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Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States

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ARTICLES

FEDERALISM, REGULATORY ARCHITECTURE, AND THE CLEAN WATER RULE: SEEKING CONSENSUS ON THE WATERS OF THE UNITED STATES

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This Article reviews the troubled history of the "Waters of the United States" Rule of the Clean Water Act, and analyzes how its newest incarnation harnesses a surprising point of convergence between the conflicting Supreme Court interpretations in Rapanos v. United States *that necessitated its development. While debate over the federalism implications of the Rule rages on, the framework it creates from the multiple* Rapanos *opinions suggests that the path forward hinges less on the substantive rule of jurisdiction and more on the regulatory architecture of presumptions, default rules, and burden shifting. Splitting the difference between competing judicial approaches, the new Rule alternates presumptions in favor of and against federal regulation in different hydrological contexts to appropriately support competing regulatory goals. By capitalizing on an elusive thread of continuity among seemingly irreconcilable judicial viewpoints, the new Rule may win safe passage through the next round of judicial review.*

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I. INTRODUCTION

This Article reviews the troubled history of the "Waters of the United States" Rule (the Rule)[1] of the Clean Water Act (CWA or Act),[2] and analyzes how its newest incarnation harnesses a surprising point of convergence between the conflicting Supreme Court interpretations in *Rapanos v. United States* (*Rapanos*)[3] that necessitated its development. While debate over the federalism implications of the Rule rages on,[4] the framework it creates from the multiple *Rapanos* opinions suggests that the path forward hinges less on the substantive rule of jurisdiction and more on the regulatory architecture of presumptions, default rules, and burden shifting.[5] Splitting the difference between competing judicial approaches, the new Rule alternates presumptions in favor of and against federal regulation in different hydrological contexts to appropriately support competing regulatory goals. By capitalizing on an elusive thread of continuity among seemingly irreconcilable judicial viewpoints, the Clean Water Rule may win safe passage through the next round of judicial review.

The Rule has long interpreted the part of the CWA[6] that establishes the breadth of American waterways subject to federal protection under the Act.[7] Despite decades of effort by agencies, courts, and litigants to clarify the reach of federal authority under the Rule,[8] it remains one of the most

1 Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,058 (Jun. 29, 2015) (codified at 33 C.F.R. § 328.3; 40 C.F.R. §§ 110, 112, 116, 117, 122, 230, 232, 300, 302, 401 (2016)) [hereinafter Clean Water Rule].

2 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

3 547 U.S. 715 (2006).

4 *In re* U.S. Envtl. Prot. Agency, 803 F.3d 804, 806 (6th Cir. 2015); *see also* Jonathan Adler, *Once More With Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction, in* THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS 81 (Vt. L. Sch. Land Use Inst. et al. eds., 2007).

5 *See infra* Part IV.B.

6 33 U.S.C. § 1362(7) (2012) (defining "navigable waters" as "the waters of the United States, including the territorial seas").

7 Clean Water Rule, 80 Fed. Reg. at 37,060.

8 *See infra* Part II.

persistently uncertain exercises of national regulatory jurisdiction in any field.[9] Because the statutory language construed by the Rule references navigability as a jurisdictional criterion,[10] jurisdictional uncertainty associated with the Rule is especially pronounced with regard to nonnavigable wetlands[11] that are not directly adjacent to conventionally navigable lakes and rivers, but that may nonetheless significantly impact these larger (and clearly jurisdictional) waterways downstream.[12] Over the years, a series of divisive Supreme Court interpretations of the Rule (culminating in *Rapanos*) have forced regulatory architects to the drawing table again and again, striving for a resolution that satisfies the relevant statutory, judicial, scientific, and public concerns.[13]

In 2015, following the most recent round of judicial upheaval, responsive political wrangling, and heated public engagement, a new version of the Rule—the "Clean Water Rule"[14]—was finally promulgated by the two implementing agencies, the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA).[15] The Clean Water Rule emerged only after several previous attempts to produce clarity had failed, including regulatory guidance issued by EPA and the Corps in 2008,[16] an

9 *See, e.g.*, Mark Latham, Rapanos v. United States: *Significant Nexus or Significant Confusion? The Failure of the Supreme Court to Clearly Define the Scope of Federal Wetland Jurisdiction, in* THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS, *supra* note 4, at 5–6, (discussing the "continued puzzlement concerning the reach of federal wetlands jurisdiction").

10 33 U.S.C. § 1311(a) (2012) (prohibiting the "discharge of any pollutant" except as in compliance with the enumerated sections). The Act further defines "discharge of a pollutant" as "any addition of any pollutant to *navigable waters* from any point source." *Id.* § 1362(12) (emphasis added).

11 "Wetlands" are defined as areas of specially adapted hydric or saturated soils, technically including navigable lakes and rivers as well as smaller and/or seasonal ponds, streams, marshes, swamps, bogs, and other nonnavigable waterways. *See* Ralph W. Tiner, *Technical Aspects of Wetlands: Wetland Definitions and Classifications in the United States*, https://water.usgs.gov/nwsum/WSP2425/definitions.html (last visited Apr. 9, 2016) (describing wetlands as "different kinds of wet habitats"). For the purpose of the Rule, "wetlands" refer primarily to nonnavigable hydric soils that are "wet for some period of time, but not necessarily permanently wet." *Id.*; *see also* Clean Water Rule, 80 Fed. Reg. at 37,106 (codified at 40 C.F.R. § 110.1(3)(iv)) (defining wetlands as "areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support . . . vegetation typically adapted for life in saturated soil conditions").

12 *See* Clean Water Rule, 80 Fed. Reg. at 37,057 (explaining that "[w]etlands and open waters in floodplains and riparian areas are chemically, physically, and biologically connected with downstream waters and influence the ecological integrity of such waters"). Uncertainty is especially associated with remote wetlands because the Supreme Court firmly approved CWA jurisdiction over directly adjacent wetlands in *U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

13 *See infra* Part II (discussing the history of the Rule and these important judicial interventions).

14 *See, e.g.*, U.S. Envtl. Prot. Agency, *Clean Water Rule*, http://www.epa.gov/cleanwaterrule (last visited Apr. 9, 2016) (highlighting the name of the rule).

15 Clean Water Rule, 80 Fed. Reg. at 37,054.

16 Memorandum from Benjamin H. Grumbles, Assistant Adm'r for Water, U.S. Envtl. Prot. Agency, & John Paul Woodley, Jr., Assistant Sec'y of the Army (Civil Works), Dep't of the Army, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United*

earlier attempt by the implementing agencies to revise the Rule in 2011,[17] and various proposals for direct statutory reform by Congress[18]—some of which would have strengthened federal reach,[19] while others would have weakened it.[20] Crafted amidst this intense political dissensus, the Clean Water Rule seeks a compromise position between competing extremes, clarifying limits on federal reach while remaining grounded in the best available hydrological science.[21] It reduces the need for case-by-case analysis in some contexts while preserving it in others,[22] mitigating the uncertainty that has undermined the regulatory process while preserving flexibility to cope with harder calls.

The Clean Water Rule continues to assert categorical jurisdiction over most navigable waterways[23] and tributaries that are characterized by a bed, banks, and ordinary high water mark,[24] and it includes directly adjacent wetlands (within specified distances).[25] These waterways will be subject to federal jurisdiction without further analysis, although based on a set of measurable, physical criteria that limit the categorical assertion of federal

States & *Carabell v. United States* (Dec. 2, 2008) [hereinafter 2008 Jurisdiction Guidance], *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf.

17 *See* CLAUDIA COPELAND, CONG. RESEARCH SERV., R43455, EPA AND THE ARMY CORPS' RULE TO DEFINE "WATERS OF THE UNITED STATES" 1 (2016) (discussing the 2011 proposed rule, which was never adopted, and the preceding 2008 regulatory guidance).

18 *See* ROBERT MELTZ & CLAUDIA COPELAND, CONG. RESEARCH SERV., RL33263, THE WETLANDS COVERAGE OF THE CLEAN WATER ACT (CWA): *RAPANOS* AND BEYOND 19–20 (2014) (discussing multiple congressional proposals to revise the Rule).

19 For example, the "Clean Water Authority Restoration Act," introduced to the 109th Congress by Senator Russell Feingold, would have responded to the Court's more limited interpretation by statutorily defining the waters of the United States broadly and clarifying that the purpose of the CWA was to prevent pollution rather than to maintain navigability. *See* S. 912, 109th Cong. (2005); *see also* MELTZ & COPELAND, *supra* note 18, at 19 (discussing the proposed bill); *see also* H.R. 2421, 110th Cong. (2007) (a similar proposed bill that would have strengthened federal jurisdiction over waters).

20 For example, the Defense of Environment and Property Act, introduced to the 114th Congress by Senator Rand Paul "to clarify the definition of navigable waters, and for other purposes," would have severely reduced federal CWA jurisdiction even beyond the Supreme Court's interpretation. *See* S. 980, 114th Cong. (2015). *See generally* CLAUDIA COPELAND, CONG. RESEARCH SERV., R43943, EPA AND THE ARMY CORPS' "WATERS OF THE UNITED STATES" RULE: CONGRESSIONAL RESPONSE AND OPTIONS (2015) (discussing legislative proposals to amend the CWA); *see also* MELTZ & COPELAND, *supra* note 18, at 19–20 (discussing the Federal Wetlands Jurisdiction Act of 2005, which also sought to restrict federal jurisdiction).

21 *See infra* Part IV.

22 Clean Water Rule, 80 Fed. Reg. at 37,054, 37,056–57.

23 *See* Clean Water Rule, 80 Fed. Reg. at 37,058; *see also* U.S. ENVTL. PROT. AGENCY, FACT SHEET CLEAN WATER RULE (2015) [hereinafter FACT SHEET], *available at* http://www.epa.gov/sites/production/files/2015-05/documents/fact_sheet_summary_final_1.pdf (including a comparison table showing where the final rule departs from the proposed and preexisting versions of the Rule).

24 40 C.F.R. § 110.1(3)(iii) (2016) (defining "tributaries").

25 *Id.* § 110.1(1), (3)(i)–(ii) (defining "waters of the United States," "adjacent," and "neighboring" as encompassing wetlands within a minimum of 100 feet of the ordinary high water mark, or within the 100-year floodplain to a maximum of 1,500 feet above the ordinary high water mark).

authority.[26] The Clean Water Rule also categorically excludes certain waterways from jurisdiction, including waste treatment, stormwater, and wastewater systems, prior converted cropland, certain artificial lakes and ponds, groundwater, and most ditches.[27] No further analysis is needed to rebut an assertion of federal jurisdiction in these cases.[28] Finally, it establishes criteria for determining jurisdiction over waterways beyond these categories based on their relationship to primary jurisdictional waters.[29] Nonadjacent wetlands may be federally regulated if they are shown to have a significant connection (or "nexus") to navigable waterways, because their own destruction could negatively impact the chemical, physical, or biological integrity of the larger waterways downstream.[30] These waterways will be considered jurisdictional only if the requisite nexus is established on the basis of case-specific analysis;[31] wetlands that fail the test fall beyond federal reach.[32]

This articulation of the Rule responds to many of the vexing jurisdictional questions left open by earlier judicial interventions.[33] It creates, for the first time, a set of measurable parameters for streamlining and unifying jurisdictional determinations, constraining agency discretion on the basis of peer-reviewed scientific consensus about the hydrological and ecological functions of waterways.[34] It attempts to moderate competing political demands for unlimited and eviscerated jurisdictional reach.[35] Nevertheless, the Clean Water Rule has not yet brought the hoped-for regulatory closure; the Sixth Circuit stayed the Rule nationwide shortly after it took effect, pending litigation by multiple states and other organizations in over a dozen separate cases (arguing that the Rule both over- and under-regulates).[36] Wearyingly if unsurprisingly, legal uproar over the reach of the Rule continues, and it will likely press on until the Supreme Court visits the issue yet again.

If the Court takes the case, however, the Justices will be reviewing a rule that responds directly to the mixed messages they sent the agencies during the infamously fractured *Rapanos* decision, in which the Court split five ways in its attempt to establish the appropriate boundaries of federal

26 Clean Water Rule, 80 Fed. Reg. at 37,056.

27 40 C.F.R. § 110.1(2) (2016) (listing categorical exclusions).

28 Clean Water Rule, 80 Fed. Reg. at 37,058.

29 40 C.F.R. § 110.1(3)(v) (2016).

30 *Id.* § 110.1(1)(vii)–(viii), (3)(v) (discussing case-specific analysis for specific kinds of wetlands, and defining "significant nexus"); *see also* Clean Water Rule, 80 Fed. Reg. at 37,055 (discussing jurisdiction over non-adjacent waters and wetlands).

31 Clean Water Rule, 80 Fed. Reg. at 37,059.

32 *Id.* at 37,067.

33 *See* discussion *infra* Parts II–III.

34 FACT SHEET, *supra* note 23 ("The rule protects waters that are next to rivers and lakes and their tributaries because science shows that they impact downstream waters. The rule sets boundaries on covering nearby waters for the first time that are physical and measurable.").

35 *See id.* (discussing how "[t]he rule protects clean water without getting in the way of farming, ranching, and forestry").

36 *In re* U.S. Envtl. Prot. Agency, 803 F.3d 804, 809 (6th Cir. 2015).

reach.[37] Together with a concurring opinion by Justice Kennedy, Justice Scalia's plurality of four agreed to reject and remand the Corps' assertion of jurisdiction over wetlands with remote connections to navigable waters.[38] However, they parted company on how the jurisdictional call should be made on remand, with Justice Scalia suggesting that jurisdiction extend only to wetlands with a permanent surface connection to navigable waters, and Justice Kennedy suggesting that jurisdiction may legitimately extend to other wetlands as well, if the government shows a significant nexus to navigable waters on a case-by-case basis.[39] Chief Justice Roberts joined in Justice Scalia's opinion, but wrote separately to chastise the agency for continuing to assume overly broad authority under the statute.[40] Meanwhile, dissenting on behalf of the remaining four, Justice Stevens argued that it was reasonable to defer to the agency's blanket assertion of authority over like wetlands on grounds that most will have a significant nexus with navigable waters—so long as it is possible for a permit applicant to show why the wetland she wants to fill lacks that nexus.[41] Justice Breyer joined the dissent but also wrote separately to emphasize that deference to the agency was reasonable because its interpretation was the only way to accomplish the objectives of the Act.[42]

Notoriously among the least helpful Supreme Court decisions of all time, *Rapanos* brims with competing rationales that failed to establish meaningful guidance for decision makers.[43] While the *Rapanos* disarray fueled a vortex of regulatory uncertainty for stakeholders, agencies, and the lower courts struggling to interpret it afterward, it also sowed the seeds of compromise in the allocation of regulatory burdens in the new Clean Water Rule. Most notably, the Clean Water Rule capitalizes on a convergence between the Kennedy concurrence and Stevens dissent, which create similar substantive rules of jurisdiction, but effectively allocate the burden of proof differently by establishing opposite presumptions in marginal cases.[44]

In *Rapanos*, Kennedy's approach theoretically enables jurisdiction throughout the hydrological chain so long as a significant nexus is shown,

37 *Rapanos*, 547 U.S. 715, 718 (2006) (Scalia writing for four person plurality, Roberts and Kennedy filing separate concurrences, Stevens writing for four person dissent, Breyer filing additional dissent).

38 *Id.* at 757 (plurality opinion) (vacating the judgments of the Sixth Circuit and remanding with instructions to use a different jurisdictional standard); *id.* at 759 (Kennedy, J., concurring) (voting with plurality to remand for use of a proper standard).

39 *Id.* at 757 (plurality opinion) (instructing lower courts to determine, first, whether the ditches and drains near the wetlands in question contain a "relatively permanent flow," and, second, whether the wetlands possess a "continuous surface connection" with the jurisdictional waters nearby); *id.* at 759 (Kennedy, J., concurring) (instructing lower courts to determine whether the lands in question had a significant "nexus" to the nearby jurisdictional waters).

40 *Id.* at 758 (Roberts, C.J., concurring).

41 *Id.* at 797 (Stevens, J., dissenting).

42 *Id.* at 811–12 (Breyer, J., dissenting).

43 Charles Duhigg & Janet Roberts, *Rulings Restrict Clean Water Act, Foiling E.P.A.*, N.Y. TIMES, Feb. 28, 2010, http://www.nytimes.com/2010/03/01/us/01water.html (last visited Apr. 9, 2016).

44 *See infra* Part IV.

but it puts the burden of establishing nexus for nonadjacent wetlands on the agency.[45] This can be very expensive for the agency, and on balance, is likely to result in less regulation (affirmed in the wake of *Rapanos*, when the United States gave up on thousands of enforcement actions rather than invest scarce agency resources in trying to prove jurisdiction).[46] Meanwhile, Stevens's dissent would also allow far-flung jurisdiction on the same scientific premise[47]—but it assumes significant nexus throughout the hydrological chain, in deference to the agency's interpretation of what is needed to effectuate CWA statutory goals.[48] Still, it allows the landowner to effectively rebut the presumption of significant nexus in marginal cases, putting the burden on the landowner to show why a given wetland should *not* be jurisdictional for lack of nexus (at which point, the agency would cede its jurisdictional entitlement to the landowner by granting the permit).[49] Of course, this can be expensive for a landowner, and all else equal, would probably result in less wetland filling.[50] The two approaches are thus mirror opposites of one another at the level of regulatory architecture, symmetrical in substance but for the small detail of who will bear the burden of proof.

The Clean Water Rule effectively splits the difference between these two approaches—categorially extending jurisdiction throughout much of the

45 See *Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring) ("When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, *the Corps must establish a significant nexus* on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries." (emphasis added)).

46 *See* Duhigg & Roberts, *supra* note 43 ("Companies that have spilled oil, carcinogens and dangerous bacteria into lakes, rivers and other waters are not being prosecuted, according to Environmental Protection Agency regulators working on those cases, who estimate that more than 1,500 major pollution investigations have been discontinued or shelved in the last four years.").

47 See *Rapanos*, 547 U.S. at 797 (Stevens, J., dissenting) ("The Corps' exercise of jurisdiction is reasonable even though not every wetland adjacent to a traditionally navigable water or its tributary will perform all (or perhaps any) of the water quality functions generally associated with wetlands. . . . Instead, it is enough that wetlands adjacent to tributaries generally have a significant nexus to the watershed's water quality.").

48 *See id.* at 809.

49 *See id.* at 797 ("If a particular wetland is 'not significantly intertwined with the ecosystem of adjacent waterways,' then the Corps may allow its development 'simply by issuing a permit.'"); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-297, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION 8 (2004) ("The Corps approves virtually all section 404 permit applications. In fiscal year 2002, for example, of 85,445 section 404 permit applications filed, the Corps denied 128 and 4,143 were withdrawn by the applicant."). *See also infra* note 229 and accompanying text (discussing my use of the vocabulary of legal entitlements in jurisdictional contexts like this one).

50 *See* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74 (2002) ("The mean individual permit application in our sample costs over $271,596 to prepare (ignoring the cost of mitigation, design changes, costs of carrying capital, and other costs), while the cost of preparing a nationwide permit application averages $28,915.").

hydrological chain (as Stevens advocated),[51] but using case-specific analysis for most nonadjacent wetlands (as Kennedy advocated).[52] In this way, there is something for everyone to like—or hate—in different parts of the rule. Neither landowners nor agencies can rest on a plenary regulatory entitlement while the other side bears all responsibility for establishing jurisdiction or the lack thereof. Critically, while the Kennedy and Stevens rules of jurisdiction are theoretically similar, their differing presumptions bear enormous significance for actual governance (because the reality of resource constraints means that there will likely be more regulation under the Stevens approach, and less under Kennedy's approach).[53] Here too, the new Rule splits the difference in a way that sensibly honors the competing considerations—privileging federal jurisdiction in circumstances where harm is most likely, and protecting state and private autonomy where the nation's waters are least clearly at risk.

By incorporating alternating defaults, the Clean Water Rule thus seeks the most logical middle path between them—striving for a workable regulatory compromise, and highlighting how sophisticated legal architecture can create improbable common ground from seemingly irreconcilable political dissensus. While it may not be the best overall rule from any single perspective within the debate, it capitalizes on the best possible common ground among them, including elements from the other Justices' views in *Rapanos* as well. Intriguingly, this analysis also shows how the debate over the federalism implications of the Rule is giving way to a debate over the regulatory architecture of the Rule. By incorporating both the Stevens and Kennedy approaches (and nodding to recommendations by the others),[54] the Clean Water Rule suggests that the substantive rule of jurisdiction may no longer be the primary obstacle for a majority of the Court, which shifts instead to identifying who must show when that jurisdictional standard has been met. Although followers of Justice Scalia's perspective in *Rapanos* may remain unpersuaded, recognizing this key point may help defuse some of the most divisive struggles over defining the waters

51 Clean Water Rule, 80 Fed. Reg. 37,054, 37,073 (June 29, 2015) ("The agencies define 'waters of the United States' in paragraph (a) of the rule for all sections of the CWA to include the traditional navigable waters (a)(1), interstate waters (a)(2), the territorial seas (a)(3), impoundments of jurisdictional waters (a)(4), covered tributaries (a)(5), and covered adjacent waters (a)(6). Waters in these categories are jurisdictional 'waters of the United States' by rule—no additional analysis is required. This eliminates the need to make a case-specific significant nexus determination for covered tributaries or covered adjacent waters because the agencies determined that these waters have a significant nexus to waters identified in (a)(1) through (a)(3) of the rule and thus are 'waters of the United States.'"). *See also Rapanos*, 547 U.S. at 797 (Stevens, J., dissenting).

52 *See* Clean Water Rule, 80 Fed. Reg. at 37,073 ("In addition to waters that are categorically 'waters of the United States' or categorically excluded under paragraphs (a) and (b), the rule identifies certain waters that can be 'waters of the United States' only where a case-specific determination has found a significant nexus between the water and traditional navigable waters, interstate waters, or the territorial seas."). *See also Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring).

53 *See* Sunding & Zilberman, *supra* note 50, at 74.

54 *See infra* notes 219, 234–237 and accompanying text.

of the United States, focusing our collective energy in more productive directions.

Part II reviews the early history of wetlands regulation under the Clean Water Act and the development of the Rule through key iterations of Supreme Court review, including *United States v. Riverside Bayview Homes* (*Riverside Bayview Homes*)[55] and *Solid Waste Agency of Northern Cooke County v. U.S. Army Corps of Engineers* (*SWANCC*).[56] Part III analyzes the Supreme Court's aggressively split decision in *Rapanos,* and how it proverbially (if not literally) muddied the water of wetlands regulation afterward. Part IV explores the new Clean Water Rule as a response to *Rapanos*, showing how the new version of the Rule exploits an unlikely thread of continuity between its multiple opinions. It concludes that for that reason, and for the wisdom of its politically necessary compromise, the Rule warrants both deference and respect.

II. THE CWA AND THE "WATERS OF THE UNITED STATES"

Enacted in 1972 by a large bipartisan majority in Congress,[57] the CWA seeks to restore and maintain the quality of the nation's waters by regulating the discharge of pollutants into jurisdictional waterways.[58] The goal of the statute was to make the nation's waters fishable, swimmable, and drinkable by 1983.[59] Congress had stepped into a field formerly regulated by the states because the collective action problems involved in regulating the public water commons had failed to protect them from excessive pollution.[60] Nevertheless, Congress instructed EPA to work closely with the states in designing a program of cooperative federalism—one that would reap the comparative advantages of national technical expertise in helping to establish appropriate standards and local enforcement expertise in designing appropriate means of implementation.[61]

The primary tools for regulating water pollution under the Act include the establishment of: 1) discharge standards, limiting the total discharge of regulated pollutants into impaired waterways through established "total

55 474 U.S. 121 (1985).

56 531 U.S. 159 (2001).

57 *See* Bonnie Stewart et al., *Clean Water Act's Anti-Pollution Goals Prove Elusive*, OR. PUB. BROAD., July 17, 2012, http://www.opb.org/news/article/anti-pollution-goals-elude-clean-water-act-enforce/ (last visited Apr. 9, 2016) (noting that the Act was passed 40 years ago by a large, bipartisan majority of Congress).

58 CWA, 33 U.S.C. § 1251(a)(1) (2012) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that . . . it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.").

59 *See id.* § 1251(a)(2) ("[I]t is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by . . . 1983.").

60 *See, e.g.*, Erin Ryan, *Environmental Federalism's Tug of War Within*, in THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS 355, 364–65 (Kaylani Robins ed., 2016).

61 *See* 33 U.S.C. § 1251(b).

maximum daily loads" (TMDLs);[62] 2) performance standards, including the "best practicable control technology currently available;"[63] and 3) the section 402 National Pollutant Discharge Elimination System (NPDES), which prohibits discharges of pollutants from a "point source" into regulated waters without a permit.[64] The NPDES program regulated end-of-pipe water pollution in two phases, beginning with the Phase I effort to regulate pollution by the largest dischargers (including industrial and large municipal sources), followed by the Phase II program to regulate stormwater pollution discharged by small and medium-sized municipal storm sewers.[65] Though EPA oversees the NPDES program, states can choose to self-implement the permitting program, and all but four states have accepted this delegation of national authority.[66]

While the statutory language of the CWA is seemingly straightforward, Congress left many details for later interpretation by the implementing agencies.[67] A particularly vexing question has been how far up the hydrological chain federal authority under the Act should extend, especially over diffuse wetlands and intermittent tributaries. The following Sections outline the regulatory guidance the agencies have promulgated to facilitate implementation of the Act in this regard, and the Court's efforts to interpret them over time.

A. Wetlands Regulation Under the CWA

The CWA and its implementing rules have interpreted "pollutants" broadly to include anything that would threaten the chemical, physical, and biological integrity of the nation's waters—including heat from industrial sources and power plants and sediments from construction and other activities.[68] Sediments used to fill wetlands are specially regulated under section 404 of the Act, because unimpaired wetlands play an important natural role in helping to purify pollutants before they enter critical

62 *See id.* § 1313(d)(1)(C).

63 *See id.* § 1314(b)(1)(A).

64 *See id.* § 1311; *see also id.* § 1342.

65 *See id.* § 1342(p)(4) (authorizing the "Phase I" and "Phase II" Stormwater Rules); EPA OFFICE OF WATER, STORMWATER PHASE II FINAL RULE: FACT SHEET 2.1, at 2 (2005), *available at* http://www.epa.gov/npdes/pubs/fact2-1.pdf (discussing the Phase II Rule); *id.* at 3 (discussing the conferral of municipal discretion under the general permit system); Envtl. Def. Ctr. v. U.S. Envtl. Prot. Agency, 344 F.3d 832, 845–46, 846 n.20 (9th Cir. 2003) (discussing the Phase II Rule's regulation of construction site sedimentation).

66 *See* 33 U.S.C. § 1342(b) (authorizing state permit programs); *see also* Ryan, *supra* note 60, at 405 ("[N]early all states have chosen to administer their own permitting programs, in order to maximize regulatory autonomy in managing in-state water resources and economic development."); U.S. Envtl. Prot. Agency, *NPDES Program Authorizations*, http://www.epa.gov/sites/production/files/2015-10/documents/state_npdes_program_status.pdf (last visited Apr. 9, 2016) (noting that the four unauthorized states are Massachusetts, New Hampshire, New Mexico, and Idaho).

67 *See, e.g.*, Am. Wildlands v. Browner, 260 F.3d 1192, 1197 (10th Cir. 2001) ("EPA has been charged by Congress with the authority to administer and interpret the Act.").

68 *See* 33 U.S.C. § 1362(6) (2012) (defining "pollutant"); 40 C.F.R. § 122.2 (2015) (defining "pollutant").

waterways.[69] While EPA oversees the enforcement of section 402, the regulation of wetland filling under section 404 is overseen by the Corps.[70] Section 404 prohibits the filling of jurisdictional wetlands, but it allows exceptions by permit according to the following policies: the agency must seek to avoid filling jurisdictional wetlands, but may issue permits when filling is unavoidable if impacts are mitigated and compensatory mitigation is provided for any resulting harm.[71]

Wetlands perform a host of valuable ecosystem services ranging from water filtration, flood protection, storm surge buffering, fish nursery, and others—but they confer little economic value directly to their owners in their natural state.[72] By contrast, when these hydric soils are filled and hardened to provide support for structures, they provide valuable opportunities for agricultural use or to construct surface structures, often on lucrative waterfront real estate.[73] Indeed, before wetland values were fully recognized, the U.S. government encouraged the filling of wetlands through the early Swamp Land Acts[74] of the nineteenth century, and other programs seeking to make them more valuable for economic development.[75] As a result of these policies and the unregulated progress of the real estate market, about half of the nation's wetlands have already been lost to fill—and up to 95% in places like San Francisco.[76]

Once filled, wetlands can no longer perform their natural functions, and adjacent communities have suffered the consequences—as demonstrated most palpably in the flooding of New Orleans after Hurricane Katrina, the dead-zones in Chesapeake Bay and the Gulf of Mexico due to unfiltered water pollution, and other high profile examples.[77] An Illinois study demonstrated the importance of wetlands to regulating flooding and overall ecological function in a stream corridor, finding that every 1% increase in wetlands reduced peak flows by 3.7%.[78] In the 1980s, increasing recognition

69 *See* 33 U.S.C. § 1344(a) (requiring permits for disposal of dredged or fill material); *see also* 33 C.F.R. § 320.4(b) (2015) (directing the Corps to consider the effect of fill material on wetlands and the important role they play when determining whether to issue a section 404 permit).

70 33 U.S.C. § 1344(a), (d).

71 *See* U.S. ENVTL. PROT. AGENCY, WETLAND REGULATORY AUTHORITY (2004), *available at* http://www.epa.gov/sites/production/files/2015-03/documents/404_reg_authority_fact_sheet.pdf.

72 *See* U.S. ENVTL. PROT. AGENCY, FUNCTIONS AND VALUES OF WETLANDS (2001), *available at* http://www.wayneswcd.org/Education/wetland%20valuefunction.pdf; NICHOLAS A. ASHFORD & CHARLES C. CALDART, ENVIRONMENTAL LAW, POLICY, AND ECONOMICS: RECLAIMING THE ENVIRONMENTAL AGENDA 672 (2008).

73 ASHFORD & CALDART, *supra* note 72, at 672.

74 Swamp Land Act of 1850, 43 U.S.C. §§ 981–984 (2012).

75 JAMES RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 119 (2d ed. 2009).

76 *Id.* at 852; Peter Goodwin et al., *Tidal Wetland Restoration: An Introduction*, 27 J. OF COASTAL RES. 1, 1 (2001).

77 *See generally* Erin Ryan, *New Orleans, the Chesapeake, and the Future of Environmental Assessment: Overcoming the Natural Resources Law of Unintended Consequences*, 40 U. RICH. L. REV. 981, 982 (2006) (discussing the unintended consequences of natural resource planning and assessment).

78 *See* James Salzman et al., *Protecting Ecosystem Services: Science, Economics, and the Law,* 20 STAN. ENVTL. L.J. 309, 319 (2001).

of the devastating consequences of wetland loss prompted President George H.W. Bush to declare a national policy of preventing further loss of wetland resources (the "No Net Loss" declaration).[79]

Ideally, CWA section 404 is designed to forestall the further degradation of wetlands on which the nation's waterways depend for the very chemical, physical, and biological integrity that the statute was enacted to protect. However, the question of exactly which wetlands are subject to federal regulation under the CWA has produced a long and vigorous debate.[80] The statute itself refers only to navigable waters,[81] but it has long been understood that the health of navigable waters at the bottom of the watershed depends on the intact wetlands higher in the hydrological chain.[82] But which wetlands? All of them? A specified subset?

Indeed, it has not always been easy to establish what should even count as a wetland for CWA purposes.[83] The technical definition of wetland refers to an area with hydric soils adapted for underwater vegetation growth, which encompasses even ephemeral waterways during the dry season.[84] Yet the same prairie potholes that look like shallow ponds in the wet season seem more like open fields during the dry season. Still, for the purpose of interpreting the CWA, the ultimate question is not what counts as a wetland in the abstract, but what counts as a "jurisdictional" wetland, or one subject to federal regulation under the Act.

In 1974, the Corps issued regulations defining the reference to "navigable waters" in the Clean Water Act as encompassing "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[85] However, this definition left for later clarification the ambiguous term, "waters of the United States." In 1977, the Corps issued additional regulations—regulations that would become known as the "Waters of the United States Rule"[86]—defining the waters of the United States to include "isolated wetlands and

79 *See* RASBAND ET AL., *supra* note 75, at 852–53.

80 *See, e.g.*, *Riverside Bayview Homes*, 474 U.S. 121, 126 (1985); *SWANCC*, 531 U.S. 159, 167 (2001); *Rapanos*, 547 U.S. 715, 729 (2006) (plurality opinion).

81 *See, e.g.*, CWA, 33 U.S.C. § 1251(a)(1) (2012) (prohibiting the discharge of pollutants into "navigable waters").

82 *E.g.*, *Riverside Bayview Homes*, 474 U.S. at 134–35 (finding Corps' conclusion that adjacent wetlands serve significant biological functions for traditionally navigable waters is reasonable).

83 *Id.* at 132–33.

84 33 C.F.R. § 328.3(c)(4) (2015); Tiner, *supra* note 11 (explaining that the term "wetlands" refers primarily to nonnavigable hydric soils that are "wet for some period of time, but not necessarily permanently wet").

85 33 C.F.R. § 209.120(d)(1) (1974).

86 U.S. ENVTL. PROT. AGENCY, TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES 21 (2015), *available at* http://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf [hereinafter TECHNICAL SUPPORT DOCUMENT] (noting that "[t]he Corps' current regulation contains similar language . . . and EPA has promulgated regulations that include a substantially identical definition" to the Corps' 1977 regulations).

lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which would affect interstate commerce."[87]

With that definition in mind, then, which wetlands should be subject to CWA section 404? To be sure, there are easy calls—distinct geographical features like rivers and lakes are usually jurisdictional, especially if they are large enough to be navigable.[88] Then there are those wetlands that may not themselves be navigable in fact, but that have permanent standing connections to waterways that are—such as adjacent ponds, riparian and coastal marshlands, and nonnavigable tributaries of navigable waters.[89] These, too, have proved relatively uncontroversial.[90] But there are also the many harder calls, such as seasonal and ephemeral wetlands that dry out for parts of the year, manmade ditches that can convey pollutants into navigable waterways, wetlands separated from navigable waterways by artificial berms, and those with underground hydrological connections to navigable waters.[91] And there are also waters that may be hydrologically isolated from those that are "navigable in fact," but may have other kinds of ecological connections, such as those jointly composing a habitat corridor for various forms of wildlife.[92] The following discussion reviews the history of the Supreme Court's treatment of these questions.

B. Riverside Bayview Homes *and Significant Nexus*

The breadth of the Rule was first challenged at the Supreme Court by a Michigan developer who was denied a section 404 permit to fill lakeside marshes.[93] In *Riverside Bayview Homes*, the plaintiff challenged federal authority over wetlands that were not navigable in fact, arguing that since the CWA itself used the word navigable, the nonnavigable marshes at issue could not be subject to the Act.[94] Nevertheless, the Court concluded that the waters of the United States, as clarified by agency regulations, reasonably

87 33 C.F.R. § 323.2(a)(5) (1978).

88 *See Rapanos*, 547 U.S. 715, 730–33 (2006) (plurality opinion).

89 *Id.* at 731.

90 *See Riverside Bayview Homes*, 474 U.S. 121, 134–35 (2001) (discussing the reasonableness of extending jurisdiction to wetlands adjacent to navigable water).

91 *Compare Rapanos*, 547 U.S. at 732–34, 742 (plurality opinion) (holding that only those waters that have "relatively permanent, standing or flowing bodies of water" can be considered "waters of the United States"), *with id.* at 805–06 (Stevens, J., dissenting) (arguing in favor of extending jurisdiction to all adjacent waters on the grounds that they are likely to have a significant nexus with nearby navigable waters).

92 *See SWANCC*, 531 U.S. 159, 167–68 (2001) (declining to extend Corps' CWA jurisdiction to waters that are completely hydrologically isolated from navigable waters, but noting that jurisdiction may extend to a water so long as it has a "significant nexus" to "navigable waters," perhaps implying an ecological nexus of habitat function).

93 *Riverside Bayview Homes*, 474 U.S. at 124.

94 Brief for Respondent, *Riverside Bayview Homes*, 474 U.S. 121 (1985) (No. 84-701), 1985 WL 669797, at *30–*31 (arguing that "'[w]etlands' have never been classified as navigable waters in their own right").

included nonnavigable wetlands with a significant nexus to waters that were navigable in fact.[95] Deferring to Congress's long acquiescence to the Corps' assertion of this sort of jurisdiction, the Court concluded that the language, history, and policy of the Act all made clear that the statute was enacted to protect water quality, and it was thus reasonable for the agency to define the waters of the United States by reference to water quality functions—including the filtration, flood retention, and habitat functions associated with wetlands.[96] As wetlands loss would threaten water quality, they were reasonably encompassed by the Rule.[97]

Riverside Bayview Homes therefore held that, at a minimum, wetlands were jurisdictional if they were adjacent to navigable in fact waters.[98] But what about wetlands with a nonadjacent nexus? What about nonnavigable waters whose connections to navigable waters were of the biological sort, rather than the direct hydrological sort—for example, those that do not share water with navigable waterways, but that form part of a wildlife habitat corridor? The Corps attempted to resolve this issue by promulgating new regulations in 1986, clarifying the 1977 interpretation of the waters of the United States.[99] In the later rule, the Corps clarified that section 404 jurisdiction also extended to any interstate waters that were or would be: 1) used as habitat by migratory birds protected by treaties; 2) used as habitat by other migratory birds that cross state lines; 3) used as habitat for endangered species; or 4) used to irrigate crops sold in interstate commerce.[100]

The earlier regulations had implicitly drawn on available federal authority conferred by the Constitution's Commerce Clause, specifically in reference to the prong of the Commerce Clause that confers federal authority over the channels of interstate commerce—as are navigable waterways.[101] The new Rule sought to take advantage of the full scope of available federal authority to regulate wetlands, not only by virtue of their connections to the channels of interstate commerce, but also under other constitutionally enumerated federal powers.

For example, the provision asserting jurisdiction over waters used as habitat by migratory birds drew on the Treaty Clause,[102] which confers federal authority to implement the terms of international treaties, such as the Migratory Bird Treaty of 1918,[103] by which the United States and England

95 *Riverside Bayview Homes*, 474 U.S. at 133–35, 138.

96 *Id.* at 134–35.

97 *Id.*

98 *Id.* at 135, 139.

99 Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

100 *Id.*

101 *See Riverside Bayview Homes*, 474 U.S. at 123 (noting that the Corps "initially constru[ed] the Act to cover only waters navigable in fact"); *see also The Daniel Ball*, 77 U.S. 557, 558 (1870) (noting that waters are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce")

102 U.S. CONST. art. II, § 2, cl. 2.

103 *See, e.g.*, Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2012).

(acting on behalf of Canada) agreed to protect migratory birds in which all signatories held an interest. The second provision asserted jurisdiction over migratory birds not covered by the treaty and other species that cross state lines, asserting a federal interest in wildlife as a fugitive interstate resource not confined to the law of any one state (and potentially also of federal interest under the Commerce Clause).[104] The third provision ties these waters to federal authority under the Endangered Species Act,[105] drawing constitutional authority from other parts of the Commerce Clause, treating species as instrumentalities in interstate commerce (and the commercial interests in preserving them as activities having a substantial relation to interstate commerce).[106] The fourth provision extends jurisdiction to wetlands irrigating crops sold in interstate commerce on grounds that they thereby have a substantial relationship to interstate commerce.[107]

C. SWANCC *and Hydrologically Isolated Wetlands*

The breadth of these assertions were challenged in the next Supreme Court case to wrestle with the problem, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*—more commonly known as *SWANCC*.[108] In this case, Northern Cook County (the County) had planned to fill several ponds that had formed at the site of an abandoned gravel mine for use as a landfill.[109] When gravel mines are hollowed out to form a cavity, a new local watershed can form, as tributaries that once emptied into a downstream basin are intercepted by the new impermeable cavity.[110] Over time, these cavities commonly fill with water to create new wetland ecosystems, providing habitat for species often pressed out of previous wetland areas by development.[111] Abandoned gravel mines providing wetland habitat have created new habitat and recreational sites, such as the Galster Pit Mine in New York State, which saw the transformation of a devastated abandoned mine brownfield into a thriving new ecosystem.[112]

It was on this basis that the Corps denied the County's application for a permit to fill the ponds.[113] The Corps could not assert jurisdiction over the

104 *E.g.*, Wild Horses and Burros Act, 16 U.S.C. §§ 1331–1340 (2012).

105 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

106 *See* Gibbs v. Babbitt, 214 F.3d 483, 492 (2000) (finding it reasonable for Congress to regulate endangered species under the Commerce Clause because the species implicate commercial activities and interstate markets).

107 Carey Schmidt, *Private Wetlands and Public Values: "Navigable Waters" and the Significant Nexus Test Under the Clean Water Act*, 26 PUB. LAND AND RESOURCES L. REV. 97, 102–03, 117 (2005).

108 531 U.S. 159 (2001).

109 *Id.* at 163.

110 William H. Brown, *When Worlds Collide—The Gravel Pit Evaporation Conflict*, 18 COLO. LAW. 207, 237 (1964).

111 U.S. DEP'T OF THE INTERIOR, SAND AND GRAVEL PITS AS FISH AND WILDLIFE HABITAT IN THE SOUTHWEST 1 (1988).

112 N.Y. State Dep't of Envtl Conservation, *National Mine Reclamation Award: 1995 Award for New York Gravel Mine*, http://www.dec.ny.gov/lands/5368.html (last visited Apr. 9, 2016).

113 *SWANCC*, 531 U.S. at 165.

wetlands in question on the basis that they were navigable, nor because they were adjacent to a navigable waterway. An abandoned rock-bottomed gravel mine is, almost by definition, unconnected to downstream waters, because these waterways are not even bridged by a subterranean groundwater connection, as many other surface waters are. The sole basis for CWA jurisdiction in this case was the presence of migratory birds on the ponds, and the plaintiff challenged this as a legitimate basis for extending regulatory authority under the CWA.[114]

The issue in *SWANCC* was therefore straightforward: could the Army Corps exercise jurisdiction over hydrologically isolated wetlands on this basis?[115] However, the case itself was argued on two different levels: the statutory interpretation level (did Congress actually intend to exercise this much federal jurisdiction?), and the constitutional level (even if it wanted to, could Congress have exercised this much jurisdiction, consistent with constitutional limits on federal authority?).[116] Even though the statutory question was the primary issue before the Court, its treatment on all sides was suffused with anxiety about the implications of the statutory issue for the constitutional question, and of the constitutional question for the statutory issue.

The Supreme Court ultimately resolved the question solely on statutory interpretation grounds, holding that Congress did not mean to regulate hydrologically isolated wetlands based on the presence of migratory birds (although failing to fully engage the questions of whether Congress could have done so on the basis of the other available sources of authority, such as that conferred by the Treaty Clause).[117] The Court held that the statute itself was insufficiently clear on this point, and if the statute were not perfectly clear, then the Court would not defer to an agency's interpretation that pushes to the limits of its constitutional authority.[118] Articulating this "clear statement rule," the Court clarified that in such a circumstance, Congress must make a clear statement of its intent to push that far, removing any uncertainty for judicial review.[119]

The Court's decision in *SWANCC* thus invalidated the Migratory Bird Rule and effectively threw the scope of federal CWA jurisdiction into disarray.[120] A circuit split emerged as the lower courts struggled to reconcile *SWANCC*'s jurisdiction-limiting principle with the longstanding scope of federal authority previously exercised under the CWA. The Fifth Circuit adopted a more limited approach to federal wetlands jurisdiction, but the other six circuits that heard relevant challenges between *SWANCC* and

114 *Id.* at 165–66.

115 *Id.* at 162.

116 *Id.*

117 *Id.* at 174.

118 *Id.*

119 *Id.*

120 United States v. Hubenka, 438 F.3d 1026, 1032 (10th Cir. 2006) (indicating that SWANCC "struck down the migratory bird rule"); Erin R. Flanagan, *It's the "Supreme Law of the Land:" Using the Migratory Bird Treaty Act to Protect Isolated Wetlands Left High and Dry by* SWANCC, 22 PACE ENVTL. L. REV. 175, 176–77 (2005).

Rapanos continued to uphold jurisdiction throughout the full tributary system, including wetlands with only intermittent connections to navigable waterways, artificial tributaries, and those with only subsurface and ecological connections.[121] Some observers compared the actions of these six circuits to nullification—or at least open disregard for the Supreme Court's warnings about jurisdictional overreach in *SWANCC* (although none of them directly contradicted its holding disallowing jurisdiction over hydrologically isolated gravel mines).[122] *SWANCC* did not, however, overrule *Riverside Bayview Homes*'s rule that wetlands with a significant nexus to waters that were navigable in fact would be treated as jurisdictional.[123]

At this point, then, it was clear that adjacent wetlands with a significant nexus to navigable waters would be considered jurisdictional, at least according to the operative Supreme Court precedent, and isolated wetlands with a mere ecological nexus to navigable waters would not be.[124] Still, the open question that paralyzed CWA enforcement after that remained unanswered: What about non-adjacent wetlands with a hydrological nexus?[125] After *SWANCC*, it was clear that nonadjacent wetlands that are physically (and thus hydrologically) isolated, like the gravel mine ponds, will never make the jurisdictional cut. But what about wetlands that are not adjacent to navigable rivers, lakes, or coastlines, but that still share some kind of significant hydrological connection?

What if a connection is present but remote—say, if the wetlands are connected to navigable waters by twenty miles of nonnavigable creeks? What about wetlands that are connected by an artificial drainage ditch—like an agricultural irrigation ditch or a municipal stormwater ditch? What about wetlands that are close, but separated from navigable waters by an artificial

121 *Compare In re* Needham, 354 F.3d 340, 345 (5th Cir. 2003), *and* Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001), *with Hubenka*, 438 F.3d 1026 (10th Cir. 2006); United States v. Johnson, 437 F.3d 157 (1st Cir. 2006); United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003); Treacy v. Newdunn Assoc., LLP, 344 F.3d 407, 416–17 (4th Cir. 2003); United States v. Krilich, 303 F.3d 784, 791 (7th Cir. 2002); Headwaters v. Talent Irrigation Dist., 243 F.3d 526, 534 (9th Cir. 2001). Indeed, in *Rice,* the Fifth Circuit expanded on the jurisdiction-limiting principle of *SWANCC* to curtail federal jurisdiction under the Oil Pollution Act. *Rice*, 250 F.3d at 269.

122 *See* 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, 820–21 (2003) (observing that a majority of lower courts interpreted *SWANCC* as having a narrow impact on jurisdictional questions, and noting that their "loose approach to defining a hydrological connection ignores *SWANCC's* requirement of a significant nexus"); Jeremy A. Colby, *SWANCC: Full of Sound and Fury, Signifying Nothing. . .Much?* 37 J. MARSHALL L. REV. 1017, 1018 (2004) (discussing the circuit split in interpreting *SWANCC* and arguing that the looser interpretation adopted by the majority of circuits undermines the force of the jurisdiction-limiting principle of *SWANCC*).

123 *See, e.g.*, *SWANCC*, 531 U.S. at 167, 172 (discussing *Riverside Bayview Homes* and reaffirming that nonnavigable wetlands adjacent to traditional navigable waters are jurisdictional).

124 *Id.* at 165–68, 170–71.

125 *See id.* at 167 (discussing the absence of opinion in *Riverside Bayview Homes* regarding jurisdiction over non-adjacent wetlands, and leaving the issue open as to the authority of the Corps to regulate non-adjacent wetlands with a hydrological nexus).

berm? What about hydrological connections that are entirely subsurface, through groundwater exchange? And what about ephemeral or intermittent waterways? Since 59% of all stream miles in the lower 48 states are ephemeral—as are 95% of all stream miles in the arid West—the decision to assign them as jurisdictional or not would have enormous consequences.[126] It was in the midst of this great uncertainty that the *Rapanos* case was heard.

III. THE SUPREME COURT MUDDIES THE WATER IN *RAPANOS*

In 1989, and despite regulatory warnings from the Corps that it would violate section 404, John Rapanos filled fifty-four acres of ephemerally saturated soils that were eleven to twenty miles from navigable waters, but connected to those waters by various ditches and streams.[127] June Carabell filled wetlands that were separated from jurisdictional waters by a four-foot wide artificial berm, similarly after warnings and without a permit.[128] When the government initiated enforcement actions against both landowners, the landowners separately sued on grounds that the federal government lacked jurisdiction over these wetlands.[129] The question in both cases was simple: were these waters of the United States for the purposes of the CWA?[130]

The cases were consolidated and ultimately decided by the Supreme Court, in what would ultimately prove one of the Court's most fractured decisions of all time.[131] The Court produced five different opinions without a clear majority view, remanding the case for further proceedings but without a clear standard to apply.[132] The following Sections describe the various opinions reached by different members of the Court.

A. Judicial Disarray in Rapanos

Writing for a plurality of four, Justice Scalia concluded that jurisdiction was lacking, because it should cover only those permanent, standing, continuously flowing bodies of water forming geographically cognizable features that have direct surface connections to navigable waters.[133] By his analysis, hydrological connection alone is never enough to establish federal jurisdiction.[134] Nonadjacent wetlands, those that are intermittent, and those

126 TECHNICAL SUPPORT DOCUMENT, *supra* note 86, at 143; James Murphy, *Hard to Navigate:* Rapanos *and the Future of Protecting Our Waters*, NAT. RESOURCES & ENV'T, Summer 2007, at 4.

127 *Rapanos*, 547 U.S. 715, 719–20 (2006) (plurality opinion).

128 *Id.* at 730.

129 *Id.* at 729–30.

130 *Id.* at 729.

131 Murphy, *supra* note 126, at 3–4; Joshua A. Bloom, *What's Next After* Rapanos*?*, NAT. RESOURCES & ENV'T, Summer 2007, at 14.

132 Murphy, *supra* note 126, at 4.

133 *Rapanos*, 547 U.S. at 739 (plurality opinion).

134 *Id.* at 742 ("Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: first, that the adjacent channel contains a 'wate[r] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface

with hydrological connections that are physically remote from navigable in fact waters cannot be said to have a significant nexus, he reasoned, and so they cannot satisfy the *Riverside Bayview Homes* requirement.[135] He chided the Corps' definition for encroaching too far on local land use authority and for straying too far from the dictionary definition of the common words involved—likening the agency's "Land Is Waters" interpretation to "parody."[136] On remand, he indicated that the agency should find jurisdiction only if 1) the adjacent body is traditionally navigable or 2) it is joined by a continuous surface connection so that the boundary between the two is hard to locate.[137] Chief Justice Roberts joined the plurality, but concurred separately to emphasize his disappointment that the agency had not heeded *SWANNC*'s invitation to take a humbler view of the extent of its CWA authority.[138]

Justice Kennedy concurred in the judgment, writing separately to indicate his alternative reasoning.[139] In his view, a more remote hydrological connection isn't necessarily enough to establish jurisdiction, but it might be—if the agency proves it is enough to establish the significant nexus required by *Riverside Bayview Homes*.[140] *SWANCC* overturned the Migratory Bird Rule, he explained, but it affirmed the significant nexus test: jurisdiction exists if destruction of the wetland would significantly affect the physical, biological, or chemical integrity of the nation's waters.[141] If it does so alone or cumulatively, an ecological connection to navigable waters might suffice (such as providing water filtration services), even if it is not a continuous surface connection of the sort Justice Scalia's plurality would require.[142] He would allow a presumption of nexus if the wetland is directly adjacent to a navigable waterway or is a major tributary, but if the tributary is minor, intermittent, or ephemeral, then case-by-case findings are required to examine whether the significant nexus is present.[143] In his view, case-by-case evaluation was necessary to avoid overbreadth of the agency rule, as some will fail the connection (as in *SWANCC*).[144] But sometimes, even a marginal connection will pass the test.[145] Here, the record contained evidence suggesting a possible nexus, so Justice Kennedy voted to remand to make that determination.[146]

connection with that water, making it difficult to determine where the "water" ends and the 'wetland' begins.").

135 *Id.* at 740–42.

136 *Id.* at 732–34.

137 *Id.* at 757.

138 *Id.* at 758 (Roberts, C.J., concurring).

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

140 *See id.* at 781–82 (basing the jurisdictional question on the significant nexus between waters rather than merely the presence or absence of a hydrological connection).

141 *Id.* at 766–67, 780.

142 *Id.* at 772, 779–80 (indicating concerns with adjacency to traditionally navigable waters, but excluding any requirement of a continuous surface connection).

143 *Id.* at 781–82.

144 *Id.*

145 *Id.*

146 *Id.* at 783.

Justice Stevens dissented for the remaining four members of the court, who were all willing to defer to the agency's stated rule as reasonable, on grounds that jurisdiction does not depend on a surface connection.[147] He argued that *Riverside Bayview Homes* controls, and nothing in that opinion suggests that jurisdiction requires a continuous surface connection.[148] A purely hydrological or ecological connection might suffice to establish a significant nexus under *Riverside Bayview Homes*.[149] The plurality's reliance on *SWANCC* was misplaced, he explained, because these cases were not about hydrologically isolated wetlands—they simply involved wetlands that were not directly adjacent to navigable waters.[150] Moreover, he reasoned that even if not *every* wetland has a significant nexus to navigable waters, if *most* of them do, then it is reasonable for the agency to assert jurisdiction over *all* of them, while using the permitting program to facilitate the appropriate exceptions.[151] By his reasoning, the agency could legitimately create a rebuttable presumption of general jurisdiction over wetlands that could be waived by individual permit application.[152] If the agency were convinced by the permittee's showing that these wetlands would *not* have a significant nexus, then it could effectively waive its jurisdictional entitlement (or at least the section 404 prohibition on filling wetlands) by granting the permit and allowing fill.[153] Justice Stevens would have deferred to Congress's acquiescence and upheld the regulations as they had been applied for decades, and he warned that the Court should not overturn thirty years of combined executive and legislative implementation.[154]

Justice Breyer joined in Justice Stevens's dissent, but he also wrote separately to emphasize his understanding about the relationship of the challenged rule to Congress's stated purpose in enacting the CWA: protecting the chemical, physical, and biological integrity of the nation's waters.[155] He noted that federal authority under the Commerce Clause easily extends to wetlands, and that the Court should defer to the agency's interpretation because the waters of the United States are so intricately connected that Congress could have, and probably did, mean exactly this interpretation.[156] By his analysis, if broadly defining jurisdiction is critical to accomplishing Congress's clearly stated statutory goals, and this interpretation is really the only way to accomplish those goals, then that

147 *Id.* at 788 (Stevens, J., dissenting) (rejecting Justice Scalia's reasoning because it disregards the "technical and complex character" of the agency's duty to preserve the quality of the nation's waters).

148 *Id.* at 792–93.

149 *Id.* at 797.

150 *Id.* at 794–95.

151 *Id.* at 797–98.

152 *Id.*

153 *Id.* Note that section 404 permits are granted for other reasons in addition to lack of nexus, including circumstances in which filling a jurisdictional wetland is unavoidable for an important purpose but remediable by mitigation. *See supra* note 69–71 and accompanying text (discussing circumstances in which permits to fill are granted).

154 *Rapanos,* 547 U.S. at 799.

155 *Id.* at 811 (Breyer, J., dissenting).

156 *Id.*

alone should suffice for the significant nexus.[157] He recommended that the federal agencies implementing the rule should rewrite the regulations to say this even more clearly, because then this interpretation would also warrant *Chevron*[158] deference.[159]

In his dissent, Justice Stevens also noted that although Justice Kennedy provided the fifth vote to remand, his reasoning was not in harmony with that of the plurality opinion.[160] Instead, Justice Kennedy's reasoning was the narrowest reasoning on which five members of the Court could agree, since it was reasoning that the four justices in Justice Stevens's concurrence could at least agree with, even though they would have taken the reasoning a few steps further.[161] As such, he noted, it should be the precedential rule of the case.[162] Indeed, uncertain of which rule should prevail, in one of the first appellate cases to test the ramifications of *Rapanos*, the First Circuit held in *United States v. Johnson*[163] that jurisdiction exists if the agency can meet either the Scalia or the Kennedy tests for jurisdiction, and the Supreme Court denied review.[164]

B. Wetlands Regulation After Rapanos

The relentless judicial dissensus in *Rapanos* set in motion a period of intense regulatory confusion among later decision makers struggling to interpret the reach of federal wetlands authority. After the court's ruling, it remained clear that any traditionally navigable waters would be jurisdictional, including those considered navigable in fact at present, in the past, or in the nonspeculatively foreseeable future.[165] Those with an unbroken surface connection to navigable waters were still jurisdictional.[166] And those whose use or degradation would directly affect interstate or foreign commerce would be jurisdictional—such as those used for fishery, recreational, and industrial purposes.[167] But all others—ephemeral wetlands, nonadjacent wetlands, artificially joined and separated wetlands, etc.—remained uncertain, with differing answers depending on which Supreme

157 *Id.* (rejecting the addition of another "nexus" requirement outside what Congress and the agency establish as sufficient).

158 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

159 *Rapanos*, 547 U.S. at 811 (Breyer, J., dissenting).

160 *Id.* at 810 (Stevens, J., dissenting).

161 *Id.*; *see also* United States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006) (treating Justice Kennedy's test as controlling after *Rapanos* as "the narrowest ground to which a majority of the Justices would have assented if forced to choose").

162 *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting).

163 467 F.3d 56 (1st Cir. 2006).

164 *Id.* at 60 (finding a cranberry farm to be a jurisdictional wetland).

165 *See, e.g., Rapanos*, 547 U.S. at 730–31 (plurality opinion) (making clear that waters are jurisdictional when they are navigable in fact or reasonably could be made navigable); 2008 Jurisdiction Guidance, *supra* note 16, at 4–5.

166 2008 Jurisdiction Guidance, *supra* note 16, at 5.

167 *Id.* at 5 n.20.

Court interpretation was applied.[168] Interpretation remained uncertain even under the First Circuit's approach, as these wetlands would still require evaluation for significant nexus on a case-by-case basis, coupling uncertainty before scientific findings are made with the later uncertainty of adjudicatory discretion.[169]

At least in theory, the Kennedy standard shouldn't have diminished federal jurisdiction that much from past practice. Establishing significant nexus harmonized with the long-established rule of *Riverside Bayview Homes*,[170] and presumably, the agency would be able to prove nexus wherever it legitimately existed. However, the new requirement of case-by-case fact-finding overwhelmed agency resources. CWA enforcement began to suffer as federal agencies withdrew from the regulatory field, reportedly abandoning enforcement actions in hundreds if not thousands of cases in the years following *Rapanos*.[171] Studies showed a reversal in the previous trend of cleaner waters nationwide, as the regulatory process bogged down under the new jurisdictional uncertainty and process hurdles.[172] Indeed, EPA issued post-*Rapanos* guidance in 2008, noting that project proponents could request a presumption of jurisdiction to speed up the increasingly time-intensive permitting process.[173]

168 TECHNICAL SUPPORT DOCUMENT, *supra* note 86, at 31–32, 40–42 (noting that the plurality's and Justice Kennedy's tests are "premised on entirely different analyses with little analytical overlap").

169 *See* Kristen Clark, *Navigating Through the Confusion Left in the Wake of* Rapanos*: Why a Rule Clarifying and Broadening Jurisdiction Under the Clean Water Act is Necessary*, 39 WM. & MARY ENVTL. L. AND POL'Y REV. 295, 297 (2014) (describing how "[t]he confusion over which test should apply, as well as the lengthy case-by-case determinations required through the Kennedy opinion, have led to a decrease in agency efficiency and general enforcement"); Greenberg Traurig, *Clean Water Act Jurisdiction Under the Newly Issued Clean Water Rule*, LEXISNEXIS, July 21, 2015, http://www.lexisnexis.com/legalnewsroom/environmental/b/cleanaircleanwater/archive/2015/07/21/clean-water-act-jurisdiction-under-the-newly-issued-clean-water-rule.aspx (last visited Apr. 9, 2016) (discussing that one source of uncertainty with the new rule is the case-by-case significant nexus category because the agencies' reliance on their longstanding expertise "adds another layer of agency discretion, and therefore uncertainty, to the 'scientific' determination of significant nexus").

170 *See SWANCC*, 531 U.S. 159, 167 (2001) ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*.").

171 *See* Duhigg & Roberts, *supra* note 43.

172 *See* Charles Duhigg, *Clean Water Laws Are Neglected, at a Cost in Human Suffering*, N.Y. TIMES, Sept. 13, 2009, at A1 (reporting on the results of an extensive review of water pollution records showing that "in recent years, violations of the Clean Water Act have risen steadily across the nation"); N.Y. Times, *Toxic Waters Project: A Series About the Worsening Pollution in American Waters, and Regulators' Response*, projects.nytimes.com/toxic-waters (last visited Apr. 9, 2016) (providing a collection of reports on the subject).

173 U.S. Army Corps of Eng'rs, Regulatory Guidance Letter 08-02, Jurisdictional Determinations, at 3 (June 26, 2008), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf ("A landowner, permit applicant, or other 'affected party' may elect to use a preliminary [jurisdictional determination] to voluntarily waive or set aside questions regarding CWA/RHA jurisdiction over a particular site, usually in the interest of allowing the landowner or other 'affected party' to move ahead expeditiously to obtain a Corps permit authorization where the party determines that is in his or her best interest to do so.")

As both agency and academic commentators have noted, Congress could do more to clarify the situation,[174] but despite years of political effort, the members of Congress have been unable to break the partisan gridlock that appears to prevent it from doing so.[175] After *Rapanos*, several legislative proposals were made to clarify the scope of federal jurisdiction under the CWA. For example, Senator Russ Feingold introduced legislation that would have amended the Act to affirm broad federal authority over waters of the United States,[176] and Senator Rand Paul later proposed a bill that would have severely restricted federal reach.[177] However, no proposal has ever made it out of legislative committee to a full floor vote.[178]

Within this political context, it was therefore left to the agencies to try again for an interpretation that would both satisfy the goals of the statute and survive judicial review. To provide direction for regulated entities and agency decision makers after *Rapanos*, the Corps issued regulatory guidance in 2008,[179] and a failed attempt was undertaken to revise the Rule itself in 2011.[180] But in the years that followed, the clear need for regulatory reform prompted the implementing agencies to revisit the Rule for what they hoped would be the last time. This time, the architects of the revised rule drew on the conflicting interpretations by members of the Court in *Rapanos*—in particular, the approaches taken by Justice Kennedy and Justice Stevens—in forging a workable compromise in the allocation of regulatory benefits and burdens.

IV. TRYING AGAIN: THE CLEAN WATER RULE

In 2015, after almost a decade of regulatory chaos, EPA and the Corps finally released a new version of the Rule that took aim at the greatest sources of uncertainty and unhappiness for both sides. The Rule—this time anointed "the Clean Water Rule"—is the result of protracted negotiation among agencies and stakeholders during the period of notice and comment on the proposed rule, released in 2014,[181] which drew over one million public comments.[182] While most commenters supported the proposal, some in the

174 *See, e.g.*, Duhigg & Robert, *supra* note 43 (noting that the EPA's administrator has urged Congress to clarify jurisdiction under the CWA).

175 *See* COPELAND, *supra* note 20, at 10–11 (noting that despite various legislative options ranging from new legislation to amendments to appropriation bill limits, "[e]ach option faces a steep path to enactment").

176 *See supra* note 19 and accompanying text.

177 *See supra* note 20 and accompanying text.

178 *See* COPELAND, *supra note* 20, at 9–10 (discussing Congress's attempt to pass the Clean Water Restoration Act, which seeks to clarify jurisdiction).

179 2008 Jurisdiction Guidance, *supra* note 16.

180 *See* COPELAND, *supra* note 17, at 1 (discussing the 2011 proposed rule, which was never adopted, and the preceding 2008 regulatory guidance).

181 79 Fed. Reg. 22188 (Apr. 21, 2014).

182 *See* U.S. ENVTL. PROT. AGENCY, CLEAN WATER RULE RESPONSE TO COMMENTS—MASS MAILING CAMPAIGN 2 (2015), *available at* http://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_mass_mailing_campaigns.pdf.

regulated community were bitterly critical.[183] Opponents argued that the rule over-claimed federal authority and would paralyze legitimate business activity under burdensome regulations.[184] Resistance was especially fierce among agricultural interests—epitomized by the Missouri Farm Bureau's viral YouTube video, "That's Enough," which protested the Rule by humorously parodying the popular song "Let it Go" from the Disney Movie, *Frozen*.[185]

EPA Administrator Gina McCarthy toured the country meeting with disgruntled opponents, attempting to reassure them that the final rule would take account of their concerns.[186] Indeed, the final rule was modified in several areas as part of the agencies' effort to reach a compromise with the legitimate concerns of affected stakeholders, especially in agriculture.[187] Just as important, however, the Rule also represents a compromise between the Supreme Court's conflicting opinions about how far federal authority under the CWA should extend. Different parts of the Rule respond directly to the concerns that each of the Justices voiced in different parts of the infamously fractured *Rapanos* decision. The following Sections analyze the new Clean Water Rule, tracing the judicial provenance of core elements and exploring the sophisticated regulatory architecture by which the Rule reconciles competing judicial concerns.

A. The Clean Water Rule

The Clean Water Rule maintains the least controversial aspects of earlier versions of the Rule, categorically asserting jurisdiction over interstate waters, the territorial seas, navigable waters, and impoundments of otherwise jurisdictional waters.[188] Tributaries to these waters are also treated as jurisdictional when there are physical indicators of flow—a bed, banks, and ordinary high water mark.[189] The Rule also asserts categorical jurisdiction over wetlands that are adjacent to navigable waterways, defined as such if any part is contiguous or located within a minimum of 100 feet of the ordinary high water mark, or within the 100-year floodplain (to a

183 *See id.* (noting that "[t]he overwhelming majority (90%) of the mass mailing campaign commenters expressed support for the proposed rule").

184 *See, e.g.*, Todd Gaziano & M. Reed Hopper, *Final "Waters of the U.S." Rule Is More Overreach by EPA*, FORBES, Aug. 3, 2015, http://www.forbes.com/sites/realspin/2015/08/03/final-waters-of-the-u-s-rule-is-more-overreach-by-the-epa/ (last visited Apr. 9, 2016).

185 *See* Missouri Farm Bureau, *That's Enough*, YOUTUBE (May 23, 2014), https://www.youtube.com/watch?v=9U0OqJqNbbs (last visited Apr. 9, 2016) ("That's enough, that's enough. . . . Don't need more government anyway!").

186 Kevin Miller, *Head of EPA Meets with Maine Farmers amid Controversy over Water Quality Rules*, HERALD PRESS, Nov. 30, 2015, http://www.pressherald.com/2015/11/30/head-of-epa-meets-with-maine-farmers-amid-rules-controversy/ (last visited Apr. 9, 2016).

187 *See* FACT SHEET, *supra* note 23 (including a comparison table showing where the final rule departs from the proposed and preexisting versions of the rule).

188 40 C.F.R. § 110.1(1) (2015) (defining "waters of the United States"); *see also* FACT SHEET, *supra* note 23 (indicating where the final Rule departs from the proposed and pre-existing versions).

189 40 C.F.R. § 110.1(3)(iii) (2015) (defining "tributaries").

maximum of 1,500 feet above the ordinary high water mark).[190] These waterways will be subject to federal jurisdiction without further analysis,[191] but for the first time, categorical assertions of jurisdiction are limited by a set of measurable, physical criteria based on the best available peer-reviewed science.[192]

The Clean Water Rule also sets forth those waterways that are categorically excluded from jurisdiction.[193] These include waste and wastewater treatment systems, stormwater management systems, prior converted cropland, artificial lakes and ponds constructed for various purposes, swimming pools, puddles, erosional features, most ditches (that are not a relocated tributary), and groundwater.[194] As EPA is quick to note in its public outreach materials, the Rule does not apply to any waterways that have not been historically regulated under the CWA.[195]

Regarding waterways that do not meet any of these criteria, the Clean Water Rule establishes a process for determining jurisdiction based on their relationship to primary jurisdictional waters.[196] Open waters without clear geographical features, certain coastal wetlands, prairie potholes, vernal pools, and other nonadjacent wetlands may be federally regulated if they are shown to have a significant connection (or nexus) to navigable waterways, because their own destruction could negatively impact the chemical, physical, or biological integrity of the larger waterway downstream.[197] Similarly, any other wetland within 4,000 feet of navigable waters or their tributaries that are shown to have a significant nexus may be federally regulated.[198]

Importantly, however, these categories of waterways will be considered jurisdictional only if the requisite nexus is established on the basis of case-specific analysis.[199] The analysis evaluates the relationship between waterways with respect to specified hydrological and ecological functions relating to sediment trapping, nutrient trapping, pollutant filtering and transformation, flood water retention and attenuation, runoff storage, flow contribution, organic matter export, food resource export, and the provision of life cycle dependent aquatic habitat for species located on the primarily

190 *Id.* §§ 110.1(1), (3)(i) (defining "waters of the United States" and "adjacent"). "Adjacent" is defined as "bordering," "contiguous," or "neighboring," even if separated by natural or artificial obstructions. *Id.* § 110.1(3)(i).

191 Clean Water Rule, 80 Fed. Reg. at 37,058.

192 *Id.* at 37,055, 37,073, 37,104–05.

193 40 C.F.R. § 110.1(2) (2015) (listing categorical exclusions).

194 *Id.*

195 *See* FACT SHEET, *supra* note 23 (noting that the rule does not apply to contested waterways such as groundwater, shallow subsurface flows, tile drains, erosional features, or most ditches, and that it does not change policy on irrigation transfers, water transfers, or storm water management).

196 *Id.* (discussing case-specific analysis for specific kinds of wetlands, and defining "significant nexus").

197 *Id.*

198 40 C.F.R. §§ 110.1(1)(viii), (3)(v) (2015) (discussing case-specific analysis for other kinds of wetlands, and defining "significant nexus").

199 *Id.* § 110.1(1)(vii)–(viii).

jurisdictional waterway.[200] Wetlands that do not significantly contribute to the integrity of primarily jurisdictional waterways in these ways will not be subject to federal regulation under the statute.[201]

The Clean Water Rule thus reflects a compromise between competing interests in stronger and weaker regulatory reach, and between appropriate regulatory presumptions. The categorical assertion of authority over immediately adjacent wetlands tributaries with conventional geographical features—regardless of intermittent flow—reflects the agencies' acceptance of the scientific consensus that such tributaries will almost always affect navigable waters downstream.[202] As Justices Stevens and Breyer argued in *Rapanos*, this justifies the presumption in favor of regulatory jurisdiction.[203] Still, the limitation of categorical authority to tributaries with "conventional geographical features" nods to the concerns raised by Justice Scalia in *Rapanos*,[204] and the case-by-case analysis required for other nonnavigable waters shows regard for the position taken there by Justice Kennedy—that individualized inquiry is warranted when it is possible that wetlands may or may not affect the nation's waters more broadly.[205]

B. Resolving Rapanos *at the Level of Regulatory Architecture*

Close analysis reveals how the Clean Water Rule creates a framework for convergence between the seemingly conflicting approaches taken by Justice Kennedy and Justice Stevens in *Rapanos*, and one that ultimately incorporates proposals from the other *Rapanos* opinions as well.

As discussed in Part III, Justice Kennedy's concurrence and Justice Stevens's dissent appear to point in opposite directions—with Kennedy rejecting the agency's interpretation of the Rule and Stevens willing to affirm it.[206] Yet the two approaches actually rely on closely similar substantive rules of jurisdiction, based on a nearly identical statutory analysis: according to both Justices, federal CWA jurisdiction follows a significant nexus to navigable waters.[207] Justice Stevens was willing to defer to the agency's

200 *Id.* § 110.1(3)(v).

201 *See id.* § 110.1(1)(vi), (viii) (outlining jurisdictional waterways and stating that wetlands are included under the statute if they are adjacent to the outlined waterways or if they "have a significant nexus" to those waterways).

202 *See, e.g.*, Clean Water Rule, 80 Fed. Reg. 37,054, 37,058 (June 29, 2015) ("The next two types of waters 'tributaries' and 'adjacent' waters, are jurisdictional by rule, as defined, because the science confirms that they have a significant nexus to traditional navigable waters, interstate waters, or territorial seas."). The rule also repeatedly refers to a "Science Report" prepared by the EPA that provides the basis for the functions used to establish significant nexus. *See, e.g.*, *id.* at 37,057.

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

204 *See Rapanos*, 547 U.S. 715, 739 (2006) (plurality opinion) (asserting that jurisdiction should only apply to "bodies of water forming geographically cognizable features that have direct surface connections to navigable-in-fact waters").

205 Clean Water Rule, 80 Fed. Reg. at 37,059 (describing the significant nexus analysis as consistent with Supreme Court opinions).

206 *Rapanos*, 547 U.S. at 788 (Stevens, J., dissenting).

207 *Id.* at 780 (Kennedy, J., concurring); *id.* at 797 (Stevens, J., dissenting).

broad assertion of jurisdiction on grounds that nearly all waters within a watershed are likely to impact the navigable waters downstream, and so his interpretation initially seems the most tolerant of federal jurisdiction.[208] However, Justice Kennedy's approach would also allow jurisdiction throughout the watershed—so long as significant nexus is shown.[209] It would presume nexus for traditionally navigable waters and their immediately adjacent wetlands, and accept case-specific proof of it for all others.[210] At least in theory, then, his approach is equally tolerant of CWA jurisdiction, so long as the agency's assumptions about broad nexus are scientifically established. For this reason, the two seemingly conflicting approaches share a critical substantive core.

The main but crucial difference between them is simply where they allocate the burden of proof in marginal cases. Beyond uncontroversially navigable waters and their immediately adjacent wetlands, Justice Kennedy put the burden squarely on the agency, while Justice Stevens put the burden on the landowner seeking a section 404 permit to fill.[211] The two approaches establish opposite presumptions at the beginning of the analysis, effectively requiring the opposite party to rebut the regulatory default: under Kennedy's approach, the agency must rebut a presumption of no jurisdiction with proof of significant nexus, while under Stevens's approach, a landowner can rebut the presumption of jurisdiction by proving a lack of significant nexus.[212]

As the post-*Rapanos* era demonstrated, this small detail of legal architecture has enormous consequences for real world governance.[213] The Kennedy approach, placing the burden of proof on the agency, became the governing rule for most jurisdictional conflicts after *Rapanos*.[214] Yet this approach was extremely resource-intensive for the agencies involved, especially in an era of extreme budgetary stress.[215] After all, the post-*Rapanos* era coincided with the era of federal budget sequestration and government shutdown.[216] As a result, the implementing agencies focused their limited attention on only those cases in which establishing jurisdiction would not be too difficult—foregoing important enforcement actions in cases where there might actually have been significant nexus, but where the agency couldn't afford to prove it.[217] Indeed, an investigation by the New York Times reported that in the years after *Rapanos*, EPA abandoned some

208 *Id.* at 797 (Stevens, J., dissenting). *See also supra* notes 147–154 and accompanying text (discussing Justice Stevens's analysis).

209 *Id.* at 780 (Kennedy, J., concurring). *See also supra* notes 139–146 and accompanying text (discussing Justice Kennedy's analysis).

210 *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).

211 *See* discussion *supra* Part III.

212 *See Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring); *id.* at 797 (Stevens, J., dissenting).

213 *See* Duhigg & Roberts, *supra* note 43 and accompanying text.

214 *See* 2008 Jurisdictional Guidance, *supra* note 16, at 11–13.

215 *See* Duhigg & Roberts, *supra* note 43.

216 *See* EXEC. OFFICE OF THE PRESIDENT OF THE U.S., IMPACT AND COSTS OF THE OCTOBER 2013 GOVERNMENT 5 (2013), *available at* https://www.whitehouse.gov/sites/default/files/omb/reports/impacts-and-costs-of-october-2013-federal-government-shutdown-report.pdf.

217 Duhigg & Roberts, *supra* note 43.

1,500 high profile enforcement actions rather than invest scarce resources proving its jurisdiction to pursue them—including many cases where jurisdiction was presumably provable, but prohibitively expensively so.[218]

Nevertheless, the Clean Water Rule pushes past the intractable conflicts that upended the CWA after *Rapanos*, rejecting the all-or-nothing approaches advocated there in favor of a regulatory compromise that implements each strategy with regard to the waterways where it makes the most sense. In fact, it also incorporates core elements from the other *Rapanos* opinions. The new Rule incorporates parts of Justice Stevens's categorical deference, parts of Justice Scalia's narrow view of a tributary, and parts of Justice Kennedy's case-by-case balancing to accommodate ecological and hydrological connections, while also heeding Chief Justice Robert's warnings about jurisdictional limits and Justice Breyer's advice to clarify the formal agency findings and scientific bases for jurisdiction that will command *Chevron* deference.[219]

The Clean Water Rule begins by incorporating Justice Stevens's broad deference to the agencies' assertion of categorical jurisdiction, not only for the noncontroversial categories of traditionally navigable waters, but also for many tributaries and wetlands that may have required additional findings under Justice Kennedy's approach. However, it does so with important limits that respond to the concerns of the other four *Rapanos* opinions. For example, categorical assertions of jurisdiction for nonnavigable waters are limited to those with the kinds of conventional geographical features that Justice Scalia specifically referenced in his plurality opinion.[220] There, he suggested that jurisdiction "should cover only those permanent, standing, continuously flowing bodies of water forming geographically cognizable features that have direct surface connections to navigable-in-fact waters."[221] Under the Rule, tributaries are jurisdictional throughout the hydrological chain, even when they are intermittent—but only those with the defined physical characteristics of bed, bank, high water mark, and surface connection that accord Justice Scalia's common parlance view of what should count as a waterway.[222] While Justice Scalia would not have approved the extension of jurisdiction to intermittent tributaries or others without a permanent surface connection to navigable waters, the Rule directly incorporates many of the physical limitations that he championed in *Rapanos*.

Similarly, while Justice Stevens's *Rapanos* approach would allow categorical jurisdiction over nearly all wetlands,[223] the portion of the Rule

218 *Id.*

219 *See* Clean Water Rule, 80 Fed. Reg. 37,054, 37,055 (June 29, 2015) ("In this final rule, the agencies clarify the scope of 'waters of the United States' that are protected under the Clean Water Act (CWA), based upon the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the statute.").

220 *See id.* at 37,058; *Rapanos*, 547 U.S. 715, 739, 742 (2006) (plurality opinion).

221 *Rapanos*, 547 U.S. at 739 (plurality opinion).

222 Clean Water Rule, 80 Fed. Reg. at 37,076.

223 *Rapanos*, 547 U.S. at 788 (Stevens, J., dissenting).

that asserts categorical jurisdiction nods toward Scalia's strict view of immediate adjacency, designating only those wetlands that meet strict scales of proximity.[224] Only wetlands within 100 feet of the ordinary high water mark or within the 100-year flood plain up to 1,500 feet of the ordinary high water mark will be treated as jurisdictional without case-specific analysis[225]—a limited categorical assertion that would likely satisfy Justice Kennedy, and probably even Justice Scalia. These elements also heed Chief Justice Roberts's open admonition that the agencies more clearly acknowledge the limits of jurisdictional authority conferred to them by the statute.[226]

Moreover, even in these circumstances where the Rule categorically presumes jurisdiction, landowners who want to fill wetlands believed to lack significant nexus can make a formal showing to the agency of why their proposed actions would not cause the downstream harm that the statute is designed to prevent.[227] When the agency is persuaded, it grants the section 404 permit to allow the action, effectively waiving its authority to prevent fill in favor of the owner's prerogative.[228]

The categorical part of the Clean Water Rule thus follows Justice Stevens's presumption in favor of the agency, while allowing the agency to cede its legal entitlement[229] to the owner when the applicant proves that a proposed fill will not harm the nation's waters. However, the Stevens model of broad presumptive jurisdiction is rejected by the part of the Rule that governs those nonnavigable waters that lack the criteria of bed and bank or that lie beyond the categorical envelope of adjacency.[230] Yet this part of the Rule also rejects Justice Scalia's approach of categorically rejecting jurisdiction over such waters. Instead, the Rule here adopts Justice Kennedy's approach of enabling the agency to prove jurisdiction by showing significant nexus on a case-specific basis.

To establish CWA jurisdiction over these other waters, the agency must show that such a waterway "significantly affect[s] the chemical, physical, or

224 Clean Water Rule, 80 Fed. Reg. at 37,058.

225 *Id.*

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

227 *Id.* at 37,095.

228 *Id.*; 33 C.F.R. § 325.2 (2014) (regulations governing processing of permit applications).

229 I use the language of legal entitlements here to differentiate between underlying jurisdiction and the actual use of that jurisdiction to block a desired action. As I have shown in previous work, the Calabresi and Melamed "Cathedral" vocabulary of legal entitlements can help elucidate the negotiated exercise of regulatory jurisdiction in federalism-sensitive contexts. ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 241–50 (2012). In this context, the jurisdictional entitlement refers to the ability of the agency to prevent a regulated activity, or to cede the entitlement to the landowner to act without regulatory interference. Applied here, the Stevens approach grants the jurisdictional entitlement to the agency but allows the landowner to shift it with a showing of no nexus, while the Kennedy approach grants the legal entitlement to the landowner but allows the agency to shift it with a showing of significant nexus. *See id.* at 250–61. *See also* Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1, 13 (2010) (discussing jurisdictional entitlements in federalism-sensitive contexts).

230 40 C.F.R. § 110.1(1)(vii)–(viii) (2015).

biological integrity of traditional navigable waters, interstate waters, or the territorial seas," and if the agency meets that burden, then jurisdiction is established.[231] Here, the legal entitlement begins with the landowner, but it can be shifted to the agency if the agency makes the required showing of a significant nexus to other jurisdictional waters. In this way, the Rule effectively shifts the burden of proof of significant nexus for more diffuse and remote waters from the landowner to the agency.[232]

Notably, both approaches assume the possibility of significant nexus throughout the hydrological chain, reflecting the understanding that both Justices Stevens and Kennedy shared in *Rapanos* (together with Justice Breyer, but not Justice Scalia or Chief Justice Roberts).[233] Again, the only difference is who bears the burden of proving significant nexus. In this way, the Clean Water Rule effectively splits the difference between these two *Rapanos* approaches—categorically extending jurisdiction through much of the hydrological chain (as Justice Stevens would have done), but using case-by-case analysis of most nonadjacent wetlands (as Justice Kennedy would have done).[234]

The final rule also responds to Chief Justice Roberts's warnings that the agencies acknowledge some kind of jurisdictional limits,[235] and it incorporates actual limits that reflect Justice Scalia's intuitions about what kinds of waterways should and should not require additional justification.[236] Finally, in asserting a basis for these limits in the scientific record, it follows Justice Breyer's recommendation to more formally establish the agency's determination as to what extent of jurisdiction is necessary to accomplish Congress's goal of protecting the chemical, physical, and biological integrity of the nation's waters—so as to command greater judicial deference.[237] The

231 Clean Water Rule, 80 Fed. Reg. at 37,059.

232 Note that I am using the term "burden of proof" casually here, invoking its common usage; I leave to the better experts of procedure whether this regulatory architecture creates a separate burden going forward.

233 *Compare Rapanos*, 547 U.S. 715, 782 (2006) (Kennedy, J. concurring) ("Where an adequate nexus is established for a particular wetland, it may be permissible . . . to presume covered status for other comparable wetlands in the region."), *and id.* at 797 (Stevens, J. dissenting) (arguing that jurisdiction over wetlands should not depend on a case-specific analysis, because "it is enough that wetlands adjacent to tributaries generally have a significant nexus to the watershed's water quality"), *and id.* at 811 (Breyer, J. dissenting) ("Those waters are so various and so intricately interconnected that Congress might well have decided the only way to achieve this goal is to write a statute that defines "waters" broadly."), *with id.* at 755 (plurality opinion) (asserting that "significant nexus" "appears nowhere in the Act, but is taken from *SWANCC*'s cryptic characterization of the holding of *Riverside Bayview*").

234 Clean Water Rule, 80 Fed. Reg. at 37,056, 37,058.

235 *See supra* note 138 and accompanying text.

236 *See supra* notes 217–218 and accompanying text.

237 *See supra* note 219 and accompanying text (discussing Justice Breyer's analysis in *Rapanos*). *See also* Clean Water Rule, 80 Fed. Reg. 37,054, 37,055 (Jun. 29, 2015) ("In this final rule, the agencies clarify the scope of 'waters of the United States' that are protected under the Clean Water Act (CWA), based upon the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the statute."). The Rule itself leans heavily on the Science Report that EPA relied on in promulgating the Rule: "The rule only covers as tributaries those waters

Clean Water Rule thus draws important elements from each of the voices in the *Rapanos* opinion that prompted its revision. Indeed, the agencies warrant recognition for locating these elusive common threads amidst such infamously conflicting judicial guidance.

Of course, as previously noted, alternating the legal defaults between the Stevens and Kennedy approaches can have substantial consequences for actual regulatory outcomes. Because shifting the burden of proof leaves almost everything else in a legal rule unchanged, it may at first seem like a modest adjustment—but as every litigator knows, the burden of proof can be outcome determinative. In the wetlands context, proving the lack of nexus where it is presumed can be expensive for the landowner, and at the margins, may result in fewer permits to fill categorically jurisdictional waters.[238] Similarly, proving nexus on a case-specific basis may result in less protection for noncategorical wetlands, if budgetary constraints continue to force agencies to limit their expenditure of resources.[239]

In this way, a legal default that seems like a small stone in the arch of an overall rule may yet prove to be the cornerstone—and it is in this regard that the Clean Water Rule highlights the underappreciated significance of regulatory architecture in difficult lawmaking. The Clean Water Rule represents a compromise between intractably opposing positions, pleasing no one entirely. It could thus be justified, as compromises usually are, as the best that could be done under the circumstances. Yet its unique regulatory architecture—the burden-shifting approach that it takes in different hydrological contexts—confers more satisfying justification for the rule on the basis of sound environmental policy, efficient cost allocation, and fair process.

The Clean Water Rule alternates defaults not just to satisfy judicial review, but because doing so will facilitate the best regulatory outcomes. The alternating presumptions make sense in the contexts where they are

that science tells us provide chemical, physical, or biological functions to downstream waters and that meet the significant nexus standard." Clean Water Rule, 80 Fed. Reg. at 37,058. *See also* Laurie C. Alexander, *Science at the Boundaries: Scientific Support for the Clean Water Rule*, 34 FRESHWATER SCI. 1588 (2015) (evaluating the scientific support for the legal conclusions drawn by the Clean Water Rule).

Nevertheless, critics contend that the agency could do more to specify how it arrived at the specific distance criteria used for establishing jurisdiction under the Rule. *See, e.g.*, North Dakota v. U.S. Envtl. Prot. Agency, No. 3:15-cv-59, 2015 WL 5060744, at *6 (D.N.D. Aug. 27, 2015) (granting a preliminary injunction while state plaintiffs challenge elements of the final Rule as departing arbitrarily from the scientific record and failing to follow logically from the proposed rule). *See also* Patrick Parenteau, *A Bright Line Mistake: How EPA Bungled the Clean Water Rule*, 46 ENVTL. LAW 379 (2016) (arguing that the 4,000 foot rule is not supported by agency science); Michael C. Blumm & Steven M. Thiel, *(Ground)waters of the United States: Unlawfully Excluding Tributary Groundwater from Clean Water Act Jurisdiction*, 46 ENVTL. LAW 333 (2016) (critiquing the exclusion of groundwater from jurisdiction as scientifically unsupported); Craig N. Johnston & Gerald Torres, *Normal Farming and Adjacency: A Last Minute Gift for the Farm Bureau*, 46 ENVTL. LAW 395 (2016) (critiquing the exclusion of normal farming activities from the Rule's definition of adjacency).

238 *See supra* notes 49–50 and accompanying text.

239 *See supra* note 46 and accompanying text.

deployed, because categorical jurisdiction really is preserved for those cases where the best available peer-reviewed science indicates that a fill would cause harm,[240] and case-specific analysis is saved for those cases where the answer really is less certain.[241]

In this way, the rule is both environmentally and economically efficient, erring on the side of protecting those wetlands that science suggests are most likely to be critical to CWA objectives.[242] Forcing the owner to bear the cost of showing harm where the agency is likely to prevail will reduce the number of owners that go forward, thus reducing the amount of resources unnecessarily expended on both sides. Forcing the agency to bear costs when harm is less certain should induce the agency to press for jurisdiction only where it believes it truly necessary, reducing the expenditure of agency resources on marginal cases and erring against jurisdictional overreach. Litigants from both the regulated and environmental communities have criticized certain of the lines drawn by the new Rule—especially the 4,000-foot limit on case-specifically addressed non-adjacent wetlands[243]—but the Chief Justice's direct warning in *Rapanos* may indicate that to survive judicial review (unless Congress finally acts itself to clarify the issue), the agencies may be forced to engage in some degree of discretionary line drawing.

Finally, the Clean Water Rule's burden-shifting approach exposes some irony in the protracted political debate after *SWANCC* and *Rapanos*, which often casts the Waters of the United States dilemma as a federalism issue: *how far should federal regulation reach?*[244] Yet in this more mechanical analysis, federalism fades into the backdrop as regulatory architecture takes center stage. While many have argued that Justice Kennedy's approach in *Rapanos* is more faithful to the principles of federalism than Justice Stevens's,[245] the burden-shifting analysis reveals that the two are nearly equivalent from the federalism perspective. The substantive rule of jurisdiction is virtually identical: federal jurisdiction follows significant nexus, and that is all. Once again, the key difference is who bears the burden

240 *See supra* note 237 and accompanying text.

241 The Rule specifically indicates that nexus should be proved in these categories because while the science suggests that some of these waters are interdependent, it acknowledges that others may be less so. The agencies conclude that requiring case-specific analysis will lead to more consist administration and more scientifically sound exercises of jurisdiction. *Id.* at 37,059.

242 Note, however, that critics from both the environmental and regulated communities have argued that elements of the Rule depart from the scientific record. *See supra* note 237 (addressing arguments in favor of and against the relationship between the Rule and the supporting science).

243 *Id.*

244 *See* Missouri Farm Bureau, *supra* note 185 (criticizing the Rule's application to agricultural ditches in the video parody of a Disney Film, *Frozen*).

245 *See* Bradford C. Mank, *Implementing Rapanos—Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers?*, 40 IND. L. REV. 291, 331 (2007) ("In the areas of national power and federalism, Justice Kennedy has taken a centrist position that seeks a middle ground between Justice Scalia's states' rights philosophy and Justice Stevens's support for broad national power.").

of proof in establishing whether a marginal waterway satisfies this common jurisdictional standard. But setting the burden of proof is a matter of civil procedure, not constitutional law. As the Clean Water Rule ultimately shows, the path forward hinges more on carefully tailored regulatory architecture than a close reading of the Commerce Clause. And the Clean Water Rule threads this needle in a way that might finally satisfy a majority of the Court.

V. CONCLUSION

The Clean Water Rule has thus been painstakingly constructed in a way that should defuse the most likely assaults against it. Despite the plethora of arguments framing the wetlands issue as a federalism cliffhanger,[246] the new Rule defuses the jurisdictional debate through sophisticated regulatory architecture that shifts the burden of proof in contexts where the owner and the agency should rightly bear it. In so doing, it reasonably balances the competing considerations of environmental protection and economic development, state and federal authority, public commons and private property. It combines regulatory tools from civil procedure and scientific consensus to facilitate difficult decisions where consensus has long been lacking, taking as best account as possible of the multiple judicial perspectives offered in the last round of Supreme Court review.

In that previous round, *Rapanos*, the Court's analysis was fractured among five opinions, each emphasizing different concerns about regulatory reach and effectiveness, each with seemingly distinct implications for environmental federalism.[247] Those favoring more regulatory reach under the CWA tout the Stevens and Breyer opinions, while those favoring less federal reach tout the Kennedy opinion, the Roberts opinion, or the Scalia opinion (which departs most dramatically from historical assertions of CWA authority). No rule could fully satisfy each of these competing approaches, but the Clean Water Rule capitalizes on a critical convergence between them—especially those offered by Justices Kennedy and Stevens, which create similar substantive rules of jurisdiction based on an identical legal analysis: federal reach extends as far as there is significant nexus, or the likelihood of harm to the nation's waterways.[248]

The Clean Water Rule recognizes that the main difference between the Kennedy and Stevens approaches, at least with regard to more controversial waterways, is where each would allocate the burden of proving that harm to the nation's waterways will follow.[249] In *Rapanos*, Justice Kennedy put the burden on the agency, while Justice Stevens put the burden on the landowner.[250] Their proposals would thus establish opposite presumptions at

246 *See* Erin Ryan [*Environmental Federalism's Tug of War Within*], *supra* note 60, at 382–84; Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 41–42 (1999).

247 *See Rapanos*, 547 U.S. 715 (2006).

248 *See* discussion *supra* Part IV.B.

249 *See* discussion *supra* Part IV.B.

250 *See* discussion *supra* Part III.A.

the beginning of the analysis, requiring different parties to rebut opposing regulatory defaults—with Justice Kennedy requiring the agency to rebut a presumption of no jurisdiction by proof of significant nexus, and Justice Stevens requiring a landowner to rebut the presumption of jurisdiction by proving a lack of nexus (and receiving permission to fill).[251] The Clean Water Rule threads the needle by adopting both presumptions, alternating them in application to the circumstances in which each makes most sense: Justice Stevens's presumption of jurisdiction where harm is most likely, putting a thumb on the scale in favor of CWA reach, and Justice Kennedy's presumption against jurisdiction where harm is most speculative, favoring private autonomy.

Framing the issue of regulatory reach this way promises to tame the environmental federalism issues that have bedeviled the waters of the United States virtually since its inception. Now, the relevant issue sounds more in civil procedure than constitutional law: who should bear the burden of proof about when a waterway satisfies the common jurisdictional standard? If we accept the uncontroversial statutory premise that Congress designed the CWA to protect the nation's waterways,[252] then the substantive jurisdictional standard of significant nexus seems unassailable (as the Court itself first recognized in *Riverside Bayview Homes*). The jurisdictional standard is the part of the rule that has always seemed fraught with federalism concerns—but by shifting focus to burden allocation, the Clean Water Rule moves the primary political debate beyond the jurisdictional standard itself.

Of course, the followers of Justice Scalia's position in *Rapanos* may not subscribe to this approach, so the looming question remains how the members of the Court will receive the Clean Water Rule when it inevitably reaches them. It seems likely that Justices Breyer, Ginsburg, Kagan, and Sotomayor will approve, given their general willingness to defer to the environmental agencies' own determinations—but even here, uniform approval is not certain. After all, the Clean Water Rule confers weaker federal jurisdiction than the version they approved in *Rapanos*, and if there really is scientific consensus that navigable waters depend on the health of all waters in the watershed,[253] then perhaps—as Justice Breyer himself argued in *Rapanos*—the only way to meaningfully implement the congressional intent behind the CWA are the terms of the original Rule.[254] Putting the burden on the landowner in all circumstances would, as President George H.W. Bush long ago advocated, put a thumb on the scale against further wetlands loss.[255] On balance, a more uniform presumption in favor of jurisdiction would protect more wetlands from fill, and a presumption against jurisdiction will protect fewer of them.[256] So if the

251 *Id.*

252 CWA, 33 U.S.C., § 1251(a) (2012).

253 *See supra* note 82 and accompanying text.

254 *See supra* note 42 and accompanying text.

255 *See supra* note 79 and accompanying text.

256 *See supra* notes 203–204 and accompanying text; Duhigg & Roberts, *supra* note 43.

changes in the Clean Water Rule are found to depart from the agency's own science, then it is possible (if unlikely) that a Justice in Stevens's *Rapanos* camp might reject these elements of the new Rule as arbitrary or capricious.

It seems less likely that the members of the Court who signed on to Justice Scalia's *Rapanos* opinion will defer, given that the Rule preserves the possibility of jurisdictional determinations for waterways that Justice Scalia categorically rejected in *Rapanos*, such as intermittent tributaries.[257] On the other hand, they may also be more amenable to the Clean Water Rule's approach than the one they rejected in *Rapanos*, given the jurisdictional compromise at its heart and its incorporation of concrete physical criteria to streamline jurisdictional determinations and limit federal reach. While the new Rule does not adopt the narrowest jurisdictional vision that Justice Scalia set forth in *Rapanos*, it acknowledges his concern that diffuse waterways be treated differently from those with conventional features of bed, bank, and high water mark. It respects Chief Justice Roberts's demand for more explicit jurisdictional limits. But of course, the coalition Justice Scalia forged in *Rapanos* is entirely uncertain now that he is gone from the Court.

As with so many cases currently headed for the Court, the defining ballot is likely to be the one cast by Justice Kennedy. Is he likely to defer to the agencies' approach? Based on his reasoning in *Rapanos*, it seems that he should. The Clean Water Rule adopts his jurisdictional standard of significant nexus, and to ensure that jurisdiction follows nexus, it creates specific, measurable parameters for establishing significant nexus to navigable waters. Closely tracking the intuitions that inspired his own opinion in *Rapanos*, the Rule constrains agency discretion on the basis of peer-reviewed scientific consensus about the hydrological and ecological functions of waterways.[258] Ultimately, the Clean Water Rule is a compromise in every way, so that he is no more likely to be fully satisfied than any other adjudicator. But it is a compromise that responds carefully and logically to the concerns that he and his colleagues have raised in previous iterations of the Supreme Court debate, and to the competing stakeholder demands that have been repeatedly raised in the political sphere.

For these reasons, it seems that the rule should satisfy Justice Kennedy—but of course, predictions of Supreme Court decisions are rarely worth their own weight. In the end, one only need count five, but now that the membership of the reviewing Court is uncertain—as are the relevant views of Justices Sotomayor and Kagan, who replaced Justices Souter and Stevens since *Rapanos* was decided—even that seems an impossible task (in some respects, reflecting the herculean task of the Clean Water Rule itself).

257 *Compare supra* note 38 and accompanying text, *with* Clean Water Rule, 80 Fed. Reg. at 37,063 ("This diverse groups of wetlands (*e.g.*, many Prairie potholes or vernal pools) can be connected to downstream waters through surface water, shallow subsurface water, and groundwater flows, and through biological and chemical connections.").

258 FACT SHEET, *supra* note 23 ("The rule protects waters that are next to rivers and lakes and their tributaries because science shows that they impact downstream waters. The rule sets boundaries on covering nearby waters for the first time that are physical and measurable.")

Even so, this analysis of the science, fairness, and history of its elements suggests that the Rule should fare well in judicial review. While it may not be the best choice from any given perspective, it capitalizes on the best possible common ground among them, forging a politically necessary compromise that warrants both deference and respect.