

Economic and Environmental Issues in Arkansas: A Policy Perspective

Legal Research and Water Rights – Environmental Resources Education Project

Executive Summary

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Five separate water resource related legal research projects comprise the Legal Research and Water Rights – Environmental Resources Education Project. The five projects include:

1. Evaluation of the Impact of the Recent United States Supreme Court Decision in *Rapanos v. United States*, 126 S.Ct. 2208 (2006) on Protection of Arkansas Wetlands;
2. Consideration of the Desirability of Authority to Manage Water Resources at the Watershed Level;
3. Reconsideration of the Viability of Common Law Remedies for Water Resource Management (both as to quantity and quality) as a Supplement to Federal and State Statutory and Regulatory Schemes;
4. The Authority and Responsibility of Units of Arkansas Government Such as Irrigation Districts and Levee Districts in Regard to Management of Water Resources; and
5. Evaluation of the Efficacy of the Expressed Arkansas Water Policy:

"To encourage and facilitate the conservation, development and efficient use of surface water and to establish a comprehensive ground water protection program that encourages the conservation of ground water while protecting the beneficial use of the state's aquifers for future generations." Natural Resource Commission Regulations 301.1 & 401.1

This review will focus on the first two research projects.

1. Evaluation of the Impact of the Recent United States Supreme Court Decision in *Rapanos v. United States*, 126 S.Ct. 2208 (2006) on Protection of Arkansas Wetlands

Introduction

Section 404(a) of the Federal Clean Water Act requires a permit from the United States Army Corps of Engineers for the discharge of dredged or fill material into the navigable waters at specified disposal sites (wetlands).@ Through court interpretation, section 404 has become the major tool for federal regulation of wetlands development. If the Corps concludes that development activity might harm wetlands, the Corps can decline to issue a permit to allow development or issue a permit under conditions designed to protect the wetlands from harm.

On June 19, 2006, the United States Supreme Court decided the long awaited and much anticipated case of *Rapanos v. United States*, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006). Although the case had been expected to resolve the question of federal government authority under section 404(a) of the Clean Water Act to regulate wetlands adjacent to non-navigable tributaries of traditional navigable waters, the decision raised more questions than it answered. This research project examines the *Rapanos* decision and evaluates its impact on the protection of Arkansas wetlands.

What are Wetlands and Why are they Important?

The United States Environmental Protection Agency defines wetlands as follows:

Wetlands are areas where water covers the soil, or is present either at or near the surface of the soil all year or for varying periods of time during the year, including during the growing season. Water saturation (hydrology) largely determines how the soil develops and the types of plant and animal communities living in and on the soil. Wetlands may support both aquatic and terrestrial species. The prolonged presence of water creates conditions that favor the growth of specially adapted plants (hydrophytes) and promote the development of characteristic wetland (hydric) soils.

Wetlands serve many important hydrologic, ecologic, and biogeochemical functions. Among the functions performed by wetlands are:

- Flood and storm control

- Provide wildlife habitat
- Protect subsurface water resources
- Provide pollution treatment
- Assist in erosion control
- Serve as sources of nutrients, nursery grounds, and sanctuaries for fish

The Impact of Rapanos and Related United States Supreme Court Decisions on Wetlands Generally

The Clean Water Act of 1972 gave the Corps of Engineers authority under section 404 of the Act to protect “waters of the United States.” In decisions prior to *Rapanos*, the Court had held that “waters of the United States” encompassed more waters than under the Corps’ traditional authority to protect “navigable waters,” that is, waters capable for use in commerce. While wetlands adjacent to traditional navigable waters were clearly held to be protected, isolated non-navigable waters and wetlands were not. The question in *Rapanos* was the Corp’s authority over wetlands adjacent to non-navigable tributaries of traditional navigable waters. The Supreme Court’s response to the question posed was a decision in which there was no majority of five justices supporting any of the five separate opinions issued in the case. Four of the justices, in an opinion by Justice Stevens, would uphold the Corps regulations issued under section 404 and the Corps’ authority over wetlands adjacent to non-navigable tributaries of traditional navigable waters. Four other justices, joining in an opinion by Justice Scalia, would restrict the Corp’s authority to “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters and to “wetlands with a continuous surface connection to” such relatively permanent waters. Justice Kennedy, whose opinion may prove to be the most important, concluded that wetlands are “waters of the United States” “if the wetlands, either alone or in combination with similarly situated lands in the regions significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as ‘navigable.’” Justice Kennedy’s standard has become known as the “significant nexus” test.

The effect of the splintered decision in *Rapanos* has been to leave in doubt the Corp's authority to protect wetlands beyond the somewhat narrow range that Justice Scalia's opinion would allow. Following *Rapanos* and related decisions, the Environmental Integrity Project estimated, perhaps somewhat pessimistically, that the decisions "expose over half of wetlands in the U.S. to development."

Post Rapanos Developments – Corps of Engineers Official Agency Guidance to Interpretation of Rapanos

On June 5, 2007, the Corps of Engineers issued an official "agency guidance" that addresses how the Corps will interpret the *Rapanos* decision in applying its section 404 regulatory authority to protect wetlands. Under that guidance, it will categorically assert its authority over:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

The Corps will conduct a fact-specific analysis to determine whether there is a "significant nexus" with a traditional navigable water for jurisdiction over:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The Corps will apply the following analysis in determining whether a "significant nexus" exists between the wetland and the traditional navigable water:

- Assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly

affect the chemical, physical and biological integrity of downstream traditional navigable waters

- Significant nexus includes consideration of hydrologic and ecologic factors

Under the “guidance,” no Corps of Engineers’ section 404 jurisdiction will be asserted over:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The Potential Impact of the Rapanos Decision on Arkansas Wetlands

As late as the 1870’s, wetlands covered 9.8 million acres or 30% surface area of Arkansas. Today, only 2.8 million acres or about 8% surface area of the state is covered by wetlands. In short, in a little over one-hundred years, wetlands in Arkansas have been reduced by approximately 72%.

Wetlands in Arkansas are of five types: riverine, fringe, depressions, flats, and slopes. Although all types of Arkansas wetlands are potentially exposed to loss of section 404 regulatory protection by *Rapanos* and related United States Supreme Court decisions, under the Corps of Engineers’ “guidance,” depressions-, flats-, and slopes-type wetlands are especially vulnerable because of lack of a significant nexus with traditional navigable waters. Corps of Engineers’ protection of riverine- and fringe-type wetlands that do not meet the more restrictive test of Justice Scalia’s approach will be determined on a case by case basis under the “significant nexus” analysis.

2. Consideration of the Desirability of Authority to Manage Water Resources at the Watershed Level

Property development and other activities are proving to be an ever increasing threat to the integrity of waters in the United States. There is wide agreement that the negative impacts of

those activities on waters are best addressed by management at the watershed level. However, present authority to act at that level is for the most part limited to voluntary cooperation on the part of the persons and entities affected. Existing watershed protection authority is:

- Fragmented – no watershed wide authority
- Not consistent with watershed boundaries
- Lacks structure
- Lacks means of implementation of management regulations
- Limited by lack of federal government authority under the Clean Water Act to regulate Non-point source pollution

Management at the watershed level needs to be addressed at both the local and statewide levels. Watershed management is needed at the local watershed level because watersheds vary greatly as to size, regulatory needs, and characteristics. In addition, effective watershed management requires local level democratic based legitimacy and the ability to respond promptly and directly to problems.

Statewide authority is needed to supplement local management by watershed. Statewide authority would:

- Provide uniformity as to standards and goals among watersheds
- Provide a mechanism for resolving trans watershed boundary issue
- Provide scientific and technical expertise
- Ensure availability of the broader resources of state government
- Provide a degree of insulation from local political concerns
- Insure uniform local watershed management structure

Other considerations that need to be considered in creation of a watershed management authority include:

- Financing for both statewide and local authority
- Compliance mechanisms for both statewide and local authority

- The need for sharing of information both horizontally and vertically
- The need to integrate with existing state and local authority
- That the federal role be limited to providing scientific data and research

A number of factors must be considered in creating the structure of an authority for management at the watershed level. Among those factors are:

At the state level –

- Whether the authority should be incorporated into an existing state agency
- Whether to create a separate Watershed Management Authority agency

At the local level –

- Whether to create a Watershed Management Authority District or similar entity having watershed wide management authority
- Whether the local managing personnel should be elected or appointed
- Whether to expand existing authority under Arkansas Watershed Improvement District Act of 1949 (Ark. Stat. secs. 14-117-101-427)