

FOURTH CIRCUIT WADES IN—APPLYING THE RAPANOS ‘SIGNIFICANT NEXUS’ TEST FOR CLEAN WATER ACT JURISDICTION TO WETLANDS ADJACENT TO NONNAVIGABLE TRIBUTARIES

Precon Development Corp. v. U.S. Army Corps of Engineers,
___F.3d___, Case No. 09-2239 (4th Cir. Jan. 25, 2011).

The U.S. Court of Appeals for the Fourth Circuit has become the latest Federal Circuit Court to attempt to divine guidance regarding the scope of Clean Water Act (CWA) jurisdiction over wetlands in the wake of the U.S. Supreme Court’s fractured ruling in *Rapanos v. United States*, 547 U.S. 715 (2006). In *Precon Development Corp. v. U.S. Army Corps of Engineers* the Fourth Circuit reviewed a determination by the U.S. Army Corps of Engineers (Corps) that it had jurisdiction over certain wetlands that were adjacent to nonnavigable drainage ditches and several miles away from the nearest navigable waterway. The court’s decision to reverse the Corps’ jurisdictional determination illustrates the uncertain legal landscape that both regulated entities and the federal government face as the implications of *Rapanos* continue to unfold nearly five years after the opinion first appeared.

Background—CWA Jurisdiction under *Rapanos*

In *Rapanos*, the U.S. Supreme Court addressed the question of whether federal jurisdiction under the CWA extends to wetlands that are not navigable in fact and are not adjacent to such navigable waters. Although a majority of the Court rejected the Corps’ blanket assertion of jurisdiction over all wetlands adjacent to nonnavigable tributaries of navigable-in-fact waters, the majority could not agree on a single jurisdictional test. Instead, a plurality of the Court, in an opinion written by Justice Scalia, suggested that wetlands should only be considered jurisdictional waters when they: (1) are adjacent to a “relatively permanent body of water connected to traditional interstate navigable waters” and (2) have “a continuous surface connection with that water.” Justice Kennedy, in a concurring opinion, proposed a broader test in which CWA jurisdiction:

...depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.

Under Justice Kennedy’s “significant nexus” test, the requisite nexus exists:

...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.’

Conversely, there is no jurisdiction over wetlands whose “effects on water quality are speculative or insubstantial.” Justice Kennedy explained that a significant nexus necessarily exists where the wetlands are adjacent to navigable-in-fact waters. He also suggested that the Corps could, through regulations or adjudication, identify categories of nonnavigable tributaries that are significant enough that jurisdiction would be conclusively established over adjacent wetlands. In the absence of any such regulation, however, with respect to wetlands adjacent to nonnavigable tributaries, “the Corps must establish a significant nexus on a case-by-case basis.”

In a concurring opinion, Chief Justice Roberts observed that because a majority of the Court was unable to agree on the proper jurisdictional test:

...[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis.

Since *Rapanos* was decided, that is precisely what has happened: Although most of the federal courts of appeals that have considered *Rapanos* have found that the “significant nexus” test applies, some have held that the plurality test provides (or might provide) an alternative basis for jurisdiction or have avoided the issue altogether. The latest court to test the *Rapanos* waters is the Fourth Circuit.

The Fourth Circuit Court of Appeals’ Decision

In *Precon Development*, the Fourth Circuit reviewed the Corps’ assertion of CWA jurisdiction over 4.8 acres of wetlands (Site Wetlands) located approxi-

mately seven miles from the nearest navigable-in-fact water. The Site Wetlands sat adjacent to (but were separated by a berm from) a 2,500-foot-long man-made drainage ditch, which in turn joined a larger drainage ditch. This larger ditch met up with another tributary and ultimately flowed into the navigable Northwest River.

To determine whether it had jurisdiction over the Site Wetlands, the Corps had applied Justice Kennedy's "significant nexus" test as interpreted in a non-binding guidance on CWA jurisdiction issued by the Corps and the Environmental Protection Agency in June 2007. (An updated version of the guidance was issued in December 2008.) Pursuant to the guidance, the Corps aggregated the 4.8 acres of wetlands at issue with another 443 acres of "similarly situated" wetlands in the area (only 161 of which were on the defendant's property) and evaluated the entire 448 acres and the two adjacent ditches for a significant nexus with the Northwest River. Finding that a significant nexus existed, the Corps concluded that it had jurisdiction over the Site Wetlands.

On appeal, the parties agreed that the "significant nexus" test governed; thus, the court did not address the issue of whether the *Rapanos* plurality's "continuous surface connection" test provided an alternate ground for CWA jurisdiction. Rather, the defendant property owner challenged the Corps' jurisdictional determination on two grounds: (1) that the decision to aggregate the 448 surrounding acres was impermissible; and (2) that even as to the aggregated 448 acres, the Corps did not provide sufficient evidence of a significant nexus between the wetlands and the Northwest River.

In its analysis, the court first noted that because the Corps' interpretation of the phrase "significant nexus" was not adopted through notice-and-comment rulemaking, that interpretation would be granted less deference than would be accorded under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Granting the more modest deference required by *Skidmore v. Swift*, 323 U.S. 134 (1944), the court upheld the Corps' decision to aggregate the 448 acres of surrounding wetlands as "similarly situated." In doing so, the court rejected the property owner's argument that the Corps was wrong to treat abutting wetlands the same as nonabutting, adjacent wetlands (such as the Site Wetlands) and found that the Corps acted reasonably in aggregating

the two ditches into a single "tributary" for purposes of the analysis. The court was more troubled by the Corps' decision to include adjacent wetlands stretching over three miles downstream as "similarly situated," observing that the Corps' record provided only "a bare minimum of persuasive reasoning on this point." The court ultimately upheld the Corps' finding but "urged" the Corps "to consider ways to assemble more concrete evidence of similarity before again aggregating such a broad swath of wetlands."

Failure to Establish the Proper Nexus

The court agreed with the property owner, however, that the Corps had failed to adequately establish a significant nexus between the Site Wetlands—along with similarly situated wetlands—and the Northwest River. While noting that "the significant nexus test does not require laboratory tests or any particular quantitative measurements in order to establish significance," the court held that "some evidence of both a nexus and its significance" must be presented. As examples of the types of evidence that might support a determination of significance, the court cited the following examples from Justice Kennedy's opinion:

...documentation of 'the significance of the tributaries to which the wetlands are connected,' a 'measure of the significance of [the hydrological connection] for downstream water quality,' and/or 'indication of the quantity and regularity of flow in the adjacent tributaries.'

The Corps' administrative record did not contain any of this evidence. Although the Corps had documented the potential flow rates of the two ditches, the record contained no measurements of actual flow. Even if it had, such a measurement, standing alone, would not necessarily have sufficed to establish a significant nexus. In this regard, the court stressed that the significant nexus test requires an examination of the "comparative relationship" between the wetlands at issue, their adjacent tributary, and traditional navigable waters. The court also rejected the Corps' reliance on the presence in the record of other physical observations about the wetlands and adjacent tributaries, as there was nothing in the record that would allow the court to evaluate whether these characteristics were "significant" for the Northwest

River. In particular, the court stated that although it had been established that the wetlands and adjacent tributaries “trap sediment and nitrogen and perform flood control functions,” the Corps had not established “if the Northwest River suffers from high levels of nitrogen or sedimentation, or if it is ever prone to flooding.”

Remand to the Corps for Reconsideration Jurisdiction

Concluding that the Corps had failed to establish that the nexus between the 448 acres of wetlands and the Northwest River was “significant,” the court remanded to the Corps for reconsideration of its jurisdiction over the Site Wetlands. Not wanting to place an “unreasonable burden” on the Corps, the court instructed:

We ask only that in cases like this one, involving wetlands running alongside a ditch miles from any navigable water, the Corps pay particular attention to documenting why such wetlands significantly, rather than insubstantially, affect the integrity of navigable waters. Such documentation need not take the form of any particular measurements, but should include some comparative information that allows us to meaningfully review the significance of the wetlands’ impacts on downstream water quality.

Conclusion and Implications

The Fourth Circuit’s decision is the latest attempt by a Federal Circuit Court of Appeals to grapple with the unresolved legacy of *Rapanos*. In particular, the increasing adoption of Judge Kennedy’s flexible “significant nexus” test means that both regulated entities and the regulatory agencies will continue to face uncertainty over whether wetlands adjacent to nonnavigable tributaries are subject to CWA jurisdiction. Moreover, until the agencies give meaning to the term “significant nexus” through notice-and-comment rulemaking or the Supreme Court provides further clarity, this determination will have to be made on a case-by-case basis, further exacerbating the uncertainty and increasing the costs and time involved in obtaining regulatory approval for development that will have an impact on wetlands.

Precon Development also suggests that, in practice, the “significant nexus” test could be used either to extend or constrain federal jurisdiction over wetlands that are remote from navigable-in-fact waters. Where CWA jurisdiction ultimately lies will depend on how stringently the courts interpret the “significance” requirement, a topic that no doubt will be the subject of substantial future litigation. At a minimum, it appears that the Corps will not be able to rest CWA jurisdiction over remote wetlands adjacent to nonnavigable tributaries on conclusory assertions of significance. (Edward Grauman, Richard Davis)

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