Department of Justice

STATEMENT

OF

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DEPUTY ASSISTANT ATTORNEY GENERAL
ENVIRONMENT AND NATURAL RESOURCES DIVISION

BEFORE THE

SUBCOMMITTEE ON FISHERIES, WILDLIFE AND WATER
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

CONCERNING

RECENT SUPREME COURT DECISIONS DEALING WITH THE CLEAN WATER ACT
(RAPANOS V. UNITED STATES and CARABELL V. U.S. ARMY CORPS OF ENGINEERS)

PRESENTED ON

AUGUST 1, 2006

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INTRODUCTION

Chairman Chafee, Senator Clinton, and Members of the Subcommittee, thank you for inviting the Department of Justice to testify about a recent and important environmental case, Rapanos v. United States, __ U.S. __, 126 S.Ct. 2208 (2006), in which the Supreme Court addressed the jurisdictional scope of the Clean Water Act (CWA) in two consolidated cases, Rapanos v. United States, 376 F.3d 629 (6th Cir. 2004) and Carabell v. United States Army Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2004). I am pleased to be joined by Benjamin Grumbles, the Assistant Administrator for Water, U.S. Environmental Protection Agency, and John Paul Woodley, Jr., Assistant Secretary of the Army for Civil Works. They will provide an overview of national wetlands protection policy under the CWA as well as EPA and Corps of Engineers responsibilities while I will focus more on litigation by the Department of Justice.

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 wetlands 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 nearly 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, in particular those cases involving wetlands. 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, the standard of law we believe is applicable on remand of those two cases, and several key issues that might arise from the decision.

As this Subcommittee 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 preliminary thinking about this important decision issued over a month ago, my testimony should not be used in litigation in any particular case. Instead, the position of the United States in any particular case 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. We frequently defend 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 when it makes a case-specific decision, such as 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 and EPA make broader policy decisions such as those embodied in a rulemaking. Parties may also sue EPA for failure to perform a non-discretionary duty under the CWA. 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 ENRD, we have an Environmental Defense Section that specializes in defending the actions of Federal agencies, including EPA and the Corps, when they are challenged in court in connection with the CWA.

ENRD also brings 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 wetlands cases brought pursuant to CWA section 404, which are handled by our Environmental Defense Section or by U.S. Attorney's Offices. Criminal enforcement of the CWA is handled by our Environmental Crimes Section, usually in conjunction with local U.S. Attorney's Offices.

CWA civil judicial enforcement actions generally begin with a referral or investigation from another Federal agency, whether it is EPA or the Corps, regarding alleged violations of the CWA. Often by the time we receive a referral, the agency in question has exhausted 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 inquiry 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 explore possibilities for achieving settlement of the alleged violations without litigation.

The vast majority of 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 commend the Corps for implementing 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. The Department also litigates cases regarding discharges into nonnavigable tributaries of navigable-in-fact waters.

In sum, the Division, in conjunction with U.S. Attorney Offices across the nation, litigates CWA actions that involve the United States. The wetlands caseload is a portion of ENRD's case responsibilities. On average, we handle about 10-15 new wetlands enforcement cases each year on behalf of the EPA or the Corps. In addition, there have been a few criminal cases involving wetlands.

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).[1] One of the mechanisms 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 pursuant to a permit issued in accordance 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."[2] While earlier versions of the 1972 legislation included the word

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[1]The 1972 legislation extensively amended the Federal Water Pollution Control Act (FWPCA), which was originally enacted in 1948. Further amendments to the FWPCA, which were enacted in 1977, changed the popular name of the statute to the Clean Water Act. See Pub. L. No. 95-217, 91 Stat. 1566; 33 U.S.C. 1251 note.

[2]For purposes of the Section 402 and 404 permitting programs, as discussed below, the current EPA and Corps regulations implementing the CWA include substantively equivalent definitions of the term "waters of the United States." The Corps defines that term to include:
(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 . . . ;
(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.
33 C.F.R. 328.3(a); see 40 C.F.R. 230.3(s) (EPA).

The regulations define the term "wetlands" to mean "those areas that are inundated or saturated

"navigable" within that definitional provision, the Conference Committee deleted that word and expressed the intent to reject prior geographic limits on the scope of Federal water-protection measures. Compare S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972), with H.R. Rep. No. 911, 92 Cong., 2d Sess. 356 (1972) (bill reported by the House Committee provided that "[t]he term 'navigable waters' means the navigable waters of the United States, including the territorial seas").

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 the EPA, or by a State with an approved program, under the National Pollutant Discharge Elimination System (NPDES) program.[3]

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by surface or ground water 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." 33 C.F.R. 328.3(b). The term "adjacent" is defined to mean "bordering, contiguous, or neighboring," and the regulations state that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. 328.3(c).

[3]Congress established a mechanism under Section 404(g)(1) by which a State may assume responsibility for administration of the Section 404 program with respect to "the discharge of dredged or fill material into the navigable waters (other than those waters which are presently

U.S. Supreme Court Backdrop for the *Rapanos* Decision

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 131-132 n.8.

In SWANCC, the Supreme Court in 2001 faced an aspect of the question reserved in Riverside Bayview, and it rejected the Corps' construction of the term "waters of the United States" as encompassing "isolated," intrastate, nonnavigable ponds based solely on their use as

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used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto) . . . ." If the EPA Administrator approves a proposed State program, the Corps is directed under Section 404(h)(2)(A) to "suspend the issuance of permits . . . for activities with respect to which a permit may be issued pursuant to such State program . . . ." Under a State-administered program, EPA and the Corps retain authority under Section 404(h)(1)(D)-(F) to forbid or impose conditions upon any proposed discharge permit. EPA also retains enforcement authority under Sections 404(n) and 309 to issue compliance orders and commence administrative, civil, and criminal actions to enforce the CWA. A similar State authorization program exists for the NPDES program under Section 402(b) of the CWA.

habitat for migratory birds. 531 U.S. at 171-172. 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 also looked to the well-established doctrine 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 intention, 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 clear indication of Congressional intention in this context. Following the SWANCC decision, a significant amount of litigation ensued, ultimately resulting in seven of eight Circuit Courts of Appeal generally holding that the SWANCC decision applied 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); United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004); United States v. Gerke Excavating, Inc., 412 F.3d 804 (7th Cir. 2005), petition for cert. granted and judgment vacated, 74 U.S.L.W. 3714 (U.S. June 26, 2006) (No. 05-623); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001); United States v. Hubenka, 438 F.3d 1026 (10th Cir. 2006), petition for cert. pending (U.S. May 17, 2006) (No. 05-11337); 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 Federal jurisdiction over the wetlands 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 of whether jurisdiction under the CWA extends to wetlands that are adjacent to tributaries of navigable-in-fact waters.[4]

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[4]The Supreme Court also granted certiorari on the question of whether such an interpretation of the CWA was constitutional. The United States argued that as applied to the wetlands filling activities under review, the CWA's ban on unauthorized pollutant discharges was a permissible exercise of Congress' power to regulate (a) the channels of interstate commerce and (b) activities that substantially affect interstate commerce. The Supreme Court did not reach this

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 adjacent to (abutting) traditional navigable waters are included within the statutory term (Rapanos); and that the CWA does not extend to wetlands that are hydrologically isolated from any navigable water of the United States (Carabell).

The Supreme Court Decision in *Rapanos*

The judgment of the Supreme Court was to vacate and remand 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*." 126 S.Ct. at 2235. Justice Kennedy, who concurred in the judgment of the Court, established a different test, 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 2252. Chief Justice Roberts joined in the plurality opinion and also wrote a concurring opinion. Justice Stevens, in a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined, 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

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question in the Rapanos decision.

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 2220. Citing 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. Then, after reviewing the statutory language, the plurality concluded that "waters of the United States," includes "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. at 2221 (citation omitted). The phrase does not include "ordinarily dry channels through which water occasionally or intermittently flows." Id. 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 this test in footnotes. 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 2221 n.5 (citations omitted).

The plurality then examined the factor of the adjacency of the wetlands under review to "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 2226 (citation omitted and emphasis in original).

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 2227. 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. (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. Justice Kennedy, however, concluded that wetlands are "waters of the United States" where "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.'" Id. at 2248. The concurrence by Justice Kennedy stated, in relevant part, 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. 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 2249.

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 2243 (citation omitted).

In his concurring opinion, Chief Justice Roberts wrote that "[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This 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))." 126 S.Ct. at 2236.

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 tests 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 2265.

DEPARTMENT OF JUSTICE RESPONSE TO THE RAPANOS DECISION

Following this decision, ENRD is taking steps to ensure that the legal positions already taken on behalf of the Federal government in litigation are consistent with Rapanos, regardless of where a case arises or which agency is involved in a particular case. In addition to taking the necessary steps to ensure that our existing cases are consistent with Rapanos, we established a process that the positions we take in all Rapanos-related litigation going forward are internally consistent and appropriately coordinated within the Federal government. We have and will continue to devote particular attention in our CWA cases to assure that there is a factually and legally sound basis, consistent with Rapanos, before asserting jurisdiction over the aquatic resources in question.

The Division convened an internal group of experienced attorneys to begin assembling and reviewing cases which could be impacted by the decision. We also began coordinating with the responsible Federal agencies, who were conducting similar reviews, to discuss the ramifications of the decision. Subsequently, the United States has sought extensions of time as necessary in filed cases; advised our attorneys nationwide to coordinate any post-Rapanos filings with our team of experienced attorneys so that our positions are accurate and consistent; and undertaken a detailed review of potentially affected cases. By letter of July 14, 2006, Michael A. Battle, Director of the Executive Office for United States Attorneys, and Sue Ellen Wooldridge, Assistant Attorney General, Environment and Natural Resources Division, wrote to United States Attorneys concerning the procedure for coordination of any filing that may raise

issues related to the Rapanos decision.

Although we are moving carefully to ensure that the Federal agencies with programmatic responsibility over wetlands have adequate time to evaluate the case and advise the Department of Justice on implementing the decision, we have continued to take necessary steps to protect wetlands. For instance, we have finalized settlements that were being negotiated prior to Rapanos and where the parties still found settlement to be desirable after the ruling. In one case, for instance, we recently lodged a consent decree that requires a developer to pay a $600,000 civil penalty and restore streams and wetlands filled, without a permit, associated with construction of a golf course and related facilities in the State of Georgia. In another case, the United States recently settled a matter involving the unpermitted harvesting of peat from rare and environmentally significant peat bogs in the State of Michigan. The defendant in that case is required to restore the majority of the bog affected by the peat mining and to donate more than 2,800 acres of peatland to the State.

We have also filed pleadings in pending cases advising courts of the opinion. In one case, the United States has opposed criminal defendants' efforts to use Rapanos to suppress evidence obtained in a search warrant. In that case, the defendants argue that the Rapanos case reaches the actions of the defendants, who piped raw, untreated human excrement directly into a creek that flows into the St. John's River in Florida.

We are just beginning to see courts apply the Rapanos decision. In another case, within days of the Supreme Court's decision, a District Court in Texas granted an oil pipeline company's motion for summary judgment, holding that the United States had not established that the discharge of at least 3,000 barrels of oil from a pipeline into an intermittent creek reached

navigable-in-fact waters of the United States. The deadline for appeal of that decision has not yet passed.

In Rapanos, no opinion commanded a majority of the Court. In his concurring opinion, as we have noted, Chief Judge Roberts observed that lower courts "will now have to feel their way on a case-by-case basis." 126 S.Ct. at 2236. 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, ___ U.S. ___, 126 S. Ct. 2594, 2607 (2006). Based on all of these decisions, the Department of Justice has advised courts that it believes the applicable standard to determine if a wetland is governed by the CWA is whether either the Rapanos plurality's or Justice Kennedy's test is met in a particular fact situation. Based on this standard, the Department of Justice filed a new wetland enforcement case last week. This case involves alleged CWA Section 404 and 402 (stormwater) violations during the construction of a senior housing development near Lynchburg, Virginia.

Although ENRD is reviewing CWA cases to determine whether this opinion impacts what we previously advised various courts in which litigation is pending, Rapanos dealt primarily with the status of wetlands. In the plurality opinion, Justice Scalia stressed that the decision does not affect dischargers under sections 301 and 402 of the CWA. He stated that any person clearly remains responsible for the "addition of any pollutant to navigable waters," and that includes a "pollutant *that naturally washes downstream* . . . " 126 S.Ct. at 2227 (citations omitted).

I would like to mention another facet of our post-Rapanos activities: working

cooperatively with the States as we have done for many years. In general, we have made great strides to improve Federal-State cooperation and coordination in environmental protection generally. When the SWANCC decision was issued, we worked closely with the States and hosted a national conference and training session on wetlands protection and enforcement. The Division anticipates continuing this close work with the States. Should this opinion result in some wetlands not being covered by the CWA, States clearly have the option - as they have done in the past - of enacting legislation that would provide such protection.

CONCLUSION

In closing, I would like to assure the Subcommittee 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 and the Federal agencies are diligently reviewing their cases and procedures to assure that we satisfy the newly announced standards. 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.