

On Environmental Law

U.S. Supreme Court Limits Federal Jurisdiction Over Wetlands

In a potentially crucial environmental law decision, the U.S. Supreme Court has spoken out against the government's expansive regulation of wetlands under the Clean Water Act (CWA). Over the years, federal regulators have attempted to apply the CWA to a surprising range of dry or semi-wet land features, including man-made ditches and intermittently flowing storm drain systems and culverts, resulting in expensive and time-consuming legal hurdles for landowners and developers. All of that may be about to change, however, as federal regulators and the courts attempt to interpret the Supreme Court's somewhat fractured decision in the consolidated cases, *Rapanos v. U.S.* and *Carabell v. U.S.*

Wetlands Regulation Under the Clean Water Act

The CWA prohibits the discharge of any pollutant by dumping or filling in "navigable waters" without a permit from the Army Corps of Engineers. "Navigable waters" is defined in the CWA as "waters of the United States." Over time, the Corps and the courts have stretched the meaning of "waters of the United States" – and hence, "navigable waters" – to include areas bearing very little resemblance to traditional bodies of water.

The *Rapanos/Carabell* Opinions

The recent Supreme Court decision involved two cases of Michigan developers who wanted to fill in wetlands on their properties. The three sites in *Rapanos* were near or connected to drains that emptied into a series of creeks leading to Lake Huron. The developer backfilled the three sites without a permit and was found criminally and civilly liable for violating the CWA. In *Carabell*, the developers went to court after being denied a permit to fill in a wetland bordering a ditch that flowed into another ditch that flowed into Lake St. Clair. In addition, the wetland was separated from the ditch by an impermeable man-made berm. In both cases, the Sixth Circuit Court of Appeals held that the wetlands constituted "navigable waters" which were subject to regulation under the CWA.

A five-justice majority of the U.S. Supreme Court found that the Sixth Circuit had applied the wrong standard in reviewing the Corps' decisions that the wetlands were subject to the CWA. However, the justices could not agree on what the correct standard should be. In an opinion written by Justice Scalia, four of the justices argued that waters covered under the CWA should include only relatively permanent, standing or continuously

flowing bodies of water such as streams, oceans, rivers, and lakes, not intermittent or ephemeral channels where water flows only periodically. Justice Scalia's opinion set forth a two-step test for establishing whether wetlands are covered under the CWA merely by their proximity to other tributaries to navigable water. First, the tributary must be a relatively permanent body of water connected to traditional interstate navigable waters. Second, the wetland must have a continuous surface connection with the tributary, making it difficult to determine where the water ends and the land begins.

The fifth justice in the majority, Justice Kennedy, agreed that the lower courts had applied the wrong standard, but disagreed that the CWA should be more strictly interpreted. Instead of pushing for less regulation over wetlands, he argued in favor of a case-by-case determination into whether a particular wetland bears a "significant nexus" to traditional navigable waters.

New Opportunities to Argue Against Federal Overreaching

Despite the lack of a bright line standard for regulating wetlands under the CWA, the Supreme Court's decision provides a new opportunity to argue that drainage ditches, ephemeral channels, and remote wetlands not directly adjacent to traditional waters should not be regulated by the Corps. A majority of the Court arguably has rejected the Corps' historical pattern of regulating all wetlands bearing any hydrological connection to navigable waters. Four of the justices have embraced Justice Scalia's two-step test under which the government could not assert jurisdiction over wetlands whose only connection to traditional navigable waters is a series of drainage ditches. At the very least, under Justice Kennedy's "significant nexus" test, the Corps must determine its jurisdiction over wetlands on a case-by-case basis. Any failure to take into account particular site characteristics, the wetland's proximity to tributaries and other factors could render a decision by the Corps to be unlawful and subject to reversal.

It remains to be seen whether the Supreme Court's decision will trigger a new approach by the Corps and/or much needed clarification of the current regulatory scheme. Any regulatory changes are sure to be accompanied by legal wrangling as the lower courts deal with the less than clear guidance from the Court. In the meantime, the State of Ohio will continue to exercise its jurisdiction over non-federal wetlands as "waters of the state." Until federal regulations under the CWA actually change, anyone planning to develop, improve or even landscape property arguably containing wetlands should consult with a competent wetland expert.

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