

August 21, 2008 - FROM JOE RITCHEY – Attorney At Law

Here is a excerpt of an argument I submitted to defeat County attempts to continue their jurisdiction over what they contended was an ephemeral stream, a 16 inch wide and 8 inch deep water drainage gutter that had water in only about 4-7 times a year during 'rainy years', and some years not at all, like several of the last few years. I had already gotten the court to agree that under Fish and Game Sections 1600, et seq. the State had wholly pre-empted the field of stream bed regulations, leaving County with no jurisdiction . Take a look at those sections. They do really take all control over stream beds, including ephemeral streams, from the County and vest jurisdiction in the Department of Fish and Game as trustee for the people of the state of California. Then I made the following argument as well.

"I object to County regulations that have expanded Santa Cruz County's General Law Jurisdiction and County control beyond any statutory scheme set out by the legislature and without State authorization expanded control to include ephemeral, or , as characterized by the USSC this 'dry drainage flows or man-made drainage ditches , dry streams, etc'. This USSC curtailment of administrative expansion of jurisdiction came less than 24 months ago. I am suspicious County Counsel has known about it but chose to not advise the Court of this rather significant persuasive opinion.

The United States Supreme Court considered this type of regulatory extension of jurisdiction in a case interpreting the meaning of Stream in the 'master' regulatory scheme [Clean Water Act] under which States, including California, thereafter enacted environmental regulation of " Streams, Lakes, Rivers, etc".

The Court ruled the definition of "streams" could not be stretched to include "ephemeral streams" [nor to otherwise 'dry watercourses, etc']. The Court noted that such an interpretation was not a natural and common interpretation of the term "stream" and was such a strained unquantifiable potentially unlimited definition that it could "lead to government jurisdiction over nearly the entire land area of the United States" since there are nearly endless networks of "channels that furrow the surface of the United States, ephemerally containing water wherever and whenever the rain falls" and that under such an interpretation "any plot of land containing such an otherwise dry drainage channel could be regulated as a stream"

In announcing its decision the court specifically disapproved an interpretation by the lower circuit that had extended land use environmental regulation to water channels 'such as intermittent streams

and man-made channels which intermittently carry water ‘. The USSC looked at the definitions given by various Dictionary editions [significantly Websters and and other sources] and concluded the commonly accepted definition of “ streams” does not allow inclusion of “water channels with only ephemeral flows.” In *Rapanos v. United States*, (Consolidated with *Carabell et al. v United States Army Corps of Engineers*) 2006, 126 S.Ct. 2208, the Court said:

....”water as found in "streams," "oceans," "rivers," "lakes," and "bodies" of water "forming geographical features..... connotes continuously present, fixed bodies of water, as opposed to usually dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition's terms, namely "streams," connotes a continuous flow of water in a permanent channel--especially when used in company with terms such as "rivers," "lakes," and "oceans." [6] None of these terms encompasses transitory or ephemeral flows of water.the phrase does not include channels through which water flows intermittently or ephemeraly, or channels that only periodically provide drainage for rainfall. [126 S.Ct. 2222]

[the exclusion of] channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, dry streams or arroyos [through which occasional storm waters may flow], the Corps has stretched the term "waters of the United States" beyond parody.

While I am of course pleased this USSC decision so vigorously supports the original defenses I raised , there comes a time when even ‘ justified landowner resistance ‘ may harm the land through delay of implementation of a solution to a problem . Often the County get in the way of constructive solutions and become a major problem, delaying reasonable solutions.

I want to move forward and get the work done . I now face a possible 12 month delay for ‘approval’ and have been told there is no way I can start planting redwood forest floor landscape until the Fall of 2009! I should not even need to wait for approvals under the reasoning of the USSC. The County has stood in the way of my completion of my improvement plans. The state says the County does not have jurisdiction and the USSC now cut the legs out from the County’s own claim to jurisdiction. The County’s general law ordinance interpretation has not been authorized by the state. The County’s interpretation of their jurisdiction is an , according to the USSC, unnatural and not warranted extension of the plain and common meaning of what is a stream. You will

note the USSC, per the present commanding ruling 'block' looked with contempt and disdain on the "loosy goosy" unlimited extensions and /not able to be quantified' extensions of jurisdiction through the undefined limits of what qualifies as sufficient flow to be included as 'not too ephemeral in nature' such that it can be still said to have sufficient flow to be within jurisdiction"