Debating *Rapanos*

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Justice Kennedy's Analysis of Navigable Waters in *Rapanos*

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Five years ago in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*,[1] the Supreme Court rejected the Corps' and EPA's argument that isolated ponds in northern Illinois constituted "navigable waters" within the meaning of the Clean Water Act (CWA) because the ponds were used by migratory birds. The agencies' response to *SWANCC* was to avoid it. Ignoring the reasoning of *SWANCC*, the agencies claimed that they could regulate any water that is not isolated, and continued to assert jurisdiction over any non-navigable water that had "any hydrological connection" to a navigable water. It did not matter how far the water was from navigable water, how frequently it carried water, or how much water it carried. All that mattered was that it was connected somehow to navigable water.[2] By claiming that all "connected" waters were tributaries, the agencies erected a skeleton of "tributaries" which, they argued, provided a basis to regulate any wetland "adjacent" to the new-found tributaries.

Now, the United States Supreme Court, in the consolidated cases of *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*, has rejected the any-hydrological-connection theory.[3] *Rapanos* involved three wetland parcels (two "adjacent" to a ditch, one "adjacent" to a river) twenty miles away from the nearest navigable water. *Carabell* involved a wetland about a mile away from a traditional

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[1] 531 U.S. 159 (2001) (*SWANCC*).

[2] Government Brief in *Rapanos* at 31 ("[N]either the directness nor the substantiality of a tributary's connection to traditional navigable waters is relevant to the jurisdictional inquiry. . ."

[3] 2006 U.S. Lexis 4887, *1 (June 19, 2006).

navigable water. The wetland was near a ditch but separated from the ditch by an intervening berm. In both cases, the Sixth Circuit held that the wetlands were waters of the United States because they had a hydrological connection through a series of ditches, creeks, and culverts to navigable waters.

The Supreme Court vacated the Sixth Circuit's decisions and remanded the cases to the appellate court. While five of the nine justices agreed that the Corps had overstepped its bounds, the same five justices did not agree on what the proper standard is for determining jurisdiction. Justice Scalia wrote a four-justice plurality opinion, joined by Chief Justice Roberts and Justices Alito and Thomas. Justice Scalia's opinion emphasized the plain language of the CWA—i.e., the Act regulates "navigable waters"—and lambasted the agencies for regulating ditches, drains, and desert washes far removed from navigable waters. Although recognizing that the CWA goes beyond the traditional navigable waters, Justice Scalia interpreted the statute to reach "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,'" and to exclude "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[4]

Justice Kennedy concurred in the judgment but with his own rationale. He agreed with Justice Scalia that the government's argument did not give effect to the

[4] *Rapanos*, at 20-21.

statutory term "navigable" waters and that the government's disregard of regularity and volume of flow and proximity to navigable-in-fact waters led to an overbroad interpretation of "navigable waters." But he held that the "significant nexus" standard from *SWANCC* is the operative standard for determining whether a non-navigable water should be regulated under the CWA. The dissent, written by Justice Stevens and joined by Justices Souter, Ginsburg, and Breyer, would have affirmed the Corps' jurisdiction in both cases. Thus, the Court issued a 4-1-4 decision.

Chief Justice Roberts, lamenting this fractured result, pointed to *Grutter v. Bollinger*,[5] and *Marks v. United States*[6] as a guide for lower courts in interpreting *Rapanos*. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'"[7] Although commentators may debate how to determine the "narrowest grounds" in any given case, it is clear that Justice Kennedy's opinion will be critical to determining the implications of this case. Accordingly, this article examines Justice Kennedy's concurring opinion with a specific focus on identifying those aspects of his decision that establish limits on the Corps' jurisdiction and

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[5] 539 U.S. 306, 325 (2003).

[6] 430 U.S. 188, 193 (1977).

[7] *Rapanos* at 193.

identify the principles that must be considered in any case-by-case analysis of "significant nexus."

I. IMPORTANT PRINCIPLES OF JURISDICTION IN THE KENNEDY OPINION

Justice Kennedy begins his analysis by framing the issue before the Court as "Do the Corps' regulations, as applied to the wetlands in *Carabell* and the three parcels in *Rapanos*, constitute a reasonable interpretation of 'navigable waters' as in *Riverside Bayview* or an invalid construction as in *SWANCC*?"[8] He reconciles *Riverside Bayview* and *SWANCC*, the Court's only previous decisions on CWA jurisdiction, by showing that both cases applied a "significant nexus" standard:

> Taken together these cases establish that in some instances, as exemplified in *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking.[9]

While Justice Kennedy did not articulate the "bright-line" jurisdictional standard that many hoped would emerge from these cases, his opinion does recognize important limitations on federal jurisdiction under the CWA and establish principles that can be applied in determining whether non-navigable waters have the requisite nexus with traditional navigable waters.[10]

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[8] *Id.* at 9-10 (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). and *SWANCC*).

[9] *Id.* at 10.

[10] Some commentators have argued that the Kennedy opinion is more closely aligned with the dissent than with the plurality. This is wishful thinking. Kennedy disagreed with the dissent on most of the

A. Kennedy Rejects the Government's "Any Hydrological Connection" Theory of Jurisdiction.

The key element of Justice Kennedy's opinion is his rejection of the government's argument, which had been accepted by the Court of Appeals, that any hydrological connection to traditional navigable water, by itself, is enough to meet the "significant nexus" standard and to establish jurisdiction:

> [M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.[11]

Kennedy holds that to be jurisdictional, a non-navigable waterbody's relationship with traditional navigable waters must be "substantial."

Because the any-hydrological-connection theory had been the government's principal test for jurisdiction after *SWANCC*, Kennedy's careful rejection of the test will work a sea change in the regulation of waters under the CWA. Now, to establish that a non-navigable water (including a non-navigable wetland) is a water of the United States, it is apparent that the agencies must measure and establish, case by case, the nature of the non-navigable water's connection to, and relationship with, traditional navigable waters. The agencies have never before undertaken such a review.

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key points. He rejected the government's any-connection theory. He rejected the Corps' existing standard for identifying tributaries. He refused to defer to the Corps' interpretation of the statute. And he limited *Riverside Bayview* to its facts, holding that it did not support the government's claims of jurisdiction over all "non-isolated wetlands." Moreover, on all these points, Kennedy agrees with the plurality.

[11] *Rapanos* at 28.

Before *SWANCC*, relying on the so-called migratory bird rule, the presence of birds was enough to establish jurisdiction. Since birds can land anywhere, jurisdiction was easily established. After *SWANCC*, applying the hydrological connection theory, jurisdiction could be established by assuming that water would flow down gradient ultimately to a navigable water. Neither test required the agencies to examine the relationship between the non-navigable waterbody and a navigable water. And, one of the prominent arguments urged by the Solicitor General was that the any-connection theory must be upheld because any other jurisdictional theory would confront the government with difficult problems of proof. In spite of the government's remonstrations, however, Justice Kennedy now requires, for non-navigable wetlands, a showing that "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.'"[12]

[12] *Ibid*. at 23. Kennedy repeatedly emphasizes the importance of the relationship to traditional navigable waters (to be a "water of the United States," a non-navigable water must "perform important functions for an aquatic system incorporating navigable waters," *Id*. at 24, or "play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." *Id*. at 25).

B. Kennedy Rejects the Government's Existing Standard for Tributaries, in Particular, the Use of "Ordinary High Water Mark."

A second key element in Kennedy's analysis is his rejection of the Corps' approach to identifying "tributaries." Closely examining the Corps' regulations and the application of those regulations as documented in a 2004 report by the Government Accountability Office (GAO),[13] he concludes that the standard takes the Corps too far from traditional navigable waters.

He starts by noting that the "Corps views tributaries as within its jurisdiction if they carry a perceptible 'ordinary high water mark.' 328.4(c); 65 Fed. Reg. 12823 (2000)." He quotes the regulatory definition of "ordinary high water mark" (OHWM), which defines OHWM in terms of physical characteristics, not ordinary flow.[14] Importantly, the Federal Register notice he cites[15] includes an extensive discussion of many comments criticizing the Corps for defining OHWM in terms of physical characteristics rather than establishing a standard for identifying *ordinary* flow. Commentators pointed out that "ephemeral watercourses do not have flowing water and cannot develop an ordinary high water mark" and argued that the Corps "need[s]

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[13] The GAO was known at the time as the General Accounting Office. The GAO study cited by Justice Kennedy documented the Corps' use of "marks" on the barren desert landscape to assert jurisdiction hundreds of miles from the nearest navigable water. These "marks," the GAO reported, are often "remnants of a time when water flowed along a different course." The study also reported numerous instances in which the Corps districts used underground drain tiles, storm drain systems, and pipes to establish a hydrological connection to otherwise isolated features. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices In Determining Jurisdiction*, GAO-04-297, at 21, 24-26 (Feb. 2004) (GAO Study).

[14] *Rapanos* at 3 (citing 33 C.F.R. 328.3(e)) (lines on the bank, shelving, litter and debris).

[15] 65 Fed. Reg. 12823 (2002).

to define what constitutes 'ordinary flow' in an ephemeral watercourse that establishes an OHWM."[16] But the Corps in 2000 declined to address the issue, stating only that "ephemeral streams that are tributary to other waters of the United States are also waters of the United States, as long as they possess an OHWM."[17] Likewise, ditches: "non-tidal drainage ditches are waters of the United States if they extend the OHWM of an existing water of the United States."[18]

After citing this Federal Register discussion and the Corps' use of the term as applied in the field as evidenced by the GAO study, Justice Kennedy rejects the Corps' use of OHWM as a measure for identifying tributaries. He finds that:

> *[T]he breadth of this standard*—which seems to leave wide room for regulation of *drains*, *ditches*, and *streams remote* from any navigable-in-fact water and carrying only *minor water-volumes* towards it—*precludes its adoption* as the determinative measure . . . Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*.[19]

Kennedy's rejection of the Corps' use of ordinary high water mark is significant because this standard has been the basis for an extremely expansive view of jurisdiction over ditches, dry desert drainages, swales, gullies, and other non-

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[16] *Id.*

[17] 65 Fed. Reg. 12818, 12823. In 2002 the Corps finally acknowledged that it "should look at improving the definition of OHWM. This will be the subject of a separate review. . . . The frequency and duration at which water must be present to develop an OHWM has not been established for the Corps regulatory program." 67 Fed. Reg. 2020, 2026.

[18] *Id.*

[19] *Rapanos* at 24-25 (emphasis added). Justice Scalia was likewise unpersuaded by the Corps' treatment of "tributaries" and use of OHWM. *Ibid.* at 6-9.

wetland erosional features since its adoption.[20] Ultimately, Kennedy's dissatisfaction with the Corps' tributary standard leads him to reject the Government's arguments that it may regulate all wetlands that are adjacent to all tributaries.

Here, he explicitly parts company with Justice Stevens' dissent. Stevens argued that *Riverside Bayview* "squarely controls these cases,"[21] and held, based on *Riverside Bayview*, that the Corps may regulate all "non-isolated wetlands."[22] Kennedy, however, concludes that *Riverside Bayview* is not on point. *Riverside Bayview* applies only "to wetlands adjacent to navigable-in-fact waters."[23] Thus:

> The Corps' theory of jurisdiction in these consolidated cases--adjacency to tributaries, however remote and insubstantial--raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case.24

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[20] The Corps' website on administrative appeals of jurisdictional determinations documents the breadth of the Corps' jurisdictional reach. In Tucson, for example, the Corps determined that an ephemeral desert wash was a tributary to the Colorado River even though the wash terminated at a storm water detention basin hundreds of miles from the Colorado. The Corps determined that a "tributary connection" was established from the detention basin through a 6 inch diameter culvert. The culvert connected to a 1 foot wide channel, which connected to a concrete channel, which connected to a natural channel, which meandered through a residential neighborhood. Beyond that there was no channel, only paved surfaces. According to the Corps, however, "[t]hese road crossings act as conduits of the water and maintain the tributary connection" to three normally dry channels that finally connect to the Colorado River. U.S. Army Corps of Eng'rs, Los Angeles Dist., Admin. Appeal Decision, *Approved Jurisdictional Determination for the Sunrise Office Park, File No. 2001-00379-RJD*, at 2-4 (Sept. 7, 2001), *available at* http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/AS%20SENT%20FinalSunriseOfficeParkAppealDecision.pdf.

[21] *Rapanos* at 6.

[22] *Ibid.* at 11.

[23] *Ibid.* at 23.

[24] Kennedy at 23.

Instead, Kennedy finds that "[a]bsent more specific regulations, . . . 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."[25] Kennedy explains his rationale in imposing this requirement by noting that "[g]iven the potential overbreadth of the Corps' regulations [as it relates to tributaries], this showing is necessary to avoid unreasonable applications of the statute."[26] He adds further that the Corps "through regulations or adjudication may choose to identify categories of tributaries that, *due to their volume of flow* (either annually or on average), *their proximity to navigable waters*, or other relevant considerations, are significant enough that wetlands adjacent to them are likely…" to have a significant nexus to navigable waters.[27]

In sum, Kennedy (1) rejects the Corps' approach to tributaries—in particular, the reliance on "any hydrological connection" and "ordinary high water mark" and (2) rejects "adjacency to tributaries" as a measure of jurisdiction over wetlands near non-navigable waters because the "existing standard for tributaries . . . provides no . . . assurance . . . that wetlands adjacent to them are likely, in the majority of cases, to perform important functions of an aquatic system incorporating navigable waters."[28] Adding to *SWANCC*'s overturning of the Corps regulation at 33 C.F.R. § 328.3(a)(3)

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[25] *Ibid.* at 25.

[26] *Id.*

[27] *Ibid.* at 24 (emphasis added).

[28] *Id.*

("waters" that "could affect" interstate commerce), Kennedy's analysis in *Rapanos* effectively vitiates the Corps' regulations at 33 C.F.R. § 328.3 (a)(5) (tributaries) and (a)(7) (adjacent wetlands). The definitions of "adjacent" at § 328.3(c) and "ordinary high water mark" at § 328.3(e) are similarly suspect under Kennedy's analysis. It is no wonder that Chief Justice Roberts and Justices Kennedy and Breyer all call for rulemaking.

C. Except for Wetlands Adjacent to Traditional Navigable Waters, Kennedy Requires Significant Nexus Evaluation Case by Case.

Kennedy also disagreed with the dissent when it deferred to the Corps' assertion of jurisdiction over ditches and the wetlands claimed to be "adjacent" to them.

> [T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however *remote* and *insubstantial*, that *eventually may flow* into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far.[29]

He declines to defer because he is skeptical of the Corps' existing standard for identifying tributaries. And, because the standard for tributaries is overbroad, he finds no assurance that wetlands adjacent to such tributaries will have the necessary significant nexus. "Indeed, in many cases wetlands adjacent to tributaries covered by

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[29] *Ibid*. at 22 (emphasis added).

this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*."[30]

Thus, except in the case of wetlands adjacent to traditional navigable waters (i.e., the *Riverside Bayview* facts), absent further rulemaking by the agencies, he now requires a case-by-case showing of significant nexus.[31] He repeatedly cautions that "insubstantial," "speculative," or "minor flows" are insufficient to establish a "significant nexus."[32] Examining the records in the cases before the Court, he criticized the *Rapanos* record because it failed to provide crucial evidence about the "*quantity and regularity of flow in the adjacent tributaries*—a consideration that may be important in assessing the nexus" to navigable waters.[33] Likewise, in *Carabell*, the "Corps based its jurisdiction solely on the wetlands' adjacency to the ditch opposite the berm on the property's edge. As explained earlier, mere adjacency to a *tributary of this sort* is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow towards it."[34]

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[30] *Ibid*. at 25.

[31] *Id*.

[32] *Ibid*. at 22-24. Indeed, in the first case decided following the *Rapanos* decision, *United States of America v. Chevron*, No. 5:05-CV-293-C, 2006 U.S. Dist. Lexis 47210, *1 (D. Tex. June 28, 2006), the court looked for evidence of regularity and frequency of flow and whether the pollutant in question would "actually," as opposed to "speculatively," reach navigable-in-fact waters. *Chevron* at *28.

[33] *Rapanos* at 29 (emphasis added).

[34] *Ibid*. at 30.

D. Kennedy Sets Forth a New Standard for Assessing the Jurisdictional Status of Wetlands.

Justice Kennedy's "significant nexus" standard in effect replaces the Corps' regulatory definition of "adjacent." That definition would allow the regulation of all wetlands that are "bordering, neighboring, or contiguous" to any of the waters covered in the regulation at section 328.3(a)(1)-(7), which would include all tributaries, however defined. The Government had argued in its briefs to the Supreme Court that any hydrological connection would establish jurisdiction but that jurisdiction could also be established without any connection. "The Corps and EPA regulations that assert jurisdiction over wetlands that are 'adjacent' to other jurisdictional waters, without regard to the presence of hydrologic connections . . . reflect a reasonable and valid interpretation of the Act."[35] The Government further explained that it was reasonable for the Corps and EPA to rely on "the concept of 'adjacency,' which serves as a reasonable proxy for the presence of a hydrologic connection and for the importance of the wetland to the surrounding aquatic environment, to assert regulatory jurisdiction. . ."[36]

However, under Justice Kennedy's opinion, wetlands and other waters are now jurisdictional only if they have a significant nexus to traditional navigable waters. For "wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecological

[35] Carabell Government Brief at 18.

[36] *Id.* at 19.

interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone."[37] Absent new regulations, however, the Corps must make case-by-case findings that wetlands adjacent to non-navigable *tributaries* have a significant nexus to navigable waters. "Given the potential overbreadth of the Corps' regulations," Kennedy explains, "this showing is necessary to avoid unreasonable applications of the statute."[38] Thus, the Corps may not rely on the existing regulations. A significant nexus can not be presumed. It must be established case by case.

CONCLUSION

The upshot then of Justice Kennedy's concurrence is that the Corps' current regulations defining seven categories of waters as "waters of the United States" are seriously eroded. Justice Kennedy does not accept the Corps' approach to tributaries.[39] He rejects the Corps' use of ordinary high water mark as overbroad.[40] He holds that the Corps may not rely on "adjacency" to claim jurisdiction over wetlands near non-navigable waterbodies.[41] And he repeatedly emphasizes that "significant nexus" requires consideration of factors such as volume and frequency of flow and proximity

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[37] *Rapanos* at 23.

[38] *Ibid.* at 25.

[39] 33 C.F.R. Section 328.3(a)(5).

[40] *Id.* at Section 328.3(d).

[41] *Id.* at Section 328.3(a)(7) and (c).

to traditional navigable waters, factors that are not considered under the current regulations. Further, Justice Kennedy is writing against the background of SWANCC, in which the Supreme Court had previously rejected the "other waters" regulation at Section 328.3(a)(3). In sum, of the seven types of waters identified in the regulation as "waters of the United States," the only one that appears to survive Justice Kennedy's analysis (and certainly the plurality opinion) is Section 328.3(a)(1), which claims jurisdiction over traditional navigable waters. It is for this reason that Justice Kennedy concludes that "absent more specific regulations . . . the Corps must establish a significant nexus on a case-by-case basis . . ."[42]

Clearly, rulemaking is needed. But the Corps and EPA have repeatedly backed away from rulemaking in the past. In 1989, after losing *Tabb Lakes, Ltd. v. United States*[43] because they applied the migratory bird rule without having first gone through rulemaking, the Corps and EPA issued guidance announcing they would pursue a rulemaking. But they never did. The same thing happened after *United States v. Wilson*,[44] which rejected their assertion of jurisdiction over waters that "could affect" interstate commerce. That was 1997. Then, in 2001, the Supreme Court in *SWANCC* rejected the migratory bird rule, and the Corps and EPA began the rulemaking process. As, the Chief Justice noted:

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[42] *Rapanos* at 25.

[43] No. 89-2905, 1989 WL 106990 (4th Cir. Sep. 19, 1989).

[44] 133 F.3d 251 (4th Cir. 1997).

> [Rulemaking] would have [given them] plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority…. The proposed rulemaking 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.[45]

These are strong words from the Chief Justice. One can only hope the agencies have not forgotten this history, and, therefore, will not be condemned to repeat it. As Justice Breyer tartly observed, they should "write new regulations, and speedily so."[46]

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[45] *Roberts* at 2.

[46] *Breyer* at 2.

The *Rapanos* Decision

By M. Reed Hopper & Damien Schiff

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The Supreme Court has ruled in consolidated cases that the assertion of jurisdiction under the Clean Water Act (CWA) by the United States Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) is too broad. The CWA prohibits the discharge of pollutants (which include dredged and fill material) into "navigable waters" without a federal permit. The Act defines the term "navigable waters" as "waters of the United States." That term has been interpreted to cover nearly any area over which water flows, including the shallow "wetlands" on Mr. Rapanos's Michigan lots. Rapanos was charged with violating the CWA when he filled wetlands on his property without authorization. The district court found him liable with respect to one of his properties because the "wetlands" on that site were deemed adjacent to a tributary (i.e., a nonnavigable, man-made drainage ditch) that flowed through a series of conduits to a navigable waterway up to twenty miles away. On appeal, the Sixth Circuit Court of Appeals affirmed the district court's determination on the basis of the "hydrological connection" theory. Under this test, CWA jurisdiction exists no matter how remote or insubstantial the connection between a wetland and a navigable-in-fact waterbody. On June 19, 2006, the Supreme Court vacated the judgments of the Sixth Circuit and remanded the cases for further proceedings.

No opinion of the Court garnered a majority of the justices. The judgment of the Court was announced by Justice Scalia, whose opinion was joined by the Chief Justice and Justices Thomas and Alito. The Chief Justice wrote a brief concurring opinion. Justice Kennedy concurred in the judgment only, writing a separate opinion. Justice Stevens wrote

the principal dissent, joined by Justices Souter, Ginsburg, and Breyer. Justice Breyer also dissented separately.

Four justices, forming a plurality on the court, determined that the language, structure, and purpose of the CWA required limiting federal authority to "relatively permanent, standing or continuously flowing bodies of water" traditionally recognized as "streams, oceans, rivers and lakes." These Justices (Scalia, Thomas, Alito, and Roberts) would also authorize federal regulation of wetlands abutting these water bodies if they contain a continuous surface water connection such that the wetland and water body are "indistinguishable." The four dissenting justices took the view that, to advance the statutory goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters," the agencies can regulate practically any waters. Justice Kennedy, on the other hand, acted alone and proposed a "significant nexus" test for determining CWA jurisdiction. Under this test, a waterbody is subject to federal regulation only if that waterbody substantially affects a navigable-in-fact waterway. Justice Kennedy would exclude remote ditches and streams with insubstantial flows from regulation and would reject speculative evidence of a "significant nexus."

FACTUAL BACKGROUND

The *Rapanos* case concerns three parcels of land, owned by Petitioners John and Judith Rapanos, referred to as the Salzburg, Hines Road, and Pine River sites. The nearest

traditional navigable waterway to the Salzburg site is some twenty miles away. An intermittent surface water connection exists through a manmade ditch, a non-navigable creek, and a non-navigable river that becomes navigable before flowing into Saginaw Bay. The Hines Road site has an intermittent surface water connection to the Tittabawassee River, a traditional navigable water, by means of a ditch that runs alongside the site. The Pine River site is in undefined proximity and has a surface-water connection to the Pine River, a non-navigable water, which flows into Lake Huron.

The consolidated *Carabell* case concerns one twenty-acre tract of land (part of which is wetland) located about one mile from Lake St. Clair, a traditional navigable water. The tract borders a ditch that flows into a drain that flows into a creek that flows into Lake St. Clair. A four-foot-wide manmade berm separates the tract from the ditch, such that water rarely if every passes over.

In both cases the federal government deemed the petitioners' lands to be "waters of the United States" under the CWA, thus requiring that petitioners obtain Section 404 "dredge and fill" permits prior to instituting any development activities.

These jurisdictional findings both petitioners challenged. The Sixth Circuit determined, in the *Rapanos* case, that the three sites were "waters of the United States" because each was hydrologically connected to navigable waters traditionally understood. As for the *Carabell* case, the Sixth Circuit determined that because the tract was adjacent to a tributary of a navigable water traditionally understood, jurisdiction was present.

THE SCALIA PLURALITY

The essential point of Justice Scalia's opinion is that, although the phrase "waters of the United States" contains some ambiguity, the government's interpretation of that phrase is so obviously outside the bounds of plain meaning (as elucidated by canons of construction, intrastatutory references, precedent, and "common sense") that it is entitled to no deference.[1] The plurality concludes that "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."[2]

The plurality rejects the position that CWA jurisdiction extends only to those waters that fit the definition of navigable waters traditionally understood and the wetlands adjacent thereto. Instead the plurality supposes that the CWA must cover some waters not fitting the traditional definition.[3] The plurality reasons that because Section 1362(7) ("the waters of the United States") includes the definite article "the" as well as the plural "waters," the phrase should not be interpreted to mean just "water," but rather permanent, standing, or flowing

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[1] *See* Rapanos v. United States, 126 S. Ct. 2208, 2220 (2006) (plurality opinion). The plurality states that the record is not clear as to whether the connections between the three Rapanos sites and the nearby drains and ditches are continuous or intermittent, or whether the flows in the drains and ditches themselves are continuous or intermittent. *Id.* at 2219.

[2] *Id.* at 2225 (internal quotations marks, points of ellipsis, and brackets omitted).

[3] *Id.* at 2220.

bodies of water, such as streams, rivers, lakes, and oceans.[4] Restricting the phrase to bodies of water containing permanent or continuously flowing water is consistent with common sense, for the statute simply will not permit a "Land Is Waters" approach to jurisdiction.[5] In the plurality's estimation, *United States v. Riverside Bayview Homes, Inc.*,[6] and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,[7] are consistent with this interpretation. Both cases describe CWA jurisdictional waters as "open waters"; that appellation just does not fit dry channels and other land features over which the government asserts jurisdiction.[8] These land features, the plurality notes, are more properly characterized as "point sources" (if anything) under the Act.[9]

The plurality takes issue with the "purposivist" approach to jurisdiction adopted by Kennedy and dissenters that because Congress intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[10] the phrase "waters of the United States" should be interpreted as broadly as possible so as to give effect to that purpose. The plurality rejects that position for a variety of reasons, not the least of which because it gives insufficient attention to other Congressional purposes expressed in the Act,

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[4] *Id.* at 2220-2221.

[5] *Id.* at 2222.

[6] 474 U.S. 121 (1986).

[7] 531 U.S. 159 (2001).

[8] *Rapanos*, 126 S. Ct. at 2222.

[9] *See* 33 U.S.C. § 1362(14).

[10] *Id.* § 1251(a).

such as the "policy . . . to recognize, preserve, and protect the primary responsibility and rights of the States to prevent, reduce, and eliminate pollution, [and] plan the development and use . . . of land and water resources."[11]

Canons of construction are also called upon by the plurality. The vast arrogation of state authority to the federal government under an expansive jurisdictional reading of the CWA would create such a significant re-weighing of the federal-state balance that a clear statement to that effect is required of Congress. No such statement is to be found in the CWA.[12] Similarly, because such an expansive reading would raise serious federalism concerns under the Tenth Amendment, the statute should be construed so as to avoid raising those issues.[13]

Addressing the adjacency issue, the plurality interprets *Riverside Bayview* as deferring to the government's ecological judgment that certain wetlands are so bound up with neighboring navigable waterbodies that one cannot discern where the water ends and the wetland begins, and that CWA jurisdiction can properly be asserted over such wetlands. Accordingly, the plurality concludes that a wetland is "adjacent" to "waters of the United States," and thus such wetlands are "waters" in their own right, if there is "no clear demarcation between 'waters' and wetlands."[14] But where there is no "boundary problem"—

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[11] *Id.* § 1251(b). *See Rapanos*, 126 S. Ct. at 2223.

[12] *See Rapanos*, 126 S. Ct. at 2224.

[13] *Id.*

[14] *Id.* at 2226.

i.e., where one can easily tell where the "waters of the United States" end and the wetlands begin—there can be no adjacency. And to establish adjacency, the government must make two findings. One, the adjacent waterbody must itself be a relatively permanent body of water connected to traditional interstate navigable waters. Two, the wetland must have a continuous surface water connection with that waterbody such that one cannot tell where the water ends and the wetland begins.[15]

The plurality also recognizes the significant malleability of Kennedy's jurisdictional test. The plurality asks provocatively:

> When, exactly, does a wetland "significantly affect" covered waters, and when are its effects "in contrast . . . speculative or insubstantial"? . . . . As the dissent hopefully observes, such an unverifiable standard is not likely to constrain an agency whose disregard for the statutory language has been so long manifested. In fact, by stating that "[i]n both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above," Justice Kennedy tips a wink at the agency, inviting it to try its same expansive reading again.[16]

Thus, to recapitulate, the plurality adopts a split waters/wetland jurisdictional view, developing tests peculiar to each. For non-navigable tributaries, the plurality requires that there be a continuous (or at least seasonal) flow in a defined channel, such as a creek or stream but not an irrigation ditch. For wetlands, the plurality requires that the abutting land be so bound up with the jurisdictional water that the two are essentially

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[15] *Id.* at 2227.

[16] *Id.* at 2234 n.15.

"indistinguishable."[17]

THE KENNEDY CONCURRENCE

Justice Kennedy's principal disagreement with the plurality and dissent is in the use of the "significant nexus" criterion, developed in *SWANCC* from the Court's opinion in *Riverside Bayview*. According to Kennedy, jurisdiction under the CWA for a nonnavigable waterbody or wetland requires a significant nexus between that waterbody or wetland and a navigable water traditionally understood.[18] Kennedy adopts the premise that Congress intended to regulate some nonnavigable waters in enacting the CWA.[19] Kennedy objects to the plurality's position that the CWA does not cover irregular flows. He notes several instances in the western United States of waterways that are generally dry but can at times carry tremendous amounts of water.[20] Because an intermittent flow can constitute a "stream," the government is correct that "waters of the United States" can be reasonably interpreted to include the paths of such impermanent streams.[21]

Kennedy also takes issue with the plurality's reading of *Riverside Bayview*. That case, in Kennedy's view, stands for the proposition that adjacency can serve as a valid basis for jurisdiction even as to "wetlands that are not significantly intertwined with the ecosystem of

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[17] *Id.* at 2234.

[18] *Rapanos*, 126 S. Ct. at 2241 (Kennedy, J., concurring).

[19] *See id.*

[20] *Id.* at 2242.

[21] *Id.* at 2243.

adjacent waterways."[22] Thus, Kennedy cannot accept the plurality's position that where the boundary between wetland and adjacent waterway is clear, wetlands beyond that boundary are outside of jurisdiction.[23] Similarly, Kennedy cannot accept that a "continuous flow" connection between a wetland and an adjacent waterbody is necessary to jurisdiction, because such a requirement does not take sufficient account of occasional yet significant flooding.[24] Jurisdiction is possible even without a hydrological connection, "for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme."[25] In short, Kennedy believes that the plurality gives insufficient attention to the interests asserted by the United States.[26]

But equally unsatisfactory to Kennedy is the dissent's approach, for that would read the word "navigable" out of the CWA.[27] To preserve independent significance for the word "navigable," a significant nexus must exist between the nonnavigable tributary or wetland and the traditional navigable waterway.

> [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

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[22] *Id.* at 2244 (quoting *Riverside Bayview*, 474 U.S. at 135 n.9).

[23] *Id.* at 2244.

[24] *Id*

[25] *Id.* at 2245-46.

[26] *Id.* at 2246.

[27] *Id.* at 2247.

outside the zone fairly encompassed by the statutory term "navigable waters."[28]

This nexus is automatically established for wetlands adjacent to navigable-in-fact waterways.[29] Kennedy opines that the Corps might reasonably conclude that wetlands adjacent to certain classes of tributaries would also automatically have a significant nexus and thus fall within federal jurisdiction.[30] And he suggests that where adjacency and the requisite significant nexus are established for a particular wetland, it may be appropriate to presume jurisdictional status for other similar wetlands in the region.[31]

It is important to note, however, that in the absence of federal regulations, the determination of jurisdictional wetlands adjacent to nonnavigable tributaries must be conducted on a case-by-case basis.[32] Also, contrary to the Scalia plurality, Kennedy appears to accept the agency interpretation of "adjacent" as meaning "contiguous, bordering, or neighboring."[33]

Speaking specifically to the *Rapanos* case, Kennedy warns that "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally

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[28] *Id.* at 2248.

[29] *Id.*

[30] *See id.*

[31] *Id.* at 2249.

[32] *Id.* at 2249.

[33] Id. at 2248.

understood."[34] As for *Carabell*, Kennedy underscores that jurisdiction is not precluded merely because the tract is separated from the adjacent "tributary" by a man-made impermeable berm.

> Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system.[35]

But it is clearly not enough that the wetlands are merely geographically adjacent.[36] Thus Kennedy concludes that remand is appropriate to determine whether a significant nexus exists between the tract and a navigable-in-fact water, notwithstanding (or perhaps because of) the hydrologic barrier.

IS THERE A CONTROLLING OPINION?

In the 1977 case of *Marks v. United States*[37] the Supreme Court set forth the rule that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Arguably, this rule would dictate that the "significant nexus" text be followed exclusively.

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[34] *Id.* at 2250-51.

[35] *Id.* at 2251.

[36] *Id.* at 2252.

[37] 430 U.S. 188 (1977).

But as recently as 2003, in *Grutter v. Bollinger*,[38] a racial quota case, the Supreme Court did not follow the *Marks* rule and noted that it was unworkable in practice: "It does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.'"[39] The difficulty with the *Marks* rule is that it produces controversial results, for it not only allows one justice to control the entire court, but it also allows that justice to impose his will on the entire nation.

Because it has proven unworkable in the past, it is doubtful that the Supreme Court expects *Marks* to be followed by the lower courts.[40] It is noteworthy that the dissent in *Rapanos* does not rely on the *Marks* rule, although the dissent prefers the broader Kennedy test over the narrower plurality test. Instead, Justice Stevens suggests that "the United States may elect to prove jurisdiction under either test."[41]

Instead of relying on the concurring opinion with the least votes, it might make more sense to rely on the opinion that garnered the most votes, the winning opinion. This would make the plurality the controlling opinion. If the plurality is followed by the courts below, it would substantially curtail federal jurisdiction under the CWA. If, on the other hand, Justice Kennedy's "significant nexus" test is adopted, the limitation on federal authority will vary on a case-by-case basis depending on whether the court gives the test a narrow or a broad

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[38] 539 U.S. 306 (2003).

[39] *Id.* at 325.

[40] In this regard it is well to note that the Chief Justice references *Marks* in his *Rapanos* concurrence but gives no direction as to whether its rule should be applied. *See Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring).

[41] *Id.* at 2265 & n.14 (Stevens, J., dissenting).

reading.

The *Marks* inquiry is also complicated here because the jurisdictional tests offered by Scalia and Kennedy overlap but neither is a subset of the other; and the dissent, although finding jurisdiction wherever Scalia or Kennedy would, does so on the basis of deference to agency decision-making. Contrast this circumstance with the now-classic *Marks*-type scenario in *Regents of University of California v. Bakke*.[42] In that case, four justices contended that use of race was not permissible in state school admissions; four justices held that it was permissible; and Justice Powell, concurring in the result, held that it was permissible in some instances and not in others.[43] With respect to *Rapanos*, under the Scalia test, jurisdiction obtains if there is a continuous flow in a defined channel. Yet under the Kennedy test, continuous flow (or, for that matter, any flow) is relevant to the jurisdictional inquiry only to the extent that flow is in an indicator of significant effect. Where the Kennedy and Scalia tests sharply differ is on hydrological connection: for Scalia, a hydrological connection is a necessary but not sufficient condition to jurisdiction; whereas for Kennedy, a hydrological connection is neither necessary nor sufficient. Thus, Kennedy's opinion, unlike Powell's in *Bakke*, does *not* represent the median-point between the plurality and dissent. Hence, a *Mark*-type inquiry is all the more inapt. What we may end up with in a case like *Bakke* or *Rapanos* is simply the result—reversal or sustaining of the

[42] 438 U.S. 265 (1978).

[43] *See id.* at 271-72.

opinion below—with no rationale to apply.

WHAT IS THE *RAPANOS* JURISDICTIONAL RULE?

The opinion provides a five justice majority rejecting the government position, adopted by the Sixth Circuit, that *any* hydrological connection is sufficient to establish Clean Water Act jurisdiction. Both the Scalia plurality and the Kennedy concurrence vote to reverse the lower court. And although the justices part ways on their jurisdictional interpretation, the justices reach other common ground as well.

For example, all the justices appear to agree that *SWANCC* prohibits federal regulation of isolated, nonnavigable, intrastate water bodies. This constitutes a tacit recognition that *SWANCC* did more than invalidate the "Migratory Bird Rule" as some lower courts had held, such as the Sixth Circuit in *Rapanos*. *Rapanos*, therefore, is a clarification or affirmation of the *SWANCC* decision.

Also, Justice Kennedy and the Scalia plurality agree that federal jurisdiction does not extend to remote ditches and drains with insubstantial flows. Justice Kennedy expressly excludes the "regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes"[44] while the Scalia plurality expressly excludes man-made ditches and drains with intermittent flows from rain or drainage.[45]

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[44] 126 S.Ct. at 2249.

[45] *Id.* at 2215.

Unfortunately, elucidating any further jurisdictional rule from *Rapanos* will have to await lower court determinations. This may occur rather quickly because there are several jurisdictional cases now pending in the lower courts. And, in fact, a district court in Texas has already applied *Rapanos* to determine the extent of federal authority over remote intermittent drainage ditches and streams.

In *United States v. Chevron Pipe Line Co.*,[46] the company spilled oil into an unnamed drainage ditch that connects to an intermittent stream which flows many miles to a navigable-in-fact waterway.[47] But, at the time of the spill, and during the spill cleanup, the ditch never contained flowing water.[48] The district court ruled that CWA jurisdiction does not extend to the ditch because it is not adjacent to an open body of navigable water and because the oil did not reach a "navigable waters of the United States."[49]

The case is noteworthy, and perhaps portentous, because the court refused to apply the Kennedy "significant nexus" test, determining that the test is undefined as well as "vague" and "subjective." Rather than rely on this standardless test, the court concluded that the Scalia plurality and Fifth Circuit precedent determined the outcome of the case.[50]

Whether this reading of *Rapanos* is adopted by the Fifth Circuit and other courts remains to be seen.

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[46] – F.Supp. 2nd–, 2006 WL 1867376 (N.D. Texas).

[47] *Id.* at 1.

[48] *Id.*

[49] *Id.* at 7-8.

[50] Id. at 9.

WHAT HAPPENS WITH THE *RAPANOS* CASE NOW?

The opinion of the Sixth Circuit has been vacated; now it falls to the district court to make the determination, in the first instance, of whether jurisdiction extends to the Rapanos properties. According to the measure offered by the plurality, the government must establish that Mr. Rapanos's properties are "as a practical matter *indistinguishable*" from "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.'" The government is unlikely to meet this test, for at least two reasons. First, two of the three properties are immediately adjacent to man-made drainage ditches, not streams and creeks. Second, the wetlands on all three sites are readily distinguishable from any neighboring stream, river or lake. Should the lower court adopt the Kennedy "significant nexus" standard, the government must establish that the Rapanos properties "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of" navigable-in-fact waters." It is difficult to determine at this time whether the Rapanos properties meet this test. The government expert relied upon to establish jurisdiction conceded that he had never made a site-specific analysis. Based in part on that evidentiary vacuum, Justice Kennedy concluded that the record is currently inadequate to determine whether the requisite significant nexus exists.

CONCLUSION

Although Mr. Rapanos did not get what he had hoped—a bright line rule for federal jurisdiction—he did get what he asked for: invalidation of the "any hydrological connection" standard applied by the government and approved by the Sixth Circuit. This constitutes a significant constraint on federal authority under the CWA. How much of a constraint will depend on the willingness of federal regulators and the lower courts to recognize the fundamental principle affirmed by the majority in *Rapanos* that there are limits to federal power and the means employed to achieve national aims.

Recalibrating the Definition of "Waters of the United States" after *Rapanos*

By Jeffrey H. Wood

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The Clean Water Act's ("CWA") principal jurisdictional element, i.e., the term "waters of the United States," is at the fore of the debate over the proper reach of federal environmental law. Under CWA Section 404(a), any person engaging in any activity which results in the "discharge of dredged or fill material into the navigable waters" must obtain a permit from the U.S. Army Corps of Engineers ("Corps").[1] The term "navigable waters" is defined broadly by statute to mean all "waters of the United States."[2] The Corps has further defined this term by regulation to include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, play lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters."[3] "Waters of the United States" is defined to include even "tributaries" of these waters and "wetlands adjacent to [them]" (other than waters that are themselves wetlands).[4]

The Supreme Court has issued three noteworthy decisions delineating the "waters of the United States," including the 4-1-4 split opinion issued in June of 2006 in *Rapanos v. United States*, which generated three distinct standards for making jurisdictional determinations under the CWA. Over the past six months, at least four federal courts have attempted to apply the *Rapanos* opinion to particular cases. Some judges have held that Justice Kennedy's concurrence governs future cases; others have held that the plurality's test

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[1] 33 U.S.C. § 1344(a) (emphasis added).

[2] *Id.* § 1362(7).

[3] 33 C.F.R. § 328.3(a)(3).

[4] *Id.* § 328.3(a)(5)-(7).

applies; others have used a "mix-and-match" approach and tried to develop a coherent test based upon the likely position of any five justices; and at least one court has declined to adopt any of the *Rapanos* opinions, opting instead to simply rely on prior precedent from its own circuit. This article discusses *Rapanos* and the approaches taken by the various lower courts attempting to decipher the applicable test for defining the "waters of the United States."

I. The Supreme Court's Prior Cases on the "Waters of the United States"

In 1984, the Supreme Court held that the Corps had jurisdiction under Section 404 over wetlands that actually abutted a navigable waterway.[5] This decision applied to wetlands that were "inseparably bound up with the waters of the United States," but the Court expressly reserved judgment on the issue of whether the Corps had authority to restrict discharges of fill material into "wetlands that are not adjacent to open bodies of water."[6]

In 2001, the Supreme Court issued another important decision concerning the Corps' jurisdiction under CWA Section 404.[7] In *SWANCC*, the Supreme Court held that the Corps' jurisdiction did *not* extend to nonnavigable, isolated, intrastate wetlands where the only connection to navigable waters was the presence of migratory birds.[8] Even Justice Stevens'

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[5] *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985).

[6] *Id.* at 131-32.

[7] *See* Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 172-74 (2001) (the "*SWANCC*" decision).

[8] *Id.* at 172-73.

dissenting opinion explained that, after *SWANCC*, the Corps' jurisdiction under Section 404 would only extend to "actually navigable waters, their tributaries, and wetlands adjacent to each."[9]

The *Rapanos* Decision

Notwithstanding *SWANCC*, the Corps continued to operate under an extremely expansive interpretation of its jurisdiction, asserting permitting authority over all types of wet areas, including storm drains, roadside ditches, and lands that are covered by floodwaters just once every 100 years. Last year, the Supreme Court decided to review two decisions of the U.S. Court of Appeals for the Sixth Circuit, *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*. In those cases, the Sixth Circuit held that the Corps' jurisdiction under Section 404 extended to wetlands near ditches or man-made drains which eventually emptied into traditional navigable waters located up to twenty miles away.[10] In one of those cases, Mr. Rapanos faced up to five years in jail and hundreds of thousands of dollars in criminal and civil fines for impacting so-called "jurisdictional wetlands."

In June of 2006, the Supreme Court reversed the Sixth Circuit and remanded *Rapanos* and *Carabell* to the lower courts for reconsideration, although the ultimate standard that should be applied upon remand was not abundantly clear.[11] Illustrating the contentious

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[9] *Id.* at 176-77 (Stevens, J., dissenting).

[10] *See Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004); *Carabell*, 391 F.3d 704, 708 (2004).

[11] *See* Rapanos v. United States, 126 S. Ct. 2208 (2006).

nature of this issue, the Court's decision was split three ways: a four-member "plurality" comprised of Justices Scalia, Thomas, Alito and Roberts; a four-member dissenting block comprised of Justices Stevens, Souter, Ginsburg and Breyer; and the "swing-vote" cast by Justice Kennedy. Deciphering the majority sentiment of the Court in these instances is not an easy task.

The plurality opinion authored by Justice Scalia explained that the "waters of the United States" includes non-navigable wetlands only if there is an "adjacent channel [that] contains a 'wate[r] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters)" *and* "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[12] This test, if applied, would result in a significant reduction in the Corps' regulatory jurisdiction.

However, the ultimate impact of *Rapanos* may not be as sweeping, simply because the fifth (and deciding) vote in favor of reversing the Sixth Circuit was cast by Justice Kennedy, who disagreed with the plurality's rationale.[13] Justice Kennedy, writing in a concurring opinion, set forth his own "significant nexus" test:

> [W]etlands possess the requisite [significant] 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

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[12] *Id.* at 2227.

[13] *Id.* at 2242 (Kennedy, J., concurring).

> "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."
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> . . . As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the [CWA] by showing adjacency alone.[14]

Under this formulation, the Corps' jurisdiction does not extend automatically to wetlands adjacent to non-navigable tributaries of navigable waters unless a "significant nexus" to navigable waters exists.[15] Notably, Justice Kennedy expressly rejected several of the Corps' common rationales for exerting jurisdiction over non-navigable waters. For instance, Justice Kennedy explained that a "mere hydrological connection" to navigable waters is insufficient alone to trigger CWA obligations.[16] Justice Kennedy also rejected the Corps' use of the "ordinary high water mark" as a measure for identifying tributaries to navigable waters.[17] He also rejected "adjacency to tributaries" as a sole basis for federal jurisdiction.[18]

II. Is Justice Kennedy's "Significant Nexus" Test Controlling?

The debate over federal jurisdiction under the CWA is currently focused on whether the plurality, concurring or dissenting opinions in *Rapanos* (or some combination thereof) is controlling. In the six months since *Rapanos*, at least four federal courts have addressed this

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[14] *Id.* at 2248.

[15] *Id.*

[16] *Id.* at 2251.

[17] *Id.* at 2249-50.

[18] *Id.* at 2248.

question. Three theories have been advanced. Two courts have concluded that, under Supreme Court precedent, Justice Kennedy's "significant nexus" test should be viewed as the controlling framework in future cases: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[19] Those courts found that Justice Kennedy's opinion should be viewed as the narrowest grounds and, in turn, his test should be considered the governing framework for deciding whether wetlands constitute "waters of the United States." Other courts hold that a waterbody is jurisdictional if *either* the plurality or Justice Kennedy's concurring opinion is satisfied. A third approach, which was offered in a dissenting opinion from the First Circuit, would be to apply the plurality's opinion alone. A final approach, which was adopted by a federal district court in Texas, noted the lack of consensus from the Supreme Court on this issue and opted to employ the straight-forward precedent of its own circuit.

Seventh & Ninth Circuits

Two federal appellate courts have decided that Justice Kennedy's analysis alone now governs the issue of "waters of the United States." In August of 2006, the Ninth Circuit issued the first appellate decision in light of *Rapanos*, holding that a fifty-eight acre pond constituted "waters of the United States" where water "seep[ed] directly" into a navigable

[19] Marks v. United States, 430 U.S. 188, 193 (1977) (internal quotations omitted).

river through an underground aquifer.[20] An environmental group filed a citizen suit against the City of Healdsburg for discharging treated sewage into a large pond (known as Basalt Pond), which was created by a rock quarry pit that had filled with water from a surrounding aquifer.[21] The pond was located between fifty to several hundred feet from the Russian River (an undisputed "navigable water of the United States"), although a levee separating the pond and river "usually" prevented any surface connection.[22] The court found that a "vast underground aquifer" provided the "principal pathway for a continuous passage of water between Basalt Pond and the Russian River."[23]

The Ninth Circuit explained that Justice Kennedy's concurring opinion in *Rapanos* provided the "controlling rule of law."[24] The Ninth Circuit noted that, in light of *Rapanos*, "it is apparent that the mere adjacency of Basalt Pond and its wetlands to the Russian River is not sufficient for CWA protection."[25] In fact, the Ninth Circuit stated categorically that "[a]djacency of wetlands to navigable waters alone is not sufficient" to constitute jurisdictional waters.[26] Nonetheless, the court held that the seepage of water from the pond to the river through the underground aquifer constituted the "significant nexus" required by

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[20] *See* Northern California River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006).
[21] *Id.* at 1025.
[22] *Id.* at 1025-26.
[23] *Id.* at 1027-28.
[24] *Id.* at 1029.
[25] *Id.* at 1030.
[26] *Id.* at 1025.

Rapanos.[27] The court also explained that its conclusion was supported by an "actual surface connection" between the pond and the river which occurred "when the River overflows the levee and the two bodies of water commingle."[28] The court also found a "significant ecological connection" between these two waters, because the pond and the river both supported the same wildlife.[29] Finally, the court found that the pond "significantly affects the chemical integrity" of the river by measurably increasing the chloride levels in the river.[30]

Likewise, in *United States v. Gerke Excavating, Inc.*, the Seventh Circuit took the position that Justice Kennedy's concurrence is the only test which must be satisfied when determining whether a water constitutes a "water of the United States."[31] The Seventh Circuit cited the *Marks* standard and, without explanation, the court equated the "narrowest opinion" with the one least restrictive of federal jurisdiction.[32] As such, the Seventh Circuit found Justice Kennedy's concurrence to constitute the "least common denominator."[33]

First Circuit

On Halloween, the First Circuit adopted a "mix-and-match" approach, holding that the "federal government can establish jurisdiction [under the CWA] over the target sites if it

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[27] *Id.*

[28] *Id.* at 1030 (noting that "at least 26 percent of the Pond's volume annually reaches the River itself").

[29] *Id.* at 1031.

[30] *Id.*

[31] 464 F.3d 723 (7th Cir. 2006).

[32] *Id.* at 724-25.

[33] *Id.*

can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*."[34] The First Circuit found Justice Stevens' dissenting opinion particularly instructive on this point.[35] In *Rapanos*, Justice Stevens stated that he "assume[d] that Justice Kennedy's approach will be controlling in most cases" and that "in future cases the United States may elect to prove jurisdiction under either test."[36] The First Circuit found this approach compelling mainly because it "ensures that lower courts will find jurisdiction in all cases where a majority of the Court would support such a finding."[37] A federal district court in Florida reached a similar conclusion in *United States v. Evans*.[38] Notably, it is unlikely that a court could combine the 4-member dissent with Justice Kennedy's concurrence to form a *Marks* majority.[39]

Importantly, Judge Torruella dissented from the First Circuit's decision in *Johnson*, explaining that "Justice Kennedy's seemingly opaque 'significant nexus' test" cannot be considered a "constitutional measure of federal regulatory jurisdiction."[40] Justice Kennedy's approach would, in Judge Torruella's judgment, "leave[] the door open to continued federal

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[34] United States v. Johnson, 2006 WL 3072145, at *10 (1st Cir. Oct. 31, 2006).

[35] *Id.* at *8.

[36] 126 S. Ct. at 2265 n. 14.

[37] *Johnson*, 2006 WL 3072145, at *8.

[38] 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006).

[39] *See* King v. Palmer, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc) ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority.").

[40] 2006 WL 3072145, at *10 (Torruella, J., dissenting in part).

overreach."[41] Instead, Judge Torruella would apply the plurality's "hydrologic connection" test.

Chevron Pipe Line Co. (N.D. Tex.)

Finally, at least one federal district court has applied neither test, opting instead to continue applying the law of its own circuit. In June of 2006, a federal district court in Texas issued the first post-*Rapanos* ruling concerning the extent of federal jurisdiction under the CWA.[42] In that case, the U.S. Environmental Protection Agency ("EPA") filed an enforcement action against Chevron Pipe Line Company for spilling approximately 3,000 barrels of oil, which migrated into an unnamed, intermittent "channel/tributary" that was dry in the absence of significant rainfall events.[43] This intermittent channel/tributary extended 17 miles before it reached another intermittent creek, which extended 24 miles before reaching the only arguable navigable waterway.[44]

The district court noted that, in *Rapanos*, the Supreme Court failed to "reach a consensus" as to the "jurisdictional boundary of the CWA," leaving the lower courts to "feel their way on a case-by-case basis."[45] The district court also noted that Justice Kennedy's opinion "leaves no guidance on how to implement its vague, subjective centerpiece," the

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[41] *Id.*

[42] *See* United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605 (N.D. Tex. 2006).

[43] *Id.* at 606-08.

[44] *Id.* at 608.

[45] *Id.* at 613 (internal quotations omitted).

significant nexus test.[46] Due to the lack of discernable guidance from the Supreme Court, the district court looked to the prior precedent of the Fifth Circuit Court of Appeals (where Texas resides) to determine the proper contours of the "significant nexus" test, and held that the "waters of the United States" includes only those waterbodies that are "navigable-in-fact or adjacent to an open body of navigable water."[47] The unnamed tributary where the oil spill occurred clearly did not meet that test, and therefore, the CWA claim was dismissed.[48]

III. The Moving Target

Thus far, *Rapanos* has done little more than add an additional layer of judicial uncertainty to the question of federal jurisdiction under the CWA. It certainly has not provided a clear definition of "waters of the United States," to the frustration of the regulated community. The Eleventh Circuit has not yet addressed this issue in the wake of *Rapanos*.[49] Ever since July, the Corps Headquarters has stated that guidance on how the districts should apply *Rapanos* is forthcoming. In the meantime, without the benefit of official Corps guidance interpreting *Rapanos*, it can be stated that federal jurisdiction under Section 404 of the Clean Water Act is generally understood to extend to:

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[46] *Id.*

[47] *Id.* at 613-14.

[48] *Id.* at 614-15 (relying upon *In re Needham*, 354 F.3d 340, 346 (5th Cir. 2003)).

[49] *But see* Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1247 (11th Cir. 2001) (explaining that the "narrowest grounds" are understood as the "less far-reaching-common ground").

(1) Navigable-in-fact waters;[50]

(2) Tributaries to navigable-in-fact waters;[51] *and*

(3) Any other wetlands and other non-navigable waters possessing a "significant nexus" to navigable-in-fact waters, meaning that "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;'"[52] *but not*

(4) Other waters lacking a significant nexus to navigable waters, such as "nonnavigable, isolated, intrastate waters."[53]

Admittedly, this formulation assumes that Justice Kennedy's concurrence provides the governing framework, a position which the Eleventh Circuit and other courts may not adopt. Where the "significant nexus" test does apply, it will at the very least require the Corps to engage in more comprehensive fact-finding than previously was the case.[54] As Chief Justice Roberts lamented in a separate concurring opinion in *Rapanos*, the lower courts and the regulated community will, as a result of the fractured opinion in *Rapanos*, have to "feel their way on a case-by-case basis."[55]

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[50] *See* 33 U.S.C. § 1362(7)

[51] *See id.*

[52] *Rapanos*, 126 S. Ct. at 2248

[53] *See SWANCC*, 531 U.S. at 172.

[54] *See* United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006) (remanding CWA enforcement action to district court for fact finding in accordance with Justice Kennedy's concurrence in *Rapanos*).

[55] 126 S. Ct. at 2235-36 (Roberts, C.J., concurring).