

# The Supreme Court and the Clean Water Act: — Five Essays —



Essays on the Supreme Court's Clean Water Act jurisprudence  
as reflected in *Rapanos v. United States*.

Jonathan H. Adler ■ Kim Diana Connolly ■ Royal C. Gardner  
Stephen M. Johnson ■ Mark Latham

Vermont Law School's Land Use Institute  
Vermont Journal of Environmental Law



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reflected in *Rapanos v. United States*.

Edited with an Introduction by

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FIVE ESSAYS**

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# Introduction

L. Kinvin Wroth\*

The federal Clean Water Act prohibits the unpermitted discharge of pollutants, including dredged or filled material, into “navigable waters,” further defined as “the waters of the United States.”<sup>1</sup> By the late 1970s, the Army Corps of Engineers had interpreted its jurisdiction under the Act to include discharges of dredged or filled material into wetlands and other features that formed part of the same ecosystem with water bodies over which it had jurisdiction under more traditional definitions of “navigable waters.” With apparent endorsement by a Supreme Court decision in 1985, the Corps continued to apply this interpretation despite what hindsight suggests were warning signals from the Court in 2001.<sup>2</sup> Then in 2006 the Court once again waded into the debate with *Rapanos v. United States*,<sup>3</sup> which held...

To complete the preceding sentence and to offer suggestions as to the meaning of the *Rapanos* decision for the future application of the Clean Water Act, Vermont Law School’s Land Use Institute, in conjunction with the *Vermont Journal of Environmental Law (VJEL)*, is pleased to present this collection of five essays by a group of thoughtful and distinguished scholars.

In *Rapanos*, a fractured 5-4 majority of the Supreme Court found that the Corps had exceeded its authority by taking jurisdiction over certain wetlands adjacent to, or narrowly separated from, non-navigable tributaries of traditional navigable waters. In five opinions, the Court could not agree on a test for the jurisdiction and sent the case back to the Court of Appeals for another try. Thus, the decision is thought by most (not all) of our authors at best to have muddied the waters (the universal, unavoidable pun). **Mark Latham**, Associate Professor Law at Vermont Law School and a former partner and chair of the Environmental Practice Group at Gardner, Carton & Douglas, Chicago, characterizes the lack of a clear jurisdictional interpretation as a “disservice” to the regulated, the regulators, and all involved in the process. The uncertainty that has already begun to affect subsequent lower-court Clean Water Act decisions will continue until the regulating agencies through rule-making, or Congress through legislation, clarify the situation. **Stephen M. Johnson**, Professor of Law and Associate Dean at Mercer University Law School and a long-time

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<sup>1</sup> 33 U.S.C. § 1311(a), 1344(a), 1362(7) (2000).

<sup>2</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

<sup>3</sup> *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

environmental litigator, teacher, and author, was co-counsel on the *amicus* brief of the Association of State Wetlands Managers in *Rapanos*. He suggests that the lack of deference to the Corps' position reflects lack of agency response to concerns expressed previously by the Court, and he calls for agency rule-making as the solution, expressing the fears that administrative inaction or issuance of guidance will only lead to further litigation and that Congress is unlikely to act.

**Kim Diana Connolly**, Associate Professor of Law at the University of South Carolina School of Law and a long-time adjunct in Vermont Law School's Environmental Law Summer Session, was co-counsel on the *Rapanos amicus* brief of present and former Members of Congress. She concludes that the problem lies not with *Rapanos* but with the underlying provisions of the Act and the need for a case-by-case application of them. The solution, to be hoped for but pessimistically not anticipated, is to be found in a redefinition by Congress of "waters of the United States" in light of the broad original purpose of the Act and new insights produced in the current climate-change debate. **Royal C. Gardner**, Professor of Law and Director of the Institute for Biodiversity Law and Policy at Stetson University College of Law, served as *amicus* counsel in *Rapanos* for the National Mitigation Banking Association. He addresses the issues from the perspective of wetland mitigation banking. The statutory framework for that burgeoning industry, and the industry, itself tend to support a broad interpretation of Clean Water Act jurisdiction; a narrow reading of *Rapanos*, whether in the courts, in agency rule-making, or by Congress, could have an adverse impact on the industry's beneficial scope and on broader watershed planning efforts. **Jonathan H. Adler**, Professor of Law and Director of the Center for Business Law and Regulation at the Case Western University School of Law, takes a different view of *Rapanos*, finding it a natural reflection of the Court's approach to issues of federalism in the regulatory sector. Characterizing the Corps' prior interpretation of the Clean Water Act's jurisdictional limits as unduly expansive and provocative, he applauds *Rapanos* for, however imperfectly, having imposed meaningful limits on future regulatory action that will allow the states an appropriate and salutary role in the protection of precious environmental resources.

Like our previous publication on the Supreme Court's Taking Clause decisions of 2005,<sup>4</sup> this pamphlet is intended to stir discussion while the issues are still fresh. Accordingly, the work was put together with two conditions: Its authors were free to identify and develop their topics without editorial direction or oversight. The authors were also free to explore those topics at whatever level of formality or informality of style they chose, subject only to editorial insistence on some reasonable uniformity of citation form.

Also, like its predecessor, this collection appeared initially in electronic format on *VJEL*'s web site.<sup>5</sup> Dual publication has two benefits: First, the essays are electronically available to readers

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<sup>4</sup> THE SUPREME COURT AND TAKINGS: FOUR ESSAYS (Vermont Law School, 2006), also available on line at <http://www.vjel.org/books/PUBS10003.html>.

<sup>5</sup> Available at <http://www.vjel.org/books/PUBS10004.html>.

while still relatively fresh from the authors' minds and hands. Second, changes of circumstance that may affect the conclusions of the essays can be taken into account through revision of the electronic text whenever the occasion demands. This flexibility is especially apt for the present topic, because, on June 5, 2007, after these essays had been completed, posted on the web, and set in type, the Corps of Engineers and the Environmental Protection Agency issued and proclaimed a six-month public comment period on long-awaited administrative guidance setting forth their post-*Rapanos* interpretation and application of the Clean Water Act's jurisdictional provisions. In supporting statements, both agencies indicated that they were considering a further collaborative rule-making effort but that the Administration had taken no position on whether clarifying legislation would be sought.<sup>6</sup>

The guidance, which both tracks and narrows *Rapanos*, has provoked a variety of comments, mostly unfavorable, from both (or all) sides of the aisle.<sup>7</sup> As briefly indicated above, our authors in the essays here published expressed doubt about the ultimate utility of guidance and saw agency rule-making or Congressional action as the appropriate sources for the clarification that *Rapanos* plainly requires. Our authors will now have the opportunity to elaborate upon those views through addenda to their published articles that we will post in our electronic text.

The efforts of many individuals in addition to the patient and productive authors were necessary to the execution and completion of this project. Professor Patrick Parenteau, Director of Vermont Law School's Environmental and Natural Resources Law Clinic and also co-counsel on the Association of State Wetlands Manager amicus brief, organized two presentations at the Law School involving authors Connolly and Adler that served to identify the issues and inspire the present effort. *Vermont Law Review* Notes Editor Michelle Maresca, '07, rounded up and organized a group of her colleagues—Shiloh Hernandez, '08, Sarah Katz, '08, Megan Roberts, '08, Peter Royer, '07, and Frank Skiba, '08—who provided invaluable assistance in blue-booking and cite-checking all footnotes to assure the reasonable uniformity referred to above. Lauren Whitley, '07, editor-in-chief of *VJEL*, and Brock Howell, '07, *VJEL*'s web editor, willingly and efficiently saw to it that the

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<sup>6</sup> See Clean Water Act Jurisdiction Following the Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*, available at <http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf>; Notice of Availability, 72 Fed. Reg. 31,824 (June 8, 2007), available at <http://a257g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-11123.pdf>; Corps and EPA Responses to the *Rapanos* decision: Key Questions for Guidance Release, nos. 11, 12, available at <http://www.epa.gov/owow/wetlands/pdf/13RapanosQ&As.pdf>.

<sup>7</sup> See, e.g., National Wildlife Federation, Long-Awaited Guidance Further Jeopardizes Protection of Our Waters, [http://www.allamericanpatriots.com/48724493\\_wildlife\\_nwf\\_long\\_awaited\\_guidance\\_further\\_jeopardizes\\_protection\\_our\\_waters](http://www.allamericanpatriots.com/48724493_wildlife_nwf_long_awaited_guidance_further_jeopardizes_protection_our_waters) (June 6, 2007); S. Cornibert, "Just-released EPA Wetlands Guide May Face Rare Facial Challenge," 28 *Inside E.P.A. Weekly Rep.*, No. 23, pp. 1, 10-11 (June 8, 2007); Lawrence R. Liebesman & Rafe Petersen, "Corps and EPA Guidance Attempts to Clarify Clean Water Act Jurisdiction 'Muddied' by the Supreme Court in *Rapanos v. United States*," <http://www.hklaw.com/Publications/Newsletters.asp?IssueID=786&Article=4088> (June 22, 2007)

essays were put on line as soon as they were ready. Anne Mansfield, Associate Director of Vermont Law School's Environmental Law Center (ELC), and Jane D'Antonio, ELC Institute Administrator, saw to the countless administrative and editorial details necessary to assure both web and print publication. Finally, Geoffrey Shields, President and Dean of VLS, and Karin Sheldon, Associate Dean and Director of the ELC, gave the project all necessary support from start to finish.

July 3, 2007

# ***Rapanos v. United States*: Significant Nexus or Significant Confusion? The Failure of the Supreme Court to Clearly Define the Scope of Federal Wetland Jurisdiction**

Mark Latham\*

## INTRODUCTION

*Because one of the most important functions of the Supreme Court is to ensure uniformity in federal law, when such conflicts become too sharp the Court must step in to prevent unfairness to the public or an adverse impact on the administration of the law.*<sup>1</sup>

In *Rapanos v. United States*<sup>2</sup> the Supreme Court made its third foray into deciphering the scope of federal jurisdiction under section 404 of the Clean Water Act.<sup>3</sup> The question of the federal government’s jurisdiction under the statute is not merely an abstract one or an obscure issue of interest only to academics. As recognized by Justice Scalia in *Rapanos*, the scope of federal jurisdiction over wetlands is far from a trivial question in part because:

The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.... [O]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetland permits.<sup>4</sup>

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<sup>1</sup> SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW* 211 (Craig Joyce ed.) (2003).

<sup>2</sup> *Rapanos v. United States*, 126 S. Ct. 2208 (2006). The *Rapanos* decision consists of two consolidated Clean Water Act cases, one involving an enforcement action for failure to obtain a permit under section 404 prior to filling wetlands, *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), and the other, *Carabell v. U.S. Army Corps of Eng’rs*, 391 F.3d 704 (6th Cir. 2004), arising from the denial of a section 404 permit to deposit fill materials into a wetland.

<sup>3</sup> Section 404(a) of the Clean Water Act authorizes the Secretary of the Army to issue permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C. § 1344(a) (2000).

<sup>4</sup> *Rapanos*, 126 S. Ct. at 2214 (internal quotations omitted) (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74-76 (2002)).

Justice Scalia then also recognized that the substantial per permit and annual costs he quoted in the plurality opinion were unavoidable “because the Clean Water Act ‘impose[s] criminal liability,’ as well as steep civil fines, ‘on a broad range of ordinary industrial and commercial activities.’”<sup>5</sup> Consequently, both regulators with the Army Corps of Engineers (“Corps”) and U.S. EPA (“EPA”) as well as those subject to regulation under section 404, and responsible for collectively expending close to two billion dollars annually required to obtain permits, watched the *Rapanos* case closely for needed guidance as to what their respective regulatory obligations were in terms of permitting, enforcement and compliance under section 404 and its implementing regulations.

Unfortunately, not only for Court observers but also for regulators and the regulated, the Supreme Court’s attempt in *Rapanos* to interpret the Clean Water Act failed to deliver a clear answer or workable solution to the important question of what is the breadth of federal jurisdiction over wetlands. More so than its prior efforts to clarify and provide guidance concerning this core question of federal environmental law, the Court’s incompatible views as expressed in Justice Scalia’s plurality opinion and Justice Kennedy’s concurring opinion sadly accomplished nothing but the injection of further confusion into the important area of federal jurisdiction over wetlands.<sup>6</sup>

The failure of the Court to garner majority agreement on a clear interpretation of section 404 jurisdiction is a disservice to regulators, property owners, lawyers, current and future litigants and federal judges who routinely confront the question whether the federal government has jurisdiction over a particular wetland. Instead of clear guidance, those who rely on the Court of last resort for an answer find in *Rapanos* nothing but utter confusion. Chief Justice Roberts, apparently powerless to persuade at least four of his colleagues otherwise, certainly recognized that the Court’s *Rapanos* decision served no one’s interests when he lamented in his brief concurring opinion that “[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act.”<sup>7</sup> Unfortunate it is indeed and the case-by-case decision-making that the Court has imposed upon regulators, property owners and others by its *Rapanos* decision certainly means that the lower courts and regulators will continue to make section 404 jurisdictional decisions on an ad hoc basis, providing little in terms of certainty but that of continued puzzlement concerning the reach of federal wetland jurisdiction.

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<sup>5</sup> *Rapanos*, 126 S. Ct. at 2214 (internal citations omitted). Section 301(a) of the Clean Water Act makes it illegal to discharge dredged or fill material into navigable waters without a section 404 permit. 33 U.S.C. § 1311(a) (2000). Section 309, in turn, provides for a menu of enforcement options including administrative, civil or criminal enforcement for those who are found in violation of section 301(a). 33 U.S.C. §§ 1319(a), (b), (c), (g)(1)(B) (2000).

<sup>6</sup> See *Rapanos*, 126 S. Ct. at 2214-35 (plurality opinion); *id.* at 2236-52 (Kennedy, J., concurring).

<sup>7</sup> *Rapanos*, 126 S. Ct. at 2236.

## I. OVERVIEW: THE COURT'S PRIOR SECTION 404 JURISDICTIONAL DECISIONS

A. *United States v. Riverside Bayview Homes*

The Court's first journey into the depths of section 404 jurisdiction was a little over twenty years ago in *United States v. Riverside Bayview Homes, Inc.* where the Court was presented with the question of whether federal jurisdiction extended to wetlands that were adjacent to navigable waters and their tributaries.<sup>8</sup> In a unanimous opinion demonstrating near complete deference to the Corps' regulatory interpretation of its section 404 jurisdiction, the Court concluded that wetlands adjacent to navigable waters and their tributaries were properly the subject of federal jurisdiction.<sup>9</sup>

There were three fundamental reasons why the Court found jurisdiction in *Riverside Bayview*. First, the Court recognized that the Corps was confronted with a challenging line drawing problem in determining the scope of its jurisdiction:

On a purely linguistic level, it may appear unreasonable to classify "lands," wet or otherwise, as "waters." . . . In determining the limits of its power to regulate discharges under the [Clean Water] Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs – in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.<sup>10</sup>

Given the uncertainties surrounding this line drawing dilemma, the Court indicated that the Corps was allowed to rely upon legislative history and the policies underlying its statutory grant of authority and that those sources, while far from clearly defining the scope of jurisdiction, did support the reasonableness of the Corps' conclusions concerning its jurisdictional reach under section 404.<sup>11</sup>

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<sup>8</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Under the regulations issued by the Corps in effect at the time of *Riverside Bayview*, the definition of "waters of the United States" included navigable in fact waters, tributaries to such waters, interstate waters and their tributaries, non-navigable intrastate waters whose use or misuse could affect interstate commerce and all freshwater wetlands that were adjacent to other waters. It was this latter category that was at issue in *Riverside Bayview*. See *id.* at 123-25.

<sup>9</sup> *Id.* at 139.

<sup>10</sup> *Id.* at 132.

<sup>11</sup> See *id.* ("Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority.").

The second reason the Court found jurisdiction in *Riverside Bayview* was that the Court unquestionably recognized that in the Clean Water Act Congress “chose to define the waters covered by the Act broadly.”<sup>12</sup> As such, through defining the term “navigable waters” as “the waters of the United States,” the Court reasoned that “Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.”<sup>13</sup> Accordingly, the Corps’ regulation extending the jurisdiction of the Clean Water Act to adjacent wetlands was consistent with the intent of Congress to assert its legislative power broadly under the Commerce Clause.<sup>14</sup>

The third reason for the Court’s refusal to invalidate the Corps’ regulations defining adjacent wetlands as jurisdictional was that the Court unequivocally accepted the recognition by the Corps of the critical ecological function that adjacent wetlands play in water pollution control:

[T]he Corps has determined that wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality: “The regulation of activities that can cause water pollution cannot rely on... artificial lines ... but must focus on all waters that together form the entire aquatic system. Water moves in hydrological 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 Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as those wetlands are part of this aquatic system.”<sup>15</sup>

The Court respected this ecological-based rationale of the Corps in its definition of “navigable waters” to include adjacent wetlands. In doing so, the Court deferred to the technical expertise used by the Corps in establishing the scope of jurisdiction it believed was required to prevent water pollution and to enhance existing water quality.

As a result the Court in *Riverside Bayview* upheld the reach of federal jurisdiction over wetlands adjacent to navigable waters and their tributaries.<sup>16</sup> Unlike *Rapanos*, the Court’s *Riverside Bayview* opinion did provide guidance to both regulators and the regulated and left intact a regulation that answered an important question of federal jurisdiction over wetlands.

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See id.*

<sup>15</sup> *Id.* at 133-34 (alteration in original) (quoting Definition of Navigable Waters of the United States, 42 Fed. Reg. 37,122, 37,128 (July 19, 1977) (to be codified at 33 C.F.R. pt. 329)).

<sup>16</sup> *Id.* at 139.

*B. Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*

The Court in *Riverside Bayview* expressly did not address whether the reach of the Corps' jurisdiction included wetlands that were not adjacent to navigable waters or their tributaries.<sup>17</sup> The opportunity to address that very question was presented when the Court was asked in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* [*SWANCC*] to determine whether the Corps could assert jurisdiction over wholly intrastate wetlands or so-called "isolated wetlands" through its "migratory bird rule."<sup>18</sup> In refusing to accept a further extension of the Corps' jurisdiction to wetlands that were not adjacent to navigable waters or their tributaries, the Court in *SWANCC* struck down the Migratory Bird Rule as beyond the grant of congressional authority provided to the Corps in section 404 of the Clean Water Act.<sup>19</sup>

Three points of distinction stand out in a comparison of the approach taken by the Court to the analysis of federal jurisdiction over wetlands in *SWANCC* with that previously taken in *Riverside Bayview*. First, in *Riverside Bayview* the Court demonstrated near total deference to the Corps' regulatory interpretation of the scope of its jurisdiction.<sup>20</sup> In *SWANCC*, on the other hand, the Court refused to extend any deference to the Corps in its adoption of the migratory bird rule as one of the grounds for asserting jurisdiction.<sup>21</sup> Second, in *Riverside Bayview* consideration of legislative history was a substantial factor in the Court's decision upholding jurisdiction over adjacent wetlands.<sup>22</sup> As one of the hallmarks of the Rehnquist Court, however, in *SWANCC* legislative history was looked at only as necessary to reject the Corps' claim that legislative history supported the migratory bird rule as consistent with congressional intent.<sup>23</sup> Finally, and perhaps the most striking difference between the Court's analytical approaches in these two wetland cases, is that in *Riverside Bayview* the Court expressly recognized the ecological importance of adjacent wetlands and in large part deferred to Corps technical expertise in determining that adjacent wetlands were an important component of protecting and enhancing overall water quality.<sup>24</sup> In *SWANCC*, unlike *Riverside Bayview*, not a word was uttered by the majority in discussing whether the ecological significance of wholly intrastate

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<sup>17</sup> *Id.* at 131.

<sup>18</sup> *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). The migratory bird rule was promulgated by the Corps in 1986 and extended the reach of the Corps' jurisdiction over intrastate waters that were or could be used as habitat by birds protected by migratory bird treaties or that were or could be used as habitat by other migratory birds that crossed state lines. *See id.* at 164.

<sup>19</sup> *Id.* at 174.

<sup>20</sup> *Riverside Bayview*, 474 U.S. at 131, 139.

<sup>21</sup> *SWANCC*, 531 U.S. at 172 (expressly refusing to extend *Chevron* deference to the migratory bird rule).

<sup>22</sup> *Riverside Bayview*, 474 U.S. at 135-38.

<sup>23</sup> *SWANCC*, 531 U.S. at 168-72.

<sup>24</sup> *Riverside Bayview*, 474 U.S. at 134.

wetlands as a part of a larger aquatic system might serve as a possible viable reason for the Corps' assertion of jurisdiction.<sup>25</sup>

## II. THE ERA OF JURISDICTIONAL CONFUSION BEGINS

In rejecting the validity of the migratory bird rule, the Court in *SWANCC* did not specifically address the extent of federal jurisdiction over those wetlands that were only deemed adjacent to navigable waters due to one or more connections via ditches or channels that may have been some distance from tributaries to navigable waters. As a result, after *SWANCC*, litigants and the lower courts were uncertain regarding the scope of federal wetlands jurisdiction and this uncertainty sowed the seeds for the later confusion reflected by *Rapanos* about the limits of federal jurisdiction over wetlands that were not clearly adjacent to navigable waters or clearly isolated. *SWANCC* clearly found that there was an outer limit on the jurisdiction of the federal government under section 404, but the parameters of the limitation were far from clear as a brief survey of a few post-*SWANCC* cases demonstrates.<sup>26</sup>

### A. The Lower Courts

In *United States v. Deaton*,<sup>27</sup> for example, the Fourth Circuit considered and rejected the assertion that the Court's holding in *SWANCC* had wider application, beyond invalidating the migratory bird rule, concerning the jurisdiction of the Corps over wetlands.<sup>28</sup> The wetlands at issue in *Deaton* were deemed adjacent and thus jurisdictional because of a connection through a series of roadside ditches and culverts to a tributary that was linked to a navigable water.<sup>29</sup>

Similarly, in *United States v. Gerke Excavating, Inc.*,<sup>30</sup> Judge Posner affirmed that the Corps could assert jurisdiction over wetlands that the defendant claimed were not adjacent to a navigable water. The defendant's argument to the contrary was grounded in the fact that the wetlands, which had been filled without a permit, were "drained by a ditch that runs into a nonnavigable creek that

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<sup>25</sup>The dissent in *SWANCC*, on the other hand, did raise the ecological value of migratory birds as one basis of finding jurisdiction. See *SWANCC*, 531 U.S. at 192-96 (Stevens, J. dissenting).

<sup>26</sup>See, e.g., *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1004 n.11 (11th Cir. 2004) (noting post-*SWANCC* the split among courts concerning which bodies of water fall under Clean Water Act jurisdiction).

<sup>27</sup>*United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003).

<sup>28</sup>*Id.*

<sup>29</sup>The Deatons' primary contention was that the Corps could not assert jurisdiction over a roadside ditch that after draining into a culvert and into yet another ditch made a thirty-two mile journey through a tributary of Chesapeake Bay, which is certainly a navigable water. *Id.* at 702.

<sup>30</sup>*United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 808 (7th Cir. 2005).

runs into the nonnavigable Lemonwier River, which in turn runs into the Wisconsin River, which is navigable.”<sup>31</sup> In response, Judge Posner pointed out that “[w]hether the wetlands are 100 miles from a navigable water or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway the wetlands are ‘waters of the United States’ within the meaning of the Act,” and found *SWANCC* did not change that conclusion since it did not overrule *Riverside Bayview*.<sup>32</sup>

The Fifth Circuit in *In re: Needham* read the resulting impact of *SWANCC* on the jurisdiction of the federal government dramatically differently.<sup>33</sup> *Needham* addressed the question of whether the government could recover pursuant to the Oil Pollution Prevention Act (“OPA”)<sup>34</sup> the costs incurred by the Coast Guard in responding to an oil spill. Recognizing that the definition of “navigable waters” in OPA was “co-extensive with the definition found in the Clean Water Act,”<sup>35</sup> the court turned to *SWANCC* for guidance and concluded that:

In our view, this [regulatory definition of navigable waters] is unsustainable under *SWANCC*. The CWA and the OPA are not so broad as to permit the federal government to impose regulations over tributaries that are neither themselves navigable nor truly adjacent to navigable waters . . . . Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.<sup>36</sup>

Thus among the lower courts there was a degree of confusion and disagreement as to the reach of *SWANCC*’s holding concerning the scope of federal jurisdiction under section 404 over our nation’s waters.

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<sup>31</sup> *Id.* at 805.

<sup>32</sup> *Id.* at 807, 809.

<sup>33</sup> See *In re: Needham*, 354 F.3d 340, 345 (5th Cir. 2004). Several district courts also found that after *SWANCC* there were further limits on the jurisdiction of the federal government over wetlands. See, e.g., *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002) (“[T]he Court finds as a matter of law that the wetlands on Defendant’s property were not directly adjacent to navigable waters, and therefore, the government cannot regulate Defendant’s property.”); *United States v. Newdunn*, 195 F. Supp. 2d 751 (E.D. Va. 2002) and *United States v. RGM Corp.*, 222 F. Supp. 2d 780 (E.D. Va. 2002). While these lower court decisions all subsequently were reversed on appeal, they nonetheless reflect the post-*SWANCC* confusion as to the scope of federal wetlands jurisdiction.

<sup>34</sup> 33 U.S.C. § 2701 (2000).

<sup>35</sup> *In re: Needham*, 354 F.3d at 344.

<sup>36</sup> See *id.* at 345-46. The Fifth Circuit had earlier reached the same result in *Rice v. Harken*, 250 F.3d 264, 269 (5th Cir. 2001) (citing *SWANCC*’s holding that “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 a body of navigable water.”)

### B. The Regulatory Agencies

The lower courts were not alone in their uncertainty about the meaning of *SWANCC*. The very agencies charged with regulating “navigable waters” were also perplexed as demonstrated by a notice of a post-*SWANCC* proposed rulemaking.

In an effort to “obtain early comment on issues associated with the scope of waters that are subject to the Clean Water Act..., in light of the U.S. Supreme Court decision in [*SWANCC*],” the Corps and the EPA published in January of 2003 an *Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States”* (“ANPRM”).<sup>37</sup> In sum, the ANPRM requested “information or data from the general public, the scientific community, and Federal and State resource agencies on the implications of the *SWANCC* decision for jurisdictional decisions under the CWA.”<sup>38</sup> The goal of seeking the requested information was “to develop proposed regulations that will further the public interest by clarifying what waters are subject to the CWA jurisdiction.”<sup>39</sup>

In a memorandum issued jointly by the Corps and EPA that accompanied the ANPRM, the agencies expressly recognized that there was a lack of consistency in the courts concerning the meaning of *SWANCC*. At the time of the ANPRM the post-*SWANCC* case law was still developing, but “[w]hile a majority of cases hold that *SWANCC* applies only to waters that are isolated, intrastate and non-navigable, several courts have interpreted *SWANCC*’s reasoning to apply to waters other than the isolated waters at issue in that case.”<sup>40</sup> It was hence the view of the Corps and the EPA that further regulatory action was required to clarify the scope of their section 404 jurisdiction after *SWANCC*. In the atmosphere of agency jurisdictional uncertainty the joint memorandum also counseled the respective agency field staff to obtain formal approval from headquarters on a project-by-project basis before claiming jurisdiction over waters where after *SWANCC* jurisdiction was far from clear.<sup>41</sup>

Alas, as recognized by Chief Justice Roberts in his concurring opinion in *Rapanos*, the ANPRM did not result in a new post-*SWANCC* regulatory definition of “waters of the United States.”<sup>42</sup> The agencies were apparently content to live in a world of ambiguity; no regulatory action resulted from the ANPRM despite the express recognition by the agencies of the state of uncertainty surrounding section 404 jurisdiction after *SWANCC*.

<sup>37</sup> Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991, 1991 (Jan. 15, 2003).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1996.

<sup>41</sup> The specific types of waters mentioned where field staff were to seek advance approval included those where jurisdiction could be asserted on the basis of: (1) uses by interstate or foreign travelers for recreational or other purposes; (2) the presence of fish or shellfish that could be taken and sold in interstate commerce; or (3) the use of water for industrial purposes by industries in interstate commerce. *Id.* at 1996.

<sup>42</sup> See *Rapanos*, 126 S. Ct at 2236 (Roberts, C.J., concurring).

## III. FROM A STATE OF UNCERTAINTY TO UTTER BEWILDERMENT

Chief Justice Roberts may have been correct to point the finger at the Corps and EPA for their collective failure to promulgate a final rule that perhaps could have served to clarify the scope of federal jurisdiction post-*SWANCC*. Whether as suggested by Chief Justice Roberts such a rulemaking could have refined the jurisdictional reach of the Corps and EPA we will never know since the “proposed rulemaking went nowhere.”<sup>43</sup>

What we do know, however, is that the Supreme Court accepted an opportunity in *Rapanos* to clarify the jurisdictional question undecided in *Riverside Bayview* and left wanting by *SWANCC*. Unable to garner a majority of the Justices to agree on the question of federal government jurisdiction over “waters of the United States,” the divided Court left in its wake a decision that moves the jurisdictional question from that of uncertainty to one of the absurd. The result is a missed opportunity by the Court “to say what the law is,”<sup>44</sup> and as Chief Justice Roberts correctly noted this failure is unfortunate because in the absence of clarity from the Court, “[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis.”<sup>45</sup> Certainly the Corps and EPA, too, will join hands with the lower courts and regulated entities as they feel their way together through the darkness left behind by the Court in *Rapanos*.

What tools did the Court provide in *Rapanos* to illuminate the journey of those parties who now are required to embark upon the case-by-case trek of wetland jurisdictional determinations? First, they are offered the guiding hand of Justice Scalia. Under his analysis the key Clean Water Act term “waters of the United States”, “includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographical features’ that are described in ordinary parlance as . . . streams[,] . . . oceans, rivers, [and] lakes.”<sup>46</sup> According to Justice Scalia this is the only “plausible interpretation” of the term, and “[t]he phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”<sup>47</sup>

While the limited scope of jurisdictional reach proffered by Justice Scalia might be less than consistent with the intent of Congress as expressly recognized by his brethren in *Riverside Bayview*, where the Court accepted as beyond dispute that “Congress chose to define the waters covered by the Act broadly,”<sup>48</sup> his jurisdictional requirement of the presence of water does have the appeal of

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<sup>43</sup> *Id.*

<sup>44</sup> To paraphrase what every first year law student learns in constitutional law about the role of the Supreme Court in our tripartite form of government, see *Marbury v. Madison*, where Chief Justice Marshall noted “it is emphatically the province and duty of the judicial department to say what the law is.” 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>45</sup> See *Rapanos*, 126 S. Ct at 2236 (Roberts, C.J., concurring).

<sup>46</sup> *Id.* at 2220, 2225 (alteration in original) (internal citations omitted).

<sup>47</sup> *Id.* at 2225.

<sup>48</sup> *Riverside Bayview*, 474 U.S. at 133.

clarity. That is, if there is a permanent flow of water present in a wetland and that wetland possesses a continuous surface connection to a navigable water, the federal government has jurisdiction.<sup>49</sup> Of course, Justice Scalia's approach leaves much to be desired from an environmental protection perspective since, in another inconsistency with *Riverside Bayview*, he fails to consider the ecological significance of wetlands. In his *Rapanos* opinion Justice Scalia simply ignores the importance that ecological considerations played in the Court's determination to uphold jurisdiction in *Riverside Bayview*. Indeed, he demonstrated hostility towards the *Rapanos* dissent and, in taking a not too veiled jab at Justice Stevens, noted that "[t]he dissent's exclusive focus on ecological factors, combined with its total deference to the Corps' ecological judgments, would permit the Corps to regulate the entire country as 'waters of the United States.'"<sup>50</sup>

Justice Scalia's approach, consequently, while perhaps providing clarity, would leave many wetlands beyond the scope of federal jurisdiction and, absent state protection, does not provide a workable solution from an ecological point of view. Moreover, Justice Scalia's approach is simply inconsistent with the stated goals expressed by Congress in adopting the Clean Water Act.<sup>51</sup>

Then there is Justice Kennedy's concurring opinion to consider.<sup>52</sup> What guidance does it provide for the judges, lawyers, clients and regulators lost in the post-SWANCC maze of wetlands jurisdiction? While at least Justice Scalia attempted to provide a bright line interpretation of the statute, Justice Kennedy's approach in essence provides a map with no indication of where North, South, East or West is located. Relying on SWANCC, Justice Kennedy concluded that jurisdiction was established if there was a "significant nexus" between the wetlands at issue and a navigable water.<sup>53</sup> Deriving the "significant nexus" test from SWANCC, however, arguably misreads the Court's opinion in that case because in writing for the majority Chief Justice Rehnquist only said that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview*."<sup>54</sup> He did not then find that the Corps failed to have jurisdiction over the isolated wetlands at issue in SWANCC because they lacked a significant nexus to a navigable water; there was only one mention of "significant nexus" in the SWANCC opinion, and Chief Justice Rehnquist did not apply what would have been a new test in the majority's analysis. Instead, the

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<sup>49</sup> See *Rapanos*, 126 S. Ct. at 2235.

<sup>50</sup> See *id.* at 2230. Justice Scalia's comment directed at the *Rapanos* dissent is not only inconsistent with *Riverside Bayview* but also patently untrue after SWANCC where the Supreme Court certainly did place limits on the extent of federal jurisdiction over wetlands. The difficulty is that SWANCC did not precisely articulate the extent of its limitation on federal jurisdiction and, as noted here, *Rapanos* dramatically escalated the jurisdictional confusion that arose following SWANCC since the Court failed to achieve a majority opinion.

<sup>51</sup> See 33 U.S.C. § 1251(a)(1) (2000) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.")

<sup>52</sup> *Rapanos*, 126 S. Ct. 2236-52.

<sup>53</sup> *Id.* at 2248.

<sup>54</sup> SWANCC, 513 U.S. at 167.

SWANCC majority found federal jurisdiction wanting because the migratory bird rule exceeded the authority delegated to the Corps by Congress under section 404.<sup>55</sup>

Be that as it may, unlike Justice Scalia's direct surface-water connection requirement for federal jurisdiction, at least the "significant nexus" test would include those wetlands that are of ecological significance. It thus holds true to one of the rationales first relied upon by the Court in *Riverside Bayview* for upholding federal jurisdiction over adjacent wetlands. Further, Justice Kennedy's test, setting aside momentarily how one may apply it, appears far-reaching and consistent with the recognition in *Riverside Bayview* that in defining the term "navigable waters" to include "the waters of the United States," Congress intended an expansive view of federal jurisdiction that included some waters that were not navigable in fact.<sup>56</sup>

The difficulty, however, apart from its questionable reliance on SWANCC for its genesis, is that the significant nexus test is fraught with uncertainty, both in terms of application and guidance, for those mired in the current muck of wetland jurisdictional determinations after the Court's inability in *Rapanos* to fashion a clearly articulated majority view. That is, just what constitutes the necessary significant nexus sufficient for either the Corps or EPA to assert jurisdiction over property owners' wetlands? Justice Kennedy does make an effort to provide a modicum of guidance for those trying to answer that very question by noting that, mindful of the stated goals of the Clean Water Act:<sup>57</sup>

[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."<sup>58</sup>

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<sup>55</sup> *Id.* at 174. Justice Scalia, not surprisingly, was quite critical of Justice Kennedy's proffered test: "One would think, after reading Justice Kennedy's exegesis, that the crucial provision of the text of the CWA was a jurisdictional requirement of a 'significant nexus' between wetlands and navigable waters. In fact, however, that phrase appears nowhere in the Act, but is taken from SWANCC's cryptic characterization of the holding of *Riverside Bayview*. . . . Only by ignoring the text of the statute and by assuming that the phrase of SWANCC ('significant nexus') can properly be interpreted in isolation from the text does Justice Kennedy reach the conclusion he has arrived at." Rapanos, 126 S. Ct. at 2234.

<sup>56</sup> *Riverside Bayview*, 474 U.S. at 133.

<sup>57</sup> See 33 U.S.C. § 1251(a) ("The objective of this chapter is to restore the chemical, physical, and biological integrity of our Nation's waters.").

<sup>58</sup> Rapanos, 126 S. Ct. at 2248 (Kennedy, J., concurring).

It must be asked if the above provides real world guidance and whether Justice Kennedy's significant nexus test adds anything new to the holding that adjacency was sufficient to establish jurisdiction as articulated by the Court two decades ago in *Riverside Bayview*. Further, given that "water moves in hydrological cycles"<sup>59</sup> could one assert, contrary to *SWANCC*, that under certain circumstances even isolated wetlands have a significant nexus because if polluted they could affect the chemical, physical, and biological integrity of the nation's waters? Put simply, the significant nexus test also fails to provide much illumination for those trying to determine whether federal jurisdiction extends to a particular wetland.

#### IV. POST-*RAPANOS*: MORE UNCERTAINTY IN THE LOWER COURTS

Not surprisingly in the wake of the Court's failure in *Rapanos* to command majority support for a clearly articulated position on the scope of federal wetland jurisdiction, the lower courts have been left to roam through the competing opinions of the Justices to arrive at a solution to pending cases. The approaches taken by the lower courts thus far in the aftermath of *Rapanos* vary and are reflective of the lack of guidance yet again provided by the Court.

In the first reported post-*Rapanos* decision a district court was confronted with whether the government could seek civil penalties under the Clean Water Act and OPA for a leak of oil from a pipeline into an unnamed channel/tributary that had a flow of water only when significant rainfall events occurred.<sup>60</sup> Although Chevron implemented remedial activities in response to the 126,000-gallon leak, the federal government nonetheless sought civil penalties, and the defendant responded by filing a motion for summary judgment arguing that since the oil spill was neither into a navigable water nor into an adjacent water body the government lacked jurisdiction.<sup>61</sup>

The district court noted that *Rapanos* addressed the facts at hand, "albeit without a consensus."<sup>62</sup> After looking at the two distinct tests for establishing jurisdiction provided by Justice Scalia and Justice Kennedy, the district court found that "[w]ithout any clear direction on determining a significant nexus, this Court will do exactly as Chief Justice Roberts declared—'feel [its] way on a case-by-case basis'"<sup>63</sup> in order to resolve the question presented by Chevron's motion.

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<sup>59</sup> *Riverside Bayview*, 474 U.S. at 134.

<sup>60</sup> *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006).

<sup>61</sup> *Id.* at 610.

<sup>62</sup> *Id.* at 612.

<sup>63</sup> *Id.* at 613.

In examining Justice Kennedy's significant nexus test, the judge nicely summarized the difficulty with this new approach, writing that it was "an ambiguous test" and provided "no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is 'significant' and how is 'nexus' determined?"<sup>64</sup> The district court ultimately concluded that it would primarily look to the existing precedent of the Fifth Circuit in granting the motion and thus essentially ignored *Rapanos* because of its lack of any appreciable guidance.<sup>65</sup>

In another district court opinion arising from a criminal enforcement action under the Clean Water Act, the Middle District of Florida took a different approach concerning the applicability of *Rapanos*.<sup>66</sup> Here too the judge noted the uncertainty arising from the competing opinions of the *Rapanos* Court: "because both [the plurality and Justice Kennedy] articulated different standards to be applied on remand, it is not clear which standard is now controlling."<sup>67</sup> In an interesting resolution of this dilemma, the judge followed Justice Stevens' *dissenting opinion* to conclude that either test will do, and thus the government was left free to establish jurisdiction by application of either the plurality's requirement of a relatively permanent, standing body of water or Justice Kennedy's significant nexus test.<sup>68</sup>

The Ninth Circuit was the first Court of Appeals to decide the jurisdictional issue after *Rapanos* in *Northern California River Watch v. City of Healdsburg*.<sup>69</sup> One interesting aspect of the Ninth Circuit's reading of *Rapanos* is that it interpreted the Court's decision in a conclusory fashion as narrowing the scope of *Riverside Bayview*, and as a result that case was inapplicable to determining whether a fifty-eight-acre pond only separated by a levee from a navigable in fact water—the Russian River in Northern California—was jurisdictional.<sup>70</sup> After quickly concluding that the proper test

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<sup>64</sup> *Id.*

<sup>65</sup> In granting Chevron's motion the district court looked to the Fifth Circuit decision in *In re: Needham*, 354 F.3d 340 (5th Cir. 2003) and noted that "*Needham* is the closest case on point in this circuit and this Court will look to the discussion and reasoning contained in that opinion—dicta or not." See *Chevron Pipe Line*, 437 F. Supp. 2d at 611.

<sup>66</sup> *United States v. Evans*, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006).

<sup>67</sup> *Id.* at \*19.

<sup>68</sup> See *id.*; see also *United States v. Johnson*, 2006 WL 3072154 (1st Cir. Oct. 31, 2006) (determining that the government could establish jurisdiction by application of either Justice Scalia's test or Justice Kennedy's significant nexus test).

<sup>69</sup> *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006).

<sup>70</sup> *Id.* at 1025-26. Based on the facts before the Ninth Circuit in *Northern California River Watch*, the interpretation of the effect of *Rapanos* on *Riverside Bayview* seems rather cramped. It appears from the facts that the water at issue was indeed adjacent to a navigable water, and the court could have still relied on *Riverside Bayview* to establish Clean Water Act jurisdiction and avoided *Rapanos* altogether.

to apply from *Rapanos* was the significant nexus test,<sup>71</sup> the Ninth Circuit found that the test was met because, among other reasons, the unpermitted wastewater discharge into the pond eventually migrated into the Russian River and affected its “chemical, physical, and biological integrity.”<sup>72</sup>

Given the close proximity of the pond to the Russian River, the Ninth Circuit easily found that the required significant nexus was present. *Northern California River Watch*, however, still does not diminish the fact that the significant nexus test provides little, if any, guidance for those situations commonly encountered where direction from the Supreme Court was most needed and that is the situation where jurisdiction is asserted on the basis of a series of ditches and channels that eventually flow into a navigable water.

Thus we see that the lower courts post-*Rapanos* have taken three different approaches to determining the jurisdiction of the federal government over wetlands. One approach allows application of either the plurality’s approach or Justice Kennedy’s concurring significant nexus test.<sup>73</sup> The second approach followed by courts is to adopt the significant nexus test, despite its lack of clear guidance as to precisely how one applies it.<sup>74</sup> A final approach adopted, and reflective of the lack of consensus among the Justices, is to essentially ignore *Rapanos* and look to the precedent within the circuit for establishing the applicable law for reaching jurisdictional determinations.<sup>75</sup>

<sup>71</sup> The Ninth Circuit reached this conclusion by reliance upon *Marks v. United States*, which 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 of grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal citations omitted). In contrast, the First Circuit in *United States v. Johnson*, found it practically hopeless in looking at *Rapanos* to apply *Marks*, finding that the “understanding of ‘narrowest grounds’ as used in *Marks* does not translate easily to the present situation.” *United States v. Johnson*, 2006 WL 3072154 at \*9. In addition, the First Circuit pointed out that “the Supreme Court itself has moved away from the *Marks* formula. . . . Since *Marks*, several members of the Court have indicated that whenever a decision is fragmented such that no single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority has embraced.” *United States v. Johnson*, 2006 WL 3072154 at \*11. Thus there is even confusion in the Supreme Court and the lower courts as to what approach should be used to divine the meaning of the Court in deeply fractured opinions such as *Rapanos*, and as a result the lower courts are left to speculate as to just what the Justices meant.

<sup>72</sup> *N. Cal. River Watch*, 457 F.3d at 1031. The Ninth Circuit also found that the pond shared a direct surface water connection since the Russian River occasionally overflowed a levee and commingled with the pond. *Id.* at 1030. The court also found that the pond shared a significant ecological connection with the Russian River and thus had a significant biological effect on a navigable water because “[t]he wetlands support substantial bird, mammal and fish populations, all as an integral part of and indistinguishable from the rest of the Russian River ecosystem.” *Id.* at 1031.

<sup>73</sup> See, e.g., *United States v. Johnson*, 2006 WL 3072154; *United States v. Evans*, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006).

<sup>74</sup> See, e.g., *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006); *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006).

<sup>75</sup> See, e.g., *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d (N.D. Tex. 2006).

Hence, so much for the Supreme Court's effort in *Rapanos* to foster a consistent, unified approach in the lower courts to the important Clean Water Act question of the scope of federal government jurisdiction. As demonstrated by the handful of post-*Rapanos* decisions to date, we are left in the familiar and unfortunate position that began with *SWANCC*. That position consists of confronting a lack of clarity from the Supreme Court, followed by uncertainty among the lower courts, coupled with understandable confusion among regulators and the regulated, in the important area of federal jurisdiction over wetlands.

#### V. CLARIFICATION IN THE ABSENCE OF SUPREME COURT GUIDANCE

Can anything be done to provide clarity and guidance concerning the scope of federal wetland jurisdiction or is this simply an area of environmental law where uncertainty is inherent and must be decided on a case-by-case basis? I would hope that the latter is not the case.

One thing is clear and that is, as shown by the prior effort in *SWANCC* and now *Rapanos*, the Court is simply incapable of providing clarification in this area and has only left behind a sea of confusion. Given the sharp split of the Court in *Rapanos* it is unlikely that another case would provide any further guidance absent new membership on the Court. One can only conclude that this means that either the regulatory agencies, namely the Corps and EPA, will take steps through a rulemaking to establish the parameters of their jurisdiction or, alternatively, Congress may take action to clarify the intended scope of the federal government's Clean Water Act jurisdiction over waters that are neither navigable in fact nor adjacent to such waters.

##### *A. Rulemaking as a Regulatory Fix*

As discussed earlier, the EPA and Corps invited interested parties to submit comments and provide information in anticipation of a rulemaking to further define federal jurisdiction after *SWANCC*. The rulemaking never occurred, but a similar effort could certainly take place now that *Rapanos* has failed to adequately characterize federal government jurisdiction over wetlands. Indeed, given the uncertain scope of the agencies' jurisdiction after *SWANCC* and *Rapanos*, one would think that the agencies would strongly favor such a rulemaking if for no other reason than to provide guidance for field personnel who must confront the question of jurisdiction on a routine basis and now have their determinations subject to question and challenge by the courts.

Of course, any rulemaking effort that clarified the scope of jurisdiction would also raise the specter of court challenges. To lessen the possibility of a successful challenge and the subsequent voiding of a regulatory definition by the courts, an approach that the agencies could follow is to conduct a

negotiated rulemaking pursuant to the Negotiated Rulemaking Act.<sup>76</sup> Through a negotiated rulemaking with a variety of interested parties—environmental groups, regulators, lawyers, representatives from trade associations such as the National Association of Homebuilders, wetland consultants, states and local units of government—perhaps a mutually agreeable regulatory definition of “waters of the United States” could be developed that would provide the clarity that stakeholders require to determine with some degree of confidence whether federal jurisdiction existed or not. Despite the disparate interests that such stakeholders share, the negotiated rulemaking approach has been successfully used in the development of environmental regulations. One example is the *All Appropriate Inquiry* regulations that were enacted recently to implement certain amendments to the Comprehensive Environmental Response, Compensation, and Liability Act.<sup>77</sup>

### *B. Congressional Action*

If there is no action taken by the implementing agencies to better define the scope of their jurisdiction over wetlands, Congress could certainly act. And perhaps congressional action is the better approach to end speculation as to what it intended in the Clean Water Act by defining “navigable waters” as “the waters of the United States.”<sup>78</sup>

Action by Congress is entirely possible since in 2003 Senate Bill 473 was proposed to amend the Clean Water Act to “clarify the jurisdiction of the United States over waters of the United States.”<sup>79</sup> To provide this much-needed clarification, the bill proposed to broadly redefine the term “waters of the United States” as:

[A]ll waters subject to the ebb and flow of the tide, the territorial seas, and all intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and impoundments of the foregoing, *to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.*<sup>80</sup>

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<sup>76</sup> 5 U.S.C. § 581 (2000).

<sup>77</sup> Standards and Practices for All Appropriate Inquiries, 70 Fed. Reg. 66070, 66106 (Nov. 1, 2005) (to be codified at 40 C.F.R. pt. 312) (stating “[t]oday’s final rule is based upon a proposed rule that was developed with the assistance of a regulatory negotiation committee comprised of various affected stakeholder groups and modified slightly, based upon public comments received in response to the proposed rule”).

<sup>78</sup> 33 U.S.C. § 1362(7) (2000).

<sup>79</sup> Clean Water Authority Restoration Act of 2003, S. 473, 108th Cong. (2003), Senate Bill 473 was sponsored by Senators Feingold, Boxer, Jeffords and Lieberman. *See also* Clean Water Authority Restoration Act of 2005, H.R. 1356, 109th Cong. (2005) (reflecting language virtually identical to that of Senate Bill 473).

<sup>80</sup> S. 473 § 4(3) (emphasis added).

As proposed, Senate Bill 473 would further amend the Clean Water Act “by striking ‘navigable waters of the United States’ each place it appears” and replacing it with “waters of the United States.”<sup>81</sup> A similar redefinition was also proposed in Senate Bill 473 by deleting the term “navigable waters” completely from the statute and replacing it with “waters of the United States.”<sup>82</sup> Senate Bill 473 would thus end the interpretation difficulty first encountered in *Riverside Bayview* arising from the use by Congress in 1972 of the term “navigable waters” in the Clean Water Act and its definition as “waters of the United States.”<sup>83</sup>

Whether passage of legislation similar to Senate Bill 473 will occur in an effort to clarify Clean Water Act jurisdiction remains to be seen, now that control of both the Senate and House of Representatives has changed as a result of the November 2006 mid-term elections. It has been reported, however, that with the change in control and Democratic lawmakers assuming leadership positions over committees related to the environment that “one piece of legislation almost certain to re-emerge in both houses is the stalled ‘Clean Water Restoration Act.’”<sup>84</sup> If that assertion holds true, and if President Bush were to sign the Clean Water Restoration Act into law, the amendments should serve to clarify that Congress intended to assert broad jurisdiction over the waters of the United States in the continuing effort to achieve the often cited goal of restoring and maintaining the “chemical, physical, and biological integrity of the Nation’s waters.”<sup>85</sup>

#### CONCLUSION

After *SWANCC*, clarification concerning the scope of the federal government’s jurisdiction over wetlands was undoubtedly required. Where clarity was most needed was in the situation where jurisdiction was constructed upon a series of channels, trenches and ditches that eventually tied into a tributary flowing into a navigable water. Here is where not only those directly involved in the litigation culminating in the consolidated *Rapanos* case, but also judges, lawyers, property owners, developers and regulators, were looking for certainty from the Court. By accepting certiorari in *Rapanos*, the Court implicitly agreed to provide these parties with an answer to the question of the scope of federal jurisdiction, but unfortunately failed to do so. Until clarification comes from the agencies or Congress, this failure of the Court will only heighten the contention between regulators and the regulated as to just how far the reach of federal jurisdiction over wetlands extends as they grope for answers to this fundamental question under the Clean Water Act.

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<sup>81</sup> *Id.* at § 5(1).

<sup>82</sup> *Id.* at § 5(2).

<sup>83</sup> 33 U.S.C. 1362(7) (2000).

<sup>84</sup> Lucy Kafanov, Water: *Dems set sights on wetland protection, Army Corps projects*, GREENWIRE, Nov. 9, 2006, <http://stevens.vermontlaw.edu:2069/Greenwire/2006/11/09/archive/2/?terms=clean%20water%20act>

<sup>85</sup> 33 U.S.C. § 1251(a) (2000).

# The Rulemaking Response to *Rapanos*: The Government's Best Hope for Retaining Broad Clean Water Act Jurisdiction

Stephen M. Johnson\*

## INTRODUCTION

More than two decades ago, in *United States v. Riverside Bayview Homes*, the United States Supreme Court accorded *Chevron*<sup>1</sup> deference to the Army Corps of Engineers' regulatory interpretation of the term "waters of the United States" under the Clean Water Act to include wetlands adjacent to "other bodies of water over which the Corps has jurisdiction."<sup>2</sup> In the two subsequent cases that the Court has heard involving those same regulations, federal agency interpretations have not received *Chevron* deference.

In the first case, *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* [*SWANCC*], decided in 2001, a majority of the Court concluded that the Clean Water Act does not authorize the regulation of isolated, intrastate waters as waters of the United States when the sole basis for regulation is the use or potential use of the waters as habitat for migratory birds.<sup>3</sup> Since the majority determined that the statute was clear, the agency's interpretation was not entitled to *Chevron* deference.<sup>4</sup> Although it was obvious that the *SWANCC* Court struck down the migratory bird test, it was not clear how much further the Court's ruling narrowed the scope of waters of the United States and it was not clear that the Court's ruling established a bright line test that should be used to determine jurisdiction under the Clean Water Act. Subsequent to the Court's ruling, the Corps and the Environmental Protection Agency (EPA) issued guidance to interpret the scope of the *SWANCC* ruling and issued an advance notice of proposed rulemaking, suggesting that the agencies planned to amend the regulations that defined waters of the United States to clarify the scope of jurisdiction after *SWANCC*.<sup>5</sup> The agencies withdrew the notice after receiving significant

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<sup>1</sup> *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

<sup>2</sup> *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 132, 135 (1985).

<sup>3</sup> *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 167 (2001).

<sup>4</sup> *Id.* at 171-72.

<sup>5</sup> The Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (proposed Jan. 15, 2003).

opposition to rulemaking<sup>6</sup> and after several courts interpreted the *SWANCC* decision narrowly.<sup>7</sup>

Then, last term, in the consolidated case of *Rapanos v. U.S.* and *Carabell v. U.S. Army Corps of Eng'rs*, the Supreme Court focused, once again, on the legality of the federal regulations that define waters of the United States.<sup>8</sup> This time, the focus was on regulation of wetlands adjacent to non-navigable tributaries of traditional navigable waters and regulation of wetlands separated from such tributaries by a berm. The cases seemed to present textbook examples of disputes ripe for *Chevron* deference in that they involved agencies' long-standing regulatory interpretations of an ambiguous statute on issues involving the agencies' scientific expertise. However, there was no consensus on the *Rapanos* Court that the agencies' regulations were entitled to *Chevron* deference, and very little consensus on anything else, as the Court did not issue a majority opinion. Instead, the plurality, per Justice Scalia, and the dissent, per Justice Stevens, engaged in a familiar statutory interpretation debate at *Chevron* step one. Scalia, relying on textualism and chastising the dissent for its "policy laden" conclusions, focused on the words of the statute, dictionary definitions of those words, and traditional canons of interpretation to conclude that the Clean Water Act clearly did not authorize the regulations adopted by the Corps.<sup>9</sup> Stevens, in dissent, focused on the purpose of the statute and legislative history to conclude that either the statute clearly authorized the agencies' regulation of the wetlands at issue or the statute was at least ambiguous, so that the Court should defer to the agencies' reasonable interpretation at *Chevron* step two.<sup>10</sup> Justice Kennedy's opinion, which is likely to have the most significant impact on the scope of jurisdiction under the Clean Water Act, seemed to ignore the *Chevron* framework altogether.<sup>11</sup>

To some extent, the Court's refusal to grant *Chevron* deference to the Corps and EPA regulations interpreting waters of the United States could be viewed as part of a judicial trend

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<sup>6</sup> See U.S. GEN. ACCOUNTING OFFICE, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION, GAO-04-297, at 14 (2004) [hereinafter GAO REPORT].

<sup>7</sup> See, e.g., *Treacy v. Newdunn Assocs.*, 344 F.3d 407 (4th Cir. 2003) (finding manmade ditch under interstate highway was a "tributary," for purpose of Army Corps of Engineers enforcement powers under CWA, since water from ditch flowed into traditional, navigable waters); *U.S. v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) (finding "Corps regulation extending CWA jurisdiction to tributaries of navigable waters represented reasonable interpretation of CWA that was entitled to *Chevron* deference."); *Cnty. Ass'n. for Restoration of Env't v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002) (holding irrigation canals into which wastewaters from dairy operation were discharged were "navigable waters" under CWA); *Headwaters, Inc., v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) (finding irrigation canals were "waters of the United States," and thus subject to CWA, even though canals were separated from natural streams by system of closed waste gates).

<sup>8</sup> *Rapanos v. U.S.*, 376 F.3d 629 (6th Cir. 2004), *vacated*, 126 S. Ct. 2208 (2006) (plurality opinion); *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004), *vacated sub nom. Rapanos v. U.S.*, 126 S. Ct. 2208 (2006) (plurality opinion).

<sup>9</sup> *Rapanos v. U.S.*, 126 S. Ct. 2208, 2220-34 (2006) (plurality opinion).

<sup>10</sup> *Id.* at 2255-56 (Stevens, J., dissenting).

<sup>11</sup> *Id.* at 2236-52 (Kennedy, J., concurring).

away from according *Chevron* deference to agency rulemaking. Over the past few years, the Supreme Court has issued several opinions that could be viewed as limiting the situations in which agencies' interpretations of federal statutes receive *Chevron* deference.<sup>12</sup> If *Rapanos* were another step in the erosion of *Chevron* deference, it would have important implications for the agencies in deciding upon the appropriate response to the *Rapanos* opinions. However, other recent Supreme Court opinions demonstrate that agencies' interpretations of statutes will continue to receive *Chevron* deference when the statutes that the agencies are interpreting are ambiguous and the agencies have been delegated authority to issue interpretations of those statutes that have the force of law.<sup>13</sup> In fact, several of the Justices in *Rapanos* suggested that regulations adopted by the Corps and EPA to redefine waters of the United States would be accorded *Chevron* deference.<sup>14</sup> Thus, the refusal of a majority of the *Rapanos* Court to accord *Chevron* deference to the Corps' and EPA's regulations was not due to a general judicial trend, which likely does not exist, away from *Chevron* deference. More likely, the refusal to accord *Chevron* deference to the regulations was a reaction to the agencies' failure to amend their regulations to be consistent with the *SWANCC* decision. This also has important implications for the agencies in deciding upon the appropriate response to the *Rapanos* opinions.

As will be outlined below, the *Rapanos* opinions threaten the validity of several portions of the agencies' existing regulations that define waters of the United States, and narrow, at least to some extent, federal jurisdiction over such waters. The agencies can respond to the *Rapanos* decision in several ways. They can press for an amendment of the Clean Water Act to clarify that jurisdiction extends to all of the waters that are regulated under the existing regulations or for a similar legislative response to establish broad federal jurisdiction. However, such a change is

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<sup>12</sup> See, e.g., *Gonzales v. Or.*, 126 S. Ct. 904 (2006) (holding "powers expressly delegated to Attorney General by Controlled Substances Act were limited and did not extend to defining medical standards for care and treatment of patients."); *U.S. v. Mead Corp.*, 533 U.S. 218 (2001) (holding "administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law."); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (holding that "agencies are generally entitled to deference in the interpretation of statutes that they administer but a reviewing court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Christensen v. Harris County*, 529 U.S. 576 (2000) (holding "agency's interpretation of statute which is contained in opinion letter, policy statements, agency manuals, or enforcement guidelines, all of which lack force of law, do not warrant *Chevron*-style deference.").

<sup>13</sup> See, e.g., *Verizon Commc'ns, Inc. v. Fed. Commc'n Comm'n*, 535 U.S. 467 (2002) (holding the methodology chosen by the FCC to set rates for lease of network elements is not inconsistent with the plain language of the Act and is not unreasonable); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (holding 1990 amendments to Clean Air Act regarding ozone in nonattainment areas were ambiguous as to long-term applicability, requiring deference to EPA's reasonable interpretation). The Court's resolution of two Clean Air Act cases this term should provide further clarification regarding the Roberts Court view of *Chevron*. *Mass. v. E.P.A.*, 126 S. Ct. 2960 (argued Nov. 29, 2006); *Env'tl. Def. v. Duke Energy Corp.*, 126 S. Ct. 2019 (argued Nov. 1, 2006).

<sup>14</sup> See *infra* notes 69-72.

unlikely to be forthcoming in a timely manner so the agencies must take other measures to respond to the opinions in the interim.

Barring, or pending, a legislative change, the agencies could either (1) amend their regulations defining waters of the United States to clarify which non-navigable waters and wetlands are covered by the Clean Water Act; (2) retain the existing regulations, but issue guidance to clarify which non-navigable waters and wetlands are covered by the Clean Water Act; or (3) retain the existing regulations and decide, without guidance, on a case-by-case basis, which non-navigable waters and wetlands are covered by the Clean Water Act.

The Corps, EPA, and the Department of Justice appear to prefer to address the implications of the *Rapanos* decision through guidance, rather than regulation. Shortly after *Rapanos*, the Corps and EPA issued interim guidance which promised further guidance “in the near future,” but recommended that, pending further guidance, staff should (1) delay making jurisdictional determinations in areas outside of traditional navigable waters; (2) defer, to the extent possible, taking positions on the scope of jurisdiction over waters of the United States in court pleadings, administrative hearings, or dealings with outside parties; and (3) refrain from referring new enforcement actions to the Department of Justice for Clean Water Act violations in waters that are not traditional navigable waters.<sup>15</sup> One month after the Corps and EPA issued their interim guidance, representatives of both agencies testified at a congressional hearing that the agencies were developing joint guidance to implement the decision.<sup>16</sup> Pending the issuance of guidance, confusion has reigned among the agencies, the regulated community, and the courts. As described below, the only thing that most of the early judicial applications of *Rapanos* have in common is that they are misreading some portion of the Court’s opinions.

Just as the Corps and EPA were reluctant to clarify the impact of the *SWANCC* decision through regulation, they are reluctant to address the impacts of the *Rapanos* decision in a rulemaking. Unfortunately, without a rulemaking, lower federal courts are likely to continue to issue splintered rulings regarding the scope of jurisdiction over waters of the United States, and federal jurisdiction over such waters could be narrowed further. The remainder of this essay will explore (1) the

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<sup>15</sup> *Interim Guidance on the Rapanos and Carabell Supreme Court Decision*, E-Mail from Mark F. Sudol to CDL-REG-All (July 5, 2006 10:25 EST) (on file with author). The interim guidance did not, however, foreclose regulation of non-navigable waters pending further guidance, and the regulations that the Corps subsequently proposed to modify and reissue the nationwide permits contemplate that at least some intermittent and ephemeral streams will be regulated as “waters of the United States.” *Id.*

<sup>16</sup> *Interpreting the Effect of the U.S. Supreme Court’s Recent Decision in the Joint Cases of Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers on “The Waters of the United States:” Hearing Before the Subcomm. of Fish, Wildlife and Water of the S. Comm. on Env’t and Pub. Works, 109th Cong. 13-15 (2006)* (joint statement of Hon. Benjamin H. Grumbles, Asst. Admin. for Water, U.S. E.P.A. and Hon. John Paul Woodley, Jr., Asst. Secy. of the Army for Civil Works, Dep’t of the Army) [hereinafter *Hearing*].

consensus that exists on the Supreme Court regarding the appropriate scope of jurisdiction over waters of the United States; (2) the misinterpretation of the Court's opinions by lower courts and the public that necessitates clarification by the agencies; and (3) the advantages of rulemaking to implement the *Rapanos* decision, as opposed to guidance or case-by-case adjudication.

### I. THE CONSENSUS IN *RAPANOS*

At first glance, it might seem difficult to frame any consensus from the fractured opinions in *Rapanos*. The plurality opinion, authored by Justice Scalia, joined by Justices Thomas, Alito and the Chief Justice, interpreted “waters” under the Clean Water Act to be limited to “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers [and] lakes. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.’”<sup>17</sup> Regarding “adjacent” wetlands, the plurality argued that “only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands ‘adjacent to’ such waters, are covered by the Act.”<sup>18</sup>

Justice Kennedy, in his concurring opinion, contended that whether wetlands can be regulated under the Clean Water Act:

[D]epends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. . . . With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollution trapping, flood control, and runoff storage. Accordingly, wetlands 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.”<sup>19</sup>

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<sup>17</sup> *Rapanos v. U.S.*, 126 S. Ct. 2208, 2225 (2006) (plurality opinion).

<sup>18</sup> *Id.* at 2226.

<sup>19</sup> *Id.* at 2248 (Kennedy, J., concurring) (citation omitted).

Justice Kennedy's test does not require a hydrological connection between the wetlands and traditional navigable waters as long as there is a "significant nexus" between the wetlands and the navigable waters.<sup>20</sup> Justice Kennedy also suggested that the Corps' regulatory definition of "tributaries" was too broad, because it could include some non-navigable drains, ditches and streams that do not have a significant nexus to traditional navigable waters.<sup>21</sup>

Justice Stevens wrote a dissenting opinion in the case, joined by Justices Souter, Ginsburg and Breyer. The dissenting Justices argued that the Supreme Court previously upheld the regulation of wetlands adjacent to tributaries of navigable waters in *Riverside Bayview Homes*, or, if it did not, that the Court should defer to the agencies' regulation of wetlands adjacent to non-navigable tributaries in these cases under *Chevron*.<sup>22</sup> While the dissenters did not agree that jurisdiction over waters of the United States should be limited to waters and wetlands with a significant nexus to traditional navigable waters, they did not think that the nexus test would significantly diminish the scope of wetlands covered under the Act.<sup>23</sup>

Although there was no majority opinion in the case, several of the Justices offered their views on the potential application of the decision by lower courts. Chief Justice Roberts, in a concurring opinion, suggested that lower courts and regulated entities would have to "feel their way on a case-by-case basis," but he cited *Marks v. U.S.* as guidance for interpreting the precedential value of the Justices' opinions in *Rapanos*.<sup>24</sup> In *Marks*, the Court noted 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.'"<sup>25</sup> The dissenting Justices, however, offered another suggestion regarding the manner in which lower courts should interpret *Rapanos*. According to Justice Stevens, "[g]iven that all four Justices who joined [the dissenting] opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met."<sup>26</sup>

The approach suggested by the dissenters seems to make the most sense, and is the approach that the Department of Justice indicated, in congressional testimony, that it would follow as it planned to bring new wetlands enforcement actions.<sup>27</sup> In order to determine the potential implications of *Rapanos* for the regulation of waters of the United States under the Clean Water Act, it seems appropriate to

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<sup>20</sup> *Id.* at 2250-52 (Kennedy, J., concurring).

<sup>21</sup> *Id.* at 2248-49 (Kennedy, J., concurring).

<sup>22</sup> *Id.* at 2264-65 (Stevens, J., dissenting).

<sup>23</sup> *Id.* at 2264 (Stevens, J., dissenting).

<sup>24</sup> *Id.* at 2236 (Roberts, C.J., concurring).

<sup>25</sup> *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

<sup>26</sup> *Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting) (emphasis added).

<sup>27</sup> *Hearing, supra* note 16 (statement of John C. Cruden, Dep. Asst. Atty. Gen., Env't & Nat. Res. Div., U.S. Dept. of Justice).

parse the opinions to identify those areas where a majority of Justices have reached consensus. Applying that approach, a majority of Justices in the fractured opinions agree on the following: (1) Jurisdiction over waters of the United States includes, but is *not limited to*, traditional navigable waters. The plurality, dissenters, and Justice Kennedy all agreed on this point.<sup>28</sup> (2) Jurisdiction includes all waters and wetlands that have a significant nexus to traditional navigable waters. Although the dissenting Justices would interpret the statute more broadly than this, they would agree with Justice Kennedy that waters and wetlands with a significant nexus to traditional navigable waters are waters of the United States.<sup>29</sup> Parsing the opinions more closely, a consensus also exists between Justice Kennedy and the dissenting Justices that wetlands adjacent to traditional navigable waters categorically have such a nexus.<sup>30</sup> (3) Jurisdiction includes “relatively permanent, standing or continuously flowing bodies of water” that have a “continuous surface water connection” to traditional navigable waters, even if there is not a significant nexus to the traditional navigable water. The plurality suggested this test<sup>31</sup> and, to the extent that it encompasses some waters that are not otherwise regulated by the Kennedy test, the dissenting Justices would support this test.<sup>32</sup> (4) Jurisdiction will exclude *some* tributaries of navigable waters, including some non-navigable tributaries and wetlands adjacent to those tributaries. The plurality would exclude tributaries that are not “relatively permanent” and “continuously flowing” and wetlands that lack a surface connection to traditional navigable waters,<sup>33</sup> while Justice Kennedy would exclude tributaries and adjacent wetlands that lack a significant nexus to traditional navigable waters.<sup>34</sup> To the extent that tributaries and adjacent wetlands meet those tests of both the plurality and Justice Kennedy, a consensus would exist that they are not waters of the United States.

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<sup>28</sup> *Rapanos*, 126 S. Ct. at 2220; *Id.* at 2241 (Kennedy, J., concurring); *id.* at 2255-56 (Stevens, J., dissenting).

<sup>29</sup> *Id.* at 2264-65 (Stevens, J., dissenting).

<sup>30</sup> Justice Kennedy, in his concurring opinion, stated that “[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps’ conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.” *Id.* at 2248 (Kennedy, J., concurring). Justice Kennedy also suggested that it may be possible to identify, by regulation, “major tributaries” that have such a relationship to traditional navigable waters (due to their annual flow, proximity to navigable waters, or other relevant considerations) that it is appropriate to conclude that wetlands adjacent to those major tributaries, as a class, have a significant nexus to traditional navigable waters and are, thus, “waters of the United States.” *Id.*

<sup>31</sup> *Id.* at 2226. However, the plurality opinion may be even narrower than it appears at first glance, because Justice Scalia, in the opinion, was careful to state that the plurality was only interpreting the meaning of “waters” and was not focusing on “the precise extent to which the qualifiers ‘navigable’ and ‘of the United States’ restrict the coverage of the Act.” *Id.* at 2220.

<sup>32</sup> *Id.* at 2265 (Stevens, J., dissenting). Justice Kennedy, on the other hand, argues that a mere hydrological connection to a traditional navigable water is not, in and of itself, sufficient to establish jurisdiction. *Id.* at 2250-52 (Kennedy, J., concurring).

<sup>33</sup> *Id.* at 2221.

<sup>34</sup> *Id.* at 2249 (Kennedy, J., concurring).

Although the dissenting Justices would support jurisdiction over additional waters, without a showing of a significant nexus or a showing of a continuous surface water connection to a traditional navigable water, there is no consensus on the Court to extend jurisdiction beyond those categories of waters outlined above. Consequently, since the current regulations assert jurisdiction broadly over all interstate waters; isolated, intrastate waters (the use, degradation or destruction of which could affect interstate or foreign commerce); tributaries of traditional navigable waters; interstate waters and isolated waters; and wetlands adjacent to all of those waters,<sup>35</sup> the regulations are likely to be invalid unless a majority of the waters in each of those *classes* of waters has a significant nexus to traditional navigable waters or has a continuous surface connection to traditional navigable waters.

## II. POST-*RAPANOS* JUDICIAL DECISIONS

Predictably, courts have had difficulty interpreting the conflicting opinions in *Rapanos*, and, other than the First Circuit, most are misreading the opinions. The first post-*Rapanos* opinion was issued by the United States District Court for the Northern District of Texas in *United States v. Chevron Pipe Line Co.*<sup>36</sup> The case involved an oil spill into an intermittent stream that flowed through two other intermittent bodies of water into a fork of the Brazos River.<sup>37</sup> Chevron filed a motion for summary judgment on the grounds that the stream was not “navigable waters” under the Clean Water Act and Oil Pollution Act.<sup>38</sup> The district court was unable to find any consensus in the Supreme Court opinions, so relying on Chief Justice Roberts’ statement in his concurrence that lower courts will “have to feel their way on a case-by-case basis,” the court looked at pre-*Rapanos* decisions in the Circuit.<sup>39</sup> The court granted Chevron’s motion for summary judgment, basing its holding on the prior Fifth Circuit holding in *In re Needham*<sup>40</sup> and on the *plurality* opinion in *Rapanos*.<sup>41</sup>

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<sup>35</sup> Navigation and Navigable Waters, 33 C.F.R. § 328.3(a)(1)-(7) (2006).

<sup>36</sup> U.S. v. Chevron Pipe Line Co., 437 F. Supp. 2d 605 (N.D. Tex. 2006).

<sup>37</sup> *Id.* at 607-08.

<sup>38</sup> *Id.* at 610.

<sup>39</sup> *Id.* at 613-14 (quoting *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring)).

<sup>40</sup> See *In re Needham*, 354 F.3d 340 (5th Cir. 2003) (holding “Clean Water Act and OPA did not permit federal government to impose regulations over tributaries that were neither themselves navigable nor truly adjacent to navigable waters.”).

<sup>41</sup> *Chevron Pipe Line*, 437 F. Supp. 2d at 615. The court noted that “the unnamed channel/tributary at issue into which the oil spilled is strikingly similar to a dry arroyo described by Justice Scalia in the plurality opinion as being the ‘most implausible of all’ in which to find the sweeping assertion of jurisdiction over ephemeral channels.” *Id.* at 613. While the court focused primarily on the plurality’s test and local precedent, it did conclude, in a footnote, that the United States did not establish a “significant nexus” with “competent summary judgment evidence.” *Id.* at 615, n.15.

A panel of the U.S. Court of Appeals for the Ninth Circuit issued the next post-*Rapanos* opinion that misreads *Rapanos* in *Northern Cal. River Watch v. City of Healdsburg*.<sup>42</sup> The case involved a challenge to the discharge of sewage by the city of Healdsburg into Basalt Pond, which is adjacent to the traditionally navigable Russian River.<sup>43</sup> The Court concluded that the Pond itself and surrounding areas were wetlands adjacent to the Russian River.<sup>44</sup> While that should have ended the analysis according to *Riverside Bayview Homes*, the *Healdsburg* panel held that “the mere adjacency” of the wetlands to the traditional navigable water was not sufficient to establish jurisdiction under the Clean Water Act.<sup>45</sup> While the panel held that Justice Kennedy’s opinion was the “controlling opinion” in *Rapanos*, they misread his opinion to require that a significant nexus to a traditional navigable water must be demonstrated in every case to establish jurisdiction over a body of water. In his *Rapanos* concurrence, Justice Kennedy clearly argued that the Corps’ regulation of wetlands adjacent to traditional navigable waters was valid without any additional need to demonstrate a significant nexus on a case-by-case basis.<sup>46</sup>

Shortly after the Ninth Circuit panel issued its *Healdsburg* decision, the Seventh Circuit issued its opinion in *United States v. Gerke*.<sup>47</sup> The *Gerke* court cited *Marks v. U.S.* as support for its conclusion that Justice Kennedy’s significant nexus test should govern the determination of the scope of waters of the United States.<sup>48</sup> The *Gerke* court’s ruling comes closer to the correct reading of the *Rapanos* opinions outlined above than *Chevron Pipe Line* or *Healdsburg*, in that the court also recognized that a majority of the current Supreme Court would uphold jurisdiction over waters that have a continuous surface water connection to a traditional navigable water even without a demonstration that a significant nexus exists between the waters and the traditional navigable water,<sup>49</sup> but the court did not adopt that as an alternative test for jurisdiction.

The First Circuit, though, correctly interpreted the *Rapanos* opinions in the recent *United States v. Johnson* ruling.<sup>50</sup> The court attempted to apply the *Marks* test suggested by the Chief Justice’s opinion in *Rapanos*, but recognized that application of *Marks* “has proven troublesome . . . for the Supreme Court itself and for the lower courts,”<sup>51</sup> and that the Supreme Court has moved away from *Marks*.<sup>52</sup> The Court examined several different approaches that courts have used to determine the

<sup>42</sup> *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006).

<sup>43</sup> *Id.* at 1025.

<sup>44</sup> *Id.* at 1027-28.

<sup>45</sup> *Id.* at 1028-30.

<sup>46</sup> *Rapanos v. U.S.*, 126 S. Ct. 2208, 2248 (2006) (plurality opinion) (Kennedy, J., concurring).

<sup>47</sup> *U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006).

<sup>48</sup> *Id.* at 724 (citing *Marks v. U.S.*, 430 U.S. 188, 193 (1977)).

<sup>49</sup> *Id.* at 724-5.

<sup>50</sup> *U.S. v. Johnson*, 467 F.3d 56 (1st Cir. 2006).

<sup>51</sup> *Id.* at 62.

<sup>52</sup> *Id.* at 65.

“narrowest ground” for decision under *Marks*, but concluded that none of the potentially conflicting approaches made sense when applied to the *Rapanos* opinions.<sup>53</sup> Consequently, the court adopted the approach suggested by Justice Stevens’ dissenting opinion and held that “the federal government can establish jurisdiction . . . if it can meet either the plurality’s or Justice Kennedy’s standard.”<sup>54</sup> The court then remanded the case to the lower court for additional fact-finding to determine whether either test was met.<sup>55</sup>

### III. RULEMAKING VERSUS THE ALTERNATIVES

At this time, the Corps and EPA prefer to address the confusion caused by the *Rapanos* decision through guidance, rather than through rulemaking or case-by-case adjudication. This makes sense for all of the traditional reasons that agencies often prefer to make policy through guidance, rather than rulemaking or case-by-case adjudication. First, because fewer procedures are required by law for the development of guidance, agencies can adopt policies (and change policies) more quickly and at a lower cost through guidance than through rulemaking.<sup>56</sup> As with rulemaking, agencies can ensure some level of uniformity and consistency in interpretation of a statute by issuing

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<sup>53</sup> *Id.* at 62-64. As the court recognized, if Justice Kennedy’s test were viewed as the single controlling test for jurisdiction, “there would be a bizarre outcome—the court would find no federal jurisdiction even though eight Justices (the four members of the plurality and the four dissenters) would all agree that federal authority should extend to such a situation.” *Id.* at 64.

<sup>54</sup> *Id.* at 66. The court determined that Stevens’ approach “provides a simple and pragmatic way to assess what grounds would command a majority of the Court.” *Id.* at 64. The court recognized that at least one other court, the D.C. Circuit, had rejected the “head counting” approach as a means of applying *Marks*, but the court distinguished that case on the grounds that it was not possible for the D.C. Circuit to use the “head counting” approach to find any majority from the precedent in that case. *Id.* at 64-65. The Court also noted that “[s]ince *Marks*, several members of the Court have indicated that whenever a decision is fragmented such that no single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority of the court has embraced.” *Id.* at 65.

<sup>55</sup> *Id.* at 66.

<sup>56</sup> Interpretive rules and general statements of policy are exempt from the notice and comment procedures that apply to informal rulemaking, 5 U.S.C. § 553(b). In fact, the Administrative Procedures Act (APA) does not require agencies to provide any opportunities for public participation in the development of guidance documents. The APA does, however, require agencies to publish some guidance documents in the Federal Register and to make other guidance documents that are not published in the Federal Register available for public inspection and copying, 5 U.S.C. § 552(a)(1)-(2).

guidance, as opposed to interpreting the statute on a case-by-case basis in adjudication.<sup>57</sup> Similarly, as with rulemaking and unlike case-by-case adjudication, agencies can provide advance notice to the regulated community regarding their interpretation of the law through guidance.<sup>58</sup> Most importantly, though, agencies often prefer to adopt policies through guidance as opposed to rulemaking or case-by-case adjudication because it is much more difficult for persons to challenge the policies in court or administrative fora when they are adopted through guidance.<sup>59</sup> While all of those are good reasons for the Corps and EPA to prefer to clarify the impact of the *Rapanos* opinions through guidance rather than rulemaking, it would be inadvisable for the agencies to simply rely on guidance.

Although the Corps and EPA may prefer to interpret *Rapanos* through guidance rather than rulemaking in order to limit the potential for litigation, the agencies could face litigation regarding a decision to proceed through guidance rather than rulemaking. The Pacific Legal Foundation (PLF) has petitioned the agencies to amend their regulations defining waters of the United States and adopt the *Rapanos* plurality's definition of the term.<sup>60</sup> If the agencies ultimately deny the petition, PLF could

<sup>57</sup> William Funk, A PRIMER ON NONLEGISLATIVE RULES, 53 ADMIN. L. REV. 1321, 1323 (2001). Through guidance, agencies can notify regional staff about the agencies' interpretation of the law and the regional staff can interpret the law consistently. However, uniformity is not guaranteed, because guidance documents are not binding, as discussed later in this essay. In fact, if agency staff treat guidance as binding, courts are likely to strike down the application of the guidance. Normally, though, agency staff will apply guidance consistently. Further, the public often treat guidance as binding, even though it isn't. Agencies cannot achieve the same level of uniformity and consistency by relying on regional staff to interpret the law through case-by-case adjudication without guidance.

<sup>58</sup> *Id.* As noted above, the APA requires agencies to publish or make available many guidance documents. 5 U.S.C. § 552(a)(1)-(2). While the APA and other federal laws, like the Information Quality Act, impose broader notice requirements on rulemaking than on guidance, the notice requirements for guidance in those laws are still broader than the notice requirements for adjudication. In addition, although there is little opportunity for public involvement in the *development* of guidance under the APA or other federal laws, agencies can provide clearer statements of their interpretation of law through guidance than through case-by-case adjudication, when the agency's pronouncements are tied more closely to the facts of the adjudication. More significantly, agencies can provide those statements before the law is applied, which is not the case with adjudication in the absence of guidance.

<sup>59</sup> See Funk, *supra* note 55, at 1335 (explaining that it is often difficult to challenge agency guidance until it is applied, either because the guidance is not "final agency action," because challenges to the guidance are not ripe, or because there is no statute that provides jurisdiction for review of the guidance).

<sup>60</sup> Pacific Legal Foundation, *Petition for Rulemaking Under Administrative Procedure Act to Amend Regulatory Definition of "Waters of the United States" as found in 33 C.F.R. § 328.3* (Sept. 25, 2006), available at <http://rapanos.typepad.com/ProposedRules.pdf> (last visited October 30, 2006). Although the Clean Water Act does not include a provision that authorizes persons to petition EPA to amend its regulations, the Administrative Procedures Act requires federal agencies to "give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). It also requires that "[p]rompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial." 5 U.S.C. § 555(e).

challenge the denial in court.<sup>61</sup> To the extent, therefore, that the agencies are motivated, in deciding between proceeding by guidance versus rulemaking, by considerations of potential litigation, the agencies may not be able to avoid litigation simply by choosing to avoid rulemaking.<sup>62</sup>

There are other, more important reasons, why rulemaking may be preferable to guidance. First, Justices supporting the plurality, concurring, and dissenting opinions in *Rapanos* each stressed the importance of clarifying the scope of waters of the United States through a new rulemaking. Chief Justice Roberts chided the agencies for failing to amend their regulations after the *SWANCC* decision, suggesting that the “defeat” for the agencies in *Rapanos* could have been avoided if they had amended their regulations.<sup>63</sup> Justice Breyer, in dissent, argued that courts will be required to make ad hoc determinations that could turn “scientific questions into matters of law,” so he urged the Corps to “write new regulations, and speedily so.”<sup>64</sup> Finally, Justice Kennedy, in his concurring opinion, suggested that the Corps could avoid having to make case-by-case determinations regarding whether a significant nexus exists between a body of water and a traditional navigable water by issuing regulations that define classes of waters<sup>65</sup> that have that nexus, such as wetlands adjacent to “major tributaries” or wetlands adjacent to certain classes of non-navigable tributaries, as waters of the United States.<sup>66</sup> If the significant nexus test is the controlling test after *Rapanos*, it will be

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<sup>61</sup>The Administrative Procedure Act provides that final agency actions are subject to judicial review. 5 U.S.C. § 704. The decision of EPA and the Corps to deny PLF’s petition to amend the agencies’ regulations would constitute a final agency action, which would most likely be reviewable in federal district court. See 28 U.S.C. § 1331 (stating that district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States).

<sup>62</sup>The focus of the litigation will be different and narrower when the agencies are defending their decision to decline to adopt the rules suggested by PLF than it would be if the agencies were defending amendments to the rules that define waters of the United States under the Clean Water Act.

<sup>63</sup>*Rapanos v. U.S.*, 126 S. Ct. 2208, 2236 (2006) (plurality opinion) (Roberts, C.J., concurring).

<sup>64</sup>*Id.* at 2266 (Breyer, J., dissenting).

<sup>65</sup>As long as the majority of waters in the classes identified in regulations have a “significant nexus” to traditional navigable waters, the regulations should be valid even though individual waters within the class may lack that significant nexus. In upholding the Corps’ regulation of adjacent wetlands in *Riverside Bayview Homes*, the Supreme Court recognized that:

[I]t may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps’ decision to define all adjacent wetlands as “waters.” If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps’ definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

*U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 135 n.9 (1985).

<sup>66</sup>*Rapanos*, 126 S. Ct. at 2248-49 (Kennedy, J., concurring).

very time-consuming for the Corps and EPA to interpret that test on a case-by-case basis without rulemaking, and could exacerbate the problem of inconsistent jurisdictional determinations that has arisen post-SWANCC.<sup>67</sup>

In addition, rulemaking provides many other traditional advantages over guidance or case-by-case adjudication. The notice and comment procedures that would apply to the amendment of the regulatory definition of waters of the United States allow a broader range of public participation in the development of the amendments than would be possible through the development of guidance or case-by-case adjudication.<sup>68</sup> Further, unlike guidance, rules will have the force of law. Thus, agencies will not have to justify the rationale behind the rules in each case in which they are applied, whether in enforcement or permitting procedures. Most importantly, though, rules adopted through notice and comment rulemaking should be entitled to *Chevron* deference, whereas guidance is not likely to be accorded such deference by a reviewing court.

The plurality and dissenting justices all applied the *Chevron* framework in *Rapanos* and only disagreed on the outcome because the plurality felt that the statute was not ambiguous. The Chief Justice, in his concurrence, stressed that if the Corps had amended its regulatory definition of waters of the United States after SWANCC, the interpretation would have been entitled to “generous” deference under *Chevron*, since the statute clearly delegated the agency authority to define the scope of waters of the United States.<sup>69</sup> Justice Breyer, in his dissent, stressed that “if one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart” of defining waters of the United States, and that those judgments are entitled to deference under *Chevron*.<sup>70</sup> Although Justice Kennedy did not frame his *Rapanos* concurrence in *Chevron* terms, he appeared to be more concerned with the form of the Corps’ decision than the substance.<sup>71</sup> If the Corps adopted regulations that implemented Kennedy’s significant nexus test, he would likely join with the dissenters to conclude, at *Chevron* step one, that the agency’s regulations

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<sup>67</sup> See GAO REPORT, *supra* note 6 (finding that, post-SWANCC, district offices of the Corps applied different approaches to determine whether wetlands were subject to jurisdiction under the Clean Water Act and that few districts make documentation of their practices for making jurisdictional determinations publicly available).

<sup>68</sup> EPA and the Corps received approximately 133,000 comments from state agencies, national development organizations, environmental groups, and other parties when the agencies issued their advance notice of proposed rulemaking after the SWANCC decision. *Id.* at 14.

<sup>69</sup> *Rapanos*, 126 S. Ct. at 2235-36 (Roberts, C.J., concurring). The Chief Justice’s comments are somewhat confusing, however, in light of the fact that he joins the plurality in suggesting that the Corps’ interpretation clearly violates the plain meaning of the statute. Presumably, therefore, if the Corps had adopted their interpretation through a rulemaking, the Court would have invalidated the rules at *Chevron* step one, so that the agency would *not* be entitled to “generous deference.” *Id.*

<sup>70</sup> *Id.* at 2266 (Breyer, J., dissenting).

<sup>71</sup> The plurality notes that “Justice Kennedy tips a wink at the agency, inviting it to try its same expansive reading again.” *Id.* at 2235.

were clearly in accord with the statute or, at step two, that the statute was ambiguous but that the agency's regulations were a reasonable interpretation of the statute.<sup>72</sup>

If the Corps and EPA choose to clarify the *Rapanos* ruling through regulation, rather than guidance, the amended rules would be entitled to *Chevron* deference despite the Supreme Court's recent decision in *National Cable & Telecomms. Assoc. v. Brand X Internet Servs.*<sup>73</sup> The *Brand X* Court held that a court's prior judicial construction of a statute can trump an agency construction otherwise entitled to *Chevron* deference, but "only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."<sup>74</sup> However, since there was no majority opinion in *Rapanos*, there is no "prior judicial construction" to trump *Chevron* deference.<sup>75</sup>

On the other hand, if the Corps and EPA choose to clarify the *Rapanos* ruling through guidance, rather than rulemaking, the guidance would *not* be entitled to *Chevron* deference. Generally, policy statements, agency manuals, and enforcement guidelines, "all of which lack the force of law," are entitled to less deference than rules adopted through notice and comment rulemaking.<sup>76</sup> The amount of deference that such an interpretation receives, according to the Supreme Court's decision in *Skidmore v. Swift*, depends on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."<sup>77</sup> As the Court noted in *United States v. Mead Corp.*, "[that] approach has produced a spectrum of judicial responses, from great respect at one end ... to near indifference at the other."<sup>78</sup>

While the Supreme Court, in *Auer v. Robbins*, suggested that an agency's guidance may be entitled to a level of deference equal to or greater than *Chevron* when the guidance is interpreting

<sup>72</sup> If, on the other hand, the Corps and EPA ignore the significant nexus limit and adopt regulations that assert jurisdiction over a broader category of waters, the agencies would likely lose Justice Kennedy's vote. If Justice Kennedy were to review such amended regulations under *Chevron*, he would likely conclude that the rules were invalid at step one, since the statute clearly imposes a significant nexus requirement.

<sup>73</sup> *Nat'l Cable & Telecomms. Assoc. v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

<sup>74</sup> *Id.* at 2700.

<sup>75</sup> If Justice Scalia's opinion had garnered one more vote, it would have limited the Corps' discretion on remand as Justice Scalia clearly stated in the opinion that his interpretation of the statute was the "only plausible interpretation." *Rapanos*, 126 S. Ct. at 2225.

<sup>76</sup> *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Two subsequent cases, *Barnhart v. Walton*, 535 U.S. 212 (2002), and *U.S. v. Mead Corp.*, 533 U.S. 218 (2001), have created some confusion regarding whether interpretive rules, guidance documents or policy statements should be afforded *Chevron* deference when the agency has been delegated authority to interpret the statute in a manner that has the force of law, but the Court reaffirmed *Christensen* in *Alaska Dep't of Env'l Conservation v. EPA*. See *Alaska Dep't of Env'l Conservation v. EPA*, 540 U.S. 461, 487-88 (2004) (refusing to grant *Chevron* deference to an EPA guidance memo interpreting the Clean Air Act).

<sup>77</sup> *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

<sup>78</sup> *U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001).

the agency's own regulation,<sup>79</sup> courts are not likely to grant such deference to the agency when the regulation that the agency is interpreting through guidance is invalid.<sup>80</sup> Thus, to the extent that the *Rapanos* opinions undercut the validity of the Corps and EPA's existing regulatory definition of waters of the United States, the agencies will not be able to rely on *Auer* deference for guidance that interprets the *existing* regulations.<sup>81</sup> If, on the other hand, the agencies amend their regulations to conform with the post-*Rapanos* interpretation of the Clean Water Act, guidance that the agencies issue to interpret ambiguities in the new regulations could be entitled to *Auer* deference.<sup>82</sup> As discussed further below, the agencies could potentially maximize the deference accorded to their interpretation of the Clean Water Act by amending their regulations to incorporate the significant nexus test, which regulations would be entitled to *Chevron* deference, and interpreting the significant nexus requirement through guidance, which could be entitled to *Auer* deference.

Many environmental groups oppose the rulemaking alternative because they fear that the Corps and EPA will be more likely to reduce the scope of jurisdiction over waters if they adopt regulations to clarify *Rapanos* than if they adopt guidance to clarify the decision.<sup>83</sup> When the Corps and EPA issued an advance notice of proposed rulemaking to clarify the *SWANCC* decision, almost all of the comments on the proposal opposed amendment of the agencies' regulations.<sup>84</sup>

Clearly, a legislative fix would be preferable to regulation, guidance, or case-by-case adjudication. However, Congress is unlikely to amend the Clean Water Act to adopt the Corps and

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<sup>79</sup> In *Auer*, the Court held that an agency's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). Courts have afforded *Auer* deference to an agency's interpretation of its own regulations even when the interpretation is merely advanced in litigation and was not articulated in a guidance document or other interpretive rule. *Auer* deference is only warranted, however, when the agency's regulation is ambiguous. *Christensen*, 529 U.S. at 588.

<sup>80</sup> While some commentators questioned whether *Auer* remained good law after *U.S. v. Mead Corp.*, the Supreme Court reaffirmed, but narrowed *Auer* in *Gonzales v. Or.*, when it held that an agency's interpretation of its own regulations is not entitled to *Auer* deference when the regulation merely restates the language of the statute that the agency is charged with administering. *Gonzales v. Or.*, 126 S. Ct. 904, 915 (2006).

<sup>81</sup> Similarly, while *Auer* deference might normally be accorded to an agency's interpretation of an ambiguous regulation in the course of case-by-case adjudication, it should not be accorded to that interpretation when the underlying regulation is invalid.

<sup>82</sup> Some commentators have criticized this approach, which could encourage agencies to adopt legislative rules consisting of "mush." John F. Manning, NONLEGISLATIVE RULES, 72 GEO. WASH. L. REV. 893, 944 (2004). As Justice Scalia noted in his dissent in *United States v. Mead Corp.*, "Agencies will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect." *Mead Corp.*, 533 U.S. at 246.

<sup>83</sup> *Hearing*, *supra* note 16 (statement of William W. Buzbee, Dir., Env'tl. and Nat. Res. Law Program, Emory Law School).

<sup>84</sup> See GAO REPORT, *supra* note 6 at 14 (noting that EPA reported that 99% of the 133,000 comments submitted on the advance notice of proposed rulemaking were opposed to a new rule).

EPA's existing regulatory definition of waters of the United States in the near future. Accordingly, the agencies are left to choose between regulation, guidance, and case-by-case adjudication. While it may have made sense to avoid a rulemaking response to *SWANCC*, despite the Chief Justice's statements to the contrary, the post-*Rapanos* landscape is much different than the post-*SWANCC* landscape. After *SWANCC*, it was possible to argue that the Court simply invalidated the migratory bird test and that the Corps and EPA could continue to regulate all other waters covered by the agencies' regulations, including isolated waters if there were bases other than the migratory bird test upon which jurisdiction could be asserted. Further, most of the post-*SWANCC* judicial opinions supported a narrow reading of the case and continued broad jurisdiction over waters of the United States.

That is simply not the case after *Rapanos*. Although the Corps and EPA may ultimately be able to regulate waters almost as broadly as they did prior to the case, the terminology that the agencies must use and the bases that they must articulate for regulating those waters have changed much more dramatically than post-*SWANCC*.<sup>85</sup> To the extent that the *Rapanos* ruling imposes a significant nexus limit on regulation of waters or a limit based on the plurality's approach, the agencies' existing regulations are overbroad in asserting jurisdiction over all interstate waters; isolated, intrastate waters (the use, degradation or destruction of which could affect interstate or foreign commerce); tributaries of traditional navigable waters; interstate waters and isolated waters; and wetlands adjacent to all of those waters without regard to whether the waters meet the significant nexus or plurality's tests.<sup>86</sup> The *Rapanos* decision does much more to weaken the agencies' regulatory definition of waters of the United States (and tributaries) than *SWANCC* did.

Furthermore, it is unlikely that courts will adopt uniform and consistent interpretations of *Rapanos* that support broad jurisdiction under the Corps and EPA's existing regulations as courts did after *SWANCC*. The initial decisions demonstrate the confusion that is likely to increase exponentially. The post-*Rapanos* landscape is, in short, much less friendly towards the agencies than the post-*SWANCC* landscape. While the agencies could rely on the courts to uphold broad regulation of waters under their existing regulations post-*SWANCC*, it is much less likely that they will be able to turn to the judiciary for an ally post-*Rapanos*.

If the Corps and EPA were to adopt amendments to the regulatory definition of waters of the United States, what would the amendments look like? Two approaches are possible. One approach would be to simply adopt the language of the *Rapanos* opinions as the regulatory definition. Thus,

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<sup>85</sup> On the other hand, it may be that *Rapanos* is simply clarifying that the *SWANCC* decision was broader than the agencies interpreted it. After all, Justice Kennedy's significant nexus test was first articulated in the *SWANCC* majority opinion.

<sup>86</sup> However, if the Corps and EPA can demonstrate that a *majority* of the waters within each class of waters regulated under the existing regulations have a significant nexus to traditional navigable waters, the regulation of each class would be justified under the Clean Water Act, even though individual waters within the class may lack the significant nexus. *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 135 n.9 (1985).

the term would be defined to include: (1) traditional navigable waters (i.e. waters that are navigable in fact); (2) waters that have a significant nexus to traditional navigable waters; or (3) relatively permanent, standing or continuously flowing bodies of water that have a continuous surface water connection to traditional navigable waters. The significant nexus test could then be elaborated upon through guidance that focuses on the statutory water quality goals and functions identified in Justice Kennedy's opinion, including, but not limited to, pollutant trapping, flood control, and runoff storage.<sup>87</sup> The regulation would be entitled to *Chevron* deference and the guidance, interpreting the vague significant nexus requirement in the regulation, could be entitled to *Auer* deference.

Alternatively, the agencies could try to identify some of the categories of waters that have a significant nexus to traditionally navigable waters and define waters of the United States to include: (1) traditional navigable waters; (2) major tributaries of traditional navigable waters; (3) wetlands that are adjacent to traditional navigable waters or adjacent to major tributaries of traditional navigable waters; (4) wetlands that have a continuous surface water connection to traditional navigable waters; (5) relatively permanent, standing or continuously flowing bodies of water that have a continuous surface water connection to traditional navigable waters; and (6) other waters that have a significant nexus to traditional navigable waters. The agencies could define major tributaries, relying on Justice Kennedy's opinion, and retain the current definition of adjacency.<sup>88</sup> Once again, the significant nexus requirement could be fleshed out with guidance that could be entitled to *Auer* deference.

## CONCLUSION

Clearly, any amendment of the agencies' regulations will spawn litigation and perpetuate the uncertainty regarding the scope of federal jurisdiction over waters of the United States. However, the Corps and EPA will be unlikely to avoid litigation over their interpretation of *Rapanos* if the interpretation is adopted through either guidance or case-by-case adjudication, as the interpretation

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<sup>87</sup> *Rapanos v. U.S.*, 126 S. Ct. 2208, 2248 (2006) (plurality opinion) (Kennedy, J., concurring) (emphasis added). Justice Kennedy also stresses that when determining whether waters have a significant nexus to traditional navigable waters one must examine whether the waters "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.'" *Id.* (emphasis added).

<sup>88</sup> The Corps defines "adjacent" as "bordering, contiguous, or neighboring" and specifies that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" Navigation and Navigable Waters, 33 C.F.R. § 328.3(c) (2006). Justice Kennedy, in his concurring opinion, concluded that the Corps' definition of adjacency is reasonable, and that a surface water connection is not required for adjacency. *Rapanos*, 126 S. Ct. at 2245-2246 (Kennedy, J., concurring). Similarly, the dissent found that the definition was reasonable, and stressed that the Supreme Court had previously upheld the definition in *Riverside Bayview Homes, Id.* at 2263 (Stevens, J., dissenting).

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will be challenged when the agencies ultimately apply it to deny a permit or bring an enforcement action. The use of guidance or case-by-case adjudication to interpret *Rapanos* will also perpetuate the uncertainty regarding jurisdiction. Since Congress is unlikely to amend the Clean Water Act to affirm the agencies' existing regulations in the near future, a rulemaking narrowly tailored to the tests of Justice Kennedy and the plurality provides significant advantages over guidance and case-by-case adjudication when the agencies' interpretations are ultimately challenged in court. In the absence of legislation, it may be the agencies' best hope for a broad interpretation of the Clean Water Act.

# Any Hope for Happily Ever After? Reflections on *Rapanos* and the Future of the Clean Water Act Section 404 Program

Kim Diana Connolly\*

## I. A FAIRY TALE<sup>1</sup> INTRODUCTION

Once upon a time,<sup>2</sup> the rulers of the land<sup>3</sup> gave the United States Army Corps of Engineers (“Corps”)<sup>4</sup> important responsibilities to help protect the people of the land.<sup>5</sup> This was so long ago that the Corps went by the name “Corps of Artillerists and Engineers of the Department of War.”<sup>6</sup>

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<sup>1</sup> At first I believed my daily dose of fairy tales and other children’s literature in connection with my two wonderful offspring, Tayte and Simon, inspired this fanciful introduction to this essay. Yet on further reflection I believe my years of observing the realm of Section 404 permitting has led me to conclude that it is well suited to rendition as an imaginary land peopled with whimsical characters.

<sup>2</sup> See U.S. Army Corps of Engineers Regulatory Program, *Summary of History*, <http://www.usace.army.mil/cw/cecwo/reg/reghist.pdf> (last visited Feb. 9, 2007) (stating that the Rivers and Harbors Act, 33 U.S.C. §§ 401–467n, was “the first general legislation giving the Corps jurisdiction and authority over the protection of navigable waters.”).

<sup>3</sup> For purposes of this essay, the “rulers of the land” are the Senators and Representatives of the United States Congress. The “deciders of the land” are the courts that make up the United States judicial system. *Cf.* Terence Hunt, *Bush, ‘The Decider,’ Vows More Changes*, ABC NEWS, Apr. 18, 2006, <http://www.abcnews.go.com/Politics/wireStory?id=1856539> (last visited Feb. 9, 2007) (“I hear the voices and I read the front page and I know the speculation,’ [President George W. Bush] said testily. ‘But I’m the decider and I decide what’s best...””).

<sup>4</sup> The main United States Army Corps of Engineers website is located at <http://www.usace.army.mil/> (last visited Feb 9, 2007).

<sup>5</sup> This authority came from the Rivers and Harbors Act of 1899 and its precursors. Rivers and Harbors Act of 1899, Ch. 425, 30 Stat. 1121 (1899) (codified as amended at 33 U.S.C. §§ 401-418 (2000)). See also Rivers and Harbors Appropriations Act of 1886, Ch. 929, 24 Stat. 310, 329 (1886); Rivers and Harbors Appropriations Act of 1890, Ch. 907, 26 Stat. 426 (1890); River and Harbor Act of 1894, Ch. 299, 28 Stat. 338, 363 (1894); River and Harbor Appropriations Act of 1896, Ch. 314, 29 Stat. 202, 234 (1896).

<sup>6</sup> See U.S. Army Corps of Engineers, *History Publications*, <http://www.hq.usace.army.mil/history/pubs.htm> (last visited Feb 9, 2007) (“In 1794, Congress organized a Corps of Artillerists and Engineers, but it was not until

It came to pass that the great deciders of the land determined that protecting the people required protecting navigable waters of the land.<sup>7</sup> Accordingly, the rulers of the land eventually passed a new law expanding the Corps' responsibilities to protect the people and navigable waters of the land.<sup>8</sup> This new law made it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure [sic] within the limits of any breakwater, or of the channel of any navigable water" without a Corps permit.<sup>9</sup> As the decades passed, sometimes certain people disagreed with the way the Corps was implementing its responsibility under this new law,<sup>10</sup> but the rulers of the land didn't take that responsibility away.

For many decades thereafter, Corps personnel worked hard at their assigned task of protecting these navigable waters.<sup>11</sup> After a few generations passed, the understanding and beliefs of the people of the land underwent a transformation. They realized that much of the land on which

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1802 that it reestablished a separate Corps of Engineers."); *see generally* U.S. Army Corps of Engineers, *U.S. Army Corps of Engineers Brief History*, <http://www.hq.usace.army.mil/history/brief.htm#1beg> (last visited Feb 9, 2007).

<sup>7</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824); *The Daniel Ball*, 77 U.S. 557 (1871); *U.S. v. The Montello*, 87 U.S. 430 (1874).

<sup>8</sup> The full text of Section 10 of the Rivers and Harbors Act reads: "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure [sic] within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." 33 U.S.C. § 403 (2000). The Corps' current regulations state in relevant part that "[t]he U.S. Army Corps of Engineers has been involved in regulating certain activities in the nation's waters since 1890." 33 C.F.R. § 320.1(a)(1) (2006).

<sup>9</sup> *Id.*

<sup>10</sup> *See generally* William Andreen, *The Evolution of Water Pollution Control in the United States: State, Local and Federal Efforts, 1789 - 1972: Part II*, 21 STAN. ENVTL. L.J. 215-294 (2003); William Andreen, *The Evolution of Water Pollution Control in the United States: State, Local and Federal Efforts, 1789-1972: Part I*, 21 STAN. ENVTL. L.J. 145-200 (2003).

<sup>11</sup> As much disagreement as I have at times with Corps Headquarters-level (and higher) decisions, I have the utmost respect for most Corps employees working in the field for the regulatory program. I have formed these views, in part, through annual opportunities for extended discussions with different members of the Corps regulatory staff from around the country, by serving as an instructor for the PROSPECT course Environmental Laws and Regulations since 1998. *See* USACE Learning Center, ENVIRONMENTAL LAWS & REGULATIONS (Control Number: 170, Course Number: 33ELR01A), available at <http://pdsc.usace.army.mil/CourseListDetail.aspx?CtrlNbr=170> (last visited Feb 9, 2007); Environmental Partners, [www.environmentalpartners.net/](http://www.environmentalpartners.net/) (last visited Feb 9, 2007).

they lived, the air that they breathed, and the waters (including the navigable waters that the Corps had been charged with protecting) that they used had become unclean.<sup>12</sup>

At the same time, the people of the land had come to understand that the environment, including the waters of the land and the land nearby those waters, was important for many reasons.<sup>13</sup> These waters supported clean drinking water, reduced flood events, provided habitat for many non-human creatures, supplied opportunities for leisure and amusement, and were beautiful.<sup>14</sup>

And so the people sought to generate a new ethos of caring for the environment.<sup>15</sup> The rulers of the land listened, and created inventive ways to protect the environment through various new laws.<sup>16</sup>

<sup>12</sup> See generally Senator Gaylord Nelson, *How the First Earth Day Came About*, <http://earthday.envirolink.org/history.html> (last visited Feb. 9, 2007) (noting that during the early and mid-1960's in nationwide speeches, he determined that "[a]ll across the country, evidence of environmental degradation was appearing everywhere, and everyone noticed except the political establishment. The environmental issue simply was not to be found on the nation's political agenda. The people were concerned, but the politicians were not."); U.S. Environmental Protection Agency, *History – Earth Day*, <http://epa.gov/history/topics/earthday/index.htm> (last visited Feb. 9, 2007). See also ROBERT W. ADLER, JESSICA C. LANDMAN AND DIANE M. CAMERON, *THE CLEAN WATER ACT 20 YEARS LATER* 5-7 (1993).

<sup>13</sup> See, e.g., JOHN AND MILDRED TEAL, *LIFE AND DEATH OF THE SALT MARSH* (1969).

<sup>14</sup> See generally NAT'L ACAD. OF SCIENCES, NAT'L RESEARCH COUNCIL, *WETLANDS: CHARACTERISTICS AND BOUNDARIES* (1995), available at <http://www.nap.edu/books/0309051347/html/index.html> (last visited Feb. 9, 2007); U.S. Army Corps of Engineers, *Technical and Biological Information*, available at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/techbio.htm> (last visited Feb. 9, 2007); U.S. Evtl. Prot. Agency, *Functions and Values*, available at <http://www.epa.gov/owow/wetlands/functions.html> (last visited Feb. 9, 2007); Iowa Dept. of Agric., Soil Conservation Serv., *Iowa Wetland Restoration and Conservation Plan, Chapter 4: Functions and Values of Wetlands and Riparian Areas*, available at <http://www.ag.iastate.edu/centers/iawetlands/download.html> (last visited Feb. 9, 2007). See also Brief of Ecological Society of America, Society of Wetland Scientists, American Society of Limnology and Oceanography, and Estuarine Research Federation As Amici Curiae in Support of Respondents, *Rapanos v. United States*, *Carabell v. United States Army Corps Of Engineers*, 126 S. Ct. 2208 (2006) (Nos. 04-1034, 04-1384), Supreme Court of The United States, Jan. 13, 2006, available at <http://www.eswr.com/1105/rapanos/rapamicesa.pdf> (last visited Feb. 9, 2007).

<sup>15</sup> See Library of Congress, *Today in History: April 22 – Earth Day*, <http://memory.loc.gov/ammem/today/apr22.html> (last visited Feb. 9, 2007), *Earth Day History*, <http://www.themesh.com/abouted.html> (last visited Feb. 9, 2007). One scholar reported that "[o]n August 31, [1970] Senator Ted Stevens of Alaska complained: 'Suddenly out of the woodwork come thousands of people talking about ecology.'" Jack Lewis, *The Birth of EPA*, *EPA JOURNAL*, Nov. 1985, available at <http://www.epa.gov/history/topics/epa/15c.htm> (last visited Feb. 9, 2007).

<sup>16</sup> See generally RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (Univ. Chicago 2004). See also Natural Res. Def. Council, *E-law: What Started It All?*, available at <http://www.nrdc.org/legislation/helaw.asp> (last visited Feb. 9, 2007); William Andreen, *The Evolving Law of Environmental Protection in the United States: 1970-1991*, 9 *ENVTL. AND PLANNING L.J.* 96 (1992).

One of these new laws, which came to be known as the Clean Water Act,<sup>17</sup> gave even more responsibility to the Corps in terms of protecting the waters of the land.<sup>18</sup> This responsibility was shared with a newcomer to the land, the United States Environmental Protection Agency (EPA).<sup>19</sup> Together, the Corps and EPA<sup>20</sup> tried to protect the waters as the rulers had directed by creating a permit process for discharges of dredged or fill materials into newly defined “navigable waters.”<sup>21</sup> As before, sometimes certain people did not think these agencies were properly implementing the directives from the rulers of the land.<sup>22</sup> Nevertheless, the Corps and EPA came to deal with a multitude of the inhabitants of the land every year<sup>23</sup> who wanted to do things on their property that might impact the waters of the land.

But the voices of those who thought the Corps was not doing a good job (often for different reasons) have continued to roar, and much time has been invested fighting about whether the Corps (and EPA) were correctly following the directions from the rulers of the land under Clean Water Act Section 404.<sup>24</sup> These battles have been on many fronts, including what activities the Corps could

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<sup>17</sup> Pub. L. No. 92-500, 86 Stat. 816 (1972), as codified in 33 U.S.C. §§ 1251-1387 (2000), further amended in Pub. L. No. 95-217, 91 Stat. 1567 (1977); Pub. L. No. 100-4, 101 Stat. 45 (1987).

<sup>18</sup> Specifically, Section 404 provided permitting authority to Secretary of the Army to “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.” 33 U.S.C. § 1344 (2000).

<sup>19</sup> The National Archives, *Records of the Environmental Protection Agency [EPA]*, <http://www.archives.gov/research/guide-fed-records/groups/412.html#412.1> (last visited Feb. 9, 2007).

<sup>20</sup> The EPA summarizes its role in Section 404 permitting as follows: “Develops and interprets policy, guidance and environmental criteria used in evaluating permit applications; Determines scope of geographic jurisdiction and applicability of exemptions; Approves and oversees State and Tribal assumption; Reviews and comments on individual permit applications; Has authority to prohibit, deny, or restrict the use of any defined area as a disposal site (Section 404(c)); Can elevate specific cases (Section 404(q)); Enforces Section 404 provisions.” U.S. Environmental Protection Agency, *Wetland Regulatory Authority*, available at [http://www.epa.gov/owow/wetlands/pdf/reg\\_authority\\_pr.pdf](http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf) (last visited Feb. 9, 2007).

<sup>21</sup> See *infra* notes 42-86 and accompanying text for discussion of the controversy surrounding the definition of “navigable waters” under the Clean Water Act.

<sup>22</sup> See, e.g., *Leslie Salt Co. v. Froehle* 578 F.2d 742 (9th Cir. 1978); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617 (8th Cir. 1979); *Avoyelles Sportsmen’s League, Inc. v. Alexander* 511 F. Supp. 278 (W.D. La. 1981), *aff’d in part and rev’d in part on other grounds*, 715 F.2d 897 (5th Cir. 1983); *Alma v United States*, 744 F. Supp. 1546 (S.D. Ga. 1990).

<sup>23</sup> U.S. Army Corps of Engineers, *Regulatory Statistics*, available at [http://www.usace.army.mil/cw/cecwo/reg/reg\\_stat.htm](http://www.usace.army.mil/cw/cecwo/reg/reg_stat.htm) (last visited Feb. 9, 2007).

<sup>24</sup> Administrative appeals are the most recent innovation through which permit applicants (and those seeking jurisdictional determinations) can seek redress for their grievances with the permitting process. Administrative Appeal Process Establishment for the Regulatory Program of the Corps of Engineers; Final Rule, 64 Fed. Reg. 11708 (Mar. 9, 1999); Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers, 65 Fed. Reg. 16486 (Mar. 28, 2000) (codified at 33 C.F.R. pt. 331 (2006)). The numbers of those seeking such appeals are low: less than one hundred typically are sought nationwide each year. See U.S. Army Corps of Engineers, Administrative Appeals Process, <http://www.usace.army.mil/cw/cecwo/reg/appeals.htm> (last visited Feb. 9, 2007). See generally KIM DIANA CONNOLLY, STEPHEN M. JOHNSON & DOUGLAS R. WILLIAMS, *WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404*, CH. 11, *The Administrative Appeals Process* (2005).

control,<sup>25</sup> what compensation should be required if waters of the land were impacted,<sup>26</sup> and exactly which land and waters the Corps could control.

It is this last battlefield that is the focus of this fairy-tale essay: exactly which waters of the land<sup>27</sup> did the rulers of the land mean for the Corps and EPA to defend? The battles about this subject have continued since passage of the Clean Water Act,<sup>28</sup> and those who depend on the waters (including many people of the land as well as other animal inhabitants)<sup>29</sup> are left in confusion and dismay.

In a traditional fairy tale, a knight or prince (or princess) of some sort would now undertake a brave quest or valiant battle and set things right, allowing the people of the land to live happily ever after.<sup>30</sup> However, as the more formal part of the essay below will explore, although the

<sup>25</sup> Under the Clean Water Act, permits only are required for “discharges” into navigable waters. 33 U.S.C. § 1344(a) (2000). Controversy about what “discharge” includes have been significant. See *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399 (D.C. Cir. 1998); *Borden Ranch P’ship v. U.S. Army Corps of Eng’rs*, 261 F.3d 810, 815 (9th Cir. 2001), *aff’d by an equally divided court*, 537 U.S. 99 (2002). For a detailed overview of the issue, see KIM DIANA CONNOLLY, STEPHEN M. JOHNSON & DOUGLAS R. WILLIAMS, *WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404*, CH. 4, *Regulated Activities* (2005).

<sup>26</sup> See *Env’tl. Prot. Agency, U.S. Army Corps of Engineers, and the U.S. Departments of Agric., Commerce, Interior, and Transp., Nat’l Wetlands Mitigation Action Plan* (Dec. 24, 2002), available at <http://www.mitigationactionplan.gov/map1226withsign.pdf> (last visited Feb. 9, 2007). See generally KIM DIANA CONNOLLY, STEPHEN M. JOHNSON & DOUGLAS R. WILLIAMS, *WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404*, CH. 8, *Mitigation* (2005).

<sup>27</sup> The Corps devotes an entire section of its portion of the Code of Federal Regulations to defining “waters of the United States.” 33 C.F.R. pt. 328 (“This section defines the term ‘waters of the United States’ as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act. It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning ‘waters of the United States.’ The terminology used by Section 404 of the Clean Water Act includes ‘navigable waters’ which is defined at Section 502(7) of the Act as ‘waters of the United States including the territorial seas.’ To provide clarity and to avoid confusion with other Corps of Engineer regulatory programs, the term ‘waters of the United States’ is used throughout 33 CFR Part 320-330.” 33 C.F.R. § 328.1 (2006)).

<sup>28</sup> See *infra* Part II.

<sup>29</sup> The direct role of wetlands in the wellbeing of people is perhaps best captured in the international arena. See Ramsar Convention on Wetlands, *World Wetlands Day, 2 February*, [http://www.ramsar.org/wwd/wwd\\_index.htm](http://www.ramsar.org/wwd/wwd_index.htm) (last visited Feb. 9, 2007) (for example, the 2007 focus of World Wetlands Day was fisheries, “in recognition of: \* the needs of the one billion people who rely on fish as their primary source of animal protein; [and] \* the state of the world’s fisheries where 75% of commercially important marine and most inland water fish stocks are either currently overfished or being fished at their biological limit, and where the effects of unsustainable aquaculture practices on wetland ecosystems are of growing concern.” [http://www.ramsar.org/wwd/7/wwd2007\\_index.htm](http://www.ramsar.org/wwd/7/wwd2007_index.htm) (last visited Feb. 9, 2007) and the 2006 focus of World Wetlands Day was livelihoods, with the Ramsar Secretary General noting that “[l]ivelihoods of wetland dependant [sic] people depend fully on water production and protection agriculture, livestock grazing, fisheries and handicraft industry - and inappropriate wetland management, unwise use, and of course droughts, can cause complete breakdown of the rural sustainable livelihoods, with poverty as a result.” [http://www.ramsar.org/wwd/6/wwd2006\\_atext3e.htm](http://www.ramsar.org/wwd/6/wwd2006_atext3e.htm) (last visited Feb. 9, 2007)).

<sup>30</sup> See generally *Marvels and Tales: Journal of Fairy Tale Studies, Index of Articles and Scholarship in Translation*, <http://www.langlab.wayne.edu/MarvelsHome/articles.html#w> (last visited Feb. 9, 2007).

next verse in the saga of our nation's waters remains unwritten, such a dénouement is unlikely, at least any time in the near future.

The truth of the matter is that the Corps, as the primary regulator of the waters of the United States under Clean Water Act Section 404,<sup>31</sup> processes tens of thousands of permits annually<sup>32</sup> and will have to continue to do so. The latest Supreme Court result makes that job a bit harder, but actually not all that different from the difficult job the rulers of the land bestowed on the Corps lo those many years ago. In every permit application, the Corps has to make a case-by-case decision.<sup>33</sup> To that end, this essay concludes that the rulers of the land (with the indirect assistance of the Corps and the deciders of the land) have crafted a dysfunctional permitting program, and that the *Rapanos* decision<sup>34</sup> is another in a long line of exhibits that shows the program doesn't work as it should or could.<sup>35</sup>

Accordingly, although in the summer of 2006 the great deciders provided the varied stakeholders in the wetlands world (including the regulated community, the conservation community, those with land neighboring areas proposed for permitting, and the regulators themselves) no clear direction as to how to proceed with activities that might impact wetlands and other waters of the United States, this is not much of a change from the situation before the *Rapanos* decision was

<sup>31</sup> See generally *Permits for Discharges of Dredged or Fill Material Into Waters of the U.S.*, 33 C.F.R. pt. 323 (2006).

<sup>32</sup> See U.S. Army Corps of Engineers, *US Army Corps of Engineers Regulatory Program* (2003) [hereinafter *Regulatory Statistics*], available at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2003webcharts.pdf> (last visited Feb. 9, 2007). The latest statistics available on-line are from FY 2002 and FY 2003. *Id.* They show that in 2002, there were 81,302 permits applied for and in 2003, there were 86,177 permits applied for. These numbers include general permits.

<sup>33</sup> See generally KIM DIANA CONNOLLY, STEPHEN M. JOHNSON & DOUGLAS R. WILLIAMS, *WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404* (American Bar Ass'n, 2005). A series of questions are set forth via a "checklist" format in the first chapter of that book that begin with the queries:

"1) Does the federal government have geographic jurisdiction over the project you are proposing?

a) May the project area properly be delineated as a wetland?

2) Assuming the project area does include wetlands, are these wetlands 'navigable waters'/'waters of the United States'?"

*Id.* at 9.

<sup>34</sup> *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

<sup>35</sup> Pointing out the failures of the permitting process has been well done by scholars who have come before. See, e.g., Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695 (1989); Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773 (1989); Hope Babcock, *Federal Wetlands Regulatory Policy: Up to Its Ears in Alligators*, 8 PACE ENVTL. L. REV. 307 (1991); Timothy D. Searchinger, *Wetlands Issues 1993: Challenges and a New Approach*, 4 MD. J. CONTEMP. LEGAL ISSUES 13 (1993); Michael C. Blumm, *The Clinton Wetlands Plan: No Net Gain in Wetlands Protection*, 9 J. LAND USE & ENVTL. L. 203 (1994); Alyson C. Flournoy, *Section 404 at Thirty-Something: A Program in Search of a Policy*, 55 ALA. L. REV. 607 (2004).

issued. Nevertheless, the continued battles and increased confusion will waste precious energy that would be better directed toward coming together to create a functional permitting process, which almost certainly will require amendment of the relevant statutory language.

Following this introduction, Part II of this essay contains a brief overview of the *Rapanos* decision and events leading up to it, followed by Part III which provides an overview of the Corps permitting process. The concluding section, Part IV, attempts to address the outstanding question presented by this essay: can there ever be a “happily ever after”<sup>36</sup> when it comes to protections for wetlands and other waters of the land?<sup>37</sup>

## II. THE *RAPANOS* DECISION AND ITS PRECURSORS

In June 2006, the United States Supreme Court undermined already difficult-to-implement legal protections for wetlands and other waters of the United States by issuing its *Rapanos* decision.<sup>38</sup> Although the outcome was not as restrictive as the plurality would have liked,<sup>39</sup> the fractured opinion

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<sup>36</sup> I have always found it delightful that non-English languages have adopted the term “Happy End” or “Happy Ending” directly from our language. See, e.g. Wordreference.com, English-French dictionary, <http://www.wordreference.com/enfr/happy> (last visited Feb. 9, 2007); About, *The Denglish Dictionary*, [http://german.about.com/library/blvoc\\_denglish3.htm](http://german.about.com/library/blvoc_denglish3.htm) (last visited Feb. 9, 2007).

<sup>37</sup> As I concluded in an earlier opinion authored shortly after the *Rapanos* decision was issued, to the extent that fodder for law review articles and interesting class hypotheticals creates happiness for law professors, the Court’s decision did indeed create some happy moments (though not a traditional “happily ever after”) for the academic community. Kim Diana Connolly, SCOTUS Blog, *More on Rapanos/Carabell*, [http://www.scotusblog.com/movabletype/archives/2006/06/more\\_\\_on\\_\\_rapanos\\_\\_3.html](http://www.scotusblog.com/movabletype/archives/2006/06/more__on__rapanos__3.html) (last visited Feb. 9, 2007).

<sup>38</sup> 126 S. Ct. 2208 (2006). See generally Robert Meltz, Claudia Copeland, *The Wetlands Coverage of the Clean Water Act is Revisited by the Supreme Court: Rapanos v. United States* (Congressional Research Service, Sept. 12, 2006), available at <http://www.cnire.org/NLE/CRSreports/06Oct/RL33263.pdf> (last visited Feb. 9, 2007). For background materials on the cases, including the original Carabell permit application and associated documentation as well as the Rapanos enforcement documents, see Kim Diana Connolly, *US Supreme Court Rapanos and Carabell Wetlands Cases*, <http://www.law.sc.edu/wetlands/rapanos-carabell/> (last visited Feb. 9, 2007). See also James Murphy, *Muddying the Waters of the Clean Water Act: Rapanos v. United States and the Future of America’s Water Resources*, 31 VERMONT L.R. 355 (2007).

<sup>39</sup> Writing for the plurality, Justice Scalia opined that “waters of the United States” should include “only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams ... oceans, rivers [and] lakes. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” 126 S. Ct. at 2225. Justices Thomas, Alito and Roberts joined that opinion. *Id.* at 2214.

left this hotly contested area of law with increased confusion<sup>40</sup> and guaranteed continued combat.<sup>41</sup> The issue was the interpretation of Congress' term "navigable waters,"<sup>42</sup> defined as "waters of the United States."<sup>43</sup> This is not a new battle — it was in fact waged immediately after passage of what came to be known as the Clean Water Act.<sup>44</sup>

Congress articulated its broad ecosystem restoration and protection aspirations in enacting the Clean Water Act by stating an intention "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>45</sup> To that end, the Act prohibits "the discharge of any pollutant by any person" without a permit issued in compliance with the Act.<sup>46</sup> The Act defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."<sup>47</sup> To comply with these requirements, therefore, Section 404 of the Act requires all persons to obtain a permit from the Corps "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."<sup>48</sup> The fact that the term "navigable waters" was defined

<sup>40</sup> See compiled initial press coverage at Kim Diana Connolly, *U.S. Supreme Court Rapanos and Carabell Wetlands Cases*, [http://www.law.sc.edu/wetlands/rapanos-carabell/carabell.shtml#press\\_coverage](http://www.law.sc.edu/wetlands/rapanos-carabell/carabell.shtml#press_coverage) (last visited Feb. 9, 2007). See also Ass'n of State Wetland Managers, *Rapanos/Carabell*, [http://www.aswm.org/fwp/rapanos\\_\\_state2006.htm](http://www.aswm.org/fwp/rapanos__state2006.htm) (last visited Feb. 9, 2007); Jon A. Mueller, *Adjacent Wetlands: Is Your Nexus Significant? Rapanos v. United States*, Daily Env't Rep. Analysis and Perspective, Mar. 12, 2007, available at <http://pubs.bna.com/NWSSTND/IP/BNA/DEN.NSF/SearchAllView5AF1F7BA69BB2088525729A000BF59A?Open&highlight=RAPANOS,GUIDANCE#%3C~A0B4D2N5D7~%3E> (last visited Mar. 15, 2007).

<sup>41</sup> Compare Pacific Legal Foundation, *Rapanos Blog*, <http://rapanos.typepad.com> (last visited Feb. 9, 2007) with Clean Water Network, *Supreme Court Delivers Murky Ruling on Carabell and Rapanos*, <http://www.cleanwaternet.org/issues/scope/getengaged/displaycontent.cfm?ContentID=388&ContentTypeID=4&PageFormat=DisplayContent&ConfigID=146> (last visited Feb. 9, 2007). See also Georgetown University Law Center, *The Clean Water Act in the Supreme Court: the Rapanos and Carabell Decisions*, <http://www.podcastdirectory.com/podshows/626338> (last visited Feb. 9, 2007); Akin Gump, *SCOTUS Blog*, [http://www.scotusblog.com/movabletype/archives/2006/06/discussion\\_boar\\_\\_1.html](http://www.scotusblog.com/movabletype/archives/2006/06/discussion_boar__1.html) (last visited Feb. 9, 2007).

<sup>42</sup> 33 U.S.C. § 1344 (2000).

<sup>43</sup> Congress defined "navigable waters" as "waters of the United States, including the territorial seas." *Id.* § 1362(7).

<sup>44</sup> The Federal Water Pollution Control Act (FWPCA) is commonly referred to as the Clean Water Act following the 1977 amendments to the FWPCA. Pub. L. No. 95-217, 91 Stat. 1566 (1977) ("SEC. 518. This Act may be cited as the 'Federal Water Pollution Control Act' commonly referred to as the Clean Water Act.").

<sup>45</sup> 33 U.S.C. § 1251(a) (2000). To achieve this objective, Congress listed seven goals, each of which indicates concern for values other than navigability. *Id.* § 1251(a)(1)-(6). These broad goals of the law include "protection and propagation of fish, shellfish, and wildlife," "recreation in and on the water," elimination of "the discharge of toxic pollutants in toxic amounts," and "programs for the control of nonpoint source pollution." *Id.*

<sup>46</sup> *Id.* § 1311(a).

<sup>47</sup> *Id.* § 1362(12).

<sup>48</sup> *Id.* § 1344(a).

by Congress only as “waters of the United States, including the territorial seas,”<sup>49</sup> however, led to some confusion after passage of the Act.

This confusion was quickly addressed<sup>50</sup> in (among other decisions) a 1975 District Court challenge to the Corps’ overly narrow initial interpretation of its Clean Water Act jurisdiction.<sup>51</sup> The court held that the Corps’ constricted construction was wrong because Congress had “asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution.”<sup>52</sup> Given that directive, the Corps of Engineers shortly thereafter issued more appropriate regulations<sup>53</sup> (which are essentially the same today), asserting jurisdiction beyond traditionally navigable waters to interstate waters, other waters for which commerce connections can be found, and impoundments and tributaries of same.<sup>54</sup>

A 1972 report from a House Committee supported this interpretation by stating that the term “navigable waters” should “be given the broadest possible constitutional interpretation unencumbered

<sup>49</sup> *Id.* § 1362(7).

<sup>50</sup> An excellent detailed history of the development of Section 404 law can be found in Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. REV. 873, 877-905 (1993). See also James R. Curtiss, Note, *The Clean Water Act of 1977: Midcourse Corrections In The Section 404 Program*, 57 NEB. L. REV. 1092, 1094-1107 (1978).

<sup>51</sup> Nat’l Res. Defense Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) (rejecting Corps’ position that Section 404’s jurisdiction limited to waters meeting traditional tests of navigability).

<sup>52</sup> *Id.* at 686. See also United States v. Ashland Oil & Transportation Co., 504 F.2d 1317 (6th Cir. 1974) where the United States Court of Appeals for the Sixth Circuit interpreted the Conference Report’s reference to the “the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes” to mean that Congress intended that the Act reach any activity that substantially affects commerce.

<sup>53</sup> 40 Fed. Reg. 31,320 (1975).

<sup>54</sup> The definition as it appears in full in the regulations reads as follows: “The term ‘waters of the United States’ means:

(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)–(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)–(6) of this section.

by agency determinations . . . made for administrative purposes.”<sup>55</sup> Likewise, Representative John Dingell explained during consideration in 1972 that the new Act “clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.”<sup>56</sup>

Yet the 1975 regulatory interpretation led to significant controversy,<sup>57</sup> in light of which Congress re-examined the intended breadth of the program in its 1977 reauthorization of the Clean

(8) Waters of the United States do not include prior converted cropland. Notwithstanding 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. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.” 33 C.F.R. § 328.3(a) (2006).

<sup>55</sup> H.R. Rep. No. 911, 92d Cong., 2d Sess. 131 (1972).

<sup>56</sup> 118 Cong. Rec. 33757 (1972). Representative Dingell’s remarks as reprinted in the Congressional Record read, in part, as follows:

[T]he conference bill defines the term “navigable waters” broadly for water quality purposes. It means all “the waters of the United States” in a geographical sense. It does not mean “navigable waters of the United States” in the technical sense as we sometimes see in some laws.

The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability — derived from the Daniel Ball case (77 U.S. 557, 563, [10 Wall. 557, 19 L. Ed. 999]) — to include waterways which would be “susceptible of being used \* \* \* with reasonable improvement,” as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera.

The U.S. Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution’s grant to Congress of “Power \* \* \* To regulate commerce with Foreign Nations and among the several States \* \* \*” (art. I, sec. 8, clause 3). *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 [6 L. Ed. 23] (1824). Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation—highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The “gist of the Federal test” is the waterway’s use “as a highway,” not whether it is “part of a navigable interstate or international commercial highway.” Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill. Indeed, the conference report states on page 144: “The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.” *Id.* at 33756-57.

<sup>57</sup> James R. Curtiss, Note, *The Clean Water Act of 1977: Midcourse Corrections In The Section 404 Program*, 57 NEB. L. REV. 1092, 1103-7 (1978).

Water Act.<sup>58</sup> As the Supreme Court acknowledged in a later case,<sup>59</sup> Congress' actions and statements indicated that it clearly intended the phrase "navigable waters" to include wetlands, without regard to artificial geographic limitations, when it passed the 1977 amendments.<sup>60</sup>

Those 1977 Congressional debates indeed saw legislators affirm a broad approach to jurisdiction. The Senate Environment and Public Works Committee made clear that "[t]he committee amendment is designed to reaffirm this intent and dispel the widespread fears that the program is regulating activities that were not intended to be regulated."<sup>61</sup> As part of the debate,

<sup>58</sup> See generally *id.* 1107-1112; Michael C. Blumm, *The Clean Water Act's Section 404 Permit Program Enters Its Adolescence: An Institutional and Programmatic Perspective*, 8 *ECOLOGY L. Q.* 409 (1979-1980).

<sup>59</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

<sup>60</sup> See *Riverside Bayview*, 474 U.S. at 137 ("Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it."); see also *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 626 (8th Cir. 1979) (relying on 1977 legislative history to determine regulatory scope of Section 404 as originally passed).

<sup>61</sup> S. Rep. No. 95-370, 95th Cong., 1st Sess. (1977), at 74-75. During the Senate's floor debate on the 1977 amendments, Senator Lloyd Bentsen of Texas offered an amendment to the Environment and Public Works Committee's bill that would have amended the Act to limit the scope of Section 404 to only traditionally navigable waters and their adjacent wetlands. Opponents of Senator Bentsen's amendment provided detailed analysis as to why Senator Bentsen's amendment to reduce jurisdiction of the Act should be rejected. For example, Senator Gary Hart of Colorado spoke at length on the shortcomings of the approach advocated by Senator Bentsen: "The Congress can capitulate. The Congress can abandon the national interest. The Congress can permit activities of a dredge-and-fill nature to go forward on those small streams, marshes, wetlands, and swamps which will make their way into the bigger waterways of this country and have a tremendous adverse effect on the people of this country and on their welfare, on their crops, on many of their activities. Or we can establish a program of the sort the committee has established, which will protect all of those water systems; which will protect all of the elements of those systems, which will not permit dredge and fill activities to deposit very toxic materials into those waterways." 123 Cong. Rec. 26,713 (Aug. 4, 1977). Likewise, Senator John H. Chafee of Rhode Island spoke about the value of wetlands for the whole country in arguing for defeat of Senator Bentsen's proposal by noting that "I think it is important to bear in mind that marshes and wetlands are not a parochial responsibility or an asset; they are not a local asset; they are a national asset. They are not just confined within boundaries which happen to exist for any one of our States. The wetlands perform a vital part of the food chain for our wildlife. . . . We have to remember that it affects everything else downstream. There is a linkage between wetlands and streams and estuaries and rivers, and they all must live in harmony, through wise management." 123 Cong. Rec. 26,716-17 (Aug. 4, 1977). These comments and others like them as part of a long debate held before the full Senate resulted in a vote where broad jurisdiction was affirmed causing Senator Bentsen himself to state: "The committee has failed to recommend any reduction in the scope of the § 404 permit program. . . . The program would still cover all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies." 123 Cong. Rec. 26,711 (Aug. 4, 1977). In supporting this amendment, Senator John Tower of Texas referred to *Callaway*, 392 F. Supp. at 686 and noted "[a] court decision, coupled with an administrative decision, is causing us to be faced with a regulatory scheme which covers not just the rivers of the Nation but all surface waters and wetlands of the United States." 123 Cong. Rec. 26,721-22 (Aug. 4, 1977).

Senator Howard Baker of Tennessee explained the common scientific understanding of hydrological linkage between all types of waters by noting that

[i]t is important to understand that toxic substances threaten the aquatic environment when discharged into small streams or into major waterways. Similarly, pollutants are available to degrade water and attendant biota when discharged in marshes and swamps, both below and above the mean and ordinary high water marks . . . Continuation of the comprehensive coverage of this program is essential for the protection for the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.<sup>62</sup>

Yet despite these Congressional attempts to clarify the matter, federal jurisdiction was challenged again in subsequent years.<sup>63</sup> The first time the United States Supreme Court agreed to weigh in on the jurisdiction issue was in *United States v. Riverside Bayview Homes*.<sup>64</sup> For a unanimous court in 1985, Justice White wrote “[i]n view of the breadth of federal regulatory authority contemplated by the Act 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 Act.”<sup>65</sup>

But the controversy over jurisdiction did not end there. In fact, the unanimous court decision led the Corps (and EPA) to reconsider the breadth of appropriate federal regulatory reach and issue slightly revised regulations with preamble language that came to be known as the “Migratory

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<sup>62</sup> 123 Cong. Rec. 26,718 (Aug. 4, 1977). Congressional debate on the value of wetlands when determining the scope of its jurisdiction with respect to an earlier enactment is entitled “persuasive value” because “[h]ere we have Congress at its most authoritative, adding complex and sophisticated amendments to an already complex and sophisticated act. Congress is not merely expressing an opinion . . . but is acting on what it understands its own prior acts to mean.” *Bell v. New Jersey*, 461 U.S. 773, 784-785 & n.12 (1983) (quoting *Mount Sinai Hosp. v. Weinberger*, 517 F.2d 329, 343 (5th Cir. 1975)).

<sup>63</sup> See, e.g., *Leslie Salt Co. v. U.S.*, 896 F.2d 354 (1990), *cert. denied*, 498 U.S. 1126 (1991) (upheld the Migratory Bird Rule); *Hoffman Homes v. EPA*, 999 F.2d 256 (7th Cir. 1993) (likewise upheld the rule); *Tabb Lakes v. U.S.*, 715 F. Supp. 726 (E.D. Va. 1988), *aff’d without opinion*, 885 F.2d 866 (4th Cir. 1989) (Migratory Bird Rule held invalid in the Fourth Cir. in 1989 for failure to follow the Administrative Procedure Act’s required notice and comment procedures); *U.S. v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

<sup>64</sup> 474 U.S. at 135.

<sup>65</sup> *Id.* at 134.

Bird Rule.”<sup>66</sup> Upheld by many Circuit courts through multiple challenges,<sup>67</sup> this Corps and EPA interpretation was ultimately ruled a bit too broad by a sharply divided 5-4 Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* [SWANCC].<sup>68</sup> That decision led to great confusion, delay and speculation that the permitting program would fall apart.<sup>69</sup> It did not. In fact, most subsequent interpretations of the breadth of the SWANCC decision found it to be very narrow.<sup>70</sup>

Yet when two Sixth Circuit opinions interpreting SWANCC were accepted for review by the Supreme Court,<sup>71</sup> some expected a more definitive direction for the program from the Court. However, the fractured *Rapanos* opinion, with its plurality, two concurrences, and two dissents, has led to even less certainty.<sup>72</sup>

Justice Scalia’s plurality, relying on a 1954 edition of Webster’s New International Dictionary definition of “waters,”<sup>73</sup> called for a significant narrowing of Clean Water Act jurisdiction.<sup>74</sup> By contrast, Justice Stevens and three other justices in dissent would have upheld the lower court jurisdictional findings and deferred to the agency interpretations as reflecting Congressional intent.<sup>75</sup> The swing vote was Justice Kennedy, who agreed with the plurality as to the remand decision but disagreed vehemently as to its reasoning.<sup>76</sup> He would find jurisdiction

<sup>66</sup> Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,217 (1986) (codified at 33 C.F.R. §§ 320-330); Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,765 (1988) (codified at 40 C.F.R. §§ 232-233).

<sup>67</sup> See, e.g., *Leslie Salt Co. v. United States*, 896 F.2d 354 (1990), cert. denied, 498 U.S. 1126 (1991), *Hoffman Homes v. EPA*, 999 F.2d 256 (7th Cir. 1993). See also Dennis J. Priolo, *Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction Over Isolated Wetlands*, 30 LAND & WATER L. REV. 91 (1995).

<sup>68</sup> 531 U.S. 159, 174 (2001).

<sup>69</sup> For a scholarly examination of these issues from differing perspectives, see Lance D. Wood, *Don't be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 ENV'T'L L. REP. 10187 (Feb. 2004); Virginia Albrecht and Stephen Nickelsburg, *Could SWANCC Be Right? A New Look At the Legislative History of the Clean Water Act*, 32 ENV'T'L L. REP. (Sept. 2002).

<sup>70</sup> See, e.g., *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005); *Treacy v. Newdunn Assocs. LLP*, 344 F.3d 407 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004); *Cnty. Ass'n for Restoration of Env't v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001). But see *In re Needham*, 354 F.3d 340 (5th Cir. 2003); *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001).

<sup>71</sup> *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), and *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004).

<sup>72</sup> See STEPHEN M. JOHNSON, KIM DIANA CONNOLLY, & MARK A. RYAN, SUPPLEMENTS TO THE CLEAN WATER HANDBOOK, SECOND EDITION AND WETLANDS: LAW AND POLICY: UNDERSTANDING SECTION 404 (Jan. 2007), 2006 *Developments in the Corps Nationwide Permit Program*, available at [http://www.abanet.org/abastore/front\\_end/static/nosearch/watersuppp001-017.pdf](http://www.abanet.org/abastore/front_end/static/nosearch/watersuppp001-017.pdf) (last visited Feb. 9, 2007).

<sup>73</sup> 126 S. Ct. at 2255

<sup>74</sup> *Id.* at 2221.

<sup>75</sup> *Id.* at 2264 (Stevens, J., dissenting).

<sup>76</sup> *Id.* at 2246 (“the plurality’s opinion is inconsistent with the Act’s text, structure, and purpose.”).

supported only where there is a “significant nexus between the wetlands in question and navigable waters in the traditional sense...assessed in terms of the statute’s goals and purposes.”<sup>77</sup> Justice Kennedy’s significant nexus can be found “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.’”<sup>78</sup>

Judicial response to the *Rapanos* decision has been mixed. In the Ninth<sup>79</sup> and Seventh<sup>80</sup> Circuits, analyses have been based on Justice Kennedy’s test.<sup>81</sup> Yet the First Circuit expressed some doubts about these other circuits’ approaches.<sup>82</sup> Then a later Ninth Circuit analysis struggled to apply the various *Rapanos* jurisdictional tests to an isolated salt-processing pond.<sup>83</sup> Likewise, the Connecticut District Court seemed misguided in its attempt to apply *Rapanos* to pollution regulation at a shooting range bordering on wetlands.<sup>84</sup> So the judicial branch appears to be in need of more guidance.

The agencies, meanwhile, are mired in some sort of executive quagmire<sup>85</sup> and have been delayed in issuing promised guidance.<sup>86</sup> Of course, anticipated SWANCC “guidance”<sup>87</sup> took almost

<sup>77</sup> *Id.* at 2248.

<sup>78</sup> *Id.*

<sup>79</sup> Northern California River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir., 2006).

<sup>80</sup> United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir., 2006).

<sup>81</sup> See, e.g., *Gerke*, 464 F.3d at 725 (“...as a practical matter the Kennedy concurrence is the least common denominator (always, when his view favors federal authority).”)

<sup>82</sup> United States v. Johnson, 467 F.3d 56 (1st Cir. 2006) (“Curiously, without explanation, the [*Gerke*] court equates the ‘narrowest opinion’ with the one least restrictive of federal authority to regulate.” *Id.* at 61.)

<sup>83</sup> San Francisco Baykeeper v. Cargill Salt Div., 2007 U.S. App. LEXIS 5442 (9th Cir. 2007).

<sup>84</sup> Simsbury-Avon Pres. Soc’y, LLC v. Metacon Gun Club, Inc., 2007 U.S. Dist. LEXIS 7177 (D. Conn. 2007). The *Metacon* court reaches summary judgment and finds no jurisdiction by applying the significant nexus test to wetlands demonstrated to be adjacent to traditional navigable waters. *Id.* at \*27-29. However, Justice Kennedy’s concurrence specifically states “[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps’ conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.” *Rapanos*, 126 S. Ct. at 2248.

<sup>85</sup> Amena H. Saiyid, *Guidance Expected to Clarify Jurisdiction Of Federal Agencies in Wake of Court Rulings*, BNA DAILY ENV’T, Jan. 17, 2007 at B6 (“The Environmental Protection Agency and the U.S. Army Corps of Engineers intend to mark the new year with joint guidance to clarify federal jurisdiction over wetlands...”).

<sup>86</sup> Memorandum from Mark F. Sudol, *Interim Guidance on the Rapanos and Carabell Supreme Court Decision* (July 5, 2006), available at <http://www.craig-environmental-law.com/forms/ArmyCorpsReactiontoRapanos.pdf> (last visited Feb. 9, 2007) (“As you know, on June 19th the Supreme Court issued a decision in the consolidated wetlands cases. OGC, OECA, and OW are studying the opinions and do not yet have an Agency position on them. In the very near future, we intend to issue guidance on how the Agency should proceed in light of the decision.” *Id.* at 3.).

<sup>87</sup> Following issuance of a “legal interpretation,” Gary S. Guzy, EPA, Robert M. Andersen, Corps, *Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters*, Jan. 19, 2001, available at <http://www.aswm.org/fwp/swancc/legal.pdf> (last visited Feb. 9, 2007), almost two years passed before a formal response was produced following SWANCC. See Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” Appendix A, Joint Memorandum, 68 Fed. Reg. 1995 (Jan. 15, 2003).

two years to produce<sup>88</sup> and was considered by many to be less than guiding.<sup>89</sup> In addition to the promised guidance, some representatives of the development community have joined those Justices who called for a rulemaking<sup>90</sup> by agitating for new regulations in the wake of *Rapanos*.<sup>91</sup>

However, the lack of guidance doesn't stop the need for the Corps (and EPA) to implement the program on a daily basis, which leads to the discussion in the following section of this essay about Section 404 permitting program implementation.<sup>92</sup> Moreover, the confusion surrounding the reach of the jurisdictional scope of the Section 404 program is far from the only area of controversy surrounding the day-to-day permitting operations of Corps staff. Disagreement and debate also surround which activities the Corps can regulate,<sup>93</sup> the mitigation it can require,<sup>94</sup> the general permitting program under 404(e)<sup>95</sup>... the list could go on. Suffice it to say that those on the front lines of processing permit applications have, for decades, operated without the clarity they deserve.<sup>96</sup> Nevertheless, permits are applied for and must be processed; thus, the magic meets the mundane in the quest to protect the waters of the land.

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<sup>88</sup> *Joint Memorandum, supra* note 87.

<sup>89</sup> See Susan Bruninga, *EPA, Corps Guidance Could Be Modified as Part of Bigger Effort to Improve Program*, BNA DAILY ENV'T, Apr. 29, 2004 at A6 ("The guidance issued in 2003 has been criticized by environmental advocates who say it does not provide enough protections to isolated wetlands and that up to 20 million acres of wetlands could be at risk. Industry groups said the guidance does not do enough to clarify which wetlands are covered by the Clean Water Act, especially after recent conflicting court decisions on jurisdictional issues.").

<sup>90</sup> 126 S. Ct. 2249; *id.* at 2266 (Breyer, J., dissenting); *id.* at 2236 (Roberts, C. J., concurring).

<sup>91</sup> Pacific Legal Foundation, PLF Petitions for New Clean Water Act Regulations, [http://rapanos.typepad.com/my\\_weblog/2006/09/plf\\_petitions\\_\\_f.html](http://rapanos.typepad.com/my_weblog/2006/09/plf_petitions__f.html) (last visited Feb. 9, 2007) ("Because [sic] the Administration has yet to propose new regulations implementing the *Rapanos* decision, Pacific Legal Foundation has submitted its own regulations to the Corps and EPA for action.").

<sup>92</sup> See *infra* Section III.

<sup>93</sup> See *supra* note 25.

<sup>94</sup> See generally KIM DIANA CONNOLLY, STEPHEN M. JOHNSON & DOUGLAS R. WILLIAMS, *WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404, CH. 8, Mitigation* (2005). See also "Compensatory Mitigation for Losses of Aquatic Resources," 71 Fed. Reg. 29604 (May 23, 2006).

<sup>95</sup> STEPHEN M. JOHNSON, KIM DIANA CONNOLLY & MARK A. RYAN, *SUPPLEMENTS TO THE CLEAN WATER HANDBOOK, SECOND EDITION AND WETLANDS: LAW AND POLICY: UNDERSTANDING SECTION 404* (Jan. 2007), 2006 *Developments in the Corps Nationwide Permit Program*, available at [http://www.abanet.org/abastore/front\\_\\_end/static/nosearch/watersuppp001-017.pdf](http://www.abanet.org/abastore/front__end/static/nosearch/watersuppp001-017.pdf) (last visited Feb. 9, 2007).

<sup>96</sup> As I mentioned in an earlier footnote, I have gotten to hear the experiences of Corps employees on at least an annual basis since 1998. See *supra* note 11.

### III. THE DAY-TO-DAY IMPLEMENTATION OF SECTION 404 OF THE CLEAN WATER ACT

The Corps, charged with the day-to-day implementation of the programs to protect the nation's waters,<sup>97</sup> has attempted to “balance” the interests of all those in the wetlands world.<sup>98</sup> The Corps regulatory program's entrance to its webpage phrases its balancing act the following way: “[w]orking to provide strong protection of the Nation's aquatic environment, efficient administration of the Corps' regulatory program, and fair and reasonable decision-making for the regulated public.”<sup>99</sup>

Balancing is not an easy task, given the strong beliefs on both sides. However, the Corps' structure and the overall agency's basic mission make this task even more difficult. One of the oldest regulatory programs of the federal government,<sup>100</sup> the Corps' regulatory offices are deliberately decentralized.<sup>101</sup> With thirty-eight districts nationally and over 1200 staff, most decisions are made on the ground by program staff.<sup>102</sup> There is limited headquarters-level guidance.<sup>103</sup>

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<sup>97</sup> 33 CFR pt. 320 (2006).

<sup>98</sup> See ExpectMore.gov, *Detailed Information on the Corps of Engineers: Regulatory Program Assessment*, available at <http://www.whitehouse.gov/OMB/expectmore/detail.10001130.2005.html> (last visited Feb. 9, 2007) (“The purpose of the program is to protect, maintain and restore the nation's aquatic resources in a way that enhances and balances environmental and economic development values and objectives. The program does this by means of regulations and related measures.”).

<sup>99</sup> U.S. Army Corps of Engineers, *Regulatory Program, Overview*, available at <http://www.usace.army.mil/cw/cecwo/reg/> (last visited Feb. 9, 2007).

<sup>100</sup> *Id.* See also *supra* notes 4-10 and accompanying text.

<sup>101</sup> “The Corps is a highly decentralized organization. Most of the authority for administering the regulatory program has been delegated to the thirty-six district engineers and eleven division engineers.” 33 C.F.R. § 320.1(a)(2) (2006).

<sup>102</sup> As the Corps own website explains, “[i]n the U.S. the Corps is divided into eight regional divisions. Each division is further divided in to subordinate districts. Division and district boundaries, for the most part, are determined by watersheds. The districts are the operational level of the Corps, seeing to the day-to-day activities in all of the missions areas.” U.S. Army Corps of Engineers, *Where We Are*, <http://www.usace.army.mil/howdoi/where.html#State> (last visited Feb. 9, 2007).

<sup>103</sup> This is not surprising, given the low number of people who actually work in the Headquarters Regulatory office. See *supra* note 101.

Nevertheless, under its Clean Water Act Section 404 permitting program,<sup>104</sup> the Corps is charged with issuing two types of permits:<sup>105</sup> standard (sometimes called individual) permits<sup>106</sup> and general permits.<sup>107</sup> Although, percentage-wise, standard permits only represent about five percent of the total permitting actions undertaken by the Corps, they embody the largest component in terms of resources of the Corps' day-to-day regulatory program operations.<sup>108</sup>

The standard permit process can be conceptually broken into four phases:<sup>109</sup> (1) The pre-application/application phase, in which a project is identified and the organization undertaking it develops and submits an application with as-needed input from Corps staff on application and review requirements;<sup>110</sup> (2) the public notice and comment phase, through which the Corps solicits the views of a variety of individuals, agencies and organizations;<sup>111</sup> (3) the evaluation, decision and mitigation phase, when the Corps evaluates the application and the public comments and seeks to balance various factors, minimize the impact of projects on the environment, and coordinate with several federal, state and tribal agencies;<sup>112</sup> and (4) the monitoring and enforcement phase, where the Corps monitors projects to ensure that the permit's conditions are met.<sup>113</sup>

The Corps is called upon to process a massive number of permit applications<sup>114</sup> each year for proposed impacts on aquatic resources such as wetlands. Corps personnel review close to ninety thousand permit applications per year.<sup>115</sup> The vast majority of these permit applications proceed in

<sup>104</sup> See generally U.S. Army Corps of Engineers, *Regulatory Program Value to the Nation: Keeping Waters Clean and Clear*, available at <http://www.iwr.usace.army.mil/docs/RegulatoryProgram.pdf> (last visited Feb. 9, 2007).

<sup>105</sup> See generally U.S. Army Corps of Engineers Memphis District, *The Regulatory Permit Program – A Brief Guide from the Memphis District*, available at <http://www.mvm.usace.army.mil/regulatory/Permit/permit.htm> (last visited Feb. 9, 2007) (“This brochure discusses the regulatory program of the U.S. Army Corps of Engineers: what it is, how it began, how it may affect you, and what you as a concerned American can do to help.”).

<sup>106</sup> For a detailed overview of this process, see KIM DIANA CONNOLLY, STEPHEN M. JOHNSON & DOUGLAS R. WILLIAMS, *WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404, CH. 6, Individual Permits* (2005).

<sup>107</sup> For a detailed overview of this process, see *id.* CH. 5, *General and Nationwide Permits*.

<sup>108</sup> This is because standard permits “require public notice, opportunity for public hearing, an analysis of project alternatives, and completion of an Environmental Assessment.” U.S. Army Corps of Engineers, *Regulatory Program, All Permit Decisions FY2002*, available at <http://www.usace.army.mil/cw/cecwo/reg/2002webcharts.pdf> (last visited Feb. 9, 2007).

<sup>109</sup> See generally U.S. Army Corps of Engineers, *Regulatory Permit Process*, available at <http://www.vtn.iwr.usace.army.mil/regulatory/regpermit.htm> (last visited Feb. 9, 2007). See also WILLIAM L. WANT, *LAW OF WETLANDS REGULATION, CH. 6, The Permit Process* (West, 2006).

<sup>110</sup> See *Regulatory Permit Process*, *supra* note 109.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> The standard permit application can be found on-line. Application for Department of the Army Permit, OMB Approval No. 0710-0003, available at <http://www.usace.army.mil/cw/cecwo/reg/eng4345a.pdf> (last visited Feb. 9, 2007).

<sup>115</sup> See U.S. Army Corps of Engineers, *US Army Corps of Engineers Regulatory Program* (2003), <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2003webcharts.pdf> (last visited Feb. 9, 2007).

an expedited manner that does not involve a detailed review.<sup>116</sup> Nevertheless, the Corps must have jurisdiction over all activities for which it requires a permit. The process of determining whether a permit is required thus involves a jurisdictional determination to identify whether a particular piece of land contains jurisdictional waters of the United States.<sup>117</sup>

The *Rapanos* decision has left the process of making such jurisdictional calls in serious disarray. As discussed above, many months past their self-imposed deadline<sup>118</sup> the Corps has yet to provide its district offices (and other stakeholders) with guidance as to how to proceed.<sup>119</sup> Corps districts have put jurisdictional determinations on hold.<sup>120</sup> And the waiting continues.

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<sup>116</sup> Most permits processed by the U.S. Army Corps of Engineers are those issued pursuant to 404(e), 33 U.S.C. § 1344(e). *US Army Corps of Engineers Regulatory Program*, *supra* note 115, at 1 (showing that in FY 2003, 78,803 permits proceeded as nationwide or regional general permits).

<sup>117</sup> U.S. Army Corps of Engineers Wilmington District, Jurisdictional Determinations, <http://www.saw.usace.army.mil/WETLANDS/JDs/index.html> (last visited Feb. 9, 2007) (“A jurisdictional determination (JD) is the process of identifying and locating jurisdictional Waters of the United States (including wetlands) regulated by the U.S. Army Corps of Engineers (COE) under Section 404 of the Clean Water Act. The method of performing a JD employs a multi-parameter approach defined in Technical Report Y-87-1, Corps of Engineers Wetlands Delineation Manual, dated January 1987, and supplemental guidance. It requires positive evidence of hydrophytic [sic] vegetation, hydric soils, and wetlands hydrology for a determination that an area is a wetland.” *Id.*) See also Environmental Laboratory, U.S. Dept. of the Army, Corps of Engineers, *Wetlands Delineation Manual* (1987), available at [http://www.saw.usace.army.mil/WETLANDS/Policies/delin\\_\\_man87.pdf](http://www.saw.usace.army.mil/WETLANDS/Policies/delin__man87.pdf) (last visited Feb. 9, 2007).

<sup>118</sup> The initial communication from the regulating agencies regarding the case was issued in July 2006, and promised substantive guidance in “the next few weeks.” See Memorandum from Mark Sudol, *supra* note 86, at 2.

<sup>119</sup> When it will be out is anybody’s guess. See Endangered Species and Wetlands Report, Dec. 5, 2006, <http://www.eswr.com/latest/> (last visited Feb. 9, 2007). (“The latest on the grapevine is that it is supposed to be out ‘soon,’ but who knows what that means? Persons with second-hand knowledge of the actual document agreed upon by EPA and the Army Corps of Engineers say that it casts a wider jurisdictional net than the development community would like. But the guidance has been at CEQ for a couple of months now, and the mid-term election, which was thought to be holding it up, is long over.”)

<sup>120</sup> See, e.g., U.S. Army Corps of Engineers, Baltimore District, *Jurisdictional Determinations*, <http://www.nab.usace.army.mil/Regulatory/JD.htm> (last visited Feb. 9, 2007) (“In the wake of the Supreme Court decisions in *United States v. Rapanos* and *United States v. Carabell*, the U.S. Army Corps of Engineers and the Environmental Protection Agency are examining the methods in which we describe and document jurisdictional determinations (JDs) pursuant to the Clean Water Act (CWA). ... In order to allow the Corps and EPA to prepare and issue substantive guidance, the Baltimore District is, in accordance with guidance from our Headquarters, delaying making CWA jurisdictional determinations for areas beyond the limits of traditional navigable waters (Section 10 waters) until new guidance is issued.”). See also U.S. Army Corps of Engineers Wilmington District, *Regulatory Division*, <http://www.saw.usace.army.mil/wetlands/> (last visited Feb. 9, 2007) (“In light of the pending release of formal guidance on this issue, when there are these types of waters present on a site, the Wilmington District will not issue a Final JD until the final or additional interim guidance is issued by headquarters.”).

Ultimately, however, the processing of Corps permits still requires a case-by-case analysis.<sup>121</sup> This latest wrinkle in the *Rapanos* decision makes the requisite analysis a little more convoluted and almost certainly adds some time to the decision process, but not much has changed on a larger level. We are thus stuck in the middle of the story, with no ending (happy or otherwise) in immediate sight.

#### CONCLUSION — HOW DO WE GET TO “HAPPILY EVER AFTER” FOR SECTION 404 PERMITTING LAW?

As we come to the end of my musings on the “tale” underlying the issues at play following the *Rapanos* case, the question to ponder is deceptively simple. Is there a way to get to “happily ever after”<sup>122</sup> in the Clean Water Act jurisdiction debate, and/or in other parts of Section 404 permitting?

The answer “no” is certainly defensible. The controversial history of the Section 404 permitting program,<sup>123</sup> as well as a cursory examination of the current situation, easily could lead to the conclusion that the stakeholders have become so divided and the battles so embittered that no functional zone of potential agreement<sup>124</sup> exists.<sup>125</sup>

<sup>121</sup> For an interesting discussion of the agency role in jurisdictional calls post-SWANCC, see Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845 (2004) (“Under the model, agencies should act in ways that respect policies from all three governmental branches but that primarily favors congressional intent, as expressed by a statute’s language, structure, and legislative history. Agencies, particularly those charged with environmental enforcement, also owe substantial deference to the teachings of their scientific and other professional expertise, with the understanding that public debate is essential where non-scientific values are at stake. Finally, agencies owe a strong obligation to prefer active, robust, and effective enforcement strategies.” *Id.* at 881).

<sup>122</sup> For me, “happily ever after” would be a workable program that provides appropriate protection to the resources Congress indicated intent to protect through the Clean Water Act. See *supra* notes 45-62 and accompanying text. I acknowledge that others may have an entirely different version of a happy ending.

<sup>123</sup> See, e.g., Joan M. Ferretti, *Restoring the Nation’s Wetlands: Can the Clean Water Act’s Dredge And Fill Guidelines Do the Job?*, 1 PACE ENVTL. L. REV. 105 (1983); Bruce D. Ray, *Section 404 of the Clean Water Act: An EPA Perspective*, 2 NAT. RESOURCES & ENV’T 20 (1986-1987); James T. B. Tripp, *Public Input in the Permitting Process: The Section 404 Example*, 2 NAT. RESOURCES & ENV’T 23 (1986-1987); Bhavani Prasad V. Nerikar, *This Wetland Is Your Land, This Wetland Is My Land: Section 404 of the Clean Water Act and Its Impact on the Private Development of Wetlands*, 4 ADMIN. L. J. 197 (1990-1991); Simeon D. Rapoport, *The Taking of Wetlands Under Section 404 of the Clean Water Act*, 17 ENVTL. L. 111 (1986-1987).

<sup>124</sup> In traditional negotiation parlance, the “zone of potential agreement” is the overlapping areas where all sides will accept a decision. ROY J. LEWICKI, JOHN MINTON & DAVID SAUNDERS, *Zone of Potential Agreement*, in NEGOTIATION (Irwin-McGraw Hill, 3d ed. 1999); MICHAEL WATKIN, SUSAN ROSEGRANT & SHIMON PERES, *BATNAS and ZOPA*, in BREAKTHROUGH INTERNATIONAL NEGOTIATION: HOW GREAT NEGOTIATORS TRANSFORMED THE WORLD’S TOUGHEST POST-COLD WAR CONFLICTS 26-35 (Jossey-Bass Publishers, 2001).

<sup>125</sup> This is certainly in keeping with the conclusions of esteemed scholars on the subject over the years. See, e.g. Alyson C. Flournoy, *Section 404 at Thirty-Something: A Program in Search of a Policy*, 55 ALA. L. REV. 607, 608 (2004). (“Over the years, both governmental and non-governmental reports have highlighted the persistent gaps in knowledge, enforcement, monitoring, funding, and interagency coordination under section 404, and the attendant

But that is the easy answer, and certainly inappropriate for a fairy tale-based consideration. So what version of “Bibbity Bobbity Boo” can we invoke to protect wetlands and other waters while allowing some reasonable amount of land use?

Magic words could theoretically come from the administrative, judicial or legislative branch. But the administrative branch is limited to activities granted by statutory authority,<sup>126</sup> and the judicial branch is charged with interpreting, not making laws.<sup>127</sup> The difficulties these two branches have encountered with the jurisdictional issue alone since the original delivery of the wording in Clean Water Act Section 404<sup>128</sup> make it clear that the original spell did not work.

In other words, it seems to be precisely some new magic words from Congress that are needed to rectify this situation.<sup>129</sup> In the parlance of this essay, thus, the rulers of the land will have to revisit and reaffirm their original directive on protecting the nation’s waters. Predictions on whether that will be able to happen will, of course, be mixed. But the 110th Congress, with its new political make-up,<sup>130</sup> may offer some hope for passage of clarifying language.

disappointing results. ... A review of the section 404 program’s evolution under successive administrations reveals a program (and agency) perpetually in flux with a poorly-defined goal. A broad look at section 404’s first thirty years highlights important tensions that have beset the section 404 program from its inception.”); Hope Babcock, *Federal Wetlands Regulatory Policy: Up to Its Ears in Alligators*, 8 PACE ENVTL. L. REV. 307 (1991) (“An examination of the federal wetlands permitting program reveals significant problems. These problems, combined with ingrained attitudes about the sanctity of private property, lack of public appreciation of wetland values, and insufficient political will to protect them, make it easy to see why wetlands continue to disappear and why the federal wetlands regulatory program is one of the most controversial of the country’s environmental programs” *Id.* at 307-308.); Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695 (1989); Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773 (1989) (declaring that Section 404 of the Clean Water Act “lies like an open wound across the body of environmental law, one of the simplest statutes to describe and one of the most painful to apply.” *Id.*)

<sup>126</sup> U.S. Const. art II, § 3 (“...shall take care that the laws be faithfully executed...”).

<sup>127</sup> U.S. Const. art III.

<sup>128</sup> See *supra* Section II.

<sup>129</sup> This is not a new idea. For example, Judge Stanley Harris in the American Mining Congress case noted that “[t]he appropriate remedy for what the agencies now perceive to be an imperfect statute, however, is Congressional action; defendants’ authority is limited to adopting regulations that effect the will of Congress as expressed in the statute.” *Am. Mining Cong. v. U.S. Army Corps of Eng’rs*, 951 F. Supp. 267, 278 (1997), *aff’d*, *Nat’l Mining Assoc. v. Army Corps of Eng’rs*, 145 F.3d 1399 (D.C. Cir. 1998). See also *Vickie V. Sutton, Wetlands Protection - A Goal Without a Statute*, 7 S.C. ENVTL. L.J. 179, 207 (1998).

<sup>130</sup> In January 2007, the 110th Congress was sworn in with a Democratic majority in both the U.S. House of Representatives and U.S. Senate. Jonathan Weisman & Shailagh Murray, *Democrats Take Control on Hill*, WASH. POST, Jan 5, 2007 at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/04/AR2007010400802.html> (last visited Feb. 9, 2007).

Something like the Clean Water Authority Restoration Act,<sup>131</sup> which would redefine “waters of the United States” using the long-standing regulatory language<sup>132</sup> as “all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.”<sup>133</sup> would be a definite step in the right direction, especially with respect to the jurisdictional matter. The findings section contains what is likely to be sufficient bases for defensibility as to requisite commerce connections, though that will undoubtedly be a fight at some point.<sup>134</sup> But that approach may be too narrow in terms of the resource as a whole.

The climate change debate<sup>135</sup> may provide a larger opportunity to address the waters of the

<sup>131</sup> S. 912, 109th Cong., 1st Sess (2005); H.R. 1356, 109th Cong., 1st Sess. (2005). *Nat'l Res. Defense Council, Restoring America's Clean Water Legacy: The 110th Congress Must Pass Legislation to Restore the Scope of the Clean Water Act*, available at [http://www.nrdc.org/legislation/factsheets/leg\\_07020201A.pdf](http://www.nrdc.org/legislation/factsheets/leg_07020201A.pdf) (last visited Mar. 15, 2007) (“To restore the traditional scope of protection intended by Congress and to achieve the goal of restoring and maintaining the chemical, physical, and biological integrity of the nation’s waters, legislation must: Define protected ‘waters of the United States’ based on the decades-old definition in Corps and EPA regulations; Delete the word ‘navigable’ from the Act to clarify that the Clean Water Act is principally intended to protect the nation’s waters from pollution, and not just maintain navigability; Explain the basis for Congress’s assertion of constitutional authority over the nation’s waters, as defined in the Act, including smaller water bodies and so-called ‘isolated’ waters.” *Id.*)

<sup>132</sup> See *supra* note 54.

<sup>133</sup> *Id.* § 4. *Cf.* a competing proposal pending before the last Congress, the Federal Wetlands Jurisdiction Act, H.R. 2658, 109th Cong., 1st Sess (2005).

<sup>134</sup> The Commerce Clause of the U.S. Constitution limits federal authority. U.S. Const. art. I, 8, cl. 3. Both *Carabell* and *Rapanos* petitioners raised commerce clause issues in their questions presented, see <http://www.supremecourtus.gov/qp/04-01384qp.pdf> (last visited Feb. 9, 2007) (*Carabell*) and <http://www.supremecourtus.gov/qp/04-01384qp.pdf> (last visited Feb. 9, 2007) (*Rapanos*). Because the Supreme Court has yet to address this matter in the Clean Water Act context, the Commerce Clause will likely remain an issue for any legislation proposing jurisdictional breadth beyond traditional navigability for protection of the nation’s waters. See, e.g., Kenneth L. Rosenbaum, *The Supreme Court Endorses A Broad Reading of Corps Wetlands Jurisdiction Under FWPCA 404*, 16 ENVTL. L. REP. 10008 (1986); John A. Leman, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause*, 28 U.C. DAVIS L. REV. 1237 (1995); J. Blanding Holman, IV, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139, 142 (1995); Lori J. Warner, *The Potential Impact of United States v. Lopez on Environmental Regulation*, 7 DUKE ENVTL. L. & POL’Y F. 321, 326 (1997); Gregory T. Broderick, *From Migratory Birds to Migratory Molecules: The Continuing Battle Over the Scope of Federal Jurisdiction Under the Clean Water Act*, 30 COLUM. J. ENVTL. L. 473 (2005); Diane Summers Clarke, *It’s Not Easy Being Green: The Constitutionality Of Implementing The Endangered Species Act Under The Commerce Clause*, 14 SOUTHEASTERN ENVTL. L.J. 297 (2006); Joshua L. Lee, *Federal Wetland Jurisdiction and the Power To Regulate Commerce: Searching for the Nexus in Gerke Excavating*, 2006 B.Y.U.L. REV. 263 (2006).

<sup>135</sup> See, e.g., AN INCONVENIENT TRUTH, <http://www.climatecrisis.net/> (last visited Feb. 9, 2007); U.S. Environmental Protection Agency, Climate Change, <http://www.epa.gov/climatechange/> (last visited Feb. 9, 2007); Competitive Enterprise Institute, Global Warming, <http://www.globalwarming.org/> (last visited Feb. 9, 2007); Union of Concerned Scientists, Global Warming, [http://www.ucsusa.org/global\\_warming/](http://www.ucsusa.org/global_warming/) (last visited Feb. 9, 2007).

United States issue in Congress. As the United Nations-sanctioned report recently concluded, global warming is a serious problem.<sup>136</sup> Like other environmental treasures, wetlands are seriously endangered by the changing climate.<sup>137</sup> Thus as legislative approaches to global warming move forward,<sup>138</sup> including clarification of the protections Congress wishes to be afforded to wetlands and other waters of the United States (or even just a clarification of the definition of waters of the United States) could be a logical part of the mix.<sup>139</sup>

Federalism and reality have led many to call for strengthened state<sup>140</sup> and local approaches<sup>141</sup>

<sup>136</sup> Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis, Summary for Policy Makers*, available at <http://www.ipcc.ch/SPM2feb07.pdf> (last visited Feb. 9, 2007). See generally Intergovernmental Panel on Climate Change website at <http://www.ipcc.ch/> (last visited Feb. 9, 2007).

<sup>137</sup> See, e.g. John Kusler & Virginia Burkett, *Climate Change in Wetland Areas Part I: Potential Wetland Impacts and Interactions*, ACCLIMATIONS, NEWSLETTER OF THE US NATIONAL ASSESSMENT OF THE POTENTIAL CONSEQUENCES OF CLIMATE VARIABILITY AND CHANGE (MAY- JUN. 1999); available at <http://www.usgcrp.gov/usgcrp/Library/nationalassessment/newsletter/1999.06/wet.html> (last visited Feb. 9, 2007); James G. Titus, *Greenhouse Effect And Coastal Wetland Policy: How Americans Could Abandon An Area The Size Of Massachusetts At Minimum Cost*, 15 ENV'T MGMT. 39 (1991); James G. Titus, *Sea Level Rise and Wetland Loss: An Overview*, U.S. Environmental Protection Agency, (1988) [http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/SHSU5BNQKX/\\$File/chap1.pdf](http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/SHSU5BNQKX/$File/chap1.pdf) (last visited Feb. 9, 2007).

<sup>138</sup> Speaker Nancy Pelosi, Press Releases, Pelosi Statement on Energy Independence and Global Warming Agenda, Mar. 14, 2007, available at <http://speaker.house.gov/newsroom/pressreleases?id=0103> (last visited Mar. 15, 2007) ("Our Committees are already working hard on hearings and legislation designed to meet our June timetable for taking crucial legislative steps to achieve energy independence and reduce activities that contribute to global warming. The Leadership is continuing to work with all of these Committees to ensure that we will have legislation that addresses renewable energy and energy efficiency. We are going to take bold action throughout this Congress to reduce our dependence on foreign oil, stop global warming, and ensure that America is in the forefront in developing innovative technologies. These decisions are critical to our national security and to the creation of millions of jobs here in America.") See also Karoun Demirjian, *Global warming bills heat up in Congress*, CHI. TRIB., Mar. 7, 2007, available at <http://www.chicagotribune.com/news/nationworld/chi-070307climate,1,5259146.story?track=rss> (last visited Mar. 15, 2007); Christina Bellantoni, *Congress tackles global warming*, WASH. TIMES, Feb. 12, 2007, available at <http://www.washtimes.com/national/20070212-122836-3530r.htm> (last visited Mar. 15, 2007).

<sup>139</sup> The breadth of likely impacts to wetlands as a result of global warming go well beyond regulatory matters. See Pew Oceans Comm'n, *America's Living Oceans: Charting A Course For Sea Change* (2003) 83, available at [http://www.pewtrusts.com/pdf/env\\_pew\\_oceans\\_final\\_report.pdf](http://www.pewtrusts.com/pdf/env_pew_oceans_final_report.pdf) (last visited Feb. 9, 2007) ("scientists expect.... climate change will result... serious, if not catastrophic, damage to some ecosystems. Important coastal and ocean habitats, including... coastal wetlands, estuaries, and mangrove forests will be particularly vulnerable to the effects of climate change. These systems are essential nurseries for commercial fisheries and support tourism and recreation."). It is thus important to acknowledge that the impact of climate change on all the nation's wetlands almost certainly cannot be addressed in the context of the Corps Regulatory Program, and that any relevant amendments to the Clean Water Act would only be a part of the solution.

<sup>140</sup> See generally Ass'n of State Wetland Managers, *State Wetland Programs*, <http://aswm.org/swp/index.htm> (last visited Feb. 9, 2007).

<sup>141</sup> See Kim Diana Connolly, *Looking to Local Law: Can Local Ordinances Help Protect Isolated Wetlands?* 27 NAT'L WETLANDS NEWSLETTER 21 (May-June 2005).

to protect waters.<sup>142</sup> However, the non-federal responses post-SWANCC have been limited,<sup>143</sup> and the politics that hamper federal-level responses are just as potent, if not more so, on state and local levels.

At the end of the day, the jurisdictional definition of “waters of the United States” should be understood, as Congress intended,<sup>144</sup> to include not only traditional navigable waters and their tributaries, but also the wetlands whose functions support them. Rapanos seems to signal that it will take Congressional reaffirmation to get there.

Yet short of new magic words in the form of legislative clarification of CWA Sections 404 and 502, the battles will persist in courts, and the difficulties of administering this law will continue to plague the Corps and EPA. Thus there is room for hope, but certainly no guarantee, that there can be some sort of “happily ever after” for the Clean Water Act Section 404 program following Rapanos.

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<sup>142</sup> Like many of the other matters discussed in this conclusion, such is not a new concept. See, e.g., Hope Babcock, *Federal Wetlands Regulatory Policy: Up to Its Ears in Alligators*, 8 PACE ENVTL. L. REV. 307, 350 (1991).

<sup>143</sup> See Jeanne Christie, *Overview of State Efforts to Close the Gaps in Jurisdiction: Status and Trends in State Wetland Programs*, <http://www.aswm.org/calendar/legal/christie.pdf> (last visited Feb. 9, 2007).

<sup>144</sup> See *supra* notes 55-58 and accompanying text. See also Brief of The Honorable John D. Dingell, The Honorable John Conyers, Jr., The Honorable Robert F. Drinan, The Honorable Gary W. Hart, The Honorable Kenneth W. Hechler, The Honorable Charles McCurdy Mathias, Jr., The Honorable Paul N. McCloskey, Jr., The Honorable Charles B. Rangel, And The Honorable Richard Schultz Schweiker, As Amici Curiae In Support of The Respondent, 126 S.Ct. 2208 (2006) (Nos. 04-1034, 04-1384), Supreme Court of The United States, Jan. 13, 2006, available at <http://www.eswr.com/1105/rapanos/rapamicongress.pdf> (last visited Feb. 9, 2007).

# Rapanos and Wetland Mitigation Banking

Royal C. Gardner\*

One reason that I enjoy teaching a Wetland Law and Policy Seminar (beyond the opportunities it presents for field trips) is that wetlands are connected to almost everything. Some connections are conceptual. Wetland regulation, at least in the United States, begins and ends with constitutional issues. As an initial matter, does Congress have the authority under the Commerce Clause to regulate non-navigable waters?<sup>1</sup> If so, does the denial of a wetland permit constitute a compensable taking of private property?<sup>2</sup>

Other connections are biological. Wetlands are frequently transitional areas between upland and open water, and as such can have a relationship with both terrestrial and aquatic species.<sup>3</sup> Moreover, the term “wetlands” comprises a diverse array of ecosystems that can be found throughout the United States,<sup>4</sup> and indeed throughout the globe.<sup>5</sup> Given these various connections

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<sup>1</sup> *E.g.*, *Hoffman Homes, Inc. v. Adm'r, U.S. Envtl. Prot. Agency*, 999 F.2d 256 (7th Cir. 1993) (ruling initially that federal jurisdiction over isolated water went beyond Congress's interstate commerce power; dismissing enforcement action on rehearing based on non-constitutional ground of lack of substantial evidence).

<sup>2</sup> *E.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 618-30 (2001) (examining reasonable investment-backed expectations in context of regulatory takings claim based on wetland permit denial by state).

<sup>3</sup> WILLIAM J. MITSCH & JAMES G. GOSSELINK, *WETLANDS* 18-19 (3rd ed. 2000).

<sup>4</sup> NATIONAL RESEARCH COUNCIL, *WETLANDS: CHARACTERISTICS AND BOUNDARIES* 21 (1995) (listing the major classes of U.S. wetlands as freshwater marsh, tidal salt and brackish marsh, prairie pothole, fen, bog, swamp, bottomland, and mangrove). By regulation, Florida identifies more than a dozen different types of wetlands: “swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps and other similar areas.” FLA. ADMIN. CODE ANN. r. 62-340.200 (19) (2006).

<sup>5</sup> See MITSCH & GOSSELINK, *supra* note 3, at 35-69 (discussing wetlands of the world). The Ramsar Convention on Wetlands, which is a treaty devoted to the conservation of wetlands, has a broad definition: “areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres.” Convention on Wetlands of International Importance especially as Waterfowl Habitat, Feb. 2, 1971, art. 1.1, available at [http://www.ramsar.org/key\\_conv\\_e.htm](http://www.ramsar.org/key_conv_e.htm). Accordingly, under the Ramsar definition, wetlands can include coral reefs, Updated List of Ramsar Coral Reef Sites as of 29 September 2006, 1-2 (2006), [http://www.ramsar.org/types\\_coral\\_present.pdf](http://www.ramsar.org/types_coral_present.pdf), and karst cave systems. DOROTHEA AUGUST, RAMSAR, SUBTERRANEAN RAMSAR SITE IN THE SLOVAK REPUBLIC: SLOVAK REPUBLIC DESIGNATES 35-KM LONG CAVE SYSTEM (2006), [http://www.ramsar.org/wn/w.n.slovak\\_demanova.htm](http://www.ramsar.org/wn/w.n.slovak_demanova.htm).

(and sufficient time), I can draw a link between wetlands and Saddam Hussein,<sup>6</sup> Antarctica,<sup>7</sup> and bankruptcy law.<sup>8</sup>

Despite the biological (and other) connections that wetlands offer, U.S. law generally puts wetlands into a box. Statutes, regulations, policies, and court decisions tend to draw lines around wetlands, seeking to isolate them for purposes of regulation or legal analysis. *Rapanos v. United States* is just the latest example of an understandable, but misguided, attempt to separate wetlands from their surrounding environment.<sup>9</sup>

When the U.S. Supreme Court accepted *Rapanos* for review, it granted certiorari on two questions. The first issue was a matter of statutory interpretation: Does the Clean Water Act's permit requirement for discharges into waters of the United States "extend to nonnavigable wetlands that do not even abut a navigable water?"<sup>10</sup> The second issue focused on the constitutional authority of the federal government: How far does Congress's power under the Interstate Commerce Clause extend with respect to intrastate wetlands?<sup>11</sup> As it turned out, the *Rapanos* decision addressed the first question in such a manner that obviated for now the need to answer the second, more fundamental, question. This essay considers both questions in the context of an interstate industry that has sprung from the Clean Water Act: wetland mitigation banking.

Part I provides a background on wetland mitigation banking, explaining the concept and tracing the reasons for its development, including express congressional support for the industry. Part II then turns to the question of whether the Clean Water Act may be reasonably interpreted to cover wetlands that are not abutting traditionally navigable waters. Congressional directives about wetland mitigation banking offer additional evidence that it is indeed reasonable to assert Clean Water Act jurisdiction over non-navigable wetlands, such as those at issue in *Rapanos*. Next, Part III discusses how the wetland mitigation banking industry helps establish an interstate commerce nexus for the federal government. Finally, Part IV examines the possible impacts that *Rapanos* may have on the wetland mitigation banking industry. The *Rapanos* plurality's truncated view of waters of the United States, which fails to recognize the relationship between wetlands and their surroundings, would likely stunt the mitigation banking

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<sup>6</sup> See Royal C. Gardner, *Perspectives on Wetlands and Biodiversity: International Law, Iraqi Marshlands, and Incentives for Restoration*, 2003 COLO. J. INT'L ENVTL. L. & POL'Y 1, 9-14 (discussing destruction of Mesopotamian Marshlands).

<sup>7</sup> See Wil Burns et. al., *International Legal Developments in Review: 2005— International Environmental Law*, 40 INT'L LAW 197, 203 (2006) (discussing Switzerland's proposed draft resolution on synergies between the Ramsar Convention and the Antarctic Treaty).

<sup>8</sup> See Royal C. Gardner & Theresa J. Pulley Radwan, *What Happens When a Wetland Mitigation Bank Goes Bankrupt?*, 35 ENVTL. L. REP. 10590 (2005) (discussing implications for long-term stewardship of mitigation sites).

<sup>9</sup> *Rapanos v. United States*, 126 S. Ct. 2208 (2006) (plurality). *Carabell v. United States Army Corps of Engineers* is the companion case. For purposes of convenience, I will refer only to *Rapanos* in this essay.

<sup>10</sup> Duke Law, Supreme Court Online, *Rapanos v. United States & Carabell v. Army Corps of Engineers* (consolidated), <http://www.law.duke.edu/publiclaw/supremecourtonline/certgrants/2005/rapvuni.html>.

<sup>11</sup> *Id.*

industry. While the *Rapanos* plurality may view itself as keeping executive branch agencies in check, it ultimately does so in a manner that disrespects congressional preferences and prerogatives.

### I. A BRIEF HISTORY OF WETLAND MITIGATION BANKING

Since the first President Bush's tenure, the United States has espoused the goal of "no net loss" of wetlands.<sup>12</sup> While "no net loss" is a nice shorthand expression, it is difficult to define<sup>13</sup> and (depending on the definition) even more difficult to achieve.<sup>14</sup> Nevertheless, however defined, a "no net loss" policy contemplates that compensatory mitigation will play an important role in attempting to reach the desired environmental objectives.<sup>15</sup>

A primary tool in the battle to achieve "no net loss" is the Clean Water Act, which prohibits the discharge of dredged or fill material into "navigable waters" without a section 404 permit issued by the U.S. Army Corps of Engineers.<sup>16</sup> In one of many odd twists in wetland regulation, the Corps makes its permit decisions by applying standards established by the U.S. Environmental Protection Agency—the 404(b)(1) guidelines.<sup>17</sup> To complicate matters further, the Corps also has a separate permit program

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<sup>12</sup> See Royal C. Gardner, *Public Participation and Wetlands Regulation*, 10 UCLA J. ENVTL. L. & POL'Y 1, 26-27 (discussing the development of the goal of "no net loss"); U.S. ENVIRONMENTAL PROTECTION AGENCY & U.S. ARMY CORPS OF ENGINEERS, NATIONAL WETLANDS MITIGATION ACTION PLAN 1 (2002) (expressing goal of increasing overall wetland functions and values); Fact Sheet, The White House, President Announces Wetlands Initiative on Earth Day (Apr. 22, 2004), <http://www.whitehouse.gov/news/releases/2004/04/20040422-1.html> (announcing goal of overall net increase of 3 million wetland acres over the next five years).

<sup>13</sup> Because wetland functions and values can be difficult to measure, acreage is often used as a surrogate.

<sup>14</sup> While we might be achieving a net gain in acreage, we are not doing so in functions and values. See NATIONAL RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 2-3 (2001) (stating that the goal of no net loss of wetland functions is not being achieved, although the precise magnitude of the shortfall cannot be determined); U.S. FISH AND WILDLIFE SERVICE, STATUS AND TRENDS OF WETLANDS IN THE COTERMINOUS UNITED STATES 1998 TO 2004 7 (2005) (reporting a net gain in wetlands, but noting that the report does not draw conclusions about the quality of the wetlands). See also Colbert on Demand, [http://www.colbertondemand.com/videos/The\\_Colbert\\_Report/Colberts\\_The\\_Word\\_Birdie](http://www.colbertondemand.com/videos/The_Colbert_Report/Colberts_The_Word_Birdie) (providing an irreverent view on differing definitions of wetlands).

<sup>15</sup> WHITE HOUSE OFFICE ON ENVIRONMENTAL POLICY, PROTECTING AMERICA'S WETLANDS: A FAIR, FLEXIBLE, AND EFFECTIVE APPROACH (1993), available at <http://www.wetlands.com/fed/aug93wet.htm> (stating that mitigation is a "central premise" of the Clean Water Act section 404 program).

<sup>16</sup> 33 U.S.C. § 1344 (2000).

<sup>17</sup> *Id.* §1344(b)(1). In light of the Corps, and EPA's shared responsibilities, Professor Oliver Houck once described the section 404 program as being "constructed on the backs of two beasts moving in different directions." Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773, 774-75 (1989). Moreover, even the title of permit standards is misleading; the "guidelines" are binding regulations promulgated through public notice and comment and codified in the Code of Federal Regulations. See 40 C.F.R. 230 (2006) (setting out the regulations and procedures for section 404 permitting).

under the Rivers and Harbors Act, which uses the much-maligned public interest review.<sup>18</sup> Justice Scalia invoked the public interest review when describing the Corps as an “enlightened despot.”<sup>19</sup> As a practical matter, however, the Corps does not deny section 404 permits based solely on the public interest review. If a project fails to meet the 404(b)(1) guidelines, it will likely fail the public interest review too, but the latter is not the reason for the permit denial. (Indeed, I will buy lunch for the first person who can provide me a copy of a section 404 permit denial in the last ten years that was based solely on the public interest review.) Whatever the applicable standard, however, the Corps rarely denies permits,<sup>20</sup> a fact which does not bode well for achieving “no net loss.”

To offset the impacts of the thousands of activities permitted annually, the Corps often requires the project proponents to provide compensatory mitigation: restoring, enhancing, creating, or in limited circumstances preserving other wetlands.<sup>21</sup> Thus, if a developer wishes to fill ten acres of a freshwater marsh for a shopping mall, the Corps may grant the permit on the condition that the developer agrees to restore 15 acres of marsh elsewhere.<sup>22</sup> On paper, such a transaction would appear to achieve “no net loss.” In reality, the compensatory mitigation often fails.<sup>23</sup> Sometimes the mitigation project is never even started, while sometimes the mitigation project is attempted but does not result in a functioning wetland. Even if the mitigation project is initially successful,

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<sup>18</sup>The public interest review factors have been described as “virtually standardless,” Houck, *supra* note 17, at 826, and “a parody of standardless administrative choice.” 1902 Atlantic Ltd. v. Hudson, 574 F. Supp. 1381, 1398 n.16 (E.D. Va. 1983). The public interest factors include: “conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.” 33 C.F.R. 320.4(a)(1) (2006).

<sup>19</sup>Rapanos v. United States, 126 S. Ct. 2208, 2214 (2006) (plurality).

<sup>20</sup>In fiscal year 2003 (the most recent time period for which the Corps provides data on its website), the Corps denied 299 permits out of more than 86,000 permit actions. The previous fiscal year, the Corps denied 128 projects. U.S. ARMY CORPS OF ENGINEERS, U.S. ARMY CORPS OF ENGINEERS REGULATORY PROGRAM, [HTTP://WWW.USACE.ARMY.MIL/CW/CECWO/REG/2003WEBCHARTS.PDF](http://www.usace.army.mil/cw/cecwo/reg/2003webcharts.pdf); See also Craig Pittman & Matthew Waite, *They won't say no*, St. Petersburg Times, May 22, 2005, at 1A (reporting that between 1999 and 2003, the Corps in Florida “approved more than 12,000 wetland permits and rejected one”).

<sup>21</sup>For a general background on federal mitigation policies, see NATIONAL RESEARCH COUNCIL, *supra* note 14, at 82-93 and Royal C. Gardner, *Mitigation, in WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404*, at 253-81 (Kim Diana Connolly et al. eds., 2005).

<sup>22</sup>Factors that affect the mitigation ratio include the level of functions of the wetland filled, the expected increase in the level of functions of the mitigation site, the lag time between the impact and the completed mitigation project, the risk associated with the mitigation project, and the distance of the mitigation site from the fill site. DENNIS M. KING & ELIZABETH W. PRICE, *DEVELOPING DEFENSIBLE WETLAND MITIGATION RATIOS 8* (2004), <http://www.nero.noaa.gov/hcd/socio/FinalNOAA%20Wetland%20mitigation%20ratio%20guidance.pdf>.

<sup>23</sup>See NATIONAL RESEARCH COUNCIL, *supra* note 14, at 103-22 (citing numerous reasons why mitigation efforts do not achieve their intended results).

typically there is no long-term steward who would care for the site. Monitoring and enforcement of mitigation conditions has not been a priority for the Corps. Many studies confirmed the problems associated with permittee-responsible mitigation.<sup>24</sup>

In the late 1980s and early 1990s, the Corps and the EPA began to consider other approaches to compensatory mitigation. Rather than issuing permits based on a permittee's promise to perform mitigation after the development project, the agencies examined whether it would be feasible for the permittee to provide the mitigation prior to impacts.<sup>25</sup> Such an approach made sense on a number of levels, especially for entities whose activities regularly required the filling of wetlands, thus triggering a need to provide mitigation. For example, a state department of transportation constructs linear projects, and in some areas of the country wetland impacts cannot be avoided. Why not do the mitigation work up front – restore, enhance, create, or preserve wetlands in advance of the highway project – thereby generating an environmental “credit” that could be banked and used later to fulfill a permit's mitigation requirements? Wetland mitigation banking seemed to be an improvement over the status quo of unfulfilled mitigation promises. Credits would only be generated if the mitigation project met certain performance standards, thus suggesting a greater likelihood of success. From the permittee's perspective, the availability of credits would likely ease the permitting process.

Initially, most wetland mitigation banks were operated by state departments of transportation or port authorities.<sup>26</sup> Soon, however, the agencies began to encourage private entrepreneurs to operate third-party mitigation banks. In an entrepreneurial or commercial mitigation bank, the bank operator restores, enhances, creates, and/or preserves wetland areas, creating credits, which are then transferred or sold to a permittee.<sup>27</sup> As in the state department of transportation example (a single-user mitigation bank), the permittee uses the credits to satisfy its mitigation requirements. In an entrepreneurial bank, however, there is also a transfer of responsibility. After purchasing a credit (with agency approval), a permittee has fulfilled its mitigation obligations. The responsibility to maintain the mitigation site now rests with the mitigation banker. Accordingly, the entrepreneurial mitigation banker is selling more than wetland credits. It is selling peace of mind by assuming the legal responsibility for the continuing success of the mitigation site.

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<sup>24</sup> *Id.* See also PAUL MINKIN & RUTH LAW, U.S. ARMY CORPS OF ENGINEERS NEW ENGLAND DISTRICT, SUCCESS OF CORPS-REQUIRED WETLAND MITIGATION IN NEW ENGLAND 1 (2003), available at <http://www.mitigationactionplan.gov/USA/CE%20New%20England%20District%20Mitigation%20Study.pdf> (studying 60 mitigation sites; finding that 67% satisfied permit requirements, but only 17% were “adequate functional replacements for the impacted wetlands”).

<sup>25</sup> See generally William J. Haynes II & Royal C. Gardner, *The Value of Wetlands as Wetlands: The Case for Mitigation Banking*, 23 ENVTL. L. REP. 10,261 (1993) (discussing the environmental and economic benefits of mitigation banking).

<sup>26</sup> ENVTL. LAW INST., WETLAND MITIGATION BANKING, app. A (1993) (listing wetland mitigation banks).

<sup>27</sup> *Id.* at 43-46; Royal C. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings*, 81 IOWA L. REV. 527, 551 (1996).

In 1995, four federal agencies, including the Corps and EPA, issued guidance on the establishment and operation of wetland mitigation banks.<sup>28</sup> (Another wetland regulatory oddity: although the guidance is not a regulation, it was published in the Federal Register for public notice and comment.) The 1995 guidance recognized the many advantages of mitigation banking over traditional permittee-responsible mitigation: the greater likelihood of success, the reduction of lag time between wetland destruction and wetland replacement, larger and consolidated mitigation sites, and greater agency oversight.<sup>29</sup> The guidance sought to provide clear rules for regulators, the regulated community, and mitigation bankers. The agencies wanted to create financial incentives to provide good wetland mitigation.

Despite the fact that the rules were mere guidance (and could be revoked without notice), the market responded resoundingly. In 1992, only one of the 46 wetland mitigation banks was an entrepreneurial bank.<sup>30</sup> By 2002, 219 wetland mitigation banks had been established, and approximately 62% were entrepreneurial banks.<sup>31</sup> The Environmental Law Institute's most recent study identified 405 approved banks and found a further increase in the percentage of entrepreneurial banks.<sup>32</sup> The Corps estimates that there are now more than 450 wetland mitigation banks approved throughout the country, with almost 200 more banks proposed.<sup>33</sup>

Yet the tremendous growth in mitigation banking cannot be attributed solely to the 1995 guidance. Congress has taken an active role in supporting the mitigation banking industry.

In 1991, in the Intermodal Surface Transportation Efficiency Act, Congress authorized the use of mitigation banks to offset wetland impacts associated with federally funded highway projects.<sup>34</sup> In 1998, Congress went even further and expressly endorsed the concept of wetland mitigation banking in the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21).<sup>35</sup> TEA-21 established a congressionally mandated preference that mitigation for wetland impacts from

<sup>28</sup> Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks, 60 Fed. Reg. 58605 (Nov. 28, 1995) [hereinafter Federal Mitigation Banking Guidance].

<sup>29</sup> *Id.* at 58607.

<sup>30</sup> ENVTL. LAW INST., WETLAND MITIGATION BANKING, *supra* note 26, at 5-6.

<sup>31</sup> ENVTL. LAW INST., BANKS AND FEES: THE STATUS OF OFF-SITE MITIGATION IN THE UNITED STATES 35-39 (2002).

<sup>32</sup> JESSICA WILKINSON & JARED THOMPSON, ENVTL. LAW INST., 2005 STATUS REPORT ON COMPENSATORY MITIGATION IN THE UNITED STATES 8 (2006). The figure of 405 banks includes 330 active banks and 75 banks that had sold all their credits. *Id.* at 4. The report was able to classify bank types for 302 banks and found that 218 (72%) were entrepreneurial. *Id.* at 8.

<sup>33</sup> ENVTL. PROT. AGENCY, MITIGATION BANKING FACTSHEET (2006), <http://www.epa.gov/owow/wetlands/facts/fact16.html>.

<sup>34</sup> Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914, 1945 (1991).

<sup>35</sup> 23 U.S.C.A. §§ 103(b)(6)(M) & 133(b)(11) (2005).

federally funded transportation projects should come from mitigation banks, so long as those banks were established in accordance with the 1995 guidance.<sup>36</sup>

The advantages of mitigation banking over traditional permittee-responsible mitigation have been noted by scientific organizations, such as the Society for Wetland Scientists<sup>37</sup> and the National Research Council.<sup>38</sup> Outside the context of federally funded transportation projects, however, it is within the permit applicant's discretion to decide what type of mitigation project to offer. The Corps does not require that all (or even a majority of) permittees purchase credits from a mitigation bank.<sup>39</sup> Instead, the permittee may opt to perform the mitigation itself (on-site or off-site) or make a payment to an in-lieu fee sponsor, which is typically a non-governmental organization or natural resource agency.<sup>40</sup>

Each type of mitigation is not held to the same standard. For example, mitigation banks are generally subject to more rigorous agency scrutiny and oversight.<sup>41</sup> In addition, mitigation banks and in-lieu fee arrangements typically have different timelines for the completion of restoration projects. A mitigation bank must meet certain performance standards before credits are generated; a permittee can purchase and use the mitigation bank credit only when the performance standard is met.<sup>42</sup> In the case of an in-lieu fee arrangement, the funds are collected and pooled with the intention to perform the mitigation project in the future.<sup>43</sup> The permittee may make the in-lieu fee payment and satisfy its mitigation obligation before the mitigation project has even begun. Long-term stewardship requirements also vary significantly. In the case of mitigation banks, an entity (with financial

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<sup>36</sup> *Id.* To complete the interesting loop from guidance to statute and back again, the Corps, EPA, and the Department of Transportation issued a guidance document on how to apply the mitigation provisions of TEA-21. ENVTL. PROT. AGENCY ET AL., FEDERAL GUIDANCE ON THE USE OF THE TEA-21 PREFERENCE FOR MITIGATION BANKING TO FULFILL MITIGATION REQUIREMENTS UNDER SECTION 404 OF THE CLEAN WATER ACT (2003), available at <http://www.epa.gov/owow/wetlands/pdf/TEA-21Guidance.pdf>.

<sup>37</sup> SOCIETY OF WETLAND SCIENTISTS, WETLAND MITIGATION BANKING (2004), <http://www.sws.org/wetlandconcerns/banking.html>.

<sup>38</sup> NATIONAL RESEARCH COUNCIL, *supra* note 14, at 9.

<sup>39</sup> See WILKINSON & THOMPSON, *supra* note 32, at 27 (reporting that permittee-responsible mitigation accounted for approximately 60% of mitigation acreage in fiscal year 2003).

<sup>40</sup> For a critique of in-lieu fee mitigation, see Royal C. Gardner, *Money for Nothing? The Rise of Wetland Fee Mitigation*, 19 VA. ENVTL. L.J. 1, 38-51 (2000).

<sup>41</sup> See NATIONAL RESEARCH COUNCIL, *supra* note 14, at 82-93 (reviewing requirements for different mitigation options).

<sup>42</sup> Federal Mitigation Banking Guidance, *supra* note 28, at 58611-12.

<sup>43</sup> *Id.* at 58613.

resources) should be identified as responsible for the long-term care of the mitigation site.<sup>44</sup> Such a requirement is extremely rare in the case of permittee-responsible mitigation.<sup>45</sup>

Concerned about the uneven playing field among different mitigation providers, Congress directed the Corps, through the 2004 National Defense Authorization Act, to issue regulations that would “apply equivalent standards and criteria to each type of compensatory mitigation.”<sup>46</sup> One of the objectives of the law is to “maximize available [mitigation] credits and opportunities for mitigation.”<sup>47</sup> The Corps (and the EPA) issued a proposed regulation in March 2006 that sought to improve the effectiveness of wetland mitigation through watershed planning, increased public participation in the mitigation process, and the promotion of additional opportunities for mitigation banking.<sup>48</sup>

The Corps and the EPA were considering the public comments on the proposed regulations when the U.S. Supreme Court issued its decision in *Rapanos*.

## II. BEYOND PARODY? REASONABLE INTERPRETATIONS IN LIGHT OF CONGRESSIONAL INACTION AND ACTION

As wetland aficionados know, *Rapanos* is the final installment in a trilogy of U.S. Supreme Court cases that examine the scope of the geographic jurisdiction of the Clean Water Act. First came *Riverside Bayview Homes, Inc. v. U.S. Army Corps of Engineers* in 1985, which upheld the federal government’s assertion of jurisdiction over wetlands adjacent to traditionally navigable waters.<sup>49</sup> In *Riverside Bayview Homes*, however, the Supreme Court expressly declined to address the issue of so-called isolated wetlands, waters that had no hydrologic connection to traditionally navigable waters.<sup>50</sup> That issue was addressed in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers [SWANCC]* in 2001, which limited the federal government’s ability to regulate isolated

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<sup>44</sup> *Id.* at 58612-13.

<sup>45</sup> Until recently, there was no detailed national guidance with respect to requirements for permittee-responsible mitigation. An attempt by the Corps to issue such guidance unilaterally in 2001 was withdrawn. Royal C. Gardner, *Corps’ New Regulatory Guidance Letter on Mitigation: Trick or Treat?*, 24 NAT’L WETLANDS NEWSL. (Env’tl. Law Inst., Washington, DC), Mar.-Apr. 2002, at 3. Guidance that was developed with EPA was more warmly received. See U.S. ARMY CORPS OF ENGINEERS, REGULATORY GUIDANCE LETTER NO. 02-2 (2002), available at [http://www.epa.gov/owow/wetlands/pdf/RGL\\_02-2.pdf](http://www.epa.gov/owow/wetlands/pdf/RGL_02-2.pdf) (detailing permittee mitigation responsibilities and agency guidelines for achieving no net loss goal).

<sup>46</sup> National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392, 1431 (2003).

<sup>47</sup> *Id.*

<sup>48</sup> Compensatory Mitigation for Losses of Aquatic Resources, 71 Fed. Reg. 15520-01, 1520 (Mar. 28, 2006) (to be codified at 33 C.F.R. pts. 325 & 332).

<sup>49</sup> United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).

<sup>50</sup> *Id.* at 131-32, n.8.

waters under the Clean Water Act.<sup>51</sup> In 2006, *Rapanos* then dealt with waters that are geographically in between wetlands abutting a traditionally navigable water and wetlands with no hydrological connection with traditionally navigable waters. In each of these cases, a central issue was one of reasonableness: Was it a reasonable interpretation of the Clean Water Act to cover these waters?

An agency interpretation of a statute that it administers is ordinarily entitled to *Chevron* deference.<sup>52</sup> A court reviewing the agency interpretation first asks whether Congress has provided clear direction on the question at hand. If so, then congressional intent must be followed. Often, however, the statute is vague or susceptible of various interpretations. If that is the case, then the reviewing court must decide whether the agency interpretation is a permissible construction of the statute. The court's role is not to substitute its interpretation for that of the agency; rather, the court should determine whether the agency's judgment is reasonable. Although each of the cases invokes the *Chevron* standard to a varying degree,<sup>53</sup> the theme of reasonable (or unreasonable) interpretations runs through them all.

In *Riverside Bayview Homes*, for example, the Supreme Court considered whether it was reasonable for the Corps to require a permit for activities within non-navigable wetlands that were abutting a traditionally navigable river. The Court reviewed the statutory language of the Clean Water Act, its purposes, and its legislative history to conclude that it was reasonable for the federal government to assert jurisdiction over such waters.<sup>54</sup> Interestingly, the Court also considered congressional inaction in reaching its decision.<sup>55</sup>

Like many aspects of the Clean Water Act section 404 program, its geographic scope was (and continues to be) a subject of controversy. The Corps (after a lawsuit) had amended its regulations to define "navigable waters" under the Clean Water Act in a most expansive manner.<sup>56</sup> Congress was well aware of this new interpretation, and indeed there were attempts to pass legislation

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<sup>51</sup> *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 173-74 (2001).

<sup>52</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984) (articulating the policy of judicial deference to an agency's reasonable interpretation of an ambiguous statute).

<sup>53</sup> Compare *Rapanos v. United States*, 126 S. Ct. 2208, 2225 (2006) (plurality) (stating that Corps' interpretation is not a permissible construction); *id.* at 2235-36 (Roberts, C.J., concurring) (suggesting that the Corps and EPA would have enjoyed *Chevron* deference if they had completed a rulemaking on the definition of waters of the United States); *id.* at 2240 (Kennedy, J., concurring in the judgment) (discussing *Chevron* in the context of *Riverside Bayview Homes*); *id.* at 2252-53 (Stevens, J., dissenting) (stating that Corps' action is "quintessential example" of a "reasonable interpretation") with *SWANCC*, 531 U.S. at 172 (declining to extend *Chevron* deference); *id.* at 191 (Stevens, J., dissenting) (criticizing majority's failure to extend *Chevron* deference) and *Riverside Bayview Homes*, 474 U.S. at 131 (stating that under *Chevron* the Court's inquiry is limited to whether the assertion of jurisdiction is reasonable).

<sup>54</sup> *Riverside Bayview Homes*, 474 U.S. at 131-35.

<sup>55</sup> *Id.* at 135-37.

<sup>56</sup> See *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (ordering the Corps to adopt section 404 permitting regulations over waters of the United States to the fullest extent permissible under federal Commerce Clause authority).

to reverse the Corps' interpretation.<sup>57</sup> In *Riverside Bayview Homes*, the Court noted that the actions (or inactions) of one Congress do not shed light on the intentions of a previous Congress, and the Court emphasized that congressional inaction must be relied upon cautiously.<sup>58</sup> Nevertheless, the Court observed that Congress's consideration of the Corps' interpretation, and its decision to allow the interpretation to remain in place, were indicia that the Corps' interpretation was reasonable.<sup>59</sup> Congressional inaction was not dispositive, but it provided evidence of reasonableness.

In contrast, in *Rapanos*, the plurality rejects the Corps' position as "beyond parody" and offers what it considers to be the sole reasonable interpretation of the Clean Water Act's terms.<sup>60</sup> According to the plurality, "navigable waters" or "the waters of the United States" must refer to "only relatively permanent, standing or flowing bodies of water," such as streams, oceans, rivers, lakes, and bodies of water that form "geographical features."<sup>61</sup> Apparently, this interpretation inexorably flows from the use of the definite article preceding the term "waters of the United States."<sup>62</sup> With respect to whether wetlands are included within the term, the plurality is just as definitive. First, to qualify as a water of the United States, a wetland must be "a relatively permanent body of water connected to traditional interstate navigable waters."<sup>63</sup> Second, the wetland must have a "continuous surface connection" with the traditionally navigable water, "making it difficult to determine where the 'water' ends and the 'wetland' begins."<sup>64</sup> I will leave it to others to critique the plurality's reasoning in a more comprehensive fashion,<sup>65</sup> but I must note that even if this imaginative interpretation of the Clean Water Act is reasonable, it is not the only reasonable construction.

To conclude that the plurality's approach is the one and true divination of the Clean Water Act's meaning ignores congressional action with respect to wetland mitigation banking. As discussed above, Congress has endorsed and encouraged the growth of the mitigation banking industry, through first authorizing and then requiring the use of mitigation banks to offset the

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<sup>57</sup> See *Riverside Bayview Homes*, 474 U.S. at 135-37 (discussing congressional attempts to limit the Corps' expansive definition of navigable waters).

<sup>58</sup> *Id.* at 137.

<sup>59</sup> *Id.*

<sup>60</sup> *Rapanos v. United States*, 126 S. Ct. 2208, 2222 (2006) (plurality).

<sup>61</sup> *Id.* at 2220-21.

<sup>62</sup> *Id.* at 2220.

<sup>63</sup> *Id.* at 2227.

<sup>64</sup> *Id.*

<sup>65</sup> See Jonathan H. Adler, *Once More, with Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction*, *infra*, at 92-95; Kim Diana Connolly, *Any Hope for Happily Ever After? Reflections on Rapanos and the Future of the Clean Water Act Section 404 Program*, *supra*, at 46-54; Stephen M. Johnson, *The Rulemaking Response to Rapanos: The Government's Best Hope for Retaining Broad Clean Water Act Jurisdiction*, *supra*, at 26-29; Mark Latham, *Rapanos v. United States: Significant Nexus or Significant Confusion? The Failure of the Supreme Court to Clearly Define the Scope of Federal Wetland Jurisdiction*, *supra*, at 13-16.

impacts of federally funded transportation projects. Moreover, Congress has directed the Corps to level the playing field with respect to mitigation providers to further support mitigation banking beyond the highway context. Yet, if the plurality's interpretation is correct, then Congress's actions (duly enacted laws) have been rendered largely irrelevant.

The driver behind the mitigation banking industry is the regulatory requirement to provide mitigation to offset adverse environmental impacts of development projects. If there is no jurisdiction over a wetland, there is no requirement to apply for a permit. If there is no requirement to seek a permit, there is no mechanism to require the restoration, enhancement, creation, or preservation of other wetlands as mitigation. Without the requirement to provide mitigation, there is no need for a mitigation bank. If the plurality's approach to jurisdiction were adopted, the wetland mitigation banking industry as envisioned by Congress would collapse.

Why is this relevant? In *Riverside Bayview Homes*, congressional inaction was found to provide some evidence of the reasonableness of the agency's position. In *Rapanos*, there is even a stronger argument – not congressional inaction, but congressional action in the form of legislation. Congress was aware of how the agencies were interpreting the geographic scope of the Clean Water Act. Instead of reining in or reversing the agencies, Congress enacted laws directed at how wetland impacts should be mitigated, thereby implicitly accepting the agencies' interpretations. While the actions of Congress in 1991, 1998, and 2003 do not establish the intent of the 1972 Congress that enacted the Clean Water Act, the actions of these subsequent Congresses buttress the conclusion that the agency's interpretations were reasonable. At the very least, the congressional actions suggest that the Corps' interpretation was not beyond parody. By supporting the wetland mitigation banking industry as a market-based approach to environmental protection, it is clear that Congress understood the present jurisdictional scope of the Clean Water Act.

### III. THE CLEAN WATER ACT, WETLAND MITIGATION BANKING, AND INTERSTATE COMMERCE<sup>66</sup>

By basing its conclusion on statutory grounds, the *Rapanos* plurality did not reach the constitutional issue of whether federal jurisdiction over these non-navigable wetlands went beyond Congress's Commerce Clause powers. Similar to the *SWANCC* Court, however, the *Rapanos* plurality did express concern that "the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power."<sup>67</sup> In part because of

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<sup>66</sup> Portions of this section are based on the National Mitigation Banking Association's amicus brief in *Rapanos*. Brief for Nat'l Mitigation Banking Ass'n as Amicus Curiae Supporting Respondents, *Rapanos v. United States*, 126 S. Ct. 2208 (2006) (Nos. 04-1034, 04-1384), 2006 WL 139211 [hereinafter *NMBA Brief*].

<sup>67</sup> *Rapanos*, 126 S. Ct. at 2223.

this constitutional concern, the *Rapanos* plurality (like the *SWANCC* Court before) declined to defer to the Corps' judgment. Yet an examination of the commerce issues tends to support the Corps' position, especially in light of the Supreme Court's decision in *Gonzales v. Raich*.<sup>68</sup>

First, section 404 of the Clean Water Act, by its plain language, is directed at commercial activities. It prohibits the discharge of dredged or fill materials into waters of the United States without a permit. Congress clearly was aware that dischargers would be involved in commercial activity, as demonstrated by the activities Congress chose to exempt from the permit requirement in section 404(f).<sup>69</sup> In that subsection, Congress identifies several commercial activities that generally are not subject to Clean Water Act regulation: farming, silvicultural, and ranching activities; maintenance of structures such as dikes, dams, levees, and transportation structures; construction or maintenance of irrigation or drainage ditches; creation of temporary sediment basins on a construction site; and maintenance of farm, forest, and certain mining roads.<sup>70</sup> These exemptions, however, are limited and subject to a recapture provision.<sup>71</sup> Regulation of farming, silviculture, ranching, mining, and similar industries is easily within Congress's interstate commerce authority.

Other commercial activities are not statutorily exempt, although many qualify for general permits authorized under section 404(e).<sup>72</sup> For example, the Corps has issued nationwide general permits for utility line activities,<sup>73</sup> hydropower projects,<sup>74</sup> surface coal and other mining activities,<sup>75</sup> and the construction of single-family housing.<sup>76</sup> Again, these activities obviously are intrinsically connected to interstate commerce. While the activities regulated under section 404(f) and 404(e) may not necessarily shed light on the meaning of "waters of the United States,"<sup>77</sup> they are helpful in establishing that Congress is acting within its interstate commerce powers when regulating these activities and their environmental impacts.

Moreover, Congress's regulation of compensatory mitigation within the section 404 program establishes another link to interstate commerce. As noted in the National Mitigation

<sup>68</sup> *Gonzalez v. Raich*, 545 U.S. 1 (2005).

<sup>69</sup> See 33 U.S.C. § 1344(f) (2000) (listing non-prohibited discharges).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* § 1344(f)(2) (limiting permit-exempted activities to those that will not change the waters' former use or impair the waters' flow, circulation, or reach).

<sup>72</sup> *Id.* § 1344(e).

<sup>73</sup> Nationwide Permit 12.

<sup>74</sup> Nationwide Permit 17.

<sup>75</sup> Nationwide Permit 21 and 44.

<sup>76</sup> Nationwide Permit 29.

<sup>77</sup> See *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 171 n.7 (2001).

Banking Association's (NMBAs) amicus brief in *Rapanos*, wetland mitigation banking is a "robust" industry regulated under the Clean Water Act and transportation laws.<sup>78</sup>

Companies in this industry often have mitigation banks or other operations in multiple states. The industries providing other services for compensatory mitigation, such as vegetation and materials for restoration, also are interstate enterprises. While most mitigation banks are located within and offer credits within one state, some mitigation banks are authorized to operate in multiple states. Indeed, the Environmental Protection Agency has recognized that "entrepreneurial providers of bank credits have emerged as a nationally-organized industry contributing hundreds of millions of dollars annually to the domestic product."<sup>79</sup>

The growth and vitality of this market-based approach to wetland mitigation (to offset the environmental impacts of commercial activities) is precisely what Congress intended.

In some ways (as the NMBAs amicus brief suggested), the interstate commerce issues associated with wetland mitigation banking are the mirror image of those raised in *Gonzales v. Raich*.<sup>80</sup> In *Raich*, the Court considered the constitutionality of the Controlled Substances Act (CSA), which prohibits the possession of, among other items, home-grown marijuana even if it is intended for personal, medical use.<sup>81</sup> The *Raich* Court concluded "that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."<sup>82</sup> Congress thus may regulate a purely intrastate activity in an attempt to limit the growth of a national, interstate market. With respect to wetland mitigation banking, Congress intends to create and promote a national, interstate market. If the Interstate Commerce Clause provides the authority for Congress to restrict markets, it also provides Congress the authority to create markets, especially when the market is related to commercial activities.

Some wetland mitigation banks provide excellent bird habitat,<sup>83</sup> which leads to a final point concerning *Raich*: its reasoning may permit the resurrection of some form of the Migratory

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<sup>78</sup> NMBA Brief, *supra* note 66, at 3.

<sup>79</sup> *Id.* at 9-10 (footnotes omitted). The NMBA amicus brief noted that "[s]everal courts of appeals have recognized that the restoration and mitigation industries associated with environmental regulation form an appropriate linkage to interstate commerce." *Id.* at 16 (citing *United States v. Ho*, 311 F.3d 589, 604 (5th Cir. 2002) (asbestos removal services) and *United States v. Olin*, 107 F.3d 1506, 1511 (11th Cir. 1997) (hazardous waste disposal)).

<sup>80</sup> *Id.* at 14-15.

<sup>81</sup> *Gonzales v. Raich*, 545 U.S. 1, 7-8 (2005).

<sup>82</sup> *Id.* at 22.

<sup>83</sup> For example, Mud Slough Mitigation Bank in Oregon has been designated an Important Bird Area, Mud Slough Wetland: Important Bird Area (IBA), [http://www.oregonniba.org/Mud%20Slough\\_\\_Wetland\\_\\_One%20Pager.doc](http://www.oregonniba.org/Mud%20Slough__Wetland__One%20Pager.doc), and Panther Island Mitigation Bank in Florida (adjacent to the National Audubon Society's Corkscrew Swamp Sanctuary) provides habitat for the endangered wood stork. Paul Andrews, *President's Message*, 30 PILEATED WOODPECKER (Sanibel-Captiva Audubon Soc'y, Sanibel, FL), Feb.-Mar. 2005, at 1, available at <http://www.sancapaudubon.org/Newsletters/JanFeb2005.htm>.

Bird Rule. The Migratory Bird Rule, which was contained in a Corps memorandum, stated that the presence of migratory birds at a wetland could provide a sufficient interstate commerce nexus to justify asserting Clean Water Act jurisdiction over the site.<sup>84</sup> In *SWANCC*, the Court invalidated the Migratory Bird Rule as going beyond congressional intent.<sup>85</sup> The Court did not, however, rule definitively on the issue and left open the possibility that migratory birds may provide a sufficient interstate commerce connection to assert federal jurisdiction over so-called isolated waters.<sup>86</sup> *Raich's* discussion of the classic Commerce Clause case, *Wickard v. Filburn*,<sup>87</sup> gives new life to a cumulative impacts argument.

*Wickard* involved the regulation of a farmer growing wheat for use on his own farm. The Supreme Court reasoned that this purely local activity “may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”<sup>88</sup> Although the impact of a single farmer’s activities would be de minimis, the Court nevertheless held that the potential cumulative impact of such trivial actions could be covered by the Interstate Commerce Clause.<sup>89</sup> The *Raich* Court found *Wickard's* precedent controlling: “leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.”<sup>90</sup>

What is the connection between wheat and marijuana cases and the regulation of wetlands? The cumulative impact analysis used in *Wickard* and *Raich* (What if everyone grew their own wheat? What if everyone grew their own marijuana?) is transferable to isolated waters that provide habitat for migratory birds. If a few hydrologically isolated wetlands are filled, the impact on migratory birds will not be substantial. But the cumulative impact of filling thousands of acres of these areas would have a significant impact on migratory bird populations – and a substantial impact on interstate commerce. A perusal of the U.S. Fish and Wildlife Service’s economic analysis of birding in the United States demonstrates the link between wetland bird species and billions of dollars of bird-related economic activity.<sup>91</sup> If the wetlands go, so do the migratory birds and the commercial activities dependent upon them.

Those who scoff at the notion that the Clean Water Act may be used as a mechanism to protect birds would be well advised to review the statute’s plain language. Congress instructs the

<sup>84</sup> Gardner, *Public Participation and Wetlands Regulation*, *supra* note 12, at 35-38.

<sup>85</sup> *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001).

<sup>86</sup> *Id.* (interpreting the Clean Water Act to avoid reaching the constitutional issue).

<sup>87</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>88</sup> *Id.* at 125.

<sup>89</sup> *Id.* at 127-28.

<sup>90</sup> *Gonzalez v. Raich*, 545 U.S. 1, 19 (2005).

<sup>91</sup> See U.S. FISH & WILDLIFE SERVICE, BIRDING IN THE UNITED STATES: A DEMOGRAPHIC AND ECONOMIC ANALYSIS 12, 15 (2001), available at [http://library.fws.gov/nat\\_\\_survey2001\\_\\_birding.pdf](http://library.fws.gov/nat__survey2001__birding.pdf) (reporting that birders spent nearly \$32 billion in retail sales in 2001, and 47% of them visited wetlands to conduct birding activities).

Corps to make section 404 permit decisions based on the section 404(b)(1) guidelines, which in turn are to be based on criteria contained in section 403(c).<sup>92</sup> Section 403(c) expressly requires consideration of a proposed activity's impacts on "fish, shellfish, [and] wildlife."<sup>93</sup> Accordingly, protecting migratory birds, at least those that are aquatic or wetland-dependent, is entirely consistent with congressional intent as expressed in law.

#### IV. THE IMPACT OF *RAPANOS* ON WETLAND MITIGATION BANKING AND WATERSHED PLANNING

Because the wetland mitigation banking industry is a creature of government regulation, one might say that its future is uncertain (and the end is always near).<sup>94</sup> The ultimate impact of *Rapanos* on wetland mitigation banking depends on a number of judicial, administrative, and legislative factors. Will the lower courts adopt the plurality's restrictive interpretation, Justice Kennedy's suggested "significant nexus" test, a combination of both, or some other approach? Early results are mixed.<sup>95</sup> On the administrative front, the Corps and the EPA are unlikely to engage in a quick notice-and-comment rulemaking effort. As the proposed compensatory mitigation regulation illustrates, the development of a wetland regulation takes time, and any such effort may bump up against the end of the Bush administration's tenure.<sup>96</sup> Moreover, in light of the plurality's emphasis that there is only one way to interpret the Clean Water Act's jurisdictional scope, it is not clear how much deference the agency's regulation would receive.<sup>97</sup> Of course, Congress could enact legislation to clarify the jurisdictional scope of the Clean Water Act, but environmental legislation has not recently been a priority.

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<sup>92</sup> 33 U.S.C. § 1343(c) (2000).

<sup>93</sup> *Id.*

<sup>94</sup> *Cf.* Jim Morrison, *Roadhouse Blues*, on *AN AMERICAN PRAYER* (Elektra/Wea 1978).

<sup>95</sup> Compare *United States v. Johnson*, 467 F.3d 56, 60 (1st Cir. 2006) (concluding that either the plurality or Justice Kennedy's approach may be used) with *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) (finding Justice Kennedy's opinion controlling); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (finding Justice Kennedy's standard controlling); and *United States v. Chevron Pipeline Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (concluding that because of lack of consensus in U.S. Supreme Court, Fifth Circuit precedent will primarily apply).

<sup>96</sup> Congress directed the Corps to issue the final rule in November 2005, two years from the date of enactment, but it did not issue the proposed rule until March 2006.

<sup>97</sup> Chief Justice Roberts laments that the Corps and EPA did not conclude their rulemaking on the definition of waters of the United States. *Rapanos v. United States*, 126 S. Ct. 2208, 2236 (2006) (Roberts, C.J., concurring). But, as Justice Kennedy notes, "because the plurality presents its interpretation of the Act as the only permissible reading of the plain text, . . . the Corps would lack discretion, under the plurality's theory, to adopt contrary regulations." *Id.* at 2247 (Kennedy, J., concurring in the judgment).

There is, however, one point that is clear: to the extent that federal jurisdiction contracts, there will be an adverse impact on the wetland mitigation banking industry.

As noted above, if there is no need to seek a permit to fill a wetland, there will be no need to provide compensatory mitigation. If there is no need to provide compensatory mitigation, then there is no demand for mitigation credits and mitigation bankers have nothing to sell. The aftermath of *SWANCC* demonstrates this obvious point. After *SWANCC* called into question the federal government's ability to regulate hydrologically isolated wetlands, mitigation bankers in the Chicago District Corps of Engineers saw their sales volume and gross income reduced by half.<sup>98</sup> One could reasonably expect to see a greater decline if the *Rapanos* plurality's approach became binding.

Beyond its possible impact on mitigation banking, *Rapanos* also holds implications for watershed planning efforts. The National Research Council recommended that the Corps adopt a watershed approach to wetland protection, urging that regulators use a landscape perspective to consider the type and location of mitigation sites.<sup>99</sup> Noting that "there are many watersheds where existing wetland functions have been degraded, and the mix of wetland types in the watershed is a result of historical development patterns," the Council suggested in some cases it made "little sense to replicate a degraded system."<sup>100</sup> Instead, it may be preferable from a watershed perspective to require out-of-kind mitigation (e.g., restoring a different type of wetland than the type impacted), if that "would improve watershed functioning."<sup>101</sup> The Corps' and EPA's proposed compensatory mitigation regulation adopted this recommendation and encourages the use of watershed plans and approaches.<sup>102</sup>

The *Rapanos* plurality's approach would eliminate the federal government's ability to conduct watershed planning through the Clean Water Act. A watershed approach considers an area's present ecological conditions, development plans and trends, and ecological objectives for the future. To achieve the ecological objectives, a watershed approach should identify priority areas for restoration and preservation, as well as sites that may be developed. Such an approach necessarily recognizes the connections between traditionally navigable waters, their tributaries, and

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<sup>98</sup> Morgan M. Robertson, *Emerging Ecosystem Service Markets: Trends in a Decade of Entrepreneurial Wetland Banking*, 4 FRONTIERS IN ECOLOGY & THE ENV'T 297, 299 (2006). See also John Ryan & David Urban, *Managing Mitigation: An Insider's Perspective on the Banking Industry*, 26 NAT'L WETLANDS NEWSL. (Env'tl. Law Inst., Washington, DC), Nov.-Dec. 2004, at 9 (discussing the impact of *SWANCC*).

<sup>99</sup> NATIONAL RESEARCH COUNCIL, *supra* note 14, at 140-49, 166-68.

<sup>100</sup> *Id.* at 142.

<sup>101</sup> *Id.* Thus, a preference for on-site, in-kind mitigation should not be based on a policy presumption; rather, such a preference should "follow from an analytically based watershed assessment." *Id.*

<sup>102</sup> Compensatory Mitigation for Losses of Aquatic Resources, 71 Fed. Reg. 15520, 15523-24 (Mar. 28, 2006) (to be codified at 33 C.F.R. pts. 325 & 332 and 40 C.F.R. pt. 230).

all wetlands within the watershed (whether hydrologically connected or not). The *Rapanos* plurality would sever those connections.

In some respects, Justice Kennedy's significant nexus test forces the Corps to adopt a watershed approach (excluding hydrologically isolated waters). His opinion concurring in the judgment points out the relationship between wetlands and other, distant waters, and accordingly makes a linkage between the loss of wetlands along the Mississippi River and the growth of the Gulf of Mexico's dead zone.<sup>103</sup> Nevertheless, a connection between wetlands and traditionally navigable waters may not automatically be presumed. Under Justice Kennedy's test, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute. Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.<sup>104</sup>

A watershed approach should respond to Justice Kennedy's concerns. It would likely include an inventory of the area's wetlands and their conditions, which should provide information about the extent to which they contribute to the chemical, physical, and biological integrity of traditionally navigable waters.

The challenge with respect to watershed planning (and implementing Justice Kennedy's test) is resources. Like the "no net loss" policy, watershed planning is a nice shorthand expression, but difficult to implement.<sup>105</sup> Developing an effective watershed plan requires the participation of many stakeholders; it also requires a lot of time and funding. As the National Research Council observed, however, the Corps lacks resources to implement its responsibilities with respect to oversight of compensatory mitigation.<sup>106</sup> Yet the watershed approach remains the best option for the Corps to assert jurisdiction over our nation's wetlands, which provides an additional reason why the Corps and EPA should retain the watershed approach as a key component when the compensatory mitigation rule is finalized. Otherwise, the compensatory mitigation regulation may

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<sup>103</sup> *Rapanos v. United States*, 126 S. Ct. 2208, 2246-47 (Kennedy, J., concurring in the judgment).

<sup>104</sup> *Id.* at 2249.

<sup>105</sup> See J.B. Ruhl et al., *Proposal for a Model State Watershed Management Act*, 33 ENVTL. L. 929 (2003) (detailing challenges associated with watershed planning).

<sup>106</sup> NATIONAL RESEARCH COUNCIL, *supra* note 14, at 101-03.

have little relevance at the federal level, serving at most as a model for state and local agencies, a result that Congress did not intend.<sup>107</sup>

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In rejecting the Corps' interpretation of waters of the United States, the plurality derisively quotes from the movie *Casablanca*.<sup>108</sup> But the plurality's opinion is, for at least the moment, just that: a mere plurality. In light of Justice Kennedy's concurrence, perhaps a more appropriate quote for wetland protection under the Clean Water Act is from Monty Python and the Holy Grail: "I'm not dead."<sup>109</sup> Congress and the agencies still have the opportunity – and the authority – to make the necessary connections to protect wetlands on a watershed basis.

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<sup>107</sup> One possible outcome of *Rapanos* is that states or local governments may assert jurisdiction over wetlands; indeed after *SWANCC*, "several counties in the Chicago, Illinois, region took jurisdiction over wetlands that the Corps did not regulate." David Urban, *Rapanos v. United States: A Mitigation Banker's Perspective*, 28 NAT'L WETLANDS NEWSL. (Env'tl. Law Inst., Washington, DC), Sep.-Oct. 2006, at 11. While having counties assert jurisdiction is better than no jurisdiction at all, such an approach has negative implications for the mitigation banking industry and for the environmental benefits of mitigation banking. Counties typically do not allow wetland impacts to be mitigated outside their jurisdiction. While understandable from a political perspective, county lines are not necessarily drawn based on watershed boundaries. Thus, mitigation bankers will find their service areas more limited. As such, there will be smaller mitigation bank sites. See *id.* at 11 ("[S]maller jurisdictional areas cause smaller mitigation sites."). In this scenario, the public will lose the benefit of larger consolidated mitigation sites, and we may see more reliance on "postage stamp" mitigation, which in the past has not been successful.

<sup>108</sup> See *Rapanos v. United States*, 126 S. Ct. 2208, 2218 n.2. (2006):

Captain Renault [Claude Rains]: "What in heaven's name brought you to Casablanca?"

Rick [Humphrey Bogart]: "My health. I came to Casablanca for the waters."

Captain Renault: "The waters? What waters? We're in the desert."

Rick: "I was misinformed."

*Id.* (some quotation marks omitted).

<sup>109</sup> IMDb, Memorable Quotes from Monty Python and the Holy Grail (1975), <http://www.imdb.com/title/tt0071853/quotes>. Of course, the character who speaks this line is ultimately knocked on the head and thrown on the dead collector's cart. One hopes that the Clean Water Act section 404 program does not meet a similar fate.

# Once More, With Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction

Jonathan H. Adler\*

## INTRODUCTION

The Supreme Court's decision reaffirming limits on federal regulatory jurisdiction in *Rapanos v. United States*<sup>1</sup> was significant, but hardly revolutionary.<sup>2</sup> The Court's ultimate holding followed directly from its prior decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* [SWANCC].<sup>3</sup> In SWANCC, a five-justice majority held that the Clean Water Act [CWA] did not extend to isolated, intrastate waters because they lack a "significant nexus" to navigable-in-fact waters.<sup>4</sup> From this decision, *Rapanos*' holding that the CWA only reaches those wetlands with a "significant nexus" to navigable-in-fact waters naturally follows.<sup>5</sup> The Court was fractured, lacking a majority opinion. Nonetheless, *Rapanos* reiterated the principles underlying the SWANCC decision.

Taken together, *Rapanos* and SWANCC indicate that the current Supreme Court is reluctant to conclude that Congress has authorized far-reaching federal regulatory controls over private land use. The Court is not eager to confront or define the constitutional limits of federal regulatory authority. Yet the Court can and will insist that Congress explicitly authorize federal regulatory measures that encroach upon matters traditionally left in state and local hands, such as local land use. In this way, *Rapanos* reaffirms the federalism "clear statement" rule that disfavors federal regulatory intrusions into matters traditionally regulated by the states and disregards the purported need for a comprehensive federal regulatory scheme.

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<sup>1</sup> *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

<sup>2</sup> See Bradford C. Mank, *Implementing Rapanos: Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators and Developers*, 40 IND. L. REV. (forthcoming 2006-07) (noting *Rapanos* was "not a revolutionary decision"). For additional analysis of *Rapanos v. United States* see Jonathan H. Adler, *Reckoning with Rapanos: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation*, 14 MO. ENVT'L. L. & POL'Y REV. 1 (2006).

<sup>3</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engrs.* [SWANCC], 531 U.S. 159 (2001).

<sup>4</sup> *Id.* at 167.

<sup>5</sup> See *infra* Part III.

That such a clear statement rule is in tension with some environmental concerns does not undermine its legitimacy, nor does it suggest that the Court's decisions were wrong. To recognize and enforce limits on federal regulatory power is not to deny the importance of environmental conservation or the interconnected nature of ecological concerns. Environmental progress is wholly consistent with meaningful limits on federal power. The challenge to policy makers is to adapt conservation measures to the broader legal landscape and recognize that environmental protection can live within legal limits.

## I.

There has never been federal land-use planning in the United States. Such measures were briefly considered in the early 1970s, but not adopted.<sup>6</sup> The “quiet revolution” in land-use control that swept state and local jurisdictions in the 1960s failed to produce equivalent federal measures.<sup>7</sup> Even with the Nixon Administration's support, federal land-use legislation never reached the President's desk.

Despite the lack of a federal land-use planning law, the combined effect of federal environmental laws is to regulate a substantial amount of private land use.<sup>8</sup> Federal environmental statutes from the Endangered Species Act and Surface Mine Reclamation and Control Act to the Resource Conservation Act and even the Clean Air Act contain provisions that limit private land use to one extent or another. Of all federal programs, however, the federal regulation of wetlands under section 404 of the Clean Water Act is arguably the single most expansive federal regulation of private land use.<sup>9</sup>

There are an estimated 107 million acres of wetlands in the continental United States.<sup>10</sup>

<sup>6</sup> This history is briefly recounted in Jonathan H. Adler, *Back to the Future of Conservation: Changing Perceptions of Property Rights & Environmental Protection*, 1 N.Y.U. J.L. & LIBERTY 987, 993-997 (2005).

<sup>7</sup> See FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971) (describing the “quiet revolution” in land use control).

<sup>8</sup> See Robert H. Nelson, *Federal Zoning: The New Era in Environmental Policy*, in *LAND RIGHTS: THE 1990S PROPERTY RIGHTS REBELLION* 295, 296 (Bruce Yandle ed., 1995) (describing the extent to which federal environmental regulations affect private land use decisions); FRED BOSSELMAN ET AL., *FEDERAL LAND USE REGULATION 1* (1977) (noting the extensive impact of federal environmental laws on land use decisions).

<sup>9</sup> The other contender for this title would be section 9 of the Endangered Species Act, which prohibits habitat modification that could result in the “take” of a listed endangered species. 16 U.S.C. 1538(a)(1) (prohibiting the “take” of endangered species of fish and wildlife); *Babbitt v. Sweet Home Chapter of Cmty. For a Great Oregon*, 515 U.S. 687 (1995) (upholding definition of “take” to include habitat modification or degradation that harms an endangered species). The management of federal lands, which constitute approximately 30 percent of the nation, also entails a substantial amount of land-use control, but not of private lands.

<sup>10</sup> U.S. FISH & WILDLIFE SERV., *STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES: 1998 TO 2004* (2006).

Approximately three-fourths of these wetlands are privately owned.<sup>11</sup> If all lands that potentially meet an ecological definition of “wetlands” are subject to federal regulatory control, the section 404 program authorizes federal land-use control over tens of millions of acres of private land. Indeed, as currently implemented, section 404 requires millions of landowners to sacrifice control over their own land in order to provide the public with the ecological services wetlands provide.<sup>12</sup> From the mustard seed of statutory jurisdiction over “navigable waters of the United States” has grown a regulatory tree whose branches extend across the landscape far beyond the actual “waters” of the United States.<sup>13</sup>

For some landowners, the cost of such regulations can be quite substantial. Obtaining an individual wetland permit takes over two years, on average, and can cost upwards of \$250,000.<sup>14</sup> Those eligible for nationwide permits spend significantly less time and money, but the costs remain significant.<sup>15</sup> All told, one study estimates that the public and private sectors together spend \$1.7 billion annually to obtain wetland permits.<sup>16</sup> Some landowners have successfully challenged permit denials as uncompensated regulatory takings, but this is the exception not the rule.<sup>17</sup>

Given its potential scope, it is understandable why section 404 did more than any other single federal program to stoke the fires of property rights activism and landowner opposition to federal environmental regulations in the 1990s.<sup>18</sup> The changing, and seemingly expanding, definition of what could constitute a regulated “wetland” under federal law generated fear and uncertainty among private landowners.<sup>19</sup> The Bush Administration’s 1989 revisions to the federal wetland delineation

<sup>11</sup> Jon Kusler, *Wetland Delineation: An Issue of Science or Politics?*, ENV’T, Mar. 1992, at 7, 29.

<sup>12</sup> See PAUL SCODARI, MEASURING THE BENEFITS OF FEDERAL WETLAND PROGRAMS 1 (1997) (“The benefits of wetland protection accrue to the general public, while a large share of protection costs are borne by private landowners.”).

<sup>13</sup> A grain of mustard seed “is indeed the least of all seeds; but when it is grown, it is the greatest among herbs, and becometh a tree, so that the birds of the air come and lodge in the branches thereof.” Matthew 13:31.

<sup>14</sup> David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74-76 (2002). This estimate excludes the costs of mitigation, design changes, and project delays. *Id.* at 74. Out-of-pocket costs for obtaining permits may dramatically *understate* the total costs by as much as an order of magnitude. David Sunding, *An Opening for Meaningful Reform?* REGULATION, Summer 2003, at 30, 32.

<sup>15</sup> Sunding & Zilberman, *supra* note 14, at 74-76.

<sup>16</sup> *Id.* at 81.

<sup>17</sup> See, e.g., WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 10:7-15 (2006) (describing takings challenges to wetlands regulations); Darren Botello-Samson, *You Say Takings, and I Say Takings: The History and Potential of Regulatory Takings Challenges to the Endangered Species Act*, 16 DUKE ENVTL. L. & POL’Y F. 293, 319-331 (2006) (describing takings challenges to the ESA).

<sup>18</sup> See generally Adler, *supra* note 6, at 1001-06 (describing the growth of property rights activism in response to environmental regulation); see also JAMES V. DELONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT — AND WHY YOU SHOULD CARE (1997); A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE (Philip D. Brick & R. McGregor Cawley eds., 1996); LAND RIGHTS: THE 1990S PROPERTY RIGHTS REBELLION, *supra* note 6; Jonathan H. Adler, *Takings Cause—The Property Rights Revolt*, NAT’L REV. Dec. 19, 1994.

<sup>19</sup> The “basic definition of wetlands used by the government changed at least six times” between 1986 and 1994. DELONG, *supra* note 18, at 134.

manual, in particular, introduced thousands of landowners to the threat of federal regulation.<sup>20</sup> By some estimates, the new manual nearly doubled the amount of land regulated under the CWA.<sup>21</sup>

The expanded definition of wetlands was particularly controversial because it seemed so irrational. Many landowners could not understand how land that was not particularly wet could be regulated as “waters of the United States” under federal law.<sup>22</sup> Horror stories about federal regulation—some real, others not—proliferated. A few high-profile criminal prosecutions for section 404 violations added to growing landowner anxiety. In one particularly infamous case, conservationist William Ellen was sent to prison for filling wetlands without a federal permit when the Army Corps of Engineers changed the definition of wetlands after he had begun construction and received the then-necessary permits.<sup>23</sup> John Rapanos himself, while hardly an innocent victim of federal environmental regulation, faced criminal penalties for his violations of section 404.<sup>24</sup>

The perceived excesses of federal wetland regulation fed broader concerns that some federal environmental regulation had gone “too far.” Such concerns were stoked by grassroots property rights organizations, business groups, and anti-regulatory activists, including a growing cadre of public interest legal foundations intent on curtailing the reach of federal regulation. Environmental organizations such as the Natural Resources Defense Council and Sierra Club Legal Defense Fund (later renamed Earthjustice) had long fought to expand the scope of CWA regulatory jurisdiction over wetlands.<sup>25</sup> Now organizations such as the Pacific Legal Foundation, Mountain States Legal Foundation, and Defenders of Property Rights challenged such regulatory authority, particularly where such regulation limited traditional uses of private land.<sup>26</sup>

Given the strong economic, environmental, and ideological interests involved, it was inevitable that the battle over the scope of federal wetland regulation would be waged in federal court.

<sup>20</sup> See Richard Minter, *Muddy Waters: The Quagmire of Wetlands Regulation*, POL’Y REV., Spring 1991, at 70 (noting the impact of the 1989 revisions on private landowners); Warren Brookes, *The Strange Case of the Glancing Geese*, FORBES, Sept. 2, 1991, at 104 (reporting that the 1989 *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* “extended the reach of the 1972 Clean Water Act,” prompting “angry protest from traditional Republican constituencies, farmers, businesses, real estate developers, landowners, and local governments”).

<sup>21</sup> Nancie G. Marzulla, *The Property Rights Movement: Where It Began and Where It Is Headed*, in LAND RIGHTS: THE 1990S PROPERTY RIGHTS REBELLION 1, 17 (Bruce Yandle ed., 1995).

<sup>22</sup> As one court observed, “a landowner who places clean fill dirt on a plot of subdivided dry land may be imprisoned for the statutory felony offense of ‘discharging pollutants into the navigable waters of the United States.’” *United States v. Mills*, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).

<sup>23</sup> DeLONG, *supra* note 18, at 16-17.

<sup>24</sup> *Rapanos v. United States*, 126 S. Ct. 2208, 2215 (2006).

<sup>25</sup> See, e.g. *NRDC v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975) (holding the Army Corps has jurisdiction over wetlands under section 404 of the CWA).

<sup>26</sup> See generally, Ronald A. Zumbun, *Life, Liberty and Property Rights*, in BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT 41-53 (Lee Edwards ed., 2004) (describing growth of public interest legal groups that sought to protect property rights and limit environmental regulations).

Congress showed little interest in revisiting the CWA jurisdiction, nor did the first Bush or the Clinton Administration.<sup>27</sup> Efforts to limit federal wetland regulations through “takings” legislation that would require the federal government to compensate landowners subject to regulatory controls also made little progress. If the debate over wetlands regulation was to be resolved, it would be up to the judiciary.

## II.

In many respects, *SWANCC* and *Rapanos* were presaged by the Rehnquist Court’s federalism jurisprudence. Beginning in the 1990s, a majority of the Court made clear that it would begin to look critically at ever broader assertions of federal regulatory authority. For decades Congress had been permitted to stretch the scope of its limited and enumerated powers, but with *United States v. Lopez*<sup>28</sup> and *United States v. Morrison*<sup>29</sup> the message was that Congress should stop and go no further. In these cases, the Court invalidated federal statutes for exceeding the scope of Congress’s power to regulate “commerce . . . among the several states.” *Lopez* was the first instance of such an invalidation in over fifty years.<sup>30</sup>

The need to limit federal power was hardly a new concern. Since *Marbury v. Madison*, it had been acknowledged that Congress’s powers were “few and defined” and that the enumeration of specific powers presumed that Congress lacked those powers that were not enumerated.<sup>31</sup> Even during the New Deal, at the height of judicial acquiescence to federal power, the Court reiterated the need to maintain *some* limit on Congressional action.<sup>32</sup> While the courts adopted a broader understanding of what constituted “commerce” and accepted somewhat elastic definitions of what was “necessary and proper” to achieve legitimate federal ends, there was still a recognition that federal power had some limit.

In the 1920s and 1930s, when the Supreme Court actively policed the scope of federal power, policymakers were well aware that they sought to challenge the prevailing understanding of

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<sup>27</sup> If anything, both acted to increase the regulatory scope or burden of section 404. As noted above, the Bush Administration adopted a more expansive wetland delineation manual. The Clinton Administration repealed Nationwide Permit 26, replacing it with more burdensome permitting requirements. See Sunding & Zilberman, *supra* note 14.

<sup>28</sup> *United States v. Lopez*, 514 U.S. 549 (1995) (holding the Gun-Free School Zones Act exceeded the scope of Congress’s power to regulate commerce among the several states).

<sup>29</sup> *United States v. Morrison*, 529 U.S. 598 (2000) (holding portions of the Violence Against Women Act exceeded the scope of Congress’s power to regulate commerce among the several states).

<sup>30</sup> The last case prior to *United States v. Lopez* in which the Supreme Court had invalidated a federal statute for exceeding the scope of the Commerce Clause was *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating portions of the Bituminous Coal Conservation Act).

<sup>31</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

<sup>32</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (“That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.”).

the scope of federal power. Legislation was drafted and implemented with an eye toward satisfying, albeit stretching, existing precedent.<sup>33</sup> Decades later when Congress sought to eradicate the cancer of private discrimination in public accommodations, legislators were aware of the need to draft legislation that could survive a subsequent Commerce Clause challenge.<sup>34</sup>

When Congress subsequently turned its attention to environmental concerns in the late 1960s and 1970s, however, relatively little attention was paid to potential constitutional constraints on the scope of federal power.<sup>35</sup> Insofar as constitutional concerns were considered at all, federal policymakers focused on the potential threat of Fifth Amendment “takings” challenges to environmental regulations, particularly those that inhibited development.<sup>36</sup> Enumerated powers were an afterthought, at most, and for understandable reasons. After the Supreme Court’s expansive interpretations of the Commerce Clause in *Wickard v. Filburn*,<sup>37</sup> *Heart of Atlanta Motel v. United States*,<sup>38</sup> and *Katzenbach v. McClung*,<sup>39</sup> Congress had reason to believe that the power “to regulate commerce . . . among the several states” amounted to a *de facto* plenary power over the nation’s affairs. Many assumed that the federal government of limited and enumerated powers had passed away to rest in peace. This blind spot, combined with the broad scope and ambition of federal environmental law, made federalism challenges to federal environmental regulation inevitable.

When the Supreme Court voided the Gun-Free School Zones Act in *United States v. Lopez*,<sup>40</sup> commentators immediately recognized the potential vulnerability of some environmental laws and the section 404 program in particular.<sup>41</sup> Considering the wetland regulations then on the books, Georgetown University’s Richard Lazarus concluded that the Army Corps’ rules were “clearly out of

<sup>33</sup> For example, Congress enacted the Child Labor Tax Law in an effort to use the federal taxing power to circumvent *Hammer v. Dagenhart*, 247 U.S. 251 (1918), in which the Supreme Court invalidated Congressional efforts to regulate Child Labor through the Commerce Clause.

<sup>34</sup> See, e.g., *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964) (noting the legislative history of the Civil Rights Act of 1964 “is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce”).

<sup>35</sup> Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147, 148 (2001) (noting that when Congress adopted many environmental statutes, “[t]he underlying assumption [was] that the Commerce Clause grants virtually carte blanche authority to legislate for environmental protection.”) (citation omitted).

<sup>36</sup> See, e.g., FRED BOSSELMAN ET AL., *THE TAKING ISSUE* (1973).

<sup>37</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>38</sup> *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

<sup>39</sup> *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>40</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>41</sup> See, e.g., David A. Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365 (1998); Lori J. Warner, *The Potential Impact of United States v. Lopez on Environmental Regulation*, 7 DUKE ENVTL. L. & POL’Y F. 321 (1997).

bounds post-*Lopez*,” and would need to be rewritten.<sup>42</sup> Whether or not it was possible to maintain an expansive federal regulatory program in the face of newfound limits on federal power, there was little question that the existing regulatory program would face challenges. Even under a fairly limited reading of *Lopez*’s import—a reading that subsequent developments appear to reaffirm<sup>43</sup>—the wetland regulations on the books at the time of *SWANCC* and *Rapanos* were highly problematic. Yet rather than confront the potential limits on its own authority, the Corps and EPA buried their collective heads in the sand, hoping the storm over federal authority would pass them by—but it did not work out that way.

Federal authority to regulate commerce “among the several states” extends to channels of interstate commerce, instrumentalities or things and persons in interstate commerce, and those activities that “substantially affect” interstate commerce.<sup>44</sup> This remains the test even after the Court’s apparent retreat from serious Commerce Clause scrutiny in *Gonzales v. Raich*.<sup>45</sup> *Raich* upheld extensive federal authority to regulate non-commercial possession of marijuana as part of a comprehensive regulatory scheme controlling economic conduct—the sale, distribution, and manufacture of pharmaceuticals and other drugs—under the Controlled Substances Act.<sup>46</sup> At the same time, the Court reaffirmed the *Lopez* Court’s explication of Commerce Clause doctrine.<sup>47</sup>

As written, the current Army Corps and EPA regulations defining the scope of “navigable waters” exceed the scope of current Commerce Clause authority in two important ways. First, the regulations apply to waters and wetlands whose use or degradation merely “could affect” interstate commerce, rather than those whose use or degradation *actually* affect interstate commerce.<sup>48</sup> Second, the regulations do not require that the potential effect on commerce be “substantial.” Whereas *Lopez* and *Raich* require a “substantial effect” on interstate commerce, federal wetlands regulations require a mere “effect,” and only a potential one at that.

It is certainly possible the Army Corps and EPA could promulgate new regulations that satisfy the requirements of the Commerce Clause and yet, as a practical matter, are nearly equivalent in scope to the regulations challenged in *SWANCC* and *Rapanos*. The Corps would be on strong legal ground were it to argue that the class of activities it seeks to regulate, as a whole, has an actual,

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<sup>42</sup> Richard J. Lazarus, *Corps Slips on Lopez, FWS Wins*, ENVTL. F., Mar.-Apr. 1998, at 8.

<sup>43</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding the prohibition of medical marijuana possession under the Controlled Substances Act as a permissible exercise of federal power under the Commerce Clause). For this author’s take on the *Raich* decision, see Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751 (2005).

<sup>44</sup> See *Lopez*, 514 U.S. at 558-59 (emphasis added).

<sup>45</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>46</sup> 21 U.S.C. §§ 801-904 (2006).

<sup>47</sup> *Id.* at 16, 24-25.

<sup>48</sup> 33 C.F.R. § 328.3 (a)(3) (2006) (emphasis added).

substantial effect on interstate commerce. Relying upon *Raich*, and *Chevron* deference,<sup>49</sup> federal regulators could almost certainly defend such rules in court. Further, *Rapanos* leaves ample room for the Corps to define what could constitute a “significant nexus” connecting wetlands to truly navigable waters.<sup>50</sup>

Most lower courts have been reluctant to curtail the scope of the Corps’ jurisdictional determinations. This is no surprise. Lower federal courts were almost uniformly resistant to Commerce Clause challenges to federal regulations across the board after *Lopez* and *Morrison*.<sup>51</sup> Indeed, it is fair to say most courts were simply going through the motions when purporting to apply *Lopez* and *Morrison* to challenged federal statutes. Few judges took the Supreme Court’s Commerce Clause pronouncements seriously.<sup>52</sup> The Supreme Court, on the other hand, has stayed the course, at least when it comes to adopting narrow constructions of federal regulatory authority.

The fragility of the Corps’ jurisdictional claims became apparent during the course of the *SWANCC* litigation. Aware of the potential weakness of its claims, the federal government adopted a new Commerce Clause rationale for its constitutional authority to prohibit the construction of *SWANCC*’s proposed balefill in gravel pits isolated from navigable-in-fact waters.<sup>53</sup> In the end, however, the Supreme Court ducked the constitutional question in *SWANCC*, holding instead that the CWA did not confer federal regulatory jurisdiction over isolated, intrastate waters.<sup>54</sup>

Federalism concerns remained in the forefront of the case. Among the reasons offered for rejecting the Army Corps’ interpretation of its own regulatory authority, the Court cited the canon

<sup>49</sup> See *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) (holding that where statutory text is ambiguous, courts should defer to a permissible interpretation proffered by the agency entrusted with implementing the statute in question).

<sup>50</sup> Even the plurality opinion authored by Justice Scalia, taken by itself, would leave the federal government ample authority to redefine the scope of “waters of the United States,” as the opinion assumes that the scope of federal jurisdiction over waters is ambiguous. See *Rapanos v. United States*, 126 S. Ct. 2208, 2235-36 (2006) (Roberts, C.J., concurring). Justice Kennedy suggests that “the plurality presents its interpretation of the Act as the only permissible reading of the plain text,” *Id.* at 2246-47 (Kennedy, J., concurring in the judgment). This is mistaken, as the plurality opinion uses the language of *Chevron* “step two,” rather than *Chevron* “step one.” See Adler, *supra* note 2, at 21-22.

<sup>51</sup> See Glenn Reynolds & Brannon Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Regulation and Nobody Came?*, 2000 WIS. L. REV. 369 (2000); Brannon Denning & Glenn Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003).

<sup>52</sup> It is notable that among the minority of Commerce Clause cases featuring serious debate over and consideration of the implications of *Lopez* and *Morrison* are several challenges to the constitutionality of applying the Endangered Species Act to intrastate activity. See, e.g., *GDF Realty v. Norton*, 362 F.3d 286 (5th Cir. 2004) (denial of en banc petition); *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003) (denial of en banc petition); *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

<sup>53</sup> *SWANCC*, 531 U.S. 159, 173 (2001).

<sup>54</sup> *Id.*

against statutory constructions that “raise serious constitutional problems,” such as the ultimate scope of federal regulatory authority pursuant to Congress’s power to regulate commerce among the several states.<sup>55</sup> The broad interpretation of the CWA urged by the Army Corps threatened to “push the limit of congressional authority” and permit “federal encroachment upon a traditional state power.”<sup>56</sup> The Court refused to go along with such an interpretation lacking “a clear indication that Congress intended that result.”<sup>57</sup>

The Supreme Court concluded the CWA did not authorize the application of section 404 to “ponds that are *not* adjacent to open water,” such as the abandoned gravel pits at issue in the case.<sup>58</sup> The Court did not disturb its prior holding in *United States v. Riverside Bayview Homes* that the CWA authorized the regulation of wetlands adjacent to navigable waters, for such wetlands were “inseparably bound up with the ‘waters’ of the United States.”<sup>59</sup> Such a connection established a “significant nexus between the wetlands and ‘navigable waters’”<sup>60</sup> sufficient to regulate the adjacent wetlands as part of the “waters of the United States.” Lacking such a connection, waters would lie outside the scope of section 404.

*SWANCC* did not put an end to litigation over the scope of section 404. To some, the geographic scope of federal wetlands regulation was as muddy as ever.<sup>61</sup> Despite the lingering uncertainty, *SWANCC* did make some things clear. Most importantly, the decision reaffirmed the principle that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise,” such as whether Congress can regulate a given activity under the Commerce Clause, “and by the other of which such questions are avoided,” a court’s “duty is to adopt the latter.”<sup>62</sup> Whereas federal courts once adopted expansive interpretations of federal

<sup>55</sup> *Id.* (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 172. In so doing, the Court rejected the argument that the Corps of Engineers’ regulation was due deference under *Chevron USA Inc. v. NRDC*, 467 U.S. 837 (1984). Although courts will generally defer to federal agency interpretations of ambiguous statutory language, the *SWANCC* majority found such deference to be inappropriate “where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.” 531 U.S. at 173.

<sup>58</sup> *Id.* at 168 (emphasis in original).

<sup>59</sup> *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985).

<sup>60</sup> *SWANCC*, 531 U.S. at 167.

<sup>61</sup> Robert W. Adler, *The Law at the Water’s Edge: Limits to “Ownership” of Aquatic Ecosystems*, in *WET GROWTH: SHOULD WATER LAW CONTROL LAND USE?* 201, 228 (Craig Anthony (Tony) Arnold ed., 2005) (asserting that the jurisdictional reach after *SWANCC* was “perhaps as uncertain as it has been since the *Callaway* decision in 1975”).

<sup>62</sup> *Jones v. United States*, 529 U.S. 848, 857 (2000) (quoting *United States ex rel. Attorney Gen. v. Del. and Hudson Co.*, 213 U.S. 366, 408 (1909)).

jurisdiction so as to effectuate the broad purposes of federal environmental statutes, *SWANCC* made clear that the Supreme Court would now construe ambitious environmental legislation in a narrower fashion.<sup>63</sup>

After *SWANCC*, the Corps could have sought to define what constituted a “significant nexus” but it did not. Instead it sought to ignore the implications of the Court’s holding for as long as possible. In the waning hours of the Clinton Administration, the EPA and the Army Corps issued a joint memorandum construing *SWANCC* to do no more than prevent the assertion of regulatory authority where the only basis for jurisdiction is the presence of migratory birds.<sup>64</sup> Under this interpretation, the so-called “Migratory Bird Rule,” was invalid, but the remainder of the Corps’ rules remained standing.

The Bush Administration made minor revisions to the Joint Memorandum in January 2003.<sup>65</sup> At the same time, the two agencies proposed to clarify the scope of regulatory jurisdiction under the CWA through a rulemaking.<sup>66</sup> This effort was soon abandoned due to extensive criticism from environmentalist organizations and conservation groups.<sup>67</sup> One reason given by federal officials to forego the rulemaking was that federal courts had adopted narrow interpretations of the *SWANCC* decision.<sup>68</sup> Ironically, on the same day as the Army Corps/EPA announcement, the U.S. Court of Appeals for the Fifth Circuit held that such narrow interpretations of *SWANCC* were “unsustainable.”<sup>69</sup> Lacking any clear regulatory guidelines, regional offices applied *SWANCC* quite inconsistently.<sup>70</sup>

<sup>63</sup> For a general discussion of the Supreme Court’s retreat from broad readings of environmental statutes, see Richard J. Lazarus, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 773 (2000). See also Richard J. Lazarus, *The Nature of Environmental Law and the U.S. Supreme Court*, in STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE (Michael Alan Wold ed., 2005).

<sup>64</sup> Memorandum from Gary S. Guzy, Gen. Counsel, U.S. Envtl. Protection Agency, & Robert M. Andersen, Chief Counsel, U.S. Army Corps of Eng’r, Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters (January 19, 2001) [hereinafter Joint Memorandum], available at <http://www.aswm.org/fwp/swancc/legal.pdf>; see also Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 ECOLOGY L.Q. 811, 858-60 (2003) (discussing the joint memorandum).

<sup>65</sup> Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991 app. A (Jan. 15, 2003).

<sup>66</sup> *Id.* at 1991.

<sup>67</sup> See Eric Pianin, *EPA Scraps Changes To Clean Water Act; Plans Would Have Reduced Protection*, WASH. POST, Dec. 17, 2003, at A20.

<sup>68</sup> *Id.* (quoting G. Tracy Mehan III, assistant administrator for water at EPA).

<sup>69</sup> Daniel Simmons, *Navigating SWANCC: An Examination of the U.S. Army Corps of Engineers’ Authority Under the Clean Water Act*, 34 ENVTL. L. REP. 10723, 10730 (2004) (citing *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003)).

<sup>70</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-04-297, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION 3 (2004) (“Corps districts differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the jurisdiction of the federal government.”).

Given the conflicting signals from the courts and federal regulators, and federal courts' inherent reluctance to invalidate federal regulations, additional conflict was inevitable. Following a flood of CWA litigation, a circuit split soon emerged. The U.S. Courts of Appeals for the Fourth,<sup>71</sup> Sixth,<sup>72</sup> and Seventh<sup>73</sup> Circuits read *SWANCC* narrowly, in accord with continuing federal policy,<sup>74</sup> to preclude only federal regulation of isolated, intrastate, non-navigable waters. This was not a unanimous view, however. The U.S. Court of Appeals for the Fifth Circuit—the only circuit court to foresee the reemergence of Commerce Clause limits prior to *Lopez*—understood that the principal holding of *SWANCC* called for the exclusion of at least some waters previously subject to federal control.<sup>75</sup>

The Fifth Circuit held that federal jurisdiction under the CWA no longer extended to wetlands, “puddles, sewers, roadside ditches and the like” that are not truly adjacent to navigable waters.<sup>76</sup> It explicitly rejected the expansive interpretations of federal jurisdiction adopted by the other circuits, holding the CWA is “not so broad as to permit the federal government to impose regulations over ‘tributaries’ that are neither themselves navigable nor truly adjacent to navigable waters.”<sup>77</sup> Interestingly enough, even those lower courts that refused to enforce meaningful limits on the scope of the Corps' regulatory authority recognized that *SWANCC* required a “significant nexus” between wetlands and navigable waters—an understanding that was still not reflected in the Army Corps and EPA regulations.<sup>78</sup>

The division among the circuits, and the federal government's inconsistent jurisdictional determinations, produced continuing uncertainty about the scope of federal regulatory jurisdiction under the CWA. This made additional litigation and a return to the Supreme Court inevitable. Enter John Rapanos and the Carabells who challenged the federal government's statutory and constitutional authority to regulate their lands.

<sup>71</sup> *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003).

<sup>72</sup> *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003).

<sup>73</sup> *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003).

<sup>74</sup> See Joint Memorandum, *supra* note 56; see also Lance D. Wood, *Do Not Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 ENVTL. L. REP. 10187 (2004).

<sup>75</sup> See *In re Needham*, 354 F.3d 340 (5th Cir. 2003); *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001). Although *Needham* and *Rice* specifically address the scope of federal regulation over “waters of the United States” under the Oil Pollution Act, both decisions note that federal jurisdiction under the OPA was intended to be coextensive with that under the Clean Water Act. *Needham*, 354 F.3d at 344; *Rice*, 250 F.3d at 267.

<sup>76</sup> *Needham*, 354 F.3d at 345.

<sup>77</sup> *Id.*

<sup>78</sup> See Mank, *supra* note 64, at 847-48. As Mank notes, many lower courts picked up on the “significant nexus” requirement, even if they did not apply it in a particularly stringent manner. *Id.* at 883-91. See also Mank, *supra* note 2.

## III.

In *Rapanos v. United States*,<sup>79</sup> a slim and divided majority reversed and remanded the decisions of the U.S. Court of Appeals for the Sixth Circuit that had upheld the Army Corps' assertion of regulatory jurisdiction over wetlands owned by John Rapanos and the Carabells.<sup>80</sup> *Rapanos* was not a sweeping victory for opponents of broad federal regulatory jurisdiction, but it did give them something to sing about. The Court rejected the lower court's expansive interpretation of regulatory jurisdiction under the CWA. The Army Corps will have to make a greater showing than the Sixth Circuit had required if the lands owned by Rapanos and Carabell are to be regulated as "waters of the United States." Despite the failure to produce a majority opinion, the *Rapanos* court reaffirmed the central holding of *SWANCC* and made clear that CWA jurisdiction has meaningful limits.

The fractured nature of the *Rapanos* majority complicates the analysis of the Court's holding. As the Court explained in *Marks v. United States*, "[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.'"<sup>81</sup> In *Rapanos*, the judgment of the Court was to vacate and remand the lower court's decisions on the grounds that they adopted an unduly broad interpretation of federal regulatory authority under the CWA.<sup>82</sup> The justice who concurred in this judgment on the "narrowest grounds" is Justice Kennedy. Therefore, the central holding of *Rapanos* can be found in those areas where Justice Kennedy agreed with Justice Scalia's plurality opinion and concurred in the judgment of the Court. Standing in the middle of the Court, Justice Kennedy is "key."<sup>83</sup>

Under *Marks* the central holding of *Rapanos* is that "the Corps' jurisdiction over wetlands depends upon the existence of a *significant* nexus between the wetlands in question and navigable waters in a traditional sense."<sup>84</sup> As defined by Justice Kennedy, "navigable waters" are "waters that are or were navigable in fact, or that could reasonably be so made."<sup>85</sup> There is a "significant nexus" between given wetlands and navigable waters, Justice Kennedy explained,

<sup>79</sup> *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

<sup>80</sup> *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004); *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004).

<sup>81</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).

<sup>82</sup> *Rapanos*, 126 S. Ct. at 2214.

<sup>83</sup> William J. Buzbee, Professor of Law, Dir. of Env'tl. and Natural Res. Law Program, Emory Law School, Testimony Before the Senate Environment and Public Works Subcommittee on Fisheries, Wildlife, and Water 4 (Aug. 1, 2006) ("Justice Kennedy's opinion is the key."), available at [http://www.epw.senate.gov/109th/Buzbee\\_Testimony.pdf](http://www.epw.senate.gov/109th/Buzbee_Testimony.pdf).

<sup>84</sup> 126 S. Ct. at 2248 (Kennedy, J., concurring in the judgment) (emphasis added); see also *id.* at 2241 ("Absent a significant nexus, jurisdiction under the Act is lacking").

<sup>85</sup> *Id.* at 2236.

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 term “navigable waters.”<sup>86</sup>

Whereas it is reasonable for the Corps to presume jurisdiction over wetlands adjacent to truly navigable waters—that is “waters that are or were navigable in fact, or that could reasonably be so made”<sup>87</sup>—adjacency to a *nonnavigable* tributary will not, absent a greater ecological connection, establish jurisdiction.<sup>88</sup> Further, it is not enough for a federal regulator or environmental scientist to announce “I’ve got a theory” about how a given water or wetland could affect some far-away navigable waterway. The nexus must be identifiable and significant.

*Rapanos* largely followed the reasoning adopted by the Court in *SWANCC* that “waters of the United States” only extend to those waters and wetlands that have a “significant nexus” to truly navigable waters and are “inseparably bound up with the ‘waters’ of the United States.”<sup>89</sup> *SWANCC* held that the CWA did not reach waters that are not themselves “adjacent to open water.”<sup>90</sup> Setting aside whether this conclusion was consistent with the letter or spirit of *Riverside Bayview Homes*, it would be reasonable to conclude that *SWANCC* precluded regulation of wetlands not “adjacent to open water” as well.

Eager to constrain the impact of *Rapanos* on the section 404 program, the Bush Administration and some commentators suggest that the permissible scope of CWA jurisdiction is broader than that provided for by Justice Kennedy’s opinion.<sup>91</sup> In particular, some suggest that there may be wetlands that lack a “significant nexus” to navigable waters as defined by Justice Kennedy, but that could nonetheless be subject to federal regulation by combining the reasoning of Justice Scalia’s plurality and Justice Stevens’ dissent. Justice Stevens makes this same overture in his opinion.<sup>92</sup> This claim is mistaken on two grounds.

First, in *Marks* the Court defined the holding of a case in which there is an opinion joined by a majority of justices as “that position taken by *those Members who concurred in the judgments* on the narrowest grounds.”<sup>93</sup> By definition, this excludes consideration of Justice Stevens’ dissent, for it

<sup>86</sup> *Id.* at 2248 (emphasis added).

<sup>87</sup> *Id.* at 2236.

<sup>88</sup> *Id.* at 2252.

<sup>89</sup> *SWANCC*, 531 U.S. 159, 168 (2001) (quoting *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985)).

<sup>90</sup> *Id.* at 168.

<sup>91</sup> See, e.g., *Texas Redistricting Case Could Complicate High Court Wetlands Ruling*, INSIDE EPA, July 28, 2006, available at 2006 WLNR12952674 (reporting remarks of then-EPA General Counsel Ann Klee); see also Mank, *supra* note 2 (citing Department of Justice materials).

<sup>92</sup> *Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting).

<sup>93</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977) (emphasis added).

did not concur in any part of the judgment of the Court. Justice Stevens' dissent, like dicta from a majority opinion, is suggestive of how the Court might rule in future cases, but it does not—indeed cannot—form part of the *holding* of the Court.

Some Bush Administration officials and commentators have suggested that the Court's treatment of highly splintered opinions in cases involving multiple issues allows for a more flexible approach to determining the holding of the Court, citing recent cases such as *League of United Latin American Citizens v. Perry* (*LULAC*).<sup>94</sup> This is a mistake. The Court's own determination of what constitutes the holding and judgment of a case is fully consistent with a strict reading of *Marks*. In *LULAC*, for example, the judgment of the Court was announced by a plurality opinion that drew support from different justices for different issues.<sup>95</sup> Nonetheless, the holding of the court on any given issue remains "that position taken by those Members who concurred in the judgments on the narrowest grounds." Those justices who did not wholly join the plurality opinion issued their own partial concurrences and partial dissents.<sup>96</sup> In *Rapanos*, by contrast, there was nothing partial about Justice Stevens' dissent, for he flatly rejected the judgment of the Court and therefore did not contribute to the ultimate holding of the Court.<sup>97</sup>

Justice Kennedy certainly agreed with Justice Stevens and the other dissenters that Justice Scalia's plurality opinion adopted an unduly narrow interpretation of the CWA. Yet Justice Kennedy also agreed with the plurality and disagreed with the dissenters on several key points.<sup>98</sup> Most significantly, Justice Kennedy explicitly rejected Justice Stevens' near-limitless approach to federal jurisdiction and concluded that the Army Corps' current method for delineating CWA jurisdiction was inconsistent with the act.<sup>99</sup> That the dissenters would almost certainly join Justice Kennedy in any future decision in which he would uphold federal jurisdiction does not make Justice Stevens' dissent a part of the holding of the Court.

Second, a close reading of the plurality opinion indicates that one cannot assume that there are *any* wetlands that the plurality would accept as part of the "waters of the United States" that would not also satisfy Justice Kennedy. According to the plurality, "relatively continuous flow is a *necessary*

<sup>94</sup> 126 S. Ct. 2594 (2006); see *Texas Redistricting Case Could Complicate High Court Wetlands Ruling*, INSIDE EPA, July 28, 2006, available at 2006 WLNR12952674.

<sup>95</sup> *LULAC*, 126 S. Ct. at 2604.

<sup>96</sup> See *id.* at 2626 (Stevens, J., concurring in part and dissenting in part); *id.* at 2647 (Souter, J., concurring in part and dissenting in part); *id.* at 2651-52 (Breyer, J., concurring in part and dissenting in part); *id.* at 2652 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2663 (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>97</sup> *Rapanos*, 126 S. Ct. at 2252 (Stevens, J., dissenting).

<sup>98</sup> See Virginia S. Albrecht & Diedre G. Duncan, *Justice Kennedy's Concurring Opinion in Rapanos Suggests Need for Rulemaking*, DAILY ENV. REP., Aug. 4, 2006, available at [http://www.hunton.com/files/tbl\\_\\_s47Details%5CFileUpload265%5C1573%5CKennedys\\_\\_Concurring\\_\\_Opinion\\_\\_Rapanos.pdf](http://www.hunton.com/files/tbl__s47Details%5CFileUpload265%5C1573%5CKennedys__Concurring__Opinion__Rapanos.pdf); see also Adler, *supra* note 2, at 9-14.

<sup>99</sup> *Rapanos*, 126 S. Ct. 2247 (Kennedy, J., concurring in the judgment).

condition for qualification as a ‘water’ not an *adequate* condition.”<sup>100</sup> In other words, the plurality would not accept CWA jurisdiction over a wetland lacking a “relatively continuous flow,” but the existence of such a connection, by itself, would not necessarily be enough to establish such jurisdiction. Additional indicia of the sort that would constitute a “significant nexus” with waters of the United States under Justice Kennedy’s analysis could still be required. Were there to be a wetland connected to a navigable-in-fact water by a “relatively continuous flow” of water that is so inconsequential as to fail to satisfy Justice Kennedy’s requirement of a “significant nexus,” there is every reason to believe that it would fail to satisfy the plurality as well. The plurality’s characterization of its own test as a necessary-but-not-sufficient basis for asserting jurisdiction should preclude any claim that there is an 8-1 holding in *Rapanos* that *any* “relatively continuous flow” is sufficient to establish CWA jurisdiction.

Another erroneous interpretation of *Rapanos* is that it did not follow *SWANCC* in reading the scope of CWA jurisdiction narrowly due to federalism concerns. While Justice Kennedy’s concurrence did not stress the rule of constitutional avoidance to the same extent as the plurality, his concurrence explicitly addresses the underlying federalism concern and adopts a narrow construction of the meaning of “waters of the United States” so as to ensure that the scope of regulatory jurisdiction under the CWA does not exceed Congress’s Commerce Clause power. As Justice Kennedy noted in his concurrence, one purpose of the “significant nexus” requirement is to “prevent[] problematic applications of the statute.”<sup>101</sup> “In *SWANCC*, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications—those involving waters without a significant nexus—that appeared likely, as a category, to raise constitutional difficulties and federalism concerns.”<sup>102</sup> Rather than rejecting the argument that a broad reading of the CWA might exceed the scope of Congress’s power to regulate commerce among the states, Justice Kennedy’s adoption of the “significant nexus” test explicitly ensures that the scope of wetlands regulation remains within constitutional bounds.

#### IV.

Justice Stevens’ dissent in *Rapanos*, much like his dissent in *SWANCC*, argued that limiting regulatory authority risks greater environmental despoliation. For Justice Stevens, the jurisdictional question should be settled by the Army Corps’ determination that wetlands with any hydrological connection to waters of the United States “preserve the quality of our Nation’s waters.”<sup>103</sup> Given the

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<sup>100</sup> 126 S. Ct. at 2223 n.7 (plurality opinion of Scalia, J.) (emphasis in original); see also *id.* at 2221 n.5 (“[W]e have no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel as a ‘wate[r] of the United States.’”) (second alteration in original).

<sup>101</sup> *Id.* at 2250 (Kennedy, J., concurring in the judgment).

<sup>102</sup> *Id.* at 2246.

<sup>103</sup> *Id.* at 2252 (Stevens, J., dissenting).

“technical and complex character” of wetland conservation, deference to the agency’s constructions of its own regulatory authority is essential to the maintenance of environmental quality.<sup>104</sup> Curtailing the Army Corps’ regulatory jurisdiction over some waters and wetlands, Justice Stevens suggests, “jeopardizes the quality of our waters.”<sup>105</sup>

There is no question that *SWANCC* and *Rapanos* impose jurisdictional limits that exclude some ecological considerations. In this sense, the decisions may draw arbitrary legal distinctions that are not wholly congruent with environmental concerns. As Robert Adler observes:

From an ecological and hydrological perspective, efforts to draw clear lines between “isolated” waters and “navigable” waters are largely arbitrary and fail to reflect the nature of the hydrological cycle, critical hydrological linkages between surface and groundwater, and ecological linkages between components of broader aquatic ecosystems.<sup>106</sup>

The same can be said about any effort to draw a line between those wetlands that are inseparably bound up with navigable waters and those that are merely adjacent to drainage ditches, ephemeral streams, or other waterways with a fairly attenuated, though real, hydrological connection to navigable waters and their direct tributaries. But this does not undermine the legal legitimacy of the Court’s decisions. Ecological and other interconnections do not eliminate the need to draw legal boundaries.

The existence of ubiquitous ecological interconnections does not require an equally extensive federal regulatory apparatus. If anything, the fact that “everything is connected to everything else” should make policymakers extremely reluctant to centralize environmental decision making into a single program that is expected to take account of all the environmental implications of human-induced environmental change. Taking the challenge of interconnectedness seriously requires more humility about the viability of centralized, over-arching governmental authority and a greater appreciation of the benefits of decentralization. To recognize the need for jurisdictional line-drawing is not to sacrifice environmental protection to legal formalism.

In the economic sphere, it has long been recognized that extensive interconnectedness does not justify centralized regulatory control. Quite to the contrary, the pervasive interdependence of economic activities and the near-infinite systemic feedback responses they can generate make centralized command and control a Sisyphean task. Institutionally, decentralized institutional

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 2265. In both his *Rapanos* and *SWANCC* dissents, Justice Stevens cites the infamous 1969 fire on the Cuyahoga River as evidence of how the nation’s waters were becoming increasingly polluted up until adoption of the Clean Water Act in 1972. *Id.*; *SWANCC*, 531 U.S. 159, 174-75 (2001) (Stevens, J., dissenting). Justice Stevens’ characterization of the 1969 river fire is quite conventional, but also somewhat misleading. See Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 *FORDHAM ENVTL. L. REV.* 89 (2002).

<sup>106</sup> Adler, *supra* note 61, at 229.

structures can be more capable of generating and communicating dispersed time- and location-specific information than more centralized systems. This was one of the central insights of Nobel Laureate economist F.A. Hayek.<sup>107</sup> That ecosystems are “highly connected and interactive systems” does not mean that “limited and fractured” regulatory systems are incapable of addressing environmental concerns.<sup>108</sup> To the contrary, the Framers of the Constitution consciously decided to “fragment” government power horizontally and vertically in the Constitution *despite* the existence of pervasive interrelationships and interconnections in the economic sphere,<sup>109</sup> and there is no reason why this decision should not carry over into the realm of ecology.

Local knowledge and insight about local ecological needs and conditions are essential to effective environmental conservation. Different types of wetlands provide different types of ecological services in different parts of the country.<sup>110</sup> As a consequence, the environmental value of a given wetland is likely to be recognized by locals well before it is recognized in Washington, D.C.<sup>111</sup> “Local governments are better able to assess the potential impacts of wetland modification.”<sup>112</sup> This is not because “local governments are more perfect, but because they are more local.”<sup>113</sup> The variability and complexity of ecological matters requires the utilization of such local knowledge, and this, in turn, requires a degree of decentralization—a far greater degree of decentralization than the CWA provides.

The history of wetlands conservation shows that state and local governments, in concert with private conservation organizations, can play a vital role in protecting ecological resources.

<sup>107</sup> F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519-20 (1945). Hayek later elaborated on this point, noting that “[t]he chief reason why we cannot hope by central direction to achieve anything like the efficiency in the use of resources which the market makes possible is that the economic order of any large society rests on a utilization of the knowledge of particular circumstances widely dispersed among thousands of individuals.” F.A. Hayek, *The New Confusion About Planning*, in NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 236 (1978).

<sup>108</sup> David Orr, *The Constitution of Nature*, 17 CONSERVATION BIOLOGY 1478, 1481 (2003) (“Nature is a unified mosaic of ecosystems, functions and processes. Government, on the other hand, was conceived by the founders as a limited and fractured enterprise.... [N]ature works in highly connected and interactive systems.”).

<sup>109</sup> See Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469, 490-93 (2003) (explaining that the existence of interstate externalities and interrelationships was “an oft-repeated axiom in the constitutional debates”) (original emphasis omitted).

<sup>110</sup> See generally Kusler, *supra* note 11.

<sup>111</sup> See SCODARI, *supra* note 12, at 16 (finding that federal policies subsidizing wetland destruction were due, in part, to “historical lack of knowledge concerning the beneficial aspects of wetlands”).

<sup>112</sup> Patricia Riexinger, *Local Implementation of New York’s Freshwater Wetlands Act*, in ASSOCIATION OF STATE WETLAND MANAGERS, WETLAND PROTECTION: STRENGTHENING THE ROLE OF THE STATES 229 (1985).

<sup>113</sup> Maggy Hurchalla, *A Community Perspective for Wetlands Protection*, in ASSOCIATION OF STATE WETLAND MANAGERS, WETLAND PROTECTION: STRENGTHENING THE ROLE OF THE STATES 260 (1985).

States and localities began enacting wetland conservation programs at a time when the federal government still thought the best wetland was a filled and developed wetland.<sup>114</sup> Massachusetts enacted its first wetlands law in 1963, and this was based, in part, on preexisting local rules.<sup>115</sup> By the time a federal court concluded that section 404 required the Army Corps to regulate wetlands, every state in the lower 48 with more than ten percent of their land area in wetlands had adopted some form of wetland regulation.<sup>116</sup> Massachusetts already had twelve years of experience with wetland regulations at this point, including efforts to protect both coastal and inland wetlands, as well as floodplains, before the Army Corps got into the act.<sup>117</sup> Some local governments and many conservation organizations had been involved in wetlands conservation for decades.<sup>118</sup>

That there is an environmental interest in the protection of a given water or wetland does not, in itself, establish that there is a uniquely *federal* interest. Nor does the existence of a federal interest in some wetland functions, such as the provision of habitat for migratory waterfowl or the reduction of flood risks along navigable waterways, mean that there is a federal interest in all wetlands. The federal interest is greatest where federal authorities have a comparative advantage in protecting particular environmental resources, such as may be the case with transboundary resources (e.g. navigable rivers and streams that cross state lines and interstate watersheds) or scientific research. The federal interest is less strong in the case of relatively isolated intrastate waters and wetlands that states and localities are fully capable of protecting. Many of the ecological benefits wetlands provide are local or regional in scope and can be sufficiently captured at the local level to spur local action of one sort or another.

If the federal government is to play an optimal role in the protection of wetlands and match its efforts to those aspects of wetland conservation that require action of a federal scope, it should concentrate its efforts in those areas where non-federal efforts are most likely to be insufficient.<sup>119</sup> The broadest assertion of federal regulatory authority is not necessarily the most prudent exercise of such authority. Federal resources, like all resources, are limited, and the aim of environmental conservation is best served if those resources are deployed to those areas where they can do the most good. The

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<sup>114</sup> For an overview of the history of state wetlands regulation, see Jonathan H. Adler, *Wetlands, Waterfowl and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 47-54 (1999). See also Robert Beck, *The Movement in the United States to Restoration and Creation of Wetlands*, NAT. RESOURCES J. 781 (1994).

<sup>115</sup> Alexandra D. Dawson, *Massachusetts' Experience in Regulating Wetlands*, in ASSOCIATION OF STATE WETLAND MANAGERS, WETLAND PROTECTION: STRENGTHENING THE ROLE OF THE STATES 255 (1985).

<sup>116</sup> JON A. KUSLER ET AL. STATE WETLAND REGULATIONS: STATUS OF PROGRAMS AND EMERGING TRENDS 1 (1994).

<sup>117</sup> Adler, *supra* note 114, at 48; Dawson, *supra* note 115, at 255.

<sup>118</sup> For a brief discussion of non-governmental wetland conservation, see Adler, *supra* note 114, at 59-62.

<sup>119</sup> See generally, Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130 (2005).

focus on the ultimate scope of federal regulatory authority under the CWA has been a distraction. The ultimate question is not what the federal government *can* do, but what it *should* do.<sup>120</sup>

#### CONCLUSION

Where do we go from here? The answer depends upon how federal regulators, state and local policymakers, and the conservation community respond to the decision. The issue before policymakers post-*Rapanos* is not purely an ecological one. The legal and structural question is about the role of the federal government, and federal regulations in particular, not whether certain environmental resources are worth protecting.

There is a clear need for the Army Corps to revise its jurisdictional regulations to bring them in line with *SWANCC* and *Rapanos*—a step the Army Corps appears prepared to take.<sup>121</sup> To maximize the ecological effectiveness, and not just the political palatability, of eventual revisions to the federal wetlands program, the Army Corps and EPA need to broaden their focus and consider more than how they can maximize the geographic scope of their rules. Were they to reenact the same substantive rules with only cosmetic changes to the regulatory language, a great opportunity would be missed. If the federal wetlands program is to have stability and predictability, the agencies must walk through the fire of criticism such a reorientation will provoke. This, in the end, could lead to better protection for wetlands and water resources, and the development of a national conservation strategy that lives within legal limits.

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<sup>120</sup> It is also important to note that preventing the federal government from achieving a given goal in a particular fashion only limits the *means*, and not the *ends* of federal policy. So even if federal regulatory power is limited, there are other ways for the federal government to achieve important federal goals.

<sup>121</sup> See Benjamin H. Grumbles, Assistant Adm'r for Water, U.S. Env'tl. Prot. Agency, & John Paul Woodley, Jr., Assistant Sec'y of the Army for Civil Works, Dep't of the Army, Statements Before the Subcommittee on Fisheries, Wildlife, and Water of the Committee on Environment and Public Works, United States Senate (August 1, 2006), available at [http://epw.senate.gov/109th/Grumbles\\_\\_Woodley\\_\\_Testimony.pdf](http://epw.senate.gov/109th/Grumbles__Woodley__Testimony.pdf); see also Mank *supra* note 2.

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