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Kristen L. Holm-Hansen

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**“A STREAM WOULD RISE FROM THE EARTH, AND
WATER THE WHOLE FACE OF THE GROUND”:¹
THE ETHICAL NECESSITY FOR WETLANDS
PROTECTION POST-RAPANOS**

KRISTEN L. HOLM-HANSEN*

INTRODUCTION

While elections are rarely won or lost on environmental issues, creating and voting on environmental policy is an important part of every modern legislative session. With the United States facing population growth, the effects of recent environmental disasters, and an ever-growing reliance on consumerism and technology, environmentalism is an increasingly important political issue. Industry regulation by the federal government is necessary to ensure a healthy environment for future generations, as well as to protect natural spaces and other species. Absent environmental regulation, landowners and companies would have unfettered discretion in matters such as pollution discharge and land use, leaving the environment in an extremely vulnerable position. In a capitalistic society, without the deterrent effect of the federal government’s power to prosecute and impose fines for breaches of environmental regulation, companies have little incentive to internalize the cost of pollution control. As a result, important ecosystems have been threatened by decades of lax regulations² and overtly pro-business administrations,³ necessitating significant regulatory changes.

1. *Genesis* 2:6.

* J.D. candidate, Notre Dame Law School, 2012. I would like to thank my father, who throughout his life taught me the importance of environmentalism, and took me on numerous kayaking expeditions through South Carolina wetlands.

2. See William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789–1972: Part I*, 22 *STAN. ENVTL. L.J.* 145, 199–200 (2003) (noting that since colonial times, state governments have not been adept at enforcing environmental regulations, necessitating federal environmental policies).

3. See ZACHARY A. SMITH, *THE ENVIRONMENTAL POLICY PARADOX* 22 (4th ed. 2004) (stating that the Secretary of the Interior during the Reagan administration was “openly hostile towards environmentalists” and that the administrator of the Environmental Protection Agency actually asked Congress to reduce

Whether acknowledged or not, ethical concerns are implicit in every piece of environmental regulation. When the government determines that there is a need for something such as pollution control and implements a new policy, it is inherently supporting at least one value of environmentalism. The ethical theories that drive the modern environmental movement, and subsequently public policy, illuminate the need for additional regulations. Today, one of America's most threatened landscapes is the wetlands that are vital to the overall health of the country's hydrologic system, water quality, and biodiversity.⁴ In recent years, despite the efforts of the Army Corps of Engineers ("Army Corps") and the Environmental Protection Agency ("EPA"), wetlands protection has been threatened by two Supreme Court decisions interpreting the Clean Water Act: *United States v. Rapanos*⁵ and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*.⁶ Before these holdings, the Army Corps had jurisdiction over most wetlands through permit issuance, and the EPA had regulatory authority.⁷ After almost thirty-four years of protection,⁸ many of the nation's wetlands are now vulnerable to development and destruction as a result of these recent decisions.

funding to the agency); see also Barton H. Thompson, Jr., *Conservative Environmental Thought: The Bush Administration and Environmental Policy*, 32 *ECOLOGY L.Q.* 307, 324 (2005) (arguing that the George W. Bush administration trended towards bending to industry pressure to reduce environmental protections, rather than implementing reform or new policies).

4. See Dennis W. Magee, *A Primer on Wetland Ecology*, in *WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404*, 27, 38–42 (Kim Diana Connolly et al. eds., 2005) (stating that wetlands perform functions such as storing floodwaters, improving water quality, and contributing to biodiversity).

5. 547 U.S. 715, 742 (2006) (holding that the Army Corps of Engineers did not have jurisdiction over "isolated" wetlands).

6. 531 U.S. 159, 171–73 (2001) (holding that the Migratory Bird Rule, which gave the Army Corps of Engineers jurisdiction over otherwise unprotected waters, exceeded the bounds of the agency's authority).

7. See Robin Kundis Craig, *Justice Kennedy and Ecosystem Services: A Functional Approach to Clean Water Act Jurisdiction After Rapanos*, 38 *ENVTL. L.* 635, 648 (2008) (writing that jurisdiction was often extended over wetlands as an exception despite a mainly formal classificatory approach to Clean Water Act regulation); Kenneth S. Gould, *Drowning in Wetlands Jurisdictional Determination Process: Implementation of Rapanos v. United States*, 30 *U. ARK. LITTLE ROCK L. REV.* 413, 420 (2008) (noting that prior to *Rapanos* the Army Corps of Engineers and the EPA interpreted "waters of the United States" language in the Clean Water Act broadly and regulated waters that did not fall under the category of traditionally navigable waters).

8. Thirty-four years represents the period from the passage of the Federal Water Pollution Control Act Amendments (Clean Water Act) of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended in scattered sections of Title 33) until the Supreme Court's 2006 decision in *Rapanos*, 547 U.S. at 715.

In exploring this topic, Part I of this Note surveys several leading theories of environmental ethics including deep ecology, Christian environmental ethics, and conservationism that help frame today's public policy debates regarding environmental regulation. Part II of this Note describes the current state of wetlands protection in the United States by examining a series of court decisions on wetlands protection under the Clean Water Act. Finally, in Part III of this Note, I argue that ethical concerns necessitate both the implementation of a legislative solution restoring the Clean Water Act to its full protective capacity and also show the need for increased environmental regulation generally in the United States.⁹

I. "FOR NO ONE CAN LAY A FOUNDATION OTHER THAN THE ONE THAT HAS BEEN LAID:"¹⁰ ENVIRONMENTAL ETHICS IN THE UNITED STATES

The Bible begins with the Book of Genesis and the story of Adam and Eve's expulsion from the Garden of Eden.¹¹ God tells the couple that they will now have to fend for themselves in the wilderness:

[C]ursed is the ground because of you; in toil you shall eat of it all the days of your life; thorns and thistles it shall bring forth for you; and you shall eat the plants of the field. By the sweat of your face you shall eat bread until you return to the ground, for out of it you were taken; you are dust, and to dust you shall return.¹²

For centuries, humans struggled simply to live by avoiding such dangers as wild animals, droughts, and floods. It was humanity versus the environment, a daily battle to survive and continue the existence of the human race. While natural disasters still devastate populations across the world, humanity now faces an even deadlier opponent—ourselves. With the development of technology came the advent of pollution and environmental degradation, exacerbating poverty in some regions, and threatening human health across the planet.¹³

9. See Andreen, *supra* note 2, at 146 ("[T]he federal government—when given adequate resources and the proper tools—can successfully address major environmental problems.").

10. 1 *Corinthians* 3:11.

11. *Genesis* 3:1–24.

12. *Genesis* 3:17–19.

13. See JAMES B. MARTIN-SCHRAMM & ROBERT L. STIVERS, *CHRISTIAN ENVIRONMENTAL ETHICS: A CASE METHOD APPROACH* 9–10 (2003) ("[S]uccess is a problem. What humans have done well for themselves has among other things reduced habitat for animals and plants, changed climate, polluted air and

Out of the uncertainty of humanity's continued existence and the threat to Earth's many ecosystems came various theories of environmental ethics. In the United States, environmental issues came to the forefront of public policy in the latter half of the twentieth century.¹⁴ Environmental ethics has fueled political debates, provided policymakers with a framework for conceptualizing solutions, and has helped shape the federal government's implementation of regulatory policies.¹⁵

Many philosophers wrote from a theological perspective, using religious teachings to promote conservation, while others incorporated concepts such as natural rights and humanism into environmentalism.¹⁶ Although religious-based ethics may initially seem at odds with environmentalism and conservation efforts (due to an emphasis on the value of non-human life),¹⁷ philosophers and theologians have put forth compelling arguments for the necessity of environmental protection. Larry Rasmussen argues that the Judeo-Christian tradition can use nature as a foundation for morality because God's greatness is expressed through the natural world, and its observation can lead to knowledge of God.¹⁸ Rasmussen seeks to overcome the anthropocentr-

water, and created a burden of toxic wastes for future generations. . . . What remains to be seen is whether humans can renegotiate their fit into natural ecosystems before those systems force the issue.”)

14. SMITH, *supra* note 3, at 17 (“A series of events in the 1960s brought environmental issues to the attention of the public and, eventually, policy makers. Rachel Carson published *Silent Spring* in 1962, focusing public attention on pollution A number of sensational events also increased public awareness of environmental matters. . . . On April 22, 1970, the country observed the first Earth Day.”); *see, e.g.*, Eckardt C. Beck, *The Love Canal Tragedy*, 5 EPA J. 17, 17–18 (1979) (describing the infamous Love Canal tragedy of the 1970s, which occurred after the Hooker Chemical Company sold a contaminated waste dump to a city in New York over which houses and a public school were built, resulting in severe birth defects, high levels of carcinogens, and miscarriages); George J. Church, *Exxon Valdez: The Big Spill*, TIME, Apr. 10, 1989, at 38 (describing the Exxon Valdez oil spill, the biggest environmental disaster of the 1980s, which spilled millions of gallons of oil into the Prince William Sound).

15. *See* J.B. RUHL ET AL., THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW vii (2d ed. 2010) (writing that environmental law is an interdisciplinary mix of “politics . . . and philosophy”).

16. *See generally* PAMELA SMITH, WHAT ARE THEY SAYING ABOUT ENVIRONMENTAL ETHICS? 3 (1997) (describing modern theories of environmental ethics including liberation ecotheology, naturalism, and ecofeminism); PETER S. WENZ, ENVIRONMENTAL ETHICS TODAY xi (2001) (writing about “current positions, controversies, and concepts in environmental ethics”).

17. *See* MARTIN-SCHRAMM & STIVERS, *supra* note 13, at 33 (writing that the anthropocentrism of Christianity leads to environmental concerns taking a backseat to other ethical and moral issues in modern Christian traditions).

18. Larry Rasmussen, *Ecology and Morality: The Challenge to and from Christian Ethics*, in RELIGION AND THE NEW ECOLOGY: ENVIRONMENTAL RESPONSIBILITY

ism of Judaism and Christianity through a comparative study of religions that reveals a “convergence of ‘eco’-value” that supports a Judeo-Christian environmental ethic that calls for the protection of nature through restraint and innovation.¹⁹

Another prominent theory of Judeo-Christian environmental ethics is the concept of stewardship. Stewardship is defined as “the conducting, supervising, or managing of something; especially: the careful and *responsible* management of something entrusted to one’s care.”²⁰ In *Genesis* there are two references to this concept. In *Genesis* 1:26–28, God gives dominion to humanity over the earth, and in *Genesis* 2:4–24, God asks Adam to take care of the Garden of Eden.²¹ Stewardship calls for the conservation

IN A WORLD IN FLUX 246, 250–51 (David M. Lodge & Christopher Hamlin eds., 2006) (using Thomas Aquinas and the Belgic Confession to argue for the existence of an environmental ethic found in Christian natural law).

19. According to Rasmussen, the “eco”-values include reverence for the earth and its profound cosmological processes, respect for the earth’s myriad species, an extension of ethics to include all life forms, restraint in the use of natural resources combined with support for effective alternative technologies, equitable redistribution of wealth, and the acknowledgement of human responsibility in regard to the continuity of life and the ecosystems that support life.

Id. at 267 (citing Mary Evelyn Tucker & John A. Grim, *The Emerging Alliance of World Religions and Ecology*, 130 DAEDALUS 1, 19 (2001)). Rasmussen has also created a list of shared environmental values among Christian religions:

The natural world has value in itself and does not exist solely to serve human ends. . . . The dependence of human life on the rest of nature can and should be acknowledged. . . . The well-being of humans and that of nonhuman beings is inseparably connected. There are legitimate and illegitimate uses of nature. Greed and destructiveness are condemned. Restraint and protection are commended.

Id. at 267–68 (citing Kusumita Pedersen, *Environmental Ethics in Interreligious Perspective*, in EXPLORATIONS IN GLOBAL ETHICS: COMPARATIVE RELIGIOUS ETHICS AND INTERRELIGIOUS DIALOGUE 253 (Summer B. Twiss & Bruce Grelle eds., 1998)).

20. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1154 (10th ed. 1998) (emphasis added).

21. MARTIN-SCHRAMM & STIVERS, *supra* note 13, at 102–03

In *Genesis* 1:26–28, God [says] . . . “be fruitful and multiply, and fill the earth and subdue it; and have dominion over the birds of the air and over every living thing that moves upon the earth.” In *Genesis* 2:4b–24 God forms the first human being (*Adam*) from the dust of the ground (*adama*). Then God plants a garden in Eden and puts Adam in the garden with instructions to “till it and keep it.”

See also WENZ, *supra* note 16, at 227–28 (“*Genesis* 1:24 describes the creation of animals before people: ‘And God made the beast of the earth after his kind, and cattle after their kind, and every thing that creepeth upon the earth after his kind: and *God saw that it was good.*’”) (emphasis added). Wenz goes on to argue that using a “Stewardship Interpretation” (instead of a “Master Interpre-

of resources and the protection of non-human life that can be accomplished through environmental regulation. As humanity was entrusted with the care of the planet, the natural environment must be taken care of *responsibly* and managed in a way so as to preserve what God has given.²² Applying a Judeo-Christian ethical framework to the ecological problems that plague our country illuminates the necessity for environmental regulation that can be accomplished through the legislative system.²³

Other prominent and historically influential theories of environmental ethics include deep ecology, conservationism, ecofeminism, and preservationism. Arne Naess developed deep ecology in the 1970s in response to environmental crises occurring across the nation.²⁴ Perhaps inspired by Kantian philosophy,²⁵ Naess touted the goal of deep ecology as recognizing that humans are not the only species which can be thought to be an end-in-themselves; rather, all living things are ends-in-themselves.²⁶ Naess's philosophy identified several precepts that, if followed, will enable humans to live according to the deep ecol-

tation") shows that the Bible does not promote anthropocentrism but rather "environmental synergism." *Id.* at 228.

22. *But see* WENZ, *supra* note 16, at 212 (explaining historian Lynn White's thesis on the causes of environmental degradation placed much of the blame for the current state of the environment on Christianity due to its stress on the uniqueness of humanity and the biblical message of domination); Christopher Hamlin & David M. Lodge, *Beyond Lynn White: Religion, the Contexts of Ecology, and the Flux of Nature*, in RELIGION AND THE NEW ECOLOGY: ENVIRONMENTAL RESPONSIBILITY IN A WORLD IN FLUX, *supra* note 18, at 1, 2-3 (writing that White's thesis claiming that Christians had consistently interpreted the message of Genesis as calling for subdual of the earth, leading to environmental degradation throughout the ages, influenced many).

23. SMITH, *supra* note 16, at 84 (citing U.S. CONFERENCE OF CATHOLIC BISHOPS, CATECHISM OF THE CATHOLIC CHURCH princs. 307, 373 (1994)) (writing that the Catholic Church's Catechism calls for stewardship and responsibility for environmental management, emphasizing the goodness of creation and the interdependence of creatures); *id.* at 85 ("For religious reasons contemporary Catholic magisterial voices lend support to an *ethic of sustainability*. They prescribe respectful and 'reasonable' use of nonhuman creation . . . a preservationist approach to biodiversity . . . and a *host of careful behaviors* implicit in the notion of 'stewardship.'") (emphasis added).

24. SMITH, *supra* note 16, at 6.

25. *Compare* MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 122 (2009) (quoting Immanuel Kant's basis for his philosophy: "I say that man, and in general every rational being, exists as an end in himself, not merely as a means for arbitrary use by this or that will."), *with* SMITH, *supra* note 16, at 6 (describing deep ecology as a philosophy that aims to have all living things recognized as ends-in-themselves), *and* WENZ, *supra* note 16, at 224 (describing deep ecology's platform as including the belief that both human and non-human life are intrinsically valuable).

26. SMITH, *supra* note 16, at 6.

ogy ideal.²⁷ These hypotheses include precepts such as “[s]elf-realization for all living beings” and “[n]o exploitation.”²⁸ Underlying the deep ecology philosophy is the notion that a human (the “Self”) cannot be separated from the rest of the world; therefore, all living and non-living beings are part of the “Self.”²⁹ This belief necessitates opposition to development that potentially harms non-human life and destroys biodiversity.³⁰

Like deep ecology, ecofeminism was introduced to the United States as a philosophy in the 1970s; however, rather than just identifying the need for an egalitarian relationship between humans and other life, the theory finds that the historical subordination of women has also contributed to the environmental crisis and must be remedied.³¹ Philosophers such as Carolyn Merchant have identified the defeminization of nature and the androcentrism of American society as the root of today’s environmental problems.³² In another variation of ecofeminism, philosophers have argued that the exploitation of nature actually leads to the subordination of women and minorities.³³ In either case, the solution to environmental degradation is egalitarianism among all sexes, all life forms and ecosystems, and all races.

Although deep ecology and ecofeminism were certainly influential theories in the 1970s (and in a certain respect continue to be so today), the mainstream, present-day environmentalist schools of thought are more analogous to the preservationist and conservationist movements of the early 19th century. These ethical theories, in contrast to the philosophies previously discussed,³⁴ are inherently anthropocentric. Rather than focusing on the intrinsic value of non-human (and even individual human) life, these theories advance environmentalism as a means to secure the future well-being of humanity.³⁵ The

27. *Id.*

28. *Id.*

29. *Id.* at 7.

30. WENZ, *supra* note 16, at 224.

31. SMITH, *supra* note 16, at 19–20.

32. *Id.* at 20.

33. *Compare id.* at 19 (stating that subordination of women has led to similar subordination of the environment), *with* WENZ, *supra* note 16, at 189 (explaining that the “master mentality” in Western thought was enabled through subordination of the environment, which led to technological and economic development; thus, men believed that if they could control nature they could control everything else, including women and minorities).

34. *See supra* notes 13–22 and accompanying text.

35. *Compare, e.g.*, SMITH, *supra* note 16, at 49 (describing Leopold’s “land ethic,” a non-anthropocentric environmental philosophy, as a philosophy that describes all living organisms as part of a larger system in which a human is a member, not a conqueror), *with* Paul R. Ehrlich, *Human Natures, Nature Conser-*

preservationist movement can be traced to John Muir, the founder of the Sierra Club, whose goal was to keep “natural spaces” natural by protecting certain land from human modification.³⁶ The modern-day preservationist movement can still be seen in non-governmental organizations like the Audubon Society, whose goals include the preservation of natural spaces.³⁷ Preservationists wish to protect places like natural parks because the existence of such spaces is inherently good for humanity.³⁸ The existence of the natural areas, not the use of the areas, is the intended end.³⁹ On the other hand, conservationism is based on utilitarian principles that hold that conservation is good for society as a whole.⁴⁰ The value of the land (or the conserved resources), however, is not based upon its aesthetic and/or inherent value as touted by the preservationists; rather, it is based on its usefulness for bettering humanity.⁴¹ Modern-day conservationists argue for regulatory policies in order to ensure people’s happiness now by allowing them to enjoy nature through activities like hunting and hiking, as well as for the health and pleasure of future generations.⁴²

vation, and Environmental Ethics, 52 *BIO SCIENCE* 31, 31 (2002) (“[Environmental scientists] have concluded that nature must be conserved not just for its own sake but also for the sake of *Homo sapiens* . . .”).

36. Donald Worster, *John Muir and the Modern Passion for Nature*, 10 *ENVTL. HIST.* 8, 15 (2005).

37. See, e.g., S.C. AUDUBON SOC’Y, S.C. SIERRA CLUB, & S.C. WILDLIFE FED’N, *THE TYGER RIVER DAM: DO THE ENDS JUSTIFY THE MEANS?* 13–28 (2007), <http://www.sc.audubon.org/PDFs/tygerriver.pdf> (arguing against the damming of a river which would flood the Sumter National Forest); *State Forest Campaign*, IND. FOREST ALLIANCE, <http://www.indianaforestalliance.org/state.html> (last visited Sept. 25, 2011) (asking Indiana residents to write a letter to the Division of Forestry to end commercial logging in state forests).

38. WENZ, *supra* note 16, at 68–69.

39. *Id.*

40. Christine Oravec, *Conservationism vs. Preservationism: The “Public Interest” in the Hetch Hetchy Controversy* 70 *Q. J. OF SPEECH* 444 (1984), reprinted in *LANDMARK ESSAYS: ON RHETORIC AND THE ENVIRONMENT* 17, 17 (Craig Waddell ed., 1998).

41. David Schmitz, *When Preservationism Doesn’t Preserve*, 6 *ENVTL. VALUES* 327, 327–28 (1997) (arguing that conservationists are concerned about protecting limited and precious resources while preservationists believe that wilderness is valued for more than just its resources; rather, it holds value for humanity in itself).

42. See, e.g., Richard L. Gordon, *Conservation and the Theory of Exhaustible Resources*, 32 *CAN. J. ECON. & POL. SCI.* 319 (1966) (arguing that conservationists seek to preserve resources for future generations); Martyn G. Murray, *Conservation of Tropical Rain Forests: Arguments, Beliefs, and Convictions*, 52 *BIOLOGICAL CONSERVATION* 17, 18 (1990) (identifying twenty-one different conservation arguments in various categories in a questionnaire about the justification of rainforest conservation—including aesthetic values, biological uniqueness, eco-

Philosophers, theologians, and scientists have argued for various forms of environmental protection throughout the past few decades (for various reasons); however, the path to change is not through these disciplines, but rather must come from the federal government and the judicial system.⁴³ While theorists may persuade some Americans to change their behavior, without governmental regulation, the market system will continue to ignore environmental issues at the expense of future human generations and other living species.⁴⁴ The government must take proactive steps toward improved environmental regulation in order to safeguard the country's future. Applying the preceding philosophical arguments⁴⁵ to the current legal and environmental controversy regarding isolated wetlands protection in the United States shows the ethical necessity for governmental regulation.

II. "I BROUGHT YOU INTO A PLENTIFUL LAND:"⁴⁶ WETLANDS PROTECTION IN THE UNITED STATES

Through the formation of the Environmental Protection Agency in 1970,⁴⁷ various judicial decisions,⁴⁸ and state laws,⁴⁹ the states and the federal government have begun the process of

conomic management, education and research, and moral responsibility—demonstrating that conservationists are concerned about current and future uses of natural resources and spaces).

43. *Contra* DAVID SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE* 222, (2005) (writing that the solution for today's environmental problems lies in the hands of the *state* governments, which must recognize that "(1) government should be as close to home as possible and (2) that laws should be made by elected legislators" rather than the EPA). However, Schoenbrod's approach fails to take into account the fact that environmental regulation was controlled by the states prior to the 1970s, and that such an approach perhaps would result in a "race to the bottom" as states compete to attract business through lax environmental regulations and little accountability.

44. *See* SMITH, *supra* note 3, at 8–11 (arguing that market systems frequently ignore the future value of limited resources, that the intrinsic values of resources are immeasurable in economic terms, and that externalities are often ignored).

45. *See supra* notes 10–36 and accompanying text.

46. *Jeremiah* 2:7.

47. *EPA History*, EPA, <http://www.epa.gov/aboutepa/history/> (last updated Oct. 3, 2011); *see also Superfund*, EPA, <http://epa.gov/superfund/about.htm> (last visited Sept. 24, 2011) (describing that in the 1980s Congress passed the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") of 1980 which created the Superfund Program and allows the government to clean up chemical spills throughout the country and hold accountable the polluters responsible—one of the most significant pieces of environmental legislation in the country's history).

remediating environmental degradation and preventing future harms. Federal and state regulations aim to ensure that the future health of humans will be protected through the conservation and protection of natural resources. These laws implicitly recognize the importance of stewardship and humanity's role as manager and protector. Unfortunately, however, the current state of environmental regulation leaves much to be desired, and legislative purpose does not often align with ideas about the inherent value of nature and non-human species.⁵⁰

One of the most important areas of environmental law in the United States is water regulation. Clean water is not just necessary for a healthy human population, it is also vital for the well-being of every ecosystem⁵¹ and thus must be regulated. In addition to ensuring that water is uncontaminated, the goals of water regulation should include guaranteeing that there will be *enough*

48. See *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 502 (2004) (holding that the EPA was authorized under the Clean Air Act ("CAA") to halt construction of a mine when CAA guidelines were not met); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697–98 (1995) (holding that under the Endangered Species Act, which made it illegal to "take" endangered species, it is reasonable for "take" to include habitat modification). *But see Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004) (holding that the Bureau of Land Management, the Department of the Interior, and the State of Utah were not required to control off-road vehicle use in federal wilderness study areas); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980) (holding that the National Environmental Policy Act does not require that an agency place environmental concerns above all others when making land-use decisions).

49. See, e.g., South Carolina Conservation Easement Act of 1991, S.C. CODE ANN. §§ 27-8-10 to -8-120 (2007); Washington Pesticide Control Act, WASH. REV. CODE ANN. § 15.58 (West 2004 & Supp. 2011).

50. See FRANK T. MANHEIM, *THE CONFLICT OVER ENVIRONMENTAL REGULATION IN THE UNITED STATES* (2009) (discussing the history of environmental regulation in the United States and how it can be improved through comparison with regulation in the European Union); see also *United States v. Rapanos*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); DANIEL J. FIORINO, *THE NEW ENVIRONMENTAL REGULATION IX-X* (2006) (arguing that the current method of environmental regulation is not working and offering suggestions for improvement).

51. See BRIAN J. SKINNER & BARBARA MURCK, *THE BLUE PLANET: AN INTRODUCTION TO EARTH SYSTEM SCIENCE* 468 (3d. ed. 2011) ("Water is indispensable for the biosphere."); Abdullah Al-Kandari, *The Importance of Water in the Ecosystem and Marine Crisis in the Gulf Region*, 27 *GEOJOURNAL* 353, 353 (1992) ("For terrestrial ecosystems, freshwater is vital for the survival of their biotic components Water availability for life on earth is inextricably linked with the global hydrological cycle [The] "flow" of water . . . provides sustenance for human and natural ecosystems.").

water to support human life and a healthy environment.⁵² Water's "divine significance"⁵³ is recognized in Catholicism⁵⁴ as well as throughout the Bible.⁵⁵ Thus, the concept of stewardship necessarily includes water protection.

In 1972, Congress overhauled the 1948 Federal Water Pollution Control Act, which later became known as the Clean Water Act.⁵⁶ Congress stated that the objective of the Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁵⁷ The Act aimed to reduce pollution in the nation's waters through programs such as the regulation of pollutant discharge and setting water quality standards for industries.⁵⁸ Specifically, the Act prohibited industrial and municipal facilities from discharging pollutants, dredge, or fill material into *navigable waters* pursuant to the National Pollutant Discharge Elimination System without a permit issued by the Army Corps of Engineers under section 404.⁵⁹ The Army Corps defined navigable waters "to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce."⁶⁰ The use of the term "navigable waters" in the statute has led to much of the litigation involving the Clean Water Act. As a result, courts have been called upon to

52. See, e.g., SMITH, *supra* note 3, at 122 (discussing the inefficient usage of water in the United States and that many people will, if they have not already, experience water shortages and/or contamination).

53. MARTIN-SCHRAMM & STIVERS, *supra* note 13, at 175.

54. See HENRY THEILER, *HOLY WATER AND ITS SIGNIFICANCE FOR CATHOLICS* 8 (J.F. Lang trans., 1909) ("[W]ater has an important function to perform in the realm of nature Reflect for a moment how in nature every living creature requires water . . . [a]nd as water plays its important part in nature's kingdom, so too it does in the province of grace as the blessed and holy water.").

55. See MARTIN-SCHRAMM & STIVERS, *supra* note 13, at 175–76 ("[W]ater is so fundamental to life that both creation accounts in the book of Genesis simply assume its existence. . . . [T]he biblical writers emphasize that God provides water for the flourishing of all creation, not just human life. . . . God uses water as a means" for personal (baptism), social (the parting of the Red Sea in *Exodus*), and planetary transformation (in *Genesis* as nourishment to the Garden of Eden and in *Revelations* to bring healing after the apocalypse).).

56. *Laws & Regulations: Summary of the Clean Water Act*, EPA, <http://www.epa.gov/lawsregs/laws/cwa.html> (last updated Aug. 11, 2011).

57. Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 § 101(a) (codified at 33 U.S.C. § 1344 (2006)).

58. *Id.*

59. See *id.* § 404 (codified at 33 U.S.C. § 1344 (2006)).

60. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985) (quoting 40 Fed. Reg. 31,320 (July 22, 1975)).

interpret which waters are actually protected, and determine which isolated waters *may* affect interstate commerce.⁶¹

The passage of the Clean Water Act gave the EPA and the Army Corps of Engineers jurisdiction over important waters that had previously been left to individual states to regulate. While some states already had effective regulations in place, a few going even further than the Clean Water Act, other states had not passed any comparable legislation.⁶² By requiring that potential polluters and developers apply for a permit before possibly affecting water quality, the federal government took a proactive step towards preventing environmental degradation and ecological harm.

In addition to protecting the water quality of “traditional” waters (rivers, lakes, etc.) through pollution reduction, the Clean Water Act gave the EPA the power to prevent potential developers and landowners from filling in “navigable waters.”⁶³ Thus, the federal government was able to use section 404’s permit process to prevent the destruction of the nation’s wetlands. Before the Clean Water Act’s passage, wetlands received no federal protection,⁶⁴ and as a result were left vulnerable across the United States.⁶⁵ Although the statutory term “wetlands” is vague, the Army Corps of Engineers has, through its regulatory authority, defined wetlands as “those areas that are inundated or saturated

61. Jamie J. Janisch, *Scope of Federal Jurisdiction Under Section 404 of the Clean Water Act: Rethinking “Navigable Waters” After Rapanos v. United States*, 11 U. DENV. WATER L. REV. 91, 95–96 (2008).

62. See Andreen, *supra* note 2, at 189 (writing that after World War II, and before the beginning of federal environmental regulations, many states attempted to develop or improve their water pollution control legislation and regulations); William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789–1972: Part II*, 22 STAN. ENVTL. L.J. 215, 238 (2003) (stating that prior to federal water pollution regulation, forty percent of America’s municipal waste water was untreated and the other sixty percent was “treated, but with ‘varying degrees of effectiveness.’”) (quoting *Stream Pollution Control: Hearings on S. 418 Before a Subcomm. of the Senate Comm. on Public Works*, 80th Cong. 26 (1947) (statement of Dr. Thomas Parran, Surgeon General of the United States, referring to a 1944 study)).

63. 33 U.S.C. § 1344(c).

64. Mark A. Latham, *(Un)restoring the Chemical, Physical, and Biological Integrity of Our Nation’s Waters: The Emerging Clean Water Act Jurisprudence of the Roberts Court*, 28 VA. ENVTL. L.J. 411, 419 (2010).

65. See RUHL ET AL., *supra* note 15, at 289 (“At the time of European settlement . . . the coterminous United States had approximately 221 million acres of wetlands. The most recent assessment of wetland status estimates there are 107.7 million acres of wetlands [remaining] in the coterminous United States.”); Gould, *supra* note 7, at 413 (writing that from the beginning of European settlement in the continental United States until 2008, 50% of the nation’s wetlands have been destroyed).

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 . . . includ[ing] swamps, marshes [and] bogs.”⁶⁶ Wetlands protection is a vital component of water regulation, as it provides “flood control, erosion protection, habitat for a variety of species, and pollution mitigation.”⁶⁷

In *United States v. Riverside Bayview Homes*, the Army Corps filed suit in federal court to enjoin a corporation from filling a wetland in preparation for housing construction.⁶⁸ The Sixth Circuit reversed the district court’s decision that enjoined the defendant from filling in the wetlands without a section 404 permit.⁶⁹ In its analysis, the Supreme Court deferred to the Army Corps’ definition of a wetland: “lands 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.’”⁷⁰ Reversing the Sixth Circuit’s decision, the Court decided that under the definition of “waters of the United States” as stated in the Clean Water Act, the landowner was required to get a permit before filling the land.⁷¹ The Court then found that the Army Corps’ decision to include adjacent wetlands within the protected waters of the United States was not inconsistent with Congress’s delegation of authority to the agency.⁷² The Court reserved judgment, however, on

66. Gould, *supra* note 7, at 415–16 (quoting 33 C.F.R. § 328.3(b)).

67. Latham, *supra* note 64, at 420; *see also* Gould, *supra* note 7, at 416–17 (stating that wetlands help maintain biodiversity and water quality, as well as provide water storage).

68. 474 U.S. 121, 124 (1985).

69. *Id.* at 125.

70. *Id.* at 129 (quoting 33 C.F.R. § 323.2(c) (1985)). *But see* EPA OFFICE OF WATER & OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS, AMERICA’S WETLANDS: OUR VITAL LINK BETWEEN LAND AND WATER 1–3, available at http://water.epa.gov/type/wetlands/upload/2003_07_01_wetlands_vital_wetlands.pdf (last modified July 2003) (“‘Wetlands’ is the collective term for marshes, swamps, bogs, and similar areas found in generally flat vegetated areas Wetlands are areas where water covers the soil . . . all year or for varying periods of time during the year . . .”).

71. *Riverside Bayview Homes*, 474 U.S. at 131 (“[R]espondent’s property is a wetland adjacent to a navigable waterway. Hence, it is part of ‘the waters of the United States’ as defined by 33 C.F.R. § 323.2 (1985), and if the regulation itself is valid as a construction of the term ‘waters of the United States’ as used in the Clean Water Act . . . the property falls within the scope of the Corps’ jurisdiction over ‘navigable waters’ under § 404 of the Act.”).

72. *Id.* at 133–34.

whether *isolated* wetlands (those not adjacent to other navigable bodies of water) should be protected.⁷³

In 1986, one year after *Riverside Bayview*, the EPA released the Migratory Bird Rule stating that waters of the United States will include not only navigable waters but also those “[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties” and “[w]hich are or would be used as habitat by other migratory birds which cross state lines.”⁷⁴ This regulation modified 33 C.F.R. § 328.3, authorizing the Army Corps to require that permits be issued before landowners can fill certain additional areas, thereby extending the protection and coverage of the Clean Water Act.⁷⁵

In 2001, the issue of the extension of protection afforded by the Clean Water Act was once again placed before the Supreme Court. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“SWANCC”), several Illinois municipalities intended to use a certain site for waste disposal that was covered with both “permanent and seasonal ponds.”⁷⁶ The Army Corps denied the § 404(a) permit to fill the waters based on the Migratory Bird Rule,⁷⁷ but the Supreme Court disagreed, finding that the Migratory Bird Rule exceeded the Army Corps’ jurisdiction as authorized by Congress under the Clean Water Act.⁷⁸ In doing so, the Court distinguished *Riverside Bayview*:

[O]ur holding [in *Riverside Bayview*] was based in large measure upon Congress’ unequivocal acquiescence to, and approval of, the Corps’ regulations interpreting the CWA to cover wetlands adjacent to navigable waters. We found that Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands “inseparably bound up with the ‘waters’ of the United States.” It was the significant nexus between the wetlands and “navigable waters” that informed our reading of the CWA in *Riverside Bayview Homes*.⁷⁹

Although SWANCC did not directly involve wetlands, it did have major implications for future wetlands protection. Five years later, the Supreme Court heard *Rapanos v. United States*,⁸⁰ a

73. *Id.* at 131 n.8.

74. Migratory Bird Rule, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (to be codified at 33 C.F.R. § 328.3(a)(3)).

75. *Id.*

76. 531 U.S. 159, 163 (2001).

77. *Id.* at 165.

78. *Id.* at 167.

79. *Id.* (internal citations omitted).

80. 547 U.S. 715, 719–20 (2006).

case involving isolated wetlands in Michigan. The litigation had been ongoing for twelve years, after a landowner had filled wetlands in preparation for development. The Army Corps had informed the landowner, Rapanos, that he could not fill the land without a permit as the wetlands fell within the jurisdiction of the Army Corps as “waters of the United States.”⁸¹ Writing for a plurality of the Court, Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, found that the Army Corps could not extend its jurisdiction over waters that were not permanent *and* connected on the surface to navigable waters.⁸² In its analysis, the plurality implied that the burden of attaining a permit is great,⁸³ and stated that the Army Corps “exercises the discretion of an enlightened despot relying on such factors as ‘economics,’ ‘aesthetics,’ ‘recreation,’ and ‘in general, the needs and welfare of the people.’”⁸⁴

Justice Scalia rebutted the Army Corps’ approach to defining protected waters (as water in general, not *the* waters) by citing Webster’s dictionary definition of “the waters” as requiring permanence, a feature that most wetlands lack.⁸⁵ In order to protect the decision in *Riverside Bayview*, the Court clarified that “*only* those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and [are] covered by the [Clean Water] Act.”⁸⁶ Justice Scalia recognized the potentially adverse effect the ruling will have on wetlands protection:

81. *Id.* at 719–21.

82. *Id.* at 757.

83. *Id.* at 721 (“The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.”) (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74–76 (2002)).

84. *Id.* (citing 33 C.F.R. § 320.4(a) (2004)).

85. *Id.* at 732–33 (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954))

“[T]he waters of the United States” include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in “streams,” “oceans,” “rivers,” “lakes,” and “bodies” of water “forming geographical features.” All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows None of these terms encompasses transitory puddles or ephemeral flows of water.”

(internal citations omitted).

86. *Id.* at 742.

Finally, respondents and many *amici* admonish that narrowing the definition of “the waters of the United States” will hamper federal efforts to preserve the Nation’s wetlands. . . . [But], a Comprehensive National Wetlands Protection Act is not before us, and the “wis[dom]” of such a statute is beyond our ken. What is clear, however, is that Congress did not enact one when it granted the Corps jurisdiction over only “the *waters* of the United States.”⁸⁷

Justice Kennedy’s concurring opinion in *Rapanos* used the “significant nexus” test from *SWANCC* to resolve the issue of whether an isolated wetland is protected.⁸⁸ In order for a body of water to be protected, it must “posses a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”⁸⁹ “A ‘nexus’ exists ‘if the wetlands . . . significantly affect the chemical, physical, and biological integrity of other covered waters more traditionally understood as navigable.’”⁹⁰

The lack of a majority in *Rapanos* resulted in confusion with respect to the meaning of the Clean Water Act, and the issue of wetlands protection. Now courts must choose between the “significant nexus” test proposed by Justice Kennedy, and Justice Scalia’s textual statutory interpretation based on the permanence of the water.⁹¹ Courts seem to have been applying Justice Kennedy’s test more frequently, as it generally leads to a better environmental result; however, results have been inconsistent.⁹²

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, wrote a dissent arguing that the plurality erred in its statutory interpretation, and that Justice Kennedy failed to properly defer to the Army Corps’ definitional determinations.⁹³ The dissent stated that the Army Corps’ decision to include these kinds of wetlands under its jurisdiction is a reasonable interpretation of the Clean Water Act.⁹⁴ Highlighting the expert testimony regarding the ecological importance of the wetlands in contention,⁹⁵ Justice Stevens argued that the Court’s holding in *Riverside Bayview* is controlling because the wetlands are not actually iso-

87. *Id.* at 745–46 (internal citations omitted).

88. *Id.* at 759 (Kennedy, J., concurring).

89. *Id.*

90. Jennifer L. Bolger & Edward B. Witte, *Post Rapanos: The Regulatory Miasma Engulfing Isolated Wetlands and the Clean Water Act*, 13 ABA AGRIC. MGMT. COMMITTEE NEWSL., Aug. 2009, at 8.

91. Latham, *supra* note 64, at 426–27.

92. Bolger & Witte, *supra* note 90, at 9.

93. *Rapanos*, 547 U.S. at 787–88 (Stevens, J., dissenting).

94. *Id.* at 788.

95. *Id.* at 790.

lated, and thus do not fall under the reservation stated in that case.⁹⁶ The dissent also pointed out that the plurality's reliance on *SWANCC* is misguided, because (1) the waters in that case were not wetlands, and (2) they were truly isolated waters.⁹⁷

The *Rapanos* decision has left the lower courts unclear as to what the standard is for defining a wetland. For example, in *Northern California River Watch v. City of Healdsburg*,⁹⁸ an environmental group sued a California municipality under the Clean Water Act for discharging wastewater into a pond. The Ninth Circuit found that the pond satisfied both the textual test advanced by Justice Scalia and Justice Kennedy's "significant nexus" test; therefore, the city was found to be in violation of the Clean Water Act.⁹⁹ In *United States v. Cundiff*,¹⁰⁰ the Sixth Circuit described the difficulty in applying *Rapanos*:

Parsing any one of *Rapanos*'s lengthy and technical statutory exegeses is taxing, but the real difficulty comes in determining which—if any—of the three main opinions lower courts should look to for guidance. As the Chief Justice observed: "It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis."¹⁰¹

In *Cundiff*, two landowners were sued under the Clean Water Act for filling wetlands in order to create usable farmland.¹⁰² Like in *Watch*, the court found that the Army Corps had jurisdiction under both Justice Kennedy's test and the *Rapanos* plurality's test, and thus the landowners needed a permit before filling the wetlands.¹⁰³

Cundiff and *Watch* show how courts have been able to protect isolated wetlands in spite of Justice Scalia's strict textual interpretation. Even though the waters in question in the cases were not

96. *Id.* at 729; see also *supra* notes 70–73 and accompanying text (explaining the Court's reasoning in *Riverside Bayview*).

97. *Id.* at 794–95.

98. *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 996 (9th Cir. 2007).

99. *Id.* at 1000 (stating that the pond is adjacent to a river and is actually part of a wetland, meeting the plurality test from *Rapanos*, and that the pond meets the requirements for protection under Justice Kennedy's significant nexus test).

100. 555 F.3d 200 (6th Cir. 2009).

101. *Id.* at 207–08 (citing *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring)).

102. *Id.* at 205.

103. *Id.* at 211–13.

actually connected to a navigable body of water, the courts were able to satisfy the *Rapanos* tests by interpreting the plurality's ruling broadly.¹⁰⁴ In both cases the wetlands eventually drained into a navigable adjacent body of water.¹⁰⁵ If the plurality's test had been applied as Justice Scalia most likely intended, however, the courts would not likely have been able to find that there had been a violation of the Clean Water Act.¹⁰⁶

In fact, other cases have come out differently based on similar circumstances. For example, in *Normandy Corporation v. South Carolina Department of Transportation*,¹⁰⁷ the state court had to decide whether wetlands on a parcel of land fell within the jurisdiction of the Army Corps, which would require that a permit be issued before filling. Applying both Justice Kennedy's nexus test and the plurality test, the court found that the Army Corps did not have jurisdiction, even though an adjacent river was located five miles away and a connection existed between the river and the wetlands.¹⁰⁸

The *Rapanos* decision has created uncertainty for landowners, the EPA, and the Army Corps. Following the *Rapanos* decision, and in an attempt to alleviate some of the uncertainty, the EPA published a memorandum to clarify the reach of the EPA and Army Corps' jurisdiction:

[T]he agencies will assert jurisdiction over the following waters: [t]raditional navigable waters, [w]etlands adjacent to traditional navigable waters, [n]on-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months), [and] [w]etlands that directly abut such tributaries.¹⁰⁹

104. Allyson C. Chwee, Note, *United States v. Cundiff: Sixth Circuit Decision Makes Rapanos v. United States Controversy (Navigable) Water Under a Bridge*, 43 CREIGHTON L. REV. 233, 271-73 (2009).

105. *Id.* at 272-73.

106. *Id.* at 272.

107. 688 S.E.2d 136 (S.C. Ct. App. 2009).

108. *Id.* at 148-49; see also *Pine Tree Homeowners' Ass'n v. Ashmar Dev. Co.*, No. 04-Civ-10006(LMS), at 15 (S.D.N.Y. Jan. 29, 2008) (deciding that a nine-acre lake in New York does not fall under the Army Corps's jurisdiction even though the lake is navigable).

109. Memorandum from EPA & U.S. Army Corps of Engineers, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *Rapanos v. United States & Carabell v. United States* 1 (Dec. 02, 2008), available at http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf.

The memorandum went on to list the waters whose jurisdiction will be determined on a fact-specific, case-by-case basis: “[w]etlands adjacent to non-navigable tributaries that are not relatively permanent, [and] [w]etlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.”¹¹⁰ Unfortunately, if a court decides to adopt a strict reading of the Supreme Court’s recent jurisprudence of the Clean Water Act, as it did in *Normandy*, the EPA will lack the jurisdiction to protect much of the nation’s wetlands, notwithstanding its memorandum to the contrary.

III. “THROUGHOUT THE LAND THAT YOU HOLD, YOU SHALL PROVIDE FOR THE REDEMPTION OF THE LAND.”¹¹¹

The Ethical Necessity for Restoring the Clean Water Act

As shown by the aforementioned cases,¹¹² a fact-specific basis for determining whether certain wetlands fall under the protection of the Clean Water Act is neither economically practical nor environmentally sound.¹¹³ While the EPA has pursued prosecution in many situations, and the Army Corps has attempted to deny permits to fill isolated wetlands, the agencies simply lack the resources to act as an omnipresent watchdog. Furthermore, environmental interest groups and non-profits are not able to pick up all of the slack. With the ambiguity surrounding the extent of wetlands protection, lawsuits are oftentimes rendered futile, and environmentalists are left powerless while valuable wetlands are destroyed.¹¹⁴ This continued destruction implicates the ethics underlying environmental policy.

110. *Id.*

111. *Leviticus* 25:24.

112. See *supra* notes 97–107 and accompanying text.

113. See Stephen Louthan & Steve Dougherty, *EPA and Corps Guidance on Clean Water Jurisdiction*, 37 *COLO. LAW.* 39, 43 (2008) (stating that post-*Rapanos* projects will experience delays and increased costs due to more complicated regulations necessitated by the Supreme Court’s decision and that obtaining a section 404 permit is now more complicated). But see Lakshmi Lakshmanan, Note, *The Supreme Court Wades Through the Clean Water Act to Determine What Constitutes the “Waters of the United States,”* 14 *MO. ENVTL. L. & POL’Y REV.* 371, 391 (2007), for an argument that the Court took into account the cost of a section 404 permit which increases housing costs of \$1,400 to \$7,000 dollars per unit; however, that argument did not anticipate the financial burdens of increased litigation to resolve further ambiguities and a more complicated permit process.

114. See, e.g., *Wetlands in Jeopardy*, S. ENVTL. LAW CTR. http://www.southernenvironment.org/cases/federal_water_protections/ (last updated Aug. 11, 2011) (describing how a 492-acre wetland near Charleston, South Carolina, was initially determined by the Army Corps to be isolated and therefore could be filled without a permit; Southern Environmental Law Center was only

Judeo-Christian environmental ethics call for the protection of God's creation under the concept of stewardship.¹¹⁵ Wetlands provide a habitat to a variety of species, greatly improve water quality, and protect against natural disasters such as floods and droughts.¹¹⁶ Imprudent devastation of biodiverse land that benefits all living beings violates this concept of stewardship. Wetlands destruction also contravenes Rasmussen's "eco-value" theory that seeks to undermine the anthropomorphism of today's majority approach towards environmentalism.¹¹⁷ Under the "eco-value" theory, wetlands protection is obligatory, because restraint must be employed by humans whenever possible, minimizing harm to the natural environment.¹¹⁸

Deep ecology calls for the recognition of the inherent value of non-human species, as well as the natural environment itself.¹¹⁹ Destroying valuable ecosystems for economic gain is unacceptable under a deep ecology ethic, and *must* be avoided.¹²⁰ Such destruction is an exploitation of the natural environment and fails to acknowledge the innate value of a wetland, as it exists in itself, and only looks to the land as a way to benefit humans. Similarly, ecofeminism would find the destruction of wetlands objectionable.¹²¹ Such actions continue the subjugation of the natural environment, and thus, in turn, contribute to the exploitation of women and minorities.¹²²

Conservationism and preservationism also call for wetlands protection although with, perhaps, a more tempered voice. Traditionally anthropocentric, conservationists would contend that certain wetlands, albeit not all, need to be protected in order to preserve natural resources for future generations.¹²³ Recognizing the value that wetlands provide for humans, regulation is necessary to protect valuable resources contained within such natural spaces. The continual destruction of wetlands violates the utilitarian principles of conservationism because, although such actions may be economically beneficial to a few people, the overall detriment to humanity outweighs the benefits.¹²⁴

able to save the wetlands after proving that it was connected to the Ashley River).

115. See *supra* notes 20–23 and accompanying text.

116. Latham, *supra* note 64, at 419–20.

117. See *supra* note 18 and accompanying text.

118. See *supra* note 19 and accompanying text.

119. See *supra* notes 24–30 and accompanying text.

120. *Id.*

121. See *supra* notes 31–33 and accompanying text.

122. See *supra* note 33 and accompanying text.

123. See *supra* notes 41–42 and accompanying text.

124. See *supra* note 40 and accompanying text.

Preservationism necessitates wetlands protection for the benefit of humans as well, but based on their value as natural spaces rather than on the resources they may provide.¹²⁵

Unfortunately, the Supreme Court has left the future of wetlands protection uncertain.¹²⁶ In spite of what seemed to be congressional intent to the contrary,¹²⁷ the Court has interpreted the Clean Water Act to preclude federal jurisdiction of “isolated” waters.¹²⁸ Legislative action is therefore necessary to place wetlands back within the regulatory protection of the Army Corps and the EPA. Under almost any theory of modern environmental ethics, the post-*Rapanos* regulatory scheme that has put the wetlands’ future in a precarious position is unethical. The Supreme Court is unlikely to ignore *stare decisis* and remedy the situation; therefore, Congress needs to act.

The proposed Clean Water Restoration Act would provide the solution to the problems that arose in the wake of *Rapanos*. Bills have been introduced in Congress in 2005,¹²⁹ 2007,¹³⁰ and 2009;¹³¹ however, each time it has failed to become law. The bills sought to remove the word “navigable” throughout the Clean Water Act, and also define waters of the United States 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, lakes, natural ponds, and all impoundments of the foregoing.”¹³²

125. See *supra* notes 38–39 and accompanying text.

126. Darren Springer, *How States Can Help to Resolve the Rapanos/Carabell Dilemma*, 21 TUL. ENVTL. L.J. 83, 84–85 (2007) (writing that the *Rapanos* decision has made the task of deciding whether a wetland is subject to federal protection a case-by-case determination that is unclear and ambiguous).

127. Jonathan Z. Cannon, *Words and Worlds: The Supreme Court in Rapanos and Carabell*, 25 VA. ENVTL. L.J. 277, 298 (2007) (“[Justice Stevens’ dissent] gives much greater weight to congressional purpose—and particularly the [purpose of protecting the aquatic ecosystem]—than does Justice Scalia’s [plurality opinion].”).

128. *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (“[O]nly those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands are . . . covered by the [Clean Water] Act.”).

129. Clean Water Authority Restoration Act of 2005, H.R. 1356, 109th Cong. (2005).

130. Clean Water Restoration Act of 2007, H.R. 2421, 110th Cong. (2007).

131. Clean Water Restoration Act, S. 787, 111th Cong. (2009).

132. *Id.* § 4.

The Clean Water Restoration Act would place all wetlands back under the safeguard of the Clean Water Act. It would restore the Army Corps' jurisdiction over seemingly isolated waters and allow the agency to prevent overdevelopment and the destruction of biodiversity, as well as facilitate high water quality, and mitigate the effects of some natural disasters. The Army Corps would once again have the discretion to deny a section 404 permit when a developer's plans would cause the destruction of an important ecosystem.

Alternatively, a solution could be sought through the judicial system. In 1972, Christopher Stone wrote *Should Trees Have Standing?: Law, Morality, and the Environment*, an influential text for the burgeoning field of environmental law. Professor Stone recognized that the environmental movement required more than philosophical arguments in order to initiate change—voices from the legal community had to be heard.¹³³ Inspired while teaching a first-year property class, Stone began exploring the idea of giving “nature” legal rights.¹³⁴ He came up with three criteria necessary in order to implement such a change in the legal system: “(1) a suit in the object's own name (not some human's); (2) damages calculated by loss to a nonhuman entity (not limited to economic loss to humans); and (3) judgment applied for the benefit of the nonhuman entity.”¹³⁵

Also in 1972, the Supreme Court heard *Sierra Club v. Morton*,¹³⁶ and Stone's ideas were addressed in the case briefs. The Supreme Court decided to uphold the Ninth Circuit's decision that the Sierra Club had no standing to sue for an injunction against the development of a wilderness area in the Sierra Nevada Mountains.¹³⁷ Justice Douglas, however, used Stone's ideas about environmental standing in his dissent:

133. CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?: LAW, MORALITY, AND THE ENVIRONMENT* xi–xii (3d. ed. 2010).

134. *Id.*

135. *Id.* at xii.

136. 405 U.S. 727, 731–34 (1972).

137. STONE, *supra* note 133, at xiii

After all, the Ninth Circuit reasoned, the Sierra Club itself “does not allege that it is ‘aggrieved’ or that it is ‘adversely affected’ within the meaning of the rules of standing. Nor does the fact that no one else appears on the scene who is in fact aggrieved and is willing or desirous of taking up the cudgels create a right in appellee. The right to sue does not inure to one who does not possess it, simply because there is no one else willing and able to assert it.”

Id. (quoting *Sierra Club v. Hickel*, 433 F.2d 24, 32 (9th Cir. 1970), *aff'd Sierra Club*, 405 U.S. 727)).

The critical question of 'standing' would be simplified and also put neatly into focus if we . . . allowed environmental issues to be litigated . . . in the name of the inanimate object about to be despoiled, defaced, or invaded Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. This suit would therefore be more properly labeled as *Mineral King v. Morton*.¹³⁸

Stone points out that although the idea of giving the environment standing may seem radical, not too long ago the courts refused to recognize the rights of certain groups, such as women.¹³⁹ Like a corporation, the natural environment would not have all the constitutional and legal rights of an American citizen; rather, what it would have is standing in the courts to sue for damages and injunctions when it has been harmed.¹⁴⁰ If the environment has standing, it follows that when assessing damages or deciding whether to issue an injunction, the court will consider the harm being done to the environment itself—not how humans will be affected by the action.¹⁴¹ Finally, the damages will be awarded to the natural object and not to human parties or organizations.¹⁴² Although Stone's argument did garner a following among environmentalists in the 1970s¹⁴³ and, as demonstrated by Justice Douglas's dissent in *Sierra Club*,¹⁴⁴ by some in the legal community, it did not result in the changes for which many had hoped.¹⁴⁵ However, Stone's theory could be utilized, failing congressional action, to grant wetlands protection. Under the current statutory and regulatory framework, and in light of *Rapanos* and *SWANCC*, the continued existence of an isolated wetland is at the complete discretion and mercy of the landowner. The wetland has no rights, no agency, and no guardian to advocate on its behalf. In a post-*Rapanos* world, a landowner now has the ability to fill in an isolated wetland without ever having to apply for a section 404 permit. Environmental advocates

138. *Sierra Club*, 405 U.S. at 741–42 (Douglas, J., dissenting) (internal citations omitted).

139. STONE, *supra* note 133, at 1–2.

140. *Id.* at 4, 8.

141. *Id.* at 13–14.

142. *Id.* at 16–17 (writing that awarding damages to the environment itself may require setting up a trust fund that is administered by a guardian).

143. *Id.* at 130–32, 160–64 (describing early suits filed by humans on behalf of animals).

144. See *supra* note 138 and accompanying text.

145. See STONE, *supra* note 133, at 141.

have no way to sue for an injunction to stop the filling of such a wetland, or seek damages in the event of its destruction. If courts gave standing to the natural environment, a guardian could be assigned to the wetland who would then sue the landowner on its behalf. In such a manner, isolated wetlands would receive the protection previously afforded, thereby recognizing the inherent value of the environment.

CONCLUSION

The post-*Rapanos* landscape of wetlands protection demonstrates the need for additional and stricter environmental regulations. Vague federal statutory language leaves the environment vulnerable to hostile interpretations by the courts and state governments who are responsible for implementing policies, such as water quality standards. Although the Clean Water Act is one of the most progressive pieces of environmental legislation passed to date by Congress, it has failed in many respects. While the Clean Water Restoration Act would solve the problem of vulnerability of isolated wetlands, much more needs to be accomplished before the United States' regulations are on par with other environmentally progressive countries that have recognized the dire need for environmental protections.¹⁴⁶

Ethical concepts and moral beliefs influence politicians and their constituents on a myriad of issues, such as abortion, assisted suicide, armed conflict, and same-sex marriage, and often come up in discussions regarding these political issues. Ethical arguments should likewise be invoked when discussing and conceptualizing environmental regulations, because they are an inherent part of such a debate. Under most theories of environmental ethics, and certainly under the leading ones, the need for additional wetlands protection is apparent. Whether compelled by a concept of stewardship, conservationism, or another belief, Americans have an ethical duty to protect and conserve the natural environment. Widespread campaigns advocating for public policies that will protect vulnerable areas such as wetlands are crucial before it is too late.

146. See *supra* note 50 and accompanying text.