The Environmental Protection Agency today issued a proposed new rule that seeks to clarify exactly how far the federal government's jurisdiction reaches in requiring permits for the dredging and filling of wetlands. In doing so, President Obama's EPA is responding directly to Chief Justice John Roberts' lament in his concurring opinion in *Rapanos v. United States* that the agency had failed to clarify its jurisdictional authority. Under Justice Roberts' explicit directive, if EPA finalizes today's proposed regulations, the agency should be entitled to significant deference in its interpretation of the question of which waters it can regulate, the central issue in the new proposed rule. Whether Roberts will actually defer to EPA's interpretation of its statutory authority is, of course, another question but his *Rapanos* concurrence seems to suggest that he would.

Here is some background on the complex question of which wetlands come under federal authority. Under Section 404 of the Clean Water Act, anyone seeking to dredge or fill wetlands "into the navigable waters" of the United States is required to obtain a permit from the Army Corps of Engineers (or a state to which EPA has delegated authority to issue

wetlands permits). Regulatory authority for regulating wetlands is split between EPA and the Army Corp, with both agencies having policy authority and the Army Corps issuing permits. The question of what constitutes "navigable waters" is a contested one and the Clean Water Act itself gives very little guidance, defining "navigable waters" only as "waters of the United States." EPA has a regulation that further defines "waters of the United States," a definition that has led to three major U.S. Supreme Court decisions over the past almost thirty years.

In the first case, *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), a unanimous Court upheld EPA's regulatory definition of "waters of the United States" that included wetlands adjacent to traditionally navigable waters. No member of the current Court disputes the *Riverside* holding. In the second case, the high Court held 5-4 in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159* (2001) that U.S. jurisdiction did not extend to "isolated," non-navigable waters of the United States such as ponds. And in *Rapanos*, the Supreme Court issued a very splintered opinion with Justice Anthony Kennedy providing the decisive vote. The four conservatives (the plurality), including Justice Roberts, would have limited jurisdiction over wetlands to "relatively permanent, standing or continuously flowing bodies of water…" that are connected to traditional navigable waters. They would also recognize jurisdiction over wetlands with a "continuous surface connection" to relatively permanent bodies of water and might extend jurisdiction to seasonal bodies of water, especially those affected by drought that could cause them to dry up. They would strike the portion of the current EPA rule that extends jurisdiction beyond the parameters they set forth as outside the scope of the Clean Water Act's statutory definition of navigable waters. The four liberals would have upheld EPA's jurisdiction as applied to the facts in the *Rapanos* case and left the EPA rule in tact. Justice Kennedy joined with the conservatives to remand the case to the lower courts but wrote his own concurring opinion that differed dramatically from the conservatives' narrow interpretation of "navigable waters." He argued that the Clean Water Act extends federal jurisdiction to those wetlands with a 'significant nexus' to waters "that are or were navigable in fact or that could reasonably be so made." The lower court had failed to apply the "significant nexus" test, in Kennedy's view, so he joined the conservative plurality in remanding the case. The result of the *Rapanos* case was to require the Army Corps to determine on a case-by-case basis whether individual wetlands had a significant nexus as defined by Justice Kennedy.

So why is today's action responsive to Justice Roberts? Because in addition to joining the conservative plurality, Justice Roberts filed his own, very short, concurring opinion in *Rapanos*. In it he chastised EPA for failing to issue a new regulation after the second

wetlands decision, known as SWANCC, in order to clarify the agency's regulatory jurisdiction. Remember that the Court in SWANCC refused to allow EPA to regulate non-navigable wetlands and water bodies that are isolated from navigable waters even though EPA's definition of "waters of the United States" extended to such water bodies. EPA started a rule-making process in response to SWANCC but ultimately did not issue a new rule. As Roberts said about the failure to issue a new rule:

> The proposed rule making went nowhere. Rather than refining its view of its authority in light of our decision in SWANCC, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.

Roberts made clear that had EPA issued a rule after SWANCC clarifying its jurisdiction, the agency would have received generous deference from courts under *Chevron v. Natural Resources Defense Council:*

> Given the broad, somewhat ambitious, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.

Today's announcement of a new proposed rule responds directly to Justice Roberts' criticism of the agency. It clarifies the federal government's regulatory reach in two respects. First, the proposed rule defines certain types of water bodies as categorically having the "substantial nexus" to navigable waters that Justice Kennedy's *Rapanos* decision demands. Previously, permitting authorities had to determine substantial nexus on a case by case basis. Importantly, tributaries and impoundments of navigable waters are now automatically included within the agency's reach, whether or not they are permanent and free-flowing. Wetlands adjacent to tributaries and impoundments as well as to traditional navigable waters, territorial seas and interstate waters are also categorically included within the definition of waters of the United States. Second, the proposed rule eliminates the portion of the existing rule that most expansively defined the agency's jurisdiction, a provision that defined "waters of the United States" to include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie

potholes, wet meadows, playa lakes, or natural ponds." It replaces that language with a catch-all category called "other waters" that includes within the definition of waters of the U.S. bodies of water that, on a case-by-case basis, the Army Corps determines have a significant nexus with navigable water, interstate water or the territorial seas. The proposed rule also makes clear that the Corps has no jurisdiction over certain water bodies that do not meet the substantial nexus test.

EPA and the Army Corps are clearly aiming to define waters of the United States in a way that categorically includes a large portion of the nation's water bodies, especially those in the arid west that are often intermittently flowing. Estimates are that the new regulatory definition "restores protection to 20 million acres of wetlands and more than half our nation's streams." The NRDC's Jon Devine has a helpful post today explaining the environmental significance of the proposed rule. The scientific basis for doing so is set forth in an EPA report issued last fall. The agencies are also, however, responding to the test proposed by Justice Kennedy in requiring a substantial nexus to a traditional body of water for those bodies of water that do not fit within the new categories and in eliminating from the definition of waters of the U.S. the most questionable categories. If Justice Roberts' concurrence is to be taken seriously, the proposed rule, if finalized, should be entitled to substantial deference by reviewing courts.