United States v. Rapanos: Is "Waters of the United States" Necessary for Clean Water Act Jurisdiction?

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INTRODUCTION

Anyone who has ever worked in a retail setting cringes when the owner puts the Assistant Manager in charge of the store. The Assistant Manager is the subordinate to whom the owner gives vague instructions, and then fails to grant sufficient decision-making authority to carry out those instructions. The Assistant Manager's insecurity quickly shows; this person is fairly sure of the mandate but not necessarily certain how to go about achieving it. This person, though well meaning, is essentially powerless and ineffective. Anyone who must depend on this person in any meaningful way is in for an uphill struggle for satisfaction.

Congress, acting as the "owner" of the Clean Water Act ("CWA"), has put the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("the Corps") in charge of the store. In the 1970s, Congress supplemented the Rivers and Harbors Act ("RHA") with comprehensive environmental legislation, but delegated to the EPA a scientifically impossible task.[1] Congress proclaimed a sweeping mandate to protect the integrity of the nation's waterways from the ever-growing national water pollution problem, and then empowered the EPA to act only within the actual geographical limits of those waterways.[2] The EPA has struggled since then to execute Congress's broad mandate in the wake of mixed political messages and jurisdictional restraints. Furthermore, the EPA, at once encouraged and hobbled, has inevitably stumbled into the many pitfalls of state sovereignty, constitutional problems, and constraints arising from the Administrative Procedure Act.[3] Indeed, regulated individuals who rely on the EPA to administer the CWA consistently are currently forced to follow a moving target.

This comment explores the Environmental Protection Agency's administration of the Clean Water Act, detailing its partnership with the Army Corps of Engineers and its struggle to recognize and enforce the grey areas of Congress's intent.[4] It also explores the tension flowing from the long struggle of the EPA to define the contours of Clean Water Act jurisdiction in the shadow of their statutory limitations and

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[1] The Clean Water Act, enacted in 1972 and codified at 33 U.S.C. §§ 1251-63, 1265, 1281-92, 1311-26, 1328, 1341-45, 1361-76, took over the pollution control aspects of the Rivers and Harbors Appropriation Act of 1899, codified as amended at 33 U.S.C. §§ 401, 403-04, 406-409, 411-416, 418, 502, 687, but retained its geographical jurisdictional limitations.

[2] *See* 33 U.S.C. § 1251(a) (2006) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."), 33 U.S.C. § 1344(a) (2006) ("The Secretary may issue permits . . . for the discharge of dredged or fill material into the navigable waters . . . .").

[3] *See infra* Parts II.A-C.

[4] *See* discussion *infra* Part I.

conflicting political messages from Congress, and the struggle of the federal courts to do the same with no clear guidance from the Supreme Court.[5] Finally, this comment focuses on the Clean Water Act's misplaced geographical link to navigable water servitude and suggests an alternate basis for federal water pollution jurisdiction.[6] This comment proposes that the CWA's geographical jurisdictional link to navigable waters is unnecessary under the Commerce Clause and unfaithful to the stated objective of the Act. Furthermore, this comment recommends that Congress strengthen the CWA by dispensing with the unnecessary geographical jurisdictional link and allowing the EPA to regulate activities that substantially affect interstate commerce regardless of where those activities occur.

Part I provides a legislative history of the Clean Water Act, beginning with the origins of federal navigation servitude and the River and Harbors Act of 1899. The RHA was an early attempt by Congress to regulate the nation's rivers and harbors and later to protect their integrity generally from the effects of pollution, and later formed the basis for the CWA.[7] Part I then traces the legislative history through to the Federal Water Pollution Control Act of 1972, pointing out the moment when Congress could have made federal water pollution control effective and long-lasting. Part I then moves on through the Corps' regulatory language under the CWA, a federal court's order to amend the language, and then to the congressional struggle to amend the Clean Water Act itself in 1977. Nine years later, the EPA and the Corps finally reconciled conflicting regulatory language defining their jurisdiction under the CWA.[8] Remarkably, Congress never took the logical step needed to resolve confusion over the CWA's jurisdiction, namely, to remove the CWA's geographical limitation and allow the EPA to regulate based on their scientific expertise.[9]

Part II examines the Supreme Court's efforts over time to define CWA jurisdiction, the Corps' regulatory responses to those decisions, and the resulting confusion in the federal courts. The most recent Supreme Court decision to address the issue of CWA jurisdiction, *United States v. Rapanos*,[10] has done little if anything to dispel confusion in the federal courts or with the administrators of the CWA. Indeed, the 4-1-4 split decision has created additional confusion in the lower courts as they

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[5] *See* discussion *infra* Part II.
[6] *See* discussion *infra* Part III.
[7] *See* discussion *infra* Part II.
[8] *See infra* note 92 and accompanying text.
[9] *See* discussion *infra* Parts III-IV.
[10] 126 S. Ct. 2208 (2006).

struggle to fathom its meaning.[11] Part II illustrates the abject ineffectiveness of attempts to normalize CWA jurisdiction judicially or through Corps regulation, which points strongly to Congressional amendment of the CWA as the only remaining and meaningful solution.

Part III offers alternate and possibly equally valid ways to discern the ultimate holding of the *Rapanos* 4-1-4 split decision. This Part examines whether *Marks v. United States*[12] might provide assistance and details how interpretations of the *Rapanos* decision in the lower courts have already diverged.[13] This Part also outlines three approaches to handling the jurisdiction issue going forward, namely continuing on a case-by-case basis, promulgating new agency regulations, and amending the CWA itself. The first two approaches have already proven ineffective and troublesome.[14] The third approach has the potential to solve the jurisdictional issue and significantly strengthen the legislation.[15]

Finally, this Part offers a solution to the judicial and agency confusion caused by the CWA's "navigable waters" jurisdictional limit. This Part suggests that Congress could do away with the limit entirely and the CWA would still pass constitutional muster, as does the Endangered Species Act, for example, which contains no such jurisdictional limit.[16] Congress could instead root its authority *solely* in its power to regulate interstate commerce, without any geographical jurisdictional limit to "waters of the United States."[17] In this way, Congress could settle the jurisdiction question, remain faithful to the stated purpose of the Clean Water Act, and create truly effective federal water pollution control legislation.

I. FEDERAL CLEAN WATER LEGISLATION

Congress does not possess unlimited power to act under the United States Constitution. The Constitution instead delegates to Congress "All legislative Powers herein granted."[18] That is, the Constitution sets forth limited and enumerated Congressional powers. Among these is the power to declare war, to collect taxes, and to "regulate Commerce with foreign Nations, and among the several States, and with the Indian

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[11] *See* discussion *infra* Part II.F.
[12] 430 U.S. 188 (1977).
[13] *See* discussion *infra* Part III.A.
[14] *See* discussion *infra* Part III.B.1-2.
[15] *See* discussion *infra* Part III.B.3.
[16] *See* discussion *infra* Part III.C.
[17] *See* discussion *infra* Part IV.
[18] U.S. CONST. art. I, § 1.

Tribes."[19] It is under the last authority that Congress has enacted all federal pollution control legislation.

A. Federal Navigation Servitude: Early Supreme Court Decisions

In an early decision, the Supreme Court held that Congressional Commerce Clause power includes the authority to control the navigable waters of the United States.[20] The *Gibbons* Court stated that "[a]ll America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed."[21] Therefore, the *Gibbons* Court concluded, Congress had power to control channels of interstate commerce such as "bays, inlets, rivers, harbours, and ports" of the United States.[22]

In another important early decision, the Supreme Court held that the term "navigable" in the United States was not linked to tides as it is in other countries. The *Daniel Ball* Court noted in 1871 that "[h]ere the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters."[23] The *Daniel Ball* Court noted that in the United States, many waters are commercially navigable in fact but that are not tidal.[24] The *Daniel Ball* Court held that "navigable waters" therefore included non-tidal waters "used, or are susceptible of being used, in their ordinary condition, as highways for commerce."[25] The *Daniel Ball* Court further held that such waters are subject to Congressional control "when they form . . . by themselves, or by uniting with other waters, a containued [sic] highway over which commerce is or may be carried on with other States or foreign countries."[26] This decision affirmed Congress's power to regulate bodies of water such as the Great Lakes and intrastate rivers as instruments of commerce.

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[19] *Id.* § 8, cl. 3.

[20] Gibbons v. Ogden, 22 U.S. 1, 197 (1824) ("The power of Congress . . . comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.'").

[21] *Id.* at 190.

[22] *Id.* at 208.

[23] The Daniel Ball, 77 U.S. 557, 563 (1871).

[24] *Id.* ("Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length."); *see also* Genesee Chief v. Fitzhugh, 53 U.S. 443, 457 (1852) ("It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers where there is no tide.").

[25] *Daniel Ball*, 77 U.S. at 563.

[26] *Id.*

In a later opinion, the Supreme Court affirmed and expanded the *Daniel Ball* Court's definition of "navigable waters" as it applied to federal regulatory jurisdiction.[27] The *Appalachian Electric* Court held that waters that are now or ever have been susceptible for use in transporting goods, either in their natural state or with reasonable improvements, are "navigable waters" of the United States.[28] The *Appalachian Electric* Court thus expanded Congress's regulatory power over waters that were, either in their natural state or with reasonable improvements, susceptible to navigation or had been susceptible to navigation in the past.

B. Pre-Clean Water Act Jurisdiction: The River and Harbors Act

Building on the *Gibbons* and *Daniel Ball* decisions, Congress enacted the Rivers and Harbors Appropriation Act of 1899 ("RHA").[29] The RHA gave the United States Army Corps of Engineers authority to protect, enhance, and develop navigable waters.[30] It also gave the Secretary of the Army regulatory authority, through the Corps, to grant or deny permission to "excavate or fill or in any manner to alter or modify the course, location, condition, or capacity of . . . any navigable water of the United States."[31] Finally, the RHA gave the Secretary of the Army authority to grant or deny, through the Corps, permission "to throw, discharge, or deposit . . . any refuse matter of any kind . . . into any navigable water of the United States, or into any tributary" where "the same shall . . . be washed into such navigable water."[32] The RHA provided similar regulation of dumping from the shore to prevent navigation from being "impeded or obstructed."[33] This provision also contained an exception for "the improvement of navigable waters or construction of public works."[34] Thus, the main concern of the RHA was the protection of the physical navigability of the nation's waterways.

For nearly seventy years, the Corps generally exercised its regulatory authority to protect navigable waters that were actually being

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[27] United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

[28] *Id.* at 407-08 ("A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. . . . When once found to be navigable, a waterway remains so.").

[29] Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1121 (codified as amended at 33 U.S.C. §§ 401, 403-04, 406-09, 411-16, 418, 502, 687 (2006)).

[30] 33 U.S.C. §§ 401, 403, 407 (2006).

[31] 33 U.S.C. § 403.

[32] 33 U.S.C. § 407.

[33] *Id.*

[34] *Id.*

used as channels to facilitate commerce.[35] Environmental problems were ordinarily left to the states to control.[36] However, "the states [generally] failed to enact or implement effective laws to control or prevent water pollution." [37] By the late 1960s, the Corps recognized that "water pollution and wholesale destruction of aquatic habitat, fisheries, and wetland areas that lie within the reach of the traditional navigable waters of the United States" were becoming increasingly serious problems.[38]

In 1968, the Corps responded to the problem of water pollution by promulgating a new set of regulations.[39] Rather than limiting their scope solely to the protection of the physical navigability of the nation's waterways, the regulations adopted general policies and specific procedures for the Corps to consider matters of public interest "in processing permit applications for dredging, filling, excavation, and other related work in navigable waters of the United States."[40] Relevant factors included "the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest."[41] The regulations also provided for mandatory public notice to "all parties deemed likely to be interested" of permit applications for any work aside from "dredging of vessel berths and approach channels which cannot affect adversely any interests."[42] The District Engineer or other officer would preside over discretionary public hearings for permit applications "whenever there appear[ed] to be sufficient public interest."[43]

The Corps construed its jurisdiction under the RHA so broadly during this time that legislative action seemed virtually inevitable.[44] Congress could have either expressly affirmed or curtailed the Corps' jurisdiction simply by amending the language of the RHA. To its credit, what Congress did instead was pen an entirely different type of legislation with an entirely different focus in another area of the United States Code.[45]

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[35] Tyler Moore, *Defining "Waters of the United States": Canals, Ditches, and Drains*, 41 IDAHO L. REV. 37, 39 (2004).

[36] Donna M. Downing et al., *Navigating Through Clean Water Act Jurisdiction: A Legal Review*, 23 WETLANDS 475, 477 (2003).

[37] *Id.*

[38] *Id.*

[39] Administrative Procedure, 33 Fed. Reg. 18,670 (Dec. 18, 1968).

[40] *Id.* at 18,672.

[41] *Id.* at 18,671.

[42] *Id.* at 18,673.

[43] *Id.*

[44] *See supra* notes 39-43 and accompanying text.

[45] The RHA focuses on regulating obstructions to navigation, alterations of channels, and depositing refuse into navigable waters. 33 U.S.C. §§ 401, 403, 407 (2006). The

C. Jurisdiction under the CWA: The Crooked Stream

Both the Corps' expanding interpretation of its jurisdiction under the RHA and the RHA's failure to fully address the growing problems of water pollution could not continue indefinitely. Congress responded to the widening gap in federal legislation by enacting the Federal Water Pollution Control Act Amendments of 1972, commonly referred to as the Clean Water Act ("CWA").[46] The CWA comprised a comprehensive legislative anti-pollution scheme and also set the stage for the difficulties to come, including a misplaced anchor in federal navigation servitude and bifurcation of administrative duties between the EPA and the Army Corps of Engineers.[47]

In enacting the CWA, Congress retained the "navigable waters" language of the RHA to indicate the Corps' jurisdiction under the new legislation.[48] Congress made it clear that it intended the term "navigable waters" to embody the "broadest possible constitutional interpretation."[49] The Committee on Public Works' report to the House demonstrated this intention:

> One term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency

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RHA is located in Title 33, Chapter 9 of the U.S. Code, which addresses the "protection of navigable waters and of harbor and river improvements generally." The CWA, by contrast, was intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). The CWA is located in Title 33, Chapter 26 of the U.S. Code, which addresses "water pollution prevention and control research and related programs."

[46] Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-63, 1265, 1281-92, 1311-26, 1328, 1341-45, 1361-76 (2006)). Congress passed the bill overwhelmingly. While the House of Representatives passed the bill by a margin of 366 to 11, the Senate passed the bill unanimously. *See* 118 CONG. REC. 36,774 (Oct. 17, 1972), 118 CONG. REC. 37,055 (Oct. 18, 1972). President Nixon vetoed. Message of President Nixon on Vetoing S. 2770, 8 WEEKLY COMP. PRES. DOC. 43 (Oct. 17, 1972). However, Congress overrode it the following day. *Id.*; *see* 118 CONG. REC. 36,879 (Oct. 17, 1972), 118 CONG. REC. 37,060 (Oct. 18, 1972).

[47] *See infra* notes 48, 53-56 and accompanying text.

[48] *See* 33 U.S.C. § 1344(a) (2006) ("The Secretary may issue permits . . . for the discharge of dredged or fill material into the navigable waters . . . .")

[49] H.R. REP. NO. 92-911, at 131 (1972); *see* H.R. REP. NO. 92-1465, at 144 (1972) (Conf. Rep.).

> determinations which have been made or may be made for administrative purposes.[50]

A Senate-House Conference Committee Report echoed this language and affirmed Congress's intent.[51] In the end, Congress used broad and vague language in Section 502 of the CWA by defining the term "navigable waters" to mean "the waters of the United States, including the territorial seas."[52]

The CWA's creation of a dual source of jurisdictional interpretation would muddy the waters for years to come. In section 101 of the CWA, Congress provided that the "Administrator of the Environmental Protection Agency . . . shall administer" the CWA.[53] This delegation not only gave the Administrator of the EPA considerable discretion in interpreting the CWA, but also set the framework for future misinterpretations of the CWA by both the EPA and the Corps, which would administer the permit programs under the CWA with supervision by the EPA.

Section 404 of the CWA granted the Secretary of the Army, through the Chief of Engineers, authority to regulate "discharge of dredged or fill material into navigable waters" at particular disposal sites.[54] The Secretary of the Army was to specify a disposal site for each permit "through the application of guidelines developed by the [EPA] Administrator, in conjunction with the Secretary."[55] The CWA provided that the EPA Administrator's and the Secretary's guidelines must be "based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under [section 403 of the CWA]."[56] The guidelines under section 403 of the CWA include:

> (A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;
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> (B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their byproducts through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

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[50] H.R. REP. NO. 92-911, at 131.
[51] H.R. REP. NO. 92-1465, at 144.
[52] 33 U.S.C. § 1362(7) (2006).
[53] Clean Water Act § 101, 33 U.S.C. § 1251(d) (2006).
[54] Clean Water Act § 404(a), 33 U.S.C. § 1344(a) (2006).
[55] Clean Water Act § 404(b), 33 U.S.C. § 1344(b)(1) (2006).
[56] *Id.*

> (C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;
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> (D) the persistence and permanence of the effects of disposal of pollutants;
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> (E) the effect of the disposal at varying rates, of particular volumes and concentrations of pollutants;
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> (F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and
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> (G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.[57]

Thus, whereas the RHA had previously limited the Corps objectives to solely protect the physical navigability of the nation's waterways, the CWA expanded the Corps' focus to address critical issues of pollution of the nation's waterways.

In keeping with its own mandate within the CWA to read "navigable waters" as broadly as possible, the Corps promulgated a rule establishing the outer limits of its jurisdiction in 1974.[58] The Corps defined "navigable waters of the United States" and "navigable waters" as "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."[59] This expansive reading seems to reflect the Corps' responsiveness to the growing problem of pollution in the United States in the 1970s and to Congress's intent that "navigable waters" be given the broadest possible reading allowed under the Constitution.

Far from curtailing the Corps' ruling, one federal court has insisted that the Corps construe its jurisdiction even more broadly.[60] In July of 1975, the United States District Court for the District of Columbia ordered the Corps to rescind the portion of their 1974 rule "as *limits* the permit jurisdiction of the Corps of Engineers by definition or otherwise to other than 'the waters of the United States'" and to "[p]ublish within forty (40) days . . . proposed regulations clearly recognizing the full regulatory mandate of the [CWA]."[61] The district court thus ordered the

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[57] Clean Water Act § 403, 33 U.S.C. § 1343(c)(1) (2006).
[58] Administrative Procedure, 39 Fed. Reg. 12,115 (April 3, 1974).
[59] *Id.* at 12,119.
[60] *See* Natural Res. Def. Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).
[61] *Id.* at 686 (emphasis added).

Corps to *extend* its jurisdiction "to the maximum extent possible under the Commerce Clause of the Constitution."[62]

In response, the Corps issued interim final regulations that included a redefinition of "navigable waters" for purposes of section 404 of the CWA.[63] The new "navigable waters" encompassed all coastal waters shoreward to their mean high water mark and all coastal wetlands capable of supporting vegetation that requires saturated soil conditions.[64] Inland "navigable waters" included all navigable rivers, lakes, and streams and their tributaries (primary, secondary, tertiary, etc.), and all interstate waters.[65] Jurisdiction extended to *intrastate waters that have recreational, fishing, industrial or agricultural connection to interstate commerce* and adjacent wetlands capable of supporting vegetation that requires saturated soil conditions.[66] "Manmade canals . . . navigated by recreational or other craft" were also included.[67] Drainage and irrigation ditches were excluded, but the new definition gave the District Engineer discretion to regulate "ecologically valuable water bodies [and] environmentally damaging practices" on a case-by-case basis.[68]

The Corps thus gave effect to the district court's order to expand "navigable waters" jurisdiction to the outer limits of the Commerce Clause, as Congress contemplated in crafting the Clean Water Act of 1972.[69] Shortly thereafter, the House of Representatives introduced a bill that sought to narrow the Corps' jurisdiction.[70] The proposed legislation generated considerable debate.[71]

D. The Clean Water Act of 1977 and its Effect on Jurisdiction

In 1977, following the Corps' promulgation of interim final regulations in 1975 and broad assertion of jurisdiction thereafter, Congress considered interim amendments to the Clean Water Act.[72] The House introduced House Bill 3199 and referred it to the Committee on Public Works and Transportation.[73] The Committee noted in House

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[62] *Id*.
[63] Administrative Procedure, 40 Fed. Reg. 31,320 (July 25, 1975).
[64] *Id.*
[65] *Id.*
[66] *Id.* at 31,321.
[67] *Id.*
[68] *Id.*
[69] *See supra* notes 49-51, 64-69 and accompanying text.
[70] *See* Clean Water Act of 1977, H.R. 3199, 95th Cong. (as introduced by Rep. Roberts and referred to the H. Comm. on Pub. Works and Transp., Feb. 17, 1977).
[71] *See* 123 CONG. REC. 26,690 (1977).
[72] Clean Water Act of 1977, H.R. 3199, 95th Cong. (as introduced by Rep. Roberts and referred to the H. Comm. on Pub. Works and Transp., Feb. 17, 1977).
[73] *Id.*

Report 139 that this major piece of legislation must focus on achieving "interim improvements within the existing framework" of the Clean Water Act of 1972.[74] The Committee noted that a "limited, selective list of relatively modest adjustments can and must be enacted immediately," and that House Bill 3199 "contains those amendments of most pressing urgency."[75]

House Bill 3199 proposed a redefinition of "navigable waters" as they applied to section 404 to include only waters "presently used, or susceptible of use in their natural condition or by reasonable improvement" in interstate commerce.[76] The bill limited Section 404 jurisdiction to those waters and their adjacent wetlands, which it defined as wetlands periodically inundated by contiguous navigable waters and normally supporting vegetation that required saturated soil.[77] Debate ended on the House floor with an adoption of the narrowed definition of "waters."[78]

The Senate bill contained no such redefinition.[79] Instead, the Senate approached the problem of Corps overregulation by first limiting the activities over which the Corps would have jurisdiction and then delegating some responsibility for regulation to federally approved state programs.[80] Debate on the Senate floor *defeated an amendment proposing adoption of the House's redefinition of "waters"*; thus, the Corps' expansive definition of "waters" remained unchanged.[81]

Eventually, the House abandoned its efforts to narrow the definition of "waters." The Senate's approach prevailed in the final version of the Clean Water Act of 1977 signed into law by President Carter.[82] In Senator Baker's words, "the legislation as ultimately passed . . . 'retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 [Clean Water Act].'"[83] Regulation going forward would necessarily focus less on the navigability of the waters being regulated and more on the activity that endangered them.

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[74] H.R. REP. NO. 95-139, at 1-2 (1977).

[75] *Id.* at 2.

[76] Clean Water Act of 1977, H.R. 3199, 95th Cong. § 16(b) (as introduced by Rep. Roberts and referred to the H. Comm. on Pub. Works and Transp., Feb. 17, 1977).

[77] *Id.*

[78] Clean Water Act of 1977, H.R. 3199, 95th Cong. § 216 (as passed by the House of Representatives, Apr. 5, 1977).

[79] S. REP. NO. 95-370, at 56, 65 (1977).

[80] *Id.* at 65-72.

[81] 123 CONG. REC. 26,690 (1977).

[82] Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified at 33 U.S.C. §§ 1281(a), 1294-97 (2006)).

[83] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 136 (1985) (quoting 123 CONG. REC. 39,209 (1977)) (first alteration in original).

E. State Permitting Provision under the Clean Water Act of 1977

The Clean Water Act of 1977 represents the latest major revision to the Clean Water Act. Although the House, in considering this new legislation, was unable to form a consensus to narrow CWA jurisdiction, Congress reached at least one important compromise with the States. The Clean Water Act of 1977 included a provision for federally approved state permit programs to replace Corps regulation of fill material discharge under certain conditions.[84] However, the provision did not allow States to supersede the Corps' jurisdiction to regulate fill discharge into waters that were actually navigable or waters subject to the ebb and flow of the tide, "including wetlands adjacent thereto."[85]

As discussed *supra*, the fact that states had declined to take a proactive stance in controlling pollution in the nation's waterways spawned the original Clean Water Act of 1972.[86] Indeed, granting states the power to administer permit programs under the Clean Water Act has not induced states to do so.[87] As one EPA administrator would observe nearly twenty years after the Clean Water Act of 1977's enactment, "States and Tribes may assume operation of the section 404 program, and to date *two have done so* (Michigan and New Jersey)."[88] This statement is powerful evidence that ambivalence among the states to the water pollution problem persists and the Corps' jurisdiction is the only thing that stands between the health of the nation's waters and the ravages of water pollution.

F. EPA and Corps Definitions Conflict

In the same year Congress passed the Clean Water Act of 1977, the Corps finalized its 1975 interim rule and notably changed the term to be defined from "navigable waters" to the "waters of the United States" to more closely follow the CWA's language.[89] Two years later, the EPA revised its definition of "waters of the United States," adding the phrase

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[84] 33 U.S.C. § 1344(g)(1) (2006).

[85] *Riverside Bayview*, 474 U.S. at 138 (quoting 33 U.S.C. § 1344(g)(1)).

[86] *See supra* notes 36-38 and accompanying text.

[87] *See 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. on Fisheries, Wildlife, and Water of the S. Comm. on Env't and Pub.Works*, 109th Cong. 7 (2006) (statement of Benjamin H. Grumbles, Assistant Administrator for Water, U.S. Environmental Protection Agency and John Paul Woodley, Jr., Assistant Secretary of the Army for Civil Works, Department of the Army).

[88] *Id.* (emphasis added).

[89] Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

"waters the use, degradation, or destruction of which would affect or could affect" interstate commerce.[90] The EPA's definition, therefore, was broader than the Corps' definition. The two authorities were under a statutory mandate to cooperate, and regulated individuals would be significantly affected by any confusion between them. The discrepancy in the definitions, therefore, presented a potentially serious problem.

To resolve the question, the Secretary of the Army sent a letter on March 29, 1979 to the Attorney General of the United States.[91] The letter requested the Attorney General's opinion on "whether the [Clean Water] Act gives ultimate administrative authority to determine the reach of the term 'navigable water' for purposes of [section] 404" to the Secretary of the Army or the EPA Administrator.[92] Later that year, the U.S. Attorney General answered by issuing an opinion stating that "the structure and intent of the Act support an interpretation of [section] 404 that gives the [EPA] Administrator the final administrative responsibility" for construing the term.[93]

Some years later, in 1986, the Corps issued final regulations consolidating six rulemaking events and revising its definition of "waters of the United States" to match that of the EPA.[94] Later still in 1989, the two authorities entered a Memorandum of Agreement pursuant to the Attorney General's 1979 letter and "set[ting] forth an appropriate allocation of responsibilities between the EPA and U.S. Army Corps of Engineers (Corps) to determine the geographic jurisdiction of the Section 404 program."[95] This consolidation of definitions and clarification of responsibilities brings the discussion to the current state of the term "waters of the United States."

G. Present Definition of the "Waters of the United States"

The language in the 1986 final regulations issued by the Army Corps of Engineers tracks precisely the regulations promulgated earlier

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[90] National Pollutant Discharge Elimination System; Revision of Regulations, 44 Fed. Reg. 32,854, 32,901 (June 7, 1979).

[91] 43 Op. Att'y Gen. 197 (1979).

[92] *Id.* at 1.

[93] *Id.* at 11.

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

[95] Memorandum of Agreement between the Army Corps of Eng'rs and the Envtl. Prot. Agency (Jan. 19, 1989), http://www.epa.gov/owow/wetlands/guidance/404f.html; *see Wetlands Regulation and the* SWANCC *Decision: Hearing Before the S. Comm. on Env't and Pub.Works*, 108th Cong. (2003) (statement of G. Tracy Mehan, Assistant Administrator for Water, Environmental Protection Agency).

by the EPA.[96] The Corps' definition of "waters of the United States" under section 404 of the CWA now reads:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All 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 any such waters:
>
> > (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
> >
> > (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> >
> > (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
>
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
>
> (6) The territorial seas;
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.[97]

Both authorities also provide that "[w]aters of the United States do not include prior converted cropland" and that "[n]otwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA."[98]

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[96] *See* 40 C.F.R. § 230.3(s) (2006).
[97] 33 C.F.R. § 328.3(a) (2006).
[98] 33 C.F.R. § 328.3(a)(8); 40 C.F.R. § 230.3(s)(3).

The regulations also provide that "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA . . . are not waters of the United States."[99] Thus, there is only one definition today of "waters of the United States," as broad as possible under the Commerce Clause, promulgated by the two bodies authorized to regulate those waters under the CWA.[100]

II. RECENT LEGAL BACKGROUND: THE "PUSH-ME-PULL-YOU" OF CWA JURISDICTION

The EPA and the Corps give the term "waters of the United States" an extraordinarily broad reading.[101] The federal courts may not issue advisory opinions, however, because judicial power is constitutionally limited to deciding cases or controversies.[102] Thus, the CWA's administrators and regulated parties must wait for a contested case to reach the courts to learn the courts' position on the matter of Clean Water Act jurisdiction.

In the meantime, the EPA must respond to political and executive pressure and the Corps must update its rulings to conform to new EPA policies regarding CWA jurisdiction.[103] These regulatory rulings are always subject to some level of judicial scrutiny.[104] The sections that

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[99] 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s)(7).

[100] *See* 33 C.F.R. § 328.3(a); *see also* 40 C.F.R. § 230.3(s).

[101] 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s).

[102] U.S. CONST. art. III, § 2.

[103] Memorandum of Agreement between the Army Corps of Eng'rs & the Envtl. Prot. Agency, pt. II (Jan. 19, 1989), http://www.epa.gov/owow/wetlands/guidance/404f.html ("It shall . . . be the policy of the Army and EPA that the Corps shall fully implement EPA guidance on determining the geographic extent of [CWA] section 404 jurisdiction and applicability of the 404(f) exemptions.").

[104] The Administrative Procedure Act, which governs judicial review of agency action, provides in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

follow trace the recent legal dialogue between the judiciary and the Corps, and the inevitable confusion this dialogue has caused in the lower federal courts.

A. The Supreme Court Affirms "Waters of the United States" Includes Adjacent Wetlands: Riverside Bayview

In 1985, the Supreme Court in *Riverside Bayview* held that Clean Water Act jurisdiction included wetlands adjacent to traditional navigable waters.[105] The Court noted that the borders of wetlands often could not readily be distinguished from the navigable waters that fed into them.[106] The Court also noted, importantly, that Corps expertise should weigh heavily in these types of scientific decisions.[107] Although this decision appears to be a victory for the Corps, in later years *Riverside Bayview* would be used to argue for limitations on CWA jurisdiction.

In *Riverside Bayview*, a development corporation owned "80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan."[108] In preparation for building a housing development on this marshy land, the corporation piled a significant amount of fill without first obtaining a permit under § 404 of the Clean Water Act.[109] The Corps sued in the United States District Court for the Eastern District of Michigan to enjoin the corporation from filling in their wetlands without a permit.[110] The District court held that the CWA applied to the company's land and the Corps had jurisdiction over it.[111]

The Sixth Circuit reversed, holding the wetlands were not "adjacent to navigable waters."[112] The court based its opinion on the fact that the area did not support the type of aquatic vegetation that requires frequent

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(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706 (2006).

[105] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985).

[106] *Id.* at 132 ("In determining the limits of its power to regulate discharges under the [CWA], the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one.").

[107] *Id.* at 134 ("In view of the breadth of federal regulatory authority contemplated by the [CWA] itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the [CWA].").

[108] *Id.* at 124.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 125.

[112] *Id.*

flooding.[113] The court noted that a broader reading of CWA jurisdiction would violate the takings doctrine.[114] The court also found that Congress did not contemplate giving the Corps jurisdiction over wetlands that were not flooded by nearby navigable waters.[115]

The Supreme Court reversed the Sixth Circuit.[116] First, the Court noted there was no inherent takings problem, stating that "[w]e have frequently suggested that governmental land-use regulation may *under extreme circumstances* amount to a 'taking' of the affected property."[117] The Court noted that "we have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking."[118] The Court noted that "[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense."[119] Finally, the Court noted that federal law requires the government to compensate private landowners and that the mere specter of a takings problem does not justify curtailing Clean Water Act jurisdiction.[120]

Next, the *Riverside Bayview* Court turned to section 323.2(c)'s plain language and found the corporation's property constituted a "wetland."[121] The regulatory language stated that ground water may

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[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.* at 126.

[117] *Id.* (emphasis added).

[118] *Id.* ("[O]ur general approach [is] . . . that the application of land-use regulations to a particular piece of property is a taking only 'if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.'" (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)); *see* Hodel v. Va. Surface Mining & Reclamation Assn., 452 U.S. 264, 293-297 (1981).

[119] *Riverside Bayview*, 474 U.S. at 127 ("[A]fter all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred.").

[120] *Id.* at 128 ("Because the Tucker Act, which presumptively supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute, is available to provide compensation for takings that may result from the Corps' exercise of jurisdiction over wetlands, the Court of Appeals' fears that application of the Corps' permit program might result in a taking did not justify the court in adopting a more limited view of the Corps' authority than the terms of the relevant regulation might otherwise support." (citations omitted)).

[121] *Id.* at 129 ("Wetlands . . . are defined as lands that are 'inundated *or saturated* by surface *or ground water* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.'") (quoting 33 C.F.R.§ 323.2(c) (1985)).

support aquatic vegetation and trigger CWA jurisdiction.[122] The Court noted that the land in question supported the type of aquatic vegetation outlined in the regulatory language.[123] The Court noted that nothing in the regulatory language says that the wetland must be flooded by an adjacent body of water as the circuit court stated.[124] Further, the Court noted the "frequent flooding" requirement injected by the circuit court reinstated the exact regulatory structure that the Corps rejected in 1976.[125] The Court found that the circuit court's construction of CWA jurisdiction was invalid.[126]

The Court then found that the corporation's wetlands were "adjacent" to a navigable water under section 323.2.[127] The wetland's aquatic vegetation extended to Black Creek, which was a navigable waterway.[128] The Court found the corporation's wetland was part of the "waters of the United States" as defined under the CWA and subject to Corps jurisdiction.[129]

Finally, the Court determined the Corps acted reasonably within the Act by exercising jurisdiction over wetlands that are "adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'"[130] First, the Court noted it was not an easy task for the Corps to determine where water ends and solid ground begins.[131] The Court found the Corps appropriately looked to legislative history and the underlying policies of the CWA for guidance.[132] The Court noted that neither source was clear.[133] However, the Court found that when taken together, the sources supported the Corps' determination of the corporation's adjacent wetlands as "waters" within the meaning of the Clean Water Act.[134]

The CWA's objective, the Court noted, is "'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[135] The Court observed that Congress intended "integrity" under

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[122] *Id*.
[123] *Id.* at 130.
[124] *Id.* at 129.
[125] *Id.* at 130.
[126] *Id.* ("In fashioning its own requirement of 'frequent flooding' the Court of Appeals improperly reintroduced into the regulation precisely what the Corps had excised.").
[127] *Id.* at 131.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* at 132.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.* (quoting 33 U.S.C. § 1251).

the Clean Water Act to mean "'a condition in which the natural structure and function of ecosystems [are] maintained.'"[136] The Court also noted that Congress recognized that protection of aquatic ecosystems demands broad federal jurisdiction because "'[water] moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'"[137] Further, the Court explained that "the [CWA]'s definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the [CWA] is of limited import.[138]

The Court noted that, following the EPA's lead, the Corps stated the following in its 1977 rulemaking:

> The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system . . . will affect the water quality of the other waters within that aquatic system.
>
> For this reason, the landward limit of Federal jurisdiction under [s]ection 404 must include any adjacent wetlands that form the border of *or are in reasonable proximity to* other waters of the United States, as these wetlands are part of this aquatic system.[139]

The *Riverside Bayview* Court accepted the Corps' justification.[140] The Court concluded that it was not unreasonable that the Corps' scientific judgment would produce the *legal* judgment that adjacent wetlands are "waters" under the CWA, given the breadth of regulatory authority contemplated by the Clean Water Act and the inherent problems in defining precise boundaries of waters subject to regulation.[141]

The Court further accepted that, even if the water in the wetlands did not come from an adjacent body of open water, jurisdiction applies because the water from the wetlands could still have a tendancy to drain into those open waters.[142] The Court further found that the Corps had reasonably determined such wetlands may serve to filter and purify such water, which provided a valid basis to deny a building permit to the

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[136] *Id.* (quoting H.R. REP. NO. 92-911, at 76 (1972)).

[137] *Id.* at 133 (quoting S. REP. NO. 92-414, at 77 (1972)).

[138] *Id.*; *see* S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.); *see also* 118 CONG. REC. 33,756-57 (1972).

[139] *Riverside Bayview*, 474 U.S. at 133-34 (quoting Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,128 (July 19, 1977)) (emphasis added).

[140] *Id.* at 134.

[141] *Id.*

[142] *Id.*

corporation.[143] Moreover, the Court accepted the Corps' reasonable determination that such waters trapped in wetlands may slow the drainage to lakes, rivers and streams, thus preventing flooding and erosion.[144] Finally, the Court accepted the Corps' reasonable determination that adjacent wetlands "may 'serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species.'"[145]

Perhaps the most striking feature of the *Riverside Bayview* opinion was that the Court gave great weight to the scientific expertise of the Army Corps of Engineers. In its unwillingness to substitute its judgment for that of the Corps, the Court found not only the Corps' interpretation of the CWA was entitled to *Chevron* deference, but also that the Corps' interpretation was reasonable. This exercise of deference would stand in stark contrast to later opinions, particularly in *Rapanos v. United States*.[146] In the meantime, however, the administrators had no reason to believe the Supreme Court would question their authority. As a result, they forged ahead with bold jurisdictional rulings under the Clean Water Act.[147]

B. The Corps Further Expands CWA Jurisdiction: The "Migratory Bird Rule" and "Ephemeral Streams"

Buoyed perhaps by the 1985 *Riverside Bayview* opinion, the Army Corps issued a final ruling the following year. In what has been dubbed the "Migratory Bird Rule," the Corps announced that its jurisdiction under Clean Water Act extended to *intrastate* waters that, inter alia, provide habitat for migratory birds.[148] The Corps based its ruling on an EPA regulation stating the waters of the United States included those:

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[143] *Id.*; *see* 33 C.F.R. § 320.4(b) (2006) (authorizing the Corps to consider effect on wetlands when issuing building permits, including wetlands which serve "significant water purification functions").

[144] *Riverside Bayview*, 474 U.S. at 134; *see* 33 C.F.R. § 320.4(b)(2)(iv)-(v) (2006).

[145] *Riverside Bayview*, 474 U.S. at 134-35 (quoting 33 C.F.R. § 320.4(b)(2)(i) (1985)).

[146] Rapanos v. United States, 126 S. Ct. 2208 (2006); *see also* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001). In 1985, the year *Riverside Bayview* was decided, the Supreme Court consisted of Chief Justice Burger and Associate Justices Blackmun, Brennan, Marshall, O'Connor, Powell, Rehnquist, Stevens, and White. In 2006, *Rapanos* was decided by a Supreme Court consisting of Chief Justice Roberts and Associate Justices Breyer, Ginsburg, Kennedy, O'Connor, Scalia, Stevens, Souter, and Thomas. Only two Justices remained from the *Riverside Bayview* Court: Justices Stevens and O'Connor.

[147] *See* discussion *infra* Part II.B.

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

> (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.[149]

The Corps may not have considered this statement of jurisdiction farfetched. Indeed, no fewer than two circuit courts that considered the question upheld the Migratory Bird Rule.[150] In fact, the regulation stood unmolested until the Supreme Court invalidated it fifteen years later.[151]

In the year prior to the Supreme Court's invalidation of the Migratory Bird Rule, the Corps issued another final rule.[152] This regulation asserted CWA jurisdiction over waters with no constant flow.[153] The ruling stated that the "waters of the United States" included "ephemeral streams," "drainage ditches," and "tributaries" with a perceptible "ordinary high water mark."[154] The ruling cited to the existing definition of "ordinary high water mark," identified by a "line on the shore established by the fluctuations of water" and could be indicated by a "clear, natural line," or "shelving, changes in character of soil, destruction of . . . vegetation, the presence of litter and debris, or other appropriate means."[155] The Supreme Court later characterized the ruling as "extend[ing] 'the waters of the United States' to . . . any land feature over which rainwater or drainage passes and leaves a visible mark."[156]

These two broad rulings created a framework for resistance from the Supreme Court and ensuing confusion among the circuit courts. The Court struck down the Migratory Bird Rule, holding that the CWA did not grant the Corps jurisdiction over isolated intrastate waters.[157] Some

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[149] *Id.*

[150] *See* Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990); *see also* Hoffman Homes, Inc. v. Adm'r, United States E.P.A., 999 F.2d 256 (7th Cir. 1993).

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

[152] Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (Mar. 9, 2000).

[153] *Id.*

[154] *Id.* at 12,823.

[155] 33 C.F.R. § 328.3(e) (2006).

[156] Rapanos v. United States, 126 S. Ct. 2208, 2217 (2006).

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

courts, however, interpreted the holding to mean that the CWA granted jurisdiction only over waters that had a significant physical connection to navigable waters, as in *Riverside Bayview*.[158] This disparity in interpretation among the lower courts created a circuit split that has yet to heal.[159]

C. The Supreme Court Shoots Down the Migratory Bird Rule: SWANCC

In 2001, the Supreme Court issued its first decision that categorically limited the Corps' jurisdiction under the Clean Water Act.[160] The Corps, the Court reasoned, had gone beyond its Congressional mandate in enacting the Migratory Bird Rule.[161] The Court held that the goal of protecting migratory birds' habitat was insufficient to confer jurisdiction, and that the CWA required some "nexus" to navigable waters.[162]

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*, a group of suburban Chicago municipalities had selected an abandoned sand and gravel pit as a solid waste disposal site.[163] The pit featured excavation trenches that had evolved into permanent and seasonal ponds.[164] The Chicago District of the Army Corps of Engineers determined that it had jurisdiction under subpart (b) of the Migratory Bird Rule and required the municipalities to apply for a landfill permit.[165] The Corps denied the permit because of the municipalities' failure to address certain requirements under section 404 of the CWA.[166] The municipalities brought suit under the Administrative Procedure Act, and the district court granted summary judgment to the Corps on the jurisdictional issue.[167] The Seventh Circuit affirmed, holding that the Corps had jurisdiction under the cumulative impact doctrine of the Commerce Clause and the Migratory Bird Rule to regulate the sand and gravel pit, and as a threshold matter, the EPA's Migratory Bird Rule was a reasonable interpretation of its jurisdiction under section 404 of the CWA.[168]

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158 *See* discussion *infra* Part II.D.
159 *See* discussion *infra* Part II.D.
160 *SWANCC*, 531 U.S. 159.
161 *Id.* at 174.
162 *Id.* at 171-72.
163 *Id.* at 162-63.
164 *Id.* at 163.
165 *Id.* at 164.
166 *Id.* at 165.
167 *Id.*
168 Solid Waste Agency, Inc. v. U.S. Army Corps of Eng'rs, 191 F.3d 845, 850-52 (7th Cir. 1999).

The Supreme Court reversed the Seventh Circuit in a 5-4 decision.[169] The Court reasoned that the EPA's Migratory Bird Rule failed on constitutional grounds, including significant impingement of the states' traditional and primary power over land and water use.[170] In doing so, the *SWANCC* Court read the Clean Water Act conservatively to avoid significant constitutional and federalism questions.[171] The *SWANCC* Court also rejected the Corps' request for administrative deference, a decision that stands in stark contrast to that of the *Riverside Bayview* Court discussed *supra*.[172]

The *SWANCC* Court highlighted the importance of navigation to federal jurisdiction under the CWA.[173] The Court first reaffirmed that "navigable" represented a lower standard than "navigable in fact" by observing that "[w]e said in *Riverside Bayview Homes* that the word 'navigable' in the statute was of 'limited effect' and went on to hold that [section] 404(a) extended to nonnavigable wetlands adjacent to open waters."[174] However, the *SWANCC* Court hinted that it would limit the Corps by stating "it is one thing to give a word limited effect and quite another to give it no effect whatever**.**"[175]

Accordingly, the *SWANCC* Court refused to write "navigable waters" out of the statute and observed that "[t]he 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."[176] The *SWANCC* Court held that "nonnagivable, isolated, intrastate waters" were not a part of the "waters of the United States."[177] Through this lens, the *SWANCC* Court majority viewed the isolated, sand-and-gravel pit in Illinois. The Court found that because the pit lacked a connection with or adjacency to a navigable or non-navigable interstate water, it fell outside the reach of the Clean Water Act.[178] Unfortunately, the *SWANCC* Court majority failed to articulate a usable test for lower courts to apply to future cases, and the holding was open to interpretation.

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169 *SWANCC*, 531 U.S. at 166.
170 *Id.* at 174.
171 *Id.*
172 *Id.*
173 *Id.* at 172.
174 *Id.*
175 *Id.*
176 *Id.*
177 *Id.*
178 *Id.* at 168.

The Fifth Circuit interpreted the opinion expansively to mean that waters must be "truly adjacent" to qualify for Corps jurisdiction.[179] Other circuits took a very limited view of the holding, applying *SWANCC* to instances involving truly isolated, intrastate waters.[180] With no affirmative test and little guidance going forward, the circuit courts struggled to apply the *SWANCC* decision.

D. After SWANCC*: The Flock Scatters*

When Congress enacted the federal pollution control CWA amendments in the 1970s, it delegated responsibility for determining CWA jurisdiction to the EPA and the Corps.[181] As discussed *supra*, Congress indicated in their debates that it intended for the EPA and the Corps to interpret their jurisdiction under the CWA to the outer limits of the Commerce Clause.[182] However, Congress placed a jurisdictional limit in the CWA with statutory language limiting jurisdiction to navigable waters.[183] Under these conflicting political messages, the Corps was forced to feel their way to the limits of their jurisdiction.[184] When the Supreme Court finally struck down one of the Corps' rulings, the courts below had little guidance other than *Riverside Bayview* to aid in deciding future cases.[185] Thus, it should come as little surprise that the circuits split almost immediately.

1. The Fifth Circuit: CWA Jurisdiction Extends to Wetlands "Truly Adjacent" to Navigable Waters

In *Rice v. Harken Exploration Co.*, a decision reached the same year as *SWANCC*, the Fifth Circuit applied the *SWANCC* holding very aggressively.[186] The *Rice* Court noted that "under [*SWANCC*], it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water."[187] The *Rice* Court attempted, as a matter of first impression, to determine whether groundwater was protected under the Oil Protection Act, the jurisdictional component of which, the court determined, was

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[179] *See* discussion *infra* Part II.D.1.
[180] *See* discussion *infra* Part II.D.2.
[181] *See supra* notes 53-54 and accompanying text.
[182] *See supra* notes 49-51 and accompanying text.
[183] *See* 33 U.S.C. § 1344(a) (2006) ("The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.").
[184] *See* discussion *supra* Parts II.A-C.
[185] *See* discussion *supra* Parts II.C-F.
[186] Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001).
[187] *Id.* at 269.

identical to the CWA's.[188] The court determined the only discharges in question were onto dry land; therefore, the court did not reach the question of whether a non-adjacent tributary would be protected.[189] However, the *Rice* Court signaled its broad reading of *SWANCC* by stating "a body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water."[190] Thus, had the *Rice* Court reached the question, the court would likely have ruled that a non-navigable secondary or tertiary tributary, or a non-adjacent wetland with a hydrological connection to a navigable water by way of another body of water, would not be protected under the Clean Water Act.

Two years later, the Fifth Circuit again addressed the CWA's jurisdictional reach.[191] In *In re Needham*, the court noted that at least two sister circuits read CWA jurisdiction broadly to cover "all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'"[192] The *Needham* Court stated, however, that "[i]n our view, this definition is unsustainable under *SWANCC*."[193] The *Needham* Court, contrary to the *Riverside Bayview* Court, opined that the Corps' regulation was "not entitled to Chevron deference" because, if applied broadly, CWA jurisdiction would be pushed "to the outer limits of the *Commerce Clause* and raise serious constitutional questions."[194] The *Needham* Court substituted its judgment for that of the Corps and concluded that the term "adjacent" requires a "significant measure of proximity," and "including all 'tributaries' as 'navigable waters' would negate *Rice's* adjacency requirement, and extend [EPA jurisdiction] beyond the limits . . . in *SWANCC*."[195] Following the Fifth Circuit's own precedent, the *Needham* Court held that the EPA had jurisdiction only over "navigable-in-fact waters or . . . non-navigable waters (or wetlands) that are truly adjacent to an open body of navigable water."[196]

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[188] *Id*. at 267 ("The scope of the [Oil Protection Act] is an issue of first impression for this Court."). The court noted that "[t]he legislative history of the OPA and the textually identical definitions of 'navigable waters' in the OPA and the CWA strongly indicate that Congress generally intended the [jurisdictional] term 'navigable waters' to have the same meaning in both the OPA and the CWA." *Id*. The court asserted that "[a]ccordingly, the existing case law interpreting the CWA is a significant aid in our present task of interpreting the OPA." *Id.* at 267-68.

[189] *Id.* at 270.

[190] *Id.*

[191] *In re* Needham, 354 F.3d 340 (5th Cir. 2003).

[192] *Id.* at 345; *see* United States v. Deaton, 332 F.3d 698 (4th Cir. 2003); *see also* United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003).

[193] *Needham*, 354 F.3d at 345.

[194] *Id.* at 345 n.8.

[195] *Id.* at 347 n.12.

[196] *Id.* at 347.

2. The Fourth, Sixth, Seventh and Ninth Circuits: CWA Jurisdiction Extends to Wetlands with "Some Nexus" to Navigable Waters

Two years after *SWANCC*, the Fourth Circuit held in *United States v. Deaton* that the Corps' interpretation of its own regulations merited a combination of *Seminole Rock* and *Chevron* deference.[197] The *Deaton* Court found that a ditch that eventually drained into navigable waters could reasonably be a "tributary" under the Corps' regulations, and thus the Corp could properly assert jurisdiction over the wetland in question that was adjacent to such a ditch.[198] The *Deaton* Court noted, "we do not read *SWANCC* to hold that the [more narrow] 1974 regulations represent the *only* permissible interpretation of the Clean Water Act."[199]

Later that same year, in *Treacy v. Newdunn Associates, L.L.P.*, the Fourth Circuit held that Corps' jurisdiction extends to all tributaries, regardless of whether they are man-made.[200] The *Treacy* Court noted that the question should be whether the CWA's goal of protecting the chemical, physical, and biological integrity of the nation's waters is being undermined, not whether the body of water is man-made or natural.[201] The court stated that *SWANCC* required that a wetland be "*inseparably* bound up with the 'waters' of the United States," and that only the Corps' attempts at jurisdiction over waters that had "no

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[197] *Deaton*, 332 F.3d at 711-12. The Supreme Court announced its standard of judicial deference to an agency's statutory interpretation in its 1984 opinion in *Chevron, U.S.A., Inc. v. NRDC, Inc.*:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. 837, 842-43 (1984). The Court went on to say that the court should not substitute its own judgment for that of the agency. *Id.* at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.").

[198] *Id.* at 712.

[199] *Id.* at 711 (emphasis added).

[200] Treacy v. Newdunn Assocs., L.L.P., 344 F.3d 407 (4th Cir. 2003).

[201] *Id.* at 417.

hydrological connection whatsoever to navigable waters" would fail under *SWANCC*.[202]

In the Sixth Circuit, six years before the *SWANCC* decision was handed down, Michigander John Rapanos was convicted of unlawfully filling wetlands in violation of the Clean Water Act.[203] In 1997, Rapanos appealed, and the Supreme Court denied certiorari.[204] Rapanos appealed a second time, and this time the Supreme Court granted certiorari and remanded the case to the Sixth Circuit to review in light of *SWANCC*.[205] The Sixth Circuit remanded the case to the district court.[206] The district court found that because Rapanos's wetlands "were not 'directly adjacent to navigable waters,' the government could not regulate them."[207] On appeal, the Sixth Circuit disagreed.[208] The court aligned itself with the Fourth Circuit, which stated that wetlands draining into a ditch that passes through other waterways to a navigable-in-fact water formed a sufficient nexus to navigable waters to confer Clean Water Act jurisdiction.[209] The Sixth Circuit stated that "[b]ecause the wetlands are adjacent to the [Labozinski] Drain and there exists a hydrological connection among [Rapanos'] wetlands, the Drain, and the [navigable] Kawkawlin River, we find an ample nexus to establish jurisdiction.[210] The court reversed the district court and reinstated Rapanos' convictions.[211] Rapanos would revisit the Supreme Court three years later; however, one should note that the Sixth Circuit gave *SWANCC* a much different reading than did the Fifth Circuit.[212]

In the same year, the Seventh Circuit held in *United States v. Rueth Development Co.* that surface hydrological connection, no matter how attenuated, is sufficient for Corps jurisdiction under the CWA.[213] The *Rueth* Court found sufficient nexus in wetlands "adjacent to an unnamed tributary of Dyer Ditch which is a tributary of Hard Ditch which is a tributary of the [navigable] Little Calumet River."[214] Like the Sixth Circuit, the court aligned itself with the Fourth Circuit in holding that

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202 *Id.* at 415.
203 United States v. Rapanos, 895 F. Supp. 165 (E.D. Mich. 1995).
204 Rapanos v. United States, 522 U.S. 917 (1997).
205 Rapanos v. United States, 533 U.S. 913 (2001).
206 United States v. Rapanos, 339 F.3d 447, 448 (6th Cir. 2003).
207 *Id.* at 450 (citations omitted).
208 *Id.* at 453.
209 *Id.* at 452.
210 *Id.* at 453.
211 *Id.* at 448.
212 *See* discussion *supra* Part II.D.1.
213 335 F.3d 598 (7th Cir. 2003).
214 *Id.* at 604.

"adjacency" is established by a showing of almost any surface hydrological connection.[215]

The same year that the Supreme Court issued the *SWANCC* ruling, the Ninth Circuit addressed the issue of jurisdiction under the Clean Water Act in *Headwaters, Inc. v. Talent Irrigation District*.[216] The *Headwaters* Court held that where there was a surface hydrologic connection, even if intermittent, whereby a waterway was capable of carrying pollutants to other "waters of the United States," it was a tributary to other waters of the United States and fell within CWA jurisdiction under 33 C.F.R. § 328.3(a).[217] The *Headwaters* Court believed that *SWANCC* had no bearing on their decision because the irrigation ditches in question were not isolated.[218]

In each of the decisions above, the circuit courts dealt with the issue of adjacency on a local level. Each circuit developed their own standard for federal Clean Water Act jurisdiction under section 404, *Riverside Bayview*, and *SWANCC*.[219] Some circuits, including the Sixth Circuit, continued to read CWA jurisdiction very broadly.[220] The tension among these broad interpretations of CWA jurisdiction, issues of federalism, and private ownership interests, exacerbated by the cost of the permit program to regulated individuals, would stretch the Clean Water Act to its limits. In the absence of congressional action addressing the jurisdictional issue, the Supreme Court weighed in once more.[221]

E. The Supreme Court Muddies the Waters: Rapanos v. United States*' 4-1-4 Split*

As discussed *supra*, the United States brought suit under section 404 of the Clean Water Act against John Rapanos, a private developer who filled Michigan wetlands lying near ditches or man-made drains that eventually emptied into traditional navigable waters.[222] In a separate action, private developers, the Carabells, brought suit against United States for denying their application under section 404 to fill their Michigan wetlands, which were separated from a drainage ditch by an impermeable berm.[223] In both cases, the district court found federal

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[215] *Id.*
[216] 243 F.3d 526 (9th Cir. 2001).
[217] *Id.*
[218] *Id.* at 533.
[219] *See* discussion *supra* Part II.D.1-2.
[220] *See supra* notes 195-202 and accompanying text.
[221] Rapanos v. United States, 126 S. Ct. 2208 (2006) (4-1-4 decision).
[222] *Id.* at 2219 (plurality opinion).
[223] *Id.*

jurisdiction over the wetlands under the CWA.[224] In the first case, the district court found that Rapanos' wetlands were "adjacent to other waters of the United States."[225] In the second, the district court found the Carabells' land was also "adjacent to neighboring tributaries of navigable waters and has a significant nexus to 'waters of the United States.'"[226]

In *Rapanos*, the Sixth Circuit affirmed the lower court, stating there were "hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters" sufficient for jurisdiction under the Clean Water Act.[227] The Sixth Circuit also affirmed *Carabells*, stating that the wetland was "adjacent" to navigable waters.[228] The Supreme Court consolidated the two cases to decide "whether these wetlands constitute 'waters of the United States' under the [CWA], and if so, whether the [CWA] is constitutional."[229]

In *Rapanos*, the Supreme Court began with factual observations about the Rapanos sites.[230] The Supreme Court noted that "[t]he wetlands at the Salzburg site are connected to a man-made drain, which drains into Hoppler Creek, which flows into the [navigable] Kawkawlin River, which empties into Saginaw Bay and Lake Huron."[231] Furthermore, "[t]he wetlands at the Hines site are connect to . . . the 'Rose Drain,' which has a surface connection to the [navigable] Tittabawassee River."[232] The Court went on to explain that "the wetlands at the Pine River site have a surface connection to the [navigable] Pine River, which flows into Lake Huron."[233] The Court also noted that "[i]t is not clear whether the connections between [the Rapanos'] wetlands and the nearby drains and ditches are continuous or intermittent, or whether the nearby drains and ditches contain continuous or merely occasional flows of water."[234]

The *Rapanos* Court continued with observations regarding the Carabells' site. "A man-made drainage ditch runs along one side of the [Carabells'] wetland," the Court held, "separated from it by a 4-foot-wide man-made berm."[235] The Court continued that "[t]he ditch empties

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[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.* (quoting United States v. Rapanos, 376 F.3d 629, 643 (6th Cir. 2004)).
[228] *Id.* (citing Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704, 708 (6th Cir. 2004)).
[229] *Id.*
[230] *Id.* at 2214.
[231] *Id.* at 2219.
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *Id.*

into another ditch or a drain, which connects to Auvase Creek, which empties into Lake St. Clair."[236] The Court proceeded to evaluate federal jurisdiction over both parties' sites under the plain language of the Clean Water Act, congressional intent in enacting the CWA and its constitutionality.[237] In *Rapanos*, the Supreme Court ultimately vacated the Sixth Circuit judgment and remanded.[238]

1. The Plurality: *Riverside Bayview* and the 1954 Webster's Dictionary Definition of "Waters" Controls; States to Retain Primary Pollution and Land/Water Use Responsibilities and Rights

The *Rapanos* plurality, written by Justice Scalia and joined by three other Justices, began by reiterating the well-settled idea that "navigable waters" under the plain language of the CWA is broader than traditional navigable waters.[239] The plurality opined that "waters of the United States" does not include channels containing intermittent or ephemeral flow.[240] Relatively continuous flow, the plurality stated, is a necessary condition for qualification as a "water."[241] A more expansive reading by the Corps, the *Rapanos* plurality opined, would defeat the preservation of "'the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources.'"[242] The Court referred to its decision in *SWANCC*, stating an expansive reading of the regulations would "result in a significant impingement of the States' traditional and primary power over land and water use."[243]

In developing its working definition of "waters," the plurality referred to a 1954 edition of Webster's New International Dictionary.[244] According to the fifty-three-year-old definition of the word "waters,"[245] the Court held that "the phrase 'the waters of the United States' includes 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,'" and cannot

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[236] *Id.*
[237] *Id.* at 2220-24.
[238] *Id.* at 2235.
[239] *Id.* at 2220.
[240] *Id.* at 2222.
[241] *Id.* at 2223 n.7.
[242] *Id.* at 2223 (quoting 33 U.S.C. § 1251(b) (2006)) (alteration in original).
[243] *Id.* at 2224.
[244] *Id.* at 2220-21; *see also* WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954).
[245] It is worth noting that Merriam Webster published a third edition of the Webster's New International Dictionary prior to both the Clean Water Acts of 1972 and 1977. WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1961).

include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[246] Thus, the Court concluded, "[t]he Corps' expansive interpretation of the 'waters of the United States' is thus not 'based on a permissible construction of the statute.'"[247]

The plurality opined that to be subject to jurisdiction under the CWA, a wetland must have a continuous surface connection to waters of the United States.[248] Wetlands that only have an "intermittent, physically remote hydrologic connection to 'waters of the United States'" lack the "significant nexus" required by *SWANCC*.[249] Thus, the *Rapanos* plurality held that establishing whether wetlands are covered under the CWA requires two findings: First, the adjacent channel must contain a "relatively permanent body of water connected to traditional interstate navigable waters," and second, that the wetland has "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[250]

The *Rapanos* plurality found that the Sixth Circuit applied an incorrect standard to determine whether the wetlands at issue were "waters of the United States."[251] Because of this error and the paucity of the record, the plurality voted to remand the cases for further proceedings.[252] Justice Kennedy joined the plurality in its judgment only, giving the *Rapanos* Court the fifth vote it needed.[253]

2. Justice Kennedy's Concurrence: CWA Requires a "Significant Nexus" to Navigable Waters

Justice Kennedy's concurring opinion in *Rapanos* found that the Sixth Circuit correctly recognized that a water or wetland constitutes "navigable waters" under the CWA if it possesses a "significant nexus" to waters that are navigable in fact or that could reasonably be so made,[254] but that it had not considered all the factors necessary to determine that the lands in question had, or did not have, the requisite

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[246] *Rapanos*, 126 S. Ct. at 2225.

[247] *Id.* (quoting Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843 (1984)); *see supra* note 197 for a discussion of *Chevron* deference.

[248] *Id.* at 2226.

[249] *Id.*

[250] *Id.* at 2227.

[251] *Id.* at 2235.

[252] *Id.*

[253] *Id.* at 2236. (Kennedy, J., concurring).

[254] *See* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167, 172 (2001).

nexus.[255] The nexus required, Justice Kennedy opined, "must be assessed in terms of the [CWA]'s goals and purposes."[256] Justice Kennedy observed that "Congress enacted the law to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[257] Congress pursued that objective, Justice Kennedy noted, "by restricting dumping and filling in 'navigable waters.'"[258] The Corps' recognition that wetlands can perform critical functions related to the integrity of other waters, such as pollutant trapping, flood control, and runoff storage, serves as the rationale behind the CWA's wetlands regulation.[259]

Justice Kennedy's concurrence articulated a test for federal jurisdiction over wetlands under the Clean Water Act:

> [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."[260]

Thus, for CWA jurisdiction to attach under the Kennedy Test, there must be a substantial nexus between the wetlands in question and the chemical, physical, or biological properties of the open waters into which those wetlands flow.

Justice Kennedy opined that the "Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, however remote and insubstantial—raises concerns that go beyond the *Riverside Bayview* holding."[261] Absent more specific regulations, Justice Kennedy stated, "the Corps must establish a significant nexus on a *case-by-case basis* when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries" to avoid unreasonable applications of the CWA.[262] Although Justice Kennedy found that "the record contains evidence suggesting the possible existence of a significant nexus," the concurrence also found that "neither the agency nor the reviewing courts properly considered the issue."[263] Therefore, the concurrence recommended that the case be

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255 *Rapanos*, 126 S. Ct. at 2236 (Kennedy, J., concurring).
256 *Id.* at 2248.
257 *Id.* (quoting 33 U.S.C. § 1251(a) (2006)).
258 *Id.* (quoting 33 U.S.C. §§ 1311(a), 1362(12) (2006)).
259 *See* 33 C.F.R. § 320.4(b)(2) (2006).
260 *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring).
261 *Id.*
262 *Id.* at 2249 (emphasis added).
263 *Id.* at 2250.

remanded for further consideration under the "controlling legal standard."[264]

3. Justice Stevens' Dissent: *Chevron* Deference Applies

Justice Stevens' dissenting opinion, joined by three other Justices, also found that *Riverside Bayview* "squarely controls these cases."[265] Justice Stevens noted that the question there was framed as whether the CWA "authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water *and their tributaries*."[266] Applying *Chevron* deference the Corps' interpretation of their jurisdiction to include such wetlands in their interpretation of "waters of the United States," the *Riverside Bayview* Court found such an interpretation was permissible.[267]

Turning to the cases at hand, Justice Stevens opined that in these cases, which concern "wetlands that are adjacent to 'navigable bodies of water or their tributaries,'"[268] the Corps had again "reasonably interpreted its jurisdiction to cover non-isolated wetlands."[269] Justice Stevens further noted that the *Riverside Bayview* Court found there is a presumption that wetlands adjacent to tributaries possess sufficient nexus to confer Corps jurisdiction.[270] Observing that the Corps has implemented such jurisdiction for over thirty years, Justice Stevens opined that any change to that jurisdiction is properly left to "Congress or the Corps rather than to the Judiciary," noting that "[u]nless and until [adversely affected persons] succeed in convincing Congress (or the Corps) that clean water is less important today than it was in the 1970s, we continue to owe deference to regulations . . . that all of the Justices on the Court in 1985 recognized in *Riverside Bayview*."[271]

Justice Stevens also found the plurality's definition of "waters" problematic, both logically and with respect to Supreme Court jurisprudence.[272] Justice Stevens also found problematic the canonic construction the plurality relied upon to support its position that land use regulation was a right, reserved to the States, that the Corps was not

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[264] *Id.*
[265] *Id.* at 2255 (Stevens, J., dissenting).
[266] *Id.* (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985)).
[267] *Id.*
[268] *Id.* at 2257 (citations omitted).
[269] *Id.*
[270] *Id.* at 2258.
[271] *Id.* at 2259.
[272] *Id.* at 2259-60.

empowered to overcome,[273] and that "adjacent" waters have a surface hydrological connection requirement found nowhere in the Corps' regulations.[274] Justice Stevens observed that "[b]ecause there is ambiguity in the phrase 'waters of the United States' and because interpreting it broadly . . . advances the purpose of the [CWA], the Corps' approach [of regulating pollutants as they enter ditches or streams] should command [Supreme Court] deference."[275] Justice Stevens likewise found Justice Kennedy's "significant nexus" requirement a superfluous addition to the Corps' regulations, particularly in light of the *Riverside Bayview* bright-line presumption that nonadjacent wetlands are sufficiently connected to the waters of the United States to confer Corps jurisdiction.[276]

4. Justice Breyer's Dissent: The Corps Retains Control through Rulemaking

In another dissenting opinion, Justice Breyer found that Congress "intended to fully exercise its relevant *Commerce Clause* powers" by using the expansive term "waters of the United States" in the Clean Water Act and leaving it to the Army Corps of Engineers to create a scientifically workable definition.[277] Justice Breyer further found that, although the *Rapanos* Court wrote an unnecessary "nexus" requirement into the Clean Water Act, the Corps had plenary power to define the term.[278] Justice Breyer observed that if and when the Corps enacted such a regulation, "the courts must give those regulations appropriate deference [under *Chevron*]."[279]

F. Federal Court Inconsistency: The Next Wave

The 4-1-4 split decision in *Rapanos* signaled to the lower courts that even the Supreme Court was at odds over the issue of Clean Water Act jurisdiction. Worse, the split presented the lower courts with logistical problems in discerning the precedential holding, if indeed there was one. With several cases in the pipe, the circuits took on the Herculean task of answering the question: "What next?"

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[273] *Id.* at 2261.
[274] *Id.* at 2263.
[275] *Id.* at 2262.
[276] *Id.* at 2264-65.
[277] *Id.* at 2266 (Breyer, J., dissenting).
[278] *Id.*
[279] *Id.*; *see supra* note 197 for a discussion of *Chevron* deference.

1. The Seventh Circuit Adopts the Kennedy Test

Immediately after the Supreme Court issued its opinion in *Rapanos*, it remanded *United States v. Gerke Excavating, Inc.* to the Seventh Circuit for further proceedings and factual findings.[280] The Seventh Circuit remanded *Gerke Excavating* to the United States District Court for the Western District of Wisconsin with instructions to proceed consistent with Justice Kennedy's opinion.[281] The Seventh Circuit stated that Justice Kennedy's test was "the narrowest ground to which the majority of the Justices would have assented if forced to choose."[282] Therefore, the court concluded, the Kennedy Test governed future proceedings.[283] The court thus remanded to the district court with instructions to follow the standard Justice Kennedy proposed in his *Rapanos* concurrence.[284]

2. The Ninth Circuit Misapplies the Kennedy Test

The same summer the *Rapanos* decision was filed, the Ninth Circuit upheld the Corps' jurisdiction over Basalt Pond, a "rock quarry pit that had filled with water from the surrounding aquifer, located next to the [navigable] Russian River," in *Northern California River Watch v. City of Healdsburg*.[285] The *River Watch* court based its conclusion, however, on a misapplication of the Kennedy Test. The *River Watch* court held the pond fell within CWA jurisdiction because it found a "significant nexus" to a navigable river. However, the *River Watch* court's reasoning failed to consider Justice Kennedy's observation that "[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps' . . . assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone. That is the holding of *Riverside Bayview*."[286] Thus, the Ninth Circuit applied the Kennedy Test needlessly.

3. The Northern District of Texas Refuses to Apply the Kennedy Test

In the same year as the *Rapanos* decision, the Northern District of Texas refused to even attempt the Kennedy Test. [287] In *United States v.*

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[280] United States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006).
[281] *Id.* at 725.
[282] *Id.*
[283] *Id.* at 724.
[284] *Id.* at 725.
[285] 457 F.3d 1023 (9th Cir. 2006).
[286] Rapanos v. United States, 126 S. Ct. 2208, 2248 (2006) (Kennedy, J., concurring).
[287] United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605 (N.D. Tex. 2006).

Chevron Pipe Line Co., a recent decision that released a large oil corporation from civil liability under the CWA for discharging crude oil into a creek and streambed, the district court stated flatly that "[b]ecause [Justice] Kennedy failed to elaborate on the 'significant nexus' required, this Court will look to the prior reasoning in this circuit."[288] The *Chevron* court somewhat surprisingly rejected the Kennedy Test wholesale and relied solely on pre-*Rapanos* Fifth Circuit decisions and the non-controlling *Rapanos* plurality to find that the creek and streambed were not navigable waters of the United States.[289]

4. The Middle District of Florida Applies Both the Plurality and the Kennedy Tests

In *United States v. Evans*, the Middle District of Florida solved the fragmented-court dilemma by applying both *Rapanos*'s plurality and Kennedy Tests and then taking an "either/or" approach to find Corps jurisdiction if either one or the other test was satisfied.[290] The *Evans* Court noted this approach was "consistent with Justice Stevens' [dissenting] opinion," which advocated such an approach in dicta.[291] Indeed, the *Evans* Court's approach would yield correct results under most circumstances. However, in rare instances where water possessed a slight surface hydrological connection and an *insignificant* nexus to navigable waters, this approach would incorrectly yield a finding of Corps jurisdiction over waters outside the scope of the Clean Water Act under *Rapanos*.

III. ANALYSIS AND A DECENT PROPOSAL

Congress expressly stated the Clean Water Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[292] In other words, Congress intended this legislation to control not only the physical navigability of the nation's waters as commercial conduits, but also to control the purity of the nation's waters threatened by widespread pollution. Seeing that the growing problem of pollution in our nation's waterways created a national issue, both ideologically and physically, Congress sought to reverse the degradation of those waterways.[293]

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[288] *Id.* at 613.
[289] *Id.* at 615.
[290] No. 3:05 CR 159 J 32HTS, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006).
[291] *Id.* at *19.
[292] 33 U.S.C. § 1251(a) (2006).
[293] *See* 33 U.S.C. § 1251(a) ("The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."); Donna M. Downing

However, Congress has severely undermined the stated objective of the Clean Water Act.[294] First, it imposed upon the CWA's administrators a geographical jurisdictional constraint, which bound the CWA's ambit to the "waters of the United States."[295] This constraint made the stated objective nearly impossible and set its administrators up for conflict with the states and private landowners. Congress also indicated that the Clean Water Act be construed to the furthest possible reaches of the Commerce Clause, encouraging its administrators to act broadly.[296] These conflicting messages have crippled the CWA's chances for success by causing uncertainty in the Clean Water Act's administrators and endless confusion in the courts and amongst the regulated individuals.

It is well settled in our tripartite system of government that the judicial branch has power to resolve legislative uncertainty, limited in the case of congressional administrative delegation by the principle of intelligibility, whereby any agency must be given an "intelligible principle" under which to operate or the statute is invalid.[297] The Supreme Court has not said that the Clean Water Act lacks such an intelligible principle. However, once the Supreme Court has spoken to resolve a legislative uncertainty, how shall those words be interpreted?

Rapanos presents the lower courts with a particularly troublesome puzzle. Evidence has already shown that proceeding with litigation on a case-by-case basis produces inconsistent results.[298] Justice Breyer suggested in his *Rapanos* dissent that the Corps has plenary power to define the waters of the United States scientifically, and thus resolve the jurisdictional question.[299] However, there is no indication that the Court

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et al., *Navigating Through Clean Water Act Jurisdiction: A Legal Review*, 23 WETLANDS 475, 478 (2003) ("The Federal Water Pollution Control Act Amendments of 1972 ('FWPCA') were the landmark Congressional response to the need for a comprehensive effort to control water pollution within the constitutional authority of the Federal government."); Tyler Moore, *Defining "Waters of the United States": Canals, Ditches, and Drains*, 41 IDAHO L. REV. 37, 40 (2004) ("The Federal Water Pollution Control Act of 1972 (FWPCA)—also referred as the Clean Water Act (CWA)—was Congress'[s] attempt to comprehensively control water pollution of the nation's waters."); William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part I*, 22 STAN. ENVTL. L.J. 145, 157 (2003) ("The growing blight of water pollution had, in short, offended the conscience of the nation, and such a national problem demanded a national solution.").

[294] *See* cases cited *infra* notes 295-296.

[295] *See supra* note 48 and accompanying text.

[296] *See supra* notes 49-52 and accompanying text.

[297] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the [agency] is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

[298] *See* discussion *supra* Parts II.D-F.

[299] Rapanos v. United States, 126 S. Ct. 2208, 2266 (2006) (Breyer, J., dissenting).

would award such a definition any more deference under *Chevron* than it did in *Rapanos*. The remaining resolution for this problem is for Congress to revisit the CWA and restate its intent with a clear jurisdictional delegation. This section will address each option in turn.

A. Navigating the Rapanos *Opinion: Should* Marks *Apply?*

Supreme Court decisions are binding upon every lower court in the United States.[300] Therefore, lower courts must discern the holding of every Supreme Court case carefully and precisely. When the Court's opinion splinters, the task can be very difficult. When no opinion commands a majority of the Justices' vote, as in *Rapanos*, which opinion controls? If all circuits cannot answer this threshold question in a single voice, future litigation on a case-by-case basis is not viable. In fact, as discussed *supra*, the circuits have already split on this issue.[301] I suggest, however, that there is some value in examining the problems with interpreting *Rapanos* in more detail.

The Supreme Court held in *Marks v. United States* that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[302] In *Rapanos*, the plurality did not command the assent of five Justices; Justice Kennedy, who concurred in the plurality's judgment, did not concur in the plurality's rationale.[303] Therefore, the plurality opinion by logic cannot be controlling. Justice Kennedy's opinion, which commands the assent of five Justices, should control the lower courts' decisions.[304]

In a recent opinion, the Court observed that "[i]t does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility when

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[300] Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317, 324 (3d Cir. 1982) ("The essence of the common law doctrine of precedent or stare decisis is that the rule of the case creates a binding legal precept. The doctrine is so central to Anglo-American jurisprudence that it scarcely need be mentioned, let alone discussed at length. A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy." (citing Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969-70 (3d Cir. 1979))).

[301] *See* discussion *supra* Part II.F.

[302] 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

[303] *Rapanos*, 126 S. Ct. at 2214, 2236 (4-1-4 decision).

[304] A body of water judicially qualified as a "water of the United States" under Justice Kennedy's test for significant nexus would almost certainly satisfy the four dissenting Justices as being such a water.

it has so obviously baffled and divided the lower courts that have considered it.'"[305] The *Grutter* Court followed a splintered opinion with no overlap in reasoning, like the one in *Rapanos*, without following *Marks* to its "utmost logical possibility."[306] Instead, the *Grutter* Court followed the rationale of one Justice's opinion in concluding that student body diversity is a compelling state interest.[307] The Supreme Court arguably has some latitude in following its own precedents. However, what are the lower courts to do with an imprecise or ambiguous Supreme Court decision? May they also take such liberties?

In his dissenting opinion, Justice Stevens took a different approach than in *Marks* or *Grutter*.[308] Justice Stevens opined that the Sixth Circuit should reinstate Rapanos' judgment if *either* the plurality *or* the concurrence's tests are met.[309] Justice Stevens assumed that, in most cases, Justice Kennedy's approach would control because it treats more of the Nation's waters as within the Corps' jurisdiction.[310] Justice Stevens concluded that it was unlikely that a case will pass the plurality test but not Justice Kennedy's, so in effect Justice Kennedy's test would control.[311] However, this unfair analysis forces the Corps to operate under the plurality's more restrictive test, which did not garner a majority of the Justices' votes.[312]

Because both the *Marks* and Justice Stevens' calculus of determining which, if any, of the *Rapanos* opinion controls are flawed, an alternate method is needed.[313] Simply put, any case that satisfies Justice Kennedy's test would garner at least five votes from the *Rapanos* Justices, that is, those of Justice Kennedy and the four dissenting Justices. Therefore, Justice Kennedy's opinion should control in the lower courts. However, Justice Kennedy's "significant nexus" standard, although arguably a more informed standard than the plurality or the dissent, may be particularly unworkable. Courts would have the burden of determining the level of "significance" of any nexus to the nation's waters. This is a task for which the federal courts are ill suited and which is far better left to the scientific expertise of the EPA and the Army

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[305] Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (quoting Nichols v. United States, 511 U.S. 738, 745-46 (1994)).

[306] *Id.*

[307] *Grutter*, 539 U.S. 306; *see* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311-12 (1978) ("[Attainment of a diverse student body] clearly is a constitutionally permissible goal for an institution of higher education.")

[308] *Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting).

[309] *Id.*

[310] *Id.* at 2265 n.14.

[311] *Id.*

[312] *Rapanos*, 126 S. Ct 2208 (4-1-4 decision).

[313] *See supra* text accompanying notes 302-312.

Corps of Engineers, as Congress intended when it wisely delegated those duties in the early 1970s.[314]

Regardless of whether the courts are the appropriate fora to decide Corp jurisdiction under the CWA, the circuit courts already disagree regarding whether Justice Kennedy's opinion controls.[315] This situation was predictable; the Supreme Court itself appears unable to distinguish which *Rapanos* opinion controls.[316] Moreover, the inability of the circuit courts to agree on which opinion controls exposes *Rapanos*'s failure as a viable precedent. This complex split in the Supreme Court and its resulting ineffectiveness as meaningful precedent leaves the courts with little choice but to proceed through the fog without a compass.

B. Steaming Forward: Three Possible Futures of the CWA

After *Rapanos*, the courts, the Corps, and regulated individuals are left with no clear idea of how to proceed under section 404 of the Clean Water Act. If Congress fails to clarify the jurisdictional issue through legislation, two approaches remain. The Corps could promulgate even more rules than it already has, each one subject to scrutiny by the Supreme Court. Alternatively, both Congress and the Corps could do nothing and leave it to the courts to develop their own interpretations of CWA jurisdiction over time, with case law differing wildly among the circuits. The real solution is for Congress to eliminate the confusion they created with the geographical jurisdictional limitation in 1972 by revisiting the CWA and passing an amendment that definitively resolves the Corps' jurisdiction under the Clean Water Act.

1. Case-by-Case Adjudication: Standing Up in the Canoe

Litigation on a case-by-case basis is the most inefficient, unstable, and often unfair method of resolving almost any legislative issue, certainly one as complex and far-reaching as jurisdiction under the Clean Water Act. Litigating the CWA on a case-by-case basis would force courts to adjudicate cases presenting issues well beyond their scientific expertise, and litigants would be at the mercy of a relatively uninformed adjudicative body. Furthermore, case law provides the least guidance to regulated parties, the EPA, and courts going forward. This situation is particularly true in the case of *Rapanos*, where the circuits seem unable to apply the decision consistently.[317] Case-by-case litigation does nothing

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[314] *See supra* note 46.
[315] *See supra* Part II.F.
[316] *See supra* notes 309-12.
[317] *See supra* Part II.F.

to resolve confusion among the courts caused by the splintered *Rapanos* decision and creates more confusion as the split circuits look to each other for guidance. Moreover, ad hoc "regulation by litigation" is profoundly expensive, unpredictable, and unfair to the administrators of the CWA and regulated parties. Absent statutory certainty, courts need guidance from a united Supreme Court. The *Rapanos* decision did not produce such guidance; case-by-case litigation will only serve to exacerbate the problem.

2. Agency Rulemaking: Anything More Than a Dagger Board?

A rulemaking by the EPA or the Corps is a more stable, lasting, and informed method of regulatory clarification than quasi-rulemaking through adjudication. However, an explicit reinterpretation by the EPA or the Corps of its jurisdiction under the Clean Water Act is still subject to review by the Supreme Court.[318] In its current configuration, the High Court does not seem inclined to grant deference under *Chevron* that the executive branch requires, through the EPA or the Corps, to revise and clarify the jurisdictional issue.[319] The weakness, therefore, lies within the language of the Clean Water Act itself.

3. Legislative Amendment: Refitting the Ship

Congressional revision of the Clean Water Act is the most stable and workable solution. Revising the CWA would remove discretion from its dual administration scheme and give weight to the CWA in the courts. Revision from the legislative branch would provide the EPA, the Corps, regulated parties, and federal courts with sorely needed and undeniable guidance more effectively than agency rulemaking.

Congress passed the CWA over a presidential veto in 1972, and its 34-year history seems to indicate its permanent place in the nation's history.[320] The Clean Water Act reportedly enjoys strong bipartisan congressional support, both currently and historically.[321] If such a consensus exists, Congress may now be in a position to solve the CWA's jurisdictional incongruity by changing its statutory language. Statutory revision may be the only way to ensure that the administrators can

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[318] *See supra* note 104 and accompanying text.

[319] *See supra* note 146 and accompanying text.

[320] *See supra* note 46 and accompanying text.

[321] *See* Earthjustice.org, Wetlands Get Bipartisan Support from Senators, http://www.earthjustice.org/news/press/004/wetlands_get_bipartisan_support_from_senators.html (last visited Apr. 9, 2007) ("The Clean Water Act has always had strong support in Congress . . . .").

execute the CWA in a manner that is true to its stated intent of comprehensive national pollution control.[322]

C. A Decent Proposal: The Commerce Clause as an Independent Basis for Jurisdiction

Congress enacted the Federal Water Pollution Control Act of 1972, commonly referred to as the Clean Water Act ("CWA"), to protect the nation and its economy from the unintended consequences of known decline in water purity, physical waterways, and aquatic life.[323] The CWA's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[324] On its face, the stated objective appears to have no connection whatsoever with the geographic location of navigable waters.

As discussed above, Congress granted the Army Corps of Engineers jurisdiction over the nation's waters under the RHA to protect, enhance, and develop navigable waters.[325] It is understandable that Congress would seek to expand the Corps' jurisdiction to administer the Clean Water Act, given the Corps' expertise in the area of water management. However, it was not necessary for Congress to perpetuate in the Clean Water Act the doctrine of navigable servitude that anchored the RHA. Congress could have instead linked the CWA to the health of the nation's waterways under its commerce power, as it did similarly when enacting the Endangered Species Act ("ESA"), without a geographic jurisdictional limitation.[326] In addition, Congress could have authorized the EPA to create a new sub-agency to administer the CWA's permit program rather than delegate to the existing Corps of Engineers.

Congress did not do either of these alternatives. As enacted, the CWA's geographic link to "navigable waters" created confusion for the courts, the administrators of the Act, and the regulated parties.[327] What constitutes a "navigable water" as contemplated by the Act? Where does such a water begin? Where does it end? What is the status of a tributary? How can the Corps effectively administer the CWA without some control over intrastate activities that significantly affect the waters of the

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[322] 33 U.S.C. § 1251(a) (2006) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

[323] *See supra* Part I.B-C.

[324] Rapanos v. United States, 126 S. Ct. 2208, 2215 (2006) (plurality opinion) (citing 33 U.S.C. § 1251(a) (2006)).

[325] 33 U.S.C. §§ 401, 403, 407 (2006).

[326] Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-37, 1537a, 1538-44 (2006)); *see* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003).

[327] *See supra* Part II.C-D.

United States? Applying the existing doctrine of cumulative effects aggregation as it applies to the Commerce Clause to create new legislation could solve these questions and others.

1. Contours of the Modern Commerce Clause: From *Lopez* to *Raich*

In 1995, the Supreme Court set forth three categories of commercial activity subject to regulation by Congress under its commerce power in *United States v. Lopez*.[328] These categories ensure a sufficient nexus between the subject of the legislation and Congress's enumerated power to regulate commerce in order to maintain constitutionality. These categories have been refined over time, and are still in effect today.

The *Lopez* Court first held that "Congress may regulate the *use of the channels* of interstate commerce."[329] Such channels include national roadways, airplane routes, oceans, lakes, rivers, and other maritime routes such as canals and locks. [330] They also include non-traditional channels such as telecommunication conduits.[331]

Second, the Court held that "Congress is empowered to regulate and protect the *instrumentalities* of interstate commerce."[332] The Court noted that Congress may regulate such instrumentalities "even though the threat may come only from *intrastate* activities."[333] Relevant instrumentalities include local hotels and their employees,[334] airplanes and their passengers, aircraft and destruction thereof,[335] interstate shipments and theft thereof,[336] and vehicles used in intrastate commerce.[337] This category could easily be extended to residential developments, chartered fishing boats and their clients, passenger ships and their riders, pleasure boats and their owners, and naturalists, photographers, and hunters who cross state lines to engage in commercial activity.

Finally, the *Lopez* Court held that "Congress'[s] commerce authority includes the power to regulate those activities having a *substantial relation* to interstate commerce, *i.e.*, those activities that

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328 514 U.S. 549 (1995).
329 *Id.* at 558 (emphasis added).
330 *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
331 *See* W. Union Tel. Co. v. Lenroot, 323 U.S. 490 (1945).
332 *Lopez*, 514 U.S. at 558 (emphasis added).
333 *Id.* (emphasis added).
334 *Heart of Atlanta*, 379 U.S. 241.
335 Perez v. United States, 402 U.S. 146, 150 (1971).
336 *Id.*
337 Southern Ry. v. United States, 222 U.S. 20 (1911).

substantially affect interstate commerce."[338] Examples include "intrastate coal mining[,] intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of homegrown wheat."[339] Other examples include intrastate on-site waste disposal[340] and building a state-of-the-art hospital in the habitat of a local fly protected under the ESA.[341]

The *Lopez* Court stated that "[t]hese examples are by no means exhaustive, but the pattern is clear. Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[342] The *Lopez* Court thus held that Congress did not have commerce clause authority to regulate possession of firearms in a school zone because neither possessing a firearm nor being in a school zone was economic in nature.[343] Five years after *Lopez*, the Court reaffirmed its position in *United States v. Morrison*, a case addressing the constitutionality of federal legislation protecting women from violence.[344] The *Morrison* Court found that gender-based violence was not an economic activity. The Court concluded, therefore, that Congress had exceeded its commerce power in penning the Violence Against Women Act.

The *Lopez* analysis survives today and Supreme Court decisions subsequent to *Lopez* have continued to require a significant connection to commerce to validate federal regulation under the Commerce Clause. The *Lopez* "substantial effect on interstate commerce" test is fairly easy to meet in many cases. Internet pornography regulation is valid under the *Lopez* "channels of interstate commerce" test. Airplanes are regulated under the *Lopez* "instrumentalities of interstate commerce" test. Regulation of the sale of harmful drugs is valid under the *Lopez* "substantial relation to interstate commerce" test. Regulation involving objects that appear to have no commercial value, such as endangered species and national waterways, present a trickier question.

The same year *Morrison* was handed down, the Fourth Circuit upheld in *Gibbs v. Babbitt*, a federal regulation for the taking of red wolves by farmers under the Commerce Clause.[345] The *Gibbs* court found that "[t]he taking of red wolves implicates a variety of commercial

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338 *Lopez*, 514 U.S. at 558-59 (emphasis added) (citations omitted).
339 *Id.* at 559-60 (citations omitted).
340 *See* United States *ex. rel.* EPA v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997).
341 *See* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).
342 *Lopez*, 514 U.S. at 560 (emphasis added).
343 *Lopez*, 514 U.S. 549.
344 529 U.S. 598, 613 (2000).
345 Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000).

activities and is closely connected to several interstate markets."[346] The *Gibbs* court also found that "[t]he relationship between red wolf takings and interstate commerce is quite direct," observing that the red wolf is the subject of scientific research, wolf-related tourism, and trade in pelts.[347] The court further observed that "the individual takings may be aggregated for the purpose of Commerce Clause analysis," meaning that "[w]hile the taking of one red wolf on private land may not be 'substantial,' the takings of red wolves *in the aggregate* have a sufficient impact on interstate commerce" to support the regulation.[348] This last observation may be the most important element in saving the Clean Water Act.

Three years after *Gibbs*, the Fifth Circuit upheld a federal regulation in *GDF Realty Investments, Ltd. v. Norton* under the Commerce Clause for the taking by commercial real estate developers of cave species protected under the Endangered Species Act.[349] The *GDF Realty* Court cited the *Gibbs* opinion favorably to support its decision.[350] Also in 2003, the D.C. Circuit upheld a federal regulation in *Rancho Viejo, L.L.C. v. Norton* for the taking of the arroyo southwestern toad under the Endangered Species Act.[351] The *Rancho Viejo* court found that the activity being regulated, namely construction of a commercial housing development, was "plainly an economic enterprise."[352]

Two years later, in *Gonzales v. Raich*, the Supreme Court upheld a federal regulation of personal cultivation of marijuana by private individuals under the Controlled Substances Act.[353] The *Raich* Court found that the Controlled Substances Act was a valid exercise of Congress's Commerce Clause power because the regulated activity—the manufacture, possession, and sale of potentially harmful drugs—represented a huge interstate economic market. The Court also addressed the issue of personal cultivation as it relates to cumulative effects aggregation, which this comment will address *infra*.[354]

Legislation such as the Endangered Species Act and the Controlled Substances Act are undisputedly rooted in Congress's commerce power. Although it is difficult to see how an endangered fly could be protected under the Commerce Clause, the courts have consistently upheld the

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346 *Id.* at 492.
347 *Id.*
348 *Id.* at 493 (emphasis added).
349 326 F.3d 622 (5th Cir. 2003).
350 *Id.* at 637.
351 323 F.3d 1062 (D.C. Cir. 2003).
352 *Id.* at 1068.
353 545 U.S. 1 (2005).
354 *Id.* at 17.

takings provisions of the ESA, often in combination of the doctrine of cumulative effects aggregation to bring local activities within its reach. A similar analysis could apply to federal regulation under the Clean Water Act, were it not rooted geographically in the waters of the United States.

2. The Endangered Species Act: A Case Study in Independent Commerce Clause Power

Congress enacted the Endangered Species Act under its commerce power to protect the nation and its economy from the unintended consequences of irrevocable loss in biodiversity.[355] The ESA has no geographic jurisdictional limit; a violation of the ESA may take place anywhere in the United States.[356] The Supreme Court has never questioned the constitutionality of the ESA and other federal courts have consistently supported the legislation.[357] In *GDF Realty v. Norton*, for example, the Fifth Circuit referred to an ESA Senate Report to support the proposition that there existed a link between intrastate species preservation and interstate commerce.[358]

One feature of the ESA requires courts to consider the safety of endangered species above all other concerns, including cost to regulated parties.[359] In *Tennessee Valley Authority v. Hill*, the Supreme Court observed that "[t]he plain intent of Congress in enacting [the Endangered Species Act] was to halt and reverse the trend toward species extinction, whatever the cost,"[360] and that "the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.'"[361] Thus, the *Tennessee Valley* Court refused to engage in weighing of the equities urged by the Tennessee Valley Authority, observing that "even [if it] had the power to engage in such a weighing process," it would be difficult to "balance the loss of a sum certain . . . against a congressionally declared 'incalculable' value."[362]

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[355] *See supra* note 326.

[356] *See id.*

[357] *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978), *superseded by statute*, Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (amending portions of the ESA to create the Endangered Species Committee, commonly known as the "God Squad," but leaving Congress's original intent unchanged); *see infra* note 340 and accompanying text.

[358] GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 629 (5th Cir. 2003).

[359] *See Tennessee Valley* at 184 ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

[360] *Id.*

[361] *Id.* at 187.

[362] *Id.* at 187-88.

In enforcing the Endangered Species Act, the *Tennessee Valley* Court declined to comment on the ESA's constitutionality.[363] The Court instead restated the long-standing doctrine that it is not for the judicial branch to inquire into the wisdom of Congress's priorities.[364] Instead, "it is for the Executive to administer the laws and for the courts to "enforce them when enforcement is sought."[365]

Judicial deference to Congress plays an important part in the possibility of amending the Clean Water Act. Congress could easily repair the CWA by removing the geographic jurisdictional limit, as with the Endangered Species Act; arguing that the Supreme Court would not uphold the legislation would be difficult. All that would remain to complete the scheme is addressing the seemingly insignificant acts that, as a whole, had a significant affect on interstate commerce and navigable waters. The doctrine of cumulative effects aggregation could bring the CWA the rest of the way.

3. Cumulative Effects Aggregation: *Wickard*

In *Wickard v. Filburn*, the Supreme Court upheld federal regulation of an individual farmer's production and consumption of homegrown wheat.[366] The Court reasoned that the consumption of homegrown wheat, *even in small quantities*, has an effect on the price and market for wheat sold in interstate commerce. The *Wickard* Court announced a cumulative effects aggregation theory as a framework to assess whether an activity has a "substantial influence" on interstate commerce.[367] The doctrine holds that when Congress regulates a commercial activity that has a substantial effect on interstate commerce, such as selling marijuana, any *local instance* of that activity is a violation of that regulation.[368]

In *Maryland v. Wirtz*, the Supreme Court observed that "the power to regulate commerce, though broad indeed, has limits" and that the Court has ample power to enforce those limits.[369] The *Wirtz* Court stated that "[n]either here nor in *Wickard* had the Court declared that Congress

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[363] *Tennessee Valley*, 437 U.S. at 195.

[364] *Id.* at 194.

[365] *Id.*

[366] 317 U.S. 111 (1942).

[367] "In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions." Gonzalez v. Raich, 545 U.S. 1, 9 (2005), *see infra* notes 367-371 and accompanying text.

[368] *Raich*, 545 U.S. at 9-10.

[369] 392 U.S. 183, 196 (1968) (addressing the 1961 and 1966 amendments to the Fair Labor Standards Act, "FLSA"), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833, 855 (1976) (finding that 1974 amendments to the FLSA violated the commerce clause).

may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."[370] Rather, the *Wirtz* Court observed that "[t]he Court has said only that where *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence."[371]

Most recently, in *Gonzales v. Raich*, the Court upheld regulation of personal cultivation of marijuana under the Controlled Substances Act.[372] The *Raich* Court, following *Wickard*, reasoned that even a localized instance of a regulated activity constitutes a violation of that regulation.[373] In an amendment to the Clean Water Act, it could mean that Rapanos would be held liable for his local violation of a federal regulation of commercial activity, namely, his commercial development of private land.

In practical application, the doctrine of cumulative effects aggregation can be stated to mean that where the general regulatory statute (here, the CWA) bears a "substantial relation to commerce," individual instances of violation are actionable regardless of how large or small the violation. Thus, were Congress to revise the Clean Water Act to remove all reference to "navigable water" and authorize the EPA to create a regulatory agency to administer the CWA, the debate over what waters qualify as "navigable" would become irrelevant. The activity, *i.e.* intrastate dumping or filling as it relates to the physical or chemical quality of interstate water or its aquatic life, would be regulated, not the waters themselves. Likewise, the activity of commercial land development would also be regulated.

IV. CONCLUSION: CONGRESS SHOULD JETTISON THE "NAVIGABLE WATERS" BALLAST

Congress typically roots its national environmental and pollution legislation in its power to regulate commerce.[374] In the case of the Clean Water Act, however, Congress unwisely crafted the language of the Clean Water Act in the shadow of the framework of navigational servitude.[375] Congress's decision to write a geographic jurisdictional limitation has undermined the stated purpose of the CWA, created confusion in the judiciary as to the CWA's jurisdiction, and unfairly

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370 *Id*. at 196 n.27.
371 *Id*.
372 *Raich*, 545 U.S. at 1.
373 *Id.* at 9-10.
374 *See supra* note 358 and accompanying text.
375 *See* discussion *supra* Part I.A-C.

forced scientific decisions into our nation's courtrooms.[376] Moreover, Congress has been unfair to the regulated parties, costing them untold sums in litigation and incalculable injury in the uncertainty of their expected behavior under the CWA.

The EPA and the Army Corps of Engineers have been acting in as broad a scope as possible since 1975.[377] However, without adequate support from Congress, these agencies experience problems with enforcement, which results in confusion and expense for the agency and more uncertainty for the regulated parties.[378] Under *Rapanos*, courts may attack Corps' jurisdictional determinations with relative ease under either the plurality or the concurring opinions, or a combination of the two.[379] Therefore, agency rulings to clarify CWA jurisdiction would be ineffective.

Clearly, responsibility for the nation's water quality cannot be left to the states. As discussed *supra*, "States and Tribes may assume operation of the [CWA's] section 404 program, and to date *two have done so* (Michigan and New Jersey)."[380] Congress enacted the Clean Water Act because the States had refused to assume such responsibility. The current instability created by the *Rapanos* Court's insistence on case-by-case analysis for CWA jurisdiction will certainly cause the Clean Water Act to collapse as private owners and States' rights advocates gain momentum in the courts. *Riverside Bayview* and *SWANCC* restrict the jurisdictional reach of the Clean Water Act and, if Congress does not act now, the Clean Water Act will be significantly weakened.

The Clean Water Act has not been substantially reworked since 1977.[381] The judicial branch supports Congress's ability to enact environmental and pollution control legislation.[382] In fact, no federal environmental law has been found to exceed Congress's authority to

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[376] *See* discussion *supra* Parts I.C-G, II.

[377] *See* discussion *supra* Part I.C-G.

[378] *See* discussion *supra* Part II.

[379] *See* discussion *supra* Part II.E-F.

[380] *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. on Fisheries, Wildlife, and Water of the S. Comm. on Environment and Public Works*, 109th Cong. 7 (2006) (statement of Benjamin H. Grumbles, Assistant Administrator for Water, U.S. Environmental Protection Agency and John Paul Woodley, Jr., Assistant Secretary of the Army for Civil Works, Department of the Army) (emphasis added).

[381] *See* discussion *supra* Part I.D-G.

[382] *See* notes 341, 347-349 and accompanying text; *see also* discussion *supra* Part II. Although this comment does not focus on the constitutionality of the CWA, it is noteworthy that none of the cases in Part II challenged the CWA on constitutional grounds.

regulate activities that, even as taken in the aggregate, substantially affect interstate commerce.[383] If it is truly Congress's intent that the EPA and the Corps assert their jurisdiction expansively, Congress absolutely must amend the statutory language to support that position.

Until and unless that happens, the EPA, the Corps, regulated individuals, and the courts will struggle to define an unstable patchwork of "substantial nexus" jurisdiction. Interested private parties will bring suits in the federal courts to get the business-friendly decisions they need. The courts will continue to weaken the Corps' jurisdiction until the Clean Water Act resembles more closely the River and Harbors Act of 1899 that it replaced. In the end, any scenario except an act of Congress will create considerable litigation expense, inconsistency, and ultimate failure to serve the stated federal pollution control objectives of the Clean Water Act.

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[383] ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION LAW, SCIENCE, AND POLICY 115 (5th ed. 2006).