

# Water Quality and Wetlands Committee Newsletter

Vol. 7, No. 2

December 2007

## CHAIR'S MESSAGE

**John E. Milner**  
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The Water Quality and Wetlands Committee for 2007-2008 has hit the ground running. We published our first newsletter in September in time for the 15th Section Fall Meeting in Pittsburgh and you are now reading our second. We are constantly seeking good articles for publication (with byline attribution), so please contact our newsletter leadership about writing for the committee. We want to provide as many well-written articles concerning important and timely water quality and wetlands topics for the Section's membership as we can, so please consider taking time to contribute. You can contact any of the following Newsletter vice chairs about writing for upcoming issues:

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We are also planning several Quick Teleconferences (QT) on water-related topics over the next several months. Our first QT is being planned for the Feb. 7, 2008, concerning the "nuts and bolts" of compliance with the *Rapanos* wetlands decision and EPA's related guidance document. We are actively collaborating with the Water Resources Committee to jointly sponsor this QT and hope to continue this team approach with Water Resources and other committees in 2008 in order to provide other QT panel discussions regarding important issues.

**Water Quality and Wetlands  
Committee Newsletter  
Vol. 7, No. 2, December 2007  
Tara W. Duhy, W. Blaine Early, III,  
Beth S. Gotthelf, Steve Kelton, and  
Jeff Kray, Editors**

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**CHESAPEAKE BAY PROGRAM PARTNERS  
USE COOPERATIVE APPROACH  
FOR SETTING NEW WATER  
QUALITY STANDARDS**

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In 2000, the Chesapeake Bay Program partner governments and agencies signed the Chesapeake 2000 Agreement, a strategic plan to improve the water quality and living resources of the bay. One of the first steps was the derivation of new water quality standards that would serve as the endpoints for nutrient and sediment reduction activities. From 2000-2003, the Chesapeake Bay Program led multiple technical task groups for refining designated uses of the bay system and deriving bay-specific water quality criteria for dissolved oxygen (DO), water clarity, and chlorophyll-*a*.

In addition to representatives from academia and regulatory agencies, scientists representing the regulatory community were invited to serve on the task groups. Members of the Virginia and Maryland Associations of Municipal Wastewater Agencies (V/MAMWA) and their technical consultants (Malcolm Pirnie, Inc. and Greeley & Hansen) and counsel (AquaLaw PLC) provided extensive review and independent contributions to the standard setting process. Throughout the process, they advocated standards that were based on sound science, representative of tangible environmental benefits, and reasonably attainable.

The designated uses of the Chesapeake Bay system were refined from a simple “fishable-swimmable” use to seasonal, location-dependent aquatic life uses. The new use classification provided significant regulatory relief by allowing less stringent DO criteria for deep-water and deep-channel habitats where vertical density stratification causes naturally low DO. Water-clarity criteria were based on the light requirements of submerged aquatic vegetation. The corresponding shallow water designated use includes ambitious goals for the restoration of submerged aquatic vegetation (SAV), but includes lower, more realistic goals for areas that have not historically supported abundant SAV.

The derivation of criteria for chlorophyll-*a* (an indicator of algae blooms) proved to be the most problematic and controversial. Draft versions of the chlorophyll-*a* criteria did not demonstrate defensible linkage between chlorophyll-*a* and designated uses. This threatened to misdirect financial resources toward nutrient reduction even in regions that did not have demonstrable use impairments. Owing in part to analyses performed by V/MAMWA scientists, the 2003 bay chlorophyll-*a* criteria were reformulated as a narrative criterion. V/MAMWA worked closely with Virginia to set alternative numeric criteria for the James River, a bay tributary that experienced high chlorophyll-*a* levels.

The Bay Program partners followed the development of the new water-quality standards by allocating nutrient loads to jurisdictions and refining regulatory frameworks for nutrient permitting and trading. Many projects to upgrade wastewater treatment plants with nutrient removal technology are already underway. More recently (2006-2007), the Bay Program has developed new numeric chlorophyll-*a* criteria for low salinity segments that comprise about 13 percent of the bay system. Consistent with approaches advocated by V/MAMWA, the new criteria were based on direct relations between chlorophyll-*a* and harmful algal blooms such as have occurred on the Potomac River. V/MAMWA has provided detailed technical review and input on the new criteria. However, additional investigation is needed to determine if ongoing nutrient reduction efforts will be sufficient to attain the new chlorophyll-*a* criteria.

## **FRIENDS OF PINTO CREEK V. EPA: NO PERMIT FOR DISCHARGE OF POLLUTANTS INTO AN ALREADY- IMPAIRED WATERWAY**

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**Connie Sue Martin  
Marten Law Group PLLC**

A new decision from the Ninth Circuit Court of Appeals prohibits Environmental Protection Agency (EPA) from issuing a National Pollution Discharge Elimination System (NPDES) permit under the Clean Water Act (CWA) for discharges into waterways that do not meet water quality standards, even if the new discharge is offset by the elimination of an existing source upstream. Moreover, the court in *Friends of Pinto Creek v. United States Environmental Protection Agency* (“*Pinto Creek*”), — F.3d —, 2007 WL 2874355 (9th Cir. 2007) held that a newly permitted discharge is allowed into a “impaired” waterway only if all existing discharges have already been identified and subjected to compliance schedules. The decision, which is the first of its kind, could impact the siting and expansion of manufacturing facilities, wastewater plants and mines throughout the West and, if other circuits follow *Pinto Creek*, throughout the country.

### **Background**

Pinto Creek is a river in the Arizona desert, and is included on Arizona’s list of impaired waters under § 303(d) of the CWA, 33 U.S.C. § 1313(d), for dissolved copper. Carlota Copper Company (Carlota), owned by Canada’s Quadra Mining Ltd., proposed to construct and operate a 3,000-acre open-pit copper mine and processing facility on Pinto Creek, approximately 60 miles east of Phoenix, to extract approximately 100 million tons of ore over the 11-year life of the mine. The proposed project consisted of four open pits, a sulfuric acid heap leach pad, process solution ponds, an on-site processing plant, five waste rock disposal areas, and ancillary facilities.

The design included a series of seven retention ponds to capture storm water runoff and sediment from the five waste rock disposal areas. Each of the seven

retention ponds would have outlet structures to release storm water if a large storm exceeded the capacity of a pond. Discharges from the retention ponds were to occur through outfalls or point sources requiring a NPDES permit issued under § 402(a) of the CWA, 33 U.S.C. § 1342(a). In addition to the retention pond outfalls, Carlota proposed to augment stream flows, which might have seen reduced flows as a result of withdrawal from the project's water supply wellfield, using either groundwater pumped from the wellfield, or water from other sources. The augmentation outfall was also subject to NPDES permitting requirements.

### The NPDES Permit

EPA issued a draft NPDES permit for the discharges from the proposed mine in 1998. Following public comments concerning existing copper loads in the waters of Pinto Creek, Carlota proposed to partially remediate a nearby abandoned mine site, Gibson Mine, to offset the discharge of copper from Carlota's outfalls. In 2000 the Arizona Department of Environmental Quality (Arizona DEQ) certified Carlota's NPDES permit as meeting state water quality standards under § 401 of the CWA, 33 U.S.C. § 1341, and EPA issued the final NPDES permit. A coalition of environmental and citizen's groups (collectively, "Friends of Pinto Creek") filed the first of two challenges to the NPDES permit with the EPA's Environmental Appeals Board. In response to the challenge, EPA stayed the permit and completed a final Total Maximum Daily Load for copper in Pinto Creek (the "Pinto Creek TMDL").

The Arizona DEQ issued a new § 401 certification in 2002 and EPA reissued the draft permit for public comment. The permit allowed Carlota to discharge dissolved copper into Pinto Creek and authorized stream flow augmentation discharges, but required Carlota to partially remediate Gibson Mine before discharging from its detention pond outfalls. In 2004, following a second, unsuccessful challenge by the Friends of Pinto Creek, the Environmental Appeals Board upheld the permit. *See Environmental Appeals Board Order Denying Review*, 11 E.A.D. 692, 2004 WL 3214473 (2004). EPA issued the final NPDES permit, and the Friends of Pinto Creek appealed the issuance of the permit to the Ninth Circuit.

### The Appeal

Plaintiffs' primary argument on appeal was that by issuing an NPDES permit to discharge a pollutant, dissolved copper, into a waterway where dissolved copper already exceeded water quality standards, EPA had "violated the intent and purpose of the CWA."

Under the CWA and the NPDES permit regulations, when a new source seeks to obtain a permit for a discharge of pollutants to a stream segment already exceeding its water quality standards for that pollutant, no permit may be issued. An exception to this prohibition is where the new source demonstrates, before the close of the public comment period for the proposed permit, that: (1) there are sufficient remaining pollutant load allocations for the discharge (that is, that the stream can support additional loading of that pollutant), and (2) existing dischargers in the stream segment are subject to compliance schedules designed to bring the stream segment into compliance with applicable water quality standards. 40 C.F.R. § 122.4(i)

EPA and Carlota contended that the exception applied. With regard to the first element, that there are sufficient remaining pollutant load allocations, EPA argued that the partial remediation of the discharge from Gibson Mine required under Carlota's NPDES permit was sufficient to offset the discharge of copper allowed under the permit. EPA relied on *Arkansas v. Oklahoma*, 503 U.S. 91, 112 S. Ct. 1046, 117 L. Ed. 2d 239 (1992), a case involving a challenge by the State of Oklahoma to a permit issued by the State of Arkansas that allowed discharges of effluent from an Arkansas city that eventually made its way into Oklahoma waters, where Oklahoma contended the discharges allowed under the permit violated Oklahoma water quality standards.

In *Arkansas*, the Supreme Court found that EPA had properly issued the NPDES permit because there was substantial evidence demonstrating that the discharges would not lead to a "detectable change in water quality." *Arkansas*, 503 U.S. at 112. The Supreme Court further found in *Arkansas* that the CWA does not mandate a complete ban on discharges into waterways that are impaired but, rather, contains

provisions designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing sources and new sources. *Id.* at 108. Similarly, the thrust of EPA's argument in *Pinto Creek* was that it properly allocated the burden of undesirable discharges between new and existing sources because Carlota would offset its dissolved copper discharges by eliminating that amount of dissolved copper in discharges or runoff from the Gibson Mine site, and therefore Carlota's discharges would not lead to a detectable change in water quality.

The Ninth Circuit rejected EPA's argument, and its construction of the statute. "The error of both the EPA and Carlota is that the objective of that section [of the CWA] is not simply to show a lessening of pollution, but to show how the water quality standards will be met if Carlota is allowed to discharge pollutants into the impaired waters." *Pinto Creek*, 2007 WL 2874355 at \*6. In order to establish that the exception applies, the court required EPA and Carlota to demonstrate that both the first element—sufficient remaining pollutant load allocations—and the second element—that existing sources are subject to compliance schedules designed to achieve compliance with water quality standards—were satisfied. Here the court concluded that EPA and Carlota failed to establish that the exception applied because there were no plans or compliance schedules that would allow the impaired Pinto Creek segment eventually to meet applicable water quality standards.

Moreover, the court found, contrary to the contention of EPA, that if point sources other than the proposed new point source require compliance schedules in order to achieve the applicable water quality standard, "then the EPA must locate *any* such point sources and establish compliance schedules to meet the water quality standard before issuing the new permit. If there are not adequate point sources to meet this requirement, then a permit cannot be issued unless the state or Carlota agrees to establish a schedule to limit pollution from a nonpoint source or sources sufficient to achieve water quality standards." *Pinto Creek* at \*7.

In reaching that conclusion, the court rejected the EPA's arguments that the court's construction of the

regulation amounted to a complete ban of discharges to impaired waters, and that the court could not compel EPA to act against point sources that are illegally discharging. The court noted in addressing EPA's arguments that the regulation does not require that the waterway must comply with water quality standards before a new permit may issue (which would be the case if the regulation banned new discharges to impaired waters), but only that EPA must impose a compliance schedule. Accordingly, the court vacated the issuance of the permit and remanded the case back to EPA for further proceedings consistent with the court's opinion.

## Implications

If there is no technically feasible means of reducing the pollutant concentration in the new effluent, or compliance schedules are not in place at existing point sources to achieve the required pollutant reductions necessary to meet water quality standards, a party seeking a NPDES permit for a new discharge into waterways within the Western states that fall within the Ninth Circuit may be forced to assume responsibility for treating or reducing discharges from nonpoint sources, in order to obtain the required offsets for a permit authorizing the new discharge.

*Connie Sue Martin's practice focuses on environmental and natural resource litigation. She has special expertise in matters involving Indian tribes. Connie Sue has represented clients in dozens of environmental matters, including citizen suits under CERCLA and the Clean Water Act, and challenges to land use permitting decisions and water rights. Contact her at [cmartin@martenlaw.com](mailto:cmartin@martenlaw.com).*

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## **MAKING WET WEATHER STANDARDS WORKABLE**

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**Alexandra Dapolito Dunn  
Nathan Gardner-Andrews**

“ORSANCO remains committed to the underlying premise: that the current standards written to protect swimmers and boaters from infectious diseases are impossible to meet when heavy rain causes bacteria levels to spike in the river... As written, they set up the potential for unlimited public spending for small benefit.”

*Cincinnati Post, Oct. 10, 2006*

Within the past year, the Ohio River Valley Water Sanitation Commission (ORSANCO) has adopted important preliminary changes to its water quality regulations to recognize the unique challenges presented by wet weather events. ORSANCO is continuing to work on a more comprehensive package to implement wet weather standards, building on a set of proposed changes released for public comment in March 2006. ORSANCO’s efforts to develop wet weather standards are consistent with concepts embodied in the Environmental Protection Agency’s (EPA’s) 1994 Combined Sewer Overflow (CSO) Policy.

ORSANCO tailored its proposal specifically for the Ohio River’s expected uses in order to provide the most realistic and accurate wet weather standards. Nonetheless, ORSANCO’s efforts attracted criticism from nongovernmental organizations and citizen groups concerned about how wet weather standards would impact water quality in the Ohio River. Opponents of ORSANCO’s efforts assert that wet weather standards would decrease the number of days that recreational water quality standards are met in the Ohio River and lower water quality generally. ORSANCO has stood behind the need for wet weather standards, emphasizing how they can be developed in a manner that is both environmentally and fiscally responsible, as well as consistent with federal intent for geographic areas with significant wet weather sources and a large number of combined sewer communities.

## **Background**

Approximately 770 U.S. cities use combined sewer systems (CSS), which combine and transport both storm water and wastewater. During severe rainfall events, a CSS may not be able to handle the combined flows. In order to prevent high flows from flooding and damaging the wastewater treatment plant, emergency discharge points release some of the flow before it reaches the treatment plant. These untreated discharges are known as combined sewer overflows (CSOs). These discharges consist not only of excess storm water but also untreated wastewater, and flow directly into receiving waters.

In 1994, EPA released its CSO Policy, which put in place a number of key procedures for CSS communities to follow in order to minimize the impact of CSOs on receiving waters. In 2001, Congress endorsed the 1994 Policy when it added Section 402(q) to the Clean Water Act (CWA).

Many of the nation’s CSSs are located in the industrial cities of the Northeast and Midwest. The proximity of many CSS in these regions creates a unique water quality challenge for large receiving water bodies in those areas, such as the Ohio River. Effectively managing water quality issues for a water body as significant as the Ohio River requires cooperation over multiple federal, state and local jurisdictions, and thus ORSANCO was created. Signed in 1948, the Ohio River Valley Water Sanitation Compact established ORSANCO as an interstate water pollution control agency and authorized it to develop standards for clean water agencies that discharge into the Ohio River. ORSANCO’s founding members pledged cooperative action to achieve specific water quality goals in the interstate waters of the Ohio River Valley. The eight member states of ORSANCO (Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia, and West Virginia) work together to improve the Ohio River’s water quality.

ORSANCO’s standards establish a minimum pollution control level that must be met by all eight states whose discharges flow into the Ohio River basin. Individual states still have the opportunity to develop more

stringent standards for water quality if they so choose. All standards must meet certain criteria based on a determination of the river's suitable uses. Swimming and other recreational activities on the river are among the uses that must be considered, and existing recreational uses must be protected.

## **ORSANCO's Wet Weather Efforts**

Wet weather was identified as a key issue for ORSANCO in 2002 and 2003. ORSANCO formed a work group comprised of regulators from ORSANCO, state agencies, and EPA personnel from Headquarters and Regions 3, 4, and 5. This work group was unique from others ORSANCO has established because it included representatives from multiple EPA regions and from EPA Headquarters. In developing a proposal for wet weather standards, the work group took into consideration both the public uses of the Ohio River and the role of non-point sources in contributing to existing pollution. Among the relevant factors were the level of recreational activity that took place in the river during wet weather events, and whether such recreational activity decreased during these peak flow periods. Additionally, ORSANCO studies revealed that urban wet weather sources are the most significant contributor to Ohio River bacteria levels.

Significantly, billions of dollars are committed to improvements already underway in the Ohio River Valley to conform to the 1994 CSO Policy. These improvements will result in significantly reduced bacteria levels in the Ohio River, and will greatly increase the number of days that recreational criteria are met. However, ORSANCO studies suggest that under extreme high flow conditions, the recreational criteria still will be exceeded even if all CSOs are eliminated. Recognizing this reality, ORSANCO and its work group tried to achieve a delicate balance between environmental protection and economic responsibility, striving to improve overall water quality without requiring local municipalities to spend money in ineffective ways.

The work group's initial proposal in March 2006 would have modified ORSANCO's Pollution Control

Standards to suspend recreational bacteria limits when a wet weather event occurred and the river flow was greater than two miles per hour. The proposal anticipated that under these conditions, certain recreational activities such as swimming are not likely, and thus the proposal suggested that bacteria levels to protect recreational activities be temporarily suspended during these periods of peak flow.

ORSANCO's proposal was not well received when released for public comment. In public hearings held on the proposed standards, citizens expressed concern that ORSANCO's proposal would lower the river's overall water quality and increase public health risk. They noted that forms of recreational activity such as boating, kayaking, and jet skiing continue to take place at velocities above 2 miles per hour, and thus a higher cutoff point should be considered.

After a series of public hearings, ORSANCO met again in October 2006. Given the controversy, the commission did not approve a specific point at which recreational bacteria standards would be suspended. However, it adopted an intermediate revision to its Pollution Control Standards that will allow dischargers to seek alternative site specific bacteria criteria following the completion of a Long Term Control Plan (LTCP) and a Use Attainability Analysis (UAA). This modified approach reflects a solid balance between protecting recreational water users and the environment and allowing clean water agencies to focus their wet weather CSO controls. The intermediate revision will provide Ohio River communities with important public health protection and fiscal flexibility to spend money improving the Ohio River's water quality in the most effective and efficient manner.

ORSANCO intends to continue its efforts to develop wet weather standards by addressing some of the questions that were raised by the public. Further efforts to develop wet weather standards will be accompanied by a greater degree of public education and support so that the ultimate solution receives widespread acceptance.

## Why ORSANCO's Efforts Are Important

Wet weather standards such as those explored by ORSANCO are essential to achieving the ultimate goals of the CWA and the 1994 CSO Policy. A key principle of the CSO Policy is the directive to consider the site-specific wet weather impact of CSOs when developing CSO wet weather policies. EPA has encouraged clean water agencies to more explicitly define the recreational and aquatic life uses of the receiving water bodies into which CSOs discharge, and to control CSOs accordingly to protect the designated uses. Additionally, the CSO Policy specifically cites the appropriateness of an authority's adoption of partial uses by defining when certain types of recreational activity do not generally occur, such as during a particular type of storm event, and then adjusting the associated water quality criteria accordingly.

ORSANCO's efforts to adopt practical wet weather standards are fully consistent with the 1994 CSO Policy and are an important step in achieving the Policy's directives and fundamental purposes. Furthermore, ORSANCO's efforts are an essential element in allowing all communities along the Ohio River to achieve recreational water quality standards in both an environmentally responsible and cost effective manner. As ORSANCO correctly recognizes, CSOs are only one part of the water quality challenges facing the Ohio River basin. By more accurately defining the attainable recreational uses of the Ohio River and recognizing that there are times when the flows are such that the river is not suitable for certain recreational uses, ORSANCO can ensure that public health is protected and that expenditures by clean water agencies are focused on control measures that result in meaningful water quality improvements.

As noted earlier, publicly owned clean water agencies in the Ohio River basin have committed to spend billions of dollars to control sewer overflows. These utilities are in the process of preparing, and in many cases implementing, detailed LTCPs to significantly reduce the frequency and volume of CSO discharges. Federal and state funding for water quality improvements has fallen significantly over the last two

decades, leaving citizen ratepayers with the financial burden of meeting these mandates. Thus, it is more important than ever that ORSANCO continue its efforts to develop wet weather standards to allow these communities to better focus their resources and CSO control programs. As ORSANCO's efforts demonstrate, a combination of solid science, fiscal responsibility, environmental stewardship, and public education can result in wet weather standards that are environmentally and fiscally sound.

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# **ECOSYSTEM-BASED MANAGEMENT OF TERRESTRIAL AND COASTAL WATER RESOURCES: CAN *RAPANOS* TEACH US ANYTHING ABOUT THE FUTURE OF INTEGRATED WATER MANAGEMENT?**

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## **Introduction**

Although a plurality opinion, there was a discernable ruling under *Rapanos*: The Clean Water Act extends to those waters that have a *significant nexus* to *waters of the United States*. *Rapanos v. United States*, 547 U.S. \_\_\_, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006). However, when looking closely at the “*significant nexus*” test, as discussed by Justice Kennedy, we see it is imbued with ecosystem-based principles. The implications for federal water management are interesting, as at least one recent court decision following *Rapanos* has embraced these ecosystem-based principles. For example, *see, Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006) (citing *Rapanos* in upholding Army Corps of Engineers jurisdiction based, in part, on ecological connections between an abandoned pit and the Russian River).

The main issue, for federal jurisdiction purposes, has been what specifically constitutes *waters of the United States*. As touched upon by Justice Kennedy in his *Rapanos* concurrence, uncertainty over ecosystem-based principles has left the United States Environmental Protection Agency (EPA) and the Army Corps of Engineers developing administrative rules that do not show a significant connection between regulated water bodies. The result has been a strain on the limits of federal jurisdiction over terrestrial bodies of water. *Rapanos*, at 2248.

There is another interesting component to the *Rapanos* decision. The implications of *Rapanos* suggest the

EPA/Corps will now have judicial discretion to determine “federal jurisdiction” over water bodies based on an ecosystem assessment. This has a further implication as applied to federal control of *coastal resources*.

Recent reports have suggested the federal government change its policy towards coastal management to incorporate greater principles of ecosystem-based management. Two questions arise in response to this suggested policy change. First, does the federal government have the power to regulate coastal/terrestrial water connection on “ecosystem-based” principles? Second, what deference will the judiciary give to such an attempt of regulation by the federal government? *Rapanos* seems to offer at least some evidence as to the judicial acceptance of extending federal jurisdiction to such a hydrologic spatial scale, which will undoubtedly lead to interconnected management of terrestrial and coastal water resources.

The purpose of this short article is to describe certain aspects of the *Rapanos* decision, focusing on the Kennedy concurrence, and then suggesting its connection to the ongoing policy debate regarding coastal resource management, and how it may offer a sign of the judicial will to accept an expanding federal role over centralized water management, regardless of spatial location.

## ***Rapanos* and the Kennedy Concurrence**

### ***A Short History Prior to Rapanos***

Prior to the *Rapanos* ruling, the status of “connections” between water bodies had been in flux. A series of cases, beginning with *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121, 106 S. Ct. 455 (1985); and ending with *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159, 121 S. Ct. 675 (2001) (hereinafter “SWANNC”) brought the issue of “federal jurisdiction,” and what constitutes waters of the United States, to a proverbial head.

In summary, these cases helped to establish a limit on federal authority over “isolated” water bodies.

Although, the cases did little to clearly identify what “isolated” bodies constituted United States waters and were, therefore, subject to federal jurisdiction. The term “isolated” under *Riverside Bayview* and *SWANNC* seems to focus on a physical connection, and is, therefore, based on spatial relevance, rather than any other connections found to be ecologically significant. Under the *Rapanos* decision, the criteria for determining whether a water body is “isolated” seems to now focus more on ecological criteria, rather than solely a physical or spatial relationship.

### **The Kennedy Concurrence**

As Justice Kennedy notes in *Rapanos*, the nexus required must be assessed in terms of the act’s goals and purposes. He notes Congress enacted the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” *Rapanos*, at 2248; quoting 33 U.S.C. § 1251(a), and it pursued that objective by restricting dumping and filling in “waters of the United States...” *Id.*; quoting 33 U.S.C. §§ 1131(a), 1362(12).

Justice Kennedy indicates the rationale behind the CWA’s wetlands regulation (bodies generally not navigable, nor subject to the ebb and flow of tides), is that these wetlands “can perform critical functions related to the integrity of other waters—such as pollutant trapping, flood control, and runoff storage.” *Id.*; citing 33 C.F.R. § 320.4(b)(2). Accordingly, Kennedy states, “. . . wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, *alone or in combination with similarly situated lands in the region*, significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense.” *Id.* (emphasis added).

Although not stated explicitly, it is obvious Justice Kennedy is referring to an ecological connection between the wetland, and larger water systems. If such a connection can be made, it is quite logical to assume the wetland is significantly connected to the larger, *navigable* water body, and, therefore, subject to federal regulation. If such ecosystem connections can be made to terrestrial water systems, it is certainly

arguable those same legal arguments can impact federal control of coastal water systems. This is especially the case where the federal government has historically maintained an important role in coastal waters, directly related to the regulation of commerce.

## **Rapanos’s Connection to Policy Suggestions in Coastal Management**

### **Current Policy of Coastal Management**

The current state of coastal policy in the United States is defined by the Coastal Zone Management Act, 16 U.S.C.A. § 1451 (CZMA). The purpose of the act is to integrate coastal management through a program of federal incentives given to states. Each state is given a financial “carrot” to develop a state plan in accordance with federal guidelines. The “carrot” comes in the form of funding to the states to help implement the plan. A second “carrot” seen by some is the federal consistency requirement. § 1456(c)(1)(A). This ensures states a direct say in actions that have an impact on state coastal resources. In essence, a state is given a “trump card” in situations where it feels federal, or other coastal state activities, are having a negative impact of the coastal state plan. In all, the CZMA creates a federally guided plan of state regulation of coastal resources, where coastal states are significant participants in the development, and implementation, of coastal policy.

### **Proposals for Change**

In 2003 and 2004 respectively, two independent reports on the state of U.S. ocean resources was released for publication (*see*, Pew Oceans Commission. *America’s Living Oceans: Charting a Course for Sea Change* (2003); U.S. Commission on Ocean Policy. *An Ocean Blueprint for the 21st Century* (2004)). In addition to many general recommendations, these reports concluded the United States must take a more active role in ocean resource management. More importantly, both reports called for new policies emphasizing ecosystem-based management principles. More recently, in 2006, a unified report from these two entities was submitted reinforcing ecosystem management (*see*, Joint Ocean Commission Initiative (JOICI), *From Sea to Shining*

*Seas: Priorities for Ocean Policy Reform 8-10* (2006)). Assuming the political will to adopt such principles, a question of constitutional limitation arises. Specifically, whether the federal government could effectively control all important water resources, as defined by ecosystem principles, under the restraints of the commerce clause. In looking to the judiciary for guidance, *Rapanos* offers a glimpse into how far federal jurisdiction could be extended under ecosystem-based principles. While not fully answering the question, we can see the Court's willingness to accept ecosystem-like standards as the basis for federal jurisdiction creating a promising avenue for further, holistic control over important water resources.

### ***Implications of the Rapanos Decision***

The implications of this analysis are substantial as it relates to the proposed ecosystem management of coastal areas. Most importantly, the *Rapanos* decision evidences a judicial willingness to find that there is a Congressional aim toward extending federal jurisdiction over heretofore "physically isolated" water bodies that might otherwise have considerable ecological connections to larger bodies of water. This kind of judicial acceptance of ecological connections is precisely what is needed to properly regulate coastal zones, as recommended by the JOCI group. Without taking proper account of the entire geologic/hydrologic cycle, there is little hope to properly understand, and, therefore, manage coastal resources. At some level, this will have to include a degree of centralized control over coastal resources, up to and including terrestrial areas that have a major impact on coastal resources. Without such an integrative management scheme, it seems doubtful that any meaningful progress can be made in U.S. water quality: terrestrial, coastal, or otherwise.

*Credit must be given to the Environment, Earth, and Ocean Sciences ("EEOS") Department at the University of Massachusetts, Boston, and Professor John Duff specifically, for both funding and individual support.*

## **NORTHERN EVERGLADES AND ESTUARY PROTECTION ACT**

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The 2007 Florida Legislative Session witnessed passage of the Northern Everglades and Estuary Protection Act (NEEPA) as an amendment to, and expansion of, the Lake Okeechobee Protection Act of 2000 (LOPA). The "Northern Everglades" is defined by this legislation to include the Lake Okeechobee, the Caloosahatchee River, and the St. Lucie River Watersheds. Following this definition, the legislation is comprised of three distinct, yet related, components—one relates to Lake Okeechobee while the other two components relate to the Caloosahatchee and St. Lucie Rivers/Estuaries. While this legislation builds upon the LOPA passed in 2000, one of the most noteworthy aspects is inclusion of the St. Lucie and Caloosahatchee Watersheds.

### **Key Intent and Findings**

An overall thread throughout the extensive legislative findings and intent found in NEEPA is the recognition that water quality and quantity problems exist within the Lake Okeechobee, Caloosahatchee, and St. Lucie Watersheds. Expedient development and implementation of watershed protection plans to improve the quality, quantity, timing, and distribution of surface waters within these watersheds is deemed by the Legislature to be priorities. Achievement of total maximum daily load requirements and state water quality standards are the overreaching goals of the watershed-based protection plans.

### **Lake Okeechobee Protection Program**

Most of the provisions relating to Lake Okeechobee and LOPA remain intact with the inclusion of "phase 2" provisions. By Feb. 1, 2008, the South Florida Water Management District (SFWMD) is required to develop a "detailed technical plan" that addresses the quality and quantity of discharges into, and from, Lake Okeechobee. Measures such as voluntary water storage and quality improvements on private lands, as well as Best Management Practices (BMP)-based

source controls within the watershed, are to be elements of the Plan.

The Florida Department of Agriculture and Consumer Services is once again given a significant role in the development of BMPs and nutrient application rates for agricultural land uses. Recognizing the impact of Lake Okeechobee discharges on the St. Lucie and Caloosahatchee estuaries, and ongoing initiatives to revise the lake management, NEEPA requires an assessment of the water volumes and timing from the Lake Okeechobee Watershed and their relative contribution to the water level changes in Lake Okeechobee and to the timing and volume of water delivered to the estuaries.

### **Caloosahatchee and St. Lucie River Watershed Protection Programs**

NEEPA creates an Estuary Protection Program for the Caloosahatchee and St. Lucie River Watersheds. These Programs are required to address reductions of pollutant loadings to the estuaries, restoration of natural hydrology as well as compliance with applicable state water quality standards and total maximum daily loads.

Within the overall framework of the Protection Programs, NEEPA provides for:

- Development of an Estuary Protection Plan that includes construction projects designed to improve hydrology, water quality, and estuarine habitat. In addition, the plan must include a “implementation schedule.”
- Development of improved BMPs and utilization of “alternative technologies” to achieve pollutant reductions.
- Coordinated, interagency research and a water quality/habitat monitoring program.
- A legislative mandate to “expedite development and adoption of TMDLs” for the Caloosahatchee and St. Lucie estuaries.
- An obligation upon DEP and the SFWMD to jointly establish “annual funding priorities” that addresses pollutant reductions for the estuaries. Also prioritizes projects that qualify for federal or local government matching funds.

- SFWMD/DEP to develop a consolidated annual report that includes an assessment of water quality and habitat conditions in the estuaries, estuarine watersheds, and the status of estuary protection projects.

All in all, NEEPA builds upon past successes with the Lake Okeechobee Protection Programs. Importantly, NEEPA, recognizing the direct linkage between Lake Okeechobee and the estuaries to the east and west, expands its purview to include the estuaries.

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#### **ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES**

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**26th Annual Water Law Conference**  
Feb. 21-22, 2008  
San Diego, California

**37th Annual Conference on  
Environmental Law**  
March 13-16, 2008  
Keystone, Colorado

**Eastern Water Resources**  
May 1-2, 2008  
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