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## Overview

On June 19, the U.S. Supreme Court rendered an important decision concerning the ability of the federal government to regulate isolated wet areas on private property. The issue is important for farmers and ranchers due to the presence of seasonally ponded areas, drainage ditches, intermittently dry streams, prairie potholes and other wet areas located on farm and ranch land that may be adjacent to other waters and over which the federal government may claim jurisdiction. In that event, agricultural activities can be curtailed substantially. Unfortunately, the Court failed to reach a majority opinion, issuing a plurality opinion, two concurrences and two dissents. The case represents neither a clear win for private property rights nor the sweeping regulatory approach that the government sought.

## Clean Water Act (CWA) Background - The Regulation of Isolated Wetlands

With the enactment of the federal water pollution control amendments of 1972 (more commonly known as the CWA), the federal government adopted a very aggressive stance towards the problem of water pollution. Broadly speaking, the CWA essentially eliminates the discharge of any pollutants into the nation's waters without a permit. Section 404 of the CWA makes illegal the discharging of dredge or fill material into the "navigable waters of the United States" without obtaining a permit from the Secretary of the Army acting through the Corps of Engineers (COE). Until 1975, the Corps construed the term "navigable waters" to mean waters that were actually

navigable. In accordance with regulations promulgated in 1975, however, the Corps expanded its jurisdiction to "other waters" of the United States, including streams, wetlands, playa lakes, and natural ponds if the use, degradation or destruction of those areas could affect interstate commerce. A series of court decisions beginning in the mid-1970s also contributed to the COE's increasing jurisdiction over wetlands. Indeed, in 1983 one federal court held that the term "discharge" may reasonably be understood to include "redeposit" and concluded that the term "discharge" covered the redepositing of soil taken from wetlands such as occurs during mechanized land clearing activities. Furthermore, since 1975, the COE and the Environmental Protection Agency (EPA) have defined "waters of the United States" such that the agencies assert regulatory authority over isolated wetlands or wetlands not adjacent to "waters of the United States" if a link exists between the water body and interstate commerce. This interpretation has been upheld judicially.

**The migratory bird rule.** In 1985, an EPA internal memorandum concluded that CWA jurisdiction could be extended to include isolated wetlands that were or could be used by migratory birds or endangered species. In 1986, the COE issued memoranda to its districts explaining that the use of waters by migratory birds could support the CWA's jurisdiction. In 1993, the United States State Court of Appeals for the Seventh Circuit agreed, holding that isolated wetlands actually used by migratory birds presented a sufficient connection to interstate commerce to give the EPA and the COE jurisdiction under the CWA. This same court was faced with a similar case later in the 1990s. This time the plaintiff was a consortium of

suburban Chicago municipalities that selected for a 410-acre solid waste disposal site a 533-acre abandoned sand and gravel pit containing excavation trenches that had become permanent and seasonal ponds. The ponds and small lakes had become home to approximately 121 species of birds, including many endangered, water-dependent, and migratory birds. Because the proposal for the site required filling in some of the ponds, the plaintiff contacted the COE to determine if a landfill permit was required under Section 404 of the CWA. The Corps asserted jurisdiction under the “migratory bird rule” and refused to issue a permit in 1991 and 1994, citing a need to protect the habitat of the migratory birds. When the municipalities challenged the COE’s jurisdiction, the District Court granted the COE’s motion for summary judgment and, on appeal, the Seventh Circuit held that the Congress had authority under the Commerce Clause to regulate intrastate waters and that the “migratory bird rule” was a reasonable interpretation of the CWA.

**The Supreme Court’s 2001 opinion.** In early 2001, the Supreme Court reversed the Seventh Circuit and held that the “migratory bird rule” exceeded the authority granted to the COE under §404 of the CWA. But, the Court did not address the scope of the COE’s jurisdiction under the Constitution’s commerce clause. The Court stated that the “migratory bird rule” raised significant constitutional questions and would significantly impinge upon traditional states’ power over land and water use. Since there was no clear congressional intent to do so, the court interpreted the act to avoid raising the constitutional and federalism issues created by the COE’s interpretation of its jurisdiction.

The Supreme Court’s decision seemed to indicate rather strongly that the COE did not have a legal basis under the CWA to regulate isolated wetlands that did not have a substantive connection to interstate commerce. While room remained to argue over the issue of navigability, the Court’s opinion did appear to remove federal jurisdiction over private ponds and seasonal or ephemeral waters *where the only connection with interstate commerce was migratory waterfowl*. Since then, lower court opinions on federal jurisdiction over isolated wetlands have indicated that other factors are relevant in determining whether the federal government can regulate isolated water. Those

factors include recreational use for interstate or foreign travelers, fish or shellfish habitat, or use of the water for industrial purposes by industries engaged in interstate commerce. In any event, it has become clear since the Supreme Court’s 2001 opinion that federal jurisdiction over open waters that ultimately flow into interstate waters or waters that are navigable-in-fact remain virtually unlimited.

The key question in any particular case is whether the isolated wetland at issue has a sufficient connection with “waters of the United States” to be subject to the permit requirement of Section 404 of the CWA.

### ***Rapanos and Carabell***

The Supreme Court’s most recent opinion concerning federal jurisdiction over isolated wetlands involved two separate Michigan landowners that were prevented from developing their properties without a Section 404 permit from the COE. Both landowners argued that the COE’s assertion of jurisdiction over their respective tracts exceeded the scope of the CWA and surpassed the constitutional limits of the Commerce Clause. One landowner owned 16 acres of wooded wetlands over which the COE asserted jurisdiction because the tract abutted a ditch (but was hydrologically distinct from the ditch due to a man-made berm) that connected to a drain that emptied into a creek that eventually connected to Lake St. Clair. The other landowner’s tract was over ten miles from the nearest navigable waterway, but the COE asserted jurisdiction because water from the tract drained into a ditch that drained into a creek that flowed into a navigable river. The COE claimed that the hydrological connection made the drain a “tributary” of navigable waters. The United States Court of Appeals for the Sixth Circuit ruled for the government in both cases. The U.S. Supreme Court agreed to hear the cases in late 2005, even though the Bush administration urged the Court to not take the cases on the basis that the lower court correctly determined that the federal government had jurisdiction over the isolated wetlands at issue in both cases.

**The Scalia plurality opinion.** Unfortunately, the Court failed to clarify the meaning of the CWA phrase “waters of the United States” and the scope

of federal regulation of isolated wetlands. While the Court did vacate the decisions of the Sixth Circuit in both of the cases, the Court did not render a majority opinion, instead issuing a total of five separate opinions. The plurality opinion, written by Justice Scalia and joined by Justices Thomas, and Alito and Chief Justice Roberts, would have construed the phrase “waters of the United States” to include only those relatively permanent, standing or continuously flowing bodies of water that are ordinarily described as “streams,” “oceans,” and “lakes.” In addition, the plurality opinion also held that a wetland may not be considered “adjacent to” remote “waters of the United States” based merely on a hydrological connection. Thus, in the plurality’s view, only those wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between the two, are “adjacent” to such waters and covered by permit requirement of Section 404 of the CWA.

**Justice Kennedy’s concurrence.** Justice Kennedy authored a concurring opinion, but on much narrower grounds. *Thus, Justice Kennedy’s opinion is the controlling opinion in the case.* In Justice Kennedy’s view, the Sixth Circuit correctly recognized that a water or wetland constitutes “navigable waters” under the CWA if it possesses a significant nexus to waters that are navigable in fact or that could reasonably be so made. But, in Justice Kennedy’s view, the Sixth Circuit failed to consider all of the factors necessary to determine that the lands in question had, or did not have, the requisite nexus. Without more specific regulations comporting with the Court’s 2001 opinion, Justice Kennedy stated that the COE needed to establish a significant nexus on a case-by-case basis when seeking to regulate wetlands based on adjacency to non-navigable tributaries, in order to avoid unreasonable application of the CWA. Justice Kennedy believed the record in the cases contained evidence pointing to a possible significant nexus, but the Sixth Circuit had not required the COE to establish a significant nexus in accordance with the permissible factors. As a result, Justice Kennedy concurred that the Sixth Circuit opinions should be vacated and the cases remanded to the Sixth Circuit for further proceedings.

Justice Kennedy’s opinion is neither a clear victory for the landowners in the cases or the COE. While he rejected the plurality’s narrow reading of the phrase “waters of the United States,” he also

rejected the government’s broad interpretation of the phrase. While the “significant nexus” test of the Court’s 2001 SWANCC opinion required regulated parcels to be “inseparably bound up with the ‘waters’ of the United States,” Justice Kennedy would require the nexus to “be assessed in terms of the statute’s goals and purposes” in accordance with the Court’s 1985 opinion in *United States v. Riverside Bayview Homes*.

## **The Future of Federal Regulation of Isolated Wetlands**

The bottom line is that the Court has injected enormous uncertainty into the law. Further litigation on the issue of isolated and adjacent wetlands is assured. In addition the Congress may step into the fray. Presently, legislation has been introduced in both the U.S. House and Senate, which would make clear that the protections of the Clean Water Act are meant to be broad, just as Congress intended when it passed the landmark law in 1972, and just as the law has been interpreted by federal agencies under Republican and Democratic administrations alike. The proposed legislation specifies that the federal government has regulatory jurisdiction over, among other things, all interstate and intrastate waters and their tributaries, intermittent streams, mudflats, sandflats, prairie potholes, wet meadows, playa lakes, and natural ponds to the fullest extent possible under the Constitution. That is broad-sweeping language that would solidify the federal government’s ability to regulate wet areas on farm and ranch land.

In the meantime, farmers, ranchers, and other landowners will have to wait for another day for more certainty concerning the protection of private property rights on isolated wetlands.

*Footnotes not included, the full article can be obtained by contacting Roger McEowen.*