Clean Water Act Jurisdiction Remains Murky

Since the Supreme Court issued a split decision in *Rapanos v. United States* in 2006, the scope of Clean Water Act ("CWA") jurisdiction has perplexed landowners, courts, and regulators alike. Rather than establishing a uniform jurisdictional standard for wetlands and tributaries, the Court proposed two vastly different tests. The Scalia test holds that the CWA reaches only "relatively permanent, standing or continuously flowing" waters and wetlands with "a continuous surface connection" to those waters. The Kennedy test grounds jurisdiction on the presence of a "significant nexus" between wetlands and navigable waters. Faced with these competing standards, permittees now wrestle with basic questions over obtaining CWA permits for discharges to remote wetlands and streams. Unfortunately, the confusion is unlikely to end soon.

Following *Rapanos*, EPA and the Army Corps of Engineers struggled to interpret the opinion to determine CWA jurisdiction in the field. In June 2007, they issued non-binding joint guidance to memorialize their interpretation. Despite their best efforts, it was too little, too late—arriving a year after the controversy began, endorsing both *Rapanos* tests as legitimate methods for establishing CWA jurisdiction, and founded on subjective standards. Stakeholders immediately rebuffed the guidance as unworkable and pushed for a formal regulation.

So far, no regulation has been issued, but Corps officials recently threw gasoline on the fire by confirming that the guidance dramatically slows permitting of wetlands and tributaries. Much of the delay stems from evaluating whether individual features maintain a "significant nexus" with navigable waters under *Rapanos*' Kennedy test. For this test, the guidance provides numerous factors (such as a feature's flow characteristics, location, watershed size, and function) to determine whether a wetland or tributary has an effect that is "more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water." Of course, analyzing objective factors to make a subjective "significant nexus" determination is not easy. Yet, this gives little solace to applicants, for whom it now takes up to ten times longer to obtain permits than before the guidance. They can only wait with bated breath as the agencies decide later this year whether to promulgate binding regulations.

The federal courts are also puzzled and have split into three camps, each adopting different views of CWA jurisdiction under *Rapanos*. Some agree with the agencies' endorsement of both the Scalia and Kennedy tests, while others support only Justice Kennedy's test. Still others believe that *Rapanos* never established any law to apply and have ignored it completely or refused to rule on issues implicating the decision.

Recently, the Supreme Court has begun to reap what it sowed. Since January alone, it has received three separate petitions challenging lower court interpretations of *Rapanos*. The Justices denied the first of these petitions and likely will deny the remaining two soon—virtually guaranteeing that the turmoil will continue.

Rapanos has also drawn the attention of lawmakers. In 2007, the Clean Water Restoration Act ("CWRA") was introduced in both the House and Senate to amend the CWA by replacing the term "navigable waters," a focal point of the controversy, with the term "waters of the United States." The amendment would define "waters of the United States" broadly to include "all interstate and intrastate waters and their tributaries . . . and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution."

Although many support a legislative fix to *Rapanos*, it is hardly surprising that this proposal is controversial. Supporters contend that the amendment simply restores the CWA to its status before *Rapanos*; critics denounce it as an attempt to rewrite the statute to reach remote waters and "activities" that never before required permits. Currently, CWRA detractors appear to have an edge, garnering the support of EPA and the Corps to narrow the amendment and clarify the categories of waters and activities subject to federal jurisdiction. At this point, however, any prediction as to the CWRA's final form or its prospects of passing is little more than speculation.

With continuing uncertainty over CWA jurisdiction plaguing all three branches of the federal government, permittees are in an unenviable position. Anyone engaging in activities that might impact *any* wetlands or waters should exercise prudence, enlist experts to help navigate the regulatory morass, and consult with EPA and the Corps as appropriate. In the meantime, stakeholders should cross their fingers for a quick resolution to this important issue.

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