Rapanos v. United States

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The Supreme Court has ruled in consolidated cases that the assertion of jurisdiction under the Clean Water Act (CWA) by the United States Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) is too broad. The CWA prohibits the discharge of pollutants (which include dredged and fill material) into "navigable waters" without a federal permit. The Act defines the term "navigable waters" as "waters of the United States." That term has been interpreted to cover nearly any area over which water flows, including the shallow "wetlands" on Mr. Rapanos's Michigan lots. Mr. Rapanos was charged with violating the CWA when he filled wetlands on his property without authorization. The district court found Mr. Rapanos liable with respect to one of his properties because the "wetlands" on the site were deemed adjacent to a tributary (i.e., a non-navigable, man-made drainage ditch) that flowed through a series of conduits to a navigable waterway up to twenty miles away. On appeal, the Sixth Circuit Court of Appeals affirmed the district court's determination on the basis of the "hydrological connection" theory. Under this test, CWA jurisdiction exists no matter how remote or insubstantial the connection between a wetland and a navigable-in-fact waterbody. On June 19, 2006, the Supreme Court vacated the judgments of the Sixth Circuit and remanded the cases for further proceedings.

No opinion of the Court garnered a majority of the justices. The judgment of the Court was announced by Justice Scalia, whose opinion was joined by the Chief Justice and Justices Thomas and Alito. The Chief Justice wrote a brief concurring opinion. Justice Kennedy concurred in the judgment only, writing a separate opinion. Justice Stevens wrote the principal dissent, joined by Justices Souter, Ginsburg, and Breyer. Justice Breyer also dissented separately.

Four justices, forming a plurality on the court, determined that the language, structure, and purpose of the CWA required limiting federal authority to "relatively permanent, standing or continuously flowing bodies of water" traditionally recognized as "streams, oceans, rivers and lakes." These Justices (Scalia, Thomas, Alito, and Roberts) would also authorize federal regulation of wetlands abutting these water bodies if they contain a continuous surface water connection such that the wetland and water body are "indistinguishable." The four dissenting justices took the view that, to advance the statutory goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters," the agencies can regulate practically any waters. Justice Kennedy, on the other hand, acted alone and proposed a "significant nexus" test for determining CWA jurisdiction. Under this test, a waterbody is subject to federal regulation only if that waterbody substantially affects a navigable-in-fact waterway. Justice Kennedy would exclude remote ditches and streams with insubstantial flows from regulation and would reject speculative evidence of a "significant nexus."

Factual Background

The *Rapanos* case concerns three parcels of land, owned by petitioners John and Judith Rapanos and referred to as the Salzburg, Hines Road, and Pine River sites. The nearest traditional navigable waterway to the Salzburg site is some twenty miles away. An intermittent surface water connection exists through a man-made ditch, a non-navigable creek, and a non-navigable river that becomes navigable before flowing into Saginaw Bay. The Hines Road site has an intermittent surface water connection to the Tittabawassee River, a traditional navigable water, by means of a ditch that runs alongside the site. The Pine River site is in undefined proximity and has a surface-water connection to the Pine River, a non-navigable water, which flows into Lake Huron.

The consolidated *Carabell* case concerns one twenty-acre tract of land (part of which is wetland) located about one mile from Lake St. Clair, a traditional navigable water. The tract borders a ditch that flows into a drain that flows into a creek that flows into Lake St. Clair. A four-foot-wide, man-made berm separates the tract from the ditch, such that water rarely if every passes over.

In both cases the federal government deemed the petitioners' lands to be "waters of the United States" under the CWA, thus requiring that petitioners obtain Section 404 "dredge and fill" permits prior to instituting any development activities.

Both petitioners challenged these jurisdictional findings. The Sixth Circuit determined in the *Rapanos* case that the three sites were "waters of the United States" because each was hydrologically connected to navigable waters traditionally understood. As for the *Carabell* case, the Sixth Circuit determined that because the tract was adjacent to a tributary of a navigable water traditionally understood, jurisdiction was present.

The Scalia Plurality

The essential point of Justice Scalia's opinion is that, although the phrase "waters of the United States" contains some ambiguity, the government's interpretation of that phrase is so obviously outside the bounds of plain meaning (as elucidated by canons of construction, intrastatutory

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references, precedent, and "common sense") that it is entitled to no deference.[1] The plurality concludes that "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."[2]

The plurality rejects the position that CWA jurisdiction extends only to those waters that fit the definition of navigable waters traditionally understood and the wetlands adjacent thereto. Instead the plurality supposes that the CWA must cover some waters not fitting the traditional definition.[3] The plurality reasons that because Section 1362(7) ("the waters of the United States") includes the definite article 'the' as well as the plural 'waters,' the phrase should not be interpreted to mean just "water," but rather permanent, standing, or flowing bodies of water, such as streams, rivers, lakes, and oceans.[4] Restricting the phrase to bodies of water containing permanent or continuously flowing water is consistent with common sense, for the statute simply will not permit a "Land Is Waters" approach to jurisdiction.[5] In the plurality's estimation, *United States v. Riverside Bayview Homes, Inc.*[6] and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[7] are consistent with this interpretation. Both cases describe CWA jurisdictional waters as "open waters"; that appellation just does not fit dry channels and other land features over which the government asserts jurisdiction.[8] These land features, the plurality notes, are more properly characterized as "point sources" (if anything) under the Act.[9]

The plurality takes issue with the "purposivist" approach to jurisdiction adopted by Kennedy and dissenters that because Congress intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[10] the phrase "waters of the United States" should be interpreted as broadly as possible so as to give effect to that purpose. The plurality rejects that position for a variety of reasons, not the least of which because it gives insufficient attention to other congressional purposes expressed in the Act, such as the "policy . . . to recognize, preserve, and protect the primary responsibility and rights of the States to prevent, reduce, and eliminate pollution, [and] plan the development and use . . . of land and water resources."[11]

Canons of construction are also called upon by the plurality. The vast arrogation of state authority to the federal government under an expansive jurisdictional reading of the CWA would create such a significant re-weighing of the federal-state balance that a clear statement to that effect is required of Congress. No such statement is to be found in the CWA.[12] Similarly, because such an expansive reading would raise serious federalism concerns under the Tenth Amendment, the statute should be construed so as to avoid raising those issues.[13]

Addressing the adjacency issue, the plurality interprets *Riverside Bayview* as deferring to the government's ecological judgment that certain wetlands are so bound up with neighboring navigable waterbodies that one cannot discern where the water ends and the wetland begins and that CWA jurisdiction can properly be asserted over such wetlands. Accordingly, the plurality concludes that a wetland is "adjacent" to "waters of the United States," and thus such wetlands are "waters" in their own right, if there is "no clear demarcation between 'waters' and wetlands."[14] But where there is no "boundary problem"—i.e., where one can easily tell where the "waters of the United States" end and the wetlands begin—there can be no adjacency. And to establish adjacency, the government must make two findings. One, the adjacent waterbody must itself be a relatively permanent body of water connected to traditional interstate navigable waters. Two, the wetland must have a continuous surface water connection with that waterbody such that one cannot tell where the water ends and the wetland begins.[15]

The plurality also recognizes the significant malleability of Kennedy's jurisdictional test. The plurality asks provocatively:

> When, exactly, does a wetland "significantly affect" covered waters, and when are its effects "in contrast . . . speculative or insubstantial"? . . . As the dissent hopefully observes, such an unverifiable standard is not likely to constrain an agency whose disregard for the statutory language has been so long manifested. In fact, by stating that "[i]n both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above," Justice Kennedy tips a wink at the agency, inviting it to try its same expansive reading again.[16]

Thus, to recapitulate, the plurality adopts a split waters/wetland jurisdictional view, developing tests peculiar to each. For non-navigable tributaries, the plurality requires that there be a continuous (or at least seasonal) flow in a defined channel, such as a creek or stream but not an irrigation ditch. For wetlands, the plurality requires that the abutting land be so bound up with the jurisdictional water that the two are essentially "indistinguishable."[17]

The Kennedy Concurrence

Justice Kennedy's principal disagreement with the plurality and dissent is in the use of the "significant nexus" criterion, developed in *SWANCC* from the Court's opinion in *Riverside Bayview*. According to Kennedy, jurisdiction under the CWA for a non-navigable waterbody or wetland requires a significant nexus between that waterbody or wetland and a navigable water traditionally understood.[18] Kennedy adopts the premise that Congress intended to regulate some non-navigable waters in enacting the CWA.[19] Kennedy objects to the plurality's position that the CWA does not cover irregular flows. He notes several instances in the western United States of waterways that are generally dry but can at times carry tremendous amounts of water.[20] Because an intermittent flow can constitute a "stream," the government is correct that "waters of the United States"

can be reasonably interpreted to include the paths of such impermanent streams.[21]

Kennedy also takes issue with the plurality's reading of *Riverside Bayview*. That case, in Kennedy's view, stands for the proposition that adjacency can serve as a valid basis for jurisdiction even as to "wetlands that are not significantly intertwined with the ecosystem of adjacent waterways."[22] Thus, Kennedy cannot accept the plurality's position that where the boundary between wetland and adjacent waterway is clear, wetlands beyond that boundary are outside of jurisdiction.[23] Similarly, Kennedy cannot accept that a "continuous flow" connection between a wetland and an adjacent waterbody is necessary to jurisdiction, because such a requirement does not take sufficient account of occasional yet significant flooding.[24] Jurisdiction is possible even without a hydrological connection, "for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme."[25] In short, Kennedy believes that the plurality gives insufficient attention to the interests asserted by the United States.[26]

But equally unsatisfactory to Kennedy is the dissent's approach, for that would read the word "navigable" out of the CWA.[27] To preserve independent significance for the word "navigable," a significant nexus must exist between the non-navigable tributary or wetland and the traditional navigable waterway.

> [W]etlands 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." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[28]

This nexus is automatically established for wetlands adjacent to navigable-in-fact waterways.[29] Kennedy opines that the Corps might reasonably conclude that wetlands adjacent to certain classes of tributaries would also automatically have a significant nexus and thus fall within federal jurisdiction.[30] And he suggests that where adjacency and the requisite significant nexus are established for a particular wetland, it may be appropriate to presume jurisdictional status for other similar wetlands in the region.[31]

It is important to note, however, that in the absence of federal regulations, the determination of jurisdictional wetlands adjacent to nonnavigable tributaries must be conducted on a case-by-case basis.[32] Also, contrary to the Scalia plurality, Kennedy appears to accept the agency interpretation of "adjacent" as meaning "contiguous, bordering, or neighboring."[33]

Speaking specifically to the *Rapanos* case, Kennedy warns that "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."[34] As for *Carabell*, Kennedy underscores that jurisdiction is not precluded merely because the tract is separated from the adjacent "tributary" by a man-made impermeable berm.

Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system.[35]

But it is clearly not enough that the wetlands are merely geographically adjacent.[36] Thus Kennedy concludes that remand is appropriate to determine whether a significant nexus exists between the tract and a navigable-in-fact water, notwithstanding (or perhaps because of) the hydrologic barrier.

Is There A Controlling Opinion?

In the 1977 case of *Marks v. United States*[37] the Supreme Court set forth the rule that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Arguably, this rule would dictate that the "significant nexus" text be followed exclusively. But as recently as 2003, in *Grutter v. Bollinger*,[38] a racial preference case, the Supreme Court did not follow the *Marks* rule and noted that it was unworkable in practice: "It does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.'"[39] The obvious difficulty with the *Marks* rule is that it produces absurd results, for it not only allows one justice to control the entire court, but it also allows that justice to impose his will on the entire nation. The *Marks* rule encourages power plays on the Court to the detriment of the rule-of-law.

Because it has proven unworkable in the past, it is doubtful that the Supreme Court expects *Marks* to be followed by the lower courts.[40] It is noteworthy that the dissent in *Rapanos* does not rely on the *Marks* rule, although the dissent prefers the broader Kennedy test over the narrower plurality test. Instead, Justice Stevens suggests that "the United States may elect to prove jurisdiction under either test."[41]

Instead of relying on the concurring opinion with the least votes, it makes more sense to rely on the winning opinion that garnered the most votes. This would make the plurality the controlling opinion. If the plurality is followed by the courts below, it would substantially curtail federal jurisdiction under the CWA. If, on the other hand, Justice Kennedy's "significant nexus" test is adopted, the limitation on federal authority will vary on a case-by-case basis depending on whether the court gives the test a narrow or a broad reading.

The *Marks* inquiry is also complicated here because the jurisdictional tests offered by Scalia and Kennedy overlap but neither is a subset of the other; and the dissent,

although finding jurisdiction wherever Scalia or Kennedy would, does so on the basis of deference to agency decision-making. Contrast this circumstance with the now-classic *Marks*-type scenario in *Regents of University of California v. Bakke*.[42] In that case, four justices contended that use of race was not permissible in state school admissions; four justices held that it was permissible; and Justice Powell, concurring in the result, held that it was permissible in some instances and not in others.[43] With respect to *Rapanos*, under the Scalia test, jurisdiction obtains if there is a continuous flow in a defined channel. Yet under the Kennedy test, continuous flow (or, for that matter, any flow) is relevant to the jurisdictional inquiry only to the extent that flow is an indicator of significant effect. Where the Kennedy and Scalia tests sharply differ is on hydrological connection: for Scalia, a hydrological connection is a necessary but not sufficient condition to jurisdiction; whereas for Kennedy, a hydrological connection is neither necessary nor sufficient. Thus, Kennedy's opinion, unlike Powell's in *Bakke*, does *not* represent the median-point between the plurality and dissent. Hence, a *Mark*-type inquiry is all the more inapt. Perhaps what we really end up with in a case like *Bakke* or *Rapanos* is simply the result—reversal or sustaining of the opinion below—with no rationale to apply.

What is the *Rapanos* Jurisdictional Rule?

The opinion provides a five-justice majority rejecting the government position, adopted by the Sixth Circuit, that *any* hydrological connection is sufficient to establish Clean Water Act jurisdiction. Both the Scalia plurality and the Kennedy concurrence vote to reverse the lower court. And although the justices part ways on their jurisdictional interpretation, the justices reach other common ground as well.

For example, all the justices appear to agree that *SWANCC* prohibits federal regulation of isolated, non-navigable, intrastate water bodies. This constitutes a tacit recognition that *SWANCC* did more than invalidate the "Migratory Bird Rule" as some lower courts had held, such as the Sixth Circuit in *Rapanos*. *Rapanos*, therefore, is a clarification or affirmation of the *SWANCC* decision.

Also, Justice Kennedy and the Scalia plurality are in agreement that federal jurisdiction does not extend to remote ditches and drains with insubstantial flows. Justice Kennedy expressly excludes the "regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes"[44] while the Scalia plurality expressly excludes man-made ditches and drains with intermittent flows from rain or drainage.[45]

Unfortunately, elucidating any further jurisdictional rule from *Rapanos* will have to await lower court determinations. This may occur rather quickly because there are several jurisdictional cases now pending in the lower courts. And, in fact, a district court in Texas has already applied *Rapanos* to determine the extent of federal authority over remote intermittent drainage ditches and streams.

In *United States v. Chevron Pipe Line Co.*,[46] the company spilled oil into an unnamed drainage ditch that connects to an intermittent stream which flows many miles to a navigable-in-fact waterway.[47] But, at the time of the spill, and during the spill cleanup, the ditch never contained flowing water.[48] The district court ruled that CWA jurisdiction does not extend to the ditch because it is not adjacent to an open body of navigable water and because the oil did not reach "navigable waters of the United States."[49]

The case is noteworthy, and perhaps portentous, because the court refused to apply the Kennedy "significant nexus" test, determining that the test is undefined as well as "vague" and "subjective." Rather than rely on this standardless test, the court concluded that the Scalia plurality and Fifth Circuit precedent determined the outcome of the case.[50]

Whether this reading of *Rapanos* is adopted by the Fifth Circuit and other courts remains to be seen.

What Happens with the *Rapanos* Case Now?

The opinion of the Sixth Circuit has been vacated; now it falls to the district court to make the determination, in the first instance, of whether jurisdiction extends to the Rapanos properties. According to the measure offered by the plurality, the government must establish that Mr. Rapanos's properties are "as a practical matter *indistinguishable*" from "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.'" The government is unlikely to meet this test, for at least two reasons. First, two of the three properties are immediately adjacent to man-made drainage ditches, not streams and creeks. Second, the wetlands on all three sites are readily distinguishable from any neighboring stream, river or lake. Should the lower court adopt the Kennedy "significant nexus" standard, the government must establish that the Rapanos properties "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of navigable-in-fact waters." It is difficult to determine at this time whether the Rapanos properties meet this test. The government expert relied upon to establish jurisdiction conceded that he had never made a site-specific analysis. Based in part on that evidentiary vacuum, Justice Kennedy concluded that the record is currently inadequate to determine whether the requisite significant nexus exists.

CONCLUSION

Although Mr. Rapanos did not get what he had hoped—a bright line rule for federal jurisdiction—he did get what he asked for: invalidation of the "any hydrological connection" standard applied by the government and approved by the Sixth Circuit. This constitutes a significant constraint on federal authority under the CWA. How much of a constraint will depend on the willingness of federal regulators and the lower courts to recognize the fundamental principle affirmed by the majority in *Rapanos* that there are limits to federal power and the means employed to achieve national aims.

Footnotes

[1] *See* Rapanos v. United States, 126 S. Ct. 2208, 2220 (2006) (plurality opinion). The plurality states that the record is not clear as to whether the connections between the three Rapanos sites and the nearby drains and ditches are continuous or intermittent, or whether the flows in the drains and ditches themselves are continuous or intermittent. *Id*. at 2219.

[2] *Id*. at 2225 (internal quotations marks, points of ellipsis, and brackets omitted).

[3] *Id*. at 2220.

[4] *Id*. at 2220-2221.

[5] *Id*. at 2222.

[6] 474 U.S. 121 (1986).

[7] 531 U.S. 159 (2001).

[8] *Rapanos*, 126 S. Ct. at 2222.

[9] *See* 33 U.S.C. § 1362(14).

[10] *Id*. § 1251(a).

[11] *Id*. § 1251(b). *See Rapanos*, 126 S. Ct. at 2223.

[12] *See Rapanos*, 126 S. Ct. at 2224.

[13] *Id*.

[14] *Id*. at 2226.

[15] *Id*. at 2227.

[16] *Id*. at 2234 n.15.

[17] *Id*. at 2234.

[18] *Rapanos*, 126 S. Ct. at 2241 (Kennedy, J., concurring).

[19] *See id*.

[20] *Id*. at 2242.

[21] *Id*. at 2243.

[22] *Id*. at 2244 (quoting *Riverside Bayview*, 474 U.S. at 135 n.9).

[23] *Id*. at 2244.

[24] *Id*

[25] *Id*. at 2245-46.

[26] *Id*. at 2246.

[27] *Id*. at 2247.

[28] *Id*. at 2248.

[29] *Id*.

[30] *See id*.

[31] *Id*. at 2249.

[32] *Id*. at 2249.

[33] *Id*. at 2248.

[34] *Id*. at 2250-51.

[35] *Id*. at 2251.

[36] *Id*. at 2252.

[37] 430 U.S. 188 (1977).

[38] 539 U.S. 306 (2003).

[39] *Id*. at 325.

[40] In this regard it is well to note that the Chief Justice references *Marks* in his *Rapanos* concurrence but gives no direction as to whether its rule should be applied. *See Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring).

[41] *Id*. at 2265 & n.14 (Stevens, J., dissenting).

[42] 438 U.S. 265 (1978).

[43] *See id*. at 271-72.

[44] 126 S.Ct. at 2249.

[45] *Id.* at 2215.

[46] _ F.Supp. 2nd_, 2006 WL 1867376 (N.D. Texas).

[47] *Id.* at 1.

[48] *Id.*

[49] *Id.* at 7-8.

[50] *Id.* at 9.