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Client Alert

The Long-Awaited *Rapanos* Decision Narrows Clean Water Act Jurisdiction Over Wetlands and Tributaries, But Leaves Important Questions Unresolved

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On June 19, 2006, a sharply divided U.S. Supreme Court issued its highly anticipated decision regarding the scope of jurisdiction under federal Clean Water Act Section 404 governing filling of wetlands and other discharges of dredged or fill material into “waters of the United States.” The Court overruled the Sixth Circuit Court of Appeals and rejected assertion of jurisdiction by the U.S. Army Corps of Engineers (“Corps”) over wetlands located on lands owned by Michigan developers John Rapanos and June and Keith Carabell.

In remanding the cases for further consideration, a majority of the Court rejected the “any hydrological connection” test for jurisdiction that the Corps currently applies to “remote” wetlands, i.e., wetlands that are not adjacent to other jurisdictional “waters of the United States.” This decision signals an important narrowing of jurisdiction over remote wetlands and tributaries to navigable waters. However, the majority could not agree on the jurisdictional test that should be applied, leaving many significant issues to be resolved by the Corps, the Environmental Protection Agency (“EPA”) and the lower courts.

Background

Under the Clean Water Act Section 404, a permit from the Corps is required for any discharge of dredged or fill material to “navigable waters,” which the Act in turn defines as the “waters of the United States.” Corps regulations construe “waters of the United States” to include not only traditional navigable waters, but also tributaries of those waters and wetlands adjacent to those waters or their tributaries. 33 CFR § 328.3(a). This regulation, and the Corps’ interpretation that any hydrological connection to traditional navigable waters through adjacent tributaries is sufficient to establish jurisdiction, were at issue in the joint cases before the Supreme Court—*Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*.

Prior to *Rapanos* and *Carabell* (hereinafter jointly referred to as “*Rapanos*”), the Supreme Court had decided two significant Clean Water Act cases concerning the extent of Section 404 jurisdiction over wetlands—*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (“*Riverside Bayview*”), and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”). In *Riverside Bayview*, the Court upheld the Corps’ assertion of jurisdiction over wetlands that are adjacent to traditional navigable waters. In *SWANCC*, the Court ruled that Section 404 jurisdiction does not extend to wetlands physically isolated from traditional navigable waters where jurisdiction is premised solely on the presence of migratory bird species. In that case, the Court refused to apply the Clean Water Act to a nonnavigable, isolated intrastate pond, holding that the isolated wetlands lacked a “sufficient nexus” to any navigable waters.

After the Supreme Court decided *SWANCC* in 2001, the Corps proposed but abandoned a rulemaking process to clarify its jurisdiction. Since then, the Corp has consistently asserted jurisdiction over wetlands that have essentially any hydrological connection to traditional navigable waters through adjacent or nearby nonnavigable tributaries. The Corps has treated a wide variety of water conveying features as regulated tributaries, including ephemeral channels and storm drains. In the *Rapanos* cases, the Corps asserted jurisdiction over relatively remote wetlands, hydrologically connected to traditional navigable waters by means of surface drains or ditches that flowed into “tributaries” of traditional navigable waters. The Sixth Circuit upheld the Corps’ application of its “any hydrological connection” test.

The Supreme Court’s Decision

The issue in *Rapanos* was whether Clean Water Act jurisdiction extends to wetlands that are adjacent to **nonnavigable** tributaries of navigable waters. The *Rapanos* wetlands fell between the jurisdictional coverage of *Riverside Bayview* (wetlands adjacent to traditional navigable waters) and the exclusion of coverage under *SWANCC* (wetlands that are physically and hydrologically isolated from traditional navigable waters).

In a highly fractured decision, the Supreme Court vacated the Court of Appeals’ decision and remanded the case for reconsideration. A majority of the Court rejected the Sixth Circuit’s holding that essentially any hydrological connection is sufficient to establish jurisdiction where the wetlands are not adjacent to traditional navigable waters. Unfortunately, that majority could not agree on the proper jurisdictional test for such wetlands and the connecting tributaries.

Justices Thomas, Roberts, and Alito joined in a plurality opinion authored by Justice Scalia that set forth a new two-part jurisdictional test. Justice Kennedy wrote a separate opinion concurring in the judgment but disagreeing with the plurality’s new jurisdictional test and advocating an alternative. Justices Breyer, Ginsburg, and Souter joined in a dissent authored by Justice Stevens. Finally, Justices Roberts and Breyer authored separate concurring and dissenting opinions, respectively.

The Plurality Opinion. The plurality’s opinion advocated a significant limiting of Corps jurisdiction but did not go so far as to limit jurisdiction to traditional navigable waters as advocated by the *Rapanos* petitioners. The plurality concluded that Corps jurisdiction may extend to relatively remote wetlands that are not adjacent to traditional navigable water bodies, but under much more limited circumstances than the Corps’ “any connection” test would allow. The plurality established a two-part test for determining Corps jurisdiction in such cases.

First, such a wetland must be adjacent to a relatively permanent, continuous flowing waterbody, i.e., a tributary that qualifies as “waters of the United States” in its own right. The plurality relied on a dictionary definition of “waters” to develop this element of its test:

“waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams[,] . . . oceans, rivers, [and] lakes.” . . . The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. Plurality Opinion at 20-21.

The plurality defended its requirement for a relatively permanent, continuous flow against criticism of Justice Kennedy and the dissent:

The restriction of “the waters of the United States” to exclude 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, and dry arroyos in the middle of the desert, the Corps has stretched the term waters of the United States beyond parody. The plain language of the statute simply does not authorize this “Land Is Waters” approach to federal jurisdiction. Plurality Opinion at 15.¹

The plurality expressly disavowed the relevance of any other form of hydrologic or ecological connection between a remote wetland and a traditional navigable body of water.

Second, the wetland must have “a continuous surface connection” with the adjacent jurisdictional water, “so that there is no clear demarcation” between “where the ‘water’ ends and the ‘wetland’ begins.” This requirement was based on the plurality’s conclusion that the “difficulty of delineating the boundary between water and land was central to” the reasoning in *Riverside Bayview, Id.* at 22-24.

The plurality opinion rejected Justice Kennedy’s argument that *SWANCC* and the “nexus” principle he derived from it control the *Rapanos* case.

Justice Kennedy’s Concurring Opinion. Justice Kennedy concurred with the plurality in the decision to remand the cases. Also like the plurality, Justice Kennedy asserted that a mere “hydrological connection” between a wetland and a traditional navigable body of water would be insufficient to establish jurisdiction or provide the requisite nexus. He raised similar concerns as the plurality regarding the Corps’ broad interpretation of jurisdictional “tributaries.” For example, he rejected the notion that the existence of an Ordinary High Water Mark alone could be the deciding factor in determining whether a connecting tributary could provide a sufficient relationship between a traditional navigable water and the wetland at issue. He argued that the dissent’s reading of Corps jurisdiction on this issue was too broad, allowing Corps regulation “whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.” Justice Kennedy Concurring Opinion at 22.



¹ However, in establishing the “relatively permanent, continuous flow” requirement, the plurality specifically stated that its test “does not necessarily exclude seasonal rivers,” i.e., rivers that do not flow during dry months. The plurality argued that “[c]ommon sense and common usage distinguish between a wash and a river.” Plurality Opinion at 14, fn. 5.

Nevertheless, Justice Kennedy objected to the plurality's jurisdictional test as inconsistent with *SWANCC* and *Riverside Bayview*. He asserted that such remote wetlands should be subject to Corps jurisdiction only if a "significant nexus" exists with traditional navigable waters. Justice Kennedy looked to the *SWANCC* decision as authority for his significant nexus test, but he tied the nexus to the background and purposes of the Clean Water Act. Specifically, he asserted that a significant nexus would exist:

if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." Kennedy Concurring Opinion at 23.

According to Justice Kennedy, his ecological connection test generally would have to be applied on a case-by-case basis.² However, he also argued that the Corps could, through rulemaking, properly establish categories of tributaries that "are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system" and, therefore, would be deemed to have the requisite nexus without a case-by-case determination. *Id.* at 24. The Corps could consider annual or average volume of flow and proximity to traditional navigable waters and other relevant considerations in establishing such categories.

Justice Stevens' Dissent. Justice Stevens' dissenting opinion heavily criticized the plurality opinion authored by Justice Scalia while expressing more limited disagreement with Justice Kennedy's concurrence. According to Justice Stevens, the Corps' decision to regulate remote wetlands connected only by any hydrological connection to navigable waters was legitimate, in that such wetlands are so frequently essential to the ecological wellbeing of the watershed. Justice Stevens argued that the Corps' position reflected a reasonable interpretation of its statutory authority under the deferential standard of review of *Chevron v. Natural Resources Defense Council* 467 U.S. 837 (1984), and that a lengthy period of Congressional silence following the Corps' assertion of jurisdiction over similar wetlands was evidence of implicit Congressional approval. Justice Stevens dismissed any concerns that this jurisdiction might be overbroad in some cases, noting that the Corps had sufficient discretion to issue a permit to fill wetlands where the wetlands did not in fact have a sufficient ecological "significant nexus."

Implications of the Rapanos Decision

As Justice Roberts pointed out in his concurring opinion, the Court's failure to produce a majority opinion means that "no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act," which leaves the Corps and the lower courts to make jurisdictional determinations on a case-by-case basis. Chief Justice Roberts' Concurring Opinion at 2. Justice Stevens' guidance to the Sixth Circuit on remand may also guide the Corps' and other lower courts' applications of *Rapanos* in the future:

Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met. Stevens Dissenting Opinion at 26.

² Justice Kennedy asserted that the administrative records in the *Rapanos* and *Carabell* cases may contain sufficient information to satisfy his "significant nexus" test.

Under this view, the Corps' regulatory activities, and the lower courts' review of jurisdictional issues, may well be conducted under a two-step approach. In cases where the Corps can establish a continuous connection between the subject wetlands and adjacent tributaries, and in turn between those tributaries and navigable waters, the Corps could assert jurisdiction over the wetlands under the plurality opinion—without regard to the ultimate ecological impacts on downstream navigable waters. In cases where the Corps cannot establish that continuous connection, the Corps may base its jurisdictional determination on the significant ecological nexus test asserted by Justice Kennedy's concurring opinion.

In any case, assertions of Corps jurisdiction can be expected to narrow generally as a result of the Court's decision. One particularly significant aspect of the *Rapanos* decision is that both the plurality and Justice Kennedy's concurring opinion placed great emphasis on the **connection** between the remote wetland and traditional navigable waters. Under both opinions, the analysis focuses on the critical characteristics of the connecting tributary: whether it "has a relatively permanent, continuous flow" (according to the plurality) or "has a significant ecological nexus" to traditional navigable waters (according to the Kennedy concurrence). In so doing, the two opinions not only narrowed the scope of wetlands that may be considered jurisdictional, but also limited Corps jurisdiction over connecting tributaries themselves. Although much of the focus and controversy over Section 404 jurisdiction arises in relation to wetlands, there are significant independent regulatory implications of the Corps' assertion – and, therefore, the two opinions' narrowing – of jurisdiction over tributaries themselves.

The *Rapanos* limiting of jurisdiction over tributaries has significant regulatory implications for projects involving tributaries, e.g., for transportation projects involving crossings, bridges, highways, etc., over areas that carry water and, under the Corps' prior interpretation, were considered jurisdictional. Even with their different tests, the two opinions join in casting doubt on the future of Corps jurisdiction over the myriad of water-carrying features that have been found to be jurisdictional in the past: dry arroyos, man-made ditches, storm drains and culverts. Further, the opinions cast doubt on the interpretation of the Corps that jurisdiction in such areas extends to the Ordinary High Water Mark. See 33 CFR §328.3(e). There is no statutory or regulatory definition of tributary, but the Court's decision could prompt the Corps to develop a regulatory definition of this key term in rulemaking.

On the subject of rulemaking, all the opinions issued in this case either criticized the Corps for not conducting a rulemaking to define its jurisdiction properly after *SWANCC*, or debated the need for future rulemaking to address the jurisdictional issues raised in this decision. Such a rulemaking would no doubt be as controversial as the one considered by the Corps after *SWANCC*. In any case, we can expect the Corps to be pre-occupied with developing its approach for implementing the *Rapanos* decision over the coming weeks and months, whether it is by rulemaking or other administrative practice.

Ultimately, in the wake of a split decision in which the Court both provided answers and raised issues, there is only one certain result of the *Rapanos* decision: continued litigation and administrative challenges regarding the scope of the Clean Water Act. Lower courts have already begun to apply the Court's decision, with implications well beyond the Clean Water Act Section 404 program. For example, on June 28, 2006, the United States District Court for the Northern District of Texas ruled against the United States in an enforcement action alleging violations of the 1990 Oil Pollution Act ("OPA 90") amendments to the Clean Water Act. Based in part on the *Rapanos* case, the Court held that a tributary with only intermittent flows was not a jurisdictional "navigable water" under OPA 90. *United States v. Chevron Pipe Line Co.*, Civ. Action No. 5:05-CV-293-C (N.D.Tex., 2006).

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