JONES WALKER

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RAPANOS, CARABELL AND WHERE DO WE GO FROM HERE?


Boyd Bryan


Mike Chernekoff


Stan Millan


Rob Scheffy

On June 19, 2006, the U.S. Supreme Court issued its second landmark decision in the past five years concerning federal jurisdiction over wetlands under the Clean Water Act. See Rapanos v. United States, decided with Carabell v. U.S. Army Corps of Engineers, 547 U.S. ___, 2006 U.S. Lexis 4887 (2006). The decision appears to further limit the jurisdiction of the EPA and the U.S. Army Corps of Engineers over isolated wetlands, but has left environmentalists and the regulated community scratching their heads over what test is to be applied in deciding what is, and is not, a wetland.

Background—Federal law regulates more than navigable-in-fact waterways but many are surprised on how much more is regulated. Is land water? Wetlands (marshes, swamps, bottoms, etc.) abutting or adjacent to lakes and rivers have been regulated by the Corps of Engineers and EPA since the early 1970's. Wetlands more isolated by miles from lakes and rivers are also currently regulated. The federal regulation is under Section 404 of the Clean Water Act. Regulation means enforcement (fines and penalties) if permits are not obtained before work in wetlands. However, permits are complex, often take years to obtain, and cost lots of money.

Landowners usually want their wetlands for development, including residents, malls, roads, etc. Ecologists want public and private wetlands preserved for habitat, bird watching, erosion protection, and storm buffers. Louisiana has millions of acres of wetlands.

Problem—The high Court sanctioned federal regulation of wetlands abutting rivers and lakes in United States v. Riverside Bayview Homes, 471 U.S. 121 (1985); however, it prohibited regulating isolated waters in Solid Waste Agency of Northern Cook County v. United States, 531 U.S. 159 (2001) ("SWANCC"). After SWANCC, the Corps continued regulation of isolated wetlands by calling any hydrologic connection between them to navigable waters a tributary, e.g., any ditch. This is a broad, categorical approach that covered most all wetlands in states like Louisiana. The Corps and EPA attempted rulemaking in 2003 to resolve the isolated wetland issue but abandoned the rule. In Rapanos, the U.S. Supreme Court took a step closer to limiting federal regulatory jurisdiction, but fainted when it got to the wetland altar.

Facts—Both Rapanos' and Carabell's lands were wetlands miles from navigable waterways. The only connections to navigable rivers and lakes were through possibly dry ditches (which the agency called tributaries). Carabell's wetlands were also separated from a ditch by a little levee (beam) that was only overtopped in a ten-year storm event. Rapanos' case arose from enforcement. Carabell's arose from administratively and judicially challenging wetland regulatory jurisdiction in the 404 permit program. The Corps considered the proximity of the wetlands to the ditches as sufficient for regulatory jurisdiction. The Sixth Circuit Court of Appeals affirmed the Corps' jurisdiction over the sites based on their hydrologic connections to nearby ditches and drains, or to more remote navigable waters.

Winners—By a five to four vote, the high Court said the Sixth Circuit applied the wrong test in the sites constituted wetlands that are subject to the Corps' jurisdiction and remanded the cases for further proceedings. The landowners won. The Corps lost. However, there was no majority opinion on what regulatory test the agencies must use in the future.

Tests—Justice Scalia's plurality opinion, joined in by three other Justices, held that establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Clean Water Act required two findings: (1) that the adjacent channel contains a

"water of the United States" (i.e., a relatively permanent body of water connected to traditional interstate navigable waters; and (2) the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins. This approach eliminated the Corps' categorical "ditch as tributary" approach and would negate wetland jurisdiction in many cases, especially in states like Louisiana.

Justice Kennedy in a concurring opinion rejected this two-fold test and proposed the Corps establish regulatory jurisdiction, "…on a case-by-case basis…[that wetlands adjacent to non-navigable waters] significantly affect the chemical, physical, and biological integrity of…[navigable waters]". His broad "significant nexus" test includes quantity, volume and regularity of flow of non-navigable tributaries; proximity of tributary to navigable waters; and site functions such as pollutant trapping, flood control, and run-off storage. He rejected speculative Corps and judicial findings of "potential [or] possible" site effects for his "significant nexus" test in the two cases and insisted on substantial evidence (which does not normally apply to informal Corps administrative decision-making). He also said a "mere hydrologic connection" should not suffice in all cases.

The dissent viewed Riverside Bayview Homes as controlling and favored a categorical test as presently used by the Corps ("all ditches are tributaries"), but nonetheless applauded Kennedy's case-by-case alternative test. They felt that it would not have much negative effect on wetland regulations. This may have been their spin to the agencies when they make their regulatory choices, to have it appear that five votes were for the "significant nexus" or apparently broader Kennedy approach, and only four votes were for the Scalia narrow two-fold test. However, Kennedy may have been adding to Scalia's approach, i.e., nearby wetness is not enough, but substantial evidence of the quality of wetland functions is also needed to justify regulation.

Both Chief Roberts (concurring) and Justice Breyer (dissenting) favored rule-making by the Corps and EPA to resolve the proper regulatory test. The agencies may elect to use either test—Scalia's or Kennedy's—or some hybrid.

What Does It Mean?—The Rapanos decision leaves the regulatory standard uncertain. Arguably, the test announced by Justice Kennedy should control, because no rationale for the result enjoyed the assent of five Justices, and Kennedy's may be viewed as the position taken by the Justices who concurred in the judgment on the narrowest grounds. Unless, and until, the Corps resolves the test by new rulemaking, the lower courts will be left to sort things out on a case-by-case basis.

The complex, multiple court opinions most likely mean that if a landowner wants to resist wetland jurisdiction in cases where their connection to navigable waters is some distance away (e.g., at least a mile) via ditches or possibly even if the wetlands are impounded (leveed), he or she should ask the Corps for an approved jurisdictional determination (JD) and timely provide a consultant's report not only on the wetland criteria (hydrology, soil and vegetation), but also with data on flow, volume, proximity, and nature of any wetland water quality functions. That is, both Scalia's twofold test and Kennedy's "significant nexus" test should be addressed until future rulemaking hopefully settles on a clearer test. Landowners can then appeal the jurisdictional determination administratively (33 C.F.R. 331), and seek judicial review if necessary. They may have to go through a 404 permit process anyway before they sue. (If the permit process is an after-the-fact one for unauthorized activity or was already pending at the time of the Rapanos decision, they can ask the Corps for a new JD with "new information" they submit based on that Court decision and then administratively appeal if necessary.) During or at the end of the permit process, they will know the cost of the permit, likelihood of its issuance, and more importantly know the cost of conditions (including mitigation) before they pursue a further judicial challenge. However, they must have the data ready to place early in the Corps administrative record if they want to pursue the challenge.

Call Jones, Walker if you have any detailed questions of what to do next if you want to take advantage of this landmark, but challenging Rapanos opinion, until there are clearer Corps/EPA rules (if ever). Jones Walker attorneys have lectured and written extensively about wetlands for decades, assisted landowners on Corps administrative appeals, and handled judicial challenges to wetland jurisdiction.

Contact Boyd Bryan at bbryan@joneswalker.com, Michael A. Chernekoff at mchernekoff@joneswalker.com, Stan Millan at smillan@joneswalker.com or Rob Scheffy at rscheffy@joneswalker.com for more information.