

Recommended Actions to Clarify Clean Water Act  
Jurisdiction Following Issuance of the Consolidated Decision, *Rapanos v.*  
*U.S. 126 S. Ct. 2208 (S.Ct.2006)\**

Today there are uncertainties with respect to the extent of the areas subject to Federal regulation pursuant to the Clean Water Act. Uncertainties are due, in part, to lack of clarity in Congressional intent with regard to regulated wetlands and waters. Uncertainties are due to conflicting Supreme Court and lower court decisions interpreting the Act and to confusing and fractured decisions. They are due, in part, to conflicts between scientific evidence suggesting that all waters need to be regulated to achieve Clean Water Act goals (i.e., restore and maintain...waters of the U.S.) and Supreme Court interpretation of Congressional intent as imposing geographical limits on regulation.

There are a number of possibilities for clarifying jurisdiction other than simply waiting for the courts to clarify jurisdiction on a case-by-case basis over time.

- I.) The issuance by the Corps and EPA of supplementary guidance concerning Clean Water Act jurisdiction. The Corps and EPA are now drafting guidance. How far this guidance will go in clarifying ambiguities and fully satisfying the Supreme Court remains to be seen. It is likely that whatever guidance is provided will be useful, given the high degree of present uncertainty.
- II.) Promulgation by the Corps and EPA of more detailed, formal regulations with specific criteria and procedures for identifying waters of the U.S. is a second option. The broad public review process associated with formal rule making would be difficult and time-consuming but could also permit a broad airing of issues and the building consensus.
- III.) Ideally, Congress would adopt remedial legislation specifying that, in order to protect the quality of our water and to prevent harm caused by flooding, the Clean Water Act applies to all waters bodies in the U.S. without reference to the ambiguous term "navigable" waters. This would be the cleanest and most comprehensive fix.

All three options must carefully consider and give due regard to the multiple opinions of the Supreme Court members in *Rapanos v. U.S.* as well as earlier Supreme Court decisions such as *SWANCC* and *Riverside Bayview*. The plurality and concurrent decisions in *Rapanos* set forth alternative ways of establishing Clean Water Act jurisdiction. Justice Kennedy's concurring opinion in *Rapanos* set forth a "significant nexus" test for determining whether waters/ wetlands are subject to Clean Water Act jurisdiction. The following summary and recommendations focus upon this test which, absent legislation, will often be the controlling test for isolated wetlands, small tributary streams, ephemeral streams, wetlands adjacent to small tributary and ephemeral streams and other wetlands and waters other than traditionally navigable waters and wetlands adjacent to such waters.

*\*The recommendations and other information contained in this document are from "Significant Nexus" and Clean Water Act Jurisdiction by Jon Kusler, Esq., Pat Parenteau, Esq., and Edward A. Thomas, Esq. The draft paper is available for review and comment at the Association of State Wetland Managers, Inc. website at [www.aswm.org](http://www.aswm.org).*

## Summary and Recommendations for Clarifying Clean Water Act Jurisdiction

The Supreme Court's fractured decision in *Rapanos* has introduced additional confusion and uncertainty into the already complicated and contentious issue of determining the geographic scope of federal jurisdiction under the Clean Water Act. In the absence of a majority opinion, a variety of competing interpretations are being advanced by parties in litigation across the country, as well as by advocates and commentators with various points of view. EPA and the Corps of Engineers are trying to develop guidance and implementation procedures for their field offices. The states are trying to figure out what the decision means for programs they administer under the CWA. The regulated community is trying to determine what jurisdictional test to use to determine regulatory requirements. The conservation community is concerned that important wetlands and other waters are at risk of losing federal protection. The lower courts are feeling their way through the maze case-by-case.

The premise of the following recommendations is that no one's interest, least of all the public interest in a strong and effective CWA, is served by the current state of uncertainty surrounding this fundamental question of the Act's coverage. Accordingly, we propose the following approach and series of specific recommendations for EPA and the Corps to consider in charting a course for the future of the Act and in adopting guidance and/or regulations complying with the *Rapanos* decision. These recommendations are discussed in greater detail in the sections that follow.

In developing these recommendations we are guided by the words of Justice Kennedy in *Rapanos*:

*"[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.'"*

**Recommendation No. 1:** Adopt the approach suggested by Justice Stevens in *Rapanos* and taken by the First Circuit in *U.S. v. Johnson*, 05-1444 (1<sup>st</sup> Cir. 10-31-2006). This is the approach the Army Corps of Engineers and EPA have already taken in briefs filed by the U.S. in more than twenty pending cases. Under this approach, wetlands and tributaries are jurisdictional if they meet either Justice Kennedy's "significant nexus" test or the plurality's categorical rule that wetlands are jurisdictional if there is a surface hydrological connection to either a navigable water or a seasonal tributary (paraphrase of the plurality opinion in *Rapanos*). This approach to interpreting *Rapanos* is grounded on a line of cases holding that legal standards derived from fragmented decisions must have the support of a majority of the justices. No standard can be based solely on Justice Scalia's plurality opinion since a majority of the Court rejected the rationale on which it is based. However, whenever either Justice Kennedy's or Justice Scalia's view favors jurisdiction there is a majority with the four members who joined Justice Stevens' dissent. This approach would maintain as much of the historic reach of the CWA as possible, while minimizing the threat to the majority of the Nation's waters that would be caused by a marked reduction in federal jurisdiction. It also acknowledges the reality that some wetlands may fail both Kennedy's test and the plurality test.

**Recommendation No. 2:** Build upon existing regulations and guidance rather than engage in a substantial rewrite. *Rapanos* did not invalidate any regulations, though several of the Justices, including Kennedy, strongly suggested that new rulemaking would be in order. Whether EPA and the Corps decide to engage in rulemaking or simply issue more detailed guidance the focus should be on defining key terms such as significant nexus and setting forth criteria to determine jurisdiction. Procedures and criteria for determining "ecological significance" need to be added to the use of hydrologic connections to assess jurisdiction. Justice Kennedy made it clear that wetlands and tributaries having a significant effect on the chemical, physical and biological integrity of navigable waters are jurisdictional. For example, the agencies may continue to use the "ordinary high water mark" as a jurisdictional criterion for a specific tributary, but must include other factors, such as the significance of the tributary and associated wetlands for maintaining downstream water quality, flood control, aquatic habitat or other ecological services. Needless to say, procedures and criteria should be kept as simple and efficient as practicable. Guidance should reflect not only statements of the Supreme Court in *Riverside Bayview*, *SWANNC*, and *Rapanos* but lower court decisions addressing significant nexus.

**Recommendation No. 3:** Sound science and careful documentation should be required for both jurisdictional determinations and nonjurisdictional determinations. Decisions should be based on objective, transparent evaluation of the hydrological and ecological connections between wetlands, tributaries, and navigable waters, as well as whether existing and reasonably anticipated activities pose a threat to the chemical, physical and biological integrity of such waters, or increase flooding heights or velocities on “waters of the United States.”

**Recommendation No. 4:** Guidance should make it clear that wetlands “adjacent to” navigable in fact waters are jurisdictional per se. This is true regardless of whether there is a “continuous surface hydrological connection” between the wetlands and the navigable waters. Justice Kennedy acknowledged that such wetlands presumptively satisfy the significant nexus test. Likewise, Justice Stevens’ opinion would uphold the Corps’ existing regulations without a further showing of significant nexus or continuous surface connection.

**Recommendation No. 5:** Designate classes of major tributaries and wetlands that, in combination with other wetlands/waters within the watershed, are presumed to have a significant nexus with downstream navigable waters. Guidance should acknowledge that as circumstances change the nexus may become more significant as for example when urbanization increases stormwater flows. Conversely, the guidance should specify that jurisdiction cannot be defeated through water withdrawals or the creation of artificial barriers such as berms.

**Recommendation No 6:** Shift at least a portion of the information gathering burden with regard to determination of significant nexus to permit applicants, but require independent review and verification by field offices.

**Recommendation No 7:** Keep the “significant nexus” test separate from the determination of what is a “wetland”. This is consistent with the Corps or Engineer’s and EPA’s current efforts which separate determination of whether an area is a wetland and whether it is subject to the Clean Water Act.

**Recommendation No. 8:** Apply a “notice” procedure for activities in headwater areas not included in any overall class of wetlands and waters determined to have a significant nexus to navigable waters. Such a procedure would allow the Corps an opportunity to check whether there may be a significant nexus.

**Recommendation No 9:** Define and provide guidance with regard to the determination of “nexus” and “significance”. “Nexus” should be defined to include hydrological **or** ecological connections. “Significant” should be defined to include the **cumulative** effect of wetlands and streams on the chemical, physical and biological integrity of navigable waters.

**Recommendation No 10:** In determining “nexus” the agencies should:

**Recognize that a broad range of types of connections may form an adequate “nexus.”** Through guidance and field implementation, the Corps and EPA should endorse a variety of types of physical, chemical, and biological connections as potentially creating an adequate nexus between individual wetlands/waters or classes of wetlands/waters and navigable waters related to the achievement of CWA goals. Guidance should recognize a variety of hydrologic connections including bank-defined surface water flow, diffused surface water flow, flood flows, and subsurface flows as related to CWA goals. Recognition of a broad range of valid types of connections to goals including ecological connections opens the door for regulatory agencies to introduce data pertaining to connections from a variety of federal, state, and local sources. For example, agencies may use FEMA flood data and local stormwater information to establish the relationships between complexes of wetlands and/or tributaries and downstream flooding.

- **Encourage use of both quantitative data and qualitative judgment.** The Corps and EPA should encourage the use of quantitative data where such data is reasonably available. But, the agencies also need to allow the use of field observations and professional judgment to document “nexus” and “significance”.

- **Recognize watershed and landscape context.** As Justice Kennedy said, the Corps and EPA should consider the relationship of a water/wetland to navigable waters “either alone or in combination with similarly situated lands in the region”. The watershed and landscape context should be considered in establishing both “nexus” and “significance.” Kennedy endorses a broad hydrologic and ecological context and assessment of the cumulative importance of waters such as storage of flood waters by headwater streams and wetlands.
- Recognize both **hydrological and ecological connections.** Through guidance and implementation the Corps and EPA should make it clear that both hydrological and ecological connections must be addressed in jurisdictional determinations. Justice Kennedy repeatedly stressed the importance of considering jurisdiction in the broader context of the CWA’s goal of protecting aquatic ecosystems.
- Create a presumption that **nonnavigable tributaries** with watershed area or flow greater than a specified amount and wetlands adjacent to such **nonnavigable tributaries** are jurisdictional per se. Justice Kennedy noted that the Corps may choose, by rule or adjudication, “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.” The reference to “other relevant considerations” is particularly noteworthy. This indicates Justice Kennedy’s acknowledgement that there is more to CWA than mere flow calculations. Other relevant considerations may include such things as climate, geology, water quality, and biological diversity. Based on these considerations the Corps and EPA could justifiably designate entire tributary systems and associated wetlands as performing significant functions for the broader navigable water aquatic system.
- **Recognize that subsurface flows may create the required nexus** in some instances. Though the CWA does not regulate groundwater per se, a number of courts have recognized that discharges to wetlands and other waters are subject to regulation where there is a close connection between wetlands and navigable waters via tributary underground flows.
- **Recognize that wetlands lacking a hydrologic connection may in some instances be jurisdictional.** Justice Kennedy correctly noted that one of the principal values of wetlands is the fact that they keep pollutants like sediment and nutrients out of navigable waters. Thus, guidance and implementation should reflect these functions as part of a significant nexus determination.

**Recommendation No 11:** In determining “significance” the agencies should:

- **Consider any real “threat” to navigable waters to be “significant”.** The Corps and EPA should provide that any chemical, physical, or biological connection between a wetland and a navigable body of water that **threatens individually or cumulatively** the body of water chemically, physically, or biologically should be considered a “significant” nexus for Clean Water Act jurisdiction. More specific factors relevant to determination of “significant” may include (note, these are simply examples): impact on a rare or endangered species of plants or animals in navigable waters, violation of federal, state, or local pollution standards, violation of flooding or erosion hazards standards, or impact on water levels in waters used for navigation.
- **Consider the future, cumulative potential for pollution, flooding or other threats to navigable waters and not simply existing threats.** The Corps and EPA should recognize in its guidance and field implementation procedures that the decision whether a “significant” nexus exists is to be determined based upon not simply whether there are existing pollution or other threats to waters but potential future threats including reasonably assumed future development. It is the potential for pollution, flooding or other impacts that should count in deciding whether specific waters are subject to Clean Water Act jurisdiction. See Appendix A. Floodplain managers have, in many communities, projected future watershed development in calculating flood flows and have not allowed increases in the storm water or flood hydrograph for the one percent annual flood and storm. These and similar studies could help evaluate the “significance” of individual wetlands and other waters.
- **Consider geographical context.** The Corps and EPA need to provide guidance concerning the evaluation of geographical context in determining “significance”. Regulatory staff must not only determine the importance of individual waters but their importance as part of larger hydrologic and ecological systems. This is consistent with Kennedy’s statement that: “[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.’”