Agricultural Law Update

VOLUME 23, NUMBER 6, WHOLE NUMBER 271 JUNE 2006

Official publication of the American Agricultural Law Association

INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

NOMINATIONS FOR ANNUAL SCHOLARSHIP AWARDS

The Scholarship Awards Committee is seeking nominations of articles by professionals and students for consideration for the annual scholarship awards presented at the annual conference. Please contact Jesse Richardson, Associate Professor, Urban Affairs and Planning, Virginia Tech, Blacksburg, Virginia 24061-0113,(540) 231-7508 (phone) (540) 231-3367 (fax) email: jessej@vt.edu

State and federal roundup

ANIMALS

WILDLIFE. The defendant was charged with violation of the Lacey Act, 16 U.S.C. §§ 3372(a)(2)(A) for receiving whitetail deer sold or transported in violation of Oklahoma law. The defendant argued that the deer were not wildlife because the deer were "farm raised domestic deer," born and raised in captivity. The court noted that the statute included all wildlife, "whether or not bred, hatched, or born in captivity...," which are normally found in a wild state; therefore, the court held that whitetail deer born and raised in captivity are governed by the statute and the defendant's conviction was proper. ***United States v. Condict*, 2006 U.S. Dist. LEXIS 43826 (E.D. Okla. 2006)**.

BULL. The plaintiff was working with a carpenter in repairing a cow barn for the defendant farm owner. The defendant did not know that the plaintiff was present on the farm or that the plaintiff was working in the cow barn. The plaintiff and the carpenter did not know that the defendant had a dairy bull loose with the other dairy cows. The plaintiff was injured by the defendant's dairy bull while working in the barn and filed suit in strict liability and negligence against the defendant and carpenter for the cost of the injuries. Applying the Restatement (Second) of Torts § 509, the court held that the standard of care for owners of domestic farm animals was that the owner would be liable for harm caused by animals which the owner knew had vicious propensities. The court held that the defendant was not liable for the plaintiff's injury because the evidence demonstrated that the bull had never attacked any person before the accident. The plaintiff argued that bulls are inherently dangerous so as to require a higher standard of care, but the court held that the rule in New York was that no breed of animal was considered inherently vicious such that an owner would be deemed to have knowledge of vicious propensities. ***Bard v. Jahnke*, 848 N.E.2d 463 (N.Y. Ct. App. 2006), *aff'g*, 791 N.Y.S.2d 695 (N.Y. App. Div. 2005).**

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Federal Register summary from May 20, 2006 to July 14, 2006

BRUCELLOSIS. The APHIS has adopted as final regulations which change Idaho from a Class Free state to a Class A state, requiring all bovine animals to be moved interstate to test negative for brucellosis unless the animals are moving directly to slaughter or a quarantined feedlot. **71 Fed. Reg. 36984 (June 29, 2006)**.

COTTON. The CCC has issued proposed regulations amending regulations governing the cotton Marketing Assistance Loan Program authorized by the Farm Security and Rural Investment Act of 2002. The proposed changes include the outside storage of upland cotton pledged as collateral for CCC loans; the certification provided by approved ginners to produce bales that are compliant with CCC loan eligibility requirements; the re-concentration and transfer of upland cotton pledged as collateral for CCC loans; and the storage credit provided to producers when an upland cotton marketing assistance loan is repaid. **71 Fed. Reg. 30318 (May 26, 2006)**.

CROP INSURANCE. The FCIC has issued proposed regulations which amend the Common Crop Insurance Regulations, Basic Provisions, Small Grains Crop Insurance Provisions, Cotton Crop Insurance Provisions, Coarse Grains Crop Insurance Provisions, Malting Barley Crop Insurance Provisions, Rice Crop Insurance Provisions, and Canola and Rapeseed Crop Insurance Provisions to provide revenue protection and yield protection. The proposed regulations also amend the Common Crop Insurance Regulations, Basic Provisions to replace the Crop Revenue Coverage, Income Protection, Indexed Income Protection, and the Revenue Assurance plans of insurance. The proposed changes offer producers a choice of revenue protection (protection against loss of revenue caused by low prices, low yields or a combination of both) or yield protection (protection for production losses only) within one basic provision and the applicable crop provisions to reduce the amount of information producers

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BANKRUPTCY

DISASTER PAYMENTS. The debtors were farmers who filed a Chapter 7 plan in August, 2002, and received a discharge in December, 2002. In February, 2003, the U.S. Congress enacted the Agricultural Assistance Act of 2003, which provided crop disaster relief for 2001 and 2002 crop disaster losses. After the bankruptcy case was closed, the debtor applied for the disaster relief in August, 2003, and a check was sent to the bankruptcy trustee. The case was reopened for a determination as to whether the payment was bankruptcy estate property. The court held that the disaster payments were not estate property because the debtors' right to the payment did not arise until after the petition was filed. The trustee argued that the crop loss was the key action that gave rise to a contingent property right, which merely vested when the disaster relief law was enacted. Although acknowledging a split among courts on the issue, the court rejected that argument and agreed with those cases holding that such payments were not estate property. The court noted that the issue arises because Congress passes disaster relief programs that are retroactive, which may result in post-petition payments for pre-petition losses. The court noted that if Congress wished to avoid the result in similar cases, the protection of creditors could be included in the legislation. ***In re Burgess*, 438 F.3d 493 (5th Cir. 2006), *aff'g en banc*, 392 F.3d 782 (5th Cir. 2004)**.

SECURED CLAIMS. The debtor had granted a mortgage to a creditor on the debtor's farm on which the debtor operated a breeder poultry operation. The debtor obtained chicks from a poultry integrator that had refused to supply the debtor with more chicks, resulting in the debtor's default on the mortgage. The issue in the case was the value of the farm property. The debtor argued that the farm should be valued according to the debtor's intended future use of the farm as a residence and crop farm. Under this view, the debtor's appraiser did not assign any value to the poultry buildings because the debtor would be unable to use the buildings. The appraiser noted that the buildings would not only not provide value but could have a negative effect on the farm's value. The creditor argued that the farm should be valued according to its highest and best use as a broiler poultry operation, because if the farm was sold, the poultry integrator would be willing to supply chicks to a different owner and purchase the finished birds. The creditor's appraiser included the value of the poultry buildings in the farm value. Both parties agreed to the basic value of the farm but differed in their inclusion of the poultry buildings. The court noted that the debtor was prevented from converting the farm to a broiler poultry operation because the poultry integrator refused to do business with the debtor; thus, the debtor's proposed use of the farm was not speculative or capricious and could be used to set the value of the property. The court also noted that the creditor's appraisal was unclear as to whether the value included the costs of conversion. The court held that the value of the farm would be the debtor's value based on the intended use of the farm as a residence and for growing crops. ***In re* Bishop, 339 B.R. 595 (Bankr. D. S.C. 2005)**.

FEDERAL FARM LOANS

FALSE FINANCIAL STATEMENT. The defendant applied for an FSA loan, and at the loan closing stated that the defendant's financial condition had not changed since the time of the loan application, although the defendant had sold all the defendant's soybeans just before the closing. The loan funds were restricted in that all withdrawals had to receive written FSA approval. Most of the funds were withdrawn with FSA approval, but the defendant managed to withdraw $27,000 without FSA approval and used the funds for personal purposes. The defendant was charged with violating 18 U.S.C. § 1001 for making a false financial statement and with violating 18 U.S.C. § 658 for converting property pledged to the FSA. A jury verdict was returned convicting the defendant on both counts. The defendant appealed both verdicts as not supported by the evidence. The court held that the false statement count was supported by evidence that the defendant knew that the defendant's eligibility for the loan was a close question and that any change in financial condition would materially affect the loan qualification. In addition, the defendant had granted a security interest in all crops and knew that the sale of crops just before closing would substantially alter the security for the loan. In support of the other count, the court noted that the defendant had attempted to withdraw the funds from another branch of the bank and was turned down because FSA approval was needed for withdrawal. With full knowledge of the conditions of the loan, the defendant approached another branch of the same bank and was able to convince them to allow withdrawal without FSA approval. ***United States v. Rice*, 449 F.3d 887 (8th Cir. 2006)**.

HAY AND GRAIN TRACING

The Food and Drug Administration has published a fact sheet on hay and grain recordkeeping required under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. The fact sheet notes that the following entities and persons are excluded from the recordkeeping requirements: (1) farms; (2) foreign persons, except for foreign persons who transport food in the U.S.; (3) restaurants are excluded entirely, combination restaurant/retail facility is excluded entirely if sales of food it prepares and sells to consumers for immediate consumption are more than 90 percent of its total food sales; (4) persons performing covered activities with food to the extent that the food is within the exclusive jurisdiction of the U.S. Department of Agriculture; (5) persons who manufacture, process, pack, transport, distribute, receive, hold, or import food for personal consumption; (6) persons who receive or hold food on behalf of specific individual consumers and who are not also parties to the transaction and who are not in the business of distributing food; and (7) persons who manufacture, process, pack, transport, distribute, receive, hold, or import food packaging (the outer packaging of food that bears the label and does not contact the food), except for those persons who also engage in a covered activity with respect to food. **See www.cfsan.fda.gov/~dms/fsbtac23.html**.

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VOL. 23, NO. 6, WHOLE NO. 271 JUNE 2006
AALA Editor.....Linda Grim McCormick

2816 C.R. 163, Alvin, TX 77511
Phone: (281) 388-0155
E-mail: lindamccormick@ev1.net

Contributing Editors: Martha L. Noble, Washington, D.C. Robert A. Achenbach, Eugene, OR.

For AALA membership information, contact Robert Achenbach, Interim Executive Director, AALA, P.O. Box 2025, Eugene, OR 97405. Phone 541-485-1090. E-mail RobertA@aglaw-assn.org.

Agricultural Law Update is published by the American Agricultural Law Association, Publication office: County Line Printing, Inc. 6292 NE 14th St., Des Moines, IA 50313.

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HUNTING

BAITED FIELDS. The plaintiffs owned farm land which was used to raise crops and for a hunting club. In order to attract geese during their annual migration, the plaintiffs would gradually harvest the corn so the residue would attract the geese over an extended period. The delayed harvest would continue well past the normal harvest periods for the area. The Fish and Wildlife Service determined that the delayed harvest violated FWS hunting regulations, 50 C.F.R. § 20.21(i), which allowed hunting only on "normally harvested" farm land as defined in 50 C.F.R. § 20.11(g). The delayed harvest was ruled to be a "baited field" and FWS regulations prohibited hunting on baited fields, as defined in 50 C.F.R. § 20.11(k). The plaintiffs also used airplanes to aerially seed the corn residue with wheat seed, also to attract the geese. The FWS determined that this aerial seeding was not "normal planting," and hunting on the baited land was prohibited. The plaintiffs' neighbor informed the plaintiffs that the neighbor's land was baited as part of the neighbor's own hunting business. The FWS determined that the plaintiffs' land could not be hunted because it was affected by the baiting of the neighbor's land. The plaintiffs challenged the FWS determinations as arbitrary and capricious. The court upheld the FWS determination that the plaintiffs' land was not normally harvested because the harvesting continued long after 90 percent of the corn was harvested in the area. The court also upheld the FWS determination that aerial seeding of the corn residue with wheat seed was not normal planting because expert testimony showed that such planting was rarely used because of the very limited results in producing a marketable crop. The court upheld the FWS determination that hunting on the plaintiffs' land was prohibited because of the baiting of a neighbor's land, noting that the scope of the prohibition as to the area affected was within the reasonable judgment of the FWS. ***Falk v. United States*, 2006 U.S. App. LEXIS 16768 (8th Cir. 2006)**.

NUISANCE

LANDLORD LIABILITY. The plaintiffs, husband and wife, owned a rural residence and the defendant landlord owned neighboring farm land to the south and north of the plaintiffs. The defendant tenant leased the north and south properties from the defendant landlord, owned a hog confinement facility across the road from the plaintiffs' residence, and spread manure from the hog operation on the fields leased from the landlord. The plaintiffs filed a nuisance action against both defendants, and the trial court dismissed the action against the landlord, ruling that the landlord had no control over the actions of the tenant. The Iowa Supreme Court first held that the *Restatement Second of Torts*, Section 837 applied to determine the liability of a landlord for a nuisance caused by the actions of a tenant. The Court held that the landlord was improperly dismissed from the case because there was substantial evidence that § 837 applied to make the landlord liable for the negligence: (1) the landlord would be liable for the nuisance if the landlord carried on the activity; (2) the landlord consented to the spreading of the manure, based on statements by the landlord that the landlord expected the tenant to spread the manure on the fields; and (3) the landlord knew the tenant's activity would give rise to a nuisance, based on the long history of complaints by the plaintiffs about the manure spreading on the south field before the tenant leased the north field. The court noted that, although Iowa law generally protects a landlord from nuisances caused by tenants, the landlord's unique involvement with the tenant and the plaintiffs raised a fact issue sufficient to overcome summary judgment for the landlord. The court noted that the landlord had allowed the tenant to renew the lease even after ample notice of the possibility of a nuisance. ***Tetzlaff v. Camp*, 715 N.W.2d 256 (Iowa 2006)**.

TOBACCO

TOBACCO TRANSITION PAYMENT PROGRAM. The plaintiffs were tobacco producers who owned tobacco quotas eligible for payments under the Tobacco Transition Payment Program (TTPP) provided by the Tobacco Buyout Statute enacted as part of the American Jobs Creation Act of 2004, 7 U.S.C. § 518 *et seq.* The plaintiff filed suit for a declaratory judgment that the regulations promulgated to implement the TTPP violated the statute in that the amount paid for the quotas was less than the payments required by the statute. The current issue was the plaintiffs' request to class certification. The court granted class certification for the following class of: "all burley and fluecured tobacco producers who contracted for payment under the Regulations (7 C.F.R. § 1463) and received less than $3.00 multiplied by their 2002 effective tobacco marketing quota, after being reduced or divided where applicable." The court found that (1) the class was sufficiently large so as to make joinder of all plaintiffs reasonable; (2) the class had sufficiently common questions of law or fact; (3) the class had sufficiently similar questions of law or fact; (4) the class could be adequately represented by the major plaintiffs; and (5) the defendant has acted toward the class on grounds generally applicable to all the class members. ***Neese v. Johnson*, 2006 U.S. Dist. LEXIS 25344 (W.D. Va. 2006).**

WATER

EASEMENT. The properties involved in this case were once owned by a single person and the ditch involved ran across the property. When the property was divided into lots, the ditch ran across the defendant's property and onto the properties owned by members of the plaintiff association. The defendant blocked the ditch, resulting in the loss of water to the other ditch properties and the flooding of additional properties of the association's members. The association sought a ruling that it, or its members, owned an easement for the ditch over the defendant's property. The defendant argued that the implied easement did not exist because the current plaintiff's members' use of the water, as waste water, was different from the original owner's use of the water, irrigation. The court held that the use of the water in the ditch was not relevant to the existence of the implied easement, only that the use of the ditch for the transport of water remained consistent. The court held that the determining factor was that the ditch was used to carry water by the current and past owners and that the plaintiff's members' use of the ditch was not expanded so as to burden the defendant's use of the ditch. The defendant was ordered to unblock the ditch and was enjoined from blocking the ditch. ***Beach Lateral Water Users Association v. Harrison*, 130 P.2d 1138 (Idaho 2006)**.

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must read to determine the best risk management tool for their operation and to improve the prevented planting and other provisions to better meet the needs of insured producers. The changes will apply for the 2009 and succeeding crop years. **71 Fed. Reg. 40193 (July 14, 2006)**.

EMERGENCY CONSERVATION PROGRAM. The FSA has issued proposed regulations amending the regulations for the Emergency Conservation Program to implement provisions of the Department of Defense, Emergency Supplemental Appropriation to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Pub. L. 109-149) providing assistance to nursery, oyster, and poultry producers and non-industrial private forest landowners to rehabilitate public or private oyster reefs or farmland damaged by hurricanes during calendar year 2005. **71 Fed. Reg. 30263 (May 26, 2006)**.

FARM LOANS. The CCC had adopted as final amendments to the regulations governing the Marketing Assistance Loan and Loan Deficiency Payment Program. The amendments affect regulations governing: (1) the definition of beneficial interest with respect to eligible commodities delivered to facilities other than licensed

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"Muddying the jurisdictional waters": U.S. Supreme Court splits on Clean Water Act jurisdiction over wetlands

By Martha L. Noble

On June 19, 2006, the U.S. Supreme Court, having failed to reach a majority decision on standards for defining the scope of Clean Water Act Section 404 jurisdiction over wetlands, issued a split decision on the standards in *Rapanos v. United States*.[1] The case involved consolidated appeals from two cases in which the Federal Sixth Circuit Court of Appeal ruled against Michigan landowners who claimed that the federal regulations governing wetlands on their property exceeded the statutory jurisdiction of the Clean Water Act.[2] In *Rapanos*, some of wetlands at issue were connected by surface water that went through drains to non-navigable tributaries and then to a navigable-in-fact river. Other wetlands in the case were connected to a tributary of Lake Huron. In *Carabell*, the wetlands bordered a ditch that drained into a creek that flowed into Lake St. Clair. The wetlands were separated from the ditch by a four-foot-wide berm, which generally restricted direct passage of water between the wetlands and the ditch, except for occasional overflow to the ditch. The Sixth Circuit had ruled in both cases that the existence of a hydrological connection between the wetlands and the navigable water was sufficient to establish Clean Water Act jurisdiction over the wetlands.

The U.S. Supreme Court was not able to fashion a single standard for determining Section 404 jurisdiction over wetlands. Justice Scalia issued a plurality opinion joined by Justices Roberts, Thomas, and Alito. Justice Kennedy concurred with the judgment of the Court to vacate the lower court judgments and remand the cases for further proceedings but he did not agree with Justice Scalia's significant restriction of the Clean Water Act's jurisdictional scope. Instead, Justice Kennedy issued a concurring opinion which outlines a significant nexus test for Clean Water Act jurisdiction that is closer to existing test approved in the dissent of Justice Stevens and joined by Justices Souter, Ginsburg, and Breyer, which approved the reasoning and judgment of the lower courts.

In considering the jurisdictional scope of the Act, the U.S. Supreme Court focused on two issues. The first is the construction of the Clean Water Act term "waters of the United States." The Act prohibits the discharge of any pollutant, which is defined to include any addition of any pollutant to navigable waters from any point source. The Act further defines "navigable waters" as "the waters of the United States, including the territorial seas."[3] The question raised on appeal to the Court was whether wetlands adjacent to tributaries of traditionally navigable-in-fact waters are "waters of the United States" subject to jurisdiction of the U.S. Army Corps of Engineers Section 404 dredge and fill permit regulations. The second issue focused on the nature of the connection between wetlands "adjacent" to more open waters necessary to bring the adjacent wetlands into the scope of Section 404 jurisdiction. Wetlands adjacent to open waters are recognized in the statutory provision of the Clean Water Act which allows the states to assume partial administrative authority over the Section 404 dredge and fill permit program.[4] The question on appeal was whether the existence of a man-made berm between the wetlands and the other waters defeated Clean Water Act jurisdiction.

Opinion of Justice Scalia

Justice Scalia's plurality opinion starts its consideration of the scope of jurisdiction with the "traditional interpretation" of statutes which preceded the Clean Water Act. This traditional jurisdiction extended to interstate waters that are navigable in fact or readily susceptible of being rendered so. The Army Corps initially used this interpretation to define "navigable waters' under the Clean Water Act, a definition which was successfully challenged in federal courts as too narrow. In response, the Army Corps established the current regulations which interpret "the waters of the United States" to include, in addition to traditional interstate navigable waters,[5] "[a]ll interstate waters including interstate wetlands,"[6]; "[a]ll 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,"[7]; "[t]ributaries of [such] waters,"[8]; and "[w]etlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands)."[9] The regulation defines "adjacent" wetlands as those "bordering, contiguous [to], or neighboring" waters of the United States and specifically provides 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 wet-lands.'"[10]

The petitioning landowners had argued that the scope of Clean Water Act jurisdiction should be limited by the traditional navigation in fact test. Justice Scalia rejected that test based on the Act's text, which defines navigable waters as the more general "waters of the United States" and on the inclusion in the Act of "adjacent wetlands." Rather than address the issue of the degree of navigability in determining jurisdiction, however, Justice Scalia put aside previous Supreme Court cases on the issue and devised a new test for jurisdiction based on his reading of the definition of "waters" in Webster's New International Dictionary (2d ed. 1954). He determined that the dictionary definition's reference to streams, oceans, rivers, lakes, and bodies of water connotes "continuously present, fixed bodies of water" as opposed to ordinary channels through which water occasionally or intermittently flows. Based on that reading he limited the scope of the phrase "the waters of the United States" to relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] ... oceans, rivers, [and] lakes." The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.[11]

Justice Scalia found that the Army Corps' more expansive interpretation of the "the waters of the United States" is not "based on a permissible construction of the statute," under the *Chevron* doctrine. The *Chevron* doctrine requires that federal courts defer to a reasonable construction of a statute by the agency authorized to administer the statute.[12] He also found support for narrowing the jurisdictional scope of the Clean Water Act in the general statutory provision that states it is the "…policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ...."[13] He responded to Justice Kennedy's point that 33 states and the District of Columbia filed an *amici* brief in favor of the Army Corps' interpretation by noting that it makes no difference that states might want to unburden themselves of their rights and responsibilities.[14] He did not

Martha L. Noble is Senior Policy Associate, Sustainable Agriculture Coalition, Washington D.C.

address, however, the additional point of these state *amici* that the federal Clean Water Act plays a central role in the control of interstate water pollution.

Having defined "waters of the United States", Justice Scalia turns to the issue of "adjacent wetlands." He rejected any definition based on the ecological role of the wetlands, such as controlling sedimentation, retaining pollutants, mitigating flooding, or providing refuge for aquatic species, and instead drastically narrowed the definition of "adjacent" to wetlands that have a continuous surface connection to a water of the United States which makes it difficult to determine where the water ends and the wetland begins.[15]

In sum, Justice Scalia fashioned a two-pronged test for establishing whether wetlands such as those at the *Rapanos* and *Carabell* sites are covered by the Act that requires two findings: (1) the adjacent channel contains a "wate[r] of the United States," defined as a relatively permanent body of water connected to traditional interstate navigable waters; and (2) the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.[16]

Dissenting opinion of Justice Stevens

In his plurality opinion, Justice Stevens supported upholding the judgments of the Sixth Circuit. His application of the *Chevron* doctrine to the Clean Water Act contrasts sharply with Justice Scalia's by including the language, policies, and legislative history of the Clean Water Act. His analysis of whether the Army Corps regulatory framework is reasonable included that overall Clean Water Act policy "... to restore and maintain the chemical, physical, and biological integrity of the nation's waters," which emphasizes the ecological value of wetlands to downstream water.[17] He also noted that the Army Corps regulations provide a relatively bright line for determining jurisdiction but also allow flexibility in permitting dredge and fill activity in the wetlands based on the Corps' assessment of the ecological value of the wetlands for restoring or maintaining the uses of downstream water which are protected by the Clean Water Act.[18]

Justice Stevens characterized Justice Scalia's new two-pronged test as one which will only "... muddy the jurisdictional waters" by setting an arbitrary distinction between tributary streams and other water courses based on frequency of flow which is not related to the potential of dredge and fill activity to degrade downstream waters.[19] Justice Stevens also challenged Justice Scalia's dictionary-based definition by citing to other dictionaries and references, as well as previous U.S. Supreme Court opinions that included intermittent streams within federal jurisdiction. He also emphasized that in defining the term "adjacent" Justice Scalia declined to consult the same dictionary used to define "waters of the United States." Justice Stevens cited Webster's Second Dictionary which defines the term adjacent as "lying near, close, or contiguous; neighboring; bordering on with an acknowledgment that objects are adjacent when they lie close to each other, but not necessarily in actual contact.[20] Justice Stephens then concluded that the Army Corps definition is a reasonable interpretation of the word "adjacent" on its face and with regard to the purpose of the Clean Water Act in protecting downstream water quality.

Concurring opinion of Justice Kennedy

Given the even split of the plurality opinions, the concurring opinion of Justice Kennedy may be the key to subsequent lower court rulings. He did not approve of Justice Scalia's jurisdictional distinction based on frequency of flow in a watercourse. Not surprisingly as a former California resident, Justice Kennedy was concerned about the effect of the Scalia test on the arid West. He referred to the Los Angeles River as an example of a watercourse that often decreases to a trickle or dries up completely but periodically carries huge volumes of water.[21] Justice Kennedy also rejected Justice Scalia's test for "adjacent wetlands" because it ignores the potential ecological value of wetlands that do not have a continuous flow connection to downstream waters.[22]

Justice Kennedy, however, also found that the Army Corps regulations go too far by not paying sufficient attention to the term "navigable" and allowing jurisdiction over wetlands that lie alongside ditches and drains, however remote and insubstantial, that may eventually flow into traditional navigable waters. He then formulated his own test for Clean Water Act jurisdiction based on the term "significant nexus," which he characterizes as a test to determine if the wetland at issue is an integral part of the aquatic environment of navigable waters in terms of the Clean Water Act purpose of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. Wetlands whose effects on water quality are "speculative or insubstantial" will fall outside the zone of Clean Water Act Section 404 jurisdiction.[23]

More specifically, Justice Kennedy provides that when the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction, with adjacency requiring proximity but not a continuous flow connection. Absent more specific regulations, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Justice Kennedy also noted that where 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 but he concluded that the current regulations do not accommodate his "significant nexus" requirement.[24]

Finally, with regard to the specific facts of the cases before the Court, Justice Kennedy found that the record contains evidence suggesting the possible existence of a "significant nexus" according to the principles provided in his opinion. But he recommended vacating the judgment and remanding the case because the Sixth Circuit had determined that a "significant nexus" could be satisfied by the mere presence of a hydrological connection without further consideration of the significance of the connection for downstream water quality.

Potential impact of *Rapanos* on Clean Water Act pollution discharge permit regulations

Even though Justice Scalia noted at the beginning of his opinion that *Rapanos* is limited to the issue of Clean Water Act Section 404 dredge and fill permits, his drastic narrowing of the definition of the "waters of the United States" also raises a serious issue for enforcement of the Clean Water Act Section 411 effluent limitation guidelines and Section 402 pollutant discharge permits because the term "waters of the United States" applies to the entire Clean Water Act. The U.S. government and supporting *amici* had argued that eliminating intermittent watercourses from the definition would be an invitation to polluters to set their discharge points on those intermittent waterbodies without regard to the effects on downstream navigable waters. This point was considered during oral arguments. Justice Scalia attempted to finesse this point by contending that in such a case the intermittent stream or channel would itself become a point source if pollutants released into it are ultimately discharged into downstream navigable water.[25] Justice Stephens in the dissent noted that Justice Scalia's logic in turning ephemeral and intermittent waters into "point sources" for purposes of pollutant discharge permits could apply equally in the context of dredge and fill material which could also degrade downstream water quality and would, therefore, support a more expansive Section 404 jurisdiction.[26]

Justice Scalia's narrowed definition of "waters of the United States," will likely promote a flurry of litigation over Clean Water Act regulation of Section 402 National Pollutant Discharge Elimination Permits, as well as result in increased

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degradation of streams and rivers, especially in the arid West which has many of the nation's most ecologically vulnerable water resources. Indeed, a post-*Rapanos* ruling from a Texas federal district court provides that very outcome. In *U.S. v. Chevron Pipeline Company*,[27] an oil pipeline failed and spilled 126,000 gallons of oil into an unnamed tributary which joined up with non-navigable tributaries that flowed to the navigable Brazos River. The U.S. filed a Clean Water Act complaint against the company for discharging a pollutant without a Clean Water act discharge permit. At the time of spill, the channel of the unnamed tributary was dry. The U.S. attorney submitted an expert's affidavit that "on average, during most of the months of the year, there would be rainfall events in the area of the Chevron Pipe Line Company's oil spill that would generate sufficient flow to convey crude oil contamination from the spill site through the unnamed tributary creek, Ennis Creek, Rough Creek, the Double Mountain Fork of the Brazos River, and ultimately to the Brazos River." The court, however, relying primarily on Justice Scalia's two-pronged test ruled that there was no Clean Water Act jurisdiction over the discharge of oil because the discharge did not occur during a period in which the water was flowing in the channel and because the U.S. had not proved an actual discharge of the oil from the spill to the Brazos River. The court, however, completely ignored Justice Scalia's reasoning that for purposes of Clean Water Act effluent and pollutant discharge provisions, an intermittent watercourse carrying a discharged pollutant would become a point source for that pollutant if the pollutant reached navigable water. The court also declined to apply the ecological considerations of Justice Kennedy's "significant nexus" test because the court concluded the test was ambiguous, vague and subjective.

This ruling, if it should stand, is an open invitation for polluters to set discharge points on intermittent and seasonal water courses and hold pollutant discharges for release in the dry season, without regard to the cumulative mess of pollution and degradation heading to downstream waters during a rainy season or after significant snow melt. In addition, it would require regulators to determine the source of each pollutant arriving at the receiving navigable water body rather than controlling the pollutants at their point of discharge.

What next for Clean Water Act jurisdiction?

So where does Clean Water Act jurisdiction over wetlands stand after Rapanos? The lower courts must now deal with wetlands jurisdiction in light of the 4-1-4 split in opinions in *Rapanos*. Justice Stevens reasoned in his dissent that given that all four Justices who joined in the dissent would uphold the Corps' jurisdiction in both of the cases on appeal - and in all other cases in which either the plurality's test or Justice Kennedy's test is satisfied - on remand each of the judgments should be reinstated if either of those tests is met. Justice Stevens noted that in general Justice Kennedy's test will be more likely to provide jurisdiction than Justice Scalia's two-pronged test.[28] In addition, Justice Kennedy's concurrence may predominate under federal case law which generally recognizes that the precedent value of a plurality opinion is limited to the narrowest interpretation of the grounds contained in the concurring opinions.[29]

The *Rapanos* decision left intact the ruling in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers(SWANCC),*[30] a previous case in which U.S. Supreme Court ruled that Clean Water Act jurisdiction over isolated, intrastate wetlands with no discernible hydrological connection to navigable waters cannot be established by migratory bird use of the waters. The SWANCC ruling itself has engendered considerable uncertainty, however, because of a controversial EPA policy directive, issued in 2003 after the SWANCC case, which basically attempts to deprive many intrastate wetlands of Clean Water Act protection, without sufficient regard to their degree of isolation or their role in interstate Commerce.[31] Environmental and wildlife groups and thirty-two states opposed this Policy Directive. The immediate future of this policy directive itself is in doubt. On May 18, 2006, the House by a vote of 222-198 approved an amendment to the bill authorizing FY2007 EPA appropriations which would stop the EPA from using FY2007 funds to implement the 2003 policy directive.[32] The bill has passed the House and is pending in the Senate.

Rapanos also raises questions about Clean Water Act protection for wetlands with a hydrological connection to interstate navigable waters. The Scalia test, with its new requirement for a surface water connection as the test for "adjacency," calls into question the U.S. Supreme Court opinion in *United States v. Riverside Bayview Homes, Inc.*,[33] which approved the application of a test of ecological significance for wetlands adjacent to navigable-in-fact waters including those that may not be connected by a direct hydrological connection. Justice Kennedy indicated that under his "significant nexus" test, wetlands adjacent to navigable-in-fact waters will most likely be found to be covered by the Act because of their ecological significance, even without a continuous surface connection. But for wetlands adjacent to nonnavigable tributaries, if there is no continuous surface connection, under Justice Kennedy's "significant nexus" test, the Army Corps and the courts will need to make a detailed case-by-case inquiry in the absence of revised regulations that incorporate the presumptions of jurisdiction suggested in Justice Kennedy's concurrence. This case-by-case approach may allow many more wetlands with important ecological functions to be destroyed or degraded by development, while also increasing the costs of wetland determinations and encouraging challenges to Army Corps wetland determinations.

EPA and the Army Corps of Engineers, which have joint authority over the Clean Water Act Section 404, have not yet released guidance to agency staff on making determinations about their jurisdiction over wetlands in keeping with the *Rapanos* ruling. Recently, both agencies sent e-mail to staff requesting that they take no position in court filings on the jurisdictional issue and try to defer court filings that involve the issue. In addition, the message asked that no enforcement actions be taken until the guidance is issued. The agencies were reportedly also considering what effect the *Rapanos* decision has on Clean Water Act Section 402 pollution permit program. No date has been set for issuing the guidance nor have the agencies made any announcement about regulatory changes.[34]

In light of the EPA's continuing reluctance to issue regulatory clarification after the SWANCC case in 2001, it will likely be up to Congress to deal with the split decision in *Rapanos* by providing additional clarity to the Clean Water Act statutory provisions for Section 404 jurisdiction. Currently, bills providing clarification of the jurisdictional reach, the Clean Water Act Authority Restoration Act (H.R. 1356 and S.912), are pending before Congress. These bills would remove the navigability requirement and establish a statutory definition for "waters of the United States" which provides that ". . . all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." [35] One final note - if this legislation should be enacted, a round of

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legal challenges based on the scope of Congressional Commerce Clause power would ensue, but this is a topic for another article.

[1] 122 S. Ct. 2208 (2006), 2006 U.S. LEXIS 4887. The U.S. Supreme Court slip opinion is posted on the web at http://www.supremecourtus.gov/opinions/05pdf/04-1034.pdf (hereinafter Slip Opinion). Page references to the case in this article are those of the Slip Opinion as of July 16, 2006.

[2] *Carabell v. U.S. Army Corps of Eng'r*s, 391 F.3d 704 (6th Cir. 2004); *U.S. v. Rapanos*, 235 F.3d 256 (6th Cir. 2000).

[3] 33 U.S.C.A. § 1362(7).

[4] 33 U.S.C.A. § 1344(g).

[5] 33 CFR §328.3(a)(1).

[6] *Id.* §328.3(a)(2).

[7] *Id.* §328.3(a)(3)

[8] *Id.* §328.3(a)(5).

[9] *Id.* §328.3(a)(7).

[10] *Id.* §328.3(c).

[11] Slip Opinion, Opinion of Scalia, J. at p. 14.

[12] *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984).

[13] 33 U.S.C.A. §1251(b).

[14] Slip Opinion, Opinion of Justice Scalia, fn. 8 at 19.

[15] Slip Opinion, Opinion of Justice Scalia at pp. 23-24.

[16] *Id.*, Opinion of Justice Scalia at p. 24.

[17] *Id.*, Stevens, J. dissenting at p. 7.

[18] *Id.*, Stevens, J. dissenting at p. 8.

[19] *Id.*, Stevens, J., dissenting at pp. 14-15.

[20] *Id.*, Stevens J. dissenting at pp. 15-16.

[21] *Id.*, Kennedy, J. concurring in judgment at pp. 11-14.

[22] *Id.*, Kennedy, J. concurring in judgment at pp. 15-18.

[23] *Id.*, Kennedy, J. concurring in judgment at pp. 21-25.

[24] *Id.*, Kennedy, J. concurring in judgment at p. 25.

[25] *Id.*, Opinion of Justice Scalia at pp. 24-27.

[26] *Id.*, Stevens, J. dissenting at pp. 21-22.

[27] 2006 U.S. Dist. Lexis 47210 (June 28, 2006).

[28] Slip Opinion, Stevens, J., dissenting at pp. 25-26.

[29] *See, e.g. Grutter v. Bollinger*, 539 U. S. 306, 325 (2003) (discussing *Marks v. United States*, 430 U. S. 188 (1977)(when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds).

[30] 531 U.S. 159 (2001).

[31] Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1995 (2003)(EPA issued the Policy Directive as an appendix to this ANPR but has yet to issue a proposed rulemaking to define "waters of the United States").

[32] Department of the Interior, Environment, and Related Agencies Appropriations Act, 2007, H.R. 5386, Title V, § 508 (amendment introduced by Representatives James Oberstar (D-MN), John Dingell (D-MI) and Jim Leach (R-IA).

[33] 474 U.S. 121 (1985).

[34] See Amena H. Saiyid, *Corps, EPA Preparing Wetlands Guidance in Wake of U.S. Supreme Court Decision*, Daily Report for Executives (BNA)(July 18, 2006) at pp. A-8 to A-9.

[35] Additional information on these bills from the perspective of the environmental community is posted on the Clean Water Network website at More information is available on the Clean Water Act jurisdiction issue on the Clean Water Network's website at www.cwn.org/cwn/issues/scope/index.cfm.

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warehouses, such as feedlots, ethanol plants, wool pools, and other facilities determined by CCC to be the end user of the commodity; (2) the time of the weekly announcement of the adjusted world price for rice; (3) CCC lien searches and the fees necessary to record and file liens on marketing assistance loans; (4) the liability of a producer who improperly disposes of pledged loan collateral for a CCC farm-stored loan; (5) a producers' responsibilities for requesting loan deficiency payments; and (6) the general eligibility requirements for cotton pledged as collateral for a marketing assistance loan. **71 Fed. Reg. 32415 (June 6, 2006)**.

NATIONAL ORGANIC PROGRAM. The AMS has issued proposed regulations which would amend the USDA National List of Allowed and Prohibited Substances regulations to reflect recommendations submitted to the Secretary of Agriculture by the National Organic Standards Board (NOSB) on August 17, 2005, adding two substances, along with any restrictive annotations, to the list of prohibited substances. **71 Fed. Reg. 37854 (July 3, 2006)**.

SUGAR. The CCC has issued a notice which sets forth the establishment and adjustments to the sugar overall allotment quantity (OAQ) for the 2005-crop year which runs from October 1, 2005 through September 30, 2006. CCC set the 2005-crop OAQ at 8.600 million short tons raw value (STRV) on August 12, 2005. On August 19, 2005, CCC allocated the cane sector allotment to cane-producing states and cane processors and reassigned an expected cane supply shortfall of 120,000 STRV to imports. On September 29, 2005, CCC increased the OAQ to 8.825 million STRV and reassigned another 276,000 STRV of expected cane shortfall to imports. On December 2, 2006, CCC reassigned another 450,000 STRV of an updated cane supply shortfall to imports. On February 2, 2006, CCC increased the OAQ to 9.350 million STRV and reassigned 500,000 STRV of the anticipated domestic supply deficit to imports. The revised FY 2006 cane state allotments and cane and beet sugar processor allocations were announced on March 22, 2006. **71 Fed. Reg. 30373 (May 26, 2006)**.

TOMATOES. The AMS has announced that it is soliciting comments on its proposal to revise the United States Standards for Grades of Greenhouse Tomatoes. The AMS is proposing to revise the standards to allow that percentages of defects and size classifications be determined by count rather than weight. This would result in a revision of the following sections of the standards: Tolerances, Size Classification, Standard Pack, Damage, and Serious Damage sections. Additionally, AMS is proposing to delete the "Unclassified" section, add moldy stems as a damage defect, and add a scoring guide for damage and serious damage for skin checks. **71 Fed. Reg. 30860 (May 31, 2006)**.

VETERINARIANS. The APHIS has issued proposed regulations which amend the regulations regarding the National Veterinary Accreditation Program to establish two accreditation categories in place of the current single category, to add requirements for supplemental training and renewal of accreditation, and to offer accreditation specializations. **71 Fed. Reg. 31109 (June 1, 2006)**.

—Robert A. Achenbach, Jr., AALA Executive Director

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2006 MEMBERSHIP RECRUITMENT PROGRAM. All members are urged to check out the 2006 Membership Recruitment program on the AALA web site. As an extra incentive this year, we are offering new members a sign-up premium of a free copy of the 2005 conference handbook on CD. The CD also contains the archives of the Update from 1999-2005. This CD is worth the cost of dues by itself and can make a great incentive for prospective new members. The new member gets the CD and you get a chance to win a free registration to the 2006 annual conference in Savannah, GA. In 2005, all recruiters received at least a $25 gift certificate from Amazon.com so everyone wins.

2006 CONFERENCE. The 2006 conference brochures have been mailed and you should have received yours by now. If you have not received a brochure, let me know immediately. The 2006 conference program has also been posted on the AALA web site along with the registration form which can be filled out on your computer. Mark your calendars and plan a trip to "America's First City" for the 2006 Annual Agricultural Law Symposium at the Hyatt Regency on the Savannah riverfront in Savannah, Georgia, October 13-14, 2006. If you would like extra copies as a recruitment tool, please contact me at RobertA@aglaw-assn.org.

Robert P. Achenbach, Jr,
AALA Executive Director
P.O. Box 2023, Eugene, OR 97402
Ph 541-485-1090; FAX 541-302-1958