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US Struggles to Clear Up Confusion Left in the Wake of *Rapanos*

ADRIENNE FROELICH SPONBERG

For two decades, Michigan developer John Rapanos battled the US government over the extent of protection for wetlands and streams under the Clean Water Act (CWA). Now, more than two years after the Supreme Court issued its 4-1-4 split decision, Rapanos and the government have reached a settlement: Rapanos will pay a \$150,000 civil fine and about \$750,000 more to mitigate 54 acres of wetlands that were filled without authorization. While Rapanos may finally have some closure, confusion over CWA protections remains, leaving all three branches of the federal government struggling to provide clarity for CWA implementation and enforcement.

The main source of confusion? The three opinions the Supreme Court issued in the *Rapanos* case set forth different tests for whether a body of water is protected. Lower courts have interpreted the *Rapanos* decision inconsistently. Some circuit courts have cited Justice Kennedy's "significant nexus" test as the controlling law; others have employed Justice Scalia's stricter interpretation in the plurality opinion: waters must be continuously flowing and have a surface connection to navigable waters. These conflicting jurisdictional tests led the Department of Justice (DOJ) to petition the Supreme Court for a clarification of *Rapanos*. In arguing for the review, the DOJ warned that confusion caused by different interpretations of *Rapanos* will "inevitably hinder the [government's] ability to implement the Act in a uniform and workable fashion." Nevertheless, the Supreme Court denied the DOJ's request.

The Army Corps of Engineers and the Environmental Protection Agency (EPA), the executive agencies tasked with enforcing the CWA, attempted to interpret the ruling through joint

guidance in June 2007. Stakeholders on all sides of the argument, as well as agency officials themselves, criticized that effort. EPA's assistant administrator for enforcement and compliance assurance, Granta Nakayama, wrote to EPA's assistant administrator for water in March 2008, describing the negative impact the guidance has had on the EPA's ability to enforce the CWA. Nakayama identified the "implied presumption of non-jurisdiction" for intermittent and ephemeral tributaries—which make up 95% of stream channels in the United States—as the largest burden to the agency, since the only way around it is to conduct a time- and resource-intensive "significant nexus analysis," in keeping with Justice Kennedy's opinion. As a result of the guidance, over a 17-month period more than 500 enforcement cases were lost in court, not pursued, or lowered in priority. Given the normal caseload for these violations, Nakayama concluded that "there has been a significant impact on enforcement."

Nakayama's letter came to light as part of a joint investigation by the House Committee on Transportation and Infrastructure and the House Committee on Oversight and Government Reform. Findings from the investigation, released in December 2008, concluded that enforcement of the CWA has been "decimated over the past two years." In poring over more than 20,000 pages of documents provided by EPA and the Corps of Engineers, congressional committee staff members found that EPA field offices were "warning that they are no longer able to ensure the safety and health of the nation's waters." In addition to the diminution of enforcement, the guidance has resulted in a greater workload and lower morale for staff at the agencies. Representative

Henry Waxman (D-CA), then chair of the oversight committee, expressed frustration with the results of the investigation: "We need vigorous enforcement to protect our nation's waters, but instead, hundreds of potential violations are being ignored."

The Corps of Engineers and the EPA issued revised guidance for permitting under the CWA two days after the Supreme Court's refusal to clarify the *Rapanos* decision. Stakeholders were not impressed with the new guidance, either, calling it more of the same and evidence that the legislative branch would need to step into the fray. "The confusion that stemmed from the original guidance and that will continue to hamper landowners and local officials reinforces the need to accomplish protection for the nation's waters through congressional action," said Scott Yaich, director of conservation operations for Ducks Unlimited.

Conservation groups are hoping that the Obama administration and Congress will deliver new guidance to resolve the confusion left in the wake of *Rapanos*. Environmental groups are pinning their hopes on the Clean Water Authority Restoration Act, which has been introduced in each of the last four sessions of Congress. The legislation was the subject of several hearings in the last Congress, but it failed to progress in committee. *Greenwire* reports that environmental groups believe the legislation has a good chance in the 111th Congress.

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