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A Decade of Uncertainty: Precon, Leaked Guidance, and Where to Go From Here?

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As of early 2011, wetlands stakeholders have lived with *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) for more than a decade, and *Rapanos v. United States*, 547 U.S. 715 (2006) for half a decade. These U.S. Supreme Court decisions have increased uncertainty as to when the federal government is in charge of certain activities in waters of the United States. Yet, before *SWANCC* and *Rapanos* (in fact, immediately after the 1972 passage of the Clean Water Act (CWA)), professionals working with wetlands and other waters of the United States faced similar vexing questions: where does the authority to regulate begin and end? Should there be a change in that authority? How is that authority, wherever it begins and ends, best implemented? A few recent developments have brought these questions to the forefront in new and different ways.

First, last November saw a serious shake-up on Capitol Hill. As we entered the 112th Congress this January, we were missing a number of historic champions of legislative reform of the CWA, particularly Rep. James Oberstar (D-Minn.) in the U.S. House of Representatives and Sen. Russell Feingold (D-Wis.) in the U.S. Senate. Many experts inside the beltway and out were convinced that, lacking key leadership at this time, continued efforts to pass the America's Commitment to Clean Water Act (formerly known as the Clean Water [Authority] Restoration Act) needed to be put on hold for a few years. This leaves (at least temporarily) protections for waters of the United States up to the other branches of government.

Meanwhile, adding to the diverse body of post-*SWANCC/Rapanos* case law, in January, the U.S. Court of Appeals for the Fourth Circuit issued an interesting ruling in an appeal concerning whether the CWA applied to 4.8 acres of wetlands owned by the Precon Development Corporation in Chesapeake, Virginia (*Precon Development Corp. v. Army Corps of Engineers*, No. 09-2239 (4th Cir. Jan. 25, 2011)). Reversing a lower court decision that upheld the U.S. Army Corps of Engineers' (the Corps') 2007 jurisdictional determination and subsequent denial of a CWA permit, the Fourth Circuit remanded and directed reconsideration of the Corps' significant nexus determination.

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In an opening assessment of the fractured *Rapanos* opinions, the *Precon* court noted that because the four-vote dissent "found both the [Justice Antonin] Scalia and [Justice Anthony M.] Kennedy tests 'too stringent . . . [, i]t thus suggested that in the future, jurisdiction should be established if either the plurality's or Justice Kennedy's test is met.'" Slip op. at 15. The Fourth Circuit also stated that compliance with Justice Kennedy's "significant nexus" test should be treated as "a question of law . . . and reviewed for compliance de novo." *Id.* at 17-18. In other words, what many had previously viewed as a fact-specific determination (the consideration of whether there is a significant nexus) was, in the Fourth Circuit's view, a legal question that instead should receive only limited deference. *Id.* at 29.

In reaching its remand decision, the Fourth Circuit examined in detail: (1) whether the agency decision to determine jurisdiction by aggregating as "similarly situated" 448 acres of surrounding wetlands was permissible (concluding yes); and (2) whether there was sufficient evidence of a significant nexus through the connection between these adjacent wetlands via a human-made ditch to the Northwest River. Acknowledging that a significant nexus analysis is a "flexible ecological inquiry," *id.* at 23, the court found "that [the administrative record] contains insufficient information to allow us to assess the Corps' conclusion that these wetlands have a significant nexus with the Northwest River" and so remanded for Corps reconsideration of its significant nexus determination. *Id.* at 24. The court concluded that flow had not been appropriately demonstrated, and despite a record containing "other physical observations about the wetlands and adjacent tributaries," it found "no documentation in the record that would allow us to review [the] assertion that the functions that these wetlands perform are 'significant' for the Northwest River." *Id.* at 26-27. In support of its focus on "significance," the court identified recent cases in the U.S. Court of Appeals for the Ninth and Sixth Circuits as "good examples of the types of evidence—either quantitative or qualitative—that could suffice to establish 'significance.'" *Id.* at 28-29 (citing authority from other circuits).

Precon shows that uncertainty as to how to apply the Supreme Court-created "tests" remains high, even five years after the *Rapanos* decision and a full decade after *SWANCC*. One key comment in the decision was in footnote 10, where the Fourth Circuit stated that lower deference was owed "because—although it could—the Corps has not adopted an interpreta-

tion of 'navigable waters' that incorporates this concept through notice-and-comment rulemaking, but instead has interpreted the term only in a non-binding guidance document" (citing *United States v. Mead Corp.,* 533 U.S. 218, 234 (2001)). As it happens, despite such calls for formal rulemaking, the U.S. Environmental Protection Agency (EPA) and the Corps have been working on the preliminary step of revised guidance, with formal rulemaking evidently to follow.

Recently, a draft of this new guidance, marked as "Deliberative Process; Confidential," was leaked to *Inside EPA*. This draft guidance proposes to supersede EPA's and the Corp's December 2008 *Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in* Rapanos v. U.S. *and* Carabell v. U.S., as well as the 2003 "Joint Memorandum." The 2010 draft guidance notes "the Agencies expect that the numbers of waters found to be subject to CWA jurisdiction will increase significantly compared to practices under the 2003 SWANCC guidance and the 2008 Rapanos guidance."

If the issued guidance is the same or similar to the leaked version, it would represent a significant shift from current practices, and potentially establish a framework for rulemaking. Decisions would be more ecosystem-based, with broader concepts of aggregation. The guidance would apply to all CWA programs, not just §404. It would define key terms, such as "navigable" and "significant nexus," more broadly. It would also change interpretations with respect to tributaries and other waters. Public comment would be sought on the guidance as well (not a typical approach), while, at the same time, it would propose a future rulemaking. This draft seems a sincere attempt to more fully reflect the *Rapanos* decisions in light of lessons learned over the past five years. Nevertheless, it is clearly just a first step in what promises to be a long process.

As I contemplate recent developments, I must acknowledge that *SWANCC* and *Rapanos* reverberate in a special way for me personally. I became pregnant with my now-nine-year-old daughter while working on a proposed South Carolina legislative response to the *SWANCC* decision in spring 2001 through the University of South Carolina Environmental Law Clinic (which was not passed). Five years later, I worked on an amicus brief on behalf of various members of the U.S. Congress for *Rapanos* with my newborn (now-five-year-old) son sleeping on my lap. As I have grown into my parenting duties, I have come to appreciate the necessity of flexibility and adaptation for some things. But I have also come to value the power of predictable and protective rules grounded in caution and foresight. Surely, even in the midst of uncertainty on the statutory front, the agencies can develop administrative rules that will both protect wetlands and other waters, while helping stakeholders navigate the quagmires more easily. We need both practical and protective wisdom to prevail as we enter the second post-*SWANCC* decade. ■

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