Where have all the Marshes Gone? Wetland Regulation after *Rapanos*

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The Supreme Court significantly limited the scope of federal jurisdiction over permitting discharges into wetlands and streams in *Rapanos v. U.S.* This session will examine the case, its aftermath and how local governments are filling the gap.

Learning Objectives:

- Broad understanding of Clean Water Act programs that affect aquatic environment
- Recent legal developments that change scope of federal authority
- Brief understanding of State of Colorado authority over water quality
- Review of existing local government authorities available to address impacts to aquatic environments.

1. Federal Clean Water Act (33 USC §§1251 et seq.) ("CWA") regulates "discharges" to "navigable waters"
    a. Point source discharges of pollutants – 33 USC §1342-also known as the NPDES Program
    b. Discharges of dredge and fill materials – 33 USC §1344, also known as the 404 Program
    c. "Navigable waters" defined as "waters of the US" – USC §1352(7).
        i. In *United States v. Riverside Bayview Homes Inc.*, 474 US 121 (1985), Supreme Court ruled that the CWA covered wetlands adjacent to waters that were "navigable in fact." Colorado's only navigable in fact waters are the Colorado River below its confluence with the Gunnison River and Navaho Reservoir on the San Juan River.
        ii. The Army Corps of Engineers' regulatory definition of waters of the US, however, went far beyond navigable in fact waters and the wetlands adjacent thereto, and included, effectively, all rivers and streams with a high water line and most riparian wetlands and fens. 33 CFR §328.3.

2. *US v Rapanos*, 126 S. Ct. 2208 (2006) and 2007 Joint EPA-USCOE guidance (http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf). According to the Guidance, the Clean Water Act applies to water bodies and wetlands that meets either of the following definitions:
    a. "relatively permanent, standing or flowing bodies of water" but also "streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought" and "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months," *Rapanos*

at 2221, and wetlands with a "continuous surface connection" to such waters. *Rapanos* at 2226.

b. The wetland, "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'." *Rapanos* at 2249.

c. Some courts (as opposed to the federal agencies) look only at whether there is a "significant nexus," while others accept either. The 10th Circuit Court of Appeals, which covers Colorado, has not made its decision on this matter.

3. Pending legislation. Congress is considering fix, CWRA, but timeframe uncertain

4. Unregulated impacts. Impacts of discharges that occur in wetlands and streams that are not subject to CWA jurisdiction after *Rapanos* may no longer be regulated by the federal government
   a. What are impacts of discharges to aquatic environment?
   b. Federal protections for covered waters include EPA's "404(b)(1) guidelines" at 40 CFR 230.

5. State Authority to address impacts no longer subject to federal regulation – e.g., Colorado Water Quality Control Act, § 25-8-101, et seq.
   a. Scope. All waters of the state, including groundwater, are subject to state authority
   b. NPDES ("402") Program. Because Colorado 402 permitting authority covers all waters of the state, arguably *Rapanos* will not change coverage
   c. However, Colorado has no explicit 404 program, therefore, no current state regulation of federally non-jurisdictional waters. (Only Wisconsin and Florida have full 404 programs.)
   d. Other, potential state authorities have not been fleshed out through regulation.
   e. NOTE: Colorado Mined Land Reclamation Act, §34-32-101, et seq, CRS and Colorado Oil and Gas Conservation Act, §34-60-101, et seq., CRS, also provide authority to regulate impacts to aquatic environment.

6. Local Governments authority to address impacts no longer subject to federal regulation. What tools do local governments currently have to address impacts that will no longer be regulated at the federal level?
   a. Local Government Land Use Control Enabling Act, §29-20-101, et seq, CRS provides broad authority to local governments:

      to plan for and regulate the use of land by … (g) regulating the use of land on the basis of the impact thereof on the community or surrounding areas; and (h) otherwise planning for and regulating the use of land so as to provide planned and orderly use of land and protection of the environment … ." (§102)

b. Master plan (identify wetlands and other import aquatic environments)
c. The Areas and Activities of State Interest Act ("1041"), 24-65.1-101, et seq., CRS allow local governments to regulate "areas and activities of state interest," including such activities as municipal and industrial water projects, and development in such areas as "Natural resources of statewide importance" is limited to shorelands of major, publicly owned reservoirs and significant wildlife habitat in which the wildlife species, as identified by the division of wildlife of the department of natural resources, in a proposed area could be endangered." § 24-65.1-104(12), CRS.
d. Water supply protection ordinances, e.g., Crested Butte. Colorado law, § 31-15-707(2)(b), CRS, extends municipal jurisdiction to protect waterworks from injury and water from pollution,

> over the territory occupied by such works and all reservoirs, streams, trenches, pipes, and drains used in and necessary for the construction, maintenance, and operation of the same **and over the stream or source from which the water is taken for five miles** above the point from which it is taken … ." Emphasis added.

e. Traditional zoning and subdivision regulations, including special use and conditional use permits.
f. Intergovernmental Agreements under CRS §§ 30-28-105, 29-20-105 & 29-1-203 to address impacts to streams and wetlands that cross jurisdictional boundaries.
g. Watershed protection ordinances (NWCCOG's model comprehensive program that aggregates erosion control, sediment control, stream set back, grading and other similar practices that minimize impacts to aquatic environment associated with land disturbances is attached.)
h. Wetland and stream overlay districts. The local government can define what a wetland is; federal regulatory definitions do not limit local definitions.
i. NOTE: With the exception of regulating the subdivision of land, local governments can regulate impacts to the aquatic environment even if they occur on parcels of land greater than 35 acres in size. see e.g. *Boone v. Bd of Cty Comm'rs*, 107 P.3d 1114 (Colo. Ct App. 2005).
j. NOTE: Local governments also have the authority to impose "environmental" regulations on activities occurring on federal land, but cannot zone federal land. *California Coastal Commission v. Granite Rock*, 480 U.S. 572 (1986).
k.

7. TOPIC for DISCUSSION: Are other tools needed?