

## CLEAN WATER ACT ABUSE: WETLANDS PROTECTION UNDER SECTION 404

The Clean Water Act (CWA) was enacted in 1972 “to restore and maintain the chemical, physical, and biological integrity” of the nation’s rivers, lakes, and streams (2). But for years federal regulators have used the CWA to relentlessly expand their reach over both land and water use. One particularly controversial example is the use of the CWA’s Section 404, which covers wetlands.

A plain reading of Section 404 gives no indication of federal jurisdiction over wetlands. The statute merely requires property owners to get a permit before they discharge “dredged or fill material into navigable waters” (3). The CWA defines navigable waters as “waters of the United States, including the territorial seas” (4). Wetlands are never mentioned.

Nevertheless, years of legal battles have allowed federal environmental regulators to expand their jurisdiction to include wetlands, mainly by:

- 1) Interpreting “navigable waters” to include wetlands (even if they are not “navigable” by any stretch of the imagination), and
- 2) Prohibiting many more activities on wetlands besides filling them with sand or dredged material.

### **“NAVIGABLE WATERS” AND THE EXPANSION OF FEDERAL REGULATION**

The Constitution’s “commerce clause” allows the federal government to regulate only interstate commerce; any activities that occur entirely within a state (“intrastate”) and do not have a significant impact on interstate commerce must be left to the states to regulate. To avoid running afoul of this Constitutional limitation, the CWA was designed to regulate only “navigable waters” of the United States – waterways that are involved in interstate commerce via activities like boat traffic. It is not clear that wetlands fall under this definition, but federal regulators have included wetlands in several CWA implementing regulations anyways in their quest to expand their jurisdictional reach.

In 2006, the Supreme Court halted this expansion, arguing in *Rapanos v. United States* that the Constitution called for some limit to the CWA’s regulatory reach. John Rapanos faced criminal charges for filling in a marsh that was entirely on his own land in Midland, Michigan in order to build a mall. Filling in this wetland, even though it had no significant nexus to any navigable waterway, violated the CWA according to federal regulators. The Supreme Court reversed the charges, with Justice Scalia remarking that federal regulators had “stretched the term ‘waters of the United States’ beyond parody.” The CWA could not be used to restrict activity on private property like that owned by Mr. Rapanos because it was not directly connected to “navigable waters” (and thus interstate commerce) (5).

### QUICK FACTS

- The average applicant hoping to develop his or her own property that contains a wetland will spend nearly 800 days and some \$300,000 working with federal authorities to do so.

### NOTABLE & QUOTABLE

“EPA’s interpretation of the Clean Water Act ... knows no bounds, as the agency sees nearly every body of water in the United States, no matter how insignificant as potentially falling within its reach.”

- **Sen. James Inhofe**, (R-OK)  
(1)

However, a recently released guidance document from the Environmental Protection Agency and the Army Corp of Engineers, the two entities that administer the CWA, carefully circumvents the Rapanos decision and again attempts to expand regulators' jurisdiction to include isolated wetlands or anything resembling a wetland (6). This has set off considerable backlash from conservative lawmakers and various legal scholars.

## ***EFFECTS ON PRIVATE PROPERTY RIGHTS AND THE ECONOMY***

When environmental regulations like these prevent private property owners from building housing or commercial real estate, clearing and cultivating for agriculture, or extracting natural resources on their own land, this causes a severe deterioration in the value of their property. Imagine the frustration of buying a plot of land only to have the land rendered unusable by over-zealous federal regulators.

Thankfully, there are Constitutional protections to safeguard property owners from regulators. Courts have ruled that when the federal government regulates private property so intensively that it essentially prohibits any valuable use for the landowner, these "regulatory takings" make the property owner eligible for "just compensation" from the government under the Fifth Amendment. In other words, if the federal government completely destroys property's value in the name of environmental protection, they must pay the owner for it just the same as if they had taken it outright. Unfortunately, court cases like these are often drawn-out and ultimately fruitless affairs, wasting property owners' time and money.

In the end, property owners' primary recourse is to apply for a permit and cross their fingers that the government will approve it. But this is an arduous process and often results in failure. One recent study found that the average applicant hoping to develop his or her own wetland property will spend 788 days and \$271,596 working with federal authorities to do so. Those compliance costs and lost opportunities represent a significant barrier standing in the way of activities that productively contribute to our economy.

### Endnotes:

1. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, EPA Water Permitting Guidance Widely Extends Federal Bureaucracy Over Water Bodies (April 27, 2011) (online at [http://epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord\\_id=98e0c58b-802a-23ad-4772-89859656e00d&Region\\_id=&Issue\\_id=](http://epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=98e0c58b-802a-23ad-4772-89859656e00d&Region_id=&Issue_id=)).
2. Federal Water Pollution Control Act ("Clean Water Act"), Sec. 101(33 U.S.C. 1251) (hereinafter "CWA").
3. CWA, Sec. 404 (33 U.S.C. 1344).
4. CWA, Sec. 502(7) (33 U.S.C. 1362).
5. Rapanos v. United States, 547 U.S. 715 (2006).
6. ENVIRONMENTAL PROTECTION AGENCY AND ARMY CORPS OF ENGINEERS, Draft Guidance on Identifying Waters Protected by the Clean Water Act (April 2011) (online at [http://www.epa.gov/indian/pdf/wous\\_guidance\\_4-2011.pdf](http://www.epa.gov/indian/pdf/wous_guidance_4-2011.pdf)).
7. Avoyelles Sportmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983) (online at <http://www.wetlands.com/fed/avoyelle.htm>); Save our Community v. EPA, 741 F. Supp 605 (N.D. Texas 1990) (online at <http://www.wetlands.com/fed/socvepa1.htm>); Richard Minitier, 'Wetlands' Send Man Up the River, INSIGHT ON THE NEWS, Vol. 8, No. 50 (December 1992) (online at <http://richardminiter.com/pdf/19921214-art-insight.pdf>).
8. Benjamin Barr, Muddy Waters: Deconstructing the Clean Water Act in Arizona, THE GOLDWATER INSTITUTE (January 29, 2008) (online at <http://goldwaterinstitute.org/sites/default/files/Muddy.pdf>).

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