

Like the Swamp Thing: Something Ambiguous Rises from the Hidden Depths of Murky Waters - The Supreme Court's Treatment of Murky Wet Land in *Rapanos v. United States*

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Like the Swamp Thing: Something Ambiguous Rises from the Hidden Depths of Murky Waters—The Supreme Court’s Treatment of Murky Wet Land in *Rapanos v. United States*

TABLE OF CONTENTS

I. Introduction984

II. Background986

 A. Overview of the Clean Water Act (“CWA”)986

 B. Previous Judicial Interpretations of “the Waters of the United States”989

 1. *United States v. Riverside Bayview Homes*.....989

 2. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*.....991

III. *Rapanos* Civil Litigation in the Sixth Circuit and the Supreme Court994

 A. The Sixth Circuit’s Entry into the (Civil) Intrigue of Wetlands Permitting.....994

 B. The Pressure to Grant Certiorari996

 C. The Punt Back to the Supreme Court: You Know What They Say—There are Three Sides to Every Issue...998

 1. Team One: Chief Justice Roberts and Justices Scalia, Thomas, and Alito1000

 2. Team Two: Justices Stevens, Souter, Ginsburg, and Breyer.1003

 3. Justice Kennedy’s Concurrence: Is $1 \geq 4$?1005

IV. Impacts of a Murky Decision.....1008

 A. Ambiguous State of the Law.....1008

 B. Possible Impacts on other CWA Discharge Programs1015

 C. Outcomes and Options1018

 1. The Likely Result on Remand for *Rapanos* and *Carabell*.....1018

 2. Available Options1020

V. Conclusion1023

I. INTRODUCTION

Breaking news: “Developers, bureaucrats and environmentalists still are seeking answers on what is a wetland subject to regulation after the U.S. Supreme Court punted on the matter Monday in a case that involved Midlander John Rapanos.”¹

In 1989, the Michigan Department of Environmental Quality² cited developer John Rapanos for filling thirty acres of wetlands without a § 404 Clean Water Act permit.³ The wetlands, which Rapanos cleared to develop a shopping mall, were on a 175 acre piece of property twenty miles from Lake St. Clair.⁴ Four years later, the United States indicted Rapanos on two federal criminal charges for continuing to fill the wetlands in spite of an Environmental Protection Agency (EPA) cease-and-desist work order.⁵ Rapanos was fined \$185,000 and sentenced to three years of probation and 200 hours of community service.⁶ Fourteen years later, in 2003, the U.S. Circuit Court of Appeals for the Sixth Circuit upheld Rapanos’ conviction on two counts of polluting wetlands without a permit.⁷ In 2004, the Supreme Court denied certiorari to hear Rapanos’ criminal case.⁸

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1. Ralph E. Wirtz, *Supreme Court Decision in Rapanos Wetlands Case ‘A Mixed Bag’*, MIDLAND DAILY NEWS, June 20, 2006, at 1A, available at http://www.ourmidland.com/site/index.cfm?newsid=16812165&BRD=2289&PAG=461&dept_id=578054&rfti=8.

2. The Michigan Department of Environmental Quality was known at the time as the Michigan Department of Natural Resources. Under the Clean Water Act, a state can assume the enforcement and administration of a § 404 program.

3. *United States v. Rapanos*, 115 F.3d 367, 369 (6th Cir.), cert. denied, 522 U.S. 917 (1997).

4. *Id.* at 368.

5. *Id.* at 369.

6. *Id.* After sentencing, Rapanos requested a new trial. The government appealed for a stricter sentence. The District Court granted a new trial and set aside the jury verdict. The Sixth Circuit reversed the decision to grant a new trial and reinstated the jury verdict. *Id.* at 374.

7. This case has a very complicated procedural history. Rapanos appealed his conviction after the Sixth Circuit reversed the grant of a new trial and reinstated the jury verdict against him. On appeal, the Sixth Circuit affirmed his conviction and remanded the case for resentencing. See *United States v. Rapanos*, 235 F.3d 256 (6th Cir. 2000), vacated, 533 U.S. 913 (2001). Rapanos appealed to the Supreme Court, which vacated the judgment and remanded back to the Sixth Circuit to reconsider the case in light of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001). See *Rapanos v. United States*, 533 U.S. 913 (2001). The Sixth

In 1994, the United States also began a civil case against Rapanos.⁹ The district court, in 2000, found that Rapanos had filled a total of fifty-four acres of protected wetlands over which the Army Corps of Engineers (Corps) had jurisdiction.¹⁰ On appeal, the Sixth Circuit affirmed.¹¹ After seventeen years of protracted civil and criminal litigation and a denial of certiorari in the criminal trial, the Supreme Court granted certiorari to hear Rapanos' civil case.¹² The Court consolidated *Rapanos* with another Sixth Circuit case, *Carabell v. U.S. Army Corps of Engineers*, another case in which the appellate court had granted the Corps jurisdiction over a particular wetland area.¹³

The Supreme Court vacated the judgments of the Sixth Circuit.¹⁴ All of the Justices agreed that the Corps possibly had jurisdiction over Rapanos' and Carabell's wetlands. If so, it was a violation of the Clean Water Act for Rapanos to fill the wetlands without getting a permit and a proper exercise of jurisdiction for the Corps to deny a fill permit to the Carabells. Five Justices voted to remand the case back to the Sixth Circuit to determine if the *Rapanos* and *Carabell* wetlands fell within the statutory framework.¹⁵

Circuit remanded to the District Court for the Eastern District of Michigan in light of *SWANCC*. See *United States v. Rapanos*, 16 F. App'x 345 (6th Cir. 2001). The District Court dismissed the case against Rapanos, finding that the wetlands at issue were not directly adjacent to navigable waters, thus not subject to Corps regulation. See *United States v. Rapanos*, 190 F. Supp. 2d 1011 (E.D. Mich. 2002). The United States appealed, and in 2003 the Sixth Circuit reinstated Rapanos' criminal conviction. See *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 541 U.S. 972, *reh'g denied*, 541 U.S. 1070 (2004).

8. *Rapanos v. United States*, 541 U.S. 972 (2004).

9. *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *vacated*, 126 S. Ct. 2208 (2006). The civil case involved a smaller portion of the same wetlands involved in the criminal case.

10. *Id.* at 634. The wetlands in question comprised three individual sites: the Salzburg site, the Hines Road site, and the Pine River site.

11. *Id.* at 648.

12. *Rapanos v. United States*, 546 U.S. 932 (2005).

13. *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004), *vacated sub nom, Rapanos*, 546 U.S. 932.

14. *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

15. *Id.*

The Justices divided three ways, however, on what was necessary in order to find jurisdiction.¹⁶ In *Rapanos*, four members of the Court found that the Corps has jurisdiction over a non-navigable wetland, and thus a fill permit is required only if the wetland is both adjacent to and has a surface hydrological connection with a traditionally permanent navigable body of water.¹⁷ Four others found that the Corps has jurisdiction over a non-navigable wetland that is adjacent to a navigable body of water or a tributary of such a water body.¹⁸ Justice Kennedy found that the Corps has jurisdiction over any wetland with a significant hydrological connection (nexus) to a navigable body of water or a navigable tributary.¹⁹

Part II of this note discusses the background leading up to the Supreme Court's 2006 *Rapanos* decision. Understanding the scope of the decision requires an examination of the Clean Water Act's fill permit requirements and two previous cases interpreting those requirements. Part III discusses the decision in detail, including the differing views of the plurality, the dissent, and Justice Kennedy. Part IV analyzes the impact of the Court's murky decision, including the disorganized state of the law following the decision and its impact on other Clean Water Act provisions. The Note concludes with a discussion of the likely result on remand, the options available to remedy the problem by regulatory change, and the possible adoption of a recent Senate bill to amend the Clean Water Act in light of *Rapanos*.

II. BACKGROUND

A. Overview of the Clean Water Act²⁰

The crucial issue in *Rapanos* was the scope of the Corps' jurisdiction over wetlands under the Federal Water Pollution Control Act (Clean Water Act, or CWA). Passed in 1972, the objective of the CWA is "to restore and maintain the chemical,

16. *Id.*

17. *Id.* at 2227.

18. *Id.* at 2258 (Stevens, J., dissenting).

19. *Id.* at 2241 (Kennedy, J., concurring).

20. 33 U.S.C. § 1251-74 (2006).

physical, and biological integrity of the Nation's waters."²¹ In order to accomplish this goal, a primary focus of the CWA is to eliminate the discharge of pollutants into navigable waters.²² By the 1960s, previous regulation had left the nation's waters alarmingly deteriorated.²³ A two-year water quality study indicated that previous national efforts to decrease water pollution "ha[d] been inadequate in every vital aspect."²⁴ As a result, Congress enacted comprehensive legislation.²⁵

The CWA regulates pollution of navigable waters. Congress defined "navigable waters" as "the waters of the United States, including the territorial seas."²⁶ The Committees for Public Works for both the House and the Senate indicated a reluctance to define the term "navigable waters" with any more specificity.²⁷ Congress intended that the definition adopted, "the waters of the United States," be viewed "in the geographic sense, not in the technical sense."²⁸ Thus, pollution control over navigable waters "clearly encompasses all water bodies, including main streams and their tributaries."²⁹

Congress enacted two separate permit programs to control the discharge of pollutants into navigable waters. The National Pollution Discharge Elimination System (CWA § 402) allows discharges of any pollutants or combinations of pollutants into navigable waters if the EPA or a state agency administering its own § 402 program grants the polluter a permit.³⁰ The second

21. *Id.* § 1251.

22. *Id.*

23. S. REP. NO. 92-414, at 7 (1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3674.

24. *Id.*

25. 118 CONG. REC. 33,716 (1972) (statement of Senator Eagleton, finding that the best word to describe the legislation is "comprehensive" in its coverage of water pollution sources and engagement of different government levels, making it the most "significant advance" in the twenty-year history of federal water pollution control).

26. Clean Water Act § 502(7), 33 U.S.C. § 1362(7) (2006).

27. H.R. REP. NO. 92-911, at 76-77 (1972); S. REP. NO. 92-414, at 77 (1971).

28. 188 CONG. REC. 33,756 (daily ed. Oct. 4, 1972) (statement of Representative Dingell).

29. *Id.* at 33,757.

30. Clean Water Act § 402, 33 U.S.C. § 1342 (2006). "Pollutant[s]" include sewage, garbage, incinerator waste, biological materials, and solid wastes, among others. *Id.* § 502(6). "Discharge of a pollutant" includes any addition of

permit program (CWA § 404) regulates the deposit of dredged or fill material.³¹ Under the CWA, the definition of "pollutants" also includes dredged soil, rock, and sand.³² Permits for the deposit of dredged or fill material are granted either by the Corps or a state with a § 404 program approved by the EPA.³³

The Army Corps of Engineers administers the § 404 permit program of dredged or fill material and retains veto power over a permit if a state operates its own permit program. A state permit program covers only waters that are not navigable in fact—principally wetlands. In 1974, the Corps promulgated regulations that interpreted the § 404 program to require permits for deposits of fill material into only waterways that met the traditional test of navigability.³⁴ Two district courts struck down the narrow interpretation of "navigable waters" as an overly-restrictive interpretation of congressional intent.³⁵ Over the next decade, the Corps revised its regulations concerning the scope of jurisdiction over navigable waters, and in particular, wetlands.³⁶ The regulations specified "coastal wetlands and freshwater wetlands" as navigable waters, provided that "they were contiguous or adjacent to other navigable waters."³⁷ In 1977, the Corps defined wetlands adjacent to other waters of the U.S. as

any pollutant to navigable waters from any point source. *Id.* § 502(12). A "point source" is any "discernable and discrete conveyance, including but not limited to any pipe, ditch, or channel," among others. *Id.* § 502(14). With a few other exceptions not relevant here, any other discharges of any pollutant into navigable waters is prohibited. *Id.* § 301(a).

31. *Id.* § 404.

32. *Id.* § 502(6).

33. *Id.* § 404(a), (g)(1). Michigan, the state involved in *Rapanos*, administers its own § 404 permit program.

34. 39 Fed. Reg. 12,119 (Apr. 3, 1974). See also Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 ENVTL. L. 1, 11 (1993).

35. See *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974) (finding that Congress intended to exercise full federal authority to regulate water pollution, and this authority does not rest on past interpretations of navigability in fact); *Nat'l Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.C. 1975) (finding that "the waters of the United States" extends federal jurisdiction over the nation's waters to the extent permissible under the Constitution, and is not limited to traditional notions of navigability).

36. See Johnson, *supra* note 34, at 11-12 (noting specific regulation changes in 1977 (42 Fed. Reg. 37,122 (July 19, 1977)) and 1986 (51 Fed. Reg. 41,206 (Nov. 13, 1986))).

37. *Id.*

“waters of the United States” subject to the CWA.³⁸ At the time of the *Rapanos* decision, the Corps’ jurisdiction included interstate wetlands, wetlands adjacent to other U.S. waters, and isolated wetlands if the use, degradation, or destruction of the isolated wetlands could affect interstate commerce.³⁹

B. Previous Judicial Interpretations of “the Waters of the United States”

Rapanos was not the Supreme Court’s first attempt to delineate which wetlands could be part of “the waters of the United States.” In two prior cases, *United States v. Riverside Bayview Homes, Inc.* and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, the Court reviewed the applicability of the Corps’ regulations in very different contexts.

1. *United States v. Riverside Bayview Homes, Inc.*⁴⁰

In *Riverside Bayview Homes*, the Court upheld the Corps’ assertion of CWA jurisdiction over wetlands adjacent to other waters covered by the CWA. *Riverside Bayview Homes, Inc.* began to fill eighty acres of low-lying marshy land as part of preparations for a housing development near Lake St. Clair in Michigan.⁴¹ The Corps sought to enjoin the company from filling the property without a § 404 permit.⁴² At the time, Corps regulations defined “the waters of the United States” to include wetlands—“those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”⁴³ The Corps construed the CWA to cover wetlands adjacent to other covered waters, such as Lake St. Clair.⁴⁴

38. *Id.*

39. *Id.* (noting 33 C.F.R. § 328.3(a) (1993)).

40. 474 U.S. 121 (1985).

41. *Id.* at 124.

42. *Id.*

43. 33 C.F.R. § 323.2(c) (1978). *See also Riverside Bayview Homes*, 474 U.S. at 124.

44. 33 C.F.R. § 323.2(c) (1978). *See also Riverside Bayview Homes*, 474 U.S. at 124.

The Court defined the question in *Riverside Bayview Homes* as one of regulatory and statutory interpretation.⁴⁵ If the property was an "adjacent wetland" within the meaning of the regulation and the Corps had the authority to regulate deposits into the particular wetland, then the exercise of jurisdiction was proper.⁴⁶ The Court premised its decision on two findings of the lower court. First, the district court found that the property was "characterized by the presence of vegetation that requires saturated soil conditions for growth and reproduction."⁴⁷ Second, it ruled that the wetland was adjacent to a body of navigable water, since the wetland boundary extended to Black Creek, a navigable waterway.⁴⁸ Therefore, the Court concluded that the wetland area in question was part of the "waters of the United States" if the regulation was a valid exercise of Corps jurisdiction over "navigable waters."⁴⁹

Noting that it was an exercise in linguistics to classify any types of "land" as "waters"—the Court determined that the Corps had to make a judgment about areas that "are not wholly aquatic, but nevertheless fall far short of being dry land."⁵⁰ Based on the comprehensive nature of the Clean Water Act and the idea that "[w]ater moves in hydrologic cycles and . . . the discharge of pollutants [should] be controlled at the source,"⁵¹ the Court concluded that Congress intended to regulate at least some waters "that would not be deemed 'navigable' under the classical understanding of the term." Therefore, the Corps could reasonably conclude that "waters" encompassed wetlands adjacent to navigable waters more conventionally defined.⁵²

The Court then noted that the Corps' reasonable interpretation would be true even for wetlands that were not the result of flooded adjacent waters because wetlands could affect the water quality of adjacent lakes, rivers, and streams even without such lakes, rivers,

45. *Riverside Bayview Homes*, 474 U.S. at 126.

46. *Id.* Note that the Court was only deciding whether *Riverside Bayview Homes* had to apply for a permit under § 404 to fill the wetland, not whether the company could actually do the work. *See id.*

47. *Id.* at 130–31.

48. *Id.* at 131.

49. *Id.*

50. *Id.* at 132.

51. *Id.* at 132–33 (quoting S. REP. NO. 92-414 at 77 (1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3742).

52. *Id.* at 133.

or streams inundating the wetlands.⁵³ Riverside Bayview Homes, Inc. needed a § 404 permit because the Corps regulation expanding “waters of the United States” to include wetlands adjacent to other bodies of water over which it had jurisdiction was a reasonable interpretation of the Clean Water Act.⁵⁴

2. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (*SWANCC*)⁵⁵

In 2001, the Court again reviewed the Corps’ definition of “waters of the United States” in *SWANCC*. In *SWANCC*, the Court declined to extend the holding of *Riverside Bayview Homes* to isolated ponds used as breeding sites for migratory birds. Solid Waste Agency of Northern Cook County, a consortium of twenty-three Chicago area cities and villages, contacted the Corps to determine if it needed a permit to develop a disposal site for baled, nonhazardous solid waste on the site of an abandoned sand and gravel mining pit.⁵⁶ The abandoned site had several excavation trenches that had evolved into “permanent and seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet).”⁵⁷

The Corps originally concluded that it had no jurisdiction over the site because it was not a wetland or other area that supported vegetation that needed saturated soil.⁵⁸ However, after a call concerning the presence of migratory birds at the site, the Corps asserted jurisdiction pursuant to a regulation authorizing jurisdiction over intrastate waters used as a habitat by migratory birds that cross state lines. The Corps eventually refused to issue a § 404 permit.⁵⁹ The consortium filed suit, claiming that the Corps had “exceeded its statutory authority in interpreting the CWA to

53. *Id.* at 134–35.

54. *Id.* at 135.

55. 531 U.S. 159 (2001).

56. *Id.* at 163.

57. *Id.*

58. *Id.* at 164.

59. *Id.* at 164–65. The Corps, after originally declining to extend jurisdiction, was contacted about the presence of 121 bird species at the site. The Corps refused to issue the § 404 permit because the impact on migratory birds was unmitigatable. *Id.*

cover non-navigable, isolated, intrastate waters based upon the presence of migratory birds.”⁶⁰

The Supreme Court ultimately rejected Corps jurisdiction over the landfill site pursuant to the “Migratory Bird Rule.”⁶¹ The Court based its holding partly on the need for the term “navigable” in the CWA to have some impact—“[t]he 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.”⁶²

The Court declined to defer to the Corps’ regulatory authority, as it had in *Riverside Bayview Homes*, out of a prudential desire not to tackle what it considered serious constitutional questions about the scope of Congress’s authority under the Commerce Clause.⁶³ The Court carefully explained that *SWANCC* did not affect the previous holding in *Riverside Bayview Homes*. It found that the “significant nexus” between the wetlands and the adjacent navigable waters informed its reading of the CWA in *Riverside Bayview Homes*.⁶⁴ By contrast, the Court declined to extend *Riverside Bayview Homes* to cover isolated ponds wholly located in two Illinois counties because such ponds served as a migratory bird habitat.⁶⁵ The Corps had failed to prove a significant nexus between the non-navigable ponds and a navigable waterway.

The dissent in *SWANCC* found the majority’s emphasis on traditional navigability misplaced. Instead, it focused more on the definition of “navigable waters” in the CWA itself—“the waters of the United States, including the territorial seas.”⁶⁶ According to the dissent, that definition required neither actual nor potential navigability in fact.⁶⁷

Following *SWANCC*, lower courts developed conflicting ideas concerning the scope of federal jurisdiction under the Clean Water

60. *Id.* at 165–66.

61. *Id.* at 174.

62. *Id.* at 172.

63. *Id.*

64. *Id.* at 167.

65. *Id.* at 171–72.

66. *Id.* at 175 (Stevens, J., dissenting).

67. *Id.*

Act.⁶⁸ The Fifth Circuit in particular read *SWANCC* broadly, finding that a body of water was subject to regulation only if the water is actually navigable or is adjacent to an open body of navigable water.⁶⁹ The Fifth Circuit also found that the CWA is not broad enough to impose regulations over “tributaries” that are neither themselves navigable nor adjacent to navigable waters.⁷⁰ Other circuits have interpreted *SWANCC* narrowly, ruling that it only invalidated jurisdiction over isolated waters or tributaries of other navigable bodies of water if based solely upon the “Migratory Bird Rule.”⁷¹

If the split between the various circuits about the impact of *SWANCC* seems confusing, it is because *SWANCC*'s impact was, in fact, confusing. One commentator suggested that it was not only the federal circuits having a difficult time interpreting *SWANCC*.⁷² Gregory Broderick noted that the Bush Administration refused to take a definitive stance on the issue⁷³ when the EPA declined to promulgate new regulations after a Notice of Proposed Rulemaking in 2003 to clarify the definition of “waters of the United States.”⁷⁴ In doing so, the Administration had punted the issue to the courts, hoping for a judicial resolution “to this complex and politically charged problem.”⁷⁵

68. Gregory T. Broderick, *From Migratory Birds to Migratory Molecules: The Continuing Battle Over the Scope of Federal Jurisdiction Under the Clean Water Act*, 30 COLUM. J. ENVTL. L. 473 (2005). Broderick is a staff attorney for the Pacific Legal Foundation—the organization representing Rapanos. *Id.* at 473.

69. *D.E. Rice v. Harken Exploration Co.*, 250 F.3d 264, 268–69 (5th Cir. 2001).

70. *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003). Note that both *Rice* and *Needham* were interpreting the Oil Pollution Act by reference to the Clean Water Act, because both acts provide substantially identical jurisdictional language.

71. *See, e.g.*, *United States v. Phillips*, 356 F.3d 1086 (9th Cir. 2004) (rejecting Phillips' claim that the Clean Water Act, after *SWANCC*, does not apply to tributaries of navigable waterways); *Treacy v. Newdunn Assoc., LLP*, 344 F.3d 407, 415–17 (4th Cir. 2003) (stating that the Court only struck down the “Migratory Bird Rule” and that the Corps continues to properly assert jurisdiction “over any branch of a tributary system that eventually flows into a navigable body of water,” and that “tributary” includes the entire tributary system into a navigable body of water (quoting *United States v. Deaton*, 332 F.3d 698, 711 (4th Cir. 2003))).

72. *See* Broderick, *supra* note 68, at 497.

73. *Id.* at 498 n.166.

74. *Id.*

75. *Id.*

III. *RAPANOS* CIVIL LITIGATION IN THE SIXTH CIRCUIT AND THE SUPREME COURT

A. *The Sixth Circuit's Entry into the (Civil) Intrigue of Wetlands Permitting*

The Sixth Circuit entered the post-*SWANCC* fray in 2004 for a second time in the *Rapanos* civil case.⁷⁶ By 2004, the *Rapanos* criminal case had been remanded three times, once by the Supreme Court, during a decade of litigation.⁷⁷ *Rapanos* filed for a writ of certiorari to the Supreme Court after his criminal conviction was upheld by the Sixth Circuit.⁷⁸ Certiorari was granted, but only to remand the case back to the Sixth Circuit in light of *SWANCC*.⁷⁹ The Sixth Circuit then remanded back to the district court,⁸⁰ which found that *SWANCC* had changed the scope of federal jurisdiction. As a result, the district court ruled that the wetlands on *Rapanos*' property were not covered because they were not directly adjacent to navigable waters.⁸¹ The government appealed, which brought the criminal case before the Sixth Circuit a second time.⁸² On appeal, the Sixth Circuit reversed the district court, upholding *Rapanos*' conviction and finding that the wetlands at issue were covered by the CWA.⁸³ The Supreme Court denied certiorari.

One year later, the Sixth Circuit decided the *Rapanos* civil case.⁸⁴ The wetlands at issue in the civil case connect to the Labozinski Drain (a one-hundred year old manmade drain), which flows into Hoppler Creek, which flows into the Kawkawlin River,

76. *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004).

77. *Id.* at 633 (citing remand by the Sixth Circuit, *United States v. Rapanos*, 115 F.3d 367, 374 (6th Cir. 1997); remand for resentencing by the Sixth Circuit, *United States v. Rapanos*, 235 F.3d 256, 261 (6th Cir. 2000); and remand by the Supreme Court, *Rapanos v. United States*, 533 U.S. 913 (2001)). See *supra* note 7 for more on the complicated procedural history of this case.

78. *Rapanos*, 376 F.3d at 633.

79. *Id.* (citing *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159 (2001)).

80. *Id.* (citing *United States v. Rapanos*, 16 F. App'x 345 (6th Cir. 2001)).

81. *Id.* (citing *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1015–16 (E.D. Mich. 2001)).

82. *Id.* at 633–34 (citing *United States v. Rapanos*, 339 F.3d 447, 454 (6th Cir. 2003)).

83. *Rapanos*, 339 F.3d 447.

84. *Rapanos*, 376 F.3d 629.

a navigable river that eventually flows into Saginaw Bay and Lake Huron.⁸⁵ In 1988, Rapanos started to clear trees and eradicate the wetlands on the property.⁸⁶ He hired a land consultant after being advised that he needed a wetlands permit; the consultant found between forty-eight and fifty-eight acres of wetlands on the property.⁸⁷ Rapanos began filling the wetlands with earth and sand in spite of a cease-and-desist order. He instructed the consultant to destroy any records of his inventory and then threatened to fire and sue him if he refused.⁸⁸

During the government's civil appeal to the Sixth Circuit in 2004, Rapanos repeated the argument made in his criminal case that *SWANCC* had changed the scope of federal jurisdiction, and therefore, the wetlands on his property were no longer covered by the CWA.⁸⁹ By reference to its 2003 criminal decision, the Sixth Circuit denied his claim. The Sixth Circuit interpreted *SWANCC* to require a hydrological connection between non-navigable wetlands and other navigable waters.⁹⁰ For the Sixth Circuit, the "significant nexus" referred to in *SWANCC* was satisfied by the presence of a hydrological connection and did not require a "direct abutment" between the navigable and non-navigable waters.⁹¹

The court distinguished *SWANCC* as involving isolated waters, whereas the *Rapanos* wetlands were hydrologically interconnected with traditional navigable waters.⁹² The court found a nexus between a navigable waterway and its non-navigable tributaries.⁹³ This nexus was sufficient for the Corps to determine that it had jurisdiction over the whole tributary system of any navigable waterway.⁹⁴

85. *Id.* at 642.

86. *Id.* at 632.

87. *Id.*

88. *Id.*

89. *Id.* at 642.

90. *Id.* at 639.

91. *Id.*

92. *Id.* at 642.

93. *Id.* at 640 (quoting *United States v. Rapanos*, 339 F.3d 447, 452 (6th Cir. 2003)).

94. *Id.*

B. The Pressure to Grant Certiorari

The Supreme Court's grant of certiorari came amidst heady debate between commentators about the implications of *Rapanos* for future environmental endeavors.⁹⁵ One noted that a positive outcome for *Rapanos* was the equivalent of a judicially sanctioned CWA "opt-out" provision for certain polluters.⁹⁶ Another concluded that the Sixth Circuit's decision upholding the Corps' jurisdiction "further defined the scope of the Clean Water Act" which had previously been ambiguous.⁹⁷ Jim Murphy, an attorney with the National Wildlife Federation, called a possible court-sanctioned curtailment of federal wetland regulatory authority "catastrophic for the protection of clean water and aquatic habitat."⁹⁸ *Rapanos* stated that the government's vigorous prosecution was nothing more than a targeted attempt to bankrupt a private property owner.⁹⁹

If we had taken all the money I spent [on defense] and all the money the government spent, we could have built thousands and thousands of acres of wetlands to be preserved in perpetuity But no! The government's not interested in wetlands but in finding a target somewhere and hanging it . . . for everyone to see.¹⁰⁰

So, what is it? Is the government's nearly two-decade long action against *Rapanos* merely an attempt to "bankrupt" a private property owner on behalf of overzealous tree-huggers? After the

95. Joel B. Eisen, *Rapanos, Carabell, and the Isolated Man*, 40 U. RICH. L. REV. 1099 (2006).

96. *Id.* at 1103.

97. Brett J. Miller, *Environmental Law—Clean Water Act—A Wetland Falls Under Federal Jurisdiction Even Though It Is Located Twenty Miles from the Nearest Navigable Waterway Due to a "Significant Nexus" Created by a Manmade Drain Connecting Two Bodies of Water*, 82 U. DET. MERCY L. REV. 497, 500 (2005).

98. Daily News Staff & Associated Press, *Rapanos Awaits Supreme Court Arguments*, MIDLAND DAILY NEWS, Oct. 12, 2005, at 1A, available at http://www.ourMidland.com/site/news.cfm?newsid=15372401&BRD=2289&PAG=461&dept_id=472542&rfti=6.

99. Associated Press & Cheryl Wade, *Rapanos Avoids Prison*, MIDLAND DAILY NEWS, Mar. 16, 2005, at 1A.

100. *Id.* Note that *Rapanos* could have easily spent that money, probably less, on actually applying for a permit.

Sixth Circuit's criminal and civil decisions upholding the Corps' jurisdiction, Ralph Wirtz, a reporter who followed the *Rapanos* developments, posited this scenario:

Let's say your Little Johnny takes his little beach shovel and his little beach bucket and he fills a pothole with sand from the bucket.

Now, let's say that the pothole is on the edge of a wetland that's adjacent to a ditch in your backyard.

Now, let's say that the water from that ditch empties four miles away into a little creek that flows through a wooded area and that it connects, an additional eight miles away, to a bubbling stream. The stream then connects after about eight more miles to a tiny river used by people with small fishing boats. A few miles further, the small river connects to a bay on which large ships transport goods to other states and to other nations.

Does the relationship between the pothole and the river and the bay, however tenuous and tiny, mean that the federal government can come into your yard and charge your Little Johnny with violating the Clean Water Act?

*You betcha, says the federal government.*¹⁰¹

Wirtz's scare tactic is not a new view about the scope of federal "intrusion" into the lives of private property owners. It is the view espoused by the Pacific Legal Foundation, Rapanos' counsel, which was founded as "a potent representative in the courts for Americans who have grown weary of overregulation by big government, overindulgence by the courts, and excessive interference in the American way of life."¹⁰²

Or, is the action against Rapanos the EPA's way of fulfilling congressional intent towards wetland regulation—an intent to

101. Ralph E. Wirtz, *Rapanos Wetland Case Could Be Heard by Supreme Court This Session*, MIDLAND DAILY NEWS, Oct. 05, 2005, at 1A (emphasis added), available at http://www.ourMidland.com/site/news.cfm?newsid=15331165&BRD=2289&PAG=461&dept_id=472542&rft=6. Wirtz's scenario seemed to this author to form the extremist view of the debate between environmentalists and developers.

102. Pacific Legal Foundation, About Us, <http://www.pacificlegal.org/?mvcTask=about> (last visited Feb. 3, 2008).

make wetlands, even those in Michigan, an asset of the national polity?

[M]arshes and wetlands are not a parochial responsibility or an asset; they are not a local asset; they are a national asset. They are not just confined within boundaries which happen to exist for any one of our States They belong to all citizens. They are much too valuable to be abandoned to some unstable, fragmentary kind of protection.¹⁰³

It is against this tense backdrop that *Rapanos* was decided; or rather, not decided.

C. The Punt Back to the Supreme Court: You Know What They Say—There Are Three Sides to Every Issue

In February 2006, finally having his case heard before the Supreme Court, Rapanos made a bold prediction: “It’s going to be close. . . . Six to three, five to four in our favor.”¹⁰⁴ What he got, however, was neither six to three, five to four, nor necessarily in his favor. Instead, he got a four-four-one decision and another visit to the Sixth Circuit.

The Supreme Court granted certiorari to hear *Rapanos* and a consolidated case, *Carabell v. United States Army Corps of Engineers*,¹⁰⁵ presumably in order to clarify two things left unclear after *SWANCC*. Those two things were the definition of

103. 123 CONG. REC. 26,716–17 (daily ed. Aug. 4, 1977) (statement of Senator Chafee of Rhode Island, debating a bill proposed by Senator Lloyd Bensten offered in 1977 to amend the Clean Water Act to limit the scope of the § 404 program to only traditionally navigable waterways and their adjacent wetlands; the bill was ultimately defeated by a full Senate vote). *See also* Brief of the Honorable John D. Dingell et al. as Amici Curiae in Support of the Respondent, *Rapanos v. United States*, 126 S. Ct. 2208 (2006) (Nos. 04-1034, 14-1384). All amici were members of either the 92nd Congress, which in 1972 initially adopted the definitions in the Clean Water Act at issue in *Rapanos*, or the 95th Congress, which voted in 1977 to reaffirm the broad scope of waters provided by the Clean Water Act. The consequences of fragmentary wetland protection hit home with a vengeance in 2005, after it was revealed that the poor state of Louisiana’s coastal wetlands contributed to the destruction caused by Hurricane Katrina.

104. Ralph E. Wirtz, *Rapanos: It’ll Be Close*, MIDLAND DAILY NEWS, Feb. 22, 2006, at 2A, available at http://www.ourMidland.com/site/news.cfm?newsid=16175331&BRD=2289&PAG=461&dept_Id=472542&rfl=6.

105. 391 F.3d 704 (6th Cir. 2004).

“adjacency,” in terms of a non-navigable waterway being adjacent to navigable body of water, and the scope of the “significant nexus” between the two in order to confer federal jurisdiction over the non-navigable waterway. In both *Rapanos* and *Carabell*, the non-navigable waterways in question were wetlands.

While *Rapanos* was fighting the Corps to avoid getting a permit, the *Carabells* were fighting the Corps because it *denied* them a permit. The *Carabells* wanted to fill approximately sixteen acres of wetlands to construct a condominium complex.¹⁰⁶ A man-made berm separated the sixteen acres, one of the last remaining large forested wetland parcels in Macomb County, Michigan, from a drain that empties into Auvase Creek, which empties into Lake St. Clair.¹⁰⁷ The Corps denied their permit request because of concerns over an increased risk of erosion and water quality degradation in Lake St. Clair.¹⁰⁸ The Sixth Circuit upheld the permit denial, finding that it was a proper exercise of jurisdiction over wetlands adjacent to tributaries of navigable waterways.¹⁰⁹ Corps regulations specified that “adjacent” wetlands also included those separated from other waters by berms, man-made dikes, or barriers.¹¹⁰

The Justices split three ways over what the Corps must show to establish jurisdiction over a particular non-navigable waterway. Four Justices (Team One) found that the Corps could assert jurisdiction over a non-navigable wetland if the wetland possessed a continuous surface connection to a permanent navigable body of water. Four others (Team Two) found that the Corps could assert jurisdiction if the non-navigable wetland had an ecological effect on a navigable waterway. Justice Kennedy found that the Corps could assert jurisdiction if the non-navigable wetland possessed a significant nexus with a navigable waterway or tributary thereof.

106. *Id.* at 705.

107. *Id.* A berm is a protective mound or bank of earth. THE AMERICAN HERITAGE DICTIONARY (4th ed. 2000).

108. *Carabell*, 391 F.3d at 706.

109. *Id.* at 708.

110. 33 C.F.R. § 328.3(c) (2007).

1. *Team One: Chief Justice Roberts, and Justices Scalia, Thomas, and Alito*¹¹¹

The plurality held that in order to be subject to the § 404 permit program, a non-navigable wetland must have a “significant nexus” to a traditionally navigable waterway.¹¹² This nexus means that the non-navigable waterway must be both adjacent to and possess a surface water connection with the navigable waterway.¹¹³ The plurality voted to remand both cases back to the Sixth Circuit for further consideration in light of this standard.¹¹⁴

Justice Scalia began the plurality’s opinion with a short history of the Corps’ expanding regulatory jurisdiction, including jurisdiction over areas not traditionally thought of as “waters.”¹¹⁵ It was important to the plurality that “dredged or fill materials,” “unlike traditional water pollutants . . . do not readily wash downstream.”¹¹⁶ The Corps’ regulations provided that “the waters of the United States . . . include, in addition to traditional . . . navigable waters, . . . [a]ll other waters such as . . . streams (including intermittent streams) . . . [t]ributaries of [such] waters; . . . [and w]etlands adjacent to [such] waters [and tributaries].”¹¹⁷

Following *SWANCC*, the Corps did not amend its published regulations; instead it notified field staff to continue exercising jurisdiction over the tributary systems and adjacent wetlands of traditional navigable waters and waters “‘neighboring’ traditional

111. Interestingly, he did (possibly, if the case goes Rapanos’ way on remand) get Justice Alito. His attorney, Julie Kiel, had, at the same press conference where Rapanos made his bet, predicted that he would not get support from Alito. See Wirtz, *supra* note 104.

112. *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

113. *Id.* at 2227.

114. *Id.* at 2235. Justice Scalia found that the Corps had exercised jurisdiction over “any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow.” *Id.* at 2215.

115. *Id.*

116. *Id.* at 2216. It is important to note, as Justice Scalia did, that sand and spoil are specifically identified as pollutants in the CWA.

117. *Id.* (citing 33 CFR § 328.3(a)(3), (5), (7), which regulations specifically provide that “[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands’”).

navigable waters and their tributaries.”¹¹⁸ Recognizing the difficulty of reconciling differing federal circuit opinions after *SWANCC*, the plurality concluded that the Corps had broadly regulated those areas it considered “tributaries” and “adjacent” wetlands.¹¹⁹

The plurality framed the issue of whether four wetlands that “lie near ditches or manmade drains that eventually” enter “into traditional navigable waters” were “waters of the United States.”¹²⁰ In both *Rapanos* and *Carabell*, the Sixth Circuit had affirmed jurisdiction because the wetlands involved were adjacent to navigable waters or tributaries of navigable waters.¹²¹ The plurality reasoned that it was not necessary to decide the extent to which the term “navigable” restricts the coverage of the CWA, because the CWA applies only to “waters.”¹²²

For the plurality, the Corps’ regulatory interpretation was not a reasonable construction of the term “waters.”¹²³ The plurality defined “the waters” of the United States narrowly to include water “[a]s 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.”¹²⁴ Justice Scalia found it relevant that the definition of “navigable waters” in the CWA was not “waters of the United States” but “*the* waters of the United States.”¹²⁵ According to the

118. *Id.* at 2217 (quoting 68 Fed. Reg. 1998 and 68 Fed. Reg. 1997). The Corps continued to defend its broad interpretation in court “even after *SWANCC*’s excision of ‘isolated’ waters and wetlands from the Act’s coverage.” *Id.* at 2218.

119. *Id.* (citing *Treacy v. Newdunn Assoc., LLP*, 344 F.3d 407 (4th Cir. 2003) for the proposition that a tributary includes the “intermittent flow of surface water through . . . 2.4 miles of natural streams and manmade ditches”; *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003) for the conclusion that a roadside ditch was a tributary when its water ended up in Chesapeake Bay). Constructions of an “adjacent” wetland have included hydrological connections through a “directional sheet flow” and wetlands lying within the “‘100-year floodplain’ of a body of water.” *Id.*

120. *Id.* at 2219.

121. *Id.* (citing *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004); *Carabell v. U.S. Army Corps of Eng’rs*, 391 F.3d 704 (6th Cir. 2004)).

122. *Id.* at 2220.

123. *Id.* at 2220.

124. *Id.* at 2220–21 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

125. *Id.* (emphasis added).

plurality, for the “*the*” in the definition to have any significance, it has to mean more than “water in general.”¹²⁶ From this the plurality concluded that for a waterway to be part of “the waters of the United States,” it must be a continuously present, fixed body of water as opposed to an ordinary dry channel through which water occasionally flows.¹²⁷

Conversely, then, “the waters of the United States” would not include channels with merely “intermittent or ephemeral flow.”¹²⁸ According to the plurality, this construction of “*the waters of the United States*” accorded with both *Riverside Bayview Homes* and *SWANCC*, in that both cases described necessary jurisdiction over areas with “hydrographic features more conventionally identified as waters.”¹²⁹

After determining that “the waters of the United States” do “not include channels through which water flows intermittently or ephemerally,” the plurality then addressed whether a wetland can be “adjacent to” remote “waters of the United States” because of a “mere hydrologic connection.”¹³⁰ According to the plurality, *SWANCC* rejected the deference given to the Corps in *Riverside Bayview Homes* based upon its “ecological judgment about the relationship between waters and . . . adjacent wetlands.”¹³¹ *SWANCC* limited that deference insofar as ecological considerations “provided an independent basis for including . . . ‘wetlands’ within ‘the waters of the United States.’”¹³² *SWANCC* thus narrowed the scope of the Corps’ ecological considerations to only those that resolve ambiguities in favor of treating abutting wetlands as “waters.”¹³³ Therefore, only wetlands with a continuous surface connection to bodies that are “waters of the

126. *Id.* at 2222.

127. *Id.* at 2223. The plurality did note, however, that it does not mean to exclude rivers, streams, or lakes that may dry up in circumstances like drought, or those that are seasonal in nature. *Id.* at 2221 n.5.

128. *Id.* at 2222.

129. *Id.* The plurality viewed as persuasive the language in the CWA that defines “discharge of a pollutant” as the addition of a pollutant to navigable waters from a “point source.” Accordingly, if ditches, channels, and conduits (“through which water flows intermittently”) were “waters” and not “point sources,” the definition of point source would have no meaning. *Id.* at 2222–23.

130. *Id.* at 2225.

131. *Id.* at 2226.

132. *Id.*

133. *Id.*

United States” (as in those with no “intermittent or ephemeral flow”), such that there is no clear dividing line between the two, are “adjacent” to such waters and covered by the CWA.¹³⁴ Likewise, those wetlands that have only an intermittent, remote hydrologic connection lack the “significant nexus” sufficient to confer federal jurisdiction, even if those wetlands are next to navigable water bodies.¹³⁵

Based upon these determinations, the plurality remanded both cases back to the Sixth Circuit to determine whether Rapanos’ and Carabell’s wetlands were “waters.”¹³⁶ To be “waters,” the wetlands must exist in the ordinary sense of creating a “relatively permanent flow,” and if “the wetlands in question are ‘adjacent’” to permanent waters, there must be by a “continuous surface connection” between the two.¹³⁷

2. *Team Two: Justices Stevens, Souter, Ginsburg, and Breyer*

The dissent would have upheld the Corps’ jurisdiction over both sets of wetlands because the wetlands, which are adjacent to tributaries of navigable waters, have a cumulative ecological effect on navigable waters.¹³⁸ All four *Rapanos* dissenters also dissented in *SWANCC*.¹³⁹ The dissent in *SWANCC* heavily emphasized Congress’s intent in enacting the “watershed” legislation known as the CWA, citing the 1969 fire in the Cuyahoga River in Ohio.¹⁴⁰ The Cuyahoga River burned on account of being coated with a slick of industrial waste.¹⁴¹ In order to protect all the Nation’s waters, the dissent argued, the Corps’ interpretation of the CWA to extend to tributaries of navigable waters and wetlands adjacent to each, was “manifestly reasonable.”¹⁴²

134. *Id.* at 2222, 2226.

135. *Id.*

136. *Id.* at 2235.

137. *Id.* at 2227.

138. *Id.* at 2252–66.

139. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 174 (2001).

140. *Id.* at 175.

141. *Id.* See Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing A History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89 (2002) for an account of the fire suggesting that it was less severe than generally believed.

142. *SWANCC*, 531 U.S. at 192.

According to the same dissenters in *Rapanos*, the *SWANCC* holding did not control disposition of either *Rapanos* or *Carabell*.¹⁴³ For the dissent, “*SWANCC* had nothing to say about wetlands, . . . let alone about wetlands adjacent to traditionally navigable waters or their tributaries.”¹⁴⁴ *Rapanos* and *Carabell* were, therefore, squarely within the purview of *Riverside Bayview Homes*.¹⁴⁵ The dissent viewed *Rapanos* as merely an extension of *Riverside Bayview Homes*, in that the wetlands at issue “abut tributaries of traditionally navigable waters,”¹⁴⁶ rather than abutting traditional navigable waters themselves. The dissent noted the roles of wetlands such as nesting and spawning sites for aquatic or land species, “storage areas for storm and flood waters,” and water purification.¹⁴⁷ It viewed these roles not as “independent” ecological functions (as classified by the plurality), but rather as “‘integral’ to the chemical, physical, and biological integrity of the Nation’s waters”—the very things the Clean Water Act was designed to restore.¹⁴⁸

The “significant nexus” between the adjacent wetlands and navigable waterway necessary to support Corps’ jurisdiction, for the dissenters, was not a surface connection to a navigable body of water (as seen by the plurality).¹⁴⁹ It was, rather, a “significant nexus” between the wetlands adjacent to tributaries and a “watershed’s water quality.”¹⁵⁰

As to the plurality’s view that “the waters of the United States” do not refer to intermittent or ephemeral waters, the dissent argued that under such analysis the Corps could “regulate polluters who dump dredge into a stream that flows year round,” yet not a polluter dumping “into a neighboring stream that flows for only 290 days a year”—even though both may have the same effects on downstream water quality.¹⁵¹

143. *Rapanos*, 126 S. Ct. at 2208, 2252–65 (Stevens, J., dissenting).

144. *Id.* at 2256.

145. *Id.* at 2256–57.

146. *Id.* at 2257.

147. *Id.*

148. *Id.* (citing 33 U.S.C. § 1251(a) (2000)).

149. *Id.* at 2258.

150. *Id.*

151. *Id.* at 2259–60. Justice Scalia does seem to address this argument, noting that it may be possible to regulate the polluter dumping into a

For the dissenters, the wetlands in each case were not “isolated,” like the mine pit ponds in *SWANCC*, but rather “adjacent to tributaries of traditionally navigable waters,” and thus more similar to *Riverside Bayview Homes*.¹⁵² The dissent took the plurality to task for “plainly neglect[ing] to consult a dictionary” regarding the requirement that an adjacent body of water possess a “continuous surface connection” to other navigable waters.¹⁵³ Justice Stevens found that, according to the dictionary (even Justice Scalia’s “preferred Webster’s Second”),¹⁵⁴ an adjacent body of water also includes one lying close to (“but *not necessarily in actual contact*” with) a navigable body of water.¹⁵⁵ His chastising about the dictionary, however, seems slight in comparison to his statement about the plurality’s “antagonism to environmentalism.”¹⁵⁶

The dissent, therefore, would have upheld the Corps’ jurisdiction over Rapanos’ and Carabell’s wetlands because the wetlands, which are adjacent to tributaries of navigable waters, have a “significant nexus” (cumulative ecological effect) to those waters sufficient to confer jurisdiction under the Corps’ regulations.¹⁵⁷

3. Justice Kennedy’s Concurrence: Is 1 ≥ 4?

Justice Kennedy concurred in remanding *Rapanos* and *Carabell* back to the Sixth Circuit to determine whether a significant nexus existed between the non-navigable wetlands and other waters “navigable in fact or that could reasonably be so

neighboring stream if the neighboring stream is viewed as a “point source.” *Id.* at 2227 (plurality opinion).

152. *Id.* at 2262 (Stevens, J., dissenting).

153. *Id.* at 2263.

154. *Id.* In *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), Circuit Judge Learned Hand was careful to admonish the legal field for placing too much reliance on the dictionary as a primary tool of statutory construction, noting “it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”

155. *Rapanos*, 126 S. Ct. at 2263.

156. *Id.* at 2259 n.8.

157. *Id.* at 2264–65.

made.”¹⁵⁸ He defined significant nexus differently than the plurality, however. According to Kennedy, neither the plurality nor the dissent correctly addressed the “significant nexus” test established by *SWANCC*.

Kennedy examined *Riverside Bayview Homes* and *SWANCC* together as establishing the framework to determine whether the *Rapanos* or *Carabell* wetlands were covered by the CWA.¹⁵⁹ For Kennedy, under *Riverside Bayview Homes*, a non-navigable wetland is a “navigable water” if the connection between the wetland and the navigable water is so close that is difficult to determine where one ends and the other begins. CWA jurisdiction is lacking, under *SWANCC*, when there is not a “significant nexus” between the two.¹⁶⁰

He found the plurality’s insistence upon permanent standing water or a continuous flow to be nonsensical.¹⁶¹ Justice Kennedy reasoned that the plurality’s definition of “waters” was too restrictive, finding that the Corps could reasonably interpret the Clean Water Act to cover intermittent streams.¹⁶²

Also lacking in support, according to Justice Kennedy, was the plurality’s reliance on *Riverside Bayview Homes* to support the proposition that a wetland must have an indistinguishable surface connection with other navigable waters.¹⁶³ He noted that *Riverside Bayview Homes* recognized an overinclusive definition of navigable waters.¹⁶⁴ Finding that the Corps’ expansive definition of adjacency was a reasonable one, he recognized that, in many

158. *Id.* at 2236 (Kennedy, J., concurring).

159. *Id.* at 2241.

160. *Id.*

161. *Id.* at 2242. Justice Kennedy found that under such an approach, “the merest trickle, if continuous, would count as a ‘water’ subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not.” *Id.*

162. *Id.* at 2243.

163. *Id.* at 2244.

164. *Id.* Under *Riverside Bayview Homes*, “an overinclusive definition is permissible even when it reaches wetlands holding moisture disconnected from adjacent water-bodies.” *Id.* at 2244 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 & n.9 (1985)).

cases, the absence of an interchange of waters prior to dredging and filling makes protection of the wetlands critical.¹⁶⁵

Justice Kennedy generally chastised the plurality for its overall tone and approach, which, to him, seemed “unduly dismissive” of the public interests served by the Clean Water Act and the general protection of wetlands.¹⁶⁶

While concurring in the judgment to remand, Justice Kennedy disagreed not only with the plurality’s “read[ing] nonexistent requirements into the Act,” but also with the dissent’s “read[ing] a central requirement out”—navigability.¹⁶⁷ In order to give the term “navigable” some meaning, he found that jurisdiction depends upon a “‘significant nexus’ between the wetlands in question” and traditional navigable waters.¹⁶⁸ That nexus is met if the wetlands “significantly affect the chemical, physical, and biological integrity” of other traditionally navigable waters.¹⁶⁹ When a “wetland’s effects on water quality are” insubstantial or speculative, it is not encompassed in “navigable waters.”¹⁷⁰

Justice Kennedy found the current regulation of tributaries too broad to justify an across-the-board standard that a non-navigable wetland adjacent to a tributary of a navigable water is covered under the CWA.¹⁷¹ Under the regulations, a water is “a tributary if it feeds into a traditional navigable water (or a tributary thereof).”¹⁷² For Justice Kennedy, this standard left too much room for regulation of ditches and streams remote from navigable in fact waters.¹⁷³

He concurred in the remand, because, in his opinion, neither the Corps nor the reviewing courts properly considered whether a

165. *Id.* at 2245–46. This is because wetlands separated from a navigable water by a manmade barrier can hold flood water, impurities, or runoff that would instead flow into navigable waters.

166. *Id.* at 2246.

167. *Id.* at 2247.

168. *Id.* at 2248.

169. *Id.* The nexus has to be assessed in terms of the structure and purpose of the Clean Water Act.

170. *Id.*

171. *Id.* at 2249.

172. *Id.* (citing 33 CFR § 328.3(e) (2005)). Under the regulations, a tributary must also possess an “ordinary high water mark.” *Id.*

173. *Id.*

significant nexus existed under the principles he articulated.¹⁷⁴ For Rapanos in particular, he noted that the same evidence that established that his wetlands had surface water connections to tributaries of navigable-in-fact waters should provide the requisite significant nexus.¹⁷⁵ However, with that evidence, the Sixth Circuit had concluded that a significant nexus can be established solely by a hydrologic connection. For Justice Kennedy, a solely hydrological connection was not enough to confer jurisdiction unless it creates a significant impact on downstream water quality.¹⁷⁶

IV. IMPACTS OF A MURKY DECISION

A. *Ambiguous State of the Law*

Presumably, the Supreme Court grants certiorari in order to clarify the state of the law. One would assume that the Supreme Court does not need to intervene into a controversy absent either lower courts' misapplication of, or conflicting interpretations of, a particular law. With *Rapanos*, the Court had the chance to do just that—clarify the interpretation of a particular law (the Clean Water Act) that had been given arguably conflicting interpretations by lower circuits.¹⁷⁷

In *Rapanos*, the Supreme Court failed to perform this basic responsibility. The five member plurality that agreed to remand the cases back to the Sixth Circuit did so in order to determine a question of fact. That question was: Did the wetlands at issue in either case possess a significant nexus to a navigable body of water over which the Army Corps of Engineers has regulatory jurisdiction, sufficient to bring the wetlands within the ambit of the § 404 permit program for dredged or fill material? A remand to determine a factual dispute in light of the Court's interpretation of the Clean Water Act is a reasonable disposition of the case. The Sixth Circuit, however, has to answer this question in light of differing interpretations of what this "significant nexus" actually is.

174. *Id.*

175. *Id.* at 2250.

176. *Id.*

177. See *supra* notes 68–71 and accompanying text.

Both the plurality and Justice Kennedy remanded the case back to the Sixth Circuit to determine if a significant nexus exists between the non-navigable wetlands and other navigable waters. Under the plurality's approach, a significant nexus exists only when a non-navigable wetland meets two requirements. First, a continuous surface connection must exist that is sufficient to be hydrologically adjacent. Second, the wetland itself must be adjacent to a traditionally navigable body of water that is relatively permanent (as part of "the waters of the United States"). Under Justice Kennedy's approach, a significant nexus exists to confer jurisdiction over a non-navigable wetland on a case-by-case basis when, even in the absence of a continuous surface connection, filling the wetland would have a significant ecological effect upon a traditionally navigable body of water or a major navigable tributary thereof.

In his dissent, Justice Stevens suggested that on remand, Justice Kennedy's approach would be the one most likely taken by lower courts.¹⁷⁸ His prediction has already come to fruition. In *United States v. Gerke Excavating*, the Seventh Circuit reasoned that Justice Kennedy's jurisdictional approach controls, based upon a prudential rule that "when 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."¹⁷⁹ The *Gerke* court found that Justice Kennedy's

178. 126 S. Ct. at 2265–66 n.14 (Stevens, J., dissenting). He assumed this because Justice Kennedy's approach conferred jurisdiction over more of the Nation's waters. He further noted that for future litigation, the United States could use *either* test to prove jurisdiction. *Id.* at 2265; *see also* *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) (finding that the U.S. can assert jurisdiction over wetland sites if the site meets either Justice Kennedy's legal standard or that of the plurality). The First Circuit noted that allowing jurisdiction under both standards would be appropriate because it "ensures that lower courts will find jurisdiction in all cases where a majority of the Court would support" a jurisdictional finding. *Id.* at 2264. If Justice Kennedy's standard is met, he "plus the four dissenters would" uphold "jurisdiction"; likewise, if the plurality's test is met, the four dissenters and the four plurality members would uphold jurisdiction. *Id.*

179. 464 F.3d 723, 724 (7th Cir. 2006) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). Note that this prudential rule is inapposite to the prediction by Justice Stevens that Kennedy's approach would control because it is the narrowest opinion that would presumably extend the CWA to waters that the plurality would not reach. *See also Johnson*, 467 F.3d at 64 (noting that the

approach was narrower insofar as it reigns in federal authority in most cases.¹⁸⁰ Presumably, the four plurality Justices, if forced to choose, would choose the approach that allows for no federal regulation.¹⁸¹ The *Gerke* court found that the plurality's holding was broader insofar as it found jurisdiction over wetlands possessing a surface water connection (however small), with traditionally navigable waters even if the cumulative effects on the navigable water were speculative or insubstantial.¹⁸²

For the distinction between Justice Kennedy's approach and the plurality's to have any meaning, one would need to show that a non-navigable wetland with a surface connection to a navigable body of water or its tributary, if filled, would not have a significant effect on the water quality of the abutting navigable waterway or tributary. However, filling a non-navigable wetland that has a surface connection to a navigable body of water necessarily eradicates the connection between the two. Eradicating the connection between the two would confer a significant nexus.

Urban planning initiatives, such as draining and filling wetlands to build a shopping mall or condo complex, indirectly affect wetlands by causing changes in hydrology and sedimentation.¹⁸³ Hydrologic change, which concerns the quantity, duration, rates, and frequency of water flow, is thought of as the "linchpin" of wetland health because substantial change is the central way to impair various wetland functions.¹⁸⁴ Therefore, filling a wetland necessarily effects a hydrologic change. If the wetland is connected through a continuous surface flow to a navigable body of water or tributary thereof, hydrologic change necessarily affects the navigable body of water.

Gerke interpretation of *Marks* does not translate easily to a situation such as that of *Rapanos*, and eschewing the approach in favor of Justice Stevens's advice in *Rapanos* to find jurisdiction under either the plurality's standard or Justice Kennedy's).

180. *Id.* at 724–25 (remanding the case back to the district court to conduct fact-finding consistent with the Kennedy approach).

181. *Id.*

182. *Id.*

183. AMANDA L. AZOUS & RICHARD R. HORNER, WETLANDS AND URBANIZATION: IMPLICATIONS FOR THE FUTURE 5 (2001).

184. *Id.* at 6.

In addition, urbanized watersheds generate large amounts of pollutants, including eroded soil from construction sites. Larger quantities of pollutants reduce water filtration capacity and accelerate the transport and addition of sediments to wetlands.¹⁸⁵ Let us assume that Rapanos, while filling his wetlands, contemporaneously began developing non-wetland areas for his shopping mall. Construction debris, sediment, dry concrete, paint chippings, and tiny pieces of drywall would all accompany such a project. Since there is an “intimate connection between runoff pollution and wetland hydrology,”¹⁸⁶ one can rationally assume that the runoff generated from construction would affect the wetland’s hydrology. If the main functions of wetland areas are to filter sediment and debris and prevent those things from entering into navigable bodies of water and their tributaries, then filling Rapanos’ wetlands necessarily pushes the construction debris into tributaries and navigable water bodies. For Rapanos, given the position of his wetlands, some of the sediment logically ends up in the Kawkawlin River and Lake Huron.

Rapanos has not been fighting for almost two decades for the right to fill the wetlands on his property, or rather, to escape imposed penalties for doing so. Rapanos has been fighting for almost two decades merely because he did not want to apply for a § 404 wetland fill permit. The Clean Water Act § 404 program is a permit program, not necessarily a restriction upon filling any wetlands. The convoluted holding in *Rapanos* does not establish that a “significant nexus” is necessary in order to allow the government to forbid a person to develop wetland property. It merely stands for the proposition that the nexus is required to even determine if one needs a permit from the Army Corps of Engineers.

Interestingly, had Rapanos attempted to get a permit, the Corps probably would have approved it. According to the Corps’ § 404 program data, the agency receives an average of over 80,000 permit requests annually; of these, only about nine percent are required to go through a “detailed evaluation for an individual permit”; most are approved through a nationwide or region-

185. *Id.*

186. *Id.*

specific permit.¹⁸⁷ Of the nine percent that have to file for an individual permit, less than 0.3 percent are denied.¹⁸⁸ In Louisiana alone, between 1988 and 1996, ninety-nine percent of all permit applications were granted, including ninety-two percent in flood disaster areas.¹⁸⁹

Under the CWA, the EPA has veto power over a proposed Corps permit, but in the first thirty-five years of the program, it used the veto authority only eleven times.¹⁹⁰ It hardly seems that the Corps has been running rampant to trample the rights of private property owners, even with broad regulatory interpretations. In fact, based on these statistics, it would not be unreasonable to presume the opposite.

As a result of *Rapanos*, landowners will have to conduct costly, independent, case-by-case ambiguous scientific analyses merely to determine if they have to apply for a permit, which has a likelihood of being approved anyway. More likely, though, landowners like John Rapanos will ignore the permitting requirements altogether, in effect forcing the Corps to assume the costly burden of catching permit-dodgers. Neither scenario seems an efficient or practical way for the EPA or a private landowner to conduct business.¹⁹¹

187. Jeffery A. Zinn & Claudia Copeland, *Wetlands Issues*, in NATIONAL WETLANDS: ISSUES AND DEVELOPMENTS 8 (Samuel T. Prescott ed., 2004).

188. *Id.* It is important to note, as the plurality points out, that the individual permitting process is time-consuming and expensive. *Rapanos v. United States*, 126 S. Ct. 2208, 2214 (2006). However, if the goal of the Clean Water Act is to control the pollution of the Nation's navigable waterways at the source, then the permit option seems to be the best available regulatory scheme. Also, since almost all individual permits are for industrial or commercial developers, one would assume that, if the project is approved, a developer could amortize the cost of the permit over a fifteen year period under 26 U.S.C. § 197(a), (c), (d)(1)(D) (2006).

189. Brett Hulsey & Geoff Tichenor, *A Call for Flood Security Through Wetland Protection*, NAT'L WETLANDS NEWSLETTER, May-June 2000, 3-4 (see table showing flood damage and wetland permits granted in the top ten states for flood disasters).

190. See Zinn & Copeland, *supra* note 187, at 8 (based on data available before publishing in 2004).

191. For more information concerning EPA enforcement under *Rapanos*, see Kathleen Schalch, *Clean Water Act Enforcement Falls to Active Citizens* (NPR radio broadcast Nov. 7, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6447306>. According to David Bookbinder, Sierra Club Senior Attorney, "the Corps is going to have to prove that a wetland falls under the Clean Water Act." *Id.* The process, according to Bookbinder, is a "very, very resource-intensive effort." *Id.* In northern Wisconsin, for example, "only one in ten builders" that "illegally fill wetlands ever get caught." *Id.*

In addition, even if such a process were easy to administer, is it not the best course of action to require a nexus at the actual permit stage, rather than at the “determination if a permit is necessary” stage? Creating this significant nexus condition to determine if a wetland is part of “the waters of the United States” and therefore under the purview of the CWA, rather than using it to determine if a permit should be approved, necessarily fragments an already fragmentary process. If the Corps found that a fill application had an insubstantial effect upon a navigable water body or its tributary, it would only have to issue a permit.

Justice Kennedy approved a significant ecological test of wetland “nexus-ness”¹⁹² independent of a continuous surface connection to a navigable water body or a navigable tributary thereof. Given such approval, it is difficult to refine the difference between his approach and that of the dissent. According to Justice Kennedy, the dissent reads the requirement of “navigability” out of the CWA.¹⁹³ He asserted that it was the dissent’s view that the CWA reaches “all ‘non-isolated wetlands,’ just as it had construed the Act to reach the wetlands adjacent to navigable-in-fact waters in *Riverside Bayview Homes*.”¹⁹⁴ However, the dissent only stated that wetlands that are adjacent to navigable water bodies or tributaries served water quality roles that lead to a reasonable interpretation by the Corps that the CWA covers such non-isolated wetlands.¹⁹⁵ To take this basic premise and transform it into an overarching statement that the dissent supports jurisdiction over “all” non-isolated wetlands requires an inference that the dissent itself had not made.

According to Justice Kennedy, a higher standard than the one proposed by the dissent is necessary “to avoid unreasonable applications of the statute,” based on the ambiguous overbreadth of the Corps’ definition of “tributary.”¹⁹⁶ However, as already stated, the Corps approves the vast majority of permit applications. If the

192. It seems to this author that the Justices disagree about the inherent qualities of a significant nexus. Five agree that a nexus is required; the deliberation only concerns the essence of a nexus—or rather, “nexus-ness.”

193. *Rapanos v. United States*, 126 S. Ct. 2208, 2247 (2006) (Kennedy, J., concurring).

194. *Id.* at 2248.

195. *Id.* at 2256 (Stevens, J., dissenting).

196. *Id.* at 2248–49 (Kennedy, J., concurring).

statute required a permit for filling wetlands that are only tenuously connected through a tiny drain to a small amount of a navigable waterway—under the current permitting scheme, the owner of the wetland area would simply get a permit and mitigate his wetland damage as required by the Corps.

Given the ecological value of wetlands for flood control, water purification, species and habitat preservation, and aesthetic economic use, the better policy is to be over-inclusive rather than under-inclusive. If the goal of the CWA is to improve the overall health of the Nation's waterways, over-inclusiveness makes sense to effectuate this goal. Additionally, pollutants subscribe to the "easier to add rather than subtract" truism. Controlling the entrance of pollutants into the Nation's waterways is much more administratively and economically efficient than attempting to remove pollutants added through under-inclusive regulation. An over-inclusive approach is a reasonable construction of the CWA, given its definition of "navigable waters." Navigable waters are "waters of the United States," and legislative history indicates that Congress intended comprehensive legislation not bound to traditional notions of navigability.

The current mechanisms to regulate water quality have not totally fulfilled the CWA's statutory mandate. Even with the permitting program, average annual loss of wetlands still amounts to more than 58,000 acres per year.¹⁹⁷ This figure is down eighty percent from the previous decade.¹⁹⁸ In addition, of the nine states that reported to EPA sources of recent wetland losses, four indicated that filling and draining, residential development, and urban growth were among the highest causes.¹⁹⁹ As to overall water quality, states indicated that approximately forty percent of streams and forty-five percent of lakes that were assessed were not clean enough to support fishing and swimming.²⁰⁰ Even with the

197. See U.S. ENVTL. PROT. AGENCY, 2000 NATIONAL WATER QUALITY INVENTORY ch. 5, at 45 (citing Status and Trends of Wetlands in the Conterminous United States 1986 to 1997, U.S. Fish and Wildlife Service National Wetland Inventory), available at <http://www.epa.gov/305b/2000report/>.

198. *Id.*

199. *Id.*; see *id.* at 45 fig. 5-4.

200. *Id.* at 1.

permit program and other regulations, the CWA has a long way to go towards effectuating its goal.

B. Possible Impacts on other CWA Discharge Programs

Rapanos could possibly negatively impact other CWA discharge programs. As mentioned in the introduction to this Note, the Clean Water Act operates two separate permit programs for pollutant discharges.²⁰¹ Section 404, the subject of *Rapanos*, regulates permits for dredge or fill material into navigable waters.²⁰² CWA § 402 authorizes permits for the discharge of other pollutants or combinations of pollutants.²⁰³ The definition of “navigable waters” (“the waters of the United States”) at issue in *Rapanos* also applies to the § 402 program.²⁰⁴ If the result in *Rapanos* (that a permit is required only when a “significant nexus” exists between a non-navigable wetland and navigable waterway or tributary thereof) applies to § 404 permits, that same result may apply equally to § 402.²⁰⁵ According to Former Attorney General Benjamin Civiletti,

[t]he term “navigable waters” . . . is a linchpin of the Act . . . , critical to not only the coverage of 404, but also to coverage of the other pollution control mechanisms established under the Act, including the 402 permit program for point source discharges, the regulation of discharges of oil and hazardous substances in 311 . . . and the regulation of discharges of vessel sewage in 312.²⁰⁶

If *Rapanos* were to extend to other provisions of the CWA, what would be the result? Under the plurality’s analysis, the discharge of a pollutant into a non-navigable wetland under a §

201. See *supra* Part II.A.

202. 33 U.S.C. § 1344(a) (2006).

203. *Id.* § 1342(a)(1).

204. *Id.* § 1362(7) (noting that the definitions in § 502 apply, “[e]xcept as otherwise specifically provided, when used in [this] Act” (emphasis added)).

205. This is, of course, assuming that one could actually determine what a significant nexus is in each given situation.

206. 43 Op. Att’y Gen. No. 15, 5 (Sept. 5, 1979), *quoted in* Lance D. Wood, *Don’t be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to their Adjacent Wetlands*, 34 ELR 10187, 10195 (2004).

402 permit would face the same test as that under § 404. A polluter would be required to get a permit if a continuous surface connection exists between the wetland and a navigable-in-fact body of water or tributary thereof. This means that other CWA regulated pollutants, such as solid waste, incinerator residue, sewage, garbage, sewerage sludge, munitions, chemical wastes, biological materials, radioactive materials, and industrial and agricultural waste²⁰⁷ could be exempt from the permit requirement by being dumped into a wetland adjacent to, but without a continuous surface connection to, a navigable waterway. Such a result is not an unlikely occurrence; under the § 402 program, approximately twenty-seven percent of the permits for major industrial dischargers are discharges into intermittent or ephemeral streams, the two smallest categories of non-navigable tributaries.²⁰⁸

Exempting non-navigable tributaries and adjacent wetlands from the § 402 permit requirements provides a perverse incentive for companies to dump waste into those unregulated areas, free from the economic restraints of permitting and monitoring. When one is discussing sediment from filling a wetland, relaxing the permit requirements for non-navigable wetlands and tributaries may not seem so environmentally detrimental. However, when one is discussing the discharge of radioactive materials or incinerator residue, which will wash downstream much more easily, the result is not nearly as palatable. The United States gets its drinking water both from the navigable and non-navigable part of the total tributary system. Therefore, radioactive waste dumped into the non-navigable portion of the tributary system will become part of the drinking supply and part of the fish and shellfish that we eat.²⁰⁹

207. 33 U.S.C. § 1362(6) (2006).

208. See Wood, *supra* note 206, at 10195 n.44 (citing statistics from the National Hydrography Data Set of the U.S. Geological Survey, in response to a 2003 Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States,' published at 68 Fed. Reg. 1991 (2003)). Justice Scalia posits that such discharges could be regulated as "point sources." However, this would require that the Corps prove that waste made it specifically from a tributary-point source into navigable waters, which brings about the complicated proof issues discussed previously in this Note.

209. *Id.* at 10196.

The result for the § 402 program under Justice Kennedy's approach is not necessarily better. The problems of proof and after the fact investigation exist just as under the § 404 fill permit program. An over-inclusive permitting scheme allows the Corps to regulate incinerator waste discharge into non-navigable tributaries at the source, rather than through an ad hoc approach. Also, if Plant A and Plant B both dumped incinerator waste into a non-navigable tributary, it would be difficult to determine which waste from which plant had the significant ecological effect on the navigable waterway. Perhaps a better option would be to establish a presumption that filling a non-navigable wetland or dumping waste into a non-navigable tributary creates a significant effect on an adjacent navigable waterway. This way, the burden shifts to the polluter to demonstrate that filling a wetland or dumping waste *would not* affect the navigable waterway.

Justice Scalia indicated that the *Rapanos* result may not apply to determine jurisdiction under the § 402 program. He noted that although the Court did not decide the issue, "there is no reason to suppose that our construction today significantly affects the enforcement of § 1342 [§ 402], inasmuch as lower courts applying § 1342 have not characterized intermittent channels as 'waters of the United States.'"²¹⁰ To the plurality, the fact that pollutants other than fill or dredged material naturally wash downstream is significant enough to distinguish the two programs.²¹¹ However, the CWA classifies both incinerator waste and fill material as pollutants, and one is not given a lesser permit requirement than the other because it weighs more.

The weight of a pollutant may not be enough of a distinction to prevent the Court from holding, in a future case, that its narrowed definition of "navigable waters" applies also to the § 402 permit program. However, the problem is a little less severe under the Kennedy analysis, given that one could show a "significant nexus" by proving that a pollutant travels downstream. Both the plurality and Justice Kennedy relied heavily on *SWANCC* to justify their narrowed definitions. However, *SWANCC* was not a case about wetlands or tributaries. *SWANCC* involved an isolated pond in the

210. *Rapanos v. United States*, 126 S. Ct. 2208, 2227 (2006).

211. *Id.*

middle of a gravel pit wholly in the state of Illinois that was used as a breeding ground for migratory birds.²¹² Moreover, *SWANCC*'s holding was very specific: "[w]e hold that [the regulation], as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' . . . exceeds the authority granted to respondents under § 404(a) of the CWA."²¹³ From this narrow and incredibly specific holding, both the plurality and Justice Kennedy extrapolated a rule applying to all non-navigable tributaries and adjacent wetlands. Therefore, further extrapolating *Rapanos* to cover the § 402 program is almost certain in future litigation.

C. Outcomes and Options

1. The Likely Result on Remand for Rapanos and Carabell

Depending upon the framework adopted by the Sixth Circuit (on remand) and other lower courts, John Rapanos and the Carabells would face different results.²¹⁴ Under the plurality's approach, the Corps could require a § 404 permit only if there was a continuous surface connection between Rapanos' non-navigable wetlands and the Kawkawlin River or Lake Huron. However, under Justice Kennedy's "narrower" approach, the Corps could assert jurisdiction, even without a continuous surface connection, only if filling Rapanos' wetlands would substantially hydrologically affect the Kawkawlin River or Lake Huron. The question then becomes one of how such an effect could be conclusively shown. Justice Kennedy's approach requires that the effect be shown rather than only assumed. He does not, however, discuss how such an effect may be proven. It may be that showing a probability of pollution through environmental modeling would

212. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159 (2001).

213. *Id.* at 174 (emphasis added).

214. At the time of publication, the Sixth Circuit had not yet issued a directive opinion in Rapanos' case. However, in 2007, the Sixth Circuit remanded *Carabell v. U.S. Army Corp of Engrs.*, 217 F. App'x 431 (6th Cir. 2007), to the district court with further instructions to remand to the Army Corps of Engineers for further proceedings.

be sufficient; however, further litigation would be necessary to carve out what would and would not serve as adequate proof.

For the Carabells, the result under the plurality's approach would be the opposite. The wetlands at issue in *Carabell* were separated from the nearest navigable waterway or tributary thereof by a man-made berm. Under the plurality's approach, the wetlands would not be subject to the Corps' jurisdiction because they do not share a surface water connection to the Auvase Creek or a tributary thereof. However, under Justice Kennedy's approach, if it could be conclusively shown that filling the wetlands had a substantial effect on the creek or on Lake Huron, the Corps could require a permit, even absent a surface water connection.

In both instances, if lower courts adopt the Kennedy test, even though it is technically "narrower," it seems that more wetlands would be covered. It would be almost impossible to find a situation in which filling a wetland adjacent to a navigable waterway would *not* substantially affect the navigable waterway. The fact that more waters would be covered is important when considering that the *Carabell* wetlands were separated from the navigable creek by a man-made berm. Presumably, a developer could construct a man-made barrier, like a berm, and thus avoid (or deliberately fail) the plurality's surface water adjacency requirement.

For practical purposes, EPA officers could not take an aggregate sample of the Kawkawlin River or Lake Huron and conclusively determine if additional sediment came directly from Rapanos' wetland-filling. Even if it could be done with any amount of scientific accuracy, such a measurement could only be taken after the fact—that is, after Rapanos has filled the wetlands and developed his shopping center. Even though environmental scientists use modeling to suggest pollution effects, modeling is a time consuming, expensive process that requires before-the-fact data collection.

In most cases, it seems unnecessary to show, on a case-by-case basis (such as the one Justice Kennedy advocates) that filling a non-navigable wetland would significantly affect the adjacent navigable water quality. One environmental scientist notes that "[i]t is fair to say that changes in hydrology caused by urbanization can exert complete control over a wetland's existence and

characteristics.”²¹⁵ If wetland hydrology is inextricably tied to urban development and the wetlands in question are adjacent to a navigable body of water or tributary thereof, it logically follows that substantially altering the wetland’s hydrology necessarily causes an effect on the navigable waterway. This reasoning implies that there are no situations in which a wetland would be under the Corps’ jurisdiction according to the plurality’s test (for surface water adjacency) and fail the Kennedy ecological effects test.

Even within a framework of adopting the narrowest available holding, Justice Stevens’ dissent was careful to note that in the “unlikely event” that the plurality’s test for jurisdiction was met, but not Justice Kennedy’s, lower courts should still uphold jurisdiction.²¹⁶ Given that the dissent would have agreed to uphold jurisdiction in both cases based solely on an ecological effects analysis, agreeing with the plurality would command an eight member majority.

2. Available Options

After *Rapanos*, a few options are available to correct the ambiguity. In 2003, in response to *SWANCC*, the EPA and the Army Corps of Engineers initiated an Advance Notice of Proposed Rulemaking to request public input on the meaning of “waters of the United States.”²¹⁷ The notice recognized the value of wetlands, including flood risk reduction, water quality improvement, fish and wildlife habitat, and maintenance of the hydrologic integrity of aquatic ecosystems.²¹⁸ After receiving over 130,000 comments, the Bush Administration, EPA, and Corps “reiterated the

215. *Id.* See also U.S. Env’tl. Prot. Agency, Office of Wetlands, Oceans & Watersheds, *America’s Wetlands: Our Vital Link Between Land and Water*, <http://www.epa.gov/owow/wetlands/vital/wetlands.pdf> (last visited Feb. 5, 2008). Wetlands have important filtering capabilities for intercepting runoff. As runoff water passes through, wetlands retain excess nutrients and pollutants and reduce sediment that would clog waterways and affect fish and amphibian egg development. *Id.*

216. *Rapanos*, 126 S. Ct. at 2265 n.14 (Stevens, J., dissenting).

217. Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1,991 (Jan. 15, 2003).

218. *Id.* at 1994.

Administration's commitment to the goal of 'no net loss' of wetlands" by *not* issuing a new rule, thereby "preserving the federal government's authority to protect our wetlands."²¹⁹

Three years later in *Rapanos*, Chief Justice Roberts filed a separate concurrence to discuss the failed 2003 notice, which, in his view, "went nowhere."²²⁰ He noted that the situation in *Rapanos* could have been avoided by proceeding with the notice, in which the Corps could have "plenty of room to operate in developing some notion of an outer bound to the reach of their authority."²²¹ Presumably his concurrence indicates that new regulations, if they more clearly defined the scope of "the waters of the United States," would be entitled to Supreme Court deference in future litigation. Given the failure of the recent notice, it is unlikely that another would command a different result. It is possible that the Corps and the EPA decided not to continue with the 2003 rulemaking under the belief that *SWANCC*'s holding was narrowly limited to applications of the "Migratory Bird Rule." If so, then both agencies may reconsider a rule in light of the Court's extrapolation of *SWANCC* into the totality of the § 404 program. Such a rule could create regulations to accommodate the Kennedy significant nexus test—setting up a presumption of a significant nexus when one fills or discharges in a non-navigable waterway adjacent to other covered waters. This presumption would then shift the burden to would-be polluters in order to show that the activity would not significantly affect the navigable waterway. This option eliminates some of the problems associated with *Rapanos*, such as costly and difficult enforcement.

Absent changes to the regulatory framework, Congress could step in to amend the Clean Water Act's definition of "navigable waters." The plurality noted that the underlying statute had not undergone any changes during the five past presidential

219. Press Release, EPA and Army Corps Issue Wetlands Decision (Dec. 16, 2003); U.S. Env'tl. Prot. Agency, Office of Wetlands, Oceans and Watersheds, Background Information: Advance Notice of Proposed Rulemaking on the Clean Water Act definition of "Waters of the United States", <http://www.epa.gov/owow/wetlands/guidance/SWANCC/anprm-bg.html> (last visited Feb. 5, 2008).

220. 126 S. Ct. at 2236 (Roberts, C.J., concurring).

221. *Id.*

administrations.²²² Maybe successive Congresses since the CWA's passage in 1972 felt no need to make modifications in light of the efficiency of expanding Corps regulations. However, since *SWANCC* and *Rapanos*, one Senator has prompted Congress to enter the fray with Senate Bill 912—the Clean Water Authority Restoration Act of 2005.²²³ Sponsored by Senator Russell Feingold, the legislation attempts to redefine “waters of the United States.”²²⁴ The legislation restates the purpose of the CWA (to restore integrity of the Nation's waters).²²⁵ It also notes that “small and periodically-flowing streams comprise the majority of all stream channels . . . and serve critical biological and hydrological functions that affect entire watersheds, including reducing the introduction of pollutants to large streams and rivers.”²²⁶ The legislation would strike each incidence of “navigable waters” from the CWA and insert “waters of the United States”²²⁷ (thereby eliminating that pesky “*the*” problem that Justice Scalia referred to in the plurality).²²⁸ “Waters of the United States” would be defined as:

all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.²²⁹

222. *Id.* at 2215 (plurality opinion).

223. A Bill to amend the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States, S. 912, 109th Cong. (2005).

224. *Id.* § 2(2).

225. *Id.* § 2(1).

226. *Id.* § 3(5), (7).

227. S. 912 § 5(3).

228. *See supra* Part III.C.1.

229. *Id.* § 4(3)(23). The author recognizes that the legislation may implicate the reach of Congress's power under the Commerce Clause. *SWANCC*, *Riverside Bayview Homes*, and *Rapanos* each addressed without deciding possible Commerce Clause implications. Such concerns are beyond the scope of this note. Justice Scalia noted in the opinion of the plurality that a broader

Senate Bill 912 was referred to the U.S. Senate Committee on Environment and Public Works in August 2006 and is currently awaiting debate.²³⁰

V. CONCLUSION

The famed hero of the eighties B-movie set, Swamp Thing arose from the murky depths of a marsh after a scientist's failed attempt to create an ambiguous half-plant/half-animal that could survive in the harshest conditions. Two decades later, something ambiguous has again arisen from the same murky depths—the *Rapanos* decision. With *Rapanos*, the Court set out to clarify the scope of the Army Corps of Engineers' jurisdiction over "navigable waters" in the § 404 fill permit program. What happened, however, was the opposite. The law seems more confused now than it was after *SWANCC*. Lower courts now have an ambiguous standard to determine whether or not a developer needs to apply for a fill permit.

Both the plurality and Justice Kennedy have chosen an under-inclusive view of the scope of federal jurisdiction of non-navigable wetlands. This approach is administratively and economically impracticable. Developers like *Rapanos*, who choose to gamble by not getting a permit, are now in a position to place a difficult scientific and economic burden on the Corps.

Even with the previous "over-inclusive" permitting system in place, the Nation has far to go to achieving the Clean Water Act's objective of restoring the chemical, physical, and biological integrity of the Nation's waters. Under-inclusive regulation does nothing to improve the methods to achieve that goal.

definition of "the waters of the United States" besides the one that the plurality recommended would raise serious federalism concerns. *Rapanos v. United States*, 126 S. Ct. 2208, 2260–61 (2006).

230. At the time of publication, lawmakers had reintroduced the legislation, which failed to make it past the 109th Congress. Reintroduced by Senator Feingold (and joined by nineteen others), the Clean Water Restoration Act of 2007 adopts the same definition of "waters of the United States" as proffered in the 2005 Act. The 2007 Act has been referred to the Committee on Environment and Public Works. *See* Clean Water Restoration Act of 2007, S. 1870, 110th Cong. (2007).

The Court left open two possibilities. The first possibility is that its extrapolation of *SWANCC* into the whole of the § 404 permitting program opens the door towards exporting a narrow definition of “navigable waters” to other portions of the CWA. For many environmentalists, this possibility is not pleasant. The second possibility is that the Court would extend deference to revised Corps regulations in future litigation. Revised regulations could bring the majority of non-navigable wetlands and tributaries back under the Corps’ control. In the alternative, Congressional amendment to the CWA could restore the intent of Congress to regulate the health of overall water quality. Water flows in hydrologic cycles and it is therefore necessary to control water pollution entering the waterways, rather than to mitigate the harmful effects of water pollution afterwards.

*Brandee Ketchum**

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