

Property owners and developers may get “bogged down” by new wetlands regulations

Please allow me to dispel a nasty rumor. Wetlands are not a creation of Mother Nature, but rather are created by a cacophonous collection of interminate governmental regulations and court decisions. This paradox is about to get even more pronounced.

The EPA and the US Army Corps of Engineers jointly released a proposed rule on March 25, 2014 that would seem to be the most sweeping change in many years to the rules governing federal Clean Water Act (“CWA”) jurisdiction over wetlands. The objective is to roll up decades of court decisions and agency interpretations into a single rule. In *Rapanos v. United States*, 547 U.S. 715 (2006), a four-vote plurality of the Supreme Court held that regulated “navigable waters” are limited to “only those relatively permanent, standing or continuously flowing bodies of water forming geographic features,” such as streams, oceans, rivers and lakes. Wetlands with a “continuous surface connection” to such bodies of water, so that “there is no clear demarcation between them,” are “adjacent to” such water bodies and also are covered.

Specifically, the proposed rule would overhaul the definition of “waters of the United States” in the administrative

regulations which implement the various sections and programs of the Act. “*Waters of the United States*” will have an expanded definition. Six categories of waterbodies would be “waters of the United States” by rule (e.g., per se jurisdictional waters), and would fall under the jurisdiction of the CWA with no additional analysis required. These waterbodies are traditional navigable waters or those that unquestionably share a significant nexus to navigable waters.

An additional category, “other waters,” consists of waterbodies not covered by the first six categories, which are not themselves navigable waters and may or may not share a significant nexus to navigable waters in and of themselves. “Significant nexus” as the proposed rule would define, would mean that the water at issue significantly affects the chemical, physical or biological integrity of a traditional navigable, interstate water or territorial sea. These “other waters” under the proposed rule would be jurisdictional only upon a case-specific determination that

they share a “significant nexus” to waters of the United States rather than the express heavy reliance on the Commerce Clause in the existing rule.

The EPA and Army Corps have posited that the proposed rule “will not add to or expand the scope of waters historically protected under the CWA.” In contrast, critics have suggested that the proposed rule is “...the greatest expansion of federal control over land and water resources in the 42-year history of the Clean Water Act” and could subject “...every small business and farmer...to EPA fines if they disturb a puddle on their land.”

Whether you are a supporter or critic, the impact on private property rights will be murky. As with most changes in governmental regulation, this issue is likely to be bogged down in rulemaking and litigation for years to come, leaving uncertainty as the only constant.



Neil A. Stein, Esquire

Neil Stein is a principal and member of the Land Use, Zoning & Development group. Mr. Stein has over 30 years of experience representing real estate owners, developers, lenders and builders in complex land use, zoning, environment and corporate matters, as well as design professionals in contracting and business structuring. You can reach Mr. Stein at 610.941.2469 or by email to nstein@kaplaw.com.



Courting Art

Kaplin Stewart was a prize sponsor of a juried art competition by the Montgomery Bar Association to place art in the Courthouse of the Montgomery County Court of Common Pleas in Norristown, Pennsylvania. Aptly named the "Courting Art" competition, local senior (55+) artists were invited to submit original works of art depicting what each loves about living in Montgomery County. The works, which



The Honorable Carolyn Carluccio who conceived the idea for "Courting Art" has as her goal to promote a more comfortable visitor-friendly atmosphere to the Courthouse.

ranged from portraits to landscapes in mixed media, were displayed for the judges and invited guests at the Montgomery County Community College in

May. Twenty-five winners were selected. Reproductions of their art will be on display this summer at the Courthouse. The Honorable Carolyn Carluccio conceived the idea for "Courting Art" as her goal to promote a more comfortable visitor-friendly atmosphere to the Courthouse. If you find yourself in Norristown, please look for the winning works of art showing scenes of everyday life in Montgomery County and bringing to life Judge Carluccio's special vision for the Courthouse.



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The Kaplin Stewart Construction Law Group invites you to join us on social media to keep current on construction news, seminars and events, business issues, and other items of interest. Simply find us on Facebook under "Kaplin Stewart Construction Law" and click "like" or follow us on Twitter @KAPLAWBuilds

Jeffrey L. Silberman, Esquire, principal in the Real Estate, Business & Finance group, and other members of the firm, represented E. Kahn Development Corporation and J. Loew & Associates, Inc. in connection with the leasing of a portion of the former AEGON Insurance Group site near Malvern, PA to Saint-Gobain Corporation. Saint-Gobain is a 350 year old French company and is the world's largest building material supplier company. The Malvern site will serve as the North American headquarters for Saint-Gobain's subsidiary, CertainTeed Corp. E. Kahn Development Corp. and J. Loew & Associates, Inc. partnered with AEGON, who owned the land, to develop and lease the property. The existing buildings on site will be substantially renovated, in many instances using state-of-the-art Saint-Gobain materials, and will be designed and constructed to achieve a LEED certification. As a part of the transaction, E. Kahn Development Corporation will acquire Saint-Gobain's existing corporate offices in King of Prussia. Kaplin Stewart, along with AEGON's counsel, represented the joint venture on the acquisition, leasing and financing of the project.

Maury B. Reiter, Esquire, principal in the Estates Administration & Planning group, will be presenting "Estate Planning for Real Estate Investors" at the Pennsylvania Bar Institute's "A Day on Real Estate," on August 5, 2014 at the CLE Conference Center in Philadelphia. Mr. Reiter's broad-based business law practice includes taxation, corporate (including mergers and acquisitions) and commercial law, and estate planning and administration.

Neil A. Stein, Esquire, a principal in the Land Use, Zoning & Development group, has been re-appointed as an Adjunct Professor of Law at Temple University James E. Beasley School of Law. Mr. Stein will also be speaking at the PBI Land Use Institute in June, 2014. Mr. Stein has more than 30 years of experience representing real estate owners, developers, lenders and builders in complex land use, zoning, environmental and corporate matters.

Dirk M. Simpson, Esquire, a principal in the Estates Administration & Planning group, was a panel speaker at the 2014 Wealth Structuring Institute held at the Hyatt Regency in Philadelphia on May 29, 2014. The skills-training program was attended by over 100 of Merrill Lynch's leading financial advisors in the Mid Atlantic region.

Lisa M. LaPenna, a paralegal in the firm's Business & Commercial Litigation group, spoke about legal technology to a group of paralegal students at a Law and Justice Symposium Lecture Series on April 1, 2014 at Manor College. Ms. LaPenna spoke about electronic filing and recording, research tools and e-discovery, among other topics.

Meet Our Litigation Professionals

This month we turn the spotlight on Kevan Hirsch, a Principal in the Commercial Litigation and Construction Law Departments.

Kevan grew up in Donora, a western Pennsylvania town famous for its steel mills, 1948 smog, and sports figures (e.g., Stan Musial, Ken Griffey, Sr.). He came to Philadelphia to attend the University of Pennsylvania and graduated *Cum Laude*. After two years of "post-graduate" work as a carpenter, Kevan saw the wisdom of attending Temple University School of Law at night while working full time to support his two young children and was awarded his JD, *Cum Laude* in 1982.

Kevan began his career as a lawyer, with a prominent Center City firm, where he had worked as a litigation law clerk during school. It was a baptism by fire as within 30 days of admission to the bar, he was in court successfully seeking an injunction for a corporate client victimized by a sophisticated tax fraud scheme. Ever since then, Kevan has represented clients in complex business, insurance, and construction litigation at large firms in Philadelphia and at Kaplin Stewart since 2000.

Handling a variety of commercial cases over the past 32 years, Kevan has developed expertise in several areas including insurance coverage and bad faith, enforcement of competition restrictions, intellectual property disputes, and construction and contract

claims relating to commercial and industrial rotating and mixing equipment. As the General Counsel for a leader in implementing treasury software for Fortune 500 companies, his practice also involves consulting services and software licensing contracts, dealing with an array of legal issues relating to software,

HR and employment and LLC operating agreement and governance issues.

Active in assisting fellow professionals with alcohol, drug, gambling, and mental health issues, Kevan chairs the PBA Lawyer Assistance Committee, is a Board member of Lawyers Concerned for Lawyers of PA and a Trustee of the M. Patricia Carroll Fund.



Kevan Hirsch

Kevan is celebrating 20 years of marriage with Amy, a paralegal who shares both his passion for helping others through her own extensive volunteer work and his love for dogs. They live in Horsham Township with their yellow Labrador, Cooper, a 95 pound, 11 month old "puppy" who delights in walking his owners and leading them on wild lunges after absolutely anything blowing by in the wind. When not working or helping others, Kevan tries to maintain his single digit golf handicap and is an avid fan at Amy's triathlon races. They also travel to visit family, including his two daughters and two grand-daughters, and often spend vacations and holidays on Kiawah Island, SC.

Do You Know...

That we are soon approaching the 100th anniversary of the first major zoning law adopted in the United States? In 1916, New York City passed a zoning resolution in response to New Yorkers' increasing concerns that skyscrapers such as the Equitable Building at 120 Broadway, which was completed in 1915, would prevent light and air from reaching the streets below. Today, most cities, counties and municipalities throughout the United States have enacted comprehensive zoning codes and ordinances regulating everything from building



Equitable Building, Manhattan

to blasting and demolition. It is an extreme rarity to find an urban or suburban area that does not have zoning in place. However, if you ever want to develop in the City of Houston, Texas, don't bother looking for a zoning code... it does not have one. Houston voters have rejected efforts to institute formal zoning at least three separate times in 1948, 1962 and 1993. Does it come as a surprise to anyone that the one major urban holdout city is located in Texas?

By: Gregg I. Adelman, Esquire
gadelman@kaplaw.com,
610-941-2552.

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Kaplin|Stewart
Attorneys at Law

LITIGATION ATTORNEYS

Barbara Anisko
banisko@kaplaw.com

William D. Auxer
waxter@kaplaw.com

Andrew B. Cohn
acohn@kaplaw.com

Karin Corbett
kcorbett@kaplaw.com

Michael P. Coughlin
mcoughlin@kaplaw.com

Amee S. Farrell
afarrell@kaplaw.com

Sandhya M. Feltes
sfeltes@kaplaw.com

Mohammad A. Ghiasuddin
mghiasuddin@kaplaw.com

Kevan F. Hirsch
khirsch@kaplaw.com

Marc B. Kaplin
mkaplin@kaplaw.com

Robert A. Korn
rkorn@kaplaw.com

William J. Levant
wlevant@kaplaw.com

Joshua C. Quinter
jqinter@kaplaw.com

Kimberly L. Russell
krussell@kaplaw.com

Amy SantaMaria
asantamaria@kaplaw.com

Pamela M. Tobin
ptobin@kaplaw.com

Daniel R. Utain
dutain@kaplaw.com

Kaplin Stewart
is a member of:



Legal Perspectives

Are they crazy? Amazon pays unhappy employees to leave

Recently the CEO of Amazon, Jeff Bezos, issued a letter to shareholders in which Mr. Bezos discussed an innovative way in which Amazon deals with unhappy employees at one of Amazon's order fulfillment centers. Once a year, Amazon offers those employees the ability to leave their job if they are unhappy with the job for any reason. If the offer is accepted in the first year, Amazon will pay the unhappy employee \$2,000.00. The offer goes up \$1,000.00 per year to a maximum of \$5,000.00. The offer is publicized annually with the headline: "Please don't take this offer."

What could Amazon be thinking? Mr. Bezos stated that Amazon wants its employees to think about their careers and if they are in a job where they do not want to be, it is not healthy for employees or the company for unhappy employees to stay. While that sounds like a generous offer focused on creating a utopian workplace, there are other benefits to the policy that may be more tangible. Amazon implemented the policy after several legal battles with its fulfillment



Kimberly L. Russell

center employees about overtime and other work issues, and the policy may have strategic implications.

While it may seem strange on its face, the "offer" could give Amazon an interesting defense in litigation with disgruntled former employees. Take a typical situation for any employer: the employer lays off an employee who is at best average in his performance. The employee then sues the employer claiming that he was harassed and subjected to unfair conditions during his employment – claims that the employee never raised while employed. An employee who testifies as to the horrible working conditions he allegedly faced certainly will have to explain why, if he was so unhappy, he did not accept the "offer." Is it a bulletproof defense? No, but it is another argument to "chip away" at the credibility of an employee who seeks to rewrite his work history in a courtroom. In addition, employees who accept the "offer" sign a release of all claims against the employer. There may be some method to Amazon's madness after all.

Kimberly L. Russell is a principal in the Employment and Litigation groups. She can be reached at 610.941.2541 or by email to krussell@kaplaw.com.



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Kaplin Stewart Meloff Reiter & Stein, P.C.
Union Meeting Corporate Center
910 Harvest Drive
P.O. Box 3037
Blue Bell, PA 19422-0765

Kaplin Stewart
ATTORNEYS AT LAW