A Regulatory Proposal That Even the Supreme Court Could Love

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The federal regulation of wetlands and associated drainages under Section 404 of the Clean Water Act (CWA) has a substantial impact, both in terms of time and money, on the real estate and development industries. For these groups, the very nature of their trade ensures they are responsible for submitting a substantial portion of the 100,000 Section 404 permit applications that the U.S. Army Corps of Engineers (the Corps) reviews annually. These applicants commit considerable resources to obtaining each permit and face the threat of serious civil and criminal liability for any misstep in compliance with the statute. Thus, they depend on and reasonably expect the Corps to administer the Section 404 permitting program in an accurate, consistent, and predictable manner.

Over time, however, the Corps has become increasingly erratic in wielding its authority over nonadjacent wetlands and nonnavigable tributaries. This has led to conflicting regulatory interpretations and jurisdictional determinations among the Corps' district offices and left permit applicants in the unenviable position of complying with a Balkanized regulatory regime. It is little wonder then that real estate and development interests have been the catalyst for much of the recent litigation involving the scope of the federal government's CWA jurisdiction, including the United States Supreme Court's recent return to the issue in *Rapanos v. United States*, 126 S. Ct. 2208 (2006). Despite hopes that clarification of the Corps' jurisdiction over "waters of the United States" would result, the Court failed to provide the desperately needed judicial guidance. Even worse, its fractured 4-1-4 plurality opinion actually muddled the issues further, leaving stakeholders hanging in limbo and the lower courts reeling in uncertainty.

It is unlikely the lower courts will be able to iron out the regulatory wrinkles left in the wake of *Rapanos*. The few opinions issued since *Rapanos* confirm the inability of the judiciary to settle on a single standard to guide the program nationwide. Further cause for concern is the EPA and Corps' June 2007 issuance of nonbinding joint guidance, ostensibly to harmonize the Corps' practice with the Supreme Court's decision. After all, if the federal judiciary cannot agree on the nuances of *Rapanos* or the scope of CWA jurisdiction over nonnavigable features, what chance did EPA and the Corps stand of single-handedly articulating a valid interpretation of the opinion that can be applied consistently, yet permissively, in the field? More nonbinding administrative guidance simply is not the answer, particularly when it comes in the form of an overly broad, indecisive, and subjective policy like the agencies recently released. The ever-growing confusion spinning up in the jet wash of *Rapanos* warrants creation of a uniform national answer. The most realistic means of creating this answer—one that will be binding on the regulators and the regulated alike—is through a full-scale notice and comment rulemaking, just as the Supreme Court instructed in *Rapanos*. We propose the jurisdictional principles applied by the U.S. District Court for the Northern District of Texas in *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. June 28, 2006) (*Chevron*), as a blueprint for drafting such a regulatory amendment and seek to demonstrate that a majority of the Supreme Court Justices from *Rapanos* could agree with an amendment founded upon the those principles.

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*Post-*Rapanos *Confusion and the Path to Clarity*

In the twelve months since *Rapanos* made its appearance, confusion, dissension, and inaction have been the rule. The United States Department of Justice (DOJ), the entity responsible for prosecuting the CWA's civil and criminal provisions, has tried to make the best of the situation. Shortly after the decision issued, DOJ raised eyebrows by endorsing the *Rapanos* dissent's unconventional theory that reviewing courts—and by implication, Corps personnel in the field—may employ either Justice Scalia's or Justice Kennedy's test to uphold federal jurisdiction over nonadjacent wetlands and associated nonnavigable drainages. Beyond the fact that it takes its cue from a dissenting opinion, DOJ's position is problematic because it supports wishy-washy and subjective assertions of federal jurisdiction, a result Congress could never have intended.

The federal courts have done DOJ one better. In trying to discern a rule of law from the Justices' disjointed positions in *Rapanos*, the lower courts have produced three schools of thought for interpreting federal CWA jurisdiction. The First Circuit in *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), and a Florida district court in *United States v. Evans*, 2006 U.S. Dist. LEXIS 94369 (M.D. Fla. July 14, 2006), have adopted the DOJ and dissenting opinion's dual-standard

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approach under which both the plurality and Kennedy tests apply. Meanwhile, the Seventh Circuit in *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), and the Ninth Circuit in *N. California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006) and *San Francisco BayKeeper v. Cargill Salt Division*, No. 04-17554, 2007 U.S. App. LEXIS 5442 (9th Cir. Mar. 8, 2007), have relied on only Kennedy's test as the appropriate standard for analyzing assertions of federal jurisdiction under Section 404. Finally, U.S. District Court of the Northern District of Texas in *Chevron*, after determining that *Rapanos* failed to establish a clear legal standard, proclaimed a pox on the Justices' divided house and applied pre-*Rapanos* Fifth Circuit precedent to evaluate the scope of federal jurisdiction over nonnavigable waters and associated wetlands.

Many had hoped this confusion would have been prevented by EPA and the Corps, which promised to issue administrative guidance interpreting *Rapanos* immediately after the Supreme Court handed down the opinion. This hope was based on the expectation that the agencies would be able to tap their cache of experience and expertise in analyzing CWA jurisdiction and quickly provide a measure of clarity to the Court's puzzling decision. However, as time dragged on, hope for an administrative fix turned into frustration over the lack of one. Month after month, the agencies promised that their guidance was forthcoming. After every month that no guidance arrived, and after every new federal court opinion appeared that further muddied the issue, many stakeholders began to wonder whether the agencies were capable of offering a fresh experience-based perspective or whether they were just as confused as the courts.

At long last, that question was answered on June 5, a full year after *Rapanos*' reign began, when EPA and the Corps issued their guidance interpreting the impact of the opinion on their CWA jurisdiction. In the end, after twelve months of deliberation and debate, twelve months of consulting with experts from across the country, twelve months of scrutinizing every detail of the Supreme Court's opinion, the agencies drew upon their thirty years of CWA experience and released administrative guidance that advocates the same peculiar, dual-standard approach that DOJ has been arguing to the courts (with only some success) since June 2006. The announcement of this guidance came as a shock to most stakeholders in the regulated community, many of whom had interpreted the agencies' prolonged silence as signaling some sort of dramatic effort to unravel the *Rapanos* riddle. What they have gotten is something quite different. Not only does the agencies' long-awaited guidance take the form of nonbinding policy—the type that plagued the administration of the Section 404 permitting program before *Rapanos* and led to the Supreme Court's involvement in the first place—but the policy it adopted mimics one that is currently wreaking havoc in the federal courts and already has been rejected in several jurisdictions. This simply will not do.

In the absence of congressional intervention, which has recently gained some traction with the commencement of the 110th Congress, but which history indicates is unlikely to be successful, it appears that the only viable solution to the continued conflict over Section 404 is the creation of an official, binding, and national standard that defines federal jurisdiction in accordance with the terms of the CWA as interpreted by the Supreme Court. In other words, a formal rulemaking is in order. Because most of the controversy over Section 404 has originated from the Corps' unbalanced interpretation of the term "waters of the United States" as including "tributaries of waters" that are commonly viewed as traditionally navigable (33 C.F.R. § 328.3(a)(5)), it would be logical for the agencies to undertake this rulemaking to define the term "tributary" in their regulations.

It is important to understand, however, that such a formal rulemaking will only work if it delineates the precise bounds of jurisdiction in a manner acceptable to a majority of the *Rapanos* Court. And contrary to the assumptions of DOJ, EPA, and the Corps, not just any combination of the Justices will suffice. To be successful, the new rule must be one that at least five Justices could agree upon in its entirety. Unlike the EPA-Corps joint guidance, which attempts to salvage every detail of the *Rapanos* opinion that any five of the nine Justices might accept and blends them all into a single policy that is professed to enjoy the backing of the Court, the new rule should actually have the support of an unvarying Supreme Court majority. Thus, the rule should abandon the questionable two-test approach of the new administrative guidance and strike a middle ground that a consistent majority of the *Rapanos* Justices could endorse. Fortunately, finding this middle ground is easier than EPA and the Corps have let on.

Only four *Rapanos* Justices (the dissent) voted for nearly complete deference to the Corps' jurisdictional determinations, while five Justices (the Scalia plurality and Justice Kennedy) rejected this deferential approach. Rather than simply accepting the Corps' position, these five Justices proposed two new jurisdictional tests and then remanded the case to the lower court to develop and apply sufficient facts to the new tests. The regulatory amendment should therefore find the middle ground between the Scalia test and the Kennedy test.

Chevron: *Setting the Standard for Post-*Rapanos *Section 404 Regulation*

Given the difficulty that EPA and the Corps experienced with drafting even their informal post-*Rapanos* guidance, it would seem that lobbying for a new Section 404 rule is little more than pie-in-the-sky fantasy. However, the agencies themselves suggested in that guidance the possibility of a regulatory amendment in the coming year. More importantly, they already have the tools necessary to create a cogent rule that the Scalia plurality and Justice Kennedy could endorse and that avoids the dual standard cop-out afflicting the new administrative guidance. In fact, should the agencies decide to end this madness and engage in formal rulemaking to define "tributary," they need look no further than the opinion of the *Chevron* court.

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In *Chevron*, the district court considered whether CWA jurisdiction extends to a dry channel temporarily contaminated by oil from a leaking pipeline. In late August 2000, one of Chevron's six-inch, crude-oil-gathering pipelines near Snyder, Texas, failed, discharging approximately 3,000 barrels of oil onto the ground. The leaking oil collected in an unnamed, dry drainage channel where it contaminated a 200-yard segment of the channel bed. Upon learning of the spill, Chevron immediately began cleanup work and undertook extensive soil excavation and groundwater remediation to alleviate any potential harm to the unnamed channel and Ennis Creek, a downstream drainage feature that was also dry. By early October 2000, Chevron had completed its cleanup of the unnamed channel and Ennis Creek.

From the date of the leak until the date that Chevron completed its cleanup, neither the unnamed channel nor Ennis Creek contained any flowing water. As the court explained, both features qualified as "intermittent" streams, which by definition are typically dry in the absence of significant rainfall, and no measurable rainfall was observed in the spill area from August 1, 2000, until October 12, 2000—well after Chevron had cleaned up the oil. Moreover, these dry channels were located more than forty miles from any navigable-in-fact waterway and were connected to that waterway only by a network of other intermittent channels that also depended on runoff from significant rainfall events to carry flowing water.

Nevertheless, the federal government sought to impose civil fines against Chevron for violating the CWA by discharging a pollutant into navigable waters. The United States argued that although the unnamed channel and Ennis Creek are intermittent streams, which were dry during and after the spill, they are not exempt from CWA jurisdiction because whenever those dry channels contain flowing water, they will have an unbroken surface water connection to navigable waters. The government reasoned that when Congress used the term "navigable waters" in the CWA, it intended to federalize all tributaries feeding a navigable water, no matter their distance from that water and regardless of whether they actually contain flowing water when jurisdiction is determined. Thus, under the government's theory, Chevron was liable for civil damages simply because oil might have reached the distant navigable waterway if the dry channels had in fact contained flowing water at the time of the spill.

Chevron disputed the alleged violation, arguing that because the unnamed channel and Ennis Creek were dry, no oil from the spill ever came in contact with flowing water that could have transported it to an independently jurisdictional waterway. Reasoning that it is axiomatic that the CWA can not apply where there is no water, Chevron argued that liability under the statute does not attach to oil leaking onto dry land. Further, Chevron contended, even if pockets of stagnant water had been pooled in the channels at the time the leak occurred, the lack of flow meant that no oil could have reached any navigable waters, which is a prerequisite for federal CWA jurisdiction.

The district court agreed with Chevron and granted summary judgment in its favor. After reviewing the Scalia and Kennedy tests from *Rapanos*, the *Chevron* court explained that a majority of the Justices had failed to reach a consensus over the jurisdictional limits of the CWA, and therefore it turned to the closest pre-*Rapanos* case on point in its circuit, *In re Needham*, 354 F.3d 340 (5th Cir. 2003) (*Needham*), to make sense of the Supreme Court's opinion.

In *Needham*, the Fifth Circuit found that oil discharged into navigable waters or into waters adjacent to navigable waters will generally support assertions of federal jurisdiction under the CWA but added that the definition of "navigable waters" is not limitless. The *Needham* court explained that the government "may not simply impose regulations over puddles, sewers, roadside ditches and the like." 354 F.3d at 345. The CWA is not so sweeping as to allow the United States to federalize features that are neither independently navigable nor directly adjacent to navigable waters. Rather, in the case of spilled oil, the proper inquiry is whether "the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water." *Id.* at 346.

Applying the Fifth Circuit's reasoning, the district court in *Chevron* found that, "as a matter of law in this circuit, the connection of generally dry channels and creek beds will not suffice to create a 'significant nexus' to a navigable water simply because one feeds into the next during the rare times of actual flow." 437 F. Supp. 2d at 613. The court explained that neither of the dry features at issue qualified as navigable-in-fact waters or were truly adjacent to navigable waters, and because there was no evidence that flowing water was present or was ordinarily present in the channels, the simple fact that oil leaked into the unnamed channel and subsequently traversed to Ennis Creek was insufficient to invoke CWA jurisdiction. In the court's view, absent a discharge directly into navigable waters, the United States must provide some evidence that the discharge actually reached a navigable waterway, and the government's unsubstantiated speculation that this *might* happen is not enough. Because the United States did not present this evidence, the court held that the "significant nexus" to navigable waters required to assert federal CWA jurisdiction did not exist.

How Many Ways Can You Add to Five?

Although the *Chevron* court relied on pre-*Rapanos* Fifth Circuit precedent to reach its decision, the jurisdictional principles derived from that precedent represent a standard that a majority of the *Rapanos* Justices could support. Put simply, *Chevron* stands for the proposition that not just any hydrologic connection will establish jurisdiction under the CWA. There must be a significant nexus and a sufficient hydrologic connection between a nonnavigable, nonadjacent feature and a navigable waterway for the entire system to be federalized. In the absence of actual water flowing within the feature and between the hydrologic connection, however, CWA jurisdiction cannot exist because a discharge into a disconnected, nonnavigable, nonadjacent feature cannot natu-

rally reach and impact an otherwise associated navigable waterway. In other words, as the Act states, without a discharge "into navigable waters," CWA jurisdiction does not attach.

The *Chevron* test for CWA jurisdiction comports not only with the plain language of the Act, but, for three reasons, it also comports with the positions of the five Justices (Scalia, Roberts, Thomas, Alito, and Kennedy) comprising the *Rapanos* remand majority. First, the *Chevron* test recognizes that federal jurisdiction under the CWA extends beyond traditional navigable-in-fact waters but does not reach every nonnavigable hydrologic feature trickling across the ground. Both the Scalia and Kennedy tests (as well as the dissenting opinion) confirm that, although the word "navigable" is not meaningless, the CWA does not cut off jurisdiction at the limits of navigability. On the other hand, the five Justices of the *Rapanos* remand majority would also agree with the *Chevron* court that CWA jurisdiction over nonnavigable waters is not limitless. In *Chevron*, the district court explained that federal jurisdiction does not automatically extend to every faint, transitory, or artificial pooling or emanation of water that peppers the landscape. If the feature is not itself navigable, then it must be truly adjacent to an open body of navigable water. This limitation accords with the Scalia test's understanding that the CWA confines federal jurisdiction to "relatively permanent" drainages "connected to traditional interstate navigable waters" and "wetlands with a continuous surface connection" to waters of the United States. This limitation also squares with the Kennedy test, under which federal jurisdiction does not exist unless there is a "significant nexus" between the wetland or tributary in question and a traditional navigable waterway. Thus, a majority of the *Rapanos* Justices could agree with the *Chevron* court's position that Section 404 jurisdiction extends to waters that are navigable-in-fact or nonnavigable but truly adjacent to an open body of navigable water.

Second, the *Chevron* court indicated that a simple hydrologic connection to navigable waters alone is insufficient to federalize nonnavigable drainages and wetlands. In both *Rapanos* and *Chevron*, the United States argued that the term "navigable waters" includes all surface waters that have any hydrologic connection with a navigable water. Both courts rejected this theory. The district court in *Chevron* explained that the government's mere hydrologic connection theory of jurisdiction had been renounced by the Fifth Circuit in *Needham* as being anathema to *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*) (discussed elsewhere in this issue) and the CWA. According to the *Chevron* court, to establish federal jurisdiction, a nonnavigable tributary must not only be adjacent to a navigable-in-fact waterway, but must also maintain "a close, direct and proximate link" to that waterway.

The two camps of the *Rapanos* remand majority also rejected the mere hydrologic connection theory. The Scalia plurality plainly stated that the government had adopted an overly expansive view of CWA jurisdiction by attempting to regulate every feature with some hydrologic connection to navigable waters no matter how faint, remote, or infrequent. Thus, under the Scalia test, an inconsistent and remote hydrologic connection to waters of the United States is insufficient to confer federal jurisdiction; a continuous surface water connection is required. Although Scalia, *et al.* struck a far more decisive line, Justice Kennedy also disavowed the mere hydrologic connection theory by stating that such a connection generally should not provide an independent jurisdictional basis because it may be too insubstantial to create the necessary hydrologic linkage with navigable waters to qualify as a significant nexus. Thus, a majority of the *Rapanos* Justices could also agree with the *Chevron* court's stance that a mere hydrologic connection between nonnavigable waters and navigable waters does not support an assertion of CWA jurisdiction.

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Finally, the *Chevron* court recognized that the Corps must base CWA jurisdiction on actual conditions observed in the field, not some possibility that certain conditions might exist. Applying this principle, the court found that the government's assertion of jurisdiction over the dry channels at issue was improper because it was premised on the Corps' opinion that the channels *could have* transported oil to downstream navigable waters if the features had contained flowing water. The court explained that, in the absence of a direct discharge into navigable waters, the federal government must present some evidence that the discharge actually did or will reach navigable waters. On this point, the same five Justices from *Rapanos* again would agree with the *Chevron* court.

In articulating his significant nexus test, Justice Kennedy deemed the *Rapanos* dissent overly deferential to the Corps because it would indulge the agency's tendency to federalize every wetland proximate to any drainage—large or small, wet or dry, natural or man-made—that somehow might eventually reach a navigable waterway. Justice Kennedy stated that wetlands, and by implication nonnavigable drainages, have the necessary jurisdictional nexus if they "significantly affect the chemical, physical, and biological integrity" of navigable

waters. When their effect on water quality is only speculative or insignificant, wetlands are removed from beneath the umbrella of the term "navigable waters." Admittedly, the Scalia plurality took a more restrictive view than Justice Kennedy, stating that nonnavigable features must contain "relatively permanent flow" to be jurisdictional; "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall" do not qualify. Thus, while it appears that neither the Scalia plurality nor Justice Kennedy would freely endorse each other's take on precisely what conditions must exist for the Corps to regulate nonnavigable features, all five Justices likely would agree with the *Chevron* court that CWA jurisdiction can not extend to nonnavigable features on the basis of conjecture and unrealized theories over whether and when they may actually contain flowing surface water. Reliance on factors such as average rainfall data, watershed size, and the anticipated hydrologic potential of nonnavigable features and associated wetlands just won't cut it for jurisdictional determinations.

Taken together then, a majority of the Supreme Court Justices from *Rapanos* could agree with the three fundamental principles of CWA jurisdiction articulated in *Chevron*. First, federal jurisdiction extends to traditional navigable waters and, on a limited basis, to certain adjacent, nonnavigable features. Second, a nonnavigable feature is not jurisdictional unless it maintains an established and consistent hydrological surface water connection with the navigable waterway to which it is directly adjacent. Finally, to assert jurisdiction over a nonnavigable feature, the Corps must make an affirmative finding, supported by verifiable evidence, that the nonnavigable feature and its hydrologic connection to a navigable waterway contain sufficient surface hydrology to contribute water to, and thereby affect, the navigable waterway with such frequency or significance that it is reasonable to view the feature as an integral and inseparable component of the navigable waters.

With these principles in mind, EPA and the Corps could help resolve the growing confusion over the scope of Section 404 jurisdiction by addressing the root of the problem—the absence of a regulatory definition for the term "tributary" as a category of "waters of the United States." By incorporating the *Chevron* test with the Scalia and Kennedy tests from *Rapanos*, the agencies could create a rule that sets forth the precise bounds of federal jurisdiction over the various nonnavigable waters across the country and would be a valid interpretation of the CWA in the eyes of the Supreme Court. Such a national, binding rule would reduce litigation over the Section 404 permitting program and, more importantly, bring a sense of fairness and consistency to federal regulation under the CWA.