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Federal Courts Split Over Application of Supreme Court's Wetlands Decision

On October 24, 2007, the Eleventh Circuit Court of Appeals vacated a criminal water pollution conviction because the definition of "navigable waters" given to the jury was inconsistent with the definition articulated by the United States Supreme Court. In *United States v. McWane*, 2007 WL 3087419, *12 (11th Cir. Oct. 24, 2007), the Eleventh Circuit became the third federal circuit court of appeals to use the "significant nexus" test as the controlling definition of "navigable waters" under *Rapanos*. The conflicting federal court decisions interpreting *Rapanos* underscore that anyone involved with real estate development, as well as property owners with discharges to "navigable waters," must be cognizant of how "navigable waters" are determined in the relevant jurisdiction, and be aware of the remaining uncertainty as this issue continues to progress through the courts.

At the time of the *Rapanos* decision, property owners and developers, government regulators, and environmental advocates, were all anxious to see how the Supreme Court would resolve challenges to the Army Corps of Engineers' (Army Corps) assertion of jurisdiction over certain wetlands. However, instead of resolving many of the concerns related to wetlands determinations, the Court in *Rapanos* added more uncertainty. While five Justices agreed that remand was necessary to determine whether the wetlands in *Rapanos* were "navigable waters" covered by the Clean Water Act, those five Justices did not agree on the definition of "navigable waters."

The *Rapanos* Court was split 4-1-4 and the Justices issued five separate opinions, with no one opinion representing the majority. Justice Scalia wrote for the four Justice plurality. Under the Scalia test, a wetland is covered by the Clean Water Act if it meets the following two elements: (1) the wetland is adjacent to "a water of the United States, (i.e., a relatively permanent body of water connected to traditional interstate navigable waters);" and (2) "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Rapanos v. United States*, 126 S. Ct. 2208, 2227 (2006). Justice Kennedy provided the fifth vote for remand, but wrote a separate opinion with a separate test.

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Under the Kennedy test, jurisdiction over a wetland depends on "the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 2248. In the wake of this decision, the federal appellate courts are split on which of the opinions is the controlling test for the determination of "navigable waters."

Shortly after *Rapanos* was issued, the Seventh Circuit held that Kennedy's concurrence was controlling and applied the "significant nexus" test. *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006). The Ninth Circuit, also applying the *Rapanos* decision, recently agreed that Kennedy's concurrence is applicable. *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007). In *McWane*, the United States Environmental Protection Agency (U.S. EPA) argued, consistent with the guidance it jointly issued with the Army Corps in June 2007, that jurisdictional determinations can be made based on either the Scalia "relatively permanent waters" test or the Kennedy "significant nexus" test. *McWane* at *9. In rejecting this argument, the Eleventh Circuit ruled that the district court must apply the Kennedy test on remand. *Id.* at *14. At this point, the First Circuit is the only federal circuit court of appeals to hold that either the Scalia or Kennedy test can be used to determine whether a wetland is a "navigable water." *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006), *cert denied*, 2007 WL 1999079 (U.S. Oct. 9, 2007).

Further litigation is anticipated over both the controlling test under *Rapanos*, as well as the validity of the guidance issued by U.S. EPA and the Army Corps. Parties involved with real estate development, as well as property owners with discharges to "navigable waters," should be aware that this area of the law is continuing to develop. In the interim, affected entities should understand the implications of both the Scalia test and the Kennedy test, the weight of the guidance, as well as which test might apply in a particular jurisdiction.