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The Wetlands Coverage of the Clean Water Act is Revisited by the Supreme Court: *Rapanos v. United States*

Updated September 12, 2006

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Summary

Twice in the past, the Supreme Court has grappled with issues as to the geographic scope of the wetlands permitting program in the federal Clean Water Act (CWA). On June 19, 2006, the Supreme Court rendered a third decision, *Rapanos v. United States*, on appeal from two Sixth Circuit rulings consolidated by the Court. The Sixth Circuit rulings offered the Court a chance to clarify the reach of CWA jurisdiction over wetlands adjacent only to *nonnavigable* tributaries of traditional navigable waters — including tributaries such as drainage ditches and canals that may flow intermittently. (Jurisdiction over wetlands adjacent to traditional navigable waters was established in one of the two earlier decisions.)

The Court's decision provided little clarification, however, splitting 4-1-4. The four-justice plurality decision, by Justice Scalia, said that the CWA covers only wetlands connected to relatively permanent bodies of water (streams, rivers, lakes) by a continuous surface connection. Justice Kennedy, writing for himself, would have demanded a substantial nexus between the wetland and a traditional navigable water, using an ambiguous ecological test. Justice Stevens, for the four dissenters, would have upheld the current broad reach of Corps of Engineers/EPA regulations. Because no rationale commanded the support of a majority of the justices, lower courts will have to wrestle with the proper rule of decision to extract from *Rapanos* for resolving future cases.

The legal and policy questions associated with *Rapanos* — regarding the outer geographic limit of CWA jurisdiction and the consequences of restricting that scope — have challenged regulators, landowners and developers, and policymakers for more than 30 years. The answer may determine the reach of CWA regulatory authority not only for the wetlands permitting program but also for several other CWA programs; the CWA has one definition of “navigable waters” that applies to the entire law. Critics of the regulatory program had hoped that the Supreme Court's decision would provide a “bright line” jurisdictional standard, but the 4-1-4 ruling did not do so and has led to pressure for guidance, new regulations, or possibly congressional action to clarify the current questions.

While regulators and the regulated community debate the legal dimensions of federal jurisdiction under the CWA, scientists contend that there are no discrete, scientifically supportable boundaries or criteria along the continuum of wetlands to separate them into meaningful ecological or hydrological compartments. Wetland scientists believe that all such waters are critical for protecting the integrity of waters, habitat, and wildlife downstream. Changes in the limits of federal jurisdiction highlight the role of states in protecting waters not addressed by federal law. From the states' perspective, federal programs provide a baseline for consistent, minimum standards to regulate wetlands and other waters. Most states are either reluctant or unable to take steps to protect non-jurisdictional waters through legislative or administrative action.

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The Wetlands Coverage of the Clean Water Act is Revisited by the Supreme Court: *Rapanos v. United States*

On June 19, 2006, the Supreme Court decided *Rapanos v. United States*.¹ The decision addressed the asserted jurisdiction of the U.S. Army Corps and EPA over wetlands adjacent to “waters of the United States,” the problematic phrase used by the Clean Water Act (CWA)² to define the geographic scope of the act’s wetlands permitting program.

Actually, two separate decisions, consolidated for purposes of argument and decision, were before the Court. Both were from the Sixth Circuit, and both involved Michigan wetlands. In *Rapanos v. United States*,³ the issue was whether the CWA’s wetlands permitting program applies to wetlands that are only distantly connected to traditional navigable waters — or at a minimum, do not abut them. In *Carabell v. U.S. Army Corps of Engineers*,⁴ the issue was whether that same program reaches wetlands that are not hydrologically connected to any traditional navigable water. Both cases also raised a constitutional question: *if* the disputed CWA coverage exists, did Congress exceed its authority under the Commerce Clause of the Constitution?⁵

In taking these separate cases, the Court was revisiting a CWA conundrum with which it and many other courts had wrestled for three decades: *which wetlands are to be regulated under the federal CWA and which fall solely within the jurisdiction of the states in which they are located.*

Wetlands, with a variety of physical characteristics, are found throughout the country. They are known in different regions as swamps, marshes, fens, potholes, playa lakes, or bogs. Although these places can differ greatly, they all have distinctive vegetative assemblages because of the wetness of the soil. Some wetland areas may be continuously inundated by water, while other areas may not be flooded at all. In coastal areas, flooding may occur on a daily basis as tides rise and fall.

¹ 126 S. Ct. 2208 (2006).

² 33 U.S.C. §§ 1251-1387.

³ *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *cert. granted sub nom. Rapanos v. United States*, 74 U.S.L.W. 3228 (Oct. 11, 2005) (No. 04-1034).

⁴ *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004), *cert. granted under same name*, 74 U.S.L.W. 3228 (Oct. 11, 2005) (No. 04-1384).

⁵ The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, gives the Congress authority “To regulate Commerce ... among the several States”

Background

From the earliest days, Congress grappled with where to set the outer bound of federal authority over the nation’s waterways, particularly with regard to uses of waterways that impaired navigation. The phrase Congress often used to define federal authority was “navigable waters of the United States.”⁶ The concept proved an elastic one: in Supreme Court decisions from the early to mid-twentieth century, “navigability” underwent a substantial expansion “from waters in actual use to those which used to be navigable to those which by reasonable improvements could be made navigable to nonnavigable tributaries affecting navigable streams.”⁷

Notwithstanding the Court’s enlargement of “navigability,” the Congress considering the legislation that became the CWA of 1972⁸ felt that the term was too constricted to define the reach of a law whose purpose was not maintaining navigability, but rather preventing pollution. Accordingly, Congress in the CWA retained the traditional term “navigable waters,” but defined it to mean “waters of the United States”⁹ — seemingly minimizing the constraint of navigability. The conference report said that the new phrase was intended to be given “the broadest possible constitutional interpretation.”¹⁰

Among the provisions in the 1972 clean water legislation was section 404,¹¹ which together with section 301(a) requires persons wishing to discharge dredged or fill material into “navigable waters,” as newly defined, to obtain a permit from the U.S. Army Corps of Engineers.¹² The Corps’ initial response to section 404 was to apply it solely to waters traditionally deemed navigable (which included few wetland areas), despite the broadening “waters of the United States” definition and conference report language. Under a 1975 court order,¹³ however, the Corps issued new regulations that swept up a range of wetlands.¹⁴ This broadening ushered in a debate, continuing today, as to *which* wetlands Congress meant to reach in the section 404

⁶ See in particular two precursors of the CWA: Rivers and Harbors Act of 1899 §§ 10 (33 U.S.C. § 403), and 13 (33 U.S.C. § 407). Section 13 covers tributaries of navigable waters as well.

⁷ William H. Rodgers, Jr., *Handbook on Environmental Law* 401 (1977) (footnotes omitted).

⁸ P.L. 92-500. To be precise, the 1972 enactment was titled the Federal Water Pollution Control Act Amendments of 1972. It was only after the 1977 amendments thereto that the act as a whole became known as the Clean Water Act.

⁹ CWA § 502(7), 33 U.S.C. § 1362(7).

¹⁰ Conference report S.Rept. 92-1236 at 144, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3776, 3822.

¹¹ 33 U.S.C. § 1344.

¹² Section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant, except in compliance with various CWA sections, including section 404.

¹³ *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

¹⁴ 40 Fed. Reg. 31320 (July 25, 1975), amending 33 C.F.R. part 209.

permit program. At one time or another, the debate has occupied all three branches of the federal government.

As the title of this report indicates, *Rapanos* and *Carabell* are not the Supreme Court's first foray into the section 404 jurisdictional quagmire. In 1985, in *Riverside Bayview Homes, Inc. v. United States*,¹⁵ the Court unanimously upheld as reasonable the Corps' extension of its section 404 jurisdiction to "adjacent wetlands" — as one component of its definition of "waters of the United States."¹⁶ Under the Corps regulations, adjacent wetlands are wetlands adjacent to navigable bodies of water or interstate waters, or their tributaries.¹⁷ The Court reasoned that the water-quality objectives of the CWA were broad and sensitive to the fact that water moves in hydrologic cycles. Due to the frequent difficulties in defining where water ends and land begins, the Court could not say that the Corps' conclusion that adjacent wetlands are inseparably bound up with "waters of the United States" was unreasonable, particularly given the deference owed to the Corps' and EPA's ecological expertise. Also persuasive was the fact that in considering the 1977 amendments to the CWA, Congress vigorously debated but ultimately rejected amendments that would have narrowed the Corps' asserted jurisdiction under section 404.

In 2001, the Court returned to the geographic reach of section 404. The decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*¹⁸ directly involved the "isolated waters" component of the Corps' definition of "waters of the United States,"¹⁹ rather than the "adjacent wetlands" component at issue above. "Isolated waters," in CWA parlance, are waters that are not traditional navigable waters, are not interstate, are not tributaries of the foregoing, and are not hydrologically connected to navigable or interstate waters or their tributaries — but whose "use, degradation, or destruction [nonetheless] could affect interstate commerce."²⁰ Illustrative examples include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, *wetlands*, sloughs, [or] prairie potholes"²¹ with an interstate commerce nexus. The issue before the Court was whether "waters of the United States" is broad enough to embrace the Corps' assertion of jurisdiction over such "isolated waters" purely on the ground that they are or might be used by migratory birds that cross state lines — known as the Migratory Bird Rule.

In a 5-4 ruling, the majority opinion held that the Migratory Bird Rule was not authorized by the CWA. The decision's rationale was much broader, however, appearing to preclude federal assertion of 404 jurisdiction over isolated, nonnavigable, intrastate waters on *any* basis — indeed, over wetlands not adjacent

¹⁵ 474 U.S. 121 (1985).

¹⁶ 33 C.F.R. § 328.3(a)(7). An identical EPA definition is at 40 C.F.R. § 230.3(s)(7).

¹⁷ See note 15, *supra*.

¹⁸ 531 U.S. 159 (2001).

¹⁹ 33 C.F.R. § 328.3(a)(3). An identical EPA definition is at 40 C.F.R. § 230.3(s)(3).

²⁰ See note 18, *supra*.

²¹ See note 18, *supra* (emphasis added).

to “open water.”²² This disparity between the Court’s holding and its rationale occasioned considerable litigation in the lower courts, the majority of which opted for a narrow reading of *SWANCC*, hence a broad reading of remaining Corps jurisdiction under section 404. Such uncertainties as to the Corps’ isolated waters jurisdiction after *SWANCC* focused attention on the alternative bases in Corps regulations for asserting 404 jurisdiction — such as the existence of “adjacent wetlands.” Neither the Corps of Engineers nor EPA, however, modified its section 404 regulations since *SWANCC*.²³

The new spotlight on the concept of adjacent wetlands is the backdrop for the Supreme Court’s consideration of *Rapanos* and *Carabell*, two “adjacent wetlands” cases.

The Sixth Circuit Decisions in *Rapanos* and *Carabell*

Although the Supreme Court consolidated *Rapanos* and *Carabell*, the issues in each case as to Corps and EPA “adjacent wetlands” jurisdiction are slightly different.

Rapanos v. United States: wetlands adjacent to a tributary (man-made ditch) that ultimately flows into traditional navigable waters.

The *Rapanos* case arose as a civil enforcement action filed by the United States in 2000, seeking penalties for the filling of three Michigan wetlands without a section 404 permit. (In a separate federal *criminal* action, Mr. Rapanos was convicted in 1995 of illegally discharging fill material into protected wetlands.) As in *Riverside Bayview*, the issue was the Corps’ jurisdiction under the “adjacent wetlands” component of its regulations defining “waters of the United States.” In particular, plaintiffs argued that *SWANCC* did more than throw out the Migratory Bird Rule; it also barred section 404 regulation of wetlands that do not physically abut a traditional navigable water.

In ruling that section 404 reached the Rapanos’ wetlands, the Sixth Circuit held that immediate adjacency of the wetland to a traditional navigable water is not required. Rather, what is needed is a “significant nexus” — a ubiquitous phrase in section 404 court decisions lifted from *SWANCC*’s explanation of *Riverside Bayview*²⁴ — between the wetlands and traditional navigable waters. “Significant nexus,” in turn, can be satisfied by the presence of a “hydrological connection.” Thus, the fact that the Rapanos’ wetlands had surface water connections to nearby

²² In *SWANCC* dictum, the Court stated: “In order to rule for the [Corps of Engineers], we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.” 531 U.S. at 168 (emphasis in original).

²³ The agencies did consider initiating a rulemaking to consider “issues associated with the scope of waters that are subject to the Clean Water Act” in light of *SWANCC*, 68 Fed. Reg. 1991 (2003), but the effort was abandoned in December 2003.

²⁴ *SWANCC*, 531 U.S. at 167.

tributaries of traditional navigable waters was sufficient for section 404 jurisdiction. Nor did it seem to matter to the court that the hydrological connection to traditional navigable waters was, for at least one of the Rapanos wetlands, distant — surface waters from this wetland flow into a man-made drain immediately north of the site, which empties into a creek, which flows into a navigable river. According to the record, this wetland is between eleven and twenty miles from the nearest navigable-in-fact water. In ruling that a surface water connection to a tributary of a navigable water was enough, the circuit aligned itself with the large majority of appellate courts to rule on this issue since *SWANCC*.

In its petition for certiorari to the Supreme Court, the Rapanoses asked whether the CWA's reach extends to nonnavigable wetlands “that do not even abut a navigable water.” If a hydrological connection, “no matter how tenuous or remote,” is all that is required, the Rapanos’ petition also asked whether such CWA jurisdiction would exceed Congress’ power under the Commerce Clause.

Carabell v. U.S. Army Corps of Engineers: wetlands adjacent to a tributary (man-made ditch) that ultimately flows into traditional navigable waters — but wetlands separated from the tributary by a manmade berm.

Like the Rapanoses, the Carabells owned a wetland tract in Michigan. They wished to develop it for a condominium project. Unlike the Rapanoses, the Carabells pursued the required wetlands permitting process — state, then federal. The *Carabell* case was their challenge to the Corps’ denial of the section 404 permit, and raised, among other things, the issue of whether the Corps had jurisdiction over the wetland.

The Sixth Circuit held that “adjacent wetlands” jurisdiction existed under the Corps regulations, even though the wetland was separated from a tributary of “waters of the United States” by a four-foot-wide manmade berm that blocked immediate drainage of surface water from the parcel to the tributary.²⁵ The existence of the berm meant, critically, that unlike the wetlands in *Rapanos*, the wetlands here lacked any hydrological connection to navigable waters *at all*. Parenthetically, the fact that the “tributary” was merely a man-made ditch (which emptied into a creek, which flowed into a navigable lake) did not appear to be an issue in the case, as it was in *Rapanos*. Finally, the court endorsed the view of the majority of courts addressing the question that *SWANCC* spoke only to the Corps’ “isolated waters” jurisdiction; it did not narrow the agency’s “adjacent wetlands” authority involved here and broadly construed in *Riverside Bayview*.

In its petition for certiorari, the Carabells asked whether section 404 extends to “wetlands that are hydrologically isolated from any of the ‘waters of the United States’ .” If so, the petition asked the same follow-up question as in *Rapanos*: Would such CWA jurisdiction exceed Congress’ power under the Commerce Clause?

²⁵ Corps of Engineers regulations define the word “adjacent” in “adjacent wetlands” to mean “bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers ... are ‘adjacent wetlands.’” 33 C.F.R. § 328.3(c).

The Supreme Court Decision

For many who had waited so long to have “waters of the United States” clarified, the *Rapanos* decision (addressing the Sixth Circuit decisions in both *Rapanos* and *Carabell*) was a disappointment. In three major opinions, the court split 4-1-4 as to whether the Corps’ assertions of 404 jurisdiction in the two cases before it comported with the CWA — that is, involved “waters of the United States.” Justice Scalia wrote a four-justice plurality opinion, ruling that the Corps had overreached and thus the Sixth Circuit decisions must be vacated and remanded for further proceedings applying the plurality’s rule. Justice Kennedy, in a lone concurrence, also disagreed with the Corps’ interpretation of the CWA, but would have applied a different approach than the plurality. He supplied the fifth vote supporting the vacation and remand, making that the judgment of the Court. (Five votes is a majority on the Supreme Court.) Finally, Justice Stevens wrote a four-justice dissent upholding the Corps’ reading of its jurisdiction. Accordingly, he would have affirmed the decisions below.²⁶

The problem is that no single rationale in these three opinions commands the support of a majority of the justices. Thus, lower courts addressing challenges to Corps 404 jurisdiction in the future will have to struggle with what rule of decision to extract from *Rapanos*, and may take their cue from either the Scalia plurality decision or the Kennedy concurrence (more on this later). That being so, it behooves us to examine both these two opinions, with a briefer mention of the dissenters’ views.

Justice Scalia’s plurality opinion asserts what is probably the narrowest view of 404 jurisdiction in the three major opinions, at least in most circumstances. His opening paragraphs set the tone by describing the substantial costs of applying for 404 permits, and the “immense expansion of federal regulation of land use that has occurred under the Clean Water Act.”²⁷ This critical tone continues with the opinion’s description of how the lower courts, “[e]ven after *SWANCC*,” have continued to uphold the “sweeping” assertions of jurisdiction by the Corps over tributaries and adjacent wetlands.²⁸

Justice Scalia continued by construing “waters” in “waters of the United States” to mean only *relatively permanent, standing or flowing bodies of water*, such as streams, rivers, lakes, and other bodies of water “forming geographic features.”²⁹ This definition leads him to exclude “channels containing merely intermittent or

²⁶ In addition to these three major opinions, Chief Justice Roberts wrote a brief opinion concurring with the plurality, and Justice Breyer wrote a brief opinion concurring with the dissenters.

²⁷ 126 S. Ct. at 2215.

²⁸ *Id.* at 2217.

²⁹ *Id.* at 2221.

ephemeral flow.”³⁰ Wetlands, our topic here, are included as “waters of the United States” — that is, are “adjacent” in the Corps’ language — only when they have a “*continuous surface connection*” to bodies that are “waters of the United States” in their own right. By contrast, wetlands with only an intermittent, physically remote hydrological connection to “waters of the United States” are not covered by section 404, according to the Scalia opinion.

Importantly, the plurality sought to calm concerns that a narrow reading of section 404 would eviscerate other sections of the CWA, particularly the point-source permitting program under section 402 that is the heart of the act. That section, the plurality explained, does not require that the point source discharge *directly* into a jurisdictional water. It is enough that the discharged pollutant is likely to ultimately be carried downstream to such a jurisdictional water. Thus, unlike with section 404, discharges into non-covered waters could still be regulated.

In contrast to the absolute rules proposed by the plurality, Justice Kennedy’s concurring opinion proposed a case-by-case test. He picks up on the “significant nexus” test used by the Sixth Circuit and many other courts — but while the lower courts defined significant nexus as having a *hydrological connection* with traditional navigable waters,³¹ Justice Kennedy used an ambiguous *ecological* test.³² A wetland, he declared, has the requisite significant nexus if, alone or in combination with similarly situated lands in the region, it significantly affects the chemical, physical, and biological integrity of traditional navigable waters.³³ These ecological functions include flood retention, pollutant trapping, and filtration. Under Kennedy’s opinion, the waters that perform these functions may be intermittent or ephemeral, and they need not have a surface hydrological connection to other waters. When, in contrast, their effects on water quality are speculative or insubstantial, the wetland is beyond section 404’s reach.³⁴

This formulation, Justice Kennedy explained, allows that when the Corps seeks to regulate wetlands adjacent to *navigable-in-fact* waters, adjacency is enough for jurisdiction. In contrast, for wetlands sought to be regulated based on adjacency to *non-navigable tributaries*, a significant nexus must be shown on a case-by-case basis. Importantly, however, the Justice did allow that the Corps might adopt regulations at some point declaring certain categories of wetlands to have a significant nexus *per se*, obviating the case-by-case approach for those wetlands.

³⁰ *Id.* at 2222.

³¹ Hydrological connection is the test that the Corps has used to demonstrate significant nexus.

³² Soon after *Rapanos* was decided, a federal district court commented that Justice Kennedy’s opinion “advanced an ambiguous test — whether a ‘significant nexus’ exists to waters that are/were/might be navigable. This test leaves no guidance on how to implement its vague, subjective centerpiece.” *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex., 2006).

³³ 126 S. Ct. at 2248.

³⁴ *Id.*

Each of the foregoing views, the plurality's and Justice Kennedy's, rejects the hitherto prevailing view that any hydrological connection to a traditionally navigable water, no matter how distant, is sufficient for coverage. This "any hydrological connection" test had been a key element of the United States' assertions of "adjacent wetlands" jurisdiction.

Finally, the four dissenters found the Corps' assertion of jurisdiction reasonable in both cases. The Court's earlier decision in *Riverside Bayview*, the dissenters argue, was not confined to wetlands having continuous surface flow with traditional navigable waters or their tributaries. Rather it had endorsed jurisdiction over non-isolated wetlands generally, without case-by-case analysis. The plurality's concerns about the costs of applying for a permit, they continued, are more properly addressed to Congress, not to a court.

Legal Analysis

The jurisdictional questions raised by *Rapanos* and *Carabell* presented the Supreme Court with a "perfect storm" of hot-button issues. First, there is the federalism matter: where do CWA section 404 and the Constitution's Commerce Clause draw the line between federal and state authority over wetlands? Second, there are property rights concerns. Some 75% of jurisdictional wetlands in the lower 48 states are on private property, with the result that protests from property owners denied section 404 permits (or subjected to unacceptable conditions on same) are often heard — sometimes in the courts through Fifth Amendment takings suits. Third, *Rapanos* and *Carabell* have pervasive significance within the CWA itself, since "waters of the United States" governs not only the section 404 wetlands permitting program, but also multiple other provisions and requirements of that law (see discussion below under Policy Implications). In addition, the Corps' broad reading of its jurisdiction created novel semantics (such as viewing dry arroyos as "waters," and manmade ditches as "tributaries") that justices inclined to more literal readings of statutory language would have a hard time accepting.

The drama was further heightened by the fact that for two of the justices deciding the case, Chief Justice Roberts and Justice Alito, it was their first term on the Court. Their environmental views were not well known on the basis of their prior appellate tenure.

It was not surprising in light of the above themes that the justices split as they did: the four more "conservative" justices rejecting the Corps' expansive view of its adjacent wetland jurisdiction, the four "liberal/moderates" upholding it, and Justice Kennedy coming down in between (as he often does) with a case-by-case test, at least until the Corps adopts new rules. The question, as noted earlier, is what rule of decision the lower courts will discern in *Rapanos*, with its absence of a majority rationale, for use in future cases. In practice, courts often look for common approaches supported by a majority of the justices, looking both to the views of plurality justices (supporting the judgment of the court in the case) and those of the dissenters (who do not support the judgment). Because Justice Kennedy's concurrence is on the whole closer to the dissent than to the plurality, and will likely

often include wetlands covered by the plurality, his views may prevail.³⁵ That is, any wetland that Justice Kennedy would view as covered would also be one that the dissenters would see as covered — together, a majority of the Court.

Thus far, the few lower-court decisions to apply *Rapanos* have been inconsistent, as was widely predicted based on its fractured nature. One decision took its cue from the Scalia plurality view of 404 jurisdiction over adjacent wetlands, though principally relying on circuit precedent.³⁶ A second court looked solely to the Kennedy view.³⁷ Still another took the view, suggested by the dissenters in *Rapanos*, that a wetland satisfying *either* the plurality or the Kennedy concurrence was covered.³⁸ Support for this view, of using either the plurality or Kennedy test in a particular fact situation, was endorsed by a Department of Justice official in testimony at a Senate hearing on August 1.³⁹

In the wake of *Rapanos*, several factors are putting pressure on the Corps and EPA to do a rulemaking on the scope of “adjacent wetlands” permitting jurisdiction under the CWA (assuming Congress does not act). One is the fact that no fewer than three of the opinions in *Rapanos* urged the agencies to do so.⁴⁰ A second factor is the labor-intensive nature (and vagueness) of the Kennedy case-by-case approach, requiring empirical study of each wetland near a non-navigable tributary. And the third is the likelihood, as noted above, that the lower courts will diverge as to the rule to be applied after *Rapanos*. This is not to minimize the considerable difficulty of coming up with a rule that meets the Kennedy “significant nexus” test (if that is the one adopted) with its complicated mix of ecological factors. One can be confident that anything the Corps and EPA promulgate will find its way into the courts. At this early date, the two agencies are proceeding to develop interim guidance as to how they will construe *Rapanos*, but they have not stated their intentions as to whether they will issue a rule amending their existing jurisdictional rule.

All of the *Rapanos* opinions that mention *SWANCC* seem to accept, without discussion, that *SWANCC* eliminates jurisdictional coverage of *all* isolated, intrastate, nonnavigable waters — not just those isolated, intrastate, nonnavigable waters where

³⁵ Justice Kennedy seems to reject every major proposition of the Scalia plurality. For example, Scalia insists that the tributary contain water relatively permanently; Kennedy (and the dissenters) does not. Scalia insists on a continuous, non-intermittent surface connection with the tributary; Kennedy (and the dissenters) does not.

³⁶ *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006). This decision actually involved the amendments to the CWA made by the Oil Pollution Act, which uses the same definition of “waters of the United States” as CWA section 404.

³⁷ *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006).

³⁸ *United States v. Evans*, 2006 Westlaw 2221629, *19 (M.D. Fla. Aug. 2, 2006).

³⁹ Cruden, John C., Deputy Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, “Statement Concerning Recent Supreme Court Decisions Dealing with the Clean Water Act,” before the Subcommittee on Fisheries, Wildlife and Water, U.S. Senate Committee on Environment and Public Works, August 1, 2006, p. 16.

⁴⁰ See opinions of Justice Kennedy, Justice Breyer, and Chief Justice Roberts.

the sole basis for asserting jurisdiction was the Migratory Bird Rule. Most lower court decisions to broach this issue had adopted the latter narrower reading of *SWANCC*. Thus, although only adjacent wetlands were directly involved in *Rapanos*, there may be impacts on the Corps' authority over isolated, intrastate, nonnavigable waters also.

Finally, although both petitions for certiorari had raised the Commerce Clause issue, the decision in *Rapanos*, as expected, was on purely statutory grounds. The plurality, however, did assert that the Corps view of its adjacent wetlands jurisdiction “stretches the outer limits of Congress’ commerce power,”⁴¹ using this as one of several reasons for adopting a narrow reading of that jurisdiction.

Policy Implications

As with the legal questions, the policy questions associated with these cases — what *should be* the outer limit of CWA regulatory jurisdiction and what are the consequences of restricting that jurisdiction — also have challenged regulators, landowners and developers, and policymakers since passage of the act in 1972.

The act prohibits the discharge of dredged or fill material into navigable waters without a permit, and it also prohibits discharges of pollutants from any point source to navigable waters without a permit. Disputes have centered on whether wetlands and other waters are “navigable waters,” a legal term of art. The answer to this question is important, because it may determine the extent of federal CWA regulatory authority not only for the section 404 program, but also for purposes of implementing other CWA programs. Critics of the section 404 regulatory program, such as land developers and agriculture interests, argue that the Corps’ wetlands program has gradually and illegally expanded its asserted jurisdiction since 1972. They want the Corps and EPA to give up jurisdiction over most non-navigable tributaries and allow other federal and state programs to fill whatever gap is created.

Waters that are jurisdictional are subject to the multiple regulatory requirements of the CWA: standards, discharge limitations, permits, and enforcement. Non-jurisdictional waters, in contrast, do not have the federal legal protection of those requirements. The act has one definition of “navigable waters” that applies to the entire law. The definition applies to: federal prohibition on discharges of pollutants (section 301), requirements to obtain a permit prior to discharge (sections 402 and 404), water quality standards and measures to attain them (section 303), oil spill liability and oil spill prevention and control measures (section 311), certification that federally permitted activities comply with state water quality standards (section 401), and enforcement (section 309). As noted above, it impacts the Oil Pollution Act and other environmental laws as well. For example, the reach of the Endangered Species Act (ESA) is affected, because that act’s requirement for consultation by federal agencies over impacts on threatened or endangered species is triggered through the

⁴¹ 126 S. Ct. at 2224.

issuance of federal permits.⁴² Thus, by removing the need for a CWA permit, a non-jurisdictional determination would eliminate ESA consultation, as well. As discussed above, the Scalia opinion in *Rapanos* concluded that a narrow interpretation of the Corps' 404 jurisdiction would not impact these other provisions, but many observers contend that the question is not fully resolved.

SWANCC found invalid the assertion of CWA jurisdiction over isolated, non-navigable intrastate waters solely on the basis of their use (or potential use) as habitat by migratory birds. Most of the post-*SWANCC* cases have instead addressed tributaries and adjacent wetlands, asking which of these have the "significant nexus" to navigable waters *SWANCC* was interpreted to say is necessary to establish federal jurisdiction.

Wetlands are an important part of the total aquatic ecosystem, with many recognized functions and values, including water storage (mitigating the effects of floods and droughts), water purification and filtering, recreation, habitat for plants and animals, food production, and open space and aesthetic values. Functional values, both ecological and economic, at each wetland depend on its location, size, and relationship to adjacent land and water areas. To the layman, many of these values are more obvious for wetlands adjacent to large rivers and streams than they are for wetlands and small streams that are isolated in the landscape from other waters. Many of the functions and values of wetlands have been recognized only recently. Historically, many federal programs encouraged wetlands to be drained or altered because they were seen as having little value. Even today, while more federal laws either encourage wetland protection or regulate their modification, pressure exists to modify, drain, or develop wetlands for uses that some see as more economically beneficial.

While regulators and the regulated community debate the legal dimensions of federal jurisdiction, scientists contend that there are no discrete, scientifically supportable boundaries or criteria along the continuum of wetlands to separate them into meaningful ecological or hydrological compartments. Numerous scientific studies define and describe the importance of the functions and values of wetlands, in support of their significant nexus to navigable waters.⁴³ In all but some very narrow instances, scientists say, terms such as "isolated waters" and "adjacent wetlands" are artificial legal or regulatory constructs, not valid scientific classifications. From this perspective, even waters that lack a direct surface connection to navigable waters or that only flow intermittently are connected to the larger aquatic ecosystem via subsurface or overflow hydrologic connections. Wetland scientists believe that all such waters are critical for protecting the integrity of waters, habitat, and wildlife downstream.

In *SWANCC*, the Supreme Court did not draw a bright line for purposes of determining the limits of federal jurisdiction (many wetland scientists do not believe that a bright line is possible, in any case). While the ruling reduced federal

⁴² 16 U.S.C. § 1536.

⁴³ Leibowitz, Scott G., "Isolated Wetlands and Their Functions: An Ecological Perspective," *Wetlands*, vol. 23, no. 3, September 2003, pp. 517-531.

jurisdiction over some previously regulated wetlands, even nearly five years later it remains difficult to determine the precise effect of that decision. Many affected interests (states and the regulated community) contend that guidance from the Corps and EPA has not adequately defined the scope of regulated areas and wetlands affected by *SWANCC* and subsequent court rulings.⁴⁴ The agencies' current guidance, issued in 2003, has been challenged in Congress: in May, the House approved an amendment to EPA's FY2007 appropriations bill (H.R. 5386) that would bar EPA from spending funds to implement or enforce the guidance. In addition, the Government Accountability Office found that uncertainties about legal interpretations are amplified by variability in jurisdictional determinations made by the 38 Corps District offices that administer the CWA section 404 permit program.⁴⁵ The *Rapanos* and the *Carabells* had hoped that the Supreme Court would clarify the jurisdiction issue and that the Court would further narrow the program's geographic reach. Other interest groups disagreed with the petitioners' views on the issues, but also had hoped for clarity. Most now say that the 4-1-4 ruling, in which the three main opinions did not agree on what constitutes "waters of the United States," did not bring clarity and will require much study to discern its meaning in legal and policy terms.

Estimates of the types of wetlands and amounts of acreage affected by *SWANCC*, subsequent lower court rulings, and *Rapanos* depend on interpretation of the cases and on assumptions about defining key terms such as "adjacent," "tributary," and "significant nexus." Because in its regulations before *SWANCC* the Corps had broadly defined "waters of the United States," including those encompassed by the Migratory Bird Rule, nearly all U.S. wetlands and waters were subject to CWA jurisdiction, since practically all are used to a greater or lesser extent by migratory birds.⁴⁶ Depending on how key terms are now defined, reduced federal jurisdiction could affect very small or very large categories of waters and wetlands. Reflecting the uncertainties about how broadly or narrowly *SWANCC* would be interpreted, one estimate made after that decision found that the possible changes in jurisdiction could range from 20% to 80% of the Nation's total estimated 100 million acres of wetlands.⁴⁷ Following the *Rapanos* decision, concern has been expressed particularly about that ruling's impacts in arid and semi-arid western states to exclude intermittent or ephemeral streams and adjacent wetlands and riparian areas from CWA jurisdiction.

⁴⁴ See, for example: U.S. Congress, House of Representatives, Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, "Inconsistent Regulation of Wetlands and Other Waters," Hearing, 108th Congress, 2d Session, March 30, 2004, (H.Hrg. 108-58), 200 p.

⁴⁵ U.S. Government Accountability Office, "Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction," GAO-04-297, February 2004.

⁴⁶ Kusler, Jon, The Association of State Wetland Managers, "'Waters of the U.S.' After *SWANCC*," August 12, 2005 (draft), p. 6.

⁴⁷ Kusler, Jon, The Association of State Wetland Managers, "The *SWANCC* Decision: State Regulation of Wetlands to Fill the Gap," March 2004, pp. 6-8. Hereafter, Kusler.

A reduction in CWA jurisdiction affects implementation of the 404 and possibly other CWA programs. Earlier this year, EPA estimated conservatively that the extent of non-navigable tributaries and adjacent wetlands that could be affected by the narrow reading of the Clean Water Act that was advocated by the *Rapanos* and *Carabell* petitioners was up to 59% of the total length of streams in the United States, excluding Alaska. EPA also estimated that 34% of industrial and municipal dischargers that are subject to CWA section 402 permits are located on these stream segments and that public drinking water systems which use intakes on these segments provide drinking water to over 110 million people.⁴⁸ A review by EPA Region III in 2003 concluded that restricting federal jurisdiction to areas that appear to lack a permanent surface water connection to “navigable waters” would remove about 12% of the region’s wetlands from federal protection.⁴⁹

As noted, the uncertainties resulting from the *Rapanos* decision have led to widespread anticipation that the Corps and EPA will take administrative action to clarify how they interpret the ruling and its impact on waters that are protected by the Clean Water Act. Corps and EPA officials testified before a Senate subcommittee on August 1 that the agencies are working on substantive interpretive guidance that will clarify CWA jurisdiction in light of the decision, but there is no timeframe for this guidance.⁵⁰ A few days after the decision was issued, the agencies provided informal guidance recommending that enforcement and field staff temporarily delay making CWA jurisdictional determinations or refer new regulatory enforcement actions for areas beyond the limits of traditional navigable waters. Except for projects involving traditional navigable waters, permit decisions will either have to be deferred until additional guidance is issued, or permits will be issued based on the pre-*Rapanos* jurisdictional limits and may be revisited upon request after the final guidance is issued. While most observers acknowledge that guidance will be useful, many argue that the Corps must initiate a rulemaking to revise its regulations — especially since three justices in some fashion suggested one. Thus far, the government has not committed to issuing new rules. New regulations may clarify many current questions but are unlikely to please all of the competing interests, as one environmental advocate has observed.

However, a 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. If politics were to trump science in the rulemaking process, the likelihood of such a protective rule would not be promising. Also,

⁴⁸ Grumbles, Benjamin H., Assistant Administrator for Water, EPA, letter to Ms. Jeanne Christie, Association of State Wetland Managers, January 9, 2005 (sic), p. 3. Because there is no national database of non-navigable tributaries, EPA analyzed surrogate data on the linear extent of intermittent/ephemeral streams and stream segments that lie at the head of tributary systems and have no other streams flowing into them.

⁴⁹ Blankenship, Karl, “Supreme Court affirms wetlands protections on narrow vote,” *Bay Journal*, vol. 16, no. 5, July-August 2006, p. 9.

⁵⁰ Grumbles, Benjamin H., Assistant Administrator for Water, EPA, and John Paul Woodley, Assistant Secretary of the Army for Civil Works, Department of the Army, Statement before the Subcommittee on Fisheries, Wildlife, and Water of the U.S. Senate Committee on Environment and Public Works, August 1, 2006.

rules are subject to legal challenge and can be tied up in court for years before they are implemented.⁵¹

Filling the Gaps

Whatever gaps in wetland regulation result from reduced federal jurisdiction arguably could be filled, at least in part, by other federal or state and local programs and actions. For example, some assert that wetland restoration and creation programs, such as the Wetlands Reserve Program and the Coastal Wetlands Restoration Program, or private conservation efforts can provide protection, even if the wetland is no longer jurisdictional.⁵² However, others respond that such programs are likely to be incomplete in filling gaps, since they apply primarily to rural areas and do not apply to the one-third of the Nation's lands in federal ownership. Moreover, they were never intended to be a seamless group that would fill all possible gaps.

SWANCC, the subsequent lower court decisions, and *Rapanos* also highlight the role of states in protecting waters not addressed by federal law. From the states' perspective, the federal section 404 program provides the basis for a consistent national approach to wetlands protection. But if a larger portion of wetlands are no longer jurisdictional, they say, it can be argued that the section 404 program no longer provides a baseline for consistent, minimum standards to regulate wetlands. None of these court rulings prevents states from protecting non-jurisdictional waters through legislative or administrative action, but few states have done so. Prior to *SWANCC*, 15 states had programs that regulate isolated freshwater wetlands to some degree, but state officials acknowledge that these programs vary substantially from some that are comprehensive in scope to others that are limited by wetland size or have exemptions for agriculture and other activities.⁵³ Since 2001, a few states have passed new legislation or updated water quality regulations; the issue remains under consideration in several states, where competing proposals that are viewed by some as strengthening and by others as weakening wetland protection are being debated.⁵⁴

Although some states have authorities to regulate waters of their state, their ability to regulate effectively may be compromised, because state rules often are tied to federal definitions. The gap produced by reduced federal jurisdiction is most evident in the 32 states that have no independent wetlands programs and that typically have relied on CWA section 401 water quality certification procedures to protect wetlands. Pursuant to section 401, applicants for a federal permit must obtain a state certification that the project will comply with state water quality standards.

⁵¹ Murphy, James, "*Rapanos v. United States: Wading Through Murky Waters*," *National Wetlands Newsletter*, vol. 28, no. 5, September-October 2006, p. 19.

⁵² U.S. Environmental Protection Agency, "Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States,'" 68 *Federal Register* 1994-95, January 15, 2003.

⁵³ Kusler, p. 15.

⁵⁴ Goldman-Carter, Jan, "Isolated Wetland Legislation: Running the Rapids at the State Capitol," *National Wetlands Newsletter*, May-June 2005, pp. 27-29.

Consequently, by conditioning certification, states have the ability to affect the federal permit and to exercise some regulatory control over wetlands without the expense of establishing independent state programs. However, as described previously, diminished CWA jurisdiction which affects the section 404 program also limits the reach of other CWA programs, including section 401.

Analysts familiar with the political and fiscal environments of states believe that most states are either reluctant or unable “to step boldly into the breach in federal wetlands protection....The Corps and the U.S. Environmental Protection Agency, not to mention Congress, have little cause to rely on the notion that states will effectively backstop federal protection for isolated wetlands.”⁵⁵ Many states are barred from enacting laws or rules more stringent than federal rules, or are reluctant to take action, due to budgetary and resource concerns, as well as apprehension that regulation will be judged to involve “taking” of private property and require compensation.

Some argue that what is needed now — regardless of interpretive guidance or rulemaking that the Corps may pursue — is legislative action to affirm Congress’ intention regarding CWA jurisdiction. Others contend that, although the *Rapanos* decision did not resolve the issues, it also did not substantially affect Congress’ willingness or interest in acting on issues that have been pending for several years without congressional action. Related to this perspective is the view that, because the current questions are highly technical in nature, a simple fix may not address the problem or may create others, such as impacting rights that the CWA reserves to states.

Legislation has been introduced that would address the CWA jurisdictional issues discussed here in different ways. One 109th Congress proposal (H.R. 1356/S. 912, the Clean Water Authority Restoration Act of 2005), would provide a broad statutory definition of “waters of the United States;” clarify that the CWA is intended to protect U.S. waters from pollution, not just maintain their navigability; and include a set of findings to assert constitutional authority over waters and wetlands. Other legislation intended to restrict regulatory jurisdiction also has been introduced in the 109th Congress (H.R. 2658, the Federal Wetlands Jurisdiction Act of 2005). It would narrow the statutory definition of “navigable waters” and define certain isolated wetlands that are not adjacent to navigable waters, or non-navigable tributaries and other areas (such as waters connected to jurisdictional waters by ephemeral waters, ditches or pipelines), as not being subject to federal regulatory jurisdiction. Neither proposal has received congressional action.

⁵⁵ Odell, Turner, “On Soggy Ground — State Protection for Isolated Wetlands,” *National Wetlands Newsletter*, September-October 2003, p. 10.