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ARTICLE**TROUBLED WATERS: THE SUPREME COURT SPLITS
ON SCOPE OF WETLANDS REGULATION****Kristina Daniel Lawson***

For the past twenty years, the United States Supreme Court has struggled with the scope of the federal Clean Water Act's wetlands regulatory scheme. This summer, the Court again considered the scope of the Section 404 permit program - delving into the question whether federal jurisdiction extended to wetlands not adjacent to a traditionally navigable water. The two consolidated cases - *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*¹ - invited the Supreme Court to restrict the reach of the Clean Water Act. The Court collectively declined the invitation.

Not only did the Court decline to limit the scope of the Act, in a set of five truly distinct opinions, the fractured Court departed from its usual practice and sent both cases back to the Sixth Circuit without providing any clear rule for the lower court to apply.² While certain basic guidance can be gleaned from the split decision, as a practical matter, the decision means that potential dischargers, federal regulators, and courts throughout the country are left to wade through Section 404's murky waters without clear guidance until such time as Congress, or an administrative rule-making, intervenes.

FEDERAL WETLANDS REGULATION - SECTION 404

Adopted in 1972, the federal Clean Water Act today regulates nearly every discharge to navigable water. From stormwater and agricultural dis-

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charges, to discharges of pollutants from point sources, the Act requires dischargers to obtain permits, pretreat effluent, and limit runoff.³ The Act further requires states to adopt water quality standards,⁴ and to certify that discharges approved by the federal government comply with adopted water quality standards.⁵ Additionally, the Act imposes a strict requirement that any person wishing to discharge “dredged or fill material into the navigable waters at specified disposal sites,” obtain a federal permit before doing so.⁶ This permit program is “the centerpiece of the federal government’s wetland regulatory programs.”⁷

Commonly known as the “Section 404 permit program”, the permit requirement imposed by 33 U.S.C.A. § 1344 has been the source of controversy over the past three decades, primarily because of the United States Army Corps of Engineers’ assertion of sweeping jurisdiction over virtually any proposed alteration of “wetlands” - including various “adjacent” and “separated” wetlands.⁸ With Congress having failed to define the reach of the Section 404 program with particularity, through administrative regulations promulgated under the Act, the Corps has asserted jurisdiction over all waters susceptible to use in interstate or foreign commerce, all interstate waters, and “[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, *wetlands*, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds” that could affect interstate or foreign commerce.⁹ The Corps also has asserted jurisdiction over all “[w]etlands adjacent to waters.”¹⁰ By regulation, this jurisdiction over adjacent wetlands extends to non-adjacent wetlands that are “separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.”¹¹

It was the Corps’ continuing assertion of jurisdiction over wetlands that were not adjacent to navigable waters, and which had seemingly little hydrological or ecological connection to waters that were actually navigable-in-fact, that resulted in the most recent challenge to the Corps’ Section 404 jurisdiction. In *Rapanos v. United States*, the question presented to the Supreme Court was whether Section 404’s prohibition on unpermitted discharges to “the waters of the United States” permissibly extended to non-navigable, non-adjacent wetlands.¹²

REGULATION OF ADJACENT WETLANDS AND ISOLATED PONDS: *RIVERSIDE BAYVIEW AND SWANCC*

In 1985, the Supreme Court first addressed the question whether certain wetlands were too far removed from traditionally navigable waters to be subject to the Clean Water Act’s Section 404 permit requirement in *United States v. Riverside Bayview Homes, Inc.*¹³ Specifically at issue in *Riverside Bayview* was whether wetlands located immediately adjacent to traditionally navigable waters were subject to the Corps’ permitting jurisdiction.¹⁴ In a unanimous opinion authored by Justice White, the Court concluded that the wetlands at issue in the case - “80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan”¹⁵ - were subject

to the Corps' jurisdiction.¹⁶ The Court found the Corps' conclusion that the adjacent wetlands were subject to regulation because they were "inseparably bound up with 'waters' of United States" to be a reasonable interpretation of its authority under the Clean Water Act.¹⁷

In *Riverside Bayview*, the Court did not analyze whether or not the wetland was either hydrologically or ecologically connected to a traditional navigable water, and specifically avoided adopting a bright-line test for when a wetland is subject to the reach of the Corps. The Court also avoided an analysis of the terms "navigable waters" and "waters of the United States."¹⁸ Instead, the Court simply deferred to the Corps' seemingly reasonable regulation, recognizing that the regulation may, in some cases, reach wetlands that do not have significant environmental effects on water quality.¹⁹

Sixteen years after considering *Riverside Bayview's* actually abutting adjacent wetlands, the Court again addressed the scope of the Corps' jurisdiction under Section 404 in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC").²⁰ At issue in SWANCC was whether or not the Corps' permitting jurisdiction extended to permanent and seasonal isolated ponds located at the site of a former sand and gravel mining operation.²¹ The ponds provided suitable habitat for migratory birds, but were not adjacent to a traditionally navigable water.²²

A divided Court answered the question in the negative, finding that the ponds at issue could be filled without issuance of a Section 404 permit.²³ Specifically, the Court held that the Corps' assertion of jurisdiction over ponds providing suitable migratory bird habitat was beyond the jurisdiction contemplated by Congress when it enacted the Clean Water Act, and was therefore not entitled to the Court's deference.²⁴ Although not expressly analyzed or discussed, the "significant nexus between the wetlands and 'navigable waters' that informed [the Court's] reading of the CWA in *Riverside Bayview Homes*," was apparently not present with respect to the isolated ponds at issue in SWANCC.²⁵ Notably, the Court again failed to address what waters actually constituted "the waters of the United States."

The SWANCC Court also acknowledged that it had not yet addressed whether the authority of the Corps extended to "discharges of fill material into wetlands that are not adjacent to bodies of open water."²⁶ While, at first glance, it appeared the Court was perhaps attempting to at least partially resolve that open question, the opinion failed to actually address it. Instead, the Court's narrow decision and pointed advice left the door wide open for future challenges to the scope of the Corps' jurisdiction.

DOES THE CORPS' JURISDICTION EXTEND TO WETLANDS NOT ADJACENT TO NAVIGABLE WATERS?

With the open question framed by the Court, it was only a matter of time before a case (or two) would ripen for the Court's consideration. Given the length of the time required to process Section 404 permits, it is not surprising that June and Keith Carabell were well into the Corps' permitting process when SWANCC was decided in 2001.²⁷ In the case of John

and Judith Rapanos, and their affiliated companies, their interactions with the Corps over the proposed development of their property had spanned nearly twenty years.²⁸

The Rapanoses owned three separate parcels in the state of Michigan, which the federal government believed contained jurisdictional wetlands.²⁹ Without first obtaining a Section 404 permit, the Rapanoses filled various wetlands on their properties because they believed the Clean Water Act did “not apply to nonnavigable, intrastate wetlands far removed from any traditional navigable waters.”³⁰ One of the Rapanoses’ properties was located 20 miles from the nearest navigable-in-fact water - Lake Huron.³¹ The wetlands at this site were connected to a man-made drain, which drained into a creek, which flowed into a river, which emptied into a bay, and eventually into the lake.³² Another of the Rapanoses’ properties drained into another man-made drain, which eventually connected to a river; and, the last of the Rapanoses’ properties at issue had a surface connection to the Pine River, which also eventually flowed into Lake Huron.³³ Because the Rapanoses filled their properties without permits, the federal government proceeded both criminally and civilly against them in an attempt to enforce Section 404’s requirements.³⁴

Unlike the Rapanoses, the Carabell plaintiffs actually sought a permit to fill approximately 15.9 acres of their property for purposes of constructing a multi-family residential complex.³⁵ As described in the opinion of the Sixth Circuit:

The [Carabell] property is shaped like an inverted right triangle, the hypotenuse of which runs from the southwestern corner of the parcel at a 45 degree angle to the northeast corner. Following the hypotenuse and separating the Carabells’ property from the adjacent property is an unnamed ditch. When the ditch was excavated, the spoils were cast to either side of the ditch, creating upland berms approximately four feet wide along the banks of the ditch. The berm edging the Carabells’ property serves to block immediate drainage of surface water out of the parcel into the ditch. Wooded conditions exist up to the upland rim of the ditch. At the northeastern corner of the property, the ditch connects to the Sutherland-Oemig Drain, which empties into the Auvase Creek, which empties into Lake St. Clair, which is part of the Great Lakes drainage system. Although the record does not establish the direction of water flow in the ditch, the ditch empties either into the Sutherland-Oemig Drain at the northeastern corner of the property, or into ditches at the southwestern corner of the property that - like the Sutherland-Oemig Drain - outlet into Auvase Creek and eventually into Lake St. Clair.³⁶

After initial approval of their permit request by the Michigan Department of Environmental Quality, the federal government asserted jurisdiction over the project, and required that the Carabells file an application for a federal Section 404 permit.³⁷ The Carabells sought this permit under protest, and their application was denied.³⁸ The Carabells challenged the decision on the grounds that the Corps’ jurisdiction under Section

404 did not extend to their property because there was no hydrological connection between the wetland present on their property and a traditionally navigable water. 39

To the disappointment of those who had been expecting to see a shift in the Court's Clean Water Act jurisprudence, a majority of the Supreme Court reached only one clear conclusion with respect to the *Rapanos* and *Carabell* wetlands: that both cases should be remanded to the Sixth Circuit for further proceedings.⁴⁰ Writing for a plurality of the Court, Justice Scalia argued for a two-part test for determining whether a non-adjacent wetland was subject to the Corps' jurisdiction under Section 404: (1) the wetland must be adjacent to a channel containing a relatively permanent body of water connected to traditional interstate navigable waters, and (2) the wetland must have a continuous surface connection to the channel, "making it difficult to determine where the 'water' ends and the 'wetland' begins."⁴¹

Justice Kennedy, in a concurring opinion, absolutely rejected the test advocated by Justice Scalia, finding the plurality's test impractical, unpersuasive, and "inconsistent with the Act's text, structure, and purpose."⁴² Justice Kennedy indicated that he believed it well-within the Corps' discretion to rely on adjacency to establish jurisdiction; however, he found that if the Corps was unwilling to adopt further regulations clarifying the scope of its jurisdiction, it must instead "establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."⁴³ In a particular case, the significant nexus test could be satisfied by showing that "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.'"⁴⁴

Writing for the four dissenting justices, Justice Stevens believed that deference to the Corps was appropriate, and that the plurality and concurring opinions represented "judicial amendment of the Clean Water Act."⁴⁵ However, recognizing his viewpoint's defeat, Justice Stevens indicated that, in light of the plurality and concurring decisions, the Corps' jurisdiction should extend to cases wherein either the plurality's test or Justice Kennedy's test is satisfied.⁴⁶

NAVIGABLE DOES NOT MEAN NAVIGABLE

While the fractured *Rapanos* decision will certainly require a subset of future Section 404 permit applications to be evaluated on a case-by-case basis to determine whether the requisite "significant nexus" exists, some basic guidance as to the scope of the Corps' Section 404 jurisdiction can also be gleaned from the decision. For example, a majority of the Court has made clear that for Section 404's purposes, "navigable" does not mean traditionally navigable or navigable-in-fact.⁴⁷ This conclusion relied, in large part, on Congress' express definition of "navigable waters" as "the waters of the United States, including the territorial seas."⁴⁸ As pointed out by Justice Scalia:

For a century prior to the [Clean Water Act], we had interpreted the phrase ‘navigable waters of the United States’ to refer to interstate waters that are ‘navigable in fact’ or readily susceptible of being rendered so.⁴⁹

Upon the initial adoption of the Clean Water Act in 1972, the Corps also adopted this definition. However, it revised the definition after a court enjoined the original regulations as too narrow.⁵⁰ By making “navigable waters” a defined term, Congress had ascribed a meaning to it broader and different than the common and historic understanding of the term.

While most believed this question - whether navigable meant navigable-in-fact - to have been previously resolved by the Court, the Rapanoses nevertheless argued to the Court that both “navigable waters” and “the waters of the United States” were required to be navigable-in-fact.⁵¹ In an alliance uncharacteristic of the decision, the plurality and Justice Kennedy agreed that the Rapanoses’ argument was without merit. Justice Scalia reminded that, “We have twice stated that the meaning of ‘navigable waters’ in the Act is broader than the traditional understanding of that term.”⁵² And, Justice Kennedy similarly found that “the text [of the Clean Water Act] is explicit in extending the coverage of the Act to some nonnavigable waters.”⁵³

ONE MOLECULE OF WATER IS NOT ENOUGH

Just as a majority of the Court rejected the Rapanoses’ extreme reading of Section 404, a majority of the Court appears to have also agreed that the opposite extreme is similarly untenable; i.e., that the simple presence of water, absent other *ecologically* connecting circumstances, is not enough to establish jurisdiction under Section 404.

Specifically, the plurality would have limited the Corps’ jurisdiction to reach only wetlands that are adjacent to “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] oceans, rivers, [and] lakes,” and those wetlands continuously connected thereto, making clear that the mere presence of water was insufficient.⁵⁴ Justice Kennedy, while rejecting the plurality’s narrow approach, also impliedly indicated that the mere presence of water was not enough to establish Section 404 jurisdiction. Rather, a significant ecological nexus between the wetland proposed to be regulated and a navigable-in-fact water is required, such that a water quality connection exists between the wetland and navigable-in-fact water.⁵⁵

A CONTINUOUS CONNECTION TO A TRIBUTARY THAT FLOWS INTO A TRADITIONAL NAVIGABLE WATER IS ENOUGH

Reading the plurality and concurring decisions together, it appears possible that in a subset of wetlands cases, it may now be simpler for the Corps to establish jurisdiction over the types of wetlands at issue in *Rapanos*. Where a continuous connection from a wetland to a tributary exists, and that tributary has a permanent connection to a traditional navigable

water, it is likely the Corps will be able to simply and certainly establish jurisdiction under either the plurality's test or under Justice Kennedy's significant nexus test.

PROVING A SIGNIFICANT NEXUS - ECOLOGICAL CONNECTION REQUIRED

With respect to the limited subset of wetlands cases in which the Corps will be required to establish a "significant nexus", the *Rapanos* decision has not left the Corps (and reviewing courts) entirely without guidance. In a statement clearly intended to assist the Corps in determining when a significant nexus exists, Justice Kennedy wrote:

'wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'⁵⁶

Further, Justice Kennedy advised the Corps that, in his opinion, it would be reasonable for the Corps to "identify categories of tributaries that, due to their volume of flow (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."⁵⁷ This open invitation should induce the Corps to initiate a rulemaking along the suggested lines.

OPEN ISSUES

Two primary wetland-related issues appear to have been left open by the Court's decision. First, it is not resolved whether the Corps' jurisdiction extends to wetlands which continuously flow into a tributary which does not continuously flow into a traditional navigable water. Second, it is not resolved whether the Corps' jurisdiction extends to wetlands that do not continuously flow into a tributary which does continuously flow into a traditional navigable water. In light of the Court's split decision, absent further direction from Congress, the Corps or the Court, these questions will be answered on a case-by-case basis by the Corps and reviewing lower courts.

CONCLUSION

The tale is not over for the *Rapanoses* or the *Carabells*; they will need to press on in the Sixth Circuit. With respect to the Clean Water Act generally, the ideological fracture in the Court, coupled with Section 404's truly ambiguous language, now requires that the United States Army Corps of Engineers make every effort to adopt a reasonable regulation defining the scope of its jurisdiction over non-adjacent and separated wetlands. Should the Corps decline to do so, Congress should intervene and explain what it

meant when it said “navigable waters” are “the waters of the United States.” Without such clarification, it may be only a short time before another Section 404 case reaches the Supreme Court.

NOTES

1. *Rapanos v. U.S.*, 126 S. Ct. 2208, 62 Env’t. Rep. Cas. (BNA) 1481 (U.S. 2006).
2. *Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting).
3. 33 U.S.C.A. § 1342.
4. 33 U.S.C.A. § 1313.
5. 33 U.S.C.A. § 1341.
6. 33 U.S.C.A. § 1344. Exempt from the requirement to obtain a Section 404 permit are numerous activities, including “normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices,” (33 U.S.C.A. § 1344(f)(1)(A)); various emergency-related activities (33 U.S.C.A. § 1344(f)(1)(B)); and, “construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment,” (33 U.S.C.A. § 1344(f)(1)(E)). But see *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 52 Env’t. Rep. Cas. (BNA) 2025, 32 Env’t. L. Rep. 20011 (9th Cir. 2001), judgment aff’d, 537 U.S. 99, 123 S. Ct. 599, 154 L. Ed. 2d 508, 55 Env’t. Rep. Cas. (BNA) 1417 (2002), wherein the Ninth Circuit Court of Appeals, in a 2-1 decision, held that “deep ripping” for planting of vineyards was not “normal farming” and required a Section 404 permit. In *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 537 U.S. 99, 123 S. Ct. 599, 154 L. Ed. 2d 508, 55 Env’t. Rep. Cas. (BNA) 1417 (2002), the Supreme Court was evenly divided (4-4), with Justice Kennedy recusing himself, thus sustaining the Ninth Circuit’s decision.
7. Connolly, et al., *Wetlands Law & Policy, Understanding Section 404* (2005), p. 1.
8. “Wetlands” is defined by the Corps to mean “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” (33 C.F.R. § 328.3(b)).
9. 33 C.F.R. § 328.3(a)(3) (emphasis added).
10. 33 C.F.R. § 328.3(a)(7). The Corps defines “adjacent” as including “bordering, contiguous, or neighboring,” wetlands. (33 C.F.R. § 328.3(c)).
11. 33 C.F.R. § 328.3(c).
12. *Rapanos*, 126 S. Ct. at 2219-2220.
13. *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419, 23 Env’t. Rep. Cas. (BNA) 1561, 16 Env’t. L. Rep. 20086 (1985).
14. *Riverside Bayview*, 474 U.S. at 126, 106 S. Ct. at 459.
15. Interestingly, the wetlands at issue in *Riverside Bayview* were located only a short distance from the Carabell wetlands at issue in *Rapanos*. *Riverside Bayview*, 474 U.S. at 124, 106 S. Ct. at 458.
16. *Riverside Bayview*, 474 U.S. at 135, 106 S. Ct. at 463.
17. *Riverside Bayview*, 474 U.S. at 134, 106 S. Ct. at 463.
18. See 33 U.S.C.A. §§ 1344, 1362(7).
19. *Riverside Bayview*, 474 U.S. at 135 n.9, 106 S. Ct. at 463 n.9; see also *Rapanos*, 126 S. Ct. at 2244 (Kennedy, J., concurring).
20. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001).
21. SWANCC, 531 U.S. at 162, 121 S. Ct. at 677.
22. SWANCC, 531 U.S. at 162, 121 S. Ct. at 677.
23. SWANCC, 531 U.S. at 168, 121 S. Ct. at 680.
24. SWANCC, 531 U.S. at 174, 121 S. Ct. at 684.

25. *SWANCC*, 531 U.S. at 167, 121 S. Ct. at 680 (emphasis added). While the “significant nexus” test proved important in the Court’s recent decision in *Rapanos*, in *SWANCC*, the Court did not elaborate on its “significant nexus” requirement. The Court merely indicated it had decided *Riverside Bayview* on the basis of the significant nexus that existed between the wetlands and navigable waters at issue in that case. See *SWANCC*, 531 U.S. at 167, 121 S. Ct. at 680.
26. *SWANCC*, 531 U.S. at 167, 121 S. Ct. at 680.
27. See *Rapanos*, 126 S. Ct. at 2214 (noting that the “average applicant” for a Section 404 permit spends “788 days?in completing the process”); Brief for Petitioners June Carabell, et al., 2005 WL 3279898, pp. 6-9.
28. See *Rapanos*, 126 S. Ct. at 2214.
29. See *U.S. v. Rapanos*, 376 F.3d 629, 632, 58 Env’t. Rep. Cas. (BNA) 2000, 59 Fed. R. Serv. 3d 341, 34 Env’tl. L. Rep. 20060, 2004 FED App. 0239P (6th Cir. 2004), cert. granted, 126 S. Ct. 414, 163 L. Ed. 2d 316 (U.S. 2005) and vacated and remanded, 126 S. Ct. 2208, 62 Env’t. Rep. Cas. (BNA) 1481 (U.S. 2006).
30. See Brief for Petitioners John A. Rapanos, et al., 2005 WL 3295630, p. 5.
31. *Rapanos*, 126 S. Ct. at 2219.
32. *Rapanos*, 126 S. Ct. at 2219.
33. *Rapanos*, 126 S. Ct. at 2219. As stated by Justice Scalia, “It is not clear whether the connections between these wetlands and the nearby drains and ditches are continuous or intermittent, or whether the nearby drains and ditches contain continuous or merely occasional flows of water.” *Rapanos*, 126 S. Ct. at 2219.
34. *U.S. v. Rapanos*, 376 F.3d 629, 632, 58 Env’t. Rep. Cas. (BNA) 2000, 59 Fed. R. Serv. 3d 341, 34 Env’tl. L. Rep. 20060, 2004 FED App. 0239P (6th Cir. 2004), cert. granted, 126 S. Ct. 414, 163 L. Ed. 2d 316 (U.S. 2005) and vacated and remanded, 126 S. Ct. 2208, 62 Env’t. Rep. Cas. (BNA) 1481 (U.S. 2006).
35. *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704, 706, 59 Env’t. Rep. Cas. (BNA) 1621, 34 Env’tl. L. Rep. 20147, 2004 FED App. 0417P (6th Cir. 2004), cert. granted, 126 S. Ct. 415, 163 L. Ed. 2d 316 (U.S. 2005) and vacated and remanded, 126 S. Ct. 2208, 62 Env’t. Rep. Cas. (BNA) 1481 (U.S. 2006).
36. *Carabell*, 391 F.3d at 706, 59 Env’t. Rep. Cas. (BNA) 1621, 34 Env’tl. L. Rep. 20147, 2004 FED App. 0417P (6th Cir. 2004), cert. granted, 126 S. Ct. 415, 163 L. Ed. 2d 316 (U.S. 2005) and vacated and remanded, 126 S. Ct. 2208, 62 Env’t. Rep. Cas. (BNA) 1481 (U.S. 2006).
37. *Carabell*, 391 F.3d at 706, 59 Env’t. Rep. Cas. (BNA) 1621, 34 Env’tl. L. Rep. 20147, 2004 FED App. 0417P (6th Cir. 2004), cert. granted, 126 S. Ct. 415, 163 L. Ed. 2d 316 (U.S. 2005) and vacated and remanded, 126 S. Ct. 2208, 62 Env’t. Rep. Cas. (BNA) 1481 (U.S. 2006).
38. *Carabell*, 391 F.3d at 706, 59 Env’t. Rep. Cas. (BNA) 1621, 34 Env’tl. L. Rep. 20147, 2004 FED App. 0417P (6th Cir. 2004), cert. granted, 126 S. Ct. 415, 163 L. Ed. 2d 316 (U.S. 2005) and vacated and remanded, 126 S. Ct. 2208, 62 Env’t. Rep. Cas. (BNA) 1481 (U.S. 2006).
39. See Brief for Petitioners June Carabell, et al., 2005 WL 3279898, p.13. The Carabells also challenged the decision on the grounds that federal jurisdiction over its wetlands would exceed the boundaries of Congressional authority under the Commerce Clause. Brief for Petitioners June Carabell, et al., 2005 WL 3279898, p. 40.
40. See *Rapanos*, 126 S. Ct. at 2235; *Rapanos*, 126 S. Ct. at 2252 (Kennedy, J., concurring).
41. *Rapanos*, 126 S. Ct. at 2227.
42. *Rapanos*, 126 S. Ct. at 2246 (Kennedy, J., concurring).
43. *Rapanos*, 126 S. Ct. at 2249 (Kennedy, J., concurring). The Ninth Circuit Court of Appeals had its first opportunity to apply the *Rapanos* decision in *Northern California River Watch v. City of Healdsburg*, __ F.3d __, 2006 WL 2291155 (9th Cir. 2006). There, the court evaluated the *Rapanos* decision in the context of Section 402’s NPDES permit requirements, and declared Justice Kennedy’s significant nexus test as controlling. Because the pond at issue significantly affected the physical, biological, and chemical in-

tegrity of the water through actual surface connection and other hydrological connections, the court held an NPDES permit was required to discharge wastewater into the pond.

44. *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring).
45. *Rapanos*, 126 S. Ct. at 2253 (Stevens, J., dissenting).
46. *Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting).
47. In fact, there appears to be unanimous support for this interpretation.
48. 33 U.S.C.A. § 1362(7).
49. *Rapanos*, 126 S. Ct. at 2216.
50. *Rapanos*, 126 S. Ct. at 2216.
51. *Rapanos*, 126 S. Ct. at 2220.
52. *Rapanos*, 126 S. Ct. at 2220.
53. *Rapanos*, 126 S. Ct. at 2241 (Kennedy, J., concurring).
54. *Rapanos*, 126 S. Ct. at 2225.
55. *Rapanos*, 126 S. Ct. at 2250-2251 (Kennedy, J., concurring).
56. *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring). This requirement for an “ecologic interconnection” appears to be a departure from the Court’s previous opinions.
57. *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring).

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