
Shifting the Focus of Wetlands Protection to State and Local Governments

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As thoroughly explored and discussed in a previous issue (see 22:1 *Natural Resources & Environment*, Summer 2007), the precise definition of what constitutes a wetland subject to jurisdiction under Section 404 of the Clean Water Act (CWA) remains unclear after the Supreme Court decision in *Rapanos v. United States*, U.S. 126 S.Ct. 2208 (2006) and the subsequent Joint Guidance issued by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps). See *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Joint Guidance), 72 Fed. Reg. 31,824 (June 8, 2007), available at www.epa.gov/owow/wetlands/guidance/CWAwaters.html. Nevertheless, one thing seems perfectly clear: more of the burden for regulating and protecting wetlands will shift to state and local governments. Now, more than ever, it is critically important that states lacking independent wetlands programs enact such legislation and states that already have wetlands programs evaluate and amend them to fill in the gaps created by the fractured decision in *Rapanos* and the subsequent Guidance. While it may still be somewhat unclear just what those gaps are, there is little doubt that a significant percentage of wetlands throughout the United States may no longer be subject to CWA Section 404 jurisdiction or state certification under Section 401. For states without independent wetlands regulatory programs, Section 401 has been the primary means of achieving wetlands protection. Because the scope of Section 401 programs depends on the scope of Section 404 regulatory permitting authority, the scope of wetlands protection available to those states is keenly impacted.

Ideally, Congress will amend Section 404 or adopt broader comprehensive wetlands legislation that explicitly involves state and local governments, that provides those governments with funding for implementation, and that clarifies federal, state, and local roles in wetlands regulation. But that result is unlikely in the short term. I suggest here a few ways that state and particularly local governments can act to create and support protection for wetlands that may no longer be subject to Corps jurisdiction after *Rapanos*.

Many states have already adopted comprehensive wetlands statutes, including Massachusetts, New York, Connecticut, Michigan, Maryland, and Oregon. These statutes include such components as a title that portrays the scope of the law and a statement of whether the law covers only freshwater wetlands or, more comprehensively, addresses both wetlands and watershed management. Also included are legislative findings of fact; a wetlands definition, which will establish

the scope of the regulatory program; and a section to authorize the state wetlands regulatory agency to establish and implement a wetlands protection and restoration program. Language outlining such a program authorizes cooperation and coordination with other federal, state, and local governments. Finally, other components often included are mapping and wetland delineation criteria; permitting requirements and criteria; restoration provisions; mitigation bank provisions; tax incentives; and other provisions, such as administrative or judicial appeals, based upon the desires of the legislature. See Jon Kusler, *Model State Wetland Statute to Close the Gap* Created by SWANCC, www.aswm.org/swp/model-leg.pdf.

States should review their statutes to address any potential gaps created by *Rapanos* and the Corps/EPA Joint Guidance. Absent adopting completely new legislation, states without comprehensive wetlands programs can amend water-quality statutes and regulations to include wetlands and expand the scope of these laws to include wetlands protection and a permitting program for filling or destroying wetlands. Defining wetlands so as to include those that are, or may be, outside Corps jurisdiction, such as isolated wetlands and wetlands adjacent to nonnavigable tributaries, is an important component of any post-*Rapanos* legislation or regulation. States can also amend floodplain, critical area, sensitive area, river protection, public water, watershed management, and other programs to include wetlands. *Id.*

Local governments play a critical role in wetlands protection and restoration. Among the many tools available to local governments to address wetlands in whole or in part and that are relevant to wetlands protection and restoration are comprehensive planning; zoning, including wetland overlay zones; adopting special wetland ordinances; subdivision control; sanitary codes; floodplain regulations; sediment and erosion control ordinances; critical habitat ordinances with wetlands protection components; tree cutting and other vegetation removal ordinances; and environmental impact statement requirements. Local governments can also provide tax incentives to landowners to protect and conserve wetlands and help acquire wetlands for open space. In addition, acquisition programs and public works projects may help to protect wetlands. See Jon Kusler, *Protecting and Restoring Wetlands: Strengthening the Role of Local Governments*, www.aswm.org/propub/localgov101206.doc. Authority for developing these programs and special tools may come from state enabling statutes or may be authorized through home rule authority.

An important component of helping local governments protect and restore wetlands is cooperation and coordination with other municipalities, agencies, and other entities. Federal agencies, states, county planning departments, law schools and not-for-profit organizations, including local land trusts, and others can encourage and strengthen local government wetland protection and restoration efforts in a number of ways. Federal Section 404 and other wetland-related permits, such as those for floodplains and dam construction, can be referred to local governments prior to issuance, and even joint permitting with local governments can be undertaken. These other agencies and entities can also help by providing practical wetland assessment

models and involving local governments in preparing and testing such models and maintaining joint geographic information systems (GIS) and other databases. The other agencies and entities can also help local governments with mapping wetlands and providing digitized maps and data; preparing and distributing educational materials and model ordinances; and providing training in mapping, assessment, and restoration. See Jon Kusler, *The SWANCC Decision: State Regulation of Wetlands to Fill the Gap*, www.aswm.org/fwp/swancc/aswm-int.pdf.

Another important way to further wetland protection is to adopt Memoranda of Understanding or Memoranda of Agreement between and among local governments, federal agencies, states, and tribes to address wetland delineation, joint permit processing, assessing, monitoring, and enforcement. Intermunicipal training for local officials and efforts to coordinate smart growth and resource protection among local, regional, and state governments are also important means of

educating local officials on the importance of wetlands protection. These methods also provide local governments with the legal, communication, and technical tools they need to protect resources. See, e.g., www.law.pace.edu/landuse.

While the scope of Corps jurisdiction over wetlands may be unclear, it is clear that state and local governments must begin, if they have not already done so, to put legislation and programs in place to regulate, protect, and restore wetlands within their jurisdictions. This will not only help to ensure protection for important wetlands that fall outside the scope of the Corps jurisdiction, but will also engage municipalities in the process of providing a better quality of life for their citizens.

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