Opinion Conclusion

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO, concluded:

1. The phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams," "oceans, rivers, and lakes," Webster's New International Dictionary 2882 (2d ed.), and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of that phrase is thus not "based on a permissible construction of the statute." Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 843. Pp. 12–21.

(a) While the meaning of "navigable waters" in the CWA is broader than the traditional definition found in The Daniel Ball, 10 Wall. 557, see Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers, 531 U. S. 159, 167 (SWANCC); United States v. Riverside Bayview Homes, Inc., 474 U. S. 121, 133, the CWA authorizes federal jurisdiction only over "waters." The use of the definite article "the" and the plural number "waters" show plainly that §1362(7) does not refer to water in general, but more narrowly to water "as found in streams," "oceans, rivers, and lakes," Webster's New International Dictionary 2882 (2d ed.). Those terms all connote relatively permanent bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Pp. 12–15.

(b) The Act's use of the traditional phrase "navigable waters" further confirms that the CWA confers jurisdiction only over relatively permanent bodies of water. Traditionally, such "waters" included only discrete bodies of water, and the term still carries some of its original substance, SWANCC, supra, at 172. This Court's subsequent interpretation of "the waters of the United States" in the CWA likewise confirms this limitation. See, e.g., Riverside Bayview, supra, at 131. And the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from "navigable waters," including them in the definition of "'˜point sources,'" 33 U. S. C. §1362(14). Moreover, only the foregoing definition of "waters" is consistent with CWA's stated policy "to recognize, preserve, Cite as: 547 U. S. ____ (2006) 3 Syllabus and protect the primary responsibilities and rights of the

States . . . to plan the development and use . . . of land and water resources . . . .” §1251(b). In addition, “the waters of the United States” hardly qualifies as the clear and manifest statement from Congress needed to authorize intrusion into such an area of traditional state authority as land-use regulation; and to authorize federal action that stretches the limits of Congress’s commerce power. See SWANCC, supra, at 173. Pp. 15–21.

2. A wetland may not be considered “adjacent to” remote “waters of the United States” based on a mere hydrologic connection. Riverside Bayview rested on an inherent ambiguity in defining where the “water” ends and its abutting (“adjacent”) wetlands begin, permitting the Corps to rely on ecological considerations only to resolve that ambiguity in favor of treating all abutting wetlands as waters. Isolated ponds are not “waters of the United States” in their own right, see SWANCC, supra, at 167, 171, and present no boundary-drawing problem justifying the invocation of such ecological factors. Thus, only those wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between the two, are “adjacent” to such waters and covered by the Act. Establishing coverage of the Rapanos and Carabell sites requires finding that the adjacent channel contains a relatively permanent “water of the United States,” and that each wetland has a continuous surface connection to that water, making it difficult to determine where the water ends and the wetland begins. Pp. 21–24.

3. Because the Sixth Circuit applied an incorrect standard to determine whether the wetlands at issue are covered “waters,” and because of the paucity of the record, the cases are remanded for further proceedings. P. 39.

Comment

From: Kelly Hunter Foster
Date: Wed, 1 Mar 2017 10:17:35 -0600
Waterkeeper Alliance

I would add the caution that the Scalia opinion is more complex than indicated by the syllabus.
There are many nuances in the opinion itself and in the footnotes that are very important.
The comments will filed on the proposed rule has a summary of the divergent opinions in Rapanos that may be helpful in getting a general understanding of the Scalia test and the ramifications of adopting this approach, as well as some of the reasons why it would be inconsistent with Congressional intent to adopt it as the sole basis for CWA jurisdiction.

If you are up for it, the entire section on jurisdiction starting on page 8 is helpful in understanding the issues we will need to engage on with the EO and new rulemaking, but the discussion of the Scalia opinion starts on page 15.