Hard to Navigate: *Rapanos* and the Future of Protecting Our Waters

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The 1960s and early 1970s were a time of environmental action. Many point to the publication of Rachel Carson's *Silent Spring* in 1962 as a wake-up call that bold action was needed to protect our natural resources. But when it came to our nation's waters, the waters themselves gave a wake up call. The Cuyahoga River was so polluted it caught fire. Lake Erie was biologically dead. It was clear that the regulatory patchwork in place at the time that gave primary responsibility for water protection to the states was failing. A national response was needed.

That response came boldly when Congress passed the Clean Water Act (CWA) in 1972. It has a broad mandate to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and eliminate water pollution by 1985. The CWA is long and encompasses many programs with states and the federal government sharing responsibilities. Its chief regulatory provision prohibits point source discharges of pollutants into "navigable waters," unless otherwise permitted by the statute. The CWA establishes two permitting programs that allow for regulated pollutant discharges: the Section 402 National Pollutant Discharge Elimination System program for most discharges such as sewage and industrial waste to be administered by the Environmental Protection Agency (EPA) and the Section 404 program for dredged and fill material to be administered by the U.S. Army Corps of Engineers (the Corps).

The CWA broadly defines "navigable waters" as "waters of the United States." This jurisdictional definition controls all aspects of the statute. It was this definition that was at issue in the 2006 Supreme Court decision *Rapanos v. United States*, U.S. 126 S. Ct. 2208 (2006), one of the most important, and befuddling, CWA decisions the Court has ever issued.

Rapanos is actually two consolidated cases. One, *Rapanos v. United States*, 376 F.3d 629 (6th Cir. 2004), involved John A. Rapanos, a developer in Michigan who was found under the CWA to have illegally drained and filled three wetlands sites. All the wetlands on Rapanos' properties were directly next to waters that ultimately flowed into either Lake Huron or Lake St. Clair. However, some of the wetlands were up to eleven to twenty miles away from a navigable-in-fact water and flowed into tributaries that could be characterized as drains and did not have permanent flow.

The second case, *Carabell v. United States Army Corps of Engineers*, 391 F. 3d 704 (6th Cir. 2004), involved Keith and June Carabell and Harvey and Frances Gordenker (the Carabells), developers who applied for but were denied a permit to fill wetlands in order to build a condo development in Michigan. While the Carabell property was only about a mile from Lake St. Clair, a berm separated the wetland from a ditch that eventually flowed into the lake. Thus, unlike Rapanos' sites, there was not a demonstrated hydrological connection between the wetland and the nearby tributary. Both cases involved CWA Section 404. Rapanos and the Carabells argued that the waters at issue were not "navigable waters" and were beyond the scope of the CWA.

It is generally accepted that the CWA's definitional term "waters of the United States" has a different and broader meaning than the traditional term "navigable waters," which has been used to define federal regulation of waterways since the 1800s. This is largely because of the CWA's focus on regulating water quality rather than navigation and the fact that achieving the statute's water-quality goals necessarily requires the protection of most waters.

By the late 1970s, both the Corps and EPA were regulating virtually all surface waters under the CWA. Since that time, agency rules have made clear that CWA protections applied to almost all waters within the aquatic system, including tributaries and their surrounding wetlands, geographically separated waters such as prairie potholes and playa lakes, and the often dry washes of the arid west. In the 1980s, the U.S. Supreme Court affirmed the broad scope of the CWA in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) by finding that the Corps properly regulated wetlands next to other waters. *Riverside Bayview* largely dismissed the term "navigable" in the CWA as being of "limited import," basing its decision on important ecological and water-quality functions such as water filtration, flood retention, and habitat provision that nonnavigable waters provide.

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), 531 U.S. 159 (2001), that certain ponds in northern Illinois were not covered under the CWA when jurisdiction was based solely on their use by migratory birds. The 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. In its ruling, the Court characterized *Riverside Bayview* thusly: "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the

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"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*." The impact of this characterization has been profound.

On its face, the *SWANCC* decision was narrow. It simply precluded the Corps from asserting jurisdiction over certain ponds based solely on their use by migratory birds. Nevertheless, following *SWANCC*, agencies, various interest groups, concerned citizens, and the courts wrestled with the question of what the CWA still protected. Between 2001 and 2006, seven circuit courts, in ruling or in *dicta*, addressed the scope of the CWA's protection. All but one of them, the Fifth Circuit, ruled that the CWA's protections remained broad, with several decisions conclusively establishing that the statute covered the entire tributary system, including upper-reach intermittent streams, ephemeral streams, and man-made channels, as well as their neighboring wetlands. Some courts also found certain waters were protected due to subsurface and ecological connections. A common thread throughout many of these rulings was a reliance on *SWANCC*'s "significant nexus" language. Courts consistently interpreted this characterization to be a test and often found such a nexus when a hydrologic connection existed between upper-reach waters and navigable waters downstream.

While courts struggled with this issue, the Bush administration began the process of rulemaking to redefine jurisdiction under the CWA. Reactions against any weakening in CWA coverage were strong. Over forty states, countless conservation organizations, including several hunting and fishing groups, and 220 members of Congress, among others, weighed in against any regulatory rollbacks. In December 2003, under the weight of this pressure and mounting court rulings affirming a narrow reading of *SWANCC*, the Bush administration dropped its rulemaking. By 2005, it appeared that while many waters were still at risk due to *SWANCC*, favorable law was developing and the threat of a regulatory rollback had passed. Then came *Rapanos*.

Making Sense of a Fractured Decision

Prior to accepting *Rapanos* and *Carabell*, the Court had previously denied three petitions for certiorari of cases dealing with the issue of CWA jurisdiction. One of these cases included Rapanos' own petition for review of a criminal case involving exactly the same facts as the civil case the Court later accepted. As such, there was some surprise when the Court decided to revisit this issue.

Ultimately, the Court's decision in *Rapanos* resolved little. It had five separate opinions and no majority consensus on the ultimate question of what is regulated under the CWA. Although 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 lined up precisely along the categorical "conservative," "liberal," and "swing" member labels that characterize the Court. Scalia's plurality opinion, signed onto by Chief Justice Roberts and Justices Alito and Thomas, sought to drastically curtail the CWA's jurisdiction and showed little care for the ecological concerns of the statute. Justice Stevens' dissenting opinion, signed onto by Justices Souter, Ginsburg, and Breyer, sought to uphold the current broad jurisdiction. Finally, a concurring opinion by Justice Kennedy sided with Justice Stevens in its concern for the water-quality and ecological goals of the CWA but was unwilling to broadly defer to existing regulations; instead it insisted that certain waters be shown to have a "significant nexus" to navigable-in-fact waters.

This article will not discuss in depth the vexing question of which opinion (or opinions) controls. However, as a result of the circuit court rulings to date that have addressed the issue, it appears likely that Justice Kennedy's opinion, and how it is interpreted, will be pivotal in determining *Rapanos*' implications on our waters. But before delving into how Kennedy's significant nexus test may and should be applied, it is useful to elaborate upon the three main opinions of the case.

Justice Scalia, looking mainly to a 1954 dictionary to support his analysis, took a narrow view of jurisdiction. His opinion would 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]." (Scalia's, J. emphasis). This view, seen by environmentalists as disastrous, would cut off jurisdiction for 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. The seriousness of the potential effects cannot be understated.

For instance, EPA has estimated that intermittent or ephemeral streams comprise 59 percent of all stream miles in the United States, excluding Alaska. In the arid West, as much as 95 percent of all stream miles in some states are intermittent or ephemeral. Justice Scalia tried to get around some of the obvious water-pollution problems his approach presents by saying, in essence, that many intermittent or ephemeral streams could simply be regulated as point sources if they carried discharged pollutants into larger waters. This approach would not only cause trouble for the farthest downstream owners of such streams, who would be forced to account for their upstream neighbors, but would also allow these waters to be filled and destroyed without CWA oversight. Thankfully, five Justices firmly rejected this approach.

Justice Stevens took a broad view of the CWA's jurisdiction, trusting the Corps' judgment about the importance of many nonnavigable waters and deferring to current categorical regulation of wetlands adjacent to nonnavigable tributaries. He found that, "[g]iven that wetlands serve [] 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*]."

Justice Kennedy largely agreed with Justice Stevens that broad protection under the CWA is warranted and rejected

the Scalia test as being "without support in the language and purposes of the Act or in our cases interpreting it." Yet, Justice Kennedy was unconvinced that the current regulations were rigorous enough to support finding jurisdiction over wetlands adjacent to minor tributaries without additional information showing that the waters affected downstream waters.

Borrowing the term from *SWANCC*, Justice Kennedy found that certain wetlands need to have a "significant nexus" to traditionally navigable waters for jurisdiction to attach, and that for these wetlands the Corps must determine the existence of this nexus on a case-by-case basis. 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."

Justice Stevens states this test "will probably not do much to diminish the number of wetlands covered by the Act in the long run." But it has created confusion for the present.

Despite the confusion, Justice Kennedy did give guidance on how to interpret his test. Foremost, his test is intended to focus upon the water-quality and ecological-protection goals of the CWA. Justice Kennedy indicates that he views protections to be broad, evidenced in his strong suggestion that it is likely that both the waters in *Rapanos* and *Carabell* warrant protections (though he was unconvinced by the lower courts original application of the significant nexus test to the facts). Further, unlike Justice Scalia, who sees little value in protecting ephemeral waters, dry arroyos, and wet meadows (waters Justice Scalia characterizes in part as "puddles"), Justice Kennedy recognized that many of these waters are ecologically connected to larger waters and therefore warrant protection. He explains that wetlands perform important ecological functions, such as pollutant filtering and flood retention. 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."

Justice Kennedy also makes the important observation that waters in *combination* can have important functions that affect downstream waters. Thus, to determine jurisdiction for certain waters, the ecological relationship between a navigable-in-fact water and both the water at issue and that water in aggregate with similarly situated waters must be considered. As such, waters that perform ecological functions, such as flood retention, pollutant trapping, and filtration, that either individually or collectively impact "the chemical, physical or biological integrity" of downstream larger waters should be protected. The waters that perform these functions may be intermittent or ephemeral, and they need not have a surface hydrological connection to other waters.

Justice Kennedy also finds that for certain waters, a significant nexus to navigable waters can be assumed. He plainly states that "[a]s 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 Act by showing adjacency alone." 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, Justice Kennedy suggests that wetlands next to major tributaries may also be categorically covered by the CWA. It is only in regards to wetlands adjacent to minor tributaries that, absent more specific regulations, he refuses to allow categorical assertion of jurisdiction and requires a case-by-case determination. Even for these waters, Justice Kennedy states 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." He, however, gives little indication as to what he means by either a "comparable wetland" or a "region."

Kennedy's opinion leaves uncertain the question of whether he is willing to accept the categorical inclusion of all tributaries. He only indicates 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 Act." But Justice Kennedy also criticizes the broad scope of the definition of "tributary" as a determining factor for regulating adjacent wetlands. It further appears clear that he considers the functions, and, indeed, quantitative flow, of a nonnavigable tributary relevant in determining if wetlands adjacent to the nonnavigable tributary are jurisdictional. He states:

> 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.

He is, however, largely silent about whether an analysis of tributaries' functions and flow is necessary to assert jurisdiction over tributaries themselves.

In sum, for wetlands next to nonnavigable tributaries, Justice Kennedy offers three alternate means by which jurisdiction can be asserted: (1) a case-by-case showing of a significant nexus, (2) more specific regulations, 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. In the end, Justice Stevens may be right that Kennedy's test will not result in a major rollback of CWA protections. And such a rollback does not appear to be Kennedy's aim. However, his

demand for a significant nexus showing presents a burden the agencies may shirk. In general, scientific literature overwhelmingly asserts that the health of larger, navigable-in-fact waters is critically dependent on smaller, upper-reach tributaries and wetlands, including (and often especially) intermittent and ephemeral waters. Yet, in many cases, demonstrating that the general rule applies to a specific wetland in a specific watershed will mean money, time, and staff—resources regulatory agencies often have in short supply. Applying Kennedy's test to practical situations will be a challenge for courts, lawyers, and agency officials.

Applying Rapanos *in Court: Little Guidance and More Confusion*

At the time this article was written, five courts had tried to apply *Rapanos* substantively to specific facts, with differing and sometimes confounding results.

The Ninth Circuit Federal Court of Appeals, in *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006), applied the significant nexus test to a case that involved Basalt Pond, a pond with surrounding wetlands that receives wastewater discharges from Healdsburg's waste treatment plant. The pond is approximately fifty to several hundred feet from the navigable Russian River. 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. The court 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. The court (1) reasoned that the pond affected the river's physical integrity because the pond drained into the river via subsurface flow and the two waterbodies affected each other's water levels, (2) noted that the subsurface flow carried pollutants from the pond to the river, and (3) concluded 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."

EPIC raises more questions than it answers. Without much explanation, it applied the significant nexus test to streams, where Kennedy's opinion is ambiguous on the issue.

It is also worth noting that in *San Francisco Baykeeper v. Cargill Salt Division*, 2007 WL 686352 (9th Cir. 2007), a case where the plaintiff Baykeeper alleging illegal pollution had stipulated away jurisdictional arguments other than adjacency, the Ninth Circuit recently avoided reaching a substantive ruling on whether a pond next to a slough flowing into San Francisco Bay was jurisdictional under *Rapanos* by narrowly construing the regulatory term "adjacent wetlands" to exclude ponds. However, in *dicta*, the court offered language suggesting that not even all waters with a "significant nexus" are necessarily protected by the CWA and indicated that it wanted proof of pollution or likely pollution in order to establish a significant nexus.

A federal district court case in California applied the significant nexus test to streams, with somewhat confusing results. The case, *Environmental Protection Information Center v. Pacific Lumber Co.* (*EPIC*), decided this January, concerned storm water discharged into streams that flowed into navigable Bear Creek. 2007 U.S. Dist. LEXIS 3715 (N.D. Cal. Jan. 8, 2007). The court found that under the significant nexus test, the party seeking to invoke the court's jurisdiction must present evidence of a hydrologic connection and in some cases (e.g., intermittent and ephemeral flow in *EPIC*) must also show "some measure of the significance of that connection for downstream water quality."

EPIC raises more questions than it answers. Without much explanation, it applied the significant nexus test to streams, where Kennedy's opinion is ambiguous on the issue. By apparently relying on questions Kennedy raised in his opinion about the significance of the hydrologic connection between the tributaries at issue in *Rapanos* and navigable waters, the case required a "hydrological connection" for streams where Kennedy does not. Further, *EPIC* gives little instruction as to when such a connection is significant. Similarly, the court talked about the potential relevance of ecological evidence but left few clues as to what ecological evidence would suffice to prove significance.

In another January 2007 decision from a federal district court, the court in *Simsbury-Avon Preservation Society, LLC, et al. v. Metacon Gun Club, Inc.*, No. 3:04-cv-803-JBA, 2007 U.S. Dist. LEXIS 7177 (D. Conn. Jan. 31, 2007), ruled that wetlands neighboring the navigable Farmington River were not jurisdictional under the CWA because the wetlands lacked a continuous surface hydrological connection to the river and other possible connections to the river were too speculative to support jurisdiction. The case involved a CWA citizens' suit against a local gun club in which the plaintiffs alleged the club was discharging lead in the form of fired munitions into wetlands and a vernal pond bordering the Farmington River. In its decision, the court looked to both Kennedy's concurring opinion and the plurality opinion. In applying the plurality test, the court did not find a continuous surface water connection between the wetlands and the navigable river. In applying Kennedy's test to the wetlands, the court acknowledged that the wetlands neighbored the river, were previously subject to state wetlands regulation, and were conducive to flooding conditions that could lead to surface water connections with the river. Yet, absent conclusive evidence of the wetlands at issue contaminating other waters with lead, the court was unwilling to rule that a reasonable trier of fact could support a finding that a significant nexus

existed. This decision's apparent requirement that actual proof of contamination may be needed to satisfy Kennedy's test could place a high burden on agencies and citizens seeking to assert jurisdiction over many waters.

More diffuse guidance came in a 2006 criminal CWA case, *United States v. Evans*, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006). In this case, the U.S. 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. 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. The court upheld the legality of the search warrants, ruling with little elaboration 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.'"

Finally, just days after the *Rapanos* ruling was issued, the U.S. District Court in Northern Texas applied *Rapanos* to determine that jurisdiction did not attach in an oil spill case. In *United States v. Chevron Pipe Line Co.*, 2006 U.S. Dist. LEXIS 47210 (N.D. Tex. June 28, 2006), the judge dismissed Kennedy's opinion as being too vague to apply (the only ruling thus far to dismiss Kennedy's opinion). The judge instead relied heavily on Scalia's opinion, as well as previous Fifth Circuit case law, to hold that an intermittent stream several miles from the nearest navigable water is not covered by the Oil Pollution Act, which has the same jurisdictional definition as the CWA. The court did base its decision on the term "significant nexus," but in a manner that was heedless of Kennedy's opinion in *Rapanos* and with a result that was even less protective than the test in 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." Given the court's embrace of a jurisdictional stance all nine Supreme Court Justices reject, as well as its casual and unsupported dismissal of the Kennedy opinion, this case will likely sit as an anomaly.

Confronting Rapanos *in Practice*

It will take some time for the true implications of the *Rapanos* decision to be known. Although the decision should not justify any rollback of current CWA protections, we may see many waters imperiled as a result of *Rapanos* given the confusion it has created and the burdens a case-by-case analysis will place on implementing agencies and citizens seeking to enforce the statute. The confusion caused by some of the initial decisions interpreting *Rapanos* is also cause for worry. The Bush administration's recently released guidance on how regulatory field staff should apply *Rapanos* is cause for further worry.

The Bush administration took almost a year to issue guidance. One can only speculate on the reasons for this delay, but from the look of the final product, political infighting unrelated to the substance of the decision is a good guess. The guidance purports to rely on both tests to assert jurisdiction and provides categorical protection for relatively permanent waters and their directly, physically abutting wetlands, plus navigable-in-fact waters and their adjacent waters. Beyond that, the mischief starts.

The most nefarious aspect of the guidance is that the Bush administration has chosen to essentially eviscerate any meaningful consideration of aggregate impacts in the application of Justice Kennedy's test. In discussing the cumulative effects that smaller waters can have on navigable-in-fact waters, Justice Kennedy discussed the hypoxia event in the Gulf of Mexico, where countless small streams and wetlands in the Upper Mississippi basin collectively contribute nutrients that periodically cause a dead zone in the Gulf, which can approach the size of Massachusetts and New Jersey. He was clearly thinking of aggregate impacts on a relatively large regional scale.

The guidance, which ironically comes from an EPA and Corps that have increasingly been stressing "watershed" approaches to regulation when it suits them, neutered this concept. Rather than allowing field staff to determine a "significant nexus" by aggregating the impacts that similarly situated waters within a watershed have on the larger, navigable waters within that watershed, the guidance does not allow any aggregation of tributaries and only allows for aggregation of wetlands associated with a particular tributary. Tributary is also considered in the smallest possible terms—only a stream reach that is all of one order (a stream order is part of a stream that flows into a larger stream, so the smallest stream is called a first-order stream, which conjoins with another first-order stream to create a second-order stream and so on).

The practical implications of this are enormous and devastating. In Vermont, for instance, wetlands associated with headwater streams collectively comprised 45 percent of the total wetlands that benefited downstream water quality within four watersheds studied. This is clearly significant and representative of the cumulative importance headwaters and their associated wetlands have on downstream waters. But wetlands associated with only one small headwater stream are likely to only account for a scintilla of such benefits, almost certainly insubstantial in isolation. In the dryer Western states, the individual benefits of a stream and its wetlands are likely to be even less detectable than in the wetter Northeast. Therefore, by doing away with any meaningful ability to determine significance by aggregating waters, it will be nearly impossible under the guidance to protect many, if not most, headwater streams and associated wetlands. This is especially true given the substantial time and resources it would take to even attempt to study the significance of each tiny stream and its associated wetlands. As a result, under the guidance, each headwater complex in the watershed could be found

nonjurisdictional, and, when consequently polluted or destroyed, the cumulative effect on jurisdictional waters downstream would be profoundly negative. Kennedy clearly intended these cumulative effects to be taken into account in determining jurisdiction. The guidance pointedly, and wrongly, prohibits their consideration.

The guidance has other aspects that are at best confusing. Using Scalia's test, the guidance says EPA and the Corps will categorically regulate "seasonal" streams that flow at least three months, but the guidance leaves little instruction as to who must show such flow and how they must do it. What instruction there is raises more questions than answers. For instance, what is the baseline for flow rates? Particularly in the West, where there is a drought and stream flow suffers from withdrawals and diversions, dry streams historically had much greater flows. Also, the guidance states that flow should be measured at the downstream confluence. This appears beneficial, until one considers that due to diversions and withdrawals along streams, many streams actually have greater flows at upstream points.

The guidance also seems to have two concepts of "adjacent," one that comes from Scalia and one derived from the current regulations. The Scalia concept of adjacency, which applies to wetlands next to relatively permanent other waters, seems to require physical abutment that would be severed by a berm or other separation, even, apparently, if culverts allowed for a continuous hydrological connection between the neighboring waters. The guidance further cuts out regulation of gullies, swales, and other washes, regardless of their placement in the watershed. It then leaves an exception for certain washes in the Southwest, but other than specifying their location in the Southwest, it gives almost no explanation as to why they would be any different from comparable waters elsewhere. The Bush administration also, in two confusing footnotes, states that for waters not jurisdictional under *SWANCC*, nothing has changed and an outdated 2003 guidance that relies on largely overturned case law is still applicable. But the new guidance fails to realize the nature of the *SWANCC* ruling was that a method, the migratory bird rule, could not alone be used to establish jurisdiction, not that any particular class of waters was excluded from jurisdiction. The guidance ignores Kennedy's discussion of aggregate impacts in *Rapanos* and how it may apply to wetlands such as prairie potholes in the Great Plains that have been shown to have enormous collective impacts on traditionally navigable waters but that are not being regulated under the 2003 guidance. In terms of process, the *Rapanos* guidance requires resource and time-extensive fact-gathering to make case-by-case determinations that will no doubt frustrate and slow the permitting process for all involved.

This guidance shows that the Bush administration is in no way committed to using the nuggets Kennedy has given them to protect waters as broadly as is possible, even under the confusing *Rapanos* framework. Cases such as *EPIC* and *Simsbury* demonstrate that Justice Kennedy's framework can be confounding, misinterpreted by courts, and a hurdle for citizen enforcers of the CWA.

Ultimately, trying to navigate the maze of *Rapanos*, as this author has spent a good bit of time doing, leads to an inescapable conclusion: Congress must act promptly to unambiguously reaffirm that it intended to protect all important waters. Currently, a bill called the Clean Water Restoration Act would do just that. The bill had strong bipartisan support in the United States House of Representatives in the last Congress and was gaining ground in the United States Senate. It was reintroduced in the House on May 22, 2007, with 158 bipartisan cosponsors (HR 2421). A companion bill in the Senate is likely to be introduced shortly. Getting Congress to move is never easy, but last spring, a more hostile House 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. This indicates that the issue of clean water is one that representatives from both parties care about and are willing to act on. No other solution would provide the clarity and protection needed to ensure that the success story that is the CWA continues.

All other solutions are flawed, offering inadequate protections, more confusion, or both. Rulemaking, following Justice Kennedy's opinion and based on sound science, could allow for broad protections. However, rulemaking could not completely eliminate the hole in coverage resulting from *SWANCC* and would only benefit wetlands if it did not reduce the jurisdiction offered by current regulations. If the guidance is any indication, and 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 particularly 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.

A default option is to let courts sort out the issue. With the confusion created, it is likely there will be 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 waters environmentalists believe deserve protection go unprotected. Developers may also be tempted to plow ahead with bulldozers without seeking Corps approval and destroy waters, taking the chance that a water is unprotected or their activities will go unnoticed rather than rolling the dice with a formal jurisdictional determination and permitting process that could be time-consuming and unpredictable. This could result in both agency and citizen enforcement actions. The decisions we have gotten from courts thus far provide few indications that letting the courts sort this matter out will make any interests happy. It will, in all likelihood, lead to both confusion, delay, expense in permitting, and, most importantly, resource losses.

If ever a Supreme Court decision required a fix from Congress, *Rapanos* is it. The decision clarifies few points of law and confounds several. While the decision may keep lawyers busy, without legislative repair, the decision will leave protection of waters in doubt as courts create a patchwork of guidance that will likely jeopardize the health of our waters.

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