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HOT TOPICS

Supreme Court Plurality Decision Muddies "Navigable Waters"

By Jacki Lopez

On June 19, 2006, the Supreme Court issued a decision that may have ended a 17-year saga for John Rapanos and his four fateful wetlands. But, maybe not. In a 4-1-4 decision, with the plurality opinion authored by Justice Scalia, the Court held that the Army Corps of Engineers only has jurisdiction over "relatively permanent, standing, or continuously flowing bodies of water," as opposed to the much broader definition of "navigable waters" offered by the Army Corps of Engineers and the Sixth Circuit Court of Appeals. *Rapanos v. U.S.*, 126 S. Ct. 2208, 2225 (U.S. 2006). The concurring opinion authored by Justice Kennedy, however, provided a significantly different definition of the Corps' jurisdiction. *Rapanos*, 126 at 2252. This fracture presents an interesting, and increasingly common quandary for legal scholars and practitioners alike: is a plurality's analysis binding as *stare decisis* on the lower courts even though it is not a pure majority opinion?

There is currently no compulsory test for the lower courts to determine how such decisions should be interpreted. According to the holding in *Marks v. U.S.*, 430 U.S. 188, 193 (1977) "[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 judgments on the narrowest grounds....'" Simply put, you can rely on the opinion that deals most directly with your particular issue. Yet, application of the *Marks* analysis will likely prove useless with the *Rapanos* decision because the analysis requires some common reasoning in the plurality decision. The only common denominators in the *Rapanos* decision were that the cases be remanded and the Sixth Circuit decisions vacated.

Because the Scalia opinion offers one definition of "navigable waters" and the Kennedy opinion a nearly unrelated definition, the Army Corps of Engineers, environmentalists, landowners, lawyers, and the lower courts will continue to struggle with the definition of "navigable waters" and the scope of the Clean Water Act. In fact, Justice Roberts lamented about this dilemma in his concurring opinion, "[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act." *Rapanos*, 126 at 2236. It seems intuitive that the courts would follow plurality opinions; however, both lower courts and the Supreme Court routinely ignore plurality opinions as precedent. *See Seminole Tribe v. Fla.*, 517 U.S. 44 (1996)(overruling plurality's opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)); *see also Teaque v. Lane*, 489 U.S. 288 (1989)(ignoring plurality opinion in *Stone v. Powell*, 428 U.S. 465 (1976)).

In a case stayed pending the *Rapanos* decision, the Northern District of Texas reverted to Fifth Circuit precedent regarding "navigable waters," in part because the Supreme Court failed to reach a majority consensus regarding the scope of the Clean Water Act and definition of "navigable waters." *U.S. v. Chevron Pipe Line Co.*, No. 5:05-CV-293-C ECF, 2006 U.S. Dist. LEXIS 47210, *22 (N.D. Tex. June 28, 2006). This type of holding is sure to be common in the coming years, and the issue of "navigable waters" will likely end up before the Supreme Court again. In the meantime, we are left to traverse jurisprudence less penetrable than "navigable waters."

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1. Justice Kennedy not only disagreed with the plurality's definition of "navigable waters" (agreeing with the dissent that "navigable waters" can be intermittent), he felt the appropriate inquiry was based on a "significant nexus" standard and not on the definition of "navigable waters."