

Defining “significant nexus” after *Rapanos*

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After almost twenty-two years, the U.S. Supreme Court completed in 2006 what can be considered its Clean Water Act (CWA) jurisdictional trilogy. Unfortunately, the Court has done little more than muddy the waters in defining the extent of the federal government’s authority under the CWA. In addition, the Court is unlikely to have spoken its final word on the matter. The three cases are *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*); and *Rapanos v. United States*, 126 S. Ct. 2208 (2006). Taken together, however, these three cases do suggest the parameters of the CWA’s scope. As discussed below, that may prove to be enough for the U.S. Army Corps of Engineers (the Corps) to undertake the agency action the Court has invited.

Two competing stands for a CWA jurisdictional threshold are found in *Rapanos*: Justice Kennedy’s “significant nexus” test and the plurality’s two-part test (i.e., whether the receiving waters have a relatively permanent flow and whether those waters have a continuous surface connection to navigable-in-fact waters). Most courts that have followed *Rapanos* have concluded that satisfying either test will suffice. The Department of Justice in its case briefs and the U.S. Environmental Protection Agency (EPA) and the Corps in their draft June 2007 joint guidance document have reached the same conclusion. See *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos* at www.epa.gov/owow/wetlands/guidance/CWAters.html (June 5, 2007). It is the “significant nexus” test, however, that appears to be the primary jurisdictional focus.

Assuming a significant nexus between a wetland and navigable water (or between any “water” and a navigable-in-fact water) is required to confer jurisdiction under the CWA and that ephemeral or intermittent streams can constitute statutory “waters,” the question remains, “How is a significant nexus to be defined?”

As Justice Kennedy persuasively reasons in *Rapanos*, the plurality’s requirement for a continuous surface connection between the wetland and navigable water supply finds no support in the CWA, *Riverside Bayview*, or *SWANCC*. According to Justice Kennedy, a mere hydrologic connection cannot suffice in all cases. See also *U.S. v. Robison*, 505 F.3d 1208 (11th Cir. 2007).

Moreover, contrary to the plurality’s assertion that dredged or fill material normally does not wash downstream, Justice Kennedy, and Justice Stevens in his dissent, made clear that the assertion simply is untrue. Justice Kennedy noted that the discharge of dredged and fill material should be treated the same as the discharge of any other pollutant under the CWA. Justice Kennedy articulated the clear intent of the CWA to maintain wetlands that provide filtering and other attributes to benefit adjacent bodies of water.

The Corps’ current regulations define “adjacent” but do not address “significant nexus.” See 33 C.F.R. § 328.3(a). Interestingly, the definition of “significant nexus” may be summoned from the Fifth Circuit, which has taken possibly the narrowest view of any circuit in interpreting *SWANCC* and *Rapanos*.

In *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), the Fifth Circuit took one of the more confining post-*SWANCC* views of any court, requiring evidence of a “close, direct and proximate link between [the] discharges of oil and

any resulting actual, identifiable oil contamination” of a navigable-in-fact water. *Id.* at 272. See also *In re Needham*, 354 F.3d 340, n. 9 (5th Cir. 2003) (quoting *Rice v. Harken*). Further, in *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 614 (N.D. Tex. June 28, 2006) (appeal to Fifth Circuit pending), the Northern District of Texas noted that one “must look to see if there is a genuine issue of material fact as to whether the farthest traverse of

the spill is a navigable-in-fact water or adjacent to an open body of navigable water.” In *Chevron*, the court laid the burden on the government to show that the pollutants in question “actually reached a navigable waterway—some evidence more than speculation that such an event could occur.” *Id.* at 615. The district court added that

[i]f the effects of the pollutant have occurred upon a navigable-in-fact water, or is so likely to occur as the United States argues, then it should not be too onerous a task for the United States to come forward with some actual, concrete evidence at the summary judgment stage showing that the pollutant reached a navigable-in-fact water or waters adjacent to an open body of navigable water. *Id.* at 615, n. 14.

Similarly, in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), the Ninth Circuit functionally applied the same “significant nexus” test formulated by the district court in *Chevron*. Following Justice

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Kennedy, it found a significant nexus existed between a man-made pond and a nearby navigable water because the pond had a significant effect on the chemical, physical, and the biological integrity of the navigable water. *See also San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700 (9th Cir. 2007) (“mere adjacency” as a basis for CWA jurisdiction could be applied only to wetlands adjacent to navigable waters, and not where a nonwetland, isolated pond was adjacent to the navigable body of water). The *Cargill* court, in analysis very similar to that in *Chevron*, found that “[b]y any permissible view of the evidence,” the effect of the pond on the navigable water “is speculative and insubstantial; the Pond does not affect the integrity of” the navigable water. *Id.* at 708. The court said expert testimony that “it is possible” water from the pond could flow to the navigable water under the right hydrologic conditions “fits the definition of ‘speculative.’” *Id.*

The Ninth Circuit, the pre-*Rapanos* Fifth Circuit, and the district court in *Chevron* appear to address what Justice Kennedy meant by “significant nexus,” at least with respect to discharges to surface waters, intermittent or not. However, they do not directly address the issue of determining the jurisdictional status of an “adjacent” wetland that acts to keep pollutants out of navigable waters rather than contributing pollutants to the navigable-in-fact water. Although Justice Kennedy in *Rapanos* suggests that mere adjacency itself is enough to establish jurisdiction, his suggestion seems to be based on a presumed nexus between the adjacent wetland and navigable water.

Indeed, with regard to wetlands adjacent to navigable waters, Justice Kennedy stated that “the Corps’ conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.” *Rapanos*, 126 S. Ct. at 2248. For consistency, the Corps might well consider whether to apply a factual significant nexus test to adjacent wetlands as well, or, in the alternative, apply a rebuttable presumption to a finding of jurisdiction and permit a prospective permittee the opportunity to show that no such significant nexus exists in a particular circumstance. Justice Kennedy provides some direction on how to apply the significant nexus test to adjacent wetlands with his discussion of the filtering and other benefits wetlands have to other waters. That same test could be applied as well to establish or refute the connection between a wetland adjacent to a nonnavigable water and navigable water. The key to establishing that connection would be hard evidence (not speculative or insubstantial evidence) that the wetland beneficially impacts the navigable water.

The Corps’ current regulations may possibly be retained while adding a controlling proviso that such water are jurisdictional only if they have a “significant nexus” to “waters currently used, used in the past, or susceptible to use in

interstate or foreign commerce.” Consistent with the reasoning and jurisdictional limitations set forth in *Riverside Bayview*, *SWANCC*, and Justice Kennedy’s significant nexus test, and absent legislative action clarifying the matter, the Corps should consider amending its regulations as follows:

New subsection 33 C.F.R. § 328.4(d) (Limits of Jurisdiction):
For purposes of subsections (2), (3), (4), (5), and (7) of § 328.3(a), jurisdiction under the Clean Water Act is conferred only to the extent discharges to the waters set forth in such subsections have a significant nexus to a water which is currently used, or was 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.

A new definition at § 328.3 of “significant nexus”: *The term “significant nexus” means an impact to a water which is currently used, or was used in the past, or maybe be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide. For the purposes of this definition, the burden shall be on the entity seeking to apply jurisdiction to demonstrate such impact. Evidence that a pollutant has reached such water shall constitute a rebuttable presumption of impact. With respect to discharge or dredge or fill materials into adjacent wetlands under § 328.3(a)(7), a rebuttable presumption of impact shall be demonstrated by evidence that the wetland functions as an integral part of the aquatic environment of such water.*

While the specifics of the regulation (and parallel changes to EPA regulations) certainly can be debated, the basic principle is this: If a discharge impacts a navigable-in-fact water, that discharge should be jurisdictional. For example, if there is a discharge to an intermittent creek and that creek connects to a tributary (or a series of tributaries or other hydrologically connective features) of a navigable-in-fact water, the question in applying the presumption becomes whether the pollutant discharged actually makes it to the navigable-in-fact water. Conversely, if the pollutants are discharged to the intermittent creek while the creek is dry and sufficient cleanup precludes the pollutant from actually impacting the navigable-in-fact water, then the discharge is not subject to CWA jurisdiction. It would not necessarily be enough that a single molecule of the pollutant makes it to the navigable water, but if evidence demonstrates that the molecule makes it that far, it is up to the party contesting jurisdiction to present a credible argument that there is no actual impact. Similarly, if the issue is whether an adjacent wetland is an integral part of the aquatic environment associated with a navigable-in-fact water, the Corps would have to demonstrate that impacts that otherwise would affect that navigable water are in fact mitigated by the presence of the adjacent wetland.

Ultimately, the public review process and judicial challenges to any regulation on this matter will frame the final regulation. The Corps needs to start at some point, however, and it might as well start now.

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