NOTES

Federal Wetlands Jurisdiction—The Quagmire of *Rapanos v. United States*

G.W. Jones*

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* Candidate for J.D., University of Pittsburgh School of Law, May 2008.

** The author is a third-year student at the University of Pittsburgh School of Law. The author would like to thank his loving wife Julie for all of her support and encouragement, as well as Robert G. and Stephen M. for their friendship and support, and the Journal staff for their invaluable editing help.

I. INTRODUCTION

Federal jurisdiction over wetlands under the Clean Water Act ("CWA")[1] has always been difficult to delineate. Wetlands, by definition can be difficult to classify as either water or land. The CWA attempts to regulate these areas; it prohibits discharge of material without a permit into "navigable waters," which are in turn defined in section 1362(7) of the CWA as the "waters of the United States."[2] The Army Corps of Engineers is charged with granting permits, and must make the determination of whether or not certain areas of wetlands fall within the jurisdiction of the CWA.[3] The Corps has interpreted the phrase "navigable waters" very broadly to include waters "which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce."[4] The tributaries of any of these "waters" also fall within the Corps' jurisdiction.[5] Intrastate waters are covered if their "use, degradation or destruction . . . could affect interstate or foreign commerce."[6] Wetlands "adjacent" to waters, such as those described above, except waters that are themselves wetlands, also clearly fall within federal jurisdiction under the CWA.[7] Jurisdictional problems arise however when there are bodies of water or wetlands close to but not directly connected to navigable waters. These areas may still have significant impact on the neighboring navigable waters if a developer fills them in, or an industrial site discharges pollutants into them. Thus the Corps of Engineers has sought to regulate some of these wetland areas, in order to hold true to the CWA's overall goals "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[8]

This note analyzes the extent of federal jurisdiction over wetlands adjacent to navigable waters, and how the Supreme Court's fractured decision in *Rapanos v. United States* may have changed this analysis.[9] The highly anticipated decision in *Rapanos* and its companion case, *Carabell v. Army Corps of Engineers*, was handed down on June 19, 2006, with the court

1. 33 U.S.C. § 1362(7) (2000).
2. *Id.* §§ 1311(a), 1342(a), 1362(7).
3. *Id.* § 1344.
4. 33 C.F.R. § 328.3(a)(1) (2006).
5. *Id.* § 328.3(a)(5).
6. *Id.* § 328.3(a)(3).
7. *Id.* § 328.3(a)(1)-(7).
8. 33 U.S.C. § 1251(a) (2000).
9. Rapanos v. United States, 126 S. Ct. 2208 (2006).

issuing five separate opinions, none of which garnered a majority of the Justices.[10] Part II of this note will discuss in detail the facts of the two combined cases, *Rapanos* and *Carabell*, and clarify the multiple opinions and standards articulated by the Court. Part III will discuss the impact of the decision to date on lower courts and how district and circuit courts have struggled to apply the different standards articulated by the Supreme Court. Parts IV and V will discuss the response of other government branches, specifically that of the Environmental Protection Agency ("EPA") and the Department of Justice ("DOJ"). Part VI lays out some of the efforts of non-governmental actors in shaping this area of law. Finally Part VII concludes that the *Rapanos* decision has in fact made the jurisdiction question markedly more complex, as lower courts enforce different standards with barely any guidance from the EPA and the DOJ. Some response or guidance is sorely needed to clear up the confusing and complicated jurisdiction issues surrounding the CWA so that it can be actively and effectively enforced by the Corps of Engineers without needless costly litigation.

A. Supreme Court Interpretation of the Jurisdictional Limits of the CWA

The CWA's last category of waters, wetlands "adjacent" to other navigable waters, is where jurisdiction has been difficult to clearly define. In *United States v. Riverside Bayview Homes*, the Supreme Court acknowledged the difficulty of defining the boundary of jurisdiction under the CWA, but concluded that "the Corps must necessarily choose some point at which water ends and land begins."[11] The *Riverside Bayview* Court upheld the Corps' exercise of jurisdiction over the wetlands in question because they "actually abut[ted] on" navigable waters.[12] After *Riverside Bayview*, the Corps broadened its interpretation of the CWA, asserting jurisdiction over any waters which "are or would be used as habitat" by migratory birds.[13] The Supreme Court later struck down this "Migratory Bird Rule" in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* ("SWANCC"), which involved what Justice Rehnquist referred to as an "abandoned sand and

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10. *Id.*; Carabell v. Army Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2004), *cert. granted and consolidated*, 126 S. Ct. 415 (2006); United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004), *cert. granted and consolidated*, 126 S. Ct. 415.

11. United States v. Riverside Bayview Homes, 474 U.S. 121, 132 (1985).

12. *Id.* at 135.

13. Definition of Waters of the United States, 51 Fed. Reg. 41217 (Nov. 13, 1986) (to be codified at 33 C.F.R. § 328.3).

gravel pit," that the Corps claimed fell within their jurisdiction under the "Migratory Bird Rule."[14] The court reasoned that the "significant nexus between the wetlands and 'navigable waters'" was the critical distinction in *Riverside Bayview*, and found that this nexus was lacking in the wetlands at issue in *SWANCC*.[15] After the Court's decision in *SWANCC* the Corps provided notice of proposed rulemaking in light of the decision, but it never actually amended its regulations.[16] In the years after the *SWANCC* decision, various lower courts upheld the Corps' broad assertions of jurisdiction over a number of "ephemeral channels and drains" as "tributaries" under the Corps regulations, including 2.4 miles of natural streams and manmade ditches next to an interstate highway which intermittently contained surface water flow, as well as the "washes and arroyos of [an] arid development" through which "water courses . . . during periods of heavy rain."[17]

Prior to the grant of certiorari in *Rapanos* and *Carabell*, the question of which wetlands were covered under the CWA was unclear to say the least. *Riverside Bayview* illustrated that wetlands directly abutting navigable waters, qualified as adjacent, and fell within the jurisdiction of the Corps.[18] However, some connection with navigable waters was necessary, as *SWANCC* showed that isolated waters with no connection to traditional navigable waters would not fall under the purview of the CWA.[19] Many had hoped that the Supreme Court's decision in *Rapanos* would provide some clarity in this murky area, but these hopes were dashed when the Court's opinion came down.

The fractured Court issued five separate opinions, none of which received the support of a majority of the Justices.[20] Several different standards were articulated by the Justices, but none provides a clear reasoning for lower courts to now follow.[21] In the several months since the *Rapanos* decision, several circuit courts have dealt with this issue, but they have followed different opinions and adopted different rationales.[22] The Corps has taken

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14. Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs, 531 U.S. 159 (2001).

15. *Id.* at 167-68.

16. Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991-01 (Jan. 15, 2003) (to be codified at 33 C.F.R. § 328.3).

17. Rapanos v. United States, 126 S. Ct. 2208, 2217; *see also* Treacy v. Newdunn Assoc., 344 F.3d 407, 410 (4th Cir. 2003); Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1118 (9th Cir. 2001).

18. United States v. Riverside Bayview Homes, 474 U.S. 121 (1985).

19. *Solid Waste Agency of N. Cook County*, 531 U.S. at 159.

20. *Rapanos*, 126 S. Ct. at 2208.

21. *Id.*

22. *See* United States v. Johnson, 467 F.3d 56 (1st Cir. 2006); United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006); N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006).

steps to bring itself in line with the Court's decision by proposing amendments to their rules, but these have not yet been implemented, and so their impact is as yet unclear.[23] The EPA Appeals Board has also decided several administrative actions, remanding them back to the Administrative Law Judge so that they can be considered in light of *Rapanos*, but the Appeals Board provided little if any guidance as to which opinion should control.[24] The EPA has been working closely with the Corps of Engineers to draft a directive as to how courts should interpret *Rapanos*, though nothing has been officially released.[25] Congress has responded as well; following the 2006 midterm elections, members of both the House and Senate raised the issue of clarifying federal wetlands regulation.[26]

So far, the *Rapanos* decision itself has done little to clarify this area of law, and has instead made the issues more complex and the outcome of future cases quite difficult to predict. The issues may not clear up until the Supreme Court grants certiorari in a future case, or until the Corps or EPA issues clear precise directives on how to implement the decision. A handful of conflicting decisions already exist at the circuit court level, and this number will only grow.

II. THE *RAPANOS* DECISION

The decision in *Rapanos* was extremely convoluted, with five separate opinions being written by the divided Court.[27] The Court concluded, by a 5-4 vote, that the combined cases should each be vacated and remanded to the district court for further proceedings.[28] However no single controlling standard was articulated to provide guidance on remand. Instead, three separate standards were articulated: that of Justice Scalia (the plurality, to which four Justices subscribed), that of Justice Stevens (the dissent, which

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23. Proposal To Reissue and Modify Nationwide Permits—Ephemeral Streams, 71 Fed. Reg. 56261 (Sept. 26, 2006) [hereinafter 71 Fed. Reg. 56261].

24. *In re* Adams, US EPA OALJ, Docket No. CWA-10-2004-0156 (Oct. 18, 2006); *In re* Smith Farm Enters., LLC, US EPA Environmental Appeals Board, Docket No. CWA-3-2001-0022 (Oct. 6, 2006); *In re* Vico Constr. Corp., US EPA EAB, Docket No. CWA-3-2001-0021 (Oct. 6, 2006).

25. Lucy Kafanov, *No Surprises Expected in Post-Rapanos Guidance, Officials Say*, 10 ENVIRONMENT & ENERGY DAILY PM 9, Jan. 22, 2007.

26. Lucy Kafanov, *EPW Panel Under Boxer to Push for Wetlands Protection, Tax to Fund Cleanups*, 10 ENVIRONMENT & ENERGY DAILY 9, Dec. 6, 2006.

27. Rapanos v. United States, 126 S. Ct. 2208 (2006).

28. *Id.*

commanded another four votes), and Justice Kennedy's standard, to which no other Justice joined.[29]

Since none of these opinions was able to gain at least five votes, none is binding on the lower courts.[30] However, in *Marks v. United States*, the Supreme Court stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[31] This standard seems to provide some guidance for lower courts; however it raises the question of which of the opinions is based on the "narrowest grounds."[32] In order to fully understand the decision and to determine the future landscape of this area, it is necessary to analyze the two key opinions (that of the plurality and that of Justice Kennedy) and to a lesser extent, the dissenting opinion of Justice Stevens and concurring opinion of Chief Justice Roberts.

A. Facts of Rapanos *and* Carabell

Rapanos involved two consolidated cases from the Sixth Circuit.[33] In the first case, *Rapanos v. United States*, the petitioner, John Rapanos, deposited fill material without a permit into wetlands on three separate sites.[34] The first parcel, known as "the Salzburg site" consisted of 230 acres of which 28 were wetlands. The district court found that water from these wetlands spills into the Hoppler Drain to the north of the property, which carries water to Hoppler Creek, which in turn connects with the Kawkawlin River, which is navigable.[35] The second site, known as the Hines Road site covers 275 acres, and contains 64 acres of wetlands.[36] The wetlands have a surface water connection to the Rose Drain, which carries water to the Tittabawassee River, a navigable waterway.[37] The third parcel, the Pine River site, covers roughly 200 acres, of which 49 are wetlands.[38] Similarly, the wetlands shared a

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29. *Id.*
30. *See* Marks v. United States, 430 U.S. 188 (1997).
31. *Id.* at 193.
32. *Id.*
33. United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004); Carabell v. Army Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2005).
34. Rapanos v. United States, 126 S. Ct. 2208, 2219 (2006).
35. *Id.* at 2238 (Kennedy, J., concurring in the judgment).
36. *Id.*
37. *Id.*
38. *Id.*

surface-water connection with the nearby Pine River, which along with the Kawkawlin River, empties into Lake Huron.[39]

The second case, *Carabell v. Army Corps of Engineers*, involved a small 16 acre parcel, of which nearly 16 acres are wetlands.[40] The petitioners were denied a permit by the Corps after they sought to fill the wetlands which are located roughly one mile from 430-square mile Lake St. Clair.[41] The wetlands were bordered on one side by a man-made berm, which most of the time blocked surface water flow from the wetlands into a ditch on the other side of the berm.[42] The trial court heard testimony that if the property were filled in, "you would start seeing some overflow" during a large storm.[43] On the northern end of the property, the ditch connects with the Sutherland-Oemig Drain, which carries water year-round and empties into Auvase Creek, which in turn empties into Lake St. Clair.[44] At the southern end of the property the same ditch connects to other ditches which again empty into Auvase Creek.[45]

B. The Plurality Opinion

Justice Scalia, writing for the plurality, concluded that none of the wetlands at issue fell within the jurisdiction of the Corps under the CWA because the wetlands were not "waters of the United States" themselves, nor were they "adjacent to" any "waters of the United States" under the Corps' regulations.[46] The plurality concluded that the Corps' regulations, as they were then written, were overbroad and not "based on a permissible construction of the statute."[47]

In the view of the plurality, the phrase "the waters of the United States" should be limited to "only those relatively permanent, standing or continuously flowing bodies of water," commonly referred to as streams, lakes, rivers, or oceans.[48] According to the plurality, the phrase, and thus the reach of the Corps' jurisdiction, should not include "channels through which

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39. *Id.*
40. *Id.* at 2239.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 2235.
47. *Id.* at 2225 (*quoting* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).
48. *Id.*

water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[49] Thus, to be covered under the CWA, a wetland must be adjacent to a "water of the United States," or in the words of the plurality, "a relatively permanent body of water connected to traditional interstate navigable waters."[50] Under the plurality's standard, only "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right" can be deemed to be "adjacent to" navigable waters.[51]

The wetlands at issue in these two cases fell outside of the jurisdiction of the Corps under the plurality's standard because they lacked a "continuous surface connection" to "waters of the United States," and thus were not "adjacent" to CWA covered "waters."[52] Under this formulation, the ditches and drains connecting the Rapanos and Carabell sites to traditional navigable in fact waters would also have to be "waters of the United States" themselves in order to fall within the jurisdiction of the Corps of Engineers. Since they are only intermittent or ephemeral, and only "periodically provide drainage for rainfall," these various drains and ditches would not be considered "waters of the United States" themselves under the plurality's standard.[53] In addition, even if the ditches and drains were sufficiently permanent to constitute "waters of the United States" under the plurality's formulation, the wetlands at issue would have to share a "continuous surface connection" with the ditches and drains.[54] Because this is not the case, these wetlands are not "adjacent to" waters which themselves would be covered by the CWA.

The standard articulated by the plurality is the most restrictive of the Corps and the most limiting of federal jurisdiction under the CWA. This not surprising, since the plurality was made up of the four Justices most in favor of restricting federal power (Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito). The plurality's standard, if followed by lower courts, could have the most dramatic impact on federal jurisdiction, by removing many wetlands from the protection of the CWA even though discharge of fill or other materials into these wetlands might have a critical impact on other waters downstream. This limiting definition seems to contravene the purposes of the CWA, as it would provide no protection

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49. *Id.*
50. *Id.* at 2227.
51. *Id.* at 2226.
52. *Id.* at 2227.
53. *Id.* at 2225.
54. *Id.* at 2227.

against someone dumping pollutants into these wetlands, though those pollutants could reach local lakes and rivers, or even major bodies of water such as Lake Huron in the case of Pine River site in *Rapanos*.[55]

C. Justice Kennedy's "Significant Nexus" Standard

Perhaps the most critical voice in the Rapanos mix is that of Justice Kennedy, who attempts to reach a middle ground between the plurality and the dissent. Justice Kennedy provides the fifth vote to vacate and remand each case to the district court.[56] However, he lays out a framework far different from that offered by the plurality.[57] In Justice Kennedy's view, the proper test is that in order to fall under the jurisdiction of the CWA, there must be a "significant nexus" between the wetland at issue and waters which, "are or were navigable in fact or that could reasonably be so made."[58] Absent this link, the Corps cannot assert jurisdiction over a wetland located in close proximity to a navigable water.[59] This nexus, according to Justice Kennedy, was the key distinction in *Riverside Bayview* and *SWANCC*.[60] The wetland at issue in *Riverside Bayview* directly abutted a creek which was navigable in fact.[61] The waters at issue in *SWANCC* however, consisted of abandoned mining pits that over time became a "scattering of permanent and seasonal ponds" with no connection to waters which were navigable in fact.[62] The "significant nexus" to a navigable in fact water was the critical factor in the Court's upholding of the Corps' exercise of jurisdiction in *Riverside Bayview*; whereas, the lack of any such "significant nexus" led the Court to conclude in *SWANCC* that the Corps had overstepped its jurisdictional bounds.[63] Justice Kennedy concludes that where the Corps seeks to regulate wetlands based on their adjacency to the non-navigable tributaries of navigable waters, "the Corps must establish a significant nexus on a case-by-case basis."[64] Thus, here, where jurisdiction is based on adjacency to non-navigable tributaries, the

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55. *Id.* at 2238.
56. *Id.* at 2252.
57. *Id.* at 2236-52.
58. *Id.* at 2236 (*quoting* Solid Waste Agency of N. Cook County. v. Army Corps of Eng'rs, 531 U.S. 159, 167 (2001)).
59. *Id.*
60. *Id.* at 2240-41.
61. *Id.*
62. *Id.* at 2240 (*quoting Solid Waste Agency of N. Cook County*, 531 U.S. at 163).
63. *Id.*
64. *Id.* at 2249.

Corps must establish the presence of a significant nexus between the wetlands and the non-navigable tributaries.

In laying out this test, Justice Kennedy discusses several factors serving to illustrate the presence or absence of the requisite nexus to a navigable water.[65] While he does not provide much specific guidance, Justice Kennedy states that wetlands will possess the appropriate nexus if they "significantly affect the chemical, physical, and biological integrity of other covered waters," those which are or could be navigable in fact.[66] On the other hand, when wetlands' effect on the quality of neighboring waters is "speculative or insubstantial," they do not fall within the jurisdiction of the Corps under the statute.[67]

Given that the focus of this test is the wetlands' effect on navigable in fact waters, Justice Kennedy discusses several considerations that, "*may* be important in assessing the nexus," but is less than precise as to how exactly these are to be weighed.[68] First, the "nexus" must be examined in light of the overall goals and purposes of the CWA, namely to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[69] Kennedy indicates that the quality and regularity of flow in the adjacent tributaries may be important, but he does not expand on this any further.[70] Physical proximity to navigable waters is another important factor in this analysis.[71] He also indicates that surface water connections to the tributaries of navigable waters are important, especially in addition to evidence regarding the "significance of the tributaries to which the wetlands are connected."[72] However, he does firmly state that the presence of a mere hydrological connection is not required to establish a significant nexus, and in many cases such a connection may be too insubstantial to establish the required nexus.[73] Justice Kennedy concludes that the lower courts were correct in choosing to apply the significant nexus standard; however, they incorrectly applied the standard.[74] The district courts did hear evidence on some of these factors, but

65. *Id.* at 2248.
66. *Id.*
67. *Id.*
68. *Id.* at 2251 (emphasis added).
69. *Id.* at 2248; 33 U.S.C. § 1251(a) (2000).
70. *Id.* at 2251.
71. *Id.* at 2249.
72. *Id.* at 2250.
73. *Id.* at 2250-51.
74. *Id.* at 2236.

because not all the factors were fully assessed, Justice Kennedy voted to remand for appropriate consideration of the significant nexus standard.[75]

D. The Dissent

Justice Stevens, in dissent, takes a polar opposite view to that of the plurality. While Justice Scalia sees the Corps exercising "the discretion of an enlightened despot" in deciding which wetlands are covered under the CWA, the dissent defers completely to the judgment of the Corps.[76] In fact Justice Stevens views the Corps' inclusion of these wetlands within the CWA as a "quintessential example of the Executive's reasonable interpretation of a statutory provision."[77] Justice Stevens is quite critical of Justice Kennedy's approach, finding no statutory basis for the "significant nexus" test in the CWA.[78] Justice Stevens also suggests that because no opinion was able to persuade a majority of the Justices, the jurisdictional requirement of the CWA can be satisfied if *either* the plurality's standard or Justice Kennedy's standard is met.[79]

E. Justice Roberts' Concurrence

Chief Justice Roberts's separate concurring opinion was perhaps the most illustrative of the impact of *Rapanos*. The Chief Justice criticizes the Corps and the EPA for not changing their stance on jurisdiction after the decision in *SWANCC*. After that decision, the two agencies proposed amendments to CWA regulations in light of *SWANCC*; however the proposed rulemaking "went nowhere."[80] According to the Chief Justice, instead of following the direction of the Court, the Corps "chose to adhere to its essentially boundless view of the scope of its power."[81] He indicates that this confusion and the entire case perhaps could have been avoided if the Corps and EPA had been more responsive.[82] He also expresses his regret that no decision could carry

75. *Id.* at 2252.
76. *Id.* at 2214, 2252.
77. *Id.* at 2252.
78. *Id.* at 2264.
79. *Id.* at 2265.
80. *Id.* at 2236.
81. *Id.*
82. *Id.*

a majority, and predicts that, "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis."[83]

III. IMPACT OF THE *RAPANOS* DECISION ON RECENT LOWER COURT DECISIONS

The question now faced by the lower courts, private land developers, and their attorneys is, what standard should be followed? A number of lower courts have already faced this issue, and their analysis may be illustrative of the future course of litigation on this issue. The Corps has also proposed amended regulations, but these have yet to go into effect. Therefore, the potential impact of the proposed amended regulations is unclear. The EPA has issued several appeals decisions, which at least provide some guidance for the future. As yet, Congress has made no move to amend the CWA and it is unknown when the Supreme Court will again take up the issue as cases are petitioned for appeal.

A. Early District Court Analysis

The first court to decide a case under the *Rapanos* decision was the United States District Court for the Northern District of Texas, in the case of *United States v. Chevron Pipe Line Co.*[84] This case dealt with discharge of oil from a failed pipeline into an unnamed channel joining Ennis Creek approximately 500 feet from the spill site.[85] Ennis Creek then extends over seventeen miles to where it joins Rough Creek, which itself extends nearly 24 miles where it joins the Brazos River.[86] The unnamed channel, Ennis Creek, and Rough Creek are all defined as "intermittent" streams that typically only carry water after significant rainfall events.[87] In analyzing whether the unnamed channel and Ennis Creek fell within federal jurisdiction, the court discussed the *Rapanos* decision and chose to follow Justice Kennedy's logic, although it criticized Justice Kennedy's opinion for not providing any guidance.[88] The district court looked to the prior reasoning of the Fifth Circuit

83. *Id.*
84. United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605 (N.D. Tex. 2006).
85. *Id.* at 607-08.
86. *Id.* at 608.
87. *Id.*
88. *Id.* at 613.

to fill in the gaps of the "significant nexus" test.[89] The district court concluded that a "significant nexus" did not exist between the mainly dry Ennis Creek bed and unnamed channels to the navigable in fact Brazos River, based only on the fact that one feeds into the next "during the rare times of actual flow."[90] While Justice Kennedy provided little guidance regarding the factors to take into account in determining a "significant nexus," the *Chevron Pipe Line* court relied heavily on whether any oil from the spill was *actually* transported from the spill site to a navigable in fact water.[91]

The court noted that the dry unnamed channel is "strikingly similar" to the dry arroyo described by Justice Scalia in the plurality opinion as the extreme limit of the Corps' pre-*Rapanos* jurisdiction.[92] However, it chose to follow Justice Kennedy's reasoning, supplementing it with prior case law from the Fifth Circuit.[93] This case provides some indication that lower courts may predominantly follow Justice Kennedy's "significant nexus" test, possibly adding to or developing their own list of factors for determining the existence of that nexus. However, the influence of *Chevron Pipe Line Co.* on future wetlands cases may be limited at best, because it did not involve wetlands and is not an appellate decision.

The District Court for the Middle District of Florida took a drastically different approach in *United States v. Evans*, adopting the suggestion of Justice Stevens' dissenting opinion that future courts may use either the plurality's test or Justice Kennedy's test to establish jurisdiction.[94] Looking to *Marks v. United States*, the court sought to find the position taken by those Justices concurring on the "narrowest grounds."[95] The court concluded that neither the plurality's standard nor Justice Kennedy's would control, and instead held that the jurisdictional requirement would be met if *either* the plurality's test or the "general parameters" of Kennedy's concurrence were satisfied.[96] This holding does little to clear up the *Rapanos* decision, and provides little practical guidance as the court will consider two vague standards, either one of which may be sufficient to establish jurisdiction over wetlands or other waters.

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89. *Id.*
90. *Id.*
91. *Id.* at 614-15.
92. *Id.* at 613.
93. *Id.*
94. United States v. Evans, 36 Envtl. L. Rep. 20, 1652006 WL 2221629, 19 (M.D. Fla. 2006).
95. *Id.* at *19 (*citing* Marks v. United States, 430 U.S. 188, 193 (1997)).
96. *Id.*

B. Circuit Court Decisions—Development of Differing Approaches

The first circuit court to discuss *Rapanos* in detail was the Ninth Circuit, in *Northern California River Watch v. City of Healdsburg*, which dealt with a small pond in a rock quarry in Northern California that contained wetlands adjacent to a navigable water, the Russian River.[97] The Ninth Circuit explicitly stated that Justice Kennedy's opinion "provides the controlling rule of law."[98] The court found that the mere adjacency of Basalt Pond and its wetlands to the Russian River was not enough to indicate the presence of the required nexus.[99] The critical fact, according to the court, was that the wetlands are separated from the Russian River by only a man-made levee, which allows water to seep directly from the wetlands into the river.[100] The court also gave weight to the fact that when the Russian River overflows its banks, its waters commingle with the waters contained in the wetlands and the pond.[101] Furthermore, a significant ecological connection existed between the river and the wetlands, as the substantial bird, fish and mammal populations supported by the wetlands are "an integral part of and indistinguishable from" the ecosystem of the Russian River.[102] The court concluded that Basalt Pond "significantly affects the physical, biological and chemical integrity" of the River, and as such it warrants protection under CWA.[103]

The connection between the Basalt Pond and the navigable Russian River in *Healdsburg* is at the opposite extreme from the connection in *Chevron Pipe Line Co.* In *Healdsburg*, the Basalt Pond and Russian River are close to indistinguishable, sustaining the same animal life and commingling waters.[104] This is the opposite from the connection in *Chevron Pipe Line Co.*, where more than thirty miles of interconnected dry creek beds linked to a navigable in fact river.[105] The decision provides some explanation of what factors specifically the court will weigh in determining whether the "significant nexus" test has been met, as it emphasized as most important the fact that the wetland in question, "significantly affects the physical, biological and

97. N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006).
98. *Id.* at 1029; *see* Marks v. United States, 430 U.S. 188, 193 (1997).
99. N. Cal. River Watch v. City of Healdsburg, 457 F.3d at 130 (9th Cir. 2006).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*; *see* Rapanos v. United States, 126 S. Ct. 2208, 2248 (2006).
104. *Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006); *Healdsburg*, 457 F.3d at 1030.
105. *Chevron Pipe Line Co.*, 437 F. Supp. 2d at 613.

chemical integrity" of the adjacent navigable in fact water.[106] This standard requires a very fact specific inquiry in each case, but at least establishes some framework for the lower court to utilize on remand, and for other courts to follow as well.

Following the *Healdsburg* decision, the Northern District of California adhered to the stance taken by the circuit court in *Environmental Protection Information Center v. Pacific Lumber Co.*[107] The district court followed the Ninth Circuit, holding that Justice Kennedy's test controls, and very closely followed the factors for assessing significant nexus elaborated by the Healdsburg court.[108] For example, the defendant, Pacific Lumber Co. (PALCO) argued that the plaintiff must offer proof to "demonstrate the flow of pollutant along" the intermediate tributary to the navigable in fact water.[109] However the court rejected this argument as being consistent with Justice Scalia's standard, and therefore not part of the Ninth Circuit analysis.[110] This case may illustrate that the Ninth Circuit will follow a very strict interpretation of *Rapanos*, following only the standard articulated by Justice Kennedy, with no reliance whatsoever on the plurality's standard.

The Seventh Circuit also chose to follow Justice Kennedy's standard.[111] In *United States v. Gerke Excavating Inc.*, the court concluded, under the rationale of *Marks v. United States*, that Justice Kennedy's opinion was the narrowest, and therefore the controlling legal standard.[112] The court followed Justice Kennedy's basic approach, but did little to elaborate on Justice Kennedy's reasoning and remanded the case back to the district court for further factfinding proceedings.[113]

The Sixth Circuit, the circuit from which both *Rapanos* and *Carabell* originated, has not yet decided any cases on this point. However, it did decide *United States v. Morrison*, a very similar case, based on pre-*Rapanos* case law.[114] The Court issued an unpublished opinion in which it analyzed the case according to the "significant nexus" standard.[115] After *Rapanos* was decided, the Sixth Circuit was petitioned to rehear *Morrison* again, in light of the

106. *Healdsburg*, 457 F.3d at 1030.
107. Envtl. Prot. Info. Cent. v. Pac. Lumber Co., 469 F. Supp. 2d 803 (N.D. Cal. 2007).
108. *Id.* at 823-25.
109. *Id.* at 824.
110. *Id.*
111. United States v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006).
112. *Id.*
113. *Id.* at 725.
114. United States v. Morrison, 178 Fed. Appx. 481 (C.A.6 Mich. 2006) (unpublished decision).
115. *Id.* at 483.

changes in the law.[116] However the Sixth Circuit refused to do so, and the United States Supreme Court denied certiorari on March 5th, 2007.[117]

The First Circuit, instead of following the approach of the Ninth and Seventh Circuits (the approach of Justice Kennedy), took the approach of the district court in *United States v. Evans*, concluding that the jurisdictional requirement will be met if either the plurality's standard or Justice Kennedy's standard is satisfied.[118] The court in *United States v. Johnson* reasoned that Justice Stevens' "either-or" approach would be the most practical way to ensure that future cases would be decided on grounds that would command a majority of the Supreme Court.[119] For example, if in a particular case, Justice Kennedy's test is satisfied, then at least five Justices (Justice Kennedy plus the four dissenters) would support the exercise of jurisdiction.[120] If the test of the plurality is satisfied, then likely eight Justices would support the exercise of jurisdiction (the four Justices of the plurality, plus the four dissenters).[121] The *Johnson* court then considered the hypothetical case where there exists only a slight surface hydrological connection between wetlands and navigable in fact waters.[122] Arguably Justice Kennedy would vote against the exercise of jurisdiction because of the lack of a significant nexus, whereas the other eight Justices (plurality plus the dissent) would allow this exercise of jurisdiction because of the surface water connection.[123] If Justice Kennedy's test were the controlling approach, the case would come out completely contrary to the view of a majority of the *Rapanos* Court. The *Johnson* court held that the "either-or" approach avoids this potential problem, and adheres most closely to the "narrowest grounds" under *Marks v. United States*.[124]

The most recent opinions discussing *Rapanos* came from district courts in California and Connecticut. As discussed above, the District Court for the Northern District of California followed the Ninth Circuit's opinion in *Healdsburg*.[125] The District Court for the District of Connecticut took the

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116. Appellants Petition for Rehearing En Banc, United States v. Morrison, 178 Fed. Appx. 481 (6th Cir. June 26, 2006).

117. Morrison v. United States, 127 S. Ct. 1485 (2006) (*petition for cert. denied*).

118. United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006).

119. *Id.* at 64.

120. *Id.*

121. *Id.*

122. *Id.* at 62.

123. *Id.*

124. *Id.* at 66.

125. Envtl. Prot. Info. Cent. v. Pac. Lumber Co., 469 F. Supp. 2d 803 (N.D. Cal. 2007).

"either-or" approach, analyzing the case under both standards.[126] The district court discussed recent decisions regarding *Rapanos*, describing the approach of the First Circuit in *Johnson* as the "common sense approach."[127] Even though it indicates that the "either-or" standard and the significant nexus standard will often yield the same result, the court followed the *Johnson* approach.[128]

While the *Johnson* approach may adhere most closely to the intentions of the Justices in *Rapanos*, as a practical matter, it provides less certainty and clarity. With two vastly different standards, either one of which could control in any given case, the Corps of Engineers is forced to make multiple determinations in deciding to grant permits. Justice Scalia, in the plurality opinion, points out the already high cost of obtaining a permit from the Corps.[129] However, if more courts follow this approach, these costs will almost certainly increase as the Corps may have to make multiple determinations before granting a permit to a developer. The cost of going forward with a suit will increase as well. An attorney may be forced to attempt to prove two separate and distinct theories of jurisdiction, not knowing which one the court will find more persuasive, but knowing that focusing on only one theory would almost certainly risk a malpractice suit if the court found the other approach more convincing.

IV. ADMINISTRATIVE RESPONSES TO *RAPANOS*

A. EPA Appeals Board Decisions

The EPA's main response thus far has come in the form of Environmental Appeals Board decisions regarding jurisdiction over wetlands under the CWA. Two of the Board's decisions did relatively little except remand the respective cases to the Administrative Law Judge (ALJ) to conduct further proceedings and collect evidence "consistent with . . . the Court's *opinions* in *Rapanos*."[130] The two decisions contain almost identical language, and each note specifically that, "the Board makes no findings at this time as to what

126. Simsbury-Avon Pres. Soc., LLC v. Metacon Gun Club, Inc., 472 F. Supp. 2d 219 (D. Conn. 2007).

127. *Id.* at 225-29.

128. *Id.*

129. Rapanos v. United States, 126 S. Ct. 2208, 2214 (2006).

130. *In re* Smith Farm Enters. LLC, 2006 EPA App. LEXIS 49, at *6-7 (2006) (emphasis added); *see also In re* Vico Constr. Corp., 2006 EPA App. LEXIS 50, at *5-6 (2006).

jurisdictional test or tests should govern on remand."[131] However, the Board does note in each decision that its approach is consistent with that of the Seventh Circuit in *United States v. Gerke Excavating Inc.*, and the Board quotes *Gerke Excavating Inc.* explaining that Justice Kennedy's standard "must govern the further stages of this litigation."[132] This may be at least an implicit endorsement of Justice Kennedy's rationale, but until the ALJ re-hears each of these cases, lack of clarity exists as to which of the *Rapanos* standards the ALJ will follow.

A third case decided by the EPA ALJ gives some insight into the court's analysis, however it provides conflicting signals.[133] The *Adams* court discusses the *Rapanos* decision, mainly to point out that the "decision has no effect on this case" because the discharge of dredged material was not made into a wetland, but directly into a stream.[134] However, in a footnote, the court discusses the parties' supplemental (post-*Rapanos*) briefs, specifically that of the EPA, which concludes that *Rapanos* permits both the plurality's test and Justice Kennedy's test to determine CWA jurisdiction.[135] Despite this indication that the EPA itself endorses the *Johnson* approach, the court soon after indicates that the opinion of Justice Kennedy is "for now, the only opinion that matters."[136] Although it seems contrary to the view proposed by the EPA itself, the court seems strongly in favor of applying only Justice Kennedy's "significant nexus" approach.[137] This may prove true, and remains to be seen as the *Smith Farm* and *Vico Construction* cases are now back before the ALJ. As is the case with the various district and circuit court cases, only time will tell as cases proceed at the lower court level.

B. Change in Corps of Engineers' Stance

To date, the Corps of Engineers has not amended its regulations in any way, but it has proposed changes to its nationwide permits (NWPs) in

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131. *In re* Smith Farm Entrs., LLC, 2006 EPA App. LEXIS 49, at *7, note 6; *In re* Vico Constr. Corp., 2006 EPA App. 50, at *6, note 1.

132. *In re* Smith Farm Entrs., LLC, 2006 EPA App. LEXIS 49, at *6-7; *In re* Vico Constr. Corp., 2006 EPA App. 50, at *5 (*both quoting* United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006)).

133. *In re* Adams, 2006 EPA ALJ LEXIS 33, at *66-69 (Oct. 18, 2006).

134. *Id.* at 67-70.

135. *Id.* at 67, note 61 (*citing* EPA Supp. Br. at 11-12).

136. *Id.* at 68.

137. *Id.*

response to the *Rapanos* decision.[138] In its "Proposal to Reissue and Modify Nationwide Permits," the Corps must post the proposal so that it may remain open for public comment for sixty days.[139] In the proposal, the Corps lays out its post-*Rapanos* approach to jurisdictional determinations regarding intermittent and ephemeral streams and their adjacent wetlands. It acknowledges that the decision raises questions about its jurisdiction over "*some*" of these intermittent and ephemeral streams.[140] The Corps states that it "will asses jurisdiction regarding such waters on a case-by-case basis in accordance with evolving case law and any future guidance that may be issued by appropriate executive branch agencies."[141]

The public comment period for the proposal ended on November 27, 2006 and nothing has been instituted.[142] Therefore, the future of the proposal is not yet known. However, some industry groups have urged that these new permits be postponed until the EPA and the Corps publish their anticipated guidance on the state of the law.[143] The Water Resources Control Board has criticized the proposed nationwide permits, stating that the proposal does not address the key question of whether the federal government has the power to regulate wetlands and forces the Corps to make "case-by-case" determinations.[144]

The new NWPs provide some insight as to the possible thinking of the Corps regarding the *Rapanos* decision.[145] For example, the Corps states that the decision raises questions about its jurisdiction over "some" intermittent and ephemeral streams and their adjacent wetlands and thus indicates that it does not believe the plurality's approach to be the controlling standard.[146] The plurality opinion plainly states that the phrase "waters of the United States," over which the Corps has jurisdiction, "does not include channels through which water flows intermittently or ephemerally."[147] If the Corps understood the plurality to be the controlling standard, then there would be no question raised as to its jurisdiction over intermittent and ephemeral streams, because under the plurality's opinion, the Corps does not have jurisdiction over these

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138. 71 Fed. Reg. 56261, *supra* note 23.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Industry Seeks to Halt Wetlands Permits Over 'Ephemeral' Streams*, 23 ENVIRONMENTAL POLICY ALERT 26, Dec. 20, 2006.

144. *Id.*

145. 71 Fed. Reg. 56261, *supra* note 23.

146. *Id.*

147. Rapanos v. United States, 126 S. Ct. 2208, 2225 (2006).

"waters." However the Corps' comments on the NWPs indicate that they are "proposing greater protection for ephemeral streams," which is completely contrary to the plurality's position.[148] Perhaps the Corps' language indicates that it instead understands Justice Kennedy's standard to be controlling. This uncertainty and lack of clarity is what has led many industry groups to speak out against the new NWPs.[149]

What is certain is that the Corps must make case-by-case determinations based upon evolving case law.[150] This poses problems for the Corps in terms of its everyday enforcement, and decisions regarding permits. While the new NWPs arguably give the Corps more flexibility, it is likely that decisions will take longer to make, which in turn will likely increase the cost to developers in obtaining permits. There is also the obvious cost of litigation as the Corps defends future suits. With no one really winning in *Rapanos*, groups on both sides of the issue (developers and builders on one hand, environmental activists on the other hand) will most certainly attempt to bring future cases in an effort to obtain some clarity.

C. EPA and Corps of Engineers Joint Guidance

While the EPA Appeals Board decisions and proposed rulemaking by the Corps of Engineers have not provided much guidance the two agencies have been working jointly to provide official guidance as to how future cases should be handled.[151] The EPA has been working very closely with the Corps of Engineers and the Department of Justice since the *Rapanos* decision came down to draft guidance addressing the problems raised by the *Rapanos* decision.[152] Nothing has been released yet, but comments by high ranking EPA officials indicate that the position of the EPA will be that a wetland satisfies jurisdictional requirements if it meets either Justice Kennedy's test, or that of the plurality.[153] This position is consistent with the approach taken by the Department of Justice ("DOJ").[154] Officials would not comment on when exactly these guidelines would be released, but indicated that they were "very close" to publishing them.[155] Some comments have indicated that the

148. 71 Fed. Reg. 56261, *supra* note 23.
149. *Industry Seeks to Halt Wetland Permits Over 'Ephemeral" Streams*, *supra* note 143.
150. 71 Fed. Reg. 56261, *supra* note 23.
151. Kafanov, *supra* note 25.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

DOJ, EPA, and the Corps are currently "struggling' to develop the guidance," and though EPA officials ensure the guidance will be published soon, they refuse to give any timeframe.[156]

It is hoped that this guidance will provide some measure of clarity in the area, given that the EPA, the Corps of Engineers, and the DOJ have all endorsed one position. However, the effect this guidance will have on the 9th and 7th Circuits, which have already strongly endorsed Justice Kennedy's test, cannot be foreseen.

The same position expected to be articulated in the EPA guidance was urged by the DOJ in briefs before the 9th Circuit, but was not adopted.[157] The DOJ has taken a position consistent with that of the expected EPA guidance in several governmental briefs, arguing that wetlands should be deemed jurisdictional if they satisfy either Justice Kennedy's test, or the plurality's test.[158] However, the most recent brief written by the DOJ makes no mention of the guidance being prepared by the EPA.[159] The DOJ has also asked the 7th and 9th Circuits, the two circuit courts which have explicitly endorsed Justice Kennedy's test, to adopt the "either-or" approach adopted in several Circuits and endorsed by the EPA and Corps of Engineers.[160] It is unclear how persuasive the official EPA guidance will be, given the 9th Circuit's strong endorsement of Justice Kennedy's standard in *Healdsburg*.[161]

V. CONGRESSIONAL RESPONSE

The legislative branch is typically the slowest to react, but there are some indications that the incoming 110th Congress will pay close attention to this issue. No legislative action was taken after the Supreme Court struck down the "Migratory Bird Rule" in *SWANCC*, even though the Corps did little if anything to limit its jurisdiction.[162] However, it is now more likely that Congress will act, given the controversy that has already arisen in the wake of *Rapanos*.

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156. *Id.*

157. Brief for the Respondents in Opposition to Petition for Certiorari, Baccarat Freemont Developers, LLC v. U.S. Army Corps of Eng'rs, 2007 WL 30555 (Jan. 3, 2007).

158. *U.S. DOJ Brief Raises Questions Over Federal Water Jurisdiction*, 18 INSIDE CAL/EPA 5, Feb. 2, 2007.

159. *Id.*; *see* Brief for the Respondents in Opposition to Petition for Certiorari, *supra* note 157.

160. *Ruling Backs EPA, Corps Bid for Dual Test Overseeing Wetlands*, 23 WATER POLICY REPORT 13, Nov. 13, 2006.

161. N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1029-30 (9th Cir. 2006).

162. *See* Rapanos v. United States, 126 S. Ct. 2208, 2235-36 (2006).

Just prior to the 2006 midterm elections, Representative James Oberstar (D-MN), the Chair of the House Transportation & Infrastructure Committee, issued a report that was critical of the *Rapanos* ruling, referring to it as "more confusion in an already confused world."[163] Oberstar, along with many others, also sponsored the Clean Water Authority Restoration Act (CWARA), a bill that would eliminate the phrase "navigable waters" from the entirety of the CWA and replace it with "waters of the United States."[164] Though it was introduced long before *Rapanos* was decided, the proposed legislation is designed to restore the intent of Congress to give the CWA "the broadest possible constitutional interpretation."[165]

Immediately after the *Rapanos* decision came down, Senator Russ Feingold (D-WI) spoke out against the decision and urged the Senate to pass CWARA.[166] He also strongly criticized the plurality's opinion, calling it "completely at odds with the text and purpose of the Clean Water Act," and stating that it will place "much of the Nation's waters in jeopardy."[167] He also acknowledged the likelihood of increased litigation that would result from the decision.[168]

Senator Barbara Boxer (D-Cal.) also recently indicated that clarifying federal wetlands jurisdiction is one of her priorities as the incoming Chair of the Senate Environment and Public Works Committee.[169] Boxer is one of the sponsors of the CWARA in the Senate.[170] She plans to hold a hearing to specifically look at the *Rapanos* decision, evaluate its implications and to determine whether further action is needed to ensure that waterways are protected.[171]

It is still early in the 110th Congress to know whether any of these proposals and plans will play out. It is also difficult to predict what success the CWARA may have if it comes to a House or Senate vote, and the corresponding bills remain in committee.[172] But given the recent Democratic takeover it is not unlikely that these bills could see some success. For the

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163. *DOJ High Court Brief Raises Questions on Water Jurisdiction Guide*, 24 ENVIRONMENTAL POLICY ALERT 3, Jan. 31, 2007.

164. *Id.*; Clean Water Authority Restoration Act of 2005, H.R. 1356, 109th Cong. (2005).

165. H.R. 1356.

166. 152 Cong. Rec. S 6410 (June 22, 2006); S. 912 109th Cong. (2005).

167. *Id.*

168. *Id.*

169. Kafanov, *supra* note 25.

170. H.R. 1356; S. 912.

171. Kafanov, *supra* note 25.

172. H.R. 1356; S. 912.

moment these bills appear more long term, and right now the battle appears to be before the courts, the Corps, and the EPA. However, this situation could easily change.

VI. NGO EFFORTS

In several of the recent circuit court cases, amicus briefs have been filed on behalf of several organizations. The most outspoken supporter of the plurality's standard has been the Pacific Legal Foundation (PLF). The PLF bills itself as an organization devoted to "limited government, property rights and individual liberty."[173] The PLF has been actively involved in the area since *Rapanos* came down, even establishing a "Rapanos Blog" which chronicles activity regarding the case and provides links to numerous briefs, opinions, and commentaries.[174] The group has filed a number of briefs and petitions in subsequent cases as well, all urging that only the plurality's standard is controlling, and thereby restricting federal power under the CWA.[175] The PLF has filed a petition for rehearing en banc to the First Circuit in *United States v. Johnson*, arguing again that only the plurality's standard should control. The group plans to petition the Supreme Court to grant certiorari in *United States v. Gerke Excavating, Inc.*, and has been actively involved in *Morrison v. United States*, where it has petitioned the Supreme Court to grant certiorari in that case after, as the "Rapanos Blog" describes, "[t]he Morrisons, nearly at the end of their rope, came to PLF for help."[176] The PLF appears to have taken this case as their crusade, and most certainly will be instrumental in any future developments, at the very least ensuring that similar cases continue to move through the courts and continually petitioning the Supreme Court to once again address the issue.

VII. CONCLUSION

In the five months since *Rapanos* was decided, much has been written about the possible impact of the case. Several district and circuit courts have

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173. Pacific Legal Foundation, http://www.pacificlegal.org (last visited Feb. 8, 2007).

174. Rapanos Blog, http://rapanos.typepad.com/my_weblog (last visited Feb. 8, 2007).

175. *See* Brief Amicus Curiae of Pacific Legal Foundation in Support of the Petitioner for Writ of Certiorari, Baccarat Freemont Developers, LLC v. United States Army Corps of Eng'rs, 127 S. Ct. 1258 (2007), *cert. denied*, (No. 06-619), 2007 WL 43600; *see* Pacific Legal Found., *supra* note 173.

176. Rapanos Blog, *Post Rapanos Cert Sought*; http://rapanos.typepad.com/my_weblog (Dec. 1, 2006).

already taken up the issue, leading to the development of two main approaches—that of Justice Kennedy, and the "either-or" approach, the later approach stating that jurisdiction may be found where either Justice Kennedy's test, or the plurality's test is met.[177] The practical ramifications of these two approaches remains unclear, as the cases have not yet been re-heard at the district court level. However, both are certain to increase the complexity and cost of analyzing federal jurisdiction over wetlands under the CWA. In every case an extensive factual inquiry must be undertaken to satisfy the vague requirements of the "significant nexus test." Those jurisdictions adopting the "either-or" test will require factual inquiry into both tests if there is uncertainty as to whether or not they may be met. However, the "either-or" approach does allow the Corps of Engineers a great deal more flexibility, as well as greater discretion in enforcing the CWA. While the "either-or" test may hold more closely to the Supreme Court's opinions in *Rapanos*, it is likely to be more difficult and costly from a practical standpoint.

These difficulties will not only be faced at trial. The Corps of Engineers will be forced to make much more extensive determinations prior to granting or denying a fill permit. This will only increase the already high costs associated with obtaining such a permit.[178] Prior to *Rapanos*, an estimated $17 billion was spent each year, by both the public and private sectors, in obtaining wetlands permits.[179] With the state of the law now in flux after *Rapanos*, these costs will certainly increase, since the standards will likely prove more difficult to apply, if such standards are even known. It is likely that the Supreme Court will be faced with this question again in the not too distant future, as disagreement is already growing among the circuit courts.[180] The EPA and DOJ have not yet clearly articulated which approach they endorse, though there have been some indications through various sources. Until these two agencies can formulate a clear standard which they both endorse, the uniform approach of the Corps and the lower courts will be that which was articulated by Chief Justice Roberts in his concurring opinion. Although he joined the plurality, Justice Roberts wrote separately, providing

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177. *See* United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006); United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006).

178. David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74-76 (2002); Rapanos v. United States, 126 S. Ct. 2208, 2214 (2006).

179. *Id.* at 81.

180. *See Johnson*, 467 F.3d at 56; *c.f. Gerke*, 464 F.3d at 723.

some sage advice: "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis."[181] This is what the Corps, the EPA, and the courts are now faced with: a slow, case-by-case, wading through the quagmire left by the *Rapanos* decision.

181. *Rapanos*, 126 S. Ct. at 2236.