Rapanos v. United States, What Does It Mean?[1]

By
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INTRODUCTION

The Clean Water Act prohibits the discharge of pollutants, including dredged and fill material, into "navigable waters"[3] without a federal permit and defines the term "navigable waters" as "waters of the United States."[4] The Army Corps of Engineers and the Environmental Protection Agency interpreted "navigable waters" to cover virtually any area over which water flows, including the shallow "wetlands" on Mr. Rapanos' Michigan lots. When Mr. Rapanos filled his wetlands without authorization, he was charged with a violation of the Act. In one instance, the district court found Mr. Rapanos liable because the "wetlands" on his property were deemed adjacent to a tributary (i.e., a nonnavigable, manmade drainage ditch) that flowed through a series of conduits to a navigable-in-fact waterway up to twenty miles away.[5] The Sixth Circuit Court of Appeals upheld the district court determination and ruled that any hydrological connection with a traditional navigable water was sufficient for federal jurisdiction no matter how remote or insubstantial the connection.[6] On June 19, 2006, the U.S. Supreme Court reversed the Sixth Circuit decision and invalidated the agencies' interpretation.[7]

THE VOTE

In a rare, but not unheard of, situation, the Supreme Court split with three different rationales and a 4-1-4 vote. Nevertheless, a clear majority emerged in favor of Rapanos. Five of the nine justices voted to overturn the court below. While the court did not provide a clear delineation of federal jurisdiction under the Clean Water Act, the court did unequivocally reject the government's extravagant claim of authority over virtually all waters and much of the land in the Nation. As Chief Justice Roberts put it, rather than follow the court's lead in a previous case limiting federal authority under the Clean Water Act, "the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."[8] In less charitable phraseology, Justice Scalia stated:

> 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.[9]

In the end, four Justices, forming a plurality on the court, determined the language, structure, and purpose of the Clean Water Act required limiting federal authority to "relatively permanent, standing or continuously flowing bodies of water" traditionally recognized as "streams, oceans, rivers and lakes" that are connected to traditional navigable waters.[10] These

Justices (Scalia, Thomas, Alito, and Roberts) would also authorize federal regulation of wetlands abutting these water bodies if they contain a continuous surface water connection such that the wetland and water body are "indistinguishable."[11] Four justices in the dissent took the view that the agencies could choose to regulate essentially any waters (and much of the land) to advance the statutory goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters."[12] Justice Kennedy, on the other hand, acted alone and proposed a "significant nexus" test for determining federal Clean Water Act jurisdiction.[13] Under this test, a water body would be subject to federal regulation only if that water body would significantly affect a navigable-in-fact waterway.[14] Justice Kennedy would exclude from regulation remote drains, ditches, and streams with insubstantial flows and reject speculative evidence of a "significant nexus." [15]

WARRING JUDICIAL PHILOSOPHIES

The court's disparate opinions derive from a difference in judicial philosophy. The dissent, authored by Justice Stevens, and joined by Justices Souter, Ginsberg, and Breyer, stands ready to uphold any regulatory interpretation of the statute that would further the agency's perception of the overall purpose of the Act whereas the Scalia plurality believes the scope of the Clean Water Act must be consistent with the statutory language. The problem with the dissent's "ends-justifies-the-means" approach, as the Scalia plurality points out, is that it "substitute[s] the purpose of the statute for its text."[16] Justice Scalia does not mince words in his condemnation of this interpretive philosophy:

> And as for advancing "the purposes of the Act": We have often criticized that last resort of extravagant interpretation, noting that no law pursues its purpose at all costs, and that the textual limitations upon a law's scope are no less a part of its "purpose" than its substantive authorizations.[17]

The "textual limitation" in the Clean Water Act to which Justice Scalia refers is Congress' use of the term "navigable waters." That term has to mean something. Even Justice Kennedy, who parts ways with Justice Scalia on the scope of the Act, castigates Justice Stevens for reading the term right out of the statute.[18]

Implicit in the plurality's unwillingness to issue the Corps and EPA a regulatory blank check is the recognition that freewheeling regulation is incompatible with the "rule-of-law." The "rule-of-law," like "separation of powers" with its inherent limits on federal authority, is a fundamental safeguard against arbitrary government and ensures that the means of accomplishing the desired ends (no matter how laudable) are fair, consistent, predictable, and orderly–protections currently lacking in enforcement of the Clean Water Act.

Beyond this, the "purpose" of the act is often in the eye of the beholder. While Justice Stevens sees clear congressional intent in the statutory declaration that the objective of the Clean Water Act "is to restore and maintain the chemical, physical, and biological integrity of the Nations' waters,"[19] Justice Scalia sees clear congressional intent in the statutory declaration that

the objective is to be accomplished by specific means; namely, by eliminating "the discharge of pollutants into the navigable waters"[20] (as opposed to the Nation's waters) and pursuant to

> the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources...[21]

In light of these considerations, Justice Stevens' petulant accusation that the Scalia plurality is simply against environmentalism[22] falls flat. One wonders if Justice Stevens would advocate such broad agency deference if the Corps had stood by its original interpretation of the Clean Water Act in 1974 that the agency could only regulate traditional navigable waters.[23]

SO, WHAT'S COVERED AND WHAT'S NOT COVERED?

Putting aside the dissent, whose regulatory approach was defeated by a five justice majority, the *Rapanos* decision provides us with two different jurisdictional tests.

Jurisdictional Waters - Scalia Plurality

The Scalia plurality adopts a hydrographic test to define jurisdictional waters. Under this test "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,'" that are connected to navigable-in-fact waters, are subject to regulation under the Clean Water Act.[24] Although these water bodies can be either navigable-in-fact or nonnavigable and intrastate, they do "not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[25]

The Scalia plurality would exclude a long list of other waters and lands from federal jurisdiction, including:[26]

- nonnavigable, isolated, intrastate waters
- channels and streams with intermittent or ephemeral flows (but not seasonal flows)
- dry arroyos, coulees and washes
- directional sheet flow
- wet meadows
- storm sewers and culverts
- drain tiles
- man-made drainage ditches
- "point sources" such as pipes, ditches, channels, and conduits
- sewage treatment plants
- waterworks appurtenances such as mains, pipes, hydrants, machinery, and buildings.
- 100 year flood plain

Jurisdictional Waters - Kennedy Concurrence

The Kennedy concurrence adopts an affects test to define jurisdictional waters. Under this test only a water that possesses "a significant nexus to waters that are navigable-in-fact or that could reasonably be so made"are subject to regulation under the Clean Water Act.[27]

Justice Kennedy would exclude:

- nonnavigable, isolated, intrastate waters (such as certain ponds and mudflats)[28]
- remote drains, ditches and streams with insubstantial flows[29]

Jurisdictional Wetlands - Scalia Plurality

Under the Scalia plurality, "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and are covered by the Act."[30] The wetland must be "as a practical matter *indistinguishable*"[31] from the relatively permanent body of water and that water body itself must be "connected to traditional interstate navigable waters."[32]

The Scalia plurality rejects the agencies' regulatory definition that "adjacent" means "bordering, contiguous, or neighboring." Instead, the plurality adopts the ordinary meaning of the term–"adjacent" means abutting.[33]

Jurisdictional Wetlands - Kennedy Concurrence

Under the Kennedy concurrence, "When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish jurisdiction."[34] Categorical regulation of wetlands adjacent to "major tributaries" however, would require additional regulation or adjudication.[35]

"Absent more specific regulations ... the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[36] According to Justice Kennedy, this showing is necessary to avoid unreasonable applications of the statute such as the "regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it."[37] And, "a reviewing court must identify substantial evidence supporting the Corps' claims."[38] The agency cannot speculate; when "wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[39]

Justice Kennedy defines **"significant nexus"** in the context of wetland regulation: "Wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," 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."[40] This definition may include wetlands without an actual hydrological connection to navigable-in-fact waters (but presumably not wholly isolated).

HOW DOES *RAPANOS* AFFECT THE COURT'S PRIOR DECISIONS?

Riverside Bayview

To the Scalia plurality, the significance of *United States v. Riverside Bayview Homes, Inc.*[41], lies in its facts. In that case, the court had to determine if a wetland adjacent to a navigable-in-fact waterway was subject to regulation under the Clean Water Act. The circumstances were unique in that the marshy area was "characterized by saturated soil conditions and wetland vegetation [that] extended beyond the boundary of respondent's property to Black Creek, a navigable waterway."[42] The wetland and navigable waterway were so intertwined it was difficult to tell where the water ended and the land began.[43] Thus the court held: "Because respondents property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case."[44]

In *Rapanos*, the Scalia plurality uses the facts in *Riverside Bayview* as the "gold standard" for determining jurisdiction over adjacent wetlands: "the lower courts should determine ... whether the wetlands in question are 'adjacent' to [covered waters] in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview.*"[45]

Contrary to the plurality, the Stevens dissent relies on the broad language of the decision, particularly footnote 9, to justify complete deference to the agency interpretation of its Clean Water Act authority. But Justice Kennedy takes a position closer to the plurality. He points out that *Riverside Baview* "addressed no factual situation other than wetlands adjacent to navigable-in-fact waters" and concludes:

> The Corps' theory of jurisdiction in these consolidated cases–adjacency to tributaries, however remote and insubstantial–raises concerns that go beyond the holding in *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case.[46]

With a majority of the court sharing this view, *Riverside Bayview* can no longer be cited as holding that the Corps and EPA can regulate any wetland neighboring any tributary. But the case will surely be cited for its factual description of adjacent wetlands.

SWANCC

Like *Riverside Bayview* 16 years earlier, *Solid Waste Agency of Northern Cook County*

(SWANCC) v. U.S. Army Corps of Engineers[47] called on the Supreme Court to address a jurisdictional question under the Clean Water Act, but at the opposite end of the spectrum. Instead of wetlands "inseparably bound up" with navigable waters, the Corps sought to regulate shallow ponds that had absolutely no hydrological connection with any navigable waters.[48] The asserted basis for jurisdiction was the Corps' "Migratory Bird Rule" that authorized federal regulation of any waters that could be used by migratory birds.[49] Because the regulation of these "nonnavigable, isolated, intrastate water bodies" would read the term "navigable waters" out of the statute, the court invalidated the rule and rejected the Corps' broad interpretation of its regulatory authority.[50]

Post *SWANCC*, most of the lower courts that have addressed the scope of the Clean Water Act have routinely limited the case to its facts holding that the only effect of *SWANCC* was to invalidate the "Migratory Bird Rule" while the Corps continued to assert jurisdiction over isolated water bodies.[51] But the *Rapanos* decision brings some clarity to the issue.

In *Rapanos*, all nine Justices are in agreement as to the holding in *SWANCC*. The Scalia plurality[52], the Kennedy concurrence[53], as well as the Stevens dissent[54], all represent that *SWANCC* excluded "nonnavigable, isolated, intrastate water bodies" (like certain ponds and mudflats) from federal jurisdiction. This is a significant victory for landowners in its own right because of the prevalence of these water bodies on private lands.

With this unanimous reading of the result in *SWANCC*, that case can no longer be said to have merely invalidated the "Migratory Bird Rule."

DOES *RAPANOS* AFFECT SECTION 402 OR JUST 404?

Section 404(a) of the Clean Water Act covers dredged and fill activity while section 402 applies to other discharges; typically industrial pollutants under the EPA's National Pollutant Discharge Elimination System (NPDES) program. *Rapanos* was a 404 case but both sections utilize the same definition of "navigable waters."[55]

Justice Scalia acknowledges that the plurality's narrower definition of "navigable waters" would apply to section 402 but concludes it would not "significantly affect[] the enforcement of [§ 402]" because the "lower courts applying [§ 402] have not characterized intermittent channels as 'waters of the United States.'"[56]

> Moreover, the proof of downstream flow of pollutants required under [§ 402] appears substantially similar, if not identical, to the proof of a hydrological connection that would be required, on the Sixth Circuit's theory of jurisdiction, to prove that an upstream channel or wetland is a "water of the United States."[57]

"In either case," Justice Scalia continues, "the agency must prove that the contaminant-laden waters ultimately reach covered waters."[58]

Presumably, under the Kennedy "significant nexus" test, the agency would have the burden of demonstrating the discharge has entered a water body that significantly affects a navigable-in-fact water.

WITH A SPLIT DECISION LIKE THIS, WHICH OPINION CONTROLS?

In the 1977 case of *Marks v. United States*[59] the Supreme Court stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[60] While this rule has been difficult to apply in some cases, it is the only rule sanctioned by the Supreme Court for interpreting its split decisions.[61] "Narrowest grounds" has been interpreted to mean that opinion which is "a logical subset of other, broader opinions."[62] Put another way:

> The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rationale basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.[63]

In the *Rapanos* case, the Scalia plurality appears more narrowly drawn in that it is a logical subset of the Kennedy test. The narrow plurality test is more like strict scrutiny whereas the broader Kennedy test is more like rational basis. Even the dissent thought so:

> I assume that Justice Kennedy's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction, *but in the unlikely event that the plurality test is met but Justice Kennedy's is not*, courts should also uphold the Corps' jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test. [64]

Thus, under *Marks*, the Scalia plurality is controlling. This makes sense from a pragmatic standpoint as well because a water body that satisfies the plurality test would also satisfy the Kennedy test and even the dissent such that the jurisdictional determination would garner all nine votes on the Court for unanimous support.

If the plurality opinion is followed by the courts below, it would substantially curtail federal jurisdiction under the Clean Water Act.[65] If, on the other hand, Justice Kennedy's "significant nexus" test is adopted, the limitation on federal authority will vary on a case-by-case basis depending on whether the court gives the test a narrow or a broad reading.

WHAT HAPPENS WITH THE *RAPANOS* CASE NOW?

The Supreme Court vacated the Sixth Circuit opinion and remanded the case for further proceedings.

On remand, the Scalia plurality requires the courts to make two findings:

> First, that the adjacent channel contains a "wate[r] of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.[66]

Based on the current state of the record, the Rapanos properties are unlikely to meet this jurisdictional test because on two of the three sites there are intervening manmade drainage ditches and in all cases the evidence does not establish that these wetlands are as a practical matter indistinguishable from a stream, river or lake, the nearest of which is miles away.[67]

In contrast to the Scalia plurality, the Kennedy concurrence calls for the courts to determine if the regulated wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of" navigable-in-fact waters.[68]

Whether the Rapanos properties meet this test will depend on how broadly or narrowly the lower courts read the test. Although Justice Kennedy cited expert testimony in the record that the regulated wetlands may have a significant effect on downstream navigable-in-fact waters, the Justice noted that the government expert never did a site-specific analysis and that the record is currently inadequate to determine a jurisdictional connection.[69]

CONCLUSION

We can conclude the following from the *Rapanos* decision:

1. That federal agencies have no authority under the Clean Water Act to regulate truly isolated, nonnavigable, intrastate water bodies.

2. That federal agencies have no authority under the Clean Water Act to regulate any area merely because it has a hydrological connection with downstream navigable-in-fact waters.

3. That federal agencies have no authority under the Clean Water Act to regulate remote drains and ditches with insubstantial flows.

4. That the *Rapanos* decision applies to both the § 402 NPDES permit program of the Clean Water Act and the § 404 dredge and fill permit program..

5. That if the federal agencies or courts adopt the view of the Scalia plurality, federal jurisdiction under the Clean Water Act will end at "those relatively permanent, standing or continuously flowing bodies of water ... that are described in ordinary parlance as 'streams, oceans, rivers and lakes,'" as well as wetlands indistinguishable from these covered waters.

6. That if the federal agencies or courts adopt the view of the Kennedy concurrence, federal jurisdiction will extend to those waters and wetlands that possesses "a significant nexus to waters that are navigable-in-fact or that could reasonably be so made."

The *Rapanos* case significantly alters the scope of federal authority under the Clean Water Act. How significant will depend on the willingness of federal regulators and the lower courts to adhere to the Supreme Court's clear determination that the scope of federal power under the Clean Water Act has meaningful limits.

Endnotes

1. With some changes this article first appeared in Mealey's Litigation Report: Real Estate (July 2006).

2. Mr. Hopper is a principal attorney with the Pacific Legal Foundation who represented Mr. Rapanos in the U.S. Supreme Court.

3. 33 U.S.C. § 1344(a).

4. 33 U.S.C. § 1362(7).

5. See United *States v. Rapanos*, 190 F.Supp.2d 1011, 1012 (E.D. Mich. 2002).(This case involved three separate sites in the State of Michigan; the Salzburg, Hines Road, and Pine River sites. The first two included wetlands adjacent to nonnavigable manmade drainage ditches while the third was deemed "near" the Pine River, a nonnavigable waterway. All three sites were miles removed from any navigable-in-fact water body.)

6. See United States v. Rapanos, 376 F.3d 629, 639 (6th Cir. 2004).

7. *Rapanos v. United States*, 126 S.Ct. 2208 (2006) (*Rapanos* was consolidated with *Carabell v. United States*. That case involved wetlands separated from a nonnavigable manmade ditch by a berm such that there was no direct hydrological connection between the wetlands and the ditch. The ditch flowed eventually to Lake St Clair, a navigable-in-fact water body. Under federal regulations, wetlands adjacent to a tributary to a navigable-in-fact waterway are subject to federal jurisdiction even in the absence of a hydrological connection. See 33 CFR § 328.3(a)(5) and (7).)

8. *Id.* at 2236.

8. *Id.* at 2222.

10. *Id.* at 2221 and 2227 (Scalia, J.).

11. *Id.* at 2234.

12. *Id.* at 2252 *et seq.* (Stevens, J., dissenting).

13. *Id.* at 2236. (Kennedy, J., concurring in result).

14. *Id.* at 2248.

15. *Id.* at 2248-2249.

16. *Id.* at 2234.

17. *Id.* at 2232.

18. *Id.* at 2247.

19. 33 U.S.C. § 1251(a).

20. 33 U.S.C. § 1251(a)(1).

21. 33 U.S.C. § 1251(b).

22. *Rapanos*, 126 S.Ct. (Dissent at fn 8).

23. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 168 (2001).

24. *Rapanos*, 126 S.Ct. at 2225 -2227.

25. *Id.*

26. *Id.* at 2217-2223.

27. *Id.* at 2236.

28. *Id.* at 22404-2245.

29. *Id.* at 2248-2249.

30. *Id.* at 2226.

31. *Id*. at 2234.

32. *Id.* at 2227.

33. *Id.* at 2225-2226.

34. *Id.* at 2249.

35. *Id.* at 2248.

36. *Id.* at 2249.

37. *Id.*

38. *Id.* at 2251.

39. *Id.* at 2248.

40. *Id.* at 2248.

41. 474 U.S. 121 (1985).

42. *Id.* at 131.

43. *Id.* at 132.

44. *Id.* at 135.

45. *Rapanos*, 126 S.Ct. 2235.

46. *Id.* at 2248.

47. 531 U.S. 159 (2001).

48. *Id.* at 171.

49. *Id.* at 164.

50. *Id.* at 171-172.

51. *See*, for example, U.S. V. Rapanos, 376 F.3d 629, 637-638 (6th Cir. 2004).

52. *Id.* at 22217.

53. *Id.* at 2244.

54. *Id.* at 2256.

55. 33 U.S.C. § 1362(7).

56. *Rapanos*, 126 S.Ct. at 2227 .

57. *Id.* at 2228.

58. *Id.*

59. 430 U.S. 188 (1977).

60. *Id.* at 193.

61. *See In re Michael Francis Cook*, 322 B.R. 336, 341 (2005) ("The only approach approved by the Supreme Court is the 'narrowest grounds' approach.").

62. *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991)

63. Ken Kimura, *A Legitimacy Model For The Interpretation Of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-1604 (1992)

64. *Rapanos*, 126 S. Ct. at 2265 n.14. (Justice Stevens dissenting) (emphasis added)

65. This certainly proved true in the first case to apply the *Rapanos* decision. In *United States v. Chevron Pipe Line Company*, 437 F.Supp.2d 605 (N.D. Texas 2006), the district court determined Clean Water Act jurisdiction does not extend to a remote dry manmade drainage ditch. Rather than apply the Kennedy "significant nexus" test, which the court found ambiguous and without meaningful standards, the court elected to follow the Scalia plurality. But, for a contrary view see *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006)(petition for rehearing pending)(Kennedy test is controlling); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006)(Kennedy test is controlling); and, *United States v. Johnson*, 467 F.3d 56 (1st Cir 2006)(petition for rehearing pending)(jurisdiction may be established under either the plurality test or the Kennedy test).

66. *Id.* at 2227.

67. *Id.* at 2238 (Of course, the wetlands in *Carabell* would not meet the Scalia test because there is no surface water connection with any other body of water, permanent or otherwise.)

68. *Id.* at 2248.

69. *Id.* at 2250-2251.