

FEATURE ARTICLE

RAPANOS V. UNITED STATES AND CARABELL V. U.S. ARMY CORPS OF ENGINEERS: A REGULATORY SCHEME, A SPLINTERED DECISION AND A COURT IN FLUX

By Wendy Lee Bogdan

One of the many striking aspects of the United States Supreme Court's June 19, 2006 opinion in *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*, is an apparent contradiction. Legally, there are only a few circumstances in which the case will change determinations regarding whether a water resource is subject to the United States Army Corps of Engineers' (Corps) jurisdiction under the Clean Water Act. However, the case dramatically changes *how* that determination will be made, and also reveals the significant changes that are occurring within the United States Supreme Court itself. This article summarizes the Court's decision and then discusses how a case that on its face changes so little is at the center of so much change.

Background on *Rapanos* and the Corps' Implementation of the Clean Water Act

In *Rapanos*, the Court reviewed the Corps' definition of "waters of the United States" for purposes of the Clean Water Act. Specifically, the Court reviewed the Corps definition to determine whether Congress intended the phrase "waters of the United States" to extend to connected tributaries of navigable waters and wetlands adjacent to those tributaries. As discussed below, the Court ultimately sent the cases back to the lower court to apply a rule articulated by only one of the Court's nine justices.

Section 404 of the Clean Water Act requires that private, state, and federal entities obtain a permit from the Corps before discharging dredged or fill material into "waters of the United States." 33 U.S.C. § 1344; 33 C.F.R. §§ 320-330; 40 C.F.R. §§ 230-233.

Under the Corps' regulations, the term "waters of the United States" is expansively defined to include all waters currently used, used in the past, or susceptible to use in interstate or foreign commerce or that "could affect" interstate or foreign commerce. 33 C.F.R. § 328.3(a)(1). This includes traditional navigable waters, which are those waters that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or those that are presently used, have been used in the past, or may be susceptible to use to transport interstate or foreign commerce, as well as interstate waters including interstate wetlands.

In addition to these "traditional" navigable waters and interstate waters, the Corps' definition appears to include waters with a more tenuous connection to interstate or foreign commerce. These include all "other waters," such as *intrastate* lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and wetlands adjacent to any waters of the United States (other than waters that are themselves wetlands) *the use, degradation, or destruction of which could affect interstate or foreign commerce*. 33 C.F.R. § 328.3(a). In addition, the Corps' regulations define waters of the United States to include all impoundments of waters otherwise defined as waters of the United States, *tributaries of waters of the United States*, the territorial seas, and *wetlands adjacent to waters* (other than waters that are themselves wetlands) identified in the previous categories. 33 C.F.R. § 328.3(a). It is the Corps' interpretation of its jurisdiction over these intrastate waters, tributaries, and adjacent wetlands that has been the subject of much judicial interest.

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Summary of the *Rapanos* Decision

The *Rapanos* decision sent many attorneys back to their law school notes to recall the proper terms and rules for interpreting a splintered decision that includes no majority opinion, and in which Justices Scalia, Thomas, and Alito joined in a plurality opinion, Chief Justice Roberts authored a concurrence to that plurality opinion, Justice Kennedy concurred in the plurality opinion's judgment only, and Justices Stevens, Souter, Ginsburg and Breyer joined in a dissent.

In the plurality opinion, Justice Scalia joined by Justices Scalia, Thomas, and Alito determined waters of the United States include:

- 1). Tributaries to navigable waters, *only where water flows in a relatively permanent state, connecting to traditional interstate navigable waters*; and
- 2). Adjacent wetlands to tributaries, where there is a *continuous surface water connection* from the wetland to the tributary, making it difficult to determine where the water ends and the wetland begins.

Chief Justice Roberts' concurrence to the plurality opinion added a lament that the Corps had failed to revise its regulations in response to prior United States Supreme Court decisions regarding the scope of Clean Water Act jurisdiction.

In contrast, Justice Kennedy determined waters of the United States to include:

- 1). Wetlands adjacent to navigable in-in-fact waters.
- 2). Wetlands adjacent to nonnavigable tributaries where the Corps establishes a significant nexus on a case-by-case basis.
- 3). For purposes of (2), a significant nexus is established where the associated water resource significantly affects the chemical, physical, and biological integrity of waters that are navigable.

The dissent written by Justice Stevens and joined by Justices Souter, Ginsburg, and Breyer:

- 1). Upheld the Corps regulations defining waters of the United States to include wetlands adjacent to tributary of navigable waters.

- 2). Stated that on remand Corps jurisdiction should be upheld if either Justice Scalia's or Justice Roberts test is met.

Justice Breyer wrote a separate dissent noting that the *Rapanos* decision calls for the Corps to "speedily" write new regulations.

Without invalidating the Corps' regulations, both the plurality's opinion authored by Justice Scalia and Justice Kennedy's opinion strenuously encouraged the Corps to revise its regulations.

Given this splintered decision, Justice Kennedy's decision will be the one that has precedential value. Where there is no majority, the holding of the Court is the position taken by those members who concurred in the judgment on the narrowest grounds. *Marks v. United States*, (1977) 430 U.S. 188, 193. In this case, Justice Kennedy is almost certainly the justice who concurred on the "narrowest grounds," as his decision requires a less sweeping change to the Corps' jurisdiction than does Justice Scalia's.

Implications of the *Rapanos* Decision—The Rule Set Forth by Justice Kennedy Changes the Outcome of Jurisdictional Determinations in Some, but Not Many, Circumstances

Despite all the arguments included within the 106-page decision, Justice Kennedy's rule will not change the outcome of jurisdictional determinations in many circumstances. One circumstance in which the rule will change the outcome includes intrastate wetlands that are isolated from navigable waters, where there is evidence that the placement of fill within those wetlands will significantly affect the chemical, physical, and biological integrity of waters that are navigable. Until *Rapanos*, such wetlands had arguably been "SWANCCed" out of jurisdiction. In other words, under the holding of *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), such waters were interpreted not to be jurisdictional, particularly where the presence of migratory birds provided the only connection to interstate commerce.

However, in *Rapanos*, Justice Kennedy interpreted SWANCC to hold that isolated wetlands can be jurisdictional where there is a "significant nexus" to navigable waters. Justice Kennedy specifically identified circumstances in which such a nexus would exist.

In many cases, moreover, filling in wetlands sepa-

rated from another water by a berm can mean that flood water, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps' definition of adjacency is a reasonable one, *for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.* (Emphasis added)

On the other hand, under Justice Kennedy's rule it is unlikely that the Corps could demonstrate a significant nexus between navigable waters and some water resources over which the Corps has previously exerted jurisdiction. Such a circumstance includes a wetland connected to a navigable water only through miles of ditch with minimal flow. Such wetlands have not been considered "isolated" and therefore have not been "SWANCCed" out of jurisdiction to date. However, under Justice Kennedy's rule it is unlikely that the Corps could determine that placement of fill within such a wetland would have a significant nexus to navigable waters.

Although Justice Kennedy's Test May Not Change the Outcome of Many Jurisdictional Determinations, It Significantly Changes the Approach to the Determination

Justice Kennedy's rule may significantly change the approach to determining which waters are jurisdictional under the Clean Water Act in that the rule arguably requires consideration of the discharge activity being proposed. In the past, the analysis of whether a water body constituted waters of the United States and, as a result, was jurisdictional under the Clean Water Act, was distinct from the analyses of the nature of discharge or the discharge material and whether that discharge was jurisdictional under the Clean Water Act.

In contrast, Justice Kennedy's rule set forth in *Rapanos* arguably requires consideration of the nature of the proposed discharge when determining whether a water resource constitutes "waters of the United States" under the Clean Water Act. A District Court case decided shortly after *Rapanos* illustrate this point.

In *United States v. Chevron Pile Line Company*, the United States District Court for the Northern District of Texas applied the *Rapanos* ruling to determine whether the spill of 3000 barrels of crude oil from a pipeline in an oil field constituted discharge of dredge

or fill into waters of the United States for purposes of the Clean Water Act. The oil migrated into an intermittent tributary where it ponded and then eventually into an intermittent stream named Ennis Creek. Ennis Creek, in turn, extends 17.5 miles to a confluence with an intermitted creek named Rough Creek, which extends 23.8 miles to a confluence with the Double Mountain Fork of the Brazos River. The evidence was inconclusive as to whether the Double Mountain Fork was navigable. The Double Mountain Fork then flows 82.2 miles to a confluence with the Brazos River. The Corps alleged that during times of flow, there was an unbroken surface water connection between the tributary creek into which the oil first migrated, and the Brazos River.

Between August 24, 000 and October 2000, Chevron removed oil on the surface as well as oil stained and saturated soil. Neither the tributary nor Ennis Creek contained any flowing surface water during that time period. However, the United States argued that there might have been some pooled waters present in either the tributary or Ennis Creek on August 25, 2000, and both parties agreed that rainfall resulted in water flow in the initial tributary by October 12, 2000. As of December 2000, some oil contaminated soil remained. The United States argued that the initial tributary was a "water of the United States" and subject to federal jurisdiction under the Clean Water Act.

In applying Justice Kennedy's test to decide a motion for summary judgment, the District Court evaluated whether there was a genuine issue of material fact as to whether any of the oil migrated to a navigable-in-fact water or was adjacent to an open body of navigable water. Because there was no evidence showing that oil from the spill reached navigable waters, the initial tributary was not "waters of the United States" and therefore was not subject to federal jurisdiction under the Clean Water Act.

What is significant about this case is that it highlights the potential role of *the discharge* in determining, under Justice Kennedy's test, whether a water body constitutes "waters of the United States." The court specifically considered whether there was evidence that *the oil* reached navigable waters.

Three examples demonstrate this further. The first example consists of the discharge of fill, such as a concrete culvert, into a wetland or non-navigable stream, and results in virtually no risk of any impact

on a hydrologically connected navigable waterway 100 yards away. The second example consists of the discharge of organic debris into that same wetland or non-navigable stream, which debris could migrate into the navigable waterway and potentially affect its chemical, physical, or biological integrity by, for instance, reducing visibility and affecting aquatic feeding activities. The third example consists of paving over a portion of the same wetland or non-navigable stream, thereby increasing the amount of stormwater runoff that flows into the navigable waterway, and as a result affecting its chemical, physical, or biological integrity.

Each of these examples involves the same wetland or non-navigable water resource, but under Justice Kennedy's rule set forth in *Rapanos*, the determination as to whether that water resource constitutes "waters of the United States" varies depending on the nature of the discharge. Thus, in the first example, the wetland or non-navigable water resource would probably not constitute "waters of the United States," whereas in the second and third examples, the water resource could constitute "waters of the United States."

This creates an quandary for project proponents, consultants, attorneys, the Corps, and the courts as how to conduct wetland delineations among other aspects of Clean Water Act permitting. Everyone involved must decide the degree to which the nature of the discharge affects the decision as to whether a water resource is a "water of the United States." Assuming, as did the *Chevron* court, that under Justice Kennedy's rule the nature of the discharge does affect the likelihood that there is a significant nexus to navigable waters, then a second issue arises. This second issue is whether the significant nexus test assumes the discharge as proposed in the current permit application pending before the Corps, or whether the significant nexus test considers the likelihood that any possible discharge could affect a navigable water's biological, physical, or chemical integrity.

Setting aside Justice Kennedy's rule set forth in *Rapanos*, and based on prior practice, the Clean Water Act's structure, as well as other judicial precedent, the issue of whether a water resource constitutes a "waters of the United States" should remain separated from the nature of the material discharged. However, this separation may be difficult to maintain where, but for a single type of discharge material "X," there is no

evidence of a significant nexus between the water resource and a navigable waterway. Project proponents proposing a project that involves only the discharge of materials "A," "B," and "C," which do not create the significant nexus created by discharge of material "X," will likely feel the application of Justice Kennedy's test to be unfair.

In responding to the plurality's and Justice Kennedy's vehement suggestion to approve new regulations, the Corps must address how the significant nexus will consider the specific nature of potential discharges when determining whether a water resource has a significant nexus to navigable waters and, as a result, is a "water of the United States."

***Rapanos* Reveals the Current Flux within the Supreme Court**

Although most project proponents and regulators will carefully review *Rapanos* to determine what the case reveals about the implementation of the Clean Water Act, the case can also be read to reveal the changes occurring within the United States Supreme Court itself. With the retirement of Justice O'Connor and the appointments of Chief Justice Roberts and Justice Alito, Justice O'Connor no longer provides the swing vote on issues addressing the scope of federal powers. *Rapanos* highlights the lead role that Justice Kennedy now plays on such issues. The roles that Chief Justice Roberts and Justice Alito play, so recently the subject of heated debates, appear to be dwarfed by Justice Kennedy's role as the swing vote. Nonetheless, Chief Justice Roberts and Justice Alito did join Justice Scalia's opinion, which opinion dramatically reduced Clean Water Act jurisdiction. Thus it is clear that the two new justices will likely challenge any arguments broadly interpreting federal environmental laws. Finally, the splintered decision suggests that the alliances within the Court remain in flux.

Another facet of the *Rapanos* decision is what it reveals about the justices' positions regarding the role of the states in environmental regulation. In considering the scope of federal environmental laws, the Court often views itself as determining the extent to which the federal government has jurisdiction in this area, and the extent to which environmental regulation should be the purview of the states. However, in *Rapanos*, 33 states filed an *amici* brief discussing the importance of federal Clean Water Act regulation

for states. In recent years states and local government have been increasing their exercise of regulation over water resources in response to a perceived curtailment of federal jurisdiction under the Clean Water Act. Although advocates of limited federal powers argue that this reduction in federal environmental regulation and the attendant increase in state environmental regulation is proper and represents an appropriate return of authority and control to the states, *Rapanos* indicates that apparently at least 33 states are not so sure they want the federal government to step back its regulation.

Conclusion

Like so many United States Supreme Court decisions, *Rapanos* is a good read. The splintered decision provides plenty of opportunity for the justices to not so subtly dig at their colleagues' positions. For instance, Justice Scalia receives no mercy for relying heavily on Webster's dictionary to interpret the scope

of federal powers under the Clean Water Act.

As discussed above, the decision changes the Clean Water Act jurisdictional determination in few circumstances. However, the rule set forth by Justice Kennedy implicates new consideration of the nature of material to be discharged, particularly where, unless the discharge consists of a particular material, a water resource has no significant nexus to the chemical, physical, or biological integrity of a navigable water.

In addition, the decision reflects the new roles of the continuing members of the Court, as well as the new presence of Chief Justice Roberts and Justice Alito. The roles of the new justices appears to be overshadowed by Justice Kennedy's emergence as the swing vote.

Finally, project proponents, regulators, consultants, and environmental lawyers all await guidance from the Corps as to how it intends to proceed in the aftermath of *Rapanos*.

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