By Richard Lazarus

Court: New Corps Wetland Rule, Pronto

This past June, five different Supreme Court justices filed opinions in the two Clean Water Act Section 404 cases before the Court, *United States v. Rapanos* and *Carabell v. United States Army Corps of Engineers*, but no single opinion secured the five votes necessary to announce an "opinion of the Court." One hundred four pages in all, it was not until the final sentence of the final opinion, a dissent written and joined only by its author, Justice Stephen Breyer, that the practical effect of the resulting cacophony became clear: "Today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so."

At issue in *Rapanos* and *Carabell* was one of the single most controversial questions in environmental law: the meaning of "navigable waters," which defines the geographic scope of the Clean Water Act in general and its Section 404 dredged or fill permitting program. Four justices joined an opinion written by Justice Antonin Scalia that was strikingly dismissive of the Corps (described as an "enlightened despot") and the Clean Water Act (described as "tedious"). Although the Scalia opinion, joined by Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito, declined in one paragraph plaintiffs' invitation to restrict "navigable waters" strictly to traditional navigable waters or adjacent wetlands inseparably bound up with those waters, the opinion dwelled for the rest of its 39 pages on the absurdity of the Corps' broad interpretation.

Relying on the definition of "waters" in Webster's 1954 Second Edition of its *International Dictionary*, Scalia's opinion reasoned that the act covers "only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features.'" The act, Scalia argued, does not apply to "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." With respect to wetlands, Scalia's opinion concluded that "only those wetlands with a continuous surface connection to bodies that are ['navigable waters'] in their own right so that there is no clear demarcation between 'waters' and wetlands" receive protection.

Justice John Paul Stevens also filed an opinion jointed by three other justices: David Souter, Ruth Ginsburg, and Breyer. In sharp contrast to the Scalia opinion, the Stevens opinion concluded that the Corps' regulations broadly construing "navigable waters" were valid in all respects, including their extension to wetlands. The regulations were not rendered infirm "even though not every wetland adjacent to a traditionally navigable water or its tributary will perform all (or perhaps any) of the water quality functions generally associated with wetlands."

No other justice joined Justice Anthony Kennedy's separate opinion, but his is the opinion that, more than any other, now declares the governing law. In one significant respect, Kennedy sided with the plaintiffs *Rapanos* and *Carabell*, but in many other far more significant respects, Kennedy sided with the federal government. With respect to the former, Kennedy agreed with the Scalia opinion by concluding that the rulings of the lower courts in favor of the federal government must be vacated and remanded. Kennedy's agreement on the proper procedural disposition rendered Scalia's opinion for four justices a "plurality opinion" for the Court and Stevens's opinion for four a "dissenting opinion."

But here is where it starts to get tricky. Although Kennedy agreed that the judgment should be vacated and remanded for further consideration, the test he declared for defining the proper bounds for Clean Water Act jurisdiction rejected every single one of the significant limitations advocated by the Scalia opinion. Kennedy concluded that the act does not extend only to waters that are "permanent," "continuous," or "standing" or "form[] geographic features"; does not "exclu[de] wetlands lacking a continuous surface connection to other jurisdictional waters"; and does extend to "intermittent waters."

Kennedy further outlined a broad "significant nexus" test for determining when a nonnavigable tributary or wetland has a sufficient connection to a traditional navigable water to fall within the act's scope. He even embraced one of the Corps' broadest theories, implicated in *Carabell*, and asserted that "given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system." Finally, leaving no doubt about the implications of his position, Kennedy concluded by emphasizing that on remand "the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely that the Corps' assertion of jurisdiction is valid."

Because, moreover, the Stevens dissent expressly embraced Kennedy's view of jurisdiction with the caveat that its only fault was not going far enough, the precedential effect for the lower courts is a five-vote majority in favor of upholding an assertion of Corps jurisdiction based on Kennedy's rationale. As a practical matter, therefore, the Corps may well have lost the battle but have won the jurisdictional war in *Rapanos* and *Carabell*.

remains, however, a significant rub. Kennedy declared the existing regulations invalidly imprecise, while providing a roadmap for their revision. The chief justice separately chided the Corps for failing to exploit the "generous leeway" they would have been entitled had they already done so. With the Scalia plurality looming in the background, the Corps would be well advised to accept Kennedy's invitation. And, as Breyer counseled, "speedily so."

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