



SUPREME COURT CURTAILS ARMY CORPS OF ENGINEERS' JURISDICTION

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On June 19, 2006, the Supreme Court issued its decision in two key cases, Rapanos v. United States and Carabell v. United States Army Corps of Engineers, that raised the question of the extent of the Army Corps of Engineers' ("Corps") jurisdiction over wetlands and other waters of the United States. In both cases, the Court of Appeals for the Sixth Circuit had affirmed the Corps' application of its rules on Section 404 jurisdiction and held that wetlands located adjacent to streams or ditches were subject to the Corps' regulation. The Supreme Court accepted review of these cases to consider the extent to which the Corps may regulate streams, drainage ditches, wetlands and other features potentially identified as waters of the United States subject to regulation under Section 404 of the Clean Water Act (the "Act"). In a somewhat unusual outcome, no single opinion commanded a majority of the Court — four Justices voted to restrict the scope of the Corps' jurisdiction drastically, four voted to uphold the Corps' current jurisdiction and one Justice, Justice Kennedy, voted to add a new requirement that the Corps has to satisfy before it can claim jurisdiction. As described more fully below, and as explained in Justice Stevens' Dissent, the views expressed by Justice Kennedy in his concurring opinion will likely control future decisions on Corps' jurisdiction, at least until the Court accepts another

appeal. Under Justice Kennedy's view, the Corps' definition of its jurisdiction will continue largely intact, but the Corps will have the additional burden of showing, either on a case-by-case basis or through rulemaking or other administrative actions that the loss of any adjacent wetland areas it seeks to regulate will have a significant effect on the water quality of traditional navigable waters. As a result of the Court's decision, both the Rapanos and Carabell cases have been remanded to the Court of Appeals for further consideration.

This update will review all of the opinions and discuss the potential consequences of the Court's ruling. While the Court's decision does provide new guidance, it also creates a new set of issues and uncertainty. It will likely be many years before the definitive effects of the ruling are understood.

Brief Summary of the Decision. Justice Scalia issued the plurality opinion, which was joined by Chief Justice Roberts, Justice Thomas and Justice Alito (the "Plurality Opinion"). The Plurality Opinion would drastically curtail Corps' jurisdiction and largely limit it to rivers, streams and other open waters that flow year round and to wetlands that are physically connected to these waters. The Plurality Opinion would reverse the Court of Appeals' decision below in both cases. Justice Stevens issued a dissent joined by Justices Breyer, Souter and Ginsberg (the "Dissenting Opinion"), which would affirm the Sixth Circuit decision in both cases and upheld the Corps' rules on jurisdiction. Justice Kennedy issued an opinion concurring with the judgment that the plurality reached — remanding both cases for further consideration — but did so on entirely different grounds (the "Kennedy Opinion"). The Kennedy Opinion essentially upholds the Corps' existing rules but adds a requirement for the Corps to determine whether a jurisdictional area has a significant effect on the chemical, physical and biological integrity of other covered waters as a condition to the Corps asserting jurisdiction. The significant effect test is not based on a wetland-by-wetland analysis, but on a case-by-case review of similarly situated potentially jurisdictional lands in a "region". Justice Kennedy also suggests that once the Corps makes a determination for a particular site, it may apply that determination to other similarly situated sites. The Corps' determination is subject to an Administrative Procedure Act review. The Corps also has the option of proceeding by rule.

While Justice Kennedy concurred with the plurality's decision to remand both cases to the Court of Appeals, his views are more in line with the Dissenting Opinion. The

Kennedy Opinion's "significant nexus" test will create uncertainty and additional work for all and on the ground effect is hard to predict, but it is likely to reduce Corps jurisdiction, especially in the more arid regions of the state. Corps and EPA guidance will be critical. The Corps will be under enormous pressure to issue new rules — no easy task. Legislation is certainly a possibility.

The Plurality Opinion. The Plurality Opinion maintains that the only "plausible" interpretation of the phrase "waters of the United States" in the Clean Water Act is that it 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." The Plurality Opinion stated that the Corps could not regulate channels through which waters flow only intermittently or ephemerally or channels that periodically provide drainage for rainfall. The Plurality Opinion would allow Corps regulation of seasonal rivers that flow during the rainy season but not during the dry months. This ruling would essentially nullify the Corps tributary rule found in 33 CFR 328.3(a)(5) as to intermittent and ephemeral streams and would remove Corps jurisdiction over vast areas of California. The loss of federal jurisdiction would not mean that these features would be unregulated, as the California Department of Fish and Game regulates changes to streams under Section 1602 of the Fish and Game Code, the State and Regional Water Quality Control Boards regulate effects to water quality under the Porter-Cologne Act, and local governments address impacts under the California Environmental Quality Act.

The Plurality Opinion also addressed the issue of whether wetlands "adjacent" to its more limited view of jurisdictional streams were subject to regulation. The Plurality Opinion found that only those wetlands with a "continuous surface connection to bodies that are 'waters of the United States' in their own right, so there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such 'waters' and covered by the Act." The Plurality Opinion noted that wetlands with only an "intermittent, physically remote hydrologic connection to 'waters of the United States' . . . lack the necessary connection to covered waters." The Plurality Opinion concluded that wetlands such as those that were found at Rapanos and Carabell sites are jurisdictional only if: (1) 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 aspect of the Plurality Opinion would further restrict the scope of the Army Corps of Engineers' jurisdiction over adjacent wetlands. Virtually all vernal pools and other seasonal wetlands would not meet the continuous surface connection test and would not be jurisdictional, all ephemeral and intermittent tributaries would be eliminated and only major rivers such as the Sacramento and American Rivers in the Sacramento area and perennial creeks would be considered to be jurisdictional. As described below, however, the Plurality Opinion does not govern this case.

The Dissenting Opinion. In contrast to the Plurality Opinion, the Dissenting Opinion would uphold the Corps' regulations essentially as written. The Dissenting Opinion would affirm the Sixth Circuit's decisions in both Rapanos and Carabell. The Dissenting Opinion concluded that the Court's prior unanimous decision in United States v. Riverside Bayview Homes, 474 U.S. 121 (1985), squarely controlled these cases. The Dissenting Opinion interpreted the Riverside Bayview case as affirming the Corps' regulations and relied heavily on the view that Congress deferred to the regulations the Corps issued in 1977 by taking a number of legislative actions. Moreover, the Dissenting Opinion found that the Corps' exercise of jurisdiction is "reasonable even though not every wetland adjacent to a traditionally navigable water or its tributary will perform all (or perhaps any) of the water quality functions generally associated with wetlands. The Dissenting Opinion opined that under Riverside Bayview, jurisdiction does not depend on a wetland-by-wetland inquiry; instead, it is enough that wetlands adjacent to tributaries generally have a significant nexus to the watershed's water quality.

The Dissenting Opinion did not share Justice Kennedy's view that the Court should "replace regulatory standards that have been in place for over 30 years with the judicially crafted rule distilled from the term 'significant nexus'." The Dissenting Opinion was satisfied that the Corps may regulate wetlands adjacent to navigable waters and tributaries with no additional analysis. The Dissenting Opinion noted that these wetlands "obviously have a cumulative effect on downstream water flow by releasing waters at times of low flow or by keeping waters back at times of high flow. This logical connection alone gives the wetlands the 'limited' connection to traditionally navigable waters that is all the statute requires."

The Dissenting Opinion stated that "Justice Kennedy's 'significant nexus' test will probably not do much to diminish the number of wetlands covered by the Act in the long run," and that the Kennedy Opinion recognizes that the record in both Carabell and Rapanos "should permit the establishment of a significant nexus." The Dissenting Opinion further noted that:

Justice Kennedy's approach will have the effect of creating additional work for all concerned parties. Developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries or traditionally navigable waters will have no certain way of knowing whether they need to get Section 404 permits or not. And the Corps will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications. These problems are precisely the ones that Riverside Bayview's deferential approach avoided.

The Dissenting Opinion concluded by stating that "Justice Kennedy's approach will control in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction but in the unlikely event that the plurality's test is met but Justice Kennedy's is not, courts should also uphold the Corps' jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test."

The Kennedy Opinion. With only four votes each for the Plurality and Dissenting Opinions, Justice Kennedy becomes the deciding vote. The result Justice Kennedy reached was to remand both the Rapanos and Carabell decisions to the Sixth Circuit for reconsideration in light of a revised standard. For this reason, he concurred in the result the Plurality Opinion reached but did so on different grounds.

Justice Kennedy's Opinion pointed out that the Plurality Opinion began with the correct premise, stated in Riverside Bayview, that in enacting the Clean Water Act, Congress intended to regulate at least some waters that were not navigable in the traditional sense and that it is clear that at least some wetlands fall within the scope of the term navigable waters as used in the Clean Water Act. Justice Kennedy criticized the Plurality Opinion's conclusion that the Act's use of the term "navigable waters" allows jurisdiction only over relatively permanent standing or

flowing bodies of water including seasonal rivers but not intermittent or ephemeral streams. He also criticizes the Plurality Opinion's continuous surface water connection theory.

Justice Kennedy noted that the permanent standing water or continuous flow requirement:

makes little practical sense in a statute concerned with downstream water quality. The merest trickle, if continuous, would count as a "water" subject to federal regulation, while torrents thundering at regular intervals through otherwise dry channels would not. Though the plurality seems to presume that such irregular flows are too insignificant to be of concern in a statute focused on "waters," that may not always be true.

Justice Kennedy then described the Los Angeles River as ordinarily being only a trickle and looking like a dry roadway, yet noting that it periodically releases powerful and destructive water volumes. He explained that this is illustrative of what often dry water courses can become when waters flow. Justice Kennedy noted that the Congress could have drawn a line to exclude irregular waterways but nothing in the Clean Water Act suggests that it has done so. Based on this reasoning, Justice Kennedy concluded that the Corps "can reasonably interpret the Act to cover the paths of such impermanent streams." Justice Kennedy also addressed the Plurality Opinion's second limitation — exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters. Justice Kennedy stated that "the Plurality Opinion is "wrong to suggest that wetlands are '*indistinguishable*' from waters to which they bear a surface connection." He quoted from Riverside Bayview for the point that "if it is reasonable for the Corps to conclude that in a majority of cases adjacent wetlands have significant effects on water quality and aquatic ecosystem, its definition can stand." Justice Kennedy also cited Riverside Bayview for rejecting the proposition that wetlands covered by the Act must have contained moisture originating in the neighboring waterway, stating that "the Court in Riverside Bayview rejected the proposition that origination in flooding was necessary for jurisdiction over wetlands. It did not suggest that a flood-based origin would not support jurisdiction; indeed, it presumed the opposite."

The Kennedy Opinion concluded that the Corps' adjacency standard is reasonable in some of its applications and draws support from the structure of the Act while the Plurality Opinion's surface water connection test does not. Justice Kennedy emphasized the importance of wetlands to filter and purify water draining into adjacent bodies of water, slowing the flow of surface runoff into lakes, rivers and streams and preventing flooding and erosion. He noted that even the mere act of filling wetlands may cause the release of nutrients and toxins and pathogens that were trapped, neutralized and perhaps amenable to filtering or detoxification in the wetlands.

Justice Kennedy then observed that the Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC) case adopted a significant nexus test and that the Plurality Opinion, including its "rejection of Corps' authority over 'man-made ditches' and 'dry arroyos' . . . seems unduly dismissive of the interests asserted by the United States in these cases." For these reasons, Justice Kennedy rejected the Plurality Opinion. Justice Kennedy also rejected the Dissenting Opinion, stating that the Dissenting Opinion "reads a central requirement out [of the Act] that the word navigable waters must be given some importance." He noted the Dissenting Opinion would "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far."

Justice Kennedy stated that "[c]onsistent with SWANCC and Riverside Bayview, and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends on the existence of a *significant nexus between the wetlands in question and navigable waters in the traditional sense*. The required nexus must be assessed in terms of the statute's, goals and purposes." (Emphasis added.) These goals are to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." According to Justice Kennedy, "*wetlands 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 or 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'." (Emphasis added.)

Justice Kennedy stated that based on Riverside Bayview the current regulations properly allow a "conclusive standard" for jurisdiction to rest upon a reasonable inference of ecological interconnection only for wetlands that are adjacent to navigable-in-fact waterways. But he found that Riverside Bayview does not support a similar conclusion for more distant tributaries. He suggested that, through adjudication or rule, the Corps could identify additional tributaries that due to their flow or proximity to navigable waters or other factors "are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters," but the current rules provide no assurance that this is the case. In fact, he states that the breadth of the standard under the current rule "leaves wide room for regulation of drains, ditches and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it — precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system." He noted that in many cases wetlands "adjacent to tributaries covered by the standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's jurisdiction in SWANCC."

Justice Kennedy specifically held that: (1) when the Corps seeks to regulate wetlands adjacent to navigable in fact waters, it may rely upon adjacency to establish its regulation; and (2) absent more specific regulations, the Corps must establish a "significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries". Given the potential overbreadth of the Corps' regulations, Justice Kennedy concluded this showing is necessary to avoid unreasonable applications of the statute. He then remarked that where an adequate nexus is established for a particular wetland, "it may be permissible," as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region. This issue was, however, neither raised by the facts of the cases before the court nor addressed by any agency regulation that accommodates the nexus requirement.

While the effect of Justice Kennedy's standard will be debated for many years, he indicated how it should be applied in the two cases before the Court: "the record in this case contains evidence suggesting the possible existence of a significant nexus" according to the principles outlined above for both the Carabell and Rapanos cases. He noted that "the end result

in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely that the Corps' assertion of jurisdiction is valid."

Justice Kennedy voted to remand both matters because, in his opinion, neither the Agency nor the reviewing courts properly considered the issue of significant nexus and therefore a remand is appropriate to apply the legal standard.

How Does The Decision Affect California? A crystal ball would be a handy object to have for anyone venturing an opinion on what will happen next. Despite the uncertainty, some speculation on the future is warranted. The Corps' definitions of waters of the United States in 33 C.F.R. Part 328 appears to have survived largely intact with the significant caveat that for wetlands adjacent to nonnavigable tributaries, the Corps will need to make the additional finding set out in the Kennedy Opinion that the feature in question has a significant nexus to navigable-in-fact waters. This determination may be based not just on the effects of the individual wetland in question, but whether the wetlands either alone or in combination with similarly situated lands in the region has a significant nexus to waters more traditionally considered navigable. The level at which the Corps sets the bar for what is a significant nexus will greatly influence the extent to which it retains or relinquishes its current jurisdiction.

The Kennedy Opinion does not specifically address the issue of whether drainage ditches and other features are to be considered as being tributaries to navigable waters. The Corps could conceivably seek to continue to claim jurisdiction over remote and insignificant drainage ditches, ephemeral channels and other features as potentially being jurisdictional tributaries. However, a fair reading of the Kennedy Opinion is that the significant nexus test should apply not only to the adjacency issue, but also to the tributary issue.

The Corps and EPA will likely attempt to clarify the applicability of these cases by issuing guidance and direction to the field on how to apply the new standard. In the interim, a large degree of uncertainty will prevail and anyone seeking to apply the new standard to a particular property should anticipate considerable delay and expense. In particular, the sophistication of the consulting teams will need to be increased to include additional input from hydrologists and regional watershed studies and analyses will become of greater importance. As with many other regulatory issues, the unit of measurement will be critical for determining whether an area has jurisdiction. Justice Kennedy refers to the issue of looking at whether

similar features within "a region" are considered to have a significant nexus. Obviously, the broader the area in which the significant nexus determination is evaluated, the more likely it is that a significant nexus will be found. By contrast, limiting the "region" will be more likely to lead to a determination that there is no significant nexus.

Notwithstanding the potential difficulties posed by Justice Kennedy's standard, it is more likely than not that there will be a measurable reduction in the scope of the Corps' jurisdiction, particularly in the arid parts of California and other areas where the Corps is predominantly limited to ephemeral channels located at great distance from a navigable water. For those areas in which the Corps jurisdiction contracts, existing state and local regulation are in place to fill the gap and provide oversight for the benefit of the resources in these features.

Overall, there are many questions left to be answered. Undoubtedly, new guidance from the Courts, the Corps and EPA, and possibly the Congress, will be forthcoming.