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Counting Heads After *Rapanos*: Deciphering the Effects of a Fragmented Decision on Clean Water Act Jurisdiction

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The U.S. Supreme Court's most recent decision on the Clean Water Act (CWA), *Rapanos v. United States*[1], issued on June 19, 2006, addresses the scope of CWA jurisdiction over all "waters of the United States" ("waters of the U.S."), not solely wetlands, as many unwary practitioners may expect. In the fragmented 4-1-4 opinion, the Court attempted to clarify what wetlands qualify as "waters of the U.S." and therefore fall within the jurisdiction of the CWA and, further, to decide the constitutionality of the scope of authority the Army Corps of Engineers (Corps) historically exercised under the CWA.[2] Because a majority of justices did not agree on a single opinion, and the various opinions issued did not overlap on a single issue, lower courts and practitioners will have to "count heads" to determine what principles regarding Clean Water Act jurisdiction the majority of justices have embraced.

Background

The *Rapanos* decision is a consolidation of two cases decided by the United States Court of Appeals for the Sixth Circuit: *United States v. Rapanos* and *Carabell v. United States Army Corps of Engineers*. The course of events in *Rapanos* began in December 1988 when the Rapanos began filling wetlands without a permit on three sites to allow for development.[3] Prior to their filling, the wetlands at all three sites had surface water connections to tributaries of traditionally navigable waters.[4] At each of these three sites, the Rapanos filled large areas of wetlands without a permit despite being on full notice of the Corp's regulatory requirements.[5] The United States brought both criminal and civil charges against the Rapanos for their actions. Ironically, the Supreme Court denied Certiorari in the criminal case prior to granting Certiorari in the civil case despite the fact that Rapanos made identical arguments in both regarding CWA jurisdiction over the wetlands.[6]

In *Carabell*, the Carabells appealed the denial of a permit to fill 16 acres of wetlands on a 20-acre tract of land in order to build condominiums.[7] As noted by the Sixth Circuit, "in prehistoric times, this property was submerged under Lake St. Clair. As the lake receded over time, some areas of the Carabells' property remained covered by wetlands. Today, the property—located one mile from Lake St. Clair —is one of the last remaining large forested wetlands" in that area.[8] The Carabell wetlands border a ditch that when excavated, the spoils were cast to either side of the ditch creating upland berms along the banks of the ditch.[9] The ditch connects to the Sutherland-Oemig Drain, which flows into Auvase Creek, which flows into Lake St. Clair, which is part of the Great Lakes drainage system.[10] The berm separating the wetlands from the ditch blocks immediate drainage of surface water from the wetlands into the ditch.[11] The Corps denied the Carabells' permit asserting jurisdiction over the wetlands because destruction of the wetlands could result in degradation of water quality in the Great Lakes drainage system as a whole.[12]

The Sixth Circuit issued essentially back-to-back opinions in *Rapanos* and *Carabell* and, following the overwhelming majority of circuit courts, interpreted CWA jurisdiction broadly in an era when that issue has been hotly debated. While the pertinent question in these cases was whether the wetlands were adjacent to waters of the U.S. under EPA and the Corp's regulations, the focus of the opinions was not on the wetlands themselves but on their connection or nexus to traditionally navigable waters. After

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the Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. United States ACOE (SWANCC),*[13] most courts found that a wetland must have a hydrologic connection or significant nexus to a water of the U.S. in order to qualify as an adjacent wetland. The Sixth Circuit upheld CWA jurisdiction in both *Rapanos* and *Carabell*, finding in *Rapanos* that a hydrologic connection between a wetland and a nonnavigable tributary of a navigable water, no matter how remote or insubstantial, is a sufficient nexus,[14] and finding in *Carabell* that physical adjacency to a non-navigable tributary of a navigable water is a sufficient nexus.[15]

The Supreme Court granted certiorari and consolidated these cases to decide whether CWA jurisdiction extends to wetlands that are not adjacent to a navigable in fact water. Many had hoped that once the Supreme Court decided *Rapanos* and *Carabell* that there would be a clear answer to the question. Unfortunately, the Court split in its decision and no clear majority emerged. As Chief Justice Roberts stated in his concurrence, "it 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 now have to feel their way on a case by case basis" to determine if CWA jurisdiction exists.[16] As a result, confusion over the extent of federal regulation of wetlands and non-navigable tributaries will continue.

Hopefully the effects of *Rapanos* will not be long-lasting—Congress, EPA and the Corps are all discussing ways to resolve the problem perpetuated by the Supreme Court's fragmented opinion, but the reality is that any of the proposed regulatory or congressional remedies will come only after a lengthy process and will not provide any short term relief. A bill has been introduced in Congress known as the Clean Water Authority Restoration Act aimed at clarifying that the CWA is intended to apply to a broad array of waters by removing the term "navigable waters" from the CWA. Both Republicans and Democrats purportedly support the bill. In addition, EPA and the Corps have indicated in an informal interim guidance issued July 14, 2006, that they intend to make regulatory changes to how they determine whether a wetland or other waterbody is subject to CWA protection.

In the meantime, environmental practitioners are left to deal with the implications of *Rapanos*. As such, this article will provide a case summary in an attempt to organize the various opinions contained in the *Rapanos* decision. The plurality opinion, written by Justice Scalia, was joined by Justice Thomas, Justice Alito, and by the Chief Justice who also penned a concurring opinion. Justice Kennedy filed an important opinion concurring in the judgment, but disagreeing with the plurality's reasoning. Finally, Justice Stevens wrote a dissenting opinion in which Justices Souter, Ginsberg, and Breyer joined. A brief discussion of the how courts may interpret the fractured opinion and cases that have come down in the wake of *Rapanos* concludes this article.

Justice Scalia's Plurality

The plurality offers two novel interpretations of the statutory language of the CWA in determining the scope of federal jurisdiction over "waters of the U.S." The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[17] In order to effectuate this lofty purpose, the CWA prohibits the discharge of pollutants into "navigable waters" which are defined as "waters of the United States, including territorial seas."[18] Although the plurality agrees that the term "navigable waters" includes something more than traditional navigable-in-fact waters, it rejects the Corp's broad definition of "waters of the U.S."[19] The plurality claims that the Corps' regulations are an abusive expansion of the actual authority granted by Congress, and thus seeks to use the language of the CWA and subsequent case law to redraw what it believes are the appropriate boundaries for assertion of federal jurisdiction.[20]

In an attempt to clarify the terms "navigable waters" and "waters of the U.S.," the plurality looks to Webster's Dictionary for assistance.[21] Notably focusing on the plural "waters," as defined by Webster's, the plurality draws a narrower interpretation of water as that "found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes'" or "the flowing or moving masses, as of waves or floods, making up such streams or bodies."[22] The plurality reads the Corps' regulations as appropriate only if the phrase "**water** of the United States" had been used which would indicate a more general jurisdiction over all of the water in the United States, ephemeral or not.[23] Accordingly, the plurality redefines "waters of the U.S." as including only "permanent, standing, or flowing bodies of water" as opposed to intermittent or ephemeral flows of water.[24] However, Justice Scalia hesitates to go so far as to exclude waters that flow seasonally or streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought.[25]

As further support for its novel reading of the term "waters of the U.S.," the plurality references the term "point source," defined as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, . . ." reasoning that because these terms are ordinarily used to describe the watercourses through which intermittent waters typically flow they must be excluded from the definition of "waters of the U.S."[26] Additionally, looking back to its prior decision in *SWANCC*, the plurality relies on principles of federalism to conclude that the Corp's interpretation of the CWA is impermissible because it would "result in a significant impingement of the States' traditional and primary power over land and water use."[27]

The plurality then turns its focus to the question of what constitutes an adjacent wetland.[28] According to the plurality, a two-part inquiry is necessary to determine whether adjacent wetlands qualify as "waters of the U.S."[29] First, the wetland must be adjacent to a "waters of the U.S." as now defined by the plurality. Second, the wetland must have a continuous surface connection with another "waters of the U.S."[30] The plurality's new requirement that there must be a continuous surface connection so that there is no clear demarcation between the two in order for the wetland to qualify as "adjacent" goes beyond the Court's previous rationales as expressed in *United States v. Riverside Bayview Homes, Inc.*,[31] and *SWANCC*. The plurality, however, purports to rely on the recognition in *Riverside Bayview Homes* of the inherent difficulty of delineating the boundary between water and wetland and the significant nexus described in *SWANCC*.[32] Therefore, the plurality rejected the Corp's assertion of jurisdiction over wetlands with only an intermittent, physically remote

hydrologic connection to "waters of the U.S."[33]

Ultimately, the plurality opinion penned by Justice Scalia remanded both *Rapanos* and *Carabell* back to the lower courts to determine if the wetlands at issue are "waters of the U.S." under the new standards.[34] Accordingly, the courts must determine whether the ditches and drains in question contain a relatively permanent flow of water sufficient to qualify as "waters of the U.S."[35] If such a determination is made, the lower courts must subsequently determine if the wetlands and "waters" have a continuous surface connection sufficient to qualify as "adjacent."[36]

Justice Kennedy's Concurrence

Justice Kennedy concurs with the plurality opinion that the cases should be vacated and remanded; however, Justice Kennedy's reasoning is more akin to Justice Stevens' dissent. The crux of Justice Kennedy's decision is the application of the "significant nexus" test as first set forth in *SWANCC*.[37] Although the Sixth Circuit applied a significant nexus test, Justice Kennedy found the analysis was flawed for failing to consider the goals and purposes of the CWA.[38] Using *Riverside Bayview Homes* and *SWANCC* as a framework, Justice Kennedy holds that "the Corp's jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[39] Justice Kennedy recognized that wetlands are regulated under the CWA because of their importance to other waters.[40] Accordingly, a significant 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."[41] here the wetlands in question are "adjacent to navigable-in-fact waters, [the Corps] may rely on adjacency to establish its jurisdiction."[42] Where, however, the wetlands are adjacent to non-navigable tributaries, "the Corps must establish a significant nexus on a case-by-case basis."[43] While a hydrologic connection is not sufficient alone to establish a significant nexus, as was found by the Sixth Circuit, neither is it a requirement.[44] Justice Kennedy suggests that the presence of an ordinary high water mark based on the fluctuation of water may provide a significant nexus, but refuses to adopt it as the determinative measure.[45]

Justice Kennedy rejects each of the plurality's new tests for "waters of the U.S." and adjacent wetlands as lacking support from the statute, its purposes and the case law.[46] Notable to Justice Kennedy is the plurality's selective use of Webster's dictionary as support for its interpretation that the CWA regulates only permanent or continuously flowing waters.[47] Indeed, the very definition quoted by the plurality also includes the terms "flood" and "inundation," thereby weakening the plurality's argument that the definition only indicates permanent or continuously flowing bodies of water.[48] Under the plurality's view, according to Justice Kennedy, "[t]he merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not."[49] Thus, the plurality's new definition of "waters" makes little sense to Justice Kennedy in a statute concerned with downstream water quality.[50]

Further, Justice Kennedy finds the plurality's requirement of a continuous surface connection to establish adjacency as an inappropriate limitation on the CWA, especially in contrast to the perceived reasonable adjacency standard currently applied by the Corps.[51] Looking to *Riverside Bayview Homes*, Justice Kennedy states that no such connection was necessary for jurisdiction based on adjacency, and the Court determined it was irrelevant whether the wetlands' water source was an adjacent body of water.[52]

Justice Stevens' Dissent

The dissent written by Justice Stevens declines to join in the holding remanding the cases to the lower courts for reconsideration and would affirm jurisdiction over the wetlands at issue.[53] Finding the Corp's regulations to be reasonable, the dissent notes that the regulations at issue in this case are the same regulations unanimously deferred to by the Court in *Riverside Bayview Homes*.[54] According to Justice Stevens, in *Riverside Bayview Homes* the Court upheld the Corps' regulations defining "adjacent" as including wetlands "that form the border of or are in reasonable proximity to "[waters of the U.S.]"[55] Neither the regulations, nor the Court in *Riverside Bayview Homes* required a continuous surface connection between the wetlands at issue and "waters of the U.S.," an interpretation that the dissent notes was not suggested by either party or any amici briefs.[56] Even Websters' dictionary defines "adjacent" as "lying near, close, or continuous… not necessarily in actual contact."[57] Moreover, the dissent maintains *SWANCC* is inapplicable here because it dealt not with wetlands, but with CWA jurisdiction over non navigable, isolated, intrastate ponds.[58]

The dissent shares the concerns expressed in the Kennedy concurrence that polluters dumping in a continuously flowing or permanent body of water will be regulated while the polluter dumping in a river flowing only three quarters of the year will not be regulated, regardless of the fact that the second body of water could have an equal or even greater negative impact on downstream waters.[59] Justice Stevens rejects the plurality's reliance on geographic features as support for their new definition of "waters," stating that "[t]he dictionary treats 'streams' as 'waters' but has nothing to say about whether streams must contain water year round to qualify as 'streams.'"[60] Rather, Justice Stevens finds that "common sense and common usage demonstrate that intermittent streams, like perennial streams, are still streams."[61]

While the dissent admits that it agrees with portions of the Kennedy concurrence, the dissent cannot agree that the judicially crafted significant nexus test should replace regulations the Corps has been implementing for over three decades.[62] The dissent concedes that the implementation of the significant nexus test would not alter the jurisdiction currently asserted by the Corps to any great degree.[63] Yet, the dissent predicts that while a comparable amount of regulation would ensue, that the certainty that the current regulations give developers and others involved in the implementation of the CWA would greatly diminish if the significant nexus test were to replace the Corps' regulations.[64] Therefore, the dissent concludes that time and resources would be conserved if proper deference is given the Corps' current reasonable regulations.[65] Thus, the dissent believes the significant nexus test is not required.[66]

In general, the dissent finds a lack of appropriate deference to the intentions of the CWA and the Corps' efforts to accomplish

the "lofty goals" of the Act.[67] The dissent reasons the CWA and the Corps' regulations adopted pursuant thereto have been fairly successful in accomplishing the Congressional purposes and goals of the Act.[68] Justice Stevens urges that the judgments now vacated should be reinstated if either the plurality's specified test of permanent or continuous flow and continuous surface connection or Justice Kennedy's significant nexus test is met as the four dissenting justices would uphold the Corps' jurisdiction in both of these cases – and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied.[69]

Justice Breyer penned a short dissent in which he identified the nature of the problem as he perceives it; the waters of the nation are so "various and intricately interconnected" that Congress could well have intended to define navigable waters broadly and entrust the narrowing of its scope to the Corps, the enforcing agency.[70] Additionally, if the significant nexus test is applied, the Corps should have the power to define the test and the judiciary should give that definition deference, assuming the Corps' reasonable interpretation; the judiciary should not get into the business of case-by-case determination of significant nexus.[71]

How to Interpret the Court's Fragmented Opinion

In *Marks v. United States,*[72] the Supreme Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[73] "Narrowest grounds" is understood as the "less far reaching common ground."[74] "The 'narrowest grounds' approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other."[75]

However, the "narrowest grounds" approach set forth in *Marks*, does not work in all cases, i.e. where the differing justices' opinions do not overlap on a single issue. As a result, the Supreme Court has indicated that whenever a decision is fragmented such that no single opinion has the support of five justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority has embraced.[76] This counting heads approach dictates that on each issue, the lower courts should determine how a majority of the Justices would have decided the issue.

Three circuit courts and two district courts have issued opinions since the Supreme Court's decision in *Rapanos*. Both the Seventh and Ninth Circuits have concluded that Justice Kennedy's significant nexus test is the controlling rule of law constituting the narrowest ground on which a majority of the justices assent.[77]

Most recently, in *United States v. Johnson*, the First Circuit Court of Appeals, guided by Justice Stevens' dissent, concluded that the Corps may assert jurisdiction over a wetland if it meets either Justice Kennedy's significant nexus test or the plurality's new definitions of "waters" and "adjacent."[78] The First Circuit in *Johnson* reasoned that following Justice Stevens' instruction to elect to prove jurisdiction under either test "ensures that lower courts will find jurisdiction in all cases where a majority of the Court would support such a finding. If Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is satisfied, then at least four plurality members plus the four dissenters would support jurisdiction."[79] As recognized in *Johnson*, a number of other circuits have engaged in this counting heads approach to fragmented opinions in order to determine what a majority of the court would decide.[80] Accordingly, in *Johnson*, the Court of Appeals remanded the case back to the district court to engage in additional fact-finding necessary to address the jurisdictional question in light of Justice Kennedy's and the plurality's new legal standards.[81]

In *United States v. Evans*,[82] the Middle District of Florida likewise followed Justice Steven's advice to apply either the plurality's or Justice Kennedy's standard. Although the court in *Evans* cited to *Mark's* "narrowest grounds" approach, it concluded that because the plurality and Justice Kennedy articulated different standards for application on remand it was unclear which would control.[83] Finally, the district court in *United States v. Chevron Pipe Line Co.*,[84] departed from either approach and relied instead on precedent from the Fifth Circuit which has interpreted CWA jurisdiction narrowly. There the court found that "the connection of generally dry channels and creek beds will not suffice to create a 'significant nexus' to a navigable water simply because one feeds into the next during the rare times of actual flow."[85]

As a result of the failure of the Supreme Court to reach a majority in *Rapanos*, it appears that district courts and practitioners will have to feel their way through the CWA on a case-by-case basis. Using the counting heads approach, the following is a guideline as to how the Court should come down regarding specific jurisdictional determinations: wetlands adjacent to traditionally navigable waters would garner nine votes, adjacent wetlands with a "continuous surface connection" would garner nine votes, perennial rivers and streams would garner nine votes, perennial "trickles" would garner eight votes, ephemeral and non-ephemeral intermittent rivers and streams with a "significant nexus" or ordinary high water mark would garner five votes, and wetlands adjacent to jurisdictional non-traditional navigable waters with a "significant nexus" would garner five votes. While it may be tempting for the practitioner to argue for whichever of the various opinions best supports his or her clients' position, the prudent course follows the 'counting heads' method. Though complicated at times, this approach yields a consistent interpretation of a confusing decision.♦

Endnotes

1. 126 S.Ct. 2208 (2006).
2. *Id.* at 2220.
3. *Id.* at 2219.
4. *Id.*
5. *Id.*at 2238-39.
6. Rapanos v. U.S., 124 S.Ct. 1875 (2004)(No.03-929).
7. *Id.* at 2239.
8. Carabell v. United States Army Corps of Engineers, 391 F.3d 704, 705 (6th Cir. 2004).
9. 126 S.Ct. at 2239.
10. *Id.*
11. *Id.*
12. *Id.* at 2240.
13. 531 U.S. 159 (2001).

14. See U.S. v. Rapanos, 376 F.3d 629, 643 (6th Cir. 2004).
15. Carabell, 391 F.3d at 708-10.
16. 126 S.Ct. at 2236.
17. 33 U.S.C. § 1251(a).
18. 33 U.S.C. §§ 1311, 1362(7).
19. 126 S.Ct. at 2216-20.
20. See Id. 2216-17.
21. *Id.* 2220-21.
22. *Id.*, quoting Webster's New International Dictionary 2282 (2d ed. 1984).
23. *Id.* at 2220 (emphasis added).
24. *See Id.* at 2221-2225.
25. *Id.* at 2221, n5.
26. *Id.* at 2222-23.
27. *Id.* at 2223-24.
28. *Id.* at 2225.
29. *Id.* at 2227.
30. *Id.*
31. 474 U.S. 121 (1985).
32. *Id.* at 2225-26.
33. *Id.* at 2226.
34. *Id.* at 2235.
35. *Id.*
36. *Id.*
37. *Id.* at 2236.
38. *Id.*
39. *Id.* at 2248.
40. *Id.*
41. *Id.*
42. *Id.* at 2249.
43. *Id.*
44. *Id.* at 2250-51.
45. *Id.* at 2249.
46. *Id.* at 2242.
47. *Id.*
48. *Id.*
49. *Id.* at 2243.
50. *Id.* at 2242-43.
51. *See Id.* at 2244-45.
52. *Id.* at 2244.
53. *Id.* at 2265.
54. *Id.* at 2252-55.
55. *Id.* at 2255-56.
56. *Id.* at 2259.
57. *Id.* at 2263.
58. *Id.* at 2256.
59. *Id.* at 2259-60.
60. *Id.* at 2260.
61. *Id.*
62. *Id.* at 2264.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 2262.
68. *Id.* at 2265.
69. *Id.*
70. *Id.* at 2266.
71. *Id.*
72. 97 S.Ct. 990, 993 (1977).
73. quoting, Gregg v. Georgia, 96 S.Ct. 2909, 2923 (1976).
74. Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1247 (11th Cir. 2001).
75. United States v. Johnson, 467 F.3d 56, 64 (1st Cir. 2006).
76. *See* Waters v. Churchill, 114 S.Ct. 1878 (1994); League of United Latin Am. Citizens v. Perry, 126 S.Ct. 2594 (2006); Alexander v. Sandoval, 121 S.Ct. 1511 (2001).
77. *See* U.S. v. Gerke Excavating, Inc., 464 F.3d 723 (2006); No. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006).
78. 467 F.3d at 60.
79. *Id.* at 64.
80. See, e.g., Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1182 (2nd Cir. 1992); United States v. Williams, 435 F.2d 1148, 1157 (9th Cir. 2006).
81. 467 F.3d at 66.
82. 2006 WL 2221629 (M.D. Fla. 2006).
83. 2006 WL 2221629 at *19.
84. 437 F.Supp.2d 605 (N.D. Tex. 2006).
85. *Id.* at 613.

The *Aviall* Aftermath: Potential Unintended Consequences

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In December 2004, the United States Supreme Court in *Cooper Industries, Inc. v. Aviall Services, Inc.* overturned nearly two decades of federal lower court precedent and turned on its head a nearly universal understanding about how the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 et seq. (CERCLA) operates with respect to private party contribution actions.[1] The *Aviall* Court held that a party is precluded from filing a contribution action to recoup cleanup costs unless the government has commenced an enforcement action against the party or the party has resolved its liability to the state or federal government in an administrative or judicially approved settlement.[2]

In reaching its decision, the Court held that CERCLA § 113(f)(1) authorizes contribution actions essentially only "during or following" a specified civil action.[3] The Court further concluded that §113(f)(1)'s saving clause does nothing to "diminish" any cause of action for contribution that may exist independently of § 113(f)(1) since it does not, in and of itself, establish a cause of action, does not expand § 113(f)(1) to authorize contribution actions not brought "during or following" a Section 106 or 107(a) civil action, and does not specify what causes of action for contribution, if any, exist outside Section 113(f)(1).[4]

The Supreme Court, by refusing to look beyond the express language of the statute, overturned nearly two decades of lower court precedent allowing Potentially Responsible Parties (PRPs) to recoup a portion of their response costs even when a civil action had not been initiated that party. With its decision, however, the Court may have put at risk those settlement agreements executed prior to the Aviall decision.[5] This article examines the potential unintended consequences of the Court's decision with respect to CERCLA's contribution protection.

Background

In 1980, Congress enacted CERCLA to address growing concerns over health and environmental risks posed by hazardous waste sites around the country.[6] In 1986, Congress amended CERCLA in the Superfund Amendments and Reauthorization Act of 1986 (SARA)[7] by adding Section 113 to provide an express right for private party contribution and to re-emphasize how essential voluntary cleanups are to a successful remediation program.[8] The purpose of CERCLA (and its amendments) is to impose the costs to clean contaminated properties upon certain categories of parties ostensibly responsible for the contamination and to encourage prompt, effective and voluntary cleanups.[9] The statute shifts cleanup costs from taxpayers to those allegedly profiting or benefitting from the contamination.[10]

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CERCLA provides prospective plaintiffs with two causes of action. Under § 107(a), a party may seek cost recovery in which PRPs are jointly, severally, and strictly liable. Likewise, under § 113(f)(1) through which, any person may seek contribution from any other person who is liable or potentially liable under CERCLA.[11] Prior to passage of SARA in 1986, CERCLA contained no explicit provisions allowing PRPs to recover response costs from other PRPs.[12] Instead, CERCLA's cost recovery provision, (i.e., § 107), was the primary mechanism to compel alleged polluters to pay for environmental remediation costs.[13] Many courts held that within § 107 was an implied right to contribution,[14] while other courts held that a PRP's right to contribution arose instead as a matter of federal common law.[15]

From a defense standpoint, a critical component of CERCLA's settlement framework is the contribution protection it affords.[16] Indeed, contribution protection is one of the principal incentives to encourage PRPs to perform cleanups and settle their liability with the government.[17] The Supreme Court's *Aviall* decision, however, may have put at risk settlement agreements executed prior to the *Aviall* opinion.18

CERCLA Contribution Protection on Pre-Aviall Settlement Agreements

CERCLA has two provisions that provide so-called "contribution protection" by extinguishing any claims a non-settling party may have against settling PRPs. Section 113(f)(2) states, in pertinent part, that a "person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." Section 113(f)(3)(B), on the other hand, provides that a "person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in paragraph (2)."

In *Aviall*, the Court repeatedly drew distinctions between § 113 contribution claims and § 107 cost recovery claims. Under the holding, a PRP can seek to recover response costs from other PRPs though a contribution claim only if that party has resolved its liability to the state or federal government in an administrative or judicially approved settlement or if an action under §§ 106 or 107 has been commenced against the party. Under these circumstances, such a claim would be subject to the contribution protection defense, i.e., the settled PRPs would be protected under § 113. If, however, a PRP can only assert a "cost recovery" claim under § 107(a)(4)(B), the settled PRPs would appear to be stripped of their contribution protection defenses under § 113(f)(2) because the claim asserted against them is not a "claim for contribution" but rather a "claim for cost recovery." Under this scenario, a PRP who previously settled with the government may nevertheless face liability from non-settling PRPs.

Further, if a court rules that a PRP's cleanup agreement does not constitute an "administrative settlement" for purposes of §§ 113(f)(2) or 113(f)(3)(B), then that PRP may also lose its contribution protection under those provisions for the same reason.[19]

To date, very few federal courts have decided what constitutes an "administrative settlement" within the context of CERCLA.[20] Some of these cases are discussed in the section that follows.

What is an "Administrative Settlement"?

Consolidated Edison Co. of New York Inc. v. UGI Utilities Inc.

In *Consolidated Edison Co. of New York Inc. v. UGI Utilities Inc.*, Consolidated Edison Company (Con Ed) entered into a "Voluntary Cleanup Agreement" to clean up more than 100 sites at which Con Ed or its predecessors might have owned or operated Manufactured Gas Plants, industrial facilities where gas was produced from coal, oil, or other energy sources.[21] Prior to executing this agreement, Con Ed sued UGI seeking to recoup costs Con Ed had incurred and would incur in cleaning up sites allegedly contaminated by plants owned or operated by UGI.[22]

Con Ed argued that its Voluntary Cleanup Agreement with the New York State Department of Environmental Conservation constituted a § 113(f)(3)(B) administrative settlement. As such, Consolidated Edison argued that it had "resolved its liability to…a State…in an administrative or judicially approved settlement" and that it should be permitted to pursue a cause of action for contribution.[23] The Court, however, held that Con Ed's Voluntary Cleanup Agreement did not constitute an administrative settlement because, under the agreement's "Release and Covenant Not to Sue," the only liability that may be resolved is liability for state law claims and not CERCLA claims.[24] Moreover, the agreement's "Reservation of Rights" section also left open the possibility that the state agency could take action under CERCLA "deemed necessary as a result of a significant threat resulting from the Existing Contamination or to exercise summary abatement powers."[25] Further, the Court noted that Consolidated Edison's protection from enforcement only lasted "during the implementation of this Agreement," i.e., while Con Ed is cleaning up the designated sites.[26]

Pharmacia Corp. v. Clayton Chemical Acquisition LLC

In *Pharmacia Corporation v. Clayton Chemical Acquisition*, Pharmacia and Solutia incurred about $2 million in 2000 in cleanup costs for work performed under an Administrative Order on Consent (AOC) with the EPA. The AOC required the parties to conduct a remedial investigation/feasibility study (RI/FS) for the site.[27] Under the terms of the AOC, Pharmacia and Solutia's participation in the RI/FS did not constitute an admission of liability of the EPA's findings except in a proceeding to enforce the AOC's terms.[28]

The court held that the AOC was not an administrative settlement within the meaning of § 113(f)(3)(B) because the agreement was issued pursuant to 42 U.S.C. §9606 (CERCLA § 106), rather than § 122.[29] If the AOC "constitute[d] a settlement pursuant to section 122, USEPA would have stated in the caption that the AOC was being issued pursuant to section 122(d)(3), and not pursuant to § 106(a).[30] The Court also noted that "section 122(1) is not mentioned in the AOC."[31] Finally, the court pointed out that the word "settlement," or "any derivation thereof," was not in the title of the agreement.[32] Considering these factors, the court held the AOC did not qualify as an administrative settlement under § 113(f)(3)(B).[33]

City of Waukesha v. Viacom

In *City of Waukesha v. Viacom*, the city entered into a cost share pilot program contract with the Wisconsin Department of Natural Resources (WDNR) pursuant to Wisconsin Statute Section 292.35(11).[34] The court held that the cost share pilot program contract was not an administrative settlement under CERCLA § 113(f)(3)(B) because it did not resolve the City's CERCLA liability.[35] Specifically, Wisconsin Statute Section 292.35(11) states:

> "No common law liability, and *no statutory liability that is provided in other statutes, for damages resulting from a site or facility is affected in any manner by this section.* The authority, power and remedies provided in this section are in addition to any authority, power or remedies provided in any other statutes or provided at common law."[36]

In further support of its contention that the contract was an administrative settlement under CERCLA § 113(f)(3)(B), the City submitted a separate administrative settlement agreement with the WDNR that explicitly resolved the City's liability to the state under state law and CERCLA. The agreement with WDNR was not, however, signed.[37] The court noted that "[i]f the unsigned administrative settlement agreement demonstrates anything, it demonstrates that the City has not yet resolved its CERCLA liability to the State."[38]

ASARCO, Inc. v. Union Pacific Railroad Company

In *ASARCO, Inc. v. Union Pacific Railroad Co.*, the plaintiff entered into a Memorandum of Agreement (MOA) with the Nebraska Department of Environmental Quality (NDEQ) after voluntarily cleaning the site in accordance with state clean-up standards.[39] The plaintiff then sought contribution under CERCLA from a former site owner.[40] The court held that the agreement was not an administrative settlement because it did not resolve CERCLA liability.[41]

In reaching its decision, the court could find no evidence that Nebraska had obtained the requisite EPA authorization to settle CERCLA claims with the plaintiff. The only contact with the EPA was solicitation and receipt of comments on the plaintiff's then-proposed remediation plan.[42] Likewise, the court could find no references to CERCLA or any federal law in the MOA or in the "No Further Action" letter (NFA) incorporated into the MOA by reference, other than the language that the "work plan shall demonstrate how these activities will conform with federal [EPA] standards."[43]

Moreover, the court noted that the agreement did not contain a Covenant Not to Sue and was not entered as a consent decree under § 122(c)(1). The Court held that both were "mandatory" requirements.[44] Finally, the court held that because of the explicit statement in the MOA that it did not waive liability and the lack of a statement in the NFA waiving liability, the agreement did not resolve ASARCO's state liability.[45]

Seneca Meadows, Inc. v. ECI Liquidating, Inc.

In *Seneca Meadows, Inc. v. ECI Liquidating, Inc.*, Seneca Meadows entered into three consent decrees with the New York State Department of Environmental Conservation (DEC) to clean-up a landfill it had owned and operated.[46] Thereafter, Seneca Meadows sued to recover a portion of its cleanup costs from a number of defendants that deposited hazardous substances in the landfill prior to its closure.[47]

The court held that these consent decrees explicitly resolved Seneca Meadows's CERCLA liability to the state of New York.[48] Specifically, the third consent decree provided that Seneca Meadows had resolved its liability to the State of New York for purposes of contribution protection under CERCLA § 113(f)(2) for the "matters addressed" in the consent decrees.[49] The third consent decree also provided that DEC's acceptance of a final report evidencing that "no further remediation" is needed constituted a release and covenant not to sue for each claim that DEC may have under state law or "any other provision of statutory or common law."[50] In addition, the court held that DEC and Seneca Meadows intended for the consent orders to settle Seneca Meadows's CERCLA liability to the state.[51]

It is clear from these decisions that a remediation or "clean-up" agreement may not be an "administrative settlement" if (1) it does not explicitly settle CERCLA liability or contains a provision leaving those claims open; (2) EPA's involvement or authorization to settle is not made clear in the agreement; (3) it contains a disclaimer that its execution is not an admission of liability; (4) it does not reference CERCLA § 122; (5) it does not explicitly state it is a "settlement" agreement; or (6) it does not contain a "covenant not to sue."[52] It is clear that parties who previously entered into voluntary clean-ups should be wary that not only could they be precluded from asserting contribution claims under § 113 against other PRPs but they could also be barred from claiming CERCLA's contribution protection defense.

Conclusion

CERCLA has been the primary mechanism for environmental remediation across the county for over two decades. The contribution protection afforded by CERCLA's settlement framework is partly responsible for CERCLA's success in encouraging the clean-up of these contaminated properties. Not only did the Court's decision in *Aviall* restrict the contribution rights of PRPs who voluntarily undertake remediation, but it may also have put at risk those settlement agreements executed prior to the Aviall decision. Although *Aviall* does not invalidate prior settlement agreements, parties who have executed settlement agreements with the government before *Aviall* will have to consider whether it makes sense to modify their existing agreement with the government. Of course, these parties need to keep in mind that by modifying their existing settlement agreements, they may create a perception that they believe their settlement agreements are flawed. Therefore, such evaluations must be carefully considered on a case-by-case basis.♦

Endnotes

1. Aviall Servs., Inc. v. Cooper Indus., Inc., 125 S.Ct. 577 (2004); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq.
2. Aviall Servs., Inc. v. Cooper Indus., Inc., 125 S.Ct. 577, 583-84 (2004).
3. *Id.*; 42 U.S.C. § 9613(f)(1).
4. Aviall Servs., 125 S.Ct. at 583-84.
5. This article only focuses on those agreements executed prior to Aviall. A similar set of legal issues are likely to be debated with

respect to on-going and future clean-ups, which is itself a subject for a future article.

6. Pub. Serv. Co. of Colo. v. Gates Rubber Co., 175 F.3d 1177, 1181 (10th Cir.1999).
7. Pub. L. No. 99-499, 100 Stat. 1613 (1986).
8. *See*, e.g., H.R. Rep. No. 99-253(V), at 58 (1985), reprinted in 1986 U.S.C.C.A.N. 3124, 3181 ("Voluntary cleanups are essential to a successful program for cleanup of the Nation's…pollution problem); 131 Cong. Rec. 24730 (Sept. 24, 1985) (statement of Sen. Domenici) ("The goal of CERCLA is to achieve effective and expedited cleanup of as many uncontrolled hazardous waste facilities as possible. One important component of the realistic strategy must be the encouragement of voluntary cleanup actions or funding without having the President relying on the panoply of administrative and judicial tools available."). The logic behind this amendment was explained by the U.S. Supreme Court as follows:

   > Congress did not think it enough...to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties.

   See Pennsylvania v. Union Gas Co., 491 U.S. 1, 21-22 (1989) (plurality opinion), overruled on other grounds by Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).
9. *See*, e.g., S. Rep. No. 96-848, at 31 (1980) (The strict liability standard is "intended to induce potentially liable persons to *voluntarily* mitigate damages rather than simply rely on the government to abate hazards.") (emphasis added); 126 Cong. Rec. 26338 (Sept. 19, 1980) (statement of Rep. Florio) (Section 107 "assures that the costs of chemical poison releases are borne by those responsible for the releases" and "creates a *strong incentive* both for prevention of releases and *voluntary* cleanup of releases by responsible parties."); 126 Cong. Rec. 26,784 (1980) (House Representative Albert Gore stated that the ability to seek contribution from other responsible parties "is one of the prime considerations underlying the use of joint and several liability" in CERCLA suits); 99th Cong. 51 (1985) (emphasis added) (Assistant Attorney General Habicht has stressed that "[t]he fairness of a joint and several liability scheme depends upon the clear availability of contribution") (emphasis added); *see also* Colorado v. ASARCO, Inc., 608 F. Supp. 1484 (D. Colo. 1985); Walls v. Waste Res. Corp., 761 F.2d 311, 318 (6th Cir. 1985) ("[I]t is clear that the statute was designed primarily to facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for the hazardous wastes."); OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1578 (5th Cir. 1997); United States v. Township of Brighton, 153 F.3d 307, 313 (6th Cir. 1998) (The availability of contribution actions under CERCLA mitigates any inequity arising from the statute's strict liability scheme); United States v. Compaction Sys. Corp., 88 F. Supp.2d 339, 347 (D.N.J. 1999) (Congress sought "to ensure the prompt and thorough cleanup of contaminated sites largely through the enactment of Section 113(f).").
10. In re Bell Petroleum Servs., Inc., 3 F.3d 889, 894 (5th Cir. 1993).
11. 42 U.S.C. §§ 9607(a) and 9613(f)(1).
12. United States v. Colo. & E. R.R. Co., 50 F.3d 1530, 1535 (10th Cir. 1995).
13. Compaction Sys. Corp., 88 F. Supp.2d at 346-47 (discussing the history of CERCLA contribution).
14. *See*, e.g., Sun Co. v. Browning-Ferris, Inc., 124 F.3d 1187, 1190 (10th Cir. 1997); Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 890-892 (9th Cir. 1986); Walls, 761 F.2d at 317; United States v. New Castle County, 642 F. Supp. 1258, 1263-69 (D. Del.1986); Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (E.D. Mo.1985).
15. *Id*.; ASARCO, 608 F. Supp. 1484 ; United States v. A & F Materials Co., 578 F. Supp. 1249 (Ill. 1984).
16. 42 U.S.C. §§ 9613(f)(2) and 9613(f)(3)(B).
17. E.I. DuPont De Nemours and Co. v. United States, 460 F.3d 515 (3rd Cir. 2006).
18. *See* supra footnote 5.
19. 42 U.S.C. §§ 113(f)(1), 113(f)(2) , and 113(f)(3)(B).
20. Consol. Edison Co. of New York Inc. v. UGI Utils.s Inc., 423 F.3d 90 (2nd Cir. 2005); Pharmacia Corp. v. Clayton Chem. Acquisition, 382 F. Supp.2d 1079 (S.D.Ill. 2005); City of Waukesha v. Viacom, 362 F. Supp.2d 1025 (E.D.Wisc. 2005); ASARCO, Inc. v. Union Pac. R.R. Co., 2006 WL 173662 (D.Ariz. 2006); Seneca Meadows, Inc. v. ECI Liquidating, Inc., 427 F. Supp.2d 279 (W.D.N.Y. 2006).
21. Consol. Edison Co., 423 F.3d at 92-93 .
22. *Id.*
23. *Id.* at 95.
24. *Id.* at 96.
25. *Id.* at 96-97.
26. *Id.* at 97.
27. Pharmacia Corp., 382 F.Supp.2d 1079.
28. *Id.* at 1086.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. City of Waukesha, 362 F.Supp.2d 1025.
35. *Id.* at 1026-27.
36. Wis. Stat. § 292.35 (11)(emphasis added).
37. City of Waukesha, 362 F.Supp.2d at 1027.
38. *Id.*
39. ASARCO, 2006 WL 173662, at *9 (D.Ariz. 2006).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at *10.
44. *Id.*
45. *Id.*
46. Seneca Meadows, 427 F. Supp.2d at 282-83.
47. *Id.*
48. *Id.* at 286.
49. *Id.*
50. *Id.*
51. *Id.*
52. *See* e.g., Consol. Edison Co., 423 F.3d 90; Pharmacia Corp., 382 F. SUPP.2d 1079; City of Waukesha, 362 F. SUPP.2d 1025; ASARCO, 2006 WL 173662; Seneca Meadows, Inc., 427 F. Supp.2d 279.

Continuing Trends in the Judicial Interpretation of the CMPA

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"Tired of crowded beaches and over-developed coastlines? You'll find beauty and serenity when you visit the Georgia Coast."

This is how Georgia's Department of Economic Development opens its description of Coastal Georgia, and appropriately so.[1] The salt marshes of Georgia's coast comprise approximately one-third of all the remaining salt marsh on the U.S. Atlantic coast, making it one of the nation's most important natural resources. Georgia stands out from its neighboring states because its coastline has remained relatively untouched: it has not yet been transformed by intensive overdevelopment. This, however, may be swiftly changing, as the area is expected to become home to one million people over the next 25 years, doubling its population. Due to this development, the laws that regulate growth on Georgia's coast, though already important, will become increasingly significant in the future.

The legislature enacted the Coastal Marshlands Protection Act (CMPA or Act) in 1970 to protect this valuable resource, which is vital to Georgia's wildlife, marine life, recreation and economy.[2] In recognition of the difficulty and expense that reconstructing or rehabilitating the coastal marshlands entails, the Act aims to regulate the marshlands "to ensure that the values and functions of the coastal marshlands are not impaired" and to conserve the marshlands for future generations "as public trustees."[3] The CMPA provides the Coastal Resources Division of the Georgia Department of Natural Resources, through the Coastal Marshlands Protection Committee (the CMPC or the Committee) with the authority and responsibility to protect Georgia's tidal wetlands.[4] The Committee is charged with enforcing the CMPA through the evaluation of development permits, determining whether "the granting of a permit and the completion of the applicant's proposal will unreasonably interfere with the conservation of fish, shrimp, oysters, crabs, clams, or other marine life, wildlife, or other resources, including but not limited to water and oxygen supply."[5]

However, unlike many other laws that govern Georgia's natural resources, the bare bones of the statute remains the main source for guidance concerning its application. Although rulemaking is currently in process, in the recent past, adjudication has provided what rules and regulations have not—an insight into how the CMPA will be applied and what the scope of its application may be in the future.[6]

Most recently, in the *Center for a Sustainable Coast, et al. v. Coastal Marshlands Protection Committee* (Cumberland Harbour)[7] appeal decided this February, the Office of State Administrative Hearings handed down a decision based on the appeal of a CMPA permit that followed and furthered the reasoning of two prior appeals decided in the Superior courts of Fulton and Glynn counties known as the *Emerald Pointe* and *Man Head Marina* appeals.[8] All three of these cases, *Emerald Pointe*, *Man Head Marina* and *Cumberland Harbour*, addressed the scope of the CMPA. How far does the CMPA reach? Specifically, these cases center on defining the appropriate scope of review under the CMPA by the Coastal Marshlands Protection Committee.[9] In general, these decisions in these cases point to a broad interpretation of the CMPA's reach.

The Committee and Permittees in *Emerald Pointe*, *Man Head Marina* and *Cumberland Harbour* argued for a narrow interpretation of the CMPA. Essentially, they argue that when evaluating permit applications, the CMPA does not provide the Committee with the authority to consider how components of projects in the uplands will impact the marsh; it only allows consideration of the effects of the structures that are actually placed in, on, or over the marsh or water bottoms.[10] However, the petitioners in the each of appeals argued to the contrary, that the CMPA in fact requires the Committee to consider the entirety of a proposed project, including the upland components.[11]

> In 2002 and 2003, the Superior Courts of Fulton County and Glynn County resolved this legal argument in favor of the broad interpretation of the Act. These Superior Courts, sitting in appellate review of decisions rendered by an Administrative Law Judge (ALJ), clarified the scope of the Committee's authority and responsibility in reviewing applications for permits under the CMPA. Both courts held that the CMPA requires the Committee to evaluate all of the impacts from proposed projects to the marsh system. Such an analysis must not only include an assessment of water-borne structures, but also an evaluation of the ways in which a project's upland components will affect marsh resources. The Superior Court of Glynn County held that:
>
> From O.C.G.A. § 12-5-281 of the CMPA, it is clear that it is not the legislative intent to narrowly construe the function of the Committee so as to preclude them from considering the effects of an applicant's proposal as a whole.
>
> Therefore, this Court finds that it was legal error for the Committee to not consider traffic, waste, and run off concerns and their potential impact to the public interest as defined by O.C.G.A. § 12-5-286(g). To find otherwise would render the function of the Committee as intended by the General Assembly ineffective and meaningless.12

The latest decision regarding the Cumberland Harbour permit indicates that a broad interpretation of scope is the direction in which the young jurisprudence concerning the CMPA continues to develop. Judge Malihi's Feb. 20, 2006, decision affirmed portions of the permit while also reversing and remanding portions of the permit.[13] Both sides have appealed.[14]

The permit, if approved, would authorize the construction of

two large-scale marinas and three community docks as an integral part of a residential development named Cumberland Harbour. The residential development is expected to include between 900 and 1,200 homes, as well as extensive infrastructure supporting commercial facilities and amenities. The two largescale marinas, three community docks and the potentially more than 90 private docks to be constructed in the waters surrounding the peninsula would add an estimated 800 to 1,000 boats to this area. Together, the two marinas would comprise the largest marina facility to ever be permitted on the Georgia coast.

The Cumberland Harbour project, which would be the largest development on the Georgia coast, and whose marinas would be the largest marshlands impact ever allowed on a single area of the Georgia coast, is also proposed to be located in one of the most environmentally sensitive areas of the Georgia coast. In addition to altering surrounding marshlands and tidal waters, the project threatens federally and state protected species, such as manatees, sea turtles, right whales, gopher tortoises, and wood storks. Further, the project will forever change the wilderness experience at Cumberland Island National Seashore. The National Park Service has stated that this proposal "will introduce unprecedented levels of boat activity to Cumberland Island and the surrounding waters" and could have a "potentially tremendous impact . . . on Cumberland Island National Seashore's natural and cultural resources, as well as park operations and the visitor experience."[15]

The *Cumberland Harbour* case presented several issues, including whether a biological assessment and the mitigation measures it contemplates must be in a final form and whether the CMPA provides the Committee with the authority to regulate upland activities. With regard to the biological assessment concerning endangered species, Petitioners argued that the addition of as many as 800 to 1,000 boats directly threaten one of the most endangered marine mammals in the world – the North Atlantic right whale. The Committee, however, approved the permit for this project without critically considering the clear threat to this endangered whale. The Administrative Law Judge agreed that it was not clear that Committee had adequately considered the threat to the whale. For example, the ALJ stated that "at the time of the Committee meeting, the portion of the draft BA that dealt with right whales was 'incomplete,'" that "[t]he Permit does not require a minimum level of enforcement by state or county law enforcement officers," that "[d]etails of how the permittee-enforcement portion of the three-phase enforcement protocol, such as how penalties would be administered and how many violations would be required before marina privileges would be revoked, had not been completed at the time of the hearing on this appeal," and that "[t]he educational materials described in the Permit had not been completed at the time of the hearing in this matter."[16] With regard to the North Atlantic right whale (and sea turtles and manatees), he held:

> The biological assessment has yet to provide what education or enforcement measures will be taken, or the consequences of violation. Therefore, this Court cannot determine whether Respondent properly considered the public interest test in ensuring that there is no unreasonable interference with the conservation of the animals.[17]

Thus, the ALJ remanded "[t]his portion of the permit . . . to Respondent to consider, review and include in the permit, by incorporation or otherwise, the final conservation measures that are intended to prevent unreasonable interference with the protection of right whales, manatees, and sea turtles."[18]

Most important to the overall development of the CMPA is the issue regarding the scope of the Committee's authority to regulate so-called upland activities. The Committee and Permittee in *Cumberland Harbour* argued that the Committee did not have the authority to regulate the upland and additionally, that it did not have the authority to regulate storm water discharges that alter the marsh by altering its topography or vegetation. The ruling, however, requires the Committee to re-examine the features of the planned development to determine whether the project will "otherwise alter" the coastal marshlands, and requires consideration of features such as storm water management, the amount of impervious surface on the entire project, and buffer design and maintenance.

Judge Malihi cited to the prior two cases, *Emerald Pointe* and *Man Head Marina*, and their interpretation of the CMPA.[19] All three decisions have interpreted the jurisdiction of the Committee, as provided by the CMPA, to include the uplands when that activity includes portions to be constructed in the marsh. This determination relies on the interpretation of the language of the act, specifically the phrase "otherwise alter," a comparison between the use of the term "alter" in O.C.G.A. §12-5-286(a) and §12-5-286(m), and the legislative intent with which the CMPA was enacted. The relevant portion of the act reads:

> No person shall remove, fill, dredge, drain or otherwise alter any marshlands or locate any structure on or over marshlands in this state within the estuarine area thereof without first obtaining a permit from the committee, in the case of minor alteration or marshlands, the commissioner.[20]

Employing a plain reading of the act, the phrase "otherwise alter" was found to necessarily expand the Committee's jurisdiction beyond the already enumerated actions of removal, fill, dredge, and drain. The comparison between the use of the term "alter" in O.C.G.A. §12-5-286(a) and §12-5-286(m) further demonstrated that "alter," as used in the phrase "otherwise alter" included action beyond those that are "similar to removing, filling, or dredging the marsh and which will alter the natural topography or vegetation of the marsh."

In sum, under Judge Malihi's ruling, the Committee is expressly required to review the impact of any project which would "otherwise alter any marshlands," and that "alter" should be read broadly. Three decisions now recognize that "[a] project in the marsh does not exist in a vacuum."[21] As Judge Malihi elaborated,

> When a project involves the construction of facilities both within and outside the marshlands, the development as a whole and its impact on the marsh must be considered by the Committee. To permit the a la carte approach advocated by Respondent and Intervenor would be contrary to the public interest and the purpose of the CMPA as expressed by the General Assembly.[22]

While some have argued that to vest the CMPC with the authority to regulate the uplands would interfere with the jurisdiction of other agencies and regulations, Judge Malihi makes it clear that this is an unfounded concern. There may be overlap, but not interference. The application of the CMPA to the uplands does not interfere with other agencies and regulations because

their jurisdiction is necessarily focused on different goals, not the CMPA's relatively narrow purpose of protecting Georgia's coastal marshlands. In his final decision, Judge Malihi correctly emphasized that "only [the CMPC] has jurisdiction to evaluate compliance with the CMPA, and in particular whether the project would 'otherwise alter' the coastal marshlands."[23] It is therefore necessary that the CMPA continue to play a role in the regulation of coastal development, including the development of the uplands that alter the marsh.

What is left undecided? The *Cumberland Harbour* decision stops short of holding whether the CMPC would have "jurisdiction to evaluate a project whose location is wholly upland, but whose features may impact the marsh," as the ALJ was not presented with that case.[24] In the interim, the Board of Natural Resources (Board) has initiated a rule making in an effort to clarify what types of features the Committee will look at when development has a marshland component.[25] The March 28, 2006, Resolution of the Board of Natural Resources states in part:

> Now, therefore, be it resolved that the Board of Natural Resources directs the Department of Natural Resources to convene a citizens group to develop recommendations and undertake Rule making for storm water management measures, impervious surface coverage standard, and buffer design and maintenance for water front developments which are subject to permitting under the Marsh Act.[26]

Seeking both proposed rules and recommendations, the Department of Natural Resources (DNR) charged the stakeholders with the examination of three topics: 1) storm water management measures, 2) impervious surface coverage standards, and 3) buffer design and maintenance.[27] "The resolution further limits the parameters of the charge to water front developments subject to permitting under the Marsh Act."[28]

The stakeholders group met from May to late August, producing a strawman document and finally in late September, briefing the DNR Board on the proposed rule.[29] The proposed rule was sent to the CMPC for feedback, refined by the stakeholders and, in mid-November, final revisions were made.[30]

The minutes of the Sept. 26, 2006, Committee meeting reveal that the issue central to *Emerald Pointe*, *Man Head Marina* and *Cumberland Harbour* continue to be divisive.[31] While the stakeholders, representing diverse perspectives, overwhelmingly agreed that there should be "consistent, enforceable, and comprehensive storm water regulation in a broad area affecting the coast," there was no consensus reached defining "waterfront development" or "upland," both of which are critical to determining the scope of the CMPA.[32] The stakeholder group "could not agree on the reach of the Act."[33]

Also an issue of contention is whether the rule making should be postponed until after the Court of Appeals reaches its decision in *Cumberland Harbour*. The proposed amendments have been presented to and revised by the Board, who are scheduled to vote on them in January. The amendments, addressing the same issue as the pending appeals, would be finalized prior to the resolution of the litigation. Although the Board has the authority to promulgate rules under the CMPA, the judiciary remains the interpreter of the law. Should the Court of Appeals determine the scope of the CMPA to be broader than that defined by the rule making, the rules may be rendered moot by the decision. Given this possible outcome, it would seem prudent to postpone the adoption of amendments to the CMPA until a key piece of information—the scope of the CMPA—has been determined by the Courts.

Endnotes

1. http://www.georgia.org/Travel/Discover/Coast/
2. O.C.G.A. § 12-5-280.
3. O.C.G.A. § 12-5-281.
4. O.C.G.A. § 12-5-283.
5. O.C.G. A. § 12-5-283, 286(g)(3).
6. See infra text accompanying notes 25-35.
7. Center for a Sustainable Coast, et al. v. Coastal Marshlands Protection Committee (Cumberland Harbour), Docket No. OSAH-BNR-CM-0526576-60-Malihi (February 20, 2006), 2006 Ga. ENV LEXIS 2 (Ga. ENV 2006).
8. Ctr. for [a] Sustainable Coast v. Coastal Marshlands Protection Committee (Emerald Pointe), No. 2002CV52219 (Super. Ct. of Fulton County, Ga. Oct. 24, 2002); Man Head Marina, Inc. v. Coastal Marshlands Protection Committee, No. 02-01311 (Super. Ct. of Glynn County, Ga. May 9, 2003).
9. Cumberland Harbour, slip op. at 26, 2006 Ga. ENV LEXIS 2 at *25; See Emerald Pointe, slip op. at 3-4; Man Head Marina, slip op. at 3-4.
10. Cumberland Harbour, slip op. at 26, 2006 Ga. ENV LEXIS 2 at *25; See Emerald Pointe, slip op. at 3-4; Man Head Marina, slip op. at 3-4.
11. Cumberland Harbour, slip op. at 26, 2006 Ga. ENV LEXIS 2 at *25; See Emerald Pointe, slip op. at 3-4; Man Head Marina, slip op. at 3-4.
12. Man Head Marina, slip op. at 4.
13. Cumberland Harbour, slip op. at 30, 2006 Ga. ENV LEXIS 2 at *32.
14. The Committee and the Permittee, Point Peter, LLP have appealed the ALJ decision, and the citizen groups have filed cross-petitions. Per procedural issues, appeals are now pending before the Georgia Court of Appeals. The hearing is expected to occur in May 2007
15. Letter from Jerry Brumbelow, National Park Service, to Jeannie Butler, Georgia Department of Natural Resources (April 28, 2004).
16. Cumberland Harbour, slip op. at 10, 12, 2006 Ga. ENV LEXIS 2 at *11, *12-13.
17. Cumberland Harbour, slip op. at 23, 2006 Ga. ENV LEXIS 2 at *23.
18. Cumberland Harbour, slip op. at 24, 2006 Ga. ENV LEXIS 2 at *24.
19. Cumberland Harbour, slip op. at 27-30, 2006 Ga. ENV LEXIS 2 at *27-32.
20. O.C.G.A. §12-5-286(a) (emphasis added).
21. Cumberland Harbour, slip op. at 29, 2006 Ga. ENV LEXIS 2 at *31 (citing Emerald Pointe).
22. Cumberland Harbour, slip op. at 29-30, 2006 Ga. ENV LEXIS 2 at *31.
23. Cumberland Harbour, slip op. at 30-31, 2006 Ga. ENV LEXIS 2 at *32.
24. Cumberland Harbour, slip op. at 27 n.8, 2006 Ga. ENV LEXIS 2 at *28 n.8.
25. Memorandum from Noel Holcomb, Commissioner on Natural Resources and Carol Couch, Director Environmental Protection Division, to Members, Coastal Uplands Stakeholder Group (June 20, 2006) available at, http://crd.dnr.state.ga.us/assets/documents/jrgcrddnr/Holcomb_Couch_Memo_Revised_PPP_Timeline.pdf.

26-30. Id.

31. Minutes of the Coastal Committee, (Sept. 26, 2006), available at, http://www.gadnr.org/minutes/coastal20060926.pdf.

32-33. Id.

Message From the Chair

by Andrea Rimer
Troutman Sanders LLP

As the Environmental Law Section (ELS) gears up for another exciting year, I'd like to thank our outgoing chair, Dave Meezan from Alston & Bird, for his outstanding service and leadership to the Section in 2006, and welcome our new 2007 officers (Martin Shelton, chair-elect; Bill Sapp, secretary; Adam Sowatzka, treasurer; and Jim Griffin, member-at-large). I am honored to serve the ELS as chair in the upcoming year, and humbled to be following in the footsteps of so many of our most distinguished members who have served as past chairs of the ELS.

The Section will kick off 2007 with a luncheon on Feb. 23, featuring the "State of the Environment" by David Pope, director of the Georgia/Alabama office of the Southern Environmental Law Center and General Peter Madsen of CH2M Hill, chair of the Governor's Environmental Advisory Council. I hope you can all join us for a great lunch and an interesting presentation from our distinguished speakers.

Please also mark your calendars for our annual ELS Summer Seminar, scheduled for July 27-28 at the Amelia Island Plantation in Amelia Island, Fla. The Summer Seminar is a great opportunity to learn about the latest environmental issues, obtain a large percentage of your CLE credit for the year and network with other environmental professionals in a beautiful setting. We're in the process of planning the seminar now, so please contact me if you have ideas for panels you'd like to see presented.

Finally, a big thank you to all our members who keep our section strong with your continued support and participation. We are always looking for volunteers to write newsletter articles and hope to see many of you serve as hosts or speakers at the brown bag lunches we'll be planning throughout the year. Please contact any of the officers if you have ideas or would like to volunteer. I hope you enjoy this issue of the newsletter, and look forward to seeing all of you in the upcoming year.

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