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The Illusion of Substance: Why *Rapanos v. United States* and Its Resulting Regulatory Guidance Do Not Significantly Limit Federal Regulation of Wetlands*

In June 2006, the United States Supreme Court delivered a decision regarding the power of the federal government to regulate wetlands under the Clean Water Act¹ (“CWA”). In *Rapanos v. United States*,² the Court purported to clarify two of its previous rulings on the scope of the CWA’s jurisdiction³—*United States v. Riverside Bayview Homes, Inc.*⁴ and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (“*SWANCC*”).⁵ However, the decision did not have its intended effect because no single opinion commanded the vote of a majority of the Justices, leaving the lower courts and the agencies in charge of enforcing the CWA with unclear guidelines for regulating wetlands.⁶ Five opinions were announced: a four-Justice plurality, two individual concurrences, and two dissents. Justice Kennedy’s concurrence, which is binding on the lower courts,⁷ set out a standard for determining the CWA’s jurisdictional grant over wetlands that requires a case-by-case judicial analysis of whether the wetland forms a “significant nexus” with a navigable body of water, since navigable bodies of water are expressly covered by the CWA.⁸ In response to *Rapanos*, the Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (“Corps”) released *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Opinion in Rapanos v. United States and Carabell v. United States (2007)* (“Guidance”), a

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1. 33 U.S.C. §§ 1251–387 (2000 & Supp. 2005).

2. 547 U.S. ___, 126 S. Ct. 2208 (2006).

3. *Rapanos*, 547 U.S. at ___, 126 S. Ct. at 2216–17.

4. 474 U.S. 121 (1985).

5. 531 U.S. 159 (2001).

6. See, e.g., Michael C. Dorf, *In the Wetlands Case, the Supreme Court Divides Over the Clean Water Act—and Seemingly Over How To Read Statutes as Well*, FINDLAW LEGAL NEWS & COMMENT., Apr. 17, 2007, <http://writ.news.findlaw.com/dorf/20060621.html> (claiming that *Rapanos* left the lower courts to “muddle through as best they can, until a future case yields greater clarity”); Charles Lane, *Justices Rein In Clean Water Act*, WASH. POST, June 20, 2006, at A1 (stating that *Rapanos* could limit the federal government’s enforcement power over the CWA, but the “set of opinions handed down by the justices did little to define what those limits might be”).

7. For a discussion of why Justice Kennedy’s opinion is binding, see *infra* notes 42–50 and accompanying text.

8. *Rapanos*, 547 U.S. at ___, 126 S. Ct. at 2236 (Kennedy, J., concurring).

guidance to its regulators to accommodate the changes required by the opinion.⁹

This Recent Development will attempt to show that Justice Kennedy's concurrence and the Guidance mostly affect procedural, not substantive, requirements that the federal government must follow before exercising jurisdiction over wetlands and should not be interpreted as significantly restricting the scope of the CWA's jurisdictional grant. First, it will attempt to explicate the true holding of *Rapanos*, concluding that the Kennedy concurrence's "significant nexus" standard is controlling, but at the same time, in situations where the plurality's bright-line test would permit jurisdiction and the significant nexus test would not, courts should find federal jurisdiction. Then, it will discuss the scope and implications of the ruling and subsequent Guidance released by the EPA and the Corps, finding that neither the decision nor the Guidance need to be read to significantly limit federal jurisdiction over wetlands. Finally, it will propose two legal theories that the Corps and courts may use to comply with the *Rapanos* significant nexus standard yet still maintain broad jurisdiction over most of the nation's wetlands. The first is to permit a broad range of chemical, physical, and biological effects to constitute a significant nexus with a navigable water. The second is to more liberally use the power granted to the Corps under the CWA to prohibit the addition of pollutants to navigable waters.

Prior to *Rapanos*, the controlling Supreme Court decision regarding the CWA's coverage of wetlands was *United States v. Riverside Bayview Homes, Inc.*¹⁰ In *Riverside Bayview*, the Court held that a wetland directly abutting a navigable water was within the scope of the CWA because there is ambiguity in such cases as to where the navigable water ends and the land begins.¹¹ The decision in *Riverside Bayview* was deferential to the administrative agencies in charge of promulgating and enforcing wetland regulations regarding the CWA's jurisdictional grant.¹² As a result, the

9. ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S OPINION IN *RAPANOS V. UNITED STATES* AND *CARBELL V. UNITED STATES* (2007) [hereinafter "GUIDANCE"], available at <http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf>.

10. 474 U.S. 121 (1985).

11. *Id.* at 132.

12. *Id.* at 134 ("[T]he Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.").

Corps, which is responsible for enforcement of the CWA, expansively interpreted its jurisdiction over wetlands and other non-navigable waters.¹³

However, in *SWANCC*,¹⁴ decided sixteen years later, the Court narrowed the outer limits of the CWA's coverage. The Court in *SWANCC* held that an isolated sand pit, not adjacent to any navigable water or to any connecting tributary, was outside the jurisdictional grant of the CWA.¹⁵ While the *SWANCC* majority did not specifically address jurisdiction over wetlands, it did state in dicta that it was the "significant nexus" between the wetland at issue in *Riverside Bayview* and a nearby navigable water that permitted the federal government to regulate that wetland.¹⁶

After *SWANCC*, the extent to which the Supreme Court had narrowed the CWA's jurisdictional grant was unclear. The Fifth Circuit construed *SWANCC* broadly, holding that the Supreme Court's decision restricted not only regulation of isolated bodies with little connection to navigable waters, but also tributaries that were not directly adjacent to navigable waters.¹⁷ However, most other circuits construed *SWANCC* more narrowly, refusing to extend its holding beyond the types of isolated bodies at issue in the case.¹⁸ Despite this ambiguity, the Corps did not alter its regulations after *SWANCC* and continued to exercise broad regulatory powers due to the ambiguity of the term "significant nexus"¹⁹ and a widespread belief that *SWANCC* was a narrow ruling that should not be extended beyond its facts.²⁰

13. See *Rapanos*, 547 U.S. at ___, 126 S. Ct. at 2216–17 (Scalia, J., plurality) ("Following our decision in *Riverside Bayview*, the Corps adopted increasingly broad interpretations of its own regulations under the Act.")

14. 531 U.S. 159 (2001).

15. *Id.* at 174. Specifically, the Court invalidated the "Migratory Bird Rule," a Corps regulation construing the CWA to permit federal regulation of water bodies—like the sand pit in *SWANCC*—connected to a navigable water only by the flight patterns of migratory birds. *Id.*

16. *Id.* at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*.").

17. *In re Needham*, 354 F.3d 340, 345–46 (5th Cir. 2003) (finding after *SWANCC* that the CWA is "not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters"); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 268–69 (5th Cir. 2001).

18. See, e.g., *United States v. Hubenka*, 438 F.3d 1026, 1034 (10th Cir. 2006); *United States v. Johnson*, 437 F.3d 157, 170 (1st Cir. 2006); *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 807–08 (7th Cir. 2005); *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003) (holding that *SWANCC* "did not . . . [restrict] the [CWA] to only wetlands directly abutting navigable water. Instead, the [SWANCC] Court, in a narrow holding, invalidated the Migratory Bird Rule as exceeding the authority granted" to the Corps by the CWA.); *United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2003) (holding that a Corps regulation extending jurisdiction to all tributaries of navigable waters, including relatively distant roadside ditches, was a "reasonable interpretation" of the CWA).

19. See *Rapanos v. United States*, 547 at ___, 126 S. Ct. at 2217.

20. *Id.* at ___, 126 S. Ct. at 2256 (Stevens, J., dissenting).

In *Rapanos*, the Court attempted to resolve some of *SWANCC*'s ambiguity by addressing the question, specifically reserved in *Riverside Bayview*,²¹ of whether non-adjacent wetlands were covered by the CWA.²² The petitioners in the case were appealing fines levied against them by the Corps for backfilling wetlands on their property without a permit.²³ In a companion case decided in the same opinion, another set of petitioners was suing the Corps for denying them a permit to deposit fill material in a wetland on their property.²⁴ None of these wetlands were directly adjacent to a navigable water, but all were adjacent to non-navigable waters that connected to navigable waters.²⁵ Thus, the wetlands in question were not so closely intertwined with navigable waters as to make the boundary between the two "inherently ambiguous"²⁶ as in *Riverside*, nor, on the other extreme, "unconnected to other waters"²⁷ as in *SWANCC*. This raised a novel question for the Court as to whether wetlands that were nonadjacent, yet hydrologically connected to navigable waters, were covered by the CWA's jurisdictional grant.²⁸

A plurality of four Justices found that the Corps may have exceeded their jurisdiction in both cases and remanded it.²⁹ Their analysis mostly focused on the definition of the term "navigable waters," vaguely defined in the CWA as "the waters of the United States."³⁰ The plurality determined that this definition included only those "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,' " stating that this was the common, everyday use of the term and the only one that Congress could have intended.³¹ In the case of wetlands, the plurality would have limited the Corps's jurisdiction to those wetlands which are directly adjacent to a water of the United States and have a "continuous surface connection" with the water in question, "making it difficult to determine where the 'water' ends and the 'wetland'

21. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131–32 (1985).

22. *Rapanos*, 547 U.S. at __, 126 S. Ct. at 2219 (Scalia, J., plurality).

23. *Id.* at __, 126 S. Ct. at 2219.

24. *Id.* at __, 126 S. Ct. at 2219.

25. Three of the wetland sites were connected to navigable-in-fact waters by man-made ditches, and one was connected by a non-navigable river. *Id.*

26. *Id.* at __, 126 S. Ct. at 2226.

27. *Id.* at __, 126 S. Ct. at 2240.

28. *Id.* at __, 126 S. Ct. at 2236.

29. *Id.* at __, 126 S. Ct. at 2235.

30. 33 U.S.C. § 1362(7) (2000 & Supp. 2005).

31. *Rapanos*, 547 U.S. at __, 126 S. Ct. at 2225 (Scalia, J., plurality) (alteration in original) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

begins.”³² The plurality directed the lower court on remand to determine whether the petitioners’ wetlands met this standard.³³

Justice Kennedy wrote a lone concurrence, agreeing that the case should be remanded because the Corps may have exceeded its powers but disagreeing with the rule proposed by the plurality.³⁴ He found instead that a wetland is covered under the CWA if it forms a significant nexus with a navigable water,³⁵ adopting the term used in *SWANCC* to describe the holding of *Riverside*.³⁶ Elaborating on this standard, Justice Kennedy found that, because the stated purpose of the CWA was to “maintain the chemical, physical, and biological integrity of the Nation’s waters,”³⁷ a significant nexus exists between a wetland and a navigable water when the wetland “significantly affects the chemical, physical, and biological integrity” of the navigable water.³⁸ Conversely, a wetland does not form a

32. *Id.* at ___, 126 S. Ct. at 2227.

33. *Id.* at ___, 126 S. Ct. at 2235.

34. *Id.* at ___, 126 S. Ct. at 2236 (Kennedy, J., concurring).

35. *Id.* at ___, 126 S. Ct. at 2236 (Kennedy, J., concurring).

36. *Solid Waste Agency of N. Cook County v. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 167 (2001) (“It was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.”).

37. *Rapanos*, 547 U.S. at ___, 126 S. Ct. at 2248 (Kennedy, J., concurring) (quoting 33 U.S.C. § 1251(a) (2000)).

38. *Id.* at ___, 126 S. Ct. at 2248. The merit of the significant nexus standard is debatable, as is clear from the divided *Rapanos* decision. While the focus of this Recent Development is primarily on how to implement the “significant nexus” standard, it is worth noting that there is much discussion over whether the significant nexus test is the appropriate test for implementing the CWA’s jurisdictional requirements. One common criticism of the test is the lack of a bright-line rule to guide landowners. See, e.g., Taylor Romigh, *The Bright Line of Rapanos: Analyzing the Plurality’s Two-Part Test*, 75 *FORDHAM L. REV.* 3295, 3306–07 (2007). Certainly, the fact-heavy nature of the significant nexus test does not on its own offer much guidance to landowners as to whether they should expend time and money applying for a filling permit. As a result, some have suggested that the plurality’s approach should be adopted because it would “provide more notice to potentially affected landowners.” *Id.* at 3307. But, the fact that a rule is not easy to apply does not make it an incorrect application of the law. In fact, the drafters of the CWA intended its jurisdictional provisions to be a “congressional punt,” Jamison E. Colburn, *Waters of the United States: Theory, Practice, and Integrity at the Supreme Court*, 34 *FLA. ST. U. L. REV.* 183, 193 (2007), as evidenced by the vague definition of “navigable waters” as “Waters of the United States,” 33 U.S.C. § 1362(7) (2000 & Supp. 2005). Therefore, a fact-heavy, case-by-case approach better aligns with congressional intent. Additionally, as the significant nexus test becomes settled law (ideally with the help of a more decisive Supreme Court endorsement), more precise rules will emerge through precedent that will guide landowners.

Some commentators have also lamented Justice Kennedy’s inclusion of ecological effects as a primary factor in the test, rather than restricting it to physical effects, noting that ecological considerations “place[] a much heavier burden on the Corps and lower courts to examine complex biological relationships.” Bradford C. Mank, *Implementing Rapanos—Will Justice Kennedy’s Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers?*, 40 *IND. L. REV.* 291, 294 (2007). However, judicial rules must be designed to reflect the laws they implement, and that principle cannot be abandoned simply to ease the burden of proof. The CWA’s purpose—“maintain[ing] the chemical, physical, and

significant nexus with a navigable water when it either does not affect a navigable water or its effect on navigable water is speculative or insubstantial.³⁹ Under this interpretation of the CWA, if a wetland directly abuts a navigable water, it is reasonable for the Corps to infer that a significant nexus exists.⁴⁰ On the other hand, if a wetland does not abut a navigable water, the government may still exercise jurisdiction if it can present evidence that is neither speculative nor insubstantial that a significant nexus exists between the wetland and the navigable water.⁴¹

The standards set forth in Justice Kennedy's concurrence and the plurality should both be used in the lower courts to find that the Corps has jurisdiction over wetlands, but Justice Kennedy's opinion is broader than the plurality's, so it will usually suffice on its own. Under the analysis laid out by the Supreme Court in *Marks v. United States*,⁴² where there was no majority opinion, the narrowest holding that can gain the support of a majority of Justices is binding on lower courts.⁴³ Because Justice Kennedy's opinion is the only holding that could be supported by at least five Justices—Justice Kennedy and the four Justices who dissented—the Kennedy concurrence is binding.⁴⁴ The dissent by Justice Stevens, joined by three other Justices, would have upheld broad deference to the Corps's judgment on what constitutes "waters of the United States" under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁴⁵ as applied by

biological integrity of the Nation's waters"—is stated too clearly in the statutory definitions to be construed to only allow consideration of physical proximity. 33 U.S.C. § 1251(a) (2000).

39. *Rapanos*, 547 U.S. at ___, 126 S. Ct. at 2248 (Kennedy, J., concurring).

40. Adjacency to "certain major tributaries" may also permit an inference of a significant nexus, but, according to Justice Kennedy, the Corps and EPA would have to clearly categorize these in new regulations. *Id.*

41. *Id.*

42. 430 U.S. 188, 193–94 (1977). *Marks* addressed the standard for drawing the line between protected expression and unprotected obscenity. It held that a prior case with no majority opinion, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), superseded the previous case to control on the subject, *Roth v. United States*, 354 U.S. 476 (1957), despite the lack of a majority. The court reasoned that, of the plurality and concurring opinions in *Memoirs*, the plurality opinion—stating that expressive material is constitutionally protected unless it is "utterly without social value," *Memoirs*, 383 U.S. at 418—was the narrowest grounds upon which a majority of Justices could agree, and controlled in the instant case.

43. *Id.*; see also GUIDANCE, *supra* note 9, at 2–3.

44. See *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) ("When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose. In *Rapanos*, that is Justice Kennedy's ground." (citation omitted)); *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006); ("Justice Kennedy's concurrence, constituting the fifth vote for reversal, concurred only in the judgment and, therefore, provides the controlling rule of law.").

45. 467 U.S. 837, 843 (1985). *Chevron* was important to the *Rapanos* decision but is beyond the scope of this Recent Development. *Chevron* held that the activities of an agency charged with a duty by federal statute are entitled to considerable deference in their interpretation

Riverside Bayview,⁴⁶ but it also explicitly states that it would prefer Justice Kennedy's standard to the plurality's narrower bright-line rule.⁴⁷

Additionally, if situations arise where the plurality's bright-line rule would permit federal jurisdiction, but the Kennedy concurrence would not, courts should permit regulation under the plurality's standard. Justice Stevens anticipated this possibility in his dissent when he stated that the Corps should have jurisdiction in these situations.⁴⁸ This approach is logical, as five Justices would uphold jurisdiction under Justice Kennedy's test, but at least eight Justices would uphold jurisdiction under the plurality's test.⁴⁹ Some courts have already signaled their intent to follow Justice Stevens's instruction, citing prior appellate courts that have applied this variation of the *Marks* rule to other split Supreme Court decisions.⁵⁰

In June 2007, one year after *Rapanos*, the Corps and the EPA jointly released a guidance, addressed to EPA regions and Corps districts, on how to adapt CWA regulation practices to the *Rapanos* and *SWANCC* standards.⁵¹ The Guidance divided the nation's waters into three categories: (1) waters over which the Corps should always assert jurisdiction, (2) waters over which the Corps "generally will not assert jurisdiction," and (3) waters over which a fact-specific analysis will be conducted using the significant nexus test.⁵² Waters falling into the first

of that statute. Their interpretation should not be overruled by the courts unless (1) Congress has expressed a "clear intent" that contradicts the agency's interpretation, or (2) the agency's interpretation is not "based on a permissible construction of the statute." *Id.* A large part of the disagreement between the plurality opinion and Kennedy's dissent in *Rapanos* was due to whether the statutory language of the CWA extending jurisdiction only to "waters of the United States," 33 U.S.C. § 1362(7) (2000 & Supp. 2005) ("navigable waters" means the waters of the United States, including the territorial seas"), expressed a clear congressional intent to limit regulation to "bodies forming geographical features such as oceans, rivers, and lakes," *Rapanos*, 547 U.S. at ___, 126 S. Ct. at 2222 (emphasis omitted) (internal quotation marks omitted) (brackets omitted) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)), as stated by the plurality, or whether the fact that other definitions exist for "waters" besides the one set forth by the plurality, *id.* at ___, S. Ct. at 2243 (Kennedy, J., concurring), as well as for "streams," *id.*, require that the Court defer, per *Chevron*, to the Corps's reasonable interpretation.

46. 474 U.S. 121, 131 (1985).

47. *Rapanos*, 547 U.S. at ___, 126 S. Ct. at 2252 (Stevens, J., dissenting).

48. *Id.* at ___, 126 S. Ct. at 2265-66 n.14.

49. *United States v. Bailey*, 516 F. Supp. 2d 998, 1005 (D. Minn. 2007) ("[I]f the plurality would find CWA jurisdiction over a particular wetland, so would the four dissenters, meaning that at least eight justices would deem jurisdiction to exist.").

50. *See United States v. Johnson*, 467 F.3d 56, 64-65 (1st Cir. 2006); *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992); *see also Student Pub. Interest Research Group v. AT&T Bell Labs.*, 842 F.2d 1436, 1451 (3d Cir. 1988). *But see King v. Palmer*, 950 F.2d 771, 782-83 (D.C. Cir. 1991) (holding that the appellate court is "not free to combine a dissent with a concurrence to form a *Marks* majority").

51. GUIDANCE, *supra* note 9, at 1.

52. *Id.*

category—those that would always be regulated—are those falling under the *Rapanos* plurality’s bright-line rule, including “[t]raditional navigable waters[,] [w]etlands adjacent to traditional navigable waters[,] [n]on-navigable tributaries of traditional navigable waters that are relatively permanent” and have at least a continuous seasonal flow of water, and “[w]etlands that directly abut such tributaries.”⁵³ The Corps would *not* exert jurisdiction over those waters similar to the fact pattern set out in *SWANCC*,⁵⁴ such as “swales or erosional features,” and “ditches . . . draining only uplands” and with no permanent flow of water.⁵⁵

Finally, the Guidance lists circumstances in which a fact-based significant nexus test will be applied. These include “[n]on-navigable tributaries that are not relatively permanent[;] [w]etlands adjacent to non-navigable tributaries that are not relatively permanent[;] [and] [w]etlands directly adjacent to, but that do not directly abut, a relatively permanent non-navigable tributary.”⁵⁶

But to what extent do *Rapanos* and the Guidance actually affect the Corps’s ability to regulate wetlands under the CWA? Prior to *Rapanos*, the Corps exercised broad jurisdiction over wetlands.⁵⁷ Even relatively remote hydrological connections to navigable waters met the jurisdictional requirements of the CWA, such as connections through

“intermittent . . . streams and manmade ditches . . . a roadside ditch whose water took a winding, thirty-two-mile path to the Chesapeake Bay, irrigation ditches and drains that intermittently connect to covered waters, and . . . the washes and arroyos of an arid development site, located in the middle of the desert, through which water courses . . . during periods of heavy rain[.]”⁵⁸

Under the plurality’s standard alone, it is unlikely that any of these areas would be covered under the CWA.⁵⁹ The plurality’s rule is clear: a wetland cannot be a navigable water, so in order to be regulated it must physically abut a traditional navigable water in a way that makes it difficult

53. *Id.*

54. *SWANCC*, 531 U.S. 159, 174 (2001).

55. GUIDANCE, *supra* note 9, at 1.

56. *Id.*

57. *Rapanos v. United States*, 547 U.S. ___, ___, 126 S. Ct. 2208, 2217–18 (2006).

58. *Id.* at ___, 126 S. Ct. at 2217–18 (fourth alteration in the original) (citations omitted) (internal quotation marks omitted) (quoting *Treacy v. Newdunn Assoc.*, 344 F.3d 407, 410 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118 (9th Cir. 2005)) (citing *Cmty. Ass’n for Restoration of Env’t v. Henry Bosma Dairy*, 305 F.3d 943, 954–55 (9th Cir. 2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001)).

59. *Id.* at ___, 126 S. Ct. at 2218 (categorizing current Corps regulations as excessively broad).

to determine where the wetland begins and the navigable water ends.⁶⁰ Since the Corps's pre-*Rapanos* regulations extended jurisdiction well beyond wetlands that abut traditionally navigable waters,⁶¹ the plurality's approach would severely restrict the Corps's pre-*Rapanos* activities.

But Justice Kennedy's significant nexus test allows for a more flexible interpretation. The test can easily be construed by courts to barely limit the CWA's jurisdictional grant at all and as mostly affecting the evidentiary and procedural requirements for establishing jurisdiction over wetlands. For example, a wetland connected to a navigable water only through "an intermittent stream"⁶² would not be covered under the plurality's standard,⁶³ but would have been covered under the Corps's regulations prior to *Rapanos*, and could still be covered after *Rapanos* under the significant nexus test. The federal government must only present evidence that the wetland significantly affects the chemical, physical, and biological integrity of the navigable water to which it is connected, even if the connection is intermittent.

What *Rapanos* does inhibit is the Corps's practice of inferring a substantial effect on navigable waters based on a "mere hydrological connection,"⁶⁴ without presenting evidence of an actual effect. After *Rapanos*, only if the wetland directly abuts a navigable water may a substantial effect be inferred.⁶⁵ If the wetland is not abutting a navigable water—even if it is abutting a non-navigable water that connects to a navigable water—the Corps must present evidence on a case-by-case basis that the particular wetland *in fact* substantially affects the chemical, physical, and biological integrity of a navigable water.

If this type of direct evidence were hard to come by, the new standard could significantly impede the Corps's ability to regulate the wetlands over which it has claimed jurisdiction in the past. But many hydrologists and other experts indicate that the evidence supporting such a connection is abundant in most cases. After *Rapanos*, Environmental Defense,⁶⁶ a

60. *Id.* at ___, 126 S. Ct. at 2227.

61. *Id.* at ___, 126 S. Ct. at 2217–18.

62. *Rapanos*, 547 U.S. at ___, 126 S. Ct. at 2218 (internal quotation marks omitted).

63. *Id.* at ___, 126 S.Ct at 2225.

64. *Id.*

65. *Id.* at ___, 126 S. Ct. at 2248 (Kennedy, J., concurring).

66. Environmental Defense describes itself as linking "science, economics and law to create innovative, equitable and cost-effective solutions to society's most urgent environmental problems." Environmental Defense, Mission Statement—About Us, <http://www.edf.org/page.cfm?tagID=370> (last visited Mar. 10, 2008). Its past work includes a well-publicized 1974 study of the Mississippi River that found high levels of carcinogens, see Harold M. Schmeck, Jr., *Water from Mississippi River Linked to Cancer Death Trends*, N.Y. TIMES, Nov. 8, 1974, at 29, which contributed to the passage of the Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 21 U.S.C. § 349 (2000); 42 U.S.C. §§ 300f to 300j-25 (2000)),

nonprofit environmental think tank, stated that “[t]he proof [of a significant nexus between wetlands and navigable waters] is there, and when it is presented . . . the reach of the [CWA] will change very little.”⁶⁷ Additionally, an amicus curiae brief submitted for *Rapanos*, presented by the Association of State Wetland Managers, the Association of State Floodplain Managers, and the New England Interstate Water Pollution Control Commission, presents evidence that the “headwaters of a watershed,” including wetlands,⁶⁸ substantially affect the navigable water to which they are connected because they “collect water, sediment, energy, and chemicals from the surrounding landscape and deliver them to the larger [water bodies],” with functions including “regulation of sediment export, retention of nutrients, maintenance of water quality characteristics, processing of terrestrial organic matter, and maintenance of natural discharge patterns.”⁶⁹ While this evidentiary burden may draw out enforcement proceedings, the Corps should still be able to prove a significant nexus in most cases where there is a hydrological connection between the wetland and the navigable water.

In practice, post-*Rapanos* litigation has shown that it is quite easy to prove the existence of a significant nexus between navigable-in-fact waters and wetlands. First, in the most straightforward cases where wetlands are adjacent to navigable waters, courts have heeded Justice Kennedy’s instruction that a significant nexus should be inferred⁷⁰ and have found one to exist as a matter of law.⁷¹ Finding a significant nexus for nonadjacent wetlands has also proved fairly easy, if more time consuming. In *United States v. Cundiff*,⁷² the United States District Court for the Western District of Kentucky found a significant nexus between wetlands that were adjacent to non-navigable tributaries of a navigable-in-fact water—the Green River in Kentucky—despite the fact that the wetlands were physically remote from the Green River.⁷³ The decision was largely based on the testimony of experts who were able to provide a long list of ways in which the remote wetlands significantly affected the chemical, physical, and biological integrity of the navigable-in-fact water, thus meeting the significant nexus

and lobbying regulators to phase out lead from gasoline, *Environmental Groups Fight Ledged Gas Plan*, N.Y. TIMES, Aug. 19, 1982, at A15.

67. Charles Lane, *Justices Rein In Clean Water Act*, WASH. POST, June 20, 2006, at A1.

68. The brief describes headwaters as “first and second order streams, ditches, and wetlands.” Brief of Ass’n of State Wetland Managers et al. as Amici Curiae Supporting Respondent at 15, *Rapanos*, 547 U.S. ___, 126 S. Ct. 2208 (Nos. 04-1034 and 04-1384).

69. *Id.* at 15–16.

70. *Rapanos*, 547 U.S. at ___, 126 S. Ct. at 2248 (Kennedy, J., concurring).

71. *See, e.g.*, *United States v. Bailey*, 516 F. Supp. 2d 998 (D. Minn. 2007).

72. 480 F. Supp. 2d 940 (W.D. Ky. 2007).

73. *Id.* at 945.

standard. Some of the relatively tenuous wetland functions that lead to a finding of a significant nexus included providing water storage, acid mine drainage and filtration, and a habitat for plants and wildlife, all of which affected water storage capacity, downstream flooding, and increasing “flood peaks in the Green River, and, in turn, “impact[ing] navigation, crop production in bottomlands, downstream bank erosion and sedimentation.”⁷⁴ Additionally, the wetlands filtered sediment which affected the water quality of the Green River,” impacting navigation and “aquatic food webs.”⁷⁵ Thus, even for a wetland relatively remote from a navigable-in-fact water, the court found numerous reasons why a significant nexus existed between the two geographical bodies.⁷⁶

Additionally, in a Ninth Circuit case decided in 2007, *Northern California River Watch v. City of Healdsburg*,⁷⁷ the court found that even a groundwater connection between a wetland and a navigable water may be enough to form a significant nexus. The court held that evidence of an underground hydrological connection to a navigable water was relevant to a finding of a significant nexus.⁷⁸ This type of connection will be critical in many similar cases, as groundwater is present in small quantities almost everywhere.⁷⁹ *Northern California River Watch* also noted the importance of the activities of wildlife in finding a significant nexus. The court found that the species of birds and fish found in the wetland in question and its associated non-navigable pond “commingled with” and were “indistinguishable from” the nearby navigable-in-fact water.⁸⁰ Finally, the court considered the effect of the actual dumping which was an important factor in finding a significant nexus. The city of Healdsburg had been dumping sewage into the non-navigable body in question.⁸¹ The court cited testimony from trial that this dumping was itself causing the non-navigable water to significantly affect the chemical integrity of the navigable water by increasing chloride levels.⁸²

74. *Id.*

75. *Id.*

76. *Id.* The *Cundiff* court also found that the wetland in question met the *Rapanos* plurality’s standard, since the connecting tributaries were relatively permanent bodies of water connected to a navigable-in-fact water, and the boundary between the wetland and the tributaries was difficult to discern. *Id.* at 946–47.

77. 496 F.3d 993 (9th Cir. 2007).

78. *Id.* at 1000–01.

79. THE GROUNDWATER FOUNDATION, *GROUNDWATER BASICS 2* (2007), available at <http://www.groundwater.org/gi/docs/GWBASICS2.pdf>.

80. *N. Cal. River Watch*, 496 F.3d at 1001.

81. *Id.*

82. *Id.* The use of the property owner’s polluting acts not only to make a substantive case against the polluter, but also to establish jurisdiction, has important implications for extending

Thus, the few cases that apply *Rapanos* indicate that there are many ways to prove that wetlands significantly affect the chemical, physical, and biological integrity of non-adjacent navigable waters. Therefore, the only fundamental change in Corps policy after *Rapanos* is that the Corps must accommodate the need for case-by-case proof of a significant nexus, and the practical consequences of *Rapanos* are minimal.

This is not to say that the Corps will be able to extend its jurisdiction to *everything* that it has in the past under the significant nexus test. For example, *United States v. Hubenka*,⁸³ a Tenth Circuit case handed down after *SWANCC* but prior to *Rapanos*, involved the discharge of pollutants into a non-navigable river that had a remote hydrological connection to a navigable river.⁸⁴ Despite its best efforts, the federal government could not prove that the non-navigable river had any effect on the navigable river.⁸⁵ Yet the Tenth Circuit concluded that the “potential for pollutants to migrate from a tributary to navigable waters downstream” permitted an inference of a “‘significant nexus’ between those waters.”⁸⁶ *Hubenka* exemplifies the rare situation where the new evidentiary burden on the government will prevent jurisdiction over a non-navigable water. The inference that the Court made in *Hubenka*—deferring to the Corps’s judgment that the *potential* for the non-navigable river to substantially affect the navigable water—would not be allowed in a post-*Rapanos* court.⁸⁷ The Corps would instead have to conduct an investigation of the specific water in question and present findings of an actual effect to the court. If it could not do so, as was the case in *Hubenka*,⁸⁸ then the Corps could not exercise jurisdiction over the wetland.

However, even where evidence of a significant nexus is inadequate, the Corps may use an alternative approach to establish jurisdiction. As noted above, in *Northern California River Watch* the Ninth Circuit Court of Appeals used not only evidence unrelated to the case, such as physical proximity and ecological commingling, to find a significant nexus, but also the effect caused by the *very act for which the landowner was being sued*—specifically, depositing sewage into the pond and wetland, leading to higher chloride levels in the nearby navigable-in-fact water.⁸⁹ The

jurisdiction even where the effect of a wetland on the chemical, physical, or biological integrity of a navigable water is not “significant.” See *infra* notes 88–97 and accompanying text.

83. 438 F.3d 1026 (10th Cir. 2006).

84. *Id.* at 1029–30.

85. *Id.* at 1035.

86. *Id.* at 1034.

87. *Rapanos v. United States*, 547 U.S. ___, ___, 126 S. Ct. 2208, 2248–49 (2006) (Kennedy, J., concurring).

88. *Hubenka*, 438 F.3d at 1030–36.

89. *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007).

Northern California River Watch court found the effect of the sewage to be significant. However, where a court finds that the actions of the wetland owner have some effect on a navigable water, but finds that it is *not* significant, the Corps should still be able to exert control over the wetland, and, as a result, maintain jurisdiction over most wetlands that otherwise might be out of reach after *Rapanos*.

The *Rapanos* plurality notes, in dicta, that the actual addition of pollutants into a navigable water from a hydrologically connected source is prohibited by the CWA under 33 U.S.C. § 1311(a).⁹⁰ In doing so, the plurality—perhaps inadvertently—suggested an alternate avenue for the exercise of broad federal jurisdiction over privately owned wetlands. The language of § 1311(a) indicates that it does not matter from where or in what manner someone adds a pollutant to a navigable water, nor does the statutory language require that the amount be significant,⁹¹ as would be required by the *Rapanos* test.⁹² The only issue is whether “any” pollutant was added to a navigable water.⁹³ As noted above,⁹⁴ evidence has shown that wetlands filter out pollutants and act as a barrier between pollutants and navigable waters.⁹⁵ It follows that the destruction of wetlands that serve this function would lead to more pollutants entering navigable waters in many cases. Even if the exposure of pollutants to the water is not “significant,” the result should establish the Corps’s regulatory jurisdiction, because § 1311(a) prohibits the “discharge of *any* pollutant,”⁹⁶ not just significant pollutants. Therefore, courts should allow the Corps to exercise jurisdiction over wetlands if there is evidence presented that their

90. *Rapanos*, 547 U.S. ___, ___, 126 S. Ct. 2208, 2227 (2006) (Scalia, J., plurality) (quoting 33 U.S.C. § 1362(12)(A) (2000 & Supp. 2005); 33 U.S.C. § 1311(a) (2000)).

91. 33 U.S.C. § 1311(a) (2000). Section 1311(a) should be enforced against both active polluters and those who permissively allow pollution to occur by destroying wetlands on their property. An analogy illustrates why such enforcement is reasonable. A wetland may prevent pollutants from entering navigable waters. Similarly, a levee may protect a town from dangerous flooding. Yet if a person destroys the levee—even if she owns it—and the town floods, she would still be held responsible for the damage, even though she did not actively flood the town. Similarly, one who destroys a wetland and permissively allows pollutants to enter a navigable water should be liable under § 1311(a).

92. *Rapanos*, 547 U.S. at ___, 126 S. Ct. at 2248.

93. The statutory language states: “Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.” § 1311(a).

94. See *supra* text accompanying note 69.

95. Brief of Ass’n of State Wetland Managers et al. as Amici Curiae Supporting Respondent, *supra* note 68, at 15.

96. § 1311(a) (emphasis added).

destruction, alteration, or filling would lead to even a small amount of pollutant⁹⁷ entering navigable water.

This section should also be construed to allow the government to take preventive measures to regulate wetlands, and not just to punish polluters after the fact. While the statute most expressly addresses those who have already violated the statute,⁹⁸ nothing in the wording forbids the government from taking preventive action to avoid pollutants entering navigable waters, and the Court's practice of deferring to the Corps's interpretation to meet the goals of the CWA under *Chevron*⁹⁹ should permit the Corps's use of this construction. Even if the courts are unwilling to permit before-the-fact preventive measures under § 1311(a), the Corps can still significantly control wetlands under the statute by giving notice to landowners planning to fill their wetlands that such an act could result in pollution to navigable waters and subsequent liability under the CWA, deterring landowners from going through with the destruction.

Ultimately, courts should construe *Rapanos* and the Guidance as simply requiring the case-by-case production of evidence that the wetland at issue significantly affects the chemical, physical, and biological integrity of a navigable water. This evidence is proving to be abundant, thus permitting the Corps to continue to exercise broad jurisdiction over the nation's wetlands. The change instigated by *Rapanos* is mostly procedural, requiring a case-by-case analysis, instead of allowing an inference of a significant nexus, and is not a reinterpretation of the CWA's substance. Additionally, courts should allow the Corps to exercise jurisdiction where there is evidence presented that the destruction, alteration, or filling of wetlands would cause any pollutants to enter navigable waters. The stated purposes of the CWA, which include the restoration of the nation's waters¹⁰⁰ and a national goal of eliminating all discharge of pollutants into navigable waters,¹⁰¹ support this broad interpretation.¹⁰² Therefore,

97. Pollutant is defined broadly by the CWA to include "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into the water." 33 U.S.C. § 1362(6) (2000 & Supp. 2005).

98. The statute forbids the "addition of any pollutant to navigable waters." *Rapanos*, 547 U.S. at ___, 126 S. Ct. at 2227 (emphasis omitted) (quoting 33 U.S.C. § 1362(12)(A) (2000 & Supp. 2005)).

99. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

100. 33 U.S.C. § 1251(a) (2000).

101. § 1251(a)(1). This clause specifically states a goal of eliminating the discharge of pollutants into navigable waters by 1985, a goal that was obviously not attained (otherwise the jurisdictional reach of the CWA in 2007 would have been a moot point). However, the failure of the nation to achieve this goal on time should not diminish the effect of the intent and spirit of this stated purpose on enforcement of the Act.

Rapanos has not substantively altered the scope of the CWA. The current confusion¹⁰³ about how the courts should approach wetland regulation under the CWA can be remedied if the courts continue to allow the Corps broad discretion to interpret the CWA, but take a more active role in analyzing whether the federal government has proved an actual—not inferred—significant nexus between the wetland in question and a navigable water, and liberally permit a significant nexus to be found.

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102. Granted, the CWA also states as a purpose the recognition of the “primary responsibilities and rights of States” to prevent pollution. 33 U.S.C. § 1251(b). However, the fact that this purpose comes *after* the purpose of restoring the Nation’s waters suggest that it should be given secondary importance. Also, the states’ rights purpose statement specifically lists ways in which the states’ rights will be preserved, thus indicating that, since supremacy of jurisdiction over wetlands and related bodies of non-navigable-in-fact waters is not listed, the states were not intended to be granted primacy in this area. *Id.*

103. *See, e.g., Lane, supra* note 6.