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In This Issue

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The IADC

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What are the "Waters of the United States" in Light of *Rapanos v. United States*?

By R. Bruce Barze, Jr. & Jeffrey H. Wood

Under Clean Water Act ("CWA") Section 404(a), any person engaging in any activity that results in the "discharge of dredged or fill material into the navigable waters" must obtain a permit from the U.S. Army Corps of Engineers ("Corps"). 33 U.S.C. § 1344(a) (emphasis added). The term "navigable waters" is defined broadly by statute to mean all "waters of the United States." *Id.* § 1362(7). The Corps has further defined this term by regulation to include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters." 33 C.F.R. § 328.3(a)(3). "Waters of the United States" is defined so broadly by regulation that it also includes "tributaries" of these waters and even "wetlands adjacent to [these] waters" (other than waters that are themselves wetlands). *Id.* § 328.3(a)(5)-(7).

The Supreme Court has issued three noteworthy decisions, including an opinion issued in June of 2006, describing the reach of the term "waters of the United States" under the CWA. This article discusses those cases and concludes by stating the current legal test, although it should be cautioned that this test remains a moving target.

The Supreme Court's Prior Cases on the "Waters of the United States"

In 1984, the Supreme Court held that the Corps had jurisdiction under Section 404 over wetlands that actually abutted a

navigable waterway. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985). This decision applied to wetlands that were "inseparably bound up with the waters of the United States," but the Court expressly reserved judgment on the issue of whether the Corps had authority to restrict discharges of fill material into "wetlands that are not adjacent to open bodies of water." *Id.* at 131-32.

In 2001, the Supreme Court issued another important decision concerning the Corps' jurisdiction under CWA Section 404. *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-74 (2001) (the "*SWANCC*" decision). In *SWANCC*, the Supreme Court held that the Corps' jurisdiction did not extend to nonnavigable, isolated, intrastate wetlands where the only connection to navigable waters was the presence of migratory birds. *Id.* at 172-73. Even Justice Stevens' dissenting opinion explained that, after *SWANCC*, the Corps' jurisdiction under Section 404 would only extend to "actually navigable waters, their tributaries, and wetlands adjacent to each." *Id.* at 176-77 (Stevens, J., dissenting).

The *Rapanos* Decision

Even after *SWANCC*, the Corps continued to operate under an extremely expansive interpretation of its jurisdiction, asserting permitting authority over all types of wet areas, including storm drains, roadside ditches, and lands that are covered by floodwaters just once every 100 years. Last year, the Supreme Court decided to review two decisions of the U.S. Court of Appeals for the Sixth Circuit, *Rapanos v. United States*, No. 04-1034, and *Carabell v. United States Army Corps of Engineers*, No. 04-1384. In those cases, the Sixth Circuit held that the Corps' jurisdiction under Section 404 extended to wetlands near ditches or man-made drains which eventually emptied into traditional navigable waters located up to twenty miles away. *See Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004); *Carabell*, 391 F.3d 704, 708 (2004). In one of those cases, Mr. Rapanos faced up to five years in jail and hundreds of thousands of dollars in criminal and civil fines for impacting so-called "jurisdictional wetlands."

In June of 2006, the Supreme Court reversed the Sixth Circuit and remanded *Rapanos* and *Carabell* to the lower courts for reconsideration, although the ultimate standard that should be applied upon remand was unclear. *See Rapanos v. United States*, 126 S. Ct. 2208 (2006). Illustrating the contentious nature of this issue, the Court's decision was split three ways: a four-member "plurality" comprised of Justices Scalia, Thomas, Alito and Roberts; a four-member dissenting block comprised of Justices Stevens, Souter, Ginsburg and Breyer; and the "swing-vote" cast by Justice Kennedy. Deciphering the majority sentiment of the Court in these instances is not an easy task.

The plurality opinion authored by Justice Scalia explained that the "waters of the United States" includes non-navigable wetlands only if there is an "adjacent channel [that] contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters)" and "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id*. at 2227. This test, if applied, would result in a significant reduction in the Corps' regulatory jurisdiction.

However, the ultimate impact of *Rapanos* may not be as sweeping simply because the fifth (and deciding) vote in favor of reversing the Sixth Circuit was cast by Justice Kennedy, who disagreed with the plurality's rationale. *Id.* at 2242 (Kennedy, J., concurring). Justice Kennedy, writing in a concurring opinion, set forth his own "significant nexus" test:

> [W]etlands possess the requisite [significant] 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."
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> As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the [CWA] by showing adjacency alone.

Id. at 2248. Under this formulation, the Corps' jurisdiction does not extend automatically to wetlands adjacent to non-navigable tributaries of navigable waters unless a "significant nexus" to navigable waters exists. *Id.*

Supreme Court precedent indicates that Justice Kennedy's "significant nexus" test may be viewed as the controlling framework in future cases: "When 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." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotations omitted). Justice Kennedy's opinion could be viewed as the narrowest grounds and, in turn, his test could become the applicable framework for deciding whether wetlands constitute "waters of the United States." Chief Justice Roberts, in a separate concurring opinion, acknowledged this precedent and lamented that the lower courts and the regulated community will have to "feel their way on a case-by-case basis." *Rapanos*, 126 S. Ct. at 2235-36 (Roberts, C.J., concurring).

What Are The "Waters of the United States" After *Rapanos*?

In light of *Riverside Bayview Homes*, *SWANCC*, and now *Rapanos*, the Corps' jurisdiction under Section 404 of the CWA extends to actually navigable waters, tributaries to navigable waters, and non-navigable waters adjacent to an open body of navigable water. *Rapanos*, 126 S. Ct. at 2241-42 (Kennedy, J., concurring); *see also SWANCC*, 531 U.S. at 176-77 (Stevens, J., dissenting). However, there is still disagreement in the legal community concerning the extent to which, in light of *Rapanos*, the Corps' jurisdiction extends to other types of waterbodies, including wetlands and intermittent, perennial, or ephemeral streams with only an attenuated connection to navigable waters. The Corps is expected to issue guidance in the near future on how the districts should apply *Rapanos* in those circumstances.

Chevron Pipe Line Co. (N.D. Tex. 2006)

In the meantime, in June of 2006 a federal district court in Texas issued the first post-*Rapanos* ruling concerning the extent of federal jurisdiction under the Clean Water Act. *See United States v. Chevron Pipe Line Co.*, ___ F. Supp. 2d ___, 2006 WL 1867376 (N.D. Tex. June 28, 2006). In that case, the U.S. Environmental Protection Agency ("EPA") filed an enforcement action against Chevron Pipe Line Company for spilling approximately 3,000 barrels of oil, which migrated into an unnamed, intermittent "channel/tributary" that was dry in the absence of significant rainfall events. *Id.* at *1. This intermittent channel/tributary extended 17 miles before it reached another intermittent creek, which extended 24 miles before reaching the only arguable navigable waterway. *Id.*

The district court noted that, in *Rapanos*, the Supreme Court failed to "reach a consensus" as to the "jurisdictional boundary of the CWA," leaving the lower courts to "feel their way on a case-by-case basis." *Id.* at *6 (internal quotations omitted). The district court also noted that Justice Kennedy's opinion "leaves no guidance on how to implement its vague, subjective centerpiece," the significant nexus test. *Id.* Due to the lack of discernable guidance from the Supreme Court, the district court looked to the prior precedent of the Fifth Circuit Court of Appeals (where Texas resides) to determine the proper contours of the "significant nexus" test, and held that the "waters of the United States" includes only those waterbodies that are "navigable-in-fact or adjacent to an open body of navigable water." *Id.* at *7. The unnamed tributary where the oil spill occurred clearly did not meet that test, and therefore, the CWA claim was dismissed. *Id.* at *8-9. Because the district court's ruling in *Chevron Pipe Line Company* relied heavily on the law of its own circuit, it may not be adopted in other circuits. *See In re Needham*, 354 F.3d 340, 346 (5th Cir. 2003).

Northern California River Watch (9th Cir. 2006)

In August of 2006, the Ninth Circuit issued the first appellate decision in light of *Rapanos*, holding that a 58-acre pond constituted "waters of the United States" where water "seep[ed] directly" into a navigable river through an underground aquifer. *See Northern California River Watch v. City of Healdsburg*, ___ F.3d ___, 2006 WL 2291155 (9th Cir. Aug. 10, 2006). An environmental group filed a citizen suit against the City of Healdsburg for discharging treated sewage into a large pond (known as Basalt Pond), which was created by a rock quarry pit that had filled with water from a surrounding aquifer. *Id.* at *1. The pond was located between fifty to several hundred feet from the Russian River (an undisputed "navigable water of the United States"), although a levee separating the pond and river "usually" prevented any surface connection. *Id.* at *1-2. The court found that a "vast underground aquifer" provided the "principal pathway for a continuous passage of water between Basalt Pond and the Russian River." *Id.* at *3.

The Ninth Circuit explained that Justice Kennedy's concurring opinion in *Rapanos* provided the "controlling rule of law." *Id.* at *6. Interestingly, the Ninth Circuit noted that, in light of *Rapanos*, "it is apparent that the mere adjacency of Basalt Pond and its wetlands to the Russian River is not sufficient for CWA protection," *id.* at *5-6, even though Justice Kennedy's opinion indicated that adjacency to a navigable river is a sufficient basis to conclude that a non-navigable wetland is jurisdictional. In fact, the Ninth Circuit stated categorically that "[a]djacency of wetlands to navigable waters alone is not sufficient" to constitute jurisdictional waters. *Id.* at *1. Nonetheless, the court held that the seepage of water from the pond to the river through the underground aquifer constituted the "significant nexus" required by *Rapanos*. *Id.* at *6. The court also explained that its conclusion was supported by an "actual surface connection" between the pond and the river which occurred "when the River overflows the levee and the two bodies of water commingle." *Id.* at *7 (noting that "at least 26 percent of the Pond's volume annually reaches the River itself"). The court also found a "significant ecological connection" between these two waters, because the pond and the river both supported the same wildlife. *Id.* Finally, the court found that the pond "significantly affects the chemical integrity" of the river by measurably increasing the chloride levels in the river. *Id.*

The Moving Target

Without the benefit of official Corps guidance interpreting *Rapanos*, it can be stated that federal jurisdiction under Section 404 of the Clean Water Act currently extends to:

(1) Navigable-in-fact waters, *see* 33 U.S.C. § 1362(7);

(2) Tributaries to navigable-in-fact waters, *see id.*; and

(3) Any other wetlands and other non-navigable waters possessing a "significant nexus" to navigable-in-fact waters, meaning that "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,'" *Rapanos*, 126 S. Ct. at 2248; but not

(4) Other waters lacking a significant nexus to navigable waters, such as "nonnavigable, isolated, intrastate waters," *see SWANCC*, 531 U.S. at 172.

The "significant nexus" test will, at the very least, require the Corps to engage in more comprehensive fact-finding than previously was the case. *See United States v. Gerke Excavating, Inc.*, No. 04-3941, slip op. at 4 (7th Cir. Sept. 22, 2006) (remanding CWA enforcement action to district court for fact finding in accordance with Justice Kennedy's concurrence in *Rapanos*).