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Major Landowner Win - Court Blocks U.S. Army Corps of Engineers Attempt to Extend Jurisdiction Over "Prior Converted" Wetland

2321 N. Loop Drive, Ste 200 • Ames, Iowa 50010 www.calt.iastate.edu

November 3, 2010

- by Roger A. McEowen* and Erin C. Herbold**

A Florida federal district court has issued an order blocking an attempt by the U.S. Army Corps of Engineers (COE) to expand its powers over "prior converted cropland" under the Clean Water Act (CWA) without first subjecting its rulemaking to the applicable administrative requirements. In *New Hope Power Company, et al. v. United States Army Corps of Engineers*,[1] the court invalidated new rules that would have given the COE jurisdiction over prior converted croplands – croplands that were lawfully converted before the enactment of the CWA. The case has important implications for many landowners.

Overview

The CWA was enacted in 1972 with the primary goal of restoring the nation's rivers and lakes to a quality which would ensure their use for swimming and recreation, and protect the fish and wildlife that swim and feed in them. The CWA set two goals: (1) to eliminate the discharge of pollutants into navigable waters by 1985; and (2) to insure that by 1983 the quality of the nation's waters would be fit for recreational use and capable of sustaining fish and wildlife. Those goals were largely achieved by the early 1990s.

At its core, the CWA eliminates the discharge of any pollutants into the nation's waters without a permit. The CWA recognizes two sources of pollution. Point source pollution is pollution which comes from a clearly discernable discharge point, such as a pipe, a ditch, or a concentrated animal feeding operation. Under the CWA, point source pollution is the concern of the federal government. Nonpoint source pollution, while not specifically defined under the CWA, is pollution that comes from a diffused point of discharge, such as fertilizer runoff from on open field. Control of nonpoint sources is to be handled by the states through enforcement of state water quality standards and area-wide waste management plans. Under 1977 amendments, irrigation return flows are not considered point sources.

"Wetlands"

Section 404 of the CWA makes illegal the discharging of "dredge or fill material" into the "navigable waters of the United States" (including wetlands) without first obtaining a permit from the Secretary of the Army acting through the COE. In 1975, the COE expanded its jurisdiction beyond navigable waters to "other waters" of the United States, including streams, wetlands, playa lakes, and natural ponds. The COE issued regulations in 1977 that defined wetlands as "areas that are inundated by surface or groundwater at a frequency and duration sufficient to support, *and that under normal circumstances do support*, vegetation typically adapted for life in saturated soil conditions."[2] This definition was upheld by the United States Supreme Court in 1985.[3] In addition, every pre-1989 COE regulatory guidance letter defined the phrase "under normal circumstances," with regard to vegetation, to mean vegetation that exists under the present characteristics of the established use of a particular tract of land. If that established use

was farming, the "normal circumstance" of that land was as farmland. However, in January of 1989, the COE adopted the *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* which defined "under normal circumstances" to mean what vegetation would exist if the land was not disturbed to grow corn, soybeans or wheat. Consequently, established use on a particular tract of land became irrelevant.

But, former wetlands that were altered *before* 1985 were exempted.[4] Thus, such prior converted cropland is not subject to the permit requirements of Section 404 of the CWA.[5] At least that was the case before a 2009 change in COE policy. That change in policy was at issue in *New Hope.*

The *New Hope* Case

The plaintiff, New Hope Power Company, operated a "renewable energy" facility on portions of land that was previously used to grow sugarcane. In 1993, the COE designated the property as a "prior converted wetland" and informed the plaintiff that it did not need a CWA permit to build its plant. Years later, however, the plaintiff wanted to build an "ash monofill" (a landfill for waste produced at the facilities) on other parts of the former sugarcane farmland adjacent to the plant. The project involved transforming some of the land to limestone quarries which would eliminate the need for the long-distance hauling of ash. The plaintiff planned to use "continuous pumping" to keep the ash monofill area dry.

In January 2009, however, the COE announced that it was asserting jurisdiction over prior converted cropland. No notice or comment period accompanied the release of an "Issue Paper" that was prepared by the COE's Jacksonville, Florida, Field Office. The Issue Paper was issued in response to several applications for jurisdictional determinations involving the proposed ash monofill project. While state and local agencies had reviewed the proposed project and issued the appropriate permits, when the COE learned of the proposed project the COE applied its new rule to the project with the result that the project became subject to COE permit requirements and became much more costly to implement.[6] The COE's field office concluded that the plaintiff's proposed project would be an "atypical" transformation of the property subject to COE jurisdiction. The COE determined that "continuous pumping" to keep out wetland conditions was not the "normal circumstances" under the statute. The COE's position which was adopted by the COE Director in April of 2009 and affirmed by the local field office became known as the "Stockton Rules." Under the COE's new position as applied to the proposed project, a wetland determination was to be made based on what the property's characteristics would be if continuous pumping ceased. Consequently, as applied to the plaintiff's proposed project, the rules had the effect of changing the regulatory definition of "normal circumstances." Importantly, the new regulatory definition was applied without being subjected to the notice and comment requirements of the Administrative Procedures Act (APA).

The plaintiff filed a formal complaint in federal court, seeking to set aside the so-called "Stockton Rules."[7] The company claimed that the Stockton Rules improperly expanded the COE's jurisdiction by creating a new rule that wetland exemptions for prior converted croplands are lost upon conversion to a non-ag use. The plaintiffs further alleged that the rules also created a new interpretation for "normal circumstances" where dry lands are "maintained" using continuous pumping. They claimed that the rules were unconstitutionally vague and exceeded the COE's statutory authority.

District Court's Analysis

The U.S. District Court for the Southern District of Florida first addressed the issue of jurisdiction. The defendants alleged that the plaintiffs' claims should be dismissed because there was no "final" agency action on the matter, as required by the Administrative Procedures Act. However, the court noted that a decision is "final" when an agency concludes its process or

a party is compelled by agency action to make meaningful changes to their conduct. Here, the court looked to the factors set forth in *Bennett v. Spear*[8] for determining when finality of agency decisions exists under the APA. Under those factors, the action must mark the consummation of the agency's decision-making process and either be an action by which rights or obligations have been determined, or be an action from which legal consequences will follow.[9] The Court determined that both prongs were met. The Stockton Rules had already been implemented and the agency had already given all field offices their "marching orders."

The COE also argued that the plaintiff's claims were not yet ripe- meaning that the suit was not timely and the court would be wasting resources by hearing the case. But, the burden being placed on the plaintiff was a "real and heavy burden" and the COE's policy was the only barrier to the commencement of the ash monofill. Thus, the court determined the case was timely to adjudicate.

The court then addressed the APA's notice-and-comment requirements. The plaintiff argued that the COE improperly developed the new rules without issuing general notice of proposed rule-making in accordance with the APA. The court held that the new rules were not mere formalities or policy statements, but were legislative rules that substantially changed the COE's treatment of prior-converted cropland and "broadly extended the Corps' jurisdiction and sharply narrowed the number of exempt prior converted croplands." Accordingly, the rules were subject to the APA's notice and comment requirements which accompany changes to administrative regulations that are required to be published in the Federal Register.

The court also noted that the Stockton Rules also varied from the plain language of the Wetlands Manual which requires the COE to find present evidence of wetland indicators before an area can be designated as a wetland. While there are exceptions for atypical situations, such as emergencies, unauthorized activities or natural events, none of those existed in this case.

The COE also argued that the Director lacked the power to implement the Stockton Rules and, as a result, the rules were not binding even though they constituted the COE's current policy. Again, however, the court disagreed, noting that the Stockton Rules constituted new legislative rules that were subject to the APA's notice and comment requirements.

Accordingly, the court set aside the Stockton Rules in their entirety.

Conclusion

Had the court upheld the COE's Stockton Rules, that would have given the COE the ability to assert jurisdiction over prior converted land by assuming, for example that existing drainage devices are no longer working. Similarly, for agricultural producers, validation of the rules could have had a particularly pernicious impact in areas of the country where farmland has been tiled and drained (and is classified as prior converted cropland for COE purposes) for crop production purposes.

Undoubtedly, the court's opinion is a major victory for the plaintiff involved in the case as well as other landowners that face a similar set of facts. The case represents a major win landowners battling expanding federal control over private property. However, while the court invalidated the COE's Stockton Rules (at least in the Southern District of Florida), the question remains as to why the many similar "Stockton Rules" found in the National Food Security Act Manual of the Natural Resources Conservation Service, have not been challenged for failure to satisfy the APA's notice and comment requirements. More importantly, however, is why the "interim final" wetland conservation rules published by the USDA *before* the receipt of public comments in 1996 have been in place for over 14 years without the public having the opportunity to examine the final rules that were supposed to have been crafted in consideration of the 1996 comments.

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* Leonard Dolezal Professor in Agricultural Law, Iowa State University, Ames, Iowa; Director of the

ISU Center for Agricultural Law and Taxation. Member of the Iowa and Kansas Bar Associations and Licensed to Practice in Nebraska.
**Staff Attorney, ISU Center for Agricultural Law and Taxation. Member of the IA Bar.
[1] No. 10-22777-CIV-Moore/Simonton, 2010 U.S. Dist. LEXIS 101828 (S.D. Fla. Sept. 28, 2010).
[2] 33 C.F.R. §328.3(b).
[3] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).
[4] 58 Fed. Reg. 45,008-48,083 (1993). There is also an exemption from the CWA permit requirement for "normal farming activities," including plowing, seeding, cultivating, minor drainage, maintenance of drainage ditches, etc. COE issued regulations in 1993, limiting this exemption to pre-established farming activities that do not bring a "new area" into farming or require modifications to the hydrological regime. Thus, exempt activities are subject to a "recapture" provision that requires a permit if the discharge changes the use of water, impairs the flow, or brings an area of navigable water into use which had not been previously used in that regard. Some courts have upheld this provision for those farms that were not deemed "ongoing."
[5] It is important to note that the COE and or the EPA must agree to all NRCS wetland determinations, and determinations involving agricultural land that impact the COE's ability to regulate such land under the CWA are subject to COE approval. Similarly, the FSA cannot make wetland jurisdictional determinations that are binding on the COE or the EPA. 33 C.F.R. §328.3(a)(8) (2008).
[6] The company responded by asking whether the Corps correspondence was a final decision or whether "individual exceptions might apply." The COE responded, indicating that all projects involving a change from agricultural to non-agricultural use would require a Corps permit prior to the commencement of the project, in accordance with the Stockton Rules.
[7] A companion case was filed by landowners and the American Farm Bureau in the United States District Court for the District of Columbia. The complaint states that there are over 53 million acres of prior converted cropland throughout the country. The AFBF and landowners are seeking the reversal of the Stockton Rules. *See American Farm Bureau Federation and United States Sugar Corp. v. United States Army Corps of Engineers, No. 1:10-cv-00489 (complaint filed 3/24/2010).*
[8] 520 U.S. 154 (1997).
[9] *Bennett v. Spear, 520 U.S. 154, 177-78 (1997).*