

Written by Marten Law

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The Third Circuit is the latest federal appeals court to attempt to decipher the U.S. Supreme Court's *Rapanos v. United States* [1] decision. *Rapanos* is the 4:1:4 decision from 2006 – famous in Clean Water Act (“CWA”) circles – in which the Supreme Court announced differing standards for delineating the reach of federal jurisdiction over wetlands and other “isolated waters.” In *United States v. Donovan*,

[2]

the Third Circuit, joining two other circuits, holds that a wetland falls within CWA jurisdiction if it satisfies

either

test announced in the fractured

Rapanos

decision. Specifically, the court held that a wetland falls within CWA jurisdiction if: (1) Justice Scalia's plurality test is met – i.e., there is a “continuous surface connection” between a wetland and a water of the United States in its own right, “so that there is no clear demarcation between ‘waters’ and ‘wetlands’”;

or

(2) Justice Kennedy's “significant nexus” test is met – i.e., there is “a significant nexus to waters that are or were navigable in fact or that could reasonably be so made” so that, “either alone or in combination with similarly situated lands in the region,” the wetlands “significantly affect the chemical, physical, and biological integrity of the covered waters more readily understood as ‘navigable.’”

Donovan follows on the heels of the U.S. Army Corps of Engineers' (“Corps”) recently released draft guidance regarding CWA jurisdiction. [3] The draft guidance relies heavily on

Justice Kennedy's concurring opinion in

Rapanos

, and replaces the Corps' previous 2008 guidance interpreting CWA jurisdiction under

Rapanos

. Since recent congressional efforts to clarify the CWA following

Rapanos

have failed and the Supreme Court appears unwilling to revisit the issue anytime soon, lower court decisions and agency guidance will continue to guide CWA jurisdiction for the foreseeable future.

Statutory Background

The CWA prohibits the unpermitted discharge of pollutants into “navigable waters” from any point source.

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Read more at: <http://www.martenlaw.com/newsletter/20111206-clean-water-act-jurisdiction>

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