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Wetlands

Justice Kennedy's Concurring Opinion in Rapanos Suggests Need for Rulemaking

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CLEAN WATER ACT

DEFINING WETLANDS

In June, the U.S. Supreme Court handed down a split decision in two closely watched cases, *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*. The court rejected the government's notion that it had jurisdiction over any non-navigable water that had "any hydrological connection" to a navigable water, according to the authors of this article. They reject the view that the concurring opinion of Justice Kennedy is more closely aligned with the dissent than the plurality in the ruling, calling that interpretation of the decision "wishful thinking." The authors argue that Kennedy's concurrence seriously erodes current regulations defining categories of "waters of the United States" and that a government rulemaking is needed.

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Five years ago in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 51 ERC 1833 (2001) (*SWANCC*), the United States Supreme Court rejected the U.S. Army Corps of Engineers' and the Environmental Protection Agency's argument that isolated ponds in northern Illinois constituted "navigable waters" within the meaning of the Clean Water Act because the ponds were used by migratory birds.

The agencies' response to *SWANCC* was to avoid it. Ignoring the reasoning of *SWANCC*, the agencies claimed they could regulate any water that is not isolated and continued to assert jurisdiction over any non-navigable water that had "any hydrological connection" to a navigable water. It did not matter how far the water was from navigable water, how frequently it carried water, or how much water it carried. All that mattered was that it was connected somehow to navigable water.[1] By claiming that all "connected" waters were tributaries, the agencies erected a skeleton of "tributaries" which, they argued, provided a basis to regulate any wetland "adjacent" to the new-found tributaries.

Now, the United States Supreme Court, in the consolidated cases of *Rapanos v. United States* (No. 04-1034) and *Carabell v. U.S. Army Corps of Engineers*(No. 04-1384), has rejected the any-hydrological-connection theory.[2] *Rapanos* involved three wetland parcels (two "adjacent" to a ditch, one "adjacent" to a river) twenty 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 but separated from the ditch 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. While five of the nine justices agreed that the Corps had overstepped its bounds, the same five justices did not agree on what the proper standard is for determining jurisdiction. Justice Antonin Scalia wrote a four-justice plurality opinion, joined by Chief Justice John Roberts and Justices Samuel Alito and Clarence Thomas. Scalia's opinion emphasized the plain language of the Clean Water Act--i.e., the Act regulates "navigable waters"--and lambasted the agencies for regulating ditches, drains, and desert washes far removed from navigable waters. 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."[3]

Justice Anthony Kennedy concurred in the judgment but with his own rationale. He agreed with Justice Scalia that the government's argument did not give effect to the statutory term "navigable" waters and that the government's disregard of regularity and volume of flow and proximity to navigable-in-fact waters led to an overbroad interpretation of "navigable waters." But he held that the "significant nexus" standard from *SWANCC* is the operative standard for determining whether a non-navigable 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. Thus, the court issued a 4-1-4 decision.

Chief Justice Roberts, lamenting this fractured result, pointed to *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) and *Marks v. United States*, 430 U.S. 188, 193 (1977) as a guide for lower courts in interpreting *Rapanos*. "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 judgment on the narrowest grounds.'" *Marks* at 193. Although commentators may debate how to determine the "narrowest grounds" in any given case, it is clear that Kennedy's opinion will be critical to determining the implications of this case. Accordingly, this article examines Kennedy's concurring opinion with a specific focus on identifying those aspects of his decision that establish limits on the Corps' jurisdiction and identify the principles that must be considered in any case-by-case analysis of "significant nexus."

Important Principles of Jurisdiction

Justice Kennedy begins his analysis by framing the issue before the Court as "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*?" Kennedy, slip op. at 9-10 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 23 ERC 1561 (1985) and *SWANCC*). He reconciles *Riverside Bayview* and *SWANCC*, the court's only previous decisions on Clean Water Act jurisdiction, by showing that both cases applied a "significant nexus" standard:

> Taken together these cases establish that in some instances, as exemplified in *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. (Kennedy, slip op. at 10).

While Kennedy did not articulate the "bright-line" jurisdictional standard that many hoped would emerge from these cases, his opinion does recognize important limitations on federal jurisdiction under the Clean Water Act and does establish principles that can be applied in determining whether non-navigable waters have the requisite nexus with traditional navigable waters.[4]

Rejecting 'Any Hydrological Connection' Theory

The key element of Justice Kennedy's opinion is his rejection of the government's argument, which had been accepted by the Court of Appeals, 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. (Kennedy, slip op at 28).

Kennedy holds that to be jurisdictional, a non-navigable waterbody's relationship with traditional navigable waters must be "substantial."

Because the any-hydrological-connection theory had been the government's principal test for jurisdiction after *SWANCC*, Kennedy's careful rejection of the test will work a sea change in the regulation of waters under the Clean Water Act. Now, to establish that a non-navigable water (including a non-navigable wetland) is a water of the United States, it is apparent that the agencies must measure and establish, case by case, the nature of the non-navigable water's connection to, and relationship with, traditional navigable waters.[5] The agencies never before have undertaken such a review.

Before *SWANCC*, relying on the so-called migratory bird rule, the presence of birds was enough to establish jurisdiction. Since birds can land anywhere, jurisdiction was easily established. After *SWANCC*, applying the hydrological connection theory, jurisdiction could be established by assuming that water would flow down gradient ultimately to a navigable water. Neither test required the agencies to examine the relationship between the non-navigable waterbody and a navigable water. And, one of the prominent arguments urged by the U.S. Solicitor General was that the any-connection theory must be upheld because any other jurisdictional theory would confront the government with difficult problems of proof. In spite of the government's remonstrations, however, Kennedy now requires, for non-navigable wetlands, a showing 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.' 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.'" Kennedy, slip op. at 23.[6]

Rejecting Use of 'Ordinary High Water Mark.'

A second key element in Kennedy's analysis is his rejection of the Corps' approach to identifying "tributaries." Closely examining the Corps' regulations and the application of those regulations as documented in a 2004 report by the Government Accountability Office,[7] he concludes that the standard takes the Corps too far from traditional navigable waters.

He starts by noting that the "Corps views tributaries as within its jurisdiction if they carry a perceptible 'ordinary high water mark.' 328.4(c); 65 Fed. Reg. 12,823 (2000)." He quotes the regulatory definition of "ordinary high water mark," which defines it in terms of physical characteristics, not ordinary flow. Kennedy at 3 (citing 33 C.F.R. 328.3(e)) (lines on the bank, shelving, litter, and debris). Importantly, the Federal Register notice he cites (65 Fed. Reg. 12,823 (2000)) includes an extensive discussion of many comments criticizing the Corps for

defining "ordinary high water mark" (OHWM) in terms of physical characteristics rather than establishing a standard for identifying *ordinary* flow. Commenters pointed out that "ephemeral watercourses do not have flowing water and cannot develop an ordinary high water mark" and argued that the Corps "need[s] to define what constitutes 'ordinary flow' in an ephemeral watercourse that establishes an OHWM." *Id*. But the Corps in 2000 declined to address the issue, stating only that "ephemeral streams that are tributary to other waters of the United States are also waters of the United States, as long as they possess an OHWM."[8] 65 Fed. Reg. 12,818, 12,823. Likewise, ditches: "non-tidal drainage ditches are waters of the United States if they extend the OHWM of an existing water of the United States." *Id.*

After citing this Federal Register discussion and the Corps' use of the term as applied in the field as evidenced by the GAO Study, Justice Kennedy rejects the Corps' use of "ordinary high water mark" as a measure for identifying tributaries. He finds that:

> *[T]he breadth of this standard*--which seems to leave wide room for regulation of *drains*, *ditches*, and *streams remote* from any navigable-in-fact water and carrying only *minor water-volumes* towards it--*precludes its adoption* as the determinative measure ... Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*. (Kennedy, slip op. at 24-25 (emphasis added)).[9]

Kennedy's rejection of the Corps' use of ordinary high water mark is significant because this standard has been the basis for an extremely expansive view of jurisdiction over ditches, dry desert drainages, swales, gullies, and other non-wetland erosional features since its adoption.[10] Ultimately, Kennedy's dissatisfaction with the Corps' tributary standard leads him to reject the government's arguments that it may regulate all wetlands that are adjacent to all tributaries.

Here, he explicitly parts company with Stevens' dissent. Stevens argued that *Riverside Bayview* "squarely controls these cases" (Stevens, slip op. at 6) and held, based on *Riverside Bayview*, that the Corps may regulate all "non-isolated wetlands." Stevens, slip op. at 11. Kennedy, however, concludes that *Riverside Bayview* is not on point. *Riverside Bayview* applies only "to wetlands adjacent to navigable-in-fact waters." Kennedy, slip op. at 23. Thus:

> The Corps' theory of jurisdiction in these consolidated cases--adjacency to tributaries, however remote and insubstantial--raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case. (Kennedy, slip op. at 23).

Instead, Kennedy finds that "[a]bsent 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." Kennedy, slip op. at 25. Kennedy explains his rationale in imposing this requirement by noting that "[g]iven the potential

overbreadth of the Corps' regulations [as it relates to tributaries], this showing is necessary to avoid unreasonable applications of the statute." Kennedy, slip op. at 25. He adds further that the Corps "through regulations or adjudication may choose to identify categories of tributaries that, *due to their volume of flow* (either annually or on average), *their proximity to navigable waters*, or other relevant considerations, are significant enough that wetlands adjacent to them are likely..." to have a significant nexus to navigable waters. Kennedy, slip op. at 24 (emphasis added).

In sum, Kennedy (1) rejects the Corps' approach to tributaries--in particular, the reliance on "any hydrological connection" and "ordinary high water mark" and (2) rejects "adjacency to tributaries" as a measure of jurisdiction over wetlands near non-navigable waters because the "existing standard for tributaries ... provides no ... assurance ... that wetlands adjacent to them are likely, in the majority of cases, to perform important functions of an aquatic system incorporating navigable waters." Kennedy, slip op. at 24. Adding to *SWANCC*'s overturning of the Corps regulation at 33 C.F.R. § 328.3(a)(3) ("waters" that "could affect" interstate commerce), Kennedy's analysis in *Rapanos* effectively vitiates the Corps' regulations at 33 C.F.R. § 328.3 (a)(5) (tributaries) and (a)(7) (adjacent wetlands). The definitions of "adjacent" at § 328.3(c) and "ordinary high water mark" at § 328.3(e) are similarly suspect under Kennedy's analysis. It is no wonder that Roberts, Kennedy, and Breyer all call for rulemaking.

Requiring Case-by-Case Evaluation

Kennedy also disagreed with the dissent when it deferred to the Corps' assertion of jurisdiction over ditches and the wetlands claimed to be "adjacent" to them.

> [T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however *remote* and *insubstantial*, that *eventually may flow* into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far. Kennedy, slip op. at 22 (emphasis added).

He declines to defer because he is skeptical of the Corps' existing standard for identifying tributaries. And, because the standard for tributaries is overbroad, he finds no assurance that wetlands adjacent to such tributaries will have the necessary significant nexus. "Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." (Kennedy, slip op. at 25).

Thus, except in the case of wetlands adjacent to traditional navigable waters (i.e., the *Riverside Bayview* facts), absent further rulemaking by the agencies, he now requires a case-by-case showing of significant nexus. Kennedy at 25. He repeatedly cautions that "insubstantial," "speculative," or "minor flows" are insufficient to establish a "significant nexus." Kennedy, slip op. at 22-24.[11] Examining the records in the cases before the court, Kennedy criticized the *Rapanos* record because it failed to provide crucial evidence about the "*quantity and regularity of flow in*

the adjacent tributaries--a consideration that may be important in assessing the nexus" to navigable waters. Kennedy, slip op. at 29 (emphasis added). Likewise, in *Carabell*, the "Corps based its jurisdiction solely on the wetlands' adjacency to the ditch opposite the berm on the property's edge. As explained earlier, mere adjacency to a *tributary of this sort* is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow towards it." Kennedy, slip op. at 30.

Setting Forth a New Standard

Kennedy's "significant nexus" standard in effect replaces the Corps' regulatory definition of "adjacent." That definition would allow the regulation of all wetlands that are "bordering, neighboring, or contiguous" to any of the waters covered in the regulation at section 328.3(a)(1)-(7), which would include all tributaries, however defined. The government had argued in its briefs to the Supreme Court that any hydrological connection would establish jurisdiction but that jurisdiction could also be established without any connection. "The Corps and EPA regulations that assert jurisdiction over wetlands that are 'adjacent' to other jurisdictional waters, without regard to the presence of hydrologic connections ... reflect a reasonable and valid interpretation of the Act." [12] The government further explained that it was reasonable for the Corps and EPA to rely on "the concept of 'adjacency,' which serves as a reasonable proxy for the presence of a hydrologic connection and for the importance of the wetland to the surrounding aquatic environment, to assert regulatory jurisdiction..." *Id.* at 19.

However, under Kennedy's opinion, wetlands and other waters are now jurisdictional only if they have a significant nexus to traditional navigable waters. For "wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecological interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." Kennedy, slip op. at 23. Absent new regulations, however, the Corps must make case-by-case findings that wetlands adjacent to non-navigable *tributaries* have a significant nexus to navigable waters. "Given the potential overbreadth of the Corps' regulations," Kennedy explains, "this showing is necessary to avoid unreasonable applications of the statute." Kennedy, slip op. at 25. Thus, the Corps may not rely on the existing regulations. A significant nexus can not be presumed. It must be established case by case.

Conclusion

The upshot then of Kennedy's concurrence is that the Corps' current regulations defining seven categories of waters as "waters of the United States" are seriously eroded. Justice Kennedy does not accept the Corps' approach to tributaries. 33 C.F.R. Section 328.3(a)(5). He rejects the Corps' use of ordinary high water mark as overbroad. *Id.* at Section 328.3(d). He holds that the Corps may not rely on "adjacency" to claim jurisdiction over wetlands near non-navigable waterbodies. *Id*. at Section 328.3(a)(7) and (c). And he repeatedly emphasizes that "significant

nexus" requires consideration of factors such as volume and frequency of flow and proximity to traditional navigable waters, factors that are not considered under the current regulations. Further, Justice Kennedy is writing against the background of SWANCC, in which the Supreme Court had previously rejected the "other waters" regulation at Section 328.3(a)(3).

In sum, of the seven types of waters identified in the regulation as "waters of the United States," the only one that appears to survive Justice Kennedy's analysis (and certainly the plurality opinion) is Section 328.3(a)(1), which claims jurisdiction over traditional navigable waters. It is for this reason that Justice Kennedy concludes that "absent more specific regulations ... the Corps must establish a significant nexus on a case-by-case basis ..." Kennedy, slip op. at 25.

Clearly, rulemaking is needed. But the Corps and EPA have repeatedly backed away from rulemaking in the past. In 1989, after losing *Tabb Lakes, Ltd. v. United States*, 885 F.2d 866, 30 ERC 1510 (4th Cir. 1989)., because they applied the migratory bird rule without having first gone through rulemaking, the Corps and EPA issued guidance announcing they would pursue a rulemaking. But they never did. The same thing happened after *United States v. Wilson*, 133 F.3d 251, 45 ERC 1801 (4th Cir. 1997), which rejected their assertion of jurisdiction over waters that "could affect" interstate commerce. That was 1997. Then, in 2001, the Supreme Court in *SWANCC* rejected the migratory bird rule, and the Corps and EPA began the rulemaking process. As, the Chief Justice noted:

> [Rulemaking] would have [given them] plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.... The proposed rulemaking went nowhere. Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, 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. (Roberts, slip op. at 2).

These are strong words from the Chief Justice. One can only hope the agencies have not forgotten this history, and, therefore, will not be condemned to repeat it. As Justice Breyer tartly observed, they should "write new regulations, and speedily so." Breyer, slip op. at 2.

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[1] *Rapanos v. United States*, No. 04-1034, *Brief for the United States* at 31.("[N]either the directness nor the substantiality of a tributary's connection to traditional navigable waters is relevant to the jurisdictional inquiry..."

[2] *Rapanos v. United States*, 547 U.S. __, 126 S. Ct. 2208, 62 ERC 1481 (2006)

[3] *Rapanos v. United States*, 547 U.S.__, No. 04-1034, Scalia, slip op. at 20-21.

[4] Some commentators have argued that the Kennedy opinion is more closely aligned with the dissent than with the plurality. This is wishful thinking. Kennedy disagreed with the dissent on most of the key points. He rejected the government's any-connection theory. He rejected the Corps' existing standard for identifying tributaries. He refused to defer to the Corps' interpretation of the statute and limited *Riverside Bayview* to its facts, holding that it did not support the government's claims of jurisdiction over all "non-isolated wetlands." Moreover, on all these points, Kennedy agrees with the plurality.

[5] See discussion *infra* under subhead "Case-by-Case Evaluation Required."

[6] Kennedy repeatedly emphasizes the importance of the relationship to traditional navigable waters (to be a "water of the United States," a non-navigable water must "perform important functions for an aquatic system incorporating navigable waters," Kennedy, slip op. at 24, or "play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." Kennedy, slip op. at 25).

[7] The GAO was known at the time as the General Accounting Office. The GAO study cited by Kennedy documented the Corps' use of "marks" on the barren desert landscape to assert jurisdiction hundreds of miles from the nearest navigable water. These "marks," the GAO reported, are often "remnants of a time when water flowed along a different course." The study also reported numerous instances in which the Corps districts used underground drain tiles, storm drain systems, and pipes to establish a hydrological connection to otherwise isolated features. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices In Determining Jurisdiction*, GAO-04-297, at 21, 24-26 (Feb. 2004) (GAO Study).

[8] In 2002 the Corps finally acknowledged that it "should look at improving the definition of OHWM. This will be the subject of a separate review... . The frequency and duration at which water must be present to develop an OHWM has not been established for the Corps regulatory program." 67 Fed. Reg. 2020, 2026.

[9] Scalia was likewise unpersuaded by the Corps' treatment of "tributaries" and use of OHWM. Scalia, slip op. at 6-9.

[10] The Corps' Web site on administrative appeals of jurisdictional determinations documents the breadth of the Corps' jurisdictional reach. In Tucson, for example, the Corps determined that an ephemeral desert wash was a tributary to the Colorado River even though the wash terminated at a storm water detention basin hundreds of miles from the Colorado. The Corps determined that a "tributary connection" was established from the detention basin through a 6 inch diameter culvert. The culvert connected to a 1 foot wide channel, which connected to a concrete channel, which connected to a natural channel, which meandered through a residential neighborhood. Beyond that there was

no channel, only paved surfaces. According to the Corps, however, "[t]hese road crossings act as conduits of the water and maintain the tributary connection" to three normally dry channels that finally connect to the Colorado River. U.S. Army Corps of Eng'rs, Los Angeles Dist., Admin. Appeal Decision, *Approved Jurisdictional Determination for the Sunrise Office Park, File No. 2001-00379-RJD*, at 2-4 (Sept. 7, 2001), *available at* http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/AS%20SENT%20FinalSunriseOfficeParkAppealDecision.pdf.

[11] Indeed, in the first case decided following the *Rapanos* decision, *United States v. Chevron*, No. 5:05-CV-293-C, 2006 U.S. Dist. Lexis 47210, *1 (N.D. Tex. June 28, 2006), the court looked for evidence of regularity and frequency of flow and whether the pollutant in question would "actually," as opposed to "speculatively," reach navigable-in-fact waters. *Chevron* at *28, *see also* (130 DEN A-2, 7/7/06).

[12] *Carabell v. U.S. Army Corps of Engineers*, No. 04-1384, *Brief for the Respondents* at 18.