

July 17, 2007

Hearing  
on  
*Status of the Nation's Waters, including Wetlands,  
under the Jurisdiction of the Federal Water Pollution Control Act*

United States House of Representatives  
Committee on Transportation and Infrastructure  
Subcommittee on Water Resources and Environment

Statement  
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Mr. Chairman, members of the committee, I wish to thank you for this opportunity to express my views on federal jurisdiction under the Federal Water Pollution Control Act of 1972 (as amended by the Clean Water Act).

**Federal Enforcement Prior to *Rapanos***

In over 30 years of enforcement of the Clean Water Act agency officials were never able to provide a predictable, consistent standard for federal jurisdiction. A report from the General Accounting Office (GAO) confirms this. The report documents that the Corps' local districts "differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [Clean Water Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 3 (Feb. 2004), available at [www.gao.gov/new.items/d04297.pdf](http://www.gao.gov/new.items/d04297.pdf) (last visited May 2, 2005) (*GAO Report*). But worse than the inter-district disagreements were the *intra*-district inconsistencies. The GAO report concluded that even Corps staff working in the same office could not agree on the scope of the CWA and that "three different district staff" would likely make "three different assessments" as to whether a particular water feature is subject to the Act. *GAO Report* at 22. This was more than a theoretical concern. This degree of uncertainty permeated the enforcement decisions of the Corps and EPA. As we saw in *Rapanos*, those decisions became the basis for imposing multimillion dollar penalties and seeking criminal prosecution.

The confusion over federal Clean Water Act jurisdiction was even touted in the popular press:

“There is just pandemonium out there, but that is by design,” said Julie Sibbing, senior program manager for wetlands policy for the National Wildlife Federation.

“No one knows what is protected and what isn’t.”

The chief of the regulatory program for the Corps of Engineers agreed that things aren’t too clear.

*Definition of “Ditch” is Muddy at Best*, Cindy Skrzycki; Washingtonpost.com, Tuesday, Mar. 29, 2005; <http://www.washingtonpost.com/wp-dyn/articles/A8362-2005Mar28.html> (last visited Apr. 8, 2005).

The very definition of “wetlands” defied commonsense. Federal regulations defined “wetlands” as those areas “inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” 33 CFR § 328.3(b). Under this definition, an area need be wet only “for one to two weeks per year.” Gordon M. Brown, *Regulatory Takings and Wetlands: Comments on Public Benefits and Landowner Cost*, 21 Ohio N.U. L. Rev. 527, 529 (1994). In other words, a “wetland” may be mostly dry land.

No reasonable person would conclude that mostly dry land is subject to federal control as a “navigable water.” Ocie Mills and his son found this out the hard way. These two were convicted for filling “wetlands” on their property without a permit—an act a district court later characterized as the innocuous placing of clean fill on dry land:

This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corp of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice in Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of “discharging pollutants into the navigable waters of the United States.”

*United States v. Mills*, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).

For this offense Mills and his son served 21 months in prison, one year in supervised release, paid \$5,000 in fines, and were required to restore the site to its original condition. *Id.*

The definition of “discharge” also defied commonsense. In *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), the landowner was held liable for filling wetlands without a permit under § 404(a). But the alleged “discharge” was

nothing more than moving soil in place by dragging a shank through the hard pan (a process called “deep ripping”) to allow for the planting of vineyards in the place of row crops. *Id.* at 812-13. Although no dredged or fill material was actually added to the land, the Corps deemed it so because the soil was disturbed by the plowing process. *Id.* at 814. On writ of certiorari, challenging agency jurisdiction over this activity, the Supreme Court affirmed by an equally divided court after Justice Kennedy recused himself from the case. *See Borden Ranch Partnership v. United States Army Corps of Engineers*, 537 U.S. 99 (2002).

In addition to “wetlands” and “discharge,” other terms defining a CWA violation were equally mystifying. In court, federal prosecutors were arguing “adjacent” meant hydrologically connected and “tributary” meant anywhere water flows, whereas “navigable waters” included the entire tributary system of the United States.

A rule of law as vague and ambiguous as the government’s ever-changing § 404(a) jurisdiction, subjecting landowners nationwide to severe criminal penalties raised clear due process questions. The Supreme Court had long held that “before a man can be punished as a criminal under the Federal law his case must be ‘plainly and unmistakably’ within the provision of some statute.” *United States v. Gradwell*, 243 U.S. 476, 485 (1917). *See also United States v. Lanier*, 520 U.S. 259, 267 (1997) (“[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.”). But that was not the case under the Clean Water Act. The government’s expansive interpretation of its own authority defied any plain reading of that Act, or even any consistent application. It became necessary, therefore, to seek clarification of the law from the Supreme Court. Mr. Rapanos stepped forward.

### The Rapanos Decision

See attached analysis: *Rapanos v. United States, What Does It Mean?*

### The Lower Court Response

Adding to the confusion wrought by the fractured *Rapanos* decision, the lower Circuit Courts of Appeals have split over their interpretation of *Rapanos*. The Seventh and Ninth Circuits have held that Justice Kennedy’s “significant nexus” test for federal jurisdiction is controlling. *See United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005) (petition for cert pending) (No. 06-1331) and *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006) (petition for rehearing pending). In contrast, the First Circuit, in *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) (petition for cert pending)(No. 07-9), held that federal jurisdiction under the Clean Water Act may be established based on either the Scalia plurality test or Justice Kennedy’s test. But a district court in Texas opted for the Scalia approach.

*United States v. Chevron Pipe Line Company*, 437 F. Supp. 2d 605 (N.D. Tex. 2006), the first case to apply the *Rapanos* decision, involved an accidental discharge of oil into a dry, unnamed

drainage ditch that flowed only during significant storm events. *Id.* at 607. Although the oil was cleaned up before it reached any water, as required by state law, and the nearest navigable-in-fact waterway was connected to the ditch by intermittent streams scores of miles away, the Corps of Engineers sought fines from the company for discharging into “navigable waters” without a federal permit. *Id.* at 607-608. Therefore, the court looked to *Rapanos* for guidance in determining the scope of federal jurisdiction.

The court was quick to dismiss the Kennedy approach as an unworkable standard. The court observed that Justice Kennedy “advanced an ambiguous test—whether a ‘significant nexus’ exists to waters that are/were/might be navigable.” *Id.* at 613. According to the court, “[t]his test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is ‘significant’ and how is a ‘nexus’ determined?” *Id.* (citations omitted). Therefore, instead of relying on the Kennedy opinion, the court based its decision on existing Fifth Circuit precedent and “the Supreme Court’s plurality opinion in *Rapanos v. United States*” and concluded there was no federal jurisdiction. *Id.* at 615. That case was never appealed and has only limited precedent.

In light of the Circuit split, however, the Supreme Court has been petitioned to clarify its *Rapanos* decision and determine the controlling opinion. In the meantime, the “significant nexus” standard imposed by the court in *Gerke*, and authorized alternatively in *Johnson*, is sure to result in continuing inconsistent and unpredictable application of the law. Only the Scalia test, with its clearer lines of demarcation, is likely to provide agency officials and the regulated public with consistent and predictable jurisdictional rules. As the dissent in *Johnson* observed, the “significant nexus” approach “leaves the door open to continued federal overreach” while the plurality’s restriction on federal jurisdiction “strikes a constitutional balance” between federal power and individual rights. *Johnson*, 467 F.3d at 66-67. (Torruella, Circuit Judge, dissenting).

### The Agency Response

On June 5, 2007, the EPA and the Corps Issued their belated “guidance” on how the agencies intend to implement the *Rapanos* decision. Unfortunately for the regulated public, it appears to be business as usual. Although the agencies declare that they will “generally” not assert jurisdiction over swales and erosional features or ditches lying wholly in upland areas, they hold out the possibility that they may do so. Besides these minor (and conditional) exceptions, the agencies intend to assert their authority to the fullest, using as broad an interpretation as possible for both the Scalia and Kennedy tests. What the agencies do not regulate categorically, they will regulate case-by-case under the “significant nexus” rubric.

The agencies state that they will continue to assert categorical jurisdiction over traditional navigable waters and adjacent wetlands. Likewise, they will regulate all “relatively permanent” tributaries to traditional navigable waters and those wetlands with “a continuous surface connection” to such tributaries. But this last category is contrary to both the Scalia plurality and the Kennedy concurrence. The Scalia plurality was clear, something more than a continuous surface connection is required—i.e., a boundary drawing problem:

Therefore, *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 clear demarcation between “waters” and wetlands, are “adjacent to” such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to “waters of the United States” do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a “significant nexus” in SWANCC, (citation omitted). Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains a “wate[r] of the United States,” ( *i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

Rapanos, 126 S.Ct. at 2226-2227.

And, according to Justice Kennedy, categorical regulation of wetlands adjacent to “major tributaries” would require additional regulation or adjudication. *Id.* at 2248. “Absent 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.” *Id.* at 2249. Nevertheless, the agencies ignore these requirements.

Under the new “guidelines,” the agency will determine jurisdiction over all other tributaries and wetlands based on whether the feature has a “significant nexus” with or “significantly affects” downstream navigable waters in light of its physical, chemical or ecological characteristics. But this is strictly pro forma. The outcome is forgone. As the Corps argued in the *Johnson* case, the agency has already determined that all wetlands are significant. In addition, nothing in the “guidelines” suggest that the agencies won’t continue to assert jurisdiction over isolated ponds and wetlands in contravention of *SWANCC*.

### **The Congressional Response**

Recent legislation has been introduced in the house to amend the definition of “waters of the United States” in the Clean Water Act—the Clean Water Restoration Act, H.R. 2421 (2007). This legislation appears aimed at three objectives: (1) to bolster Congressional findings in support of the Clean Water Act, (2) to broadly redefine jurisdictional waters, and (3) to declare Congress’ intent to exercise its full constitutional authority.

The bill includes findings that the Clean Water Act is necessary to protect interstate commerce (e.g., Finding (8)), to protect federal lands (Finding 16), and in furtherance of certain international treaties (Finding 15). These recitations are included to underscore Congress’ reliance on its Commerce Clause authority, its treaty powers, and its power over federal lands.

Article IV, Section 3 of the Constitution states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Congressional power over federal land is accepted as plenary. Therefore, Congress can act to protect federal lands. But this is unlikely to provide a sufficient basis for the broad-reaching scope of the Clean Water Act as proposed in the bill which includes waters unlikely to have any affect on federal property.

As for the treaty power, the 1920 case of *Missouri v. Holland*, 252 U.S. 416, lends support to the proposition that Congress may pass legislation implementing treaties, such as for the protection of migratory birds, but with the caveat that the treaty does not contravene the Constitution. Presumably, this means that Congress may not rely on a treaty to go beyond its enumerated powers.

The enumerated power on which Congress has traditionally relied for passage of its environmental laws is the commerce power. Recent Commerce Clause jurisprudence indicates the Supreme Court will impose limits on this power. A Commerce Clause question is raised by the proposed Clean Water Restoration Act because it assumes there are no limits to congressional power to regulate the waters of the United States. The bill defines jurisdictional waters this way:

The term "waters of the United States" means all 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.

Paragraph 24 (emphasis added).

This definition of federal authority is not a "restoration" of congressional intent. It far exceeds the jurisdictional scope of the current Clean Water Act as it appears in the text of the statute. It even exceeds the extravagant scope of the existing federal regulations on which this definition is, in part, based. Indeed, with its claim of authority over "all interstate and intrastate waters," this bill pushes the limits of federal power to an extreme not matched by any other law, probably in the history of this country. Neither an ornamental pond nor the proverbial kitchen sink are excluded.

The Supreme Court has recognized three categories of legitimate Commerce Clause regulation. First, Congress has authority to regulate the "use of the channels of interstate commerce." See *United States v. Lopez*, 514 U.S. 549, 558 (1995). Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Id.* And third, Congress is authorized to regulate activities "that substantially affect interstate commerce." *Id.* at 559.

By definition, traditional navigable waters can be used as channels of interstate commerce. But the waters encompassed in the Clean Water Restoration Act include all nonnavigable waters. Therefore, the regulation of such waters is not regulation of the use of channels of interstate commerce. It is, instead, the quintessential regulation of activities that must be sustained, if at all, as activities that “substantially affect” interstate commerce.

By its terms, Section 404(a) of the Clean Water Act covers only “the discharge of dredged or fill materials into” regulated waters and, like the prohibition on the possession of guns in *United States v. Lopez*, 514 U.S. 549 and the cause of action for domestic violence in *United States v. Morrison*, 529 U.S. 598 (2000), on its face, Section 404(a) has nothing to do with economic activity. Nor is that provision part of a larger *economic* scheme that would be undermined by limiting the regulatory reach of Section 404(a). Therefore, such discharges cannot be aggregated to satisfy the Court’s test for “substantial effects.”

Section 922(q) is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

*Lopez*, 514 U.S. at 561.

The Supreme Court’s recent decision in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), does not change this analysis. The Clean Water Act does not address a market scheme that clearly falls “within the reach of the federal power” like the Controlled Substances Act in *Raich*, or even the Agricultural Adjustment Act in *Wickard*. The former regulated the entire market in drugs while the later regulated the entire market in wheat. The CWA, in contrast, does not purport to regulate any market or commodity at all. Under a constitutional analysis, therefore, the Supreme Court is likely to curtail any limitless interpretation of Clean Water Act authority.

The Clean Water Restoration Act not only raises a constitutional question, the bill itself calls for court intervention. Rather than define the reasonable scope of its federal power to regulate inter- and intra-state waters in the first instance, as it should do, the bill authorizes Congress to defer to the courts to determine “the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.” In effect, the Act is an abdication of the legislative role.

## Conclusion

To be sure, the enforcing agencies and the regulated public are in need of clear direction as to the scope of federal power to regulate wetlands and other waters. Thus far, all three branches have failed in this regard. The Supreme Court cannot come to an agreement and the agencies have been either unwilling or unable to promulgate consistent regulations that are both protective of environmental values and recognize the State and individual rights protected by the Constitution. As laudable as the current effort is to propose legislation to amend the Clean Water Act, the proposed Clean Water Restoration Act will just provide another round of intense litigation.

Thank you,



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M. Reed Hopper

# ***Rapanos v. United States, What Does It Mean?***<sup>1</sup>

By  
M. Reed Hopper<sup>2</sup>

## **INTRODUCTION**

The Clean Water Act prohibits the discharge of pollutants, including dredged and fill material, into “navigable waters”<sup>3</sup> without a federal permit and defines the term “navigable waters” as “waters of the United States.”<sup>4</sup> The Army Corps of Engineers and the Environmental Protection Agency interpreted “navigable waters” to cover virtually any area over which water flows, including the shallow “wetlands” on Mr. Rapanos’ Michigan lots. When Mr. Rapanos filled his wetlands without authorization, he was charged with a violation of the Act. In one instance, the district court found Mr. Rapanos liable because the “wetlands” on his property were deemed adjacent to a tributary (i.e., a nonnavigable, manmade drainage ditch) that flowed through a series of conduits to a navigable-in-fact waterway up to twenty miles away.<sup>5</sup> The Sixth Circuit Court of Appeals upheld the district court determination and ruled that any hydrological connection with a traditional navigable water was sufficient for federal jurisdiction no matter how remote or insubstantial the connection.<sup>6</sup> On June 19, 2006, the U.S. Supreme Court reversed the Sixth Circuit decision and invalidated the agencies’ interpretation.<sup>7</sup>

## **THE VOTE**

In a rare, but not unheard of, situation, the Supreme Court split with three different rationales and a 4-1-4 vote. Nevertheless, a clear majority emerged in favor of Rapanos. Five of the nine justices voted to overturn the court below. While the court did not provide a clear delineation of federal jurisdiction under the Clean Water Act, the court did unequivocally reject the government’s extravagant claim of authority over virtually all waters and much of the land in the Nation. As Chief Justice Roberts put it, rather than follow the court’s lead in a previous case limiting federal authority under the Clean Water Act, “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.”<sup>8</sup> In less charitable phraseology, Justice Scalia stated:

In applying the definition to “ephemeral streams,” “wet meadows,” storm sewers and culverts, “directional sheet flow during storm events,” drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term “waters of the United States” beyond parody. The plain language of the statute simply does not authorize this “Land Is Waters” approach to federal jurisdiction.<sup>9</sup>

In the end, four Justices, forming a plurality on the court, determined the language, structure, and purpose of the Clean Water Act required limiting federal authority to “relatively permanent, standing or continuously flowing bodies of water” traditionally recognized as “streams, oceans, rivers and lakes” that are connected to traditional navigable waters.<sup>10</sup>

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.”<sup>11</sup> Four justices in the dissent took the view that the agencies could choose to regulate essentially any waters (and much of the land) to advance the statutory goal of maintaining the “chemical, physical, and biological integrity of the Nation’s waters.”<sup>12</sup> Justice Kennedy, on the other hand, acted alone and proposed a “significant nexus” test for determining federal Clean Water Act jurisdiction.<sup>13</sup> Under this test, a water body would be subject to federal regulation only if that water body would significantly affect a navigable-in-fact waterway.<sup>14</sup> Justice Kennedy would exclude from regulation remote drains, ditches, and streams with insubstantial flows and reject speculative evidence of a “significant nexus.”<sup>15</sup>

## WARRING JUDICIAL PHILOSOPHIES

The court’s disparate opinions derive from a difference in judicial philosophy. The dissent, authored by Justice Stevens, and joined by Justices Souter, Ginsberg, and Breyer, stands ready to uphold any regulatory interpretation of the statute that would further the agency’s perception of the overall purpose of the Act whereas the Scalia plurality believes the scope of the Clean Water Act must be consistent with the statutory language. The problem with the dissent’s “ends-justifies-the-means” approach, as the Scalia plurality points out, is that it “substitute[s] the purpose of the statute for its text.”<sup>16</sup> Justice Scalia does not mince words in his condemnation of this interpretive philosophy:

And as for advancing “the purposes of the Act”: We have often criticized that last resort of extravagant interpretation, noting that no law pursues its purpose at all costs, and that the textual limitations upon a law’s scope are no less a part of its “purpose” than its substantive authorizations.<sup>17</sup>

The “textual limitation” in the Clean Water Act to which Justice Scalia refers is Congress’ use of the term “navigable waters.” That term has to mean something. Even Justice Kennedy, who parts ways with Justice Scalia on the scope of the Act, castigates Justice Stevens for reading the term right out of the statute.<sup>18</sup>

Implicit in the plurality’s unwillingness to issue the Corps and EPA a regulatory blank check is the recognition that freewheeling regulation is incompatible with the “rule-of-law.” The “rule-of-law,” like “separation of powers” with its inherent limits on federal authority, is a fundamental safeguard against arbitrary government and ensures that the means of accomplishing the desired ends (no matter how laudable) are fair, consistent, predictable, and orderly—protections currently lacking in enforcement of the Clean Water Act.

Beyond this, the “purpose” of the act is often in the eye of the beholder. While Justice Stevens sees clear congressional intent in the statutory declaration that the objective of the Clean Water Act “is to restore and maintain the chemical, physical, and biological integrity of the Nations’ waters,”<sup>19</sup> Justice Scalia sees clear congressional intent in the statutory declaration that the objective is to be accomplished by specific means; namely, by eliminating “the discharge of

pollutants into the navigable waters”<sup>20</sup> (as opposed to the Nation’s waters) and pursuant to

the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources...<sup>21</sup>

In light of these considerations, Justice Stevens’ petulant accusation that the Scalia plurality is simply against environmentalism<sup>22</sup> falls flat. One wonders if Justice Stevens would advocate such broad agency deference if the Corps had stood by its original interpretation of the Clean Water Act in 1974 that the agency could only regulate traditional navigable waters.<sup>23</sup>

### SO, WHAT’S COVERED AND WHAT’S NOT COVERED?

Putting aside the dissent, whose regulatory approach was defeated by a five justice majority, the *Rapanos* decision provides us with two different jurisdictional tests.

#### *Jurisdictional Waters - Scalia Plurality*

The Scalia plurality adopts a hydrographic test to define jurisdictional waters. Under this test “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,’” that are connected to navigable-in-fact waters, are subject to regulation under the Clean Water Act.<sup>24</sup> Although these water bodies can be either navigable-in-fact or nonnavigable and intrastate, they do “not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”<sup>25</sup>

The Scalia plurality would exclude a long list of other waters and lands from federal jurisdiction, including:<sup>26</sup>

- nonnavigable, isolated, intrastate waters
- channels and streams with intermittent or ephemeral flows (but not seasonal flows)
- dry arroyos, coulees and washes
- directional sheet flow
- wet meadows
- storm sewers and culverts
- drain tiles
- man-made drainage ditches
- “point sources” such as pipes, ditches, channels, and conduits
- sewage treatment plants
- waterworks appurtenances such as mains, pipes, hydrants, machinery, and buildings.
- 100 year flood plain

### ***Jurisdictional Waters - Kennedy Concurrence***

The Kennedy concurrence adopts an effects test to define jurisdictional waters. Under this test only a water that possesses “a significant nexus to waters that are navigable-in-fact or that could reasonably be so made” are subject to regulation under the Clean Water Act.<sup>27</sup>

Justice Kennedy would exclude:

- nonnavigable, isolated, intrastate waters (such as certain ponds and mudflats)<sup>28</sup>
- remote drains, ditches and streams with insubstantial flows<sup>29</sup>

### ***Jurisdictional Wetlands - Scalia Plurality***

Under the Scalia plurality, “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 clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and are covered by the Act.”<sup>30</sup> The wetland must be “as a practical matter *indistinguishable*”<sup>31</sup> from the relatively permanent body of water and that water body itself must be “connected to traditional interstate navigable waters.”<sup>32</sup>

The Scalia plurality rejects the agencies’ regulatory definition that “adjacent” means “bordering, contiguous, or neighboring.” Instead, the plurality adopts the ordinary meaning of the term—“adjacent” means abutting.<sup>33</sup>

### ***Jurisdictional Wetlands - Kennedy Concurrence***

Under the Kennedy concurrence, “When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish jurisdiction.”<sup>34</sup> Categorical regulation of wetlands adjacent to “major tributaries” however, would require additional regulation or adjudication.<sup>35</sup>

“Absent 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.”<sup>36</sup> According to Justice Kennedy, this showing is necessary to avoid unreasonable applications of the statute such as the “regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it.”<sup>37</sup> And, “a reviewing court must identify substantial evidence supporting the Corps’ claims.”<sup>38</sup> The agency cannot speculate; when “wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable waters.”<sup>39</sup>

Justice Kennedy defines “**significant nexus**” in the context of wetland regulation: “Wetlands 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.”<sup>40</sup> This definition may include wetlands without an actual hydrological connection to navigable-in-fact waters (but presumably not wholly isolated).

## HOW DOES *RAPANOS* AFFECT THE COURT’S PRIOR DECISIONS?

### *Riverside Bayview*

To the Scalia plurality, the significance of *United States v. Riverside Bayview Homes, Inc.*<sup>41</sup>, lies in its facts. In that case, the court had to determine if a wetland adjacent to a navigable-in-fact waterway was subject to regulation under the Clean Water Act. The circumstances were unique in that the marshy area was “characterized by saturated soil conditions and wetland vegetation [that] extended beyond the boundary of respondent’s property to Black Creek, a navigable waterway.”<sup>42</sup> The wetland and navigable waterway were so intertwined it was difficult to tell where the water ended and the land began.<sup>43</sup> Thus the court held: “Because respondents property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case.”<sup>44</sup>

In *Rapanos*, the Scalia plurality uses the facts in *Riverside Bayview* as the “gold standard” for determining jurisdiction over adjacent wetlands: “the lower courts should determine ... whether the wetlands in question are ‘adjacent’ to [covered waters] in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*.”<sup>45</sup>

Contrary to the plurality, the Stevens dissent relies on the broad language of the decision, particularly footnote 9, to justify complete deference to the agency interpretation of its Clean Water Act authority. But Justice Kennedy takes a position closer to the plurality. He points out that *Riverside Bayview* “addressed no factual situation other than wetlands adjacent to navigable-in-fact waters” and concludes:

The Corps’ theory of jurisdiction in these consolidated cases—adjacency to tributaries, however remote and insubstantial—raises concerns that go beyond the holding in *Riverside Bayview*; and so the Corps’ assertion of jurisdiction cannot rest on that case.<sup>46</sup>

With a majority of the court sharing this view, *Riverside Bayview* can no longer be cited as holding that the Corps and EPA can regulate any wetland neighboring any tributary. But the case will surely be cited for its factual description of adjacent wetlands.

### *SWANCC*

Like *Riverside Bayview* 16 years earlier, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*<sup>47</sup> called on the Supreme Court to address a jurisdictional question under the Clean Water Act, but at the opposite end of the spectrum.

Instead of wetlands “inseparably bound up” with navigable waters, the Corps sought to regulate shallow ponds that had absolutely no hydrological connection with any navigable waters.<sup>48</sup> The asserted basis for jurisdiction was the Corps’ “Migratory Bird Rule” that authorized federal regulation of any waters that could be used by migratory birds.<sup>49</sup> Because the regulation of these “nonnavigable, isolated, intrastate water bodies” would read the term “navigable waters” out of the statute, the court invalidated the rule and rejected the Corps’ broad interpretation of its regulatory authority.<sup>50</sup>

Post *SWANCC*, most of the lower courts that have addressed the scope of the Clean Water Act have routinely limited the case to its facts holding that the only effect of *SWANCC* was to invalidate the “Migratory Bird Rule” while the Corps continued to assert jurisdiction over isolated water bodies.<sup>51</sup> But the *Rapanos* decision brings some clarity to the issue.

In *Rapanos*, all nine Justices are in agreement as to the holding in *SWANCC*. The Scalia plurality<sup>52</sup>, the Kennedy concurrence<sup>53</sup>, as well as the Stevens dissent<sup>54</sup>, all represent that *SWANCC* excluded “nonnavigable, isolated, intrastate water bodies” (like certain ponds and mudflats) from federal jurisdiction. This is a significant victory for landowners in its own right because of the prevalence of these water bodies on private lands.

With this unanimous reading of the result in *SWANCC*, that case can no longer be said to have merely invalidated the “Migratory Bird Rule.”

#### **DOES RAPANOS AFFECT SECTION 402 OR JUST 404?**

Section 404(a) of the Clean Water Act covers dredged and fill activity while section 402 applies to other discharges; typically industrial pollutants under the EPA’s National Pollutant Discharge Elimination System (NPDES) program. *Rapanos* was a 404 case but both sections utilize the same definition of “navigable waters.”<sup>55</sup>

Justice Scalia acknowledges that the plurality’s narrower definition of “navigable waters” would apply to section 402 but concludes it would not “significantly affect[] the enforcement of [§ 402]” because the “lower courts applying [§ 402] have not characterized intermittent channels as ‘waters of the United States.’”<sup>56</sup>

Moreover, the proof of downstream flow of pollutants required under [§ 402] appears substantially similar, if not identical, to the proof of a hydrological connection that would be required, on the Sixth Circuit’s theory of jurisdiction, to prove that an upstream channel or wetland is a “water of the United States.”<sup>57</sup>

“In either case,” Justice Scalia continues, “the agency must prove that the contaminant-laden waters ultimately reach covered waters.”<sup>58</sup>

Presumably, under the Kennedy “significant nexus” test, the agency would have the burden of demonstrating the discharge has entered a water body that significantly affects a

navigable-in-fact water.

### WITH A SPLIT DECISION LIKE THIS, WHICH OPINION CONTROLS?

In the 1977 case of *Marks v. United States*<sup>59</sup> the Supreme Court stated 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.”<sup>60</sup> While this rule has been difficult to apply in some cases, it is the only rule sanctioned by the Supreme Court for interpreting its split decisions.<sup>61</sup> “Narrowest grounds” has been interpreted to mean that opinion which is “a logical subset of other, broader opinions.”<sup>62</sup> Put another way:

The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rationale basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.<sup>63</sup>

In the *Rapanos* case, the Scalia plurality appears more narrowly drawn in that it is a logical subset of the Kennedy test. The narrow plurality test is more like strict scrutiny whereas the broader Kennedy test is more like rational basis. Even the dissent thought so:

I assume that Justice Kennedy’s approach will be controlling in most cases because it treats more of the Nation’s waters as within the Corps’ jurisdiction, *but in the unlikely event that the plurality test is met but Justice Kennedy’s is not*, courts should also uphold the Corps’ jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test.<sup>64</sup>

Thus, under *Marks*, the Scalia plurality is controlling. This makes sense from a pragmatic standpoint as well because a water body that satisfies the plurality test would also satisfy the Kennedy test and even the dissent such that the jurisdictional determination would garner all nine votes on the Court for unanimous support.

If the plurality opinion is followed by the courts below, it would substantially curtail federal jurisdiction under the Clean Water Act.<sup>65</sup> 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 reading.

### WHAT HAPPENS WITH THE RAPANOS CASE NOW?

The Supreme Court vacated the Sixth Circuit opinion and remanded the case for further proceedings.

On remand, the Scalia plurality requires the courts to make two findings:

First, that the adjacent channel contains a “wate[r] of the United States,” (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.<sup>66</sup>

Based on the current state of the record, the Rapanos properties are unlikely to meet this jurisdictional test because on two of the three sites there are intervening manmade drainage ditches and in all cases the evidence does not establish that these wetlands are as a practical matter indistinguishable from a stream, river or lake, the nearest of which is miles away.<sup>67</sup>

In contrast to the Scalia plurality, the Kennedy concurrence calls for the courts to determine if the regulated wetlands, “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.<sup>68</sup>

Whether the Rapanos properties meet this test will depend on how broadly or narrowly the lower courts read the test. Although Justice Kennedy cited expert testimony in the record that the regulated wetlands may have a significant effect on downstream navigable-in-fact waters, the Justice noted that the government expert never did a site-specific analysis and that the record is currently inadequate to determine a jurisdictional connection.<sup>69</sup>

## CONCLUSION

We can conclude the following from the *Rapanos* decision:

1. That federal agencies have no authority under the Clean Water Act to regulate truly isolated, nonnavigable, intrastate water bodies.
2. That federal agencies have no authority under the Clean Water Act to regulate any area merely because it has a hydrological connection with downstream navigable-in-fact waters.
3. That federal agencies have no authority under the Clean Water Act to regulate remote drains and ditches with insubstantial flows.
4. That the *Rapanos* decision applies to both the § 402 NPDES permit program of the Clean Water Act and the § 404 dredge and fill permit program.
5. That if the federal agencies or courts adopt the view of the Scalia plurality, federal jurisdiction under the Clean Water Act will end at “those relatively permanent, standing or continuously flowing bodies of water ... that are described in ordinary parlance as ‘streams,

oceans, rivers and lakes,” as well as wetlands indistinguishable from these covered waters.

6. That if the federal agencies or courts adopt the view of the Kennedy concurrence, federal jurisdiction will extend to those waters and wetlands that possesses “a significant nexus to waters that are navigable-in-fact or that could reasonably be so made.”

The *Rapanos* case significantly alters the scope of federal authority under the Clean Water Act. How significant will depend on the willingness of federal regulators and the lower courts to adhere to the Supreme Court’s clear determination that the scope of federal-power under the Clean Water Act has meaningful limits.

### Endnotes

1. With some changes this article first appeared in Mealey’s Litigation Report: Real Estate (July 2006).
2. Mr. Hopper is a principal attorney with the Pacific Legal Foundation who represented Mr. Rapanos in the U.S. Supreme Court.
3. 33 U.S.C. § 1344(a).
4. 33 U.S.C. § 1362(7).
5. See *United States v. Rapanos*, 190 F.Supp.2d 1011, 1012 (E.D. Mich. 2002). (This case involved three separate sites in the State of Michigan; the Salzburg, Hines Road, and Pine River sites. The first two included wetlands adjacent to nonnavigable manmade drainage ditches while the third was deemed “near” the Pine River, a nonnavigable waterway. All three sites were miles removed from any navigable-in-fact water body.)
6. See *United States v. Rapanos*, 376 F.3d 629, 639 (6<sup>th</sup> Cir. 2004).
7. *Rapanos v. United States*, 126 S.Ct. 2208 (2006) (*Rapanos* was consolidated with *Carabell v. United States*. That case involved wetlands separated from a nonnavigable manmade ditch by a berm such that there was no direct hydrological connection between the wetlands and the ditch. The ditch flowed eventually to Lake St Clair, a navigable-in-fact water body. Under federal regulations, wetlands adjacent to a tributary to a navigable-in-fact waterway are subject to federal jurisdiction even in the absence of a hydrological connection. See 33 CFR § 328.3(a)(5) and (7).)
8. *Id.* at 2236.
9. *Id.* at 2222.
10. *Id.* at 2221 and 2227 (Scalia, J.).

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11. *Id.* at 2234.
  12. *Id.* at 2252 *et seq.* (Stevens, J., dissenting).
  13. *Id.* at 2236. (Kennedy, J., concurring in result).
  14. *Id.* at 2248.
  15. *Id.* at 2248-2249.
  16. *Id.* at 2234.
  17. *Id.* at 2232.
  18. *Id.* at 2247.
  19. 33 U.S.C. § 1251(a).
  20. 33 U.S.C. § 1251(a)(1).
  21. 33 U.S.C. § 1251(b).
  22. *Rapanos*, 126 S.Ct. (Dissent at fn 8).
  23. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 168 (2001).
  24. *Rapanos*, 126 S.Ct. at 2225 -2227.
  25. *Id.*
  26. *Id.* at 2217-2223.
  27. *Id.* at 2236.
  28. *Id.* at 2240-2245.
  29. *Id.* at 2248-2249.
  30. *Id.* at 2226.
  31. *Id.* at 2234.
  32. *Id.* at 2227.
  33. *Id.* at 2225-2226.

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34. *Id.* at 2249.
  35. *Id.* at 2248.
  36. *Id.* at 2249.
  37. *Id.*
  38. *Id.* at 2251.
  39. *Id.* at 2248.
  40. *Id.* at 2248.
  41. 474 U.S. 121 (1985).
  42. *Id.* at 131.
  43. *Id.* at 132.
  44. *Id.* at 135.
  45. *Rapanos*, 126 S.Ct. 2235.
  46. *Id.* at 2248.
  47. 531 U.S. 159 (2001).
  48. *Id.* at 171.
  49. *Id.* at 164.
  50. *Id.* at 171-172.
  51. *See*, for example, *U.S. V. Rapanos*, 376 F.3d 629, 637-638 (6<sup>th</sup> Cir. 2004).
  52. *Rapanos*, 126 S.Ct. at 22217.
  53. *Id.* at 2244.
  54. *Id.* at 2256.
  55. 33 U.S.C. § 1362(7).
  56. *Rapanos*, 126 S.Ct. at 2227
  57. *Id.* at 2228.

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58. *Id.*

59. 430 U.S. 188 (1977).

60. *Id.* at 193.

61. See *In re Michael Francis Cook*, 322 B.R. 336, 341 (2005) (“The only approach approved by the Supreme Court is the ‘narrowest grounds’ approach.”).

62. *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991)

63. Ken Kimura, *A Legitimacy Model For The Interpretation Of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-1604 (1992)

64. *Rapanos*, 126 S. Ct. at 2265 n.14. (Justice Stevens dissenting) (emphasis added)

65. This certainly proved true in the first case to apply the *Rapanos* decision. In *United States v. Chevron Pipe Line Company*, 437 F.Supp.2d 605 (N.D. Texas 2006), the district court determined Clean Water Act jurisdiction does not extend to a remote dry manmade drainage ditch. Rather than apply the Kennedy “significant nexus” test, which the court found ambiguous and without meaningful standards, the court elected to follow the Scalia plurality. But, for a contrary view see *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9<sup>th</sup> Cir. 2006)(petition for rehearing pending)(Kennedy test is controlling); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7<sup>th</sup> Cir. 2006)(Kennedy test is controlling); and, *United States v. Johnson*, 467 F.3d 56 (1<sup>st</sup> Cir 2006)(petition for rehearing pending)(jurisdiction may be established under either the plurality test or the Kennedy test).

66. *Id.* at 2227.

67. *Id.* at 2238 (Of course, the wetlands in *Carabell* would not meet the Scalia test because there is no surface water connection with any other body of water, permanent or otherwise.)

68. *Id.* at 2248.

69. *Id.* at 2250-2251.