



RAPANOS: PUTTING THE GOVERNMENT TO ITS PROOF UNDER THE CLEAN WATER ACT

In two of the most closely watched environmental cases from the Supreme Court's 2005 term, Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers, the Court refused to endorse the government's position that through the Clean Water Act it could lawfully assert jurisdiction over any nonnavigable water that had "any hydrological connection" to "navigable waters" of the United States. The Court's decision in these consolidated cases represents a major setback for the federal government's efforts to enforce the Clean Water Act. Much has been written about these cases, although a great deal of the commentary actually focuses on either the Court's disparate opinions, which display remarkably different judicial philosophies, or the efforts currently underway by the Department of Justice, the Environmental Protection Agency, and the Army Corps of Engineers to develop "interim guidance" to deal with that decision in pending enforcement and other matters until a rulemaking by the federal government can be initiated. But little has been written concerning the impact the Rapanos decision will actually have on the federal government's Clean Water Act

enforcement efforts. This *Commentary* addresses that question and concludes that the *Rapanos* decision will greatly restrict the federal government's ability to commence and/or continue with pending civil or criminal enforcement actions involving wetlands adjacent to nonnavigable waters unless it can present expert testimony to show that the wetlands at issue had a "significant nexus" to "navigable waters" of the United States. Gone are the days when the federal government could simply point to its regulations to easily convince a court or a jury that a property at issue was covered by the Clean Water Act.

Rapanos involved three wetland parcels approximately 20 miles away from the nearest navigable water. Carabell involved a wetland about a mile away from a traditional navigable water. The wetland was near a ditch, separated from it by an intervening berm. In both cases, the U.S. Court of Appeals for the Sixth Circuit held that the wetlands were waters of the United States because they had a hydrological connection through a series of ditches, creeks, and culverts to navigable waters.

The Supreme Court vacated the Sixth Circuit's decisions and remanded the cases to the appellate court. In a rare, but not unprecedented, circumstance, the Supreme Court split with three different rationales and entered a vote of 4-1-4. While five of the nine justices, agreeing that the Army Corps had exceeded its authority under the Clean Water Act, voted to overturn the court below, the same five justices did not agree on the standard for determining the Clean Water Act's jurisdiction.

Justice Antonin Scalia wrote a four-justice plurality opinion. He was joined by Chief Justice John Roberts and Justices Samuel Alito and Clarence Thomas. Scalia's opinion focused on the plain language of the Clean Water Act and excoriated the government's "sweeping assertions of jurisdiction over ephemeral channels and drains and corresponding attempt to regulate ditches, drains, and desert washes far removed from navigable waters." See Rapanos, 126 S. Ct. at 2218. Although recognizing that the Clean Water Act goes beyond the traditional navigable waters, Scalia interpreted the statute to reach "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," and to exclude "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." Id. at 2212. Thus, "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 covered by the Act." Id. at 2226.

The Scalia opinion goes on to state:

Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires 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. (*Rapanos*, 126 S. Ct. at 2227).

Justice Anthony Kennedy concurred in the judgment but with his own separate rationale. He agreed with Justice Scalia that the government's interpretation of the Clean Water Act did not give effect to the statutory term "navigable waters" and further that the government's failure to consider either regularity or volume of flow and/or proximity to navigable-infact waters led to an overly broad interpretation of "navigable waters." However, he concluded that the "significant nexus" standard from the Court's earlier decision in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"), set forth the correct standard for determining whether a nonnavigable water should be regulated under the Clean Water Act. The dissent, written by Justice John Paul Stevens and joined by Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer, would have affirmed the Corps' jurisdiction in both cases.

Justice Kennedy framed the issue before the Court: "Do the Corps' regulations, as applied to the wetlands in *Carabell* and the three parcels in *Rapanos*, constitute a reasonable interpretation of 'navigable waters' as in *Riverside Bayview* or an invalid construction as in *SWANCC*?" *Rapanos*, 126 S. Ct. at 2241 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and *SWANCC*). According to Justice Kennedy:

Taken together these cases establish that in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking. (*Rapanos*, 126 S. Ct. at 2241).

Justice Kennedy's opinion goes on to reject the government's argument, which had been accepted by the court of appeals (and had been the basis for a substantial number of enforcement actions brought by the federal government after *SWANCC*), that any hydrological connection to traditional navigable water, by itself, is enough to meet the "significant nexus" standard and to establish jurisdiction:

[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood. (*Rapanos*, 126 S. Ct. at 2251).

Instead, according to Justice Kennedy:

Accordingly, 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." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters." (Id. at 2248).

Justice Stevens' dissent explains well the broad enforcement authority that the government enjoyed prior to, and loses as a result of, Rapanos. Justice Stevens endorsed broad enforcement authority, stating that the Army Corps' determination that "wetlands adjacent to tributaries of traditionally navigable waters" are encompassed within the term " 'waters of the United States' is a quintessential example of the Executive's reasonable interpretation of a statutory provision." Id. at 2252. But Justice Stevens argued that the Court's plurality opinion unreasonably rejected the Court's prior opinion in Riverside Bayview, in which the Court "authorized the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries." Id. Justice Stevens' dissent found no support for the plurality's position that an approval of a determination of adjacent is "contingent upon an understanding that 'adjacent' means having a 'continuous surface connection' between the wetland and its neighboring creek." Id. at 2255.

Justice Breyer, in a separate dissent, predicted the potential for newfound restrictions on federal Clean Water Act enforcement: "If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations [and as a result of this decision], courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law." *Id.* at 2266. The Court's plurality opinion in *Rapanos* raises the bar for the

Executive to act under the Clean Water Act and will inevitably lead to more judicial involvement.

Chief Justice Roberts, expressing regret that "no opinion commands a majority of the Court" as to the jurisdictional scope of the Clean Water Act, noted that both lower courts and regulated entities will now have to feel their way on a case-by-case basis. Rapanos, 126 S. Ct. at 2235. (Roberts, S.J. concurring). While the Chief Justice noted this was not unprecedented, his citation to Grutter v. Bollinger, 539 U.S. 306, 325 (2003), and its discussion of Marks v. United States, 430 U.S. 193 (1977) (which held 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 judgment on the narrowest grounds' "), suggest that Justice Kennedy's concurring opinion, which is far more narrow in its scope than Justice Scalia's opinion, is the one for lower courts to follow.1

Indeed, the courts in the few reported post-Rapanos opinions have done just that. The court in United States v. Chevron Pipeline Co., 2006 U.S. Dist. LEXIS 47210 (N.D. Tex. June 28, 2006), is one example. In Chevron Pipeline Co., the government brought claims against Chevron Pipeline for alleged violations of the Clean Water Act and the Oil Pollution Control Act of 1990 as a result of the alleged discharge of crude oil from a pipeline that failed. The government alleged that the oil that migrated into an unnamed tributary, which was an intermittent stream, was jurisdictionally covered by the Clean Water Act and the Oil Pollution Act. The Court flatly rejected the government's argument. The Court, after discussing the fragmented opinions of the Court in Rapanos and the fact that Justice Kennedy's "significant nexus" test came with no guidance, looked to prior Fifth Circuit case law, which narrowly had interpreted "waters of the United States" under the OPA and concluded that "as a matter of law in this Circuit, the connection of generally dry channels and creek beds will not suffice to create a 'significant nexus' to a navigable waterway simply because one feeds into the next during the rare times of actual flow." Id. at *7. Finding that neither the unnamed tributary nor the adjacent creek was navigable-in-fact and

^{1.} Where Justice Kennedy's opinion allows for a measure of administrative and judicial flexibility under the "significant nexus" standard, Justice Scalia's plurality opinion would conceivably omit from the definition of "waters of the United States" "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged" as such structures are "point sources" under the Clean Water Act and not "navigable waters." See id. at 2222.

further that neither was adjacent to an open body of navigable water, the Court concluded that a "significant nexus" was not established by the government, and it granted Chevron's motion for summary judgment.

Other courts have upheld Clean Water Act authority, or at least the prospect of authority, under the Rapanos "significant nexus" standard. In Northern Cal. River Watch v. City of Healdsburg, No. 04-15442, 2006 WL 2291155 (9th Cir. August 10, 2006), the Ninth Circuit affirmed the lower court's finding of a "significant nexus" where the defendant city discharged sewage from its waste-treatment plant into "Basalt Pond," a rock quarry pit filled with water from a surrounding aquifer. ("In light of Rapanos, we conclude that Basalt Pond and its wetlands possess . . . a 'significant nexus' to waters that are navigable in fact, because the Pond waters seep directly into the navigable Russian River.") The Ninth Circuit did recognize the newfound restrictions Rapanos places on Clean Water Act enforcement: "Applying these [Rapanos] principles in this case, it is apparent that the mere adjacency of Basalt Pond and its wetlands to the Russian River is not sufficient for CWA protection. The critical fact is that the Pond and the navigable Russian River are separated only by a man-made levee so that water from the Pond seeps directly into the adjacent River." Id. at *6. See also United States of America v. Evans, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, *22 (M.D. Fla. Aug. 2, 2006) (finding, in support of a granted search warrant, that "piped raw, untreated human excrement into a creek which flowed into" a nearby river establishes potential jurisdiction for enforcing the Clean Water Act under either the Scalia or Kennedy standard from Rapanos).

Rapanos and its subsequent application will force the Executive to toe a much finer line when enforcing the Clean Water Act than the previous Supreme Court jurisprudence required. If and until Congress amends the Clean Water Act or the Executive engages in a new rulemaking, Rapanos greatly enhances the judicial role in Clean Water Act enforcement. It will also require the government to come forward with expert testimony and/or other evidence to establish a significant nexus and thus will likely allow an effective defense for current and future enforcement targets.

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