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1994, Executive Director from 1991-94 and Board member and Chair of the Membership Committee from 2004-06. In his many roles with TCS, he has always offered wisdom and original ideas.

**Chad Nelson (Director)** served two full terms with TCS during which he was Chair of the Development Committee and provided unique insight and invaluable energy.

**Lindsay Fullenkamp (Secretary)** served as Chair of the Communications Committee, and brought organization,

attention to detail, and leadership to the Board of directors during her tenure.

**John Duff (Past-President)** provided vital leadership for six years as President-Elect, President and Past President (and numerous committee positions), implementing critical Society and Board initiatives while serving in those roles.

## WHEN IS A WETLAND NOT A WETLAND?

by Jonathan Lew

**D**ue to the similar issues at hand, the U.S. Supreme Court chose to consolidate the *Rapanos* and *Carabell* cases. At issue in each case is whether wetlands lying near ditches or man-made drains that eventually empty into traditional navigable waters constitute a navigable waterway under the Clean Water Act (CWA). If wetlands fall under the CWA, then discharging any dredged or fill material requires a permit issued by the U.S. Army Corps of Engineers (Corps).<sup>1</sup> In *Rapanos*, three wetlands were backfilled without a permit and the Sixth Circuit found that the wetlands fell under the CWA because they were hydrologically connected to more remote navigable waterways. Similarly in *Carabell*, a request for a permit was denied and the Sixth Circuit found federal jurisdiction because the wetland was adjacent to navigable waterways.<sup>2</sup>

In a fractured set of opinions, the Supreme Court vacated the Sixth Circuit's decisions because it had applied an incorrect standard in deciding whether federal jurisdiction extended to tributaries of navigable waterways. Justices Scalia, Thomas, Alito and Chief Justice Roberts formed the plurality while Justices Stevens, Souter, Ginsburg and Breyer formed the dissent. Because no majority exists in the case, the standard to be applied upon remand is that of the concurring opinion by Justice Kennedy.

### Plurality

The plurality held that the CWA only grants federal jurisdiction over relatively permanent, standing or flowing bodies of water found in streams and bodies forming geographical features such as oceans, rivers, and lakes.<sup>3</sup> Ephemeral flows of water or isolated ponds are not covered by the CWA because such an "expansive interpretation would result in a significant impingement of the States' traditional and primary power over land and water use."<sup>4</sup> The plurality acknowledged that certain wetlands blend into navigable waters and these wetlands should fall under the CWA. But a "hydrological connection" is not enough for a wetland to be "adjacent to" a navigable waterway. "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 CWA."<sup>5</sup> (emphasis added). The plurality further discusses the idea that narrowing the definition of adjacent wetland will affect wetland protection. In defense of its conclusion, the plurality states that the CWA is not a Comprehensive National Wetland Protection Act and it is only defining the extent of the Corps' jurisdiction over the waters of the United States.

### Concurrence

Justice Kennedy agrees with the plurality that the Sixth Circuit's holdings should be vacated and the

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cases remanded in order for the proper test to be applied. Justice Kennedy views the "significant nexus" test to be the proper test whereby "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are navigable in fact or could reasonably be so made."<sup>6</sup> Kennedy finds the plurality's definition of "water" to be too narrow because such an interpretation overlooks irregular waterways that are dry at times during the year but periodically release powerful volumes of water. "Significant nexus" must be determined on a case by case basis. Justice Kennedy's reasoning for applying the "significant nexus" test is "that wetlands can perform critical functions related to the integrity of other waters - functions such as pollutant trapping, flood control and runoff storage"<sup>7</sup> and regulating these wetlands is necessary to achieve the objective of the CWA, which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>8</sup>

### Dissent

The dissenting justices' argument is that there is ambiguity in the phrase "waters of the United States" and because interpreting it broadly to cover such ditches and streams advances the purpose of the CWA, deference should be given to the Corps.<sup>9</sup> The judiciary should be careful not to substitute its opinion with that of the legislature; furthermore, the plurality's opinion is making a judicial amendment that the legislature did not intend.<sup>10</sup> The dissent found the wetlands at issue in this case fall under regulations interpreting "waters of the United States

to cover all traditionally navigable waters; tributaries of these waters; and wetlands adjacent to traditionally navigable waters or their tributaries."<sup>11</sup>

### Impact of the Decision

The division in the Supreme Court has resulted in lower courts applying Justice Kennedy's "significant nexus" test since his was the controlling opinion that remanded the case back to the Sixth Circuit. However, the "significant nexus" test is still somewhat undefined. Moreover, many wetland determinations are contingent upon the joint interim guidance of the Environmental Protection Agency (EPA) and the Corps. How navigable waters are defined by the EPA and the Corps, whether categorically or otherwise, will be the ultimate test in determining federal jurisdiction.

### Footnotes

- <sup>1</sup> See 33 U.S.C. §§ 1311(a), 1342(a), 1344(a), (d).
- <sup>2</sup> The U.S. Army Corps of Engineers' current regulations interpret "the waters of the United States" to "include wetlands adjacent to [such] waters." 33 CFR § 328.3(a)(7) (2004).
- <sup>3</sup> See *Rapanos v. United States*, 126 S. Ct 2208, 2220 (2006).
- <sup>4</sup> *Id.* at 2224.
- <sup>5</sup> *Id.* at 2226.
- <sup>6</sup> *Id.* at 2236.
- <sup>7</sup> 33 CFR 320.4(b)(2).
- <sup>8</sup> 33 U.S.C. § 1251(a).
- <sup>9</sup> See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).
- <sup>10</sup> To avoid judicial amendments to statutes, the agency can choose to issue interim rules to define ambiguous terms.
- <sup>11</sup> *Rapanos* at 2255.

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