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More Precision on Wetlands

Impact of the Supreme Court's decision to impose tougher constraints on the Corps

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In a highly divided opinion, Justice Anthony Kennedy issued what many, but not all, subsequent court decisions have called the controlling decision in the consolidated cases titled *Rapanos v. United States* and *Carabell v. United States*, 126 S.Ct. 2208 (2006). Justice Kennedy joined in the opinion issued by Justice Antonin Scalia, but developed a case-by-case approach rather than Scalia's more limiting dictate.

Rapanos comes four years after the *Solid Waste Agency of Northern Cook County*, 531 U.S. 159 (2001) (*SWANCC*), opinion where the high court reigned in the Corps' sweeping jurisdiction under § 404 of the Clean Water Act over ponds that are not adjacent to navigable waters based on use of the ponds by migratory birds. Frustrated by the Corps' continued sweeping jurisdictional assertions, Justice Scalia, in the plurality joined by Chief Justice John Roberts Jr., Justice Clarence Thomas and Justice Samuel Alito Jr.,

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criticized the Corps' application of its jurisdiction over "ephemeral channels and drains as tributaries." Narrowing the current Corps' jurisdictional reach, Justice Scalia held that only those wetlands that have a continuous surface connection to navigable in-fact waters would be subject to the Corps' reach.

Under the plurality's view, wetlands with only an intermittent connection would *not* fall within the scope of the Corps' jurisdiction. In his concurring opinion, Justice Kennedy offered a fact-based test for wetlands jurisdiction, finding that wetlands adjacent to non-navigable tributaries, with a significant nexus to traditionally navigable waters, can still be regulated by the Corps.

Although not as clear-cut as Justice Scalia's limitation of the Corps' present jurisdictional reach, Justice Kennedy's opinion sets out additional limiting factors and parameters for determining jurisdiction over wetlands that are not directly adjacent to navigable water. On the other side, a minority of four justices, lead by Justice Stevens, defended the Corps' power to regulate wetlands regardless of whether the wetlands were adjacent to traditionally navigable water or their tributaries if the wetlands perform functions generally associated with wetlands. The Stevens dissent held that the Court must defer to what it called a "quintessential example of the Executive's reasonable interpretation of a statutory provision."

The high court's disagreement about the approach for future wetlands regulation spells further uncertainty in which wetlands fall within the Corps' purview. Chief Justice Roberts forecasted that "lower courts and regulated entities will now have to feel their way on a case-by-case basis." Several Justices urged the Corps to clarify the current regulations. *See Rapanos*, 126 S.Ct. at 2236

Justice Robert's prediction that the *Rapanos* decision will spark further confusion has since proven true. Although on Sept. 26, 2006, the Corps issued its proposal to reissue and modify the entire nationwide permit program, the proposed changes stemming from the *Rapanos* decision were unclear. *See Federal Register*, Volume 71, Number 186 at 56258. The Corps intends to publish the revised nationwide permit rules in January 2007, and the new rules will become effective 60 days thereafter.

While acknowledging the *Rapanos* decision, the Corps has, to date, failed to provide any specificity on how it intends to comply with the Court's ruling, except to generally state that it will address jurisdiction over intermittent and ephemeral streams and their adjacent wetlands "on a case-by-case basis in accordance with evolving case law and any future guidance that may be issued by appropriate Executive Branch agencies (e.g., the Department of Justice.) However, the Corps and the EPA are expected to issue joint guidance on the impact of the *Rapanos* deci-

sion in early 2007. This joint guidance will hopefully provide the much-needed clarity on how the Corps will address wetlands jurisdiction.

Evolving case law, which has relied on *Rapanos*, also fails to provide a consistent solution to the question of what lands remain under the Corps' jurisdiction. To begin with, because no opinion commanded the necessary five-justice majority, there has been no consensus among the lower courts as to which opinion should govern. While the Third Circuit has yet to apply *Rapanos*, the Ninth and Seventh Circuits have applied Justice Kennedy's "significant nexus" test. See *United States v. Gerke Excavating, Inc.*, 464 F.3d 742 (7th Cir. 2006); *No. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006). Recently, however, the First Circuit held that either the conservative plurality's opinion or Justice Kennedy's concurrence may be applied. See *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006). The *Johnson* opinion relied on Justice Stevens's instruction that jurisdiction should be determined where either test is satisfied in finding jurisdiction. By applying both tests, the *Johnson* court addresses the concern raised by Justice Stevens: that in the event that the plurality's test is met but Justice Kennedy's less stringent test is not, the plurality's test should be applied to ensure that the view of a majority of the Court is always applied. This may occur, for example, where a continuous surface connection exists, but under Justice Kennedy's test such connection does not create a "significant nexus."

One thing is clear: Until the Corps clarifies its regulations on this issue, the lower courts will struggle to define which test to apply and, if it chooses to apply the "significant nexus" test, what parameters should be applied. If the application of the *SWANCC* test is any indicator of what the future holds after *Rapanos*, it is likely that the lower courts will vary greatly in their application of the "significant nexus" test.

The plurality criticized what it termed the Corps' seemingly boundless

jurisdictional reach. Narrowing the current Corps' jurisdictional reach, Justice Scalia held that only those wetlands that have a continuous surface connection to navigable in-fact waters would be subject to the Corps' reach. Under the plurality's view, intermittent or only "hydrologically connected" wetlands would not fall within the scope of the Corps' jurisdiction.

The Scalia opinion focuses on the traditional navigable waters to reach its finding that only permanent and continuous surface waters can provide the necessary connection to confer jurisdiction over adjacent wetlands. Notably, the plurality opinion rejected outright the Corps' jurisdiction over wetlands connected 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," further noting that the statute simply does not authorize this "Land Is Water" approach to federal jurisdiction. Stating that the Corps' interpretation "stretches the outer limits of Congress's commerce powers," the plurality concluded that only wetlands adjacent to relatively permanent, standing or continuously flowing bodies of water that have the features of navigable in-fact waters — streams, oceans, rivers and lakes — can be regulated by the Corps. Thus, under the plurality's view, only those wetlands with a continuous surface connection to waters of the United States are subject to the Corps' jurisdiction.

Judge Kennedy's "significant nexus" approach is less clear-cut than the plurality's approach, and significantly more difficult to apply. What is the "significant nexus" test? How is it likely to change the Corps' present jurisdictional approach? Justice Kennedy voted to remand the *Rapanos* and *Carabells* cases to be reconsidered under the significant nexus requirements. The Kennedy concurrence holds that the Corps jurisdiction over wetlands "depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." The sig-

nificant nexus exists "if the wetlands, either alone, or with other similarly situated lands in the region, significantly affects the chemical, physical and biological integrity of other covered waters more readily understood as navigable."

If the wetlands' effects on water quality are "speculative or insubstantial" they are not covered under the Clean Water Act. Defining the "significant nexus" requirement, Justice Kennedy rejected the Corps' approach that it had jurisdiction over wetlands that were adjacent to tributaries that were connected to navigable in-fact waters, irrespective of how remote or insubstantial these tributaries. Holding that the breadth of the current standard "leaves room for regulation of drains, ditches and streams remote from any navigable in fact water and carrying only minor water-volumes towards it" does not conclusively demonstrate that these wetlands play an important ecological role to the navigable in-fact waters. Justice Kennedy urged the Corps to "identify tributaries" based on: (1) volume of flow; (2) proximity to navigable waters; or (3) other relevant factors which are significant enough so that adjacent wetlands would perform important functions for navigable waters. Justice Kennedy further focused on wetland's filtering and runoff control functions, noting that filling such wetlands may lead to increased pollution and affect traditional navigable waters.

How will *Rapanos* impact the Corps' jurisdictional approach in New Jersey? To date, no court in this jurisdiction has addressed the impact of *Rapanos*. Since 1994 when New Jersey assumed the § 404 process, the Corps has typically regulated wetlands in New Jersey if located in the area of the New Jersey Meadowlands Commission or if located within 1,000 feet of a tidal body of water. The Corps has until now regulated wetlands in those areas even where the wetlands are isolated, i.e., not connected to any body of water. After *Rapanos*, regardless of which test — the more stringent plurality or the case-by-case approach supported by the concur-

rence — it is clear that the Corps' blanket approach will need to be revised. The plurality provides a more bright-line test where only those wetlands with a continuous surface connection to waters with a relatively permanent body of water connection to a traditionally navigable waterways would be impacted. Application of this test will prohibit regulation of isolated wetlands.

Justice Kennedy, however, while he did not completely eliminate reliance on a hydrological connection between a wetlands and navigable in fact waters, has created a requirement that the quantity and regularity of flow in the adjacent nonnavigable tributaries is an important factor in establishing juris-

diction. In certain cases, however, Justice Kennedy and the dissenters would both allow regulation of isolated wetlands. To meet the Kennedy standard, however, the Corps will need to go the extra step and establish the existence of the factors enumerated in the Kennedy concurrence. Although Justice Kennedy has tried to provide some guidance of what factors will be important to establish a significant nexus, as lamented by several of the other Justices, Kennedy's concurrence fails to provide a bright line test and is likely to result in further confusion and additional litigation.

Although the new nationwide permit rules are not likely to

address *Rapanos*, the joint EPA and CORPS guidelines, which will likely be issued in January 2007, should offer some needed clarity. Another potential is that the courts in this district will soon provide some additional guidance on how isolated wetlands and wetlands next to ephemeral and intermittent streams should be treated. At a minimum, though *Rapanos* provides some confidence that the Corps' current, seemingly limitless jurisdictional reach over remote wetlands has been reigned in by the high court. And if history is any indicator, further wetlands decisions by the Supreme Court are inevitable. ■