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INTRODUCTION

Since the early 1970s, the federal regulation of water pollution has been a vital part of the movement to improve the environment. The Clean Water Act[1] ("CWA") was the first federal legislation that gave the federal government direct authority to regulate conduct for the purpose of controlling and preventing water pollution. Its enactment was a vital step in creating uniform national policy to protect water quality and assure the long-term vitality of the most vital of our natural resources.

The scope of federal authority to regulate conduct that causes water pollution is defined by the concept of the "waters of the United States." Simply put, there is extensive, long-standing legal support for the principle that the federal government has both the constitutional and statutory authority to take measures to prevent the pollution of the "waters of the United States."[2] By the same token, however, there is also extensive legal authority supporting the proposition that state and local governments have the primary responsibility–and power–to regulate land and water use within their borders, and basic constitutional principles of federalism require that the federal government.[3] At the core of this jurisdictional problem is identifying where the water ends and the land begins. As the Supreme Court noted in a decision applying the CWA nearly thirty years ago, this problem is not an easy one to solve.[4]

The difficulty of finding the jurisdictional boundary between land and water has been increased by the Supreme Court's most recent ruling on CWA jurisdiction in *Rapanos v. United States Army Corps of Engineers*.[5] In that case, the Court issued three opinions about who had the authority to define this boundary and about what legal principles should guide the definition. None of these three disparate views commanded a majority of the Court. Consequently, substantial uncertainty remains about how to determine the outer limits of federal jurisdiction to prevent pollution in the "waters of the United States."

+ I am so blessed & greatly appreciate the love of my life, M.G.S, for her enduring support and continuously making me a better person every day! This Article is dedicated to my parents, Dr.'s Aida & Adil Elias, my First Great Teachers In Life. I am truly grateful to the best brother anyone could be blessed to have, my brother, Pierre. To the *Tulsa Law Review*, a heartfelt thank you and gratitude for your efforts, and laser sharp attention to detail.

1. 33 U.S.C. §§ 1251-1376 (1948).
2. *See infra* § III.
3. *See id.*
4. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 n. 8 (1985).
5. Rapanos v. United States, 547 U.S. 715 (2006).

The two federal agencies charged with enforcing the CWA, the Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Army Corps") have recently promulgated regulations revising the regulatory definition of "waters of the United States," and thereby defining the limits of federal authority under the Clean Water Act.[6] The regulations purport to incorporate the legal principles set forth in *Rapanos*, as well as prior case law, but there are substantial questions about whether the proposed regulations are, in fact, consistent with established law or whether they reflect an attempt to extend the legal boundaries of federal jurisdiction beyond what courts have previously approved and what the CWA and the constitution would allow. Those questions are currently being considered by the Sixth Circuit, which has issued a stay of the implementation of the proposed regulations while it considers challenges to them asserted by several state governments.[7]

This paper argues that the regulations proposed last year are inconsistent with established law, including both the text of the CWA itself and the constitutional limits on federal authority to regulate land and water use. The body of law regarding the federal authority to regulate water use has always depended upon the proposition that the federal government may only regulate those bodies of water that have a regular, tangible, physical connection to waters that can be used in interstate navigation.[8] The regulations proposed by the EPA and the Army Corps go far beyond that limitation, extending federal authority over virtually the entire ecosystem that can affect the navigable waters, which includes virtually all of the land and water in every corner of the United States. As promulgated, these regulations would make the EPA and the Army Corps the primary regulators of land and water use throughout the United States, and their regulatory authority would be exercised only with regard to whether such uses would prevent or contribute to water pollution. While the prevention of water pollution is certainly a vitally important consideration, it cannot and must not be the only consideration in regulating land and water use in all of the diverse communities and localities across the country. State and local governments must retain their traditional leading role in regulating land and water use.

This paper makes this argument in Part I by outlining the regulations proposed by the EPA and the Army Corps in 2015 and identifying the principal criticisms of those regulations. In Part II, it reviews the statutory framework of the CWA, which creates the authority for the agencies to define the "waters of the United States." In Part III, this paper examines how case law, both before and after the CWA, has defined the scope of federal authority to regulate water use, and it notes that, until the new regulations, federal law has always recognized that the federal government may only regulate waters that have a significant, physical connection to the navigable waters. Finally, in Part IV, it more closely examines the main arguments against the legality of the new regulations and demonstrates that those regulations are both bad law and bad policy.

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6. *See generally*, Clean Water Rule: Definition of Waters of the United States, 80 FED. REG. 37054, 37056-57 (2015) (codified at 33 C.F.R. § 328 and scattered sections of 40 C.F.R.).

7. *See* Ohio v. United States Army Corps of Eng'rs, 803 F.3d 804, 805 (6th Cir. 2015).

8. *See infra* § III.

I. THE NEW REGULATORY DEFINITION OF "WATERS OF THE UNITED STATES" AND ITS CRITICS

In 2015, the EPA and the Army Corps promulgated a new regulatory definition of the "waters of the United States" that was guided by the ruling in *Rapanos*, as well as by policy and scientific considerations.[9] The general objective of the regulation was to provide more predictable agency decision-making about which kinds of waters and wetlands would fall within federal jurisdiction.[10] Thus, the regulatory definition established certain categories of waters that would always fall within CWA jurisdiction, and it sought to diminish the circumstances under which jurisdictional decisions would turn on case-specific factors.[11] In addition, the agencies sought to incorporate a concept that had been crucial in the most recent Supreme Court decisions on the limits of federal power under the CWA: the idea that the CWA only authorized the federal government to regulate bodies of water or other environmental features that had a "significant nexus" with interstate waters that were actually navigable or were capable of being modified to accommodate navigation.[12] As the agencies explained when first publishing the regulation:

> The first three types of jurisdictional waters, traditional navigable waters, interstate waters, and the territorial seas, are jurisdictional by rule in all cases. The fourth type of water, impoundments of jurisdictional waters, is also jurisdictional by rule in all cases. 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. For waters that are jurisdictional by rule, no additional analysis is required.
>
> The final two types of jurisdictional waters are those waters found after a case-specific analysis to have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, either alone or in combination with similarly situated waters in the region. Justice Kennedy acknowledged the agencies could establish more specific regulations or establish a significant nexus on a case-by-case basis, and for these waters the agencies will continue to assess significant nexus on a case-specific basis.13

The new regulations employed this concept of "significant nexus" to include a broad category of "waters," many of which had not previously been included within the concept of "waters of the United States." For example, the regulations extended federal jurisdiction to "all tributaries" to interstate waters and the territorial seas, with "tributary" defined to mean a water that contributes any "flow" whatsoever, "either directly or through another water," to an actual interstate or navigable water, and that "is characterized by the presence

9. *Clean Water Rule: Definition of Waters of the United States*, *supra* note 6, at 37056-57.
10. *See id.*
11. *See id.*
12. *See id.* at 37060-61.
13. *Id.* at 37058.

of the physical indicators of a bed and banks and an ordinary high water mark," and without regard to various constructed or natural breaks.[14] Given this definition, something could constitute a "tributary" even if it was "intermittent[ ] or ephemeral."[15] Moreover, the "flow" required to meet the definitional requirements for a tributary need not go directly to a navigable water. The new regulations contemplate that "to meet the rule's definition of 'tributary,' a water must flow directly or through another water or waters to a traditional navigable water, interstate water, or the territorial seas."[16] That is, "[a] tributary may contribute flow through any number of downstream waters, including non-jurisdictional features. . . ."[17] Thus, "non-jurisdictional features"——things that were within the traditional province of state and local authority——could still fall within federal jurisdiction if there was even an intermittent flow of water through them that was related to a flow of water that reached a navigable body of water.

The new regulations also found a "significant nexus" between the navigable waters and wetlands or other "waters" that were "adjacent" to the navigable waters.[18] Thus, the regulations defined "waters of the United States" to include "[a]ll waters adjacent to" any traditional navigable or interstate water, and to any "tributary" as so defined by the new regulations.[19] The new regulations further defined "adjacent" to mean not only "bordering," or "contiguous," but also "neighboring."[20] "Neighboring" was defined to include not only "[a]ll waters within 100 feet of the ordinary high water mark" of such a water, as well as "[a]ll waters" within 1,500 feet of the "ordinary high water mark of such water" and within the 100-year floodplain of such water and "all waters" within 1,500 feet of the ordinary high water mark of the Great Lakes, or of the high tide line of a traditional navigable waterway or territorial sea.[21] The new regulations also noted that "[t]he entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain."[22]

Through their expansive definition of "tributary" and their broadly drawn concept of adjacency, the new regulations would extend federal jurisdiction to "waters" and other features that are dry land most of the time, even when these feature are located as far as 1,500 feet from even "ephemeral" creek beds that are usually dry. The new regulations also would have potentially extended CWA jurisdiction to "[a]ll waters" within the 100-year floodplain of a traditional navigable or interstate water or territorial sea and to "all waters located within 4,000 feet of the high tide line or ordinary high water mark" of any such water or of a "tributary" if "they are determined on a case-specific basis to have a significant nexus" to a traditional navigable or interstate water or territorial sea.[23] To be

14. 33 C.F.R. 328.3(c)(3) (1986).
15. *Clean Water Rule: Definition of Waters of the United States*, *supra* note 6, at 37076.
16. *Id.*
17. *Id.*
18. *See, e.g.*, 33 C.F.R. 328.3(a)(6) (1986).
19. *See id.*
20. 33 C.F.R. 328.3(c)(1) (1986).
21. 33 C.F.R. 328.3(c)(2) (1986).
22. *Id.*
23. *See, e.g.*, 33 C.F.R. 328.3(a)(8) (1986).

sure the new regulation excludes a few such things as certain swimming pools (those "created in dry land") and "puddles" (defined as "very small, shallow, and highly transitory pool[s] of water that form[s] on pavement or uplands during or immediately after a rainstorm or similar precipitation event").[24] Even so, the new regulations greatly expanded federal jurisdiction over a number of areas that had long been considered within the exclusive province of state and local government. Moreover, the regulations also gave the Army Corps and the EPA extensive discretion to define a wide variety of environmental features as falling within the scope of CWA jurisdiction.

The new regulatory definition was hardly acclaimed as a solution to the long-standing problem of establishing reasonable and cognizable limits to CWA jurisdiction. The attorneys general of Ohio and Michigan sued the Army Corps in the United States District Court for the Southern District of Ohio immediately after the issuance of the rule, alleging generally that the new definition of "waters of the United States" exceeded the authority conveyed by the CWA and was inconsistent with the principles upon which Supreme Court opinions such as *SWANCC* and *Rapanos* were based.[25] In particular, the attorneys general were concerned with the intrusion of federal power into areas previously reserved for state and local authority, especially the regulation of land use and intrastate waters.[26] In this connection, they expressed concern that the regulations would give the federal government the power to inappropriately supplant state and local authority. Their complaint expressed this concern in terms of an example of an Ohio or Michigan property owner who wanted to fix "a depression in her yard that can fill with water in heavy rains."[27] They noted that, under the new regulations, this ordinary home repair could come within federal jurisdiction and be subject to the federal permitting process "should the area be in a floodplain and anywhere within 1,500 feet of even a usually dry stream bed that can be deemed to connect with some other such feature that connects somehow with other similar land features that may on occasion take water to a tributary of a river or lake that actually is a navigable or interstate water."[28]

The lawsuit by Michigan and Ohio coincided by legal actions taken by other states and private groups, all of which challenged the legality of the proposed regulations.[29] In general, all of these lawsuits involved allegations that the regulations purported to create federal authority beyond the limits permitted by the text of the CWA and the Constitution.[30] To understand whether and to what extent these allegations make a compelling case against the legality of the new definition of "waters of the United States," it is necessary to consider the framework of the CWA.

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24. *See, e.g.*, 33 C.F.R. 328.3(b)(4)(iii) (1986) (vii); 40 C.F.R. § 230.3(s)(2)(iv)(C) (1980),(G); *Clean Water Rule: Definition of Waters of the United States*, *supra* note 6 at 37099.

25. *See* Complaint, Ohio v. United States Army Corps of Eng'rs, Case No. 2:15-cv-02467 (S.D. Ohio), available at http://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Environmental-Enforcement/2015-06-29-WOTUS-Complaint-%28as-filed%29.aspx.

26. *Id*. at 42-49.

27. *Id*. at ¶ 7.

28. *Id.*

29. *See* Ohio v. United States Army Corps of Eng'rs, 803 F.3d 804, 805 (6th Cir. 2015).

30. *See id.*

II. THE CWA'S STATUTORY FRAMEWORK

The CWA was the product of evolving federal legislation designed to protect the navigability of interstate waters. The first precursor of the CWA and the first federal legislation designed to promote clean water was the Rivers and Harbors Act of 1899.[31] In this legislation, Congress sought to prevent the discharge of trash into navigable waterways.[32] The Rivers and Harbors Act contemplated water pollution as a threat to navigation–not as a threat to environmental quality–because using rivers, harbors, and bays as waste disposal sites obstructed waterways that were essential for both commercial and military purposes.[33] Thus, the Rivers and Harbors Act was tailored to permit the federal government to prevent such obstructions to the waterways that could be used for navigation.

The first federal legislation to address pollution as a problem of environmental quality was the Federal Water Pollution Control Act of 1948 ("FWCPA").[34] Under this statutory scheme, the federal government would fund research regarding water pollution and would provide loans that states could use to build water treatment plants.[35] Through this statutory scheme, the FWCPA reflected the traditional understanding of water resource management as a function of state government; it placed the primary responsibility for pollution control with state authorities, and the federal government only provided research and funding that facilitated the development of state policies and programs for managing water pollution. Unfortunately, the FWCPA was not terribly effective at promoting better water pollution control. Even with amendments gratfted on to the legislation after its initial enactment, the FWCPA proved largely ineffective, as water quality did not significantly improve as a result of its program.[36]

The need for more effective water pollution policies became a particular focus of public and political attention in the late 1960s, with the burgeoning environmental movement and the occurrence of two highly publicized environmental disasters affecting water resources. In January 1969, a "blowout" beneath an oil-drilling platform off the California coast near Santa Barbara sent over 3 million gallons of crude oil into the Pacific Ocean, resulting in "waves so thick with crude oil that they broke on shore with an eerie silence. Thirty miles of sandy beaches coated with thick sludge. Hundreds of miles of ocean covered with an oily black sheen."[37] Six months later, an oil slick on the surface of the Cuyahoga River in Cleveland caught fire, damaging two bridges, and the news coverage of that

31. Act of Mar. 3, 1899, Ch. 425, § 13, 30 Stat. 1121, 1152 (codified as amended at 33 U.S.C. § 407 (2000)).
32. *See* JOEL M. GROSS & LYNN DODGE, CLEAN WATER ACT 5 (2005).
33. *Id.*
34. P.L. 80-845, 62 Stat. 1155.
35. GROSS & DODGE, *supra* note 32, at 5-6.
36. *Id*. at 6.
37. Miles Corwin, *The Oil Spill Heard 'Round the Country!*, L.A. TIMES, January 28, 1989, at I23, http://www2.bren.ucsb.edu/~dhardy/1969_Santa_Barbara_Oil_Spill/Home.html.

event provided a dramatic accent to the problems of water pollution.[38] Indeed, Cleveland's "burning river" even became the subject of a popular song.[39]

In the wake of these events, and the inaugural Earth Day in 1970, a subcommittee of the Senate Committee on Public Works convened hearings on the problem of water pollution.[40] In 1972, relying on the Senate Committee's findings, Congress amended the FWPCA to authorize more direct federal action addressing water pollution.[41] President Nixon vetoed these amendments, but Congress overrode the veto, and the amended FWPCA became known as the Clean Water Act ("CWA").[42]

Congress announced the policy objectives behind the CWA in its text, and the text of the CWA also focused on the concept as "navigable waters" as the subject of federal regulation. At the most fundamental level, the CWA was intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[43] Congress sought to achieve this overarching objective by reaching certain specifically enumerated goals, which included, among things: eliminating the discharge of pollution into the "navigable waters" of the United States by 1985;[44] prohibiting the discharge of "toxic pollutants in toxic amounts;"[45] providing federal financial assistance to the construction of publicly owned wastewater treatment facilities;[46] promoting the development and implementation of "waste treatment management planning processes" in every state;[47] funding research and the development of technology "necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans;"[48] developing and implementing "programs for the control of nonpoint sources of pollution . . . in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution."[49]

Towards these objectives, the CWA prohibited any discharge of pollutants into navigable waters without certain permits.[50] The required permits were available through two programs that were created by the CWA: the "National Pollutant Discharge Elimination System" ("NPDES")[51]; and "permits for dredged or fill material," commonly known as

38. MICHAEL ROTMAN, CUYAHOGA RIVER FIRE, available athttp://clevelandhistorical.org/items/show/63#.VY7MNGCprzI (last accessed June 27, 2015) Some of the most sensational publicity about the Cuyahoga River Fire came from Time Magazine, which reported on the 1969 fire and on water pollution issues generally in its issue of August 1, 1969. That issue featured a photograph of the burning Cuyahoga River on the cover; but the photograph was actually from a fire that occurred there in 1952; Jonathan Adler, *The Fable of the Burning River, 45 Years Later*, WASH. POST, June 22, 2014, http://www.washingtonpost .com /news/volokh-conspiracy/wp/2014/06/22/the-fable-of-the-burning-river-45-years-later.

39. Randy Newman, *Burn On*, SAIL AWAY (1972).

40. GROSS & DODGE, *supra* note 32, at 6.

41. ROBERT W. ADLER ET AL., THE CLEAN WATER ACT 20 YEARS LATER 2-7 (1993).

42. *Id.* at 2; GROSS & DODGE, *supra* note 32, at 6.

43. 33 U.S.C. § 1251(a) (1948).

44. 33 U.S.C. § 1251(a)(1) (1948)

45. 33 U.S.C. § 1251(a)(3) (1948)

46. 33 U.S.C. § 1251(a)(4) (1948)

47. 33 U.S.C. § 1251(a)(5) (1948)

48. 33 U.S.C. § 1251(a)(6) (1948)

49. 33 U.S.C. § 1251(a)(7) (1948)

50. 33 U.S.C. § 1311(a) (1948)

51. 33 U.S.C. § 1342 (1948)

"Section 404 permits."[52] Through this regulatory framework, the CWA essentially established two categories of water pollution: the discharge of pollutants, such as toxic substances, into water; and the placement of "dredged or fill material" into water. Federal regulations define "dredged material" as "material that is excavated or dredged from waters of the United States."[53] Those regulations also define "fill material" as material that "[r]eplac[es] any portion of a water of the United States with dry land"[54] or that "[c]hang[es] the bottom elevation of any portion of a water of the United States."[55]

The two different kinds of permits are issued by separate federal agencies. The CWA gave the EPA primary authority over NPDES permits, and it created a mechanism by which the EPA can delegate its NPDES permitting authority to state agencies.[56] Permits relating to "dredged or fill material" fall within the authority of the Army Corps.[57]

III. THE INTERPRETATION OF "WATERS OF THE UNITED STATES" BEFORE AND AFTER THE CWA

A. The Established Understanding of the Limits of Federal Power over Water Resources When the CWA Was Enacted

Of course, the definition of "waters of the United States" for the purposes of the CWA does not occur in a vacuum. There is an extensive history of the federal regulation of certain waters in the United States, and this history necessarily informs the interpretation of the operative concepts in the CWA and its attendant regulations. A review of the historical use of the concept of "waters of the United States" reveals that the term has traditionally applied to waters that were actually capable of being used in navigation and their tributaries that had a significant flow into such navigable waters.

Because the terms "waters of the United States" and "navigable waters" are legal terms of art, Congress' use of these terms in the CWA creates a presumption that, in the context of the statute, these terms incorporated this established judicial meaning.[58] Congress' regulation of the "navigable waters" and the "waters of the United States" is a function of the authority granted to it under the Commerce Clause.[59] It is axiomatic that the

52. 33 U.S.C. § 1344 (1948)

53. 33 C.F.R. § 323.3(c) (1986).

54. 33 C.F.R. § 323.3(e)(1)(i) (1986).

55. 33 C.F.R. § 323.3(e)(1)(ii) (1986). The substances that constitute "fill material" include, but are not limited to: "rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States." 33 C.F.R. § 323.3(e)(2) (1986). "The term fill material does not include trash or garbage." 33 C.F.R. § 323.3(e)(3) (1986).

56. 33 U.S.C. § 1342(a) (1948) For a state to obtain authority to issue permits under this program, the governor must submit to the Administrator of the EPA a description of the proposed program and "a statement from the attorney general . . . that the laws of such State, or the interstate compact[,] . . . provide adequate authority to carry out the described program. The Administrator shall approve each . . . program unless he deter- mines that adequate authority does not exist." 33 U.S.C. § 1342(b) (1948)

57. 33 U.S.C. § 1344 (1948).

58. Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 813 (1989) ("[w]hen Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts."); *see also* Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979).

59. U.S. CONST., art. I, § 8, cl. 3.

federal government has the constitutional authority "to secure the uninterrupted navigability of all navigable streams within the limits of the United States" as an aspect of its power to regulate interstate commerce.[60] Thus, the Supreme Court has held that "the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water courses of the country."[61] The collection of navigable water courses is understood as an essentially unitary system, being described by the Court as a "continued highway" that is essential to the continuation and development of interstate commerce.[62]

In regulating this "continued highway," the federal government's primary objective is to prevent "any interference with the country's water assets" and to assure that the navigable waters always have a sufficient flow of water to permit their use in interstate commerce.[63] The need to protect the flow of water throughout the entire system of navigable waters means that federal authority over navigable waters may extend to non-navigable waters, such as tributaries of navigable waters, that are physically connected to the navigable waters and that are capable of being actually navigable in the future, through improvements that are reasonably anticipated in the ordinary course of events.[64] In addition, the federal government may regulate those tributaries of navigable waters that are not navigable now and not anticipated to become navigable, but only to the extent necessary to protect the capacity and integrity of the channels of navigation.[65] In this way, the concept of the "navigable waters" and the "waters of the United States" has always presupposed some degree of federal authority over bodies of water that exist entirely within state boundaries.

Because this aspect of federal regulatory power has the potential to intrude upon state prerogatives, it has always been accepted that the extension of federal authority over non-navigable bodies of water must be limited so that it does not intrude upon state power to regulate water. Federal courts have long recognized that the general power to regulate water use is an essential aspect of the sovereign power of state governments.[66] The states retain "total authority over [their] internal waters," except where the federal government has specifically reserved enumerated regulatory power, such as the power to regulate navigation.[67] But even here, the extension of federal authority must be carefully drawn to avoid unnecessary incursions upon the states' primary power to regulate land and water use.[68] Thus, the federal government can regulate intrastate waters only as necessary to protect the integrity of the aquatic system that constitutes the navigable waters.[69]

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60. *Id.*

61. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899).

62. *See The Daniel Ball*, 77 U.S. 557, 563-64 (1870).

63. *See, e.g.*, United States v. Appalachian Elec. Power Co., 311 U.S. 377, 405-08 (1940).

64. *The Daniel Ball*, 77 U.S. at 563; *Appalachian Elec. Power Co.*, 311 U.S. at 406.

65. Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 525 (1941); *see also* United States v. Grand River Dam Auth., 363 U.S. 229, 232 (1960).

66. *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 375-76 (1977); United States v. Texas, 339 U.S. 707, 717 (1950).

67. California v. United States, 438 U.S. 645, 662 (1978) (citing *Rio Grande Dam & Irrigation Co.*, 174 U.S. at 709).

68. *California*, 438 U.S. at 645.

69. *Appalachian Elec. Power Co.*, 311 U.S. at 423-26 (discussing federal authority to regulate hydroelectric power plants in light of their effect on the flow of water in the navigable waters); *see also* United States v. Gerlach

The text of the CWA makes it clear that Congress understood this legal background, which established that its power to regulate the "navigable waters" and the "waters of the United States" was limited and that it could not be defined so that it intruded upon the inherent, sovereign power of state governments to regulate the use of property and the use of water. In its introductory section, where it defines its fundamental policies and objectives, the CWA makes it clear that it is not intended to intrude on state sovereignty. Thus, the CWA provides:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.[70]

The CWA and the legal background against which it is written mean that the concepts of "navigable waters" and "waters of the United States" are definitely limited in scope. The historical use of these terms and the language of the CWA itself both establish unequivocally that "waters of the United States" cannot be read to mean "any water in the United States." Rather, that term, and its companion term, "navigable waters" refer to bodies of water that can be navigated or that affect the navigability of bodies of water that can be navigated. In other words, the CWA regulates waters that are actually navigable and their significant tributaries. By the same token, the CWA cannot be read to apply to bodies of water that do not have a substantial effect on the navigable waters and their tributaries.

B. The Evolution of CWA Regulations and the Gradual Expansion of Federal Authority

The regulations attendant to the CWA initially reflected a keen appreciation of the importance of the traditional concept of "waters of the United States" in defining CWA jurisdiction. In the immediate aftermath of the CWA's enactment, the regulations provided that the CWA applied only to waters that were navigable in fact.[71] In 1975, however, the Army Corps issued interim final regulations redefining "waters of the United States" to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and non-navigable intrastate waters whose use or misuse could affect interstate commerce.[72] Thus, the limits of CWA jurisdiction appeared to coincide with the limits of Congress' commerce power.[73]

Live Stock Co., 339 U.S. 725 (1950) (discussing federal authority to regulate water use in connection with the reclamation of water resources in arid western states, in light of the nexus between those reclamation projects and the preservation of the flow of water in interstate waters); *see generally*, Roderick E. Walston, *The Federal Commerce and Navigation Powers: Solid Waste Agency of Northern Cook County's Undecided Constitutional Issue*, 42 SANTA CLARA L. REV. 699 (2002).

70. 33 U.S.C. § 1251(g) (1948).

71. 40 FED. REG. 31320 (1975).

72. *Id.*

73. *Rapanos*, 547 U.S. at 723-24 (discussing the evolution of the jurisdictional regulations under the CWA).

As a part of this extension of CWA jurisdiction, the Army Corps construed the CWA to cover all "freshwater wetlands" that were adjacent to other covered waters.[74] The regulations defined a "freshwater wetland" as an area that is "periodically inundated" and is "normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction."[75] In 1977, the Corps refined its definition of wetlands by eliminating the reference to periodic inundation and making other minor changes.[76] This definition has persisted in substance.[77]

Eventually, the Army Corps sought to extend its regulation to areas whose connection to the navigable waters was more intangible. Specifically, the regulations were broadened to that the "waters of the United States" was defined to include any water that would serve as a habitat for migratory birds.[78] In addition, the Army Corps interpreted its own regulations to include "ephemeral streams" and "drainage ditches" as "tributaries" that are part of the "waters of the United States,"[79], as long as they have a perceptible "ordinary high water mark."[80]

C. The Supreme Court's Correction of the Expansion of CWA Regulatory Authority

As CWA jurisdiction expanded to apply to apply beyond the navigable waters and their significant tributaries, questions arose about whether the EPA and Army Corps were exceeding the boundaries of federal power. In particular, these questions arose in cases where the asserted federal jurisdiction was founded on the concept of "adjacency" to navigable waters and their tributaries. These questions were most prominently considered in two cases in the Supreme Court, which established the principle that a non-navigable water could fall within CWA jurisdiction only when that water had a substantial physical connection with a navigable water.

The Supreme Court first addressed the scope of CWA jurisdiction over wetlands in *United States v. Riverside Bayview Homes, Inc.*[81] There, a developer sought to fill eighty acres of low-lying marshy land in Michigan near Lake St. Clair.[82] This circumstance implicated the regulatory definition of "wetland" and the question whether federal jurisdiction was limited to wetlands that were inundated by flooding from bodies of navigable water.[83]

In *Riverside Bayview*, the Sixth Circuit had held that the regulatory definition of wetlands should be construed to include only wetlands that were subject to flooding by

74. *See id.*
75. *See id.* (discussing 33 CFR § 209.120(d)(2)*(h)* (1976)).
76. *Id.*
77. *Id.*
78. 51 FED. REG. 41217.
79. *Rapanos*, 547 U.S. at 725 (discussing 33 CFR § 328.3(a)(5) (1986)).
80. *Id.* (citing 65 FED. REG. 12823 (2000)).
81. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).
82. *Id.* at 123-24. Lake St. Clair is a large inland lake, northeast of Detroit, lying between Lake Huron and Lake Erie, and it is connected to Lake Erie by the Detroit River. It is bounded by both Michigan and Ontario, Canada. There was no dispute in the case that Lake St. Clair was a waterway that could be a part of interstate and/or international commerce.
83. *Id.*

adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation.[84] According to the Sixth Circuit, any more expansive definition of wetlands might result in the taking of private property without just compensation.[85] The Sixth Circuit also took the position that, when enacting the CWA, Congress intended only to allow regulation of wetlands that were the result of flooding by navigable waters.[86] Consequently, the Sixth Circuit concluded that the property at issue was not within CWA jurisdiction because its semiaquatic characteristics were not the result of frequent flooding by the nearby navigable waters.[87]

In reviewing the Sixth Circuit's ruling, the Supreme Court first considered whether the Army Corps had the authority under the CWA to promulgate a regulation that defined "waters of the United States" to be a wetland adjacent to a navigable water.[88] It began its answer by noting that CWA jurisdiction must extend beyond the waters that were actually navigable, and that such jurisdiction must include non-navigable tributaries that fed the navigable waters "because the discharge of pollutants must be controlled at its source."[89] The Court concluded that the CWA could apply to non-navigable waters and to wetlands adjacent to navigable waters because all of these were part of a hydrologic system that determined the chemical, physical, and biological integrity of the navigable waters.[90] Thus, the Court reiterated the basic principle governing the extension of federal authority over non-navigable waters, including purely intrastate waters – that such waters could be regulated to the extent that they had a substantial physical connection to navigable waters so that pollutants in them would flow to the navigable waters.

The Court also considered whether, for the purpose of applying the applicable regulation, the source of water that inundated a wetland was relevant to determining whether it was "adjacent" to a navigable water.[91] The Court's answer to the first question determined its answer to the second question. Because "wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands," the *Riverside Bayview* Court concluded that adjacent wetlands were covered by the CWA, regardless of the source of water that made them wetlands, as long as such waters were "inseparably bound up" with the navigable waters.[92] Here again, the Court emphasized the importance of close, tangible, physical connection between the navigable waters and any regulated waters.

The *Riverside Bayview* Court noted an important limitation on its holding, which arose from the unique circumstances of the wetlands adjacent to Lake St. Clair, an open body of navigable water: "[w]e are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to

84. *United States v. Riverside Bayview Homes, Inc*., 729 F.2d 391, 396 (6th Cir. 1984).
85. *Id*. at 396-97.
86. *Id.*
87. *Id.*
88. *Riverside Bayview*, 474 U.S. at 132-34.
89. *Id*. at 133.
90. *Id*. at 134.
91. *Id*. at 134-35.
92. *Id*. at 134-35

bodies of open water."[93] The Court also noted that it would not be easy to decide the question of where to draw the boundary between waters that were regulated by the CWA and purely intrastate waters, not to mention the boundary between "waters of the United States" and intrastate land. In identifying this difficult question, the Court keenly anticipated the nature of the problem that would be at the center of jurisprudence about CWA jurisdiction in the coming decades:

> In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.94

In 2001, the Court built upon the principles set forth in *Riverside Bayview* when it issued its next significant decision regarding the scope of authority under the CWA in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs* ("*SWANCC*").[95] There, the Court considered whether the Army Corps had the authority under the CWA to promulgate a regulation that extended CWA jurisdiction over isolated inland ponds.[96] In answering this question, the Court established a category of intrastate waters that was categorically excluded from federal authority.

The particular regulation at issue in the case was the so-called "Migratory Bird Rule,"[97] which defined the waters of the United States to include any water that actually served or that might serve as a habitat for migratory birds or endangered species.[98] The regulation was triggered when a county waste disposal agency in Illinois, the Solid Waste Agency of Northern Cook County, purchased an abandoned mining site to use as a disposal location for nonhazardous solid wastes.[99] The property included some permanent and seasonal "ponds" that had been formed when water filled man-made holes created in connection with the former mining operations.[100]

The agency wanted to fill the ponds, but the Army Corps asserted federal jurisdiction under the CWA because the ponds were habitats for migratory birds.[101] The agency sued, challenging the legality of the Migratory Bird Rule, and arguing that the CWA did not give the Army Corps authority over isolated, man-made ponds that happened to be wildlife habitats.[102] The Army Corps maintained that, under *Riverside Bayview*, the CWA should be read to give it regulatory authority over any body of water, as long as such regulation

93. *Riverside Bayview*, 474 U.S. at 131 n. 8.
94. *Id*. at 132.
95. *Solid Waste Agency of Northern Cook County*,531 U.S. at 159.
96. *Id*. at 168-69.
97. 51 FED. REG. 41217.
98. *Solid Waste Agency of Northern Cook County*, 531 U.S. at 164.
99. *Id*. at 162-63.
100. *Id*.
101. *Id*. at 164-65.
102. *Id*.

was undertaken for the same general ecological purposes of the CWA, such as maintaining the biological integrity of aquatic systems.[103]

The *SWANCC* Court rejected the Army Corps' arguments and ruled that the Migratory Bird Rule was invalid because it exceeded the scope of regulatory authority created by the CWA.[104] The Court reasoned that fundamental purpose of the CWA was to protect waters and aquatic ecosystems, including wetlands, which had a "significant nexus" with navigable waters.[105] It is clear that *SWANCC*'s concept of "significant nexus" is derived from the idea expressed in *Riverside Bayview* that the CWA covered only waters that were "inseparably bound up" with "navigable waters."[106] Because the isolated ponds at issue in *SWANCC* did not have this kind of connection to navigable waters, the Court held that they could not be regulated by the Army Corps.

But, even more fundamentally, the Court held that the Army Corps lacked the authority to promulgate a regulation that founded CWA jurisdiction over any category of environmental features upon something other than a hydrological connection with the navigable waters.[107] The opinion in *SWANCC* emphasized that the crucial factor in determining the scope of CWA jurisdiction was the relationship between the object of regulation and the cleanliness of the navigable waters. This opinion clarified that the CWA did not provide wide-ranging authority to protect all aspects of aquatic ecosystems. Rather it was designed to protect the navigable waters from pollution, and its reach could extend only to "waters" that flowed to the navigable waters and could thereby convey pollution to the navigable waters.

In addition, *SWANCC* made it clear that the hydrological connection upon which CWA jurisdiction was based had to be "significant."[108] A connection was significant for CWA purposes when the condition of the non-navigable water or wetland would have a significant effect on the cleanliness or biological integrity of the navigable waters.[109] *SWANCC* also supported the conclusion that a water would not be covered by the CWA if it merely had some effect on an ecosystem that included a navigable water.[110] Because the CWA was concerned with water pollution, the nexus between a non-navigable water or wetland and the navigable waters had to concern the cleanliness and biological integrity of the navigable waters, not some other ecological factor.[111]

C. Rapanos and the Ensuing Confusion over the Scope of Federal Authority

Five years after the decision in *SWANCC*, two consolidated cases from Michigan presented a question about the meaning and application of the concept of "significant

103. *Solid Waste Agency of Northern Cook County*, 531 U.S. at 168-69.
104. *Id*. at 171-72.
105. *Id*. at 167.
106. *See id*. (quoting *Riverside Bayview*, 474 U.S. at 134).
107. *Id*. at 172-73.
108. *Id*. at 167.
109. *Solid Waste Agency of Northern Cook County*, 531 U.S. at 167.
110. *Id*. at 168-69.
111. *Id*.

nexus" in the context of CWA authority over wetlands "adjacent" to the navigable waters.[112] These cases arose from the Army Corps' assertion of jurisdiction over several different kinds of wetlands, with varying types and degrees of connection to the navigable waters. They provided an opportunity for the Court to conclusively assert the meaning of *SWANCC* in the context of wetlands, but a division of opinion and analysis among the Justices resulted in even less clarity than existed before.

In the first case, *Rapanos v. United States*,[113] the Army Corps had asserted jurisdiction over "54 acres of land with sometimes-saturated soil conditions" near Midland, Michigan.[114] The nearest body of navigable water was Saginaw Bay, an inlet of Lake Huron, and it was between eleven and twenty miles from the land.[115] The landowner sought to develop the property, and the Army Corps informed him that he would need a permit to do so because the property included wetlands protected by the CWA. Disregarding the assertion of federal jurisdiction, the land owner began backfilling the property without a permit, and "[t]welve years of criminal and civil litigation ensued."[116]

In the second case, *Carabell v. United States Army Corps of Engineers*,[117] a property owner sought to develop a nineteen-acre parcel of land, which was about a mile from Lake St. Clair, ironically the same body of navigable water involved in *Riverside Bayview*.[118] The property qualified as a wetland because it collected standing water at certain times of the year; and the standing water accumulated because ordinary run-off was prevented by the existence of a man-made berm, which ran along the border of the property.[119] As the Court explained, "[t]he berm is largely or entirely impermeable to water and blocks drainage from the wetland, though it may permit occasional overflow to the ditch. The ditch empties into another ditch or a drain, which connects to Auvase Creek, which empties into Lake St. Clair."[120]

In both cases, the Army Corps had asserted jurisdiction because the wetlands were adjacent to navigable waters, and the two district courts and the Sixth Circuit all agreed that all of the wetlands involved in both cases fell within the definition of "adjacent" for the purposes of the applicable regulations.[121] John Rapanos argued that the CWA only applied to waters that were actually navigable and therefore that its attendant regulations could not assert jurisdiction over any wetlands, whether or not they were adjacent to the navigable waters.[122] The Carabells made a different argument, contending that the CWA

112. *See* United States v. Rapanos, 367 F.3d 629 (6th Cir. 2004); *see also* Carabell v. United States Army Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2004). The Supreme Court granted certiorari and consolidated the two cases in Rapanos v. United States, 546 U.S. 932 (2005). This paper will refer to the consolidated cases collectively as "*Rapanos*."

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

114. *Id*. at 720.

115. *Id.*

116. *Id*. at 721.

117. *Carabell*,547 U.S. at 715.

118. *Rapanos*, 547 U.S. at 730.

119. *See id.*

120. *Id.*

121. *Id*. at 729-30.

122. *Id*. at 730-31.

could not apply to a wetland that lacked any hydrological connection to the waters of the United States.[123]

In a plurality opinion, which was joined by Chief Justice Roberts and Justices Thomas and Alito, Justice Scalia assailed the Army Corps for exceeding the limits of federal jurisdiction established by the use of the terms "navigable waters" and "waters of the United States."[124]

> In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, manmade drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction.125

Justice Scalia's opinion emphasized that, in both *Riverside Bayview* and *SWANCC*, as well as in case law preceding those decisions, the Court had held that the phrase "waters of the United States" has a limited effect, and that such a limited effect "includes, at bare minimum, the ordinary presence of water."[126] Consequently, a non-navigable body of water or a wetland could fall within the definition of the "waters of the United States" only it was joined to a navigable body of water by a regular, consistent flow of water.[127]

Justice Scalia found this limitation in more than just the meaning of the specific phrase "waters of the United States;" he also found it in general considerations of federalism, which were recognized elsewhere in the statute. In this connection, his plurality opinion pointed out that the CWA classifies channels that typically carry water currents intermittently as "point sources," as distinct from the "navigable waters."[128] Justice Scalia read this classification to denote that impermanent or intermittent flows of water, such as "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," and others,[129] must be distinguished from "navigable waters."[130] Moreover, this limited reading of federal authority under the CWA was important to preserving the traditional role of the states in regulating land and water use.[131] In this connection, he pointed out that one of the stated purpose of the statute was to preserve the traditional role of the states as the primary source of authority for both regulating land and water use and preventing pollution.[132]

This led the plurality to its conclusion about the scope of CWA jurisdiction over wetlands. Justice Scalia explained:

> [*O*]*nly* those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is

123. *Rapanos*, 547 U.S. at 739-40.
124. *Id*. at 734.
125. *Id*.
126. *Id*.
127. *Id*. at 734-35.
128. *Rapanos*, 547 U.S. at 735 (citing 33 U.S.C. at § 1362 (14) (1948).
129. *Id*. at 734.
130. *Id*. at 735.
131. *Id*. at 737.
132. *Id*. (citing 33 U.S.C. § 1251(b) (1948)).

> no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the United States" do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a "significant nexus" in *SWANCC* . . . 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 connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.[133]

The plurality opinion effectively creates a two-part test for federal jurisdiction over wetlands. First, the wetland in question must be "a relatively permanent body of water connected to traditional interstate navigable waters."[134] Second, there must be a continuous surface connection between the wetland and the navigable interstate water.[135]

Justice Stevens wrote a dissenting opinion that stood in equipoise with Justice Scalia's majority opinion, commanding the votes of Justices Souter, Breyer, and Ginsburg. Justice Stevens did not read the statutory language to be as specifically defined as Justice Scalia had.[136] Consequently, he concluded that terms such as "waters of the United States" were broad enough to give agencies such as the Army Corps broad discretion in determining their meaning and application.[137] And he thought that the Army Corps' application of the statute in *Rapanos* was within the boundaries of that discretionary authority.[138] Thus, Justice Stevens thought that the Army Corps' implementation of the CWA fell within the broad framework for judicial deference to agency action that was most authoritatively described in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[139]

Justice Stevens' path to *Chevron* deference began with his reading of the statutory terms. Unlike Justice Scalia, he did not read "waters of the United States" as simply a legal term of art, which is defined by its historical use by courts and legislatures.[140] Rather, Justice Stevens saw this statutory term as a reference to a complicated technical issue – precisely the sort of technical issue that Congress typically delegates to agency interpretation and application in the *Chevron* framework.[141] In this respect, Justice Stevens' approach to the statute embraces the idea that "waters of the United States" really means "ecosystems including the waters of the United States." Thus, Justice Stevens concludes that the statute calls for deference to the agency understanding of whether, how, and to what extent a wetland affects an ecosystem that includes a navigable water.

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133. *Rapanos*, 547 U.S. at 742 (emphasis in original) (citation omitted).
134. *Id*.
135. *Id*.
136. *Id*. at 787-88 (Stevens, J., dissenting).
137. *Id*. at 792-93 (Stevens, J., dissenting).
138. *Rapanos*, 547 U.S. at 795-97 (Stevens, J., dissenting).
139. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
140. *Rapanos*, 547 U.S. at 787-88 (Stevens, J., dissenting).
141. *Id*.

To support this conclusion, Justice Stevens asserted two principal points. First, he noted the long history of congressional acquiescence to the Army Corps' judgment about what should and should not be included in the "waters of the United States."[142] Second, he noted that the Court's decision in *Riverside Bayview* had specifically called for deference to reasonable determinations by the Army Corps about what fell within the scope of CWA authority.[143] As Justice Stevens read it, *Riverside Bayview* did not stand for the proposition that a CWA jurisdiction depended upon the existence of a continuous surface water connection; rather, he concluded that *Riverside Bayview* turned on the Court's deference to the Army Corps' judgment about what constituted a water of the United States.[144]

The third main opinion in *Rapanos* was written by Justice Kennedy. Although he agreed with the plurality's conclusion that the Sixth Circuit had erred in affirming the Army Corps' assertion of jurisdiction, thereby concurring in the judgment and creating a five-vote majority for vacating the judgments below, he departed from Justice Scalia's understanding of the meaning of the statute. His opinion offered an approach to interpreting and applying the CWA that was a kind of combination of both Justice Scalia's and Justice Stevens' approaches.

Justice Kennedy's approach to defining CWA jurisdiction over wetlands focused on the crucial concept from *SWANCC*: the "significant nexus" between a non-navigable water or wetland and the navigable waters.[145] As Justice Kennedy put it, the "wetland must possess a *'*significant nexus*'* to waters that are or were navigable in fact or that could reasonably be so made."[146] According to Justice Kennedy, such a significant nexus would exist "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[147]

In those terms, Justice Kennedy's understanding of "significant nexus" seemed compatible with Justice Scalia's understanding in the sense that both emphasized the necessity of a tangible, physical connection between the navigable waters and any other environmental feature that could be regulated under the CWA. But Justice Kennedy explicitly rejected the requirement for a significant nexus that Justice Scalia had identified.[148] He concluded that any requirement of a constantly flowing surface water connection had been precluded by *Riverside Bayview*.[149] In his reading of *Riverside Bayview*, it was irrelevant whether wetlands share water with adjacent bodies of water so long as the wetlands significantly affect the ecosystem in which the navigable water belongs.[150] In other words,

142. *Id*. at 788.
143. *Id*. at 792-93 (citing *Riverside Bayview*, 474 U.S. at 123, 131-33).
144. *Id*. at 792-93 (Stevens, J., dissenting).
145. *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring) (citing *Solid Waste Agency of Northern Cook County*, 531 U.S. at 167-68).
146. *Id*.
147. *Id*. at 780.
148. *Id*. at 772.
149. *Id*. at 772-73.
150. *Rapanos*, 547 U.S. at 772-73.

Justice Kennedy thought that a "significant nexus" could be established by any of a number of factors beyond a regularly flowing surface water connection – adjacency, connection through an ecosystem, and perhaps others.[151]

Unlike Justice Scalia, Justice Kennedy concluded that an intermittently flowing body of water could provide the requisite "significant nexus" between a wetland and the navigable waters.[152] According to his reading of the CWA, Justice Kennedy concluded that Congress had not excluded such irregular flows from the "waters of the United States."[153] In this connection, Justice Kennedy specifically rejected Justice Scalia's definition of "point source" as a primarily intermittent flow of water, and therefore he rejected Justice Scalia's conclusion about the significance of this definition for understanding the meaning of the broader term, "waters of the United States."[154] In particular, he rejected the plurality opinion's reasoning that, because a point source must possess an intermittent flow, the waters of the United States must be strictly characterized by a continuous flow. Justice Kennedy found this to be an unwarranted negative inference.[155]

Like Justice Stevens, and unlike Justice Scalia, Justice Kennedy thought that the determination of whether a particular wetland would meet these criteria was a decision for the Army Corps, to be made on a case-by-case basis.[156] The amount of deference that the agency would get in making this determination was not entirely clear from Justice Kennedy's analysis. On the one hand, he seemed to acknowledge the Army Corps' authority to make regulations that defined what a significant nexus could be. But, at the same time, he also seemed to suggest that, at least under the existing regulations, the Army Corps' answer to the question of whether a wetland would have a significant nexus to the navigable waters was subject to fairly extensive judicial scrutiny. Such ambiguity was apparent when Justice Kennedy wrote:

> 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 non-navigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute. Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.[157]

151. *Id*. (Kennedy, J., concurring).
152. *Id*. at 769-70.
153. *Id*. at 770.
154. *Id*. at 771-72.
155. *Rapanos*, 547 U.S. at 772. As Justice Kennedy explained:

Nothing in the point-source definition requires an intermittent flow. Polluted water could flow night and day from a pipe, channel, or conduit and yet still qualify as a point source; any contrary conclusion would likely exclude, among other things, effluent streams from sewage treatment plants. As a result, even were the statute read to require continuity of flow for navigable waters, certain water bodies could conceivably constitute both a point source and a water. At any rate, as the dissent observes, the fact that point sources may carry continuous flow undermines the plurality's conclusion that covered "waters" under the Act may not be discontinuous.

156. *Id*. at 782 (Kennedy, J., concurring).
157. *Id*.

In light of the analytical differences among the three opinions in *Rapanos*, and given the fact that no single analytical approach commanded five votes, it is extremely difficult to identify the holding. The simplest way to do so would be to follow the Supreme Court's own guidance about how to interpret its divided rulings. That guidance came in *Marks v. United States*,[158] where the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred on the narrowest grounds.'"[159] But there is no significant commonality among any of the opinions in *Rapanos*. Justice Scalia and Justice Kennedy appear to agree that the statutory language is the principal authority determining when a wetland can qualify as one of the "waters of the United States." But Justice Kennedy is willing to defer to the Army Corps, to some extent, when it comes to making this determination. Justice Stevens agrees with Justice Kennedy about deferring to the agency's interpretation; but Justice Stevens would follow *Chevron* principles in making that deference, and Justice Kennedy's opinion does not indicate that he would be quite so deferential. In the end, there is no core of common principles that unites five Justices and that would permit a meaningful analysis of when a wetland is within the jurisdiction of the CWA.

In his dissenting opinion in *Rapanos*, Justice Stevens seemed to recognize the difficulty posed by the Court's internal disagreements, and he suggested an approach that would not require a common core of principles for determining whether the Army Corps has the authority under the CWA to regulate a wetland. Justice Stevens suggested that lower courts should find jurisdiction under the CWA if either the plurality's test or Justice Kennedy's test was satisfied.[160] As Justice Stevens saw it, if a wetland would meet the plurality's test, it would certainly meet Justice Kennedy's test.[161]

D. Post-Rapanos Caselaw Regarding the Scope of Federal Authority

Case law decided after *Rapanos* demonstrates that there is no clear rule governing the application of the CWA to wetlands. A number of cases follow Justice Kennedy's approach, and, many of these courts employ the *Marks* method for deriving a holding from *Rapanos*' fractured ruling.[162] Other courts have followed Justice Stevens' suggestion of an "either/or" test that used both the approach of the plurality and the approach set forth in Justice Kennedy's opinion.[163]

In *United States v. Gerke Excavating, Inc.*,[164] the Seventh Circuit applied *Rapanos*, although not in a wetlands case. That case arose from the unpermitted discharge of pollutants into waters by Gerke Excavating, Inc.[165] To determine if the waters were covered by

158. Marks v. United States, 430 U.S. 188 (1977).
159. *Id*.. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976)).
160. *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting).
161. *Id*.
162. *See* United States v. Robison, 505 F.3d 1208, 1221-22 (11th Cir. 2007); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007); United States v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006).
163. *See* United States v. Johnson, 467 F.3d 56, 64 (1st Cir. 2006).
164. United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006)
165. *Gerke Excavating*, 464 F.3d at 723.

the CWA, the Seventh Circuit applied *Rapanos* for the first time.[166] Applying the *Marks* analysis for fractured Supreme Court opinions, the Seventh Circuit held that Justice Kennedy's significant nexus test was the controlling rationale in *Rapanos* because it was the "narrowest" grounds for decision.[167] In this connection, the Seventh Circuit concluded that "narrowest" meant imposing the smallest restriction on the scope of federal authority.[168] The court also made an interesting observation about the differences between the plurality opinion and Justice Kennedy's opinion, noting that in cases in which a "slight surface hydrological connection" could be found, Justice Kennedy's test would not find federal jurisdiction, though eight other Justices would find federal jurisdiction.[169]

In *Northern California River Watch v. City of Healdsburg*,[170] the Ninth Circuit followed Justice Kennedy's approach. This case arose from facts similar to those in *Gerke Excavating*: the discharging of sewage into Basalt Pond, which is adjacent to the Russian River, a navigable water.[171] Without much analysis, the Ninth Circuit relied on the Seventh Circuit's reasoning in *United States v. Gerke Excavating* to conclude that Justice Kennedy's test was "the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases."[172]

The Eleventh Circuit applied *Rapanos* in *United States v. Robison*.[173] As with the preceding Seventh and Ninth Circuit cases, the defendant in *Robison* violated a permit by discharging pollutants from undesignated points in its plant in Birmingham, Alabama.[174] Like the preceding courts, the *Robison* Court applied *Marks* and concluded that Justice Kennedy's test controlled.[175] In this connection, the court pointed out that courts may look to concurring opinions when interpreting a plurality opinion because concurring opinions have joined in the Court's decision.[176] It also followed the Seventh Circuit in determining that Justice Kennedy's significant nexus test is the narrowest one because it will make the smallest incursion on federal authority and thereby impose the least limitation on the scope of the CWA's application.[177]

The First Circuit departed from this trend in *United States v. Johnson*,[178] adopting Justice Stevens' either/or approach to applying the reasoning of the *Rapanos* plurality and concurrence. In that case, a group of Massachusetts cranberry farmers released pollutants into three wetlands that were hydrologically connected to the Weweantic River.[179] The First Circuit decided that *Rapanos* was the controlling authority for the jurisdictional issue, but the more difficult question for the court was *how* that case would apply.[180]

166. *Id*. at 724.
167. *Id*. (citing *Marks v. United States*, 430 U.S. 188 (1977)).
168. *Id*. at 724-25.
169. *Id*. at 725.
170. N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007)
171. *Id*. at 995.
172. *Id*. at 999.
173. *Robison*, 505 F.3d 1208.
174. *Id*. at 1211-12.
175. *Id*. at 1222.
176. *Id*. at 1221.
177. *Id*. at 1221-22.
178. *Johnson*, 467 F.3d at 64.
179. *Id*. at 57.
180. *Id*. at 62-64.

After considering the *Marks* analysis at length, the First Circuit determined that its method was not particularly useful because there was no real "narrowest ground" among any of the opinions.[181] Indeed, the First Circuit noted that the concept of "narrowest ground" was elusive, even in the best of circumstances.[182] As the court noted, "narrowest ground" could mean, as the Seventh Circuit concluded, the ground that is least restrictive of federal authority, but it could also mean the ground that is least restrictive of non-federal interest.[183] By the same token, it could mean the ground that is "more closely tailored to the specific situation confronting the court."[184]

Turning away from *Marks*, the First Circuit followed what it called the "common sense approach to fragmented opinions."[185] In had found this approach in a Second Circuit opinion, *Tyler v. Bethlehem Steel Corp.*,[186] which held that the court must "find [the] common ground shared by five or more justices," not simply the single opinion in which a majority of justices joined.[187] According to this method, a lower court confronted with a fragment Supreme Court opinion must find "a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree."[188]

When it applied this method, the First Circuit concluded that Justice Stevens's either/or test would most often reach the result that would command the assent of a majority of the members of the *Rapanos* Court.[189] The First Circuit noted that this test would solve the problem that was identified—but left unresolved—by the Seventh Circuit in *Gerke Excavating*.[190]

The Fifth Circuit also used Justice Stevens' either/or method, albeit for different reasons, in *United States v. Lucas*.[191] There, a Mississippi property owner who anticipated selling parcels of his land to mobile home owners had installed septic systems on his property, in accordance with county ordinances.[192] The land included wetlands that were connected to the Bayou Costapia, the Tchoutacabouffa River, and eventually the Gulf of Mexico.[193] The Fifth Circuit affirmed jury instructions that reflected elements of both Justice Kennedy's significant nexus test and the plurality opinion's test that focused on a continuous surface water connection.[194] These instructions required the jury to find that the wetlands in question were waters of the United States if they contained a significant nexus with adjacent navigable waters such that the wetlands had a notable effect on the chemical, physical, and biological integrity of the navigable waters.[195] In addition, in making this

181. *Id*.
182. *Id*.
183. *Johnson*, 467 F.3d at 62-64.
184. *Id*. at 63 (citing Johnson v. Board of Regents of the Univ. of Ga., 263 F.3d 1234 (11th Cir.)).
185. *Id*. at 64.
186. Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2nd Cir. 1992).
187. *Id*. at 1182.
188. *Johnson*, 467 F.3d at 64-65.
189. *Id*.
190. *Id*.
191. United States v. Lucas, 516 F.3d 316 (5th Cir. 2008).
192. *Id*. at 322.
193. *Id*. at 324-25.
194. *Id*. at 324-25.
195. *Id*. at 323-24.

finding, the jury was allowed to take into consideration the "flow rate of surface water between the wetlands" and the navigable waters.[196]

All of these different approaches show that *Rapanos* did little to clarify the law. Nearly a decade after it was decided, the lower courts are still uncertain about the extent of CWA jurisdiction over wetlands. And they are equally uncertain about the proper approach to interpreting the statute.

IV. THE NEW REGULATIONS ARE INCONSISTENT WITH CASE LAW AND PRINCIPLES OF FEDERALISM

The new regulations promulgated by the EPA and the Army Corps in 2015 were a long-awaited response to the uncertainly left in the wake of the divided analyses and opinions in *Rapanos.* But the new regulations proved controversial. In particular, they inspired opposition because they seemed to embrace the expansive conception of CWA jurisdiction, which had been severely criticized in *SWANCC* and the plurality opinion in *Rapanos*. The strongest arguments against the regulations are reflected by the allegations made by Ohio and Michigan in their challenge to the implementation of those regulations.

In their complaint for injunctive relief, Ohio and Michigan alleged that the new definition of "waters of the United States" was inconsistent with *SWANCC* because it would apply to "isolated, intrastate waters," which *SWANCC* ruled could not be included in the definition of "waters of the United States."[197] They also alleged that the proposed regulations were inconsistent with important principles shared by both the plurality and concurring opinions in *Rapanos*.[198] In particular, they contended that, when viewed together, the plurality and concurring opinions prohibited the extension of CWA jurisdiction over wetlands that were remote from bodies of navigable water and were adjacent only to remote and insubstantial ditches and drains.[199] Moreover, they maintained that the new regulations were based upon principles articulated by the dissenting opinion in *Rapanos* and therefore were inconsistent with the controlling legal prinicples set forth in that opinion and in preceding opinions such as *SWANCC* and *Riverside Bayview*.[200] As the states asserted in their complaint:

> [T]he Rule appears informed far more by the *dissent* in *Rapanos* than by the four-Justice plurality or Justice Kennedy's concurrence: indeed, Defendants' *Technical Support Document* (at pages 37-40) in its introductory discussion of "Supreme Court Decisions" devotes five paragraphs and two and one-half pages to a fulsome discussion of the *Rapanos* dissent, while giving just one short-shrift paragraph each (and a total of one page) to the plurality and the Kennedy concurrence.[201]

In arguing that the new regulations exceeded existing federal authority, Ohio and Michigan emphasized that the scope of federal power to prevent pollution was limited by

196. *Lucas*, 516 F.3d at 324.
197. *Id.* at ¶¶ 32-33.
198. *Id.* at ¶¶ 35-42.
199. *Id*.
200. *Id.* at ¶¶ 33-34.
201. Lucas, 516 F.3d at ¶ 34.

the principle that the regulation of intrastate land is quintessentially a matter of state power.[202] The states took the position that the new regulations extended federal power to many areas of intrastate land that were not actually adjacent to waters that had been traditionally subject to federal regulation.[203] Thus, the states contended that the new regulations were not within the scope of the authority created by the CWA and were not consistent with the constitutional limits on federal power.[204] Thus, they asserted causes of action for a violation of the Administrative Procedure Act[205] and the Tenth Amendment.[206]

In making its initial ruling in the case, the Sixth Circuit seemed persuaded by the arguments against the regulation.[207] Responding to the challengers' arguments that the new regulation was unlawful in both substantive and procedural terms, the Sixth Circuit held:

> [W]e conclude that petitioners have demonstrated a substantial possibility of success on the merits of their claims. Petitioners first claim that the Rule's treatment of tributaries, "adjacent waters," and waters having a "significant nexus" to navigable waters is at odds with the Supreme Court's ruling in *Rapanos*, where the Court vacated the Sixth Circuit's upholding of wetlands regulation by the Army Corps of Engineers. Even assuming, for present purposes, as the parties do, that Justice Kennedy's opinion in *Rapanos* represents the best instruction on the permissible parameters of "waters of the United States" as used in the Clean Water Act, it is far from clear that the new Rule's distance limitations are harmonious with the instruction.
>
> Moreover, the rulemaking process by which the distance limitations were adopted is facially suspect. Petitioners contend the proposed rule that was published, on which interested persons were invited to comment, did not include any proposed distance limitations in its use of terms like "adjacent waters" and significant nexus." Consequently, petitioners contend, the Final Rule cannot be considered a "logical outgrowth" of the rule proposed, as required to satisfy the notice-and-comment requirements of the APA, 5 U.S.C. § 553. See *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (2007). As a further consequence of this defect, petitioners contend, the record compiled by respondents is devoid of specific scientific support for the distance limitations that were included in the Final Rule. They contend the Rule is therefore not the product of reasoned decision-making and is vulnerable to attack as impermissibly "arbitrary or capricious" under the APA, 5 U.S.C. § 706(2).208

202. *Id*. at ¶¶ 42-49.
203. *Id*.
204. *Id.* at ¶¶ 45-50.
205. *Id*. at ¶¶ 51-58.
206. Lucas, 516 F.3d at ¶¶ 59-62,
207. *Ohio*, 803 F.3d at 807.
208. *Id*.

On this basis, the Sixth Circuit ordered that the new regulations be stayed pending further review.[209] This analysis by the Sixth Circuit, however brief, buttresses the idea that those who challenge the new regulatory definitions have a strong case to make.

The best argument against the new regulations is that they are simply inconsistent with the main line of case law interpreting the CWA, and, in particular, with *SWANCC* and the concept of the "significant nexus" that was outlined there. The crucial analytical point made in *SWANCC* was that the CWA jurisdiction is limited to "waters" with a substantial and tangible physical connection with the navigable waters.[210] This point was based upon the entire line of cases involving questions about the scope of federal authority to regulate water resources.[211] An intangible or intermittent connection through an aquatic ecosystem is simply not enough to serve as a basis for a federal intrusion into an area traditionally reserved for state and local regulation.[212]

But the new regulations provide for just such intangible or intermittent ecosystem connections.[213] By explicitly asserting federal jurisdiction over ephemeral streams, intermittent water flows, or even areas that are only within a 100-year floodplain of the navigable waters, the new regulations base significant elements of federal jurisdiction entirely on the kind of ecosystem connections that were ruled insufficient in *SWANCC.* The same principles and analysis that led to the invalidation of the Migratory Bird Rule in *SWANCC* also undermine the validity of the new regulations.

Despite the disparity of analytical approaches in *Rapanos*, these essential principles from *SWANCC* and before remain untouched. There is certainly no doubt that Justice Scalia's plurality opinion emphasized the important of regularly flowing surface water connections as the *sine qua non* of CWA jurisdiction.[214] Although Justice Kennedy's concurrence concluded that CWA jurisdiction was not quite so limited as Justice Scalia would have had it, he retained focus on the importance of the "significant nexus" and reaffirmed the dispositive principles of *SWANCC*.[215] Although Justice Kennedy's analysis left some room for agencies to identify what constituted a "significant nexus," there is nothing in his opinion to suggest that he embraced the same level of deference to agency decision-making advocated by Justice Stevens in his dissent or that he was willing to tolerate an agency interpretation that was squarely at odds with *SWANCC*. In other words, although Justice Kennedy's concurrence identified a slightly broader meaning for "significant nexus" than Justice Scalia's plurality, it was still based on the principles of *SWANCC* that forbid the establishment of CWA jurisdiction on intangible ecosystem connections.

In fact, the new regulations seem entirely based upon the approach advocated by Justice Stevens' dissent. Most notably, they presume that Justice Stevens prevailed when advocating for extensive deference to agency findings about when a "water" had a significant nexus with the navigable waters; as Ohio and Michigan point out in their complaint,

209. *Id.*
210. *Solid Waste Agency of Northern Cook County*, 531 U.S. at 172-73.
211. *See supra* § III.
212. *See Solid Waste Agency of Northern Cook County*, 531 U.S. at 172-73.
213. *See supra* § III.
214. *Rapanos*, 547 U.S. at 734-35.
215. *Id.* at 759 (Kennedy, J., concurring) (citing *Solid Waste Agency of Northern Cook County*, 531 U.S. at 167-68).

the EPA's and Army Corps' guidance on the new regulations rely heavily on the dissenting opinion in *Rapanos* and barely mention the plurality opinion and Justice Kennedy's concurrence at all.[216] The agencies are rather aggressive in asserting their authority to interpret the CWA and to extend federal jurisdiction to areas it has never invaded before, even though Justice Stevens' dissenting opinion is the first and only authority supporting the idea that the agencies should have such sweeping discretionary authority.

Not only do the new regulations exceed the legal boundaries defined by established law, they also comprise important principles of federalism. Because they would extend federal jurisdiction over areas with 100-year floodplains, they will give the federal government the potential to control land and water use in virtually every corner of every state. Indeed, when combined with the agencies' self-appointed discretionary authority, the new regulations could make the EPA and the Army Corps the primary arbiters of whether any new development or land use should go forward. There is simply no precedent in American law for such a compromise of powers traditionally conferred upon state and local governments. Moreover, state and local governments are simply better suited to make land use decisions that take into account all relevant factors, not just environmental ones. Simply put, the CWA is not—and was not intended to be—and instrument for making water pollution control the pre-eminent consideration in all matters of land use and development in every corner of the nation.

CONCLUSION

One of the core principles of federalism is that a division of authority between the state and federal governments is essential to assure both fair and efficient government. The newly proposed regulatory definition of "waters of the United States" compromises these principles because it would give the federal government essentially unlimited power to regulate land and water use. This expansion of federal authority is not only inconsistent with constitutional principles, but is also inconsistent with the body of law that developed surrounding the scope of federal authority to regulate water use, which has developed both before and after the enactment of the CWA. Under that body of law, the "waters of the United States" have always been understood to consist of those bodies of water that are or can be navigated, along with any tributaries that have a substantial, physical connection to such bodies of water. This definition of "waters of the United States" leaves room for the states to assume their traditional role of regulating land and water use, while permitting the federal government to protect those resources of genuinely national scope. Because the CWA is limited to the regulation of the "waters of the United States," and because the new regulations would greatly expand the scope of federal authority beyond the established definition of "waters of the United States," those new regulations are unlawful and should be overturned.

Those who support the new regulatory definition of "waters of the United States" may argue that this expansive definition is necessary to protect the entire ecosystem that supports the biological integrity of the navigable waters. This may well be true, but the Clean Water Act was not drafted as legislation for the protection of aquatic ecosystems.

216. Complaint, *supra* note 25, at ¶ 34.

As its language unequivocally demonstrates, it was drafted for the purpose of preventing the flow of pollution into the navigable waters. If the protection of aquatic ecosystems is an important national policy objective, it should be the subject of its own legislation, drafted on the basis of language that is not fraught with the limitations inherent in the concept of "waters of the United States."