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Environmental Law - The Sixth Circuit's Unsettling Interpretation of the Corps. of Engineers' Wetlands Definition - United States v. Riverside Bayview Homes, Inc.

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CASE NOTES

Environmental Law—The Sixth Circuit's Unsettling Interpretation of the Corps of Engineers' Wetlands Definition. *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391 (6th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-701).

Riverside Bayview Homes, Inc., (Riverside) owns eighty acres of undeveloped land north of Detroit, Michigan. The property is located a mile west of Lake St. Clair along the Clinton River in Harrison Township. In 1976, Riverside began preliminary work on the site in furtherance of development plans. Dirt was hauled to the property in order to fill the wet areas of the tract.[1]

Riverside submitted an incomplete fill permit application to the Department of the Army, Corps of Engineers (Corps) in November of 1976 in compliance with the Clean Water Act (CWA).[2] Before the Corps acted on the permit application, Riverside began to deposit fill material. The Corps issued a cease and desist order to prevent further filling. Riverside did not comply, prompting the United States Attorney to institute an enforcement proceeding.[3] The government alleged that Riverside violated the CWA by depositing fill on "wetland" areas without a permit.[4]

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1. United States v. Riverside Bayview Homes, Inc., 729 F.2d 391, 392 (6th Cir. 1984), *cert. granted* No. 84-701 (U.S. Feb. 19, 1985).

2. 33 U.S.C. § 1344 (1982). This Act was originally called the Federal Water Pollution Control Act. *See* S. REP. No. 1236, 92nd Cong., 2d Sess. 99, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 951. In 1977, Congress approved the shortened Clean Water Act (CWA) title. *See* H. REP. No. 830, 95th Cong., 1st Sess. 185, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4424. Subsection (a) of § 1344 provides for the permitting of discharges:

> *Discharge into navigable waters at specified disposal site.* The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

3. *Riverside*, 729 F.2d at 393. The Corps' action was authorized under 33 U.S.C. § 1319(a)(3) (1982) which provides:

> Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under Section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

Subsection (b) provides:

> *Civil Actions.* The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

4. Section 301(a), 33 U.S.C. § 1311(a) (1982) provides: "*Illegality of pollutant discharges except in compliance with law.* Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 [section 402 of the Act], and 1344 [section 404 of the Act] of this title, the discharge of any pollutant by any person shall be unlawful."

The district court issued a temporary restraining order and later a preliminary injunction prohibiting further filling. On June 20, 1979, the district court found that a large portion of Riverside's property consisted of wetlands as defined in the Corps' 1976 regulation and issued a permanent injunction.[5]

On appeal, the Sixth Circuit ordered the case remanded for further examination in light of the revised wetlands definition of 1977.[6] On remand, the district court found the new regulation to be even broader than the former definition.[7] For the second time, the court found the parcel to be a wetland and reaffirmed the permanent injunction.[8]

The Sixth Circuit reversed this holding, interpreting the CWA definition of wetlands to require "frequent flooding by water flowing from navigable waters as defined in the Act." The court held that the definition did not cover "inland lowlying areas such as the one in question here that sometimes become saturated with water."[9]

This interpretation of the wetlands definition is contrary to those established by other circuit courts. A series of statutory revisions has steadily expanded the regulatory definition of wetlands under the CWA.[10] Wetlands case law mirrors this development.[11] The Sixth Circuit's interpretation of the wetlands definition clearly conflicts with this trend.

BACKGROUND

Pursuant to the Rivers and Harbors Act of 1899,[12] the Department of the Army gave the Corps of Engineers responsibility for administering certain federal regulatory programs. This regulatory control included the authority to issue permits for the damming or diking of navigable waters,[13] to regulate other structures or work affecting these waters,[14] and to regulate harbor lines landward.[15] The Department of the Army limited the Corps' regulation to protecting the navigable capacity of the waters of the United States.

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5. 33 C.F.R. § 209.120(d)(2)(i)(h) (1976) (amended by 33 C.F.R. § 323.2(c) (1984)) provided that a permit be obtained for the filling of: "Freshwater wetlands including marshes, shallow swamps, and similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation. 'Freshwater wetlands' means those areas that are [1] periodically inundated and that [2] are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction."

6. 33 C.F.R. § 323.2(c) (1977). "The term 'wetland' means those 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." *Id.*

7. *Riverside*, 729 F.2d at 396.

8. *Id.*

9. *Id.* at 398.

10. *See* 42 Fed. Reg. 37122 (1977).

11. *See infra* text accompanying notes 41-56.

12. Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-467 (1982).

13. *Id.* § 9, 33 U.S.C. § 401 (1982).

14. *Id.* § 10, 33 U.S.C. § 403 (1982).

15. *Id.* § 11, 33 U.S.C. § 404 (1982).

In response to growing public concern with the environmental quality of the nation's water, the Corps revised its policy with respect to permit applications in 1968.[16] A more flexible "public interest review" replaced the former jurisdictional restriction.[17] The public interest review included considerations of such factors as fish and wildlife, conservation, pollution, aesthetics, ecology and the general public interest.[18] The enactment of the National Environmental Policy Act of 1969[19] gave support to the revised policy, as did the decision in *Zabel v. Tabb*.[20] In *Zabel* the Supreme Court upheld the denial of a land filling permit because of fish and wildlife concerns, which reaffirmed the Department of the Army's position that it was under a congressional mandate to consider public interest factors in permitting decisions.[21]

Based on section 13 of the Rivers and Harbors Act, the Corps in 1971 instituted the first national program regulating the discharge of pollutants into United States waters.[22] Eight months later, an injunction frustrated this first attempt to regulate water quality.[23]

The enactment of the CWA in 1972 [24] marked the beginning of Congress' effort to clean up the nation's waters through the regulation of water pollution. One stated objective of the CWA was "to restore and maintain the chemical, physical, and biological integrity of the waters of the United States through the control of discharges of dredged or fill material."[25]

Section 301 of the CWA specifically prohibits the discharge of pollutants into "navigable waters" unless the discharge complies with section 402 or section 404 of the Act.[26] Section 402 of the CWA includes the National Pollution Discharge Elimination System program (NPDES), administered by the Environmental Protection Agency (EPA).[27] Section 404 is similar to 402, but is administered by the Corps and applies to the regulation of discharges of dredged or fill material into United States waters.[28] The term "fill material" is defined in the Act to mean any

16. *See* 42 Fed. Reg. 37122 (1977).
17. *Id.*
18. *Id.*
19. 42 U.S.C. §§ 4321-4370 (1982).
20. 430 F.2d 199 (5th Cir. 1970).
21. *See* 42 Fed. Reg. 37122 (1977).
22. Rivers and Harbors Act, § 13, 33 U.S.C. § 407 (1982) reads, in part:
It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged or deposited either from or out of any ship, barge or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers passing therefrom in a liquid state, into any navigable water of the United States or into any tributary of any navigable water. . . .
23. *See* Kalus v. Resor, 335 F. Supp. 1 (D.D.C. 1971) (ruling that the defendant Secretary of the Army and others acted in excess of their statutory authority and also, in violation of the National Environmental Policy Act).
24. 33 U.S.C. §§ 1251-1376 (1982).
25. 40 C.F.R. § 230.1(a) (1984).
26. *See supra* note 4.
27. 33 U.S.C. § 1342 (1982).
28. *Id.* § 1344.

material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of any waterbody.[29] To obtain a section 404 dredge and fill permit from the Corps, the applicant must comply with EPA guidelines.[30]

The EPA formulated these guidelines to avert the adverse impact on entire water ecosystems that the discharge of pollutants or dredge material can cause.[31] These guidelines illustrate the Agency's justifiable concern for wetlands. Wetlands serve to maintain ground water supplies, to purify water, to prevent flooding and to provide habitat for fish and wildlife.[32] Two-thirds of the commercially important fish harvested in the United States use wetland areas as food sources or spawning grounds.[33]

The CWA expanded the Corps' jurisdiction by revising the definition of navigable waters to read "waters of the United States, including the territorial seas."[34] The legislative history of the CWA stated that the Senate and House conferees fully intended that the definition of navigable waters be given the broadest possible constitutional interpretation.[35]

In light of the legislative intent of the CWA, the Sixth Circuit, as early as 1973, approved the expanded Corps jurisdiction which extended beyond the traditional "navigable waters" limitation.[36] The Sixth Circuit upheld the conviction of Ashland Oil Company for the discharge of oil into a non-navigable stream. Ashland contended that the CWA did not apply to non-navigable tributaries of navigable streams.[37] The court pointed out that "Congress' clear intention as revealed in the Act itself was to effect marked improvement in the quality of the total water resources of the United States, regardless of whether the water was at the point of pollution a part of a navigable stream."[38] Thus, the court held that the criminal provision of the CWA applied to "all waters of the United States," not just to navigable waters.[39]

Nevertheless, the Corps continued to construe its jurisdictional limits as previously. Environmental groups challenged this construction as inconsistent with the congressional intent to "regulate all waters of the United States."[40] This challenge culminated in *Natural Resource Defense Council v. Callaway,* in which the United States District Court for the

29. 33 C.F.R. § 323.2(k) (1984).
30. 40 C.F.R. § 230 (1984).
31. *Id.* § 230.1(c).
32. Want, *Federal Wetlands Law: The Cases and the Problems,* 8 HARV. ENVTL. L. REV. 1, 3 (1984).
33. *Id.*
34. 33 U.S.C. § 1362(7) (1982).
35. *See* S. REP. No. 1236, 92d Cong., 2d Sess. 99, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3822.
36. United States v. Ashland Oil and Trans. Co., 504 F.2d 1317 (6th Cir. 1974).
37. *Id.* at 1319.
38. *Id.* at 1323.
39. *Id.* at 1324.
40. *See* 42 Fed. Reg. 37123 (1977).

District of Columbia ordered the revocation and rescission of the Corps' regulations which limited its permit jurisdiction under section 404.[41]

The resulting regulations included an expanded definition of navigable waters. In 1975, the Corps issued interim final regulations in the Federal Register which included under the term "navigable waters" coastal waters, freshwater wetlands, mudflats, swamps and similar areas.[42] Under the expanded regulations, the Corps defined both freshwater and coastal wetlands as areas requiring periodic inundation and supporting vegetation which requires saturated soil conditions.[43]

The Corps received a great deal of criticism with respect to the 1975 definitions, particularly the wetlands definitions.[44] The regulations did not make it clear which waters were included within the Corps' jurisdiction under section 404. Thus, with the assistance of the Department of the Interior and the EPA, the Corps established the present wetlands definition in 1977.[45] This definition replaced both the freshwater and the coastal wetlands definitions of the 1975 regulations. Notably, the new wetland definition lacked the earlier regulation's "periodic inundation" requirement.[46] The Corps stated in the preamble to the new regulations that the wetlands determination related to "existing" wetlands, not merely to areas which had been flooded periodically over a number of years. Though the regulation still required inundation or saturation, these conditions could be caused by surface or ground water or a combination of both.[47]

In spite of the improvements in the definitions, the Corps' jurisdiction over particular wetland areas has been challenged in a number of cases. In *Leslie Salt Company v. Froehlke,* a coastal wetlands case, the Ninth Circuit found that the Corps' jurisdiction under the authority of the CWA was substantially broader than under the Rivers and Harbors Act, and extended to waters which were saturated but no longer subject to tidal inundation.[48]

In *United States v. Byrd,* the Seventh Circuit found that property bordering a lake was wetlands within the Corps' jurisdiction despite the government's failure to prove that the wetlands area was inundated by waters of the navigable lake.[49] Basing its conclusion largely on an examination of the congressional intent of the CWA,[50] this court concluded that the regulation did not require that the lake be the source of the inundation. Water from any of several sources could be the cause of the flooding.[51]

41. 392 F. Supp. 685 (D.D.C. 1975).
42. 42 Fed. Reg. 37124 (1977).
43. 33 C.F.R. § 209.120(d)(2)(i)(h) (1976), *amended by* 33 C.F.R. § 323.2(c) (1982).
44. *See* 42 Fed. Reg. 37123 (1977).
45. *Id.* at 37128.
46. *Id.*
47. *Id.*
48. 578 F.2d 742 (9th Cir. 1978).
49. 609 F.2d 1204 (7th Cir. 1979).
50. *Id.* at 1206.
51. *Id.* at 1206-07.

The Fifth Circuit deferred to an EPA wetlands determination in a leading wetlands case, *Avoyelles Sportsmen's League v. Marsh.*[52] In *Avoyelles,* the EPA conducted an examination of the vegetation present at the site as well as a study of the soil conditions and the hydrology of the area.[53] The Fifth Circuit upheld the EPA application of the wetland definition to an area such as this tract which experienced significant flooding, as well as the EPA's conclusion that the discharge of pollutants into such areas would have a substantial effect on the nation's waters.[54]

When jurisdictional claims fail, frustrated permit applicants often allege that an inverse condemnation or taking has occurred. In *Deltona Corp. v. United States,* the landowners argued that the denial of their permit application amounted to a frustration of their reasonable investment expectations. The court emphasized that the proper test to be applied under the fifth amendment was whether the taking extinguished a fundamental attribute of ownership or deprived the owner of all viable uses of the land. The *Deltona* landowners did not meet this test.[55]

In *Kaiser Aetna v. United States,* however, the Supreme Court held that the government's attempt to impose a navigational servitude upon Kaiser's private lagoon amounted to a taking. The navigational servitude would allow public access, thus denying the owners the right to exclude others. The Court found this denial of a fundamental attribute of ownership to be a compensable taking.[56]

THE PRINCIPAL CASE

Using the 1975 version of the Corps' regulation, the district court found Riverside's property to be, in fact, contiguous to a navigable waterway.[57] The court also found that the area supported vegetation which required saturated soil conditions, and though flooded only five times in the last eighty years, the area was periodically inundated. These facts placed the area within the Corps' definition of wetlands.[58] By applying the facts found in the previous district court decision, the court on remand concluded that the earlier determination should be upheld under the 1977 regulations as well.[59]

In reversing this holding, the Sixth Circuit Court of Appeals reasoned that the property "as it exists now" must experience sufficient inundation to support wetland vegetation.[60] The Sixth Circuit relied on the pream-

52. 715 F.2d 897 (5th Cir. 1983).
53. *Id.* at 903.
54. *Id.* at 916.
55. 657 F.2d 1184, 1191 (Ct. Cl. 1981), *cert. denied,* 455 U.S. 1017 (1982).
56. 444 U.S. 164 (1979).
57. *Riverside,* 729 F.2d at 394. The navigable waterway which the property was adjacent to was Black Creek, a tributary of Lake St. Clair.
58. *Id.* at 395.
59. *Id.* at 396.
60. *Id.*

ble to the 1977 wetlands definition to support this conclusion.[61] The court interpreted the definition to require that the area in question be frequently flooded by waters flowing from navigable waterways so that it supported vegetation of the aquatic variety.[62] Though parts of the Riverside tract supported a flourishing variety of this vegetation, the court reasoned that it resulted from soil conditions rather than from flooding.[63] Consequently, the court found as a matter of fact that the Riverside property fit the Corps' definition of an area that was technically not a wetland though it supported wetland vegetation.[64]

By limiting the Corps' jurisdiction under the Act, the Sixth Circuit bolstered its conclusion that the Riverside property did not need a permit under section 404.[65] The court stated that Congress had not clearly indicated how far the Corps' jurisdiction should extend, if at all, beyond navigable waters.[66] The court suggested that the wetlands definition was broader than the statute allowed and that Congress could not have intended to extend the Corps' jurisdiction to property such as Riverside's which had been farmed in the past and "is now platted and laid out for subdivision development with fire hydrants and storm sewers already installed."[67] Though noting that the Fifth Circuit in *Avoyelles* had held that the Corps' broad wetlands definition was consistent with the intent of the CWA,[68] the Sixth Circuit contended that the jurisdictional breadth of the Corps' authority was still uncertain.

Accordingly, the court stated that to prohibit filling or change on the Riverside property would raise a serious fifth amendment taking problem. In support of this proposition, the Sixth Circuit cited *Kaiser Aetna v. United States.*[69] The Sixth Circuit referred to the parallels between *Kaiser Aetna* and *Riverside* as "obvious," alluding to a similar taking problem in the exercise of the Corps' "unbounded jurisdiction" in *Riverside.*[70] To avoid this problem, the court found the Riverside property to be beyond the Corps' jurisdiction.

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61. *Id.*
62. *Id.*
63. *Id.*
64. *Id. See also* 42 Fed. Reg. 37129 (1977). In discussing the newly revised wetlands definition, the preamble states:

> Finally to respond to those who expressed concern that our definition of "wetlands" may be interpreted as extending to abnormal situations including non-aquatic areas that have aquatic vegetation, we have listed swamps, bogs, and marshes at the end of this definition to further clarify our intent to include only truly aquatic areas.

65. *Riverside* 729 F.2d at 397-98.
66. *Id.* at 398.
67. *Id.* What the court failed to add in this analysis was the fact that the platting and installation of hydrants occurred in 1916. Platting, which consists of drawing lines on a map, has no bearing on the physical attributes of the land. The court failed to address this problem.
68. *Id.* at 397 n.4, *citing* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983).
69. 444 U.S. 164 (1979).
70. *Riverside,* 729 F.2d at 398.

ANALYSIS OF THE SIXTH CIRCUIT'S OPINION

The *Riverside* opinion is an anomalous one for a number of reasons. The court ignored important language in the 1977 wetlands definition. The court restricted the Corps' jurisdiction to navigable waters, a limitation that was done away with as far back as 1968.[71] The Sixth Circuit also failed to give proper deference to an agency's finding of fact. The court's interpretation of the wetlands definition conflicts with established congressional intent as well as with judicial precedent. Finally, in regard to the taking issue, the parallels between *Kaiser* and *Riverside* are not as obvious as the court seemed to think.

The *Riverside* decision is notable for its failure to recognize the clear language of the wetlands definition. Though the court relied on the full text of the 1977 wetlands definition at one point in the case,[72] on three subsequent occasions the court cited the definition and the word "inundated," but completely ignored the words "or saturated."[73] The Corps' definition is not limited by the source of water which causes the periodic flooding. The definition speaks of areas that are saturated by surface or ground water.[74] If the saturated condition of the soil supports wetlands vegetation, then the saturation is sufficient to make the area a wetland. The source of the water is therefore irrelevant.

An elementary rule of construction is that effect must be given, if possible, to every word, clause, and sentence of a statute or regulation.[75] Unless the provision is the result of obvious error, effect should be given to all provisions of a definition so that no part will be inoperative.[76] The revisions to the wetland definition since its enactment under the CWA in 1972 are evidence that the "saturated" language is not a result of error.[77] Only by ignoring the saturation language could the Sixth Circuit conclude that the Corps' regulations required periodic inundation of the existing area.

Having found this requirement, the court took the next step, a jurisdictional one, and held that the inundation must originate from a navigable source. This requirement does not appear in the wetlands definition nor in the Act itself. The court's interpretation of the Corps' section 404 jurisdiction would exclude large areas of wetlands from the Corps' permit programs. Wetlands that depend on surface water runoff, those that depend on saturation by ground water, and those that feed into navigable streams, would all be removed from the Corps' jurisdiction.[78]

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71. *See supra* text accompanying notes 16-17.
72. *Riverside*, 729 F.2d at 395.
73. *Id.* at 396, 397.
74. 33 C.F.R. § 323.2(c) (1984).
75. 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (1984).
76. *Id.*
77. *See supra* text accompanying notes 24-42.
78. Connor, *U.S. v. Riverside Bayview Homes, Inc.: Mountain or Molehill*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10333 (1984).

Inherent in both the Corps' decision to file suit and the Riverside decision to apply for a permit was the recognition that Riverside's property was a wetland. The district court did not mention the administrative record,[79] and the district court's de novo review of the Corps' wetland determination was therefore improper. A court should review an agency determination of fact on the basis of the administrative record, and as long as the agency's determination is not arbitrary, capricious, or an abuse of discretion, it should be upheld.[80] No mention was made of any arbitrary or capricious acts by the Corps, nor was any mention made of abuse of the Corps' discretion. An agency decision is "entitled to a presumption of regularity."[81]

The Sixth Circuit also failed to consider the administrative record. Even though the district court ignored the record, the circuit court could have upheld the district court's decision if it were supported by the record. The circuit court should not have reversed based on new testimony taken by the district court.

A court need not, however, defer to an agency on a question of law. On this issue, the Sixth Circuit's decision illustrates a marked lack of consideration for the congressional intent behind the CWA. Under principles of interpretation, the legislative purpose of a statute should be examined.[82] Though the Sixth Circuit took pains to cite the statute and the preamble to the new regulations, it restricted the jurisdiction of the Corps solely to the former navigable waters limitation, in clear conflict with the stated intent of the Act.[83]

Finally, the Sixth Circuit's concern with the taking issue involved in *Kaiser Aetna* was without justification in the context of *Riverside.* The law of just compensation does not support this court's restricted interpretation of the wetlands definition. The Supreme Court has ruled that the owners of property may be entitled to compensation if the exercise of regulatory control denies the owner an economically viable use of the property.[84] This determination depends on the nature and the extent of the interference with the property, so a taking must be determined by looking at the circumstances of each case.[85] Generally, a property owner who seeks to receive compensation because he is denied the most profitable use of his land must show that there is no other viable use for the property.[86] *Kaiser Aetna* stretched this principle because the Court found the government's attempt to deprive a private owner of the right to exclude others interfered with an essential property right.[87] In *Riverside,*

79. *See* United States v. Riverside Bayview Homes, Inc., No. 77-70041 (E.D. Mich. Feb. 24, 1977).
80. 5 U.S.C. § 706(2)(b) (1976).
81. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).
82. 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.09 (1984).
83. *See supra* text accompanying note 35.
84. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).
85. *See* Penn Central Trans. Co. v. New York City, 438 U.S. 104, 130 (1978).
86. *See* Deltona Corp. v. United States, 657 F.2d 1184, 1192 (Ct. Cl. 1981).
87. Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979).

the issue was purely one of regulation, and did not involve any fundamental property right. Riverside was not denied any uses of its property. It was merely required to obtain a permit.

CONCLUSION

The Sixth Circuit's ruling in *Riverside* raises questions about the future of the Corps' wetlands definition and regulatory permitting process. This ruling contradicts not only the accepted congressional intent of the CWA, but also wetlands case law.[88] This court's ruling could erode the Corps of Engineers' regulatory authority over wetlands. At a time when development encroaches on the wetlands of this country at a rate of three hundred thousand acres a year,[89] protection of wetlands, interpreted in the broadest sense, is clearly necessary.

The United States petitioned the Supreme Court for a writ of certiorari in the *Riverside* case. The Supreme Court has agreed to review this decision.[90] The case should be reversed and remanded for an agency determination of the wetlands question. This would assure uniformity among the circuit courts in cases involving wetlands issues. Only in this way can we be assured that the wetlands of this country continue to be protected.

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88. *See supra* text accompanying notes 48-54.
89. Want, *supra* note 32, at 3.
90. United States v. Riverside Bayview Homes, Inc., 729 F.2d 391 (6th Cir. 1984), *cert. granted* No. 84-701 (U.S. Feb. 19, 1985).