

SUPREME COURT DECIDES LANDMARK WETLANDS CASES

On June 19, 2006, the United States Supreme Court issued its long-awaited ruling addressing the scope of Clean Water Act (“CWA” or “Act”) authority over remote hydrologic features. The opinions delivered in the consolidated cases of *Rapanos v. United States* and *Carabell v. U. S. Army Corps of Engineers*, 126 S. Ct. 2208 (2006), represent some of the most highly anticipated of the Court’s 2006 term. Since oral arguments were held on February 21st, the important issues implicated by these cases have been the subject of careful scrutiny, debate, and concern by all levels of government, private landowners, and environmental interest groups alike. The 5-4 plurality decision for the property owners vacated the rulings of the lower courts in *Rapanos* and *Carabell*, which had upheld the extension of federal CWA jurisdiction to the wetlands in both cases. Unfortunately, while the Court reconfirmed that the federal government’s authority under the Act is not infinite, the decision failed to distill for the regulated community the precise scope of that authority.

BACKGROUND

Rapanos and *Carabell*, both of which originated from the United States Court of Appeals for the Sixth Circuit, involve a similar issue—the federal government’s authority to regulate remote, non-navigable, and non-adjacent wetlands and manmade ditches on private property under the Clean Water Act’s Section 404 program. In *Rapanos*, the United States pursued both civil and criminal penalties against a Michigan-based land developer for filling in wetlands on his property without first obtaining a permit from the U.S. Army Corps of Engineers (“Corps”). The developer argued that the federal government could not have regulated any wetlands on his property because the features were not adjacent to any navigable waters. More specifically, he argued that his wetlands were adjacent to manmade drainage ditches, which emptied into a series of non-navigable tributaries, which flowed for up to 20 miles before connecting to the nearest navigable waterway. Because he viewed the CWA as requiring a wetland to directly abut a navigable-in-fact waterway to confer federal jurisdiction over the wetland, Mr. Rapanos contended that his wetlands were not subject to regulation by the Corps, even if a surface connection existed between the features and the manmade ditches draining offsite. The Sixth Circuit disagreed, holding that the CWA does not contain a “direct abutment” requirement that must be established for the Corps to assert jurisdiction over wetlands adjacent to non-navigable tributaries. Reasoning that non-navigable waters must only exhibit a hydrologic connection or some other “significant nexus” to traditional navigable waters to invoke CWA jurisdiction, the Circuit Court determined that the *Rapanos* wetlands, which allegedly maintained surface hydrologic connections to “corresponding adjacent tributaries of navigable waters,” fell within the ambit of the Corps’ regulatory authority.

Unlike the property in *Rapanos*, the property at issue in *Carabell* contained wetlands that were hydrologically isolated by upland berms from manmade ditches, which drained offsite and eventually connected to a navigable-in-fact lake. Although the wetlands did not exhibit a surface connection to any offsite waters, and although the state of Michigan authorized the landowners to fill in the wetlands on this basis, the U.S. Environmental Protection Agency (“EPA”) intervened, asserting federal jurisdiction over the features. Following denial of their permit

application to fill the wetlands, the landowners challenged the extension of federal CWA jurisdiction to the hydrologically isolated features on their property. Arguing that the CWA requires the EPA and Corps to identify a tangible connection between non-adjacent wetlands and non-navigable tributaries before asserting federal jurisdiction, the landowners claimed that the agencies had overreached their statutory authority. Once again the Sixth Circuit balked, finding that because the wetlands were separated from a tributary of navigable waters by only a man-made berm or barrier, they qualified as “adjacent wetlands” under the Corps’ regulations and, therefore, fell within the agency’s jurisdiction.

PLURALITY OPINION

A four-Justice plurality opinion, authored by Justice Scalia and joined by Chief Justice Roberts and Justices Thomas and Alito, disagreed with the holdings of these lower courts. According to the plurality: “the phrase ‘waters of the United States’ includes 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.’” On the other hand, “[t]he phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall,” which the opinion characterized as “transitory puddles.” Consequently, “the expansive interpretation of ‘waters of the United States’” endorsed by the federal government is not “based on a permissible construction of the statute” and stretches the term “beyond parody.”

In reaching this conclusion, the plurality reasoned that the CWA extends federal jurisdiction only to “waters.” Features that exhibit mere intermittent and inconsistent flows – such as “ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert” – lack “the ordinary presence of water” required by the Act to confer federal jurisdiction. Indeed, the CWA contemplates federal regulation “only over relatively permanent bodies of water.”

The plurality then turned to the issue of adjacency to determine the validity of federal regulation of remote wetlands based on the presence of a hydrologic connection to waters of the United States. Drawing on Supreme Court precedent from *United States v. Riverside Bayview Homes, Inc.* (1985) and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“*SWANCC*”) (2001), the Justices found that “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.” Conversely, “[w]etlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ . . . lack the necessary connection to covered waters that we described as a ‘significant nexus.’” Thus, the plurality concluded, “establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings:” (1) “that the adjacent channel contains a ‘water of the United States,’ (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters);” and (2) “that the wetland has a continuous surface connection with that water, making it difficult to determine when the ‘water’ ends and the ‘wetland’ begins.”

Because the Sixth Circuit in *Rapanos* and *Carabell* had applied the wrong standard to determine whether the wetlands at issue qualified as waters of the U.S., “and because of the paucity of the record in both of these cases,” the Justices remanded the cases to the lower courts to “determine, in the first instance, whether the ditches or drains near each wetland are ‘waters’ in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are ‘adjacent’ to these ‘waters’ in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*.”

Justice Scalia, however, could not find a fifth vote (most likely Justice Kennedy) to agree with this more limited interpretation of the federal government’s CWA jurisdiction. As a result, Justice Kennedy flexed his “swing vote” power and issued a concurring opinion that could become the most carefully parsed prose in environmental law.

JUSTICE KENNEDY’S CONCURRING OPINION

Providing the all-important fifth vote in the case, Justice Kennedy filed a complex concurring opinion, finding that the Sixth Circuit had correctly relied on the “significant nexus” test developed in *SWANCC* to determine whether the wetlands were subject to federal jurisdiction due to their relationship with traditionally navigable waters. Nevertheless, Justice Kennedy concluded that the Circuit Court failed to consider all of the requisite factors for determining whether such a significant nexus existed between the wetlands at issue and the distant navigable waters to which they were allegedly connected. In evaluating the nexus between the features, the lower court did not account for the CWA’s stated purpose of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters.” On that basis alone, Justice Kennedy concurred with the plurality opinion in the decision to vacate the holdings of the Sixth Circuit and remand the cases for appropriate application of the law.

Although Justice Kennedy concurred with the plurality, his opinion actually supports many of the propositions offered by the dissenting Justices. In fact, he expressly contradicted the plurality by stating “the dissent is correct to observe that an intermittent flow can constitute a stream” and “the Corps can reasonably interpret the Act to cover the paths of such impermanent streams.” Justice Kennedy further differentiated his position by dismissing as “unpersuasive” the plurality’s second limitation on the federal CWA authority, which would exclude jurisdiction over “wetlands lacking a continuous surface connection to other jurisdictional waters” as non-adjacent. At the same time, he disputed the dissenting Justices’ deferential analysis, which “would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.” According to Justice Kennedy, “[t]he deference owed to the Corps’ interpretation of the statute does not extend so far.”

Heightening the confusion that the opinion is sure to cause, the Kennedy concurrence proffered a new test for assessing whether wetlands satisfy the significant nexus test, hence rendering them jurisdictional under the CWA as adjacent wetlands. Pursuant to this test, “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.'" However, when the "wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"

Based on this analysis, Justice Kennedy concluded, "[a]s applied to 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." Yet, for nonnavigable waters, he deemed the existing standard inadequate. To correct this deficiency, Justice Kennedy instructed the Army Corps to identify through regulations or adjudication "categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable water, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." In the absence of such new specific regulations, Kennedy added, "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."

The basis for Justice Kennedy's concurrence may become the most important and highly analyzed aspect of any of the opinions issued in these cases. As Chief Justice Roberts hinted in a brief concurring opinion, due to Kennedy's severance from both the plurality and the dissent, the lower courts tasked with applying the Court's decision face a difficult road ahead and "will now have to feel their way on a case-by-case basis." Whether the Kennedy concurrence eventually becomes binding precedent on the lower courts remains to be seen; the issue is sure to be vigorously debated in the months to come.

DISSENTING OPINION

A strongly worded dissenting opinion, authored by Justice Stevens, was also filed. The Stevens dissent, which was joined by Justices Souter, Ginsburg, and Breyer, cautioned that the plurality had cast aside "more than 30 years of practice by the Army Corps" and "disregards the nature of the congressional delegation to the agency and the technical and complex character of the issues at stake." The dissenting Justices also stated that "Justice Kennedy similarly fails to defer sufficiently to the Corps, though his approach is far more faithful to our precedents and to principles of statutory interpretation than is the plurality's."

In contrast with the plurality and concurring opinions, the dissent argued that virtually wholesale deference to the agency was appropriate in this case. "The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing waters at times of high flow." The dissent concluded that this interpretation and the "Corps' resulting decision to treat these wetlands as encompassed within the term 'waters of the United States' is a quintessential example of the Executive's reasonable

interpretation of a statutory provision.” For those reasons, the dissenting Justices would have upheld the decisions of the Sixth Circuit in both cases.

WHAT COMES NEXT?

The conflicting opinions leave stakeholders on all sides guessing at the future of federal CWA wetlands regulation and scrambling to find some consensus that the lower courts will be forced to apply on remand. The unfortunate reality is that the Court has not provided judicial clarity to what has been a regulatory morass for over 30 years. As has been the case since *Riverside Bayview* and *SWANCC*, the only real hope for a solution may be congressional intervention. Clearly, Chief Justice Roberts in his concurring opinion and Justice Breyer in his dissenting opinion each expressed displeasure at the Corps for not following through on its rulemaking efforts and sent a pointed message that re-opening that process may be in order. Yet, many stakeholders believe that the Corps cannot be entrusted with the responsibility of promulgating regulations in line with Congress' intent and command under the CWA. Moreover, the development of standards through the adjudication process, as Justice Kennedy suggests in his concurring opinion, could lead to years of continuing uncertainty, perpetuating the situation that led to the Supreme Court agreeing to hear *Rapanos* and *Carabell* in the first place. Finally, maintaining the status quo, as the dissent suggests, is equally untenable. The federal judiciary and the 39 individual Army Corps districts are in a state of disarray with regards to jurisdictional determinations for remote, non-adjacent wetlands. Allowing such uncertainty to persist, obstructing implementation of the CWA, could never have been what Congress intended.

Given the slow pace of any rulemaking process and the lack of political will in Washington, D.C. to fix this problem, it is likely that federal district and appellate courts around the country will have the first say in this ongoing dispute. Of course, the *Rapanos* and *Carabell* remands will be carefully watched, but it is also likely those cases could settle and not provide any new guidance. Thus, all eyes will track the progress of these important cases in the courts and in the Executive Branch. Beveridge & Diamond, P.C. will continue to monitor all future developments and provide updates as they arise.

To discuss these issues further, please contact Fred Wagner (fwagner@bdlaw.com), Gus Bauman (gbauman@bdlaw.com) or Parker Moore (pmoore@bdlaw.com). The Court's plurality opinion cited an *amici curiae* brief by Beveridge & Diamond, P.C.