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CORPS REJECTS INDUSTRY BID FOR RETROACTIVE WETLANDS PERMIT REVIEWS

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The U.S. Army Corps of Engineers is refusing an industry bid to win reviews of permits issued prior to the Supreme Court's controversial Rapanos ruling, despite administrative and legal precedents developers have cited in urging the Corps and EPA to revise a landmark wetlands guidance to let industry seek reviews of the agencies' decisions.

Reviews of permitting decisions in light of the ruling could narrow the agencies' jurisdictional determinations, thereby scaling back the scope of Clean Water Act permit requirements, an attorney says. But the Corps is refusing to apply the 2006 Rapanos, et ux, et al. v. United States ruling retroactively, which could spark an industry lawsuit because it runs contrary to the agencies' historic practice of granting retroactive permit assessments.

EPA and the Corps' guidance, issued in June, seeks to clarify the water act's reach in the aftermath of the high court's fractured Rapanos ruling. In their June 2006 decision, the justices failed to reach a clear consensus over how to determine whether isolated wetlands and other marginal waters --such as intermittent waters -- are within the act's scope.

The guidance is under increasing fire from industry officials and wetlands experts because of the lengthy process it requires for determining a wetland's jurisdictional status under the water act prior to issuing a dredge and fill permit. The uncertainty the guidance has generated within the regulated community has also complicated the agencies' position in litigation over water act permits, including a recent suit over permitting in upland ditches.

Industry's request for revisions to the agencies' draft guidance appears in comments submitted to the docket from Stephen Studer, an attorney with the Indiana law firm Plews Shadley Racher & Braun, released Nov. 28. The firm's clients include an economic development group planning the construction of a large warehouse and distribution center that has a wetlands permit.

Yet the Corps has already responded to Studer's claims in an undated October letter saying the arguments do not "refute the policy as issued by the Corps of Engineers headquarters, which clearly states that jurisdictional determinations completed prior to the court's Rapanos decision will not be revisited," the Corps writes, adding that only determinations issued after the ruling are subject to review.

In his comments, Studer notes that the Corps granted retroactive permitting reviews following the Supreme Court's 2001 ruling in Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, which also involved water act jurisdiction. Relevant documents are available on InsideEPA.com.

Additionally, other recent appellate court rulings involving the water act's reach have also brought retroactive reviews of the agencies' regulatory decisions, Studer says. For example, the U.S. Court of

Appeals for the 11th Circuit's Oct. 24 decision in U.S. v. Robison overturned several water act criminal convictions because trial court jury instructions did not include language consistent with Rapanos (Inside EPA, Nov. 2, p18).

"The Corps' failure to review the jurisdiction determinations made prior to the Rapanos decision would be inconsistent with prior court and agency decisions," Studer writes, noting that the high court in SWANCC recognized the retroactivity of agency decisions. "Why would the court or the Corps treat the Rapanos decision any differently than the SWANCC decision with respect to retroactivity?"

To resolve this problem, Studer suggests the agencies revise the current draft of the guidance's question and answer section, in particular question 46, which addresses the retroactivity of permit decisions. The answer says the Corps "will only revisit a jurisdictional determination completed after" Rapanos if asked, and not those issued prior to the ruling.

"It makes much more sense that the Corps would, upon request, revisit a decision made before Rapanos" because the Corps "would be avoiding potential litigation involving isolated wetlands" that lack a significant nexus to regulated waters. "The benefit of revisiting jurisdictional determinations made before Rapanos is that it provides a mechanism for the Corps to ensure its initial decisions are consistent with the law," Studer adds.

The comments come amid Studer's efforts to win a retroactive review of his client's permit, issued prior to Rapanos, with regard to its wetlands mitigation requirement, which were issued after the ruling. Studer in a Sept. 28 letter brought the same arguments to Corps officials in Louisville, KY.

EPA and the Corps in a Nov. 28 Federal Register notice extended the comment period on the draft guidelines to Jan. 28, but the agencies are implementing them in the interim to ensure the continuance of their regulatory programs. In addition to Studer's comments, industry and wetlands experts have also asked the agencies to consider allowing permit applicants to skip the lengthy jurisdictional determination process in cases where water act permit requirements are not contested (Inside EPA, Oct. 19, p1).

Meanwhile, the U.S District Court for the District of Columbia Nov. 27 denied the Natural Resources Defense Council's (NRDC) motion to intervene in an industry lawsuit that may be supported by the guidelines' language on upland ditches. A source close to the case has previously said the joint wetlands guidance could back industry's stance in National Association of Homebuilder v. U.S. Army Corps of Engineers because it states that the agencies will not assert jurisdiction over such ditches.

At issue in the suit is the Corps' authority under nationwide permit 46, which regulates ditches excavated on dry land that convey or divert water from regulated wetlands. These ditches are important for building projects because they can help drain stormwater or convey on-site water to another waterbody. Industry officials have in the past expressed concern that the ditches are jurisdictional because they are required to obtain permits in the event they need to move or alter the ditches.

Although the district court found NRDC lacked the standing needed to participate as an intervenor in the suit, the court has still granted it permission to file an amicus brief in the case, which is expected in the coming weeks.