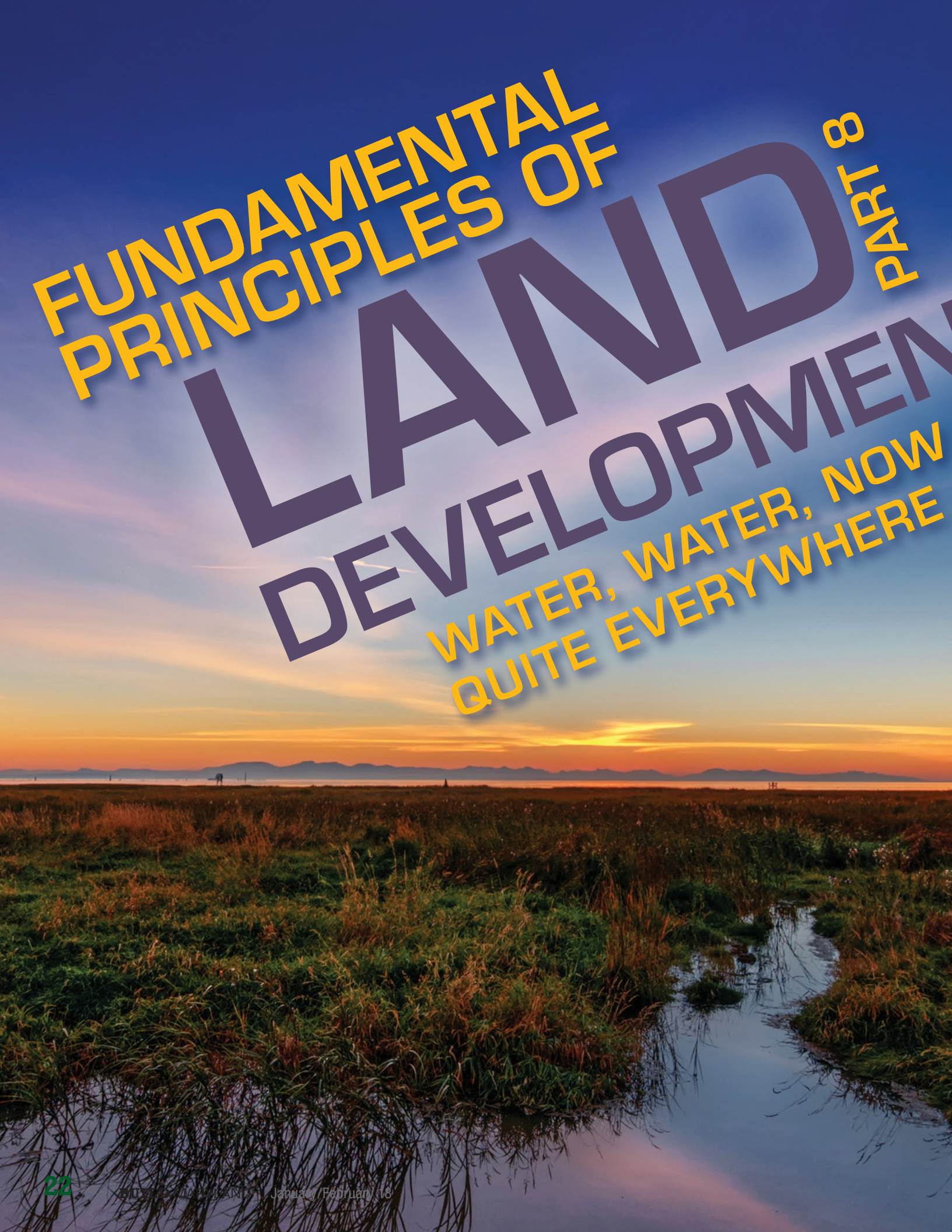
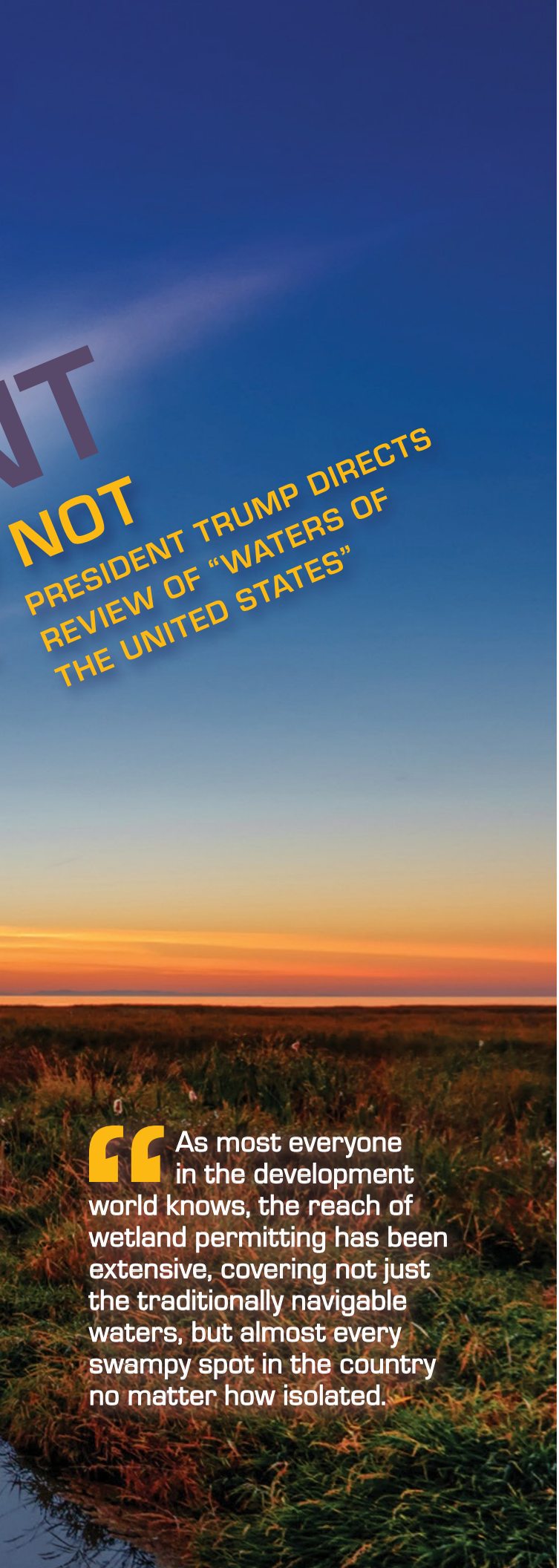


FUNDAMENTAL PRINCIPLES OF LAND DEVELOPMENT

PART 8

WATER, WATER, NOW QUITE EVERYWHERE



NOT

PRESIDENT TRUMP DIRECTS REVIEW OF "WATERS OF THE UNITED STATES"

by DAVID S. THALER, PE, LS, F., ASCE, F., NSPE, D.S. THALER & ASSOCIATES, LLC

Anyone who has ever taken a civics course might recall that the United States Corps of Engineers (Corps) has jurisdiction over the navigable waters of the United States. It is perhaps less well known that the Corps was given this jurisdiction from Congress by the River and Harbors Act of 1899. That authority in turn derives from the Commerce Clause of the United States Constitution, Article I, Section 8, "The Congress shall have the power … To regulate commerce with foreign Nations and among the several states …"

In 1972 Congress passed the Clean Water Act (CWA) whose stated objective was to "restore and maintain the chemical, physical and biological integrity of the nation's waters." The CWA prohibited the discharge of dredged or fill materials into the "the navigable waters" defined as "the waters of the United States," (WOTUS) unless authorized to do so by a permit from the Corps.

For nearly a century prior to the CWA, the phrase "the navigable waters of the United States" had been interpreted to refer to the interstate waters that are navigable *in fact* or readily capable of being made so. But after some litigation, the Corps adopted a far broader regulation interpreting the "waters of the United States" to include not only the traditional interstate navigable waters but "all interstate waters including interstate wetlands and all other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows and natural ponds, the use, derogation, destruction of which could affect interstate or foreign commerce,"

The Corps also interpreted the CWA to cover all freshwater wetlands that were adjacent to otherwise covered waters, and a "wetland" was defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adopted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."

The Corps also asserted jurisdiction over virtually any parcel of land containing a channel through which rainwater or drainage occasionally flowed.

As most everyone in the development world knows, the reach of wetland permitting has been extensive, covering not just the traditionally navigable waters, but almost every swampy spot in the country no matter how isolated.

In a recent Supreme Court decision, the Court reported that, "The average applicant for an individual [wetland] permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915–not counting costs of mitigation or

design changes…. '[O]ver $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.' These costs cannot be avoided, because the Clean Water Act 'impose[s] criminal liability,' as well as steep civil fines, 'on a broad range of ordinary, industrial and commercial activities.'" The Supreme Court went on to note that "the Corps and the Environment Protection Agency (EPA) have interpreted their jurisdiction over" 'the waters of the United States' to cover 270-to-300 million acres of swampy lands in the United States– including half of Alaska and an area the size of California in the lower 48 States." [1]

So how did federal jurisdiction expand from the relatively limited authority over the traditional "navigable waters" to federal authority over land use over so much of the entire country?

The first CWA wetlands case heard by the Supreme Court was *United States v. Riverside Bayview Homes, Inc*. 474 U.S. 121 (1985). Riverside Bayview owned 80 acres of low lying land near the shores of Lake Saint Claire in Michigan. In 1976 it filled its property in preparation for a housing development. The Corps filed suit and the Federal Appeals Court sided with Riverside Bayview and expressed doubt that Congress intended to allow regulation of wetlands that were not associated with navigable waters. The Supreme Court, however, reversed and upheld the Corps' view, finding that great deference should be given to administrative agencies when adopting regulations at the direction of Congress and as the precise limit of where the water ends and land begins is often very hard to determine, the Corps' determination was upheld.

A huge industry has grown up in wetland delineation and permitting, which has become a fundamental part of the land development due diligence and entitlement process.

The Corps adopted a methodology for the determination of what exactly constitutes a wetland, which includes three ecological parameters:

- Hydric Soil – Soil contains iron and manganese and when it is saturated by water for a long period of time, these tend to oxidize and the soil turns blackish or hydric. From the degree of blackness (known as chroma) one can determine whether the soil has been saturated;
- Hydrophytic Vegetation – Simply those types of plants that are ecologically suited to growing in wet conditions; and
- Wetland Hydrology – a constant or periodic source of water sufficient to cause saturation.

To be classified as a regulatory wetland, all three of these parameters must be present. According to Dusty Rood of Rodgers Consulting in his insightful talk given at the MBIA *Basic Principles of Land Development* class, however, there may also be a fourth parameter and that is the human one. Wetland delineations are somewhat subjective and negotiations in the field often take place as to the actual wetland location.

The Corps had asserted its jurisdiction over very isolated areas but in the case of *Solid Waste Agency of Northern Cook County* v. *Army Corps of Engineers* 531 U.S. 159 (2001) (SWANCC) the Supreme Court opined that migratory birds travelling interstate, did not make isolated ponds and wetlands "waters of the United States."

The Supreme Court next tackled the issue of the definition of the waters of the United States in 2006 in the Rapanos case *op.cit*. In 1989 John A. Rapanos backfilled wetlands on a parcel of land in Michigan that he owned and wished to develop. It included 54 acres of land with sometimes wet soil conditions. The nearest body of navigable water was more than 11 miles away, but the Corps took the position that Mr. Rapanos' fields were "waters of the United States" which could not be filled without a permit. Twelve years of criminal and civil litigation followed.

In a very split decision, Justice Scalia, writing for a plurality, overturned the Corps' expansive definition and in a blistering opinion accused the Corps of exercising "the discretion of a … despot." He found that the phrase, "the waters of the United States" includes *only* those relatively permanent standing or continuously flowing bodies of water forming geographical features "that are described in ordinary parlance as "streams, oceans, rivers, and lakes," and does *not* include channels through which water flows intermittently or ephemerally or channels that periodically provide drainage for rainfall. He further found that the Corps' jurisdiction is only over relatively permanent bodies of water, and despite the Corps' long standing practice to the contrary, he found that a wetland may not be considered "adjacent to 'remote' waters of the United States" based upon a mere "hydrologic connection." The opinion went on to say, "Isolated ponds are *not* 'waters of the United States.'" (Emphasis added.)

This opinion was a victory for the homebuilding industry and a counterblow against the expansion of federal authority into what have always been considered to be local land use decisions. Justice Scalia, however, was only joined by the Chief Justice and Justices Thomas and Alito. The Chief Justice filed a concurring opinion, Justice Kennedy filed an opinion concurring in the judgement and Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg and Breyer joined. Because there was no majority opinion, the plurality opinion did not have the force of law.[2]

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1 John A. Rapanos et ux., et al. v. United States 547 U.S. 715 (2006)

2 Coincidentally, shortly after the Rapanos decision, I had the opportunity to share a beer with Justice Scalia and to discuss the case with him. I had expected that the Supreme Court would overturn what I thought was a clear example of overextended federal authority. It did not, and so I asked Justice Scalia why? He answered with a resigned shrug–"the Supreme Court is very liberal."

On February 28, 2017, President Donald Trump issued a Presidential Executive Order entitled: "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States Rule.'" In that Executive Order, he instructed the EPA and the Corps in all future rule-making, to consider interpreting the term "navigable waters" as defined in a manner consistent with the opinion of Justice Scalia in *Rapanos* v. *United States*.

In April 2017, NAHB urged the EPA to revise the Clean Water Act and the definition of what is and what is not "waters of the United States." NAHB assistant vice president, Michael Mittelholzer said that, "Over the years, the federal government has exerted more power over small streams that only flow when it rains, isolated ponds and many ditches, often times on questionable statutory and Constitutional grounds. As more features are deemed jurisdictional, more projects require federal permits." He went on to say that builders need a rule that provides clarity and increases administrative efficiency without unlawfully regulating every ditch, isolated pond or channel that only flows when it rains.

We may soon have one.

This concludes this series. If you would like to find out more, be sure to sign up for the Advanced Principles of Land Development course coming in March.

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