Ever since the U.S. Supreme Court issued its opinions in Rapanos v. United States in 2006, it has been unclear exactly how the U.S. is to go about evaluating which wetlands and tributaries of navigable waters are subject to federal jurisdiction under the Clean Water Act. Until recently, the U.S. Army Corps of Engineers asserted federal jurisdiction over wetlands and tributaries even where their connection to open, traditionally navigable waterways were attenuated. This meant, among other things, that private developers had to obtain a permit from the Corps under Section 404 of the Clean Water Act before taking many actions that would affect these wetlands and tributaries. Developers complain of delay and hassle from the permitting requirements, while environmentalists believe the requirements are essential to ensure proper protection of wetlands and streams.

The Rapanos case narrowed the Corps’ permitting jurisdiction, but it is still very unclear what the Court requires of the Corps because there was no majority opinion issued in the case. Prof. Jonathan Adler blogged yesterday on this subject on the Volokh Conspiracy website, arguing (in the wake of a new Sixth Circuit decision interpreting the Supreme Court case) that many lower federal courts are misinterpreting the Supreme Court’s mandate. I disagree. He and I engaged in a colloquy in the discussion thread to his post that I recommend for readers interested in this question.

Here’s some background:

The Court issued three opinions: two opinions were joined by four Justices each, and the third opinion was Justice Kennedy’s alone. In the absence of a majority opinion, it is left to the rest of us (and lower courts) to discern what the rule will be going forward.

Four Justices agreed that the Corps has broad jurisdiction over wetlands and tributaries, as the Corps has asserted in the past.

Justice Kennedy held that wetlands and tributaries that “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable,’ ” are subject to federal jurisdiction. Because the first group of four Justices would find federal jurisdiction in all cases where Kennedy would find jurisdiction, but not the other way around, the Kennedy test is widely seen as providing the crucial “fifth vote” that defines the scope of federal authority here.

But wait, there’s more. Justice Scalia, writing for the other group of four Justices (in an opinion generally referred to as the case “plurality”) held that

> [E]stablishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains a “wate[r] of the United States,” (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

Justice Scalia explicitly rejected Justice Kennedy’s analytical framework; to Justice Scalia, if there is no “continuous surface connection,” there cannot be federal jurisdiction over a wetland, regardless of whether the factors that Justice Kennedy enumerates are present.

Most courts that have examined the issue of federal jurisdiction over waterways since Rapanos have concluded that a wetland or tributary is subject to federal jurisdiction if either the “Kennedy test” or the “Scalia test” is met. Typical of the reasoning is the following, from U.S. v. Gerke Excavating:

> Thus, any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in most cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the Rapanos plurality), the exception being a case in which he would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the Rapanos plurality) because there was a slight surface hydrological connection. The plurality’s insistence that the issue of federal authority be governed by strict rules will on occasion align the Justices in the plurality with the Rapanos dissenters when the balancing approach of Justice Kennedy favors the landowner. But that will be a rare case, so as a practical matter the Kennedy concurrence is the least common denominator (always, when his view favors federal authority).

(Hat tip to Volokh Conspiracy commenter Applekeys for this quotation.)
Jonathan Adler disagrees with this interpretation of the Rapanos decision, while I agree with it. Read our competing views and decide for yourself. Jonathan and I do agree, by the way, that the current federal guidance on implementing Rapanos is inadequate for the task. Hopefully the new administration will clarify and simplify the rules.