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Legal Briefing on Supreme Court Decision in *Rapanos et ux. v. United States*

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Good morning. My name is Leslie Carothers, and I'm president of the Environmental Law Institute. As many of you know, ELI is a non-partisan research and education center that advances environmental protection through improved environmental law and policy. We make our studies and publications available to all sides of the environmental debate: industry, advocacy groups, and all levels of government.

While ELI traditionally does not get involved in litigation, our Board has made an exception for cases where constitutional challenges have been raised to framework federal environmental laws. For that reason, we filed our first-ever "friend of the court" brief in *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*, and we primarily addressed the scope of congressional authority under the Constitution to regulate wetlands. These cases raised a fundamental challenge to the wetlands protection program of the Clean Water Act, which creates federal jurisdiction over "navigable waters," broadly defined as "waters of the United States." Congress created the wetlands program in 1972 and affirmed it in 1977, and it has been repeatedly upheld by the courts. The position we took in our brief aligns with that of the Department of Justice, as well as a majority of the States, but my assignment today is to provide an objective summary of what the Court ultimately ruled.

First, a bit of background. "Wetlands" are areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, vegetation adapted for life in saturated soil conditions. Wetlands include what we think of as swamps, marshes, bogs, and the like. In 1985, the Supreme Court ruled 9-0 in the *Riverside Bayview* case that wetlands adjacent to navigable water bodies are an appropriate object of federal regulation. Then, in 2001, the Court in the *SWANCC* decision declined to find federal jurisdiction over certain wholly "isolated" waters solely on the basis that they were frequented by migratory birds. The question raised by *Rapanos* and *Carabell*, cases arising from the Sixth Circuit Court of Appeals out of Michigan, falls somewhere in between: that is, whether the Corps can regulate wetlands adjacent to *non-navigable tributaries* of navigable waters. After this month's decision, the short answer is still "yes."

Legal scholars have been puzzling over the precise meaning of the Court's fractured decision in these cases. On the simplest level, the Court voted, 5-4, to vacate the Sixth Circuit's decision finding federal jurisdiction over the disputed wetlands, and to return the cases to the lower court. The reality is more complicated, however, because the five Justices who voted to vacate gave sharply divergent *rationales* for doing so. Justice Scalia authored a "plurality" opinion that took a highly restrictive view of Clean Water Act jurisdiction, joined by Chief Justice Roberts and Justices Thomas and Alito. Justice Kennedy agreed with the plurality solely on the decision to vacate the lower court's ruling, but he wrote a separate "concurring" opinion to explain why.

Justice Stevens, who would have affirmed the lower court, wrote a strong dissenting opinion, joined by Justices Souter, Ginsburg, and Breyer. Although Justice Kennedy’s opinion provided the crucial fifth vote for the remand, his opinion is highly critical of Scalia’s plurality opinion and takes a substantive position much closer to that of the dissenting justices.

With that introduction, I will delve into the substance of the opinions. Justice Kennedy, whose opinion is likely to carry great weight, writes that the test for Clean Water Act jurisdiction over wetlands is whether there is a “significant nexus” between the wetlands in question and navigable waters. Kennedy recognizes, as ELI emphasized in our amicus brief, that wetlands perform critical functions related to the integrity of navigable waters—functions like pollutant trapping and filtering, flood control, and runoff storage. As a result, when particular wetlands, either alone or in combination with similar wetlands, significantly affect—in the words of the Clean Water Act—“the chemical, physical, and biological integrity” of navigable waters, these wetlands come within federal jurisdiction. Justice Kennedy notes that the wetlands parcels in both *Rapanos* and *Carabell* may, on further review by the lower courts, turn out to be jurisdictional under his significant nexus test.

Where wetlands are adjacent to truly navigable waters such as lakes and rivers, a significant nexus—and thus federal jurisdiction over those wetlands—can be presumed. The problem, in Justice Kennedy’s view, arises when wetlands are adjacent to *non-navigable tributaries* of navigable waters, as was the case in *Rapanos* and *Carabell*. Because he thinks the Corps’ regulations on adjacent wetlands are potentially overbroad, Kennedy wants to require the Corps to establish a significant nexus through tributaries on a case-by-case basis—though his opinion also welcomes “more specific regulations” from the Corps. The call for better regulations is also made by the Chief Justice in his own brief concurrence, and by Justice Breyer, in his separate dissent.

Justice Scalia’s plurality opinion, while agreeing with Justice Kennedy about the remand to the Sixth Circuit, reaches this conclusion on radically different grounds. Scalia begins by rejecting altogether the Corps’ inclusion of intermittent or ephemeral water flows as “waters of the United States.” He wants instead to hold that the “plain language” of the statute, which he interprets based on a dictionary definition of the word “waters,” does not authorize the Corps’ reading. Furthermore, he notes that even if it did, the inclusion of intermittent flows would impinge on the States’ traditional power over land and water use, and stretch the outer limits of Congress’ power under the Commerce Clause. As a result, the plurality interprets the phrase “waters of the United States” to include only “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ . . .” For “adjacent wetlands” to come under federal jurisdiction, writes Scalia, they must both (1) be adjacent to a water of the United States, as he idiosyncratically defines the term; and (2) have a “continuous surface water connection” with that water, another requirement that he reads into the statute.

The same jurisdictional definition—“waters of the United States”—applies to the Clean Water Act requirement for an industrial plant or a sewage treatment plant to get a permit to discharge wastewater under Section 402. Justice Scalia notes that the 402 permit program isn’t at issue in his decision, but he goes on to try to distinguish the two cases. He says that the law forbids addition of pollutants “to” navigable waters, not “directly” to navigable waters. He then argues

that the intervening “conduits” do not have to be “waters of the United States,” so it doesn’t matter that he has excluded so many stream miles from Clean Water Act jurisdiction.

Finally, Justice Stevens’ dissent would have deferred to the Corps’ regulatory definition of “waters of the United States” and affirmed the Sixth Circuit’s finding of federal jurisdiction in *Rapanos* and *Carabell*.

What is the outcome of these disparate opinions, which make up a 4-1-4 tally of the sitting justices? Under Supreme Court precedent, when such a fragmented Court decides a case, and, as here, no single rationale explaining the result has the assent of five justices, the holding of the Court is the position taken by the justices or justice who concurred in the judgment on the *narrowest grounds*. Under this rule, Justice Kennedy’s opinion, rather than Justice Scalia’s plurality opinion, appears to carry the day and will likely control in most future cases.

A final note about this case. Despite the land owners’ arguments that the Corps’ interpretation would exceed the authority of Congress to regulate under the Commerce Clause, the Supreme Court decided the case on statutory, and not constitutional, grounds. Notwithstanding comments made by several justices about avoiding interpretations of regulations that would raise significant constitutional questions, the Court did not rule directly on the scope of Congress’ power to protect wetlands and waterways under the Commerce Clause.

I will close with several observations about the consequences of the Court’s splintered ruling—

- (1) More litigation will certainly follow in these and similar cases.
- (2) This decision provides that the Corps may continue to assert jurisdiction over wetlands adjacent to non-navigable tributaries of traditional navigable waters. However, to demonstrate jurisdiction, the Corps will be obliged, on a case-by-case basis, to establish a significant nexus between the wetlands in question and navigable waters. This will result in the need for parties to produce additional evidence in contested cases, and more generally, in an increased administrative burden on both developers and the Corps.
- (3) Three justices have urged the Corps to enact new regulations that would help to identify and define the categories of adjacent wetlands appropriately subject to federal jurisdiction, and the Corps will certainly face pressure to comply. It is worth noting that the Corps and EPA, in the wake of the *SWANCC* decision, initiated a rulemaking process on Clean Water Act jurisdiction that ultimately went nowhere.
- (4) Four justices are now on record as believing that tributary stream flow must be essentially continuous for such streams to be subject to federal jurisdiction as “waters of the United States.” If this view commands a majority vote in the future, only a legislative response—and not mere regulations—can change it.
- (5) A distinguished counsel for one of the land owners’ amici has noted that *all* waters are hydrologically connected. As a scientific matter, this is true. And it underlines the important fact that a watershed is a *system* of waterways, flowing from distant headwaters to rivers and the

sea. The navigability legal standard is ultimately not very helpful in deciding who should regulate the filling of and discharges into parts of such a water system, and in drawing clear jurisdictional lines.

(6) Regulation of waters based on “navigability” is not Congress’ only source of authority under the Commerce Clause power: Congress may regulate activities that, cumulatively, have substantial effects on interstate commerce. Whether Congress in fact intended to authorize regulations on that basis under the Clean Water Act, and if so how far this power reaches, are issues that remain unresolved by the Court’s decision.