

Landowners' Right To Appeal When Property Is Designated as Wetlands Subject to Federal Jurisdiction

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WETLANDS ARE AREAS saturated by surface or ground water sufficient to support distinctive vegetation adapted for life in saturated soil conditions. States and local governments have enacted laws to protect wetlands. In New York for example, the New York State Department of Environmental Conservation regulates two main types of wetlands, tidal wetlands along Long Island, New York City, and up the Hudson River, and freshwater wetlands found on river and lake flood plains across the State.

But wetlands may also be regulated by the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. §1344.

Landowners now have a right to seek direct judicial review when their property is designated as wetlands subject to federal jurisdiction under the Clean Water Act. The act makes it unlawful to discharge dredged or fill material into "navigable waters" without a permit. The Clean Water Act authorizes the United States Army Corps of Engineers to regulate certain discharges to "navigable waters," or "waters of the United States." The term "navigable waters" has been variously defined by the Corps but the United States defined the term recently in *Rapanos v United States*, 547 U.S. 715 (2006). In *Rapanos*, the plurality defined "navigable waters" as Traditional Navigable Waters (capable of use in interstate commerce) and non-navigable but relatively permanent rivers, lakes and streams as well as abutting wetlands with continuous surface water connecting to Traditional Navigable Waters. As a result, under the definition in *Rapanos*, federal jurisdiction over wetlands was reduced. This article is about a 2016 United States Supreme Court decision which allowed a property owner to directly challenge federal jurisdiction rather than follow an unnecessary and expensive administrative challenge first.

The Army Corps issues jurisdictional determinations on a case-by-case basis that specify whether property contains waters of the United States. In *United States Army Corps of Engineers v Hawkes Co.*, 136 S. Ct. 1807 (2016), the Army Corps issued a formal approved jurisdictional determination concluding that there was a “significant nexus” between property owned by the Hawkes Company and the Red River of the North. The property was located in Marshal County, Minnesota. The property was over 120 miles from the nearest Traditional Navigable Water. There was no continuous surface water connection between wetlands on the property and a “water of the United States.” Here the Petitioner obtained an option to purchase the property to harvest peat.

Hawkes challenged the approved jurisdictional determination or wetlands delineation under the Administrative Procedure Act, but the district Court ruled it could not exercise subject matter jurisdiction because the jurisdictional determination did not constitute “final agency action.” The United States Court of Appeals for the Eighth Circuit reversed the district Court’s ruling, and the Supreme Court of the United States granted certiorari to review the case.

Hawkes Co. was represented by the Pacific Legal Foundation (PLF) in the Supreme Court. In its brief, PLF argued,

In this case, by reason of the Jurisdictional Determination, Hawkes is obliged to obtain a section 404 permit from the Corps if it wishes to proceed with its peat harvesting project. This obligation was only inchoate before the JD was issued. The Clean Water Act only requires a permit for discharges to “navigable waters” generally, which Hawkes can show do not exist on the Property. In contrast, the JD is an actual adjudicative decision requiring a federal permit for discharges on this specific property. It is a quintessential application of the law to the facts of the case. For the first time, this obligation is now final and conclusive; thereby denying Hawkes its legal right to proceed with the peat harvesting project without federal approval.

Respondents also argued that under the facts of the case, the Corps did not carry its burden of demonstrating a “significant nexus” between the Hawkes property and the Red River of the North 120 miles away.

The Corps argued that the revised JD is not a “final agency action” and that, even if it were, there are adequate alternatives for challenging it in court.

It was also argued that requiring a landowner to seek a permit prior to judicial review of an approved jurisdictional determination is tantamount to a decision on the merits.

In a decision by Chief Justice Roberts, the Court disagreed with the Army Corps’ contentions and held that the definitive nature of approved JDs give rise to “direct and appreciable legal consequences.” It held that the Corps itself describes approved JDs as “final agency action.” The Court also noted that parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of “serious criminal and civil penalties.” The Court affirmed the Eighth Circuit holding that it was proper to assert a right to judicial review under the APA. In a concurring decision, Justice Kagan stated that the memorandum of agreement between the Army Corps of Engineers and the Environmental Protection Agency is central to the disposition of this case. She stated that for an agency action to be final “the action must be one by which rights or obligations have been determined or from which legal consequences flow.” *Bennett v Spear*, 520 U.S. 154 (1997). The memorandum of agreement establishes that jurisdictional determinations are “binding on the government and represent the government’s position in any subsequent federal action or litigation concerning the final determination.”

In a brief concurrence by Justice Kennedy, joined by Justices Thomas and Alito, it was stated, “the reach and systemic consequences of the Clean Water Act remain a cause for concern.” It was suggested that the Clean Water Act might not “comport *** with due process.” Justice Kennedy had earlier filed a concurrence in *Rapanos v United States*, *supra*.

As I noted in the beginning of this article, *Rapanos* defined “navigable waters” as Traditional Navigable Waters and non-navigable but relatively permanent rivers, lakes and streams as well as abutting wetlands with a continuous surface water connecting to Traditional Navigable Waters. *Rapanos* was a plurality opinion. Plurality decisions occur when a majority of Justices agree upon the result or judgment in a case but fail to agree upon a single rationale in support of the judgement. James F. Spriggs and David R. Stras, *Explaining Plurality Decisions*, 99 Geo. L.J. 515, 519 (2011).

The case involved real estate developers who were constructing a mall. Rapanos filled 22 acres of wetlands with sand without filing for a permit. Rapanos claimed his land was up to 20 miles away from any navigable waterways. But the term “navigable waterway” has been broadly interpreted by the United States Environmental Protection Agency to include areas connected to or linked to waters by tributaries. The government argued that the lands were covered by the act as “adjacent wetlands.” The sites drained into man-made drains which eventually emptied into navigable rivers and lakes.

By a 5-4 split, the Supreme Court vacated the lower court’s judgements and remanded them back to the Sixth Circuit Court of Appeals. Although there were five votes to remand, no single set of underlying legal principles for doing so was supported by a majority of justices. In effect, it was a “4-1-4” decision.

Justices Alito, Thomas and Chief Justice Roberts joined a plurality opinion written by Justice Scalia. It held that the government inappropriately applied the CWA by claiming jurisdiction over wetlands beyond the intent of Congress. Justice Scalia wrote that federal jurisdiction extended only as far as wetlands adjacent to waters that are “relatively permanent, standing or flowing” and defined adjacency as “having a continuous surface connection.” In his view, wetlands associated with intermittent streams, for example, may not be considered jurisdictional.

Justice Kennedy wrote a separate opinion concurring with the plurality, in judgment only, that the cases be remanded. He did *not* concur with the plurality on the limits of federal jurisdiction, instead finding common ground with the dissent. He remanded because the lower court did not appropriately apply a “significant nexus” test to determine if the wetlands in question were linked to navigable waters. Justice Kennedy’s opinion is considered controlling because while he concurred with the plurality, he did so on the narrowest grounds of the justices forming the plurality.

Subsequent to the *Rapanos* decision, the Army Corps and EPA issued joint guidance to their staff on implementing the Court’s decision.

The Court’s split ruling had failed to fully clarify the geographic extent of the CWA, but controlling legal principles from Justice Kennedy’s opinion suggested that a demonstrable “significant nexus” with a traditionally navigable water is necessary before asserting federal jurisdiction. The guidance provided a framework for conducting case-by-case significant nexus analyses for certain classes of waters.

The guidance also described waters that the agencies will categorically consider jurisdictional (as per Justice Scalia’s opinion), those they will not, and those waters that will be jurisdictional pending a “significant nexus” test (as per Justice Kennedy’s opinion).

The rule was challenged on the basis that the new definition would extend federal jurisdiction to ephemeral and intermittent waters with little connection to navigable waters. Presently the rule has been stayed. *In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015). The EPA and Army Corps have resumed the use of their prior regulations focusing on field investigation. But there is little to help establish the limits of federal jurisdiction when wetlands are isolated from traditional navigable waters. A final decision will hopefully provide the needed clarification.