

# StayCurrent

A Client Alert from Paul Hastings

## Clean Water Act Still Murky: High Court Fails to Provide Clear Guidance on Wetlands

By Mitchell B. Menzer, Elisa L. Paster and Colin MacMillan

On June 19, 2006, the Supreme Court issued a highly anticipated decision in *Rapanos et al. v. United States* that many hoped would provide much needed guidance on the extent of the U.S. Army Corps of Engineers' (Corps) jurisdiction over wetlands under the Clean Water Act (CWA). Instead, a deeply divided Court issued a splintered ruling that leaves lower courts to engage in case-by-case analysis based on scant guidance from the Supreme Court as to whether wetlands have a "significant nexus" with navigable waters.

Under the CWA, the Corps is authorized to require permits for "discharge of dredged or fill material into the navigable waters at specified disposal sites." The Corps has interpreted "navigable waters" broadly to include not only traditionally navigable waters (i.e., lakes and rivers used in interstate commerce), but also tributaries of those waters and the wetlands adjacent to the navigable waters or their tributaries. According to the Corps' interpretation, "ephemeral streams," storm sewers, culverts and drainage ditches constitute tributaries under the CWA, even if the tributary was inconsequential and only held water intermittently. As a result of the Corps' broad interpretation of the terms "tributary" and "adjacent wetlands", many landowners seeking to develop their property have been required to apply for permits from the Corps prior to development.

The cases at issue involve four Michigan wetlands lying near ditches or man-made drains that eventually empty into traditional navigable waters. In each case, the landowner sought to build a substantial project on undeveloped land and the Corps denied a permit to fill wetlands. Unfortunately, none of the Justices' opinions attracted the five votes necessary to establish a majority ruling. However, five of the Justices agreed that the Corps applied the wrong standard and that there was insufficient information to make a determination as to whether the particular wetlands at issue qualified as "waters of the United States." As a result, the cases were remanded to the lower courts for further factual development.

Justice Scalia, writing the plurality opinion, was joined by

Justices Roberts, Thomas, and Alito, and sought to limit the reach of the Corps to those wetlands where "first, the adjacent channel contains a 'water[r] of the United States' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." Scalia argued that, "Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' . . . lack the necessary connection to covered waters that we described as a 'significant nexus' SWANCC [a previous case]."

Justice Stevens's dissenting opinion, which was joined by Justices Souter, Ginsburg, and Breyer, relied heavily on the Court's unanimous decision in *United States v. Riverside Bayview Homes, Inc.* (1985), in which the Court upheld the Corps' authority to regulate wetlands adjacent to tributaries of navigable waters. The dissenters accepted the Corps' interpretation as furthering the broad policies of the CWA to protect the environment by preserving habitat for aquatic and land species, providing storage areas for storm runoff and purifying polluted water. Justice Stevens argued that by definition wetlands adjacent (which he defined as close in proximity but "not necessarily in actual contact") to tributaries of navigable waters generally have a "significant nexus" with the navigable waters downstream. Thus, to the dissenters there is no need for the Corps to establish on a case-by-case basis whether particular wetlands perform any or all of water quality functions associated with wetlands.

### "Significant Nexus" Standard

Justice Kennedy issued a separate opinion because, in his view, neither the plurality opinion of Justice Scalia nor the dissent of Justice Stevens addressed the requirement in the Court's decision in *SWANCC v. Army Corps of Engineers* (2001) that there exist a "significant nexus" between the wetlands and the navigable waters. Justice Kennedy disagreed sharply with the plurality opinion's view that the Corps' jurisdiction extends

only over (i) “relatively permanent, standing or flowing bodies of water” and (ii) wetlands that have a continuous surface connection to traditionally navigable waters. Justice Kennedy pointed out that in the western United States many waterways are dry for much of the year and, therefore, the plurality’s requirement of permanent standing water or continuous flow makes little sense. Justice Kennedy also disagreed with the dissenting opinion because it would uphold the Corps’ jurisdiction “whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually flow into traditional navigable waters.”

According to Justice Kennedy, the Corps’ jurisdiction over wetlands “depends upon the existence of a significant nexus between the wetlands in question and navigable waters . . .” The requisite nexus will exist if “the wetlands either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’” Concerned about the “potential overbreadth of the Corps’ regulations” and the lack of clear rules, Justice Kennedy stated that “the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries.” Until the Corps is able to craft regulations defining a “significant nexus,” Justice Kennedy said, the Corps must evaluate each wetlands permit on a case-by-case basis in order to avoid unreasonable applications of the CWA.

### Ramifications of the Rapanos Decision

Because there was no majority decision in *Rapanos*, the implications of the case are not clear. However, five members of the Court held that the Corps’ current practice of exercising jurisdiction over wetlands or any other water source based

on a mere “hydrological connection” to “navigable waters” is impermissible. The *Rapanos* case is a setback for the Corps because its claim of blanket jurisdiction over all wetlands in the vicinity of any ditch, drain, channel or other conduit connected to traditionally navigable waters was rejected by a majority of the Court. In the case of wetlands lying near small tributaries, including man-made ditches, drains and channels, the Corps will need to establish a significant nexus to the traditionally navigable waters on a case-by-case basis. Thus, the *Rapanos* case presents an opportunity for landowners of adjacent wetlands to show that the wetlands do not possess a sufficient nexus to navigable waters and no Corps permit is required.

However, the *Rapanos* case resulted in splintered opinions lacking a clear majority, and speculation will continue about the extent of the Corps’ jurisdiction over wetlands adjacent to tributaries. The *Rapanos* case did not result in a clear path forward for the Corps or the lower courts in applying the CWA to wetlands adjacent to drains, ditches, channels and conduits leading to navigable waters. Indeed, it is not even clear as to whether the Corps should apply Justice Scalia’s more rigorous test or Justice Kennedy’s “significant nexus” standard. Even in the absence of a clear majority standard, it is possible that Justice Kennedy’s “significant nexus” standard will be followed by lower courts and the Corps. As such, it opens the door to landowners to show that their wetlands are sufficiently remote and unrelated to the “chemical, physical or biological integrity” of traditionally navigable waters and that the Corps lacks jurisdiction.

Although the plurality, dissenting and concurring opinions agreed on few issues in the case, all of the Justices seem to be in agreement in one respect: only clarifying legislation from Congress or new regulations from the Corps and the Environmental Protection Agency will provide landowners and regulators adequate certainty about the extent of governmental regulation of the development of wetlands.

---

*If you have any comment regarding this alert, or would like further guidance regarding governmental regulation of the development of wetlands, please do not hesitate to contact any of the following attorneys:*

Robert H. Freilich 213-683-6314  
robertfreilich@paulhastings.com

Robert I. McMurry 213-683-6255  
robertmcmurry@paulhastings.com

Mitchell B. Menzer 213-683-6111  
mitchmenzer@paulhastings.com

---

*StayCurrent* is published solely for the interests of friends and clients of Paul, Hastings, Janofsky & Walker LLP and should in no way be relied upon or construed as legal advice. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. Paul Hastings is a limited liability partnership. Copyright © 2006 Paul, Hastings, Janofsky & Walker LLP.

IRS Circular 230 Disclosure: As required by U.S. Treasury Regulations governing tax practice, you are hereby advised that any written tax advice contained herein or attached was not written or intended to be used (and cannot be used) by any taxpayer for the purpose of avoiding penalties that may be imposed under the U.S. Internal Revenue Code.