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SCOPE OF FEDERAL JURISDICTION UNDER SECTION 404 OF THE CLEAN WATER ACT: RETHINKING "NAVIGABLE WATERS" AFTER *RAPANOS V. UNITED STATES*

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INTRODUCTION

Wetlands protection is vital to the environment and to communities.[1] Yet, "no federal legislation is specifically designed to govern the preservation and use of wetlands."[2] Instead, the United States regularly utilizes the Clean Water Act ("CWA")[3] to deal with wetlands.[4] Specifically, section 404[5] is the main legislation that the federal government uses to regulate wetlands, because it applies to activities where people "physically change waters of the United States."[6] Wetlands are often appealing to developers and farmers, who may need to change the landscape in order to fit their needs.[7] Applying section 404 to wetlands has been "controversial,"[8] mainly because in section 404, Congress subordinated private landowners' interests to environmental interests.[9] Property owners are often unsure if the section applies to their land, and determining whether it does or not can cause delay and expense.[10] Additionally, the reach of the federal government over land use and

1. RONALD KEITH GADDIE & JAMES L. REGENS, REGULATING WETLANDS PROTECTION at vii (2000).

2. *Id.* at 36.

3. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251-1387 (2000)).

4. *See* Douglas R. Williams & Kim Diana Connolly, *Federal Wetlands Regulation: An Overview, in* WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404 1, 1 (Kim Diana Connolly et al. eds., 2005) [hereinafter WETLANDS LAW AND POLICY] (characterizing § 404 as "the centerpiece of the federal government's wetlands regulatory program").

5. Clean Water Act, 33 U.S.C. § 1344 (2000).

6. Robin Kundis Craig, *Beyond* SWANCC*: The New Federalism and Clean Water Act Jurisdiction*, 33 ENVTL. L. 113, 117 (2003).

7. *See* Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 697 (1989).

8. GADDIE & REGENS, *supra* note 1, at 29.

9. *See* David H. Getches, *Foreword*, 60 U. COLO. L. REV. 685, 687 (1989); *see also* Michael K. Braswell & Stephen L. Poe, *Private Property vs. Federal Wetlands Regulation: Should Private Landowners Bear the Cost of Wetlands Protection?*, 33 AM. BUS. L.J. 179, 181 (1995) (examining whether "private landowners or the public [should] bear the cost of preserving and protecting" wetlands from a takings perspective).

10. *See* Scott L. Greeves, Note, *Federal Regulation of the Discharge of Dredged or Fill Material into Wetlands: Options and Suggestions for Land Developers*, 19 J. CORP. L. 135, 136 (1993) (stating that the CWA's application to wetlands "ha[s] a significant impact on the land development industry").

land development, topics generally fit for State regulation,[11] seems unrestrained under the CWA. The federal government's incursion into such regulation raises significant constitutional issues. This Article provides a solution that allows the CWA to remain a valid exercise of government authority, while also providing suitable protections for State rights.

The term "wetland" describes an "area in which the characteristics of the soil, vegetation, and wildlife are primarily controlled by water."[12] Although this definition is quite broad, wetlands generally include "swamps, marshes, and bogs."[13] Wetlands provide a myriad of beneficial functions to the environment and people.[14] Such functions include helping control flooding and erosion, providing unique habitat for a variety of animals, including endangered ones, and filtering water that eventually makes its way into groundwater or lakes and rivers.[15]

Private landowner's rights compete with the environmental and public interests that the CWA protects. Yet the controversy does not come from the federal government using private property to protect the environment for the public good.[16] The major contention lies with the process by which the government decides whether section 404 applies to a landowner's property. Congress delegated that decision making authority to the U.S. Army Corps of Engineers ("Corps").[17] A landowner may have difficulties determining when the Corps will require compliance with the CWA, because the CWA covers "navigable waters."[18] The Corps' decision that the CWA applies can be surprising in some situations, and to some landowners it must also appear to be arbi-

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11. *See* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 174 (2001) (recognizing "the States' traditional and primary power over land and water use"); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994) (stating that land use regulation is a "function traditionally performed by local governments").

12. Dennis W. Magee, *A Primer on Wetland Ecology, in* WETLANDS LAW AND POLICY, *supra* note 4, at 27 [hereinafter Magee].

13. GADDIE & REGENS, *supra* note 1, at 18.

14. *See* Magee, *supra* note 12, at 27; Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1244-50 (1995); Ducks Unlimited, *Habitat Conservation*, http://www.ducks.org/Conservation/Habitat/1596/HabitatHomepage.html (last visited November 18, 2007); ENVTL. PROT. AGENCY, FUNCTIONS AND VALUES OF WETLANDS (2001), http://www.epa.gov/owow/wetlands/ pdf/fun_val.pdf [hereinafter EPA WETLANDS FUNCTIONS].

15. *See* Magee, *supra* note 12, at 37-38; EPA WETLANDS FUNCTIONS, *supra* note 14.

16. This conflict exists; however, this Article will not address it. Battles between private interests and public interests are best fought and resolved in the legislature and are outside the scope of this Article.

17. *See* Clean Water Act, 33 U.S.C. § 1344(a), (d) (2000).

18. *See id. See also* Greeves, *supra* note 10, at 138-39.

trary.[19] The situation addressed in *Rapanos v. United States*[20] exemplifies the consequences that result from unclear application of the CWA.[21]

As this Article demonstrates, the CWA does not support the broad interpretations that some courts and the Corps adopted subsequent to the CWA's enactment.[22] A CWA analysis that takes into consideration constitutional issues provides a reading that discounts varying interpretations of "navigable waters" employed by courts and the Corps. This Article's clarification avoids basing the CWA's applicability solely on the "navigable waters" definition, contains the CWA within the bounds of the constitution, and preserves States' rights with regard to land use regulation.[23] Prior Commerce Clause precedent provides courts with a more stable platform for interpreting the CWA than any attempt to discern the meaning of "navigable waters." The CWA's section 404 should be read to extend federal authority only over (1) traditionally navigable waters of the United States[24] and any wetlands with an adjacent surface connection thereto and (2) attempts by landowners to discharge dredged or fill materials into other waters (including wetlands) only where such discharge will substantially affect the navigability of traditionally navigable waters.

Part I of this Article provides a brief overview of the CWA and section 404. Part II covers Congress's power over waterways and the Corps and the Supreme Court's historical interpretations of "navigable waters," including the Court's recent decision in *Rapanos*. Finally, Part III utilizes the Constitution, statutory interpretation tools, and Supreme Court precedent to set forth an interpretation of "navigable waters" that provides guidance to the Corps and courts for applying the CWA's section 404. Part III also identifies why courts should adopt this interpretation and addresses its potential consequences.

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19. *See* GADDIE & REGENS, *supra* note 1, at 37.

20. Rapanos v. United States (*Rapanos II*), 547 U.S. 715(2006).

21. *See id.* In 1994, the United States filed a civil action against John Rapanos for filling wetlands located entirely on his property without a permit and in contravention to the CWA. United States v. Rapanos (*Rapanos I*), 376 F.3d 629, 632-34 (6th Cir. 2004). Twelve years later, the legality of Rapanos's action and his ability to develop his land are still in question. *See Rapanos II*, 547 U.S. at 757 (remanding to lower court for further consideration). *Rapanos* is explored more fully in Part II.C.

22. *See* discussion *infra* Part II.B.

23. Clean Water Act, 33 U.S.C. § 1370 (stating that "nothing in [the Clean Water Act] shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States").

24. *See* discussion *infra* Part II.A.2. Traditionally navigable waters of the United States are those that "are used, or are susceptible of being used, in their ordinary condition, as highways for [interstate or foreign] commerce." The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871).

I. A BRIEF OVERVIEW OF THE CLEAN WATER ACT AND SECTION 404

Congress's amendments to the Federal Water Pollution Control Act[25] in 1972 signified its recognition of the importance that water quality has on the environment and the nation.[26] The 1977 amendments to the Federal Water Pollution Control Act resulted in the Clean Water Act ("CWA") legislation.[27] The CWA is a significant piece of federal jurisdiction dealing with water.[28] The statute protects the nation's waters by prohibiting the discharge of pollutants into those waters.[29] Under the CWA, pollutants can be "dredged spoil," and "rock, sand, [and] cellar dirt," among many other things.[30] Congress also recognized, though, that in certain situations, an absolute ban on discharge would be unreasonable and included several exceptions from the general prohibition against polluting.[31] Section 404 is one such exception, and allows the Corps to issue permits that allow "the discharge of dredged or fill material into the navigable waters."[32]

The CWA's use of the term "navigable waters" creates much of the uncertainty that surrounds section 404.[33] Section 404 allows permits for discharge "into the navigable waters."[34] The CWA defines "navigable waters" as "waters of the United States."[35] This language has led to

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25. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387)).

26. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985).

27. The 1977 legislation amended § 518 to allow the Federal Water Pollution Control Act to be commonly referred to as the Clean Water Act. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251-1387 (2000)). *See* William Goldfarb, *Changes in the Clean Water Act Since Kepone: Would They Have Made a Difference?*, 29 U. RICH. L. REV. 603, 604 n.7 (1995).

28. GADDIE & REGENS, *supra* note 1, at 28 (calling the CWA the "most significant piece of legislation affecting water quality and the regulation of waterways in the United States").

29. 33 U.S.C. § 1311(a) ("[T]he discharge of any pollutant by any person shall be unlawful.").

30. *Id.* § 1362(6). The complete list of "pollutants" includes: "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.*

31. *See id.* § 1311(a) (providing exceptions from the prohibition so long as the entity seeking to discharge complies with specified sections within the CWA).

32. *Id.* § 1344. Congress delegated the authority to issue § 404 permits to the Corps, while giving the Environmental Protection Agency ("EPA") the power to veto any decision by the Corps to issue a permit. *See id.* § 1344(a), (c). The EPA also has authority to develop guidelines for the Corps to follow when reviewing permit applications. *Id.* § 1344(b).

33. *See* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 167 (2001).

34. 33 U.S.C. § 1344(a).

35. *Id.* § 1362(7).

confusion regarding the extent to which federal power extends over various bodies of water, including wetlands. Uncertainty arises when private landowners do not know whether they are subject to the CWA because they cannot determine whether their wetlands constitute "navigable waters."[36] The interpretation provided herein eliminates this uncertainty, because it focuses on the landowner's activity. A landowner will have greater notice regarding his potential exposure to federal regulation because he can evaluate the extent of his activity and how it will change the wetland.[37]

II. NAVIGABLE WATERS BEFORE THE CLEAN WATER ACT AND "NAVIGABLE WATERS" AFTER

This Part first details the very beginnings of federal authority over navigable waters. As shown in Part III, these beginnings are important in analyzing the CWA's scope under the Commerce Clause and also provide a solid basis upon which to establish a concrete interpretation for future use. This Part also outlines the Corps' historical interpretations of "navigable waters," as well as Supreme Court decisions concerning those interpretations. The Corps' interpretations show its understanding of the expansion of federal power under the Commerce Clause. As discussed in Part III, these interpretations also highlight the Corps' apparent neglect for the language and construction of the CWA and the limits on Congress's Commerce Clause power. The Supreme Court's splintered decisions demonstrate its struggle with the CWA and "navigable waters" and provide precedent for Part III's analysis.

A. WHEN NAVIGABLE WATERS WERE THOSE THAT WERE NAVIGABLE IN FACT

Congress began exerting authority over navigable waters because of their use in interstate commerce.[38] Courts have left Congress's power

36. For purposes of the CWA, determining the definition of a wetland is not necessary because the CWA covers "waters of the United States" and does not distinguish between wetlands and waters. *See* 33 U.S.C. § 1362(7), (8) (defining "navigable waters" and "territorial seas," but not "wetlands"). Section 1344(g)(1) establishes that wetlands are properly considered "navigable waters." *Id.* § 1334(g)(1). *See also* discussion *infra* Part III.A.1.

37. Under current CWA standards, a landowner's activity may be regulated based purely on the extenuated hydrological connection between the wetland and a separate waterway several miles away. *See* Rapanos v. United States (*Rapanos II*), 547 U.S. 715, 734 (2006).

38. *See* The Daniel Ball, 77 U.S. (10 Wall.) 557, 557-60 (1871) (reviewing a federal statute requiring licenses for vessels "transport[ing] any merchandise or passengers"); Gilman v. City of Philadelphia, 70 U.S. (3 Wall.) 713, 713-15 (1865) (reviewing federal statutes defining boundaries for ports); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 447-48 (1851) (examining a federal statute extending district court jurisdiction over navigable waters).

to regulate such navigable waters practically unbounded.[39] However, courts originally recognized only those waters actually used for interstate commerce or with the potential for use in interstate commerce as navigable waters.[40] Thus, the only determination a court had to make to find that Congress had power over a body of water was whether or not that body of water was navigable in fact and whether the use or susceptible use was for interstate commerce.[41]

1. Congressional Authority Over Navigable Waters

Federal jurisdiction over navigable waters springs from the Commerce Clause.[42] The Supreme Court in *Gibbons v. Ogden*[43] held that the Commerce Clause gave Congress the power to regulate navigation.[44] However, the Commerce Clause does not give the federal government power to regulate "[t]he completely internal commerce of a State."[45] As a result, the Court held that Congress could regulate navigation related to interstate or international commerce.[46]

Later, in *Gilman v. City of Philadelphia*, the Court explained that Congress's Commerce Clause power extended to any "requisite legislation" that Congress saw fit to enact.[47] This means that Congress's jurisdiction over navigable waters is not restricted merely to the regulation of navigation upon those waters[48] but also extends to "the broad regulation of commerce granted the Federal Government."[49] So Congress can regulate navigable waters (as defined below by *The Daniel Ball*[50]) without any additional link to interstate commerce. A waterway's navigability subjects it to complete federal control.[51] This control provides the basis for the first prong of this Article's suggested interpretation of the CWA. Additionally, when Congress is acting pursuant to the Commerce Clause, not only is its authority over navigable waters abso-

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39. *See Gilman*, 70 U.S. (3 Wall.) at 724-25.

40. *See* discussion *infra* Part II.A.2.

41. *See* The Daniel Ball, 77 U.S. (10 Wall.) at 563.

42. U.S. CONST. art. I, § 8, cl. 3 (Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

43. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

44. *Id.* at 193 (recognizing that commerce "comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word 'commerce'").

45. *Id.* at 195.

46. *Id.* at 197.

47. Gilman v. City of Philadelphia, 70 U.S. (3 Wall.) 713, 724-25 (1865).

48. *See* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 426 (1940).

49. *Id.* at 426-27.

50. *See* discussion *infra* part II.A.2

51. *See Appalachian Elec. Power Co.*, 311 U.S. at 426-27 ("Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment.").

lute, but its authority over non-navigable tributaries of those waters is also quite broad with relation to maintaining navigation.[52] After the Supreme Court established Congress's power over navigable waters, a new question arose: what are navigable waters?

2. *The Daniel Ball* Defines Traditionally Navigable Waters

Because Congress enjoys a broad range of authority over navigable waters, the only limiting boundary upon the federal government's reach over waters within the States may be the federal judiciary's definition of "navigable waters."[53] Historically, use of the term navigable waters did not lead to wide disagreement. One of the earliest uses of the term came in the Supreme Court's decision in *The Daniel Ball.* There, the Court stated that navigable waters are those that "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[54] The Court distinguished "navigable waters of the United States" from those of the States noting that the former navigable waters "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries."[55] As defined in *The Daniel Ball,* navigable waters of the United States are commonly referred to as "traditionally navigable waters" or "navigable in fact."[56]

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52. *See* United States v. Grand River Dam Auth., 363 U.S. 229, 233 (1960) ("When the United States appropriates the flow either of a navigable or a nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one."); Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508, 525-26 (1941) (recognizing flood control as a valid extension of federal authority over navigable stream tributaries).

53. The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1871) (holding that Congress's Commerce Clause power over navigable waters "authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce").

54. *Id.* at 563.

55. *Id.* The mode by which commerce can be carried on includes the utilization of "[v]essels of any kind that can float upon the water." The Montello, 87 U.S. (20 Wall.) 430, 441-42 (1874).

56. The Supreme Court stated that a river is navigable in fact when it has "a capacity for general and common usefulness for purposes of trade and commerce." *Appalachian Elec. Power Co.,* 311 U.S. at 431 (Roberts, J., dissenting) (internal citations omitted). Additionally, the waterway "must be used, or available to use, for commerce of a substantial and permanent character." *Id.* at 432 (internal citations omitted). The Supreme Court has approved the Corps' traditional understanding that "'[a] determination of navigability, once made, applies laterally over the entire surface of the waterbody.'" Kaiser Aetna v. United States, 444 U.S. 164, 171-72 n.6 (1979) (citing Navigation and Navigable Waters, 33 C.F.R. § 329.4 (1978)).

B. THE CORPS' AND THE COURT'S INTERPRETATIONS OF THE CLEAN WATER ACT'S "NAVIGABLE WATERS"

Following enactment of the 1972 amendments, the Corps issued regulations in 1974 for "issuing or denying authorizations" to discharge into the "navigable waters."[57] These regulations defined "navigable waters" as waters affected by oceanic tide or waters that "are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[58] This initial definition by the Corps practically mirrors the definition of navigable waters expressed in *The Daniel Ball*.[59] The 1974 regulations also provided insight into determining which waters were "navigable waters" by further defining the nature of the commerce involved, discussing the presence of improvements to the waterway, and providing an overview of the timeline for meeting such characteristics.[60] Additionally, these regulations indicated the potential for judicial extension of authority past that of traditionally navigable waters.[61]

Judicial interpretation was not far behind the Corps' initial interpretation. The district court in *Natural Resources Defense Council, Inc. v. Callaway* declared the Corps' interpretation unlawful.[62] The court, without explanation, found that Congress meant to "assert[] federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause."[63] Although *Callaway* did not elaborate on how far the Commerce Clause would allow federal jurisdiction to expand, recent Supreme Court decisions provide that guidance.[64] These Supreme Court decisions indicate that the maximum extension under the Commerce Clause does not mean the furthest expansion

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57. *See* Navigation and Navigable Waters, 33 C.F.R. § 209.120(d) (1974).

58. *Id.* § 209.120(d)(1).

59. *See supra* Part II.A.2. Navigable waters of the United States are those that "are used, or are susceptible of being used, in their ordinary condition, as highways for [interstate or foreign] commerce." *The Daniel Ball*, 77 U.S. at 563.

60. *See* 33 C.F.R. § 209.260(e), (g), (h).

61. The regulations stated that defining navigable waters is "ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies." 33 C.F.R. § 209.260(b). Ten years after the Corps' initial interpretation, the Supreme Court held that an administrative agency's interpretation of a statute was conclusive so long as the statute was ambiguous and the agency's interpretation was reasonable. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Also of note is a regulatory provision that stated "a private water body, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities." 33 C.F.R. § 209.260(g)(1)(iii). This provision shows that the Corps recognized that the CWA extended federal jurisdiction on the basis of navigation.

62. Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

63. *Id.*

64. *See infra* Part III.A.3.

imaginable. Unfortunately, the Corps did not have that guidance following *Callaway*.

As a result of *Callaway*, the Corps issued new rules extending jurisdiction beyond traditionally navigable waters.[65] In 1975, the Corps adopted a definition that enlarged the CWA's scope over wetlands.[66] This definition asserted additional jurisdiction over intrastate waters utilized by people involved in interstate commerce.[67] The Corps' new interpretation of the CWA involved not only deciphering the language used in the CWA but also analyzing Congress's Commerce Clause power as a way to bring other waters under the scope of the CWA.[68] Yet the Corps failed to recognize the nexus between the CWA's jurisdiction and navigation. Rather than limit the activities that would trigger the CWA to those affecting navigation, the Corps brought all activities potentially affecting interstate commerce of any kind within the CWA's scope.[69] The Supreme Court deemed this reasoning erroneous in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*").[70] Part III explains further how this error conflicts with recent Supreme Court decisions requiring clear intent from Congress for such expansion.

In new regulations issued for public comment in 1977, the Corps explicitly stated that it was broadening the definition of "navigable waters" as much as constitutionally permissible based on the CWA's legislative history.[71] This broadening expanded federal jurisdiction over "waters . . . such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters [not connected to navigable waters], the degradation or destruction of which could affect interstate commerce."[72] *United States v. Riverside Bayview Homes, Inc.*[73] later assessed this interpretation, which the Corps adopted in 1978.[74]

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65. The Corps' Federal Register publication stated that its regulations were "in response to the order of" the court in *Callaway*. Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320 (July 25, 1975).

66. *Id.* at 31,324 (defining navigable waters to include "coastal wetlands, mudflats, swamps, and similar areas that are contiguous or adjacent to other navigable waters.").

67. *Id.* (defining navigable waters to include:

> [i]ntrastate lakes, rivers and streams . . . that are utilized: [b]y interstate travelers for water-related recreational purposes; [f]or the removal of fish that are sold in interstate commerce; [f]or industrial purposes by industries in interstate commerce; or [i]n the production of agricultural commodities sold or transported in interstate commerce).

68. *Id.* at 31,320.

69. *See generally id.* at 31,320-31.

70. *See generally infra* notes 86-104 and accompanying text.

71. Regulatory Program of the Corps of Engineers, 42 Fed. Reg. 37,144, 37,144 n.2 (July 19, 1977) (to be codified at 33 C.F.R. pt. 323.2) (stating such expansion was based on legislative history that pointed to Congress's attempt to make the CWA's reach as broad as possible).

72. *Id.* at 37,144.

The Supreme Court in *Riverside Bayview* reviewed a provision in the Corps' regulations that extended jurisdiction to "all wetlands adjacent to navigable or interstate waters and their tributaries."[75] The landowners in *Riverside Bayview* sought to develop land upon which the Corps had previously built a dike to stop flooding from Lake St. Clair.[76] In its review of the Corps' regulations, the Court utilized the *Chevron* deference test.[77] The Court stated that it would defer to the Corps' construction if the construction was reasonable and did not conflict with Congressional intent.[78] The Court recognized that the Corps, in determining when it had jurisdiction over a particular discharge of fill material, had the difficult task of determining the "point at which water ends and land begins."[79] The legislative history and policies behind the CWA helped the Supreme Court determine whether the Corps' interpretation was reasonable.[80]

The legislative history included a conference report regarding an amendment that would have restricted the Corps' jurisdiction under section 404 to traditionally navigable waters.[81] The Court concluded that Congress's failure to adopt the amendment showed some indication that it intended to stretch its Commerce Clause power to a point beyond traditionally navigable waters.[82] Along with the Court's deter-

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73. United States v. Riverside Bayview Homes, Inc. (*Riverside II*), 474 U.S. 121 (1985).

74. *See* 33 C.F.R. § 323.2 (1978).

75. *Riverside II*, 474 U.S. at 129.

76. United States v. Riverside Bayview Homes, Inc. (*Riverside I*), 729 F.2d 391, 392-93 (6th Cir. 1984).

77. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Under *Chevron*, a reviewing court looks to:

> whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id.

78. *Riverside II*, 474 U.S. at 131.

79. *Id.* at 132.

80. *Id.*

81. *See id.* at 136; Bradford C. Mank, *The Murky Future of the Clean Water Act After SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 ECOLOGY L.Q. 811, 836 (2003).

82. *Riverside Bayview*, 474 U.S. at 133 (noting that the term "navigable" was of "limited import"). This emphasis on the failed amendment was criticized in Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 185 (2001) (Stevens, J. dissenting). Additionally, in 2003 an amendment that would have expanded the CWA's jurisdiction failed to make its way out of the House Subcommittee on Water Resources and Environment. *See* H.R. 962, 108th Cong. (2003) (Thomas). The 2003 amendment would have removed the term navigable waters and extended jurisdiction to:

mination that wetlands had various effects on the waters around them, the Court cited the amendment's failure as additional support for holding that the Corps' interpretation extending federal jurisdiction over any "wetlands adjacent to other bodies of water over which the Corps has jurisdiction" was reasonable.[83] The Court did not examine the Corps' exertion of authority over other waters that were involved in some aspect of interstate commerce not related to navigation.[84]

In 1985, the Corps again expanded its definition of "navigable waters," this time to include wetlands adjacent to other waters over which the Corps had previously extended jurisdiction.[85] These regulations were similar to the ones considered in *SWANCC*[86] in that they asserted jurisdiction over waters without any consideration of the navigability of those waters or those waters' relationship to navigable in fact waters.[87] The regulatory provision considered by the Court in *SWANCC* was the "Migratory Bird Rule."[88] The Migratory Bird Rule extended federal authority over intrastate waters that could be used by birds traveling across state lines or birds protected by migratory bird treaties.[89] The Corps interpreted the CWA to grant jurisdiction over waters "the destruction of which could affect interstate . . . commerce" of any form.[90]

> 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.

Id. The amendment also included statements regarding the various effects that activities not related to navigability could have on interstate commerce. *Id.*

83. *Riverside Bayview*, 474 U.S. at 134-35.

84. *Id.* at 123-24 & n.2.

85. *See* Permits for Discharges of Dredged or Fill Material Into Waters of the United States, 33 C.F.R. § 323.2(a) (1985). The waters adjacent to a wetland and subject to this regulation were those: "(i) Which are or could be used by interstate or foreign travels for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purposes by industries in interstate commerce." *Id.*

86. *SWANCC*, 531 U.S. at 159.

87. *See* Definition of Waters of the United States, 33 C.F.R. § 328.3 (2006). *See also* 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, 490 (2005).

88. *SWANCC*, 531 U.S. at 164; Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (codified at 33 C.F.R. § 328.3).

89. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. at 41,217 (The Migratory Bird Rule also asserted jurisdiction over waters used "as habitat by 'endangered species'" or "to irrigate crops sold in interstate commerce."). *See SWANCC*, 531 U.S. at 164.

90. *See* Rebecca Eisenberg, Note, *Killing the Birds in One Fell Swoop:* Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 15 FORDHAM ENVTL. L. REV. 253, 266-67 (2004).

The Corps based this interpretation on the 1972 Conference Committee's Statement which stated that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations."[91]

The court of appeals held that the "'Migratory Bird Rule' was a reasonable interpretation of the Act" based on the "cumulative impact doctrine."[92] The cumulative impact doctrine allows a "single activity that itself has no discernible effect on interstate commerce [to] still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce."[93] In analyzing the Corps' Migratory Bird Rule, the Supreme Court noted the inconsistency between the Corps' original interpretation of "navigable waters" in 1974 and the expanded interpretation that the Court was considering under the Migratory Bird Rule.[94] The legislative history of the 1977 amendments did not demonstrate Congress's intent to have "navigable waters" interpreted as broadly as possible.[95] The same amendment considered in *Riverside Bayview* failed to prove such intent when considered by the Court in *SWANCC*.[96] Unconvinced that either the CWA's plain language or its legislative history provided a basis for the Corps' Migratory Bird Rule, the Court rejected expanding the CWA's reach under Congress's increasingly expansive Commerce Clause power without a clear statement from Congress.[97] Important constitutional questions raised by the Migratory Bird Rule, including the invasion on States' traditional rights over land use regulation, supported invalidating it.[98]

The rulings from *Riverside Bayview* and *SWANCC* did not fully resolve the question of how far the Corps' section 404 jurisdiction extended under the CWA. The CWA covered wetlands adjacent to traditionally navigable waters after *Riverside Bayview*.[99] But waters totally isolated from traditionally navigable waters did not fall under the CWA in *SWANCC* even if those waters played a part in interstate commerce.[100] Between these two decisions lays a large gray area that neither *Riverside Bayview* nor *SWANCC* clearly addressed.[101] Additionally, *SWANCC* sug-

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91. S. REP. NO. 92-1236, at 144 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3776, 3822.

92. *SWANCC*, 531 U.S. at 166 (citing Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 191 F.3d 845, 850-52 (1999)).

93. *Id.* at 166.

94. *Id.* at 168. The Court then held that the Corps had not produced any evidence tending to show that the Corps' interpretation of Congress's intent was incorrect in 1974. *Id.*

95. *Id.* at 168-71.

96. *Id.* at 170.

97. *Id.* at 171-74.

98. *Id.* at 174.

99. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 138-39 (1985).

100. *SWANCC*, 531 U.S. at 171-72.

101. *See* Mank, *supra* note 81, at 853-54. Such gray area includes, for example, ponds or holding basins separated from non-navigable tributaries of traditionally navigable

gested that courts consider Congress's use of "navigable" in determining jurisdiction under the CWA, reviving the importance of navigability in interpreting the CWA's jurisdiction.[102] In *Riverside Bayview*, the Court severely limited any emphasis on "navigable" in "navigable waters."[103] Yet, *SWANCC* did not determine to what extent the CWA covered various wetlands or the extent to which a body of water needed to be navigable. This lack of clarity resulted in varying interpretations at the lower court levels.[104] The Supreme Court's decision to hear the *Rapanos* case seemed to indicate that the Court would take the opportunity to provide clear guidelines.

C. SUPREME COURT'S DECISION IN *RAPANOS*

Rapanos gave the Supreme Court the opportunity to provide a clear standard for interpreting "navigable waters" and "waters of the United States" in the CWA.[105] However, the Court did not reach a majority opinion on any interpretation. Instead, Justice Scalia penned a plurality opinion.[106] This opinion vacated the court of appeals decision and remanded the case back to the lower courts.[107] Justice Kennedy concurred in the judgment only and wrote his own opinion.[108] Finally, Justice Stevens wrote one of the dissenting opinions.[109] This Part discusses the opinions and the potential consequences of the divided decision.

The Supreme Court's decision in *Rapanos* combined two cases from Michigan where the landowners sought to fill wetlands (or perform related excavation work) on their respective properties in order

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waters by man-made ditches or wetlands abutting roadside ditches that eventually deposit into traditionally navigable waters. *See generally* In re Needham, 354 F.3d 340, 345-46 (5th Cir. 2003) (holding that "the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* 'a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.'"); United States v. Deaton, 332 F.3d 698, 705-08 (4th Cir. 2003).

102. *See SWANCC*, 531 U.S. at 172 (holding that an interpretation could not be adopted that would "read[] the term 'navigable waters' out of the statute" and that Congress had its jurisdiction over traditionally navigable waters "in mind as its authority for enacting the CWA").

103. *Riverside Bayview*, 474 U.S. at 133. *See also* Mank, *supra* note 81, at 847.

104. *See, e.g., Needham*, 354 F.3d at 344-45; *Deaton*, 332 F.3d at 709-10; Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533 (9th Cir. 2001). *See also* Broderick, *supra* note 87, at 500-13; Craig, *supra* note 6, at 130-36.

105. Rapanos v. United States, 547 U.S. 715, 730 (2006).

106. *Id.* at 718 (joining Justice Scalia's opinion were Chief Justice Roberts and Justices Thomas and Alito). Chief Justice Roberts also wrote an opinion concurring with the plurality. *Id.* at 757 (Roberts, C.J., concurring).

107. *Id.*

108. *Id.* at 759 (Kennedy, J., concurring in judgment only).

109. *Id.* at 787 (Stevens, J., dissenting) (joining Justice Stevens were Justices Souter, Ginsburg, and Breyer). Justice Breyer wrote a dissenting opinion and joined Justice Stevens' opinion. *Id.* at 811 (Breyer, J., dissenting).

to commence commercial development.[110] The Army Corps of Engineers did not issue a permit to either party.[111] The wetlands at issue did not have adjacent surface water connections with navigable in fact waters. Instead, the wetlands had various connections to drains or ditches before eventually reaching navigable in fact waters.[112]

1. Justice Scalia's Plurality Opinion

The plurality opinion articulated an interpretation derived from the CWA's use of the term "waters" in "waters of the United States."[113] First, rejecting a traditional navigable waters interpretation,[114] Justice Scalia found that the CWA's use of "waters of the United States" as the definition for "navigable waters"[115] added to the scope of "navigable waters."[116] However, Justice Scalia cautioned that Congress' use of "the qualifier 'navigable' is not devoid of significance."[117] A provision in the CWA referring to "navigable waters [] other than" traditionally navigable waters[118] also suggested that "navigable waters" should "include[] something more than traditional navigable waters."[119]

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110. One party in *Rapanos* began filling one property to develop a shopping center. United States v. Rapanos, 376 F.3d 629, 632 (6th Cir. 2004). The other parties' commercial development plan was vague. *See id.* at 633. The parties in *Carabell v. U.S. Army Corps of Engineers* initially sought a permit to fill their property for the development of a "130-unit condominium complex." Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704, 706 (6th Cir. 2004). However, an administrative law judge for the Michigan Department of Environmental Quality ("MDEQ") ordered the MDEQ to issue a permit for a "112-unit alternative condominium development." *Id.* Nevertheless, the nature of both projects was commercial.

111. *Rapanos*, 547 U.S. at 763-65 (Kennedy, J., concurring in judgment).

112. Justice Scalia described one wetland as being separated from a "man-made drainage ditch" by a "4-foot-wide man-made berm" that did not allow the wetland to drain into the ditch. *Id.* at 730 (plurality opinion). The ditch then drained "into another ditch or a drain, which connects to Auvase Creek, which empties into Lake St. Clair." *Id.* Whether Auvase Creek is navigable in fact is not clear, but Lake St. Clair definitely fits within the traditional meaning of navigable waters. *Id.* The other wetlands at issue apparently did have a surface connection to a drain that eventually emptied into a traditionally navigable water. *Id.* at 762-63 (Kennedy, J., concurring in judgment). One of the wetlands may have experienced its surface connection with the drain towards which it flowed through seasonal runoff. *Id.* at 730 (plurality opinion).

113. Clean Water Act, 33 U.S.C. § 1362(7) (2000).

114. *Rapanos*, 547 U.S. at 730-31. *See supra* Part II.A.2.

115. 33 U.S.C. § 1362(7).

116. *Rapanos*, 547 U.S. at 730-31.

117. *Id.* at 731.

118. Section 404 creates an opportunity for States to set up their own permitting system for the "discharge of dredged or fill material" with the approval of the EPA Administrator. 33 U.S.C. § 1344(g)(1). This section, though, is limited to:

> [N]avigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and

Justice Scalia then focused on the CWA's use of "waters" in "waters of the United States."[120] The dictionary definition of "waters" revealed that "waters of the United States" includes "only relatively permanent, standing or flowing bodies of water."[121] According to Justice Scalia, the dictionary's definition is consistent with the traditional definition of "navigable waters" because "navigable in fact" waters must have the "ordinary presence of water."[122] That is, without the continuous presence of water, a waterway cannot support navigation. Justice Scalia also asserted that the CWA's policy of maintaining and preserving States' right support a reading narrower than the Corps' asserted authority.[123] Such a narrow reading also helps avoid any constitutional questions that may arise from the Corps' attempt to extend its authority up to the limits of the Commerce Clause.[124] Justice Scalia predicted that the CWA would not support a broad extension without Congress expressly stating that it intended such.[125] The *SWANCC* Court pronounced a similar sentiment,[126] which supports this Article's conclusion that courts must examine the CWA within the context of Congress's regulation of navigation.

Applying his interpretation of "waters of the United States" to wetlands, Justice Scalia maintained that only wetlands that had "a continuous surface connection to bodies that are 'waters of the United States' in their own right" are adjacent.[127] The CWA covers waters that provide for no "clear demarcation" between a permanent body of water and the wetlands.[128] Finally, Justice Scalia developed a two-part test for determining whether the CWA's authority extends to certain wet-

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flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto).

Id.

119. *Rapanos*, 547 U.S. at 731.

120. *See* 33 U.S.C. § 1362(7).

121. *Rapanos*, 547 U.S. at 732. The plurality found that the use of waters as opposed to water "show[ed] plainly" that navigable waters in the CWA did not "refer to water in general." *Id.* Instead, the definition for waters referred to "water 'as found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.'" *Id.* (alterations in original).

122. *Id.* at 734.

123. *Id.* at 737. The CWA's first section states that Congress intended to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

124. *Rapanos*, 547 U.S. at 738.

125. *Id.*

126. *See* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 171-74 (2001).

127. *See Rapanos*, 547 U.S. at 742. Justice Scalia uses "continuous" to mean the opposite of intermittent or occasional. *Id.* at 729.

128. *Id.* at 742.

lands.[129] The test's first part asks whether the water body connected to the wetland is "a relatively permanent body of water connected to traditional interstate navigable waters."[130] The second part requires that this connection be a "continuous surface connection" making it difficult to differentiate between the ending point of the wetland and the beginning point of the traditionally navigable waterway.[131] The plurality opinion vacated the lower court decisions and remanded the case for a determination under this test.[132]

2. Justice Kennedy's Opinion, Concurring in the Judgment

Justice Kennedy agreed with the plurality that the Court should vacate and remand the case.[133] However, Justice Kennedy did not agree with the Justice Scalia's interpretation and instead adopted a "significant nexus" approach.[134] He rejected Justice Scalia's analysis because it did not conform to the CWA's language and the Court's previous cases.[135] Justice Kennedy criticized Justice Scalia's requirement for "permanent standing water or continuous flow," because "torrents thundering at irregular flows" could just as easily pollute downstream waters as a continuous stream of considerably less volume.[136] Justice Kennedy also declined to accept the assertion that the CWA only covers wetlands with a "continuous surface connection to other jurisdictional waters."[137] Justice Kennedy appeared to overly emphasize the CWA's environmental policies in rejecting Justice Scalia's reasoning.[138] Such emphasis, although well-intentioned, does not properly give effect to the statute's language or balance with the CWA's other expressed policy of maintaining federalism.[139]

Justice Kennedy turned to *Riverside Bayview*[140] where the Court stated that the CWA applied to wetlands that had "significant effects on water quality and the aquatic ecosystem[s]" of "adjacent waterways."[141] This language would expand regulation over more wetlands than would be covered if the CWA required the wetland and other water to

129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 757.
133. *Id.* at 787 (Kennedy, J., concurring).
134. *Id.* at 759.
135. *Id.* at 768.
136. *Id.* at 769.
137. *Id.* at 772.
138. *See id.* at 767-69 ("The plurality's . . . requirement . . . makes little practical sense in a statute concerned with downstream water quality.").
139. *See infra* Part III.D.
140. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).
141. *Rapanos*, 547 U.S. at 772-73 (quoting *Riverside Bayview*, 474 U.S. at 135, n.9).

have a surface connection.[142] A significant nexus, which allows a wetland to come under the authority of the CWA, exists if the wetland "either alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[143] Because the lower courts did not appropriately address the significant nexus between the wetlands and other waters, Justice Kennedy agreed with the plurality's judgment to vacate the court of appeals decision and remand the cases for further analysis.[144]

3. Justice Stevens' Dissenting Opinion

Justice Stevens criticized both Justice Scalia's and Justice Kennedy's opinions for not giving proper deference to the Corps.[145] Employing *Chevron*,[146] Justice Stevens gave deference to the Corps' decision to assert authority over wetlands that could have potential effects on traditionally navigable waters.[147] So long as those wetlands are "bordering, contiguous, or neighboring," they still have characteristics that can affect water quality of other waters of the United States, and thus the CWA covers them.[148] Under the second *Chevron* step, Justice Stevens found the Corps' interpretation reasonable because it "advance[d] the purpose of the Act."[149] The Corps' interpretation was faithful to the CWA's language because the Corps was regulating wetlands that could control the flow of water to traditionally navigable waters and potentially affect downstream waters.[150] This connection also gave sufficient import to the CWA's use of the term "navigable waters" to permit the Corps' interpretation under the statute.[151]

D. WHERE TO GO FROM HERE

Although *Rapanos* presented the Court with a fairly suitable medium for articulating a firm standard that courts could use to evaluate future conflicts regarding the interpretation of the CWA's "navigable waters," no such standard garnered a majority. *Rapanos* failed to pro-

142. *Id.* at 742 (plurality opinion) ("[*O*]*nly* those wetlands with a continuous surface connection" to other navigable waters are adjacent and therefore covered by the CWA).
143. *Id.* at 780 (Kennedy, J., concurring).
144. *Id.* at 786-87.
145. *Id.* at 787-88 (Stevens, J., dissenting).
146. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), *supra* note 77 and accompanying text.
147. *Rapanos*, 547 U.S. at 788 (Stevens, J., dissenting).
148. *Id.* at 805-06.
149. *Id.* at 804-05.
150. *Id.* at 804.
151. *Id.* at 787-88, 805-06.

vide to landowners, courts, and the Corps clear guidance regarding the limits of federal jurisdiction under the CWA. Instead, district courts and courts of appeals now have different standards for deciding CWA cases that turn on whether the body of water or wetland falls under "navigable waters" pursuant to the CWA. The plurality opinion, although providing a clearer surface water connection test, does not carry with it the command of a majority opinion. The Corps is likely to utilize the test only to forgo determining the existence of a significant nexus when the wetland has a surface connection with a permanent body of water.[152]

As noted in *United States v. Chevron Pipe Line Co.*, applying the significant nexus test will only result in further litigation until the courts agree on a reasonable standard for the test.[153] As Chief Justice Roberts pointed out in his concurring opinion, courts will continue to evaluate most cases individually.[154] As Justice Stevens predicted in his dissent,[155] and as cases following *Rapanos* have made apparent, most courts have followed Justice Kennedy's approach.[156] However, the *Rapanos* split decision will most likely do little to stem litigation under the CWA, possibly even increasing litigation over which standard is binding.[157] Landowners will still need to invest money into administrative and judicial processes before developing their land.

III. "NAVIGABLE WATERS" DEFINED BY THE CLEAN WATER ACT AND THE CONSTITUTION

The Supreme Court's failure to present clear guidance in *Rapanos* could potentially lead to another CWA case coming before the Court. For example, one circuit could adopt Justice Scalia's interpretation while a sister circuit adopts Justice Kennedy's significant nexus approach. The same uniform law could apply to landowners in neighbor-

152. For example, a wetland with a surface water connection to a traditionally navigable water will have a *per se* significant nexus with "waters of the United States," and thus, the Corps need not show any more to bring it under federal jurisdiction.

153. United States v. Chevron Pipe Line Co., 437 F.Supp.2d 605, 613 (N.D. Tex. 2006) (holding that the significant nexus standard "leaves no guidance on how to implement its vague, subjective centerpiece").

154. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).

155. *Id.* at 810, n.14 (Stevens, J., dissenting).

156. *See, e.g.*, United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006) (remanding to the district court for further proceedings under Justice Kennedy's standard); United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006) (remanding the case to the district court for further proceedings under Justice Kennedy's standard); N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1025, 1029-30 (9th Cir. 2006) (holding that Justice Kennedy's opinion was controlling in interpreting the term navigable waters).

157. *Chevron Pipe Line*, 437 F.Supp.2d at 613 (acknowledging *Rapanos* but finding no controlling standard, therefore, utilizing pre-*Rapanos* Fifth Circuit case law to interpret navigable waters).

ing states in fundamentally different ways. This inconsistent application could benefit individuals of one state at the expense of another state. Yet the Court generally recognizes that federal regulation should prevent a discrepancy among states rather than promote it.[158] Should such a situation arise, this Article provides an interpretation of "navigable waters" that would provide lower courts with a clear rule to apply. Forgoing a wandering probe into what constitutes "waters of the United States," the navigation presented in this Article incorporates the Supreme Court's Commerce Clause framework as a means to determining jurisdiction under the CWA. This framework recognizes federal power to regulate activities substantially affecting interstate commerce. This focus on activities is the key to discerning the CWA's proper scope of jurisdiction.[159] Section 404 jurisdiction over "navigable waters" should extend only to (1) traditionally navigable waters of the United States[160] and any wetlands with an adjacent surface connection thereto and (2) the discharge of dredged or fill materials into other waters (including wetlands) only where such discharge will substantially affect the navigability of traditionally navigable waters.

A. FINDING MIDDLE GROUND BETWEEN THE CLEAN WATER ACT'S TEXT AND THE CONSTITUTION

An accurate interpretation of "navigable waters" must look to the CWA, its legislative history, and constitutional rules that guide federal power. The CWA's language and history indicate that "navigable waters" goes beyond traditionally navigable waters.[161] However, constitutional components such as federalism and the Interstate Commerce Clause force a stricter reading than what the Corps gives "navigable waters." After inspecting the factors necessary for interpreting the CWA, this Article's interpretation emerges by balancing the various considerations.

1. Traditionally Navigable Waters and Wetlands with Adjacent Surface Water Connection Thereto Are "Navigable Waters" Under the Text of the Clean Water Act

The CWA's language brings wetlands with adjacent surface water connections to traditionally navigable waters within its scope. *The Da-*

158. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 282 (1981) ("The prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause.").

159. *See* United States v. Lopez, 514 U.S. 549, 558-59 (1995).

160. *See supra* Part II.A.2.

161. Clean Water Act, 33 U.S.C. § 1362(7) (2000)). *See also* S. REP. NO. 92-1236, at 144 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3776, 3822.

niel Ball first recognized traditionally navigable waters.[162] The CWA allows states to implement permitting programs over "navigable waters" except those that are traditionally navigable and the "wetlands adjacent thereto."[163] Thus, the CWA is clear that "navigable waters" covers traditionally navigable waters and wetlands with adjacent surface water connections to such waters. Extending jurisdiction over wetlands with an adjacent surface water connection to traditionally navigable waters resolves the inherent difficulty of distinguishing when aquatic geographic features no longer constitute "waters."[164] The CWA should cover adjacent wetlands with a surface water connection to traditionally navigable waters because deciding where one waterway becomes a separate non-navigable waterway is nearly impossible when the wetland connects the traditionally navigable water with land. Additionally, one can presume that any activity taking place with regard to the wetland has a substantial effect on the navigability of the waterway, especially when considered in the aggregate, because the water from the wetland is the same water that makes up the traditionally navigable waterway.

2. Congressional Use of the Term "Navigable Waters"

The Supreme Court has struggled with the CWA's extension over "navigable waters,"[165] defined as "waters of the United States."[166] As expressed in *SWANCC*, Congress most likely "intended the phrase 'navigable waters' to include 'at least some waters that would not be deemed

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162. *See supra* Part II.A.2.

163. 33 U.S.C. § 1344(g)(1).

164. *See id.* In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985), the Court noted that:

> [T]he transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs – in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

165. *See* 33 U.S.C. § 1311(a) (the "discharge of any pollutant by any person shall be unlawful"); § 1362(12) (defining "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source"); § 1344(a) (authorizing permits for "discharge[s] . . . into the navigable waters").

166. *Id.* § 1362(7). The Court initially seemed to restrict that term's importance in *Riverside Bayview*, finding that "the Act's definition of 'navigable waters' as 'the waters of the United States' [to be] of limited import." *Riverside Bayview*, 474 U.S. at 133. Then, in its decision in *SWANCC*, the Court gave more meaning to the use of "navigable waters" by stating that the term showed that Congress was mindful that traditional federal jurisdiction over waters came from the navigability of such waters. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 171 (2001). In *Rapanos*, Justice Scalia stated for the plurality that the "qualifier 'navigable' is not devoid of significance." Rapanos v. United States, 547 U.S. 715, 731 (2006). Justice Kennedy found that the word "navigable" "must be given some effect." *Id.* at 779 (Kennedy, J., concurring).

'navigable' under the classical understanding of that term.'"[167] In order to exert legislative power under the Commerce Clause, Congress needed to base the CWA on an area which fell under its Commerce Clause power.[168] Congressional power over traditionally navigable waters is practically limitless. Thus, enlisting its power over traditionally navigable waters in the CWA, Congress could regulate traditionally navigable waters to prohibit discharge of pollutants into those waters.[169] Yet, the terms of the CWA and its legislative history indicate that Congress intended the CWA to extend authority beyond traditionally navigable waters.[170] How far beyond traditionally navigable waters Congress intended to extend the CWA is not inherently clear, but the explanation below provides an answer.

Justice Scalia's interpretation[171] failed to refine jurisdiction under the CWA. Interpreting "navigable waters" as support for an "ordinary presence of water" means "navigable waters" allows jurisdiction over any waters, regardless of whether they are navigable, potentially navigable, non-navigable, isolated, interstate or intrastate, as long as the waterway is not temporary. Thus, Justice Scalia's emphasis on "navigable waters" provides little insight into the jurisdiction of the CWA, because it only distinguishes between temporary water flows and relatively permanent bodies of water.[172] This distinction draws nothing from the term "navigable;" rather it draws mainly from "waters," which the definition also uses.[173]

Justice Kennedy's position that "jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense" is also unnecessary.[174] Justice Kennedy basically argues that if a waterway comes under the CWA's jurisdiction based on his significant nexus test, then the waterway is sufficiently "navigable."[175] This step seems unnecessary and

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167. *SWANCC*, 531 U.S. at 171 (quoting *Riverside Bayview*, 474 U.S. at 133).

168. *See supra* Part II.A.1.

169. *See* 33 U.S.C. § 1311(a).

170. *See* 33 U.S.C. § 1362(7). *See also* S. REP. NO. 92-1236, at 144 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3776, 3822 ("[T]he term 'navigable waters' [should] be given the broadest constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.").

171. Justice Scalia stated that Congress's utilization of "navigable" in the operative term "includes, at bare minimum, the ordinary presence of water." *Rapanos*, 547 U.S. at 734 (plurality opinion). In *Rapanos*, Justice Scalia, although noting that the use of "navigable" was not without "significance," first stated that it was unnecessary to determine to what extent Congress's use of "navigable" "restrict[ed] the coverage of the Act." *Id.* at 731.

172. *Id.* at 734.

173. 33 U.S.C. § 1362(7) ("The term 'navigable waters' means the *waters* of the United States.") (emphasis added).

174. *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring).

175. *See id.* at 780.

merely alleviates the past practice of appointing some emphasis to "navigable waters" rather than solely depending on the CWA's definition. A court's focus should be on the definition and the factors that determine the extent to which Congress can regulate waterways. Rather than grant influence to the term "navigable waters," this Article's interpretation merely recognizes that Congress used the term as a signal for indicating the source of its regulatory authority.

3. Waters of the United States

As shown above, determining federal jurisdiction under the CWA requires more than interpreting the term "navigable waters," because the CWA defines the term as "waters of the United States."[176] The definition is important because it is controlling.[177] Unfortunately, "waters of the United States" seems to offer no more guidance than "navigable waters."[178] One effect of Congress having used "waters of the United States" is that the CWA distinguishes between national waters and state waters.[179] The CWA does not purport to regulate navigable waters that have no potential for use as highways in interstate commerce. Thus, courts cannot base federal jurisdiction on the navigability in fact of completely in-state waters that have no connection to traditionally navigable waters.[180]

Another effect of the phrase "waters of the United States" is that it conveys a broader meaning than "navigable waters of the United

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176. 33 U.S.C. § 1362(7).

177. *See* United States v. Rowland, 464 F.3d 899, 905 (9th Cir. 2006) ("When a word is defined in a statute, courts are not at liberty to look beyond the statutory definition.") (quotations omitted). This arguably includes not looking to the signaling term that Congress used to refer to the definition. *See also* Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, *unless otherwise defined*, words will be interpreted as taking their ordinary, contemporary, common meaning.") (emphasis added).

178. Even if a term is defined, the *definition* can still require interpretation. *See* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:07 (6th ed. 2000).

179. "Navigable waters of the United States" refers to traditionally navigable waters, i.e., waters navigable in fact that can be used for interstate commerce. *See* Kaiser Aetna v. United States, 444 U.S. 164, 166 n.1 (1979) (describing "navigable waters of the United States" as "navigable in fact, and used for commerce").

180. The Commerce Clause only covers interstate and foreign commerce, it does not cover completely in-state navigable waters that have no potential use as highways for interstate or foreign commerce based purely on their being navigable in fact. But a navigable in fact waterway may be completely intrastate yet still subject to federal government regulation when, through its connection with other navigable in fact waters, it forms a highway used in interstate commerce. *See* The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1870) (noting that the Grand River, which is completely within the State of Michigan, was a traditionally navigable water because of its connection to Lake Michigan). *See also supra* Part II.A.2.

States."[181] By defining "navigable waters" as "waters of the United States," Congress's intent to expand CWA jurisdiction over more than just traditionally navigable waters is apparent. Congress's use of a general term to define a narrow term signals a more expansive reading.[182] Structural aspects of the CWA support the idea that Congress intended a broad reading when it chose "waters of the United States" to further define "navigable waters."[183] As noted by Justice Scalia in *Rapanos*, section 404(g)[184] shows that Congress acknowledged that "navigable waters" included more than those traditionally navigable.[185] Congress did this by specifically pulling waters within the jurisdiction of the CWA that are not traditionally navigable waters.[186] Finally, the CWA's legislative history shows that at least some in Congress intended that courts interpret "navigable waters" as broadly as the constitution will allow.[187]

The conclusion is that Congress intended "navigable waters" to refer to its Commerce Clause power over traditionally navigable waters but at the same time, also intended the CWA to extend beyond those traditionally navigable waters. The distinction between navigable waters of the United States (traditionally navigable waters) and waters of the United States is important because Congress has varying powers over each category. Its authority over navigable waters of the United States is plenary.[188] However, Congressional authority over additional waters—those that make up the difference between traditionally navigable waters and waters of the United States—is limited.[189] Congress cannot regulate those additional waters as channels of commerce because no one uses them to transport commerce.[190] Congress can, however, regulate activities bearing a relationship to those waters but only if the activities substantially affect interstate commerce.[191] Folded into this power to regulate activities substantially affecting commerce is

181. Navigable waters of the United States usually refers to traditionally navigable waters. *See* Rapanos v. United States, 547 U.S. 715, 792 (2006); *see also* 33 U.S.C. § 1362(7) (defining "navigable waters" as "waters of the United States, including the territorial seas.") The Court in *Riverside Bayview* found that by further defining navigable waters Congress intended to exert authority over waters "that might not satisfy traditional tests of navigability." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985).

182. *See* JAMES WILLARD HURST, DEALING WITH STATUTES 57 (1982) ("[W]here a statute uses generic rather than specific words there seems reason to presume that the legislature intends an expansive rather than a restrictive reading.").

183. United States v. Lanier, 520 U.S. 259, 267-68 n.6 (1997) ("The legislative intent of Congress is to be derived from the language and structure of the statute itself . . . .").

184. Clean Water Act, 33 U.S.C. § 1344(g)(1).

185. *Rapanos*, 547 U.S. at 734.

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

187. *See supra* note 170 and accompanying text.

188. *See supra* Part II.A.1.

189. *See Rapanos*, 547 U.S. at 731-32.

190. Craig, *supra* note 6, at 121.

191. *See infra* note 198 and accompanying text.

Congress's ability to regulate non-navigable waters with regard to such waters' potential to affect the navigability of traditionally navigable waters.[192] But non-navigable waters are immune from Congressional regulation if they are free from activities that substantially affect interstate commerce.[193]

This conclusion is born from cases that extended Congress's power over non-navigable tributaries.[194] Those cases concentrate on the activity that Congress has chosen to regulate. For example, in *Federal Power Commission v. Union Electric Co.*, the Supreme Court held that Congress had the ability to oversee dam construction on non-navigable waterways where the dams produced electricity for interstate transmission.[195] Congress's clear authority over interstate electricity transmission allowed it to regulate the electricity producing activity even when the activity involved a waterway over which it did not have plenary powers.[196] Importantly, the Court did not say that Congress would have been able to construct the dam irrespective of its purpose. The Commerce Clause, by extending power to Congress through navigation, does not grant wholesale federal regulation of non-navigable waters.[197]

This interpretation bears scrutiny under more recent Commerce Clause cases. One of the three categories over which Congress enjoys Commerce Clause power is "activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce."[198] If the activity Congress chooses to regulate meets this test, then the regulation is constitutional regardless of whether the activity is purely an intrastate activity.[199] Accordingly, courts should base the CWA's jurisdiction with respect to waters that are not traditionally navigable on the activity that the Corps is attempt-

192. *See* Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508, 525-26 (1941) (extending federal regulatory control over a non-navigable tributary of a traditionally navigable water via analogy to federal control over non-navigable portions of a traditionally navigable water).

193. *See infra* note 197 and accompanying text.

194. *See* Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 252-53 (2006) ("[T]he Commerce Clause justified federal authority over seemingly any water-related activity with a connection to commerce, 'quite without regard to the federal control of tributary streams and navigation.'") (quoting Fed. Power Comm'n v. Union Elec. Co., 381 U.S. 90, 94 (1965)).

195. *Fed. Power Comm'n*, 381 U.S. at 94.

196. *See id.*

197. *See* Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979) (describing Congress's Commerce Clause power over activities affecting interstate commerce as one existing "irrespective of whether navigation, or, indeed, water, is involved."). When one takes away the activity, Congress's authority to regulate goes with it.

198. United States v. Lopez, 514 U.S. 549, 558-59 (1995). The other two categories are "channels of interstate commerce . . . [and] instrumentalities of interstate commerce, or persons or things in interstate commerce . . . ." *Id.* at 558.

199. *See id.* at 559-60.

ing to regulate. Under this inquiry, the focus is on the activity's effects rather than on where the activity happens.

The *Lopez* categories fit nicely with Congress's undisputed power to extend federal jurisdiction over traditionally navigable waters.[200] Traditionally, the Court defined navigable waters as waters that are navigable in fact or which "are susceptible of being used" as channels of interstate commerce.[201] As a result, the Commerce Clause framework correctly acknowledges Congress's ability to regulate these waters with little, if any, limit.[202] Congress's only concern needs to be about whether an activity substantially affects interstate commerce when the regulation is not over channels of interstate commerce (or instrumentalities of interstate commerce).[203] That is, when Congress regulates channels of interstate commerce, it need not concern itself with making sure it is regulating an activity substantially affecting interstate commerce.[204] Yet, when Congress moves outside the channels, it must then look to activities that substantially affect interstate commerce.[205] For example, the Commerce Clause gives Congress the authority to regulate non-navigable tributaries that flow into traditionally navigable waters based on the tributaries' potential to affect navigability of traditionally navigable waters.[206] Classifying the regulation imposed on those tributaries as regulation imposed on an activity that substantially affects interstate commerce assists in understanding this reading. Remembering that interstate commerce comprehends navigability,[207] when an activity substantially affects navigation, it affects interstate commerce. Accordingly, Congress can properly regulate activities on non-navigable tributaries when those activities substantially affect navigation, but it cannot regulate non-navigable tributaries independently.

If Congress can regulate any activity substantially affecting interstate commerce, then why should one interpret the CWA more narrowly to regulate only those activities affecting navigation? The answer lies in the CWA's language. The CWA covers activities that, without further expression by Congress of their substantial effect on interstate commerce, can only be a proper extension of Commerce Clause power

200. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1870).

201. *Id.* at 563.

202. *See Lopez*, 514 U.S. at 558 ("Congress may regulate the use of the channels of interstate commerce."). *See also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964) (noting that Congress's broad power over channels of commerce is without dispute).

203. *See Lopez*, 514 U.S. at 559.

204. *See id.* at 558.

205. *See id.* at 559.

206. *See* Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508, 525-26 (1941) (holding that Congress has the power to enact flood control measures with regard to a non-navigable tributary of the Mississippi River because such flooding has the potential to affect interstate commerce on the Mississippi River).

207. *See supra* notes 43-44 and accompanying text.

if Congress is exercising its plenary power over traditionally navigable waters.[208] In other words, the federal government is exercising its Commerce Clause powers over channels because the CWA does not require that the activities substantially affect interstate commerce nor are the activities inherently related to interstate commerce absent their effect on waterways. Without a jurisdictional directive,[209] the CWA cannot boundlessly move beyond waters that Congress can regulate by its channels of commerce power.[210] Because Congress utilized its plenary powers over traditionally navigable waters and also intended to extend the CWA's jurisdiction beyond those waters, any extension must flow from that plenary power. As shown above, that plenary power includes regulating activities on non-navigable tributaries that could affect the navigability of a traditionally navigable waterway. Regulation not over channels or instrumentalities of commerce must be over "activities having a substantial relation to interstate commerce;"[211] so to stay within the Commerce Clause framework and maintain a nexus to the authority under which Congress acted, courts should read the CWA to extend to activities that will substantially affect a traditionally navigable waterway's navigability.[212]

Further support that the CWA does not extend to every water-related activity with a substantial relation to interstate commerce is the Supreme Court's rejection of this reasoning in *SWANCC*.[213] If the CWA does not extend to all activities substantially affecting interstate commerce that involve non-navigable isolated waters, then the CWA cannot be read to extend jurisdiction to activities on non-navigable tributaries without regard to the activities' effects on navigation. An activity involving an isolated wetland or pond to has the same potential to affect interstate commerce without relation to navigability as the same activity taking place on a non-navigable tributary. That is, the only difference

208. Clean Water Act, 33 U.S.C. § 1344(b)(1) (2000) (stating that section 1344 guidelines should be based on criteria enumerated in § 1343(c), covering discharges into the ocean). Section 1343(c)'s criteria are based mainly on the "degradation" of the waters. *Id.* § 1343(c)(1). For example, § 1343(c) states that guidelines "shall include . . . the effect of disposal of pollutants on . . . plankton, fish, shellfish, wildlife, shorelines, and beaches . . . [and] on marine life . . . ." *Id.* Section 1344 also gives the EPA veto options over permits when "the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." *Id.* § 1344(c).

209. *See Lopez*, 514 U.S. at 561-62 (1995) (discussing reading a jurisdictional element into a statute to avoid constitutional questions).

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

211. *Lopez*, 514 U.S. at 558-59.

212. Interstate commerce encompasses navigation, so an activity affecting navigability can properly be characterized as one affecting interstate commerce. *See* Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508, 523 (1940).

213. *SWANCC*, 531 U.S. at 173-74.

between a non-navigable tributary and an isolated pond, which *SWANCC* held not to be under the CWA's jurisdiction, is the tributary's capability to affect the navigability of the traditionally navigable waterway.[214] If the CWA indeed gave the federal government regulatory power over any and all activities affecting interstate commerce that involved non-navigable tributaries, then courts would inevitably extend that jurisdiction to isolated waters. Courts would base an extension of jurisdiction over non-navigable tributaries, beyond that relating to the tributaries' potential to affect navigability of navigable in fact waters, purely on the potential to affect interstate commerce without regard to navigability. Thus, any activity involving water that affected various facets of interstate commerce would make such water "navigable" under the CWA. If the CWA extended this power to non-navigable tributaries, then isolated waters would also come under this umbrella. This is contrary to the holding in *SWANCC*.[215]

Take for an example the Migratory Bird Rule.[216] Up until the *SWANCC* decision, the EPA and the Corps interpreted the CWA to extend federal jurisdiction over waters on which any activity that had the potential to affect interstate commerce took place.[217] The Court in *SWANCC* invalidated the Migratory Bird Rule because Congress did not intend to stretch its power to the questionable extent of the Commerce Clause.[218] Indeed, in *SWANCC*, the Court correctly held that to exert federal power over isolated waters, Congress would need to state explicitly that such regulated activity had the potential to substantially affect interstate commerce.[219] Thus, Congress's power to regulate non-navigable tributaries and non-adjacent wetlands rests on its power to regulate activities affecting navigation, because the CWA does not extend the authority to regulate any activity affecting interstate commerce unless the activity involves a traditionally navigable waterway.[220]

Section 404 also illustrates why examining Congress's power to regulate navigation helps explain jurisdiction under the CWA. Section 404 gives states the ability to control filling and dredging over CWA-covered, non-traditionally navigable waters.[221] Yet, Congress reserved

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214. *Id.* at 174. *Cf. Oklahoma*, 313 U.S. at 523 ("And it is clear that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions.").

215. *SWANCC*, 531 U.S. at 166. *See also supra* notes 94-97 and accompanying text.

216. *See SWANCC*, 531 U.S. at 164. *See also supra* notes 88-89 and accompanying text.

217. *See SWANCC*, 531 U.S. at 162, 166. *See also* Mank, *supra* note 81, at 818; *supra* notes 62-74 and accompanying text.

218. *SWANCC*, 531 U.S. at 174.

219. *See id.* at 172 (a clear statement is expected if Congress intended the CWA to extend to the limits of its Commerce Clause power). *See also* United States v. Lopez, 514 U.S. 549, 610 (1995) (Souter, J., dissenting).

220. *See SWANCC*, 531 U.S. at 171-72.

221. Clean Water Act, 33 U.S.C. §§ 1344(g), (t) (2000). *See also supra* note 118 and accompanying text.

the absolute power to "maintain navigation" for the federal government.[222] This recognizes states' traditional power over the waterways themselves and reduces federal involvement in an area that would otherwise be off limits to federal jurisdiction but for an activity that substantially affects navigation. Additionally, the CWA directs the Corps to take into account "the economic impact of the site on navigation and anchorage" when determining where to designate permits under section 404.[223] This also supports understanding the CWA as an exercise of Congress's power to regulate navigation.[224] The result of reading the CWA as an expression of Congress's power to regulate navigation is that non-navigable tributaries are not automatically "waters of the United States" and not all dredging and filling activities occurring on those waters would fall within the jurisdiction of the CWA.[225] Only those activities that have a substantial effect on navigation of traditionally navigable waters fit within CWA jurisdiction.

B. SUBSTANTIAL EFFECT DOES NOT EQUAL SIGNIFICANT NEXUS

Justice Kennedy's significant nexus test appears similar to the Commerce Clause's substantial effect requirement.[226] The similarity is in appearance only, because the tests' mechanics bear no similarities and manifest the error in the Supreme Court's thinking when evaluating CWA jurisdiction. The significant nexus that Justice Kennedy required is between the waterway in question and a traditionally navigable waterway.[227] The difficulty in deciding at which point a disconnected waterway achieves a significant nexus with a traditionally navigable waterway is indubitable.[228] Justice Kennedy's test also ignores the reality that the effects a waterway has on another waterway is completely dependent on the scope and intensity of the activity taking place on the waterway involved in the activity. The substantial effect test is less esoteric and properly frames the inquiry in terms of Congress's Com-

222. 33 U.S.C. § 1344(t).
223. *Id.* § 1344(b).
224. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193 (1824) ("[A] power to regulate navigation, is as expressly granted, as if that term had been added to the word 'commerce.'").
225. 33 U.S.C. §§ 1344(a), 1362(7).
226. Rapanos v. United States, 547 U.S. 715, 780 (2006) (Kennedy, J. concurring). *See also supra* note 174 and accompanying text (outlining Justice Kennedy's significant nexus test).
227. *Rapanos*, 547 U.S. at 779.
228. *See* United States v. Chevron Pipe Line Co., 437 F.Supp.2d 605, 613 (N.D. Tex. 2006) (Justice Kennedy's "test leaves no guidance on how to implement its vague, subjective centerpiece.").

merce Clause power. The activity itself must be one that substantially affects navigation on traditionally navigable waters.[229]

C. DOCTRINE OF ADMINISTRATIVE DEFERENCE NOT SUITABLE FOR "NAVIGABLE WATERS"

Justice Stevens argued in his dissent that *Chevron* deference to the Corps could be a possible remedy for providing an interpretation of "navigable waters."[230] Arguably, courts should concede to the Corps' interpretation because "navigable waters" is ambiguous. However, a court, as "the final authority on issues of statutory construction," must first look to the CWA to determine whether the statute resolves the "precise question at issue."[231] The question here is what the boundaries for federal jurisdiction under the CWA are. A narrower interpretation than the one suggested by this Article would not give effect to Congressional intent, which is evident from the CWA, that courts give "navigable waters" a broader interpretation than traditionally navigable waters.[232] An interpretation under the CWA that pushes the CWA's jurisdiction broader than this Article's suggested interpretation potentially violates the Constitution as an improper exercise of Congress's legislative power. The interpretation sandwiched by these two invalid readings and represented by this Article is Congress's answer to the "precise question." Because the final answer is derived from the statute and controlling constitutional law,[233] agency deference is unnecessary.[234]

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229. Admittedly, a court may find that an activity has a substantial effect on interstate commerce (i.e., navigation) through the cumulative effects doctrine ushered in by *Wickard v. Filburn*. 317 U.S. 111, 127-29 (1942) (allowing a court to consider an individual's acts "taken together with that of many others similarly situated" for purposes of determining whether Congress can regulate the activity under the Commerce Clause). *See supra* note 93 and accompanying text. Whether this limits or expands the federal government's jurisdiction under the CWA is outside the scope of this Article.

230. *Rapanos*, 547 U.S. at 788 (Stevens, J. dissenting). *See also supra* Part II.C.3. Indeed, the Court in *Riverside Bayview* deferred to the Corps' interpretation. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131-32 (1985). *See supra* notes 77-80 and accompanying text.

231. Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 843 n.9.

232. *See Riverside Bayview*, 474 U.S. at 133. *See also supra* Part III.A.2.

233. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (describing the rule as "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"). *See also* Hooper v. California, 155 U.S. 648, 657 (1895) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality."); Nat'l Labor Relations Bd. v. Catholic Bishop, 440 U.S. 490, 507 (1979) (declining to construe a statute in a manner that would require the Court to resolve constitutional questions); *Catholic Bishop*, 440 U.S. at 510 (Brennan, J., dissenting) (quoting Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 749-50 (1961)).

234. Justice Stevens argued that deference should be given to the Corps because it was better situated to determine factors regarding environmental effects. *Rapanos*, 547

D. THIS ARTICLE'S INTERPRETATION GIVES EFFECT TO ALL POLICIES OF THE CLEAN WATER ACT

Congress clearly expressed a policy in the CWA to protect the Nation's waters.[235] However, just as clear is the CWA's policy of respecting states' rights.[236] Implicit in all Congressional legislation, including the CWA, is the intent to pass legislation that bears constitutional scrutiny, such as legislation within the Congress's authority and not in violation of structural principles (e.g., federalism).[237] This Article's interpretation not only sets forth a clear standard to apply for future CWA cases but it also promotes the CWA's diverse policies.

First, this Article's suggested interpretation helps avoid a possible federalism issue.[238] States traditionally have the power to regulate health and the environment for their citizens.[239] By adopting the interpretation set forth in this Article, courts will be able to steer clear of interpreting the CWA in a way that threatens to invade these rights. Rather than extend federal jurisdiction to a point where it has questionable constitutional support, the foundation for this Article's interpretation is the stalwart substantial effects template.

Federalism is a constitutional issue that deserves consideration independent of the CWA's language, but the CWA further underscores federalism's importance by specifically acknowledging and implementing federalism in its text.[240] This "statutory federalism" is evident in the

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U.S. at 804 (Stevens, J. dissenting). *See also supra* Part II.C.3. A response to this is that the CWA also contains policies concerning constitutional issues, which the Court is in the best position to decide. *See infra* Part III.D.

235. Clean Water Act, 33 U.S.C. § 1251(a) (2000).

236. *Id.* § 1251(b).

237. *See, e.g., id.* ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . .").

238. "'Federalism' refers to the balance of power created in the United States Constitution between a . . . limited federal government and . . . relatively unfettered state governments." *See* Craig, *supra* note 6, at 119-20. In order to secure the rights of the people, "the power surrendered by the people is first divided between two distinct governments . . . ." THE FEDERALIST NO. 51 (James Madison). "In the tension between federal and state power lies the promise of liberty." Gregory v. Ashcroft, 501 U.S. 452, 459 (1991). When the federal government eliminates that tension, usurping power from the states, the principle of federalism is diminished and the protections that it affords are lost. Thus, courts usually loathe interpreting a statute in a way that endangers federalism without a clear statement from Congress, because it is Congress that has "substantial discretion and control over the federal balance." United States v. Lopez, 514 U.S. 549, 577 (1995).

239. *See* Gonzales v. Raich, 545 U.S. 1, 29-30 n.38 (2005) (pursuant to their traditional police powers, states may protect the "health, welfare, and safety of their citizens") (citation omitted).

240. 33 U.S.C. § 1251(b). The CWA also respects states' rights with regard to water allocation. *Id.* § 1251(g).

CWA's permitting sections such as section 404.[241] Congress's direct recognition of the complex balance between state and federal interests should direct an interpretation faithful to this principle.[242] The Supreme Court in *SWANCC* stated that Congress did not "express[] a desire to readjust the federal-state balance" in the CWA,[243] so one must read the CWA to sustain the balance between federal power and state power consistent with the Constitution. This Article's interpretation succeeds in following Congressional intent by allowing the federal government to expand its authority under the CWA up to the point where state jurisdiction bumps against that expansion as recognized by the Supreme Court's Commerce Clause jurisprudence.

This interpretation supports a second policy, the CWA's expression of environmental protection.[244] Although this Article's interpretation may seem to hinder federal attempts to regulate certain wetlands and waterways, the interpretation's strength lies in its establishment of a clear line. Once Congress and states are able to foresee the CWA's reach with certainty, then Congress will enact additional legislation to fill in any potential gaps. As the CWA stands now under *Rapanos*, states are rightfully hesitant to set up regulatory schemes that courts could find preempted depending on the ebb and flow of the CWA's jurisdiction.[245] Additionally, Congress and states must view environmental consequences in light of the CWA's environmental and constitutional balancing approach, so environmental effects cannot be the only captain of the interpretative ship.

This Article's interpretation circumscribes federal jurisdiction, which may result in some negative effects resulting from the loss of federal jurisdiction over certain wetlands. Under this Article's interpretation, section 404 only applies to wetlands that have an adjacent surface water connection with traditionally navigable waters and dredged or filled wetlands to the extent that the dredging or filling would have a substantial effect on the navigation of traditionally navigable waters. Wetlands' benefits are not dependant on the government that regulates them. Wetlands not covered by section 404 still provide water filtration, wildlife habitat, and flood control. Yet, if those wetlands lose protection, then those benefits are at risk of disappearing.[246]

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241. *See, e.g., id.* §§ 1316(c), 1317(b), 1342, 1344. *See also* Craig, *supra* note 6, at 122-25.

242. *See* Craig, *supra* note 6, at 122.

243. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 174 (2001). *See also* 33 U.S.C. §1251(b).

244. *See* 33 U.S.C. § 1251(a).

245. *See id.* § 1370. *See also* JON KUSLER, ASS'N OF STATE WETLAND MANAGERS, INC., THE SWANCC DECISION; STATE REGULATION OF WETLANDS TO FILL THE GAP 18 (2004), http://www.aswm.org/fwp/swancc/aswm-int.pdf.

246. If states failed to extend their environmental laws to cover the wetlands that would come under their jurisdiction, then some wetlands may have limited protection

This is especially troubling given the track record of some states with regard to their wetlands protection.[247]

Federal regulation prevents some issues that can arise when states are left to regulate the environment by themselves. The nature of ecosystems and the roles that isolated areas can play with respect to the environment as a whole forms the basis of this view.[248] Federal regulation provides uniform standards so that one state is not able to implement lax standards that detrimentally affect the environment of another state with more stringent standards. Additionally, the benefits from environmental regulation can often pass to states downstream or downwind.[249] This provides a disincentive for both the upstream state and the downstream state.[250] The upstream state does not realize the full benefit of the costs that it incurs implementing the regulatory scheme.[251] The downstream state may have a tendency to put off regulation in the hopes that the upstream state will take the initiative, thereby providing the downstream state with the environmental benefits without incurring any costs.[252] In these instances, federal regulation is necessary so that states are subject to the same regulations with respect to protecting the environment.

Similar to the potential for states to under-regulate wetlands is the risk of an interstate "race to the bottom."[253] The phrase "race to the bottom" describes the result when states competing for commercial development "race from the desirable levels of environmental quality" and instead compete to provide the most industry-friendly environmental regulations.[254] The resulting regulations are typically less than optimal from an environmental perspective.[255] Federal regulation eliminates the need for states to compete in such a race to the bottom.[256]

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from development or ruin. Gregory L. Sattizahn, *The Ebb and Flow of the Clean Water Act: Redefining Clean Water Act Jurisdiction After* SWANCC, 8 GREAT PLAINS NAT. RESOURCES J. 1, 18 (2004).

247. *See, e.g.*, Kusler, supra note 245, at 12. *See also* Ducks Unlimited, *Wetlands Conservation, Waterfowl Habitat Restoration, Research*, http://www.ducks.org/conservation (last visited Jan. 10, 2008) (expressing the rate at which the United States is losing wetlands as "more than seven football fields every hour").

248. Tobias Halvarson, Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers: *The Failure of "Navigability" as a Proxy in Demarcating Federal Jurisdiction for Environmental Protection*, 29 ECOLOGY L.Q. 181, 199 (2002).

249. *See* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1222 (1992).

250. *Id.*

251. *Id.*

252. *Id.*

253. *See* Halvarson, *supra* note 248, at 199.

254. Revesz, *supra* note 249, at 1210.

255. *See id.* at 1216-17.

256. One problem with the "race to the bottom" theory is that it is an argument against the political process within the state. If elected representatives in the state

Regardless of the consequences that could potentially flow from this Article's suggested interpretation, they are not ones courts can properly weigh. The Constitution and the statute's language provide that the proper interpretation should be the main concern with the CWA. By doing so, this Article gives meaning to the CWA's purposes, including both environmental protection and sustaining federalism, while staying within statutory and constitutional boundaries.

CONCLUSION

The Supreme Court's decision in *Rapanos* brought to light the difficulty of applying the CWA to wetlands. Wetlands provide numerous valuable contributions to the environment, and federal regulation protecting the wetlands is likely the most effective way to prevent their destruction. Unfortunately, the CWA does not extend to cover all bodies of water, including wetlands that may have an impact on the environment through a variety of ways, such as flood control and water filtration. Instead, the language Congress used in the CWA pronounces only one interpretation of the CWA. Congress's use of "navigable waters" defined as "waters of the United States"[257] extends the CWA's jurisdiction only over (1) traditionally navigable waters of the United States and any wetlands with an adjacent surface connection thereto and (2) the discharge of dredged or fill materials into other waters (including wetlands) only where such discharge will substantially affect the navigability of traditionally navigable waters. This reading properly gives effect to the CWA's protection of federalism and avoids expanding federal jurisdiction under the CWA past constitutional limits.

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legislatures are willing to adopt regulations favoring industry more than the environment, then perhaps such regulations are the ones properly adopted and federal oversight should not overrule those state adopted regulations. The argument that environmental interests are more important than founding principles is difficult for one to make. *See* U.S. CONST., art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."). *See also, In re* Duncan, 139 U.S. 449, 461 (1891) ("[T]he distinguishing feature of [a Republican] form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves . . . ."). Yet, environmental groups can be more effective at the national level and environmental protection is easier to value at a federal level, circumstances that support having political battles involving the environment take place in Congress rather than in state legislatures. *See* Revesz, *supra* note 249, at 1223-24.

257. Clean Water Act, 33 U.S.C. § 1362(7) (2000).