FINALLY! GUIDANCE FROM THE CORPS AND EPA ON THE REACH OF THE CLEAN WATER ACT AS INTERPRETED BY THE SUPREME COURT IN *RAPANOS V. UNITED STATES*

Nearly a year after a fractured U.S. Supreme Court offered three different views of the scope of the Clean Water Act ("CWA"), none of which commanded a majority, in *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*, 547 U.S. – (2006) ("*Rapanos*"), the U.S. Army Corps of Engineers and Environmental Protection Agency have issued long anticipated "guidance" to their field offices on how to "implement" the Court's decision. In the guidance, the agencies offer three categories: (1) certain types of waters over which they "will assert jurisdiction" (traditional navigable waters, wetlands adjacent to such waters, relatively permanent non-navigable tributaries of such waters, and wetlands directly abutting such tributaries), (2) other types of waters they will consider case-by-case to determine whether they have a "significant nexus" with a traditional navigable water, and (3) other "features" over which they "generally will not assert jurisdiction," such as gullies, erosional features, and ditches excavated in and draining uplands.

The complexity of the guidance reflects the absence of cohesive principles in the disjointed opinions of the justices in *Rapanos*. While the guidance brings some measure of order to the confusion engendered by *Rapanos*, it also assures more confusion and controversy as many important details are worked out in coming months and some aspects are challenged by one or another group. Primary among the unresolved questions: What is a "significant nexus"? In their guidance, the agencies call for consideration of "hydrologic" and "ecologic" factors in making this determination.

Background

Under the CWA, the Corps and EPA regulate "discharges" of "pollutants" into "navigable waters," which the Act defines as "the waters of the United States." The EPA, which is primarily responsible for administering the CWA, administers a permit program under section 402 for pollutant discharges, known as the National Pollutant Discharge Elimination System ("NPDES"). In section 404, Congress carved an exception out of the EPA's authority and gave the Corps the authority to permit discharges of two particular types of "pollutants," i.e. "dredged" and "fill materials." In the mid-1970s, the agencies administratively defined "navigable waters" to include waters that are or could be used for navigation, tidal waters, interstate waters, "tributaries" of jurisdictional waters, wetlands "adjacent" to jurisdictional waters, and "all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce . . . ."

As the Corps' regulatory program has gradually expanded over more and more of the landscape during the past three decades, it has been dogged by questions of its legitimacy. One of those questions concerns whether the U.S. Constitution empowers the federal government to regulate isolated waters and wetlands. The Constitution, after all, confers only limited powers on the government, among which is the power to regulate foreign and interstate commerce. The Corps answered this question in the mid-1980s with what became known as the "migratory bird

rule," asserting that it could regulate any waters and wetlands that provide habitat for migratory birds which cross state lines.

In 1985, the justices of the Supreme Court joined in laughter over the then-new migratory bird rule upon hearing of it during oral argument of the Court's first CWA wetland case, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), but refrained from discussing the issue then, holding in that case that the CWA could reasonably be interpreted to authorize the Corps to regulate wetlands that actually abutted a navigable waterway. The Court reasoned that Congress recognized that delimiting "waters of the United States" calls for a line to be drawn between land and water, delegated the line-drawing function to the Corps, and thereby authorized the Corps reasonably to choose a line that encompasses within "waters of the United States" the "adjacent" wetlands. The Court did not accept the government's invitation to interpret the CWA, as some lower courts had, to reach as far as the Commerce Clause of the Constitution allows.

Sixteen years later, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the Supreme Court took up the question of "isolated" waters and held, 5-4, that "the 'Migratory Bird Rule' is not fairly supported by the [CWA]." The Court questioned whether the commerce power extended as far as the Corps supposed, but deferred answering that question, holding that in any event Congress never intended to regulate non-navigable, isolated, intrastate waters when it enacted the CWA. Pointing to the statutory term "navigable waters," the Court noted that it held in *Riverside* that "the term 'navigable' is of 'limited import' and that Congress evidenced its intent to 'regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.'" "But it is one thing to give a word limited effect," said the Court, "and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made so." Accordingly, the Court held that the Corps' regulation defining "waters of the United States" to include non-navigable, isolated, intrastate waters and wetlands, as applied to the *SWANCC* site under the migratory bird rule, exceeds the authority granted to the Corps under the CWA.

SWANCC prompted the agencies to shift their approach. Unapologetic about having long operated beyond Congress's authorization and reluctant to withdraw their regulatory reach, some in the agencies turned to recalibrating what it means to be "adjacent" to (or "isolated" from) navigable waters. Wetlands far removed from any waters of the United States came to be characterized, nonetheless, as "adjacent" if they were within the watershed of a water of the United States and a little H_2O could make its way from the wetland to a water of the United States. The agencies also found new importance in characterizing various channels as "tributaries" of navigable waters: The more such tributaries found on the landscape, of course, the more wetlands may be found "adjacent" to those tributaries. Roadside ditches and sundry other features capable of conveying water when present, which once could not without embarrassment have been dubbed "tributaries," came to be regarded as such by some.

Rapanos

In *Rapanos*, the Court confronted the Corps' claims that four wetlands lying near ditches or man-made drains that eventually empty into traditional navigable waters constitute "waters of the United States." The trial and appellate courts upheld the Corps' claims, and the landowners petitioned the Supreme Court to review the cases.

The Supreme Court divided into three camps. While five justices agreed that the Corps had exceeded the authority granted by Congress in the CWA and, accordingly, vacated the judgments and remanded the cases to the lower courts for further proceedings, the justices came to this conclusion for very different reasons. Four rejected the Corps' jurisdictional claims, reasoning that the CWA extends only to relatively permanent, standing or continuously flowing bodies of water and wetlands directly connected to them; a fifth concurred that the Corps' claims were excessive, but opined that the CWA extends to waters and wetlands with a "significant nexus" to truly navigable waters. Four other justices dissented, characterizing the Corps' view as a "reasonable interpretation" of the CWA.

Writing for a plurality of four, Justice Scalia interpreted the CWA to encompass much less than the Corps has asserted for more than three decades. Noting that Congress defined "navigable waters" as "the waters of the United States," the plurality found it unnecessary to decide the precise extent to which the qualifiers "navigable" and "of the United States" restrict the coverage of the CWA since, at the very least, the Act authorizes jurisdiction only over "waters." That term, they maintained, "cannot bear the expansive meaning that the Corps would give it." As they put it, "[t]he use of the definite article ('the') and the plural number ('waters') show plainly that [the CWA's definition] does not refer to water in general." "In this form," the plurality declared, "'the waters' refers more narrowly to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.'" Citing Webster's New International Dictionary, they added that this definition 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' [as well as] wetlands with a continuous surface connection to [such] bodies . . . so there is no clear demarcation between 'waters' and wetlands . . . ." By the plurality's reckoning, "[i]n applying the definition to 'ephemeral streams,' 'wet meadows,' storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody."

Justice Kennedy concurred that the cases should be remanded, but not for the reasons advanced by the plurality. He agreed that the Corps' treatment of any channel that "feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark" as a "tributary" subject to regulation under the CWA is overly broad—so broad, he noted, that it "seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it." He agreed, too, that "mere hydrological connection [to navigable waters] should not suffice in all cases" to render a wetland or channel a "water of the United States" since "the connection may be too insubstantial for the hydrological linkage to establish the required nexus with [traditional] navigable waters." Criticizing the dissent for reading the word "navigable" to have no importance in the CWA, he observed that "the dissent would permit federal regulation whenever wetlands lie alongside a

ditch or drain, however remote and insubstantial, that eventually flow into traditional navigable waters." "The deference owed to the Corps' interpretation of the statute," he concluded, "does not extend so far."

Justice Kennedy's reasoning, though, differed markedly from that of the plurality. Focusing on the Court's observation in *SWANCC* that "[i]t was the significant nexus between wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*," Justice Kennedy decided that such a nexus should be the touchstone of jurisdiction under the CWA:

> Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term "navigable" some meaning, the Corps' jurisdiction over wetlands depends upon 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. . . . Accordingly, 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 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."

When the Corps seeks to regulate wetlands adjacent to nonnavigable tributaries, Justice Kennedy added, it "must establish a significant nexus on a case-by-case basis" at least until "more specific regulations" are adopted.

The plurality, as well as the dissent, panned Justice Kennedy's "significant nexus" test as a judicial innovation derived from a misreading of *SWANCC*. Justice Scalia observed that the term "significant nexus" is not used in the CWA and is used in *SWANCC* only to "refer[] to the close connection between waters and the wetlands that they gradually blend into," as in *Riverside* where the wetlands actually abutted a navigable water. By Justice Scalia's reading of *Riverside* and *SWANCC*, "[w]etlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States." (Emphasis in original.) "What other nexus," he asked, "could *conceivably* cause them to *be* 'waters of the United States'? [and w]hat possible linguistic usage would accept that [as Justice Kennedy's test proposes] whatever (alone or in combination) *affects* waters of the United States *is* waters of the United States." (Emphasis in original.)

Justice Stevens, writing for the four dissenters, viewed the case as "straightforward." The Corps, he observed, had determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of the nation's waters in many ways. "The Corps' resulting decision to treat these wetlands as encompassed within the term 'waters of the United States,'" he concluded, "is a quintessential example of the Executive's reasonable interpretation of a statutory provision." Seeing Justice Kennedy's "significant nexus" as a "judicially crafted rule" by which "our passing use of this term [in *SWANCC*] has become a statutory requirement," he added:

> I think it clear that wetlands adjacent to tributaries of navigable waters generally have a "significant nexus" with the traditionally navigable waters downstream. Unlike the "nonnavigable, isolated, intrastate waters" in *SWANCC*, . . . these wetlands can obviously have a cumulative effect on downstream water flow by releasing water at times of low flow or by keeping water 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.

Guidance

On June 5, 2007, the Corps and EPA issued several memoranda and an instructional guidebook providing guidance to their field offices to ensure that jurisdictional determinations are consistent with the Court's decision in *Rapanos.* Noting that "when there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices," the agencies conclude that "regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied."

The agencies identify several types of waters over which they "will assert jurisdiction" because such waters meet the standards of the plurality—and comport as well with the views of Justice Kennedy. In this category are:

- Traditional navigable waters, i.e., waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide.
- Wetlands adjacent to traditional navigable waters, including adjacent wetlands that do not have a continuous surface connection to such waters.
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).
- Wetlands adjacent to such tributaries that have a continuous surface connection to such tributaries (e.g., they are not separated by uplands, a berm, dike, or similar feature).

The agencies will decide case-by-case whether to assert jurisdiction over various other types of waters "based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water." As the agencies explain, five justices (the four dissenters and Justice Kennedy) would support assertions of jurisdiction over waters having a "significant nexus" to a traditional navigable water. The irony is that, under the agencies' guidance, Justice Kennedy's "significant nexus" standard, which he alone advocated and all eight other justices declared wrong, will effectively determine whether many waters and wetlands are subject to the agencies' jurisdiction. In this category are:

- Non-navigable tributaries that are not relatively permanent.
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent.

- Wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike, or similar feature).

In a significant nexus analysis, the agencies will assess the "flow characteristics and functions of the tributary itself" and the "functions performed by any wetlands adjacent to the tributary" to determine if they significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters. Also to be considered are "hydrologic factors," including volume, duration, and frequency of flow, proximity to a traditional navigable water, size of the watershed, average annual rainfall, and average annual winter snow pack. "Ecologic factors," too, will be considered, including the potential of tributaries to carry pollutants and flood waters to traditional navigable waters, provision of aquatic habitat that supports a traditional navigable water, potential of wetlands to trap and filter pollutants or store flood waters, and maintenance of water quality in traditional navigable waters. Reference to ecologic factors raises questions whether the agencies' view of "significant nexus" may enable them to engage in the very type of jurisdictional claims previously justified by the "migratory bird rule" struck down by the Supreme Court in *SWANCC*.

The agencies also identify several types of "geographic features [that] generally are not jurisdictional waters." Included in this category are:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow).
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

As the agencies explain, such features "are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters." Even though such features may not be jurisdictional waters, they may nonetheless "contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water." The agencies note that certain "ephemeral waters in the arid west" may be distinguished from the foregoing features "where such ephemeral waters are tributaries and they have a significant nexus to downstream traditional navigable waters."

The Corps and EPA have also agreed on a series of complex "coordination procedures" by which the EPA will have opportunities to review and approve (or disapprove) Corps jurisdictional determinations—thus affording the EPA a much enhanced role in the day-to-day administration of the Corps' regulatory program.

The agencies have left themselves considerable leeway to revise the guidance if they wish. During the first six months implementing the guidance, they "are inviting public comments on case studies and experiences applying the guidance." In order to "address issues that may unexpectedly arise during implementation of the guidance" and to consider public comments, "the agencies will within nine months from the date of issuance either reissue, revise, or suspend the guidance."

David Ivester