BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: Henry R. Stevenson, Jr. Individually And as Owner of Parkwood Land Company	)
United States Environmental Protection Agency, Region 6	)
Dkt. No. CWA-06-2010-2708	)

APPEAL BRIEF

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INTRODUCTION

Henry R. Stevenson, Jr., Individually and as Owner of Parkwood Land Company, appeals from an Administrative Order for violations of §309(a) of the Clean Water Act, 33 U.S.C. §1319(a). For the reasons stated below, the Administrative Order is in error because The Environmental Protection Agency lacks jurisdiction under the provisions of the Clean Water Act.

ISSUES PRESENTED FOR REVIEW

A. The Corps and EPA lack jurisdiction over the subject property.

B. The activities of PLC are grandfathered.

FACTUAL AND PROCEDURAL BACKGROUND

On or about October 11, 2006, Mr. Henry R. Stevenson, Jr., Individually and as owner of Parkwood Land Company (hereinafter, "PLC") submitted a packet to the U.S. Army Corps of Engineers' Galveston District (hereinafter "Corps" or "The Corps") requesting verification of a wetland delineation completed by GTI Environmental, Inc. (hereinafter "GTI") on behalf of PLC. In its report, GTI stated that "[t]he investigation was conducted for the purpose of determining the existence and approximate extent, if any, of waters of the United States (jurisdictional waters), included wetlands, within the +/- 79 acre tract, which would be subject to regulation under §404 of the Clean Water Act." The project site is located north of Interstate 10 and east of the Neches River, near Rose City, Orange County, Texas (hereinafter "the site").

After completing its initial review of the GTI determination, the Corps found that the wetland delineation map, included with GTI determination documents needed to be revised. GTI submitted the revised delineation map to the Corps on December 6, 2006. The Corps then issued a preliminary jurisdictional determination finding 72 of the 79 acre parcel as wetlands that are subject to the Corps' jurisdiction under §404 of the Clean Water Act.

The Corps subsequently issued Permit Number SWG-2007-84-RN (D-19279) to PLC in order to repair portions of the levee on the property. According to the Corps letter granting the permit:

> "Our review of a 1947 survey showed that the property was originally used for dredge-material disposal and is surrounded by a containment levee. According to your project description, this levee is eroding and requires repairs. Since the levee was built prior to the inception of Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899 plus the fact jurisdictional activities that have occurred prior to July 19, 1977, are authorized (grandfathered) by the NWP, the levee is considered to be previously authorized and can be repaired pursuant to NWP 3."[1]

[1] The entire parcel which is the subject of this appeal is surrounded by a 13' levee on all sides.

On or about November 17, 2010, PLC received a letter from the Environmental Protection Agency (hereinafter, "EPA") regarding "[t]he discharge of fill material into waters of the United States without a permit." A meeting with members of the EPA and the Corps occurred on the site on or about December 9, 2010.

On or about January 31, 2011, the EPA issued their Administrative Order in this case. In this order the EPA requires the submission and execution of a plan to the EPA for restoration of 1.26 acres of impacted wetlands in which PLC "discharged, caused the discharge, and/or directed the discharge of "discharge dredged material and/or discharge fill material."

ARGUMENT

A. RULES

Congress passed the Clean Water Act (hereinafter "CWA") in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251. To that end, the CWA prohibits the discharge of pollutants into navigable waters. *See id*.; §§1311(a), 1362(12)(A). The CWA defines navigable waters as "the waters of the United States, including the territorial seas." 33 U.S.C. §1362 (7). Although the Corps initially construed this definition to cover only waters navigable in fact, "in 1975 the waters of the United States' to include not only actually navigable waters but also tributaries of such waters" and "freshwater wetlands that were adjacent to other covered waters." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24 (1985).

In *Riverside Bayview Homes*, the U.S. Supreme Court upheld the Corps' determination that it had jurisdiction over wetlands adjacent to navigable waters. *Id* at 139. Even though the plain language of the statute did not compel this conclusion, the Court explained that by including a broad definition of "navigable waters" in the CWA, Congress "evidently intended to…exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classic understanding of that term." *Id* at 133. It was further reasoned by the Court that the Corps' decision to include wetlands within it jurisdiction was a reasonable one, given wetlands' critical importance to the health of adjacent waters. *Id* at 133-34.

The Supreme Court again interpreted the CWA term "navigable waters" in *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 U.S. 159 (2001) (hereinafter "*SWANCC*"). In *SWANCC*, the Court considered whether "isolated ponds, some

only seasonal, wholly located within two Illinois counties, fell under [the CWA's] definition of 'navigable waters' because they served[d] as habitat for migratory birds." *Id* at 171-72. The Court held that these waters were simply too far removed from any navigable waters to be included within that term. *Id*. To distinguish these isolated ponds from the wetlands it considered in *Riverside Bayview Homes*, the Court explained, "]i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *Id* at 167.

Five years later, in *Rapanos v. U.S.*, the Supreme Court revisited the issue of the Corps' jurisdiction over adjacent wetlands. 547 U.S. 715 (2006). Although continuing to recognize the validity of the *Riverside Bayview Homes* decision, the Court was unable to provide a clear, blue-line decision regarding jurisdiction. Instead, a fractured Court proposed two different ways to limit the reach of it earlier ruling so as not to allow jurisdiction over wetlands which were remote or lacked a connection to "navigable waters."

The *Rapanos* plurality suggested that wetlands should only fall within CWA jurisdiction when they (1) are adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters," and (2) have a "continuous surface connection with that water." *Id* at 742 (hereinafter "Plurality Opinion"). Justice Kennedy, concurring, found this test too limiting. Instead, he borrowed language from *SWANCC* to establish an alternative new test for jurisdiction over adjacent wetlands. *Id* at 779, 782. The dissent, which drew four votes, found both of these tests too stringent. In the words of the Chief Justice, "[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the CWA. Lower courts and regulated entities will have to feel their way on a case-by-case basis." *Id* at 758.

In its short life, *Rapanos* has indeed satisfied any "bafflement" requirement. The first court to decide what opinion was controlling decided to ignore all of them and instead opted for earlier circuit precedent which it felt was clearer and more readily applied. *United States v. Chevron Pipe Line Co.*, 437 F.Supp.2d 605, 613 (N.D. Tex. 2006). The Courts of Appeal have similarly been perplexed and scattered in opinion. The Ninth Circuit has stated that Justice Kennedy's test apples in most instances, *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007), while the Eleventh Circuit has held that the CWA's coverage may be established *only* under this test. *United States v. Robinson*, 505 F.3d 1208, 1219-22 (11th Cir. 2007). By contrast, the First and Seventh Circuits, though differing somewhat in their analyses, have followed Justice Stevens' (the dissent) advice and held that the CWA confers jurisdiction whenever *either* Justice Kennedy's or the Plurality Opinion's test is met. *United States v. Johnson*, (467 F.3d 56, 60-66 (1st Cir. 2006); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006). Unfortunately, the Fifth Circuit, which provides jurisdiction over the site, has not addressed this issue since the issuance of *Rapanos*.

A. The Corps and EPA lack jurisdiction over the subject property.

a. *Rapanos* – Plurality Test

Following the Plurality Opinion in *Rapanos* requires the EPA to exhibit that the site property (1) is adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters," and (2) has a "continuous surface connection with that water." PLC will stipulate that the Neches River flows adjacent to the site; however, the site and the Neches River, as previously noted, are separated by a thirteen-foot-high levee. The Corps, in a Memorandum for File dated July 5, 2007, states, by their own admission, that "there is no hydrological connection or breaks in the levee." *See* Exhibit "A."

While there is no dispute regarding the Neches River and requirement #1 above, there is no "continuous surface connection with that water" as required by the Plurality Opinion in *Rapanos*. *See Rapanos*, 547 U.S at 742. Therefore, under this test, jurisdiction over the site fails. *See id*.

b. *Rapanos* – Kennedy's Significant Nexus Test

While Justice Kennedy provides learned insight into his reasons for concurrence, reasons why the Plurality Opinion is too restrictive, and the dissent's opinion is too broad, Justice Kennedy provides little of substance regarding a clear, blue-line test. At its best, this nexus exists "if the wetlands either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." *Id* at 755. Neither the Corps nor the EPA can provide any evidence that the site (separated by a thirteen foot levee around the entire site from the Neches River) "significantly affects the chemical, physical, and biological integrity" of the Neches River upon which they may confer jurisdiction. *See id*.

Reviewing Justice Kennedy's "significant nexus" test, it is noted that he states, "[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. *Id* at 782. However, Justice Kennedy also states, "[i]ndeed, in many cases, wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the CWA's scope in *SWANCC*." *Id* 781-82. What ***is*** apparent is that Justice Kennedy did not intend, nor did he ever hold, that property which is separated from a navigable-in-fact waterway by a substantial barrier provides this "significant nexus" in order to confer jurisdiction. *See id*.

Further, Justice Kennedy, relying on the Court's opinion in *Riverside Harborview* provides that "the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion…" *Id* at 775. In this instance, however, the Corps have specifically stated that "there is no hydrological connection" with the adjacent waterway (Exhibit "A") and thus could not possibly confer any of these attributes sought by the Corps. *See id* at 775.

B. The activities of PLC are grandfathered.

As previously noted, the position of the Corps regarding the site is that the property was "originally used for dredge-material disposal and is surrounded by a containment levee." The Corps further states that "[s]ince the levee was built prior to the inception of Section 404 of the CWA and Section 10 of the Rivers and Harbors Act of 1899 plus the fact jurisdictional activities that have occurred prior to July 19, 1977, are authorized (grandfathered) by the NWP, the levee is considered to be previously authorized…" *See* Exhibit "B."

The original use of the property noted by the Corps is the same or similar use upon which PLC wishes to utilize the property. The "dredge material disposal" noted by the Corps was for the construction of the Interstate 10 bridge located adjacent to the site. It is the intention of the Department of Transportation to replace this bridge. In order to do so, the contractors need a location, relatively close to the construction site, where debris can be staged before removal to more suitable locations. PLC purchased the site with the intention filling that need.

PLC noted that the containment levee was in need of repair and requested a permit to conduct the necessary repairs. When the Corps believed that PLC had exceeded the limits of the permit – or when the Corps found that PLC intended to utilize the non-wetland component of its

property in the up-coming construction project, the Corps referred PLC to the EPA for enforcement.

The point of contention between the parties is if PLC exceeded the grandfathered activities. Although the Corps provided in the NWP that "[m]inor deviations due to changes in construction techniques, materials or the like are authorized," PLC's efforts to shore up its levee and prepare the non-wetland portion of the property for use in the construction project have incurred the "wrath of the EPA."

CONCLUSIONS

Following the U.S. Supreme Court's opinion in *Rapanos* and the subsequent attempts to interpret this holding, the ***ONLY*** means by which the Corps or EPA can confer jurisdiction upon the site is through use of the ***DISSENT'S*** opinion. This method has not been used by ***ANY*** of the Circuit Courts which have decided same or similar cases since *Rapanos*.

Even assuming that jurisdiction exists, the Corps has already provided that PLC's activities are grandfathered upon the site.

These premises considered, PLC requests this Environmental Appeal Board vacate the Administrative Order (Exhibit "C") issued by the EPA, Region 6 on or about January 31, 2011.

Respectfully Submitted,

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