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Home Builders Ass'n of Greater Chicago v. United States Army Corps of Eng'rs, 335 F.3d 607 (7th Cir. 2003)

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district court. The district court then dismissed the case for lack of jurisdiction under the CWA. The United States appealed, claiming CWA jurisdiction existed.

On appeal, the Sixth Circuit first examined whether the district court correctly interpreted *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (“SWANCC”), where the Supreme Court held that non-navigable wetlands, if adjacent to navigable water, are under the jurisdiction of the CWA. Because Rapanos’ land was proximate but not connected to wetlands, the Sixth Circuit also relied on a Fourth Circuit decision in *United States v. Deaton*. The *Deaton* court determined that a small area between wetlands and navigable waters constituted a “significant nexus” and therefore was within CWA jurisdiction. The Sixth Circuit used this holding to show that Rapanos’ land similarly had a “significant nexus” to wetlands, thus establishing CWA jurisdiction.

Next, the court turned to a disputed jury instruction defining the term “waters.” Since Rapanos did not object to the instruction, the court reviewed the instruction for plain error. The Sixth Circuit determined that SWANCC’s interpretation of the CWA jurisdiction clause did not invalidate the agency’s regulation upon which the instruction was based, concluded that the district court jury could not have based its decision on impermissible grounds, and held that Rapanos’ rights could not have been affected by the jury instruction. Concluding the CWA applied to Rapanos’ land and that the jury instructions were sufficient, the court reversed the decision of the district court, reinstated the conviction, and remanded the case to the district court for sentencing.

Becky Bye

SEVENTH CIRCUIT

Home Builders Ass’n of Greater Chicago v. United States Army Corps of Eng’rs, 335 F.3d 607 (7th Cir. 2003) (holding a government agency can enter into a coordination agreement with other regulatory agencies for the purpose of correlating federal regulations under the permit requirements of the Clean Water Act so long as the coordination agreement does not increase the agencies’ regulatory authority beyond that granted by Congress).

The Home Builders Association of Greater Chicago (“Home Builders”) filed three successive complaints in the United States District Court for the Northern District of Illinois seeking injunctive and declaratory relief against the United States Army Corps of Engineers (“Corps”). The catalyst for the suits was an Interagency Coordination Agreement (“ICA”) between the Corps and various local water-regulating agencies. Home Builders claimed adoption of the

ICA lacked sufficient notice and comment and impermissibly extended the Corps authority under both the Clean Water Act (“CWA”) and the Rivers and Harbors Act. In response to Home Builders’ fourth attempt to amend their complaint, the district court held the claim was nonjusticiable because Home Builders had failed to identify a concrete injury caused by the Corps. The district court thus dismissed the action. Home Builders appealed to the United States Court of Appeals for the Seventh Circuit, which affirmed the district court’s decision.

The purpose of the ICA was to coordinate federal regulation of soil erosion and sediment flows under the permit requirements of the CWA. The provisions of the ICA included both authorization for consultation with specified local agencies regarding soil erosion and sediment control plans and review of the implementation of these plans through onsite inspections. Under the ICA, all signatories were to remain independent. The Corps specifically retained the right to make final decisions regarding opinions, actions, or findings within its jurisdiction.

The controlling issue was whether the Corps’ adoption of the ICA was a final agency action within the meaning of the Administrative Procedures Act (“APA”). The APA permits judicial review of “final agency actions for which there is no other adequate remedy in a court.” Home Builders sought such review and claimed the Corps used the ICA as a means to improperly leverage its regulatory authority beyond that given by Congress. Furthermore, Home Builders complained the ICA would produce delays through additional procedural hurdles and conflicting requirements. The court held that although the provisions of the ICA included substantial discretionary elements and represented a definitive pronouncement of Corps policy, it only provided a procedural framework under which the Corps operated. In support of this, the court identified express provisions of the ICA granting the Corps the right to make final decisions. Additionally, the court acknowledged the possibility that the ICA would actually reduce, rather than increase, the costs and delays of the permitting process, and held the ICA did not “impose new legal requirements on regulated parties, or alter the legal regime to which Home Builders’ members were subject.” The court concluded that as long as the Corps did not leverage its regulatory authority using the ICA “beyond that provided for by statute” (which the court found it had not), entering the ICA was not a final agency action subject to judicial review.

The court briefly addressed Home Builders’ claim that the Corps lacked statutory authority to enter into the ICA in the first place by noting that the language of the CWA permitted such coordination with local authorities. The appeals court then affirmed the judgment of the district court, dismissed Home Builders’ complaint, and denied further leave to amend.

Brian M. Forbush