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# Sixth Circuit Narrows Definition of Wetlands for Purposes of Corps of Engineer's Jurisdiction

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# SIXTH CIRCUIT NARROWS DEFINITION OF "WETLANDS" FOR PURPOSES OF CORPS OF ENGINEER'S JURISDICTION

ENVIRONMENTAL LAW—WETLANDS. The Sixth Circuit held that undeveloped suburban land was not "wetlands" where there was no evidence that the land as it presently existed was frequently flooded or that the flooding caused the presence of aquatic vegetation; thus, landowners did not have to obtain an Army Corps of Engineers' permit to deposit fill material on the land. *United States v. Riverside Bayview Homes,* 729 F.2d 391 (6th Cir. 1984), *cert. granted* 105 S. Ct. 1166 (Feb. 19, 1985).

## FACTS

Riverside Bayview Homes (Riverside) owned approximately eighty acres of undeveloped land located within a suburban area north of Detroit, Michigan, approximately one mile from the navigable waterway of Lake St. Clair.[1] The land had been actively farmed in the past.[2] About sixty acres were platted in 1916 as a subdivision and subsequently had storm drains and fire hydrants installed.[3] In 1973, however, the local township and the Army Corps of Engineers (Corps) took emergency action to protect area homes and businesses against unprecedented high water levels on the Great Lakes, including Lake St. Clair.[4] This action destroyed drainage on the western border of Riverside's property.[5]

Riverside, in a 1976 attempt to develop its land, had dirt fill hauled to its property.[6] Unsure of whether the property came within the Corps' dredge and fill jurisdiction, Riverside had submitted an incomplete application for a permit.[7] The Corps felt that Riverside's property was a wetland and, therefore, Riverside's placing fill without obtaining a permit violated Section 301(a) of the Federal Water Pollution Control Act (FWPCA).[8] The Corps obtained a temporary restraining order which prohibited further filling pending a full evidentiary hearing in the district court.[9]

1. United States v. Riverside Bayview Homes, 729 F.2d 391, 392 (6th Cir. 1984).
2. *Id.*
3. *Id.*
4. *Id.* at 393.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.;* 33 U.S.C. § 1311(a) (1982).
9. United States v. Riverside Bayview Homes, No. 77-70041 [hereinafter cited as *Riverside,* No. 77-70041] (E.D. Mich. June 20, 1979) (opinion and order granting preliminary injunction in part).

District Court Judge Cornelia Kennedy issued a final judgment, holding that a large portion of Riverside's property was a wetland subject to Corps regulation under the FWPCA.[10] Judge Kennedy permanently enjoined Riverside from further filling of land below the elevation of 575.5 feet until Riverside (1) met the Corps' requirement of removing any fill already placed on the property and (2) the Corps issued a permit.[11] Judge Kennedy also issued a declaratory judgment holding unconstitutional the Corps' regulation requiring that processing of applications for permits be postponed when the U.S. Attorney began enforcement proceedings. Both parties appealed.

The Sixth Circuit remanded the case to the district court because the Corps had promulgated a new "wetlands" definition in 1977.[13] This new definition altered the requirements originally used to classify Riverside's property as a wetland.[14] District Court Judge Horace W. Gilmore, on remand, interpreted the new definition of wetlands to include Riverside's property.[15] He, thus, continued the permanent injunction against further filling. Riverside appealed.[16]

The Sixth Circuit, in the decision which is the subject of this case note, held that Judge Gilmore erred in interpreting the Corps' new definition of wetlands to include Riverside's property.[17] The court held that undeveloped suburban land was not a wetland where there was no evidence that the land, as it presently existed, was frequently flooded or that the flooding caused the presence of aquatic vegetation.[18] The Sixth Circuit also vacated as moot Judge Kennedy's declaratory judgment holding unconstitutional the Corps' regulation postponing processing of permits once a referral has occurred or judicial proceedings have been initiated.[19]

This note will set out a brief history of how "wetlands" has come to define the Corps' jurisdiction over dredge and fill activities. Then the note will analyze the court's decision. First, it will look at how the actual change in wording between the Corps' 1975 and 1977 wetlands definitions narrowed the Corps' jurisdiction over dredge and fill activities. Second,

10. *Id.*

11. *Riverside*, No. 77-70041 (E.D. Mich. June 20, 1979) (opinion and order holding defendants in comtempt for violation of temporary restraining order; *Riverside*, No. 77-70041 (E.D. Mich. June 20, 1979) (judgment permanently enjoining defendants).

12. *Riverside*, No. 77-70041, slip op. at 7-10 (E.D. Mich. June 20, 1979); 33 C.F.R. § 326.4(e) (1982) (current version as amended at 33 C.F.R. § 326.3(c)(3) & n.2 (1984).

13. 615 F.2d 1363 (6th Cir. 1980).

14. 33 C.F.R. § 323.2(c) (1984).

15. *Riverside*, No. 77-70041 (E.D. Mich. May 18, 1981) (findings and order granting permanent injunction).

16. *Id.*

17. 729 F.2d at 392.

18. *Id.* at 397.

19. *Id.* at 399.

it will discuss how the Sixth Circuit's interpretation of the 1977 definition further narrowed the Corps' jurisdiction.

## CORPS' JURISDICTION OVER DREDGE AND FILL ACTIVITIES

### *Corps' Jurisdiction Originally Limited to "Navigable Waters"*

The FWPCA Amendments,[20] enacted in October 1972, supplemented the Corps' authority under the Rivers and Harbors Act (RHA) to regulate dredging and filling in navigable waters.[21] Under the RHA, the Corps' regulatory jurisdiction to issue permits is limited to activities that take place in "navigable waters."[22] The Corps' 1972 definition of navigable waters specifically limited its jurisdiction under the RHA to the mean high water mark (MHW)[23] in tidal areas and to the ordinary high water mark (OHW)[24] in freshwater areas.[25] By thus limiting jurisdiction to areas within MHW and OHW, the Corps' regulations neither mentioned nor protected entire wetlands because wetlands usually extend beyond these marks.[26]

Enactment of the FWPCA reflected a concern for the possible environmental impacts of federal regulatory agencies. The primary objective of the FWPCA was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[27] with a national goal to eliminate the discharge of pollutants into the navigable waters by 1985.[28] One of the act's few express exceptions to its prohibition of discharge of pollutants is the Section 404 dredge and fill program.[29] Section 404 em-

20. 33 U.S.C. §§ 1251-1376 (1982).

21. 33 U.S.C. §§ 401-13 (1982).

22. Guthrie v. Alabama By-Products Co., 328 F. Supp. 1140, 1146-48 (N.D. Ala. 1971). On September 9, 1972, the Corps published a definition of "navigable waters" which included: (1) all waters presently used to transport interstate or foreign commerce (*see* The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870)); (2) all waters that had sustained navigation in the past but were no longer capable of navigation in their ordinary condition (*see* Economy Light & Power Co. v. United States, 256 U.S. 113 (1921)), (3) all waters which could be capable of sustaining navigation in the future if reasonable improvements were made (*see* United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940)), and (4) all waters subject to the ebb and flow of the tide (*see* United States v. Moretti, Inc., 478 F.2d 418 (5th Cir. 1973)). 42 Fed. Reg. 37,122 (1977).

23. MHW is "established by ground surveys with reference to available tidal datum, preferably averaged over a period of 18.6 years." 33 C.F.R. § 329.12(a)(2) (1984).

24. OHW is the "line on the shore established by fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank. . . ." 32 C.F.R. § 329.11(a)(1) (1984).

25. 42 Fed. Reg. at 37,122-23.

26. *See* Commonwealth of Puerto Rico v. Alexander, 438 F. Supp. 90, 96 (D.D.C. 1977) (where the court in noting the need for wetlands jurisdiction above the MHW stated "[s]ince water moves in hydrologic cycles, real protection of water must include protection of the complete aquatic system").

27. 33 U.S.C. § 1251(a) (1982).

28. *Id.* at § 1251(a)(1).

29. *Id.* at § 1311(a) and 1344.

powered the Corps to approve or deny permits for dredge and fill operations in navigable waterways.[30]

Under the FWPCA, the Corps' regulatory jurisdiction to issue Section 404 permits was also limited to "navigable waters."[31] However, navigable waters was more broadly defined to mean "waters of the United States."[32] The RHA navigability restriction would not apply to Section 404. Congress intended to expand the Corps' jurisdictional reach.[33] Yet, Congress did not go so far as to specifically include wetlands within its expanded definition of navigable waters under Section 404.

*Corps Defines "Wetlands"*

The Corps, notwithstanding the expanded definition of navigable waters contained in the 1972 FWPCA, clear legislative intent, and various court decisions,[34] initially promulgated Section 404 regulations with a definition of navigable waters that was as limited as that under the RHA.[35] Although these regulations, part of the Corps' April 3, 1974, permit revisions, included "wetlands" for the first time,[36] the term was not used to define or extend the Corps' jurisdiction.[37] The Corps, recognizing the importance of wetlands, included them as part of its special policy to prevent the unnecessary destruction of wetlands within its jurisdiction.[38]

The National Resources Defense Council and the National Wildlife Federation soon challenged the Corps' limitation on the jurisdiction of Section 404 to "navigable waters" as being inconsistent with congressional intent under the FWPCA to regulate "all waters of the United

30. *Id.*

31. 33 U.S.C. § 1362(7) (1982).

32. *Id.*

33. 118 Cong. Rec. 33,756-57 (1972); *see, e.g.*, United States v. Ashland Oil & Transp. Co., 364 F. Supp. 349, 350 (W.D. Ky. 1973) (where the court rejected defendant's argument that the FWPCA applied only to "navigable" waters, referring to the deletion of the term "navigable" from the definition of "navigable waters" as evidence of congressional intent to eliminate navigability as a limitation upon the jurisdictional scope of the FWPCA); United States v. Holland, 373 F. supp. 665, 671 (M.D. Fla. 1974) (where the court, after reviewing legislative history, concluded that Congress intended to "define away the old 'navigability' restriction").

34. 364 F. Supp. 349 (W.D. Ky, 1973); 373 F. Supp. 665 (M.D. Fla. 1974).

35. The Corps defined navigable waters as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 39 Fed. Reg. 12,119 (1974); 42 Fed. Reg. 37,123 (1977) (codified at 33 C.F.R. § 209.120(d)(1) (1975).

36. 39 Fed. Reg. 12,115 (1974) (codified at 33 C.F.R. 209.120(g)(3) (1975)). At this time "wetlands" were defined as "those land and water areas subject to regular inundation by tidal, rivertine, or lacustrine flowage." *Id.*

37. Schlauch & Strickland, *Changing Land to Water—The Alchemy of The Federal Wetlands Regulatory Scheme*, 27A ROCKY MTN. MIN. L. INST. 635, 715 (1982); *see* 42 Fed. Reg. at 37,123-24 (1977).

38. 33 C.F.R. § 320.4(b)(1) (1980).

States."[39] Environmentalists were concerned about "the need to regulate the entire aquatic system, including all of the wetlands that are part of it, rather than only those aquatic areas that are arbitrarily distinguished by the presence of an ordinary or mean high water mark."[40] They also expressed concern over isolated wetlands whose degradation, destruction, and disappearance continued to increase at an alarming rate.[41] Wetlands are beneficial in providing fish and wildlife habitat,[42] purifying water,[43] maintaining groundwater supplies,[44] and preventing flooding.[45] Only one month after the Corps published the Section 404 regulations, the Federal District Court for the District of Columbia agreed with the environmentalists. The court held that the term "navigable waters" in Section 404 had the same meaning it did in the rest of the FWPCA and that the Corps was obliged to revise its regulatory definition to reflect the broader legislative mandate.[46]

*Corps Includes "Wetlands" as a Jurisdictional Limitation*

In attempting to comply with the court's order, the Corps, in 1975, promulgated interim final regulations which for the first time included the term "wetlands" as a limitation on the Corps' Section 404 jurisdiction. These 1975 regulations defined two types of wetlands: (1) saltwater and (2) freshwater. Saltwater wetlands are contiguous or adjacent to coastal waters, are periodically inundated by saline or brackish waters, and are normally characterized by the presence of salt or brackish water vegetation capable of growth and reproduction.[47] Freshwater wetlands include marshes, shallows, swamps, and similar areas that are contiguous or adjacent to lakes, rivers, and streams, and are periodically inundated and normally

39. National Resources Defense Council v. Callaway, Inc., 392 F. Supp. 685, 686 (D.D.C. 1975); *see* 42 Fed. Reg. at 37,123.

40. 42 Fed. Reg. at 37,123.

41. *Id.* at 37,123-24. Until recently, the public generally regarded wetlands as having little inherent worth and only valuable if filled and developed. Over the years this ignorance permitted unhampered construction activities such as dredging and filling. As a result, the nation's original wetland acreage has been cut almost in half. Want, *Federal Wetlands Law: The Cases and the Problems,* 8 HARV. ENVTL. L. REV. 1, 3 (1984); *see also* Zabel v. Tabb, 430 F.2d 199, 204 (5th Cir. 1970), *cert. denied,* probability of pollutants being discharged and carried into adjacent or connected bodies of water, causing substantial pollution to navigable waters. *See* 42 Fed. Reg. at 37,123 and 37,128.

42. Wetlands provide essential nesting, wintering, and resting grounds for many species of migratory waterfowl, other waterbirds, and many songbirds. Council on Environmental Quality, Our Nation's Wetlands, An Interagency Task Force Report 2 (1978) (GPO No. 041-01100045-9).

43. Wetlands perform important water purification functions by holding nutrients and recycling pollutants. *Id.* at 23.

44. Wetlands also retain rainwater, which often percolates into aquifers, providing critical groundwater supplies and flood protection. *Id.* at 27.

45. *Id.* at 5-7.

46. *Callaway,* 392 F. Supp. at 686.

47. 33 C.F.R. § 209.120(d)(2)(b) (1976).

characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.[48]

Inclusion of "wetlands" to delineate the Corps' jurisdiction over dredge and fill activities generated a significant amount of public conern as many small waterbodies with no connection to navigability and little or no connection to interstate commerce were coming under the Corps' jurisdiction.[49] As a result, constituents soon beseiged their congressmen with requests to restrict the Section 404 jurisdictional scope of the Corps.[50]

Sensing a threat of major legislative revision of its regulatory authority, the Corps published revised and reorganized regulations on July 19, 1977.[51] Specifically, the Corps changed the nomenclature of the term "navigable waters" and referred to its jurisdiction under Section 404 as "waters of the United States," the definition given to that term in Section 502(7) of the FWPCA.[52] The "waters of the United States" were broken down into four categories, each of which included adjacent wetlands.[53] The Corps redefined the 1975 saltwater and freshwater definition of wetlands into one:

> [t]hose 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. Wetlands generally include swamps, bogs, and other similar areas.[54]

## APPLICATION OF THE CORPS' 1975 AND 1977 "WETLANDS" DEFINITIONS TO RIVERSIDE'S PROPERTY

This note now turns to the question of whether property such as Riverside's should be classified as a "wetland." Riverside owned approximately eighty acres located about a mile west of the navigable waters of Lake St. Clair.[55] The northern boundary of the property was separated

48. *Id.* at § 209.120(d)(2)(h).

49. The Corps received over 2,000 comments on the interim final 1975 regulations. 42 Fed. Reg. at 37,125.

50. Both the House and Senate responded to their constituents by proposing definitions of "navigable waters" which were equal to or more restrictive than the definition under the RHA. *See* 122 Cong. Rec. 16,569 and 28,771 (1976). The joint House-Senate Conference Committee was unable to resolve the differences between the two bills, and thus the session ended without passage of any Section 404 amendments.

51. 42 Fed. Reg. 37,122 (1977) (codified at 33 C.F.R. §§ 320-330.8 (1984)). Subsequent to the Corps enacting its 1977 revised dredge and fill permit regulations, Congress made changes to the FWPCA which were signed into law on December 27, 1977 as the Clean Water Act. 33 U.S.C. §§ 1344(a)-(t). Congress, however, left the Corps' Section 404 program essentially intact. *Id.*

52. 42 Fed. Reg. at 37,127 (codified at 33 C.F.R. § 323.3(a) (1984)).

53. 33 C.F.R. § 323.2(a) (1984).

54. *Id.* at 37,128 (codified at 33 C.F.R. § 323.2(c) (1984)). This definition of "wetlands" is the same for all four categories of the "waters of the United States." *Id.* at 37,127.

55. *Riverside*, No. 77-70041, slip op. at 1-2 (E.D. Mich. Feb. 24, 1977); 729 F.2d at 392-93.

from the Clinton River by a raised road bed.[56] Water channels that flowed into the navigable waters of Black Creek began about 200 feet beyond the southwest border.[57] Two ten-acre parcels of undeveloped land separated the southern border from the manmade Savan drain canals and Black Creek.[58] Along the western boundary of the property ran a paved street and a dike to prevent waters from Lake St. Clair from flooding the road.[59] Prior to 1976, portions of Riverside's property had been partially farmed, platted as a subdivision, and had storm drains and fire hydrants installed.[60]

As political awareness of the importance of the aquatic environment grew, Congress expanded the Corps' jurisdictional reach from "navigable waters" under the RHA to all "waters of the United States" under the FWPCA.[61] The Corps, per court order, expanded its own jurisdictional reach one step further: "wetlands" were specifically included. In redefining wetlands in 1977, however, the Corps narrowed its jurisdiction.

*District Court Application of the 1975 Definition*

The elements for a wetland under the 1977 definition are quite distinct from those under the 1975 definition. The 1975 definition required that a wetlands area be (1) periodically inundated and (2) normally characterized by the prevalence of vegetation that required saturated soil conditions for growth and reproduction.[62] Judge Kennedy, in applying the 1975 definition, found the second requirement easily met. She noted that because of the type of soil found on the land, the unfilled Riverside property fit the wetlands criteria of being "characterized by the prevalence of vegetation that required saturated soil conditions for growth and reproduction."[63]

The first requirement of the wetlands definition, however, presented a problem. Judge Kennedy needed to determine whether the Riverside property had ever been inundated and, if so, whether it had been inundated on a periodic basis. In accepting the dictionary definition, "flooded," as meaning "inundated,"[64] Judge Kennedy readily noted "there have been long periods of time when none of the property was inundated by water from contiguous or adjacent navigable waters. . . . Some of the higher elevations have been inundated only during the last recent unprecedented

56. Brief for Federal Appellee and Cross-appellant at 9, United States v. Riverside Bayview Homes, 729 F.2d 391 (6th Cir., 1984).
57. *Id.* at 10.
58. *Riverside*, 729 F.2d at 392.
59. *Id.*
60. 729 F.2d at 392-93.
61. *See supra* text accompanying notes 35, 39-46.
62. 729 F.2d at 392; *see* 33 C.F.R. § 209.120(d)(2)(b) & (h) (1976).
63. *Riverside*, No. 77-70041, slip op. at 3 (E.D. Mich. Feb. 24, 1977).
64. *Id.* slip op. at 4.

high water or have never been inundated."[65] In spite of these misgivings, however, Judge Kennedy did find sufficient evidence that Riverside's property had been inundated.[66]

Next, Judge Kennedy considered whether inundation of Riverside's land on four to six occasions in the past eighty years, at the contour line of 575.5 feet above sea level, should be considered "periodic."[67] Although Judge Kennedy thought it a difficult and somewhat arbitrary decision,[68] the court had to choose some point at which an occurrence became periodic.[69] Judge Kennedy selected more than five times.[70] She chose 575 feet plus the half-foot of normal monthly fluctuation of the mean high water level of Lake St. Clair as the appropriate contour line upon which to base the number of times Riverside's property had been flooded.[71] On this basis, Judge Kennedy enjoined Riverside from placing fill below the 575.5 foot contour line without first obtaining a permit under Section 404.[72] This resulted in approximately eighty percent of Riverside's property being classified as a "wetland" and therefore not usable as contemplated by the landowner without the government's permission.[73]

*District Court's Application of the 1977 Definition*

Even under the 1977 definition, the district court found Riverside's property below the elevation of 575.5 feet to be a wetland.[74] Writing for the district court, Judge Gilmore found that, from a common sense reading of the new language, the amended regulation was "broader than its predecessor."[75] Because Judge Kennedy had found that the property was periodically inundated, supported some aquatic vegetation, and was contiguous and adjacent to Black Creek, Judge Gilmore decided that Riverside's property met the wetlands criteria of inundation "at a frequency and duration sufficient to support, and that under normal circumstances [did] support" wetlands vegetation.[76] He, therefore, classified Riverside's

65. *Id.* slip op. at 6.
66. *Id.* slip op. at 6-7.
67. *Id.* slip op. at 7-8.
68. Judge Kennedy observed that "[t]he Court [was] left in the unenviable position of having to define 'periodic' without knowing the reason for the adoption of the standard." *Id.* slip op. at 7.
69. *Id.* at 8.
70. *Id.*
71. *Id.* "If treating the years 1972-1975 and 1952-1953 as one occurrence, then the lake levels have exceeded 575 feet only four times (1928, 1952-53, 1969, and 1972-75). If the level of 574.9 feet were to be considered, the number of occurrences would increase to six." *Id.*
72. *Id.*
73. 729 F.2d at 395.
74. *Riverside*, No. 70-70041, slip op. (E.D. Mich. May 18, 1981).
75. *Id.* slip op. at 2; *see* 729 F.2d at 396.
76. *Riverside*, No. 77-70041, slip op. at 2 (E.D. Mich. May 18, 1981).

property as a wetland under the 1977 definition and continued the injunction.[77]

*Sixth Circuit Application of the 1977 Definition*

Riverside appealed Judge Gilmore's interpretation of the Corps' 1977 "wetlands" definition to the Sixth Circuit. In its interpretation, applying the facts as found by Judge Kennedy in the original district court action,[78] the Sixth Circuit held that the 1977 definition did not support classification of Riverside's property as a wetland.[79] The Sixth Circuit stated that the 1977 definition required that land, "as it exists,"[80] must be "inundated at a frequency and duration sufficient to support, and that under normal circumstances [does] support" wetlands vegetation.[81] The court noted that Judge Kennedy merely found that Riverside's property had been inundated on four to six occasions in the eighty years of recorded history.[82] Although such infrequent flooding may properly be termed periodic, it cannot fairly be said to describe the land "as it exists."[83] In addition, the court noted that although Judge Kennedy had found Riverside's property to be characterized "'by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction,' . . . the source of this vegetation was the type of soil found on the property and not the few instances of flooding."[84] The court concluded that, based on the evidence presented to Judge Kennedy, Riverside's land did not meet the 1977 "wetlands" definition requirements.[85]

Noting the absence of evidence that Riverside's property as it exists now was frequently flooded and that the flooding caused the growth of aquatic vegetation, the Sixth Circuit stated that the government's case was insufficient to justify a classification of Riverside's property as a wetland subject to the Corps' Section 404 jurisdiction.[86] The Sixth Circuit thus vacated Judge Kennedy's injunction against the placement of fill.[87]

77. *Id.*

78. The Sixth Circuit noted that its order which had remanded this case to Judge Gilmore at the district court for further examination in light of the new regulation did not make the nature of the inquiry clear. The circuit court should have directed the district court to consider the voluminous evidence from the seven days of testimony given earlier before making its wetlands finding. 729 F.2d at 396. As the Sixth Circuit was in as good a position as the district court to apply the facts as found by Judge Kennedy, it did not remand a second time.

79. *Id.* at 397.

80. The court specifically noted that Section 404 was intended to regulate discharges of dredge and fill materials into the aquatic system "as it exists," and not as it may have existed over a record period of time. *Id.* at 395.

81. *Id.* at 396.

82. *Id.* at 395.

83. *Id.* at 396-97.

84. *Id.* at 397.

85. *Id.*

86. *Id.*

87. *Id.*

The court's rationale behind its decision was three-fold. Besides looking to the plain meaning of the 1977 definition, which is the emphasis of this case note, the court wanted to avoid questions concerning the validity of the definition itself under the FWPCA and a serious taking problem under the Fifth Amendment.[88] The court thus construed the 1977 wetlands definition narrowly.[89]

In looking at the validity of the 1977 definition, the Sixth Circuit indicated that the subject matter to be protected is the "navigable waters" which are defined in the FWPCA as "waters of the United States including the Territorial seas."[90] The court noted that the language of the statute made no reference to "lands" or "wetlands" or flooded areas at all.[91] The Sixth Circuit decided that although Congress may have meant to extend the protections of the FWPCA beyond the straightforward definition it provided of "navigable waters," the court was unsure just "how far away from 'navigable waters' Congress contemplated that regulations under the Act could drift."[92] The court was not sure that (1) the FWPCA indicated that the Corps' jurisdiction should go beyond navigable waters and "perhaps the bays, swamps and marshes into which those navigable waters flow;[93] that (2) Congress intended to subject inland property which is rarely if ever flooded to the permit process;[94] nor that (3) "the statute was intended to cover a piece of property a mile inland from Lake St. Clair which has been farmed in the past and is now platted and laid out for subdivision development with the fire hydrants and storm sewers already installed."[95]

The Sixth Circuit saw a very real taking problem with the exercise of such apparently "unbounded jurisdiction" by the Corps.[96] To avoid any implication of a government taking, the Sixth Circuit chose to construe the regulation containing the 1977 wetlands definition as "limited to lands such as swamps, marshes, and bogs that are so frequently flooded by waters from adjacent streams and seas subject to the jurisdiction of the Corps that it is not unreasonable to classify them as lands which frequently underlie the 'waters of the United States.'"[97]

88. *Id.* at 397-98.
89. *Id.*
90. *Id.* at 397.
91. *Id.*
92. *Id.* Although the Sixth Circuit was uncertain of Congress' intent under the FWPCA, it did note that the "Fifth Circuit [had] recently held that Corps' wetland definition is consistent with the intent of the FWPCA." *See* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983). *Id.* at 397 n. 4.
93. *Id.* at 397.
94. *Id.* at 398.
95. *Id.*
96. *Id.* Taking challenges usually occur when the Corps denies Section 404 permits. *See, e.g.*, Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981); Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981) (both courts holding that the denial of permission to develop a portion of the lands in controversy was not a taking because other portions could be developed).
97. *Id.* (citation omitted).

## COURT INTERPRETS "WETLANDS" MORE NARROWLY THAN SUGGESTED BY 1977 CHANGE IN DEFINITION

The Corps made six major changes when it redefined "wetlands" in 1977. These changes, the subject of the following analysis, both broadened and narrowed the Corps' jurisdiction over wetlands. Although, on the whole, the 1977 definition narrowed the Corps' Section 404 jurisdiction, the Sixth Circuit in *Riverside* narrowed the jurisdiction even further.

*Corps broadens definition of "wetlands"*

First, the 1977 definition includes those areas that are inundated or saturated, whereas the 1975 definition included only those areas that are inundated.[98] As courts held "inundated" as used in the 1975 definition to mean strictly surface flooding,[99] the 1977 definition's inclusion of "or saturated" can be construed to include subsurface flooding and other methods of land saturation. Such a broadened interpretation is further suggested by the 1977 definition's provision that the inundation or saturation may be caused by either surface water or groundwater.[100] The 1975 definition merely stated that the lands must be "inundated" and did not expressly provide for other methods of attaining a sufficiently wet status.[101]

The Sixth Circuit did not address the broadening of the Corps' jurisdiction suggested by the phrase, "inundated or saturated by surface or groundwater." In fact, the court ignored the 1977 definition's inclusion of the words "saturated by surface or groundwater[102] and strictly construed "inundated" to mean "flooded."[103] It further narrowed the Corps' jurisdiction by stating that this inundation or "frequent flooding" must be by waters flowing from "navigable waters" as defined in the FWPCA.[104] Nowhere in the preamble to the Corps' 1977 revised dredge and fill permit regulations nor in the definition of wetlands itself does the Corps require that the inundation or saturation be from "navigable waters."[105]

Second, the Corps changed its description of the vegetation involved. The Corps felt that:

98. *See* 33 C.F.R. § 323.2(c) (1984); 33 C.F.R. 209.120(d)(2)(b) & (h) (1976).

99. *See supra* text accompanying notes 64 and 84.

100. 33 C.F.R. § 323.2(c) (1984).

101. 33 C.F.R. § 209.120(d)(2)(b) & (h) (1976).

102. Nowhere in the opinion did the Sixth Circuit talk about Riverside's property being "saturated by surface or ground water at a frequency and duration sufficient to support . . . a prevalence of vegetation. . . ." 42 Fed. Reg. at 37,128.

103. The Sixth Circuit stated that the "new regulation makes clear that it is the present occurrence of *inundation or flooding*. . . ." *Id.* at 396 (emphasis added).

104. *Id.* at 398-99.

105. 42 Fed. Reg. 37,128.

> [t]he old [1975] definition of 'freshwater wetlands' provided a technical 'loophole' by describing the vegetation as that which requires saturated soil conditions for growth and reproduction, thereby excluding many forms of truly aquatic vegetation that are prevalent in an inundated or saturated area, but that do not require saturated soil from a biological standpoint for their growth and reproduction.[106]

The 1977 definition thus stipulated that vegetation need only be "typically adapted for life in saturated soil conditions."[107] With this change, the Corps broadened its definition of wetlands. The Sixth Circuit, in narrowly interpreting the Corps' definition of wetlands, however, ignored this change in description of vegetation.[108]

*Corps narrows definition of "wetlands"*

Third, the Corps eliminated the reference to "periodic inundation" contained in the 1975 definition.[109] In its explanation, the Corps indicated that many people interpreted that term as requiring inundation over a "record period of years."[110] Section 404, however, is intended to regulate discharges of dredge and fill material into the aquatic system "as it exists," and not as it may have existed over a record period of time.[111] Thus, if the land as it exists at the time of evaluation is not inundated or saturated, it cannot be classified as a wetland under the 1977 definition.[112] This is a narrower construction than that under the 1975 definition which only required a showing that the area had been inundated a sufficient number of times in the past.[113]

Fourth, the Corps replaced the phrase "normally characterized by the prevalence of vegetation" in the 1975 wetlands definition with the phrase, "and that under normal circumstances do support a prevalence of vegetation."[114] The Corps changed the wording to respond to three situations. First, some individuals tried to eliminate the Section 404 permit review requirement by destroying the aquatic vegetation.[115] Even if this destruction occurred, the area, under the 1977 definition, would still remain as

106. *Id.*
107. 33 C.F.R. § 323.2(c) (1984).
108. *See* 729 F.2d at 391.
109. 42 Fed. Reg. at 37,128.
110. Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 912 (W.D. La. 1981) (citing 42 Fed. Reg. 37,128 (1977)).
111. *Id.* The Sixth Circuit specifically relied on this purpose in overturning the lower court's classification of Riverside's property as a wetland. 729 F.2d at 396-97.
112. Neither the regulations nor the court elaborated on the length of time allowed for an evalution.
113. *See, e.g., Riverside* No. 77-70041 (E.D. Mich. Feb. 24, 1977) (opinion and order granting motion for preliminary injunction).
114. 42 Fed. Reg. 37, 128 (1977); *see* 33 C.F.R. § 209.120(d)(2)(b) & (h) (1976); 33 C.F.R. § 323.2(c) (1984).
115. *Avoyelles*, 715 F.2d at 912 (citing 42 Fed. Reg. 37,128 (1977)).

part of the overall aquatic system, and thus be classified as a wetland.[116] Second, some non-aquatic areas of land contain an abnormal presence of aquatic vegetation.[117] An abnormal presence of aquatic vegetation is not sufficient to include a non-aquatic area within the Section 404 program.[118] Third, the Corps specifically stated that it did "not intend . . . to assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes."[119] The Corps' analysis of these situations seems to emphasize that evaluation of wetlands must be based on the land "as it exists" now and not as it may have existed over a record period of time.[120]

Fifth, the Corps inserted a causal relationship into the 1977 definition. Not only must the vegetation be typically adapted for life in saturated soil conditions, its presence must also be caused by an inundation or saturation of the land sufficient in both duration and frequency to support such vegetation.[121] Thus, an area which contains a prevalence of vegetation typically adapted for life in saturated soil conditions, but which is not "inundated or saturated" by water would not be a wetland. Likewise, an area that is inundated or saturated by water which does not support a "prevalence of vegetation typically adapted" for life in "saturated soil" is not within the scope of the Corps' definition.[122] The Corps did not require this causal link in its 1975 wetlands definition. The Sixth Circuit, in supporting its narrow interpretation of the 1977 wetlands definition, addressed this change. "Neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the definition. Both must be present, and the latter must be caused by the former."[123]

Sixth and finally, the Corps inserted into its 1977 definition the sentence, "Wetlands generally include swamps, marshes, bogs, and other similar areas."[124] The Corps indicated in its preamble that it added this sentence to further clarify its intent to include only truly aquatic areas within its Section 404 jurisdiction.[125] This insertion and its accompanying explanation further restricted the wetlands definition.

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116. *Id.*
117. *Id.*
118. *Id.*
119. 42 Fed. Reg. 37,128 (1977).
120. *Avoyelles,* 715 F.2d at 912 (citing 42 Fed. Reg. at 37,128). The Sixth Circuit expressly noted that the Corps had similar reasons for replacing the term "normally" with the phrase, "and that under normal circumstances do support," as it did by explaining that Section 404 is intended to regulate discharges into the aquatic system "as it exists" and not as it may have existed over a record period of time. 729 F.2d at 395-96.
121. 33 C.F.R. § 323.2(c) (1984).
122. Schlauch & Strickland, *supra* note 37, at 718.
123. 729 F.2d at 396.
124. 33 C.F.R. § 323.2(c) (1984).
125. 42 Fed. Reg. 37,129 (1977).

In *Riverside,* the Sixth Circuit went beyond merely addressing the Corps' inclusion of this sentence. The court stated that the "definition thus covers marshes, swamps, and bogs directly created by such waters [those flowing from navigable waters], *but not inland low-lying areas such as the one in question here [Riverside's property] that sometimes become saturated with water.*"[126] This statement by the court conflicts with the Corps' intent. In its preamble, the Corps indicated that its definition *will be* applicable to isolated wetlands not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.[127] The Corps continued by stating that so long as the isolated area "as it exists" at the time of evaluation is (1) inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions and (2) meets the additional effect on interstate commerce condition, it will come under the Corps' jurisdiction.[128]

## CONCLUSION

In order for property to be classified as a wetland, the Sixth Circuit, under *Riverside,* requires (1) evidence that the property, as it exists at the time of evaluation, is frequently flooded; (2) that the flooding be by waters flowing from "navigable waters" as defined in the FWPCA; and (3) that the flooding cause growth of aquatic vegetation.[129] A strict reading of the 1977 wetlands definition, however, suggests that a wetlands classification requires (1) evidence that the property, as it exists at time of evaluation, be frequently flooded *or saturated;* (2) that this inundation or saturation be by *surface or groundwater;* and (3) that the inundation or saturation cause aquatic vegetation to grow there.[130] Although the court may have reached the correct result in this case, its overly narrow interpretation of the 1977 definition sets a precedent in the Sixth Circuit that could lead to misclassification of land. Many lands that once would have been classified as wetlands, and that may still be in other circuits,[131] will

126. 729 F.2d at 398 (emphasis added).

127. *Id.* at 37,129 and 37,127.

128. *Id.* at 37,127-29.

129. *See supra* text accompanying notes 79-85.

130. *See supra* text accompanying notes 98-101, 106-07, 109-21, and 123.

131. *Avoyelles,* 715 F.2d at 913 (In agreeing with the EPA's decision to analyze the soil and hydrology, the Fifth Circuit upheld the EPA's determination that bottomland hardwood wetlands cannot be converted into farmland without a Section 404 permit.); United States v. Tilton, 705 F.2d 429, 431 n.1 (11th Cir. 1983) (In noting that underground hydrological links connected defendant's swamp with a navigable stream, the Eleventh Circuit held that the swamp is within the definition of "wetlands," subject to the Corps' Section 404 jurisdiction.); United States v. Byrd, 609 F.2d 1204, 1208 (7th Cir. 1979) (In noting that water from several sources could be the cause of inundation, the Seventh Circuit affirmed the district court opinion which held that the Corps' wetland regulation does not require that the land be inundated by water from the lake.).

no longer be wetlands in the Sixth Circuit. The circuits disagree as to how far Congress intended to extend the Corps' "wetlands" jurisdiction under the FWPCA. Specifically, the circuits differ as to what criteria should be used in determining what is or is not a wetland and how the criteria should be applied. Because of this conflict, the issue may be addressed by the U.S. Supreme Court.[132] The Supreme Court could mandate which criteria to use in interpreting wetlands and how to apply them. Alternatively, the Corps, in recognizing this conflict, could more specifically redefine wetlands. Or, because resolving this conflict would involve an interpretation of congressional intent, Congress could delineate the wetlands criteria to be included within "waters of the United States." As one court stated: "'wetlands' is a jurisdictional term, the product of the legislative process, of political pressure groups. . . . [I]t satisfies a practical, a social, a political need, the need to define the scope of Section 404 jurisdiction. . . . A 'wetlands' is what Congress (as reflected by regulations) says it is."[133] Until this conflict is resolved, the Corps, which operated nationwide to protect wetlands under the FWPCA, will be forced to make inconsistent "wetlands" classifications. Areas that are protected in other circuits can be dredged and filled in the Sixth Circuit.

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132. *See supra* note 131.
133. Avoyelles Sportsmen's League v. Marsh, 511 F. Supp. at 288.