Rapanos v. United States: Searching for a Significant Nexus Using Proximate Causation and Foreseeability Principles

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Editors' Summary

The U.S. Supreme Court issued its decision in Rapanos v. United States *more than four years ago. Because no single opinion garnered a majority of the Justices' votes, the controlling test for wetlands jurisdiction remains unclear. Although the "significant nexus" test set forth in Justice Anthony M. Kennedy's concurring opinion seems to have gained acceptance by most circuit courts, the agencies and courts still struggle to find meaning in this test. Looking at the origins of the significant nexus test, relevant case law, and guidance documents, this Article concludes that, absent congressional action clarifying CWA jurisdiction, applying the principles of proximate causation and foreseeability to Justice Kennedy's significant nexus test could help to clarify what areas can and cannot be deemed jurisdictional.*

It has been more than four years since the U.S. Supreme Court issued its latest interpretation of the limits of the Clean Water Act (CWA).[1] The consolidated cases of *Carabell v. U.S. Army Corps of Engineers* and *Rapanos v. United States*[2] (hereinafter *Rapanos*) have been justly criticized for their less-than-clear opinion.[3] When the opinion was issued, it was hoped that some level of clarity would arise from the "significant nexus" test set forth in Justice Anthony M. Kennedy's concurring opinion. To date, however, the U.S. Army Corps of Engineers (the Corps), the U.S. Environmental Protection Agency (EPA), and the courts have struggled with finding meaning in this test.

This Article takes a hard look at the origins of the significant nexus test, relevant case law, and the guidance documents issued by the Corps and EPA, and suggests principles to give Justice Kennedy's words effect in a manner that is consistent with the underlying limits of the CWA. The Article concludes that for this test to have meaning, the traditional time-tested principles of proximate causation and foreseeability should be applied in helping to delineate the limits of CWA jurisdiction.

I. *Rapanos* Recap

Though the details of *Rapanos* have been widely reported, it is still worthwhile to give a quick recap of the case—and why Justice Kennedy's opinion has become the center of the discussion over jurisdiction. *Rapanos* examined the geographical reach of federal jurisdiction; specifically, whether three wetlands linked by a hydrological connection to "navigable waters" more than 20 miles away (in *Rapanos*' case) and a wetland separated by a berm from a drainage ditch that eventually drains into a navigable water (in *Carabell*'s case) were subject to §404 of the CWA.[4] The outcome was scattered; five separate opinions indicated a highly divided court.

Justice Antonin Scalia (joined by Justice Clarence Thomas, Chief Justice John G. Roberts, and Justice Samuel A. Alito Jr.) argued for a plain language interpretation of the Act. The plurality held that the CWA applies only if "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 "that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[5] In forming his opinion, Justice Scalia

1. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
2. Carabell v. U.S. Army Corps of Eng'rs, Rapanos v. United States, 126 S. Ct. 2208, 36 ELR 20116 (2006).
3. *See, e.g.*, James Murphy, Rapanos v. United States*: Wading Through Murky Waters*, 28 Nat'l Wetlands Newsl. 1 (Sept.-Oct. 2006) (Supreme Court did not provide clarity as to scope of jurisdiction over waters of the United States).
4. 33 U.S.C. §1344.
5. *Rapanos*, 126 S. Ct. at 2227.

relied on two seminal Supreme Court CWA cases, an analysis reliant upon "clear evidence" from the text of the CWA, basic canons of construction, and the "natural definition" of the term "waters."[6] By using dictionary definitions, "commonsense understanding," and "plain language" meanings, Justice Scalia crafted a literal interpretation of the CWA that reined in the overexpansive meaning the Corps attempted to give to "waters of the United States."[7]

Countering that viewpoint, four Justices dissented: John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer voted to allow a broad definition of "waters of the United States" as defined by the Corps. Their vote, then, was a vote for agency deference and a continued expansive interpretation of the CWA.[8]

Justice Kennedy provided the necessary fifth vote to reverse the U.S. Court of Appeals for the Sixth Circuit. However, though Justice Kennedy sided with the plurality to vacate the Sixth Circuit's ruling and remand for additional fact-finding, his opinion did not embrace Justice Scalia's rationale. Justice Kennedy's test held that waters are jurisdictional only to the degree they have a significant nexus with navigable-in-fact water. This nexus is present when the waters in question, "alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of the navigable water.[9]

Thus, the opinion was split 4-1-4, with no clear majority. In *Grutter v. Bollinger*,[10] the Court held that where such a fragmented decision occurs without any single rationale explaining the result has the assent of five Justices, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds."[11] While there is some debate over which position was the narrowest, the majority of courts of appeal have held that Justice Kennedy's test is controlling.[12]

II. *SWANCC*, Justice Scalia, and the Origin of the Significant Nexus Test

In the context of wetlands jurisdiction, the phrase significant nexus has a relatively short lineage. The first use of significant nexus by the Supreme Court appears to be somewhat offhand—a "cryptic characterization."[13] In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*,[14] the Court addressed whether the "migratory bird rule" was sufficient to assert federal jurisdiction.[15] Side-stepping the constitutional question of an interstate commerce connection, the Court relied on a straightforward statutory interpretation. Citing to its prior decision in *United States v. Riverside Bayview Homes, Inc.*,[16] the *SWANCC* Court acknowledged that "the term 'navigable' is of 'limited import' and that Congress evidenced its intent to 'regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.'"[17] Nonetheless, the

6. *Id.* at 2220.
7. *Id.*
8. *Id.* at 2252 ("The Corps' resulting decision to treat these wetlands as encompassed within the term 'waters of the United States' is a quintessential example of the Executive's reasonable interpretation of a statutory provision.").
9. *Id.* at 2248.
10. 539 U.S. 306, 325 (2003).
11. 539 U.S. at 325 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)). Time will tell if lower courts remain baffled and divided by the splintered *Rapanos*. *See* Nichols v. United States, 511 U.S. 738, 745-46 (1994). *See also* Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) ("when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent"). In any case, an alternative—possibly better—view is that Justice Scalia's opinion is deemed the "narrowest" because it was the one "more closely tailored to the specific situation the Court confronted." *See* United States v. Johnson, 467 F.3d 56, 63, 36 ELR 20218 (1st Cir. 2006) (quoting Furman v. Georgia, 408 U.S. 238 (1972), and Memoirs v. Attorney General of Mass., 383 U.S. 413 (1966)). The U.S. Court of Appeals for the First Circuit also noted that "it seems just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality), because that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *Johnson*, 467 F.3d at 63.
12. The recent decision of *Precon Development Corp. v. Corps,* 658 F. Supp. 2d 752, 758 (E.D. Va. 2009), summarized the conflicting court of appeals interpretation of *Rapanos*, stating: "Upon a review of the case law, however, the federal circuits have not uniformly agreed on the appropriate test." In the U.S. Court of Appeals for the Eleventh Circuit, "Justice Kennedy's 'significant nexus' test provides the governing rule of *Rapanos*." United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007). The U.S. Court of Appeals for the Seventh Circuit and the U.S. Court of Appeals for the Ninth Circuit announced Justice Kennedy's test as the controlling standard, as applied to the facts of their respective cases, but did not rule out an application of the plurality's test in a "rare case." United States v. Gerke Excavating, 464 F.3d 723, 725, 36 ELR 20200 (7th Cir. 2006) ("Justice Kennedy's proposed standard . . . must govern the further stages of this litigation"); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999-1000, 37 ELR 20202 (9th Cir. 2007) ("Justice Kennedy's concurrence provides the controlling rule of law for our case"). According to the U.S. Court of Appeals for the First Circuit and the U.S. Court of Appeals for the Eighth Circuit, however, the Corps can prove jurisdiction in any case by meeting "either the plurality's *or* Justice Kennedy's standard." *Johnson*, 467 at 66 (emphasis added); United States v. Bailey, 571 F.3d 791, 39 ELR 20148 (8th Cir. 2009). The U.S. Court of Appeals for the Fifth Circuit and the U.S. Court of Appeals for the Sixth Circuit declined to choose a controlling standard, because the waters at issue in those cases satisfied both the Justice Kennedy test and the plurality test. United States v. Lucas, 516 F.3d 316, 327, 38 ELR 20041 (5th Cir. 2008); United States v. Cundiff, 555 F.3d 200, 210, 39 ELR 20025 (6th Cir. 2009).
13. *Rapanos*, 126 S. Ct. at 2234.
14. 531 U.S. 159, 31 ELR 20382 (2001). The case arose out of efforts by the Solid Waste Agency of Northern Cook County (a consortium of 23 suburban Chicago cities and villages) to construct a regional landfill. The agency spent $31 million in seeking authorizations for construction of the landfill at an abandoned sand and gravel site that had developed isolated depressions and ponds filled by rainwater. The Corps asserted jurisdiction but would not issue a permit after it was determined that the site was home to 121 bird species.
15. The Corps interpreted the jurisdiction-defining 33 C.F.R. §328.3(a)(3) ("intrastate lakes, rivers, streams . . . the use, degradation or destruction of which could affect interstate or foreign commerce") to include such waters "which are or would be used as habitat by . . . migratory birds that cross state lines." 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).
16. 474 U.S. 121, 16 ELR 20086 (1985).
17. *SWANCC*, 531 U.S. at 167.

Court cautioned that the holding in *Riverside Bayview* "was based in large measure upon Congress' unequivocal acquiescence to, and approval of, Corps regulations interpreting the CWA to cover wetlands adjacent to navigable waters."[18] Furthermore, the *SWANCC* Court noted that the *Riverside Bayview* Court "found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'"[19] Thus, the Court concluded that "[i]t was the *significant nexus* between wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."[20] Justice Kennedy seized upon the latter sentence as the foundation for his analysis. Yet, as acknowledged in *Riverside Bayview*, perhaps the most difficult question is to determine where "water ends and land begins."[21]

The jurisdictional question addressed in *Riverside Bayview* did not turn on a significant nexus test. Instead, the Court found CWA jurisdiction only over non-navigable adjacent wetlands that actually abutted a navigable waterway.[22] The Court reasoned that the fact that such wetlands were "inseparably bound up" with the navigable water provided an adequate "legal judgment" that they too were jurisdictional.[23] This judgment was based on evidence that "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment."[24] The Court, however, specifically did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water. . . ."[25]

The *SWANCC* Court built upon the *Riverside Bayview* discussion of congressional concern for protection of water quality and the intent to "regulate wetlands inseparably bound up with the waters of the United States" to distinguish the factual situation of the extension of CWA authority to "ponds that are not adjacent to open water."[26] Yet, ultimately, the *SWANCC* Court declined the Corps' "invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under §404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds."[27] In ruling that CWA jurisdiction does not extend to isolated wetlands not adjacent to navigable waters, the Court stated that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or have been navigable-in-fact or which could reasonably be so made."[28] Rejecting the Corps' request for deference, the Court noted that §404(a) is "clear" and that in any event, in cases where the agencies' interpretation would invoke the outer limits of the U.S. Congress' power, there must be a clear indication that Congress intended that result.[29] Indeed, there is an underlying "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."[30] Lacking the necessary "clear statement" of congressional intention to expand the scope of the CWA in the manner suggested by the Corps, the Court held that the migratory bird rule exceeded the CWA.[31]

Thus, the *SWANCC* Court used the term significant nexus as a means to explain and limit *Riverside Bayview* but did little else to expand upon its meaning. In effect, the Court used significant nexus to acknowledge that waters that are not truly "navigable" may nonetheless be jurisdictional if they are either directly adjacent to a navigable-in-fact water or are "inseparably bound up" to that water, thereby triggering "Congress' concern for the protection of water quality and aquatic ecosystems . . . ."[32] Taken together, this suggests that under *SWANCC*, significant nexus requires both a direct hydrological connection to a navigable water (based on Congress' limited power over navigation[33]) as well as demonstration of an impact on such navigable water (based on the CWA's stated purpose of protection of the chemical, physical, and biological integrity of the nation's waters).[34]

Six years later in *Rapanos*, Justice Scalia opined that the significant nexus test referred to in *SWANCC* has been misinterpreted and ignored. He stressed that *SWANCC* held that "'nonnavigable, isolated, intrastate waters'—which, unlike the wetlands at issue in *Riverside Bayview*, did not 'actually abu[t] on a navigable waterway'—were not included as 'waters of the United States.'"[35] In particular, Justice Scalia found it troubling that under certain courts' interpretations, "even the most insubstantial hydrologic connection may be held to constitute a 'significant nexus.'"[36] He also made clear that *SWANCC* "rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview* . . . provided an independent basis for including entities like

18. *Id.* (citing *Riverside Bayview*, 474 U.S. at 135-39).
19. *Id.* (citing *Riverside Bayview*, 474 U.S. at 134).
20. *Id.* at 167 (emphasis added).
21. *Riverside Bayview*, 474 U.S. at 132.
22. *Id.* at 139.
23. *Id.* at 134.
24. *Id.* at 135.
25. *Id.* at 131-32, n.8.
26. 531 U.S. 159, 167 (2001) (internal quotations omitted). *SWANCC*, while a clear repudiation by the Court of Corps overreach, did little to clear up the question of the scope of jurisdiction under the CWA. A February 2004 report issued by the U.S. General Accounting Office (GAO) reviewed the problems in the Corps' jurisdictional determination (JD) process in the wake of *SWANCC*. Among other findings, the GAO noted that the Corps was using "vague" language to make JDs and was forced to rely "on the key terms in the regulatory definitions of waters of the United States which [have] not been well defined." U.S. GAO, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction 26 (GAO-04-297) (Feb. 2004). The result, the GAO found, has been "confusion in the districts" and "differences in jurisdictional determination practices among Corps districts . . . ." *Id.*
27. 531 U.S. at 171-72.
28. *Id.* at 172. While acknowledging the holding in *Riverside Bayview*—that the "word 'navigable' in the statute was of 'limited import'"—the Court clarified that "it is one thing to give a word limited effect and quite another to give it no effect whatever." *Id.*
29. *See id.*
30. *Id.* at 172-73. *See also* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) ("The Constitution created a Federal Government of limited powers").
31. 531 U.S. at 174.
32. *Id.* at 167.
33. 33 U.S.C. §§1344(a), 1362(7).
34. *Id.* §1251(a).
35. *Rapanos*, 126 S. Ct. 2208, 2217 (2006) (internal citations omitted).
36. *Id.* at 2218.

'wetlands' (or 'ephemeral streams') within the phrase 'the waters of the United States.'"[37]

Yet, despite Justice Scalia's caution that the term significant nexus was being misused, Justice Kennedy seized upon it and made it his own.[38]

III. *Rapanos*: Justice Kennedy's Need to Explain Significant Nexus

In *Rapanos*, Justice Kennedy began with the proposition that

> *Riverside Bayview* and *SWANCC* establish the framework for the inquiry in the cases now before the Court: Do the Corps' regulations, as applied to the wetlands in *Carabell* and the three wetlands parcels in *Rapanos*, constitute a reasonable interpretation of "navigable waters" as in *Riverside Bayview* or an invalid construction as in *SWANCC*?[39]

Justice Kennedy characterized *Riverside Bayview* as standing for the proposition that "the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act."[40] In turn, he stated that under *SWANCC*, "there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking."[41] Justice Kennedy filed his separate opinion because, in his view, "neither the plurality nor the dissent addresses the nexus requirement" and such a discussion is "necessary."[42]

Justice Kennedy's concurring opinion agreed with the plurality that *Riverside Bayview* stands for the proposition that "Congress intended to regulate at least some waters that are not navigable in the traditional sense."[43] From that point on, however, Justice Kennedy's views diverge from those of the plurality. Foremost, Justice Kennedy accuses the plurality of misinterpreting *SWANCC* to the point that their view will lead to "constitutional difficulties and federalism concerns" and "applications of the statute as far from traditional federal authority as are the waters [the plurality] deems beyond the statute's reach."[44]

While it is important to focus on the chemical, physical, and biological nexus requirements discussed in the concurring opinion, it is equally important to examine the limits that Justice Kennedy put on his test. Indeed, the phrase involves interpreting two related words—"significant"[45] and "nexus."[46] While not specifically citing to the dictionary definitions, Justice Kennedy appears to read these words together in stating that "remote and insubstantial" waters that "eventually may flow" into traditional navigable waters should not be regulated, without more.[47] Here, Justice Kennedy rightly took issue with the dissent's overreaching extension of jurisdiction and total deference to the agencies: "the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain . . . the deference owed to the Corps' interpretation of the statute [for remote and insubstantial waters that eventually may flow into traditional navigable waters] does not extend so far."[48] Yet, Justice Kennedy failed to provide further criteria to give meaning to his limiting principle. The traditional principles of proximate causation and foreseeability can provide such meaning.

To better understand this premise, it is useful to quickly review the principles of proximate causation and foreseeability under both common law and as applied in the environmental context.[49] Actually, "proximate cause" is a misnomer: it really is "not about causation at all but about the appropriate scope of responsibility."[50] To illustrate the importance of this legal principle, think back to the classic law school case, *Palsgraf v. Long Island R.R. Co.*[51] In that case, there was a chain of events: a passenger boarding a train slips; a railroad employee tries to help but causes the passenger to drop a package; the package contains fireworks which explode; the force of the explosion knocks over the scales at the other end of the platform; and ultimately the scales fall down on poor Mrs. Helen Palsgraf. Though she won her claim for negligent damages in the jury trial, she lost upon appeal: the railroad employee was not liable because his actions were too remote from the final effect. *Palsgraf* epitomizes how one is liable only for the harm or injury that is foreseeable—"the orbit of the danger as disclosed to the eye of reasonable vigilance."[52] Commentators have relied on *Palsgraf* and other cases for the view that a "mere possibility of injury is not sufficient, where a reasonable man would not consider injury likely to result from the act as one of its ordinary and probable results."[53]

In tort law, then, *foreseeability* limits liability to the consequences of an act that could reasonably be foreseen rather than every single consequence that follows. Otherwise, liability would be unlimited in scope, as causes never truly

37. *Id.* at 2226.
38. Interestingly, both Justice Scalia and Justice Kennedy joined Chief Justice Wm. H. Rehnquist's opinion in *SWANCC*.
39. 126 S. Ct. at 2241.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 2241.
44. *Id.* at 2246.
45. Defined in part as "important, momentous, full of meaning." Webster's New World Dictionary of the American Language (2d ed. 1986).
46. Defined in part as "a connection, tie, link between individuals of a group, members of a series, etc." *Id.*
47. *Rapanos*, 126 S. Ct. at 2247.
48. *Id.*
49. The discussion on proximate causation in environmental statutes was adapted from the Supreme Court amici curiae brief filed by Holland & Knight for the American Road and Transportation Builders Association and the Nationwide Public Projects Coalition in support of petitioners in *National Association of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 37 ELR 20153 (2007).
50. Dan B. Dobbs, The Law of Torts 443 (2000). "Proximate Causation" has been defined as: "That which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." Black's Law Dictionary 1391 (4th ed. 1968).
51. 248 N.Y. 339 (1928).
52. *Id.* at 343.
53. *See* definition of "Proximate Consequence or Result" and commentary in Black's Law Dictionary, *supra* note 50, at 1391. As one scholar noted: "The separation of proximately-caused consequences from the broader universe of actually-caused consequences is a policy-driven process that asks whether the resultant harms are so clearly outside the risks [a defendant] created that it would be unjust or at least impracticable to impose liability." Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003-2004 Term*, 42 Hous. L. Rev. 565 (2005).

cease having effects far removed in time and space. In like manner, foreseeability has a role to play in the interpretation and implementation of the significant nexus test. Foreseeability will help answer the essential question: where is the line defining the limits of federal jurisdiction under the CWA? Again, *Palsgraf* provides guidance. As Judge William S. Andrews said in his well-known dissent: "What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic."[54] Under the CWA, it must be foreseeable that a discharge into a remote water or wetland will detrimentally affect water quality in the downstream traditionally navigable water.

IV. Use of Foreseeability and Proximate Cause in Other Environmental Statutes

The courts have recognized that the Endangered Species Act (ESA) does not alter or modify proximate causation principles.[55] In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[56] Justice Sandra Day O'Connor specifically addressed proximate causation in a facial challenge to the validity of the U.S. Fish and Wildlife Service's (FWS') "harm" regulation to the extent that it prohibited habitat modification as a taking under ESA §9.[57] Justice O'Connor gave two reasons for concurring with the Court's upholding of the FWS' definition of "harm": (1) because it "is limited to significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals"[58]; and (2) the regulation's application "is limited by ordinary principles of proximate causation, which introduce notions of foreseeability."[59] Importantly, she specifically addressed the strict liability under the ESA, stating that "I see no indication that Congress . . . intended to dispense with ordinary principles of proximate causation. Strict liability means liability without fault, it does not normally mean liability for every consequence, however remote, of one's conduct."[60] In so doing, Justice O'Connor distinguished the ESA, where Congress did not expressly abrogate proximate causation principles, from the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund),[61] where Congress specifically rejected the causation requirement.[62]

Subsequent ESA cases have built on *Sweet Home*'s adoption of proximate causation as a limiting factor. In *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Service*,[63] the court found that "it would be unreasonable for the FWS to impose conditions on otherwise lawful land use if a take were not reasonably certain to occur as a result of that activity."[64]

Decisions under the National Environmental Policy Act (NEPA)[65] have also applied proximate causation principles in articulating a "rule of reason" standard in assessing the extent of effects that must be considered under that statute. As the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit has stated, "[t]he starting point in any analysis of an agency's compliance with . . . NEPA is the 'rule of reason,' under which a federal agency proposing a major action must consider only the reasonably foreseeable environmental effects of the action."[66] Courts have particularly applied the principles of proximate causation in limiting the scope of effects that must be considered under NEPA to exclude speculative future effects.[67] In *Department of Transportation v. Public Citizen*,[68] the Supreme Court upheld the Federal Motor Carrier Safety Administration's conclusion that it lacked the discretion to prevent the entry of Mexican trucks into the United States. The Court adopted the familiar doctrine of proximate causation from tort law in holding that a "but for" causal relationship was insufficient to make an agency responsible for a particular effect under NEPA. The Court concluded that "proximate cause analysis turns on policy considerations and considerations of the 'legal responsibility' of actors."[69]

54. 248 N.Y. at 352 (Andrews, dissenting).
55. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
56. 515 U.S. 687, 708, 25 ELR 21194 (1995).
57. The question in *Sweet Home* was whether the FWS' definition of "harm"—including the phrase "significant habitat modification or degradation where it actually kills or injures wildlife"—was facially invalid. 515 U.S. at 687.
58. *Id.* at 708-09
59. *Id.* at 709.
60. *Id.* at 712 (citing generally W. Keeton et al., Prosser and Keeton on Law of Torts 559-60 (5th ed. 1984) (describing the "practical necessity for the restriction of liability within some reasonable bounds" in the strict liability context)). Justice O'Connor also analyzed *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106, 18 ELR 21199 (9th Cir. 1988), in terms of proximate causation to determine that it is not a "take" under the ESA to permit mouflon sheep to eat mamane-naio seedlings that, when fully grown, might have fed and sheltered endangered palila birds. "Destruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently inhabited by actual birds." *Sweet Home*, 515 U.S. at 713-14.
61. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.
62. Justice O'Connor stated that "[i]n the absence of congressional abrogation of traditional principles of causation, . . . private parties should be held liable . . . only if their habitat modification actions proximately cause death or injury to protected animals." (citing New York v. Shore Realty Corp., 759 F.2d 1032, 1044 & n.17, 15 ELR 20358 (2d Cir. 1985), noting that in enacting CERCLA, Congress "specifically rejected including a causation requirement").
63. 273 F.3d 1229, 32 ELR 20392 (9th Cir. 2001).
64. 273 F.3d at 1243. *See also* Strahan v. Coxe, 127 F.3d 155, 163, 27 ELR 20114 (1st Cir. 1997) ("when interpreting a term in a statute [like the ESA] which is, like 'cause' here, well-known to the common law, the court is to presume that Congress intended the meaning to be interpreted as in the common law").
65. 42 U.S.C. §§4321-4370d, ELR Stat. NEPA §§2-209.
66. Potomac Alliance v. U.S. Nuclear Regulatory Comm'n, 682 F.2d 1030, 1035, 12 ELR 20937 (D.C. Cir. 1982).
67. *See* Kleppe v. Sierra Club, 427 U.S. 390, 6 ELR 20532 (1976) (the mere contemplation of future action was not sufficient to require preparation of an environmental impact statement); Sierra Club v. Marsh, 976 F.2d 763, 768, 23 ELR 20321 (1st Cir. 1992) ("Agencies must consider only those indirect effects that are 'reasonably foreseeable.' They need not consider potential effects that are highly speculative or indefinite."); Sierra Club v. Mainella, 459 F. Supp. 2d 76, 81, 36 ELR 20222 (D.D.C. 2006) ("The [NEPA process] must include, among other things, a detailed statement describing the reasonably foreseeable environmental impact[s]") (internal quotations omitted); Fla. Keys Citizens Coalition, Inc. v. U.S. Army Corps of Eng'rs, 374 F. Supp. 2d 1116, 1151 (S.D. Fla. 2005) ("Any attempt to assess the cumulative impacts from such future projects would be pure speculation and is not required."); Okla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 681 F. Supp. 1470, 1489, 18 ELR 21357 (N.D. Okla. 1988) ("If, however, the effects cannot be readily ascertained and if the alternatives are deemed remote and only speculative possibilities, detailed discussion of environmental effects is not contemplated under NEPA.").
68. 541 U.S. 752, 767 (2004).
69. *See also* Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774, 13 ELR 20515 (1983) (NEPA requires "a reasonably close causal

V. Proximate Causation Principles Under the ESA and NEPA Are Equally Applicable to the CWA

The ESA and NEPA provide useful guidance for applying the principles of proximate causation in addressing the significant nexus theory of Justice Kennedy. The question of jurisdiction under Justice Kennedy's significant nexus test is premised on the relationship between non-navigable water or wetlands and the water quality of traditionally navigable water (TNW). However, the question of how far the jurisdictional reach extends away from the TNW cannot be addressed in isolation from the act of "discharging" a pollutant from a "point source" regulated under §§402 and 404 of the Act. Indeed, Justice Kennedy recognized that definition of the "term 'discharge of a pollutant' . . . to mean 'any addition of any pollutant to navigable waters from any point source' . . . is central to the Act's regulatory structure."[70] Therefore, if a "take" under the ESA requires an action that actually kills or injures an individual ESA-listed animal, then by analogy, in order to be jurisdictional, a discharge into a non-navigable water or wetland must have a foreseeable impact on the chemical, physical, and biological integrity of the traditionally navigable water. Otherwise, CWA jurisdiction could be unlimited; without application of proximate causation, the required cause-and-effect relationship between a CWA-regulated discharge and its effect on navigable waters is simply lacking.

This conclusion draws support from Justice O'Conner's concurrence in *Sweet Home*, where she recognized that in the absence of clear congressional intent to abrogate proximate causation principles, those principles still apply. As with the ESA, nothing in the CWA indicates that Congress expressly intended to dispense with proximate causation. Further, if NEPA's "rule of reason" is limited by whether there is "a reasonably close causal relationship" between the agency action and the effect, then the significant nexus analysis would require finding a similar relationship between the discharge and the water quality of a TNW. To presume, without analysis, that every discharge into a non-navigable water, such as a drainage ditch, isolated pond, isolated wetland, or ephemeral stream, has an effect on a traditional navigable water divorced from the regulated activity of "discharging a pollutant," would completely ignore the bedrock principle of proximate causation as set forth in *Sweet Home*, *Public Citizen*, and *Metropolitan Edison Co. v. People Against Nuclear Energy*.[71]

This analysis raises an important question—could a discharge of dredged or fill material regulated under CWA §404 have a significant nexus to a TNW, whereas a discharge of a pollutant regulated under §402 into the same water body would not? Justice Kennedy discusses, but does not resolve, this question by noting that the "Act's prohibition on the discharge of pollutants into navigable waters . . . covers both the discharge of toxic materials such as sewage, chemical waste, biological material and radioactive material and the discharge of dredged spoil, rock, sand, cellar dirt and the like."[72] He then challenges Justice Scalia's assumption that, unlike such pollutants, dredged or fill material "does not normally wash downstream."[73] Justice Kennedy opines that "loose fill . . . could travel downstream through waterways adjacent to a wetland."[74] In another "slap" at Justice Scalia, he states that the "Corps experts can better assess [this factual possibility] than the plurality."[75] Further, he then suggests that

> even granting the plurality's assumption that fill will stay put . . . the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water . . . [and] where wetlands perform these filtering and runoff-control functions, filling them may increase downstream pollution much as a discharge of toxic pollutants would.[76]

Although Justice Kennedy discusses the possible effects of the two kinds of discharges regulated under the CWA on navigable waters, he does not rule out the possibility of different significant nexus determinations. In fact, "proximate causation" principles could lead to different conclusions regarding whether the significant nexus test would be met for §404 regulated discharges but not for discharges regulated under §402. For example, a discharge of a small amount of fill material into a wetland adjacent to an intermittent stream that flows into several other intermittent streams a considerable distance before reaching a TNW may not have a foreseeable impact on the water quality of the TNW. However, a discharge of a toxic-laden waste stream from an industrial plant into that very same intermittent stream may very well have a harmful effect on the TNW, because it was reasonable to presume that the toxic material would ultimately reach the TNW and harm aquatic life in that water body.

VI. Post-*Rapanos* Court Interpretations of the Justice Kennedy Test

At present, the Supreme Court has not accepted any cases that would further clarify the Court's *Rapanos* decision. However, the lower federal courts have been busy interpreting it. The courts that have applied Justice Kennedy's test provide some insight into the nature and extent of the evidence needed to meet significant nexus. The most compelling reasoning of these cases is consistent with proximate causation principles.[77]

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relationship" between the environmental effect and the alleged cause).

70. *Rapanos*, 126 S. Ct. at 2243.
71. 460 U.S. 766, 13 ELR 20515 (1983). The courts have also applied the proximate causation principles to the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§703-712. *See* United States v. Moon Lake Electric Ass'n Inc., 45 F. Supp. 2d 1070, 1085 (D. Colo. 1999) (stating that proximate cause is an "important and inherent limiting feature" to the MBTA).
72. *Rapanos*, 126 S. Ct. 2208, 2245 (2006).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. For a more extensive summary of the cases cited in this section, see Margaret "Peggy" Strand & Lowell M. Rothschild, *What Wetlands Are Regulated, Jurisdiction of the §404 Program*, *in* Wetlands Deskbook ch. 2 (3d ed., Envtl. L. Inst. 2010).

A. Cases Finding CWA Jurisdiction

The U.S. Court of Appeals for the Ninth Circuit, in *Northern California River Watch v. City of Healdsburg*[78] was the first circuit court to apply the significant nexus test to find CWA jurisdiction. The court examined the significant nexus between the city's discharge of treated sewage into Basalt Pond (a quarry pit that had filled with water from a surrounding aquifer) and nearby Russian River (a navigable river north of San Francisco). At issue was whether the pond was subject to the CWA, because it contained wetlands that were adjacent to a navigable water of the United States. The Ninth Circuit held that the wetlands were adjacent, because they are "part of a larger wetland that is adjacent to the River within the meaning of *Riverside Bayview Homes*."[79] The court also found that there was "a substantial nexus" under Justice Kennedy's analysis in *Rapanos*.[80] The court noted that "water from the Pond seeps into the river through both the surface wetlands and the underground aquifer" and cited the district court's findings "that this hydrologic connection support[s] the conclusion that the Basalt Pond has a significant effect on 'the chemical, physical and biological integrity' of the Russian River."[81] The Ponds' surface connection occurred "when the River overflows the levee and the two bodies of water commingle . . . [and that, as a result of the underground hydrologic connection,] a change in the water level of one immediately affects the water level of the other."[82] The court then noted the district court's findings that "[t]he pond and its wetlands support substantial bird, mammal and fish populations, all as an integral part of and indistinguishable from the rest of the Russian River ecosystem [and that] . . . the Pond significantly affects the chemical integrity of the Russian River by increasing its chloride levels."[83]

Another recent decision, *United States v. Cundiff*,[84] is also helpful in understanding how proximate causation principles may be applied. *Cundiff* involved the drainage of contaminated wetlands in Kentucky into tributaries of the navigable Green River. The Sixth Circuit upheld the lower court's decision that the wetlands were protected by the CWA under both Justice Kennedy's significant nexus test and the plurality opinion in *Rapanos*. At issue in the case were two adjacent tracks of land containing wetlands impacted by mine drainage. Approximately 200 acres of polluted wetlands were drained by the Cundiffs, who created ditches and dispersed material into the wetlands without a CWA permit.[85] The court's analysis of the evidence appears to support the proximate causation theory. The court credited the government's expert "who testified that the wetlands perform significant ecological functions in relation to the Green River and the two creeks, including: temporary and long term water storage, filtering of the acid runoff and sediment from the nearby mine, and providing an important habitat for plants and wildlife."[86] The court then reviewed the evidence of impact from Cundiff's ditching of the wetlands, finding that "the Cundiff's alterations—unauthorized ditch digging, the mechanical clearing of land, and the dredging of material and using it as filler—have undermined the wetlands' ability to store water which, in turn, has affected the frequency and extent of flooding, and increased the flood peaks in the Green River."[87] Thus, given this evidentiary connection, it would be reasonable to conclude that such discharges and alterations to the ditches would have more than an "insubstantial" impact on the river. Other post-*Rapanos* decisions are consistent with the use of the proximate causation theory in analyzing whether the evidence supported jurisdiction under Justice Kennedy's significant nexus test.[88]

B. Cases Finding No Jurisdiction

In contrast to the above cases, some post-*Rapanos* courts have examined a wetland and did not find a significant nexus.[89] For example, the U.S. District Court for the Northern District of Texas held that a discharge of oil to an unnamed tributary that traversed to an intermittent creek that flows only "during rainfall events" was not a discharge into a water of the United States under the Oil Pollution Act (OPA)[90] (which

78. 457 F.3d 1023, 36 ELR 20163 (9th Cir. 2006), *withdrawn & superseded*, 496 F.3d 993, 37 ELR 20202 (9th Cir. 2007).
79. 496 F.3d at 1000.
80. *Id.*
81. *Id.*
82. *Id.* at 1001.
83. *Id.* at 1000-01.
84. 555 F.3d 200, 39 ELR 20025 (6th Cir. 2009) (*petition for certiorari denied*, Oct. 5, 2009).
85. As the *Cundiff* court noted: "In its short life, *Rapanos* has indeed satisfied any 'bafflement' requirement." 555 F.3d at 208. The first court to decide what opinion was controlling decided to ignore all of them and instead opted for earlier circuit precedent which it felt was clearer and more readily applied. United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 613, 36 ELR 20131 (N.D. Tex. 2006). The courts of appeal have not fared much better. The Ninth Circuit has stated that Justice Kennedy's test applies in most instances. Northern California River Watch v. City of Healdsburg, 496 F.3d 993, 1000, 37 ELR 20202 (9th Cir. 2007). Meanwhile, the Eleventh Circuit has held that the Act's coverage may be established *only* under Justice Kennedy's test. United States v. Robison, 505 F.3d 1208, 1219-22 (11th Cir. 2007). By contrast, the First Circuit and the Seventh Circuit, though differing somewhat in their analyses, have followed Justice Stevens' advice and held that the Act confers jurisdiction whenever *either* Justice Kennedy's or the plurality's test is met. United States v. Johnson, 467 F.3d 56, 60-66, 36 ELR 20218 (1st Cir. 2006); United States v. Gerke Excavating, Inc., 464 F.3d 723, 725, 36 ELR 20200 (7th Cir. 2006). This is the approach the district court here followed, largely in reliance on the First Circuit's thoughtful reasoning. 555 F.3d at 207 and 208.
86. 555 F.3d at 211.
87. *Id.*
88. *See* United States v. Moses, 496 F.3d 984, 991, 37 ELR 20206 (9th Cir. 2007) ("the evidence supported a determination that when the water flowed, materials dislodged by Moses' operations would be carried downstream into the lower portion of Teton Creek and on into the Teton River"). *But see* United States v. Robison, 505 F.3d 1208, 1223 (11th Cir. 2007) (in adopting significant nexus as the controlling test, the court observed that "although Wagoner (the EPA investigator) testified that in his opinion there is a continuous uninterrupted flow" between a creek and a river, "he did not testify as to any significant nexus," "the government did not present any evidence . . . about the possible chemical, physical or biological effect" that the creek may have on the river, and "there was no evidence presented of any actual harm suffered by the" river).
89. Even the environmental community recognizes that some wetlands may fail both Justice Kennedy's test and the plurality test. Jon Kusler et al., Ass'n of State Wetland Managers, Inc., "Significant Nexus" and Clean Water Act Jurisdiction iii (Mar. 5, 2007).
90. 33 U.S.C. §§2701-2761, ELR Stat. OPA §§1001-7001. United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 36 ELR 20131 (N.D. Tex. 2006).

uses the same definition of "navigable waters" as the CWA). The court relied on two pre-*Rapanos* decisions of the U.S. Court of Appeals for the Fifth Circuit—*In re Needham*[91] and *Rice v. Harkin Exploration Co.*[92]—in finding that the government may not rely on merely speculative evidence regarding the "farthest traverse of the spill" and that oil "might possibly be carried downgrade."[93] Citing to Chief Justice Roberts' statement that a lower court will have to "feel its way on a case by case basis," the court held that "as a matter of law in this Circuit, the connection of generally dry channels and creek beds will not suffice to create a 'significant nexus' to a navigable water simply because one feeds into the next during the rare times of actual flow."[94]

In *Environmental Protection Information Center (EPIC) v. Pacific Lumber Co.*,[95] the court followed *Healdsburg* and determined that the significant nexus test controlled. Here, however, the court applied the test to a stream, not a wetland.[96] Importantly, the court required a hydrologic connection as part of that analysis.[97] Rejecting the lack of evidence of a nexus, the court noted that "[n]one of the evidence offered by EPIC—field observations, the GIS map, or expert testimony—address this part of the substantial nexus standard."[98] The court continued: "Ecological evidence is not a *sine qua non* for establishing a substantial nexus; however, EPIC has provided no evidence that the streams 'significantly affect the chemical, physical, and biological integrity of other covered waters.'"[99] Therefore, the court found that EPIC had not established that the streams were navigable waters.[100] Finally, the court concluded that demonstration of a pollutant's flow in navigable water is not necessary under the substantial nexus test; "this requirement, if it exists, comes from Justice Scalia's plurality opinion in *Rapanos*, which has not been adopted by the Ninth Circuit."[101]

In *Simsbury-Avon Preservation Society, LLC v. Metacon Gun Club, Inc.*,[102] the district court examined whether a gun club was discharging lead shot to a nearby stream. Because the area was "conducive to flooding, particularly during the spring" or "with an average rainstorm," the court found at least a "periodic physical nexus" between the site and the nearby navigable water.[103]

To assess whether the spent ammunition affected the "chemical, physical, and biological integrity" of the adjacent river, the court reviewed the lab results in detail—including hydrogen ion concentration levels and lead concentrations. However, even this data was not probative:

> Given the inconclusive evidence in the AEI report, notwithstanding the proximity of the Farmington River to the Metacon wetlands and the seasonal flooding of the area, the AEI data do not present more than "some metaphysical doubt" about defendant's claim of insubstantial nexus between the wetlands on defendant's property and the Farmington River.[104]

Because the evidence was insufficient, the court found that any effects on water quality from the gun club's pond were "speculative or insubstantial" and thus "outside the zone fairly encompassed by the statutory term 'navigable waters.'"[105]

On July 31, 2009, the district court's analysis of CWA jurisdiction was affirmed by the U.S. Court of Appeals for the Second Circuit on other grounds, unrelated to *Rapanos*.[106] Thus, the court did not rule on the issue of whether "navigable waters" were located near the site. Instead, the court ruled that the features on the site were not "wetlands" and that lead was not discharged from a "point source." The court therefore affirmed the district court's ruling that lead contamination on the shooting range did not constitute an "imminent and substantial endangerment to health or the environment" as required under the Resource Conservation and Recovery Act (RCRA).[107]

San Francisco Baykeeper v. Cargill Salt Division[108] involved the dumping of salt production waste into a pond next to a slough connected to the San Francisco Bay. The Baykeeper lost its appeal mainly because it sought jurisdiction based on a *pond* being adjacent to waters of the United States. The Ninth Circuit disagreed with the Baykeeper's attempt to expand *Riverside Bayview* and ruled that only adjacent *wetlands* are protected by the CWA.[109] In dicta, the court found that even under *Rapanos*, the pond in question did not have a significant nexus with the slough: "By any permissible view of the evidence, the effect of Cargill's Pond on Mowry Slough is speculative or insubstantial."[110] No evidence indicated that water has ever flowed from the pond to the slough. Furthermore, the court noted the lack of evidence to show whether the "'right hydrology conditions' have ever existed or were likely to exist."[111] In fact, the court said that this lack of evidence "fits the definition of 'speculative.'"[112] The fact that, in some high tide conditions, water flows the other way—from the slough to the pond—is not relevant, because it does not affect the navigable water (the slough).[113]

Taken together, the most compelling interpretation of the CWA from these cases is based on a cause-and-effect analysis of discharges to the non-navigable water body in question and requires an impact on the navigable water in order to

91. 354 F.3d 340, 34 ELR 20009 (5th Cir. 2003).
92. 250 F.3d 264 (5th Cir. 2001).
93. *Chevron Pipe Line Co.*, 437 F. Supp. 2d at 614.
94. *Id.* at 613.
95. 469 F. Supp. 2d 803, 37 ELR 20012 (N.D. Cal. 2007).
96. *Id.* at 823.
97. *Id.* ("That connection may suffice in some but not all cases to show 'some measure of the significance of that connection for downstream water quality.'").
98. *Id.*
99. *Id.* at 824.
100. *Id.*
101. *Id.*
102. 472 F. Supp. 2d 219, 37 ELR 20038 (D. Conn. 2007).
103. *Id.* at 229.
104. *Id.* at 230.
105. *Id.*
106. Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, No. 07-0795, 2009 WL 2341924, 39 ELR 20173 (2d Cir. July 31, 2009).
107. 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011.
108. 481 F.3d 700 (9th Cir. 2007).
109. *Id.* at 705.
110. *Id.* at 708.
111. *Id.*
112. *Id.*
113. *Id.*

establish the significance of the nexus. While the extent of evidence needed to establish jurisdiction may vary with the waterway, if the evidence requires "inference upon inference" to show proximate causation, there is no jurisdiction. Evidence that wetlands merely have the "potential" to provide the requisite nexus would not establish jurisdiction.[114] This is logical because it is not foreseeable that pollutants discharged into a water body with a potential nexus to traditional navigable water will have a negative impact on the traditionally navigable water. The above cases show the continuum in evidentiary proof, from the direct evidence of polluted water reaching the Russian River from the old quarry in *Healdsburg* and the impact of the defendants ditching to the Green River in *Cundiff*, to the inconclusive evidence that the lead shot would reach the Farmington River in the *Metacon* case, to the lack of evidence in *Cargill* that the pond would have any impact on Mowry Slough. Overall, the evidence of a significant nexus should be more than insubstantial—as in *Healdsburg* and *Cundiff*—as compared to the speculative or insubstantial evidence of *Metacon*.

VII. Proximate Causation and the Corps and EPA *Rapanos* Guidance

There is a fundamental evidentiary question critical to the interpretation of significant nexus: what is the nature and extent of evidence necessary to show a significant nexus and who must undertake that analysis? The courts have held that the burden of proof will be on the government.[115] But while the courts were hashing through the fine points of the *Rapanos* decision, the agencies were also struggling to put their own stamp on it.[116] Finally, in June 2007, the long-promised, long-overdue agency guidance was issued, essentially adopting both the Justice Scalia and Justice Kennedy tests.[117] Yet, much of the guidance is focused on interpreting the significant nexus test. Hence, the agencies (and the courts when confronted by application of the guidance) will likely rely on this test as a foundation for jurisdictional determinations where the "waters of the United States" in question are not truly "navigable," permanent, or directly adjacent to a navigable water. Thus, the on-the-ground application of the significant nexus test is key to the scope of the agency's jurisdiction over a wide spectrum of waters that are not obviously navigable in fact.

The 2007 guidance, as revised in December 2008, strives to put Justice Kennedy's test into administrative action.[118] Written by the Corps and EPA, with input from the U.S. Office of Management and Budget, the U.S. Department of Justice, the President's Council on Environmental Quality, the U.S. Department of Transportation, and the U.S. Department of the Interior, the guidance focuses on those water bodies and wetlands that would require application of the significant nexus test: "non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally; wetlands adjacent to such tributaries; and wetlands adjacent to but that do not directly abut a relatively permanent, non-navigable tributary."[119] The guidance's definition of significant nexus differs slightly from Justice Kennedy's: "A significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the chemical, physical, and/or biological integrity of a [traditionally navigable water]."[120]

The December 2008 revised guidance clarified how to determine the reach of TNWs and the regulatory term "adjacent wetlands," and refined the concept of "relevant reach."[121] The revised guidance also clarified that TNWs are broader than Rivers and Harbors Act §10 waters and include "waters that have been determined to be navigable-in-fact by the courts, are currently being used or have historically been used for commercial navigation, or for which evidence showing susceptibility to future commercial navigation is more

114. *Rapanos*, 126 S. Ct. 2208, 2251, 36 ELR 20116 (2006).

115. United States v. Suarez, 846 F. Supp. 892 (D. Guam 1994) ("the government would have the burden of proving that the wetlands defendant was charged with filling were wetlands within the coverage of the Clean Water Act").

116. Determining the controlling aspect of the opinion was so confusing that, shortly after *Rapanos* was issued, the Corps sent a memorandum to all of its field units directing permit officers to defer action on §404 JDs until further guidance came out. *See* Mark Sudol, U.S. Army Corps of Eng'rs, Interim Guidance on the Rapanos and Carabell Supreme Court Decision (July 5, 2006), *available at* http://www.craig-environmental-law.com/forms/Army-CorpsReactiontoRapanos.pdf. That guidance, however, was not immediately forthcoming. The result in many Corps districts was a complete hold on JD decisions—causing the regulated community to suffer over a year of project delays and the inability to do any long-term planning. Meanwhile, as discussed above, the lower courts also struggled to find a consistent meaning, giving radically different interpretations of *Rapanos*—some following Justice Scalia, some Justice Kennedy, and at least one circuit simply choosing to ignore the case altogether. In the end, the development community and the Corps alike were caught in the middle.

117. U.S. Army Corps of Eng'rs, CWA Guidance to Implement the U.S. Supreme Court Decision for the *Rapanos* and *Carabell* Cases (June 5, 2007), *available at* http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/cwa_guide.htm; U.S. EPA, Clean Water Act Definition of "Waters of the United States," *at* http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html (last visited Sept. 28, 2010).

118. The "guidance" really is a collection of materials issued by EPA and/or the Corps: Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (June 5, 2007, revised Dec. 2, 2008) [hereinafter Joint Memo]; Memorandum of Agreement, Coordination on Jurisdictional Determinations Under Clean Water Act Section 404 in Light of the *SWANCC* and *Rapanos* Supreme Court Decisions (June 2007) [hereinafter Coordination Memo]; Press Release, U.S. EPA, Army Corps Issue Joint Guidance to Sustain Wetlands Protection Under Supreme Court Decision (June 5, 2007); Key Points for *Rapanos* and *Carabell* Decision; Guidance Highlights for *Rapanos* and *Carabell* Decision [hereinafter Guidance Highlights]; Questions and Answers for *Rapanos* and *Carabell* Decision (June 5, 2007, revised Dec. 2, 2008) [hereinafter Guidance Q&A]; CWA Jurisdiction PowerPoint Presentation; Notice of Availability, U.S. EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction After *Rapanos*, 72 Fed. Reg. 31824 (June 8, 2007); U.S. Army Corps of Engineers Jurisdictional Determination (JD) Form Instruction Guidebook (May 30, 2007) [hereinafter Instruction Guidebook]; U.S. Army Corps of Engineers Approved Jurisdictional Determination Form [hereinafter JD Form]; and a set of Regulatory Guidance Letters, including RGL No. 07-01, Practices for Documenting Jurisdiction Under Section 9 & 10 of the Rivers & Harbors Act (RHA) of 1899 and Section 404 of the Clean Water Act (CWA) (June 7, 2007), that further enforces the significant nexus test and interagency coordination requirements. These documents are available on the Corps' website at http://www.usace.army.mil/CECW/Pages/cwa_guide.aspx (last visited Oct. 1, 2010).

119. Joint Memo, *supra* note 118, at 7.

120. Instruction Guidebook, *supra* note 118, at 7.

121. Joint Memo, *supra* note 118.

than insubstantial or speculative." Regarding "adjacency," the revised guidance clarified that a wetland is adjacent "if it has an unbroken hydrologic connection to jurisdictional waters, or is separated from those waters by a berm or similar feature, or if it is in reasonably close proximity to a jurisdictional water." Also, the revised guidance made some changes on how to assess the flow in tributaries in determining if a tributary is relatively permanent, indicating that "where the downstream limit is not representative of the stream reach as a whole, the flow regime that best characterizes the reach should be used."

The guidance attempts to draw a clear line where it will assert jurisdiction over certain waters known to be jurisdictional. The following waters are considered by agencies always to be jurisdictional:

- TNWs;
- wetlands adjacent to traditional navigable waters;
- non-navigable tributaries to traditional navigable waters that have relatively permanent flow at least seasonally (i.e., typically three months); and
- wetlands that directly abut such tributaries.[122]

Under proximate causation principles, it was reasonable for the agencies to take such a position in most instances. Clearly, TNWs are by definition jurisdictional. Wetlands directly abutting TNWs are also likely to be sufficiently connected (as in *Riverside Bayview*) to a TNW that any discharges will likely impact water quality of the TNW. Non-navigable tributaries and their adjacent wetlands that have a relatively permanent flow would also likely have sufficient connectivity to a TNW to satisfy significant nexus in most cases.

A second category of waters is presumptively not regulated. The guidance states that the following waters are "presumed" by agencies not to be jurisdictional:

- swales and erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow);
- ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not have a relatively permanent flow of water; and
- waters, including wetlands, deemed non-jurisdictional by *SWANCC*.[123]

Consistent with the relevant case law, the agencies have essentially concluded that these waters categorically do not impact the water quality of a traditional navigable water. Should the agencies wish to assert jurisdiction over such waters, they will have a fairly heavy evidentiary burden.

The third categorical determination made by the agencies is based on the significant nexus test. It is this "gray area" where the proximate causation/foreseeability principles will be the hardest to apply. The following waters are considered by agencies possibly to be jurisdictional, depending on the presence of a significant nexus:

- non-navigable tributaries that are not relatively permanent (e.g., ephemeral tributaries that flow only in response to precipitation and intermittent streams that do not typically flow year-round or have continuous flow at least seasonally);
- wetlands adjacent to non-navigable tributaries that are not relatively permanent; and
- wetlands adjacent to, but that do not directly abut, non-navigable tributaries that are relatively permanent (e.g., separated from it by uplands, a berm, dike, or similar feature).[124]

However, under the Corps' broad interpretation of "adjacency," the agencies could interpret and apply the guidance to lessen their burden to establish a significant nexus. That is, the guidance allows the agencies to find that a wetland is "adjacent" by one of three criteria: (1) unbroken hydrologic connection; (2) separation by a berm or similar feature; or (3) proximity.[125] For example, the agencies could find that a wetland was jurisdictional, even though it was separated by a road or other structure from an intermittent stream that eventually flows more than one mile into a TNW, and discount evidence showing that discharges into that wetland would not have any foreseeable impact on the water quality of the TNW. Such a result would appear to conflict with Justice Kennedy's analysis of the need to establish a significant nexus for wetlands adjacent to non-navigable tributaries.[126]

Though the guidance provides no bright line, it is clear that the evidentiary burden increases with the distance between the water to be regulated and the traditional navigable water, as well as with the regularity of the flow (which would establish the requisite connection and effect on the navigable-in-fact water). The classification of tributaries illustrates the point. The *U.S. Army Corps of Engineers Jurisdictional Determination Form Instruction Guidebook* defines a tributary as a natural, man-altered, or man-made water body that carries flow directly or indirectly into a traditional navigable water.[127] A tributary is further defined as "the entire reach of the stream that is of the same order . . . from the

122. *Id.* at 4-6.

123. Joint Memo, *supra* note 118, at 8, n.29, 11.

124. *Id.* at 7.

125. But note that the court in *Great Northwest, Inc. v. Corps*, 2010 U.S. Dist LEXIS 89132, No. 4:09-cv-0029-RRB (D. Alaska June 8, 2010), held that the Corps could not assert "adjacency" jurisdiction over a wetland that was separated from another wetland by a railroad berm because, under the Corps regulations, a wetland cannot be adjacent to another wetland and be jurisdictional, citing 33 C.F.R. §328.3(a)(7). In so holding, the court stated that "even if the Corps were to determine there exists an 'ecological connection' or 'significant nexus' between the wetlands and the Tanana River (or some other alternative basis for jurisdiction suggested by Justice Kennedy), the wetlands would still not be 'waters of the United States' ad defined by the Corps itself." Slip. op. at 26.

126. While finding that the Corps may "rely on adjacency to establish jurisdiction over wetlands adjacent to navigable-in-fact waters . . . [Justice Kennedy stated that] absent more specific regulation, . . . the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries." *Rapanos*, 126 S. Ct. 2208, 2249 (2006).

127. Instruction Guidebook, *supra* note 118, at 40.

point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream."[128] The Corps states that "a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW."[129] The *Instruction Guidebook* directs that considerations "when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands." The *Instruction Guidebook* appears at least to recognize concepts of foreseeability in stating that the significant nexus of any given tributary will be "the point the tributary enters a higher order stream."[130] Yet, this analysis is conducted "at the farthest downstream limit of such tributary."[131] Thus, the *Instruction Guidebook* suggests that if there is a significant nexus at the point a tributary meets the next downstream water body, then the entire downstream water body is deemed jurisdictional. However, the revised guidance appears to allow the agencies to use a different flow regime that "best characterizes the stream reach as a whole." In other words, the guidance appears to find that it is "foreseeable" (though not proven) that a discharge upstream of the point of confluence will impact the downstream water body. The devil will be in the details of how the agencies meet their burden of proof.

A practical application of the guidance demonstrates some of the difficulties of proof and how proximate causation principles could provide the appropriate legal paradigm. Consider a wetland adjacent to an intermittent stream in a relatively dry region where that stream enters a higher order stream several miles away from the wetland and then travels several more miles before reaching a TNW. The evidence would have to be quite strong to find that the adjacent wetland is providing functions and values to the TNW and that the discharge into that wetland would have an impact on the TNW. The guidance asserts that certain ephemeral features in the West that are tributaries may have a significant nexus to TNWs. The agencies give the example of ephemeral tributaries that "collect and transport water and sometimes sediment from the upper reaches of the landscape" to TNWs, noting that these "ephemeral tributaries may provide habitat for wildlife and aquatic organisms."[132] Yet, the arid West has a number of ephemeral systems that are far away from TNWs and only flow in very rare storm events. The nexus between these systems and the closest TNW is often very attenuated, if at all. Finding jurisdiction in this example will require the agencies to assess factors such as the flow characteristics, e.g., volume, duration and frequency, physical characteristics, proximity to TNWs, size of watershed, etc., and functions of the tributary itself and all adjacent wetlands, e.g., potential to carry pollutants to TNWs, provision of aquatic habitat that supports a TNW, and maintenance of water quality in a TNW, to determine if they will significantly affect the chemical, physical, and biological integrity of the downstream TNW. The Corps' *Instruction Guidebook* contains directions on how to document this information with accompanying data sheets. Yet, the more attenuated the linkage, the stronger the evidence the Corps will have to gather to find that a discharge into that wetland would have a foreseeable effect on the water quality of a TNW.

History suggests that the regulated community can expect the Corps and EPA to try to obtain jurisdiction over as many non-permanent waters as possible. For example, as noted above, the guidance espouses the blanket position that "certain ephemeral waters in the arid west are distinguishable from the geographic features described [in the guidance] where such ephemeral waters are tributaries and they have a significant nexus to downstream [TNWs]" given their role in providing habitat, water transport, and sediment trapping.[133] Thus, it is clear that the agencies are not about to relinquish jurisdiction over dry washes and other areas in the arid West without a fight.[134] Yet, such an effort may not be sustainable under an objective interpretation of the significant nexus test, as they might well conflict with Justice Kennedy's warning that when "wetlands effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[135]

It is instructive to review a case that, although pre-*Rapanos*, hints how a reviewing court might view the guidance and apply the significant nexus test. The district court's decision in *FD & P Enterprises, Inc. v. U.S. Army Corps of Engineers*[136] provides a good case study as to the evidentiary burden for meeting the significant nexus standard. In *FD & P*, the court rejected the Corps' argument that a mere hydrologic connection and proximity between the wetlands at issue and the Hackensack River was sufficient to meet the *SWANCC* significant nexus test. In rejecting that argument, the court analyzed the differing interpretations of *SWANCC* and held that after *SWANCC*, "the 'hydrological connection' test is no longer the valid mode of analysis."[137] Rather, the court held that the Corps must demonstrate evidence of "substantial injurious impact" to navigable water—one that goes "beyond a mere hydrological connection."[138] According to the court, the question of whether there is a "substantial nexus" turns on whether "filling of the wetlands will have a substantial injurious impact upon the chemical, physical and/or biological integrity of the [navigable waterway]."[139]

Applying this test, the *FD & P* court denied the Corps' motion for summary judgment, despite the agency's broad

128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. Joint Memo, *supra* note 118, at 11.
133. *Id.*
134. Most recently, EPA found that the mainstem of the Los Angeles River was a "traditional navigable water" even though much of the river is lined with concrete with a low flow channel. July 6, 2010, CWA Jurisdictional Determination Transmitted by Jared Blumenfeld, U.S. EPA Region 9 Administrator, to Carl Mark Toy, District Engineer, Los Angeles District.
135. Rapanos v. United States, 126 S. Ct. 2208, 2248, 36 ELR 20116 (2006).
136. 239 F. Supp. 2d 509, 33 ELR 20140 (D.N.J. 2003).
137. *Id.* at 516.
138. *Id.*
139. *Id.* at 517.

assertions that the "filling of the wetlands would have an injurious impact on the river by increasing the sediments and chemicals flowing into the river [and would] displace flood storage capacity."[140] The court noted that the contrary factual claims of FD&P created a genuine issue of material fact as to whether there is a substantial nexus between the wetlands and the Hackensack River.[141]

Indeed, the guidance seems to reflect factors noted by the *FD & P* court. The guidance defines the "principal considerations" for evaluating significant nexus to include "the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a [TNW], plus the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands."[142] If properly utilized, such extensive documentation would suffice to provide adequate proximate causation analysis. When enough evidence clearly indicates a significant nexus, only then is it foreseeable that discharging fill into a certain non-navigable water would affect water quality downstream. With a proven significant nexus, federal jurisdiction should attach.

Thus, principles of proximate causation and notions of foreseeability provide a solid framework for making the evidentiary determination of whether a non-navigable water body under the CWA has "substantial effects" to navigable waters. For example, evidence that a percentage of the water that flows through and out of a "connected" tributary actually reaches the navigable water might be sufficient to establish jurisdiction over the tributary, because it is foreseeable that a discharge into the tributary would have a negative impact on the navigable water. However, evidence that an isolated wetland is only tenuously connected to navigable water would be sufficient to dismiss jurisdiction over the wetland, because it is not foreseeable that discharges to the wetland would substantially impair the functions of navigable water several miles away.

VIII. Unknowns and Pitfalls Under the Guidance

The significant nexus concept is fraught with unknowns. While the lower courts that have interpreted the fractured *Rapanos* opinion seem to have embraced this as an objective standard, some commentators worry about courts being "plainly confused" about how to apply the test.[143] Moreover, the guidance is just that: guidance—not law and not a legally binding document.[144] If jurisdictional determinations under the guidance exceed the Justice Kennedy test—and therefore the bounds of proximate causation—the only recourse will be to appeal the decision administratively and eventually turn to the courts. Yet, a recent decision may prevent landowners from obtaining judicial review without first being subject to an enforcement action by the government for discharging without a permit.[145]

Another key unknown concerns timing and costs. To a bureaucracy that is notoriously slow—the average applicant for an individual permit spends 788 days and $271,596 in completing the process[146]—adding complex analysis to the decisionmaking process cannot bode well. In part, Justice Kennedy is to thank for this, given his statement that jurisdictional calls must be done on a case-by-case basis.[147]

140. *Id.*

141. *Id.*

142. Instruction Guidebook, *supra* note 118, at 7. The *Instruction Guidebook* expands the "fact specific" scope of investigation.

Hydrologic factors include:
- "certain physical characteristics of the tributary" as well as size of the watershed, average annual rainfall, slope, channel dimensions, and average annual winter snow pack. *Id.* at 15, 55.

Ecologic factors include:
- the ability of the tributary and its adjacent wetlands (if any) to carry pollutants and flood waters to traditional navigable waters. *Id.* at 15.
- the ability of the tributary and its adjacent wetlands (if any) to provide aquatic habitat that supports biota of a traditional navigable water. *Id.*
- the ability for adjacent wetlands to trap and filter pollutants or store flood waters. *Id.*
- the ability to maintain water quality. *Id.*
- the ability of wetlands to help maintain a consistent water temperature. Joint Memo, *supra* note 118, at 8.

Biological characteristics for consideration include:
- riparian buffer.
- vegetation type/percent cover.
- habitat for federally listed species, fish/spawn areas, other environmentally-sensitive species, and aquatic/wildlife diversity. JD Form, *supra* note 118, §III.B.

Physical factors include:
- the volume, duration, and frequency of the flow of water in a tributary.
- the distance of the wetland from other waters.
- artificial and manipulated components, substrate composition.
- shelving, wracking, water staining, sediment sorting, and scour. *Id.* at 10.
- the presence and characteristics of a reliable ordinary high water mark to indicate flow. Joint Memo, *supra* note 118, at 9.

Chemical characteristics include:
- water color (oily film, discolored, etc.).
- water quality.
- the names of pollutants. JD Form, *supra* note 118.

The above factors and more have been incorporated into the revised JD form. *See* JD Form, *supra* note 118, §III.B. The JD Form cautions that this list of considerations "is not inclusive and other functions observed or known to occur should be documented" by the reviewer. *Id.* These "other relevant factors" may include "the extent to which the tributary and adjacent wetlands have the capacity to carry pollutants . . . or flood waters to traditional navigable waters, or to reduce the amount of pollutants or flood waters that would otherwise enter traditional navigable waters." Joint Memo, *supra* note 118, at 10.

143. *See* Jon Kusler et al., Ass'n of State Wetland Managers, *Significant Nexus and Clean Water Act Jurisdiction* iii (Mar. 5, 2007).

144. *See* Joint Memo, *supra* note 118, at 4, n.16.

145. The Ninth Circuit in *Fairbanks North Star Borough v. Corps*, 543 F.3d 586, 38 ELR 20239 (9th Cir. 2008), held that Fairbanks may not seek judicial review of a jurisdictional determination after exhausting the administrative appeal process. The court stated that "Fairbanks rights and obligations remain unchanged by the approved jurisdictional determination. It does not by itself command Fairbanks to do or forbear anything; as a bare statement of the agency's opinion, it cannot be neither the subject of immediate compliance nor of defiance." *Id.* at 593. This decision, if adopted by other courts, could prevent aggrieved applicants from obtaining judicial review of a JD prior to an enforcement action by the government. *See also* National Association of Home Builders v. EPA, No. 09-0548 (D.D.C. Aug. 18, 2010) (dismissing the National Association of Home Builders' preenforcement challenge to EPA's assertion of jurisdiction over two reaches of the Santa Cruz River as TNWs. The court stated that "because the CWA clearly provides for judicial review of agency action when either EPA or the Corps assesses administrative penalties or initiates enforcement action in district court, judicial review, prior to enforcement is impliedly precluded." Slip. op. at 7).

146. Rapanos v. United States, 126 S. Ct. 2208, 2214, 36 ELR 20116 (2006).

147. *See, e.g.*, *id.* at 2249 ("Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."). On June 26, 2008, the Corps issued Regulatory Guidance Letter (RGL) 08-02 on Jurisdictional Determinations. This RGL allows a landowner, permit applicant, or other affected party to elect to use a preliminary JD without waiving any right

Furthermore, an additional layer of bureaucracy has been created, given EPA's role in the coordination of some jurisdictional determinations.[148]

The two-year permit lead time indicates that the Corps and EPA do not currently have enough staff and budget to adequately handle the existing workload.[149] Greatly increasing the data-gathering and fact-finding will more than likely further increase the lead time. The Corps indicates that its workload "will increase dramatically . . . . Additional costs could range from $15-$20 million."[150] Obviously, any budget cuts or staffing reductions will only compound matters. More likely, the government will attempt to shift the information-gathering to the permit applicant—a response that ignores the fact that the burden of proof is on the government.[151]

Justice Kennedy's test also opens the door to litigation with the "alone or in combination with similarly situated lands" qualification in his significant nexus test.[152] Justice Kennedy supports broad categories of jurisdictional water as a matter of "administrative convenience or necessity."[153] Once an adequate nexus has been established for one wetland, for example, the Corps may "presume covered status for other comparable wetlands in the region."[154] Similarly, with regard to tributaries, "the Corps may choose to identify categories of tributaries that, due to their volume of flow, their proximity to navigable water 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."[155] The Corps has seized upon this opening and has determined to categorically exclude certain areas from jurisdiction, as it has with swales, erosional features, and upland ditches.[156] Yet, the contrary concern is that the Corps will also apply the guidance in a way that would sweep in the broad category of waters and wetlands, regardless of a case-by-case significant nexus test.

The guidance categorically includes all wetlands similarly situated in a watershed as jurisdictional.[157] This categorical approach to jurisdiction leads to two big unknowns: (1) what is the nature and extent of evidence necessary to include such categories of waters and wetlands under the significant nexus test; and (2) to what degree can an agency categorically determine jurisdiction? If taken to the extreme, the Corps and EPA could rely on the findings of a third party to sweep in entire ecosystems. What if EPA, in implementing the Chesapeake Bay program under President Barack Obama's Executive Order No. 13514, categorized the Bay's entire drainage system as meeting the significant nexus test on the theory that the goals of Bay restoration would be thwarted if any part of that system, including ephemeral and isolated waters, no matter how far removed from the Bay and its tributaries, were excluded?

This is but one example of the need to ensure that proximate causation is applied. While Justice Kennedy did recognize the agencies' right to categorically include certain wetlands, that cannot be a license to simply sweep in all waters based on a gross cumulative-impact analysis. Rather, significant nexus under proximate causation principles requires more. The agencies cannot take short cuts simply to reduce their workload.

IX. Congressional Response

Not surprisingly, the *SWANCC* and *Rapanos* cases have impacted the §404 program. A 2009 EPA Inspector General's Report found that the jurisdictional confusion engendered by *SWANCC* and *Rapanos* has hampered CWA §404 enforcement.[158] In response to that report, the Obama Administration has urged Congress to address the jurisdictional "quagmire" through legislation.[159] That request led to the introduction of legislation designed to clarify the scope of CWA jurisdiction in both Houses of Congress. In June 2009, the U.S. Senate Environment and Public Works Committee reported S. 787, the Clean Water Restoration Act.[160] In April 2010, H.R. 5088, America's Commitment to Clean Water Act, was introduced in the U.S. House of Representatives.[161] Both bills would replace the phrase "navigable waters" in the

to later challenge jurisdiction, so that an applicant can move ahead expeditiously to obtain a Corps permit where the applicant determines that it is in his or her best interest to do so. The preliminary JD form does not require inclusion of the detailed information in the June 2007 guidance form to address significant nexus. "Where a permit applicant obtains a Corps proffered individual permit or permit denial, based on a preliminary JD, and where the permit applicant elects to pursue and administrative appeal the appeal, may include jurisdictional issues." In that case, the Corps will need to issue an approved JD after completing the detailed JD form.

148. EPA and the Corps will coordinate on: (1) JDs for intrastate, non-navigable, isolated waters under the interstate Commerce Clause of 33 C.F.R. §328.3(a)(3); and (2) JDs based on a finding of a significant nexus with traditional navigable waters. *See* Coordination Memo, *supra* note 118, at 1-4.

149. The Corps currently has a backlog of "5,500+" JDs and "a concomitant backlog of project proposals." Guidance Highlights, *supra* note 118, at 3. The Corps admits it does not have enough staff to handle the new significant nexus analyses in a timely manner and will have to request additional funding to "maintain the current level of protection over the Nation's aquatic resources." Guidance Q&A, *supra* note 118, at 14 (Question 40).

150. Guidance Highlights, *supra* note 118, at 3.

151. In one seminar interpreting the guidance, EPA and Corps staff encouraged applicants to provide as much of the evidence as possible. ALI-ABA, New Clean Water Act Guidance Post-*Rapanos* & *Carabell*: U.S. EPA & Army Corps Staff Explain the New Guidance, Washington, D.C. (June 29, 2007).

152. *Rapanos*, 126 S. Ct. 2208, 2248, 36 ELR 20116 (2006). Though Justice Kennedy's words seem to imply that the value of wetlands can apparently accrue from non-wetlands, the guidance interprets "similarly situated lands" as a reference to the combination of tributaries and their adjacent wetlands. *See* the guidance's definition of significant nexus, Joint Memo, *supra* note 118, at 7, and JD Form, *supra* note 118, §III.C. If the chemical, physical, or biological effects were to come from runoff from normally dry land nearby—and have nothing to do with the wetlands themselves—this new concept of geographic regulation within the CWA would undoubtedly be challenged.

153. 126 S. Ct. at 2249.

154. *Id.*

155. *Id.* at 2248.

156. Instruction Guidebook, *supra* note 118, at 72.

157. The Corps has already indicated that all wetlands adjacent to a tributary and used to support an affirmative JD for a specific tributary will also be jurisdictional under the CWA. Guidance Q&A, *supra* note 118, at 11 (Question 29).

158. Office of Inspector General, U.S. EPA, Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation, Report No. 09-N-0149 (Apr. 30, 2009), *available at* http://www.epa.gov/oig/reports/2009/20090430-09-N-0149.pdf.

159. Letter from the Heads of the Departments of the Army, Interior, Agriculture, EPA, and CEQ, to Sen. Boxer, Chair, Senate Committee on Environment and Public Works (May 20, 2009).

160. S. 787, 111th Cong. (2009).

161. H.R. 5088, 111th Cong. (2010).

CWA with a definition of "waters of the United States" not found in current law.

As amended during markup, S. 787 would replace the term "navigable waters" with "waters of the United States," including the "territorial seas." Section 4 of the bill would define the term as:

> all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds, all tributaries of any of the above waters, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.

As discussed in the findings section of the bill, S. 787 would also exclude from the new statutory definition two terms that currently are excluded from jurisdiction by regulation: "prior converted cropland" and "waste treatment systems." Prior converted croplands are wetlands that were manipulated or used to produce an agricultural commodity before December 23, 1985.[162] Waste treatment systems are treatment ponds or lagoons designed to meet CWA requirements.[163]

H.R. 5088, would define the term "waters of the United States" as:

1. all waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;
2. all interstate and international waters, including interstate and international wetlands;
3. all other waters, including 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 does or would affect interstate or foreign commerce, the obligations of the United States under a treaty, or the territory or other property belonging to the United States;
4. all impoundments of waters otherwise defined as waters of the United States under this paragraph;
5. tributaries of waters identified in clauses (1) through (4);
6. the territorial seas; and
7. waters, including wetlands, adjacent to waters identified in clauses (1) through (6).

H.R. 5088 also excludes "prior converted cropland" and "waste treatment systems," though it also provides a definition for both terms.

Opponents of S. 787 believe the legislation would expand federal CWA jurisdiction beyond interpretations that existed before *Rapanos* and *SWANCC*. The Water Action Coalition, representing business, farming, real estate, and construction industry groups, believes that S. 787 would:

- grant EPA and the Corps, for the first time ever, jurisdiction over all "intrastate waters"—essentially all wet areas within a state, including ground water, ditches, pipes, streets, municipal storm drains, gutters, and desert features subject only to undefined constitutional limits;
- grant EPA and the Corps, for the first time ever, authority over all "activities affecting these waters" (private or public), regardless of whether the activity is occurring in water or whether the activity actually adds a pollutant to the water;
- change the original intent of Congress in enacting the CWA from the Commerce Clause to the full "legislative power of Congress under the Constitution";
- conflict with CWA §§101(b) and 101(g), which state Congress' intent to "recognize, preserve, and protect the primary responsibilities and rights of the States" to control the development and use of local land and water resources and to "allocate quantities of water within [state] jurisdiction";
- eliminate the existing regulatory exemptions that were authorized by both Democratic and Republican administrations for prior converted cropland and waste treatment systems; and
- place critical regulatory decisions in the hands of constitutional lawyers and result in costly litigation regarding the scope of "intrastate waters," the extent of "activities affecting these waters," and the limit of Congress' authority under the U.S. Constitution.[164]

In his introductory remarks, Rep. James L. Oberstar (D-Minn.), who sponsored H.R. 5088, attempted to address concerns with the legislation:

> Opponents of legislation to restore the Clean Water Act characterize the restoration as a mammoth expansion of Federal power. Restoring the Clean Water Act is only an expansion to the extent the Supreme Court ignored the intent of Congress and 30 years of precedent by narrowing the Act. Opponents argue that the Federal government should not require a permit for everything you do that might affect a wet area. I agree. The Clean Water Act never required such permits and I do not offer legislation that would do so. Simply put, if it was not regulated before 2001, it will not be regulated with the enactment of the legislation.[165]

162. 7 C.F.R. §12.2.
163. 40 C.F.R. §122.2.
164. Waters Advocacy Coalition, Protect the Clean Water Act, http://protectmywater.org/ (last visited Sept. 29, 2010).
165. 156 Cong. Rec. E609 (daily ed. Apr. 21, 2010) (statement of Rep. James L. Oberstar (D-Minn.)).

Similarly, Sen. Russ Feingold (D-Wis.), who sponsored S. 787, cautioned that his legislation would not impact existing exemptions:

> My bill also maintains existing exemptions for farming, silviculture, ranching, and other activities, and leaves unchanged the activities that require a permit. The bill only ensures that the same types of waters covered before the Supreme Court decisions continue to be protected and does not affect the activities that require permits. In short, if you have not needed a permit for the last thirty-five years for an activity, you will not need one when this bill is enacted.[166]

Representative Oberstar stated that his goal was to bring H.R. 5088 to the House floor by September 2010. However, that goal was not achieved in light of the amount of unfinished business Congress already had on its plate in 2010, in addition to adjourning early to allow members time to campaign for reelection. This legislation is the fifth attempt in the House to drop the word "navigable" from the CWA.[167]

If the legislation were to pass, the legal battle would move from a debate over the meaning of the Justice Kennedy and Justice Scalia tests to a new overriding issue—whether the Commerce Clause allows the regulation of intrastate isolated, ephemeral, and intermittent streams and wetlands with no obvious connection to interstate commerce. The grounds for such a challenge were first laid in 1995 in *United States v. Lopez*,[168] when the Court declared that Congress exceeded its power to legislate under the Commerce Clause by enacting the Gun-Free School Zones Act. Next, in *United States v. Morrison*,[169] the Court found that certain provisions of the Violence Against Women Act of 1994 went beyond the scope of the Commerce Clause because the punishment of intrastate violence that is not directed at interstate commerce is a state power. Though, more recently, in *Gonzales v. Raich*,[170] the Court appeared to return to a broader reading of the Commerce Clause when it sustained a federal statute criminalizing home-grown cannabis, even where states approve its use for medicinal purposes. It remains to be seen whether the recent trend of the Supreme Court to limit the scope of Commerce Clause jurisdiction would result in a decision overturning legislation broadly regulating intrastate and isolated waters and wetlands.

X. Conclusion

Absent congressional action clarifying CWA jurisdiction, applying the principles of proximate causation and foreseeability to Justice Kennedy's significant nexus test could help to clarify what areas can and cannot be deemed jurisdictional. Proximate causation is a long-standing and accepted principle in the law and has been adopted by courts in interpreting other federal environmental laws, such as the ESA and NEPA. By applying these time-tested principles, the Corps and EPA will better achieve the intent set out by Justice Kennedy in *Rapanos*.

166. 155 Cong. Rec. S4318 (daily ed. Apr. 02, 2009) (statement of Sen. Russ Feingold (D-Wis.)).
167. Representative Oberstar and Senator Feingold were defeated in the November 2, 2010, election so it is questionable whether the legislation will be introduced in the 112th Congress.
168. 514 U.S. 549 (1995).
169. 529 U.S. 598 (2000).
170. 545 U.S. 1 (2005).