

Sink or Swim

Supreme Court ruling may limit federal wetlands regulation, but what will it mean for Ohio developers?

By Leslie G. Wolfe | Photos courtesy Walter & Haverfield LLP

It all started when the developer noticed that the site for his single-family residential development contained some marshy depressions and a few old drainage ditches leading to a nearby lake. The ditches were man-made and had been used to drain the fields back when the land was used for farming. No standing water was visible, and the ditches carried flowing water only after a heavy rain.

Three years later, the developer is still wrangling with federal regulators over whether the property contains “wetlands” that are covered under the federal Clean Water Act (CWA).

If the property does contain such “wetlands,” the developer will be required to obtain a permit from the Army Corps of



Engineers before discharging any dredged or fill material into the disputed area and may be required to offset any unavoidable wetland losses resulting from the development by creating or restoring an existing wetland. And even if the wetlands are exempt from federal regulation, the developer may still need a permit to fill under Ohio law.

If all this sounds time-consuming, complicated and expensive, you’re right. However, developers armed with just a few important tips can successfully navigate the murky waters of wetlands regulation.

Federal jurisdiction under the Clean Water Act

The CWA prohibits dumping or filling in “navigable waters” without a permit from the U.S. Army Corps of Engineers (see 33 U.S.C. §1251, et seq.). “Navigable waters” is defined as “the waters of the United States, including the territorial seas” (33 U.S.C. §1362[7]). However, the term means more than just waters capable of being navigated.

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Under federal regulations interpreting the CWA, it also means interstate wetlands, lakes, rivers, streams, mudflats and ponds, as well as tributaries to those waters, temporary or "ephemeral" streams and "adjacent" wetlands (33 C.F.R. §328.3[a][3], [5] and [7]). Even wetlands that are separated from "waters of the United States" by manmade dikes or natural river berms are covered under the CWA (33 C.F.R. §328.3[c]).

Over time, the Corps has adopted an expansive interpretation of both "tributaries" and "adjacent" wetlands. It has asserted jurisdiction over a surprising range of typically dry or semi-wet channels, such as intermittently flowing storm drain systems and culverts, man-made ditches, and "washes and arroyos" through which water courses only during periods of heavy rain.

Wetlands have been regulated as "adjacent" to jurisdictional waters simply by lying within the 100-year floodplain, by having a "hydrological



What is a "Wetland"?

Under Ohio law, "wetlands" means "those areas that are inundated or saturated by surface or ground water at a frequency and duration that are sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." In short, "wetlands" are areas which contain soils that are saturated or inundated at a frequency and duration sufficient to give rise to hydric soils and/or contain water-loving plants.

connection" to covered waters, or even by their physical proximity to covered waters.

The Rapanos/Carabell opinions

In June, the U.S. Supreme Court issued a decision that many hoped

would end this trend of expansive federal regulation under the CWA. The decision involved two cases of Michigan developers who wanted to fill in wetlands on their properties.

The lead case, *Rapanos v. U.S.* (126 S. Ct. 2208 [2006]), involved three wetlands near or connected to drains that emptied into a series of creeks leading to Lake Huron. The developer backfilled the three sites without a permit and was found criminally and civilly liable for violating the CWA.

In the consolidated case *Carabell v. U.S.*, the developers went to court after being denied a permit to fill in a wetland bordering a series of ditches flowing into Lake St. Clair. The wetland was separated from the ditch by an impermeable man-made berm.

In both cases, the Sixth Circuit Court of Appeals (which covers Ohio federal courts) held that the wetlands were covered under the CWA because they were "adjacent" to "tributaries" of navigable waters.

In reviewing the cases, the Supreme Court issued, in essence, a "split" decision. While five justices agreed to reverse the Sixth Circuit's rulings because it had

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applied the wrong standard in determining whether the wetlands were covered under the CWA, they split 4-1 as to what the correct standard should be.

Four justices argued for a stricter interpretation of "waters of the United States," which would include only relatively permanent, standing or continuously flowing bodies of water such as streams, oceans, rivers, and lakes, but not ordinarily dry channels through which water flows only periodically. Under this strict view, wetlands that connect to "navigable waters" via tributaries could be regulated only if: 1) the tributary is a relatively permanent body of water connected to traditional interstate navigable waters and 2) the wetland has a continuous surface connection with the tributary, making it

Steps to take if your property contains potential "wetlands"

- Never break ground or take any steps which might constitute dumping or filling in a wetland without obtaining the appropriate government authorizations or permits.
- Before developing or improving the property, hire a professional wetland consultant to conduct a preliminary site inspection for potential wetlands.
- If the property arguably contains wetlands, consult with an experienced wetland consultant to assess the costs and ramifications of applying for a permit under federal or state law.
- If you decide to go forward with the project, submit a wetland delineation to the appropriate agency.
- If you disagree with the agency's identification of regulated wetlands on your property, you have certain legal rights and remedies that require timely action.

difficult to determine where the water ends and the land begins.

The fifth justice disagreed that the CWA should be more strictly interpreted. Instead, he argued for a case-by-case

determination into whether a particular wetland bears a "significant nexus" to traditional navigable waters. Finally, the four dissenting justices agreed with the Corps' decision to regulate the sites as wetlands "adjacent to" covered waters, despite the lack of any continuous surface connection between the wetlands and the neighboring tributaries.

Impact on Ohio developers

Since the Court failed to reach a majority in *Rapanos/Carabell*, none of the separate opinions provides clear direction to the Corps or the lower courts. Many expect the Corps to revise its regulations to reflect a stricter interpretation of "waters of the United States" in light of the Court's decision. Any regulatory changes are sure to be accompanied

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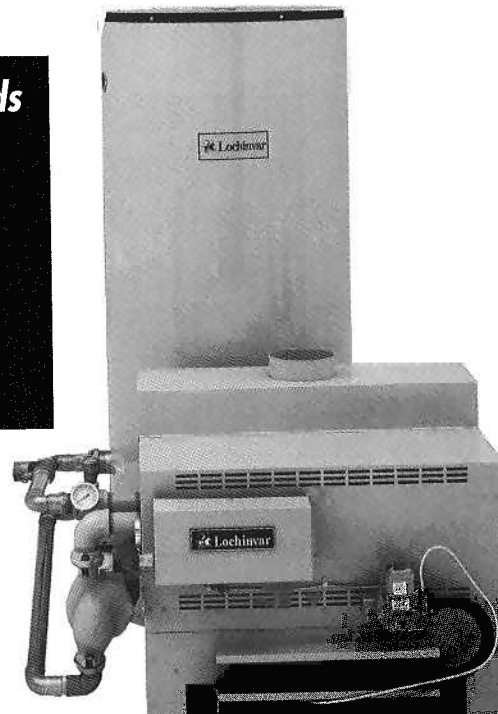
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by legal wrangling as the lower courts deal with the Supreme Court's fractured decision.

It is important to note that real estate developers in Ohio may not benefit from this anticipated easing of federal jurisdiction over wetlands. Ohio law already requires developers to obtain a permit before filling in certain isolated, wholly intrastate wetlands (see O.R.C. §§ 6111.02 to 6111.027). Thus, even if a particular wetland is exempt from regulation under the CWA, it may be covered under the state law of Ohio.

According to Rostyslaw Caryk, senior ecologist at Shaw Environmental and Infrastructure, the big question is whether Ohio will enact new legislation to regulate tributaries and streams that might fall outside of CWA regulation if the Corps retracts the scope of its jurisdiction.

"Currently Ohio has no stream law, so the real issue is what will happen to all the connecting streams, ditches and other tributaries of isolated wetlands that may become unregulated under federal law," Caryk says.

Until these issues are clarified, anyone planning to develop, improve or even landscape property containing wetlands should consult with a competent wetlands expert or legal advisor. Failure to obtain a permit to fill in state or federally protected wetlands could result in a stop work order, financial penalties or even criminal proceedings. **P**

If you have any questions about this article or if you need to speak with a legal expert concerning a wetlands issue, contact Leslie G. Wolfe at Walter & Haverfield LLP (216.781.1212). Founded in 1932, Walter & Haverfield LLP (www.walterhav.com) is a firm of 50 lawyers serving the legal needs of a broad range of Northern Ohio, national, and international corporate, individual, institutional and public clients in the practice areas of business, international trade, government litigation and relations, health care, litigation & employment law, public law, taxation, mergers & acquisitions, estate planning & wealth management, and probate administration. The firm's headquarters is located in the Tower at Erieview, 1301 E. Ninth St., Suite 3500, Cleveland, OH 44114-1821.



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