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Inside

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Navigating Through *Rapanos*: Delineating Where Lands End and Wetlands Begin

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Introduction

Unlike wetlands regulated by the New York State Department of Environmental Conservation (NYSDEC), where an official map identifies the boundaries of what are regulated wetlands,[1] federal wetlands are regulated if they are connected to the "Waters of the United States."[2] Defining the "Waters of the United States," and, more particularly, the extent of federal regulation of non-navigable waters, has been an ongoing source of struggle and litigation that to this day remains difficult to determine. I will provide some history as to how this situation arose. I will discuss the current process for delineating federally regulated wetlands, and I will also discuss some current issues in endangered species protection.

Navigable Waters = The Waters of the United States

The federal Clean Water Act of 1972 is the basis for all federal regulation of wetlands today. However, the Clean Water Act does not expressly regulate wetlands, per se. Rather, § 404(a) of the Clean Water Act defines the scope of the federal government's regulation as "Navigable Waters." The Clean Water Act enlighteningly defines "Navigable Waters" as the "Waters of the United States." Certainly the concept that wetlands are regulated is not readily apparent in that circular definition. In order to understand how the words "Navigable Waters" and the "Waters of the United States" include non-navigable wetlands, then one must look at how the Clean Water Act was cobbled together, as well as the subsequent cases that have interpreted that language.

Generally speaking, the Commerce Clause of the United States Constitution provides the basis for the federal government to regulate activities that affect interstate commerce, even if the activity would appear to be primarily intrastate.[3] Without an effect on interstate commerce, the federal government's ability to regulate activities is extremely limited. The regulation of commerce naturally includes the regulation of trade routes. Navigable waterways have always been important trade routes subject to regulation by the federal government.

As a means of protecting trade routes, the U.S. Rivers and Harbors Act of 1899 prohibited the discharge of "refuse" into any "navigable water" or its tributaries, as well as the deposit of "refuse" on the bank of a navigable water "whereby navigation shall or may be impeded or obstructed" without first obtaining a permit from the Secretary of the Army.[4] Obviously, the federal government was rightly concerned that the placement of fill might obstruct navigation, and thus impede the flow of trade—all of which is reasonably within the scope of the federal government's authority under the Commerce Clause. As a result, the placement of fill in any "navigable water," tributaries to navigable water, or the banks of either, required a permit from the United States Army Corps of Engineers (ACOE).

"Defining the 'Waters of the United States,' and, more particularly, the extent of federal regulation of non-navigable waters, has been an ongoing source of struggle and litigation that to this day remains difficult to determine."

Seventy years later, when the federal government began drafting a series of laws intended to protect the environment, the federal government needed a Constitutional basis to regulate discharges that might not directly impede navigation, but would nevertheless adversely impact navigable waters. Thus, when drafting the Clean Water Act, the federal government merely extended its tested authority to regulate the placement of fill in navigable waters. However, this time the concern was not primarily the avoidance of obstacles that would impede trade, but rather the discharge of pollutants that would impact the health of the nation's environment. As a result, the Clean Water Act's regulation is defined solely as "navigable waters, which itself is defined as the 'Waters of the United States.'" It would be left to the ACOE, and the federal courts, to wrestle with defining where the federally regulated navigable waters end and private land begins.

The Supreme Court Gets Involved

The first Supreme Court case that dealt with the issue of defining the extent of federal wetland jurisdiction was the 1985 decision known as *Riverside Bayview*.[5] Riverside Bayview Homes, Inc. was a developer that owned 80 acres of "low-lying marshy land near the shores of Lake St. Clair in Macomb County, Michigan." In 1976, Riverside Bayview started placing fill to prepare the site for development.

The ACOE, which administers the federal government's regulation of wetlands under the Clean Water Act, brought suit to stop Riverside Bayview Homes from filling in these wetlands located near the shore of Lake St. Clair. Riverside Bayview Homes appealed, and took its appeal all the way to the United States Supreme Court. It claimed that non-navigable wetlands are not navigable waters, even if they lie adjacent to navigable waters.

The Supreme Court disagreed. In a unanimous opinion, the Supreme Court said:

> Of course, it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of "waters" and include in that term "wetlands" as well. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined.[6]

Thus, the Supreme Court clearly found that wetlands adjacent to navigable waters are regulated. But the unanswered question now became, how adjacent is adjacent? How far could it be from the regulated wetland to the nearest place one could put in a canoe?

The federal courts and the Supreme Court continued to wrestle with this issue. The next Supreme Court case to change the jurisdictional landscape of wetland regulation came about in 2001 in a decision known as the Solid Waste Agency of Northern Cook County, or SWANCC for short.[7] SWANCC was the agency overseeing solid-waste landfills in Cook County, Illinois, home of the City of Chicago. SWANCC selected an abandoned sand and gravel pit to serve as a much-needed landfill to meet the county's needs. The site had two man-made trenches that evolved into seasonal ponds that became home to some migratory birds. SWANCC proposed filling these man-made trenches. It is important to note that these man-made trenches were completely isolated from **any** navigable water.

Unlike *Riverside Bayview*, here the Supreme Court was split. Five justices, a majority, held that the completely isolated man-made trenches could not possibly fall within the meaning of "navigable waters":

> We decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within Illinois, meet § 404(a)'s definition of "navigable waters" merely because they serve as habitat for migratory birds.

While it may have been an unfortunate decision for the migratory birds, it was now clear that the meaning of "navigable waters" and wetlands "adjacent" to navigable waters had some limitation. As a result, the ACOE changed its practices to comply with the Supreme Court's decision in *SWANCC* by excluding from its oversight isolated, non-navigable wetlands. Nevertheless, the extent of the federal government's scope of regulation continued to spur litigation.

The latest Supreme Court case to tangle with the issue of where "navigable water" ends and land begins is known as *Rapanos*.[8] At the time of *Rapanos*, the ACOE's regulations interpreted "the waters of the United States" to include, in addition to "traditional interstate navigable waters";[9] "[a]ll interstate waters including interstate wetlands";[10] "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce";[11] "[t]ributaries of [such] waters";[12] and "[w]etlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands) . . ."[13] The regulation defines "adjacent" wetlands as those "bordering, contiguous [to], or neighboring" waters of the United States.[14] It specifically provided that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"[15]

In April 1989, John Rapanos backfilled wetlands on land in Michigan he wanted to develop. Mr. Rapanos filled four wetlands lying near man-made drainage ditches. The nearest body of navigable water was 11 to 20 miles away. Nevertheless, the ACOE argued that any connection to a navigable water, no matter how far, was sufficient to establish federal regulation on such non-navigable wetlands. This time, the Supreme Court was completely split. The justices wrote five separate opinions, with no single opinion supported by a majority of the Court.

Four justices, led by Justice Antonin Scalia in an opinion he authored, dismissed the USACOE's "any connection" theory in that the phrase "the waters of the United States . . . cannot bear the expansive meaning that the [ACOE] would give it."[16] Four other justices, in an opinion authored by Justice John Paul Stevens, opined that the Clean Water Act "authorizes the [ACOE] to require landowners to obtain permits from the Corps before discharging fill material into

wetlands adjacent to navigable bodies of water and their tributaries," regardless of how near or far from a traditionally navigable water.[17]

Thus, with four justices stating that the man-made trenches were not regulated because they were not adjacent to a navigable waterway, and four others declining to set an outer limit on adjacency, the Supreme Court was deadlocked. The deciding vote came from Justice Anthony Kennedy.

Justice Kennedy wrote his own opinion, in which he joined in the outcome of Justice Scalia's opinion—that the man-made trenches were not regulated—but not for Justice Scalia's reasoning. Rather, Justice Kennedy wrote that "absent more specific regulations, the Corps must establish a significant nexus on a **case-by-case** basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[18]

Because Justice Kennedy concurred in the opinion written by Justice Scalia and supported by three other justices, the Court now had a majority ruling that the man-made trenches were not federally regulated wetlands. However, with no majority agreement on the rationale for such a ruling, the USACOE and the rest of us must continue to grapple with the absence of a rule establishing how far federal jurisdiction extends upstream. This issue has not been clarified by the Supreme Court, nor has Congress taken action by amending the Clean Water Act. The issue is left open for interpretation, as well as implementation by the ACOE and the United States Environmental Protection Agency (EPA).

The USACOE Approval Process

On May 30, 2007 the ACOE and EPA came out with their own guidance which applies Justice Kennedy's "substantial nexus" rationale in determining whether a wetland is federally regulated.[19] Thus, the ACOE and EPA guidance, coupled with their new jurisdictional determination application forms, are used to determine whether a wetland has a substantial nexus to a traditional navigable water.

According to the ACOE,

> The [*Rapanos*] decision provides two new analytical standards for determining whether water bodies that are not traditional navigable waters (TNWs), including wetlands adjacent to those non-TNWs, are subject to CWA jurisdiction: (1) if the water body is relatively permanent, or if the water body is a wetland that directly abuts (e.g., the wetland is not separated from the tributary by uplands, a berm, dike, or similar feature) a relatively permanent water body (RPW), or (2) if a water body, in combination with all wetlands adjacent to that water body, has a significant nexus with TNWs.[20]

ACOE wetlands are not based on filed maps, unlike NYSDEC wetlands. If it's wet, and there is either an adjacent navigable water or a "substantial nexus" connecting the wetland to a "Water of United States," then it is regulated by the ACOE. The ACOE regulations define wetlands as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[21]

The current guidance from the ACOE now states that the ACOE will assert jurisdiction over the following:

> Traditional Navigable Waterways (TNWs); all wetlands adjacent to TNWs; non-navigable tributaries of TNWs that are relatively permanent (i.e., tributaries that typically flow year-round or have continuous flow at least seasonally); and wetlands that directly abut such tributaries. In addition, the agencies will assert jurisdiction over every water body that is not an RPW if that water body is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of water body that are subject to CWA jurisdiction only if such a significant nexus is demonstrated are: non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally; wetlands adjacent to such tributaries; and wetlands adjacent to but that do not directly abut a relatively permanent, non-navigable tributary. A significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the chemical, physical, and/or biological, integrity of a TNW. Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a TNW, plus the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands.[22]

Thus, if anything is clear, a case-by-case analysis is now required to define the limits of federal jurisdiction. The ACOE's jurisdictional determination form requires an analysis of every wetland and water from the wetland being delineated to the nearest navigable water.

In order to delineate the boundary of a federally regulated wetland, a wetland biologist, working with a surveyor, first identifies what he or she believes to be the boundary of the ACOE wetland by the placement of flags in the field. Then, ACOE staff is asked to verify the flagged wetland. If the ACOE agrees with the boundary, the ACOE will issue a jurisdictional determination (called a "JD") that the wetlands are regulated by the ACOE. This is similar to a wetland delineation from the NYSDEC; however, the ACOE issues a JD in the form of a letter, where the NYSDEC will sign a certified wetland delineation map. Currently, ACOE jurisdictional determinations are valid for five years.[23]

Figure A
Marbled Salamander
Ambystoma opacum

The jurisdictional determination is not a permit, however. Unlike the NYSDEC process, the ACOE has issued general permits, known as Nationwide Permits (NWPs), which apply to every project, provided that their conditions are met. Individual permits for disturbances greater than that permitted as part of an NWP may also be sought, but the time involved is substantially greater. All disturbances require review by the ACOE, and wetland mitigation on a two-for-one ratio may also be required.[24] A key difference between NYSDEC and ACOE wetlands is that for ACOE wetlands there is no (1) regulated buffer, or (2) minimum size. Thus, development can be located directly adjacent to the boundary of an ACOE wetland (unless it is a known endangered species habitat, discussed below).

Obtaining a JD from the ACOE is not the end of the process. Rather, most disturbances to regulated wetlands require the filing and review of a pre-construction notification (or "PCN") for coverage under one of the ACOE's NWPs. Coverage in excess of that allowed by the NWPs requires an individual permit from the ACOE. The ACOE NWP permit program under section 404(e) of the CWA authorizes specific activities that have minimal individual and cumulative impacts on the aquatic environment. The vast majority of ACOE authorized activities come under the NWP program. Recently, the ACOE reissued 34 activity-specific NWPs and added 6 new NWPs with a number of new and modified general conditions designed to protect the aquatic environment.[25]

The PCN is more than just a notification, however. It is, in all practical terms, an application for coverage under one of the NWPs. This means that it will be reviewed by ACOE staff. If ACOE staff determine that additional information is needed, then they will ask for it. From the time a complete submission is made, the ACOE staff have 30 days to determine whether additional information is required. If the ACOE does not respond to the PCN within 45 days, then the application is deemed approved. Note, however, that any other condition imposed by the NWPs must also be followed, even in the case of a default approval.

One of the other general conditions of the ACOE NWP review process requires coordination between the ACOE and the United States Fish & Wildlife Service (FWS) regarding protected species issues. Under current procedures, that means that an applicant must submit a habitat analysis for locally known protected species as part of each PCN application package.

Turtles, Bats and Fairy Wands

No, This Isn't a Wicked Witch Recipe

Larger developments, especially in rural areas, may be affected by the presence of a protected habitat, both plants and animals. Endangered species protection is both a state and federal responsibility, involving both the NYSDEC and the FWS. There are three classifications: endangered, threatened, and species of special concern. Only species that have been classified as endangered or threatened are protected by the Endangered Species Act; species of special concern, (see Figure A) although not legally protected, are nevertheless often treated as protected by the Endangered Species Act, especially as part of the State Environmental Quality Review Act (SEQRA) process.

The Natural Heritage Program of the NYSDEC maintains maps showing the location of protected species. These maps are not available for public review. Instead, a request is submitted to NYSDEC for information as to whether there is any known habitat for endangered species in the vicinity of a given site. NYSDEC will respond, stating the species that may ex-

ist in the area without locating any specific area. This is to protect the species, so their habitat is not intentionally disturbed. At present, the FWS responds to inquiries about the presence of any protected species by directing the requestor to the FWS's website.[26]

If the NYSDEC's response states there are no known habitat areas in the vicinity of the site, then that response was once the end of any inquiry. While that response should be sufficient to conclude there are no impacts for the State Environmental Quality Review (SEQR), it may not be sufficient to satisfy the ACOE's obligation to consult with the FWS. Recent changes in the ACOE NWPs now require as a general condition for all the NWPs that the ACOE consult with the FWS regarding the potential impact to protected species.

If the NYSDEC response states there are protected species nearby, then it would be prudent to have a consulting biologist conduct a survey to see if any protected species are actually found on site. Timing and duration is important here. For instance, some protected plants only flower during a certain month. For example, the Fairy Wand (see Figure B), a protected plant, can only be found by its flower—and it only flowers from late May until early July in New York. Likewise, some animal species are only up and about during certain months. Blandings Turtles move around, looking for potential mates, in April and May. Missing that time may mean waiting a year to do the study, especially if the study requires trapping or radio telemetry.

Figure B
Fairy Wand
Chamaelirium luteum

A complicating factor is whether or not the development will require permits from the NYSDEC. If it does, then NYSDEC is likely to require that the habitat be evaluated. If no NYSDEC permits are necessary, the adequacy of any habitat analysis will be up to the SEQRA lead agency, the ACOE and FWS.

The Federal Endangered Species Act (ESA) requires all federal agencies, including the ACOE, to coordinate with the FWS before making decisions, including decisions on an NWP. Before engaging in any type of activity that may have direct or indirect effects on endangered species or critical habitat, agencies must "consult" with the FWS in order to evaluate the impact of such agency action. This consultation may be "formal" or "informal" in nature. The ACOE, for instance, must prepare a "biological assessment" evaluating the potential impacts of a particular project or approval. After reviewing the biological assessment prepared by the agency, the FWS prepares a "biological opinion" that ultimately determines whether the proposed agency action is likely to have an adverse impact on a listed species. If such an impact will occur, the FWS will then provide written requirements for minimizing the impact on the listed species in the form of an "incidental take" statement. The ESA requires consulting agencies to utilize the best scientific and commercial data available, and failure to consult properly may result in the proposed activity being enjoined.

Many activities involving the discharge of dredged or fill material in waters of the United States and adjacent wetlands trigger ESA consultation because of the activities' impact on protected species and their habitat. These activities include, for example, infrastructure projects such as water and sewer lines, dams and impoundments, housing and commercial development. The consultation process can be lengthy and complex with extensive negotiations between a project applicant, the ACOE and the FWS. Most NWPs require a 45-day pre-construction notification prior to commencing work. General Condition 17 covers endangered species, stating that "no activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation or which would destroy or adversely modify critical habitat."

Applicants must notify the ACOE if any listed species or designated critical habitat might be affected or is in the vicinity of the project and cannot begin work until notified by the ACOE that the requirements of the ESA have been met. The ACOE will determine whether the proposed activity "may affect" or will have "no effect" to a listed species and designated critical habitat and will notify the applicant within 45 days of receipt of a complete PCN. Where a "may effect" finding is made, the ACOE and the FWS or NMFS will engage in section 7 consultation, which may result in the ACOE adding species specific regional endangered species conditions to the NWPs. Further, the NWP rule makes clear that the authorization of an activity by an NWP does not authorize the "take" of a listed species in the absence of separate authorizations under the ESA (e.g., an ESA Section 10 permit, a Biological Opinion with "incidental take" provisions).

Section 7(a)(2) requires each Federal agency to consult with the FWS to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat (unless an exemption is obtained under

Figure C
Bog Turtle
Clemmys Muhlenbergii

subsection (h)). In turn, an applicant may request prospective or "early consultation" if the applicant "has reason to believe that an endangered species or threatened species may be present" at a proposed project.

Biological opinions are not mandatory directives. Once the opinion is received it is ultimately within the discretion of the agency (here, the ACOE) to decide how to proceed. If an agency chooses not to follow the advice set forth in a biological opinion, it will not constitute a violation of the ESA per se, so long as the agency's chosen course is a reasonable alternative measure. Yet, the Supreme Court has noted "while the Service's Biological Opinion theoretically serves an 'advisory function,' in reality it has a powerful coercive effect on the action agency." As the Court explained:

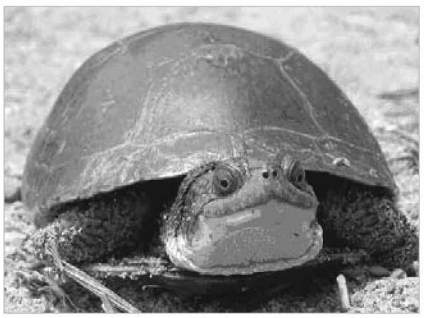

Figure D
Blandings Turtle
Emydoidea blandingii

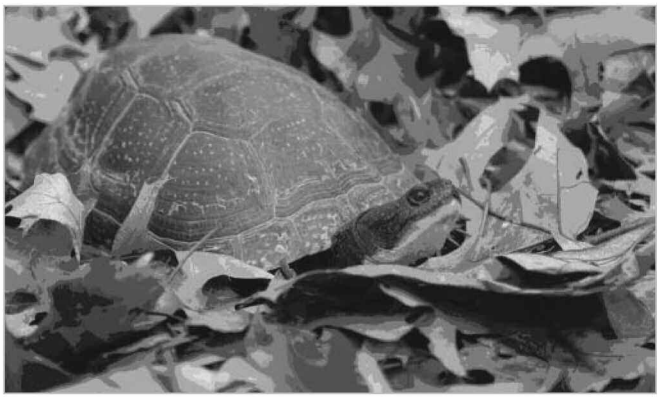

Figure D
Blandings Turtle
Emydoidea blandingii

> The Biological Opinion's Incidental Take Statement constitutes a permit authorizing the action agency to "take" the endangered or threatened species so long as it respects the Service's "terms and conditions." The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril (and that of its employees), for "any person" who knowingly "takes" an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.[27]

Thus, for all practicable purposes, the measures suggested by the Service become non-discretionary for the action agency and applicant.

Figure E
Indiana Bat
Myotis Sodalis

The presence of some species, such as Bog (See Figure C) or Blandings (See Figure D) Turtles, may add other complications. If ACOE wetlands are involved, the ACOE, in conjunction with the FWS, has been imposing buffers to protect the turtles' habitat. This has a tremendous impact on the development potential for such sites, and must be analyzed early in the approval process.

The Indiana Bat (see Figure E) is a protected species that has been the focus of much attention in recent years. Long endangered, there are nine hibernacula, or winter caves, in New York. The Indiana Bats swarm to these caves to spend the winter months in hibernation. During March and April, they emerge from their caves, and spend the summer roosting outdoors. They prefer trees with shaggy bark,[28] but will take advantage of various trees or other structures that have deep crevices allowing the bats to hide from predators during daylight hours. The presence of Indiana Bats,

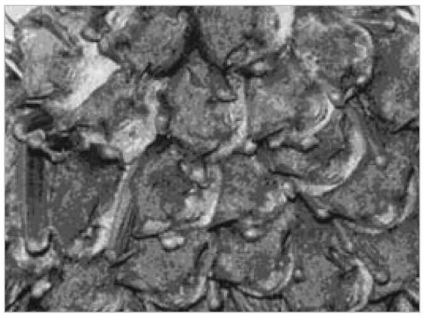

Figure E
Indiana Bat habitat
Myotis Sodalis

or even a potential Indiana Bat habitat, on a given site will impact the site's potential for development.

The Indiana Bat has been in the news lately, as the species is suffering from what has been called White Nose Syndrome. According to the FWS,[29] last year, some 8,000 to 11,000 bats died in several Albany-area hibernacula, more than half the wintering bat population in those caves. Many of the dead bats had a white fungus. This year, biologists are seeing the white fungus on bats hibernating in New York, southwest Vermont, northwest Connecticut and western Massachusetts. Little brown bats are sustaining the largest number of deaths. Also dying are northern long-eared and small-footed bats, eastern pipistrelle and other bat species using the same caves. Biologists are still not certain if the bats are transmitting White Nose Syndrome among themselves, or if people or both bats and people are spreading it. Affected dead and dying bats are generally emaciated, and those found outside are often severely dehydrated. What this means for the study and mitigation of disturbances to Indiana Bat habitat remains to be seen.

"Navigating the extent of the limits of federal jurisdiction over wetlands is perhaps more confusing than ever."

Conclusion

Navigating the extent of the limits of federal jurisdiction over wetlands is perhaps more confusing than ever. Recent ACOE guidance requires a substantial analysis as to whether a wetland falls under the ACOE's jurisdiction. In addition recent changes to the ACOE NWPs require the ACOE to consult with the FWS whenever there may be a potential impact to protected species resulting from an application.

Every project has its own peculiarities and requirements. These comments are intended to identify potential issues that often arise during the approval process. Significant time and expense can be saved by identifying, early on, a critical path of approvals. Approval from the ACOE, and consultation with the FWS (when required) should be the first issues identified in any project, as they may likely be the last approvals received.

Endnotes

1. *See* New York Environmental Conservation Law (ECL) Article 24.
2. 33 U.S.C.A. § 1362(7).
3. United States Constitution, Article I, Section 8, Clause 3 (The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;).
4. *See* 33 U.S.C. 403.
5. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).
6. *Riverside Bayview*, 474 U.S. at 133.
7. *United States Army Corps of Engineers v. Solid Waste Agency of Northern Cook County*, 531 U.S. 159 (2001).
8. *Rapanos v. United States*, 126 S. Ct. 2208 (2006).
9. 33 C.F.R. § 328.3(a)(1) (2004).
10. 33 C.F.R. § 328.3(a)(2).
11. 33 C.F.R. § 328.3(a)(3).
12. 33 C.F.R. § 328.3(a)(5).
13. 33 C.F.R. § 328.3(a)(7).
14. 33 C.F.R. § 328.3(c).
15. *Id.*
16. *Rapanos*, 126 S. Ct. at 2222.
17. *Id.* at 2255.
18. *Id.*
19. A copy of the USACOE's May 30, 2007 Jurisdictional Determination Form Instructional Guidebook can be found online at http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/jd_guidebook_051207final.pdf.
20. USACOE Jurisdictional Determination Form Instructional Guidebook (May 30, 2007) at page 6.
21. 33 C.F.R. § 328.3(b).
22. USACOE Jurisdictional Determination Form Instructional Guidebook (May 30, 2007) at page 7.
23. *Cf.* NYSDEC wetland delineations are currently valid for ten years.
24. Under the NWPs that expired in March 2007, wetland disturbances of less than one-tenth acre did not require a pre-construction notice to the USACOE. Since the new NWPs went into effect in March 2007, all disturbances to federally regulated wetlands require a pre-construction notice to the USACOE.
25. The new NWPs can be found at Vol. 72 Fed. Reg. 11092 (March 12, 2007) or online at http://www.usace.army.mil/cw/cecwo/reg/nwp/nwp_2007_final.pdf.
26. The FWS website regarding protected species can be found here: http://www.fws.gov/endangered/wildlife.html.
27. *Bennett v. Spear*, 520 U.S. 154, 169 (1997).
28. For example, shag-bark hickory.
29. http://www.fws.gov/northeast/white_nose.html.

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