
Supplements to *The Clean Water Handbook, Second Edition* and *Wetlands: Law and Policy: Understanding Section 404*

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Sifting Through the Sediment: The Supreme Court's <i>Rapanos</i> and <i>Carabell</i> Opinions	3
<i>(Supplement to Chapter 6, "Wetlands: Section 404" of The Clean Water Handbook, Second Edition and Chapter 3, "Federal Jurisdiction over Wetlands: 'Waters of the United States'" of Wetlands: Law and Policy: Understanding Section 404)</i>	
2006 Developments in the Corps Nationwide Permit Program	15
<i>(Supplement to Chapter 5, "General and Nationwide Permits" of Wetlands: Law and Policy: Understanding Section 404)</i>	
Attempts to Achieve No Net Loss: 2006 Developments in Wetland Mitigation	17
<i>(Supplement to Chapter 8, "Mitigation" of Wetlands: Law and Policy: Understanding Section 404)</i>	

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Sifting Through the Sediment: The Supreme Court's Rapanos and Carabell Opinions

In the summer of 2006, the Supreme Court re-examined the scope of Federal jurisdiction over wetlands under the Clean Water Act in the consolidated cases of *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*.¹ The Court first addressed the breadth of Clean Water Act jurisdiction in 1985, when it held, in *United States v. Riverside Bayview Homes*, that wetlands adjacent to navigable waters are “waters of the United States” that can be regulated under the Clean Water Act.² Then, in 2001, the Court held, in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, that it is inappropriate for the Federal government to rely on the migratory bird test to regulate intra-state waters that are not adjacent to navigable waters under the Act.³ EPA and the Corps interpreted the SWANCC decision narrowly and continued to assert jurisdiction over non-navigable tributaries of traditionally navigable waters and wetlands that are adjacent to those non-navigable tributaries. Most of the Federal district and appellate courts that examined the scope of federal jurisdiction subsequent to the SWANCC decision agreed with the government’s interpretation of the Clean Water Act.⁴

However, in 2005, the Supreme Court agreed to review *United States v. Rapanos*⁵ and *Carabell v. United States Army Corps of Engineers*,⁶ two decisions from the Sixth Circuit that had upheld the government’s

1. 126 S. Ct. 2208 (2006).

2. 474 U.S. 121, 135 (1985).

3. 531 U.S. 159, 174 (2001).

4. See, e.g., *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005); *Treacy v. Newdunn Assocs. LLP*, 344 F.3d 407 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004); *Community Assn. for Restoration of Environment v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001). But see, *In re. Needham*, 354 F.3d 340 (5th Cir. 2003); *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001).

5. 376 F.3d 629 (6th Cir. 2004).

6. 391 F.3d 704 (6th Cir. 2004).

interpretation of the Act.⁷ Both cases involved regulation of wetlands that were adjacent to non-navigable tributaries of traditional navigable waters, and the *Carabell* case involved regulation of a wetland that was separated from a tributary by a berm. While all of the Justices rejected the *Rapanos*' argument that Federal jurisdiction under the Clean Water Act is limited to waters that are navigable in fact,⁸ the Court was unable to reach consensus on the scope of jurisdiction over non-navigable tributaries and wetlands adjacent to those tributaries. The Justices did not issue a majority opinion in the cases, although a four Justice plurality, and Justice Kennedy, in a concurrence, agreed that the Corps' regulation of the wetlands could not be justified based on the rationales articulated below, and that the cases should be remanded to determine whether Federal regulation of the wetlands at issue was appropriate. The two major questions addressed in most of the opinions were (1) whether non-navigable tributaries are "waters of the United States" under the Clean Water Act (*Rapanos*); and (2) whether wetlands that are hydrologically separated from a tributary are "adjacent" to those waters (*Carabell*).^{8a} Although the cases before the court specifically involved the regulation of wetlands, the focus of the various opinions on the definition of "waters of the United States" and the associated scope of federal jurisdiction over non-navigable tributaries of navigable waters is likely to have much broader impacts on other Clean Water Act programs.

The plurality opinion, authored by Justice Scalia, joined by Justices Thomas, Alito, and the Chief Justice, adopted the narrowest interpretation of the Clean Water Act. Relying on a textualist reading of the statute, Justice Scalia concluded that "waters of the United States" includes "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams . . . oceans, rivers [and] lakes. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for

7. For a compilation of documents related to both case (including the original Corps application and enforcement documents), see Kim Diana Connolly, United States Supreme Court *Rapanos* and *Carabell* Wetlands Cases at <http://www.law.sc.edu/wetlands/rapanos-carabell/>.

8. See, e.g., 126 S. Ct. at 2220 (plurality recognized that "navigable waters" is broader than the traditional understanding of the term); *id.* at 2241 (Justice Kennedy, in concurrence, remarked that the term includes "some waters that are not navigable in the traditional sense"); *id.* at 2255–56 (dissenting opinion).

8a. The questions presented for the cases can be found at <http://www.supremecourtus.gov/qp/04-01384qp.pdf> (*Carabell*) and <http://www.supremecourtus.gov/qp/04-01384qp.pdf> (*Rapanos*).

rainfall.”⁹ Although the plurality conceded that the term could include some streams, rivers, or lakes that do not flow continuously throughout a year, their opinion provided little guidance regarding when that would be appropriate.¹⁰ The plurality also argued that the wetlands in the cases could not be regulated as “adjacent” wetlands, in accordance with the Court’s *Riverside Bayview* holding.¹¹ Justice Scalia wrote that “only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands ‘adjacent to’ such waters, are covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a ‘significant nexus’ in *SWANCC*.”¹²

Justice Kennedy, in a concurring opinion that reads much more like a dissenting opinion, rejected the plurality’s narrow interpretations of “waters of the United States” and “adjacent,” chastised the plurality for the tone of its opinion,¹³ but agreed with the plurality that the lower court’s decision should be vacated and the case should be remanded.¹⁴ Focusing on the purposes of the Clean Water Act, Justice Kennedy argued that the plurality’s “permanent standing or continuously flowing” requirement made “little practical sense in a statute concerned with downstream water quality.”¹⁵ Regarding “adjacency,” Kennedy noted that the plurality’s “surface connection” test was rejected in *Riverside Bayview*, was not supported by *SWANCC*, and was inconsistent with the purposes of the Clean Water Act.¹⁶ According to Justice Kennedy, whether wetlands can be regulated under the Clean Water Act

depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. . . . With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can

9. *Id.* at 2225.

10. *Id.* n.5.

11. 126 S. Ct. at 2226.

12. *Id.*

13. 126 S. Ct. at 2246. Justice Kennedy observed that “the plurality’s overall tone and approach. . . seems unduly dismissive of the interests asserted by the United States. . . .” *Id.*

14. 126 S. Ct. at 2252.

15. *Id.* at 2242.

16. *Id.* at 2244–45.

perform critical functions related to the integrity of other waters—functions such as pollution trapping, flood control, and runoff storage. Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as ‘navigable.’¹⁷

Notably, Justice Kennedy’s test does not always require a hydrological connection between the wetlands and traditional navigable waters, as long as there is a “significant nexus” between the wetlands and the navigable waters.¹⁸

Applying the “significant nexus” test, Justice Kennedy first concluded that regulation of wetlands adjacent to navigable-in-fact waters is clearly justified under the Clean Water Act.¹⁹ He was concerned, however, that the Corps’ definition of “tributaries,” which can include non-navigable drains, ditches, and streams remote from navigable in fact waters, was sufficiently broad that there may be situations where wetlands that are adjacent to tributaries of waters that are navigable in fact may not have a significant nexus to those waters.²⁰ Accordingly, Justice Kennedy encouraged the Corps to identify, by regulation, “categories of tributaries that, due to their volume of flow. . .their proximity to navigable waters, or other significant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.”²¹ In the absence of regulations though, Kennedy asserted that federal agencies “must establish a significant nexus [to a navigable-in-fact water] on a case-by-case basis when [they seek] to regulate wetlands based on adjacency to nonnavigable tributaries.”²² While Justice Kennedy

17. *Id.* at 2248.

18. *Id.* at 2245–46.

19. *Id.* at 2248. Despite clear statements by Justice Kennedy that wetlands adjacent to traditionally navigable waters can be regulated under the Clean Water Act, a panel of the Ninth Circuit Court of Appeals recently read Justice Kennedy’s opinion in *Rapanos* as narrowing *Riverside Bayview Homes* and requiring a case-by-case finding of a “significant nexus” between wetlands adjacent to traditionally navigable waters and those waters. See *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006).

20. 126 S. Ct. at 2248–49.

21. *Id.* at 2248.

22. *Id.* at 2249.

ultimately voted to vacate the lower court's decision because the government had not identified a significant nexus between the wetlands at issue in the consolidated cases and navigable in fact waters, he noted that "the record [below] contains evidence of a significant nexus [and]. . .the end result in these cases and many others to be considered by the Corps may be. . .that the Corps' assertion of jurisdiction is valid."²³

Justice Stevens wrote a dissenting opinion in the case, joined by Justices Souter, Ginsburg, and Breyer. This dissent, which received the same number of votes as the plurality, shared some analytical similarities to Justice Kennedy's concurrence. The dissenters argued that the Supreme Court previously upheld the regulation of wetlands adjacent to tributaries of navigable waters in *Riverside Bayview*.²⁴ If the case was not controlled by *Riverside Bayview*, the dissenters argued that because the Clean Water Act is ambiguous regarding jurisdiction over wetlands that are adjacent to non-navigable tributaries, the Court should defer, under *Chevron v. NRDC*,²⁵ to the Corps' reasonable interpretation of the statute.²⁶ Not surprisingly, the dissenters argued that the "continuously flowing" and "continuous surface connection" requirements of the plurality were not consistent with the text or purposes of the Clean Water Act.²⁷ The dissenters also did not feel that it should be necessary to demonstrate a "significant nexus" between wetlands and navigable in fact waters in every case in which jurisdiction is asserted. They argued that the nexus requirement, if it exists at all, "is categorically satisfied as to wetlands adjacent to navigable waters or their tributaries."²⁸ Justice Kennedy's approach, the dissenters lamented, "will have the effect of creating additional work for all concerned parties. Developers. . .will have no certain way of knowing whether they need to get 404 permits or not. And the Corps will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications."²⁹

The implications of the fractured opinions in the *Rapanos* and *Carabell* cases for federal regulation of non-navigable tributaries and wetlands adjacent to those tributaries are unclear. As Chief Justice Roberts noted in a separate concurring opinion, "no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean

23. *Id.* at 2250.

24. *Id.* at 2255.

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

26. *Id.* at 2252–53.

27. *Id.* at 2260–63.

28. *Id.* at 2264.

29. *Id.* at 2264–65.

Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis.”³⁰ The Chief Justice cited *Marks v. United States* in his opinion for guidance on interpreting the precedential value of the Justices’ opinions. In *Marks*, the Court noted 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 Although it is not clear that any “holding” can be gleaned from the disparate opinions in *Rapanos*, Justice Kennedy’s concurring opinion is the pivotal opinion in the case.³² The dissenting justices, however, offer another suggestion regarding the jurisdictional test that might be used in subsequent cases. According to Justice Stevens, “[g]iven that all four Justices who joined [the dissenting] opinion would uphold the Corps’ jurisdiction in both of these cases—and in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.”³³ Thus, under this interpretation the federal government could regulate wetlands adjacent to non-navigable waters if the wetlands have a significant nexus to a navigable-in-fact water (Kennedy’s test) *or* if there is a continuous surface connection between the wetlands and a relatively permanent body of water connected to a traditional navigable-in-fact water, even though there may be no significant nexus between the wetlands and the traditional navigable in fact water (the plurality’s test).³⁴

30. 126 S. Ct. at 2236.

31. 430 U.S. 188, 193 (1977).

32. A panel of the United States Court of Appeals for the Ninth Circuit recently concluded that Justice Kennedy’s opinion “provides the controlling rule of law” in *Rapanos*. See *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023, *15 (9th Cir. 2006). The United States Court of Appeals for the Seventh Circuit reached a similar conclusion in *United States v. Gerke*, 2006 U.S. App. LEXIS 24034, *3 (7th Cir. 2006).

33. 126 S. Ct. at 2265. The United States Court of Appeals for the First Circuit adopted this approach in *United States v. Johnson*, 2006 U.S. App. LEXIS 27042 (1st Cir. 2006).

34. *Id.* The dissenters note that it would be unusual, but not impossible, for wetlands to meet the plurality’s surface connection test but not meet Kennedy’s significant nexus test. *Id.* While the Seventh Circuit recently held, in *United States v. Gerke*, that lower court judges should follow Justice Kennedy’s concurring opinion in *Rapanos*, that court recognized that eight Justices would uphold regulation of wetlands that have a continuous surface water connection to a traditionally “navigable-in-fact” water, even without a determination that the wetlands have a “significant nexus” to the “navigable-in-fact” water. 2006 U.S. App. LEXIS, 24034, *5–6 (7th Cir. 2006).

One potential response to the *Rapanos* litigation, although unlikely, is a legislative clarification of the scope of “waters of the United States” under the Clean Water Act. While the plurality was concerned that the regulation of non-navigable tributaries and adjacent wetlands could raise Commerce Clause or federalism concerns,³⁵ neither Justice Kennedy nor the four dissenting Justices agreed that those were valid concerns.³⁶ Thus, Congress could amend the law to explicitly authorize regulation of those waters. Shortly after the Court issued its opinions in the *Rapanos* litigation, several environmental groups began campaigning heavily for passage of the Clean Water Authority Restoration Act,³⁷ which would redefine “waters of the United States” as “all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.”³⁸ There is a competing proposal pending before Congress, the Federal Wetlands Jurisdiction Act,³⁹ which would narrow the statute’s definition of federally regulated waters to those that are traditionally navigable, and their adjacent wetlands. As of early October 2006, no pending bill has received a hearing.

There has, however, been one post-decision hearing. On August 1, 2006, Senator Lincoln Chafee (R-RI), the Chairman of the Senate Committee on Environment and Public Works’ Subcommittee on Fisheries, Wildlife, and Water, held a hearing titled “The Waters of the United States—Interpreting the *Rapanos/Carabell* Decision.”⁴⁰ The Subcommittee

35. 126 S. Ct. at 2224.

36. *Id.* at 2246 (Justice Kennedy’s concurring opinion); 2262 (dissent); 2266 (Justice Breyer’s dissenting opinion). Justice Kennedy asserted that “in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty.” *Id.* at 2249. In a separate dissent, Justice Breyer wrote, “the authority of the Army Corps of Engineers under the Clean Water Act extends to the limits of congressional power to regulate interstate commerce. . . . I therefore have no difficulty finding that the wetlands at issue in these cases are within the Corps’ jurisdiction. . . .” *Id.* at 2266.

37. S. 912, 109th Cong., 1st Sess (2005); H.R. 1356, 109th Cong., 1st Sess. (2005).

38. *Id.* at 4.

39. H.R. 2658, 109th Cong., 1st Sess (2005).

40. U.S. Senate Cmte on Env’t and Public Works, http://epw.senate.gov/hearing_statements.cfm?id=260708.

heard from Ben Grumbles, Assistant Administrator, Office of Water, U.S. Environmental Protection Agency; John Paul Woodley, Jr., Assistant Secretary for Civil Works, U.S. Department of Army and John C. Cruden, Deputy Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, as well as other experts.⁴¹

In the absence of legislative clarification, the Corps and EPA could promulgate regulations that clarify when non-navigable tributaries and wetlands adjacent to those tributaries will be regulated as “waters of the United States” in light of *Rapanos*. The Chief Justice, in his separate concurring opinion, chastised the government for abandoning the previous rulemaking proceeding that would have defined “waters of the United States.”⁴² Had the government proceeded by regulation, Roberts asserted, it would have been “afforded generous leeway by the courts in interpreting” the Clean Water Act under *Chevron*.⁴³ Justice Kennedy also suggested that the agency could use rulemaking to identify categories of tributaries that could be regulated as “waters of the United States” in order to avoid making “significant nexus” decisions on a case-by-case basis in adjudication.⁴⁴ Finally, Justice Breyer wrote a separate dissenting opinion, in which he argued that the scientific questions involved in determining the scope of “waters of the United States” should be resolved by agencies through rulemaking, rather than by the courts on an ad hoc basis.⁴⁵ Since there was no majority opinion in the *Rapanos* litigation, the Supreme Court’s decision in *National Cable & Telecommunications Association v. Brand X Internet Services*⁴⁶ should not place any significant limitations on the Corps if it decides to promulgate new rules to define “waters of the United States.”⁴⁷ For the time being, however, the Corps and EPA are likely to proceed by

41. *Id.*

42. 126 S. Ct. at 2236.

43. *Id.* Chief Justice Roberts’ statement is odd, since agencies’ statutory interpretations receive deference under *Chevron* only when a statute is ambiguous, and the Chief Justice joined the plurality opinion that concluded that the “only plausible interpretation” of “waters of the United States” was “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams, . . . oceans, rivers, [and] lakes.’” 126 S. Ct. at 2225.

44. 126 S. Ct. at 2248.

45. *Id.* at 2266.

46. 125 S. Ct. 2688 (2005).

47. The *Brand X* Court held that “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Id.* at 2700.

issuing guidance, rather than by promulgating a rule.⁴⁸ Even with such guidance, though, for the foreseeable future, government agencies will need to spend more time and resources in processing permit applications, developers will have less certainty regarding whether permits are necessary under Section 404, and courts, facing an increase in 404 litigation, will need to “feel their way on a case-by-case basis.”⁴⁹

Early cases interpreting the decision focus on Justice Kennedy’s concurrence. For example, the Ninth Circuit held that the City of Healdsburg, California is required to obtain a National Pollution Discharge Elimination System (NPDES) permit to discharge sewage into a rock quarry pit filled with water from an aquifer adjacent to the Russian River.⁵⁰ The Ninth Circuit held that Justice Kennedy’s Rapanos opinion is now the “controlling rule of law” in this area and that to qualify as a navigable water under the Clean Water Act (CWA), a body of water itself need not be continually flowing but that there must be a “significant nexus” to a waterway that is in fact navigable.⁵¹ Applying that test to the trial court’s findings of fact in *Healdsburg*, the Court concluded that the pit, known as Basalt Pond, and its wetlands possess a “significant nexus” to waters that are navigable in fact and, therefore, trigger the Clean Water Act because the Pond waters seep directly into the Russian River, a traditionally navigable water.⁵²

As noted in the introduction to this addendum—and it is a point worth repeating—the *Rapanos* decision is not limited to wetlands issues. *Rapanos* dealt with the fundamental question of how we define “waters of the United States”⁵³ and that definition is central to all jurisdictional

48. EPA, *Corps of Engineers to Issue Guidance on Rapanos Decision as Soon as Possible*, 37 ENVIR. REP. (BNA) 1626 (Aug. 4, 2006). The Pacific Legal Foundation (PLF) recently petitioned EPA and the Corps of Engineers to amend the regulatory definition of “waters of the United States.” *Courts Face New Challenges Over Clean Water Act Jurisdiction Tests*, 27 INSIDE EPA 39 (Sept. 29, 2006). PLF’s petition asks the agencies to adopt the plurality’s test for identifying “waters of the United States.” *Id.*

49. 126 S. Ct. at 2236.

50. *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006).

51. *Id.*

52. *Id.*

53. The term “navigable waters” is used more than 90 times in the Clean Water Act, and is defined in Section 502 of the Act as meaning “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). The United States Army Corps of Engineers has provided a long-standing regulatory definition of “waters of the United States” to implement this provision for purposes of Section 404 of the Act. 33 C.F.R. § 328.3.

questions under the CWA. Although *Rapanos* focused on whether an adjacent wetland was jurisdictional, the underlying issue was whether the small creeks and ditches that connect the wetland to a navigable-in-fact water body are themselves protected by the CWA. It is that underlying issue that holds the key to the decision's importance beyond wetlands. In other words, if those small creeks and ditches are not "waters," not only are they not regulated under section 404, but they potentially lose all of the other protections afforded by the CWA.

These other protections are what make *Rapanos* significant beyond wetlands protection. For example, if small creeks and ditches are not covered by the Act, factories and other traditional point source dischargers arguably could discharge to them without an NPDES permit.⁵⁴ It is not uncommon for industrial and municipal waste water sources to discharge directly into a small creek or irrigation ditch that may or may not fall within the plurality's or Kennedy's tests for jurisdiction. The types of water bodies that may fall outside the jurisdiction of the CWA under the plurality or Kennedy tests, such as very small perennial creeks or intermittent and ephemeral streams, are common everywhere, and abound in the arid west.⁵⁵ Also, in the arid west, many concentrated animal feeding operations ("CAFOs") sit on irrigation canals. Justice Scalia's plurality opinion clearly was troubled with asserting CWA jurisdiction over ditches. But water flows downstream, and given the long life span of pollutants such as *E. coli* 0157:H7, Salmonella, and *Cryptosporidium*, all of which are common pollutants in feed lots discharges,⁵⁶ these pollutants will surely enter downstream navigable-in-fact water bodies. If these ditches are not "waters," then one question that is raised is whether CAFOs and other point sources discharging to them are still subject to the restrictions of the CWA. One can argue that the ditches are a "conveyance to 'waters of the United States,'" but authority for the "conveyance" argument is not clear under the CWA, and the case law will have to be developed.

Similarly, if one alters the fundamental reach of the CWA by changing how we define "waters of the United States," many other questions

54. See 33 U.S.C. § 1301(a) (2000).

55. It is estimated that 95 percent of all stream miles in some states in the arid west are intermittent or ephemeral. James Murphy, *Rapanos v. United States: Wading Through Murky Waters*, 28 NATIONAL WETLANDS NEWSLETTER (ELI) no. 5 at 17 (Sept.–Oct. 2006).

56. See United States Environmental Protection Agency, *Animal Feeding Operations, Frequently Asked Questions: What are the water quality concerns related to AFOs?* http://cfpub.epa.gov/npdes/faqs.cfm?program_id=7#125 (last visited on October 12, 2006).

arise. For example, if a small creek is effluent dominated,⁵⁷ but the stream would dry up naturally (i.e., without the added flow from the point source) during parts of the year, does it meet the “relatively permanent body of water” test put forward by the plurality? Will all section 303(d) listed water bodies that do not meet the plurality or Kennedy tests fall off the impaired waters list? What happens to Total Maximum Daily Load (“TMDL”)⁵⁸ waste load allocations that included waste loads from tributaries that were formerly jurisdictional but now may not be under *Rapanos*? Any point source on that formerly jurisdictional tributary would arguably be freed of the waste load allocation assigned to its NPDES permit. That would, in turn, have a ripple effect on all of the other allocations in the TMDL. The Resource Conservation and Recovery Act (RCRA) waste treatment exclusion exempts from RCRA regulation discharges covered under the NPDES program.⁵⁹ If no NPDES permits are required for intermittent and ephemeral streams or streams with no “significant nexus” to navigable waters, do these discharges lose their RCRA exemptions? Will states lose much of their oversight authority over federal permits under section 401 by losing the ability to issue 401 certifications for federal permits on water bodies that are no longer considered “waters?” Will a storm water discharge to a sewer system that leads to a navigable water still be considered a point source discharge? Many questions arise when one starts fiddling with the definition of “waters.”

It is impossible to predict at this point how all of the questions in the previous paragraph and numerous other as-yet unforeseen questions will be answered. In addition to the dramatically increased workload that the agencies will be facing in the coming year at least, one other thing is certain. There will be much litigation interpreting the 2006 United States Supreme Court *Rapanos* decision.

57. An effluent dominated stream is one where the effluent makes up most of the flow of the stream. This is common where a municipality’s sewage treatment plant discharges to a creek.

58. See 33 U.S.C. § 1313(d)(1)(C) (2000).

59. 42 U.S.C. § 6903(27) (RCRA defines “solid waste” as “any garbage, refuse, sludge from waste supply company . . . , but does not include . . . industrial discharges which are point sources subject to permits under section 1342 of [the CWA]. . .”).

2006 Developments in the Corps Nationwide Permit Program

The vast majority of permit actions undertaken by the United States Army Corps of Engineers (Corps) through its Clean Water Act Section 404 permit program¹ involve general permits.² In fact, in 2005, of the 89,516 federal permit decisions made by the Corps, 78,336³ were authorized by the general permitting program authorized pursuant to Section 404(e).⁴ Of those general permits, 34,114, or 38 percent, were nationwide permits.⁵ By statute, the Corps' general permits are limited to categories of activities involving discharges of dredged or fill material into waters of the United States that are similar in nature and cause only minimal adverse environmental effects when performed separately and considered cumulatively.⁶

In late September 2006, the U.S. District Court for the District of Columbia issued a long-awaited ruling⁷ regarding the 2000/2002 nationwide permit issuance.⁸ Members of the permitted community⁹ had sued the Corps, asserting that the NWPs as issued exceeded the Corps authority.¹⁰ The court held that the Corps "adequately explained its rea-

1 33 U.S.C. § 1344 (2000), *see generally* U.S. Army Corps of Engineers, *Overview*, <http://www.usace.army.mil/cw/cecwo/reg/oceover.htm>.

2. *See generally* 33 C.F.R. Part 330 (2006); *see also* U.S. Army Corps of Engineers, *Nationwide Permit Program*, http://www.usace.army.mil/cw/cecwo/reg/nationwide_permits.htm.

3. U.S. Army Corps of Engineers, *U.S. Army Corps of Engineers Regulatory Program, ALL PERMIT DECISIONS FY 2004 & 2005*, (on file with author).

4. 33 U.S.C. § 1344(e).

5. *See generally* William E. Taylor and Kate L. Geoffroy, *General and Nationwide Permits*, in KIM DIANA CONNOLLY, STEPHEN M. JOHNSON, AND DOUGLAS R. WILLIAMS, *WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404* (American Bar Ass'n, 2005).

6. 33 U.S.C. § 1344(e).

7. *National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, Civ. No. 00-379 (D.C.D.C., Sept. 29, 2006).

8. 65 Fed. Reg. 12,818 (Mar. 9, 2000); 67 Fed. Reg. 2,020 (Jan. 15, 2002).

9. Suits were originally filed by the National Association of Home Builders, the National Federation of Independent Business, and the National Stone, Sand and Gravel Association.

10. *National Ass'n of Home Builders*, slip op. at 4-5. *See also* Amena H. Saiyid, *Corps Authority to Issue Nationwide Permits Upheld in Decision by U.S. District Court*, 190 BNA DAILY ENVIRONMENT A-7 (Oct. 2, 2006).

soning behind its issuance of the NWP and [general conditions] and clearly acted within its authority.”¹¹ This decision took many years to resolve, and the decision was issued toward the end of the life of the current NWPs, which by Congressional design expire every five years.¹² The current NWPs expire on March 18, 2007.¹³

In fact, a few days before the D.C. District Court decision, the Corps¹⁴ released a Notice of Proposed Rulemaking regarding the next round of NWPs.¹⁵ One goal of the Corps in proposing these revisions to the NWPs is “to revise the text of the NWPs, general conditions, and definitions so that they are clearer, more concise, and can be more easily understood by the regulated public, government personnel, and interested parties, while retaining terms and conditions that protect the aquatic environment.”¹⁶ The Corps’ September 26, 2006 revised NWP proposal also would include six new permits and one new general condition, including permits for (1) Emergency Repair Activities, (2) Discharges into Ditches and Canals, (3) Pipeline Safety Program Designated Time Sensitive Inspections and Repairs, (4) Commercial Shellfish Aquaculture Activities, (5) Coal Remining Activities, and (6) Underground Coal Mining Activities.¹⁷ This proposal contains an acknowledgement of the confusion regarding some jurisdictional calls following the June 2006 *Rapanos* decision¹⁸ by the United States Supreme Court,¹⁹ and states that “the discussion that follows applies to all ephemeral and intermittent streams and adjacent wetlands that remain jurisdictional following *Rapanos*.”²⁰ Thousands of comments are expected on these proposed NWPs, which should be finalized in early 2007.

11. National Ass’n of Home Builders, slip op. at 32.

12. 33 U.S.C. § 1344(e)(1); *see also* 33 C.

13. 67 Fed. Reg. at 2020.

14. Because NWPs are considered permits, and not regulations, the Environmental Protection Agency is not directly involved in the actual issuance of the proposed permits.

15. U.S. Army Corps of Engineers, Proposal to Reissue and Modify Nationwide Permits, 71 Fed. Reg. 56,258 (Sept. 26, 2006), *available at*, <http://www.regulations.gov>. *See also* Amena H. Saiyid, *Corps Proposes Six New Nationwide Permits Allowing Pipeline Repair, Mining in Wetlands*, 186 BNA DAILY ENVIRONMENT A-1 (Sept. 27, 2006).

16. *Id.*

17. *Id.* at 56273–56276.

18. 126 S. Ct. 2208 (2006).

19. *See* page 13.

20. 71 Fed. Reg. at 56,261.

Attempts to Achieve No Net Loss: 2006 Developments in Wetland Mitigation

Through a process commonly referred to as mitigation, those who apply for permits pursuant to Section 404 of the Clean Water Act¹ may be required to alleviate adverse impacts that their proposed activities may have on the aquatic environment.² An underlying theory of mitigation is the attempt to achieve a goal of “no net loss” of wetlands,³ a concept that the George W. Bush Administration publicly embraced as recently as August 2006.⁴

1. 33 U.S.C. § 1344 (2000).

2. See generally Royal C. Gardner, *Mitigation*, in KIM DIANA CONNOLLY, STEPHEN M. JOHNSON, AND DOUGLAS R. WILLIAMS, *WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404* (American Bar Ass’n, 2005).

3. See Environmental Protection Agency, the United States Army Corps of Engineers, and the United States Departments of Agriculture, Commerce, Interior, and Transportation, *National Wetlands Mitigation Action Plan*, (Dec. 24, 2002), available at <http://www.mitigationactionplan.gov/map1226withsign.pdf>.

4. Hearing Before the Subcommittee on Fisheries, Wildlife, and Water of the Committee on Environment and Public Works United States Senate, 109th Cong. Aug. 1, 2006 (statements of Benjamin H. Grumbles, Assistant Administrator for Water, U.S. Environmental Protection Agency, and John Paul Woodley, Jr., Assistant Secretary of the Army for Civil Works, Department of the Army, available at <http://www.epa.gov/water/speeches/060801bg.html> (“President Bush established, on Earth Day 2004, a national goal to move beyond ‘no net loss’ of wetlands and to attain an overall increase in the quantity and quality of wetlands in America. Specifically, the President established a goal to increase, improve, and protect three million acres of wetlands by 2009. Since the President announced this objective, EPA, the Corps, the U.S. Department of Agriculture (USDA), and the Department of Interior (DOI) have restored, created, protected, or improved 1,797,000 acres of wetlands. We now have 588,000 acres of wetlands that did not exist in 2004, we have improved the quality of 563,000 wetland acres that already existed, and we have protected the high quality of 646,000 acres of existing wetlands.”).

The Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) have issued regulations⁵ and guidance documents,⁶ as well as entered into a Memorandum of Agreement,⁷ to provide direction as to how to accomplish compensatory mitigation in the wetlands permitting context. These mitigation requirements have, however, been the subject of criticism⁸ and debate in recent years. In fact, various federal agencies came together in 2002 to form a National Wetlands Mitigation Action Plan⁹ to address mitigation issues.¹⁰ This Plan included the development of various guidance documents and other concrete action items to assist in better implementation of mitigation goals.¹¹

Progress on many aspects of the National Wetlands Mitigation Action Plan stalled, however, when Congress, in the National Defense Authorization Act for 2004,¹² called on the Corps to promulgate new mitigation regulations. Although the legislation required the new regulations to be finalized by November 2005, the Corps and EPA did not

5. 40 C.F.R. Part 230; 33 C.F.R. § 320.4(r) (2006).

6. See RGL 02-02, GUIDANCE ON COMPENSATORY MITIGATION PROJECTS FOR AQUATIC RESOURCE IMPACTS UNDER THE CORPS REGULATORY PROGRAM PURSUANT TO SECTION 404 OF THE CLEAN WATER ACT AND SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899 (Dec. 24, 2002), at 1, available at <http://www.usace.army.mil/cw/cecwo/reg/rgls/RGL2-02.pdf>.

7. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, 55 Fed. Reg. 9210, 9211 (1990), available at <http://www.usace.army.mil/cw/cecwo/reg/mou/mitigate.htm>.

8. See NATIONAL RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT (2001).

9. Environmental Protection Agency, the United States Army Corps of Engineers, and the United States Departments of Agriculture, Commerce, Interior, and Transportation, *National Wetlands Mitigation Action Plan*, (Dec. 24, 2002), available at <http://www.mitigationactionplan.gov/map1226withsign.pdf>.

10. A website detailing implementation of the National Wetlands Mitigation Action Plan was created and can be found at <http://www.mitigationactionplan.gov/index.html>.

11. See generally National Compensatory Mitigation Action Plan Item Tracking and Status Table, available at <http://www.mitigationactionplan.gov/actionitem.html>.

12. Section 314, National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136 (2004).

issue a proposed rule until March 2006. This proposal, entitled *Compensatory Mitigation for Losses of Aquatic Resources*,¹³ would provide a revised approach to governing compensatory mitigation for authorized impacts to wetlands, streams, and other waters.¹⁴ As described in the introduction to the 38-page proposal, the Corps and EPA seek

...to establish performance standards and criteria for the use of permittee responsible compensatory mitigation and mitigation banks, and to improve the quality and success of compensatory mitigation projects for activities authorized by Department of the Army permits. The proposed regulations are also intended to account for regional variations in aquatic resource types, functions, and values, and apply equivalent standards to each type of compensatory mitigation to the maximum extent practicable. The proposed rule includes a watershed approach to improve the quality and success of compensatory mitigation projects in replacing losses of aquatic resource functions, services, and values resulting from activities authorized by Department of the Army permits.

After a 30-day extension of the comment period,¹⁵ hundreds of comments were submitted regarding the regulation.¹⁶ In the meantime, the next in a series of stakeholder fora was convened by the Environmental Law Institute in May 2006 in Washington, D.C. to discuss the proposed mitigation regulations and the status of the National Wetlands Mitigation Action Plan.¹⁷ A final rule revising mitigation requirements is expected in 2007.

13. "Compensatory Mitigation for Losses of Aquatic Resources," 71 Fed. Reg. 15520 (Mar. 28, 2006).

14. See generally Environmental Protection Agency, U.S. Army Corps of Engineers, *Proposed Wetlands Conservation Rule*, <http://www.epa.gov/owow/wetlands/pdf/CompMitRuleFactsheet.pdf>.¹⁵ "Compensatory Mitigation for Losses of Aquatic Resources," 71 Fed. Reg. 29604 (May 23, 2006).

16. See <http://www.regulations.gov/fdmspublic/component/main> and search using the title of the proposed rule.

17. Federal Highway Administration, NOAA National Marine Fisheries Service, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, *Fifth Stakeholder Forum on Federal Wetlands Mitigation*, May 10-11, 2006, available at <http://www2.eli.org/research/wetlandsmitigationforum2006.htm>.