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THE REGULATION OF WETLANDS ADJACENT TO NON-NAVIGABLE WATERS OF THE UNITED STATES: *RAPANOS V. UNITED STATES*

I. INTRODUCTION

In *Rapanos v. United States*, the United States Supreme Court delivered a 4-1-4 split decision that created two distinct alternatives for determination of the United States Army Corps of Engineers' ("Corps") jurisdiction over wetlands "neighboring" non-navigable waters, or tributaries of traditional "navigable waters."[1] *Rapanos* was a consolidated action of two cases from the Sixth Circuit Court of Appeals: *United States v. Rapanos* and *Carabell v. United States Army Corps of Engineers*.[2] In both cases, the United States Court of Appeals for the Sixth Circuit held in favor of Corps' jurisdiction over wetlands adjacent to "tributaries" of navigable waters.[3] In the consolidated action, the Supreme Court vacated and remanded both Circuit decisions for consideration of the facts of each case in light of the Court's alternative descriptions of the Corps' jurisdiction.[4]

As the Justices who filed opinions in Rapanos pointed out, the difficulty in specifying the extent of the Corps' jurisdiction over wetlands is

1. Rapanos v. United States (*Rapanos II*), 126 S. Ct. 2208 (2006). "Neighboring" is a qualifier used to describe the term "adjacent" in the Corps regulations. 33 C.F.R. § 328.3(c).

2. Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2004); United States v. Rapanos (*Rapanos I*), 376 F.3d 629 (6th Cir. 2004).

3. The courts in both these cases used the word "tributaries" to describe the drains and streams adjacent to the wetlands at issue. *Carabell*, 391 F.3d at 708-09; *Rapanos I*, 376 F.3d at 642.

4. *Rapanos II*, 126 S. Ct. at 2235.

largely due to the language of the Clean Water Act ("CWA").5 The CWA uses the words "navigable waters" to designate those watercourses that Congress sought to protect with the CWA. The definition of "navigable waters" engenders confusion and litigation and is at the heart of the dispute in Rapanos. The CWA's stated purpose is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.6 In order to accomplish that objective, section 404 of the CWA requires a permit from the Corps for the "discharge of dredged or fill material" into the Nation's "navigable waters."7 Consequently, a developer wishing to fill wetlands may have to expend significant time and resources in obtaining the required permits.8 Aside from the resource expenditures, though, the real dilemma for developers is determining which watercourses on their land are regulated waters.9 The Corps regulates wetlands to the extent those wetlands may be defined as "navigable waters." Consequently, the critical questions the Court faced in Rapanos were the permissible definition of "navigable waters," and the extent wetlands must be related to those waters to become subject to the Corps' jurisdiction.

Rapanos was the third case in which the Supreme Court addressed the Corps' jurisdiction under the CWA. In the first action, a unanimous Court granted the Corps jurisdiction over wetlands directly adjacent to navigable-in-fact waters, or waters that fit the traditional definition of navigability.[10] In the second case, a more divided Court (5-4 majority) refused to grant the Corps jurisdiction over "isolated ponds" far from any navigable water.[11] In *Rapanos*, the Court faced the question of the Corps' jurisdiction over wetlands with a more attenuated connection to navigable waters than those directly adjacent to navigable waters, but with a less attenuated connection than remote ponds and swamps. *Rapanos* offered the Court the perfect opportunity to

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5. *See* Steve Louthan, *U.S. Supreme Court Sharply Split over Wetlands*, URBAN LAND, Jan. 2007, at 126 [hereinafter Louthan, *Court Sharply Split*].

6. 33 U.S.C. § 1251(a).

7. *Id.* § 1344(a).

8. *See generally Rapanos II*; Less costly and time consuming nationwide or regional permits are available: "[g]eneral permits are often issued by USACE for categories of activities that are similar in nature and would have only minimal individual or cumulative adverse environmental effects. General permits can be issued on a nationwide ("nationwide permit") or regional ("regional general permit") basis." UNITED STATES ENV'T PROT. AGENCY, OVERVIEW OF EPA AUTHORITIES FOR NATURAL RESOURCE MANAGERS DEVELOPING AQUATIC INVASIVE SPECIES RAPID RESPONSE AND MANAGEMENT PLANS: CWA SECTION 404-PERMITS TO DISCHARGE DREDGED OR FILL MATERIAL, http://www.epa.gov/owow/invasive_species/invasives_management/cwa404.html (last visited Aug. 9, 2007).

9. Louthan, *Court Sharply Split*, *supra* note 5, at 126.

10. United States v. Riverside Bayview Homes, Inc. (*Riverside Bayview II*), 474 U.S. 121, 133 (1985).

11. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 171-72 (2001).

clarify the exact extent of Corps' jurisdiction over wetlands.[12] However, the Court's dual holdings in *Rapanos* only obscured the scope of the Corps' regulatory authority behind two competing tests that are neither completely loyal to the language of the CWA, nor directly track Court precedent under the CWA.

II. PRE-*RAPANOS*

The Court's first attempt at interpreting the Corps' jurisdiction under the CWA took place in 1985, thirteen years after the Act's enactment and over a decade after the Corps promulgated regulations defining the scope of its jurisdiction.[13] In *United States v. Riverside Bayview Homes, Inc.*, the parties sought a judicial determination of whether an eighty-acre wetland owned by Riverside Bayview Homes, Inc. was an "adjacent wetland" within the meaning of the CWA and therefore subject to the Corps' jurisdiction.[14] The disputed wetland abutted Lake St. Clair, a traditionally-navigable lake and, although no continuous surface hydrological connection existed between the wetland and lake, the wetland was susceptible to periodic inundation during times of high lake levels.[15] Faced with drawing a line where no clear line existed, the Court—in a unanimous decision—chose to give deference to the Corps' regulations. The Court held that, although no continuous surface hydrological connection actually existed between the wetland and the traditionally navigable waterway, the Corps' assertion of jurisdiction over the *Riverside Bayview* wetland was nonetheless in harmony with the language, policies, and history of the CWA.[16]

Subsequent to the *Riverside Bayview* holding, the Court's unanimous endorsement of the regulations promulgated by the Corps lead to the Corps adopting increasingly broad interpretations of its own regulations under the CWA.[17] "For example, in 1986, to 'clarify' the reach of its jurisdiction, the Corps announced the so-called 'Migratory Bird Rule,' which purported to extend its jurisdiction to any intrastate waters '[w]hich are or would be used as habitat' by migratory birds."[18] In fact, it was the adoption of the Migratory Bird Rule which would lead to the Court's second opinion regarding the Corps' jurisdiction

12. Channing J. Martin, *Supreme Court Decides Clean Water Act Cases*, 38 TRENDS: ABA SEC. OF THE ENV'T, ENERGY, & RES. NEWSLETTER 1, 1 (2006).

13. *Riverside Bayview II*, 474 U.S. at 123-24 & n.1.

14. *Id.* at 124-25.

15. United States v. Riverside Bayview Homes, Inc. (*Riverside Bayview I*), 729 F.2d 391, 393-94 (6th Cir. 1984).

16. *Riverside Bayview II*, 474 U.S. at 465; *see also* Steve Louthan, *Federal Jurisdiction Under the Clean Water Act After Rapanos*, 35 COLO. LAW. 47, 48 (Dec. 2006) [hereinafter Louthan, *Federal Jurisdiction*].

17. *Rapanos II*, 126 S. Ct. at 2216.

18. *Id.* at 2216-17.

under the CWA in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*").[19]

In *SWANCC*, a consortium of municipalities sought to convert an abandoned sand and gravel pit into a disposal site for nonhazardous solid waste.[20] Since its abandonment, a number of permanent and seasonal ponds had formed, thereby providing a habitat to migratory birds.[21] Because of its isolated location, the proposed site did not have any hydrological connection with, nor was it adjacent to any traditionally navigable waterway and therefore lacked a significant nexus to a navigable waterway.[22] In its ruling, apparently becoming somewhat disenchanted with the Corps' unbridled exercise of jurisdiction over non-navigable waterways, the Court, in a 5-4 majority decision, concluded the Corps had overstepped its jurisdictional authority.[23] In so doing, the Court effectively applied the breaks to what had previously been a carte blanche approach by Corps in interpreting its own jurisdiction under the CWA.

III. THE *RAPANOS* PLURALITY

In *Rapanos*, the Court faced a new challenge when confronted with wetlands that did not match the geographical characteristics found in either *Riverside Bayview* or *SWANCC*. As a result, the distinct geographic nature of the disputed wetlands in *Rapanos* proved to be even more problematic for the Court to make a statutory interpretation than its predecessors in *Riverside Bayview* and *SWANCC*. In the plurality decision authored by Justice Scalia, the Court employed a piece-meal approach to interpret an inherently ambiguous statute. Although Justice Scalia dedicated a considerable amount of his opinion refuting the reasoning championed by Justice Kennedy in his concurring opinion and by Justice Stevens in the dissenting opinion, he established a two-prong test to determine if a wetland similarly situated to the Rapanos and Carbell sites was in fact a wetland covered by the CWA.[24] The test requires two findings:

> First, that the adjacent channel contains a "wate[r] of the United States," (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a

19. *See SWANCC*, 531 U.S. 159, 164 (2001).
20. *Id.* at 162-63.
21. *Id.* at 163.
22. *Id.* at 164.
23. *Id.* at 174.
24. *Rapanos II*, 126 S. Ct. 2208, 2226 (2006).

continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.[25]

The first prong of the Scalia Test, requiring that the adjacent channel contain "waters of the United States," draws its authority, in part, from the ordinary parlance of the word "waters" as defined by Webster's New International Dictionary.[26] Because the ordinary usage of the word "waters" connotes relatively permanent standing or flowing bodies of water, wetlands that are adjacent to waterways that contain only ephemeral flows necessarily fail to qualify a wetland as a covered water under the CWA.[27]

Justice Scalia also cited the statutory language of the CWA in support of his position.[28] By virtue of the Act distinguishing between "point sources" and "navigable waters," in its own language, the Act excludes channels and conduits that typically carry intermittent flows of water as "waters of the United States."[29] Therefore, according to Justice Scalia, if a channel adjacent to a wetland qualifies as a "point source" as defined by the CWA, it will typically not occupy the dual role of a navigable water.[30]

The second prong of the Scalia Test, requiring that the wetland has a continuous surface connection with a relatively permanent standing or flowing body of water, is rooted in a commingling of the Court's reasoning found in *Riverside Bayview* and *SWANCC*.[31] While recognizing that not all wetlands implicate the boundary-drawing problem found in *Riverside Bayview*, Justice Scalia noted that the significant-nexus test espoused by the Court in *SWANCC* does not apply in situations where a wetland is only intermittently connected to a covered water.[32] By making this distinction, Justice Scalia allowed himself the opportunity to embrace a more easily discernable requirement—namely that there is a continuous surface connection with the covered water.[33]

IV. JUSTICE ROBERTS' CONCURRENCE

Justice Roberts, in his concurring opinion, took the opportunity to point out that the Corps' defeat in *Rapanos* could easily have been avoided had the Corps provided "guidance meriting deference" by promulgating rules that fit within the Court's ruling in *SWANCC*.[34] In-

25. *Id.* at 2227.
26. *Id.* at 2220-21.
27. *Id.* at 2222.
28. *Id.* at 2222-23.
29. *Id.*
30. *Id.*
31. *Id.* at 2226.
32. *Id.*
33. *Id.* at 2226-27.
34. *Id.* at 2236 (Roberts, J., concurring).

stead, the Corps' choice to "adhere to its essentially boundless view of the scope of its power" caused a divided court to adopt a requirement that lower courts decide jurisdictional questions arising under the CWA "on a case-by-case basis."[35]

V. JUSTICE KENNEDY'S CONCURRENCE

Justice Kennedy filed a concurrence in the plurality's holding to vacate and remand the decisions in the consolidated cases for "further fact-finding," but could not agree with either the plurality's or the dissent's definitions of the Corps' jurisdiction over wetlands.[36] Justice Kennedy characterized the plurality's requirements for jurisdiction over wetlands as limitations "without support in the language and purposes of the Act. . . ."[37] He claimed the plurality's first requirement "makes little practical sense in a statute concerned with downstream water quality. . .,"[38] and described the plurality's second requirement as lacking in appropriate deference to the Corps ability to distinguish wetlands from navigable waters.[39] On the other hand, Justice Kennedy elected not to side with the dissent because the dissent offered to grant the Corps too much deference.[40] He feared that the *Chevron* deference the dissent offered the Corps would allow the Corps jurisdiction over waters too far removed from navigable waters.[41]

Many consider Justice Kennedy's categorization of the Corps' jurisdiction over wetlands the controlling holding from *Rapanos*.[42] The "basic rules of legal interpretation long accepted by the federal judiciary" give precedence to Justice Kennedy's conclusion because it concurs with the plurality's holding to deny jurisdiction to the Corps on the narrowest grounds.[43] Justice Kennedy commended the Sixth Circuit for "recognizing" the "significant nexus" test formulated in *SWANCC* as the appropriate test for determining if wetlands constitute navigable waters.[44] However, Justice Kennedy concurred with the decision to vacate and remand because the Sixth Circuit failed to "consider all the factors necessary to determine that the lands in question had, or did not have, the requisite nexus."[45]

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35. *Id.*
36. *Id.* at 2236 (Kennedy, J., concurring); *see also* Martin, *supra* note 12, at 14.
37. *Rapanos II*, 126 S. Ct. at 2242 (Kennedy, J., concurring).
38. *Id.* at 2242.
39. *Id.* at 2244-45.
40. *Id.* at 2249.
41. *Id.*, *see generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
42. Marks v. United States, 430 US 188, 193 (1997); United States v. Gerke, 464 F.3d 723, 724 (7th Cir. 2006); Louthan, *Court Sharply Split*, *supra* note 5, at 127.
43. Louthan, *Court Sharply Split*, *supra* note 5, at 127.
44. *Rapanos II*, 126 S. Ct at 2250 (Kennedy, J., concurring).
45. *Id.* at 2236.

Justice Kennedy crafted a two-part test for determination of the Corps' jurisdiction over wetlands.[46] The first part of his test would address wetlands directly adjacent to navigable-in-fact waters, while the second part would deal with wetlands neighboring non-navigable waters, or drains and tributaries like those at issue in the consolidated cases.[47]

In a "straightforward affirmation" of *Riverside Bayview*, and in deference to the Corps' regulations, Justice Kennedy based the first prong of his test on "adjacency."[48] The first part of Justice Kennedy's test is satisfied and jurisdiction granted to the Corps over wetlands directly adjacent to navigable-in-fact waters, as one commentator has noted, "because there is a reasonable inference that there is an ecological connection between the wetland and the navigable waterway."[49] Justice Kennedy asserted that, in some instances, a wetland adjacent to a navigable-in-fact water may be so connected or proximally situated to the navigable water that the "Corps may deem the wetland a 'navigable water' under the Act."[50] The Corps, then, "may rely on adjacency to establish its jurisdiction" over wetlands adjacent to navigable-in-fact waters.[51] The first part of Justice Kennedy's test enables ready determinations of the Corps jurisdiction over waters or wetlands directly adjacent to navigable-in-fact waters. However, the wetlands at issue in the consolidated cases before the Court did not abut waters traditionally considered navigable. The wetlands at issue in the consolidated cases bordered drains, streams, or other tributaries to non-navigable waters.

The second part of Justice Kennedy's test addressed the more complicated task of determining jurisdiction over waters or wetlands that are adjacent to or neighbor non-navigable tributaries of navigable waterways.[52] He based the second part of his test on the "significant nexus" model introduced in *SWANCC*.[53] Also, in accordance with the text, structure, and purpose of the Act, Justice Kennedy concluded that jurisdiction over wetlands adjacent to non-navigable waters must be granted to the Corps where "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.'"[54]

Justice Kennedy did not provide any specific criteria for what constitutes a "significant nexus," but rejected jurisdiction where "wetlands

46. Steve Louthan, *Federal Jurisdiction*, *supra* note 16, at 49.
47. *Rapanos II*, 126 S. Ct. at 2246-48 (Kennedy, J., concurring).
48. *See* 33 CFR § 328.3(a)(7); Louthan, *Federal Jurisdiction*, *supra* note 16, at 49.
49. Louthan, *Federal Jurisdiction*, *supra* note 16, at 49.
50. *Rapanos II*, 126 S. Ct. at 2248 (Kennedy, J., concurring).
51. *Id.* at 2249.
52. *Id.*
53. *Id.*
54. *Id.* at 2248.

effects on water quality are speculative or insubstantial."[55] Moreover, he labeled the Corps' existing regulatory standard for tributaries too broad to be determinative.[56] Justice Kennedy did not specify particular actions that unquestionably affect the "chemical, physical, and biological integrity of other covered waters," but he negated the Corps' ability to continue to rely on a hydrological connection to establish jurisdiction over wetlands adjacent to non-navigable waters.[57] He stated "[g]iven the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection . . . that shows the wetlands' significance for the aquatic system."[58] By refining and relying on the "significant nexus" test, Justice Kennedy also supplanted the Ordinary High Water Mark ("OHWM") test the Corps previously relied upon to establish jurisdiction over tributaries to navigable waters.[59]

Legal scholars have argued that Justice Kennedy's nexus test suggests that the Corps evaluate the "wetland's overall role in the aquatic system and provide a significant measure concerning how the action will affect downstream water quality."[60] What is clear to scholars, though, is that Justice Kennedy's somewhat obscure test forces the Corps to "establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[61] A case-by-case analysis will be necessary at least until Congress or the Corps provides a more concrete rule that satisfies the nexus requirements.[62]

VI. THE DISSENT

Justice Stevens, with whom Justice Souter and Justice Ginsburg joined, dissented from both the plurality's decision and Justice Kennedy's concurrence.[63] Justice Breyer filed a separate dissent.[64] Justice Stevens claimed the "plurality disregard[ed] the nature of the congressional delegation to the [Corps] and the technical and complex character of the issues at stake" in its decision to vacate and remand the consolidated cases.[65] He characterized the plurality's holding as a "judicial amendment" to the Act, and claimed that no part of the Act "requires the relatively permanent presence of water" to qualify for regu-

55. *Id.*
56. *Id.* at 2249.
57. *Id.* at 2251.
58. *Id.*
59. *Rapanos II*, 126 S. Ct. at 2237.
60. Louthan, *Federal Jurisdiction, supra* note 16, at 50.
61. *Id.*
62. *Rapanos II*, 126 S. Ct. at 2242-43 (Kennedy, J., concurring).
63. *Id.* at 2252 (Stevens, J., dissenting).
64. *Id.* at 2266 (Breyer, J., dissenting).
65. *Id.* at 2252 (Stevens, J., dissenting).

lation.[66] As for Justice Kennedy's concurrence, Justice Stevens asserted that it failed to "defer sufficiently to the Corps," while allowing that Justice Kennedy was "more faithful to [the Court's] precedents and to principles of statutory interpretation than [was] the plurality[]."[67] Justice Stevens pointed out that Justice Kennedy's test would create additional uncertainty, extra work for all parties, and would not provide developers with any "certain way of knowing whether they need to get § 404 permits or not."[68] According to Justice Stevens, "[i]n the final analysis, . . . concerns about the appropriateness of the Corps'. . . implementation of the Clean Water Act should be addressed to Congress or the Corps rather than to the Judiciary."[69]

Justice Stevens based his analysis squarely on the unanimous holding of *Riverside Bayview*.[70] The dissent concluded that, akin to the deference the Court afforded the Corps in *Riverside Bayview*, the Court should have granted *Chevron* deference to the Corps' definition of its jurisdiction in the consolidated cases.[71] He classified the Corps' exercise of jurisdiction over wetlands as the "quintessential example of the Executive's reasonable interpretation of a statutory provision."[72] Based on "Congress' deliberate acquiescence in the Corps' regulations in 1977," Justice Stevens argued that Congress intended that the Corps, not the Court, should determine the nature and extent of wetlands and their connection to navigable waters.[73] He stated that "[b]ecause there is ambiguity in the phrase 'waters of the United States' and because interpreting it broadly to cover such ditches and streams advances the purpose of the Act, the Corps' approach should command our deference."[74] Justice Stevens called for the reinstatement of the judgments in the consolidated cases if the plurality's or Justice Kennedy's tests are met.[75] Justice Stevens accepted the application of either test because the dissent would have upheld the basis for the Corps' jurisdiction in the consolidated cases anyway, and would grant jurisdiction "in all other cases in which either the plurality's or Justice Kennedy's test is satisfied."[76]

Justice Breyer also filed a dissent based on a more robust deference standard than the plurality was willing to grant. He asserted that because the nation's waters are so "intricately interconnected," Congress

66. Id. at 2260.
67. *Id.* at 2252.
68. *Id.* at 2265.
69. *Id.* at 2259.
70. *Id.* at 2255.
71. *Id.* at 2253.
72. *Id.* at 2252.
73. *Id.* at 2257-58.
74. *Id.* at 2262.
75. *Id.* at 2265
76. *Id.*

intentionally left their definition vague to allocate to the "enforcing agency...the task of restricting the scope of that definition, either wholesale through regulation or retail through development permissions."[77] In his dissent, Justice Breyer noted that the Corps' experts were better suited than the Court to determine which wetlands fall under Corps' jurisdiction.[78] He also observed that until the Corps updates its regulations to coincide with the plurality's or Justice Stevens's jurisdictional tests, "courts will have to make *ad hoc* determinations that run the risk of transforming scientific questions into matters of law."[79]

VII. POST-*RAPANOS*

Over a dozen United States circuit court of appeals cases and United States district court cases have addressed the limit of the Corps' jurisdiction since *Rapanos*. The First Circuit held that either the plurality's or Justice Kennedy's tests are apposite for establishing Corps' jurisdiction.[80] The Seventh and Ninth Circuits support the Kennedy concurrence as "the controlling rule in their respective circuits."[81] For example, in *Northern California River Watch v. City of Healdsburg*, the Ninth Circuit exhaustively applied Justice Kennedy's significant nexus test to find that Healdsburg violated the CWA by discharging wastewater into a man-made pond containing wetlands that border additional wetlands adjacent to the Russian River, a traditional navigable water.[82] Specifically, the Ninth Circuit found: a significant chemical nexus established by elevated chloride levels in the stretch of the Russian River adjacent to the wetlands abutting the pond clearly resulting from chloride leaching into the wetlands and River from the pond, adjacent wetlands, and underlying tributary aquifer; a significant physical nexus between the pond and the Russian River based on a surface connection between the two when the river overflows its levee and the "two bodies of water commingle;" and a significant biological nexus based on the indistinguishable ecological connections between the pond and the river whereby bird, mammal and fish populations indigenous to Russian River were impossible to differentiate from those found in the wetlands adjacent to the river and the pond itself.

In March, 2007, the Corps reissued all existing Nationwide Permits ("NWPs") currently effective in part to provide better protection and

77. *Id.* at 2266 (Breyer, J., dissenting).
78. *Id.* (*citing* 33 U.S.C. § 1251(a)).
79. *Id.* at 2266.
80. United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006).
81. United States v. Gerke Excavating, 464 F.3d 723, 724 (7th Cir. 2006); N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1029 (9th Cir. 2006); *see also* Louthan, *Federal Jurisdiction*, *supra* note 16, at 50.
82. Northern California River Watch v. City of Healdsburg, 2007 WL 2230186 (9th Cir. 2006).

definitions of "intermittent and ephemeral streams and their adjacent wetlands."[83] Then, in June, 2007, the Corps and EPA simultaneously adjusted their jurisdictional standards to better reflect the *Rapanos* decision.[84] The new Corps' and EPA regulations now grant jurisdiction to the agencies over the following waters: traditional navigable waters, wetlands adjacent to traditional navigable waters, non-navigable tributaries of traditional navigable waters that are "relatively permanent" or flow "year-round," non-navigable tributaries that flow seasonally for at least three months, and wetlands that "directly abut" non-navigable tributaries.[85] The agencies will determine jurisdiction on a case-by-case basis utilizing the significant nexus test over the following waters: non-navigable tributaries with relatively intermittent flow, wetlands adjacent to intermittent tributaries, and wetlands adjacent to ("but do not abut") relatively permanent non-navigable tributaries.[86] The agencies intend to apply the significant nexus test by "assess[ing] the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of the downstream traditional navigable waters...include[ing] consideration of hydrologic and ecologic factors."[87] The agencies will not assert jurisdiction over "swales or erosional features" or ditches "excavated wholly in or draining only uplands" with only intermittent flow.[88]

VIII. CONCLUSION

The new agency guidelines should shed some light on the dual tests promulgated by *Rapanos*. Indeed, in *United States v. Moses*, the Ninth Circuit recently relied on the new guidelines to find Moses violated the CWA by significantly manipulating a non-navigable tributary that only flowed seasonally during the spring runoff.[89] While Moses was a bad actor that continuously ignored agency desist orders, the decision clearly expands the definition of waters of the United States over definitions previously relied upon the EPA and the Corps prior to *Rapanos*. However, questions persist. The *Moses* decision seems to broaden the definition of waters of the United States beyond the limit the *Rapanos* plurality was willing to grant to intermittent non-navigable tributaries. Yet, the Ninth Circuit did not undergo the extensive fact

83. Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092 (Mar. 12, 2007).

84. UNITED STATES ENV'T PROT. AGENCY & UNITED STATES ARMY CORPS OF ENG'RS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN RAPANOS V. UNITED STATES AND CARABELL V. UNITED STATES (2007).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. United States v. Moses, 2007 WL 2215954 (9th Cir. 2007).

analysis in *Moses* that it had in *Healdesburg*, seemingly giving short-thrift to the chemical, physical, and biological connections necessary to satisfy Justice Kennedy's significant nexus test. In all likelihood, "[i]f Congress does not act, and courts across the country are unable to bring clarity and consistency to the question of wetlands jurisdiction, the issue will once again end up in the U.S. Supreme Court."[90] The agencies' persistently expansive interpretation of the CWA jurisdictional definitions make this result inevitable.

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90. Louthan, *Court Sharply Split, supra* note 5, at 127.