DISCUSSION PAPER
RAPANOS V. UNITED STATES

"SIGNIFICANT NEXUS" AND
WATERS SUBJECT TO THE CLEAN WATER ACT JURISDICTION

(Please send any comments to Jon Kusler, ASWM, jon.kusler@aswm.org by September 15, 2006.)

By:

Jon Kusler, Esq.
Association of State Wetland Managers, Inc

and

Pat Parenteau, Esq.
Vermont Law School

DISCLAIMER

This paper is being circulated to stimulate discussion among state, federal, tribal and local agencies responsible for wetland regulation and management. We have no pride of ownership in anything said here. Comments, criticisms and suggestions would be greatly appreciated. Our goal is to generate ideas and proposals for dealing with the Rapanos decision. We will compile what we learn and post it on the ASWM website.

Thanks.

Jon Kusler, Esq, Association of State Wetland Managers, Inc.
Pat Parenteau, Esq., Vermont Law School

THE RAPANOS DECISION:
WHAT DID THE COURT HOLD?

On June 19, 2006 the U.S. Supreme Court in Rapanos v. United States, vacated judgments against Keith Carabell and John Rapanos who wanted to fill wetlands on property they owned in Michigan. The Court remanded the case to lower courts for further review with regard to Clean Water Act (CWA) jurisdiction. The judgments will presumably be reinstated if CWA jurisdiction is found after further review.

The Court issued five separate opinions in Rapanos, none of which commanded a majority of Court members. The only thing a majority of the Court could agree on was that the Sixth Circuit decisions did not employ a rigorous enough test to determine whether the wetlands in question were subject to CWA jurisdiction. Justice Scalia wrote a "plurality" opinion in which Chief Justice Roberts and Justices Thomas and Alito joined. However, an equal number of justices (Justices Stevens, Souter, Ginsburg, Breyer) dissented and decisively rejected the rationale of the plurality opinion. Justice Kennedy broke the tie by voting to vacate the judgments of the lower courts, although not for the reasons stated by the plurality.

In his plurality opinion, Justice Scalia concluded that "the waters of the United States" includes only relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams, …oceans, rivers, (and) lakes." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels what periodically provide drainage for rainfall". Justice Scalia went further to limit the scope of the CWA by stating that "establishing wetlands such as those at the Rapanos and Carabell sites are covered by the CWA requires two findings: First , that the adjacent channel contains a "water of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins."

Justice Kennedy issued a detailed concurring opinion in which he strongly disagreed with Scalia's analysis and rejected the pluralrity opinion as being "inconsistent with the CWA's text, structure and purpose." On the other hand, Justice Kennedy also declined to join the dissenting opinion written by Justice Stevens because he felt it went too far in the other direction and did not give enough importance to the word "navigable" in the statutory term "navigable waters."

Justice Stevens in his dissent would have deferred to the U.S. Army Corps of Engineers (Corps) in both Carabell and Rapanos and sustained the lower court decisions.

Based on how the Court has viewed prior fragmented decisions, it is likely that Justice Kennedy's concurring opinion will be viewed as the holding in this consolidated case.

The usual rule in plurality opinions, as stated in *Marks v United States*, 430 U.S. 188, 193 (1977), is that: "When 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… (citing

Gregg v Georgia, 428 U.S. 153, 169 (1979)." Here, Justice Kennedy's concurrence provides the narrowest grounds for the decision because it remands only for the purpose of further developing the record to substantiate the significant nexus requirement. Also, Kennedy indicates that the government may well be able to establish the significant nexus.

Moreover, in this case, there is no "common denominator" between Justice Kennedy's concurrence and the plurality opinion. See *Grutter v Bollinger*, 539 U.S. 306, 325 (2003); *King v Palmer*, 950 F.2d 771, 781 (DC Cir. 1991). Thus, it may be more appropriate to look for the overlap between Justice Kennedy and the dissent. See *Breyer v Meissner*, 214 F.3d 416, (3d Cir. 1999); *DeStefano v Emergency Housing*, 247 F.3e 397 (2d Cir. 2001); *Papike v Tambrands, Inc*., 107 F.3d 737, 741 (9th Cir. 1997). It is also worth pointing out Justice Stevens' observation in his dissenting opinion:

> *I assume that Justice Kennedy's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction, but in the unlikely event that the plurality's test is met but Justice Kennedy's is not, courts should also uphold the Corps' jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test.*

Whether the lower courts follow Justice Stevens' advice remains to be seen. Chances for a favorable ruling would be increased if the U.S. Environmental Protection Agency (EPA) and the Corps would issue guidance adopting the view that tributaries and adjacent wetlands should be considered jurisdictional if they meet either Justice Kennedy's or the plurality's test.

WHAT WERE THE FACTS OF THE CASES?

In Rapanos, the Supreme Court consolidated for review two lower Sixth Circuit Court of Appeal cases from Michigan—Rapanos v. United States, No. 04-1034 and Carabell, No. 04-1384. The Court was asked to decide in both cases whether the CWA under Section 404 extends to wetlands which do not contain nor are adjacent to navigable waters. The lower District court had held in both cases that the wetlands in question were subject to CWA jurisdiction as "waters of the U.S." The Sixth Circuit Court of Appeals sustained the District Court judgments.

The Rapanos cases involved three parcels involving 28, 64, and 49 acres of wetland. The District Court held that all three sites had surface water connections to tributaries or drains connected to navigable waters. John Rapanos had asked the Michigan Department of Natural Resources to examine the first site. A state official told Rapanos that the site likely included regulated wetlands. Rapanos hired a consultant who informed him that the site contained between 48 and 58 acres of wetland. Despite this report, Rapanos went forward with filling wetlands on the three sites. The Federal Government brought both criminal and civil charges against Rapanos. The District court upheld the Corp's jurisdiction for the three parcels. The Court of Appeals affirmed. See 376 F.3d 629 (2004). The owners appealed to the U.S. Supreme Court which granted certiorari to consider the jurisdictional question.

The Carabell case involved a 19.6 acre parcel, 15.9 acres of which were forested wetlands. The property was roughly one mile from Lake St. Clair. The property was separated from a ditch by a berm which ordinarily blocks surface water flows from the wetland into the ditch. The ditch connected with a continuously flowing drain which flows into a creek. The creek empties into Lake St. Clair. The owners hoped to fill in the wetlands and construct 130 condominium units. They were denied a permit by the state of Michigan and by the Corps district office. The District court upheld the Corps on a motion for summary judgment. This was affirmed by the Court of Appeals. 391 F.3d 704 (2005). The owners appealed to the U.S. Supreme Court which granted certiorari to consider the jurisdictional question here as well.

The Corps had determined that the CWA applied to the wetlands in question in both of these cases because the wetlands were connected through tributaries, ditches or drains to navigable waters (Rapanos) or were adjacent to tributaries, ditches, or drains connecting to navigable waters (Carabell) although separated under ordinary water conditions from the tributaries, ditches or drains by a berm. In making these determinations, the Corps applied its regulations in which the term "waters of the United States" was defined to include not only waters susceptible to use in interstate commerce—"the traditional understanding of the term navigable waters of the United States…--but also tributaries of those waters and…wetlands adjacent to those waters or their tributaries." (from Kennedy's opinion).

The Corps viewed "tributaries" as "within its jurisdiction if they carry a perceptible "ordinary high water mark." An ordinary high water mark was defined as a "line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of the soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas."

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

Prior to the Rapanos decision, the U.S. Supreme Court had issued two decisions concerning the scope of the CWA as applied wetlands. In the first of these decisions, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (985) the Court unanimously upheld the Corp's jurisdiction over wetlands adjacent to navigable-in-fact waterways. The Court deferred to the Corps construction of the CWA to include wetlands adjacent to navigable waters. The Court, however, reserved the question of the Corps' authority to regulate wetlands other than those adjacent to 'waters of the United States."

Justice Kennedy in his opinion relied upon Riverside Bayview as a principal legal precedent for his interpretation of the CWA although he also distinguished Rapanos and Carabell on the facts.

In the second wetland-related Supreme Court decision prior to Rapanos, a 5-4 divided Court in Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers (SWANCC), 531 U.S. 159 (2002) held that abandoned sand and gravel pits that were "intrastate, nonnavigable and isolated" were not subject to CWA jurisdiction solely based upon their use by migratory birds.

The Court observed in this case that it was the "significant nexus" between wetlands and navigable waters in Riverside Bayview Homes that informed the Court's reading of the CWA as including wetlands. The Court held that such a nexus was lacking in SWANCC.

Justice Kennedy in his opinion, therefore, focused on the "significant nexus" test for determining whether specific wetlands or other waters are subject to CWA jurisdiction. He concluded that: "Absent a significant nexus, jurisdiction under the Act is lacking."

KENNEDY'S OPINION; WHAT FACTORS ARE RELEVANT TO A "SIGNIFICANT NEXUS"?

What are the salient points of Justice Kennedy's opinion with regard to establishing "significant nexus"? He states that the Rapanos and Carabell cases should be "remanded to the Court of Appeals for proper consideration of the nexus requirement." His views with regard to "significant nexus" include the following:

First, in attempting to harmonize the Court's earlier decisions in *Riverside Bayview* and *SWANCC* (a daunting task), Justice Kennedy relates the nexus test to broad CWA goals and purposes:

> *T]he Corps' jurisdiction over wetlands "depends on the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"….*

Second, he goes on to endorse a broad, ecologically-based test for determining the requisite nexus for wetlands (and other waters) but warns that connections must not be speculative or insubstantial:

> *[W]etlands 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 waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'*

Third, Justice Kennedy applies the significant nexus test to tributaries, including impermanent streams, in addition to wetlands. He observes that "the Corps can reasonably interpret the CWA to cover the paths of such impermanent streams."

Fourth, he endorses both categorical approaches to inclusion of waters based upon significant nexus and case-by-case determinations. He states that, "through regulations or adjudication, the Corps may choose to identify categories of tributaries that due to their volume (either annually or on average), their proximity to navigable waters or other relevant 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." Justice Kennedy also says that, "absent more specific regulations, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries..." However he goes on to note that: "Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region." This suggests that the Corps has the authority to designate categories of wetlands, perhaps on a watershed basis, meeting the significant nexus test.

Fifth Kennedy specifically disagrees with the purality's exclusion of wetlands from CWA jurisdiction lacking a continuous surface connection to other jurisdictional waters.

Sixth, he concludes in disagreement with the purality that "As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone."

Seventh, Kennedy concludes, in disagreement with the purality, and that "the difficulty of defining the water's edge cannot be taken to establish that when a clear boundary is evident, wetlands beyond the boundary fall outside the Corps jurisdiction."

Eight, he concludes that Riverside Bayview, an earlier decision of the Court, did not "suggest that a flood-based origin (for moisture in a wetland) would not support jurisdiction; indeed, it presumed the opposite." He further observed that "Needless to say, a continuous connection is not necessary for moisture in wetlands to result from flooding-the connection might well exist only during floods."

Ninth, Kennedy recognized that lack of a hydrologic connection might, in some instances, nevertheless subject wetlands and waters to CWA jurisdiction because such wetlands could then store pollutants:

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

Tenth, Kennedy downplayed any Constitutional problems with waters encompassed by this broad test, stating "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."

On the other hand, Kennedy also suggested qualifications in applying a significant nexus test.

First, he warned that "the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far."

Second, he observed (as already noted above) that effects of waters subject to CWA jurisdiction upon navigable waters must not be speculative or insubstantial:

> *When… wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'*

Third, he called or case-by-case determinations of significance nexus absent "adjacency" for wetlands:

> *"When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreath of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute.*

Forth, he suggested that adequate nexus might exist in the two cases reviewed by the Court but that neither the agency (Corp) or reviewing courts had adequately treated the issue:

> *"In both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above. Thus the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, the Corps' assertion of jurisdiction is valid. Given, however, that neither the agency nor the reviewing courts properly considered the issue, a remand is appropriate, in my view, for application of the controlling legal standard."*

Fifth, he rejected the "presence of a hydrologic connection" alone as being sufficient to establish significant nexus in all cases. He observed that "Absence some measure of the significance of the connection for downstream water quality, this standard is too uncertain." With reference to the Rapanos cases, he called for "further evidence about the significance of tributaries to which the wetlands are connected." He further observed:

> *"…(M)ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."*

Similarly, in referring to the Carabell case, Kennedy observed that the "record gives little indication of the quantity and regularity of flow in the adjacent tributaries—a consideration that may be important in assessing the nexus".

Kennedy's opinion leaves open a number of questions and requires, at least for now, a burdensome case-by-case determination of jurisdiction except where adjacency is involved. But his opinion is a strong endorsement of the Riverside Bayview approach to determining nexus, and he has at least provided a rough blueprint for how the agencies, if properly motivated, could craft a rule that would designate large categories of wetlands and other waters as meeting the nexus requirement.