



Vol. 21 No. 26

August 18, 2006

“WATERS OF THE U.S.”: DEFINITION REMAINS IN DOUBT AFTER SUPREME COURT RULING

By

George J. Mannina, Jr.

On June 19, 2006, the Supreme Court decided two Clean Water Act (“CWA”) cases, *Rapanos v. United States* and *Carabell v. Corps of Engineers*, wherein the Court sought to define the CWA’s jurisdictional limits. In three opinions, none commanding a majority, the Justices could not agree on the standard. Unquestionably, the Court’s opinions will result in new agency guidance or rulemaking about what is regulated under the CWA. Indeed, the agencies are already working on guidance documents. Key Members of Congress are also debating whether a legislative response to the Court’s decision is needed. The Court invited such actions, as virtually all of the opinions stated that policy decisions about what waters are protected under the CWA should be decided by Congress, the Corps of Engineers (“Corps”) and the Environmental Protection Agency (“EPA”). There can be little doubt that interested parties will be petitioning the agencies and Congress to accept these invitations to act. Meanwhile, the Supreme Court remanded the cases for further consideration. That alone will begin a new series of judicial interpretations about the limits of CWA jurisdiction.

The History Leading to the Decision. The CWA applies to “navigable waters.” The issue before the Court was what is a protected “navigable water” under the CWA. The real world issue is when must someone get a permit to dredge or fill an area or to discharge regulated substances. Since CWA jurisdiction triggers additional requirements under the Endangered Species Act and the National Environmental Policy Act, these decisions take on added significance. In fact, the General Accounting Office found that applicants for a dredge and fill permit typically wait an average of 788 days, and spend an average of \$271,596 on lawyers and consultants. Further, the court’s interpretation of “navigable waters” may have implications for other Federal laws which rely on the concept of navigable waters.

The CWA defines the term “navigable waters” as “waters of the United States.” Since the CWA’s passage in 1972, people have argued about whether “waters of the United States” means every wet area. Some point to the CWA’s purpose to protect U.S. waterways from pollution and assert that anything that is a tributary to, or has a hydrological connection with, a navigable waterway must be regulated in order to protect water quality. Others assert the CWA’s regulatory reach is limited by the U.S. Constitution and by the CWA itself, which only regulates “navigable waters.”¹

Corps and EPA decisions about what are navigable waters have often raised eyebrows. Corps officials have argued CWA jurisdiction is based on one principle: “follow the drop of water.” In desert areas where drops

¹The Supreme Court has declined repeated attempts to draw it into the debate about whether and how the Constitution’s Commerce Clause limits the jurisdictional reach of the CWA.

of water are rarely found, the Corps has discovered navigable waters by tracing the “high water mark” from waterways that no longer exist. The Corps has also found CWA jurisdiction simply because an area lies within a 100 year-old floodplain. The Corps even found the CWA reached the “construction or expansion of a single family home” and the construction of a “garage, driveway, storage shed” or “yard.” In one case, the Corps required a CWA permit for a residential construction covering 26 square feet.

The Three Opinions of the Court. The plurality opinion leaves no doubt that Justices Scalia, Roberts, Thomas and Alito believe the Corps has severely overreached. Indeed, the plurality observed that the Corps’ expansive view of its authority “engulf[s] entire cities and immense arid wastelands” and is without limit because “the entire land area of the United States lies in some drainage basin”

The plurality concluded that the term “waters of the United States” in the CWA “cannot bear the expansive meaning that the Corps would give it.” However, the plurality rejected the argument that “waters of the United States” are limited to waters that are navigable-in-fact or could be made so. Thus, the plurality found the CWA encompasses “something more than traditional navigable waters.” Here, Justice Kennedy and the dissenting Justices agreed, making a unanimous verdict on this point. However, unanimity ended there.

Focusing on what is included in this “something more than traditional navigable waters,” the plurality asserted it includes “only relatively permanent, standing or flowing bodies of water.” For the plurality, CWA jurisdiction is limited to “continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.” Thus, “transitory puddles or ephemeral flows of water” are not jurisdictional. However, in restricting CWA jurisdiction to “relatively permanent” water, the plurality said “we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought.” Nor would the plurality “necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.”

So, when is a stream, river or lake “relatively permanent?” For the plurality, a relatively permanent water body is one where there is a water flow or presence for more than one month since the plurality uses the plural “some months.” But that area may also be dry for “some months.” Where to draw the line is not very clear. The guidance offered by the plurality is that “[c]ommon sense and common usage distinguish between a wash and a seasonal river.” However, the plurality declined “to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel as a ‘water of the United States.’”

Despite this uncertainty, the plurality does make certain things clear about what they believe is and is not within CWA jurisdiction. Streams, rivers, and lakes with a permanent or relatively permanent water flow or presence are in. Washes are out. Also out are ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made ditches, and dry arroyos in the desert. The plurality specifically mentions each item and says that to include those areas in the CWA “has stretched the term ‘waters of the United States’ beyond parody.”

Regardless of whether one loves or loathes the plurality opinion, the reality is that Justice Kennedy, the deciding fifth vote, and the four dissenting Justices, dismiss the plurality’s analysis as “without support” in the Act or judicial precedent. This reduces the plurality to a minority opinion. In fact, Justice Kennedy agreed with the dissenting Justices that an “intermittent flow can constitute a stream.” Thus, a majority of the Court concluded the CWA does cover “impermanent streams.”

The question is whether all intermittent waterways are subject to the CWA. The dissenting Justices would uphold the Corps’ assertions of jurisdiction without change, thus making virtually all intermittent streams subject to the CWA. However, Justice Kennedy asserted this would allow CWA jurisdiction over every “drain or ditch, however remote and insubstantial, that may eventually flow into traditional navigable waters. The deference owed to the Corps’ interpretation of the statute does not extend so far.”

Instead, Justice Kennedy said jurisdictional decisions should be based on whether a tributary, including an intermittent stream, has “a significant nexus” with other regulated waters and should be regulated to achieve the CWA’s goal of restoring and maintaining the quality of the nation’s waters. To determine if intermittent streams and tributaries have the requisite “significant nexus,” Justice Kennedy asserts the Corps should use

factors such as “their volume or flow (either annually or on average), their proximity to navigable water, or other relevant considerations” Justice Kennedy protested that the Corps’ existing standards offer “no . . . assurance” of applying a significant nexus test to determine if CWA jurisdiction is necessary to fulfill the CWA’s purposes. He condemned the practice by which the Corps simply “deems a water a [regulated] tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high water mark” Justice Kennedy clearly believes the Corps has gone too far in finding that a mere hydrologic connection to a traditional navigable waterway is sufficient for CWA jurisdiction.

As to what provides the requisite “significant nexus” for jurisdiction, Justice Kennedy’s opinion is somewhat opaque. He gives special emphasis to water flow rates, the proximity of waters to navigable waters, and the purposes of the CWA. However, it is conceivable that on the special facts of virtually every case, the Corps will see a significant nexus. Consider the possibility that the Corps will routinely find that the amount of pollutants contributed by a given flow, perhaps over a period of many years, may affect water quality. Then, we will be back to where we are today with virtually every tributary being jurisdictional – a result Justice Kennedy says is wrong.

Having discussed when a tributary to a navigable water is subject to the CWA, the Justices turned to when an isolated wetland is subject to the CWA.

The plurality noted that *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), held that “waters of the United States” includes wetlands actually abutting such waters. The significant fact for the plurality was immediate proximity. The plurality rejected the idea that “ecological considerations” as distinct from physical proximity can create CWA jurisdiction, concluding that “*only* those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right are jurisdictional.” [Emphasis in original.] Harking back to their discussion of tributaries, the plurality found that wetlands “with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’” are not covered by the CWA. The plurality leaves little room for doubting its intentions by stating that whether a wetland is jurisdictional is “determined by a wetland’s physical connection to covered waters, not its ecological relationship thereto.” The plurality concluded:

Thus, establishing that wetlands . . . are covered by the Act requires two findings: First, that the adjacent channel contains a “wate[r] of the United States,” (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

Again, Justice Kennedy and the dissenters found the plurality’s legal analysis without foundation, thereby rendering the plurality’s legal reasoning a minority opinion. However, Justice Kennedy did not embrace the dissenters view that the Corps can continue to implement its regulations without change.

Justice Kennedy focused on the CWA’s purpose to restore and maintain water quality, noting that wetlands may filter and purify water and retard the flow of surface runoff into lakes, rivers, and streams, thereby preventing flooding and erosion. With those functions in mind, Justice Kennedy considered the Corps’ “adjacency” standard for determining when isolated wetlands are themselves covered by the CWA. Justice Kennedy found “the Corps’ definition of adjacency is a reasonable one” The Corps’ definition is that “adjacent” means “bordering, contiguous or neighboring” and that wetlands adjacent to tributaries are jurisdictional even if those wetlands are “separated from other waters of the United States by man-made dikes or levies, natural river berms, beach dunes, and the like” 33 C.F.R. 328.3(c). Although supportive of the Corps’ definition, Justice Kennedy complained that the Corps’ adjacency standard is reasonable in only “some” of its applications. To identify which of those applications are reasonable, Justice Kennedy divided his analysis into two parts, wetlands adjacent to navigable-in-fact waters and wetlands adjacent to waters that are not navigable-in-fact.

For wetlands adjacent to navigable-in-fact waters, Justice Kennedy found “the Corps’ conclusive standards for jurisdiction rests upon a reasonable inference of biological interconnection, and the assertion of

jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.” Since the dissenting Justices would uphold all of the Corps’ regulations, here, the Court formed a majority. For wetlands adjacent to non-navigable tributaries, Justice Kennedy said “[a]bsent 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 water.” What constitutes the required “significant nexus?” Justice Kennedy rejects the view of the Corps and of many lower courts that a mere hydrologic connection is sufficient. Beyond that, the “significant nexus” standard becomes somewhat subjective. According to Justice Kennedy, the jurisdictional standard is as follows:

[W]etlands 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.”

Again, one can imagine a circumstance where, on the facts of each individual case, the Corps finds a significant nexus every time and we end up almost exactly where we are today.²

Conclusion. Who won, industry advocates or environmental activists? The answer is we don’t yet know. Clearly, the Corps is viewed by a majority of the Court as having gone too far. Lower courts will look to where the Court formed a majority. These areas of agreement were few. All nine Justices agreed the CWA includes something more than traditional navigable waters. Consensus also exists around the concept that relatively permanent tributaries to traditionally navigable waters are covered. Justice Kennedy and the four dissenting Justices took the next step, agreeing that intermittent streams can be jurisdictional. However, they did not agree on how to determine which impermanent streams are covered. Justice Kennedy and the dissenters approved the Corps’ regulations that wetlands adjacent to navigable-in-fact waters are covered by the CWA. Justice Kennedy and the dissenting Justices also agreed that wetlands adjacent to waters that are not navigable-in-fact can be subject to the CWA, but could not agree on the standard to decide when they are covered. Beyond the limited circumstances where the Court appeared to form a majority, the standard likely to be employed by the lower courts for deciding when waters are covered by the CWA will be Justice Kennedy’s significant nexus test. Whether that leads to different outcomes or just to more paper to justify the same result will become clear over time.

What is clear is that the last chapter in this saga has not been written. Most assuredly there will be more litigation. And, as noted above, we can expect interested parties to petition the Corps, EPA, and Congress for clarification. Interested parties can now expect to be fighting what may become a three part war, before the Corps and EPA, before the Congress, and before the courts.

²While a mere hydrologic connection may not by itself be sufficient to confer CWA jurisdiction, it may be the triggering threshold for the next inquiry of whether a significant nexus exists.