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Title: MUDDY WATERS: WHAT'S A WETLAND AFTER RAPANOS v. U.S.?

by

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Supreme Court Limits Corps of Engineers Authority Over Wetlands

By Richard M. Glick
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On June 19, 2006, a divided Supreme Court interpreted Section 404 of the Clean Water Act to constrict the authority of the Army Corps of Engineers over wetlands in *Rapanos et ux., et al. v. United States*, 547 US ____ (2006). The Court consolidated *Rapanos* with *Carabell v. United States Army Corps of Engineers*, both arising out of Michigan. In both cases, land owners challenged the jurisdiction of the Corps over wetlands that were located several miles from a "navigable" waterway and thus did not constitute "waters of the United States" subject to regulation. Five justices of the Supreme Court voted to vacate the decisions of the court below, holding that the record was not sufficiently developed to determine whether the wetlands at issue are jurisdictional.

However, a plurality of the Court, led by Justice Scalia, held that wetlands must be of a semi-permanent nature and abut open water to qualify as "navigable" waterways, which the Clean Water Act defines as "waters of the United States." This is a test that many wetlands, previously thought to be jurisdictional, would fail to meet. Although the plurality argues otherwise, this is a significant departure from the Court's previous wetlands jurisprudence. Thus, the case throws into question a great many permits issued by and pending before the Corps.

The *Rapanos* and *Carabell* decisions follow on two seminal Supreme Court precedents dealing with wetlands. In *United States v. Riverside Bayview Homes, Inc.*, 474 US 121 (1985), the Court upheld the Corps' jurisdiction over adjacent wetlands. The Court noted that Congress chose to broadly define "waters" subject to federal authority and so approved the Corps' extension to all adjacent wetlands, even if the lands in question serve no significant ecological benefit:

> If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment . . . the Corps may always allow development of the wetland for other uses simply by issuing a permit. *Id.* at 135.

In *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 US 159 (2001) (*"SWANCC"*), the Court struck down the Corps' "Migratory Bird Rule" that asserted § 404 authority over isolated intrastate wetlands that provide habitat for migrating birds. However, the Court recognized Congress' "unequivocal acquiescence" to the Corps' interpretation of the CWA to include adjacent wetlands and announced a test for determining jurisdiction, whether there exists a "significant nexus" between the wetlands and the affected navigable water. *Id.* at 167.

It is the extent of that "significant nexus" between "adjacent" wetlands and navigable waters that animates the *Rapanos* and *Carabell* appeals. How that nexus is determined is at the heart of the split among the Justices.

Rapanos was charged criminally, and a civil enforcement action was brought against him, for filling 54 acres of jurisdictional wetlands at three Michigan sites without a permit. The case before the Supreme Court concerned the civil case. The Corps of Engineers asserted jurisdiction over Rapanos' lands as adjacent to navigable waters, even though the wetlands are some distance from a navigable waterway, because the wetlands are "hydrologically connected" and drain into undisputed navigable waters. Rapanos countered that his wetlands are connected to navigable water by means of intermittent tributaries and manmade ditches, and are too far away to be considered "adjacent" to navigable waters. The trial court upheld the Corps' enforcement action and the Court of Appeals for the Sixth Circuit affirmed.

Carabell owns 19.6 acres of land about a mile from Lake St. Clair, a navigable water body. About 15 acres are forested wetlands. The State of Michigan issued a permit authorizing Carabell's development, but EPA objected on the ground that the property contained jurisdictional wetlands and referred the matter to the Corps for decision. The Corps denied the application for a § 404 fill permit, finding that the wetland is part of the Lake St. Clair watershed and thus adjacent to navigable waters. The Corps asserted that a drainage ditch on a neighboring property provided the nexus between Carabell's land and the lake. Carabell argued that a berm separating his land from the ditch prevented his land from draining to the ditch and therefore there is no hydrologic connection. The Corps and the District Court found to the contrary that there is a hydrologic connection, which the Sixth Circuit also affirmed.

In both cases, the Sixth Circuit was willing to grant substantial deference to the government in finding the significant nexus to navigable waterways, despite the somewhat attenuated link to the wetlands, citing *Chevron, U. S. A. v. Natural Resources Defense Council*, 467 US 837 (1984). In both cases the record included evidence that the wetlands drained, at least sometimes, to the navigable water. Some courts have interpreted *SWANCC* narrowly to require that the wetlands abut the navigable water. *In re Needham*, 354 F3d 340 (5th Cir. 2003). However, the Sixth Circuit joined others in interpreting *SWANCC* narrowly to prohibit regulation only of wetlands that are isolated in fact and have no interplay with navigable waterways whatever. *Carabell v. U. S.*, 391 F3d 704, 709 (6th Cir. 2004); *U. S. v. Rapanos*, 339 F3d 447, 452-53 (6th Cir. 2003); *U. S. v. Deaton*, 332 F3d 698, 702 (4th Cir. 2003).

The Supreme Court vacated the Sixth Circuit decisions and remanded for further consideration of the nexus between the affected wetlands and navigable waters. The plurality opinion and the concurring opinion by Justice Kennedy parted company on the applicable test. The plurality found that "the Corps has stretched the term 'waters of the United States' beyond parody" (Slip. Op. at 15) and consulted dictionary definitions to dismiss the Corps' expansive view of jurisdictional wetlands. The plurality concludes that "'the waters of the United States' include only relatively permanent, standing or flowing bodies of water." *Id.*, at 14. This definition would exclude intermittent or ephemeral streams. To do otherwise, Justice Scalia concludes, would improperly intrude on state and local land use regulatory prerogatives. *Id.*, at 19.

The plurality then turns its attention to whether "a mere hydrologic connection" is sufficient for a wetland to be considered "adjacent" to remote "waters of the United States." The four justices narrowly read the Court's *Riverside Bayview Homes* precedent, which held that wetlands that abut navigable waters are jurisdictional wetlands. Justice Scalia reasons that the basis of this holding is the difficulty sometimes in drawing boundaries between open water and abutting swamps, bogs, mudflats and the like. Although the *Riverside Bayview Homes* Court noted the ecological significance of these wetlands, the plurality in *Rapanos*, citing *SWANCC,* finds such considerations relevant only to settling the boundary issue:

> [*SWANCC*] thus confirmed that *Riverside Bayview* rested upon the inherent ambiguity in defining where water ends and abutting ("adjacent") wetlands begin, permitting the Corps' reliance on ecological considerations *only to resolve that ambiguity* in favor of treating all abutting wetlands as waters. *Id.*, at 23 (emphasis original).

The plurality concludes:

> Therefore, *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. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the United States" do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a "significant nexus" in *SWANCC*. *Id.*, at 24 (emphasis original).

In his concurring opinion, Justice Kennedy agrees that the *Rapanos* and *Carabell* cases should be remanded to examine the factual relationship between the wetlands at issue and navigable waters. Justice Kennedy also agrees that hydrologic connection alone is not enough to confer jurisdiction over wetlands. However, contrary to the plurality, he would focus on how the subject wetlands serve the Clean Water Act's primary objective, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 USC § 1251(a). Contrary to the plurality opinion, the *SWANCC* "significant nexus" test is about more than a boundary dispute, and concerns "a reasonable inference of ecological connection" between the wetlands and navigable waters:

> With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage. (Kennedy Slip Op. at 23).

The Corps, and other federal resource agencies, have long taken this ecocentric view of wetlands regulation, and have applied the following definition:

> . . .those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 33 CFR § 328.3(b).

This definition encompasses many lands that do not resemble swamps but are understood to provide important protections to recognized navigable waterways. The Corps acknowledges that not all wetlands are of the same ecological function and value, and regulatory requirements are adjusted accordingly. While there has been controversy as to whether particular "wetlands" actually meet the definition, or whether mitigation requirements are too heavy, there has been more general acceptance of the premise underlying regulation. Now that premise is altered by the Court.

The result will be that many existing § 404 permits, and pending applications, will need to be re-evaluated. Examined on a case-by-case basis, it is likely that many limitations on wetlands development now in place will be found invalid. Applicants and holders of wetlands fill permits should consult counsel as to the jurisdictional basis.

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