

## ***Sixth Circuit Adopts Expansive View of Federal Wetlands Jurisdiction Under Section 404 of the Clean Water Act***

In a recent decision, the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) has overturned a Michigan federal district court decision and adopted a broad interpretation of federal wetlands jurisdiction under the Clean Water Act (CWA), holding that a hydrological connection between a wetland and navigable waters is all that is needed to establish such jurisdiction.

### **BACKGROUND**

John Rapanos (Rapanos) owns 175 acres of land in Williams Township, Michigan. In the mid-1980s, his property contained wetlands that were connected to navigable water through an attenuated route: water could travel from the wetlands to a 100 year-old man-made drain, which eventually flowed into a creek, which in turn flowed into the Kawkawlin River, a navigable water. By all accounts, Rapanos's property was located more than ten miles from the nearest navigable water.

In 1988, Rapanos began plans to clear, drain, and fill his property to make it more attractive to developers. At the suggestion of the Michigan Department of Natural Resources (MDNR), he hired a wetlands consultant, who found that there were around 50 acres of wetlands on the property. Upon receiving that report, Rapanos ordered the consultant to destroy all records indicating that there were wetlands on the property, and proceeded to fill the wetlands on his property with earth and sand.

After Rapanos began filling his wetlands, the MDNR asked United States to intervene and enforce federal laws against Rapanos. EPA filed criminal charges against Rapanos, claiming that he had filled wetlands without a permit in violation of Section 404 of the CWA. Rapanos claimed that the United States lacked jurisdiction over his property, and, therefore, could not

enforce the CWA against him. After a protracted string of litigation, a federal district court convicted Rapanos and sentenced him to three years of probation and ordered him to pay a \$185,000 fine. Rapanos appealed.

When the Sixth Circuit affirmed Rapanos's conviction, Rapanos appealed to the United States Supreme Court. The Supreme Court vacated the Sixth Circuit's decision and ordered the Sixth Circuit to reconsider the case in light of the Supreme Court's 2001 ruling in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*. The Sixth Circuit, in turn, remanded the case to the district court for reconsideration in light of *SWANCC*.

## **CWA JURISDICTION**

Jurisdiction under the CWA extends to all "navigable waters," which is statutorily defined to mean "waters of the United States." The term "waters of the United States" is defined, in turn, through federal regulations to include "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce ... ." Concerning wetlands, the regulations further provide that wetlands "adjacent" to navigable waters are also covered under the CWA. Section 404(a) of the CWA requires a permit before fill material can be placed into such waters.

## **THE SWANCC DECISION**

In 1986, the U.S. Army Corps of Engineers (Corps) attempted to "clarify" the above definition by creating a rule stating that "waters of the United States" include intrastate waters that "are or would be used" as habitat for migratory birds or endangered species. This was known as the "migratory bird rule."

In *SWANCC*, the Corps had asserted jurisdiction over a group of seasonal ponds in Illinois that were slated to be filled and refused to issue a Section 404(a) permit to allow the filling to commence. Although the ponds were not wetlands, were located entirely within Illinois, and were not connected to any navigable waters, the Corps noted that the ponds served as a habitat for migratory birds and asserted jurisdiction under the migratory bird rule. The affected landowner challenged the Corps' jurisdiction over its property, claiming that the migratory bird rule exceeded the scope of jurisdiction contemplated by the CWA.

The Supreme Court noted its 1985 decision in *United States v. Riverside Bayview Homes, Inc.*, where it had held that wetlands "adjacent" to navigable waters were within CWA jurisdiction. In so holding, the *Riverside* court had noted that in the context of the definition of "navigable waters," "the term 'navigable' is of 'limited import' and that Congress evidenced its intent to 'regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.'" Instead, the *SWANCC* court noted, CWA jurisdiction over wetlands was dependent upon a "significant nexus" between a wetland and navigable waters, and that CWA jurisdiction clearly extended to wetlands that were "inseparably bound up with" navigable waters. The court also noted that the *Riverside* decision had not addressed the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water ... ." In the *Riverside* case, the wetlands had been directly adjacent to navigable water.

The Corps pointed to the court's holding in *Riverside* to support the migratory bird rule, arguing that the isolated nature of the ponds at issue did not preclude CWA jurisdiction because, according to *Riverside*, navigability was not required to establish jurisdiction. The court, however, rejected this argument and held that while waters did not have to be navigable

themselves in order to fall under the CWA, they must at least have some effect upon navigable waters:

We said in *Riverside Bayview Homes* that the word “navigable” in the statute was of “limited effect” and went on to hold that §404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term “navigable” has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

Because the migratory bird rule could be read to cover waters that had no effect upon navigable waters, the court struck down the rule as exceeding the scope of jurisdiction that is articulated in the CWA.

Justice Stevens dissented from the court’s decision, writing that “today, the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation *as well as the Corps’ assertion of jurisdiction over all waters except for actually navigable waters, their tributaries and wetlands adjacent to each.*” (Emphasis added).

## **THE RAPANOS DISTRICT COURT DECISION**

On remand from the Sixth Circuit, the United States District Court for the Eastern District of Michigan was required to reconsider EPA’s jurisdiction over Rapanos’s property in light of the *SWANCC* decision. The *SWANCC* decision’s impact upon CWA wetlands jurisdiction had been the subject of much dispute, however, since the decision was handed down. Some courts had interpreted the ruling strictly, holding that *SWANCC* only served to invalidate the migratory bird rule and did not affect the other avenues of asserting jurisdiction, for example, the adjacency of wetlands to navigable waters, or a wetland’s hydrological connection (however attenuated) to navigable waters. In contrast, other courts had adopted a much more expansive

view of the ruling, pointing to Justice Stevens' dissent and equivocal language by the court to support holdings that *SWANCC* invalidated CWA jurisdiction over wetlands unless they were *directly adjacent* to navigable waters, as they had been in *Riverside*.

Rapanos advanced the latter view, arguing that his property, which was miles from the nearest navigable water and only hydrologically connected to that water through a series of man-made drains and non-navigable tributaries, was outside CWA jurisdiction in light of *SWANCC*. The United States predictably advanced the more limited reading of *SWANCC* to support its assertion of jurisdiction.

The district court agreed with Rapanos and held that Rapanos's wetlands were beyond the jurisdiction contemplated by the CWA. The court noted that, in "a significant shift in [the Supreme Court's] CWA jurisprudence," the *SWANCC* holding precludes the United States from regulating wetlands that are "isolated" from any navigable waters, even when a hydrological connection exists between those wetlands and navigable waters. The court explained that the wetlands at issue in were beyond the CWA's jurisdictional reach because they "were not directly adjacent to navigable waters," and, furthermore, that "the plain text of the [CWA] mandates that navigable waters must be impacted by [a wetland's owner's] activities" before CWA jurisdiction will attach. The court also observed that the *SWANCC* opinion repeatedly referred to the property at issue in *SWANCC* "as 'isolated,' despite the fact that, as the dissent [in *SWANCC*] point[ed] out, even the most seemingly 'isolated' wetlands are in fact both hydrologically connected, as well as ecologically connected, to navigable waters." This led the court to conclude that "even if there is a hydrological connection . . . wetlands may be considered 'isolated,'" and hence, beyond the jurisdictional reach of the CWA as delineated in *SWANCC*. The United States appealed.

## THE SIXTH CIRCUIT RAPANOS DECISION

On appeal, the Sixth Circuit initially noted that “[w]etlands have presented one of the most difficult areas in which to determine the Clean Water Act’s exact jurisdictional limitations. Although wetlands are not traditionally navigable-in-fact, they play an important ecological role where they exist.” Noting the *Riverside* decision’s holding that CWA jurisdiction extends to wetlands that are “adjacent” to navigable waters, the court also observed that “[i]n the post-*Riverside* jurisprudence, however, the question remains as to how far the jurisdiction may go... .”

The court rejected the district court’s view that *SWANCC* “drastically changed the scope of power granted by the Clean Water Act” by limiting CWA jurisdiction to directly adjacent wetlands. The court adopted the logic of the Fourth Circuit’s 2003 decision in *U.S. v. Deaton*, which had upheld the Corps’ jurisdiction over property involving “wetlands that drain into a ditch which must pass through other waterways to get to navigable-in-fact water, just as is the case on Rapanos’s land.” The court specifically cited the Fourth Circuit’s explanation that:

In *Riverside Bayview* the Supreme Court concluded that the Corps regulation extending jurisdiction to adjacent wetlands was a reasonable interpretation in part because of what [*SWANCC*] described as “the significant nexus between the wetlands and ‘navigable waters.’” There is also a nexus between a navigable waterway and its nonnavigable tributaries. . . . This nexus, in light of the “breadth of congressional concern for protection of water quality and aquatic ecosystems,” is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted. . . . The Act thus reaches to the roadside ditch and its adjacent wetlands.

Under that logic, the Sixth Circuit held that “[a]lthough the [*SWANCC*] decision limits the application of the Clean Water Act, the Court did not go as far as Rapanos argues, restricting the Act’s coverage to only wetlands directly abutting navigable water. Instead, the [*SWANCC*]

Court, in a narrow holding, invalidated the Migratory Bird Rule as exceeding the authority granted...by the Clean Water Act.”

Instead, the court held, the true issue was whether there was a “significant nexus” between Rapanos’s wetlands and navigable water:

The evidence presented in this case suffices to show that the wetlands on Rapanos’s land are adjacent to the Labozinski Drain, especially in view of the hydrological connection between the two. It follows under the analysis in *Deaton*, with which we agree, that the Rapanos wetlands are covered by the Clean Water Act. Any contamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters. Therefore, the protection of the wetlands on Rapanos’s land is a fair extension of the Clean Water Act. [SWANCC] requires a “significant nexus between the wetlands and ‘navigable waters’” for there to be jurisdiction under the Clean Water Act. Because the wetlands are adjacent to the Drain and there exists a hydrological connection among the wetlands, the Drain, and the Kawkawlin River, we find an ample nexus to establish jurisdiction.

Therefore, the Sixth Circuit reversed the district court’s decision and reinstated Rapanos’s conviction.

## **RAMIFICATIONS**

The Sixth Circuit clearly indicates that it views the *SWANCC* decision to be of limited import. The *Rapanos* decision holds that wetlands do not need to be directly adjacent to navigable waters in order to fall within CWA jurisdiction, and in fact, such jurisdiction can be established by a hydrological connection running from wetlands through a man-made drain, to a non-navigable tributary, and finally, to a navigable water, covering over ten miles in the process.

What the decision does not address, however, is exactly how attenuated a hydrological connection must become for a wetland to be considered beyond the reach of CWA jurisdiction. Under the court’s holding, wetlands located many miles from navigable waters can be covered

by the CWA. Additionally, even seemingly innocuous devices like roadside ditches, which may carry water only intermittently, appear to be sufficient to establish a hydrological connection for jurisdictional purposes. Furthermore, jurisdiction can be established through a series of hydrological pathways that may not be apparent unless maps and drain records are examined. Because of the purposefully vague way in which the federal rules governing CWA jurisdiction have been drafted, any further clarity concerning this issue will likely depend on the future willingness of landowners to challenge CWA wetlands jurisdictional determinations in court.

*U.S. v. Rapanos*, --- F.3d ----, 2003 WL 21789241, 56 ERC 1929, 2003 Fed.App. 0268P,  
(6th Cir. August 5, 2003)

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