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# Supreme Court Muddies The Water On Wetland Issues

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**Insight — 6/20/2006 12:00:00 AM**

*Rapanos v. U.S. and Carabell v. Army Corps of Engineers*

The Supreme Court on June 19th decided two cases on the geographic scope of federal jurisdiction under Clean Water Act section 404. The consolidated cases of *Rapanos v. U.S.* and *Carabell v. Army Corps of Engineers* involved whether the Corps of Engineers properly exercised jurisdiction over four wetlands lying near ditches or man-made drains in Michigan. In both cases, the Corps asserted jurisdiction over wetlands on petitioners' private properties based on the adjacency of the wetlands to tributaries of "waters of the United States." Relying on this "adjacency" theory, the Corps asserted that the wetlands were jurisdictional waters under the Clean Water Act and the Corps' implementing regulations.

The district courts in both cases upheld the Corps' determination, and the Sixth Circuit Court of Appeals affirmed. In a fractured plurality decision, the Supreme Court reversed and held that the Sixth Circuit had applied an incorrect legal test for determining whether the wetlands were "waters of the United States." The Supreme Court remanded both cases to the lower court to assess whether the facts in either case could satisfy the Clean Water Act's standards—although never clearly agreed upon by the justices—for determining whether the wetlands were jurisdictional.

While a five justice majority agreed to vacate the judgment below, no five justices agreed on what test should be applied by the Corps of Engineers in determining whether a given wetland should be regulated under the Clean Water Act, or what test the lower courts should use in reviewing the Corps' jurisdictional determinations. A four justice plurality opinion authored by Justice Scalia articulated a two-part test for analyzing whether a wetland adjacent to a "tributary" is jurisdictional. According to this test, an adjacent wetland falls within the scope of federal Clean Water Act jurisdiction if: (1) the channel to which the wetland is adjacent is a "relatively permanent body of water connected to traditional interstate navigable waters;" and (2) the wetland itself "has a continuous surface connection with that water [i.e., the channel or tributary], making it difficult to determine where the water ends and the wetland begins." Under this test, wetlands adjacent to "intermittent" or "ephemeral" streams would not be jurisdictional, but those adjacent to seasonal streams which have a continuous flow for a significant portion of the year most likely would fall within the coverage of the Clean Water Act's regulatory regime.

Justice Kennedy also agreed that the lower court's judgments should be reversed, but he did not join the plurality's two-part test. Instead, Justice Kennedy wrote that the Corps is required to establish only that wetlands

have a "significant nexus" to traditionally navigable waters. Unlike the plurality's test, Justice Kennedy's analysis is functional: do the wetlands in question have a "significant nexus" to traditionally navigable waters such that the assertion of federal jurisdiction would be consistent with the goals and purposes of the Clean Water Act? Under this view, the Corps' existing "adjacency" standard is sufficient to bring wetlands adjacent to navigable-in-fact waters within the scope of the Clean Water Act. For wetlands that are not adjacent to navigable-in-fact rivers, but rather abut, border, or neighbor some form of tributary to those navigable-in-fact waters, the Corps must engage in a case-by-case factual determination to ascertain whether a "significant nexus" exists between the wetlands and a downstream navigable-in-fact water.

Overall, a five-justice majority agreed that the Corps and the lower courts had employed the wrong legal test in determining when wetlands adjacent to tributaries are properly within the Corps' section 404 regulatory authority. But there was no consensus on what standard the Corps should employ going forward. Absent a new rulemaking by the Corps to better clarify, and limit, jurisdiction over wetlands adjacent to tributaries, the Corps must now engage in a cases-by-case analysis to determine whether any given adjacent wetland bears a "significant nexus" to navigable-in-fact waters. Given the relatively elastic nature of this inquiry, litigation is likely to continue in the lower federal courts as Corps regulators in local field offices try to apply this standard. In light of this continued uncertainty and ongoing impetus for litigation, both Chief Justice Roberts and Justice Breyer, in separate concurring opinions, remarked on the need for new Corps regulations to clarify the proper scope of federal jurisdiction over wetlands.

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