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# U.S. Supreme Court Divided Over Wetlands

By Mark A. Kablack

In a recent, divided opinion, the U.S. Supreme Court has again attempted to explain the reach of federal jurisdiction over wetlands under the 1972 Clean Water Act (CWA). The decision, which was divided 4-1-4, was rendered in June in connection with two cases consolidated on appeal. Both cases involved Michigan property owners (Rapanos and Carabell) who asserted that the U.S. Army Corps had exceeded its jurisdiction in enforcing the CWA with respect to matters involving wetland alteration. The Supreme Court case, entitled: *Rapanos v. U.S.* and *Carabell v. U.S. Army Corps of Engineers* (2006), consists of a plurality opinion authored by Justice Scalia, with a concurrence by Justice Kennedy in the judgment. *Rapanos* offers important insight into the future of federal wetlands jurisdiction in matters involving real estate development.

My articles in the past have often focused on state and local wetland regulations and impacts to property owners, builders and developers. The permitting process under state and local procedures can have a significant impact on land use. The addition of another layer of regulatory review through federal regulation under the CWA can have a significant impact on the cost and time delay associated with permitting a project. As noted in Rapanos, "[t]the average applicant for an individual permit [under the CWA] spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit [under the CWA] spends 313 days and $28,915 – not counting costs of mitigation or design changes."

Federal wetland regulatory review may be triggered in a project depending upon the area of wetlands altered with "dredged or fill material" and whether the wetlands altered may be considered "navigable waters of the United States." This latter term has been the crux of debate and inquiry under the CWA. The Supreme Court has recognized for some time that the term "navigable waters" does not mean navigable in fact. Waters of the United States may include non-navigable rivers, streams, ponds and other tributaries that are connected to traditional navigable waters. However, the full reach of the CWA, and defining the proper connection of a wetland or waterway to a navigable water, has been hard to accomplish with any certainty. *Rapanos* is the latest in a line of cases decided by the Supreme Court to help define the proper reach of the CWA, implementing regulations as well as practice and procedures of the U.S. Army Corps of Engineers, the permit-granting authority for the deposition of "dredged or fill material."

In a prior decision, *United States v. Riverside Bayview Homes Inc.* (1985), the Supreme Court upheld the Army Corps' interpretation of "waters of the United States" to include wetlands that actually abutted traditional navigable waters. Subsequent to *Riverside Bayview*, the Corps increased its jurisdictional scope to wetlands that were tenuously connected to navigable waters. The Corps adopted the so-called "Migratory Bird Rule" to assert jurisdiction over relatively isolated wetlands and waters that were inhabited by migratory birds, which birds at some point would also inhabit navigable waters. The Supreme Court criticized this expansion of jurisdiction in a subsequent case entitled *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (2001), or the *SWANCC* case. In *SWANCC*, the Supreme Court found that there must be a "significant nexus" between the wetlands regulated and "waters of the United States" and struck down the Migratory Bird Rule. However, *SWANCC* did not overrule *Riverside Bayview* and the full extent of the connection or nexus required between wetlands and traditional navigable waters was the subject of dispute in the *Rapanos* case.

Scalia's plurality opinion in *Rapanos* provides a review of the statu-

tory and regulatory history of the CWA and concludes that there is a bright line test for whether a waterway or wetland is properly considered "waters of the United States." In the first instance, ditches, drains and other such tributaries that may be considered source connections to navigable waters must be "waters" in the ordinary sense, containing relatively permanent flow. Seasonal, intermittent or ephemeral flows do not qualify. In the second instance, wetlands must be adjacent to these waters in the sense of possessing a continuous surface connection. "Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States'" will not trigger jurisdiction. As a result, and based upon the lack of information at the lower court level in both the *Rapanos* matter and the *Carabell* matter, both cases were remanded to the Sixth Circuit Court of Appeals for further review.

Unfortunately, Scalia's bright line test did not win a clear majority of supporting justices. As mentioned earlier, only three other justices joined in Scalia's opinion. A separate opinion authored by Justice Kennedy ultimately agreed with Scalia's conclusion that the cases should be remanded to the Sixth Circuit, but Kennedy arrived at such a result based upon entirely different reasoning. In fact, Justice Kennedy's opinion appears in large part to be more closely aligned with the four justices who filed a dissent than it is aligned with Scalia's opinion. justice Kennedy rejects the bright line, direct connection standards promoted by Scalia. In contrast, Justice Kennedy resurrects the "significant nexus" of the *SWANCC* decision and argues that there should be intensive inquiry in each case to determine whether adequate connections with "waters of the United States" exist. The Army Corps may rely upon the direct connection standard espoused by Scalia but it may also go further, regulating wetlands that might otherwise "significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable.'"

As Chief Justice Roberts notes in his concurring opinion, there is no clear direction from the Supreme Court on precisely how to read the limits of the CWA. The combination of Justice Kennedy's "significant nexus" standard and the dissenting opinion's affirmation of Army Corps jurisdiction leaves the average applicant unsure of the potential reach of the CWA. In light of the split, both environmentalists and property rights advocates will likely cite to the *Rapanos* case to support opposite positions under the CWA. One conclusion of the *Rapanos* case is obvious – there will be continued confusion and litigation to establish the proper extent of federal wetlands jurisdiction. Additional rulemaking by the Army Corps to further define the scope of jurisdiction may be in order, and is in fact specifically called for by Justice Roberts in his concurring opinion and by Justice Breyer in his dissenting opinion. There is also pending legislation in Congress (S. 912 and H.R. 1356) to more specifically define "navigable waterways" and "tributaries" under the CWA. However, regulatory and statutory revisions will offer limited solace to those property owners, builders and developers who are currently trying to permit a project. ◆

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