

Slapp *cont from page 1* Currently, under New Jersey law, there is no statute or court rule that directly prohibits the filing a SLAPP suit. However, while there is no law against it, that does not leave the objectors without any remedies.

In New Jersey we have what is known as the *Noerr-Pennington* doctrine. Under this doctrine, persons who voice their concerns at *governmental hearings* are provided with immunity for those actions. Under most circumstances, these objectors could not be found liable to the developer for their comments during the hearings and in furtherance of the hearings. The rationale behind this immunity is that public participation is not only to be encouraged but is vital for the proper operation of our government. Therefore, given the utmost importance that this form of free speech has, it should be guarded by providing meaningful protections to the objector. An objector may also sue a person who brings a SLAPP suit for malicious use of process, frivolous lawsuit, malicious abuse of process, intentional and negligent infliction of emotional distress, but there is some question whether these common-law remedies are sufficient to protect this fundamental right to participate in the governmental process.

Some believe that the number of SLAPP suits has increased and that this increase is, ultimately undermining participation in the public process. As a result there are bills pending before the State Legislature which would provide another tool in the fight against SLAPP suits. Bills A2652/S697 would specifically authorize courts to consider motions to dismiss a SLAPP suit and, if an objector prevails, they would be awarded attorney fees and costs. This may, in fact, be a very significant tool. Currently, even if the developer loses the SLAPP suit, they have succeeded in miring the objectors in legal proceedings and subject them to thousands of dollars in legal fees before the objector can be vindicated. How many ordinary citizens or public interest group concerned over how their municipality, county or state is developing has the time and money to fight a SLAPP suit? If these bills pass then, maybe, the price of exercising our constitutional rights may not be so high and the costs of the SLAPP suit will be prohibitive to the developer.

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Environmental News

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Introduction

With the recent celebration of Earth Day 2006 it is a fitting time to introduce Frascella & Pisauro, LLC.'s first environmental newsletter. It is our goal to publish at least two environmental newsletters each year. Each newsletter will review issues of state and federal concern. I hope that you enjoy the newsletter and find the articles informative and useful. I welcome your feedback on the information presented in this newsletter as well as any ideas for future articles. Also, if you do not want to receive future issues of the newsletter, please let me know by telephone, mail or email at environews@fplegal.com - Michael L. Pisauro, Jr.

The Future of Water . . .

Since the US Supreme Court's decision in Solid Waste Agency of Northern Cook County vs. United States Army Corps of Engineers ("SWANCC") the federal government's ability to regulate some wetlands has been questioned. This February, the U.S. Supreme Court heard oral argument on three new cases. Two of the three cases challenge the Army Corp of Engineer's definition of "waters of the United States" and the Court's decisions on this matter will have far reaching impact on the future health of our wetlands.

The Clean Water Act ("CWA") was passed in 1972 during the "birth" of modern environmental law. As is common with most federal environmental laws, the federal government's authority to regulate waters is, in part, based on the U.S. government's ability to regulate commerce. In fact some have called the CWA one of the most significant reaches of the federal government's authority under the commerce power. In passing the act, Congress expressed its intent to "restore and maintain the chemical, physical, biological integrity of the nation's waters." Congress even went so far as to set a goal of eliminating the discharge of pollutants in our waters by 1985.

As we well know 21 years later, we are no where close to achieving this extraordinary goal.

Under the CWA, a permit is required in order to dis-

Another Tool For Use

A SLAPP (Strategic Lawsuit Against Public Participation) suit is just one tool that is used to quell, stifle or limit a person's right to take part in the governmental process and it is a tool that has been used all too often by developers who face opposition in the planning or zoning board for their projects. Here's how it works.

The developer sues the objectors, usually claiming that the objectors have committed acts of defamation/libel, interference with business opportunity or other claims. The hope is that the lawsuit will force the objectors to become silent and not object at the public hearings. Further, the developer is not only seeking to put a cork in the current objectors but to discourage opposition to future projects as well.

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charge pollutants or fill in wetlands and the Army Corps of Engineers has the authority to issue or deny permits for the discharge of pollutants in the “navigable waters of the US.” Herein lies the crux of the argument.

The CWA defines “navigable waters” as “the waters of the US.” 33 U.S.C 1362 . Regulations issued by the Corp further expand upon that very simple definition to incorporate both *tributaries* of waters—which would not normally be considered navigable—and *waters/wetlands* that are *adjacent to* or otherwise *hydrologically linked* to navigable waters or tributaries of navigable waters. Given the lofting goals of the CWA to would make very logical sense to cover all of the waters in the U.S. as otherwise it would be fruitless to control the discharges into navigable waters when someone upstream in a small creek can dump, without a permit, and that pollutant would migrate downstream to the protected water.

In SWANCC the Court considered whether the Corps’ expanded definition of “waters of the US” went further than federal powers would allow. The Court was called upon to determine whether the Corps had jurisdiction to deny a permit to SWANCC who wanted to fill isolated gravel pits which had become wetlands to create a “balefill.” The Corps justified the denial of a permit under the so-called “Migratory Bird rule” - as the gravel pit wetlands were used by migratory birds, the Corp asserted its jurisdiction over the wetlands and denied the permit.

The Court’s opinion authored, by the late Chief Justice Rehnquist, found that the Corps’ assertion of jurisdiction exceeded its authority under the CWA. Some interpret Rehnquist’s opinion as saying that the Corps’ denial exceeded the federal government’s power to regulate commerce. This case has been held by some to have done nothing more than invalidate the Migratory Bird Rule. Some courts, including the District Court of NJ, however, have held that SWANCC signified a definitive shift in what was once a well understood principal of the Corps’ jurisdiction.

Under the old test, a body of water fell under the jurisdiction of the Corps if it was in some way hydrologically linked to navigable water or a tributary of navigable water or came under the migratory bird rule. In FD&P Enterprises, Inc. v. U.S. Army Corps of Engineers, the Court found that the hydrological connection test was no longer a valid method of analysis. According to the District Court, the Corps has jurisdiction only where there is a significant nexus between the wetlands and a navigable waters. This significant nexus must be more than a hydrological connection between the wetland and navigable water.

If the U.S. Supreme Court’s opinion continues the SWANCC line of reasoning the CWA’s regulation of wetlands will be severely curtailed. According to a recent article in the Environmental Law Institute’s *Environmental Forum* over half of the nation’s wetlands would be without legal protection if the SWANCC holding continues to be applied. This loss would be particularly harmful for those states that do not have its own laws regulating wetlands.

New Jersey, however, has several statutes that pertain to water and wetlands, including the Water Pollution Control Act (NJSA 58:10A-1 et seq.), the Freshwater Wetlands Protection Act (NJSA 13:9 B-1 et seq.), and the Wetlands Act (NJSA 13:9A-1 et seq.) Luckily, these statutes do not appear to rely on the *federal* definition of “water” or the federal jurisdiction of wetlands. Under the WPCA waters are defined as: “the ocean and its estuaries, all springs, streams and bodies of surface or ground water, whether natural or artificial . . .” NJSA 58:10A-3t. Under the Freshwater Wetlands Act, a freshwater wetland is defined as, “an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. . . .” NJSA 13:9B-3.

Even though New Jersey’s programs do not seem dependant on the federal definition of water that does not mean we should not be concerned over the restriction of the federal authority to control water. Under the CWA even though NJ assumed responsibility to administer the program, the federal government retained authority to refuse the issuance of a permit. With the removal of this additional check, we must rely on the strength of DEP and those who run it to vigorously protect our natural resources. Currently, there are bills currently in both houses of the State legislature to restrict DEP’s authority over wetlands. One of those bills, A2736, would remove from the definition of freshwater wetland all man-made swales, canals, ruts or drainage ditch. How many of New Jersey’s

features started off as man-made but, through time, have been assimilated into the natural environment? If this bill passes, a person can discharge a pollutant into a manmade ditch that runs into a river without restriction.

Lastly, the Supreme Court’s decision regarding the Federal Government’s ability to regulate wetlands will have a potentially significant impact on *other* environmental programs as well. If the scope of the CWA’s protection of waters of the United States is construed too narrowly, how will the scope of the Endangered Species Act’s protection meet similar review in future cases?

Both directly and indirectly, the upcoming decisions by the U.S. Supreme Court may potentially redefine federal environmental law. Is our State ready?

In the Courts . .

In I/M/O Stormwater Management Rules, 2006 N.J. Super Lexis 107, the NJ Appellate Division upheld the Department of Environmental Protection’s ability to require three hundred foot vegetation buffers along waters classified as Category 1 (C1). C1 waters are protected from any measurable change in water quality. The developers asserted that these buffers were no build zones and that the regulations exceed DEP’s authority and were improper land use controls. The Court readily found that the regulations were founded in DEP’s authority to conserve the State’s natural resources and prevention of pollution. DEP also had the authority under the Water Pollution Control Act. The WPCA gave DEP authority to enact “comprehensive storm water management regulations.”

In I/M/O Freshwater Wetlands Statewide General Permits, 185 N.J. 452 (2006) the Supreme Court of NJ found that neighbors to a proposed development do not have a right under current law to demand a trial-like hearing before the office of administrative law. Objectors to a local development sought to force a trial on the delineation of wetlands after DEP had issued a Letter of Interpretation (LOI). DEP also issued a general permit for the filling of the isolated wetlands for which the objectors sought a trial-like hearing before the Office of Administrative Law. In denying the objectors’ appeal the Court reviewed the statutory and constitutional issues. The Justices noted that neither the Freshwater Wetlands Act nor the Administrative Procedure Act provided a right for neighbors to seek a hearing before the OAL. They then reviewed the constitutional issues and found that objector’s constitutional rights were protected. The Court seemed to look at two factors. First, the proposed harm was speculative in that the proposed stormwater management system was not in place and therefore it was unknown whether the run-off would increase. Secondly, the Court noted that the objectors had extensive access to the Planning Board to provide testimony and facts. Also, the objectors had public hearings from DEP in the issuance of the General Permit as well as the LOI. Therefore, the Court ruled that the objector’s due process rights had been adequately protected and a trial-like hearing by the OAL was not necessary. The Court also noted that if, in fact, the proposed stormwater management plan was insufficient and that the objectors’ property suffered from increased flooding that the developer could be civilly liable.

On May 1, 2006 the New Jersey Supreme Court heard oral argument in Mount Laurel Township v. MiPro Homes, LLC., the issue in this case is a very basic but powerful one in this state. The Court will have to decide whether a municipality can exercise its powers of eminent domain for the purpose of slowing residential development and preserving open space. In the Appellate Division, the municipalities authority to so use its powers of eminent domain were upheld. The Appellate Division recognized that controlling growth could be considered a public purpose. As a municipality may condemn land for public purposes, Mount Laurel properly exercised its eminent domain authority. If the NJ Supreme Court would reverse the appellate division, this will remove a very important tool from municipalities to control and direct growth where its citizens and elected officials believe is in the best interest of the town.