



June 21, 2006

## SUPREME COURT LIMITS FEDERAL JURISDICTION OVER WETLANDS

*(Rapanos v. United States)*

The Washington Legal Foundation (WLF) scored a victory earlier this week when the U.S. Supreme Court reversed a lower court's finding of liability on the part of landowners for filling in wetlands without a permit from the U.S. Army Corps of Engineers. In doing so, however, the ruling in the pair of related cases, *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*, gave no clear guidance on the limits of federal jurisdiction over wetlands under the Clean Water Act because there was no majority opinion. Rather, four justices led by Justice Scalia would sharply limit federal jurisdiction; four justices led by Justice Stevens would uphold the Corps's expansive interpretation of its jurisdiction; and Justice Kennedy, who stood alone in the middle, would require a showing of a "substantial nexus" of the wetland in question to navigable waters. In short, the High Court ruling promises to spawn extensive litigation in the lower courts to determine how to apply the Court's decision.

In *Rapanos v. United States*, the U.S. Army Corps of Engineers and prosecutors spent the last decade relentlessly pursuing civil and criminal charges against John Rapanos, a small developer, for placing sand and clean fill on his own property that the Corps deemed to be federally regulated wetlands. The linchpin for the Corps's jurisdiction over the property was the fiction that the property was "adjacent" to a river over 20 miles away. While the court of appeals rejected that novel claim, it allowed the Corps to assert jurisdiction anyway on a more attenuated theory that somehow the isolated wetlands (which were mostly dry) were "hydrologically connected" to the navigable river. In other words, the court essentially held that all water eventually drains into the rivers; therefore, federal jurisdiction can be asserted over isolated wetlands.

Despite the Justice Department's vigorous efforts to send him to prison for a substantial term that was *longer* than what prosecutors wanted the judge to impose on a drug dealer who was an illegal alien, the trial judge gave Mr. Rapanos probation for his "crime" in the related criminal proceeding. The federal prosecutor took issue with the judge's observation that only clean sand was put on the property by making the incredible argument that "sand is more toxic and destructive" to wetlands than toxic chemicals.

WLF's brief had urged the Court to reject the federal government's expansive claim of regulatory authority under the Clean Water Act over remote "wetlands" located miles away from any navigable waterway. Federal regulators ignored the Court's ruling

five years ago in another wetlands case which found that Congress intended the Clean Water Act's jurisdiction to extend only over those wetlands that are adjacent to waterways that are navigable, and not over remote or isolated wetlands that are otherwise subject to local land use control.

In the plurality opinion written by Justice Scalia and joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, federal jurisdiction extends only over wetlands that satisfy two conditions: first, the wetland be adjacent to a permanent body of running water connected via tributaries to a traditional navigable waterway; and second, that the adjacent wetland have a "continuous surface connection" with the adjacent waterway, making it "difficult to determine where the `water' ends and the `wetland' begins." Justice Scalia decried the Corps of Engineers's attempt to regulate wetlands adjacent to waterways that are often dry or intermittent. Otherwise, the Corps would have jurisdiction over much of the land mass in the United States.

However, the first prong of Scalia's test could encompass a wetland adjacent to a tiny stream that trickles, as long as it eventually, even miles away, connects to a traditional navigable waterway. In such a case, federal jurisdiction would be expansive. Yet, the second prong of Scalia's test would exclude a remote wetland, and indeed, many other wetlands, from federal jurisdiction if it is *not* difficult to tell "where the water ends and the wetland begins." In many cases, it is fairly clear and easy to determine that a wetland adjacent to a small stream or even a traditional navigable river with defined banks is a distinct and separate parcel of land (as opposed to a marshy area or estuary).

The dissent, led by Justice Stevens, argued that wetlands serve valuable ecological functions of trapping pollutants, and the Corps should have the discretion to regulate remote wetlands, particularly since Congress has acquiesced to this assertion of regulatory power over the last 30 years. Justice Kennedy, however, said the test should be whether the wetland in question has a "significant nexus" ecologically, either alone or with other nearby wetlands, with a navigable waterway. He concluded that the cases before the Court suggest that there may be such a connection or nexus and would remand for further findings on those grounds. If Kennedy's test is used by the lower courts instead of Scalia's, then many wetlands would still fall within the Corps's jurisdiction.

WLF clients included the Allied Educational Foundation and two environmental scientists, Laurence A. Peterson and Edmond C. Packee, Jr., of Travis/Peterson Environmental Consulting, Inc. of Alaska. WLF's brief was drafted *pro bono* by Mark A. Perry, a partner with Gibson, Dunn & Crutcher, LLP, in Washington, D.C.

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