

NACWA Developments in Clean Water Law Seminar *Redefining Clean Water Act Jurisdiction*

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Rapanos v. United States, 126 S. Ct. 2208 (2006)

- In 2006, the U.S. Supreme Court in a 4-4-1 decision determined what waters were subject to protection under the Clean Water Act. The Court did vote 5-4 to vacate the 6th Circuit decisions and remand for further proceedings.
- The *Rapanos* case is scheduled for trial in August 2008, unless it settles. The *Carabell* case is no longer in Court and is under review by the Corps.
- The current debate in interpreting the decision relates to positions that EPA, the Corps of Engineers, and the Department of Justice are taking in permit and enforcement actions regarding what portion(s) of the 4-4-1 decision control in terms of governing subsequent decisions on the scope of the Clean Water Act.

EPA and Corps Guidance Regarding CWA Jurisdiction After *Rapanos*

- On June 8, 2007 EPA and the Corps issued Guidance on agency actions after the *Rapanos* decision (72 FR 31824). The Guidance requests comments for six months ending Dec. 5, 2007. By March 5, 2008, the Agencies “will either reissue, revise, or suspend the guidance after carefully considering the public comments received and field experience with implementing the guidance.”
- The purpose was stated as “The agencies are issuing this guidance to ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions being conducted under the CWA are consistent with the *Rapanos* decision and provide effective protection for public health and the environment.”

Rapanos Guidance Key Points

- The Guidance has four separate key points
- (1) “will assert”
- (2) “will decide”
- (3) “will not assert”
- (4) “will apply significant nexus standard.”

Guidance Key Point 1

- The agencies *will assert* jurisdiction over the following waters:
 - Traditional navigable waters
 - Wetlands adjacent to traditional navigable 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 that directly abut such tributaries

Guidance Key Point 2

- The agencies *will decide* jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:
 - Non-navigable tributaries that are not relatively permanent
 - Wetlands adjacent to non-navigable tributaries that are not relatively permanent
 - Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

Guidance Key Point 3

- The agencies generally *will not assert* jurisdiction over the following features:
 - 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

Guidance Key Point 4

- The agencies *will apply the significant nexus standard* as follows:
 - A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
 - Significant nexus includes consideration of hydrologic and ecologic factors

Observations On the Guidance

- The Guidance limits traditional navigable waters to those described in 33 CFR 328.3(a)(1), not the “migratory bird rule” in SWANCC or the other commerce clause based jurisdictional waters defined in 33 CFR 328.(a)(3) as “all other waters” (p.4)
- The Guidance interprets the split nature of *Rapanos* by relying on Justice Kennedy’s opinion, the Guidance states - “The agencies’ assertion of jurisdiction over non-navigable tributaries and adjacent wetlands that have a significant nexus to traditional navigable waters is supported by five justices.”
- The Guidance rests the “significant nexus” test on an ecological footing – “In considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation’s traditional navigable waters.” (pp. 7-8)

SWANCC Lives On

- The Guidance recognizes the limits from *Rapanos* coming from Justice Kennedy's reference to the holding in *SWANCC*. In a footnote to the use of the "significant nexus" test, the Guidance announces the limitations inherent in that approach
 - "When applying the significant nexus standard to tributaries and wetlands, it is important to apply it within the limits of jurisdiction articulated in *SWANCC*. Justice Kennedy cites *SWANCC* with approval and asserts that the significant nexus standard, rather than being articulated for the first time in *Rapanos*, was established in *SWANCC*. 126 S. Ct. at 2246 (describing *SWANCC* as "interpreting the Act to require a significant nexus with navigable waters"). It is clear, therefore, that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in *SWANCC*. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non-jurisdictional by *SWANCC*." (p. 8, fn 29)

Hydrologic Connectivity

- After *SWANCC* and again after *Rapanos* court decisions have focused on physical connection features.
- The Guidance states –“Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) 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. In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water 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.” (p. 11)
- This suggests that earlier connection cases would not have been filed.

U.S. v Robison, 2007 WL 3087419 (11th Cir. Oct. 24, 2007)

- This recent decision by the 11th Circuit highlights the problem the courts face since *Rapanos* in defining the scope of the CWA and in *Robison* explaining it to a very special audience – a jury.
- In *Robison* the Court vacated CWA convictions and remanded the case for new trial finding that “The definition of ‘navigable waters’ in the jury charge in this case was erroneous under *Rapanos*, and the government has not shown that the error was harmless.” (p. 4)

Robison Facts

- The defendants were convicted in June 2005 for permit violations from discharges into Avondale Creek which the U.S. had presented EPA testimony to show was a perennial stream that had a continuous uninterrupted flow into Village Creek and eventually into the Black warrior River. On cross examination the EPA witness was somewhat discredited since he first saw the stream over four years after the violations had occurred and admitted that a dam across Village Creek blocked all downstream flow.

Robison Jury Charge

- Here the hydrologic connection theory was advanced in the jury charge:
 - As to Counts 2 through 22, a “water of the United States” includes any stream which may eventually flow into a navigable stream or river. The Government does not have to prove that the stream into which the discharge is made is itself navigable in fact. What it must prove is that the stream into which the discharge is made may eventually flow directly or indirectly into a navigable stream or river. The stream into which the discharge is made may be a natural or manmade [stream] and may flow continuously or only intermittently, as long as it may eventually flow directly or indirectly into a navigable stream or river whose use affects interstate commerce. (p.7)

Robison Decision

- The 11th Circuit thoughtfully analyzed the three sets of opinions in *Rapanos*. The defendants argued that only the Justice Kennedy significant nexus test applied while the U.S. argued that if Avondale Creek meets either the plurality or the significant nexus tests they would prevail.
- The court noted that the 9th Circuit in *Healdsburg* (496 F.3d 993) and the 7th Circuit in *Gerke* (464 F.3d 723) have followed the significant nexus test, but that the 1st Circuit in *Johnson* (467 F.3d 56, cert denied Oct 2007) allowed the U.S. to choose either test as they argued in *Robison*.

Robison Decision

- The 11th Circuit based its decision on the “narrowest grounds” guidance from *Marks v U.S.* (430 U.S. 188, 1977) and concluded that the jury instruction did not follow the significant nexus test of Justice Kennedy and was thus erroneous. They found that the U.S. did not meet its burden to show that the jury charge error was harmless because they did not introduce evidence of a significant nexus from the creek to the river nor did they show any harm from the discharges.
- They rejected the U.S. position to just follow the continuous flow approach from the *Rapanos* plurality stating that they are bound by *Marks*.

Congress to the Rescue?

- A preliminary point to remember as one examines what Congress has under consideration in redefining the jurisdiction of the CWA is that neither the June 2007 Guidance nor the January 15, 2003 ANPRM (68 FR 1991), issued after *SWANCC*, commit to any position on the commerce clause bases of jurisdiction. The 2003 FR states that project specific approval from HQs is required for waters using the other waters factors in 33 CFR 328.3(a)(3)(i)-(iii).
- Moreover, there have been no court decisions allowing a sole basis for jurisdiction under the commerce clause since *SWANCC*.

Comparing 33 CFR 328.3 & HR 2421

33 CFR 328.3(a)(1)-(3)

(a) The term *waters of the United States* means

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) 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 or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

H.R. 2421

Section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362) is amended-- (3) by adding at the end the following:

“(24) **WATERS OF THE UNITED STATES-** The term ‘waters of the United States’ means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.”

HR 2421 – The same as before or New?

- Under 33 CFR 328.3(a)(1)-(3) the foundation in the regulation is the link to interstate or foreign commerce which is not mentioned in the existing CWA definition of navigable waters.
- HR 2421 adds a new undefined test which embraces the commerce clause in stating defined waters are all those which “are subject to the legislative power of Congress under the Constitution”. The Findings in Section 3 of H.R. 2421 may give rise to other possible powers in addition to the commerce clause although the extent of that expansion is unclear.
- Also perhaps left out of protection are ephemeral streams due to the use of the term intermittent in the definition, but again see the Findings.

HR 2421 Findings

- (4) Water is transported through interconnected hydrologic cycles, and the pollution, impairment, or destruction of any part of an aquatic system may affect the chemical, physical, and biological integrity of other parts of the aquatic system.
- (5) Protection of intrastate waters, along with other waters of the United States, is necessary to restore and maintain the chemical, physical, and biological integrity of all waters in the United States.
- (7) Small and intermittent streams, including ephemeral, and seasonal streams, and their start reaches comprise the majority of all stream and river miles in the conterminous United States. These waters reduce the introduction of pollutants to larger rivers and streams, affect the life cycles of aquatic organisms and wildlife, and impact the flow of higher order streams during floods.

HR 2421 Findings

- (15) Protecting the quality of and regulating activities affecting the waters of the United States is a necessary and proper means of implementing treaties to which the United States is a party, including treaties protecting species of fish, birds, and wildlife. (Based on existing Migratory Bird Treaties and the Treaty power in Art. II, Sec. 2 of the Constitution? See *Missouri v. Holland*, 252 U.S. 416 (1920))
- (16) Protecting the quality of and regulating activities affecting the waters of the United States is a necessary and proper means of protecting Federal land, including hundreds of millions of acres of parkland, refuge land, and other land under Federal ownership and the wide array of waters encompassed by that land. (Based on the Property Clause in Art IV, Sec. 3 of the Constitution?)