



FOURTH CIRCUIT'S EXTREME DEFERENCE TO ARMY CORPS: "WATERS OF THE U.S." EVERYWHERE AFTER *PRECON II*?

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On May 27, 2015, the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) issued a final rule meant to clarify the meaning of "waters of the United States" under the Clean Water Act (CWA).¹ Regulated entities are currently considering legal challenges and some in Congress have sought repeal, leaving the Final Rule's future uncertain.² The Final Rule's fate, however, may be immaterial if federal courts follow the lead of a recent decision from the U.S. Court of Appeals for the Fourth Circuit. The ruling provides a stark reminder that even under the legal standards that predate the Final Rule, federal regulators face a very low burden when defending CWA jurisdiction in court.

Rapanos Set the Stage. In *Rapanos v. United States*,³ the U.S. Supreme Court, despite being split 4-4-1 on the holding, unanimously agreed that traditionally navigable waters are jurisdictional. Divisions appeared over non-navigable waters and their adjacent wetlands. Justice Kennedy, concurring and casting the deciding vote, reasoned that CWA jurisdiction depends on a "significant nexus" between the waters at issue and waters that are navigable in the traditional sense.⁴ Justice Kennedy's standard provides that water and wetlands meet the significant nexus test when they, "either alone or in combination with other similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of navigable waters.⁵ However, when the "effects on water quality are speculative or insubstantial" the waters would not be jurisdictional.⁶ Further, the significant nexus test is a flexible ecological inquiry into the relationship between the waters or wetlands at issue and traditional navigable waters.⁷

Substantial Judicial Deference on "Significance." The concept of significance, much like beauty, is in the eye of the beholder. The "beholder" with regards to CWA jurisdiction is the Corps, and courts grant its interpretation of "significant" a substantial amount of judicial deference under the Administrative Procedure Act (APA). In response to challenges that it acted in an arbitrary and capricious manner under the APA with a "waters of the U.S." determination, the Corps can cite cases such as *Citizens to Preserve Overton Park v. Volpe*, where the Supreme Court said agency decisions can be overturned only if the agency failed to consider relevant factors or made a clear error of judgment.⁸ The agency can also reference *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, in which the Supreme Court said agency decisions need only be rational.⁹ *Baltimore Gas & Electric Co. v. Natural Resources*

¹ U.S. Army Corps of Engineers and the Environmental Protection Agency, "Final Clean Water Rule: Definition of 'Waters of the United States'" (hereinafter "Final Rule"), available at http://www2.epa.gov/sites/production/files/2015-06/documents/preamble_rule_web_version.pdf.

² See, e.g., Jenny Hopkinson, *Barack Obama's Water War*, Politico.com, May 27, 2015, available at <http://www.politico.com/story/2015/05/epa-waterways-wetlands-rule-118319.html>.

³ 547 U.S. 716 (2006).

⁴ *Id.* at 779.

⁵ *Id.* at 780.

⁶ *Id.*

⁷ *Id.* at 779-80.

⁸ 401 U.S. 402, 416 (1971).

⁹ 463 U.S. 29, 42 (1983).

Defense Council, in which the Court held that an agency's scientific decisions get greater deference, further tilts the scales in the Corps' favor.¹⁰

Precon Development Corp. The Fourth Circuit embraced such extreme deference to the Corps' views in *Precon Development Corp. v. U.S. Army Corps of Engineers*.¹¹ *Precon II* is the second time the Fourth Circuit has addressed the underlying factual situation. In *Precon I*,¹² the court found that the Corps failed to show a significant nexus between the 4.8 acres of wetlands at issue and the nearest navigable water, seven miles away. After the Fourth Circuit remanded *Precon I*, the Corps developed purportedly new evidence and reaffirmed its jurisdictional claim over wetlands adjacent to a man-made drainage ditch. The Corps argued that the ditch connected to other ditches, and water that flowed through them eventually emptied into the Northwest River, a navigable water.

The case ultimately returned to the Fourth Circuit. The court decided in *Precon II* that the Corps had presented sufficient evidence of a significant nexus to sustain CWA jurisdiction. In the *Precon I* case, the Corps relied on theoretical flow rates to show a connection between the ditches and the Northwest River. Upon remand, the Corps presented actual measurements of flow rates and claimed it had observed flow in the ditches. The mere existence of a flow—not the amount or frequency—was determinative. The *Precon II* court accepted the Corps' position.

The court next considered the wetlands themselves. It accepted the Corps' finding that the Northwest River suffered from low dissolved oxygen levels and the 4.8 acres of wetlands, together with similarly-situated wetlands, could trap nutrients that could otherwise contribute to those low oxygen levels. The Corps also found the 4.8 acres, together with similar wetlands in the area: (1) could affect water flow in the Northwest River by trapping and storing water; (2) benefited Northwest River fish because of carbon sequestration in which plant photosynthesis processes removed carbon dioxide from the air and converted it into plant material which, because of falling leaves, provided organic material for organisms at the bottom of the food chain; and (3) provided habitat for deer, squirrels, songbirds, reptiles, and amphibians.

In making these judgments, the Corps did not look at the 4.8 acres of wetlands alone but considered the function of 448 acres of similarly-situated wetlands in the region. Not only did the court accept each of the Corps' factual findings, but the court stressed the Corps did *not* have to present quantitative data because "purely qualitative evidence" was sufficient.¹³ Significantly, the court also said the Corps "cannot be expected to present evidence of the actual ecological impact of the wetlands on downstream waters."¹⁴

Conclusion. *Precon II* embraces an evidentiary standard under which the Corps does not have to show actual impacts and could rely on entirely qualitative evaluations about the ecological role of wetlands. That lax standard, coupled with the evidence the court deemed sufficient—*i.e.*, (1) that plants engage in photosynthesis, (2) plants drop their leaves contributing organic matter for lower life forms, and (3) wetlands provide habitat for various species—suggests few wetlands will escape CWA jurisdiction even under the *Rapanos* significant nexus test.

The Final Rule lessens the Corps' evidentiary burden even further. For example, while Justice Kennedy said the question was whether the waters at issue significantly affect the chemical, physical, *and* biological integrity of navigable waters, the Final Rule changes this to chemical, physical, *or* biological integrity. This converts a three-part test into a one-part test, easily satisfied by the Fourth Circuit's carbon sequestration standard. Similarly, the Final Rule adopts the Fourth Circuit's formulation that any degree of connectivity via flow is sufficient to make a jurisdictional connection between the water at issue and a navigable water.

If other federal courts embrace the Fourth Circuit's substantial deference to the Corps' regulatory expertise and its application of a profoundly low evidentiary standard to demonstrate "substantial nexus," any battles won by opponents of the final "waters of the U.S." rule may prove entirely pyrrhic.

¹⁰ 462 U.S. 87, 103 (1983).

¹¹ 2015 WL 1020693 (Mar. 10, 2015) (hereinafter "*Precon II*").

¹² *Precon Development Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278 (4th Cir. 2010) (hereinafter "*Precon I*").

¹³ 2015 WL 1020693 at *2.

¹⁴ *Id.* at *3.