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## Federal Wetlands Jurisdiction under *Rapanos*: Unpredictability and Opportunity

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Wetlands developers, regulators and environmentalists expected the United States Supreme Court's decision in *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*, 126 S.Ct. 2208, to resolve longstanding debate over certain coverage of the Clean Water Act (the Act). In the consolidated cases, the Court considered the extent of federal jurisdiction of wetlands under the Act and specifically whether the Act applies to wetlands adjacent to non-navigable waters that flow into navigable waters. With splintered votes and disparate rationales, the Court's June 2006 decision failed to resolve this issue. Rather, the Court's opinion adds uncertainty and may create new burdens for landowners, developers and agencies. This uncertainty, however, may also present opportunities.

Under the Act, a party ordinarily must obtain a permit from the Army Corps of Engineers (the Corps) in order to discharge dredged or fill material into "navigable waters," generally defined as "waters of the United States." The Corps' regulations in turn define "waters of the United States" to include waters that are traditionally understood as navigable, interstate waters, and intrastate waters whose use could affect interstate or foreign commerce—as well as tributaries of all such waters and wetlands adjacent to such waters and their tributaries. The Supreme Court has held that the Act applies to wetlands adjacent to traditionally navigable waters but not to non-navigable, isolated, intrastate waters on the basis of visits by migratory birds to those waters. Whether wetlands adjacent to non-navigable waters that flow into navigable waters are subject to federal jurisdiction, however, has been an open question—one that many parties had hoped the Court would answer definitively. The Sixth Circuit found federal jurisdiction in these cases, which involved wetlands near ditches or drains that ultimately connected to traditionally navigable waters.

### The Court's Opinions

The Court responded to the question with a fragmented 4-1-4 decision. Five justices agreed that the cases should be vacated and remanded, albeit on ideologically disparate rationales.

The plurality opinion, authored by Justice Scalia, takes a limited, definitional view of waters subject to the Act. For federal jurisdiction to exist over a wetland, according to Scalia, the wetland must first be adjacent to a channel that "contains a . . . relatively permanent body of water connected to

traditional interstate navigable waters," and second, have a "continuous surface connection" to that water. Application of this test would substantially limit federal jurisdiction nationwide over many headwaters and canals and would particularly impact jurisdiction in western states, where streams and riverbeds often lack a "relatively permanent" flow.

Justice Kennedy provided the fifth and deciding vote to remand the cases. Kennedy, however, rejected Scalia's narrow view of federal wetlands jurisdiction and instead turned to the purposes of the Act to address the issue. According to Kennedy, federal jurisdiction applies when a "significant nexus" is present between particular wetlands and a water commonly understood as navigable—when wetlands, alone or combined with others similarly situated, "significantly affect the chemical, physical, and biological integrity" of a traditionally navigable water. Kennedy asserted that the Corps must determine on a case-by-case basis whether a "significant nexus" exists for wetlands adjacent to non-navigable tributaries, until more specific regulations address the issue.

Justice Stevens authored a four-member dissent that rejected both Scalia's narrow view and Kennedy's "significant nexus" test. Stevens opined that the Court should defer to the Corps' "reasonable interpretation" of the Act.

## Implications

**Which test?** What test now determines whether certain wetlands-filling activities require permits? By Supreme Court precedent, when no rationale for a decision commands a majority, the view taken by the concurrence on the narrowest grounds prevails, making Kennedy's "significant nexus" test primary. And because no majority supported Scalia's opinion, lower courts likely will not rely solely on his narrow test. The "significant nexus" test presents practicability issues, however. At least one lower court applying *Rapanos* has acknowledged Kennedy's test, but—citing sparse guidance from Kennedy for the test's application—turned to prior precedent in its Circuit and borrowed Scalia's reasoning to determine whether Kennedy's requisite "significant nexus" existed. As Chief Justice Roberts stated, "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis."

**New burdens.** Under the "significant nexus" test, wetlands currently subject to the Corps' jurisdiction may remain so, but—under that test and without new regulations—the Corps must establish each nexus for a wetland adjacent to a non-navigable water on an individual basis. Such determinations likely will impose a significant burden on both the Corps and on developers seeking to anticipate, refute or buttress the Corps' findings. Additionally, more administrative appeals are likely to follow this increase in individualized determinations.

**Opportunities.** While landowners and developers likely would appreciate greater clarity than the Court provided in *Rapanos*, the current uncertainty may also create new opportunities. Admonished by several Justices and seeking to ease its administrative burden, the Corps may begin drafting regulations to clarify which wetlands are subject to its jurisdiction—a process in which interested parties will be able to participate. Further, parties now have a new opportunity to challenge unfavorable findings of federal jurisdiction by filing administrative appeals to contest such findings based on *Rapanos*. Currently, EPA and the Corps intend to issue joint interim guidance at an

unspecified date and have instructed staff to refrain from making new wetlands jurisdictional determinations. Whether the Corps will reduce its claimed jurisdictional extent is unknown. But the existing uncertainty provides an opportunity to pursue the issue.

For more information on this and other environmental matters, please contact the authors listed above.