The Wetlands Coverage of the Clean Water Act (CWA): *Rapanos* and Beyond

Robert Meltz
Legislative Attorney

Claudia Copeland
Specialist in Resources and Environmental Policy

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Summary

In 1985 and 2001, the Supreme Court grappled with issues as to the geographic scope of the wetlands permitting program in the federal Clean Water Act (CWA). In 2006, the Supreme Court rendered a third decision, *Rapanos v. United State*s, on appeal from two Sixth Circuit rulings. The Sixth Circuit rulings offered the Court a chance to clarify the reach of CWA jurisdiction over wetlands adjacent only to *non*navigable tributaries of traditional navigable waters—including tributaries such as drainage ditches and canals that may flow intermittently. (Jurisdiction over wetlands adjacent to traditional navigable waters was established in the 1985 decision.)

The Court's decision provided little clarification, however, splitting 4-1-4. The four-Justice plurality decision, by Justice Scalia, said that the CWA covers only wetlands connected to relatively permanent bodies of water (streams, rivers, lakes) by a continuous surface connection. Justice Kennedy, writing alone, demanded a substantial nexus between the wetland and a traditional navigable water, using an ambiguous ecological test. Justice Stevens, for the four dissenters, would have upheld the existing broad reach of Corps of Engineers/EPA regulations.

Because no rationale commanded the support of a majority of the Justices, lower courts are extracting different rules of decision from *Rapanos* for resolving future cases. Corps/EPA guidance issued in December 2008 says that a wetland generally is jurisdictional if it satisfies either the plurality or Kennedy tests. In April 2011, the agencies proposed revised guidance intended to clarify whether waters are protected by the CWA, but this proposal is controversial. The ambiguity of the *Rapanos* decision and questions about the agencies' guidance have increased pressure on EPA and the Corps to initiate a rulemaking to promulgate new regulations, but also on Congress to provide clarification. In the 111th Congress, legislation intended to do so was approved by a Senate committee, but no further legislative action occurred. Similar legislation was not introduced in the 112th Congress. Instead, proposals to bar issuance of the Corps/EPA revised guidance and to narrow the regulatory scope of the CWA were introduced, but none of these bills was enacted.

The legal and policy questions associated with *Rapanos*—regarding the outer geographic limit of CWA jurisdiction and the consequences of restricting that scope—have challenged regulators, landowners and developers, and policymakers for more than 30 years. The answer may determine the reach of CWA regulatory authority not only for the wetlands permitting program but also for other CWA programs, since the CWA uses but one jurisdiction-defining phrase ("navigable waters") throughout the statute.

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

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In 2006, the Supreme Court decided *Rapanos v. United States,*[1] the most recent and well-known of three Supreme Court decisions wrestling with the question of which wetlands are covered by the wetlands permitting program in the Clean Water Act (CWA).[2] Since then, numerous decisions from the lower federal courts have sought to divine what criteria to draw from the fractured opinions in *Rapanos* as to which wetlands are "jurisdictional" (within the CWA's reach), and which are not. At the same time, the agencies charged with administering the wetlands permitting program, the U.S. Army Corps of Engineers and Environmental Protection Agency (EPA), have issued several guidance documents seeking to explain their view of their jurisdiction post-*Rapanos*.

This report provides background including the pre-*Rapanos* Supreme Court opinions, then moves on to *Rapanos* itself and the Corps/EPA guidance documents.

Background

From the earliest days, Congress has grappled with where to set the line between federal and state authority over the nation's waterways. Typically, this debate occurred in the context of federal legislation restricting uses of waterways that impaired navigation and commerce. The phrase Congress often used to specify waterways over which the federal government had authority was "navigable waters of the United States."[3] This "navigable waters" concept proved an elastic one: in Supreme Court decisions from the early to mid-20th century, "navigability" underwent a substantial expansion "from waters in actual use to those which used to be navigable to those which by reasonable improvements could be made navigable to nonnavigable tributaries affecting navigable streams."[4]

Notwithstanding the Court's enlargement of "navigability," the Congress considering the legislation that became the CWA of 1972[5] felt that the term was too constricted to define the reach of a law whose purpose was not maintaining navigability, as in the past, but rather preventing pollution. Accordingly, Congress in the CWA retained the traditional term "navigable waters," but defined it to mean "waters of the United States"[6]—seemingly minimizing the constraint of navigability. The conference report said that the new phrase was intended to be given "the broadest possible constitutional interpretation."[7]

Among the provisions in the 1972 clean water legislation was Section 404,[8] which together with Section 301(a) requires persons wishing to discharge dredged or fill material into "navigable waters," as newly defined, to obtain a permit from the U.S. Army Corps of Engineers.[9] The

[1] 547 U.S. 715 (2006).

[2] 33 U.S.C. §§1251-1387.

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

[4] William H. Rodgers, Jr., Handbook on Environmental Law 401 (1977) (footnotes omitted).

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

[6] CWA §502(7), 33 U.S.C. §1362(7).

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

[8] 33 U.S.C. §1344.

[9] Section 301(a), 33 U.S.C. §1311(a), prohibits the discharge of any pollutant into navigable waters, except in (continued...)

Corps' initial response to Section 404 was to apply it solely to waters traditionally deemed navigable (which included few wetland areas), despite the broadening "waters of the United States" definition and conference report language. Under a 1975 court order,[10] however, the Corps issued new regulations that swept in a range of wetlands.[11] This broadening ushered in a debate, continuing today, as to *which* wetlands Congress meant to reach in the Section 404 permit program. At one time or another, the debate has occupied all three branches of the federal government.

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

Riverside Bayview Homes

The Supreme Court's first foray into the Section 404 jurisdictional quagmire came in 1985, in *Riverside Bayview Homes, Inc. v. United States.*[12] There, the Court unanimously upheld as reasonable the Corps' extension of its Section 404 jurisdiction to "adjacent wetlands"—as one component of the agency's definition of "waters of the United States."[13] Under the Corps regulations, adjacent wetlands are wetlands adjacent to any non-wetland waterbody that constitutes a water of the United States—such as navigable bodies of water or interstate waters, or their tributaries. The Court reasoned that the water-quality objectives of the CWA were broad and sensitive to the fact that water moves in hydrologic cycles. Due to the frequent difficulties in defining where water ends and land begins, the Court could not say that the Corps' conclusion that adjacent wetlands are inseparably bound up with "waters of the United States" was unreasonable, particularly given the deference owed by courts to the Corps' and EPA's ecological expertise. Also persuasive was the fact that in considering the 1977 amendments to the CWA, Congress vigorously debated but ultimately rejected amendments that would have narrowed the Corps' asserted jurisdiction under Section 404.

SWANCC

In 2001, the Court returned to the geographic reach of Section 404. The decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*)[14] directly involved the "isolated waters" component of the Corps' definition of "waters of the United States,"[15] rather than the "adjacent wetlands" component at issue in *Riverside Bayview Homes*. "Isolated waters,"

(...continued)

compliance with various CWA sections, including section 404.

[10] NRDC v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

[11] 40 Fed. Reg. 31320 (July 25, 1975), amending 33 C.F.R. part 209.

[12] 474 U.S. 121 (1985).

[13] 33 C.F.R. §328.3(a)(7). An identical EPA definition is at 40 C.F.R. §230.3(s)(7).

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

[15] 33 C.F.R. §328.3(a)(3). An identical EPA definition is at 40 C.F.R. §230.3(s)(3).

in CWA parlance (the regulations don't actually use the phrase), are waters that are not traditional navigable waters, are not interstate, are not tributaries of the foregoing, and are not hydrologically connected to navigable or interstate waters or their tributaries—but whose "use, degradation, or destruction [nonetheless] could affect interstate commerce."[16] Illustrative examples listed in the regulations include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, *wetlands*, sloughs, [or] prairie potholes"[17] with an interstate commerce nexus, or connection. The issue before the Court was whether "waters of the United States" is broad enough to embrace the Corps' assertion of jurisdiction over such "isolated waters" purely on the ground that they are or might be used by migratory birds that cross state lines—known as the Migratory Bird Rule.

In a 5-4 ruling, the Court held that the Migratory Bird Rule was not authorized by the CWA. The decision's rationale was much broader, however, appearing to preclude federal assertion of 404 jurisdiction over isolated, nonnavigable, intrastate waters on *any* basis—indeed, over wetlands not adjacent to "open water."[18] This disparity between the Court's holding and its rationale occasioned considerable litigation in the lower courts, the majority of which opted for a narrow reading of *SWANCC*, hence a broad reading of remaining Corps jurisdiction under Section 404. Such uncertainties as to the Corps' isolated waters jurisdiction after *SWANCC* focused attention on the alternative bases in Corps regulations for asserting 404 jurisdiction—such as the existence of "adjacent wetlands." Neither the Corps of Engineers nor EPA, however, has modified its Section 404 regulations since *SWANCC*.[19]

The new spotlight on the concept of "adjacent wetlands" became the backdrop for the Supreme Court's *Rapanos* decision, the Court's second encounter with this phrase after *Riverside Bayview Homes.*

Rapanos

Rapanos was actually a consolidation of two cases, *Rapanos* and *Carabell*, on appeal from the Sixth Circuit. Though both cases involved issues as to what constitutes "adjacent wetlands," the issues in each are different.

[16] 33 C.F.R. §328.3(a)(3).

[17] *Id*. (emphasis added).

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

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

The Sixth Circuit Decisions

Rapanos in the Sixth Circuit involved the Corps' assertion of 404 jurisdiction over a wetland adjacent to a tributary (man-made ditch) that ultimately flowed, miles later, into a traditional navigable water. As in *Riverside Bayview*, the issue was the Corps' jurisdiction under the "adjacent wetlands" component of its regulations defining "waters of the United States." In particular, plaintiffs argued that *SWANCC* did more than throw out the Migratory Bird Rule; it also barred Section 404 regulation of wetlands that do not physically abut a traditional navigable water.

In ruling that Section 404 reached the Rapanos's wetlands, the Sixth Circuit held that immediate adjacency of the wetland to a traditional navigable water is not required. Rather, what is needed is a "significant nexus"—a ubiquitous phrase in Section 404 court decisions lifted from *SWANCC*'s explanation of *Riverside Bayview*[20]—between the wetlands and traditional navigable waters. "Significant nexus," in turn, can be satisfied by the presence of a "hydrological connection." Thus, the fact that the Rapanos's wetlands had surface water connections to nearby tributaries of traditional navigable waters was sufficient for Section 404 jurisdiction. Nor did it seem to matter to the court that the hydrological connection to traditional navigable waters was, for at least one of the Rapanos wetlands, distant—surface waters from this wetland flow into a man-made drain immediately north of the site, which empties into a creek, which flows into a navigable river. According to the record, this wetland is between 11 and 20 miles from the nearest navigable-in-fact water. In ruling that a surface water connection to a tributary of a navigable water was enough, the circuit aligned itself with the large majority of appellate courts to rule on this issue since *SWANCC*.

In its petition for certiorari to the Supreme Court, the Rapanoses asked whether the CWA's reach extends to nonnavigable wetlands "that do not even abut a navigable water."

Carabell in the Sixth Circuit involved the Corps' assertion of jurisdiction over a wetland adjacent to a tributary (man-made ditch) that ultimately flowed into traditional navigable waters—but the wetland was separated from the tributary by a manmade berm.

The Sixth Circuit held that "adjacent wetlands" jurisdiction existed under the Corps regulations, even though the wetland was separated from a tributary of "waters of the United States" by a four-foot-wide manmade berm that blocked immediate drainage of surface water from the parcel to the tributary.[21] The existence of the berm meant, critically, that unlike the wetlands in *Rapanos*, the wetlands here lacked any hydrological connection to navigable waters *at all*. Parenthetically, the fact that the "tributary" was merely a man-made ditch (which emptied into a creek, which flowed into a navigable lake) did not appear to be an issue in the case, as it was in *Rapanos*. Finally, the court endorsed the view of the majority of courts addressing the question that *SWANCC* spoke only to the Corps' "isolated waters" jurisdiction; it did not narrow the agency's "adjacent wetlands" authority involved here and broadly construed in *Riverside Bayview*.

[20] *SWANCC*, 531 U.S. at 167.

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

In its petition for certiorari, the Carabells asked whether Section 404 extends to "wetlands that are hydrologically isolated from any of the 'waters of the United States.'"

The Supreme Court Decision

For many who had waited so long to have "waters of the United States" clarified, the *Rapanos* decision (addressing the Sixth Circuit decisions in both *Rapanos* and *Carabell*) was a disappointment. In three major opinions, the Court split 4-1-4 as to whether the Corps' assertions of 404 jurisdiction in the two cases before it comported with the CWA—that is, involved "waters of the United States." Justice Scalia wrote a four-Justice plurality opinion, ruling that the Corps had overreached and thus the Sixth Circuit decisions must be vacated and remanded for further proceedings applying the plurality's rule. Justice Kennedy, in a lone concurrence, also disagreed with the Corps' interpretation of the CWA, but would have applied a different approach than the plurality. He supplied the fifth vote supporting the vacation and remand, making that the judgment of the Court. (Five votes is a majority on the Supreme Court.) Finally, Justice Stevens wrote a four-Justice dissent upholding the Corps' reading of its jurisdiction. Accordingly, he would have affirmed the decisions below.[22]

The problem is that no single rationale in these three opinions commands the support of a majority of the Justices. Thus, lower courts addressing challenges to Corps 404 jurisdiction since *Rapanos* have struggled with what rule of decision to extract from the decision. Does the Scalia plurality decision control? Or does the Kennedy concurrence provide the test? Or is satisfying either of these adequate to support jurisdiction?

Justice Scalia's plurality opinion asserts what is probably the narrowest view of 404 jurisdiction in the three major opinions, at least in most circumstances. His opening paragraphs set the tone by describing the substantial costs of applying for 404 permits, and the "immense expansion of federal regulation of land use that has occurred under the Clean Water Act."[23] This critical tone continues with the opinion's description of how the lower courts, "[e]ven after *SWANCC*," have continued to uphold the "sweeping" assertions of jurisdiction by the Corps over tributaries and adjacent wetlands.[24]

Justice Scalia goes on to construe "waters" in "waters of the United States" to mean only *relatively permanent, standing or flowing bodies of water*, such as streams, rivers, lakes, and other bodies of water "forming geographic features."[25] This definition leads him to exclude "channels containing merely intermittent or ephemeral flow."[26] Wetlands, our topic here, are included as "waters of the United States"—that is, are "adjacent" in the Corps' language—only when they have a *"continuous surface connection"* to bodies that are "waters of the United States" in their own right. By contrast, wetlands with only an intermittent, physically remote hydrological connection to "waters of the United States" are not covered by Section 404, according to the Scalia opinion.

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

[23] 547 U.S. at 722.

[24] *Id*. at 726.

[25] *Id*. at 732-733.

[26] *Id*. at 733-734.

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

Justice Kennedy's concurring opinion, in contrast to the absolute rules proposed by the plurality, offers a case-by-case test. He picks up on the "significant nexus" test used by the Sixth Circuit and many other courts—but while the lower courts defined significant nexus as having a *hydrological connection* with traditional navigable waters,[27] Justice Kennedy used an ambiguous *ecological* test.[28] A wetland, he declared, has the requisite significant nexus if, alone or in combination with similarly situated lands in the region, it significantly affects the chemical, physical, and biological integrity of traditional navigable waters.[29] These ecological functions include flood retention, pollutant trapping, and filtration. Under Kennedy's opinion, the waters that perform these functions may be intermittent or ephemeral, and they need not have a surface hydrological connection to other waters. When, in contrast, their effects on water quality are speculative or insubstantial, the wetland is beyond Section 404's reach.[30]

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

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

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

[27] Hydrological connection is the test that the Corps has used to demonstrate significant nexus.

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

[29] 547 U.S. at 780.

[30] *Id.*

Legal Analysis of *Rapanos*

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

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

Thus far, lower courts applying *Rapanos* have drawn different tests from the decision, as was predicted based on its fractured nature. Nine of the thirteen federal circuits have ruled so far, an indication of the frequency with which CWA jurisdictional questions arise.[31] Two federal circuits held that the Kennedy "significant nexus" test alone controls;[32] two applied the Kennedy test but reserve for another day the question whether the plurality test as well is valid;[33] three accepted Justice Stevens's suggestion that a wetland satisfying either the Kennedy or plurality tests is jurisdictional;[34] and two avoided the issue altogether by finding that the Kennedy test and plurality test were both satisfied by the particular wetland in the case.[35] (See **Figure A-1** in the **Appendix** to this report.) No circuit decision has opted for the plurality test alone. As the

[31] Going back to the CWA's enactment in 1972, several of the federal circuits have addressed issues as the scope of CWA jurisdiction—that is, the scope of "waters of the United States"—on ten or more occasions. See Marjorie A. Shields, *What Are "Navigable Waters Subject to Federal Water Pollution Control Act*," 160 A.L.R. Fed. 585 (updated weekly).

[32] United States v. Robison, 505 F.3d 1208 (11th Cir. 2007), *cert. denied*, 129 S. Ct. 627 (2008); United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006), *cert. denied*, 552 U.S. 810 (2007);

[33] Northern California River Watch v. Wilcox, 2011 Westlaw 238292, *1 (9th Cir. Jan. 26, 2011), *clarifying* Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007), *cert. denied*, 552 U.S. 1180 (2008); Precon Development Corp. v. U.S. Army Corps of Engineers, 2011 Westlaw 213052 (4th Cir. Jan. 25, 2011).

[34] United States v. Donovan, 661 F.3d 174 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2409 (2012); United States v. Bailey, 571 F.3d 791 (8th Cir. 2009); United States v. Johnson, 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007).

[35] United States v. Cundiff, 555 F.3d 200 (6th Cir.), *cert. denied*, 130 S. Ct. 74 (2009); United States v. Lucas, 516 F.3d 316 (5th Cir.), *cert. denied*, 129 S. Ct. 116 (2008).

footnotes below show, the Supreme Court has declined to review every one of these circuit decisions where a petition for certiorari has been filed. The likely reason for these consistent denials is that with no change in the Justices since *Rapanos* that is likely to make a difference in their voting pattern, the Court may see little point to taking another case in the area.

District court decisions, at least the reported ones, seem to all follow either the Kennedy test alone or the Kennedy-or-plurality test view.[36] As with the appellate decisions, there appears to be no reported district-court decision squarely holding that the plurality test alone governs.[37]

To a considerable extent, the court decisions turn on how the courts read Supreme Court guidance on what rule of law may be inferred from decisions of the Court in which no rationale commands the support of five or more Justices. The United States, for its part, has consistently taken the Kennedy-or-plurality position in litigation, as it did in congressional testimony soon after the *Rapanos* decision[38] and in the Corps/EPA guidance on interpreting *Rapanos* (discussed below).

In the wake of *Rapanos*, several factors arguably put pressure on the Corps and EPA to do a rulemaking on the scope of "adjacent wetlands" permitting jurisdiction under the CWA (assuming Congress does not act). One is the fact that no fewer than three of the opinions in *Rapanos* urged the agencies to do so.[39] A second factor is the labor-intensive nature (and vagueness) of the Kennedy case-by-case approach, requiring empirical study of each wetland near a non-navigable tributary. The third factor is the divergence of the lower courts as to the rule to be applied after *Rapanos*. One can be confident, however, that anything the Corps and EPA promulgate will find its way into the courts. The agencies stated in guidance issued in 2008 that "further consideration of jurisdictional issues, including clarification and definition of key terminology, may be appropriate in the future, either through issuance of additional guidance or through rulemaking."[40]

All of the *Rapanos* opinions that mention *SWANCC* seem to accept, without discussion, that *SWANCC* eliminates jurisdictional coverage of *all* isolated, intrastate, nonnavigable waters—not just those isolated, intrastate, nonnavigable waters where the sole basis for asserting jurisdiction was the Migratory Bird Rule. Most lower court decisions to broach this issue had adopted the latter narrower reading of *SWANCC*. Thus, although only adjacent wetlands were directly involved in *Rapanos*, there may be impacts on the Corps' authority over isolated, intrastate, nonnavigable waters also.

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[36] See, e.g., United States v. Evans, 2006 Westlaw 2221629 (M.D. Fla. 2006) (Kennedy test or plurality test); Environmental Protection Information Center v. Pacific Lumber Co., 469 F. Supp. 2d 803 (S.D. Cal. 2007) (bound by *City of Healdsburg* to apply Kennedy test only); Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc., 472 F. Supp. 2d 219 (D. Conn. 2007) (Kennedy test or plurality test).

[37] One reported decision took its cue from the Scalia plurality view, though principally relying on circuit precedent. United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605 (N.D. Tex. 2006). This decision actually involved the amendments to the CWA made by the Oil Pollution Act, which uses the same definition of "waters of the United States" as CWA Section 404. A second decision holds that the significant nexus test is inapplicable outside the isolated wetlands context (with the implication that the plurality test alone applies). Sierra Club v. City and County of Honolulu, 2008 Westlaw 3850495, *7 (D. Hawaii August 18, 2008).

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

[39] See opinions of Justice Kennedy, Justice Breyer, and Chief Justice Roberts.

[40] U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*," December 2, 2008, p. 3.

Finally, although both petitions for certiorari in *Rapanos* raised the Commerce Clause issue, the decision in *Rapanos*, as expected, was on purely statutory grounds. The plurality, however, did assert that the Corps view of its adjacent wetlands jurisdiction "stretches the outer limits of Congress' commerce power,"[41] using this as one of several reasons for adopting a narrow reading of that jurisdiction. This plurality view is plainly relevant to congressional bills seeking to overturn *SWANCC* and *Rapanos* by amending the CWA to explicitly assert jurisdiction over waters to the fullest extent consistent with the Constitution (see "Legislative Consideration").

The EPA/Corps Guidance on *Rapanos*

On December 2, 2008, EPA and the Corps of Engineers issued guidance to their field offices on how *Rapanos* should be interpreted in jurisdictional determinations, agency enforcement actions, and other agency actions. The guidance does not impose legally binding requirements on EPA or the Corps, and may not apply in a particular circumstance.

The Corps and EPA had previously issued other guidance, attempting to clarify the Court's rulings on the jurisdictional issues discussed here. Following the *Rapanos* ruling, the agencies first issued informal guidance in 2006; it was replaced by formal guidance in June 2007. The December 2008 guidance made limited changes to the 2007 guidance and supersedes it.[42] The 2008 revisions were made after review of public comments on the 2007 guidance and evaluation of the agencies' own implementation of the guidance. However, they noted in 2008, "The agencies will continue to monitor implementation of the Rapanos Guidance and, as we gain experience, consider appropriate opportunities to provide additional guidance or to initiate rulemaking."[43] This statement encouraged those who argue that revised regulations are needed to resolve lingering interpretive questions. Others contend that a legislative remedy is required. The potential for litigation to challenge the guidance itself is unclear.

The 2008 guidance adopts the Kennedy-test-or-plurality-test view, with the addition of agency interpretation of vague phrases in the Kennedy and plurality opinions. It has three parts, addressing waters that are (1) categorically within the scope of "waters of the United States"; (2) within "waters of the United States" or not, on a case-by-case basis; or (3) categorically outside the scope of "waters of the United States."

(1) Waters categorically labeled "waters of the United States"—that is, without a case-by-case inquiry into whether there is a "significant nexus" with a traditional navigable water—are first, traditional navigable waters[44] and their adjacent wetlands. Under this test, the existence of a

[41] 547 U.S. at 738.

[42] "Clean Water Jurisdiction Following the Supreme Court's Decision in Rapanos v. United States and Carabell v. United States," Dec. 2, 2008, see http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm, under "Previous EPA Statements on Waters of the US." This webpage contains the 2008 guidance and the 2007 guidance, now superseded. It also includes a legal memorandum issued in January 2003 that continues to govern the agencies' interpretation of jurisdiction over the "isolated waters" addressed in the Supreme Court's 2001 *SWANCC* ruling.

[43] "Questions and Answers Regarding the Revised *Rapanos & Carabell* Guidance, December 2, 2008," p. 3, http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_5_wetlands_Rapanos_-20Guidance_QA-20120208.pdf.

[44] These include all waters described in 33 C.F.R. §328.3(a)(1) (Corps of Engineers) and 40 C.F.R. §230.3(s)(1) (EPA). The 2008 guidance provides clarification of the scope of traditional navigable waters and guidance to field staff on making such a determination.

continuous surface connection, as demanded by the plurality, but not Kennedy or the dissenters, is required to establish adjacency. Categorical "waters of the United States" also include non-navigable tributaries of traditional navigable waters, where such tributaries are "relatively permanent waters" (i.e., typically flowing year-round or at least seasonally) and adjacent wetlands with a continuous surface connection to such tributaries (not separated by uplands, berms, etc.). The 2008 guidance clarifies that a wetland is adjacent if it has an unbroken hydrologic connection to jurisdictional waters, or is separated from those waters by a berm or similar feature, or if it is in reasonably close proximity to a jurisdictional water.

(2) Waterbodies that are "waters of the United States" on a case-by-case basis are those dependent on a finding of a "significant nexus" with a traditional navigable water, per the Kennedy concurrence. They include non-navigable tributaries that are not relatively permanent (such as intermittent and ephemeral streams) and their adjacent wetlands, and wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary. The 2008 guidance states that, in making the site- and fact-specific analysis to determine "significant nexus," the agencies will evaluate hydrology (e.g., proximity to traditional navigable waters), ecologic factors (e.g., ability of wetlands to trap and filter pollutants or store flood waters), and flow characteristics (flow and functions of the tributary and adjacent wetlands). The purpose of these tests is to demonstrate a connection and the role of a tributary and any adjacent wetlands in protecting the chemical, physical, and biological integrity of downstream traditional navigable waters.

(3) Waterbodies not generally considered "waters of the United States" are swales or erosional features (e.g., gullies) and ditches (including roadside ditches) excavated wholly in and draining only uplands, and that do not carry a relatively permanent flow of water. The agencies generally will not assert jurisdiction over these waterbodies.

To provide greater transparency of decisionmaking, the 2007 guidance required the Corps and EPA to be more thorough in documenting their jurisdictional determinations than in the past. To meet this requirement, which continues under the 2008 guidance, the Corps uses a standardized documentation form and posts results on District websites.[45] These steps respond to criticism, such as detailed in a GAO report, that Corps district offices have used differing practices in making jurisdictional determinations and that few districts made their documentation public.[46]

Overall, stakeholder groups, including industry, environmental advocates, and states, expressed disappointment or frustration with the 2007 guidance and the 2008 revision—some believing that it goes too far in narrowing protection of wetlands and U.S. waters, others believing that it does not go far enough. Generally, most agree that implementing the "significant nexus" test is especially difficult, because the guidance is complicated and vague. Industry groups said that because there are no clear guideposts on this key point, the guidance fails to provide the certainty desired by the regulated community. Environmentalists said that the "significant nexus" test in the guidance is more limited than the standard described by Justice Kennedy, because although his opinion recognizes the impact of losing wetlands or other small tributaries on large waters,[47] the guidance does not account for cumulative effects. In evaluating "significant nexus," the guidance

[45] The Corps has eight U.S. Divisions (which generally follow watershed boundaries), further subdivided into 38 Districts.

[46] U.S. General Accounting Office (now Government Accountability Office), "Waters and Wetlands, Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction," February 2004, GAO-04-297.

[47] 547 U.S. at 775 (2006).

focuses only on a tributary and wetlands adjacent to that tributary. The 2008 revised guidance did not modify the 2007 guidance with respect to evaluating "significant nexus." Overall, industry groups reportedly believe that the 2008 revisions provide modest improvement over the earlier guidance and could make some jurisdictional determinations easier, but environmental advocates assert that the guidance substantially limits the waters that will be protected by the Clean Water Act.[48]

One issue that has caused considerable confusion following the *Rapanos* ruling concerns CWA jurisdiction over wetlands not immediately adjacent to traditional navigable waters—including how jurisdiction will be applied in states within the Fourth, Seventh, Ninth, and Eleventh Circuits, where appellate courts have subsequently said that the Kennedy test alone is controlling. As noted, the 2008 guidance adds some clarification about determining adjacency, but continuing questions about this and other interpretive issues are possible.

Since the initial 2007 guidance was issued, the CWA permitting process has become more complex and is slower, according to many participants and observers. A revealing EPA memorandum in March 2008 reports that since July 2006 (shortly after *Rapanos* was decided), the *Rapanos* ruling or the 2007 guidance negatively affected approximately 500 enforcement cases, a "significant portion" of the CWA enforcement docket.[49] The breakdown identified in the EPA memo is 304 instances in which EPA regions decided not to pursue formal enforcement because of jurisdictional uncertainty, 147 instances where the enforcement priority of a case was lowered due to jurisdictional concerns, and 61 cases where lack of CWA jurisdiction has been asserted as an affirmative defense in an enforcement case. The memorandum goes on to say the greatest burden on the government results from "the implied presumption of non-jurisdiction [in the plurality test] for the most common types of waters in our country, intermittent and ephemeral tributaries to traditionally navigable waters and headwater wetlands. This presumptive exclusion can only be overcome by a resource-intensive 'significant nexus analysis' [the Kennedy test] described in the Guidance." The memorandum recommended "a few targeted revisions" to the guidance that OECA believes would address these issues, while remaining consistent with the *Rapanos* decision. For example, it recommended revising the guidance to incorporate Justice Kennedy's suggestions that, when evaluating jurisdiction, it is appropriate to consider wetlands either alone or in combination with other similarly situated lands in the region. The 2008 revised guidance did not address this recommendation.

Echoing the EPA memorandum, a Corps official stated at a May 2008 conference that making jurisdictional determinations is 8 to 10 times more resource-intensive for Corps staff who must consider a multitude of factors to determine what constitutes a "significant nexus." Representatives of developers and environmental advocates concurred that the joint guidance exacerbates permitting delays.[50] Concern about this reported impact on CWA enforcement drew the attention of two House committee chairmen in 2008. Their staffs reviewed a large number of

[48] American Rivers, "Bush Administration's So-called Revised Guidance on Clean Water is Just More of the Same," press release, December 3, 2008.

[49] Memorandum from Granta Nakayama, EPA Ass't Administrator for Enforcement and Compliance Assurance, to Benjamin Grumbles, EPA Ass't Administrator for Water, "OECA's Comments on the June 6, 2007 Memo, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States*," dated March 4, 2008, on file with authors. EPA informs us that the "June 6, 2007 Memo" is the same as the June 2007 guidance referred to in footnote 42.

[50] Kinney, Jeff, "Clean Water Act Jurisdictional Decisions Slower, More Complex, Amy Corps Says," *Daily Environment Report*, May 20, 2008, p. A-3.

EPA and Corps documents and concluded that there had been a significant decline in CWA inspections, investigations, and enforcement actions since the *Rapanos* ruling and the 2007 guidance.[51]

2011 Proposed Revised Guidance

At the end of 2010, the Obama Administration weighed into the CWA jurisdiction debate as EPA and the Corps drafted new joint agency guidance to clarify regulatory jurisdiction over U.S. waters and wetlands and to replace the agencies' 2008 guidance.

The document underwent several months of interagency review before release in April 2011 in the form of proposed revised guidance, subject to public comment until July 1, 2011. In releasing the proposal, the agencies said that once it is finalized, the revised guidance will supersede the 2008 guidance; until then, the existing guidance remains in effect. Also, the agencies said that after the guidance is finalized, they expect to propose revisions to regulations to further clarify which waters are subject to CWA jurisdiction, consistent with the Supreme Court's rulings, but a schedule for doing so was not specified.[52] As noted previously, three of the *Rapanos* opinions had argued for such a rulemaking.[53]

Like the existing guidance, the proposed revisions adopt the Kennedy-test-or-plurality-test view of *Rapanos*. However, the agencies believe that a wider evaluation of jurisdiction is possible than the existing guidance suggests, stating, "after careful review of these opinions, the agencies concluded that previous guidance did not make full use of the authority provided by the CWA to include waters within the scope of the Act, as interpreted by the Court."[54] EPA and the Corps acknowledge that, compared with the existing guidance, the proposed revisions are likely to increase the number of waters identified as protected by the CWA.

> The agencies expect, based on relevant science and recent field experience, that under the understandings stated in this draft guidance, the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance, though certainly not to the full extent that it was typically asserted prior to the Supreme Court decisions in *SWANCC* and *Rapanos*.[55]

EPA and Corps officials believe that the likely increase in jurisdictional waters will occur because, in their view, the existing guidance under-protects waters and has created uncertainty about many gray areas of jurisdiction, which the revised guidance is intended to clarify. Officials believe that additional acreage likely to be jurisdictional will not be large, but they have not

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[51] "Decline of Clean Water Act Enforcement Program," Majority Staff Memorandum to Representative Henry Waxman, Chairman, House Committee on Oversight and Government Reform, and Representative James L. Oberstar, Chairman, House Committee on Transportation and Infrastructure, December 16, 2008, 21 p., on file with authors.

[52] Environmental Protection Agency and Department of Defense, "EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act," 76 *Federal Register* 24479, May 2, 2011. The proposed revised guidance and related documents are available at http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm under "Learn More About The Guidance."

[53] See note 39 and accompanying text.

[54] Environmental Protection Agency and Army Corps of Engineers, "Draft Guidance on Identifying Waters Protected by the Clean Water Act," April 27, 2011, p. 2.

[55] *Id*. at 3.

estimated how much expansion will occur. Certain types of aquatic resources are likely to benefit, because they generally are non-jurisdictional under the existing guidance (for example, some prairie potholes). Although there still will be need for case-by-case determination of "significant nexus" waters (i.e., to demonstrate potential hydrologic or ecological connections to jurisdictional waters), the proposed revisions are intended to make such evaluations clearer.

The proposed revisions build on the existing guidance with modifications that the agencies believe are consistent with the CWA, the Court's rulings, and science. According to EPA and the Corps, the guidance is focused on protection of smaller waters that feed into larger ones, to keep downstream water safe from upstream pollutants. The focus is also on reaffirming protection for wetlands that filter pollution and store water in order to help keep communities safe from floods. Two key changes in the proposed revisions, discussed below, are (1) inclusion of all interstate waters in those that are categorically labeled "waters of the United States," and (2) an expanded characterization of "adjacency" for waters and wetlands that must demonstrate a significant nexus to a jurisdictional water.

Like the existing guidance, the proposed revisions interpret phrases in the plurality and Kennedy opinions in order to clarify waters that (1) are categorically within the scope of "waters of the United States;" (2) are "waters of the United States" if they meet a case-by-case test of "significant nexus" to a jurisdictional water; or (3) are generally outside the scope of "waters of the United States."

(1) Waters categorically labeled "waters of the United States" are those that are traditional navigable waters, wetlands adjacent to traditionally navigable waters or interstate waters, non-navigable tributaries of traditional navigable waters or interstate waters that are relatively permanent (i.e., they meet the plurality standard), and wetlands that directly abut relatively permanent waters. Existing regulations define "adjacent" to mean bordering, contiguous, or neighboring. Regarding categorically protected waters, the proposed guidance makes two changes compared to the existing guidance: (a) all interstate waters are considered categorically jurisdictional, whereas under the existing guidance, interstate waters are not mentioned and their treatment is unclear, and (b) the standard for non-navigable tributaries that are "relatively permanent" is modified. Under the existing guidance, "relatively permanent" means a water that typically flows year-round or has continuous flow at least seasonally (meaning, e.g., typically for three months). Under the proposed revisions, seasonal flow making a water relatively permanent means the water typically flows during the wet season of the region in which the water is located.

(2) Waters over which the agencies generally will assert jurisdiction are those that are not categorically jurisdictional but have "significant nexus" to a jurisdictional water. Under the Kennedy standard in *Rapanos*, waters have a "significant nexus" if, either alone or in combination with similarly situated waters in the region, they significantly affect the chemical, physical, or biological integrity of traditional navigable waters. The existing guidance says that the agencies will assert jurisdiction over non-navigable tributaries that are not relatively permanent and their adjacent wetlands, and over wetlands adjacent to but not directly abutting a relatively permanent tributary based on a fact-specific evaluation of significant nexus.

The 2008 guidance defines tributaries for the purpose of the "significant nexus" determination as a single stream reach of the same order.[56] It then limits "similarly situated" waters (described in

[56] Stream order is a measure of the relative size of streams. Stream sizes range from the smallest, first-order, to the largest, the twelfth-order (e.g., the Amazon River). Over 80% of the total length of the earth's rivers and streams are (continued...)

the Kennedy standard) to a single stream reach or to wetlands that are adjacent to the same single stream reach. Aggregation of streams or stream reaches is not allowed under the existing guidance, and jurisdiction for tributaries under the "significant nexus" test is considered in isolation, that is, not together with other waters in the area.

The proposed guidance is broader and allows watershed-wide aggregation for similarly situated wetlands and tributaries. Under the proposed guidance, a tributary is jurisdictional if it is a tributary to a navigable-in-fact water or an interstate water and, alone or in combination with other tributaries in the watershed, has a significant nexus to such water. It essentially defines tributaries as those features that flow into another jurisdictional water and have a bed (the bottom of the channel) and bank, which is generally indicated by an ordinary high water mark.

Under the 2008 guidance, in evaluating significant nexus, EPA and the Corps can consider the flow characteristics (volume, duration, and frequency of flow) and ecological factors such as potential of the tributary to carry pollutants downstream to a traditional navigable water, or the potential of wetlands to trap and filter pollutants. The proposed guidance allows consideration of other factors such as maintenance of habitat that provides spawning areas for species in downstream waters. It states that all wetlands within a wetland mosaic (a landscape of wetlands and non-wetlands) should ordinarily be considered collectively when determining adjacency. As a result, wetlands likely to now be considered jurisdictional under the revised guidance would be those that are adjacent to a newly identified traditional navigable water, or those that are adjacent to other jurisdictional non-wetland waters based on a more expansive "significant nexus" determination of adjacency.

Under the proposed revisions, so-called "other waters"[57] would require case-by-case evaluation and are to be divided into two categories. First, physically proximate (see above) "other waters" that would satisfy the regulatory definition of "adjacent" if they were wetlands are to be evaluated in the same manner as adjacent wetlands to determine significant nexus. Second, non-physically proximate "other waters" that do not meet the definition of "adjacent" in the proposed guidance (e.g., there is no demonstrable ecological interconnection to a jurisdictional waterbody) cannot be easily evaluated for significant nexus to jurisdictional waters. Thus the revised guidance proposes to continue the current practice of referring such waters to agency Headquarters for evaluation.

(3) Regarding waters that generally are not waters of the United States and over which the agencies will not assert jurisdiction, the existing guidance and proposed revisions are similar. Both exclude geographic features such as swales, gullies, and ditches that are not tributaries or wetlands. The revised guidance also specifically identifies a number of other examples of non-jurisdictional waters (e.g., waters that are excluded from coverage by statute or existing regulation; artificial lakes or ponds that are created by excavating and/or diking dry land and are used exclusively for purposes such as stock watering or irrigation; and artificially irrigated areas that would revert to upland should irrigation cease).

(...continued)

headwater streams (first- and second-order). See http://www.cotf.edu/ete/modules/waterq/wqphysmethods.html.

[57] "Other waters" are waters that are geographically separated in that they do not have a hydrological connection to jurisdictional waters. Jurisdiction previously was asserted under Corps regulations (33 CFR §328.3(a)(3)) which provide for CWA jurisdiction over "[a]ll other waters … the use, degradation or destruction of which could affect interstate or foreign commerce…." Geographically isolated, non-navigable intrastate waters were at issue in *SWANCC*.

Release of the proposed revisions was accompanied by a preliminary economic analysis document prepared by EPA. It examines a range of indirect costs and benefits resulting from implementing guidance to clarify the scope of CWA jurisdiction. The analysis indicates that the majority of costs would result from incremental permitting costs and mitigation expenses incurred by entities seeking CWA Section 404 permits. Economic benefits also would result from water quality improvements such as protecting additional small streams and wetlands. EPA's analysis estimates that the benefits of implementing the proposed guidance would range from $162 million to $328 million annually, while the incremental costs would be between $87 million and $171 million. EPA acknowledges that valuing the benefits of the new guidance to wetlands and other waters poses many challenges, and the precision and accuracy of results are highly uncertain; nevertheless, EPA concludes that the analysis suggests that benefits are likely to justify costs.[58] It is noteworthy that EPA took the unusual step of preparing an economic analysis to accompany the proposed guidance, likely reflecting anticipated significant interest in the new guidance. Economic analyses are typically developed to support formal regulatory proposals, rather than non-binding agency guidance.

Critical reaction to the proposed revisions began even before release of the document in April 2011. While the guidance was being developed and reviewed internally, press reports suggested that it would substantially increase waters subject to CWA regulation, raising concern among industry and some other groups that was confirmed when the proposed guidance was released.[59] Industry criticism focuses on two issues: (1) the revised guidance would broaden the number and kinds of waters subject to regulation, in their view beyond what the CWA and the Supreme Court's rulings permit; and (2) government is effecting policy change through non-binding guidance that generally is not reviewable by courts. EPA and Corps officials respond that the guidance will not extend federal protection to any waters not historically protected under the Clean Water Act and will be fully consistent with the law, including decisions of the Supreme Court. Most state and local officials are supportive of clarifying the scope of CWA-regulated waters, but some are concerned that expanding the CWA's scope could impose costs on states and localities as their own actions (e.g., transportation projects) become subject to new requirements. Environmental advocacy groups welcomed the new guidance, which would more clearly define U.S. waters that are subject to CWA protections but would not, they say, expand the reach of the law.

The proposed guidance has drawn congressional attention, as well, both before and after its release. Some Members wrote letters supporting issuance of new guidance to address the confusion resulting from the Supreme Court's rulings.[60] Others criticized the revised guidance as going beyond clarification and thus amounting to a *de facto* rule, instead of advisory guidelines.[61] Legislative provisions to prohibit the agencies from funding activities related to revising the guidance were included in several appropriations bills in the 112th Congress, but none of these provisions was enacted. Interest in legislation concerning the guidance also was evident with bills such as S. 2245 and H.R. 4965, to prevent the agencies from finalizing the 2011 draft guidance,

[58] U.S. Environmental Protection Agency, "Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction," April 27, 2011, http://www.epa.gov/owow/wetlands/pdf/wous_cost_benefit_estimate_summary.pdf.

[59] Inside E.P.A., "EPA's Draft Guidance Seeks To 'Increase Significantly' Water Act's Scope," February 17, 2011.

[60] Letter from Honorable Benjamin L. Cardin et al. to President Barack Obama, March 31, 2011, on file with authors.

[61] Letter from Honorable Bob Gibbs et al. to Lisa P. Jackson, EPA Administrator, and Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works, April 14, 2011; and Letter from Honorable John Barrasso et al. to Lisa P. Jackson, EPA Administrator, May 27, 2011, on file with authors.

and S. 2122/H.R. 4304, which would amend the CWA with a narrow definition of waters that are subject to the act's jurisdiction. None of these bills was enacted.

Policy Implications

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

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

Waters that are jurisdictional are subject to the multiple regulatory requirements of the CWA: standards, discharge limitations, permits, and enforcement. Non-jurisdictional waters, in contrast, do not have the federal legal protection of those requirements. The act has one definition of "navigable waters" that applies to the entire law. The definition applies to federal prohibition on discharges of pollutants (§301), requirements to obtain a permit prior to discharge (§§402 and 404), water quality standards and measures to attain them (§303), oil spill liability and oil spill prevention and control measures (§311), certification that federally permitted activities comply with state water quality standards (§401), and enforcement (§309). It impacts the Oil Pollution Act and other environmental laws, as well. For example, the reach of the Endangered Species Act (ESA) is affected, because that act's requirement for consultation by federal agencies over impacts on threatened or endangered species is triggered through the issuance of federal permits.[62] Thus, by removing the need for a CWA permit, a non-jurisdictional determination would eliminate ESA consultation, as well. As discussed above, the Scalia opinion in *Rapanos* concluded that a narrow interpretation of the Corps' 404 jurisdiction would not impact these other provisions, but many observers contend that the question is not fully resolved. EPA said that it might issue additional guidance concerning the effect of *Rapanos* on other CWA programs that use the common "waters of the United States" definition, but it has not done so. In March 2008, EPA officials reportedly asked states to assist in developing guidance to govern CWA jurisdiction decisions under Section 402, because of continuing uncertainty on the law's scope, especially in western states that have a preponderance of intermittent and ephemeral streams.[63]

SWANCC found invalid the assertion of CWA jurisdiction over isolated, non-navigable intrastate waters solely on the basis of their use (or potential use) as habitat by migratory birds. Most of the post-*SWANCC* cases have instead addressed tributaries and adjacent wetlands, asking which of

[62] 16 U.S.C. §1536.

[63] "EPA Eyes Guide to Clarify Water Act's Scope for Discharge Permits," *Inside EPA*, Vol. 29, no. 10, March 7, 2008.

these have the "significant nexus" to navigable waters that *SWANCC* was interpreted to say is necessary to establish federal jurisdiction.

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

While regulators and the regulated community debate the legal dimensions of federal jurisdiction, scientists contend that there are no discrete, scientifically supportable boundaries or criteria along the continuum of waters/wetlands to separate them into meaningful ecological or hydrological compartments. Numerous scientific studies define and describe the importance of the functions and values of wetlands, in support of their significant nexus to navigable waters.[64] In all but some very narrow instances, scientists say, terms such as "isolated waters" and "adjacent wetlands" are artificial legal or regulatory constructs, not valid scientific classifications. From this perspective, even waters and wetlands that lack a direct surface connection to navigable waters or that only flow intermittently are connected to the larger aquatic ecosystem via subsurface or overflow hydrologic connections. Wetland scientists believe that all such waters/wetlands are critical for protecting the integrity of waters, habitat, and wildlife downstream.

In *SWANCC*, the Supreme Court did not draw a bright line for purposes of determining the limits of federal jurisdiction (many wetland scientists do not believe that a bright line is possible, in any case). While the ruling reduced federal jurisdiction over some previously regulated wetlands, even more than a decade later it remains difficult to determine the precise effect of that decision. Many affected interests (states and the regulated community) contend that the 2003 guidance from the Corps and EPA did not adequately define the scope of regulated areas and wetlands affected by *SWANCC* and subsequent court rulings.[65] The Rapanoses and the Carabells had hoped that the Supreme Court would clarify the jurisdiction issue and that the Court would further narrow the program's geographic reach. Other interest groups disagreed with the petitioners' views on the issues, but also had hoped for clarity. Most say that the 4-1-4 ruling, in which the three main opinions did not agree on what constitutes "waters of the United States," did not bring the desired clarity of meaning in legal and policy terms.

Estimates of the types of wetlands and amounts of acreage affected by *SWANCC, Rapanos*, and subsequent lower court rulings depend on interpretation of the cases and on assumptions about defining key terms such as "adjacent," "tributary," and "significant nexus." Because in its

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

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

regulations before *SWANCC* the Corps had broadly defined "waters of the United States," including those encompassed by the Migratory Bird Rule, nearly all U.S. wetlands and waters were subject to CWA jurisdiction, since practically all are used to a greater or lesser extent by migratory birds.[66] Depending on how key terms are defined, reduced federal jurisdiction could affect very small or very large categories of waters and wetlands. Reflecting the uncertainties about how broadly or narrowly *SWANCC* would be interpreted, one estimate made after that decision found that the possible changes in jurisdiction could range from 20% to 80% of the nation's total estimated 100 million acres of wetlands.[67] Following the *Rapanos* decision, concern was expressed particularly about that ruling's impacts in arid and semi-arid western states to exclude intermittent or ephemeral streams and adjacent wetlands and riparian areas from CWA jurisdiction.

A reduction in CWA jurisdiction affects implementation of the 404 and possibly other CWA programs. Early in 2006, EPA estimated conservatively that the extent of non-navigable tributaries and adjacent wetlands that could be affected by the narrow reading of the Clean Water Act that was advocated by the *Rapanos* and *Carabell* petitioners was up to 59% of the total length of streams in the United States, excluding Alaska. EPA also estimated that 34% of industrial and municipal dischargers that are subject to CWA Section 402 permits are located on these stream segments and that public drinking water systems which use intakes on these segments provide drinking water to over 110 million people.[68] Because there is no national database of non-navigable tributaries, EPA analyzed surrogate data on the linear extent of intermittent/ephemeral streams and stream segments that lie at the head of tributary systems and have no other streams flowing into them. Some estimate that the smallest, or headwater, first- and second-order streams represent more than 75% of the nation's stream network. These streams, if left unprotected by expansive interpretation of the Court's rulings, are at risk from a variety of polluting activities due to urbanization, construction, and channelization for flood control purposes.[69]

As noted, the uncertainties resulting from the *Rapanos* decision led to widespread anticipation that the Corps and EPA would take administrative action to clarify how they interpret the ruling and its impact on waters that are protected by the Clean Water Act. Corps and EPA officials testified before a Senate subcommittee in August 2006 that the agencies were working on substantive interpretive guidance to clarify CWA jurisdiction in light of the decision[70]—the guidance that was eventually released in June 2007 and was revised in December 2008. While many observers acknowledged that guidance is useful, some have argued that the Corps must initiate a rulemaking to revise its regulations—especially since three Justices in some fashion suggested one. This view is now widely held by many diverse stakeholders—environmental groups, industry, and states—who disagree on the substance of new guidance proposed by EPA and the Corps in April 2011.

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

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

[68] Grumbles, Benjamin H., Assistant Administrator for Water, EPA, letter to Ms. Jeanne Christie, Association of State Wetland Managers, January 9, 2005 (sic), p. 3. The letter was written in January 2006, not 2005.

[69] American Rivers and Sierra Club, "Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands," February 2007, p. 7.

[70] Grumbles, Benjamin H., Assistant Administrator for Water, EPA, and John Paul Woodley, Assistant Secretary of the Army for Civil Works, Department of the Army, Statement before the Subcommittee on Fisheries, Wildlife, and Water of the U.S. Senate Committee on Environment and Public Works, August 1, 2006, 109th Congress, 2d session.

New regulations may clarify many current questions, but they are unlikely to please all of the competing interests, as one environmental advocate observed.

> However, a rulemaking would only benefit wetlands if it did not reduce the jurisdiction offered by current regulations and if the Administration remained faithful to sound science. If politics were to trump science in the rulemaking process, the likelihood of such a protective rule would not be promising. Also, rules are subject to legal challenge and can be tied up in court for years before they are implemented.[71]

The schedule for either final guidance or new regulations is uncertain. Final guidance was submitted to the White House Office of Management and Budget (OMB) for review in February 2012, but it has not been issued. Many observers believe that, because of the controversies surrounding the guidance, the Administration decided to delay issuing final guidance until after the 2012 election, but that, following President Obama's re-election, final guidance will be issued in 2013. According to the 2012 federal regulatory agenda, released in December 2012, EPA and the Corps are developing a proposed rule to determine and clarify whether a water is protected by the CWA. But the agencies do not indicate in the agenda when the proposed rule will be issued, or whether the rulemaking will incorporate revised guidance on CWA jurisdiction.[72] Placement of the rule on the regulatory agenda is the first formal declaration setting out the intent of the agencies.

Filling the Gaps

Whatever gaps in wetland regulation result from reduced federal jurisdiction arguably could be filled, at least in part, by other federal or state and local programs and actions. For example, some assert that wetland restoration and creation programs, such as the Wetlands Reserve Program and the Coastal Wetlands Restoration Program, or private conservation efforts can provide protection, even if the wetland is no longer jurisdictional under federal law.[73] However, others respond that such programs are likely to be incomplete in filling gaps, since they apply primarily to rural areas and do not apply to the one-third of the nation's lands in federal ownership. Moreover, they were never intended to be a seamless group that would fill all possible gaps.

SWANCC, Rapanos, and the subsequent lower court decisions also highlight the role of states in protecting waters not addressed by federal law. From the states' perspective, the federal Section 404 program provides the basis for a consistent national approach to wetlands protection. But if a larger portion of wetlands are no longer jurisdictional, they say, it can be argued that the Section 404 program no longer provides a baseline for consistent, minimum standards to regulate wetlands. None of these court rulings prevents states from protecting non-jurisdictional waters through legislative or administrative action, but few states have done so. Prior to *SWANCC*, 15 states had programs that regulate isolated freshwater wetlands to some degree, but state officials acknowledge that these programs vary substantially from some that are comprehensive in scope to others that are limited by wetland size or have exemptions for agriculture and other activities.[74]

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

[72] See http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=2040-AF30.

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

[74] Kusler, p. 15.

Since 2001, a few states have passed new legislation or updated water quality regulations; the issue remains under consideration in several states, where competing proposals that are viewed by some as strengthening and by others as weakening wetland protection have been debated.[75]

Although some states have authorities to regulate waters of their state, their ability to regulate effectively may be compromised, because state rules often are tied to federal definitions. The gap produced by reduced federal jurisdiction is most evident in the 32 states that have no independent wetlands programs and that typically have relied on CWA Section 401 water quality certification procedures to protect wetlands. Pursuant to Section 401, applicants for a federal permit must obtain a state certification that the project will comply with state water quality standards. Consequently, by conditioning certification, states have the ability to affect the federal permit and to exercise some regulatory control over wetlands without the expense of establishing independent state programs. However, as described previously, diminished CWA jurisdiction which affects the Section 404 program also limits the reach of other CWA programs, including Section 401.

Analysts familiar with the political and fiscal environments of states believe that most states are either reluctant or unable "to step boldly into the breach in federal wetlands protection.... The Corps and the U.S. Environmental Protection Agency, not to mention Congress, have little cause to rely on the notion that states will effectively backstop federal protection for isolated wetlands."[76] Many states are barred from enacting laws more stringent than federal rules, or are reluctant to take action, due to budgetary and resource concerns, as well as apprehension that regulation will be judged to involve "taking" of private property and require compensation.

Legislative Consideration

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

In the 109th Congress, bills were introduced to address the CWA jurisdictional issues in different ways, but Congress took no action. One proposal (the Clean Water Authority Restoration Act of 2005) would have provided a broad statutory definition of "waters of the United States"; would have clarified that the CWA is intended to protect U.S. waters from pollution, not just maintain their navigability; and would have included a set of findings to assert constitutional authority over waters and wetlands. Other legislation intended to restrict regulatory jurisdiction also was introduced (the Federal Wetlands Jurisdiction Act of 2005). It would have narrowed the statutory definition of "navigable waters" and defined certain isolated wetlands that are not adjacent to navigable waters, or non-navigable tributaries and other areas (such as waters connected to

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

[76] Odell, Turner, "On Soggy Ground—State Protection for Isolated Wetlands," *National Wetlands Newsletter,* September-October 2003, p. 10.

jurisdictional waters by ephemeral waters, ditches or pipelines), as not being subject to federal regulatory jurisdiction.

Legislation similar to the Clean Water Authority Restoration Act of 2005 was introduced in the 110th Congress (H.R. 2421 and S. 1870, a slightly different bill). The House Transportation and Infrastructure Committee held hearings on H.R. 2421 and related jurisdictional issues in July 2007, and a third hearing in April 2008. The Senate Environment and Public Works Committee held a non-legislative hearing on issues related to the *Rapanos* and *SWANCC* rulings in December 2007, and a legislative hearing on S. 1870 in April 2008.

Proponents of legislation contend that Congress must clarify the important issues left unsettled by the Supreme Court's 2001 and 2006 rulings and by the Corps/EPA guidance. Bill sponsors argued that the legislation would "reaffirm" what Congress intended when the CWA was enacted in 1972 and what EPA and the Corps had subsequently been practicing until recently, in terms of CWA jurisdiction. However, critics asserted that by making *activities* that affect waters of the United States (in addition to discharges) subject to the CWA's jurisdiction, the legislation would expand federal authority, and thus would have consequences that are likely to increase confusion, rather than settle it. Critics questioned the constitutionality of the bill, arguing that, by including all non-navigable waters in the jurisdiction of the CWA, it would exceed the limits of Congress's authority under the Commerce Clause. Supporters contended that the legislation is properly grounded in Congress's commerce power. The Bush Administration did not take a position on any legislation to clarify the scope of "waters of the United States" protected under the CWA.

Congressional attention resumed in the 111th Congress, especially after statements by Obama Administration officials supporting the need for legislative clarification of these issues. In May 2009, the heads of EPA, the Corps, the Department of Agriculture, the Department of the Interior, and the Council on Environmental Quality jointly wrote to congressional leaders to identify certain principles that might help guide legislative and other actions: Broadly protect the nation's waters; make the definition of covered waters predictable and manageable; promote consistency between CWA and agricultural wetlands programs; and recognize long-standing practices, such as exemptions now in effect only through regulations or guidance.[77]

A modified version of legislation from the previous Congress was introduced in the Senate (S. 787, the Clean Water Restoration Act), and in June 2009, the Senate Environment and Public Works approved it with an amendment in the nature of a full substitute to the bill as introduced. As approved by the committee, S. 787 would have deleted "navigable waters" from the CWA and use "waters of the United States" directly to define jurisdiction. It defined "waters of the United States" by a rewritten version of the regulatory definition in use by EPA and the Corps—

> The term "waters of the United States" means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds, all tributaries of any of the above waters, and all impoundments of the foregoing.

In response to prior criticism, the definition did not encompass *activities* that affect waters of the United States (see above). The bill as reported also instructed that "waters of the United States"

[77] See http://epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord_id=64739ae3-802a-23ad-4c30-36fc58cc1014&Region_id=&Issue_id=.

be construed consistently with (1) how EPA and the Corps interpreted and applied "waters of the United States prior to January 9, 2001, the day before *SWANCC* was decided, and (2) Congress's constitutional authority. The bill would have excluded, as in current EPA-Corps regulations, prior converted cropland and waste treatment systems. It also included a savings section that referenced without paraphrasing eight provisions in CWA §§402(l) and 404(f) which exempt certain types of discharges from CWA permits, such as discharges from normal farming activities, and discharges from maintenance of drainage ditches. The full Senate did not take up the bill.[78]

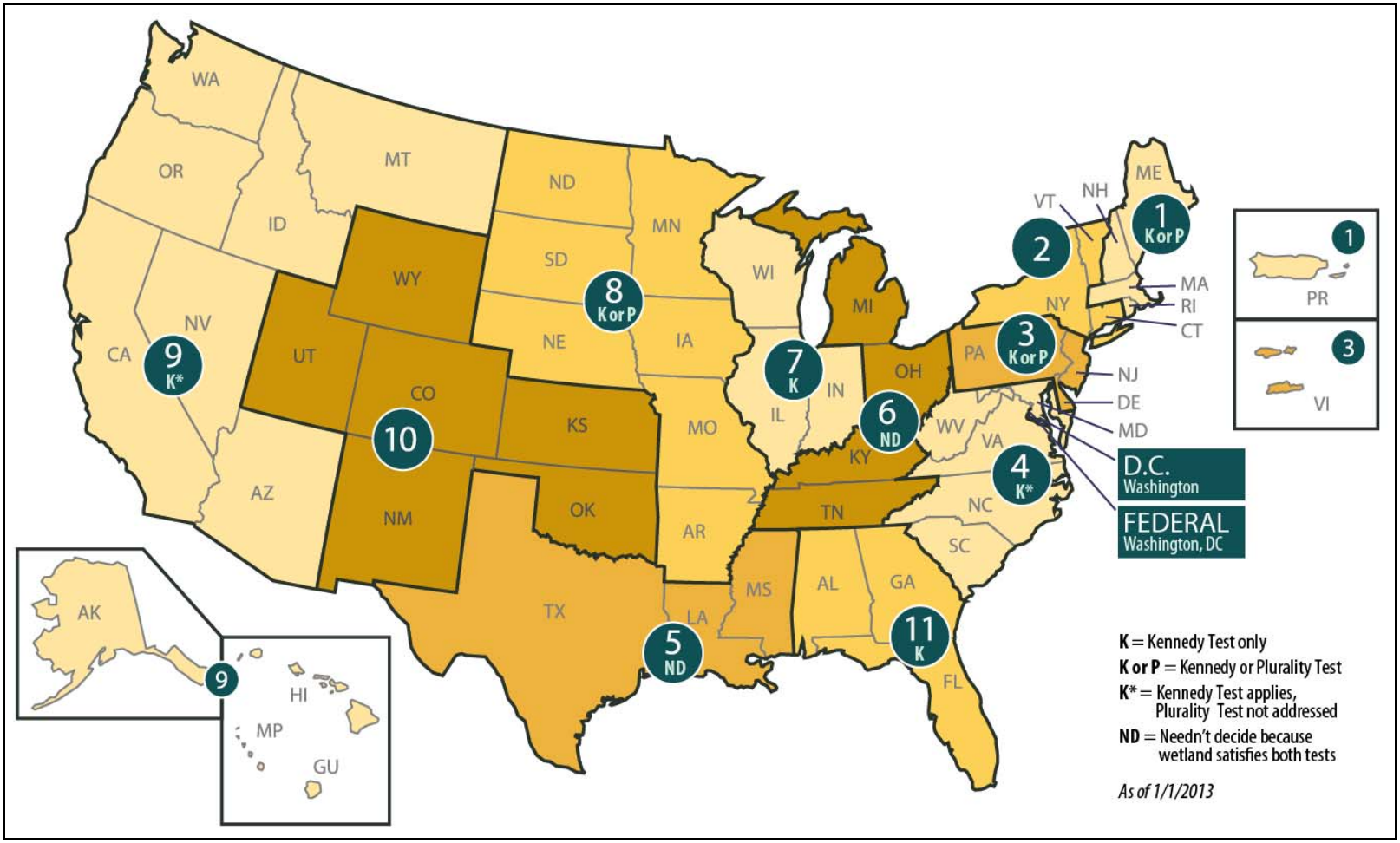
Legislation similar to the bills in the 111th Congress was not re-introduced in the 112th Congress, while, as described above, bills were introduced to block EPA and the Corps from issuing revised "waters of the United States" guidance, as were others to narrow the statutory definition of waters that are subject to CWA jurisdiction. In light of the widely differing views of proponents and opponents, future prospects for legislation on the geographic scope of CWA jurisdiction are highly uncertain. One difficulty of legislating changes to the CWA in order to specify which waters and wetlands are subject to the act's jurisdiction results from the fact that the complex scientific questions about such areas are not easily amenable to precise resolution in law. Debates over whether and how to revise the act highlight the challenges of trying to use the law to do so.

[78] The committee report on the bill, S.Rept. 111-361, was filed in December 2010, 18 months after the committee's action to approve the amended legislation. Companion legislation was introduced in the House in the 111th Congress (H.R. 5088), but no further action occurred.

Appendix. Which *Rapanos* Test Governs?

Figure A-1. Which *Rapanos* Test Governs?

Rulings of Federal Circuit Courts of Appeal Only



Source: Compiled by CRS

Notes: The 13 Federal Judicial Circuits (See 28 U.S.C.A. §28).

Author Contact Information

Robert Meltz
Legislative Attorney
rmeltz@crs.loc.gov, 7-7891

Claudia Copeland
Specialist in Resources and Environmental Policy
ccopeland@crs.loc.gov, 7-7227