Regulations Propose Definitions of U.S. Waters

Irma S. Russell

In his dissent in *Rapanos v. United States*, Justice Breyer argued that the Clean Water Act (CWA) authorized the U.S. Army Corps of Engineers (Corps) to regulate waters and wetlands to the limit of the Commerce Clause. 547 U.S. 715, 811. He also suggested that the Corps write regulations to resolve the long-standing question of the scope of regulation of the waters of the United States. The final paragraph of his dissent states:

> If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. That is not the system Congress intended. Hence I believe that today's opinions, taken together, call for the Army Corps of Engineers to *write new regulations*, and speedily so.

Id. at 812–13 (emphasis added).

Justice Breyer concluded that Congress intended to give the Corps "the task of restricting the scope of that definition, either wholesale through regulation or retail through development permissions." *Id.* at 811. Citing Justice Stevens' dissent in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), Justice Breyer noted the ambitious and difficult task of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* at 181–82. Justice Breyer had "no difficulty finding that the wetlands at issue in these cases are within the Corps' jurisdiction." He rejected the "nexus" requirement articulated by Justice Kennedy in his concurrence in *SWANCC* as an addition to the statute. Based on his conclusion that Congress left "untouched" the powers of the Corps to administer the Act, Justice Breyer suggested the agency "write regulations defining the term" and noted that, under *Chevron*, "the courts must give those regulations appropriate deference." *Id.* citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In his concurrence, Chief Justice Roberts presented his differing view regarding deference to agency rules, pointing out that the Corps and Environmental Protection Agency (EPA) initiated rulemaking after the *SWANCC* decision. Rather than suggesting new regulatory action, Chief Justice Roberts emphasized that earlier rulemaking "went nowhere" and failed to refine the Corps' "view of its authority in light of our decision in *SWANCC*," stating that the rulemaking failed to "provid[e] guidance meriting deference under our generous standards." *Id.* at 757–58. Finding the agency "chose to adhere to its essentially boundless view of the scope of its power," the Chief Justice concluded: "the upshot today is another defeat for the agency." *Id.* While acknowledging that *Chevron* affords agencies "generous leeway . . . in interpreting the statute they are entrusted to administer," the Roberts concurrence indicated that an interpretation asserting "essentially limitless" jurisdiction may not deserve such deference because of the "clearly limiting terms Congress employed in the [CWA]." *Id.*

The Corps and EPA have taken the first step to answer the call "to write new regulations" regarding the scope of the "waters of the United States." While the agencies may not have acted as speedily as Justice Breyer's dissent suggested in 2006, they have published for public comment a proposed rule defining the scope of waters protected under the CWA. Originally calling for comments by July 21, 2014, the agencies extended the comment period to October 20, 2014. *See* Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22187 (Apr. 21, 2014), www.federalregister.gov/articles/2014/04/21/2014-07142/definition-of-waters-of-the-united-states-under-the-clean-water-act.

In explaining the need for the proposal, the agencies noted that defining the scope of U.S. waters was necessary "in light of the U.S. Supreme Court cases" of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), *SWANCC*, and *Rapanos v. United States*, 547 U.S. 715 (2006).

The agency commentary noted that the proposed definition is needed to "enhance protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity" of the regulation. The agency also noted the "confusion and uncertainty" of the "case-specific" application currently used and its intent to provide "clarity to regulated entities" regarding whether areas are "jurisdictional and discharges are subject to permitting." *Id.*

The issue of regulation of wetland areas has proved intractable for courts and agencies. In *Riverside Bayview*, the first case interpreting "waters of the United States" under the CWA, the Supreme Court unanimously upheld the jurisdiction of the Corps to regulate marsh lands as "adjacent wetlands," finding that "saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to and does support wetland vegetation." *Id.* at 129–30. Noting the inherent ambiguity of drawing a line where land ends and water begins, the Court found the Corps' construction of the statutory term "waters of the United States" reasonable and entitled to deference in light of the language, policy, and history of the Act. *Id.* at 133–34.

In 2001, the Supreme Court again addressed the issue in *SWANCC*, 531 U.S. 159, rejecting the Corps' asserted jurisdiction over ponds under its Migratory Bird Rule. The majority opinion, authored by Chief Justice Rehnquist and joined by Justices Scalia, Kennedy, O'Connor, and Thomas, rejected the argument that Congress acquiesced to the Migratory Bird Rule in failing to pass House Bill 3199. *SWANCC*, 531 U.S. at 168. The Court stated that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Id.* at 160.

While the Court did not overturn its decision in *Riverside Bayview*, it rejected the Corps' application of the rules to the waters at issue in the case, holding that the "Migratory Bird Rule" interpretation could not be the sole basis for jurisdiction and noting that the interpretation would read the significance of the term "navigable" out of the statute. *Id.* at 171–72. Stretching a statute to the outer limits of Congress' power is justified in the view of the majority only where there is "a clear indication that

Congress intended that result." *Id.* at 172. Additionally, the Court noted its concern that the Migratory Bird Rule had the potential to infringe upon the States' primary authority over land and water use. *Id.* at 174. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented, arguing that the majority's decision invalidating the Migratory Bird Rule rested on incorrect premises of the scope of the CWA, that Congress acquiesced to the Rule, and that the majority opinion was unfaithful to precedent and inconsistent with *Chevron* deference. *Id.* at 191.

In 2006, the Supreme Court addressed the issue of the authority of the Corps to regulate wetlands for the third time in *Rapanos*. The Court delivered a divided decision, without achieving a rationale endorsed by a majority of the justices. Courts of Appeals of different circuits have delivered a variety of decisions interpreting and debating *Rapanos*. In *Rapanos*, the Court reversed decisions by the Court of Appeals for the Sixth Circuit, which had upheld the Corps' actions in two consolidated cases. The first of these, *Rapanos*, arose from a civil enforcement action by the United States alleging that developers illegally filled protected wetlands. The second arose from an action by property owners (the Carabells) against the government for denial of a permit request to fill wetlands. Based on two different rationales, a majority of the justices held that the Corps exceeded its jurisdiction in each case. Justice Scalia, joined by Chief Justice Roberts, Justice Alito, and Justice Thomas, wrote the plurality opinion, interpreting the "waters" provision to include "relatively permanent, standing or continuously flowing bodies of water forming 'geographic features' that are described in ordinary parlance as 'streams, oceans, rivers and lakes,'" *id.* at 734–35, and to exclude "streams that flow intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 739.

Justice Kennedy concurred in the result in *Rapanos* based on a separate rationale. Finding that the Sixth Circuit correctly identified the "significant nexus" test from *Riverside Bayview*, he determined that the courts and the Corps failed to apply the necessary factors and concluded that the rulings in both cases should be vacated and remanded.

The definition of "waters of the United States" proposed by EPA and the Corps based on two different rationales is: "Traditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; impoundments of traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and tributaries." 79 Fed. Reg. 22188 (Apr. 21, 2014). If this rule becomes final, waters and wetlands that fall within the definition would be jurisdictional by rule and "no additional analysis would be required"—the effect Justice Breyer suggested in his dissent in *Rapanos*.

The rationale of the proposed rule presented by EPA and the Corps follows the principles articulated by Justice Kennedy, basing jurisdiction on a determination that the nexus, alone or in combination with similarly situated waters in the region, is significant based on data, science, the CWA, and case law. *Rapanos*, 547 U.S. at 780. The agencies propose that "other waters" (not fitting the above categories) be determined through a case-specific showing that, either alone or in combination with similarly situated "other waters" in the region, they have a "significant nexus" to a traditional navigable water, interstate water, or territorial seas. In addition, the proposed rule defines "significant nexus." With regard to isolated wetlands or wetlands adjacent to a non-navigable tributary, Justice Kennedy's concurring opinion held that the Corps must establish a "significant nexus" to navigable waters to classify wetlands as U.S. waters, *id.* at 782, requiring a finding that "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." *Id.* at 780.

Whatever the result of the comments to the rule proposed by the Corps and EPA and the agency action, it is likely that the debate on the extent of federal jurisdiction under the Clean Water Act is not over.

Irma S. Russell is professor at the University of Montana School of Law and a member of the editorial board of* Natural Resources & Environment. *She may be reached at irma.russell@mso.umt.edu.