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Defining the Scope of Wetlands Regulation

Case highlights confusion over scope of the Clean Water Act's wetlands rules

On June 19, the United States Supreme Court issued a new Clean Water Act (CWA) wetlands opinion that again attempted to define the breadth of the United States Army Corps of Engineers' regulatory authority over wetlands. While this case highlight the confusion regarding the scope of the CWA's wetlands rules, and the Corps implementation and interpretation of the CWA, the impact of this decision in New Jersey should be relatively insignificant.

The case, *Rapanos v. the United States*, which was decided together with the companion case *Carabell v United States Army Corps of Engineers*, involved four wetlands in Michigan. The *Rapanos* petitioners faced civil and criminal charges for having illegally filled three wetland areas without a permit, while the *Carabell* petitioners were appealing the Corps' denial of their application for a permit to fill a fourth wetland area on their property. The wetlands in these cases were areas lying near or adjacent to tributaries, ditches or man-made drains that eventually flowed downstream into larger, more traditionally navigable waters.

This case presents the next iteration of the Supreme Court's attempts to define the federal jurisdictional limit for regulating wetlands under the CWA. The Clean Water Act prohibits the discharge of dredge and fill material into "navigable waters" without a permit. Navigable waters are defined as "waters of the United States." The Corps has historically viewed the phrase "waters of the United States" as broadly as possible, thereby claiming that it had the authority to regulate wetlands under the CWA to the same limits as Congress' authority to regulate wetlands under the Commerce Clause of the United States Constitution.

The Supreme Court's two prior forays into this issue were *United States v. Riverside Bayview Homes, Inc.*, decided in 1985, and *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC),* decided in 2001. In *Riverside*, the Supreme Court held that the Corps' wetlands jurisdiction under the CWA extended to wetlands lying adjacent to a traditionally navigable water body. Therefore the discharge of dredge or fill material into those adjacent wetlands required a permit from the Corps. In *SWANCC*, the Supreme Court held that wholly intrastate isolated wetlands were not regulated under the CWA, and therefore the Corps had no authority to require permits for activities in those wetlands.

The wetlands at issue in the *Rapanos* case lies somewhere between those addressed in *Riverside* and in *SWANCC*. In *Rapanos*, the wetlands were not located immediately adjacent to traditionally navigable water bodies, but were also not wholly intrastate isolated wetlands. Instead, they were generally adjacent to drains and/or trenches which eventually flowed to traditionally navigable waters. The Sixth Circuit Court of Appeals found that these wetlands were adjacent to waters of the United States and therefore subject to the Corps' wetlands jurisdiction.

In deciding whether these wetlands were regulated under the CWA, the Supreme Court was unable to form a majority. Instead, there was a plurality opinion issued by Justice Antonin Scalia, and joined by Chief Justice John Roberts Jr., and Justices Clarence Thomas and Samuel Alito. Justice Anthony Kennedy wrote a concurring opinion, and Justices John Paul Stevens, David Souter, Ruth Bader Ginsberg and Stephen Breyer dissented.

The plurality opinion held that the Corps' attempt to assert jurisdiction in this case was potentially overbroad and exceeded the limit of the CWA, subject to the ordered remand. The plurality generally conducted a two-step analysis in deciding the case. It first addressed the

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question of what Congress intended by its use of the phrase "waters of the United States." If drains or trenches are not "waters of the United States," then wetlands lying adjacent to those features could not be regulated under the CWA. The plurality then addressed the scope of the Corps' authority to regulate wetlands that were adjacent to "waters of the United States."

Under the plurality's approach, "waters of the United States" means waters such as lakes and streams. Citing *Webster's New International Dictionary*, Justice Scalia wrote that as used in the phrase "waters of the United States," "'the waters' refers more narrowly to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers [and] lakes,' or 'the flowing or moving masses, as waves or floods, making up such streams or bodies.' On this definition, 'the waters of the United States' include only relatively permanent, standing or flowing bodies of water." The plurality ordered the remand because the lower courts had not analyzed the nature of the drains and trenches to determine whether they were "permanent, standing or flowing" water bodies and thus "waters of the United States."

The plurality next addressed the Corps' authority to regulate wetlands adjacent to "waters of the United States." In deciding that the wetlands at issue in these cases were adjacent to waters of the United States, the lower courts had simply looked for a hydrological connection between the wetlands and the drains/trenches. However, the plurality held that to be a regulated adjacent wetland required more than a simple hydrological connection between the wetland and the "water of the United States." Relying on *Riverside*, the plurality stated that there had to be some difficulty in determining where the "waters of the United States" end and the wetlands begins. "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 CWA. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States'…lack the necessary connection to covered waters."

Under the plurality's approach, tributaries or drains which generally do not contain water would not be "waters of the United States" and thus any suspected wetlands adjacent to those tributaries or drains would not be regulated wetlands under the CWA. Likewise, wetlands would not be considered adjacent to "waters of the United States," and thus not regulated under the CWA, if there is a physical separation between the wetlands and the primary water body.

Justice Kennedy, in his concurring opinion, first rejected the plurality's assertion that the phrase "waters of the United States" included only relatively permanent, standing or continuously flowing water bodies. Next, Justice Kennedy rejected the plurality's test for adjacency. Instead, Justice Kennedy indicated that the CWA would allow the regulation of wetlands adjacent to "waters of the United States" if there is a significant nexus between the suspected wetlands and the "waters of the United States." Finding a significant nexus requires an analysis of whether the suspected wetlands significantly effects the chemical, physical and biological integrity of downstream waters bodies. However, if the impact of a suspected adjacent wetland on downstream waters is merely speculative or insubstantial, there would be no significant nexus, and those wetlands would not be regulated under the CWA.

As noted above, the *Rapanos* case continues an unfortunate tradition of Supreme Court wetlands decision that fail to enunciate a bright line test for when the Federal government has jurisdiction to regulate certain types of wetlands. However, while the Corps may now face uncertainly regarding which wetlands it can regulate in light of *Rapanos*, the regulation of wetlands in New Jersey should remain essentially unaffected.

New Jersey administrative Code § 7:7A-2.1(c) states that

> [o]n March 2, 1994 the [New Jersey Department of Environmental Protection] assumed responsibility for administrating the Federal wetlands program…in delegable waters… In non-delegable waters the [Corps] retains jurisdiction under Federal law, and both Federal and State requirements apply. A project in non-delegable waters requires two permits, one from the [New Jersey Department of Environmental Protection] … and one from the [Corps].
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> The New Jersey wetland regulations define 'delegable waters' as 'all waters of the United States…within New Jersey, except waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement, as a means to transport interstate or foreign commerce, shoreward to their ordinary high water mark…'

Generally, wetlands adjacent to traditionally navigable waters would be regulated by both the Corps and the New Jersey Department of Environmental Protection. However, for wetlands that might no longer be regulated by the Corps after *Rapanos*, the New Jersey Department of Environmental Protection would nonetheless continue to regulate those wetlands. For example, assume a developer wants to develop a parcel of land that includes wetlands. The wetlands are not directly adjacent to a traditionally navigable water, but there is a drainage ditch on the property which eventually meanders its way to a traditionally navigable water body. Under the *Rapanos* case, it is possible that the drainage ditch would not be deemed "waters of the United States," and therefore the wetland would not be regulated by the Corps as an adjacent wetland. In that case, the wetland would be deemed, as least by the *Rapanos* plurality, to be a wholly intrastate isolated wetland. However, the New Jersey wetlands rules still would likely regulate that wetland, and require the developer to first obtain a permit before conducting any regulated activities in that wetland.

Therefore, while the *Rapanos* case has the potential to significantly effect the manner and scope of the Corps' wetlands jurisdiction in the United States, its effect in New Jersey is likely to be minimal. Any wetlands that might escape the Corps' Federal jurisdiction would remain subject to the New Jersey Department of Environmental Protection's wetlands rules.■