

Comments on Clean Water Act Jurisdiction following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States

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My comments concern Appendix D (Legal Definition of “Traditional Navigable Waters”), which states that under 33 CFR §328.3(a)(1) you will continue to assert Clean Water Act (CWA) jurisdiction over all “traditional navigable waters.” The guidance set forth in the appendix unlawfully expands the meaning of 33 C.F.R. §328.3(a) (1) with regard to non-tidal waters, and blatantly misinterprets a century and a half of case law concerning the meaning of traditional navigable waters, including the ruling of a majority of the Supreme Court Justices in *Rapanos v. United States*, ___ U.S. ____, 126 S.Ct. 2208 (2006).

Title 33 C.F.R. §328.3(a)(1) includes “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” Appendix D states that you will continue to assert jurisdiction over these “(a)(1) waters,” which it describes as traditional navigable waters. But you go on to state that “these (a)(1) waters include all of the ‘navigable waters of the United States,’ defined in 33 C.F.R Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN.)”

I agree that subsection (a) (1) covers traditional navigable waters; however, “traditional navigable waters” is synonymous with “navigable waters of the United States.” Thus, contrary to Appendix D, mere navigability-in-fact does not make a water body a traditional navigable water. There is absolutely no legal authority for your contention that the (a) (1) waters include “all other waters that are navigable-in-fact.” Equally lacking in legal authority is your assertion that “[i]f the federal courts have determined that a water body is navigable-in-fact under federal law for any purpose, that water body qualifies as a ‘traditional navigable water’ subject to CWA jurisdiction under 33 C.F.R. § 328.3(a) (1) and 40 C.F.R. §230.3(s) (1).”

As explained below: (1) there is only one set of traditional navigable waters and it is coextensive with navigable waters of the United States; (2) non-tidal waters are navigable waters of the United States only if they are navigable-in-fact and part of a continued highway of waterborne, interstate or foreign commerce; and (3) a majority of the current Supreme Court has ruled that Clean Water Act jurisdiction is limited to

navigable waters of the United States, certain of their tributaries, and wetlands adjacent to either.

In *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), the Supreme Court defined “navigable waters of the United States” for purposes of non-tidal waters:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade or travel on water. *And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.*

Id. at 563 (emphasis added). Although Appendix D cites *The Daniel Ball*, it quotes only the portion dealing with the meaning of navigable-in-fact. Conveniently omitted is the Court’s definition of navigable waters of the United States, which I have emphasized above. As explained by the Court in that case, a non-tidal water is a navigable water of the United States only if it is (1) navigable-in-fact *and* (2) part of a continued highway of waterborne, interstate or foreign commerce.

In the 1970s, the Corps attempted to expand the geographic scope of its authority under the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, which regulates activities in navigable waters of the United States. The Corps asserted that navigable-in-fact intrastate lakes are navigable waters of the United States if they merely have a present or historic land-based link to interstate or foreign commerce. The courts consistently rejected the Corps’ position, holding that a navigable-in fact intrastate lake is not a navigable water of the United States unless it is part of a continued highway of waterborne, interstate or foreign commerce. In a case involving the Great Salt Lake, the Tenth Circuit stated:

Although the definition of “navigability” laid down in *The Daniel Ball* has subsequently been modified and clarified ... its definition of “navigable water of the United States,” insofar as it requires a navigable interstate linkage by water, appears to remain unchanged.

Hardy Salt Co. v. Southern Pacific Transp. Co., 501 F.2d 1156, 1167 (10th Cir. 1974) (citations omitted). *See also, Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d

617 (8th Cir. 1979); *National Wildlife Federation v. Alexander*, 613 F.2d 1054 (D.C. Cir. 1979) (holding, respectively, that Lake Minnetonka and Devil's Lake are not navigable waters of the United States).

After Congress passed the CWA, 33 U.S.C. § 1251 *et seq.* in 1977, the courts began to refer to navigable waters of the United States as traditional navigable waters, in order to distinguish them from the more expansive “navigable waters” regulated by the CWA. From that time forward, the courts have consistently used the terms “traditional navigable waters” and “navigable waters of the United States” synonymously. Furthermore, it is well-settled that the traditional navigable waters covered by 33 CFR § 328.3(a)(1) are coextensive with navigable waters of the United States. Indeed, in the *Rapanos* decision, both the plurality and Justice Kennedy emphasized this point. The plurality described all of the waters that fall within each subsection of 33 CFR § 328.3; the (a)(1) waters, according to the plurality, are “traditional *interstate* navigable waters.” 126 S.Ct. at 2216 (emphasis added). Justice Kennedy observed that subsection (a)(1) describes the “navigable waters of the United States,” as defined in *The Daniel Ball* and *Appalachian Power*:

In a regulation the Corps has construed the term “waters of the United States” to include not only waters susceptible to use in interstate commerce - the traditional understanding of the term “navigable waters of the United States,” *see e.g., United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406-408, 61 S.Ct. 291, 85 L.Ed. 243 (1940); *The Daniel Ball*, 10 Wall. 557, 563-564 (1871) - but also tributaries of those waters and, of particular relevance here, wetlands adjacent to those waters or their tributaries. 33 CFR §§328.3(a) (1), (5), (7) (2005).

_____ U.S. at _____, 126 S.Ct. at 2237. Thus, both the plurality and Justice Kennedy, that is, a majority of the Court, foreclosed your contention that subsection (a)(1) embraces such waters as the Great Salt Lake or Lake Minnetonka that are not interstate and are not part of a continued highway of waterborne, interstate or foreign commerce.

Furthermore, regardless of what waters are covered by the text of subsection (a)(1), a majority of the Supreme Court made clear in *Rapanos* that CWA jurisdiction can extend only to navigable waters of the United States, certain tributaries of such waters, and wetlands adjacent to either. Although the plurality and Justice Kennedy disagreed on what constitutes a “tributary” and an “adjacent wetland,” they agreed that those features must at least have some relationship to a navigable water of the United States. The plurality said that the term “waters of the United States” “includes only (1) navigable *interstate* waters; (2) relatively permanent, standing or flowing bodies of water” that are tributaries to navigable *interstate* waters; and (3) wetlands that have a continuous surface connection to such waters. 126 S.Ct. at 1227. Justice Kennedy stated in his concurrence that any non-navigable water that flows into a traditional navigable water is a “water of the United States” if it has a “significant nexus” to the navigable water, regardless of the

duration or frequency of its flow. He rebuffed the plurality's requirement of a continuous surface connection for wetlands jurisdiction, stating that the "significant nexus" test should govern that determination as well:

Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term "navigable" some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense

___U.S. at ____, 126 S.Ct. at 2248. As noted, Justice Kennedy equates traditional navigable waters with navigable waters of the United States.

Appendix D cites *Utah v. United States*, 403 U.S. 9 (1971), for the proposition that the Great Salt Lake is "navigable under federal law even though it 'is not part of a navigable interstate or international commercial highway.'" That case concerned Utah's efforts to assert ownership over certain shorelands around the lake and had nothing to do with federal regulatory authority. Thus, it is highly misleading for you to rely on that case in an effort to justify the assertion of CWA jurisdiction.

As explained in *Utah v. United States*, upon asserting their independence from Great Britain, the thirteen original states, as successors to the English Crown, claimed title to all submerged lands under the navigable-in-fact waters located within their borders. Under the equal footing doctrine, states subsequently admitted to the Union have the same property rights in waters that were navigable-in-fact on the date of their admission to the Union. Thus, Utah's title claim turned on whether the Great Salt Lake was navigable-in-fact on January 4, 1896. In ruling that the lake was navigable-in-fact on that date, the Supreme Court quoted only the definition of "navigable-in-fact" from *The Daniel Ball* because, as the Court noted, the continued highway requirement is simply immaterial to the issue of ownership. *Id.* at 10. Indeed, as noted above, three years after *Utah v. United States*, the Tenth Circuit ruled in *Hardy Salt* that the Great Salt Lake is not a navigable water of the United States because it does not meet the continued highway requirement. Furthermore, the *Hardy Salt* court explicitly noted that nothing in *Utah v. United States* supports the argument that the Great Salt Lake is a navigable water of the United States. 501 F.2d at 1168-1169, n.5.

For a more detailed discussion of the overall issue, I refer you to an article that I recently published, *The Continued Highway Requirement as a Factor in Clean Water Act Jurisdiction*, 37 ELR 10747 (Oct. 2007). A copy is attached.

In sum, intrastate waters that are navigable-in-fact are not traditional navigable waters unless they are part of a continued highway of waterborne, interstate or foreign commerce. Appendix D should be revised accordingly because it overstates your authority under the CWA.