

Rapanos v. United States: Searching for a Significant Nexus Using Proximate Causation and Foreseeability Principles (Excerpt: Part II)

The following excerpt comes from the “Rapanos v. United States: Searching for a Significant Nexus” article published in the December 2010 issue of the Environmental Law Reporter News & Analysis. Due to length restrictions, the Newsletter is running two extended excerpts. The first part, published in the January/February 2011 issue, looked at applying the principles of proximate causation and foreseeability to Justice Anthony M. Kennedy’s significant nexus test to help clarify jurisdictional waters under the 2006 U.S. Supreme Court decision in Rapanos. The second part, published here, looks at proximate causation and the Rapanos Guidance issued by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers.

BY LAWRENCE R. LIEBESMAN, RAFF PETERSEN, AND MICHAEL GALANO

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.¹ But while the courts were hashing through the fine points of the *Rapanos v. United States*² decision, the agencies were also struggling to put their own stamp on it.³ Finally, in June 2007, the long-promised, long-overdue agency guidance was issued, essentially adopting both the Justice Antonin G. Scalia and Justice Anthony M. Kennedy tests.⁴ 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 authors would like to thank Steve Kelton, formerly of Holland & Knight, who contributed significantly in the preparation of this article.

The 2007 guidance, as revised in December 2008, strives to put Justice Kennedy’s test into administrative action.⁵ Written by the U.S. Army Corps of Engineers (the Corps) and the U.S. Environmental Protection Agency (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.”⁶ 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 (TNW)].”⁷

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.”⁸ 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 cur-

rently being used or have historically been used for commercial navigation, or for which evidence showing susceptibility to future commercial navigation is more 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 TNWs;
- non-navigable tributaries to TNWs that have relatively permanent flow at least seasonally, i.e., typically three months; and
- wetlands that directly abut such tributaries.⁹

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 *United States v. Riverside Bayview Homes, Inc.*¹⁰) 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 *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*.¹¹

Consistent with the relevant case law, the agencies have essentially concluded that these waters categorically do not impact the water quality of a TNW. 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.¹²

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.¹³ 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.¹⁴

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*¹⁵ defines a tributary as a natural, man-altered, or man-made water body that carries flow directly or indirectly into a TNW.¹⁶ A tributary is further defined as “the entire reach of the stream that is of the same order . . . from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream.”¹⁷ 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.”¹⁸ 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.”¹⁹ Yet, this analysis is conducted “at the farthest downstream limit of such tributary.”²⁰ 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 demonstrates 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.”²¹ Yet,

“[P]rinciples 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.”

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 for 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.²² 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.²³ 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.’”²⁴

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* provides a good case study as to the evidentiary burden for meeting the “significant nexus” standard.²⁵ 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.”²⁶ 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.”²⁷ 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].”²⁸

Applying this test, the *FD & P* court denied the Corps’ motion for summary judgment, despite the agency’s broad 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.”²⁹ 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.³⁰

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.”³¹ 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.

UNKNOWN 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.³² Moreover, the guidance is just that: guidance—not law and not a legally binding document.³³ 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.³⁴

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 process³⁵—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.³⁶ Furthermore, an additional layer of bureaucracy has been created, given EPA’s role in the coordination of some jurisdictional determinations.³⁷

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.³⁸ 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.”³⁹ 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.⁴⁰

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.⁴¹ Justice Kennedy supports broad categories of jurisdictional water as a matter of “administrative convenience or necessity.”⁴² 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.”⁴³ 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.”⁴⁴ 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.⁴⁵ 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.⁴⁶ 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 shortcuts simply to reduce their workload.

IMPACT OF *PRECON DEVELOPMENT CORP. v. U.S. ARMY CORPS OF ENGINEERS*

The recent decision of the U.S. Court of Appeals for the Fourth Circuit, *Precon Development Corp. v. U.S. Army Corps of Engineers*, (No. 09-2239) (Jan. 25, 2011), addressed the evidentiary requirements of Justice Kennedy’s significant nexus test and lends support for applying proximate causation principles in determining CWA jurisdiction. *Precon* is the most extensive analysis to date interpreting the nature and extent of the evidence needed to meet the “significant nexus” test of the *Rapanos* guidance.⁴⁷ In *Precon*, the Corps had asserted jurisdiction over 4.8 acres of wetlands more than seven miles from the nearest navigable water. The wetlands were adjacent to two drainage ditches that flowed approximately 3.11 miles to connect with a swamp that drained into the Northwest River, a TNW in Chesapeake, Virginia. The Corps found that these ditches were “relatively permanent” tributaries to the river and then aggregated the 448 acres of wetlands adjacent to the tributaries’ watershed as “similarly situated wetlands” under Justice Kennedy’s test. The Corps also found that, although a berm had “severed the direct surface water connection” between the wetlands and the ditches, the “berm had a negligible effect on the overall ecological functions that . . . all of the adjacent wetlands provide to downstream [traditionally navigable waters].”⁴⁸ The Corps then asserted jurisdiction based on a quantitative and qualitative analysis of flow and storage capacity of the ditches, concluding that the ditches and their “similarly situated adjacent wetlands” cumulatively provided significant flood flow and filtering benefits to downstream TNWs.⁴⁹ The district court upheld the Corps’ jurisdictional findings.⁵⁰

The Fourth Circuit reversed, holding that, despite the Corps’ evidence of flow and function, the evidence did not support the “Corps determination that the nexus that exists between the 448 acres of similarly situated wetlands and the Northwest River is significant.”⁵¹ The court still upheld the Corps discretion to aggregate the 48 acres of wetlands as “similarly situated” under the guidance, although questioning whether the Corps had “precisely adhered” to the guidance in identifying adjacent wetlands stretching over three miles downstream as “similarly situated.”⁵² However, it found that the record did not contain enough evidence to assess the effects of these wetlands on the ecology of the river. The court then quoted

Justice Kennedy’s language that “the significant nexus test is a flexible ecological inquiry into the relationship between the wetlands at issue and the traditionally navigable water, [noting that Justice Kennedy] clearly intended for some evidence of both a nexus and its significance to be presented.”⁵³

An analysis of the court’s opinion provides a “roadmap” for assessing the nature of the evidence needed to support a significant nexus finding. First, measurement of a tributary’s flow in retaining floodwaters is insufficient, standing alone, without “additional information regarding its significance.” Rather, the inquiry requires evidence “emphasiz[ing] the comparative relationship between the wetlands at issue, the adjacent tributary and the traditionally navigable waters.”⁵⁴ Second, there must be evidence in the record allowing review of whether the wetlands functions provide significant benefits for the TNW. For example, the *Precon* court observed that “although we know that the wetlands and their adjacent tributaries trap sediment and nitrogen and perform flood control functions, we do not know if the River suffers from high levels of nitrogen or if it is prone to flooding.”⁵⁵ Third, the Corps cannot simply expect a reviewing court to defer to its significant nexus finding. *Precon* held that, while the Corps’ factual findings are entitled to deference

“As the [*Precon*] court noted, the farther and more remote wetlands are from a TNW, the greater the extent of the evidence needed to establish significant nexus.”

under the Administrative Procedure Act’s “arbitrary and capricious” standard, “significant nexus” is ultimately a legal determination for whether wetlands adjacent to non-navigable tributaries come within the CWA’s definition of “navigable waters.”⁵⁶ Finally, the Court made clear that the physical evidence can be either quantitative or qualitative and that it did not intend to place an unreasonable burden on the Corps. However, it held that the Corps should provide sufficient documentation “which need not take the form of any particular measurements but should include some comparative information that allows us to meaningfully review the significance of the wetlands impacts on downstream water quality.”⁵⁷

The *Precon* analysis supports using the principles of proximate causation and foreseeability as a legal paradigm for evaluating the strength of the evidence needed to find a significant nexus. As the court noted, the farther and more remote wetlands are from a TNW, the greater the extent of the evidence needed to establish significant nexus. For example, as the court noted, “we can imagine . . . that wetlands next to a tributary with minimal flow might be significant to a river one quarter mile away, whereas wetlands next to a tributary with much greater flow might have only insubstantial effects on a river located twenty miles away.”⁵⁸ The “sliding scale” approach to the evidence is especially illustrated in the court’s comments about wetlands at issue in the case that were “lying along a ditch—but

separated from the ditch by a man-made berm—which eventually drained into Lake St. Claire approximately one mile downstream.”⁵⁹ The court even cited to the Corps’ own guidance on the extent of evidence issue.⁶⁰ It logically follows that the more remote a wetland is to a TNW in terms of distance, separation, and flow, the less likely the loss of that wetland would be the foreseeable “proximate cause” of impairment of the TNW’s water quality and other functions. Therefore, there would be a greater burden on the Corps in documenting whether losing the wetland’s functions and values would foreseeably contribute to the loss of the TNW’s functions and values. These principles are especially applicable to the Corps’ aggregation of similarly situated adjacent wetlands. As the *Precon* decision recognizes, the Corps cannot simply aggregate the cumulative functions and values of all wetlands adjacent to a tributary, but must also provide sufficient specific evidence comparing these aggregated wetlands to the functions performed by the TNW to conclude that their loss would have a foreseeable impact on the TNW.

CONCLUSION

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 Endangered Species Act and the National Environmental Policy Act. By applying these time-tested principles, the Corps and EPA will better achieve the intent set out by Justice Kennedy in *Rapanos*. ■

ENDNOTES

1. *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”).
2. 126 S. Ct. 2208, 36 ELR 20116 (2006).
3. 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 jurisdictional determinations (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/ArmyCorpsReactiontoRapanos.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.
4. 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. Envtl. Prot. Agency, 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).
5. 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, 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 Guid-

ance Highlights]; Questions and Answers for *Rapanos* and *Carabell* Decision (June 5, 2007, revised Dec. 2, 2008) [hereinafter Guidance Q&A]; CWA Jurisdiction Power-Point Presentation; Notice of Availability, 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).

6. Joint Memo, *supra* note 5, at 7.

7. INSTRUCTION GUIDEBOOK, *supra* note 5, at 7.

8. Joint Memo, *supra* note 5.

9. *Id.* at 4-6.

10. 474 U.S. 121, 16 ELR 20086 (1985).

11. 531 U.S. 159, 31 ELR 20382 (2001); Joint Memo, *supra* note 5, at 8, n.29, 11.

12. *Id.* at 7.

13. 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' as defined by the Corps itself." Slip. op. at 26.

14. 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 non-navigable tributaries." *Rapanos*, 126 S. Ct. 2208, 2249 (2006).

15. INSTRUCTION GUIDEBOOK, *supra* note 5.

16. *Id.* at 40.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Joint Memo, *supra* note 5, at 11.

22. *Id.*

23. Most recently, EPA found that the main stem 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, EPA Region 9 Administrator, to Carl Mark Toy, District Engineer, Los Angeles District.

24. *Rapanos*, 126 S. Ct. 2208, 2248, 36 ELR 20116 (2006).

25. 239 F. Supp. 2d 509, 33 ELR 20140 (D.N.J. 2003).

26. *Id.* at 516.

27. *Id.*

28. *Id.* at 517.

29. *Id.*

30. *Id.*

31. INSTRUCTION GUIDEBOOK, *supra* note 5, 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 5, 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 5, §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 5, at 9.

Chemical characteristics include:

- water color (oily film, discolored, etc.).
- water quality.
- the names of pollutants. JD Form, *supra* note 5.

The above factors and more have been incorporated into the revised JD form. See JD Form, *supra* note 5, §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 5, at 10.

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

33. See Joint Memo, *supra* note 5, at 4, n.16.

34. The U.S. Court of Appeals for 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's 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).

35. *Rapanos*, 126 S. Ct. 2208, 2214, 36 ELR 20116 (2006).

36. 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 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 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 issue an approved JD after completing the detailed JD form.

37. 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 5, at 1-4.

38. The Corps currently has a backlog of "5,500+" JDs and "a concomitant backlog of project proposals." Guidance Highlights, *supra* note 5, 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 5, at 14 (Question 40).

39. Guidance Highlights, *supra* note 5, at 3.

40. 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*: EPA & Army Corps Staff Explain the New Guidance, Washington, D.C. (June 29, 2007).

Continued on page 28

FIELD INDICATORS OF HYDRIC SOILS IN THE UNITED STATES, VERSION 7.0 (Leonore M. Vasilas et al., eds. 2010).

U.S. DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICE, LAND RESOURCE REGIONS AND MAJOR LAND RESOURCE AREAS OF THE UNITED STATES, THE CARIBBEAN, AND THE PACIFIC BASIN, AGRICULTURAL HANDBOOK 296 (USDA 2006).

WAKELEY, JAMES S., DEVELOPING A "REGIONALIZED" VERSION OF THE CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL: ISSUES AND RECOMMENDATIONS, ERDC/EL TR-02-20 (U.S. Army Engineer Research and Development Center 2002).

Significant Nexus, from page 19

41. *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 5, at 7, and JD Form, *supra* note 5, §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.

42. 126 S. Ct. at 2249.

43. *Id.*

44. *Id.* at 2248.

45. INSTRUCTION GUIDEBOOK, *supra* note 5, at 72.

46. 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 5, at 11 (Question 29).

47. The Fourth Circuit covers the states of Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

48. *Precon Development Corps. v. U.S. Army Corps of Engineers*, No. 09-2239, slip op. at 25 (Jan. 25, 2011).

49. *Id.* at 9.

50. 658 F. Supp. 2d 752 (E.D. Va. 2009).

51. *Precon*, slip op. at 27.

52. The Court stated that "we recognize that Justice Kennedy's instruction—that "similarly situated lands in the region can be evaluated together—is a broad one, open for considerable interpretation and requiring some ecological expertise to administer." *Id.* at 22.

53. *Id.* at 25.

54. *Id.* at 26.

55. *Id.* at 27.

56. *Id.* at 29.

57. The court cited to the decisions of the U.S. Court of Appeals for the Sixth and Ninth Circuits as "good examples of the types of evidence—either quantitative or qualitative—that could suffice to establish 'significance.'" *Id.* at 28-29 (Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007) (significant nexus test met after district court found "increased chloride levels in the relevant navigable water from 5.9 parts per million to 18 parts per million due to chlorine seepage from the wetlands in question into the navigable river.") *Precon*, slip op. at 29; *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009) (Sixth Circuit's opinion rested on evidence that the wetlands' "acid mine drainage storage capabilities and flood storage capabilities had 'direct and significant' impacts on the [Green River].") Slip op. at 27.).

58. *Precon*, slip op. at 26.

59. *Id.* at 28. The Court cited to *Carabell v. Corps*, 126 S. Ct. 2208 (2006) the companion case to *Rapanos*, noting

that the "geography of these wetlands at issue places them squarely in that category of wetlands over which jurisdiction is no longer assured." [noting that the wetlands were "considerably more removed from traditionally navigable waters than the wetlands at issue in *Carabell*"] *Id.*

60. The Corps' guidance states that, "as the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a traditionally navigable water." *Id.* at 28.

IN THE NEWS

WETLAND ECOSYSTEM AUTHORITY, HGM PIONEER DIES

One of wetland science's greatest authorities on wetland ecosystems, Dr. Mark Brinson, who also pioneered a system of hydrogeomorphic (HGM) classification of wetlands, unexpectedly died on January 3, 2011. He is survived by his wife of 40 years, his son and daughter-in-law, and one grandchild. Dr. Brinson retired as a Distinguished Research Professor at East Carolina University, and had received numerous accolades and honors over the course of a remarkable career. An obituary written by his friend and colleague, Bob Christian, is available on the East Carolina University website, at www.ecu.edu.

OIL SPILL PANEL ISSUES REPORT

President Barack Obama's National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling issued its findings and recommendations on the BP Deepwater Horizon oil spill in the Gulf of Mexico. In addition to the panel's numerous recommendations for improving oversight and risk management, it also outlined several ways to improve environmental protection in relation to offshore drilling, including an increased role for interagency coordination between the National Oceanic and Atmospheric Administration (NOAA), the U.S. Fish and Wildlife Service, and the U.S. Environmental Protection Agency (EPA). The panel suggested that the U.S. Congress amend the Outer Continental Shelf Lands Act to provide NOAA with a formal consulting role in drill leasing stages, where NOAA issues recommendations concerning ecologically sensitive areas and the U.S. Department of the Interior (DOI) incorporates them or, if the DOI chooses to reject the recommendations, publishes its rationale for doing so.

It also recommended that the U.S. Department of Energy, NOAA, the U.S. Geological Survey, and other agencies create a joint research program to provide a comprehensive scientific basis for oil and gas leasing. The panel also called for the DOI to improve its oil spill risk analysis and planning process by creating a new review process to ensure "that all critical information and spill scenarios are included," that a new entity will "verify operator capability to perform according to the plans," and that oil spill response plans be subject to interagency review and approval. The panel also called on EPA and the U.S. Coast Guard to establish distinct procedures for responding to a "Spill of National Significance," which would entail augmenting the National Response Team and Regional Response Team structures to provide interagency scientific and policymaking expertise during a spill, create a communications protocol, and strengthen the role for state and local government involvement in planning and response. The panel called on EPA to "update and periodically review its dispersant testing protocols for product listing or pre-approval, and modify the pre-approval process to include temporal duration, spatial reach, and volume of the spill." Furthermore, the panel recommended that offshore barrier berms no longer be authorized as an oil spill response measure due to their ineffectiveness. Read the entire report at www.oilspillcommission.gov/final-report.

NWF RELEASES CLIMATE-SMART CONSERVATION DECISION REPORT

The National Wildlife Federation released a new report in January 2011, *Scanning the Conservation Horizon: A Guide to Climate Change Vulnerability Assessment*, to help natural resource managers and conservationists understand the impacts of climate changes and how to safeguard natural resources. The report is a peer-reviewed product of leading scientists from government, nonprofits, and academia. It includes: an overview of the general principles of climate change vulnerability in relation to species, habitats, and ecosystems; descriptions for the scientific methods available for assessing vulnerability; and examples of vulnerability assessments carried out by a variety of stakeholders. The report is available at www.nwf.org/vulnerabilityguide.