Alert

Fourth Circuit Issues Important Decision on CLean Water Act Jurisdiction

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On March 10, 2015, the United States Court of Appeals for the Fourth Circuit [i] issued an opinion in a long-standing dispute over the United States Army Corps of Engineers' jurisdiction over 4.8 acres of wetlands slated for development with ten (10) homes by Precon Development Corporation ("Precon"). After a 13-year long battle, the Court ruled that the Corps had jurisdiction over Precon's wetlands. In making this determination, the Court gave substantial deference to the Corp's expertise in making such jurisdictional determinations.

Earlier in the Precon saga, the Fourth Circuit determined that the Corps' Clean Water Act ("CWA") jurisdiction over the wetlands turned on whether there was a "significant nexus" between the impacted wetlands and navigable waters, pursuant to the U.S. Supreme Court's decision *Rapanos v. U.S.*[ii] The "significant nexus" test announced in *Rapanos* requires the Corps to look at whether "the wetlands, either alone or in combination with *similarly situated lands* in the region, significantly affect the chemical, physical, and biological integrity" of traditional navigable waters.[iii] Applying this test, the Fourth Circuit concluded that the Corps had proven there was a significant nexus between the 4.8 acres of wetlands and navigable waters, and thus that the Corps had appropriately taken jurisdiction over these wetlands.

Precon had argued that because of the relatively small size of the 448 acres of "similarly situated" wetlands compared to the overall size of the Northwest River watershed, the Corps could not meet its burden to show a "significant nexus" under *Rapanos*. The Court flatly rejected this argument. The Court also rejected Precon's expert testimony regarding the lack of hydrological connectivity in favor of the Corps' qualitative evidence that there was flow between the wetlands and navigable waters and that the wetlands provided important functions of storing water and slowing flow during flooding events. In sum, the Fourth Circuit afforded substantial deference to the Corps' determination regarding jurisdictional waters, even in the face of competing expert testimony offered by the developer.

The decision, while unpublished and not binding precedent, is important in that it is the first court to weigh scientific evidence under the significant nexus test, and it reached its decision by extending deference to the Corps' determination.

If you have questions regarding this case or wetlands regulations in general, please contact members of Linowes and Blocher's Environmental Practice Group:

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[i] The Fourth Circuit covers Maryland, Virginia, West Virginia, and North and South Carolina.

[ii] 547 U.S. 715 (2006).

[iii] *Rapanos*, 547 U.S. at 780 (emphasis added).

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