RAPANOS v. UNITED STATES: "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT

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I. INTRODUCTION

The United States Supreme Court in *Rapanos v. United States* considered federal jurisdiction over wetlands indirectly connected to traditional "waters of the United States."[1] The Court in *Rapanos* had an opportunity to clarify the definition of "waters of the United States" and the federal government's jurisdiction over such waters for purposes of the Clean Water Act ("CWA"), which has been a controversial aspect in environmental law.[2] As one commentator put it, "[t]he decision in these combined cases [*Rapanos*] could have profound implications for not just Michigan but watersheds in other states and regions."[3] However, once the opinion became available, it became clear that little direction would be offered by it.[4] Instead, the Court issued a confusing plurality and elected not to

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1. *See* Rapanos v. United States, 126 S. Ct. 2208 (2006).

2. *See* Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719 (2006).

3. Joel B. Eisen, *Rapanos, Carabell, and the Isolated Man*, 40 U. RICH. L. REV. 1099, 1105 (2006) (discussing the impact of possible rulings in the *Rapanos* case).

4. *See* Margaret Graham Tebo, E-Report, *Lawyers, Developers Puzzle Over Wetlands Case*, 5 NO. 25 A.B.A. J. 3, June 23, 2006 (discussing the various opinions in the *Rapanos* case).

seize a golden opportunity to clarify the reach of the CWA.[5] As Chief Justice Roberts put it, "[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act."[6] This is not only an unfortunate ruling because the Court missed an opportunity to clarify the CWA, it is also unfortunate because the confusing plurality opinion the Court issued is likely to cause uncertainty in future litigation over the CWA in the lower federal courts.[7] Interested parties on both sides of the environmental debate will now be forced to further litigate the federal government's reach under the CWA in order to get solid answers.[8] This is disconcerting for those on both sides of the environmental debate because until the court takes up the issue again, confusion and inconsistency will likely result. The *Rapanos* opinion has left "[d]evelopers, environmental lawyers and the Army Corps of Engineers . . . scratching their heads."[9]

While it is unfortunate that the Court was not able to come to a unified standard for federal jurisdiction over "waters of the United States," and it may even be likely that it will cause some confusion, the confusion and concern is unnecessary. When the *Rapanos* decision is boiled down into the controlling opinion authored by Justice Kennedy, it becomes clear that the decision is not as confusing as it might seem at first blush.[10]

These issues are all particularly relevant for individuals who are involved in agriculture. Farmers must comply with a plethora of local and federal regulations, including the CWA. Under the CWA, farmers are required to be mindful of discharge from fertilizer in both the form of animal excrement or artificial fertilizer into water.[11] If these discharges take place into waters that fall under the CWA, the farmer will be subject to the penalties outlined in the CWA.[12] In order for farmers to make decisions about when to obtain permits, and about how to maintain and care for their crops or feedlots, they need a clear standard on when they have violated applicable law. The *Rapanos* case has further muddied these

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5. *See* Eisen, *supra* note 3, at 1105.

6. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring).

7. *Id.* (stating that, "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis."); s*ee also* Highway J. Citizens Group v. U.S. Dep't of Transp., 456 F.3d 734, 744 (7th Cir. 2006) ("[A] case by case analysis is what each court is left with following Rapanos."); United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 614 n.13 (N. Dist. Tex. 2006) (attempting to apply the difficult to interpret decision in *Rapanos*).

8. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (stating that, "Lower courts and regulated agencies will now have to feel their way on a case-by-case basis.")

9. Tebo, *supra* note 4.

10. *See Rapanos*, 126 S. Ct. at 2247 (Kennedy, J., concurring).

11. *See* 33 U.S.C. § 1251(a)(3) (2006).

12. *See* 33 U.S.C. §§ 1319, 1365 (2006).

standards, making it difficult for farmers to know when they are or are not in compliance with the CWA. [13]

This note, however, will attempt to show that the *Rapanos* case is not as confusing as it has been made out to be. This is in large part because of the concurrence authored by Justice Kennedy, which makes a healthy compromise and applies an easy to understand test.[14] This note will also attempt to decipher the ruling in *Rapanos* and explore its possible impacts and relevant arguments, as well as highlight important aspects of the CWA. Section II will discuss the CWA's relevant definitions and explore Court rulings that have helped shape the federal government's jurisdiction. It will also briefly outline the arguments for limiting the federal government's jurisdiction under the CWA, as well as the arguments for allowing the federal government broad jurisdiction over "waters of the United States." Section III will attempt to decipher the Court's plurality in *Rapanos*, along with a brief discussion of cases leading up to *Rapanos*, and recent federal cases applying it. Section IV will discuss what, if anything, *Rapanos* has changed. Section V will outline possible impacts on agricultural operations.

II. THE CLEAN WATER ACT

A. *Overview and Definitions*

In 1972, Congress enacted the CWA for the purpose of "[r]estoration and maintenance of chemical, physical and biological integrity of [the] Nation's waters."[15] The CWA also states that "it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited."[16] A "discharge of pollutants" is defined as "any addition of any pollutant to navigable waters from any point source."[17] The CWA defines the waters that it covers as "navigable waters."[18] The act defines this term as "the waters of the Unites States, including the territorial seas."[19] A reading of the act quickly reveals the ambiguity that has led to litigation over its reading. It is with the backdrop of these general policies that

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13. *See* Jeff L. Todd, *Environmental Law: The Clean Water Act – Understanding When a Concentrated Animal Feeding Operation Should Obtain an NPDES Permit*, 49 OKLA. L. REV. 481, 485-86 (1996).
14. *See generally Rapanos*, 126 S. Ct. at 2247-48 (Kennedy, J., concurring).
15. 33 U.S.C. § 1251(a) (2006).
16. 33 U.S.C. § 1251(a)(3).
17. 33 U.S.C. § 1362(12) (2006).
18. 33 U.S.C. § 1362(7).
19. 33 U.S.C. § 1362(7).

the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") have attempted to implement the intent of Congress.[20]

B. *Scope of Federal Jurisdiction*

Many manufacturing companies discharge wastewater and storm water into the nation's waters.[21] This is also a common problem in the agricultural industry in connection with animal feeding operations.[22] These discharges are regulated through the CWA by both state and federal programs.[23] An individual who makes such a discharge through wastewater or storm water is required to obtain a National Pollutant Discharge Elimination System ("NPDES") permit under section 402 of the CWA.[24] These permits are obtained from the EPA or at the state level if the state has an EPA-approved permitting program.[25] If a discharge is made without an NPDES permit, or if the permit is violated, the violating individual will be subject to criminal and civil penalties at both the state and federal level.[26] The Corps has the authority to issue permits for discharge of dredged or fill material to the "waters of the United States."[27] Also, if permits and regulations are not complied with, the violating party will be subject to criminal and civil liability.[28]

The federal government, through its agencies, has enjoyed far-reaching jurisdiction under the CWA. For example, the Corps defines the scope of "waters of the United States" very broadly to include, "[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."[29] As Justice Scalia stated in *Rapanos*, there has been an "immense expansion of federal regulation of land use that has occurred under the Clean Water Act – without any change in the governing statute."[30] "Even though federal environmental regulation adopts a cooperative federalism model, the federal

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20. *See* 33 C.F.R. § 328.3(a)(3) (2007) (defining "waters of the United States" broadly as "[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").

21. ENV'T ENERGY AND RES. SEC., A.B.A., THE CLEAN WATER ACT HANDBOOK 1 (Mark A. Ryan ed., 2d ed. 2003) (hereinafter HANDBOOK).

22. *See* Todd, *supra* note 13, at 485-86.

23. HANDBOOK, *supra* note 21, at 1.

24. 33 U.S.C. § 1342 (2006).

25. HANDBOOK, *supra* note 21, at 1.

26. *See* 33 U.S.C. §§ 1319, 1365 (2006).

27. HANDBOOK, *supra* note 21, at 2. (citing 33 U.S.C. § 1344 (2006)).

28. *See* 33 U.S.C. §§ 1319, 1365.

29. 33 C.F.R. § 328.3(a)(3).

30. *Rapanos*, 126 S. Ct. at 2215.

government sets most environmental priorities . . . and directs much state effort."[31] The argument that the federal government has expanded its reach beyond the limits originally intended finds support in the CWA itself.[32] One writer, venting his frustration about an overreaching federal government, put it this way: "You might have a fighting chance in the federal justice system if you're a kidnapper, gun smuggler, counterfeiter[,] or some other run-of-the-mill crook. But let the government get ahold [sic] of your leg for pouring sand in a few puddles on your own land, and you're a goner."[33] The Court has recognized arguments about expansion of federal regulation to some extent and has subsequently limited federal jurisdiction over "waters of the United States" to the "significant nexus" test discussed in *Solid Waste Agency v. Army Corps of Engineers* ("SWANCC"), which provides the modern test for determining jurisdiction over "waters of the United States."[34]

There is also an argument that the current jurisdictional structure under the CWA is acceptable. As the dissent in *Rapanos* illustrates, the argument is that deference should be given to the legislative and executive branches of the federal government.[35] The dissent in *Rapanos* also argues that limiting the federal government's jurisdiction under the CWA, which has been in place for over thirty years, would disregard the congressional delegation to the agencies responsible for implementing the CWA.[36] As this note will discuss, these two lines of reasoning come into conflict with each other in the *Rapanos* decision.

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31. Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 380 (2005).

32. *See* 33 U.S.C. § 1251(g) (2006) (stating, "[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter.").

33. Nolan Finley, *Feds Stand Guard Against Those Who Pour Sand in Puddles*, DETROIT NEWS, Apr. 24, 2005, at 15A.

34. *See* Solid Waste Agency v. Army Corps of Eng'rs, 531 U.S. 159 (2001) (This case stands for the proposition that the federal government must show that the water sought to be regulated must have a "significant nexus" with waters that have been traditionally recognized as navigable waters of the United States. Also, this shows the modern court's willingness to evaluate environmental regulation on federalism grounds.).

35. *Rapanos*, 126 S. Ct. at 2253 (Stevens, J., dissenting).

36. *Id.* at 2252.

III. JUST WHAT DOES THE COURT HOLD IN *RAPANOS*?

A. *The Court's Opinion*

Understanding the meaning of this opinion requires examining the law and deciphering plurality opinions, as well as looking at case law defining the significant nexus requirement.[37]

Prior to *Rapanos*, the Court had taken up two other important CWA cases concerning jurisdiction over "waters of the United States."[38] In *Riverside Bayview Homes*, the Court upheld the Corps jurisdiction over wetlands adjacent to navigable waters.[39] In *SWANCC* it was held that if wetlands are physically isolated from what would be considered traditional navigable waters they do not fall under the jurisdiction of the CWA.[40] *SWANCC* also held that a significant nexus was required in order to claim jurisdiction over isolated wetlands.[41] These cases provide the backdrop for the *Rapanos* decision.

The *Rapanos* case consolidated two cases involving federal jurisdiction issues over wetlands. [42] The Rapanos deposited fill material into wetlands without a permit on three separate sites in Michigan.[43] The wetlands involved in the Rapanos matter are "connected to a man-made drain, which drains into Hoppler Creek, which flows into the Kawkawlin River, which empties into the Saginaw Bay and Lake Huron."[44] The second site at issue in the Rapanos matter is a wetland that is connected to Rose Drain, "which has a surface connection to the Tittabawasee River."[45] The third site contains wetlands that "have a surface connection to the Pine River, which flows into Lake Huron."[46] The court noted that the nature of the connections between the wetlands and the ditches were unclear.[47]

The Carabells were denied a permit to fill a wetland located on a parcel of land approximately one mile from Lake St. Clair.[48] At the Carabell site, a drainage ditch, separated by a four-foot-wide man-made berm, runs along one

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37. *See* Tebo, *supra* note 4.

38. *See Solid Waste Agency*, 531 U.S. 159; United States v. Riverside Bayview Homes, 474 U.S. 121 (1985).

39. *Riverside Bayview Homes*, 474 U.S. at 139.

40. *See Solid Waste Agency*, 531 U.S. at 171-72.

41. *See id.* at 167.

42. *Rapanos*, 126 S. Ct. at 2219-20 (consolidating *Rapanos* and *Carabell* for consideration by the Court).

43. *Id.* at 2219.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

side of the wetland.[49] The berm is impermeable to water and allows overflow from the wetland to pass over it into the ditch, which "empties into another ditch or a drain, which connects to Auvase Creek, which empties into Lake St. Clair."[50]

After both cases had been through the federal district courts and Court of Appeals, the Supreme Court granted certiorari and consolidated the cases in order to determine if the wetland qualified as "waters of the United States" under the CWA.[51]

Rapanos was a 4-1-4 decision.[52] Chief Justice Roberts, Justices Alito and Thomas joined in Justice Scalia's plurality opinion that announced a new two-part jurisdictional test.[53] Justice Scalia justified his new view of federal jurisdiction under the CWA by attempting to show that the Court has recognized the limits on the "waters of the United States" in the past.[54] He also noted that in *Riverside Bayview Homes* the Court interpreted the "waters of the United States" under the CWA as referring to "rivers, streams and other hydrographic features more conventionally identifiable as waters."[55] The first part of this new test begins with Justice Scalia's new definition of the "waters of the United States" to include "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."[56] He added that "waters of the United States" do "not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[57] Justice Scalia based this conclusion on his view that the current expansive interpretation the Corps had given to "waters of the United States" was impermissible under principles of statutory construction.[58] Scalia's new limiting definition of "waters of the United States" is also based on his view that federal jurisdiction

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49. *Id.*
50. *Id.*
51. *Id.* at 2220.
52. *See id.* at 2208 (Three justices sided with Justice Scalia's opinion, Justice Kennedy concurred separately, and the remaining four justices dissented.).
53. *Id.* at 2214; Wayne M. Whitlock & Norman Carlin, *The Long-Awaited Rapanos Decision Narrows Clean Water Act Jurisdiction Over Wetlands and Tributaries, but Leaves Important Questions Unresolved*, MONDAQ BUS. BRIEFING, Aug. 2, 2006, *available at* 2006 WLNR 13350519.
54. *See Rapanos*, 126 S. Ct. at 2222 (recognizing that in prior Supreme Court cases the Court had described waters covered by the CWA as "open water" and "open waters").
55. *Id.* (citing *Riverside Bayview Homes*, 474 U.S. at 131).
56. *Id.* at 2225.
57. *Id.*
58. *Id.* (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984)).

asserted under the CWA has gone too far.[59] Justice Scalia also points out the problem that even after *SWANCC*, lower courts have applied an overly broad standard to "waters of the United States."[60] Scalia went on to lay out the second portion of the test 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" are covered by the CWA.[61] This is a far cry from the Corps' former definition of what constituted "waters of the United States."[62] Justice Scalia responded to Justice Kennedy's narrow concurrence, as well as the dissent, by stating "[t]he restriction of the waters of the United States to exclude channels containing merely intermittent flow also accords with the commonsense understanding of the term."[63] He added that "[t]he plain language of the [CWA] simply does not authorize this Land is Waters approach to federal jurisdiction."[64] In sum, Justice Scalia's opinion established a two-part test to determine jurisdiction, limited the definition of "waters of the United States," and rejected the argument that *SWANCC*, and the idea of a "nexus" that it contained, controlled the case.[65] However, the opinion does recognize to some extent that the CWA was meant to regulate some water as not navigable under the traditional meaning of that word.[66]

Chief Justice Roberts in his concurring opinion reiterated that the Court had indeed put limits on the nearly limitless authority that federal agencies have taken under the CWA.[67] In support of limiting federal jurisdiction under the CWA he pointed out that, "the Corps chose to adhere to an essentially boundless view of the scope of its power."[68] Chief Justice Roberts ended his concurrence with a statement that stated his disappointment in the Court's inability to reach a

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59. *See id.* at 2223-24 (discussing the Corps' broad asserted jurisdiction over land, without consideration of what type of water and land they are claiming jurisdiction over).

60. *Id.* at 2217-18 (citing Treacy v. Newdunn Ass'n, 344 F.3d 407, 410 (4th Cir. 2003) (intermittent flow of surface water over 2.4 miles); United States v. Deaton, 332 F.3d 698, 702 (4th Cir. 2003) (water in roadside ditch that was thirty-two miles away from Chesapeake Bay); Community Ass'n for Restoration of Env't v. Henry Bosma Dairy, 305 F.3d 943, 954-55 (9th Cir. 2002) (intermittent irrigation ditches and drains); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 534 (9th Cir. 2001) (intermittent irrigation ditches and drains); Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1118 (9th Cir. 2005) (washes and arroyos in the middle of the desert)).

61. *Rapanos*, 126 S. Ct. at 2226.

62. *See* 33 C.F.R. § 328.3(a) (2006).

63. *Rapanos*, 126 S. Ct. at 2222.

64. *Id.*

65. Whitlock & Carlin, *supra* note 53.

66. *Rapanos*, 126 S. Ct. at 2220.

67. *Id.* at 2235.

68. *Id.* at 2236.

clear majority and warned of the possible uncertainties that may occur in lower courts as a result of the ruling.[69]

Justice Kennedy's concurrence differed from the plurality and argued that the majority opinion was inconsistent with past precedent.[70] In Justice Kennedy's view, the proper standard for deciding the case at hand was the significant nexus standard contained in *SWANCC*.[71] He argued that both the plurality and Justice Stevens' dissent failed to apply the proper standard.[72] Justice Kennedy agreed that the case should be remanded, not to apply the standard announced by the plurality, but to apply the significant nexus test which the Court of Appeals recognized; however he failed to apply all the proper facts.[73] Because both the dissent and the plurality did not undertake an analysis of the nexus requirement that Justice Kennedy felt was necessary, he addressed the matter in his concurrence.[74] He agreed with the plurality as determining that, "Congress intended to regulate at least some waters that are not navigable in the traditional sense."[75] However, he disagreed with the plurality over the two limitations it had put on the CWA.[76] He claimed that the plurality's limitations were without support in the CWA because limiting the statute to only standing water, or continuous flow, would limit the Corps' and the EPA's jurisdiction in a way that would make "little practical sense in a statute concerned with downstream water quality."[77] Justice Kennedy points out that, especially in the western U.S., the limitation of the plurality would not make sense because areas of limited flow are a significant concern under the CWA.[78] For Justice Kennedy, this illustrates the ineffectiveness of the requirement that only standing water or continuous flow should fall under the CWA.[79] Because Congress has not drawn a line excluding intermittent waterways and the definition of waters might be said to include a "flood or inundation," the Corps and the EPA are allowed to interpret the act to cover intermit-

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69. *Id.*
70. *See id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 2241.
75. *Id.* (citing *Riverside Bayview Homes*, 474 U.S. at 133; *Solid Waste Agency*, 531 U.S. at 167).
76. *Id.* at 2242.
77. *Id.*
78. *Id.* (discussing the Los Angeles River as an example of a river that can carry very little water at certain times of the year but periodically releases large volumes of water).
79. *See id.*

tent streams.[80] Justice Kennedy also disagreed with the plurality's interpretation of the term "waters" as being supported by the *Riverside Bayview* case.[81]

Next, Justice Kennedy addressed the plurality's limitation on the reach of the CWA.[82] Justice Kennedy argued that the plurality's requirement that a continuous surface connection was necessary was not consistent with the precedent in either *Riverside Bayview* or *SWANCC*.[83] Justice Kennedy felt that the plurality's opinion was inconsistent with the purpose and structure of the CWA, and was "unduly dismissive" of the important public and governmental interest under the CWA.[84] However, Justice Kennedy also recognized a federalism argument. He declined to extend the broad reach of the CWA the dissenters advocated for in insisting that a mere hydrologic connection is not enough to establish jurisdiction under the significant nexus theory.[85] He also recognized as did the plurality, the dangers of the overly broad standards, for jurisdiction under the CWA.[86] Absent more specific regulation, a significant nexus must be established on a case-by-case basis in order to "regulate wetlands based on adjacency to non-navigable tributaries."[87] Justice Kennedy concludes that it is possible that both the Rapanos and Carabell situations may qualify under the significant nexus standard, but that further considerations about the specific wetlands involved was needed on remand.[88] In sum, Justice Kennedy's opinion can be read to hold that if wetlands significantly affect the physical, biological, and chemical integrity of waters traditionally understood as navigable, the requisite nexus is satisfied.[89]

The dissenters disagreed with both the plurality's and Justice Kennedy's analysis of the case.[90] Their argument rested on Congress' intent to "restore and

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80. *See id.* at 2242-43.

81. *Id.* at 2243 (discussing the fact that the *Riverside Bayview* opinion did not rely on the dictionary definition of the term "waters" in determining the meaning of navigable waters).

82. *Id.* at 2244.

83. *See id.* at 2244-45 (discussing that neither *Riverside Bayview* or *SWANCC* can be read to hold that a lack of continuous connection precludes federal jurisdiction under the CWA).

84. *Id.* at 2246.

85. *Id.* at 2247 (Kennedy, J., concurring) (stating that "[T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into a traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far.").

86. *Id.* at 2249 (discussing the possibility that "[D]rains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it" would be covered under the Corps' current interpretation of the CWA).

87. *Id.*

88. *See id.* at 2250-52.

89. Kevin Holewinski & Ryan D. Dahl, *Rapanos: Putting the Government to Its Proof Under the Clean Water Act*, MONDAQ BUS. BRIEFING, Aug. 21, 2006, *available at* 2006 WLNR 14461790 (quoting *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring)).

90. *See Rapanos*, 126 S. Ct. at 2253 (Stevens, J., dissenting).

maintain the chemical, physical, and biological integrity of the Nation's waters" by passing the CWA.[91] The dissenters complained that over 30 years of practice by the Corps and the EPA would now be disregarded if the "creative criticism" of Justice Kennedy and the plurality were to be accepted.[92] The dissenters argued that the Corps' decision to include wetlands as "navigable waters" was a good example of reasonable interpretation of the CWA.[93] The dissent concluded that if the approach of the plurality were followed, the deference the Court owes to the Executive would be disregarded and the purpose of the CWA would be subverted.[94] Justice Breyer also wrote a separate dissent discussing the power of Congress to regulate under the CWA based on its congressional power to regulate interstate commerce.[95]

B. *Deciphering the Confusing Plurality*

In order to determine the impact of *Rapanos*, we must determine just what the confusing opinion holds. The Supreme Court has used two identifiable methods in order to decipher plurality opinions. The method traditionally used by the Court holds that the narrowest concurrence controls the holding of the case.[96] This would suggest that Justice Kennedy's concurrence advocating the significant nexus theory would likely control the holding of the case.[97] Herein lies the true problem of determining just what the *Rapanos* decision holds. Chief Justice Roberts noted that "no opinion commands a majority of the Court" as to the jurisdiction of the CWA, and that regulatory entities and courts would now have to feel their way around on a case-by-case basis.[98] The concurring opinion of Justice Kennedy is much narrower than that of Justice Scalia's plurality, and not nearly as broad as that of the dissenters.[99] Justice Kennedy's opinion attempts to make allowance for administrative and judicial flexibility through the significant nexus test, while Scalia's opinion would omit many traditionally cov-

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91. *Id.* at 2252 (Stevens, J., dissenting) (citing 33 U.S.C. §§ 1251-1387).
92. *Id.*
93. *Id.* at 2252-53 (citing *Chevron U.S.A.*, 467 U.S. at 842-45).
94. *Id.* at 2265.
95. *See id.* at 2266.
96. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (holding that when the Court's decision is fragmented, and not a single rationale of the case enjoys the assents of five Justices, the holding of the Court should be viewed as the position taken by the members who concurred in the judgment on the narrowest grounds. Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).
97. *See Rapanos*, 126 S. Ct. at 2236 (Kennedy, J., concurring).
98. *Id.* at 2236 (Roberts, C.J., concurring).
99. *See id.* at 2236-52.

ered waterways from the reach of the CWA.[100] This makes it difficult to square the opinions with one another; however, under *Marks v. United States* it would appear that Justice Kennedy's significant nexus opinion should control.[101]

However, some lower courts have not directly applied Justice Kennedy's significant nexus test. For example, in *United States v. Chevron Pipe Line Co.*, which dealt with the governmental claims against Chevron Pipe Line for violating the CWA and the Oil Pollution Control Act, the court attempted to feel its way around the CWA on a case-by-case basis, as Chief Justice Roberts suggested.[102] The government claimed that oil had made its way into a tributary through an intermittent stream which was jurisdictionally covered by the CWA and the Oil Pollution Act.[103] In rejecting the government's arguments and noting that Justice Kennedy's significant nexus test did not come with any guidance for its application, the court decided to look to prior Fifth Circuit law that did not allow the CWA to cover dry creek beds through the significant nexus test if the tributary and the adjacent creek were not navigable in fact and neither were adjacent to an open body of water, even though the waterway feeds into the next during the time of actual flow.[104] This looks much more like the outcome that Justice Scalia advocated in his opinion rather than Justice Kennedy's significant nexus test, finding that since the unnamed tributary, and not the adjacent creek, was navigable in fact, and that neither was adjacent to an open body of water, the significant nexus was not met.[105] It seems that even though Justice Kennedy's opinion would have included a situation such as this, the Court chose not to follow his opinion directly.[106] This illustrates the strange impact of the *Rapanos* case, in that the outcome in this case seems contrary to the very purpose of the CWA.[107] But the lower court, now unnecessarily confused by precedent, decided not to implement the significant nexus theory. Instead, they made a ruling that sets a dangerous environmental precedent in Texas – that discharges of oil into intermittent streams will be untouched by the CWA.[108]

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100. *See id.*

101. *See Marks*, 430 U.S. at 193; *Rapanos*, 126 S. Ct. at 2247 (Kennedy, J., concurring).

102. United States v. Chevron Pipe Line, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

103. *Id.* at 611.

104. *Id.* at 613.

105. *Id.*

106. *Rapanos*, 126 S. Ct. at 2242 (Kennedy, J., concurring) (discussing the ineffectiveness of a standard that would not include streams with intermittent flows).

107. 33 U.S.C. § 1251(a) ("[r]estoration and maintenance of chemical, physical and biological integrity of [the] Nation's waters . . . .").

108. *Chevron Pipe Line*, 437 F. Supp. 2d at 615 (N.D. Tex. 2006) (holding that a discharge from an oil pipeline into an intermittent stream did not fall under the jurisdiction of the CWA).

Conversely, other courts have upheld the CWA authority in a more traditional fashion. In *Northern California River Watch v. City of Healdsburg*, the Ninth Circuit found a significant nexus when a city discharged sewage from its waste water plant into a rock quarry pit that was filled with water from a surrounding aquifer.[109] The court stated "[i]n light of *Rapanos*, we conclude that Basalt Pond and its wetlands possess . . . a significant nexus to waters that are navigable in fact, because the Pond water seeps directly into the navigable Russian River."[110] This court appeared to come to a more solid conclusion than the Texas court did in *Chevron Pipe Line*. The court here recognized and articulated the restriction *Rapanos* had placed on the enforcement of the CWA.[111] Here the Ninth Circuit recognized these restrictions by stating that:

> Applying these principles in this case, it is apparent that the mere adjacency of Basalt Pond and its wetlands to the Russian River is not sufficient for CWA protection. The critical fact is that the Pond and navigable Russian River are separated only by a man-made levee so that water from the Pond seeps directly into the adjacent River.[112]

This shows that courts are willing to uphold the CWA under the new *Rapanos* standards.[113] This case also properly follows Justice Kennedy's concurrence and illustrates the more environmentally friendly outcome that applying the significant nexus test yields.

Not much time has passed since the *Rapanos* decision came down from the Court, making it difficult to determine just how courts will apply the difficult to understand opinion. As one commentator put it:

> Rapanos and its subsequent application will force the Executive to toe a much finer line when enforcing the Clean Water Act than the previous Supreme Court jurisprudence required. If and until Congress amends the Clean Water Act or the Executive engages in a new rulemaking, Rapanos greatly enhances the judicial role in Clean Water Act enforcement. It will also require the government to come forward with expert testimony and/or other evidence to establish a significant nexus and thus will likely allow an effective defense for current and future enforcement targets.[114]

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109. N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1030 (9th Cir. 2006).

110. *Id.* at 1025.

111. *Id.* at 1030; *but see* United States v. Moses, 496 F.3d 984, 990 (9th Cir. 2007) (appearing to more closely follow Justice Scalia's interpretation of jurisdiction under the CWA, this approach seems to be followed in other 9th Circuit cases as well).

112. *Id.*; *see also* United States v. Evans, No. 3:05-cr-159(53)-J-32MMH, 2006 U.S. Dist. LEXIS 94369, at *76 (M.D. Fla. July 14, 2006) (holding "piped raw, untreated human excrement into a creek which flowed into" a nearby river would establish potential jurisdiction under the CWA under either Justice Scalia's or Kennedy's standards of the CWA).

113. Holewinski & Dahl, *supra* note 89.

114. *Id.*

Does this bring us any closer to figuring out just what we can expect after *Rapanos*, or in defining the confusing plurality? Maybe. The major weakness in Justice Kennedy's opinion, as the *Chevron* court noted above, is that it was given without guidance and looks more like something that would be expected to come out of First Amendment law.[115] As the above post-*Rapanos* cases illustrate, even when a clear standard or holding is applied, in this case the significant nexus standard, it appears the results may not be uniform.[116] This will not foster the desired predictability for the agencies attempting to enforce the provisions of the CWA, or those seeking to comply with the requirements of the CWA for permitting and proper use of land. However, since its inception, federal jurisdiction under the CWA has been questioned and will likely continue to be questioned.

IV. WHAT, IF ANYTHING, HAS *RAPANOS* CHANGED?

Even though *Rapanos* is confusing and may be difficult to apply using the significant nexus test, has it really changed anything? As stated above, the predecessors to the *Rapanos* decision were *Riverside Bayview* and *SWANCC*. *SWANCC* was decided in 2001 and showed signs that the Court was willing to consider putting jurisdictional limits on the federal government's power over the Nation's water. *Rapanos* is merely the Court's latest installment in a long running debate since the passing of the CWA in 1972. Perhaps the most significant change is in the Court's apparent willingness to place limits on agencies' jurisdiction under the CWA.[117] In the end, we are left with Justice Kennedy's significant nexus test, that retains the opportunity for the Corps and other agencies, such as the EPA, to issue their own interpretation of the significant nexus test for purposes of regulation.[118] As he often does, Justice Kennedy has struck a balance between the rigid rules that Justice Scalia's plurality would impose, and the generous deference that Justice Stevens would grant to administrative agencies.[119]

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115. *See* Tebo, *supra* note 4.

116. *See Chevron Pipe Line*, 437 F. Supp. 605 (holding that a discharge from an oil pipeline into a intermittent stream did not fall under the jurisdiction of the CWA); *N. Cal. River Watch*, 457 F.2d 1023 (holding that a significant nexus existed between a pond and a wetland where water from the pond seeped into the ground).

117. *See Rapanos*, 126 S. Ct. at 2242 (Kennedy, J., concurring) (agreeing with the *Rapanos* plurality that the term "navigable" in the CWA implies limits on the Corps's jurisdiction).

118. *See id.* at 2235-51; *Leading Cases*, 120 HARV. L. REV. 351 (2006) [hereinafter *Leading Cases*].

119. *Leading Cases*, *supra* note 118, at 356.

Justice Kennedy's opinion is also more closely in line with past precedent.[120] The opinion articulates the limits recognized by *SWANCC*, and attempts to uphold the ecological issues recognized in *Riverside Bayview*. As time goes by, courts seem more willing and able to apply the significant nexus test laid out by Justice Kennedy.[121]

Again, to our original question, what is the law for the federal government's jurisdiction under the CWA? The answer, as discussed above, appears to be that the pragmatic approach of a significant nexus is the standard to be applied when determining jurisdiction under the CWA. Has it really changed anything? No. While the new significant nexus test may put a higher burden on the government than the "agency" tests in *Riverside Bayview Homes*, environmental advocates are likely to embrace this theory because it is by far the soundest of the opinions in the *Rapanos* case.[122] While some argue that "[t]he regulated community should find comfort in the Court's opinion, authored by Justice Scalia, the 'tone' of which resonated with landowners, consultants, engineers and lawyers who know first hand the frustrations associated" with the permitting process under the CWA.[123] It appears that they will have to wait for real change to the federal government's jurisdiction under the CWA, because Justice Kennedy's opinion controls[124] and allows agencies, under the CWA, to employ their own scientific knowledge and make their own interpretations.[125] While the federal government will now be "put to its proof," it is unlikely much will change.

In sum, as one commentator puts it:

> Justice Kennedy's approach offers an attractive balance between federal and state interests . . . [T]he significant nexus test . . . dovetail[s] nicely with the Court's recent Commerce Clause jurisprudence . . . The term "significant" in Justice Kennedy's test mirrors the modifier substantial in the Commerce Clause cases and thus should ensure that not all hydrological connections will lead to federal jurisdiction . . . . On the other hand, Justice Kennedy's approach offers to preserve a meaningful federal role in environmental regulation because he did not embrace Justice Scalia's argument . . . classifying water pollution regulation within the category of

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120. *See Solid Waste Agency*, 531 U.S. 159 (holding that the so-called migratory bird standard did not apply to isolated ponds); *Riverside Bayview Homes*, 474 U.S. 121 (upholding the CWA's applicability to wetlands adjacent to navigable waters).

121. *See Evans*, 2006 U.S. Dist. LEXIS 94369; Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 469 F. Supp. 2d 803 (N.D. Cal. 2007); U.S. v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006) (all applying Justice Kennedy's "significant nexus" standard).

122. *See Leading Cases*, *supra* note 118, at 352.

123. Mary D. Shahid & R. Cody Lenhardt Jr., *Navigation of Troubled Waters: Wetland Regulation in South Carolina after Rapanos*, 18 S.C. LAWYER, Sept. 2006, at 24, 25.

124. *See Marks*, 430 U.S. at 193.

125. *Leading Cases*, *supra* note 118, at 358-59.

> land and water use . . . [and] would have the potential to restrict dramatically the federal government's ability to regulate environmental affairs.[126]

V. POSSIBLE IMPACT FOR AGRICULTURAL OPERATIONS

The CWA impacts agriculture in many ways. First and foremost many farmers are landowners and advocates of landowner rights. Secondly, farmers not only come into conflict with the CWA when dealing with fill material in wetlands and streams (as was the case in *Rapanos*), they discharge in other ways as well.[127] Whether it be manure from an animal feeding operation, or fill material deposited into a wetland or stream, farmers are required to be part of the complex permitting scheme developed under the CWA.[128] In Iowa, as in other states, the balance is a delicate one between profitability and the health of the environment. All farmers will have to consider the implication of *Rapanos* when deciding whether to apply for an NPDES permit under the CWA. While all the issues that affect wetlands, as well as how they interact with the farming industry, are beyond the scope of this article,[129] it will attempt to discuss the few ways that *Rapanos* has changed the environmental law landscape for farmers.

For CAFOs, the *Rapanos* decision should not greatly change when an NPDES permit is needed. Permitting for these facilities is based on the number of animal units and, other factors aside, whether or not there is a discharge into waters of the United States.[130]

Perhaps the most troubling issue for farmers, the EPA, and other agencies regulating them, is how *Rapanos* will affect discharges into ephemeral and intermittent streams.[131] For farmers, this will now mean that if the government is to charge them with violating the CWA by discharging manure or fill material into "waters of the United States," the government will have to show a significant

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126. *Id.* at 358.

127. *See* Todd, *supra* note 13, at 481-82.

128. *See id.* at 485-86; *see also Rapanos*, 126 S. Ct. 2208 (discussing wetland aspects of the permitting scheme developed under the CWA).

129. For a discussion of law impacting wetlands and farming operations *see* Alison Schroeder, Note, *Federal Wetland Legislation: A Slough of Issues for Iowa Farmers*, 11 Drake J. Agric. L. 383 (2006).

130. *See* Todd, *supra* note 13 at 486-87 (further discussing the Clean Water Act and its specific impacts on CAFOS).

131. *EPA Argues Spill Rule's Delayed Compliance Deadline Moots Lawsuit*, 28 ENV'T DEF. ALERT 1, Jan. 5, 2007 ("EPA and the U.S. Army Corps of Engineers have promised for months that they would soon issue guidance on interpreting the Rapanos decision, but sources tracking the issue say it appears the guidance is stalled, in part due to the difficulty the agencies may be facing as they consider how to address ephemeral and intermittent streams.") [hereinafter *EPA Argues*].

nexus in order to impose one of the civil or criminal penalties under the CWA.[132] However, the difficulties in deciding when to seek a permit through a federal agency are still unclear because of the EPA's and the Corps' failure to adopt guidance, *not* because *Rapanos* is too difficult to understand or apply.[133]

Even though advocates of property owner rights may be disappointed that the rigid rules Justice Scalia would have put in place did not become law, they should take solace in the fact that the governing opinion of Justice Kennedy "offers an attractive balance between federal and state interests . . . [and] ensure[s] that not all hydrological connections will lead to federal jurisdiction."[134]

What all farmers attempting to navigate the difficult puzzle of federal regulatory mechanisms have found is that not much has changed. What has changed is that the government must show that there is a significant nexus, whether through a wetland or through an ephemeral or intermittent stream that is connected to navigable waters of the United States.[135] The most prudent choice for farmers and other industries alike is to err on the side of caution and continue to permit and operate under existing standards set by the EPA and Corps until further guidance is issued.

VI. CONCLUSION

The balance between environmental integrity and landowners' rights is fragile. The Court's confusing plurality in *Rapanos* illustrates that finding this balance is not an easy task. However, it is important to remember that while many of us think bogs, swamps, marshes, small ephemeral or intermittent streams are inconsequential, in the overall scheme, they are not. Our nation's waterways affect us all and are worth protecting. The *Rapanos* decision, though confusing, strikes a solid balance between concern over environmental policy and overreaching by the federal government.

The decision in *Rapanos* recognizes that there are indeed limits on the government's authority under the CWA, while at the same time recognizing that there must be a standard to protect the integrity of the nation's waterways. Even though the opinion is confusing, the controlling opinion of Justice Kennedy is well thought-out and articulated. Unlike both the plurality and dissenting opinions, it is consistent with precedent. The significant nexus standard would not change the result of the other two most recent cases on the jurisdiction of the CWA. Most adjacent wetlands will still meet the significant nexus standard and

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132. *See* 33 U.S.C. § 1251.
133. *See EPA Argues*, *supra* note 132.
134. *Leading Cases*, *supra* note 118, at 358.
135. *See Rapanos*, 126 S. Ct. at 2235-51.

isolated waters will not meet the standard. It should also be remembered that the idea of a significant nexus is nothing new; it goes back to *SWANCC* when the Court stated "[i]t was the significant nexus between the wetlands and navigable waters that informed [the courts] reading of the CWA in *Riverside Bayview Homes*."[136]

The confusion that results from this case is the result of the extreme opinions from the majority and dissent. If the controlling opinion is used, clearly a pragmatic framework has been established by Justice Kennedy that courts and regulators can apply and should embrace.

The *Rapanos* decision, thanks to Justice Kennedy, should be seen for what it is, a compromise between an extremely deferential approach to agencies that many environmental advocates would endorse, and a restrictive reading of the CWA that many landowners' would endorse. Under the *Rapanos* holding, both sides are preserved a position in the regulation of the nation's waters.

We all live "down stream," and it is important to remember that we all have a stake in keeping our nation's waters clean. While regulations like the CWA seem cumbersome at times, they are needed. Nature provides agricultural businesses with the ability to make a living, and the rest of us the food we need to live. However, it is important that we preserve our natural resources for future generations, and for now the CWA is one the most important mechanisms in accomplishing this. That has not been changed, at least for now, by the Supreme Court. As the Native American proverb reminds us "[w]e do not inherit the earth from our ancestors; we borrow it from our children."

136. *Solid Waste Agency*, 531 U.S. at 167.