Environmental Law & Property Rights

Testing *Rapanos*: *United States v. Robison* and the Future of "Navigable Waters"

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An apocryphal tale concerning Justice Story relates that "if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it."[1] Something similar certainly could be said of both the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers ("Corps") in their efforts to administer and enforce the Clean Water Act (CWA). Since the advent of the modern CWA in 1972, the EPA and the Corps have expanded their jurisdiction under the Act over "navigable waters" to include nonnavigable streams and wetlands remote from any genuinely "navigable" waterways, as that concept was understood historically. The U.S. Supreme Court often acquiesced in this effort, affirming unanimously in *United States v. Riverside Bayview Homes* that the Corps could exercise its CWA jurisdiction over wetlands adjacent to other waters covered under the Act, including tributaries of traditionally navigable waterways.[2]

Beginning with the Court's decision in *Solid Waste Agency of Northern Cook County v. Corps of Engineers*,[3] however, and continuing most recently with the Court's 2006 decision in *United States v. Rapanos*,[4] the Supreme Court has started recognizing important limitations on the scope of the federal government's authority under the Clean Water Act. Unfortunately, the Court's fractured 4-1-4 *Rapanos* decision has left the lower courts, federal and state agencies, and the public uncertain as to the present extent of the Act's jurisdiction.

The official position of the EPA and the Corps is that their jurisdiction under the CWA covers all waters that would satisfy *either* the test set forth in Justice Scalia's *Rapanos* plurality opinion *or* Justice Kennedy's concurrence.[5] Nonetheless, the Seventh, Ninth, and Eleventh Circuits have identified Justice Kennedy's "narrow" test as providing the controlling standard.[6] Under Justice Kennedy's test, the CWA extends to all waters or wetlands that bear a "significant nexus" to traditionally navigable waterways.[7] In contrast, the plurality would extend the Act's jurisdiction only to "relatively permanent, standing or flowing bodies of water" and wetlands "with a continuous surface connection to bodies that are 'waters of the United States' in their own right."[8]

Some have noted, however, that Justice Kennedy's test could potentially exclude from coverage some waters and wetlands that would otherwise be covered by the plurality's test.[9] This quirk in the fractured *Rapanos* opinion arguably was dispositive in the Eleventh Circuit's recent decision in *United States v. Robison*.[10] In that case, the court overturned the conviction of certain employees of McWane, Inc. in Birmingham, Alabama on the grounds that the government had failed to prove a "significant nexus" between the nonnavigable Avondale Creek (into which McWane's employees had made unauthorized discharges) and the Black Warrior River (a traditionally navigable waterway miles downstream).[11] Arguably, Avondale Creek would have been covered under the *Rapanos* plurality's test due to the creek's permanent, flowing nature. The *Robison* case is significant in that it recognizes limitations on the jurisdiction of both the Corps and the EPA under the CWA and provides a strong argument that the *Rapanos* opinion does create meaningful limitation on the federal government's authority under the Act, even when applying what might be considered Justice Kennedy's looser test.

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I. Regulation of "Navigable Waters" under the Clean Water Act from 1972 to Riverside Bayview Homes

In 1972, Congress undertook comprehensive reform of the nation's existing water pollution control laws.[12] The result was the overhaul of the existing Federal Water Pollution Control Act (FWPCA). Congress's 1972 amendments to the FWPCA, which became commonly known as the Clean Water Act after further amendments in 1977, restructured federal authority over water pollution control, consolidating most regulatory authority over discharges to the nation's waters with the EPA, but leaving the Corps with jurisdiction over dredge and fill activity.[13]

Section 301(a) of the CWA broadly prohibits "the discharge of any pollutant by any person" into "navigable waters" unless authorized under the Act.[14] Compliance with Section 301(a) is generally satisfied through one of two permitting programs. Section 402 of the Clean Water Act establishes the National Pollutant Discharge Elimination System (NPDES) program, which regulates the discharge of pollutants from a "point source" into "navigable waters."[15] Section 404 of the Act governs the discharge of "dredged or fill material" into "navigable waters."[16] Section 402 is administered by the EPA, while Section 404 is administered by the Corps.[17] To distinguish between the two programs in laymen's terms, Section 402 would cover discharges of wastewater from a pipe into a creek, stream, or river, for example, while Section 404 would cover the disposal of riverbed material dredged as part of river channel navigation maintenance activities or the placement of fill material in a creek, stream, or river as part of a pier construction project.

Sections 402 and 404, although administered by different agencies, share a common statutory definition of the term "navigable waters." "Navigable waters" is defined broadly by the CWA as "the waters of the United States."[18] The Act provides no further definition of "waters of the United States," although the meaning of the phrase is critical to the jurisdictional scope of the Act.

In 1974, the Corps adopted regulations defining the term "navigable waters" consistent with the Corps' definition of the same phrase as used under the much older 1899 Rivers and Harbors Act, which authorized the Corps to maintain the navigability of the nation's interstate waterways.[19] Specifically, the Corps defined "navigable waters," as used under the Clean Water Act, as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[20] The Corps thus tied its definition to traditional concepts of navigability.

The Corps' 1974 definition of "navigable waters" was rejected in *Natural Resources Defense Council v. Callaway*, where the court held that the term "navigable waters" was "not limited to the traditional tests of navigability."[21] In response, in July of 1975, the Corps published "interim final regulations" selecting a broader approach to the regulation of tributaries under the Clean Water Act.[22] Under this rule, "navigable waters" were defined to include "[a]ll tributaries of navigable waters of the United States," interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce.[23]

What proved to be the most controversial aspect of the Corps' 1975 regulations was the Corps' revision of its definition of "navigable waters" to include all "freshwater wetlands" adjacent to other covered waters.[24] The term "wetlands" was itself subsequently defined broadly to include "those areas that are inundated or saturated by surface or ground water at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions"—i.e., swamps, marshes, and bogs.[25] The inclusion of all freshwater wetlands adjacent to other covered waters meant that inland development of marshland—perhaps miles from any traditionally navigable waterway—became subject to the often costly and onerous regulatory burdens of the Corps' Section 404 permitting program.

In *Riverside Bayview Homes*, the Supreme Court unanimously upheld the Corps' inclusion of "adjacent wetlands" in its definition of "navigable waters."[26] Relying largely on legislative history, the Court concluded that the term "navigable," as used in the Act, was of "limited import."[27] In adopting a broad definition of "navigable waters" as "waters of the United Stated," the Court reasoned, "Congress intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[28]

II. Limiting the Scope of "Navigable Waters" from *SWANCC* to *Rapanos*

In 1986, the Corps attempted to further expand its regulatory authority under the Clean Water Act by adopting what became known as the Migratory Bird Rule.[29] Under this rule, the Corps extended the jurisdictional scope of its Section 404 permitting authority to, *inter alia*, intrastate waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties."[30] The Corps thus intended to extend its permitting authority under the Clean Water Act to wholly isolated water bodies completely disassociated from waters that were navigable-in-fact. Under the Migratory bird rule, for example, discharge of dredge or fill material to a farmer's cattle pond could be regulated as "waters under the United States" pursuant to the Clean Water Act so long as the pond could be used as habitat for migratory birds.

SWANCC

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC"),[31] in a 5-4 opinion, the Supreme Court struck down the Migratory Bird Rule. In the *SWANCC* case, the Corps had extended its Clean Water Act jurisdiction over an abandoned sand and gravel pit that provided habitat for migratory birds pursuant to the Migratory Bird Rule.[32] In its opinion, the Court provided a significant corrective to its earlier *Riverside* opinion. The Court distinguished *Riverside* as a case involving wetlands that bore a "significant nexus" to traditionally navigable waters.[33] The Court, moreover, explicitly recognized that traditional concepts of navigability still had some relevance under the Clean Water Act—contra *Riverside*—even though Congress may have intended the Clean Water Act to reach some waters "that would not be deemed 'navigable' under the classical understanding of the term."[34]

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While the *SWANCC* decision made it clear that the Corps could not regulate wholly isolated waters as "navigable water" under the Clean Water Act, many issues concerning the scope of the Corps' jurisdiction remained. Among other things, the Corps' regulations did not provide a clear explanation of the "adjacency" concept. It also remained unclear what sort of channels qualified as "tributaries" under the Act. Do occasional swales, ditches or gullies, inundated only during heavy rainfall, constitute the sort of "tributaries" within the Corps' regulatory jurisdiction under the Clean Water Act? These issues eventually came to a head in the Supreme Court's recent opinion in *United States v. Rapanos*.

The *Rapanos* opinion involved two consolidated cases concerning the Corps' jurisdiction over wetlands under Section 404 of the Clean Water Act: *Rapanos v. United States*, (Petition 04-1034) and *Carabell v. United States Army Corps of Engineers*, (Petition 04-1384).[35] Petitioners in No. 04-1034, the Rapanoses and their affiliated businesses, deposited fill material without a Section 404 permit into wetlands on three separate sites near Midland, Michigan, which each had only a remote connection to traditionally navigable waterways.[36] The United States brought civil enforcement proceedings against the Rapanos petitioners, and the District Court found that the three described wetlands were "within federal jurisdiction" because they were each "adjacent to other waters of the United States."[37] On appeal, the Sixth Circuit affirmed, holding that there was federal jurisdiction over the wetlands at all three sites because "there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters."[38]

Petitioners in No. 04-1384, the Carabells, were denied a Section 404 permit to deposit fill material in a wetland located on a triangular parcel of land about one mile from Lake St.

Clair.[39] A man-made drainage ditch ran along one side of the wetland, separated from it by a four-foot-wide man-made berm.[40] The berm was largely or entirely impermeable to water and blocks drainage from the wetland, though it may have permitted occasional overflow to the ditch.[41] The ditch emptied into another ditch, which connected to Auvase Creek, which in turn emptied into Lake St. Clair.[42] After exhausting their administrative appeals, the Carabell petitioners filed suit in the U.S. District Court, challenging the exercise of federal regulatory jurisdiction over the site at issue.[43] The District Court ruled that there was federal jurisdiction over the site because the wetland was "adjacent to neighboring tributaries of navigable waters and ha[d] a significant nexus to 'waters of the United States.'"[44] Again, the Sixth Circuit affirmed, holding that the Carabell wetland was "adjacent" to navigable waters and covered under the Act.[45]

In a plurality opinion joined by Chief Justice Roberts, Justice Alito, and Justice Thomas, Justice Scalia recommended vacatur of the judgments of the Sixth Circuit in both Petition 04-1034 and Petition 04-1384, concluding that the Sixth Circuit had applied the wrong standard to determine if the wetlands in both cases are jurisdictionally-covered "navigable waters."[46] Due to the paucity of the record in both of these cases, the plurality concluded that on remand the lower courts should determine "whether the ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow," and if so, "whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates [a] boundary-drawing problem."[47] Justice Scalia reasoned that the term "navigable waters," defined as "the waters of the United States," could only refer to "relatively permanent, standing or flowing bodies of water," such as streams, oceans, rivers, lakes, and other bodies of water "forming geographical features."[48] Additionally, Justice Scalia concluded that 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 demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[49]

In a separate concurrence (joined by no other Justice), Justice Kennedy agreed that remand was appropriate in both cases, but disagreed with the two central conclusions of Justice Scalia's plurality opinion.[50] Unlike Justice Scalia, Justice Kennedy believed that intermittent, seasonal channels and swales could be included within the Act's definition of "navigable waters."[51] Justice Kennedy pointed out that many rivers in the western United States, like the Los Angeles River, ordinarily carry only a trickle of water, and often are completely dry for long periods of the year.[52] At other times, however, these rivers can carry tremendous, and often destructive, volumes of water, requiring concrete and steel channel regularization.[53] However, under the plurality's opinion, "The merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not."[54] Justice Kennedy also disagreed with the plurality's exclusion of wetlands lacking a continuous surface water connection to other jurisdictional waters.[55] In Justice Kennedy's opinion, the relevant connection between the jurisdictional water and the wetland sufficient for jurisdiction can permissibly be based on a broader set of considerations, including subsurface connections and ecological factors.[56]

Despite his differences with the plurality opinion, Justice Kennedy agreed that the judgments of the Sixth Circuit in the consolidated cases before the Court should be vacated and remanded.[57] Focusing on language in the Court's *SWANCC* opinion, Justice Kennedy concluded that the lower courts, on remand, should consider "whether the specific wetlands at issue possess a significant nexus with navigable waters."[58] In his opinion,

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[59]

Importantly, this test takes into consideration the relationship between the relevant adjacent tributary and traditional navigable water.[60] "When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[61]

III. The Circuits Respond to *Rapanos*

The fractured *Rapanos* decision has led to significant confusion among the courts, relevant federal and state agencies, and the regulated community concerning the current scope of the Clean Water Act. Federal Agencies and the courts have taken divergent views on the meaning of the *Rapanos* decision, and have struggled to articulate the new governing standard. At least five federal circuits have now weighed in on the meaning of the *Rapanos* decision—the Ninth,[62] Seventh,[63] First,[64] Fifth,[65] and Eleventh Circuits.[66]

In a short per curiam opinion in *United States v. Gerke Excavating, Inc.*,[67] a panel of the Seventh Circuit—including Judges Posner and Easterbrook—determined that Justice Kennedy's concurrence provided the controlling jurisdictional test under Section 404 of the Clean Water Act. The Court reasoned that the Kennedy concurrence was the narrower of the two majority opinions, and should control under the test set forth in *Marks v. United States*.[68] That case provides that when a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose.[69] The Seventh Circuit recognized, however, that in some cases Justice Kennedy's test might prohibit federal jurisdiction otherwise permitted by the plurality, i.e., in those cases where there is only a slight surface water connection between wetlands and a nonnavigable tributary.[70]

The Ninth Circuit followed the Seventh Circuit's lead in *Northern California River v. City of Healdsburg*,[71] adopting Kennedy's concurrence as the jurisdictional test under Section

402 of the Act. The First Circuit rejected the Seventh Circuit's rationale, holding in *United States v. Johnson*[72] that federal jurisdiction existed under Section 404 whenever the test set forth in the plurality opinion *or* Justice Kennedy's opinion is met—the same approach recommended by EPA and the Corps in their June 5, 2007 Joint Guidance.[73] The Fifth Circuit, in *United States v. Lucas*, having determined that the facts under review satisfied both tests, refrained from determining whether Justice Kennedy's concurrence provided the exclusive test for determining jurisdictional questions under the Clean Water Act. [74]

IV. *United States v. Robison*

The Eleventh Circuit, in *United States v. Robison*, adopted the same approach recommended by the Seventh and Ninth Circuits, namely that Justice Kennedy's *Rapanos* concurrence provides the exclusive test for determining the scope of federal jurisdiction under the Clean Water Act.[75] The *Robison* case, however, is unique because it involves a set of circumstances in which Justice Kennedy's concurrence—the "narrower" of the two opinions—prohibits an exercise of federal jurisdiction that would likely have been permissible under Justice Scalia's plurality opinion.

In *Robison*, the Eleventh Circuit reversed the convictions of four employees of McWane, Inc., for criminal violations of the Clean Water Act.[76] Among other things, the defendants had been charged with knowingly discharging pollutants into the waters of the United States in violation of McWane's Section 402 permit.[77] The specific violations at issue involved discharge of pollutants into Avondale Creek, which is adjacent to McWane's plant.[78] Avondale Creek flows into another creek called Village Creek.[79] In turn, Village Creek flows approximately twenty-eight miles into and through Bayview Lake, which was created by damming Village Creek.[80] On the other side of Bayview Lake, Village Creek becomes Locust Fork, and Locust Fork flows approximately twenty miles out of Bayview Lake before it flows into the Black Warrior River.[81]

At trial, the government presented testimony from an EPA investigator (Fritz Wagoner) that Avondale Creek is a perennial stream with a "continuous uninterrupted flow" into Village Creek.[82] Wagoner testified that there is a "continuous uninterrupted flow" not only from Avondale Creek into Village Creek, but also from Village Creek through Bayview Lake and into Locust Fork, and ultimately into the Black Warrior River.[83] Wagoner admitted that he had not conducted a tracer test to check the flow of Avondale Creek into the Black Warrior River, nor did Wagoner conduct tests to measure the volume of water discharged from Avondale Creek or between the bodies of water that connect Avondale Creek and the Black Warrior River.[84] The district court itself observed that there was no evidence of any actual harm or injury to the Black Warrior River.[85]

At trial, the parties agreed that the proper definition of "navigable waters" under the Clean Water Act was a key element of the government's case.[86] The district court charged the jury that "navigable waters" include "any stream which may eventually flow into a navigable stream or river," and that such stream may be man-made and flow "only intermittently."[87] The sufficiency of the trial court's charge—as well as the case presented by the government—turned on whether the government's evidence of a continuous flow between Avondale Creek (a relatively permanent, fixed body of water) and the Black Warrior River (a navigable-in-fact water) was sufficient to establish Clean Water Act jurisdiction over the defendant's discharge into Avondale Creek.[88]

On appeal, the parties disagreed as to the proper interpretation of the Supreme Court's *Rapanos* opinion, which had been handed down after the trial court conviction. The defendants argued that the *Rapanos* decision undermined the sufficiency of the district court's jury instruction and the government's case-in-chief.[89] For its part, the government contended that even if the jury charge was inconsistent with *Rapanos*, any error was harmless and did not warrant reversal.[90]

The Eleventh Circuit reviewed the *Rapanos* case, describing the plurality opinion and Justice Kennedy's concurrence consistently with the description of each provided above. The relevant question for the court was determining the controlling rule in light of the fractured opinion.[91] In light of the *Marks* standard, the Eleventh Circuit determined that it must choose between the plurality's test and Justice Kennedy's concurrence as the governing standard, rejecting the government's argument that Clean Water Act jurisdiction existed where either test was satisfied.[92] The court ultimately concluded that Justice Kennedy's test was the narrower of the two and should control, despite the fact that Justice Kennedy's test might prohibit Clean Water Act jurisdiction in some cases that would otherwise qualify under the plurality's test.[93] Consequently, a "water can be considered 'navigable' under the CWA only if it possesses a 'significant nexus' to waters that 'are or were navigable in fact or that could reasonably be so made.' Moreover, a 'mere hydrologic connection' will not necessarily be enough to satisfy the 'significant nexus' test."[94]

Based on Justice Kennedy's "significant nexus" test, the Eleventh Circuit concluded that the government had failed to meet its burden.[95] Although the government's witness testified that there is a continuous uninterrupted flow between Avondale Creek and the Black Warrior River, he did not testify as to any "significant nexus" between Avondale Creek and the Black Warrior River.[96] The government did not present any evidence, through Wagoner or otherwise, concerning the possible chemical, physical or biological effect that Avondale Creek may have on the Black Warrior River, and there was also no evidence presented of any actual harm suffered by the Black Warrior River.[97] Thus, the trial court's jury instruction was not "harmless," and the defendants' convictions were due to be vacated and remanded to the trial court for a new trial.[98] The court did not express any opinion as to whether Avondale Creek does or does not actually satisfy Justice Kennedy's test, but only that the government had not presented sufficient evidence to establish the "significant nexus" between Avondale Creek and the Black Warrior River.[99]

On June 13, 2008, the United States filed a petition for writ of certiorari with the U.S. Supreme Court, asking the Court to reverse the Eleventh Circuit's decision.[100] On December 1, 2008, the Supreme Court denied the government's petition.

V. The Future of "Navigable Waters"

On its face, the *Robison* case limits the scope of the Act to wetlands and non-navigable tributaries that can be shown to have a hydrologically significant connection to traditionally navigable waterways. The same should be true in other circuits—such as the Seventh and Ninth Circuit[101]—that have adopted Justice Kennedy's concurring opinion in *Rapanos* as providing the exclusive controlling test for Clean Water Act jurisdiction. Importantly, this test, as illustrated in the *Robison* case, could exempt from federal regulation wetlands and non-navigable waterways that might otherwise have been covered by Justice Scalia's plurality opinion.

However, it remains to be seen how far the Corps and EPA can expand the scope of "navigable waters" post-*Rapanos* through agency rulemaking. Justice Kennedy suggests that a case-by-case application of his test is only appropriate in the absence of "more specific regulations."[102] This was not lost on the *Rapanos* plurality, which noted that Justice Kennedy's concurring opinion "tips a wink at the agency, inviting it to try its same expansive reading again."[103]

The fracturing of the circuit courts over *Rapanos*'s meaning may also invite the Supreme Court to once again attempt to resolve the issue. And, the Supreme Court's perennial role in expanding or narrowing the scope of the Act again illustrates the continuing importance of appointments to the U.S. Supreme Court. Justices appointed during the Obama administration are, more likely than not, going to take a broader reading of the scope of the Clean Water Act's jurisdiction. However, unless and until one of the five justices in the *Rapanos* majority retire—Chief Justice Roberts, Justices Scalia, Alito, Thomas and Kennedy—the Court will most likely continue to recognize some limitations on the scope of the Clean Water Act.

Legislation seeking to undermine the import of the *Rapanos* decision is also on the horizon. A bill introduced by Congressman Oberstar in May of 2007, H.R. 2421, proposed adoption of the "Clean Water Restoration Act," which would expand the definition of "waters of the United States" to include:

> [A]ll waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.[104]

If reintroduced in the future and enacted into law, the Oberstar bill would push the scope of the Clean Water Act's jurisdiction to the full extent of Congress's Commerce Clause power. In doing so, the bill would undermine much of *Rapanos*'s import, and would force the Supreme Court, ultimately, to determine the extent of the federal government's authority to regulate the nation's waters under Article I, Section 8 of the U.S. Constitution, an issue the Court has avoided to this point. The Supreme Court did note in *SWANCC* that an overly broad exercise of federal authority over isolated waters would raise "significant constitutional questions."[105] If Congress enacts the Clean Water Restoration Act, the Court eventually may be presented with an opportunity to address those significant questions.

Undoubtedly, the *Rapanos* decision has created a significant amount of confusion and uncertainty among the lower courts as to the current jurisdictional scope of the Clean Water Act. The only thing certain at this point, however, is that we have not yet heard the last word on the scope of the Act's jurisdiction. It remains to be seen whether the other circuits adopting Justice Kennedy's "significant nexus" test will apply it as earnestly as the Eleventh Circuit. And, even were this to occur, regulatory and legislative efforts may ultimately scale back *Rapanos*'s significance.

Endnotes

1 Note, 37 Am. L. Rev. 911, 916 (1903).

2 474 U.S. 121 (1985).

3 531 U.S. 159 (2001).

4 547 U.S. 715 (2006).

5 *See* U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States (June 5, 2007), *available at* http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf.

6 *See* Northern California River v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007); Robison v. United States, 505 F.3d 1208 (11th Cir. 2007); United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006).

7 *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring).

8 *Id*. at 732, 742.

9 *See, e.g.*, *Gerke Excavating*, 464 F.3d at 725.

10 505 F.3d 1208 (11th Cir. 2007).

11 *Id*. at 1222.

12 *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 898 (Oct. 18, 1972).

13 *See generally*, U.S. Environmental Protection Agency, The Challenge of the Environment: A Primer on EPA's Statutory Authority (Dec. 1972) (discussing legislative history and purpose of the 1972 Federal Water Pollution Control Act Amendments).

14 33 U.S.C. § 1311(a).

15 *Id*. § 1342.

16 *Id*. § 1344(a).

17 *See id*. §§ 1342(a), 1344(a).

18 *Id*. § 1362(7).

19 39 Fed. Reg. 12,115 (1974).

20 *Id*. at 12,119.

21 392 F. Supp. 685, 686 (D.D.C. 1975).

22 40 Fed. Reg. 31,320 (1975).

23 *Id*. at 31,320-21.

24 *Id*. at 31,321.

25 33 C.F.R. 323.2(c) (1978).

26 474 U.S. 121 (1985).

27 *Id*. at 133.

28 *Id*.

29 51 Fed. Reg. 41,206 (1986).

30 *Id*. at 41,217.

31 531 U.S. 159 (2001).

32 *Id*. at 162.

33 *Id*. at 167.

34 *Id*. at 159.

35 *See Rapanos*, 547 U.S. at 729-30.

36 *Id*.

37 *Id*.

38 *Id*. at 729-30.

39 *Id*. at 730.

40 *Id*.

41 *Id*.

42 *Id*.

43 *Id*.

44 *Id*.

45 *Id*.

46 *Id*. at 757.

47 *Id*.

48 *Id*. at 732-33.

49 *Id*. at 742.

50 *See id*. at 759 (Kennedy, J., concurring).

51 *See id*. at 769.

52 *Id*.

53 *Id*.

54 *Id*.

55 *Id*. at 772.

56 *Id*. at 772-73.

57 *Id*. at 787.

58 *Id*.

59 *Id*. at 780.

60 *Id*. at 781.

61 *Id*. at 782.

62 Northern California River v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007).

63 United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006).

64 United States v. Johnson, 467 F.3d 56 (1st Cir. 2006).

65 United States v. Lucas, 516 F.3d 316 (5th Cir. 2008).

66 United States v. Robison, 505 F.3d 1208 (11th Cir. 2007).

67 464 F.3d 723 (7th Cir. 2006).

68 *Id*. at 724 (citing Marks v. United States, 430 U.S. 188, 193 (1977)).

69 Marks v. United States, 430 U.S. 188, 193 (1977).

70 *Gerke Excavating*, 464 F.3d at 725.

71 496 F.3d 993 (9th Cir. 2007).

72 467 F.3d 56 (1st Cir. 2006).

73 *See* Joint Guidance, *supra*, note 5.

74 516 F.3d 316 (5th Cir. 2008).

75 505 F.3d 1208 (11th Cir. 2007).

76 *Id*. at 1229.

77 *Id*. at 1213.

78 *Id*. at 1211.

79 *Id*.

80 *Id*.

81 *Id*.

82 *Id*.

83 *Id*. at 1211-12.

84 *Id*.

85 *Id*. at 1212.

86 *Id*. at 1215.

87 *Id*.

88 *See id*. 1222-24.

89 *Id*. at 1215.

90 *Id*. at 1216.

91 *Id*. at 1219.

92 *See id*. at 1221.

93 *Id*. at 1222.

94 *Id*. (citations omitted).

95 *Id*. at 1223.

96 *Id*.

97 *Id*.

98 *Id*. at 1224.

99 *See id*. at 1224 n.21.

100 United States v. McWane, Inc., Petition No. 08-223 (June 13, 2008).

101 *See Northern California River*, 496 F.3d 993; *Gerke Excavating*, 464 F.3d 723.

102 *Rapanos*, 547 U.S. at 718 (Kennedy, J., concurring).

103 *Id*. at 756 n.15.

104 *Available at* http://thomas.loc.gov/home/gpoxmlc110/h2421_ih.xml.

105 *See SWANCC*, 531 U.S. at 683-84.