

What Went Wrong in *San Francisco Baykeeper v. Cargill Salt Division*?
The Ninth Circuit's Weak Reading of Kennedy's *Rapanos* Concurrence, and a Prescription for Litigating Clean Water Act Claims under *Rapanos*

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The Supreme Court's split decision in Rapanos v. United States left the lower courts with the question of whether to apply the plurality's restrictive test for determining which waters are protected under the Clean Water Act (CWA), or whether to use Justice Kennedy's more flexible, policy-based test. For those courts intending to follow Kennedy's concurrence, the parameters of his "significant nexus" test were far from explicit. In Baykeeper v. Cargill Salt Division the Ninth Circuit relinquished its first opportunity to apply the significant nexus test expansively in order to keep the CWA potent as a tool for environmental protection. The best remaining approach for litigants seeking to establish CWA coverage of non-navigable-in-fact waters that are not wetlands is to proceed under the theory that such waters are tributaries with a significant nexus to navigable waterways, pressing this language into service in the broadest array of hydrological scenarios possible.

- I. The Waters of the United States: Background to *Baykeeper*..... 532
 - A. What is at Stake: Threats to the Clean Water Act by *Rapanos* and *Baykeeper*..... 532
 - B. Pre-*Rapanos* Interpretations of "The Waters of the United States" and the Origins of the Significant Nexus Test..... 537

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C.	The Divided <i>Rapanos</i> Opinion	539
II.	<i>Baykeeper</i> Court Nods to Kennedy, But Misses its Chance to Read <i>Rapanos</i> Broadly	542
A.	The <i>Baykeeper</i> Holding	542
B.	The <i>Baykeeper</i> Court's Dodge and Its Consequences	545
C.	What Could Have Been	547
III.	Confusion and Conflict in Current Interpretations of <i>Rapanos</i>	549
A.	Whose Opinion Counts?	549
B.	The Specter of a Weak Clean Water Act: Courts Shy from the <i>Rapanos</i> Plurality	550
C.	A Slightly Stronger Clean Water Act: Decisions Following Kennedy's Concurrence	550
D.	The Compromise Approach: Case-by-Case and Either/Or Decisions	553
E.	The Open Question: Is Significant Nexus Just for Wetlands, or Will Courts Use It for Tributaries and Other Adjacent Waters, too?	554
IV.	The Untapped Potential of Justice Kennedy's Significant Nexus Test	554
A.	A Hypothetical Case	554
B.	A Proposal: Guidelines for Applying the Significant Nexus Test to Tributaries and Non-Wetland Adjacent Waterways	555
	Conclusion	556

I. THE WATERS OF THE UNITED STATES: BACKGROUND TO *BAYKEEPER*

A. *What is at Stake: Threats to the Clean Water Act by Rapanos and Baykeeper*

In 2006, the Supreme Court issued a divided and controversial decision in *Rapanos v. United States*¹ that inarguably altered the scope of the Clean Water Act's (CWA) wetlands protection. The precise effect of the decision, however, was uncertain at the time it was issued and in many respects remains unclear today. The Ninth Circuit recently grappled with the conflicted *Rapanos* opinion in *San Francisco Baykeeper v. Cargill Salt Division (Baykeeper)*,² a case that offered that Circuit Court an opportunity to interpret the Supreme Court's vague directives in a way that that would have preserved regulatory agencies' power under the statute to curb pollution in many types of bodies of water. Unfortunately, the court squandered this chance by refusing to construe *Rapanos* as broadly as possible. While adopting the "significant nexus" test

1. 547 U.S. 715 (2006).

2. 481 F.3d 700 (9th Cir. 2007).

proposed in Justice Kennedy's *Rapanos* concurrence would have upheld the agencies' ability to prevent pollution of a wider range of waters, including the pond at stake in *Baykeeper*, the Court of Appeals refused to apply the test to the *Baykeeper* facts. The court thus eliminated one option for strengthening the CWA.

The CWA, which prohibits the discharge of pollutants³ into "navigable waters,"⁴ leaves that term undefined, other than to equate "navigable waters" with "the waters of the United States, including the territorial seas."⁵ In effectively identical sets of regulations, the Act's administering agencies, the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA), have hammered out more precise definitions of "waters of the United States." In addition to navigable-in-fact waters, the regulatory lists currently include tributaries of such waters and wetlands adjacent to waters otherwise covered by the Act.⁶

The agencies' regulations are both the result and the cause of perpetual litigation over the finer distinctions between what are and are not the waters of the United States, a question whose answers determine the scope and power of the CWA. The debate culminated—or, perhaps, reached a nadir—recently in the Supreme Court's fractured and incoherent opinion in *Rapanos*. The case

3. Clean Water Act § 301, 33 U.S.C. § 1311(a) (2006).

4. *Id.* § 502(12), 33 U.S.C. § 1362(12).

5. *Id.* § 502(7), 33 U.S.C. § 1362(7).

6. Definitions for the EPA's National Pollutant Discharge Elimination System read as follows:
Waters of the United States or waters of the U.S. means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate 'wetlands;'

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, 'wetlands,' sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) 'Wetlands' adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

40 C.F.R. § 122.2 (2008).

required the Court to rule on whether all wetlands adjacent to navigable waters—wetlands which were included in both the EPA's⁷ and the Corps'⁸ regulations defining “the waters of the United States,”—merited CWA coverage. As discussed in more detail below, the Court failed to issue a majority opinion and left lower courts without a clear path to follow. Although the plurality, which would eliminate CWA coverage for non-navigable waters unless a “continuous surface connection” linked them to traditionally navigable waters,⁹ and Justice Kennedy's concurrence both set new limits on the CWA's reach, their respective tests for CWA coverage could lead courts to opposite conclusions, and no clear rule explains which of these opinions courts should use as controlling precedent.

Even after the various Courts of Appeal choose between the *Rapanos* plurality and the concurrence, however, they will face the conundrum of how exactly to impose the new restrictions on CWA coverage. This will require addressing the difficult question of how to uphold the ambitious goals of the Act while excluding from its reach water bodies whose connections to

7. See Clean Water Act § 502(12), 33 U.S.C. § 1362(12) (2006).

8.

The term waters of the United States means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

33 C.F.R. § 328.3(a) (2008).

9. 547 U.S. 715,742 (2006).

navigable-in-fact waters are so tenuous that the statute should not protect them. The Kennedy concurrence, which attempts to take into account the policy underlying the Act and has so far received at least a passing or partial endorsement from even the most confused and hostile lower courts,¹⁰ announced that the CWA's coverage of wetlands adjacent to navigable waters depends on whether a "significant nexus" exists between the wetland and waters otherwise covered by the Act.¹¹ What exactly characterizes this nexus, whether the test applies to non-wetlands whose CWA coverage is disputed, and how markedly the test's widespread application will reshape CWA jurisprudence, remain open and unsettling questions.

Unlike the highly restrictive plurality opinion, Justice Kennedy's *Rapanos* concurrence leaves intact a degree of administrative and judicial discretion, introducing a flexible test that allows courts and agencies to assess CWA applicability with an eye to the Act's broad protective mandate. In *Baykeeper*, however, the Ninth Circuit relinquished its first opportunity to use the significant nexus test to keep the CWA potent as a tool for environmental protection. The Court of Appeals declined to apply the significant nexus test outside the narrow spectrum of cases involving wetlands adjacent to navigable-in-fact waters.¹² In doing so, the court read Kennedy's concurrence very conservatively.¹³ It rejected an argument that the significant nexus test could justifiably be used to evaluate CWA coverage of *non*-wetland waters adjacent to navigable waters because pollution of any waterway adjacent to navigable waters, regardless of its wetlands status, raises equivalent water-quality concerns.¹⁴

By closely examining the arguments in favor of CWA coverage rejected in *Baykeeper* alongside the outcomes of the few CWA cases that have reached the courts since *Rapanos*, this Note seeks to articulate some of the early ramifications of *Rapanos*, and to show that the Ninth Circuit in *Baykeeper* took a guarded middle path that may constrain the lower courts' efforts to apply Kennedy's test. Following this exploration of *Baykeeper*, the Note attempts to identify the best litigation strategy for establishing CWA jurisdiction under the significant nexus test, and for stretching that test to its most environmentally

10. See, e.g., *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *Simsbury-Avon Pres. Soc'y, L.L.C. v. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219 (D. Conn. 2007), *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006).

11. *Rapanos v. United States*, 547 U.S. 715, 782 (2006).

12. *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 702 (9th Cir. 2007).

13. *Id.* at 707.

14. *Id.* at 708. In its brief to the Ninth Circuit, *Baykeeper* argued that the district court "properly analogized the Pond to the 'adjacent wetland' regulation approved by the Supreme Court, noting that, if a wetland in the Pond's location would be entitled to CWA protection, which it indisputably would be, a waterbody in the same location also should be." [Proposed] Brief Of Plaintiffs San Francisco Baykeeper And Citizens Committee To Complete The Refuge As Appellees And Opening Brief As Cross-Appellants, at 18, *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700 (9th Cir. 2007) (Nos. 04-17554 and 05-15051).

protective dimensions. Unfortunately, *Baykeeper* appears to have definitively closed a door on the possibility of expanding the significant nexus test to encompass non-wetlands adjacent to navigable waters. However, the *Baykeeper* court's reluctance to take an activist stance and rehabilitate the CWA by applying the significant nexus test in a non-wetlands context does not mean such a thing is impossible.

In fact, the EPA and the Corps themselves have announced that they will do so, using the significant nexus test when evaluating CWA coverage under both an adjacent wetlands theory or a tributary theory.¹⁵ That is to say, the agencies' regulatory definitions of "the waters of the United States" includes both "wetlands adjacent to waters" otherwise covered by the Act,¹⁶ and "tributaries of waters" otherwise covered under other provisions of the Act.¹⁷ The agencies (or other parties seeking to enforce the statute) may make different arguments concerning the characteristic of a given body of water, depending on which theory of CWA coverage they are asserting, as discussed in detail below. As *Baykeeper* makes clear, selecting which theory to proceed under may have severe consequences under *Rapanos*, but the EPA and Corps' joint Guidance attempts to mitigate the potentially harsh consequences of *Rapanos* and create a more consistent standard for determining CWA coverage by using the significant nexus test to identify both tributaries and adjacent wetlands that merit CWA protection.

In light of these developments, this Note follows its examination of *Baykeeper* by envisioning a hypothetical water formation that neither qualifies as an adjacent wetland nor is a permanently-flowing tributary, and argues that the best remaining approach for establishing CWA jurisdiction is now an aggressive attempt to identify the water body in question as a tributary with a significant nexus to undisputedly navigable waters. It also outlines the factors that have been endorsed by the administering agencies and will most likely emerge as essential to reaching significant nexus determinations in borderline cases.

15.

The agencies' assertion of jurisdiction over *non-navigable tributaries and adjacent wetlands* that have a significant nexus to traditional navigable waters is supported by five justices. . . . While Justice Kennedy's opinion discusses the significant nexus standard primarily in the context of wetlands adjacent to non-navigable tributaries, his opinion also addresses Clean Water Act jurisdiction over tributaries themselves. . . . In considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters.

U.S. EPA & U.S. ARMY CORPS OF ENGINEERS, JOINT GUIDANCE MEMORANDUM: CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES* 7–8, June 5, 2007, available at <http://www.epa.gov/wetlands/guidance/CWAwaters.html> (emphasis added) [hereinafter JOINT GUIDANCE MEMORANDUM].

16. See 40 C.F.R. § 122.2(g) (2008); 33 C.F.R. 328.3(a)(7) (2008).

17. See 40 C.F.R. § 122.2(e); 33 C.F.R. 328.3(a)(5).

B. *Pre-Rapanos Interpretations of “The Waters of the United States” and the Origins of the Significant Nexus Test*

The phrases “waters of the United States” and “navigable waters” are ambiguous yet crucial to the CWA’s potency. Their meanings have been regularly disputed in litigation and reinterpreted by the courts since even before the Act existed. This section traces the evolving understanding of the phrase “navigable waters,” a long history out of which the term “significant nexus” first emerged. *Rapanos*, the latest high court effort to clarify these terms, is part of this history, and the Kennedy concurrence has brought the term “substantial nexus” to the forefront of CWA litigation for the first time. However, as discussed below, *Rapanos* is likely to have made the meanings of both “the waters of the United States” and “substantial nexus” more obscure than before.

Prior to the environmental movement of the 1960s and 1970s out of which the CWA emerged, the United States Supreme Court endorsed the traditional interpretation of “navigable waters” of the United States in cases concerning the scope of federal licenses for commercial use of waterways as those that could actually be navigated and used in interstate commerce.¹⁸ After high profile water-pollution scares galvanized the federal government,¹⁹ Congress passed the Clean Water Act Amendments in 1972, creating the permitting scheme that exists today.²⁰ The agencies charged with administering the Act issued regulations claiming jurisdiction over broadly-defined navigable waters soon after, though not until after the Natural Resources Defense Council sued the Corps in federal court to force it to widen its definition of “the waters of the United States” in order to better serve the Act’s purpose.²¹

The Court first endorsed the Corps’ assertion of authority over wetlands adjacent to navigable waters in *United States v. Riverside Bayview Homes, Inc.* (*Riverside Bayview*).²² The *Riverside Bayview* Court called the agency’s definition of navigable waters “reasonable” in light of Congress’ ambitions for the 1972 Amendments, which it found was intended “to restore and maintain

18. See, e.g., *The Daniel Ball*, 77 U.S. 557, 563 (1870) (defining “navigable waters of the United States within the meaning of the acts of Congress” as those that form “a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water”); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 n.21, 407 (1940) (Waters “constitute navigable waters of the United States within the meaning of the acts of Congress . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water,” although “[t]o appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered.”)

19. Gregory T. Broderick, *From Migratory Birds to Migratory Molecules: The Continuing Battle Over the Scope of Federal Jurisdiction Under the Clean Water Act*, 30 COLUM. J. ENVTL. L. 473, 479 (2005).

20. *Id.* at 481–82.

21. Jonathan H. Adler, *Reckoning with Rapanos: Revisiting “Waters of the United States” and the Limits of Federal Wetland Regulation*, 14 MO. ENVTL. L. & POL’Y REV. 1, 3–4 (2006).

22. 474 U.S. 121 (1985).

the chemical, physical, and biological integrity of the Nation's waters."²³ Justice White acknowledged the facial inconsistency of interpreting "waters" to include certain "lands," but emphasized the role of wetlands in maintaining water quality and concluded that "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority."²⁴ Finding the Corps' construction of the statute reasonable in light of these policy goals, the Court ruled that the landowner was required to apply to the Corps for a permit before filling wetlands on his property.²⁵ Because the regulations were reasonable, and because the Corps' definition of wetlands adjacent to navigable waters did not, as the developer asserted, comprise only those wetlands inundated or frequently flooded by their adjacent navigable waters,²⁶ the question of whether the property fell within the Corps' authority was "an easy one."²⁷

Sixteen years later, in *Solid Waste Agency v. United States Army Corps of Engineers (SWANCC)*,²⁸ the Court revealed the limits of its willingness to defer to the agencies' interpretation of the CWA, and first used the term "significant nexus" to describe a required connection between traditionally navigable waters and a water body the agency claimed was covered by the Act. The *SWANCC* court invalidated the Corps' Migratory Bird Rule, in which the Corps claimed Section 404(a) permitting authority²⁹ extended to all waters "[w]hich are or would be used as habitat" by migratory birds covered by international treaties, by migratory birds that otherwise cross state lines, or by endangered species, as well as waters used to irrigate crops sold in interstate commerce.³⁰ By defining "the waters of the United States" so broadly as to render meaningless the word "navigable" in the statute, the Court explained, the Corps had exceeded its authority.³¹ Although the *Riverside Bayview* court had acknowledged that the word "navigable" had "limited effect," the *SWANCC* Court refused to completely sever CWA jurisdiction from the concept of navigability: "[I]t is one thing to give a word limited effect and quite another to give it no effect whatever. The 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 had been navigable-in-fact or which could reasonably be so made."³²

23. *Id.* at 133 (citing 33 U.S.C. § 1251 (1972)).

24. *Id.* at 132–33.

25. *Id.* at 139.

26. *Id.* at 129. "[T]he regulation could hardly state more clearly that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to and does support wetland vegetation." *Id.* at 129–30.

27. *Id.* at 129.

28. 531 U.S. 159 (2001).

29. Section 404(a) of the Clean Water Act authorizes the Corps to issue permits allowing the "discharge of dredged or fill materials into the navigable waters." 33 U.S.C. § 1344(a) (2006).

30. Final Rule for Regulatory Program of the Corps of Engineers, 51 Fed. Reg. 41,217 (Nov. 13, 1986) (codified at 40 C.F.R. § 6328.3(a)(3)).

31. *SWANCC*, 531 U.S. at 174.

32. *Id.* at 172.

SWANCC did not resolve the question of exactly where CWA jurisdiction ends. In the gap between the adjacent wetlands in *Riverside Bayview*, over which the Corps' authority was upheld, and the isolated ponds in SWANCC, no longer covered once the Court rejected the Migratory Bird Rule, a number of waters remained whose status was unclear. These included bodies of water that could be traced to navigable waters but whose characterization as a tributary or an adjacent wetland could be disputed. Without venturing beyond the facts at hand, the SWANCC court did hint that a requirement for establishing CWA coverage might be the "significant nexus" it had found between the adjacent wetlands and navigable waters in *Riverside Bayview*, and which did not exist in SWANCC.³³ Justice Rehnquist did not elaborate on the term, but perhaps its vagueness formed some of its appeal, as it survived SWANCC to emerge as key in the next major CWA case to reach the Court.

C. *The Divided Rapanos Opinion*

The Supreme Court's most recent decision bearing on the definition of "waters of the United States" is perhaps most remarkable for its lack of a majority opinion. It leaves the lower courts with at least one and likely two quandaries: Which opinion controls? And, for courts that choose to follow Justice Kennedy's more environmentally promising concurrence, how should the inexact test he proposes be applied?

Rapanos arrived at the Court as a consolidation of two appeals court cases, *United States v. Rapanos*³⁴ and *Carabell v. United States Army Corps of Engineers*.³⁵ Both involved challenges to the Corps' assertion of permitting authority under section 404(a). John Rapanos, a Michigan landowner, had sought to backfill his property and had been told he could not proceed without a permit from the Corps. The agency claimed section 404(a) coverage because Rapanos' parcel, with its "sometimes-saturated"³⁶ soil, lay next to and drained into a tributary of a navigable water body ten miles away.³⁷ The Carabells, also Michigan landowners, objected after the Corps denied them a permit to fill wetlands that abutted a ditch that "connects to a drain that empties into a creek which eventually connects to" a traditionally navigable lake.³⁸

With the tone of a man arguing sense to a roomful of hysterics, Justice Scalia wrote the plurality opinion, announcing that the lower courts must no longer have room to uphold the Corps' "sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries'" as they had done since

33. *Id.* at 167.

34. 376 F.3d 629 (6th Cir. 2004).

35. 391 F.3d 704 (6th Cir. 2004).

36. *Rapanos v. United States*, 547 U.S. 715, 720 (2006).

37. Adler, *supra* note 21, at 9–10.

38. *Id.* at 9.

SWANCC.³⁹ Making a passing and spurious distinction between EPA permits for pollutant discharge and the section 404(a) permits at issue, Scalia dismissed the water quality effects of the dredge and fill material discharges regulated under section 404(a), which “unlike traditional water pollutants, [he claimed] are solids that do not readily wash downstream.”⁴⁰ Citing a 1954 dictionary definition of “waters,”⁴¹ and conjuring images of the federal government regulating “puddles,”⁴² the plurality announced that the Corps in practice had “stretched the term ‘waters of the United States’ beyond parody” and violated the “plain language” of the statute.⁴³

The plurality split its analysis of which waters are covered into two parts. First, it redefined “waters of the United States” or “navigable waters,” holding that the Act “confers jurisdiction only over relatively *permanent* bodies of water.”⁴⁴ In other words, “waters of the United States” means only “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’”⁴⁵

Second, the plurality narrowed the category of “wetlands adjacent to” otherwise covered waters, and therefore encompassed by the regulatory definitions of “the waters of the United States.” After first determining whether both a wetland and a navigable water (according to the new, “relatively permanent body of water connected to traditional interstate navigable water” definition⁴⁶) exist, the plurality would then decide whether the two could properly be considered “adjacent.” A “mere hydrologic connection” between a wetland and a nearby navigable water would not establish adjacency.⁴⁷ Instead, adjacent wetlands must show a “continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands.”⁴⁸

39. *Rapanos*, 547 U.S. at 726.

40. *Id.* at 723. Justice Scalia later denied that the plurality’s holding would frustrate EPA enforcement of the National Pollutant Discharge Elimination System (NPDES), even though the new, narrow, definitions would apply to the entire CWA, because courts could still find that “traditional” pollutants had been added to navigable waters in violation of 33 U.S.C. § 1342 when the pollutants had washed downstream into navigable waters, a scenario he insists is unlikely in the case of dredged or fill materials directly at issue in *Rapanos*. *Id.* at 743–45. For purposes of section 1342, intermittently flowing waterways would no longer qualify as “waters of the United States,” but could be depicted as “conveyances” or “point sources” in order to establish violations of the Act. *Id.* at 743. Justice Kennedy, discussing the implications if the plurality were to control, objected to the “assumption” that dredged or fill material “will stay put” and suggested that agency expertise is more appropriate than the plurality’s speculation on the matter. *Id.* at 775. The dissent also disputed this contention. *Id.* at 806–07.

41. *Id.* at 732.

42. *Id.* at 733.

43. *Id.* at 734.

44. *Id.*

45. *Id.* at 739 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

46. *Id.* at 742.

47. *Id.* at 740.

48. *Id.* at 742.

Had it been the controlling opinion, the plurality's restrictive interpretation of the statute and its supporting regulations could have drastically curtailed the administering agencies' abilities to regulate water quality. It would have removed the agencies' jurisdiction over countless waterways that had previously fallen within the Act's reach. Because of the 4-1-4 split, though, the plurality is not the Court's final word. Its influence in the lower courts is likely to be minimal compared to that of Justice Kennedy's concurrence, which proposed a much less draconian, though also much less clear-cut, test for CWA coverage.

Citing *SWANCC* as precedent, Justice Kennedy argued that waters (including wetlands) fall within the definition of "the waters of the United States" only when they "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."⁴⁹ Justice Kennedy thus endorsed a case-by-case analysis of significant nexus, which means an assessment of whether "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"⁵⁰ A wetland fails the test if its "effects on water quality are speculative or insubstantial."⁵¹ The significant nexus test becomes necessary, Kennedy noted, only when the wetlands are remote from navigable waters (such as when they adjoin non-navigable tributaries or drainage channels); for wetlands directly adjacent to navigable-in-fact waters, the Corps has established an "inference of ecologic interconnection" and need not go further.⁵²

While Justices Kennedy, Roberts, Scalia, Alito and Thomas all agreed that the cases must be remanded to the Sixth Circuit, four justices dissented from the judgment, and would have upheld the Corps' assertion of jurisdiction over both the Rapanos and Carabell properties. In dissent, Justice Stevens argued that *Chevron* deference to the agency's construction of the Act was due, and that wetlands adjacent to any tributary or navigable water should fall within the Act's scope, consistent with the Court's decision in *Riverside Bayview*.⁵³ Rejecting completely the plurality's conditions, which it called "revisionist"⁵⁴ and "utterly unpersuasive,"⁵⁵ Justice Stevens conceded some common ground with Justice Kennedy, but insisted that Kennedy withheld proper deference to the agency.⁵⁶ Implying that Justice Kennedy's "judicially crafted" test is inappropriate and superfluous, Stevens suggested that wetlands adjacent to

49. *Id.* at 759.

50. *Id.* at 780.

51. *Id.*

52. *Id.*

53. *Id.* at 788.

54. *Id.* at 793.

55. *Id.* at 800.

56. *Id.* at 810.

tributaries under the pre-*Rapanos* standards “generally have a ‘significant nexus’ with the traditionally navigable waters downstream” anyway.⁵⁷ He therefore predicted that Justice Kennedy’s concurrence will “probably not do much to diminish the number of wetlands covered by the Act,” but will increase uncertainty and paperwork for both landowners and the agencies.⁵⁸ Finally, Justice Stevens proposed that, although lower courts are likely to view Justice Kennedy’s concurrence as controlling, they should uphold agency assertions of jurisdiction when either the plurality’s or the concurrence’s tests are met.⁵⁹

II. *BAYKEEPER* COURT NODS TO KENNEDY, BUT MISSES ITS CHANCE TO READ *RAPANOS* BROADLY

A. *The Baykeeper Holding*

In *Baykeeper*, the Ninth Circuit sharply limited the adjacency theory of CWA coverage; its decision constrained the potential scope of the CWA by ruling that a body of water is a protected “water[] of the United States” by virtue of its adjacency to other protected waters *only* when it is a wetland.⁶⁰ The Court of Appeals thus reversed the District Court, which had granted summary judgment in favor of the plaintiff environmental group on the grounds that ponds adjacent to navigable waters should be protected for the same reasons justifying protection of adjacent wetlands.⁶¹

In a 1996 citizen suit, conservation organization San Francisco Baykeeper and others⁶² alleged that the defendant Cargill had, without a permit, discharged pollutants into one of the waters of the United States, violating sections 1311 and 1342(p)(2)(B) of the CWA.⁶³ Cargill generates waste residue as a byproduct of the salt production process it employs, evaporating water from the San Francisco Bay in a series of ponds.⁶⁴ Cargill maintains a waste containment facility within the Don Edwards San Francisco Bay Wildlife Refuge (“the Refuge”), where it holds an easement to operate.⁶⁵ One such pond (“the Pond”), which receives waste from an elevated waste pile during times of heavy rainfall, is adjacent to the Mowry Slough (“the Slough”) and separated

57. *Id.* at 808.

58. *Id.* at 808–09.

59. *Id.* at 810. Justice Stevens acknowledged, however, that a water body falling within the plurality’s definition of “waters of the United States” but not passing Justice Kennedy’s test is “unlikely.” *Id.* at 810, n.14.

60. San Francisco Baykeeper v. Cargill Salt Div., 481 F.3d 700, 702 (9th Cir. 2007).

61. *Id.* at 703.

62. Plaintiffs-Appellees in the Ninth Circuit case were San Francisco Baykeeper, Citizens Committee to Complete the Refuge, and Michael R. Lozeau, collectively referred to hereinafter as “Baykeeper.”

63. *Baykeeper*, 481 F.3d at 703 n.1.

64. *Id.* at 702.

65. *Id.*

from it by an earthen levy.⁶⁶ The Pond is a non-navigable, intrastate body of water and has not been determined⁶⁷ to be a wetland.

Baykeeper initially won a motion for summary judgment under the theory that the Pond was a protected water under the EPA's Migratory Bird Rule, but this victory was overturned by the Supreme Court's invalidation of the Migratory Bird Rule in *SWANCC*.⁶⁸ Baykeeper then alleged an alternative theory of CWA coverage: it argued that the Pond is among the "waters of the United States" by virtue of its adjacency to the Slough, which the parties agreed is a navigable tributary of the San Francisco Bay.⁶⁹ The District Court found three characteristics of the water bodies in question to be undisputed facts: 1) the Pond was adjacent to the Slough, 2) the ground between them was saturated, and 3) water leaked between the two bodies at high tide, allowing water from the Slough into the Pond.⁷⁰ Before the court finalized this second grant of summary judgment, the parties entered into a contingent settlement agreement that proposed remedies the parties might consider pending further proceedings and appeals; in it Baykeeper waived its right to revisit its claims against Cargill under any other theory of CWA jurisdiction.⁷¹

The Court of Appeals' reversal of the District Court decision rested on a narrow reading of the EPA regulations and on *Chevron* deference to the agency's refusal to assert jurisdiction over the Pond. Citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁷² and *United States v. Mead Corp.*,⁷³ the court first noted that the administering agency had been granted the implicit authority to interpret the CWA and its interpretation was entitled to deference unless it was "not reasonable."⁷⁴ Here, *Chevron* deference was particularly appropriate, according to the court, because the determination of which areas the CWA will cover demands expert knowledge and policy-weighting that the agencies are uniquely equipped to handle.⁷⁵ Baykeeper's reference to *Riverside Bayview* was inapposite, according to the court, because that case left intact the Corps' reasonable determination that wetlands adjacent to navigable waters should be covered by the CWA, and thus did not disturb

66. *Id.*

67. *Id.*

68. *Id.* at 703.

69. *Id.* at 702-03.

70. *Id.* at 703.

71. *Id.* at 704. Baykeeper had previously won a motion for summary judgment in the District Court based on the theory that the CWA applied under the Migratory Bird Rule, but the 9th Circuit subsequently vacated this ruling in light of *SWANCC* and remanded in order to determine whether other grounds for CWA jurisdiction existed, at which point Baykeeper turned to its adjacency theory. *Id.* at 703.

72. 467 U.S. 837 (1984).

73. 533 U.S. 218 (2001).

74. 481 F.3d 700, 705 (9th Cir. 2007).

75. *Id.* at 706.

the Supreme Court's jurisprudence on deference to agency interpretations of statutes.⁷⁶

The court also rejected Baykeeper's contention that it should apply Kennedy's "significant nexus" test.⁷⁷ Citations to *SWANCC* and to Kennedy's concurrence in *Rapanos* failed to convince the court, which remained focused on deference and explained that neither establishes precedent for overturning an agency interpretation of "waters of the United States" in order to impose the test without a showing that the agency action was unreasonable.⁷⁸

Baykeeper's efforts to bring several other cases to bear failed as well, because they concerned either tributary jurisdiction (*Headwaters, Inc. v. Talent Irrigation District*⁷⁹) or wetlands adjacency (*Baccarat Fremont Developers, L.L.C. v. United States Army Corps of Engineers*,⁸⁰ *Northern California River Watch v. City of Healdsburg*⁸¹) rather than addressing whether non-wetlands adjacent to navigable waterways fit within the CWA's reach.⁸² All of these cases attempt to settle questions about the CWA's scope, but none sets a precedent for including water bodies other than wetlands within CWA coverage on the basis of their adjacency to navigable waterways.

In *Headwaters*, the Ninth Circuit affirmed the District Court's finding that irrigation canals into which the defendant had released herbicide without a permit were waters of the United States, and so subject to the CWA's permit requirements.⁸³ The fact that the canals exchanged water with natural streams and a lake made them tributaries of those navigable waters, protected by the CWA since *United States v. Eidson*.⁸⁴ The *Headwaters* court distinguished tributaries, which flow at least intermittently into navigable waters, from isolated waters.⁸⁵ The *Baykeeper* court dismissed *Headwaters* as irrelevant, though, because no evidence suggested the Pond was a tributary.⁸⁶

The other two cases Baykeeper relied on to support its position concerned wetlands adjacent to navigable waters. In *Baccarat*, the Ninth Circuit confirmed the Corps' authority under the CWA to regulate all wetlands adjacent to navigable waters, even when the Corps lacks evidence of a significant hydrological or ecological connection between the wetlands and the navigable waters.⁸⁷ The court rejected the developers' claim that the Supreme

76. *Id.* at 707.

77. *Id.* at 706.

78. *Id.* at 707.

79. 243 F.3d 526 (9th Cir. 2001).

80. 425 F.3d 1150 (9th Cir. 2005).

81. 457 F.3d 1023 (9th Cir. 2006).

82. *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 708–09 (9th Cir. 2007).

83. *Headwaters*, 243 F.3d at 533.

84. 108 F.3d 1336, 1341–42 (11th Cir. 1997).

85. *Headwaters*, 243 F.3d at 53–54.

86. *Baykeeper*, 481 F.3d at 708.

87. *Baccarat Fremont Developers, L.L.C. v. U.S. Army Corps of Eng'rs*, 25 F.3d 1150, 1151, 1158 (9th Cir. 2005).

Court's holding in *SWANCC* requires the agencies to show more than simple adjacency when they seek to protect wetlands.⁸⁸ Under *Baccarat*, a pre-*Rapanos* decision, the Ninth Circuit endorsed the agencies' assertion of jurisdiction over wetlands abutting navigable waters with no obligation to prove their pollution would actually affect adjacent navigable waters, but, as the *Baykeeper* court indicated, the decision did not establish their authority or duty to apply the adjacency provision to non-wetlands.⁸⁹

In the most recent case, *Northern California River Watch v. City of Healdsburg*, the Ninth Circuit followed Justice Kennedy's concurrence in *Rapanos*—calling it the controlling opinion—and applied the “significant nexus” rule, finding that a quarry pit contained wetlands that seeped directly into the adjacent navigable river, and thus that the pit contains “waters of the United States” under the EPA regulations' adjacent wetlands provision.⁹⁰ The fact that a surface connection joined the pit and the river, and that wildlife populations moved between the two, supported the finding of a significant nexus, as opposed to a “speculative or insubstantial” link between the water body and the navigable waterway.⁹¹ While *City of Healdsburg* clarified the Ninth Circuit's understanding of *Rapanos* in the wetlands context, the *Baykeeper* court refused to apply the significant nexus test to the Pond/Slough system, explaining that *Rapanos* and *City of Healdsburg* pertain strictly to wetlands, not to other kinds of water bodies adjacent to navigable waterways.⁹²

Finally, the court concluded that, because of the settlement agreement in which *Baykeeper* waived its ability to pursue new theories of CWA coverage, its “fallback” theory—that the pond should be protected because it actually is a tributary of the Slough or because its pollution might affect interstate commerce—must be proven based only by facts on which the District Court based its ruling.⁹³ Because the District Court found no evidence that water ever moved from the Pond to the navigable Slough, making the Pond a tributary, or that using the Pond for waste disposal might affect interstate commerce, the Court of Appeals refused to consider these additional theories as extensions of *Baykeeper*'s adjacency argument.⁹⁴

B. *The Baykeeper Court's Dodge and Its Consequences*

In *Baykeeper*, the Ninth Circuit abandoned an opportunity to extend Justice Kennedy's practical, science-based and policy-minded test for CWA applicability to bodies of water that, though technically not defined as

88. *Id.* at 1155.

89. *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 709 (9th Cir. 2007).

90. 457 F.3d 1023, 1025–26, 1031 (9th Cir. 2006).

91. *Id.* at 1030–31.

92. *Baykeeper*, 481 F.3d at 709.

93. *Id.* at 709.

94. *Id.* at 709–10.

wetlands, may have characteristics—such as adjacency to navigable waters and possible permeability—that make their protection just as urgent.

Under the EPA's definition (identical to the Corps' definition⁹⁵), "wetlands" are "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."⁹⁶ This definition, which turns on the presence of a fairly specific category of plant life, notably does not rely on or distinguish wetlands as possessing unique hydrologic characteristics that require heightened protection under the CWA. Because the definition depends on what grows in the wetlands rather than how easily or at what volume water travels between wetlands and other waters, it is in some tension with the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." The agencies' definition of "waters of the United States" was clearly driven by an understanding of wetlands' physical connections to other water bodies and their tendency or capacity to affect the quality of nearby waters.

The inclusion of "tributaries" within the agencies' definition of "waters of the United States" demonstrates that the hydrological inseparability of certain non-navigable waters from navigable-in-fact waters is the basis of the agencies' broad understanding of the term.⁹⁷ The regulations do not define tributaries. Some courts have simply cited a dictionary definition of the word, to the effect that tributaries are streams that flow into larger waterways.⁹⁸ Pre-*Rapanos*, a very expansive understanding of the term's meaning dominated CWA jurisprudence; tributaries included channels both natural and manmade, permanent and intermittent,⁹⁹ as long as they ultimately emptied into waters that otherwise qualified for CWA protection, either by dint of their actual navigability or because of their capacity to affect interstate commerce. The *Rapanos* plurality has, to some extent, cast doubt on that certainty, with its insistence on relatively permanent flow.¹⁰⁰ Some Courts of Appeals, however, have insisted that *Rapanos* "has not undercut" its existing tributary analysis, as the Ninth Circuit stated recently in *United States v. Moses*.¹⁰¹ As the court noted, the *Rapanos* plurality acknowledges that seasonal streams fall within the purview of the CWA, and Justice Kennedy's significant nexus test—which the

95. 33 C.F.R. § 3283(b) (2008).

96. 40 C.F.R. § 122.2 (2008).

97. See 40 C.F.R. § 122.2(e), 33 C.F.R. § 328.3(a)(5).

98. See, e.g., *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001).

99. See *United States v. Eidson*, 108 F.3d 1336, 1341–42 (11th Cir. 1997).

100. *Rapanos v. United States*, 547 U.S. 715, 732 (2006).

101. 496 F.3d 984, 989 (9th Cir. 2007).

court interpreted as applying in the tributary context as well as to adjacent wetlands—can certainly accommodate impermanent tributaries.¹⁰²

Baykeeper represents the Ninth Circuit's lost opportunity to use the significant nexus test to bridge the gap between these alternative grounds for establishing CWA jurisprudence by using a policy-based justification for extending the significant nexus test to the non-wetlands context. By leaning on Justice Kennedy's discussion of the Act's goals and the hydrological realities the *Rapanos* plurality's inflexible tests ignored, the *Baykeeper* court could have justified at least considering whether allowing Cargill to pollute the Pond might endanger the Slough's water quality. The court could have emphasized the utility of significant nexus as a guideline in ambiguous contexts such as this one, and need only have *applied* the test—not necessarily concluded that the nexus existed—in order to establish a tremendously useful precedent for using it to restore some of the Act's strength.

By declining to do so, the court abdicated its responsibility to consider the CWA's environmentally protective mandate. Even Scalia was compelled to admit in *Rapanos* that the agencies' regulations intentionally stretched the definition of "waters of the United States" to "the outer limits of Congress's commerce power" in order to achieve the Act's restoration and conservation goals.¹⁰³ As Kennedy explains his test, the "required nexus must be assessed in terms of the statute's goals and purposes."¹⁰⁴ The Ninth Circuit may have believed that little pollution risk actually existed in the *Baykeeper* scenario, but had it properly emphasized the Act's purpose and the consequences of narrowing its scope, it might have recognized the validity and the importance of applying the significant nexus test here.

Of course, such a holding would have been not only environmentally progressive but also risky. It might very well have prompted another round of CWA scrutiny in the Supreme Court, in which the outcome would depend on Justice Kennedy's choice between whether to champion his substantial nexus test as an all-purpose tool or side with the *Rapanos* dissenters and permanently limit its application to adjacent wetlands. Whatever the reasons for its timidity, the Ninth Circuit chose to demur, resorting to the most restrictive and cautious possible interpretation of the Kennedy concurrence, and indeed inventing a limitation on the significant nexus test that did not exist before.

C. What Could Have Been

After *Baykeeper* won its initial motion for summary judgment under the Migratory Bird Treaty theory of CWA jurisprudence, only to have the ruling overturned following *SWANCC*, it developed its hybrid substantial nexus argument to make the best of facts that did not incontrovertibly establish the

102. *Id.* at 990.

103. *Rapanos*, 547 U.S. at 723–24.

104. *Id.* at 779.

Pond as either a wetland or a tributary.¹⁰⁵ Without evidence that the Pond had ever flowed into the Slough, Baykeeper decided to take a risk and proceed under neither the theory that the Pond was an adjacent wetland, not by arguing that it was a tributary, but by crafting a more expansive adjacency theory, drawing on the justifications for the adjacent wetlands provision.¹⁰⁶ The group presented Kennedy's concurrence in *Rapanos* as a reconciliation of *Riverside Bayview* and *SWANCC*, arguing that Kennedy acknowledged that *SWANCC* excluded from the CWA's ambit "some non-navigable waters" that "lack a sufficient connection with navigable waters to be considered part of the same aquatic system," but upheld the Act's broad scope as articulated in *Riverside Bayview*.¹⁰⁷ In fact, Baykeeper argued, Kennedy's significant nexus test "makes no distinction between waters and wetlands where a significant nexus exists," focusing instead on the extent to which pollution might damage "the aquatic system."¹⁰⁸ Baykeeper sought to prove that under Kennedy's test, the Pond should be covered by the CWA because it performed the same vital water quality maintenance functions as many wetlands.¹⁰⁹

In retrospect, the settlement agreement Baykeeper entered into at the District Court level was disastrous. It prevented Baykeeper from later pursuing any theory of CWA jurisdiction other than the "Adjacent Waters Theory" that the District Court endorsed when it granted summary judgment to Baykeeper.¹¹⁰ The Court of Appeals nevertheless allowed Baykeeper leeway to argue additional theories, but required that it rely only on facts previously cited to support the adjacency theory in the District Court.¹¹¹ Because it had focused so heavily on its adjacency theory argument in District Court, Baykeeper failed to develop a broad factual record that might have supported additional theories of CWA coverage for the Pond. For example, Baykeeper could have argued that the Pond was covered because it was a tributary or because it was used in interstate commerce; however, the Ninth Circuit panel found that the facts in the District Court record were insufficient to support those theories. The settlement agreement thus crippled Baykeeper when the Court of Appeals panel proved inhospitable to its creative adjacency argument. Had it been free to develop either of its alternative theories more fully, whether or not it could have marshaled sufficient evidence to win under the tributary or interstate commerce provisions is unknown.

105. Telephone interview with Daniel Purcell (Baykeeper attorney), Keker & Van Nest, LLP (Nov. 6, 2007).

106. *Id.*

107. Supplemental Brief Of Plaintiffs San Francisco Baykeeper And Citizens Committee To Complete The Refuge Concerning Effect Of *Rapanos v. United States* at 7-8, *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700 (9th Cir. 2007) (No. CV-96-02161-CAL).

108. *Id.* at 13.

109. *Id.* at 14.

110. *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 704 (9th Cir. 2007).

111. *Id.* at 709.

Although it is doubtful that either of the alternative theories of coverage would have guaranteed a win for Baykeeper, there would have been great benefit in having them addressed in the Ninth Circuit's opinion. If Baykeeper had been free to fully argue the case under a tributary theory, which requires some showing that the water body flows into a traditionally navigable water, the Ninth Circuit would have been forced to elucidate its understanding of when and how the significant nexus test should be applied to supplement existing tributary jurisprudence. Since the Pond's flow into the Slough is intermittent at best, the facts of the case presented a valuable opportunity to apply the significant nexus test to a jurisdictionally vague body of water and establish an important piece of precedent to help shape and clarify the test. In applying the test to determine whether the Pond was a tributary, the court undoubtedly would have drawn on other post-*Rapanos* applications of the test, which have been scattered and unpredictable, even when limited to the adjacent wetlands question. While no consensus has emerged on what constitutes significant nexus, the *Rapanos* dissent seems prescient: so far courts seem unwilling to disrupt the status quo, citing significant nexus to support holdings that are largely consistent with those they would have reached before *Rapanos*. At the moment, though, the test remains dangerously nebulous, lacking objective criteria and therefore vulnerable to judicial whims, as a survey of recent "waters of the United States" cases demonstrates.

III. CONFUSION AND CONFLICT IN CURRENT INTERPRETATIONS OF *RAPANOS*

A. *Whose Opinion Counts?*

Baykeeper is part of the lower courts' first round of post-*Rapanos* CWA decisions. So far, the courts have been understandably inconsistent in deciding which opinion to follow and how to apply the rules embedded in those opinions. A survey of the lower courts' options and their trends in choosing amongst the alternatives set out in *Rapanos* shows that the courts are loathe to embrace the plurality but unsure how to apply the Kennedy concurrence.

Rapanos left the lower courts to choose among three options: they could claim that either the plurality or Justice Kennedy's concurrence controlled, or commit to applying the CWA when the water body qualified under either the plurality's test or Justice Kennedy's. The uncertainty over which approach was correct stems from how to apply the rule from *Marks v. United States*,¹¹² in which the Court held that when it issues a decision with no majority, "the holding . . . may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."¹¹³

112. 430 U.S. 188 (1977).

113. *Id.* at 193 (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

The “judgments” on which the most members agreed in *Rapanos*, of course, were that the Sixth Circuit decisions upholding the Corps’ jurisdiction should be vacated and the cases remanded.¹¹⁴ What, though, are the “narrowest grounds” on which five justices concurred? *Marks* doesn’t point to any clear winner. One view is that Justice Kennedy’s test is primarily a repudiation of Justice Scalia’s proposed limitations on “waters of the United States,” which, combined with that of the dissent, makes the “narrowest grounds” of agreement a rejection of the plurality.¹¹⁵ In practice, a court taking this approach would likely apply the significant nexus test. At the other extreme—the most threatening possibility from an environmentalist’s perspective—is the idea that lower courts might simply ignore *Marks* and follow the plurality, or might think they are required to find CWA jurisdiction only when *both* the tests provided by the plurality and the concurrence are met.¹¹⁶ This result could severely check the agencies’ existing authority under the CWA. Finally, courts might follow Justice Stevens’ prompt and find CWA jurisdiction when either the plurality test or Justice Kennedy’s is satisfied.¹¹⁷ Effectively, this approach is unlikely to differ from a simple endorsement of the significant nexus test.¹¹⁸

B. The Specter of a Weak Clean Water Act: Courts Shy from the Rapanos Plurality

So far, no court has fully embraced the plurality’s highly restrictive interpretation of “waters of the United States.” Not only does *Marks* explain that when the Court is fragmented the plurality opinion alone should not bind lower courts unless it can be reconciled with views of other justices, but the plurality opinion’s implications for implementation of the CWA are alarming in their extremity. The courts’ hesitation to even cite the plurality may represent scruples about retreating from the twenty years of CWA jurisprudence since *Riverside Bayview* first endorsed wetlands adjacency as a reasonable interpretation of “waters of the United States.”¹¹⁹

C. A Slightly Stronger Clean Water Act: Decisions Following Kennedy’s Concurrence

Most jurisdictions, the Ninth Circuit among them, have held that Justice Kennedy’s concurrence controls.

Five months after deciding *Baykeeper*, the Ninth Circuit Court of Appeals asserted in *City of Healdsburg* that “the controlling opinion [from *Rapanos*] is

114. *Id.*; *Rapanos v. United States*, 547 U.S. 715, 759 (2006).

115. Kevin Frankel, *A Flood of Uncertainty: Rapanos and Carabell*, 32 COLUM. J. ENVTL. L. 141, 156 (2007).

116. *Id.* at 157.

117. *Rapanos*, 547 U.S. at 810.

118. *See id.* at 788.

119. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985).

that of Justice Kennedy”¹²⁰ because it “is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases.”¹²¹ The court held that a wetland-containing Basalt Pond had a significant nexus to nearby navigable waters, and was therefore subject to the CWA’s permit requirements under the National Pollution Discharge Elimination System (NPDES).¹²² Distinguishing the Basalt Pond at issue from the isolated Pond in *Baykeeper*, the court explained that the Basalt Pond contained and was surrounded by wetlands, leaving only the question of whether it was “sufficiently adjacent” to the navigable Russian River to qualify for CWA protection.¹²³ To evaluate that adjacency, the court used Justice Kennedy’s test, determining that the nexus existed because the Basalt Pond significantly affected the “chemical, physical and biological integrity” of the Russian River.¹²⁴ In a sense, though, the court treated its application of the significant nexus test as redundant, observing that the pond would have qualified as a water of the United States because of its actual adjacency to navigable waters, which the court said constitutes automatic grounds for finding CWA coverage under *Riverside Bayview*.¹²⁵ The court stated that actual adjacency made the significant nexus test somewhat superfluous here, since it understood significant nexus to be a requirement only when wetlands’ proximity to navigable waterways is questionable.¹²⁶ *City of Healdsburg* therefore provides little enlightenment as to how the Ninth Circuit will apply the test in more ambiguous cases, although it does express the court’s intention to preserve the *Riverside Bayview* precedent. Apparently the Ninth Circuit will call the significant nexus test into service only when confronted with a body of water that does not clearly fall into one of the categories in the agencies’ regulatory definitions of “waters of the United States.”

At least one District Court in the Ninth Circuit has seemed confident about reconciling *Baykeeper* and *City of Healdsburg*. In *Coldani v. Hamm*, the court denied a dairy’s motion to dismiss a citizen suit against it for allegedly violating the NPDES provisions of the CWA.¹²⁷ The court ruled that allegations that the dairy had polluted groundwater with a hydrological connection to navigable waters was sufficient to survive the dairy’s motion to dismiss.¹²⁸ However, the court warned that the plaintiff seeking to enforce the CWA would have to go beyond establishing a mere hydrological

120. N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 995 (9th Cir. 2007).

121. *Id.* at 999.

122. *Id.* at 995.

123. *Id.* at 998.

124. *Id.* at 1000.

125. *See id.* (citing Justice Kennedy’s *Rapanos* concurrence to the effect that “a significant nexus may be inferred when wetlands are adjacent to navigable waters.”).

126. *See id.* at 1000.

127. No. Civ. S-07-660, 2007 U.S. Dist. LEXIS 62644, at *24 (E.D. Cal. Aug. 14, 2007).

128. *See id.* at *28.

connection.¹²⁹ He must prove that the alleged pollutants “affect surface waters of the United States”¹³⁰ as required by the significant nexus test, using the framework the Court of Appeals laid out in *City of Healdsburg*.¹³¹ In denying the motion to dismiss, the court added that categorically excluding groundwater pollution from the scope of the CWA would contradict the Act’s policy goals.¹³²

The Seventh and Eleventh Circuits have also ruled that they will follow the Kennedy concurrence. In *United States v. Gerke Excavating, Inc.*,¹³³ which concerned dredging and filling in wetlands not immediately adjacent to navigable waters, the Seventh Circuit remanded to the District Court for further factfinding in light of *Rapanos*.¹³⁴ The Court of Appeals explained that it considered the Kennedy opinion binding under *Marks*.¹³⁵ The court called Justice Kennedy the “least common denominator”¹³⁶ because the dissenters would always support the outcome if his test found federal authority over wetlands, and the plurality would always join the holding if it did not.¹³⁷ In *United States v. Robinson*,¹³⁸ the Eleventh Circuit expressed distaste for an “either/or” test, discussed below, and concluded that *Marks* required it to follow Justice Kennedy’s concurrence.¹³⁹

At least one District Court in the Third Circuit has also announced that it will apply Justice Kennedy’s test, citing *Marks* and *City of Healdsburg* as authority.¹⁴⁰ The judge in *United States v. Pozgai* acknowledged that “courts have taken somewhat different approaches in interpreting *Rapanos* in the light of *Marks*,”¹⁴¹ but relied exclusively on Justice Kennedy’s test to find that the wetland in question was subject to the CWA.¹⁴²

Even when courts settle on the significant nexus test, they must wrestle with questions of how to apply it to a range of hydrological scenarios, without more exact guidance than Justice Kennedy’s insistence that the water body have more than a “speculative or insubstantial” effect on the “chemical, physical, and biological integrity of other covered waters.”¹⁴³ Courts may have too much room to maneuver when applying the test, leaving them frustrated or

129. *See id.*

130. *Id.*

131. *Id.* at 21-22.

132. *Id.* at 24-25.

133. 464 F.3d 723 (7th Cir. 2006).

134. *Id.* at 725.

135. *Id.* at 724.

136. *Id.* at 725.

137. *Id.* at 724-25.

138. 505 F.3d 1208 (11th Cir. 2007).

139. *Id.* at 1220-21.

140. *United States v. Pozgai*, No. 88-6545, 2007 U.S. Dist. LEXIS 23450, at *4 (E.D. Pa. Mar. 8, 2007).

141. *Id.*

142. *Id.* at *5.

143. *Rapanos v. United States*, 547 U.S. 715, 780 (2006).

tempted to fall back on ideology to fill the gap left by the absence of measurable criteria. In *Environmental Protection Information Center v. Pacific Lumber Company*,¹⁴⁴ a Ninth Circuit District Court pointed out that *City of Healdsburg* binds it to follow Justice Kennedy's concurrence. The court explained that the streams in question must have "some sort of significance for the water quality of" the nearby navigable creek in order to qualify for CWA coverage.¹⁴⁵ While the court found no evidence of such an effect,¹⁴⁶ the case is notable as an instance of a court using the test in a non-wetlands context. The court does not even specify here what theory of CWA jurisdiction is being argued—presumably the streams are non-navigable tributaries—but simply says its task is to determine whether the streams themselves are navigable waters and that significant nexus is the required test.¹⁴⁷

D. The Compromise Approach: Case-by-Case and Either/Or Decisions

A number of courts, seeking to synthesize the plurality opinion with Justice Kennedy's concurrence, have chosen to assess the water body in question under both standards and find CWA coverage if either applies. In *United States v. Johnson*,¹⁴⁸ the First Circuit suggested that *Marks* "does not translate easily" to *Rapanos*, because in some cases where the plurality would uphold federal authority Justice Kennedy would find no significant nexus.¹⁴⁹ As previously discussed,¹⁵⁰ Justice Stevens' dissent discounted this risk, observing that such a scenario is very difficult to imagine. Nevertheless, the *Johnson* court denied that it could identify "narrowest grounds" in *Rapanos*, and held that Justice Stevens was correct to propose that the "federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard."¹⁵¹

Johnson has been cited extensively by lower courts in support of applying both *Rapanos* tests. Courts in the Second, Sixth and Eighth Circuits have followed this approach.¹⁵² In a slight twist, a Texas District Court in *United States v. Chevron Pipe Line Company* complained that *Rapanos* leaves lower courts with an unreliable "case-by-case" approach to its application.¹⁵³ Disparaging the significant nexus test as "vague" and "subjective," the court also seemed determined to espouse a version of that test that resembles the

144. 469 F. Supp. 2d 803 (N.D. Cal. 2007).

145. *Id.* at 823.

146. *See id.* at 824.

147. *Id.* at 822.

148. 467 F.3d 56 (1st Cir. 2006).

149. *Id.* at 64.

150. *See Rapanos v. United States*, 547 U.S. 715, 788 (2006).

151. *Johnson*, 467 F.3d at 66.

152. *See Simsbury-Avon Pres. Soc'y, L.L.C. v. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 226 (D. Conn. 2007), *United States v. Cundiff*, 480 F. Supp. 2d 940, 944 (W.D. Ky. 2007), *United States v. Bailey*, 516 F. Supp. 2d 998, 1006 (D. Minn. 2007).

153. 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

Rapanos plurality: it went on to announce 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.”¹⁵⁴

Perhaps most importantly, the CWA’s administering agencies have published a Joint Guidance Memorandum (Guidance) that claims the either/or approach to interpreting *Rapanos* is correct.¹⁵⁵

E. The Open Question: Is Significant Nexus Just for Wetlands, or Will Courts Use It for Tributaries and Other Adjacent Waters, too?

Baykeeper is a failed attempt to urge a court to adapt the significant nexus test to non-wetlands on the basis of adjacency to navigable waters, extending both the adjacency provision and the significant nexus test beyond their original dimensions. Now that the Ninth Circuit has rejected this attempt to treat the test and the regulatory definition of “waters of the United States” as malleable, other Courts of Appeal will not likely take that leap. Courts may find extending the test to tributaries more palatable, though. Unlike the theory advanced in *Baykeeper*, which would have used the test to promote a broader interpretation of “waters of the United States” than the regulations explicitly establish, using significant nexus in the context of tributaries would, for the most part, simply maintain the pre-*Rapanos* scope of the Act. The EPA and the Corps certainly seem to think it is appropriate. Their Guidance announces that the agencies will use the significant nexus test to determine whether to assert jurisdiction over some intermittent tributaries, in direct contravention of the *Rapanos* plurality’s tributary definition.¹⁵⁶ The Guidance discusses hydrologic and ecological justifications for using the same criteria to evaluate whether both non-adjacent wetlands and tributaries should be protected under the CWA,¹⁵⁷ and should equip the agencies and citizen enforcers with an invaluable strategy for establishing CWA coverage.

IV. THE UNTAPPED POTENTIAL OF JUSTICE KENNEDY’S SIGNIFICANT NEXUS TEST

A. *A Hypothetical Case*

Envisioning a CWA case arising from a factual scenario that resembles the one in *Baykeeper* illustrates the need for a litigating strategy aimed at satisfying the significant nexus test. Imagine, somewhere in the Ninth Circuit, a water system much like the Pond and Slough configuration in *Baykeeper*: an isolated pond or even a “ditch,” possibly but not necessarily manmade, sits among a

154. *Id.* at 613.

155. JOINT GUIDANCE MEMORANDUM, *supra* note 15, at 5.

156. *See id.* at 6.

157. *Id.* at 8–10.

system of marshes and small streams. This pond or ditch does not itself boast a prevalence of vegetation typically adapted for life in saturated soil conditions. Directly adjacent to it, however, lies a wetland, or perhaps a seasonal creek. No surface connection joins the two, except when storms flood the area several times per year. The owner of the parcel of land on which the pond sits, in the process of developing his property, uses the pond as a repository for significant quantities of dredged sand. He does not seek a permit from the Army Corps of Engineers. A local birdwatching group becomes aware of the practice and, concerned that the filling of the pond will ruin its status as a destination for a population of migratory birds, challenges the landowner in court. Under what theory should the group argue the CWA applies?

Under *Rapanos* and the current Guidance the agencies have adopted, the safest route is to make the best case possible for tributary jurisdiction. The significant nexus test will have to come into play here because this is not a traditional tributary with “relatively permanent” flow into a navigable waterway. Nor is the pond’s adjacency to a navigable waterway sufficient, after *Baykeeper*, to establish CWA coverage. Instead, the birdwatchers will have to present evidence or at least a convincing likelihood that the pond intermittently flows or could flow into and significantly affects the quality of at least one of the surrounding navigable waterways. The paucity of existing significant nexus jurisprudence leaves the birdwatchers without a clear map of how to attack the test, however. The proposal below draws on the joint Guidance to identify characteristics most likely to support a substantial nexus finding when an immediate connection to navigable waters is not apparent.

B. A Proposal: Guidelines for Applying the Significant Nexus Test to Tributaries and Non-Wetland Adjacent Waterways

To stretch the significant nexus test as far as possible under current CWA jurisprudence, parties seeking enforcement should argue that non-wetlands are tributaries *with a significant nexus to navigable waterways*, pressing this language into service in the broadest array of hydrological scenarios possible. Factors likely to support the significant nexus theory include the ability to show that the water body in question:

1. Contributes water to a higher-order tributary or navigable-in-fact waterway;¹⁵⁸
2. Is adjacent to wetlands, and if so, that the flow dynamics between the adjacent bodies and all other connected waters is such that the chemical, physical or biological integrity of any of the navigable waters in the system is significantly altered by the water body at issue, either alone or in combination with its adjacent wetlands;¹⁵⁹

158. *See id.* at 9.

159. *See id.*

3. Exchanges water with other tributaries, wetlands, or navigable-in-fact waters at a significant volume or with significant frequency, and/or duration, contentions best supported with the most exhaustive data available about the water body's hydrological and physical characteristics;¹⁶⁰
4. Has a significant capacity to transport pollutants, particularly the pollutant at issue, or flood waters;¹⁶¹
5. Helps maintain consistent water temperature in navigable waterways;¹⁶²
6. If only an "ephemeral" tributary, is at least capable of discharging into downstream navigable waters during times of increased precipitation;¹⁶³
7. May provide habitat or other ecological services for aquatic life dependent on navigable waters; or¹⁶⁴
8. May aid nutrient cycling, sediment retention and transport, or pollution trapping or filtration, or improve water quality in navigable waters.¹⁶⁵

CONCLUSION

This Note proposes factors for establishing significant nexus that are supported by the Guidance document published by the CWA's administrating agencies, and more specific and markedly more science-based than any the lower courts have proposed. Over the life of the Act, the agencies have staked out for themselves, and for parties seeking enforcement of the CWA, a number of avenues for establishing federal authority to protect the quality of the nation's waters. These may be in jeopardy after *Rapanos*, but that danger can be minimized if courts and interested parties proceed carefully through the next round of CWA litigation. Citizen enforcers and environmental groups should approach the challenge of satisfying the amorphous test as ambitiously as possible, using all the angles the Guidance prompts them to consider. The effect of the Supreme Court's recent look at "waters of the United States" is to have left the issue considerably more muddled than it was before. Substantial nexus can restore some clarity to the CWA, if courts begin to tie the concept to some measurable criteria, but the agencies and litigating parties will have to initiate that process and work to ensure those criteria are scientifically and ecologically sound.

160. *See id.* at 9–10.

161. *See id.* at 10.

162. *See id.*

163. *Id.*

164. *See id.*

165. *See id.*

We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, <http://www.boalt.org/elq>.