The Ninth U.S. Circuit Court of Appeals has upheld the conviction of Joseph Robertson for wetlands violations under the federal Clean Water Act. The court held that the proper test for defining “waters of the United States” is the “significant nexus” test set forth in Justice Anthony Kennedy’s opinion in Rapanos v. United States (2006). See United States v. Robertson, No. 16-30178, -- F.3d --, 2017 WL 5662532 (9th Cir. Nov. 27, 2017).

The facts underlying the conviction were that in the process of excavating and constructing a series of ponds on both National Forest System lands and a privately owned mining claim, Robertson discharged dredge and fill material, without permits, into surrounding Montana wetlands and into an adjacent tributary that runs into Cataract Creek. Cataract Creek is a tributary of the Boulder River, which in turn is a tributary of the Jefferson River, a traditionally navigable water of the United States. Robertson challenged his conviction by arguing that, among other things, the federal government did not have jurisdiction under the Clean Water Act, 33 U.S.C. § 1251 et. seq. (CWA) because the wetlands and the adjacent tributary into which he deposited dredge and fill materials were not “waters of the United States.” Robertson relied on the narrow definition of “waters of the United States” contained in Justice Antonin Scalia’s plurality decision in Rapanos. Robertson’s appeal resulted in the Ninth Circuit revisiting the “rather complex picture” painted by the fractured Rapanos decisions.

In Rapanos, the Supreme Court confronted the issue of whether wetlands that did not contain or directly abut traditional navigable waterways were “waters of the United States” and thus subject to CWA jurisdiction. The Court split 4-1-4 in rejecting the Sixth Circuit’s decision that a “hydrological connection” between wetlands and navigable waters qualifies the wetlands as “waters of the United States” under the CWA.

In the plurality opinion, Justice Scalia concluded that a simple “hydrological connection” to a navigable water is not enough to subject a wetland to CWA jurisdiction. In order to be subject to CWA jurisdiction, he held that the wetland must (1) be adjacent to a channel that contains a “water of the United States,” meaning “a relatively permanent body of water connected to traditional interstate navigable waters,” and (2) have a “continuous surface connection” with the “water of the United States,” such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” 547 U.S. at 742. According to the plurality, the term “waters of the United States” “does not include channels through which water flows intermittently or ephemerally.” Id. at 739.

In his concurring opinion, Justice Kennedy opined that there need not be a continuous surface connection between a wetland and a continuously flowing body of water in order for the wetland to be subject to CWA jurisdiction. According to Justice Kennedy, CWA jurisdiction over wetlands is satisfied if the wetland has a “significant nexus” to a downstream traditional navigable water -- a condition that is satisfied if the wetland has a significant effect on the “chemical, physical, and biological integrity” of the navigable water. Id. at 779.

In the dissenting opinion in Rapanos, Justice John Paul Stevens stated that he would uphold the Army Corps’ broad definition of “waters of the United States” to include any wetland that is adjacent to a navigable water or its tributaries. 547 U.S. at 787, 792. Justice Stevens observed that both the plurality and Justice Kennedy’s concurrence “fail[ ] to give proper deference to the agencies entrusted by Congress to implement the [CWA].” Id. at 810. Justice Stevens “assume[d] that Justice Kennedy’s approach will be controlling . . . because it treats more of the nation’s waters as within [CWA] jurisdiction,” but he would uphold jurisdicition even “in the unlikely event that the plurality’s test is met but Justice Kennedy’s is not.” Id. at n. 14.

In Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007), the Ninth Circuit had held that Justice Kennedy’s concurrence was controlling. In his appeal, Robertson argued that the Ninth Circuit’s en banc holding in United States v. Davis, 825 F.3d 1014 (9th Cir. 2016), changed the analysis for determining the controlling opinion of a fragmented Court under the Supreme Court’s decision in Marks v. United States (1977).
Marks held that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.” Id. at 193. Applying Marks and Davis, the Robertson court reasoned that in a contest between Justice Scalia’s plurality decision in Rapanos and Justice Kennedy’s concurrence—“both of which supported the majority judgement”—Justice Kennedy’s concurrence “is narrower than the plurality opinion because it restricts federal authority less” and remains the controlling opinion in Rapanos. Id. As the trial court determined CWA jurisdiction to “exist under the ‘significant nexus’ test set forth in Justice Kennedy’s concurrence in Rapanos,” the Ninth Circuit held that there was “no error” and affirmed. Id.

As the Robertson court observed, three circuits (First, Third and Eighth) have explicitly concluded that CWA jurisdiction can be based on either the Rapanos plurality opinion or Justice’s Kennedy’s test; the Fifth Circuit has reached the same conclusion in an unpublished opinion; the Fourth Circuit has applied Justice Kennedy’s test without deciding if the plurality provides an alternative; and the Sixth Circuit has expressly not yet decided which test is controlling.

In response to the Rapanos decision, the EPA and the Army issued guidance regarding CWA jurisdiction in 2007 and 2008. Members of Congress and others asked the agencies to replace the guidance with a regulation and, at the conclusion of their rulemaking processes, the agencies issued the “Clean Water Rule: Definition of ‘Waters of the United States.’” 80 F.R. 37054 (“2015 Rule”). The 2015 Rule broadly defined waters of the United States. Thirty-one states sought judicial review of the 2015 Rule in multiple actions. See 82 F.R. 12532. Seven states and the District of Columbia then intervened in the cases. On October 9, 2015, the Sixth Circuit stayed the 2015 Rule nationwide.

On February 28, 2017, President Trump signed the “Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” The Executive Order requires that the EPA Administrator and Assistant Secretary of the Army for Civil Works review the 2015 Rule and “publish for notice and comment a proposed rule rescinding or revising the rule.” The Executive Order “directs that the EPA and the Department of Army shall consider interpreting the term ‘navigable waters’ in a manner ‘consistent with Justice Scalia’s opinion’ in Rapanos v. United States.” Id.

At least one commentator has argued that the Ninth Circuit’s decision in the Robertson case could make it more difficult for the Trump administration’s effort to adopt a new CWA jurisdictional rule modeled on Justice Scalia’s plurality decision in Rapanos. We question whether the Robertson decision alone is likely to have that effect. In any case, this remains a very controversial area that continues to evolve and is sure to generate further litigation following agency action. Stay tuned. Demonstrating that the government does not base its payment decisions on compliance with the regulation in question. Evidence that the government has paid claims in the past despite knowing of similar regulatory violations will be extremely important.

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