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NEWS & ANALYSIS

A Practitioner's Guide to Protecting Wetlands in a Post-*Rapanos* World

by Jim Farrell and Marie Quintin

Editors' Summary: The recent U.S. Supreme Court decision in Rapanos v. United States failed to clarify the murky area of federal jurisdiction under the CWA. Justice Scalia's plurality opinion, requiring a restrictive approach, and Justice Kennedy's concurrence, setting forth a "significant nexus" standard, created two different routes of jurisdictional analysis. In this Article, Jim Farrell and Marie Quintin first discuss how to interpret a plurality opinion. They then focus on Justice Kennedy's significant nexus test and outline a step-by-step process as well as factors to consider when determining whether a significant nexus exists.

On June 19, 2006, the U.S. Supreme Court issued a much-anticipated opinion¹ that many hoped would clarify the scope of federal jurisdiction under §404 of the Clean Water Act (CWA).² Since *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC),³ circuit courts have reached differing conclusions about which wetlands fall within the U.S. Army Corps of Engineers' (the Corps') jurisdiction.⁴ In the *Rapanos* v.

*United States*⁵ opinion, all nine Justices agreed that the phrase "waters of the United States" encompasses some waters (both open waters and wetlands) that are not navigable in the traditional sense.⁶ In the end, however, inconsistent interpretations⁷ of language in the CWA produced a 4-1-4 split that will now force lower courts to establish the boundary that the Court failed to define.

I. Interpretation of a Plurality Opinion—*Marks v. United States*⁸

In his concurring opinion, Chief Justice John G. Roberts expressed his frustration "that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the CWA. Lower courts and regulated entities will now have to feel their way on a case-by-case basis."⁹ In

Jim Farrell is a third-year law student at the University of Mississippi School of Law and a 1999 graduate of the U.S. Naval Academy, where he received a B.S. in English. He served as a naval officer for five years prior to attending law school. Marie Quintin is a second-year law student at Pace University School of Law. Prior to law school, she received a B.A. in Anthropology from the University of North Carolina at Charlotte and completed graduate work in Natural Resources Sciences at the University of Rhode Island. She has worked as a wildlife biologist and consultant. Mr. Farrell and Ms. Quintin worked together as summer law clerks at the U.S. Environmental Protection Agency (EPA) in 2006. They would like to thank Mike Walker, Senior Enforcement Counsel for EPA's Office of Enforcement and Compliance Assurance, and their attorney mentors in the Legal Counsel and Resource Management Division, Jon D. Jacobs and James T. Morgan. Mr. Farrell may be contacted at james.r.farrell@gmail.com and Ms. Quintin at mquintin@aol.com.

1. *Rapanos v. United States*, 126 S. Ct. 2208, 36 ELR 20116 (2006).

2. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607. Section 404(a) of the Clean Water Act (CWA) authorizes the Corps, or a state with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. §1344(a).

3. 531 U.S. 159, 31 ELR 20382 (2001).

4. *Compare* *Baccarat Fremont Developers, L.L.C. v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1156, 35 ELR 20212 (9th Cir. 2005) (holding that "the Court clearly contemplates the Corps' jurisdiction over adjacent wetlands, even when they lack a significant ecological connection with waters of the United States"), *and* *United States v. Rapanos*, 376 F.3d 629, 639, 34 ELR 20060 (6th Cir. 2004) ("What is required for CWA jurisdiction over 'adjacent waters,' . . . is a 'significant nexus between the wetlands and navigable waters,' which can be satisfied by the presence of a hydrological connection."), *and*

United States v. Deaton, 332 F.3d 698, 712, 33 ELR 20223 (4th Cir. 2003) (holding "that discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters," creating a "nexus . . . sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted"), *with* *In re Needham*, 354 F.3d 340, 345, 34 ELR 20009 (5th Cir. 2003) (holding that "[t]he CWA [is] not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters").

5. 126 S. Ct. 2208, 36 ELR 20116 (2006).

6. *See id.* at 2220 (plurality opinion) ("[T]he Act's term 'navigable waters' includes something more than traditional navigable waters."); *see also id.* at 2241 (Kennedy, J., concurring) ("[I]n enacting the Clean Water Act Congress intended to regulate at least some waters that are not navigable in the traditional sense."); *id.* at 2255 (Stevens, J., dissenting) ("[W]aters of the United States" [covers] all traditionally navigable waters; tributaries of these waters; and wetlands adjacent to traditionally navigable waters or their tributaries.").

7. *See Rapanos*, 126 S. Ct. at 2241, pt. A (Kennedy, J., concurring).

8. 430 U.S. 188 (1977).

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

Marks, the Court explained that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.”¹⁰ Since then, the Court has recognized that for certain cases, “[the *Marks*] test is more easily stated than applied to the various opinions supporting the result”¹¹

A recent post-*Rapanos* decision illustrates the difficulty of applying *Marks* to future §404 cases. In *United States v. Chevron Pipe Line Co.*,¹² a Texas district court judge applied both Justice Antonin G. Scalia’s and Justice Anthony M. Kennedy’s tests from *Rapanos* to determine the meaning of “waters of the United States.” The judge first explained that Justice Kennedy “advanced an ambiguous test—whether a ‘significant nexus’ exists to waters that are/were/might be navigable. This test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is ‘significant’ and how is ‘nexus’ determined?”¹³ For that reason, the judge looked to prior analysis performed by the U.S. Court of Appeals for the Fifth Circuit, which has historically interpreted “the waters of the United States” narrowly,¹⁴ and concluded that “[w]ithout any clear direction on determining a significant nexus, this Court will do exactly as Chief Justice Roberts declared—‘feel [its] way on a case-by-case basis.’”¹⁵ Based upon the Fifth Circuit’s reasoning in *In re Needham*¹⁶ and that of the plurality opinion in *Rapanos*, the Texas judge then held that the waters at issue were not waters of the United States. Alternatively, the judge held that “even under Justice Kennedy’s required test . . . the United States has failed to establish a ‘significant nexus’ with competent summary judgment evidence.”¹⁷

Like the district judge in Texas, most lower court judges are likely to disregard the theoretical implications of a plurality opinion in favor of more practical considerations. Those skeptical of our judicial system probably assume that judges will simply adopt the test that reflects their opinions of the appropriate extent of federal jurisdiction—judges

who believe that the government asserts too much jurisdiction will likely apply Justice Scalia’s test, while those who believe the federal government must play a greater role in environmental protection will likely endorse Justice Kennedy’s significant nexus test. While such concerns may not be wholly misplaced, it is more reasonable to expect that prudent judges will discern the similarities between Justice Kennedy’s concurrence and the dissent, properly concluding that the plurality’s narrow interpretation will rarely appeal to the majority of the Justices.

The district judge in Texas hesitated to apply Justice Kennedy’s significant nexus test, insisting that it provided no guidance on how to determine whether or not a significant nexus exists. On the contrary, Justice Kennedy left clues throughout his opinion that, when considered together, shape his vision of a significant nexus. The passage of time will eventually create a body of precedent that will further define the intricacies of Justice Kennedy’s significant nexus test. In the meantime, this Article will attempt to outline the initial framework for analysis within the test’s evolving borders.

II. The Tests

To make its strongest argument, the government should first try to satisfy Justice Scalia’s restrictive interpretation of federal jurisdiction under §404 since the eight other Justices would inevitably affirm the rare finding of jurisdiction by Justice Scalia.¹⁸ Justice Scalia requires proof of a “continuous surface connection”¹⁹ between the wetland over which the Corps has asserted jurisdiction and “bodies that are ‘waters of the United States,’”²⁰ which he has defined as “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’”²¹

A. Scalia’s Test

A limited pictorial of Justice Scalia’s restrictive test for determining federal jurisdiction over a wetland is:

10. 430 U.S. at 193 (internal quotation marks and citation omitted).

11. See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Nichols v. United States*, 511 U.S. 738, 745-46 (1994)).

12. No. 5:05-CV-293-C, 2006 WL 1867376, 36 ELR 20131 (N.D. Tex. June 28, 2006). The court was determining whether pooled water in an intermittent stream constituted a “navigable water.” *Id.* at *1.

13. *Id.* at *6.

14. *Id.* at *7; see, e.g., *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) (holding that “[t]he CWA [is] not so broad as to permit the federal government to impose regulations over ‘tributaries’ that are neither themselves navigable nor truly adjacent to navigable waters”).

15. *United States v. Chevron Pipe Line Co.*, 2006 WL 1867376, at *7, 36 ELR 20131 (N.D. Tex. June 28, 2006).

16. 354 F.3d 340 (5th Cir. 2003).

17. *Chevron Pipe Line Co.*, 2006 WL 1867376, at *9 n.15.

18. See *Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting):

Given that all four Justices who have joined this opinion would uphold the Corps’ jurisdiction in both of these cases—and in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.

19. *Id.* at 2226 (plurality opinion).

20. *Id.*

21. *Id.* at 2225.

Wetland

Credit: Annette Davis, U.S. EPA

Navigable Water**Must have a continuous
surface [water] connection**

“[R]elatively permanent, standing, or continuously flowing body of water forming a geographic feature.”²²

Under Justice Scalia’s approach, the following terms aid or hinder a finding of jurisdiction:

Preferred Terminology*

- Continuous
- Seasonal
- Relatively permanent
- Coming and going at intervals
- Geologically fixed body of water

Forbidden Terminology*

- Intermittent
- Ephemeral
- Periodic
- Drainage for heavy rainfall
- Short-lived, dry, man-made

*See Appendix A for a chart contrasting Justice Scalia’s plurality language with that of Justice Kennedy’s concurrence.

Unfortunately, most wetlands involved in today’s litigation do not resemble those at issue in *United States v. Riverside Bayview Homes, Inc.*,²³ which will make it difficult for the government to prevail under the plurality’s extremely narrow test. In that case, Justice Kennedy’s significant nexus test will likely support the broader assertion of jurisdiction that might otherwise go unrecognized by the plurality.

If imprecision is the key to flexibility, then Justice Kennedy’s ambiguous significant nexus test may eventually prove to be the government’s greatest asset in its quest for enhanced federal protection of wetlands possessing only a tenuous connection to the waters of the United States. Justice Kennedy’s willingness to consider cumulative impacts²⁴ and his reluctance to exclude the Rapanos and Carabell properties from jurisdiction²⁵ make his test both an

ideal starting point in cases that advocate an expansive interpretation of federal jurisdiction and a guaranteed source of five votes in cases where the government succeeds in establishing a significant nexus.

B. Kennedy’s Significant Nexus Test

“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.’”²⁶

While there is no set formula or rule, the following may be useful in determining whether the U.S. government has jurisdiction over wetlands.

22. *Id.* at 2225.

23. 474 U.S. 121, 16 ELR 20086 (1985). The Court held that the 80 acres of marshy land owned by Riverside Bayview Homes, Inc., were subject to the Corps’ jurisdiction under §404 not only because they had characteristics common to wetlands but also because the property, which was near Lake St. Clair, was a “wetland adjacent to a navigable waterway.” *Id.* at 124, 130-31.

24. See *Rapanos*, 126 S. Ct. at 2251 (Kennedy, J., concurring) (highlighting the Corps’ finding that “[t]he cumulative impacts of numer-

ous such projects [proposed by the Carabells] would be major and negative as the few remaining wetlands in the area are developed”).

25. *Id.* at 2250 (“In both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus Thus the end result in these cases . . . may be the same as that suggested by the dissent, namely, that the Corps’ assertion of jurisdiction is valid.”).

26. *Id.* at 2248.

Jurisdictional Wetlands Test

(1) Is the Wetland Adjacent to a Navigable Water?²⁷

YES: The federal government has jurisdiction because a significant nexus is inferred by virtue of the wetland's adjacency to a navigable water.

NO: Go to 2.

(2) Is the Wetland Adjacent to a "Major Tributary?"²⁸

Note: Justice Kennedy tells us that the Corps should be able to create a category of "*major tributaries*" that, because of their (1) volume of flow, (2) proximity to navigable waters, and (3) other relevant considerations, are significant enough that wetlands adjacent to them are likely to perform important functions for an aquatic system incorporating navigable waters.²⁹ The Corps' creation of such a category of tributaries would lessen the government's burden in establishing its case for jurisdiction, because proof that a wetland is adjacent to one of these tributaries would create a "reasonable inference of ecologic interconnection."³⁰ In other words, the government could prove that a significant nexus exists simply by proving that the wetland is adjacent to such a tributary.

YES: The federal government has jurisdiction because the wetland is likely to perform important functions for an aquatic ecosystem incorporating navigable waters.

NO: Go to 3.

(3) Does the Wetland Have a Significant Nexus with a "Minor Tributary?"³¹

(a) Prove that the water body at issue is a minor tributary by showing that it:

- (1) flows into a navigable-in-fact water, and
- (2) has a perceptible ordinary high water mark.

(b) Look to the significant nexus factors to prove that the wetland has a significant nexus with the minor tributary.

Exception: Where an adequate nexus is established for a particular wetland, it may be permissible to presume covered status for other comparable wetlands that are adjacent to minor tributaries in the region.³²

Proof of more than one of the following significant nexus factors may be required to demonstrate that wetlands have a significant nexus to navigable water:

- The **cumulative impacts** of the proposed discharge of dredged or fill material would be major and negative as the few remaining wetlands in the area are developed.³³
- They fall within the **regulatory definition of a wetland**: 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.³⁴
- They have a **direct surface-water connection** to navigable waters.³⁵
- They have sufficient **proximity** to a navigable water.³⁶
- They provide **water storage functions** that, if destroyed, could result in increased risk of erosion and degradation of water quality.³⁷
- They perform **important functions** such as: (1) filtering and purifying water draining into adjacent water bodies; (2) slowing the flow of runoff so as to prevent erosion and flooding; and (3) providing critical habitat for aquatic animal species.³⁸
- They have **significant effects on water quality and the aquatic ecosystem**.³⁹
- They function as **integral parts of the aquatic environment** even when the moisture creating the wetlands does not find its source or fate in the adjacent bodies of water.⁴⁰
- They have a **hydrological connection** with the navigable water; however, proof of a hydrological connection alone is not sufficient to demonstrate the existence of a significant nexus.⁴¹
- There is the **absence of a hydrological connection**.⁴² Wetlands adjacent to but lacking a hydrological connection to a tributary may perform critical functions such as pollutant filtering, flood control, and runoff storage, thereby protecting the water quality of downstream navigable waters.
- There is sufficient **quantity and regularity of flow in the adjacent tributaries**.⁴³
- Their **significant nexus can be expressed without the use of conditional language**. Conditional language suggests an undue degree of speculation.⁴⁴ For example, "*possible flooding*" and "*potential ability*."⁴⁵

III. Conclusion

Although *Rapanos* failed to embrace the hydrological connection argument⁴⁶ and resolve the circuit split that has emerged since *SWANCC*, it will not ultimately prove fatal to wetlands protection as many hastily concluded after reading the plurality opinion. Justice Scalia's hostile tone and narrow reading of §404 may have initially succeeded in shock-

ing conservationists, inspiring environmentally-indifferent developers, and calling into question the vitality of §404, but his opinion's inflexibility will never command a majority of the Court. On the other hand, Justice Kennedy's test, though best defined by its ambiguity, provides a broad foundation from which to defend federal jurisdiction in future wetlands litigation and preserves the promise of expanded environmental protection.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 2248-49.

32. *Id.*

33. *Id.* at 2251.

34. *Id.* at 2237.

35. *Id.* at 2238 (noting a state official's observation that carp spawning in a ditch on the Rapanos property indicated a direct surface water connection between the ditch and Saginaw Bay of Lake Huron).

36. *Id.* at 2240 (noting that "[t]he property in *Riverside Bayview*, like the wetlands in the *Carabell* case [*Carabell v. U.S. Army Corps of Engineers*] . . . was located roughly one mile from Lake St. Clair").

37. *Id.*

38. *Id.* at 2240, 2245.

39. *Id.* at 2244.

40. *Id.* at 2248.

41. *Id.* at 2251.

42. *Id.* at 2245-46.

43. *Id.* at 2251.

44. *Id.*

45. *Id.*

46. *See, e.g.,* *United States v. Rapanos*, 376 F.3d 629, 639, 34 ELR 20060 (6th Cir. 2004) (holding that "[w]hat is required for CWA jurisdiction over 'adjacent waters,' . . . is a 'significant nexus between the wetlands and navigable waters,' which can be satisfied by the presence of a hydrological connection").

Appendix A Language Comparison Chart

Terms	Scalia's Plurality	Kennedy's Concurrence
"The Waters of the United States"	Waters of the U.S. include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in "streams," "oceans," "rivers," "lakes," and "bodies" of water "forming geographical features." ¹	"Waters" does not necessarily carry the connotation of "relatively permanent, standing or flowing bodies of water." ² Waters may mean "flood or inundation." ³
Navigable Waters	The Clean Water Act's (CWA or "the Act") term "navigable waters" includes something more than traditional navigable waters. "We have twice stated that the meaning of 'navigable waters' in the Act is broader than the traditional understanding of the term—in <i>SWANCC</i> and <i>Riverside Bayview</i> . . . we have also emphasized, however, that the qualifier 'navigable' is not devoid of significance." ⁴	Kennedy says that "navigable" should be given some effect, but not too much. He noted that the Court's decision to uphold jurisdiction in <i>Riverside Bayview</i> was based on the Corps' judgment that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. The wetlands' status as integral parts of the aquatic environment—that is, their significant nexus with navigable waters—was what established the Corps' jurisdiction over them as waters of the U.S. ⁵
Adjacent	"Adjacent" means there is a continuous surface water connection.	"Adjacent" means there is a significant nexus.
Intermittent	Standing or flowing bodies of water must be relatively permanent. ⁶	An intermittent flow can constitute a stream while it is flowing, because a stream is "a current or course of water or other fluid, flowing on the earth." ⁷ Kennedy agreed with the dissent's definition of a stream. Kennedy says the Corps can reasonably interpret the CWA to cover the paths of impermanent streams. ⁸ Kennedy implicitly supports intermittent streams when he explains that the plurality is wrong to conclude that the phrase "navigable water" includes "seasonal" rivers but not intermittent or ephemeral streams. ⁹
Ephemeral	An ephemeral stream is not included in the definition of "waters" because it is a stream "whose flow is 'coming and going at intervals . . . Broken, fitful, or existing only, or no longer than, a day.'" ¹⁰	The Corps can reasonably interpret the CWA to cover the paths of impermanent streams. ¹¹ Kennedy implicitly supports ephemeral streams when he explains that the plurality is wrong to conclude that the phrase "navigable waters" includes "seasonal" rivers but not intermittent or ephemeral streams. ¹²
Hydrographic Features	Refer to dictionary for definitions of geographical features such as oceans, rivers, and lakes. ¹³	Hydrographic features "could just as well refer to intermittent streams carrying substantial flow to navigable waters." ¹⁴ Note: In <i>Riverside Bayview</i> , the Court compared wetlands to "rivers, streams, and other hydrographic features more conventionally identifiable as waters." ¹⁵

1. *Rapanos v. United States*, 126 S. Ct. 2208, 2221, 36 ELR 20116 (2006).

2. *Id.* at 2242.

3. *Id.*

4. *Id.* at 2220.

5. *Id.* at 2247-48.

6. *Id.* at 2221.

7. *Id.* at 2243.

8. *Id.*

9. *Id.* at 2242.

10. *Id.* at 2221.

11. *Id.* at 2243.

12. *Id.* at 2242.

13. *Id.* at 2236.

14. *Id.*

15. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132, 16 ELR 20086 (1985).

Terms	Scalia's Plurality	Kennedy's Concurrence
Hydrological Connections	"Wetlands with only an intermittent, physically remote, hydrologic connection to 'waters of the U.S.' do not implicate the boundary-drawing problem of <i>Riverside Bayview</i> , and thus lack the necessary connection to covered waters that we described as 'significant nexus' in <i>SWANCC</i> ." ¹⁶	Mere hydrologic connection should not suffice in all cases to demonstrate the existence of a significant nexus ¹⁷ ; however, it may be the <i>absence</i> of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme. ¹⁸ Because a wetland may be performing critical functions such as pollutant filtering, flood control, and runoff storage, proof of the absence of a hydrologic connection may be the factor that best demonstrates the wetland's significance for the aquatic system. ¹⁹
Ecological Connections	"The waters of the U.S. is determined by a wetland's physical connection to covered waters, not its ecological relationship thereto" ²⁰	Adjacency to a navigable water creates a "reasonable inference of ecologic interconnection." ²¹ Ecological connections are the basis of many of Kennedy's significant nexus factors.
River	Rivers are categorized as "permanent, geographically fixed bodies of water" and would clearly fall within the definition of "waters of the U.S." ²² "Seasonal" rivers: "We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by Justice Stevens's dissent." ²³	See "Streams" below.
Streams	Categorized as "permanent, geographically fixed bodies of water" and would clearly fall within the definition of "waters of the U.S." ²⁴ The other definition of "stream" repeatedly emphasizes the requirement of continuous flow, a steady flow, as of water, air, gas, or the like; anything issuing or moving with continued succession of parts; a continued current or course; current; drift; the verb form of "stream" contains emphasis on continuity ²⁵ Streams that are "intermittent" and "ephemeral," that is "streams whose flow is coming and going at intervals . . . or existing only, or no longer than, a day . . . diurnal . . . short-lived, are not waters of the U.S." ²⁶	"Congress could draw a line to exclude irregular waterways, but nothing in the statute suggests it has done so. Quite the opposite, a full reading of the dictionary definition precludes the plurality's emphasis on permanence: The term 'waters' may mean 'flood or inundation,' events that are impermanent by definition." ²⁷ Kennedy says the Corps can reasonably interpret the CWA to cover the paths of impermanent streams. ²⁸ Kennedy implicitly supports intermittent streams when he explains that the plurality is wrong to conclude that the phrase "navigable waters" includes "seasonal" rivers but not intermittent or ephemeral streams. ²⁹
Creek	"Ditches, channels, conduits, and the like, that can hold water permanently as well as intermittently are usually referred to as 'rivers,' 'creeks,' or 'streams.'" ³⁰	Bouquet Canyon Creek carried no flow for much of the year but carried 122 ft./sec. on February 12, 2003. ³¹ Kennedy would support intermittent creeks as "waters of the U.S."

16. *Rapanos*, 126 S. Ct. at 2227.17. *Id.* at 2251.18. *Id.* at 2245-46.19. *Id.* at 2245.20. *Id.* at 2229 (based on *Riverside Bayview Homes*, 474 U.S. at 135 n.9).21. *Id.* at 2248.22. *Id.* at 2221 n.6.23. *Id.* at 2221 n.5.24. *Id.* at 2221 n.6.25. *Id.*26. *Id.* at n.5.27. *Id.* at 2242.28. *Id.* at 2243.29. *Id.* at 2242.30. *Id.* at 2223 n.7.31. *Id.* at 2242.

Terms	Scalia's Plurality	Kennedy's Concurrence
Brook	Brooks are categorized as "permanent, geographically fixed bodies of water" and would clearly fall within the definition of "waters of the U.S." ³²	Kennedy would support intermittent brooks as "waters of the U.S."
Channel	Channels containing merely intermittent or ephemeral flow are not waters of the U.S. Channels included in the definition of "point source" are not waters of the U.S. Dry channels that only sometimes contain water are not waters of the U.S. ³³ A channel is generally a point source (not a water of the U.S.) because it is a term ordinarily used to describe the watercourses through which intermittent waters typically flow. ³⁴ Channels containing permanent flow are plainly within the definition of "waters." ³⁵	Implicitly included within the definition of "waters of the U.S." ³⁶ L.A. River periodically releases water volumes so powerful and destructive that it has been encased in concrete and steel. This would satisfy Kennedy's definition of "waters" as "flood or inundation." ³⁷
Tributaries	Scalia cites numerous cases that illustrate the Corps' inconsistent determination of what tributaries qualify as "waters of the U.S." Scalia also concluded that the Corps defines "tributaries" too broadly. ³⁸	The Corps has construed the term "waters of the U.S." to include not only waters susceptible to use in interstate commerce but also tributaries of those waters. ³⁹ The reasoning in <i>Riverside Bayview</i> (supporting jurisdiction without any inquiry beyond adjacency) could apply equally to wetlands adjacent to certain major tributaries. ⁴⁰ Note: Major tributaries are a category of waters that, due to their: (1) volume of flow; (2) proximity to navigable waters; or (3) other relevant considerations, are significant enough that wetlands adjacent to them are likely to perform important functions for an aquatic system incorporating navigable waters. ⁴¹ The Corps can assert jurisdiction over a wetland adjacent to a minor tributary if it can be shown that the minor tributary bears a sufficient nexus with a navigable water. ⁴² In <i>Rapanos</i> , Kennedy said that the Sixth Circuit should have given some indication of the quantity and regularity of flow in the adjacent tributaries because such information could have been an important consideration in assessing the nexus. ⁴³
Isolated Ponds	"Non-navigable, isolated, intrastate waters," if they do not actually abut on a navigable waterway, are not included as "waters of the U.S." ⁴⁴	Because a significant nexus was lacking with respect to isolated ponds and a navigable water in <i>SWANCC</i> , Kennedy agreed with the Court's finding of no Corps jurisdiction. ⁴⁵
Ordinary High Water Mark	Inclusion would "stretch the waters of the U.S. to any land feature over which rainwater or drainage passes and leaves a visible mark—even if only 'the presence of litter and debris.'" ⁴⁶	"The Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possess an ordinary high water mark . . . This standard presumably provides a rough measure of the volume and regularity of flow." ⁴⁷
100-year Flood Line	This is probably not a water of the U.S.—unless it is possible to stretch "seasonal" that far . . . ⁴⁸	Kennedy does not address this.

32. *Id.* at 2221 n.6.33. *Id.* at 2222.34. *Id.* at 2221.35. *Id.* at 2221 n.5.36. *Id.* at 2242 (discussing L.A. River).37. *Id.*38. *Id.* at 2218.39. *Id.* at 2237.40. *Id.* at 2248.41. *Id.*42. *Id.* at 2249.43. *Id.* at 2251.44. *Id.* at 2217 (based on *Riverside Bayview*).45. *Id.* at 2241.46. *Id.* at 2217.47. *Id.* at 2249.48. *Id.* at 2219 (referencing 100-year flood line).

Terms	Scalia's Plurality	Kennedy's Concurrence
Point Source	Point source describes "watercourses through which intermittent waters typically flow." ⁴⁹ Point sources and navigable waters are "separate and distinct categories." ⁵⁰	Nothing in the point source definition requires an intermittent flow. ⁵¹ Certain water bodies could conceivably constitute both a point source and a water. ⁵²
Dry Arroyos, Culver, Wet Meadow, Storm Sewer, Drain Tiles, and, to some extent, Drainage Ditches	"In applying the definition of 'waters of the U.S.' to these terms, the Corps has stretched the term beyond parody. The plain language of the statute simply does not authorize a 'Land is Waters' approach to federal jurisdiction." ⁵³	Kennedy does not address these.
Drainage Ditch	"Drainage ditch" is in the definition of point source; however, Scalia remanded the case to the Sixth Circuit so that they could determine whether the ditches or drains near each wetland are "waters" in the ordinary sense, containing a relatively permanent flow. ⁵⁴ This indicates he would be willing to accept argument that a particular ditch is a "water"—not just a "point source."	The dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain that eventually may flow into navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far. ⁵⁵ In <i>Rapanos</i> , Kennedy noted the presence of a surface water connection between a ditch and navigable waters, which was proved by the discovery of carp spawning in the ditch on the Rapanos property. ⁵⁶
Ditches: man-made / roadside	A ditch is generally a point source—and not a water of the U.S.—because it is a term ordinarily used to describe the watercourses through which intermittent waters typically flow. ⁵⁷	The Corps cannot automatically assert jurisdiction over a wetland that lies alongside a ditch or drain. The ditch cannot be extremely remote and insubstantial, even if it eventually flows into traditional navigable waters. ⁵⁸

49. *Id.* at 2223.50. *Id.*51. *Id.* at 2243.52. *Id.*53. *Id.* at 2222.54. *Id.* at 2236.55. *Id.* at 2247.56. *Id.* at 2238.57. *Id.* at 2224.58. *Id.* at 2247.

Terms	Scalia's Plurality	Kennedy's Concurrence
<p>Significant Nexus</p>	<p>Scalia does not find significant nexus applicable and does not endorse "case-by-case determination of ecological effect."⁵⁹ "Significant nexus" appears nowhere in the CWA, but is taken from <i>SWANCC</i>'s cryptic mischaracterization of the holding of <i>Riverside Bayview</i>.⁶⁰</p>	<p>Kennedy noted that in <i>Riverside Bayview</i> the Court said "[i]f it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand."⁶¹ Kennedy noted that the Court's decision to uphold jurisdiction in <i>Riverside Bayview</i> was based on the Corps' judgment that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. The wetlands' status as integral parts of the aquatic environment—that is, their <i>significant nexus</i> with navigable waters—was what established the Corps' jurisdiction over them as waters of the U.S.⁶² Determination of whether a significant nexus exists depends upon analysis in light of Congress' purposes and goals for enacting the CWA.</p> <p>Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Since wetlands can perform critical functions such as pollutant trapping, flood control, and runoff storage (functions which help to achieve the CWA's purpose), Kennedy concluded that "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.'"⁶³</p> <p>Kennedy noted the important functions that wetlands perform (as cited by the Corps): (1) filtering and purifying water draining into adjacent water bodies; (2) slowing the flow of runoff so as to prevent erosion and flooding; and (3) providing critical habitat for aquatic animal species.⁶⁴</p> <p>In <i>Carabell</i>, Kennedy focused on <i>proximity</i> to a navigable water. Like the property in <i>Riverside Bayview</i>, the Carabell property was only one mile from a navigable water.⁶⁵</p> <p>In <i>Rapanos</i>, Kennedy noted the presence of a surface water connection between a ditch and navigable waters, which was proved by the discovery of carp spawning in the ditch on the Rapanos property.⁶⁶</p> <p>Fill equates pollutant; therefore, proving that fill will impair downstream water quality is a factor that indicates a wetland has a significant nexus with a navigable water. Kennedy says the government can also show that filling will destroy the wetland's ability to filter and purify and may result in the release of toxins and pathogens that would otherwise have been amenable to filtration/detoxification.⁶⁷</p> <p>The plurality is wrong to suggest that wetlands are indistinguishable from waters to which they bear a surface connection.⁶⁸</p> <p>Kennedy is willing to consider cumulative impacts.⁶⁹</p> <p>Mere hydrologic connection should not suffice in all cases to demonstrate the existence of a significant nexus;⁷⁰ however, it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.⁷¹ Because a wetland may be performing critical functions such as pollutant filtering, flood control, and runoff storage, proof of the absence of a hydrological connection may be the factor that best demonstrates the wetland's significance for the aquatic system.⁷²</p>

59. *Id.* at 2233.60. *Id.* at 2234.61. *Id.* at 2244.62. *Id.* at 2247-48.63. *Id.* at 2248.64. *Id.* at 2240, 2245.65. *Id.* at 2240.66. *Id.* at 2238.67. *Id.* at 2245.68. *Id.* at 2244.69. *Id.* at 2251.70. *Id.*71. *Id.* at 2245-46.72. *Id.* at 2245.