Department of Justice

STATEMENT

OF

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DEPUTY ASSISTANT ATTORNEY GENERAL
ENVIRONMENT AND NATURAL RESOURCES DIVISION

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

ENTITLED

"THE CLEAN WATER RESTORATION ACT OF 2007"

PRESENTED ON

APRIL 16, 2008

STATEMENT OF
DEPUTY ASSISTANT ATTORNEY GENERAL JOHN C. CRUDEN
BEFORE THE
HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
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INTRODUCTION

Chairman Oberstar, Representative Mica, and Members of the Committee, I am pleased to be here today to discuss jurisdiction under the Federal Water Pollution Control Act (the Clean Water Act or CWA). I am joined by Benjamin Grumbles, the U.S. Environmental Protection Agency Assistant Administrator for Water, John Paul Woodley, Jr., Assistant Secretary of the Army for Civil Works, and Arlen L. Lancaster, Chief, Natural Resources Conservation Service, U.S Department of Agriculture. They will provide an overview of national policy and guidance, as well as EPA, Corps of Engineers, and Agriculture responsibilities, under the CWA. I will focus on litigation handled by the Department of Justice in response to the Supreme Court's decision in Rapanos v. United States, 547 U.S. 715 (2006).

I am the Deputy Assistant Attorney General, Environment and Natural Resources Division (ENRD or the Division), U.S. Department of Justice. The Division is responsible for representing the United States in litigation involving environmental and natural resources statutes, and litigation under the CWA is a part of our responsibilities. We defend Federal agencies when their administrative actions are challenged, and we also bring enforcement cases against individuals or entities that violate environmental and natural resources statutes. The Division has a docket of well over 7,000 pending cases and matters, with cases in every judicial district in the nation. We litigate cases arising from more than 70 different environmental and natural resources statutes.

In this testimony, I will first provide a brief overview of our CWA docket. I will then outline the statutory and U.S. Supreme Court background for the Rapanos decision, the position of the United States in that litigation, and the Supreme Court holding. I will then turn to what actions the Department of Justice has taken since the issuance of the decision and the current status of Rapanos-related litigation in the lower courts.

As this Committee knows, however, the position of the United States in litigation is expressed in briefs we file with the courts. Our legal position must be tied to the facts and take into account the precedent within the jurisdiction in which we are litigating. In addition, because we litigate cases on behalf of the United States, we coordinate with potentially affected Federal agencies before we file a brief. Accordingly, although I will describe to you our work related to this important decision, my testimony should not be used in litigation in any particular case. Instead, the position of the United States in any litigation will be articulated in the context of that case.

AN OVERVIEW OF OUR CLEAN WATER ACT DOCKET

The Department of Justice's primary role with regard to the CWA is to represent the Environmental Protection Agency ("EPA"), the Army Corps of Engineers ("Corps"), and any other Federal agency that might be involved in litigation that arises pursuant to the CWA.

ENRD and U.S. Attorneys across the country frequently bring actions to enforce the CWA. Three sections in ENRD handle CWA enforcement actions. Civil enforcement cases are generally handled by our Environmental Enforcement Section, except cases brought pursuant to CWA section 404, which are handled by our Environmental Defense Section or U.S. Attorneys' Offices. Criminal enforcement of the CWA is handled by our Environmental Crimes Section and U.S. Attorneys' Offices.

CWA civil judicial enforcement actions generally begin with a referral or investigation by another Federal agency, whether it is EPA or the Corps, regarding alleged violations of the CWA. By the time we receive a referral, the agency in question has usually considered all avenues for resolving the dispute administratively, and has carefully considered whether judicial enforcement is the appropriate course of action. Upon receiving the agency's recommendation, we conduct our own internal independent review and analysis to determine whether there is sufficient evidence to support the elements of the violation and whether the case is otherwise appropriate for judicial action. If we determine that judicial enforcement is warranted, we prepare a complaint and then typically offer to engage in pre-filing settlement discussions in accordance with Executive Order 12988.

Many environmental violations, including CWA-type violations, are addressed and resolved by State and local governments. In the wetlands area, most Federal enforcement of the CWA occurs at the administrative level and is carried out by EPA and the Corps, and does not involve the Department of Justice. In this regard, I note the Corps implemented an administrative appeals process in 2000. The process allows disputes over whether a site is subject to Corps jurisdiction under the CWA (so-called "jurisdictional determinations") to be resolved before a matter gets to the point of potential litigation, which is when the Department of Justice would get involved.

ENRD also defends Federal agencies that are being sued in connection with the CWA. Such actions can take a variety of forms. For example, affected parties will sometimes bring an action against the Corps or EPA challenging the grant or denial of a CWA permit. Regulated entities, environmental interests, and public entities such as municipalities may also seek judicial review when the Corps or EPA makes broader policy decisions such as those embodied in a rulemaking. Finally, Federal agencies can be sued for discharging pollutants into waters of the United States if they have not complied with the applicable requirements of the CWA.

In sum, the Division, in conjunction with U.S. Attorneys' Offices across the nation, litigates CWA actions that involve the United States. Our docket is significant, involving both defensive cases and civil and criminal enforcement. One part of the CWA docket is wetland actions, which are clearly impacted by the Supreme Court's decision almost two years ago in Rapanos.

STATUTORY AND CASE LAW CONTEXT FOR THE RAPANOS DECISION

Clean Water Act and Regulations

Congress enacted the CWA in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" as provided in section 101(a). A key mechanism adopted by Congress to achieve that purpose is a prohibition contained in section 301(a) on the discharge of any pollutant, including dredged or fill material, into "navigable waters" except in compliance with the Act. The CWA defines the term "discharge of a pollutant" in section 502(12)(a) as "any addition of any pollutant to navigable waters from any point source . . . ." It defines the term "pollutant" in section 502(6) to mean, among other things, dredged spoil, rock, sand, and cellar dirt. The CWA provides in section 502(7) that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." Corps and EPA regulations at 33 C.F.R. 328.3(a) and 40 C.F.R. 230.3(s) define the term "waters of the United States" for purposes of the wetlands program.

The CWA establishes two complementary permitting programs through which appropriate Federal or State officials may authorize discharges of pollutants from point sources into the waters of the United States. Section 404(a) of the CWA authorizes the Secretary of the Army, acting through the Corps, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Under Section 404(g), the authority to permit certain discharges of dredged or fill material may be assumed by State officials. Pursuant to Section 402 of the CWA, the discharge of pollutants other than dredged or fill material (e.g., sewage, chemical waste, and biological materials) may be authorized by EPA or a State with an approved program, under the National Pollutant Discharge Elimination System (NPDES) program.

U.S. Supreme Court Decisions Prior to *Rapanos*

In United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), and subsequently in Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) (SWANCC), the Supreme Court addressed the proper construction of the CWA terms "navigable waters" and "the waters of the United States." In Riverside Bayview, the Court framed the question before it as "whether the [CWA], together with certain regulations promulgated under its authority by the [Corps], authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries." 474 U.S. at 123. The Court unanimously sustained the Corps' regulatory approach as a reasonable exercise of the authority conferred by the CWA. At the same

time, however, the Court declined "to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . ." Id. at 131-32 n.8.

In SWANCC, the Supreme Court in 2001 faced an issue undecided in Riverside Bayview, and it rejected the Corps' construction of the term "waters of the United States" as encompassing intrastate, nonnavigable, isolated ponds based solely on their use as habitat by migratory birds. 531 U.S. at 171-72. The Court explained that, if the use of isolated ponds by migratory birds were found by itself to be a sufficient basis for Federal regulatory jurisdiction under the CWA, the word "navigable" in the statute would be rendered meaningless. Id. at 172. The Court stated that “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.” Id. A clear expression of Congressional intent, the Court opined, was particularly necessary “where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.” Id. at 173. The Court found no such clear indication of Congressional intent in this context.

Following the SWANCC decision, ENRD litigated a number of cases involving CWA jurisdiction, ultimately resulting in decisions by eight Circuit Courts of Appeal (including the Sixth Circuit in Rapanos and Carabell), seven of which generally held that the SWANCC decision applied only to intrastate, non-navigable, isolated bodies of water, and did not affect jurisdiction over tributaries to navigable-in-fact waters or wetlands adjacent to such tributaries. See, e.g., United States v. Johnson, 437 F.3d 157 (1st Cir. 2006), cert. denied, 128 S.Ct. 375 (2007); United States v. Deaton, 332 F.3d 698 (4th Cir. 2003); United States v. Gerke Excavating, Inc., 412 F.3d 804 (7th Cir. 2005), cert. denied, 128 S.Ct. 45 (2007); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001); United States v. Hubenka, 438 F.3d 1026 (10th Cir. 2006), cert. denied, 127 S.Ct. 114 (2007); Parker v. Scrap Metal Processors, Inc., 386 F.3d 993 (11th Cir. 2004).

THE RAPANOS DECISION

Lower Court Decisions in *Rapanos* and *Carabell*

In Rapanos, the Supreme Court addressed the jurisdictional scope of the CWA in two consolidated cases. The first case, Rapanos v. United States, involved a developer who, without a permit, filled 54 acres of wetlands adjacent to tributaries of navigable-in-fact water bodies. 376 F.3d 629 (6th Cir. 2004). The District Court found that the wetlands were subject to CWA jurisdiction because they were adjacent to "waters of the United States" and held petitioners civilly liable for CWA violations. The Sixth Circuit affirmed the District Court's decision and found the wetlands within the scope of the CWA’s protections based on the wetlands' hydrologic connections to tributaries of navigable-in-fact waters.

The second case, Carabell v. United States Army Corps of Eng'rs, involved a permit applicant who was denied authorization to fill wetlands physically proximate to, but separated by a berm from, a tributary of a navigable-in-fact waterbody. 391 F.3d 704 (6th Cir. 2004). The District Court found the wetlands to be within the scope of the CWA's protections over the wetlands because they were adjacent to tributaries of navigable-in-fact waters. The Sixth Circuit affirmed the District Court on the basis that a "significant nexus" existed between the wetlands at issue and an adjacent nonnavigable tributary of navigable-in-fact waters.

The Supreme Court granted certiorari, in part, on the question whether jurisdiction under the CWA extends to wetlands that are adjacent to tributaries of navigable-in-fact waters. (The Court also granted certiorari on the question whether such an interpretation of the CWA was constitutional, but ultimately did not reach this question.) The United States argued before the Supreme Court that the Corps and EPA acted reasonably in defining the CWA term "the waters of the United States" to include wetlands adjacent to tributaries of navigable-in-fact waters. Petitioners, on the other hand, argued that only wetlands actually abutting traditional navigable waters are included within the statutory term (Rapanos); and that the CWA does not extend to wetlands that are hydrologically separated from any navigable water (Carabell).

The Supreme Court Decision in *Rapanos* and *Carabell*

The Supreme Court vacated and remanded both cases for further proceedings. In summary, four Justices, in a plurality opinion authored by Justice Scalia, concluded that "the lower courts should determine . . . whether the ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*." 547 U.S. at 757. Justice Kennedy, who concurred in the judgment of the Court, established a different standard, concluding that the cases should be vacated and remanded to determine "whether the specific wetlands at issue possess a significant nexus with navigable waters." Id. at 787. Chief Justice Roberts joined in the plurality opinion and also wrote a concurring opinion. Justice Stevens, in a dissenting opinion joined by Justices Souter, Ginsburg, and Breyer, would have affirmed the decisions by the lower courts. Justice Breyer also wrote a separate dissenting opinion.

The plurality opinion, authored by Justice Scalia, first concluded that the petitioner's argument that the terms "navigable waters" and "waters of the United States" are limited to waters that are navigable in fact "cannot be applied wholesale to the CWA." Id. at 730. Citing the text of CWA Section 502(7) and 404(g)(1), Justice Scalia opined that "the Act's term 'navigable waters' includes something more than traditional navigable waters." Id. at 731. In particular, the Court's plurality opinion emphasized that the relevant statutory text refers not merely to all "water of the United States," but to "the" waters of the United States—meaning bodies of water such as "streams, oceans, rivers and lakes," but not every ditch or other body that may contain water. Id. at 732-33.

Accordingly, the plurality determined that "the waters of the United States" refers to "only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'" Id. (footnote and citation omitted). The plurality stated that the phrase does not include "ordinarily dry channels through which water occasionally or intermittently flows." Id. at 733. This interpretation gathered further support, reasoned the plurality, from the Act's additional use of the term "navigable waters," as those words confirm that CWA jurisdiction lies not over every body of water, but over only those "relatively *permanent* bodies of water." Id. at 734. The Corps' interpretation of the term "the waters of the United States," the plurality concluded, was not based on a permissible construction of the statute.

Justice Scalia elaborated on the plurality's standard in a footnote. He stated:

> By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months--such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent. . . . It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's "intermittent" and "ephemeral" streams . . . that is, streams whose flow is "[c]oming and going at intervals . . . [b]roken, fitful," . . . or "existing only, or no longer than, a day; diurnal . . . short lived" . . . are not.

Id. at 732-33 n.5 (citations omitted).

Responding to arguments about the purposes of the CWA, the plurality noted that only its construction of the statutory text comported with the stated "'policy of Congress'" to ensure preservation of the States' roles in preventing and reducing pollution. Id. at 737. By contrast, Justice Scalia explained, an overly expansive interpretation ascribed to this text would significantly impinge on the States' traditional and primary authority over land and water use, and would encourage the Corps to function as a de facto regulator, as if it were a "local zoning board." Id. at 738. Later, the plurality opinion pointed out that, ultimately, it is the language of the Act actually passed by Congress that is controlling. Id. at 751-52; see also id. at 745 (rejecting arguments that narrowing the CWA jurisdictional language would "hamper federal efforts to preserve the Nation's wetlands" and reasoning that the Court had before it only the statutory text adopted by Congress, not a "Comprehensive National Wetlands Protection Act").

Finally, the plurality found insufficient legislative evidence of Congressional "acquiescence," reasoning that its precedents have required "overwhelming evidence" to support an argument that Congress had acceded to an agency's interpretation, and that this evidence was simply lacking here. Id. at 750.

The plurality also examined the factor of the adjacency of the wetlands under review to "the waters of United States." Justice Scalia concluded that "*only* those wetlands with 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, are 'adjacent to' such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*." Id. at 742 (citation omitted).

The plurality opinion stressed that the decision should not affect dischargers under sections 301 and 402 of the CWA. In response to arguments that this opinion would "frustrate enforcement against traditional water polluters [under CWA sections 301 and 402] . . .," the plurality concluded: "That is not so." Id. at 742,743. The plurality went on to say that "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates [section 301], even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." Id. at 743 (citation omitted).

Justice Kennedy did not join the plurality's opinion, but instead authored an opinion concurring in the judgment. He agreed with the plurality that the statutory term "waters of the United States" extended beyond water bodies that are navigable-in-fact. For these waters, he explained, the starting point for analysis must be the Riverside Bayview and SWANCC decisions:

> *Riverside Bayview* and *SWANCC* establish the framework for the inquiry in the cases now before the Court: Do the Corps' regulations, as applied to the wetlands in *Carabell* and the three wetlands parcels in *Rapanos,* constitute a reasonable interpretation of "navigable waters" as in *Riverside Bayview* or an invalid construction as in *SWANCC?* Taken together these cases establish that in some instances, as exemplified by *Riverside Bayview,* the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking.

Id. at 767.

Justice Kennedy observed that "[t]he required nexus must be assessed in terms of the statute's goals and purposes" (id. at 779):

> Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," §§

> 1311(a), 1362(12). With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters--functions such as pollutant trapping, flood control, and runoff storage. 33 CFR § 320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if 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." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

Id. at 779-80.

Justice Kennedy concluded that "[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." Id. at 780. With respect to wetlands adjacent to nonnavigable tributaries, Justice Kennedy explained that: "[a]bsent more specific regulations, . . . the Corps must establish a significant nexus on a case-by-case basis[.]" Id. at 782. He also suggested that once "an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region." Id.

Justice Kennedy did not agree with the plurality's interpretation of "waters of the United States" and agreed with the dissent "that an intermittent flow can constitute a stream. . . . It follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams." Id. at 770 (citation omitted). Justice Kennedy also disagreed with the plurality's approach to adjacency, concluding that "the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme." Id. at 775. And he disputed the plurality's analysis about a broader CWA interpretation raising Commerce Clause or other federalism concerns, reasoning that the "significant nexus" standard avoids those concerns, even putting aside questions about the "waters' aggregate effects," see id. at 777 (citing Wickard v. Filburn, 317 U.S. 111 (1942)). By the same token, Justice Kennedy went on to disagree with the dissent's reading of the statute insofar as its interpretation would read the term "navigable" out of the statute. He noted that "the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." Id. at 778.

In his concurring opinion, Chief Justice Roberts noted that the Corps and EPA did not proceed with plans to develop a regulation to clarify the scope of waters subject to the CWA following the SWANCC decision. He observed that "[a]gencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous

leeway by the courts in interpreting the statute that they are entrusted to administer." Id. at 758.

The four dissenting Justices would have affirmed the lower courts' opinions and upheld the Corps' exercise of jurisdiction in these cases as reasonable. Justice Stevens also concluded: "In these cases, however, while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different standards to be applied on remand. Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases--and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied--on remand each of the judgments should be reinstated if *either* of those tests is met." Id. at 810 (footnote omitted).

DEPARTMENT OF JUSTICE RESPONSE TO THE RAPANOS DECISION

In Rapanos, no opinion commanded a majority of the Court. In his concurring opinion, Chief Justice Roberts observed that lower courts "will now have to feel their way on a case-by-case basis." Id. at 758. He did, however, provide guidance, saying that "[t]his situation is certainly not unprecedented. See *Grutter v. Bollinger,* 539 U.S. 306, 325 . . . (2003) (discussing *Marks v United States*, 430 U.S. 188 . . . (1977))." Id. Since Rapanos was decided, the Supreme Court has examined another fragmented decision in the Texas redistricting case, League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006). Based on these decisions and others, the Department of Justice has advised courts that it believes that a particular water body may be regulated under the CWA if it satisfies either the Rapanos plurality's or Justice Kennedy's standard.

In the 22 months since Rapanos was decided, this has been an area of active litigation. The Department of Justice has filed more than 45 briefs in more than 30 federal court proceedings in which geographic jurisdiction under the CWA was a significant issue, including briefs in nine of the thirteen Courts of Appeal. For the convenience of the Committee, attached to this statement are two charts showing post-Rapanos court filings by the United States and judicial decisions applying the Rapanos standards, as of March 27, 2008. In six cases in which the United States prevailed in asserting jurisdiction after Rapanos, the losing party sought certiorari and the Supreme Court has denied those petitions. The cases are United States v. Johnson, 467 F.3d. 56 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007); United States v. Morrison, 178 Fed. Appx. 481 (6th Cir. 2006), cert. denied, 127 S.Ct. 1485 (2007); United States v. Gerke Excavating, Inc., 464 F 3d. 723 (7th Cir. 2006), cert. denied, 128 S.Ct. 45 (2007); United States v. Heinrich, 184 Fed. Appx. 542 (7th Cir. 2006), cert. denied, 127 S.Ct. 2974 (2007); United States v. Hubenka, 438 F.3d 1026 (10th Cir.), cert. denied, 127 S.Ct. 114 (2006); Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs, 425 F. 3d 1150 (9th Cir. 2005), cert. denied, 127 S.Ct. 1258 (2007).

One key issue in pending and decided cases is our position that the United States may establish CWA jurisdiction under either the plurality's standard or Justice Kennedy's standard articulated in the Rapanos decision. This position has met with

mixed results. The First Circuit has agreed with the United States, as have district courts in Minnesota, Kentucky, Connecticut, and Florida. United States v. Johnson, supra; United States v. Bailey, 516 F. Supp. 2d 998 (D. Minn.), appeal dismissed, No. 07-3533 (8th Cir. 2007); United States v. Cundiff, 480 F. Supp. 2d 940 (W.D. Ky.), appeal filed, No. 07-5630 (6th Cir. 2007); Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc., 472 F. Supp. 2d 219 (D. Conn.), appeal pending, No. 07-0795CV (2d Cir. 2007); United States v. Evans, No. 3:05 CR 159, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006). See also United States v. Lucas, 516 F.3d 316 (5th Cir.), reh'g en banc denied (2008) (upholding criminal conviction on grounds that that the United States had established CWA jurisdiction under each of the standards articulated in Rapanos).

Other courts have concluded that Justice Kennedy's "significant nexus" standard is applicable, including the Eleventh Circuit, the Ninth Circuit, and the Seventh Circuit, as well as district courts in Oregon, Indiana, Illinois, California, and Pennsylvania. United States v. Robison, 505 F.3d 1208 (11th Cir. 2007), petition for reh'g en banc denied (2008); Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007), cert. denied, 170 L.Ed.2d 61 (2008); United States v. Gerke Excavating, supra; United States v. Cam, No. 05-141-KI (D. Or. Dec. 21, 2007); United States v. Fabian, 522 F. Supp. 2d 1078 (N.D. Ind.), mot. for recons. denied, (2007); United States v. Lippold, No. 06-30002, 2007 WL 3232483 (C.D. Ill. Oct. 31, 2007); Environmental Protection Information Center v. Pacific Lumber Co., 469 F. Supp. 2d 803 (N.D. Cal. 2007); United States v. Pozsgai, No. 88-6545 (E.D. Pa. March 8, 2007), appeal pending, No. 07-1900 (3rd Cir. 2007).

We believe that the opinions of the Seventh and the Ninth Circuits do not foreclose the use of the plurality standard to establish jurisdiction. The Seventh Circuit in United States v. Gerke remanded that case for further proceedings in light of Rapanos and stated that "Justice Kennedy's proposed standard . . . must govern the further stages of this litigation . . . . " 464 F.3d at 725. The Court recognized, however, that cases may occasionally arise in which Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1," and it did not specify what it regarded as the proper disposition of such a case. Id. The Ninth Circuit, in a citizens' suit, Northern California River Watch v. City of Healdsburg, initially stated that Justice Kennedy's concurrence was the controlling law. We filed a motion, as amicus curiae, asking the Court to clarify this statement by recognizing that jurisdiction may also be established under the plurality standard. The court subsequently withdrew its earlier opinion and issued a new opinion that concluded that Justice Kennedy's standard provides "the controlling rule of law for our case," 496 F.3d at 999-1000 (emphasis added), and found that the waters at issue met this standard.

The Department and others have litigated some cases to the point of a merits decision on CWA jurisdiction. Given the standards articulated in Rapanos, the determination in each case is highly fact specific. For example, the Fifth and Ninth Circuits and district courts in Oregon, Minnesota, Indiana, Kentucky, Pennsylvania, and Florida have found CWA jurisdiction. United States v. Lucas, supra; Northern California River Watch v. City of Healdsburg, supra; United States v. Moses, 496 F.3d 984 (9th

Cir.), reh'g en banc denied, (2007), petition. for cert. filed (2008) (07-1195)**;** United States v. Cam, supra; United States v. Bailey, supra; United States v. Fabian, supra; United States v. Cundiff, supra; United States v. Pozsgai, supra; United States v. Evans, supra. In other cases, the Ninth Circuit and district courts in Connecticut and Texas have found CWA jurisdiction to be lacking. San Francisco Baykeeper v. Cargill Salt Division, 481 F.3d 700 (9th Cir. 2007); Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc., supra; United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605 (N.D. Tex. 2006).

While many decided cases so far have involved jurisdiction over wetlands under section 404 of the CWA, some decisions concern other CWA programs. See, for example, United States v. Lucas, supra (section 402); United States v. Robison, supra (section 402); San Francisco Baykeeper v. Cargill Salt Division, supra (section 402); United States v. Lippold, supra (section 402); United States v. Evans, supra (section 402); United States v. Chevron Pipe Line Co., supra (section 311).

CONCLUSION

In closing, I would like to assure the Committee that the Department of Justice takes seriously its obligation to protect public health and the environment and to enforce and defend the existing laws. The Rapanos decision is significant. We will continue to review all pending and potential cases to determine whether the waters involved meet the standards articulated in the Rapanos decision.

I would be happy to answer any questions that you may have about my testimony.

Attachment to Statement of John C. Cruden

Chart One

Post-Rapanos Court Filings by the United States (As of March 27, 2008)

Case Name and Court	Type of Case	Nature of Filing	Date Filed
Supreme Court Cases			
Charles Johnson v. United States, No. 07-9 (S. Ct.)	Clean Water Act (CWA) 404 Civil Enforcement	Opposition to Petition for Certiorari	Aug. 31, 2007
Gerke Excavating, Inc. v. United States, No. 06-1331 (S. Ct.)	CWA 404 Civil Enforcement	Opposition to Petition for Certiorari	June 6, 2007
Paul A. Heinrich v. United States, No. 06-1271 (S. Ct.)	CWA 404 Civil Enforcement	Opposition to Petition for Certiorari	May 21, 2007
Joseph Morrison v. United States, No. 06-749 (S. Ct.)	CWA 404 Civil Enforcement	Opposition to Petition for Certiorari	Jan. 30, 2007
Baccarat Fremont Developers v. United States Army Corps of Engineers, No. 06-619 (S. Ct.)	Challenge to CWA 404 Permit Determination	Opposition to Petition for Certiorari	Jan. 3, 2007
John Hubenka v. United States, No. 05-11337 (S. Ct.)	CWA 404 Criminal Enforcement	Opposition to Petition for Certiorari	Aug. 7, 2006
Appellate Cases			
United States v. George Rudy Cundiff, Nos. 05-5469, 05-5905, 07-5630 (6th Cir.)	CWA 404 Civil Enforcement	Merits Brief	Feb. 21, 2008
United States v. Charles Barry Robison, No. 05-17019-EE (11th Cir.)	CWA 402 Criminal Enforcement	Opposition to Defendants' Petition for Rehearing En Banc	Jan. 18, 2008
(see above)	(see above)	Petition for Rehearing En Banc	Dec. 13, 2007

(see above)	(see above)	Merits Brief	Oct. 2, 2006
Simsbury-Avon Preservation Society v. Metachon Gun Club. Inc., No. 07-0795CV (2nd Cir.)	CWA Citizen Suit	Amicus Curiae Brief	June 19, 2007
United States v. David H. Donovan, No. 07-1220 (3rd Cir.)	CWA 404 Civil Enforcement	Merits Brief	May 18, 2007
United States v. Robert J. Lucas, No. 06-60289 (5th Cir.)	CWA 404 and 402 Criminal Enforcement	Merits Brief	Mar. 22, 2007
United States v. C. Lynn Moses, No. 06-30379 (9th Cir.)	CWA 404 Criminal Enforcement	Merits Brief	Mar. 1, 2007
(see above)	(see above)	Response in Opposition to Motion for Summary Disposition	Sept. 8, 2006
United States v. Paul A. Heinrich, No. 05-3199 (7th Cir.)	CWA 404 Civil Enforcement	Opposition to Petition for Panel Rehearing and Rehearing En Banc	Nov. 14, 2006
United States v. Gerke Excavating, Inc., No. 04-3941 (7th Cir.)	CWA 404 Civil Enforcement	Opposition to Petition for Rehearing En Banc	Nov. 1, 2006
(see above)	(see above)	Petition for Panel Rehearing to Clarify the Court's Opinion of September 22, 2006	Sept. 28, 2006
(see above)	(see above)	Circuit Rule 54 Position Statement	Aug. 18, 2006
United States v. Charles Johnson, No. 05-1444 (1st Cir.)	CWA 404 Civil Enforcement	Reply in Support of Motion to Vacate and Remand	Oct. 2, 2006
(see above)	(see above)	Motion to Vacate and Remand and Response in Opposition to Petition for Rehearing En Banc	Sept. 11, 2006

San Francisco Baykeeper v. Cargill Salt Division, Nos. 04-17554 and 05-15051 (9th Cir.)	CWA Citizen Suit	Amicus Curiae Supplemental Letter Brief	Aug. 28, 2006
June Carabell v. United States Army Corps of Engineers, No. 03-1700 (6th Cir.)	Challenge to CWA 404 Permit Determination	Reply in Support of Motion to Remand to the District Court with Instructions to Remand to the Army Corps of Engineers for Application of the Appropriate Legal Standard and Further Factual Development	Aug. 25, 2006
(see above)	(see above)	Motion for Remand to the District Court with Instructions to Remand to the Army Corps of Engineers for Application of the Appropriate Legal Standard and Further Factual Development	July 31, 2006
United States v. D.J. Cooper, No. 05-4956 (4th Cir.)	CWA 402 Criminal Enforcement	Opposition to Second Motion for Post-Conviction Release	Aug. 23, 2006
Northern California River Watch v. City of Healdsburg, No. 04-15442 (9th Cir.)	CWA Citizen Suit	Motion as Amicus Curiae to Clarify the Court's Opinion	Aug. 23, 2006
Baccarat Fremont Developers v. United States Army Corps of Engineers, No. 03-16586 (9th Cir.)	Challenge to CWA 404 Permit Determination	Supplemental Authority Letter	July 31, 2006
United States v. John Rapanos, No. 03-1489 (6th Cir.)	CWA 404 Civil Enforcement	Motion for Remand to the District Court for Further Proceedings Regarding Regulatory Jurisdiction	July 31, 2006
Greater Gulfport Properties v. United States Army Corps of Engineers, No. 05-60243 (5th Cir.)	Challenge to Corps' of Engineers' CWA Jurisdictional Determination	Response to Supplemental Authority Letter	July 26, 2006

District Court Cases			
United States v. Mastec North America, No. 06-6071 (D. Or.)	CWA 404 Civil Enforcement	Closing Argument	Mar. 24, 2008
United States v. Keith David Rosenblum, Cr. No. 07-294 (D. Minn.)	CWA 402 Criminal Enforcement	Response to Defendant's Objections	Jan. 28, 2008
(see above)	(see above)	Objections to Magistrate's Report	Jan. 11, 2008
(see above)	(see above)	Opposition to Motion to Dismiss	Nov. 13, 2007
United States v. Gerald Lippold, Cr. No. 06-30002 (C.D. Ill.)	CWA 402 Criminal Enforcement	Opposition to Defendant's Motion to Dismiss Superceding Indictment for Violation of Due Process	Oct. 5, 2007
United States v. Ivan Cam, CR 05-141-KI (D. Or.)	CWA 404 Criminal Enforcement	Opposition to Motion to Withdraw Guilty Plea	Aug. 27, 2007
United States v. Massey Energy Co., Civ. No. 2:07-0299 (S.D. W. Va.)	CWA 402 Civil Enforcement	Opposition to Motion to Dismiss	Aug. 24, 2007
United States v. Charles Johnson, Civil Action No. 99-12465-EFH (D. Mass.)	CWA 404 Civil Enforcement	Motion to Govern Proceedings on Remand	Apr. 19, 2007
American Petroleum Institute v. Stephen Johnson, No. 1:02CV02247 PLF (D.D.C.)	Challenge to EPA's Spill Prevention, Control, and Countermeasure Rule under CWA 311	Reply Memorandum in Support of Cross-Motion for Summary Judgment	Mar. 30, 2007

(see above)	(see above)	Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of EPA's Cross-Motion for Summary Judgment	Dec. 20, 2006
United States and State of Ohio v. Ike Parker, Civil Action No. 3:91 CV 7482 (N.D. Ohio)	CWA 404 Civil Enforcement	Opposition to Motion to Dissolve Consent Decree	Mar. 16, 2007
United States v. Gary Bailey, Civil Action No. 05-2245 (D. Minn.)	CWA 404 Civil Enforcement	Reply Memorandum in Support of Summary Judgment	Mar. 14, 2007
(see above)	(see above)	Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment	Feb. 1, 2007
United States v. Sea Bay Development Corp., Civil Action No. 2:06-cv-624 (E.D. Va.)	CWA 404 Civil Enforcement	Opposition to Motion to Dismiss	Feb. 27, 2007
United States v. George Rudy Cundiff, Civil Action No: 4:01-CV-6-M (W.D. Ky.)	CWA 404 Civil Enforcement	Post-Hearing Brief Concerning "Waters of the United States"	Feb 9, 2007
(see above)	(see above)	Pre-Hearing Brief	Jan. 18, 2007
United States v. John Pozsgai, Civil Action No. 88-6545 (E.D. Pa.)	CWA 404 Civil Enforcement	Memorandum Demonstrating that the *Rapanos* Decision Does Not Provide Grounds for Post-Judgment Relief	Sept. 28, 2006
United States v. Rowland A. Fabian, Civil Action No. 2:02CV495RL (N.D. Ind.)	CWA 404 Civil Enforcement	Response to Supplemental Brief on *Rapanos/Carabell*	Aug. 31, 2006
(see above)	(see above)	Supplemental Brief Following *Rapanos/Carabell*	Aug. 17, 2006

United States v. Ronald Robert Evans, Sr., Case No. 3:05-cr-159(S4)-J-32MMH (M.D. Fla.)	CWA 402 Criminal Enforcement	Opposition to Defense Motion to Dismiss Count Five	July 20, 2006
(see above)	(see above)	Memorandum Re: Supreme Court's *Rapanos* Decision	July 7, 2006

Chart Two
Judicial Decisions Applying the Rapanos Standards (As of March 27, 2008)[1/]

Cir.	Case	Citation	Standard Applied/Result
1st	**United States v. Charles Johnson, No. 05-1444 (1st Cir. Oct. 31, 2006), petition for rehearing and rehearing en banc denied Feb. 21, 2007, petition for certiorari denied Oct. 9, 2007**	**467 F.3d 56**	**Case remanded to district court; U.S. may establish Clean Water Act (CWA) jurisdiction under either the plurality's or Justice Kennedy's standard**
2nd	Simsbury-Avon Preservation Society v. Metachon Gun Club, Inc., Civil Action No. 3:04cv803 (D. Conn. Jan. 31, 2007), appeal pending (2nd Cir. No. 07-0795CV)	472 F. Supp. 2d 219	Summary judgment granted in favor of defendant; evidence did not establish CWA jurisdiction under either the plurality's or Justice Kennedy's standard
3rd	United States v. John Pozsgai, Civil Action No. 88-6545 (E.D. Pa. March 8, 2007), appeal pending (3rd Cir. No. 07-1900)	Not reported	Rapanos did not prevent a finding of contempt of prior court order; Justice Kennedy's standard satisfied
4th	None		
5th	**United States v. Robert J. Lucas, No. 06-60289 (5th Cir. Feb. 1, 2008), petition for rehearing en banc denied March 4, 2008**	**516 F.3d 316**	**Criminal conviction under CWA affirmed; evidence presented at trial supported plurality's, Justice Kennedy's, and dissent's standards**
	United States v. Chevron Pipe Line Co., Civil Action No. 5:05-CV-293-C (N.D. Tex. June 28, 2006)	437 F. Supp. 2d 605	Civil action under CWA 311 dismissed; applied prior 5th Cir. precedent

[1/] Appellate decisions are in bold.

6th	United States v. George Rudy Cundiff, Civil Action No: 4:01-CV-6-M (W.D. Ky. March 29, 2007), appeal pending (6th Cir. No. 07-5630)	480 F. Supp. 2d 940	U.S. may establish CWA jurisdiction under either the plurality's or Justice Kennedy's standard; jurisdiction established under both
7th	**United States v. Gerke Excavating, Inc., No. 04-3941 (7th Cir. Sept. 22, 2006), petition for rehearing and rehearing en banc denied Dec. 1, 2006, petition for certiorari denied Oct. 1, 2007**	**464 F.3d 723**	**Case remanded to district court for application of Justice Kennedy's standard**
	United States v. Rowland A. Fabian, Civil Action No. 2:02CV495RL (N.D. Ind. Mar. 29, 2007), motion for reconsideration denied Oct. 5, 2007	522 F. Supp. 2d 1078	CWA jurisdiction established; Justice Kennedy's standard satisfied
	United States v. Gerald Lippold, Criminal No. 06-30002 (C.D. Ill. Oct. 31, 2007)	2007 WL 3232483	Motion to dismiss indictment on due process grounds denied under Justice Kennedy's standard
8th	United States v. Gary Bailey, Civil Action No. 05-2245 (D. Minn. Sept. 25, 2007), appeal dismissed (8th Cir. Dec. 19, 2007, No. 07-3533)	516 F. Supp. 2d 998	CWA jurisdiction established under Justice Kennedy's standard (but stated CWA jurisdiction may be established under either the plurality's or Justice Kennedy's standard)
	United States v. Keith David Rosenblum, Criminal No. 07-294 (D. Minn. March 3, 2008)	2008 WL 582356	Defendant's motion to dismiss for lack of jurisdiction denied; Justice Kennedy's standard not applicable to discharges to a publicly owned treatment works

9th	**San Francisco Baykeeper v. Cargill Salt Division, Nos. 04-17554 and 05-15051 (9th Cir. Mar. 8, 2007)**	**481 F.3d 700**	**District court opinion finding CWA jurisdiction reversed; plaintiff failed to establish CWA jurisdiction on asserted regulatory ground and Justice Kennedy's standard not satisfied***
	United States v. Moses, No. 06-30379 (9th Cir. Aug. 3, 2007), petition for rehearing en banc denied September 24, 2007, petition for certiorari filed March 19, 2008	**496 F.3d 984**	**Criminal conviction under CWA affirmed; Justice Kennedy's standard satisfied***
	Northern California River Watch v. City of Healdsburg, No. 04-15442 (9th Cir. Aug. 6, 2007) (vacating 457 F. 3d 1023), petition for certiorari denied Feb. 19, 2008	**496 F.3d 993**	**District court decision finding CWA jurisdiction affirmed; Justice Kennedy's standard satisfied**
	Environmental Protection Information Center v. Pacific Lumber Co., No. C 01-2821 MHP (N.D. Cal. Jan. 8, 2007)	469 F. Supp. 2d 803	Plaintiff's motion for summary judgment denied; Justice Kennedy's standard not satisfied*
	United States v. Ivan Cam, CR 05-141-KI (D. Or. Dec. 21, 2007)	Not reported	Motion to withdraw guilty plea denied; Justice Kennedy's standard satisfied
10th	None		
11th	**United States v. Charles Barry Robison, No. 05-17019 (11th Cir. Oct. 24, 2007), petition for rehearing en banc denied March 27 2008**	**505 F.3d 1208**	**Criminal conviction vacated and remanded to district court for application of Justice Kennedy's standard**
	United States v. Charles Barry Robison, No. CV-04-PT-199-S (N.D. Ala. Nov. 7, 2007)	521 F. Supp. 2d 1247	Rapanos did not establish a new standard for tributaries; case reassigned to new judge

	United States v. Ronald Robert Evans, Sr., Case No. 3:05-cr-159(S4)-J-32MMH (M.D. Fla. August 2, 2006)	2006 WL 2221629	U.S. may establish CWA jurisdiction under either the plurality's or Justice Kennedy's standard; there was probable cause to believe that discharges occurred into jurisdictional waters under either standard
DC	None		
Fed	None		

*These cases within the Ninth Circuit were issued after the initial decision and prior to issuance of the amended decision in Northern California River Watch v. City of Healdsburg. In the amended decision, the Ninth Circuit stated that the Rapanos concurrence "provides the controlling rule of law for our case" and that the concurring opinion would constitute "the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases." Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007), cert. denied, 170 L.Ed.2d 61 (2008). The amended decision in Healdsburg, issued by the Ninth Circuit on August 6, 2007, revised the language in its prior decision of August 10, 2006, which had stated that Justice Kennedy "provides the controlling rule of law." Healdsburg, 457 F.3d 1023, 1029 (9th Cir. 2006) (vacated).