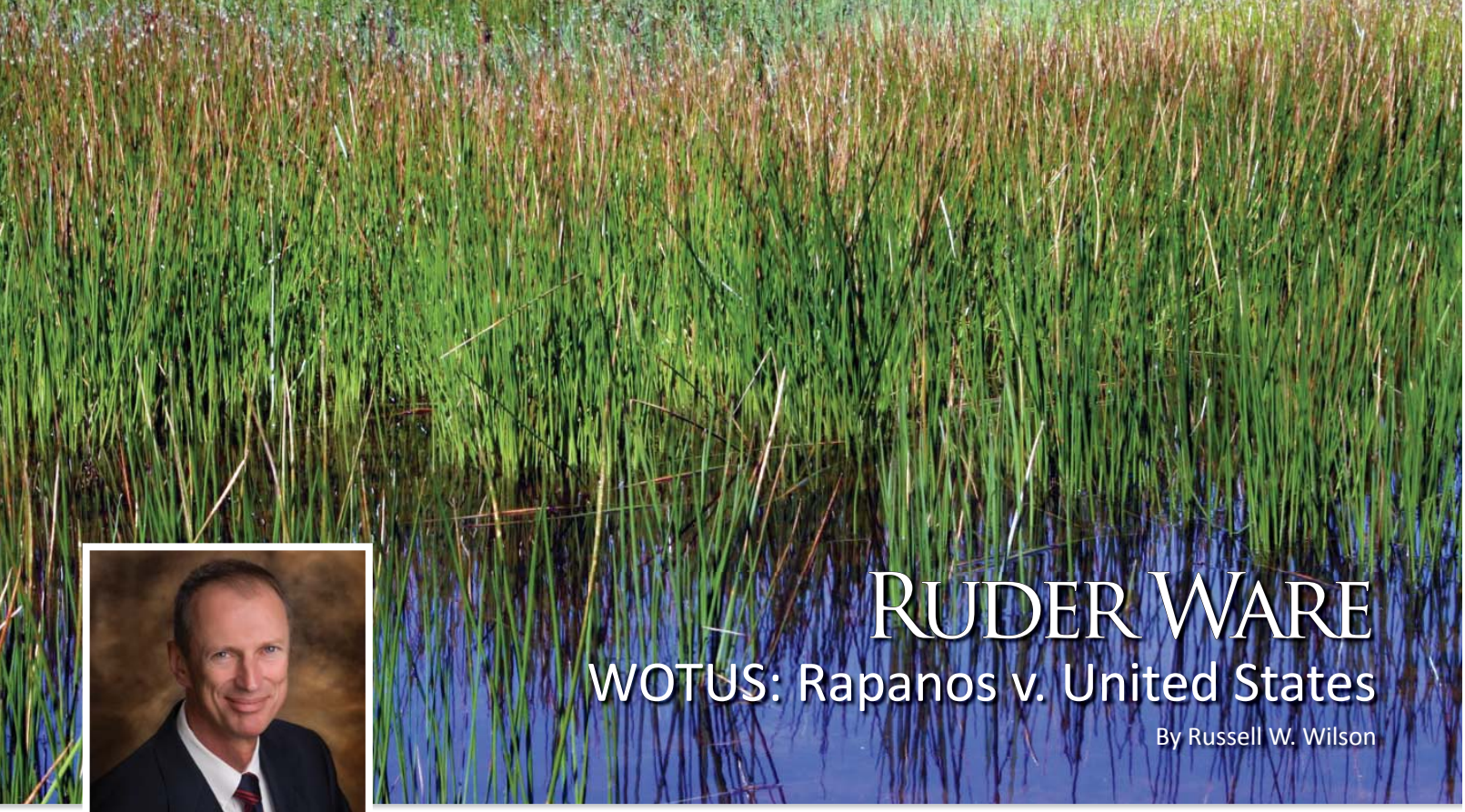

Ruder Ware

WOTUS: Rapanos v. United States

By Russell W. Wilson

Rapanos v. United States: The Narrow View, The Broad View, and the Search for the Significant Nexus to Clean Water Act Jurisdiction

United States v. Riverside Bayview Homes, Inc. and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* created a jurisdictional vacuum which *Rapanos v. United States ("Rapanos")*, 547 U.S. 715 (2006) attempted to fill by developing the "significant nexus" test of jurisdiction under the*Clean Water Act* ("CWA"). In *Riverside Bayview*, a unanimous U.S. Supreme Court ruled in 1985 that wetlands adjacent to traditional navigable waters are subject to the jurisdiction of the CWA so as to require a permit under section 404 for the dredging or filling of such wetlands. In 2001 a divided Supreme Court held, 5 to 4, that isolated intrastate ponds and mud flats do not require such a permit because they fall outside CWA jurisdiction. Both cases interpreted regulations promulgated by the U.S. Army Corps of Engineers that define the "waters of the United States" under the CWA, as does *Rapanos*.

Next came *Rapanos* in 2006, which set the stage for the joint effort of the U.S. Environmental Protection Agency ("EPA") and the U. S. Army Corps of Engineers ("Corps") to further define the "waters of the United States." *Rapanos* does not provide an answer to the extent of jurisdiction under the CWA. Rather, it provides the analytical framework to address that question on a fact-specific, case-by-case basis. To add to the uncertainty, that analytical framework was not decided by a majority. Four justices (Scalia, Roberts, Thomas, and Alito) took the narrow, states-rights view of CWA jurisdiction. Four justices (Stevens, Souter, Ginsberg, and Breyer) issued a dissenting opinion that championed the broad federal power view. Justice Kennedy was the swing vote. While Justice Kennedy concurred with the result (to send the case back to the district court for further fact finding), he articulated a rationale for CWA jurisdiction – whether there exists a "significant nexus" between the wetland and traditional navigable waters. The case was remanded to the district court to determine whether a significant nexus, in fact, existed. This article explores the narrow view, the broad view, and the view of Justice Kennedy.

THE NARROW VIEW

Justice Scalia's plurality opinion, which expresses the narrow view, describes the burdens imposed on land owners and developers, in general, and on John Rapanos, in particular. Rapanos backfilled three parcels of wetlands (the "Salzburg site," the "Hines Road site," and the "Pine River site") located near Midland, Michigan. These wetlands hold "sometimes saturated soil conditions." They are located roughly 11 to 20 miles away from the nearest traditional navigable

water. The record in the case was not clear as to whether the connections between the wetlands and nearby drains and ditches are continuous or intermittent. Nor was the record clear as to whether the nearby drains and ditches contain continuous or merely occasional flows of water. Ultimately, the water flows to Lake Huron, traditional navigable water.

Mr. Rapanos did not have a permit from the Corps to fill the wetlands, and the Corps prosecuted him. After twelve years of civil and criminal litigation, Mr. Rapanos faced potential imprisonment for 63 months and hundreds of thousands of dollars in criminal and civil fines. (Additional parties to the appeal, the Carabells, had sued the Corps in an effort to obtain a wetlands permit.) More broadly, the plurality opinion observes that "[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the [Corps permit] process" and more than "$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits."

The narrow view describes the Corps as an "enlighted despot" that relies upon "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the people" in its permit decision making. The plurality decried the "immense expansion of federal regulation of land use that has occurred under the Clean Water Act" in the absence of amendment to the governing statute.

"In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over 'the waters of the United States' to cover 270-to-300 million acres of swampy lands in the United States--including half of Alaska and an area the size of California in the lower 48 states."

According to the plurality opinion,

"[i]n fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a 'water of the United States.' "

The plurality opinion castigates the Corps for its actions and inactions, following the Court's decisions in *Riverside Bayview* and *SWANCC*. First, the plurality censures the Corps for having adopted "increasingly broad interpretations of its own regulations" under the CWA following the court's ruling in *Riverside Bayview*. More criticism of the Corps follows.

"Following our decision in *SWANCC*, the Corps did not significantly revise

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its theory of federal jurisdiction under § 1344(a) [of the CWA]. The Corps provided notice of a proposed rulemaking in light of *SWANCC*…but ultimately did not amend its published regulations. Because *SWANCC* did not directly address tributaries, the Corps notified its field staff that they 'should continue to assert jurisdiction over traditional navigable waters…and, generally speaking, their tributary systems (and adjacent wetlands)'… In addition, because *SWANCC* did not overrule *Riverside Bayview*, the Corps continues to assert jurisdiction over waters 'neighboring' traditional navigable waters and their tributaries."

Could the plurality opinion make it any clearer that it expects the Corps to revise its regulations that define the jurisdiction the CWA? The plurality opinion observes:

"It is not clear whether the connections between these wetlands and the nearby drains and ditches are continuous or intermittent, or whether the nearby drains and ditches contain continuous or merely occasional flows of water." (Emphasis supplied.)

The plurality opinion rejects the argument that the CWA applies strictly to water that is actually navigable. "We have twice stated that the meaning of 'navigable waters' in the Act is broader than the traditional understanding of that term," citing its decisions in *Riverside Bayview* and *SWANCC*. The plurality opinion explains, however, that the qualifier " 'navigable' is not devoid of meaning." The opinion focuses on Congress' use of the definite article "the" and the plural ("waters", as opposed to "water") in definitions found in Webster's New International Dictionary 2882 (2d ed. 1954). According to the plurality, Congress intended the CWA to apply to geographical


Photo by Ruth Faivre.

features that "connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." The scathing opinion further invokes the "commonsense understanding" of the term and concludes that "the Corps has stretched the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction." The plurality opinion then reviews prior case law in support of its position that "…the Act's use of the traditional phrase 'navigable waters' (the defined term) further confirms that it confers jurisdiction only over relatively *permanent* bodies of water." (Emphasis in the original.)

According to the plurality opinion, the term "waters of the United States" is unambiguous, but even if it were, the plurality would reject the Corps' "expansive interpretation" that would, citing *SWANCC*, "result in significant impingement of the States' traditional and primary power over land and water use." (Internal citation omitted.). The plurality opinion finds only one plausible interpretation of "the waters of the United States."

"['the waters of the United States'] …includes 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.' See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the 'waters of the United States' is thus not 'based on a permissible construction of the statute.' " (Internal citations omitted.)

According to the narrow view, the "significant nexus" is confined to wetlands that are adjacent to navigable waters as in *Riverside Bayview*.

"Therefore, *only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection

to covered waters that we described as a 'significant nexus' in *SWANCC*." (Emphasis in the original; internal citations omitted.)

The plurality opinion concludes that the "wrong standard" had been applied to determine if the Rapanos (and Carabell) wetlands are covered as "waters of the United States" and because of the "paucity of the record" in both cases whether the "ditches and drains in both cases near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*."

This narrow construction, which restricts the "significant nexus" to wetlands adjacent to open waters as in *Riverside Bayview*, is the interpretation of four of the justices. While Justice Kennedy agreed in his separate concurring opinion with the result (to remand the case for further fact finding), his articulation of the "significant nexus" is grounded in science. There is no science in Justice Scalia's plurality opinion. But before we turn to Justice Kennedy's opinion concurring in the result, let's review the dissenting opinion.

THE BROAD VIEW

The main dissenting opinion, authored by Justice Stevens, and joined by Justices Souter, Ginsburg, and Breyer, would affirm the judgments from the Sixth U.S. Circuit Court of Appeals which held that the Rapanos and Carabell wetlands were subject to the Corps' jurisdiction under the CWA. (Justice Breyer also wrote a separate dissenting opinion.) According to the main dissent, the term "waters of the United States" is ambiguous, the Corps' interpretation of that phrase is reasonable, and the Court should defer to the Corps' reasonable interpretation, as it has done so in other cases, particularly in *Riverside Bayview.* The dissent notes that the definition used by the Corps "were the very same regulations" that the Court evaluated in *Riverside Bayview* when the Court unanimously upheld their validity.

"The broader question is whether regulations that have protected the quality of our waters for decades, that were implicitly approved by Congress, and that have been repeatedly enforced in case after case, must now be revised in light of the creative criticisms voiced by the plurality and Justice Kennedy today."

The dissent attacks what it views as the plurality's misrepresentative view of the cost of development. As for costs in the cost benefit analysis, the dissent points to evidence in the

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record that the cost of preserving wetlands"…amount to only a small fraction of 1% of the $760 billion spent each year on private and public construction and development activity." Moreover, the dissent observes that the plurality's "exaggerated concern about costs" omits any discussion of the benefits of preserving wetlands. "The importance of wetlands for water quality is hard to overstate." The dissent cites the well-known functions of wetlands in reducing flood peak, protecting shorelines, recharging groundwater, trapping suspended sediment, filtering toxic pollutants, and protecting fish and wildlife.

The dissenting opinion characterizes the "creative opinion" of the plurality as "utterly unpersuasive." Further, "[m]ost importantly, the plurality disregards the fundamental significance of the Clean Water Act." The dissent continues:

"As then-Justice Rhenquist explained when writing for the court in 1981, the Act was 'not merely another law' but rather was 'viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation… 'Congress' intent in enacting the [Act] was clearly to establish an all-encompassing program of water pollution regulation,' and '[t]he most casual perusal of the legislative history demonstrates that …views on the comprehensive nature of the legislation were practically universal." (Internal citations omitted.)

This dissent explains that the plurality opinion, contrary to the Corps' reasonable interpretation of the "waters of the United States," arbitrarily imposes two conditions: (1) intermittent or ephemeral wetlands do not count as tributaries; only permanent tributaries count; and, (2) there must be a continuous surface connection between wetlands and navigable waters. The dissent resorts to the very same dictionary cited by the plurality and counters that opinion for claiming that intermittent or ephemeral streams or rivers are not, in fact, streams or rivers. Citing *Riverside Bayview*, the dissent notes "Congress found it 'essential that discharge of pollutants be controlled at the source.' " "Intermittent streams can carry pollutants just as perennial streams can, and their regulation may prove as important for flood control purposes." The dissent observes that under the plurality view developers could, with impunity, fill intermittently wet wetlands with polluted fill material that would make its way to traditional navigable water during precipitation or flooding


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Moreover, the dissent points out that the term "adjacent" does not require actual contact. Thus, the dissent finds the Corps' definition of "adjacent" ("bordering, contiguous, or neighboring") to be "plainly reasonable." The Corps' definition further specifies that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.' "

Further relying upon *Riverside Bayview*, the dissent elaborates on the important roles wetlands play.

"Among other things, wetlands can offer 'nesting, spawning, rearing and resting sites for aquatic or land species'; 'serve as valuable storage areas for storm and flood waters'; and provide 'significant water purification functions …These values are hardly "*independent*" ecological considerations as the plurality would have it …–instead, they are integral to the 'chemical, physical, and biological integrity of the Nation's waters.' " (Emphasis in the original; internal citations omitted.)

The dissenting opinion includes a description of the conduct of Mr. and Mrs. Rapanos, upon which the plurality opinion is silent. According to the evidence in the record pointed out by the dissent, Mr. Rapanos knew the Michigan Department of Natural Resources ("MDNR") had informed him his lands "probably included wetlands that were 'waters of the United States.' " Rapanos threatened to "destroy" his own wetlands consultant (Dr. Frederick Goff) unless Goff destroyed his wetland report, which Rapanos found to be unfavorable. Rapanos then spent $350,000 in one area (the Salzburg site) to fill wetlands, prevented MDNR inspectors from inspecting, ignored an MDNR cease-and-desist

order, and refused to obey an EPA administrative compliance order. Rapanos engaged in similar conduct at two other areas (the Hines Road and Pine River sites).

"They ultimately spent $158,000 at the 275-acre Hines Road site, filling 17 of its existing 64 acres of wetlands. At the 200-acre Pine River site, they spent $463,000 and filled 15 of its 49 acres of wetlands.

Prior to their destruction, the wetlands at all three sites had surface connections to tributaries or traditionally navigable waters…"

Justice Steven's dissent observes that the effect of the plurality opinion and the concurring opinion of Justice Kennedy is to replace "30 years of practice by the Army Corps" with "judicially crafted rule distilled from the term 'significant nexus' as used in *SWANCC.*" Justice Stevens writes for the dissenters that the proper analysis is "straightforward." "The Corps' resulting decision to treat these wetlands as …'waters of the United States' is a quintessential example of the Executive's reasonable interpretation of a statutory provision."

The main dissenting opinion highlights the discrepancy between what the plurality opinion means by the 'significant nexus' requirement from that articulated by Justice Kennedy. The dissent finds Justice Kennedy's view "far more faithful to our precedents and to principles of statutory interpretation than is the plurality's." Justice Stevens identifies the uncertainties likely to follow in the wake of the plurality/concurring opinions.

"But Justice Kennedy's approach will have the effect of creating additional work for all concerned parties. Developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries of traditionally navigable waters will have no certain way of knowing whether they need to get § 404 permits or not. And the Corps will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications. These problems are precisely the ones that *Riverside Bayview's* deferential approach avoided…Unlike Justice Kennedy, I see no reason to change *Riverside Bayview's* approach—and every reason to continue to defer to the Executive's sensible, bright-line rule."

Justice Stevens points out another dilemma posed by the plurality and concurring opinions. Whose version of the 'significant nexus' test is to be followed? Will it be that of the narrow plurality view that imposes the requirements of surface connection to permanent bodies of water that ignore the importance of ephemeral or intermittent

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streams and subsurface hydrologic connections? Or will it be that as articulated by Justice Kennedy, which may not be far from that of the dissent?

"Justice Kennedy's 'significant nexus' test will probably not do much to diminish the number of wetlands covered by the Act in the long run. Justice Kennedy himself recognizes that the records in both cases contain evidence that 'should permit the establishment of a significant nexus,' and it seems likely that evidence would support similar findings as to most (if not all) wetlands adjacent to tributaries of navigable waters."

Applying two separate articulations of the "significant nexus" test heightens uncertainty rather than lessening it, in the view of the main dissent.

Justice Breyer added his separate dissenting opinion in which he made two points. First, he would uphold the Corps' regulations on the basis of the regulation of interstate commerce. Second, he made explicit that which is implicit in all of the opinions.

"In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. This is not the system Congress intended. Hence, I believe that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so."

With that we turn to the critical opinion—the "significant nexus" test as articulated by Justice Kennedy.

JUSTICE KENNEDY'S "SIGNIFICANT NEXUS" TEST

Justice Kennedy's concurrence in the judgment opinion starts with the beginning. The beginning, that is, of the CWA, the purpose of which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." For Justice Kennedy the significant nexus is to that scientific principle, which, he observes, is what Congress intended when it passed the CWA. Science, then, is the touchstone of Justice Kennedy's opinion.

Justice Kennedy attacks the plurality's idea that wetlands are " …simply moist patches of earth." The concurring opinion observes that the Corps' Wetlands Delineation Manual provides "over 100 pages of technical guidance for Corps officers" to determine the existence and boundaries of wetlands:

"(1) prevalence of plant species typically adapted to saturated soil



conditions, determined in accordance with the United States Fish and Wildlife Service's National List of Plant Species that Occur in Wetlands; (2) hydric soil, meaning soil that is saturated, flooded, or ponded for a sufficient time during the growing season to become anaerobic, or lacking in oxygen, in the upper part; and, (3) wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at least five percent of the growing season in most years."

Justice Kennedy, referencing section 328.3(c) of the Corps' regulating definition, goes on to state:

"Under the Corps' regulations, wetlands are adjacent to tributaries, and thus covered by the Act, even if they are 'separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.'"

Justice Kennedy says that *Riverside Bayview* and *SWANCC* established the analytical framework. He pointed out that the Court in *Riverside Bayview* had specifically left open for future determination whether the Corps has authority to regulate wetlands other than those adjacent to open waters. On the other hand, he notes that the Court in *SWANCC* had rejected the theory that the Corps had authority to regulate intrastate isolated ponds and mudflats under its "Migratory Bird Rule," which the Corps had attempted to justify on the basis of interstate commerce. In Justice Kenney's view " …neither the plurality nor the dissent addresses the nexus requirement…"

The plurality opinion began, in Kennedy's view, with the correct premise that the CWA extends to "at least some waters that are not navigable in the traditional sense." The concurring opinion makes that point clear in an analysis of the text of the statute. (Recall that the Court reached that same conclusion in *Riverside Bayview* on a unanimous vote.) Justice Kennedy's concurring opinion then dismantles the plurality opinion's assertion that the CWA requires that regulated wetlands must be (1) relatively permanent, standing or flowing bodies of water and (2) must have a continuous surface connection to traditional navigable water.

RELATIVELY PERMANENT, STANDING OR FLOWING BODIES OF WATER

Justice Kennedy points out that the plurality arrives at its conclusion that a wetland must be a relatively permanent, standing or flowing body of water on a selective reading of dictionary definitions that is "without support in the language and purposes of the Act or in our cases interpreting it." The plurality's position " …makes little practical sense in a statute

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concerned with downstream water quality." The plurality's position would allow the "merest trickle" (*i.e.* an insignificant nexus) to be regulated under the CWA so long as the trickle is continuous. Conversely, the plurality's position would exclude from the Corps' regulatory authority " …torrents thundering at irregular intervals through otherwise dry channels…" Justice Kennedy cites the Los Angeles River as an example.

"The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river …Yet it periodically releases water volumes so powerful and destructive that it has been encased in concrete and steel over a length of some 50 miles… Though this particular waterway might satisfy the plurality's test, it is illustrative of what often-dry watercourses can become when rain waters flow." (Internal citations omitted.)

In support of his analysis, Justice Kennedy cites a study showing that for much of the year, Bouquet Creek near Saugus, California, carried no flow, but on February 12, 2003, it carried 122 cubic feet per second. Justice Kennedy further points out that the dictionary contains numerous definitions of floods, inundations, and "intermittent streams" that are, just that—intermittent.

CONTINUOUS SURFACE CONNECTION

This second requirement of the plurality is "unpersuasive" in Justice Kennedy's view.

"To begin with, the plurality is wrong to suggest that wetlands are '*indistinguishable*' from waters to which they bear a surface connection …Even if the precise boundary may be imprecise, a bog or a swamp is different from a river." (Emphasis in the original.)

Moreover, Justice Kennedy notes that the plurality's theory is inconsistent with*Riverside Bayview*, in which the Court determined that whether "the moisture creating the wetlands …find[s] its source in the adjacent bodies of water" is irrelevant. Nor does *SWANCC*, which neither explicitly nor implicitly overruled*Riverside Bayview*, support the surface-connection requirement, in Justice Kennedy's view.

Justice Kennedy attacks the plurality's argument that dredged fill material, such as spoil, rock, sand, cellar dirt, and the like, "does not normally wash downstream.":

"It seems plausible that new or loose fill, not anchored by grass or roots from other vegetation, could travel downstream through waterways adjacent to a wetland; at the least this is a factual possibility that the Corps' experts can better assess than can the plurality. Silt, whether from natural or human sources, is a major factor in aquatic environments, and it may clog waterways, alter ecosystems, and limit the useful life of dams."

Justice Kennedy's opinion explains that the Corps has reasonably concluded that wetlands filter and purify water that drains into adjacent bodies of water and slows the flow of surface runoff, thus preventing flooding and erosion. Filling the wetlands may impair those functions, causing downstream pollution.

"In many cases, moreover, filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps' definition of adjacency is a reasonable one, for it may be the absence of any interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme."

Justice Kennedy finds "the plurality's overall tone and approach" to be "unduly dismissive of the interests

asserted by the United States." Referencing the oxygen-depleted zone in the Gulf of Mexico caused by pollution transported by the Mississippi River, Justice Kennedy writes that "[s]cientific evidence indicates that wetlands play a critical role in controlling and filtering runoff."

"It is true, as the plurality indicates, that environmental concerns provide no reason to disregard limits in the statutory text, …but in my view the plurality's opinion is not a correct reading of the text. The limits the plurality would impose, moreover, give insufficient deference to Congress' purposes in enacting the Clean Water Act and to the authority of the Executive to implement that statutory mandate."

Justice Kennedy further points out that the plurality opinion presents its interpretation "as the only permissible reading of the plain text." Were that the case "the Corps would lack discretion, under the plurality's theory, to adopt contrary regulations."

Justice Kennedy's opinion is also critical of that of the dissent for giving no importance to the word "navigable" in the phrase "navigable waters." Justice Kennedy observes that Congress' choice of words created difficulties " …for the Act contemplates regulation of certain 'navigable waters' that are in fact not navigable."

"Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters' … and it pursued that objective by restricting dumping and filling in 'navigable waters' …With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage …Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.' "

Turning to the Corps' regulations, Justice Kennedy finds its existing standard for tributaries to be categorical and overbroad. The existing standard deems a water a tributary "if it feeds into a traditional navigable water (or tributary thereof) and possesses an ordinary high water mark, defined by a 'line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics,' § 328.3(e)." The breadth of this categorical definition troubled Justice Kennedy because it lacks the assurance of establishing the significant nexus to traditional navigable waters:

"Yet the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an

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important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*."

Looking ahead, Justice Kennedy notes that the Corps may rely on adjacency to establish jurisdiction. "*Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.*" (Emphasis supplied.) Justice Kennedy's opinion predicts that in most cases wetlands that are adjacent to tributaries will possess the requisite significant nexus. "Thus the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid."

With Justice Kennedy concurring in the result, but not the reasoning, of the plurality opinion, the case was sent back to the district (trial level) court "for further proceedings."

SUMMARY POINTS

The following points can be taken from the *Riverside Bayview, SWANCC,* and *Rapanos* trilogy of decisions:

- Traditional navigable waters means waters that were, are, or could reasonably be made navigable in fact.
- The CWA applies to "something more" than traditional navigable waters.
- Wetlands that are adjacent to open waters that are traditionally navigable fall within the jurisdiction of the CWA.
- Wetlands adjacent to tributaries that flow to traditional navigable waters fall within the jurisdiction of the CWA if they possess a significant nexus to the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters.
- The Corps of Engineers' regulations in effect when *Riverside Bayview, SWANCC,* and *Rapanos* were decided (1985, 2001, and 2006, respectively) may not be applied by the Corps categorically to determine whether wetlands that are adjacent to tributaries to traditional navigable waters are regulated under the jurisdiction of the CWA.
- In the absence of more specific regulations, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands that are adjacent to tributaries to traditional navigable waters.
- Any such more specific regulations would have to comport with the significant nexus test as articulated by Justice Kennedy.
- The determination as to whether a given wetland that is adjacent to a tributary to traditional navigable water possesses the required

Table of Underlying Facts in *Riverside Bayview*, *SWANCC*, and *Rapanos*

CASE	AREA OF REGULATION	NAVIGABILITY	RULING
Riverside Bayview	Wetlands adjacent to open waters, i.e. Black Greek, which flow to Lake St. Claire. SWANCC	The wetlands are not navigable.	Jurisdiction applies under the CWA because they meet the "adjacent" component of the definition of "waters of the United States."
SWANCC	Isolated, intrastate ponds and mudflats i.e., not connected to navigable surface water, in abandoned quarry in northern Illinois.	Non-navigable ponds and mudflats.	Jurisdiction rejected under the "Migratory Bird Rule" component of the definition of the "waters of the United States."
Rapanos	Wetlands adjacent to various tributaries that flow to Lake Huron.	The wetlands are not navigable.	Remanded to the district court. Justice Kennedy's test: Is there a significantnexus to the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters? Or are the effects of the wetlands on water quality speculative or insubstantial?

significant nexus to the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters is a scientific exercise.

Following the Court's decision in *Rapanos*, the EPA, which administers the CWA, and the Corps, which regulates dredging and filling under section 404 of the CWA, jointly initiated the process that has led to a proposed definition of the "waters of the United States."

In "Waters of the United States": *Something More* Than Actually Navigable Waters" we explored one end of the spectrum, and in "The Odd Jurisdictional Line: 'Waters of the United States in *SWANCC*' " we examined the other end. For additional help in understanding the different facts in the these three cases, see "Table of Underlying Facts in *Riverside Bayview, SWANCC,* and *Rapanos*.

All of this serves as background to the joint proposal by the EPA and the Corps for a new definition of the "waters of the United States." This article is a part of a series exploring the "waters of the United States."