

What the Rapanos - Carabell Wetlands Decisions Mean to Floodplain and Stormwater Managers.

Recently the United States Supreme Court issued a strange and confusing Opinion that can be understood as a call for coordination between and among all those concerned with Water: Stormwater, Floodplain and Wetland Managers.

Water is the very basis of life as we know it. Increasingly, clean and drinkable water is scarce and likely to become dangerously inadequate in many areas of the world as population increases, ancient aquifers are drawn down to a point of diminishing returns, and existing water supplies become polluted. Yet at the same time throughout the world, we are seeing a mounting toll of disasters caused by catastrophically too much water in places which humans have created a built environment. In the United States, the folks who are concerned with reducing the misery caused by floods on the human environment do not usually have a close relationship to the folks who protect our Nations Wetlands and Water Quality.

Increasingly we are finding that activities designed to protect humans from flood disasters also can help protect Wetlands and augment efforts to protect and restore water quality.

On June 19, 2006 the United States Supreme Court handed down its decision in a case known as Rapanos-Carabell, involving the geographic extent of the area which the Federal Government may regulate as "wetlands" under the Clean Water Act of 1972. The two cases at issue are consolidated under the single decision RAPANOS et ux., et al. v. UNITED STATES _US_ (2006) Nos. **04-1034 and 04-1384**, 2006 WL 1667087 (U.S.). The cases both involve persons who filled areas which the US Army Corps of Engineers had determined were "wetlands" subject to the Regulations promulgated to enforce the Clean Water Act of 1972. In one case (Rapanos), the Plaintiffs had refused to request a permit as required by the Corps under the authority delegated to it under Section 404 of the Clean Water Act; in the other case (Carabell), the Corps denied the Section 404 Permit and the plaintiff proceeded nevertheless. The Plaintiffs claimed that the areas in question were not properly subject to the jurisdiction of the Corps under our Federal System of government.

The issue is essentially: What is a "water" of the United States and; consequently, what is the geographic extent of the wetlands which may be regulated by the Federal Government pursuant to the Clean Water Act of 1972?

The Supreme Court Opinion is rather complex, filled with bitter, angry barbs tossed back and forth between and among the Justices. The Justices essentially voted 4-1-4:

D) Writing for four Justices, Justice Stevens, who was joined by Justices Breyer, Ginsburg, and Souter, said that the Corps had jurisdiction of the wetlands in question, and the decisions of the Corps and lower courts should be sustained. This group of Justices indicated that:

a) "...the proper analysis is straightforward. The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, **and reducing downstream flooding by absorbing water at times of high flow.** The Corps' resulting decision to treat these wetlands as encompassed within the term "waters of the United States" is a quintessential example of the Executive's reasonable interpretation of a statutory provision." (emphasis added) Justice Stevens cites: *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842-845 (1984).

II) Writing for four Justices, Justice Scalia, who was joined by Justices Roberts, Thomas, and Alito, said in our Federal System of government that land use in these particular areas was a State/Local concern, and that the opinion of the lower courts should be overturned. Justice Scalia clearly thought that the Corps assertion of Federal jurisdiction was far too broad. Specifically he indicated that:

a) the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams," "oceans, rivers, [and] lakes,";

b) the phrase "Waters of the United States" does "not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of that phrase is thus not "based on a permissible construction of the statute." Like Justice Stevens, Justice Scalia also cites: *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S.

c) "...establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains "waters of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

d) "...the CWA confers jurisdiction only over relatively permanent bodies of water. Traditionally, such "waters" included only discrete bodies of water; and

III) Finally, Justice Kennedy said that the matter should be returned to the lower courts for re-processing in accordance with revised instructions. Kennedy indicates that:

a) the lower courts may well find that the COE appropriately had jurisdiction over the Carabell and Rapanos wetlands;

b) the lower courts must clarify concerns expressed by the Corps in defending its determination that the areas in question were in fact “wetlands of the United States”. Kennedy specifically points to such statements as fill in question would result in "major concerns about water quality" as needing further elucidation;

c) the Corps should establish a clear “nexus” between Federal concerns with respect to the “waters of the United States” and the particular land to be regulated. Justice Kennedy appears to desire some sort of quantification of what impacts will occur to “Waters of the United States” from filling or otherwise disturbing the land in question.

d) because the Sixth Circuit applied an insufficiently clear standard to determine whether the wetlands at issue are covered “waters,” and because of the paucity of the record, the cases are remanded for further proceedings.

IV) In the past, as a matter of federal jurisprudence, Justice Kennedy’s opinion would be considered to be the controlling opinion. However, in light of a recent Supreme Court Case, *League of United Latin American Citizens et al. v. Perry et al.*, the Department of Justice has indicated in testimony before a congressional sub-committee that they are considering issuing guidance to EPA and the Corps of Engineers that both the very narrow criteria set forth by Justice Scalia and the broader Kennedy “Nexus” test may be used on “a case by case basis.” EPA and the Corps of Engineers plan to issue clarification as soon as possible.

In any case, the cases have been returned to the lower courts to reprocess in accordance with the Supreme Court’s decision.

V) Perhaps asking and answering a few Questions will help everyone understand this complex case:

A) Question: Does this Case mean that the Court has somehow disapproved of either Floodplain or Wetland Regulation?

Answer A) **NO! NO! Quite the contrary!**

Four Justices believe that the Corps of Engineers has stretched Federal Jurisdiction far beyond the statutory intent of Congress. That is, that the Federal Government is interfering with what is the proper land use prerogatives of State and Local Government. There is no indication whatsoever from any of the Justices that wetland and floodplain regulation is anything other than a perfectly appropriate activity of government. The disagreement between the Justices concerns which is the appropriate level of government to make land use decisions concerning wetlands

which are not physically linked by water to “Waters of the United States” on an ongoing basis. Four Justices think that the wetlands in question can be properly regulated by our Federal Government based on the Corps of Engineers interpretation of the Clean Water Act as that Act is presently written. The Controlling Opinion by Justice Kennedy requires the lower courts to determine if there are additional facts which will establish a nexus between the wetlands and the “Waters of the United States”.

B) Question: What in the world is a “NEXUS?”

Answer B). NEXUS is a legal term which means a connection or link between two things. Sometimes the US Supreme Court uses the term “nexus” in the context of a test to determine whether there is an extremely close, precise and definite fit, as when it is evaluating whether the actions of a private individual should be considered to be the responsibility of another seemingly unrelated party. *See, Blum v. Yaretsky*, 457 US 991, 1004 (1982). On the other hand, in Cases analyzing whether a government action is an unconstitutional “Taking” of property in contravention of the Fifth Amendment of the US Constitution, the Court uses the term “nexus” to determine whether a claimed relationship between an articulated government interest and the exaction imposed on a development permit seeker have any reality whatsoever. *See, the discussion of: Nollan v California Coastal Commission 483 US 825 (1987); and Dollan v. Tigard 512 US 374 (1994) contained in Courts Issue Good News for Floodplain Management*, found at the ASFPM web site [www.floods.org]. So, as Justice Kennedy uses the term “nexus” in the Controlling Opinion, nexus means either: a) a very tight relationship, or b) more than an ephemeral relationship. Or, it may mean something in between. Take your pick. My legal analysis is that Kennedy most likely means “nexus” as the term is used in the Nolan and Dollan Cases; that is a relationship that is real, and not a clever falsehood. Justice Kennedy also seems to want to see something more specific and tangible than an unsubstantiated conclusion that there is a “major effect” by one thing on another.

Quantitative analysis of many water quality effects may not be always possible. However, using flood and stormwater hydrology and hydraulics, quantitative numerical indication of the effect the wetland in question would have on flooding of the “Waters of the United States” would seem to be a great place to start developing an analysis of the potential effect of a proposed development.

This suggestion that the effect of development on the wetland in question is a good place to start developing an analysis of whether there is a relationship between the land in question and “Waters of the United States” is bolstered by language in the opinion written by Justice Scalia. Scalia indicates that in the context of the Clean Water Act:

“The nexus required must be assessed in terms of the Act’s goals and purposes. Congress enacted the law to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U. S. C. §1251(a), and it pursued that objective by restricting dumping and filling in “waters of the United States,”

§§1311(a), 1362(12). The rationale for the Act's wetlands regulation, as the Corps has recognized, is that wetlands can perform critical functions related to the integrity of other waters-such as pollutant trapping, **flood control, and runoff storage.** **33 C.F. R. §320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense. When, in contrast, their effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term "navigable waters." (emphasis added.)**

C) Question: What does this case mean for Floodplain and Stormwater Managers?

Answer C). This case presents an enormous opportunity for Floodplain and Stormwater Managers to further develop win-win relationships with Wetland Managers, as well as all others concerned with Water Quality. Stormwater and Floodplain Managers are increasingly aware of the enormous flood protective qualities of our precious wetlands. Destruction of wetlands can and has had severely deleterious effects on flooding in this nation. We now can offer help to beleaguered Wetland Managers as they try to help protect areas which can help prevent catastrophic flooding.

When one is seeking to quantify the impact of filling a wetland, floodplain/stormwater hydrology and hydraulics offer a great place to start the analysis. As set forth in great detail in the publication *No Adverse Impact and the Courts*, [found on the ASFPM web site (www.floods.org)] courts have historically been extremely sensitive to protecting public safety by supporting fair and properly regulation of development so that development does not cause harm to others. Or as the ASFPM summarizes the concept: courts are quite prone to accept a "No Adverse Impact" analysis. I suggest that the Rapanos and Carabell cases offer significant opportunities for Stormwater and Floodplain Managers to offer win-win help to Wetland Managers as they define quantitative impacts on flood depth and velocity from filling wetlands.

Specifically Floodplain and Stormwater Managers can help Wetland Managers understand and quantify the fundamental fact that "Today's Floodplain is not tomorrow's Floodplain". When we have wetland loss, loss of natural valley storage, as well as loss of permeable surface area; we have documented that flood heights can increase dramatically. In actual calculations in North Carolina, it was determined, using future conditions hydrology and hydraulic modeling, that even when communities comply with the minimum standards of the National Flood Insurance Program flood heights may increase by nearly six feet as wetlands and floodplains are developed.

This sort of quantitative analysis will help determine if a some proposed activity, in wetlands, **"alone or in combination with similarly situated lands in the region"**

(Justice Scalia helpfully points out, cumulative impact should be considered) has a “nexus” to the Waters of the United States.”

D) Question: Are there any Wetland, Stormwater or Floodplain Managers who need to be particularly concerned about specific aspects of this decision?

Answer D) Yes, those whose areas of responsibility include areas of intermittent or occasional stream creek or arroyo flow. The Scalia Opinion indicates that “...establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains a “water of the United States,” (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that **the wetland has a continuous surface connection** with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

If the majority of the Court were to go along with this concept, than huge areas of the Nation, which contain intermittent streams and creeks, in the Arid West in particular, would apparently not be covered by the protections currently afforded by the Clean Water Act.

E) Question: So, where do we go from here?

Answer E). Wetland Managers will find Floodplain Managers and Stormwater Managers expertise of considerable value in beginning the process of defining the “nexus” between activities which affect wetlands and floods on the “Waters of the United States.” Floodplain and Stormwater Managers need to support the actions of Wetland Managers as those Water Stewards restore, protect, and nurture the wetlands we Floodplain and Stormwater Managers find so valuable in reducing and preventing the awful misery caused by floods to developed property.

In my opinion, the Water Managers of this nation need to work together better than we have in the past. Let us, all of us Floodplain and Stormwater Managers, reach out to the Wetland and Water Quality Community and offer help, support and technical advice.

An Enormous amount of additional information on Wetlands in general, as well as the Rapanos& Carabell Cases is found on the really excellent and informative website of the Association of State Wetland Managers (ASWM) at www.aswm.org .

Edward A. Thomas Esq.
Michael Baker Inc.
“Challenge Us”

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Ed Thomas is a floodplain manager, and disaster relief specialist, who is also an Attorney. The opinions expressed are the authors, and do not reflect approval by any organization.

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