Environmental & Energy Advisory
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Supreme Court Requires “Significant Nexus” to Navigable Waters for Jurisdiction under Clean Water Act §404

On June 19, 2006, the Supreme Court handed down its decision in Rapanos v. United States, (No. 04-1034), a case that federal regulators, states, property rights activists and environmental groups all hoped would clarify whether, and the extent to which, the jurisdiction of the U.S. Army Corps of Engineers (“Corps”) under §404 of the Clean Water Act (“CWA”), 42 U.S.C. §1344, extends to wetlands and other non-navigable waters (such as ephemeral streams, dry washes, ditches, drains and channels that occasionally contain flowing water). There was no majority opinion in Rapanos, and Justice Kennedy’s concurring opinion will likely guide future interpretations of the Corps’ jurisdiction. The gist of Justice Kennedy’s opinion is that a wetland (and potentially any other non-navigable water) falls within the Corps’ jurisdiction only if it has a “significant nexus” to a navigable water. In the case of wetlands, this would occur if the wetland “alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity” of navigable waters. Slip op. at 22-23 (Kennedy, J., concurring). Justice Kennedy also wrote that in order to implement the “significant nexus” standard, the Corps must either promulgate new regulations consistent with the opinion or determine whether the standard is met on a case-by-case basis.

This Advisory explains the Supreme Court’s decision in Rapanos and provides an overview of the implications of the decision for property owners, developers and businesses that may need to wholly or partially fill wetlands and other non-navigable waters as part of their operations.

The Corps’ Traditionally Asserted Jurisdiction

Sections 301 and 502 of the CWA prohibit the discharge of dredged or fill material into “navigable waters” unless such discharge is authorized by a permit issued by the Corps pursuant to §404(a). The CWA defines “navigable waters,” in relevant part, as “waters of the United States.” 33 U.S.C. §1362(7). Accordingly, the Corps’ jurisdiction under §404 is limited to dredged and fill material discharged into the “waters of the United States.”

The Corps’ longstanding regulations implementing §404 extend the definition of the “waters of the United States” to the outer limits of Congress’ commerce power. The Corps’ regulations assert jurisdiction not only over interstate waters and traditional...
“navigable” waters (i.e., waters which are used, or have been used in the past, or are susceptible for use in carrying interstate commerce), but also over virtually all intrastate waters that could conceivably affect commerce, including non-navigable tributaries, ephemeral streams, ditches and man-made channels that eventually connect (through other tributaries) with navigable waters. See 33 C.F.R. §328.3(a). The Corps’ regulations also encompass wetlands that are adjacent to any such “waters” denominated above. Id. at §328.3(a)(7). The Corps defines “adjacent wetlands” as those “bordering, contiguous to or neighboring” such waters. Id. at §328.3(c). The Corps’ regulations also expressly apply to wetlands separated from other waters of the United States by features such as man-made dikes or barriers, natural river berms, and beach dunes. Id.

The breadth of the Corps’ regulations has imposed a significant burden on property owners, developers, mining companies, farmers, and others who conduct operations on the land. Often, wetlands, ephemeral streams, dry washes, and ditches through which waters flow sporadically due to high precipitation must be filled as part of the development or use of real property. The Corps’ regulations have made such projects costly as a result of the need to obtain a §404 permit, with resulting delay and required mitigation. In his plurality opinion in Rapanos, Justice Scalia noted that the average applicant for an individual §404 permit spends 788 days and $271,596, and an applicant for a nationwide permit spends 313 days and $28,915 (not including the costs of mitigation or project design changes). Slip op. at 2. The private and public sector combined spend over $1.7 billion each year obtaining wetlands permits. Id.

While these costs are substantial, the benefits created by wetlands for the quality of navigable waters and their tributaries can also be significant. The Corps has determined that wetlands often provide habitat for aquatic animals, serve to filter and purify water draining into adjacent bodies of water, and prevent flooding and erosion by slowing the flow of surface runoff into lakes, rivers and streams. Slip op. at 20 (Kennedy, J., concurring).

Past U.S. Supreme Court Interpretations

Prior to Rapanos, the Supreme Court had considered the scope of the Corps’ §404 jurisdiction over non-navigable waters on two occasions.

In the 1985 case of United States v. Riverside Bayview Homes, Inc., the Supreme Court examined the language, policies, and history of the CWA and held that the Corps’ interpretation that “waters of the United States” encompass all wetlands adjacent to other bodies of water over which the Corps has jurisdiction was a permissible interpretation of §404. 474 U.S. 121, 135 (1985). The Court concluded that the “breadth of the federal regulatory authority contemplated by the [CWA] itself and the inherent difficulties in defining precise bounds to regulable waters” made the Corps’ ecological judgment about the relationship between navigable waters and their adjacent wetlands reasonable. Id. at 134. The Court clarified that its holding did not rest on a hydrological connection between the wetlands and adjacent bodies of water, and that its decision did not address the Corps’ jurisdiction over wetlands that are not adjacent navigable waters. Id. at 134, 131, n. 8.

In 2001, in Solid Waste Agency of Northern Cook County v. U.S. (“SWANCC”), the Supreme Court cut back on the Corps’ §404 jurisdiction by holding that the Corps could not assert jurisdiction over isolated ponds, merely because they may have been utilized
by migratory birds. 531 U.S. 159, 174 (2001). Although the SWANCC decision nominally dealt only with the “migratory bird” aspect of the Corps’ asserted jurisdiction (as the Corps had concluded that the site at issue did not qualify as wetlands), its wording undercut much of the reasoning of Riverside Bayview and suggested that a majority of the Supreme Court believed that the Corps only had jurisdiction over waters that are either “navigable” (i.e., that have been used in the past, are used at present, or are susceptible for use to carry commerce), are physically adjacent to such navigable waters or are direct tributaries to such navigable waters. See id. at 169-74. Nonetheless, the Corps did not alter its §404 regulations after the SWANCC decision and continued to assert jurisdiction over non-navigable waters (such as ephemeral streams and including adjacent wetlands) that eventually connect through other tributaries with navigable waters, and the lower courts by and large upheld that jurisdiction.1

The Rapanos Decision

The Rapanos case addressed an issue that was left unresolved by Riverside Bayview and SWANCC – namely, whether “waters of the United States” extends to wetlands that are not physically adjacent to waters that are navigable. The four-justice plurality opinion significantly limited the Corps’ jurisdiction over wetlands and other non-navigable waters. Specifically, the four-justice plurality held that the Corps’ jurisdiction under §404 extends only to those “relatively permanent, standing or continuously flowing bodies of water … that are described in ordinary parlance as ‘streams, … oceans, rivers, [and] lakes.’” Slip op. at 20. The plurality also specifically held that the Corps’ jurisdiction does not extend to “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” Id at 21.

Throughout its opinion, the plurality emphasized that the Corps has no jurisdiction over ephemeral streams, storm drains, or roadside ditches, regardless of whether waters might flow occasionally through such channels and reach navigable waters. The plurality also held that the Corps may assert jurisdiction over wetlands only if: (i) the wetlands are physically adjacent to “waters of the United States” (as defined above); and (ii) the wetland has a continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins. Id. at 24.

As noted above, however, the plurality decision was signed by only four justices. The necessary fifth vote to reverse the lower court in Rapanos was provided by Justice Kennedy, who wrote his own concurring opinion. Justice Kennedy wrote that whether or not a wetland falls within the Corps’ jurisdiction will depend upon whether it has a “significant nexus” to navigable waters. Slip op. at 22-23 (Kennedy, J., concurring). According to Justice Kennedy’s opinion, the requisite “nexus” will exist, and thus a particular wetland could constitute a water subject to the Corps jurisdiction, if the wetland “alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity” of navigable waters. Id. at 23. On the other hand, when the effect of the wetland on water quality in a

1 See e.g., United States v. Rapanos, 376 F.3d 629, 639 (6th Cir. 2004); Carabell v. U.S. Army Corps of Engineers, 391 F.3d 704, 708 (6th Cir. 2004); Treacy v. Newdunn Assoc., LLP, 344 F.3d 407, 415 (4th Cir. 2003); United States v. Deaton, 332 F.3d 698, 702 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004); United States v. Rueth Dev. Co., 335 F.3d 598, 604 (7th Cir. 2003), cert. denied, 540 U.S. 1050 (2003); Headwaters v. Talent Irrigation District, 243 F.3d 526, 533-34 (9th Cir. 2001).
navigable water is “speculative or insubstantial,” then the non-navigable water will not fall within the Corps’ jurisdiction. *Id.*

Since Justice Kennedy’s holding is narrower than that of the plurality, practically speaking, it will be Justice Kennedy’s opinion that the lower courts will follow in determining whether the Corps has jurisdiction over a particular wetland. That is, if a wetland is deemed to fall outside of the Corps’ jurisdiction under Justice Kennedy’s “significant nexus” test, it will also fall outside of the Corps’ jurisdiction as interpreted by the four-justice plurality, with the result that five justices of the Supreme Court would hold that there is no Corps jurisdiction. Conversely, if a particular wetland does in fact satisfy Justice Kennedy’s “significant nexus” test, both Justice Kennedy, and the four justices dissenting in *Rapanos*, would hold that the Corps does have jurisdiction.

Consistent with the holding of *Riverside Bayview*, Justice Kennedy determined that wetlands physically adjacent to navigable waters always satisfy the “significant nexus” test. *Id.* Justice Kennedy also stated that wetlands adjacent to “certain major tributaries” may satisfy the “significant nexus” test simply due to their adjacency to these tributaries. *Id.* at 24. However, Justice Kennedy concluded that the current Corps’ standard for determining whether a water is a tributary (if it feeds into a navigable water (or a tributary thereof) and possesses an ordinary high-water mark) is insufficient to determine whether the wetlands adjacent to that tributary satisfy the “significant nexus” test because it is not specific enough to determine whether the wetlands are likely to play an important role in the integrity of an aquatic system that includes navigable waters. *Id.* at 24-25. As a result, Justice Kennedy held that absent new regulations that are sufficiently specific to satisfy the “significant nexus” test, the Corps must establish a “significant nexus” on a case-by-case basis when it seeks to regulate wetlands adjacent to non-navigable waters. *Id.* at 25.

Justice Kennedy also noted that “where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.” *Id.* Through regulation, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system that includes navigable waters, and therefore fall within the Corps’ jurisdiction. *Id.* at 24.

Justice Kennedy made clear that the evidence used to determine whether a “significant nexus” exists must be substantial as opposed to speculative. *Id.* at 23. In other words, evidence that wetlands merely have the “potential” to serve the interests noted above may not be sufficient. *Id.* at 29. In addition, as formulated by Justice Kennedy, the “significant nexus” test is not satisfied by a mere hydrologic connection between the wetlands and navigable waters. *Id.* at 28. Likewise, a hydrologic requirement is not *required* to establish a “significant nexus.” *Id.* at 29.

**Implications of *Rapanos***

The Corps has not had an opportunity to state how it will implement *Rapanos*. If the Corps were to follow the plurality opinion, it would not assert jurisdiction over any non-navigable waters (such as ephemeral streams, dry washes and ditches) through which water does not continuously flow or over wetlands that are not physically adjacent to
perennial streams and waters. This would obviously be favorable to property owners, developers, mining companies, farmers, and others that construct on, develop, or otherwise use land because they would not need to obtain §404 permits in order to deposit dredge or fill material in such areas for construction or development purposes.

If the Corps were to follow Justice Kennedy’s concurrence, which seems likely, it henceforth must establish a “significant nexus” on a case-by-case basis between wetlands and a navigable water before it asserts jurisdiction, unless or until it modifies its regulations. Justice Breyer, in his separate dissent in Rapanos, stated that “today’s opinions, taken together, call for the [Corps] to write new regulations, and speedily so,” in order to avoid lower courts having to decide whether a “significant nexus” exists on an ad hoc basis. Slip op. at 2 (Breyer, J., dissenting).

Whether or not the Corps revises its regulations, a property owner, developer, or business seeking to construct or develop land may now raise arguments, depending on the facts of a particular case, that a particular wetland does not provide (or that there is insufficient evidence that it provides) (i) habitat for aquatic wildlife, (ii) sediment and pollution trapping, (iii) nutrient recycling, (iv) flood peak reduction, and/or (v) reduction flow water augmentation that implicates a navigable water. Of course, given the subjective nature of the “significant nexus” test, even where the Corps concludes that a significant nexus does not exist, environmental groups may seek to delay projects by attempting to mount challenges in the courts. Moreover, assuming that the Corps determines to implement the “significant nexus” test on a case-by-case basis, results are likely to be inconsistent due to difficulties in administering the standard.

Justice Kennedy’s opinion does not specifically state whether non-navigable waters other than wetlands (such as ephemeral streams, dry washes, ditches, or drains and channels that occasionally contain flowing water), must also have a “significant nexus” with navigable waters in order to fall within the Corps’ jurisdiction. That result, however, would seem to follow from his reasoning. Thus, property owners, developers, and other regulated entities may, and should, raise arguments, where the facts so warrant, that the flow through particular non-navigable waters is so infrequent, is so low in volume, contains so few “contaminants,” and/or is so far from a navigable water, that it would not significantly affect the quality of the navigable water, and thus is not subject to the Corps’ jurisdiction.

Given the administrative difficulty and inconsistencies inherent in implementing a case-by-case process, it is likely that the Corps will issue regulations consistent with Justice Kennedy’s concurring opinion. Indeed, Justice Roberts, in his concurring opinion in Rapanos, chastised the Corps for not having promulgated new regulations refining its view of its “essentially boundless” authority in light of the 2001 SWANCC decision. Slip op. at 2 (Roberts, J., concurring).

**Conclusion**

The practical result of the Supreme Court’s decision in Rapanos is that lower courts will follow Justice Kennedy’s “significant nexus” test in determining whether the Corps has jurisdiction over a particular wetland. Accordingly, the courts will determine whether the wetland “alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity” of navigable waters or if the effect of the wetland on water quality in a navigable water is “speculative or
insubstantial.” If the wetland significantly affects the chemical, physical, and biological integrity of navigable waters, the Corps has jurisdiction over the wetland under §404.

Property owners, developers and businesses may now challenge the Corps’ jurisdiction over particular wetlands, and possibly over other non-navigable waters (such as ephemeral streams, dry washes and ditches), where the site-specific facts demonstrate that the wetlands or other non-navigable waters do not significantly affect the aquatic system of navigable waters.

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