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Protecting America's Wetlands Under Rapanos: Defining "the Waters of the United States"

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PROTECTING AMERICA'S WETLANDS UNDER *RAPANOS*: DEFINING "THE WATERS OF THE UNITED STATES"

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INTRODUCTION

When can a landowner dredge and fill wetlands on his or her property without fear of intervention by the federal government? If one wants to build a structure on his or her property, should he or she be concerned about the small stream or wetland in the backyard? Does the size of the stream or wetland matter? Does it matter if the stream flows continuously throughout the year? What if there is a lake nearby? What if one receives a nod from state authorities to go forward with a development project—can one initiate such a project without authorization from the federal government? The answer to these questions is unclear even in light of a recent United States Supreme Court case specifically addressing the matter.[1]

The scope of federal jurisdiction over wetlands and other land features exhibiting saturated soil conditions in the United States is defined by the Clean Water Act (hereinafter CWA).[2] The Supreme Court has attempted to appropriately define the

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[1] *See* Rapanos v. U.S., 126 S. Ct. 2208, 2208 (2006) (indicating that the Justices of the Supreme Court reached a 4-1-4 decision, with four Justices forming a plurality, one Justice authoring a concurrence and four Justices dissenting); *see also* CLAUDIA COPELAND & ROBERT METZ, THE WETLANDS COVERAGE OF THE CLEAN WATER ACT IS REVISITED BY THE SUPREME COURT: RAPANOS V. U.S. (The Library of Congress 2006) *available at* http://www.cnie.org/NLE/CRSreports/06Oct/RL33263.pdf (stating that while the court reached a decision in this case, it provided little clarification to earlier decisions on the subject).

[2] *See* 33 U.S.C. § 1362(7) (2007) (defining federal jurisdiction as covering "the waters of the U.S."); *see also Rapanos*, 126 S. Ct. at 2208 (establishing that "navigable waters" are "the waters of the U.S., including the territorial seas.").

boundary of federal jurisdiction under the CWA for over twenty years.[3] One of the reasons there is no well-defined boundary to this jurisdiction may be because water is a fluid substance. It flows irrespective of state or national boundaries, downstream and out to the oceans. As a result, it is unclear where federal authority ends and state authority begins. Recently, in *Rapanos v. United States*,[4] the Supreme Court made another attempt to define the scope of federal jurisdiction with regard to the CWA by issuing a fractured plurality decision.[5] The Court was hoping to resolve this issue by providing a workable rule that alerts landowners to the appropriate circumstances giving rise to federal jurisdiction, but it failed to reach a consensus.[6]

This Note will first briefly address the history of federal regulation of the nation's waters, and will then analyze the Supreme Court's decision in *Rapanos*. Next, this note will refute the plurality's unprecedented reading of the CWA and discuss how the various legitimate interpretations of the case provide for broader implications in related litigation in the future.

I. HISTORICAL SETTING AND BACKGROUND

A. The Shifting Concern of National Water Policy

National water policy with regard to wetlands protection can be characterized as a policy of constant change and

[3] The Court first addressed the scope of federal jurisdiction under the Clean Water Act in U.S. v. Riverside Bayview Homes, 474 U.S. 121 (1985), and later addressed the same question in Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engr's, 531 U.S. 159 (2001) [hereinafter *SWANCC*].

[4] *Rapanos*, 126 S. Ct. at 2208.

[5] *Id.* (delivering a 4-1-4 decision on the issue of whether several wetlands connected to navigable waters through ditches or human-made drains were within scope of federal jurisdiction under CWA); *see* COPELAND, *supra* note 1 (discussing the Supreme Court's split decision in *Rapanos*).

[6] In *Rapanos*, the plurality determined that wetlands were covered by the CWA only if their flow was relatively permanent, and had a continuous surface connection to traditionally defined "waters of the U.S." *See Rapanos*, 126 S. Ct. at 2221, 2226. M. Reed Hopper is a principal attorney with the Pacific Legal Foundation who represented Mr. Rapanos in the U.S. Supreme Court. *See also* M. Reed Hopper, *Rapanos v. U.S. A Comment*, 1-3 LEXISNEXIS REAL ESTATE REP. 33 (2006). Mr. Hopper concluded from the *Rapanos* decision that federal agencies have no authority under the CWA to regulate: (1) truly isolated, non-navigable, intrastate water bodies; (2) any area merely because it has a hydrological connection with downstream navigable-in-fact waters, and; (3) remote drains and ditches with insubstantial flows. *Id.*

manipulation.[7] Prior to the end of the nineteenth century, no federal legislation existed that adequately regulated an important national highway of commerce—the nation's navigable waterways.[8] Neither the states nor the federal government had a workable system of laws that could prevent obstructions on the nation's rivers.[9] Acknowledging this problem, Congress enacted the principal Rivers and Harbors Act (hereinafter RHA) in 1899 in order to regulate "water transportation and commerce."[10] Section 13 under the RHA, known as the Refuse Act, prohibited the discharge of "refuse" into any "navigable water" when such discharge would impede or obstruct navigation.[11] Additionally, the Refuse Act declared the Army Corps of Engineers (hereinafter the Corps) as the regulatory agency responsible for issuing permits for the discharge of refuse.[12] Although initially

[7] *See* Alyson C. Flournoy, *Section 404 at Thirty-Something: A Program in Search of a Policy*, 55 ALA. L. REV. 607, 610–12 (2004) (discussing the Clean Water Act's lack of clear policy regarding wetlands protection and the shifting directions that have characterized the EPA's "frequent reinventions" of agency policies); *see also* Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N. DAK. L. REV. 873, 877 (1993) (characterizing the history of wetlands protection as "one of constant change or struggle in an evolving effort to develop a coherent policy direction").

[8] *See* Kalen, *supra* note 7, at 879 (discussing the growing necessity for federal river and harbor legislation in the second half of the nineteenth century because of the absence of federal common law prohibiting obstructions on navigable waterways); *see also* William L. Andreen, *The Evolution of Water Pollution Control in the U.S.—State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENVTL. L.J. 215, 220 (2003) (explaining that the Rivers and Harbors Act of 1899 is considered by many as the first piece of federal water legislation dealing with pollution control).

[9] *See* Sean M. Helle, Note, *Aquaculture and Pollutants Under the Clean Water Act: A Case For Regulation*, 89 IOWA L. REV. 1011, 1015 (2004) (noting that the federal enactments in the late 1800's were the first federal enactments to address the "integrity of the nation's waters"); *see also* Kalen, *supra* note 7, at 879 (describing the tension between the states and the federal government prior to the enactment of federal legislation).

[10] *See* Helle, *supra* note 9, at 1016 (highlighting the fact that the various Rivers and Harbors Acts of the late 1800's were established expressly to deal with the issue of obstruction's on nation's waterways rather than water pollution); *see also* Kalen *supra* note 7, at 879 (noting that Congress responded to the need for an obstruction policy by enacting the various Rivers and Harbors Acts).

[11] 33 U.S.C. § 407 (2007); *SWANCC*, 531 U.S. 159, 178 (2001) (Stevens, J., dissenting) (explaining that Section 13 of the RHA, known as the Refuse Act regulated the discharge of refuse into navigable waters).

[12] *SWANCC*, 531 U.S. at 175 (Stevens, J., dissenting) (stating that Congress granted the regulatory power to the Corps in the Refuse Act and then broadened that power in the Clean Water Act); Kalen, *supra* note 7, at 880 (noting that the Secretary of the Army regulated the issuance of permits under the Refuse Act).

enacted to prevent obstructions, the Refuse Act became the first legislative tool to control water pollution.[13]

By the mid-twentieth century, water pollution resulting from industrial processes became an issue of national concern.[14] When a slick of industrial waste on the Cuyahoga River in Ohio caught on fire in 1969, Congress responded by enacting the Federal Water Pollution Control Act Amendments of 1972, known today as the Clean Water Act (hereinafter CWA).[15] The CWA symbolized a jurisprudential shift in federal water regulation.[16] Preventing water pollution became the primary focus of federal water regulation, thus replacing the old federal concern of preventing waterway obstructions.[17] Congressional enactment of such programs as the National Environmental Policy Act of 1969, the Water Quality Improvement Act of 1970, and the Clean Water Act characterized the new national focus on pollution

[13] *See* U.S. v. Republic Steel Corp., 362 U.S. 482, 485 (1960) (recognizing the RHA's capacity to regulate pollutant discharge when it held that the discharge of industrial solid waste into the Calumet River constituted refuse and therefore an obstruction to a navigable waterway); *see also SWANCC*, 531 U.S. at 177–78 (Stevens, J., dissenting) (explaining that the growing interest in the use of federal power to protect the "aquatic environment" brought with in a new interpretation of the Refuse Act); U.S. v. Standard Oil Co., 384 U.S. 224, 226 (1966) (holding that the accidental discharge of commercially viable gasoline, while not a literal discharge of refuse, still fell under the purview of the RHA because oil "is both a menace to navigation and a pollutant" and has a "deleterious effect of waterways."); Kalen, *supra* note 7, at 880–81 (arguing that the Refuse Act's transformation from a statute primarily concerned with obstructions to waterways to a statute concerned with water pollution occurred because the language of the Act was the only legislative tool available that could arguably prohibit the discharge of pollutants into navigable waters).

[14] *See* Kalen, *supra* note 7, at 877 (explaining that preservation of natural resources became a national concern in the mid-twentieth century as is exemplified by the passage of various federal land and resource management statutes); *see also* Oswego City Sch. Dist. Regents Exam Prep Ctr., http://regentsprep.org/Regents/ushisgov/themes/environment/history.cfm (last visited Nov. 1, 2006) (discussing the heightened concern with environmental issues during the modern era).

[15] Rapanos v. U.S., 126 S. Ct. 2208, 2265 (2006) (Stevens, J., dissenting) (stating that the incident in Ohio brought water pollution into the national spotlight and action was needed to restore the quality of water); *SWANCC*, 531 U.S. at 174–75 (Stevens, J., dissenting) (finding that Congress proposed the CWA to prevent industrial waste disasters in the future).

[16] *See SWANCC*, 531 U.S. at 178 (Stevens, J., dissenting) (highlighting that "[d]uring the middle of the 20th century, the goals of federal water regulation began to shift away from an exclusive focus on protecting navigability and toward a concern for preventing environmental degradation."); *see also* Kalen, *supra* note 7, at 880–81 (illustrating that "[a]lthough ostensibly enacted to regulate against obstructions to the navigability of the nation's waters, Section 13 of the Act subsequently became viewed as a statutory authority for controlling pollution.").

[17] *See SWANCC*, 531 U.S. at 179 (Stevens, J., dissenting) (arguing that this shift in federal water regulation reached its climax in 1972 with the passage of the CWA); *see also* Kalen, *supra* note 7, at 878-79 (reasoning that between the late 1950s and mid 1970s water legislation was transformed from promoting commerce to preventing pollution).

prevention.[18] Indeed, the CWA was "described by its supporters as the first truly comprehensive federal water pollution legislation."[19]

B. A Brief History of the Phrase "Navigable Waters"

The early navigation laws dealt with activities on the "navigable waters of the United States."[20] As a legal term of art, "navigable waters" was used in the RHA and later in the CWA.[21] Today, the CWA regulates the discharge of pollutants into "navigable waters," which is defined under section 502(7) as the "waters of the United States."[22] An astute observer will notice that the absence of the term "navigable" in section 502(7) gives rise to the question of whether it should be accorded any significance. Indeed, the Supreme Court has addressed the proper interpretation of this language on more than one occasion.[23] This Note will briefly address the history of the phrase "navigable waters" in order to understand the role it played in *Rapanos*.[24]

[18] Congressional enactments during the early 1970's illustrated the growing federal interest in water quality issues: in 1969 Congress enacted the National Environmental Policy Act, Pub. L. 91-190, 83 Stat. 852 (1970), in 1970 it passed the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970), and in 1972 Congress passed the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1387 (2006), commonly known as the CWA. Major water legislation has been passed in recent years "to enhance the quality and value of our water resources and to establish a national policy for the prevention, control and abatement of water pollution." U.S. Environmental Protection Agency, http://www.epa.gov/history/topics/fwpca/05.htm (last visited Sept. 19, 2007).

[19] *SWANCC*, 531 U.S. at 179.

[20] *See* The Daniel Ball, 77 U.S. 557, 560 (1870) (explaining that steamship was not liable under navigation laws unless it was employed on "navigable waters of the U.S."); *see also Rapanos*, 126 S. Ct. at 2216 ("For a century prior to the CWA, we had interpreted the phrase 'navigable waters of the United States' in the Act's predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible of being rendered so.").

[21] *See* 33 U.S.C. § 407 (2007) (discussing protection of "navigable waters" and improvements of harbors and rivers, generally); *see also* 33 U.S.C. § 1362(7) (2007) ("The term 'navigable waters' means the waters of the United States, including the territorial seas.").

[22] 33 U.S.C. § 1362(7) (2007).

[23] *See Rapanos*, 126 S. Ct. at 2216 (noting that the phrase "navigable waters" was interpreted in several Supreme Court cases); *SWANCC*, 531 U.S. at 163 (referencing CWA's definition of "navigable waters" as "the waters of the United States," which include intrastate waters); U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985) (discussing phrase "the waters of the United States"); *see also Daniel Ball*, 77 U.S. at 560 (addressing proper interpretation of phrase "navigable waters").

[24] *See Rapanos*, 126 S. Ct. at 2208 (determining whether certain wetlands were within the meaning of "naviagable waters" under the CWA).

The phrase "navigable waters" originated in England.[25] At early common law, "navigable waters" was defined as those waters subject to tidal flow.[26] The early navigation laws in the U.S. incorporated this common law rule.[27] Although workable in England, the tidal flow rule created problems in the United States because of commercial activity that took place in and on rivers unaffected by tidal flow.[28] Ships navigating rivers could avoid liability for the simple reason that a river did not ebb and flow with the tide.[29] Acknowledging this loophole, in 1870, the Supreme Court in *The Daniel Ball* redefined "navigable waters" as waters that are "navigable in fact" which could be used as highways of commerce.[30] Thus, the Court established the modern definition that forms the basic understanding of the term.[31]

[25] *See Daniel Ball*, 77 U.S. at 563 (noting that, at early common law in England, usual test for "navigable waters" was whether body of water ebbed and flowed with the tide); *see also* Brian Elwood, Note, *Rapanos v. United States: The Supreme Court's Failed Attempt to Interpret Wetland Regulation Under the Clean Water Act*, 56 CATH. U.L. REV. 1343, 1350 n.43 (2007) (describing the English common law definition of "navigable waters").

[26] *See Daniel Ball*, 77 U.S. at 563 (discussing applicability of "tidal flow" rule in the U.S.); *see also* James Morgan v. Edward King, 35 N.Y. 454, 458 (1866) (referencing "tidal flow" rule at common law).

[27] *See Daniel Ball*, 77 U.S. at 563 (mentioning the test for "navigable waters" at early common law in England); *see also* Genesee Chief v. Fitzhugh, 53 U.S. 443, 455 (1852), *superceded by statute*, Act Extending Jurisdiction to Lakes and Navigable Waters, 5 Stat. 726 (1845), *as recognized in* Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 293 (1972) (noting that at early common law, U.S. courts adopted English common law test for "navigable waters").

[28] *See Daniel Ball*, 77 U.S. at 563 (stating that "the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters"); *see also James Morgan*, 35 N.Y. at 458 (noting that common law test for "navigable waters" should be modified to unique character of waters of the U.S.).

[29] *See Daniel Ball*, 77 U.S. at 563 (referencing English common law test for navigable waters as those which were "subject to the tide"); *see also* Hine v. Trevor, 71 U.S. 555, 562–63 (1867) (noting that in the past cases many steam boat owners escaped liability because "the [C]ourt declared that no act of Congress had conferred admiralty jurisdiction in cases arising above the ebb and flow of the tide").

[30] *See* U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 406 n.21 (1940) (reaffirming the navigable in fact test set forth in *The Daniel Ball*); *Daniel Ball*, 77 U.S. at 563 (redefining the test as "[t]hose rivers . . . which are navigable in fact . . . when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water").

[31] *See, e.g.*, *SWANCC*, 531 U.S. at 172 (holding that the term "navigable" be construed in a manner consistent with the traditional definition as set forth in *The Daniel Ball* (citing U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 407–08 (1940))); *see* Margaret A. Johnston, Note, *Environmental Law—Clean Water Act—The Supreme Court Scales Back the Army Corps of Engineers' Jurisdiction Over "Navigable Waters" Under the Clean Water Act*, 24 U. ARK. LITTLE ROCK L. REV. 329, 337 (2002) (stating that the Court in *The Daniel Ball* established the definition of navigable waters that forms the "modern understanding" of the phrase).

The cases after *The Daniel Ball* expanded upon the bare bones navigable-in-fact definition. "Navigable waters" was stretched by the Supreme Court to include potentially navigable waters,[32] previously navigable waters, and other waterways susceptible to navigation.[33]

By the mid twentieth century, the navigable-in-fact rule underwent some significant changes.[34] Initially the scope of the rule began to change to include other waters not necessarily navigable-in-fact.[35] This widening of the scope of the navigable-in-fact rule may have been influenced by the Supreme Court's broader interpretation of the Commerce Clause.[36] Specifically, the Court expanded the commerce power in 1937 to include activities that have a "serious effect on interstate commerce."[37] In 1941, the Court validated the use of the commerce power to prescribe the wages and hours of employees of a lumber manufacturer who shipped goods interstate.[38] Soon thereafter, in 1942, the Court authorized the use of the commerce power to

[32] *See* The Montello, 87 U.S. 430, 441–42 (1874) (holding that despite having to be improved to accommodate commercial vessels, the river at issue constituted a navigable-in-fact river and the fact that vessels sometimes encountered difficulty in travel was irrelevant); *see also Appalachian*, 311 U.S. at 407–08 ("A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken.").

[33] *See Appalachian*, 311 U.S. at 407–08 ("'Natural or ordinary condition' refers to volume of water, the gradients and the regularity of the flow."); *see also* Economy Light & Power Co. v. U.S., 256 U.S. 113, 123 (1921) (holding that a river was navigable despite artificial obstructions and being out of use for a century and a half).

[34] *See* Zabel v. Tabb, 430 F.2d 199, 208 (5th Cir. 1970) (noting that the Army Corps of Engineers could consider other relevant factors beyond navigability in determining Refuse Act jurisdiction); *see also U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985) (stating that "in 1975 the Corps issued interim final regulations redefining 'the waters of the U.S.' to include . . . tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce" (quoting 40 Fed. Reg. 31320 (1975))).

[35] *See Zabel*, 430 F.2d at 208 (stating that previous cases have held that the rule encompassed factors other than navigability); *see also Riverside*, 474 U.S. at 123 (noting that "the waters of the U.S." included nonnavigable intrastate waters).

[36] *See* U.S. CONST. art. I, § 8, cl. 3 (defining Congress's power to regulate objects of interstate commerce which includes the regulation of "the waters of the U.S." as an object that is substantially related to interstate commercial enterprise); Kaiser Aetna v. U.S., 444 U.S. 164, 174 (1979) (stating that under the Commerce Clause "congressional authority over the waters of this Nation does not depend on a stream's 'navigability'").

[37] Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Co., 301 U.S. 1, 41 (1937).

[38] *See* U.S. v. Darby, 312 U.S. 100, 118 (1941) (stating that Congress had power to regulate activities which substantially affect interstate commerce, including intrastate shipment of lumber manufactured by employees whose wages were below prescribed minimum); *see also* Citicorp Indus. Credit v. Brock, 483 U.S. 27, 33 (1987) (noting that in many statutes "Congress has exercised its authority under the Commerce Clause to exclude from interstate commerce goods which, for a variety of reasons, it considers harmful").

regulate certain intrastate activities whose cumulative effect could substantially affect interstate commerce.[39] Thus, the Court's broader interpretation of the commerce power to include within its regulatory framework intrastate activities signified an increase in the federal government's regulatory powers.[40] As a result, the stage was set for a broader interpretation of the term "navigable waters."[41]

In the 1970's the federal courts started to address the scope of "navigable waters" under the Refuse Act.[42] In 1970, the Fifth Circuit in *Zabel v. Tabb*,[43] enlarged the scope of "navigable waters" when it held that the consideration of "ecological factors" permitted non-navigable tidelands to fall under Refuse Act jurisdiction.[44] In 1971,[45] a federal district court in *Kalur v. Resor* held that the Corps lacked the authority to regulate non-

[39] *See* Wickard v. Filburn, 317 U.S. 111, 125 (1942) ("Even if activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . ."); *see also* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 119 (16th ed. 2007) ("Wickard set forth the principle of 'aggregation,' which allows Congress to regulate activity that, taken in isolation, does not substantially affect interstate commerce, on the ground that multiple iterations of that same activity would substantially affect interstate commerce.").

[40] *See, e.g.*, SULLIVAN & GUNTHER, *supra* note 39, at 106–07 (noting for "nearly 60 years after the New Deal, the Court did not strike down a single federal statute as exceeding Congress's power under the Commerce Clause" until 1995 when the Supreme Court held that a congressional gun control law "exceeded the authority of Congress under the commerce power."); Kimberly Breedon, Comment & Casenote, *The Reach of Raich: The Implications For Legislative Amendments and Judicial Interpretations of the Clean Water Act*, 74 U. CIN. L. REV. 1441, 1455 (2006) (describing the Court's unfettered deference to congressional regulation of intrastate activities under the Commerce Clause during the years between 1937 and 1995).

[41] Breedon, *supra* note 40, at 1442 (highlighting that such a broad interpretation of the term "navigable waters" has "resulted in a split among the lower courts as to the reach of Congress's commerce powers to regulate non-adjacent wetlands"). *See generally* Elaine Bueschen, Comment, *Do Isolated Wetlands Substantially Affect Interstate Commerce?*, 46 AM. U. L. REV. 931, 949–50 (1997) (noting the Supreme Court's opinion in U.S. v. Lopez, which drastically limited Congress' Commerce Clause power, evoked much trepidation about Congress' future ability to regulate non-adjacent wetlands).

[42] Kalur v. Resor, 335 F. Supp. 1, 1 (D.D.C. 1971) (stating that the Refuse Act "prohibits the discharge of refuse into any navigable water, or tributary of any navigable water"). *See generally* 33 U.S.C. § 407 (2007) (noting § 407 is commonly referred to as the Refuse Act of 1899).

[43] 430 F.2d 199, 201 (5th Cir. 1970).

[44] *See id.* (finding that the Corps should have considered ecological factors even before pollution became a national concern); *see also* Bueschen, *supra* note 41, at 940 (explaining the significant ecological functions of the isolated wetlands, "such as providing migratory birds with food, habitat, breeding, and resting areas").

[45] *See, e.g.*, Bueschen, *supra* note 41, at 934 (arguing that the "recent Supreme Court case, U.S. v. Lopez, also could impede the Corps' and the EPA's regulatory jurisdiction over isolated wetlands"); *see Kalur*, 335 F. Supp. at 1 (noting the Refuse Act "provides that the Secretary of the Army may permit the deposit of 'refuse' in navigable waters.").

navigable waterways under the Refuse Act despite the potential for environmental impact.[46] Responding to the *Kalur* decision, the Corps revised its regulations to accord with the opinion.[47] After the *Kalur* opinion, the most dramatic shift in navigable waters jurisprudence occurred with the passage of the Clean Water Act.

C. The Clean Water Act and Navigable Waters

Enacted in 1972, the Clean Water Act's stated purpose was "to establish a comprehensive long-range policy for the elimination of water pollution,"[48] and "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[49] Because of the CWA's modern focus on pollution prevention, in 1971 Congress debated the definition of "navigable waters" under the CWA in order to determine the scope of the Act.[50] After a debate between the House and the Senate over the proper definition of "navigable waters," where the House defined the term as "the navigable waters of the United States", and the Senate determined it to mean the "waters of the United States," the Conference Committee adopted the Senate's broader interpretation.[51] Accordingly, section 502(7) as later promulgated defined "navigable waters" as "the waters of the United States."[52]

[46] *See Kalur*, 335 F. Supp. at 11 (stating that Corps has no authority to deposit refuse in non-navigable tributaries of navigable waters); *see also* Bueschen, *supra* note 41, at 953 (revealing the serious environmental impact that would result from the destruction of isolated wetlands, such as increased water pollution, flooding and the loss of various species).

[47] *See* Definition of Navigable Waters of the United States, 37 Fed. Reg. 18,289, 18,290 (Sept. 9, 1972) (to be codified at 33 C.F.R. pt. 209) (defining "navigable waters" as "waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."); *see also* Kalen, *supra* note 7, at 886–87 (noting the Corps' response to the *Kalur* decision by publishing a new definition of "navigable waters").

[48] *SWANCC*, 531 U.S. 159, 179 (2001) (citing S. Rep. No. 92-414, 95 (1971)).

[49] 33 U.S.C. § 1251(a) (2007).

[50] *See* 33 U.S.C. § 1362(7) (2007) (defining "navigable waters" as "the waters of the U.S."); *see also SWANCC*, 531 U.S. at 180–81 (Stevens, J., dissenting) (noting that the conferees specific deletion of the term "navigable" was related to the statutes overall purpose of maintaining the purity of the Nation's waters which was the focus of this particular debate to begin with—to define the scope of CWA jurisdiction in light of the statute's goals and purposes); Kalen, *supra* note 7, at 888–90 (discussing the extensive congressional debate surrounding the term's definition).

[51] *See SWANCC*, 531 U.S. at 180–81 n.7 (Stevens, J., dissenting); *see also* H.R. 11896, 92nd Cong. § 502(8) (1971); S. 2770, 92nd Cong. § 502(h) (1971); H.R. REP. NO. 92-1465, at 79 (1972) (Conf. Rep.).

[52] 33 U.S.C. § 1362(7) (2007).

Moreover, the Conference Report stated that the Senate's definition was to "be given the broadest possible constitutional interpretation."[53] As a result, it appeared that Congress intended to enlarge the scope of CWA jurisdiction to the greatest permissible extent.[54]

D. The Code of Federal Regulations Interpreting the CWA

Initially, the Corps promulgated regulations that mirrored the traditional navigable-in-fact rule established at common law.[55] Courts wasted no time in questioning these regulations. In *United States v. Holland*,[56] a federal district court noted the Conference Committee's deletion of the term "navigable" from the House Report and held that federal jurisdiction extended to non-navigable man-made canals that emptied into a bayou.[57] In *Natural Resources Defense Council, Inc. v. Callaway*,[58] another federal district court, also noting Congress' deletion of the term "navigable" from the House Report, held that the CWA conferred federal jurisdiction to the maximum extent permissible under the Commerce Clause.[59] Responding to these decisions, the Corps issued a revised statement of its jurisdiction in 1975[60] and, in

[53] *SWANCC*, 531 U.S. at 181 (Stevens, J., dissenting) (citing S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.), *reprinted in* 1 ENVTL. POLICY DIV. OF THE CONG. RESEARCH. SERV., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL AMENDMENTS OF 1972, at 327 (1973) [hereinafter LEGISLATIVE HISTORY])).

[54] *See* 1999 U.S. Briefs 1178, 24 (stating legislative history of CWA indicates Congress did not intend to restrict Act to waters that satisfy traditional standards of navigability); *but see id.* at 168 n.3 (finding that Congress intended nothing more than to exert its "commerce power over navigation").

[55] *See* Rapanos v. U.S., 126 S. Ct. 2208, 2216 (2006) (noting that the Corps initially adopted traditional definition of "navigable waters" (citing 33 C.F.R. § 209.120(d)(1) (1974) (current version at 33 C.F.R. § 321.2(a) (2007))); *see also SWANCC*, 531 U.S. at 168 (discussing the Corps' original interpretation of the CWA).

[56] 373 F. Supp. 665 (M.D. Fla. 1974).

[57] *See id.* at 674–76 (finding that Congress intended CWA jurisdiction to extend beyond the "mean high water line" because of the importance of wetlands to the delicate coastal environment); *see also* S. REP. NO. 92-414, at 77 (1972) (Conf. Rep.), *reprinted in* 2 LEGISLATIVE HISTORY, at 1495 (1973) (noting that Congress considered it "essential that discharge of pollutants be controlled at the source").

[58] 392 F. Supp. 685 (D. D.C. 1975).

[59] *See Callaway*, 392 F. Supp. at 686 (stating interpretation of "the waters of the United States" is "not limited to traditional tests of navigability"); *see also* U.S. v. Cumberland Farms of Conn., 647 F. Supp. 1166, 1174 (1986) (citing to the interpretation of "navigable waters" proposed in *Natural Resources*).

[60] *See* Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,319, 31,320 (Jul. 25, 1975) (noting that the Corps of Engineers published four proposed regulations in response to *Natural Resources*); *see also Rapanos*, 126 S. Ct. at 2216

July of 1977, formally adopted new regulations that expanded federal jurisdiction to the outer limits of the commerce power, thus reading the term "navigable" right out of the statute.[61] Under the 1977 regulations, the Corps asserted jurisdiction over, among other things, coastal wetlands, freshwater wetlands, intermittent rivers, and perched wetlands "that are not contiguous or adjacent to previously identified navigable waters."[62]

Less than a year later, the Corps' 1977 regulations came under criticism by some members of Congress.[63] Once again lawmakers attempted to limit the Corps' authority under the CWA to "waters [navigable-in-fact] and their adjacent wetlands."[64] The debate engaged both chambers of Congress and eventually was resolved in favor of the Corps' expansive interpretation.[65] Notably, Congress framed the debate specifically around the "issue of wetlands preservation" and consciously addressed the expansive definition of "waters" asserted by the Corps.[66] Accordingly, Congress rejected attempts to limit the Corps' jurisdiction and acquiesced to a definition of "waters" that at the

(highlighting that the Corps of Engineers adopted a broad interpretation of "navigable waters" in response to *Natural Resources).*

[61] *See* Permits For Activities In Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,319, 31,324-25 (Jul. 25, 1975) (including within the definition of navigable waters, among other things, coastal wetlands, mudflats, swamps, marshes, shallows, tributaries, intrastate lakes, and "other waters" that included intermittent rivers, streams, and perched wetlands); *see also SWANCC*, 531 U.S. at 168 (noting Congress broadened the definition of "navigable waters" by formally adopting CFR § 323.2(a)(5)).

[62] *See SWANCC*, 531 U.S. at 168; *see also,* Permits For Discharges of Dredged or Fill Material Into Waters of The U.S., 42 Fed. Reg. 37144 (Jul. 19, 1977) (stating that the term "the waters of the U.S." includes isolated wetlands, lakes, and other waters that are not part of a "tributary system").

[63] *See U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 123, 136 (1985) (noting that amendments were proposed in both the House and Senate to narrow the definition of navigable waters); *see also* Clean Water Act of 1977, H.R. 3199, 95th Cong. §§ 16(a)-(d) (1977) (outlining the definition of "navigable waters" proposed in House amendments).

[64] *Riverside*, 474 U.S. at 136.

[65] *See Riverside*, 474 U.S. at 137 (citing Senator Baker who stated that the CWA "retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act"); *see also* Clean Water Act of 1997, H.R. 3199, 95th Cong. § 16 (1997) (retaining the existing definition of navigable waters).

[66] *See Riverside*, 474 U.S. at 137. "The significance of Congress' treatment of the Corps' § 404 jurisdiction in its consideration of the Clean Water Act of 1977 is twofold. First, the scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of 'navigable waters'." *Id.* During Congressional debate, one congressman described the nation's wetlands as "a natural resource of immense environmental value." 123 CONG. REC. 30994, 30994 (statement of Hon. Newton I. Steers, Jr.).

very least included wetlands adjacent to traditionally navigable waters.[67]

E. Riverside Bayview

In 1985, the United States Supreme Court, in *United States v. Riverside Bayview Homes, Inc.*,[68] first addressed the Corps' expansive interpretation of the phrase "the waters of the United States."[69] This case involved a wetland adjacent to navigable waters.[70] The Court asked whether, under Section 404 of the CWA, the Corps had the authority to regulate the discharge of "fill material into wetlands adjacent to navigable bodies of water and their tributaries."[71] Applying what is commonly referred to as Chevron deference,[72] the Court first asked, whether the statutory term "the waters of the United States" under the CWA was ambiguous, and if so, whether the Corps' interpretation was reasonable in light of the "legislative history and underlying policies" of the CWA.[73] Noting the difficulty in drawing the line between where "water ends and land begins,"[74] the Court held that in interpreting "waters" the Corps faced the problematic and

[67] *See Riverside*, 474 U.S. at 138 ("[E]ven those [congressmen] who thought that the Corps' existing authority under § 404 was too broad recognized (1) that the definition of '[n]avigable waters . . . include[s] adjacent wetlands'."); *see also* H.R. REP. NO. 95-139, at 16 (1977) (demonstrating that the House bill proposed by those who sought a narrow definition of navigable waters recognized that adjacent wetlands should be included within navigable waters).

[68] *Riverside*, 474 U.S. at 131; *see Rapanos*, 126 S. Ct. at 2214 (noting the court's interpretation of "navigable waters" in *Riverside* limits the jurisdiction of the Clean Water Act).

[69] *Riverside*, 474 U.S. at 133; *see Rapanos*, 126 S. Ct. at 2216 (stating that "the proper interpretation" was first addressed in *Riverside*).

[70] *See Riverside*, 474 U.S. at 131 (finding that "the respondent's property is a wetland adjacent to a navigable waterway").

[71] *Id.* at 123.

[72] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (establishing the doctrine whereby courts, when faced with a justiciable challenge to a regulatory agency's decision-making, accord to the agency a relaxed standard of scrutiny that acknowledges the agency's unique position to better assess questions within its special expertise); *see also* Josh Clemons, *Addressing Nonpoint Source Pollution in the Fifth and Eleventh Circuits: Could Pronsolino Happen in Mississippi and Alabama?*, 21 J. LAND USE & ENVTL. L. 55, 71 (2005) (describing how "'Chevron deference' is indeed quite deferential").

[73] *See Riverside*, 474 U.S. at 132–39 ("In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins . . . Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority.").

[74] *Riverside*, 474 U.S. at 132 ("[T]he transition from water to solid ground is not necessarily or even typically an abrupt one.").

textually unguided task of assessing ambiguous areas such as "shallows, marshes, mudflats, swamps, bogs . . . not wholly aquatic but nevertheless . . . short of being dry land."[75] Accordingly, the Court looked to the second prong of Chevron deference—the reasonableness inquiry.[76] The Court held that the legislative history, specifically Congress's failure to limit federal jurisdiction to navigable-in-fact waters in the 1977 debates,[77] provided "some evidence" that the Corps' interpretation of the CWA was reasonable.[78] Additionally, while not abolishing the weight of the term "navigable," the Court prudently stated that Congress's addition of the definition "the waters of the United States" in the CWA made it clear that the term "navigable" be of limited import.[79] As a result, a unanimous Court upheld the Corps' jurisdiction over a wetland directly abutting an open body of water.[80]

[75] *Id.* at 132.

[76] *Id.* at 134 (discussing that since water moves in hydrologic cycles, that water quality can be affected by pollutants outside of the traditional realm of navigable-in-fact waters and therefore, the Corps' consideration of ecological factors in determining that adjacent wetlands are "inseparably bound up with the 'water' of the U.S. . . . provides an adequate basis" for CWA jurisdiction). *See generally* Jamie A. Yavelberg, Note, *The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations After EEOC v. Aramco*, 42 DUKE L.J. 166, 185 (1992) ("The reasonableness inquiry requires that an agency simply present a coherent and rational interpretation of the statute to the court.").

[77] *Riverside*, 474 U.S. at 137 (finding that the Corps' 1977 regulations were "brought to Congress' attention through legislation specifically designed to supplant it") (citations omitted); *see Rapanos*, 126 S. Ct. at 2231 (highlighting Congress' rejection of "a proposal to 'limi[t] the Corps' regulatory jurisdiction to waters navigable in fact and their adjacent wetlands'" (quoting *Riverside*, 474 U.S. at 136)).

[78] *Riverside*, 474 U.S. at 137 ("[A] refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction . . ."); *see also* Mark Squillace, *From "Navigable Waters" to "Constitutional Waters": The Future of Federal Wetlands Regulation*, 40 U. MICH. J.L. REFORM 799, 827 (2007) ("[T]he Court found the Corps' rules to be a reasonable interpretation of the statute . . .").

[79] *See* Squillace, *supra* note 78, at 133 (illustrating the term "navigable waters" is defined by the CWA as "waters of the United States"); *see also* Tyler Moore, *Defining "Waters of the U.S.": Canals, Ditches, and Drains*, 41 IDAHO L. REV. 37, 39 (2004) (noting a line of Supreme Court cases expanding the definition of "navigable waters" to those that are "navigable in fact").

[80] *Riverside*, 474 U.S. at 135 (holding that owner of wetland property abutting a navigable waterway was within Corps' jurisdiction); *see also* Moore, *supra* note 79, at 38–39 ("[E]ven non-tidal waters . . . are navigable waters.").

F. The Growth of the Ecological Effects Test and the Migratory Bird Rule

Riverside Bayview significantly affected CWA jurisdiction because for the first time the Court validated the Corps' authority to regulate wetlands and acknowledged that the Corps' regulatory authority extended beyond the traditional navigable-in-fact limitation.[81] Moreover, the Court validated the Corps' ability to consider biological and ecological factors in its jurisdictional assessments.[82] Specifically, the unanimous *Riverside* Court stated that the Corps' "ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the [CWA]."[83] The Court's endorsement of the Corps' ecological judgment dealt a considerable blow to private landowners and caused one commentator to state that "if such ecological interconnection comprises an acceptable test of whether wetlands are to be regulated, every wetland lying within the flyways of migratory birds would be included, which could well include every wetland in the entire United States."[84]

Following *Riverside Bayview*, in 1986 the Corps promulgated the so-called "migratory bird rule"[85] which sought to extend CWA jurisdiction to any intrastate waters "[w]hich are or would be

[81] *See* Randall S. Guttery, Stephen L. Poe & C.F. Sirmans, *Federal Wetlands Regulation: Restrictions On the Nationwide Permit Program and the Implications for Residential Property Owners*, 37 AM. BUS. L.J. 299, 308 (2000) (arguing that the Court endorsed the broad view of CWA jurisdiction promulgated in the Corps' 1977 regulations). *But see Rapanos*, 126 S. Ct. at 2229 (finding that *Riverside* held only that wetlands directly abutting navigable-in-fact waters received CWA protection).

[82] *See Riverside*, 474 U.S. at 134–35 (noting that the Corps' recognition of hydrologic connections, filtration properties of wetlands, biological functions of wetlands including "nesting, spawning, rearing and resting sites for aquatic . . . species" and whether the wetland in question functions as an integral unit of the local environment are all relevant factors serving to justify CWA jurisdiction); *see also* Guttery et al., *supra* note 81, at 307 (observing that the Court in *Riverside* found biological and ecological factors to be acceptable connections to navigable waterways).

[83] *See Riverside*, 474 U.S. at 134.

[84] Guy V. Manning, Comment, *The Extent of Groundwater Jurisdiction Under the Clean Water Act After Riverside Bayview Homes*, 47 LA. L. REV. 859, 871 (1987).

[85] *See, e.g.*, *SWANCC*, 531 U.S. 159, 164 (2001); *see* Kim Diana Connolly, *Keeping Wetlands Wet: Are Existing Protections Enough?*, 6 VT. J. ENVTL. L. 1, 4 (2004/2005) (noting that the EPA and Corps believe that waters that may be used as habitat for migratory birds are the types of waters that can affect commerce if allowed to be destroyed).

used as habitat" by migratory birds.[86] Sure enough, *Riverside Bayview*'s broader interpretation of CWA jurisdiction played out in 1990 when the Ninth Circuit upheld the migratory bird rule in *Leslie Salt Co. v. United States*[87] and again in 1993 when the Seventh Circuit similarly accepted the migratory bird rule, holding that "it is reasonable to interpret the regulation as allowing migratory birds to be that [ecological] connection between a wetland and interstate commerce."[88] As a result of *Riverside*'s endorsement of the ecological effects test and the Seventh and Ninth Circuits' validation of the migratory bird rule, the new enlarged scope of the CWA increased the federal regulatory burden on landowners and developers and raised serious constitutional questions about the limits of federal regulation.[89]

G. SWANCC and the Death of the Migratory Bird Rule

In 2001, the Supreme Court, addressing the Corps' interpretation of Section 404 of the CWA, issued a decision that many hoped would squarely address the serious Commerce Clause question raised by the migratory bird rule.[90] Failing to

[86] *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41217 (Nov. 13, 1986) (codified at 33 C.F.R. 328.3 (2007)); *see also SWANCC*, 531 U.S. at 164 (stating that "Migratory Bird Rule" extended the Corps' jurisdiction to intrastate waters).

[87] Leslie Salt Co. v. U.S., 896 F.2d 354, 360 (9th Cir. 1990), *remanded to* 820 F. Supp. 478 (N.D. Cal. 1992), *aff'd*, 55 F.3d 1388 (9th Cir. 1995). "The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Id.* at 360. "[A]lthough prior to the Migratory Bird Rule the Corps could not have jurisdiction over waters that were not either connected to or adjacent to interstate waters, this rule allows potential jurisdiction over not only isolated, but completely intrastate, bodies of water if migratory birds are present." Tanya M. White & Patrick R. Douglas, Note, *Postponing the Inevitable, The Supreme Court Avoids Deciding Whether the Migratory Bird Rule Passes Commerce Clause Muster*, 9 MO. ENVTL. L. POL'Y REV. 9, 11 (2001).

[88] Hoffman Homes, Inc. v. E.P.A. 999 F.2d 256, 261 (7th Cir. 1993).

[89] *See* Guttery et al., *supra* note 81, at 310 n.53 (opining that the Corps' use of the migratory bird rule to support the assertion of an interstate nexus and thus the valid use of the Commerce Power raised serious constitutional questions). *See generally* Bueschen, *supra* note 41, at 955 (discussing how *Riverside* and its progeny appear to allow CWA jurisdiction over remote wetlands with very little connection to interstate commerce).

[90] Following the expansion of Corps' federal regulatory authority after *Riverside* and the validation of the migratory bird rule by the lower courts, many interested parties, specifically landowners, eagerly awaited for the Supreme Court to address the issue of whether the migratory bird rule offended the Commerce Clause. When the Court squarely addressed the validation of the migratory bird rule in *SWANCC*, it deliberately avoided answering this constitutional question. *See SWANCC*, 531 U.S. at 162. However, the Court, in dicta, noted the lower court's holding which found the migratory bird rule to be

reach the constitutional question, the Court, in *Solid Waste Agency v. United States Army Corps of Engineers* (hereinafter *SWANCC*),[91] by a 5-4 majority, invalidated the migratory bird rule solely on statutory grounds, holding that the Corps' use of the rule to extend jurisdiction to isolated intrastate waters exceeded the authority it was granted under the CWA.[92] In addressing whether the migratory bird rule was a proper interpretation of the CWA, the Court explained that it had never decided whether federal jurisdiction extended to isolated, non-navigable, intrastate waters, and distinguished *Riverside* by stating that "it was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."[93] Next, the Court discussed the

a valid exercise of the commerce power under a substantial effects theory. *Id.* at 166. The Court in *U.S. v. Lopez* held that Congress may exercise its commerce powers over (1) channels of commerce, (2) instrumentalities of commerce, and (3) activities that substantially affect commerce. 514 U.S. 549, 558–59 (1995). It seems that the *SWANCC* Court's subsequent invalidation of the migratory bird rule on statutory interpretation grounds implied that the substantial effects doctrine could not be relied upon with regard to wetlands protection. Additionally, the Court noted that the respondents' reliance on a substantial effects argument raised "significant constitutional questions" and as a result of the potential to offend the Constitution, the "significant impingement" the Migratory Bird Rule placed on states' rights and the CWA's express recognition to "preserve, and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . of land and water resources . . . .", the Court would read the CWA in a way that would avoid raising serious constitutional questions. 531 U.S. at 173–74. The post-*SWANCC* confusion in the lower courts reflected the implicit acceptance that the substantial effects justification for CWA jurisdiction had been invalidated by the Court in *SWANCC*. The Fourth Circuit analyzed Congress' power to regulate the "channels of interstate commerce" as a justification to regulate a tributary of a navigable water. *See* U.S. v. Deaton, 332 F.3d 698, 706–07 (4th Cir. 2003). A Wisconsin District court interpreted the *Deaton* court's reluctance to use the substantial effects justification because it could raise a serious constitution question and relying on *SWANCC*'s construction of the term "navigable" in the CWA to conclude that the Supreme Court "ha[d] indicated that it believes that the [CWA] was enacted pursuant to Congress' channels of commerce authority"). U.S. v. Thorson, 2004 WL 737522, at *17 (W.D. Wis. 2004) (quoting *SWANCC*, 531 U.S. at 172).

[91] *See SWANCC*, 531 U.S. at 174 (explaining the Court's decision to avoid deciding "significant constitutional and federalism questions"); *see also Deaton*, 332 F.3d at 705 (discussing the Court's decision in *SWANCC* to avoid addressing constitutional issues when statutes can be interpreted as avoiding such problems while still comporting with the plain intent of Congress in enacting the statute).

[92] *See SWANCC*, 531 U.S. at 174; *see also* FD&P Enters. Inc., v. U.S. Army Corps. Of Eng'rs, 239 F. Supp. 2d 509, 513 (D.N.J. 2003) (noting that the Court's decision in *SWANCC* limited the authority of Corp's under the CWA by rejecting the Migratory Bird Rule, and since this time it has been difficult for courts to determine the reach of the CWA).

[93] *See SWANCC*, 531 U.S. at 166 (noting that the lower court addressed the constitutional question of whether the Migratory Bird Rule offended the Commerce Clause and determined that the "cumulative impact doctrine" permitted regulation of intrastate activities such as isolated excavation ponds if the aggregate effect of that class

legislative history and explained that even though Congress stated that navigable waters should "be given the broadest constitutional interpretation,"[94] this did not signify its "[intent] to exert anything more than its commerce power over navigation."[95] The Court further noted that even though Congress failed to reject the Corp's expansive regulations in the 1977 debates, this did not amount to Congress's acquiescence to the Corps' 1977 regulations because Congress did not specifically address the question of federal jurisdiction over isolated, non-navigable, intrastate waters.[96] Affirming the "limited import" language in *Riverside Bayview*,[97] the Court concluded that Congress's definition of navigable waters as "the waters of the United States," while limiting the weight of the term navigable, did not permit reading that term out of the statute.[98] As a result, the Court found that the migratory bird rule, by conferring jurisdiction over isolated waters, failed to acknowledge Congress's express use of the term "navigable" in the CWA and

of activity substantially impacted interstate commerce) (citing Solid Waste Agency v. U.S. Army Corps of Eng'rs 191 F.3d 845, 850 (7th Cir. 1999)).

[94] *SWANCC*, 531 U.S. at 168 n.3.

[95] *Id.*

[96] *See id.* at 170 (stating that "respondent point us to no persuasive evidence that the House bill was proposed in response to the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction"); *see also Riverside*, 474 U.S. at 137 (explaining that Congress' "refusal to overrule an agency's an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it."). *But see SWANCC*, 531 U.S. at 186 (Stevens, J., dissenting) (arguing that Congress' deliberate rejection of cutting back on the Corps' expansive 1975 regulations in the 1977 debates expressly indicates congressional acquiescence to the Corps' enlarged jurisdiction as recognized in *Riverside*).

[97] *See U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 123, 133 (1985) ("Although [the Act] prohibits discharges into 'navigable waters,' the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import. In adopting this definition of 'navigable waters,' Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.") (citations omitted); *see also* Bueschen, *supra* note 41, at 936 (noting that the definition of "navigable waters" has been extended to include isolated wetlands).

[98] *See Riverside*, 474 U.S. at 133 ("[T]he term 'navigable' as used in the [CWA] is of limited import."); *see also* FD&P Enters., Inc. v. U.S. Army Corps of Eng'rs, 239 F. Supp. 509, 513 (D.N.J. 2003) ("The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.").

thus exceeded the scope of authority granted by the language of the statute.[99]

The *SWANCC* Court's strategic avoidance of the question whether the Corps' regulations violated the Commerce Clause came as a subtle disappointment to those interested in the Court's Commerce Clause jurisprudence.[100] As recently as 1995, in *United States v. Lopez*,[101] the Court had held that Congress's commerce power extended to activities that substantially affect interstate commerce.[102] After *Lopez*, the question whether non-navigable, intrastate wetlands became proper objects of regulation under a substantial effects theory concerned environmentalists and landowners alike and became a potential window into the Court's evolving Commerce Clause jurisprudence.[103] An answer to that question would affect the

[99] *See SWANCC*, 531 U.S. at 173–74 (finding municipal landfill used as habitat by migratory birds "is a far cry, indeed, from the 'navigable waters' and 'waters of the U.S.' to which the statute by its terms extends . . . claim[ing] federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the States' traditional and primary power over land and water use"); *see also FD&P Enters.*, 239 F. Supp. 2d at 513 (asserting that "the Migratory Bird Rule [in *SWANCC*] exceeded the authority granted to the Corps under the CWA" and further specifying that "'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.").

[100] *See* Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 578–79 (2007) (discussing *SWANCC*'s avoidance of the constitutional issue regarding environmental statutes and Commerce Clause jurisprudence and declaring uncertainty as to "just how far the Court will go in reining in federal authority to regulate natural resources and pollution on Commerce Clause or other grounds in future cases . . . "); *see also* Paul Boudreaux, *A New Clean Water Act*, 37 ELR 10171, 10171 (2007) ("Instead of the problematic path of confronting the Commerce Clause directly, the federalists on the Court resorted to an ingenious logical sequence . . . By deciding the case through statutory interpretation, the Court avoided having to resolve the thorny issue of the commerce power in relation to protecting wildlife.").

[101] 514 U.S. 549 (1995).

[102] *Id.* at 559, 560 ("We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce . . . Where economic activity substantially affects interstate commerce, legislation regulating the activity will be sustained."); *see also* U.S. v. Morrison, 529 U.S. 598, 609–10 (2000) (highlighting *Lopez*'s clarification of Congress' commerce authority to regulate those activities substantially affecting interstate commerce).

[103] *See* Sam Saad, *Commerce Clause Jurisprudence: Has There Been a Change?*, 23 J. LAND RESOURCES & ENVTL. L. 143, 165 (2003) (posing questions of environmental regulation necessarily come under *Lopez*'s substantial effects test, therefore creating uncertainty as to "how that test affects Congress's ability to regulate the environment"); *see also* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 11 (1999) ("The explicit question to be addressed in most future Commerce Clause cases is whether given activities - from the burning of homes and the filling of wetlands to hazardous waste clean-up . . . - have a substantial effect on interstate commerce.").

reach of the constitution and the balance of regulatory power between federal and state governments.[104]

Addressing this issue, the Court noted its reluctance to reach constitutional questions unless Congress clearly indicated its intention to achieve a particular result.[105] In this case, it could hardly be said that "the waters of the United States" spoke directly to the validity of the Corps' migratory bird rule under the Commerce Clause.[106] Accordingly, the Court avoided answering the constitutional question in favor of construing the language of the CWA to fall short of conferring jurisdiction over the excavation ponds at issue.[107]

In his dissent, Justice Stevens criticized the majority's dismissal of Congress's unambiguous assertion that CWA jurisdiction should "be given the broadest possible constitutional interpretation."[108] Offering a detailed examination of the

[104] *See* Adler, *supra* note 103, at 11–12 (discussing balance of power between state and federal systems and explaining that future Commerce Clause cases will necessarily address "the extent to which congressional enactments, and the subsequent edicts of regulatory agencies, infringe upon the prerogatives of states governments to handle their own affairs"); *see also* Jamie Y. Tanabe, Comment, *The Commerce Clause Pendulum: Will Federal Environmental Law Survive in Post-SWANCC Epoch of "New Federalism"?*, 31 ENVTL. L. 1051, 1062 (2001) (examining effects on federal environmental regulation post-*Lopez* and highlighting potential widespread ramifications on federalist principles through decisions on "what extent Congress will be able to continue to use its Commerce Clause power to regulate the environment").

[105] *See SWANCC*, 531 U.S. at 172 ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended the result. This requirement stems from our prudential desire not to needlessly reach constitutional issues . . . "); *see also* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (stating courts will construe statutes to avoid raising constitutional problems unless Congress clearly intends otherwise because Congress is bound by oath; therefore "[t]he courts will . . . not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it").

[106] *See SWANCC*, 531 U.S. at 173 (indicating it is unclear what object Corps is seeking to regulate—the wetland or petitioner's municipal landfill); *see also* Jonathan Cannon, *Environmentalism and the Supreme Court: A Cultural Analysis*, 33 ECOLOGY L.Q. 363, 392 (2006) (discussing Corps' argument that the migratory bird rule covered "isolated waters," constituted "waters of the U.S.," and properly conferred federal jurisdiction over excavation pond).

[107] *See SWANCC*, 531 U.S. at 174 (holding the migratory bird rule "exceeds the authority granted to respondents [Corps] under § 404(a) of the CWA"); *see also* Jonathan H. Adler, *When is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 112 (2007) ("Specifically, the Court held that the CWA does not confer federal regulatory jurisdiction over isolated, intrastate waters, including isolated wetlands.").

[108] *SWANCC*, 531 U.S. at 181 ("The Court dismisses this clear assertion of legislative intent with the back of its hand."); *see* J. Michael Bayes, *New Limits on the Army Corps of Engineers' Jurisdiction: The Court Throws the Migratory Bird Rule Overboard*, 7 ENVTL. LAW. 691, 721 (2001) (highlighting Justice Stevens' declaration in *SWANCC*, "the provision's legislative history . . . makes clear that Congress understood § 404(g)(1) – and

legislative history of the CWA, Justice Stevens rejected the majority's holding that "navigable" be given some importance.[109] Justice Stevens explained that Congress's express deletion of the term "navigable" from the definition suggested by the 1971 House Report, coupled with the fact that the goals of the CWA—namely the protection of the "significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for various species of aquatic wildlife"—which have nothing to do with navigation, indicate that Congress intended "navigable waters" to be shorthand for "waters over which federal authority may properly be asserted."[110] Moreover, Justice Stevens noted that the 1977 congressional debates were initiated in response to the Corps' expansive1975 revised statement of regulations and thus Congress's rejection of a narrower definition of "waters" demonstrated that it was fully aware of the scope of CWA jurisdiction asserted by the Corps.[111]

Justice Stevens then explained that the inclusion of section 404(g) in the 1977 amendments, which gave the states authority under the CWA to administer dredge and fill permit programs over non-navigable waters,[112] indicated that Congress intended to extend federal jurisdiction not only to non-navigable tributaries but also to isolated waters.[113] Specifically, the Corps' revised statement of regulations in 1975 set forth three phases of jurisdiction to be established in yearly succession starting in that

therefore federal jurisdiction – to extend, not only to navigable waters and nonnavigable tributaries, but also to 'isolated' waters, such as those at issue in this case").

[109] *SWANCC*, 531 U.S. at 180–81 (Stevens, J., dissenting) ("The activities regulated by the CWA have nothing to do with Congress' 'commerce power over navigation.' Indeed, the goals of the 1972 statute have nothing to do with navigation at all.") (italics omitted).

[110] *Id.* at 181–82.

[111] *Id.* at 185–86 (suggesting that Congress endorsed the Corps' broad conception of its jurisdiction by rejecting the 1977 House proposal to limit the Corps' jurisdiction under §404 to navigable waters and their adjacent wetlands)

[112] *Id.* at 188 (noting that under the new section states had optional jurisdiction over the discharge of dredge and fill material into certain "non-navigable waters," in the sense that states could only regulate those waters not presently used, or susceptible to being used, for the transport of interstate or foreign commerce (quoting § 404 (g)(1) of the 1977 amendments)); *see also* 33 U.S.C. § 1344 (g)(1) (2007) (providing that states may administer dredge or fill programs to navigable waters and adjacent wetlands with proper authorization).

[113] *See id.* at 189 ("Congress understood § 404(g)(1) — and therefore federal jurisdiction — to extend, not only to navigable waters and non-navigable tributaries, but also to 'isolated' waters, such as those at issue in this case.").

year.[114] Phase 1, which became effective in 1975, asserted jurisdiction over traditional navigable waters.[115] Phase 2, effective after July 1, 1976, extended CWA jurisdiction to non-navigable tributaries. Finally, phase 3, effective after July 1, 1977, purported to cover all other waters necessary "for the protection of water quality."[116]

Congress, in promulgating section 404(g), stated in the Conference Report that it intended the states to administer a permit program "for the discharge of dredge and fill material into phase 2 and phase 3 waters after the approval by the [EPA] Administrator."[117] Accordingly, because phase 2 and phase 3 waters purport to cover such subjects as "intermittent rivers, streams, tributaries, perched wetlands that are not contiguous or adjacent to navigable waters," Congress's enactment of the 404(g) program plainly established its desire to extend CWA jurisdiction "beyond just navigable waters, their tributaries, and the wetlands adjacent to each."[118] Further, section 404(g)'s explicit effort to foster state control over phase 2 and phase 3 waters indicated that Congress intended the states to "supplant federal control with their own regulatory programs."[119]

Addressing the constitutionality of the migratory bird rule, Justice Stevens noted that the rule did not raise any serious constitutional questions with regard to Congress's Commerce Clause authority.[120] Citing the Court's adoption of the so-called

[114] *See id.* at 184 (citing 40 Fed. Reg. 31325-31326 (1975)) (stating that new regulations would become effective in three phases, beginning in 1975 and concluding in 1977); *see also* 42 Fed. Reg. 37,127 (July 19, 1977) (codifying the "migratory bird" rule, which is an example of the regulations set forth in 1975).

[115] *See SWANCC*, 531 U.S. 159, 184 (2001) (Stevens, J., dissenting) (citing 40 Fed. Reg. 31,325-31,326 (1975)) ("[P]hase 1, which became effective immediately, encompassed the navigable waters covered by the 1974 regulation and the RHA . . .") (citing 40 Fed. Reg. 31326 (1975)).

[116] *Id.* (citing 40 Fed. Reg. 31326 (1975)).

[117] *See id.* at 184. Phase 3 gave the Corps jurisdiction over all "navigable" waters, which was defined by the 1975 regulations to include any waters that the District Engineer determined needed to be regulated to ensure water quality, such as "intermittent rivers, steams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." 40 Fed. Reg. 31325 (1975).

[118] *Id.* at 189–90.

[119] *Id.* at 192 (Stevens, J., dissenting). *But see* Flournoy, *supra* note 7, at 618 (arguing that the "claimed absence of federal constraints on land use may be a convenient myth perpetuated in the hopes of bringing it to a reality.").

[120] *See Id.* at 192–94 (Stevens, J., dissenting) (stating that migratory bird rule was within Congress' Commerce power to regulate activities that "substantially affect" interstate commerce because decline of commercial activities associated with migratory birds was direct); *see also* Patrick Parenteau, *Bad Calls: How Corps' Districts are Making*

"substantial effects" doctrine,[121] Justice Stevens argued that the Corps' assertion of jurisdiction over migratory bird habitat easily falls within Congress's commerce power because the discharge of dredge and fill material into such habitat, on a cumulative level, substantially affects interstate commerce.[122] Specifically, Justice Stevens reasoned that the discharge of dredge and fill material is "almost always undertaken for economic reasons"[123] and the destruction of a wide range of migratory bird habitat, in the aggregate, will have a substantial effect on migratory bird populations resulting in an economic decline in a "host of commercial activities" associated with these birds.[124]

H. Post SWANCC Confusion

The federal judiciary's response to the *SWANCC* decision exhibited differing characterizations of the *SWANCC* holding.[125] Some courts narrowly interpreted *SWANCC* to only invalidate

Up Their Own Rules of Jurisdiction Under the Clean Water Act, 6 VT. J. ENVTL. L. 1, 17 (2004/2005) (discussing the bases for Clean Water Act jurisdiction).

[121] The substantial effects doctrine permits federal jurisdiction to cover individual, intrastate, economic activities having only a trivial effect on interstate commerce when the cumulative effect of "all other[s] similarly situated is far from trivial." *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 127 (1942). In this case, the Supreme Court upheld a criminal statute and further articulated the aggregation principle, finding that Congress could use its power to regulate an activity even if the particular intrastate activity has no effect on interstate commerce. As long as the regulated activity (considered as a class of activities) has a substantial effect on interstate commerce, and the affected party is a member of the class regulated, the regulation is a valid use of congressional commerce power. *See* Perez v. U.S., 402 U.S. 146, 154 (1971).

[122] *See SWANCC*, 531 U.S. at 192–94 (Stevens, J., dissenting) ("In addition to the intrinsic value of migratory birds . . . it is undisputed that literally millions of people regularly participate in birdwatching and hunting and that those activities generate a host of commercial activities of great value.").

[123] *See id.* at 193.

[124] *See id.* at 194–95 (illustrating the commercial activities associated with migratory bird habitat include bird-watching and hunting as well as crop production); *see also* Thomas L. Casey, *Reevaluating "Isolated Waters": Is Hydrologically Connected Groundwater "Navigable Water" Under the Clean Air Act?*, 54 ALA. L. REV. 159, 173–74 (2002) (concluding that *SWANCC* reaffirmed much of what the Court earlier held in Riverside, that the "substantial nexus" test annunciated by the Court in *SWANCC* is nothing more than a clarification of the standard first established in Riverside for determining the scope of "waters of the U.S." under the Act).

[125] *See, e.g.*, Connolly, *supra* note 85, at 27–29 (outlining the jurisdictional issues surrounding the post-*SWANCC* jurisprudence); *see also* Adler, *supra* note 110, at 112–13 ("A study by the General Accounting Office found that Army Corps district offices' jurisdictional determinations varied significantly after *SWANCC*. In the courts, a circuit split soon developed on the scope of the holding. Most circuits adopted a fairly narrow reading of SWANCC, though the U.S. Court of Appeals for the Fifth Circuit interpreted *SWANCC* to impose potentially significant limits on federal regulatory authority under the CWA.").

the migratory bird rule.[126] These courts tended to preserve CWA jurisdiction over some isolated, non-navigable, intrastate, waters if a nexus to navigable waters, other than migratory bird habitat, could be shown.[127] Other courts broadly interpreted *SWANCC* not only to invalidate the migratory bird rule, but also to invalidate any attempt to assert jurisdiction over isolated, non-navigable, intrastate waters.[128] These courts tended to preclude CWA jurisdiction unless a "direct and non-tenuous linkage" to a navigable-in-fact waterway was shown.[129]

[126] *See, e.g.*, U.S. v. Interstate Gen. Co., 39 Fed. Appx. 870, 874 (4th Cir. 2002) (finding that "[i]n sum, *SWANCC's* holding addressed only the validity of [the migratory bird rule]); *see also* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533 (9th Cir. 2001) (holding nonnavigable irrigation canals "waters of the U.S." and finding that *SWANCC* only invalidated the migratory bird rule); U.S. v. Buday, 138 F. Supp. 2d 1282, 1293 (D. Mont. 2001) (stating that the SWANCC Court struck the migratory bird rule's "clarification" and its application as exceeding Congress' intent . . . because it premised Congress' power on the effects that a water body could have on interstate commerce, and that the case at issue did not concern the Migratory Bird Rule).

[127] *See* Stephen A. Gibbons, Comment, *Just Because You Say It, Doesn't Make It So: What Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers Really Says*, 11 U. BALT. J. ENVTL. L. 45, 53 (2003) (positing that the courts narrowly interpreting *SWANCC* to only invalidate the migratory bird rule interpreted the significant nexus language to mean "any nexus" even if it was based on an "indirect hydrologic connection"); Lawrence R. Liebesman & Stuart Turner, *Summary of Federal Court Decisions Interpreting the Supreme Court's 2001 Decision in SWANCC*, A.L.I.-A.B.A. CONTINUING LEGAL EDUC. A.L.I.-A.B.A. COURSE OF STUDY 29, at 31 (May 28-30, 2003), available at WESTLAW SH088 ALI-ABA 29 ("[C]ourts have read the decision narrowly, interpreting it as merely invalidating a controversial 1986 regulation allowing the Corps to assert jurisdiction over isolated wetlands based on their use by migratory birds.").

[128] *See, e.g.*, Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001) (interpreting *SWANCC* broadly to hold that CWA jurisdiction only extends to navigable-in-fact bodies of water or wetlands adjacent thereto); *see* also FD&P Enters. v. U.S. Army Corps of Eng'rs, 239 F. Supp.2d 509, 516 (D.N.J. 2003) (rejecting the "hydrologic connection" test and adopting the "significant nexus" test thus reading *SWANCC* broadly in order to reject CWA jurisdiction over isolated waters); U.S. v. Rapanos, 190 F. Supp. 2d 1011, 1015–16 (E.D. Mich. 2002) [hereinafter *Rapanos I*) (citing *SWANCC*'s language at 531 U.S. at 172 finding that CWA jurisdiction must be predicated on a showing of a substantial effect on navigable-in-fact waters).

[129] *See Rapanos I*, 190 F. Supp. 2d at 1015–16 (stating that CWA jurisdiction over wetlands require that the wetlands "'were or had been navigable in fact or which reasonably could be made so'" (quoting *SWANCC*, 531 U.S. at 172)); *Rice*, 250 F.3d at 269 (holding that "a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water"); *FD&P Enters.*, 239 F. Supp.2d at 516 (declaring that a "significant nexus" with navigable waters was necessary to establish CWA jurisdiction); US v. RGM Corp., 222 F. Supp. 2d 780, 786–86 (E.D. Va. 2002) (ruling that CWA jurisdiction applies only to waters "'that were or had been navigable in fact or which could reasonably be made so'" (quoting *SWANCC*, 531 U.S. at 172)); U.S. v. Newdunn Assocs., 195 F. Supp. 2d 751, 767–68 (E.D. Va. 2002) (finding that CWA jurisdiction only applies to wetlands if the wetlands are contiguous or adjacent to navigable waters), *rev'd* 344 F.3d 407 (4th Cir. 2003); Gibbons, *supra* note 127, at 52 (explaining that, subsequent to *SWANCC*, courts found CWA jurisdiction existed if the wetland bore a significant nexus to navigable waters).

The post-*SWANCC* disagreement exhibited by the lower courts hinged on the interpretation of the "significant nexus" requirement articulated by the Court.[130] Without a clearly defined standard for the "significant nexus" requirement, courts were free to apply their own interpretation of the term.[131] Thus, a major problem with *SWANCC* was its failure to speak to whether a mere hydrologic connection was sufficient to give rise to a "significant nexus" or whether adjacent wetlands require direct abutment to navigable waters.[132] Additionally, the issue of groundwater was never addressed in *SWANCC*, leaving courts dumbfounded when faced with cases exhibiting a lack of a surface connection but having a substantial groundwater connection.[133] Despite the difficulty of interpreting the *SWANCC* holding, the ruling initiated a shift in regulatory power from the federal government to the states.[134] Following the decision, some

[130] *See, e.g., FD&P Enters,* 239 F. Supp. 2d at 513 (weighing conflicting judicial interpretations of the significant nexus requirement); Jeremy A. Colby, *SWANCC: Full Sound and Fury, Signifying Nothing . . . Much?*, 37 J. MARSHALL L. REV. 1017, 1031 (2004) ("SWANCC, however, has generated much litigation over the meaning of . . . 'significant nexus.'").

[131] *Compare Rice*, 250 F.3d at 269 (interpreting *SWANNC* to mean that a body of water is under CWA jurisdiction "if the body of water is actually navigable or is adjacent to an open body of navigable water" (citing *SWANCC* at 680)), *with Headwaters*, 243 F.3d at 533 (reasoning that *SWANCC* enables CWA jurisdiction to include canals that "are connected as tributaries to other 'waters of the U.S.'").

[132] In *Rapanos*, Justice Scalia's plurality opinion held that *SWANCC* established that CWA jurisdiction extends to navigable waters and wetlands that directly abut such waters. Rapanos v. U.S.,126 S. Ct 2208, 2217 (2006). Justice Kennedy's concurring opinion argued that CWA jurisdiction extends to all waters having a "significant nexus" to navigable waters, taking into account biologic, ecologic and hydrologic considerations. *Id.* at 2248. Finally, Justice Stevens' dissent maintained that any nexus implicating downstream water quality issues is sufficient to establish CWA jurisdiction. *Id.* at 2264. Thus, the *SWANCC* Court's vagueness allows courts a wide range in which to establish jurisdiction and consequently allows significantly disparate levels of wetland regulation and protection. *See* Brandon A. Van Balen, Note, *Clearing The Muddy Waters?: An Examination of SWANCC And The Implication for Wetlands Protection And The Administrative State*, 36 WAKE FOREST L. REV 845, 865-66 (2001).

[133] *See, e.g.,* U.S. v. Newdunn, 344 F.3d 407, 411 (4th Cir. 2003) (correcting lower a court's ruling for confusing *SWANCC*'s meaning when defining jurisdictional wetlands); *see also* Brian Knutsen, *Asserting Clean Water Act Jurisdiction Over Isolated Waters: What Happens After the SWANCC Decision*, 10 ALB. L. ENVTL. OUTLOOK 155, 181–82 (2005) ("Since the Supreme Court's ruling in *SWANCC* . . . [t]he question still remains as to exactly what sort of link will suffice for [CWA jurisdiction]. At least two connections to so-called 'isolated waters' may provide the 'significant nexus' that the Court in *SWANCC* deemed so crucial. First, the fact that these isolated waters play an important role in providing for flood control over navigable waters may attach CWA jurisdiction. Second, a showing of a groundwater connection between the 'isolated water' and a navigable body of water may provide a jurisdictional basis.").

[134] *See Rapanos I,* 190 F. Supp. 2d at 1014 (characterizing *SWANCC* as at the very least to hold that "isolated" waters were not covered by the CWA, thus creating a "significant shift" in CWA jurisdiction from federal to state authority); *see also* Colby,

commentators argued that thirty to sixty percent of the nation's wetlands became subject to destruction by unsupervised private development.[135] In South Carolina for example, over 200 wetlands previously covered by the CWA were declared too isolated after *SWANCC*.[136]

In response to the *SWANCC* decision, the Corps and the EPA initiated a proposed rulemaking to specifically address the extent of Corps' jurisdiction over isolated waters as defined by 33 C.F.R. § 328.3(a)(3).[137] Under this definition of "waters," the Corps asserted jurisdiction over "other waters" including intrastate waters, wetlands, prairie potholes, mudflats, and wet meadows.[138] Many commentators believed *SWANCC* invalidated the Corps' definition of "other waters" promulgated under 33 C.F.R. § 328.(a)(3).[139] After initially considering revising the

supra note 130, at 1032 (positing that the shift in regulatory power from the federal government to the states is one plausible reading of *SWANCC*, but indicating that under another fair interpretation of the case, *SWANCC* only invalidated the migratory bird rule and thus still permits the Corps to regulate intrastate waters with a minimal hydrologic connections); Johnston, *supra* note 31, at 337 (claiming that "[b]y invalidating the Migratory Bird Rule as an unauthorized extension of the Corps' powers under the CWA, the Supreme Court made an important shift in the balance of regulatory power between the federal and state governments with respect to environmental issues").

[135] *See* Johnston, *supra* note 31, at 355 (deducing that "[a]s a result [of *SWANCC*'s shift if regulatory power], thirty to sixty percent of our nation's wetlands are not at risk of potentially unsupervised development" (citing JON KUSLER, ASS'N. OF STATE WETLAND MGRS., INC., THE SWANCC DECISION AND STATE REGULATIONS OF WETLANDS 1 (2001), *available at* http://www.aswm.org/swancc/aswm-int.pdf)); RiverKeeper.org, Federal Rollbacks: The SWANCC Decision and Bush Administration Attacks on Clean Water Act, http://riverkeeper.org/campaign.php/watershed/you_can_do/442 (last visited Sept. 19, 2007) (warning that since *SWANCC*, "[f]ederal protections could have been lost for more than sixty percent of the combined watershed areas [in the northeast alone]").

[136] *See* Robert J. Alberts, *The Fate of Wetlands After Rapanos/Carabell: Fortuitous or Folly?*, 35 REAL EST. L.J. i, 1 (2006) ("In the wake of [*SWANCC*], thousands of acres formerly under the Corps' jurisdiction were relegated to the jurisdiction of the states. In South Carolina alone, 237 wetlands were declared too isolated to fall under federal control."); Sammy Fretwell, *State Enacts Emergency Wetlands Protection*, THE STATE (Columbia, S.C.), Feb. 9, 2001, at B3 (informing that *SWANCC*'s ruling has left "[a]bout 453,000 acres of wetlands . . . at risk in South Carolina").

[137] *Compare* 33 C.F.R. 328.3(a)(3) (listing the meaning of "waters of the U.S."), *with* 68 Fed. Reg. 1991 (2003) (reporting that the Corps' and EPA is seeking proposed rulemaking to conclusively define the extent of CWA jurisdiction given under 33 C.F.R. 328.3(a)(3)).

[138] *See* 33 C.F.R. 328.3(a)(3) (defining "waters of the U.S." to mean "[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")); *see also* 68 F.R. 1991 (2003) (noting that the Corp's and EPA are proposing rulemaking to conclusively define the extent of CWA jurisdiction given under 33 C.F.R. 328.3(a)(3)).

[139] *See, e.g.*, Knutsen, *supra* note 133, at 175 ("The majority of courts addressing the issue of CWA jurisdiction over 'isolated' waters since the *SWANCC* opinion have found, and this article argues, that the entirety of 328.3(a)(3) is no longer valid."); *see also*

regulation, the EPA and the Corps decided to leave the regulation unchanged.[140] Thus, following *SWANCC*, no affirmative legislative changes were made to the Corps' prior regulations.[141]

II. RAPANOS—THE CASE IN THE MIDDLE

In 2006, the Supreme Court decided yet another wetlands case, *Rapanos v. United States*.[142] The *Rapanos* case can be characterized as occupying a middle ground between *Riverside* and *SWANCC*.[143] In *Riverside*, a unanimous Supreme Court upheld jurisdiction over wetlands that directly abutted a navigable creek.[144] In *SWANCC*, the Court, by a 5-4 majority, struck down jurisdiction over physically isolated excavation ponds.[145] In *Rapanos*, the Court addressed wetlands directly abutting tributaries of navigable waters.[146] Factually and legally,

Jennifer DeButts Cantrell, Note, *For the Birds: The Statutory Limits of the Army Corps of Engineers' Authority Over Intrastate Waters After* SWANCC, 77 S. CAL. L. REV. 1353, 1380 (2004) (inferring invalidation of entire *33 C.F.R.* 328.3(a)(3) from Court's holding in *SWANCC*).

[140] *See Rapanos v. U.S.*, 126 S. Ct. 2208, 2236 (2006) (Roberts, CJ., concurring) (explaining that the proposed rulemaking did not result in the Corps taking any action to change the federal regulation after *SWANCC*); *see also* Felicity Barringer, *In Reversal, EPA Won't Narrow Wetlands Protection*, N.Y. TIMES, Dec. 17, 2003, at A35 (announcing EPA reversal of plans to narrow scope of Clean Water Act).

[141] *See Rapanos*, 126 S. Ct. at 2236 (noting that the Corps failed to clarify the scope of its power after *SWANCC*); *see also* Charlotte S. Garvey, *Committee Chair Offers Wetlands Bill*, ROCK PRODUCTS, Jun. 2007, at 4 (reporting new legislation proposed in Congress to clarify scope of Clean Water Act).

[142] 126 S. Ct. 2208 (2006); *see* Laurence E. Rosoff and Louise Ambrose, Rapanos *Navigable Waters, and Wetlands*, THE PRACTICAL REAL ESTATE LAWYER, July 2007, at 51-52 (discussing decision made by Supreme Court regarding "navigable waters" as defined in Clean Water Act).

[143] *See Rapanos*, 126 S. Ct. at 2240–41 (Kennedy, J., concurring) (discussing the framework established by *Riverside* and *SWANCC* as laying the foundation to ask the question whether *Rapanos* "constitute[s] a reasonable interpretation of 'navigable waters' as in *Riverside* . . . or an invalid construction as in *SWANCC*"); *see also* Bill Currie, Note, *Opening the Floodgates: The Roberts Court's Decision in* Rapanos v. U.S. *Spells Trouble for the Future of the Waters of the U.S.*, 18 VILL. ENVTL. L.J. 209, 226–227 (2007) (referring to *SWANCC* and *Riverside* as opposing cases in critique of Justice Kennedy's concurring opinion).

[144] *See U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124–26 (1985) (recounting facts and procedural history of *Riverside*); *see also SWANCC*, 531 U.S. 159, 167 (2000) ("[I]n *[Riverside]* we held that the Corps had §404(a) jurisdiction over wetlands that actually abutted on a navigable waterway.").

[145] *See SWANCC*, 531 U.S. at 163, 171; *see also* Lyle Denniston, *Justices Curb Wetlands Protection; 5-4 Ruling Limits Federal Clean Water Act Refuges*, PITTSBURGH POST-GAZETTE, Jan. 10, 2001, at A7 (reporting split-decision made in *SWANCC*).

[146] *See Rapanos*, 126 S. Ct. at 2219 (characterizing the four wetlands at issue as lying "near ditches or man-made drains that eventually empty into traditional navigable waters . . . ."); *id.* at 2253–54 (Stevens, J., dissenting) (establishing that the three

the *Rapanos* wetlands occupy a middle ground because they are not readily characterized as directly abutting nor can they be characterized as physically isolated.[147] Thus, *Riverside* and *SWANCC* establish the framework to determine whether the *Rapanos* wetlands fall within the ambit of "the waters of the United States."[148]

In an attempt to harmonize the *Riverside* and *SWANCC* holdings and to set forth the rule of law regarding the scope of CWA jurisdiction, the *Rapanos* Court rendered a fractured 4-1-4[149] decision in which no opinion commanded a majority.[150] This Note will thoroughly examine the various arguments in the case and propose that the Army Corps of Engineers and the lower courts are free to apply the standard articulated in either the plurality or the concurring opinion.

A. Facts

In *Rapanos,* the Court addressed whether CWA jurisdiction covered four different wetlands: three having continuous surface-water connections to navigable waters and one separated from a tributary by a four-foot-wide man-made berm.[151] John Rapanos

wetlands parcels associated with John Rapanos each exhibited surface water connections to tributaries of navigable waters and the fourth wetland at issue—the Carabell parcel—abutted a man-made ditch flowing approximately one-mile to Lake St. Clair—a navigable lake).

[147] *Id.* at 2241 (Kennedy, J., concurring) (stating that nexus between wetlands and navigable waters must be significant); Ralph Tinner, *Technical Aspect of Wetlands: Wetland Definitions and Classifications in the U.S.*, U.S. FISH AND WILDLIFE SERVICE, Mar. 7, 1997, http://water.usgs.gov/nwsum/WSP2425/definitions.html (defining and classifying wetlands both in regulatory and non-regulatory contexts).

[148] *Rapanos*, 126 S. Ct. at 2241.

[149] 4-1-4 refers to the four Justice plurality consisting of Chief Justice Roberts and Justices Scalia, Alito and Thomas, the solo concurrence authored by Justice Kennedy and the four Justice dissent consisting of Justices Stevens, Breyer, Souter, and Ginsburg. *See Rapanos*, 126 S. Ct. at 2208. While the Supreme Court sought to resolve a deep controversy concerning the Corp's jurisdiction under the CWA, the Court "fractured into four-to-one-to-four blocs." *See* Bradford C. Mank, *Implementing Rapanos—Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers?*, 40 IND. L. REV. 291, 292 (2007).

[150] *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) ("It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress's limits on the reach of the Clean Water Act."); *see* Taylor Romigh, Comment, *The Bright Line of Rapanos: Analyzing The Plurality's Two-Part Test*, 75 FORDHAM L. REV. 3295, 3296 (2007) (stating that the plurality opinion in Rapanos "failed to advance a standard to govern in future challenges").

[151] *See* 126 S. Ct. at 2253–54 (Stevens, J., dissenting) (contending that wetlands adjacent to tributaries of navigable waters are within the jurisdiction of CWA); *see also* Heather Keith, Comment, *U.S. v. Rapanos: Is "Waters of the U.S." Necessary for Clean*

owned the first three parcels at issue, and Keith and June Carabell owned the fourth parcel.[152] The first parcel, known as the Salzburg Site, contained 28 acres of wetlands whose waters flowed directly into the Hoppler Drain, which spilled into Hoppler Creek, which in turn flowed into the navigable Kawkawlin River.[153] The second parcel, known as the Hines Road site, contained 64 acres of wetlands with a surface water connection to the Rose Drain, which flowed into the navigable Tittabawassee River.[154] The third parcel, the Pine River site, contained 49 acres of wetlands with a surface water connection to the Pine River, which flowed into Lake Huron.[155] The fourth parcel, the Carabell wetlands, consisted of approximately 16 acres of wetlands separated from the continuously flowing Sutherland-Oemig Drain by a four-foot-wide man-made berm that blocked surface water flow between the wetlands and the drain.[156] The Sutherland-Oemig Drain emptied into Auvase Creek, which flowed one mile into Lake St. Clair, a 430 square mile lake.[157]

B. Procedural History

The four distinct wetlands at issue in *Rapanos* were the subjects of two different cases before the Sixth Circuit Court of Appeals.[158] In the first case, *United States v. Rapanos*,[159] the Sixth Circuit held that the CWA covered John Rapanos' three wetlands based on the "hydrological connection" between all three wetlands and navigable waters.[160] Similarly, in *Carabell v.*

Water Act Jurisdiction, 3 SETON HALL CIR. REV. 565, 595 (2007) (concluding that Rapanos' three wetland sites connect to navigable rivers, and that Carabell's site runs along side of a man-made ditch, separated by a "four-foot wide man-made berm").

[152] *Rapanos*, 126 S. Ct at 2238–39. Specifically, John Rapanos owned the Salzburg site and a company he controlled owned the Hines Road site. John Rapanos' wife and a company she controlled owned the Pine River site. *Id.*

[153] *Id.* at 2238.

[154] *Id.*

[155] *Id.*

[156] *Id.* at 2239.

[157] *Id.* at 2239.

[158] *See U.S. v. Rapanos*, 339 F.3d 447, 448 (6th Cir. 2003) (describing the government's claims against Rapanos); Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704, 707 (6th Cir. 2004) (discussing Carabell's claim against the government).

[159] 339 F.3d 447 (6th Cir. 2003).

[160] *Id.* at 453 (stating that Rapanos' wetlands were within jurisdiction of CWA because they were adjacent to drain via hydrological connection).

United States Army Corps of Engineers,[161] the Sixth Circuit held that the Southerland-Oemig drain constituted a tributary of a navigable waterway and the wetland at issue exhibited a "significant nexus" with navigable waters because of its adjacency to the drain and the "hydrological connection" between the drain and Lake St. Clair.[162]

The Supreme Court granted certiorari to address the proper interpretation of the CWA's phrase "the waters of the United States" and to determine whether the Sixth Circuit applied the correct standard.[163] The Court issued a fractured decision consisting of a plurality opinion authored by Justice Scalia and joined by Chief Justice Roberts and Justices Alito and Thomas, a concurring opinion authored by Justice Kennedy, and a dissenting opinion authored by Justice Stevens and joined by Justices Souter, Breyer and Ginsburg.[164] Both the plurality's and Justice Kennedy's opinion remanded the case to the Sixth Circuit for different reasons.[165] The plurality articulated a "physical connection" test,[166] whereas Justice Kennedy's rationale promoted a "significant nexus" test.[167] As a result of these differing standards and the lack of a controlling opinion, it is unclear how the lower courts should apply the case.[168]

[161] 391 F.3d 704 (6th Cir. 2004).

[162] *Id.* at 710 (noting that wetlands were within jurisdiction of CWA because nexus between wetlands and "navigable waters" was significant).

[163] *Rapanos*, 126 S. Ct. at 2220 (stating that certiorari was granted to determine whether wetlands at issue constituted "waters of the U.S." and to review constitutionality of Act).

[164] *Id.* at 2214, 2235, 2252 (noting composition of the 4-1-4 fractured decision); *see also* Hopper, *supra* note 6, at 52–53 (describing the Court's voting distribution).

[165] *Rapanos*, 126 S. Ct. at 2235 (stating that Sixth Circuit applied wrong standard to determine whether wetlands were within scope of CWA jurisdiction); *id.* at 2252 (Kennedy, J., concurring) (concurring with decision but asserting that "significant nexus" test should be applied to determine scope of CWA's jurisdiction).

[166] *Id.* at 2232 n.13 (characterizing the plurality's standard as a "physical-connection requirement").

[167] *See* Hopper, *supra* note 6, at 53 (characterizing the plurality's standard as a "hydrographic test").

[168] *See Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (explaining that no opinion in *Rapanos* is obviously controlling); *see* COPELAND *supra* note 1 (stating that the lower courts will have to "wrestle" with the proper rule of decision to extract from *Rapanos*).

C. Plurality Opinion

The plurality opinion set forth two important holdings that deal with the scope of CWA jurisdiction and the scope of the Corps' regulations.[169] Specifically, the questions the plurality asked and answered were: (1) what is the definition of "the waters of the United States;" and (2) in what circumstances may wetlands be defined as "waters"?[170] Basing its opinion largely on a dictionary definition of "waters,"[171] the plurality held that under the CWA the "waters of the United States" includes only those "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers and lakes'."[172] The plurality also stated that "the phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[173] Scattered throughout the opinion, the plurality listed other lands and waters it would exclude from CWA jurisdiction including non-navigable, isolated, intrastate waters; dry arroyos; coulees and washes; wet meadows; storm sewers and culverts; drain tiles; man-made drainage ditches; point sources such as pipes, ditches channels and conduits; directional sheet flow; and 100 year flood plains.[174]

[169] *See* U.S. v. Moses, 2007 U.S. App. Lexis 18483, at *16 (9th Cir. 2007) (stating that one of the plurality's requirements for "waters" to be included in the phrase "the waters of the U.S." was that the water had to either have "permanent standing" or "continuous flow at least for a period of 'some months'"); *see also* S.F. Baykeeper v. Cargill Salt Division, 481 F.3d 700, 707 (9th Cir. 2007) (commenting that the decision in *Rapanos* dealt with the "scope of the Corps' authority to regulate adjacent wetlands").

[170] N. Cal. River Watch v. City of Healdsburg, 2007 U.S. App. Lexis 18615, at *14–16 (9th Cir. 2007) (illustrating that whether a saturated land feature is to be included in the term "waters" was addressed differently by the various opinions in *Rapanos*); *Moses*, 2007 U.S. App. Lexis 18483, at *13–15 (commenting that the plurality, the concurring, and the dissenting opinions in *Rapanos* each had a different "definitional statement" to describe what geographic feature can be considered "waters").

[171] *Rapanos*, 126 S. Ct. at 2220–23, 2225 (citing Webster's New International Dictionary 2882 (2d ed. 1954)).

[172] *Id.* at 2242 (deriving this holding directly from Webster's Dictionary which defines "waters" as a substance "'found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies'").

[173] *Id.* at 2225.

[174] *Id.* at 2217–23 (stating that such waters were not within CWA's jurisdiction because they were not continuously flowing or relatively permanent bodies of water); *SWANCC*, 531 U.S. 159, 171 (2001) (noting that "Congress' decision in 1977" exempted specific categories of discharges, such as "discharge of dredged or fill material . . . for the

The plurality's adversity to intermittent and ephemeral streams is apparent by its criticism of various lower court judgments that have relied on intermittent "waters" to establish a hydrologic connection.[175] Supporting its premise that "waters" only include "relatively permanent," not intermittent flows, the plurality argued that by defining "point source" separately from "navigable waters" in Section 502[176] the CWA expressly categorizes certain "channels and conduits" that "typically carry intermittent flows" as separate and distinct entities.[177] Therefore, by negative inference, the discrete classification of certain point sources typically carrying intermittent flows, indicates that Congress intended to exclude such watercourses from the scope of "the waters of the United States."[178]

Attempting to answer the question of what circumstances permit the Corps to exercise authority, the plurality held that "only those wetlands with a continuous surface connection to . . . 'waters of the United States' . . . so that there is no clear demarcation between 'waters' and wetlands [may be deemed] 'adjacent to' such waters and covered by the [CWA]."[179] The wetland must be "as a practical matter, indistinguishable" from a "relatively permanent, standing or continuously flowing body of water."[180] Thus, in sum, the test becomes (1) whether the water

purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches").

[175] *See, e.g.*, *Rapanos*, 126 S. Ct. at 2217-18 (characterizing that case, which predicated jurisdiction on an intermittent hydrologic connection, as an example of a "sweeping assertion of jurisdiction" (citing Treacy v. Newdunn Assoc., 344 F.3d 407, 410 (4th Cir. 2003))). *But see* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 534 (9th Cir. 2001) (positing that canals that are prevented from "exchanging" water with streams or lakes and tributaries that intermittently flow are "waters of the U.S.").

[176] *See* 33 U.S.C. § 1362(7) (2007) (describing navigable waters as "waters of the U.S., including the territorial seas"); *see also* 33 U.S.C. § 1362(14) (2007) (defining point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.").

[177] *Rapanos*, 126 S. Ct. at 2223 (suggesting that ditches, channels, and conduits are separately classified to illustrate that "these are, by and large, not 'waters of the U.S.'"); U.S. v. Sea Bay Dev. Corp., 2007 U.S. Dist. Lexis 29059, at *7-8 (E.D. Va. 2007) (stating that the plurality in *Rapanos* held that "ditches, channels, conduits carrying an intermittent flow of water" do not constitute "waters of the U.S.").

[178] *Rapanos*, 126 S. Ct. at 2223 (highlighting that point sources and navigable waters are "separate and distinct categories").

[179] *Id.* at 2226.

[180] *Id.* at 2225–34; *see* Simsbury-Avon Pres. Soc'y v. Metacon Gun Club, 472 F. Supp. 2d 219, 224 (D. Conn. 2007) (citing Army Corps regulations that define "wetlands" and "adjacent").

in question is a "relatively permanent body of water, connected to traditional interstate navigable waters"; and (2) whether the "wetland has a continuous surface connection with such a waterway, making it difficult to determine where the 'water' ends and the 'wetland' begins."[181]

The plurality vacated the decision of the Sixth Circuit Court of Appeals in both cases noting the "paucity" of factual evidence by which to apply the new standard—remanding the case for further fact finding.[182]

D. Justice Kennedy's Lone Concurrence

Justice Kennedy concurred in the plurality's judgment to remand both cases to the Sixth Circuit however he set forth a different standard for determining federal jurisdiction. First, he acknowledged the traditional navigable-in-fact definition of "waters"[183] and then explained under what circumstances "other waters" may fall into the field of "waters" as traditionally defined.[184] Specifically, Justice Kennedy found that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and

[181] *Rapanos*, 126 S. Ct. at 2236–37.

[182] *Id.* at 2235; *see Simsbury-Avon Pres. Soc'y*, 472 F. Supp. 2d 219 at 224 (D. Conn. 2007) (noting the plurality's decision to vacate and remand).

[183] *Rapanos*, 126 S. Ct. at 2237 (defining the "traditional understanding" of the term (citing U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 406–08 (1940); The Daniel Ball, 10 Wall. 557, 563–64 (1871))); *see id.* at 2248 (describing the need to give the statutory term "navigable "some meaning").

[184] *See id.* at 2240–41 (stating under certain circumstances wetlands may be considered "other waters" that fall under CWA jurisdiction however the issue is what those circumstances are. According to Justice Kennedy, the *Riverside* Court held that the Corps could permissibly rely on "ecological judgment" to determine that wetlands adjacent to navigable waters are covered by the CWA. However, he noted that the question of the Corps' authority over other wetlands not adjacent to navigable waters was left open. Citing *SWANCC*, Justice Kennedy highlighted the isolated nature of the excavation ponds in that case in order to illustrate the difference between adjacent wetlands and non-adjacent, isolated waters. This difference represents the void in which the *Rapanos* Court attempted to draw the line of CWA jurisdiction.); *id.* at 2241 (showing on the one hand there are circumstances where "the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection." Thus, the major question is where to draw the line and how to determine the significance of placing the line at a particular spot.); *see SWANCC*, 531 U.S. 159, 171 (2001) (finding that the term "other waters" as used in § 404(g) of the CWA refers to those waters that are covered by the CWA but are not navigable waters in the traditional sense.).

navigable waters in the traditional sense."[185] He defined "significant nexus" vaguely by stating that "wetlands possess [it if,] either alone or in combination with similarly situated lands in the region, [they] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'."[186] He acknowledged the importance of such factors as ecological interconnections,[187] volume and regularity of flow,[188] proximity,[189] and "other relevant considerations"[190] in determining whether a particular parcel exhibits the requisite significant nexus. Furthermore, he held that wetlands adjacent to open waters[191] might be categorically defined as possessing a significant nexus,[192] but that adjacency of tributaries to navigable waters requires a case-by-case inquiry.[193]

[185] *Rapanos*, 126 S. Ct. at 2248 (explaining the significant nexus requirement, according to Justice Kennedy, eliminates the ambiguity that arises with regard non-adjacent wetlands that are not completely isolated from navigable waters. Thus, where a wetland is found to be non-adjacent to an open body of water the Court should look to whether there is a significant nexus between the wetland in question and a nearby navigable body of water. In this way, the Corps is required to acknowledge both the language of the CWA—the term "navigable"—and the purpose of the CWA—to protect downstream water quality.); *see id.* at 2246 (showing additionally, such a significant nexus assures that no constitutional question arises with regard to the commerce power since a significant nexus between a wetland and a navigable water implies that similarly situated wetlands would have a significant affect on navigable waters and thus interstate commerce).

[186] *Id.* at 2248 (defining the "significant nexus" requirement in terms of the purpose of the CWA); *see id.* at 2250 (Stevens, J., dissenting) (discussing the beneficial effects wetlands have on local aquatic ecosystems by providing "'habitat, sediment trapping, nutrient recycling and flood peak diminution'").

[187] *Id.* at 2244 (citing *Riverside*'s recognition of wetlands' significant effect on water quality and aquatic ecosystems).

[188] *Id.* at 2248–49. Justice Kennedy noted that *Riverside* established categorical jurisdiction over wetlands directly abutting open bodies of water and that the Corps may draft guidelines that categorize tributaries significant enough that their adjacent wetlands, in the majority of cases, will significantly affect the nearby aquatic ecosystem connected to navigable waters. Such factors as volume and regularity of flow may be used to categorize such tributaries. *Id.*

[189] *Id.* at 2248 (stating proximity to navigable waters is a factor that may be used by the Corps to categorize the tributary as significant).

[190] *Id.*

[191] *See id.* at 2238 (acknowledging the Corps' definition of adjacent in 33 C.F.R. § 328.3(c) as "bordering, contiguous or neighboring"). *But see id.* at 2226 n.10 (arguing that adjacency cannot be defined as forming the border of or in "reasonable proximity" to but rather may only be categorically defined as actually-abutting so as to implicate the boundary-drawing problem in *Riverside*).

[192] *Id.* at 2248 (relying on *Riverside Bayview* to support the proposition that "the assertion of jurisdiction for . . . wetlands is sustainable under the Act by showing adjacency alone").

[193] *Id.* (explaining that the dissent's reliance on "ecological functions" to justify categorizing all "'non-isolated wetlands'" as covered under the Act takes the *Riverside* holding too far and as a result a fact-sensitive, case-by-case inquiry is most appropriate).

Justice Kennedy established that a fact-sensitive, case-by-case inquiry by the Corps is necessary to avoid overbroad and unreasonable interpretations of the significant nexus requirement.[194] Moreover, "a reviewing court must identify substantial evidence supporting the Corps' claims"[195] and "a mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."[196]

E. The Stevens Dissent

Criticizing the plurality's lack of respect for the Corps.' discretion,[197] Justice Stevens argued that the Corps should be afforded complete deference to categorically regulate wetlands adjacent to tributaries.[198] Relying on the Court's "unanimous opinion in *Riverside Bayview*"[199] and Congress's implied acquiescence to the Corps.' expansive 1977 regulations,[200] Justice

[194] *Id.* at 2249 (noting that once a nexus is established, it may be acceptable to assume covered status for other analogous wetlands located in the same region).

[195] *Id.* at 2251.

[196] *Id.*

[197] *See id.* at 2252 (Stevens, J., dissenting) (asserting that "technical and complex" nature of wetlands ecology coupled with the Corps' thirty year practice of defining CWA jurisdiction requires the Court to defer to the Corps' discretion); *see also* Jonathan H. Adler, *Reckoning with Rapanos: Revisiting "Waters of the U.S." and the Limits of Federal Wetland Regulation* 14 MO. ENVTL. L. & POL'Y REV. 1, 10–11 (2006) (describing deference dissent in *Rapanos* would grant to Army Corps as "near absolute" in terms of constructing its own jurisdiction under CWA).

[198] "*Riverside Bayview* made clear that jurisdiction does not depend on a wetland-by-wetland inquiry. Instead, it is enough that wetlands adjacent to tributaries generally have a significant nexus to the watershed's water quality. If a particular wetland is 'not significantly intertwined with the ecosystem of adjacent waterways,' then the Corps may allow its development 'simply by issuing a permit.'" *Rapanos*, 126 S. Ct. at 2258 (Stevens, J., dissenting). The Court in *Riverside* explained that where it is reasonable for the Corps to determine that there are considerable environmental effects on surrounding ecosystems in most cases involving adjacent wetlands, its decision to define all adjacent wetlands as "waters" may stand. U.S. v. Riverside Bayview Homes, 474 U.S. 121, 135 n.9 (1985).

[199] *See Rapanos*, 126 S. Ct. at 2253 (Stevens, J., dissenting) (explaining Court's unanimous decision in *Riverside* was properly deferential to the political branches of government); *see also Riverside*, 474 U.S. at 123 (presenting opinion of a unanimous Court).

[200] *See Rapanos*, 126 S. Ct. at 2257–58 (Stevens, J., dissenting) (citing Congress' meaningful acquiescence to 1977 regulations of the Corps as additional support for Corps' jurisdiction over non-isolated wetlands); *see also* Susanne Goodson, Comment, *Charting a Course Through Nonnavigable Waters Using the SWACC Compass*, 78 TEMP. L. REV. 287, 297 (2005) (stating that in its passage of the 1977 amendments to CWA, Court in *Riverside* determined that Congress impliedly acquiesced to Corps' broader definition of navigable waters).

Stevens asserted that "[b]ecause there is ambiguity in the phrase 'waters of the United States' and because interpreting it broadly to cover such ditches and streams advances the purpose of the Act, the Corps' approach should command our deference."[201] He further stated that "all identifiable tributaries that ultimately drain into large bodies of water"[202] should be included within the scope of CWA jurisdiction because such inclusion furthers the purpose of the CWA—to protect "downstream water quality."[203] It follows that all wetlands adjacent to tributaries of traditionally navigable waters should receive categorical coverage by the CWA.[204] Unlike Justice Kennedy, Justice Stevens would hold that *any* nexus with navigable waters is sufficient.[205] Even so, with some skepticism, Justice Stevens acknowledged instances where, as in *SWANCC*, there may exist wholly isolated, non-navigable, intrastate waters that have no downstream effect.[206]

Substantially though, Justice Stevens' test, asks whether there is any "plausibly discernible relationship to any aspect of

[201] *Rapanos*, 126 S. Ct. at 2226 (Stevens, J., dissenting).

[202] *Id.* (Stevens, J., dissenting).

[203] *Id.* at 2263 (Stevens, J., dissenting) (discussing the importance of "downstream water quality" in the jurisdictional assessment).

[204] *See id.* at 2252 (Stevens, J., dissenting) (arguing that all wetlands adjacent to tributaries of navigable waters categorically affect downstream water quality and thus automatically fall under CWA jurisdiction); *see also U.S. v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003) (explaining long standing principle that Congress authorized with the CWA to protect non-navigable waters where pollutants have potential to adversely affect downstream water quality of navigable waters).

[205] The dissent's focus on downstream water quality forms the foundation for its total deference to the Corps' regulations. By focusing on water quality issues, the dissent acknowledges the relationship between ecological considerations and deference. Thus, any nexus that implicates downstream water quality, according to the dissent, is sufficient for jurisdictional purposes. *Rapanos*, 126 S. Ct. at 2264 (Stevens, J., dissenting). Even under the "significant nexus" standard presented by Justice Kennedy, Justice Stevens maintained that such a test is automatically satisfied where wetlands are adjacent to navigable waters. Mank, *supra* note 149, at 341.

[206] "Unlike the 'nonnavigable, isolated, intrastate waters' in *SWANCC* . . . [wetlands adjacent to tributaries of navigable waters] can obviously have a cumulative effect on downstream water flow by releasing waters at times of low flow or by keeping waters back at times of high flow. This logical connection alone gives the wetlands the 'limited' connection to traditionally navigable waters that is all the statute requires—and disproves Justice Kennedy's claim that my approach gives no meaning to the word 'navigable[.'] Similarly, these wetlands can preserve downstream water quality by trapping sediment, filtering toxic pollutants, protecting fish-spawning grounds, and so forth. While there may exist categories of wetlands adjacent to tributaries of traditionally navigable waters that, taken cumulatively, have no plausibly discernable relationship to any aspect of downstream water quality, I am skeptical." *Rapanos*, 126 S. Ct. at 2264 (Steven, J., dissenting) (citations omitted). *Contra SWANCC*, 531 U.S. 159 (2001) (holding that the Army Corps of Engineers could not assert jurisdiction over isolated intrastate waters).

downstream water quality."[207] If the answer is yes, then a jurisdictional finding is reasonable. Consequently, the dissenting Justices found that all four wetlands at issue exhibited the requisite relationship with downstream water quality and thus no remand for fact-finding was necessary.[208]

III. ANALYSIS

A. Chevron Deference

The various opinions in *Rapanos* illustrate the Justices' disparate views on the proper allocation of agency deference.[209] "Chevron Deference," as it is called, refers to the judicial practice of deferring to agency decision-making when such decisions are "based on a permissible construction of [a] statute."[210] For example, when the Corps initiates a jurisdictional assessment under Section 404, its decisions are sheltered from challenge by a two-step analysis that determines whether the Corps permissibly interpreted the CWA.[211] Under the *Chevron* analysis, the first question is whether Congress "has directly addressed the precise question at issue, and if so, whether it has [answered] unambiguously."[212] If Congress has not addressed the precise question presented, or it has answered that question ambiguously, a reviewing court must turn to the second prong of the *Chevron* analysis and ask whether "the agency's interpretation is reasonable."[213] If the congressional enactment

[207] *SWANCC*, 531 U.S. at 159.

[208] *Rapanos*, 126 S. Ct. at 2225; *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) (classifying the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides as an adequate basis for a legal judgment).

[209] *See* Knutsen, *supra* note 133, at 164–65 (discussing the confusion spurred by the *SWANCC* opinions); *see also* Breedon, *supra* note 40, at 1471 (noting the inconsistencies that arise when applying the Clean Water Act to wetlands).

[210] *Chevron*, 467 U.S. at 843; *see* Knutsen, *supra* note 133, at 167 (characterizing judicial deference of agency decision-making as "Chevron deference" after the seminal *Chevron* case).

[211] *See Chevron*, 467 U.S. at 842–43 (according agencies a relaxed standard of scrutiny when making decisions relevant to their unique expertise); *see also* Breedon, *supra* note 40, at 1472 (asserting that the Corps assert extensive jurisdiction over several categories of waters without much reference to section 404).

[212] *See Chevron*, 467 U.S. at 842–43; *see also* Breedon, *supra* note 40, at 1471.

[213] *Chevron*, 467 U.S. at 843; *see* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2534 (2007) (supporting the *Chevron* analysis as a means of examining the actions of agencies).

being interpreted does not "directly and clearly address the precise matter at issue," then as long as the agency's interpretation is reasonable the reviewing court should defer.[214] Evidence of reasonableness can be shown when the agency's interpretation (1) involves a technical and complex assessment, (2) requires the reconciliation of conflicting interests, and (3) "consider[s] the matter in a detailed and reasonable fashion . . ."[215]

B. Chevron Deference and Ecological Considerations

The inherent tension between the Scalia plurality, Kennedy concurrence and the Stevens dissent is directly related to varying allocations of Chevron Deference. Justice Scalia believes that the Corps should be given little deference while Justice Kennedy supports a middle ground and Justice Stevens promotes near-absolute deference.

This deference continuum is related to the Corps' reliance on ecological factors.[216] The plurality, concurrence, and dissent each answer the following question differently: How much weight is the Corps permitted to give to ecological considerations in determining whether a particular parcel of land is covered by the CWA? If the answer is that ecological considerations are irrelevant in the jurisdictional assessment, then you would agree with the plurality.[217] On the other hand, if you think that ecological considerations are of paramount importance than you would agree with the dissent.[218] It follows that, Justice Kennedy falls in the middle of these two extremes.

[214] *See Chevron*, 467 U.S. at 842–43; *see also* Breedon, *supra* note 40, at 1472.

[215] *Chevron*, 467 U.S. at 865.

[216] *See* 33 C.F.R. 320.4(b) (2007) (outlining the Corps' regulatory policies regarding the issuance of section 404 permits defining relevant ecological considerations with regard to wetlands functioning as including such factors as biological functions, food-chain production, nesting, spawning, rearing and resting sites for aquatic species, natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics , erosion, storm drainage, water purification functions, ecological interrelationship with other wetlands in the region among other things); *see also Leading Cases*, 120 HARV. L. REV. 351, 358–59 (2006) [hereinafter *Leading Cases*] (discussing how Scalia and Kennedy's opinions differ in granting the Corps discretion in determining when there is an ecological nexus).

[217] *See Rapanos v. U.S.*, 126 S. Ct. 2208, 2226 (2006) (stating that the Corps may rely on its ecological judgment only to categorize wetlands directly abutting navigable waters as falling under the CWA).

[218] *Id.* at 2257. "Specifically, these wetlands abut tributaries of traditionally navigable waters. As we recognized in *Riverside Bayview*, the Corps has concluded that such

The relationship between Chevron Deference and the Corps' assessment of ecological factors derives from the decision-making flexibility the ecological assessment allows for.[219] Permitting the Corps to wholeheartedly rely on ecological impact assessments necessarily provides for substantial leeway to argue in favor of jurisdiction based on the most attenuated hydrologic connection.[220] Justice Scalia attempted to rein in the Corps' decision-making power by invalidating the ecological effects test in favor of a physical connection test.[221] Justice Kennedy also attempted to limit the Corps' power, albeit to a lesser extent, by requiring a minimum showing of significant ecological effect.[222] Finally, the dissent made little attempt to limit the Corps' decision-making power, citing the Corps' unique ability to

wetlands play important roles in maintaining the quality of their adjacent waters, and consequently in the waters downstream. Among other things, wetlands can offer 'nesting, spawning, rearing and resting sites for aquatic or land species'; 'serve as valuable storage areas for storm and flood waters'; and provide 'significant water purification functions.' These values are hardly '*independent*' ecological considerations as the plurality would have it, instead they are integral to the 'chemical, physical, and biological integrity of the Nation's waters. Given that wetlands serve these important water quality roles and given the ambiguity inherent in the phrase 'waters of the U.S.,' the Corps has reasonably interpreted its jurisdiction to cover non-isolated wetlands." *Id.* (citations omitted).

[219] *See Leading Cases*, *supra* note 216, at 358–59 (arguing that the Corps' reliance on ecological considerations permits it to exercise greater discretion in the form of its "scientific expertise" thus indicating that the plurality's and Justice Kennedy's standards, by placing judicially created limitations on the Corps, rein in the its discretion, albeit to varying extents); *see also* Currie, *supra* note 143, at 219 (noting the variation in discretion goven to the Corps in the opinions of Scalia and Kennedy).

[220] *See* Manning, *supra* note 84, at 870–73 (discussing the ability to connect physically isolated wetlands to navigable waters by way of ecological factors such as ground water interconnection, vegetative uniformity and surface runoff); *see also* Randall S. Guttery, *Federal Wetlands Regulation: Restrictions on the Nationwide Permit Program and the Implications for Residential Property Owners*, 37 AM. BUS. L.J. 299, 307–08 (2000) (evaluating *Riverside*'s endorsement of the ecological test); Brief for Association of State Wetland Managers et al. as Amici Curiae Supporting Respondents, Rapanos v. U.S., 126 S. Ct. 2208 (2006) (Nos. 04-1034, 04-1384) (citing note 22 Gomi, T., R. C. Sidle and J. S. Richardson. 2002. Understanding processes and downstream linkages of headwater systems. BioScience 52:905–16) (explaining that all upstream wetlands affect downstream hydrology and biology thus indicating that virtually all wetlands in the U.S. may potentially possess an ecological nexus with navigable waters).

[221] *See, e.g.*, *Rapanos*, 126 S. Ct. at 2226 n. 10 (positing that *Riverside* only spoke to actually abutting wetlands as falling within the term "waters" and that physically separated, nearby wetlands cannot naturally be characterized as "waters" despite the potential for ecological impact).

[222] *Id.* at 2249. "[T]he Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute." *Id.*

promote the fundamental purpose of the CWA—to protect downstream water quality.[223]

C. Ecological Factors v. Physical Connection: The Deference Continuum

The plurality held that wetlands are "waters" only when they exhibit a "continuous surface connection to [navigable waters]" such that the wetland in question is virtually "indistinguishable" with the abutting navigable water.[224] Supporting its continuous surface connection test, the plurality explained that *Riverside* and *SWANCC*, when taken together, ostensibly prohibit the Corps from considering ecological factors when making jurisdictional assessments.[225] Focusing on the facts of the case, the plurality explained that *SWANCC* held that "ecological considerations [were] irrelevant to the question of whether physically isolated waters come within the Corps' jurisdiction."[226] Therefore, the plurality read *SWANCC* as not only invalidating the migratory bird rule, but also as revoking the lower court's acceptance of the ecological effects test after *Riverside*. According to the plurality, *SWANCC* confirmed that *Riverside Bayview* "rested upon the inherent ambiguity in defining where water ends and abutting wetlands begin, permitting the Corps' reliance on ecological considerations *only to resolve that ambiguity* in favor of treating all abutting wetlands as waters."[227] Thus, the plurality's deference to the Corps is limited to the categorical designation of actually abutting wetlands.[228] Beyond the scope of such wetlands, the Corps cannot rely on ecological considerations, but rather must rely on a continuous surface water connection to confer jurisdiction.[229]

[223] *Id.* at 2257. "Given that wetlands serve these important water quality roles and given the ambiguity inherent in the phrase 'waters of the United States,' the Corps has reasonably interpreted its jurisdiction to cover non-isolated wetlands." *Id.*

[224] *Id.* at 2226–34. "Thus, *only* those wetlands with a continuous surface connection to the bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* at 2226 (emphasis added).

[225] *Id.* at 2225–27 (discussing the relevance of *Riverside* and *SWANCC* with regard to the "inherent ambiguity in defining where water ends and abutting wetlands begin").

[226] *Id.* at 2226.

[227] *Id.*

[228] *Id.*

[229] *See supra* note 204.

Particularly relevant to the plurality's characterization of *Riverside* and *SWANCC* is its interpretation of the phrase "the waters of the United States." The plurality focused on the *scope of ambiguity* inherent in the term "waters."[230] Discussing this scope, the plurality explained that *SWANCC* and *Riverside* established that "waters" is ambiguous only in some respects.[231] According to the plurality, "waters" is not ambiguous with respect to open water but it is ambiguous with respect to wetlands merely nearby.[232] Harmonizing its statutory interpretation of "waters" with *Riverside*, the plurality stated that the abutting wetlands in *Riverside* were ambiguous only to the point that it invoked the "boundary drawing problem" and thus in this limited circumstance Chevron deference was appropriate.[233] On the other hand, in *SWANCC*, since no boundary drawing problem arose with respect to *SWANCC*'s physically isolated waters, no ambiguity issue existed.[234] Accordingly, in this type of situation Chevron Deference is inappropriate.

Justice Kennedy's concurrence characterized *Riverside* and *SWANCC* as granting the Corps greater freedom to assess ecological factors than the plurality would allow. Citing *Riverside*'s deference to the Corps, Justice Kennedy approved of the Corps' reasonable reliance on ecological considerations in determining that wetlands abutting navigable waters were covered by the CWA.[235] However, Justice Kennedy noted that the *Riverside* Court reserved "the question of the Corps' authority to

[230] *Rapanos*, 126 S. Ct. at 2229. The scope of ambiguity is "determined by a wetland's *physical connection* to covered waters, *not* its ecological relationship thereto." *Id.* at 2229.

[231] *Id.* at 2226. Like any statutory term, "waters" may be interpreted differently as seen in the opinion. The plurality argues that the scope of ambiguity defines the extent of Chevron Deference afforded to the Corps. Justice Scalia believes that the scope of ambiguity does not extend to wetlands in mere "reasonable proximity" to navigable waters. *Id.* at 2226 n.10.

[232] *Id.* (discussing the "boundary drawing problem" in *Riverside* and the limited deference afforded to the Corps when such a problem provides an adequate basis for reliance on ecological judgment that such wetlands be defined as waters under the Act).

[233] *Rapanos*, 126 S. Ct. at 2225–26, 2226 n.10.

[234] *Id.* at 2226 (stating that "[i]solated ponds were not 'waters of the U.S.' in their own right, and presented no boundary-drawing problem that would have justified the invocation of ecological factors to treat them as such.") (citation omitted).

[235] *See id.* at 2245 (discussing how the Corps' conclusions that wetlands serve important water quality functions such as filtering, storing and purifying are relevant ecological considerations that support the Corps' reasonable definition of adjacency that was upheld in *Riverside*).

regulate wetlands other than those adjacent to open waters."[236] Discussing *SWANCC*'s effect on the *Riverside* holding, Justice Kennedy explained that *SWANCC* addressed the validity of the Corps' reliance on the migratory bird rule.[237] Finding that the migratory bird rule was irrelevant to the statutory construction of the term "waters," the *SWANCC* Court held that it is the "significant nexus" between navigable waters and wetlands that establishes CWA jurisdiction.[238] It follows that the significant nexus requirement acknowledges ecological considerations to the extent that such considerations are significant.[239] Appropriately understood and yet deliberately undefined, the significant nexus requirement reflects Justice Kennedy's apportionment of *Chevron* deference allocated to the Corps by way of recognition of ecological considerations. Where the plurality accords no weight to ecological considerations, Justice Kennedy permits some, but only if the Corps can identify "substantial evidence" that dispels the notion that ecological evidence is "speculative."[240]

Justice Stevens' dissent characterized *Riverside* and *SWANCC* differently than both the plurality and the concurrence. According to the dissent, *Chevron* deference requires recognition of the Corps' reasonable interpretation of "waters" in order to advance the purpose of the CWA.[241] Specifically, the dissent found that *Riverside* answered the broader issue of whether CWA jurisdiction covered wetlands adjacent to navigable waters *and their tributaries*.[242] Therefore, the dissent would categorically

[236] *Id.* at 2240.

[237] *Id.* at 2240–41.

[238] *Id.* at 2241.

[239] *Id.* at 2247–38. It appears from Justice Kennedy's opinion that hydrographic features such as groundwater or surface water runoff and ecological features such as biological and chemical interconnections may be considered by the Corps in assessing jurisdiction. *Id.* at 2248. Indeed, Justice Kennedy noted the scientific complexity involved in any jurisdictional assessment and stated his concern that the plurality's continuous surface connection test failed to protect against water quality problems relating to flooding, groundwater connections, downstream discharge of dredge and fill materials and intermittent stream runoff. *Id.* at 2245.

[240] *Id.* at 2251.

[241] *Id.* at 2255 (Stevens, J., dissenting) (explaining that the difficulty in drawing clean lines between land and water (boundary drawing problem) created the need to defer to the Corps' judgment in order to advance the purpose of the CWA).

[242] *Id.* (discussing how the *Riverside* Court characterized the question presented as whether the CWA extends to wetlands adjacent to navigable waters and their tributaries even though the facts of the case dealt only with the a particular wetland actually abutting an open body of water).

define adjacency as including wetlands "that form the border of or are in reasonable proximity to other waters."[243]

Endorsing the Corps' wholesale use of ecological considerations, the dissent, citing *Riverside*, stated that "[i]f it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the ecosystem, its definitions can stand."[244] Where Justice Kennedy requires substantial evidence of significant ecological impact, the dissent requires only evidence that the Corps' reliance on ecological factors was reasonable under the circumstances. This effectively places a lesser burden on the Corps to substantiate its findings in a reviewing court and thus permits the Corps substantial leeway in fashioning creative ecological arguments in support of its jurisdictional assessments.

D. Scalia Plurality's Unprecedented Interpretation

Focusing on the undue "burden of federal regulation" placed on private landowners, the Scalia plurality attempted to lay down a bright-line rule to reduce litigation and limit the Corps' decision-making power.[245] Inherent in the plurality's holding is its adversity to the Corps' power over private landowners and its disregard for the purpose of the CWA.[246] As a result, the plurality fashioned the Court's narrowest rule in order "to protect the primary responsibilities and rights of States to . . . plan the development and use of land and water resources . . ."[247] Focusing on the definite article "the" and the plural noun "waters," the plurality argued that "waters" does not refer to water in general, but rather more narrowly to water "as found in streams and bodies forming geographical features such as oceans, rivers, and lakes, or the flowing or moving masses, as of waves or floods,

[243] *Id.* at 2255–56 (highlighting Congress's implied acquiescence in 1977 to the Corps's asserted jurisdiction over wetlands "that form the border of or are in reasonable proximity to other waters").

[244] *Id.* at 2256.

[245] *Id.* at 2214 (Scalia, J., plurality) (noting the burden of federal regulation on landowners and characterizing the Corps as an "enlightened despot" with regard to its decision-making power).

[246] *Id.* at 2235 n.15 (discussing the opaqueness of Justice Kennedy's significant nexus requirement and arguing that such an "unverifiable standard is not likely to constrain an agency whose disregard for the statutory language has been so long manifested").

[247] *Id.* at 2215 (quoting 33 U.S.C. §1251(b) (2007)).

making up such streams or bodies."[248] The import of terms such as rivers, streams, lakes, and oceans, according to the plurality, clearly connotes "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."[249] Therefore, "waters" should be understood to include only "relatively permanent, standing or flowing bodies of water."[250] Additionally, bolstering its "relatively permanent" designation, the plurality cited Section 502's separate treatment of "point sources" as an indicator that intermittent watercourses fall outside the scope of "the waters of the United States."[251]

While the plurality's pursuit of a bright line rule to reduce litigation and protect private landowners is admirable, it is undeniably an attempt to legislate a new rule unsupported by the language and purpose of the CWA and the case law interpreting it.[252] Particularly alarming is the plurality's characterization of "waters" to not include intermittent or irregular flows.[253] Justice Kennedy noted that the plurality's "point source" treatment ignores the fact that such channels and conduits may contain permanent flows and thus be simultaneously classified as "waters" under the Act subject to dredge and fill permitting.[254] Nowhere in the CWA is "point source" restricted to intermittent watercourses and the plurality's unprecedented distinction between "point source" and "waters" threatens to exclude polluting point sources from section 404 jurisdiction.[255]

[248] *Id.* at 2220–21 (analyzing the statutory text with the help of Webster's dictionary).

[249] *Id.* at 2221.

[250] *Id.*

[251] *Id.* at 2223 ("separate classification of 'ditch[es], channel[s], and conduit[s]' – which are terms ordinarily used to describe the watercourses through which intermittent waters typically flow – shows that these are, by and large, *not* 'waters of the U.S.'").

[252] *Id.* at 2242 (Kennedy, J., concurring) (arguing that the limitations on the Act imposed by the plurality are not supported by the language of the Act nor the purpose of the Act).

[253] *Id.* at 2221 (finding that the dictionary definition of the term "waters," which includes the terms streams, oceans, rivers and lakes, connotes permanent, standing bodies of water that excludes recognition of intermittent flows).

[254] *Id.* at 2243 (suggesting that polluted water can flow from pipes, channels, or conduits and be point sources, otherwise "effluent streams from sewage treatment plants" would be excluded).

[255] *Id.* (positing that distinctions between waters and point sources are "unsound" by ignoring streams from sewage treatment plants, which can be both water sources and point sources); *see* 33 U.S.C. § 1362(14) (2007) (defining a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch,

Furthermore, the plurality's exclusion of intermittent waters from Section 404 completely disregards the reality that the vast majority of rivers (approximately 75% or more) in the Western United States are non-perennial or intermittent.[256] As a result of the plurality's holding, "[i]ntermittent streams [will] be allowed to be used for waste disposal, thus imperiling [western] perennial streams during times of connected flow."[257] For example, Walker Lake and Pyramid Lake, both in Nevada, are two unique freshwater desert lakes that support large fisheries and substantial recreational economies.[258] Under the plurality's "relatively permanent" test, the surrounding intermittent streams and wetlands that provide water to those lakes are all at risk of unfettered deposition of dredge and fill material, thus placing the Nevada citizens who rely on those intermittent streams and wetlands at a substantial risk of economic loss in the future.[259] Additionally, intermittent streams in the West behave differently from what most people east of the Mississippi River typically think of as a stream. Intermittent and ephemeral streams in the West feed downstream perennial rivers and lakes during periods of overland flow.[260] Intermittent overland flow

channel, tunnel, conduit, well . . . or vessel or other floating craft, from which pollutants are or may be discharged").

[256] Brief for Western Organization of Resource Councils as Amici Curiae Supporting Respondents, Rapanos v. U.S., 126 S. Ct. 2208 (2006) (Nos. 04-1034, 04-1384), 2004 U.S. Briefs 1034, 20 (citing Comments of the Western Water Alliance to the U.S. Environmental Protection Agency, Docket ID OW-2002-0050, April 16, 2003, Table 2, at pages 9-10 (attached hereto as Appendix 2)). In Arizona, non-perennial rivers account for 96% of all river miles in the state. *Id.*; *see* ENVTL. PROT. AGENCY, EPA 841-B-06-002, WADEABLE STREAMS ASSESSMENT: A COLLABORATIVE SURVEY OF THE NATION'S STREAMS (2006), *available at* www.epa.gov/owow/streamsurvey. The majority of the streams in the western U.S. do not flow continuously. *Id.*

[257] Brief for Western Organization of Resource Councils, *supra* note 256, at 21.

[258] *See id.* at 21 n.11 (explaining that in Mineral County, Nevada the local government is extremely concerned with preserving the wetlands of Walker Lake and Pyramid Lanke because the provide a great economic benefit); *see also* Sierra Club, Walker Lake: Nevada's International Treasure, http://nevada.sierraclub.org/conservation /walkerlake/WLbriefing.html (last visited Oct. 10, 2007) (noting that Walker Lake is famous for its Lahotan cutthroat trout fisher and that its recreational uses are the "mainstay of the economy of small rural Mineral County").

[259] Brief for Western Organization of Resource Councils, *supra* note 256, at 21 n.11 (announcing that the Walker Lake is one of only five fresh, deep water desert lakes in the world that supports a substantial fishery); *see* National Wildlife Federation, *Weakening the Clean Water Act: What it Means for Nevada, available at* http://www.nwf.org/wildlife /pdfs/CleanWaterActNevada.pdf (last visited Feb. 13, 2008) (stating that the wetlands in Nevada supports the recreational economy and that the Nevada waters need to be protected from charges of pollutants, dredge, and fill activities).

[260] *See* Brief for W. Org. of Res. Councils, *supra* note 256, at 22–23 (discussing the characteristics of stream systems in the Western U.S. and how the failure to protect such

generally occurs as a result of rainfall, snowmelt, groundwater contribution or other precipitation runoff.[261] The problem with plurality's "relatively permanent" test is that it fails to acknowledge the paramount importance of Western intermittent and ephemeral streams in downstream water quality and downstream water recharge.[262] If the plurality's test is binding, groundwater and perennial stream recharge could be reduced significantly, which will have an adverse affect on municipal drinking water, irrigation water availability, and water quality. This indicates that the plurality's unprecedented reliance on Webster's dictionary fails to acknowledge not only the CWA's purpose in protecting water quality but also the scientific complexity involved in water quality impact assessments.

The plurality's disregard for the role and purpose of intermittent streams and their adjacent wetlands in downstream water quality could have a substantial effect on navigable waters.[263] Rivers, lakes, streams and tributaries are the units

intermittent streams from dredged and fill material will inevitably result in negative downstream effects and water quality and water availability problems); *see generally* Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002) (presenting an example of the potentially harmful effects on stream systems absent regulation where high fecal coliform bacteria associated with animal manure was found in the water supply used by the largest dairy in Washington).

[261] *See* Brief for W. Org. of Res. Councils, *supra* note 256, at 22 (noting that such streams "feed downstream perennial waters by overland flow during times when streams carry groundwater contribution, snowmelt, and other precipitation runoff"); *see also* Kenneth W. Tate, California Rangelands Research and Information Center, *Monitoring Series: Streamflow*, July 1995, *available at* http://californiarangeland.ucdavis.edu/Publications%20pdf/MS9.pdf (explaining that intermittent and ephemeral streams are seasonal or storm related overland flows that transport precipitation downslope over the surface of the soil).

[262] Courts in the West, both district and appellate, have consistently upheld federal jurisdiction over non-perennial tributary waters. *See* Quivira Mining Co. v. U.S. Envtl. Prot. Agency, 765 F.2d 126, 130 (10th Cir. 1985). The *Quivira* court affirmed the EPA's determination that a CWA permit was required for discharges into surface arroyos that, during storms, channeled rainwater both directly to streams and into underground aquifers that connected with such streams. *See* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 534 (9th Cir. 2001). The Ninth Circuit held that "even tributaries that flow intermittently are 'waters of the U.S.'" The reasoning for including intermittent tributaries within the jurisdiction of the Act is clear: "'As long as the tributary would flow into the navigable body, it is capable of spreading environmental damage and is thus a 'water of the U.S.' under the Act.'" *Id.* at 534 (quoting U.S. v. Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997).

[263] *See* Brief for Ass'n of State Wetland Managers as Amici Curiae Supporting Respondents, *Rapanos v. U.S.*, 126 S. Ct. 2208 (2006) (Nos. 04-1034, 04-1384), 2004 U.S. Briefs 1034, 36 (emphasizing that the potentially devastating effects of inadequate attention and care for streams and wetlands is a factor of their close connection to various ecological systems (citing Takashi Gomi, et al., *Understanding Processes and Downstream Linkages of Headwater Systems*, October 2002, http://faculty.forestry.ubc.ca/richardson/abstracts/Gomi_etal2002.pdf); *see also* Richard B. Alexander, et al., *The Role of*

that typically comprise a watershed. Visually, they form a tree-like pattern.[264] The outermost branches of this tree represent the more remote waters such as intermittent and ephemeral streams and their adjacent wetlands.[265] Small alterations to these outermost branches may have little water quality impact.[266] However, numerous alterations aggregated together may substantially affect the overall health and functioning of the watershed.[267] Failing to cover intermittent and ephemeral streams, therefore, directly subverts the "congressional concern" with protecting downstream water quality.

The plurality opinion also fails to acknowledge the imperative ecological needs in preserving wetlands. The importance of protecting navigable waters is evident by the fact that between the years 1986 to 1997 an estimated net loss of 644,000 acres of wetlands in the United States occurred due to human activities such as urban development, agriculture and rural development.[268] It is imperative then, to defer to the Corps' ecological judgment when determining CWA jurisdiction in light

Headwater Streams in Downstream Water Quality, Feb. 2007, *available at* http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1752-1688.2007.00005.x (suggesting that headwater and streams play an integral role in linking pollutant sources and high-order, or navigable, streams).

[264] *See* U.S. Environmental Protection Agency, "What is a Watershed?", Apr. 3, 2007, http://www.epa.gov/owow/watershed/whatis.html (describing the intricate ecological relationship present in all watersheds); *see also* Sarah Dorner and David Swayne, *Transforming Watershed Modelling Components Into Graphical Probability Networks*, (2004), http://www.elet.polimi.it/IFAC_TC_Environment /Venice2004/poster /1v04swayne.pdf (explaining generally that the importance of protection rests in the interconnected drainage network comprised of fields, ponds, streams and rivers, to name a few).

[265] *See* Brief for Ass'n of State Wetland Managers, *supra* note 263, at 33 (stating that these "leaves and twigs" are known as first and second order streams, ditches and wetlands); *see also* Judy L. Meyer, et al., *Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands*, February, 2007, *available at* http://www.sierraclub.org/healthycommunities/rivers/WRABreport_full.pdf (claiming that these headwater streams often appear to be insignificant as a result of their relative size).

[266] *See* Brief for Ass'n of State Wetland Managers, *supra* note 263, at 33.

[267] *See id.* at 34 (concluding that the aggregate detrimental effects on the "tree" are a factor of the interconnectivity of the corresponding "branches"); *see also* Winsor H. Lowe and Gene E. Likens, *Moving Headwater Streams to the Head of the Class*, BIOSPHERE, Mar. 2005, at 196, *available at* http://www.ohvec.org/galleries/reclamation /moving_headwater_streams.pdf (stating that headwater streams, although relatively small, account for nearly seventy percent of stream-channel length in this country).

[268] *See* THOMAS E. DAHL, U.S. FISH & WILDLIFE SERV., STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS U.S. 1986 TO 1997, 29–30 (2000) (discussing net loss of wetlands in U.S. due to human activities and providing useful figures to illustrate various losses occurring to different types of wetlands); *see also* NAT'L WETLANDS INVENTORY, Summary Findings: STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS U.S. 1986 TO 1997, DAHL, T.E. (2000).

of the substantial losses that are presently occurring.[269] The plurality's continuous surface connection test is simply a poor proxy for ecological impact and thus is irrelevant in the context of a statute concerned with downstream water quality. It is well established that upstream headwaters, tributaries and wetlands serve important water quality roles such as water filtration, retention of nutrients, removal of pollutants and reduction of sediment export.[270] Moreover, wetlands can offer "nesting, spawning, rearing and resting sites for aquatic or land species [and] serve as valuable areas for storm and flood waters."[271] Wetlands and tributaries have also been shown to provide economic benefits including decreases in the cost of downstream water treatment, improvements in recreational opportunities, increases in property values and decreases in the health risks associated with microbial pathogens in drinking water.[272]

There may also be compelling social and economic interests in wetland preservation based on wetlands' unique ability to

[269] The plurality's test seems to limit the current scope of federal regulation, which will potentially result in a regulatory gap in some states. A subsequent decrease in federal authority may prompt those states to take action to fill the void. In other states, this regulatory void may already be filled. Still in others, state regulators may seek to deregulate. Some may argue that federal regulations are necessary to prevent the possibility that states will choose not to regulate certain wetlands in order to promote economic development. This is predicated on a "race to the bottom theory." On the other hand, some states may seek to strengthen their regulations in response to strong public demand for environmental protection. States often regulate wetlands however sometimes such regulation may be ineffective. With regard to the CWA, it seems relevant that the purpose of the statute is to protect the biological and ecological health of the Nation's waters. Thus, given the historical decrease in wetlands across the country as a result of various human activities, it is imperative that the federal program reach those remaining wetlands that can be said to reasonably fall within the language of the CWA and are subject to unfettered development. Whether the states or the federal government is in a better position to regulate is a question for an entirely different article. Indeed, in some instances, as noted above, there may be strong justifications from an environmental protection standpoint to allow states to assume such authority because they will choose to draft more stringent regulations. I only point out that there is a delicate balance between state and federal authority and in some instances, as exemplified by Section 404(g), there is an overlap. Either way, the states are not always effective regulators and thus it may be important for the federal authority to step in to prevent the unnecessary destruction of wetlands validly falling under the language of the CWA.

[270] *See, e.g.*, U.S. CONGRESS OFFICE OF TECH. ASSESSMENT, WETLANDS: THEIR USE AND REGULATION, OTA-O-206, at 43, 48–49 (Mar. 1984), *available at* http://govinfo.library.unt.edu/ota/OTA_4/DATA/1984/8433.pdf; *see* U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134-35 (1985) (citing the undisputed and significant water quality roles that wetlands play in preserving aquatic environment).

[271] 33 C.F.R. § 320.4(b)(2)(i) (2007); *Riverside*, 474 U.S. at 134–35.

[272] For an in-depth analysis of the "irreplaceable ecosystem services" provided by wetlands see *supra* note 232, at 35–41 (citing various scientific reports that support wetlands' water quality roles and economic relevance). Kristen Schuyt & Luke Brander, *The Econonic Values of the World's Wetlands*, 8–11 (WWF-International 2004) (2004).

mitigate flooding.[273] For example, roughly 60 percent of the estimated forty-five million acres of wetlands that existed prior to the development of the Mississippi River watershed were destroyed by land use practices.[274] As a result, "[w]ater that would have taken weeks to months to move downstream now reaches the [Mississippi] River in a matter of hours."[275] The effects of these historical wetland losses on flooding potential became apparent in 1993 when the Mississippi River experienced catastrophic flooding causing a forty-eight percent reduction in farm products being shipped south on the river.[276] Presumably, much of this economic loss could have been mitigated had the Mississippi watershed received greater wetland protection during its era of land development.[277] Moreover, the Hurricane Katrina disaster of 2005 and its associated flooding exemplified the need for increased protection of wetlands.[278] Specifically, Louisiana, the state most affected by Katrina, contains roughly 40 percent of all the wetlands in the continental United States.[279] Because Louisiana and other southern coastal states like Alabama, Florida and Texas contain many wetlands and are particularly vulnerable to hurricanes, wetland protection efforts are particularly important in this region to ensure that such

[273] *See* Knutsen, *supra* note 133, at 183–85 (noting the severe impact flooding has had in the past on land use practices and transportation of goods throughout the nation); *see also Wetlands and Flood Control in the Mississippi Watershed*, Envtl. Rev. Newsl. (Envtl. Rev., Seattle, Wash.), Aug. 1996, *available at* http://www.environmentalreview.org/vol03/hey.html.

[274] *See* Knutsen, *supra* note 133, at 184; *see also* Elizabeth Rooks-Barber, Bruce Reid & Nicholas Winstead, *Waterbirds on Working Lands in Mississippi*, TECHNICAL REPORT JAN. 2007 at 7 (Nat'l Audubon Soc'y, Vicksburg, Miss.).

[275] Knutsen, *supra* note 133, at 184 (quoting *Wetlands and Flood Control in the Mississippi Watershed*, Envtl. Rev. Newsl. (Envtl. Rev., Seattle, Wash.), Aug. 1996, *available at* http://www.environmentalreview.org/vol03/hey.html).

[276] *Id.*

[277] *See* William K. Stevens, *The High Risks of Denying Rivers Their Flood Plains*, N.Y. TIMES, Jul. 20, 1993, at C1 (stating that large-scale land development on flood plains (and the accompanying interference with the surrounding wetlands) contributed to the increased economic losses sustained from floods, which nearly tripled in the period from 1951 to 1985 as compared with the period from 1916 through 1950).

[278] *See Hurricane Katrina: Assessing the Present Environmental Status: Hearing Before the Subcomm. on Environment and Hazardous Materials of the H. Comm. on Energy and Commerce*, 109th Cong. 2 (2005) (statement of Erik D. Olson, Senior Attorney, National Resources Defense Council), *available at* http:// www.nrdc.org/legislation/katrina/0509291a.pdf (noting that the weaknesses inherent in the environmental safeguards implemented in Gulf Coast communities were exposed as a result of Hurricane Katrina, in particular, the loss of coastal wetlands in Louisiana, which would have "substantially reduc[ed] the storm's impact").

[279] *See Louisiana Coastal Wetlands: A Resource at Risk*, *available at* http://marine.usgs.gov/fact-sheets/LAwetlands/lawetlands.html (last visited Jan. 9, 2007).

wetlands continue to "provide a buffer against the impact of future hurricanes" and associated flooding.[280] Spurred by Katrina, Congress is currently considering proposals to authorize the Corps to implement certain restoration efforts that will slow the rate of coastal wetlands loss in the region.[281] The plurality's holding fails to consider the important role wetlands play in floodwater retention, providing another compelling justification for its inadequacy.

E. Who Got It Right?

Justice Kennedy's significant nexus test fails to fully acknowledge the importance of floodwater retention. While presumably the Corps will have some leeway to cover wetlands with more attenuated connections to navigable waters than the simple direct abutment test advocated by the plurality, Justice Kennedy's test leaves no room for a substantial effects argument based on flood control. This relates to the watershed concept noted above. Wetlands and tributaries that are found on the margins of the watershed "tree" will typically not have a significant nexus with the more central navigable waters that make up the heart of the watershed.[282] Thus, under Justice Kennedy's "significant nexus" test, marginal wetlands are at greater risk of destruction and could eventually disappear; the loss of few having an insignificant effect on water quality, but the loss of many potentially having a substantial effect on water

[280] *See* Pervaze A. Sheikh, *The Impact of Hurricane Katrina on Biological Resources*, Oct. 18, 2005, *available at* http://www.opencrs.com/rpts/RL33117_20051018.pdf.

[281] *Id.*; *see* Jeffrey A. Zinn, *Coastal Louisiana Ecosystem Restoration After Hurricanes Katrina and Rita*, Mar. 17, 2006, *available at* http://www.nationalaglawcenter.org/assets/crs/RS22276.pdf (discussing the Corps' proposed initiatives being considered by Congress in the wake of Hurricanes Katrina and Rita that would seek to protect or restore hundreds of thousands of acres of Louisiana's wetlands).

[282] Justice Kennedy's significant nexus test requires substantial evidence of significant impact and thus marginal wetlands that have minimal individual impact will not satisfy this test. Therefore, despite such wetlands' ability to affect navigable waters individually and substantially affect navigable waters in the aggregate, they will be excluded from federal regulation. *See* Wickard v. Filburn, 317 U.S 111, 122–24, 127–28 (1942), This exemplifies both the failure of Justice Kennedy's test to appropriately guard against downstream water quality impact as well as the incompatibility of the dissent's desire to read "navigable" out of the statute and Justice Kennedy's emphasis on balancing the statutory language with the overall purpose of the CWA. Despite Justice Kennedy's laudable attempt at balancing these interests, Congress undoubtedly addressed the deletion of the term "navigable" in the 1977 debates and impliedly acquiesced to the Corps' expansive regulations. *See SWANCC*, 531 U.S. at 159, 186–87 (2001) (Stevens, J., dissenting).

quality.[283] Given the history of wetland losses in this country and the need to increase protection of any remaining wetlands for flood control and water quality purposes, this author believes that the greater protections provided by the dissent are the most appropriate.

F. What happens next?

The *Rapanos* Court's fractured decision gives rise to the question of whether the plurality's approach or Justice Kennedy's approach is the controlling rule of law. Addressing this question, Justice Stevens, at the conclusion of his dissenting opinion, stated that "all four Justices who have joined this opinion would uphold the Corps' jurisdiction . . . in all other cases in which either the plurality's or Justice Kennedy's test is satisfied . . . ."[284] Continuing with this logic, Justice Stevens stated, "[i]n sum, in these and future cases, the United States may elect to prove jurisdiction under either test."[285] Notwithstanding the Justice Stevens' directive, some lower courts have held that Justice Kennedy's standard alone is the controlling rule of law.[286] Still other activists have asserted that the plurality controls.[287] Contrasting evaluations of the controlling legal standard provide for litigations to address the threshold question of which

[283] *See, e.g.*, Dennis F. Whigham & Thomas E. Jordan, *Isolated Wetlands and Water Quality*, 23 WETLANDS 541, 541–43, 547–48 (2003) (confirming findings that "the majority of so-called isolated wetlands are really not isolated but instead have. . . hydrologic connections to other waters and wetlands" and concluding that "alteration of the wetlands would result in undesirable water-quality impacts on downstream surface waters and subsurface waters connected to local and regional ground-water systems"); *see also* Thomas C. Winter & James W. LaBaugh, *Hydrologic Considerations in Defining Isolated Wetlands*, 23 WETLANDS 532, 533 (2003) (finding that most so-called isolated wetlands are in fact hydrologically linked).

[284] *Rapanos v. U.S.*, 126 S. Ct. 2208, 2265 (2006).

[285] *Id.*

[286] U.S. v. Gerke, 464 F.3d 723 (7th Cir. 2006); N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006).

[287] *See, e.g.*, Brief of Defendant-Appellant at 6-7, U.S. v. Gerke, No. 04-3941 (7th Cir. 2006) (available at http://rapanos.typepad.com/GerkePetition.pdf) (last visited January 7, 2007); *see also* U.S. v. Johnson, 467 F.3d 56, 66–67 (1st Cir. 2006) (Torruella, J., concurring in part, dissenting in part) (advocating the plurality as the controlling standard based on his reading of *Rapanos*).

standard to apply.[288] Indeed, the lower courts so far have issued opinions arguing all sides.[289]

A concurring opinion authored by a single Justice in a fractured decision by the Supreme Court has become controlling law in the past. For example, in *Regents of Univ. of Calif. v. Bakke*,[290] the Court issued a 5-4 plurality decision containing a lone concurrence authored by Justice Powell which became recognized as controlling by some lower courts.[291] Similarly, in *Branzburg v. Hayes*,[292] the Court issued a 5-4 majority decision with a short concurrence authored by Justice Powell that was interpreted by some lower courts as creating a plurality ruling.[293]

Based on *Bakke* and *Branzburg* it may be argued that Justice Kennedy's lone concurrence in *Rapanos* is controlling. However, this Note addresses these cases simply to alert the reader that in the past, lone concurring opinions have become the controlling rule of law in some cases. Certainly, there is precedent for courts to consider whether this is possible with regard to Justice Kennedy's "significant nexus" test in *Rapanos*.

Nevertheless, in the aftermath of *Rapanos*, lower courts will have to ask whether the plurality's test or Justice Kennedy's test is controlling and why. According to *Marks v. United States*,[294] when the Supreme 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

[288] *See, e.g., Johnson*, 467 F.3d 56 (1st Cir. 2006) (addressing the question of whether to apply the plurality's standard or the Kennedy standard in light of the complexity of the issue and the varying approach of other courts).

[289] For a useful summary of the Federal Circuit courts split on application of the *Rapanos* decision, see Laura Fandino and Jeff Kray, Marten Law Group, *Federal Circuit Courts Split on Application of Supreme Court's Rapanos Decision*, Dec. 6, 2006, http://www.martenlaw.com/news/?20061206-rapanos-application.

[290] 438 U.S. 265 (1978).

[291] *See, e.g.*, Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1199–1200 (9th Cir. 2000) (holding that Justice Powell's concurring opinion in *Bakke* controlled). *But see* Hopwood v. Tex., 78 F.3d 932 (5th Cir. 1996) (deciding in contravention of Justice Powell).

[292] 408 U.S. 665 (1972).

[293] *See, e.g.*, Williams v. American Broadcasting Co. Inc., 96 F.R.D. 658, 667 (W.D. Ark. 1983) (observing that since Justice Powell's three-paragraph concurrence was needed to make up the majority in *Branzburg* it became the controlling rule of law); *see also* J.J.C. v. Fridell, 165 F.R.D. 513, 515 (D. Minn. 1995) (noting that despite the ambiguity in determining the controlling standard in *Branzburg* a majority of courts acknowledged Justice Powell's opinion as controlling).

[294] 430 U.S. 188 (1977).

those Members who concurred in the judgments on the narrowest grounds."[295]

On August 10, 2006 the Ninth Circuit Court of Appeals became the first federal appellate court to apply *Rapanos*. In *Northern California River Watch v. City of Healdsburg*,[296] the Ninth Circuit concluded that "Basalt Pond," a water-filled rock quarry pit separated from the Russian River by a man-made levee, possessed a "significant nexus" to a navigable-in-fact body of water.[297] Citing the *Marks* rule noted above, the court concluded without further analysis that Justice Kennedy's "significant nexus" test provided the controlling rule of law presumably because the court believed it concurred on the "narrowest grounds."[298]

Another post-*Rapanos* case decided on June 28, 2006 in the U.S. District Court for the Northern District of Texas attempted to apply *Rapanos*. In *United States v. Chevron Pipe Line Co.*,[299] the court held that Chevron Pipe Line's discharge of 3000 barrels of oil into an intermittent stream near Snyder, Texas did not invoke CWA jurisdiction because the stream bed lacked a "significant nexus" to any navigable-in-fact body of water.[300] Although the court relied on Justice Kennedy's significant nexus test without analysis of the *Marks* rule, it noted that "without any clear direction on determining a significant nexus, this Court will feel its way on a case-by-case basis."[301] As a result, the court looked to prior precedent in the Fifth Circuit to determine the proper standard to be applied.[302] Relying on *In re Needham*,[303] a Fifth Circuit case that articulated that the relevant question is whether "the farthest traverse of the spill" reached navigable waters, the District Court found only speculative evidence at best

[295] *Id.* at 193 (quoting Gregg v. Ga., 428 U.S. 153 (1976)).

[296] 457 F.3d 1023 (9th Cir. 2006).

[297] *Id.* at 1025–26 (describing Basalt Pond).

[298] *Id.* at 1029–30 (concluding without further discussion that Justice Kennedy's significant nexus standard is controlling).

[299] 437 F. Supp. 2d 605 (N.D. Tex. 2006).

[300] *Id.* at 613. "Thus, as a matter of law in this circuit, the connection of generally dry channels and creek beds will not suffice to create a "significant nexus" to a navigable water simply because one feeds into the next during the rare times of actual flow." *Id.*

[301] *Id.* (citing *Rapanos v. U.S.*, 126 S. Ct. 2208, 2236 (2006)).

[302] *Id.* ("Because Justice Kennedy failed to elaborate on the "significant nexus" required, this Court will look to the prior reasoning in this circuit.").

[303] 354 F.3d 340 (5th Cir. 2001).

that the discharged oil could have reached a navigable-in-fact body of water or those waters adjacent thereto.[304]

On September 22, 2006, the Seventh Circuit concluded in *United States v. Gerke Excavating*[305] that in light of the *Rapanos* decision, the case before it should be remanded for further fact-finding in order to apply Justice Kennedy's significant nexus test.[306] Interpreting the *Marks* rule, the *Gerke* court found that "[w]hen a majority of the Supreme Court agrees only on the outcome of the case and not on the ground for that outcome, lower-court judges are to follow the narrowest grounds to which a majority of the Justices would have assented if forced to choose."[307] Interestingly, the court made the argument that in the situations where Justice Kennedy would uphold jurisdiction the four dissenting Justices would always agree with him, and conversely, in the situations where Justice Kennedy would not uphold jurisdiction the four plurality Justices would almost always agree with him.[308] Thus, Justice Kennedy's concurrence is

[304] *U.S. v. Chevron Pipeline Co.*, 437 F. Supp. 2d 605, 614 (N.D. Tex. 2006) (discussing how evidence at trial showing 30 year rainfall averages indicating a potential for rainfall events in the region to saturate the dry creek beds sufficiently to convey the crude oil far enough to reach navigable waters was speculative and insufficient to establish that a rainfall event had actually occurred and actually conveyed the crude oil to any navigable water during the time in question).

[305] 464 F.3d 723 (7th Cir. 2006).

[306] *Id.* at 725.

[307] *Id.* at 724 (citing Marks v. U.S., 430 U.S. 188, 193 (1977)).

[308] *Id.* at 724–25. "The plurality Justices thought that Justice Kennedy's ground for reversing was narrower than their own, because they concluded their extensive and in places harsh criticism of the concurrence by saying that 'Justice Kennedy tips a wink at the agency [i.e., the Corps of Engineers], inviting it to try tits same expansive reading again' . . . [Justice Kennedy's] test is narrower (so far as reigning in federal authority is concerned) than the plurality's in most cases, though not in all because Justice Kennedy also said that 'by saying the Act covers wetlands (however remote) possessing a surface water connection with a continuously flowing stream (however small), the plurality's reading would permit application of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach.' 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)." *Id.*

the "least common denominator" decided in *Rapanos* and is therefore the controlling rule of law.[309]

On August 2, 2006, the Middle District of Florida also addressed the question of a controlling standard. In *United States v. Evans*,[310] the court concluded that CWA jurisdiction can be found if either the plurality's test or Justice Kennedy's test is met.[311] Interpreting the *Marks* rule by stating that the "'narrowest grounds' is understood as the 'less far-reaching' common ground," the *Evans* court posited that neither the plurality nor the concurrence exhibited a "less far-reaching" common ground because both opinions articulated a different standard.[312] Thus, the court agreed with Justice Stevens' assertion that both opinions provide a basis for federal jurisdiction.

On October 31, 2006, the District of Massachusetts, in *United States v. Johnson*,[313] issued an opinion addressing the uncertainties surrounding the application of the *Marks* rule to *Rapanos* and offering in-depth analysis of the various interpretations that may be applied. What emerged was a framework supporting valid legal arguments that either the plurality, or the concurrence, or both opinions may be considered controlling depending on what stance an advocate wishes to take.

The *Johnson* court, citing Justice Stevens' directive, held that CWA jurisdiction may be established by application of either the plurality or Justice Kennedy's standard.[314] In an opinion concurring in part and dissenting in part, one Circuit Justice agreed with the majority's decision to remand the case for further fact-finding, but disagreed with the majority's endorsement of either standard finding that "[t]he plurality's '"hydrological connection' test provides the proper constitutional limit on federal regulation . . . ."[315]

[309] *Id.* (holding Justice Kennedy's proposed standard, as the least common denominator, must govern litigation).

[310] No. 05-CR-159, 2006 WL 2221629, at *1 (M.D. Fla. Aug. 2, 2006).

[311] *Id.* (acknowledging Justice Stevens's directive in *Rapanos* and holding that either plurality's or Justice Kennedy's standard may be used to establish jurisdiction).

[312] *Id.*

[313] 467 F.3d 56 (1st Cir. 2006).

[314] *See id.* at 60 ("We conclude that the U.S. may assert jurisdiction over the target sites if it meets either Justice Kennedy's legal standard or that of the plurality.").

[315] *See id.* at 66 (Torruella, J., concurring in part, dissenting in part).

Citing *Marks*, the *Johnson* majority noted that the legal standard that arises out of a fractured opinion must be "'viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[316] The court then addressed the question of which standard may be considered the "narrowest." Analyzing the *Marks* case, the *Johnson* court explained that in both *Marks* and the previous case upon which the Supreme Court derived its *Marks* rule,[317] the "'narrowest ground' was also the ground least restrictive of federal jurisdiction . . . ."[318] Based on this premise, it may be argued that Justice Kennedy's standard, because it is generally accepted as permitting broader federal authority, is the least restrictive on the federal government and thus controlling.[319] However, the *Johnson* court aptly noted that acceptance of this premise does not answer the question of "how one would determine which opinion is controlling in a case where the government is not a party."[320] Moreover, it may be argued that based on the constitutional question implicated by the outer limits of the Commerce Clause arising from a broader allocation of federal authority, the "narrowest ground" should be understood as the

[316] *Id.* at 65.

[317] *See id.* at 62 ("The 'narrowest grounds' approach emerged when the [*Marks*] Court examined . . . *Memoirs v. Attorney General of Massachusetts*, 383 U.S. 413 (1966) . . ." (discussing Marks v. U.S., 430 U.S. 188, 193–94 (1977))).

[318] *Id.* at 63.

[319] Justice Kennedy raised the issue of a remote wetland with a tenuous, yet continuous, surface connection to navigable waters. Kennedy argued that such a wetland would satisfy the plurality's test, but fail the significant nexus test. However, he improperly characterized the holding of the plurality opinion. Specifically, Justice Scalia asserted that only wetlands which implicate the boundary-drawing problem in *Riverside*, in that they are indistinguishable from directly-adjacent navigable waters, are covered under the plurality's standard. It is difficult to imagine that a remote wetland connected to navigable waters by a mere continuous trickle could garner the approval of four plurality Justices. Indeed, in *U.S. v. Gerke Excavating, Inc.*, the court acknowledged that Justice Kennedy's hypothetical wetland would be a "rare case." 464 F.3d 723, 725 (2006). Further, in *Rapanos*, Justice Kennedy's hypothetical was utilized to argue that regulation of a remote wetland connected by a mere trickle to navigable waters implicates the outer limits of the commerce power. Thus, the workability of the plurality's standard was called into question and the validity of the significant nexus standard was bolstered. Justice Stevens noted, in his dissent, that Justice Kennedy's approach will be controlling in most cases "because it treats more of the Nation's waters as within the Corps' jurisdiction, but in the unlikely event that that the plurality's test is met but Justice Kennedy's is not, courts should also uphold the Corps' jurisdiction." *Rapanos v. U.S.*, 126 S. Ct. 2208, 2265 n.14 (2006) (Stevens, J., dissenting).

[320] U.S. v. Johnson, 467 F.3d 56, 63 (1st Cir. 2006).

standard most restrictive of federal jurisdiction.[321] Accordingly, the plurality's standard is controlling under this premise.

Noting the inefficacy of the previous analysis, the *Johnson* court looked to the *Evans* court, which articulated the "narrowest grounds" to be the "'less far-reaching' common ground."[322] The *Johnson* court interpreted this language to define the controlling standard as that opinion which is "more closely tailored" to the specific fact situation such that it is a "logical subset" of the other broader opinion.[323] According to the *Johnson* majority, this approach makes sense when "two opinions reach the same result for less sweeping reasons than the other."[324] Specifically, "[w]hen applied to future cases, the less sweeping opinion would require the same outcome in a subset of cases that the more sweeping opinion would."[325]

Unfortunately, applying this new articulation of the *Marks* rule once again yields inconsistent results. On the one hand, it is easy to argue that the plurality's standard, which confers jurisdiction only over "those wetlands with a continuous surface connection" to navigable waters such that "they are indistinguishable" from adjacent covered waters, is a logical subset of the broader "significant nexus" test which presumably covers more remote wetlands, easily distinguishable from adjacent covered waters, having a significant ecological affect thereon. Indeed, Justice Stevens' dissent endorsed this view by stating that "Justice Kennedy's approach will be controlling in most cases because it treats more of the Nation's waters within the Corps' jurisdiction . . . ."[326] On the other hand, Justice Kennedy, in his opinion, fashioned an argument that the "significant nexus" test is actually narrower in some instances than the plurality's test.[327] Citing the plurality's use of the "continuous surface connection" element, Justice Kennedy postulated that a small but continuously flowing stream creating

[321] *See id.* ("[G]iven the underlying constitutional question presented by *Rapanos* . . . the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality), because that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause.").

[322] *Id.* at 60.

[323] *Id.* at 63–64.

[324] *Id.* at 64.

[325] *Id.*

[326] *Rapanos v. U.S.*, 126 S. Ct. 2208, 2265 n.14 (2006) (Stevens, J., dissenting).

[327] *Id.* at 2246.

a surface water connection to a remote intrastate wetland could provide the basis for CWA jurisdiction under the plurality's test while undoubtedly failing the "significant nexus" test.[328] Therefore, in some unlikely instances, Justice Kennedy's test may be considered a logical subset of the plurality's test.

Based on this fictional application of the outer limits of each standard, the *Johnson* court, much like the *Gerke* court, advocated a "common sense" approach whereby the view of the dissenting Justices should be rationally applied to the above scenarios in order to determine whether a majority of Justices in any given situation would concur in the result.[329] Because the four dissenting Justices would uphold jurisdiction in every situation evaluated under either test, the question becomes whether there is a situation where the plurality's standard or Justice Kennedy's standard would win the most votes.[330] Specifically, in a situation where CWA jurisdiction is upheld by Justice Kennedy but struck down by the plurality, combining votes of all the Justices would yield a 5-4 majority favoring Justice Kennedy. On the other hand, in the unlikely event noted above involving a remote wetland with a continuous surface connection which would satisfy the plurality but fail the concurrence, combining votes would yield an 8-1 majority favoring the plurality. Therefore, according to the *Johnson* court, the common sense voting approach militates towards recognizing either the plurality or Justice Kennedy's standard as controlling because there are plausible situations in which either standard would garner a concurrence by a majority of Justices.[331]

[328] *Id.* "On the other hand, by saying the Act covers wetlands (however remote) possessing a surface-water connection (however small), the plurality's reading would permit application of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach." *Id.*

[329] *U.S. v. Johnson*, 467 F.3d 56, 64–65 (1st Cir. 2006). The Court stated:

> Following Justice Stevens's instruction ensures that lower courts will find jurisdiction in all cases where a majority of the Court would support such a finding. If Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction. Other circuits have previously taken this common sense approach to fragmented opinions.

Id.

[330] *Id.*; *U.S. v. Gerke Excavating Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (citing Marks v. U.S., 430 U.S. 188, 193 (1977)).

[331] *Johnson*, 467 F.3d at 64 (stating that finding a "common ground" shared by the majority of the justices is the common sense approach and is the same approach followed by other circuits); *see* U.S. v. Williams, 435 F.3d 1148, 1157 (9th Cir. 2006) (noting that

In *Gerke*, the Court, noting the fictional instance where the plurality Justices could be aligned with the dissenting Justices in an 8-1 majority, dismissed this academic exercise as a "rare case," finding that "as a practical matter the Kennedy concurrence is the least common denominator . . . ."[332] In contrast, the *Johnson* Court, acknowledging such a fictional plurality-dissent alignment, found that neither standard in *Rapanos* can be characterized as the "narrowest ground," and therefore, as per Justice Stevens' directive, either standard may be applied by lower courts.[333] This author believes that *Johnson*'s reliance on the fictional plurality-dissent alignment improperly characterizes the plurality's holding which pointedly defined the continuous surface connection element in terms of the boundary-drawing problem observed in *Riverside*. It seems implausible to find an application of the plurality's test as establishing jurisdiction over a remote wetland attached to a minimally sufficient continuous stream based on an invocation of the boundary-drawing problem.[334] Indeed, it is most likely that a remote wetland would be clearly distinguishable from any nearby open body of water.

the majority of the court needs to find a common legal standard which produces results with which the majority can agree with).

[332] *Gerke*, 464 F.3d at 723.

[333] *Id.* at 61. The carefully acknowledged that "[w]hen a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose." *Id.* Furthermore,

> [t]his understanding of "narrowest grounds" as used in *Marks* does not translate easily to the present situation. The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction. As *Gerke* points out, in cases where there is a small surface water connection to a stream or brook, the plurality's jurisdictional test would be satisfied, but Justice Kennedy's balancing of interests might militate against finding a significant nexus. In such a case, if Justice Kennedy's test is the single controlling test (as advocated by the Seventh and Ninth Circuits), there would be a bizarre outcome—the court would find no federal jurisdiction even though eight Justices (the four members of the plurality and the four dissenters) would all agree that federal authority should extend to such a situation. This possibility demonstrates the shortcomings of the *Marks* formulation in applying *Rapanos*.

Id at 64. This holding was based on Marks v. U.S., 430 U.S. 188, 193 (1976) which held that "[w]hen 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 . . . .[sic]" (quoting Gregg v. Ga., 428 U.S. 153, 169 n.15 (1976)).

[334] *See, e.g.*, *Gerke*, 464 F.3d at 724 (indicating that Justice Kennedy, in *Rapanos v. U.S.*, concurred in the judgment, but not in the plurality opinion).

In *Rapanos*, Chief Justice Roberts issued a short concurring opinion foretelling of the inevitable disagreements that have manifested in cases like *Gerke* and *Johnson*.[335] Noting the lack of a clear majority, the Chief Justice, in a display of subtle indignation, cited *Grutter v. Bollinger*[336] to shed light on the breadth of uncertainty flowing from the *Rapanos* decision.[337] In *Grutter*, the Court questioned whether Justice Powell's lone concurring opinion in *Bakke* became the controlling rule, noting that in the aftermath of the case the lower courts were divided on the issue.[338] Moreover, the *Grutter* Court explained that the *Marks* rule should not be pursued to the "utmost logical possibility when it has so easily baffled and divided the lower courts that have considered it."[339]

By citing the *Grutter* Court's criticism of the *Marks* rule, the Chief Justice lends support for a non-application of *Marks* to the present situation. As illustrated by the *Gerke* and *Johnson* analysis of expected voting ratios under varying logical possibilities, the *Marks* rule can easily yield opposing and baffling results.[340] Indeed, the *Grutter* Court's criticism of *Marks* highlighted the lower court splits that occurred after *Bakke* and explained that following *Marks* to its utmost logical possibilities may prove unworkable. Ironically, by engaging in an academic exercise of logical possibilities the post-*Rapanos* lower court rulings have already exhibited an array of incompatible results.

The practical effect of the post-*Rapanos* confusion and the applicability or non-applicability of the *Marks* rule is that creative lawyers and judges can choose to apply whatever

[335] *See* Rapanos,126 S. Ct. at 2236 ("Lower courts and regulated entities will now have to feel their way on a case-by-case basis.")

[336] 539 U.S. 306 (2003).

[337] *Rapanos*, 126 S. Ct. at 2236.

[338] *Grutter*, 539 U.S. at 325 ("In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent under *Marks*.").

[339] *Id.* (citing Nichols v. U.S., 511 U.S. 738, 745–46 (1994)) (internal quotes omitted) (asserting that the degree of confusion that follows a splintered decision is itself a reason for reexamining that decision).

[340] This is evident by the current Circuit Court split following the decision in *Rapanos*, 126 S. Ct. at 2208, where the Court found that the CWA's "waters of the United States" included only relatively permanent, standing, or continuously flowing bodies of water. Further evidence is the previous Circuit Court split in the aftermath of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), where the Court found that an applicant's race could be considered in school's admissions program if it was factored in with other characteristics in a competitive process.

standard best fits their needs. For example, in a panel on jurisdiction at an American Bar Association conference in Washington, D.C., an advocate for the National Association of Home Builders asserted that the plurality's test "is the only area of jurisdiction."[341] At that same conference, an advocate for the Environmental Defense Fund argued that Justice Kennedy's standard should be controlling.[342] In the *Healdsburg*[343] case noted above, the Pacific Legal Foundation, an organization devoted to limited government and property rights, argued in favor of the plurality, citing *Marks* and asserting that the plurality's standard is obviously the narrowest ground.[344] In the same case, attorneys for the Western Environmental Law Center argued in favor of Justice Kennedy's approach.[345] Based on this author's reading of *Rapanos* and the positions taken by various interest groups, the plurality's test limits federal authority to the greatest extent. Thus, it is no surprise that advocates for property rights side with the plurality and advocates for environmental protection and increased federal regulatory authority side with Kennedy.

[341] *Delay Could Give EPA Time To Win Court Support for Dual Water Test*, 15 WATER POL'Y REP. 22 (Inside Wash. Publishers, Oct. 30, 2006) [hereinafter Delay]; *see Upcoming Appellate Case Could Answer Key CWA Jurisdiction Question*, 15 WATER POL'Y REP. 18 (Inside Wash. Publishers, Sep. 4, 2006) (commenting on how the National Association of Home Builders filed an amici brief saying *Marks* should be the controlling guide for the court).

[342] Delay, *supra* note 341; *see Just-Released EPA Wetlands Guide May Face Rare Facial Challenge*, 16 WATER POL'Y REP. 12 (Inside Wash. Publishers, June 11, 2007) (describing how the EPA's guidelines' use of the "significant nexus" test is far more limited than Justice Kennedy had intended in *Rapanos*).

[343] N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006).

[344] Brief for Pacific Legal Foundation as Amici Curiae Supporting Petitioners, N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006) (No. 04-15442), *available at* http://www.law.emory.edu/index.php?id=3302 (arguing that the plurality's standard is the logical subset of the broader significant nexus standard); *see Hearing on Status of the Nation's Waters, Including Wetlands, under the Jurisdiction of the Federal Water Pollution Control Act Before the Subcomm. on Water Res. and Env't of the H. Comm. on Transp. and Infrastructure*, 110th Cong. (2007) (statement of M. Reed Hopper, Principle Attorney, Pacific Legal Foundation).

[345] Brief of Plaintiff-Appellee at 18-19, N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006) (No. 04-15442) *available at* 2004 WL 2294233 (positing that many courts have interpreted *SWANCC* narrowly to hold that while CWA does not reach isolated waters have no connection with navigable waters , it does reach inland waters that share a hydrological connection with navigable waters); *see Judges Subject Pond to Federal Jurisdiction*, THE DAILY JOURNAL CORPORATION, Aug. 11, 2006, *available at* http://www.westernlaw.org/news/welc-in-the-news/Healdsburg%20decision%20-%20water%20news.doc/view (commenting that the court's decision relied heavily on Justice Kennedy's ruling in *Rapanos*).

CONCLUSION

Given the apparent ease with which to argue in favor of the plurality's test, it is interesting that none so far have simply applied the plurality's standard outright. Rather, Justice Kennedy's standard has received widespread support by commentators and courts alike. Certainly there are many reasons for such indifference to the plurality. This author believes that Justice Kennedy's approach strikes a better balance between the plain language and purpose of the CWA. On the one hand, Justice Kennedy seeks to give the term "navigable" some importance as per *Riverside* and *SWANCC*. On the other hand, he acknowledges Congress's intent to create a comprehensive regulatory scheme to protect downstream water quality. As a result, the "significant nexus" standard pays due respect to these competing limitations. In contrast, the plurality's standard pays little deference to Congress's delegation of authority to the Corps and thus seeks to rein in the Corps' decision making power by applying a rigid dictionary definition of "waters" that, as a practical matter, disregards water quality dynamics in the western United States and denies the use of ecological considerations in jurisdictional assessments. Perhaps this fallacy has prompted one commentator to suggest that the plurality is "extraordinarily wrong from a scientific standpoint."[346]

[346] Delay, *supra* note 342.