

The Significant Nexus of Science to the Future Protection of the Waters of the United States

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Floodplain Ecosystem Symposium
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Overview of Prepared Remarks

- Context
- Regulatory Background and History
- What we lawyers need from scientists
- Discussion



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The History of Defining “Navigable Waters”



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Discussion covers all “navigable waters” – which includes many (most? all?) floodplains



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Federal regulation depends on
constitutional and statutory
coverage



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The “troublesome” language of Clean Water Act 404(a)

“The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the **navigable waters** at specified disposal sites.”

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Clean Water Act, 502 General Definitions

"(7) The term 'navigable waters' means the waters of the United States, including the territorial seas."

- Different from traditional notions of navigability under the Rivers and Harbors Act (33 C.F.R. Pt. 329)
- Applies to entire Clean Water Act

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CWA Goal

- Congress stated that it was passing the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2000). To achieve this objective, Congress listed seven goals, each of which indicates concern for values other than navigability. *Id.* § 1251(a)(1)-(6). These broad goals of the law include "protection and propagation of fish, shellfish, and wildlife," "recreation in and on the water," elimination of "the discharge of toxic pollutants in toxic amounts," and "programs for the control of nonpoint source pollution." *Id.*

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History somewhat clear in 1972, crystal clear in 1977

- Had the honor of writing a brief (with Bob Adler and Amy Wildermuth of Utah School of Law) for Members of Congress, both Republicans and Democrats, all but one of whom were members of the 92nd Congress (passed 1972 Clean Water Act definition at issue in *Rapanos/Carabell*). In addition, the amici included former Senators who were members of the 95th Congress and who voted in 1977 to reaffirm the broad scope CWA protection.
- Broad purpose in 1972 (affirmed in 1977), to prevent pollution, included wetlands protection
- Unlike in unanimous 1985 *Riverside Bayview Homes*, legislative history was not the focus of any of the *Rapanos/Carabell* decisions

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Early Interpretations of CWA § 404 Breadth

- *NRDC v. Calloway* (D.C. District Court 1975)



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"Waters of the United States" 33 CFR § 328.3(a)(5) & (7)

1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all ... subject to the ebb and flow of the tide;
2. All interstate waters including interstate wetlands;
3. All "other waters" ... the use, degradation or destruction of which could affect interstate or foreign commerce ...
4. All impoundments of waters otherwise defined as waters of the United States under the definition;
5. **Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;**
6. The territorial seas;
7. **Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.**

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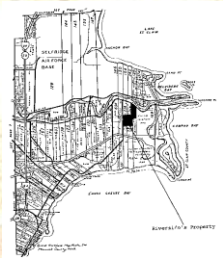
33 C.F.R. 328.3(a)(3)

- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
- i. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - ii. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - iii. Which are used or could be used for industrial purpose by industries in interstate commerce;

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First Supreme Court Interpretation

Riverside Bayview Homes (1985)



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"Migratory Bird Rule"

- Preambles to 1986 Corps and 1988 EPA regulations defining "waters of the United States," 51 Fed. Reg. 41317 (1986) and 53 Fed. Reg. 20765 (1988)
- Declared as jurisdictional waters that are or may be used by migratory bird habitat
- Upheld by subsequent lower court decisions (Leslie Salt, Hoffman Homes v. Administrator)



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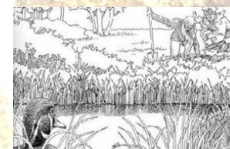
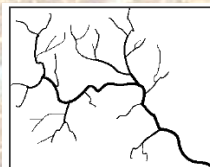
SWANCC

- Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (2001)
- See <http://www.swancc.org>



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Then Comes... Rapanos and Carabell (2006)



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John A. Rapanos v. United States

__U.S.__, 126 S. Ct. 2208 (19 June 06)



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Rapanos Questions Presented

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?
2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

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Carabell Questions Presented

1. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the "waters of the United States?"
2. Do the limits on Congress' authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States?"

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Amici supporting government

- Macomb County; New York, Michigan, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, Washington, and Wisconsin, the District of Columbia, the Pennsylvania Department of Environmental Protection, and the International Association Of Fish And Wildlife Agencies; Chesapeake Bay Foundation; New York City; Ecological Society of America and Society of Wetland Scientists, the American Society of Limnology and Oceanography, and Estuarine Research Federation; Natl. Mitigation Banking Assn.; Members of Congress (Reps. John D. Dingell (D-Mich.), John Conyers Jr. (D-Mich.), Charles B. Rangel (D-N.Y.), Robert F. Drinan, Gary W. Hart, Kenneth W. Heckler, Charles McC. Mathias Jr., Paul N. McCloskey, Jr., and Richard Schultz-Schwesker; American Rivers, Envl. Defense, Natl. Audubon Society, NROD, Physicians for Social Responsibility, Sierra Club, Tip of the Mitt Watershed Council, and Waterkeeper Alliance; Envl. Law Institute; American Planning Assn.; Former EPA administrators (Carol Browner, William K. Reilly, Douglas Costle, Russell Train); Ducks Unlimited, WWF, American Fisheries Society, American Sportfishing Assn., Bass Pro Shops, Boone & Crockett Club, Izaak Walton League of America, Michigan United Conservation Clubs, The Orvis Company Inc., Pheasants Forever, Theodore Roosevelt Conservation Partnership, Trout Unlimited, Wildlife Management Institute, The Wildlife Society, Western Organization of Resource Councils, Idaho Rural Council, Northern Plains Resource Council, Powder River Basin Council, Dakota Resource Council, Oregon Rural Action, Western Colorado Congress, Community Assn. for Restoration of the Environment, Concerned Citizens for Clean Water, Rios Bravos, New Mexico Acequia Assn., Headwaters, Oregon Natural Resources Council, Snake Valley Citizens Alliance, Northern California River Watch, Arizona Wildlife Federation, Walker Lake Working Group, Wyoming Outdoor Council, Iowa Farmers Union and Mineral County; Scientists Jared Diamond, Paul Ehrlich, Harold Mooney, Gordon Orians, Stuart Pimm, Sandra Postel, Peter Raven, John Terborgh, David Wilcove, and Edward O. Wilson; Assn. of State Wetland Managers, Assn. of State Floodplain Managers, and New England Interstate Water Pollution Control Commission; Assn. of State and Interstate Water Pollution Control Administrators; Calvin Johnson

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Amici supporting petitioners

Claremont Institute, Center for Constitutional Jurisprudence; Natl. Assn. of Home Builders; Natl. Federation of Indpt. Business Legal Fdtn.; Natl. Stone, Sand and Gravel Assn., American Road and Transportation Builders Association, City of Victorville, Calif., and Nationwide Public Projects Coalition; CropLife America, National Cattlemen's Beef Association, National Corn Growers Association, National Council Of Farmer Cooperatives, National Pork Producers Council, Dairy Producers Of New Mexico, Kansas Livestock Association, and Texas Cattle Feeders Association; American Farm Bureau Federation; Intl. Council of Shopping Centers, National Multi-Housing Council, National Association Of Industrial And Office Properties, Real Estate Roundtable, Associated General Contractors Of America, American Resort Development Association, and National Association Of Real Estate Investment Trusts; Fdtn. for Environmental and Economic Progress, Natl. Assn. of Realtors, Utility Water Act Group, and U.S. Chamber of Commerce; Home Builders Assn. of Central Arizona; American Petroleum Institute; Alaska, Utah, Western Urban Water Coalition, Natl. Water Resources Assn., Assn. of Calif. Water Agencies, Central Arizona Water Conservation District, State Water Contractors, Metropolitan Water District of Southern California, Westlands Water District, San Diego County Water Authority and California Farm Bureau Federation; Cato Institute, New England Legal Fdtn. and Charles Johnson, Mountain States Legal Fdtn., Washington Legal Fdtn. Allied Educationl Fdtn., Laurence A. Peterson, and Edmond C. Packee Jr.; Mackinac Center for Public Policy; Natl. Assn. of Waterfront Employers; Western Coalition of Arid States; Attainable Housing Alliance; Pulte Homes, Centex Homes, Hovnanian Enterprises, Inc., KB Home, Lennar Corporation and M.D.C. Holdings Inc.; Rep. John Duncan (R-Tenn.)

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For "Soup to Nuts" Overview

- <http://www.law.sc.edu/wetlands/rapanos-carabell/carabell.shtml>



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4-1-4 Decision with 5 opinions


- SCALIA, J., announced the judgment of the Court, and delivered an opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined.
- ROBERTS, C. J., filed a concurring opinion.
- KENNEDY, J., filed an opinion concurring in the judgment.
- STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined.
- BREYER, J., filed a dissenting opinion.

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Agreement by 5 or more

- Clean Water Act "navigable waters" are broader in scope than traditional "navigable waters" (all justices)
- Rapanos and Carabell must be remanded for "proper" evaluation of whether the wetlands at issue are "waters of the United States" (plurality and Justice Kennedy)

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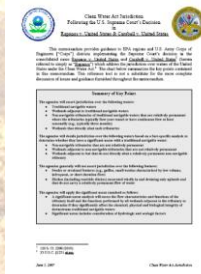
The "Kennedy Test"

- Jurisdiction extends to waters that "possess a significant nexus" to waters that are or were navigable in fact or that could reasonably be so made. "... such waters possess the requisite nexus" if "either alone or in combination with similarly situated lands in the region, [they] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" ... Where the wetlands in question are "adjacent to navigable-in-fact waters, [the government] may rely on adjacency to establish its jurisdiction," but ... where the wetlands are adjacent to nonnavigable tributaries, "[a]bsent more specific regulations . . . [the government] must establish a significant nexus on a case-by-case basis..."

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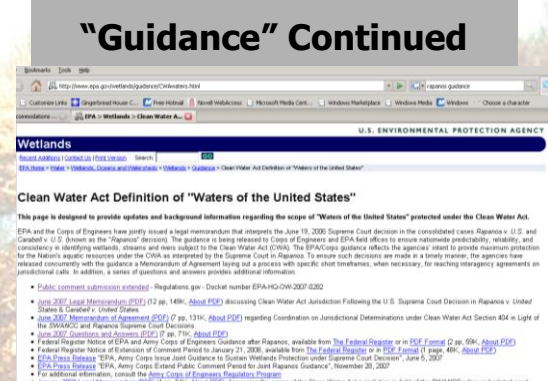
Rapanos "Guidance"

<http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf>



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"Guidance" Continued

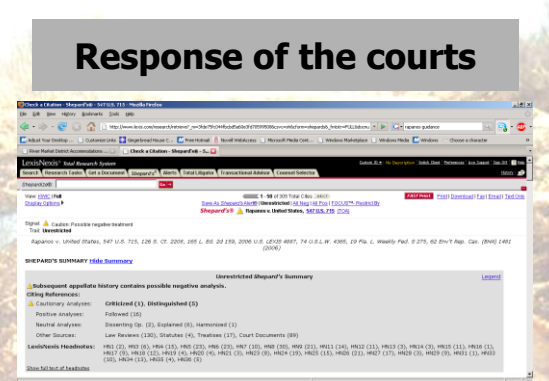


This page is designed to provide updates and background information regarding the scope of "Waters of the United States" protected under the Clean Water Act. EPA and the Corps of Engineers have jointly issued a legal memorandum that interprets the June 19, 2009 Supreme Court decision in the consolidated cases Rapanos v. U.S. and Carabell v. U.S. known as the "Rapanos" decision. The guidance is being released by Corps of Engineers and EPA staff officers to ensure nationwide predictability, reliability, and consistency in identifying wetlands, streams and rivers subject to the Clean Water Act (CWA). The EPA/Corps guidance reflects the agencies' intent to provide maximum protection for the Nation's aquatic resources under the CWA as interpreted by the Supreme Court in Rapanos. To ensure such decisions are made in a timely manner, the agencies have released concurrently with the guidance a Memorandum of Agreement laying out a process with specific short timelines, when necessary, for reaching interagency agreements on jurisdictional calls. In addition, a series of questions and answers provides additional information.

- Public comment submission extended - Regulations.gov - Docket number EPA-HQ-OW-2007-0302
- June 2007 Legal Memorandum (LMO) (2 pp. 149K) [About PDF](#) discussing Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States & Carabell v. United States
- June 2007 Memorandum of Agreement (MOA) (7 pp. 131K) [About PDF](#) regarding Coordination on Jurisdictional Determinations under Clean Water Act Section 404 in Light of the SWANCC and Rapanos Supreme Court Decisions
- June 2007 Questions and Answers (Q&A) (7 pp. 716K) [About PDF](#)
- Federal Register Notice of EPA and Army's Agency Guidance after Rapanos, available from [The Federal Register](#) or in [PDF format](#) (2 pp. 80K) [About PDF](#)
- Federal Register Notice of Comment Period to January 21, 2008, available from [The Federal Register](#) or in [PDF format](#) (2 pp. 49K) [About PDF](#)
- EPA Press Release "EPA, Army Corps Issue Joint Guidance to Stream Wetlands Protection under Supreme Court Decision" June 9, 2007
- CWA Section 404, Army Corps of Engineers Public Comment Period for Joint Rapanos Guidance, November 30, 2007
- For additional information, consult the [New Copy of Energy Health Program](#)
- January 2003 Legal Memorandum (LMO) (8 pp. 54K) [About PDF](#) reviewing the scope of the Clean Water Act jurisdiction in light of the SWANCC ruling and related court decisions.

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Response of the courts



Search results for "Rapanos" and "Waters of the United States" showing various legal documents, including court opinions and legislative history.

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The Take of the "Dissent"


Justice Kennedy's 'significant-nexus' test will probably not do much to diminish the number of wetlands covered by the Act in the long run. Justice Kennedy himself recognizes that the records in both cases contain evidence that "should permit the establishment of a significant nexus," ... and it seems likely that evidence would support similar findings as to most (if not all) wetlands adjacent to tributaries of navigable waters. But Justice Kennedy's approach will have the effect of creating additional work for all concerned parties. Developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries of traditionally navigable waters will have no certain way of knowing whether they need to get § 404 permits or not. And the Corps will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications.

Justice Stevens for the dissent

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Clean Water Restoration Act

- H.R. 2421/S. 1870 would redefine mirroring prior, workable regulatory language
- See <http://transportation.house.gov/Media/File/water/20070717/KIM%20DIANA%20CONNOLLY.pdf> for Congressional testimony



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The role of scientists will become even more CRUCIAL

- ...confusion will reign for years in all likelihood...
- Many issues raised by *Rapanos*, but the answers/next steps for most part unclear
- Figuring out how to define "significant nexus" important for floodplain protection and much more!



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And now, to you...

- What is/should be a significant nexus under law?
- Where should we go from here?



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Finding me later

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