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Wetlands, Environmental Protection and the New Supreme Court

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Special to the Legal

With the recent decisions by the U.S. Supreme Court in two cases regarding wetlands, court watchers are trying to determine how the two latest court appointees, Chief Justice John Roberts and Justice Samuel Alito, will view federal environmental protection.

Siding with the more conservative members of the court, Roberts and Alito showed that they may not necessarily defer to federal agencies' view of the scope of their jurisdiction, and may restrict, in the future, federal environmental protection. The court's plurality opinion in *Carabell, et al. v. United States Army Corps of Engineers* and *Rapanos v. U.S.* perhaps show how deeply divided this court may be in the future on the scope of federal environmental protection.

The Clean Water Act provides the primary legal authority for the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers to protect waters and wetlands and sets forth a permitting process at Section 404 of the act to allow for the dredging and filling of these areas. In addition to traditionally navigable waters, both EPA and the corps rely on the effects on interstate commerce, under the Commerce Clause of the U.S. Constitution, to give the federal government the required nexus to regulate and protect waters and wetlands that are significantly removed from traditionally navigable waters.

The first test of the extent of federal jurisdiction over wetlands that were far removed from traditionally navigable waters came

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five years ago, when the Supreme Court split 5-4 in an opinion that found that the federal government did not have jurisdiction over isolated intrastate wetlands, solely on the basis of migratory birds traveling from one state to another and using these isolated wetlands as a stopping point. Since two of the five votes in the majority were former Chief Justice William Rehnquist and former Justice Sandra Day O'Conner, the participation of Roberts and Alito in these recent wetlands cases was significant.

The two wetlands cases recently considered by the court involve two separate Michigan landowners. In one case, the landowner filled wetlands on his property without first obtaining a Section 404 permit from the corps. The corps contended that the landowner needed to obtain a Section 404 permit prior to filling these wetlands and pursued the landowner in both criminal and civil enforcement actions. Because the wetlands at issue in this case were connected to downstream navigable waters more than 20 miles away only through a series of roadside ditches and culverts, the landowner contended that federal permitting jurisdiction did not reach to the wetlands on his property.

In the second case, the landowner was denied a Section 404 permit and then challenged the denial in the federal courts. The landowner contended that the wetland on its property was not subject to federal jurisdiction, because it was separated from a ditch that eventually flowed to a truly navigable water by an impermeable berm that prohibited any hydrologic connection between the water in the wetland and the water in the ditch. In both cases, the property owners argued that the definition of the term "waters" in the act did not reach to these wetlands, and therefore these wetlands were not under the Section 404 permitting and enforcement jurisdiction of the corps. In both cases, the circuit courts held for the federal government, finding that the corps had jurisdiction over these wetlands.

The court issued a plurality opinion, with four of the more conservative justices signing onto one opinion, four of the more liberal justices signing onto another opinion, and Justice Stephen Kennedy issuing a third opinion, concurring with the result of the conservative opinion but rejecting both the conservative and liberal opinions in favor of another analysis.

Scalia, writing the plurality opinion in which he was joined by Roberts and Justices Clarence Thomas and Alito, found that the phrase "waters of the United States," which is the statutory definition of the term "navigable waters" and therefore defines the scope of federal permitting authority under Section 404 of the act, "includes only those relatively permanent, standing or

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continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers and lakes. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." As noted by Scalia, the corps had for 30 years defined its jurisdiction under Section 404 to the outer limits of the federal Commerce Clause. Scalia's analysis of the scope of the act sharply reduced that jurisdiction.

Roberts, writing an opinion concurring with the plurality opinion, stated that the corps "had taken the view that its authority was essentially limitless," and noted that since the corps had failed to revise its regulations following the previous decision five years ago, "the upshot today is another defeat for the agency." In closing, Roberts lamented the lack of a clear signal given by the court, noting that the "lower courts and regulated entities will now have to feel their way on a case-by-case basis."

Stevens' wrote the opinion for the dissent, in which Justices David Souter, Ruth Bader Ginsberg and Stephen Breyer joined. Stevens' analysis gave deference to the corps' administration of the Section 404 permitting program, noting that this case presented the "quintessential example of the executive's reasonable interpretation of a statutory provision." In looking to the science involving wetlands and their positive effect on water quality, Stevens wrote that "the importance of wetlands is hard to overstate."

But perhaps the most important opinion was authored by Kennedy, who sided with the result of remand as reached by Scalia, but whose analysis sounded far more like that presented in the opinion of Stevens. As set forth by Kennedy, a wetland or water is subject to federal Clean Water Act jurisdiction if there is a "significant nexus between the wetland in question and navigable waters in the traditional sense." Kennedy suggested that factors that would determine whether a significant nexus existed included those that would affect the integrity of water quality, like pollutant loading, flood control and runoff storage. Importantly, Kennedy stated that a continuous connection between the wetland in question and the navigable water was not required.

The effects of this decision are immediate and may be far-reaching. To allow it to study the court's decision, the corps and EPA have begun to develop guidance for the field on their jurisdiction under the act. Until that guidance is developed, both agencies will be reluctant to take positions on their jurisdiction, whether by way of court filings or jurisdictional determinations in the field. When they restart issuing jurisdictional determinations, it would not be surprising if their rationale includes consideration of the "significant nexus" test.

In addition, at least one district court has already determined that EPA did not demonstrate a "significant nexus" to traditionally navigable waters in an enforcement action arising from pollution discharged into a ditch. If the significant nexus test becomes the norm, and difficult to maintain, the federal government will lose a significant portion of the Section 404 program. •

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