

WESTERN WETLANDS IN JEOPARDY AFTER *RAPANOS V. UNITED STATES*: CONGRESSIONAL ACTION NEEDED TO DEFINE “NAVIGABLE WATERS” UNDER THE CLEAN WATER ACT

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I. INTRODUCTION

Congress’s landmark water pollution legislation, the Clean Water Act (“CWA”), has been the major cause of the successful cleanup of many of our nation’s rivers, lakes, coastlines, and wetlands over the past thirty years.¹ However, the scope of the waters covered by the CWA, more specifically termed “navigable waters,” has come into question with recent United States Supreme Court decisions, especially the 2006 decision *Rapanos v. United States*.² Although the term “navigable waters” in the CWA usually has been defined broadly to extend beyond navigable-in-fact waters,³ the *Rapanos* decision seems to narrow the scope of waters covered under the CWA. However, no Supreme Court majority provides a test for defining “navigable waters,” and, as such, the scope of the CWA is now unclear. Because of this uncertainty, many wetlands and tributaries in the United States, especially those in the arid western region, may not receive CWA protection, thereby jeopardizing the continued existence of these important waters and their valuable environmental functions.

Accordingly, this Note provides a brief historical account of the CWA before discussing the major cases that analyzed “navigable waters” prior to *Rapanos*. Next, it examines the various opinions in *Rapanos* and two subsequent Ninth Circuit cases that applied *Rapanos*. Finally, this Note analyzes the possibility of new federal regulations clarifying the scope of “navigable

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¹ *Interpreting the Effect of the U.S. Supreme Court’s Recent Decision in the Joint Cases of Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers on “The Waters of the United States”*: Hearing Before the Subcomm. of Fish, Wildlife, and Water of the S. Comm. on Env’t & Public Works, 109th Cong. (Aug. 1, 2006) [hereinafter *Hearing*] (statement of Sen. Hillary Rodham Clinton), available at http://epw.senate.gov/hearing_statements.cfm?id=260397.

² *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

³ Traditionally, navigable-in-fact waters are those waters that are actually capable of use for trade or travel, or as “highways for commerce.” *The Daniel Ball*, 77 U.S. 557, 563 (1870); see also *infra* Part II.B.

waters,” the better option of new congressional legislation, and the benefits of such legislation for the arid western region of the United States.

II. HISTORICAL DEVELOPMENT OF THE CLEAN WATER ACT AND WETLANDS PROTECTION

The CWA, as we know it today, originated with the 1972 amendments to the Federal Water Pollution Control Act.⁴ A House sponsor of the bill stated that this was “the most comprehensive and far-reaching water pollution bill [the House had] ever drafted”⁵ Specifically, the primary objective of the CWA was “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁶ The Supreme Court even noted the expansive nature of the CWA by stating that it was “a comprehensive program for controlling and abating water pollution.”⁷ However, although the CWA’s scope may be broad, the extent to which it covers wetlands is uncertain after a series of United States Supreme Court cases.⁸

A. *History of the Clean Water Act*

The origins of federal water pollution control arose out of a concern for navigability in the nation’s waterways and can be traced back to the Rivers and Harbors Act of 1899.⁹ This Act prohibited obstructions to navigability in waters of the United States and forbade excavation or filling of a lake or stream.¹⁰ Although the Rivers and Harbors Act was initially intended as a tool for aiding navigation, the Supreme Court, in *United States v. Republic Steel Corp.*,¹¹ held that the Act also could address steel mill discharges.¹²

Subsequently, Congress enacted the Federal Water Pollution Control Act of 1948, which more directly targeted water pollution.¹³ This Act’s primary purpose was to establish water quality standards, and it encouraged the states to develop and enforce water pollution control laws.¹⁴ However, “[t]he problems caused by water pollution actually became more pronounced during the life of the 1948 Act.”¹⁵ For instance, in 1969, the Cuyahoga River in Cleveland caught on fire due to a coating of industrial waste;¹⁶ Lake Erie was declared

⁴ JOEL M. GROSS & LYNN DODGE, CLEAN WATER ACT 1 (2005).

⁵ 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT OF 1972, at 369 (1973) (statement by Rep. Mizell).

⁶ Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (2000).

⁷ *Train v. City of New York*, 420 U.S. 35, 37 (1975).

⁸ See *Rapanos v. United States*, 126 S. Ct. 2208 (2006); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

⁹ C. Peter Goplerud III, *Water Pollution Law: Milestones from the Past and Anticipation of the Future*, NAT. RESOURCES & ENV’T, Fall 1995, at 7, 7.

¹⁰ *Id.*

¹¹ *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960).

¹² GROSS & DODGE, *supra* note 4, at 5 (citing *Republic Steel Corp.*, 362 U.S. 482).

¹³ *Id.*

¹⁴ Goplerud, *supra* note 9, at 7.

¹⁵ *Id.*

¹⁶ *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (Stevens, J., dissenting).

“dead” from pollution; and the Hudson River was closed to fishing.¹⁷ Following these and other serious realizations of the extent of water pollution, Congress, and perhaps most of the country, experienced an environmental awakening in the early 1970s.¹⁸

Thus, Congress enacted the 1972 amendments to the Federal Water Pollution Control Act, known today as the CWA. The major purpose of the CWA was “to establish a comprehensive long-range policy for the elimination of water pollution.”¹⁹ Congress also had the specific goals of making the waters of the United States fishable and swimmable by 1983 and reaching zero discharge of pollutants by 1985.²⁰ Although the government has yet to meet these goals, the CWA has significantly improved the quality of America’s waterways. In fact, previously

[m]any rivers and beaches were little more than open sewers. Enactment of the CWA dramatically improved the health of rivers, lakes and coastal waters. It stopped billions of pounds of pollution from fouling the water and doubled the number of waterways safe for fishing and swimming. Today, many rivers, lakes, and coasts are thriving centers of healthy communities.²¹

To achieve the CWA’s goal of restoring and maintaining the “chemical, physical, and biological integrity of the Nation’s waters,”²² the CWA prohibits discharging any pollutant into waters of the United States without a permit.²³ In other words, without a permit, “no one is allowed to ‘add’ any ‘pollutants’ (a broadly defined term including such things as solid waste, biological materials, and heat) from a ‘point source’ (encompassing all manner of discrete conveyances) into ‘navigable waters’ (defined as the ‘waters of the United States’).”²⁴

The two most prevalent types of permits under the CWA that allow for discharging pollutants into “navigable waters” are the National Pollutant Discharge Elimination System (“NPDES”) permit²⁵ and section 404 “dredge and fill” permit.²⁶ First, NPDES permits are technology based, which means that a certain type of facility would have the same discharge limitations in any location, and the Environmental Protection Agency (“EPA”) oversees these permits.²⁷ For example, a steel mill in one location would have the same discharge limit into “navigable water” as a steel mill in another location.²⁸ Second, the Army Corps of Engineers (“Corps”) administers the “dredge and

¹⁷ Goplerud, *supra* note 9, at 7-8.

¹⁸ *Id.* at 8.

¹⁹ S. REP. NO. 92-414, at 95 (1971), *reprinted in* 2 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1511 (1973).

²⁰ Goplerud, *supra* note 9, at 8.

²¹ GROSS & DODGE, *supra* note 4, at 13 (quoting *Before the H. Subcomm. on Water Resources and Env’t of the Comm. on Transportation and Infrastructure*, 106th Cong. (1999) (testimony of J. Charles Fox, Assistant Administrator for Water, U.S. EPA), *available at* http://www.epa.gov/ocir/hearings/testimony/106_1999_2000/101899cf.htm).

²² Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (2000).

²³ GROSS & DODGE, *supra* note 4, at 1-2.

²⁴ *Id.* at 2.

²⁵ Clean Water Act § 402, 33 U.S.C. § 1342.

²⁶ Clean Water Act § 404, 33 U.S.C. § 1344. There are actually four types of permits under the CWA, but these two are the most prevalent. GROSS & DODGE, *supra* note 4, at 2.

²⁷ Clean Water Act § 402, 33 U.S.C. § 1342; GROSS & DODGE, *supra* note 4, at 27-30.

²⁸ GROSS & DODGE, *supra* note 4, at 2.

fill” permits under section 404 of the CWA,²⁹ with the EPA overseeing the Corps and sharing enforcement responsibilities.³⁰ This permit is required before anyone can place fill material in “navigable water.”³¹ These section 404 “dredge and fill” permits have become controversial when applied to the filling of wetlands because of the tension between protecting important wetlands and allowing for development of privately-owned land.³² However, the only waters subject to NPDES and section 404 “dredge and fill” permits are those waters that fall within the scope of “navigable waters” under the CWA.³³

B. The Regulations of the Army Corps of Engineers and the Scope of “Navigable Waters”

Although the CWA defines “navigable waters” as “the waters of the United States, including the territorial seas,”³⁴ the Corps has made regulations that further define its scope under section 404 of the CWA.³⁵ Initially, the Rivers and Harbors Act of 1899 gave the Corps jurisdiction to oversee “navigable waters,” although this jurisdiction only extended to those waters that were navigable-in-fact.³⁶ “Navigable-in-fact” waters include those waters that “are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”³⁷ However, whereas the purpose of the Rivers and Harbors Act was to keep waterways free for navigation, in the CWA, “Congress broadened the Corps’ mission to include the purpose of protecting the quality of our Nation’s waters for esthetic, health, recreation, and environmental uses.”³⁸

Although the CWA seems to broaden the definition of “navigable waters,” the extent of the Corps’ jurisdiction over “the waters of the United States” remains uncertain.³⁹ Initially, in 1972, the Corps’ regulations construed the CWA’s “the waters of the United States” to cover only those waters that fit the traditional definition of navigable waters (or those that were navigable-in-

²⁹ Clean Water Act § 404, 33 U.S.C. § 1344; GROSS & DODGE, *supra* note 4, at 2.

³⁰ *Hearing*, *supra* note 1, at 5-6 (statement of Benjamin H. Grumbles, Assistant Administrator for Water, EPA, and John Paul Woodley, Jr., Assistant Secretary of the Army for Civil Works, Department of the Army), *available at* http://epw.senate.gov/109th/Grumbles_Woodley_Testimony.pdf.

³¹ GROSS & DODGE, *supra* note 4, at 2. However, exempt from the requirement of a section 404 permit are several categories of activities, including normal farming, ranching, dam and bridge maintenance, construction of forest and farm roads, and certain types of irrigation systems. *Id.* at 82-83 (citing Clean Water Act § 404(f), 33 U.S.C. § 1344(f)).

³² *Id.* at 2.

³³ *Hearing*, *supra* note 1 (testimony of William W. Buzbee), *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=C3fa969f-23f4-480c-8be7-8f327e12afd3.

³⁴ Clean Water Act § 502(7), 33 U.S.C. § 1362(7).

³⁵ *See* 33 C.F.R. § 328.3 (2006).

³⁶ *See* *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940); *The Daniel Ball*, 77 U.S. 557, 563 (1870).

³⁷ *The Daniel Ball*, 77 U.S. at 563.

³⁸ *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 175 (2001) (Stevens, J., dissenting).

³⁹ *See generally* *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

fact).⁴⁰ The Corps expanded this definition in 1975 to include tributaries of navigable-in-fact waters, interstate waters and tributaries to those waters, and non-navigable intrastate waters of which the use or misuse could impact interstate commerce.⁴¹ These regulations also expanded the definition to include freshwater wetlands adjacent to other waters covered by the CWA.⁴² Although this definition initially required that the adjacent, covered waterway also periodically flood the wetland before the CWA covered that wetland, the 1977 definition removed this requirement.⁴³

Thus, the most recent Corps definition for “the waters of the United States” includes traditionally defined navigable waters, all interstate waters, and

[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including . . . wetlands adjacent to [covered waters under the CWA.]⁴⁴

Furthermore, the Corps defines wetlands as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”⁴⁵ However, although the Corps attempted to clarify “the waters of the United States” with these regulations, various cases have arisen questioning the true scope of the Corps’ jurisdiction under section 404 of the CWA.⁴⁶ Moreover, these cases also put into question the scope of “navigable waters” for all provisions of the CWA.⁴⁷

C. United States v. Riverside Bayview Homes

In *United States v. Riverside Bayview Homes, Inc.*⁴⁸ (“*Riverside Bayview*”), the United States Supreme Court concluded that wetlands adjacent

⁴⁰ The original Corps interpretation of “navigable waters” was “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.” *SWANCC*, 531 U.S. at 168 (quoting 33 C.F.R. § 209.120(d)(1) (1974)). Additionally, the original Corps regulations also stated that it “is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor.” *Id.* (quoting 33 C.F.R. § 209.260(e)(1)).

⁴¹ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24 (1985) (citing 40 Fed. Reg. 31,320 (1975)).

⁴² *Id.* at 124.

⁴³ *Id.*

⁴⁴ 33 C.F.R. § 328.3(a) (2006).

⁴⁵ *Id.* § 328.3(b).

⁴⁶ See *Rapanos v. United States*, 126 S. Ct. 2208 (2006); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001); *Riverside Bayview*, 474 U.S. 121.

⁴⁷ *Hearing*, *supra* note 1 (testimony of William W. Buzbee), available at http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=C3fa969f-23f4-480c-8be7-8f327e12afd3.

⁴⁸ *Riverside Bayview*, 474 U.S. 121.

to traditional navigable waters fell within the scope of the CWA.⁴⁹ Riverside Bayview Homes, Inc. owned the wetlands at issue, which were eighty acres of low-lying, marshy land near the shores of Lake St. Clair in Michigan and adjacent to Black Creek, a navigable water.⁵⁰ When Riverside Bayview Homes began filling the land in 1976 for the development of homes, the Corps filed suit in federal court to enjoin the company from filling the property without a permit.⁵¹ The district court found the Corps had jurisdiction over these wetlands, but the Sixth Circuit reversed, holding that, although these wetlands were adjacent to “waters of the United States,” the wetlands were not subject to flooding from a navigable water “at a frequency sufficient to support the growth of aquatic vegetation.”⁵² This narrow interpretation of “navigable waters” arose because a broader view might result in the taking of private property without just compensation.⁵³

Subsequently, the United States Supreme Court reversed, holding that the Corps’ interpretation of its jurisdiction to include wetlands adjacent to “the waters of the United States” was a reasonable interpretation of the CWA.⁵⁴ First, in response to the Sixth Circuit’s takings concern, the Supreme Court concluded that just because a regulation may sometimes result in a taking, that is no justification for curtailing a program “if compensation will in any event be available in those cases where a taking has occurred.”⁵⁵ Second, the Court also disagreed with the Sixth Circuit’s holding that the Corps’ regulations required that a navigable waterway must flood a wetland before that wetland gained CWA coverage.⁵⁶ In fact, the Court held the plain language of the regulation only required a covered wetland be “inundated *or saturated* by surface *or ground water* . . . [and this land supports] vegetation typically adapted for life in saturated soil conditions.”⁵⁷

Finally, because of Congress’s concern for protecting water quality and aquatic ecosystems,⁵⁸ the Court concluded the Corps could reasonably extend its CWA jurisdiction over “navigable waters” to wetlands adjacent to, but not regularly flooded by, traditional navigable waters.⁵⁹ Deferring to the Corps’

⁴⁹ *Id.* at 123, 139.

⁵⁰ *Id.* at 124, 131.

⁵¹ *Id.* at 124.

⁵² *Id.* at 124-25.

⁵³ *Id.* at 125.

⁵⁴ *Id.* at 139.

⁵⁵ *Id.* at 128.

⁵⁶ *Id.* at 129-30.

⁵⁷ *Id.* at 129 (quoting 33 C.F.R. § 323.2(c) (1985)).

⁵⁸ *Id.* at 132-33. In fact, the Court cited the purpose of the CWA as an attempt “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* at 132 (citing 33 U.S.C. § 1251 (1982)). Additionally, in clarifying this purpose, the Court cited a House Report stating that “integrity” “refers to a condition in which the natural structure and function of ecosystems [are] maintained.” *Id.* (alteration in original) (quoting H.R. REP. NO. 92-911, at 76 (1972)).

⁵⁹ *Id.* at 135. In applying *Chevron* deference, the Court stated:

An agency’s construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. Accordingly, our review is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but

expertise, the Court held the regulations were not unreasonable given the Corps' findings that such wetlands may filter water flowing to navigable waters, prevent erosion by slowing surface runoff into navigable waters, and, in general, "function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water."⁶⁰ The Court further supported this holding by concluding Congress acquiesced in the administrative construction of the CWA because the House and Senate had extensively considered proposals to limit "navigable waters" and proponents of a change did not want to remove wetlands altogether.⁶¹ Thus, the Court held that the term "navigable" was "of limited import" and Congress did in fact intend to use its Commerce Clause power to regulate at least some waters that are not navigable under the traditional definition.⁶²

D. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*⁶³ ("SWANCC"), the Supreme Court concluded the Corps' CWA jurisdiction over "navigable waters" did not extend to isolated, intrastate ponds that are not adjacent to traditionally defined navigable waters.⁶⁴ The SWANCC waters were permanent and seasonal ponds located on 533-acres in Illinois and developed from the remaining pits of a sand and gravel mining operation abandoned in approximately 1960.⁶⁵ More recently, when a consortium of Illinois municipalities bought this land for the disposal of baled nonhazardous solid waste, the Corps did not consider these ponds "wetlands" but asserted jurisdiction under the "Migratory Bird Rule."⁶⁶ This Rule, which extended the Corps' section 404 jurisdiction to intrastate waters that are habitats for migratory birds crossing state lines, applied because the Corps found that approximately 121 bird species, including many requiring an aquatic environment, had been observed at the site.⁶⁷ Further, the Corps eventually refused to issue a section 404 permit because the municipalities had not established that this was the least damaging alternative, they had not set aside enough funds to

not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as "waters."

Id. at 131 (citations omitted) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984)).

⁶⁰ *Id.* at 134-35.

⁶¹ *Id.* at 136-38.

⁶² *Id.* at 133.

⁶³ *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159 (2001).

⁶⁴ *Id.* at 162.

⁶⁵ *Id.* at 163.

⁶⁶ *Id.* at 163-64.

⁶⁷ *Id.* at 164. Specifically, the Migratory Bird Rule extended the Corps' jurisdiction to intrastate waters:

- a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- b. Which are or would be used as habitat by other migratory birds which cross state lines; or
- c. Which are or would be used as habitat for endangered species; or
- d. Used to irrigate crops sold in interstate commerce.

Id. (internal quotation omitted).

remediate leaks, and the project's damage on area-sensitive species was unmitigatable.⁶⁸

Following this permit denial, the municipalities challenged the Corps' CWA jurisdiction in court, but both the district court and Seventh Circuit ruled in favor of the Corps.⁶⁹ The Seventh Circuit held Congress had the authority to regulate these types of waters under the cumulative impact doctrine.⁷⁰ Because millions of Americans cross state lines each year to hunt and observe migratory birds and spend over a billion dollars to do so, destruction of the habitats of migratory birds would have a substantial aggregate effect on interstate commerce.⁷¹ Thus, as the CWA reaches all waters allowed by the Commerce Clause, the Seventh Circuit ruled the Corps' Migratory Bird Rule was a reasonable interpretation of the CWA.⁷²

Subsequently, the Supreme Court, in an opinion by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas, reversed, holding the Migratory Bird Rule exceeded the authority granted to the Corps under the CWA.⁷³ First, the Court disagreed with the Corps' argument that Congress acquiesced to the Migratory Bird Rule because this Rule did not appear until 1986, nine years after the alleged 1977 acquiescence, and those congressional debates centered on wetlands, not isolated waters.⁷⁴ Second, although the Court acknowledged *Riverside Bayview's* holding that navigable waters under the CWA included more than the traditional definition of the term, the Court concluded the term "navigable" still has some importance.⁷⁵ Finally, contrary to the Corps' recommendation, the Court did not extend *Chevron*⁷⁶ deference in this case because the Migratory Bird Rule would invoke the outer limits of Congress's power.⁷⁷ As the Court found no "clear indication that Congress intended" the CWA to reach an isolated pond and such coverage would impede the states' power over land and water, the Court held the Migratory Bird Rule exceeded the Corps' CWA jurisdiction.⁷⁸

On the other hand, Justice Stevens, in a dissent joined by Justices Souter, Ginsburg, and Breyer, concluded the Corps' interpretation of the CWA was

⁶⁸ *Id.* at 165.

⁶⁹ *Id.* at 165-66.

⁷⁰ *Id.* at 166. The Seventh Circuit defined the cumulative impact doctrine as when "a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." *Id.* (quoting *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 191 F.3d 845, 850 (7th Cir. 1999)).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 161-62.

⁷⁴ *Id.* at 170.

⁷⁵ *Id.* at 172. As the Court stated, "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.*

⁷⁶ *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁷⁷ *SWANCC*, 531 U.S. at 172-74.

⁷⁸ *Id.*

entitled to deference.⁷⁹ Because the majority refused to extend *Chevron* deference to the agency's construction of the same statute involved in *Riverside Bayview*, the dissent stated that "[t]his refusal is unfaithful to both *Riverside Bayview* and *Chevron*."⁸⁰ Further, although the majority never reached the constitutional issue of congressional power over isolated ponds,⁸¹ the dissent concluded Congress does have such power under the third *United States v. Lopez*⁸² category of permissible Commerce Clause actions, or those "activities that 'substantially affect' interstate commerce."⁸³ Although the individual ponds may not substantially affect interstate commerce, "it is enough that, taken in the aggregate, the *class of activities* in question has such an effect."⁸⁴ Therefore, because filling isolated waters that provide migratory bird habitats will, in the aggregate, adversely affect migratory birds and decrease commercial activities, such as birdwatching and hunting, the dissent concluded Congress does have Commerce Clause power to regulate such waters.⁸⁵

III. *RAPANOS v. UNITED STATES*

After *Riverside Bayview* and *SWANCC*, the next, and most recent, Supreme Court case to discuss the scope of "navigable waters" under the CWA was the 2006 case, *Rapanos v. United States*.⁸⁶ *Rapanos* was a consolidation of two cases involving Michigan wetlands, both of which connected to traditional navigable waters by a series of ditches, drains, or other waterways.⁸⁷ Because the wetlands were not directly adjacent to traditional navigable waters, such as in *Riverside Bayview*, or completely isolated, such as in *SWANCC*, the Court faced the issue of whether wetlands near ditches or drains that eventually emptied into traditional navigable waters constituted "navigable waters" under the CWA.⁸⁸ Although this case was an opportunity for the Supreme Court to

⁷⁹ *Id.* at 190, 192 (Stevens, J., dissenting). "The Corps' interpretation of the statute as extending beyond navigable waters, tributaries of navigable waters, and wetlands adjacent to each is manifestly reasonable and therefore entitled to deference." *Id.* at 192.

⁸⁰ *Id.* at 191.

⁸¹ Because the majority concluded these isolated ponds exceeded the Corps' authority under the CWA, it did not discuss whether Congress had such authority under the Commerce Clause. *Id.* at 162 (majority opinion).

⁸² *United States v. Lopez*, 514 U.S. 549 (1995).

⁸³ The three broad *Lopez* categories Congress can regulate under the Commerce Clause include "(1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons and things in interstate commerce; and (3) activities that 'substantially affect' interstate commerce." *SWANCC*, 531 U.S. at 192-93 (Stevens, J., dissenting) (citing *Lopez*, 514 U.S. at 558-59).

⁸⁴ *Id.* at 193 (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981); *Perez v. United States*, 402 U.S. 146 (1971); *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)).

⁸⁵ *Id.* at 194-96.

⁸⁶ *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

⁸⁷ *Id.* at 2219.

⁸⁸ *Id.* at 2216-19. The distinction between "navigable waters" and "the waters of the United States" is that "[t]he Act uses the phrase 'navigable waters' as a *defined* term, and the definition is simply 'the waters of the United States.'" *Id.* at 2220 (citing 33 U.S.C. § 1362(7) (2000)).

clarify the scope of “navigable waters,” the case instead provides numerous opinions with no majority and thus no clear definition of “navigable waters.”

A. *The Rapanos’ Wetlands*

John and Judith Rapanos owned various parcels of land in Bay, Midland, and Saginaw Counties, Michigan.⁸⁹ These parcels included fifty-four acres with “sometimes-saturated soil conditions,” which were between eleven and twenty miles from the closest navigable-in-fact waterway.⁹⁰ Within this property, three specific sites were at issue in *Rapanos*.⁹¹ First, the Salzburg site connected to a man-made drain, which drained into Hoppler Creek, then emptied into the Kawkawlin River, and finally flowed into Lake Huron at Saginaw Bay.⁹² Second, the Hines Road wetlands site connected to a drain, which had a surface connection to the Tittabawasse River.⁹³ Finally, the Pine River wetlands had a surface connection to the Pine River, which eventually flowed into Lake Huron.⁹⁴ For each of these wetlands, the facts were unclear as to whether the connections to the ditches and drains were continuous or merely sporadic.⁹⁵

In 1988, with hopes of constructing a shopping center on the Salzburg site, John Rapanos asked the State to inspect a section of the property.⁹⁶ The State informed him that this site was probably a regulated wetland and sent him a permit application.⁹⁷ Rapanos also hired a consultant, who found between forty-eight and fifty-eight acres of wetlands on this particular site.⁹⁸ However, Rapanos ordered the consultant to destroy the paper record of wetlands on the property and threatened him if he did not comply.⁹⁹ Subsequently, Rapanos began filling wetlands on all three sites.¹⁰⁰ Upon discovery of these actions, the EPA issued various administrative compliance orders requiring Rapanos to cease the filling immediately, but he failed to comply with any of the orders.¹⁰¹ The United States then initiated both criminal¹⁰² and civil proceedings.¹⁰³ In

⁸⁹ *United States v. Rapanos*, 376 F.3d 629, 632 (6th Cir. 2004).

⁹⁰ *Rapanos*, 126 S. Ct. at 2214.

⁹¹ *Id.* at 2219.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *United States v. Rapanos*, 376 F.3d 629, 632 (6th Cir. 2004).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 632-33.

¹⁰¹ *Id.* at 633.

¹⁰² John Rapanos’ criminal proceedings began with his jury conviction in 1995 for violating the CWA by filling in his wetlands without a permit. *United States v. Rapanos*, 895 F. Supp. 165, 166 (E.D. Mich. 1995). After a failed appeal for a motion for judgment of acquittal and a new trial, the district court sentenced Rapanos to a fine of \$185,000 and to three years of probation. *United States v. Rapanos*, 235 F.3d 256, 258 (6th Cir. 2000). The Sixth Circuit affirmed, but the Supreme Court remanded the case for further consideration in light of *SWANCC*. *Rapanos v. United States*, 533 U.S. 913 (2001). The district court then set aside the conviction, finding that because Rapanos’ property was not directly adjacent to navigable waters, the government could not regulate those wetlands. *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1016-17 (E.D. Mich. 2002). However, the Sixth Circuit reversed and reinstated the conviction, holding that despite *SWANCC*, the United States retained jurisdiction

the civil case, the district court concluded Rapanos had filled 54 out of 141 acres of protected wetlands over the three sites.¹⁰⁴ Because these wetlands were “within federal jurisdiction” as they were “adjacent to other waters of the United States,” the district court found the Rapanoses liable for violating the CWA.¹⁰⁵ The Sixth Circuit affirmed as the record demonstrated the existence of “hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters.”¹⁰⁶

B. *The Carabell's Wetlands*

The *Rapanos* decision also included the wetlands involved in another Sixth Circuit decision, *Carabell v. United States Army Corps of Engineers*.¹⁰⁷ There, June and Keith Carabell (and Harvey and Frances Gordenker) owned 19.61 acres of land, which contained 15.96 acres of wooded wetlands and represented one of the last large forested wetlands in Macomb County, Michigan.¹⁰⁸ The Carabell property was a triangular parcel, located approximately one mile from Lake St. Clair.¹⁰⁹ An unnamed ditch separated the Carabell property from the adjacent property.¹¹⁰ The excavation of this ditch created a four-foot-wide berm that blocked surface water drainage from the Carabell land into the ditch.¹¹¹ At one end of the Carabell property, the ditch drained into another ditch or a drain, which connected to Auvase Creek.¹¹² This creek then flowed into Lake St. Clair, which is part of the Great Lakes Drainage System.¹¹³

Before developing a condominium project, the Carabells applied for a permit from the Michigan Department of Environmental Quality (“MDEQ”) to fill this property.¹¹⁴ Although the MDEQ issued a permit to fill 15.9 acres in 1998, the EPA asserted CWA jurisdiction.¹¹⁵ The Corps denied a permit in 2000 because the proposed filling would have substantial long-term, negative effects on water quality, wildlife, the wetlands, conservation, and the overall ecology in the area.¹¹⁶ The Corps also concluded that minor negative impacts would

over the wetlands in this case under the CWA. *United States v. Rapanos*, 339 F.3d 447, 454 (6th Cir. 2003). Finally, Rapanos’ petition for writ of certiorari was denied by the Supreme Court. *Rapanos v. United States*, 124 S. Ct. 1875 (2004).

¹⁰³ *Rapanos*, 376 F.3d at 634.

¹⁰⁴ *Id.*

¹⁰⁵ *Rapanos v. United States*, 126 S. Ct. 2208, 2219 (2006).

¹⁰⁶ *Rapanos*, 376 F.3d at 643, 648 (“Because the wetlands are adjacent to the Drain and there exists a hydrological connection among the wetlands, the Drain, and the Kawkawlin River, we find an ample nexus to establish jurisdiction.” (quoting *Rapanos*, 339 F.3d at 453)).

¹⁰⁷ See *Rapanos*, 126 S. Ct. 2208; *Carabell v. U.S. Army Corps of Eng’rs*, 391 F.3d 704 (6th Cir. 2004).

¹⁰⁸ *Carabell*, 391 F.3d at 705.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 706.

¹¹⁵ *Id.*

¹¹⁶ Specifically, in a letter to the Carabells, the Corps stated:

occur on downstream erosion and sedimentation, flood hazards and floodplains, and aquatic wildlife, and that less damaging practicable alternatives were available.¹¹⁷ After an administrative appeal failed, the Carabells filed action in federal court on July 26, 2001.¹¹⁸ In a recommendation, a magistrate judge concluded the Carabell's property was subject to the CWA because it was not isolated but instead adjacent to tributaries of navigable waters with a significant nexus to waters of the United States.¹¹⁹ The district court accepted the magistrate judge's recommendations, and the Sixth Circuit affirmed.¹²⁰

Finally, the United States Supreme Court granted certiorari in both *Rapanos* and *Carabell* and consolidated the cases.¹²¹

C. *The Wetlands in the United States Supreme Court*

In this consolidated case, the two issues presented to the United States Supreme Court were (1) whether the wetlands in *Rapanos* and *Carabell* constituted "the waters of the United States" under the CWA and, if so, (2) whether the CWA was constitutional.¹²² However, because the Court held the Sixth Circuit applied an incorrect standard to determine "the waters of the United States," the Court remanded the case on this issue and did not analyze the CWA's constitutionality.¹²³ Although a majority of the Court agreed to remand, a majority of Justices did not agree on the appropriate standard to determine what "navigable waters" the CWA actually covers. In fact, on the issue of "navigable waters," the case contains a plurality opinion, two concurrences, and two dissents. Thus, because lower courts are now left without a controlling test, some courts have applied Justice Kennedy's one-person concurrence because he concurred in the judgment on the narrowest grounds,¹²⁴

[The] parcel is primarily a forested wetland that provides valuable seasonal habitat for aquatic organisms and year round habitat for terrestrial organisms. Additionally, the site provides water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair. The minimization of impacts to these wetlands is important for conservation and the overall ecology of the region. Because the project development area is a forested wetland, the proposed project would destroy the resources in such a manner that they would not soon recover from impacts of the discharges. The extent of impacts in the project area when considered both individually and cumulatively would be unacceptable and contrary to the public interest.

Id.

¹¹⁷ *Id.* at 706-07.

¹¹⁸ *Id.* at 707; *see also* Carabell v. U.S. Army Corps of Eng'rs, 257 F. Supp. 2d 917 (E.D. Mich. 2003).

¹¹⁹ Carabell, 391 F.3d at 707.

¹²⁰ *Id.* at 707, 710.

¹²¹ Rapanos v. United States, 126 S. Ct. 414 (2005); Carabell v. U.S. Army Corps of Engineers, 126 S. Ct. 415 (2005).

¹²² Rapanos v. United States, 126 S. Ct. 2208, 2220 (2006).

¹²³ *Id.* at 2235.

¹²⁴ *See, e.g.*, N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1029 (9th Cir. 2006) ("[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 in the judgments on the narrowest grounds." (quoting Marks v. United States, 430 U.S. 188, 193 (1977))); *see also* United States v. Robison, 521 F. Supp. 2d 1247, 1248, 1250 (N.D. Ala. 2007) (mem.) (discussing that although the Eleventh Circuit adopted Justice Kennedy's significant nexus test, this case

others have applied the plurality's test,¹²⁵ and still others have applied a combination of both tests.¹²⁶

1. Justice Scalia's Plurality Opinion

In a plurality opinion, Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, proposed a two-part test to determine whether a body of water is "navigable" for purposes of the CWA.¹²⁷ Under this test, the CWA covers a wetland if (1) the wetland is adjacent to a channel that contains "'wate[r] of the United States' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters)" and (2) "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."¹²⁸

In establishing the first element of this test, the plurality defined "the waters of the United States," or the specific waters to which a wetland must be adjacent before gaining CWA coverage, by looking at the plain meaning of the statute, prior cases, and the purpose of the statute.¹²⁹ First, the plurality stated the CWA only allows federal jurisdiction over "waters" and the phrase, "the waters of the United States," does not allow for the Corps' expansive meaning.¹³⁰ In fact, the plurality noted the definitive article "the" and the plural "waters" indicate the CWA does not cover all "water"; instead, "the waters" refers only to water "found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes" or "the flowing or moving masses, as of wave or floods, making up such streams or bodies."¹³¹ Because this dictionary definition refers to continuous, fixed bodies of water, as opposed to dry channels in which water occasionally flows, the plurality concluded "the waters of the United States" only include relatively permanent bodies of water.¹³²

was being assigned to a different judge because this judge was "so perplexed by the way the law applicable to this case has developed that it would be inappropriate . . . to try it again").

¹²⁵ See, e.g., *United States v. Chevron Pipeline Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006); see also *infra* note 210.

¹²⁶ See, e.g., *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) ("The federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*"). In his dissent, Justice Stevens suggested lower courts apply both tests so if either test is satisfied, CWA jurisdiction is established. See *infra* text accompanying note 174.

¹²⁷ *Rapanos*, 126 S. Ct. at 2214, 2227.

¹²⁸ *Id.* at 2227 (alteration in original).

¹²⁹ *Id.* at 2220-24.

¹³⁰ *Id.* at 2220.

¹³¹ *Id.* at 2220-21 (alteration in original) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

¹³² *Id.* at 2221. The plurality further supported this interpretation of the CWA by examining the CWA's definition of "point source." *Id.* at 2222-23. A point source is "any pipe, ditch, channel, tunnel, conduit, well . . . from which pollutants are or may be discharged." Clean Water Act § 502(14), 33 U.S.C. § 1362(14) (2000). Because this definition refers to ditches and channels, which the plurality viewed as having intermittent water flows, and the CWA also defines "discharge of a pollutant" as adding pollutants to "navigable waters from any point source," the plurality concluded "point sources" and "navigable waters" are two separate categories. Thus, only "point sources," not "navigable waters," contain ditches, channels, and other watercourses with intermittent flows.

Second, the plurality noted the phrase “navigable waters” and prior cases also confirm “the waters of the United States” include only relatively permanent bodies of water.¹³³ Because the traditional definition of “navigable waters” relates to those waters that are navigable-in-fact and the Court in *SWANCC* noted the term still carried some of its original meaning, the plurality concluded “navigable waters” contain “at bare minimum, the ordinary presence of water.”¹³⁴ The plurality also claimed that nowhere in *Riverside Bayview* did the Court suggest expanding “the waters of the United States” beyond “hydrographic features more conventionally identifiable as ‘waters.’”¹³⁵ Similarly, in both *Riverside Bayview* and *SWANCC*, the Court referred to “navigable waters” as “open waters,” which the plurality stated does not include typically dry channels.¹³⁶

Finally, the plurality considered the CWA’s stated “policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States”¹³⁷ In fact, the plurality noted that the Corps’ expansive definition of “the waters of the United States” would infringe upon the states’ rights to plan and develop land and water resources.¹³⁸ The plurality also concluded, as did the *SWANCC* Court, that a clearer statement from Congress is necessary before stretching the definition of “the waters of the United States” to the outer limits of Congress’s commerce power.¹³⁹ As such, “the waters of the United States” include only “those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’ The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”¹⁴⁰ Thus, under the first element of the plurality’s test, the Corps only has jurisdiction over a wetland if that wetland lies adjacent to a body of water that is relatively permanent and continuously flowing.¹⁴¹

¹³³ *Rapanos*, 126 S. Ct. at 2222.

¹³⁴ *Id.* The plurality noted that the Act’s term “navigable waters” does include more water than just the traditional navigable waters as defined by *The Daniel Ball* but reaffirmed that the word “navigable” is not completely devoid of meaning. In fact, the CWA provides for the substitution of federal jurisdiction over that of a state over “navigable waters . . . other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto.” The plurality stated that this provision shows the CWA covers more than just traditional navigable waterways. *Id.* at 2220 (omissions in original) (quoting 33 U.S.C. § 1344(g)(1)).

¹³⁵ *Id.* at 2222 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985)).

¹³⁶ *Id.*

¹³⁷ *Id.* at 2223.

¹³⁸ *Id.* at 2223-24. In fact, the plurality stated that it would “ordinarily expect a ‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional state authority.” *Id.* at 2224.

¹³⁹ *Id.* at 2224. Accordingly, the Court held the Corps’ expansive definition of “the waters of the United States” is not “based on a permissible construction of the statute.” *Id.* at 2225.

¹⁴⁰ *Id.* at 2225 (alterations and omissions in original) (citation omitted).

¹⁴¹ *Id.* at 2227.

For the second element of the plurality's test, which requires that a wetland have a continuous surface connection with "the waters of the United States," the plurality considered the Court's decision in *Riverside Bayview*.¹⁴² The plurality summarized the holding of *Riverside Bayview* as deferring to the Corps' judgment to include those wetlands in the CWA because of the inherent ambiguity in determining where water ends and adjacent wetlands begin.¹⁴³ In fact, in *Riverside Bayview*, a "significant nexus" existed between the wetlands and the "navigable water," and, as such, the Corps was justified in considering ecological factors to determine the CWA covered such wetlands.¹⁴⁴ On the other hand, when a wetland has only intermittent or remote hydrologic connections to "the waters of the United States," such as the isolated ponds in *SWANCC*, there is no boundary-drawing problem and, thus, no "significant nexus" between the wetlands and "the waters of the United States."¹⁴⁵ Thus, the plurality claimed "only those wetlands with a continuous surface connection to bodies of water that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."¹⁴⁶

Accordingly, under the plurality's test, a wetland is only covered by the CWA if it is adjacent to a "water[] of the United States," or a water that is permanent with continual flows, and the wetland has a continuous surface connection to that adjacent body of water.¹⁴⁷

2. Chief Justice Roberts' Concurrence

In a brief concurrence, Chief Justice Roberts suggested that the Corps and EPA could have avoided this fragmented and confusing decision by enacting rules that clarified the outer bounds of their CWA authority.¹⁴⁸ In fact, he stated that the Court's decision in *SWANCC* indicated the Corps does not have limitless authority under the CWA and, after *SWANCC*, the Corps and EPA did intend to develop new regulations clarifying the waters covered by the CWA.¹⁴⁹ However, as Chief Justice Roberts noted, the Corps and EPA failed to develop any rules, which resulted in the avoidable situation in *Rapanos* and another defeat for the Corps.¹⁵⁰

3. Justice Kennedy's Concurrence

Although Justice Kennedy agreed the Court should remand the case to the Sixth Circuit, he completely disagreed with the plurality's two-part test.¹⁵¹

¹⁴² *Id.* at 2225-26.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2226.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2227.

¹⁴⁸ *Id.* at 2235-36 (Roberts, C.J., concurring).

¹⁴⁹ *Id.* at 2235.

¹⁵⁰ Chief Justice Roberts also noted that "the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority." *Id.* at 2236.

¹⁵¹ *Id.* at 2246, 2252 (Kennedy, J., concurring) ("[T]he plurality's opinion is inconsistent with the Act's text, structure, and purpose.").

Instead, relying on *Riverside Bayview* and *SWANCC*, he concluded a wetland falls under the CWA's protections if the wetland has a "significant nexus" to a navigable-in-fact waterway.¹⁵² This "significant nexus" test determines whether the CWA covers a wetland that falls somewhere in between the wetland directly adjacent to a navigable waterway in *Riverside Bayview* and the isolated ponds in *SWANCC*.¹⁵³ The existence of a "significant nexus" depends on Congress's goal in enacting the CWA, which was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by restricting dumping and filling in "navigable waters."¹⁵⁴ Therefore, under Justice Kennedy's "significant nexus" test:

[W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," 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." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."¹⁵⁵

Further, Justice Kennedy discussed the importance of wetlands to navigable waterways.¹⁵⁶ For instance, he noted the Corps' conclusions "that wetlands may serve to filter and purify water draining into adjacent bodies of water and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion."¹⁵⁷ Thus, if wetlands are filled, downstream pollution may actually increase, much as it would from the discharge of a toxic pollutant.¹⁵⁸ Indeed, the thirty-three states that filed an amici brief claimed the CWA protects those states lying downstream from upstream, out-of-state polluters that the downstream state cannot regulate.¹⁵⁹ Although Justice Kennedy agreed with the plurality that environmental concerns are not reason enough to disregard statutory limits, he concluded the plurality's limits to "navigable waters" do not sufficiently defer to Congress's purposes in enacting the CWA and the executive branch's authority to implement it.¹⁶⁰

Finally, Justice Kennedy noted that evidence in *Rapanos* and *Carabell* suggested a possible significant nexus between the wetlands and "navigable

¹⁵² *Id.* at 2248.

¹⁵³ Specifically, *Riverside Bayview* and *SWANCC*

establish that in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking.

Id. at 2241.

¹⁵⁴ *Id.* at 2248 (quoting 33 U.S.C. § 1251(a) (2000)).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2245. Indeed, "[c]ontrary to the plurality's description, wetlands are not simply moist patches of earth." *Id.* at 2237 (citation omitted).

¹⁵⁷ *Id.* at 2245 (citations omitted).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 2246. For example, the amici brief noted that "nutrient-rich runoff from the Mississippi River has created a hypoxic, or oxygen-depleted, 'dead zone' in the Gulf of Mexico that at times approaches the size of Massachusetts and New Jersey." *Id.* at 2247.

¹⁶⁰ *Id.* at 2247.

waters.”¹⁶¹ However, mere hydrologic connection is not sufficient.¹⁶² “Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands’ significance for the aquatic system.”¹⁶³ Likewise, mere adjacency to navigable-in-fact water is not necessarily sufficient either.¹⁶⁴ Instead, he concluded remand was appropriate for the lower courts to decide whether the wetlands possessed a significant nexus with waters readily understood as “navigable.”¹⁶⁵

4. *The Dissents*

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, wrote a dissent opposing both the plurality’s two-part test and Justice Kennedy’s “significant nexus” test.¹⁶⁶ The dissent stated that, unlike the Court’s decision in *Riverside Bayview*, these “judicial amendment[s] of the Clean Water Act” were not “faithful to [the Court’s] duty to respect the work product of the Legislative and Executive Branches of our Government.”¹⁶⁷ Instead, the dissent, relying on *Riverside Bayview*, stated the Court should have deferred to the Corps’ judgment to treat these wetlands as included within “the waters of the United States.”¹⁶⁸ As a result, the dissent concluded the CWA might not cover all wetlands, but “it is enough that wetlands adjacent to tributaries [of traditional navigable waters] generally have a significant nexus to the watershed’s water quality.”¹⁶⁹

Although the dissent completely disregarded the plurality’s opinion and two-part test, the dissent did conclude Justice Kennedy’s “significant nexus”

¹⁶¹ *Id.* at 2250.

¹⁶² *Id.* at 2251.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2252.

¹⁶⁵ *Id.*

¹⁶⁶ Specifically the dissent stated:

The broader question is whether regulations that have protected the quality of our waters for decades, that were implicitly approved by Congress, and that have been repeatedly enforced in case after case, must now be revised in light of the creative criticisms voiced by the plurality and Justice Kennedy today. Rejecting more than 30 years of practice by the Army Corps, the plurality disregards the nature of the congressional delegation to the agency and the technical and complex character of the issues at stake. Justice Kennedy similarly fails to defer sufficiently to the Corps, though his approach is far more faithful to our precedents and to principles of statutory interpretation than is the plurality’s.

Id. (Stevens, J., dissenting).

¹⁶⁷ *Id.* at 2253.

¹⁶⁸ In fact, the dissent stated:

The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation’s waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. [Thus, the Corps’ treatment of wetlands as] ‘waters of the United States’ is a quintessential example of the Executive’s reasonable interpretation of a statutory provision.

Id. at 2252 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984)).

¹⁶⁹ *Id.* at 2258.

test likely would not diminish the quantity of wetlands covered by the CWA.¹⁷⁰ However, the dissent stated this test would create additional work for all parties involved and developers wishing to fill a wetland would have no sure way of knowing whether they need a section 404 permit.¹⁷¹ Instead, the Corps would have to make a case-by-case inquiry for each wetland, thereby increasing time and resources involved in the permit application process.¹⁷² Thus, the dissent would continue to defer to the Corps as the Court did in *Riverside Bayview*.¹⁷³ However, because this opinion is not controlling, the dissent suggested that on remand, the lower courts should uphold the Corps' jurisdiction under either the plurality's or Justice Kennedy's test.¹⁷⁴

Additionally, Justice Breyer wrote a brief dissent suggesting the Corps should quickly develop new regulations.¹⁷⁵ In fact, he stated that Congress intended the Corps to make the technical judgments that form the basis of these types of wetlands cases.¹⁷⁶ However, without updated regulations, "courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law."¹⁷⁷

IV. APPLICATION OF *RAPANOS* IN THE NINTH CIRCUIT

A. *Wastewater Dumping in Northern California River Watch v. City of Healdsburg*

Two months after the Supreme Court decided the *Rapanos* case, the Ninth Circuit applied it in *Northern California River Watch v. City of Healdsburg* ("*River Watch*").¹⁷⁸ In *River Watch*, the wetlands at issue included the Basalt Pond located next to the Russian River, which is a traditionally defined navigable water.¹⁷⁹ The pond was originally created when a pit from a 1960s excavation project filled up to the water table line of the surrounding aquifer.¹⁸⁰ The pond and Russian River were separated by a levee and distances of fifty to several hundred feet, and the levee typically prevented a surface connection between the two bodies.¹⁸¹ When the City began to dump sewage into the Basalt Pond without obtaining an NPDES permit under the CWA, an environmental group sued in federal court.¹⁸² The district court based its decision on *Riverside Bayview* and held that "discharges into the Pond are discharges into the Russian River, a navigable water of the United States protected by the CWA."¹⁸³ However, because the Supreme Court narrowed the scope of *River-*

¹⁷⁰ *Id.* at 2259-64.

¹⁷¹ *Id.* at 2264-65.

¹⁷² *Id.* at 2265.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 2266 (Breyer, J., dissenting).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006).

¹⁷⁹ *Id.* at 1026.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 1025-26.

¹⁸³ *Id.* at 1025.

side Bayview in *Rapanos*, the Ninth Circuit reviewed this case under Justice Kennedy's "significant nexus" test.¹⁸⁴

Under the "significant nexus" test, the Ninth Circuit held the Basalt Pond affected the "chemical, physical, and biological integrity" of the Russian River, thereby justifying CWA protection for the Basalt Pond.¹⁸⁵ First, the Basalt Pond affected the chemical integrity of the Russian River because the City's sewage discharges into the pond caused an increase in chloride levels in the river.¹⁸⁶ Second, although the court stated that mere adjacency to a navigable water is not sufficient, the pond and river were physically connected by occasional surface overflow and an underground aquifer.¹⁸⁷ In fact, at least twenty-six percent of the pond's volume reached the river each year.¹⁸⁸ Finally, a biological, or ecological, connection existed because the pond and its wetlands supported wildlife, including birds, mammals, and fish, that are "an integral part of and indistinguishable from the rest of the Russian River ecosystem."¹⁸⁹ Thus, because the pond affected the river on a chemical, physical, and biological level, a significant nexus between the two existed, and the Ninth Circuit affirmed that the City violated the CWA by not obtaining a CWA permit.¹⁹⁰

A year later, in 2007, the *River Watch* case returned to the Ninth Circuit, where the court affirmed that CWA jurisdiction existed under Justice Kennedy's "significant nexus" test but possibly called into question whether this test will always apply.¹⁹¹ There, the court stated that the "significant nexus" test was the "narrowest ground to which a majority of the Justices would assent if forced to choose *in almost all cases*."¹⁹² Further, the court clarified that, contrary to what it said in the 2006 opinion, mere adjacency to a navigable water is indeed sufficient to establish CWA jurisdiction by virtue of a "reasonable inference of ecologic interconnection."¹⁹³ As such, the court held that CWA jurisdiction was established over Basalt Pond by virtue of its adjacency *and* its "substantial nexus" to the Russian River.¹⁹⁴

B. *Altering a Creek in United States v. Moses*

In 2007, the Ninth Circuit again applied *Rapanos* in *United States v. Moses*,¹⁹⁵ a case considering Idaho's Teton Creek, in which water only flowed

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1030.

¹⁸⁶ *Id.* at 1031.

¹⁸⁷ *Id.* at 1030.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1031.

¹⁹⁰ *Id.*

¹⁹¹ *N. Cal. River Watch v. City of Healdsburg (River Watch II)*, 496 F.3d 993 (9th Cir. 2007).

¹⁹² *Id.* at 999 (emphasis added), quoted in Mark A. Ryan, *The Ninth Circuit Jumps into the Post-Rapanos Fray*, NAT. RESOURCES & ENV'T, Winter 2008, at 60, 60. Ryan concludes this language leaves the door slightly open for the Ninth Circuit to apply the plurality's test to a future case with the right facts. Ryan, *supra*, at 61.

¹⁹³ *River Watch II*, 496 F.3d at 1000 (quoting *Rapanos v. United States*, 126 S. Ct. 2208, 2248 (2006) (Kennedy, J., concurring)).

¹⁹⁴ *Id.*

¹⁹⁵ *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007).

seasonally. Although water only flowed in the relevant part of Teton Creek during the spring run-off, the Teton Creek was a tributary of the Teton River, which eventually flowed to the Snake River.¹⁹⁶ In *Moses*, developer Charles Moses continued to hire excavators to restructure and reshape the creek bed over a period of twenty years, even after the Corps repeatedly warned him to stop.¹⁹⁷ Finally, after disobeying an EPA administrative compliance order, Moses was indicted, found guilty for violating the CWA, and sentenced to eighteen months in prison and a \$9000 fine.¹⁹⁸ On appeal, one of his arguments was that the portion of Teton Creek he manipulated was not a water of the United States under the CWA.¹⁹⁹

Examining *Rapanos*, the Ninth Circuit considered whether the CWA covers intermittent streams that empty into “the waters of the United States” and concluded that “the Supreme Court unanimously agreed that intermittent streams (at least those that are seasonal) can be waters of the United States.”²⁰⁰ The Ninth Circuit noted that even though the plurality considered “the waters of the United States” to be relatively permanent and continuously flowing, footnote five of the plurality opinion stated that “[w]e also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.”²⁰¹ Further, because both Justice Kennedy and the dissenting opinion concluded that impermanent streams could be covered by the CWA, jurisdiction in this case was appropriate.²⁰²

As one commentator noted, the *Moses* decision applied a broad approach to the CWA and *Rapanos*.²⁰³ For instance, the *Moses* court stated, “There can be little doubt that a tributary of waters of the United States is itself a water of the United States.”²⁰⁴ Further, the court concluded a waterway always retains status as a water of the United States, even if it later dries up.²⁰⁵ This has implications for the arid western states where streams are often intermittent and might imply how the Ninth Circuit would apply the CWA to “dry” riverbeds.²⁰⁶

V. ANALYSIS: CLARIFYING “NAVIGABLE WATERS”

Although cases such as *River Watch* are seemingly straightforward cases in which to apply Justice Kennedy’s “significant nexus” test, many other cases,

¹⁹⁶ *Id.* at 985.

¹⁹⁷ *Id.* at 986.

¹⁹⁸ *Id.* at 987.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 989, 991.

²⁰¹ *Id.* at 990 (quoting *Rapanos v. United States*, 126 S. Ct. 2208, 2221 n.5 (2006)); *see also* Ryan, *supra* note 192, at 61 (noting that although Justice Scalia states that intermittent streams are not covered by the CWA, he “thoroughly confuses this point in footnote 5 of the *Rapanos* decision by stating that ‘seasonal streams’ are subject to the CWA”).

²⁰² *Moses*, 496 F.3d at 990-91.

²⁰³ Ryan, *supra* note 192, at 61.

²⁰⁴ *Moses*, 496 F.3d at 988 n.8, *quoted in* Ryan, *supra* note 192, at 61.

²⁰⁵ *Id.* at 989, *cited in* Ryan, *supra* note 192, at 61.

²⁰⁶ Ryan, *supra* note 192, at 61; *see also infra* Part V.C. (discussing the implications of CWA jurisdiction on the arid western states).

including cases similar to *Moses*, will likely be much more difficult.²⁰⁷ For instance, on remand to the Sixth Circuit, the Corps will now need to show how the wetlands on both the Rapanos and Carabell properties relate chemically, physically, and biologically to the nearby navigable waterways.²⁰⁸ Although Justice Kennedy did note that some evidence was already found by an expert in the lower courts,²⁰⁹ more will likely be needed, thereby increasing costs for the Corps and both the Rapanoses and Carabells. Further, there is no guarantee that a court will even apply the “significant nexus” test because a court could instead apply the plurality’s test or a combination of the two.²¹⁰ Thus, the court application of *Rapanos* has been, and will continue to be, confusing. On the other hand, if the Corps develops new regulations or Congress develops CWA amendments clarifying “the waters of the United States,” costs could decrease for both the government and individuals.²¹¹ With new regulations or legislation, the Corps or Congress could also ensure the protection of wetlands, especially in arid western states, in pursuit of restoring and maintaining “the chemical, physical, and biological integrity of the Nation’s waters.”²¹² Similarly, new regulations or legislation concentrating on the protection of wetlands could further the Bush Administration’s goal of achieving an overall increase of the nation’s wetlands each year.²¹³

²⁰⁷ See Kristina Daniel Lawson, *Troubled Waters: The Supreme Court Splits on Scope of Wetlands Regulation*, MILLER & STARR REAL ESTATE NEWSALERT, Sept. 2006, at 1, 7-8, available at http://msrlegal.com/pdf/MSR_Sep06_NewsAlert.pdf.

With respect to the Clean Water Act generally, the ideological fracture in the Court, coupled with Section 404’s truly ambiguous language, now requires the United States Army Corps of Engineers make every effort to adopt a reasonable regulation defining the scope of its jurisdiction over non-adjacent and separated wetlands. Should the Corps decline to do so, Congress should intervene and explain what it meant when it said “navigable waters” are “the waters of the United States.” Without such clarification, it may be only a short time before another Section 404 case reaches the Supreme Court.

²⁰⁸ *Id.* at 7 (“The tale is not over for the Rapanoses or the Carabells; they will need to press on in the Sixth Circuit.”).

²⁰⁹ *Rapanos v. United States*, 126 S. Ct. 2208, 2250 (2006) (Kennedy, J. concurring).

²¹⁰ Indeed, with the splintered *Rapanos* decision, courts may or may not apply Justice Kennedy’s test. For example, in *United States v. Chevron Pipeline Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006), the court applied the plurality’s two-part test. See Mark Squillace, *From “Navigable Waters” to “Constitutional Waters”: The Future of Federal Wetlands Regulation*, 40 U. MICH. J.L. REFORM 799, 848-50 (2007) (discussing the *Chevron Pipeline* case and noting how the court even seemed to apply the plurality’s opinion incorrectly); *supra* notes 191-92 and accompanying text; see also *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (“The federal government can establish jurisdiction over the target sites if it can meet either the plurality’s or Justice Kennedy’s standard as laid out in *Rapanos*.”).

²¹¹ If the regulations or legislation were more straightforward, both parties would have a better sense of what waters the CWA actually covered, and, thus, less money would be spent proving and arguing for a particular side. Cf. 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, 81 (2002) (“[O]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits for residential and public sector activities.”).

²¹² Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (2000).

²¹³ Specifically, as of 2004, “[t]he President’s goal is to restore, improve and protect at least three million additional acres of wetlands over the next five years.” Press Release, EPA,

A. *Clarifying the Corps' Regulations: Too Late to Be Completely Effective*

Because the Supreme Court's *Rapanos* decision narrows the scope of the Corps' jurisdiction under the CWA but does not clarify the specific limits of this jurisdiction, the Corps has an opportunity to clarify its own limits through new regulations.²¹⁴ Although the Corps and EPA attempted to clarify this jurisdiction after the Supreme Court's *SWANCC* decision, as Chief Justice Roberts noted, this attempt failed.²¹⁵ Thus, because of the uncertainties of proceeding under the plurality's test or the case-by-case analysis required by Justice Kennedy's "significant nexus" test,²¹⁶ the Corps could clarify at least the limits to the scope of its jurisdiction under the CWA through new regulations.²¹⁷ In doing so, the Corps would have to be faithful to *Riverside Bayview*, *SWANCC*, and *Rapanos*.²¹⁸

In developing new regulations, the Corps has some guidance from Justice Kennedy's concurring opinion:

Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.²¹⁹

As one commentator noted, "This open invitation should induce the Corps to initiate a rulemaking along the suggested lines."²²⁰ Moreover, although Justice Kennedy concluded mere adjacency to a navigable water's tributary is not enough to establish jurisdiction, he suggested that both tributaries of traditionally defined navigable waters and wetlands adjacent to them could fall under CWA coverage.²²¹ However, without more specific standards, these types of cases now require case-by-case analysis.²²²

Bush Administration Commits to Increasing Wetlands Nationwide (Apr. 22, 2004), *available at* 2004 WL 865878.

²¹⁴ Indeed, as one commentator stated, after *Rapanos*, "the Corps is likely to enjoy a relatively free hand in establishing new limits on its own jurisdiction." Matthew A. Macdonald, Case Comment, *Rapanos v. United States and Carabell v. United States Army Corps of Engineers*, 31 HARV. ENVTL. L. REV. 321, 332 (2007).

²¹⁵ *Rapanos v. United States*, 126 S. Ct. 2208, 2235-36 (Roberts, C.J., concurring).

²¹⁶ Justice Kennedy's test does add new language that lawyers and permit seekers will attempt to use to their advantage. Thus, "[w]ith increased industry and developer pressure, the risk is that the Army Corps will too readily fold, declining jurisdiction where it anticipates litigation or a strong regulatory challenge. Vast swaths of hugely important wetlands and tributaries around the country are at risk." *Hearing, supra* note 1 (testimony of William W. Buzbee), *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=C3fa969f-23f4-480c-8be7-8f327e12afd3.

²¹⁷ See *Rapanos*, 126 S. Ct. at 2266 (Breyer, J., dissenting); *supra* note 175 and accompanying text.

²¹⁸ "Adopting a regulatory interpretation that is potentially at odds with *Rapanos* and *SWANCC* is not in the interest of the regulated community nor does it best serve the cause of wetland conservation. Refusing to abide [by these decisions] is a recipe for further litigation, court losses, and regulatory uncertainty." *Hearing, supra* note 1 (statement of Jonathan H. Adler), *available at* http://epw.senate.gov/109th/Adler_Testimony.pdf.

²¹⁹ *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring).

²²⁰ Lawson, *supra* note 207, at 7.

²²¹ *Rapanos*, 126 S. Ct. at 2248-49 (Kennedy, J., concurring).

²²² *Id.* at 2249.

Indeed, a year after the *Rapanos* decision, the Corps and EPA offered informal “guidance” to clarify their CWA jurisdiction under either the plurality’s two-part test or Justice Kennedy’s “significant nexus” test.²²³ Specifically, the Corps and EPA declared that they will assert jurisdiction over traditional navigable waters, wetlands adjacent to those waters, non-navigable tributaries that have continuous or at least seasonal flows, and wetlands that directly abut such tributaries.²²⁴ Further, applying Justice Kennedy’s “significant nexus” test, the Corps and EPA also will “assert jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to a traditional navigable water.”²²⁵ To determine the existence of a “significant nexus,” the Corps and EPA will look to hydrologic and ecologic factors, such as volume of water, proximity to a traditional navigable water, rainfall, and potential to carry and trap pollutants.²²⁶ On the other hand, the Corps and EPA generally will not assert jurisdiction over swales or erosional features, or ditches that merely drain uplands and do not have relatively permanent water flows.²²⁷

Although this guidance does clarify some of the confusion caused by the fractured *Rapanos* decision, this is only informal guidance, not a notice and comment rule, and whether jurisdiction exists is still confusing for those waters that fall somewhere between *SWANCC*’s isolated ponds and *Riverside Bayview*’s adjacent waterways.²²⁸ Further, neither this guidance nor a new set of regulations would likely alleviate litigation.²²⁹ First, new regulations adher-

²²³ EPA, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (June 5, 2007), available at http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/rapanos_guide_memo.pdf; see also Ryan, *supra* note 192, at 61 (“[T]he recently issued Joint Guidance on *Rapanos* from the [EPA] and the [Corps] allows jurisdiction to be established if either the Scalia or the Kennedy test is satisfied.”); Joshua C. Thomas, Note, *Clearing the Muddy Waters? Rapanos and the Post-Rapanos Clean Water Act Jurisdictional Guidance*, 44 Hous. L. Rev. 1491, 1525-28 (2008) (describing the guidance in detail and stating that “[t]he guidance indicates that the Corps will do exactly what Justice Stevens suggested: assert jurisdiction if either Scalia’s or Kennedy’s criteria are met”).

²²⁴ EPA, *supra* note 223, at 1, 4-6.

²²⁵ *Id.* at 7.

²²⁶ *Id.*

²²⁷ *Id.* at 1.

²²⁸ Thomas, *supra* note 223, at 1530-31 (“While it does follow the Court’s splintered attempt to sort out the jurisdictional muddle, the guidance really only confirms what we already knew: relatively permanent tributaries and wetlands physically connected to them are regulable under the CWA; isolated wetlands with no connection whatsoever to navigable waters are not. The difficult decisions are those involving nonpermanent or semipermanent tributaries and wetlands that are not physically connected but nevertheless bear some relationship to nearby regulable waters.” (footnote omitted)); see also James Murphy & Stephen M. Johnson, *Significant Flaws: Why the Rapanos Guidance Misinterprets the Law, Fails to Protect Waters, and Provides Little Certainty*, 15 SOUTHEASTERN ENVTL. L.J. 431, 446-55 (2007) (discussing many problems with the guidance).

²²⁹ See *Hearing*, *supra* note 1 (testimony of William W. Buzbee), available at http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=C3fa969f-23f4-480c-8be7-8f327e12afd3 (“Any significant cutting back on protected waters would deserve judicial rejection and legislative criticism. . . . [A]ny changes of a strengthening sort would still provoke litigation challenging either new regulations or case-specific regulatory judgments.”).

ing to Justice Kennedy's "significant nexus" test would be very open-ended requiring detailed case-by-case analysis. Thus, even if the Corps makes a serious attempt to find the chemical, physical, and biological connections, or lack thereof, between a wetland or tributary and a navigable water, the landowners will likely contest the finding. In fact, with such a factual and subjective test, this analysis will be ripe for litigation. Second, if the Corps tries to be more specific about the extent of its jurisdiction, landowners will also likely sue on the basis that this exceeds the bounds of the Corps' jurisdiction under the CWA and *Rapanos*. Further, although the Corps could attempt to set out a more specific "significant nexus" test, perhaps based on numerical values or quantity levels of a water source, this is unlikely to be successful because of the expansive variety of wetlands.²³⁰

Thus, the broad nature of the "significant nexus" test will prove difficult for the Corps to apply, even with its recent guidance, or to use in promulgating new regulations. Although Justice Breyer, in *Rapanos*, did suggest that the Corps should not waste any time in developing new regulations,²³¹ it may be too late to proceed with these. In fact, with this broad test, the Corps will likely end up with more litigation that could eventually make it back to the Supreme Court, or the Corps, to avoid litigation, may not put up the fight necessary to protect the wetlands that really are important to "navigable waters."²³² Thus, because it may be too late for the Corps to clarify its own jurisdiction to protect wetlands fully, Congress should now step in and amend the CWA to clarify just how far the Corps can extend jurisdiction. However, if Congress chooses not to act, or takes long in doing so, the Corps should adopt the "significant nexus" test in new regulations simply to avoid further narrowing of its jurisdiction by the Supreme Court in later litigation.²³³

²³⁰ See *Hearing*, *supra* note 1 (statement of Sen. Lisa Murkowski), available at http://epw.senate.gov/hearing_statements.cfm?id=260394 (stating that, with wetlands "[o]ne size does NOT fit all," but instead "[e]ven [a] casual observer [looking at] the science of wetlands management rather than the politics of it, must accept the idea that not all wetlands serve the same function, nor are they equally important in cleaning and conditioning water resources, nor are they equally important in mitigating storm damage").

²³¹ *Rapanos v. United States*, 126 S. Ct. 2208, 2266 (2006) (Breyer, J., dissenting); *supra* note 175 and accompanying text.

²³² See *Hearing*, *supra* note 1 (testimony of William W. Buzbee), available at http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=C3fa969f-23f4-480c-8be7-8f327e12afd3 ("Administrative agencies like the Army Corps respond to many pressures, but most are risk averse and seek to avoid litigation," and because the Corps may easily fold, "[v]ast swaths of hugely important wetlands and tributaries around the country are at risk.").

²³³ 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, 349 (2007) (concluding the Corps should consider promulgating regulations clarifying its CWA jurisdiction, as opposed to Congress, which will less likely "be able to achieve sufficient consensus to pass legislation defining the Act's jurisdiction").

B. A Proposal for Congressional Legislation Clarifying “Navigable Waters”

Although the Corps could clarify its own jurisdiction under the CWA, “[a]gencies are creatures of Congress,”²³⁴ and, thus, Congress could also clarify the post-*Rapanos* ambiguities of “navigable waters.”²³⁵ Further, a congressional clarification would not just reach “navigable waters” under section 404 “dredge and fill” permits, but would also reach those waters affected by the release of pollutants under NPDES permits and other CWA permits.²³⁶ A congressional clarification would also be a better option because, as the Supreme Court stated in *SWANCC*, when an action reaches the outer bounds of Congress’s authority, the Court expects “a clear indication that Congress intended that result.”²³⁷ Although a Corps regulation maybe cannot encroach upon the outer limits of what Congress could have but has not granted, Congress has the power to enact any legislation constitutional under the Commerce Clause.²³⁸ Indeed, one commentator suggested Congress should amend the CWA to change “navigable waters” to “constitutional waters.”²³⁹ Thus, congressional clarification of the term “navigable waters” and its definition, “the waters of the

²³⁴ Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 850 (2004).

²³⁵ See *supra* note 207.

²³⁶ Both section 404 dredge and fill permits under 33 U.S.C. § 1344 and section 402 NPDES permits under § 1342 relate to discharging into “navigable waters.”

Additionally, the Clean Water Act has broad authority over not only the wetlands permitting program, but also programs such as the Section 301 program governing discharges of pollutants; requirements to obtain permits prior to discharge under Section 402; water quality standards under Section 303; and oil spill liability, prevention, and control measures under Section 311, among others. All these programs utilize the one definition of “navigable waters” that applies to the entire Clean Water Act.

Hearing, supra note 1 (statement of Sen. Lincoln Chafee), available at http://epw.senate.gov/hearing_statements.cfm?id=260708.

²³⁷ *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001).

²³⁸ In 2005, both the House and Senate introduced, although did not pass, bills to clarify the scope of “navigable waters” under the CWA. The Senate Bill took the broad approach, defining “the waters of the United States” as

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

S. 912, 109th Cong. § 4 (2005) (emphasis added). On the other hand, the House Bill required CWA covered waters to have a “significant nexus with traditional navigable waters,” which includes wetlands adjacent to traditional navigable waters or waters with a “continuous, naturally occurring surface water connection” to a traditional navigable water. H.R. 2658, 109th Cong. §§ 2-3 (2005).

²³⁹ Squillace, *supra* note 210, at 854-55, 857 (stating that Congress should amend the CWA because water resources are so integrated and local or state regulations are burdensome on states when water flows between jurisdictions).

United States,” would go a long way in defining the Corps’ jurisdiction, protecting wetlands, and preventing future litigation over the issue.²⁴⁰

If Congress clarified the Corps’ jurisdiction, or at least the outer limits of that jurisdiction, concerns about federalism and states’ rights would also be alleviated. In fact, specifically with section 404 “dredge and fill” permits, property owners are currently unclear as to whether their property is a wetland covered by the CWA.²⁴¹ This may inhibit development on lands not covered by the CWA or promote the devious type of land filling that Rapanos did with his Michigan wetlands. Furthermore, the current, ambiguous phrase “navigable waters” leaves federalism questions about where federal regulation over the water ends and state regulation over land begins. Thus, clarifications from Congress would alleviate this confusion.

Accordingly, Congress should amend the CWA to clarify what waters are included in “the waters of the United States” for purposes of the CWA.²⁴² An amendment should include the more obviously protected waters, such as traditionally defined navigable-in-fact waters, the territorial seas, and those waters affected by the ebb and flow of the tide.²⁴³ More importantly, though, Congress should include a wetlands protection section that covers those wetlands that have an impact on waterways that are traditionally defined as navigable or affect interstate waters.²⁴⁴ By the term “impact,” Congress could clarify that the CWA covers those wetlands that stop pollutants from draining into, or that perform some other water purification directly impacting, navigable-in-fact waters. This analysis would hold true for both wetlands and those waterways considered tributaries of navigable-in-fact waters. Further, this use of “impact” would protect the nation’s waters overall by protecting the wetlands and tributaries that have a pollution-reducing effect on traditional navigable waters.²⁴⁵ To some extent, this would be a codification of Justice Kennedy’s

²⁴⁰ See *Hearing, supra* note 1 (testimony of William W. Buzbee), available at http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=C3fa969f-23f4-480c-8be7-8f327e12afd3 (stating that four benefits of a legislative clarification include (1) promoting stability in the law; (2) avoiding future litigation over “waters” covered by the CWA; (3) preventing courts from mistakenly applying the *Rapanos* plurality instead of Justice Kennedy’s concurrence; and (4) preventing a weakening of protections under the CWA).

²⁴¹ See *Hearing, supra* note 1 (testimony of Keith Kisling, for the National Association of Wheat Growers and National Cattlemen’s Beef Association), available at http://epw.senate.gov/109th/Kisling_Testimony.pdf (“Both the overzealous government regulation and the failure to provide adequate notice about the extent of authority to regulate result in serious infringement of the rights of producers to use their own property.”).

²⁴² See James Murphy, *Muddying the Waters of the Clean Water Act: Rapanos v. United States and the Future of America’s Water Resources*, 31 VT. L. REV. 355, 378 (2007) (concluding the “ultimate solution [to the confusion of *Rapanos*] should lie with Congress” and “Congress should take action to reaffirm that it intended to cover all important waters”).

²⁴³ These categories of “waters” are currently included in the Corps’ regulations. See 33 C.F.R. § 328.3 (2006).

²⁴⁴ See Squillace, *supra* note 210, at 857-58 (concluding Congress should change the term “navigable waters” to “constitutional waters,” which “would likely extend the government’s permitting authority to virtually all activities that could impact water resources”).

²⁴⁵ The importance of wetlands and waterways on pollution is noted in the EPA and Corps’ guidance issued after the *Rapanos* decision. In fact, for those tributaries (and their adjacent wetlands) that are non-navigable and not relatively permanent, one of the things the agencies look at in determining the existence of a significant nexus is “the extent to which the tribu-

“significant nexus” test, which requires analysis of the effect a wetland or other water has on the “chemical, physical, and biological integrity” of a traditional navigable water. However, this “impact” analysis would clarify to the Corps, the EPA, the courts, and landowners the appropriate test to consider.²⁴⁶

Additionally, contrary to the *Rapanos* plurality, Congress’s clarification of “navigable waters” should not require a minimum flow or a surface connection to “navigable waters.”²⁴⁷ First, a minimum or continuous flow requirement does not protect those waters that may only rarely flow but still have a big impact on the nation’s waters. For instance, Senator James Jeffords described a rainfall of two inches in Phoenix in the summer of 2006, by stating that this caused

widespread flooding. Some streams in that region recorded a one-foot increase in flow over the course of only a few hours. [He was] certain that any pollution sitting in those streambeds was washed downstream. This example shows that even if a shallow stream flows only part of the year, pollution will still make its way downstream.²⁴⁸

Thus, instead of requiring a minimum streamflow or regular flow, the waterway should be analyzed by its impacts on other waters of the nation on an annual basis. If such a water does impact downstream waters, as do many of the streams in Phoenix and much of the West, then the CWA should cover those waters. Otherwise, with pollutants draining from these waters, Congress’s goal of restoring and maintaining “the chemical, physical, and biological integrity of the Nation’s waters” could never be met or maintained.²⁴⁹

Second, a wetland or tributary’s impact on “navigable waters” does not necessarily arise from a surface connection, as the plurality in *Rapanos* also required. In fact, such a hydrologic connection between a wetland or tributary and the navigable water could be from surface connections, either through direct overflows between the two or via a connecting tributary, or a groundwater connection, such as in *River Watch*. Because groundwater is both a large and important part of our nation’s water supply, and aquifers often cross state lines, Congress should not forget these hydrologic connections.²⁵⁰ Otherwise,

tary and adjacent wetlands have the capacity to carry pollutants (e.g., petroleum wastes, toxic wastes, sediment) or flood waters to traditional navigable waters, or to reduce the amount of pollutants or flood waters that would otherwise enter traditional navigable waters.” EPA, *supra* note 223, at 10.

²⁴⁶ See *supra* notes 124-26, 210 and accompanying text.

²⁴⁷ See Taylor Romigh, Comment, *The Bright Line of Rapanos: Analyzing the Plurality’s Two-Part Test*, 75 FORDHAM L. REV. 3295, 3331-35 (2007) (concluding the plurality’s test should not be adopted because, although it does offer a bright-line test, it does not further the CWA’s purpose of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters”).

²⁴⁸ *Hearing, supra* note 1 (statement of Sen. James M. Jeffords), available at http://epw.senate.gov/hearing_statements.cfm?id=260402.

²⁴⁹ “Water is transported through interconnected hydrologic cycles, and the pollution, impairment, or destruction of any part of an aquatic system may affect the chemical, physical, and biological integrity of other parts of the aquatic system.” S. 912, 109th Cong. § 3(4) (2005).

²⁵⁰ In an article after *SWANCC* but before *Rapanos*, Thomas L. Casey suggests that because the statute and legislative history are unclear as to the CWA’s coverage of groundwater, “[r]elying on the language of the Supreme Court . . . leads to the conclusion that ‘waters of

both the groundwater and the “navigable water” that a particular water eventually reaches could become polluted by water not covered under the CWA. Thus, Congress should consider “impacts,” including groundwater impacts, on traditional navigable waters in a broader sense than is required by the plurality’s opinion.²⁵¹

Consequently, the focus on “impacts” on “navigable waters” would clarify the waters the CWA actually covers. Although the Corps would still perform a case-by-case analysis, its jurisdiction under the CWA would be clearer. Thus, there would be fewer possibilities to fight the Corps’ decisions in court because if a wetland or tributary impacts a traditionally defined navigable water, it is covered. Further, with isolated waters, such as in *SWANCC*, the term “isolated” would not be as significant because those waters could still be covered if there was an impact on navigable waters. Although the CWA may still not cover the particular waters in *SWANCC*, it may cover other similar waters that do have an impact on pollution control in traditionally defined navigable waters.²⁵² Additionally, with the requirement of an “impact” on traditional navigable waters, Congress would still be acting within the bounds of the Commerce Clause because these intrastate wetlands and tributaries impact interstate commerce by keeping pollution out of important interstate waters.²⁵³ Thus, through congressional legislation, the states, as well as developers, would have a better grasp of the bounds of the CWA, and, more importantly, the Corps and EPA would have a better idea of how to protect the wetlands that are so important to our nation’s waters.²⁵⁴

the United States’ include hydrologically connected groundwater.” Thomas L. Casey, III, Commentary, *Reevaluating “Isolated Waters”: Is Hydrologically Connected Groundwater “Navigable Water” Under the Clean Water Act?*, 54 ALA. L. REV. 159, 161 (2002). *But see* H.R. 2658, 109th Cong. § 3 (2005) (excluding groundwater from “the waters of the United States” in a proposed bill amending the CWA).

²⁵¹ In an article written prior to *Rapanos*, Professor Bradford C. Mank suggests a similar test based on the “significant nexus” mentioned in *SWANCC*. Under this test, “non-navigable waters must have a perceptible or measurable impact on navigable waters to be considered ‘waters of the United States.’” 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, 889 (2003).

²⁵² Kaiya Tollefson suggests such “isolated” intrastate wetlands should be federally regulated because of their contributions to local and regional aquifers, their role in nutrient retention and recycling, their contributions to the nation’s biodiversity, and the inadequacy of state responses to protecting these waters. Kaiya Tollefson, Note, *If Marijuana, then Marshes: Using the “Comprehensive Scheme” Principle of Gonzales v. Raich to Regulate “Isolated” Wetlands*, 28 T. JEFFERSON L. REV. 513, 513, 535-37 (2006). Moreover, this note suggests that, because of the holding in *Gonzales v. Raich*, 545 U.S. 1 (2005), the federal government’s regulation of such waters is permitted under the Commerce Clause. Tollefson, *supra*, at 540. In fact, the failure to regulate such wetlands will undercut the overarching scheme of the CWA to protect the nation’s water and the aquatic and wildlife that depend on these waters. *Id.*

²⁵³ *See* ROBIN KUNDIS CRAIG, ENVTL. LAW INST., *THE CLEAN WATER ACT AND THE CONSTITUTION* 113-17 (2004) (discussing how *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), would not limit federal regulation of intrastate waters under the Commerce Clause because these waters have substantial connections to interstate commerce).

²⁵⁴ *But see* Thomas, *supra* note 223, at 1531-33. In this note, Thomas concludes increased agency efficiency, not congressional action, is preferable because the EPA and the Corps

C. How This Proposal Would Protect Wetlands in Arid Western States

Because many lakes and streams in the arid western United States are dry for much of the year, these congressional legislation changes would protect waters that are impacted by these often “dry” waters. In fact, because of the desert-like conditions in much of this region, there often is no consistent surface connection between a riverbed and downstream water. However, as Senator Jeffords’ Phoenix example illustrates, these “dry” riverbeds and washes can still impact the pollution of traditionally defined navigable waters.²⁵⁵ Moreover, besides the occasionally flowing waterway affecting the waters of the West, and the entire nation, wetlands in general perform important functions:

Wetlands are among the Nation’s most valuable and productive natural resources, providing a wide variety of functions. They help protect water quality, reduce downstream flooding by storing flood waters, maintain flows and water levels in traditional navigable waters during dry periods, support commercially valuable fisheries, and provide primary habitat for wildlife, fish, and waterfowl. Wetlands are at the core of this country’s rich natural heritage and are central to its healthy, prosperous future.²⁵⁶

In other words, wetlands are extremely important to the nation in general as well as to the waterways that flow through this country.

Additionally, “[m]illions of people in the United States depend on wetlands and other waters of the United States to filter water and recharge surface and subsurface drinking water supplies, protect human health, and create economic opportunity.”²⁵⁷ Further, especially in western areas where water is scarce, protecting the small amount of existing water is vital to the continuing growth of the region. For instance, Lake Mead, part of the Colorado River, is vital to the West’s water supply as it provides water for twenty million people and millions of acres of desert irrigation.²⁵⁸ As the Southwest continues to experience large population growth, even more water will be taken from Lake Mead and other parts of the Colorado River.²⁵⁹ In fact, Lake Mead has already

have the authority to regulate any wetlands under the significant nexus test, unless such a wetland falls under the *SWANCC* rule. *Id.* at 1531-32. Although agencies are the technical experts on wetlands and the significant nexus test could indeed provide guidance to the Corps and EPA, the fractured *Rapanos* decision causes confusion as to which of the *Rapanos*’ tests a court will apply when reviewing the action of the Corps or EPA. *See supra* notes 124-26, 210 and accompanying text.

²⁵⁵ *See supra* text accompanying note 248.

²⁵⁶ *Hearing, supra* note 1 (statement of Benjamin H. Grumbles, Assistant Administrator for Water, EPA, and John Paul Woodley, Jr., Assistant Secretary of the Army for Civil Works, Department of the Army), available at http://www.epa.gov/ocir/hearings/testimony/109_2005_2006/2006_0801_bhg.pdf.

²⁵⁷ S. 912, 109th Cong. § 3(11) (2005).

²⁵⁸ Launce Rake, *Chasing Lake Mead’s Water: Deceitful Promise, Shrinking Treasure*, LAS VEGAS SUN, Dec. 29, 2006, at 1. Furthermore, the water supplies in the West are important to sustain the aquatic species that also rely on these waters. WILLIAM BLOMQUIST ET AL., COMMON WATERS, DIVERGING STREAMS 6-8 (2004).

²⁵⁹ The southwestern states of Arizona, California, and Nevada, (all users of Colorado River water) continue to surpass other states in terms of population growth. BLOMQUIST ET AL., *supra* note 258, at 5. Further, although western states have been successful in conservation efforts, including experiencing substantial drops in per capita water usage, total consumption of water continues to grow rapidly with the population. *Id.*

experienced severe declines in water level because of population growth and severe drought.²⁶⁰ In effect, less water in the river and lake means less water is available to dilute the pollution that already exists in the water.²⁶¹ Thus, if wetlands and tributaries impacting the Colorado River do not receive CWA protection, even more pollution could find its way into this important water supply.²⁶² Therefore, protecting the wetlands and tributaries that impact the Colorado River and other waterways of the West is an important concern that Congress could advance by clarifying “navigable waters” under the CWA.

Although the Ninth Circuit’s *Moses* case indicates that perhaps the Ninth Circuit would protect such dry riverbeds by upholding CWA jurisdiction over those waterways, that case is arguably broader than *Rapanos*, and such a ruling could be overturned in the Supreme Court.²⁶³ Further, the EPA and Corps’ guidance issued after *Rapanos* indicates that those agencies intend to protect waterways with intermittent flows in the West under the “significant nexus” test because of the waterways’ important biological and physical effects on traditional navigable waters.²⁶⁴ However, although these waters are likely covered under the “significant nexus” test, they are most likely not covered under the *Rapanos* plurality’s test. With this confusion and the possibility of the Supreme Court changing its mind again and overturning an agency’s exercise of CWA jurisdiction over mostly dry riverbeds, the agency “guidance” may only be a temporary fix. Thus, because this jurisdiction over waterways with intermittent flows likely pushes the limits of the Commerce Clause, congressional action is essential to assure and clarify that such waterways are protected even if they flow intermittently.

²⁶⁰ Rake, *supra* note 258.

²⁶¹ See *id.* (discussing how “[p]ollution from Las Vegas wastewater and urban runoff has become more concentrated than a decade ago” and will likely become worse if nothing changes).

²⁶² In fact, water quality in the Colorado River “has deteriorated due to direct releases of sewage and industrial waste; and polluted runoff from farms, roads, mines, mining wastes and other sources adds salts and contaminants.” Robert W. Adler, *It’s Time to Restore the Colorado River*, LAS VEGAS REV.-J., Nov. 11, 2007, at 1D. Further, unlike restoration efforts that exist in other aquatic ecosystems, such as Chesapeake Bay, the Great Lakes, and the Everglades, the Colorado River has been treated as a “huge bucket from which to draw water for non-ecological uses,” and little has been done to protect its ecosystem. *Id.* Although CWA jurisdiction over the Colorado River’s wetlands and tributaries provides protection over only one part of this important ecological system, it is an important step to protecting the water supply, as well as the diverse Colorado River ecosystem.

²⁶³ See *supra* Part IV.B.

²⁶⁴ EPA, *supra* note 223, at 11.

Certain ephemeral waters in the arid west . . . are tributaries and they have a significant nexus to downstream traditional navigable waters. . . . During and following precipitation events, ephemeral tributaries collect and transport water and sometimes sediment from the upper reaches of the landscape downstream to the traditional navigable waters. These ephemeral tributaries may provide habitat for wildlife and aquatic organisms in downstream traditional navigable waters. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters.

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VI. CONCLUSION

Because *Rapanos v. United States* called into question the scope of “navigable waters” under the CWA, many wetlands and tributaries of traditionally defined navigable waters may no longer be covered under this important and successful water pollution act. In fact, in the arid western United States, where many waterways are dry much of the year, many important “waters” that provide pollution protection to major waterways may not receive CWA coverage. Although the Army Corps of Engineers may be able to clarify its own CWA jurisdiction with new regulations, the ambiguous and confusing standards set forth in *Rapanos* will likely make any changes by the Corps result in litigation. Consequently, to continue to work towards eliminating water pollution, Congress should clarify the scope of “navigable waters” through a CWA amendment based on a wetland or tributary’s impact on traditionally defined navigable waters.

