

Stormwater Detention Pond: Federal District Court Addresses Applicability of Clean Water Act



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

05/31/2017

Co-Author: Mary Kate Thompson

A U.S. District Court in the Northern District of New York in a May 11th decision addressed whether a waterbody in the State of New York known as Sheila's Pond constitutes a "water of the United States." See *Zdziebloski v. Town of East Greenbush*, 2017 WL 1968672.

This question was a particular focus since it would be dispositive of whether the waterbody is encompassed by the Clean Water Act ("CWA").

Plaintiffs John and Sheila Zdziebloski ("Plaintiffs") commenced a Clean Water Act citizen suit action against the Town of East Greenbush ("Town") alleging violations of that federal statute. They alleged that the Town "has neglected its responsibility to maintain a stormwater detention basin located on Onderdonk Estates, a residential development northwest of Plaintiffs' house." The alleged neglect (improper maintenance of the detention basin) resulted in flooding on Plaintiffs' property by causing the discharge of pollutants, including "silt, mud, dirt, clay and runoff from streets, into Sheila's Pond." This discharge allegedly caused flooding on both the pond and other parts of the property.

The court addressed whether Sheila's Pond was a "water of the United States" as defined by the CWA.

The relevant regulations define "waters of the United States" as "all waters which have currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce and their tributaries." They also include "wetlands adjacent to [jurisdictional] waters" as "waters of the United States."

The United States Supreme Court addressed whether certain wetlands were encompassed by "waters of the United States" in *Rapanos v. United States*. 547 U.S. 715 (2006).

Justice Scalia, writing for the plurality opinion, provided the continuous connection test, stating:

Wetlands should only fall within the CWA jurisdiction when they: (1) are 'adjacent to a relatively permanent body of water connected to traditional interstate navigable waters'; and (2) have 'a continuous surface connection with that water.'"

In his concurrence, Justice Kennedy put forth the significant nexus test requiring wetlands to "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'" in order to "come within the statutory phrase 'navigable waters.'"

The Circuit Courts of Appeal have split on which opinion constitutes the controlling test. However, the Second Circuit had yet to address the issue. Therefore, the federal district court applied both standards, concluding that Sheila's Pond is not regulated by the CWA under either test.

The Plaintiffs presented only one admissible theory of jurisdiction for Sheila's Pond. They argued it qualified as a jurisdictional waterbody because on two separate occasions excess water was pumped from Sheila's Pond to a tributary. During the pumping, "schools of fish and turtles were pumped to the [tributary] along with the water."

The federal district court determined that the water-pump theory of jurisdiction failed under both the continuous connection and significant nexus tests. Pumping water from the pond did not provide a continuous connection from the pond to the tributary. Scalia test does not require a "perpetual flow." However, it must be difficult to determine "where the 'water' ends and the 'wetland' begins." Pumping water, two short isolated incidents, was deemed not enough to satisfy this test.

Sheila's Pond was also deemed to fail Kennedy's test. The significant nexus test requires qualifying wetlands to "perform critical functions related to the integrity of other waters – functions such as pollutant trapping, flood control, and runoff storage." While the Plaintiffs' pumping did relocate schools of fish and other members of the ecosystem, they did not regularly perform critical functions upholding the integrity of the tributary. The court again deemed it significant that the pumping occurred as isolated incidents.

Under both the continuous connection and significant nexus tests for wetlands under the CWA, the federal district court in New York found that Sheila's Pond did not constitute a jurisdictional wetland. As a result, a necessary CWA jurisdictional term was absent. Therefore, the town of East Greenbush was held not to have violated the CWA by allowing pollutants to enter the pond.

[A copy of the decision can be found here.](#)