

**MUDDYING THE WATERS OF THE CLEAN WATER ACT:  
RAPANOS v. UNITED STATES AND THE FUTURE OF  
AMERICA'S WATER RESOURCES**

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Oral arguments often pass for theater in the legal world, and the true meaning of their drama is usually hard to discern until after the entire story has been told. Take the recent U.S. Supreme Court case *Rapanos v. United States Army Corps of Engineers*, which will no doubt be deemed one of the most significant—if not most befuddling—of the Clean Water Act (CWA) decisions.<sup>1</sup>

The case involves a pivotal question: what waters are protected by the landmark CWA, which seeks to clean up our nation's waters? In what can only be considered a bright spot in an otherwise largely dismal environmental record, the Bush Administration argued for broad CWA protections. Common wisdom going into the February 21, 2006 oral argument was that four Justices—Breyer, Ginsburg, Souter, and Stevens—were supportive of the Administration's position; Justices Scalia and Thomas were likely hostile; and swing Justice Kennedy, and, less likely, the new Chief Justice Roberts, and Justice Alito, who was sitting for his first oral argument as a Supreme Court Justice, were in play.

About halfway through Solicitor General Paul Clement's impressive presentation to the Court, Justice Breyer launched into a confounding line of questioning.<sup>2</sup> General Clement was arguing for broad deference to U.S. Army Corps of Engineers (Corps) regulations defining the CWA's jurisdiction as including "tributaries" and wetlands "adjacent" to other covered waters, such as tributaries.<sup>3</sup> In a somewhat exasperated tone, Justice Breyer, who five years earlier had joined a dissenting opinion in another CWA case expounding the many benefits of protecting wetlands, prodded General Clement on where he could support the contention that certain wetlands provided valuable ecological functions in relation to other waters, such as flood control.<sup>4</sup> Justice Breyer said he could not find a "quantitative assessment" of such functions.<sup>5</sup> Furthermore, while he found it "very plausible" that "a wetland acts as a sponge," he scolded General

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1. *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

2. Transcript of Oral Argument at 62, *Rapanos v. U.S.*, 126 S. Ct. 2208 (2006) (No. 04-1034).

3. *Id.* at 61–62.

4. *Id.* at 62–63, 65.

5. *Id.* at 63.

Clement for the “need to drop a citation somewhere.”<sup>6</sup> General Clement suggested Justice Breyer “defer to the agency in its exercise of expertise” and pointed to amicus briefs that discussed the ecological benefits of wetlands.<sup>7</sup>

This moment furrowed the brows and stirred the anxiety of many. Did Justice Breyer really doubt wetlands serve such important functions? Was Justice Breyer wavering? Could he possibly abandon his former position, taken just five years ago, and adopt a restrictive view of the CWA’s jurisdiction? Or, perhaps, was he trying to give the Solicitor General an opening to persuade other members of the Court who Justice Breyer knew needed convincing?

Speculation at the time ran rampant, but in hindsight this line of questioning appears to have had a very specific purpose. In all probability, Justice Breyer was attempting to draw from General Clement the ace in the hole that would move Justice Kennedy—the only swing Justice who, from the decision, appears to have been persuadable—towards affirming the government’s position.

Unfortunately, the ace in the hole was not delivered and neither was Justice Kennedy’s vote. The inability to convince Justice Kennedy that existing information supports broad deference to the Corps’s categorical regulation of wetlands adjacent to non-navigable waters has resulted in one of the most confusing environmental rulings since Congress passed comprehensive environmental statutes in the late 1960s and 1970s. While not removing any waters from jurisdiction, the ruling likely makes Justice Breyer’s line of questioning the key criterion that regulatory agencies will be tasked to consider on a case-by-case basis in order to protect many wetlands and, potentially, tributaries. The nature of this confusing ruling and how to respond to it will be the subject of this Essay.

## I. THE CLEAN WATER ACT: COMPREHENSIVE FEDERAL PROTECTION FOR OUR NATION’S WATERS

Congress passed the CWA in 1972 with a broad mandate “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and eliminate water pollution by 1985.<sup>8</sup> The chief purpose of the CWA is to prohibit point source discharges of pollutants into navigable waters, unless otherwise permitted by the CWA.<sup>9</sup> For jurisdictional

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6. *Id.* at 65.

7. *Id.*

8. Clean Water Act § 101, 33 U.S.C. § 1251(a) (2000).

9. *Id.* § 1311(a).

purposes, the CWA defines “navigable waters” as “waters of the United States.”<sup>10</sup>

In support of its mandate, the CWA contains broadly defined terms, such as: “pollutants,” which includes waste, like sewage or chemical waste, as well as dredged and fill material;<sup>11</sup> and “point source,” which includes any “discernible, confined[,] and discrete conveyance” including any “ditch, channel, . . . [or] conduit.”<sup>12</sup> The CWA further establishes two primary permitting programs for pollutant discharges: (1) the section 402 National Pollutant Discharge Elimination System permitting program for most discharges (like sewage and industrial waste), to be administered by the U.S. Environmental Protection Agency (EPA); and (2) the section 404 permitting program for dredged and fill material to be administered by the U.S. Army Corps of Engineers.<sup>13</sup>

In *Rapanos*, the meaning of the term “navigable waters” was at issue, but understanding the broader context of the CWA is important for anticipating how this decision will play out in practice. While section 402 and section 404 are often viewed through separate regulatory lenses, this distinction is illusory for jurisdictional purposes. These programs are born from the CWA’s prohibition of pollutant dumping in section 301, and the CWA’s jurisdiction is in no way tied to the type of discharge involved or the permit program triggered by such discharge.<sup>14</sup> Thus, the CWA does not discriminate between protecting a water against dumping fill and dumping toxic chemical waste.

Without delving deeply into the literature or legislative history, it is generally accepted that unlike the term “navigable waters”—which had been used to define federal regulation of waterways since the 1800s—the CWA’s definitional term “waters of the United States” is new and much broader.<sup>15</sup> Both the CWA’s structure and legislative history indicate that it is not intended to be limited to the more conventional concept of “navigable waters,” which encompassed waters “used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and

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10. *Id.* § 1362(7).

11. *Id.* § 1362(6).

12. *Id.* § 1362(14).

13. *Id.* §§ 1342, 1344. Both of these programs can be delegated to states for administration.

*Id.*

14. *Id.* § 1311(a).

15. William Sapp et al., *From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term “Navigable Waters”*, 36 *Envtl. L. Rep. (Envtl. Law Inst.)* 10190, at 10202–03 (2006).

travel on water.”<sup>16</sup> While the U.S. Army Corps of Engineers was initially reluctant to regulate broadly under the CWA, due to litigation and what was viewed as the obvious breadth of the CWA’s scope, by 1977 both the Corps and the EPA were regulating virtually all surface waters under the CWA.<sup>17</sup>

Thus, by the late 1970s, regulations made clear that CWA protections applied to almost all waters within the aquatic system, including tributaries and their surrounding wetlands; geographically separated waters like prairie potholes and playa lakes; and the often dry washes of the arid west. In the 1980s, the U.S. Supreme Court affirmed this broad scope of the CWA in *United States v. Riverside Bayview Homes, Inc.*, by finding that the Corps properly regulated wetlands next to other waters.<sup>18</sup>

*Riverside Bayview* is important not only because it supported broad CWA jurisdiction, but also because it did so based on important ecological considerations. In *Riverside Bayview*, the Court found that “the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment” and held that the regulation of such wetlands was therefore permissible.<sup>19</sup> As reasons for upholding protection of adjacent wetlands under the CWA, the Court noted the ability of wetlands to “filter and purify water draining into adjacent bodies of water, . . . to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion,” and to “serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing[,] and resting sites for aquatic . . . species.”<sup>20</sup>

The extent of the CWA’s scope, however, became less clear when the Supreme Court ruled, in the 2001 case *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“SWANCC”), that certain ponds in northern Illinois were not covered under the CWA when jurisdiction was based solely on their use by migratory birds.<sup>21</sup> The

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16. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); see also Sapp, *supra* note 15, at 10200–04 (defining navigable in fact waters).

17. See Sapp, *supra* note 15, at 10204–07 (describing the history of Corps and EPA regulations); see also Lance Wood, *Don’t Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 *Env’tl. L. Rep.* (Env’tl. Law Inst.) 10187, at 10205–13 (2004) (describing the history of the Corps’s regulations from 1974 to 1977).

18. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Also, in *International Paper Co. v. Ouellette*, the court affirmed that the CWA protected “virtually all bodies of water.” *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987).

19. *Riverside Bayview*, 474 U.S. at 135, 139.

20. *Id.* at 134–35 (citation omitted) (internal quotation marks omitted).

21. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001).

decision was largely built on the Court's desire to give some meaning to the term "navigable" as used to define jurisdiction in the statute.<sup>22</sup> In *SWANCC*, the Court stated: "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.' It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."<sup>23</sup>

The *SWANCC* decision was narrow. It simply precluded the Corps from asserting jurisdiction over certain ponds based solely on their use by migratory birds. It did not rule on the validity of the Corps's regulations giving it jurisdiction over "tributaries," "adjacent wetlands," and waters "the use, degradation[,] or destruction of which could affect interstate or foreign commerce" such as prairie potholes and playa lakes.<sup>24</sup>

Nevertheless, the decision created quite a stir. In the wake of *SWANCC*, agencies, various interest groups, concerned citizens, and the courts wrestled with the question of what was still protected by the CWA. Over the course of almost five years, some clarity again developed. Primarily, several circuit courts (with only one circuit court expressing doubts) conclusively established that the entire tributary system, including upper-reach intermittent streams, ephemeral streams, and man-made channels, remained covered by the CWA, as did their neighboring wetlands.<sup>25</sup> Some courts also found certain waters were protected that did not necessarily have surface connections to larger waters but could impact

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22. *See id.* at 172. The Court noted:

We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited import," and went on to hold that § 404(a) extended to non-navigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

*Id.* (citation omitted).

23. *Id.* at 167 (citation omitted).

24. *See* 33 C.F.R. § 328.3(a) (2005).

25. *See, e.g.*, *United States v. Hubenka*, 438 F.3d 1026, 1034 (10th Cir. 2006) (finding jurisdiction over intrastate, non-navigable tributaries); *United States v. Johnson*, 437 F.3d 157, 181 (1st Cir. 2006) (upholding jurisdiction over wetlands adjacent to non-navigable tributaries flowing to a navigable river); *Treacy v. Newdunn Assocs.*, 344 F.3d 407, 416–17 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) (same); *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001) (finding non-navigable canal tributaries jurisdictional); *but see In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) (expressing in dicta a limited view of CWA jurisdiction); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 268–69 (5th Cir. 2001) (same).

those waters due to subsurface connectivity and ecology.<sup>26</sup> Most courts that ruled on this issue relied on *SWANCC*'s "significant nexus" language, often finding such a nexus when a hydrological connection existed between upper-reach waters and navigable waters downstream.<sup>27</sup>

In the political context, while courts struggled with this question, the Bush Administration began the process of rulemaking to redefine jurisdiction under the CWA. Reactions to this proposal were strong. Over forty states; countless conservation organizations, including several hunting and fishing groups; and 220 members of Congress weighed in strongly for keeping the current and broadly protective rules.<sup>28</sup> In December 2003, between this opposition and a string of favorable circuit court rulings affirming the broad CWA jurisdiction, the Bush Administration dropped its rulemaking. It appeared that, other than in the Fifth Circuit, favorable law was developing to support strong CWA protections—then came *Rapanos*.

## II. AN UNCLEAR RULING

In April 2004, the Supreme Court rejected three petitions for certiorari to review appeals court decisions affirming CWA protections for remote wetlands hydrologically connected to larger downstream waters.<sup>29</sup> These decisions, which included an earlier criminal case involving John Rapanos and the wetlands at issue in the civil case the Court ultimately did review, reasoned that a "significant nexus" was present when a hydrological connection existed between upstream and navigable-in-fact waters and that the entire tributary system was properly regulated under the CWA.<sup>30</sup>

The Court's rejection of certiorari on these decisions seemed to indicate that the Court was in no hurry to revisit the issue and would allow the lower courts to continue to work it out. Thus, in October 2005, many were taken aback when the Court granted certiorari to hear two "waters of

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26. *N. Cal. River Watch v. City of Healdsburg*, No. C01-04686WHA, 2004 WL 201502, at \*8–9 (N.D. Cal. Jan. 23, 2004) (finding that groundwater and ecological connections can establish jurisdiction); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180–81 (D. Idaho 2001) (finding that subsurface water connectivity can establish jurisdiction).

27. *See, e.g., Johnson*, 437 F.3d at 180–81; *United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2003).

28. *Rapanos v. United States*, 126 S. Ct. 2208, 2256 n.4 (2006) (Stevens, J., dissenting); Letter from 220 Members of Congress to The Honorable George W. Bush, President of the United States (Nov. 24, 2003); Matt Shipman, *GOP Rift Hampers New Administration Bid to Settle Water Act Scope*, Inside EPA, July 5, 2006, available at <http://insideepa.com>.

29. *Treacy v. Newdunn Assocs.*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) (involving Rapanos in an earlier criminal case); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004).

30. *See Newdunn*, 344 F.3d at 416–17; *Rapanos*, 339 F.3d at 453; *Deaton*, 332 F.3d at 712.

the United States” cases arising out of Michigan: *Rapanos v. United States*, the civil companion to the earlier rejected criminal case, and *Carabell v. U.S. Army Corps of Engineers*.<sup>31</sup>

These cases had similar facts, with one important distinction. *Rapanos*, like the cases the Court had earlier declined to review, involved wetlands connected by surface flow to tributaries that eventually flowed into navigable-in-fact waters.<sup>32</sup> The case involved three sites eleven to twenty miles away from the nearest traditionally navigable water.<sup>33</sup> Each site involved different tributary types, from a wide perennially flowing natural river, to intermittently flowing man-made or man-altered conveyances.<sup>34</sup> Unlike *Rapanos*, *Carabell* involved a wetland that did not share a continuous or documented flow with its neighboring tributary, a ditch that carried an indeterminate amount of water about a mile to the navigable Lake St. Clair.<sup>35</sup>

Apprehension about the outcome ran rampant, with speculation arising that the ruling would ultimately focus on the distinction between wetlands with a surface hydrological connection to other waters and wetlands without such a connection. There was hope that the Court would affirm the approach of several lower courts in upholding jurisdiction for the entire tributary system and hydrologically connected, neighboring wetlands. However, many feared that the Court would be more skeptical of the *Carabell* wetlands where a surface hydrological connection was not present.

Faced with these various facts, the Court was unable to resolve much. The final decision had five separate opinions and no majority consensus on the ultimate question of what was regulated under the CWA. While a majority voted to remand the cases back to the lower court for further review, there were divergent and contradictory rationales for what standard the lower court should apply.

The three main opinions—Justice Scalia’s plurality opinion, signed onto by Chief Justice Roberts and Justices Alito and Thomas; Justice Stevens’s dissenting opinion signed onto by Justices Souter, Ginsburg, and Breyer; and a concurring opinion by Justice Kennedy—addressed at length the question of the scope of the CWA’s jurisdiction. These opinions diverged, however, on what constituted “waters of the United States.”

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31. *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (2005); *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 414 (2005). The Court decided both cases in *United States v. Rapanos*, 126 S. Ct. 2208 (2006).

32. *Rapanos*, 126 S. Ct. at 2238 (Kennedy, J., concurring).

33. *Id.* at 2214 (plurality opinion).

34. *Id.* at 2238 (Kennedy, J., concurring).

35. *Id.* at 2239.

Justice Scalia, looking mainly to a 1954 dictionary to support his analysis, took a narrow view of jurisdiction.<sup>36</sup> His opinion would dramatically limit the CWA's coverage to "those relatively permanent, standing or continuously flowing bodies of water" and "only those wetlands with a continuous surface connection to [other regulated waters]."<sup>37</sup> This view would cut off jurisdiction for the countless wetlands that may not be continuously hydrologically connected to nearby waters and put many upper-reach and arid-region tributaries at risk of losing federal protection from pollution and destruction. Justice Scalia tried to get around some of the obvious water pollution problems his approach presents by saying, in essence, that many of these streams could simply be regulated as point sources if they carried discharged pollutants into larger waters.<sup>38</sup> For many reasons, some of which are described below, this attempt to explain away any pollution concerns is troubling and misguided.

Justice Stevens took a broad view of the CWA's jurisdiction, deferring to the Corps's current categorical regulation of all tributaries and their adjacent wetlands.<sup>39</sup> Justice Stevens found that:

[T]he Corps has concluded that [wetlands adjacent to other waters, including non-navigable tributaries] play important roles in maintaining the quality of their adjacent waters, and consequently in the waters downstream . . . . Given that wetlands serve these important water quality roles and given the ambiguity inherent in the phrase "waters of the United States," the Corps has reasonably interpreted its jurisdiction to cover non-isolated wetlands [such as those at issue in *Rapanos* and *Carabell*].<sup>40</sup>

Justice Kennedy largely agreed with Justice Stevens that broad protection under the CWA is warranted.<sup>41</sup> Yet, where Stevens was willing to uphold the assertion of jurisdiction over the waters at issue, finding that existing information supported categorical regulation of these waters under the current regulations, Kennedy was unconvinced that the regulations were

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36. *Id.* at 2220–21 (plurality opinion).

37. *Id.* at 2225, 2226. It is worth noting that Justice Scalia qualified this test in a footnote, stating that he does not necessarily mean to "exclude seasonal rivers" or waters "that might dry up in extraordinary circumstances, such as drought." *Id.* at 2221 n.5 (emphasis omitted).

38. *Id.* at 2227. Justice Scalia, who apparently did not consider the possibility of siltation, contended that fill simply stayed in place and did not wash downstream. *Id.* at 2228.

39. *Id.* at 2252, 2265 (Stevens, J., dissenting).

40. *Id.* at 2257 (citation omitted). Stevens went on to say that he thinks "it clear that wetlands adjacent to tributaries of navigable waters generally have a 'significant nexus' with the traditionally navigable waters downstream." *Id.* at 2264.

41. *Id.* at 2241 (Kennedy, J., concurring).



rigorous enough to support categorical regulation of wetlands adjacent to minor tributaries without additional information showing that the waters impacted downstream waters.<sup>42</sup> On the other hand, Kennedy outright rejected Justice Scalia's test as being "without support in the language and purposes of the [CWA] or in our cases interpreting it."<sup>43</sup>

Kennedy found that waters need to have a "significant nexus" to traditionally navigable waters for jurisdiction to attach, and that the Corps must determine the existence of this nexus on a case-by-case basis.<sup>44</sup> Justice Kennedy then set forth a test:

[W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."<sup>45</sup>

Justice Stevens stated that this test "will probably not do much to diminish the number of wetlands covered by the [CWA] in the long run."<sup>46</sup>

As discussed below, Justice Kennedy's opinion should largely guide the courts and agencies in applying the *Rapanos* decision. Justice Stevens's statement expressed the hope that the broad ecological factors discussed by Justice Kennedy as proper bases for asserting the CWA's jurisdiction will indeed be applied to ensure that federal protections for important waters are not removed. Yet, given the bombastic tone and more clear-line rule of Justice Scalia's opinion, coupled with the work it takes to interpret and apply Justice Kennedy's opinion, there is potential for courts and regulatory agencies to be swayed by Scalia into adopting an arbitrary and unnecessarily restrictive interpretation of what waters remain covered by the CWA.

### III. WHOSE OPINION CONTROLS? A VEXING QUESTION

One of the most vexing aspects of the *Rapanos* opinion is deciding

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42. *Id.* at 2248–49.

43. *Id.* at 2242.

44. *Id.* at 2249.

45. *Id.* at 2248.

46. *Id.* at 2264 (Stevens, J., dissenting).

what test the lower courts should apply. Given the divergent nature of the opinions, this question is not easy to answer.

Although five justices rejected Scalia's approach, there is no majority consensus for determining jurisdiction. The five votes in support of remanding the cases diverge dramatically in their reasoning. Justice Kennedy, who joined Scalia in sending the cases back for lower court review, flatly rejected Scalia's reasoning, calling his test inconsistent with the CWA and unsupported by caselaw.<sup>47</sup> Likewise, Justice Scalia had little more than scorn to offer Kennedy's approach. Justice Scalia derided Justice Kennedy's case-by-case approach based on a "significant nexus" as "turtles all the way down."<sup>48</sup>

In turn, Kennedy accused Scalia of being "unduly dismissive" of the interests put forth by the government.<sup>49</sup> Unlike Justice Scalia, who saw little value in protecting ephemeral waters, dry arroyos, and wet meadows (waters Scalia characterized in part as "puddles"),<sup>50</sup> Justice Kennedy understood that many of these waters are ecologically connected to larger waters and therefore warrant protection.<sup>51</sup> He noted at length that nowhere in the CWA is there support for a jurisdictional distinction between waters with continuous flow and waters with intermittent flow.<sup>52</sup> Similarly, he noted that the CWA, case precedent, and ecology fail to support Scalia's insistence on a surface-water connection between wetlands and nearby water bodies.<sup>53</sup> Kennedy explained that wetlands perform important ecological functions, such as pollutant filtering and flood retention.<sup>54</sup> Consequently, "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."<sup>55</sup>

Justice Kennedy's and Justice Scalia's skepticism of each other's approach was warranted. Scalia's rejection of the "significant nexus" test for CWA jurisdiction was well-founded, as neither the CWA nor SWANCC require such a finding. However, the term "significant nexus" was used in SWANCC and relied on by lower courts in interpreting jurisdiction after

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47. *Id.* at 2242 (Kennedy, J., concurring).

48. *Id.* at 2233 (plurality opinion). According to Justice Scalia, this snipe is a reference to a classic story where an Eastern guru argues that the world rests on the backs of various animals with a turtle at the bottom. When asked what supports the turtle, the guru says that it is turtles all the way down. *Id.* at 2234 n.14.

49. *Id.* at 2246 (Kennedy, J., concurring).

50. *Id.* at 2221 (plurality opinion).

51. *Id.* at 2244 (Kennedy, J., concurring).

52. *Id.* at 2242-43.

53. *Id.* at 2244.

54. *Id.* at 2245-46.

55. *Id.* (emphasis added).

SWANCC.<sup>56</sup>

On the other hand, the rest of Justice Scalia's opinion was virtually unfounded. It was almost solely supported by a selective reading of a 1954 dictionary definition and had virtually no grounding in the CWA, caselaw, or, for that matter, turtles—species that stand to suffer greatly if Scalia's view were to become law.<sup>57</sup> Moreover, Justice Scalia's view of jurisdiction would radically undermine the CWA's chief water quality goals. While Justice Scalia left some room for interpretation as to how permanent or continuous water presence or flow must be for jurisdiction to attach, his view could nevertheless erase jurisdiction for many or most ephemeral and intermittent streams. After all, EPA has estimated that intermittent or ephemeral streams comprise fifty-nine percent of all stream miles in the United States, excluding Alaska.<sup>58</sup> Scalia's interpretation could have even more dramatic impact in the arid west, where as much as ninety-five percent of all stream miles in some states are intermittent or ephemeral.<sup>59</sup> Additionally, under Justice Scalia's approach, the CWA's jurisdiction would be removed from all wetlands that lack continuous surface flow into waters he deems covered. This would put an extraordinary number of wetlands at risk. Justice Scalia also suggested that intrastate waters that are navigable-in-fact are not covered either, meaning that waters as significant as the Great Salt Lake may not be protected.<sup>60</sup>

In recognizing the need to apply the CWA's protections to waters that serve important water-quality and ecological functions, Kennedy's opinion was more akin to the Stevens's dissent than to the Scalia plurality. Where Stevens and Kennedy diverged is not so much in *what* waters are regulated, but in *how* those waters can be regulated. Justice Kennedy required a showing of a "significant nexus" for certain waters, whereas Justice Stevens was willing to defer to existing regulations without such a showing.<sup>61</sup>

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56. It was correctly pointed out by both Justice Stevens and Justice Scalia that the term "significant nexus" was used in *SWANCC* as a characterization, not as a test. *Id.* at 2233 (plurality opinion); *id.* at 2264 (Stevens, J., dissenting).

57. *Id.* at 2233 (plurality opinion).

58. Letter from Benjamin H. Grumbles, Assistant Administrator, U.S. Environmental Protection Agency, to Jeanne Christie, Executive Director, Association of State Wetland Managers (Jan. 9, 2005) at 2.

59. *See, e.g.*, ARIZ. DEPT. OF ENVTL. QUALITY, COMMENTS ON ADVANCED NOTICE OF PROPOSED RULEMAKING ON THE CLEAN WATER ACT REGULATORY DEFINITION OF "WATERS OF THE UNITED STATES" 2 (2003) (describing the quality and function of surface waters in Arizona), available at [http://www.earthjustice.org/library/legal\\_docs/AZ-20Dept-20of-20Enviro-20Quality-201738.pdf](http://www.earthjustice.org/library/legal_docs/AZ-20Dept-20of-20Enviro-20Quality-201738.pdf).

60. *Rapanos*, 126 S. Ct. at 2220 n.3.

61. As pointed out in an earlier footnote, Justice Stevens found that, at the least collectively, wetlands adjacent to tributaries do indeed have a "significant nexus" to downstream waters. *Id.* at 2264 (Stevens, J., dissenting).

So far, five courts have considered the issue of which opinion controls, with varying results. The first court to consider *Rapanos* was the Federal District Court for the Northern District of Texas, which is in a circuit that has been particularly hostile to broad CWA jurisdiction. In an opinion with suspect reasoning, the judge essentially ignores Justice Kennedy's opinion, finding that Justice Kennedy's significant nexus test "leaves no guidance on how to implement its vague, subjective centerpiece."<sup>62</sup> Instead, the judge found that because there was no clear majority rule, and because Scalia tended to favor limited jurisdiction, pre-*Rapanos* caselaw in the Fifth Circuit limiting jurisdiction to navigable-in-fact waters and abutting wetlands remained authoritative.<sup>63</sup> In another federal district court case, the Middle District of Florida indicated that a mix-and-match approach could be applied to the opinion, whereby jurisdiction would be established if either the Kennedy or the Scalia test is met.<sup>64</sup> However, this case was merely interpreting the reasonableness of a lower court's conclusion that the CWA applied to a polluted creek in the context of issuing search warrants, so its analysis did not have to zero in on a precise holding regarding this issue.<sup>65</sup>

The clearest statements as to whose opinion controls *Rapanos* have come from the three circuit courts: the Ninth, Seventh, and First Federal Circuit Courts of Appeals. In the Ninth Circuit case, *Northern California River Watch v. City of Healdsburg*, the court found that "Justice Kennedy . . . provides the controlling rule of law."<sup>66</sup> The court cited *Marks v. United States* for this contention.<sup>67</sup> In *Marks*, 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

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62. *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

63. *Id.* at 614–15. Curiously, the court ended up concluding that CWA jurisdiction was even narrower than Justice Scalia allowed: "[A]bsent actual evidence that the site of the farthest traverse of the spill is *navigable-in-fact* or adjacent to an open body of navigable water, the Court finds that a 'significant nexus' is not present under the law of this circuit." *Id.* at 615.

64. *United States v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at \*19 (M.D. Fla. Aug. 2, 2006) (finding that waters are jurisdictional under the CWA if they satisfy "either the plurality's test (a relatively permanent, standing or continuously flowing water) or the general parameters of Justice Kennedy's concurrence (a tributary that feeds into a traditional navigable water; not necessarily a continuously flowing stream, river or ocean, but perhaps also not a ditch or drain)"). Justice Stevens also suggested that jurisdiction can be established if either the Kennedy or the Scalia test is met. *Rapanos*, 126 S. Ct. at 2265–66 n.14 (Stevens, J., dissenting).

65. *Evans*, 2006 WL 2221629, at \*4.

66. *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

67. *Marks*, 430 U.S. at 193.

concurring in the judgments on the narrowest grounds.’”<sup>68</sup>

The Seventh Circuit, in *United States v. Gerke*, remanded an enforcement action to the district court for additional fact finding in light of *Rapanos*.<sup>69</sup> In *Gerke*, the court also relied on *Marks* to find that in almost all instances Kennedy’s opinion will control.<sup>70</sup> The Seventh Circuit went into a far more detailed analysis than the Ninth Circuit in making its finding. Citing *Marks*, it stated:

When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose. In *Rapanos*, that is Justice Kennedy’s ground.<sup>71</sup>

The court further elaborated on its reasoning:

[A]ny conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in *most* cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the *Rapanos* plurality), the exception being a case in which he would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality) because there was a slight surface

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68. *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

69. *Gerke* involved a case in which the Seventh Circuit had already ruled in favor of the government that the wetlands were jurisdictional. *United States v. Gerke*, 412 F.3d 804, 808 (7th Cir. 2005). However, the Supreme Court, in granting a petition for certiorari, *Gerke v. United States*, 126 S. Ct. 2964 (2006), remanded the case back to the Seventh Circuit to make its finding consistent with *Rapanos*. *United States v. Gerke*, No 04-3941, 2006 WL 2707971 (7th Cir. Sept. 22, 2006).

70. *United States v. Gerke*, No 04-3941, 2006 WL 2707971, at \*1–2 (7th Cir. Sept. 22, 2006). It is worth noting that some courts have taken a more literal meaning of *Marks*, which would make it less useful as guidance in interpreting which opinion, if any, controls in *Rapanos*. For instance, the D.C. Circuit analyzed *Marks* applicability to a case, like *Rapanos*, where the concurring opinion was not a logical subset of the plurality opinion. See *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991). The *King* court confined the *Marks* analysis to instances only concerning the plurality and the concurring opinions, stating that “*Marks* is workable—one opinion can be meaningfully regarded as ‘narrower’ than another—only when one opinion is a logical subset of other, broader opinions.” *Id.* at 781. The court went on to explain that, “When . . . one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic.” *Id.* at 782. The D.C. Circuit declined to apply the reasoning of *Marks* to an overlap between the concurrence and the dissent, finding this an improper application of *Marks*. *Id.* at 783. The Supreme Court itself has noted the limitations of *Marks*, stating that in certain instances its test is “more easily stated than applied to the various opinions supporting the result.” *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quotation omitted).

71. *Gerke*, 2006 WL 2707971, at \*1 (citation omitted).

hydrological connection. The plurality's insistence that the issue of federal authority be governed by strict rules will on occasion align the Justices in the plurality with the *Rapanos* dissenters when the balancing approach of Justice Kennedy favors the landowner. But that will be a rare case, so as a practical matter the Kennedy concurrence is the least common denominator (always, when his view favors federal authority).<sup>72</sup>

While the Seventh Circuit did not completely reject reliance on the plurality opinion, it clearly placed emphasis on Kennedy's opinion as the decisive one. The court also appeared to call for a sequenced analysis of jurisdiction. Its reasoning implies that a court must first look to see if Kennedy's test is satisfied before it can consider asserting jurisdiction under Scalia's test, and in this it parts company with the approach suggested by the Florida district court in the *Evans* case (and, as will be explained later, from the position the Department of Justice has taken so far). If Kennedy's test is not satisfied, the Seventh Circuit appears to allow for a possibility that a court (or an implementing agency) could then look to Scalia's test to see if the factual situation presents a rare case in which Scalia's test may be satisfied, but Kennedy's is not.<sup>73</sup>

Following an approach similar to the court in *Evans*, the First Circuit ruled that the CWA's jurisdiction under *Rapanos* attaches if "either Justice Kennedy's legal standard or that of the plurality" is satisfied.<sup>74</sup> Unlike the Ninth and Seventh Circuits, which relied on *Marks*, the court engaged in a lengthy analysis where it determined that *Marks* and Supreme Court caselaw does not provide exacting guidance on how to interpret an opinion fractured in the manner of *Rapanos*.<sup>75</sup> As such, the court looked largely to Justice Stevens's instruction in his dissent that jurisdiction under the CWA should attach if either Justice Kennedy's test or Justice Scalia's test is met.<sup>76</sup> The court found Justice Stevens's approach persuasive because it:

ensures that lower courts will find jurisdiction in all cases where a majority of the Court would support such a finding. If Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test

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72. *Id.* at \*2.

73. *Id.* at \*1–2. This was fairly clear from the court's unequivocal statement that the narrowest ground under a *Marks* analysis is "Kennedy's ground" and that Scalia's test may only be used as "an exception" in the "rare case" where Scalia's analysis would support jurisdiction, but Kennedy's test would "favor[] the landowner." *Id.*

74. *United States v. Johnson*, 467 F.3d 56, 60 (1st Cir. 2006).

75. *Id.* at 60–66.

76. *Id.* at 66.

is satisfied, then at the least the four plurality members plus the four dissenters would support jurisdiction.<sup>77</sup>

However, the court gave virtually no guidance on how the district court should apply either Justice Kennedy's or Justice Scalia's test other than to say, helpfully, that under Justice Kennedy's test, for wetlands next to navigable-in-fact waters, adjacency alone is sufficient to establish jurisdiction and that the "significant nexus" test need only be applied on a "case-by-case basis" where the wetlands are adjacent to non-navigable tributaries.<sup>78</sup>

Thus, while the issue is far from settled, the "significant nexus" test appears to be taking center stage in the post-*Rapanos* jurisdictional analysis.

#### IV. WHAT IS A SIGNIFICANT NEXUS?

Assuming that the controlling test for jurisdiction will be Justice Kennedy's "significant nexus" test, it is important to answer the question of what that test is. Rather than looking to a cutoff point based on the presence and flow of water—the approach taken by Scalia—Kennedy looked to ecological relationships between water bodies. He recognized that this relationship is not always dependent on either continuous flow or a relatively permanent presence of water.<sup>79</sup> Kennedy also made the important observation that waters in *combination* can have important functions that impact downstream waters.<sup>80</sup> As described below, Kennedy's analysis spoke to whether a reasonable ecological basis for protection exists.

Under Kennedy's opinion, waters that perform ecological functions that either individually or collectively impact "the chemical, physical or biological integrity"<sup>81</sup> of downstream larger waters should be protected.<sup>82</sup> These ecological functions include flood retention, pollutant trapping, and filtration.<sup>83</sup> The waters that perform these functions may be intermittent or ephemeral, and they need not have a surface hydrological connection to other waters.<sup>84</sup>

Kennedy also indicated that for certain waters, a significant nexus to navigable waters can be assumed. For instance, he plainly stated that "[a]s

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77. *Id.* at 64.

78. *Id.* at 59.

79. *Rapanos v. United States*, 126 S. Ct. 2208, 2242–43 (2006) (Kennedy, J., concurring).

80. *Id.* at 2248.

81. 33 U.S.C. § 1251(a) (2000).

82. *Rapanos*, 126 S. Ct. at 2248.

83. *Id.* at 2248.

84. *Id.* at 2242–46.

applied to wetlands adjacent to navigable-in-fact waters, the Corps's conclusive standard for jurisdiction rests upon a reasonable inference of ecological interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the CWA by showing adjacency alone."<sup>85</sup> He again reiterated that "[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction."<sup>86</sup> Therefore, wetlands adjacent to navigable-in-fact waters are categorically covered under Kennedy's analysis, and a case-by-case determination is not needed. Likewise, Kennedy suggested that wetlands next to major tributaries may also be categorically covered by the CWA.<sup>87</sup> It is only in regards to wetlands adjacent to minor tributaries that Kennedy refused to allow categorical assertion of jurisdiction under the current regulations.<sup>88</sup>

Justice Kennedy's stance regarding the regulation of tributaries is harder to discern. Justice Kennedy's opinion left uncertain the question of whether he is willing to accept the categorical inclusion of all tributaries. He only indicated that the current definition of tributary "may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the [CWA]."<sup>89</sup> Kennedy then criticized the broad scope of the definition of tributary as a determining factor for regulating adjacent wetlands:

[T]he breadth of this standard—which seems to leave wide room for the regulation of drains, ditches, and streams remote from any navigable-in-fact waters and carrying only minor water volumes towards it—precludes its adoption as the determinative measure of whether wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.<sup>90</sup>

It appears clear that Kennedy believed the functions, and quantitative flow of a non-navigable tributary are relevant to determining if wetlands adjacent

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85. *Id.* at 2248.

86. *Id.* at 2249.

87. *Id.* at 2248 ("[I]t may well be the case that *Riverside Bayview's* reasoning—supporting jurisdiction without any inquiry beyond adjacency—could apply equally to wetlands adjacent to certain major tributaries.").

88. *Id.* at 2249 ("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 non-navigable tributaries.").

89. *Id.* Justice Kennedy never called into question the significance of major tributaries to navigable-in-fact waters.

90. *Id.*



to the non-navigable tributary are jurisdictional. He was, however, largely silent on whether an analysis of a tributary's function and flow is necessary to assert jurisdiction over the tributary itself.<sup>91</sup>

Justice Kennedy's reluctance to accept jurisdiction of certain wetlands under the current regulatory scheme does not mean that he believes that such waters are not covered by the CWA. Indeed, his belief that both the *Rapanos* and *Carabell* waters likely have the requisite significant nexus indicates otherwise.<sup>92</sup> Justice Kennedy only disagreed with a blanket application of current rules to assert jurisdiction over wetlands adjacent to minor tributaries of navigable waters. Instead, he offered three alternate means by which jurisdiction can be asserted: (1) a case-by-case showing of a significant nexus, (2) more specific regulations,<sup>93</sup> and (3) region-wide categorical regulation of comparable wetlands once it has been established in a particular case that a certain wetland in a region has the requisite jurisdictional nexus.<sup>94</sup> It will now be up to courts and the agencies to sort out how to apply the "significant nexus" test to the protection of our waters.

#### V. THE COURTS: MIXED RESULTS SO FAR, BUT POSITIVE INDICATIONS FROM AN APPEALS COURT

At the time this Essay was written, three courts had tried to apply the meaning of *Rapanos* on substantive grounds to specific facts. Three

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91. Kennedy stated that:

Through regulations or adjudication, the Corps 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, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.

*Id.* at 2248. While Kennedy was specifically talking about the jurisdiction of wetlands, it is logical to suggest that he may also have been indicating that some of the tributaries he was discussing also need to possess a significant nexus to navigable-in-fact waters for the CWA's jurisdiction to attach.

92. Justice Kennedy's concern with the *Rapanos* ruling appeared to be its strict reliance on hydrological connection without discussion of the nature of the hydrological connection or other ecological considerations. Justice Kennedy's concern in *Carabell* seemed to be with the perhaps speculative nature of the ecological functions performed by the wetland, highlighted by phrases such as "possible flooding" and "potential ability" to perform ecological functions, as well as what he considered inadequate information concerning the "quantity and regularity of flow" in the tributary abutting the wetland. *Id.* at 2250–52.

93. Justice Kennedy stated that adjudication could also be used to categorically cover wetlands adjacent to certain tributaries. *Id.* at 2248.

94. Kennedy stated that "[w]here an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region." *Id.* at 2249. However, he gave little indication as to what he means by either a "comparable wetland" or a "region."

different results ensued. However, one opinion, a Ninth Circuit decision (and thus far the only circuit court to speak at any length on the subject), gives the clearest guidance.

A. *Looking to Ecological Factors to Protect Adjacent Waters*

The Ninth Circuit case, *Northern California River Watch v. City of Healdsburg*, involved Basalt Pond, a roughly one-half mile long by quarter mile wide pond with surrounding wetlands that receives wastewater discharges from Healdsburg's waste treatment plant.<sup>95</sup> The pond is approximately fifty to several hundred feet from the Russian River, a navigable water way in California's wine country.<sup>96</sup> A significant amount of water and discharge flows from the Basalt Pond through an aquifer into the river. Without this flow, the pond would overtop the levee and flow into the river.<sup>97</sup>

As stated above, the court looked to Justice Kennedy's opinion finding that he "took the view that wetlands come within the statutory phrase 'navigable waters,' if the wetlands have a 'significant nexus' to navigable-in-fact waterways," and that "the 'required nexus must be assessed in terms of the statute's goals and purposes,' which are to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"<sup>98</sup>

The court then found that such a connection existed between the pond and the river by looking at a variety of ecological and hydrological factors linking the pond to the river. It reasoned that the pond affected the river's physical integrity because the pond drained into the river via subsurface flow and the two water bodies affected each other's water levels.<sup>99</sup> Looking at the issue of chemical integrity, the court noted that the subsurface flow carried pollutants from the pond to the river.<sup>100</sup> The court further relied on biological factors to find a significant nexus, concluding

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95. N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1026 (9th Cir. 2006). The court found that the pond was a wetland because it had wetland characteristics around its shores. Therefore, the court did not have to answer the question of whether adjacent waters that are not wetlands are also protected under the CWA. *Id.* at 1027–28. The Ninth Circuit will have to answer that question in a pending case, *San Francisco Baykeeper et al. v. Cargill Salt Division*. Appellant Cargill's Opening Brief at 3, Appeal Nos. 04-17554, 05-15051 (9th Cir. Apr. 12, 2005). Justice Kennedy's opinion, however, offers no support for the argument that a pond with a significant nexus should not be protected by the CWA. Indeed, given his concern with achieving the CWA's water quality protection aims, such an artificial distinction would make little sense.

96. *N. Cal. River Watch*, 457 F.3d at 1026.

97. *Id.*

98. *Id.* at 1029–30 (citation omitted).

99. *Id.* at 1030.

100. *Id.* at 1031.

that “[t]he wetlands support substantial bird, mammal[,] and fish populations, all as an integral part of and indistinguishable from the rest of the Russian River ecosystem. . . . [T]hese facts make Basalt Pond indistinguishable from any of the natural wetlands alongside the Russian River that have extensive biological effects on the River itself.”<sup>101</sup>

The court, however, seemed to misinterpret one aspect of Justice Kennedy’s opinion. It stated that “[a]djacency of wetlands to navigable waters alone is not sufficient [to assert CWA jurisdiction].”<sup>102</sup> However, as discussed above, Kennedy made clear that for wetlands situated next to navigable-in-fact waters, like the Russian River, adjacency alone *is* sufficient to assert jurisdiction.

This one issue aside, the ruling is promising. Primarily, it looked to Kennedy’s opinion and in no way gave authority to Justice Scalia’s approach, which a majority of the Supreme Court rejected. Also, it gave consideration to broad ecological factors—subsurface connectivity, concerns regarding pollution, habitat considerations—where surface flow is infrequent. These ecological considerations certainly apply to a great number of other waters and should be used to justify their protection.

### *B. Mix and Match in Florida*

The bizarre criminal CWA case, *United States v. Evans*, involved a forced labor camp, drug manufacture and distribution, conspiracy to violate the Thirteenth Amendment’s prohibition on slavery and involuntary servitude, and other crimes more likely to be encountered in a *Miami Vice* rerun than in a CWA case.<sup>103</sup> In this case, the United States District Court for the Middle District of Florida found that for the purposes of issuing a search warrant, it was reasonable for a judge to conclude that there was probable cause to believe that CWA jurisdiction extended to a relatively permanent, continuously flowing creek that naturally runs into a navigable-in-fact river in Florida.<sup>104</sup> The creek at issue—a seven- to eight-foot wide, one-foot deep body of water flowing into the nearby St. Johns River—was allegedly receiving unpermitted human waste discharge from the defendants’ farm labor camp near Palatka, Florida.<sup>105</sup>

The court found that the judge issuing the search warrant had a

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101. *Id.*

102. *Id.* at 1025.

103. *United States v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006).

104. *Id.* at \*22–23.

105. *Id.* at \*22.

reasonable basis to find that the CWA extended to the creek running behind the labor camp if the creek and St. John's River "satisf[ied] either the plurality's test (a relatively permanent, standing or continuously flowing water) or the general parameters of Justice Kennedy's concurrence (a tributary that feeds into a traditional navigable water; not necessarily a continuously flowing stream, river or ocean, but perhaps also not a ditch or drain)."<sup>106</sup> The court also looked to language in Scalia's opinion that would confer CWA jurisdiction over polluting activities by treating certain waters, such as intermittent streams, as point sources rather than waters of the United States if those waters carry the discharged pollutants to a navigable-in-fact water.<sup>107</sup> The court upheld the legality of the search warrants, ruling that the creek met both Scalia's and Kennedy's definition of a protected water.<sup>108</sup>

While it is perhaps unwise to make too much of this ruling given its context, the mix-and-match approach the court seemed to endorse is potentially troubling. Foremost, reliance on Scalia's test may invite courts and agencies to draw bright-line rulings that stray from the more sound considerations, endorsed by five Justices, that are grounded in the CWA's goals to protect the integrity of the nation's waters. One poignant example is Scalia's argument that intermittent waters can be regulated as point sources.<sup>109</sup> This is a classic red herring. It gives the false sense that the type of poisons, like ammonia, that wash downstream and grab headlines are being accounted for, while allowing upper reach waters to be filled with impunity. Yet, from an ecological approach, this result will only lead to downstream pollution by removing the many water quality and habitat functions these upper reach waters perform. This "tributaries as point sources" approach might also have unfair results. The furthest downstream owner of a land containing an intermittent tributary is potentially subjected to liability for her upstream neighbors' pollution, since she is responsible for the ultimate point of discharge into larger waters. Using Scalia's approach will also be unnecessary in most cases, as sound reliance on ecological factors will almost surely protect virtually all waters that would meet Scalia's test.<sup>110</sup>

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106. *Id.* at \*19.

107. *Id.* at \*21. The court stated: "[I]t appears that CWA jurisdiction can be established in this case if . . . the creek seen running behind the Florida Camp property was itself a covered water or conveyed the pollutant downstream to a covered water." *Id.*

108. *Id.* at \*22. The court found that "regardless of whether one applies the plurality's test or the broad parameters suggested by Justice Kennedy" there is "probable cause to believe that the creek fell within the definition of 'waters of the United States.'" *Id.*

109. *Rapanos v. U.S.*, 126 S. Ct. 2208, 2227 (2006) (plurality opinion).

110. The *Gerke* court, without outright rejecting Scalia's approach in all instances, avoided any

*C. An Anomaly in Texas*

In the oil spill case, *United States v. Chevron Pipe Line Co.*, the Federal District Court in northern Texas dismissed Justice Kennedy's opinion as being too vague to apply.<sup>111</sup> The judge instead relied heavily on Justice Scalia's opinion, as well as *In re Needham*, a Fifth Circuit case that stated in dicta that CWA jurisdiction should be limited to navigable-in-fact and immediately adjacent waters.<sup>112</sup> The court then held that an intermittent stream several miles from the nearest navigable water is not covered by the Oil Pollution Act.<sup>113</sup>

The court did base its decision on the term "significant nexus," but in a manner that was heedless of Justice Kennedy's opinion in *Rapanos* and with a result that was even less protective than the test in Justice Scalia's plurality opinion. The court found that "absent actual evidence that the site of the farthest traverse of the spill is *navigable-in-fact* or adjacent to an open body of navigable water, the Court finds that a 'significant nexus' is not present under the law of this circuit."<sup>114</sup> Given the court's embrace of a jurisdictional stance all nine Justices reject, as well as its casual and unsupported dismissal of the Kennedy opinion, this case will likely sit as an anomaly.

## VI. IMPLICATIONS IN PRACTICE

It will take some time for the true implications of the *Rapanos* decision to be known. While it should not justify any rollback of current CWA protections, we may see many waters imperiled as a result of this decision. This is due to the confusion it created and the burdens a case-by-case analysis will place on the Corps and other implementing agencies, such as the EPA. The possibility also exists that the Administration may respond by drawing arbitrary lines that remove protections for certain waters to ease administrative burdens and to reconcile Scalia's and Kennedy's conflicting approaches, even though Justice Scalia's approach should not be given

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temptation to rely unduly on Scalia's opinion. It did so by analyzing jurisdiction first under Justice Kennedy's test, which the Seventh Circuit had determined to be the narrowest common ground in almost all instances. *United States v. Gerke*, No. 04-3941, 2006 WL 2707971, at \*1 (7th Cir. Sept. 22, 2006).

111. *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

112. *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003).

113. *Chevron*, 437 F. Supp. 2d at 614-15. The CWA and the Oil Pollution Act have identical jurisdictional definitions. See 33 U.S.C. § 1362(7) (2000) (CWA definition of "navigable waters" as "waters of the United States"); Oil Pollution Act of 1990 § 1001(21), 33 U.S.C. § 2701(21) (2000) (OPA definition of "navigable waters" as "waters of the United States").

114. *Chevron*, 437 F. Supp. 2d at 615.

weight.

It is not encouraging that the Corps's first reaction was to issue guidance asking for the temporary suspension of all enforcement actions except for those associated with waters governed under section 10 of the Rivers and Harbors Act—a subset of waters much smaller than what even Justice Scalia deemed protected.<sup>115</sup> This preliminary guidance also suggests temporarily delaying the issuance of pending permits when a “permittee might believe that some or all of his activities are now not subject to regulation under CWA Section 404 because of the *Rapanos/Carabell* decision.”<sup>116</sup> Hopefully, this does not mean that the Corps, in future guidance, will take the position that the *Rapanos* decision *did* remove certain waters from jurisdiction.

The Department of Justice's (DOJ) post-*Rapanos* stance also gives some cause for concern and adds to speculation that the Administration may give undue weight to Justice Scalia's interpretation, despite its rejection by a majority of the Court. DOJ has stated that “it believes the applicable standard to determine if a wetland is governed by the CWA is whether either the *Rapanos* plurality's or Justice Kennedy's test is met in a particular fact situation.”<sup>117</sup> DOJ has also indicated that certain waters have lost protection as a result of the decision. For instance, DOJ has stated that “[i]n *Rapanos*, the Supreme Court considered a particular application of the Corps's jurisdictional regulations in 33 C.F.R. part 328, holding that the CWA did not provide the Corps jurisdiction over certain wetlands that are connected to non-navigable tributaries of traditional navigable waters.”<sup>118</sup>

Deputy Assistant Attorney General John Cruden, in a statement to Congress, also indicated that DOJ may rely on Justice Scalia's opinion to treat certain intermittent and ephemeral waters as point sources of pollution rather than jurisdictional waters.<sup>119</sup> While this approach by DOJ may be in the interest of preserving as many arguments for jurisdiction as possible, such an approach runs the risk of inviting courts to interpret the CWA in a manner allowing for countless small streams and neighboring wetlands to be destroyed due to lack of federal jurisdiction.

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115. E-mail from Mark Sudol, Chief, Corps Regulatory Branch, to U.S. Army Corps of Engineers Staff (July 5, 2006), [http://insideepa.com/secure/data\\_extra/dir\\_06/epa2006\\_1167.pdf](http://insideepa.com/secure/data_extra/dir_06/epa2006_1167.pdf).

116. *Id.*

117. *Supreme Court Decisions on Water Resources: Hearing Before the Subcomm. on Fisheries, Wildlife, and Water of the S. Comm. on Environment and Public Works*, 109th Cong. (2006) (statement of John C. Cruden, Deputy Assistant Attorney General, Environment and Natural Resources Division of the Department of Justice) [hereinafter Cruden Statement].

118. Defendants' Unopposed Motion for Voluntary Remand, Nat'l. Assoc. of Homebuilders v. U.S. Army Corps of Engineers, No. 1:06-cv-00502 (D.C. Dist. Court) (July 26, 2006) at 2.

119. See Cruden Statement, *supra* note 117.

These indications aside, the first true test of what the Administration will do with this decision will likely come soon, when the Corps and EPA issue joint guidance interpreting *Rapanos*. The guidance should clearly state that jurisdiction has not been scaled back. It should explain which waters remain categorically covered and instruct field staff how to establish jurisdiction on a case-by-case basis for those wetlands further up the tributary system that are no longer categorically covered. It also should include the important ecological factors Justice Kennedy allows to be considered when determining jurisdiction and emphasize the need to carefully build a record asserting jurisdiction based on those factors. It should make clear that the agencies must examine the collective impact of similarly situated waters in a region when making any jurisdictional determination, even for a singular water. Any guidance should also instruct field staff how to categorically assert jurisdiction over comparable wetlands in regions where case-by-case determinations are made. This should include ecologically sound criteria for determining what a “comparable wetland” is and what a “region” is. It should also encourage the various regions to collect all relevant information so that the Corps can make case-by-case determinations that will withstand judicial scrutiny.

While the burden placed on the Corps is real, Justice Kennedy gave the Corps and EPA ample grounds to continue to assert jurisdiction broadly. This will only happen with useful guidance and diligence by these agencies. Moreover, if the Corps and EPA are aggressive in collecting the proper regional information for case-by-case determinations, over time, Kennedy’s allowance of categorical regulation once the prerequisite case-by-case determinations are made will ease the regulatory burden. Cases such as *Healdsburg* will further support a strong stance of broad jurisdiction by the Administration. Only by shirking their duties and succumbing to pressure from developers will the Corps and EPA fail in this effort to protect our waters.

That said, the framework provided by Kennedy is far from ideal and does not provide sufficient guarantees that all important waters will be protected in practice. The Corps in particular is not well designed to deal with the solutions offered by Justice Kennedy. The Corps operates thirty-eight separate districts and, as the U.S. Government Accountability Office pointed out in a recent study, has applied the *SWANCC* decision in a haphazard manner, with many districts devising their own set of jurisdictional criteria.<sup>120</sup> It is unfortunately quite likely that similarly

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120. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, GAO-04-297, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION 3–4 (2004), available at [http://www.gao.gov.news.items/d04297.pdf](http://www.gao.gov/news.items/d04297.pdf).

inconsistent criteria will be applied in the wake of *Rapanos*, with waters in certain regions suffering badly as a result.

## VI. WHAT THE FUTURE HOLDS

The ultimate solution should lie with Congress. Congress should take action to reaffirm that it intended to cover all important waters. Currently, a bill called the Clean Water Authority Restoration Act would do just that.<sup>121</sup> It already has over 160 bipartisan co-sponsors in the House of Representatives and is gaining ground in the Senate. Getting Congress to move is never easy, but the House recently passed with bipartisan support an amendment to the U.S. Department of Interior/EPA appropriations bill that cut funding for a post-SWANCC guidance that had the effect of restricting jurisdiction.<sup>122</sup> This indicates that the issue of clean water is one that representatives from both parties care about and are willing to act on.

There may also be a push for rulemaking, especially since three justices in some fashion suggested one. If done right, it could make protections more solid as Justice Kennedy's opinion provides ample grounds for scientifically-based rules to encompass virtually all important waters. However, rulemaking would only benefit wetlands if it did not reduce the jurisdiction offered by current regulations and if the Administration remained faithful to sound science. Given the political stakes and the pressures that will be applied on decision makers from various interest groups, the likelihood of such a protective rule is not promising. Also, rules can be subject to time-consuming legal challenges before they are implemented. Thus, even in the best-case scenario, rulemaking will leave us with the Kennedy framework for quite some time.

Absent swift congressional action, the task of sorting out *Rapanos* will largely fall to the courts. We are likely to see more, not less, litigation over the meaning of "waters of the United States" as a result of *Rapanos*. Developers will be lining up to challenge jurisdictional determinations they do not like, and the Corps is almost inevitably going to let some waters go unprotected that environmentalists believe deserve protection. Developers may also be tempted to plow ahead with the bulldozers and destroy waters, without seeking Corps's approval, deciding they will take their chances that a water is unprotected or their activities will go unnoticed rather than roll the dice with a formal jurisdictional determination and permitting process

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121. Clean Water Authority Restoration Act, H.R. 109-1356, 109th Cong. (2005).

122. Making appropriations for the Department of the Interior, environment, and other related agencies for the fiscal year ending September 30, 2007 and for other purposes, Pub. L. No. 109-54, 110 Stat. 499 (2006).



that could be time-consuming and unpredictable. This could result in both agency and citizen enforcement actions. We may also see, as is perhaps foreshadowed in the differing rulings already, a circuit court split on what waters are protected. This would create both confusion and, in all likelihood, resource losses in certain parts of the country.

#### CONCLUSION

If nothing else, *Rapanos* guarantees that lawyers will encounter ample opportunities to litigate this issue in the coming years. Read and applied faithfully, *Rapanos* should not signal any rollback of pre-*Rapanos* CWA protections. But without swift congressional action, the implications of *Rapanos* will play out in courtrooms and agencies with uncertain, and perhaps confusing, results. The health of our waters could hinge on these results.