



The Water Report™

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FEDERAL WETLANDS JURISDICTION

NEW POST-RAPANOS GUIDANCE — LONGER FEDERAL REACH, LESS CERTAINTY

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Introduction

The US Environmental Protection Agency (EPA) and the US Army Corps of Engineers (Corps) (collectively “the agencies”) continue to refine their approach to determining the extent of federal jurisdiction over wetlands and other waters in the wake of the US Supreme Court’s 2006 decision in *United States v. Rapanos*, 547 U.S. 715 (2006). In December 2010, those agencies completed a draft of new non-binding guidance (“New Guidance”) governing the scope of federal jurisdiction under the Clean Water Act (CWA). While the New Guidance was pending before the White House Office of Management and Budget, it was leaked to the public — resulting in significant commentary and an outcry for more opportunity for public participation in the agencies’ decision making. The agencies then made minor revisions to the New Guidance and released it for public comment. *EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act*, 76 Fed. Reg. 24479 (May 2, 2011) (<http://edocket.access.gpo.gov/2011/pdf/2011-10565.pdf>). Comments must be received before July 1, 2011.

The draft New Guidance makes significant changes from earlier guidance released in 2007 and 2008, most notably by subjecting more types of jurisdictional decisions to the fact-specific “significant nexus” test introduced by US Supreme Court Justice Kennedy in *Rapanos*. EPA and the Corps acknowledge that this approach will likely result in a significant increase in the number of waters found subject to CWA jurisdiction. Arguably, this expansion of federal authority should be the subject of a formal rulemaking, and not simply issued as guidance, as it will be highly controversial. Indeed, a letter signed by 170 members of Congress objecting to the New Guidance was already delivered to the EPA Administrator and Secretary of the Army on April 14, 2011. The New Guidance published in the Federal Register acknowledges this concern and indicates a formal rulemaking will follow finalization of the New Guidance.

In order to provide context for the New Guidance, this article traces the development of federal courts’ understanding of the *Rapanos* case in general and Justice Kennedy’s significant nexus test in particular. This article then explains how the New Guidance differs from previous *Rapanos* guidance documents and examines its implications for those parties interested in development in wet areas.

Uncertainty Created by the *Rapanos* Decision

In *Rapanos*, a fractured Supreme Court issued three separate opinions, none of which represented a majority of the Court. The issue in *Rapanos* was whether the Corps exceeded its authority under Section 404 of the CWA by requiring permits for the filling of wetlands that were adjacent to ditches and man-made drains that eventually emptied into navigable waters. Justice Scalia’s plurality opinion held that federal jurisdiction exists only over wetlands with a “continuous surface connection” to “waters of the United States,” which he defined as “relatively permanent, standing or flowing bodies of water.” In a concurring opinion, Justice Kennedy took a different approach and instead argued that federal jurisdiction under the CWA is satisfied where there is a “significant nexus” physically

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Marks Test

Circuits Split

Stevens' Dissent

Facts Controlled

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or ecologically between wetlands and navigable waters. Finally, Justice Stevens and three other justices issued a dissenting opinion arguing that the Court should defer to the Corps' then broader standard for CWA jurisdiction. For additional details concerning the decision, see Bricker, *TWR* #29 and Walston, *TWR* #30.

The Supreme Court's multiple opinions in *Rapanos* have created uncertainty in the lower federal courts as to the proper test to determine whether a water body is subject to regulation under the CWA. In order to interpret *Rapanos*, courts have turned to another US Supreme Court case, *Marks v. United States*, 430 U.S. 188 (1997). *Marks* held that when the majority of the Supreme Court agrees only on the outcome of a case but not the reasons for the outcome, then lower courts must follow the *narrowest* rationale that the majority of justices would have agreed to if they were forced to choose. The opacity of this standard is well illustrated by the post-*Rapanos* case law.

Applying the *Marks* test, the federal circuit courts have split on which *Rapanos* opinion governs the scope of the federal government's jurisdiction under the CWA. The Seventh and Ninth Circuits reasoned that the narrowest *Rapanos* opinion must be the opinion that preserves the greatest amount of federal authority over wetlands. This opinion, they concluded, is Justice Kennedy's, because his significant nexus test provides federal jurisdiction over more waters than Justice Scalia's test and the four dissenting justices would likely side with Justice Kennedy in finding federal jurisdiction over any waters meeting the significant nexus test. Under this theory, the four dissenters plus Justice Kennedy constitute a majority of the Court for the purpose of the *Marks* test. See *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir 2007) and *U.S. v. Gerke Excavating Inc.*, 464 F.3d 723 (7th Cir 2006). The Eleventh Circuit also adopted Justice Kennedy's test, although under a slightly different interpretation of *Marks*. See *U.S. v. Robinson*, 505 F.3d 1208, 1221-22 (11th Cir. 2007).

The First and Eighth Circuits, by contrast, decided that *Marks* was not an appropriate tool for interpreting *Rapanos*. According to these courts, *Marks*' directive to use the "narrowest" holding could mean either the opinion that gives the federal government the greatest authority or the opinion that gives it the least authority. *Marks*, therefore could not be relied upon to choose the winning *Rapanos* opinion. Instead, the First and Eighth Circuits adopted Justice Stevens' view expressed in his *Rapanos* dissent that federal jurisdiction is appropriate where a water body meets either Justice Kennedy's or Justice Scalia's test. The two circuits therefore determined that they must employ both tests to determine whether a water body qualifies as waters of the United States under the CWA. See *U.S. v. Bailey*, 571 F.3d 791 (8th Cir. 2009) and *U.S. v. Johnson*, 467 F.3d 56 (1st Cir. 2006).

Post-*Rapanos* decisions in the Fifth and Sixth Circuits similarly analyzed federal jurisdiction under both the Kennedy and the Scalia tests, although neither court determined which test controlled under *Marks*. Rather, both of these courts avoided the *Marks* issue by simply reviewing the particular facts in their respective cases and determining that federal jurisdiction was satisfied under either standard. See *U.S. v. Cundiff*, 555 F.3d 200 (6th Cir 2009) and *U.S. v. Lucas*, 516 F.3d 316 (5th Cir 2008).

Despite the disagreement in the circuit courts about which *Rapanos* opinion controls, the common denominator in all of these cases is Justice Kennedy's opinion. Because the Kennedy significant nexus standard generally provides for more expansive federal jurisdiction than Justice Scalia's standard, the Kennedy test is the most relevant in close cases. Additionally, because it is at least possible to argue that a significant nexus can be found in all but the most isolated wetlands, the Kennedy approach leads courts to closely analyze the facts in each case.

A recent decision by the Fourth Circuit provides some guidance on the type and quality of evidence needed to establish federal jurisdiction under the significant nexus test. The 4.8 acres of wetlands at issue in *Precon Dev. Corp. v. U.S. Army Corps of Engineers* were seven miles from the nearest navigable waterway. These wetlands were adjacent to a seasonal, man-made drainage ditch that flowed to another ditch, which, in turn, flowed into a tributary of the Northwest River in southeastern Virginia. The wetlands were separated from the first ditch by a berm. Utilizing its 2007 guidance document, the Corps determined that the significant nexus test applied because the wetlands were adjacent to "relatively permanent waters." Lumping the wetlands at issue with all other "similarly situated" wetlands in the watershed, the Corps found a significant nexus to the Northwest River because the wetlands collectively helped to moderate downstream flooding, and filter sediments and nutrients.

Although the Fourth Circuit court rejected the developer's argument that the Corps needed to produce quantitative laboratory evidence to demonstrate an ecological connection between the wetlands and the river, the court nevertheless held that the Corps' evidence was insufficient to find a significant nexus. Specifically, the Fourth Circuit held that the Corps failed to demonstrate that flooding or sediment and nutrient loading were issues in the Northwest River and that the local wetlands were significant in controlling these threats. In doing so, the court contrasted *Cundiff* and *Healdsburg* where the Corps had produced evidence that the wetlands at issue in those cases performed functions that had a significant impact on the quality of the relevant navigable waters. Under *Precon*, therefore, the significant nexus test requires either a quantitative or qualitative showing of why local wetlands significantly affect the physical or ecological integrity of navigable waters. *Precon Dev. Corp. v. U.S. Army Corps of Engr's*, No. 09-2239 at 30 (4th Cir. Jan. 25, 2011).

Draft Wetlands Guidance

The New Guidance

If finalized, the New Guidance will supersede prior guidance issued by the agencies in 2007 and 2008. Whereas the prior guidance relied on both Justice Scalia's continuous surface connection test and Justice Kennedy's significant nexus test, the New Guidance places greater emphasis on the latter — at least for the types of waters where federal jurisdiction is most questionable. This approach will inevitably result in more waters being deemed jurisdictional and thus subject to CWA, continuing the judicial trend of conducting intensive factual analysis to make the determination.

As stated on page 3 of the New Guidance:

The agencies expect, based on relevant science and field experience, that under the understandings stated in this draft guidance, the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance, though certainly not to the full extent that it was typically asserted prior to the Supreme Court decisions in *SWANCC* [*v. U. S. Army Corps of Engineers*, 531 U.S. 159 (2001)] and *Rapanos*.

Specifically, the New Guidance subjects the following types of waters to the fact-specific significant nexus test:

- Tributaries to navigable waters or interstate waters that are not “relatively permanent” (meaning less than seasonal)
- Wetlands adjacent to any traditional navigable water, tributary, or interstate water
- Any waters falling into the “other waters” provision of EPA and the Corps’ CWA regulations, which include: mudflats; sandflats; wetlands not adjacent to the waters included in the above categories; wet meadows; and other specified waters if their fill could affect interstate or foreign commerce

Further, the New Guidance will apply not only in the context of CWA section 404, but addresses the scope of “waters of the United States” wherever that phrase appears in the CWA. That would include the section 202 National Pollutant Discharge Elimination System (NPDES) permit program, the section 311 oil spill program, the section 303 provisions on water quality standards and total maximum daily loads, and the section 401 water quality certification process. New Guidance at p. 2.

It is important to note that “guidance” is not the same as regulations. Guidance is an indicator of how the agencies will approach jurisdictional determinations, whereas regulations have the force of law and are entitled to some deference by federal courts. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This suggests that the primary import of the New Guidance is to clarify for property owners and the courts how the agencies will conclude they have jurisdiction under the CWA, but the courts will not feel bound by deference-to-regulations considerations. See *Precon Development Corp., Inc. v. Army Corps of Engineers*, Slip Opinion, ___ F.3d ___, Dkt. No. 09-2239 (4th Cir. 2011); *National Mining Ass’n v. EPA*, Slip Opinion, ___ F.3d ___, Dkt. No. 10-1220 (RBW) (D.C. Cir. 2011).

Conclusions

Because the New Guidance is a harbinger of more aggressive jurisdictional determinations by the agencies without benefit of a formal rulemaking, we can expect more rather than less litigation to follow. The inability of the US Supreme Court and the federal agencies to provide clarity on CWA jurisdiction makes for unsatisfying advice to clients. Until the agencies promulgate comprehensive regulations (not likely soon), the Supreme Court reconciles the split in the Circuits (less likely still), or Congress rewrites the CWA (not likely at all), we can only work with our clients and technical experts to evaluate the specific location for its ecological connection to navigable waters. If it is a close call, the assumption has to be that the agencies will assert jurisdiction.

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