



News from the

Cypress Stump

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Supreme Court Rules! New Rapanos Guidelines: What does it all mean?

For the past year or so, the US Army Corps of Engineers has been experimenting on the landmark split-decision of the US Supreme Court on the combined Rapanos and Carabell cases. In both cases, the question of jurisdiction of some wetlands and surface waters was challenged and lower courts ruled in favor of the Corps jurisdiction over the wetlands. The Supreme Court agreed to hear the case and ended in a 4-1-4 decision split:

- Four of the justices (led by Justice Stevens) ruled that the Corps interpretation was appropriate and reasonable.
- Another four justices (led by Justice Scalia) ruled that Regulatory authority should extend only 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, the swing vote, concluded that wetlands are “waters of the U.S.” 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’. When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term, ‘navigable waters’”. This is referred to as a **Significant Nexus** of the wetland function to navigable waters.

So what does the Corps do with this? Well ... combine all of them into one methodology, that’s what. So the method now includes all of the concepts that the Justices mentioned: Traditional Navigable Waters, Relatively Permanent Flow, Significant Nexus, among other buzz words and catch-phrases. It also adds the “status quo” ruling of the Justice Stevens camp by making the ruling so ambiguous, vague, and subjective, as to make the potential interpretation of wetland jurisdiction to include nearly all wetlands anyway.

Without presenting all of the nitty-gritty details, this new method can be boiled down to the following categories; 1) those wetlands which will be jurisdictional without need for documentation, 2) those that require documentation to determine significant nexus, and 3) those that will not require documentation:

Wetlands and Waters that are definitely Jurisdictional

- All **Traditional Navigable Waters** (TNW) and any wetlands **adjacent** to such waters
- Non-navigable tributaries of TNW that have **Relatively Permanent Flow** (RPF) defined as 3 months of continuous flow

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- Wetlands that directly **abut** RPF tributaries

The agencies will require a fact-specific analysis to determine if a significant nexus exists for:

- Non-navigable tributaries that are not relatively permanent (non-RPF)
- Wetlands **adjacent** to non-navigable tributaries that nor not relatively permanent
- Wetlands adjacent to but that do not directly **abut** a Relatively permanent non-navigable tributary

The agencies generally will not assert jurisdiction over the following:

- **Swales or erosional features** (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 relatively permanent flow of water.

Subjectivity, vagueness, and ambiguity reign with this method with a lack of defined, measurable parameters to use for significant nexus. Furthermore, the method lacks sound definitions for key concepts, the primary one being “adjacent”. Prior to Rapanos, a wetland was considered adjacent if it was within 200-feet of a feature with an ordinary high water line. Now, that definition is out, with the potential of any and all wetlands being considered adjacent regardless of distance.

The potential check on this method maybe in Justice Kennedy’s statement that jurisdiction should not be asserted when any nexus is considered “**insubstantial** or **speculative**”. You will definitely see arguments in questionable jurisdictional calls with these two terms being tossed around.

LG²ES has submitted the First Significant Nexus determination to the Jacksonville District Corps and EPA as a test of this new guidance with the potential to set precedence for all determinations in the future. In this case, the wetland in question is adjacent to a non-relatively permanent roadside swale that drains into a regional stormwater pond. From there, water must flow through relatively permanent canals to a traditional navigable water at a total distance of over 5 miles. Although we, and the Jacksonville Corps staff agreed that the wetland was non-jurisdictional, Corps headquarters in Washington and EPA over ruled us. They determined that the wetland is jurisdictional abusing the ambiguous adjacency definition. Furthermore, they claimed that “if a bird could roost in a nearby canal and feed in our wetland, then a significant nexus is established”. Remember “**Speculative** and **Insubstantial**”? How speculative and insubstantial can it get?

As it stands, the new Rapanos Rule effectively reverses the SWANNC ruling in most cases. Isolated wetlands that were once non-jurisdictional under SWANCC are now considered jurisdictional under Rapanos using “adjacency” or speculative and insubstantial significant nexus.

LG² and the TPC Sawgrass: Environmental Management System and Sustainability

The Tournament Players Club at Sawgrass (TPC Sawgrass) selected LG²ES to develop and implement an Environmental Management System (EMS) with a focus on Green Operations and Sustainability for the TPC Sawgrass facilities and the THE PLAYERS CHAMPIONSHIP event. Ms. Leesa Gerald, who has prepared Environmental Management Systems for several Fortune 500 companies, will lead the TPC Sawgrass managers in all departments developing environmental policy that will be integrated into all aspects of daily operations. The TPC, as well as the PGA Tour, in their “Giving Back” campaign with millions of dollars of donations, will implement a new additional campaign of “Giving Back to the Environment”, demonstrating the model of sustainable and green golf course management at all PGA events.

Once completed, it is intended that the EMS model will be customized to all 22 TPC facilities nationwide and will eventually spread to all PGA facilities and events.

The Eye in the Sky-SJRWMD Examines Your Past Site Activities

If you are considering purchase of a property that has been cleared or graded, with constructed ponds or has other past land improvement, you may want to perform some due diligence assessment before you commit. The St. Johns River Water Management District has been examining historical aerial photographs to determine if such past activities were illegal. Aerial photographs dating back to 1984 tell the tale. If one requests a jurisdictional determination or applies for an Environmental Resource Permit, the permit reviewer may examine aerial photographs to determine if past improvements were in fact permitted properly.

If a past activity is found to be in non-compliance, meaning that the activity was performed without the proper permit, the current property owner could be held responsible. The current owner could be required to permit and mitigate for non-compliant wetland

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impacts or be required to restore the area to original conditions, complete with the liability of site maintenance and monitoring.

If an unpermitted wetland impact is found, then the District will attempt to determine the date of the activity. The next step is to determine if the alleged illegal activity was indeed, illegal. Was the wetland area truly jurisdictional at the time of the activity thus even requiring a permit?

So, before you commit to a property that is not in its natural condition, you should examine historical aerial photographs to determine if you are also buying unwanted liability to someone else's indiscretions. LG²ES maintains a full GIS database with all available historical aerial photographs and can provide the most accurate history of your property.

On the other hand, if you are the current owner of property with past unpermitted activity, then initiating the corrective action, with SJRWMD approval, can possibly be performed without the punitive action (fines).

NEW Gopher Tortoise Permitting System-

In June 2006 the Florida Fish and Wildlife Conservation Commission agreed that reclassification of the gopher tortoise from Species of Special Concern to Threatened is warranted; however the reclassification did not occur until a management plan for the species is approved. The final management plan was approved with an amendment at the September 2007 Commission meeting in St. Petersburg. On 9 April 2008, The Florida Fish and Wildlife Conservation Commission (FWC) approved the proposed Gopher Tortoise Permitting Guidelines at their Commission meeting in Tallahassee. The policy outlined within these guidelines provides a new framework for permitting and managing gopher tortoises within Florida and will replace the interim permitting guidelines. The adoption of these new guidelines detailed below is expected to occur in the spring of 2009.

Under this new permitting system, FWC has categorized six different permit types (detailed below).

- Type 1 Permits- Relocation of 10 or fewer burrows on or offsite to areas with short or long-term protection. **FWC contribution-\$200.**
- Type 2 Permits- Authorized Gopher Tortoise Agent and Authorized Gopher Tortoise Recipient Sites. LG²ES will be your authorized agent and help determine your site needs to become an authorized gopher tortoise recipient site. **FWC mitigation contribution -\$500.**

- Type 3 Permits- Relocation of more than 10 burrows on or off-site. Relocating to areas of larger acreage and long term protection result in a lower mitigation cost- **FWC mitigation contribution -\$200 for the first 5 tortoises and \$300 for each additional tortoise.** Relocating to smaller recipient sites with no long term protection in place will result in a higher mitigation cost- **FWC mitigation contribution -\$200 for the first 5 tortoise and \$3,000 for each additional tortoise.**
- Type 4 Permits- Temporary exclusion permits. These permits are reserved for construction of major utility corridors in a linear fashion which involve capturing tortoises and excluding them from the footprint of construction for a temporary period of time. The post construction habitat must be able to support the tortoises that were temporarily excluded. **FWC mitigation contribution -\$100 - \$300 for each tortoise depending on conservation impact.**
- Type 5 Permits- Emergency Take Without Relocation- the new permit system will focus on options which provide actual conservation benefits for tortoises. However, there may be extraordinary circumstances where there is a need to authorize direct take of tortoises. For this reason, FWC will issue Type 5 permits under very limited and specific circumstances for emergencies as defined in Florida Statutes and FWC rules. **FWC mitigation contribution- \$4,000 for each tortoise.**
- Type 6 Permits- Authorized Relocation Post Settlement of Law Enforcement Case - This permit authorizes on-site or off-site relocation of gopher tortoises that are still present on sites where an illegal activity (required permits were not obtained) has been resolved. **FWC mitigation contribution -\$4,000 for each tortoise located on the remainder of the site.**

LG²ES is current with all new permitting guidelines and is qualified to be your Authorized GT agent. The decisions of which permit applies to your project will depend on many factors; call LG²ES to help you determine the best plan of action for your development needs regarding gopher tortoise issues.

LG²ES wins Statewide National Guard GIS project

The Florida Army National Guard (FLARNG) awarded a contract to LG²ES to perform a Threatened and Endangered Species Survey to include implementation of a Statewide GIS Mapping Application, and mapping of 57 of the FLARNG sites. The project included a

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detailed presence and absence survey of species listed as Threatened, Endangered, or of Special Concern by the US Fish and Wildlife Service and the Florida Wildlife Conservation Commission. Habitat boundaries, actual species locations, and evidence of occurrence were recorded utilizing GPS and incorporated into the FLARNG geodatabase.

LG²ES constructed an ESRI-based solution, utilizing ArcGIS Server located at the FLARNG installation at Camp Blanding. The final application resides on FLARNG's server, making the data and application available to all Guard users within the State of Florida. The mapping application was designed to be user friendly, and provides the ability to access environmental and facility data for any of the FLARNG sites. Essential query, navigational and output capabilities are also available.

The geodatabase is also a repository of pertinent documents for each site including reports, permits, surveys, engineer drawings, etc. The application makes this information accessible to FLARNG users. A user simply logs on the site, picks a site from a map of Florida, and then selects various available spatial data layers such as aerial photographs of various years, soils data, our protected species data, facilities data, etc. The user also has the ability to list, view, and print any documents pertaining to that site.

This web-base GIS application is an extremely useful tool for FLARNG staff and management that helps administration in St. Augustine coordinate with various site managers at each location to assist in permit management and compliance. This geodatabase development and application design demonstrates our ability to implement an integrated solution to the problem of managing multiple data sources and formats from multiple locations.

If you are interested in a similar GIS database to unite all of your properties or facilities, please contact Lee Gerald or Dan Boylan at LG²ES.

The PLAYERS CHAMPIONSHIP and TPC Sawgrass win Sustainable Florida Award

LG²ES nominated the TPC Sawgrass, home of The PLAYERS CHAMPIONSHIP, for an award for the Annual Sustainable Florida Best Practices Award. LG²ES presented TPC's new Environmental Management System (EMS) that was implemented which involved the golf course maintenance operations, club house operation, maintenance facilities operations, and The PLAYERS CHAMPIONSHIP annual event. TPC won the award in the Non-Profit category.

The TPC world-class golf and resort facility has taken extraordinary efforts to take care of more than just their famous golf greens in their effort to go "Green". The EMS involves a periodic environmental audit and review of business practices to identify areas for improvement. Those improvements ranged from recycling, to water conservation, integrated pest-management plan, environmentally friendly (organic) food and other food products purchased by all departments. New goals, strategies and operations get the entire organization into the "swing" of things. The plan is to take its green initiative to its other 22 facilities across the nation.

Sustainable Florida is an alliance of business, government and civic leaders and organizations committed to define excellence for Florida's economic, environmental, and social future. It is a program of the Collins Center for Public Policy independent, non-partisan, non-profit that finds smart solutions to challenges facing Florida. Since initiating the Best Practice Awards program in 1998, Sustainable Florida has recognized and honored more than 200 businesses, non-profit organizations, governmental groups and individuals whose work is committed to the future success of Florida.

Mitigation for sale

The following mitigation is available:

- West Augustine Mitigation Area-Now in Basin 5. \$150,000 per credit, Regionally Significant.
- Basin 9, 10 credits at \$135,000 per credit.
- Basin 17, 10 credits at \$130,000 per credit. Regionally Significant
- Basin 16, 60 credits on 1800 acre wetland tract, Regionally Significant
- Basin 5, 40 credits, \$200,000 per credit, some regionally significant.

LG²ES has a new Website

Please visit our new website www.lg2es.com. It features a new FTP site for large file exchange with our clients and features the *LG² Advantage*. Go to the website and see what it's all about.

It is the purpose of this newsletter to share information with our clients and with those who would have a professional or academic interest in environmental and regulatory issues. If you wish to

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