (i.e. "taking") of a listed species or affecting designated critical habitat. Cutting trees during the fall or winter months can be done without harming any bats. If a point is

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INDIANA BATS (CONTINUED)

reached where developers consider dealing with this issue within the regulatory process to be too burdensome, the ultimate impact on Indiana bat habitat could be far greater than it was without regulatory oversight.



Indiana bat at summer roost tree. Photograph courtesy of INHS Reports March-April 1996. Illinois Natural History Survey.

FEDERAL WETLANDS PERMITS CHANGING

CORPS NATIONWIDE PERMITS PROPOSED TO BE MODIFIED

Anyone involved with federal wetland permits should pay close attention to the proposed changes to the Nationwide Permits (NWP) issued by the U.S. Army Corps of Engineers (Corps) and published in the Federal Register on September 26, 2006. Several important changes are proposed.

The announcement of the NWP changes also provides an opportunity for other changes, including the New York State Department of Environmental Conservation (NYSDEC) to change their position on the thresholds for blanket approval of Section 401 Water Quality Certification Permits and the Corps District offices to modify their regional conditions for NWPs. Details of the process involved, proposed changes,

and related repercussions are provided in the following discussion.

Process Involved

From the September 26, 2006 publication date there is a 60-day comment period. If you want to comment, do so by November 27, 2006. Regional conditions to the NWPs by Corps District offices will be prepared and distributed by public notice and comments solicited. These regional conditions are very important, they can even revoke NWPs in their District. In New York we have two Corps Districts; Buffalo and New York, which split the state in half; with Buffalo taking the western half and New York taking the eastern half. Proposed regional conditions for both Districts were provided on October 13, 2006. There is a 45-day comment period on these regional conditions.

After this time, the final proposed NWP changes will be published, probably in late January 2007. They will become effective 60 days from the publication date (end of March 2007).

During this 60-day period another important process takes place. The NYSDEC and tribal groups will make their decisions regarding Clean Water Act Section 401 Water Quality Certification, as well as Coastal Consistency decisions by the New York Department of State in this timeframe. The NYSDEC will establish what thresholds will be required for blanket 401 Water Quality Certification approval during this period. Above these thresholds, an individual Water Quality Certification permit will be required.

What are Nationwide Permits?

Nationwide Permits are a type of General Permit. NWPs are often confused with regulations, but they are not; they are existing permits. In the federal wetland permitting process there are basically two types of permits: 1) Individual Permits and 2) Nationwide Permits. NWPs offer a more streamlined

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FEDERAL WETLANDS PERMITS CHANGING... (CONTINUED)

permit process and a general processing time limit of 45 days. There is no public notice requirement in the NWP arena and the sister federal agencies (USFWS and EPA) do not comment on the permit application. Off-site project alternatives are not required to be addressed, but on-site avoidance and minimization must be demonstrated. NWPs are determined to apply in situations where the impact to the wetland/water resources is considered to be individually and cumulatively minimal. The thresholds and conditions when and where NWPs apply are established in the permits and related conditions.

Why are Nationwide Permits Under Review?

Nationwide Permits expire every 5 years. The existing NWPs were last published in the Federal Register on January 15, 2002 and are set to expire on March 18, 2007. After 5 years, the Corps can reissue, modify, add, or revoke NWPs.

What do Most of the Proposed Changes Involve?

Most of the currently proposed changes are modifications to existing NWPs and several additions. There is a stated effort to streamline and simplify the wording in the NWPs. Much duplicative wording is eliminated. Five new NWPs are proposed to be added. The 1/10-acre threshold of wetland filling allowance without notice has been eliminated, so more pre-construction notices (PCNs) will be required. Ephemeral streams are emphasized and jurisdiction extended into these areas. There are significant changes to the General Conditions that apply to NWPs, especially to the way endangered and threatened species issues are considered.

Specific Proposed Changes to Existing NWPs

There are 44 NWPs (although one number is reserved) and each one where changes are proposed is reviewed in the Notice. Those not discussed are being reissued unchanged. Highlights of changes to the more popular NWPs are discussed below.

... NWP 12 Utility Line Activities

NWP 12 applies to the construction, maintenance, and repair of utility lines and associated facilities. Several changes are proposed to this NWP. The 1/2-acre threshold limit still applies, but it is emphasized that it applies to each single and complete project as defined in 33 CFR 330.2(i). Access road construction is removed and moved to NWP 14. When PCNs are required is simplified; they are specified for any activity requiring a Section 10 permit (Navigable Waters) *or*

when there is temporary or permanent fill of greater than 1/10 acre. It should be noted that in General Condition 20—Mitigation (g) there is a statement that mitigation may be required in utility rights-of-way where a forested or scrub-shrub wetland is converted to a herbaceous wetland.

... NWP 29 Residential Developments

Anyone involved with residential development or subdivisions should pay close attention to what is now included in NWP 29. In the past, NWP 29 applied to a single-family house. The proposed change is to remove residential developments from old NWP 39 and cover them under the newly revised NWP 29. Residential development of any size meeting the limits of a NWP would be covered under NWP 29.

Importantly, notification (PCNs) are required for *any* wetland impact (i.e. there is no 1/10-acre limit without notice as before). The outside limit of impact is 1/2 acre, including loss of waters. Streambed impacts are limited to 300 feet including intermittent and ephemeral streams. The Corps can waive this 300-foot limit on a case-by-case basis. Mitigation (discussed below under General Conditions) is generally required for any impact over 1/10 acre.

... NWP 39 Commercial and Institutional Developments

Sweeping changes are proposed for NWP 39. As previously discussed, residential developments of any kind are removed from NWP 39 and now covered under NWP 29.

Significantly, the 1/10 acre of impact without notice has been eliminated. PCNs are now required for *any* impact to wetlands/waters (meaning something the size of this piece of paper).

The 300-foot limit for the loss of streambeds applies to intermittent and ephemeral streams, but there is the possibility of a waiver as discussed under NWP 29.

Since General Condition 20 requires permittees to avoid and minimize impacts, a written avoidance and minimization statement and a compensatory mitigation proposal is not required with the PCN. Unless, as indicated under General Condition 27-PCN, the impact is over 1/10 acre, then the permittee must submit a statement describing how the mitigation will be satisfied. However, both the New York and Buffalo Districts' proposed regional conditions require a detailed mitigation plan if the impact is over 1/10 acre.

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FEDERAL WETLANDS PERMITS CHANGING... (CONTINUED)

New Proposed NWPs

Five new NWPs are proposed, they include: **A**-Emergency Repair Activities, **B**-Discharges into Ditches and Canals, **C**-Pipeline Safety Program Designated Time Sensitive Inspections and Repairs, **D**-Commercial Shellfish Aquaculture Activities, and **E**-Coal Mining Activities.

Of these, proposed NWP **B**-Discharges into Ditches and Canals is of the greatest interest. This NWP would allow up to 1 acre of impact to *certain types* of ditches or canals to allow landowners to return land to its prior conditions. However, the ditches or canals must meet all three of the following criteria: 1) constructed in uplands, 2) receive water from another water of the United States, and 3) divert water to another water of the United States. Notification (PCN) is required for discharges into more than 500 feet of a ditch or canal.

Proposed Changes to General Conditions

There are 27 general conditions (GC) that apply to all NWPs. You must comply with all applicable conditions for a NWP to apply. This fact is emphasized in the proposed changes. These conditions are very important and help determine whether a project can go forward or not under NWP guidelines. General conditions are different than regional conditions discussed in a following section. Significant changes to general conditions are proposed. A few raise real concerns.

... General Condition 17—Endangered Species

Of particular note is proposed General Condition 17, relative to Endangered and Threatened species. The wording of this general condition opens up the definition of an “affect” to a federally listed species, which appears to be different than the wording in the Endangered Species Act relative to “taking” of a listed species or an impact to a designated critical habitat. In New York, the recent heightened concern over the summer roosting habitat of the listed Indiana bat has everyone on edge. The wording of General Condition 17 does not help to resolve this issue, especially since there are no designated critical habitats in New York for Indiana bat in summer roosting areas.

The other real concern here is one of timing. The Corps is to notify an applicant within 45 days whether there is an issue with a federally listed species. However, if there is a concern, no work can begin until the Corps provides notification that the proposed activities will have “no effect” on listed species

or Section 7 consultation is completed.

No time limit is given for this notification. One of the great advantages of limiting a project’s impacts within the NWP thresholds is that a decision must be reached in 45 days. If it isn’t, you can assume the permit is issued. With this proposed change, concern over a listed species could stretch a decision out for months.

... General Condition 20—Mitigation

As stated in GC-20, mitigation will basically be required for any impact over 1/10 acre and a PCN is required, which is generally the current position.

... General Condition 27—Pre-Construction Notification

As previously indicated, PCNs will be required for many more projects. Among other things, the PCN must include: a wetland/waters delineation, a statement of how mitigation will be satisfied, assessment of any affected endangered and threatened species, and an assessment of any historic property that may be affected. In 30 days, the Corps will determine if the PCN is complete.

Definitions

There are some interesting changes in the definition section. Ephemeral streams and streambeds are defined. The new word for wetland creation is wetland establishment. There is



Small ephemeral drain in upland woods. Should this be a Corps-jurisdictional water of the United States?

FEDERAL WETLANDS PERMITS CHANGING... (CONTINUED)

no elucidation of "adjacent" or "isolated". Apparently, the agencies are still leaving these definitions to the people in black robes. This regulatory jurisdiction by the interpretation of case law leaves us all in an abyss.

Regional Conditions

Both the New York and Buffalo Districts published their proposed regional conditions on October 13, 2006. These conditions do not allow the use of NWP's in specified geographical

regions of each District, in bogs or fens, and there are restrictions in Critical Resource Waters. Also, a detailed mitigation plan is required for impacts over 1/10 acre or projects requesting a waiver of the 300-foot limit to stream impacts.

TES OVERVIEW

TES strives to keep its clients apprised of the most up-to-date changes to the letter and the spirit of wetland regulations and permits. This article is a synopsis of some changes. Contact your TES representative for further details.

...These regional conditions are very important, they can even revoke NWP's in their district...

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