
What's Next After *Rapanos*?

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It took almost twenty-two years, but in 2006, the U.S. Supreme Court completed what can in some ways be considered its Clean Water Act (CWA) trilogy with regard to the Act's jurisdictional scope. Unfortunately, the Court has done little more than muddy the waters in defining the extent of the federal government's authority under the CWA, and it is unlikely to have spoken its final word on the matter. The three cases *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), and *Rapanos v. United States*, 126 S. Ct. 2208 (2006) taken together do suggest the parameters of the CWA's scope, however, and finally may provide a springboard for the agency action that the Court has implored the U.S. Army Corps of Engineers (the Corps) to engage in.

This article will not provide analysis of those cases, except as necessary; other articles in this issue provide those summaries and assessments. Rather, this article will discuss how, as a practical matter, to make sense of the Court's muddled direction. It will propose regulatory fixes by the Corps and United States Environmental Protection Agency (EPA) that, absent CWA amendments, would both provide clarity to the Act's implementation and likely pass muster with the Court.

There are a few things that are evident and provide direction until the agencies develop final guidance or modify existing regulations (or until legislative action occurs). First, as noted by the few courts that have addressed the issue following *Rapanos*, one of two approaches is appropriate in determining whether a discharge to a nonnavigable-in-fact water is jurisdictional under the CWA. Courts can look to Justice Kennedy's "significant nexus" test articulated in his *Rapanos* concurrence, or they can look to either the significant nexus test or the *Rapanos* plurality's two-part test (i.e., do the receiving waters have a relatively permanent flow, and do those waters have a continuous surface connection to navigable-in-fact waters). This "either/or" approach follows Justice Stevens' instruction to lower courts in the *Rapanos* dissent that looking for jurisdiction under either test is proper, and it is the course that the Corps and EPA have decided to follow for the time being.

Indeed, only now, almost a year after *Rapanos* was decided, have the agencies published any meaningful guidance on the matter. Initially, on July 5, 2006, a few weeks after *Rapanos* was decided, the Corps issued internal interim guidance to its

field offices entitled *Interim Guidance on the Rapanos and Carabell Supreme Court Decision*. That guidance essentially recommended a bury-the-head-in-the-sand approach. Field offices were advised to delay making jurisdictional determinations for areas beyond the limits of traditional navigable waters, and where such delays are not possible, defer decisions on jurisdictional scope pending further guidance.

In September 2006, the Corps, in the preamble to its proposed Section 404 nationwide permit modifications and reissuance, simply indicated that it will assess jurisdiction "on a case-by-case basis in accordance with evolving case law and any future guidance that may be issued by appropriate Executive Branch agencies (e.g., the United States Department of Justice [DOJ])." 71 Fed. Reg. 56,258, 56,261 (2006). Although DOJ has not formally announced how it will interpret *Rapanos*, the solicitor general's position in briefs to the Supreme Court provides a good indication of where the United States stands. Based on its opposition to certiorari in both *Baccarat Fremont Developers, LLC v. United States Army Corps of Engineers*, No. 06-619 (Jan. 2007), at 11, and *Morrison v. United States*, No. 06-749 (Jan. 2007), the United States appears to have settled on its interpretation: jurisdiction is proper under either the plurality's two-part test or under Justice Kennedy's significant nexus test. The recent joint Corps/EPA guidance is consistent with this approach.

On June 5, 2007, the Corps and EPA issued joint guidance (the *Rapanos* guidance), and although the agencies note that the guidance will be followed immediately by field staff, a six-month comment period will be made available, and it will be no less than nine months before the agencies "either reissue, revise, or suspend the guidance." The absence of a definitive statement from the agencies on which both agency staff and the regulated community can rely makes it that much more critical that regulatory changes be implemented. Rather than take the initiative, the agencies' express intent was to "provide guidance to the field to enable them to make jurisdictional determinations that are defensible following the *Rapanos* decision." *Corps and EPA Response to the Rapanos Decision, Key Questions for Guidance Release*. The *Rapanos* guidance will not be assessed in this article, but its primary points are that the following waters will be considered jurisdictional pending further agency action: (1) traditionally navigable waters; (2) wetlands adjacent to traditionally navigable waters; (3) "relatively permanent" (year-round or nonprecipitation-instigated, seasonal (at least three months) flow) nonnavigable tributaries of traditionally navigable waters; and (4) wetlands that directly abut such tributaries.

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Furthermore, the guidance provides that the “significant nexus” test will be applied to nonnavigable tributaries that are not “relatively permanent,” wetlands adjacent to such tributaries, and wetlands that are adjacent to but do not abut “relatively permanent” nonnavigable tributaries. The guidance provides that the significant nexus test will assess flow characteristics and functions of the tributary and the functions performed by the adjacent wetlands to determine the affect on the chemical, biological, and physical integrity of the downstream navigable waters, including consideration of hydrologic and ecologic factors. Not jurisdictional at all will be swales, gullies, or other “erosion features” that have low volume, short duration, or infrequent flow, or ditches built in and that drain uplands and that do not have a “relatively permanent” flow.

The courts that have adhered to the significant nexus or “either/or” approaches and the solicitor general appear to be correct, both as a matter of procedure and statutory construction, based upon the doctrine set forth in *Marks v. United States*, 430 U.S. 188 (1977), discussed elsewhere in this issue (when there is a majority only on the result and not the reasoning of a case, lower courts “must follow the narrowest ground to which a majority of the Justices would have assented if forced to choose”). However, it is noteworthy to recognize that whereas *Riverside Bayview* was a unanimous decision, both SWANCC and *Rapanos* were highly fractured opinions, with the nearly dysfunctional *Rapanos* plurality decision failing to come away with any majority view. Although SWANCC and the *Rapanos* plurality attempt to undermine *Riverside Bayview*, the fact is that, by the terms of those decisions, they do not. Therefore, SWANCC, the *Rapanos* plurality, and the Justice Kennedy concurrence and Justice Stevens dissent in *Rapanos* all must be considered in view of the unanimous *Riverside Bayview* decision. On that basis, it would seem that the significant nexus test articulated in Justice Kennedy’s concurrence is the standard that is most loyal to *Riverside Bayview*, as well as to SWANCC, and is the foundation upon which the Corps’ and EPA must revise their regulations.

Determination of “Significant Nexus”

Assuming that it is the significant nexus between a wetland and navigable water that defines whether an adjacent wetland can be jurisdictional under the CWA (or between any “water” and a navigable-in-fact water) and that ephemeral or intermittent streams can constitute statutory “waters,” the question remains, “How is that significant nexus defined?”

As an initial matter, it would behoove the Corps and EPA to establish a regulation setting forth a standard by which significant nexus can be measured. Justice Roberts, in his concurrence, left no question that the Corps’ failure to promulgate a regulation after SWANCC did not sit well with the Court and contributed to the plurality’s parsimonious interpretation of the CWA. According to Chief Justice Roberts,

[t]he proposed rulemaking went nowhere. Rather than refining its view of its authority in light of our decision in SWANCC, and providing guidance meriting deference under

our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.

It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. [Citations omitted] What is unusual in this instance, perhaps, is how readily the situation could have been avoided.

126 S.Ct. at 2236. Then, in one final turn of the knife, the Chief Justice adds that the “agencies can decide for themselves whether . . . it was wise for them to take no action in response to SWANCC.” *Id.* (Justice Kennedy, however, in responding to the Chief Justice, noted that “[n]ew rulemaking could have averted the disagreement here only if the Corps had anticipated the unprecedented reading of the Act that the plurality advances.” *Id.* at 2247.)

Even assuming that the plurality’s “unprecedented” reading of the CWA is not considered by lower courts as the sole basis of adjacency jurisdiction, the agencies must provide a more substantive response to the Court’s mandate than the *Rapanos* guidance if they want to avoid another admonition down the road. In light of the triad of Supreme Court decisions, the question becomes how the Corps can establish the workable parameters of “significant nexus” through regulation.

As Justice Kennedy persuasively reasons in *Rapanos*, the plurality’s requirement for a continuous surface connection between the wetland and navigable water simply finds no support in the CWA, *Riverside Bayview*, or SWANCC. He further notes that although the Corps’ existing adjacency regulations can be used to regulate wetlands adjacent to navigable-in-fact waters, absent further regulation, the Corps must establish a significant nexus with respect to adjacency to non-navigable tributaries. *Id.* at 2249–50.

Contrary to the plurality’s conclusory assertion that dredged or fill material does not normally wash downstream, both Justice Kennedy and Justice Stevens made clear that the assertion simply is not true. *Id.* at 2245, 2263–64. Justice Kennedy noted that discharge of dredged and fill material should be treated as would discharge of any other pollutant under the CWA. *Id.* at 2245. Justice Kennedy further articulated the clear intent of the CWA to maintain wetlands that provide filtering and other attributes to benefit adjacent bodies of water.

Under the significant nexus test, Justice Kennedy points out that the plurality might foreclose jurisdiction over wetlands that actually abut navigable-in-fact waters but confer jurisdiction where there was a continuously flowing stream, no matter how insignificant a connection and despite the fact that there may not be impacts from that connection. According to Justice Kennedy, a mere hydrologic connection cannot suffice in all cases. *Id.* at 2250–51.

Under the Corps definition of “waters of the United States,” those waters include, among other things, (1) waters currently used, used in the past, or susceptible to use in interstate or for-

eign commerce, (2) all interstate waters and wetlands, (3) all other waters for which the use, degradation, or destruction could affect interstate or foreign commerce, (4) tributaries of the above, or (5) wetlands adjacent to the above-referenced waters. 33 C.F.R. § 328.3(a). The term “adjacent” is defined as “bordering, contiguous, or neighboring.” *Id.* § 328.3(c). Adjacent wetlands also include those “separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like . . .” *Id.*

It appears possible to retain the Corps’ current regulations while adding a controlling proviso that such waters are jurisdictional only if they have a “significant nexus” to “waters currently used, used in the past, or susceptible to use in interstate or foreign commerce.” *Id.* Interestingly, it is from the Fifth Circuit, which has taken the narrowest view of any circuit with respect to interpreting SWANCC and *Rapanos*, that the definition of “significant nexus” can be summoned.

In *Rice v. Harken*, 250 F.3d 264 (5th Cir. 2001), the Fifth Circuit took one of the more confining post-SWANCC views of any court, dismissing suggestions that a mere hydrological connection, in which intermittent creeks and groundwaters were in the chain, could confer jurisdiction under the Oil Pollution Act (OPA). (The jurisdictional basis of the CWA, the court reasoned, was equally applicable to the OPA.) As a basis for its reasoning, however, the Fifth Circuit noted that discharges onto land that seep into groundwater, and eventually into intermittent creeks and streams, were not jurisdictional because in that case there was no evidence of negative effects on navigable waters. Indeed, to establish jurisdiction, the court required evidence of a “close, direct and proximate link between [the] discharges of oil and any resulting actual, identifiable oil contamination” of a navigable-in-fact water. 250 F.3d at 272. *See also In re Needham*, 354 F.3d 340, n. 9 (5th Cir. 2003) (quoting *Rice v. Harken*).

A mere nine days after *Rapanos* was decided, the Northern District of Texas issued an opinion in *United States v. Chevron Pipe Line Co.*, Civil Action No. 5:05-CV-293-C-ECF (June 28, 2006) (appeal pending). In *Chevron*, the district court noted that no opinion in *Rapanos* commanded a majority and looked to the significant nexus test, but then concluded that “[b]ecause Justice Kennedy failed to elaborate on the ‘significant nexus’ required, this Court will look to the prior reasoning in this circuit,” and that it will proceed on a case-by-case basis (it points out that this was accurately predicted by Chief Justice Roberts). As understood by the district court, as a matter of law in the Fifth Circuit, “the connection of generally dry channels and creek beds will not suffice to create a ‘significant nexus’ to a navigable water simply because one feeds into the next during rare times of actual flow.” Instead, the court “must look to see if there is genuine issue of material fact as to whether the farthest traverse of the spill is a navigable-in-fact water or adjacent to an open body of navigable water.”

The court laid the burden on the government to show that the pollutants in question “actually reached a navigable waterway—some evidence more than speculation that such an event *could* occur.” (emphasis in original.) In case it did not make its point strongly enough, the district court added that

[i]f the effects of the pollutant have occurred upon a navigable-in-fact water, or is so likely to occur as the United States argues, then it should not be too onerous a task for the United States to come forward with some actual, concrete evidence at the summary judgment stage showing that the pollutant reached a navigable-in-fact water or waters adjacent to an open body of navigable water.

Id., n. 14.

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Similarly, the Ninth Circuit has functionally applied the same “significant nexus” test formulated by the district court in *Chevron*. In the *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. Aug. 10, 2006), the issue was whether the Basalt Pond and associated wetlands to which pollutants were discharged was jurisdictional under the CWA. A levee separated the pond from the navigable-in-fact Russian River, the distance of separation between the two ranging from fifty to several hundred feet. There was no typical surface connection between the pond and river. Expert testimony confirmed, however, that pollutants from the pond made their way to the river, seeping to a gravel bed and then to a vast underground aquifer, which supplied the “principal pathway” between the pond and river. The Ninth Circuit, following Justice Kennedy’s ground rules, agreed that the mere adjacency of the pond and its associated wetlands to the river was not sufficient to confer jurisdiction. It was the direct seep that provided the significant nexus in that case, and the district court’s finding of fact that “support the conclusion that the Basalt Pond and its wetlands ‘significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in a traditional sense.’” 457 F.3d at 1030, quoting Justice Kennedy’s *Rapanos* concurrence, 126 S. Ct. at 2241. To buttress its conclusion, the Ninth Circuit also noted that when the pond overflows, there is an actual surface connection between the pond and the river.

Subsequent to its ruling in *Healdsburg*, the Ninth Circuit decided *San Francisco Baykeeper v. Cargill Salt Division*, No. 04-17554, D.C. No. CV-96-02161-SI (March 8, 2007). In that case, the court held that using “mere adjacency” as a basis for CWA jurisdiction applied only to wetlands adjacent to navigable waters, and not, as in the circumstances of *Cargill*, where a nonwetland-isolated pond was adjacent to the navigable body of water. The court appeared to dismiss use of Justice

Kennedy's significant nexus test when a nonadjacent wetland was involved. In his *Rapanos* concurrence, however, Justice Kennedy described the nexus between a wetland or other non-navigable water and a navigable water. 126 S.Ct. at 2241.

Nonetheless, the Ninth Circuit noted that applying the significant nexus test in *Cargill* did not in any event confer jurisdiction because there was no evidence that water from the isolated pond flowed to the navigable water. According to the court, “[b]y any permissible view of the evidence,” the effect of the pond on the navigable water “is speculative and insubstantial; the Pond does not affect the integrity of” the navigable water. *Id.* The court concluded that expert testimony to the effect of under the right hydrologic conditions, “it is possible” water from the pond could flow to the navigable water, “fits the definition of ‘speculative.’” *Id.*

The Ninth Circuit, pre-*Rapanos* Fifth Circuit, and district court in *Chevron* do appear to address what Justice Kennedy meant by “significant nexus,” at least with respect to discharges to surface waters, intermittent or not. However, they do not directly address the issue of determining the jurisdictional status of an “adjacent” wetland that acts to keep pollutants out of navigable waters rather than contributing pollutants to the navigable-in-fact water. Although Justice Kennedy suggests that mere adjacency itself is enough to establish jurisdiction, 126 S. Ct. at 2248, it is because of a presumed nexus between the adjacent wetland and navigable water. Indeed, with regard to wetlands adjacent to navigable waters, Justice Kennedy stated that “the Corps’ conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.” *Id.* For the sake of consistency, the Corps might well consider whether to apply a factual significant nexus test to adjacent wetlands as well, or, in the alternative, apply a rebuttable presumption to a finding of jurisdiction and permit a prospective permittee the opportunity to show that no such significant nexus exists in a particular circumstance. Justice Kennedy does provide some direction with regard to applying the significant nexus test to adjacent wetlands with his discussion of the filtering and other benefits wetlands have to other waters. Of course, that same test would be applied to instances in which the connection between a wetland adjacent to a nonnavigable water and navigable water must be established or refuted. Therefore, a similar “significant nexus” test can be applied to those adjacent wetlands as well: whether there is hard (nonspeculative or insubstantial) evidence that the wetland beneficially impacts the navigable water.

Proposed Regulatory Modifications

Absent legislative action, the Corps can no longer avoid regulatory modifications. Unfortunately, in discussing the *Rapanos* guidance, although the Corps and EPA note that rulemaking is an option, the agencies appear instead to be looking to the guidance as an alternative to regulatory action, noting the time-consuming nature of the rulemaking process and that efforts to date have been focused on the guidance.

Consistent with the reasoning and jurisdictional limitations set forth in *Riverside Bayview*, SWANCC, and Justice Kennedy's significant nexus test, and absent legislative action clarifying the matter, the Corps should consider adding to its regulations along the following lines:

a. *New Subsection 33 C.F.R. § 328.4(d) (Limits of Jurisdiction):*

For the purposes of Subsections (2), (3), (4), (5) and (7) of § 328.3(a), jurisdiction under the Clean Water Act is conferred only to the extent discharges to the waters set forth in such subsections have a significant nexus to a water that is currently used, or was used in the past, or may be susceptible to use in the interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

b. *A new definition at § 328.3 of “significant nexus”:* The term significant nexus means an impact to a water which is currently used, or was used in the past, or may be susceptible to use in the interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide. For the purposes of this definition, the burden shall be on the entity seeking to apply jurisdiction to demonstrate such impact. Evidence that a pollutant has reached such water shall constitute a rebuttable presumption of impact. With respect to discharge of dredge or fill materials into adjacent wetlands under § 328.3(a)(7), a rebuttable presumption of impact shall be demonstrated by evidence that the wetland functions as an integral part of the aquatic environment of such water.

The specifics of the regulation (and parallel changes to EPA regulations) certainly can be debated, but the basic principle must be consistent: If there is an impact from the discharge to a traditionally navigable water, that discharge should be jurisdictional. For example, if there is a discharge to an intermittent creek and that creek connects to a tributary or (a series of tributaries or other hydrologically connective features) to a navigable-in-fact water, the question in applying the presumption becomes whether the pollutant discharged actually makes it to the navigable-in-fact water. Conversely, if the pollutants are discharged to the intermittent creek while the creek is dry and sufficient cleanup is conducted that precludes the pollutant from actually impacting the navigable-in-fact water, then the discharge is not subject to CWA jurisdiction. It would not necessarily be enough that a single molecule of the pollutant makes it to the navigable water, but if evidence demonstrates that the molecule makes it that far, it is up to the party contesting jurisdiction to present a credible argument that there is no actual impact. Similarly, if the issue is whether an adjacent wetland is an integral part of the aquatic environment associated with a navigable-in-fact water, the Corps would have to demonstrate that impacts that otherwise would affect that navigable water are in fact mitigated by the presence of the adjacent wetland.

Ultimately, the public review process, and unquestionably judicial challenges to any regulation on this matter, will frame the final regulation. The Corps needs to start at some point, however, and it might as well start now. 🌱