



By Richard Lazarus

Rapanos Tests Muddy The Waters

The Supreme Court can sometimes make a mess of things. Exhibit A is the Court's ruling last June in *Rapanos v. United States*, concerning the meaning of "navigable waters" in the Clean Water Act. The Court issued a judgment favorable to property owners' claims that the Army Corps of Engineers had exceeded its statutory jurisdiction, but left to the lower courts the task of discerning the precedential effect of five separate opinions and no "opinion of the Court." Eight months later, the law remains muddled as the lower courts have sharply splintered about how to glean precedent from such disparate opinions.

There is supposedly settled law regarding how to do so. In *Marks v. United States*, the Supreme Court advised that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds." What *Rapanos* teaches is that the lower courts have little idea what that means.

Three of the five separate opinions in *Rapanos* are the most significant: Justice Scalia's plurality opinion for four justices; Justice Stevens's dissenting opinion for four justices; and Justice Kennedy's opinion for himself concurring only in the judgment. What makes determining the precedential effect so difficult

is the absence of meaningful overlap in the views of Justice Scalia's plurality and Justice Kennedy apart from reversal of the appellate court's judgment.

Justice Scalia contended that the act extends only to waters that are "relatively permanent, standing, or continuously flowing," while Justice Kennedy said they did not need to be. Justice Scalia asserted that the act did not apply to "intermittent waters" and only to wetlands with a continuous surface connection to traditional navigable waters. Justice Kennedy said the act could apply to intermittent waters and wetlands need not possess such a continuous surface connection. According to Kennedy, the critical inquiry is whether the water body in question has a "significant nexus" to traditional navigable waters.

In almost every respect, Kennedy's view accepts a far broader view of jurisdiction than the Scalia plurality. But not every. At least in theory, Scalia's continuous surface connection test could be broader as applied to some wetlands than is Kennedy's "significant nexus" test.

Only two justices discussed the precedential implications. The chief justice stated that the lower courts "will have to feel their way on a case-by-case basis." More strategically, Justice Stevens stressed that because the four dissenters supported jurisdiction applying to any waters (and wetlands) covered by either the Scalia plurality test or the Kennedy concurrence test, a majority of the Court supported extending CWA jurisdiction to waters that met either test.

There are now seven lower federal court opinions discussing the precedential effect of *Rapanos* and at least three different points of view. Both the Ninth Circuit in *Northern California River Watch v. City of Healdsburg* and the Seventh Circuit in *U.S. v. Gerke Ex-*

cavation, Inc. have held that Kennedy's concurrence provides the governing standard because it is the narrowest ground in support of the judgment. Within the Fifth Circuit, however, one federal court has taken a very different view. The Northern District of Texas in *U.S. v. Chevron Pipeline* complained that Kennedy's nexus test "leaves no guidance on how to implement its vague, subjective centerpiece." Purporting to apply the chief's "case by case" approach, the district court asserted that it would apply Fifth Circuit precedent pre-dating *Rapanos*, which had endorsed a view of jurisdiction most like the Scalia plurality.

Finally, the First Circuit in *U.S. v. Johnson*, and district courts within the Eleventh and Second Circuits, have followed Justice Stevens's instruction. Counting the four justices in dissent, they argue that eight justices support application of Scalia's test as one possible basis for jurisdiction, and five justices

support application of Kennedy's test as an additional basis for jurisdiction. Accordingly, these courts hold that CWA jurisdiction attaches to waters that meet either the Scalia plurality or the Kennedy concurrence test.

Three things could begin to eliminate the current cacophony. Congress could amend the law to add clarity. The Army Corps of Engineers could (finally) revise its regulations to embrace one (or more) of the competing views. Or, of course, the Court could revisit the issue in an effort to provide greater clarity. While the first two options are unlikely to succeed, they seem far preferable right now to the Court's further mucking it up.

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"The Court could revisit the issue to provide clarity on Clean Water Act jurisdiction. Or it could further muck it up."