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Wetland's 'protection' threatens property owners

If you own property that contains wetlands, the U.S. Army Corps of Engineers may attempt to assert its regulatory jurisdiction over those wetlands under the federal Clean Water Act. This jurisdictional issue is particularly important for landowners located in the East Bay, where the line between waters that are subject to regulation and those that are not is often blurred.



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In many situations, the Corps' jurisdiction will hinge on whether the wetland is considered "adjacent" to jurisdictional waters such as San Francisco Bay. Unfortunately, the Corps often defines "adjacency" as broadly as possible in order to assert its control over private property.

There is no clear test for determining whether a wetland is adjacent. Under federal regulations, the Corps' jurisdiction under the Clean Water Act is limited to "waters of the United States," which includes wetlands "adjacent" to navigable waters and their tributaries. The Corps' regulations simply define "adjacent" as "bordering, contiguous, or neighboring." The U.S. Supreme Court has not itself defined the term "adjacent," nor has it addressed the propriety of the Corps' definition.

In fact, only two U.S. Supreme Court cases have addressed the geographic reach of the Corps' jurisdiction under the Clean Water Act. In *U.S. v. Riverside Bayview Homes*, the court held that "waters of the United States" includes wetlands adjacent to those waters, and thus approved Corps jurisdiction over a wetland that actually abutted a navigable waterway.

In *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, the Court rejected the Corps' assertion of authority over an isolated intrastate pond, holding that the Corps' "migratory bird rule" exceeded the Corps' authority under the Clean Water Act. In reaching this conclusion, the court clarified its holding in *Riverside Bayview Homes* with respect to adjacent wetlands, and emphasized that the concept of "adjacency" requires that there be a "significant nexus" between the wetlands and "navigable waters."

In current federal court litigation involving wetlands located on private property in Fremont, the Corps has raised var-

ious theories to justify its adjacency determination, including mere geographical proximity, hydrological and/or ecological connectivity, and the existence of berms between the wetlands and navigable waterways. Under the Corps' theories, a wetland is jurisdictional so long it is close – whatever that means – to a navigable waterway, even if there is no hydrological connection between the two.

Whether or not a wetland is "adjacent" to a navigable waterway is, and will be, an issue subject to intense litigation in the Bay Area. An assertion of jurisdiction by the Corps over wetlands on private property that appear isolated may have devastating effects on property owner's ability to use their property.

There is no question that preservation of our nation's waters is of fundamental importance to the Bay Area and the nation. This mission does not entitle the federal government, however, to improperly expand its jurisdiction under the Clean Water Act to infringe upon the rights of property owners without effectively protecting our waters.

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