CLEAN WATER IN THE MIDWEST

RECENT COURT DECISIONS

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I. Who decides what is a federally regulated wetlands?

A. The *Rapanos v. United States* Supreme Court Decision

Five years ago, in the United States Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers ("SWANCC")*, 531 U.S. 149 (2001), the Court held that the Clean Water Act does not confer jurisdiction over wetlands that are "isolated." However, the SWANCC decision left a void, and confusion to fill it, as to when property falls on the side of the line denoting an "isolated" wetlands, which is beyond the jurisdiction of the Clean Water Act, and wetlands that have a sufficient nexus or proximity to navigable waters to confer federal jurisdiction. Simply stated, the SWANCC decision left open the question of when does a wetland cease to be "isolated" and become a "water of the United States"? After several federal circuit court decisions that left the answer to this question unclear, the hope had been that the U.S. Supreme Court would shed clear light on the question in its recently completed term.

However, any hope for clarity on what constitutes a "wetlands" under the Clean Water Act was dashed when in *Rapanos v. United States*, 547 U.S. __, 126 S. Ct. 2208, 62 ERC 1481 (2006), the U.S. Supreme Court failed to reach a majority decision on when property, that is not in and of itself a "navigable water," constitutes a "wetlands" within the meaning of the Clean Water Act.[2] At the same time, in its plurality opinion, written by Justice Antonin Scalia, the Supreme Court expressed criticism towards the U.S. EPA and the Corps for their failure to adopt rules clarifying wetlands protections. Some might consider this situation akin to "the pot calling the kettle black."

So, where are we now in determining what constitutes a federally regulated "wetlands"? It seems we are still mired in a "guessing game" that at present requires court intervention to gain an answer, except perhaps on the fringes of the issue. We have two pre-*Rapanos* Supreme Court cases that offer some guidance. From the *SWANCC* decision, we know that the presence of migratory birds is not enough to establish federal jurisdiction over an isolated wetlands with no hydrological connection to a traditional navigable water. From

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[2] In the 4-1-4 *Rapanos* decision, Justice Scalia's plurality opinion was joined by Justices Alito, Thomas and Chief Justice Roberts (who also wrote a separate concurrence). Justice Kennedy concurred in a lengthy, separate opinion. Justices Stevens, Breyer, Ginsburg and Souter dissented.

the decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 23 ERC 1561 (1985), and supported by *SWANCC* and *Rapanos*, it seems that a wetlands which abuts a traditional navigable water is also subject to the Clean Water Act's jurisdiction. But, as a wetland's location moves farther away from abutting a traditional navigable water, and less clearly "adjacent to" it, the answer to the federal jurisdiction question is still uncertain.[3] The Supreme Court's split decision in *Rapanos v. United States* (No. 04-1034) and *Carabell v. U.S. Army Corps of Engineers* (No. 04-1384) provides some insight on what is not a federally regulated wetlands, but regrettably falls far short of telling us what is.

A federal wetlands is not created by "any hydrological connection" to a navigable water. Both the *Rapanos* plurality opinion and Justice Kennedy's concurring opinion rejected the government's hydrological-connection theory. The *Rapanos* wetland parcels were twenty miles away from traditional navigable waters. The *Carabell* wetland was approximately a mile away from traditional navigable waters, near a ditch but separated from it by a berm. The Court vacated and remanded the Sixth Circuit Court of Appeals finding that both wetlands were "waters of the United States" based on the existence of a hydrological connection via a chain of ditches, creeks and culverts to traditional navigable waters. Thus, the *Rapanos* Court proves wrong the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers' insistence since *SWANCC* that "any hydrological connection" to navigable waters is enough to confer federal jurisdiction.

But the gap that *Rapanos* fails to fill is what is the "right" answer to when is a wetlands sufficiently "connected" to a traditional navigable water to confer federal jurisdiction. Justice Scalia opined that "waters of the United States" does not include property that does not show a "relative permanence" of water flow. He rejected the regulation of ditches and drains located far away from navigable waters. His plurality opinion appears to require that a federal wetlands display two things: a relatively permanent presence of water and a continuous surface connection (as opposed to merely a hydrological one) to traditional navigable waters.[4]

In his concurring opinion, Justice Kennedy endorsed the application of the "significant nexus test" set forth in *SWANCC*, at least until the U.S. EPA and the Corps promulgate a joint rule on the issue. While Justice Kennedy provides a test to determine whether federal jurisdiction extends to a wetlands, he does not clearly tell us what constitutes a "passing grade." He explains, however, that a federal wetlands must "either alone, or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and

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[3] The Supreme Court Justices themselves do not appear to agree on the proper interpretation of the scope of the *Riverside Bayview* decision. In his dissent, Justice Stevens contends the *Riverside Bayview* decision "squarely controls" the *Rapanos* and *Carabell* cases because it held that federal jurisdiction extends to all "non-isolated wetlands." Stevens, slip op. at 11. In contrast, Justice Kennedy interprets *Riverside Bayview* much more narrowly, stating that its ruling applies "to wetlands adjacent to navigable-in-fact waters." Kennedy, slip op. at 23.

[4] Although Justice Scalia acknowledged that the Act's reach extends beyond traditional navigable waters, he interpreted the "navigable waters" language to include "only those relatively permanent, standing or continuously flowing bodies of water" and not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Rapanos v. United States*, 547 U.S. __, No. 04-1034, Scalia, slip op. at 20-21.

biological integrity of other covered waters more readily understood as 'navigable.'"[5] In other words, it seems that mere "adjacency" to a navigable water or its tributary is not alone enough to constitute a sufficient nexus.[6] Contrary to the oft used phrase in identifying high value real estate, for Justice Kennedy at least, it is not "location, location, location." Yet, given the stand alone nature of his opinion, one cannot conclude that Justice Kennedy's "significant nexus test" provides a legal standard for lawyers, developers or property owners as to what constitutes a federal wetlands. It would be wrong to presume that Justice Kennedy's significant nexus test provides the answer, given that his interpretation of the Act's jurisdiction appears broader than the plurality's (who he criticizes for finding "nonexistent requirements" in the Act) and narrower than the dissenters who would have extended the Act's jurisdiction to the wetlands involved in the cases. The Justices simply could not agree on what that standard should be.

While the Justices could not reach agreement on the proper legal standard for determining the extent of the Act's jurisdiction over wetlands, there does appear to be a majority view that the answer must come from clear rulemaking by the U.S. EPA and the Corps. In what may be judicial frustration at having its *SWANCC* decision virtually ignored by the agencies as they subsequently embraced the "any hydrological connection" standard for conferring jurisdiction over wetlands, the Justices on all sides of the decision criticize the lack of clear rulemaking on the issue. Justice Scalia, writing for the plurality, compared the U.S. Army Corps of Engineers' broad interpretation of the Act's wetlands jurisdiction to that of an "enlightened despot." Chief Justice Roberts similarly commented: "Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."[7] And Justice Kennedy concluded that the significant nexus test must fill the gap left "absent more specific regulations."[8] Even Justice Breyer in his dissent counseled the Corps to act on new rules without delay.[9]

More important than the Justices' criticism of the lack of new rulemaking by the Corps is the Court's refusal to give deference to the Corps' interpretation of the Act's jurisdictional reach in the absence of clear rules. In both the plurality and the concurring opinions, the Justices refuse to defer to the Corps' interpretation of the statute. The opinions raise the question of whether the current Court interprets the *Chevron* doctrine more narrowly than did its predecessors.

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[5] Kennedy, slip op. at 23.

[6] Justice Kennedy further clarifies his demand for more than proximity of location in his rejection of the Corps' reliance on the "ordinary high water mark" standard as the means for identifying tributaries to traditional navigable waters. In rejecting this approach, Justice Kennedy explains: "Indeed, in many cases wetlands adjacent to tributaries covered by [the "ordinary high water mark"] standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." Kennedy, slip op. at 25.

[7] Roberts, slip op. at 2.

[8] Kennedy, slip op. at 25.

[9] Justice Breyer advised the Corps that it should "write new regulations, and speedily so." Breyer, slip op. at 2.

Thus, today, the identity of who has the authority to determine what constitutes a "wetlands" regulated under the Clean Water Act appears to rest in most cases with the courts. In the absence of an isolated wetland like the one in *SWANCC* or a wetland abutting a navigable-in-fact waterway as in *Riverside Bayview*, there is currently no "brightline" defining the Act's jurisdictional boundaries. What is left is a broad grey area, which at least until the adoption of new wetlands rules by the Corps and the U.S. EPA, will continue to be sorted out in the courts on a case-by-case basis.[10]

B. U.S. EPA and U.S. Army Corps Reaction to *Rapanos*

It does not appear that the U.S. EPA and the Corps interpreted the *Rapanos* decision to direct the agencies to engage without delay in rulemaking to set the standards for wetlands protection. Instead of announcing plans to initiate a wetlands rulemaking, the agencies have said that joint interim guidance is to be issued "soon" by the U.S. EPA and the U.S. Army Corps of Engineers to clarify the scope of the *Rapanos* decision. (Benjamin Grumbles, U.S. EPA Assistant Administrator for Water, Testimony before the U.S. Senate Fisheries, Wildlife and Water Subcommittee, August 1, 2006). However, according to the U.S. EPA, these agencies "have not made up [their] minds about rulemaking." (*Id.*) The decision to issue interim guidance does have the advantage of providing a quicker response than would be provided in a formal rulemaking. However, it lacks the higher degree of certainty and concreteness that a rulemaking would provide. The courts will likely continue to look to their own precedent in trying to determine on a case-by-case basis what does and does not constitute wetlands protected by the Act.

The guidance reportedly will try to define a "significant nexus" test and to clarify the scope of Section 404's jurisdiction over seasonal rivers, perennial streams and intermittent flows through desert regions. Pending the issuance of the guidance, decisions on wetlands issues apparently have come to a grinding halt. U.S. EPA and the Corps have been told to hold off on making any wetlands determinations. In the meantime, cases continue to be filed in both federal district and appellate courts in which litigants challenge the Corps' and the U.S. EPA's assertion of jurisdiction over property they deem to be wetlands. However, the U.S. Department of Justice and the U.S. EPA have advised their attorneys to seek extensions on filing any briefs addressing the issue of what constitutes "wetlands" under the Act. With respect to the other side of the litigation coin, the U.S. EPA is not referring any enforcement cases that fall into the "unknown" area of wetlands regulation falling in between *SWANCC* and *Riverside Bayview*. For now, the regulated community is left to navigate without a rudder through these unknown waters, and the extensive delays that accompany attempting to get any wetlands determinations from the Corps are not likely to significantly decline any time soon.

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[10] As evidence of the existing uncertainty, a post-*Rapanos* decision by the U.S. District Court for the Northern District of Texas, *United States v. Chevron Pipe Line Co.*, No. 5:05-CV-293 (N.D.Tex. 6/28/06) applied the "significant nexus" test from Justice Kennedy's concurring opinion in *Rapanos* to find that there was no evidence of a "significant nexus" between an intermittent stream and traditional navigable waters. The case involved an oil spill into an unnamed stream that was dry at the time of and after the spill. The evidence further showed the intermittent stream did not flow into a navigable river, located 45 miles away, except during times of rainfall.

II. The "Daily" in "Total Maximum Daily Load" ("TMDL") Means Just That.

A. *Friends of the Earth, Inc. v. EPA, et al.*, (D.C. Cir. April 25, 2006)

A "total maximum daily load" is the maximum amount of a pollutant that a water body can receive while still meeting the applicable water quality standards. Section 303(d) requires that TMDLs are to be set at the level "necessary" to meet relevant water quality standards. Under § 303(d) of the Clean Water Act, the U.S. EPA has the authority to approve or disapprove TMDLs established by states, to set them itself in the District of Columbia, and to step in and establish TMDLs when the states fail to act. Historically, the U.S. EPA interpreted the word "daily" as used in § 303(d) of the Clean Water Act's TMDL provision to give it the flexibility to establish TMDLs in numerous ways, including monthly or seasonal averages, as appropriate based on the water body at hand. There are now TMDLs established across the nation that rely on something other than daily load limits as the means or measurement for compliance, particularly in the case of storm water discharges. However, the U.S. Court of Appeals for the District of Columbia pulled in the reins on U.S. EPA's interpretation of the Act's TMDL provision in its decision in *Friends of the Earth Inc. v. EPA*, 446 F.3d 140 (D.C. Cir. 2006). Reversing the finding of the lower court, the D.C. Circuit ruled that as used in the Act, "daily" is not ambiguous. Writing for the court, Judge Tatel stated that it means "every day" under the Act's plain language.[11]

The *Friends of the Earth* decision involved two TMDLs, one established by and the other approved by U.S. EPA, to address the impaired conditions for dissolved oxygen and turbidity (total suspended solids or TSS) levels in the Anacostia River located in the District of Columbia. The U.S. EPA approved a TMDL for dissolved oxygen discharges that limited such discharges on an annual basis. For turbidity, the U.S. EPA approved a TMDL that limited seasonal discharges. The U.S. EPA contended that under the Act and its regulations, it was not limited to setting daily load limits where neither dissolved oxygen nor TSS were pollutants suited to doing so to address the causes of the river's failure to attain water quality standards. In rejecting the U.S. EPA's position, the D.C. Circuit found that there was no room in the language of the Act to find authority for the U.S. EPA to change "TMDLs" to "Total Maximum 'Seasonal' Loads" or to "Total Maximum 'Annual' Loads." The court rejected the U.S. EPA's argument that some pollutants are not suited to setting standards or limitations on a daily loads basis, finding that it ran counter to the clear congressional intent expressed in the use of the word "daily" in the Act. As the court flatly stated, "daily means daily, nothing else." The *Friends of the Earth* decision calls into question the validity of existing TMDL determinations established or approved by the U.S. EPA on any basis that does not satisfy the meaning of "daily."

The *Friends of the Earth* court did not seem to take issue with the U.S. EPA's reasoning for why TMDLs cannot always be established on a daily load limit basis. It acknowledged that not all pollutants and not all causes of impairments to water bodies are

[11] To reiterate the common understanding and meaning of daily, Judge Tatel added: "Doctors making daily rounds would be of little use to their patients if they appeared seasonally or annually."

well-suited to such controls. The U.S. EPA further argued that at times, deviating from daily limits was necessary because some pollutants cause more damage when released at low daily levels, whereas in other cases a large, one-day discharge may have no effect if the seasonal or annual discharges remain low. The U.S. EPA's argument is particularly true for many combined sewer, as well as separate storm sewer, systems. A daily load allocation for intermittent storm water discharges is both difficult to formulate and to implement. Combined sewer systems that do not have the means to fully control untreated or partially-treated sewer discharges during heavy rain events will particularly struggle to meet a daily load limit.

Yet, the D.C. Circuit noted that the U.S. EPA bore some responsibility for the "bind" it now found itself in on this issue. The language of the Act itself requires the setting of TMDLs for those pollutants deemed "suitable" by the U.S. EPA.[12] In 1978, the U.S. EPA adopted TMDL regulations in which it determined that "all pollutants" were "suitable" for daily limits.[13] Thus, the court was "at a loss as to why [the U.S. EPA] neglected this straightforward regulatory fix in favor of the tortured argument that 'daily' means something other than daily." The court invited the U.S. EPA to "move to stay the district court's order on remand," so that the U.S. EPA could either seek an amendment to § 303(d) of the Act or exercise its authority granted under the Clean Water Act to revise the federal TMDL regulations to exclude those pollutants which are not suitable for setting daily load limits. Whether or not the U.S. EPA will pursue the alternate legislative and regulatory "fixes" to this problem suggested by the D.C. Circuit is not certain, as further discussed below.

In the meantime, in August, 2006, the District of Columbia Water and Sewer Authority, an intervenor in the case, petitioned for U.S. Supreme Court review of the *Friends of the Earth* decision. The Petitioner argues that the D.C. Circuit has "plucked" the word "daily" out of context from § 303(d) and made it stand alone as a definitive standard. The petition for review also warns of the significant threat of increased costs for ratepayers, extensive disruptions to sewer authority operations and a decline in water quality if the ruling is applied to CSO discharges. Other adversely impacted parties are expected to file amicus briefs urging the Supreme Court to accept the petition.

The Supreme Court may hear this case given the conflicting 2001 decision on this issue by the U.S. Court of Appeals for the Second Circuit in *NRDC v. Muszynski*, 268 F.3d 91 (2d Cir. 2001). In *Muszynski*, the Second Circuit held that the U.S. EPA did not need to include daily TMDL limits under its § 303(d) authority to adequately address impaired water quality. The Second Circuit ruled that "the CWA does not require that all TMDLs be expressed strictly in terms of daily loads" because this could produce "absurd" results for some pollutants.[14] While the split in the circuits on this issue may cause the Supreme Court to take up the appeal, the current makeup of the Court may not bode well for a reversal of a ruling that relies so heavily on the proper construction of the meaning of the word "daily."

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[12] TMDLs must be established only for those pollutants "which the Administrator identifies . . . as suitable." 33 U.S.C. § 1313(d)(1)(C).
[13] 43 Fed. Reg. 60,622, 60,665 (Dec. 28, 1978).
[14] *Muszynski,* 268 F.3d 91, 103 (2d Cir. 2001).

B. U.S. EPA Reaction to *Friends of the Earth* Decision

To provide guidance to the states and U.S. EPA regions in the wake of the *Friends of the Earth* decision, and perhaps also as a stop-gap measure while it determines whether to amend the TMDL regulations, the U.S. EPA has solicited comments on a July 11, 2006 draft memo it has prepared in response to the *Friends of the Earth* decision (see copy attached). The draft memo recommends that all "*future* TMDLs and associated load and waste load allocations be expressed in terms of daily time increments." (July 11, 2006 Draft Memo at p. 1, emphasis added) Thus, at least until either the Supreme Court weighs in on this issue, or other federal courts follow it, the U.S. EPA is not showing any indication that it expects the states to revise existing TMDLs that are not expressed in terms of daily loads, but it is allowing the court decision to influence TMDL decisions going forward beyond just the boundaries of the District of Columbia. Further, the U.S. EPA "does not believe that the *Friends of the Earth* decision requires any changes in the way wasteload allocations are currently implemented in NPDES permits." (*Id.*) The U.S. EPA is clearly drawing a distinction between how TMDLs are developed going forward, which affects state permitting agencies' decisions on allowable loads, and the individual NPDES permitting decisions that apply and implement both existing and future TMDLs, which may not require a daily discharge limit.

While acknowledging the potential nationwide implications of the *Friends of the Earth* decision to restrict U.S. EPA's and the states' flexibility in the types of TMDLs established, the U.S. EPA's Draft Memorandum strongly asserts that there is continued flexibility in how those TMDLs are transformed into permit limits – an issue not expressly addressed by the D.C. Circuit's opinion. In its July 11, 2006 Draft Memorandum, the U.S. EPA proposes that there is still room for "flexibility" in setting TMDLs in the wake of the *Friends of the Earth* decision. The U.S. EPA explains that within the concept of "daily" loads, a TMDL may be expressed as a minimum and maximum load or as an average load. (*Id.*) For example, the allowed daily load may differ depending on time of year, wet versus dry weather conditions and other relevant factors, or it may be tied to the stream flow conditions occurring on a given day. The U.S. EPA's Draft Memorandum correctly highlights the fact that while "daily" may mean "daily" as the D.C. Circuit held, there are various ways to craft a TMDL that may still fall within the ordinary meaning of that word and even more ways potentially to avoid imposing "daily" restrictions in individual NPDES permits that implement the TMDLs. [15]

[15] As the Director of the U.S. EPA's Office of Wastewater Management, James Hanlon, was recently quoted as explaining: "Even though a daily TMDL limit would be reflected through wasteload allocations in clean water permits, the controlling limit would be the seasonal or annual limits for certain types of pollutants." Using the example of nitrates from fertilizers that may cause little or no environmental impact to an impaired water body on a daily basis, Mr. Hanlon noted that the effects are demonstrated on an annual or seasonal basis. In such cases, the permit conditions would address the time and levels that are necessary to cause "significant" environmental effects. 21 BNA TXLR, Number 29 (July 27, 2006).